No. 20-18

IN THE

Supreme Court of the United States

ARTHUR GREGORY LANGE,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

With only "jealously and carefully drawn" exceptions, the Fourth Amendment prohibits a police officer's warrantless entry into a home as "unreasonable *per se*." *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (quotation marks omitted). Yet with little analysis, the decision below held that when an officer tries to arrest someone for a misdemeanor offense—*any* misdemeanor offense—and that individual enters a private home instead of yielding to the arrest, an officer may *always* pursue that person into the home, without pausing to obtain a warrant, in order "to prevent the suspect from frustrating the arrest which had been set in motion." Pet. App. 18a. The decision below accords "no significance," Pet. App. 20a, to the gravity of the

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

offense for which the officer seeks to arrest, and it requires no particular showing of exigent circumstances—simply the existence of "hot pursuit" in an attempt to make an arrest. As Petitioner argues, that categorical rule is contrary to Fourth Amendment history, precedent, and fundamental principles, and the decision below should be reversed.

Among its other deficiencies, the decision below is grossly at odds with the common law protections from warrantless home intrusion that the Framers and ratifiers of the Fourth Amendment adopted that Amendment to preserve. As this Court has recognized, "[t]he common law may, within limits, be instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable," *Steagald v. United States*, 451 U.S. 204, 217 (1981) (footnote omitted), a matter "obviously relevant, if not entirely dispositive," when assessing a search's reasonableness, *Payton v. New York*, 445 U.S. 573, 591 (1980) (footnote omitted); *see Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001) ("we are guided by 'the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing'" (quoting *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995))).

Indeed, this Court has sometimes said that it "inquire[s] first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed," and only if that inquiry "yields no answer" does the Court proceed to evaluate the search or seizure under a more general standard of "reasonableness." *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999); *see Virginia v. Moore*, 553 U.S. 164, 168 (2008) ("In determining whether a search or seizure is unreasonable, we begin with history. We look to the statutes and common law of the

founding era to determine the norms that the Fourth Amendment was meant to preserve.").

Importantly, the Court "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Tennessee v. Garner*, 471 U.S. 1, 13 (1985) (quoting *Payton*, 445 U.S. at 591 n.33). Because "[t]he common-law rules governing searches and arrests evolved in a society far simpler than ours," marked by conventions of law enforcement and criminal procedure that are entirely foreign today, the "significance accorded to" common law rules "must be kept in perspective." *Steagald*, 451 U.S. at 217 n.10. The common law does not always "provide a simple answer directly transferable to our system," *United States v. Watson*, 423 U.S. 411, 442 (1976) (Marshall, J., dissenting), and some of its rules become "distorted almost beyond recognition when literally applied," *Garner*, 471 U.S. at 15. Thus, a mechanical adoption of those rules that ignores "sweeping change in the legal and technological context," *id.* at 13, risks *undermining*, rather than upholding, "the norms that the Fourth Amendment was meant to preserve," *Moore*, 553 U.S. at 168; *see Kyllo v. United States*, 533 U.S. 27, 34 (2001) (accommodation of Founding-era rules to new conditions is sometimes necessary to "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted").

With respect to warrantless intrusions into the home to make an arrest, however, adherence to the common law safeguards prevailing at the Founding is justified—indeed, imperative.

First, the rules governing such intrusions were "definitively settled by the common law at the time the Fourth Amendment was adopted." *Payton*, 445 U.S. at

598. "From earliest days, the common law drastically limited the authority of law officers to break the door of a house to effect an arrest." *Miller v. United States*, 357 U.S. 301, 306-07 (1958). Although "the common law recognized some authority in law officers to break the door of a dwelling to arrest for *felony*," *id.* at 307 (emphasis added), a category strictly confined to the most serious of crimes, the law granted that authority for lesser offenses only in certain well-defined circumstances: where a serious assault might ripen into a felony because the victim was at risk of dying, or where public safety required the immediate suppression or prevention of a violent "affray" or "breach of the peace." *See infra* Part I. All of these rules were based on specific exigencies that made the delay of securing a warrant untenable. And absent those exigent circumstances, forcibly entering a home without a warrant to make an arrest was unquestionably "regarded as an unlawful search or seizure under the common law." *Wyoming*, 526 U.S. at 299.

Second, while the legal context surrounding warrantless arrests has changed since the common law rules were formulated, that shift militates in *favor* of maintaining the protections afforded by those traditional rules. Since the Fourth Amendment's ratification, the development of professional police forces and investigative law enforcement has transformed the nature of policing, making armed state officers a more ubiquitous and intrusive presence than in eighteenth-century England or America. Meanwhile, the legal requirements for warrantless arrests have diminished, giving those officers discretionary authority far beyond what the Framers could have conceived of. *See infra* Part II. To the extent, therefore, that "the common-law rules of arrest developed in legal contexts that substantially differ" from the present, *Payton*, 445 U.S. at

591, those differences only provide more reason to adhere to the common law's limits on warrantless entry into the home to make an arrest.

Finally, this Court has "long recognized the relevance of the common law's special regard for the home to the development of Fourth Amendment jurisprudence." *Id.* at 597 n.45; *e.g.*, *Weeks v. United States*, 232 U.S. 383, 390 (1914) ("The maxim that every man's house is his castle, is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen." (quotation marks omitted)). "The common law was the colonists' ally in their struggle against [the] writs of assistance . . . . that precipitated the Fourth Amendment," *Payton*, 445 U.S. at 608 (White, J., dissenting); *see* James Otis, *Against Writs of Assistance* (1761) ("one of the most essential branches of English liberty is the freedom of one's house"), and the history of that struggle has made it "axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,'" *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) (quoting *United States v. U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 313 (1972)).

For all these reasons, this Court should embrace the common law protections against warrantless home entry that prevailed at the Founding. Fidelity to those safeguards demands rejecting the categorical rule adopted below and reaffirming that "[a]ny warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency." *Kentucky v. King*, 563 U.S. 452, 470 (2011).

ARGUMENT

I. Founding-Era Common Law Prohibited Forcibly Entering Homes to Make Warrantless Arrests, Except in Defined Circumstances Based on Specific Exigencies.

"At the time of the framing, common law was central to nearly all areas of Anglo-American law." Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 Wake Forest L. Rev. 239, 281 n.123 (2002).[2] In particular, "[c]ommon-law criminal procedure occupied a unique position in English and American political thought," *id.*, and "framing-era sources . . . give essentially consistent accounts of the more salient aspects of criminal procedure," *id.* at 282.

Police officers were "unknown to the common law," *State v. Freeman*, 86 N.C. 683, 684 (1882), which developed its rules of arrest before the creation of professional police forces, William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771, 775 n.6 (1993). "Law enforcement in colonial times was," instead, "'a business of amateurs.'" Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 830 (1994) (quoting Lawrence M. Friedman, *Crime and Punishment in American History* 27 (1993)). "Public order was maintained by a loose system of sheriffs, constables, and night watchmen," with the constable carrying "the main burden of law enforcement." *Id.* at 830. The constable "was usually a low status 'freeman' pressed into

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[2] The term "common law" is here used to refer to "the whole body of law extant *at the time of the framing*." *Atwater*, 532 U.S. at 327 (emphasis added).

a tour of duty for a year," serving part-time without salary. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 620 (1999).

This skeletal law enforcement apparatus differed from modern practice in both structure and function. "The duties of constables . . . never developed into the job of investigative 'policing' with which modern law enforcement agencies are charged." Steiker, *supra*, at 831. Instead, "[c]onstables were expected to preserve order by," among other things, "responding to 'affrays' (fights) and other disturbances . . . but they were not otherwise expected to investigate crime." Davies, *Recovering*, *supra*, at 621-22. As a result, "framing-era common-law standards for warrantless arrests left little room for governmental investigation of crime," and the constable "was regarded primarily as a 'ministerial' officer who carried out the commands of justices of the peace, rather than as a law enforcement officer who ferreted out crime on his own initiative." Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law,"* 77 Miss. L.J. 1, 181-82 (2007).

The "division of crimes . . . into felonies and misdemeanors" played a central role in the law of warrantless arrest, as did the further subdivision of misdemeanors "into such as are breaches of the peace, and such as are not." Horace L. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 568 (1924).[3] "The distinction between felonies and lesser offenses was an important factor in common-law arrests because common law permitted warrantless arrests on the basis of

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[3] Felony was similarly divided into treason- and non-treason offenses, but "there were no special rules" regarding treason that are relevant here. Wilgus, *supra*, at 568.

'necessity,'" Davies, *Correcting*, *supra*, at 58-59, and constables "had the duty (not merely the permission) by law to arrest *felons, and suspected felons* before conviction or indictment, and were subject to severe penalties for neglecting such duties," Wilgus, *supra*, at 560 (emphasis added); *see id.* at 685 (the reason for special rules concerning warrantless felony arrests—including forcible entry—was "the public necessity and the strong motive the offender has to escape"). For more minor offenses, by contrast, arrests were often not made at all. Instead, "the summons was the rule." Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L. Rev. 221, 258 (1989).

Significantly, "felony" was a far narrower category at common law than it typically is today: among the serious crimes that were not felonies were "kidnapping," "false imprisonment," "forcible and violent entry," "mayhem," "riots and routs," "obstructing justice," and "assault . . . even if made with the intent to rob, murder, or rape." Wilgus, *supra*, at 572-73; *see* "Felony," Giles Jacob, *A New Law Dictionary* (1739) (listing as felonies treason, murder, homicide, rape, burning of houses, burglary, robbery, and breach of prison). "[V]irtually all felonies were punishable by death," *Garner*, 471 U.S. at 13, and "[n]o crime was considered a felony which did not occasion a total forfeiture of the offender's lands or goods or both," *Kurtz v. Moffitt*, 115 U.S. 487, 499 (1885); *see* 4 William Blackstone, *Commentaries on the Laws of England* 94 (1791) ("Felony . . . comprises every species of crime, which occasioned at common law the forfeiture of lands or goods. This most frequently happens in those crimes, for which a capital punishment either is or was

liable to be inflicted.").[4]

Accordingly, the authority of peace officers to arrest without a warrant for misdemeanors was far narrower than their authority to arrest for felonies. While there was some divergence in views about the range of misdemeanors that justified warrantless arrest, *see Atwater*, 532 U.S. at 327-28, and while statutes extended that power to address specific problems, such as suspicious "nightwalkers," *see id.* at 333-34, the primary purpose of warrantless misdemeanor arrests was to maintain public order by preventing and subduing breaches of the peace. *See Carroll v. United States*, 267 U.S. 132, 157 (1925) ("The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace," whereas warrantless felony arrests were aimed at "the due apprehension of criminals charged with heinous offenses.").

"During the framing era, Americans drew their understanding of common-law criminal procedure primarily from the leading treatises—especially Sergeant William Hawkins's *A Treatise of the Pleas of the Crown* and Sir Matthew Hale's *The History of the Pleas of the Crown*—as well as from a variety of derivative works, including especially justice of the peace manuals." Davies, *Correcting*, *supra*, at 72-73. Crucially, these and other common law authorities operated on the understanding that "an officer lacked authority to arrest unless it was expressly recognized in the law books." Davies, *Case Study*, *supra*, at 303; *see, e.g.*, *Entick v. Carrington*, 95 Eng. Rep. 807, 817 (C.P. 1765) ("if this is law it would be found in our books"). The "grandfather" of the justice of the peace manuals,

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[4] Quotations from Founding-era sources have been updated to modern American spelling throughout this brief.

Davies, *Case Study*, *supra*, at 279 n.121, expressed the sentiment this way: "The Liberty of a Man is a thing specially favored by the Common Law of this Land; and therefore if any [of] the King's Subjects shall imprison another without sufficient Warrant of him, or his Law, the party [ag]grieved may have his Action, and shall recover Damages." Michael Dalton, *The Country Justice* 446 (1690).

The principle that arrest authority did not extend beyond affirmatively recognized categories was particularly true for extreme arrest measures such as forcible entry, or "breaking doors."[5] As explained by Richard Burn in "[t]he most influential of the English justice of the peace manuals during the latter eighteenth century," Davies, *Case Study*, *supra*, at 279 n.121, "[a]s to the case of breaking open doors, in order to apprehend offenders, it is to be observed, that the law doth never allow of such extremities but in cases of necessity," Richard Burn, *The Justice of the Peace, and Parish Officer* 46 (1758). Burn's admonition was repeated, word-for-word, in numerous other works, including prominent Founding-era manuals published in Pennsylvania and New Jersey. *See Conductor Generalis* 29 (N.J. 1764) (hereinafter *N.J. Conductor Generalis*); *The Conductor Generalis* 27 (Pa. 1792) (hereinafter *Pa. Conductor Generalis*). In keeping with that maxim, common law authorities permitted warrantless entry by peace officers only in specifically enumerated

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[5] What constituted "breaking" was "the same as in burglary," Wilgus, *supra*, at 806, and included, among other things, "lifting up the latch of a door, or unloosing any other fastening which the owner has provided," Blackstone, *supra*, at 226; *see* 1 Matthew Hale, *History of the Pleas of the Crown* 551-52 (1736) (apart from "actual breaking," which included "unlatching the door" and "opening the casement" of a window, "every one, that enters into another's house against his will . . . doth in law break the house").

circumstances. *See, e.g.*, 2 William Hawkins, *A Treatise of the Pleas of the Crown* 138 (1787) ("where a person authorized to arrest another who is sheltered in a house, is denied quietly to enter into it, in order to take him; it seems generally to be agreed, that he may justify breaking open the doors *in the following instances*" (emphasis added)); Burn, *supra*, at 46 (same); *N.J. Conductor Generalis*, *supra*, at 29 (same); *Pa. Conductor Generalis*, *supra*, at 27 (same). It was "every day's practice" in the courts to hold officers to account for "breaking open doors where by law it is not justifiable, and there is no plausible excuse for doing it." 2 Hawkins, *supra*, at 216.

Examining the specific "instances" in which warrantless entry was permitted at common law—as well as the *reasons* why the common law allowed it—reveals that a categorical rule authorizing "hot pursuit" entry into homes to arrest for any crime, regardless of the gravity of the offense or the exigencies of the situation, is at odds with the principles familiar to the Framers and ratifiers of the Fourth Amendment.

A. Pursuit of Felons

From the start, the authority to enter a home to make an arrest was tied to felonies. A fifteenth-century Year Book (a precursor to modern law reports), noted that for "a felony, or suspicion of felony, one may break into the dwelling house to take the felon." Wilgus, *supra*, at 800 (citing Y.B. 13 Ed. 4, 9a (1455)). Later, Edward Coke's *Institutes of the Laws of England* similarly restricted forcible entry to felony arrests, and only in limited circumstances. Coke took the narrow view that only upon indictment for felony would even a warrant authorize officers to forcibly enter homes to arrest the suspect. 4 Edward Coke, *Institutes of the Laws of England* 176 (1797). Without an indictment, Coke permitted home entry in only one

exigent circumstance: "upon hue and cry" of a felony victim, such as one who was "slain" or "robbed," in which case "the king's officer that pursueth may (if denial be made) break a house to apprehend the delinquent." *Id.* at 177.

In other situations, Coke wrote, even if an arrest warrant had issued based on knowledge or suspicion of a felony, "neither the Constable, nor any other can break open any house for the apprehension of the party." *Id.*; *see id.* ("for justices of peace to make warrants upon surmises, for breaking the houses of any subjects to search for felons . . . is against Magna Carta"). Coke's account of "the common-law justifications for felony and less-than-felony warrantless arrests" was "repeated with virtually no change of substance in the criminal procedure treatises and manuals used in framing-era America," Davies, *Correcting*, *supra*, at 61, and the *Institutes* was itself "read in the American Colonies by virtually every student of the law," *Klopfer v. North Carolina*, 386 U.S. 213, 225 (1967).

Matthew Hale, the one-time Chief Justice of the King's Bench, wrote the influential *History of the Pleas of the Crown*, "posthumously published in 1736." *Atwater*, 532 U.S. at 330. While Hale's view on warrantless arrests was more permissive than Coke's, he too permitted forcible entry only when necessary to arrest for felony, not for a lesser offense. Hale wrote that where a person was known or believed to have committed a felony, a warrantless arrest was permissible and, to effectuate that arrest, an officer could "break open doors to take the felon," if denied entrance. 2 Matthew Hale, *History of the Pleas of the Crown* 90 (1736). Significantly, under Hale's rule, "there must be a felony in fact done," as well as "just grounds of suspicion" that the arrestee committed it. *Id.* at 92. In that situation,

"if the supposed offender fly and take house, and the door will not be opened upon demand of the constable and notification of his business, the constable may break open the door, though he have no warrant." *Id.*

William Hawkins's "widely read" treatise, *see Atwater*, 532 U.S. at 331, also addressed "in what cases it is lawful to break open doors, in order to apprehend offenders." 2 Hawkins, *supra*, at 138. Hawkins began with the "premise" that "the law doth never allow of such extremities but in cases of necessity." *Id.* (footnote omitted). Accordingly, if a constable sought to arrest someone "sheltered in a house" but was denied entrance, "he may justify breaking open the doors" in specific enumerated instances, most of which involved judicial authorization. *See id.* at 138-39. One exception was "[w]here one *known* to have committed a treason or felony" was "pursued either with or without a warrant." *Id.* at 139 (emphasis added) (footnote omitted). But Hawkins added that "where one lies under a probable suspicion only, and is not indicted, it seems the better opinion at this day, That no one can justify the breaking open doors in order to apprehend him." *Id.* (footnote omitted).

William Blackstone, "the preeminent authority on English law for the founding generation," *District of Columbia v. Heller*, 554 U.S. 570, 593-94 (2008) (quotation marks omitted), also linked forcible entry to exigent circumstances arising from felony arrests. While Blackstone wrote his *Commentaries on the Laws of England* "as an introductory overview for law students, not as a detailed treatise," Davies, *Case Study*, *supra*, at 437 n.119, that work is "usually a satisfactory exposition of the common law of England," *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1969 (2020) (quotation marks omitted). According to Blackstone, peace officers acting without a warrant could arrest known

felons and persons whom they suspected with probable cause of a "felony actually committed, or a dangerous wounding whereby felony is likely to ensue." Blackstone, *supra*, at 292 (footnote omitted). "[F]or *that* purpose," Blackstone continued, an officer was "authorized (as upon a justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken." *Id.* (emphasis added). A felony committed in an officer's presence would likewise "justify breaking open doors upon following such felon." *Id.* at 293. Notably, although Blackstone approved of warrantless arrests in a broader range of situations, *e.g.*, *id.* at 292, he did not sanction the breaking of doors for those lesser offenses.

Prominent justice of the peace manuals published in England and America likewise permitted warrantless entry when necessary for a felony arrest only. As William Sheppard explained, the right to make forcible entries for that purpose grew out of constables' unconditional obligation to apprehend felons:

> It is the duty of these Officers, to do their utmost endeavor, with all diligence, to find out, and apprehend Felons: And if there shall be herein any neglect found in them . . . they may be grievously punished. *And for this cause* they may, and they must *after a Felony is done*, either by, or without the Warrant of some Justice of Peace, make diligent search for him that did it, . . . *for it is the chief part of their Office to repress Felony*, and albeit it be a man's house he doth dwell in, which they do suspect the Felon to be in, . . . if the owner of the house, upon request, will not open his doors . . . it seems the Officer may break open the doors upon him to come in to search.

William Sheppard, *The Offices of Constables* 15 (1657)

(emphasis added). A manual published in Virginia set forth the same principles. *See* George Webb, *The Office and Authority of a Justice of Peace* 145 (1736) ("Officers may break open any House, to take a Felon, or One suspected of Felony."); *id.* at 93 ("He is bound, by his Office, to endeavor the Taking of Felons.").

In sum, it was universally recognized at common law that warrantless entry into homes was permissible only when necessary to arrest felons, the most serious of criminals. This rationale did not extend to capturing lesser offenders—with specific exceptions discussed below.

B. "Dangerous Woundings" Creating a Risk of Felony

The common law also permitted homes to be forcibly entered in a special situation linked to felonies: when an attack resulted in a dangerous wound from which the victim might die, potentially transforming what would otherwise be a misdemeanor into a felony.

Coke, for example, permitted the breaking of doors to arrest in only one situation where a felony had not occurred: a serious assault that could ripen into a felony because the victim was "wounded, so as he is in danger of death." 4 Coke, *supra*, at 177. Hawkins likewise permitted warrantless entry "[w]here one known to have . . . given another a dangerous wound, is pursued either with or without a warrant, by a constable." 2 Hawkins, *supra*, at 139. So did various justice of the peace manuals. *See* Burn, *supra*, at 46; *N.J. Conductor Generalis*, *supra*, at 29. In such cases, apprehension of the offender was permitted until it was clear whether the victim would die—and thus whether a felony had been committed. *See* 2 Edward Coke, *Institutes of the Laws of England* 52 (1681) ("If a man woundeth another dangerously, any man may arrest

him . . . until it may be known whether the party wounded shall die thereof, or no.").

This "dangerous wounding" rule was essentially an addendum to the authority for warrantless felony arrests—an extension based on practical necessity. "If there was only a wounding, but not an actual homicide . . . that would not have constituted a felony at common law," but "murder and voluntary manslaughter were felonies." Davies, *Correcting*, *supra*, at 59-60. "The difficulty, in the immediate aftermath of an attack, was determining whether the victim would die. Thus, the common law provided a specific rule for a 'dangerous wounding' that permitted at least a temporary warrantless arrest to determine whether or not there was a felony." *Id.* at 60. A guidebook for constables published in colonial New Jersey explained this rationale plainly: "if upon your view any person appears to be dangerously wounded, and the party wounded charges any person present, you certainly ought to detain him, as the delay of a warrant may be the escape of a murderer." Saunders Welch, *Essay on the Office of Constable* 115 (reprinted in *N.J. Conductor Generalis*, *supra*, at 111); *see also Mayo v. Wilson*, 1 N.H. 53, 56 (1817) ("If one man dangerously wound another, any person may arrest him, that he be safely kept, till it be known whether the person shall die or not.").

Based on this rule, officers could enter a home without a warrant to apprehend someone who had inflicted a dangerous wound—in other words, a potential killer. Blackstone made clear the underlying justification, explaining that doors could be broken "in case of felony actually committed, *or a dangerous wounding whereby felony is likely to ensue*." Blackstone, *supra*, at 292 (emphasis added) (footnote omitted). Hale similarly wrote that a constable could make forcible entry

in cases where "a felony is not yet committed, but [is] in danger to be committed." 2 Hale, *supra*, at 94. Thus, if the victim of a wounding "is in danger of death," and the perpetrator "flies and takes his house, and shuts the doors and will not open them," the constable "may break the doors of the house to take him." *Id.*

The common law's special rule for dangerous woundings was therefore an outgrowth of its treatment of warrantless felony arrests. Intimately tied to violence and threat of death, the rule was justified by a unique exigency.

C. "Hue and Cry" to Capture Felons

The common law recognized "yet another species of arrest . . . and that is upon an *hue* and *cry* raised upon a felony committed." Blackstone, *supra*, at 293. The "hue and cry" was "the old common law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another." *Id.* It enabled a constable to demand that those around him assist in the search and apprehension.

Some of the common law authorities permitted warrantless home entry upon a hue and cry. But this did not enlarge the range of qualifying offenses, because the hue and cry was available only to pursue "felons" and those who had "dangerously wounded any person." 2 Hale, *supra*, at 98; *see* Burn, *supra*, at 392 (permitting the breaking of doors upon "a hue and cry levied," based on "a suspicion of felony" or "a dangerous wound given"); *id.* at 391 (citing "robbery, burglary, manslaughter, or other felony committed"). Thus, as Coke put it, "upon hue and cry of one that is slain or wounded, so as he is in danger of death, or robbed, the king's officer that pursueth may (if denial be made) break a house to apprehend the delinquent."

4 Coke, *supra*, at 177; *accord* 2 Hale, *supra*, at 94 (permitting forcible entry "upon hue and cry" where "*A.* hath wounded *B.*, so that he is in danger of death"); Davies, *Case Study*, *supra*, at 326 ("arrests could be made on the basis of 'hue and cry' for felony or for the potential felony of grievous wounding, but not for other misdemeanors").

Here again, the reason for allowing warrantless entry was the need to swiftly apprehend perpetrators of the most serious crimes before they absconded. *See* Burn, *supra*, at 391 (the hue and cry authorized warrantless arrests because otherwise "the felon may escape before the warrant be obtained"); Welch, *supra*, at 116 ("The apprehending [of] felons and bringing them to justice, is of so great consequence to the public, that the common law authorizes private persons to perform that service . . . . You have power to raise a hue and cry, with horse and foot, to search all suspected places, and break open doors in the pursuit of felons."). The authority extended no further.

D. Violent Affrays and Breaches of the Peace

Apart from dangerous woundings that might ripen into a felony, the common law permitted breaking doors for only one type of non-felony offense: "affrays" or "breaches of the peace." This type of offense held a unique status among non-felony crimes. Much like dangerous woundings, affrays and breaches of the peace were misdemeanors that created a risk that felony might ensue. *See* 2 Hale, *supra*, at 90 (listing "affrays" with "dangerous wounding[s]" as two special cases that implicated a "*danger* of felony"). As such, they triggered warrantless arrest powers, including forcible entry into homes, that were not available for other misdemeanors. *See* Wilgus, *supra*, at 573 ("different rules apply to arrests for *breaches of the peace,*

than do in arrests for other misdemeanors"). This separation of "breaches of the peace" from other misdemeanors was an "important" and "developed" distinction in Framing-era arrest law. Davies, *Case Study*, *supra*, at 247-48.

The term "breach of the peace," when used in connection with arrest law, "was generally understood to refer to misconduct that involved public violence or at least a provocation that could produce violence." *Id.* at 248; *see Atwater*, 532 U.S. at 327 n.2 (assuming that, "as used in the context of common-law arrest, the phrase 'breach of the peace' was understood narrowly, as entailing at least a threat of violence").[6]

Blackstone described "breach of the peace" in both a broader and narrower sense, differentiating between "an actual breach of the peace" and one that is "constructively so, by tending to make others break it," and explaining that "[b]esides actual breaches of the peace, any thing that tends to provoke or excite others to break it, is an offence of the same denomination." Blackstone, *supra*, at 142, 150; *see id.* at 150 ("malicious defamations" could qualify, because "[t]he direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed"). But even Blackstone's broader definition was marked by the possibility of violence. *See id.*; Davies, *Case Study*, *supra*, at 284-87

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[6] The Court's assumption in *Atwater* was right. Contemporary sources indicate that "breach of the peace," in the arrest context, connoted "violent or potentially violent public tumults or disturbances." Davies, *Case Study*, at 300; *see* 1 James Fitzjames Stephen, *A History of the Criminal Law of England* 193 (1883) ("The common law did not authorise the arrest of persons guilty or suspected of misdemeanours, except in cases of an actual breach of the peace either by an affray or by violence to an individual.").

& n.144. And relevant here, Blackstone did not teach that doors could be broken in response to constructive or otherwise nonviolent breaches of the peace. Instead, he limited forcible entry to the narrower category of "affrays," defined as "the fighting of two or more persons in some public place, to the terror of his majesty's subjects." Blackstone, *supra*, at 145; *see id.* (noting the word's etymological roots in "*affraier*, to terrify"); Webb, *supra*, at 5 (defining "affray" as "a Fighting between Two, or more; but there must be a Stroke given, or offered, or Weapon drawn"): *id.* ("It differs from an Assault, which is an Injury done to a particular Person; but an Affray is a common Wrong, for which the Offender may be indicted, fined, and imprisoned."). Constables and similar officers, Blackstone explained, were "bound to keep the peace; and to that purpose may break open doors to suppress an affray, or apprehend the affrayers." Blackstone, *supra*, at 145.

Hawkins also approved warrantless entry where an "affray is made in a house in the view or hearing of a constable; or where those who have made an affray in his presence fly to a house, and are immediately pursued by him, and he is not suffered to enter." 2 Hawkins, *supra*, at 139. But he narrowly defined a qualifying "affray" as "a public offense, to the terror of the people," while excluding, among other things, "quarrelsome or threatening words," or an assault that "happens in a private place . . . in which case it cannot be said to be to the terror of the people." 1 William Hawkins, *A Treatise of the Pleas of the Crown* 265 (1777). Although "actual violence" was not required, a credible risk was, "as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people." *Id.* at 266.

Hale's account was similar. "If there be an affray

in a house, where the doors are shut, whereby there is likely to be manslaughter or bloodshed committed, . . . the constable may break open the doors to keep the peace and prevent the danger." 2 Hale, *supra*, at 95. At the outer bounds of this authority, a constable who came upon "disorderly drinking or noise in a house at an unseasonable time of night, especially in inns, taverns, or alehouses," could, upon being denied entrance, break open the doors to "suppress the disorder." *Id.* Critically, these cases of disorder and threatened violence or death—*i.e.*, "case[s] of *danger* of felony," *id.* at 90, were the only circumstances not involving actual felonies in which Hale sanctioned warrantless forcible entries. That is significant because, in Hale's view, constables could make warrantless arrests for "some misdemeanors, less than felony," *id.* at 88, in a much wider array of circumstances. *E.g.*, *id.* at 87-90 (endangering infants, making menacing threats, adultery, "opprobrious words," "suspicious night walkers").

The justice of the peace manuals provided consistent accounts. *See* Burn, *supra*, at 9 ("[I]f an affray be in a house, the constable may break open the doors to preserve the peace; and if affrayers fly to a house, and he follow with fresh [pur]suit, he may break open the doors to take them."); *Pa. Conductor Generalis*, *supra*, at 12 (same); Sheppard, *supra*, at 8-9 ("If he that doth make the Affray, when he doth see the Officer coming to arrest him, shall fly into a house, the Officer may in the fresh pursuit of him, break open the doors upon him to take him, and justify it."); Webb, *supra*, at 6 (a constable "may command the Affrayers to depart, and if they refuse, may apprehend them, without Warrant, if the Affray be in his View," and "may break open an House to take the Offenders").

In short, unless a felony or dangerous wounding had occurred, the home's protection from warrantless

intrusions could be breached only in response to ongoing or incipient violence and disorder that compromised public safety. Officers' authority to make forcible entry in these circumstances was grounded in the need to suppress such danger and, by immediately apprehending the offenders, to ensure that it would not resume. *See* Sheppard, *supra*, at 9 ("[T]he Officer may and ought to carry them before some Justice of the Peace, to find Sureties for the Peace, because they have broken the Peace already, and are meet to be bound that they shall not break it again."). Breach-of-the-peace arrests were permitted to meet a special exigency: the need "to protect the people of the community from acts of violence." Schroeder, *supra*, at 789.

Further illustrating that prevention of violence was the rationale for breach-of-the-peace arrests, the common law prohibited warrantless arrest "for a *past* breach of the peace, unless committed in [an officer's] presence and followed by immediate and continuous pursuit." Wilgus, *supra*, at 701 (emphasis added); *see Regina v. Tooley*, 92 Eng. Rep. 349, 352 (Q.B. 1710) ("[A] constable cannot arrest, but when he sees an actual breach of the peace; and if the affray be over, he cannot arrest."). Because it was "the proper business of a constable to preserve the peace, and not to punish the breach of it," a constable had "no power to arrest a man for an affray done out of his own view, without a warrant from a justice, unless a felony were done, or likely to be done." Burn, *supra*, at 9; *see Pa. Conductor Generalis*, *supra*, at 12 (same); Dalton, *supra*, at 36 ("After the Affray . . . the Constable, without a Warrant, cannot arrest the Affrayors, except [if] some person be in peril of Death by some hurt there received."); 2 Hale, *supra*, at 90 (same). As Coke explained, warrantless arrests could be made to "restrain any of the offenders, to the end the King's peace may be kept, but

after the affray ended, they cannot be arrested without an express Warrant." 2 Coke, *supra*, at 52; *see* Webb, *supra*, at 7-8 (providing model for a warrant upon oath against a person who had engaged in an affray); Welch, *supra*, at 115 ("[I]t is extremely dangerous for you to intermeddle after the affray or assault is over. In such cases the injured person ought to apply to a magistrate for his warrant.").

Because these warrantless arrests were "made not so much for the purpose of bringing the offender to justice as in order to preserve the peace, . . . the right to arrest was accordingly limited to cases in which the person to be arrested was taken in the fact or immediately after its commission." Stephen, *supra*, at 193. Immediate arrest ensured that those found breaking the peace would "not break it again" upon the officer's departure. Sheppard, *supra*, at 9. Thus, "[i]t was only when the offense was a felony that the privilege to arrest without warrant was given for the sole purpose of securing the apprehension of a criminal." Francis H. Bohlen & Harry Shulman, *Arrest With and Without a Warrant*, 75 U. Pa. L. Rev. 485, 490 (1927). And because warrantless arrests for past breaches of the peace were entirely prohibited, officers could not, of course, forcibly enter homes to effectuate such arrests.

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In sum, at common law, an officer could forcibly enter a home without a warrant only if necessary to arrest a fleeing felon (a category primarily restricted to capital offenders), if necessary to apprehend the perpetrator of a dangerous wounding that might result in murder or manslaughter, or if necessary to suppress a violent breach of the peace or prevent its recurrence. Each of these rules represented a carefully drawn exception to the overarching principle that officers could not break into homes without a warrant to search or

arrest. And each was based on specific, established exigencies that made the delay inherent in securing a warrant untenable.

II. Because Warrantless Arrest Authority Has Expanded Far Beyond What the Framers Conceived, this Court Should Not Depart from the Common Law by Extending that Power Further.

As shown above, the common law offered robust security to the home against warrantless intrusions made for the purpose of making arrests. While precise rules from the Founding era cannot always be transferred to a modern context without distorting their essence, *see supra* at 3, there are compelling reasons to adhere to the common law's insistence that warrantless home entry be justified by serious exigency. One reason is that, since the Founding, many critical protections that the common law once provided against warrantless arrests have been eroded by transformations in the law and in the practice of policing.

To start, the range of misdemeanors for which an officer may make a warrantless arrest has significantly expanded. At common law, "warrantless misdemeanor arrests were usually limited to breaches of the peace," along with some "specific exceptions . . . to accommodate an unusual need for prompt arrest of relatively serious misdemeanants." Davies, *Case Study*, *supra*, at 317. "With the growth of organized police forces in the late nineteenth and early twentieth centuries," however, American jurisdictions "expand[ed] the[se] common law arrest powers." Schroeder, *supra*, at 789; *see* Wilgus, *supra*, at 550 (the states have enlarged the right to arrest without a warrant "for various misdemeanors and violations of ordinances, other than breaches of the peace"); Salken, *supra*, at 258-59 (legislatures granted "sweeping arrest powers" and

"began to authorize custodial arrests for minor crimes"). Indeed, by the 1920s, commentators were already objecting that the "legislative mill turns out a steady addition to the list of misdemeanors," and that "every over-zealous peace officer . . . is permitted to take up, on sight, every person whom he detects in the act of committing" such minor crimes. Bohlen & Shulman, *supra*, at 491.

Not only has the range of qualifying misdemeanors expanded, the requirements for making an arrest have diminished as well. At common law, an officer was "authorized to make an arrest without a warrant, for a mere misdemeanor" only when it was "committed in his presence." *John Bad Elk v. United States*, 177 U.S. 529, 534 (1900); *Kurtz*, 115 U.S. at 498. This rule that an officer must witness the misdemeanor for which he made an arrest was ultimately jettisoned, *see* Wilgus, *supra*, at 705-06, albeit not without some judicial resistance, *e.g.*, *In re Kellam*, 41 P. 960, 961 (Kan. 1895) ("The liberties of the people do not rest upon so uncertain and insecure a basis as the surmise or conjecture of an officer that some petty offense has been committed."). A probable-cause standard was substituted for the traditional in-the-presence rule—giving officers more much leeway because, among other things, "hearsay can be used to establish probable cause." Schroeder, *supra*, at 805 n.106 (citing, *inter alia*, *Draper v. United States*, 358 U.S. 307, 312-13 & n.4 (1959)).

Officers' authority to make felony arrests without a warrant has expanded as well. The common law made it "absolutely necessary" that "a felony has been really committed," though an officer needed only probable cause that the person he arrested was "properly suspected" as the perpetrator. Welch, *supra*, at 117; *see* 2 Hale, *supra*, at 90-91 (permitting warrantless

arrest "when a felony is *certainly* committed" and the arrestee is suspected "upon probable grounds to be the felon"); Blackstone, *supra*, at 292 ("upon probable suspicion" for a "felony actually committed"); Webb, *supra*, at 145 ("A Felony must actually be committed, or done, before any Person is legally chargeable upon Suspicion."). After the Founding, that rule was supplanted by a new rule in which "[n]o felony need in fact have been committed." Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 Harv. L. Rev. 566, 576 (1936); *see id.* at 568-77 (tracing the evolution of this change). This new standard "displac[ed] the previous reliance on arrest warrants," Davies, *Recovering*, *supra*, at 637, and undermined the deterrent effect of damages actions for wrongful arrests. *See, e.g.*, *Holley v. Mix*, 3 Wend. 350, 353 (N.Y. Sup. Ct. 1829) (officer not liable despite no felony "if he acted upon information from another which he had reason to rely on").

Add to all this "the creation of professional police forces," an innovation that began in the nineteenth century. Schroeder, *supra*, at 775 n.6; *see* Lawrence M. Friedman, *A History of American Law* 213 (3d ed. 2005) (before that, "the usual haphazard collection of constables and night watchmen was the standard"). "Our twentieth-century police and even our contemporary sense of 'policing' would be utterly foreign to our colonial forebears." Steiker, *supra*, at 830. Whereas Founding-era constables "generally served without training, uniforms, weapons, or other accoutrements of modern law enforcement officers," supplying only a "rudimentary peacekeeping function," the "new police forces differed in their personnel, function, and organization," performing a "greatly enlarged investigative function" and "an expanded preventive function as well." *Id.* at 831, 833-34; *see* Hall, *supra*, at 578-90.

"Modern procedure, which is structured to accommodate proactive enforcement of criminal laws and investigation aimed at 'ferreting out' complaintless crimes, accords police officers far more power than the Framers ever imagined or intended." Davies, *Case Study*, *supra*, at 252.

While the growth of investigatory policing and warrantless arrest authority may be an unsurprising response to modern conditions, the power and discretion it confers on police officers has "created new threats to '[t]he right of the people to be secure . . . against unreasonable searches and seizures.'" Steiker, *supra*, at 830 (quoting U.S. Const. amend. IV). Such innovations provide all the more reason to maintain the protections that were afforded by the common law when the Fourth Amendment was ratified—protections that shielded individuals from warrantless entry into their homes except where there was an important need for prompt action. Those standards reflect a vital principle: "When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant." *Welsh*, 466 U.S. at 751 (quoting *McDonald v. United States*, 335 U.S. 451, 459-60 (1948) (Jackson, J., concurring)). And "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." *Id.* at 753.

CONCLUSION

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

Respectfully submitted,

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