

No. _____

In The
Supreme Court of the United States

ROBERT BELLO,

Petitioner,

v.

ROCKLAND COUNTY, NEW YORK, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In New York State, when a handgun licensee becomes the subject of a mental health report made pursuant to Mental Hygiene Law § 9.46, the state's handgun licensing scheme (i) requires the licensing officer to suspend or revoke the handgun license; and (ii) requires the disqualified licensee to surrender all handguns, rifles, and shotguns to an appropriate law enforcement agency. N.Y. Penal Law § 400.00(11); Mental Hygiene Law § 9.46. App-27.

New York does not prohibit the return of surrendered firearms to another, non-prohibited, owner.¹ Yet, police departments refuse to release firearms and courts refuse to recognize the property and due process rights of the non-prohibited handgun owner. Rather, both require the handgun owner to try their hand in state court, but no state statute provides a post-deprivation procedure for the release of firearms surrendered under N.Y. Penal Law § 400.00(11)(b), (c).

While there is Second Circuit precedent requiring the government to provide prompt post-deprivation due process for a once-disqualified individual to retrieve *long guns* [*Panzella v. Sposato*, 863 F.3d 210, 216 (2d Cir. 2017), as amended (July 18, 2017)] when handguns are at issue, neither the once-disqualified

¹ Firearm owners who reside with an individual they know or have reason to know is prohibited from possessing a firearm pursuant to 18 U.S.C. § 922(g) (1), (4), (8) or (9) shall be obligated by statute to properly secure their firearms from such individual. N.Y. Penal Law § 265.45.

owner nor a non-prohibited owner of such handguns has recourse in the federal courts.

The questions presented are:

Whether the Fourth Amendment is implicated where law enforcement refuses to release firearms surrendered for mental health reasons to a non-prohibited owner?

Whether the Fourteenth Amendment right to due process is violated where no prompt post-deprivation remedy exists to recover handguns surrendered based on the mental health disqualification of a separate owner?

PARTIES TO THE PROCEEDING

Petitioner is Robert Bello, a resident of Rockland County, New York. He was the plaintiff in the district court and plaintiff-appellant in the court of appeals. Petitioner is an individual.

Respondents are Rockland County, New York, Sheriff Louis Falco, III, and Thomas Simeti. They were the defendants in the district court and defendants-appellees in the court of appeals.

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PETITION FOR WRIT OF CERTIORARI

Robert Bello (“Petitioner”) respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit of Appeals.

LIST OF ALL PROCEEDINGS

United States Court of Appeals for the Second Circuit, No. 20-1879, *Bello v. Rockland Cty., New York*, 846 F. App’x 77, 78 (2d Cir. 2021), judgment entered May 26, 2021. App-1.

United States District Court for the Southern District of New York, No. 7:19-cv-03514-VB, *Bello v. Rockland County*, final judgment was entered May 11, 2020. The district court opinion is reported at *Bello v. Rockland Cty., New York*, No. 19 CV 3514 (VB), 2020 WL 2319115, at *1 (S.D.N.Y. May 11, 2020), aff’d, 846 F. App’x 77 (2d Cir. 2021) and reproduced at App-7.

STATEMENT OF JURISDICTION

The Second Circuit issued its Summary Order and Judgment on May 5, 2021. On March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth and Fourteenth Amendments to the United States Constitution, and the relevant portions of the New York State Penal Law are reproduced at App-25.

STATEMENT OF THE CASE

In November 2018, Petitioner resided with his mother in Rockland County, New York. Petitioner was a correction officer and owned several handguns and long guns, which he stored in secured gun safes. Petitioner and his mother (“Mrs. Bello”) jointly owned 10 handguns, which were registered on each of their respective New York State Pistol Licenses. App-32. When Mrs. Bello’s pistol license expired on February 1, 2018, all 10 jointly owned handguns were thereafter under the exclusive possession and ownership of Petitioner. App-32-33, 35. Under New York law, possession of a handgun without a valid license is a crime. N.Y. Penal Law § 265.00.

After a therapy session in November 2018, Mrs. Bello’s therapist caused a mental health report to be created pursuant to Mental Hygiene Law (“MHL”) § 9.46, believing Mrs. Bello posed a danger to herself or others. App-34. The § 9.46 report triggered the following statutory requirements pursuant to N.Y. Penal Law § 400.00(11)(b) and (c): (i) the New York State Police were required to inform a Rockland County pistol licensing officer that Mrs. Bello was the subject of a § 9.46 report; (ii) the pistol licensing

officer was required to suspend or revoke Mrs. Bello's pistol license; and (iii) Mrs. Bello was required to surrender all of the handguns registered on her pistol license, as well as all of her rifles and shotguns, to a local law enforcement agency. *Id.*, App-27, 34.

The New York State Police notified the statutory licensing officer, who issued a "Notice of Suspension and Order to Surrender" to Lori Bello on November 1, 2018 (the "Suspension Order"). App-34. The Suspension Order (i) notified Mrs. Bello that her pistol license was suspended² as a result of a report made about her pursuant to MHL §9.46; (ii) directed Mrs. Bello to turn in all weapons she "owns or co-owns" and/or which are listed on her pistol permit to the Rockland County Sheriff's Office within 48 hours; and (iii) directed Mrs. Bello to turn in her pistol permit to the Rockland County Clerk's Office. App-34-36, 53.

The Suspension Order was not directed at the Rockland County Sheriff's Office or any of its employees, nor was it directed at Petitioner. App-34-36, 53. On November 2, 2018, prior to the 48-hour deadline, Rockland County sheriff deputies arrived at the Bello residence, showed Mrs. Bello the Suspension Order, and demanded the surrender of the 10 handguns on Mrs. Bello's expired pistol license. App-33-35. The deputies had no search warrant or seizure order authorizing them to take any action. App-35-38. When Mrs. Bello explained that she had no access to the 10 handguns because her pistol license was expired and Petitioner had exclusive

² Apparently, neither the NYSP nor the licensing officer knew that Mrs. Bello's pistol license had expired on February 1, 2018.

access to the locked gun safe where the pistols were stored, the deputies ordered Mrs. Bello to call Petitioner to have him come home, which she did. *Id.* Upon arriving home, Petitioner informed the deputies that the handguns were exclusively in his possession and Mrs. Bello has no access to the locked gun safe where they were stored. App-34-38. The deputies demanded the 10 handguns from Petitioner, who contested the seizure but nevertheless complied. App-35-38.

Petitioner promptly contacted the Sheriff's Office to seek the return of his 10 handguns, informing that the handguns are kept in a locked safe to which no one, including Mrs. Bello, had access. His request was denied. App-38-39. Petitioner retained an attorney who, by letter dated December 8, 2018 and Petitioner's sworn affidavit, informed Rockland County Sheriff, Louis Falco, that Petitioner alone possesses the handguns, the handguns are stored in a secured and locked gun safe, to which neither Mrs. Bello nor any third party had access, Mrs. Bello's pistol license was expired, that upon the return of the handguns to Petitioner, he would continue to store them in the locked gun safe, and that there was no legal or factual impediment to the return of the handguns to Petitioner. App-39.

By letter dated January 18, 2019, Sheriff Falco, through Thomas Simeti "Counsel to the Sheriff", informed counsel that based on their review, the handguns cannot be released because the Suspension Order issued to Mrs. Bello precludes their release, which it does not. App-40-41. Sheriff Falco testified in a separate federal action of his policy of requiring

individuals to obtain a court order from state court requiring him to release firearms; he would not release firearms without such an order. If no state action was pursued, the owner of surrendered firearms would never recover their property. App-41-50. The Sheriff's Office has no post-deprivation procedure in place for the return of firearms. App-41-50.

Petitioner filed a complaint in the Southern District of New York for violations of Petitioner's Fourth and Fourteenth Amendment rights, to which Respondents filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(c). The district court granted Respondents' motion. App-7. The court found no due process violation occurred because Petitioner could have sought to have Mrs. Bello's surrender order vacated in state court. App-17. ("Plaintiff knew the Sheriff's Department seized the guns, and why. Plaintiff also knew to whom he could appeal to get the guns back. But plaintiff took no steps to invalidate Justice Walsh's Surrender Order."). *Id.*

Petitioner's Fourth Amendment claim fared no better; the district court held "the government's continued retention of property does not constitute an additional seizure or transform a lawful seizure into an unlawful one." App-17-18.

The Second Circuit affirmed. App-1. As to the Fourteenth Amendment claim, the circuit held that Petitioner "failed to utilize the process he had available to him, namely, seeking an amendment to the Surrender Order from [the licensing officer] or from the New York appellate courts." App-3-5.

Regarding Petitioner’s Fourth Amendment claim, the circuit held that, because the initial seizure of the firearms from *Mrs. Bello* was reasonable, Respondents’ failure to return the items to *Petitioner* “does not, by itself, state a separate Fourth Amendment claim of unreasonable seizure.” App-5.

As set forth below, there is no state statute or prompt post-deprivation procedure for handgun owners to recover their property. The circuit’s decision emboldens and insulates law enforcement from being held accountable; it also perpetuates the longstanding theme in New York State – there is no recognized constitutional **right** to possess handguns.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

This petition should be granted for three reasons.

First, the Second Circuit’s decision calls out for an exercise of this Court’s supervisory power. In affirming the district court, the Second Circuit failed to abide by the same post-deprivation standard it created for rifles and shotguns just 4 years earlier. In *Panzella v. Sposato*, 863 F.3d 210, 218 (2d Cir. 2017), using the balancing factors in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Second Circuit (i) rejected the notion that a plaintiff’s post-deprivation remedy for the return of long guns is to seek an order in state court directing the sheriff to return them³; (ii) found

³ Even if a state proceeding were available, the federal courts were created to provide an avenue for the redress of

that a providing a prompt post-deprivation hearing would not unduly burden the county; and (iii) found that a prompt post-deprivation hearing “would prevent the unjustified deprivation of [such] person’s property interest.” *Id.* at 219. The same result was reached in *Razzano v. Cty. of Nassau*, 765 F. Supp. 2d 176, 190-91 (E.D.N.Y. 2011) (rejecting the idea that a plaintiff seeking the return of long guns should have to pursue a remedy in state court).

In Petitioner’s case, the circuit ignored *Panzella* and *Mathews*, instead ruling that Petitioner should have sought relief in state court: Petitioner should have sought to ‘invalidate’ or ‘amend’ *Mrs. Bello’s* [statutorily mandated] surrender of handguns in an [unidentified and non-existent] state court proceeding.⁴ App-17, 5. New York has no statutory mechanism for a third party to commence an action to amend an order relating to another licensee’s handgun license, nor would Petitioner have standing to challenge *Mrs. Bello’s* statutorily mandated surrender of handguns. Apart statutory requirement that *Mrs. Bello* surrender the handguns on her pistol license [§ 400.00(11)(b), (c) at App-27] and, thus, a ministerial act of a New York State pistol licensing officer⁵, the surrender provision of the order was

constitutional violations. The federal courts are an available and appropriate avenue for Petitioner.

⁴ Neither court cited any actual mechanism for accomplishing such a feat, just that it should have been pursued. The district court also acknowledged that Petitioner would need to elicit *Mrs. Bello’s* assistance in doing so. App-16.

⁵ Pistol permit “licensing officers”, as defined in N.Y. Penal Law § 265.00(10) consist of the police commissioners of New York City, Nassau County, Suffolk County (for the towns of Babylon,

complete once the handguns were turned over to the deputies. Respondents' argument, adopted by the district and circuit court, that the surrender order prevented the sheriff's office from releasing the handguns to Petitioner is a *non sequitur*. There was also no accompanying seizure order or warrant authorizing or ordering the sheriff's office to seize the handguns or to retain them - there was no 'order' directing the sheriff or his deputies to do anything.

Even if Petitioner had standing to seek an amendment to Mrs. Bello's surrender order in state court, which he did not, the relief would solely be equitable. No resolution of Petitioner's constitutional claims would be accomplished, nor would he be allowed to recover compensatory presumed damages [in at least a nominal amount] for Respondents' constitutional violations, or statutory attorney's fees under 42 U.S.C. § 1988.

The second reason to grant the petition is the lack of a prompt state post-deprivation procedure [and post-deprivation procedure within the Rockland County Sheriff's Office] to ensure the protection of constitutional rights. The district court and the circuit theorize that Petitioner "could have sought relief from [the licensing officer] or from a State appellate court" but neither point to an *actual* state process or a procedure pursuant to the Sheriff Department's policies - because there are none. In *Panzella* and *Razzano*, the courts at least identified

Brookhaven, Huntington, Islip and Smithtown), the Suffolk County Sheriff, and elsewhere in the state a judge or justice of a court of record having his office in the county of issuance.

an actual state procedure, Article 78, before rejecting it. The lack of any prompt post-deprivation procedure violates the Fourteenth Amendment. Without this Court's intervention, this type of constitutional deprivation will continue to occur.

The third reason for this Court to grant certiorari is that the Second Circuit decided important questions of constitutional law that should be, but have not yet been, addressed by this Court – the Fourth and Fourteenth Amendment rights of an individual seeking the return of firearms that were seized from, or surrendered to law enforcement by, a co-owner outside of the criminal realm.

Fourth and Fourteenth Amendment challenges to the government's refusal to return property generally involve property seized in the context of a criminal investigation and/or prosecution. The individual seeking the return of the property is historically the person from whom the property was seized.

Here, the government has possession of firearms solely because a non-criminal event or condition caused an individual to become disqualified from possessing firearms, temporarily or otherwise. The firearms themselves are not contraband or evidence, and there is no aspect of criminality. The individual seeking the return of the firearms is not the person from whom the firearms were seized⁶, but another

⁶ Disqualified individuals arguably retain an ownership interest in the firearms; such firearms could be transferred from the police department to a non-prohibited individual or an FFL for sale or other type of transfer, depending on the jurisdiction.

owner – a spouse or other family member, as in Petitioner’s case – with no prohibitors to firearm possession. The seizure or surrender of the firearms implicates the protected property interest of the joint owner. Where the government refuses to release such firearms to a non-prohibited owner upon demand for their release, the government’s continued retention of the firearms violates the owner’s property rights. Because the police department’s only role here is to serve as a repository for the firearms of disqualified individuals, vis-à-vis a non-disqualified owner the police have no legal authority or privilege to retain them. With the advent and expansion of red flag laws, this constitutional issue is likely to recur, particularly in New York.

LEGAL ARGUMENT

I. No Post-Deprivation Due Process Exists For Handguns Surrendered for Mental Health Reasons

i. The Second Circuit Ignored its Precedent

New York requires the surrender of all firearms – handguns, rifles, and shotguns – where a handgun licensee becomes the subject of a report under Mental Hygiene Law § 9.46. N.Y. Penal Law § 400.00(11)(b), (c). App-27. There is no state procedure for a previously-disqualified individual, or a non-prohibited joint owner, to seek the return of firearms surrendered for mental health reasons.

Four years ago, the Second Circuit held that a prompt post-deprivation hearing was required in connection with the return of rifles and shotguns. *Panzella v. Sposato*, 863 F.3d 210, 218 (2d Cir. 2017). In *Panzella*, the plaintiff sought the return of long guns surrendered upon the issuance of an order of protection, where neither the state nor sheriff's department had a post-deprivation procedure. The Second Circuit conducted a thorough balancing test using the balancing factors in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Rejecting the county's argument that the plaintiff should have sought a court order directing the return of her long guns in a state court Article 78 proceeding⁷, and ordering the county to conduct a prompt post-deprivation hearing, the Second Circuit concluded that state court proceedings are inadequate, costly, and overly burdensome. *Panzella* 863 F.3d at 218. "In light of the burdens an Article 78 proceeding places on the person whose longarms have been taken, we conclude there is a significant risk of erroneous deprivation of that person's interests in her longarms."⁸); accord,

⁷ A proceeding under N.Y. Civil Practice Law and Rules 7803(3) ("Article 78") employs a rational basis review, places the burden on the petitioner, and the limits the court's determination to whether the government's decision was arbitrary or capricious. When firearms are at issue, New York state courts thereafter routinely adopt whatever 'public safety' argument is proffered by the government.

⁸ The Second Circuit's about-face in light of its treatment of rifles and shotguns in *Panzella* perpetuates New York's disparate treatment of handguns, where possession of a handgun is a "privilege", subject to the "broad discretion" of a licensing officer, that can be suspended or revoked at "any time". *Toussaint v. City of New York*, No. 17-CV-5576, 2018 U.S. Dist. LEXIS 152985, 2018 WL 4288637, at *7 (E.D.N.Y. Sept. 7, 2018) (dismissing

Razzano v. Cty. of Nassau, 765 F. Supp. 2d 176, 190-91 (E.D.N.Y. 2011) (rejecting the idea that a plaintiff seeking the return of long guns should be required to pursue a remedy in state court)⁹; see also, *Krimstock v. Kelly*, 306 F.3d 40, 59-60 (2d Cir 2002) (“Requiring plaintiffs to resort to an Article 78 proceeding, however, would place the onus on each plaintiff to bring a separate civil action in order to force the City to justify its seizure and retention of a vehicle...we conclude that [] an Article 78 proceeding does not provide a prompt and effective means for claimants to challenge the legitimacy of the City’s retention of their vehicles”).

case because the plaintiff “cannot show that he has a protected liberty or property interest in a handgun license; *Perros v. Cty. of Nassau*, 238 F. Supp. 3d 395, 401 (E.D.N.Y. 2017) (“Under New York law, it is well-settled that the possession of a handgun license is a privilege, not a right.” (internal citations omitted)); c.f., *Kuck v. Danaher*, 600 F.3d 159, 165 (2d Cir. 2010) (suggesting that, while a Connecticut plaintiff has a liberty interest in a firearm permit, a New York plaintiff may not have one because New York licensing officers have broader discretion in issuing firearm licenses).

⁹ After *Panzella*, New York State passed Criminal Procedure Law § 530.14(d), which created a procedure for a joint firearms owner to regain possession of firearms surrendered upon the issuance of a temporary order of protection: “If any other person demonstrates that such person is the lawful owner of any weapon taken into custody pursuant to this section or section eight hundred forty-two-a of the family court act, and provided that the court has made a written finding that there is no legal impediment to the person’s possession of such a weapon, such court shall direct that such weapon be returned to such lawful owner.” While not challenged here, the statute still places the burden on a property owner to seek redress in court, rather than mandating law enforcement release the firearms to a non-prohibited joint owner upon demand.

Petitioner relied on the precedent set in *Panzella*, then the circuit court ignored its own precedent. Instead, Petitioner suffered an opposite outcome: his constitutional claims were dismissed, and he was directed to search for a [nameless] remedy in state court.

ii. No State Remedy Exists

No statutory remedy exists for an individual to seek the return of firearms surrendered or confiscated due to a mental health disqualification, including those surrendered because of a report pursuant to N.Y. Mental Hygiene Law § 9.46.

Where, as here, neither the state nor the police department have a mechanism for post-deprivation due process, the risk of erroneous deprivation is substantial, particularly in the absence of any procedural safeguards. See, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

iii. 'Invalidating' or 'Amending' the Surrender Order is a *Non Sequitur*

Petitioner was not directed to pursue the Article 78 process rejected in *Panzella*, which was at least an established state proceeding. Instead, the district and circuit courts held that Petitioner should have sought to 'invalidate' or 'amend' the surrender order issued to *Mrs. Bello*.¹⁰ App-17, 5.

¹⁰ Neither court cited any mechanism for accomplishing such a feat, just that it should have been pursued. The district court

Neither Petitioner nor Respondents were parties to, or the subject of, the surrender order. New York has no statutory mechanism for a third party to commence an action to amend or vacate an order issued against another licensee under the state's licensing scheme. Petitioner is not challenging any statutory obligations Mrs. Bello may have had under § 400.00(11), he simply wanted his property returned. Once Mrs. Bello's handgun license was suspended and the handguns were surrendered, the terms of the 'surrender order' had all been satisfied; there was nothing left of the order to vacate. There was also no order barring their return to Petitioner; no seizure order or search warrant had been issued, nor was there any order authorizing or directing Respondents to take any action, including retaining the handguns until some future event.¹¹

iv. Respondents Fail the *Mathews* Test

Under the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the courts should have weighed (1) the private interest affected by the state action; (2) the risk of erroneous deprivation through the procedures used and the value of additional procedural safeguards; and (3) the government's interest in taking the challenged action. *Id.* at 335.

also acknowledged that Petitioner would need to elicit Mrs. Bello's assistance in doing so. App-16.

¹¹ There is no legal impediment to the return of Petitioner's handguns. Respondents' position below, adopted by the district and circuit courts, that the 'surrender order' prevented the sheriff's department from releasing the handguns to Petitioner is belied by the arguments set forth herein.

“[I]n evaluating what process satisfies the Due Process Clause, ‘the Supreme Court has distinguished between (a) claims based on established state procedures and (b) claims based on random, unauthorized acts by state employees.’ ” *Razzano v. Cty. of Nassau*, 765 F. Supp. 2d 176, 185 (E.D.N.Y. 2011) quoting, *Hudson v. Palmer*, 468 U.S. 517, 532, (1984) and *Parratt v. Taylor*, 451 U.S. 527, 537 (1981)). Where, as here, a plaintiff alleges a deprivation pursuant to an established state procedure, “the state can predict when it will occur and is in the position to provide a pre-deprivation hearing.” *Id.* see also, *Walters v. Wolf*, 660 F.3d 307, 310, 313 (8th Cir. 2011) (where police refused to return gun without a court order the court observed, “*Parratt* and its progeny hold that, when an established state procedure deprives one of property, postdeprivation remedies generally fail to satisfy *Mathews...*”), citing, *Zinermon v. Burch*, 494 U.S. 113 (1990) (citation omitted).

Petitioner a recognized property interest in his handguns. The surrender of Petitioner’s handguns was the result of an established state procedure, but neither the state nor the sheriff’s department have a post-deprivation procedure for the return of firearms under these circumstances. Regarding the last *Mathews* factor, the government has no cognizable interest in retaining the handguns of a non-prohibited owner. Upon demand by a non-prohibited owner for the return of firearms surrendered for mental health reasons, post-deprivation due process requires police departments to promptly assess whether the owner is

prohibited from possessing the firearms and, if not, to immediately return them.¹²

v. State Exhaustion is Not a Prerequisite to
42 U.S.C. § 1983 Actions

Even if there were a state remedy, exhaustion of state administrative remedies is a not prerequisite to an action under 42 U.S.C. § 1983. *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 498 (1982) (cases cited) (recognizing the ‘carve-out’ of the general no-exhaustion rule for adult prisoners bringing actions pursuant to § 1983); *Monroe v. Pape*, 365 U.S. 167 (1961)(a state or local official may be sued under § 1983 for actions taken “under color of state law” even though the official’s actions also violate state or local law and a remedy exists under state law); see also, *Wilbur v. Harris*, 53 F.3d 542, 544 (2d Cir. 1995) (a § 1983 plaintiff is not required to exhaust state administrative remedies).

“The Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era. During that time, the Federal Government was clearly established as a guarantor of the basic federal rights of individuals against

¹² A post-deprivation hearing for returning long guns to the once-disqualified owner, as set forth in *Panzella*, would require evidence related to the underlying reasons for the disqualification and surrender in the first instance. Requiring this type of hearing for a joint owner who was never deemed disqualified, like Petitioner, would unnecessarily delay the return of property.

incursions by state power. As we recognized in *Mitchum v. Foster*, 407 U.S. 225, 242, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346, 25 L.Ed. 676 (1880)), “[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial.” *Patsy*, 457 U.S. at 503 (internal quotation omitted). “When federal claims are premised on [§ 1983]—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights”. *Id.* quoting, *Steffel v. Thompson*, 415 U.S. 452, 472–473 (1974). Of primary importance to the exhaustion question was the mistrust that the 1871 Congress held for the factfinding processes of state institutions. *Id.* “This Congress believed that federal courts would be less susceptible to local prejudice and to the existing defects in the factfinding processes of the state courts.” *Ibid.*

Petitioner was entitled to seek redress for his constitutional claims in federal court under 42 U.S.C. § 1983, which would have provided an avenue for compensatory damages, equitable relief, and statutory attorney’s fees.

For the above reasons, this petition for a writ of certiorari should be granted.

II. This Court Should Decide and Settle the Fourth Amendment Rights of Joint Owners of Handguns Surrendered for Mental Health Reasons

Fourth Amendment jurisprudence concerning the return of private property from law enforcement generally involves property seized in a criminal context – as evidence, contraband, and/or part of a criminal investigation.

The manifest differences between the return of property seized for crime-related reasons and firearm surrenders based on a non-criminal, disqualifying event or condition, call out for this Court to settle the resulting Fourth Amendment implications.

When property is seized in the criminal context, the primary inquiry is where there was probable cause to seize the property. The term “probable cause” as used below, however, does not take into account the entirety of the phrase: “probable cause to believe a crime is being, has been, or is about to be committed.” The substance of all the definitions of probable cause is a reasonable ground for belief of guilt.” *Maryland v. Pringle*, 540 U.S. 366, 366 (2003). There is no question of “guilt” in this matter, whether for Mrs. Bello or Petitioner.

While an argument could be made that the Fourth Amendment only protects individuals in the criminal context, the plain text of the Fourth Amendment suggests otherwise, as it guarantees the “right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and

seizures...” App-25. A “seizure of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.” *United States v. Jacobsen*, 466 U.S. 109, FN 5 (1984) (noting that “the concept of a ‘seizure’ of property is not much discussed in [Supreme Court] cases”).

The view of the Second, Sixth, and Seventh Circuits is that once the seizure has occurred, the ‘seizure’ is over, the Fourth Amendment no longer applies, and the remaining issue is one of due process. See, *Bello v. Rockland County, New York*, 846 F. App’x 77, 79 (2d Cir. 2021) (“The mere fact that Rockland County continued to possess [Petitioner’s] seized firearms therefore does not give rise to a plausible Fourth Amendment claim.”) quoting, *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 187 (2d Cir. 2004); *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003), citing, *Fox v. Van Oosterum*, 176 F.3d 342, 350 (6th Cir. 1999) (refraining from deciding whether or whether a ‘seizure’ occurs when a person voluntarily gives a thing to a state actor, then asks the state actor to return that thing, and the state actor refuses to do so, holding that the failure to return seized property would not constitute a Fourth Amendment seizure).

The Ninth Circuit in *Brewster v. Beck*, 859 F.3d 1194, 1197 (9th Cir. 2017) determined otherwise, holding that the Fourth Amendment “is implicated by a delay in returning the property, whether the property was seized for a criminal investigation, to protect the public, or to punish the individual.” See also, *Fontana v. Haskin*, 262 F.3d 871, 879 (9th Cir. 2001) (Fourth Amendment prohibition against unreasonable search and seizure continues to apply after an arrestee is in

the custody of the arresting officers.”) citing, *Albright v. Oliver*, 510 U.S. 266, 277, (1994) (Ginsburg, J., concurring) (seizure continues throughout criminal trial).

An individual who has given valid consent to a seizure may withdraw that consent by requesting the article’s return. *Lee*, 330 F.3d at 464 citing, *Florida v. Jimeno*, 500 U.S. 248, 252 (1991) (“A suspect may of course delimit as he chooses the scope of the search to which he consents.”); *United States v. Jachimko*, 19 F.3d 296, 299 (7th Cir.1994) (stating general principle that consent may be withdrawn); *Richard A. Vaughn, DDS, P.C. v. Baldwin*, 950 F.2d 331 (6th Cir.1991) (where plaintiff gave his business records to the IRS so that they could be copied but later made a formal demand for their return, “the government had no right to possession after consent was withdrawn”); compare, *United States v. Wilson*, 540 F.2d 1100, 1103 (D.C.Cir.1976) (even in a criminal prosecution, “it is fundamental to the integrity of the criminal justice process that property involved in the proceeding against which no Government claim lies, be returned promptly to its rightful owner.”).

While consent may be interpreted to be an exception to the warrant requirement [*Id.*], the withdrawal of consent and demand for the property’s return “need not be complied with if there is then probable cause to retain [the property] as evidence. *Id.*, quoting 3 WAYNE R. LA FAVE, SEARCH & SEIZURE § 8.1(c) (3d ed.1996) (citing examples).

The Sheriff’s Department came into possession of Petitioner’s handguns as a temporary repository in a

non-criminal manner. “Probable cause to believe a crime was, is about to, or had been committed” was never a consideration. When the deputies arrived at the Bello home, the 48-hour timeframe for Mrs. Bello to comply with the surrender order was still 24 hours away. The handguns were secured in a locked gun safe to which no one other than Petitioner, including Mrs. Bello, had access. Petitioner’s production of his handguns to the deputies was a temporary gesture, as evidenced by the fact that he promptly contacted the Sheriff’s Department and verbally requested their return and subsequently requested their return in writing through counsel, submitting Petitioner’s sworn affidavit that he alone had access to the locked gun safe in which the handguns were stored, that Mrs. Bello’s handgun license was expired, and that there was no legal or factual impediment to the return of his firearms. App-39, 44.

The intent of N.Y. Penal Law § 400.00(11)(b), (c) is to promptly dispossess firearms from individuals who have been reported to “likely engage in conduct that will cause serious harm to self or others.” App-27, 53. While that goal was accomplished by Petitioner’s storage of the handguns from Mrs. Bello’s access, he recognized that there may be a need to satisfy a perceived urgency, opened the safe and surrendered the handguns under protest. Having validated that Mrs. Bello has no access to the handguns, Respondents had no remaining interest in continuing to retain Petitioner’s firearms. Upon Respondents’ refusal to return property that was neither contraband, evidence of a crime, nor part of a criminal

investigation¹³, Petitioner's Fourth Amendment rights were violated.

With the implementation of 'red flag' laws nationwide, this issue is likely to be a recurring theme, particularly in New York, which calls out for this Court's consideration. Accordingly, this petition for a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

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¹³ New York State recognizes that, in the context of firearms surrendered upon the issuance of a temporary order of protection, the police are merely a repository to secure the firearms until the order of protection is vacated or until a non-prohibited owner seeks their return. See, FN 10, *supra*.