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 California Court Of Appeal, First Appellate Division

BRIEF OF INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether pursuit of a person who a police 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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INTEREST OF AMICUS CURIAE

The Institute for Justice (IJ)[1] is a nonprofit, public-interest law center committed to securing the foundations of a free society by defending constitutional rights. A central pillar of IJ's mission is the protection of private property rights, both because the ability to control one's property is an essential component of personal liberty and because property rights are inextricably linked to all other civil rights. See *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993) ("Individual freedom finds tangible expression in property rights.").

IJ's property-rights work includes challenges to laws that allow officials to trespass on private property without first securing a warrant based on individualized probable cause. See, *e.g.*, *LMP Servs., Inc.* v. *City of Chicago*, 2019 IL 123123 (Ill. May 23, 2019), cert. denied, No. 19-398 (Nov. 4, 2019); *McCaughtry* v. *City of Red Wing*, 831 N.W.2d 518 (Minn. 2013); *Black* v. *Vill. of Park Forest*, 20 F. Supp. 2d 1218 (N.D. Ill. 1998). IJ also regularly files amicus briefs in Fourth Amendment cases before this Court. See, *e.g.*, *Collins* v. *Virginia*, 138 S. Ct. 1663 (2018); *Carpenter* v. *United States*, 138 S. Ct. 2206 (2018); *City of Los Angeles* v. *Patel*, 576

[1] Amicus affirms that both parties have consented to the filing of this brief, no attorney for either party authored this brief in whole or in part, and no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

U.S. 409 (2015); *Riley* v. *California*, 573 U.S. 373 (2014); *Florida* v. *Harris*, 568 U.S. 237 (2013).

SUMMARY OF ARGUMENT

The Fourth Amendment protects "[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches." Over the past century, this Court has overwhelmingly treated "reasonableness" as "the ultimate touchstone" for deciding whether a search or seizure violated the Amendment. *Kansas* v. *Glover*, 140 S. Ct. 1183, 1191 (2020) (quotes omitted). Meanwhile, "the Fourth Amendment's 'to be secure' phraseology has been largely ignored." Luke M. Milligan, *The Forgotten Right to Be Secure*, 65 Hastings L.J. 713, 734 (2014). Amicus respectfully urges the Court to take a closer look at the Security Clause.

The main problem with the current approach is that "reasonableness," unmoored from any objective standard, invites courts to engage in "relativistic balancing" acts. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 559 (1999). As a result, there is a "broad consensus among scholars that Fourth Amendment law is incoherent, unpredictable, and in fundamental need of repair." Nicholas A. Kahn-Fogel, *An Examination of the Coherence of Fourth Amendment Jurisprudence*, 26 Cornell J. L. & Pub. Pol'y 275, 289 (2016). What courts need is a compass—a North Star they can use to identify "unreasonable" searches, similar to the property-based

test this Court applies when deciding whether a search has occurred. *E.g.*, *Florida* v. *Jardines*, 569 U.S. 1 (2013); *United States* v. *Jones*, 565 U.S. 400 (2012).

The Security Clause, properly understood, provides that compass. Textually, the "right of the people to be secure" appears first in the Amendment and identifies its purpose. Historically, the Framers conceived of "security" as freedom from threats to their persons and property, and they adopted the Amendment in response to decades of abuse under British officers' unchecked power to search and seize. And normatively, the Declaration of Independence makes clear that government's purpose is "to secure [our] rights." 1 Stat. 1 (1776); see also U.S. Const., Preamble. The Security Clause reiterates that purpose in the search-and-seizure context.

This case gives the Court a chance to show how the Security Clause provides an objective standard for evaluating police conduct. As the Court has recognized, lower courts are "sharply divided" on the question presented: whether pursuit of a fleeing misdemeanant always creates an exigency justifying warrantless home entry. *Stanton* v. *Sims*, 571 U.S. 3, 6 (2013). The Security Clause can help answer that question—and the answer is no.

Below, Amicus explains that the Security Clause demands freedom from threats to our persons and property. Section I, *infra*. That freedom is honored by a robust warrant requirement with narrow exceptions for true emergencies. Section II, *infra*. Many courts,

however, categorically allow warrantless entries for "misdemeanor pursuits" based on this Court's decision in *United States* v. *Santana*, 427 U.S. 38 (1976) (upholding "hot pursuit" warrantless entry of unarmed drug dealer's home). Because that rule—and *Santana*, to the extent it authorizes it—undermines our security by allowing police to burst into our homes to investigate harmless offenses, the Court should declare it unreasonable under the Security Clause and reverse the decision below. Section III, *infra*.

ARGUMENT

I. The Security Clause requires freedom from threats to our persons and property.

The Fourth Amendment starts with "[t]he right of the people to be secure." This language, which has been "largely ignored," Milligan*, supra* 734, deserves attention. After all, constitutional interpretation "start[s] with the text," *Gamble* v. *United States*, 139 S. Ct. 1960, 1965 (2019), which means "every word must have its due force, and appropriate meaning" and "[n]o word . . . can be rejected as superfluous." *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U.S. 69, 77–78 (1946) (quoting *Holmes* v. *Jennison*, 39 U.S. (14 Pet.) 540, 570–71 (1840)).

What does it mean to be "secure" in our homes from unreasonable searches and seizures?

Start with the meaning at the Founding. In 1777, Samuel Johnson's dictionary defined "secure" to mean "protected from . . . danger" and "free from fear." Milligan, *supra* 738 & n.152 (quotes omitted). William Blackstone similarly wrote that "personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, [and] his body," as well as freedom from "menaces" to his safety. 1 W. Blackstone, *Commentaries on the Laws of England* 125 (1765). Security was also intimately linked with private property. As John Adams, who played a formative role in the adoption of the Fourth Amendment, put it, "[p]roperty must be secured, or liberty cannot exist." *Carpenter* v. *United States*, 138 S. Ct. 2206, 2240 (2018) (Thomas, J., dissenting).

To the Founding generation, then, security meant freedom from threats to their persons and property. See Milligan, *supra* 738–41.

Given "the immediate evils that motivated the framing and adoption of the Fourth Amendment," *Payton* v. *New York*, 445 U.S. 573, 583 (1980), it makes sense that the Framers would emphasize the right to be secure. The Amendment was a response to the "reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley* v. *California*, 573 U.S. 373, 403 (2014). Many of these writs' most prominent critics denounced them not just for their intrusiveness, but for the looming threat they posed to persons and property. See David H. Gans, *We Do Not Want to Be*

Hunted: The Right to be Secure and Our Constitutional Story of Race and Policing, 11 Colum. J. Race & Law (2021) (forthcoming) 8–11 (collecting critiques), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622599.

For example, James Otis, who in 1761 argued the *Writs of Assistance Case* that so influenced the Framers, said that the writs "place[d] the liberty of every man in the hands of every petty officer." *Id.* at 7 (quotes omitted). With them, officers could "enter [homes] . . . break locks, bars, and every thing in their way; and whether they br[oke] through malice or revenge, no man, no court, [could] inquire." *Id.* (quotes omitted). This left "every hous[e]holder . . . *less secure* than he was before this writ had any existence among us." *Id.* (quotes omitted).

A decade later, the attendees of a Boston town meeting that included Otis and Samuel Adams denounced a regime under which "our Houses, and even our Bed-Chambers, are exposed to be ransacked, our Boxes, Trunks and Chests broke open, ravaged and plundered by Wretches . . . whenever they are pleased to say they suspect there are [illegal goods] in the House." *Id.* at 11 (quotes omitted). Such broad discretion to search, they held, was a "Power[ ] altogether unconstitutional, and entirely destructive to that *Security* which we have a right to enjoy; and to the last degree dangerous, not only to our property, but to our lives." *Id.* at 10 (quotes omitted) (emphasis added).

The Founding generation's "frequent repetition of the adage that a man's house is his castle" is also instructive. *Payton*, 445 U.S. at 596 (quotes omitted); see *Carpenter*, 138 S. Ct. at 2239–40 (2018) (Thomas, J., dissenting) (collecting prominent uses of castle metaphor to show that the Framers "were quite familiar with the notion of security in property"). Castles, of course, keep their occupants safe by barring intruders. See Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 Wake Forest L. Rev. 307, 353–54 (1998) (citing uses of castle metaphor to show that "[t]he Framers valued security and intimately associated it with the ability to exclude the government").

But castles do something else too: They give their occupants peace of mind that they are safe. See Milligan, *supra* 748. This is why Lord Coke called a man's house his "castle and fortress, [just] as well for his defence against injury and violence, *as for his repose*." *Id.* at 747 (quotes omitted) (emphasis added). And it is why Adams, on the eve of the Revolution, saw the home as providing "as compleat a security, safety and *Peace and Tranquility*" as a castle. Milligan, *supra* 748 (quotes omitted) (emphasis added).

All this—the meaning of the term "secure," the abuses that prompted the adoption of the Fourth Amendment, and the deeper meaning of the castle metaphor—sheds light on the Security Clause. By declaring our right to be secure in our homes, the Framers were protecting our persons and property

from officials' unchecked power to search and seize. See Milligan, *supra* 732–50; Gans, *supra* 13–14.

II. The Security Clause requires a robust warrant requirement with narrow exceptions for true emergencies.

This Court has long recognized the importance of a robust warrant requirement. Though the Court typically derives that rule from the Reasonableness Clause, the Court has also noted its security value. *E.g.*, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 455 (1971) (plurality) (warrant requirement protects the "right of personal security against arbitrary intrusions by official power"); *Johnson* v. *United States*, 333 U.S. 10, 14 (1948) (lack of a warrant requirement "would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers").

This makes sense. Law enforcement is dangerous business. Any time police interact with civilians, there's a risk the exchange could escalate from mere "pleasantries" to "hostile confrontations of armed men involving arrests, or injuries, or loss of life." *Terry* v. *Ohio*, 392 U.S. 1, 13 (1968). This risk to "life and limb" only increases when police forcibly enter people's homes, where they may "provoke violence in supposed self-defense by the surprised resident." *Hudson* v. *Michigan*, 547 U.S. 586, 594 (2006); see Brief of Nat. Assn. of Crim. Defense Lawyers and Cal. Attorneys for Crim. Justice as Amici Curiae in Support of Petitioner 4–15 (collecting cases where warrantless home entries led to injury, property damage, or death).

Beyond the physical risk to persons and property, the unchecked power to enter our homes also undermines security by instilling uncertainty and fear. As Justice Jackson, echoing Otis' argument in the *Writs of Assistance Case*, explained: "Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart" as when "homes, persons and possessions are subject at any hour to unheralded search and seizure by the police." *Brinegar* v. *United States*, 338 U.S. 160, 180–81 (1949) (Jackson, J., dissenting).

The warrant requirement protects us from these "serious threat[s] to personal and family security" by "limiting the circumstances under which the sanctity of [the] home may be broken by official authority." *Camara* v. *Mun. Ct.*, 387 U.S. 523, 531 (1967). Even with ironclad probable cause, police cannot generally "thrust themselves into a home" without the approval of a "neutral and detached magistrate." *Johnson*, 333 U.S. at 14. This approval process "minimizes the danger of needless intrusions" into private homes, *Payton*, 445 U.S. at 586 (quotes omitted), which maximizes our security in persons and property.

True, there are rare occasions when "the exigencies of the situation" require an immediate entry to defend that security. *McDonald* v. *United States*, 335 U.S. 451, 456 (1948). But this exception, like all exceptions to the warrant requirement, is supposed to be "narrow and well-delineated." *Flippo* v. *West Virginia*, 528 U.S. 11, 13 (1999) (per curiam). Otherwise, the exception

will "swallow the rule," *City of Los Angeles* v. *Patel*, 576 U.S. 409, 424–25 (2015), and our security will suffer as a result.

To keep the exigent-circumstances exception within its proper scope, there are two main rules courts should follow:

First, courts should—as this Court typically does—perform a "careful case-by-case assessment of exigency." *Missouri* v. *McNeely*, 569 U.S. 141, 152 (2013). This entails "a fact-intensive, totality of the circumstances analy[is]." *Id.* at 158. Identifying emergencies on a case-by-case basis, the Court has recognized, guards against sudden expansions of the exigency exception. *Id.* at 153.

Second, courts should use the Security Clause to decide whether the facts in each case presented "a genuine emergency." *Kentucky* v. *King*, 563 U.S. 452, 473 (2011) (Ginsburg, J., dissenting). This framework differs from the Court's current approach, which starts by asking if "the needs of law enforcement are so compelling that a warrantless entry is objectively reasonable." *Id.* at 460 (quoting *Mincey* v. *Arizona*, 437 U.S. 385, 394 (1978)). While the needs of law enforcement are important (and indeed, often promote our security), a police-first approach flouts the Fourth Amendment's text and purpose.

The Amendment was adopted not to make life easier for police, but to protect our security. Thus, whenever police invoke the exigency exception, courts

should start by asking whether there was an "emergency threatening life or limb." *Mincey*, 437 U.S. at 393. If the delay required for police to get a warrant "would [have] gravely endanger[ed] their lives or the lives or others," *Warden* v. *Hayden*, 387 U.S. 294, 299 (1967), the exigency exception should apply. If, on the other hand, there was no immediate danger requiring a warrantless entry, courts should presume no exigency existed.

This security-based approach is not novel. Perhaps the first to apply it was Justice Jackson in *McDonald*. There, police entered McDonald's home without a warrant after they heard adding machines (evidence of illegal gambling) inside. 335 U.S. at 452–53. The Court declared the entry unconstitutional because there was no warrant and no emergency to justify the entry. *Id.* at 455. Writing separately, Justice Jackson explained that the necessity for a warrantless entry "certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it." *Id.* at 459 (Jackson, J., concurring). Otherwise, our homes could be "indiscriminately invaded" by police investigating "offenses that involve no violence or threats of it." *Ibid*. A rule "so reckless and fraught with danger," he concluded, "displays a shocking lack of sense of all proportion." *Id.* at 459, 461.

Since *McDonald*, this Court has expressly applied Justice Jackson's logic at least once. In *Welsh* v. *Wisconsin*, the Court invalidated a warrantless entry of Welsh's home after he was reported to have driven off

the road, possibly drunk, and wandered off. 466 U.S. 740, 754 (1984). Following Justice Jackson's concurrence, the Court adopted the "common-sense approach . . . that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense," and stressed that "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a relatively minor offense . . . has been committed." *Id.* at 753.

Beyond *Welsh*, several of the Court's classic exigency cases have reached results consistent with this security-based approach. See, *e.g.*, *Johnson*, 333 U.S. 10 (rejecting warrantless home entry to arrest nonviolent opium smoker); *Warden*, 387 U.S. 294 (allowing warrantless home entry to arrest armed robber); *Michigan* v. *Tyler*, 436 U.S. 499 (1978) (allowing warrantless entry to extinguish fire); *Brigham City, Utah* v. *Stuart*, 547 U.S. 398 (2006) (allowing warrantless entry to break up fight); *Michigan* v. *Fisher*, 558 U.S. 45 (2009) (per curiam) (similar).

This fact-intensive, security-based approach honors the Fourth Amendment's text and purpose by ensuring a robust warrant requirement with narrow exceptions for true emergencies. Moreover, this framework, while not often discussed, controlled in *Welsh* and runs through several of this Court's classic exigency cases. As explained below, the Court should take the same approach when analyzing the question presented.

III. A categorical rule for misdemeanor pursuits would violate the Security Clause.

On an evening in 2016, a California police officer noticed Petitioner Lange playing loud music and honking his horn while driving—a misdemeanor traffic offense—and started tailing him. App. 2a. Just before Lange turned into his driveway, the officer flashed his lights, but Lange did not notice and entered his garage—another misdemeanor offense. App. 3a. The officer then parked behind Lange and entered the garage, using his foot to stop the door from closing. App. 3a. Because the officer had no warrant to enter his home, Lange moved to suppress DUI evidence discovered after the entry. App. 2a.

The California Court of Appeals denied Lange's motion, finding exigent circumstances because the officer was allegedly in "hot pursuit" of a misdemeanant. App. 21a. The court refused to consider the harmless nature of the offense, citing this Court's recent statement that "nothing in [*Welsh*] establishes that the seriousness of the crime is equally important *in cases of hot pursuit*." App. 20a (quoting *Stanton* v. *Sims*, 571 U.S. 3, 9 (2013) (per curiam)). Instead, the court followed *Santana*, where this Court upheld a "hot pursuit" entry into an unarmed drug dealer's home to prevent the destruction of evidence. App. 15a–16a, 19a (citing 427 U.S. 38 (1976)). The court read *Santana* to mean that any time police witness a person commit a jailable misdemeanor—no matter how trivial the offense, no matter how much time they have to get a warrant, and no matter the risks of forcing their way into

the suspect's home—they never need to get a warrant. App. 21a.

That can't be right. Start with a simple example: Under the lower court's categorical rule, a police officer who saw a man jaywalk across the street and enter his home could claim he was in "hot pursuit"—even if the jaywalker was unaware—and burst into his home without a warrant. The street could be totally empty, and the officer could have ample time to get a warrant, but as long as jaywalking was a criminal offense, neither fact would matter. All that would matter would be that the officer believed he saw the man jaywalk and started pursuing him.

A rule that allows police to invade people's homes without a warrant for such trivial offenses is not tenable under the Security Clause. For one thing, "hot pursuit" cases—a subset of the narrow exigency doctrine—are supposed to be few and far between. Yet the vast majority of arrests in this country are for misdemeanors. Alexandra Natapoff, *Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal* 2 (2018). A categorical rule for misdemeanor pursuits, then, would blow a massive hole in the warrant requirement, leaving us all far less secure as a result.

Worse, adoption of a categorical rule here would undermine our security in precisely the place—the home—where the Fourth Amendment's protections are strongest. See *Jardines*, 569 U.S. at 6 ("[W]hen it comes to the Fourth Amendment, the home is first among

equals."). This would necessarily diminish our security in all cases involving misdemeanor pursuits. Lower courts would be forced to ask themselves: If police can burst into our homes—our castles—to pursue nonviolent traffic offenders, what *can't* they do?

If the right to be secure in our homes matters—and it does—this Court must reject the categorical rule for misdemeanor pursuits. Fortunately, there are at least two ways the Court could do so:

First, the Court could clarify that the "hot pursuit" doctrine only applies when the object of the pursuit (rather than the mere fact of the pursuit) is a "genuine exigency." *King*, 563 U.S. at 470. Specifically, the Court could hold that a "hot pursuit" must involve either a dangerous criminal or the imminent destruction of evidence. Such a holding would be consistent with the Court's most recent word on the exigency doctrine. See *Mitchell* v. *Wisconsin*, 139 S. Ct. 2525, 2537 (2019) (explaining that the doctrine allows police to act quickly to protect the public safety or preserve evidence when they have "no time to secure a warrant") (quotes omitted).

It would also better explain the result in *Santana*. As written, *Santana* purports to be based on *Warden*, which the Court held "clearly governed." 427 U.S. at 42. But it's hard to see why: In *Warden*, police were responding to a report that a man who had just committed armed robbery was hiding in a nearby house. 387 U.S. at 297. The Court upheld the officers' warrantless entry to arrest the robber because he was dangerous

and "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Id.* at 298–97. By contrast, nobody's safety was threatened in *Santana*. The only emergency there—the true reason police initiated the "hot pursuit"—was the imminent destruction of evidence. See 427 U.S. at 43.

Clarifying the "hot pursuit" doctrine in this manner would resolve this case. The Court could distinguish *Santana* because this case is not about the destruction of evidence. (The officer did not enter Lange's garage in order to preserve perishable evidence; he entered to confront Lange about why he did not immediately pull over.) The Court could distinguish *Warden* because Lange's minor offenses did not present anything like the grave dangers of a fleeing armed robber. And the Court could apply *Welsh*, which rejected a warrantless home entry to arrest a man for a minor traffic offense similar to Lange's. 466 U.S. at 754.

Second, the Court could simply overrule *Santana* as incompatible with its broader exigency jurisprudence. Before *Santana*, the Court rejected multiple warrantless entries where police had probable cause to investigate a nonviolent offense. *E.g.*, *Johnson*, 333 U.S. at 10 (rejecting warrantless entry of hotel room even though police could smell person smoking opium inside); *McDonald*, 335 U.S. at 455 (rejecting warrantless home entry even though police could hear adding

machines inside). After *Santana*, the Court rejected another warrantless entry in *Welsh*, 466 U.S. at 754.

True, *Santana* purportedly involved a "hot pursuit." But if the Court does not clarify that the pursuit in *Santana* was based solely on the destruction of evidence, then *Santana* cannot stand. This Court has treated *Warden*—the case on which *Santana* was supposedly based—as the fountainhead "hot pursuit" case. *Welsh*, 466 U.S. at 750. In the years between *Warden* and *Santana*, however, the Court described the doctrine as involving "hot pursuit of a *fleeing felon*." *Vale* v. *Louisiana*, 399 U.S. 30, 35 (1970) (emphasis added). At the time, this made sense, given "the relative dangerousness of felons" historically. *Tennessee* v. *Garner*, 471 U.S. 1, 14 (1985). But in the years leading up to *Santana*, the line between felonies and misdemeanors became increasingly blurred: More nonviolent acts were classified as felonies, and vice versa. *Ibid*. The result was *Santana*, the Court's first "fleeing felon" case involving a *nonviolent* crime.

This may explain why *Santana* came out the way it did—but it doesn't make it right. In *Garner*, this Court held that a statute authorizing police to use deadly force against unarmed, nonviolent fleeing felons violated the Fourth Amendment. 471 U.S. at 22. The Court explained that while police may use deadly force to prevent the escape of truly dangerous suspects, a categorical authorization to shoot felons makes no sense in a world where violent conduct increasingly falls on either side of the felony/misdemeanor divide. *Id.* at 14.

To the extent application of the "hot pursuit" doctrine in *Santana* was based on the felony status of that offense, it shares the same deficiency as the statute rejected in *Garner*: a blank check for police to use identical enforcement methods—which will often be dangerous—for vastly different crimes—many of which will be harmless. If this is what *Santana* amounts to, it conflicts with both the security-based approach adopted in *Welsh* and with the fact-intensive nature of this Court's exigency jurisprudence, and must be overruled.

* * *

To summarize, the Fourth Amendment protects our right to be secure in our houses. By any measure, a categorical rule for misdemeanor pursuits would undermine that security by turning a narrow exception to the warrant requirement into the general rule. The Court should therefore reject the categorical rule as unreasonable under the Security Clause. Doing so will provide crucial guidance for lower courts on how a security-based approach to the Fourth Amendment works in practice.

CONCLUSION

The Court should reject the categorical rule for misdemeanor pursuits and reverse the decision below.

Respectfully submitted,

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