No. 20-18

IN THE

Supreme Court of the United States

ARTHUR GREGORY LANGE,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeal of the State of California,
First Appellate Division

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statute

Rule

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The State's brief cements the need for this Court's review. The State recognizes that lower courts are hopelessly split on the question whether pursuit of a suspected misdemeanant gives police carte blanche to enter a home without a warrant. BIO 6-7. The State "agrees" that this Court should "resolve that division of authority." BIO 8. The State does not deny that this case squarely presents the question that has divided the lower courts. And the State also "agree[s] with Lange" on the merits, arguing that "the Court should reject [the] categorical rule" applied below and instead adopt "a case-specific exigency analysis." BIO 4-5.

Why, then, does the State urge this Court to deny the petition and leave the split to fester? It musters just two reasons: This case comes from an intermediate state court, and the State believes it might ultimately prevail on a different ground if the Court granted certiorari and reversed. BIO 8-9. But those quibbles are no reason to deny review. The Court routinely hears cases from intermediate courts. And it even more routinely grants certiorari despite a respondent's assertion that it could win on another ground on remand—especially when that alternative ground is forfeited, dubious, or (as here) both.

The Court should seize this chance to resolve an entrenched split on an important Fourth Amendment issue that has long bedeviled the lower courts—especially because it could be years before the Court sees another suitable vehicle for resolving this recurring question.

1. The fact that the petition seeks review of a decision of "a state intermediate appellate court," BIO 8, is of no moment. That posture can be a reason to deny certiorari if it means that a petition does not present a question that has divided the federal courts of appeals and state courts of last resort. *Cf.* Sup. Ct. R. 10. That was the situation in the case on which the State relies. BIO 8; *see* Pet. at 11-12, *Huber v. N.J. Dep't of Env't Prot.*, 562 U.S. 1302 (2011) (No. 10-388). But it is assuredly *not* the situation here: Everyone agrees that "federal and state courts of last resort" are "sharply divided" on the question presented. *Stanton v. Sims*, 571 U.S. 3, 10 (2013) (per curiam); *see* Pet. 8-14; BIO 6-7.

In such circumstances, this Court often selects a case from an intermediate state court as the vehicle for resolving the split. In recent years, for example, the Court has reviewed no fewer than five other cases from the California Courts of Appeal alone. *See Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 137 S. Ct. 2325 (2017); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 467-68 (2015); *Riley v. California*, 573 U.S. 373, 380 (2014); *Navarette v. California*, 572 U.S. 393, 396 (2014); *Fernandez v. California*, 571 U.S. 292, 298 (2014).[1]

2. The State's remaining objection is equally insubstantial. The State does not deny that Mr. Lange raised his Fourth Amendment objection at

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[1] Other examples abound. *See, e.g.*, *Herrera v. Wyoming*, 139 S. Ct. 1686, 1694 (2019); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017); *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1508 (2017).

every stage of the proceedings; that this case involves a clean record and a simple, recurring set of facts; or that the warrantless entry into Mr. Lange's home violated the Fourth Amendment under the case-specific approach the State now concedes is correct. Pet. 16-17. Nor does the State identify any other feature of the case that would prevent the Court from reaching and resolving the question presented.

Instead, the State says only that if the Court granted certiorari and reversed, the State would "argue on remand" that the fruits of the unlawful entry into Mr. Lange's home are admissible under "the good-faith exception to the exclusionary rule." BIO 9. But the Court often grants review to resolve a question that actually controlled the decision below even when a respondent maintains that it could ultimately prevail on some other ground—including the "good-faith exception." BIO at 30, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402).[2]

Here, the State's good-faith argument would be a particularly tenuous basis for denying review because it has been forfeited many times over. The State did not argue good faith at the suppression hearing and thus could not have done so "for the first time on

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[2] *See, e.g.*, BIO at 17-19, *Niz-Chavez v. Barr*, No. 19-863 (cert. granted June 8, 2020); BIO at 7-12, *Chicago v. Fulton*, No. 19-357 (cert. granted Dec. 18, 2019); BIO at 20-22, *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020) (No. 18-1432); BIO at 27-31, *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492 (2020) (No. 18-1233); BIO at 11-12, *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020) (No. 18-776); BIO at 22-23, *Kahler v. Kansas*, 140 S. Ct. 1021 (2020) (No. 18-6135); BIO at 8-11, *Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020) (No. 18-7739).

appeal." *Lorenzana v. Superior Ct.*, 511 P.2d 33, 43 (Cal. 1973); *see, e.g.*, *Higgason v. Superior Ct.*, 170 Cal. App. 3d 929, 941-42 (1985) (declining to consider good-faith argument not raised below). And the State then forfeited the issue again (and again) by failing to raise it in the appellate division or the Court of Appeal. *See People v. Verdugo*, 44 Cal. App. 5th 320, 333 n.11 (2020) ("Issues not adequately developed in an appellate brief are generally deemed forfeited."). The State does not acknowledge those forfeitures, much less provide any reason to think the lower courts would excuse them.[3]

Even if the State could overcome that obstacle, its new argument would have a steep hill to climb. The good-faith exception applies only when police acted "in objectively reasonable reliance on binding appellate precedent." *Davis v. United States*, 564 U.S. 229, 249-50 (2011). Here, the State has not shown that any such precedent exists. It cites two decisions from California's intermediate appellate courts: *In re Lavoyne M.*, 221 Cal. App. 3d 154 (1990), and *People v. Lloyd*, 216 Cal. App. 3d 1425 (1989). BIO 9. But even if those decisions could be read as broadly as the State suggests, it is not clear that "state intermediate court of appeals decisions" can be "'binding appellate precedent' within the meaning of *Davis*." *United States v. Lara*, 815 F.3d 605, 614 (9th Cir. 2016) (reserving the issue). And even if they could, *Lavoyne M.* and *Lloyd* were issued by the Second and Fourth District Courts of Appeal. This

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[3] For the State's arguments omitting any mention of the good-faith issue, see Opp. to Mot. to Suppress 6-7; Suppression Hr'g Tr. 55-57; App. Div. Br. 11-24; C.A. Br. 37-45.

case arose in the First District, and the State cites no authority establishing that the First District would treat decisions from other districts as "binding appellate precedent" under *Davis*.

The State's belated invocation of the good-faith exception thus provides no reason to deny review. Instead, the Court should follow its usual practice by granting certiorari, resolving the question presented, and leaving it to the lower courts to decide whether and how to address the State's alternative argument on remand. *See, e.g.*, *United States v. Stitt*, 139 S. Ct. 399, 407-08 (2018); *BNSF Ry. Co. v. Tyrell*, 137 S. Ct. 1549, 1559 (2017); *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1170 (2017).

3. The Court should be especially hesitant to deny certiorari based on the State's quibbles about this case because the Court will seldom see such a clean vehicle for resolving the question presented. Misdemeanor pursuits ending in warrantless home entries are surprisingly common. Pet. 14-15 & n.6; *see* NACDL & CACJ Br. 7-15 & nn.3-5. But as the petition explained, misdemeanor prosecutions rarely include full litigation of Fourth Amendment issues. Pet. 15. And because the law is uncertain, courts usually resolve Section 1983 suits involving misdemeanor pursuit based on qualified immunity, without reaching the question presented. Pet. 18.

The State disputes none of this. And it offers no good reason to allow the split to persist during what could be a years-long wait for a case that not only squarely presents the question that has divided the lower courts, but also comes from a state supreme court and involves the rare respondent lacking any alternative arguments that could be raised on remand.

4. Even if the Court does not grant plenary review, it should at minimum grant the petition, vacate the decision below, and remand for further consideration in light of the State's change in position. The Court often follows that course when the United States or a state confesses error in a case presenting a question that does not warrant review. *See, e.g.*, *Brown v. Barr*, No. 19-5133 (Apr. 20, 2020); *White v. United States*, 138 S. Ct. 641 (2018) (No. 17-270); *Lindsey v. Indiana*, 137 S. Ct. 32 (2016) (No. 15-7813); *Ajoku v. United States*, 572 U.S. 1056 (2014) (No. 13-7264). It should do the same here: Mr. Lange's conviction now rests on a holding that even the State concedes is wrong.

The far better course, however, would be to grant the petition and set the case for argument. All agree that the question presented warrants review. Neither the State's change in position nor anything the California courts might do on remand could eliminate the nationwide split or otherwise diminish the need for this Court to resolve the issue. And the State's agreement with Mr. Lange on the merits is likewise no reason to withhold plenary review. Instead, the Court should appoint an amicus curiae to defend the judgment below, just as it has in many similar cases in the past. *See, e.g.*, *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 765 (2020); *Smith v. Berryhill*, 139 S. Ct. 1765, 1773 (2019); *Beckles v. United States*, 137 S. Ct. 886, 892 (2017); *Mata v. Lynch*, 576 U.S. 143, 147 (2015).

CONCLUSION

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

Respectfully submitted,

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