NO. 20-18

IN THE

Supreme Court of the United States

ARTHUR GREGORY LANGE,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

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

Brief of National Association of Criminal Defense Lawyers and California Attorneys for Criminal Justice as *Amici Curiae* in Support of Petitioner

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent national organization in the United States representing attorneys practicing in the field of criminal defense—including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to ensuring fairness within America's criminal justice system. California Attorneys for Criminal Justice (CACJ), a NACDL affiliate and the largest statewide organization of California criminal-defense lawyers and allied professionals, defends the rights of persons accused of crimes and the interests of wrongfully convicted persons. Both NACDL and CACJ are nonprofit, voluntary professional bar associations that frequently appear as *amici curiae* before this Court in cases raising issues of importance to criminal defendants and the defense bar.

NACDL, CACJ, and their many thousands of combined members have an important interest in ensuring that the exigent circumstances exception to the Fourth Amendment's warrant requirement is applied in a manner that is consistent with this Court's precedents and that minimizes the risk of dangerous in-home confrontations between police and suspected offenders.

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[1] Pursuant to Supreme Court Rule 37.3(a), counsel of record for petitioner, respondent, and *amicus curiae* in support of the judgment below have consented to the filing of this brief. No party authored this brief in whole or in part, and no person or entity, other than the undersigned *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

Amici have conducted an exhaustive review of decisions by state and federal courts involving police pursuit of suspected misdemeanants into a residence without a warrant, and two takeaways are clear.

First, such pursuits often spiral unpredictably. Once inside a home, adrenaline-filled officers must make split-second decisions regarding the use of force, and injuries to police, suspects, and innocent third parties are common. *Amici* have identified scores of cases in which property was damaged during the entry; a police officer, the pursued, or a home occupant wound up injured or dead; or both. In each instance, it is easy to picture how a brief pause in the action to obtain a warrant could have prevented chaos and injury.

Indeed, the havoc described by courts in many misdemeanant-pursuit cases bears a close resemblance to the dangers that inspired the knock-and-announce requirement. As this Court has explained, requiring police to pause and announce their presence serves a strong societal interest in protecting "human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident." *Hudson* v. *Michigan*, 547 U.S. 586, 594 (2006). The Court has also acknowledged that the requirement protects property, as forced entry by police often involves breaking doors and other items, and safeguards the "privacy and dignity that can be destroyed by a sudden entrance," such as when someone is deprived the opportunity "to pull on clothes or get out of bed." *Id.* (citations omitted). Likewise, warrantless home invasions in pursuit of misdemeanants—which are generally unannounced from the perspective of

occupants other than the pursued—routinely imperil these interests.

Second, the typical justifications for a warrantless home entry—preventing evidence destruction and protecting the safety of officers and the public—are often not implicated in misdemeanant pursuits. In many of the cases identified by *amici*, the pursuit was prompted by non-threatening offenses—such as public urination, riding an ATV without a helmet, or failing to pay a cab fare—that involved no evidence the retreating misdemeanant could destroy. Categorically allowing warrantless entry in these situations would involve the kind of "considerable overgeneralization" that this Court's Fourth Amendment precedents forbid. See *Richards* v. *Wisconsin*, 520 U.S. 385, 393, 394 (1997) (holding that "in each case," courts must "determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement").

Of course, there will be situations where a particular misdemeanant poses a serious threat that justifies warrantless entry, but the run of cases identified by *amici* reinforce the wisdom of this Court's rule that "the exigent-circumstances exception must be applied on a case-by-case basis." *Birchfield* v. *North Dakota*, 136 S. Ct. 2160, 2174 (2016). *Amici* urge the Court to hew to that approach and reject a *per se* rule that would dangerously encourage police to barge into homes in every case, regardless of the circumstances.[2]

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[2] Like petitioner, *amici* employ the traditional definition of "misdemeanor": a non-felony offense punishable by incarceration.

ARGUMENT

I. Categorically Authorizing Warrantless Home Entries in Pursuit of Misdemeanants Would Give Rise to Serious Harms

In a variety of Fourth Amendment cases, this Court has observed that the risk that a government intrusion may "threaten the safety or health of [an] individual" or otherwise present a "physical danger" is a "crucial factor" in determining its reasonableness. *Maryland* v. *King*, 569 U.S. 435, 464 (2013) (citation omitted); see also *Winston* v. *Lee*, 470 U.S. 753, 763 (1985) (examining "threats to the [the suspect's] health or safety" posed by a search); *Schmerber* v. *California*, 384 U.S. 757, 771 (1966) (noting that search involved "virtually no risk, trauma, or pain"). This Court has also recognized that unannounced home entries by police frequently generate exactly this kind of risk. Because *warrantless* home entries in pursuit of misdemeanants are generally unannounced as well (particularly from the perspective of occupants other than the pursued), they often present the very same dangers.

That is not a matter of speculation; it is a matter of empirical proof. A robust body of decisions in both the civil and criminal contexts demonstrates that warrantlessly chasing a misdemeanant into a home often snowballs out of control, resulting in personal injury and property damage as police face quick decisions in an unfamiliar setting with limited information. A blanket license to charge into homes in pursuit of misdemeanants encourages police to create these risks in every case, even when it would be objectively unreasonable to do so.

1. Since the Founding era, courts have recognized that unannounced entries invite violence. In 1757, an English common-law court reviewed the murder conviction of a man who reacted to a peace officer's entry into his friend's workshop by killing the officer with an ax. See *Case of Richard Curtis*, Fost. 135, 168 Eng. Rep. 67 (Crown 1757). In evaluating whether the officer had adequately announced himself before entering, the court explained that officers must inform occupants that they "cometh not as a mere trespasser, but claiming to act under a proper authority." Fost. at 137; 168 Eng. Rep. at 68. Chief Justice Abbott of the King's Court echoed that concern a few decades later: "[I]f no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost." *Launock* v. *Brown*, 2 B. & Ald. 592, 593, 106 Eng. Rep. 482, 483 (K.B. 1819).

This Court has voiced the same concern. In *McDonald* v. *United States*, 335 U.S. 451 (1948), officers investigating an illegal lottery operation heard sounds of an adding machine emanating from a rooming house. Proceeding without a warrant, one officer "opened a window leading into the landlady's room and climbed through," introducing himself to the woman once inside. *Id.* at 453. The officer then ushered his colleagues into the house, where they arrested several occupants and seized evidence of their lottery venture. *Id.* This Court ruled that the warrantless entry violated the Fourth Amendment because no exigency justified departure from the warrant requirement. *Id.* at 454-456. Officers waiting outside could have "apprehend[ed] petitioners in case they tried to leave," and there was no reason to suspect

evidence was being destroyed. *Id.* at 455. Writing in concurrence, Justice Jackson observed that the method of search was "certain to involve the police in grave troubles if continued." *Id.* at 460 (Jackson, J., concurring). He explained: "Many home-owners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot [him]. * * * But an officer seeing a gun being drawn on him might shoot first." *Id.* at 460-461.

Citing Justice Jackson's concurrence, this Court has explained several times that surprise entry by police threatens "life and limb" because it "may provoke violence in supposed self-defense by the surprised resident." *Hudson* v. *Michigan*, 547 U.S. 586, 594 (2006) (citing *McDonald*, 335 U.S. at 460-461 (Jackson, J., concurring)). Hence, requiring officers to pause and announce their presence is "a safeguard for the police themselves," who might otherwise be "mistaken for prowlers" and "shot down by a fearful householder." *Miller* v. *United States*, 357 U.S. 301, 313 n.12 (1958) (citing *McDonald*, 335 U.S. at 460-461 (Jackson, J., concurring)); see *Sabbath* v. *United States*, 391 U.S. 585, 589 (1968) ("[A]nother facet of the rule of announcement was, generally, to safeguard officers, who might be mistaken, upon an unannounced intrusion into a home, for someone with no right to be there.") (citing *McDonald*, 335 U.S. at 460-461 (Jackson, J., concurring)).

Other interests are at stake as well. Besides putting residents and officers in danger, unannounced entry may deprive homeowners of "the opportunity * * * to avoid the destruction of property occasioned by a forcible entry." *Hudson*, 547 U.S. at 594

(citation omitted). Yet another interest is the "privacy and dignity that can be destroyed by a sudden [police] entrance," as unannounced entry can deprive unsuspecting residents of "the opportunity * * * to pull on clothes or get out of bed" or "collect oneself before answering the door." *Id.* (citation omitted).

2. These same dangers clearly arise from sudden, warrantless entries in pursuit of misdemeanants. Such entries are generally unannounced or made in some other manner that may inspire a surprised, defensive, and potentially violent reaction by residents, and police frequently decide to enter in the heat of the moment without the opportunity for reflection and deliberation that comes with a brief pause to seek a warrant.

Stanton v. *Sims*, 571 U.S. 3 (2013) (per curiam), is the quintessential example. In that case, Officer Mike Stanton and his partner, working in La Mesa, California, responded to a late-night call about a disturbance involving a person with a baseball bat. *Id.* at 4. Upon approaching, they saw three men walking in the street. *Id.* Two of the men turned into a nearby apartment complex, while the third, Nicholas Patrick, ran toward a residence. *Id.* Patrick was not holding a baseball bat, but Stanton considered his behavior suspicious and yelled for him to stop. *Id.* Patrick instead retreated into a fenced yard where Stanton could not see him. *Id.* At this point, Stanton believed Patrick had committed a jailable misdemeanor by disobeying his order to stop. *Id.* Rather than knock on the fence door or pause to apply for a warrant, Stanton chased after Patrick and kicked open the fence door. *Id.* at 5. Unfortunately, the owner of the house, Drendolyn Sims, was standing right behind the door when Stanton kicked it open.

Id. The door blasted Sims in the face, splitting open her forehead and sending her into her home's front steps. *Id.*; *Sims* v. *Stanton*, 706 F.3d 954, 958 (9th Cir. 2013). Sims was rendered incoherent as a result of the blow, injured her shoulder, and required treatment at a hospital. *Stanton*, 571 U.S. at 5; *Sims*, 706 F.3d at 958.

Sims's story is not unusual. *Amici* have reviewed approximately one hundred and fifty decisions in § 1983, *Bivens*, and criminal cases involving warrantless home entries in pursuit of suspected misdemeanants, and the situations the courts describe confirm the serious danger and other costs associated with such entries. Below are a few examples.

a. *Thompson* v. *City of Florence*, 2019 WL 3220051 (N.D. Ala. July 17, 2019). At 2 a.m. on a Sunday morning in Florence, Alabama, twenty-year-old Mason Kamp urinated on the corner of his girlfriend's outdoor patio. *Id.* at *3. A plainclothes officer walking on an adjacent sidewalk spotted Kamp, displayed his badge, and told Kamp that he was not allowed to urinate in public. *Id.* Thinking that the plainclothes patrolman might merely be posing as a police officer, Kamp asked the officer for identification, the two exchanged words, and Kamp went back into his girlfriend's apartment. *Id.* Public urination generally constitutes public lewdness in Alabama, a jailable misdemeanor, and the officer decided to apprehend Kamp. *Id.*; see Ala. Code §§ 13A-12-130(a) & 13A-5-7(a)(3).

The officer and his partner, who was also in plainclothes, knocked on a door connecting the patio to the apartment. 2019 WL 3220051, at *3. Kamp's girlfriend answered, and the officers said they needed to speak with the "gentlemen" who was recently outside.

Id. The officers then spotted Kamp inside, pushed past the girlfriend into the apartment, and a "scrum" ensued among the plainclothes officers, Kamp, and another occupant. *Id.* at *4. The girlfriend, not knowing that Kamp had urinated on her patio or that the intruders were genuine police officers, retrieved a 9mm Ruger handgun from her purse and dialed 911 with her free hand. *Id.* In an audio recording of the 911 call, the girlfriend is heard saying that two strangers "posing as police officers" were in her apartment; that two of the occupants were down on the floor and one was cuffed; and that the strangers "ha[d] broken half" of the contents of her apartment "for no reason." *Id.*

A backup officer arrived and tackled the girlfriend to the ground while she was still on the phone, causing the handgun to fly out of her hands. 2019 WL 3220051, at *4. The 911 audio terminates with the sound of the girlfriend screaming. *Id.* When the dust settled, Kamp, his girlfriend, and another occupant ended up in jail, and one of the officers went to the hospital for injuries suffered during the chaos. *Id.*

b. *Mascorro* v. *Billings*, 656 F.3d 1198 (10th Cir. 2011). Late one night in Sulphur, Oklahoma, a sheriff's deputy noticed seventeen-year-old Joshua Burchett driving without taillights. *Id.* at 1202. The deputy attempted a traffic stop, but Burchett instead "drove two blocks to his [mother and stepfather's] house, ran inside, and hid in the bathroom." *Id.* In Oklahoma, eluding a peace officer is a jailable misdemeanor. Okla. Stat. tit. 21, § 540A.

Burchett's mother and stepfather, Christina and Jose Mascorro, woke to the sound of the deputy kicking their front door and shouting orders that someone come outside. 656 F.3d at 1202. When Jose opened

the door, the deputy drew his gun and demanded to see the person who had been driving the car. *Id.* Christina asked the deputy which car he meant, then noticed her son's car in the driveway and said: "That's my son's car. Oh, my gosh, what did he do?" *Id.* Jose asked the deputy if he had a warrant, and Christina started to turn away from the door. *Id.* The deputy "sprayed [Christina] in the face with pepper spray, and then stepped into the house and sprayed her again." *Id.* Once inside, the deputy also pepper-sprayed Jose and Christopher, Christina's fourteen-year-old child, square in the face. *Id.* Christina retreated into a bedroom to call 911. *Id.*

Burchett, who had been hiding in a bathroom, refused to come out, so a backup officer "drew his gun, kicked down the bathroom door, and took him into custody." 656 F.3d at 1203. Christina and Jose were handcuffed while riding with Christopher in an ambulance to the hospital, where all three received treatment. *Id.* Christina and Jose were then taken to jail, purportedly for obstructing a peace officer, but a state court quashed their arrests because no exigent circumstances justified the deputy's entry. *Id.* When the Mascorros returned home, they found their belongings strewn about, trash cans upturned, and a hole in the wall. *Id.*

c. *Bash* v. *Patrick*, 608 F. Supp. 2d 1285 (M.D. Ala. 2009). One Sunday in 2007, Andrew Bash was driving home after shopping in downtown Mosses, Alabama. *Id.* at 1290. A police officer and his partner noticed loud music coming from Bash's car and activated their lights and siren to pull him over for a violation of the City's noise ordinance. *Id.* Bash continued driving approximately one mile to his house, though "[h]e did not exceed the posted speed limit."

Id. In Alabama, failure to stop a vehicle in response to an officer's signal is a jailable misdemeanor. Ala. Code §§ 13A-10-52; 13A-5-7(a)(1).

Bash parked his car in his driveway and stepped out. The officer asked Bash to produce his driver's license, but Bash "replied that he was not going to give [him] a damn thing and dashed for the house." 608 F. Supp. 2d at 1290-1291. The officer and his partner pursued Bash into the house, where the officer "immediately pounced upon [Bash] and began beating him with his fists and attempting to restrain him." *Id.* The officer then drew his taser and tased Bash. *Id.*

Bash's wife, who was in the home with four children, reacted by threatening the officer with a raised barstool and a kitchen knife. 608 F. Supp. 2d at 1290-1291. The officer, in turn, put down his taser and drew his service weapon. *Id.* Bash then bit the officer on the thumb, distracting him from his taser, which Bash's wife threw out the open door. *Id.* The officer went to fetch the taser, but Bash's wife locked him out. *Id.* The officer broke through a window in the front door to regain entry, by which point Bash was being handcuffed inside by the officer's partner. *Id.* Charges were filed against Bash, but all were ultimately dismissed. *Id.* at 1291-1292.

d. *Potis* v. *Pierce County*, 2016 WL 1615428 (W.D. Wash. Apr. 22, 2016). In the middle of the night in Puyallup, Washington, a sheriff's deputy noticed that Jeffrey Smith and his girlfriend were driving with a broken headlight. *Id.* at *1. The deputy activated his siren and used his air horn to instruct Smith to pull over, but Smith continued driving four blocks to his home, then ran inside. *Id.* at *1-2. In Washington, failure to obey an officer's signal to stop is a jailable

misdemeanor. *Id.* at *3; see Wash. Rev. Code §§ 46.61.021 & 9.92.030.

The deputy followed Smith to his home, "rammed down" the front door, and tackled him. 2016 WL 1615428, at *1. Smith's girlfriend then entered the house and found Smith in a struggle with the deputy. *Id.* at *2. The girlfriend yelled at the deputy and allegedly tried to move him off of Smith, but he pushed her away. Once Smith was cuffed, the girlfriend "backed away nearer [to] the front door, contemplating fleeing," but the deputy used a "straight arm bar take down" to force her to the ground, then "placed his knee on her neck and throat area." *Id.* at *2, *4.

e. *Sero* v. *City of Waterloo*, 2009 WL 2475066 (N.D. Iowa Aug. 11, 2009). Late one night in Waterloo, Iowa, two officers observed Carl Burchard walk out of a liquor store, stare at the officers' patrol car, and walk toward an alley. *Id.* at *1. The officers drove after him, at which point Burchard began running and appeared to hide something behind a garage. *Id.* at *1-2. The officers exited their car and told Burchard to stop, but he ran to the back door of a house and was let in by one of its occupants. *Id.* At that point, the officers had grounds to arrest Burchard for interference with official acts, a jailable misdemeanor. *Id.* at *9; see Iowa Code §§ 719.1(1)(a)-(b) & 903.1(1)(a).

According to the police report, one of the officers approached the back door and turned the handle to enter, but it was locked, so he began kicking the door and ordering that it be opened. 2009 WL 2475066, at *2. Charles Sero, who was sleeping on a couch in the front room, awoke to his daughter and wife telling him that someone was kicking on their back door. *Id.* Sero went to the door and tried to open it, but it was jammed. *Id.* As Sero struggled with the door,

the officer "hit the door with his shoulder and forced it open." *Id.* The officer found Burchard inside and threatened that he would be "tasered" if he did not accompany the officer outside. *Id.*

While the officers spoke to Burchard outside, Sero's wife demanded to know why they had kicked in her door and who was going to pay for the repair. 2009 WL 2475066, at *2. Not receiving satisfactory answers, she called 911 and asked for a police supervisor. *Id.* As the conversation continued, Charles Sero raised his arm in the direction of one of the officers and asked whether they had a warrant, at which point another officer seized him and placed his arms behind his back, causing a shoulder injury that required surgery. *Id.* at *3. Sero was ultimately charged with interference with official acts, but a magistrate acquitted him in a bench trial. *Id.*

* * *

Those examples are not aberrations. *Amici* have identified numerous misdemeanant-pursuit cases in which the conduct that prompted the pursuit was non-threatening,[3] property was damaged during the

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[3] See, *e.g.*, *State* v. *Foreman*, 2019 WL 4125596, at *1-2 (Del. Super. Ct. Aug. 29, 2019) (unpublished order) (indecent exposure); *Kolesnikov* v. *Sacramento Cnty.*, 2008 WL 1806193, at *1-2 (E.D. Cal. Apr. 22, 2008) (riding off-road vehicle without a helmet); *Disney* v. *City of Frederick*, 2015 WL 737579, at *1-2 (D. Md. Feb. 19, 2015) (simple trespass); *Altshuler* v. *City of Seattle*, 819 P.2d 393, 394-395 (Wash. Ct. App. 1991) (running red light); *State* v. *Adams*, 794 S.E.2d 357, 358-359 (N.C. Ct. App. 2016) (driving with suspended license); *State* v. *Lam*, 989 N.E.2d 100, 101-102 (Ohio Ct. App. 2013) (failure to use turn signal); *State* v. *Bahneman*, 2008 WL 1972704, at *1 (Minn. Ct. App. May 6, 2008) (unpublished opinion) (speeding); *City of Middletown* v. *Flinchum*, 765 N.E.2d 330, 331 (Ohio 2002) (tire spinning and fishtailing); *State* v. *Koziol*, 338 N.W.2d 47, 47-48

warrantless entry,[4] and/or a police officer, the pursued, or a home occupant wound up injured or dead.[5]

(Minn. 1983) (driving too fast in winter conditions); *Luer* v. *St. Louis Cnty.*, 2018 WL 6064862, at *1-5 (E.D. Mo. Nov. 19, 2018) (failure to pay cab fare).

[4] See, *e.g.*, *Brown* v. *Thompson*, 241 F. Supp. 3d 1330, 1334-1335 (N.D. Ga. 2017) (bullets fired through door and shotgun discharged in house); *Huber* v. *Coulter*, 2015 WL 13173223, at *4-6 (C.D. Cal. Feb. 10, 2015) (broken door); *Brooks* v. *City of Fresno*, 2008 WL 4670996, at *1-4 (Cal. Ct. App. Oct. 23, 2008) (unpublished opinion) (door forced open with breaching tools); *State* v. *Rouse*, 557 N.E.2d 1227, 1228 (Ohio Ct. App. 1988) (door kicked down).

[5] See, *e.g.*, *Est. of Sauceda* v. *City of N. Las Vegas*, 380 F. Supp. 3d 1068, 1073-1074 (D. Nev. 2019) (homeowner shot dead); *Carroll* v. *Ellington*, 800 F.3d 154, 161-166 (5th Cir. 2015) (suspect died after suffering numerous injuries, including puncture wounds to neck, chest, and extremities from being tased 35 times; officers injured and covered in suspect's feces); *Furber* v. *Taylor*, 685 F. App'x 674, 676 (10th Cir. 2017) (suspect and officer scuffle and exchange gunfire); *Marchand* v. *Simonson*, 16 F. Supp. 3d 97, 103-105 (D. Conn. 2014) (suspect tased while crossing threshold into home); *Smith-Grimes* v. *City of W. Palm Beach*, 2013 WL 12094855, at *1-3 (S.D. Fla. Feb. 13, 2013) (homeowner's back injured and finger broken during son's struggle with officers); *Lockett* v. *City of Akron*, 714 F. Supp. 2d 823, 826-828 (N.D. Ohio 2010) (sixty-five-year-old homeowner knocked over by officer, injuring hip and back); *Garcia* v. *City of St. Paul*, 2010 WL 1904917, at *1-2 (D. Minn. May 10, 2010) (suspect suffered two broken ribs, temporary loss of vision in one eye, and bleeding from back of the head); *Brown* v. *Peterson*, 2009 WL 10671542, at *1-2 (D. Alaska Jan. 30, 2009) (suspect pepper-sprayed inside home); *Alto* v. *City of Chi.*, 863 F. Supp. 658, 659-660 (N.D. Ill. 1994) (suspect shot during struggle inside home); *State* v. *Ferraro*, 923 N.W.2d 179, 179-180 (Wis. Ct. App. 2018) (unpublished table opinion) (suspect's shoulder dislocated); *State* v. *Anderson*, 2009 WL 2192334, at *1-2 (N.J. Super. Ct. App. Div. July 24, 2009) (officer struck by surprised home occupants); *Goines* v. *James*, 433 S.E.2d 572, 574-575 (W. Va. 1993) (homeowners injured in brawl with officer).

Often, as in the cases above, it is easy to picture how adhering to the warrant requirement would have prevented chaos and injury. Home dwellers are less confused and skeptical when officers knock, identify themselves, and present a warrant, and a pause in the action allows adrenaline to lower for both the pursuer and the pursued. Requiring police to justify a home entry to a neutral magistrate also provides officers a chance to weigh the risks and advantages of continuing the pursuit, orient themselves to their surroundings, and strategize on the safest way to engage the suspect.[6]

In contrast, categorically allowing warrantless entry for misdemeanant pursuit encourages police to rush into unfamiliar homes, often in the dark of night and with no idea of who or what they will encounter inside. Filled with adrenaline, they then face difficult, split-second decisions about use of force with regard to anyone they find—which may include occupants other than the suspect who are innocent of any

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[6] Indeed, police organizations themselves acknowledge the inherent dangers of hot pursuits. See, *e.g.*, Philadelphia Police Dep't, Directive 9.4 (June 2016), http://www.phillypolice.com/accountability/ (requiring officers to "weigh the benefits of immediate capture with the risks inherent to the pursuit itself," including threats to "the safety and welfare of the public, other officers, [and] the suspect"); Houston Police Dep't, General Order No. 600-11 (Sept. 2020), https://www.houstontx.gov/police/general_orders/600/600-11%20Foot%20Pursuits.pdf (recognizing that pursuit is "inherently dangerous" and may "occur in a wide variety of dynamic and unpredictable circumstances"); Fresno Police Dep't Policy Manual, Policy No. 325 (July 2020), https://www.fresno.gov/police/wp-content/uploads/sites/5/2020/08/PolicyManual_Redacted.pdf (requiring officers to consider the "[s]eriousness of the suspected offense" and the "risks involved to officers or citizens" when contemplating a forced entry in hot pursuit).

wrongdoing, surprised by the entry, and think they are under attack by unlawful intruders. As the examples above demonstrate, those situations often get out of hand. These dangers must be accounted for in evaluating the reasonableness of a warrantless entry in pursuit of a misdemeanant, rather than disregarded as part of a blanket rule authorizing such entries.

II. A *Per Se* Exception to the Warrant Requirement for Misdemeanant Pursuit Would Be Overbroad

This Court has repeatedly held that "the exigent-circumstances exception [to the warrant requirement] must be applied on a case-by-case basis." *Birchfield* v. *North Dakota*, 136 S. Ct. 2160, 2174 (2016); see *Riley* v. *California*, 573 U.S. 373, 402 (2014) (courts must "examine whether an emergency justified a warrantless search in each particular case"); *Missouri* v. *McNeely*, 569 U.S. 141, 150 (2013) ("each case of alleged exigency" must be evaluated "based on its own facts and circumstances" (citation omitted)).[7]

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[7] The Court has modeled this fact-specific approach in exigency cases over many decades. See, *e.g.*, *Brigham City* v. *Stuart*, 547 U.S. 398, 406 (2006) (warrantless entry to provide emergency assistance was "reasonable under the circumstances"); *Illinois* v. *McArthur*, 531 U.S. 326, 331 (2001) (warrantless seizure to prevent suspect's return to his trailer to destroy hidden contraband was reasonable "[i]n the circumstances of the case before us"); *Cupp* v. *Murphy*, 412 U.S. 291, 296 (1973) (warrantless search of suspect's fingernails to preserve evidence he was trying to rub off was justified "[o]n the facts of this case").

Significantly, the Court has even proceeded on a case-by-case basis in evaluating exigency related to the pursuit of *felons*. See *Warden* v. *Hayden*, 387 U.S. 294, 298-299 (1967) (warrantless entry in pursuit of armed robber was reasonable "[u]nder the circumstances of this case"); *United States* v. *Santana*, 427 U.S.

As a point of comparison to petitioner's case, an informative example is *Minnesota* v. *Olson*, 495 U.S. 91 (1990), in which the Court considered whether an exigency existed to justify a warrantless home entry to arrest the getaway driver in a deadly armed robbery. Acting on good information regarding the getaway driver's whereabouts, but without a warrant, police surrounded a duplex and called one of its residents to say the suspect should come out. *Id.* at 93-94. Upon hearing the suspect speak to the resident in the background ("tell them I left"), the officers stormed the house and arrested him. *Id.* at 94. Shortly thereafter, the suspect provided an inculpatory statement to police. *Id.*

The Court began its analysis by noting with approval the Minnesota Supreme Court's "fact-specific application" of the exigency standard, and then highlighted several facts that cut against an exigency finding, including that the suspect was known to be the getaway driver rather than the murderer and that there was no sign of danger to occupants of the duplex. *Id.* at 100-101. The Court also noted that, in light of the police presence outside the house, it was clear the suspect was "going nowhere" and "would have been promptly apprehended" upon exiting. *Id.* (citation omitted). Concluding that the facts "d[id] not add up to exigent circumstances," the Court affirmed the Minnesota Supreme Court's decision to

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38, 42-43 (1976) (warrantless entry in pursuit of heroin distributer was reasonable given her immediate attempt to flee upon seeing police, likelihood that she would use a brief delay to destroy evidence, and minimally invasive nature of entry into the vestibule just inside an open front door); see also *McNeely*, 569 U.S. at 168 (Roberts, C.J., concurring in part and dissenting in part) (observing that *Hayden* and *Santana* were decided based on "totality of the circumstances").

reverse the defendant's conviction. *Id.* at 94-95, 100-101.

In the course of applying the case-by-case approach exemplified by *Olson*, the Court has consistently declined invitations to establish *per se* exigencies. For example, in *McNeely*, the Court refused to "depart from careful case-by-case assessment" and rejected a categorical rule that dissipation of alcohol in the blood always constitutes an exigency justifying warrantless blood draws from suspected drunk drivers. 569 U.S. at 152.

Similarly, in *Richards* v. *Wisconsin*, 520 U.S. 385 (1997), the Court rejected a blanket exception to the knock-and-announce requirement for searches in felony drug investigations. The Court acknowledged that felony drug searches "may frequently involve" special risks to officer safety and the preservation of evidence, but explained that "not every drug investigation will pose these risks to a substantial degree." *Id.* at 391-393. In some cases, for example, officers might know that the only people present in a residence have no involvement in the drug activity, or that the drugs are being stored in a way that makes them hard to destroy quickly. *Id.* at 393. A categorical rule would have "impermissibly insulate[d] these cases from judicial review," resulting in "considerable overgeneralization." *Id.* The Court instead reaffirmed a case-by-case approach, unanimously holding that, "in each case," courts must "determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement." *Id.* at 394.

Categorically allowing warrantless entry for misdemeanant pursuit would similarly involve "considerable overgeneralization." *Id.* at 393. Although

some instances of misdemeanant flight will reasonably support a conclusion that pausing to obtain a warrant would allow evidence to be destroyed or create danger to police or others, not every fleeing misdemeanant "will pose these risks to a substantial degree." *Id.* The examples discussed above in Part I illustrate the point. The jailable misdemeanors at issue in those cases—failure to obey a police officer in *Stanton*, *Mascorro*, *Bash*, *Sero*, and *Potis*, and public urination in *Thompson*—did not involve evidence that the retreating misdemeanant could destroy. And none of the cases involved any risks to officer or public safety—until the warrantless entry occurred. The seventeen-year-old who drove without taillights in *Mascorro* threatened no one when he cowered in his mother's bathroom, and no danger would have been created by a brief delay in bringing to justice the public urinator in *Thompson*.

The facts of petitioner's case also demonstrate how a categorical rule would be overbroad. Like the getaway driver in *Olson*, petitioner was non-threatening and posed no danger to anyone inside the residence. When the officer entered his home without a warrant, none of petitioner's suspected offenses—honking his horn without cause, playing his car stereo too loudly, and disobeying a peace officer—involved evidence petitioner could destroy. And, as in *Olson*, if the pursuing officer had simply waited outside, he could have thwarted any attempted flight while applying for a warrant. See *McNeely*, 569 U.S. at 154-155 (noting that Federal Rules of Criminal Procedure and majority of states have "streamline[d] the warrant process" by authorizing remote warrant applications from the field and "standard-form warrant applications for drunk-driving investigations"). Indeed, neither the facts of petitioner's case nor any of the examples of

misdemeanant pursuit in Part I meet this Court's basic definition of exigency: "an emergency [that] leaves police insufficient time to seek a warrant." *Birchfield*, 136 S. Ct. at 2173.

Of course, there may be situations in which a particular misdemeanant poses a serious threat that justifies a warrantless entry, but the examples discussed herein confirm the prudence of examining "each case of alleged exigency" based on "its own facts and circumstances." *McNeely*, 569 U.S. at 150 (citation omitted)). *Amici* urge the Court to hew to this traditional approach, rather than embrace a *per se* rule that would dangerously encourage police to barge into homes in every case, regardless of the circumstances.

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeal should be reversed.

Respectfully submitted,

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