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

REPLY BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

Page

Introduction 1

Argument 2

I. The categorical hot-pursuit exception should not be extended to pursuits of suspected misdemeanants 2

  A. Precedent does not establish a categorical hot-pursuit exception that applies in the misdemeanor context 2

  B. The relevant considerations weigh against extending the categorical hot-pursuit rule to misdemeanor offenses 6

    1. Founding-era history 6

    2. Privacy interests 9

    3. Law enforcement interests 10

  C. The United States recognizes the need for case-specific inquiries in misdemeanor pursuit cases 19

II. The Court should vacate the judgment below and remand for application of the good-faith exception 21

Conclusion 22

TABLE OF AUTHORITIES

Page

CASES

Atwater v. City of Lago Vista
532 U.S. 318 (2001) 5

Birchfield v. North Dakota
136 S. Ct. 2160 (2016) 6

Butler v. State
309 Ark. 211 (1992) 15

Carroll v. Ellington
800 F.3d 154 (5th Cir. 2015) 15

Chapman v. United States
365 U.S. 610 (1961) 12

Collins v. Virginia
138 S. Ct. 1663 (2018) 4, 5

Commonwealth v. Jewett
471 Mass. 624 (2015)... 16

Davis v. United States
564 U.S. 229 (2011) 21

District of Columbia v. Wesby
138 S. Ct. 577 (2018) 18

Escobar v. Montee
2016 WL 397087 (N.D. Tex.
Feb. 2, 2016) 14

TABLE OF AUTHORITIES (continued)

Page

Florida v. Jardines
569 U.S. 1 (2013) 21

Georgia v. Randolph
547 U.S. 103 (2006) 9, 19

Hudson v. Michigan
547 U.S. 586 (2006) 9

Illinois v. McArthur
531 U.S. 326 (2001) 18

Kyllo v. United States
533 U.S. 27 (2001) 9

Lewis v. United States
518 U.S. 322 (1996) 18

Logan v. United States
552 U.S. 23 (2007) 18

Lyttle v. Riley
2011 WL 7415429 (E.D. Mich.
Dec. 21, 2011) 14

Macooh v. Queen
[1993] 2 S.C.R. 802 5

Maryland v. Buie
494 U.S. 325 (1990) 10

Michigan v. Tyler
436 U.S. 499 (1978) 9

TABLE OF AUTHORITIES
(continued)

Page

Mincey v. Arizona
437 U.S. 385 (1978) 9, 12

Minnesota v. Olson
495 U.S. 91 (1990) 3, 14

Missouri v. McNeely
569 U.S. 141 (2013) 2

Mitchell v. Wisconsin
139 S. Ct. 2525 (2019) 20

Payton v. New York
445 U.S. 573 (1980) 1, 7, 9, 10

Riley v. California
573 U.S. 373 (2014) 6, 12

Scher v. United States
305 U.S. 251 (1938) 4, 5

Scott v. Harris
550 U.S. 372 (2007) 13, 15

Stanton v. Sims
571 U.S. 3 (2013) (per curiam) 4

State v. Markus
211 So. 3d 894 (Fla. 2017) 15

Steagald v. United States
451 U.S. 204 (1981) 10, 11

TABLE OF AUTHORITIES
(continued)

Page

Tennessee v. Garner
471 U.S. 1 (1985) 19

United States v. Santana
427 U.S. 38 (1976) .... *passim*

Warden v. Hayden
387 U.S. 294 (1967) 3

Welsh v. Wisconsin
466 U.S. 740 (1984) .... *passim*

STATUTES

Cal. Penal Code
§ 148.. 16
§ 487.. 18

Me. Stat. Title 17-A § 4-A... 18

N.J. Stat. Ann. § 2C:1-4 18

OTHER AUTHORITIES

American Law Institute, Code of
Criminal Procedure § 28,
Commentary (1930)... 8

1 Richard Burn, *The Justice of the Peace*
and Parish Officer (1797)...................................... 8

TABLE OF AUTHORITIES
(continued)

Page

CopQuest, Qwik-Codes California Penal Code, https://www.copquest.com/qwik-codes-california-penal-code-law-summaries_20-1000.htm 17

Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (2009)................... 8

Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547 (1999) 7, 8

Foster & Magnet, *The Law of Forcible Entry*, 15 Alberta L. Rev. 271 (1977)..................... 8

2 Matthew Hale, *The History of the Pleas of the Crown* (1736) 6, 8

2 William Hawkins, *A Treatise of the Pleas of the Crown* (1787) 8

LaFave, *Search and Seizure* (6th ed. 2020) 10, 11, 12

LaFave et al., *Substantive Criminal Law* (3d ed. 2017) 18

Mayson & Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. Rev. 971 (2020) 14

INTRODUCTION

This Court long ago recognized that police may pursue a fleeing felony suspect into a home without first obtaining a warrant. Since then, the Court has repeatedly described that "hot-pursuit" exception in categorical terms, allowing police and lower courts to conclusively presume the existence of exigent circumstances. But it has never applied the exception to the pursuit of a suspected misdemeanant. The Court-appointed amicus curiae identifies no persuasive reason for the Court to do so now.

Amicus contends that this Court's precedent eliminates any doubt about the availability of a categorical hot-pursuit exception in the misdemeanor context. Br. 12. In fact, the Court has made clear that this is very much an open question. And the factors the Court generally consults in deciding whether to extend a categorical warrant-requirement exception weigh against an extension here: Amicus notes (Br. 20-23) that common law authorities allowed officers to make warrantless entries when pursuing suspects believed to have committed felonies or dangerous misdemeanors, but fails to identify historical support for a categorical rule applying in *all* misdemeanor cases. Amicus asserts (Br. 15) that pursuits of suspected misdemeanants "typically" present a risk that the suspect will harm others, destroy evidence, or escape out of the home, but does not substantiate those assertions. Finally, amicus dismisses the privacy interests at stake as "minimal." Br. 19. As this Court has recognized, however, "[f]reedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 587 (1980) (internal quotation marks omitted). Particular exigencies may

justify burdening those important privacy interests in certain cases involving pursuits of suspected misdemeanants. But the Fourth Amendment should not be construed to provide an invitation for officers to enter without a warrant in every such case.

ARGUMENT

I. THE CATEGORICAL HOT-PURSUIT EXCEPTION SHOULD NOT BE EXTENDED TO PURSUITS OF SUSPECTED MISDEMEANANTS

In applying the exigent circumstances exception to the warrant requirement, courts typically "evaluate each . . . alleged exigency based 'on its own facts and circumstances.'" *Missouri v. McNeely*, 569 U.S. 141, 150 (2013). The Court-appointed amicus argues that the Court should deviate from that case-by-case approach here, and extend the categorical hot-pursuit exception to all pursuits involving suspected misdemeanants. The Court should reject that argument.

A. Precedent Does Not Establish a Categorical Hot-Pursuit Exception That Applies in the Misdemeanor Context

1. Amicus and petitioner diverge on the significance of this Court's decision in *United States v. Santana*, 427 U.S. 38 (1976). Amicus contends that *Santana* established a categorical hot-pursuit exception that applies every time a suspect "retreat[s] into her house" after an officer initiates a "proper arrest" in public, regardless of whether the arrest is for a felony or misdemeanor offense. Br. 11 (internal quotation marks omitted). Petitioner describes *Santana* as merely an application of "the case-by-case exigency" standard. Pet. Br. 24-25. Neither is quite right.

As amicus explains, this Court has used categorical terms to describe the rule in *Santana*, *see* Br. 25-27,

and it routinely lists "hot pursuit" as its own category of exigency, separate from case-specific exigencies, *e.g., Minnesota v. Olson*, 495 U.S. 91, 100 (1990). That categorical approach is a sensible one in the felony context. *See* Resp. Br. 14-15. And lower courts and treatises have long shared a categorical understanding of the hot-pursuit rule. *See id.*; Amicus Br. 26-27.

Petitioner's characterization of *Santana* cannot be squared with this settled understanding. And his warning that any "categorical 'hot pursuit' exception" would raise "thorny questions," Pet. Br. 8; *see id.* at 32-34, ignores the fact that this Court has already effectively answered those questions. For example, petitioner asks: "must the suspect disobey an officer's order to stop?" Pet. Br. 33. *Santana* establishes that police need not literally shout "stop," but that officers must "set in motion" a pursuit "in a public place." 427 U.S. at 43. Petitioner asks: "[m]ust officers themselves follow the suspect, or can they be directed to the home by witnesses?" Pet. Br. 33. *Santana* explains that there was no "true 'hot pursuit'" in a prior case in which police were directed to the suspect's home by witnesses. 427 U.S. at 42-43 & n.3 (explaining that hot pursuit requires "some sort of a chase" by police and distinguishing *Warden v. Hayden*, 387 U.S. 294 (1967), on that basis).[1]

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[1] *Santana* also indicates that the hot-pursuit exception applies only where "a reasonable person in the fleeing suspect's shoes" would be aware of the pursuit. Amicus Br. 31; *see Santana*, 427 U.S. at 43 (emphasizing that Santana "saw the police"); Pet. Br. 32 ("Does a suspect have to know officers are pursuing him?"). And the Court's decision in *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984), establishes that "hot pursuit" requires officers to make an "immediate or continuous pursuit" of the suspect. *See* Pet. Br. 33 ("Must the pursuit be continuous?").

But while the categorical nature of the hot-pursuit exception in the felony context is settled—and beyond the scope of the question presented in this case, *see* Pet. i—this Court has never extended that categorical rule to pursuits of suspected misdemeanants. Amicus suggests that a categorical hot-pursuit rule in the misdemeanor context logically follows from *Santana*. *See* Br. 10-11. This Court has emphasized, however, that "*Santana* involved a felony suspect," *Stanton v. Sims*, 571 U.S. 3, 9 (2013) (per curiam), and that "federal and state courts nationwide are sharply divided on the question" whether the Fourth Amendment categorically authorizes a "warrantless entry in hot pursuit of a fleeing misdemeanant," *id.* at 6, 10. The division over that open question is what prompted the petition in this case; *Santana* does not resolve it.[2]

2. The other decisions invoked by amicus do not resolve that question either. Amicus points (Br. 11-12) to *Scher v. United States*, 305 U.S. 251 (1938), but that case did not involve a misdemeanor suspect or a hot pursuit. Although the Court upheld the warrantless entry of a garage to search a vehicle on suspicion of felony-grade bootlegging, *see id.* at 252 n.1, 255, there was no "chase": the suspects were not aware the police were following them. Rather, the federal agents in *Scher* received a "tip that a particular car would be transporting bootleg liquor," and the officers "followed the car" for some time without attempting to stop it or to arrest the driver. *Collins v. Virginia*, 138 S. Ct.

[2] To be sure, no precedent of this Court squarely compels it to reject amicus's position. Contrary to amicus's suggestion (Br. 3), California does not argue that *Welsh* says otherwise. *Welsh* bears on some of the considerations relevant to the question presented here, *see* Resp. Br. 26-27 & n.20, but "did not involve hot pursuit," *Stanton*, 571 U.S. at 8.

1663, 1673 (2018). Only *after* "the driver 'turned into a garage'" did the officers "approach[]" and search the vehicle. *Id.* This Court recently observed that the analysis in *Scher* was "imprecise" and "factbound." *Id.* at 1674. Whatever *Scher*'s precedential significance, it does not support extending the categorical hot-pursuit exception to the misdemeanor context.

Amicus next argues that *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), "compels the application of *Santana* in" this case. Br. 12. But *Atwater* held that the Constitution allows police to conduct warrantless misdemeanor arrests *in public*. 532 U.S. at 354. It did not involve an "entry into a home without a warrant"—which the Court distinguished as "extraordinary" and "unusually harmful to" privacy interests. *Id.* (internal quotation marks omitted). The Court also emphasized that "statutes in all 50 States" authorized public arrests of suspected misdemeanants. *Id.* at 344. Here, there is no such "clear consensus among the States." *Id.* at 340 (internal quotation marks omitted).

Finally, amicus invokes (Br. 19) a decision of the Supreme Court of Canada, *Macooh v. Queen* [1993] 2 S.C.R. 802, 820-821, construing the Canadian Charter of Rights and Freedoms to allow police to pursue a person suspected of committing a "provincial offense" into a home without obtaining a warrant. *Id*. at 820-821. But *Macooh* was informed by a unique feature of Canadian law: only the "federal Parliament" has authority to create an "indictable" offense, *id.* at 819, the type of offense that amicus compares to American felonies, *see* Br. 19. As a result, the court stressed that Canada's designation of an offense as "indictable" versus "provincial" "only very imperfectly reflects the severity of the offence." *Macooh*, 2 S.C.R. at 819.

B. The Relevant Considerations Weigh Against Extending the Categorical Hot-Pursuit Rule to Misdemeanor Offenses

This Court does not "mechanical[ly]" extend categorical Fourth Amendment exceptions to new or different contexts. *Riley v. California*, 573 U.S. 373, 386 (2014). For example, the Court has refused to extend the search-incident-to-arrest exception—another "long recognized" categorical rule (Amicus Br. 1)—to searches of arrestees' cellphones, *Riley*, 573 U.S. at 385-386, or to the "warrantless taking of a blood sample" from a DUI arrestee, *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2176 (2016). In those and other cases, the Court's analysis has considered relevant "guidance from the founding era," the privacy concerns that would be implicated by extending the exception, and the "'legitimate governmental interests'" at stake. *Riley*, 573 U.S. at 385. Here, those factors do not support extending the categorical hot-pursuit exception to pursuits of suspected misdemeanants. *See* Resp. Br. 15-30.

1. Founding-era history

Amicus observes that history provides no "clear answers" here, but contends that "common-law authorities generally considered warrantless entry to be justified in hot pursuit cases." Br. 20. As California has explained, however, that was true only in cases involving felonies and certain dangerous misdemeanors. *See* Resp. Br. 18-21. The closest analogue to today's hot-pursuit exception was the rule that, in cases where the constable suspected a person of a felony, "if the supposed offender fly and take house, . . . the constable may break the door, tho he have no warrant." *E.g.*, 2 Matthew Hale, *The History of the Pleas of the Crown*

92 (1736). That rule extended to a subset of misdemeanors, such as those where a suspect "hath wounded B, so that he is in danger of death," *id.* at 94; but it did not apply in *every* misdemeanor case.[3]

Amicus provides an alternative account of history in which a warrant was *never* required "to enter a house to make an arrest." Br. 20 (internal quotation marks omitted). But this Court rejected that understanding of the common law in *Payton*, 445 U.S. at 595-598. Even the dissent in *Payton* that amicus invokes (Br. 21) did not go so far. As Justice White understood things, the common law allowed warrantless home entries for felony arrests only. 445 U.S. at 616 (White, J., dissenting). He emphasized the importance of a "felony requirement" to "guard[] against abusive or arbitrary enforcement" and "ensure[] that invasions of the home occur only in case of the most serious crimes." *Id.* at 616-617.

Amicus also discusses several common law doctrines that do not "map[] precisely onto what we now call 'hot pursuit.'" Br. 22-23. Some of the authorities referenced by amicus simply confirm what California

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[3] Far from "stray treatise statements," Amicus Br. 41, the common law commentaries relied on by California comprehensively addressed scenarios in which constables could enter homes without warrants, *see* Resp. Br. 19-21; *see also Payton*, 445 U.S. at 591-598. Their failure to endorse anything resembling a categorical misdemeanor-pursuit exception is telling. *See* Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 646 n.273 (1999) ("[C]ommon-law sources tended to define lawful authority positively and to catalog the forms of authority that existed; as a general matter, the absence of an affirmative statement of authority was understood to mean there was no authority.").

has already explained: that warrantless home entries were permitted, at most, in a subset of misdemeanor cases. "In no case [could] a forcible entry be made without a warrant to arrest for a misdemeanour which [was] not in the order of a breach of the peace[.]" Foster & Magnet, *The Law of Forcible Entry*, 15 Alberta L. Rev. 271, 280 (1977); *see id.* (listing "talking loudly" in public and "urinating in the street" as examples of misdemeanors that were not a "breach of the peace"); *see also* Amicus Br. 22 (discussing "'affray[s], or breach[es] of the peace'"); U.S. Br. 24-25 (similar).[4]

Other authorities invoked by amicus appear to go somewhat further. For example, amicus discusses colonial-era statutes extending the "ancient doctrine of 'hue and cry'" to offenses that would not have qualified before the colonial period. Br. 22. Even those statutes did not extend to all misdemeanor offenses, however. And the founders intended the Fourth Amendment to rein in the kind of "promiscuous" search practices exemplified by those statutory expansions of "hue and cry." *See, e.g.*, Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 244-245, 556, 765-767 (2009).[5]

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[4] The principal sources relied on by the founders, such as the works of Hale, Hawkins, and Burn, used narrower terms like "infliction of dangerous wounds" or "affray" (rather than "breach of the peace") to describe misdemeanor cases in which constables could make warrantless home entries. *See, e.g.*, Hale, *supra*, at 94; 2 William Hawkins, *A Treatise of the Pleas of the Crown* 139 (1787); 1 Richard Burn, *The Justice of the Peace and Parish Officer* 121, 123 (1797); *see generally* Davies, *supra*, at 644-646. "Breach of the peace" was not generally used in that context until much later. *See, e.g.*, American Law Institute, Code of Criminal Procedure § 28, Commentary, 254 (1930).

[5] Amicus also argues that the "exclusionary rule did not exist" at

2. Privacy interests

Privacy interests and respect for "[f]reedom from intrusion into the home" also weigh against extending the categorical hot-pursuit exception to all misdemeanor pursuits. *Payton*, 445 U.S. at 587 (internal quotation marks omitted); *see Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.").

Amicus acknowledges that "privacy interests . . . in homes" are significant, Br. 28, but argues that a fleeing suspect "abandon[s]" those interests by "invit[ing] the pursuing officer to follow him in," *id.* at 18; *see* U.S. Br. 15 (similar). Amicus does not seriously contend, however, that flight qualifies as a form of "voluntary consent." *Georgia v. Randolph*, 547 U.S. 103, 106 (2006). Retreating from a police encounter into a home is the opposite of giving the police consent to follow. And this Court has elsewhere rejected arguments that suspects "abandon" their Fourth Amendment rights by engaging in certain "wanton" or otherwise wrongful behavior. Amicus Br. 18; *see, e.g.*, *Mincey v. Arizona*, 437 U.S. 385, 391 (1978); *Michigan v. Tyler*, 436 U.S. 499, 505 (1978).

In any event, the analysis here should not focus exclusively on the suspect's privacy interests. There may be other occupants of the home who have nothing to do with the suspected offense. They too have privacy interests under the Fourth Amendment—which

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common law. Br. 21 (internal alterations omitted); *see also* Br. of Ohio et al. 16-19. But that is irrelevant here. The question presented asks what the Fourth Amendment allows, not what remedy is appropriate if it is violated. The Court has been careful to treat those questions as separate. *See, e.g.*, *Hudson v. Michigan*, 547 U.S. 586, 590 (2006).

are surely implicated when police unexpectedly enter the home in pursuit of a fleeing suspect. *See generally* 6 LaFave, *Search and Seizure* § 11.3(b) (6th ed. 2020) (LaFave); *cf. Steagald v. United States*, 451 U.S. 204, 219 (1981). Amicus characterizes these interests as "minimal" due to the narrow "scope of the intrusion." Br. 19. But when officers enter a home to effect an arrest, they may conduct a "sweep" of multiple rooms and "look in closets" for anyone else who could pose a danger. *Maryland v. Buie*, 494 U.S. 325, 333, 334 (1990). That disturbance is hardly a minimal intrusion. *See Payton*, 445 U.S. at 589.

To be sure, the current hot-pursuit exception for suspected felons implicates similar privacy interests. *See* Resp. Br. 23. But extending that categorical rule to all misdemeanor offenses could profoundly increase the aggregate burden on privacy interests, due to the greater number and frequency of misdemeanor offenses and arrests. *See id.* at 22-23. Amicus offers no direct response to this point, and the appendix attached to the amicus brief only underscores the breadth and number of non-felony offenses—many of which may arise in front yards, driveways, sidewalks, and other spaces near a person's home. *See* Amicus Br. App. 1a-80a.

3. Law enforcement interests

Amicus's arguments in support of a categorical rule focus primarily on the government's interests. Br. 13-17. As the State has explained, however, the law enforcement interests that justify a felony hot-pursuit exception do not arise with the same frequency in the misdemeanor context, and are not sufficient to offset the historical considerations and privacy interests weighing against extending the categorical exception to misdemeanor cases. Resp. Br. 23-30.

a. Amicus and the United States principally emphasize the government's interest in preventing suspects from "thwart[ing]" lawful arrests. Amicus Br. 35; *see id.* at 14-15; U.S. Br. 11-12. They reason that "requiring" police "to call off a chase when a [misdemeanor] suspect escapes into a home . . . would teach offenders that reaching home base means they are 'home free.'" Amicus Br. 15; *see* U.S. Br. 11-12. That reasoning is flawed. Rejecting a categorical hot-pursuit exception does not require police to abandon pursuit of any misdemeanor suspect. If police perceive a case-specific exigency, they may enter the home immediately. If not, they can remain outside, seek a warrant, and arrest the suspect as soon as they get one. In either event, the suspect might temporarily be "home," but he is not "free."

The United States contends that, "in many cases, obtaining such a warrant will be impossible." Br. 13. It argues that an "officer often will not know" "if the suspect has fled into someone else's residence" and that, in such circumstances, "an arrest warrant alone may be insufficient." *Id.* at 13-14 (citing *Steagald*, 451 U.S. at 205-206, 221-222). But if an officer is in doubt about whose home it is, the answer is to seek a search warrant. *See* 3 LaFave § 6.1(b). A search warrant will generally satisfy the Fourth Amendment so long as the magistrate "pass[es] on *both* the probable cause to arrest and the probable cause to search." *Id.*

The United States also worries that, if officers "only have gotten a glimpse of the suspect's basic physical attributes," Br. 13, they may have too "little identifying information" for a "'John Doe' arrest warrant[]," *id.* at 14. But even when officers lack sufficient information to obtain a standard arrest war-

rant (which would authorize arrest of the described individual anywhere), they will likely be able to get a search warrant providing limited authority to look for the suspect in the particular home he recently entered. *See* 2 LaFave § 4.5(e); 3 LaFave § 5.1(h).[6]

Amicus highlights the "danger[s]" of "flight itself," Br. 14, and the need to encourage "'compliance with police orders,'" *id.* at 14, 15; *see also* U.S. Br. 11. Those are undoubtedly important interests. That is why California and every other State has made it a crime to resist or evade a lawful arrest. Resp. Br. 28 & n.22.[7] According to amicus, those criminal sanctions are not sufficient to encourage suspected misdemeanants to comply with lawful police orders absent a categorical hot-pursuit exception. Br. 32. But there are always some people who will disobey a criminal prohibition. That does not mean the deterrence achieved with respect to the many others who comply is "[in]sufficient." *Id.* Even if it did, this Court has not treated a general desire to deter crime or flight as a government interest sufficient, by itself, to justify categorical exceptions to the warrant requirement. *Cf. Riley*, 573 U.S. at 401 (searches of cell phones incident to arrest could have

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[6] "In practice," officers may choose to "walk away" in some misdemeanor-pursuit cases, preferring to devote their time and resources to matters other than pursuing a warrant application for a relatively minor offense. Br. of Los Angeles County Police Chiefs' Association 27-28. That is a legitimate exercise of enforcement discretion; but it does not support a categorical exception to the warrant requirement. *Cf. Chapman v. United States*, 365 U.S. 610, 615 (1961) ("'inconvenience'" and "'delay'" of warrant application are not "'convincing reasons'" for failing to obtain a warrant); *Mincey*, 437 U.S. at 393 (similar).

[7] *See also* Br. of Sonoma County District Attorney's Office et al. 16 & n.9 (discussing 34 Sonoma County "'evading' cases" charged in 2019).

deterred use of phones as "tools in facilitating coordination and communication among members of criminal enterprises").

This Court's decision in *Scott v. Harris*, 550 U.S. 372 (2007), is not to the contrary. *See* Amicus Br. 14-15. In that case, the Court concluded that officers did not violate the Fourth Amendment when they "attempt[ed] to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind." 550 U.S. at 374. Far from recognizing any categorical Fourth Amendment exception designed to deter such flights, the Court upheld the officers' use of deadly force based on the "fact-bound" circumstances of the case. *Id.* at 383. A similar case-specific inquiry is appropriate here.

b. Amicus also contends that "[h]ot pursuit typically implicates several additional government interests"—specifically, a risk that fleeing suspects will harm others, destroy evidence, or escape from the home during the time it would take to secure a warrant. Br. 15; *see id.* at 15-17.

But amicus does not even attempt to substantiate the assertion that misdemeanor pursuits "typically" involve threats to safety or a risk of evidence-destruction. *See* Br. 16-17. Instead, amicus highlights isolated examples, such as a case where a suspect trespassed into a stranger's home, Br. 16, and "DUI cases" presenting "[c]oncerns about evidence recovery," *id.* at 17. As the State has explained, however, a case-by-case exigency standard will normally allow officers to address those concerns as they arise in particular cases. Resp. Br. 31-32.

Amicus devotes greater attention to the risk that a suspect will "exit the back door" or otherwise escape

while police wait outside to secure a warrant. Br. 44; *see id.* at 16, 36, 43-44. In some cases, the circumstances may demonstrate a genuine risk of escape from the home; and that too is an exigency that may be addressed through the ordinary case-specific exception. *See Olson*, 495 U.S. at 100-101. But that exigency is unlikely to arise with sufficient frequency in the misdemeanor-pursuit context to justify a categorical rule.

Attempting to escape from a home while police wait outside presents obvious risks to the suspect. Bolting out a "back door" or climbing out of a window, Amicus Br. 44, will invite the police to chase on foot or by car, seriously imperiling the suspect's safety.[8] It may also expose the suspect to additional criminal penalties for resisting or evading arrest. *See* Resp. Br. 26; *infra* n.10.

For misdemeanor suspects, the possible benefits of attempting escape will not often justify those risks. Convicted misdemeanants typically receive only fines or relatively brief periods of incarceration. *See* Mayson & Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. Rev. 971, 1012 (2020). And there is no guarantee that a suspect who succeeds in escaping will permanently evade apprehension. In many cases, police will already have the information necessary "to identify [the suspect] later" (Amicus Br. 16): Frequently, the pursuing officer will observe the suspect's appearance and know the address of the home the suspect entered. In some cases, police will have recorded the

[8] *See, e.g.*, *Lyttle v. Riley*, 2011 WL 7415429, at *2 (E.D. Mich. Dec. 21, 2011) (after suspect "fled out of the back door," officer "deployed his taser" and suspect "fell face first to the ground"); *Escobar v. Montee*, 2016 WL 397087, at *2 (N.D. Tex. Feb. 2, 2016) (police canine "charged at [suspect] and bit into his" leg).

license-plate number of a car the suspect drove. Officers will sometimes also have "prior familiarity with (and thus ability to identify) the suspect." U.S. Br. 19; *see also* Br. of Los Angeles County Police Chiefs' Association App. 26a-27a (similar).

Amicus reasons that, in "[e]very hot pursuit case," the suspect has demonstrated a "propensity" to assume the risks of an escape attempt because he has already "decided to flee" from the police. Br. 36. That may be true in a limited subset of hot-pursuit cases, such as those involving extended foot pursuits or high-speed car chases. *Cf. Scott*, 550 U.S. at 374. But there is no reason to think those cases are typical. As defined by *Santana*, "hot pursuit" requires only "some sort of a chase." *Santana*, 427 U.S. at 43. The suspect in *Santana*, for example, merely took "one step backward" from her "doorway" into "the vestibule of her residence." *Id.* at 40 n.1. Many other "hot pursuit" cases involve similarly fleeting pursuits.[9] That kind of brief retreat from the police does not alone suggest that a suspect is reckless enough to attempt the far riskier action of attempting to escape the home while police wait outside to arrest him.[10]

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[9] *See, e.g.*, *Carroll v. Ellington*, 800 F.3d 154, 163 (5th Cir. 2015) (single step through "door of the garage"); *State v. Markus*, 211 So. 3d 894, 910 (Fla. 2017) (suspect "walked backwards" "a few feet into his open garage/recreation room"); *Butler v. State*, 309 Ark. 211, 213, 217 (1992) (several steps from "the front porch" to the "doorway").

[10] Beyond the personal safety risks of attempting to escape the home while the police stand outside, *see, e.g.*, *supra* n.8, such attempts make prosecution and conviction for resisting or evading arrest more likely. They pose greater safety risks for officers and the public than the kind of fleeting "pursuits" discussed above, and will generally be viewed by prosecutors and courts as more

c. Finally, amicus contends that it would be "unworkable" to limit the hot-pursuit exception to felonies because "[p]olice officers are not lawyers" or "walking code-books" and "cannot be expected to know by heart" whether an offense could be charged as a felony. Br. 38, 39.

This argument ignores the fact that, in a number of States, police have already been required for years to differentiate between misdemeanors and felonies in applying the hot-pursuit exception. *See* Pet. 11-14. And "the sky has shown no signs of falling." Amicus Br. 9. Even in jurisdictions adhering to the categorical approach amicus defends, officers must distinguish between "jailable" and "nonjailable" offenses. *E.g.*, *Commonwealth v. Jewett*, 471 Mass. 624, 633-634 (2015). Amicus provides no reason why it would be any less workable for officers to apply the felony-misdemeanor line nationwide.

Amicus also ignores many other statutory and constitutional provisions that require police to differentiate between classes of offenses—often "on the fly," Amicus Br. 39. *See* Resp. Br. 29 & n.23. An officer's statutory arrest authority, in particular, frequently depends on how an offense is classified. *See id.* And many police-department policies on foot chases and vehicular pursuits already require officers to determine whether a suspect has committed a "felony offense[]" when deciding whether to initiate or continue

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culpable behavior. And because they more clearly demonstrate willful, intentional misconduct, they will more readily support conviction for resisting or evading arrest. *See, e.g.*, Cal. Penal Code § 148 (making it a crime to "*willfully* resist[]" arrest) (emphasis added); Resp. Br. 28 n.22 (collecting similar statutes in other States).

the chase or pursuit. Br. of National Fraternal Order of the Police 20; *see, e.g.*, Br. of Los Angeles County Police Chiefs' Association App. 30a, 35a, 70a; Br. of Illinois et al. 13.[11]

No special challenges are presented by "wobbler[]" offenses. Amicus Br. 39. As amicus explains, "wobblers" are crimes that may be charged as "felonies or misdemeanors depending on the prosecutor's prerogative." *Id.* When an offense is a wobbler, an officer in the field will not know whether the suspect's conduct will ultimately be charged as a felony or misdemeanor. But that dynamic is hardly unique to wobbler offenses. An officer with probable cause to believe a felony has been committed will rarely know whether the prosecutor will charge that particular felony, charge a lesser-included misdemeanor offense, or file no charges. Subsequent charging decisions do not retroactively invalidate the constitutionality of searches and arrests made in the field. For purposes of the Fourth Amendment, a crime that may be charged as a felony is a felony. *Cf. Welsh*, 466 U.S. at 747 n.6 (probable cause assessed based on what police "know" "at the time of the arrest").

Amicus also points to offenses that vary in classification based on "'facts difficult . . . to know at the scene of an arrest,'" such as theft offenses that qualify as a felony or misdemeanor "depending on [the] value of [the] stolen item." Br. 39. To invoke the hot-pursuit exception, however, an officer need only have probable

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[11] Officers often carry pocket-size reference guides that list commonly occurring offenses and their felony-misdemeanor classifications. *See, e.g.*, CopQuest, Qwik-Codes California Penal Code, https://www.copquest.com/qwik-codes-california-penal-code-law-summaries_20-1000.htm (guide "[e]asily fits inside ticket tender").

cause to believe that the suspect committed a felony. *See Santana*, 427 U.S. at 42. And "[p]robable cause 'is not a high bar.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018). In the theft context, for example, an officer would likely have probable cause of felony-level theft so long as the stolen good is one generally known to be expensive—such as a new laptop rather than a power cord. *See, e.g.*, Cal. Penal Code § 487 (grand theft involves an item with value exceeding $950).[12]

Nor is it "arbitrary" to distinguish between felony and misdemeanor offenses in this context. Amicus Br. 38. That distinction is the "most important classification of crime in general use in the United States." 1 LaFave et al., *Substantive Criminal Law* § 1.6(a) (3d ed. 2017). Many aspects of criminal procedure turn on whether an offense is classified as a felony or misdemeanor. *See id.* And while "crime-labeling" may vary "from State to State," Amicus Br. 40, that is unexceptional in our federal system. Indeed, federal constitutional rules often vary based on state-specific policy decisions. *See, e.g.*, *Lewis v. United States*, 518 U.S. 322, 326 (1996) (Sixth Amendment jury trial right turning on whether state law made crime punishable

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[12] Maine and New Jersey classify offenses "by degree, rather than as felonies or misdemeanors." Amicus Br. 39-40. But Maine simply calls "misdemeanors" by another name. *See* Me. Stat. tit. 17-A § 4-A ("Class E" crimes involve incarceration "not exceed[ing] one year"). And at least one class of New Jersey offenses would seem to fit the traditional understanding of a misdemeanor. *See* N.J. Stat. Ann. § 2C:1-4 ("disorderly persons offense[s]" provide "maximum penalty of 6 months' imprisonment"); *cf. Logan v. United States*, 552 U.S. 23, 27 (2007) (federal "felon-in-possession" statute treats state offenses as felonies if they are "punishable by imprisonment for a term exceeding one year").

by "six months or less"); *Illinois v. McArthur*, 531 U.S. 326, 336 (2001) (Fourth Amendment rule turning on whether state law made offense "jailable" or "nonjailable"); *Welsh*, 466 U.S. at 754 & n.14 (similar).

Of course, like most lines drawn in the law, the felony-misdemeanor distinction is imperfect. Some felonies involve conduct that "present[s] no great[] exigency," Amicus Br. 38; some misdemeanors "involve conduct more dangerous than many felonies," *Tennessee v. Garner*, 471 U.S. 1, 14 (1985). But it is the principal line the law has used for centuries to distinguish serious offenses from less serious ones. Legislatures generally exercise care and judgment in determining whether an offense falls on one side of that line or the other. Officers are expected to know, or be able to find out, whether a particular offense is classified as a felony. And if police pursue a fleeing suspect to a home and do not know whether the suspected offense is a felony or misdemeanor, it is not asking too much to require them to wait outside until they either confirm that the offense is a felony or obtain a warrant. *See generally Randolph*, 547 U.S. at 109 (the Court recognizes only "'jealously and carefully drawn'" exceptions to the "rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable *per se*").

C. The United States Recognizes the Need for Case-Specific Inquiries in Misdemeanor Pursuit Cases

The United States recognizes that a "categorical hot-pursuit rule" is appropriate "at least in the felony context," Br. 19, but then appears to ask the Court to adopt a "general presumptive rule" in the misdemeanor context, *id.* at 20. Under that rule, courts would presume that exigent circumstances exist when officers pursue a suspected misdemeanant into a home.

See id. at 20-21. But defendants could apparently rebut that presumption based on a variety of case-specific factors, including the "nonviolent or extremely minor nature of the suspected offense." *Id.* at 19.

The differences between the rule proposed by the United States and the traditional, case-specific inquiry supported by California appear to be rather modest. The ultimate question is the same: whether "exigent circumstances" are "present." U.S. Br. 20. Both approaches would seem to require officers to ascertain "the line between felonies and misdemeanors." *Id.* at 18.

The only significant difference is whether exigent circumstances are presumed, absent some contrary showing by the party alleging a Fourth Amendment violation. Normally, warrantless searches are presumptively unreasonable and "the burden is on the government to demonstrate exigent circumstances." *Welsh*, 466 U.S. at 750. Departures from that framework may be appropriate in cases involving recurring scenarios where exigent circumstances "almost always" exist, such as DUI cases where "the driver's unconsciousness" "requires him to be taken to the hospital" and police need to obtain a blood sample. *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2539 (2019) (plurality). As California has explained, however, there is no basis for concluding that exigent circumstances will "almost always" exist in misdemeanor-pursuit cases. Resp. Br. 23-27. While the rule proposed by the United States might be somewhat more protective of privacy rights than the truly categorical exception defended by amicus, the traditional exigent-circumstances inquiry more appropriately balances privacy and law enforcement interests in the misdemeanor context.

II. THE COURT SHOULD VACATE THE JUDGMENT BELOW AND REMAND FOR APPLICATION OF THE GOOD-FAITH EXCEPTION

Amicus offers several brief arguments why the "Court should affirm the judgment of the California Court of Appeal even if it holds that the hot pursuit exception must be assessed on a case-by-case basis." Br. 49. But these arguments were not pressed or passed on below, fall beyond the scope of the question presented, and do not appear to be meritorious in any event.[13]

Amicus is correct, however, that "Officer Weikert arrested Lange in good-faith reliance on 'binding appellate precedent.'" Br. 49 (quoting *Davis v. United States*, 564 U.S. 229, 232 (2011)); *see* Br. of Sonoma County District Attorney's Office et al. 36 (same). If the Court holds that the categorical hot-pursuit exception should not extend to the misdemeanor-pursuit context, it should remand for the lower court to apply the good-faith exception to the exclusionary rule. Resp. Br. 34-35.

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[13] For example, amicus contends that Lange's garage was "open for the world . . . to see" (Br. 49-50) and suggests that it was therefore a "public place" under *Santana*, 427 U.S. at 42. But the doorway in *Santana* was a "public place"—allowing officers to initiate a warrantless arrest there—because there is a well-recognized "implicit license" permitting a "visitor to approach the home by the front path" and speak with a resident at the doorway. *Florida v. Jardines*, 569 U.S. 1, 8 (2013). No such license allows visitors to enter someone's garage uninvited, at nighttime, when the garage door is closing.

CONCLUSION

The Court should vacate the judgment below and remand for further proceedings.

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