

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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ARTHUR GREGORY LANGE, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 20-18  
 )  
 CALIFORNIA, )  
 )  
 Respondent. )  
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Pages: 1 through 117  
Place: Washington, D.C.  
Date: February 24, 2021

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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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13 supporting affirmance.  
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1 P R O C E E D I N G S

2 (10:00 a.m.)

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

6 Mr. Fisher.

7 ORAL ARGUMENT OF JEFFREY L. FISHER

8 ON BEHALF OF THE PETITIONER

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

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

20 For two answers -- for two reasons,  
21 the answer is no. First, the governmental  
22 interest in investigating minor offenses is not  
23 always or even usually strong enough to support  
24 home entries unsanctioned by judicial officers.  
25 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 rule.

6           Second, as the numerous case -- 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 circumstances.

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 we have the other  
22 side --

23 CHIEF JUSTICE ROBERTS: Just --  
24 Justice Thomas.

25 JUSTICE THOMAS: Thank you, Mr. Chief

1 Justice.

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

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

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

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

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

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

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

25 MR. FISHER: Well, I think, Justice

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

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

17 JUSTICE THOMAS: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Breyer.

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

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

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

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

17 MR. FISHER: Any statute --

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

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

1 JUSTICE BREYER: So our problem is,  
2 how do you draw a line if you're going to do a  
3 misdemeanor -- boy, Massachusetts is very  
4 different from California. And so --

5 MR. FISHER: Justice Breyer, we --

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

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

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

25 And the Court said the same thing in

1 McNeely. When you're dealing with a  
2 particularly important privacy interest, there  
3 the body, you need case-by-case analysis.

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

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

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

18 JUSTICE BREYER: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice Alito.

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

25 The person, the arrestee, must



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

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

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

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

22           That -- after viewing the video, even  
23 that seems to me dubious. And if you take into  
24 account Mr. Lange's blood alcohol content, it's  
25 even more questionable.

1           But, if we hold that hot pursuit  
2 requires a hot pursuit, won't we go a long way  
3 toward preventing warrantless arrests for minor  
4 infractions and therefore deal with the serious  
5 problems that you raise in your brief?

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

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

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

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

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

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

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

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

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

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

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

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

7 MR. FISHER: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Sotomayor.

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

20 MR. FISHER: Well, Justice Sotomayor  
21 --

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

24 MR. FISHER: -- it would certainly  
25 lean that direction, but let me give you some

1 examples from cases cited in the briefs where we  
2 don't think it would necessarily in light of the  
3 totality create that -- that -- that inference.

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

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

16 JUSTICE SOTOMAYOR: But I --

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

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

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

25 JUSTICE SOTOMAYOR: A police officer

1 --

2 MR. FISHER: -- Justice Sotomayor, so

3 --

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

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

12 But remember, the officer may know the  
13 person, so he may know that the person doesn't  
14 want to interact with him in public and think  
15 that's what's going on. There could be other  
16 reasons why the officer thinks that the person  
17 simply wants to get away from whatever the  
18 officer is trying to 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.

20 JUSTICE KAGAN: Well, I -- I --

21 MR. FISHER: And then you just --

22 JUSTICE KAGAN: -- I -- Mr. Fisher, I  
23 -- I agree with you about Santana, that you can  
24 -- you can legitimately read Santana either way,  
25 but -- but the way the Court has read it -- and



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

11 MR. FISHER: I think there's two --  
12 two things about the references more recently to  
13 Santana. The references in general talk about  
14 hot pursuit, Justice Kagan. They don't talk  
15 about a felon or not. And I think the best way  
16 to read those hot pursuit references is probably  
17 along the lines of what Justice Alito was saying  
18 in that if you read "hot" in that phrase as  
19 requiring a real emergency and giving rise to an  
20 exigent circumstance, then all those hot pursuit  
21 references make sense.

22 And so then you're just left with a  
23 question of whether Santana would have adopted a  
24 felony rule versus a non-felony rule, and the  
25 Court has very little to say about that

1 specifically. And, more generally, in its case  
2 law, what the Court says is you look at the  
3 totality of the circumstances, and in Welsh --  
4 what Welsh says is you look at the severity of  
5 the crime as part of the analysis, but you don't  
6 draw bright lines based on the severity of the  
7 crime.

8 JUSTICE KAGAN: Thank you, Mr. Fisher.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Gorsuch.

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

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

1 the other between misdemeanors and felonies.

2 And I think that is, I think, a point  
3 in my column as to why it makes more sense to  
4 just simply look at the severity of the  
5 underlying conduct as part of the totality of  
6 the circumstance and not draw any bright lines  
7 on a classification basis.

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

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

25 JUSTICE GORSUCH: That's not what we

1 took in the question presented, though, right?

2 MR. FISHER: I think all the parties  
3 agree that it's -- that -- that as the Court --  
4 as the case came to the Court, this is hot  
5 pursuit as the Court has used that phrase in its  
6 cases. And the difficulty again is -- is in  
7 Santana, where the Court said that -- that hot  
8 pursuit was present when somebody took a couple  
9 steps backward on her front porch --

10 JUSTICE GORSUCH: So --

11 MR. FISHER: -- from the threshold of  
12 their house into the inside.

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

17 MR. FISHER: I -- I think that's  
18 generally correct.

19 JUSTICE GORSUCH: Okay.

20 MR. FISHER: I wouldn't resist too  
21 hard, though --

22 JUSTICE GORSUCH: I -- I -- I  
23 understand.

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

25 JUSTICE GORSUCH: I understand. I

1 just want to -- with my little time left -- I'm  
2 sorry, Mr. Fisher, for interrupting you, but I  
3 do have another question. That is, you ask us  
4 to take everything on a case-by-case approach.  
5 Your amicus, the Constitutional Accountability  
6 Center, offers more -- seeks to offer more  
7 guidance through reference to the common law and  
8 identifying the rule that we can draw out of  
9 that. What's your response to that approach?

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

21 And then the only other category you  
22 really have at common law is breach of the peace  
23 or an affray, which shows that there's --  
24 there's physical harm at -- either occurring or  
25 at serious risk. And, again, every one of those

1 cases would qualify on a case-by-case basis.

2 So even though you had, you know, what  
3 you could think of as broad rules at the common  
4 law, what they really are are rules that  
5 encaptured situations where it's necessarily  
6 exigent circumstances.

7 JUSTICE GORSUCH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Kavanaugh.

10 JUSTICE KAVANAUGH: Thank you, Chief  
11 Justice.

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

21 So, on page 14 of your brief, you  
22 refer -- summarize existing doctrine with  
23 respect to destruction of evidence, the risk of  
24 persons who are threatened with serious injury,  
25 to protect the officers or the public, and then

1 you also say -- and this is the one I really  
2 want to explore -- to prevent a suspect's  
3 escape.

4           And wouldn't the Exigent Circumstances  
5 Doctrine in all those things apply almost  
6 inevitably in a hot pursuit case, particularly  
7 preventing a suspect's escape, because the  
8 suspect has already escaped, in essence, from --  
9 or fled from the officer, and so, to use your  
10 phrase, there is reason to believe -- I think  
11 that was your phrase to the Chief Justice --  
12 there's reason to believe that the suspect will  
13 escape from the house because they've already  
14 fled?

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

1       Santana. So remember, Justice Kavanaugh, I'm  
2       not going to disagree with you that somebody  
3       who engages in a reckless --

4                   JUSTICE KAVANAUGH: Yeah. Put aside  
5       --

6                   MR. FISHER: -- a reckless chase --

7                   JUSTICE KAVANAUGH: -- put aside  
8       whether it's really a hot pursuit. Assume a hot  
9       pursuit, a real hot pursuit.

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

14                  JUSTICE KAVANAUGH: Well, let me --

15                  MR. FISHER: -- I could --

16                  JUSTICE KAVANAUGH: Okay. Keep going.

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

22                  JUSTICE KAVANAUGH: But the Exigent  
23       Circumstances Doctrine, I -- I guess -- well,  
24       let me ask you this: Do you object to the  
25       Solicitor General's presumption and, if so, why?



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

21                   JUSTICE KAVANAUGH: Thank you,  
22 Mr. Fisher.

23                   CHIEF JUSTICE ROBERTS: Justice  
24 Barrett.

25                   JUSTICE BARRETT: Good morning,

1 Mr. Fisher. I want to ask you about the  
2 analytical distinction between escaping arrest  
3 and evading arrest. So do you concede that the  
4 exception would apply and the policeman could  
5 break down the door, so to speak, enter the home  
6 without a warrant, if the defendant had escaped  
7 arrest?

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

21 JUSTICE BARRETT: Well, I -- I  
22 understand that, but, I mean, custody here --  
23 you know, let's imagine you have somebody who  
24 has committed something we would all agree would  
25 be a misdemeanor, something minor like -- but --

1 but not in a car. Let's say it's on foot.  
2 Let's say it's some minor vandalism in a park.  
3 And the police approach, have the show of  
4 authority, and stop the person they've submitted  
5 to authority. You know, there you have an  
6 arrest. And then the person turns on his heels  
7 and runs.

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

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

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

1           There could be -- there just could be  
2 more to know. And the teaching of the Court's  
3 case law is -- is when it comes to sanctity of  
4 the home -- and remember that's what's really at  
5 issue in this case -- that we don't draw  
6 overbroad categorical rules, even if they're  
7 most always going to envelop situations where  
8 there are, indeed, exigent circumstances.

9           I think the other way to think about  
10 it is the concern is to have officers secure in  
11 their ability to carry out their jobs. You  
12 already have built into the Exigent  
13 Circumstances Doctrine a less-than certitude  
14 requirement. And so officers are going to be  
15 okay when they're in those situations. It's  
16 just for the outlier situations --

17           JUSTICE BARRETT: If there's a  
18 less-than certitude requirement --

19           MR. FISHER: -- that would protect the  
20 sanctity of the home.

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

1 that person and the person who initially stops  
2 and then runs.

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

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

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

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

1 about today.

2 JUSTICE BARRETT: Thank you, Mr.  
3 Fisher.

4 CHIEF JUSTICE ROBERTS: A minute to  
5 wrap up, Mr. Fisher.

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

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

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

25 And we think that that lesson from

1 history is equally relevant today when you're  
2 dealing with minor offenses and some -- and  
3 officers who sometimes are overzealous in the  
4 competitive exercise of ferreting out crime.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Mr. Harbourt.

8 ORAL ARGUMENT OF SAMUEL T. HARBOURT

9 ON BEHALF OF THE RESPONDENT

10 SUPPORTING VACATUR

11 MR. HARBOURT: Mr. Chief Justice, and  
12 may it please the Court:

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

22 In our view, the categorical rule  
23 should not apply in the misdemeanor context.  
24 Felony and misdemeanor pursuits were treated  
25 differently at common law. The government has a

1 weightier interest in immediately pursuing and  
2 apprehending felony suspects, and a  
3 case-specific approach for misdemeanors would be  
4 more consistent with precedent and with the  
5 privacy interests underlying the Fourth  
6 Amendment.

7 I welcome the Court's questions.

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

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

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

24 MR. HARBOURT: Your Honor, we  
25 certainly acknowledge that officers will not



1 always be in a position to know whether an  
2 offense is a felony or a misdemeanor. That's  
3 true, and we acknowledge that.

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

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

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

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

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

1                   But I don't think that a suspect would  
2                   be home-free in the curtilage for the same  
3                   reason that the suspect isn't home-free inside  
4                   the physical structure of the -- the home either  
5                   if as just for --

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

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

13                  CHIEF JUSTICE ROBERTS: Thank you,  
14                  counsel.

15                  Justice Thomas.

16                  JUSTICE THOMAS: Thank you, Mr. Chief  
17                  Justice.

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

23                  MR. HARBOUR: Certainly, Your Honor,  
24                  there have been a number of changes to offense  
25                  classifications since the common law era. But,

1 in our view, the fundamental legal principle  
2 recognized at common law is just as vital and  
3 relevant today, and that fundamental principle  
4 was that officers could not pursue suspects into  
5 homes without warrants in cases involving minor  
6 misdemeanor offenses.

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

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

22           JUSTICE THOMAS: Well, for -- I think,  
23 as the Chief Justice mentioned and Justice  
24 Breyer, that's a line that we've had quite a bit  
25 of difficulty drawing, but beyond that, what

1 prevents a state from simply enacting a law that  
2 says evading arrest or fleeing from a police  
3 officer is a felony?

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

12 JUSTICE THOMAS: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Breyer.

15 JUSTICE BREYER: Thank you.

16 Look, to be -- not to put -- to be  
17 specific, as far as I know, a misdemeanor in  
18 Massachusetts is defined as a crime for which  
19 the sentence in jail is up to two-and-a-half  
20 years and the jail term must be served, however,  
21 not in the state prison but in a local county  
22 jail. All right? So we include as misdemeanors  
23 assault and battery, carrying a loaded firearm  
24 under the influence of drugs, reckless driving  
25 where a death results. I mean, they're pretty

1 serious.

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

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

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

1 California. What you, in fact, have been saying  
2 is a misdemeanor -- the hot pursuit rule also  
3 allows pursuit into the home if it's jailable,  
4 which, by the way, picks up auctioning off a  
5 rabbit as a prize, which carries a jail term.

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

10 JUSTICE BREYER: Oh, good. What is  
11 that? What is that?

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

17 CHIEF JUSTICE ROBERTS: Justice Alito.

18 JUSTICE ALITO: What if a police  
19 officer has probable cause to believe that a  
20 fleeing person has committed two offenses, each  
21 of which is punishable by imprisonment for up to  
22 11 months?

23 MR. HARBOUR: Your Honor, in -- in --  
24 in those cases, assuming the Court defines  
25 "misdemeanor" along the lines that I was just

1 discussing with Justice Breyer, I think that  
2 would be a misdemeanor offense, and so, in our  
3 view, the categorical hot pursuit rule would not  
4 apply. The officer would need to point to --

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

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

20 JUSTICE ALITO: Well, let me ask you  
21 this question: Under the California  
22 constitution, does the Attorney General have the  
23 authority to tell the district attorneys of the  
24 states that it -- of the state that it will  
25 not -- that they are not to defend any

1 warrantless arrests of persons in the home where  
2 the offense is a minor offense as defined by  
3 some definition provided by the Attorney  
4 General?

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

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

23 MR. HARBOURT: Yes, Your Honor, and --  
24 and to be quite clear, we -- we opposed cert in  
25 this case and, in our brief in opposition,



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

9 JUSTICE ALITO: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Sotomayor.

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

24 And so I don't know why anybody is  
25 arguing that there's a difference between felony

1 and misdemeanors and why we're recognizing a  
2 categorical rule at all.

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

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

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

22           MR. HARBOURT: Your -- Your Honor, in  
23 -- in our view, that case-specific exigency  
24 standard is not consistent with the Court's  
25 precedent in the felony pursuit context. So

1 there's Santana, but it's not just Santana; it's  
2 all of the Court's many statements over the  
3 years describing hot pursuit in categorical  
4 terms, including Stanton, which did address a  
5 limited issue as far as its holding, but the  
6 Court, in describing the scope of the doctrine,  
7 described "our precedent holding that hot  
8 pursuit of a fleeing felon justifies an  
9 officer's warrantless entry."

10 JUSTICE SOTOMAYOR: At what point --

11 CHIEF JUSTICE ROBERTS: Justice Kagan.  
12 Justice Kagan.

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

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

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

24                   And we think in a felony pursuit  
25 context, considered as a class, one or more of

1 those exigencies is pretty likely to arise in  
2 your average felony pursuit case.

3 JUSTICE KAGAN: Thank you,  
4 Mr. Harbourt.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Gorsuch.

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

21 And in a world like that, why does it  
22 make sense to retreat back to the original  
23 meaning of the Fourth Amendment, which I'm going  
24 to oversimplify but generally says that you get  
25 to go into a home without a warrant if the

1 officer sees a -- a -- a violent action or  
2 something that's likely to be -- lead to  
3 imminent violence? That -- that's vastly  
4 oversimplifying, but why isn't -- why isn't that  
5 the right approach?

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

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

23 JUSTICE GORSUCH: And what unified  
24 that entire class of cases seems to be, again,  
25 some actual violence or its imminent threat.

1 And the -- what -- what qualified as a felony at  
2 common law was -- were very few crimes and they  
3 were all punished by the death penalty usually,  
4 and today pretty much again anything or  
5 everything can be called a felony.

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

15 JUSTICE GORSUCH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Kavanaugh.

18 JUSTICE KAVANAUGH: Thank you.

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

24 MR. HARBOURT: On the facts of this  
25 case, Your Honor, or --

1 JUSTICE KAVANAUGH: Not -- not on this  
2 case, just in general that the -- you could get  
3 into the house based on exigent circumstances  
4 without a warrant, correct?

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

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

12 MR. HARBOURT: We do, Your Honor, and  
13 the reason that we --

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

24 MR. HARBOURT: That's correct, Your  
25 Honor.



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

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

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

1                   And that is just not inherently risky  
2                   or dangerous conduct or conduct that suggests  
3                   we're dealing with a suspect who poses an  
4                   ongoing danger to himself or others or to  
5                   society or who poses a risk of, you know,  
6                   bolting out of a back door and making a run for  
7                   it while the police, standing outside, pursue by  
8                   foot or -- or by car.

9                   JUSTICE KAVANAUGH: Thank you.

10                  CHIEF JUSTICE ROBERTS: Justice  
11                  Barrett.

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

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

1           MR. HARBOURT: Well, Your Honor, two  
2 responses. One is just a -- a quibble with the  
3 understanding of the common law rule. We -- we  
4 don't -- we disagree with the Court-appointed  
5 amicus that a breach of the peace could be a  
6 sufficient basis to justify a warrantless home  
7 entry in pursuit of the suspect at common law.

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

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

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

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

1                   MR. HARBOURT: For two reasons, Your  
2 Honor --

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

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

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

22                   CHIEF JUSTICE ROBERTS: A minute to  
23 wrap up, Mr. Harbourt.

24                   MR. HARBOURT: Thank you. It's  
25 settled that officers may immediately pursue

1 suspects into homes when case-specific  
2 exigencies exist. And we think it's also  
3 settled that officers may enter a home without a  
4 warrant if they have probable cause to believe a  
5 fleeing suspect has committed a felony.

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

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

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Ms. Rice.

24

25

1 ORAL ARGUMENT OF AMANDA K. RICE  
2 COURT-APPOINTED AMICUS CURIAE  
3 IN SUPPORT OF THE JUDGMENT BELOW

4 MS. RICE: Thank you, Mr. Chief  
5 Justice, and may it please the Court:

6 The Fourth Amendment generally  
7 requires officers to get warrants before  
8 entering homes. But the warrant requirement is  
9 subject to exceptions, and hot pursuit is one of  
10 them.

11 The hot pursuit exception justifies  
12 warrantless home entry in a narrow class of  
13 cases where a suspect tries to thwart a lawful  
14 public arrest by outracing an officer to a  
15 dwelling.

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

23 Officers cannot be expected to  
24 accurately classify offenses in the midst of a  
25 chase, and this Court's reasoning in *Atwater*,

1 which rejected a felony/misdemeanor distinction  
2 for public arrests, applies with equal force  
3 here.

4           Unable to defend a felony-only hot  
5 pursuit rule, Petitioner now suggests that hot  
6 pursuit isn't actually a distinct exception to  
7 the warrant requirement at all. Instead, he  
8 claims that officers must point to exigencies  
9 other than a hot pursuit even in felony cases.

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

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

23           But this Court should not  
24 constitutionalize those nuanced local policy  
25 judgments, particularly not along a line as

1 wobbly as the one between felonies and  
2 misdemeanors.

3 I look forward to the Court's  
4 questions.

5 CHIEF JUSTICE ROBERTS: Counsel, a lot  
6 of your argument is focused on uncertainties,  
7 you know, the officers don't know why the person  
8 is fleeing, they don't know what he might do in  
9 -- inside the house, that sort of thing. And I  
10 understand that to be the basis for your support  
11 of a categorical rule.

12 But there are going to be some cases  
13 where there aren't -- there isn't really any  
14 uncertainty. You know, some that have been  
15 suggested, the -- you know, the group of  
16 teenagers in the empty lot drinking -- drinking  
17 beer, and the officer comes, up and they all --  
18 all take off.

19 Why isn't it -- and it may not be a  
20 case-by-case approach, but I guess close to what  
21 the Solicitor General is suggesting, which is a  
22 -- a presumption? I mean, do you really need to  
23 have the right of hot pursuit in the case that  
24 I've hypothesized? You know, no real basis for  
25 chasing the -- the 18 -- or the 18-year-old



1 drinking beer with his friends into -- into his  
2 parents' house?

3 MS. RICE: Chief Justice Roberts, the  
4 hot pursuit rule serves a crucial law  
5 enforcement interest in every case by  
6 eliminating perverse incentives for suspects to  
7 flee. Flight itself can be dangerous, and it  
8 always undermines the rule of law. And as you  
9 suggest, it can be impossible to know in the  
10 heat of the moment which cases present risks to  
11 greater or lesser degrees.

12 But one thing we know for certain, as  
13 Justice Kavanaugh points out, is that the group  
14 of suspects implicated in hot pursuit cases have  
15 already shown themselves to be interested in  
16 escape.

17 CHIEF JUSTICE ROBERTS: Yeah, but the  
18 reason -- the reason that a teenager drinking  
19 beer is interested in escape, you know, is  
20 hardly -- it doesn't seem to be -- to be  
21 something that would warrant the officer, you  
22 know, breaking into the house.

23 MS. RICE: An officer could certainly  
24 decide not to pursue under those circumstances,  
25 Chief Justice Roberts, but the Constitution

1 doesn't require that they do so.

2           To your question about the presumption  
3 the Solicitor General's brief suggests, the  
4 presumption is better than a pure case-by-case  
5 rule because it better reflects the categorical  
6 balance of the interests and it provides more  
7 guidance on the margins.

8           But it also suffers from nearly all of  
9 the same flaws. There's not a doctrinal basis  
10 for it, as Santana and subsequent cases  
11 articulate a rule and not a presumption. It  
12 still relies on the line between felonies and  
13 misdemeanors. I'm not sure which cases would be  
14 covered by it, so it suffers from the same  
15 administrability questions. And like a  
16 case-by-case rule, it invites constitutional  
17 litigation over these difficult  
18 heat-of-the-moment judgments.

19           CHIEF JUSTICE ROBERTS: Justice  
20 Thomas.

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

23           Counsel, I'd like to refer back to  
24 Justice Alito's first question about looking at  
25 hot pursuit in a more rigorous way. Wouldn't

1 your argument be a bit easier if, for example,  
2 in this case, there was actually a hot pursuit  
3 rather than this kind of meandering pursuit that  
4 we have here?

5 MS. RICE: Justice Thomas, there's no  
6 dispute in this case that there was a hot  
7 pursuit. That's the premise of the petition for  
8 certiorari. And Santana made clear that while  
9 some sort of chase is required, there need not  
10 be an extended hue and cry in the streets.

11 So I agree that there are limits on --  
12 on what a hot pursuit is, but I -- I would  
13 resist your suggestion that this case didn't  
14 implicate one.

15 JUSTICE THOMAS: Well, it -- you --  
16 you do cite Santana, and I think we've read it  
17 that way. But do you -- do you have any cases  
18 that say expressly that a warrantless entry is  
19 -- is available even in cases of -- or in cases  
20 of all misdemeanors as opposed to some  
21 misdemeanors?

22 MS. RICE: Justice Thomas, I'm not  
23 sure the case -- this Court has ever addressed  
24 that question directly, but Santana's holding  
25 was framed categorically, and in each of the

1 times where this Court has subsequently referred  
2 to hot pursuit -- and there's a fair number of  
3 them, as Justice Kagan suggested -- it has  
4 referred to hot pursuit as a categorical  
5 justification for warrantless entry. It has  
6 never suggested that some other exigency is  
7 required or that the exception is limited to  
8 fleeing felons.

9 JUSTICE THOMAS: So, in -- in other  
10 words, we've never expressly said all  
11 misdemeanors, whether they are -- they involve  
12 dangerous settings or not, were subject to  
13 warrantless entry?

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

16 JUSTICE THOMAS: One last question  
17 with respect to the common law. If we think  
18 that there is some doubt as to whether or not  
19 common law favors you or if we think it actually  
20 disfavors you, what should we do?

21 MS. RICE: Like in *Atwater*, this just  
22 isn't a case where there was a clear answer that  
23 existed in 1791 and has been adhered to ever  
24 since. So, like in *Atwater*, Justice Thomas,  
25 other modes of constitutional analysis, like the

1 traditional interest balancing we've been  
2 discussing today, should control.

3 JUSTICE THOMAS: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Breyer.

6 JUSTICE BREYER: Well, I mean, this is  
7 a tough case. Justice Goldberg -- you remind me  
8 when on a different subject many years ago --  
9 spoke of a cruel trilemma. Well, here, if we  
10 take your view, then it seems like the home  
11 isn't the castle at all for the most trivial of  
12 things. I mean, many examples -- I like the  
13 rabbit example. I don't know why California has  
14 made it a crime to give a lot -- rabbit as a  
15 lottery prize or something. But, I mean, it  
16 seems ridiculous when your home isn't your  
17 castle for terribly minor things.

18 If we take the opposite view, we lose  
19 the benefits of a bright line where hot pursuit  
20 is really serving an important purpose. And if  
21 we take the middle thing, we have to do this  
22 distinction, misdemeanors and felonies, which is  
23 tough.

24 In your reading for this, because you  
25 did a good job of preparing, did you come across

1 anything that sort of listed for us the reasons  
2 for hot pursuit and why it's there as a special  
3 category so you might say, look, hot pursuit  
4 where these reasons are there but not hot  
5 pursuit, has to be just the regular exigency,  
6 where the crime is minor, somehow defined? Have  
7 you come across something I could read on that?

8 MS. RICE: Justice Breyer,  
9 unfortunately, I'm not sure I have a -- a source  
10 for you that gives a clear answer to that, but I  
11 think Santana itself made clear that hot pursuit  
12 always serves important law enforcement  
13 interests, in particular in identifying suspects  
14 and preventing their escape and ensuring officer  
15 and resident safety.

16 JUSTICE BREYER: Yeah, I know those  
17 things, that's true, but what -- I mean, look,  
18 the rabbit case, I mean, that's ridiculous. The  
19 policeman can just get into your house when you  
20 went inside your house because you once sold a  
21 rabbit as a prize?

22 MS. RICE: I agree that that sounds  
23 like a pretty silly law --

24 JUSTICE BREYER: Yeah.

25 MS. RICE: -- Justice Breyer.

1 JUSTICE BREYER: All right. But --  
2 but, I mean, we can think about 50 of those when  
3 you start getting into misdemeanors. It's how I  
4 just -- that's dramatic.

5 MS. RICE: The key is how the --

6 JUSTICE BREYER: But what do we do  
7 about the 50 or 1,000 of the parking -- you  
8 know, parking tickets or all kinds of things?

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

20 JUSTICE BREYER: Hmm. Okay. I  
21 will -- I will think about it. Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Alito.

23 JUSTICE ALITO: Doesn't a hot pursuit  
24 or any pursuit require an attempt to avoid  
25 arrest?

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

3                   JUSTICE ALITO: All right. And -- and  
4 the question that we accepted includes the  
5 term -- includes the phrase, "a state law  
6 enforcement officer's pursuit" of the  
7 Petitioner. The court below held only that a  
8 reasonable person in Mr. Lange's position would  
9 have seen the police lights and understood that  
10 the police officer was trying to stop him. But  
11 there is no hold -- there is no finding and  
12 there is no holding that he was attempting to  
13 avoid arrest.

14                   MS. RICE: So, in Fourth Amendment  
15 cases, as I think Justice Sotomayor suggested  
16 earlier, the question focuses on the perspective  
17 of the police officer and what a reasonable  
18 officer in the officer's shoes would have  
19 understood to be going on. And so I -- I do  
20 think in this case, when the officer turned on  
21 his lights and Mr. Lange decided not to stop but  
22 instead to pull into his garage and begin  
23 closing the door, that Officer Weikert had  
24 probable cause to arrest him for a misdemeanor,  
25 and the minimal intrusion into his garage



1 allowed him to apprehend the Petitioner there  
2 without going further into the home. Remember  
3 --

4 JUSTICE ALITO: Well, no matter whose  
5 perspective we look at this from -- the  
6 officer's perspective, Mr. Lange's perspective  
7 -- isn't the question whether he tried to get  
8 into his house for the purpose of evading  
9 arrest? And it wouldn't be a subjective  
10 inquiry; it would be an objective inquiry.  
11 Would an objective -- taking a look at this  
12 video, objectively, was this an attempt to evade  
13 arrest?

14 MS. RICE: I think so, Justice Alito.  
15 When an officer turns on his lights and a  
16 suspect decides not to pull over but, instead,  
17 to enter into a garage and close the door, I  
18 think whether you're talking about the  
19 reasonable officer or the reasonable suspect,  
20 that is an attempt to thwart a lawful public  
21 arrest.

22 JUSTICE ALITO: Well, that wasn't  
23 something that was held by the lower court.  
24 That wasn't the standard the lower court  
25 applied. And I will tell you, looking at this

1 video, I -- I see no attempts to avoid arrest.

2 I see somebody who -- who may well  
3 have not have even noticed these lights and  
4 simply proceeded into his own garage.

5 MS. RICE: Again, Justice Alito, I  
6 think there is no dispute here that this  
7 qualified as a hot pursuit. If you disagree, I  
8 suppose the Court could dismiss this case as  
9 improvidently granted, but I don't think that's  
10 necessary.

11 There was a hot pursuit in this case  
12 because a reasonable person in Petitioner's  
13 shoes would have seen the lights and known that  
14 the officer --

15 JUSTICE ALITO: Why do you say there's  
16 no dispute that this was a hot -- that this was  
17 a hot pursuit? I thought that was the -- baked  
18 into the question that we agreed to decide?

19 MS. RICE: I don't think so, Justice  
20 Alito. I -- I think the question presented is  
21 about whether the hot pursuit exception extends  
22 to misdemeanors, not about whether this was a  
23 hot pursuit at all.

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor.

2 JUSTICE SOTOMAYOR: Counsel, assuming  
3 that I find the common law unclear on the  
4 margins, but I don't find it unclear that the  
5 common law by its nature allowed for entry --  
6 warrantless entries into the home only for a  
7 certain -- not -- not for offenses that were  
8 minor, but every offense it listed was -- or --  
9 or exception that it created was for serious  
10 offenses, not minor ones.

11 How can I -- how can we ignore that  
12 teaching of the common law? And I guess I go  
13 back to Justice Gorsuch's point that perhaps we  
14 should just hew to the common law more strictly  
15 and recognize exceptions only that reflect the  
16 teachings of the common law, so exigent  
17 circumstances, hot pursuit for serious offenses  
18 that themselves, like the Solicitor General  
19 suggests, suggest a basis for entry or a need  
20 for entry.

21 Why don't we just adopt the exception  
22 without reference to labels like felony or  
23 misdemeanor but go back to whether or not the  
24 protection was necessary and the crime reflected  
25 the issues that the common law thought important

1 to justify warrantless entry?

2 MS. RICE: Justice Sotomayor, I -- I  
3 agree that the felony/misdemeanor label isn't  
4 particularly helpful in this context, but to  
5 answer your question about the common law, if  
6 you think the common law tracks some kind of  
7 distinction between breaches of the peace and  
8 other kinds of misdemeanors, I emphasize that  
9 Atwater considered exactly that kind of  
10 distinction and declined to distinguish between  
11 common law breaches of the peace and other kinds  
12 of misdemeanors in the context of public  
13 arrests.

14 And it would be pretty strange then to  
15 try to draw that line for offenders who decide  
16 to flee a public arrest. I'd say too that I'm  
17 not sure that anyone here is advocating for a  
18 breach-of-the-peace-type line. Instead, whether  
19 you're talking about a case-by-case rule or a  
20 presumption, the things that those -- that the  
21 cases would seem to turn on don't relate to the  
22 -- the severity of the offense but, in fact,  
23 whether, you know, in the language of  
24 Petitioner, other exigencies existed.

25 I -- I think hot pursuit is an

1 exigency, and so that -- that additional  
2 analysis is unnecessary, but it certainly  
3 doesn't seem to turn on any kind of breach of  
4 the peace or other common law baseline.

5 JUSTICE SOTOMAYOR: Thank you,  
6 counsel.

7 CHIEF JUSTICE ROBERTS: Justice Kagan.

8 JUSTICE KAGAN: Ms. Rice, if you look  
9 at our Fourth Amendment cases, you read them as  
10 a group, over and over and over they all talk  
11 about the home as the -- the sacrosanct place,  
12 the place of greatest protection. Everything  
13 else is compared to that and found not to be  
14 quite the thing that the Fourth Amendment  
15 protects. That's the central thing. Do you --  
16 do you disagree with that?

17 MS. RICE: I would agree with that,  
18 Justice Kagan.

19 JUSTICE KAGAN: Okay. So, if I  
20 understand your argument, the way you kind of  
21 get around that is -- is by saying that in these  
22 hot pursuit cases the suspect makes a decision  
23 to go into the -- the home. It's almost a kind  
24 of waiver argument. Is -- is that what you're  
25 -- you're saying?

1 MS. RICE: I think the fact that the  
2 encounter begins in public and the suspect  
3 decides to bring the encounter into the home is  
4 relevant. I don't know that I would classify it  
5 as waiver, and I -- I don't think it fits in the  
6 framework of consent, but I do think it  
7 diminishes the suspect's interest in the privacy  
8 of his home.

9 JUSTICE KAGAN: I -- I guess what I'm  
10 thinking of is this: I'm trying to see why we  
11 would make any kind of distinction between this  
12 sort of case, where the encounter begins in  
13 public and then goes into the home, and take  
14 another kind of case, which is -- which is  
15 Payton, where -- where the holding, of course,  
16 was that the police can't enter a home to arrest  
17 a felon without a warrant or without exigent  
18 circumstances, even if the felon is doing a  
19 crime right in his home. So why would we  
20 distinguish between the two?

21 MS. RICE: I -- I think the difference  
22 between those two cases is crucial here, Justice  
23 Kagan. The point of the hot pursuit exception  
24 is that a suspect can't bootstrap the privacy  
25 protections of the home onto a public arrest

1 through culpable conduct.

2           And so the decision to flee inside, I  
3 think, makes the constitutional difference  
4 between the Payton case and a hot pursuit case.

5           JUSTICE KAGAN: But I guess that's  
6 what -- what I'm -- I'm suggesting, that there's  
7 really no distinction at all. In the Payton  
8 case, the -- the -- the person is also making a  
9 decision to do the crime, you know, let's --  
10 let's say that he is engaged in a massive fraud  
11 and he's -- he's decided, hey, what a great  
12 idea, I'm going to use my home to do this rather  
13 than my office.

14           So, I mean, you have the same kind of  
15 thing where the person is basically leveraging  
16 the fact that the home is protected, you know,  
17 in order to get greater protection. And yet, in  
18 Payton, we said doesn't matter.

19           MS. RICE: Justice Kagan, I -- I think  
20 it's always the case, you're right, that a  
21 suspect decides to commit a crime and so is  
22 culpable in that sense. But changing the  
23 location of the encounter from a public space to  
24 a privacy space and then claiming, sorry, I'm in  
25 my home, it's a private space, you can't come

1 in, isn't the kind of conduct that the Fourth  
2 Amendment is prepared to recognize -- recognize  
3 as reasonable.

4 JUSTICE KAGAN: Thank you, Ms. Rice.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Gorsuch.

7 JUSTICE GORSUCH: Ms. Rice, you did  
8 some very careful work looking at some of the  
9 founding era sources, and I'd just like to ask  
10 you, were you able to locate anything that  
11 suggests that officers have the power to enter  
12 the home in pursuit of any and all misdemeanor  
13 crimes or, in the SG's version, presumptively  
14 allowed to do so for any and all misdemeanors?

15 MS. RICE: Justice Gorsuch, I'm not  
16 sure there's a common law source that says that  
17 expressly, so as -- as Justice Thomas mentioned  
18 earlier, I think that authority is clear in the  
19 context of escapees, so after an arrest has been  
20 completed.

21 Conversely, though, I'm not sure if  
22 Petitioner or California has identified a single  
23 common law case where a warrantless entry of an  
24 officer in hot pursuit of a misdemeanant gave  
25 rise to a common law trespass suit, much less --



1 JUSTICE GORSUCH: Okay. I'm sorry to  
2 interrupt, but just given our limited time,  
3 given that there is no common law authority for  
4 the rule you propose of any and all misdemeanors  
5 or the rule that the Solicitor General proposes,  
6 presumptively for any and all, if we can accept  
7 that, accepting that there are also some  
8 concerns about what breach of the peace or  
9 escape meant, I guess I'm back to where Justice  
10 Sotomayor is.

11 Why would we create a rule that is  
12 less protective than what everyone understands  
13 to be the case of the Fourth Amendment as  
14 original matter? Why would we adopt a rule we  
15 know is wrong as an original matter?

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

19 JUSTICE GORSUCH: Well, I -- I -- I  
20 thought we just agreed that -- that there is no  
21 rule at common law that any and all misdemeanors  
22 allow entry of the home in exigent -- in -- in  
23 hot pursuit or the Solicitor General's view. I  
24 thought that was common ground. I'm sorry.

25 MS. RICE: No -- no worries, Justice

1 Gorsuch. I think the point is that the common  
2 law just doesn't map on very well to the  
3 question presented in this case, and that's true  
4 for a number of reasons, including that an  
5 unlawful entry would not have provided a basis  
6 for overturning a conviction but also because  
7 some authorities, which were debated in Payton,  
8 suggested that a warrant wasn't required to  
9 enter a house to make an arrest in the first  
10 place. So the hot pursuit justification  
11 wouldn't have been necessary.

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

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

20 But let me ask you another question.  
21 You raise concerns about an officer's ability to  
22 distinguish between felonies and misdemeanors as  
23 one reason for your rule. But there's also the  
24 line between misdemeanors and infractions that  
25 are non-jailable. And if misdemeanors and

1 felonies have proliferated in recent years, the  
2 number of these infractions has skyrocketed.  
3 Non-jailable traffic offenses, fire code  
4 violations -- you choose. Rabbits.

5 Does your rule allow an officer to  
6 enter the home for a violation of a regulatory  
7 rule as well and, if not, why is drawing that  
8 line preferable to drawing the  
9 misdemeanor/felony line?

10 MS. RICE: Justice Gorsuch, the slip  
11 here and the cert petition are limited to  
12 jailable misdemeanors. So you -- you don't need  
13 to resolve that question in this case. I would  
14 say, though, that Atwater declined to draw a  
15 line between jailable and fine-only offenses.  
16 So I -- I think the hot pursuit rule -- rule  
17 would probably extend to such offenses as a --

18 JUSTICE GORSUCH: Thank you.

19 MS. RICE: -- matter of logic.

20 JUSTICE GORSUCH: Thank you.

21 MS. RICE: But --

22 JUSTICE GORSUCH: I appreciate that.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Kavanaugh.

25 JUSTICE KAVANAUGH: Thank you, Chief

1 Justice.

2 Good morning, Ms. Rice. First, I want  
3 to explore how much is really at stake or how  
4 much of a difference there would be between the  
5 two positions here for officers on the ground in  
6 the wake of our decision.

7 So I understand your position to be  
8 that there should be a rule, a categorical rule,  
9 and it seems to me the reason to have a  
10 categorical rule is because often, if not  
11 always, there will be some kind of exigency  
12 involved when you had a how -- a hot pursuit,  
13 destruction of evidence, danger to others,  
14 escape of the suspect.

15 I guess that cuts both ways, though,  
16 because one could say, well, you don't need a  
17 categorical rule because you already have the  
18 Exigent Circumstances Doctrine that covers all  
19 the things that justify the categorical rule.

20 So I guess I'm wondering what the real  
21 difference in practice would be between a world  
22 where we have a categorical rule and a world  
23 where we allow all the Exigent Circumstances  
24 Doctrine cases to apply as they exist now.

25 MS. RICE: Justice Kavanaugh, I think

1 you're right to suggest that the fact of the  
2 suspect's flight is itself an exigency and so is  
3 likely to be dispositive of the  
4 interest-balancing in every case.

5           But I think then that the -- the  
6 case-by-case type rule is -- is only depriving  
7 officers and courts, frankly, of the kind of  
8 clear rule that this Court has said is  
9 particularly important where officers need to  
10 make quick decisions. It's also inviting  
11 constitutional litigation about those same quick  
12 decisions.

13           So, if you think that in every case  
14 or, as Atwater suggested, in most cases the  
15 balance of the interests will cut this way, the  
16 -- this Court's general preference for clear  
17 categorical rules should carry the day.

18           JUSTICE KAVANAUGH: Let me ask you a  
19 question now about methodology, a word, the  
20 original meaning of the term "unreasonable" in  
21 the Fourth Amendment. It seems to me that's a  
22 different kind of term than "search" or  
23 "seizure" or "cruel and unusual," and  
24 "unreasonable" means unreasonable. So what  
25 we're really talking about is not original

1 meaning or original intent or even original  
2 expected application because I don't -- I'm not  
3 aware of anyone in the first Congress or in the  
4 state ratifying processes that said  
5 "unreasonable" means the common law, unlike --  
6 and the text is unlike the Seventh Amendment,  
7 which refers to the common law expressly.

8           And Professor Lafave and others have  
9 pointed this out. So it's not really original  
10 meaning or even original intent. It's more like  
11 presumed original expected applications, like a  
12 Justice Douglas-style interpretation. No  
13 offense to Justice Douglas, but a little more  
14 free-form than what we usually talk about when  
15 we talk about original meaning. I just want to  
16 get your response to that.

17           MS. RICE: I think that's right,  
18 Justice Kavanaugh, that it's -- it's unlikely  
19 that the founders meant to freeze into place  
20 particular applications of -- of reasonableness.  
21 Instead, I think it's fair to understand that  
22 term as one better served by a -- a sort of  
23 categorical interest-balancing.

24           JUSTICE KAVANAUGH: Thank you,  
25 Ms. Rice.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Barrett.

3 JUSTICE BARRETT: Good morning, Mrs.  
4 Rice -- Ms. Rice. I have a question about  
5 whether -- what it meant to breach the peace,  
6 you know, so that seems to be kind of a  
7 capacious category, and there's some dispute  
8 about what would fall within it. Is there any  
9 argument that resisting arrest, that resisting a  
10 constable would have been a breach of peace at  
11 common law?

12 MS. RICE: Justice Barrett, I'm not  
13 aware of any authority directly on that point,  
14 though I think you're absolutely right that it's  
15 very unclear which offenses would and would not  
16 have constituted breaches of the peace at common  
17 law. In fact, that's one of the reasons why  
18 this Court in Atwater declined to distinguish  
19 between common law breaches of -- of the peace  
20 and other kinds of misdemeanors.

21 JUSTICE BARRETT: I assume it was a  
22 crime. Do you know?

23 MS. RICE: I -- I believe it was,  
24 Justice Barrett.

25 JUSTICE BARRETT: And you -- but you

1 don't know whether -- I mean, it certainly  
2 doesn't fall within one of the common law  
3 felonies. So does that mean it was a  
4 misdemeanor to do that, to resist arrest?

5 MS. RICE: I don't know the answer to  
6 that question, but I -- I think, at common law,  
7 a suspect generally had no right to resist a  
8 lawful arrest, and resistance to lawful  
9 apprehension could be prosecuted. I -- I don't  
10 know that that was a felony.

11 JUSTICE BARRETT: Ms. Rice, let me ask  
12 you another question. I thought your brief was  
13 a little bit equivocal about whether your  
14 concept of pursuit would require knowledge that  
15 you were being chased or not.

16 So is your rationale for this that,  
17 you know, someone who -- well, the cop could  
18 have arrested the defendant in public, and so  
19 the police officer can follow the defendant into  
20 the house to finish in private what was started  
21 in public? Or does it rely on some kind of  
22 consciousness of being chased?

23 MS. RICE: Justice Barrett, I think,  
24 like other Fourth Amendment standards, it  
25 doesn't rely on any subjective knowledge, but I



1 think a reasonable person in the suspect's shoes  
2 must understand that he's not free to leave.  
3 It's difficult to understand even the concept of  
4 flight or Santana's language around thwarting a  
5 public arrest without that kind of, you know,  
6 reasonable basis for understanding that they're  
7 not free to leave.

8 JUSTICE BARRETT: So you would concede  
9 that we would have to ask, if we adopted your  
10 rule, whether the police officer -- whether a  
11 reasonable police officer could have understood  
12 the suspect to be fleeing as opposed to just  
13 going about his business, not seeing the police  
14 officer, and moving into the house?

15 MS. RICE: Correct, Justice Barrett, I  
16 think that that's a limit on the hot pursuit  
17 rule.

18 JUSTICE BARRETT: Okay. Thank you,  
19 Ms. Rice.

20 CHIEF JUSTICE ROBERTS: Ms. Rice, a  
21 minute to wrap up.

22 MS. RICE: Thank you, Mr. Chief  
23 Justice.

24 In this case, Office Weikert's  
25 split-second decision to stop the garage door

1 from closing was a reasonable minimal intrusion  
2 that almost certainly prevented Petitioner from  
3 getting away with drunk driving by refusing to  
4 heed the officer's lawful order to stop. So the  
5 decision below should be affirmed under any of  
6 the rules advocated here today.

7 But the categorical hot pursuit rule,  
8 that reflects precedent, appropriately balances  
9 law enforcement and privacy interests, provides  
10 necessary guidance to officers, and avoids  
11 unnecessary constitutional litigation. The  
12 justifications for that rule apply to felonies  
13 and misdemeanors alike, and it is exceedingly  
14 narrow.

15 In the end, the categorical hot  
16 pursuit rule does nothing more and nothing less  
17 than prevent suspects from grafting the  
18 protections of the home onto lawful public  
19 encounters by engaging in wrongful conduct.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Ms. Ross.

24

25

1 ORAL ARGUMENT OF ERICA L. ROSS  
2 FOR THE UNITED STATES, AS AMICUS CURIAE,  
3 SUPPORTING AFFIRMANCE

4 MS. ROSS: Mr. Chief Justice, and may  
5 it please the Court:

6 The amicus has laid out the case for a  
7 categorical rule. Our principal submission is  
8 that, for many of the same reasons, the Court  
9 should recognize at least a general presumptive  
10 rule that when a misdemeanor suspect tries to  
11 thwart a lawful public encounter by moving the  
12 encounter to a residence, an officer's decision  
13 to follow him is reasonable.

14 As the Court recognized in Mitchell  
15 versus Wisconsin, a presumptive rule is  
16 appropriate where the circumstances generally  
17 present in a category of cases mean that law  
18 enforcement interests will always or nearly  
19 always outweigh the suspect's interests. That's  
20 true here.

21 On the one hand, the suspect's flight  
22 implicates important societal interests in  
23 enforcing the law and not rewarding flight, it  
24 makes it difficult for officers to obtain a  
25 warrant, and it increases the risks of

1 destruction of evidence perhaps for a more  
2 serious offense, further escape, or danger to  
3 officers and the public.

4 On the other hand, the suspect's  
5 decision to bring a public encounter to the home  
6 diminishes any privacy interests he may have  
7 there.

8 CHIEF JUSTICE ROBERTS: Counsel, what  
9 is your understanding of the limits that apply  
10 when an officer does go into the home, assuming  
11 that your position -- your position that he's  
12 allowed to? What exactly are the limits on what  
13 he can do once he's in?

14 MS. ROSS: Certainly. So we think  
15 that there are three primary limits. The first  
16 is that the manner of entry itself must be  
17 reasonable. The second is that the scope of the  
18 entry has to comport with this Court's cases,  
19 like Chimel and Buie, essentially saying that  
20 it's not going to be a full-blown search of the  
21 entire residence. And, third, of course,  
22 officers in this context, as in all others,  
23 can't use excessive force.

24 CHIEF JUSTICE ROBERTS: The manner of  
25 entry must be reasonable. Well, presumably, the

1 person who fled in locked the door because, you  
2 know, he didn't want the police to catch him.  
3 What -- what would be -- I mean, can the officer  
4 try to knock it down or what?

5 MS. ROSS: So, Your Honor, I -- I  
6 guess I would quibble a little bit with the idea  
7 that -- that the suspect will necessarily have  
8 locked the door.

9 I think in a case like this one, you  
10 know, the garage door is closing. In a case  
11 like Santana, the door was open. I don't think  
12 that that was key to the analysis in that case,  
13 so I think there will be a -- a class of cases  
14 where this question actually really won't come  
15 up because it will be very clear that the  
16 officer's action was reasonable. I think --

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

20 MS. ROSS: So I think that will be a  
21 circumstance-specific determination. I think it  
22 will -- it -- it -- it is, I think, in felony  
23 cases too in which we accept and I think most of  
24 the parties before you accept and the lower  
25 courts certainly have treated the -- the hot

1       pursuit exception as a categorical rule.

2                   CHIEF JUSTICE ROBERTS:  And I suppose  
3       once he's inside, he can discover things that  
4       are in plain sight that might indicate a  
5       violation of the law, right?

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

7                   CHIEF JUSTICE ROBERTS:  Okay.  Thank  
8       you, counsel.

9                   Justice Thomas.

10                  JUSTICE THOMAS:  Thank you, Mr. Chief  
11       Justice.

12                  Just a couple of quick questions,  
13       counsel.  Did the common law permit entry for --  
14       when there was a -- a case of resisting arrest  
15       after a hot pursuit?

16                  MS. ROSS:  Justice Thomas,  
17       unfortunately, like -- like counsel, I'm not  
18       aware of a specific case on that point.  I do  
19       know that, as others have suggested, the closest  
20       analogy, I think, would be escape, and in that  
21       case, yes, the common law did permit that type  
22       of entry.

23                  JUSTICE THOMAS:  But do you think that  
24       escape is close enough analogy -- is a close  
25       enough comparator?

1                   MS. ROSS: So, Your Honor, I think the  
2 issue here is that everyone essentially, I  
3 think, acknowledges that the common law does not  
4 fully answer this question and does not clearly  
5 answer this question.

6                   And so I think, in that situation, the  
7 Court should turn, as Ms. Rice said, to other  
8 modes of constitutional analysis. I think  
9 particularly given the water under the bridge  
10 here with respect to both Santana and Atwater,  
11 the Court needs to both conduct the interest  
12 balancing that it traditionally does but also  
13 think about administrability concerns.

14                   So I think as -- just as Santana  
15 recognized that we shouldn't sort of incentivize  
16 individuals to flee otherwise lawful public  
17 encounters with the police in the felony context  
18 by backing into a home, the same is true in the  
19 misdemeanor context given Atwater.

20                   JUSTICE THOMAS: Thank you.

21                   CHIEF JUSTICE ROBERTS: Justice  
22 Breyer.

23                   JUSTICE BREYER: Well, I talked --  
24 I -- I asked last time, I want you to think of  
25 the cruel trilemma, okay? There is a fourth

1 possibility which your words nearly always  
2 suggested, and that is that we -- what do you  
3 think that we could say, yes, it's almost always  
4 exigent, almost always, because all -- almost  
5 always the police departments have rules and  
6 almost always it is a felony and almost always  
7 there is a good reason for it, dah, dah, dah.

8           And -- but we go back to the  
9 Constitution's words, "reasonable,"  
10 "unreasonable." It can show that it is not  
11 reasonable in the circumstance and there'd be a  
12 number of different things you'd bring into that  
13 and one would be the -- the length of the -- of  
14 the chase, was it just two steps or not.

15           Another would be the type of conduct  
16 that led to the chase. So, if it's a rabbit  
17 type of conduct, that's a pretty strong reason  
18 against allowing that chase into the house. And  
19 another would be the availability of the  
20 magistrate and the risks of escape, dah, dah,  
21 dah.

22           But you point out they'd only come up  
23 in a few cases. They don't normally chase  
24 people for minor things. But just leave it at  
25 that and say reasonable and we don't have an



1 absolute rule. We thought we could answer this,  
2 but sometimes you just can't.

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

5 MS. ROSS: So, Justice Breyer, I think  
6 what you've said very nearly approximates the --  
7 the rule that we've submitted would be  
8 appropriate here.

9 I think, generally, we think that when  
10 officers follow a suspect who has committed --  
11 or who they have probable cause to believe has  
12 committed a misdemeanor offense into a home,  
13 that is going to be reasonable. We follow the  
14 Court's decision in Mitchell versus Wisconsin,  
15 which left open the possibility that in -- that  
16 a suspect could, in an unusual case, show that  
17 his was essentially the unusual case where the  
18 normal considerations aren't at play.

19 I think that both gives sufficient  
20 guidance to officers on the beat because it's  
21 not a felony and misdemeanor distinction in any  
22 meaningful sense, but it really is -- is an  
23 understanding that this will almost always be  
24 reasonable and the officer just has to have his  
25 eye out for the truly minor case for the -- the

1 things that we think are normally present in hot  
2 pursuit scenarios: for example, a concern about  
3 the ability to identify the suspect later, a  
4 concern about lots of exits, where, you know,  
5 the -- the officer's on his own and he can't  
6 secure the perimeter, a concern about potential  
7 violence where none of those are at play.

8 JUSTICE BREYER: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Alito.

10 JUSTICE ALITO: Would your rule be  
11 different from an across-the-board exigent  
12 circumstances rule? Would it apply in felony  
13 cases? If IRS officers went to someone's office  
14 to arrest a person for tax evasion and the  
15 person slipped out and there was a chase, the  
16 person went to his house, would it apply --  
17 would it be open to that person to say that --  
18 that -- that you should have gotten -- you  
19 needed to get a warrant in that situation?

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

22 The first is that I do take this  
23 Court's decision in Santana to have  
24 categorically held that the hot pursuit was  
25 sufficient in that context, and that's on page

1 43 of the opinion.

2 I think for -- this Court has  
3 certainly taken -- albeit not in holdings but  
4 has repeatedly noted that the felon hot pursuit  
5 rule is its own exception and generally isn't  
6 part of the -- or -- or the other exigent  
7 circumstances don't necessarily need to be  
8 proved on a case-by-case basis.

9 And I also just think that your  
10 hypothetical, while I guess possible, is so rare  
11 that in the felony context, it makes sense to  
12 have what the state refers to as a conclusive  
13 presumption because --

14 JUSTICE ALITO: Well, it may not be  
15 a -- it may not be a good -- a good  
16 hypothetical, but what you said takes us back to  
17 this distinction between felonies and  
18 misdemeanors, which is very difficult to impose  
19 as a nationwide Fourth Amendment requirement.

20 MS. ROSS: I guess I respectfully  
21 disagree, Justice Alito. I don't think it  
22 really hinges on the felony/misdemeanor  
23 distinction. I think an officer on the beat  
24 will know that when a suspect who he has  
25 lawfully tried to stop flees that encounter, he

1 has the authority to follow him in. That  
2 doesn't mean he should as a matter of policy.  
3 It just means that the Fourth Amendment doesn't  
4 restrict his ability to do so.

5           And I think what we're really carving  
6 out here are the very minor offenses. I think  
7 if you're fleeing from a felony or -- or from a  
8 serious offense, what the legislature has  
9 determined to be a serious offense, in the vast  
10 majority of cases, that is going to -- to be  
11 enough. And -- and that's generally how the  
12 Court has had categorical rules in -- in those  
13 circumstances.

14           JUSTICE ALITO: Thank you.

15           CHIEF JUSTICE ROBERTS: Justice  
16 Sotomayor.

17           JUSTICE SOTOMAYOR: I continue to  
18 wonder why the dicta in our cases should control  
19 or make -- some dicta make the assumption that  
20 the mere commission of any felony justifies  
21 entry into a home even in -- in hot pursuit  
22 circumstances if the pursuit is not so hot.

23           And -- and maybe we -- I'm going back  
24 to what Justice Alito started with earlier in  
25 saying we really do need to understand what

1 those terms mean to decide this case and make an  
2 absolute rule.

3 Your presumption, it sounds like you  
4 want to make it a legal presumption and one that  
5 needs to be rebutted by the Defendant. But I  
6 don't know why we would create a legal  
7 presumption, Ms. Ross.

8 Why don't we just speak practically  
9 and say that there are some circumstances  
10 where -- that, in many circumstances, it might  
11 be justified to go into the home, but in some  
12 they're not, and leave it at that. I'm not sure  
13 why we go -- we need to create a legal rule.

14 MS. ROSS: Justice Sotomayor, I think  
15 a legal rule is appropriate here because it will  
16 make it far easier for officers on the beat to  
17 understand what is expected of them, and it will  
18 also minimize the opportunity and temptation for  
19 judicial second-guessing of encounters that have  
20 to be -- and decisions that have to be made in  
21 the heat of the moment based on the suspect's  
22 own decision to flee a public encounter.

23 So I think this is not dissimilar  
24 from --

25 JUSTICE SOTOMAYOR: Ms. Ross, the

1 Second -- the First Amendment by its nature  
2 creates judicial review because it speaks about  
3 reasonableness and unreasonableness. These  
4 categorical rules seem to destroy that -- that  
5 presumption of the First Amendment. And I don't  
6 know why we should be creating more when the  
7 common law didn't.

8 MS. ROSS: Justice Sotomayor, I don't  
9 think that it would be stripping courts of  
10 judicial review. I think the point is simply to  
11 recognize how the analysis we think properly  
12 conducted would come out in the vast majority of  
13 cases.

14 And I think this is an important  
15 point. I think Petitioner and the state in the  
16 misdemeanor context removed the fact of flight,  
17 at least in their briefing, I think Petitioner  
18 perhaps not as much so today, but removed the  
19 fact of flight from the analysis.

20 I think it weighs heavily on both  
21 sides of the Fourth Amendment question here, and  
22 when properly conducted, I think it would yield  
23 the same results in almost every case, and,  
24 therefore, we do think a presumption is  
25 warranted.

1 CHIEF JUSTICE ROBERTS: Justice --  
2 Justice Kagan.

3 JUSTICE KAGAN: I want to press on  
4 that a little bit, Ms. Ross. I mean, I guess  
5 the two questions that I have about this  
6 presumption of yours is where does it come from  
7 and why is it needed.

8 On the where does it come from, we --  
9 we -- we -- we look at Fourth Amendment law and  
10 we just don't generally see the Court talking  
11 about presumptions, in a couple of non-majority  
12 opinions in this extremely sui generis area of  
13 drunk driving, but otherwise there's just no  
14 tradition in Fourth Amendment law of using  
15 presumptions, as opposed to case-by-case  
16 analysis of reasonableness.

17 And -- and why do you need it? There  
18 are plenty of doctrines that say to a police  
19 officer, you know, when in doubt maybe you can  
20 take a little bit more of a risk. Qualified  
21 immunity does that. In this case, there's the  
22 fact of the good-faith exception lurking in the  
23 background.

24 Why would you need a presumption  
25 rather than just like you should make your best

1 shot? You should -- you should make the call  
2 that you think is appropriate.

3 MS. ROSS: Justice Kagan, in terms of  
4 why we think officers need this presumption, I  
5 don't think it's because the -- the end result  
6 is going to come out differently. I do think  
7 it's an administrability issue. I think in the  
8 field it is very helpful for officers to know  
9 that, just as they have a conclusive presumption  
10 or an absolute rule in the felony context, they  
11 generally are going to be able to follow  
12 misdemeanor suspects who flee into their homes.

13 I think that that reflects how the  
14 accurate balancing would turn out in most cases.  
15 I also think that the reason why that's true is  
16 because the fact of flight itself is going to  
17 implicate significant government interests in  
18 the desire not to have suspects flee and  
19 enforcement of the rule of law and the ability  
20 to identify suspects. When someone --

21 JUSTICE KAGAN: And on my first  
22 question, Ms. Ross?

23 MS. ROSS: Sure. So, on your first  
24 question, I think the best analogy that we have  
25 for you is Mitchell versus Wisconsin. I take



1 the -- the point that there are more misdemeanor  
2 offenses than there are situations in which you  
3 encounter a passed-out drunk driver. But I  
4 think the methodological idea is the same, which  
5 is to say that there are certain facts present  
6 in a category of cases -- this is at Note 2 of  
7 the Court's opinion -- that are going to bear on  
8 the same -- on the analysis in essentially the  
9 same way in the vast majority of cases.

10 JUSTICE KAGAN: Thank you.

11 MS. ROSS: And I think if the Court is  
12 more comfortable with the categorical rule,  
13 that's certainly not something that we oppose  
14 here given the constraints that I was discussing  
15 with Chief Justice Roberts initially.

16 But I do think that -- that a --

17 JUSTICE KAGAN: Thank you, Ms. Ross.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Gorsuch.

20 JUSTICE GORSUCH: Good morning, Ms.  
21 Ross. I'd like to return to the question I -- I  
22 raised with Ms. Rice earlier and -- one of them  
23 at any rate -- and that is you -- you make a  
24 point about the difficulty of an officer's  
25 ability to distinguish between felonies and

1       misdemeanors.

2                   But there's also a line between  
3       misdemeanors and infractions, and they are  
4       multitudinous infractions these days.

5                   Do you, like Ms. Rice, take the  
6       position that an officer can presumptively or  
7       absolutely in -- in her case proceed into the  
8       home in hot pursuit of a -- of a violation of an  
9       infraction?

10                   MS. ROSS:  So, Justice Gorsuch, I  
11       think the first thing I would say is the same  
12       thing that Ms. Rice said, which is that no one  
13       has briefed that question in this case and  
14       really --

15                   JUSTICE GORSUCH:  I -- I understand  
16       that.  But she proceeded on to answer my  
17       question.  I would appreciate it if you would  
18       too.

19                   MS. ROSS:  Certainly, Your Honor.  So  
20       I think that the presumptive rule that we have  
21       set out here, the logic of it certainly could  
22       apply.

23                   I think that the unusual case probably  
24       wouldn't be quite as unusual in that  
25       circumstance because we do think that the -- the

1 very minor nature of the crime, not necessarily  
2 how it is classified as a matter of state law,  
3 but the very minor nature of the crime might  
4 affect the ability of a defendant to show that  
5 his is, in Mitchell's words, the unusual case.

6 JUSTICE GORSUCH: So, if we put that  
7 together, that an officer can go into a home to  
8 arrest for an infraction, a non-jailable  
9 infraction, we live in a world in which  
10 everything is illegal, you put that together  
11 with the good-faith exception and the -- the  
12 fact that an officer's not being tested on his  
13 subjective intentions, which may be nefarious,  
14 but whether a reasonable officer could think as  
15 he did, and a hot pursuit can be pretty tepid,  
16 it turns out, have we come pretty close to --  
17 doesn't that sound a bit like the general war --  
18 world and -- and the founding that the framers  
19 were so concerned about rejecting?

20 MS. ROSS: I don't think so, Your  
21 Honor, for a couple of reasons. The first is  
22 that I think a key fact in that fact pattern is  
23 the fact that the -- the officer necessarily, at  
24 least in the class of cases we're talking about  
25 today, tried to have an encounter outside of the

1 home, and it's the suspect's decision to bring  
2 that into the home that occasioned the -- a  
3 continued pursuit.

4 JUSTICE GORSUCH: Well, that, of  
5 course, is contested. Thank you very much,  
6 counsel.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Kavanaugh.

9 JUSTICE KAVANAUGH: Good morning, Ms.  
10 Ross. I think we have a couple of options here  
11 people have explored, but I want to just narrow  
12 it down to two, and it's not going to use the  
13 word "presumption."

14 But, if -- if I think there are two  
15 options here, one is categorical rule for  
16 felonies and exigent circumstances for  
17 misdemeanor cases. So that's one option. The  
18 other option's a categorical rule for both.

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

22 But I wonder if the exigent  
23 circumstances doctrine, in other words, the  
24 first option, really wouldn't provide, you know,  
25 not as clear a rule but still a pretty clear

1 rule for officers because the Exigent  
2 Circumstances Doctrine really, as I see it,  
3 tracks common sense, these are the kinds of  
4 cases and the kinds of reasons an officer would  
5 do this in the first place, want to go into the  
6 house without a warrant, especially escape of  
7 the suspect, threats to others, destruction of  
8 evidence.

9           So I guess I'm not sure what's gained  
10 by a categorical rule. That said, I'm not --  
11 you know, I think it's also -- you can pose that  
12 question in the other direction -- I'm not sure  
13 what's gained by not having a categorical rule.  
14 I'd appreciate your analysis of that.

15           MS. ROSS: Certainly, Justice  
16 Kavanaugh. So I think what's gained by having a  
17 categorical rule is the administrability.

18           It seems that if we expect that,  
19 especially once you take the fact of flight into  
20 account, which, again, is going to make it very  
21 hard for officers to know in any particular  
22 situation whether the other exigent  
23 circumstances are present -- once you take that  
24 into account, I think in the vast majority of  
25 cases, nearly every case, in fact, the analysis

1 is going to come out to make the officer's  
2 action reasonable.

3 And so I think once we recognize that,  
4 it makes sense to provide additional clarity to  
5 both officers and courts by effectively adopting  
6 either a categorical rule or a presumptive rule.

7 JUSTICE KAVANAUGH: The one caution,  
8 though, is that will leave -- that'll leave the  
9 category of extreme cases, where an officer did  
10 not use common sense, is still covered by -- by  
11 the doctrine. And that seems problematic, as  
12 several people have raised.

13 MS. ROSS: So -- so I don't think that  
14 that's right at least if you accept our  
15 proposition or our proposal of a presumptive  
16 rule. I take your question to be --

17 JUSTICE KAVANAUGH: Right.

18 MS. ROSS: -- a categorical rule. And  
19 in that case, yes, I think that's true. I think  
20 that that's where policy comes in. And I think  
21 it's very important to note that we are not  
22 suggesting that just because the Fourth  
23 Amendment would permit this that it's  
24 necessarily what jurisdictions or even officers  
25 on their own should adopt as a matter of best

1 practice.

2 JUSTICE KAVANAUGH: Yeah, my question  
3 might be why you've come up with a presumptive  
4 rule rather than categorical. I appreciate your  
5 answers, Ms. Ross. Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Barrett.

8 JUSTICE BARRETT: Good morning, Ms.  
9 Ross. Is your rule -- can I summarize it this  
10 way, that you think it's categorical for  
11 felonies plus presumptive for misdemeanors, or  
12 would you say just presumptive for everything,  
13 but we understand that for felonies it's always  
14 going to be satisfied?

15 MS. ROSS: So -- so I think the  
16 difference may not matter, but, yes, we think  
17 that it is categorical in the felony context. I  
18 think you can think of that as an irrebuttable  
19 presumption.

20 But the basic point of our rule is,  
21 when you put the two sides together, it's really  
22 not a distinction between the felony and the  
23 misdemeanor. It's just looking out for the  
24 super-unusual case.

25 JUSTICE BARRETT: Well, then I have a

1 methodological question about the categorical  
2 rule for felonies.

3           So we're all in agreement that at  
4 common law this exception applied for felonies.  
5 But, you know, common law, the list of felonies  
6 was pretty short.

7           Why do we take -- and as we've pointed  
8 out again and again and again, today, the line  
9 between felonies and misdemeanors can seem quite  
10 arbitrary -- so why would we pull out as the key  
11 fact something's designation as a felony? Why  
12 wouldn't we simply say, okay, for the very  
13 serious crimes that used to be felonies at  
14 common law, then this rule applies, but  
15 otherwise the felony/misdemeanor line doesn't  
16 really have much significance here? In other  
17 words, why is it felony rather than the list  
18 of particular crimes that justify warrantless  
19 entry into the home?

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



1                   And I think as an administrability  
2                   matter, that has proven to not be too much of a  
3                   difficulty for the lower courts, again, in that  
4                   context.

5                   I take the point that we shouldn't be  
6                   sort of strictly dividing between felonies and  
7                   misdemeanors. And, again, I think our rule has  
8                   the benefit of not doing that.

9                   JUSTICE BARRETT: Thank you.

10                  CHIEF JUSTICE ROBERTS: A minute to  
11                  wrap up, Ms. Ross.

12                  MS. ROSS: Thank you, Mr. Chief  
13                  Justice.

14                  When officers seek to conduct a lawful  
15                  public encounter based on probable cause that a  
16                  suspect has committed a misdemeanor, but the  
17                  suspect flees into a residence, an officer's  
18                  decision to follow him generally will be  
19                  reasonable.

20                  This Court has already held that a  
21                  felony suspect's flight in those circumstances  
22                  does not permit him to claim the privacy of the  
23                  home to thwart a lawful encounter. The same  
24                  basic logic should govern in the misdemeanor  
25                  context.

1           Petitioner's case-by-case approach, by  
2 contrast, ignores the impact that a suspect's  
3 flight has on both sides of the Fourth Amendment  
4 analysis and the difficulties it creates for  
5 officers in defining and identifying exigent --  
6 other exigent circumstances in the moment. It  
7 also would be difficult to administer and would  
8 invite judicial second-guessing of decisions  
9 that, due to the suspect's own actions, must be  
10 made, in Atwater's words, on the spur and in the  
11 heat of the moment.

12           This Court should reject that  
13 approach, adopt at least a general presumptive  
14 rule that warrantless entry in misdemeanor hot  
15 pursuit cases is reasonable, and affirm.

16           Thank you.

17           CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19           Rebuttal, Mr. Fisher.

20           REBUTTAL ARGUMENT OF JEFFREY L. FISHER

21           ON BEHALF OF THE PETITIONER

22           MR. FISHER: Thank you. Three points,  
23 Your Honors.

24           First, as to the common law, the  
25 common law is dispositive in this case. The

1 common law required a warrant to enter the home  
2 unless a specified exception existed at law.  
3 Entick said that, Chitty said that, Hawkins said  
4 that, numerous other authorities. And so the  
5 absence of any exception that covers all  
6 misdemeanors is dispositive here. And it really  
7 is, as Justice Barrett put it -- it's exigent  
8 circumstances all the way down because the test  
9 the common law commentators were applying was  
10 whether there was a requirement for an immediate  
11 arrest. And so the subcategories that we've  
12 talked about today really are subcategories of  
13 that test.

14           The second point I'd like to address  
15 is the question why not just make hot pursuit  
16 doctrine itself a direct species of exigent  
17 circumstances, as I think Justice Alito and  
18 others have asked. I think the reason to resist  
19 leaning too hard on a special category of hot  
20 pursuit is it puts a lot of pressure on exactly  
21 what would constitute a hot pursuit and what is  
22 hot.

23           At common law, it was clear that  
24 "escape" meant escape from a prior custodial  
25 arrest. And Hale and others were -- were

1 precise about this. So for the other side to  
2 craft a rule or for the Court to craft a rule  
3 about hot pursuit, you'd have to ask questions  
4 about is some other form of attempted detention,  
5 like in this case, good enough to trigger a hot  
6 pursuit? Does the suspect have to be aware of  
7 it or reasonably perceived to be aware of it?  
8 Does the officer have to witness the crime?  
9 There could be any number of other case-specific  
10 questions on which circuit splits could already  
11 be seen to be proliferating in the lower courts  
12 about what constitutes hot pursuit.

13           So we think the best solution here is  
14 to recognize in general terms that hot pursuit,  
15 as Justice Kavanaugh puts it, is important for  
16 exigent circumstances but not draw firm bright  
17 lines about a category of hot pursuit.

18           And then, finally, you have the  
19 question of administrability. Justice Breyer  
20 and others have asked about that. Let me say  
21 two things. One is that officers apply the  
22 Exigent Circumstances Doctrine on a daily basis  
23 across the country in all other circumstances.  
24 And the Court has never been confronted with  
25 arguments saying that is unworkable or difficult

1 for officers to do. It is actually the nature  
2 of their jobs to consider the totality of the  
3 circumstance.

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

14 We're asking for the officers to do  
15 exactly what they do all the time. And a -- a  
16 presumption or, even worse, a categorical rule  
17 would just complicate matters. And as Justice  
18 Kagan pointed out, there's already a thumb on  
19 the scale of officers in other ways to give them  
20 benefit of the doubt; you don't need a  
21 categorical rule or even a presumption to solve  
22 that problem on a daily basis.

23 For all those reasons, we'd ask the  
24 Court to reverse.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Ms. Rice, this Court appointed you to  
3 brief and argue this case as an amicus curiae in  
4 support of the judgment below. You have ably  
5 discharged that responsibility, for which we are  
6 grateful.

7 The case is submitted.

8 (Whereupon, at 11:52 a.m., the case  
9 was submitted.)

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