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 Division

BRIEF OF ILLINOIS, THE DISTRICT OF COLUMBIA, IOWA, MARYLAND, MICHIGAN, NEVADA, OREGON, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE

The States of Illinois, Iowa, Maryland, Michigan, Nevada, Oregon, Virginia, and the District of Columbia (collectively, the "amici States") submit this brief in support of petitioner and urge reversal of the California Court of Appeal, which extended the "hot pursuit" doctrine to suspected misdemeanants. Under this doctrine, police have authority to enter a private home to complete an immediate, warrantless arrest of a suspect, even in the absence of other exigencies, so long as the immediate, continuous pursuit of the suspect began in public.

The amici States have an interest in the enforcement of their laws, which includes promoting the safety of law enforcement officers and others during the apprehension of suspects. The lower court's decision extending the hot pursuit doctrine to suspected misdemeanants interferes with that interest. A totality of the circumstances test for exigency, by contrast, has proven sufficient to serve this and other components of the States' law enforcement interest, including ensuring the preservation of evidence and protecting public safety. In fact, this rule is being implemented by police departments across the country.

In addition, adopting a totality of the circumstances test would cultivate a greater sense of personal privacy and security among the amici States' residents. This, in turn, serves the States' interests by fostering trust between the States and their residents and encouraging participation in civic activities, including sitting on juries and cooperating with law enforcement, that benefit the States.

SUMMARY OF ARGUMENT

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Because "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," it is generally unreasonable for police to enter a person's home without a warrant. *Payton v. New York*, 445 U.S. 573, 576, 585 (1980).

Nevertheless, there are times when the States' interests require that an exception be made. A longstanding exception to the warrant requirement applies in "exigent circumstances," such as the immediate need to preserve evidence or where a suspect poses an immediate risk of danger to himself or others. *Kentucky v. King*, 563 U.S. 452, 460 (2011). This Court has also recognized a categorical rule that the "hot pursuit of a fleeing suspect" to a felony is necessarily an exigent circumstance that justifies the warrantless entry into a private home. *United States v. Santana*, 427 U.S. 38, 42-43 (1976). The lower court here extended the categorical hot pursuit rule to suspected misdemeanants on the theory that the nature of the offense "is of no significance in determining the validity of the entry without a warrant." Pet. App. 20a.

This extension of the hot pursuit doctrine is inconsistent with this Court's precedents, for the reasons petitioner and California explain. The amici States agree and write separately to explain that the extension also is inconsistent with the States' law enforcement interests, which, together with privacy concerns,

guide the exigent circumstances analysis. See *Illinois v. McArthur,* 531 U.S. 326, 331 (2001). Instead, application of a totality of the circumstances test for exigency to warrantless arrests of suspected misdemeanants best serves the States' interest in safe enforcement of their laws. Experience teaches that foot pursuits into homes can endanger the safety of officers and others. Moreover, States have a reduced interest in securing the immediate arrest of suspected misdemeanants as compared with suspected felons.

The totality of the circumstances approach also is administrable in the field. In States and localities that have adopted this standard, the test allows officers to act without waiting for a warrant when necessary to protect themselves and the public, or to preserve evidence. In this way and others, the test has proven workable for officers to apply. Additionally, empirical data shows officers are more effective when they slow down the decision-making process and obtain a warrant if possible, than when they act in the heat of pursuit.

Finally, the totality of the circumstances test is preferable in the misdemeanor context because it better secures state residents' privacy interests. The hot pursuit doctrine enables incursions of personal privacy which, in turn, reduces the willingness of residents to participate in civic activities that benefit the State, like serving on juries and testifying as a witness to a crime. For these reasons, this Court should reverse the lower court's decision extending the hot pursuit doctrine to misdemeanors.

ARGUMENT

I. The Totality Of The Circumstances Test For In-Home Warrantless Arrests Of Suspected Misdemeanants Advances The States' Interest In Safe Policing.

The States have a significant interest in enforcing their criminal laws. See *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (recognizing state interest in "effective crime prevention and detection"). This interest encompasses the States' concurrent interest in the safety of their residents and officers of the peace. See, *e.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995) (recognizing States' "interest in protecting the health, safety, and welfare of its citizens"). In the amici States' experience, when it comes to suspected misdemeanors, the totality of the circumstances test for exigency serves both of these interests more effectively than the hot pursuit exception employed by the lower court for at least two reasons.

First, States have a lesser interest in the immediate arrest of many suspected misdemeanants than for suspected felons. Common law and contemporary state statutes both recognize this distinction between felonies and misdemeanors, and this Court's Fourth Amendment jurisprudence has often taken that reduced interest into account. Second, officers may be less safe and less effective when they are allowed to pursue suspects into private homes without slowing down to evaluate the totality of the circumstances, and whenever possible obtain a warrant.

A. States have a reduced interest in effectuating immediate arrests for misdemeanors.

This Court has long held that warrantless arrests in the home are presumptively unreasonable, subject to certain exceptions. See *King*, 563 U.S. at 459. Such exceptions typically depend on the State's interest in effectuating an immediate search and seizure, balanced against the individual privacy interests at stake. *Compare Riley v. California*, 573 U.S. 373, 391 (2014) ("The search incident to arrest exception rests not only on the heightened government interests at stake in a volatile arrest situation, but also on an arrestee's reduced privacy interests upon being taken into police custody."), *with Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) (holding that when government's interest is only to arrest for minor offense, it is difficult to overcome presumption of unreasonableness of warrantless invasion of "the sanctity of the home"). And in the case of suspected misdemeanants, the State often has a reduced interest in effectuating an immediate arrest.

Indeed, the Court has recognized that the States' interest in enforcing the law is diminished relative to countervailing interests where the offense is of a less serious nature. See *Welsh*, 466 U.S. at 750 (noting that the Court's "hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause to arrest is relatively minor"). In a 1948 concurrence, for instance, Justice Robert Jackson explained that the reasonableness of a warrantless search "certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards

of the method of attempting to reach it." *McDonald v. United States*, 335 U.S. 451, 459-460 (1948) (Jackson, J. concurring).

Put differently, the level of punishment associated with a crime reflects society's interest in preventing the crime, and by defining an offense as a misdemeanor, the legislature makes an implicit statement that the governmental interest in arresting and convicting people of that offense is reduced.[1] In fact, the distinction between misdemeanors and felonies has deep roots in the common law, where it extended to the context of searches and seizures. See, *e.g.*, *United States v. Watson*, 423 U.S. 411, 418-420 (1976) (discussing common law distinction); *Tennessee v. Garner*, 471 U.S. 1, 11-15 (1985) (same); *Payton*, 445 U.S. at 606-07.[2]

For example, this Court explained nearly a century ago that "the usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony." *Carroll v. United States*, 267 U.S. 132, 156 (1925). This reflected the common-law rule that a peace officer was permitted to arrest without a warrant for a felony whether or not it was committed in his presence if there was reasonable ground for making the arrest, but was only permitted to arrest without a warrant for a misdemeanor if the misdemeanor was committed in

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[1] William A. Schroeder, *Warrantless Misdemeanor Arrests and The Fourth Amendment*, 58 Mo. L. Rev. 771, 804 (1993).

[2] See also 2 W. Hawkins, A Treatise of the Pleas to the Crown, ch. 14 § 1 at 136 (8th ed. 1824) (suggesting that the hot pursuit doctrine was limited to felons or other serious offenders).

his presence. *Watson*, 423 U.S. at 418.[3] In this way, the common law balanced the reduced "public need for the most certain and immediate arrest of criminal suspects" in the case of misdemeanors "with the requirement of magisterial oversight to protect against mistaken insults to privacy." *Id.* at 441-442 (Marshall, J., dissenting).

In contemporary times, as well, the felony/misdemeanor distinction is "(t)he most important classification of crimes in general use in the United States."[4] It reflects a recognition by the States that those crimes labeled "felonies" are more serious offenses than those designated "misdemeanors." See, *e.g.*, *State v. Brown*, 902 S.W.2d 278, 294 (Mo. 1995) ("By definition a felony is a 'crime of a . . . more serious nature than those designated misdemeanors.'") (quoting Black's Law Dictionary 617 (7th ed. 1990)); *In re Larsen*, 655 A.2d 239, 247 (Pa. 1994) ("As noted, the crime has been classified by the General Assembly as a felony, which by its very definition denotes a crime of a serious nature."). In other words, "[t]he government has an undeniable legitimate interest in apprehending criminal suspects, and that interest is even stronger when the

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[3] Citing 10 Halsbury's Laws of England 344-345 (3d ed. 1955); 4 W. Blackstone, Commentaries at 292; 1 J. Stephen, A History of the Criminal Law of England 193 (1883); 2 M. Hale, Pleas of the Crown at 72-74; Horace L. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 547-550, 686-688 (1924); *Samuel v. Payne,* 1 Doug. 359, 99 Eng. Rep. 230 (K.B. 1780); *Beckwith v. Philby,* 6 Barn. & Cress. 635, 108 Eng. Rep. 585 (K.B. 1827).

[4] Wayne R. Lafave & Austin H. Scott, Criminal Law § 1.6(a).

criminal is . . . suspected of a felony, which is by definition a crime deemed serious by the state." *Miller v. Clark Cnty.*, 340 F.3d 959, 964 (9th Cir. 2003).

This recognition carries through to many areas of criminal procedure.[5] It can affect pretrial procedures such as discovery, see, *e.g.*, *People v. Khan*, 483 N.E.2d 1030, 1035 (Ill. App. Ct. 1985) ("Illinois Supreme Court rules regarding discovery are not applicable in misdemeanor cases.")[6], indictments, see, *e.g.*, *State v. Hollis*, 750 S.W.2d 674, 675 (Mo. Ct. App. 1985) (the same strictness in charging is not required for misdemeanors as for felonies)[7], and preliminary hearings[8], as well as trial proceedings.[9]

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[5] *Ibid.* (applicability of many rules of criminal procedure depends upon whether the crime in question is a felony or a misdemeanor).

[6] See also, *e.g.*, Conn. Gen. Stat. Ann. § 54-86 (depositions of witnesses permissible only in felony cases).

[7] See also, *e.g.*, Ala. Const. art. I, § 8 (grand jury unnecessary in misdemeanor cases); R.I. Const. art. I, § 7 (indictment or information required for all felony prosecutions); 725 ILCS 5/111-2 ("(a) All prosecution of felonies shall be by information or by indictment . . . (b) All other prosecutions may be by indictment, information or complaint.").

[8] See, *e.g.*, Fed. R. Crim. P. 58(b)(2) (mandating special rules for the initial appearance in misdemeanor cases); Ala. Code § 15-11-1; 725 ILCS 5/109-3.1 (mandating special procedures for preliminary hearings in felony cases); Md. Cts. & Jud. Proc. Code Ann. § 4-304; Or. Rev. Stat. § 135.070 (if defendant charged with felony, magistrate must read the information and inform defendant of his rights before the preliminary hearing).

[9] See, *e.g.*, Ala. Code § 15-16-21; Mo. Sup. Ct. R. 27 (mandating different trial procedures for misdemeanors and felonies); Neb. Rev. Stat. § 29-2001 (misdemeanant, but not felon, may be tried

Moreover, felonies carry more serious consequences, beyond simply longer terms of incarceration. For example, certain acts may be criminal only if engaged in by convicted felons,[10] or if done in furtherance of the commission of a felony.[11] Beyond direct criminal consequences, some States have recognized felony convictions as a ground for divorce,[12] disbarment and the loss of other professional licenses,[13] and loss of eligibility to vote,[14] serve on juries,[15] or hold

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in absentia); Nev. Rev. Stat. § 175.141 (if indictment or information for felony, clerk must read it and state defendant's plea to the jury).

[10] See, *e.g.*, Fla. Stat. Ann. § 790.23 (unlawful for convicted felons to possess a firearm); Nev. Rev. Stat. § 202.360 (same).

[11] See, *e.g.*, 720 ILCS 5/19-1(a) ("A person commits burglary when without authority he knowingly enters . . . a building . . . with intent to commit therein a felony or theft."); Utah Code § 76-4-203 (crime to solicit a person to commit an act which is a felony); see also LaFave & Scott, *supra* note 4, § 14.5 (discussing the felony-murder doctrine).

[12] See, *e.g.*, Alaska Stat. § 25.24.050; Idaho Code § 32-603; N.D. Cent. Code § 14-05-03; S.D. Codified Laws Ann. § 25-4-2; Tex. Fam. Code Ann. § 6.0004; Va. Code Ann. § 20-91.

[13] See, *e.g.*, N.Y. Jud. Law § 90(4)(a) ("Any. . . attorney who shall be convicted of a felony . . . shall upon such conviction, cease to be an attorney . . . ."); Ohio Bar R. 5 § 18(A)(1) (any judicial officer or attorney convicted of a felony may be suspended).

[14] See, *e.g.*, Ark. Const. art. III, § 2 (no person shall be deprived of the right to vote "except for the commission of a felony at common law"); Va. Const. art. II, § 1; Ariz. Rev. Stat. Ann. § 16-101; Kan. Stat. Ann. § 21-4615.

[15] See, *e.g.*, 28 U.S.C. § 1865(b)(5) (person with pending felony charge or felony conviction in state or federal court ineligible to serve on a jury.); Alaska Stat. § 09.20.020; Ariz. Rev. Stat. Ann.

public office.[16] Some States require convicted felons to register their presence in the State.[17]

In these and other ways, the distinction between misdemeanors and felonies has been recognized for hundreds of years. The States' reduced interest in the immediate arrest of suspected misdemeanants should continue to be reflected in a rule that requires a warrant to enter a home to make misdemeanor arrests in the absence of additional exigent circumstances.

B. Warrantless entry into a private home in pursuit of a suspected misdemeanant may create unreasonable risk to officers and others absent additional exigent circumstances.

In addition to the States' reduced interest in effectuating immediate arrests of misdemeanants, the States' interest in enforcing laws in a way that protects the safety of officers and others is also relevant. And that interest is best served by requiring a warrant to effectuate an in-home arrest of a suspected misdemeanant, except in situations where the totality of the circumstances demonstrates exigency requiring immediate action.

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§ 21-201; Kan. Stat. Ann. § 21-4615; Mo. Rev. Stat. § 561.026(3); Utah Code § 78-46-7.

[16] See, *e.g.*, Ariz. Rev. Stat. Ann. § 13-904; Kan. Stat. Ann. § 21-4615; Mo. Rev. Stat. § 561.021(1), (2).

[17] See, *e.g.*, Fla. Stat. Ann. § 775.13; see also Ala. Code § 13A-11-181 (person convicted of felonies more than twice must register with sheriff in county of residence).

While "foot pursuits are a necessary and sometimes important part of good policing," they can be "dangerous and present substantial risks to officers and the public."[18] Among other reasons, foot pursuits can be dangerous because officers "may experience fatigue or an adrenaline rush that compromises their ability to control a suspect they capture, to fire their weapons accurately, and even to make sound judgments."[19] Warrant procedures, by contrast, can protect officers and others by ensuring that officers engage in considered reflection before entering a home.

According to one study, for example, nearly one in five foot pursuits conducted by officers in the Los Angeles County Sheriff's Department resulted in officer injuries.[20] The study also found that a suspect assaulted a deputy in more than two out of five foot pursuits, while approximately three in five foot pursuits resulted in injuries to a suspect.[21] At the same time, approximately one in six foot pursuits resulted in misdemeanor charges only.[22] Similarly, a study of the Richland County, South Carolina Sheriff's Department found that one third of deputies reported being

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[18] U.S. Dept. of Justice. *Investigation of the Chicago Police Department*, at 26 (Jan. 13, 2017), https://tinyurl.com/zks457t.

[19] *Ibid.*

[20] Robert J. Kaminsky, A Descriptive Analysis of Foot Pursuits in the Los Angeles County Sheriff's Department (Jun. 18, 2010), at 4, https://tinyurl.com/y4qnask9.

[21] *Ibid.*

[22] *Id.* at 5.

injured intentionally by a suspect during a foot pursuit.[23] And these injuries compromised their ability to return to work: in total, 16 deputies missed 273 days of work due to intentional injuries, and 20 deputies missed 496 days of work due to accidental injuries suffered during foot pursuits.[24] Dozens more deputies spent hundreds of days working at reduced capacity, as well.[25]

Unsurprisingly, therefore, to advance their interest in keeping officers safe and on the job, police departments around the country ask officers to evaluate the totality of the circumstances before making a warrantless entry into a home. For example, the Houston Police Department instructs officers to abandon foot pursuit "[i]f the suspect's identity is established or other information exists that allows for the suspect's probable apprehension at a later time and there is no immediate threat to the public or police officers."[26] The policy further directs officers to "balance the possibility of losing evidence of a crime (e.g., narcotics, weapon used in a crime) with the safety of later apprehension."[27] In other words, Houston police officers are

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[23] Robert J. Kaminsky, *Police Foot Pursuits and Officer Safety*, Law Enforcement Executive Forum, at 65 (Mar. 2007), https://tinyurl.com/yxnjmc84.

[24] *Id.* at 67-68.

[25] *Ibid.*

[26] Houston Police Department General Order 600-611, https://tinyurl.com/y3ttzdj9.

[27] *Ibid.*

asked to make a totality of the circumstances determination about any ongoing pursuit, including ones that continue into a home.

In another example, the Collingswood, New Jersey police department established a foot pursuit policy that prohibited pursuit into buildings absent exigent circumstances, such as a threat to the safety of the general public, and in the first two years under the new policy, the department experienced fewer injuries to officers.[28] Similarly, the Portland Police Bureau directive on foot pursuits describes them as "inherently dangerous," and directs that no member of the Portland police "shall be criticized for deciding against initiating, discontinuing his/her involvement in or terminating a foot pursuit."[29] Moreover, officers are instructed not to continue pursuits into buildings absent "extreme circumstances."[30]

In some cases, departments have rejected the categorical hot pursuit approach to warrantless home entries for the apprehension of suspected misdemeanants even where their state courts have approved of it. For instance, Austin Police Department General Order 319.3.2 provides that "[o]fficers shall not forcibly enter a private home to arrest a person for a misdemeanor violation," including "officers in hot pursuit of

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[28] Shannon Bohrer, Edward F. Davis, & Thomas J. Garrity, Establishing a Foot Pursuit Policy, FBI Law Enforcement Bull., at 13 (May 2000).

[29] Portland Police Bureau Dir. 630.15, https://tinyurl.com/y6zme7d8.

[30] *Ibid.*

a subject."[31] Texas courts, however, have applied the hot pursuit doctrine to misdemeanors. See, *e.g.*, *Waugh v. State*, 51 S.W.3d 714, 718 n.3 (Tex. App. 2001) (collecting cases).

The benefits of a totality of the circumstances test for exigency in the misdemeanor context are further demonstrated by recent analyses conducted by the United States Department of Justice (DOJ) and the International Association of Chiefs of Police. DOJ's 2016 investigation of the Baltimore City Police Department, for example, assessed a 2014 incident during which an officer on patrol started to respond to a call, when he saw an unknown man "observe [his] marked uniform presence and flee on foot."[32] The officer abandoned the call for service and instead pursued this individual on foot into his home.[33] According to DOJ, even if the officer's warrantless entry could be justified under the hot pursuit doctrine, his actions were "unsafe" and he had "endangered himself, the individual he pursued, and a homeowner, and damaged a homeowner's property."[34]

The solution, according to DOJ, is to engage in considered reflection about a situation before committing to a foot pursuit: "When officers decide to pursue a suspect, even though they must decide quickly whether to pursue, they should assess the seriousness

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[31] Austin Police Department General Orders, https://tinyurl.com/y5lessf9.

[32] U.S. Dept. of Justice. *Investigation of the Baltimore City Police Department*, at 94 (Aug. 10, 2016), https://tinyurl.com/y3cofpgq.

[33] *Ibid.*

[34] *Id.* at 95.

of the suspected violation at issue, the dangerousness of the pursuit under the circumstances, whether the person they intend to pursue poses an immediate and serious threat or could be apprehended later or through other means."[35] DOJ drew on the experiences of the International Association of Chiefs of Police, which similarly recommends that "[b]ecause of the inherent and demonstrated dangers involved in foot pursuits, it should be a matter of agency policy that officers should not be criticized or sanctioned for making a rational and professionally informed decision not to engage in or to terminate a foot pursuit."[36]

In sum, because applying the hot pursuit doctrine to misdemeanors has the effect of authorizing officers to pursue suspects into a home without regard for the seriousness of the offense or other relevant circumstances, it runs counter to the States' interest in safe policing. The totality of the circumstances test for exigency, by contrast, reflects the States' reduced interest in the immediate arrest of many suspected misdemeanants and the importance of safe policing.

II. The Totality Of The Circumstances Test For Exigency Sufficiently Secures The States' Law Enforcement And Public Safety Interests.

As discussed, the totality of the circumstances test for exigency recognizes that in many cases, concerns about officer and public safety make it unreasonable to perform a warrantless in-home arrest of a suspected misdemeanant. But where immediate action

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[35] *Id.* at 93.

[36] *Id.* at 94.

without the delay of obtaining a warrant is needed, the totality of the circumstances test has proven flexible enough to secure the States' interests. This is so because the general exigent circumstances test permits police officers to make a warrantless entry to effect an arrest when necessary to protect the public or preserve evidence. See *Mincey v. Arizona,* 437 U.S. 385, 394 (1978) (sometimes, "the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment") (internal quotations omitted). And this test has proven workable for officers and courts to apply.

A. A totality of the circumstances approach to exigency is sufficient to secure the States' interests.

Courts in at least three States—Arkansas, Florida, and New Jersey—have rejected the categorical hot pursuit doctrine for misdemeanors. See *State v. Markus*, 211 So.3d 894, 901 (Fla. 2017); *Norris v. State*, 993 S.W.2d 918, 923 (Ark. 1999); *State v. Bolte*, 560 A.2d 644, 654 (N.J. 1989). Nevertheless, the usual totality of the circumstances test applies in these States to allow officers to complete warrantless in-home arrests when justified by the presence of exigent circumstances. See, *e.g.*, *Sosnowski v. State*, 245 So. 3d 885, 888 (Fla. Dist. Ct. App. 2018); *Stutte v. State*, 432 S.W.3d 661, 663-64 (Ark. Ct. App. 2014); *State v. Walker*, 62 A.3d 897, 907 (N.J. 2013).

Although there is no comprehensive list of what constitutes exigent circumstances, one established example of an exigency that justifies a warrantless entry into a home under the totality of the circumstances

test is the "emergency aid" exception. This exception applies to allow officers "to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City, Utah v. Stewart*, 547 U.S. 398, 403 (2006)*;* see also, *e.g., Michigan v. Fisher*, 558 U.S. 45, 49 (2009) (upholding warrantless home entry based on emergency aid exception). Applying this exception, courts in the States that have rejected the hot pursuit doctrine for non-felonies have still found that warrantless entries into the home were permissible when necessary to protect someone from harm under the totality of the circumstances test.

For example, a Florida court upheld the warrantless arrest of Thomas Sosnowski on misdemeanor charges as he fled into his home. *Sosnowski*, 245 So. 3d at 887, 890. On the evening of his arrest, Sosnowski's wife called the authorities because she feared for her safety and that of their young son. *Id.* at 886. When officials arrived, Sosnowski's wife appeared to be terrified and had fresh bruises on her face, chest, and neck. *Ibid.* After Sosnowski refused police orders and retreated towards his house, the officers climbed the fence to his backyard to apprehend him. *Ibid.* In upholding the arrest, the court explained that "while the evidence of [his wife's] abuse provided the officers sufficient probable cause to arrest Sosnowski without a warrant, the evidence of abuse alone is not enough to support a warrantless entry into his backyard." *Id.* at 888 (emphasis omitted) (citing *Markus*, 211 So.3d at 909 ("Florida courts have [ ] found probable cause for minor offenses insufficient to justify warrantless home searches and arrests.")). But, the court also held, "[i]mmediate entry into Sosnowski's backyard

and home was necessary for the officers to ensure the safety of a five-year-old child," and "[p]ublic safety has long been recognized as an exigent circumstance permitting warrantless entry into a residence." *Ibid.* In other words, the totality of the circumstances test for exigency was enough to secure the State's interest in public safety, even where the categorical hot pursuit doctrine was unavailable. See also, *e.g.*, *State v. Reece*, 117 A.3d 1235, 1245 (N.J. 2015) (exigent circumstances existed under emergency-aid exception to justify warrantless in-home arrest for suspected misdemeanors where officers were responding to dropped 9-1-1 call).

The need "to prevent the imminent destruction of evidence" has also been recognized as sufficient to justify a warrantless entry into a home. *Brigham City*, 547 U.S. at 403; see also *Georgia v. Randolph,* 547 U.S. 103, 116, n.6 (2006); *Minnesota v. Olson,* 495 U.S. 91, 100 (1990). This exception covers not only the destruction but also the dissipation of evidence, such as blood alcohol content, over time. See *Schmerber v. California*, 384 U.S. 757, 770-771 (1966) (warrantless testing for blood-alcohol content was justified based on potential dissipation of evidence).

In jurisdictions where the hot pursuit doctrine has not been extended to suspected misdemeanants, the destruction of evidence exception allows officers to act without waiting for a warrant as needed to preserve evidence. In *Walker*, for example, Newark Police received a tip from a confidential source about a person selling drugs from an apartment. 62 A.3d at 900. Plain-clothed officers went to the suspect's apartment to try to buy drugs from him. *Ibid.* When they

knocked, a person later identified as the suspect answered while smoking a marijuana cigarette. *Ibid.* The suspect saw the officer's badge, threw the marijuana cigarette into his apartment, and attempted to slam the door. *Ibid.* Police stopped the door from closing, followed the suspect into his apartment, and arrested him. *Ibid.* The New Jersey Supreme Court held that the arrest complied with the Fourth Amendment because the officers had probable cause to arrest for a misdemeanor disorderly persons offense, *id.* at 903, and entered the apartment to prevent the destruction of evidence, *id.* at 907.

Indeed, even in States like Illinois that have applied the hot pursuit doctrine to misdemeanors, it is apparent that a categorical exception to the warrant requirement is unnecessary to ensure the State's interest in enforcing misdemeanor offenses. In *People v. Wear*, 893 N.E.2d 631 (Ill. 2008), a majority of the Illinois Supreme Court extended the hot pursuit doctrine to misdemeanors, *id.* at 646, while three justices rejected the categorical approach, *id.* at 652 (Burke, J., concurring). Those three justices agreed with the outcome, however. They would have held that, even though the hot pursuit doctrine should not be extended to misdemeanors, "under the totality of the circumstances, [the officer] acted reasonably" when entering the defendant's home without a warrant to arrest him for the misdemeanor offense of driving under the influence. *Id.* at 652-653.

Finally, not only does the totality of the circumstances test for exigency authorize officers to forego a warrant where necessary to prevent the destruction of evidence, data suggests police officers are more effective in recovering evidence when acting consistent

with that standard. For example, while the probable cause analysis for obtaining a warrant and acting in the field is the same, multiple studies have found that warrants have an evidence recovery rate of greater than 80%.[37] The evidence recovery rate when officers search without a warrant is typically less than 50%.[38] In other words, the totality of the circumstances test is not only consistent with the States' law enforcement interests, because it allows officers to enter a home without a warrant where necessary to protect the public or preserve evidence, but it may make officers more effective by discouraging them from rushing into situations when the totality of the circumstances does not demand immediate action.

B. A totality of the circumstances approach is no harder for police in the field to apply than the hot pursuit doctrine.

This Court has noted the benefits associated with bright line rules that clarify the duties of law enforcement and allow easier application. See, *e.g.*, *California v. Acevedo*, 500 U.S. 565, 576-579 (1991) (finding rule too confusing for police to apply); *New York v. Belton*, 453 U.S. 454 (1981) ("A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.") (internal quotations

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[37] Max Minzer, *Putting Probability Back Into Probable Cause*, Benjamin N. Cardozo School of Law Jacob Burns Institute for Advanced Legal Studies Working Paper No. 240, at 12-13 (July 2008), https://tinyurl.com/y3qtbads.

[38] *Id.* at 13-14.

omitted). Here, though, the categorical hot pursuit doctrine presents its own set of judgments for officers to make. To be sure, the Court's directives in *Santana* have eliminated some of those determinations. See *Santana*, 427 U.S. at 42-43. But, as courts have recognized, other judgment calls remain.

Although hot pursuit of a fleeing felony suspect *can* be an exigent circumstance justifying a warrantless arrest in one's home, *Olson,* 495 U.S. at 100-101; see also *Santana,* 427 U.S. at 42-43, not all such pursuits justify a warrantless in-home arrest. In *Welsh,* this Court instructed lower courts to weigh the "gravity of the underlying offense" when determining the legality of the entry. 466 U.S. at 753. And the Court also required that officers have engaged in an "immediate or continuous pursuit" into a home in response to a crime that occurred in a public place. *Ibid.* Answering these questions requires officers in the field to make judgment calls in the same way that they must do when determining whether a warrantless intrusion is reasonable based on the totality of the circumstances.

For starters, determining whether a pursuit is "immediate or continuous" requires an analysis of the particular facts of a case. In *United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001), for example, the court held that pursuit of a suspected misdemeanant was not "immediate or continuous," and therefore the hot pursuit doctrine did not apply, because the officers who were chasing the suspect lost sight of him for 30 minutes prior to their warrantless entry into a private yard. *Id.* at 898-899, 907. The court reasoned: "The half-hour time period, during which the officers received no new information about where [the suspect] had gone, turned the pursuit from lukewarm to ice

cold." *Id.* at 907-908. Therefore, this case was not like one "where the police officers always knew exactly where the suspect was, but decided that it would be dangerous for them to enter the property until reinforcements arrive." *Ibid.* Under those circumstances, the hot pursuit doctrine could apply. *Ibid* (citing *United States v. Lindsay*, 506 F.2d 166, 173 (D.C. Cir. 1974)).

Illinois's experience confirms this point. Since the Illinois Supreme Court first extended the hot pursuit doctrine to misdemeanors, the State's officers have occasionally stumbled when determining whether they were in hot pursuit of a suspect. For example, in *People v. Smock*, 100 N.E.3d 208 (Ill. App. Ct. 2018), officers arrived at the defendant's trailer in response to a noise complaint. *Id.* at 211. When the defendant opened the door, one officer told him that he was under arrest and tried to grab him by the hand. *Ibid.* The defendant fled back into his trailer, and the officers pursued and arrested him. *Ibid.* The appellate court concluded that the arrest violated the Fourth Amendment because the defendant only came into public view when the officers knocked on his door and encouraged him onto his porch. *Id.* at 217. The hot pursuit doctrine, which requires that the pursuit begin in a public place, thus did not apply. *Ibid.*

In States where courts have applied the hot pursuit doctrine to misdemeanors, officers must also determine whether an offense is sufficiently grave under *Welsh* to justify hot pursuit. In *Commonwealth v. Martin*, 81 N.E.3d 350 (Mass. App. Ct. 2017), for example, the court declined to apply the hot pursuit doctrine to the officers' pursuit of the defendant, who fled from police after he was spotted smoking marijuana;

the pursuit culminated in the officers' warrantless entry into the defendant's home, where a gun was recovered in his pocket. *Id.* at 353-354. Although Massachusetts has extended the hot pursuit doctrine to misdemeanors, *Commonwealth v. Jewett*, 31 N.E. 3d 1079, 1089 (Mass. 2015), the court in *Martin* held that the doctrine did not apply because the pursuit "commenced with probable cause to issue a citation for civil marijuana possession, which is not a jailable misdemeanor" and therefore insufficiently severe, 81 N.E. 3d at 356.

In sum, officers applying the hot pursuit doctrine have to draw distinctions based on the facts of each specific case to determine whether warrantless pursuit into a private home is justified. Indeed, some jurists have suggested that drawing these distinctions in the field is easier when there is a clear rule that the doctrine applies only to suspected felonies. See, *e.g.*, *State v. Ferguson*, 767 N.W.2d 187, 203 (Wis. 2009) ("As city police officers step over the threshold to arrest for disorderly conduct, how are they to know if conduct will subsequently be charged as a jailable or nonjailable offense? When officers have to act in the middle of the night under split-second circumstances, how can we expect them to make these nuanced decisions?") (Bradley, J., concurring). In other words, applying the hot pursuit doctrine can be quite similar in the field to the totality of the circumstances approach for exigency.

III. Requiring That The Totality Of The Circumstances Demonstrate Exigency Prior To Entering A Home To Arrest A Suspected Misdemeanant Advances The States' Interest In Their Residents' Privacy Rights.

This Court has historically judged possible Fourth Amendment violations by balancing the government's regulatory and law enforcement interests against the individual privacy interests at stake. See, *e.g.*, *Arizona v. Gant*, 556 U.S. 332, 345 (2009) ("A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals."). But there are also public interests that are tied to individual privacy interests. Put differently, the States themselves have an interest in the privacy rights protected by the Fourth Amendment—similar to the States' interest in the First Amendment context, which this Court has long recognized. See, *e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 532 (2001) ("In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively.") (internal quotations and citation omitted).

So, for example, the Court allows reasonable time, place, and manner regulations of speech based on its consideration of the public's collective interests in facilitating and regulating speech. See, *e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 118-119 (1972) (describing public's collective interests in preventing disruption of school activities, on the one hand, and in

publicizing "significant grievances," on the other); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (referring to the importance to both the public and the speaker in having political expression heard). Relatedly, the Court has acknowledged the importance of communicating ideas for democratic dialogue as well as to individual expression. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment."). First Amendment interests are thus both collective and individual, and the collective interests at stake can both support and cut against governmental intrusion on the right.

History and common sense demonstrate that the States have collective interests in Fourth Amendment rights, just as they do in First Amendment rights. Privacy is essential to the flourishing of free thought, which serves both individual and collective interests. See *Healy v. James*, 408 U.S. 169, 171 (1972) ("We also are mindful of the equally significant interest in the widest latitude for free expression and debate consonant with the maintenance of order.").[39] And the Fourth Amendment secures these interests just as the

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[39] See Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* 61-80 (1997) (explaining that without privacy, we feel weak and vulnerable; with privacy, we feel the independence and strength to resist conformity and exercise the autonomy to forge our own unique lifestyle).

First Amendment does.[40] Indeed, protections against unreasonable searches and seizures help to provide a setting in which other liberties—such as free speech, religious activity, and a private family life—can be exercised, allowing social relations among interdependent and free individuals to flourish.[41] Thus, historically, the Fourth Amendment's warrant requirement reflected the concern that allowing searches of homes without an individualized warrant empowered the Crown to suppress opposition to the British monarchy, confiscate and destroy dissident religious texts, and suppress anti-state publications.[42]

Following this Court's lead, many state courts have recognized the interest of the States in their residents' right to privacy, as well. See*, e.g.*, *Kearney v. Solomon Smith Barney, Inc.*, 137 P.3d 914, 934 (Cal. 2006) (resolving conflict of law in favor of application of California's privacy statute because to do otherwise would impair California's strong interest in protecting the privacy of its residents); *State v. Gibbs*, 730 N.E.2d 1027, 1031 (Ohio Ct. App. 1999) ("the state has a legitimate interest in protecting its citizens from unwanted intrusions into their privacy because each citizen has the right to be let alone") (citing *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736-737 (1970)); *Petrillo v. Syntex Laboratories, Inc.*, 499

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[40] Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 Fordham L. Rev. 2257, 2266 (2002).

[41] Joseph William Singer, Entitlement: The Paradoxes of Property 11, 23, 31-32, 131 (2000).

[42] Alexander Reinert, *Public Interest(s) and Fourth Amendment Enforcements*, 2010 U. Ill. L. Rev. 1461, 1486 (2010).

N.E.2d 952, 971 (Ill. App. Ct. 1986) ("Moreover, the State has a significant interest in safeguarding the privacy rights of individual patients."); *West Virginia Citizens Action Group v. Daley*, 174 W. Va. 299, 308 (W. Va. 1984) (prohibitions on canvassing after 5:00 p.m. "also directly further the towns' interest in protecting the privacy of their residents"); *State v. Keaton*, 371 So. 2d 86, 92 (Fla. 1979) ("The state has a legitimate concern with protecting substantial privacy interests of its citizens from being invaded in an essentially intolerable manner.") (citing *Cohen v. California*, 403 U.S. 15, 21 (1971)).

And just as the individual right to privacy is perhaps most sacred in one's own home, see *United States v. United States District Court*, 407 U.S. 297, 313 (1972) ("physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"), nowhere is the State's interest in protecting that right for its residents stronger than in their homes, see, *e.g.*, *Curtis v. Thompson*, 840 F.2d 1291, 1299 (7th Cir. 1988) ("Unquestionably, Illinois' interest in ensuring the privacy of its residents while they are at home is strong and valid."). This Court has recognized that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471 (1980). And the Court has held that the State may act to protect this interest: "a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect

this freedom." *Frisby v. Schultz*, 487 U.S. 474, 484-485 (1988).

But where police regularly intrude on the privacy of the home to make warrantless arrests of suspected misdemeanants without consideration of other exigent circumstances, the intrusions not only undermine the States' interests in protecting the privacy of their residents, they alienate the community from the police.[43] This alienation is harmful to government and societal interests generally because "integral to the Constitution and our societal view of government is a reciprocal trust between the government and its citizens."[44] More specifically, this alienation undermines the States' ability to enforce their laws by making members of these communities less likely to cooperate as witnesses and jurors.[45] In other words, when individuals suffer intrusions on their right to privacy, it affects the willingness of the whole community to participate in collective activity that is beneficial to the States.[46]

In sum, the States' interests here do not support allowing officers to intrude on individual privacy. Rather, those interests—including in officer safety and

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[43] Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 386-392 (1998).

[44] Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 Colum. L. Rev. 1751, 1777 (1994)

[45] David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265, 268-269 (1999).

[46] Reinert, *supra* note 42, at 1488.

encouraging collective activity beneficial to the States—would not be served by extending the hot pursuit doctrine to misdemeanants. This is especially true given the States' reduced interest in the immediate arrest of misdemeanants. Where state interests would be served by allowing law enforcement to enter a home without a warrant to arrest a misdemeanant, the totality of the circumstances test adequately protects those interests.

CONCLUSION

The Decision of the Court of Appeal for the State of California, First Appellate Division, should be reversed.

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