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 District

BRIEF OF PROFESSOR STEVEN PENNEY AS *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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QUESTION PRESENTED

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?

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INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae, Professor Steven Penney, is a law professor at the University of Alberta in Edmonton, Alberta, Canada. Professor Penney researches, teaches, and consults in the areas of criminal procedure, evidence, substantive criminal law, privacy, and law and technology. He is co-author of *Criminal Procedure in Canada* and co-editor of *Evidence: A Canadian Casebook*. He is also a member of the advisory boards of the Alberta Law Review and Canadian Journal of Law & Justice.

Professor Penney has no personal interest in the outcome of this case but does have a professional interest in the development of U.S. criminal procedure and its potential influence on Canadian criminal law. Indeed, the United States shares its common-law roots with Canada. So it is no surprise that this Court has found the Canadian application of the common law persuasive. *See, e.g.*, *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 273 & n.18 (1989). And the Supreme Court of Canada has likewise looked to the American understanding of the common law, including in matters of criminal procedure.

SUMMARY OF ARGUMENT

Nearly thirty years ago, the Supreme Court of Canada faced the very question this Court faces here. Relying on the same common-law principles that form

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* or their counsel made a monetary contribution to this brief's preparation. All parties have consented in writing to the filing of this brief.

the foundation of this Court's Fourth Amendment jurisprudence, the Supreme Court of Canada adopted the categorical rule applied by the California court below: warrantless entry into a residence to effectuate arrest is permissible following a hot pursuit of a suspect, regardless of offence classification. *See R. v. Macooh*, [1993] 2 S.C.R. 802, 816 (Can.).

That decision supports the judgment below. The Supreme Court of Canada's legal reasoning applies here as well. And decades of experience have shown that the rule works well in practice. Its two limitations—the police must be actively engaged in hot pursuit and have sufficient legal grounds for arrest—have safeguarded the privacy interests that the Fourth Amendment protects.

I. In *Macooh*, the Supreme Court of Canada began by surveying common-law sources on which this Court frequently relies, and unanimously concluded that the right to enter a residence in hot pursuit applied at common law regardless of offence classification.

The court went on to note that a rule relying on offence classification would be unworkable. For example, in Canada, as in the United States, offence classifications imperfectly reflect the severity of the offence. And at the time of arrest, it is not always clear which offence classification will result from a defendant's conduct.

When interpreting the scope of the Fourth Amendment, this Court looks to traditional protections that the common law provided against unreasonable searches and seizures. This Court has also recognized as persuasive Canada's application of that common law. Thus, the Supreme Court of Canada's

adoption of a categorical hot pursuit exception regardless of offence classification strongly supports the California court's judgment below.

II. Canada's experience in the nearly three decades following *Macooh* demonstrates that the rule applied in the California court below is both readily administrable and sufficiently protective of privacy interests. Indeed, by consistently applying *Macooh*'s two limitations, lower courts throughout Canada have ensured that privacy interests are safeguarded.

First, *Macooh*'s categorical rule applies only when police are engaged in hot pursuit. To that end, lower courts have refused to apply the exception where, for example, a police officer never signaled to the defendant to stop, a defendant was not in fact fleeing from police, or where there was a lack of continuity connecting police pursuit with the defendant's commission of the alleged offence. Thus, lower courts have strictly enforced *Macooh*'s rule that police truly be engaged in hot pursuit before they make a warrantless residential arrest.

Second, the rule in *Macooh* applies only if police have reasonable and probable grounds to make an arrest at the time of pursuit. Canadian courts, through faithful enforcement of this requirement, have prevented the exception from applying where its justification is lacking.

As a result, concerns that a categorical rule might eviscerate important privacy interests and sanction police abuse are completely unsupported by the Canadian experience.

ARGUMENT

I. THE SUPREME COURT OF CANADA HAS DERIVED FROM THE COMMON LAW THE SAME CATEGORICAL RULE AS THE COURT BELOW.

While police must generally obtain a warrant before arresting a person in a private dwelling in Canada, no warrant is required for a residential arrest made in hot pursuit, regardless of the nature or classification of the offence. Rooted in centuries-old common-law principles, this categorical hot pursuit exception has stood the test of time in Canada. Because the United States and Canada share a common-law heritage, the Canadian experience supports affirmance of the judgment below.

A. Nearly Thirty Years Ago, The Supreme Court Of Canada Adopted A Categorical Exception To The Warrant Requirement For All Cases Of Hot Pursuit.

In *R. v. Macooh*, [1993] 2 S.C.R. 802, 806 (Can.), the Supreme Court of Canada, presented with facts similar to those here, adopted a categorical hot pursuit exception to the warrant requirement that applies regardless of how the underlying offence is classified.

1. Much like Petitioner Arthur Lange, Doug Macooh was driving home in the middle of the night when he committed a minor offence, in his case, failing to stop at a stop sign. *Macooh*, 2 S.C.R. at 806. After observing this infraction, a police officer activated his vehicle's emergency lights and began following Macooh. *Id.*

Macooh, like Lange, did not stop. *Macooh*, 2 S.C.R. at 806. Instead, he accelerated, driving

through two more stop signs. *Id.* He finally exited his vehicle at an apartment complex, where he ignored the officer's orders to surrender and ran into an apartment. *Id.*

The officer approached the apartment door and called out to Macooh, but there was no answer. *Macooh*, 2 S.C.R. at 806. The officer then entered the apartment and told Macooh that he was under arrest. *Id.* Macooh resisted the arrest. *Id.* An altercation ensued, and the officer observed that Macooh was impaired. *Id.*

Macooh was ultimately charged with impaired driving, failing to stop for a peace officer, failing to submit to a breathalyzer test, and assaulting a peace officer. *Macooh*, 2 S.C.R. at 806.

2. Macooh challenged his warrantless arrest, arguing that it was invalid because he committed a less serious, non-criminal "provincial offence." In Canada, all criminal offences are prosecuted either by way of indictment ("indictable" offences) or summarily ("summary conviction" offences). *See Interpretation Act*, R.S.C. 1985, c. I-21, s. 34(1)(a)-(b). Many are "hybrid" offences, meaning the prosecution can choose either route. *See id.* s. 34(1)(c). Thus, "pure" summary offences encompass only the least serious crimes. *See* James Stribopoulos, *Unchecked Power: The Constitutional Regulation of Arrest Reconsidered*, 48 McGill L.J. 225, 236 (2003).

Under the *Constitution Act, 1867*, R.S.C. 1985, app. II, no. 5, s. 91(27), the federal Canadian Parliament has exclusive jurisdiction over "Criminal Law," which means that "provincial" (non-federal) offences like Macooh's are categorically non-criminal and non-

indictable. They are prosecuted by proceedings analogous to those for both "summary conviction" offences in the federal *Criminal Code* and misdemeanors at common law. *See Macooh*, 2 S.C.R. at 819–20.

3. In a unanimous decision, the Supreme Court of Canada held that Macooh's warrantless arrest was valid.

The court explained that entry into a residence to arrest in hot pursuit was "an exception traditionally recognized by the common law to the principle of the sanctity of the home." *Macooh*, 2 S.C.R. at 812; *see also id.* at 813–15; *cf. R. v. Lyons*, [1984] 2 S.C.R. 633, 657 (Can.) (noting "the right of pursuit" as a longstanding exception to the common law's protection of the sanctity of the home); *Eccles v. Bourque*, [1975] 2 S.C.R. 739, 747 (Can.) (noting "hot pursuit" exception to "knock and announce" requirement for residential arrests at common law).

Because there was no dispute that the officer's entry into Macooh's apartment occurred "in hot pursuit," the question before the court was "whether there [wa]s any basis for extending the hot pursuit exception to arrests for provincial offences." 2 S.C.R. at 812. The court offered several justifications for including provincial offences within the hot pursuit exception.

First, the court engaged in a detailed analysis of the common law, concluding that at common law, "the right to enter in hot pursuit" was not "limited to arrest for felonies" and applied regardless of offence classification. *Macooh*, 2 S.C.R. at 817–18; *see also id.* at 813–15; *infra* Section I.B (discussing in detail *Macooh*'s common-law analysis).

Second, the court explained there were "strong policy considerations" counseling against Macooh's

proposed distinction between indictable and non-indictable offences "in determining the spatial limits on the power of arrest in hot pursuit." *Macooh*, 2 S.C.R. at 819.

The court emphasized that "it would be unacceptable for police officers who were about to make a completely lawful arrest to be prevented from doing so merely because the offender had taken refuge in his home or that of a third party." *Macooh*, 2 S.C.R. at 815. Indeed, in cases of hot pursuit, "[t]he offender is . . . not being bothered by the police unexpectedly while in domestic tranquility." *Id.* Rather, the suspect "has gone to his home while fleeing solely to escape arrest." *Id.* This flight by a suspect "should not be . . . rewarded." *Id.* In addition, the flight itself creates "[s]ignificant danger," jeopardizes the safety of others, and also risks the destruction of evidence. *Id.* at 816; *see* A.K. Rice Amicus Br. 19–20 (explaining that *Macooh* correctly understood how the hot pursuit exception reflects a balance of "weighty government interests on one side, and minimal privacy interests on the other").

Turning to Macooh's assertion that warrantless residential arrests should not be permitted for lesser offences, the court noted that the division between offence categories "only very imperfectly reflects the severity of the offence." *Macooh*, 2 S.C.R. at 819. Relatedly, "[i]n some situations, too, it is not clear . . . what the ultimate charge may be." *Id.* Further, the court noted that "there is no logical connection between the fact that an offence falls in one or the other of these categories and the need there may be to make an arrest in hot pursuit in residential premises." *Id.*; *cf.* A.K. Rice Amicus Br. 36–40 (observing that "[t]he law

enforcement interests supporting the hot pursuit exception relate to *flight*, not the underlying offense," and that the felony-misdemeanor line is arbitrary and often impossible for officers to apply in the field).

These considerations weighed against adopting different rules for warrantless residential arrests based on offence classification.

Finally, the court dismissed Macooh's argument that the Supreme Court of Canada's earlier decision in *R. v. Landry*, [1986] 1 S.C.R. 145 (Can.), *overruled by R. v. Feeney*, [1997] 2 S.C.R. 13, 49 (Can.), *see infra* I.B.3, which allowed warrantless residential arrests for certain offences even *absent* exigent circumstances, should not be extended to cover less serious offences.[2] *Macooh*, 2 S.C.R. at 812. Although lower courts had framed the case in this manner, the court said that *Landry*'s broad rule was not "the issue." *Id.* Rather, because everyone agreed that a hot pursuit had taken place, the "more narrow" question the court had to resolve was whether to extend the well-rooted hot pursuit doctrine to less serious provincial offences. *Id.*

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At bottom, the Supreme Court of Canada found that the hot pursuit exception was rooted in "common sense." *Macooh*, 2 S.C.R. at 816. "[I]f an arrest without a warrant is permissible at the outset," the court

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[2] The Supreme Court of Canada in *Landry* had held that police were permitted to make residential arrests for indictable offences without a warrant, assuming probable grounds and proper announcement. *See Landry*, 1 S.C.R. at 155–56; *id.* at 160 (noting that without such power, an offender "might find complete and permanent protection from the law in his or her own home or the home of another").

explained, "the offender's flight into a dwelling house cannot make it unlawful." *Id.* "The entry of the police in hot pursuit is then perfectly justified," regardless of offence classification. *Id.*

B. Canada And The United States Share The Historical Common Law From Which The Supreme Court Of Canada Derived The Categorical *Macooh* Hot Pursuit Exception.

When interpreting the Fourth Amendment, this Court looks to "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing." *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). The United States shares its English common-law heritage with Canada. *See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 273 n.18 (1989). Therefore, it is particularly significant that in *Macooh*, the Supreme Court of Canada derived the same categorical rule applied by the California Court of Appeal from this shared common-law history. The Supreme Court of Canada's reading of the common law supports affirmance of the judgment below.

1. United States courts interpreting historical common law have long looked across the border for guidance. Indeed, this Court has recognized as persuasive the Canadian application of common law. *See, e.g.*, *Browning-Ferris Indus. of Vt., Inc.*, 492 U.S. at 273 & n.18 (finding the Canadian understanding of common law "significant" in interpreting the Eighth Amendment's Excessive Fines Clause); *see also Stone v. Powell*, 428 U.S. 465, 496, 499 (1976) (Burger, C.J., concurring) (noting that no exclusionary rule exists "in other common law jurisdictions such as England

and Canada" in opinion advocating for limits on American exclusionary rule); *Culombe v. Connecticut*, 367 U.S. 568, 568–59, 589–90, 589 n.37 (1961) (Frankfurter, J., announcing the Court's judgment and an opinion) (looking to Canadian law in case about admissibility of evidence under the Fourteenth Amendment's Due Process Clause).

Likewise, the Supreme Court of Canada frequently looks to the American understanding of the common law, including in matters of criminal procedure. In developing the law of arrest and search and seizure, for example, Canadian Supreme Court Justices often draw on this Court's Fourth Amendment jurisprudence, including its "valuable" analysis of historical common law. *R. v. Silveira*, [1995] 2 S.C.R. 297, 351–53 (Can.) (opinion of L'Heureux-Dubé, J.) (quoting *R. v. Rao*, [1984] O.J. No. 3180 (ON CA)); *see also id.* at 370–73 (majority opinion); *Feeney*, 2 S.C.R. at 87–90, 94–95, 97–98 (L'Heureux-Dubé, J., dissenting); *Landry*, 1 S.C.R. at 168–71, 174, 185 (La Forest, J., dissenting); *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, 173–75 (Can.). This makes good sense, given the shared common-law roots of the United States and Canada.

2. In *Macooh*, the Supreme Court of Canada looked to this shared common-law history in considering the Canadian equivalent of the question presented here: whether the hot pursuit doctrine applies equally to indictable and non-indictable offences.[3] 2 S.C.R. at 817. In particular, the court asked whether at common law the right to enter in hot pursuit was "limited

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[3] As noted above, indictable offences in Canadian law are analogous to felonies and non-indictable offences are analogous to misdemeanors. *See supra* Section I.A.2.

to arrest for felonies." *Id.* And the answer, it found, was emphatically "no."

The court in *Macooh* relied on *Halsbury's Laws of England*, an "eminent" common-law source, *Atwater v. City of Lago Vista*, 532 U.S. 318, 329 (2001), and one on which this Court has frequently relied in Fourth Amendment cases, *see, e.g.*, *United States v. Watson*, 423 U.S. 411, 418 (1976). Lord Halsbury first analyzed felonies, explaining that an officer may "break open the door of the house" if a felony has been committed and the felon is "followed" to the house. 10 *Halsbury's Laws of England* 354 (3d ed. 1955). Next, he explained that "[i]f an affray occurs in the presence of a constable, and the offenders run away and are immediately pursued by the constable and they enter a house, then the doors may be broken open by the constable to apprehend them in the course of the immediate pursuit." *Id.* The court in *Macooh* found further support for Lord Halsbury's analysis in the English case of *Swales v. Cox*, [1981] QB 849, which states that at common law "there was power of entry into premises" in the case of "a constable following an offender running away from an affray." 2 S.C.R. at 813, 817–18 (emphasis omitted). The Supreme Court of Canada thus concluded that "it does not appear that at common law the right to enter in hot pursuit was limited to arrest for felonies." *Id.*

The references in these sources to "an affray" supported the *Macooh* court's conclusion that the common law did not limit hot pursuit to felonies. An affray, often referred to as a "breach of the peace," *see Atwater*, 532 U.S. at 329 (citing common-law authorities using these terms interchangeably), was classified as a misdemeanor at common law, *see Watson*, 423 U.S.

at 440 (citing Horace L. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 572–73 (1924)). In states that still use the term "affray" in their criminal codes, this offense remains a misdemeanor.[4] And states that now use other labels for this offense, such as "breach of the peace" or "disorderly conduct," also classify it as a misdemeanor. *See* 4 *Wharton's Criminal Law* § 540 (15th ed.) (collecting state statutes).[5]

The court in *Macooh* also stressed that the common law extended the hot pursuit exception to all misdemeanors, not just affray. Citing two Canadian scholars who conducted an extensive survey of the common law, the court observed that the common law "recognized a right to enter in hot pursuit for *any misdemeanour* provided it was committed in the presence of a police officer."[6] 2 S.C.R. at 818 (emphasis added) (citing W.F. Foster & Joseph E. Magnet, *The Law of Forcible Entry*, 15 Alta. L. Rev. 271, 279 (1977)).

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[4] *See, e.g.*, Fla. Stat. § 870.01(1); Ga. Code Ann. § 16-11-32; Nev. Rev. Stat. § 203.050; N.M. Stat. Ann. § 30-20-2; N.C. Gen. Stat. Ann. § 14-33; S.C. Code Ann. §§ 16-1-10(C), 16-5-120; *see also* D.C. Code § 22-1301 (making the offense of "affray" punishable by no more than 180 days in prison).

[5] *See, e.g.*, Ala. Code § 13A-11-7; Ariz. Rev. Stat. Ann. § 13-2904; Colo. Rev. Stat. § 18-9-106; Cal. Penal Code Ann. § 415; *In re Alejandro G.*, 43 Cal. Rptr. 2d 471, 472 (Cal. Ct. App. 1995) (noting that a violation of § 415 is a misdemeanor); Conn. Gen. Stat. § 53a-181; Del. Code Ann. tit. 11, § 1301.

[6] For that proposition, the Canadian scholars cited Professor Wilgus's *Arrest Without a Warrant*. *See* W.F. Foster & Joseph E. Magnet, *The Law of Forcible Entry*, 15 Alta. L. Rev. 271, 279 n.71 (1977). This Court has frequently looked to Professor Wilgus's article when discerning common-law principles in Fourth Amendment cases. *See, e.g.*, *Watson*, 423 U.S. at 418.

Accordingly, the court found that Macooh's failure to stop for a police officer justified his warrantless residential arrest, holding that "a right of entry to make an arrest in hot pursuit exists at common law, both for indictable offences and for other types of offence." 2 S.C.R. at 819; *cf.* A.K. Rice Amicus Br. 20–23, 41–42 (discussing the common-law roots of a categorical hot pursuit exception).

3. *Macooh* is consistent with other Supreme Court of Canada decisions applying the common law. Both before and after *Macooh*, the Supreme Court of Canada affirmed a categorical hot pursuit doctrine rooted in the common law. In fact, even the dissenting justice in *Landry* (which validated warrantless residential arrests for indictable offences) readily acknowledged that warrantless residential arrests were appropriate in cases of hot pursuit. *See Landry*, 1 S.C.R. at 168 (La Forest, J., dissenting) (citing *Semayne's Case* (1604) 77 Eng. Rep. 194 (KB)). The dissent broadly characterized hot pursuit as a doctrine about "[f]ugitives from justice," and it made no distinctions based on the type of offence. *Id.* at 176.

And several years after *Macooh*, in *Feeney*, 2 S.C.R. at 49, the Supreme Court of Canada—in its most recent pronouncement on residential arrests—again affirmed the clear grounding of a categorical hot pursuit exception in the common law. Although the court disavowed *Landry*'s holding that police have a general power to arrest without a warrant on private premises, *id.* at 45–48, the court reaffirmed the categorical hot pursuit exception articulated in *Macooh*, *id.* at 49 (noting the "well-established common law power of the police to enter private premises to make an arrest in hot pursuit"). Recognizing that *Macooh* involved a non-indictable, provincial offence, the court

in *Feeney* nonetheless found it self-evident that in all cases of hot pursuit, "society's interest in effective law enforcement takes precedence over the privacy interest." *Id.*; *see also Silveira*, 2 S.C.R. at 351 (opinion of L'Heureux-Dubé, J.) (noting the *Macooh* court's recognition of the hot pursuit exception to the "sanctity of the home" principle).

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In sum, Canadian courts have recognized that the doctrine of hot pursuit—and its undifferentiated application to all types of offences—is well-rooted in the common law and uncontroversial.

II. THE CANADIAN EXPERIENCE DEMONSTRATES THAT A CATEGORICAL RULE IS READILY ADMINISTRABLE AND ADEQUATELY PROTECTS PRIVACY INTERESTS.

In the nearly thirty years since *Macooh*, lower courts throughout Canada have consistently recognized that the hot pursuit exception applies to all types of offences, including summary conviction criminal offences[7] and provincial offences.[8] Three decades of cases applying *Macooh* demonstrates that a categorical rule has not led to rampant and unchecked police entry into homes. Courts have avoided that result by diligently enforcing a readily administrable, narrow, and well-delineated hot pursuit exception. And the many cases finding in favor of defendants confirm that the categorical rule affords ample protection for

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[7] *See R. v. K.(J.)*, 2002 BCPC 160 (Can.), ¶ 32; *R. v. Bérubé (G.)*, 1998 CanLII 28661 ¶ 13 (NB PC) (Can.).

[8] *See R. v. Sar*, 2013 NBPC 23 (Can.), ¶ 141; *R. v. Ballegeer*, 2013 ABPC 128 (Can.), ¶ 33; *R. v. Bate*, [2002] M.J. No. 324 (MB PC) (Can.), ¶ 92.

privacy and the sanctity of the home. It thus comes as no surprise that *Macooh*'s categorical rule is widely accepted and uncontroversial in Canada. *Cf.* A.K. Rice Amicus Br. 24, 48.

A. For the exception to apply, courts require a finding that there was a true "hot pursuit" of the defendant, defined in *Macooh* as "continuous pursuit conducted with reasonable diligence, so that pursuit and capture along with the commission of the offence may be considered as forming part of a single transaction." *Macooh*, 2 S.C.R. at 817 (citing R.E. Salhany, *Canadian Criminal Procedure* 44 (5th ed. 1989)); *cf.* A.K. Rice Amicus Br. 35. Without a finding of hot pursuit or another recognized exigent circumstance, a warrantless arrest made in a private dwelling is unlawful. *Feeney*, 2 S.C.R. at 52.

In *R. v. Caissie*, [1999] N.B.J. No. 254 (Can.), for example, the New Brunswick Court of Appeal declined to apply the hot pursuit exception because "the police officer never signaled to [the defendant] to stop nor even turned on his patrol car's flashing lights," *id.* ¶ 14, and thus "there was no pursuit by the police officer within the meaning of the definition of this concept in the *Macooh* decision," *id.* ¶ 15. The court emphasized that hot pursuit "flows from a situation where there has been an offence committed and the pursuit of a fugitive offender in order to arrest him." *Id.* ¶ 16. The lack of hot pursuit meant that the officer had no authority to detain the defendant on private property. *See id.*

Similarly, in *R. v. Sar*, 2013 NBPC 23 (Can.), the New Brunswick Provincial Court considered *Macooh*'s definition of hot pursuit and concluded the exception did not apply because the defendant was not in fact fleeing from the police. *Id.* ¶¶ 142–43.

And in *R. v. Robillard*, [2012] S.J. No. 607 (Can.), the Saskatchewan Provincial Court distinguished *Macooh* because, unlike in that case, the police pursuit of the defendant "was not 'continuous' with the commission of" the alleged offence. *Id.* ¶ 25. The prosecution thus failed to establish "that the police were entitled to enter [the defendant's] residence without warrant because they were in hot or fresh pursuit." *Id.*

These and many other similar decisions make clear that lower courts in Canada have stringently enforced the threshold requirement that there must be a hot pursuit within the meaning established by *Macooh*.[9] *Cf.* A.K. Rice Amicus Br. 31–32 & n.3, 47 (explaining that relevant "lower court decisions" in U.S. jurisdictions either apply or "are nearly uniformly consistent with" the requirement that "[h]ot pursuit occurs only where a reasonable person in the fleeing suspect's shoes would know the police were pursuing him").

B. Courts in Canada have also faithfully enforced the important limitation that the police must have reasonable and probable grounds to make an arrest at

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[9] *See also, e.g.*, *R. v. Fleet*, [2015] N.S.J. No. 570 (NS PC) (Can.), ¶ 25 (rejecting hot pursuit argument because "it was [the officers'] investigation, not their pursuit of the accused, that brought them" to the home); *R. v. Bennett*, [2012] N.J. No. 368 (NL PC) (Can.), ¶ 53 ("[T]he police were not involved in a hot pursuit when they entered the residence. There was no pursuit nor was there any connection between an alleged offence and the entering of the residence to affect an arrest."); *R. v. Shott*, [2006] A.J. No. 1337 (AB PC) (Can.), ¶ 34 ("The facts as found by me do not establish any 'real continuity between the commission of the offence and the pursuit undertaken by police.' There was simply no hot pursuit, much less even lukewarm pursuit.").

the time of the pursuit for the hot pursuit exception to apply. *See, e.g.*, *R. v. Stevens*, [2011] O.J. No. 6059 (ON CJ) (Can.), ¶¶ 46–48 (distinguishing *Macooh* because officer did not have grounds to arrest the defendant until after she entered the defendant's home); *R. v. Hyde*, 2010 ABPC 30 (Can.), ¶¶ 31–34 (rejecting application of hot pursuit exception where officer "admitted that he did not have grounds to arrest the accused for impaired driving when he first approached him in the [defendant's] garage"); *R. v. Bate*, [2002] M.J. No. 324 (MB PC) (Can.), ¶ 97 (holding hot pursuit exception did not apply because "the police officers did not have reasonable and probable grounds to arrest the accused at the time that they attended to the door of his residence").

As these decisions applying *Macooh* show, Canadian courts have focused on across-the-board limitations on the exception that are better tailored to curbing potential abuses, rather than drawing a line based on offence categories. This approach makes good sense: The risk of abuse lies in police entering homes without having truly engaged in a hot pursuit or without probable cause to make an arrest in the first place—and not, for example, in following disobedient drivers, who already are subject to warrantless arrest in public. *See, e.g.*, Traffic Safety Act, R.S.A. 2000, c. T-6, s. 169; *cf. Atwater*, 532 U.S. at 354. The Canadian experience thus shows that *Macooh*'s categorical rule is well equipped to deter law enforcement overreach. *Cf.* A.K. Rice Amicus Br. 45–47 ("Lange's and his amici's surveys of cases, plus their active imaginations, have produced only non-hot pursuit cases and cases in which any harm is attributable to excessive force or other unreasonable behavior.").

C. Lower-court decisions in Canada also show that, unlike an amorphous, case-by-case exception, a categorical rule with clear parameters is "readily administrable"—an interest this Court has recognized as important to the Fourth Amendment balance. *See Atwater*, 532 U.S. at 347; *cf.* A.K. Rice Amicus Br. 32–33. The Canadian experience demonstrates that a lower court need only compare the situation at hand to *Macooh*, thus avoiding the speculation, unpredictability, and lack of uniformity inherent to a case-by-case approach.

In *R. v. Estey*, 2008 NBPC 56 (Can.), for example, the New Brunswick Provincial Court considered whether the police lawfully entered the defendant's home without a warrant after the defendant sped toward a police car and then fled at high speed. "Given the circumstances as described and the requirements for such an entry outlined in *Macooh*," the court concluded, "I can come to no other conclusion than that the officer had the necessary grounds to enter the home without an entry warrant as he was, at the time, reasonably in 'hot pursuit' of the operator of the vehicle and had good reason to believe that the person had entered the residence." *Id.* ¶ 26; *see also, e.g.*, *R. v. Deforest*, 2009 SKPC 22 (Can.), ¶¶ 35, 45 (finding that, under *Macooh*, warrantless arrest on porch was proper where officers had "activated their emergency lights" and "signalled for [the defendant] to stop," but "[h]is response was to speed away to a residence"); *R. v. Leblue*, 2004 SKPC 107 (Can.), ¶ 35 (warrantless arrest of defendant in private driveway was proper where the officer "was in hot pursuit within the meaning of the [*Macooh*] definition").

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In short, nearly three decades of experience has dispelled any concern that a categorical rule would eviscerate the sanctity of the home and condone widespread and abusive warrantless entries, and the rule has proven simple and straightforward to apply in practice. Given this history, it is unsurprising that there has not been academic criticism of *Macooh*[10] or any effort to reverse it in Parliament or the courts.[11]

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[10] For example, there is no negative commentary about *Macooh* in leading Canadian criminal procedure treatises. *See* Steve Coughlan, *Criminal Procedure* 17, 329 (4th ed. 2020); Steven Penney et al., *Criminal Procedure in Canada*, 137–38 (2d ed. 2018); Tim Quigley, *Procedure in Canadian Criminal Law* § 5.5(a) (2d ed. 2019); *see also* Steve Coughlan & Glen Luther, *Detention and Arrest* 12, 44, 50–52, 260–61, 299 (2d ed. 2017).

[11] *See, e.g.*, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue 12: Evidence (Dec. 16, 1997), https://www.sencanada.ca/en/Content/SEN/Committee/361/lega/12ev-e (hot pursuit exception treated as uncontroversial in parliamentary discussions of legislation proposed to codify *Feeney*).

CONCLUSION

The Supreme Court of Canada, applying the same common-law principles that form the bedrock of this Court's Fourth Amendment jurisprudence, adopted the same categorical rule as the court below. Canada's 27-year experience under this categorical rule has demonstrated it is effective, workable, and well equipped to deter police abuse. The judgment below should be affirmed.

Respectfully submitted,

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