No. 20-18

IN THE

Supreme Court of the United States

ARTHUR GREGORY LANGE,

Petitioner,

v.

CALIFORNIA,

Respondent.

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

BRIEF OF THE DKT LIBERTY PROJECT, LAW ENFORCEMENT ACTION PARTNERSHIP, REASON FOUNDATION, AND DUE PROCESS INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The Liberty Project is committed to defending privacy, guarding against government overreach, and promoting every American's right and responsibility to function as an autonomous and independent individual. The Liberty Project espouses vigilance against government overreach of all kinds, but especially overreach that restricts individual civil liberties. The Liberty Project has filed briefs as *amicus curiae* in both this Court and in state and federal courts in cases involving constitutional rights and civil liberties, including the freedom from unreasonable searches and seizures under the Fourth Amendment.

The Law Enforcement Action Partnership ("LEAP") is an organization of police, prosecutors, judges, corrections officials, and other law enforcement professionals who want to make our communities safer and the criminal justice system more just. LEAP believes that in many encounters between police and the communities they serve, the short-term gains of effecting an arrest under a broad mandate of power are outweighed in the long-term by the lessened trust of the community, which in turn lessens our effectiveness.

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[1] Counsel of record for Petitioner, Respondent, and Court-appointed *amicus curiae* have consented to the filing of this brief. Pursuant to Rule 37.6, *amici curiae* affirms that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or its counsel made a monetary contribution to this brief's preparation or submission.

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SUMMARY OF ARGUMENT

Permitting police officers categorically to effect a warrantless home entry during a misdemeanor pursuit will have deleterious consequences. A categorical rule, which overlooks the case-specific circumstances as to whether a true exigency exists, opens the door to misuse by police officers, erodes public trust in police, and ultimately will undermine successful policing itself.

These impacts are not hypothetical or abstract. The case law shows that officers—when given the opportunity to use a categorical rule—will effect warrantless entries into homes during pursuits for suspected violations of small-scale crimes where no true exigency exists. In the run-of-the-mill misdemeanor pursuit, the suspect's entry into his or her home does not jeopardize evidence or implicate the safety of others. With a categorical rule, certain officers may initiate misdemeanor pursuits on flimsy pretenses to provide an "exigency" in order to enter a home without a warrant and look for evidence of more serious crimes.

These officers will not be held to account, even where they have engaged in racial profiling when deciding whether to pursue the suspect and enter the home. So long as the officer, after the fact, points to probable cause that the fleeing suspect committed a misdemeanor, the warrantless entry, under this Court's case law, will be protected. This type of abuse of law enforcement power, in turn, erodes public confidence in the system and increases the likelihood that citizens will not trust, and instead will resist, law enforcement efforts. In the end, policing itself suffers.

A categorical rule is also unnecessary because officers have other mechanisms to more safely and effectively investigate the crimes and effect arrests where necessary, without having to resort to warrantless entry. For these reasons, as well as those set forth by Petitioner, this Court should conclude that the "hot pursuit" exigent circumstances exception does not categorically apply to misdemeanor pursuits.

ARGUMENT

I. Affirming a Categorical Rule Will Lead Both To Police Overreach And To The Erosion Of Public Trust In Police.

Permitting officers to categorically use a "hot pursuit" exception with misdemeanor pursuits gives officers an opportunity to effect warrantless entries based on flimsy pretexts, including when the officers in fact are making decisions based on improper race-based consideration. The case law discussing law enforcement's use of warrantless entries in misdemeanor pursuits show just how misdemeanor pursuits ending in a home, in the typical case, present no true exigencies. Those pursuits do not implicate the safety of third parties, the officers, or suspects themselves, nor do those pursuits implicate concerns over destruction of evidence or that the suspect will escape. As a result, officers' use of the exception—when no actual exigency exists—allows officers to abuse the categorical rule when warrantless entry is not needed, and to engage in racialized policing without being held accountable for it.

This abuse of power, in turn, erodes public trust in law enforcement. When officers have the freedom to overreach—particularly into the home—and when that freedom is broadened by qualified immunity's strong protections, the public perception of police suffers, as does law enforcement's ability to safely and effectively carry out their duties. This impact, particularly when officers do not need a categorical rule to effectively do their jobs, is unwarranted.

A. The Categorical Rule Leads To Abuse of Power And Opens The Door Wider To Racialized Policing.

A categorical rule permitting police to execute a warrantless entry while pursuing a fleeing misdemeanor suspect opens the door (quite literally) to abuse of power and police overreach where the warrantless entry is not, under the circumstances, needed. Examples abound regarding how officers have capitalized—or attempted to capitalize—on a categorical "hot pursuit" exception in the misdemeanor context when no true exigency existed that would justify a warrantless entry. These examples demonstrate how law enforcement power can be abused.

Specifically, in *Bash v. Patrick*, officers observed an individual playing music in his car at a level that the officers believed was a violation of the city's noise ordinance. 608 F. Supp. 2d 1285, 1290 (M.D. Ala. 2009). The suspect did not respond to the officers' sirens and lights and instead drove the speed limit to his home and pulled into his driveway. *Id.* After a brief exchange in the suspect's driveway, the officers pursued the suspect into his home and, once inside, one officer began beating the suspect with his fists while the other officer deployed

his Taser, hitting the suspect. *Id.* at 1291. The officers later claimed the warrantless entry into the home was supported because they were in hot pursuit of someone they suspected of violating the noise ordinance and of attempting to evade police, both misdemeanor offenses. *Id.* at 1299-30; *see also Middletown v. Flinchum*, 765 N.E.2d 330, 334 (Ohio 2002) (Pfeifer, J., dissenting) (noting the officers claimed exigent circumstances for entering a home after the suspect spun his tires and fishtailed his car).

As another example, in *Potis v. Pierce County*, officers followed a suspect into a home after pursuing the suspect for what the officers claimed was a broken headlight. No. C14-826, 2016 WL 1615428, at *3 (W.D. Wash. Apr. 22, 2016); *see also Mascorro v. Billings*, 656 F.3d 1198, 1202 (10th Cir. 2011) (warrantless entry after pursuing suspect who was driving without taillights). Further, in *State v. Lam*, officers observed a turn signal violation and, after activating their patrol cruiser's lights, chased the suspect into his brother's home, which they then entered by use of a battering ram. 989 N.E.2d 100, 101-02 (Ohio Ct. App. 2013). Moreover, in another case, officers conducted a warrantless entry into the home of a suspect who had fled after an officer attempted to stop him for riding an ATV without a helmet. *Kolesnikov v. Sacramento Cnty.*, No. Civ. S-06-2155, 2008 WL 1806193, at *1 (E.D. Cal. Apr. 22, 2008). While apprehending the suspect, the officers struck him "once or twice with a closed fist." *Id.* In a particularly tragic case, *People v. Stewart*, officers pursued an individual who refused to pay a $4.85 cab fare and fled to his apartment. 417 P.3d 882, 885 (Colo. App. 2017). The

officers entered the suspect's gated patio, saw the suspect with what they believed was a gun, and ultimately shot the suspect twice. *Id.*

These cases are not isolated instances. Misdemeanor pursuits and warrantless entries for suspected small-scale offenses are regular occurrences. *See State v. Foreman*, 2019 WL 4125596, at *1-*2 (Del. Super. Ct. Aug. 29, 2019) (indecent exposure); *Thompson v. City of Florence*, No. 3:17-CV-01053, 2019 WL 3220051, at *9 (N.D. Ala. July 17, 2019) (public urination); *State v. Adams*, 794 S.E.2d 357, 359 (N.C. Ct. App. 2016) (driving with a suspended license); *Disney v. City of Frederick*, No. Civ. 14-2860, 2015 WL 737579, at *2 (D. Md. Feb. 19, 2015) (trespass); *Sero v. City of Waterloo*, No. C 08-2028, 2009 WL 2475066, at *1 (N.D. Iowa Aug. 11, 2009) (fleeing); *State v. Koziol*, 338 N.W.2d 47, 47-48 (Minn. 1983) (driving too fast for the conditions).

In none of the above cases were there true exigencies, meaning those that necessitated officers entering the home without a warrant. In each of the cases discussed above, the suspect's entry into a home did not threaten others or implicate concerns that the suspect would escape. Nor did the suspect's entry into a home implicate the potential prompt destruction of evidence relevant to the suspected misdemeanor. And yet, in each instance, officers abusing the categorical rule nevertheless claimed exigency as a basis for their warrantless entries into homes.

The ability of officers to categorically claim that an exigency is present whenever they are pursuing suspects for misdemeanor crimes—without case-specific facts establishing that a warrantless entry actually was

reasonable—creates a strong potential for abuse by officers. Specifically, and as demonstrated in the decisions noted above, officers will be able to use a misdemeanor offense, as innocuous as possibly playing car music too loudly or failing to pay a cab fare, to enter the home—a "first among equals" under the Fourth Amendment—without a warrant. *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) (quotation marks omitted).

Perhaps more importantly, with a categorical rule, officers may be incentivized to invent potential small-scale offenses as a pretext for entering the home to look for evidence of more significant crimes. For example, in the *Lam* decision, the officers followed the suspect around, apparently waiting for a misdemeanor offense to occur, because they knew the suspect from "a lot of history" and knew that he "had possessed firearms and drugs" in the past. *Lam*, 989 N.E.2d at 101. And, ultimately, upon viewing the turn signal violation, chasing the suspect, and entering the house, the officers found drugs in the home and on one of the home's occupants. *Id.* at 102; *see also Furber v. Taylor*, 685 F. App'x 674, 676 (10th Cir. 2017) (officer tailing a suspect and following her to her home instead of stopping her immediately after observing the offense).

A categorical rule also provides the potential for racialized policing. Although "the Constitution prohibits selective enforcement of the law based on considerations such as race," *Whren v. United States*, 517 U.S. 806, 813 (1996), the reality is that racialized policing regularly occurs. *See* Vermont Advisory Committee to the United States Commission on Civil Rights, *Racial Profiling in Vermont*, Briefing Report, at 1 (2008) ("In addition to

being 'wrong,' racial profiling is an ineffective law enforcement practice steeped in racial and cultural stereotypes and erroneous assumptions about the propensity of people of color to commit particular types of crimes.").[2]

Specifically, "most examples of racially-influenced policing are likely to involve spontaneous or unplanned encounters with citizens, such as motor vehicle stops," Ron Susswein, *Skills Assessment: Eradicating Racial Profiling: Practical Guidance on How Police Departments and Officers Can Prevent Racially-Influenced Policing*, Major Crimes Division of Criminal Justice (New Jersey), at 83 (June 2005),[3] and "[m]any traffic officers say that by following any vehicle for 1 or 2 minutes, they can observe a basis on which to stop it," Deborah Ramirez et al., U.S. Dep't of Justice, *Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned*, at 9 (Nov. 2000).[4] This data demonstrates how officers can engage, largely undetected, in race-based policing. With a categorical rule, officers can then enter homes without a warrant, thereby giving themselves an opportunity to look for evidence of more serious crimes that may be sitting in plain view inside the home (which, in turn, would provide probable cause to search the home in its entirety).

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[2] https://www.usccr.gov/pubs/docs/VTRacialProfiling.pdf.

[3] https://www.state.nj.us/lps/dcj/agguide/directives/racial-profiling/pdfs/skills-assessment.pdf.

[4] https://www.ncjrs.gov/pdffiles1/bja/184768.pdf.

These actions go largely undetected because, as this Court has made clear, "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed *objectively*, justify the action." *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (internal quotation marks and alterations omitted). In other words, "[t]he officer's subjective motivation is irrelevant." *Id.* The data demonstrates that these types of misdemeanor pursuits can easily lead to race-based policing. Thus, were this Court to affirm a categorical rule justifying warrantless entry in every misdemeanor pursuit case, race-motivated warrantless entry would be upheld, regardless of whether a true exigency existed and regardless of whether the entry was, in fact, racially-motivated.

Simply put, providing officers with another mechanism to circumvent the warrant process—particularly for things like small-scale vehicle operation offenses—will open the door not only to police overreach, but also to more race-based policing. *See, e.g.*, *Foreman*, 2019 WL 4125596, at *1 (warrantless entry of wrongly-identified Black individual's home after receiving report of an "unknown black male suspect" engaged in indecent exposure, with the entry leading officers to find inside the home drugs and drug paraphernalia). For these reasons, and because, as described below, a categorical rule is not needed for investigating misdemeanor offenses and making arrests, the Court should reject a categorical rule for warrantless entry stemming from misdemeanor pursuits.

B. The Potential For Overreach And Abuse Undermines Public Trust And Accountability In Law Enforcement.

As the case law demonstrates, a categorical rule for misdemeanor pursuits often leads to police overreach and abuse of power. Under this Court's case law and the doctrine of qualified immunity, officers seizing on this potential for abuse rarely will be held to account. This abuse of power, or even its potential, will result in further erosion of public trust in law enforcement, and police officers themselves ultimately will suffer. Indeed, providing law enforcement with the opportunity to abuse power by using a categorical rule, coupled with the broad qualified immunity protections offered to officers, will lead to under-enforcement of police overreach. This, in turn, will undermine public confidence that police officers will fairly carry out their responsibilities, and will be held to account when they do not.

Specifically, were this Court to affirm a categorical rule allowing warrantless home entry based on misdemeanor pursuits, police officers almost always will be able to claim qualified immunity for their entry, absent probable cause for believing the suspect committed a misdemeanor. In many states, fleeing from the police itself is a misdemeanor, *see, e.g.*, Cal. Penal Code § 148(a), such that flight itself can manufacture the necessary probable cause for an entry after pursuit. If a police officer lacked that probable cause and nevertheless engaged in pursuit and entered the home, the officer could be sued in a civil rights action and would receive the protections of qualified immunity unless the

violation was "clearly established" at the time it occurred. *See, e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) ("Despite their participation in this constitutionally impermissible conduct, [officers] may nevertheless be shielded from liability for civil damages if their actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (internal quotation marks omitted)).

As this Court knows well, that "clearly established" standard sets a high bar that a plaintiff must overcome when a qualified immunity defense is raised. And, as this Court also knows, many plaintiffs are unable to clear that high hurdle. In those cases in which plaintiffs have challenged misdemeanor-based warrantless entries, officers regularly receive qualified immunity. For example, officers received qualified immunity for a warrantless entry, resulting in the officers kneeling on a non-suspect homeowner's neck inside the home, after pursuing a headlight-violation suspect into a house. *See Potis*, 2016 WL 1615428 at *3-4. And officers received qualified immunity for a warrantless entry in pursuit of a misdemeanor trespass suspect, which resulted in the officers pepper spraying both the suspect and his mother. *Disney*, 2015 WL 737579, at *5; *see also Bash*, 608 F. Supp. 2d at 1298-1300 (granting qualified immunity to officers who entered a home in pursuit of an individual suspected of violating a noise ordinance).

Given the likelihood that officers not only will have more opportunities to misuse their power but also, under the doctrine of qualified immunity, are less likely to be held to account, affirming a categorical exception will

erode public trust and be a detriment to policing itself. Studies show that the public's perception of law enforcement as "fair and just" is "critical to successful policing." Inst. on Race and Justice, Northeastern Univ., *COPS Evaluation Brief No. 1: Promoting Cooperating Strategies to Reduce Racial Profiling*, at 21 (2008).[5] The public is more likely to support, rely on, and employ law enforcement, and cooperate with and assist police in their work, as well as comply with the law, when it views the actions of law enforcement as legitimate. *See* Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 Law & Soc'y Rev. 513, 534 (2003). These positive externalities, in turn, "free[ ] the police up to deal with problematic people and situations." *Id.* at 535.

The reverse, sadly, also is true. Law enforcement "loses legitimacy in the eyes of those who have experienced, or even observed, . . . unjust conduct." U.S. Dep't of Justice, *Investigation of the Ferguson Police Department*, at 80 (Mar. 4, 2015).[6] When individuals view law enforcement as arbitrary or unfair and police as overzealous and unrestricted, it "increases the likelihood [that] people will fail to comply with legal directives," Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 Harv. L. Rev. 2283, 2356 (2018), and renders them "more likely to resist law enforcement efforts and less likely to cooperate with [law]

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[5] https://www.researchgate.net/publication/269931068_Promoting_cooperative_strategies_to_reduce_racial_profiling.

[6] https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

enforcement efforts to prevent and investigate crime," DOJ, *Investigation of Ferguson Police*, *supra*, at 80.

Police officers themselves agree with these studies, reporting that successful policing depends on demonstrating to the public both fairness and respect. Rich Morin *et al.*, *Behind the Badge*, Pew Research Center, at 64, 67, 71-72 (2017).[7] Studies indicate that "[l]awful policing increases the stature of the police in the eyes of citizens, creates a reservoir of support for police work, and expedites the production of community safety by enhancing cooperation with the police." National Research Council, *Fairness and Effectiveness in Policing: The Evidence* 6 (2004).

As this past year has once again demonstrated, public perception of police and officers' perception of their profession matter. Almost 90% of police officers report that in recent years they have become more concerned for their safety and that policing has become more dangerous. *See* Morin *et al.*, *Behind the Badge*, *supra*, at 15, 80. And, in 2015, public trust in police officers had fallen to a twenty-two year low. Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, Gallup (June 19, 2015).

Against this backdrop, a ruling giving law enforcement further opportunity to overreach and abuse their power, coupled with broad qualified immunity protections, will be detrimental both to public trust in police, as well as to law enforcement officers themselves. As a result, and because, as described below, a

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[7] https://assets.pewresearch.org/wp-content/uploads/sites/3/2017/01/06171402/Police-Report_FINAL_web.pdf.

categorical rule is not needed for law enforcement to perform its duties effectively, this Court should reject the categorical rule and permit warrantless intrusions into homes only where a true exigency exists.

II. Upholding A Categorical Rule For Suspected Misdemeanor Offenses Is Unnecessary.

Beyond being improper under the Fourth Amendment, upholding a categorical warrant exception for misdemeanor pursuit is also unnecessary. Law enforcement has other tools available to it to investigate and arrest misdemeanor suspects, and a categorical rule needlessly implicates safety concerns for officers and suspects alike. These other tools include obtaining a warrant or using the "knock and talk" technique, both of which are sufficient, reliable, and safe. Rejecting a categorical rule for misdemeanor pursuits also is not prohibitive of officers using the exigent circumstances exception in certain cases; officers may still enter a home without a warrant when the circumstances render the intrusion reasonable under the Fourth Amendment. At bottom, there is no good reason—and certainly no reason overcoming the presumption against warrantless entry—that officers need a categorical rule for misdemeanor pursuits to safely and adequately carry out their duties.

A. Rejection Of A Categorical Rule Will Not Leave Law Enforcement Unable To Investigate And Arrest For Misdemeanor Offenses.

Rejecting the categorical rule will not leave law enforcement without the ability to quickly and

adequately carry out their jobs. Specifically, were this Court to reject the categorical rule, officers still will have options available to them, including the ability to seek a search warrant, to use the "knock and talk" technique, and to enter a home in truly exigent circumstances in order to carry out their duties.

First, requiring law enforcement to obtain a warrant before entering a misdemeanor suspect's home is workable in the typical misdemeanor case. Police officers are well versed in and capable of obtaining search warrants when probable cause exists. "Search warrants are *ordinarily* required for searches of dwellings," and the process for obtaining a warrant is well-known to law enforcement. *Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (quotation marks omitted). Not only that, as Chief Justice Roberts has noted, "police can often request warrants rather quickly these days," including in many states by electronic application. *Id.* at 172-73 (Roberts, C.J., concurring in part and dissenting in part); *see also id.* ("Judges have been known to issue warrants in as little as five minutes."). And, as discussed below, where a true exigency exists—for example, where the suspect poses a risk of danger to himself or others—officers need not wait those few minutes for a warrant.

In the garden variety misdemeanor pursuit, however, the delay caused while officers obtain a warrant presents no immediate and serious consequences. For example, under the facts of Mr. Lange's case before this Court, there was no indication that Mr. Lange, upon entry into the home, posed a danger to himself or anyone else, nor was there any

apparent risk that Mr. Lange would escape or destroy evidence relevant to the misdemeanor vehicle crime that the officer claimed permitted warrantless entry into the home.

In addition, officers not satisfied with waiting for a warrant (or *while* waiting for a judge to approve a requested warrant) can also engage in what is known as the "knock and talk," meaning "knocking on the door and speaking to an occupant for the purpose of gathering evidence." *Florida v. Jardines*, 569 U.S. 1, 21 (2013) (Alito, J., dissenting). Officers need no warrant to engage in this exercise. Officers suspecting an individual—who has entered a home—of a misdemeanor are not prevented from executing a knock and talk to better investigate the crime or to ensure that no true exigencies exist. *See Jardines*, 569 U.S. at 8 ("[A] police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011))). And, as was true with the officers opting to seek a warrant to enter the home, the knock and talk will not detract from the officers' ability to carry out their duties. Again, under the facts of Mr. Lange's case, the officer who entered Mr. Lange's home without a warrant conversed with Mr. Lange and, in the course of that conversation, smelled alcohol on Mr. Lange's breath. There is no reason that conversation could not have been had outside of Mr. Lange's home through the officer's use of a knock and talk. Simply put, the warrantless intrusion into Mr. Lange's home was unnecessary, as is true for the typical misdemeanor case.

Not only that, but in the rare event where obtaining a warrant—or executing a knock and talk—would present immediate and serious consequences, law enforcement would be able to enter the home due to exigent circumstances. Specifically, were this Court to reject the categorical rule, it would be rejecting only the wholesale use of the exigent circumstances *any* time an officer is in pursuit of a misdemeanor suspect. Officers still would be permitted to conduct a warrantless entry for misdemeanor offenses where "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, 563 U.S. 452, 460 (2011) (quotation marks and alteration omitted). Like other exceptions to the Fourth Amendment's warrant requirement, the exigencies exception is based in reasonableness, with this Court having concluded that the warrantless search is reasonable where "there is compelling need for official action and no time to secure a warrant." *McNeely*, 569 U.S. at 149 (quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978)).

Indeed, this fact-specific exigency analysis for misdemeanor pursuit-based entries is the approach the Sixth and Tenth Circuits, and various state courts, have taken without trouble. *See, e.g.*, *Smith v. Stoneburner*, 716 F.3d 926, 931 (6th Cir. 2013) ("[I]f the presumption against warrantless entries stemming from minor crimes is to have any meaning, the exigency must be a serious one in that context"); *Mascorro*, 656 F.3d at 1207 (finding no exigency for a misdemeanor-based warrantless search where the "risk of flight or escape

was somewhere between low and nonexistent" and "there was no evidence which could have potentially been destroyed and there were no officer or public safety concerns" (footnote omitted)); *State v. Markus*, 211 So. 3d 894, 909 (Fla. 2017) (finding no exigent circumstances for a misdemeanor pursuit where the suspect "did not pose a danger to the public, to the police, or to anyone" and "the evidence was at hand with no risk of imminent destruction").

B. Adoption Of The Categorical Rule Needlessly Implicates Safety Concerns.

Finally, in addition to not being necessary for law enforcement to carry out its duties, upholding a categorical rule for misdemeanor pursuit needlessly implicates both public and officer safety concerns. A police officer pursuing a misdemeanor suspect into a home might find his safety or the suspect's safety (or the safety of others) in jeopardy in a manner that would not be present were the officer to, a few minutes later, approach the front door with a warrant or to carry out a knock and talk.

For example, one Department of Justice study of the Baltimore Police Department found that foot pursuits have "a number of attendant risks, including endangering officers and community members." U.S. Dep't of Justice, *Investigation of the Baltimore City Police Department*, at 76 (Aug. 10, 2016).[8] In addition, according to that study, "[i]n some cases, the people who officers pursue have not committed serious crimes and present no threat to officers or community members, but

[8] https://www.justice.gov/crt/file/883296/download.

these pursuits end with [the] officers using significant force" and "when individuals flee in vehicles, officers use unreasonable force after any potential threat to them has subsided." *Id.* Not only that, officers engaged in foot pursuits also have been found to needlessly endanger themselves and community members, and "officers repeatedly fail to consider the risk factors inherent in food pursuits" and "too frequently employ tactics that are unsafe for officers, the individuals they pursue, and the community." *Id.* at 93.

This risk is particularly palpable when the foot pursuit ends in the suspect's home, where the suspect may have weapons and the officer is likely to feel even more on guard. This risk has been borne out in the case law. For example, in *Bash*, the officers ended up deploying a Taser on the suspect after entering his home without a warrant, 608 F. Supp. 2d at 1290-91, and in *Stewart* the officers twice shot the suspect—suspected of not paying his cab fare—believing he had armed himself after entering the house, 417 P.3d at 885. In addition, in the *Kolesnikov* decision, the warrantless entry in pursuit of a suspected failure to wear a helmet while driving an AVT ended with the officers tasing the suspect. And in *Mascorro*, a traffic offense pursuit led to a warrantless entry where the officer pepper-sprayed the suspect's family members. Injuries are not limited to suspects or the home's other occupants; officers themselves also have been injured during misdemeanor warrantless entries. For example, in the *Thompson* decision, pursuit into a home of a suspect accused of public urination ultimately ended in an officer's hospitalization. *See Thompson*, 2019 WL 3220051, at *4.

Simply put, these instances of force are preventable results of unnecessary warrantless entries. Rejection of a categorical rule for misdemeanor pursuits will best protect officers, suspects, and civilians alike.

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeal, First Division should be reversed.

December 11, 2020

Respectfully submitted,

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