

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 Division**

—◆—
**BRIEF OF LOS ANGELES COUNTY
POLICE CHIEFS' ASSOCIATION AS
AMICUS CURIAE IN SUPPORT OF
THE JUDGMENT BELOW**

—◆—
J. SCOTT TIEDEMANN*
ALEX Y. WONG
LIEBERT CASSIDY WHITMORE
6033 W. Century Blvd., Suite 500
Los Angeles, CA 90045
(310) 981-2000
stiedemann@lcwlegal.com
awong@lcwlegal.com
**Counsel of Record*

Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
I. INTERESTS OF THE <i>AMICUS CURIAE</i>	1
II. SUMMARY OF THE ARGUMENT.....	2
III. ARGUMENT	5
A. FOURTH AMENDMENT RIGHTS WILL CONTINUE TO RECEIVE ADEQUATE PROTECTION UNDER THE CATE- GORICAL RULE, AS THEY HAVE IN CALIFORNIA	5
1. Practical Considerations Already Limit Police Use of Warrantless Entries and the Potential for Abuse of the Categorical Rule	6
a. Nature of the Crime	7
b. Public Safety	10
c. Officer Safety	11
d. Public Scrutiny	12
e. Civil Liability.....	13
2. Department Policy, Officer Training, and Internal Review Deter Potential Police Overreach.....	14
a. Warrantless Entries	14
b. Body Worn Cameras	16
c. Vehicle Pursuit Policies	18
d. Foot Pursuit Policies.....	20
e. Internal Review	22

TABLE OF CONTENTS—Continued

	Page
3. Existing Law Provides Civil and Criminal Judicial Remedies to Address Unlawful Entries by Police onto Private Property.....	23
B. REJECTING THE CATEGORICAL RULE WILL INCREASE THE STRAIN ON LIMITED POLICE RESOURCES BY ENCOURAGING MISDEMEANANTS TO FLEE INTO RESIDENCES, WHICH WILL REQUIRE A MUCH LARGER POLICE RESPONSE.....	24
IV. CONCLUSION.....	29

APPENDIX

1. California Commission on Peace Officer Standards and Training, <i>Learning Domain 16: Search and Seizure</i> , Chapter 3: Warrantless Searches and Seizures	App. 1
2. El Segundo Police Department Policy Manual, Policy 151.55 – Supervisor’s Responsibility and Control [Vehicle Pursuits]	App. 10
3. Hawthorne Police Department Policy Manual, Policies 300.5 – Reporting the Use of Force and 300.6 – Medical Consideration	App. 17
4. La Verne Police Department Policy Manual, Policy 429 – Foot Pursuits.....	App. 25
5. Long Beach Police Department Policy Manual, Policy 7.1.7 – Vehicle Pursuits	App. 34

TABLE OF CONTENTS—Continued

	Page
6. Los Angeles Police Department Policy Manual, Volume 3, Policy 579.15 – Objectives of Body Worn Video	App. 48
7. Torrance Police Department Policy Manual, Policy 307 – Vehicle Pursuits	App. 68

TABLE OF AUTHORITIES

	Page
CASES	
<i>People v. Lloyd</i> , 216 Cal.App.3d 1425 (1989)	2, 3, 5
<i>Missouri v. McNeely</i> , 569 U.S. 141 (2013)	4, 25
CONSTITUTIONAL PROVISION	
U.S. Const. amend. IV	<i>passim</i>
STATUTES	
42 U.S.C. § 1983	24
Cal. Penal Code § 17(a).....	2
Cal. Penal Code § 19	2
Cal. Penal Code § 192(c)	7
Cal. Penal Code § 242	8
Cal. Penal Code § 243(a).....	7, 8, 15
Cal. Penal Code § 243(d).....	7, 8, 15
Cal. Penal Code § 243(e)(1)	7, 15, 27
Cal. Penal Code § 273.5(a).....	7
Cal. Penal Code § 273a(a).....	8, 15
Cal. Penal Code § 273a(b).....	8, 15
Cal. Penal Code § 273d(a).....	15
Cal. Penal Code § 487	8, 9
Cal. Penal Code § 817(c)	26
Cal. Penal Code §§ 13500 <i>et seq.</i>	14

TABLE OF AUTHORITIES—Continued

	Page
Cal. Vehicle Code § 17004.7.....	18
Cal. Vehicle Code § 17004.7(c)(9)(A)	19
 RULE	
Sup. Ct. R. 37.6	1
 OTHER AUTHORITIES	
California Commission on Peace Officer Standards and Training, <i>Learning Domain 16: Search and Seizure</i> (Version 4.8; Chapter 3: Warrantless Searches and Seizures).....	14, 15
El Segundo Police Department Policy Manual.....	22
Hawthorne Police Department Policy Manual.....	22
La Verne Police Department Policy Manual.....	20, 21
Long Beach Police Department Policy Manual	18
Los Angeles Police Department Manual, Volume 3, Policy 579.15: Objectives of Body Worn Video	16, 17
Torrance Police Department Policy Manual.....	19

I. INTERESTS OF THE *AMICUS CURIAE*¹

The Los Angeles County Police Chiefs’ Association (“LACPCA”) submits this brief in support of Court-appointed *amicus curiae* Amanda K. Rice. The LACPCA is a nonprofit mutual benefit corporation consisting of the Police Chief Executives of the 45 independent cities in Los Angeles County. The LACPCA focuses on advancing the science and art of police administration and crime prevention in Los Angeles County; coordinating the implementation of law enforcement efforts by local law enforcement leaders; and developing, teaching, and disseminating professional law enforcement practices.

The LACPCA submits this brief to offer insight into law enforcement practices under existing California law. Specifically, what the parties call the “categorical rule” allows police to pursue misdemeanants into a home without a warrant under the exigent circumstances of hot pursuit. The fear of police abuse is overblown because the rule does not exist in a vacuum. To the contrary, statewide training standards limit police conduct during warrantless searches and seizures. Department policies provide internal safeguards against unlawful warrantless entries by encouraging officers to terminate pursuits, by applying internal review, and

¹ All parties to this matter have provided written consent for this *amicus curiae* brief. Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part. No one other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

by punishing officer misconduct. Furthermore, existing remedies provide external safeguards: criminal defendants can move to suppress evidence and civil plaintiffs can bring claims for civil rights violations. Individually, police officers consider many factors when deciding whether to continue a pursuit or make a warrantless entry onto private property. These considerations, supported by department policies, lead officers to decide against continuing a pursuit or making a warrantless entry in many circumstances.

The categorical rule is a small part of a much larger process. While it allows warrantless entries under the limited, exigent circumstances of hot pursuit, many other forces act upon police officers to regulate their conduct and guard against abuse. The categorical rule allows police officers some necessary discretion at a critical point of pursuits and arrests. Accordingly, the LACPCA supports the underlying decision of the California Court of Appeal, First Appellate Division and urges that it should be upheld.

II. SUMMARY OF THE ARGUMENT

California law allows police officers to make warrantless entries onto private property for the limited exigency of hot pursuit. This includes hot pursuit of misdemeanants.² The court in *People v. Lloyd*, 216

² Cal. Penal Code § 17(a) defines felonies as crimes that are “punishable with death, by imprisonment in the state prison, or” by imprisonment in county jail for a specified term. Cal. Penal Code § 19 defines misdemeanors as offenses that are punishable

Cal.App.3d 1425, 1430 (1989) recognized that technical distinctions between felonies and misdemeanors had no bearing on the permissibility of warrantless entries. This is especially true in California, where “wobbler” crimes may be charged as misdemeanors or felonies depending on the facts of a given case. Highly dynamic situations like pursuits and warrantless entries should not depend on such a capricious distinction.

Instead, the focus has shifted to more practical considerations in the decades since *Lloyd*. Police departments train officers to balance the competing risks to officer and public safety should a pursuit continue, against the risk caused by allowing a suspect to escape. As a result, violent offenses (whether misdemeanors or felonies) balance more toward pursuit and arrest, while non-violent offenses (whether misdemeanors or felonies) balance more toward terminating pursuit before warrantless entries occur. Police also consider public safety, officer safety, public scrutiny, and potential liability. Different circumstances raise different practical challenges, which officers have become better-equipped to address under the categorical rule.

Internal safeguards against police abuse have also developed since *Lloyd*. California has developed state-wide training standards for police officers, which set requirements and limitations for warrantless searches and seizures. Police departments implement many policies that bear on suspect pursuits and warrantless

by up to six months’ imprisonment, up to a one-thousand-dollar fine, or both, unless otherwise defined by law.

entries. Modern pursuit policies, in particular, encourage officers to terminate vehicle or foot pursuits under many circumstances, before warrantless entries become necessary. Discipline policies punish officer misconduct, even where the misconduct did not violate any laws. Certain high-risk activities that may occur in relation to warrantless entries, like vehicle pursuits and uses of force, receive heightened scrutiny and internal review to guard against abuse.

External safeguards provide remedies to individuals who believe they were subjected to an unlawful search or seizure. Criminal defendants can (and often do) move to suppress evidence when they believe it resulted from an unlawful search or seizure. Likewise, civil plaintiffs can bring civil rights claims against police officers or departments if they believe their constitutional rights were violated.

If the Court rejects the categorical rule, it will have a chilling effect on law enforcement. Petitioner and Respondent propose an alternative rule that will require a reviewing court to “evaluate each case of alleged exigency based on its own facts and circumstances.” Respondent’s Brief in Opposition to a Writ of Certiorari 11–12 (citing *Missouri v. McNeely*, 569 U.S. 141, 150 (2013) (internal quotation marks omitted)). This approach discounts all of the developments that exist in conjunction with the categorical rule. It focuses too much on technical distinctions between felonies and misdemeanors that do not matter in the context of the Fourth Amendment.

III. ARGUMENT

A. FOURTH AMENDMENT RIGHTS WILL CONTINUE TO RECEIVE ADEQUATE PROTECTION UNDER THE CATEGORICAL RULE, AS THEY HAVE IN CALIFORNIA

In 1989, the California Court of Appeal, Second District, held that police officers acted lawfully when they sought to follow a misdemeanant into his home without a warrant while in hot pursuit. *People v. Lloyd*, 216 Cal.App.3d 1425, 1430 (1989). The court rejected the defendant’s Fourth Amendment challenge and stated, “[T]he fact that the offenses justifying the initial detention or arrest were misdemeanors is of no significance in determining the validity of the entry without a warrant.” *Id.* (internal citations omitted).

In the decades since *Lloyd*, California police officers have operated under what the parties here label a “categorical rule” for hot pursuits. This categorical rule allows police officers to enter private property (notably, homes or residences) without a warrant while in hot pursuit of a misdemeanant. *Lloyd*, 216 Cal.App.3d at 1430. Under California’s categorical rule, pursuits that result in warrantless entry into homes are still extremely rare occurrences. This is because, contrary to the fears expressed by Petitioner, Respondent, and *amici curiae* in support of Petitioner, the categorical rule is not a shortcut to warrantless entries into private homes. Rather, it has allowed pursuing officers to focus on more relevant factors and make on-the-ground, practical decisions regarding officer and public

safety while pursuing suspects. Even under the categorical rule, as it has existed in California, Fourth Amendment rights have received, and will continue to receive adequate protection.

1. Practical Considerations Already Limit Police Use of Warrantless Entries and the Potential for Abuse of the Categorical Rule

Fifty years ago, police officers routinely chased suspects regardless of the offense. Law enforcement has changed drastically over the last half-century. The modern trend has favored fewer pursuits and greater exercise of discretion. This trend continues, even under the categorical rule in California. The decision whether to pursue focuses on the nature of the underlying offense—specifically, whether it involves a violent crime. Public safety, officer safety, public scrutiny, and the potential for civil liability also limit the number of pursuits, which limits the number of warrantless entries as a result.

Police do not always follow misdemeanants into homes. Rather, they weigh the available information and make a decision in conjunction with their supervisors. It is standard practice to employ field supervising officers and/or watch commanders who are also responsible for monitoring pursuits. The available facts pass through two to three levels of review: responding officers observe, report, and react to the situation; field supervisors receive the information and provide support

to the officers; and watch commanders similarly monitor pursuits to provide additional support and make decisions where necessary. Officers at all three levels have the authority to terminate a pursuit. As a result, officers frequently decide not to continue pursuits or make warrantless entries, even with California’s categorical rule in place.

a. Nature of the Crime

Police officers are trained to consider many factors while pursuing a suspect. The nature of the underlying crime is a significant factor. Generally, property crimes are not worth a sustained pursuit. The chance to prosecute a minor vandalism charge, for example, does not balance well against the concerns for public and officer safety that arise in a pursuit. In such a situation, departments would expect their officers, field supervisors, and watch commanders to favor calling off the pursuit. However, violent crimes often do require pursuit because the violent individual poses an ongoing threat to others.

The misdemeanor-felony distinction becomes especially difficult in jurisdictions like California, where the law recognizes many “wobbler” offenses—crimes that may be charged as a misdemeanor or a felony depending on the facts.³ In many circumstances, police

³ See Cal. Penal Code §§ 192(c) (vehicular manslaughter); 243(a) (misdemeanor battery); 243(d) (felony battery); 243(e)(1) (misdemeanor domestic violence); 273.5(a) (felony domestic violence);

and prosecutors cannot determine whether an offender has committed a misdemeanor or felony until after the arrest and subsequent investigation have concluded. A reviewing court may have the ability to determine that officers were pursuing a misdemeanant, but, in many instances, those officers cannot make the same distinction during the pursuit itself.

Police do not focus on statutory differentiations between misdemeanors and felonies when they decide whether to pursue a suspect. Such categorizations are moderately useful to the extent that they align with the seriousness of a given crime, but they draw attention away from more practical and important considerations. For example, when police receive a call that an ex-boyfriend is at an ex-girlfriend's home attacking her mother, and the suspect flees into the house, they do not ask whether the attack qualifies as a misdemeanor battery⁴ or felony battery⁵ before responding. Police respond, and if the suspect flees they will give chase. In such a case, the officers have a strong motivation to complete the pursuit because the batterer could inflict more harm if police do not take him into custody.

Property crimes can also merit pursuit where there are extenuating circumstances. For example, police may decide against pursuit, or else may call off

273a(a) (felony child abuse); 273a(b) (misdemeanor child abuse); & 487 (grand theft) for examples.

⁴ See Cal. Penal Code §§ 242 and 243(a) (defining the elements of criminal battery and the punishment for misdemeanor battery, respectively).

⁵ See Cal. Penal Code § 243(d) (defining felony battery).

pursuit, for a single instance of grand theft.⁶ However, where police identify a team of offenders who have committed multiple grand thefts, then they would have more reason to pursue. The decision relies less on grand theft's classification as a misdemeanor or felony and more on the extenuating circumstances that show an ongoing harm to the community. Under such circumstances, pursuit for a property crime becomes reasonable. However, property crimes generally do not warrant pursuit regardless of whether they are felonies or misdemeanors—especially where there are no extenuating circumstances to favor pursuit. Accordingly, officers' consideration of the underlying crime acts as a limit to the number of pursuits resulting in warrantless entries, even under the categorical rule.

Local, county, and state-level prosecutors may add nuance to considerations of the underlying crime. A jurisdiction's prosecutors sometimes implement policies that favor or disfavor prosecuting certain crimes. For example, a prosecutor may adopt a policy against prosecuting certain misdemeanors. Because the policy exists outside an individual pursuit and departments have time to adjust to it, the misdemeanor-felony distinction becomes somewhat more workable. Police departments can identify behaviors or activities that are specific to the offenses covered by a given policy.

⁶ Grand theft is a “wobbler” property crime that may be charged as a misdemeanor or a felony depending on the circumstances, where the offender takes “money, labor, or real or personal property” that is greater than \$950 in value or else falls into another statutorily defined category. See Cal. Penal Code § 487.

Departments can then counsel their officers to recognize the signs that would indicate an offense that prosecutors do not wish to pursue, and they can provide additional training if necessary. Officers who witness those real-world behaviors or activities can comply with prosecutorial policies by declining to pursue or make warrantless entries. The same police discretion that exists under the categorical rule also promotes cooperation between police and prosecutors.

b. Public Safety

Every pursuit bears upon public safety. Whether on foot or in a vehicle, pursuits often take place partially or wholly in public. Vehicle pursuits are especially concerning from a public safety standpoint, because a suspect behind the wheel of a two-ton vehicle can inflict terrible damage. Accordingly, police procedure has adapted to the risks of high-speed vehicle pursuits. More departments have begun implementing standards that encourage officers, field supervisors, or watch commanders to call off vehicle pursuits if the suspect drives too dangerously. Officers have even less incentive to continue a vehicle pursuit where they are able to secure identifying information, like a license plate number or driver's license. When officers positively identify the suspect, they have a better chance of making the arrest later, under safer conditions. Police officers are trained to consider the risks that a fleeing vehicle poses to the public. The risks factor into whether the pursuit should continue, and, absent

strong contrary factors, best practices favor terminating the pursuit.

While a suspect on foot can still cause harm to people or property, the analysis changes slightly in that officers are more inclined to chase violent offenders where they know or have reason to believe the individual has already caused bodily harm. A suspect who has already committed violence may do so again. In such instances, public safety often favors continuing the pursuit to complete the arrest. Conversely, officers, field supervisors, or watch commanders may be more inclined to call off a foot pursuit for a property crime. Property crimes do not involve violence against others. There, the risk posed by the misdemeanor escaping is lower than for a violent crime, and the risks to public safety are more likely to tip the balance against pursuit. Again, consideration of the risks to public safety limit the number of pursuits resulting in warrantless entry.

c. Officer Safety

Police entry into a home raises serious concerns for officer safety. While suspects sometimes flee to homes or private residences, pursuits that begin in public more often end in public. On occasions where suspects do turn toward homes or residences, police often apprehend them in the street or front yard, before they reach the interior. However, when suspects do enter a home, officers must decide whether to follow. The decision whether to follow a fleeing suspect into a

home relies on many factors, including but not limited to: whether the officer has maintained visual contact with the suspect; whether other officers are present to give support; how long it will take backup to arrive; whether the home is visibly occupied; whether the suspect poses a threat to the occupants; and whether the underlying offense was a violent crime.

Officers are trained to consider the fact that they likely will not know the building's layout. They could be exposing themselves to ambush. They may have to operate without supporting units for an extended period of time. They could expose the occupants to danger during a confrontation with the suspect. On the other hand, where officers can maintain an unobstructed view of the suspect, can follow closely without breaking visibility, or have reason to believe the suspect poses an immediate threat to the occupants, then continued pursuit may provide the best resolution.

The decision to continue pursuit and enter a home is highly discretionary. It focuses on the practical facts and circumstances of each individual pursuit. Even under the categorical rule, officer safety considerations often weigh against warrantless home entries, absent extenuating circumstances.

d. Public Scrutiny

Police departments give constant consideration to public sentiment and perception. Recent public opinion has directed incredible scrutiny at law enforcement agencies across the country. Public scrutiny shapes

police action; departments expect their officers to conduct themselves at all times in a competent and professional manner.

Police departments operate optimally when they have the full trust, support, and goodwill of the communities they serve. Home entries are necessary from time to time under certain circumstances, but police understand that it takes only one poorly handled entry onto private property to lose the public's trust. The fact that departments rely upon the continued support of the public to effectively perform their missions also serves to limit warrantless entries into homes and further limits the potential for abuse of the categorical rule.

e. Civil Liability

By extension, law enforcement agencies do not want to be sued. Lawsuits cost time, money, and resources. Judgments against a department must be paid out of public funds, officers may also be held individually liable under certain circumstances (such as unreasonable uses of force), and lawsuits can tarnish the reputations of officers and departments alike. Even where an agency receives a favorable verdict, or is able to negotiate a quick, low-cost settlement, there are still costs for legal representation and time spent away from the job. An officer who must testify in a legal proceeding cannot also perform his or her job duties. Lawsuits are bad for all parties involved since they reduce a department's effectiveness and ability to enforce the

law. Accordingly, departments devote significant resources toward ensuring proper police conduct.

2. Department Policy, Officer Training, and Internal Review Deter Potential Police Overreach

Policies and procedures will vary from department to department, but they invariably aim to promote best practices with an emphasis on officer conduct. The below sections address certain policies and practices that may apply in a misdemeanor pursuit, including vehicle and foot pursuit policies, as well as internal review and reporting policies. These policies and practices exist under the categorical rule in California and provide additional safeguards against police overreach.

a. Warrantless Entries

California has developed statewide training standards for warrantless entries under the categorical rule. The California Department of Justice created the Commission on Police Officer Standards and Training (“POST”). Cal. Penal Code §§ 13500 *et seq.* POST-developed training limits the scope of warrantless entries under exigent circumstances.⁷ Once officers make a warrantless entry under exigent circumstances, they may take only those actions that are necessary to

⁷ California Commission on Peace Officer Standards and Training, *Learning Domain 16: Search and Seizure* (Version 4.8; Chapter 3: Warrantless Searches and Seizures) (LACPCA Appendix App. 1–App. 9) (June 2017).

resolve the emergency. The training provides examples of emergencies, including instances of child abuse,⁸ violent assault,⁹ and domestic violence.¹⁰ Police may also enter private property to prevent a suspect's escape or the imminent destruction of evidence, but they may not take actions beyond those necessary to capture the suspect or otherwise deemed reasonable under the Fourth Amendment.¹¹ The training materials explicitly state that, after the exigency ends, officers must leave the private property within a reasonable amount of time and may not reenter without a warrant or the owner's consent.¹²

⁸ Child abuse is another “wobbler” offense that may be charged as a misdemeanor or a felony under California law. See Cal. Penal Code § 273a(a) (defining felony child abuse); Cal. Penal Code § 273a(b) (defining misdemeanor child abuse). Similarly, infliction of physical punishment on a child (Cal. Penal Code § 273d(a)) may be charged as a felony or a misdemeanor depending on the facts of the particular case.

⁹ Cal. Penal Code §§ 243(a) & (d) (defining misdemeanor and felony battery, respectively).

¹⁰ Cal. Penal Code § 243(e)(1) (defining misdemeanor domestic violence).

¹¹ Cal. POST, *Learning Domain 16*, *supra* note 7 (LACPCA Appendix App. 6–App. 8). The POST training materials note that exigent circumstances permit entry onto private property “especially if the suspect is armed and dangerous or has just committed a violent felony.” Here, the training’s use of the term “violent felony” acts as an example where warrantless entry is “especially” reasonable. It does not exclude warrantless entries based on misdemeanor pursuits, nor does it reflect the demanding nature of real-time analysis that police officers apply during pursuits.

¹² Cal. POST, *Learning Domain 16*, *supra* note 7 (LACPCA Appendix App. 8).

POST standards train police officers to make warrantless entries only under appropriate exigent circumstances. They limit the scope of warrantless searches and seizures to the confines of the exigency itself. They require officers to leave the private property within a reasonable amount of time, and they bar reentry unless officers obtain a warrant or the owner's permission. Accordingly, POST training limits police overreach by defining the boundaries of warrantless entries and requiring officers to leave once the exigent circumstance has ended. Police officers can already make warrantless arrests for misdemeanors committed in the officer's presence. Where probable cause for a warrantless arrest already exists, in the midst of a hot pursuit a warrantless entry onto private property for the limited purpose of completing the arrest does not represent a further degradation of Fourth Amendment rights, particularly where the officers leave within a reasonable time.

b. Body Worn Cameras

Many departments require officers to activate body worn video recording devices ("body worn cameras") during pursuits. For example, the Los Angeles Police Department ("LAPD") requires officers to activate body worn cameras during vehicle stops, pedestrian stops, vehicle pursuits, and foot pursuits.¹³ Body

¹³ Los Angeles Police Department Manual, Volume 3, Policy 579.15: Objectives of Body Worn Video (LACPCA Appendix App. 50–App. 51) (also requiring officers to activate bodycams for Code 3 responses; calls for service; searches; arrests; uses of force;

worn cameras promote accountability; help resolve disputed accounts of a given encounter; help resolve complaints against officers, including false allegations by members of the public; aid evidence collection and later investigation; and deter criminal activity or uncooperative behavior by individuals who learn they are being recorded.

The LAPD and departments with similar body worn camera policies expect their officers to record misdemeanor pursuits. Whether by vehicle or on foot, officers are required to start recording at the initial stop. Body worn camera policies regularly specify that officers are required to record law enforcement activities in their entirety.¹⁴ This would include the initial contact, any ensuing pursuit, any warrantless entry onto private property, any use of force, the arrest, and any interrogation of the suspect afterward. Officers know that their actions are recorded and subject to later scrutiny. Consequently, body camera policies create an additional layer of accountability and guard against police misconduct, including during warrantless entries.

in-custody transports; witness and victim interviews; crowd management; and situations where the officer's judgment deems that video recording would aid the efforts of law enforcement).

¹⁴ E.g., LAPD Manual, *supra* note 13 (LACPCA Appendix App. 51) ("The [body worn camera] shall continue recording until the investigative or enforcement activity involving a member of the public has ended. If enforcement or investigative activity with a member of the public resumes, the officer shall activate the [body worn camera] device and continue recording.").

c. Vehicle Pursuit Policies

Departments expect officers to know when they are allowed to begin a vehicle pursuit.¹⁵ This involves balancing all available information, including but not limited to the seriousness of the underlying crime; the crime's relationship to community safety; whether the fleeing suspects pose a danger to community safety; whether officers are familiar with the area and can navigate it safely; traffic, weather, and road conditions that bear on officer and public safety during a pursuit; the presence of pedestrians and other innocent bystanders; and whether the officers have identified the suspects and may apprehend them more safely at a later date.¹⁶ Policies also dictate when officers should terminate a pursuit.¹⁷ If the risks to public or officer safety outweigh the risks caused by allowing the suspect to escape, then officers are expected to perform the ongoing analysis and stop pursuing.¹⁸

¹⁵ E.g., Long Beach Police Department Policy Manual (LAC-PCA Appendix App. 35–App. 36) (June 19, 2020) (providing an example of a comprehensive vehicle pursuit policy).

¹⁶ E.g., Long Beach PD Policy Manual (LACPCA Appendix App. 36–App. 38) (listing 15 factors for officers to consider before initiating a pursuit).

¹⁷ E.g., Long Beach PD Policy Manual (LACPCA Appendix App. 43) (listing conditions that require officers to terminate pursuits).

¹⁸ In California, police departments may qualify for statutory immunity from civil liability resulting from vehicle pursuits. In order to do so, they must adopt a written vehicle pursuit policy that meets certain criteria and provide annual training to their officers. Cal. Vehicle Code § 17004.7. The written pursuit policy must include factors that officers should consider when deciding

There has been a recent move toward non-retaliation clauses to protect officers or supervisors who call off a pursuit. Departments recognize that vehicle pursuits can be dangerous and unpredictable, so they do not want to second-guess officer decisions to terminate a pursuit.¹⁹ Accordingly, departments have begun adopting policy language that frees officers from discipline if they decide to terminate a vehicle pursuit due to the risks involved.

Modern vehicle pursuit policies tend to reduce the number of warrantless home entries, because they increase the likelihood that officers will terminate a vehicle pursuit before it requires a warrantless entry. They require officers and supervisors to reflect before and during a vehicle pursuit. Many policies also prohibit retaliation for an officer's decision to terminate pursuit. In situations where the pursuit continues and officers move to capture the suspects, policies reinforce public and officer safety as priorities.²⁰ All of these

whether to terminate a pursuit. The list begins with an ongoing evaluation of the risks to officer and public safety. Cal. Vehicle Code § 17004.7(c)(9)(A). The section focuses on safety concerns during a vehicle pursuit. As a result, police departments have increasingly emphasized discretion in vehicle pursuits.

¹⁹ E.g., Torrance Police Department Policy Manual (LACPCA Appendix App. 68) (“In recognizing the potential risk to public safety created by vehicular pursuits, no officer or supervisor shall be criticized or disciplined for deciding not to engage in a vehicular pursuit because of the risk involved.”).

²⁰ E.g., Torrance PD Policy Manual (LACPCA Appendix App. 92) (“Officers should consider safety of the public and the involved officers when formulating plans to contain and capture the suspects [following a vehicle pursuit].”).

elements guard against police abuse of warrantless entries, because they allow departments to scrutinize officer conduct at multiple points before a warrantless entry occurs. They also encourage officers to terminate vehicle pursuits when practical, before warrantless entries become necessary.

d. Foot Pursuit Policies

Many departments also have policies specific to foot pursuits.²¹ Several considerations overlap with those of vehicle pursuits: risks to public and officer safety, knowledge of the local area, the presence of innocent bystanders, et cetera. Foot pursuits differ from vehicle pursuits in that the suspect is less likely to escape by gaining distance from police. Suspects fleeing on foot are more likely to try to hide. Running suspects rarely enter homes. They face many unknown factors: whether the home is occupied; whether the occupants will work against the entrant; whether the suspect can gain easy access (against locked doors, closed windows, and the like); or whether the suspect can escape easily or will become trapped inside. Suspects are more likely to hide where they can gain easy access and believe they stand a better chance of evading police: in businesses with public bathrooms; behind walls or fences; in backyards; or under vehicles.

²¹ E.g., La Verne Police Department Policy Manual (LAC-PCA Appendix App. 25–App. 33) (Oct. 12, 2020) (providing an example of a comprehensive foot pursuit policy).

Like vehicle pursuit policies, foot pursuit policies include safeguards that reduce the likelihood of warrantless entries. Foot pursuits require the same continuing analysis of risks that may compel officers to terminate a pursuit. Officers have the same authority to call off a foot pursuit. More departments are also adopting non-retaliation clauses for officers who decide to call off foot pursuits due to the risks involved.²² Because a running suspect is less likely to escape without a vehicle, foot pursuit policies offer surveillance and containment as safer alternatives to an active chase.²³ For example, officers are trained to consider the availability of air support, canine searches, or thermal imaging and other technologies to locate and capture running suspects. Departments also expect officers to recognize specific factors that justify calling off a pursuit, such as losing the suspect's location; observing an injury to an officer or a third party that requires immediate attention, with no other emergency responders nearby; or pursuing alone with no support.²⁴ All of these elements tend to reduce the number of warrantless entries under the categorical rule.

²² E.g., La Verne PD Policy Manual (LACPCA Appendix App. 26) (“[N]o officer or supervisor shall be criticized or disciplined for deciding not to engage in a foot pursuit because of the perceived risk involved.”).

²³ E.g., La Verne PD Policy Manual (LACPCA Appendix App. 26–App. 27) (describing various methods of surveillance and containment as safer alternatives to foot pursuits).

²⁴ See, e.g., La Verne PD Policy Manual (LACPCA Appendix App. 27–App. 29) (listing 15 factors that would support a decision to terminate a foot pursuit).

e. Internal Review

Police departments maintain internal review procedures to correct officer misconduct and ensure a high standard of police operations. Officer misconduct occurs when an officer's behavior deviates from the department's standards and policies. Department standards and policies often set higher bars for officer behavior than those set by law, so that an officer's conduct might not have violated any laws but may still violate department policy. The least serious deviations result in counseling and training. Many instances of misconduct trigger the disciplinary process, which involves progressive discipline up to and including termination. The seriousness of the discipline will depend on the gravity of the misconduct, whether the officer has engaged in past misconduct, and other factors.

Separately, certain police actions can trigger supervisory review automatically, in the absence of any misconduct. For example, many departments require supervisory review and supplemental reports for vehicle pursuits.²⁵ Similarly, many departments require expanded reporting and investigation procedures for officer uses of force.²⁶ These requirements apply even

²⁵ E.g., El Segundo Police Department Policy Manual (LAC-PCA Appendix App. 14) (accessed Dec. 31, 2020) (requiring supervising officers to write post-pursuit reports including analysis of pursuit tactics, compliance with department policy, legal issues, and evaluation of any force used).

²⁶ E.g., Hawthorne Police Department Policy Manual (LAC-PCA Appendix App. 19–App. 23) (Jan. 14, 2020) (requiring officers to immediately and completely document and report any use of force; and requiring supervisors to separately investigate the

where a reviewing district attorney (or similarly situated official) has determined there was no violation of law and the department has determined there was no officer misconduct.

An officer's decision to pursue a suspect or to use force still comes under review, even where law and policy find no violations. Officers who conduct vehicle pursuits know that the department will review their decisions. Similarly, officers who engage in uses of force know that their actions will be subject to review and independent investigation. These internal review policies moderate officer conduct and act as a check on possible abuse. These policies also address the most dangerous parts of a hot pursuit ending in a warrantless entry: vehicle pursuits and uses of force. By moderating officer conduct in high-risk situations, these policies guard against officer misconduct under the categorical rule.

3. Existing Law Provides Civil and Criminal Judicial Remedies to Address Unlawful Entries by Police onto Private Property

External safeguards already protect Fourth Amendment rights under California's categorical rule. In the criminal context, defendants frequently exercise their ability to challenge police searches and seizures

underlying facts, ensure medical treatment is given, interview subjects upon whom the force was applied, photograph any injuries, et cetera).

through motions to suppress evidence obtained from allegedly deficient procedures. Police officers and prosecutors know that a motion to suppress can undo an entire prosecution if it removes key evidence from the case. The enormous consequences of an unlawful search or seizure motivate officers to comply with constitutional requirements.

Civily, plaintiffs can bring an action under United States Code Title 42 Section 1983. Even where the government declines to prosecute, wronged individuals can assert a civil claim and seek compensation. Officers and departments do not want to be found civilly liable, which further incentivizes police to conduct searches and seizures lawfully. These restraints exist under the categorical rule. They give recourse to individuals who believe police may have acted unlawfully, and they create external checks on searches and seizures.

B. REJECTING THE CATEGORICAL RULE WILL INCREASE THE STRAIN ON LIMITED POLICE RESOURCES BY ENCOURAGING MISDEMEANANTS TO FLEE INTO RESIDENCES, WHICH WILL REQUIRE MUCH LARGER POLICE RESPONSES

Contrary to Petitioner's claims and the claims of several *amici curiae*, warrant applications regularly take several hours to complete. A "fast" warrant application may be processed in an hour and a half if factors are favorable (e.g., it occurs during normal court hours,

has strong supporting facts, receives quick responses from the magistrate or judge, etc.). Judges and magistrates expect more support for an arrest warrant than a search warrant. Officers who need an arrest warrant generally must collect evidence and complete an investigation in order to establish a sufficient factual basis for probable cause. The higher expectations for arrest warrants means they rarely issue quickly unless there are compelling reasons to do so.

Officers can get a specific type of search warrant, commonly referred to as a *McNeely* warrant, in thirty to sixty minutes; however, *McNeely* warrants are not representative for several reasons. First, *McNeely* warrants are limited in scope and merely allow officers to take blood tests from drivers who are suspected of driving under the influence of intoxicating substances. Such warrants do not have any bearing on the scenario before the Court: misdemeanants entering private residences during a hot pursuit. Second, the suspect is already in police custody when officers apply for a *McNeely* warrant. Third, *McNeely* warrants come on pre-printed forms, so the applying officer need only fill in the blanks. Finally, *McNeely* warrants involve an expedited process when compared to standard warrants specifically because blood toxicity diminishes over time, meaning every delay results in less available evidence until it disappears entirely.

Additionally, telephonic or electronic warrant applications do not accelerate the warrant application process. They still require the applicant to submit an affidavit with specific facts supporting probable cause

and identifying the person or thing to be searched or seized, and they must still await a judge or magistrate's review. A telephonic or verbal warrant application requires the same information, provided by oath or affirmation.²⁷ The difference is not one of timing but rather of momentary accessibility. An officer in the field can apply for a warrant without returning to an office computer. However, the officer must still meet the various requirements for warrant applications. It is not always practical for officers to do so while responding to a call. Where a warrant is necessary, officers more often rely on colleagues at the department to apply for the warrant rather than submit an electronic or telephonic application. Warrant applications often involve additional police officers and resources.

Police departments have an obligation to commit their limited resources effectively. Where police do not have the ability to make a warrantless entry after a fleeing misdemeanor, a warrant application against an entrenched suspect requires a substantial amount of police resources. First, officers need to monitor the building against the suspect's escape. The strategy will vary depending on the characteristics of the building and the area (e.g., building size, layout, neighboring land and structures, etc.), but typically a single-family residence takes six to ten officers to monitor properly. Most police chiefs would not be comfortable with fewer than four to six officers providing constant monitoring.

²⁷ See Cal. Penal Code § 817(c) (describing the requirements for verbal declarations when applying for a warrant of probable cause for arrest).

Any fewer officers creates issues of officer safety and increases the chances that a suspect will escape.

Second, while officers lock down the scene, at least one other officer (usually an investigator) must gather the available facts and evidence to apply for an arrest warrant. Third, supervisors and/or watch commanders need to monitor the situation and react accordingly (e.g., facilitate shift changes, redirect other officers to cover additional patrols, etc.). Fourth, once the officers secure a warrant, they must then coordinate the entry and arrest. The process will vary between agencies, but for some this will require calling a specialist unit like a SWAT team. By then, the suspect has had time to find a potential means of escape, destroy evidence, or barricade herself against the delayed police entry.

Between the initial responding officers, the investigator, supervisory staff, and specialist units, locking down a building of any size to secure an arrest warrant requires considerable police resources. Certainly, extenuating circumstances may justify a warrant application for an underlying misdemeanor offense.²⁸ However, police departments do not have enough resources to make warrant applications for every misdemeanor pursuit that ends on private property. In practice, when a misdemeanant escapes into a private

²⁸ Extenuating circumstances may include identifying the suspect and confirming that he or she has other, active warrants; responding to a violent crime, like misdemeanor domestic violence (Cal. Penal Code § 243(e)(1)); or having reason to believe the suspect poses an ongoing danger to the community.

home and the officers are unable to enter, the officers often have no choice but to walk away. They may write a report and request investigator follow-up the next day, but such efforts usually prove futile. The delay allows suspects to destroy evidence or escape, especially where officers were unable to identify them beforehand. Accordingly, misdemeanants who successfully flee into homes will have escaped justice.

Instead, where officers closely pursue a misdemeanant, they can apply police resources more effectively when they have the option to follow into a home or residence to complete the arrest. Exercise of that option still falls subject to a multitude of other considerations, but it is important for police officers to have the discretion to complete a misdemeanant pursuit. Depriving officers of the categorical rule's discretion will mean more unresolved crimes and increased strain on limited police resources. It will encourage misdemeanants to flee into private residences and hamper the police officers who pursue them.

IV. CONCLUSION

Based on the foregoing, the Court should uphold the categorical rule for misdemeanor hot pursuits and the decision of the Court of Appeal for the State of California, First Appellate Division.

Respectfully submitted,

J. SCOTT TIEDEMANN*

ALEX Y. WONG

LIEBERT CASSIDY WHITMORE

6033 W. Century Blvd., Suite 500

Los Angeles, CA 90045

(310) 981-2000

stiedemann@lcwlegal.com

awong@lcwlegal.com

**Counsel of Record*

Counsel for Amicus Curiae

January 14, 2021