No. 20-18

IN THE

Supreme Court of the United States

ARTHUR GREGORY LANGE,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari
to the Court of Appeal of the State of California,
First Appellate District

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether pursuit of a person whom an officer has probable cause to believe has committed a misdemeanor categorically qualifies as an exigent circumstance sufficient to allow the officer to enter a home without a warrant.

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BRIEF FOR PETITIONER

Petitioner Arthur Gregory Lange respectfully requests that this Court reverse the judgment of the California Court of Appeal.

OPINION BELOW

The opinion of the California Court of Appeal (Pet. App. 1a-22a) is available at 2019 WL 5654385.

JURISDICTION

The judgment of the court of appeal was entered on October 30, 2019. Pet. App. 1a. The California Supreme Court denied a timely petition for review on February 11, 2020. *Id.* 28a. On March 19, 2020, this Court entered a standing order that had the effect of extending the time within which to file a petition for a writ of certiorari to July 10, 2020. The petition was filed on that date and granted on October 19, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment 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 persons or things to be seized."

STATEMENT OF THE CASE

The "very core" of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) (citation omitted). One of the Fourth Amendment's bedrock principles is thus that police officers may not enter a home without consent unless they secure a warrant from a neutral magistrate. *Payton v. New York*, 445 U.S. 573, 589-90 (1980). This Court has recognized only one exception to that warrant requirement, for "exigent circumstances." *Id.* at 590. And the Court has taken care to ensure that the exception extends no further than its justification: It "always requires case-by-case determinations," and it applies only when "an emergency leaves police insufficient time to seek a warrant." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173, 2180 (2016). The question presented here is whether such an emergency necessarily exists any time an officer pursues a suspected misdemeanant.

A. Factual background

In 2016, petitioner Arthur Lange retired to Sonoma, California after a three-decade career in commercial real estate. This case began a few months later, as Mr. Lange was driving home one evening. He was listening to music with his windows down, and at one point he honked his horn a few times. Pet. App. 2a.

California highway patrol officer Aaron Weikert began following Mr. Lange's station wagon, "intending to conduct a traffic stop." Pet. App. 2a. Officer Weikert later testified that he believed the music and honking were noise infractions, which were punishable by small fines. Suppression Hr'g Tr. 9-10; *see* Cal. Veh.

Code §§ 27001, 27007; Cal. Uniform Bail & Penalty Schedule 55 (2016), https://perma.cc/4DUV-UXHT.

At first, Officer Weikert did not activate his siren or overhead lights. Pet. App. 2a-3a. Instead, he followed at a significant distance as Mr. Lange left the main road and made several turns into his residential neighborhood. *Id.*; *see* Vid. 0:00-0:51. Officer Weikert neared Mr. Lange's car only after Mr. Lange had turned onto his street. Vid. 0:51-0:53. Approaching his home, which includes an attached garage, Mr. Lange slowed to open his garage door. *Id.* 0:51-0:56. He then accelerated slightly, continuing toward his driveway. *Id.* 0:57-1:02. Only at that point did Officer Weikert activate his overhead lights. *Id.* 1:03.[1]

"[A]pproximately four seconds" later, Mr. Lange turned into his driveway. Pet. App. 17a; *see* Vid. 1:03-1:07. As Mr. Lange parked in his garage and the door began to descend, Officer Weikert pulled into the driveway and parked behind him. Vid. 1:07-1:23. Officer Weikert left his squad car and approached the door, which had nearly finished closing—Mr. Lange's car was completely out of sight. *Id.* 1:26-1:30. Officer Weikert stuck his foot under the door to force it to reopen, then walked into Mr. Lange's garage. *Id.* 1:31-1:45; *see* Pet. App. 3a.

Once inside, Officer Weikert asked Mr. Lange: "Did you not see me behind you?" Vid. 1:45-1:46. Mr. Lange answered that he had not. *Id.* 1:53-1:54. Officer Weikert asked about the honking and music, then requested Mr. Lange's license and registration. *Id.*

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[1] References to "Vid." refer to timestamps in the video recorded by Officer Weikert's dashboard camera, which was introduced into evidence in the trial court. Pet. App. 3a.

1:56-2:17. After more questioning, Officer Weikert stated that he smelled alcohol and ordered Mr. Lange out of the garage for field sobriety tests. Vid. 3:04-3:20. Ultimately, Mr. Lange was arrested for driving under the influence, taken to a hospital for a blood-alcohol test, then released with a citation.

B. Proceedings below

1. The State of California charged Mr. Lange with driving under the influence and a noise infraction. Pet. App. 2a. Mr. Lange moved to suppress the evidence Officer Weikert obtained after entering his garage, arguing that the "warrantless entry into his home violated the Fourth Amendment." *Id.*

The State did not contend that Mr. Lange's noise infractions justified a warrantless home entry, or that Officer Weikert had any reason to suspect Mr. Lange of driving under the influence before he entered the garage. Instead, the State asserted that Mr. Lange's "fail[ure] to stop after the officer activated his overhead lights" created "probable cause to arrest" for the separate, uncharged misdemeanors of failing to obey a lawful order and obstructing a peace officer. Pet. App. 3a-4a; *see id.* 17a.

Even then, the State did not argue that any case-specific exigency would have prevented Officer Weikert from seeking a telephonic or electronic warrant had he wished to enter Mr. Lange's home to arrest him for those misdemeanors. *Cf.* Cal. Penal Code §§ 817, 1526. The State did not, for example, argue that the circumstances raised any concern about public safety, the destruction of evidence, or escape. Instead, the State maintained that pursuit of a person whom an officer has probable cause to arrest for any jailable misdemeanor, without more, *always* qualifies as an exigent

circumstance authorizing a warrantless home entry. Pet. App. 3a-4a. The superior court agreed and denied Mr. Lange's motion to suppress. *Id.* 4a.

The appellate division of the superior court affirmed in an interlocutory appeal. Pet. App. 26a-27a. Mr. Lange then pleaded no contest to driving under the influence, and the appellate division affirmed his conviction. *Id.* 23a-25a.

2. While his criminal case was pending, Mr. Lange filed a civil petition to overturn the suspension of his driver's license by the Department of Motor Vehicles. Pet. App. 4a. Disagreeing with the criminal court, the civil court held that Officer Weikert's warrantless entry into Mr. Lange's home violated the Fourth Amendment. *Id.* 4a-5a. The court found "no evidence" that Mr. Lange "knew the officer was following him, nor any evidence [he] was attempting to flee." *Id.* 5a. It thus concluded that Officer Weikert lacked probable cause for anything other than the noise infractions, and that pursuit of a person suspected of nonjailable infractions does not justify a warrantless entry. *Id.* 4a-5a. The court reinstated Mr. Lange's license. *Id.* 4a.

3. The California Court of Appeal accepted a discretionary transfer of Mr. Lange's criminal appeal "because of [the] conflicting decisions" in his civil and criminal cases. Pet. App. 14a. It then affirmed his conviction. *Id.* 1a-22a.

As relevant here, the court held that Mr. Lange should have known he was being stopped when Officer Weikert activated his lights. Pet. App. 16a-17a. The court therefore concluded that when Mr. Lange continued "approximately 100 feet" to his driveway, he created probable cause to arrest him for the uncharged flight-related misdemeanors the State had invoked at

the suppression hearing. *Id.* 17a. The court also agreed with the State that because Officer Weikert had probable cause to arrest for those offenses, his momentary "hot pursuit" justified his warrantless entry into Mr. Lange's home. *Id.* 18a-19a.

In so holding, the court rejected Mr. Lange's argument that "the exigent circumstance of 'hot pursuit' should be limited to 'true emergency situations,' not the investigation of minor offenses." Pet. App. 19a. Instead, the court applied a categorical rule: "Because the officer was in hot pursuit of a suspect whom he had probable cause to arrest for [a jailable misdemeanor], the officer's warrantless entry into Lange's driveway and garage were lawful." *Id.* 21a.

4. The California Supreme Court denied Mr. Lange's petition for discretionary review. Pet. App. 28a.

SUMMARY OF THE ARGUMENT

A categorical warrant exception for misdemeanor pursuit cannot be squared with precedent, history, or fundamental Fourth Amendment principles. Instead, pursuit of a misdemeanor suspect is governed by the same case-by-case approach that governs in every other exigent-circumstances context: Officers may make a warrantless home entry if taking the time to seek a warrant would frustrate a compelling law-enforcement need—but not otherwise.

I. The Fourth Amendment draws "a firm line at the entrance to the home." *Payton v. New York*, 445 U.S. 573, 590 (1980). Absent consent, officers generally may not cross that line unless they persuade a neutral magistrate that the intrusion is justified. *Id.* This Court has recognized only one exception to that requirement: when "exigent circumstances" leave

officers no time to seek a warrant. *Id.* And the Court has emphasized that the exception applies only in a true "emergency"—a standard that "always requires case-by-case determinations." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2180 (2016).

Those familiar principles resolve this case. No one doubts that some pursuits involve genuine exigency. But that scarcely justifies a rule deeming *every* misdemeanor pursuit to be an emergency allowing a warrantless home entry. Instead, as this Court has repeatedly admonished, the exigent-circumstances exception requires a case-specific showing that seeking a warrant would compromise a compelling law-enforcement need.

Even if the Court were prepared to begin minting per se exigency rules, misdemeanor pursuit would be a bad place to start. Misdemeanor pursuits come in all shapes and sizes, and—as this case illustrates—many of them involve no real exigency. A rule allowing police to burst into a home without a warrant any time they pursue a suspected misdemeanant would thus be vastly overbroad. This Court has rightly refused to tolerate that sort of overbreadth—especially when core Fourth Amendment interests are at stake.

The lower courts that have adopted a categorical misdemeanor-pursuit rule have purported to rely on *Warden v. Hayden*, 387 U.S. 294 (1967), and *United States v. Santana*, 427 U.S. 38 (1976). But those decisions are entirely consistent with the case-by-case exigency analysis mandated by this Court's subsequent decisions. And even if *Hayden* and *Santana* could be read to support a per se exigency rule for serious felonies like the ones at issue in those cases, they would still provide no basis for extending the same categorical treatment to all misdemeanors.

II. Framing-era common law provides further reason to reject a categorical misdemeanor-pursuit rule. The Framers adopted the Fourth Amendment to preserve the common law's protections against unreasonable searches and seizures. The common law prized the sanctity of the home as a core component of liberty. It therefore treated a warrantless entry into a home as an extreme act that could be justified only when truly necessary. And although the common-law authorities differed somewhat on exactly what circumstances could authorize a warrantless entry, they agreed on the dispositive issue here: Mere pursuit of a nonviolent misdemeanant was not one of them.

III. Even if precedent and history left some doubt about the answer to the question presented, basic Fourth Amendment principles would eliminate it. This Court assesses the reasonableness of a search or seizure by weighing the severity of the intrusion on citizens' privacy and security against the legitimate needs of law enforcement. A categorical misdemeanor-pursuit exception flunks that balancing test.

As an initial matter, a categorical exception would require officers and courts to focus on the wrong issues. Courts that have tried to define a categorical "hot pursuit" exception have confronted a host of thorny questions: Must the suspect know he is being pursued? Must officers themselves do the pursuing, or can they rely on witnesses? Do pursuers have to see the suspect, or can they follow footprints or other evidence? What if officers lose the suspect for a few minutes—or longer? The answers are far from obvious. And any answers courts might give would be poor proxies for the relevant Fourth Amendment concerns. The case-by-case approach, in contrast, zeroes in on those concerns by asking directly whether there was a

"compelling need for official action and no time to secure a warrant." *Missouri v. McNeely*, 569 U.S. 141, 149 (2013) (citation omitted).

Nor is a categorical rule needed for effective law enforcement. Officers are well-versed in applying the traditional case-specific exigency standard, which is equally workable in the pursuit context. That standard gives officers ample latitude to act without a warrant when the situation requires it. And when immediate action is not needed, officers can resolve matters through other means. Often, a simple knock-and-talk will suffice. Failing that, officers can always get a warrant—a process that can frequently be completed in a matter of minutes, without leaving the scene.

Finally, a categorical misdemeanor-pursuit exception would give police officers discretion to enter private dwellings based on a vast array of minor offenses. The burden of those warrantless entries would be felt most acutely in communities that are already disproportionately subject to discretionary enforcement of misdemeanor laws. And that burden is severe: A warrantless entry invades the privacy and security of everyone in the home, not just the suspect. It also risks violent confrontations between officers and residents (who may not realize that the invaders are the police). Experience has shown that, all too often, those confrontations end in tragedy.

ARGUMENT

In deciding "whether to exempt a given type of search from the warrant requirement," this Court first looks to precedent and any available "guidance from the founding era." *Riley v. California*, 573 U.S. 373, 385 (2014). When those sources do not provide an answer, the Court applies a "balancing of interests" that weighs the severity of the intrusion on privacy and security against the legitimate needs of law enforcement. *Id.* at 385-86. All three of those guideposts counsel decisively against a categorical misdemeanor-pursuit rule and in favor of the same fact-specific standard that governs in every other exigent-circumstances case: An officer pursuing a suspected misdemeanant may enter a home without a warrant if—but only if—he could reasonably conclude that taking the time to seek a warrant would frustrate some compelling law-enforcement need.

I. A categorical misdemeanor-pursuit exception would contradict this Court's precedents.

This case is about the circumstances in which pursuit of a suspect gives rise to an exigency allowing police to enter into a home without a warrant. Except for a brief opinion that declined to reach the merits, this Court has not considered a pursuit case in decades. *See Stanton v. Sims*, 571 U.S. 3, 10-11 (2013) (per curiam). But the Court's general approach to the exigent-circumstances exception is now well-settled. Time and again, the Court has held that exigent circumstances exist only if "an emergency leaves police insufficient time to seek a warrant." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016). And time and again, the Court has made clear that this

standard "always requires case-by-case determinations." *Id.* at 2180.

Those settled principles foreclose a categorical misdemeanor-pursuit exception. Instead, as with any other potential exigency, the question whether a pursuit justifies a warrantless entry must be judged on a case-by-case basis. Some misdemeanor pursuits undoubtedly involve safety threats or other risks that demand immediate action. But many do not. And a categorical rule would unmoor the exigent-circumstances exception from its justification by greenlighting warrantless entries even when no real exigency prevents officers from seeking a magistrate's approval before barging into a private residence.

A. The Fourth Amendment forbids warrantless home entries absent consent or exigent circumstances.

The Fourth Amendment protects "[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures." As that text makes plain, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 586 (1980) (citation omitted). That special protection reflects the home's traditional status as a place of refuge: The "very core" of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) (citation omitted).

Because of the home's special status, the Fourth Amendment's warrant requirement "draw[s] a firm line at the entrance to the house." *Payton*, 445 U.S. at 590. Outside the home, warrantless searches and

seizures are often permissible. For example, an officer with probable cause need not obtain a warrant to arrest a suspect in a public place, even if the offense is "very minor." *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). But inside the home, a different rule governs: Absent "consent" or "exigent circumstances," an officer's "entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant." *Steagald v. United States*, 451 U.S. 204, 211 (1981).[2]

The warrant requirement is no "formalit[y]." *Groh v. Ramirez*, 540 U.S. 551, 558-59 (2004) (quoting *McDonald v. United States*, 335 U.S. 451, 455 (1948)). Warrants serve the "high function" of "interpos[ing]" a magistrate's "objective mind" between the citizen and the police officer who would "violate the privacy of the home." *McDonald*, 335 U.S. at 455-56. In other words, the warrant requirement "ensures that the inferences to support" police action "are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Riley v. California*, 573 U.S. 373, 382 (2014) (citation omitted). The requirement thus stands as "a principal protection against unnecessary intrusions into private dwellings." *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984).

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[2] The type of warrant required depends on the circumstances. An arrest warrant "implicitly carries with it the limited authority" to enter the suspect's home if there is reason to believe the suspect is inside. *Payton*, 445 U.S. at 603. But a separate search warrant is required to make an arrest in a third party's home because an arrest warrant does not protect the third-party's distinct privacy interests. *Steagald*, 451 U.S. at 216.

The warrant requirement also serves another vital function: Absent exigent circumstances, officers executing a warrant "must announce their presence and provide residents an opportunity to open the door." *Hudson v. Michigan*, 547 U.S. 586, 589-90 (2006). That knock-and-announce rule protects "life and limb, because an unannounced entry may provoke violence" by startled occupants who do not realize that the intruders are police officers. *Id.* at 594. The rule avoids "the destruction of property occasioned by a forcible entry." *Id.* (citation omitted). It "assures the opportunity to collect oneself before answering the door"—for example, "'to pull on clothes or get out of bed.'" *Id.* (citation omitted). And when police execute an arrest warrant, the rule allows the arrestee to avoid any invasion of the home by surrendering at the door.

B. As in any other exigency case, a pursuit justifies a warrantless home entry only if an emergency leaves no time to seek a warrant.

1. The exigent-circumstances exception bypasses the critical protections of a warrant by allowing a police officer "to act as his own magistrate." *Welsh*, 466 U.S. at 751 (citation omitted). Accordingly, the exception is narrow: Exigent circumstances exist only when officers confront a "compelling need for official action and no time to secure a warrant." *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2534 (2019) (plurality opinion) (citation omitted). In other words, there must be a genuine "emergency." *Riley*, 573 U.S. at 402; *Missouri v. McNeely*, 569 U.S. 141, 149 (2013).

Whether that standard is met depends on "the totality of circumstances." *McNeely*, 569 U.S. at 149 (citing *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006)); *see Mitchell*, 139 S. Ct. at 2535 n.3 (plurality

opinion). Over the years, this Court has concluded that exigent circumstances can exist in a variety of situations, including when immediate action is needed to "prevent the imminent destruction of evidence," to "fight a fire and investigate its cause," or to "assist persons who are seriously injured or threatened with such injury." *Brigham City*, 547 U.S. at 403. The Court has also stated that exigent circumstances exist if immediate action is necessary to "prevent a suspect's escape," *Minnesota v. Olson*, 495 U.S. 91, 100 (1990), or to protect officers or the public, *Riley*, 573 U.S. at 388 (citing *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967)). The shared feature that unites those scenarios is that the delay required to seek a warrant would have "some real immediate and serious consequences." *Welsh*, 466 U.S. at 751 (citation omitted).

In contrast, the Court has long held that exigent circumstances do *not* exist when the only cost of seeking a warrant would be "inconvenience" or "some slight delay." *Chapman v. United States*, 365 U.S. 610, 615 (1961) (citation omitted). "The investigation of crime would always be simplified if warrants were unnecessary," but "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). Instead, officers may enter a home without a warrant only if they could reasonably conclude that seeking one would threaten a "compelling" law-enforcement need. *Kentucky v. King*, 563 U.S. 452, 460 (2011) (citation omitted).

In making that determination, officers must consider "technological developments that enable police officers to secure warrants more quickly." *McNeely*, 569 U.S. at 155. Today, California and many other jurisdictions allow officers to secure warrants by

phone or email, without leaving the scene. Cal. Penal Code §§ 817, 1526; *see McNeely*, 569 U.S. at 154 & n.4. That process can be completed in as little as five to fifteen minutes. *Id.* at 172-73 (Roberts, C.J., concurring in part and dissenting in part). When such procedures are available, exigent circumstances exist only if the law-enforcement interests at stake would be compromised by even that brief delay. *Id.* at 154-55 (majority opinion).

2. This Court has recognized that pursuit of a suspect is one of the many situations that "*may* give rise to an exigency sufficient to justify a warrantless search." *McNeely*, 569 U.S. at 149 (emphasis added); *see, e.g.*, *Riley*, 573 U.S. at 402; *King*, 563 U.S. at 460. The question in a pursuit case is the same as in any other case involving a potential exigency: Whether, considering all the circumstances, an emergency created a "compelling need for official action and no time to secure a warrant." *McNeely*, 569 U.S. at 149 (citation omitted).[3]

A pursuit case could satisfy that standard if, for example, taking the time to seek a warrant would risk the destruction of evidence; would allow the suspect to escape; or would endanger occupants of the home, members of the public, or the officers themselves. But absent such risks (or some equally compelling law-enforcement need) the only cost of seeking a warrant

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[3] We generally avoid using the term "hot pursuit" because it is ambiguous. Some courts use it to encapsulate the traditional exigency inquiry. Judge Sutton, for example, has explained that a pursuit is "hot" only if "the emergency nature of the situation" demands "immediate police action." *Smith v. Stoneburner*, 716 F.3d 926, 931 (6th Cir. 2013) (citation omitted). But other courts, including the courts below, use the term to describe *any* immediate pursuit, regardless of exigency. Pet. App. 18a-19a.

would be a brief pause before officers can enter the home. An officer's preference to avoid that "inconvenience" or "slight delay" is certainly understandable. *Chapman*, 365 U.S. at 615. But this Court has never allowed mere convenience or efficiency to justify a warrantless home entry.

3. Rather than applying the traditional case-specific exigency standard, courts that have adopted a categorical misdemeanor-pursuit rule hold that pursuit, "in and of itself, is sufficient to justify a warrantless entry"—regardless of the circumstances. *Commonwealth v. Jewett*, 31 N.E.3d 1079, 1089 n.8 (Mass. 2015). That per se rule flouts this Court's repeated instruction that "the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search *in each particular case*." *Riley*, 573 U.S. at 402 (emphasis added); *see, e.g.*, *Birchfield*, 136 S. Ct. at 2180, 2183.

Indeed, the Court has eschewed per se exigency rules even for narrow categories of cases that follow predictable fact patterns. For example, in *every* case of suspected drunk driving "it is a biological certainty" that evidence of "alcohol in the bloodstream will be destroyed" over time. *McNeely*, 569 U.S. at 169 (Roberts, C.J., concurring in part and dissenting in part). In *McNeely*, however, the Court rejected a categorical exception to the warrant requirement for blood draws in drunk-driving cases. *Id.* at 145. Instead, the Court reiterated the need for "careful case-by-case assessment of exigency." *Id.* at 152-53.

Even more recently, the Court declined to adopt a categorical rule for the "narrow" category of cases in which a drunk-driving suspect is unconscious and "cannot be given a breath test." *Mitchell*, 139 S. Ct. at 2531 (plurality opinion). The plurality reasoned that

the special features of such cases will "almost always" satisfy the traditional exigency standard. *Id.* at 2539. But it still declined to adopt a per se rule, remanding for a case-specific inquiry into whether police could have "reasonably judged that a warrant application would interfere with other pressing needs or duties." *Id.*

This Court has thus steadfastly adhered to a case-by-case exigency analysis, repeatedly refusing to deem any single fact dispositive. That settled approach resolves the question presented here: Like the dissipation of blood alcohol, the pursuit of a misdemeanor suspect "may support a finding of exigency in a specific case," but "it does not do so categorically." *McNeely*, 569 U.S. at 156. Instead, as in other contexts, exigency "must be determined case by case based on the totality of the circumstances." *Id.*

C. This Court should not create a categorical misdemeanor-pursuit exception to its case-by-case exigency inquiry.

Even if this Court's decisions did not foreclose categorical exigency rules, a categorical misdemeanor-pursuit rule would still be unjustified. Pursuit cases vary widely—far more widely than drunk-driving cases. Many of them do not involve any plausible emergency. A categorical misdemeanor-pursuit exception would thus suffer from the "considerable overgeneralization" this Court has refused to tolerate when core Fourth Amendment interests are at stake. *Richards v. Wisconsin*, 520 U.S. 385, 393 & n.5 (1997).

1. Both the offenses that can give rise to a pursuit and the other surrounding circumstances vary greatly. Start with the underlying offenses. A fleeing suspect in a violent crime will often pose an obvious safety risk. The same cannot be said of persons suspected of

committing a vast array of nonviolent misdemeanors, from jaywalking, to loitering, to traffic offenses. A categorical misdemeanor-pursuit exception would ignore those distinctions, treating pursuit of teenagers walking home just after curfew the same as pursuit of a fleeing armed robber.

A categorical rule would also ignore the wide variations among pursuits themselves. In some cases, a suspect disobeys a police order to stop; in others, the suspect does not even know that police are there. *See, e.g.*, *State v. Ionescu*, 937 N.W.2d 90, 93-95 (Wis. Ct. App. 2019). In some cases, a suspect has evidence that could quickly be destroyed; in others, there is "no evidence" at all, and thus nothing to destroy. *Mascorro v. Billings*, 656 F.3d 1198, 1207 (10th Cir. 2011). In some cases, a fleeing suspect breaks into another person's home, potentially endangering the occupants or creating a risk of continued flight; in others, a suspect retreats into his own home, posing no apparent threat to anyone and making the "risk of flight or escape" somewhere "between low and nonexistent." *Id.*

Warrantless home entries in cases lacking any real exigency are not a hypothetical problem. This case illustrates the point: Officer Weikert had no reason to think Mr. Lange posed any danger to anyone. The offenses Officer Weikert was investigating—noise infractions and a failure to stop—involved no evidence that Mr. Lange could have destroyed. Officer Weikert had just watched Mr. Lange open and park in his own garage (and, indeed, had parked right behind him) so there was no risk of escape. And the State has never argued that it would have been impractical for Officer Weikert to seek an email or telephonic warrant if he wished to enter Mr. Lange's home.

A review of recent decisions shows that this case is no outlier. Consider just a few examples:

- Two plainclothes officers forced their way into a woman's home to arrest her boyfriend after seeing him urinate on her partially enclosed patio. *Thompson v. City of Florence*, 2019 WL 3220051, at *3-4 (N.D. Ala. July 17, 2019).
- An officer saw a man "possibly fidgeting" with a mailbox. The officer tried to question him, but the man walked to his nearby home. The officer pursued him into his garage, then into his house. *Carroll v. Ellington*, 800 F.3d 154, 161-63 (5th Cir. 2015).
- Officers entered a woman's home in pursuit of her son, who was suspected of shoplifting a $15 cell phone charger from a nearby drug store. *Smith v. Stoneburner*, 716 F.3d 926, 928-29 (6th Cir. 2013).
- An officer saw a teenager he knew "driving without taillights" and "turned around to pull him over." The teenager "drove two blocks to his parents' house, ran inside, and hid in the bathroom." Brandishing a gun, the officer forced his way into the home. *Mascorro*, 656 F.3d at 1202, 1207.

Other examples abound. *See, e.g., State v. Foreman*, 2019 WL 4125596, at *1-2 (Del. Super. Ct. Aug. 29, 2019) (indecent exposure); *Luer v. St. Louis County*, 2018 WL 6064862, at *1-2 (E.D. Mo. Nov. 19, 2018) (failure to pay a taxi fare); *Disney v. City of Frederick*, 2015 WL 737579, at *1 (D. Md. Feb. 19, 2015) (trespassing); *Huber v. Coulter*, 2015 WL 13173223, at *4-6 (C.D. Cal. Feb. 10, 2015) (making a false 911 call).

A categorical rule would allow officers to burst into homes in these and similar cases, even absent any reasonable basis for believing that the situation created a "compelling need for official action and no time to secure a warrant." *Mitchell*, 139. S. Ct. at 2534 (plurality opinion) (citation omitted). It would, in short, be vastly overbroad.

2. In two analogous contexts, this Court has held that such overbreadth is unacceptable when core Fourth Amendment interests are at stake.

First, the Court has held that determining the reasonableness of a use of force to apprehend a suspect "requires careful attention to the facts and circumstances of each particular case," including "the severity of the crime at issue" and "whether the suspect poses an immediate threat to the safety of the officers or others." *Graham v. Connor*, 490 U.S. 386, 396 (1989). And the Court has rejected a categorical rule authorizing the use of deadly force against all fleeing felons, explaining that such force is justified only when there is reason to believe a fleeing suspect is dangerous. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

Of course, a warrantless home entry is much less intrusive than a use of deadly force. But it is still a severe—and often forcible—intrusion. Indeed, this Court has included both "entry into a home without a warrant" and "seizure by means of deadly force" on the short list of "searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests." *Whren v. United States*, 517 U.S. 806, 818 (1996). And a categorical misdemeanor-pursuit rule suffers from the same sort of impermissible overbreadth as the categorical rule rejected in *Garner*: It would authorize

an extraordinary intrusion in many cases where the circumstances do not justify it.

Second, the Court has rejected a categorical exception to the knock-and-announce rule for much the same reason. In *Richards*, the Court reviewed a decision holding that "police officers are *never* required to knock and announce their presence when executing a search warrant in a felony drug investigation." 520 U.S. at 387. The Court recognized that knocking and announcing in such cases "frequently" presents "special risks to officer safety and the preservation of evidence." *Id.* at 393-94. But the Court still rejected a categorical exception because of its "considerable overgeneralization." *Id.* The Court emphasized that "not every drug investigation will pose these risks to a substantial degree." *Id.* And it therefore held that any exception to the knock-and-announce rule must be justified by the "facts and circumstances of a particular entry." *Id.* at 394.

So too here. Indeed, this case follows a fortiori from this Court's unanimous decision in *Richards* because a categorical misdemeanor-pursuit rule implicates stronger privacy interests and suffers from even greater overbreadth. As *Richards* explained, forgoing a knock before entering a home to execute a warrant is much "less intrusive" than entering with no warrant at all. 520 U.S. at 393 n.5. And the categorical rule rejected in *Richards*—which was limited to felony drug cases—suffered from far less "overgeneralization," *id.* at 393, than a rule reaching *every* pursuit of a suspected misdemeanant, no matter what the offense or the surrounding circumstances.

3. A categorical misdemeanor-pursuit rule also bears no resemblance to the "limited class of traditional exceptions to the warrant requirement that

apply categorically," such as the "automobile exception" and the exception for a search "incident to a lawful arrest." *McNeely*, 569 U.S. at 150 n.3. Those categorical exceptions share two features that are absent here. First, the justification for warrantless action is present in almost every case governed by the exceptions, so "bright-line rule[s]" allow "only a limited number of searches that the law would not otherwise justify." *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999) (Breyer, J., concurring). Second, any overbreadth is more tolerable because it affects greatly diminished expectations of privacy.[4]

The automobile exception generally allows officers to conduct a warrantless search of a car found in public "so long as they have probable cause." *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018). This Court has grounded that exception in the "ready mobility" of automobiles, *id.* at 1669 (citations omitted)—a feature shared by nearly every car. It has also relied on the "reduced expectation of privacy" that results from "pervasive regulation" of cars and driving. *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam).

The search-incident-to-arrest exception allows officers to conduct a warrantless search of a person who is lawfully arrested. *Riley*, 573 U.S. at 382. That exception applies categorically because the Court has concluded that the two risks that justify a search

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[4] We focus here on the categorical warrant exceptions described in *McNeely*. Some other types of search and seizure—such as a public arrest—do not require a warrant at all. *See Atwater*, 532 U.S. at 354. But like the searches and seizures covered by categorical warrant exceptions, those that are not subject to the warrant requirement at all generally do not involve any "extraordinary" intrusion akin to a warrantless home entry. *Id.* (citation omitted); *see id.* at 352-53.

incident to arrest—"harm to officers and destruction of evidence"—are "present in all custodial arrests." *Id.* at 386. And the Court has also emphasized that "any privacy interests retained by an individual after arrest" are "significantly diminished by the fact of the arrest itself." *Id.*; *see Birchfield*, 136 S. Ct. at 2177.

When such diminished expectations of privacy are involved, administrability concerns may justify an appropriately tailored categorical rule. But any "preference for categorical treatment" must "give[] way to individualized review" when it comes to core Fourth Amendment interests. *Atwater*, 532 U.S. at 352-53. In *Collins*, for example, the Court held that the automobile exception does not allow officers to enter a home or its curtilage to search a vehicle because the justifications for the exception do not "account for the distinct privacy interest in one's home." 138 S. Ct. at 1672-73. And in *Riley*, the Court held that a search incident to arrest cannot extend to the arrestee's cell phone because modern phones "contain[] in digital form many sensitive records previously found in the home." 573 U.S. at 396-97.

This Court has thus consistently refused to allow categorical rules to authorize warrantless intrusions into the home or its equivalent. When such core privacy interests are at stake, the Fourth Amendment demands that officers either "get a warrant" or show that "an emergency justified a warrantless search in [their] particular case." *Riley*, 573 U.S. at 402-03; *see Collins*, 138 S. Ct. at 1675. Precisely the same logic applies here.

D. *Hayden* and *Santana* do not support a categorical misdemeanor-pursuit exception.

The lower courts that have adopted a categorical misdemeanor-pursuit exception have not tried to square it with this Court's established approach to exigent circumstances. Instead, they have largely assumed that the Court's decisions in *Hayden* and *United States v. Santana*, 427 U.S. 38 (1976), dictate a special categorical rule for *all* "hot pursuit." *See, e.g.*, *Commonwealth v. Jewett*, 31 N.E.3d 1079, 1087-89 & n.8 (Mass. 2015). Those cases dictate no such thing.

1. *Hayden* and *Santana* predate this Court's decision in *Payton*, which held that officers generally must obtain a warrant to make an arrest in a home. *See Payton*, 445 U.S. at 589-90. They also predate this Court's decisions defining the exigent-circumstances exception to that warrant requirement. Nevertheless, both *Hayden* and *Santana* are entirely consistent with the case-by-case exigency analysis those subsequent decisions require.

In *Hayden*, an armed man robbed a cab company, then fled. 387 U.S. at 297. Two cab drivers followed him to a house and reported the address to police, who arrived "[w]ithin minutes." *Id.* The officers entered the house, where they found the robber and two guns. *Id.* at 298. This Court upheld the warrantless entry, explaining that, "[u]nder the circumstances," the "'exigencies of the situation made that course imperative.'" *Id.* (citation omitted). The Court emphasized that "[s]peed" was "essential" to the officers, because any delay would have "gravely endanger[ed] their lives or the lives of others." *Id.* at 298-99.

In *Santana*, officers arranged for a controlled purchase from a drug dealer, then returned to the

dealer's home. 427 U.S. at 39-40. The dealer was standing in her doorway when the officers arrived, and the officers pursued her when she fled inside. *Id.* at 40 & n.1. The Court held that this "hot pursuit" justified a warrantless entry, but it did not rely on the mere fact of pursuit. *Id.* at 42-43. To the contrary, the Court explained that the case was "clearly governed by [*Hayden*]," where the search "was based upon 'the exigencies of the situation'" rather than any special pursuit rule. *Id.* at 42-43 & n.3 (quoting *Hayden*, 387 U.S. at 298). And the Court emphasized that "the need to act quickly" was "even greater" in *Santana* than in *Hayden*: As soon as the dealer "saw the police," there was "a realistic expectation that any delay would result in destruction of evidence." *Id.* at 43.

The officers in both *Hayden* and *Santana* plainly faced a "compelling need for official action" and "no time to secure a warrant." *McNeely*, 569 U.S. at 149 (citation omitted). Accordingly, as this Court observed in discussing another case from the same era, each decision "fits comfortably within" the Court's "case law applying the exigent circumstances exception" because the Court "considered all of the facts and circumstances of the particular case and carefully based [its] holding on those specific facts." *Id.* at 151 (discussing *Schmerber v. California*, 384 U.S. 757 (1966)).

2. Even if *Hayden* and *Santana* could be read to implicitly adopt a categorical rule for some class of pursuit cases, they would not mandate that approach for all *misdemeanor* pursuits. Both cases involved serious felonies that, by their nature, often pose a threat to public safety or risk the destruction of evidence. Neither opinion even considered pursuits involving less serious offenses—much less analyzed the very different Fourth Amendment considerations

such pursuits present. And it would be especially inappropriate to derive a categorical misdemeanor-pursuit rule from *Hayden* and *Santana* given this Court's subsequent admonition that "the gravity of the underlying offense for which [an] arrest is being made" is "an important factor to be considered in determining whether any exigency exists." *Welsh*, 466 U.S. at 753.

The Court need not decide here whether *Hayden* and *Santana* might support a categorical rule for some subset of offenses like the ones at issue in those cases—say, offenses involving violence or drugs, or even all felonies. The California Court of Appeal affirmed Mr. Lange's conviction by adopting and applying a per se rule that *all* misdemeanor pursuits necessarily constitute exigent circumstances. To resolve this case, the Court need hold only that the Fourth Amendment does not permit that sweeping exception to the warrant requirement.

II. A categorical misdemeanor-pursuit exception would violate the common-law protections the Fourth Amendment was adopted to preserve.

A categorical exception authorizing warrantless home entries in every case of misdemeanor pursuit could not be reconciled with this Court's obligation to "assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *United States v. Jones*, 565 U.S. 400, 406 (2012) (brackets and citation omitted). At the time of the Framing, the common law treated a warrantless entry as a severe intrusion on the privacy and security of the home that could be justified only in limited circumstances. The leading common-law authorities described those circumstances in somewhat different ways, but none of them included the mere pursuit of a

nonviolent misdemeanant. A categorical misdemeanor-pursuit rule thus would have been unrecognizable to the Framers.

1. "Originally, the word 'unreasonable' in the Fourth Amendment likely meant 'against reason'—as in 'against the reason of the common law.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2243 (2018) (Thomas, J., dissenting) (citing Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1270-75 (2016)). Joseph Story, for example, declared that the Fourth Amendment was "little more than an affirmance of the great constitutional doctrine of the common law." 3 Joseph Story, *Commentaries on the Constitution of the United States* 748 (1833). Consistent with that understanding, this Court interprets the Fourth Amendment to preserve "the traditional protections against unreasonable searches and seizures afforded by the common law." *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *see, e.g.*, *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999).

2. The common law reserved its highest protection against searches and seizures for the home. "The zealous and frequent repetition of the adage that a 'man's house is his castle[]' made it abundantly clear" that the privacy and security of the home "was one of the most vital elements of English liberty." *Payton v. New York*, 445 U.S. 573, 596-97 (1980). At common law, nonconsensual entry into the home—whether by a private citizen or the government—was a trespass. *See* Donohue, *supra*, at 1198. The common law thus "rejected the proposition that the Crown could enter its subjects' domiciles at will." *Id.* Because "[e]very man in his home was entitled to live free from the gaze of the Crown," a "wrong occurred not just when property was confiscated or incriminating evidence

obtained, but at the moment the King's messengers entered." *Id.*; *see, e.g.*, *Entick v. Carrington*, 95 Eng. Rep. 807, 817-18 (C.P. 1765).

At common law, therefore, "breaking of doors"—that is, entering a home without permission—was considered "so violent, obnoxious, and dangerous a proceeding, that it should be adopted only in extreme cases, where an immediate arrest is requisite." Joseph Chitty & Richard Peters, Jr., *Practical Treatise on the Criminal Law* 44 (1819). In other words, intrusion into a "man's own house," which was "regarded as his castle," was permitted only in cases of "absolute necessity." *Id.* at 42; *see* 1 Richard Burn, *The Justice of the Peace, and the Parish Officer* 101 (14th ed. 1780). The common law identified specific circumstances that justified such a grave intrusion. But "where the law [wa]s silent and express principles d[id] not apply, this extreme violence [wa]s illegal." Chitty, *supra*, at 42.[5]

3. By the time of the Framing, "English legal treatises, prominent law lords, the Court of Common Pleas, the Court of King's Bench, Parliament, and the general public had come to embrace the broad understanding that," in general, "a warrant must issue prior to search or seizure within the home." Donohue, *supra* at 1238; *see id.* at 1216-40. The leading common-law commentators sometimes described the exceptions to that warrant requirement in somewhat different terms or relied on common-law concepts that do not readily translate to the present day. But all of them

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[5] "Breaking doors" was not limited to forcible entry. It was a common-law term of art that included even "lifting up the latch." 4 William Blackstone, *Commentaries on the Laws of England* 226 (4th ed. 1770); *see Curtis v. Hubbard*, 1 Hill 336, 338 (N.Y. 1841).

agreed that the mere pursuit of a suspected misdemeanant was not among the limited circumstances justifying a warrantless home entry.

Start with Lord Coke, who was "widely recognized by the American colonists 'as the greatest authority of his time on the laws of England.'" *Payton*, 445 U.S. at 593-94. Coke described only one circumstance where pursuit created an exception to the warrant requirement: "[U]pon hue and cry of one that is slain or wounded, so as he in danger of death, or robbed, the king[']s] officer that pursueth may . . . break a house to apprehend the delinquent." Edward Coke, *The Fourth Part of the Institutes of the Laws of England* 176 (6th ed. 1797).[6]

Burn's view was slightly broader: He wrote that doors could be broken "either with or without warrant" in pursuit of "one known to have committed a treason or felony, or to have given another a dangerous wound." Burn, *supra* at 101. But when the person pursued was "under a probable suspicion only," Burn concluded that the "better opinion" was that "no one can justify the breaking of doors to apprehend him" without a warrant. *Id.*

William Hawkins took much the same position on pursuit in his "widely read" treatise. *Atwater v. City of Lago Vista*, 532 U.S. 318, 331 (2001). To the pursuit scenario identified by Burn, he added only that an officer who "immediately pursued" participants in an "affray"—that is, a fight—could break doors to arrest

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[6] "[H]ue and cry" was "the old common law process of pursuing" a suspect from town to town "with horn and with voice," which required all citizens to aid in the search. Blackstone, *supra*, at 290-91. That practice was "reserved for the most serious of crimes." Donohue, *supra*, at 1231-35.

them. 2 William Hawkins & Thomas Leach, *Treatise of the Pleas of the Crown* 138-39 (6th ed. 1787). Other common-law authorities took the same view. *See, e.g.*, 1 James Parker, *Conductor Generalis: Or, the Office, Duty and Authority of Justices of the Peace* 29 (1764); William Simpson, *The Practical Justice of the Peace and Parish-Officer* 25-26 (1761); *The Law of Arrests* 236 (2d ed. 1753).

Matthew Hale's discussion of pursuit went slightly further, concluding that a constable could "break the door, tho he have no warrant" when even a *suspected* felon or one who had "wounded [another], so that he is in danger of death," "flies and takes his house." 2 Matthew Hale, *The History of the Pleas of the Crown* 92-94 (1736).

Aside from pursuit cases, the commentators also held that some other exigent circumstances justified a warrantless home entry. Those circumstances included the need to suppress a violent affray in a house; to respond to disorderly conduct in a house or, especially, an inn or tavern; or to recapture a prisoner who had escaped from custody. *See, e.g.*, Burn, *supra*, at 102-03; Hawkins, *supra*, at 139; Hale, *supra*, at 95.[7]

4. Despite some variation among the common-law commentators, therefore, they agreed on two critical points: warrantless home entries were a grave intrusion permitted only in specific circumstances,

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[7] A few commentators wrote that even in cases not involving pursuit, officers could enter a home without a warrant to arrest a felon. *See Payton*, 445 U.S. at 595. But that minority view was limited to felons; it did not extend to misdemeanants. *See id.* at 616 (White, J., dissenting). And in any event, *Payton* rejected that understanding of the common law. *Id.* at 597-98 (majority opinion).

and those circumstances did not include mere pursuit of a nonviolent misdemeanant. To the contrary, "[i]n the case of a misdemeanor not amounting to a breach of the peace," it was "well settled" that "an officer without a warrant may not break doors." American Law Institute, Code of Criminal Procedure § 28, Commentary, at 254 (1930). Or, as Professor Donohue puts it, the "norm" at common law "was clear: in order to enter into a home, the constable was required to first have a warrant—unless he was in pursuit of a felon" or responding to a violent incident. Donohue, *supra*, at 1228-29; *see id.* at 1229-30.

That common-law rule was, moreover, even narrower than it might appear to a modern reader. The common law reserved the "felony" classification for the most serious offenses, almost all of which "were punishable by death." *Tennessee v. Garner*, 471 U.S. 1, 13 (1985); *see* 4 William Blackstone, *Commentaries on the Laws of England* 98 (4th ed. 1770). Many modern felonies were "classified as misdemeanors, or nonexistent, at common law." *Garner*, 471 U.S. at 14. A categorical rule authorizing officers to enter a home without a warrant in pursuit of a person suspected of *any* misdemeanor—which includes a vast array of low-level offenses—would thus be a startling departure from the common-law protection of the home the Framers sought to preserve.

III. A categorical misdemeanor-pursuit exception would unjustifiably impose severe burdens on core Fourth Amendment rights.

Even if a categorical misdemeanor-pursuit exception were not foreclosed by this Court's decisions and Framing-era common law, it would still be impossible to reconcile with the Fourth Amendment.

When precedent and history do not provide a clear answer, this Court assesses the "reasonableness" of a given search or seizure by weighing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *County of L.A. v. Mendez*, 137 S. Ct. 1539, 1546 (2017) (citation omitted); *see Riley v. California*, 573 U.S. 373, 385-86 (2014). A categorical misdemeanor-pursuit exception flunks that balancing test. It would transform the exigency inquiry from one focused directly on the relevant Fourth Amendment concerns to one centered on the formal definition of "pursuit." It is not necessary for effective policing. And it would give police sweeping discretion to invade the privacy and security of *all* occupants of the home in service of minimal law-enforcement interests.

A. A categorical exception would turn on formalities rather than the relevant Fourth Amendment interests.

This Court's traditional exigent-circumstances standard focuses directly on the considerations relevant to the "ultimate touchstone" of the Fourth Amendment: the "reasonableness" of acting without a warrant. *Kentucky v. King*, 563 U.S. 452, 459 (2011). A categorical misdemeanor-pursuit exception, in contrast, would ignore the relevant Fourth Amendment interests and focus instead on whether a case met the technical requirements of the exception.

Consider just a few of the questions that this Court would have to answer to define a categorical misdemeanor-pursuit exception:

- Does a suspect have to know officers are pursuing him? *Compare, e.g.*, *Thomas v. State*,

658 S.E.2d 796, 801 (Ga. Ct. App. 2008) (yes), *with, e.g.*, *State v. Ionescu*, 937 N.W.2d 90, 93-95 (Wis. Ct. App. 2019) (no).

- If so, must the suspect disobey an officer's order to stop? *Compare, e.g.*, *City of Middletown v. Flinchum*, 765 N.E.2d 330, 332 (Ohio 2002) (yes), *with, e.g.*, *United States v. Santana*, 427 U.S. 38, 40 (1976) (no such order given).
- Must officers themselves follow the suspect, or can they be directed to the home by witnesses? *Compare, e.g.*, *United States v. Joy*, 2014 WL 288936, at *17 (W.D. Tenn. 2014) (no hot pursuit because officers never saw the suspect), *with, e.g.*, *State v. Richter*, 612 N.W.2d 29, 38 (Wis. 2000) ("'[H]ot pursuit' does not necessarily require that the officer personally witness the crime or the suspect's flight.").
- Can pursuers follow footprints or other evidence rather than the suspect himself? *Compare, e.g.*, *Coffey v. Carroll,* 933 F.3d 577, 586 (6th Cir. 2019) (no hot pursuit where officers followed footprints), *with, e.g.*, *State v. Dow*, 844 P.2d 780, 784 (Mont. 1992) (hot pursuit even though officers followed footprints).
- Must the pursuit be continuous? If not, how long of an interruption is too long? *Compare, e.g.*, *United States v. Johnson*, 256 F.3d 895, 908 (9th Cir. 2001) (a half-hour is too long), *with, e.g.*, *People v. White*, 183 Cal. App. 3d 1199, 1204 (1986) (two hours is not too long).

Because this Court's few pursuit cases have turned on case-by-case assessments of exigency, it has had no occasion to define "hot pursuit" with precision. But a categorical misdemeanor-pursuit exception

would transform pursuit from a relevant circumstance into its own legal rule, requiring courts to define the boundaries of "hot pursuit" by answering all of these questions—and many more.

As the decisions cited above attest, such questions have already vexed the lower courts. And even if the Court eventually settled on criteria that addressed every permutation of pursuit, such a test would stray far afield from the relevant Fourth Amendment concerns. It is not clear why, for example, the reasonableness of a warrantless entry should depend on whether the officer personally witnessed the crime; whether his pursuit was interrupted; or whether he found the suspect's home by following the suspect or by other means. Those circumstances have at best a loose relationship to the pertinent law-enforcement interests. The traditional case-by-case approach, in contrast, targets those interests directly by allowing warrantless home entry when an "emergency" leaves "insufficient time to seek a warrant." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016).

B. A categorical exception is not needed for effective policing.

The legitimate needs of law enforcement do not require a categorical misdemeanor-pursuit rule. To the contrary, the traditional case-by-case inquiry that governs in other exigency contexts has already proven equally workable in this one.

1. A case-by-case approach to misdemeanor pursuit "is hardly unique." *Missouri v. McNeely*, 569 U.S. 141, 158 (2013). Many Fourth Amendment questions are governed by fact-specific standards rather than per se rules. *Id.* And officers *already* apply

the very same case-by-case standard to every other potential exigency. *Id.* at 149.

Officers are thus intimately familiar with—and well-versed in applying—the standard that governs under a case-by-case approach to pursuit. It turns on factors that are readily discernible in the field, such as whether the situation poses risks to officer safety or to the preservation of evidence. That standard also gives officers ample latitude to act without a warrant when needed, requiring only "an objectively reasonable basis for believing" that an exigency exists. *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006).

The experience of jurisdictions that have rejected a categorical misdemeanor-pursuit exception confirms that the traditional totality-of-the-circumstances approach is both readily administrable and fully capable of protecting law-enforcement interests. Courts in those jurisdictions have not hesitated to uphold warrantless entries to prevent the destruction of evidence, *see, e.g.*, *State v. Walker*, 62 A.3d 897, 906-07 (N.J. 2013); to protect officer safety, *see, e.g.*, *United States v. White*, 185 F. Supp. 3d 1295, 1307-11 (D. Utah 2016); or to protect third parties, *see, e.g.*, *Rojas v. Anderson*, 2012 WL 2153941, at *3 (D. Colo. June 13, 2012).

2. Nor does the case-by-case approach impair effective law enforcement in pursuit cases that do not justify warrantless entries. In cases that do not "call[] for immediate action," the officer can simply "knock[] on the door and ask[] to speak" with the suspect—a "prudent and frequently applied procedure in such cases." *Commonwealth v. Curry*, 1992 WL 884417, at *4 (Va. Cir. Ct. Jan. 6, 1992). That sort of "'knock-and-talk' is an increasingly popular law enforcement tool, and it's easy to see why. All an officer has to do is

approach a home's front door, knock, and win the homeowner's consent to a search." *Bovat v. Vermont*, 2020 WL 6121478, at *1 (U.S. Oct. 19, 2020) (Gorsuch, J., respecting the denial of certiorari).

Even if the suspect will not come to the door and no other occupant consents to the officer's entry, the officer can always seek a warrant—a process that can often be completed from a squad car in a matter of minutes. *McNeely*, 569 U.S. at 154-55 & n.4; *id.* at 172-73 (Roberts, C.J., concurring in part and dissenting in part). A case-by-case approach thus would not leave officers "bereft of lawful alternatives" to warrantless action, *United States v. Carloss*, 818 F.3d 988, 1015 (10th Cir. 2016) (Gorsuch, J., dissenting). Absent consent or exigency, the Fourth Amendment "leave[s] ample room for law enforcement to do its job": a warrant "will always do." *Id.* Officers may not relish the process of seeking a warrant. But when no emergency exists, the Constitution commands it.

3. Some lower courts have feared that without a categorical rule, suspects could avoid "apprehension and conviction" by retreating into their homes. *State v. Ricci*, 739 A.2d 404, 408 (N.H. 1999) (citation omitted). Not so. A case-by-case approach does not prevent police from entering a home to make an arrest; it simply requires them to get a warrant first. And as we have explained, if officers could reasonably conclude that seeking a warrant would allow the suspect to escape or otherwise evade culpability, they can proceed without one.

Lower courts have likewise erred in assuming that a case-by-case approach would give misdemeanor suspects "an incentive to flee law enforcement." *City of Bismarck v. Brekhus*, 908 N.W.2d 715, 723 (N.D. 2018). That concern is potentially relevant only in the

subset of cases where the suspect knows he is being pursued by police. It also indulges the dubious assumption that a significant number of misdemeanor suspects will tailor their actions based on the nuances of Fourth Amendment doctrine. And it ignores the fact that flight into a home will not prevent police from entering if exigent circumstances exist, or after the short delay required to get a warrant.

More fundamentally, the concern about encouraging flight overlooks the fact that suspects who knowingly flee from the police expose themselves to additional criminal penalties. In California, for instance, willfully resisting, delaying, or obstructing a peace officer is punishable by up to one year in jail. Cal. Penal Code § 148(a); *see also* Cal. Penal Code § 2800(a). Such criminal sanctions are a far more appropriate way to deter flight than a categorical rule authorizing warrantless home entries—especially because a warrantless entry invades the privacy and security of *everyone* in the home, not just the fleeing suspect.

C. A categorical exception would impose severe Fourth Amendment harms.

A categorical misdemeanor-pursuit rule would give police officers wide discretion to enter private dwellings without warrants based on a vast array of minor offenses, even when there is no real emergency. The burden of those warrantless entries would fall disproportionately on communities that already bear the brunt of discretionary enforcement of misdemeanor laws. And that burden is severe indeed: A warrantless entry not only invades the privacy of the home, but also risks confrontations that can end in tragedy.

1. The sweep of the Nation's misdemeanor criminal codes is breathtaking. In California, where this case arose, misdemeanors include matters as mundane as transporting shrubs without the proper tag. Cal. Penal Code §§ 384c, 384f. Police also wield enormous discretion to stop and arrest for a host of public-order offenses, including public intoxication, *id.* § 647(f); unlawful assembly, *id.* § 409; obstructing a sidewalk or street, *id.* § 647c; and public nuisance, *id.* § 372.

As the leading study of the misdemeanor system explains, California is no outlier. Across the Nation, "misdemeanor prohibitions against common conduct expose nearly everyone to the authority of the petty offense process." Alexandra Natapoff, *Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal* 186 (2018). "Twenty-five states," for example, "treat some or all forms of speeding as a crime carrying a potential jail sentence." *Id.* at 230. As a result, "almost everybody commits minor offenses. Between traffic codes and urban ordinances, it is almost impossible not to." *Id.* at 216-17. The categorical rule would allow any of those ubiquitous minor offenses to become the predicate for a warrantless home entry.

In fact, a categorical rule would allow *any* citizen-police encounter—even a mere *Terry* stop—to escalate into a warrantless entry. In California, as in other states, flight from or failure to cooperate with police is itself a misdemeanor. *See* Cal. Penal Code § 148(a). The categorical exception would thus allow officers to enter a home without a warrant whenever they can establish probable cause to believe that a citizen has failed to cooperate with any lawful order to stop—even

if it turns out the citizen did not realize the officer was trying to make a stop.

That is just what happened here. When Officer Weikert activated his lights to make a traffic stop, he suspected Mr. Lange of committing two noise infractions—nothing more. Pet. App. 16a. Yet the categorical rule allowed the State to justify Officer Weikert's warrantless entry into Mr. Lange's home by asserting that the very same fact that created the purported "hot pursuit"—Mr. Lange's act of continuing to drive for "approximately four seconds"—also established probable cause to arrest him for fleeing from a police officer. *Id.* 17a.

2. By giving police such broad discretion to make warrantless home entries, the categorical rule would invite abusive or unnecessary practices. *Cf. Brendlin v. California*, 551 U.S. 249, 263 (2007) (rejecting a rule that would give police a "powerful incentive" to intrude on Fourth Amendment rights).

Police might, for example, choose to tail a suspect all the way home rather than attempting to stop her immediately after an observed offense. *See, e.g.*, *Furber v. Taylor*, 685 Fed. Appx. 674, 676 (10th Cir. 2017). Officers could seek to lure a known suspect out of his house so that, if he predictably retreated back inside, they could claim "hot pursuit" and enter without a warrant. *See, e.g.*, *Burns v. Vill. of Crestwood*, 2016 WL 946654, at *2-4, *6 (N.D. Ill. Mar. 14, 2016). Or police could approach a suspect near his home, hoping to provoke flight and create a justification for entering the house—a possibility that is especially likely when the officers are in plain clothes and easily mistaken for civilians. *Cf.* U.S. Dep't of Justice, *Investigation of the Chicago Police Department* 31 (Jan. 13, 2017), https://perma.cc/M7LB-EAE2

(describing "jump out" stops that often end in pursuit because suspects do not realize that plainclothes officers are the police).

In other cases, an officer with probable cause to arrest for a misdemeanor might seize on the categorical rule to follow a person into a home when the officer has no intention of making an arrest, but simply wishes to question or issue a citation—and perhaps look around the home in the process. Because the law criminalizes so much low-level conduct, police officers routinely have probable cause to believe a person has committed a misdemeanor, but not the slightest intention of actually making an arrest. Here, for example, it appears that when Officer Weikert entered Mr. Lange's garage, he intended only to investigate the noise infractions, not to arrest Mr. Lange for fleeing from a traffic stop. Vid. 1:46-1:55; *see also, e.g.*, *People v. Wear*, 893 N.E.2d 631, 644 (Ill. 2008) (officer "did not form the intent to arrest" until after entering the suspect's home).

Of course, Fourth Amendment analysis is objective, not subjective, so the legality of a home entry cannot turn on the officer's intentions. *Brigham City*, 547 U.S. at 404-05. But by setting the objective criteria for warrantless entry so low, a categorical misdemeanor-pursuit exception would transform a doctrine intended for true emergencies into "a tool with far broader application." *Collins v. Virginia*, 138 S. Ct. 1663, 1672-73 (2018). A rule allowing officers to enter a home without a warrant merely to question or cite a suspect would stretch the exigent-circumstances exception past its breaking point.

3. The unnecessary intrusions that would be authorized by the categorical rule are all the more troubling because they would not be distributed

equally. Study after study has confirmed the unfortunate reality that, in many communities, racial minorities are disproportionately subject to the sort of police-citizen encounters that give rise to misdemeanor pursuits. *See* Natapoff, *supra*, at 151-157.

In Baltimore, for example, the Department of Justice found that racial disparities in arrest rates were "most pronounced for highly discretionary offenses," with Black people accounting for 91% of those charged only with "failure to obey" or "trespassing," 89% of those charged with "making a false statement to an officer," and 85% of those arrested for "disorderly conduct." U.S. Dep't of Justice, *Investigation of the Baltimore City Police Department* 7-8 (Aug. 10, 2016), https://perma.cc/4CNB-7ZVZ. The Boston Police Department reported that Black people were more likely to be stopped repeatedly and to be frisked or otherwise searched once stopped, even when controlling for area crime rate, criminal history, and potential gang affiliation. *Boston Police Commissioner Announces Field Interrogation and Observation (FIO) Study Results* (Oct. 8, 2014), https://perma.cc/BGC9-9NTX.[8]

A categorical misdemeanor-pursuit exception would raise the stakes in a significant subset of citizen-police encounters around the home by

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[8] *See, e.g.*, U.S. Dep't of Justice, *Investigation of the Newark Police Department* 16-22 (July 22, 2014), https://perma.cc/DB38-F4ZX; U.S. Dep't of Justice, *Investigation of the New Orleans Police Department* 39 (Mar. 16, 2011), https://perma.cc/HW67-T83Q; Dermot F. Shea, Police Comm'r, *Crime & Enforcement Activity in New York City: Jan 1-Dec 31, 2019*, at 15, B-1, https://perma.cc/62MP-EUBT; *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540, 661 (S.D.N.Y. 2013); *see also* Natapoff, *supra*, at 152-55 (discussing additional studies).

authorizing warrantless entries that would not otherwise occur. That burden would inevitably fall disproportionately on the communities already most affected by the underlying stops and arrests.

4. The burden of a warrantless home entry can be severe. Experience shows that warrantless entries risk property damage, trauma, and violent confrontations that can have life-altering (or even life-ending) results for officers, suspects, and innocent residents.

The mere fact of a warrantless entry can be harrowing. Consider the homeowner who, "clad only in his underwear," left his bedroom at 2:30 am to be "confronted by two men with weapons drawn and flashlights pointed at him." *Luer v. St. Louis County*, 2018 WL 6064862, at *1-2 (E.D. Mo. Nov. 19, 2018). The men turned out to be police officers pursuing a suspect—possibly the homeowner's son—who had failed to pay a taxi fare. *Id.* That incident left the family badly traumatized, but fortunately inflicted no physical harm. *Id.* at *2.

Other warrantless entries do not end so well. The occupants of a home may not realize that the armed intruders are police officers rather than criminals. Or officers may mistake an occupant's startled reaction for resistance. Either way, the results can be tragic. Take just a few recent examples:

- Two plainclothes officers pursued a man suspected of public urination into his girlfriend's apartment, causing her to brandish a firearm and call 911. The "chaotic" scrum that ensued sent an officer to the hospital and tore up the apartment. *Thompson v. City of Florence, Ala.*, 2019 WL 3220051, at *4 (N.D. Ala. July 17, 2019).

- Officers chasing a suspect entered a house and mistakenly grabbed his sleeping brother, provoking a confrontation during which the brother was tased and struck in the face. *Franklin v. City of S. Bend*, 2015 WL 5174060, at *2 (N.D. Ind. Sept. 3, 2015).
- In pursuit of a teenager suspected of a traffic offense, an officer forced his way into a home by brandishing his gun and pepper-spraying the teenager's parents and younger brother. *Mascorro v. Billings*, 656 F.3d 1198, 1202-03 (10th Cir. 2011).
- A man pursued for "possibly fidgeting" with a mailbox died after police tased and beat him in his home. *Carroll v. Ellington*, 800 F.3d 154, 162 (5th Cir. 2015).
- An officer shot and killed a resident who pulled a gun after the officer—who was in a camouflage uniform and apparently did not identify himself—ran into the home chasing guests at a New Year's Eve party. *Estate of Sauceda v. City of N. Las Vegas*, 380 F. Supp. 3d 1068, 1074 (D. Nev. 2019).

Unfortunately, these cases are not outliers. *See* NACDL Cert. Amicus Br. 7-14.

Such injuries and deaths are always tragic, but never more so than when they result from a situation involving only minimal law-enforcement interests. The inherent risks of a warrantless entry may be justified when "an emergency leaves police insufficient time to seek a warrant." *Birchfield*, 136 S. Ct. at 2173. But a categorical rule would authorize the same grave intrusion—with all its attendant risks—in non-emergency situations arising from low-level, even

trivial conduct. The Fourth Amendment's reasonableness standard does not tolerate such a disproportionate result.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeal should be reversed.

Respectfully submitted,

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