No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LEANDRE JORDAN, PETITIONER

V.

THE STATE OF OHIO, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
FROM THE SUPREME COURT OF OHIO

# PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Are warrantless, probable cause arrests reasonable when no exigency or contemporaneous crimes are present to excuse the failure to obtain a warrant? Should *United States v. Watson*, 423 U.S. 411 (1976), be overruled in light of the modern trend to more closely analyze the common law within its historical context? *Lange v. California*, 141 S.Ct. 2011, 2022-24 (2021).

In *Watson,* this Court adopted the categorical rule that warrantless arrests in public based on probable cause do not violate the Fourth Amendment to the United States Constitution. Even though exigent circumstances and probable cause of a crime were present at the time of Watson's arrest, the warrantless-arrest rule set forth in *Watson* did not require these conditions before the police may make a public arrest. *Watson* at 423-424; *id*. at 434-435 (Marshall, J., dissenting). Failing to condition the reasonableness of probable cause arrests in public upon exigent circumstances or contemporaneous criminal conduct left law enforcement with exclusive discretion to deprive of their liberty. For the last 46 years, the Fourth Amendment's warrant requirement, the role of the neutral and detached magistrate, and the protection against unreasonable seizures have been eviscerated.

The Fourth Amendment's reasonableness requirement should demand that officers either seek a warrant from a neutral and detached magistrate or make a probable cause arrest without unjustifiable delay. Only exigent circumstances or contemporaneous criminal conduct should excuse the failure to obtain a warrant. A less demanding rule falls far below the guarantees of the common law.

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

There are no parties to the proceeding other than those listed in the caption.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

## RELATED PROCEEDINGS

All proceedings directly related to this petition include:

1. Opinion and Judgment Entry of the Supreme Court of Ohio dated November 9, 2021, *State v. Jordan*, No. 2020-0495.

2. Opinion and Judgment Entry of the Court of Appeals of Ohio, First Appellate District dated February 28, 2020, *State v. Jordan*, Nos. C-180559, C-180560.

3. Judgment Entry of the Court of Common Pleas for Hamilton County, Ohio dated September 24, 2018, *State v. Jordan*, Nos. B-1607185-A, B-1702130-A.

4. Judgment Entry of the Court of Common Pleas for Hamilton County, Ohio, Overruling Defendant's Motion to Suppress dated April 2, 2018, *State v. Jordan*, B-1607185-A, B-1702130-A.

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## OPINIONS BELOW

The opinion of the Supreme Court of Ohio in this matter was published on November 9, 2021 appears as Appendix A to the petition and is reported at *State v. Jordan*, Slip Opinion No. 2021-Ohio-3922. *App. A.* The opinion of the Court of Appeals of Ohio for the First Appellate District was published on February 28, 2020 appears as Appendix B to the petition and is reported at *State v. Jordan*, 2020-Ohio-689, 145 N.E.3d 357 (1st Dist.). *App. B.* The judgment entry and decision of the Court of Common Pleas for Hamilton County, Ohio, in docket numbers B-1607280-A and B-1702130-A, issued on September 24, 2018, appear at Appendix C to the petition and is not published. *App. C & D.*

## STATEMENT OF JURISDICTION

The Supreme Court of Ohio issued its opinion affirming the lower appellate court's decision on November 9, 2021. Accordingly, the deadline to file this petition is 90 days from that date, or February 7, 2022. The instant petition is therefore timely. This Court's jurisdiction is drawn from 28 U.S.C. § 1257(a). Specifically, the case challenges the validity of warrantless arrests on the ground that limitless authority for law enforcement to conduct a warrantless arrest is repugnant to the Fourth Amendment to the United States Constitution.

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Ohio Revised Code § 2935.03 (Appears as Appendix G)

Ohio Revised Code § 2935.04

> When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained.

## STATEMENT OF THE CASE

Someone entered the Cincinnati home of James and Emiko Locke during the day on December 12, 2016, and stole a safe containing $40,000 and personal papers. Detective Mark Longworth ("Longworth") of the Cincinnati Police Department, who was assigned to investigate, thought it "unusual" that the safe had been taken while the rest of the valuables in the home were left untouched. He suspected that someone familiar with the home had taken it. *Investigation Notes, State's Exhibit 1 ("Ex. 1"), p. 5.* The Lockes pointed the finger at their son, Michael Locke ("Michael"), who was one of two other people familiar with the existence and contents of the safe. *Id.*

The Lockes had kicked Michael out of the house shortly before the safe was stolen. On the day of the burglary, Michael repeatedly called his parents to find out where they were, even showing up at their home afterward "fishing for information." The other suspect was Emiko Locke's godson, who had developed "an extensive criminal history and also knew about the large amount of currency in the safe" after staying in the Locke home. *Ex. 1, p. 5.*

A few days later, possibly on December 14, 2016, a neighbor reported seeing a white Chrysler 300 sedan leaving the area near the Lockes' house around 4:30 p.m. on December 12, and he believed that a barber named "Dre" had been driving it. *Ex. 1, p. 5.* The Lockes linked this barber to Michael, saying that Michael had received a haircut recently and had been dropped off at their home in the Chrysler. Detective Longworth located the Chrysler near the barbershop, photographed it, and confirmed with the Lockes that this was the car they knew to be driven by "Dre." When the

detective "ran the plate," he learned that Petitioner, Leandre Jordan ("Jordan"), had been operating the vehicle but that one of Jordan's relatives owned it. However, Jordan was not arrested that day.

Days after the safe was taken—Detective Longworth was not sure which day—he interviewed Michael. The young man confirmed that Petitioner Jordan drove the Chrysler and that they had been together on December 12, 2016. He gave the detective permission to look at the call records on his cellular phone, which confirmed the calls he made to his parents around the time of the crime. But Michael also spoke with Jordan at 4:36 p.m., 4:49 p.m., and 5:03 p.m. While Michael denied having committed a burglary of his parents' home, this interview confirmed Detective Longworth's suspicions that Michael and Jordan were both involved. But Jordan was not arrested that day, either.

Instead of making an immediate arrest, Detective Longworth engaged in "several days" of surveillance at the barber shop. He saw Petitioner Jordan enter and exit the Chrysler numerous times in the eight days after the safe was stolen.

On December 20, 2016, Detective Longworth and his partner stopped Petitioner Jordan as he left a cell phone store. While Detective Longworth expressed uncertainty about this incident under oath, Jordan vividly described the arrest. The detectives confronted him as he walked from the store to his own car, a black Lexus:

> I'm talking on the phone talking to my girlfriend, and as I'm approaching the car and put the keys inside the car, the detectives ran up on me to the car and with their guns drawn.

*Transcript of Proceedings of Hearing on March 7th, 2018 ("Tr."), pp.* 210. He complied with their instructions to set down his phone and keys and to rest his hands on the car. The detectives placed him under arrest. They immediately searched him, finding his wallet:

> As he removed my wallet, he took out my ID and the other ID of Angel Madison that was in my wallet, and during this whole time, I asked him why I was under arrest, and they are both silent, not saying anything.

*Tr. pp.* 212. During the interrogation that followed, the detectives asked him about his address, the address on his "girlfriend's driver's license," and his involvement with the safe at the Locke's home. Jordan denied any participation. But the arrest and ensuing interview led Detective Longworth to suspect and investigate the home of Jordan's girlfriend, Angel Madison ("Madison").

Detective Longworth swore out an affidavit requesting a search warrant for Madison's apartment. *Affidavit for Search Warrant, State's Exhibit 4 ("Ex. 4"), p. 2.* He testified to his belief and "good cause to believe" that "*at said place there are concealed*; a safe, $40,000 US currency, personal papers belonging to James Locke[.]" *Ex. 4, p. 1.* (Emphasis in original.) The Hamilton County Municipal Court issued a warrant, and Detective Longworth searched Madison's home. *Id., p. 3.* The detective did not find the safe, nor did he recover "any items belonging to James Locke." He and his fellow officers *did* find cash in the amount of $2,097, heroin, cocaine, an electronic scale, and an inoperable pistol. *Search Warrant Inventory, State's Exhibit 10 ("Ex. 10"), p. 1.*

Grand Jurors in Hamilton County, Ohio, indicted Petitioner Jordan on December 28, 2016, followed by a separate and additional indictment issued on April 20, 2017. In total, Jordan was charged with six crimes, including possession and trafficking of heroin and cocaine and aggravated possession and trafficking of drugs. Each count involving cocaine carried a "major drug offender specification," which triggers mandatory prison time under Ohio law. The state never pursued an indictment on the burglary offense.

On February 27, 2018, Petitioner Jordan submitted his Motion to Suppress ("Motion"). He sought an order prohibiting the introduction at trial of any evidence seized during the search of Angel Madison's home. In support, Jordan urged the Hamilton County Court of Common Pleas that he had been arrested without probable cause, that evidence obtained within his vehicle was not acquired during a lawful search incident to arrest, and that the information gleaned from his interrogation was elicited without the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). The Motion noted that Jordan's "wallet was taken as a result of this search" of his person. He sought an order prohibiting the introduction at trial of any evidence seized during the search of Angel Madison's home because his arrest was made in violation of the Fourth Amendment to the United States Constitution. *Motion, pp. 1-4.*

The trial court held a hearing on the Motion on March 7, 2018. At the hearing, Detective Longworth confirmed for the court that the arrest occurred before any warrant had been issued:

> Q. Okay. And the warrant for burglary wasn't found until after you had already arrested and searched him, correct?
>
> A. That's correct. There was a warrantless arrest based on probable cause.

*Tr. pp.* 204. After hearing the detective's testimony, Petitioner Jordan's attorney urged the court that the arrest had also been unconstitutional because it was conducted without a warrant:

> It is our belief that seizure and that search was illegal because there was no consent, there was no warrant, and there was no probable cause.
>
> As a result of that illegal detention, that illegal seizure, that illegal search, per the witness' own testimony, they got the address of 208 Belmont, specifically asked, did you have any independent knowledge, would you have gotten that any other way, the testimony is, I can't say, but, no, that's the way I got it is from that search of Leandre Jordan from December 20.
>
> It's our position that that detention, the seizure, was an illegal seizure, and any evidence that stemmed from that, the address, the key is fruit of the poisonous tree and should be suppressed.

*Tr. pp.* 228-229 (Emphasis added). Counsel specifically noted the long period of time between the moment that Detective Longworth began to believe that Jordan committed a crime and the arrest at gunpoint:

> [A]t that point Detective Longworth had had eight days to go to a judge and get a warrant. He had not.

*Tr. pp.* 230.

The trial court denied the Motion from the bench and confirmed this ruling in a later journal entry. *App.* 52. Judge Robert H. Gorman made an explicit finding

that Detective Longworth had already developed probable cause as early as December 12, 2016, supporting his belief that Petitioner Jordan was involved with the burglary. The court "assumed from [his] finding as to the warrantless arrest" that there was probable cause supporting the search warrant. The matter proceeded to trial on June 18, 2018, after which jurors returned guilty verdicts on all but one charge, trafficking in cocaine. *App.* 45-51. Jordan was sentenced to eleven years in prison with credit for 170 days served in jail. *Id.*

Petitioner Jordan initiated a timely appeal to Ohio's First District Court of Appeals. *App.* 34-44. He argued "that his arrest was illegal because it was not based on probable cause and was made without a warrant," and as a result, "the trial court erred in denying his motion to suppress[.]" *App.* 38 at ¶ 8. The appellate court recognized that a " 'warrantless seizure is per se unreasonable unless it falls within one of the recognized exceptions to the warrant requirement.' " *App.* 39 at ¶ 10, quoting *State v. Pies*, 140 Ohio App.3d 535, 539, 748 N.E.2d 146 (1st Dist.2000)). But the panel relied upon the "exception" for a "warrantless arrest in a public place, which does not violate the Fourth Amendment if the police officer had probable cause to believe that the person committed or was committing a felony." *App.* 39 at ¶ 10. While the trial court had erred by considering "Jordan's post-arrest admissions" in support of its probable-cause finding, the appellate court affirmed, concluding that the remaining evidence was "sufficient to cause a prudent person to believe that a burglary had been committed, and that Jordan was involved in the burglary." *App.* 41 at ¶ 17.

The First District rejected Petitioner Jordan's position that his arrest violated the Fourth Amendment because "police failed to obtain an arrest warrant," and "no exigency existed to excuse that requirement." *App.* 41 at ¶ 18. The panel criticized a line of Ohio cases holding "that 'in order for an officer to lawfully perform a warrantless arrest in a public place, the arrest must not only be supported by probable cause, it must also be shown that obtaining an arrest warrant beforehand was impracticable under the circumstances, i.e., that exigent circumstances exist.' " *App.* 42 at ¶ 18 (quoting *State v. VanNoy*, 188 Ohio App.3d 89, 2010-Ohio-2845, 934 N.E.2d 413, ¶ 23 (2d Dist.)); *see State v. Woodards*, 6 Ohio St.2d 14, 20, 215 N.E.2d 568 (1966) ("Under certain circumstances, a warrant need not be obtained in order to render an arrest valid. The arresting officer must have probable cause to believe that a felony was committed by defendant, and the circumstances must be such as to make it impracticable to secure a warrant."); *State v. Heston*, 29 Ohio St.2d 152, 280 N.E.2d 376 (1972) (same). Instead, the court followed "the majority approach," exemplified by more recent precedents from the Supreme Court of Ohio, which required only a showing of "probable cause to believe that Jordan had committed a felony" to justify his public arrest at gunpoint eight days after a crime had been committed. *App.* 42-43, ¶ 21; *e.g., State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, ¶ 66. Jordan's assignment of error was overruled, and his conviction was affirmed. *App.* 43 at ¶ 21.

Petitioner Jordan sought further review of his arrest in the Supreme Court of Ohio, which accepted the appeal for a limited purpose:

> This court accepted a discretionary appeal to consider a single proposition of law: "Under R.C. 2935.04, once probable cause is established, a warrantless arrest is unconstitutional if there is unreasonable delay in effecting the arrest. Whether the delay is reasonable depends upon the circumstances surrounding the delay and the nature of the offense." Jordan frames his proposition of law in terms of unreasonable delay, but he also variously casts his argument in terms of a requirement of exigent circumstances or of the impracticability of securing an arrest warrant. Essentially, he asks this court to hold that a police officer is constitutionally required to secure an arrest warrant before conducting an arrest whenever the circumstances demonstrate that it is practicable to do so.

*App.* 7 at ¶ 13. Writing for the majority, Chief Justice Maureen O'Connor rejected Jordan's arguments. *App.* 18 at ¶ 32. The court reasoned that "R.C. 2935.04 authorizes warrantless arrests for felony offenses," and that the rule enacted in that statute was consistent with the protections of the Fourth Amendment. *App.* 9 at ¶ 17; *App.* 18 at ¶ 32. The determinative precedent was this Court's decision in *Watson*, 423 U.S. 411:

> The United States Supreme Court returned to the issue of warrantless felony arrests in *Watson*, in which it upheld, as consistent with the Fourth Amendment, a warrantless arrest that was based on probable cause and that was made in public. *See* 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598. The court stated that nothing in its precedent indicated that the Fourth Amendment required a warrant to make a valid felony arrest, and "[i]ndeed, the relevant prior decisions are uniformly to the contrary." *Id.* at 416-417, 96 S.Ct. 820. It characterized that precedent as "reflect[ing] the ancient common-law rule" that a police officer may make a warrantless arrest for a felony when the officer has reasonable grounds for making the arrest. *Id.* at 418, 96 S.Ct. 820. In light of that longstanding rule, the court declined to transform a judicial preference for arrest warrants into a constitutional requirement. *Id.* at 423, 96 S.Ct. 820.

*App.* 12 at ¶ 22. The majority distinguished the arrest in *Heston* as one occurring "inside private property, based on information that Heston had committed a felony, that he intended to leave town to evade apprehension, and that one of Heston's alleged accomplices had already fled." *App.* 14 at ¶ 25. Although the decision referenced *Woodards*, it did not explain why, in 1966, the majority needed to determine that "the failure to obtain a warrant was not unreasonable" under the circumstances to hold that an arrest conducted in public was "justified." *Compare App.* 14-15, ¶ 26 *with Woodards*, 6 Ohio St.2d at 20-21. Given these authorities, and most prominently *Watson,* the majority concluded that "a warrantless arrest, conducted in public and with probable cause to believe that the arrestee has committed a felony, is reasonable and does not violate the Fourth Amendment to the United States Constitution or Article I, Section 14 of the Ohio Constitution." *App.* 18 at ¶ 32.

Associate Justice Melody J. Stewart authored a dissenting opinion, which Associate Justice Jennifer Brunner joined. *App.* 19-33. These jurists noted that the felony arrest statutes, Ohio Revised Code §§ 2935.03 and 2935.04, each incorporated a textual "requirement that an arrest warrant be obtained prior to an arrest *unless doing so is impracticable*." *App.* 19-20 at ¶ 35. The dissent explained that in past cases, the court applied the Ohio Constitution's prohibition against warrantless arrests when officers engaged in an arrest outside of their statutory authority to do so. *App.* 19-23. Ultimately, the dissenting Justices concluded that "the facts in this case demonstrate that the officers had ample time to secure a warrant before

arresting appellant, LeAndre Jordan," and "the officers acted outside of their statutory authority to arrest and in violation of Article I, Section 14 of the Ohio Constitution." *App.* 19-20 at ¶ 35.

## REASONS FOR GRANTING THE PETITION

Petitioner Jordan now seeks further review in this Court and offers the following reasons why a writ of certiorari should be granted.

### I. Warrantless, probable cause arrests are unreasonable when no exigency or contemporaneous crimes are present to excuse the failure to obtain a warrant.

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.
>
> - *Johnson v. United States*, 333 U.S. 10, 13-14 (1947).

This Court failed to heed this warning when fashioning the warrantless arrest rule in *United States v. Watson*, 423 U.S. 411 (1976). Under *Watson*, this Court gave law enforcement exclusive authority to act on their untested probable cause determinations when making a felony arrest. Specifically, *Watson* held that felony arrests without a warrant do not violate the Fourth Amendment so long as the arrest occurs in a public place and is supported by probable cause. *Watson* at 411. The instant case demonstrates why the Court's constitutional analysis and decision affirming warrantless, probable cause arrests, without regard for exigency or

contemporaneous criminal activity, was misguided and must be revisited.

There was no dispute in *Watson* that the "ancient common-law rule" provided "that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest." *Watson*, 423 U.S. at 418; *Id.* at 438 (Marshall, J., dissenting). But the majority opinion in *Watson* glazed over most of the nuance in the common law regarding the authority of police to make a warrantless arrest in public. The common law that existed when the Bill of Rights was ratified is important because it sets the undisputed low bar for the protections of the Fourth Amendment. *Lange*, 141 S.Ct. at 2022. The generalizations in *Watson* undermine the decision's footing and justify revisiting the rule it set out.

First, the common law conception of a felon differs substantially from the modern one, although *Watson* explicitly relied heavily upon the "balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant." *Watson*, 423 U.S. at 421. Justice Byron White later described this type of logic as "a mistaken literalism that ignores the purposes of a historical inquiry." *Tennessee v. Garner*, 471 U.S. 1, 13 (1985). The common law felony exception was "animated" by "[t]he importance of protecting the public[.]" Laura K. Donohue*, The Original Fourth Amendment*, 83 U.Chi.L.Rev. 1181, 1231 (2016). Accordingly, felonies at common law were those serious crimes "punishable by death," on par with treason, or which required "a total forfeiture of either lands, or goods, or both" during feudal times. *Id.;* 4 W. Blackstone, *Commentaries on the Laws of*

*England* 94-95 (1795). It was "usual to say that all other crimes or offenses than treason or felony, are misdemeanors." H. L. Wilgus, *Arrest Without a Warrant*, 22 Mich.L.Rev. 541, 572-573 (1924). Indeed, the number of offenses that presently equate to a common law felony has dwindled substantially as society has achieved a greater degree of civility, placing the death penalty out of reach for all but the most heinous crimes, while totally rejecting feudal property concepts. *Garner* at 14; *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Fifth Amendment to the United States Constitution* ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."); *Fourteenth Amendment to the United States Constitution* ("nor shall any state deprive any person of life, liberty, or property, without due process of law"). And as this Court has more recently explained, felony exceptions at common law "applied to felonies as a class, and to no other whole class of crimes." *Lange*, 141 S.Ct. at 2023.

*Watson*'s reliance on state laws permitting an arrest in public without a warrant was equally out of touch. *Watson*, 423 U.S. at 421-422. Laws providing for warrantless arrests in public were largely passed before the Fourth Amendment's protections were incorporated against the states, and at least one commentator described such state laws as being enacted "in derogation of common law." Wilgus, 22 Mich.L.Rev. at 549-550. Indeed, the common law did not necessarily allow an arrest without a warrant in public for any crime whatsoever:

> On the commission of a felony anyone might arrest the offender, and it was the duty of the constable to do so. If

> the offender was not arrested on the spot, the sheriff and constable from the earliest times, and the justices of the peace from their institution, ought to raise the hue and cry, and all should follow the cry. There was no statute that authorized justices of the peace to take information as to a crime and issue a warrant for the arrest of a suspected person; but by degrees they assumed and practiced this power, and between the 14th and 17th century these warrants superseded or were considered equivalent to the old hue and cry; the right of summary arrest in cases of felony however continued.

*Id.* at 548 (emphasis added, footnotes omitted). Given that arrests pursuant to a warrant had supplanted the old hue-and-cry practice of banding together as a village to round up a criminal in all cases but those punishable by death or feudal forfeiture, the rule permitting a warrantless arrest in public for most crimes had evolved out of the common law in England well before this nation set out its foundational charter. For the bulk of crimes currently classified as felonies, an arrest in public without a warrant would have been considered unlawful and therefore unreasonable:

> At common law an assault was a misdemeanor and it was still only such even if made with the intent to rob, murder, or rape. Affrays, abortion, barratry, bribing voters, challenging to fight, compounding felonies, cheating by false weights or measures, escaping from lawful arrest, eavesdropping, forgery, false imprisonment, forcible and violent entry, forestalling, kidnapping, libel, mayhem, maliciously killing valuable animals, obstructing justice, public nuisance, perjury, riots and routs, etc. were misdemeanors; but embezzlement, obtaining money under false pretenses, bigamy, etc., were not crimes at all, until made so by statute.

*Id.* at 572-573 (footnotes omitted).

Consistent with the rule at common law, it is time to take heed that "the longstanding existence of a Government practice does not immunize the practice from

scrutiny under the mandate of our Constitution." *Watson*, 423 U.S. at 438 (Marshall, J., dissenting). It matters not that Congress "plainly decided against conditioning warrantless arrest power on proof of exigent circumstances" as late as 1951 given that "18 U.S.C. § 3052 conditioned the warrantless arrest powers of the agents of the Federal Bureau of Investigation on there being reasonable grounds to believe that the person would escape before a warrant could be obtained" long before that. *Id.*, at 423 n.13. The federal government's earlier adoption of an exigency exception to the warrant requirement in cases of public arrest strongly supports the view that the common-law warrant requirement for public arrests had indeed been incorporated into the Fourth Amendment. *See id.* at 415-416; *see Kentucky v. King*, 563 U.S. 452, 459-450 (2011) (generally describing the exigency exception to the warrant requirement). The lesser protections of *Watson*, which have diminished the Fourth Amendment for only mere decades against the centuries of common law, should be revisited. And the better practice would be to adopt a "presumption favoring warrants, as well as the exception allowing immediate arrests of the most dangerous criminals," consistent with the common law. *Id.* at 442 (Marshall, J., dissenting). For these reasons, *Watson* should be overruled.

### A. *Watson* must be overruled to bring the warrantless arrest exception into balance with existing Fourth Amendment exceptions to the warrant requirement.

The probable-cause-to-arrest exception is unlike any other Fourth Amendment carve out to the warrant requirement. While this Court has given force to the warrant requirement by narrowly drawing exceptions attuned to reasonableness under the

circumstances of entry into the home and searches of a dwelling, the probable cause exception for public arrests has swallowed the Fourth Amendment's warrant requirement. This disconnect between the rules for public arrests and intrusions into a home is enough reason alone to revisit *Watson*. Afterall, there is no text in the Fourth Amendment justifying differential treatment of the rights "of the people to be secure in their persons, houses, papers, and effects." Persons and homes are on at least equal footing if the words of the Constitution matter. *See Watson*, 423 U.S. at 445-446 (Marshall, J., dissenting).

This Court has recently shown a willingness to reconsider well-established exceptions to the Fourth Amendment's warrant requirement and narrow the circumstances in which those exceptions apply, departing from categorical rules in favor of case-by-case analyses. *See Lange*, 141 S.Ct. 2911 (2021); *Rodriguez v. United States*, 575 U.S. 348 (2015). This trend should carry forward in the instant case, and the categorical rule set forth in *Watson* allowing for warrantless arrests in a public place based on probable cause should be rejected. As a class, these arrests are likely to be unreasonable if a warrant could practically be obtained. Only the presence of exigent circumstances or contemporaneous criminal conduct should excuse the failure to obtain a warrant.

Just last term, this Court rejected a categorical rule allowing police to make a warrantless entry into the home while pursuing a fleeing misdemeanor suspect. *Lange*, 141 S.Ct. 2011 (2021). The Court considered whether pursuit of a fleeing misdemeanor suspect presented a categorical exigent circumstance, thereby

permitting warrantless entry into the home to apprehend the suspect. *See id*. at 2019. Noting that "exigent circumstances" applied to enable law enforcement to respond to "situations presenting a compelling need for official action and no time to secure a warrant," the Court determined such exigencies do not arise every single time that a misdemeanant flees into a home. *Id*. at 2017, quoting *Riley v. California*, 573 U.S. 373 (2014). Instead, the Court reiterated that exigencies arise in a few recognized circumstances: to protect an occupant from imminent harm; to prevent the imminent destruction of evidence; and to prevent escape. *Id*. "In those circumstances, the delay required to obtain a warrant would bring about 'some real immediate and serious consequences' " and thus would excuse the warrant requirement. *Id*. at 2017-2018, quoting *Welsh v. Wisconsin*, 466 U.S. 740 (1984). Accordingly, the Court required lower courts to analyze misdemeanor hot pursuits on a case-by-case basis. *Id*. at 2019-2022.

Although the concept of exigency has developed within the context of home invasion, it should apply with equal force to seizures because persons and homes, as well as searches and seizures, are protected equally under the Fourth Amendment. *See Lange*, 141 S.Ct. at 2017 (tracking the development of exigent circumstances). Thus, it would appear inconsistent to allow police to act without exigent circumstances but upon probable cause alone when depriving a citizen of their liberty interests. There is no exception to the warrant requirement other than *Watson* that allows police to act without any recognition of exigency. *Compare South Dakota v. Opperman*, 428 U.S. 364, 367 (1976) (the concept of exigency underlies the automobile

exception, due to the inherent mobility of the automobile and danger that contraband would be removed before a warrant could be obtained).

Additionally, *Lange* is not the only recent instance where law enforcement authority to seize or search has been limited in scope under the Fourth Amendment. For instance, in the context of traffic stops, also known as a limited seizure, police do not have unfettered discretion to investigate beyond the scope of the traffic violation, although this was not always the rule. In *Illinois v. Caballes*, this Court first recognized that a dog sniff conducted during a lawful traffic stop did not violate the Fourth Amendment's proscription against unreasonable seizures. *Illinois v. Caballes*, 543 U.S. 405 (2005). The Court reasoned that the use of a trained narcotics-detection dog did not implicate any privacy interests, as the dog would only perform the sniff on the exterior while the motorist was lawfully seized for a traffic violation. *Id*. at 409. The *Caballes* Court explained that "conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a *reasonable manner*," and did not otherwise infringe upon a protected privacy interest. *Id*. at 408 (emphasis added.).

Ten years after *Caballes* was decided, the contours of executing a dog sniff in a "reasonable manner" were called into question. *Rodriguez v. United States*, 575 U.S. 348 (2015). The *Rodriguez* Court was asked whether police can extend a completed traffic stop, without reasonable suspicion, to conduct a dog sniff. *Id*. at 353. As with the issue presented in this case, the *Rodriguez* Court was tasked to define the outer bounds of the dog-sniff rule. Absent reasonable suspicion, could

police extend a traffic stop indefinitely? The Court answered this question in the negative, establishing a well-reasoned *limit* to the dog-sniff rule. Importantly, the Court did not eliminate the availability of dog-sniffs during traffic stops; it simply required that the dog-sniff investigation did not lengthen the detention. The authority to conduct the dog-sniff was limited to the time it would take to reasonably complete the detention for the initial stop. *Id*. at 354.

The *Rodriguez* and *Lange* decisions are instructive to the instant matter as they demonstrate how Fourth Amendment principles can be narrowed to protect a citizen's privacy interests without depriving law enforcement of valuable tools to investigate criminal activity. These cases also demonstrate how Fourth Amendment inquiries no longer fit neatly into a categorical rule, and that a totality-of-the-circumstances approach is favored to ensure that Fourth Amendment protections against unreasonable police intervention are fully realized. This precedent calls into question *Watson*'s categorical rule permitting warrantless arrests in a public place based on probable cause alone. The circumstances preceding the arrest must be scrutinized to ascertain whether the failure to obtain a warrant was justified under the circumstances. Absent a warrant, police must demonstrate exigency or contemporaneous criminal activity for a warrantless, probable cause arrest to be valid. As *Lange* illustrates, exigency is a tried and trusted concept, and there is no reason to continue to deny its application to probable-cause arrests made in public.

"A seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the

Constitution." *Caballes* at 407, citing *United States v. Jacobsen*, 466 U.S. 109 (1984). Petitioner Jordan's case demonstrates how a probable cause arrest can be executed in an unreasonable manner, infringing not only upon one's right to be free from unreasonable seizure, but upon one's privacy interests as well. *See Chimel v. California*, 395 U.S. 752 (1969) (a lawful custodial arrest triggers a *search* of one's person as incident to arrest). Accordingly, the existence of probable cause should not excuse an unexplained failure to procure an arrest warrant, as an arrest carries implications beyond the seizure of one's person.

Once probable cause that an offense has been committed is established, the passage of time before making the arrest must trigger an inquiry into whether it was reasonable for law enforcement to forgo procurement of an arrest warrant. A set timeframe is not necessary to ascertain what is reasonable, as reasonableness will be governed by the lack of exigency, the nature of the offense, and the circumstances surrounding the delay. *See*, *e.g.*, *State v. Paananen*, 2015-NMSC-031, 357 P.3d 958, ¶ 27 (holding that circumstances other than exigent circumstances can render a warrantless public arrest supported by probable cause reasonable; the critical inquiry is whether it was reasonable for the officer to not procure an arrest warrant). This analysis would be consistent with that of *Lange* and *Rodriguez*, rejecting a categorial approach and focusing on the factual circumstances of each arrest to ascertain whether police acted reasonably. A case-by-case inquiry is necessary to protect the integrity of the warrant requirement, and the reaffirm the importance of having a neutral and detached magistrate determine probable cause. *See Gerstein v. Pugh*,

420 U.S. 103 (1975) (the surest protection against unreasonable, warrantless seizures is for judges to conduct a probable cause determination whenever possible).

### B. Petitioner Jordan's case illustrates an unreasonable, warrantless arrest, demanding that *Watson*'s categorial approach to warrantless arrests be overruled.

Jordan was an immediate suspect in the burglary at the Locke residence, yet law enforcement did not act to apprehend him on the day of the incident or even shortly thereafter. Though it may be prudent in some circumstances for law enforcement to delay an arrest to obtain additional information, the primary evidence in this case was obtained within hours. Detective Longworth had verified the suspect vehicle with the juvenile eyewitness and connected Jordan to that vehicle. Rather than seek a warrant, however, the detectives waited, surveilled Jordan at his place of employment, and effected the arrest at gunpoint eight days after the burglary. Unlike in *Watson*, Jordan was not engaged in a criminal offense at the time of his arrest. Any exigency that would have arguably supported an immediate arrest at the time of the burglary (i.e., destruction of evidence or fleeing suspect), had dissipated by the detective's delay. Under these circumstances, the officers should not be rewarded for acting on untested probable cause; they should have been required to obtain an arrest warrant.

The *Watson* Court advised "officers may find it wise to seek arrest warrants where practicable to do so," but this case demonstrates how law enforcement will not heed that advisement. Citizens like Jordan have no protection against overzealous officers who effectuate warrantless seizures in a public place and avoid judicial

oversight. Jordan was seized, his person was searched, and police capitalized on the evidence obtained from that search to procure a search warrant of his girlfriend's apartment. There was no judicial oversight over the arrest prior to the procurement of the search warrant, and when evidence of the burglary was not revealed in the apartment search, police abandoned their investigation. Nevertheless, they continued to capitalize on the warrantless arrest as the subsequent search warrant revealed the presence of drugs, and an indictment on drug related charges issued.

The Fourth Amendment can no longer tolerate the blatant and dangerous privacy intrusion presented in the instant case, particularly in light of this Court's recent decision in *Lang*e. Without demanding a warrant or the presence of exigency, the *guarantee* that people will be secure in their persons and free from unreasonable seizure is nullified. Exigent circumstances would justify a public, probable-cause arrest, limiting wholesale deference to police, and reviving the common-law protection of judicial consideration of the reasonableness of seizures under the Fourth Amendment. Moreover, the rule advocated for in this case would not force police to cut their investigation short or force immediate procurement of an arrest warrant. It will only require law enforcement to submit their investigation to a magistrate for a probable cause determination if they elect to delay the arrest. Consistent with *Lange*, only the presence of exigency should overcome the warrant requirement. *See Watson* at 450-451 (Marshall, J., dissenting). The time is ripe to overrule *Watson* and depart from the categorical rule that warrantless arrests are constitutional. This Court should consider whether probable-cause arrests are unreasonable when no exigency

is present and when police have failed to procure an arrest warrant.

## II. The Court is presented with a live controversy.

The present dispute remains a live one. "Article III of the Constitution grants the Judicial Branch authority to adjudicate 'Cases' and 'Controversies.' " *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). Generally, "those who invoke the power of a federal court" must "demonstrate standing—a 'personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' " *Id.*, quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984). "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974).

Petitioner Jordan is imprisoned for an eleven-year term. Through these proceedings, he seeks to establish that his conviction was the result of an unlawful seizure, requiring a reversal. Accordingly, there is a live dispute that this Court may consider.

## CONCLUSION

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

Respectfully Submitted,

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