No. 20-18

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 CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

BRIEF IN OPPOSITION

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September 14, 2020

QUESTION PRESENTED

Whether pursuit of a person who a police officer has probable cause to believe has committed a misdemeanor offense categorically qualifies as an exigent circumstance sufficient to allow the officer to enter a home without a warrant.

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STATEMENT

1. Petitioner Arthur Lange drove past a California highway patrol officer in Sonoma late in the evening on October 7, 2016. Pet. App. 2a. Lange was playing music loudly and unnecessarily honking his car's horn, leading the officer to "follow[] Lange intending to conduct a traffic stop." *Id.*

After briefly following Lange, the officer flashed his vehicle's overhead lights to signal that Lange should pull over and stop. Pet. App. 3a. By that point, however, Lange was approximately 100 feet from the driveway of his home. *Id.* at 17a. Rather than stopping as directed, Lange turned into the driveway and continued into his garage. *Id.* at 3a. As the garage door began to close, the officer "exited his vehicle, approached the garage door, stuck his foot 'in front of the sensor and the garage door started to go back up.'" *Id.*[1]

Upon entering the garage and questioning Lange, the officer observed signs of excessive intoxication, such as slurred speech. C.T. 26, 136.[2] A blood test later revealed that Lange's blood-alcohol content was 0.245 percent, over three times the legal limit. *Id.* at 20, 207.

2. In California's criminal justice system, locally elected district attorneys and city attorneys typically handle criminal prosecutions in the superior courts. They also generally handle misdemeanor appeals, which are heard by the appellate divisions of the superior courts.

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[1] A camera on the officer's dashboard recorded a video of these events. That video is in the record below. Pet. App. 3a.

[2] Citations to "C.T." are to the clerk's transcript from the court of appeal.

Here, the Sonoma County District Attorney charged Lange with two misdemeanor violations of driving under the influence of alcohol, *see* Cal. Veh. Code § 23152(a)-(b), and with an infraction for operating his car's sound system at an excessive level, *id.* § 27007.[3] Lange moved to suppress the evidence obtained after the officer entered Lange's garage, arguing that the officer had no justification to enter without a warrant. Pet. App. 2a-3a. The district attorney argued that the entry was lawful because the officer was in "hot pursuit" of Lange based on probable cause to believe that Lange had violated California Penal Code Section 148, which makes it a misdemeanor to "willfully resist, delay or obstruct a peace officer in the discharge of his duties." Pet. App. 3a-4a, 6a; *see* C.T. 23-24, 562-564. Because the officer had lawfully sought to stop Lange to investigate Vehicle Code infractions, Section 148 required Lange to comply with the officer's instruction to pull over. Pet. App. 17a.[4]

The superior court agreed with the district attorney and denied the motion to suppress. Pet. App. 4a. After the appellate division of the superior court affirmed that ruling, *id.* at 5a, Lange pleaded no contest to one DUI count, *id.* at 6a. In light of a prior DUI conviction and his high blood-alcohol content, the superior court sentenced Lange to 30 days in jail (which

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[3] Subdivision (a) of Vehicle Code Section 23152 makes it a misdemeanor to drive while impaired by alcohol; subdivision (b) makes it a misdemeanor to drive with a blood-alcohol content of 0.08 percent or more. Lange was charged with violating each subdivision. C.T. 2-3.

[4] The district attorney also pointed to Vehicle Code Section 2800, which makes it a misdemeanor to "willfully fail or refuse to comply with a lawful order, signal, or direction of a peace officer." *See* C.T. 562-564.

he could satisfy by participating in a work-release program) and three years' probation. C.T. 208. The probation conditions required Lange to, among other things, install and maintain a monitoring device to prevent his car from starting if he had been drinking. *Id.* Lange appealed the conviction to the appellate division of the superior court, which again affirmed the trial court's denial of the suppression motion. Pet. App. 6a; *see also id.* at 23a-24a (concluding that Lange could bring a "second appeal" of the denial of his suppression motion following entry of his conviction).

3. At that point, the court of appeal granted Lange's petition to review the case. Pet. App 1a.[5] California's Attorney General is typically responsible for litigating criminal appeals in the court of appeal, the California Supreme Court, and this Court—including some of the misdemeanor appeals (like this one) that are transferred to the court of appeal from the appellate division of a superior court.

The court of appeal affirmed Lange's conviction. Pet. App. 14a-21a. Relying on longstanding California appellate precedent, the court explained that the "hot pursuit" exception applies "'[w]here the pursuit into the home was based on an arrest [or detention] set in motion in a public place.'" *Id.* at 20a (quoting *People v. Lloyd*, 216 Cal. App. 3d 1425, 1430 (1989)). Under that precedent, "'the fact that the offenses justifying the initial detention or arrest were misdemeanors is of

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[5] In misdemeanor cases, a defendant may appeal suppression issues as of right only to the superior court's appellate division. *See* Cal. Penal Code § 1538.5(j). Additional appellate review may be had in the court of appeal only if it exercises its discretion to order transfer of the case (either on its own motion, upon certification by the appellate division, or upon a party's petition). Cal. R. of Ct. 8.1002.

no significance in determining the validity of the entry without a warrant.'" *Id.* The court of appeal rejected Lange's argument that the officer lacked probable cause of any misdemeanor before entering the garage. *Id.* at 18a. It agreed with the trial court and the appellate division that the officer had probable cause to arrest petitioner for "failing to immediately pull over" when the officer activated his lights. *Id.* at 17a-18a (citing Penal Code § 148 and Vehicle Code § 2800).

Lange then filed a petition for review with the California Supreme Court. That Court denied review without requesting an answer. Pet. App. 28a.[6]

ARGUMENT

As this Court has recognized, "federal and state courts nationwide are sharply divided on the question 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." *Stanton v. Sims*, 571 U.S. 3, 6 (2013) (per curiam). The Court may wish to resolve that conflict in an appropriate case. But this does not appear to be such a case because, among other things, Lange's misdemeanor DUI conviction should stand in any event due to the good-faith exception to the exclusionary rule. If the Court does grant review in this case, however, California would agree with Lange that the Court should reject a categorical rule that probable cause to arrest a fleeing

[6] In a separate civil proceeding that preceded the appeals in his criminal case, Lange challenged the decision of the Department of Motor Vehicles to suspend his driver's license for one year. Pet. App. 4a-5a. In that case, the superior court agreed with Lange that the warrantless entry into his garage violated the Fourth Amendment, and overturned his license suspension on that ground. *Id.* That decision became final when the Department of Motor Vehicles did not appeal.

suspect for a misdemeanor always authorizes a warrantless entry into a home. While there are valid arguments on both sides of the question, on balance, a case-specific exigency analysis is more appropriate than a categorical rule in this context.

1. The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Its "'central requirement' is one of reasonableness." *Illinois v. McArthur*, 531 U.S. 326, 330 (2001). Because "'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,'" it is generally unreasonable for police to enter a person's home without a warrant. *Payton v. New York*, 445 U.S. 573, 576, 585 (1980); *see, e.g.*, *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018).

A longstanding exception to the warrant requirement applies in "exigent circumstances." *Kentucky v. King*, 563 U.S. 452, 460 (2011). Exigencies include, for example, an immediate risk that a suspect will destroy evidence or a danger that the suspect will harm himself or others. *See id.* This Court has also recognized that the "hot pursuit of a fleeing suspect" may create an exigent circumstance justifying a warrantless home entry. *Id.*; *see* 3 LaFave, *Search and Seizure* § 6.1(d) (5th ed. 2012). The Court recognized that exception in *United States v. Santana*, 427 U.S. 38, 42-43 (1976), where an individual retreated into her home after participating in a controlled purchase of heroin. The Court relied on an earlier case, *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 309 (1967), which held that the police did not violate the Fourth

Amendment when they entered a suspect's home without a warrant shortly after the suspect had fled the scene of an armed robbery.

Santana and *Hayden* both involved pursuit of suspected felons.[7] State courts of last resort and federal appellate courts have since disagreed on how those decisions apply to cases where the police pursued a suspect into a home based on probable cause to believe he or she committed a misdemeanor. Some courts have concluded that probable cause of any misdemeanor—so long as it is punishable by jail time—authorizes such a warrantless entry.[8] Those courts typically reason that "suspects would have an incentive to flee law enforcement" if they knew that they could escape arrest by beating the police to their homes. *E.g.*, *City of Bismarck v. Brekhus*, 908 N.W.2d 715, 723 (N.D. 2018); *see also State v. Ricci*, 144 N.H. 241, 245 (1999) ("'Law

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[7] Petitioner suggests that *Santana* and *Hayden* made "case-specific assessments of exigency." Pet. 23. But this Court has since described the rule applied in those cases in categorical terms. *See, e.g.*, *Stanton*, 571 U.S. at 8 (describing *Santana* as "our precedent holding that hot pursuit of a fleeing felon justifies an officer's warrantless entry"); *Missouri v. McNeely*, 569 U.S. 141, 149 (2013) (listing "hot pursuit" as its own category of exigency, separate from case-specific exigencies such as an imminent danger to public safety or a risk of evidence destruction); *King*, 563 U.S. at 460 (same). In any event, the question presented by this petition is limited to circumstances where police have probable cause to believe that a fleeing suspect "has committed a misdemeanor." Pet. i.

[8] *See City of Bismarck v. Brekhus*, 908 N.W.2d 715, 723 (N.D. 2018); *Commonwealth v. Jewett*, 471 Mass. 624, 634, (2015); *People v. Wear*, 229 Ill. 2d 545, 571 (2008); *Middletown v. Flinchum*, 95 Ohio St. 3d 43, 45 (2002); *State v. Ricci*, 144 N.H. 241, 245 (1999).

enforcement is not a child's game of prisoners base, or a contest, with apprehension and conviction depending upon whether the officer or defendant is the fleetest of foot.'").

Other courts have adopted a less categorical approach, taking into account the severity of the misdemeanor and other case-specific circumstances in determining whether the officer reasonably entered a home without a warrant.[9] Those courts often reason that the categorical approach would give the police an "unacceptable" level of authority because "jailable offense[s]"—which in some States include minor offenses like "jaywalking and littering"—are so numerous. *E.g.*, *State v. Markus*, 211 So. 3d 894, 911 (Fla. 2017). They have also invoked this Court's decision in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), where officers violated the Fourth Amendment by entering a suspect's home without a warrant in the course of investigating a "noncriminal, traffic offense." *Id.* at 753; *see id.* at 742-743. Although *Welsh* was not a "hot pursuit" case, the Court stressed that the "gravity of the underlying offense" can be an important consideration in assessing whether exigent circumstances exist. *Id.* at 753.

This Court discussed the division of authority with respect to the pursuit of fleeing misdemeanor suspects in *Stanton*, 571 U.S. at 6. In that case, in the course of responding to a neighborhood disturbance, an officer pursued a suspect onto the curtilage of a home without first obtaining a warrant. *Id.* at 4. The home's owner sued the officer under 42 U.S.C. § 1983

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[9] *See State v. Markus*, 211 So. 3d 894, 911 (Fla. 2017); *Mascorro v. Billings*, 656 F.3d 1198, 1207 (10th Cir. 2011); *Butler v. State*, 309 Ark. 211, 217 (1992); *State v. Bolte*, 115 N.J. 579, 597 (1989).

for violating her Fourth Amendment rights. *Id.* at 5. In a per curiam opinion, the Court held that the officer was entitled to qualified immunity because it was not clearly established "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 Court acknowledged that none of its prior decisions had resolved that question: *Welsh* was not a hot pursuit case, *id.* at 7-9; and while "*Santana* involved a felony suspect, [the Court] did not expressly limit [its] holding based on that fact," *id.* at 9. The "sharp[] divide[]" of state and federal courts on the issue reinforced the Court's determination that the officer had acted reasonably. *Id.* at 6 (collecting cases).

2. California agrees that it would be appropriate for the Court to resolve that division of authority in a case presenting a suitable vehicle for its consideration. But this case is hardly an "ideal vehicle." Pet. 16. The unpublished decision below was issued by a state intermediate appellate court. While this Court has occasionally granted review to consider questions of nationwide significance in a similar posture, *see, e.g.*, *Riley v. California,* 573 U.S. 373 (2014), it generally prefers to review decisions of federal appellate courts or state courts of last resort rather than those of a state intermediate appellate court, *see, e.g.*, *Huber v. New Jersey Dep't of Envtl. Prot.*, 562 U.S. 1302 (2011) (statement of Alito, J., respecting denial of certiorari) ("[B]ecause this case comes to us on review of a decision by a state intermediate appellate court, I agree that today's denial of certiorari is appropriate.").

The Court also generally avoids granting plenary review where its "resolution of a clear conflict" would be "irrelevant to the ultimate outcome of the case."

Shapiro et al., *Supreme Court Practice* § 4.4(f) (11th ed. 2019). That consideration applies here because of the good-faith exception to the exclusionary rule. If the Court granted review and rejected the categorical rule, the State would argue on remand that petitioner's misdemeanor conviction should stand because the officer entered petitioner's garage in good-faith reliance on "binding appellate precedent." *Davis v. United States*, 564 U.S. 229, 232 (2011). As this Court has recognized, the California courts of appeal have long "refused to limit the hot pursuit exception to felony suspects," upholding warrantless entries based on probable cause of a misdemeanor. *Stanton*, 571 U.S. at 9 (citing *People v. Lloyd*, 216 Cal. App. 3d 1425, 1430 (1989); *In re Lavoyne M.*, 221 Cal. App. 3d 154, 159 (1990)). The Court may wish to defer consideration of the conflict identified by petitioner until it arises in a case where the Court's decision would be more likely to affect the outcome of the proceeding.[10]

3. If the Court does grant plenary review in this case, however, California would argue that the Court should reject the categorical rule in the misdemeanor context.

A suspect's flight into a home after committing a misdemeanor will sometimes, but not invariably, give

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[10] Although California courts apply the good-faith exception to the exclusionary rule, *see, e.g.*, *People v. Silveria*, __ Cal. 5th __, 2020 WL 4691510, at *22 (Aug. 13, 2020) (applying *Davis*, 564 U.S. at 232), state courts in certain other jurisdictions do not, *see Heien v. North Carolina*, 574 U.S. 54, 76 n.2 (2014) (Sotomayor, J., dissenting) (listing jurisdictions). Indeed, two of the States that have adopted the categorical approach to the question presented here—Massachusetts and New Hampshire—do not apply the exception. A third, Illinois, has rejected it in part. *See id.*

rise to an exigency justifying a warrantless entry. For example, probable cause that an individual has committed domestic violence—which is often a misdemeanor offense, *see Voisine v. United States*, 136 S. Ct. 2272, 2276 (2016)—may require the police to enter the home immediately to protect the suspect's spouse from physical harm. Other serious misdemeanors, such as brandishing a firearm in a threatening manner and child endangerment, may likewise involve safety-based exigencies.[11] And in other cases, a suspect's flight from the authorities may reflect such a propensity for reckless behavior that it establishes a risk to others. For example, if an individual flees from the police immediately after stealing a firearm or other dangerous weapon, an officer may reasonably conclude that the suspect would endanger the lives of others in his home during the time it takes to secure a warrant.

On occasion, the Court has pointed to similar concerns as a reason for adopting a bright-line Fourth Amendment rule, offering the virtue of administrability for police and the courts. *See, e.g.*, *United States v. Robinson*, 414 U.S. 218, 234-235 (1973). But countervailing considerations weigh against applying the hot-pursuit exception in a categorical fashion in the misdemeanor context. This Court typically "looks to the totality of circumstances" when determining whether an exigency exists, rather than applying categorical rules. *See, e.g.*, *Missouri v. McNeely*, 569 U.S. 141, 149-150 & n.3 (2013) ("'[T]he fact-specific nature of the reasonableness inquiry' demands that we evaluate each case of alleged exigency based 'on its own facts

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[11] *See, e.g.*, Cal. Penal Code § 417 (brandishing a firearm or deadly weapon in a threatening manner); *id.* § 273a(b) (child endangerment).

and circumstances.'") (citation omitted). And misdemeanors, as a class of offenses, do not always involve the kind of serious circumstances that justify disturbing the "sanctity of the home" without a warrant. *Butler v. State*, 309 Ark. 211, 215 (1992); *see generally Collins*, 138 S. Ct. at 1670 ("'when it comes to the Fourth Amendment, the home is first among equals'").

In *Markus*, for example, the police pursued a person into his home after observing him smoking a marijuana cigarette outside. 211 So. 3d at 912. The suspect's behavior was "nonviolent." *Id.* And because he threw "the cigarette onto the ground" before going inside his home, the "officers could have simply secured the evidence" without pursuing him. *Id.* at 909-910; *see also, e.g.*, *Mascorro v. Billings*, 656 F.3d 1198, 1205 (10th Cir. 2011) (warrantless home entry based on probable cause that suspect drove without working taillights); *Butler*, 309 Ark. at 213, 215-217 (probable cause of non-violent "disorderly conduct"). In such circumstances, a categorical rule may well be over-inclusive. And it may also present a greater risk of the type of overreach the Fourth Amendment was designed to prevent, when compared with a rule requiring the government to identify particular circumstances establishing a case-specific need for immediately entering the home. *Cf. Payton*, 445 U.S. at 583 (discussing the "indiscriminate searches and seizures . . . that motivated the framing and adoption of the Fourth Amendment").

Accordingly, if the Court grants plenary review, the State will argue that an officer's probable cause to believe that a fleeing suspect has committed a misdemeanor does not categorically authorize the officer to pursue the suspect into a home without a warrant. Instead, in the misdemeanor context, a court should

"evaluate each case of alleged exigency based 'on its own facts and circumstances.'" *McNeely*, 569 U.S. at 150. For that reason, if the Court grants the petition, it should consider appointing an amicus curiae to argue in favor of the categorical approach.

In light of the State's position on the constitutional question presented by this petition, the Attorney General will no longer rely on a categorical hot-pursuit exception with respect to fleeing misdemeanants in criminal cases handled by the California Department of Justice. The Department will also communicate that position to the locally elected district attorneys and city attorneys who handle most criminal prosecutions and misdemeanor appeals in California. It remains possible, however, that some local prosecuting officials will continue to rely on the categorical rule in cases involving a suspected misdemeanant's flight into a home. *See supra* pp. 1, 3. Should the opportunity arise in an appropriate case, the Attorney General will urge the California courts of appeal to revisit the categorical rule, and will support review before the California Supreme Court and urge that Court to reject the categorical approach.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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