No. 20-18

IN THE

Supreme Court of the United States

ARTHUR GREGORY LANGE,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari
to the Court of Appeal of the State of California,
First Appellate District

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Above all else, the Fourth Amendment protects the sanctity of the home. This Court, therefore, has never allowed officers to invade a home without a magistrate's approval unless taking the time to seek a warrant would risk some concrete, immediate harm—for example, when people would be hurt, evidence would be lost, or a building would burn.

Charged with defending the judgment below, the Court-appointed Amicus asks this Court to go far beyond this framework: She advocates a new categorical rule that would permit officers to enter homes without warrants even when seeking judicial permission would cause nothing more than a brief delay in investigating a minor offense. The Solicitor General is unwilling to endorse that proposal (or Amicus's conception of "hot pursuit" itself), but still advocates for a "presumption" that the police can enter a home without a warrant to pursue suspected misdemeanants. Br. 4-5.

Both positions founder. To begin, the Court's terse, factbound opinion in *United States v. Santana*, 427 U.S. 38 (1976), cannot bear the weight Amicus places on it. Nor can Amicus's reading of the case be squared with the Court's overall exigent-circumstances jurisprudence. Furthermore, whatever inexactitude may have existed at common law concerning warrantless home invasions, the original understanding of the Fourth Amendment plainly excluded mere pursuit of a nonviolent misdemeanant from the limited circumstances where such invasions were authorized.

The remaining arguments advanced by Amicus and the Solicitor General distort both sides of the

Fourth Amendment's general balancing test. On the law-enforcement side, the plain fact is that people retreat into their homes for all sorts of reasons having nothing to do with criminality. And even when fleeing suspects seem to have nefarious purposes, widespread police policies restricting pursuits belie the notion that a categorical rule (or general presumption) is necessary to deter or punish flight. Instead, those interests are served by appropriate criminal sanctions.

On the other side of the balance, sudden home invasions risk property damage, personal injury, and even death—not to mention unwanted exposure of the details of families' private lives. Suspects do not "invite[]" these harms (Amicus Br. 18) simply by, say, pulling their cars into their garages. Nor does mere flight extinguish the rights of third parties—for instance, parents awakened when gun-wielding officers burst into their home chasing a teenager who committed a minor traffic offense. *Cf. Mascorro v. Billings*, 656 F.3d 1198, 1202-03 (10th Cir. 2011). The Court should reject the notion that the Fourth Amendment condones such tumult in service of minimal law-enforcement interests.

I. This Court's precedents do not support a categorical misdemeanor-pursuit rule.

Neither Amicus nor the Solicitor General appears to dispute that the concept of "hot pursuit" falls within the exigent-circumstances doctrine. Nor do they deny that the Court's traditional exigency standard requires a showing "in each particular case," *Riley v. California*, 573 U.S. 373, 402 (2014), that "an emergency leaves police insufficient time to seek a warrant," *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016). Yet Amicus and the Solicitor General

make no attempt to fit the misdemeanor-pursuit rules they propound under this rubric. Instead, they simply assert that the Court adopted a categorical approach to "hot pursuit" in *Santana*.

That reading of *Santana* wilts upon scrutiny. It also clashes with the Court's overall exigent-circumstances jurisprudence.

A. Amicus substantially overreads *Santana*.

1. In *Santana*, this Court held that a suspected drug dealer's "act of retreating into her house" allowed the police to follow the suspect inside to arrest her. 427 U.S. at 42. That holding is perfectly consistent with this Court's case-specific approach to exigent circumstances: The police "need[ed] to act quickly" because of a "realistic expectation that any delay would result in the destruction of evidence." *Id.* at 43; *see* Lange Br. 24-25.

Amicus insists the Court went further, unnecessarily announcing a rule authorizing warrantless entries in *every* "hot pursuit" case. Amicus Br. 1-2, 10-11, 25-26; *see also* SG Br. 9-10. This argument fails for three reasons.

First, it disregards *Santana*'s reasoning. Amicus fixates on the Court's statement that the drug dealer's retreat into her home could not "thwart an otherwise proper arrest." *Santana*, 427 U.S. at 42. But she ignores *why* that was so. The Court reasoned in the next three sentences that the case was "clearly governed by *Warden* [*v. Hayden*, 387 U.S. 294 (1967)]." *Id.* at 43. And *Hayden* applied the traditional case-specific exigency analysis: Officers in that case arriving at the home minutes behind a suspected armed robber had to act fast because, "[u]nder the

circumstances," delay would have "gravely endanger[ed] [the officers'] lives or the lives of others." 387 U.S. at 298-99.

Hayden, in other words, did not establish or apply any categorical pursuit rule. (In fact, that case did not even involve what Amicus calls "hot pursuit"; the officers in that case did not observe the crime and were directed to the suspect's home by a witness. 387 U.S. at 297; *compare* Amicus Br. 31.) If *Hayden*'s case-specific analysis "clearly governed" *Santana*, then *Santana* likewise turned on emergency circumstances that required immediate action. *Cf. Arizona v. Gant*, 556 U.S. 332, 341-43 (2009) (rejecting the contention that *New York v. Belton*, 453 U.S. 454 (1981), created a categorical search-incident-to-arrest rule because the *Belton* opinion explained it was merely applying prior precedent allowing searches under specified circumstances).

Second, Amicus's view of *Santana* reads far too much into far too little. The Court's legal analysis spans less than two pages; it does not discuss the Fourth Amendment's original meaning or the privacy and law-enforcement interests that would have been implicated by a categorical rule. *Santana*, 427 U.S. at 42-43. That makes perfect sense if *Santana* did nothing more than apply the traditional case-specific exigency test. But it would make little sense if, as Amicus maintains, the Court was creating a new categorical rule with wide-ranging implications for police practices and individual privacy.

Third, even read as a stand-alone rule, the "thwarting arrest" language in *Santana* does not support Amicus's position. *Santana* says that "a suspect may not defeat an arrest which has been set

in motion in a public place" by retreating into a home. 427 U.S. at 43. But Officer Weikert tried to detain Mr. Lange in public to conduct *an investigatory stop*, not an arrest. Lange Br. 2. Even when Officer Weikert entered Mr. Lange's garage, he still was not trying to arrest him. *Id.* 40. Amicus, therefore, seeks a categorical rule that applies not only where an *arrest* begins in public, but also where an officer is seeking merely to issue a citation or conduct an investigatory stop. Nothing in *Santana* extends that far. *Cf. Knowles v. Iowa*, 525 U.S. 113 (1998) (holding that, even when an officer has the authority to arrest an individual, an officer's authority under the Fourth Amendment depends on whether he actually initiates an arrest or a lesser seizure).

2. Seeking to bolster her reading of *Santana*, Amicus invokes the decision decades before in *Scher v. United States*, 305 U.S. 251 (1938). Amicus Br. 11-12. But *Scher* "is best regarded as a factbound" decision whose reasoning was "case specific and imprecise." *Collins v. Virginia*, 138 S. Ct. 1663, 1674 (2018). Indeed, *Scher* did not even involve "hot pursuit," as Amicus delineates the concept. Amicus requires the suspect to *know* that he is being pursued. Br. 31, 46. Yet the pursuit in *Scher* was covert. The federal agents followed the suspect at a distance, making sure not to give him "any indication" they were tailing him. Tr. of R. at 29, 36, *Scher*, *supra* (No. 49); *see also* 305 U.S. at 253. And they were successful: The suspect did not know he was being followed. Tr. of R. at 30, 35, *Scher, supra* (No. 49). Whatever precedential value *Scher* may have, it did not establish any "hot pursuit" doctrine.

3. Amicus lastly asserts that the Court's modern case law treats *Santana* as a freestanding, categorical

exception to the warrant requirement. Br. 10-11. But no modern case that references "hot pursuit" involved such activity, so there has been no need for precision. By the same token, the Court recently noted that exigent circumstances exist "when police fear the imminent destruction of evidence." *Birchfield*, 136 S. Ct. at 2173. Surely that remark did not dispense with the longstanding requirement that such a belief be objectively reasonable.

At any rate, the term "hot pursuit" can be understood as a shorthand that incorporates case-specific determinations of exigency. Lange Br. 15 n.3. Judge Sutton, for example, has reasoned that a pursuit is "hot" only if the circumstances show that "the emergency nature of the situation" demands "immediate police action." *Smith v. Stoneburner*, 716 F.3d 926, 931 (6th Cir. 2013) (citation omitted). Understood in this way, there is nothing wrong with warrantless entries based on "hot pursuit."

4. Even if *Santana* did establish a categorical pursuit rule for some offenses, Amicus would still be wrong that *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), would dictate that such a rule necessarily applies to all misdemeanors. *Atwater* declined, in the context of public arrests, to differentiate between felonies and misdemeanors (or even lower-level infractions). But the Court emphasized that when an arrest is "conducted in an extraordinary manner, unusually harmful to [the arrestee's] privacy," any preference for categorical rules governing arrests must "give[] way to individualized review." *Atwater*, 532 U.S. at 352-53 (citation omitted); *see also Riley*, 573 U.S. at 386 (refusing to apply categorical search-incident-to-arrest rule established in *United States v. Robinson*, 414 U.S. 218 (1973), to cell phones because

of extraordinary privacy interests involved). The Court also explained that an "entry into a home without a warrant" is such an "extraordinary" intrusion. *Atwater*, 532 U.S. at 354 (citation omitted). *Atwater* thus signals the opposite of what Amicus maintains.

B. The Court's broader exigent-circumstances case law bars a categorical misdemeanor-pursuit rule.

"Elaborat[ing]" beyond this Court's opinions supposedly dealing with "hot pursuit," Amicus argues that categorically allowing the police to follow suspected misdemeanants inside homes without warrants is necessary to address the problem of "flight." Br. 13-14; *see also* SG Br. 11-13. But this Court's general approach to exigent circumstances forecloses Amicus's logic—or even the adoption of any categorical "presumption" to deal with flight.

1. A desire to discourage flight from arrest is not an "emergency," *Birchfield*, 136 S. Ct. at 2173, that qualifies as an exigent circumstance. In every one of this Court's prior exigency cases, including *Santana*, officers pointed to some specific harm that would occur if they took the time to seek a warrant: injury, property damage, loss of evidence, escape. The Court has never—not once—allowed officers to bypass the warrant requirement absent that sort of immediate, concrete risk.

It is fair to say that flight should "not be incentivized." Amicus Br. 14. But that abstract interest is more appropriately served by our legal system's usual method for deterring and punishing wrongful conduct: criminal penalties. Lange Br. 37. If existing criminal sanctions are somehow insufficient,

the answer is to prescribe greater penalties for such conduct. It is not to allow officers to disregard the warrant requirement when seeking one would not risk any concrete, immediate harm.

2. That leaves the alternative theory that flight is a reasonable *proxy* for the emergency scenarios that can satisfy the exigent-circumstances standard. Amicus Br. 14; *see also* SG Br. 12-13. While Amicus says that pursuit cases "usually" implicate concrete exigencies, she offers no empirical support for that speculation. Br. 14. The Solicitor General tries to fill the void, suggesting that someone who retreats into his home might "alter his appearance, hide himself among other individuals in the home, or effectuate [an] escape." Br. 17. But the Solicitor General musters not one example of any of that coming to pass. At any rate, if an officer in a particular case did have reason to fear that a suspect might orchestrate an escape and "get away entirely," *id.* 13, that would justify proceeding without a warrant.

Moreover, even a cursory review of pursuit cases reveals that there are many innocent reasons why people retreat into their homes. Teenagers sometimes run home simply because they are frightened. *Cf. Mascorro*, 656 F.3d at 1202. Suspects may not realize—despite objective indications to the contrary—that they are being pursued. *Cf. Disney v. City of Frederick*, 2015 WL 737579, at *1, *5 (D. Md. Feb. 19, 2015). Women alone at night sometimes feel safer interacting with officers from inside their homes. *Cf. Gutierrez v. Cobos*, 2015 WL 13239104, at *1 (D.N.M. Aug. 25, 2015), *aff'd*, 841 F.3d 895 (10th Cir. 2016). And in some communities, flight "might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to

hide criminal activity." *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016).

Even if Amicus's probabilistic assessment were accurate, it would be immaterial. Proxies do not justify categorical rules when core Fourth Amendment interests are at stake. For instance, the Court recognized in *Richards v. Wisconsin*, 520 U.S. 385 (1997), that knocking and announcing in felony drug investigations "frequently" presents "special risks to officer safety and the preservation of evidence." *Id.* at 393-94. The Court nevertheless unanimously rejected a categorical exception to the knock-and-announce rule for such investigations. *Id.* at 394. The same reasoning applies here. Even if suspected misdemeanants who flee "usually" trigger valid concerns sounding in exigent circumstances, the Fourth Amendment still demands individualized assessments before officers burst into people's homes.

Amicus insists that the Court has carved out "categorical" rules for other types of warrantless entries, pointing to the need to deliver "emergency assistance" or to "put out a fire." Br. 28-29. But those are not really categorical rules. As Amicus herself recognizes, a categorical rule does not require "an assessment of whether the policy justifications underlying the exception . . . are implicated in a particular case." Br. 27 (quoting *Missouri v. McNeely*, 569 U.S. 141, 150 n.3 (2013)). Yet each of the "rules" Amicus identifies applies only when "an emergency leaves police insufficient time to seek a warrant." *Birchfield*, 136 S. Ct. at 2173. Put another way, those rules derive from case-specific determinations that the relevant justification—an emergency threat to people or property—is present. Amicus's categorical misdemeanor-pursuit rule does not.

3. Apparently perceiving the incompatibility of Amicus's proposed rule with precedent, the Solicitor General urges the Court to adopt a "general rule," or rebuttable "presumption," like the one endorsed by the plurality in *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019). Br. 4-5, 20. Such a presumption would be an improvement over the categorical rule applied below. But it would still be an unjustified departure from the traditional case-specific approach.

Mitchell involved an extremely narrow set of cases: drunk-driving cases "in which the driver is unconscious and therefore cannot be given a breath test." 139 S. Ct. at 2531. The plurality endorsed a presumption to govern such cases because it concluded that the traditional exigency standard would "almost always" allow police to secure a blood test without a warrant. *Id.* at 2539.

Misdemeanor pursuits are immensely more varied and multidimensional. They range from vehicular pursuit for minor traffic infractions to following someone inside on foot because of allegedly disorderly conduct on his front porch. *See* Pet. 9-14. Accordingly, if any analogy to drunk-driving cases is appropriate here, it would be to *McNeely*, where the Court considered the full universe of drunk-driving cases and refused to "depart from careful case-by-case assessment[s] of exigency." 569 U.S. at 152-53.

II. A categorical misdemeanor-pursuit rule would contradict the Fourth Amendment's original meaning.

Amicus and the Solicitor General try to muddy what was clear at the Framing. But they fail. The Fourth Amendment was originally understood to bar any categorical misdemeanor-pursuit rule.

1. Amicus says that the common-law authorities that Mr. Lange and California have cited contain little more than "negative inferences" or "stray" statements. Br. 41; *see* Lange Br. 28-31; Cal. Br. 18-21. Hardly. The common law in place at the Founding flatly prohibited intrusions on the sanctity of the home except where authorized by "express principles." Joseph Chitty & Richard Peters, Jr., *Practical Treatise on the Criminal Law* 42 (1819); *see also* CAC Br. 9-11 (collecting other authorities). That is precisely why the leading commentators took such care to define the specific circumstances that justified warrantless entries—and why their uniform omission of pursuit of a nonviolent misdemeanant is dispositive.

That leaves Amicus trying to cobble together four common-law warrant exceptions into something resembling a categorical misdemeanor-pursuit rule. Br. 21-23. The Solicitor General invokes the same exceptions to assert that the common law was so uncertain that the Court should give up on any attempt to discern the Fourth Amendment's original meaning. Br. 23-27. But the exceptions on which Amicus and the Solicitor General rely were both clearer and narrower than they suggest: They reached only some misdemeanors, all of which seemingly involved violence or the threat of violence.

First, officers could enter a home without a warrant when they pursued a felon or someone who had inflicted a wound that could ripen into a felony if the victim died. Lange Br. 29-31; Cal. Br. 18-19. Relying primarily on a Canadian decision issued two centuries after the Framing, Amicus suggests that the same rule extended to pursuit for "any misdemeanour." Br. 21 (quoting *R. v. Macooh*, 2 S.C.R. 802, 818 (Can. 1993)). But that decision is dubious

authority indeed. It cites only a single source to support the quoted assertion: a law review article in which the authors conceded that the authority behind their assertion was "weak." W.F. Foster & Joseph E. Magnet, *The Law of Forcible Entry*, 15 Alta. L. Rev. 271, 279 n.71 (1977).[1] Amicus also quotes a brief reference to "hot pursuit" in William Cuddihy's treatise. Br. 21. But Cuddihy did not suggest that hot pursuit extended to all misdemeanors. To the contrary, the quoted passage simply summarizes "Hale, Hawkins, and Burn," who made clear that it did not. William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 750 (2009).

The Solicitor General implicitly acknowledges that the common-law pursuit doctrine was largely limited to felonies. Br. 24. But the Government says this restriction is irrelevant because the "line between felonies and misdemeanors is quite different today than it was when the Fourth Amendment was adopted." *Id.* It is far from clear that this evolution in the law is relevant to the originalist inquiry. *See, e.g.*, *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984) (Fourth Amendment rules turn on legislative classifications of crimes, not crimes themselves). But if it is, it proves the inverse of what the Solicitor General would like. That the common law restricted warrantless entries to the narrow, dangerous class of crimes then considered felonies would mean that history would cut against a

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[1] This Court has disagreed with the Supreme Court of Canada regarding other Fourth Amendment issues that turn on common-law concepts. *Compare Riley v. California*, 573 U.S. 373 (2014) (unanimously prohibiting warrantless searches of cell phones incident to arrest), *with R. v. Fearon*, 3 S.C.R. 621 (Can. 2014) (allowing such searches).

categorical rule for all modern felonies. It follows *a fortiori* that history would foreclose a categorical rule for the vastly broader class of offenses captured under today's misdemeanor codes.

Second, Amicus invokes the "hue and cry." Br. 22. But as explained, the hue and cry was limited to felonies and dangerous woundings. Br. 29 & n.6; *see* CAC Br. 17-18 (citing Blackstone, Coke, Hale, and Burn). Amicus's only contemporary authority is a treatise on homicide, not searches and seizures. *See* Robert Bevill, *A Treatise on the Law of Homicide and of Larceny at Common Law* 162-63 (1799). And the treatise nowhere asserts that the hue and cry could be raised for all misdemeanors.[2]

Third, Amicus cites authorities recognizing that officers could break doors to arrest participants in an "affray" or "breach of the peace." Br. 22-23, 42. But at the Framing, affrays and breaches of the peace were a subset of misdemeanors that involved violence or a threat of violence. CAC Br. 18-22 (quoting authorities including Blackstone, Burn, Hale, and Hawkins). Both cases Amicus cites from the Framing era fit that mold. One involved men "making a riot" and "fighting." *City*

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[2] The modern sources that Amicus cites (Br. 22) are no more helpful. Cuddihy's treatise appears to be describing the hue and cry as a means of executing "warrants by justices of the peace," not conducting warrantless entries. Cuddihy, *supra*, at 245. What's more, Cuddihy classified the searches Amicus describes as among the "general searches" the Fourth Amendment prohibited. *Id.*; *see id.* at 742. Amicus's other source simply cites justice of the peace manuals, which limited the hue and cry to "felons, and such as have dangerously wounded another." John A. Dunlap, *The New York Justice* 31 (1815), *cited in* George C. Thomas III, *Stumbling Toward History: The Framers' Search and Seizure World*, 43 Tex. Tech. L. Rev. 199, 227 (2010).

Council of Charleston v. Payne, 11 S.C.L. (2 Nott & McC.) 475, 475 (S.C. Const. App. 1820). The other involved a shop owner who had "struck [a man] on the head" and attempted to strike a justice of the peace. *Knot v. Gay*, 1 Root 66, 66-67 (Conn. Super. Ct. 1774); *see* 1 James Parker, *Conductor Generalis: Or, the Office, Duty and Authority of Justices of the Peace* 11 (1764) (describing an "affray" as conduct involving "actual violence" or behavior that would "cause a terror to the people").

Finally, Amicus references the common law rule allowing an officer to break doors when pursuing a person who, after being arrested, escaped from custody. Br. 23. The very fact that a special rule existed for escapees reinforces that pursuit of a suspected misdemeanant was *not* sufficient to justify a warrantless invasion of a home.

III. Fourth Amendment balancing precludes a categorical misdemeanor-pursuit rule.

Amicus and the Solicitor General exaggerate law enforcement's need for a categorical misdemeanor-pursuit rule and understate such a rule's threats to privacy and security.

A. A categorical misdemeanor-pursuit rule is not necessary to serve law-enforcement interests.

The traditional case-by-case exigency standard "is being implemented by police departments across the country" in the context of misdemeanor pursuits. Ill. Br. 1; *see also id.* at 12. Six states and the District of Columbia also attest that the traditional standard "has proved sufficient" to serve "the States' law enforcement interest." *Id.* at 1. California likewise

disclaims any need for a categorical misdemeanor-pursuit rule. Amicus nonetheless argues that officers need categorical authority to invade homes, to ensure that they can "swiftly apprehend[] fleeing suspects." Br. 13. Amicus is incorrect.

1. Actual law-enforcement policies and practices demonstrate that the case-by-case approach to misdemeanor pursuit adequately serves the interest in fighting crime. DOJ has long taken the position that before officers initiate a pursuit at all, they should be required to consider factors including "the seriousness of the suspected violation at issue," "whether the person they intend to pursue poses an immediate and serious threat," and whether the suspect "could be apprehended later or through other means." U.S. Dep't of Just., *Investigation of the Baltimore City Police Department* 93 (Aug. 10, 2016) (*DOJ Baltimore Report*), https:// perma.cc/5UC4-L35L. Over the past twenty years, DOJ has sharply criticized police departments that authorize foot pursuits of suspects who "have not committed serious crimes and present no threat to officers." *Id.* at 76; *see also, e.g.*, Letter from Steven H. Rosenbaum, Chief, Special Litig. Section, to Alejandro Vilarello, Miami City Att'y 14 (Mar. 13, 2003), https://perma.cc/2NZQ-Z6HV.

DOJ's position reflects a broad consensus in the law-enforcement community. The International Association of Chiefs of Police similarly discourages pursuits in many circumstances, recommending that officers consider whether "the suspect poses an immediate threat" and whether the suspect could be apprehended "at another time and place." Int'l Ass'n of Chiefs of Police, *Foot Pursuits: Considerations* 1 (July 2019); *see also* LACPCA Br. 4 (explaining that many departmental policies "encourage officers to terminate

vehicle or foot pursuits under many circumstances, before warrantless entries become necessary").

Law-enforcement amici supporting Amicus try to deflect these model policies, asserting that, in practice, the police would not always use the broad authority conferred by a categorical misdemeanor-pursuit rule. But they *could*: Under Amicus's rule, a police department (or entire state) could adopt an unyielding policy of invading the home of every person who flees from any legitimate attempted traffic stop. *See* Lange Br. 38-39. Just as constitutional protections do not turn on prosecutorial grace, neither should they turn on the voluntary restraint of police chiefs or their officers.

Anyhow, these amici miss the point. The key fact is simply that law enforcement itself recommends best practices at odds with the rule applied below. This refutes the notion that requiring a warrant or true emergency before pursuing a suspect into a home would hinder effective law enforcement.

Amicus also suggests that a case-by-case approach to misdemeanor pursuit would "teach offenders that reaching home base means they are 'home free.'" Br. 15. Not at all. When officers reasonably conclude that a suspect's flight into his home presents genuine exigency—including a risk that the suspect could escape undetected—they may immediately pursue the suspect inside. Even absent exigent circumstances, the officer may still monitor the house to make sure the suspect does not leave, and then—after a short delay to secure a warrant—enter the home. Lange Br. 35-36. In this scenario, suspects do nothing more than bottle themselves up inside their

homes for the short time necessary for officers to obtain warrants.

2. Experience also shows that the traditional case-specific exigency standard is readily administrable. Officers apply this very standard in all other exigency contexts—which, by definition, also are situations requiring "split-second decisions based on rapidly unfolding facts." Amicus Br. 32. And widespread police policies already require officers to apply similar case-specific standards before *initiating* a pursuit. *See e.g.*, LACPCA Br. 18 (Los Angeles County); NFOP Br. 19-20 (Columbus, Ohio). In light of those "self-imposed limitations of so many police departments," one must "view[] with suspicion" Amicus's assertion that applying the traditional exigency standard here would vex well-trained officers. *Tennessee v. Garner*, 471 U.S. 1, 20 (1985).

In fact, it is Amicus's categorical rule that would create administrative difficulties. Under our approach, officers apply the traditional exigency standard in every case, including ones involving pursuits. Under Amicus's approach, officers would still have to learn and apply the traditional exigency rule for non-pursuit cases, but they would also need to learn the boundaries of a special "hot pursuit" rule. That would be no easy task. The Solicitor General, for instance, suggests that a suspect's awareness of an officer's pursuit is just a factor that "may" be considered, not a prerequisite. Br. 19-20. Amicus apparently assumes that knowledge is required. Br. 31.

More generally, this Court has observed that defining the boundaries of a purportedly bright-line Fourth Amendment rule can itself "generate[] a great

deal of uncertainty." *Gant*, 556 U.S. at 346. Yet the Solicitor General offers no comprehensive test for identifying "hot pursuit," and Amicus declines to address many other definitional questions, including whether the pursuit must be continuous, or how long of a break is too long. *See* Lange Br. 32-33. Other amici supporting the judgment below offer still other definitions. *See, e.g.*, Ohio Br. 3, 10. If lawyers on the other side cannot pin down any ready definition of hot pursuit, it seems unlikely police officers would be able to apply the concept with any confidence or consistency.

3. Finally, Amicus maintains that difficulties in distinguishing felonies from misdemeanors in the field would make it hard for officers to apply a categorical rule for felony pursuits and a case-specific standard for misdemeanor pursuits. Br. 38-40. That dichotomy can be avoided simply by recognizing that the same case-specific exigency standard governs felony pursuit as well. To be sure, that standard is more likely to be satisfied when officers pursue individuals suspected of committing violent felonies. But the traditional case-specific standard readily accommodates those considerations. *See Welsh*, 466 U.S. at 753 (holding that "an important factor" when determining whether a home arrest is justified by exigent circumstances is "the gravity of the underlying offense for which [an] arrest is being made").

Even if the Court were to adopt a categorical rule with respect to felonies (or some subset of felonies), Amicus's administrability contentions still would not justify extending the same treatment to every suspected misdemeanor. As California has explained, officers are already required to understand and apply the felony/misdemeanor distinction while on patrol.

Cal. Br. 28-30. The Solicitor General likewise does not see any administrability problem in applying one rule to felonies and another to misdemeanors. Br. 19-20.[3]

B. A categorical misdemeanor-pursuit rule would severely infringe upon privacy.

Amicus tries to downplay the practical realities of warrantless home invasions. But the inescapable fact is that such invasions severely impinge privacy interests and regularly risk tragic results.

1. Contrary to Amicus's suggestions, suspects who retreat into their homes do not "invite[]" officers to follow them inside, or otherwise "abandon[] any reasonable expectation of privacy." Br. 18-19. Yes, fleeing from the police is generally wrongful conduct. But this Court has rejected the proposition that suspects who engage in wrongful conduct in their homes thereby "forfeit[] any reasonable expectation of privacy." *Mincey v. Arizona*, 437 U.S. 385, 391 (1978). In *Michigan v. Tyler*, 436 U.S. 499 (1978), for example, the Court rejected the argument that a suspected arson vitiated the suspect's expectation of privacy in the building. It is "impossible," the Court explained, "to justify a warrantless search on the ground of abandonment by arson when that arson has not yet been proved." *Id.* at 505-06.

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[3] Ohio says parts of its own criminal code are so confusing that officers have trouble differentiating felonies from misdemeanors. Ohio Br. 21. The solution is for Ohio to fix its criminal code. It would turn the Bill of Rights and Fourteenth Amendment on their heads to say that a State enlarges the investigative powers of its police force when it maintains an incoherent criminal code.

Amicus's argument suffers from the same basic flaw. Amicus asserts that police may follow suspects inside homes without warrants whenever they have probable cause to believe suspects are fleeing from lawful attempts to detain them. Br. 31. Yet the whole point of the warrant requirement is to "require a magistrate to pass on" an officer's assessment of probable cause, unless some "grave emergency" makes that impossible. *McDonald v. United States*, 335 U.S. 451, 455 (1948). A "zealous officer" will often be more likely than a neutral magistrate to think that his attempt to detain an individual in public was legitimate, *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), or to interpret innocent conduct as improper flight, *United States v. Corder*, 724 Fed. Appx. 394, 397-400 (6th Cir. 2018). Under the Fourth Amendment, therefore, individuals do not categorically lose the right to privacy in their homes simply because *police officers* think they have probable cause to believe the individuals have fled lawful attempts to detain them.

Second, Amicus and the Solicitor General fail to account for the distinct Fourth Amendment interests of parents, spouses, children, or roommates who share a purportedly fleeing suspect's home. Those third parties often have nothing at all to do with pursuits or the events giving rise to them. But when police enter without a warrant, such individuals still suffer serious disruptions, unwanted exposures of details of their private lives, and risks of injury. Lange Br. 32.

The Solicitor General retorts that "living with someone else always presents the risk" that he might do something to provoke the police to pursue him into the home. Br. 15. But the understanding that any resident of a home has the authority to voluntarily

consent to police entry rests on property law and social convention. *Fernandez v. California*, 571 U.S. 292, 298 (2014). There is no such basis for deeming one occupant's apparent flight to forfeit the Fourth Amendment rights of all occupants.

2. Amicus also tries to wave away the harrowing results that sometimes follow from warrantless entries. But these outcomes are the predictable result of the sudden and heated home invasions that Amicus's rule would authorize, and they are documented in the dozens of cases cited by amici—many of which would unambiguously qualify under Amicus's definition of hot pursuit. NACDL Br. 4-16; *see, e.g.*, *Carroll v. Ellington*, 800 F.3d 154, 161-66, 172-73 (5th Cir. 2015); *Huber v. Coulter*, 2015 WL 13173223, at *4-6 (C.D. Cal. Feb. 10, 2015); *Bash v. Patrick*, 608 F. Supp. 2d 1285, 1290-91, 1298-1300 (M.D. Ala. 2009). As DOJ has explained, an officer pursuing a suspect "may experience an adrenaline rush" that "may impede [the] officer's ability to exercise proper judgment and appropriate restraint" in the use of force. *DOJ Baltimore Report* 92; *see also* Ill. Br. 11. In such situations, *other* Fourth Amendment rules are insufficient to protect against significant harms. *Contra* SG Br. 16.

Even when officers make every effort to minimize collateral damage, there is still a serious risk of injury or loss of life. As this Court has long recognized, one of the primary reasons unannounced entries are so dangerous is that unsuspecting occupants—often flush with adrenaline themselves—will pull a gun or other weapon because they do not realize that the invaders are police officers. *Hudson v. Michigan*, 547 U.S. 586, 594 (2006). If nothing else, officers who enter a home typically exert firm authority and conduct a

protective sweep, a tactic that includes "look[ing] in closets and other spaces" near the suspect, *Maryland v. Buie*, 494 U.S. 325, 334 (1990). The personal intrusions such searches entail are no trifling matter.

3. Finally, neither Amicus nor the Solicitor General denies that the burdens that warrantless invasions in pursuit of suspected misdemeanants would impose would fall disproportionately on racial minorities and communities that already bear the brunt of aggressive misdemeanor enforcement. Lange Br. 40-42. Recall that a categorical misdemeanor-pursuit rule would authorize officers to invade homes without a warrant even where, as here, they have no intention of making an arrest. *See supra* at 5. Many such encounters would result in no charges or prosecutorial action at all—only disgruntled or humiliated homeowners (or worse) in already-marginalized neighborhoods.

* * *

Amicus briefly asserts that if the Court rejects the lower court's categorical approach, it should still affirm because the facts here show that exigent circumstances existed when Officer Weikert entered Mr. Lange's home. Br. 49-50. The Solicitor General similarly asserts that applying the Government's proposed presumption to the facts would result in an affirmance. Br. 30-32. But those contentions are outside the question presented, and there is no reason this Court should depart from its usual practice by taking up either fact-specific issue in the first instance. Indeed, it would be particularly inappropriate to wade into those waters given California's concession that "the record here does not establish a case-specific exigency." Br. 11.

In short, if this Court rejects the categorical rule applied below in favor of either the traditional case-specific standard or the Solicitor General's rebuttable presumption, it should reverse and remand to allow the California courts to consider any remaining Fourth Amendment or remedial issues in the first instance.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeal should be reversed.

Respectfully submitted,

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