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 DIVISION

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, THE CATO INSTITUTE, THE R STREET INSTITUTE, THE AMERICAN CONSERVATIVE UNION FOUNDATION, AND PROFESSOR ALEXANDRA NATAPOFF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution. In furtherance of those principles, the ACLU has appeared in numerous cases before this Court involving the meaning and scope of the Fourth Amendment, both as direct counsel and as an amicus. Because this case directly implicates those issues, its proper resolution is a matter of concern to the ACLU and its members. The ACLU of Northern California is an affiliate of the ACLU and shares this mission and concerns.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual Cato Supreme Court Review, and files amicus briefs. The present case centrally concerns Cato because it represents an opportunity to improve Fourth Amendment doctrine and maintain that provision's protections in the modern era.

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[1] Petitioner and respondent have consented to the filing of this brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

The R Street Institute is a nonprofit, nonpartisan, public-policy research organization. R Street's mission is to engage in policy research and educational outreach to promote free markets as well as limited, effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

The American Conservative Union Foundation ("ACUF") is a non-profit organization that seeks to preserve and protect the values of life, liberty, and property for every American. ACUF's five policy centers represent a range of issues, including property rights, criminal justice reform, statesmanship and diplomacy, arts and culture, and human rights and dignity. ACUF is dedicated to aiding in the development of Fourth Amendment doctrine consistent with sound Constitutional principles and the rule of law.

Alexandra Natapoff is the Lee S. Kreindler Professor of Law at Harvard University where she teaches and writes about criminal law and procedure. She is a national expert on misdemeanors and the author of *Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal* (Basic Books, 2018). She has an interest in the sound development of this body of law.

Amici respectfully submit this brief to assist the Court in resolving whether petitioner's Fourth Amendment rights were violated when, without obtaining a warrant, a police officer entered petitioner's home based only on probable cause to believe that petitioner had committed a misdemeanor. In light of amici's strong interest in the protections contained in the Constitution—including the Fourth Amendment's guarantee of freedom from

unwarranted intrusion into the home—the proper resolution of this case is a matter of substantial interest to amici, their affiliates, and their members. For the reasons given by petitioner, and those set forth below, the California Court of Appeal erred in recognizing a categorical rule permitting officers to enter a home in pursuit of a person suspected to be a misdemeanant.

SUMMARY OF THE ARGUMENT

I. The text of the Fourth Amendment, sources contemporaneous with the Amendment's framing, and this Court's precedents all make clear that the sanctity of the home is of paramount concern. Yet the California Court of Appeal adopted a rule that would allow police officers to enter a home whenever they are in pursuit of an individual they have probable cause to believe has committed a misdemeanor. That sweeping and categorical exception to the warrant requirement is antithetical to the Fourth Amendment.

The modern misdemeanor system reaches a staggering array of everyday conduct. It criminalizes everything from doodling on a dollar bill, selling snacks without a license, spitting in public, eavesdropping, littering (including on your own property), jaywalking, and possession of a felt tip marker by a person under twenty-one.[2] Given this breadth, the categorical rule endorsed below effectively creates a twenty-first century equivalent to the general warrants the Fourth Amendment was adopted to prevent. This Court should

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[2] *See* 18 U.S.C. § 333; N.Y.C. Admin. Code § 20-453; Va. Code Ann. § 18.2-322; Okla. Stat. tit. 21, § 1202; Broward, Fla. Code § 21-76; Ala. Code § 32-5A-212; N.Y.C. Admin. Code § 10-117(c-1).

reject that approach and reaffirm that warrantless entry into the home is the exception, not the rule.

II. This Court has "long held that the 'touchstone of the Fourth Amendment is reasonableness.'" *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)). And this "touchstone" is ill-suited to inflexible, categorical exceptions. Rather, it "is measured in objective terms by examining the totality of the circumstances." *Id.* at 39. This Court has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry," *id.*—a theme that has animated Fourth Amendment jurisprudence for almost a century, *see Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) ("There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.").

The antipathy to bright-line exceptions finds its zenith when it comes to intrusions on the home. Accordingly, the Court has been careful to demand that any test for home entry must consider all relevant circumstances. This finely tuned approach ensures that officers enter the home only when "reasonable." A categorical rule permitting warrantless entry to arrest someone suspected of jaywalking, or any of the countless other misdemeanors, would evade the exacting "reasonableness" analysis this Court's cases require and permit "unreasonable" intrusions into the home. Contrary to the assertions of some lower courts, applying the traditional totality approach to cases involving misdemeanor pursuit is unlikely to encourage suspects to flee to their homes. Nor is the totality test too

complicated to administer—indeed, it is applied by countless officers in the field every day.

III. The categorical approach applied below cannot be justified by reference to this Court's exigent circumstances precedents. Those decisions hold that an exigency arises only where there is a true emergency, or where the risk of evidence destruction related to a serious crime or physical harm necessitates a quick response. Where such circumstances exist, the exigency exception permits entry. But none of these circumstances is typically, much less categorically, present when police seek to arrest a suspected misdemeanant; they do not, therefore, support adopting a categorical rule permitting warrantless entry into the home in pursuit of such individuals. To the contrary, it is *unreasonable* to permit officers, absent case-specific exigent circumstances, to pursue a person into their home without a warrant simply to arrest that person for minor or non-exigent offense.

ARGUMENT

I. A CATEGORICAL EXCEPTION FOR FLEEING MISDEMEANANTS FLOUTS THE FOURTH AMENDMENT'S TEXT AND HISTORY

A. The Fourth Amendment Protects Against Unrestrained Invasions of the Home

1. The text of the Fourth Amendment expressly protects the home from "unreasonable searches and seizures." U.S. Const. amend. IV. In fact, the home is the *only* specific location the Fourth Amendment singles out for protection.

This Court has long recognized the centrality of the home to the Fourth Amendment's protections. "At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from

unreasonable governmental intrusion." *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (internal quotation marks omitted). "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972). *See also Jones v. United States*, 357 U.S. 493, 498 (1958) ("[I]t is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home."). And the Court has explained that citizens' expectation of privacy is "most heightened" in the home. *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

2. The Fourth Amendment's protection of the home was a direct response to unrestrained invasions of the home under the English writs of assistance. *See United States v. Chadwick*, 433 U.S. 1, 8 (1977); *see also Carpenter v. United States*, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting) ("Widespread hostility" to the Crown's intrusions into the home were a "driving force behind the adoption of [the Fourth] Amendment."). These writs allowed customs officials to search for smuggled contraband wherever they wanted. Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 Ind. L.J. 979, 991-92 (2011). As John Adams put it: "A man's house is his castle; and while he is quiet, he is well guarded as a prince in his castle. [The English] writ [of assistance], if it should be declared legal, would totally annihilate this privilege." 2 Legal Papers of John Adams 142-44 (Wroth & Zobel eds. 1965). Indeed, according to Justice Frankfurter, English abuse of these writs so enraged Adams that he viewed protection of the home from the Crown as partial motivation for the Revolutionary War itself. *See Davis v. United States*, 328 U.S. 582, 603-05 (1946) (Frankfurter, J., dissenting).

Thus, at the time of the Fourth Amendment's framing, the public clearly understood that provision to, at a minimum, protect against general warrants like the English writs of assistance. Contemporary sources confirm the point. For example, in his first essay in support of the Bill of Rights, Maryland Farmer argues the Fourth Amendment was necessary because nothing in the original constitution prevented federal officers from invading the home under the auspices of a general warrant. Essays by A Farmer (I) (Feb. 15, 1788), *reprinted in* 5 *The Complete Anti-Federalist* 14 (Herbert J. Storing ed. 1981) ("[S]uppose for instance, that an officer of the United States should force the house, the asylum of a citizen, by virtue of a general warrant, I would ask, are general warrants illegal by the constitution of the United States?"). Similarly, Justice Story wrote that the Fourth Amendment's inclusion in the Bill of Rights "was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American Revolution." Joseph Story, *Commentaries on the Constitution of the United States* § 1895 (1833). Modern commentators have recognized the same. *See* Clancy, *supra*, at 1040 (explaining that during the framing of what would become the bill of rights, "a significant focus was . . . on general warrants").

In *Chimel v. California*, this Court likewise recognized that the Fourth Amendment "was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence." 395 U.S. 752, 760-61 (1969). And in *Weeks v. United States*, the Court explained that as originally understood, the Fourth Amendment protects the American people from

"unreasonable searches and seizures, such as were permitted under the general warrants issued under authority of the [English] government." 232 U.S. 383, 389-90 (1914).

B. The Categorical Exception Applied Below Undermines the Fourth Amendment's Protections for the Home by Creating a New System of General Warrants

By categorically permitting police officers to enter a home without a warrant whenever they pursue a suspect they have probable cause to arrest for a misdemeanor, the California Court of Appeal violated petitioner's Fourth Amendment rights. Because of the misdemeanor system's expansive reach, the rule applied below would provide police with a twenty-first century equivalent of the general warrant and would eviscerate the sanctity of the home.

1. The stunning breadth of the misdemeanor system has created a "world in which the law on the books makes everyone a" criminal. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 511 (2001). We are all guilty of committing a misdemeanor at some point. *See* Alexandra Natapoff, *Punishment Without Crime* 43 (2018) ("[G]etting charged with a low-level crime is a normal part of American life, about as common as going [to] the doctor when you get the flu, buying a truck or SUV, or attending a four-year college.").

State codes "criminalize everything and everyone the police and prosecutors might want to punish." Stuntz, *supra*, at 560. At least one member of this Court has recognized this as "a grave problem." Neil Gorsuch, *A Republic, If You Can Keep It* 242, 247-48 (2019). Madison issued a similar warning more than two hundred years

ago: "[I]f the laws be so voluminous that they cannot be read . . . who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?" *The Federalist* No. 62 (James Madison). In the two centuries since, the accretion of misdemeanors has made the problem even worse.

The majority of misdemeanor arrests—excluding non-DUI traffic violations—involve four offenses: marijuana possession, petty theft, DUI, and simple assault/battery. Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors By The Numbers*, 61 B.C. L. Rev. 971, 999-1000 (2020). But there are a whole host of other misdemeanors that can lead to arrest. "Loitering, spitting, disorderly conduct, and jaywalking belong to a large group of crimes called 'order-maintenance' or 'quality-of'-life' offenses, and they make it a crime to do unremarkable things that lots of people do all the time." Natapoff, *supra*, at 3. Traffic misdemeanors and vehicle code violations—such as the ones petitioner was arrested for violating—represent over 20 million additional arrests. Natapoff, *supra*, at 45 n.9.

The amount of ordinary conduct that misdemeanor laws criminalize is illustrated by the sheer volume of misdemeanor arrests each year. After again discounting for non-DUI traffic violations, "approximately 13.2 million misdemeanor cases—42.6 per 1,000 people—are filed in the United States every year." Mayson & Stevenson, *supra*, at 998. These represent about three-quarters of all criminal charges in the United States. *Id.* at 1015. The overwhelming number of misdemeanor arrests is a recent trend, in part driven by aggressive "quality-of-life" policing. "Between 1993 and 2010 the number of misdemeanor arrests [in New York City] almost

doubled." Issa Kohler-Haussman, *Managerial Justice and Mass Misdemeanors*, 66 Stan. L. Rev. 611, 630 (2014).[3] These high numbers persist despite record low levels of more extreme crime. "[M]isdemeanor arrests, but not felony arrests, have continued to climb even as violent and property crime rates have declined substantially and stabilized at historically low levels." *Id.* at 640.

Still, these figures represent only the tip of the iceberg. Many misdemeanor arrests do not lead to charges and are thus not reflected in these statistics. For example, "prosecutors in New York City decline to prosecute a significant number of misdemeanor arrests—between approximately 17,000 and 30,500 in each of the last five years." *Id.* at 645.

As is too often the case with sweeping laws affording broad discretion, research consistently finds racial disparities in misdemeanor arrest patterns. Mayson & Stevenson, *supra*, at 1005; Kohler-Haussman, *supra*, at 635. Largely because of misdemeanor arrests, "[b]y age twenty-three, 38 percent of white men, 44 percent of Latino men, and 50 percent of African American men can

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[3] Recent data suggest that misdemeanor case-filing rates may finally be declining. Mayson & Stevenson, *supra*, at 1015-16. That said, today's misdemeanor system still greatly exceeds the historical scope and volume of misdemeanors. *See* Shima Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. Rev. 837, 854 (2018) ("[M]isdemeanor crimes on the books have grown exponentially over the years. The common law recognized no more than a few dozen separate misdemeanor offenses. Today, there are hundreds."); Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. Rev. 731, 768 (2018) ("The fact that misdemeanor justice has been shrinking does not mean that the volume-related problems highlighted by recent scholarship are not there, or are any less serious than claimed.").

expect to be arrested at least once." Natapoff, *supra*, at 151. Similarly, "[e]very year, police stop 12 percent of all drivers but 24 percent of minority drivers." *Id.*; *see also id.* at 151-57 (detailing well-documented racial disparities in misdemeanor arrests for marijuana possession, disorderly conduct, resisting arrest, loitering, and jaywalking in jurisdictions across the country). Evidence shows this is not because Black and Latino drivers are systematically worse at following traffic laws than white drivers; it is because police systematically enforce them more strictly against minority drivers. *See* Frank R. Baumgartner et al., *Suspect Citizens* 64-77 (2018). Similar national racial disparities exist, for example, in marijuana possession arrests, even though marijuana usage rates are comparable across races. Am. Civil Liberties Union, A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform (Apr. 17, 2020), https://tinyurl.com/y2rhf2oy.

2. "Broad codes create an infinite pool of the guilty, among whom police . . . have unbridled discretion to select" for arrest. Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1357-58 (2012).

This discretion presents a grave problem in the Fourth Amendment context. When everyone is guilty of some misdemeanor, police can and do bootstrap those violations into pretextual searches for other crimes, even when they lack any sound basis for suspecting the other crimes. Thus, "law enforcement agents around the nation continue to use the local vehicle code and other low-level violations as pretexts to rummage around for unrelated offenses." Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U.L. Rev. 703, 707 (2005); *see Whren v. United States*, 517 U.S. 806, 812-13 (1996) (holding that an officer's pretextual motives are irrelevant

to the validity of a search under the Fourth Amendment). Adoption of the categorical approach applied below would expand upon this troubling phenomenon and similarly authorize police to rummage pretextually through *the home*.

As noted above, millions of Americans unwittingly commit a misdemeanor every day. If an officer wants to enter a private home, he need only wait. Sooner or later, the suspect is likely to commit an ordinary act that qualifies as a misdemeanor; the police can then "pursue" that person to their home and enter without a warrant—even where there is no risk of physical harm or destruction of evidence. The staunch opposition to general warrants that gave rise to the Fourth Amendment arose from colonists' frustration that those warrants "legitimated highly intrusive law enforcement techniques" and "were an ideal vehicle for harassment by petty officials." Gerard V. Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DePaul L. Rev. 817, 836 (1989). The categorical approach applied below permits exactly that.

II. THE CATEGORICAL APPROACH APPLIED BELOW IS CONTRARY TO THIS COURT'S PRECEDENT

A. This Court's Precedents Demand A Specific and Fact-Dependent Analysis of Reasonableness To Justify Warrantless Intrusion into the Home

"It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 477 (1971)). This rule recognizes that "the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home." *McDonald v. United States*, 335 U.S. 451, 455 (1948). The

sanctity of the home is "too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals." *Id.* at 455-56.

The warrant requirement is subject to a few "jealously and carefully drawn" exceptions. *Jones*, 357 U.S. at 499. As relevant here, warrantless home entry is permitted in just two narrow settings: consent of an occupant or exigent circumstances. *Steagald v. United States*, 451 U.S. 204, 211 (1981). No other justification is sufficient. *See, e.g.*, *Collins v. Virginia*, 138 S. Ct. 1663 (2018) (holding that officers may not enter the curtilage pursuant to the "automobile exception"); *id.* at 1672 (explaining that the "plain view" exception cannot by itself justify entry into a home); *Chimel*, 395 U.S. at 762-63 (holding that the "search incident to arrest" exception does not authorize a search of "any room other than that in which an arrest occurs.").

Determinations of probable cause, consent, and exigent circumstances all require a totality of the circumstances analysis, to ensure that invasions of privacy are permitted only when they are in fact "reasonable." Take each in turn. First, there is no *per se* rule that permits an automatic finding of probable cause to support the issuance of a warrant. "In evaluating whether the State has met [the probable cause] standard," this Court has "consistently looked to the totality of the circumstances" and "rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." *Florida v. Harris*, 568 U.S. 237, 244 (2013).

Second, to enter a dwelling based on consent, an officer must first obtain "voluntary" consent. And voluntariness "is a question of fact to be determined from

all the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 40 (1996). *See also Moran v. Burbine*, 475 U.S. 412, 421 (1986) (holding that the voluntariness of a *Miranda* waiver must be assessed according to the "totality of the circumstances.").

Third, this Court has likewise rejected categorical rules for exigent circumstances. It recently—and repeatedly—emphasized that "the exigent-circumstances exception must be applied on a case-by-case basis." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2174 (2016); *see also id.* at 2183 (observing that the exception "has *always* been understood to involve an evaluation of the *particular facts of each case*") (emphasis added); *Missouri v. McNeely*, 569 U.S. 141, 149 (2013) ("To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances."). This fact-specific understanding has guided this Court's analysis since the first case in which it upheld a search under the exigent circumstances doctrine. *See Warden v. Hayden*, 387 U.S. 294, 298 (1967) ("Under the circumstances of this case, 'the exigencies of the situation made [warrantless entry] imperative.'" (quoting *McDonald*, 335 U.S. at 456)).

The through line of these doctrines is the same: any intrusions into the home must be carefully tailored to the specific facts, because categorical exceptions risk under-protecting the core privacy interest the Fourth Amendment was designed to safeguard.

B. Warrantless Entry into the Home in Pursuit of Suspected Misdemeanants Must Be Supported by a Totality of the Circumstances

A categorical exception to the warrant requirement for pursuit of suspected misdemeanants is inconsistent

with this Court's aversion to bright-line exceptions to core Fourth Amendment protections. Indeed, even in circumstances where privacy and liberty interests are less elevated than the home, this Court has repeatedly rejected *per se* rules in favor of a more narrowly tailored totality-of-the-circumstances approach.

For example, the dividing line between "the curtilage" and "open fields"—a crucial distinction that defines the scope of a home occupant's right to privacy from government intrusion—is determined by a fact-specific inquiry. *United States v. Dunn*, 480 U.S. 294, 301 (1987). In laying out the relevant test, this Court emphasized that it was not embracing a "formula" and it "decline[d] the Government's invitation to adopt a 'bright-line rule.'" *Id.* at 301 & n.4. Instead, it required courts to consider all relevant facts to determine "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.* at 301.

Similarly, when defining the contours of "reasonable suspicion"—which justifies physical apprehension of a person on the street—this Court has "said repeatedly that [courts] must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)). *See also Illinois v. Wardlow*, 528 U.S. 119, 126-27 (2000) (Stevens, J., concurring) (noting that this Court rejected the *per se* rules proffered by both parties in favor of a "totality of the circumstances" approach).

To be sure, this Court has found bright-line exceptions to the warrant requirement useful in certain settings. But

nearly all involve a diminished expectation of privacy. For example, the categorical "automobile exception" is premised on "a reduced expectation of privacy" inherent in automobile operation and ownership. *California v. Carney*, 471 U.S. 386, 393 (1985); *see also Bd. Of Educ. v. Earls*, 536 U.S. 822, 831-32 (2002) (permitting suspicionless searches of students in extracurricular activities in part because of a diminished expectation of privacy).

The Court has likewise allowed warrantless searches where it has found little or no reasonable expectation of privacy, as on the premises of closely regulated industries, because "no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978). So too for warrantless searches at the border, *United States v. Flores-Montano*, 541 U.S. 149, 154 (2004), and in prison cells, *Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984).

These justifications do not support warrantless home entries. Quite the opposite. This Court has long recognized that "privacy expectations are most heightened" in the home, *Ciraolo*, 476 U.S. at 213—"a zone that finds its roots in clear and specific constitutional terms," *Payton*, 445 U.S. at 589. Indeed, "[i]n the home . . . *all* details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo*, 533 U.S. at 33. The mandate to protect the privacy of the home from unjustified intrusions is so strong that a lawfully-present officer violates the Fourth Amendment when he moves a turntable only "a few inches[,]" *Arizona v. Hicks*, 480 U.S. 321, 325 (1987), or sets foot in a room adjacent to an arrestee, *Chimel*, 395 U.S. at 763.

Other categorical exceptions involve scenarios that inherently raise officer safety or evidence destruction concerns. The "search incident to arrest" exception, for instance, "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Arizona v. Gant*, 556 U.S. 332, 338 (2009). And "narrowly confined" protective sweeps may be "conducted to protect the safety of police officers or others." *Maryland v. Buie*, 494 U.S. 325, 327 (1990).

When particularized facts show that warrantless entry is necessary to protect against significant evidence destruction or physical injury, the traditional "exigent circumstances" exception applies. But the mere possibility that such concerns might arise in some small subset of misdemeanant pursuits does not justify *categorically* permitting entry into the home.

C. A "Fleeing Felon" Does Not Present a *Per Se* Exigent Circumstance

Although respondent California agrees that this Court should not adopt a categorical exception to the warrant requirement for cases involving only misdemeanors, it claims that the Court has already recognized a categorical rule permitting home entry whenever police pursue a "fleeing felon." California is wrong. This Court has *never* held that an exigent circumstance existed in the absence of one of the two traditional exigent circumstances factors—even for felonies. California claims to find support for its contrary argument in this Court's decisions, common law sources, and social science assumptions. None of these sources bears the weight California places on them.

1. First, California declares that this Court's decision in *United States v. Santana*, 427 U.S. 38 (1976),

established a blanket exception. Resp't's Br. at 12. Not so. *Santana*'s holding was explicitly predicated on the "realistic expectation that any delay would result in destruction of evidence," 427 U.S. at 43, as California recognizes. Resp't's Br. at 14. California also invokes this Court's use of "categorical terms to describe" the "fleeing felon" exception. *Id.* But each case California cites makes only passing reference to the notion of a "fleeing felon" exception. These statements are dicta, not holdings. What is more, in other cases post-dating *Santana*, this Court has *also* stressed the importance of factors independent of the status of the crime to the exigency inquiry. *See, e.g.*, *Welsh v. Wisconsin*, 466 U.S. 740, 752 (1984).

2. Next, California invokes a purported consensus of common-law authorities. California claims "[t]hat history provides considerable support for the categorical hot-pursuit exception with respect to individuals suspected of committing felony offenses." Resp't's Br. at 21. This is an overstatement. To be sure, this Court has previously suggested in dicta that common law sources recognized pursuit of fleeing felons as a categorical exception to the warrant requirement. *See Steagald*, 451 U.S. at 217-18; *Payton*, 445 U.S. at 598 ("[T]he prevailing practice [according to founding-era common law authorities] was not to make arrests [in the home] except in hot pursuit or when authorized by a warrant."). But a survey of founding-era common law commentators shows a deep split of opinion on this issue.

California's own authorities prove the point. As Chitty recognized, at the time of the Fourth Amendment's framing, "there [wa]s a considerable degree of intricacy and confusion in the authorities which relate to" the circumstances in which police may "break doors." 1

Joseph Chitty, *A Practical Treatise on the Criminal Law* 35 (1819 ed.) (*cited in* Resp't's Br. at 20). Chitty's observation, quoted by California, that officers "may be justified" in breaking doors to apprehend a person on suspicion of a felony, dealt with *post hoc* civil trespass liability—not whether the police had authority to enter the home in the first place. *See id.* In contrast, he explained the state of the common law surrounding authority to enter a home to make an arrest as follows:

> [W]hen *it is certain* that a treason or felony has been committed, or a dangerous wound given, and the offender, being pursued, takes refuge in his own house, either a constable, or private individual, without distinction, may without any warrant break open his doors, after proper demand of admittance. . . .

Id. But this involved certainty that the suspect committed a felony—a standard much higher than probable cause. When a suspect's status as a felon was merely *suspected*, Chitty recognized a deep divide in opinion on the authority to enter the home. *See id.* ("Authors . . . differ on the point whether the same power be invested in the officer or private person when felony is only *suspected*.").

A review of several leading founding-era commentators confirms the schism. For example, California relies heavily on Hale. Resp't's Br. at 19; *see* 2 Matthew Hale, *The History of the Pleas of the Crown* 92 (1847 ed.). But as this Court recognized in *Payton*, Hale's broad view of police authority to make in-home arrests without a warrant does not comport with the Fourth Amendment. *See* 445 U.S. at 595, 603 (rejecting Hale's

view that warrantless home entry to conduct an arrest is lawful). Hawkins and Burn took the opposite approach. Under their view, warrantless home entry in pursuit of a felon was never permissible when based only upon "probable suspicion." 2 William Hawkins, *Pleas of the Crown*, 86-87 (1721 ed.); 1 Richard Burn, *The Justice of the Peace and Parish Officer* 166 (1810 ed.).

Finally, California cites Coke for his views on the "Hue and Cry." Resp't's Br. at 20-21. "The 'hue and cry,' however, was not the same as 'hot pursuit' by officers of the law[.]". *Steagald*, 451 U.S. at 229 n.2 (Rehnquist, J., dissenting). In fact, Coke, "the greatest authority of his time on the laws of England," had the most hostile view towards warrantless home entry. *Payton*, 445 U.S. at 594. According to Coke, anything short of the King's indictment was insufficient to justify entering the home to arrest a felon. 3 Edward Coke, *Institute of the Laws of England* 116 (1644 ed.) ("For Justices of Peace to make warrants upon surmises, for breaking the house of any subjects to search for felons, or stolen goods, is against the Magna Carta."). The differing views of these influential commentators confirm Chitty's observation: at the time of the Fourth Amendment's adoption, the common law was not definitively settled as to whether pursuit of a suspected felon was sufficient to override the warrant requirement. And when the common law authorities are split in this way, they provide this Court little guidance. *See Payton*, 445 U.S. at 597-98.

But even if the founding era sources were unanimous in support of such an exception, hot pursuit of a "felon" in 1791 included a much smaller class of offenders than it would today. Indeed, common law felonies were almost exclusively those crimes punishable by death. *Tennessee*

v. Garner, 471 U.S. 1, 13 (1985); 4 William Blackstone, *Commentaries on the Laws of England* 98 (1769 ed.). Regardless of justifications that may have supported a fleeing felon exception at common law, extending an exception intended for offenses punishable almost exclusively by death to offenses punishable by confinement for a year and a day "would be a mistaken literalism that ignores the purposes of a historical inquiry."[4] *Garner*, 471 U.S. at 13.

3. Finally, California speculates about real-world interactions to justify its categorical carve out. It claims as its "principal justification" that "the flight of a suspected felon into a home is likely to implicate at least one of" the recognized exigencies. Resp't's Br. at 24. But where it does, the exigent circumstances exception will apply. And in urging a categorical approach, California offers only bare assertion bereft of *any* data. This Court should decline the invitation to forge a new blanket exception to the Constitution based on mere say-so.

D. Concerns That a Totality of the Circumstances Approach Would Incentivize Crime Are Overstated

Lower courts adopting the categorical approach often express concern that requiring police to procure a warrant before following a misdemeanant into a home incentivizes flight. *See, e.g.*, *City of Bismarck v. Brekhus*, 908 N.W.2d 715, 723 (N.D. 2018) ("[S]uspects would have an incentive to flee law enforcement because flight itself would not justify application of the hot pursuit doctrine")

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[4] Today, it is a felony to counterfeit a penny, 18 U.S.C. § 490, possess marijuana for a second time, 21 U.S.C. § 844; 21 C.F.R. § 1308.11(d)(23), or receive a letter addressed to a fake name in connection with an illegal business. 18 U.S.C. § 1342.

(quoting *State v. Weber*, 887 N.W.2d 554, 569 (Wis. 2016)); *State v. Ricci*, 144 N.H. 241, 245 (1999) ("Law enforcement is not a child's game of prisoners base, or a contest, with apprehension and conviction depending upon whether the officer or defendant is the fleetest of foot."). These concerns are misguided. As the Chief Justice recognized in *Missouri v. McNeely*, police can procure a warrant remotely in "as little as five minutes." 569 U.S. at 173 (Roberts, C.J., concurring in part); *id.* at 154. When probable cause exists, therefore, police can generally procure a warrant while they sit outside the home. And in the rare instance where true "exigent circumstances" exist, the law permits a warrantless entry. *See Santana*, 427 U.S. at 42-43; *Hayden*, 387 U.S. at 309.

A five-minute delay to an arrest for a misdemeanor is hardly an incentive to flee, especially considering the additional and often more severe penalties that likely result from such flight. *See, e.g.*, Cal. Penal Code § 148(a)(1) (authorizing one year imprisonment and a fine of up to $1,000 for resisting arrest).

Finally, there is no administrability problem with the totality approach, which, after all, has long governed the "exigent circumstances" exception. Properly construed, a totality approach does not require police to distinguish between felons and misdemeanants mid-pursuit. Police need only determine whether there is an immediate risk of potential evidence destruction related to a serious crime or a threat to safety. This is an inquiry police are already entrusted to make and that has proven administrable. *See Garner*, 471 U.S. at 11-12 (imposing a similar standard for police use of force over thirty-five years ago). And in any case, the fact that the Fourth Amendment's requirements might impose a burden on police does not justify its evisceration. *See Mitchell v.*

Wisconsin, 139 S. Ct. 2525, 2535 n.8 (2019) (recognizing that bright line rules excusing the warrant requirement are inappropriate in the Fourth Amendment context even though they would be easier for police to administer); *Scott v. Harris*, 550 U.S. 372, 383 (2007) ("Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness.'").

III. EXIGENT CIRCUMSTANCES EXIST ONLY IF THERE IS A RISK OF EVIDENCE DESTRUCTION RELATED TO A SERIOUS CRIME OR IMMINENT DANGER OF PHYSICAL HARM

It would resolve this case to reaffirm that the exigent circumstances exception "always requires case-by-case determinations." *Birchfield*, 136 S. Ct. at 2180, and that this Court will not "depart from careful case-by-case assessment of exigency and adopt the categorical rule" applied by the California Court of Appeal. *McNeely*, 569 U.S. at 152. This recent precedent alone conclusively answers the Question Presented, which asks whether pursuit of a suspected misdemeanant "categorically qualif[ies] as an exigent circumstance." *See* Pet. at i.

But this Court can and should go further. "The requirement that [a court] base [its] decision on the 'totality of the circumstances' has not prevented [this Court] from spelling out a general rule for the police to follow." *McNeely*, 569 U.S. at 168 (Roberts, C.J., concurring). The Court should clarify that, under its precedents, there are three requirements for concluding that the totality of the circumstances gives rise to an exigency grave enough to effect a warrantless entry. First, there must be an emergency that can tolerate *no* delay. Second, the officer may enter the home only to

prevent either (1) physical harm or (2) evidence destruction. And third, the officer may enter the home without a warrant to prevent evidence destruction only if the underlying offense is sufficiently grave. None of these considerations supports adopting a categorical rule permitting warrantless entry into the home in pursuit of a suspected misdemeanant.

1. By definition, an exigency requires that there be "no time to obtain a warrant." *McNeely*, 569 U.S. at 167 (Roberts, C.J., concurring). "Police action literally must be 'now or never' to" respond to an emergency. *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973). Time and again, this Court has recognized as fundamental this extraordinary degree of urgency. *Birchfield*, 136 S. Ct. at 2173; *Michigan v. Tyler*, 436 U.S. 499, 509 (1978); *Schmerber v. California*, 384 U.S. 757, 771 (1966). This understanding accords with the plain meaning of "exigent": "requiring immediate action or aid; urgent." *Exigent*, *Black's Law Dictionary* (11th ed. 2019).

2. This Court's precedents further indicate that the exigent circumstances doctrine permits warrantless entry only if the State can demonstrate, with reference to particularized facts, that the circumstances threatened imminent destruction of evidence or serious injury to person or property.

In *Warden v. Hayden*, the first case in which this Court permitted warrantless entry because of exigent circumstances, an armed robber stole cash from a local Baltimore business and quickly fled on foot. 387 U.S. at 297. He was followed to a nearby house where, "within minutes," the police arrived and entered without a warrant to search for the suspect. *Id.* at 297-98. Emphasizing the immediate threat of physical danger,

this Court held that the officers' actions were justified: Police need not delay "an investigation if to do so would gravely endanger their lives or the lives of others." *Id.* at 298-99.

Nine years later, this Court returned to the exception in *United States v. Santana*, 427 U.S. 38 (1976). In that case, Philadelphia police officers arranged a controlled heroin purchase. *Id.* at 39. When the officers arrested the salesperson, she told them that Santana had the proceeds of the sale nearby. *Id.* at 40. The police drove to Santana's location and attempted to place her under arrest. *Id.* When she "retreated into the vestibule of her house," the officers followed, despite lacking a warrant. *Id.* As in *Hayden*, the Court held that the search was permissible, albeit justified on concerns of evidence destruction: "Once Santana saw the police, there was . . . a realistic expectation that any delay would result in destruction of evidence." *Id.* at 43.

In both *Hayden* and *Santana*, police were pursuing a suspected felon. But the status of the crime was not determinative in either case. Instead, the Court stressed the importance of either impending physical harm or evidence destruction to justify the exigency. *Cf. Welsh*, 466 U.S. at 752 ("[C]ourts have permitted warrantless home arrests for major felonies *if identifiable exigencies, independent of the gravity of the offense*, existed at the time of the arrest.") (emphasis added).

In the years since *Hayden* and *Santana*, this Court has returned to the exigent circumstances exception on a number of occasions. Each time it found an exigency, it did so because government employees were preventing imminent evidence destruction or providing emergency assistance. *See Mitchell*, 139 S. Ct. at 2537 (evidence

destruction); *Kentucky v. King*, 563 U.S. 452 (2011) (same); *Michigan v. Fisher*, 558 U.S. 45 (2009) (emergency assistance); *Brigham City v. Stuart*, 547 U.S. 398 (2006) (same); *Michigan v. Tyler*, 436 U.S. 499 (1978) (same). Importantly, this Court has *never* held that an exigent circumstance existed without one of these two factors—even in cases involving suspected felonies.

3. Finally, the exigent circumstances exception applies to prevent evidence destruction only if the underlying crime is sufficiently serious. As Justice Jackson observed in 1948, the existence of an exigency "certainly depends somewhat upon the gravity of the offense thought to be in progress." *McDonald*, 335 U.S. at 459 (Jackson, J., concurring). He characterized the illegal lottery operation at issue in that case as "a shabby swindle," but "not one which endangered life or limb or the peace and good order of the community." *Id.* To Justice Jackson, it was a "shocking proposition that private homes . . . may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it." *Id.* Breaking into a dwelling in order to suppress such activity "displays a shocking lack of all sense of proportion" to both the sanctity of the home and the possibility of rapidly escalating violence inherent in warrantless entries. *Id.* at 459-61.

Building on this rationale, this Court held in *Welsh v. Wisconsin* that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." 466 U.S. at 753. "When the government's interest is only to arrest for a minor offense, th[e] presumption of unreasonableness is difficult to rebut," and the government should be required to obtain a

warrant. *Id.* at 750. Indeed, "it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor." *Id.* at 753. Therefore, the exigent circumstances exception should "rarely [apply] when there is probable cause to believe that only a minor offense . . . has been committed." *Id.*[5]

4. The upshot of these precedents is that pursuit of a fleeing misdemeanant will rarely constitute a genuine exigency. As the Chief Justice observed in *McNeely*, "[j]udges have been known to issue warrants in as little as five minutes." 569 U.S. at 173. In a significant number of jurisdictions, therefore, the exigent circumstances exception will apply only when an officer cannot afford to wait mere minutes before forcing his way into a dwelling. Nonviolent misdemeanors like petitioner's are unlikely to present such circumstances.

Moreover, unlike in *Santana* and *Hayden*, there is no reason to believe that evidence preservation or safety interests are typically implicated when a police officer pursues a suspected misdemeanant.

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[5] As this Court has recognized in other contexts, the severity of a crime is relevant to the scope of a defendant's constitutional rights. *See, e.g.*, *Scott v. Illinois*, 440 U.S. 367 (1979) (finding no Sixth Amendment right to counsel where the underlying offense was a misdemeanor that led to no actual imprisonment); *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968) (recognizing category of petty offenses for which there is no right to a jury trial); *North v. Russell*, 427 U.S. 328, 334 (1976) (permitting criminal trials before nonlawyer judges when the underlying offense is a minor traffic violation); *Colten v. Kentucky*, 407 U.S. 104, 117 (1972) (upholding relatively informal adjudication of misdemeanors in "inferior courts [that] are not designed or equipped to conduct error-free trials").

Finally, misdemeanors generally do not involve conduct that rises to a level society deems severe—that is what makes them only misdemeanors in the first place. There is accordingly no need for a categorical approach that would permit police to intrude into the home in response to a misdemeanor pursuit. To hold otherwise would be to embrace the "shocking lack of all sense of proportion" that Justice Jackson warned against. *McDonald*, 335 U.S. at 459.

In sum, the exigent circumstances exception does not support the adoption of a categorical rule allowing warrantless entry into the home in pursuit of a suspected misdemeanant.

CONCLUSION

The judgment of the California Court of Appeal should be reversed.

Respectfully submitted,

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