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 RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
The Rutherford Institute
109 Deerwood Road
Charlottesville, VA 22911
(434) 978-3888

MICHAEL B. KIMBERLY
ETHAN H. TOWNSEND
Counsel of Record
BRETT MEYERHOFF
McDermott Will & Emery LLP
500 North Capitol St. NW
Washington, DC 20001
(202) 756-8000
ehtownsend@mwe.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Table of Authorities ii

Interest of the *Amicus Curiae* 1

Summary of Argument 1

Statement 4

Argument...5

I. Neither the common law nor founding-era history tolerate the warrantless entry of a home based on pursuit of a nonviolent misdemeanant...........................6

  A. Citizens' homes have special status under the Fourth Amendment..7

  B. The exceptions to the Fourth Amendment's warrant requirement are grounded in historical practice. 8

II. Warrantless pursuit of a nonviolent misdemeanant into the home, without more, is never constitutional...12

  A. The right of privacy is highest in the home and the interests of the government are low. 12

  B. In circumstances like these, the balance of interests will always favor the private citizen......16

III. At minimum, the court should adopt a reasonableness test over a categorical warrant exception 17

Conclusion 20

TABLE OF AUTHORITIES

Cases

Argersinger v. *Hamlin*,
407 U.S. 25 (1972) 13

Bovat v. *Vermont*,
2020 WL 6121478 (U.S. Oct. 19, 2020)........ 4, 15, 16

Brigham City v. *Stuart*,
547 U.S. 398 (2006) 9, 14

California v. *Ciraolo*,
476 U.S. 207 (1986) 19

Carpenter v. *United States*,
138 S. Ct. 2206 (2018) 7

Collins v. *Virginia*,
138 S. Ct. 1663 (2018) 16

County of L.A. v. Mendez,
137 S. Ct. 1539 (2017) 18

Florida v. *Jardines*,
569 U.S. 1 (2013) 2, 9, 11

Georgia v. *Randolph*,
547 U.S. 103 (2006) 9, 12

Hudson v. *Palmer*,
468 U.S. 517 (1984) 6

Johnson v. *United States*,
333 U.S. 10 (1948) 13

Kentucky v. *King*,
563 U.S. 452 (2011) 3, 5, 14

Kyllo v. *United States*,
533 U.S. 27 (2001) 3, 15

McDonald v. *United States*,
335 U.S. 451 (1948) 14

Cases—continued

Michigan v. *Tyler*,
436 U.S. 499 (1978) 14

Mincey v. *Arizona*,
437 U.S. 385 (1978) 17

Missouri v. *McNeely*,
569 U.S. 141 (2013) 15

New York v. *Belton*,
453 U.S. 454 (1981) 6, 16

Payton v. *New York*,
445 U.S. 573 (1980) .... *passim*

Paxton's Case,
1 Quincy 51 (Mass. 1761) 8

Riley v. *California*,
573 U.S. 373 (2014) .... *passim*

Semayne's Case,
77 Eng. Rep. 194 (KB 1604) .... *passim*

United States v. *Banks*,
540 U.S. 31 (2003) 14

United States v. *United States District Court*,
407 U.S. 297 (1972) 2, 8, 19

Welsh v. *Wisconsin*,
466 U.S. 740 (1984) 14

Statutes, Codes, and Constitutions

18 U.S.C.
1030(a)(2)(A) 13
1030(a)(2)(B) 13

Cal. Penal Code
§ 383a 17
§ 817 15
§ 1526 15

Statutes, Codes, and Constitutions—continued

Penal Code section 148(a) 2

U.S. Const. Amend. IV 17

Other Authorities

Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 Yale L.J. 1648 (2019) 13

Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts* (6th ed. 1681) 10, 18

George C. Thomas III, *The Common Law Endures in the Fourth Amendment*, 27 Wm. & Mary Bill of Rts. J. 85 (2018) 8

1 Joseph Chitty, *A Practical Treatise on the Criminal Law* (1819) 10, 18

Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181 (2016) 7

M. H. Smith, *The Writs of Assistance Case* (1978) 8

2 Matthew Hale, *Pleas of the Crown* (1736) 10, 18

1 Richard Burn, *The Justice of the Peace, and Parish Officer* (14th ed. 1780) 10, 18

Letter from John Adams to William Tudor (Mar. 29, 1817), in 10 *The Works of John Adams, Second President of the United States* (1856) 8

Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (1871) 6, 7, 11, 12

The Votes and Proceedings of the Freeholders and other Inhabitants of The Town of Boston, In Town Meeting assembled, According to Law (1772) 8

Other Authorities—continued

William Blackstone, 4 *Commentaries on the Laws of England* (Clarendon 1769) 7

William Hawkins, *Treatise of the Pleas of the Crown* (1721) 10

INTEREST OF THE *AMICUS CURIAE*[*]

The Rutherford Institute is an international non-profit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed, and in educating the public about constitutional and human rights issues.

At every opportunity, The Rutherford Institute will resist the erosion of fundamental civil liberties, which many would ignore in a desire to increase the power and authority of law enforcement. The Rutherford Institute believes that where such increased power is offered at the expense of civil liberties, it achieves only a false sense of security while creating the greater dangers to society inherent in totalitarian regimes.

SUMMARY OF ARGUMENT

A California police officer, Aaron Weikert, entered the garage of petitioner Arthur Lange, without a warrant, under the guise of the hot-pursuit exception to the warrant requirement. Weikert's justification for entry of this protected space was simply that Lange had committed two traffic violations under the California Vehicle Code totaling a base fine of $60, and that the few seconds during which Weikert had his lights on constituted probable cause to believe Lange was attempting

[*] All parties to this matter have provided written consent for this *amicus curiae* 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 the preparation or submission of this brief. No one other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

to evade the detention in violation of Penal Code section 148(a). But that is no justification to carry out the "chief evil against which the wording of the Fourth Amendment is directed"—physical entry of the home without a warrant. *United States* v. *United States District Court*, 407 U.S. 297, 313 (1972).

Although this Court's cases have often resisted bright-line rules in the Fourth Amendment context, many of this Court's most important precedents operate as categorical rules in practice, particularly when it comes to searches of the home. This is one of those circumstances that calls for a blanket rule: The special status of the home in the Court's Fourth Amendment doctrine cannot be overridden by the interest of police in pursuing nonviolent misdemeanants.

Regardless whether the Court focuses on the Fourth Amendment's historical and common-law underpinnings or instead on a balancing of privacy values against governmental interests, all relevant considerations indicate that the sanctity of the home will prevail, in all cases, over the interest of law enforcement officers in "hot pursuit" of citizens who fail to obey traffic laws or commit other nonviolent misdemeanors.

"For four hundred years, the Anglo-American tradition has promised that a person's home is 'his castle.'" *Semayne's Case*, 77 Eng. Rep. 194, 194 (KB 1604). This tradition and "sensitivity to privacy interests" in the home was "not * * * lost on the Framers." *Payton* v. *New York*, 445 U.S. 573, 596 (1980). The Court's modern day precedents have upheld the common law's view of the home as the apex of privacy interests under the Fourth Amendment. See*, e.g., Florida* v. *Jardines*, 569 U.S. 1, 6 (2013) ("when it comes to the Fourth Amendment, the home is first among equals").

Based on the home's status as the "archetype" (*Payton*, 445 U.S. at 587) of Fourth Amendment privacy, this Court has recognized just two exceptions to the warrant requirement inside the home in its over two-hundred year history: voluntary consent and exigent circumstances that are "so compelling that a warrantless search is objectively reasonable." *Kentucky* v. *King*, 563 U.S. 452, 459 (2011). This Court has never applied "exigent circumstances" to justify the warrantless pursuit of a nonviolent misdemeanant into the home. Similarly, common law and founding-era history support just two exceptions to the warrant requirement during "pursuit" cases: the pursuit of felons and the pursuit of individuals who have committed a non-felonious *violent* act. It would have been unfathomable in the Founding Era to imagine that a government agent could pursue a *nonviolent* misdemeanant into his home without a warrant.

Even if the Court looks past Founding Era doctrine and applies a "balancing of interests" that weighs the severity of the intrusion on privacy and security against the "legitimate governmental interests" of law enforcement (*Riley* v. *California*, 573 U.S. 373, 385-386 (2014)), the same result would hold. Privacy interests in the home—the "archetype" and "very core" of an individual's Fourth Amendment privacy interests—strongly outweigh the incremental law enforcement interests gained by effectuating a warrantless entry into the home to pursue a nonviolent misdemeanant.

That is especially so because law enforcement would not be left without recourse in circumstances like these: officers may still apply for a warrant from outside the home, utilize "ordinary visual surveillance" to determine if there is another exigency that would allow warrantless entry, or perform a "knock and talk" and seek consent. *Kyllo* v. *United States*, 533 U.S. 27, 31-32

(2001); *Bovat* v. *Vermont*, 2020 WL 6121478, at *1 (U.S. Oct. 19, 2020) (Gorsuch, J., with whom Sotomayor, J. and Kagan, J. join, respecting the denial of certiorari).

History, this Court's decisions, and a reasonableness balancing dictate that a warrantless search of a home for a suspected nonviolent misdemeanant can never be justified on the basis of hot pursuit alone.

STATEMENT

This case concerns the arrest of petitioner Arthur Lange in the garage of his home. California highway patrol officer Aaron Weikert arrested Lange after following him in his unlit patrol car. Pet. App. 3a-4a. Weikert's pursuit of Lange began after Lange blared loud music in his car and honked his horn a few times. Pet. App. 3a. Lange's alleged noise infractions were nonviolent offenses in California, subject to base fines of a combined $60. Pet. 4.

After observing Lange's purported offenses, Weikert followed Lange at a distance and did not turn on his overhead lights until shortly before Lange turned into his own driveway, opened his garage door, and then parked inside. Pet. App. 2a-3a. At that time, Weikert parked behind Lange in his driveway, exited his car, and prevented the garage door from closing by placing his foot under the closing door. Pet. App. 3a. Weikert then entered into the garage to speak to Lange. Upon questioning and requesting Lange's license and registration, Weikert stated that he could smell alcohol on Mr. Lange's breath. Pet. Br. 4. At that time, he ordered him out of the garage for a DUI investigation.

Lange was charged with driving under the influence and "the infraction of operating a vehicle's sound system at excessive levels." Pet. App. 2a. Lange moved to suppress the evidence Weikert obtained after entering

his garage, arguing that the officer's "warrantless entry into his home violated the Fourth Amendment." *Ibid.*

Ultimately, the California Court of Appeals affirmed the lower court decisions holding that Weikert's warrantless entry was permissible under the "hot pursuit" exception to the warrant requirement. Pet. App. 19a. In so holding, the court of appeals sharpened a divide in courts of appeals all over the country regarding whether there is a categorical rule permitting warrantless entry into homes when officers are in hot pursuit, regardless of the nature of the offense (a felony or misdemeanor), or whether courts should instead take a case-by-case approach to the question. This Court granted certiorari to resolve this divide. It should now reverse.

ARGUMENT

When it comes to the Fourth Amendment's protection of the home, categorical rules have long been the standard. If an officer does not have a warrant to enter the home of an individual, the search is "presumptively unreasonable." *Kentucky* v. *King*, 563 U.S. 452, 459 (2011). And this Court has expressed a "general preference" to "provide clear guidance to law enforcement through categorical rules" under the Fourth Amendment. *Riley* v. *California*, 573 U.S. 373, 398 (2014). For "[i]f police are to have workable rules, the balancing of the competing interests * * * must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers." *Ibid.* (quotation marks omitted). That makes good sense. "[T]he protection of the Fourth and Fourteenth Amendments can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law

enforcement." *New York* v. *Belton*, 453 U.S. 454, 458 (1981) (quotation marks omitted). In contrast, the Court has emphasized "caution in approaching claims that the Fourth Amendment is inapplicable." *Hudson* v. *Palmer*, 468 U.S. 517, 525 (1984). This case is no different from a standard one in which a categorical rule is the correct choice to uphold the strictures of the Fourth Amendment. The special status of the home as its occupant's "castle" (*Semayne's Case*, 77 Eng. Rep. 194, 194 (KB 1604)) leaves no room for doubt that the sanctity of the private citizen's residence can never be overridden by the interest of police in enforcing nonviolent misdemeanors as in this case. At the very least, the inverse categorical rule must be wrong—it cannot possibly be true that hot pursuit of nonviolent misdemeanants always permits warrantless entry into the home, else the Fourth Amendment's protection of the home would come to mean nothing at all.

I. NEITHER THE COMMON LAW NOR FOUNDING-ERA HISTORY TOLERATE THE WARRANTLESS ENTRY OF A HOME BASED ON PURSUIT OF A NONVIOLENT MISDEMEANANT.

In Fourth Amendment cases, the Court first looks to "guidance from the founding era" to decide whether that guidance dictates an outcome. *Riley*, 573 U.S. at 385. Here, all of the Founding Era evidence demonstrates that police could never enter the home in pursuit of a nonviolent misdemeanant. Indeed, the home was regarded as the one place that not even the "[K]ing of England" could go. Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 299 n.3 (1871).

A. Citizens' homes have special status under the Fourth Amendment.

The home is special. For four hundred years, the Anglo-American tradition has promised that a person's home is "his castle." *Semayne's Case*, 77 Eng. Rep. at 194. Sir Edward Coke traced the origin of the home's unique character to the Magna Carta. See Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1212 (2016). Describing the special status of the home in a speech to parliament, William Pitt proclaimed:

> The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the [K]ing of England may not enter; all his force dares not cross the threshold of the ruined tenement.

Cooley, *supra*, at 299 n.3.

Because of the long-recognized inviolability of the home, the Crown's officers needed a warrant to enter it, which required some level of suspicion. See William Blackstone, 4 *Commentaries on the Laws of England* 288 (Clarendon 1769). To circumvent this protection, the English monarchs sought general warrants, devices that afforded officers limitless entry because they required no suspicion and specified no person, no crime, and no particular location to be searched.

The American colonists particularly abhorred general warrants. Outrage over the King's suspicionless entry into homes "spark[ed] the Revolution itself." *Carpenter* v. *United States*, 138 S. Ct. 2206, 2213 (2018). In 1761, the Massachusetts Bay Superior Court considered a challenge to writs of assistance, a kind of general

warrant. *Paxton's Case*, 1 Quincy 51 (Mass. 1761). Arguing the case, James Otis warned that suspicionless searches threatened to "totally annihilate" "one of the most essential branches of English Liberty," namely "the freedom of one's house." M. H. Smith, *The Writs of Assistance Case* 553-554 (1978). John Adams, who witnessed the proceedings, later recalled that all in the audience left "ready to take [a]rms against [w]rits of [a]ssistance. * * * Then and there the child Independence was born." *Letter from John Adams to William Tudor* (Mar. 29, 1817), in 10 *The Works of John Adams, Second President of the United States* 248 (1856). Indeed, the Boston Committee of Correspondence included among its 1772 list of grievances the "unconstitutional" power of customs commissioners to "under color of law and the cloak of a general warrant, break through the sacred Rights of the Domicil." *The Votes and Proceedings of the Freeholders and other Inhabitants of The Town of Boston, In Town Meeting assembled, According to Law* 15-18 (1772).

Indeed, "[h]istorians agree that the Framers had the English writs of assistance on their mind when they wrote the Fourth Amendment." George C. Thomas III, *The Common Law Endures in the Fourth Amendment*, 27 Wm. & Mary Bill of Rts. J. 85, 88 (2018). Thus, it is clear that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States District Court*, 407 U.S. 297, 313 (1972).

B. The exceptions to the Fourth Amendment's warrant requirement are grounded in historical practice.

True to those historical foundations, and observing "the overriding respect for the sanctity of the home"

that "has been embedded in our traditions since the origins of the Republic," this Court has long-recognized the special role played by the home in American life and law. *Payton*, 445 U.S. at 601. The Court has made it clear that the Fourth Amendment draws "a firm line at the entrance to the house" and that "the zone of privacy" is nowhere "more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home." *Id.* at 589-590. It "'is the archetype of the privacy protection secured by the Fourth Amendment.'" *Id.* at 587. This apex of Fourth Amendment protection, the Court explained, "has been embedded in our traditions since the origins of the Republic." *Id.* at 601. Thus, "when it comes to the Fourth Amendment, the home is first among equals." *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013).

That is why, with respect to entry into the home, any exceptions to the warrant requirement have been "'jealously and carefully drawn.'" *Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006). Only two, in over 200 years, have overcome this great historical presumption: "voluntary consent" (*ibid.*) and, as relevant here, "exigent circumstances" that are "so compelling that [a] warrantless search is objectively reasonable." *Brigham City* v. *Stuart*, 547 U.S. 398, 402-403 (2006). Thus, absent consent or "compelling" exigent circumstances, officers may not cross the "firm line at the entrance to the house" without a warrant. *Payton*, 445 U.S. at 589-590.

1. As to the exigent circumstances exception to the warrant requirement, common law and founding-era history show its limited utility during "pursuit" cases: the pursuit of felons and the pursuit of individuals who have committed a non-felonious violent act. Although common law authorities articulated those exceptions in

slightly different ways and with different factual scenarios, none supports the idea that officers could pursue a nonviolent misdemeanant into her home without a warrant.

To start, Lord Coke, who was "the greatest authority of his time on the laws of England" (*Payton*, 445 U.S. at 594), explains that officers could only violate the sanctity of the home "upon hue and cry of one that is slain or wounded." Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts* 177 (6th ed. 1681). Matthew Hale similarly instructed that a constable could "break the door, tho he have no warrant" only when in pursuit of a suspected felon or one who had "wounded [another], so that he is in danger of death." 2 Matthew Hale, *Pleas of the Crown* 94 (1736); see *id.* at 92. Felonious conduct or violence was the key to unlocking the "castle" (*Semayne's Case*, 77 Eng. Rep. at 194) for William Hawkins, Richard Burn, and Joseph Chitty, too: The warrantless breaking of doors was only allowed to be pursued for "one known to have committed a Treason or Felony, or to have given another a dangerous wound," or for participants in a violent "affray." William Hawkins, *Treatise of the Pleas of the Crown* 86-87 (1721); see also 1 Richard Burn, *The Justice of the Peace, and Parish Officer* 101-102 (14th ed. 1780); 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 35 (1819).

At common law, then, the only time an officer could pursue a suspect into his home without a warrant was when a suspect had committed a felony (in those times crimes punishable by death), or when officers pursued an individual who committed a violent act, such as "upon hue and cry of one that is slain or wounded," or where one was "known" "to have given another a dangerous wound."

2. The "guidance from the founding era" (*Riley*, 573 U.S. at 385) this Court looks to first when deciding exceptions from the warrant requirement is clear: There is not a scintilla of support for the idea that, at common law, officers could pursue a nonviolent misdemeanant into their home without a warrant. Instead, common law made clear that the people abhorred warrantless intrusion into their homes, which they understood to be a place that even "the [K]ing of England may not enter." Cooley, *supra* at 299 n.3. This bright-line rule barring an officer from pursuing a nonviolent misdemeanant into the home without a warrant comports with the Fourth Amendment's historical and common law underpinnings, which have made clear for hundreds of years the Anglo-American tradition that has promised that a person's home is "his castle." *Semayne's Case*, 77 Eng. Rep. at 194. The common law cuts against an officer's warrantless pursuit of a nonviolent misdemeanant into the home—the place that is at the "very core" of an individual's Fourth Amendment rights. *Jardines*, 569 U.S. at 6. Not one commentator in the common-law recognized that an act of non-violence could ever justify warrantless entry to the home. Instead, the outer limits of the common law justified warrantless entry only upon suspicion of a "dangerous wound" or a wound to another "so that he is in danger of death."

Looking to the founding era precedent, therefore, demonstrates that the blaring of loud music (even discordant loud music), as Lange did here, cannot be said to inflict any "dangerous wound" on anyone. Nor can any other nonviolent misdemeanor, which, by its very definition, cannot result in a "dangerous wound" or a "danger of death." The Court should accordingly adopt the same standard from the founding era and common

law that warrantless entry into the home is impermissible when officers pursue suspects for nonviolent crimes.

II. WARRANTLESS PURSUIT OF A NONVIOLENT MISDEMEANANT INTO THE HOME, WITHOUT MORE, IS NEVER CONSTITUTIONAL.

As we have shown, Founding Era doctrine recognized a bright-line rule that warrantless entry into the home never extended to the pursuit of persons suspected of nonviolent crimes. Even if this law were not clear, and the Court proceeded to apply a "balancing of interests" that weighs the severity of the intrusion on privacy and security against the "legitimate governmental interests" of law enforcement (*Riley*, 573 U.S. at 385-386), there will never be sufficient "legitimate governmental interests" to justify breaching the ramparts of the "castle" (*Semayne's Case*, 77 Eng. Rep. at 194) in pursuit of a nonviolent misdemeanant like Lange.

A. The right of privacy is highest in the home and the interests of the government are low.

1. The balancing analysis begins with the individual privacy interests at issue in this case—which heavily weigh the scale in favor of a categorical ban on the warrantless pursuit of nonviolent misdemeanants into the home. The home, as we have explained, is regarded as being at the "archetype" and "very core" of Fourth Amendment protection, the "first among equals," where "privacy expectations are most heightened" and as being the "center of the private lives of our people." *Georgia* v. *Randolph*, 547 U.S. 103, 115 (2006). Thus, when weighing the privacy interests in an individual's "castle" (*Semayne's Case*, 77 Eng. Rep. at 194) that "the [K]ing of England may not enter" (Cooley, *supra* at 299 n.3), the other side—legitimate governmental interests

in law enforcement—must bring incredibly dire interests to the scale. That is clearly not the case in the context of warrantless pursuit of nonviolent misdemeanants.

2. Misdemeanors (and particularly nonviolent misdemeanors), are "smaller faults[] and omissions of less consequence" than felonies. See Blackstone, *supra* at 5. They are "petty-offense[s]." *Argersinger* v. *Hamlin*, 407 U.S. 25, 52 (1972) (Powell, J., Rehnquist, C.J., concurring). Repeated scholarship reinforces the point that law enforcement interests in apprehending misdemeanants are not as weighty as those in apprehending more serious crimes, because the "conduct at issue in misdemeanors is typically not particularly dangerous." Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 Yale L.J. 1648, 1695 (2019). Congress, too, has understood the differing severity of misdemeanors and felonies, choosing to, for example, classify theft of "minimal" or "nominal" (18 U.S.C. 1030(a)(2)(A)) computer data as a misdemeanor but classifying theft of "valuable" information as a felony (*id.* 18 U.S.C. 1030(a)(2)(B)).

None of the recognized bases for the exigent circumstances exception provide sufficient weight to vitiate the paramount right that nonviolent misdemeanants be secure in their homes. The exigent circumstances exception in this Court's law can trace its origins to *Johnson* v. *United States*, where the Court explained that "exceptional circumstances" can exist to tip this balance. 333 U.S. 10, 14-15 (1948). This Court has never recognized that any such exceptional circumstances exist in the context of apprehending a suspected nonviolent misdemeanant. Instead, the Court has explained that the circumstances must be dire before it will permit warrantless home entry, such as "assist[ing] persons

who are seriously injured or threatened with such injury" (*Brigham City*, 547 U.S. at 403), putting out a fire in a residence (*Michigan* v. *Tyler*, 436 U.S. 499, 509 (1978)), and preventing the "'imminent destruction of evidence.'" *King*, 563 U.S. at 460.

In fact, this Court has long-recognized the opposite for minor offenses—exigent circumstances do not justify a warrantless entry into the home.

This Court in *Welsh* v. *Wisconsin*, 466 U.S. 740 (1984), held that a warrantless entry into the home of an individual to arrest him for a minor, nonjailable, traffic offense is prohibited by the Fourth Amendment, but the Court also intimated that nonviolent misdemeanors generally might also not qualify for the exigent circumstances exception in the home. For instance, the Court favorably cited to Justice Jackson's concurrence in *McDonald* v. *United States*, 335 U.S. 451 (1948), a case involving the misdemeanor of carrying on a lottery, where Justice Jackson states it is a "shocking proposition that private homes" may be invaded by officers "following up offenses that involve no violence or threats of it." *Welsh*, 466 U.S. at 751. It thus followed, in the Court's words, that "it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor." *Id*. at 753. Nor will it be "reasonable to enter a dwelling to make a warrantless arrest" when there is a "risk of losing evidence of a minor offense." *United States* v. *Banks*, 540 U.S. 31, 37 n.4 (2003) (describing holding of *Welsh*).

Law enforcement also cannot point to the need for effective policing as a valid rationale for tipping the balance in the context of nonviolent misdemeanors. Police officers can "often request warrants rather quickly

these days" and a majority of states "provide for electronic warrant applications" or other procedures that allow officers to secure warrants by phone or email, without leaving the scene. *Missouri* v. *McNeely*, 569 U.S. 141, 172-173 (2013) (Roberts, C.J., concurring); Cal. Penal Code §§ 817, 1526. Indeed, officers in many states can call a judge directly and be authorized to affix the judge's signature to a warrant, can use an e-warrant procedure that can be electronically returned to an officer, and can even e-mail warrant requests to judges' iPads. *Ibid.* Judges have been known to issue warrants in as little as five minutes. *Ibid.*

And, while officers are waiting those five short minutes before crossing the "firm line at the entrance to the house" (*Payton*, 445 U.S. at 590), officers (including Weikert in this case) are entitled to stand guard outside the suspect's home and apply for a warrant there. While outside the suspect's home, an officer can still utilize ordinary "visual observation" to determine if there is another exigency that would allow warrantless entry. *Kyllo* v. *United States*, 533 U.S. 27, 32 (2001).

Of course, securing a home and obtaining a warrant are not the only tools at an officer's disposal for effective policing. An officer, after following a misdemeanant to his house, can simply "knock and talk," which is an "increasingly popular law enforcement tool," although one which can be abused by police. *Bovat* v. *Vermont*, 2020 WL 6121478, at *1 (U.S. Oct. 19, 2020) (Gorsuch, J., with whom Sotomayor, J. and Kagan, J. join, respecting the denial of certiorari). This approach entails going to "a home's front door, knock[ing], and win[ning] the homeowner's consent to a search." *Ibid.* Indeed, so long as police officers act reasonably and do not "linger" or carry out "snooping," a "knock and talk" is an available tool that can obviate the "need to bother with a warrant,

or worry whether exigent circumstances might forgive one's absence." *Ibid.*

B. In circumstances like these, the balance of interests will always favor the private citizen.

The Court's Fourth Amendment law is, in the main, one of categorical rules. *Belton*, 453 U.S. at 458. Consider the so-called automobile exception to the warrant requirement, and the search-incident-to-arrest exception. In both cases, inherent characteristics of the circumstance (such as "ready mobility" of automobiles for the automobile exception (*Collins* v. *Virginia*, 138 S. Ct. 1663, 1669 (2018)) and the diminished privacy interest for detained individuals and concern for "harm to officers and destruction of evidence" (*Riley*, 573 U.S. at 386) provide that the balance between privacy and law enforcement will always tip in favor of the government. The Court has similarly recognized bright-line rules for exceptions to these rules, when the balance shifts in favor of privacy. For example, the automobile exception does not apply when the vehicle is at the home or within its curtilage due to the "substantial Fourth Amendment interest[s]" individuals have in their homes. *Collins*, 138 S. Ct. at 1672.

A bright-line approach is warranted in these circumstances, as well. Just as the automobile exception and the search incident to the arrest rules have immutable characteristics making categorical rules sensible, so too does entry of the home in pursuit of a nonviolent misdemeanant. The home is the apex of the privacy interests protected by the Fourth Amendment. And nonviolent misdemeanors are the nadir of misconduct. Thus, just as the automobile exception gives way to the privacy interest at the home, the exigent circumstances

exception must always yield, weighed against entry of a home to apprehend a nonviolent misdemeanant.

Without doubt, a warrant prior to entering a nonviolent misdemeanant's home may add a challenge to law enforcement's investigation of crimes, but "[t]he investigation of crime would always be simplified if warrants were unnecessary." *Mincey* v. *Arizona*, 437 U.S. 385, 393 (1978). "[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment" and "the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Ibid*.

A wait of a few short minutes while standing guard outside a home to obtain a warrant to investigate the blaring of loud music or the selling of reprocessed butter without a label (see Cal. Penal Code § 383a, Pet. 25) is a pittance of "cost" (*Riley*, 573 U.S. at 401) for the "archetype" (*Payton*, 445 U.S. at 587) of Fourth Amendment privacy interests—"the right of the people to be secure in their * * * houses." U.S. Const. Amend. IV.

III. AT MINIMUM, THE COURT SHOULD ADOPT A REASONABLENESS TEST OVER A CATEGORICAL WARRANT EXCEPTION

As we have shown, history and this Court's decisions dictate that a warrantless search of a home for a suspected nonviolent misdemeanant can never be justified, standing alone. If the Court declines to adopt the categorical rule we advocate, however, it should at minimum reject the inverse categorical rule adopted by the court below. If the supposed "hot pursuit" of a non-violent misdemeanant were enough to justify, categorically, warrantless invasions of residences, the Fourth Amendment's protection of the home would come to

mean nothing. After all, who doesn't roll a stop sign or exceed the speed limit at least once, every time on the way home from work or the store? At minimum, therefore, the Court should adopt the position advanced by petitioner that the reasonableness of a warrantless, hot-pursuit entry into the home should be evaluated case-by-case, balancing each "individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." Pet. Br. 32 (quoting *County of L.A.* v. *Mendez*, 137 S. Ct. 1539, 1546 (2017)).

A categorical warrant exception for misdemeanor pursuit would be clearly untethered from traditional common-law limits on warrantless home entries, which supports warrantless entry when officers "pursued" a suspect who had committed a felony or other violent offenses, "upon hue and cry of one that is slain or wounded," or where one was "known" "to have given another a dangerous wound." Coke, *supra*, at 177; Hawkins, *supra*, at 86-87; Burn, *supra*, at 101-102; Chitty, *supra*, at 35. An attempt to stretch such traditional common-law limits on warrantless home entries from felonies or chasing an individual who "wounded [another], so that he is in danger of death" to all nonviolent misdemeanors is insupportable when compared to this Court's pronouncement that at the Fourth Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Hale, *supra*, at 94; see *id.* at 92.

It cannot be the case that an officer pursuing an individual for a minor jailable misdemeanor can have a categorical ticket into the individual's home—regardless of circumstances—to carry out the "chief evil" against which the Fourth Amendment is directed.

United States District Court, 407 U.S. at 313. There are a plethora of trivial offenses that are jailable misdemeanors across the country. As noted in petitioner's brief, "[t]wenty-five states," for example, "treat some or all forms of speeding as a crime carrying a potential jail sentence." Pet. Br. 38 (quotation marks omitted). The categorical warrant exception allows any of those minor offenses to be the predicate for a warrantless home entry. That would be insane.

At base, the categorical rule applied by the court below trades in a doctrine intended to allow police officers to enter a home without a warrant to pursue serious crimes—such as the infliction of a "dangerous wound"—into a doctrine that allows officers to perpetuate the "chief evil" of the Fourth Amendment, so long as they have probable cause to carry out an arrest for the minor jailable misdemeanor of speeding. That simply cannot comport with this Court's instruction that the home is where "privacy expectations are most heightened." *California* v. *Ciraolo*, 476 U.S. 207, 212-213 (1986).

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted.

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
The Rutherford Institute
109 Deerwood Road
Charlottesville, VA 22911
(434) 978-3888

MICHAEL B. KIMBERLY
ETHAN H. TOWNSEND
Counsel of Record
BRETT MEYERHOFF
McDermott Will & Emery LLP
500 North Capitol St. NW
Washington, DC 20001
(202) 756-8000
ehtownsend@mwe.com

Counsel for Amicus Curiae

DECEMBER 2020