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 District

BRIEF OF THE NATIONAL COLLEGE FOR DUI DEFENSE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTERESTS OF AMICUS CURIAE[1]

Amicus curiae is the National College for DUI Defense ("NCDD"). NCDD is a nonprofit professional organization of lawyers, with over 1,500 members, focusing on issues related to the defense of persons charged with driving under the influence. Through its educational programs, its website, and its email list, the College trains lawyers to represent persons accused of drunk driving. NCDD's members have extensive experience litigating issues regarding breath, blood, and urine tests for alcohol and other drugs. NCDD has appeared as Amicus Curiae in several drunk driving cases before the Supreme Court of the United States.

SUMMARY OF ARGUMENT

In this brief Amicus raises four main arguments.

First, that categorical exceptions to the Fourth Amendment warrant requirement are disfavored and should be avoided. Thus, a per se rule allowing warrantless entries into the home for all offenses, whether jailable or not, based solely on hot pursuit, should be rejected.

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than Amicus and their counsel made a monetary contribution to the preparation or submission of this brief.

Second, that modern electronic warrant procedures are legal, efficient, effective and should be encouraged. The expansion of exceptions to the warrant requirement is therefore unnecessary, while restrictions should continue to be the path moving forward.

Third, the risk of bodily harm or death that can occur to law enforcement and innocent bystanders when a forceful warrantless entry into the home occurs, outweighs the benefits of forgoing the warrant process.

Fourth, a general rule forbidding warrantless entries into the home for nonfelony offenses, except for the protection of life or limb, is easily workable.

For these reasons, this Court should reverse the decision of the Court of Appeal of the State of California, First Appellate District.

ARGUMENT

I. Categorical exceptions to the Fourth Amendment warrant requirement are disfavored and should be avoided. Warrantless entry into the home is the chief evil for which the Fourth Amendment was designed to protect against. Allowing warrantless entries for all criminal offenses, including minor misconduct such as failure to wear a mask in public or honking a horn, are examples of why categorical exceptions are overbroad and unreasonable.

A long history of abuse led to the Fourth Amendment's inclusion in our Constitution in 1791. The protection of one's home from the government is the "chief evil" that the language of the Fourth Amendment is directed towards. The "warrant requirement" is the principal protection imposed on the government. Without a warrant any entry is presumptively unreasonable. Exceptions are few and far between and must be "carefully delineated." The government is said to have a "heavy burden" when attempting to demonstrate "an urgent need" that might justify entry without a warrant. Few exceptions have made the grade. One, hot pursuit, is the subject of this appeal.

"As a matter of originalist scholarship, the critiques rest on strong ground. At the time of the Founding, prominent scholars and public opinion embraced the position that—*outside of active pursuit of a known felon*—the Crown could not forcibly enter a subject's domicile for purposes of search and seizure without a

specific warrant." The Original Fourth Amendment, Laura K. Donohue, 83 U. Chi. L. Rev. 1181, at 1188; 1228-29; 1235; 1239. (emphasis added)

Two subsequent cases have continued to allow the above, but only in felony cases. There is no precedent for what the State of California is asking the Court to do here. In fact, as will be discussed later, history, policy, this Court's precedent and good ole common sense would dictate rejection of the State's position. Rejection of the State's position can be grounded in the Founders' own words. The Original Fourth Amendment, Laura K. Donohue, 83 U. Chi. L. Rev. 1181-29.

In *Welsh v. Wisconsin*, 466 U.S. 740 (1984) the court was asked to "decide at least one aspect of the unresolved questions: whether, and under what circumstances, the Fourth Amendment prohibits the police from making a warrantless night entry of a person's home in order to arrest him for a nonjailable traffic offense." *Id.* at 741. Expansion, expansion of or whatever you want to call it was rejected "for nonjailable traffic offenses."

It is now time to rewrite the above paragraph with one change—delete the words "nonjailable traffic offense" and insert the words "misdemeanor offense" and again say "no, we are not going there either."

The State argues that probable cause to arrest for a misdemeanor, no matter how miniscule the violation, is sufficient to dispense with traditional Fourth Amendment protections. This Court has never

interpreted the Fourth Amendment that broadly in the past and should not do so now.

This Court was faced with a similar request in *Missouri v. McNeely*, 569 U.S. 141 (2013) when the State of Missouri asked the Court to hold the odor of alcohol alone provided sufficient cause to dispense with the requirement to obtain a warrant to take a citizen's blood. Setting the framework to answer the question the Court said:

> To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances. See *Brigham City v. Stuart*, 547 U.S. 398, 406, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006) (finding officers' entry into a home to provide emergency assistance "plainly reasonable under the circumstances"); *Illinois v. McArthur*, 531 U.S. 326, 331, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001) (concluding that a warrantless seizure of a person to prevent him from returning to his trailer to destroy hidden contraband was reasonable "[i]n the circumstances of the case before us" due to exigency); *Cupp*, 412 U.S. at 296, 93 S. Ct. 2000 (holding that a limited warrantless search of a suspect's fingernails to preserve evidence that the suspect was trying to rub off was justified "[o]n the facts of this case"); see also *Richards v. Wisconsin*, 520 U.S. 385, 391-96, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997) (rejecting a *per se* exception to the knock-and-announce requirement for felony drug investigations based on

> presumed exigency, and requiring instead evaluation of police conduct "in a particular case"). *We apply this "finely tuned approach" to Fourth Amendment reasonableness in this context because the police action at issue lacks "the traditional justification that . . . a warrant . . . provides." Atwater v. Lago Vista*, 532 U.S. 318, 347, n. 16, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001). *Absent that established justification, "the fact-specific nature of the reasonableness inquiry," Ohio v. Robinette*, 519 U.S. 33, 39, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996), *demands that we evaluate each case of alleged exigency based "on its own facts and circumstances." Go–Bart Importing Co. v. United States*, 282 U.S. 344, 357, 51 S. Ct. 153, 75 L. Ed. 374 (1931) (emphasis added).

The boundaries of the Fourth Amendment have a direct relation to the history that led to its creation. This Court wrote in *Boyd v. U.S.*, 116 U.S. 616, 625 (1886):

> In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of

> English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed '*the liberty of every man in the hands of every petty officer.*'[4] This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.
>
> 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' (emphasis added).

Later in *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967) this Court noted "[The Fourth Amendment] was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against invasions of 'the sanctity of a man's home and the privacies of life,' from searches under indiscriminate, general authority." *Id.* at 301 (quoting *Boyd*, 116 U.S. at 630).

The Court in *Payton v. New York*, 445 U.S. 573 (1980) also discussed the history of the drafting of the Fourth Amendment.

> It is thus perfectly clear that the evil the Amendment was designed to prevent was broader than the abuse of a general warrant. Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the

> Amendment. Almost a century ago the Court stated in resounding terms that the principles reflected in the Amendment "reached farther than the concrete form" of the specific cases that gave it birth, and "apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life."

Id. at 585 (quoting *Boyd*, 116 U.S. at 630).

In *U.S. v. Jones*, 565 U.S. 400, 404-05 (2012) again this Court took us back to the time of the revolution to emphasize the sanctity of one's home:

> *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765), is a "case we have described as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law' " with regard to search and seizure. *Brower v. County of Inyo*, 489 U.S. 593, 596, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989) (quoting *Boyd v. United States*, 116 U.S. 616, 626, 6 S. Ct. 524, 29 L. Ed. 746 (1886)). In that case, Lord Camden expressed in plain terms the significance of property rights in search-and-seizure analysis:
>
> > "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground,

> he must justify it by law." *Entick, supra*, at 817.

U.S. v. Jones, 565 U.S. at 400. *See also United States v. Jeffers*, 342 U.S. 48, 51 (1951) (The Fourth Amendment was intended to be a bulwark against such arbitrariness—arbitrariness that is inconsistent both with liberty and with the rule of law. "Over and again this Court has emphasized that the mandate of the Amendment requires adherence to *judicial processes*. . . . In so doing the Amendment does not place an unduly oppressive weight on law enforcement officers but merely interposes an *orderly procedure* under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended.") (emphasis added).

Justice Sotomayor wrote the following in *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018):

> "[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013). "At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Ibid.* (quoting *Silverman v. United States*, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961)). To give full practical effect to that right, the Court considers curtilage—"the area 'immediately surrounding and associated with the home'"—to be "'part of the home itself for Fourth Amendment purposes.'" *Jardines*, 569 U.S. at 6, 133 S. Ct. 1409 (quoting *Oliver v. United States*, 466 U.S. 170, 180, 104 S. Ct.

> 1735, 80 L. Ed. 2d 214 (1984)). "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *California v. Ciraolo*, 476 U.S. 207, 212-13, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986).

a. The Warrant Requirement

The warrant requirement was intended to provide a balance between the goals of law enforcement and protection of our personal liberties; to provide the "orderly procedure" which ensures "judicial impartiality that is necessary" to guard against such "arbitrariness." *Jeffers*, 342 U.S. at 51.

Later that same year in *McDonald v. United States*, 335 U.S. 451 (1948), the Court explained further:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. *Power is a*

> *heady thing; and history shows that the police acting on their own cannot be trusted.* And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

Id. at 455-56 (emphasis added).

We recognize that the warrant requirement is not absolute. There are exceptions to the rule. But, the question here is does this factual setting give rise to a "categorical" exception allowing the entry upon saying the magic words, or should the better and more reasoned approach be application of the "finely tuned approach" as the question was posed in *McNeely*?

> Absent that *established justification*, "the fact-specific nature of the reasonableness inquiry," *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996), demands that we evaluate each case of alleged exigency based "on its own facts and circumstances." *Go–Bart Importing Co. v. United States*, 282 U.S. 344, 357, 51 S. Ct. 153, 75 L. Ed. 374 (1931) (emphasis added).

McNeely, 569 U.S. at 150 (emphasis added).

So the question rephrased is "does probable cause to believe that a nonfelony has been committed have

the "traditional justification" that "a warrant provides" to forgo a review of the facts by an independent magistrate?

Only two criminal cases dealing with "hot pursuit" have been cited that support entry being made without a warrant: *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967) (entry allowed to search for an armed robber); *U.S. v. Santana*, 427 U.S. 38 (1976) (distribution and possession of heroin). Both of the above cases involved felony offenses. *Stanton v. Sims*, 571 U.S. 3 (2013), a civil case, did nothing more than acknowledge the Court has yet to definitively say it is permissible to enter a citizen's home based on an officer's subjective belief the suspect has committed a misdemeanor offense.

The common theme allowing the entry without a warrant through all the exigency based exceptions is that "While these contexts do not necessarily involve equivalent dangers, in each a warrantless search is potentially reasonable because 'there is compelling need for official action and no time to secure a warrant.'" *McNeely*, 569 U.S. at 160, quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978).

In *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984), a civil license suspension case, this Court said:

> It is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. And a principal protection against unnecessary intrusions into private dwellings is the warrant

> requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest. It is not surprising, therefore, that the Court has recognized, as a basic principle of Fourth Amendment law, that searches and seizures inside a home without a warrant are presumptively unreasonable (internal citations and quotation marks omitted).

Continuing, the Court in *Welsh* wrote:

> Consistently with these *long-recognized principles*, the Court decided in *Payton v. New York*, supra, that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances. At the same time, the Court declined to consider the scope of any exception for exigent circumstances that might justify warrantless home arrests, thereby leaving to the lower courts the initial application of the exigent-circumstances exception. Prior decisions of this Court, however, have emphasized that *exceptions to the warrant requirement are "few in number and carefully delineated*," *United States v. United States District Court*, supra, 407 U.S., at 318, 92 S. Ct. at 2137, and that the police bear a *heavy burden* when attempting to demonstrate an urgent need that might justify warrantless searches or arrests. Indeed, the Court has recognized only a few such emergency conditions, see, e.g., *United States v. Santana*, 427 U.S. 38, 42-43, 96 S. Ct. 2406, 2409–2410, 49 L. Ed. 2d 300 (1976) (hot pursuit of a fleeing felon);

> *Warden v. Hayden*, 387 U.S. 294, 298-99, 87 S. Ct. 1642, 1645-46, 18 L. Ed. 2d 782 (1967) (same); *Schmerber v. California*, 384 U.S. 757, 770-71, 86 S. Ct. 1826, 1835-36, 16 L. Ed. 2d 908 (1966) (destruction of evidence); *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S. Ct. 1942, 1949, 56 L. Ed. 2d 486 (1978) (ongoing fire), and has actually applied only the "hot pursuit" doctrine to arrests in the home, see Santana, supra.

Welsh, 466 U.S. at 748-49.

Justice Jackson said it best in his concurrence in *McDonald v. U.S.*, 335 U.S. 451, 459 (1948) (Jackson, J., concurring) "Whether there is reasonable necessity for a search without waiting to obtain a warrant 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." This Court has weighed those competing considerations before. See *Welsh v. Wisconsin*, 486 U.S. at 753 (We "hold 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.") "This is the best indication of the State's interest in precipitating an arrest, and is one that can be easily identified both by the courts and by officers faced with a decision to arrest." *Id.* at 754. This Court observed that even the dissenters in *Payton* "recognized the importance of the felony limitation on such arrests." ("The felony requirement guards against abusive or arbitrary enforcement and ensures that invasions of the

home occur *only* in case of the *most serious crimes*.") *Id.* at footnote 12 (emphasis added).

That is important because if lines inevitably have to be drawn, they should be clearly identifiable. Thus, far this Court has "drawn a line" at the front door when it comes entry without a warrant for "minor" offenses. The State has offered nothing to justify erasing that line for a misdemeanor offense.

II. Modern electronic warrant procedures are legal, efficient, effective and should be encouraged. Restrictions to warrantless entries should be the path moving forward. Judicial permission prior to entry should be encouraged and not diminished.

a. The availability of an electronic warrant process is relevant to determining whether a per se rule is overbroad.

Supreme Court cases have historically recognized that the warrant requirement is "an important working part of our machinery of government," not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge v. New Hampshire*, 403 U.S. 443, 481, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). In *Riley v. California*, 134 S. Ct. 2473, 2493, 189 L. Ed. 2d 430 (2014) the court noted that recent technological advances have made the process of obtaining a warrant itself more efficient, thus reducing

the number of incidents where lack of obtaining a warrant can be constitutionally excused.

In *Missouri v. McNeely* this court stated that: In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. *Missouri v. McNeely*, 569 U.S. 141, 152, 133 S. Ct. 1552, 1561, 185 L. Ed. 2d 696 (2013) (emphasis added). This same principle should apply when seeking to enter a home.

The Court in *McNeely* noted that the use of an electronic warrant process (or "e-Warrants") was prevalent, and it determined that the need to create additional exceptions to the Fourth Amendment warrant requirement was unnecessary: Well over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing. And in addition to technology-based developments, jurisdictions have found other ways to streamline the warrant process, such as by using standard-form warrant applications for drunk driving investigations. We by no means claim that telecommunications innovations have, will, or should eliminate all delay from the warrant-application process. But technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of

exigency. *Missouri v. McNeely*, 569 U.S. 141, 154-55, 133 S. Ct. 1552, 1562-63, 185 L. Ed. 2d 696 (2013) (footnotes omitted).

b. The electronic warrant process is now available in virtually every state, rendering the expansion of warrantless entries into the home for *every* misdemeanor offense unnecessary and overbroad.

Since *McNeely* was decided in 2013, the number of states that now include language (either in legislation or in court rules) allowing the issuance of warrants based on telephonic, video, or electronic affidavits has grown from a simple majority to at least forty-five. *Improving DUI System Efficiency: A Guide to Implementing Electronic Warrants*, Justice Management Institute, Executive Summary p. ii, https://www.responsibility.org/wp-content/uploads/2018/04/FAAR_3715-eWarrants-Interactive-PDF_V-4.pdf?pdf=eWarrants_Implementation_Guide (last accessed December 8, 2020).

The pre *McNeely* days are in the rear view mirror. No longer do officers have to deal with "time-consuming formalities." They are now equipped with software that virtually does it all. Cloudgavel says "Law enforcement officers can now get an arrest warrant approved in minutes as opposed to hours. The value of eWarrants is a game-changer for the criminal justice system and the public who depend on it." https://cloudgavel.com/.

AnywhereWARRANT was created for the mobile users to create any Ewarrant, arrest or search, including a blood search warrant from anywhere. It touts that it "is entirely a virtual warrant system, including browser embedded secure video conference. The software also allows law enforcement to contact judiciaries while still in the field, from any workstation or tablet using the internet." https://www.palasys.com/anywhere-ewarrant/.

Officers do not have to worry if a court officer or judge has gotten their electronic warrant request if they are using the Kofax system. https://www.kofax.com/About/Press-Releases/2017/Kofax-TotalAgility-Digitally-Transforms-Search-Warrant-Process. "Court clerks and judges are automatically notified via email when a new warrant is awaiting review. If a submission in a clerk's queue is not processed within 10 minutes of receipt, the clerk receives a second email alert. Similarly, judges are given 25 minutes to review and approve or deny a warrant. Once this time period has elapsed, the job is automatically assigned to a secondary judge who is notified by email and given 10 minutes to complete the review."

III. The risk of great bodily harm or death that can occur to law enforcement and innocent bystanders, when a forceful and perhaps unannounced warrantless entry into the home occurs, outweighs the benefits of forgoing the warrant overview process.

Consider that "When Americans are concerned about their personal security, they buy firearms. Such concerns have been rampant since March, initially due to the onset of the COVID-19 pandemic and then the social unrest in June that followed George Floyd's killing. Our estimates indicate that almost three million more firearms have been sold since March than would have ordinarily been sold during these months. Half of that increase occurred in June alone. This pattern highlights an important potential consequence that may result from this tumultuous period: more firearms in the hands of private citizens." https://www.brookings.edu/blog/up-front/2020/07/13/three-million-more-guns-the-spring-2020-spike-in-firearm-sales/; https://www.foxnews.com/us/first-time-gun-owners-safety-protection; Florida's governor drafts laws that would allow people to shoot looters. https://nypost.com/2020/11/11/florida-governor (First-time gun ownership skyrockets amid riots, increased violence across country: 'You can't really be too safe').

The risk to innocent parties during police entries into the home are not rare. See *Cops do 20,000 no-knock raids a year. Civilians often pay the price when they go wrong.* https://www.vox.com/2014/10/29/7083371/

swat-no-knock-raids-police-killed-civilians-dangerous-work-drugs. As stated in that article:

> "Advocates say these cases highlight racial bias in the criminal justice system, particularly when the victim is a police officer. But they also highlight the bizarre nature of no-knock raids, which have been criticized for causing unnecessary confusion and endangering innocent adults and children."

American citizens want *less* risk of harm during citizen-police encounters at the threshold of their homes, not more. Society has demarked the type of behavior for which hot pursuit may be acceptable, and that line is marked with the classification "felony."

Due to the increased protections afforded to a citizen in their home, many states authorize the use of force in its defense. Under English common law, a person had a right to defend their home as it was their castle. The Castle Doctrine carried over into the colonies and continues to exist in each state. Findlaw Castle Doctrine Overview, March 28, 2019, https://criminal.findlaw.com/criminal-law-basics/castle-doctrine-overview.html. The Castle Doctrine is defined as "an exception to the retreat rule allowing the use of deadly force by a person who is protecting his or her home and its inhabitants from attack, esp. from a trespasser who intends to commit a felony or inflict serious bodily harm." Black's Law Dictionary 10th Edition for the Iphone and Ipad. Version 1.4. A citizen in their home is not required to retreat any further before resorting to the use of force. The Castle Doctrine allows a citizen to

use force to repel an attack on their home, even resorting to deadly force.

While every state has the Castle Doctrine, over half of them have Stand Your Ground statutes. These statutes allow a person to stay where they are and resort to force, even deadly force, to repel a threat of harm. When a Stand Your Ground defense is in play, there is no duty to retreat before resorting to the use of force. Stand Your Ground allows a citizen who is lawfully in a place they have a right to be may stand their ground and use force in their defense. Twenty-six states have a Stand Your Ground defense. Ala. Code §13A-3-23; Alaska Stat. §11.81.335; Ariz. Rev. Stat. §13-411; Fla. Stat. Ch. §776.013; Ga. Code §16-3-23.1; Idaho Code §19-202A; Iowa Code §704.1; Ind. Code §35-41-3-2; Kan. Stat. Ann. §21-5230; Ky. Rev. Stat. §503.050; La. Rev. Stat. §14:19; Mich. Comp. Laws §780.972; Miss. Code Ann. §97-3-15; Mo. Rev. Stat. §563.031; Mont. Code Ann. §45-3-110; Nev. Rev. Stat. §200.120; N.H. Rev. Stat. Ann. §627:4; N.C. Gen. Stat. §14-51.3; Okla. Stat. Tit. 21 §1289.25; 18 Pa.C.S. §505; S.C. Code Ann. §16-11-440; S.D. Codified Laws §22-18-4; Tenn. Code Ann. §39-11-611; Tex. Penal Code §9.31; Utah Code Ann. §76-2-402; Wyo. Stat. §6-2-602. With the presence of Stand Your Ground laws, it is more likely that the perception of an unauthorized entry into the home will result in the use of force.

In addition to Stand Your Ground laws, numerous states have created a presumption of a reasonable fear of imminent death or great bodily harm or presumption of self-defense when force is used in the citizen's

home. When a citizen in their home resorts to the use of deadly force, these states presume the decision was necessary and reasonable. Ala. Code §13A-3-23; Alaska Stat. §11.81.335; Ariz. Rev. Stat. §13-411; Fla. Stat. Ch. §776.013; Ga. Code §16-3-23.1; Idaho Code §19-202A; Iowa Code §704.1; Ind. Code §35-41-3-2; Kan. Stat. Ann. §21-5230; Ky. Rev. Stat. §503.050; La. Rev. Stat. §14:19; Mich. Comp. Laws §780.972; Miss. Code Ann. §97-3-15; Mo. Rev. Stat. §563.031; Mont. Code Ann. §45-3-110; Nev. Rev. Stat. §200.120; N.H. Rev. Stat. Ann. §627:4; N.C. Gen. Stat. §14-51.3; Okla. Stat. Tit. 21 §1289.25; 18 Pa.C.S. §505; S.C. Code Ann. §16-11-440; S.D. Codified Laws §22-18-4; Tenn. Code Ann. §39-11-611; Tex. Penal Code §9.31; Utah Code Ann. §76-2-402; Wyo. Stat. §6-2-602.

With a presumption of fear of death or great bodily injury, it increases the chances force will be used and an officer can be injured. If an officer rushes into a house without the knowledge of those inside that the intruders are police "acting lawfully," those citizens that are present may believe they are justified in resorting to deadly force. Since deadly force can be used, it puts officers at risk of injury and even death. The risk of harm to officers can be reduced by limiting their entry into the home to those crimes which are the most serious and harmful to society.

For those states not presuming great bodily injury or death, the self-defense statutes look at the subjective belief of the citizen in responding to the force. Most self-defense statutes allow a citizen to defend themselves when he or she reasonably believes it is

necessary to protect themselves. It becomes a subjective analysis of what force the defender believed was being used against them. In the heat of the moment, with people rushing into your home, it would be easy to believe you are subject to harm. When a citizen believes they are subject to harm, they can resort to the use of force, particularly deadly force. The authorized use of deadly force risks the lives and wellbeing of officers. See "Lawful but awful": US self-defense laws questioned after Breonna Taylor's death; The U.S. legal system evolved to protect police and civilians alike who accidentally kill or injure innocent bystanders in the course of self-defense. https://www.usatoday.com/story/news/investigations/2020/09/25/breonna-taylors-death-raises-questions-self-defense-laws/3529543001/ (last accessed December 7, 2020).

The year 2020 has brought this country an expansion of criminal offenses. Consider the recent mask and other mandates enacted by states. In Oregon, refusal to wear a mask may result in a jail sentence. *Criminal Charges and fines 'last resort' for violating Oregon's Social Restrictions to slow Coronavirus*, The Oregonian, November 17, 2020. Reporting of these crimes is being requested by government officials. https://www.washingtontimes.com/news/2020/apr/22/americans-are-asked-to-snitch-on-each-other-during/; https://www.nytimes.com/2020/04/17/smarter-living/neighbors-not-practicing-social-distancing-heres-what-to-do.html; https://www.texasmonthly.com/politics/coronavirus-reporting-neighbors-violations/. One might think that good ole common sense would dictate that it would not be a good idea to

bust through someone's front door to enforce such a rule but without clear guidance to the contrary, it could happen.

IV. A workable rule is available to guide law enforcement: *for nonfelony hot pursuits, get a warrant before entering the home.* The only exception should be where the facts establish that loss of life or limb is at risk.

A working rule to guard against the forceful entry of the home, for a petty crime where the risk of harm far exceeds the seriousness of the offense, is simple. Just as this Court wrote before when dealing with the warrantless search of a cell phone. "—get a warrant." *Riley v. California*, 573 U.S. 373, 403, 134 S. Ct. 2473, 2495, 189 L. Ed. 2d 430 (2014)

Unless there are exigent circumstances, no just cause exists to enter a house without a warrant to arrest someone for a nonviolent, nonfelony offense.

CONCLUSION

Amicus would argue the great weight of authority requires that, before entry into a person's home based on the suspected commission of a misdemeanor or lesser offense, the officer must let an independent magistrate make that call. The protections and the potential for disaster are too great for a crime that small.

In conclusion Amicus would argue that if there is another line to be drawn other than surrounding one's home it would be that no misdemeanor offense should justify dispensing with the warrant requirement thus erasing that line. Litigation regarding what is or isn't "hot pursuit"; what is or is not a "true medical emergency" or if there are exigent circumstances should be left to the felony cases.

> Courts bear the responsibility to set limits to ensure that the goals of law enforcement and peace keeping do not automatically override Fourth Amendment protections afforded to the home.

Ball v. United States, 185 A.3d 21, 31 (D.C.App.2018), Easterly, Associate Judge.

If the legislature in any state has determined that a person's only misdeed rises only to the level of a misdemeanor offense, then we ought not throw caution and the constitution to the wind before entering his home. That, in and of itself, ought to be enough to draw a line prohibiting entry.

For the forgoing reasons, this Court should reverse the decision of the Court of Appeal of the State of California, First Appellate District.

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