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 California, First Appellate District

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, DownsizeDC.org, Downsize DC Foundation, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc., Gun Owners of California, and DownsizeDC.org are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Gun Owners Foundation, Downsize DC Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). Restoring Liberty Action Committee is an educational organization. *Amici* organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Some of these *amici* have filed *amicus* briefs before this Court in other Fourth Amendment cases, including:

- United States v. Jones, No. 10-1259, Brief *Amicus Curiae* of Gun Owners of America, Inc. in Support of Neither Party (May 16, 2011) (Petition Stage);

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[1] It is hereby certified that counsel for Petitioners and Respondents have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

- United States v. Jones, No. 10-1259, Brief *Amicus Curiae* of Gun Owners of America, Inc. in Support of Respondent (October 3, 2011) (Merits Stage); and

- Carpenter v. United States, No. 16-402, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.* in Support of Petitioner (Aug. 14, 2017).

SUMMARY OF ARGUMENT

Both Petitioner and Respondent oppose the creation of a categorical rule to allow home invasions by officers while pursuing fleeing misdemeanor suspects. And both parties support the creation of a "case-by-case" rule which would allow for such home invasions under some circumstances. Neither party considered a third approach — the adoption of a categorical rule **against** home invasions in pursuit of fleeing misdemeanor suspects. Based on the founding era research provided by the parties, that third rule appears to be more consistent with the Framers understanding of the scope of Fourth Amendment protection. Also, because the Jones and Jardines re-affirmation of the property basis of the Fourth Amendment was largely ignored by the parties, these *amici* urge that re-briefing be ordered to address those central concerns, particularly since the scope of the Fourth Amendment's protection of the home is the issue in this case. Should this Court choose either to sanction the approach taken by the court below, or the case-by-case approach advocated by the parties, it would run great risk of increasing pretextual entries

into homes and endanger the lives of both homeowners and law enforcement officers.

ARGUMENT

I. TO ADOPT A CASE-BY-CASE APPROACH TO GOVERN MISDEMEANOR PURSUIT HOME INTRUSIONS WOULD BE TO ADOPT NO RULE AT ALL.

Petitioner and Respondent ask this Court to take somewhat different procedural approaches to resolve this case. The Brief for Petitioner asks this Court to reverse the judgment of the California Court of Appeal (Brief for Petitioner ("Pet. Br.") at 44), while the Brief for Respondent Supporting Vacatur urges this Court to vacate the judgment below and remand for further proceedings (Brief for Respondent Supporting Vacatur ("Resp. Br.") at 36). However, Petitioner and Respondent both approach the underlying legal issue and the rule that should be adopted in a highly similar manner.

A. Petitioner Urges Adoption of a Case-by-Case Approach.

Petitioner opposes the creation of a "categorical warrant exception for misdemeanor pursuit" to the Fourth Amendment and urges that the Court apply "the same case-by-case approach that governs in every other exigent-circumstances context." Pet. Br. at 6. Petitioner then outlines in broad terms the rule it would have this Court adopt: "Officers may make a

warrantless home entry[2] if taking the time to seek a warrant would frustrate a compelling law-enforcement need — but not otherwise." *Id.* at 6. Petitioner describes how this Court handles Fourth Amendment cases, and how it should approach this case, by applying a "balancing test": "This Court assesses the reasonableness of a search or seizure by weighing the severity of the intrusion on citizens' privacy and security against the legitimate needs of law enforcement." *Id.* at 8.

Petitioner cites a recent decision of this Court for its conclusion that the "'ultimate touchstone'" of a Fourth Amendment warrantless search is "reasonableness" (Pet. Br. at 32) (citing Kentucky v. King, 563 U.S. 452, 459 (2011)).[3] Once reasonableness is identified as the ultimate test of a Fourth Amendment warrantless search or seizure, it becomes natural for Petitioner to offer the following "rule" to guide an officer making a decision as to whether or not he has the authority to break into a home:

> An officer pursuing a suspected misdemeanant may enter a home without a warrant if — but only if — he could **reasonably** conclude that taking the time to seek a warrant would

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[2] The term "home entry" is a sanitized term, which in no way captures the terror of Americans experiencing a "dynamic" police entry of a home — with or without a warrant.

[3] These *amici* challenge this view as a misunderstanding of the Fourth Amendment test in Section II, *infra*.

> frustrate some **compelling** law-enforcement need. [Pet. Br. at 10 (emphasis added).]

However, it does not require close examination to realize that Petitioner is not really asking this Court to adopt a genuine rule of law that officers could apply in the field. Rather, Petitioner is asking the Court to allow an officer in the field to make a judgment about what he believes is "reasonable," taking into account whether he believes that his need is "compelling." This should not be the way in which constitutional protections are communicated to law enforcement. In the case of a prosecution, it would be the evaluation by a judge as to whether these twin tests were met, which really means that the police officer would be predicting whether a judge would later believe that he had reached a "reasonable" conclusion. That is not a rule of law.

To be sure, Petitioner presents a compelling case against adoption of a categorical warrant exception. He points out that there are all types of misdemeanors, some probably better described as "infractions," and many do not involve any exigency. And there are all types of misdemeanants. A categorical rule allowing police break-ins takes none of the facts of a police-citizen encounter into consideration. In other words, a categorical rule which would authorize police home break-ins in a variety of circumstances which would shock the conscience of a modern judge should not be adopted. These *amici* agree.

Petitioner does not address whether a "case-by-case" approach would provide a meaningful protection for a citizen's home against invasion. The harm is done at the moment of the break-in, no matter what a judge may do later. Even if a judge later were to decide the officer's action was without justification, the police interaction, possible arrest, possible charges, and even a trial could have already occurred. Although evidence seized unconstitutionally later may be suppressed, and a prosecution may be dropped or dismissed, those things typically would occur only after a lawyer is hired and expenses are incurred. Moreover, the physical harm to the home is nothing compared to the terror that is inflicted on the occupants and the risk that such home invasions present to occupants and police. *See* Section III, *infra*.

An officer has almost no consequence from conducting an unconstitutional home invasion, but he could be criticized for not taking action. Unlike at common law, where an officer invading a house was a trespasser who could be sued, the judicially created doctrine of qualified immunity protects the officer from consequences of a wrong decision unless the precise legal issue had already been ruled upon by a court in that jurisdiction.

B. Respondent Urges Adoption of a Case-by-Case Approach.

Respondent recommends the same approach as Petitioner. opposing an extension of the felony pursuit Fourth Amendment categorical exception to misdemeanors. Resp. Br. at 1. Like Petitioner,

Respondent cites a case from this Court for the proposition that the "central requirement" of the Fourth Amendment "is one of reasonableness." Illinois v. McArthur, 531 U.S. 326, 330 (2001). Resp. Br. at 12. From that position, it seeks to preserve the power of the State of California to have its officers break into homes in pursuit of misdemeanor suspects in certain situations:

> No doubt, there are cases in which it is important — even imperative — for police to pursue a fleeing misdemeanor suspect into a home. In most of those cases, however, officers will be able to identify a case-specific exigency justifying a warrantless entry. [*Id*. at 1.]

Like Petitioner, Respondent would have these searches be based on "facts and circumstances" or the "totality of the circumstances." Resp. Br. at 5. And, like Petitioner, Respondent focuses on "privacy" considerations, but not "property" considerations.

C. Both Petitioner and Respondent Ignore a Third Way.

Both Petitioner and Respondent view the choice for this Court as a binary between: (i) a categorical rule which allows police to break and enter a home whenever they are in pursuit of a person thought to have committed either a minor infraction or a misdemeanor; or (ii) a "case-by-case" approach by which the legality of the home invasion later would be deemed "reasonable" by a modern judge, largely based on his own notions of fairness. There is a third choice

that this Court could make — to design a categorical rule which prohibits all home invasions, except for such narrow exceptions as faithfully track the text, history, and tradition of the Fourth Amendment. This is the approach urged by these *amici*, as described in Section II, *infra*.

D. Both Petitioner and Respondent Ignore the Property Basis of the Fourth Amendment.

Since this Court's decision in Katz v. United States, 389 U.S. 347 (1967), most litigants have focused narrowly on the "reasonable expectation of privacy" test identified by Justice Stewart in addressing Fourth Amendment issues of all sorts. However, in United States v. Jones, 565 U.S. 400 (2012), this Court reassessed its Fourth Amendment jurisprudence and restored the primacy of the property principle in determining Fourth Amendment cases.[4] In Florida v. Jardines, 569 U.S. 1 (2013), this Court relied on the Jones decision and again applied property principles — not privacy interests — to decide the Fourth Amendment issue. The Illinois v. McArthur case cited by Respondent pre-dates Jones and Jardines.

The Jones and Jardines cases were virtually ignored by the parties. Petitioner ignored Jardines,

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[4] *See* H. Titus & W. Olson, "United States v. Jones: Reviving the Property Foundation of the Fourth Amendment," CASE WESTERN RESERVE UNIVERSITY, J. OF LAW, TECHNOLOGY & THE INTERNET, vol. 3, no. 2 (Spring 2012).

but once cited Jones using a quotation not about property, but privacy. Pet. Br. at 26. Respondent ignored Jones, but once cited Jardines about the special protection of a home. Resp. Br. at 21. The property principles revived and applied in Jones and Jardines have great relevance to resolving the pending case. Justice Gorsuch's dissent in Carpenter v. United States, 138 S. Ct. 2206 (2018), involving cell phone data was designed to encourage litigants to focus on the property principles and not be limited to arguing atextual notions such as "reasonable expectations of privacy," which Justice Scalia believed had failed to recognize that the Fourth Amendment expressly protects property interests.

> The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous. [Jones at 405.]

Certainly when a person's protected interest in his home is threatened, the property issue should be addressed first, not privacy. Because that issue was largely ignored by the parties, these *amici* suggest that this Court consider requesting briefing of the property principles which bear upon the Court's resolution of this case.

II. THE PARTIES' FOURTH AMENDMENT HISTORICAL RESEARCH PROVIDES NO FOUNDING ERA SUPPORT FOR EITHER A CATEGORICAL EXCEPTION OR CASE-BY-CASE EXCEPTIONS.

Petitioner correctly recognized that in determining the scope of the Fourth Amendments, this Court would look to available guidance from the founding era. Pet. Br. at 10. Petitioner summarized its historical research as follows: "although the common-law authorities differed somewhat on exactly what circumstances could authorize a warrantless entry, they agreed on the dispositive issue here: Mere pursuit of a nonviolent misdemeanant was not one of them." Pet. Br. at 8, 27-28. Petitioner provided a number of helpful authorities, including Laura K. Donohue, "The Original Fourth Amendment," 83 U. CHI. L. REV. 1181 (2016), and her observation that at common law, nonconsensual entry into the home by the government "was a trespass." Pet. Br. at 27. Petitioner explained that only in cases of "absolute necessity" could an intrusion into a home be permitted. *Id.* at 28. Petitioner cited Lord Coke describing only one circumstance where pursuit created an exception to the warrant requirement: "'[U]pon hue and cry of one that is slain or wounded, so as he in danger of death, or robbed, the king['s] officer that pursueth may . . . break a house to apprehend the delinquent." Edward Coke, *The Fourth Part of the Institutes of the Laws of England* 176 (6th ed. 1797)." Pet. Br. at 29. However, the "hue and cry" exception to the warrant requirement is distinguishable from pursuit of a misdemeanor suspect, and the other authorities cited

appear to allow no clear founding era support for officers entering a home without a warrant to pursue a misdemeanor suspect, either categorically or on a case-by-case basis. Pet. Br. at 29-30.

Respondent commented on the "hue and cry" exception as being "somewhat broader" than the modern hot-pursuit exception in that they apparently extended to individuals who were suspected for recently committed offenses but who were not actively fleeing an arrest attempt. Resp. Br. at 20. However, it is not at all clear that the "hue and cry" rule would apply without a "hue and cry." For these reasons, the "hue and cry" rule, while historically supported, likely provides no support for a fact-based, case-by-case rule for fleeing misdemeanant home invasions which is urged by both Petitioner and Respondent.

Based on a review of founding era authorities cited by the parties, a different type of categorical rule should be considered by this Court — that is, without a warrant, officers may not break and enter the home of a misdemeanor suspect, even in hot pursuit. That rule would not disturb the historic "hue and cry" exception for a warrantless break-in, but the justification for that home invasion would be quite different from a fleeing misdemeanant. The circumstance of an officer hearing the "hue and cry of one who "is slain or wounded, so as he [is] in danger of death..." is distinguishable. Should this Court allow re-briefing on the property aspects of the Fourth Amendment that were not well developed by either litigant, additional scholarship could be brought to

bear on the applicability of the "hue and cry" rule to the present case.

III. UNINTENDED CONSEQUENCES WOULD FOLLOW THIS COURT'S SANCTION FOR MORE HOME INVASIONS.

California recognizes the danger of categorical approving misdemeanor-pursuit-into-home for the arsenal of law enforcement officers, as it has asked this Court to vacate the opinion of the court below. It can be anticipated that if this Court affirms the decision below, not only would it be an endorsement of Fourth Amendment violations, but it will also permit law enforcement in more states and localities to use this weapon in ways that will result in negative consequences for our citizens and for law enforcement in general.

A. Pretextual Traffic Violation Pursuits Will Be Used to Circumvent the Warrant Requirement to Enter Homes.

In Whren v. United States, 517 U.S. 806 (1996), this Court rejected a challenge to law enforcement engaging in searches and seizures in the course of a traffic stop for a minor traffic offense, when law enforcement is conducting the stop as a pretext to look for more serious offenses, such as for drug interdiction. Specifically, as long as an officer has an objectively valid reason for the stop — a light bulb out, crossing a traffic lane marking, etc. — that it is irrelevant what the subjective belief or intent of the officer is.

Even when the officer is objectively reasonable, but nonetheless incorrect, about whether a motorist has violated a law, this Court has held it can still result in a valid traffic stop that can be used to justify a further search for contraband. In Heien v. North Carolina, 574 U.S. 54 (2014), the officer began following the driver because she "looked 'very stiff and nervous.'" *Id.* at 57. The officer ultimately pulled the car over because it had a brake light that failed to illuminate, but this apparently did not violate North Carolina's laws at that time. The officer found what he hoped for during his pretextual traffic stop when a search turned up cocaine. *Id.* at 58.

Amici are rightly concerned that if this Court now adopts the lower court's categorical approach, or the case-by-case approach urged by the parties, law enforcement on a broader basis will begin to engage in pretextual traffic "pursuits" to gain entry into homes to search for contraband without the need for a warrant as required by the Fourth Amendment. Such a pretext can be based on impermissible racial profiling or even based on known lawful owners of firearms to catch them in a technical firearms violation in a jurisdiction that disfavors firearms ownership, such as San Francisco's onerous storage requirements for firearms in the home.[5]

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[5] *See* Jackson v. San Francisco, 576 U.S. 1013 (2015) (cert. denied).

B. Misdemeanor Pursuits into Homes Could Lead to Increased Firearm-Related Injuries.

Many states have some form of castle doctrine, permitting an individual in his dwelling to defend it, without the requirement to retreat, from a home invader when in fear of life or bodily injury. California, for example, enacted the "Home Protection Bill of Rights" in 1984, which permits a person to use deadly force to protect his or her household under certain circumstances. *See* Cal. Penal Code § 198.5.

Misdemeanor or traffic pursuits used to justify entering homes without a warrant very predictably could lead to homeowners defending their homes with force. In this case, the evidence demonstrated that Lange was not aware that the officer had turned his lights on or that he was being "persued." *See* Pet. Br. at 3. This case could have turned out quite differently if a person being pursued (or someone else already in the home) had ready access to a firearm and defended the home before he became aware that the "intruder" was a police officer.

CONCLUSION

For the forgoing reasons, the decision of the California Court of Appeal should be reversed.

Respectfully submitted,

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