

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

ARTHUR GREGORY LANGE,)
)
 Petitioner,)
)
 v.) No. 20-18
)
 CALIFORNIA,)
)
 Respondent.)

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ARTHUR GREGORY LANGE,)

Petitioner,)

v.) No. 20-18

CALIFORNIA,)

Respondent.)

- - - - -

Washington, D.C.

Wednesday, February 24, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 20-18, Lange versus California.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Mr. Chief Justice, and may it please the Court:

There is no basis in precedent or history for the categorical pursuit rule applied below. Police officers may not enter a person's home without the approval of a magistrate unless an emergency leaves no time to seek a warrant. So the key question here is whether probable cause to believe a person has committed a misdemeanor and retreated automatically gives rise to an exigency requiring immediate action.

For two answers -- for two reasons, the answer is no. First, the governmental interest in investigating minor offenses is not always or even usually strong enough to support home entries unsanctioned by judicial officers. As Judge -- as Justice Jackson noted over a half

1 century ago, and Judge Sutton stressed more
2 recently, such invasions can be wholly out of
3 proportion with minor nonviolent offenses, not
4 to mention mere infractions, which are also
5 swept up in the Court-appointed amicus's rules.

6 Second, as the numerous cases -- cases
7 in the briefs demonstrate, there are many
8 nonthreatening reasons why people sometimes step
9 inside or continue into their garages when
10 pursued by officers. Teenagers are sometimes
11 frightened or confused and wish their parents to
12 be present for any questioning. Women driving
13 alone are sometimes afraid to stark on -- stop
14 on dark roads and occasionally are not even
15 sure those following them are police officers.
16 And residents of certain communities often wish
17 to avoid having others see them interacting with
18 the police, particularly when they're likely to
19 be asked to identify perpetrators of other more
20 serious offenses.

21 None of this is to say that a person
22 who retreats into his or her dwelling is, as
23 amicus puts it, home free. A warrantless entry
24 is still allowed when a concrete exigency
25 exists, and even when there isn't any emergency,

1 the police still have many options, including
2 simply knocking on the door.

3 But if a homeowner in this situation
4 insists, it is not too much to ask for officers
5 to procure a warrant before breaching the Fourth
6 Amendment's most sacrosanct space.

7 I'm happy to take questions.

8 CHIEF JUSTICE ROBERTS: Mr. Fisher,
9 you just said that the police could just go
10 ahead and knock on the door. I -- I -- I would
11 expect that would be a terribly dangerous
12 situation. The one thing you know is that the
13 person inside is trying to get away from you,
14 and, you know, if you go right up to the door
15 and knock, there's no reason to -- you -- you
16 shouldn't be concerned that he might swing the
17 door open and have a -- have -- have a gun.

18 And the alternative you suggest about,
19 well, just, you know, you -- you -- you can go
20 get a warrant, but, you know, it's easier to get
21 a warrant now than it was maybe 20 years ago,
22 but you still don't have any idea how long
23 that's going to take, and during that time, you
24 know, the -- the person in the house can also
25 destroy evidence or, again, arm -- arm himself,

1 call confederates to -- to come.

2 I -- I think your options really put
3 the police in a dangerous situation.

4 MR. FISHER: Well, Mr. Chief Justice,
5 let me first address knocking specifically and
6 then the array of options.

7 As to knocking specifically, I think
8 it's important to bear in mind that the amicus
9 here is asking for a categorical rule that
10 sweeps up everything that is categorized as "hot
11 pursuit." And so, yes, that's going to involve
12 some dangerous situations like you're imagining,
13 and there may well be exigent circumstances
14 there that -- that allow dispensing with
15 knocking.

16 But the definition of "hot pursuit"
17 the other side is propounding includes somebody
18 simply stepping in off their front porch or
19 driving into their garage, as in this case. So
20 there are going to be many situations where
21 somebody seems to be just simply seeking a
22 moment of refuge or -- or -- or respite, and I
23 think, in those situations, knocking may work.

24 But, if knocking doesn't work all the
25 time, as -- as the courts noted more recently,

1 warrants can be available within five or 10
2 minutes sometimes and --

3 CHIEF JUSTICE ROBERTS: Well -- well,
4 sometimes --

5 MR. FISHER: -- if the officer --

6 CHIEF JUSTICE ROBERTS: -- some --
7 sometimes, but, you know, even places that have
8 a system set up like that, you know, you -- you
9 -- magistrates are on duty and you can call
10 them, it's not always the case that you go
11 through -- get through right away. And,
12 certainly, that's sufficient time, even if it's
13 just two minutes, for somebody inside the house
14 to get a weapon.

15 MR. FISHER: So we don't disagree,
16 Mr. Chief Justice, that however long it might
17 take to get a warrant, whether it's five minutes
18 or five hours, if the officer thinks that -- has
19 reason to believe that the -- that the person
20 will grab a gun, will summon confederates,
21 anything like that, then there would be exigent
22 circumstance.

23 CHIEF JUSTICE ROBERTS: Well, isn't it
24 the -- kind of the flip side of what you've been
25 arguing in your brief, wouldn't the -- the more

1 trivial offense suggest a higher danger? I
2 mean, if somebody, you know, takes off and runs
3 away when you say you're going to, you know,
4 arrest them for littering, it seems to me that
5 that's the situation where you'd be most
6 concerned. I mean, he's got something to hide.

7 MR. FISHER: Well, Mr. Chief Justice,
8 I think that when you give a hypothetical like
9 that, you just have to bear in mind that this is
10 a totality-of-the-circumstances inquiry. So,
11 yes, I could imagine a reckless escape after a
12 minor offense that might totally shift the
13 balance in the way you're describing, but,
14 again, remember we're also talking about
15 somebody taking two steps off their front porch,
16 somebody who's literally just walking into the
17 house and saying, look, I want to go grab a
18 coat, it's cold outside, or who knows what else.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MR. FISHER: And the other side --

22 CHIEF JUSTICE ROBERTS: Justice --
23 Justice Thomas.

24 JUSTICE THOMAS: Thank you, Mr. Chief
25 Justice.

1 Mr. Fisher, I think, at common law,
2 the officer could pursue an escapee to their
3 home and make a warrantless entry. Could we
4 analogize someone who disobeys an officer's
5 orders or resists arrest to an escapee under
6 common law?

7 MR. FISHER: I don't think so, Justice
8 Thomas, and I'm not sure even the other side
9 goes that far, and the reason why is because the
10 escapee exception was reserved for people who
11 had already been arrested. And remember, if
12 they've been arrested, that tells you two
13 things. It tells you one -- one thing: they
14 probably committed a felony to begin with,
15 because, in the common law, they do -- usually
16 didn't even bother arresting people who had
17 committed mere misdemeanors unless it was an
18 affray in progress.

19 And, secondly, it tells you that
20 person is -- is -- does pose a very serious
21 flight risk because they've already escaped
22 once, and that totally shifts the balance in
23 some of the ways I was describing with the Chief
24 Justice.

25 JUSTICE THOMAS: What do we do with

1 the cases at common law that seem to allow the
2 officer to enter without a warrant when there's
3 a -- when he's pursuing a person who's
4 breaching -- engaged in a breach of the peace?

5 MR. FISHER: I think the way to
6 understand those cases, Justice Thomas, is that
7 they presented exigent circumstances. Remember,
8 Chitty said that if there was a need for an
9 immediate arrest, that was good enough at common
10 law. And the other commentators were in accord.

11 And so, if somebody was engaged in a
12 breach of -- of the peace, that meant that he
13 was -- he was engaged in violent acts or on the
14 brink of violent acts, and so that gave the
15 officer the -- the -- the cause necessary to go
16 inside without a warrant.

17 JUSTICE THOMAS: One of the things,
18 and this is just an aside, it just seems a
19 little odd that we would look to common law to
20 determine whether or not a warrantless entry is
21 permitted, and yet the remedy is the
22 exclusionary rule, which has no basis in common
23 law. How do you reconcile those two?

24 MR. FISHER: Well, I think, Justice
25 Thomas, it's important to just answer the Fourth

1 Amendment question before you. Obviously, the
2 common law would have something very different
3 to say about the exclusionary rule if that were
4 before you or if you had a different case. But
5 this could be a civil case, as most of the cases
6 that are cited in the briefs are. Or you could
7 have a police policy about breaking doors and
8 going into homes for every single misdemeanor,
9 no matter what the circumstances.

10 So the question that's before you
11 under the Fourth Amendment needs to be answered.
12 And I don't think anybody in this case would
13 urge you -- at least I wouldn't urge you -- to
14 deviate from the Fourth Amendment question and
15 stray into the exclusionary rule issue.

16 JUSTICE THOMAS: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Breyer.

19 JUSTICE BREYER: What should we do --
20 I think your approach is always exigent
21 circumstances, and you look and see if there are
22 exigent circumstances. But our case, Santana,
23 and certainly the lower courts have said we
24 need an absolute rule here. It's just not worth
25 it. The person who's being chased can just

1 stop. He's supposed to. And there are dangers
2 all over the place. Sometimes not. Sometimes
3 there's a good reason. But it's a bright-line
4 rule that says hot pursuit is automatically
5 exigent circumstances. So what do we do about
6 all those cases? And you can find some
7 counter-examples but not too many.

8 MR. FISHER: Well, Justice -- Justice
9 Breyer, if you -- if you're asking simply about
10 the lower court cases, they're -- they're, of
11 course, very much in conflict when it comes to
12 misdemeanor pursuit, which is directly in front
13 of you here.

14 JUSTICE BREYER: Well, that -- all
15 right, misdemeanor --

16 MR. FISHER: Any statute --

17 JUSTICE BREYER: Let me cut you off
18 there for a second, because the problem with
19 trying to separate misdemeanor and -- and felony
20 is that different states have different rules
21 and different crimes that count as misdemeanors
22 and some are pretty serious.

23 MR. FISHER: Well -- well, that's
24 right, but --

25 JUSTICE BREYER: So our problem is,

1 how do you draw a line if you're going to do a
2 misdemeanor -- boy, Massachusetts is very
3 different from California. And so --

4 MR. FISHER: Justice Breyer, we --

5 JUSTICE BREYER: -- so what do we do?

6 MR. FISHER: We -- we agree you
7 shouldn't draw a line. And what you should do
8 is do what the Court has always done with
9 exigent circumstances particularly dealing with
10 the home, which is do it on a case-by-case basis
11 and leave the officers substantial discretion to
12 analyze the situation, as the Court has always
13 said, but do require a showing of actual exigent
14 circumstances.

15 That's what the Court said in *Atwater*,
16 which is the case that declined to distinguish
17 between misdemeanors and -- and less -- even
18 less serious offenses. But what the Court said
19 is, when you're dealing with the home, then that
20 calculus shifts. And because the home is the
21 Fourth Amendment's most protected place in
22 extraordinary privacy interests, there, you need
23 to have a case-by-case assessment.

24 And the Court said the same thing in
25 *McNeely*. When you're dealing with a

1 particularly important privacy interest, there
2 the body, you need case-by-case analysis.

3 And, Justice Breyer, as a practical
4 matter, I think it's important to understand
5 that officers already do this. They already do
6 it on a daily basis with the Exigent
7 Circumstances Doctrine in general.

8 And even in many jurisdictions,
9 including in California, as the L.A. County
10 brief shows, officers do this every day while
11 engaged in what we call hot pursuit or flight.

12 So we're not asking the officers to do
13 anything they aren't already being instructed by
14 their own departments and including the
15 Department of Justice to do when it comes to a
16 situation involving flight.

17 JUSTICE BREYER: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice Alito.

19 JUSTICE ALITO: Mr. Fisher, let me try
20 out this argument which supports your position,
21 and the argument very simply is that hot pursuit
22 has to be hot and it has to be a pursuit. It
23 has to -- it has to involve a chase.

24 The person, the arrestee, must
25 actually being trying to flee and avoid arrest,

1 and that makes it -- it -- there are
2 justifications for such a doctrine because, when
3 an arrestee is chased and flees into his house,
4 there are strong reasons across the board for
5 not waiting for a warrant.

6 There's a heightened risk that this
7 person is going to sneak away before the house
8 can be surrounded. One of the briefs says it
9 takes six to eight officers to surround the
10 house waiting for a warrant.

11 There's a heightened risk that
12 evidence is going to be destroyed, a heightened
13 risk that the person is going to barricade
14 himself in the house, get a gun, and resist the
15 execution of a warrant.

16 Here, the -- the video shows there was
17 no chase and Mr. Lange really didn't flee, and
18 all that the court below held was that a
19 reasonable person in his position would have
20 known that the officer was trying to stop him.

21 That -- after viewing the video, even
22 that seems to me dubious. And if you take into
23 account Mr. Lange's blood alcohol content, it's
24 even more questionable. But, if we hold that
25 hot pursuit requires a hot pursuit, won't we go

1 a long way toward preventing warrantless arrests
2 for minor infractions and therefore deal with
3 the serious problems that you raise in your
4 brief?

5 MR. FISHER: I think you're right,
6 Justice Alito, you would go a long way, and I
7 think that's very much what Judge Sutton tried
8 to do in the Stone Burner case, is particularly
9 define the word "hot" as requiring some sort of
10 reckless or extended chase.

11 But I think there's two things I
12 would -- I would point out there that -- that
13 you'd want to think about and pause over. The
14 first is -- is that even then, I'm not sure
15 every single case is going to involve true
16 exigency in light of the totality of the
17 circumstances.

18 And so just to use your -- your
19 example about a house needing many officers to
20 surround it, well, you could have a single-door
21 apartment like in Minnesota versus Olson that
22 wouldn't require more than one officer. So
23 there's going to be many facts and
24 circumstances.

25 And as I said to Justice Breyer, the

1 teaching of the Court's case law involving the
2 home is when there's overbreadth in terms of a
3 proposed rule, you have to default back to --

4 JUSTICE ALITO: Well, it's not -- it's
5 not perfect. But the alternative is either to
6 require impossible line-drawing between minor
7 offenses and major offenses or completely
8 overhaul what has been understand as the Hot
9 Pursuit Doctrine. So there would have to be
10 exigent circumstances even where the offense is
11 a felony and a very serious felony.

12 MR. FISHER: Well, I think, there,
13 Justice Alito, if you had a reckless chase
14 combined with a serious felony, I think it's
15 hard to imagine situations where you wouldn't
16 have exigent circumstances.

17 But the teaching of Welsh in this
18 Court's case law is that the -- it -- it's just
19 that, that the severity of the offense does
20 matter, and so you don't have to draw a bright
21 line. As I said to Justice Breyer, we don't
22 think you should. But the severity --

23 JUSTICE ALITO: Well, thank you. I'm
24 out of --

25 MR. FISHER: -- of the offense --

1 JUSTICE ALITO: -- I'm out of time.

2 MR. FISHER: -- should be in the
3 calculus.

4 JUSTICE ALITO: Yeah, Mr. Fisher, I'm
5 out of time, but thank you.

6 MR. FISHER: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor.

9 JUSTICE SOTOMAYOR: Mr. Fisher, I'm
10 trying to figure out, going back to what Justice
11 Alito was saying, what circumstance where there
12 is a genuine hot pursuit do you think would not
13 justify a police officer, just on the basis of
14 the pursuit, believing that the person was
15 trying to hide something, trying to perhaps
16 destroy evidence, whatever the cause, why
17 wouldn't that justify a -- wouldn't the nature
18 of the pursuit itself --

19 MR. FISHER: Well, Justice Sotomayor
20 --

21 JUSTICE SOTOMAYOR: -- create a sense
22 of urgency?

23 MR. FISHER: -- it would certainly
24 lean that direction, but let me give you some
25 examples from cases cited in the briefs where we

1 don't think it would necessarily in light of the
2 totality create that -- that -- that inference.

3 The Gutierrez case is a case where a
4 woman was driving alone at night and hurried to
5 her mother's house, and when the officer himself
6 pulled up behind her and scared her, she tried
7 to run inside the house.

8 There are situations involving
9 teenagers, as I said in my opening, who are
10 simply scared and flustered, and so it's not
11 laudable conduct for them to dart back to their
12 parents' house, but it's, I think,
13 understandable. And an officer particularly who
14 knows the teenager and knows --

15 JUSTICE SOTOMAYOR: But I --

16 MR. FISHER: -- what an awkward
17 situation it --

18 JUSTICE SOTOMAYOR: -- but you're --
19 you're giving me examples from the perspective
20 of the fleer. I'm talking about the perspective
21 of the police officer, because isn't that what
22 we have to look at?

23 MR. FISHER: I think that's right --

24 JUSTICE SOTOMAYOR: A police officer
25 --

1 MR. FISHER: -- Justice Sotomayor, so
2 --

3 JUSTICE SOTOMAYOR: -- a police
4 officer watching someone run away, why
5 wouldn't -- and -- and do it in -- in -- in a
6 genuinely hot pursuit manner, wouldn't that be
7 enough to raise a reasonable suspicion?

8 MR. FISHER: I think generally, yes,
9 Justice Sotomayor. It's hard to answer the
10 question entirely in the abstract.

11 But remember, the officer may know the
12 person, so he may know that the person doesn't
13 want to interact with him in public and think
14 that's what's going on.

15 There could be other reasons why the
16 officer thinks that the person simply wants to
17 get away from whatever the officer is trying to
18 arrest him.

19 So I think, Justice Sotomayor, I'm not
20 trying to push back very hard on this. I'm just
21 trying to say that the teaching of McNeely and
22 even of Wisconsin against Mitchell in a highly
23 stylized situation is that you do not adopt
24 categorical rules even when the majority of
25 situations or the vast majority of situations

1 also, as in Richards, the knock-and-announce
2 case involving drug crimes, even when the vast
3 majority of the situations are going to allow
4 the warrantless conduct, you don't draw a
5 categorical rule necessarily. But, obviously,
6 any rule like that would fall far beyond the
7 facts of this case.

8 JUSTICE SOTOMAYOR: Thank you,
9 counsel.

10 CHIEF JUSTICE ROBERTS: Justice Kagan.

11 JUSTICE KAGAN: Mr. Fisher, unlike
12 California, you take the position there's no
13 categorical rule even as to fleeing felons.

14 And I'm -- I'm wondering if you would
15 try to defend that for me because I -- I look at
16 our case law and see quite a number of cases
17 which have one after another after another just,
18 you know, said that there is such a rule as to
19 fleeing felons.

20 So how do you deal with quite a lot of
21 -- you know, some of it dicta, but -- but really
22 quite a lot of statements to that effect?

23 MR. FISHER: I think there's two steps
24 in analyzing the case law, Justice Kagan. First
25 is to recognize that there's only one case the

1 Court has had that involves what the parties
2 here would call hot pursuit, and that's Santana.
3 So I don't think all the further -- the more
4 recent references to hot pursuit or to Santana
5 could create a rule that didn't otherwise exist.

6 And so then the question is, what do
7 we think of -- what -- what is the holding of
8 Santana? And Santana itself says that it was
9 "clearly governed by Hayden." And Hayden,
10 again, the parties all agree, was not even a hot
11 pursuit case and it -- and it involved exigent
12 circumstances.

13 And so Santana, we think, certainly
14 has cross-currents in the paragraph of analysis
15 that the parties have debated, but just like in
16 Share, this Court dealt with more recently in
17 Collins, we think in that situation it's best
18 read as a fact-bound exigent circumstances
19 opinion. And then you just --

20 JUSTICE KAGAN: Well, I -- I -- I --
21 Mr. Fisher, I -- I agree with you about Santana,
22 that you can -- you can legitimately read
23 Santana either way, but -- but the way the Court
24 has read it, and I'm thinking about Steagald,
25 I'm thinking about Stanton, there are statements

1 to this effect in Welsh and McNeely, it seems
2 that we've made a choice about -- about which of
3 two possible ways to read Santana that, you
4 know, we have adopted one of them. And you're
5 -- you're right, not in cases where that was the
6 question at hand. But, again, there seems to be
7 such a number of these cases that, you know,
8 eventually, you got -- you got yourself a rule.

9 MR. FISHER: I think there's two --
10 two things about the references more recently to
11 Santana. The references in general talk about
12 hot pursuit, Justice Kagan. They don't talk
13 about a felon or not. And I think the best way
14 to read those hot pursuit references is probably
15 along the lines of what Justice Alito was saying
16 in that if you read "hot" in that phrase as
17 requiring a real emergency and giving rise to an
18 exigent circumstance, then all those hot pursuit
19 references make sense. And so then you're just
20 left with the question of whether Santana would
21 have adopted a felony rule versus a non-felony
22 rule, and the Court has very little to say about
23 that specifically. And, more generally, in its
24 case law, what the Court says is you look at the
25 totality of the circumstances. And Welsh --

1 what Welsh says is you look at the severity of
2 the crime as part of the analysis, but you don't
3 draw bright lines based on the severity of the
4 crime.

5 JUSTICE KAGAN: Thank you, Mr. Fisher.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch.

8 JUSTICE GORSUCH: Good morning,
9 Mr. Fisher. Just to pick up where Justice Kagan
10 left off, suppose that the hot pursuit doctrine
11 did have a categorical rule for felonies. Would
12 ruling in your favor create kind of an absurd
13 incentive for states to actually make failure to
14 heed a police officer's lights, rather than a
15 misdemeanor, turn it into a felony? Do you
16 worry about that?

17 MR. FISHER: Well, Justice Gorsuch, I
18 think that I can't address the empirical
19 question whether I worry about it, but I do
20 think it points out that you shouldn't be
21 drawing a line, especially in this case, where
22 you dont -- wouldn't have to do it one way or
23 the other between misdemeanors and felonies.

24 And I think that is, I think, a point
25 in my column as to why it makes more sense to

1 just simply look at the severity of the
2 underlying conduct as part of the totality of
3 the circumstance and not draw any bright lines
4 on a classification basis.

5 JUSTICE GORSUCH: In terms of hot
6 pursuit and the discussion we've had so far this
7 morning, if we -- if we try to place limits on
8 what makes a pursuit hot instead of limits on
9 the seriousness of the suspected crime, which I
10 understood to be the question presented, would
11 those rules about hot pursuit be anything more
12 than dicta in this case?

13 MR. FISHER: Well, I think that you
14 have a case before you where you could hold
15 there was no hot pursuit, and then that
16 reasoning in explaining why it was not hot
17 pursuit would, I think, be obviously a holding
18 of the Court. It's difficult for me to answer
19 too much beyond that as to how you might
20 particularize any further rules and whether
21 those would be dicta or not.

22 JUSTICE GORSUCH: That's not what we
23 took in the question presented, though, right?

24 MR. FISHER: I think all the parties
25 agree that it's -- that -- that as the Court --

1 as the case came to the Court, this is hot
2 pursuit as the Court has used that phrase in its
3 cases. And the difficulty again is -- is in
4 Santana, where the Court said that -- that hot
5 pursuit was present when somebody took a couple
6 steps backward on her front porch --

7 JUSTICE GORSUCH: So --

8 MR. FISHER: -- from the threshold of
9 their house into the inside.

10 JUSTICE GORSUCH: -- so we don't have
11 the benefit of a lower court decision. We don't
12 have the benefit of parties joining issue on
13 this. Right?

14 MR. FISHER: I -- I think that's
15 generally correct.

16 JUSTICE GORSUCH: Okay.

17 MR. FISHER: I wouldn't resist too
18 hard, though --

19 JUSTICE GORSUCH: I -- I -- I
20 understand.

21 MR. FISHER: -- the notion of --

22 JUSTICE GORSUCH: I understand. I
23 just want to -- with my little time left -- I'm
24 sorry, Mr. Fisher, for interrupting you, but I
25 do have another question. That is, you ask us

1 to take everything on a case-by-case approach.
2 Your amicus, the Constitutional Accountability
3 Center, offers more -- seeks to offer more
4 guidance through reference to the common law and
5 identifying rules that we can draw out of that.
6 What's your response to that approach?

7 MR. FISHER: I think we're in harmony
8 with that brief, Justice Gorsuch, for two
9 reasons. The common law had two basic rules.
10 One is that a felony was good enough to continue
11 hot pursuit inside of a house, and the reason
12 why was because a felony would have been a
13 capital offense, and we think the risk of escape
14 to avoid the hangman would have been so strong
15 there that that's why all of those cases would
16 necessarily have qualified under a case-by-case
17 basis.

18 And then the only other category you
19 really have at common law is breach of the peace
20 or an affray, which shows that there's --
21 there's physical harm at -- either occurring or
22 at serious risk. And, again, every one of those
23 cases would qualify on a case-by-case basis.

24 So even though you had, you know, what
25 you could think of as broad rules at the common

1 law, what they really are are rules that
2 encaptured situations where it's necessarily
3 exigent circumstances.

4 JUSTICE GORSUCH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Kavanaugh.

7 JUSTICE KAVANAUGH: Thank you, Chief
8 Justice.

9 And good morning, Mr. Fisher. I want
10 to follow up on questions from the Chief Justice
11 and Justice Breyer about how exigent
12 circumstances would work in this situation
13 because it seems to me that there's a chance
14 that exigent circumstances doctrine would
15 essentially cover the waterfront of all the
16 circumstances you would have when you have a hot
17 pursuit to the house.

18 So, on page 14 of your brief, you
19 refer -- summarize existing doctrine with
20 respect to destruction of evidence, the risk of
21 persons who are threatened with serious injury,
22 to protect the officers or the public, and then
23 you also say, and this is the one I really want
24 to explore, to prevent a suspect's escape.

25 And wouldn't the exigent circumstances

1 doctrine in all those things apply almost
2 inevitably in a hot pursuit case, particularly
3 preventing a suspect's escape, because the
4 suspect has already escaped, in essence, from --
5 or fled from the officer, and so, to use your
6 phrase, there is reason to believe -- I think
7 that was your phrase to the Chief Justice --
8 there's reason to believe that the suspect will
9 escape from the house because they've already
10 fled?

11 MR. FISHER: Well, Justice Kavanaugh,
12 I think you're asking the right question, which
13 is whether all of -- every scenario you can
14 imagine under the label "hot pursuit" would
15 constitute an exigent circumstance, but we just
16 think, empirically, that's not the case, and
17 we've cited -- and -- and part of it is because
18 of this conversation we've had -- been having
19 this morning about how broadly "hot pursuit" is
20 defined not just in the lower courts but also in
21 this Court when you think about a case like
22 Santana. So remember, Justice Kavanaugh, I'm
23 not going to disagree with you that somebody
24 who engages in a reckless --

25 JUSTICE KAVANAUGH: Yeah. Put aside

1 --

2 MR. FISHER: -- reckless chase --

3 JUSTICE KAVANAUGH: -- put aside
4 whether it's really a hot pursuit. Assume a hot
5 pursuit, a real hot pursuit.

6 MR. FISHER: I -- so I think a real
7 hot -- if what you mean by "a real hot pursuit"
8 is a sort of reckless extended chase, then I
9 think the odds are very high, but even then --

10 JUSTICE KAVANAUGH: Well, let me --

11 MR. FISHER: -- I could --

12 JUSTICE KAVANAUGH: Okay. Keep going.

13 MR. FISHER: So even then, I think
14 that you and I are both using words like
15 "usually the case," "almost always the case,"
16 and under McNeely and -- and Richards, that's
17 just not good enough when it comes to the home.

18 JUSTICE KAVANAUGH: But the Exigent
19 Circumstances Doctrine, I -- I guess -- well,
20 let me ask you this: Do you object to the
21 Solicitor General's presumption and, if so, why?

22 MR. FISHER: We do object to it. It's
23 obviously better than the -- than the
24 categorical rule that amicus propounds. But the
25 reason -- we think it just unnecessarily

1 complicates the analysis. We think that -- we
2 don't precisely know what the presumption means,
3 but it -- I think it would mean one of two
4 things: either that that fact in isolation
5 tilts in the favor of finding exigent
6 circumstances, which we don't disagree with but
7 we just think sets up an artificial legal rule
8 that just gets in the way of the ordinary
9 totality of the circumstances approach, or it
10 would become a much more muscular presumption,
11 something like a burden-shifting regime of
12 McDonnell Douglas or Batson, and we just think
13 that is unnecessarily difficult as well and just
14 inconsistent with the Court's
15 totality-of-the-circumstances approach in the
16 case law.

17 JUSTICE KAVANAUGH: Thank you,
18 Mr. Fisher.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett.

21 JUSTICE BARRETT: Good morning,
22 Mr. Fisher. I want to ask you about the
23 analytical distinction between escaping arrest
24 and evading arrest. So do you concede that the
25 exception would apply and the policeman could

1 break down the door, so to speak, enter the home
2 without a warrant, if the defendant had escaped
3 arrest?

4 MR. FISHER: Certainly, at common law,
5 the answer would be yes, Justice Barrett, and I
6 think that in -- in modern times, I think that
7 that would almost always be the case as well.
8 And I think the difference is because an escape
9 is something where somebody has already been
10 taken into a custody -- into custody and then
11 has fled that custody, whereas somebody who is
12 evading, I think is the word that you used, is
13 somebody that has not yet been taken into
14 custody and so, in the situation viewed again in
15 totality of the circumstances, might just be
16 frightened, confused, startled --

17 JUSTICE BARRETT: Well, I -- I
18 understand that, but, I mean, custody here --
19 you know, let's imagine you have somebody who
20 has committed something we would all agree would
21 be a misdemeanor, something minor like -- but --
22 but not in a car. Let's say it's on foot.
23 Let's say it's some minor vandalism in a park.
24 And the police approach, have the show of
25 authority, and stop the person they've submitted

1 to authority. You know, there you have an
2 arrest. And then the person turns on his heels
3 and runs.

4 It's hard to see where there's a
5 meaningful analytical distinction between
6 someone who's been arrested, who's been seized
7 in that sense, and then runs and someone who
8 just runs from the beginning after the police,
9 you know, shows authority and says stop. What's
10 the analytical distinction?

11 MR. FISHER: I agree with you, Justice
12 Barrett. Nine times out of 10 or more there
13 won't be a meaningful distinction, so then the
14 officer would have exigent circumstances.

15 But, again, you have to look at this
16 in the totality of the circumstances, and it
17 might be the person has a mental disability. It
18 might be a person just doesn't quite understand
19 what's going on. It might be the officer knows
20 the person and he's saying, "I just want to go
21 home and see my parents" and is running off.

22 There could be -- there just could be
23 more to know. And the teaching of the Court's
24 case law is -- is when it comes to sanctity of
25 the home -- and remember that's what's really at

1 issue in this case -- that we don't draw
2 overbroad categorical rules, even if they're
3 most always going to envelop situations where
4 there are indeed exigent circumstances.

5 I think the other way to think about
6 it is the concern is to have officers secure in
7 their ability to carry out their jobs. You
8 already have built into the Exigent
9 Circumstances Doctrine a less-than certitude
10 requirement.

11 And so officers are going to be okay
12 when they're in those situations. It's just for
13 the outlier situations --

14 JUSTICE BARRETT: If there's a
15 less-than certitude requirement --

16 MR. FISHER: -- that would protect the
17 sanctity of the home.

18 JUSTICE BARRETT: -- why wouldn't it
19 apply? I mean, you -- you -- you said nine
20 times out of 10 that in my hypothetical where
21 someone just refuses to submit, turns and runs,
22 that there won't be really a distinction between
23 that person and the person who initially stops
24 and then runs.

25 So why -- you know, and the person may

1 not -- you used the example of someone who might
2 be disabled or young or afraid. Why doesn't the
3 certitude -- you know, the room -- the room for
4 doubt give the officer the ability there to say
5 it's an exigent circumstance?

6 MR. FISHER: I think because, on the
7 particular facts of that tenth case out of 10,
8 the officer may not have any doubts at all and
9 may fully realize that this is not an emergency
10 situation.

11 And I think that's the important thing
12 to understand about amicus's rule, is that the
13 only cases the amicus's rule picks up are the
14 ones where there is no exigent circumstance
15 under traditional doctrine. We all agree that
16 if there's a traditional exigent circumstance,
17 the officer can conduct a warrantless entry.

18 The only cases that a categorical rule
19 sweeps in and makes any difference with respect
20 to are ones where the officer knows that there
21 is not a true emergency and there is time to
22 seek a warrant. That's what we're here talking
23 about today.

24 JUSTICE BARRETT: Thank you, Mr.
25 Fisher.

1 CHIEF JUSTICE ROBERTS: A minute to
2 wrap up, Mr. Fisher.

3 MR. FISHER: Sure. I think that there
4 have been a couple of case -- a couple of
5 questions I've gotten about respect for police
6 authority and -- and the like, and I think the
7 important thing to remember -- and you've asked
8 why people would escape or at least flee, flee
9 an -- an attempt to -- to pause them.

10 And this is -- this is not a new
11 problem that's had to deal with this, and I
12 think that it's important to remember that all
13 the way back to the framing in the common law
14 before, there was a question of how to deal with
15 people who might be frightened or confused or
16 even distrustful of police officers or
17 constables.

18 And the solution has always been the
19 warrant. That has been the solution that gives
20 people security in their homes and understanding
21 and calm that officers are proceeding according
22 to law.

23 And we think that that lesson from
24 history is equally relevant today when you're
25 dealing with minor offenses and some -- and

1 officers who sometimes are overzealous in the
2 competitive exercise of ferreting out crime.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Harbourt.

6 ORAL ARGUMENT OF SAMUEL T. HARBOUR

7 ON BEHALF OF THE RESPONDENT

8 SUPPORTING VACATUR

9 MR. HARBOUR: Mr. Chief Justice, and
10 may it please the Court:

11 The exigent circumstances exception
12 typically requires a case-specific showing that
13 justifies an immediate warrantless entry into
14 someone's home. The question here is whether to
15 follow that case-specific approach when police
16 pursue a misdemeanor suspect who retreats into a
17 home or whether to extend to the misdemeanor
18 context a categorical rule for hot pursuits of
19 suspected felons.

20 In our view, the categorical rule
21 should not apply in the misdemeanor context.
22 Felony and misdemeanor pursuits were treated
23 differently at common law. The government has a
24 weightier interest in immediately pursuing and
25 apprehending felony suspects, and a

1 case-specific approach for misdemeanors would be
2 more consistent with precedent and with the
3 privacy interests underlying the Fourth
4 Amendment.

5 I welcome the Court's questions.

6 CHIEF JUSTICE ROBERTS: I -- I guess I
7 would pose the question that Justice Breyer was
8 focusing on. The line between felonies and
9 misdemeanors is -- is very hard to draw. In
10 many cases, it's counterintuitive, and it
11 certainly varies from state to state.

12 You know, if it's drunk driving, it
13 can be a felony if it's your third offense. I
14 mean, how does an officer know whether it's the
15 first offense or the third? It can depend on
16 the value of stolen goods. How does the officer
17 know that?

18 It seems to me -- and -- and it's a --
19 it's a distinction that we rejected in another
20 context pertinent here, the Atwater case. What
21 about all those uncertainties?

22 MR. HARBOURT: Your Honor, we
23 certainly acknowledge that officers will not
24 always be in a position to know whether an
25 offense is a felony or a misdemeanor. That's

1 true, and we acknowledge that.

2 But the reality is officers will often
3 be in a position to know, and we don't believe
4 that this will pose substantial practical
5 problems for officers in the field.

6 In a number of cases, an officer is
7 going to have probable cause of an offense that
8 he has no reasonable for -- room for doubt is a
9 felony. For example --

10 CHIEF JUSTICE ROBERTS: What do you --
11 what do you do with respect to curtilage? You
12 know, a man's home is his castle, but we've also
13 extended special protection to curtilage.

14 Do -- do you -- your rules apply in
15 that case? You know, can they -- why isn't the
16 person home free when he's on the porch, he
17 doesn't have to go through the door at all?

18 MR. HARBOUR: Your Honor, I think the
19 Court has -- has been pretty clear in recent
20 cases like Collins and Florida versus Jardines
21 that the curtilage does qualify as part of the
22 special area entitled to the home's protections
23 under the Fourth Amendment.

24 But I don't think that a suspect would
25 be home-free in the curtilage for the same

1 reason that the suspect isn't home-free inside
2 the physical structure of the -- the home either
3 if as just for --

4 CHIEF JUSTICE ROBERTS: So you think
5 just -- you think the same protection applies to
6 the curtilage as to the inside of the house?

7 MR. HARBOUR: Your Honor, I -- I
8 believe that -- that the clear teaching of this
9 Court's recent precedents in -- in Jardines and
10 Collins would --

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas.

14 JUSTICE THOMAS: Thank you, Mr. Chief
15 Justice.

16 Counsel, following up on the Chief's
17 question and Justice Breyer's questions, isn't
18 the definition of "felony" today quite different
19 and "misdemeanor" today quite different from
20 what it was at common law?

21 MR. HARBOUR: Certainly, Your Honor,
22 there have been a number of changes to offense
23 classifications since the common law era. But,
24 in our view, the fundamental legal principle
25 recognized at common law is just as vital and

1 relevant today, and that fundamental principle
2 was that officers could not pursue suspects into
3 homes without warrants in cases involving minor
4 misdemeanor offenses.

5 And we -- we still have a lot of
6 misdemeanor offenses, minor offenses on the
7 books today. And so, surely, the best way to --
8 to honor and vindicate that founding era
9 commitment to the sanctity of the home is not to
10 throw up our hands and -- and discard those
11 historic limits entirely by adopting the -- the
12 sweeping categorical rule proposed by amicus.

13 We can do better than that, and the
14 way to operationalize those historic limits on
15 officer warrantless entries into homes is, in
16 our view, to look to the felony/misdemeanor
17 line, which is the principal line drawn in
18 American law today for distinguishing offenses
19 based upon their level of severity.

20 JUSTICE THOMAS: Well, for -- I think,
21 as the Chief Justice mentioned and Justice
22 Breyer, that's a line that we've had quite a bit
23 of difficulty drawing, but beyond that, what
24 prevents a state from simply enacting a law that
25 says evading arrest or fleeing from a police

1 officer is a felony?

2 MR. HARBOUR: Your Honor, we think
3 it's pretty speculative to assume that a state
4 would enhance the -- the penal consequences and
5 all of the collateral consequences that come
6 with a felony conviction for -- for certain
7 types of flight merely to circumvent a ruling of
8 this Court limiting the scope of the Hot Pursuit
9 Doctrine.

10 JUSTICE THOMAS: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Breyer.

13 JUSTICE BREYER: Thank you.

14 Look, to be -- not to put -- to be
15 specific, as far as I know, a misdemeanor in
16 Massachusetts is defined as a crime for which
17 the sentence in jail is up to two-and-a-half
18 years and the jail term must be served, however,
19 not in the state prison but in a local county
20 jail. All right?

21 So we include as misdemeanors assault
22 and battery, carrying a loaded firearm under the
23 influence of drugs, reckless driving where a
24 death results. I mean, they're pretty serious.

25 So, under your rule, if you're after

1 somebody who's just beaten up five people,
2 assault and battery, or he has just really been
3 driving recklessly and killed his wife, you're
4 saying no hot pursuit, right? But, in
5 California, misdemeanor is very different,
6 minor. What do we do?

7 MR. HARBOUR: Your Honor, what I
8 think you do is you recognize -- you limit the
9 scope of the hot pursuit exception to felonies.
10 And, of course, that -- that doesn't mean that
11 warrantless entries are not permitted in -- in
12 misdemeanor cases. It just means that the
13 officer in those cases has to identify some
14 case-specific basis to enter the home without --
15 without first getting a warrant.

16 JUSTICE BREYER: So, in Massachusetts,
17 if, in fact, he's beaten up into a bloody pulp,
18 four people, you cannot just automatically hotly
19 pursue him into the house, but, in California,
20 you can because it's a felony, or what? I mean,
21 they'll be all over the place. We'll have -- I
22 mean, that's what I don't see how to draw this
23 line, misdemeanor/felony. And you don't in
24 California. What you, in fact, have been saying
25 is a misdemeanor -- the hot pursuit rule also

1 allows pursuit into the home if it's jailable,
2 which, by the way, picks up auctioning off a
3 rabbit as a prize, which carries a jail term.

4 MR. HARBOURT: Your Honor, I think the
5 Court could avoid those -- those consequences by
6 drawing a national uniform definition of
7 "misdemeanor." It could look to --

8 JUSTICE BREYER: Oh, good. What is
9 that? What is that?

10 MR. HARBOURT: Well, the standard
11 traditional national consensus view, it's not
12 the definition in every state, but, in a sizable
13 majority of states, the definition is an offense
14 authorizing up to a year of incarceration.

15 CHIEF JUSTICE ROBERTS: Justice Alito.

16 JUSTICE ALITO: What if a police
17 officer has probable cause to believe that a
18 fleeing person has committed two offenses, each
19 of which is punishable by imprisonment for up to
20 11 months?

21 MR. HARBOURT: Your Honor, in -- in --
22 in those cases, assuming the Court defines
23 "misdemeanor" along the lines that I was just
24 discussing with Justice Breyer, I think that
25 would be a misdemeanor offense, and so, in our

1 view, the categorical hot pursuit rule would not
2 apply. The officer would need to point to --

3 JUSTICE ALITO: Well, what if the
4 person could get two consecutive 11-month
5 sentences? If he could get one sentence of a
6 year and a day, that would fall within -- on one
7 side of the line, but two consecutive 11-month
8 sentences would not.

9 MR. HARBOUR: Your Honor, I'm not
10 sure the Court would need to resolve all -- all
11 kinds -- all of the questions along those lines,
12 administrative questions, in -- in this case,
13 but I do think that's the typical way that
14 probable cause is assessed in the field. You
15 look at the individual crime and not to the
16 possibility of, you know, stacked consecutive
17 sentences from multiple crimes.

18 JUSTICE ALITO: Well, let me ask you
19 this question: Under the California
20 constitution, does the Attorney General have the
21 authority to tell the district attorneys of the
22 states that it -- of the state that it will
23 not -- that they are not to defend any
24 warrantless arrests of persons in the home where
25 the offense is a minor offense as defined by

1 some definition provided by the Attorney
2 General?

3 MR. HARBOURT: Your Honor, the
4 Attorney General of California is the chief law
5 enforcement officer of the state. The exact
6 kinds of -- of state constitutional lines and
7 responsibilities that Your Honor is asking about
8 are -- are fairly undeveloped as a matter of
9 formal legal precedent, and typical practice is
10 to defer to locally elected district attorneys
11 and city attorneys, who bring misdemeanor
12 prosecutions in the trial court.

13 JUSTICE ALITO: Well, if the Attorney
14 General could do that, I really don't understand
15 why you are here. You are here on behalf of the
16 State of California asking us to hold that a
17 California rule is unconstitutional, even though
18 the Attorney General, whom you represent, may
19 well be able to effect that change as a matter
20 of policy.

21 MR. HARBOURT: Yes, Your Honor, and --
22 and to be quite clear, we -- we opposed cert in
23 this case and, in our brief in opposition,
24 informed the Court that the California
25 Department of Justice would cease relying on the

1 categorical hot pursuit rule in misdemeanor
2 cases handled by the department. But the Court
3 did grant cert, and so we're here providing the
4 Court with our analysis of what we think the
5 best view of its Fourth Amendment precedent and
6 doctrine is.

7 JUSTICE ALITO: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Sotomayor.

10 JUSTICE SOTOMAYOR: Counsel, I've been
11 listening to the exchange with my colleagues
12 involving the difficulty in deciding what's a
13 felony and what's a misdemeanor. Part of the
14 problem is that what are felonies are no longer
15 absolutely, necessarily, and in all situations
16 dangerous crimes. You can have white-collar
17 crimes where there is no danger. You can have
18 all sorts of environmental crimes, other things
19 that don't cause -- that don't create exigency
20 in the same sense that Santana was announcing
21 the rule or that the common law came from. And
22 so I don't know why anybody is arguing that
23 there's a difference between felony and
24 misdemeanors and why we're recognizing a
25 categorical rule at all.

1 Why isn't the better reading just that
2 hot pursuit is a type of exigent circumstance
3 that can but does not always justify warrantless
4 entry, regardless of whether the underlying
5 offense is a felony or a misdemeanor?

6 If you look at our holding in Santana,
7 we talked about all of the circumstances that
8 would make it likely that a drug dealer would
9 destroy evidence once they saw the police
10 officer on -- on the scene. Our next case,
11 Stanton, was not about whether or not the issue
12 was a felony or not. It was -- the issue was,
13 was the situation such as to justify,
14 reasonably, entry?

15 So I guess what I'm asking is, why
16 don't we just announce the rule that I stated,
17 that exigency can but doesn't always, whether
18 it's a misdemeanor or a felony, justify a
19 warrantless entry?

20 MR. HARBOUR: Your -- Your Honor, in
21 -- in our view, that case-specific exigency
22 standard is not consistent with the Court's
23 precedent in the felony pursuit context. So
24 there's Santana, but it's not just Santana; it's
25 all of the Court's many statements over the

1 years describing hot pursuit in categorical
2 terms, including Stanton, which did address a
3 limited issue as far as its holding, but the
4 Court, in describing the scope of the doctrine,
5 described "our precedent holding that hot
6 pursuit of a fleeing felon justifies an
7 officer's warrantless entry."

8 JUSTICE SOTOMAYOR: At what point --

9 CHIEF JUSTICE ROBERTS: Justice Kagan.
10 Justice Kagan.

11 JUSTICE KAGAN: Mr. Harbourt, to
12 continue with the difficulty of drawing lines
13 between felonies and misdemeanors, Justice
14 Sotomayor referred to this, but, you know, it --
15 it's true that it's the basic line suggesting
16 the severity of the fence -- the offense, but
17 it's really not the basic line as to whether an
18 offense is violent or dangerous. I mean,
19 sometimes it is, but a lot of times, it's not.
20 And that -- the violence and dangerous aspect of
21 -- of the conduct seems the more relevant one
22 for purposes of deciding when an intrusion into
23 the home is proper.

24 So just to give you an example, most
25 domestic violence laws continue to be

1 misdemeanors, and then, on the other hand, as
2 Justice Sotomayor said, most white-collar fraud
3 offenses are felonies. That -- that doesn't
4 seem to make a whole lot of sense with respect
5 to when you would allow intrusions into the home
6 and when not.

7 MR. HARBOURT: Your Honor, it's not
8 just the distinction between felonies as a class
9 and misdemeanors as a class as to the likelihood
10 that the offense will involve violence. Another
11 key distinction is that the penalties in
12 felonies on the whole are going to be quite a
13 bit more severe than the penalties authorized
14 for misdemeanors. And that's relevant here
15 because the -- the authorized penalties in a
16 felony case, I mean, decades or more in state or
17 federal prison, is going to provide a quite
18 powerful incentive to felony suspects to -- to
19 attempt to escape and permanently evade
20 apprehension or perhaps destroy evidence. And
21 those are exigent circumstances as well.

22 And we think in a felony pursuit
23 context, considered as a class, one or more of
24 those exigencies is pretty likely to arise in
25 your average felony pursuit case.

1 JUSTICE KAGAN: Thank you,
2 Mr. Harbourt.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch.

5 JUSTICE GORSUCH: Good morning,
6 counsel. I think my colleagues have kind of
7 pointed out two -- two difficulties with your
8 argument. First, Justice Breyer points out that
9 different states have different rules about what
10 a felony is and what a misdemeanor is, and it
11 would seem odd that the Constitution would -- in
12 its meaning, would depend upon the happenstance
13 of positive state law. And, second, we live in
14 a world in which everything has been
15 criminalized. And some professors have even
16 opined that there's not an American alive who
17 hasn't committed a felony in some -- under some
18 state law.

19 And in a world like that, why does it
20 make sense to retreat back to the original
21 meaning of the Fourth Amendment, which I'm going
22 to oversimplify but generally says that you get
23 to go into a home without a warrant if the
24 officer sees a -- a violent action or something
25 that's likely to be -- lead to imminent

1 violence? That -- that's vastly
2 oversimplifying, but why isn't -- why isn't that
3 the right approach?

4 MR. HARBOURT: Your Honor, we
5 absolutely agree that the Court should take the
6 approach of looking to the original
7 understanding of the Fourth Amendment and in
8 particular to the common law history and
9 tradition.

10 I think we understand the common law
11 history possibly it sounds like a little bit
12 differently than you do. As we understand it,
13 the leading common law commentators that our
14 founders would have looked to all
15 comprehensively addressed officer authority to
16 enter homes without warrants in pursuit of
17 suspects, and they allowed such entries in
18 limited situations: A, in felony cases, and B,
19 in a certain small subset of misdemeanor cases
20 involving serious danger --

21 JUSTICE GORSUCH: And what unified
22 that entire class of cases seems to be, again,
23 some actual violence or its imminent threat.
24 And the -- what -- what qualified as a felony at
25 common law was -- were very few crimes and they

1 were all punished by the death penalty usually,
2 and today pretty much again anything or
3 everything can be called a felony.

4 MR. HARBOURT: Your Honor, felonies
5 at -- at common law are certainly a more limited
6 subset than they are today. They weren't all
7 violent, though. Larceny, for example, was
8 treated as a felony, so we do think that the
9 felony pursuit rule at common law is a pretty
10 good analog for the categorical rule that we
11 read this Court's precedent as accepting in
12 Santana and other cases.

13 JUSTICE GORSUCH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh.

16 JUSTICE KAVANAUGH: Thank you.

17 And good morning, Mr. Harbourt.
18 Following up on Justice Gorsuch, I thought
19 everyone here concedes that even if there's not
20 a categorical rule the Exigent Circumstances
21 Doctrine would apply. Is that correct?

22 MR. HARBOURT: On the facts of this
23 case, Your Honor, or --

24 JUSTICE KAVANAUGH: Not -- not on this
25 case, just in general that the -- you could get

1 into the house based on exigent circumstances
2 without a warrant, correct?

3 MR. HARBOURT: That -- that's correct,
4 Your Honor. We -- we're --

5 JUSTICE KAVANAUGH: Okay. And then
6 one of the exigent circumstances that I
7 mentioned to Mr. Fisher was prevent a suspect's
8 escape from Minnesota versus Olson. You agree
9 with that too?

10 MR. HARBOURT: We do, Your Honor, and
11 the reason that we --

12 JUSTICE KAVANAUGH: And that wouldn't
13 necessarily always have what Justice Gorsuch was
14 talking about with respect to violence. It
15 could, it might not, but I think everyone's
16 conceded -- in this case, you and Mr. Fisher --
17 or acknowledged, I don't want to put it
18 pejoratively, but acknowledged what the law is
19 that preventing escape is an exigent
20 circumstance that would justify warrantless
21 entry into the house, correct?

22 MR. HARBOURT: That's correct, Your
23 Honor.

24 JUSTICE KAVANAUGH: Okay. And then,
25 on the common law, the amicus at page 23 -- and

1 this is picking up on a question Justice Barrett
2 asked and Justice Thomas asked to Mr. Fisher --
3 page 23 of the amicus brief says a warrantless
4 arrest at common law could always be made
5 whenever a person was lawfully arrested for any
6 cause and afterwards escaped and sheltered
7 himself in a house.

8 Now, of course, that's after an
9 arrest, but I think Justice Barrett's questions
10 pointed out, this is an extremely close analogue
11 in many circumstances. What's your response to
12 that aspect of the common law?

13 MR. HARBOURT: Your Honor, it -- my
14 response is that it's not an extremely close
15 analog. There is a critical difference between
16 an escape from a full-blown custodial arrest,
17 which is inherently risky and often going to
18 involve violence, and hot pursuit as broadly
19 defined by the Court in Santana, which can
20 extend to as little as one or two steps from the
21 front porch, the front yard, or even, as in
22 Santana itself, the immediate doorway area into
23 the home.

24 And that is just not inherently risky
25 or dangerous conduct or conduct that suggests

1 we're dealing with a suspect who poses an
2 ongoing danger to himself or others or to
3 society or who poses a risk of, you know,
4 bolting out of a back door and making a run for
5 it while the police standing outside pursue by
6 foot or -- or by car.

7 JUSTICE KAVANAUGH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett.

10 JUSTICE BARRETT: Good morning, Mr.
11 Harbourt. So you just told Justice Kavanaugh
12 that even if we say that the common law had a
13 rule that was limited to felonies, that you
14 agree that exigent circumstances would justify
15 a -- a warrantless entry into the home.

16 If, in fact, the common law rule was
17 quite narrow and said warrantless entries into
18 the home only when there are felonies, breaches
19 of the peace in affrays, and escapes from
20 arrest, why wouldn't that end the matter? Tell
21 me -- explain to me what your rationale is for
22 saying that you would then go on to exigent
23 circumstances.

24 MR. HARBOURT: Well, Your Honor, two
25 responses. One is just a -- a quibble with the

1 understanding of the common law rule. We -- we
2 don't -- we disagree with the Court-appointed
3 amicus that a breach of the peace could be a
4 sufficient basis to justify a warrantless home
5 entry in pursuit of the suspect at common law.

6 JUSTICE BARRETT: Okay. That's fine.
7 Put that aside. Just answer the main question.

8 MR. HARBOURT: Beyond that, Your
9 Honor, as -- as -- as we understand, we agree
10 with petitioner that there were common law
11 analogues to the case-specific Exigent
12 Circumstances Doctrine.

13 For example, if an officer was aware
14 of an affray or an ongoing fight in someone's
15 home or witnessed an affray outside, that could
16 involve violence and ongoing risk of violence
17 that could justify pursuing the suspect into the
18 home. So there were analogs at common law to
19 the case-by-case exigency standard.

20 JUSTICE BARRETT: But why then
21 wouldn't you just be in alignment with Mr.
22 Fisher and say it's exigent circumstances all
23 the way down?

24 MR. HARBOURT: Well, here, Your Honor
25 --

1 JUSTICE BARRETT: I guess I don't
2 really understand because, in -- in the
3 misdemeanor cases that you're positing, they
4 just kind of fall in a different category.
5 You're saying most just fall into the same kind
6 of, like, break in the door because there's a
7 dispute going on inside or there's a fire or
8 there's some danger.

9 Why isn't it all then just exigent
10 circumstances, as Mr. Fisher proposes?

11 MR. HARBOURT: For two reasons, Your
12 Honor. I think principally because we read this
13 Court's precedent as already recognizing a
14 categorical hot pursuit exception in the felony
15 context, but setting that aside and focusing on
16 the common law, we do read the leading common
17 law commentators that our founders would have
18 looked to as endorsing a categorical pursuit
19 rule in the felony context.

20 CHIEF JUSTICE ROBERTS: A minute to
21 wrap up, Mr. Harbourt.

22 MR. HARBOURT: Thank you. It's
23 settled that officers may immediately pursue
24 suspects into homes when case-specific
25 exigencies exist. And we think it's also

1 settled that officers may enter a home without a
2 warrant if they have probable cause to believe a
3 fleeing suspect has committed a felony.

4 But, in our view, when an officer
5 cannot make out probable cause of a felony or
6 point to any specific harm that would result
7 from waiting to get a warrant, the Constitution
8 should require that officer to get a warrant.
9 That approach is the one most consistent with
10 history and precedent as well as respect for
11 privacy in the home.

12 Under a categorical rule by contrast,
13 police could make warrantless entries based on
14 probable cause of any misdemeanor, even for
15 minor offenses like littering or loitering,
16 whenever a suspect disobeys police and takes a
17 few steps into his home.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Ms. Rice.

22 ORAL ARGUMENT OF AMANDA K. RICE

23 COURT-APPOINTED AMICUS CURIAE

24 IN SUPPORT OF THE JUDGMENT BELOW

25 MS. RICE: Thank you, Mr. Chief

1 Justice, and may it please the Court:

2 The Fourth Amendment generally
3 requires officers to get warrants before
4 entering homes. But the warrant requirement is
5 subject to exceptions, and hot pursuit is one of
6 them.

7 The hot pursuit exception justifies
8 warrantless home entry in a narrow class of
9 cases where a suspect tries to thwart a lawful
10 public arrest by outracing an officer to a
11 dwelling.

12 This Court has never suggested that
13 the hot pursuit exception turns on the
14 classification of the underlying offense. It
15 should now expressly hold that it does not. The
16 justifications for the exception relate to the
17 suspect's flight, not the nature of his initial
18 crime.

19 Officers cannot be expected to
20 accurately classify offenses in the midst of a
21 chase, and this Court's reasoning in *Atwater*,
22 which rejected a felony/misdemeanor distinction
23 for public arrests, applies with equal force
24 here.

25 Unable to defend a felony-only hot

1 pursuit rule, petitioner now suggests that hot
2 pursuit isn't actually a distinct exception to
3 the warrant requirement at all. Instead, he
4 claims that officers must point to exigencies
5 other than a hot pursuit even in felony cases.

6 No court appears to have taken that
7 view, nor do any of the states on either side of
8 this case support it. For good reason. The hot
9 pursuit exception is settled law and it protects
10 important law enforcement interests that
11 categorically outweigh privacy interests when a
12 suspect decides to flee.

13 To be clear, the fact that the
14 Constitution permits officers to enter homes in
15 hot pursuit cases does not mean that they must
16 always do so. State law and department policies
17 can and do limit the circumstances in which
18 officers pursue fleeing suspects.

19 But this Court should not
20 constitutionalize those nuanced local policy
21 judgments, particularly not along a line as
22 wobbly as the one between felonies and
23 misdemeanor.

24 I look forward to the Court's
25 questions.

1 CHIEF JUSTICE ROBERTS: Counsel, a lot
2 of your argument is focused on uncertainties,
3 you know, the officers don't know why the person
4 is fleeing, they don't know what he might do in
5 -- inside the house, that sort of thing. And I
6 understand that to be the basis for your support
7 of a categorical rule. But there are going to
8 be some cases where there aren't -- there isn't
9 really any uncertainty. You know, some that
10 have been suggested, the -- you know, the group
11 of teenagers in the empty lot drinking, drinking
12 beer, and the officer comes up and they all --
13 all take off.

14 Why isn't it -- and it may not be a
15 case-by-case approach, but I guess close to what
16 the Solicitor General is suggesting, which is a
17 -- a presumption. I mean, do you really need to
18 have the right of hot pursuit in the case that
19 I've hypothesized? You know, no real basis for
20 chasing the -- the 18 -- or the 18-year-old
21 drinking beer with his friends into -- into his
22 parent's house?

23 MS. RICE: Chief Justice Roberts, the
24 hot pursuit rule serves a crucial law
25 enforcement interest in every case by

1 eliminating perverse incentives for suspects to
2 flee. Flight itself can be dangerous, and it
3 always undermines the rule of law. And as you
4 suggest, it can be impossible to know in the
5 heat of the moment which cases present risks to
6 greater or lesser degrees.

7 But one thing we know for certain, as
8 Justice Kavanaugh points out, is that the group
9 of suspects implicated in hot pursuit cases have
10 already shown themselves to be interested in
11 escape.

12 CHIEF JUSTICE ROBERTS: Yeah, but the
13 reason -- the reason that a teenager drinking
14 beer is interested in escape, you know, is
15 hardly -- it doesn't seem to be -- to be
16 something that would warrant the officer, you
17 know, breaking into the house.

18 MS. RICE: An officer could certainly
19 decide not to pursue under those circumstances,
20 Chief Justice Roberts, but the Constitution
21 doesn't require that they do so.

22 To your question about the presumption
23 the Solicitor General's brief suggests, the
24 presumption is better than a pure case-by-case
25 rule because it better reflects the categorical

1 balance of the interests and it provides more
2 guidance on the margins, but it also suffers
3 from merely all of the same flaws. There's not
4 a doctrinal basis for it, as Santana and
5 subsequent cases articulate a rule and not a
6 presumption. It still relies on the line
7 between felonies and misdemeanors. I'm not sure
8 which cases would be covered by it, so it
9 suffers from the same administrability
10 questions. And like a case-by-case rule, it
11 invites constitutional litigation over these
12 difficult heat-of-the-moment judgments.

13 CHIEF JUSTICE ROBERTS: Justice
14 Thomas.

15 JUSTICE THOMAS: All right, thank you,
16 Mr. Chief Justice.

17 Counsel, I'd like to refer back to
18 Justice Alito's first question about looking at
19 hot pursuit in a more rigorous way. Wouldn't
20 your argument be a bit easier if, for example,
21 in this case, it was actually a hot pursuit
22 rather than this kind of meandering pursuit that
23 we have here?

24 MS. RICE: Justice Thomas, there's no
25 dispute in this case that there was a hot

1 pursuit. That's the premise of the petition for
2 certiorari. And Santana made clear that while
3 some sort of chase is required, there need not
4 be an extended hue and cry in the streets.

5 So I agree that there are limits on
6 what a hot pursuit is, but I -- I would resist
7 your suggestion that this case didn't implicate
8 one.

9 JUSTICE THOMAS: Well, it -- you --
10 you do cite Santana and I think we've read it
11 that way. But do you -- do you have any cases
12 that say expressly that a warrantless entry is
13 -- is available even in cases of -- or in cases
14 of all misdemeanors as opposed to some
15 misdemeanors?

16 MS. RICE: Justice Thomas, I'm not
17 sure of a case this Court has ever addressed
18 that question directly, but Santana's holding
19 was framed categorically, and in each of the
20 times where this Court has subsequently referred
21 to hot pursuit, and there's a fair number of
22 them, as Justice Kagan suggested, it has
23 referred to hot pursuit as a categorical
24 justification for warrantless entry. It has
25 never suggested that some other exigency is

1 required or that the exception is limited to
2 fleeing felons.

3 JUSTICE THOMAS: So, in -- in other
4 words, we've never expressly said all
5 misdemeanors, whether they are -- they involve
6 dangerous settings or not, were subject to
7 warrantless entry?

8 MS. RICE: That's correct, Justice
9 Thomas. You've never expressly said that.

10 JUSTICE THOMAS: One last question
11 with respect to the common law. If we think
12 that there is some doubt as -- as to whether or
13 not common law favors you or if we think it
14 actually disfavors you, what should we do?

15 MS. RICE: Like in Atwater, this just
16 isn't a case where there was a clear answer that
17 existed in 1791 and has been adhered to ever
18 since. So like in Atwater, Justice Thomas,
19 other modes of constitutional analysis, like the
20 traditional interest balancing we've been
21 discussing today, should control.

22 JUSTICE THOMAS: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Breyer.

25 JUSTICE BREYER: Well, I mean, this is

1 a tough case. Justice Goldberg when he -- on a
2 different subject many years ago, he spoke of a
3 cruel trilemma. Well, here, if we take your
4 view, then it seems like the home isn't the
5 castle at all for the most trivial of things. I
6 mean, many examples -- I like the rabbit
7 example. I don't know why California has made
8 it a crime to give a rabbit as a lottery prize
9 or something. But, I mean, it seems ridiculous
10 when your home isn't your castle for terribly
11 minor things.

12 If we take the opposite view, we lose
13 the benefits of a bright line where hot pursuit
14 is really serving an important purpose. And if
15 we take the middle thing, we have to do this
16 distinction, misdemeanors and felonies, which is
17 tough.

18 In your reading for this, because you
19 did a good job of preparing, did you come across
20 anything that sort of listed for us the reasons
21 for hot pursuit and why it's there as a special
22 category so you might say, look, hot pursuit
23 where these reasons are there, but not hot
24 pursuit, has to be just the regular exigency,
25 where the crime is minor, somehow defined? Have

1 you come across something I could read on that?

2 MS. RICE: Justice Breyer,
3 unfortunately, I'm not sure I have a source for
4 you that gives a clear answer to that, but I
5 think Santana itself made clear that hot pursuit
6 always serves important law enforcement
7 interests, in particular in identifying suspects
8 and presenting their escape and ensuring officer
9 and resident safety.

10 JUSTICE BREYER: Yeah, I know those
11 things, that's true, but what -- I mean, look,
12 the rabbit case, I mean, that's ridiculous. The
13 policeman can just get into your house when you
14 went inside your house because you once sold a
15 rabbit as a prize?

16 MS. RICE: I agree that that sounds
17 like a pretty silly law --

18 JUSTICE BREYER: Yeah.

19 MS. RICE: -- Justice Breyer.

20 JUSTICE BREYER: But -- but, I mean,
21 we can think about 50 of those when you start
22 getting into misdemeanors. It's how I just --
23 that's dramatic.

24 MS. RICE: The key --

25 JUSTICE BREYER: But what do we do

1 about the 50 or a thousand, the parking -- you
2 know, parking tickets or all kinds of things?

3 MS. RICE: Hot pursuit only allows
4 officers to enter a home, Justice Breyer, when
5 the suspect makes the decision to bring a public
6 encounter inside a home. So a suspect can
7 always avoid any intrusion into a home by
8 deciding not to flee inside, particularly in
9 these sorts of silly cases. I think as Chief
10 Justice Roberts suggested, if the suspect
11 nevertheless decides to flee into a home, those
12 might be the very cases where something worse is
13 actually afoot.

14 JUSTICE BREYER: Okay. I will -- I
15 will think about it. Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Alito.

17 JUSTICE ALITO: Doesn't a hot pursuit
18 or any pursuit require an attempt to avoid
19 arrest?

20 MS. RICE: I -- I think that's fair to
21 say, Justice Alito.

22 JUSTICE ALITO: All right. And -- and
23 the question that we accepted includes the
24 term -- includes the phrase, "a state law
25 enforcement officer's pursuit" of the

1 petitioner. The court below held only that a
2 reasonable person in Mr. Lange's position would
3 have seen the police lights and understood that
4 the police officer was trying to stop him. But
5 there is no hold -- there is no finding, and
6 there is no holding, that he was attempting to
7 avoid arrest.

8 MS. RICE: So in Fourth Amendment
9 cases, as Justice Sotomayor suggested earlier,
10 the question focuses on the perspective of the
11 police officer and what a reasonable officer in
12 the officer's shoes would have understood to be
13 going on. And so I -- I do think in this case,
14 when the officer turned on his lights and
15 Mr. Lange decided not to stop, but instead to
16 pull into his garage and begin closing the door,
17 that Officer Weikert had probable cause to
18 arrest him for a misdemeanor, and the minimal
19 intrusion into his garage allowed him to
20 apprehend the petitioner there without going
21 further into the home.

22 JUSTICE ALITO: No matter whose
23 perspective we look at this from, the officer's
24 perspective, Mr. Lange's perspective, isn't the
25 question whether he tried to get into his house

1 for the purpose of evading arrest? And it
2 wouldn't be a subjective inquiry; it would be an
3 objective inquiry. Would an objective -- taking
4 a look at this video, objectively was this an
5 attempt to evade arrest?

6 MS. RICE: I think so, Justice Alito.
7 When an officer turns on his lights and a and
8 decides not to pull over but, instead, to enter
9 into a garage and close the door. I think
10 whether you're talking about the reasonable
11 officer or the reasonable suspect, that is an
12 attempt to thwart a lawful public arrest.

13 JUSTICE ALITO: Well, that wasn't
14 something that was held by the lower court.
15 That wasn't the standard the lower court
16 applied. And I will tell you, looking at this
17 video, I -- I see no attempts to avoid arrest.

18 I see somebody who -- who may well
19 have not have even noticed these lights and
20 simply proceeded into his own garage.

21 MS. RICE: Again, Justice Alito, I
22 think there is no dispute here that this
23 qualified as a hot pursuit. If you disagree, I
24 suppose the Court could dismiss this case as
25 improvidently granted, but I don't think that's

1 necessary.

2 There was a hot pursuit in this case
3 because a reasonable person in petitioner's
4 shoes would have seen the lights and known
5 that --

6 JUSTICE ALITO: Why do you say there
7 is no dispute that this was a hot -- that this
8 was a hot pursuit? I thought that was baked
9 into the question that we agreed to decide?

10 MS. RICE: I don't think so, Justice
11 Alito. I -- I think the question presented is
12 about whether the hot pursuit exception extends
13 to misdemeanors, not about whether this was a
14 hot pursuit at all.

15 JUSTICE ALITO: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor.

18 JUSTICE SOTOMAYOR: Counsel, assuming
19 that I find the common law unclear on the
20 margins, but I don't find it unclear that the
21 common law by its nature allowed for entry --
22 warrantless entries into the home only for a
23 certain -- not -- not for offenses that were
24 minor, but every offense it listed was -- or --
25 or exception that it created was for serious

1 offenses, not minor ones.

2 How can I -- how can we ignore that
3 teaching of the common law? And I guess I go
4 back to Justice Gorsuch's point that perhaps we
5 should just hue to the common law more strictly
6 and recognize exceptions only that reflect the
7 teachings of the common law, so exigent
8 circumstances, hot pursuit for serious offenses
9 that themselves, like the Solicitor General
10 suggest -- suggest a basis for entry or a need
11 for entry.

12 Why don't we just adopt the exception
13 without reference to labels, like felony or
14 misdemeanor, but go back to whether or not the
15 protection was necessary and the crime reflected
16 the issues that the common law thought important
17 to justify warrantless entry?

18 MS. RICE: Justice Sotomayor, I -- I
19 agree that the felony/misdemeanor label isn't
20 particularly helpful in this context, but to
21 answer your question about the common law, if
22 you think the common law tracks some kind of
23 distinction between breaches of the peace and
24 other kinds of misdemeanors, I emphasize that
25 Atwater considered exactly that kind of

1 distinction and declined to distinguish between
2 common law breaches of the peace and other kinds
3 of misdemeanors in the context of public
4 arrests.

5 And it would be pretty strange then to
6 try to draw that line for offenders who decide
7 to flee a public arrest. I say, too, that I'm
8 not sure that anyone here is advocating for a
9 breach of the peace type line. Instead, whether
10 you're talking about a case-by-case rule or a
11 presumption, the things that those -- that the
12 cases would seem to turn on, don't relate to the
13 severity of the offense but, in fact, whether,
14 you know, in the language of Petitioner, other
15 exigencies existed.

16 I think hot pursuit is an exigency and
17 so that -- that additional analysis is
18 unnecessary, but it certainly doesn't seem to
19 turn on any kind of breach of the peace or other
20 common law baseline.

21 JUSTICE SOTOMAYOR: Thank you,
22 counsel.

23 CHIEF JUSTICE ROBERTS: Justice Kagan.

24 JUSTICE KAGAN: Ms. Rice, if you look
25 at our Fourth Amendment cases, you read them as

1 a group, over and over and over they all talk
2 about the home as the sacrosanct place, the
3 place of greatest protection. Everything else
4 is compared to that and found not to be quite
5 the thing that the Fourth Amendment protects.
6 That's the central thing. Do you -- do you
7 disagree with that?

8 MS. RICE: I don't agree with that,
9 Justice Kagan.

10 JUSTICE KAGAN: Okay. So if I
11 understand your argument, the way you kind of
12 get around that is -- is by saying that in these
13 hot pursuit cases the suspect makes a decision
14 to go into the home. It's almost a kind of
15 waiver argument. Is -- is that what you're
16 saying?

17 MS. RICE: I think the fact that the
18 encounter begins in public and the suspect
19 decides to bring the encounter into the home is
20 relevant. I don't know that I would classify it
21 as waiver, and I -- I don't think it fits in the
22 framework of consent, but I do think it
23 diminishes the suspect's interest in the privacy
24 of his home.

25 JUSTICE KAGAN: I -- I guess what I'm

1 thinking of is this: I'm trying to see why we
2 would make any kind of distinction between this
3 sort of case where the encounter begins in
4 public and then goes into the home, and take
5 another kind of case, which is -- which is
6 Payton, where -- where the holding, of course,
7 was that the police can't enter a home to arrest
8 a felon without a warrant or without exigent
9 circumstances, even if the felon is doing a
10 crime right in his home. So why would we
11 distinguish between the two?

12 MS. RICE: I -- I think the difference
13 between those two cases is crucial here, Justice
14 Kagan. The point of the hot pursuit exception
15 is that a suspect can't bootstrap the privacy
16 protections of the home onto a public arrest
17 through culpable conduct.

18 And so the decision to flee inside, I
19 think, makes the constitutional difference
20 between the Payton case and a hot pursuit case.

21 JUSTICE KAGAN: But I guess that's
22 what -- what I'm -- I'm suggesting, that there's
23 really no distinction at all. In the Payton
24 case, the -- the -- the person is also making a
25 decision to do the crime, you know, let's --

1 let's say that he is engaged in a massive fraud
2 and he's -- he's decided, hey, what a great
3 idea, I'm going to use my home to do this rather
4 than my office.

5 So, I mean, you have the same kind of
6 thing where the person is basically leveraging
7 the fact that the home is protected, you know,
8 in order to get greater protection. And yet, in
9 Payton, we said doesn't matter.

10 MS. RICE: Justice Kagan, I -- I think
11 it's always the case, you're right, that a
12 suspect decides to commit a crime and so is
13 culpable in that sense, but changing the
14 location of the encounter from a public space to
15 a privacy space and then claiming, sorry, I'm in
16 my home, it's a private space, you can't come
17 in, isn't the kind of conduct that the Fourth
18 Amendment is prepared to recognize -- recognize
19 as reasonable.

20 JUSTICE KAGAN: Thank you, Ms. Rice.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch.

23 JUSTICE GORSUCH: Ms. Rice, you did
24 some very careful work looking at some of the
25 founding era sources, and I'd just like to ask

1 you, were you able to locate anything that
2 suggests that officers have the power to enter
3 the home in pursuit of any and all misdemeanor
4 crimes or, in the SG's version, presumptively
5 allowed to do so for any and all misdemeanors?

6 MS. RICE: Justice Gorsuch, I'm not
7 sure there's a common law source that says that
8 expressly, so as -- as Justice Thomas mentioned
9 earlier, I think that authority is clear in the
10 context of escapees, so after an arrest has been
11 completed.

12 Conversely, though, I'm not sure if
13 Petitioner or California has identified a single
14 common law case where a warrantless entry of an
15 officer in hot pursuit of a misdemeanant gave
16 rise to a common law trespass suit, much less --

17 JUSTICE GORSUCH: Okay. I'm sorry to
18 interrupt, but just given our limited time,
19 given that there is no common law authority for
20 the rule you propose of any and all misdemeanors
21 or the rule that the Solicitor General proposes,
22 presumptively for any and all, if we can accept
23 that, accepting that there are also some
24 concerns about what breach of the peace or
25 escape meant, I guess I'm back to where Justice

1 Sotomayor is.

2 Why would we create a rule that is
3 less protective than what everyone understands
4 to be the case of the Fourth Amendment as
5 original matter? Why would we adopt a rule we
6 know is wrong as an original matter?

7 MS. RICE: Justice Gorsuch, I'm not
8 sure it's as simple as that. I don't think we
9 know the rule is wrong --

10 JUSTICE GORSUCH: Well, I -- I -- I
11 thought we just agreed that -- that there is no
12 rule at common law that any and all misdemeanors
13 allow entry of the home in exigent -- in -- in
14 hot pursuit or the Solicitor General's view. I
15 thought that was common ground. I'm sorry.

16 MS. RICE: No -- no worries, Justice
17 Gorsuch. I think the point is that the common
18 law just doesn't map on very well to the
19 question presented in this case, and that's true
20 for a number of reasons, including that an
21 unlawful entry would not have provided a basis
22 for overturning a conviction but also because
23 some authorities, which were debated in Payton,
24 suggested that a warrant wasn't required to
25 enter a house to make an arrest in the first

1 place. So the hot pursuit justification
2 wouldn't have been necessary.

3 I -- I think it's fair to say that
4 there just wasn't a clear answer here at common
5 law, and so other modes of constitutional
6 analysis should control.

7 JUSTICE GORSUCH: Well, I guess I -- I
8 guess I'm still stuck where I was. I don't know
9 why we would adopt a rule that's less protective
10 than the original meaning.

11 But let me ask you another question.
12 You raise concerns about an officer's ability to
13 distinguish between felonies and misdemeanors as
14 one reason for your rule. But there's also the
15 line between misdemeanors and infractions that
16 are non-jailable. And if misdemeanors and
17 felonies have proliferated in recent years, the
18 number of these infractions has skyrocketed.
19 Non-jailable traffic offenses, fire code
20 violations -- you choose. Rabbits.

21 Does your rule allow an officer to
22 enter the home for a violation of a regulatory
23 rule as well and, if not, why is drawing that
24 line preferable to drawing the
25 misdemeanor/felony line?

1 MS. RICE: Justice Gorsuch, the slip
2 here and the cert petition are limited to
3 jailable misdemeanors. So you -- you don't need
4 to resolve that question in this case. I would
5 say, though, that Atwater declined to draw a
6 line between jailable and fine-only offenses.
7 So I -- I think the hot pursuit rule -- rule
8 would probably extend to such offenses as a --

9 JUSTICE GORSUCH: Thank you.

10 MS. RICE: -- matter of logic.

11 JUSTICE GORSUCH: Thank you.

12 MS. RICE: But --

13 JUSTICE GORSUCH: I appreciate that.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh.

16 JUSTICE KAVANAUGH: Thank you, Chief
17 Justice.

18 Good morning, Ms. Rice. First, I want
19 to explore how much is really at stake or how
20 much of a difference there would be between the
21 two positions here for officers on the ground in
22 the wake of our decision. So I understand your
23 position to be that there should be a rule, a
24 categorical rule, and it seems to me the reason
25 to have a categorical rule is because often, if

1 not always, there will be some kind of exigency
2 involved when you had a how -- a hot pursuit,
3 destruction of evidence, danger to others,
4 escape of the suspect. I guess that cuts both
5 ways, though, because one could say, well, you
6 don't need a categorical rule because you
7 already have the Exigent Circumstances Doctrine
8 that covers all the things that justify the
9 categorical rule.

10 So I guess I'm wondering what the real
11 difference in practice would be between a world
12 where we have a categorical rule and a world
13 where we allow all the exigent circumstances
14 doctrine cases to apply as they exist now.

15 MS. RICE: Justice Kavanaugh, I think
16 you're right to suggest that the fact of the
17 suspect's flight is itself an exigency and so is
18 likely to be dispositive of the
19 interest-balancing in every case. But I think
20 then that the -- the case-by-case type rule is
21 -- is only depriving officers and courts,
22 frankly, of the kind of clear rule that this
23 Court has said is particularly important where
24 officers need to make quick decisions. It's
25 also inviting constitutional litigation about

1 those same quick decisions.

2 So, if you think that in every case
3 or, as Atwater suggested, in most cases the
4 balance of the interests will cut this way, the
5 -- this Court's general preference for clear
6 categorical rules should carry the day.

7 JUSTICE KAVANAUGH: Let me ask you a
8 question now about methodology, a word, the
9 original meaning of the term "unreasonable" in
10 the Fourth Amendment. It seems to me that's a
11 different kind of term than "search" or
12 "seizure" or "cruel and unusual," and
13 "unreasonable" means unreasonable. So what
14 we're really talking about is not original
15 meaning or original intent or even original
16 expected application because I don't -- I'm not
17 aware of anyone in the first Congress or in the
18 state ratifying processes that said unreasonable
19 means the common law, unlike -- and the text is
20 unlike the Seventh Amendment, which refers to
21 the common law expressly. And Professor LaFave
22 and others have pointed this out. So it's not
23 really original meaning or even original intent.
24 It's more like presumed original expected
25 applications, like a Justice Douglas-style

1 interpretation. No offense to Justice Douglas,
2 but a little more free form than what we usually
3 talk about when we talk about original meaning.
4 I just want to get your response to that.

5 MS. RICE: I think that's right,
6 Justice Kavanaugh, that it's -- it's unlikely
7 that the founders meant to freeze into place
8 particular applications of -- of reasonableness.
9 Instead, I think it's fair to understand that
10 term as one better served by a -- a sort of
11 categorical interest-balancing.

12 JUSTICE KAVANAUGH: Thank you,
13 Ms. Rice.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett.

16 JUSTICE BARRETT: Good morning, Mrs.
17 Rice -- Ms. Rice. I have a question about
18 whether -- what it meant to breach the peace,
19 you know, so that seems to be kind of a
20 capacious category, and there's some dispute
21 about what would fall within it. Is there any
22 argument that resisting arrest, that resisting a
23 constable would have been a breach of peace at
24 common law?

25 MS. RICE: Justice Barrett, I'm not

1 aware of any authority directly on that point,
2 though I think you're absolutely right that it's
3 very unclear which offenses would and would not
4 have constituted breaches of the peace at common
5 law. In fact, that's one of the reasons why
6 this Court in Atwater declined to distinguish
7 between common law breaches of -- of the peace
8 and other kinds of misdemeanors.

9 JUSTICE BARRETT: I assume it was a
10 crime. Do you know?

11 MS. RICE: I -- I believe it was,
12 Justice Barrett.

13 JUSTICE BARRETT: And you -- but you
14 don't know whether -- I mean, it certainly
15 doesn't fall within one of the common law
16 felonies. So does that mean it was a
17 misdemeanor to do that, to resist arrest?

18 MS. RICE: I don't know the answer to
19 that question, but I -- I think, at common law,
20 a suspect generally had no right to resist a
21 lawful arrest, and resistance to lawful
22 apprehension could be prosecuted. I -- I don't
23 know that that was a felony.

24 JUSTICE BARRETT: Ms. Rice, let me ask
25 you another question. I thought your brief was

1 a little bit equivocal about whether your
2 concept of pursuit would require knowledge that
3 you were being chased or not. So is your
4 rationale for this that, you know, someone
5 who -- well, the cop could have arrested the
6 defendant in public, and so the police officer
7 can follow the defendant into the house to
8 finish in private what was started in public?
9 Or does it rely on some kind of consciousness of
10 being chased?

11 MS. RICE: Justice Barrett, I think,
12 like other Fourth Amendment standards, it
13 doesn't rely on any subjective knowledge, but I
14 think a reasonable person in the suspect's shoes
15 must understand that he's not free to leave.
16 It's difficult to understand even the concept of
17 flight or Santana's language around thwarting a
18 public arrest without that kind of, you know,
19 reasonable basis for understanding that they're
20 not free to leave.

21 JUSTICE BARRETT: So you would concede
22 that we would have to ask, if we adopted your
23 rule, whether the police officer -- whether a
24 reasonable police officer could have understood
25 the suspect to be fleeing as opposed to just

1 going about his business, not seeing the police
2 officer, and moving into the house?

3 MS. RICE: Correct, Justice Barrett, I
4 think that that's a limit on the hot pursuit
5 rule.

6 JUSTICE BARRETT: Okay. Thank you,
7 Ms. Rice.

8 CHIEF JUSTICE ROBERTS: Ms. Rice, a
9 minute to wrap up.

10 MS. RICE: Thank you, Mr. Chief
11 Justice. In this case, Officer Weikert's
12 split-second decision to stop the garage door
13 from closing was a reasonable minimal intrusion
14 that almost certainly prevented Petitioner from
15 getting away with drunk driving by refusing to
16 heed the officer's lawful order to stop. So the
17 decision below should be affirmed under any of
18 the rules advocated here today.

19 So the categorical hot pursuit rule,
20 that reflects precedent, appropriately balances
21 law enforcement and privacy interests, provides
22 necessary guidance to officers, and avoids
23 unnecessary constitutional litigation. The
24 justifications for that rule apply to felonies
25 and misdemeanors alike, and it is exceedingly

1 narrow.

2 In the end, the categorical hot
3 pursuit rule does nothing more and nothing less
4 than prevent suspects from grafting the
5 protections of the home onto lawful public
6 encounters by engaging in wrongful conduct.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Ms. Ross.

11 ORAL ARGUMENT OF ERICA L. ROSS
12 FOR THE UNITED STATES, AS AMICUS CURIAE,
13 SUPPORTING AFFIRMANCE

14 MS. ROSS: Mr. Chief Justice, and may
15 it please the Court:

16 The amicus has laid out the case for a
17 categoric rule. Our principal submission is
18 that, for many of the same reasons, the Court
19 should recognize at least a general presumptive
20 rule that when a misdemeanor suspect tries to
21 thwart a lawful public encounter by moving the
22 encounter to a residence, an officer's decision
23 to follow him is reasonable.

24 As the Court recognized in Mitchell
25 versus Wisconsin, a presumptive rule is

1 appropriate where the circumstances generally
2 present in a category of cases mean that law
3 enforcement interests will always or nearly
4 always outweigh the suspect's interests. That's
5 true here.

6 On the one hand, the suspect's flight
7 implicates important societal interests in
8 enforcing the law and not rewarding flight, it
9 makes it difficult for officers to obtain a
10 warrant, and it increases the risks of
11 destruction of evidence perhaps for a more
12 serious offense, further escape, or danger to
13 officers and the public.

14 On the other hand, the suspect's
15 decision to bring a public encounter to the home
16 diminishes any privacy interests he may have
17 there.

18 CHIEF JUSTICE ROBERTS: Counsel, what
19 is your understanding of the limits that apply
20 when an officer does go into the home, assuming
21 that your position -- your position that he's
22 allowed to? What exactly are the limits on what
23 he can do once he's in?

24 MS. ROSS: Certainly. So we think
25 that there are three primary limits. The first

1 is that the manner of entry itself must be
2 reasonable. The second is that the scope of the
3 entry has to comport with this Court's cases,
4 like Chimel and Buie, essentially saying that
5 it's not going to be a full-blown search of the
6 entire residence. And, third, of course,
7 officers in this context, as in all others,
8 can't use excessive force.

9 CHIEF JUSTICE ROBERTS: The manner of
10 entry must be reasonable. Well, presumably, the
11 person who fled in locked the door because, you
12 know, he didn't want the police to catch him.
13 What -- what would be -- I mean, can the officer
14 try to knock it down or what?

15 MS. ROSS: So Your Honor, I -- I guess
16 I would quibble a little bit with the idea
17 that -- that the suspect will necessarily have
18 locked the door.

19 I think in a case like this one, you
20 know, the garage door is closing. In a case
21 like Santana, the door was open. I don't think
22 that that was key to the analysis in that case,
23 so I think there will be a -- a class of cases
24 where this question actually really won't come
25 up because it will be very clear that the

1 officer's action was reasonable. I think --

2 CHIEF JUSTICE ROBERTS: Well, if the
3 door is -- if the door is locked, can he, you
4 know, break the window and get in that way?

5 MS. ROSS: So I think that will be a
6 circumstance-specific determination. I think it
7 will -- it -- it -- it is, I think, in felony
8 cases too in which we except and I think most of
9 the parties before you except and the lower
10 courts certainly have treated the hot pursuit
11 exception as a category rule.

12 CHIEF JUSTICE ROBERTS: I suppose once
13 he's inside, he can discover things that are in
14 plain sight that might indicate a violation of
15 the law, right?

16 MS. ROSS: That's correct, Your Honor.

17 CHIEF JUSTICE ROBERTS: Okay. Thank
18 you, counsel.

19 Justice Thomas.

20 JUSTICE THOMAS: Thank you, Mr. Chief
21 Justice.

22 Just a couple of quick questions,
23 counsel. Did the common law permit entry for --
24 when there was a -- a case of resisting arrest
25 after a hot pursuit?

1 MS. ROSS: Justice Thomas,
2 unfortunately, like -- like counsel, I'm not
3 aware of a specific case on that point. I do
4 know that, as others have suggested, the closest
5 analogy, I think, would be escape and in that
6 case, yes, the common law did permit that type
7 of entry.

8 JUSTICE THOMAS: But do you think that
9 escape is close enough analogy, is a close
10 enough comparator?

11 MS. ROSS: So Your Honor, I think the
12 issue here is that everyone essentially, I
13 think, acknowledges that the common law does not
14 fully answer this question and does not clearly
15 answer this question.

16 And so I think in that situation, the
17 Court should turn, as Ms. Rice said, to other
18 modes of constitutional analysis. I think
19 particularly given the water under the bridge
20 here with respect to both Santana and Atwater,
21 the Court needs to both conduct the interest
22 balancing that it traditionally does but also
23 think about administrability concerns.

24 So I think as -- just as Santana
25 recognized that we shouldn't sort of incentivize

1 individuals to flee otherwise lawful public
2 encounters with the police in the felony context
3 by backing into a home, the same is true in the
4 misdemeanor context given Atwater.

5 JUSTICE THOMAS: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Breyer.

8 JUSTICE BREYER: Well, I -- I asked
9 last time, I want you to think of the cruel
10 trilemma, okay? There is a fourth possibility
11 which your words merely always suggested. And
12 that is that we -- what do you think that we
13 could say, yes, it's almost always exigent,
14 almost always, because almost always the police
15 departments have rules and almost always it is a
16 felony and almost always there is a good reason
17 for it, dah, dah, dah.

18 And -- but, we go back to the
19 Constitution's words, reasonable, unreasonable.
20 It can show that it is not reasonable in the
21 circumstance and there'd be a number of
22 different things you'd bring into that and one
23 would be the -- the length of the -- of the
24 chase, was it just two steps or not.

25 Another would be the type of conduct

1 that led to the chase. So if it's a rabbit type
2 of conduct, that's a pretty strong reason
3 against allowing that chase into the house. And
4 another would be the availability of the
5 magistrate and the risks of escape, dah, dah,
6 dah.

7 But you point out they'd only come up
8 in a few cases. They don't normally chase
9 people for minor things. But just -- just leave
10 it at that and say reasonable and we don't have
11 an absolute rule. We thought we could answer
12 this but sometimes you just can't.

13 What do you think? I'm not saying I'm
14 for it. I just want to know what you think.

15 MS. ROSS: So Justice Breyer, I think
16 what you've said very nearly approximates the --
17 the rule that we've submitted would be
18 appropriate here.

19 I think, generally, we think that when
20 officers follow a suspect who has committed --
21 would have probable cause to believe has
22 committed a misdemeanor offense into a home that
23 is going to be reasonable, we follow the Court's
24 decision in Mitchell versus Wisconsin, which
25 left open the possibility that in -- that a

1 suspect could in an unusual case show that his
2 was essentially the unusual case where the
3 normal considerations aren't at play.

4 I think that both gives sufficient
5 guidance to officers on the beat because it's
6 not a felony and misdemeanor distinction in any
7 meaningful sense, but it really is -- is an
8 understanding that this will almost always be
9 reasonable and the officer just has to have his
10 eye out for the truly minor case for the -- the
11 things that we think are normally present in hot
12 pursuit scenarios.

13 For example, a concern about the
14 ability to identify the suspect later, a concern
15 about lots of exits, where, you know, the -- the
16 officer is on his own and he can't secure the
17 perimeter, a concern about potential violence
18 where none of those are at play.

19 JUSTICE BREYER: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice Alito.

21 JUSTICE ALITO: Would your rule be
22 different from an across-the-board exigent
23 circumstances rule? Would it apply in felony
24 cases? If IRS officers went to someone's office
25 to arrest a person for tax evasion and the

1 person slipped out and there was a chase, the
2 person went to his house, would it apply --
3 would it be open to that person to say that --
4 that -- that you should have gotten -- you
5 needed to get a warrant in that situation?

6 MS. ROSS: I don't think it would,
7 Justice Alito, I think for a couple of reasons.

8 The first is that I do take this
9 Court's decision in Santana to have
10 categorically held that the hot pursuit was
11 sufficient in that context, and that's on page
12 43 of the opinion.

13 I think for -- this Court has
14 certainly taken -- albeit not in holdings but
15 has repeatedly noted that the felon hot pursuit
16 rule is its own exception and generally isn't
17 part of the -- or -- or the other exigent
18 circumstances don't necessarily need to be
19 proved on a case-by-case basis.

20 And I also just think that your
21 hypothetical, while I guess possible, is so rare
22 that in the felony context, it makes sense to
23 have what the state refers to as a conclusive
24 presumption because --

25 JUSTICE ALITO: Well, it may not be a

1 good -- it may not be a good -- a good
2 hypothetical, but what you said takes us back to
3 this distinction between felonies and
4 misdemeanors, which is very difficult to impose
5 as a nationwide Fourth Amendment requirement.

6 MS. ROSS: I guess I respectfully
7 disagree, Justice Alito. I don't think it
8 really hinges on the felony/misdemeanor
9 distinction. I think an officer on the beat
10 will know that when a suspect who he has
11 lawfully tried to stop flees that encounter, he
12 has the authority to follow him in. That
13 doesn't mean he should as a matter of policy.
14 It just means that the Fourth Amendment doesn't
15 restrict his ability to do so.

16 And I think what we're really carving
17 out here are the very minor offenses. I think
18 if you're fleeing from a felony or -- or from a
19 serious offense, what the legislature has
20 determined to be a serious offense, in the vast
21 majority of cases, that is going to -- to be
22 enough. And -- and that's generally how the
23 Court has had categorical rules in -- in those
24 circumstances.

25 JUSTICE ALITO: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor.

3 JUSTICE SOTOMAYOR: I continue to
4 wonder why the dicta in our cases should control
5 or make -- some dicta make the assumption that
6 the mere commission of any felony justifies
7 entry into a home even in -- in hot pursuit
8 circumstances if the pursuit is not so hot.

9 And -- and maybe we -- I'm going back
10 to what Justice Alito started with earlier in
11 saying we really do need to understand what
12 those terms mean to decide this case and make an
13 absolute rule.

14 Your presumption, it sounds like you
15 want to make it a legal presumption and one that
16 needs to be rebutted by the Defendant. But I
17 don't know why we would create a legal
18 presumption, Ms. Ross.

19 Why don't we just speak practically
20 and say that there are some circumstances
21 where -- that, in many circumstances, it might
22 be justified to go into the home, but in some
23 they're not, and leave it at that. I'm not sure
24 why we go -- we need to create a legal rule.

25 MS. ROSS: Justice Sotomayor, I think

1 a legal rule is appropriate here because it will
2 make it far easier for officers on the beat to
3 understand what is expected of them and it will
4 also minimize the opportunity and temptation for
5 judicial second-guessing of encounters that have
6 to be -- and decisions that have to be made in
7 the heat of the moment based on the suspect's
8 own decision to flee a public encounter.

9 So I think this is not dissimilar
10 from --

11 JUSTICE SOTOMAYOR: Ms. Ross, the
12 Second -- the First Amendment by its nature
13 creates judicial review because it speaks about
14 reasonableness and unreasonableness. These
15 categorical rules seem to destroy that -- that
16 presumption of the First Amendment. And I don't
17 know why we should be creating more when the
18 common law didn't.

19 MS. ROSS: Justice Sotomayor, I don't
20 think that it would be stripping courts of
21 judicial review. I think the point is simply to
22 recognize how the analysis we think properly
23 conducted would come out in the vast majority of
24 cases.

25 And I think this is an important

1 point. I think Petitioner and the state in the
2 misdemeanor context removed the fact of flight,
3 at least in their briefing, I think Petitioner
4 perhaps not as much so today, but removed the
5 fact of flight from the analysis.

6 I think it weighs heavily on both
7 sides of the Fourth Amendment question here, and
8 when properly conducted, I think it would yield
9 the same results in almost every case, and,
10 therefore, we do think a presumption is
11 warranted.

12 CHIEF JUSTICE ROBERTS: Justice --
13 Justice Kagan.

14 JUSTICE KAGAN: I want to press on
15 that a little bit, Ms. Ross. I mean, I guess
16 the two questions that I have about this
17 presumption of yours is where does it come from
18 and why is it needed.

19 On the where does it come from, we --
20 we -- we -- we look at Fourth Amendment law and
21 we just don't generally see the court talking
22 about presumptions, in a couple of non-majority
23 opinions in this extremely sui generis area
24 of drunk driving, but otherwise there's just no
25 tradition in Fourth Amendment law of using

1 presumptions, as opposed to case-by-case
2 analysis of reasonableness.

3 And -- and why do you need it? There
4 are plenty of doctrines that say to a police
5 officer, you know, when in doubt maybe you can
6 take a little bit more of a risk. Qualified
7 immunity does that. In this case there's the
8 fact of the good faith exception lurking in the
9 background.

10 Why would you need a presumption
11 rather than just like you should make your best
12 shot. You should -- you should make the call
13 that you think is appropriate.

14 MS. ROSS: Justice Kagan, in terms of
15 why we think officers need this presumption, I
16 don't think it's because the -- the end result
17 is going to come out differently. I do think
18 it's an administrability issue. I think in the
19 field it is very helpful for officers to know
20 that, just as they have a conclusion of
21 presumption or an absolute rule in the felony
22 context, they generally are going to be able to
23 follow misdemeanor suspects who flee into their
24 homes.

25 I think that that reflects how the

1 accurate balancing would turn out in most cases.
2 I also think that the reason why that's true is
3 because the fact of flight itself is going to
4 implicate significant government interests in
5 the desire not to have suspects flee and
6 enforcement of the rule of law and the ability
7 to identify suspects. When --

8 JUSTICE KAGAN: And on my first
9 question, Ms. Ross?

10 MS. ROSS: Sure. So on your first
11 question I think the best analogy that we have
12 for you is Mitchell versus Wisconsin. I take
13 the -- the point that there are more misdemeanor
14 offenses than there are situations in which you
15 encounter a passed-out drunk driver. But I
16 think the methodological idea is the same, which
17 is to say that there are certain facts present
18 in a category of cases -- this is at Note 2 of
19 the Court's opinion -- that are going to bear on
20 the same -- on the analysis in essentially the
21 same way in the vast majority of cases.

22 JUSTICE KAGAN: Thank you.

23 MS. ROSS: I think if the Court is
24 more comfortable with the categorical rule,
25 that's certainly not something that we oppose

1 here given the constraints that I was discussing
2 with Chief Justice Roberts initially.

3 But I do think that --

4 JUSTICE KAGAN: Thank you, Ms. Ross.

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch.

7 JUSTICE GORSUCH: Good morning, Ms.
8 Ross. I'd like to return to the question I -- I
9 raised with Ms. Rice earlier and -- one of them,
10 at any rate -- and that is, you make a point
11 about the difficulty of an officer's ability to
12 distinguish between felonies and misdemeanors.

13 But there's also a line between
14 misdemeanors and infractions, and they are
15 multitudinous infractions these days.

16 Do you, like Ms. Rice, take the
17 position that an officer can presumptively or
18 absolutely in her -- her case proceed into the
19 home in hot pursuit of a -- of a violation of an
20 infraction?

21 MS. ROSS: So, Justice Gorsuch, I
22 think the first thing I would say is the same
23 thing that Ms. Rice said, which is that no one
24 has briefed that question in this case and --

25 JUSTICE GORSUCH: I -- I understand

1 that. But she proceeded on to answer my
2 question. I would appreciate it if you would,
3 too.

4 MS. ROSS: Certainly, Your Honor. So
5 I think that the presumptive rule that we have
6 set out here, the logic of it certainly could
7 apply.

8 I think that the unusual case probably
9 wouldn't be quite as unusual in that
10 circumstance because we do think that the -- the
11 very minor nature of the crime, not necessarily
12 how it is classified as a matter of state law,
13 but the very minor nature of the crime might
14 affect the ability of a Defendant to show that
15 his is, in Mitchell's words, the unusual case.

16 JUSTICE GORSUCH: So if we put that
17 together, that an officer can go into a home to
18 arrest for a -- an infraction, a non-jailable
19 infraction, we live in a world in which
20 everything is illegal, you put that together
21 with the good faith exception and the -- the
22 fact that an officer is not being tested on his
23 subjective intentions, which may be nefarious,
24 but whether a reasonable officer could think as
25 he did, and hot pursuit could be pretty tepid,

1 it turns out, have we come pretty close to --
2 doesn't that sound a bit like the general war --
3 world and -- and the founding that the framers
4 were so concerned about rejecting?

5 MS. ROSS: I don't think so, Your
6 Honor, for a couple of reasons. The first is
7 that I think a key fact in that fact pattern is
8 the fact that the -- the officer necessarily, at
9 least in the class of cases we're talking about
10 today, tried to have an encounter outside of the
11 home, and it's the suspect's decision to bring
12 that into the home, that occasioned the --

13 JUSTICE GORSUCH: Well, that, of
14 course, is contested. Thank you very much,
15 counsel.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh.

18 JUSTICE KAVANAUGH: Good morning, Ms.
19 Ross. I think we have a couple of options here
20 as people have explored. But I want to just
21 narrow it down to two, and it's not going to use
22 the word presumption.

23 But if -- if I think there are two
24 options here, one is categorical rule for
25 felonies and exigent circumstances for

1 misdemeanor cases. So that's one option. The
2 other option's a categorical rule for both.

3 And I asked Ms. Rice about this, what
4 would be the difference in the real world. She
5 said, as you said, clear rules for officers.

6 But I wonder if the exigent
7 circumstances doctrine, in other words, the
8 first option, really wouldn't provide, you know,
9 not as clear a rule, but still a pretty clear
10 rule for officers because the exigent
11 circumstances doctrine really, as I see it,
12 tracks common sense, these are the kinds of
13 cases and the kinds of reasons an officer would
14 do this in the first place, want to go into the
15 house without a warrant, especially escape of
16 the suspect, threats to others, destruction of
17 evidence.

18 So I guess I'm not sure what's gained
19 by categorical rule. That said, I'm not, you
20 know, I think it's also -- you can pose that
21 question in the other direction -- I'm not sure
22 what's gained by not having a categorical rule.
23 I would appreciate your analysis of that.

24 MS. ROSS: Certainly, Justice
25 Kavanaugh. So I think what's gained by having a

1 categorical rule is the administrability.

2 It seems that if we expect that,
3 especially once you take the fact of flight into
4 account -- which, again, is going to make it
5 very hard for officers to know in any particular
6 situation whether the other exigent
7 circumstances are present -- once you take that
8 into account, I think in the vast majority of
9 cases, nearly every case, in fact, the analysis
10 is going to come out to make the officer's
11 action reasonable.

12 And so I think once we recognize that,
13 it makes sense to provide additional clarity to
14 both officers and courts by effectively adopting
15 either a categorical rule or a presumptive rule.

16 JUSTICE KAVANAUGH: The one caution,
17 though, is that will leave -- that will leave
18 the category of extreme cases, where an officer
19 did not use common sense, is still covered by --
20 by the doctrine. And that seems problematic, as
21 several people have raised.

22 MS. ROSS: So -- so I don't think that
23 that is right at least if you accept our
24 proposition, or our proposal of a presumptive
25 rule. I take your question to be --

1 JUSTICE KAVANAUGH: Right.

2 MS. ROSS: -- a categorical rule. And
3 in that case, yes, I think that's true. I think
4 that that's where policy comes in. And I think
5 it's very important to note that we are not
6 suggesting that, just because the Fourth
7 Amendment would permit this, that it's
8 necessarily what jurisdictions or even officers
9 on their own should adopt as a matter of --

10 JUSTICE KAVANAUGH: Yeah, my question
11 might be why you've come up with a presumptive
12 rule rather than categorical. I -- I appreciate
13 your answers, Ms. Ross. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett.

16 JUSTICE BARRETT: Good morning, Ms.
17 Ross. Is your rule, can I summarize it this
18 way, that you think it's categorical for
19 felonies plus presumptive for misdemeanors, or
20 would you say just presumptive for everything
21 but we understand that for felonies it's always
22 going to be satisfied?

23 MS. ROSS: So -- so I think the
24 difference may not matter but, yes, we think
25 that it is categorical in the felony context. I

1 think you can think of that as an irrebuttable
2 presumption.

3 But the basic point of our rule is,
4 when you put the two sides together, it's really
5 not a distinction between the felony and the
6 misdemeanor. It's just looking out for the
7 super-unusual case.

8 JUSTICE BARRETT: Well, then I have a
9 methodological question about the categorical
10 rule for felonies.

11 So we're all in agreement that at
12 common law this exception applied for felonies.
13 But, you know, common law, the list of felonies
14 was pretty short.

15 Why do we take -- and as we've pointed
16 out again and again and again today, the line
17 between felonies and misdemeanors can seem quite
18 arbitrary -- so why would we pull out as the key
19 fact somethings designation as a felony? Why
20 wouldn't we simply say, okay, for the very
21 serious crimes that used to be felonies at
22 common law, then this rule applies, but
23 otherwise the felony/misdemeanor line doesn't
24 really have much significance here, in other
25 words, why is it felony rather than the list

1 of particular crimes that justified warrantless
2 entry into the home?

3 MS. ROSS: So a couple of reasons,
4 Justice Barrett. The first I think would just
5 be based on this Court's precedent. I think
6 that that is how the Court has read Santana, and
7 I'm not sure that there was sort of an analogous
8 felony at common law in the Santana situation.

9 And I think as an administrability
10 matter, that has proven to not be too much of a
11 difficulty for the lower courts, again in that
12 context.

13 I take the point that we shouldn't be
14 sort of strictly dividing between felonies and
15 misdemeanors. And, again, I think our rule has
16 the benefit of not doing that.

17 JUSTICE BARRETT: Thank you.

18 CHIEF JUSTICE ROBERTS: A minute to
19 wrap up, Ms. Ross.

20 MS. ROSS: Thank you, Mr. Chief
21 Justice.

22 When officers seek to conduct a lawful
23 public encounter based on probable cause that a
24 suspect has committed a misdemeanor, but the
25 suspect flees into a residence, an officer's

1 decision to follow him generally will be
2 reasonable.

3 This Court has already held that a
4 felony suspect's flight in those circumstances
5 does not permit him to claim the privacy of the
6 home to thwart a lawful encounter. The same
7 basic logic should govern in the misdemeanor
8 context.

9 Petitioner's case-by-case approach, by
10 contrast, ignores the impact that a suspect's
11 flight has on both sides of the Fourth Amendment
12 analysis and the difficulties it creates for
13 officers in defining and identifying exigent --
14 other exigent circumstances in the moment. It
15 also would be difficult to administer and would
16 invite judicial second-guessing of decisions
17 that, due to the suspect's own actions, must be
18 made, in Atwater's words, on the spur and in the
19 heat of the moment.

20 This Court should reject that
21 approach, adopt at least a general presumptive
22 rule that warrantless entry in misdemeanor hot
23 pursuit cases is reasonable, and affirm.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Rebuttal, Mr. Fisher.

3 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

4 ON BEHALF OF THE PETITIONER

5 MR. FISHER: Thank you. Three points,
6 Your Honors. First, as to the common law, the
7 common law is dispositive in this case. The
8 common law required a warrant to enter the home
9 unless a specified exception existed at law.
10 Entick said that, Chitty said that, Hawkins said
11 that, numerous other authorities. And so the
12 absence of any exception that covers all
13 misdemeanors is dispositive here. And it really
14 is, as Justice Barrett put it -- it's exigent
15 circumstances all the way down because the test
16 the common law commentators were applying was
17 whether there was a requirement for an immediate
18 arrest. And so the subcategories that we've
19 talked about today really are subcategories of
20 that test.

21 The second point I'd like to address
22 is the question why not just make hot pursuit
23 doctrine itself a direct species of exigent
24 circumstances that I think Justice Alito and
25 others have asked. I think the reason to resist

1 leaning too hard on a special category of hot
2 pursuit is it puts a lot of pressure on exactly
3 what would constitute a hot pursuit and what is
4 hot.

5 At common law, it was clear that
6 escape meant escape from a prior custodial
7 arrest. And Hale and others were -- were
8 precise about this. So for the other side to
9 craft a rule or for the Court to craft a rule
10 about hot pursuit, you'd have to ask questions
11 about is some other form of attempted detention,
12 like in this case, good enough to trigger a hot
13 pursuit? Does the suspect have to be aware of
14 it or reasonably perceived to be aware of it?
15 Does the officer have to witness the crime?
16 There could be any number of other case-specific
17 questions on which circuit splits could already
18 be seen to be proliferating in the lower courts
19 about what constitutes hot pursuit.

20 So we think the best solution here is
21 to recognize in general terms that hot pursuit,
22 as Justice Kavanaugh puts it, is important for
23 exigent circumstances but not draw firm bright
24 lines about a category of hot pursuit.

25 And then, finally, you have the

1 question of administrability. Justice Breyer
2 and others have asked about that. Let me say
3 two things. One is that officers apply the
4 Exigent Circumstances Doctrine on a daily basis
5 across the country in all other circumstances.
6 And the Court has never been confronted with
7 arguments saying that is unworkable or difficult
8 for officers to do. It is actually the nature
9 of their jobs to consider the totality of the
10 circumstance.

11 And the second point about that is
12 that their own policies and practices direct
13 them to do that. And even the Solicitor General
14 today, even through the form of a presumption,
15 says that officers should be considering the
16 totality of the circumstances. So it's the
17 other side again that's asking for the officers
18 to consider something additional, some sort of
19 hot pursuit special category that would
20 complicate matters.

21 We're asking for the officers to do
22 exactly what they do all the time. And a -- a
23 presumption or, even worse, a categorical rule
24 would just complicate matters. And as Justice
25 Kagan pointed out, there's already a thumb on

1 the scale of officers in other ways to give them
2 benefit of the doubt; you don't need a
3 categorical rule or even a presumption to solve
4 that problem on a daily basis.

5 For all those reasons, we'd ask the
6 Court to reverse.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Ms. Rice, this Court appointed you to
10 brief and argue this case as an amicus curiae in
11 support of the judgment below. You have ably
12 discharged that responsibility, for which we are
13 grateful.

14 The case is submitted.

15 (Whereupon, at 11:52 a.m., the case
16 was submitted.)

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