No.

In the Supreme Court of the United States

PATRICK J. LYNCH, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,
Petitioners,

v.

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, and POLICE COMMISSIONER RAYMOND W. KELLY,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Skinner* v. *Railway Labor Executives' Association*, 489 U.S. 602 (1989), the Court upheld government regulations mandating suspicionless post-accident breathalyzer, blood and urine testing of railroad employees. The Court found that "'special needs,' beyond the normal need for law enforcement" (*id.* at 619)—to prevent and investigate the causes of mass accidents—exempted the privately conducted searches from the usual Fourth Amendment requirement of individualized suspicion. The Court, however, explicitly "le[ft] for another day the question whether routine use in criminal prosecutions of [the] evidence obtained * * * would * * * impugn the administrative [non-law-enforcement] nature of the * * * program" and thereby preclude departure from the requirement of individualized suspicion as a predicate to a search. *Id.* at 621 n.5. This case presents precisely that question, in the context of a program of suspicionless breath testing of New York City police officers following another sort of public safety incident—shootings.

The following question is presented:

Whether the "special needs" doctrine allows police investigators to perform suspicionless, nonconsensual, warrantless breath tests on officers involved in shootings notwithstanding that one of the purposes of the tests is to gather evidence for possible criminal prosecutions.

RULE 29.6 STATEMENT

Petitioner Patrolmen's Benevolent Association of the City of New York, Inc. has no parent corporation, and no publicly held corporation owns more than ten percent of its membership.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Patrick J. Lynch and the Patrolmen's Benevolent Association of the City of New York, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-19a) is reported at 589 F.3d 94. The decision of the district court (App. B, *infra*, 20a-33a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered December 11, 2009. A timely petition for rehearing was denied on February 17, 2010, and a corrected order issued February 25, 2010. App. C, *infra*, 34a-35a. On May 3, 2010, Justice Ginsburg extended the time to petition for a writ of certiorari to July 16, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

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

The Police Department operating procedure at issue here (IO-52) is set forth in Appendix D, *infra*, 36a-43a.

INTRODUCTION

In 2007, the New York City Police Department ("NYPD") issued a new order requiring that, as part of its investigation of shootings by police officers that result in injury or death, the NYPD's Internal Affairs Bureau ("IAB") subject the officers to suspicionless breathalyzer testing. App., *infra*, 36a-43a. The decision below upholding that order conflicts with this Court's decision in *Ferguson* v. *City of Charleston*, 532 U.S. 67, 83 n.20 (2001), where the Court held that "extensive entanglement of law enforcement" in a supposedly administrative search whose fruits will be evaluated for possible use in criminal prosecutions "cannot be justified by reference to legitimate needs." The decision also is at odds with the decisions of numerous state supreme courts that have interpreted the Fourth Amendment to invalidate state statutes that similarly mandate nonconsensual, suspicionless breath or blood testing of drivers involved in accidents resulting in injury or death where, as here, the evidence is gathered by police investigators and may be used in criminal prosecutions.

The issue is important. The decision below calls into question what has long been understood to be a minimum protection of the Fourth Amendment: the requirement that police have at least some ground for individualized suspicion before subjecting individuals whom they are investigating for potentially criminal misconduct to bodily searches. The case also raises the question of the degree of constitutional protection retained by the broad category of workers and individuals whose conduct affects public safety—

such as police and corrections officers, mass transit workers, and drivers—in the context of police investigations of public safety incidents for which these persons may bear criminal responsibility. More immediately, if uncorrected, the decision below will authorize the NYPD to continue to subject dozens of officers each year to nonconsensual searches in the course of police investigations in which, though the officers' conduct is being specifically scrutinized for evidence of crimes as serious as murder, they are deprived of the minimum protections of the Fourth Amendment.

STATEMENT

A. The Genesis of IO-52.

In 2007, following a shooting by undercover police in New York City, "there were rumors that * * * one or more officers were under the influence of alcohol at the time of the shooting."[1] See Defs.' Mem. of Law in Supp. of Defs.' Mot. to Dismiss, at 23; see also Court of Appeals Appendix ("CA App.") 72 ¶¶47-53. The Police Commissioner appointed a commission, chaired by the Chief of the Internal Affairs Bureau of the NYPD, to review procedures for undercover operations. CA App. 73 ¶¶50-51. The committee made numerous recommendations, including that the Commissioner order "mandatory breathalyzer tests of all NYPD officers, on duty and off duty, whose firearm discharge results in injury or death." *Id.* ¶52. After publicizing the recommendations, the Police Commissioner entered Interim Order 52, entitled "Alcohol Testing for Uniformed Members of the Ser-

[1] The record is devoid of evidence suggesting any factual basis for the rumors. See *infra*, p. 7.

vice Involved in Firearms Discharges Resulting in Injury To or Death of a Person" (hereinafter "IO-52") (App., *infra*, 36a-43a). See CA App. 73-74.

B. IO-52 and Its Role in the NYPD's "Investigation into a Potential Crime."

IO-52 confers primary responsibility for the non-consensual breath testing of officers who have wounded or killed someone to the Internal Affairs Bureau (see App., *infra*, 36a-39a), the section of the NYPD specifically "charged with * * * investigating * * * criminality and serious misconduct among NYPD officers" (CA App. 63). IO-52 mandates that, after the "Internal Affairs Duty Captain, Internal Affairs personnel and the Patrol Services Bureau Duty Inspector and Duty Captain" are alerted that a shooting has occurred, the Duty Captain or Inspector must detain "involved member(s) of the service * * * on the scene when feasible and consistent with safety (i.e., hospitalization not immediately required); pending arrival of Internal Affairs Bureau personnel assigned to administer alcohol test." App., *infra*, 37a. When the IAB Duty Captain arrives, he "[c]onduct[s the] alcohol test, using a PBT (portable breathalyzer test)." *Id.* at 38a. "If the reading on the PBT device is less than .08, no further testing is required * * *." *Ibid.* "If the reading on the PBT device is .08 or greater," the officer will be taken to the IAB testing facility for Intoxilyzer testing. IO-52 requires that "[t]he entire Intoxilyzer testing process, including the reading of the test results, will be videotaped" and the evidence carefully preserved "to safeguard the tape for evidentiary purposes." *Id.* at 39a-40a (emphasis omitted). IO-52 includes no option for an officer to refuse the suspicionless breath test, transportation

to the Internal Affairs Bureau facility, or Intoxilyzer testing. See generally App., *infra,* 36a-43a.

IO-52 is overlaid on (CA App. 74 ¶57), and specifically mandates compliance with (App., *infra,* 36a ¶2, 39a), pre-existing orders governing investigations of "Firearms Discharge by Uniformed Members of the Service" (CA App. 68-72, 96-107). Those orders set forth the extensive procedures the NYPD follows for investigating any shooting by an officer including special procedures for incidents that result in serious injury or death. See *id*. at 68-72. Under these orders, all firearms discharges by NYPD Officers "are treated as part of a possible criminal investigation." *Id*. at 69 ¶33. This is "in recognition of the fact that criminal charges may result against the NYPD officer or a civilian involved." *Ibid*. The NYPD treats the scene of every shooting, at which IO-52 mandates breath-testing of officers, "as a crime scene to ensure prosecutions." *Id*. at 72 ¶45. The investigation of a shooting by a police officer includes extensive interviews of the officers, involved persons, and witnesses, and gathering of physical evidence. See generally *id*. at 69-72, 96-107. Depending on the results of the investigation, including the breath tests for alcohol, the City may take "[a]ppropriate action" against the tested officers, which may include employment actions such as dismissal, prosecution of the officer in "a criminal case," or both. *Id.* at 72 ¶46.

C. Pre-Existing Regulations Ensuring Officers' Fitness for Duty.

Prior to issuance of IO-52, numerous regulations designed to ensure that officers were fit and sober for duty were already in place. They mandated that police superiors, trained to identify signs of intoxication and drug use, observe and assess officers' fitness for

duty and immediately detain and investigate an officer who appears intoxicated. See CA App. 94-95. Officers are also subjected to drug testing upon entering NYPD service, applying for certain assignments, and when the NYPD has reasonable ground for suspecting drug use. *Id.* at 66. All officers are also subjected to random suspicionless drug-testing. *Ibid.* Pre-existing orders mandated a range of employment actions and punishments for on-duty or excessive off-duty intoxication including dismissal probations, counseling, and terminations. See *id.* at 65, 79, 94-95. Pre-existing orders also mandated extensive procedures for investigating every shooting and ensuring that officers who discharged their weapons while intoxicated or otherwise unfit for duty were detected, their firearms removed, and appropriate actions taken. See *id.* at 94-107.

IO-52 differs from these pre-existing regulations ensuring officer fitness for duty and the integrity of police shootings in this significant respect: IO-52 is the only order to subject officers to suspicionless, nonconsensual searches as part of an investigation into specific, possibly criminal conduct, where the NYPD intends to use the results for criminal prosecutions where appropriate. See CA App. 69-70 ¶33, 72 ¶¶45-46. By contrast, other orders mandating searches of officers either specifically assure that "[p]ositive test samples" from suspicionless searches "will remain confidential" except as necessary to take noncriminal employment actions such as "Department [D]isciplinary Charges and Specifications" (*id.* at 91); or require reasonable suspicion as a predicate to the search (see*, e.g.*, *id.* at 86).

D. The Stated Purpose of IO-52 and the Special Non-Law-Enforcement Related Needs Invoked to Justify It.

IO-52 states its purpose, in its entirety, as:

> To ensure the highest levels of integrity at the scene of police involved firearms discharges which result in injury to or death of a person, on or off duty, within New York City.

App., *infra*, 36a.

The City readily concedes that the record is devoid of any evidence that the specific problem that the new suspicionless breath testing is designed to detect—an intoxicated officer shooting his weapon and unjustifiably injuring or killing another person—is a real threat or indeed has ever occurred. See App., *infra*, 45a-46a (Transcript of Argument Before Court of Appeals). No record evidence suggests that the rumor that gave rise to IO-52 had any basis in fact. See *ibid.*

In support of its contention that it has a special, non-law-enforcement need for suspicionless, nonconsensual breath testing of officers who have injured someone through discharge of their weapons, the City instead averred: *First*, over a three-year period, 38 of the total of 35,000 uniformed NYPD officers (CA App. 64 ¶3)—approximately one-tenth of one percent—had some degree of alcohol impairment while driving off-duty. *Id.* at 67 ¶21. *Second,* over a three-year period, the counseling unit that evaluates NYPD personnel to identify or address possible alcohol issues conducted approximately 600 interviews, about two-thirds of which were first interviews. *Id.* at 61-62. *Third*, over a three-year period, four offic-

ers committed suicide and had some alcohol in their blood or were physically near alcohol. *Id.* at 67 ¶22.

E. Proceedings and Opinions Below.

This action was commenced in United States District Court for the Southern District of New York in October 2007, shortly after IO-52 became effective, seeking a declaratory judgment and injunctive relief precluding enforcement of IO-52. Petitioners sought a preliminary injunction, alleging that the mandatory testing violates the Fourth Amendment's requirement of individualized suspicion as a predicate to a bodily search. The City moved to dismiss or in the alternative, for summary judgment, contending that the alcohol-testing is constitutional under the "special needs" doctrine. In a decision and order dated September 30, 2008, the court denied all three motions.

Addressing the motion for preliminary injunction, the district court explained: "Defendants contend that a sober police force serves to further" the City's "substantial interest in the safety of its citizens, visitors, and the police department," and "IO 52 encourages sobriety." App., *infra*, 31a. This "special need," the court found, was unrelated to law-enforcement. *Ibid.* Although the court recognized that the testing was also partly "concerned with law enforcement goals" (*id.* at 30a), it found that "generat[ing] evidence for prosecution" could not be the ***primary*** purpose because thus far none of the tested officers had "even found to be intoxicated" and hence none had been prosecuted (*id.* at 31a).

On appeal, the Second Circuit upheld the denial of the preliminary injunction. App., *infra*, 1a-19a. Although noting that IO-52 states its only purpose as

"'[t]o ensure the highest levels of integrity at the scene of police involved firearms discharges'" (*id.* at 10a n.2), the court found that the record indicated that the policy of mandatory suspicionless breath testing served four distinct purposes: (1) to ensure "that an officer who fires his or her gun while intoxicated * * * can be quickly disciplined or removed from duty" (*id.* at 11a); (2) to deter intoxicated shootings (*ibid.*); (3) to "promot[e] the NYPD's reputation among New York City residents" (*id.* at 12a); and (4) to gather "evidence in a criminal investigation of the officer who [is] tested" (*ibid.*). The court deemed the first three to be "special needs" unrelated to law enforcement and the fourth to be self-evidently "directly related to crime control." *Id.* at 12a-13a.

Citing this Court's decisions in several automobile checkpoint cases, the court of appeals held that where, as here, a policy of suspicionless testing has multiple purposes, only one of which is to gather "evidence in a criminal investigation of the [individual] who [is] tested," the "primary" purpose controls. See App., *infra*, 12a-14a. The court of appeals then—in one sentence without analysis—upheld the trial court's conclusion that plaintiffs had failed to disprove the City's contention that law enforcement was not the primary purpose. *Id.* at 14a. As noted, this conclusion relied on the rationale that no tested officers had been prosecuted because none had been intoxicated. *Id.* at 31a.

Although the court of appeals cursorily cited this Court's decision in *Ferguson* v. *City of Charleston*, 532 U.S. 67, 83-84 (2001) (App., *infra*, 8a), it disregarded the Court's key holdings. Specifically, it failed to note that *Ferguson* rejected a claim of "special needs" for suspicionless drug-testing because of the

"fact that positive test results were turned over to the police" (532 U.S. at 84) and because "extensive entanglement of law enforcement" in suspicionless bodily searches "cannot be justified by reference to [special] needs" (*id.* at 83 n.20). Finally, the court of appeals failed to acknowledge that both *Ferguson* and the checkpoint cases themselves expressly "distinguished the cases dealing with checkpoints from those dealing with 'special needs.'" *Id.* at 83 n.21.

F. All Parties to the Appeal Agree that the Present Record Is Sufficiently Complete To Allow Final Decision on the Constitutionality of IO-52.

At oral argument in the court of appeals, counsel for all parties to the appeal agreed unequivocally that, although the appeal was from the denial of a preliminary injunction, the existing record is sufficiently developed to allow a final determination of the constitutionality of IO-52.[2] Petitioners represent

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[2] The court of appeals inquired whether "we are in a position on the basis of this record to rule that the breathalyzer policy is reasonable under the * * * Special Needs Doctrine or is the record not yet fully developed for * * * any court to * * * make that kind of assessment?" Counsel for respondents answered: "[W]e obviously believe that the record was sufficient to make that determination." App., *infra*, 47a. The court inquired whether "there's enough of an evidentiary record to support that legal determination?" Counsel for respondents again answered: "Absolutely." *Ibid.* The court summarized: "So, you and [counsel for plaintiffs] agree that the evidentiary record is as complete as it's likely to get?" *Id.* at 49a. Respondents' counsel confirmed: "[C]ertainly as complete as it's probably gonna get from my point of view." *Ibid.* Counsel for petitioners concurred. *Id.* at 49a-50a.

that if the Court grants review and affirms, petitioners will dismiss their complaint.

REASONS FOR GRANTING THE PETITION

I. This Case Well Presents An Issue Reserved In *Skinner* v. *Railway Labor Executives' Association*: Whether The Fourth Amendment Permits Nonconsensual, Suspicionless Substance Testing Designed In Part To Gather Evidence For Possible Use In A Criminal Prosecution.

"To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." *Chandler* v. *Miller*, 520 U.S. 305, 313 (1997). This is particularly true "[i]n most criminal cases," where the Court generally finds "in favor of the procedures described by the Warrant Clause of the Fourth Amendment." *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

In *Skinner*, the Court nonetheless upheld government regulations mandating suspicionless, warrantless breathalyzer, blood and urine testing by private railroads of their employees in investigations of serious public safety incidents. The Court confirmed that "[s]ubjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis, * * * implicates * * * concerns about bodily integrity" similar to those implicated by blood testing and is therefore a "search" within the meaning of the Fourth Amendment. *Skinner*, 489 U.S. at 616-617 (citing *Schmerber* v. *California,* 384 U.S. 757, 767-768 (1966)). The Court found, however, that the tests were mandated by the government, "not to assist in

the prosecution of employees, but rather to prevent accidents and casualties in railroad operations." *Id.* at 620-621 (internal quotation marks omitted)).

The Court held that these "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Skinner*, 489 U.S. at 619 (internal quotation marks omitted). The Court emphasized that the searches were conducted not by law-enforcement officials, but rather by private "[r]ailroad supervisors" who "are not in the business of investigating violations of the criminal laws" and therefore "have little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence." *Id.* at 623. Imposing upon them a requirement of adducing individualized grounds for suspicion as a predicate to a search therefore would be impractical. See *ibid.* In so ruling, however, the Court explicitly reserved "for another day" the question whether such suspicionless, warrantless testing of individuals in the investigation of public safety incidents would be constitutional if test results were intended for use, or were routinely used, in criminal prosecutions of the tested individuals. *Id.* at 621 n.5.

Since *Skinner*, the Court has explicitly predicated its decisions upholding suspicionless searches by reference to "special needs" on the fact that the results of the searches at issue were not to be used in criminal prosecutions. As Justice Kennedy observed in *Ferguson*: "The traditional warrant and probable-cause requirements are waived in our previous [special needs] cases ***on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes.***" 532 U.S. at 88 (Kennedy, J., concurring) (empha-

sis added). In *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989), for example, decided with *Skinner*, the Court found a "special need" for suspicionless drug testing of customs service employees because "[t]est results may not be used in a criminal prosecution of the employee without the employee's consent," making it "clear that the * * * drug-testing program is not designed to serve the ordinary needs of law enforcement." *Id.* at 666. The Court similarly emphasized the lack of law-enforcement involvement and non-use of test results for criminal prosecutions in its decisions allowing certain suspicionless drug testing in schools. See, *e.g.*, *Board of Educ.* v. *Earls*, 536 U.S. 822, 833 (2002) (emphasizing that "the test results are not turned over to any law enforcement authority"); *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 658 (1995) (emphasizing that "the results of the tests * * * are not turned over to law enforcement authorities or used for any internal disciplinary function").

In *Ferguson*—the only "special needs" case since *Skinner* in which the Court confronted a regime of suspicionless, nonconsensual drug or alcohol testing of free persons, the results of which would routinely be considered for use in criminal prosecutions—the Court held the searches unconstitutional. See *infra,* Part II. The Court found: "The fact that positive test results were turned over to the police does not merely provide a basis for distinguishing our prior cases applying the 'special needs' balancing approach to the determination of drug use. It also provides an affirmative reason for enforcing the strictures of the Fourth Amendment." *Ferguson*, 532 U.S. at 84. The Court also found highly significant that, "throughout the development and application of the [drug testing]," "police were extensively involved." *Id.* at 82.

The court concluded that, regardless of any benevolent ultimate purpose, such ***extensive "entanglement of law enforcement cannot be justified by reference to legitimate needs***." *Id.* at 83 n.20 (emphasis added).

This case cleanly presents precisely the question reserved by the Court in *Skinner*, not presented in subsequent "special needs" cases where the search policies carefully cabined test results from law-enforcement officials, and then addressed by the Court in a different context in *Ferguson.* Unlike in *Skinner*, where "respondents aver[red] generally that test results might be made available to law enforcement authorities" but cited no evidence to support that claim (489 U.S. at 621 n.5), there is no doubt here that "test results might be made available to law enforcement authorities," as they are gathered by law-enforcement authorities in the first instance. Indeed, the results are gathered in particular by the Police Department's IAB—the bureau "charged with * * * investigating possible * * * criminality * * * among NYPD officers." CA App. 63 ¶2.

Further, the Police Department readily acknowledges that it administers the nonconsensual breath tests to officers as part of its "investigation into a possibly criminal matter" (CA App. 70 ¶33)—a police shooting that has wounded or killed someone—and it agrees that the test results may be used in a "criminal case" and "prosecution" of the tested officers, involved civilians, or both (*id.* at 69 ¶33, 72 ¶¶45-46, 76 ¶66). Accordingly, both lower courts found, and it is beyond reasonable dispute, that one of the City's purposes in testing officers, whether or not the primary purpose, is to investigate them for a possibly serious crime of unjustifiably wounding or killing a

civilian and to gather evidence with which it might criminally prosecute them. See App., *infra*, 12a, 30a-31a.

The procedural posture of this petition for certiorari—arising on appeal from a denial of a preliminary injunction of the policy—poses no impediment to the Court's review. The parties to the appeal concurred below that the record is complete and sufficient for a final determination of the constitutionality of the testing policy, IO-52. See *supra*, pp. 10-11 & n.2. The Court has previously granted certiorari in similar circumstances, to address the constitutionality of a City's policy of suspicionless checkpoint stops, likewise arising from an appeal following a motion for preliminary injunction. See *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000).

II. The Second Circuit's Decision Is In Sharp Tension With This Court's Decision In *Ferguson* v. *City of Charleston*.

A. *Ferguson* Makes Clear that "Excessive Entanglement of Law Enforcement" and Police Evaluation of Positive Test Results for Use in Criminal Prosecutions Invalidate Suspicionless Searches.

A decade after *Skinner*, the Court decided *Ferguson* v. *Charleston*, 532 U.S. 67, which, although arising in a somewhat different context, left little doubt as to how the question left open in *Skinner* would be answered. The ruling below in this case cannot be reconciled with *Ferguson*.

In *Ferguson*, the Court found unconstitutional a program of nonconsensual, suspicionless drug testing of pregnant women where the ultimate objective—to protect the tested women and their fetuses from

harm from illegal drug use—was to be achieved via threatened or actual criminal prosecution of women who tested positive. Despite the highly "beneficent" purpose of this program, the Court rejected application of the "special needs" doctrine to such a situation. *Ferguson*, 532 U.S. at 81. Although the majority and Justice Kennedy in concurrence disagreed about whether the "primary purpose" of the searches was a "special need" to protect maternal and fetal health, or instead a law-enforcement objective to investigate and gather evidence of a possible crime, this was not the dispositive consideration. As the majority explained: "***Our essential point is the same as Justice Kennedy's—the extensive entanglement of law enforcement cannot be justified by reference to legitimate needs***." *Id.* at 83 n.20 (emphasis added). Justice Kennedy concurred: notwithstanding that "the policy may well have served legitimate needs unrelated to law enforcement, it had as well a penal character with a far greater connection to law enforcement than other searches sustained under our special needs rationale" and was therefore unconstitutional. *Id.* at 88-89 (Kennedy, J., concurring).

So too here. Whatever the ostensible legitimate civil purposes served by the policy, law enforcement is not merely "entangled" with IO-52, it is a law-enforcement policy in every sense from inception through implementation. The idea for the policy was conceived by a committee chaired by the chief of the IAB, the arm of the Police Department charged with investigating crimes by police officers, and will be implemented by that bureau. As noted, the breath-testing is conducted as part of what the NYPD itself characterizes as an "investigation into a possibly criminal matter" (CA App. 70 ¶33) to assess criminal liability and gather evidence that may be used for a

possible "criminal case" and "prosecution" of the tested officer for unlawfully killing or wounding another person (*id.* at 72 ¶¶45-46, 76 ¶66).

As in *Ferguson,* "[t]he stark and unique fact that characterizes this case" is that the policy at issue was in part "designed to obtain evidence of criminal conduct by the tested [persons]" that would be evaluated by "police and that could be admissible in subsequent criminal prosecutions." 532 U.S. at 85-86. As the Court concluded in *Ferguson*, "[t]he Fourth Amendment's general prohibition against nonconsensual, warrantless, and suspicionless searches necessarily applies to such a policy." *Id.* at 86.

The Court also observed in *Ferguson* that, "[i]n other special needs cases," it had "tolerated suspension of the Fourth Amendment's warrant or probable-cause requirement in part because there was ***no*** law enforcement purpose behind the searches." 532 U.S. at 79 n.15 (emphasis added) (citing *Skinner*, 489 U.S. at 620-621; *Von Raab*, 489 U.S. at 665-666; *Acton*, 515 U.S. at 658). By contrast, as noted above, it is not fairly disputable that one of the purposes of IO-52, whether or not the primary purpose, is law-enforcement. See App., *infra*, 12a-13a, 32a.

Disregarding *Ferguson*, however, the court of appeals invoked this Court's checkpoint cases for the proposition that special civil objectives can justify suspicionless seizures by law-enforcement officials who are, in part, looking for evidence of possibly criminal conduct. See App., *infra*, 13a-14a (citing *Edmond,* 531 U.S. at 37-39; *Michigan Dep't of State Police* v. *Sitz,* 496 U.S. 444 (1990) (need to reduce the hazard posed by drunk drivers justified drunk-driving checkpoint), and *United States* v. *Martinez-*

Fuerte, 428 U.S. 543 (1976) (need to intercept illegal aliens justified checkpoint near border).

The court of appeals failed to note, however, that in *Ferguson*, the Court expressly distinguished the temporary seizures involved in the checkpoint cases from bodily searches like those required by IO-52. See 532 U.S. at 83 n.21 (distinguishing *Edmond*, *Sitz,* and *Martinez-Fuerte*). The Court explained: "First, those cases involved roadblock ***seizures***" entailing only a brief stop "rather than 'the intrusive search of the body or the home.'" *Ibid.* (emphasis added). "Second, the Court [has] explicitly distinguished the cases dealing with checkpoints from those dealing with 'special needs.'" *Ibid.* In short, the checkpoint cases cannot support the lawfulness of IO-52.

B. Applying *Ferguson*'s Definition of "Primary Purpose," IO-52 Has Ordinary Law Enforcement Purposes, and the "Special Needs" Exception Therefore Does Not Apply.

In addition to making the "essential point" in *Ferguson* that "the extensive entanglement of law enforcement" in suspicionless substance testing "cannot be justified by reference to legitimate needs" (532 U.S. at 83 n.20), the majority found that law enforcement was the "primary purpose" of the suspicionless drug-testing program at issue. The Court reasoned that, although "the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for *law enforcement purposes* in order to reach that goal." *Id.* at 82-83 (emphasis in

original). The majority held that the "immediate objective" determines the "primary purpose." See *ibid.*

The courts below erred in disregarding *Ferguson*'s focus on "immediate objective" in identifying which of the NYPD's multiple asserted purposes for its program of suspicionless searches was "primary." As in *Ferguson*, however legitimate the stated ultimate objectives, "the ***immediate*** objective of the searches [is] to generate evidence *for law enforcement purposes*." 532 U.S. at 83 (first emphasis added).

IO-52 describes its purpose, in its entirety, as being to "ensure the highest levels of integrity at the scene of police involved firearms discharges which result in injury to or death of a person." App., *infra*, 36a. That sentence bears two interpretations. The first, and most apparent, is: a purpose to ensure the "highest levels of integrity" in the investigation of the crime "scene," that is, to ensure that the very best evidence of innocence or guilt is obtained. The second, urged by the NYPD (CA App. 76 ¶69), is: a purpose to ensure that the officers have acted or are perceived by the public as having acted with integrity in discharging their weapons.

The first purpose—to ensure the "integrity" of the investigation by enabling police to obtain the very best evidence of innocence or guilt—is self-evidently and quintessentially a law-enforcement objective, and the lower courts so found. See App., *infra*, 12a. The police always would like to obtain the very best evidence of innocence or guilt, but that is not a civil need. Indeed, the Fourth Amendment was written precisely to protect against the intrusions on the privacy of citizens that would be wrought by law

enforcement officials' unrestrained pursuit of the very best evidence of innocence or guilt.

The second objective—to ensure that the officers are perceived by the public as having acted with integrity—though a legitimate civil objective, is also, just like the legitimate civil objective of protecting maternal and fetal health in *Ferguson*, entirely derivative of a more immediate law-enforcement objective: to acquire the best evidence of innocence or guilt. A negative breathalyzer can reinforce the NYPD's perceived integrity, if at all, only by reassuring the public that the best evidence of innocence of intoxicated shooting has been obtained. A positive breathalyzer can reinforce the NYPD's integrity, if at all, only by reassuring the public that the best evidence of guilt has been obtained and can be used to prosecute the guilty officer to the fullest extent of the law. The "immediate objective" of the suspicionless breathalyzer is thus a law-enforcement objective of obtaining the best evidence of innocence or guilt, and it is only by so doing that the invoked "ultimate" objective of reassuring the public of the integrity of the NYPD following a shooting can be accomplished.

Although IO-52 suggests no other purposes, the Chief of the IAB stated in an affidavit, and the court of appeals accordingly found (see App., *infra*, 10a-11a & n.2), that the policy serves two additional purposes (see *id.* at 11a): (1) "protecting the safety of the public and NYPD officers" by enabling the NYPD to immediately remove from further duty any intoxicated officers and (2) "deterring alcohol intoxication by NYPD officers who are carrying firearms" (CA App. 77 ¶15).

However, prior to adoption of IO-52, the NYPD already maintained extensive regimes for monitoring

the sobriety and fitness for duty of officers and immediately investigating, confiscating the weapon of, removing from duty, and/or punishing any officer who is intoxicated. See *supra,* pp. 5-6. IO-52 added only one thing to those regimes of protection and deterrence: the ability to test officers ***after*** they have caused serious injury or death without any ground for suspicion, and with the power to use positive tests to prosecute. See *ibid.*

As the Mississippi Supreme Court observed in holding unconstitutional a state statute that similarly mandated suspicionless post-incident testing whose results could be used in criminal prosecutions, such testing—occurring, as it does, only ***after*** a serious safety incident occurs—comes too late to "protect[] the safety of the public" and "deter[]" the dangerous conduct. "Although the State undoubtedly has a significant interest in preventing accidents involving alcohol and drugs * * * [post-incident testing] * * * does nothing to further that interest. [It] is not applicable prior to the occurrence of a serious accident; therefore, it is prosecutorial, not preventive in nature." *McDuff* v. *Mississippi*, 763 So. 2d 850, 855 (Miss. 2000) (en banc) (citation omitted). The same is true here.

C. The Court Should Grant Review Even if It Agrees with the Lower Courts that the *Primary* Purposes of IO-52 Are Legitimate Civil Objectives Unrelated to Law Enforcement.

Because the majority in *Ferguson* found that the "primary purpose" of the program of drug-testing at issue there was law enforcement, it arguably remains an open question whether, as Justice Kennedy appears to have believed, "extensive entanglement of

law enforcement" and the "fact that positive test results [are] turned over to the police" would doom a program of suspicionless searches even if law enforcement were not the "primary purpose." 532 U.S. at 83-84 & n.20; see *id.* at 86-89 (Kennedy, J., concurring) (disagreeing with the majority that the "primary purpose" of a search policy is assessed by reference to "immediate purpose," emphasizing the legitimacy of the State's ultimate objective for the searches at issue, and concluding nonetheless that the searches were unconstitutional because "while the policy may well have served legitimate needs unrelated to law enforcement, it had as well a penal character with a far greater connection to law enforcement" than was justified "under our special needs rationale"). In petitioners' view, this case does not present that question because, as just observed in Part II.B*, supra*, the "immediate objectives" of IO-52 are, as defined by the majority in *Ferguson*, inextricably related to law enforcement. Taking the lower courts' findings of the "primary purpose" of IO-52 as correct, however, the case would present the question squarely.

Thus, if the lower courts and respondents are correct that IO-52's asserted purposes of maintaining the integrity of the police department, deterring intoxicated shootings, and immediately removing officers who have engaged in intoxicated shootings are the primary purposes and are "divorced from the State's general interest in law enforcement" (*Ferguson*, 532 U.S. at 79)—then this case presents an opportunity to clarify whether significant law enforcement entanglement and purpose in suspicionless drug-testing, whose primary purpose is civil, precludes "special needs" exemption.

III. The Decision Below Exacerbates A Conflict Among The Lower Courts As To The Scope Of The Special Needs Doctrine.

State supreme courts and federal courts of appeals have divided over the scope of the special needs doctrine in cases analogous to the instant case, with the majority rejecting programs similar to IO-52 as violative of the Fourth Amendment.

A. In the wake of *Skinner* and *Ferguson*, state supreme courts have divided on the constitutionality of statutes that, like IO-52, mandate suspicionless, post-incident substance testing as part of a police investigation of a public safety incident and of the possibly criminal conduct of the tested individuals in causing the injury or death of another person. The statutes differ from IO-52 only in that they mandate suspicionless substance testing of drivers following car accidents, rather than of police officers following shootings. Like respondents, most of the States in these cases invoked "special needs" or "compelling interests" in identifying and immediately removing a person who presents a threat to public safety and in deterring the dangerous conduct as justifications for avoiding the Fourth Amendment requirement of individualized suspicion as a predicate to testing.

Invoking *Skinner*, most of the state supreme courts reviewing such statutes have—in contrast to the Second Circuit below—found them unconstitutional. See*, e.g.*, *Cooper* v. *Georgia*, 587 S.E.2d 605 (Ga. 2003) (striking down Georgia "implied consent" statute requiring suspicionless breath, blood and urine testing of drivers involved in accidents resulting in serious injury or death); *McDuff* v. *Mississippi*, 763 So. 2d 850 (Miss. 2000) (invalidating comparable Mississippi provision); *Pennsylvania* v. *Kohl*, 615

A.2d 308 (Pa. 1992) (declaring unconstitutional a similar Pennsylvania statute, absent probable cause to believe that the driver was driving under the influence); see also *Alaska* v. *Blank*, 90 P.3d 156, 162 & n.34 (Alaska 2004) (to avoid unconstitutionality, construing statute to require "probable cause to search" and exigent circumstances as a predicate to a warrantless breath test, notwithstanding that the statute on its face required only "probable cause to believe that the person was operating * * * a motor vehicle * * * that was involved in an accident"). And the Supreme Court of Kentucky has sustained its statute against Fourth Amendment challenge only because the statute expressly requires reasonable ground for suspicion or probable cause to believe the driver was intoxicated as a predicate to the mandated breath or blood test for alcohol testing. See*, e.g. Helton* v. *Kentucky,* 299 S.W.3d 555, 563 (Ky. 2010).

While not declaring their State's "implied consent" statutes unconstitutional, still more state appellate courts have similarly held that the Fourth Amendment forbids use in criminal prosecutions of the results of breath and blood tests taken pursuant to such statutes unless the officers had probable cause to believe the driver was intoxicated. See*, e.g., Arizona* v. *Quinn*, 178 P.3d 1190, 1195-1196 (Ariz. Ct. App. 2008) (holding that the Fourth Amendment forbade use in a criminal prosecution of suspicionless blood test results obtained pursuant to Arizona statute, but allowing use in civil proceedings to revoke driver's license); *Hannoy* v. *Indiana*, 789 N.E.2d 977, 983-988 (Ind. Ct. App. 2003) (invoking *Ferguson* and *Skinner* to hold that sheriff department's policy of obtaining blood samples without probable cause from drivers involved in accidents resulting in serious bodily injury or death was unconstitutional, but noting

constitutionality of statute that conditioned retention of a driver's license on consent to a chemical test if a driver is involved in an accident resulting in serious bodily injury or death).

Several of these courts expressly recognized the importance of the "special needs" of the States to (1) "remov[e] drunk drivers from the highways" (*Kohl*, 615 A.2d at 314), (2) "ensur[e] that only those qualified are permitted to operate motor vehicles" (*ibid.*), and/or (3) deter[] drunk driving (*Cooper*, 587 S.E.2d at 611)—"special needs" that precisely parallel those invoked by the City in this case of immediately removing intoxicated officers from duty and deterring officers from engaging in intoxicated shooting. Nonetheless, the courts found that the statutes, which, like IO-52, authorize suspicionless testing in the context of a police investigation into possibly criminal conduct, are also self-evidently designed "to enable the police to obtain evidence of intoxication or drug use to be utilized in criminal proceedings." *Kohl*, 615 A.2d at 314-315; accord, *e.g., Cooper*, 587 S.E.2d at 611. These courts viewed the fact that positive results could regularly be used for criminal prosecution as dispositive of the unconstitutionality of the statutes. See *ibid.*; *Kohl*, 615 A.2d at 314; *McDuff*, 763 So.2d at 855. As one court explained: "[O]ur review of the Supreme Court's 'special needs' search and seizure cases leave[s] us with the firm belief that it did not, and does not, intend to expand that particular exception to the warrantless, suspicionless, nonconsensual drawing of a person's blood by law enforcement as part of a criminal investigation." *Hannoy*, 789 N.E.2d at 985.

The view is not unanimous, however. Like the majority of state supreme courts identified above, the

Supreme Court of Illinois initially held an Illinois statute mandating suspicionless blood and breath testing of drivers involved in serious accidents unconstitutional. *King* v. *Ryan*, 607 N.E.2d 154, 162 (Ill. 1992). It reasoned that, although the State had compelling interests in "remov[ing] intoxicated drivers from the road" and "deter[ring] others from driving while intoxicated," the statute could not "fall[] within the special needs exception" because it "is also intended to gather evidence for use in a criminal proceeding." *Id.* at 160. However, after the Illinois legislature revised the statute to delete the provision explicitly authorizing use of positive tests in criminal proceedings, the Illinois Supreme Court upheld it, notwithstanding its recognition that the test results would still routinely be used in criminal prosecutions. See *Fink* v. *Ryan*, 673 N.E.2d 281 (Ill. 1996). Observing that "the [U.S.] Supreme Court has not yet determined whether evidence obtained under the 'special needs' exception may be routinely used in criminal proceedings" (*id.* at 287), the court concluded that it could, provided such routine use for criminal prosecutions was only "incidental" to the primary purpose (*ibid.*). The Chief Justice and two other justices dissented. *Id.* at 288, 290.

The Maine statute authorizing suspicionless blood and breath testing of drivers who may have been responsible for a serious injury or death was also upheld, the court reasoning that (1) the State had a "special need" to investigate the causes of traffic accidents; and (2) the statute expressly prohibits use of test results in criminal prosecutions except where the State establishes that police investigators would have found independent probable cause to believe that the driver was impaired at the time of the accident had they not been too busy addressing the ex-

igencies of the accident to check. See *Maine* v. *Cormier*, 928 A.2d 753, 760 (Me. 2007) (upholding 29-A Me. Rev. Stat. § 2522(1) (2006)). The court distinguished *Ferguson* on the ground that "the Maine statute's approval of using test results in prosecutions in only limited circumstances demonstrates that the statute does not have law enforcement as its primary purpose." *Id.* at 763. Two justices dissented, observing that the statute allows the State to cobble together probable cause from after-acquired evidence it would not have inevitably discovered, and therefore would violate the Fourth Amendment absent a "special needs" exception, which they deemed unavailable under *Ferguson* because of the "law enforcement focus" of the statute. *Id.* at 765-767 (Levy & Calkins, JJ., dissenting).

The disarray among and within the state supreme courts on the question of the constitutionality of post-accident testing performed by police officers investigating the tested individuals for potentially criminal conduct illustrates the confusion left in the wake of *Skinner* and *Ferguson* and warrants the Court's attention.

B. Though the federal appellate courts have not been presented with policies identical to IO-52, a number have addressed analogous questions. The majority have concluded, in sharp contrast to the Second Circuit, that suspicionless searches performed by law enforcement or with extensive entanglement of law enforcement, in part to gather evidence of possible crimes, is unconstitutional, notwithstanding the presence of "special needs."

For example, the Fifth and Ninth Circuits held that a State's proffered "special need" to protect children is not sufficiently "'divorced from the state's

general interest in law enforcement'" to exempt joint social-services and law-enforcement searches into possible child abuse from the normal requirements of the Fourth Amendment. *Greene* v. *Camreta*, 588 F.3d 1011, 1029 (9th Cir. 2009) (quoting *Roe* v. *Texas Dep't of Protective & Reg. Servs.*, 299 F.3d 395, 406-407 (5th Cir. 2002) (in turn quoting *Ferguson*, 532 U.S. at 79)).[3] Detailing the statutory "entanglement of law enforcement and social services officials in the state's investigation of child abuse" from inception of a complaint through resolution, both circuits concluded that the searches "functioned 'as a tool both for gathering evidence for criminal convictions and for protecting the welfare of the child'" (*Greene*, 588 F.3d at 1028-1029 (quoting *Roe*, 299 F.3d at 406-407)); see also *Gates* v. *Texas Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 423-424 (5th Cir. 2008) (same). Confronted with those mixed purposes, the courts did not inquire, as did the Second Circuit, which one was "primary." Rather, invoking *Ferguson,* they concluded that the searches were unconstitutional because of the extensive involvement of law enforcement and the probability that if the results of the investigation were incriminating, criminal prosecutions would result. The Ninth Circuit observed: "'[n]one of [the Court's] special needs cases have * * * upheld the collection of evidence for criminal law enforcement purposes.'" *Greene*, 588 F.3d at 1027 (quoting *Ferguson*, 532 U.S. at 83 n.20); see also *ibid.*

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[3] Certiorari petitions have been filed seeking review of the Ninth Circuit's decision. *Greene* v. *Camreta*, No. 09-1454 (filed May 27, 2010), No. 09-1478 (filed June 1, 2010). If certiorari were to be granted in *Greene*, the Court should at least hold the instant petition.

(quoting *Ferguson*, 532 U.S. at 88 (Kennedy, J., concurring)).

In *Knox County Education Association* v. *Knox County Board of Education*, 158 F.3d 361 (6th Cir. 1998), the Sixth Circuit indicated that even reasonable-suspicion-based breath testing of school personnel that was otherwise constitutional would be unconstitutional if performed by police officers. See *id.* at 385. The court explained: "The problem with having law enforcement officers administer the test is that they will have immediate access to the results. This publication converts the testing from a matter peculiarly within the scope of the employment relationship to one which directly involves law enforcement authorities." *Ibid.* The court found it unnecessary to decide the question, however, because "it seems unlikely, especially in light of the Court's admonition here, that the Board would revert to having law enforcement officials conduct the test." *Id.* at 385 n.28.

In sum, the Second Circuit's interpretation of the scope of the special needs doctrine as applied to post-incident suspicionless searches stands in sharp conflict with numerous decisions of state supreme courts and several federal courts of appeals evaluating similar statutes and policies.

IV. The Issue Here Is Of Substantial Practical Importance And Is Recurring.

Whether police may subject individuals to suspicionless, nonconsensual drug testing in their investigation of public safety incidents, and use the results to prosecute the tested individuals, is a critical and recurring question. It affects the broad category of employees and citizens whose conduct implicates

public safety concerns, from law-enforcement and corrections officers, mass transit and ship workers, workers at energy facilities like power plants and oil rigs, to train, bus, truck, and automobile drivers, among many others. In every investigation of a public safety incident, from one as small as a car accident to one as large as a mass transit accident, suspicionless searches by police will always simultaneously serve not only a law-enforcement investigatory objective, but also several meritorious civil objectives including all the purposes the NYPD invokes here: to "deter" further intoxicated operations, to protect the safety of the public and workers by identifying and immediately "removing" any intoxicated operators, and/or to encourage public confidence in the sobriety of the operators.

Indeed, the potential reach of the court of appeals' rationale is far greater. The court's holding that a civil "primary purpose" exempts from the requirement of individualized suspicion even searches conducted by the police in part to gather evidence for criminal prosecutions would permit police drug-testing of broad swaths of the public. To start, schools seeking additional deterrent effect for their anti-drug programs could invite ***police*** to perform the suspicionless urinalysis testing of children who participate in athletics and extracurricular activities, which school officials themselves now conduct, and to prosecute children who test positive. That is because the "***primary*** purposes" of school drug-testing programs—to deter drug use and to protect children—are civil; and, according to the Second Circuit, law-enforcement entanglement and use of test results for prosecutions would not alter that analysis. Mass-transit, trucking, energy facility, and law-enforcement employers likewise could, under the

Second Circuit's decision, all enhance the deterrent effect of their existing employee drug-testing programs by sending positive test results to the police for criminal prosecutions, or inviting police themselves to do the testing, providing the primary purposes of such testing remained to investigate accidents, deter drug and alcohol abuse, or enhance the reputation of the organization. The Second Circuit's decision authorizes police to enter previously civil arenas without any individualized grounds for suspicion, but with testing kits.

The court of appeals' decision expands the "special needs" exception beyond the justification for its existence. Until now, "special needs" cases were a "closely guarded category of constitutionally permissible suspicionless searches" (*Chandler*, 520 U.S. at 309) with "***no*** law enforcement purpose" (*Ferguson,* 532 U.S. at 79 n.15 (emphasis added)). The Court created the special needs exception because, it found, searches conducted for civil purposes and in civil contexts constitute a lesser intrusion on the privacy interests protected by the Fourth Amendment than searches by law-enforcement officials investigating potential crimes. Cf., *e.g., Ferguson,* 532 U.S. at 79-80; *O'Connor* v. *Ortega,* 480 U.S. 709, 717, 721-722 (1987). Where law-enforcement officials conduct the searches in part to investigate and gather evidence of possible crimes, that justification for an exception to the Fourth Amendment's ordinary requirements is extinguished.

The Court has held that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity* v. *State of New Jersey*, 385 U.S. 493, 500 (1967). Absent correction by the Court, dozens of NYPD officers will con-

tinue to be deprived every year of their constitutional right to be free of unreasonable searches in highly sensitive circumstances. They will be subjected to potentially humiliating testing after having risked their lives to save other citizens and protect our laws, even if they themselves have suffered severe physical injury (see CA App. 207-208), and regardless whether their actions and the soundness of their judgment in shooting are self-evidently beyond reproach.

Finally, the Second Circuit's rationale has things exactly backward. The court relied on the district court's conclusion that the "primary purpose" of the policy is not law enforcement because the officers tested were not intoxicated and the policy therefore had not produced prosecutions. See *supra,* pp. 8-9. The courts' reasoning overlooks the fact that the Fourth Amendment is designed to protect the privacy rights of the innocent as well as the guilty. Indeed, a dearth of prosecutions resulting from this policy would, if anything, only highlight the paucity of record evidence that intoxicated shootings are actually a "concrete danger" (*Chandler*, 520 U.S. at 319; see *supra*, pp. 8-9), further undermining the City's claim of "special needs."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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