No. _____

IN THE

Supreme Court of the United States

ARTHUR GREGORY LANGE,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Absent "consent" or "exigent circumstances," a police officer's "entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant." *Steagald v. United States*, 451 U.S. 204, 211 (1981). The question presented is:

Does pursuit of a person who a police officer has probable cause to believe has committed a misdemeanor categorically qualify as an exigent circumstance sufficient to allow the officer to enter a home without a warrant?

RELATED PROCEEDINGS

People v. Lange, No. S259560 (Cal. Feb. 11, 2020).

People v. Lange, No. A157169 (Cal. Ct. App. Oct. 30, 2019).

People v. Lange, No. SCR-699391 (Cal. Super. Ct. Mar. 29, 2019).

Lange v. Shiomoto, No. SCV-260489 (Cal. Super. Ct. Jan. 25, 2018).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Arthur Gregory Lange respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, First Appellate Division.

OPINIONS BELOW

The opinion of the California Court of Appeal (Pet. App. 1a) is available at 2019 WL 5654385.

JURISDICTION

The California Supreme Court denied a timely petition for review on February 11, 2020. Pet. App. 28a. On March 19, 2020, this Court entered a standing order that extended the time within which to file a petition for a writ of certiorari in this case to July 10, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."

INTRODUCTION

This Court has already recognized that "federal and state courts of last resort around the Nation" are "sharply divided" on the question presented here. *Stanton v. Sims*, 571 U.S. 3, 10 (2013) (per curiam). That question, which *Stanton* expressly reserved, is "whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect." *Id.* at 6.

The entrenched conflict on that question stems from a gap in this Court's precedents. It is well settled that the Fourth Amendment requires police to obtain a warrant before entering a home except in "exigent circumstances." *Payton v. New York*, 445 U.S. 573, 590 (1980). It is likewise uncontroversial that a "hot pursuit" is one situation that may create such an exigency. But the Court has decided only a handful of hot-pursuit cases, which provide "equivocal" guidance here. *Stanton*, 571 U.S. at 10.

On the one hand, the Court has twice upheld warrantless entries by officers pursuing felons: an armed robber, *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967), and a drug dealer with evidence at risk of destruction, *United States v. Santana*, 427 U.S. 38, 39-40, 42-43 (1976). On the other hand, in a case involving a "nonjailable" traffic violation, the Court admonished that the "application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned" in a case involving such a "minor offense." *Welsh v. Wisconsin*, 466 U.S. 740, 742, 753 (1984).

Hayden, *Santana*, and *Welsh* do not address pursuits involving suspected misdemeanors, which are by far the most common basis for arrest. Lacking

specific guidance from this Court, federal courts of appeals and state courts of last resort have split into the two camps identified in *Stanton*. Some hold that pursuit of a misdemeanor suspect *always* qualifies as an exigent circumstance. Others reject that categorical rule and instead ask the same fact-specific question that governs in other exigent-circumstances cases: Whether officers faced a "compelling need for official action" and had "no time to secure a warrant." *Missouri v. McNeely*, 569 U.S. 141, 149 (2013) (quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978)).

This case provides an ideal opportunity to resolve that entrenched conflict on "misdemeanor pursuit." This Court should grant certiorari and reject the categorical rule, which contradicts the Court's exigent-circumstances precedent, ignores traditional common-law limits on warrantless entries, and allows officers investigating trivial offenses to invade the privacy of all occupants of a home even when no emergency prevents them from seeking a warrant.[1]

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[1] Like *Stanton*, we use the term "misdemeanor" in its usual sense: a non-felony offense punishable by incarceration. 571 U.S. at 4-5 & n.*; *cf.* 18 U.S.C. § 3559(a)(6)-(8). Some states extend the "misdemeanor" label to nonjailable offenses akin to the traffic violation in *Welsh*, but those nonjailable offenses are outside the conflict recognized in *Stanton* and the question presented here.

STATEMENT OF THE CASE

A. Factual background

One evening in October 2016, petitioner Arthur Lange was driving home in Sonoma, California. Pet. App. 2a. He was listening to loud music and at one point honked his horn a few times. *Id.*

A California highway patrol officer, Aaron Weikert, began following Mr. Lange, "intending to conduct a traffic stop." Pet. App. 2a. Officer Weikert later testified that he believed the music and honking violated Sections 27001 and 27007 of the California Vehicle Code. *Id.* 16a; *see* Suppression Hr'g Tr. 9-10. Those noise infractions carried base fines of $25 or $35. Cal. Uniform Bail & Penalty Schedule 55 (2016), https://perma.cc/4DUV-UXHT.

Officer Weikert initially followed at some distance and did not activate his siren or overhead lights. Pet. App. 2a-3a; Vid. 0:00-0:51. He neared Mr. Lange's station wagon only after Mr. Lange turned onto his residential street. Vid. 0:51-0:53. Approaching his house, Mr. Lange slowed and activated his garage door opener. Pet. App. 2a; Vid. 0:53-1:02. As Mr. Lange continued toward his driveway, Officer Weikert turned on his overhead lights, but not his siren or megaphone. Pet. App. 3a; Vid. 1:03.[2]

At that point, Mr. Lange was about as far from his driveway as first base is from second. "[A]pproximately four seconds" later, he turned into his driveway and then parked in his attached garage. Pet. App. 17a;

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[2] Officer Weikert's dashboard camera recorded a video of the incident, which was introduced at the suppression hearing. Pet. App. 3a. References to "Vid." refer to timestamps in the video.

Vid. 1:03-1:07. Officer Weikert parked in the driveway behind him. Pet. App. 3a; Vid. 1:21. As the garage door began to descend, Officer Weikert left his squad car, stuck his foot under the door to stop it from closing, and entered the garage. Pet. App. 3a; Vid. 1:22-1:33.

Inside the garage, Officer Weikert asked Mr. Lange: "Did you not see me behind you?" Vid. 1:46-1:55. When Mr. Lange answered that he had not, Officer Weikert asked him about the honking and music, then requested Mr. Lange's license and registration. Vid. 1:56-02:17. After more questioning, Officer Weikert stated that he could smell alcohol on Mr. Lange's breath and ordered him out of the garage for a DUI investigation. Vid. 3:04-3:20.

B. Procedural History

1. Mr. Lange was charged with driving under the influence and "the infraction of operating a vehicle's sound system at excessive levels." Pet. App. 2a. He was not charged with any offense for continuing into his garage rather than stopping on the street when Officer Weikert activated his lights. *Id.*

Mr. Lange moved to suppress the evidence Officer Weikert obtained after entering his garage, arguing that the officer's "warrantless entry into his home violated the Fourth Amendment." Pet. App. 2a. The State did not dispute that the evidence would have to be suppressed if the entry was unlawful. It also did not contend that Mr. Lange's suspected noise infractions justified a warrantless entry, or that Officer Weikert had any reason to suspect Mr. Lange of driving under the influence before he entered the garage. Instead, the State asserted that Mr. Lange's "fail[ure] to stop after the officer activated his

overhead lights" created "probable cause to arrest" for the separate, uncharged misdemeanors of failing to obey a lawful order and obstructing a peace officer. *Id.* 3a-4a; *see id.* 17a. The State further argued that because Officer Weikert had probable cause to arrest for those misdemeanors, his brief pursuit from the street to Mr. Lange's driveway created an exigency sufficient to justify a warrantless entry. *Id.* 3a-4a.

The superior court acknowledged that both sides had cited "a lot of points [of] authority" that "can be interpreted various ways." Pet. App. 4a. But it agreed with the State and denied the motion to suppress. *Id.*

The appellate division of the superior court affirmed the denial of the suppression motion in an interlocutory appeal. Pet. App. 26a-27a. Mr. Lange pleaded no contest to a DUI charge. *Id.* 6a. He then appealed his conviction, again challenging the denial of his suppression motion. The appellate division again affirmed. *Id.* 23a-25a.

2. While his criminal case was pending, Mr. Lange filed a successful civil petition to overturn the related suspension of his driver's license. Pet. App. 4a. Disagreeing with the criminal court, the civil court held that Officer Weikert's warrantless entry violated the Fourth Amendment. *Id.* 5a. The court found "no evidence Lange knew the officer was following him, nor any evidence Lange was attempting to flee." *Id.* It therefore concluded that Officer Weikert lacked probable cause for anything other than the two noise infractions, and that those infractions could not justify a warrantless entry. *Id.*

3. The California Court of Appeal accepted a discretionary transfer of Mr. Lange's criminal appeal "because of [the] conflicting decisions in Lange's civil

writ proceeding and in his criminal case." Pet. App. 14a. It then affirmed his conviction. *Id.* 1a-22a.

As relevant here, the court held that Mr. Lange should have known he was being stopped when Officer Weikert activated his lights. Pet. App. 16a-17a. The court therefore concluded that when Mr. Lange continued "approximately 100 feet" to his driveway, he created probable cause to arrest him for the two flight-related misdemeanors the State had invoked at the suppression hearing. *Id.* 17a. The court also agreed with the State that because Officer Weikert had probable cause to arrest for those offenses, his brief "hot pursuit" justified his warrantless entry into Mr. Lange's home. *Id.* 18a-19a.

In so holding, the court specifically rejected Mr. Lange's argument that "the exigent circumstance of 'hot pursuit' should be limited to 'true emergency situations,' not the investigation of minor offenses." Pet. App. 19a. The court presumed that hot pursuit would not justify a warrantless entry to arrest for a "nonjailable" violation like the one in *Welsh*. *Id.* 21a. But it rejected any further consideration of the severity of the offense or other surrounding circumstances. Instead, it applied a categorical rule: "Because the officer was in hot pursuit of a suspect whom he had probable cause to arrest for [a jailable misdemeanor], the officer's warrantless entry into Lange's driveway and garage were lawful." *Id.*

4. The California Supreme Court denied Mr. Lange's petition for discretionary review. Pet. App. 28a.

REASONS FOR GRANTING THE WRIT

After another seven years of grappling with misdemeanor pursuit, lower courts are now even more "sharply divided" on the question reserved in *Stanton v. Sims*, 571 U.S. 3, 10 (2013) (per curiam). This Court's intervention is sorely needed. Misdemeanor pursuits ending in warrantless home entries are common and implicate the core of the Fourth Amendment, yet their legality varies with the happenstance of geography. What's more, the categorical rule embraced by the court below and at least five state courts of last resort violates the Fourth Amendment. It ignores this Court's direction that the exigent-circumstances exception demands case-by-case assessments of exigency. It contradicts traditional common-law limits on warrantless home entries. And it vastly expands police authority to intrude into the home without a warrant—even where, as here, an officer is investigating an offense so minor that he does not initially intend to make an arrest at all.

I. Courts are intractably split over the proper approach to misdemeanor pursuit.

In *Stanton*, this Court illustrated the split over misdemeanor pursuit by citing four cases: Decisions by the Ohio and New Hampshire Supreme Courts holding that misdemeanor pursuit always allows police to enter a home without a warrant, and decisions by the Tenth Circuit and the Arkansas Supreme Court rejecting that categorical rule and instead demanding a case-specific showing of exigency. *Stanton*, 571 U.S. at 6-7. Since *Stanton*, the split has only deepened. At least five state courts of last resort have adopted the categorical rule, while

two federal courts of appeals and three state supreme courts have emphatically rejected it.

A. Five state supreme courts hold that misdemeanor pursuit categorically justifies warrantless home entry.

The state courts of last resort in Massachusetts, Ohio, Illinois, North Dakota, and New Hampshire have adopted the same categorical rule the California Court of Appeal applied here.

In Massachusetts, "hot pursuit of an individual suspected of committing a jailable misdemeanor" is a categorical exception to the warrant requirement. *Commonwealth v. Jewett*, 31 N.E.3d 1079, 1088 (Mass. 2015). In *Jewett*, an officer with probable cause to arrest for reckless driving pursued a suspect into his home. *Id.* at 1083, 1085. The court specifically declined to require any exigency beyond the mere fact of pursuit because it read this Court's decision in *Santana* to mean that "hot pursuit, in and of itself, is sufficient to justify a warrantless entry." *Id.* at 1089 n.8.

In Ohio, too, hot pursuit always allows police to "enter without a warrant, regardless of whether the offense for which the suspect is being arrested is a misdemeanor." *City of Middletown v. Flinchum*, 765 N.E.2d 330, 332 (Ohio 2002). As in *Jewett*, the pursuit in *Flinchum* was based on probable cause to arrest for reckless driving—there, spinning a car's tires. *Id.* at 331-32. A sharp dissent criticized the court's categorical rule, emphasizing that it allowed police to "burst into [a] house to arrest a mere tire spinner," even though the chase "was more lukewarm amble than hot pursuit." *Id.* at 334 (Pfeifer, J., dissenting).

The Illinois Supreme Court has likewise treated misdemeanor pursuit as a categorical exception to the warrant requirement. *See People v. Wear*, 893 N.E.2d 631, 644-46 (Ill. 2008). In *Wear*, the officer pursued a DUI suspect to his driveway, then into his home. *Id.* at 634-36. Because jail time could be imposed for a DUI, the court held that the officer's "warrantless, nonconsensual entry" was "excused under the doctrine of hot pursuit." *Id.* at 646. Three concurring Justices criticized the majority's categorical approach, arguing that the court "err[ed] and fundamentally alter[ed] fourth amendment law" by failing to consider "the seriousness of the underlying offense" in determining whether a pursuit qualifies as an exigent circumstance. *Id.* at 649.

The Supreme Court of North Dakota agrees with its counterparts in Massachusetts, Ohio, and Illinois that in cases involving "jailable misdemeanors," officers "may make warrantless entry to arrest for crimes committed in their presence and while in hot pursuit of the suspect." *City of Bismarck v. Brekhus*, 908 N.W.2d 715, 722 (N.D. 2018), *cert. denied*, 139 S. Ct. 187 (2018). Accordingly, because "fleeing or attempting to elude a police officer" was a jailable misdemeanor, the *Brekhus* court upheld a warrantless entry based on a pursuit of a suspect who had failed to pull over for a traffic stop. *Id.* at 721-22.

Finally, in *State v. Ricci*, 739 A.2d 404 (N.H. 1999), the Supreme Court of New Hampshire held that probable cause to arrest for "the misdemeanor offense of disobeying a police officer," coupled with a short pursuit, constituted exigency. *Id.* at 407. The court reserved the question whether pursuit of a person suspected of committing a nonjailable "violation" could justify a warrantless entry, but it

otherwise treated hot pursuit as a categorical exception to the warrant requirement. *Id.* at 407-08.[3]

B. Two federal courts of appeals and three state supreme courts require a case-specific showing of exigency.

The Tenth and Sixth Circuits and at least three state courts of last resort reject the notion that misdemeanor pursuit categorically justifies warrantless entry into a home. Instead, those courts apply a case-by-case approach, allowing warrantless entry only when some exigency beyond mere pursuit of a suspected misdemeanant leaves police no time to seek a warrant.

The Tenth Circuit has held that a hot pursuit justifies warrantless entry only if it combines "a serious offense" with "an immediate and pressing concern such as destruction of evidence, officer or public safety, or the possibility of imminent escape." *Mascorro v. Billings*, 656 F.3d 1198, 1207 (10th Cir. 2011). In *Mascorro*, the court considered a pursuit of a person suspected of committing two "nonviolent misdemeanor[s]"—a traffic offense and eluding a police officer. *Id.* at 1205 & n.9. The court emphasized

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[3] Wisconsin could be considered a sixth state on the categorical side of the split, as it appears to have adopted the categorical rule in all but name. In *State v. Weber*, 887 N.W.2d 554 (Wis. 2016), the lead opinion "decline[d] to adopt the per se rule" for misdemeanor pursuit. *Id.* at 569. But it also upheld a warrantless entry simply because the misdemeanor at issue was "jailable," and it expressly declined to require any other indicia of exigency. *Id.* at 565; *see id.* at 571-72 (Kelly, J., concurring) (endorsing the same rule). As two dissenters noted, the lead opinion effectively adopted "a per se rule that hot pursuit of a fleeing suspect is always an exigent circumstance." *Id.* at 583.

that this Court has never "found an entry into a person's home permissible based merely on the pursuit of a misdemeanant." *Id.* at 1209. The Tenth Circuit then held that the entry at issue was unlawful because the officer had not established "the sort of 'real immediate and serious consequences' of postponing action to obtain a warrant" that are "required for a showing of exigent circumstances." *Id.* at 1207 (citation omitted).

The Sixth Circuit likewise holds that a misdemeanor pursuit can justify a warrantless entry only if it is coupled with a "serious" exigency. *Smith v. Stoneburner*, 716 F.3d 926, 931 (6th Cir. 2013). In *Stoneburner*, officers investigating a misdemeanor theft followed the suspect into his home after he cut short a conversation on his deck. *Id.* Writing for the court, Judge Sutton explained that a pursuit rises to the level of exigent circumstances only when "the emergency nature of the situation" requires "immediate police action." *Id.* (citation omitted). Judge Sutton found no such emergency in *Stoneburner*, emphasizing that the suspect "was not armed," "was not violent," and "had committed no other, more serious crimes." *Id.* at 931-32. "Had they wished to pursue the investigation further," therefore, "the officers could have contacted a magistrate and secured a warrant." *Id.* at 932.[4]

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[4] The Sixth Circuit also held the entry unlawful on an alternative ground, reasoning that because the encounter on the deck had been consensual, there was no "pursuit" at all. *Stoneburner*, 716 F.3d at 931.

The Florida Supreme Court has similarly held that "hot pursuit of a nonviolent misdemeanant" does not justify warrantless entry "simply because the nonviolent offense for which there was probable cause was jailable." *State v. Markus*, 211 So.3d 894, 901 (Fla. 2017). Instead, the court held that "exigent circumstances require that there be a grave emergency" that makes proceeding without a warrant "imperative to the safety of the police and of the community." *Id.* at 906-07 (citation and internal quotation marks omitted). In *Markus*, the court rejected a warrantless entry by officers pursuing a person suspected of marijuana possession because the offense was "a nonviolent misdemeanor" and the evidence was "outside the home" where it could not be destroyed. *Id.* at 896-97; *see id.* at 909-10.

The New Jersey Supreme Court has also rejected the "contention that hot pursuit alone can support a warrantless entry into a home." *State v. Bolte*, 560 A.2d 644, 654 (N.J. 1989). Instead, "whether hot pursuit by police justifies a warrantless entry depends on the attendant circumstances." *Id.* In *Bolte*, the court held that pursuit of a suspect for traffic infractions and the misdemeanor of resisting arrest was "insufficient to establish exigent circumstances." *Id.* The court emphasized the absence of any "potential destruction of evidence" or "danger to either the police or the public." *Id.* at 652; *see In re J.A.*, 186 A.3d 266, 275-76 (N.J. 2018) (reaffirming *Bolte*).

Finally, the Arkansas Supreme Court has also held that misdemeanor pursuit alone does not qualify as an exigent circumstance. *Butler v. State*, 829 S.W.2d 412, 415 (Ark. 1992). The court in *Butler* rejected the State's contention that hot pursuit justified warrantless entry in a disorderly conduct

case because the offense (though jailable) was "minor" and because no attendant circumstances "require[ed] aid or immediate action." *Id.*[5]

II. This Court should resolve the entrenched split.

1. "Most arrests in this country are for misdemeanors." Alexandra Natapoff, *Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal* 2 (2018). Roughly thirteen million misdemeanor cases are filed each year, outnumbering felonies by four to one. *Id.* at 41. It is thus no surprise that courts routinely confront the question whether probable cause to arrest for a misdemeanor allows police to pursue a suspect into a home.[6]

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[5] A few other jurisdictions appear to have rejected the categorical rule, but without providing definitive guidance on what showing beyond mere misdemeanor pursuit is required. *See, e.g.*, *State v. Legg*, 633 N.W.2d 763, 771-74 (Iowa 2001) (upholding warrantless entry based on various case-specific circumstances); *State v. Paul*, 548 N.W.2d 260, 265-68 (Minn. 1996) (upholding warrantless entry stemming from the chase of a DUI suspect without addressing other offenses).

[6] *See, e.g.*, *Yoast v. Pottstown Borough*, 2020 WL 529882, at *8 (E.D. Pa. Feb. 3, 2020); *State v. Foreman*, 2019 WL 4125596, at *3-5 (Del. Super. Ct. Aug. 29, 2019); *Thompson v. City of Florence*, 2019 WL 3220051, at *9-11 (N.D. Ala. July 17, 2019); *Rodriguez v. City of Berwyn*, 2018 WL 5994984, at *9-11 (N.D. Ill. Nov. 15, 2018); *Swearingen v. Carle*, 286 F. Supp. 3d 1014, 1021-22 (S.D. Iowa 2017); *Brown v. Thompson*, 241 F. Supp. 3d 1330, 1337-39 (N.D. Ga. 2017); *State v. Adams*, 794 S.E.2d 357, 362-64 (N.C. Ct. App. 2016); *Martinez v. Day*, 639 Fed. Appx. 278, 279 (5th Cir. 2016); *Potis v. Pierce County*, 2016 WL 1615428, at *3-4 (W.D. Wash. Apr. 22, 2016); *Burns v. Village of Crestwood*, 2016 WL 946654, at *7-10 (N.D. Ill. Mar. 14, 2016); *Carroll v. Ellington*, 800 F.3d 154, 172-73 (5th Cir.

Those written opinions are just the tip of the iceberg. Many arrests never give rise to prosecution. *See* Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 Md. L. Rev. 1, 3 (2000). Even when charges are filed, the crushing caseloads in many misdemeanor courts make full litigation of Fourth Amendment questions rare. For example, one study of more than 50 misdemeanor cases with potential Fourth Amendment issues found that "[b]ecause of delay, cost, and other challenges, not a single suppression hearing was held." Natapoff, *supra*, at 110. The true number of misdemeanor pursuits ending in warrantless home entries thus far exceeds the (already large) number of written decisions addressing the issue.

2. Particularly on such a recurring question, the "Fourth Amendment's meaning" should not "vary from place to place." *Virginia v. Moore*, 553 U.S. 164, 172 (2008) (citation omitted). Yet it does. In states like Massachusetts, a misdemeanor pursuit, by itself, always authorizes police to enter a home without a warrant. *Commonwealth v. Jewett*, 31 N.E.3d 1079, 1087-89 (Mass. 2015). In states like Florida, by contrast, that same entry violates the Fourth Amendment unless proceeding without a warrant was "imperative to the safety of the police and of the community." *State v. Markus*, 211 So.3d 894, 907 (Fla. 2017) (citation omitted). The Fourth Amendment's protection of the home should not turn on whether the home is located in Boston or Miami.

2015); *Hambrick v. City of Savannah*, 2014 WL 4829457, at *6-8 (S.D. Ga. Sept. 29, 2014).

Nor should it turn on whether a case is litigated in federal or state court. But again, it does. In Ohio, federal courts prohibit warrantless entries that would be permitted in the state courts across the street. *Compare Smith v. Stoneburner*, 716 F.3d 926, 931-32 (6th Cir. 2013), *with City of Middletown v. Flinchum*, 765 N.E.2d 330, 332 (Ohio 2002). That sort of disagreement makes it impossible for police in Ohio to know in advance what rules will be applied to their actions. Recognizing that such uncertainty is intolerable, this Court has routinely granted certiorari to resolve similar federal/state disagreements on Fourth Amendment questions that govern officers' primary conduct. *See, e.g.*, Pet. 27-28, *Torres v. Madrid*, No. 19-292 (cert. granted Dec. 18, 2019); Pet. 11-12, *Kansas v. Glover*, 140 S. Ct. 1183 (2020) (No. 18-556); Pet. 20-21, *Byrd v. United States*, 138 S. Ct. 1518 (2018) (No. 16-1371). It should do so again here.

III. This case is an excellent vehicle for resolving the split.

This case squarely and cleanly presents the issue that has divided the lower courts. It is thus an ideal vehicle for resolving the question presented—and all the more so because clean vehicles like this one will be rare.

1. The question presented was pressed and passed upon at every stage of the proceedings: the suppression hearing, Pet. App. 2a-4a; the appellate division, *id.* 24a-25a, 26a-27a; and the court of appeal, *id.* 18a-21a. Mr. Lange also raised the issue

in seeking review in the California Supreme Court. Pet. for Review 18-24.[7]

The answer to the question presented is also dispositive of Mr. Lange's Fourth Amendment claim. The California Court of Appeal upheld Officer Weikert's warrantless entry into Mr. Lange's home based solely on the categorical rule. Pet. App. 19a-21a. The court could not have upheld it on any other ground: The State has never identified any exigency beyond the bare fact of misdemeanor pursuit, or any reason why Officer Weikert could not have sought a warrant if he wished to enter Mr. Lange's home. Mr. Lange thus would have prevailed in any of the jurisdictions that demand a case-specific showing of exigency.

That is not mere speculation. This case involves a recurring fact pattern: an attempted stop for a minor traffic offense followed by a short pursuit. The Tenth Circuit and the New Jersey Supreme Court have confronted very similar facts and squarely held that they do not "amount to the kind of exigency excusing an officer from obtaining a warrant before entering a home." *Mascorro v. Billings*, 656 F.3d 1198, 1207 (10th Cir. 2011); *see State v. Bolte*, 560 A.2d 644, 654 (N.J. 1989).

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[7] This Court often grants certiorari despite the denial of discretionary review by a state court of last resort. In fact, the Court has recently and repeatedly done so in other Fourth Amendment cases from California. *See Riley v. California*, 573 U.S. 373, 380 (2014); *Navarette v. California*, 572 U.S. 393, 396 (2014), *Fernandez v. California*, 571 U.S. 292, 298 (2014).

2. Although misdemeanor pursuits are common, clean vehicles like this one are not. As explained above, Fourth Amendment issues are seldom fully litigated in misdemeanor prosecutions. *See* p.15, *supra*. As a result, most decisions addressing misdemeanor pursuit are issued in civil suits under 42 U.S.C. § 1983. And those Section 1983 suits typically suffer from the same vehicle problem that prevented this Court from resolving the question presented in *Stanton*: qualified immunity.

In *Stanton*, the Court did not reach the merits of the Fourth Amendment issue because the entrenched split precluded a finding that the law was clearly established—which meant that the officer was immune from suit whether or not his entry was lawful. 571 U.S. at 10-11. Especially since *Stanton*, lower courts addressing misdemeanor pursuit have consistently followed the same path. Ten of the twelve recent decisions cited in footnote 6, *supra*, were Section 1983 suits governed by qualified immunity. None of them would have been a suitable vehicle for deciding the question presented because none of them reached the merits—instead, all of them simply followed *Stanton* and granted qualified immunity because the law is unsettled. This criminal case, in contrast, provides a rare opportunity to consider the question presented without the qualified-immunity overlay.

IV. The Fourth Amendment does not permit a categorical warrant exception for misdemeanor pursuit.

A categorical warrant exception for misdemeanor pursuit contradicts both this Court's modern exigent-circumstances precedent and traditional common-law limits on warrantless home entries. It also yields

unjustified results, allowing an officer investigating a minor offense to forcibly enter a home even where there is no real emergency—and even where, as here, the officer initially intends only to question a suspect or issue a citation.

A. The categorical rule conflicts with this Court's precedents.

1. "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) (citation omitted). That special protection for the home stems from its traditional status as a place of refuge: "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (citation omitted).

"[A] principal protection against unnecessary intrusions into private dwellings is the warrant requirement." *Welsh*, 466 U.S. at 748. "[I]n the absence of consent or exigent circumstances," this Court has "consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant." *Steagald v. United States*, 451 U.S. 204, 211 (1981); *see Payton v. New York*, 445 U.S. 573, 589-90 (1980).

The warrant requirement ensures that the validity of intrusions into the sanctity of the home is "decided by a judicial officer, not by a policeman." *Johnson v. United States*, 333 U.S. 10, 14 (1948) (Jackson, J.). It reflects the Founders' judgment that the privacy of the home is "too precious to entrust to the discretion of those whose job is the detection of

crime and the arrest of criminals." *McDonald v. United States*, 335 U.S. 451, 455-56 (1948).

2. The exigent-circumstances exception bypasses that critical protection by allowing a police officer "to act as his own magistrate." *McDonald*, 335 U.S. at 460 (Jackson, J., concurring). Accordingly, the exception is a narrow one: Exigent circumstances exist only "when an emergency leaves police insufficient time to seek a warrant." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016) (citing *Michigan v. Tyler*, 436 U.S. 499, 509 (1978)).

Whether that standard is met depends on "the totality of the circumstances." *Missouri v. McNeely*, 569 U.S. 141, 149 (2013). This Court has recognized that "[a] variety of circumstances may give rise to an exigency." *Id.* Those circumstances include the need to prevent immediate danger to the police or the public, to "prevent the imminent destruction of evidence," to "provide emergency assistance to an occupant of a home," or to "enter a burning building to put out a fire and investigate its cause." *Id.*

"Hot pursuit" is another circumstance that "*may* give rise to an exigency sufficient to justify a warrantless search." *McNeely*, 569 U.S. at 149 (emphasis added); *see, e.g.*, *Birchfield*, 136 S. Ct. at 2173; *Welsh*, 466 U.S. at 750. The question in a hot pursuit case is thus the same as in any other exigent-circumstances inquiry: Whether there was "compelling need for official action and no time to secure a warrant." *McNeely*, 569 U.S. at 149 (citation omitted).[8]

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[8] This Court follows the same approach to the exigent-circumstances exception regardless of the type of search

3. Rather than asking that governing question, courts that apply the categorical rule hold that "hot pursuit, in and of itself, is sufficient to justify a warrantless entry"—regardless of the surrounding circumstances. *Commonwealth v. Jewett*, 31 N.E.3d 1079, 1089 n.8 (Mass. 2015). That approach flouts this Court's repeated instruction that the exigent-circumstances exception "always requires case-by-case determinations." *Birchfield*, 136 S. Ct. at 2180; *see, e.g.*, *Riley v. California*, 573 U.S. 373, 402 (2014). In *McNeely*, for example, the Court rejected a categorical exigency rule for blood-alcohol dissipation in DUI cases, emphasizing the need for "careful case-by-case assessment of exigency." 569 U.S. at 152.

This Court has never permitted a categorical rule to bypass that case-specific inquiry. Even when common fact patterns yield "general rules" providing "guidance" to police, *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2535 n.8 (2019) (plurality opinion), courts still must examine the totality of the circumstances in each case. The *Mitchell* plurality, for example concluded that "the exigent-circumstances rule almost always permits a blood test without a warrant" in the narrow class of DUI cases where the driver is unconscious. *Id.* at 2531. But even then, the plurality emphasized that this general rule could not apply categorically and was instead subject to case-by-case exceptions. *Id.* at 2539.

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involved. Thus, although *McNeely* involved blood-alcohol tests, the Court cited and relied on decisions involving warrantless home entries. 549 U.S. at 148-50.

Even if the Court were willing to condone some categorical exigency rules, the misdemeanor-pursuit rule would be a particularly poor candidate because of its "considerable overgeneralization," *McNeely*, 569 U.S. at 153 (citation omitted). As this case illustrates, many misdemeanor pursuits involve no plausible claim of exigency. Absent unusual circumstances, nonviolent misdemeanors like Mr. Lange's pose no threat to the safety of officers or the public. Likewise, many cases involve no risk of destruction of evidence. Here, for example, Officer Weikert had the entire incident on video, so "there was no evidence which could possibly have been destroyed." *Mascorro v. Billings*, 656 F.3d 1198, 1207 (10th Cir. 2011). And where, as here, an officer watches a suspected misdemeanant open and park in his own garage, the "risk of flight or escape" is usually "somewhere between low and nonexistent." *Id.*

On the other side of the ledger, police can often seek and obtain a warrant remotely in "as little as five minutes." *McNeely*, 569 U.S. at 173 (Roberts, C.J., concurring). In many misdemeanor pursuits, that brief delay would not risk any "real immediate and serious consequences." *Welsh*, 466 U.S. at 751 (citation omitted). And this Court's precedent has long been clear: When police have time to seek authorization from a neutral magistrate before invading the privacy of the home, they must "postpone[] action to get a warrant." *Id.* (citation omitted).

4. The courts that have adopted the categorical misdemeanor-pursuit rule have not tried to square it with this Court's established approach to exigent circumstances. Instead, they have largely assumed that *United States v. Santana*, 427 U.S. 38 (1976), and *Warden v. Hayden*, 387 U.S. 294 (1967), dictate a

special categorical approach for hot pursuit. *See, e.g.*, *Jewett*, 31 N.E.3d at 1089 & n.8; *City of Middletown v. Flinchum*, 765 N.E.2d 330, 332 (Ohio 2002). Those decisions dictate no such thing.

Most obviously, *Santana* and *Hayden* involved felonies, not misdemeanors. And even then, the Court made case-specific assessments of exigency. In *Santana*, the Court emphasized that police chasing a drug dealer faced a "need to act quickly" and "a realistic expectation that any delay would result in destruction of evidence." 427 U.S. at 42-43. And in *Hayden*, police were pursuing an armed robber. 387 U.S. at 299. "Speed . . . was essential" to the officers, as any delay would have "gravely endanger[ed] their lives or the lives of others." *Id.* In both cases, then, the circumstances established a "compelling need for official action" and "no time to secure a warrant," *McNeely*, 569 U.S. at 149—the genuine exigency that is lacking in many misdemeanor pursuits.

B. The categorical rule contradicts traditional common-law limits on warrantless entries.

In reading the Fourth Amendment, this Court is "guided by 'the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing.'" *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001) (citation omitted); *see Payton*, 445 U.S. at 591. Those traditional protections provide yet more reason to reject a categorical misdemeanor-pursuit rule.

In *Payton*, this Court discerned the common law of arrest "as it appeared to the Framers" by surveying the leading contemporary commentators. 445 U.S. at 596; *see id.* at 593-96. To the extent those commentators addressed a hot-pursuit exception to

the warrant requirement, they uniformly instructed that officers pursuing a suspect could "break doors"—that is, enter a home without consent—only when the suspected offense was a serious one that created a risk of violence or other genuine exigency.

In *Payton*, the Court started with Lord Coke, who was "widely recognized by the American colonists 'as the greatest authority of his time on the laws of England.'" *Payton*, 445 U.S. at 593 (citation omitted). Coke described only one circumstance where pursuit created an exception to the requirement that officers secure court approval before entering a home to arrest: "[U]pon hue and cry of one that is slain or wounded, so as he is in danger of death, or robbed, the king's officer that pursueth may . . . break a house to apprehend the delinquent." Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts* 177 (6th ed. 1681).

Hale similarly instructed that a constable could "break the door, tho he have no warrant" when a suspected felon or one who had "wounded [another], so that he is in danger of death," "flies and takes his house." 2 Matthew Hale, *Pleas of the Crown* 94 (1736); *see id.* at 92. Hawkins limited the warrantless breaking of doors to pursuit of "one known to have committed a Treason or Felony, or to have given another a dangerous wound," or participants in a violent "affray." William Hawkins, *Treatise of the Pleas of the Crown* 86-87 (1721). And Burn also agreed that officers could "justify breaking open the doors" without a warrant in cases of pursuit following a "treason or felony," an affray, or the infliction of a "dangerous wound." Richard Burn, 1 *The Justice of the Peace, and Parish Officer* 101-02 (14th ed. 1780).

At common law, then, there was authority supporting warrantless entry when officers "pursued" a suspect who had committed a felony or "broken the peace" by committing a violent misdemeanor. American Law Institute, Code of Criminal Procedure, Commentary to § 28, p. 254 (1930). But "[i]n the case of a misdemeanor not amounting to a breach of the peace," it was "well settled" that "an officer without a warrant may not break doors." *Id.*; *see, e.g.*, Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1228-29 (2016); 9 Hailsham Halsbury et al., *The Laws of England* § 124, at 98 (1909). A rule authorizing warrantless home entry in every case of misdemeanor pursuit cannot be squared with that common-law understanding.

C. The categorical rule yields unjustified results.

The categorical misdemeanor-pursuit rule would also stretch the exigent-circumstances exception far beyond its justification. It would give police officers discretion to forcibly enter private dwellings without a warrant based on a vast array of minor offenses, even when there is no real emergency—indeed, even when they do not intend to arrest at all.

1. Countless trivial offenses are jailable misdemeanors. In California, where this case arose, those crimes include regulatory matters as mundane as transporting shrubs without the proper tag, Cal. Penal Code §§ 384c, 384f, and selling reprocessed butter without a label, *id.* § 383a; *see id.* § 19. They also include a host of public-order offenses that give police enormous discretion to arrest, including disturbing the peace, *id.* § 416; public intoxication, *id.* § 647(f); unlawful assembly, *id.* § 409; obstructing a sidewalk or street, *id.* § 647c; and public nuisance, *id.* § 372.

California is no outlier. Across the Nation, "misdemeanor prohibitions against common conduct expose nearly everyone to the authority of the petty-offense process." Natapoff, *supra*, at 186. "Twenty-five states," for example, "treat some or all forms of speeding as a crime carrying a potential jail sentence." *Id.* at 230. The categorical rule allows any of those minor offenses to be the predicate for a warrantless home entry. And that concern is not hypothetical: The offenses actually used to justify warrantless entries have included such trivial matters as "mere tire spinn[ing]." *Flinchum*, 765 N.E.2d at 334 (Pfeifer, J., dissenting).

2. In many jurisdictions, moreover, flight from or failure to cooperate with the police is itself a jailable misdemeanor. *See, e.g.*, Cal. Penal Code § 148(a)(1). The categorical rule thus allows officers investigating even a *nonjailable* infraction or violation to bootstrap their way into a warrantless entry whenever they can establish probable cause to believe the suspect has fled or failed to cooperate. And, as this Court has emphasized, "[p]robable cause 'is not a high bar.'" *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) (citation omitted).

That sort of bootstrapping is exactly what happened here. When Officer Weikert activated his lights, he had probable cause to believe only that Mr. Lange had committed two noise infractions. Pet. App. 16a. Yet the categorical rule allowed the State to justify Officer Wekert's warrantless entry into Mr. Lange's home by asserting that the very same fact that created the purported hot pursuit—Mr. Lange's act of continuing to drive for "approximately four seconds"—also established probable cause to arrest him for fleeing from a police officer. *Id.* 17a.

3. This case also illustrates another perverse consequence of the categorical rule: Although hot pursuit has always been understood as a justification for entry to *arrest*, the categorical rule allows officers to make warrantless entries even when they seek only to *question* or *cite*.

Here, for example, it appears that when Officer Weikert entered Mr. Lange's garage, he intended only to investigate the noise infractions, not to arrest Mr. Lange for fleeing from a traffic stop. Vid. 1:46-1:55. In fact, Mr. Lange was never charged with any flight-related offense at all—the State did not even raise those offenses until much later, when it sought to justify the warrantless entry at the suppression hearing.

Officer Weikert thus entered Mr. Lange's home not to make an arrest, but merely to complete a traffic stop. Much the same thing happened in *People v. Wear*, 893 N.E.2d 631 (Ill. 2008), where the officer acknowledged that he "did not form the intent to arrest" until after he had entered the suspect's home. *Id.* at 644. And because so many low-level offenses are misdemeanors, police routinely have probable cause to believe a person has committed a misdemeanor but not the slightest intention of making an arrest. *Cf.* Natapoff, *supra*, at 216-17 ("[A]lmost everybody commits minor offenses. Between traffic codes and urban ordinances, it is almost impossible not to."). The categorical rule gives officers in that common situation a free pass to pursue a suspect into a home without a warrant even if they seek only to issue a citation or conduct a *Terry* stop.

Of course, Fourth Amendment analysis is objective, not subjective, so the legality of a home entry cannot turn on the officer's intentions. *See*

Brigham City v. Stuart, 547 U.S. 398, 404-05 (2006). But by setting the objective criteria for warrantless entry so low, the categorical rule transforms a doctrine intended to allow police officers to enter a home without a warrant to make an emergency arrest into a doctrine that allows the same grave intrusion in service of far lesser law-enforcement interests. A rule that allows police to forcibly enter a home without a warrant merely to question a suspect or issue a citation stretches the exigent-circumstances exception past its breaking point.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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