No. 20-18

In the Supreme Court of the United States

ARTHUR LANGE,

Petitioner,

v.

CALIFORNIA,

Respondent.

BRIEF OF *AMICI CURIAE* STATES OF OHIO, ALABAMA, ARKANSAS, IDAHO, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, AND UTAH IN SUPPORT OF COURT-APPOINTED *AMICUS CURIAE*

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STATEMENT OF *AMICI* INTEREST

In baseball, a runner who reaches home plate without being tagged or otherwise put out by the opposing team is "safe." *See* Official Baseball Rules §§5.08, 5.09(b) (2019), https://tinyurl.com/MLBRules 2019. But criminal law, unlike baseball, does not reward the evasive runner. Those who run from police to avoid a lawful detention do not win anything—certainly not additional rights under the Constitution—by reaching home safely. "Law enforcement is not a child's game …, with apprehension and conviction depending upon whether the officer or defendant is the fleetest of foot." *Commonwealth v. Jewett*, 471 Mass. 624, 634 (Mass. 2015) (quotations omitted).

This Court, for decades, has agreed. Over forty years ago, it recognized the "hot-pursuit doctrine." That doctrine says that police comply with the Fourth Amendment when they pursue a fleeing criminal suspect into a home after first attempting a lawful arrest in public, even if they lack a warrant to enter. *United States v. Santana*, 427 U.S. 38, 42–43 (1976). This case presents the question whether the hot-pursuit doctrine applies when the crime for which police have probable cause to arrest the suspect is a misdemeanor rather than a felony. The answer is "yes." The holding in *Santana*—that the Fourth Amendment allows an officer to follow a fleeing suspect into a home without a warrant—did not turn on the label the legislature selected for the crime the suspect was thought to have committed. Instead, the Court reasoned that the Fourth Amendment gives criminal suspects no right to "thwart an otherwise proper arrest" by retreating into a home before the police can catch them. *Id.* at 42. There is, in Fourth Amendment terms, nothing "un-

reasonable" about pursuing an individual who runs from police into the home. Because the hot-pursuit doctrine's *justification* does not turn on the label attached to the crime for which police have probable cause to make an arrest, the doctrine's *application* does not turn on that label, either.

The *amici* States urge this Court not to adopt a misdemeanor-based carveout to the hot-pursuit doctrine. A carveout would undermine the States' vital interest in public safety and effective law enforcement. Officers tasked with making time-sensitive decisions about where to pursue a defendant in the dangerous context of a police chase cannot fairly be asked to know the difference between a serious misdemeanor and a low-grade felony. Further, in light of the exclusionary rule, honest mistakes made in the midst of a dangerous pursuit could lead to the acquittal of dangerous criminals who flee from authorities. Indeed, a carveout would *encourage* drunk drivers and other criminals to flee from police: misdemeanants will more often flee police and retreat into a home if doing so buys them time to destroy evidence of a more serious crime.

Although Ohio and its fellow *amici* oppose creating a misdemeanor carveout to the hot-pursuit doctrine as a matter of constitutional law, the Fourth Amendment sets only the "constitutional floor" with regard to limits on searches and seizures. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring). That means state and local governments are free to restrain police conduct in ways the Fourth Amendment does not. *See id.*; Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018). The States submitting this brief

do not object to other jurisdictions adopting misdemeanor carveouts to the hot-pursuit doctrine as a matter of their own state or local law. They simply object to recognizing that carveout as a matter of federal constitutional law, as that would raise the constitutional floor and limit the States' freedom to experiment with different policies.

SUMMARY OF ARGUMENT

I. The Fourth Amendment prohibits "unreasonable searches and seizures." As a general rule, it is "unreasonable" for the police to enter a private home without a warrant. *Payton v. New York*, 445 U.S. 573, 586 (1980). There are, however, exceptions. Relevant here, the "hot-pursuit doctrine" permits warrantless entries if (and only if) officers continuously pursue, into a private home, a suspect who flees after officers attempt to make a lawful arrest in a public place. *United States v. Santana*, 427 U.S. 38, 42–43 (1976). Under *Santana*, the hot-pursuit doctrine unambiguously applies in cases where the suspect flees after police attempt a *felony* arrest. This case presents the question whether the doctrine applies to cases in which a suspect flees from a *misdemeanor* arrest. The answer is "yes," for at least two reasons.

First, the hot-pursuit doctrine's justifications have nothing to do with the "misdemeanor" or "felony" label attached to the crime for which officers have probable cause to make an arrest. The Court adopted the doctrine in *Santana* because it concluded that criminal suspects have no right "to thwart an otherwise proper arrest" by "retreating into" the home. *Id.* at 42. The Court reasoned that, if police have probable cause to make a lawful arrest "in a

public place," and if the suspect flees instead of surrendering, police may pursue the suspect even into a private home. *Id.* at 43. In other words, *Santana* reasoned that suspects must not be rewarded with additional rights for fleeing from police. The same logic applies without regard to whether the crime for which officers had probable cause to make an arrest was a felony or a misdemeanor. Thus, there is no doctrinal basis for creating a misdemeanor exception to the hot-pursuit doctrine.

Second, the warrantless entry into a home following the hot pursuit of a suspected misdemeanant is "reasonable" even apart from *Santana*. A stop for one crime often uncovers "evidence of a more serious crime." *Maryland v. Wilson*, 519 U.S. 408, 414 (1997). The general public knows that. So, when a suspect has decided that fleeing from police (a crime in itself) is the better option than being caught, that decision implies that the suspect stands to gain something significant from evading arrest. Perhaps the suspect wants to destroy evidence of a more serious crime. Perhaps the suspect is wanted for (or about to be caught in the act of) a crime so serious that the only way to avoid a long prison sentence is to make it home, draw up a strategy, and fight back. Either way, the choice to flee police and run into a home is "certainly suggestive," *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000), of exigent circumstances requiring immediate apprehension. And that is true regardless of the severity of the crime that caused the officers to attempt the arrest. In other words, the exigent circumstances that make it "reasonable" to follow a fleeing felon into a home are the same circumstances that make it "reasonable" to follow a fleeing misdemeanant into a home.

II. Lange and his supporters ask the Court to hold that the hot-pursuit doctrine applies to suspected misdemeanants only if the totality of the circumstances justifies a warrantless entry. In other words, they seek to replace a categorical rule with an *ad hoc* balancing test. They fail to justify the adoption of such a test.

A. The Court should reject as irrelevant Lange's argument that the Fourth Amendment, as an original matter, forbade the government from entering the home of a fleeing misdemeanor suspect after a hot pursuit. Even if Lange is right about the Fourth Amendment's original meaning with respect to this narrow question, an originalist approach unambiguously requires affirmance.

This case presents a Fourth Amendment issue only because of the "exclusionary rule," which requires the suppression of some unconstitutionally obtained evidence. *See Herring v. United States*, 555 U.S. 135, 139 (2009). The reason Lange asks this Court to hold that the warrantless entry into his home violated the Fourth Amendment is because such a ruling may permit him to exclude the evidence obtained after that entry. The problem with this argument is that the Fourth Amendment, as originally understood, contained no exclusionary rule. *Collins v. Virginia*, 138 S. Ct. 1663, 1676 (2018) (Thomas, J., concurring); *see also Davis v. United States*, 564 U.S. 229, 237 (2011). Thus, on a purely originalist analysis, Lange loses. He can succeed only if this Court applies a sort of "halfway originalism." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2470 (2018).

The Court should decline to take a halfway originalist approach to the question presented in this

case. Doing so would diminish the sovereign authority that the Constitution, as originally understood, reserves to the States. *See* U.S. Const., 10 amend. Given the exclusionary rule, narrowing the hot-pursuit doctrine in the manner Lange proposes would diminish the States' authority over "the punishment of local criminal activity," which is "[p]erhaps the clearest example of" the authority that the Constitution reserves to the States. *Bond v. United States*, 572 U.S. 844, 858 (2014). Originalism should not be used to justify an unoriginalist limitation on the States' "lawful sovereign powers." *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2096 (2018).

B. On top of everything else, the test Lange and his supporters propose would yield three practical problems. *First*, it would violate the Court's "general preference" for providing "clear guidance to law enforcement through categorical rules." *Riley v. California*, 573 U.S. 373, 398 (2014). Their test would require officers to first determine whether the crime for which they attempted an arrest was a misdemeanor or a felony, and to then decide whether a warrantless entry is "reasonable" given the totality of the circumstances. Neither step is easily applied. Given "the details of frequently complex penalty schemes," *Atwater v. City of Lago Vista*, 532 U.S. 318, 348 (2001), many officers may not know whether the crime the suspect committed is a "misdemeanor" or a "felony." And even if they can make that determination instantaneously, they can have no assurance that a reviewing court applying the inherently *ad hoc* totality-of-the-circumstances test will agree with their assessment of the need for a warrantless entry. The proposed test is about as far from a categorical rule as one can imagine.

Second, Lange's test would cause the Fourth Amendment's meaning to fluctuate from State to State. The manner in which state legislatures define crimes "varies markedly from one State to another." *Rummel v. Estelle*, 445 U.S. 263, 284 (1980). In some States, even very serious crimes, such as human trafficking, remain only misdemeanors. *See* Md. Code Ann. Crim. Law §3-1102(c)(1). Thus, the consequence of Lange's proposed test is that an identical search brought about by identical criminal conduct in identical circumstances will be constitutional in one State and unconstitutional in another. Whatever the Fourth Amendment means, it should mean the same thing everywhere.

Third, the test would create a perverse incentive to run from police. It would reward fleeing misdemeanants who make it home by giving them constitutional protections they would not otherwise enjoy. The potential benefit of flight would be particularly enticing for drunk drivers and for others who seek to hide evidence of, or avoid capture for, crimes more serious than the crime of running from police.

ARGUMENT

This case presents the following question: If police attempt to arrest a suspect that they have probable cause to believe has committed a misdemeanor, and if the suspect then flees, may officers engaged in a hot pursuit of the suspect follow the suspect into a home without first obtaining a warrant? The answer is "yes."

I. The hot-pursuit doctrine contains no carveout for misdemeanors.

A. The Fourth Amendment provides:

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

As this text suggests, "reasonableness" is "the ultimate touchstone" in assessing the constitutionality of a warrantless search or seizure. *Kentucky v. King*, 563 U.S. 452, 459 (2011). And the reasonableness of a search or seizure turns on "a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)) (discussing the balancing test in the context of a seizure); *see also Riley v. California*, 573 U.S. 373, 385 (2014) (applying this test in a case about searches).

This balancing analysis is inherently factbound. Over time, however, this Court has crafted a host of general rules—some presumptive, some categorical—that provide the police and the public with guidance regarding the constitutionality of warrantless searches and seizures in some frequently arising situations. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2174, 2183 (2016); *accord Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). One core presumption is that warrantless entry into a home is unreasonable. *Payton v. New York*, 445 U.S. 573, 586 (1980). But that presumption gives way in many situations, including when exigent circumstances justify immediate entry into the home. *See id.* at 583. Exigent circumstances subdivide into different categories. For example, police may enter a home to protect against imminent injury or to prevent the destruction of evidence. *King*, 563 U.S. at 460.

This case involves one particular category of exigency: the hot-pursuit doctrine. Under that doctrine, when police have probable cause to make an arrest, and when they "set in motion" that arrest "in a public place," they may pursue a fleeing suspect into a home without a warrant. *United States v. Santana*, 427 U.S. 38, 42–43 (1976). The rule that officers may follow a fleeing suspect into a home, however, comes with three caveats. *First*, police officers must have a lawful basis for detaining the individual before the hot-pursuit begins; they cannot "create the exigency" by trying to detain a person without proper justification. *King*, 563 U.S. at 462. *Second*, officers must "set in motion" the detention "in a public place," *Santana*, 427 U.S. at 43, in a way that gives suspects reasonable notice that they are not "free to leave," *Smith v. Stoneburner*, 716 F.3d

926, 931 (6th Cir. 2013) (per Sutton, J.). *Third*, the doctrine applies only if the officers, after giving the required warning, continuously pursue the suspect from the "public place" where the confrontation begins into the "private place" to which he retreats. *Santana*, 427 U.S. at 43. The chase need not be long or dramatic to qualify as a hot pursuit. *Id.* But it must involve "immediate or continuous pursuit" of the suspect "from the scene" of the encounter. *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984).

Since *Santana*, this Court has repeatedly described hot pursuit as its own, standalone category of exigency justifying warrantless entry into the home. *See, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2222–23 (2018); *Birchfield*, 136 S. Ct. at 2173; *Riley*, 573 U.S. at 402; *Missouri v. McNeely*, 569 U.S. 141, 149 (2013); *King*, 563 U.S. at 460; *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *Georgia v. Randolph*, 547 U.S. 103, 116 n.6 (2006). In the words of Massachusetts's high court, hot pursuit is "an *exception unto itself* rather than … just another factor" in determining whether exigent circumstances exist. *Commonwealth v. Jewett*, 471 Mass. 624, 635 n.8 (Mass. 2015) (emphasis added, quotations omitted). *Santana* did not purport to limit the hot-pursuit doctrine's application to suspected felons, as opposed to suspected misdemeanants. Nor has this Court limited hot pursuit to felonies in the decades that followed. *See Stanton v. Sims*, 571 U.S. 3, 9 (2013).

B. All this leads to the doctrinal question that this case presents: Does the hot-pursuit doctrine apply in cases where the chase began after police attempted to arrest the suspect for a misdemeanor crime? The answer is "yes." That follows for two reasons.

First, the justifications for the hot-pursuit doctrine do not turn on the "misdemeanor" or "felony" label attached to the crime for which officers have probable cause to make an arrest. It would therefore make no sense to apply the doctrine only to fleeing suspects thought to have committed felonies rather than misdemeanors.

This Court adopted the hot-pursuit doctrine in *United States v. Santana*, 427 U.S. 38. Its justification boiled down to a syllogism:

> *Premise 1*: "the warrantless arrest of an individual in a public place upon probable cause [does] not violate the Fourth Amendment." *Id.* at 42.
>
> *Premise 2*: the Fourth Amendment does not entitle a suspect to "thwart an otherwise proper arrest," *id.*, "by the expedient of escaping to a private place," *id.* at 43.
>
> *Therefore*: If an officer attempts a lawful arrest in a public place and the suspect flees, the Fourth Amendment permits the officer to pursue the suspect and make an arrest even if the suspect retreats into a private home. *Id.*

Nothing about this reasoning turns on the nature of the fleeing suspect's crime. Indeed, the severity of the crime in *Santana* was neither relied upon nor even mentioned in justifying the doctrine's application. Instead, the Court adopted the hot-pursuit doctrine based entirely on the logic that the Fourth Amendment does not permit suspects to "thwart an otherwise proper arrest" through the expedience "of escaping to a private place." *Id.* at 42 & 43. In essence, the doctrine is an application to the Fourth Amendment of the longstanding principle that no

"wrongdoer" should be permitted "to profit by his own wrong." *Tilghman v. Proctor*, 125 U.S. 136, 145 (1888). Just as officers may not "create [an] exigency" that alters the Fourth Amendment balance, *King*, 563 U.S. at 462, suspects may not "trigger the need for a warrant by racing the police to the sanctity of the home," *State v. Ricci*, 144 N.H. 241, 245 (N.H. 1999). The principle that wrongdoers ought not be rewarded for their wrongdoing applies with equal force regardless of whether the wrongdoer is a suspected felon or a suspected misdemeanant. Therefore, as a purely doctrinal matter, there is no reason to distinguish between the two.

Second, even setting *Santana*'s reasoning aside, the pursuit of a suspected misdemeanant into his home is "reasonable" under this Court's other precedents. Again, courts determine the reasonableness of a search or seizure by balancing "the degree to which it intrudes upon an individual's privacy" or other Fourth Amendment interest and "the degree to which it is needed for the promotion of some legitimate governmental interests." *Riley*, 573 U.S. at 385 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)); *accord Plumhoff*, 572 U.S. at 774 (quoting *Graham*, 490 U.S. at 396). That balance comes out in favor of applying the hot-pursuit doctrine without regard to whether police attempted the original detention for a misdemeanor or a felony.

Consider first the government's strong interest in immediately entering homes into which fleeing suspects retreat. Neither courts nor police officers are "required to exhibit a naiveté from which ordinary citizens are free." *DOC v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977)). They can therefore

consider, in their assessment of reasonableness, "commonsense judgments and inferences about human behavior." *Kansas v. Glover*, 140 S. Ct. 1183, 1188 (2020) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000)). Experience and commonsense establish two propositions that bear on the importance, from the government's perspective, of allowing warrantless entries of homes into which misdemeanants retreat after a hot pursuit.

The first is that police stops, even those stemming from minor infractions, often uncover "evidence of a more serious crime." *Maryland v. Wilson*, 519 U.S. 408, 414 (1997). Both anecdotes and aggregate data bear this out. To take a famous anecdote, recall that authorities found and arrested Timothy McVeigh after stopping him for driving without a license plate. *See* Kyle Schwab, *Oklahoma City National Memorial & Museum now features Timothy McVeigh's car*, The Oklahoman (Sept. 15, 2014), https://bit.ly/3g97T30. As for the data, it shows that circumstances like McVeigh's arise quite often. In Ohio, for example, traffic stops for minor infractions lead to thousands of arrests each year for serious crimes like drunk driving, drug offenses, and unlawful possession of weapons. *See* Ohio State Highway Patrol, 2019 Operational Report at 25, https://bit.ly/3mGvEBN.

The second insight from common experience is this: because the public and the police alike understand that stops and arrests for minor offenses can lead to arrests for major offenses, a suspect's choice to flee detention for a minor infraction is "certainly suggestive" that something more is afoot. *Wardlow*, 528 U.S. at 124. People, including most criminals, are rational actors who respond to incentives. Thus, one would not expect them to flee police unless they

determine that the benefits of doing so justify the risk of being caught and punished for the flight. In most cases where the risk is justified in cost-benefit terms, the need for an immediate arrest is readily apparent. For example, a suspect may choose to flee, and to risk the penalty for doing so, because fleeing buys time to destroy evidence of a much more serious crime. Alternatively, the suspect may be wanted for (or at risk of being caught during the commission of) a crime that carries a penalty so severe that the risks of fleeing and fighting back, even if they increase only marginally the odds of a successful escape, are worth it. In either circumstance, the State has a weighty interest in making the arrest and seizing the evidence immediately: any delay gives the suspect time to destroy evidence or to hunker down in his home while preparing for a last stand. *Cf. Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298–99 (1967).

In sum, the very fact that the suspect has fled into a home provides a strong justification for making an arrest without delay. And that justification outweighs any concern with the "quality of the intrusion on the individual's Fourth Amendment interests." *Plumhoff*, 572 U.S. at 774 (quoting *Graham*, 490 U.S. at 396). No doubt, being "arrested in the home," or having one's home searched, "involves not only the invasion attendant to all" searches and seizures "but also an invasion of the sanctity of the home." *Collins v. Virginia*, 138 S. Ct. 1663, 1672 (2018) (quotations omitted); *accord Groh v. Ramirez*, 540 U.S. 551, 559 (2004). But the Fourth Amendment permits warrantless entries into the home when exigent circumstances—for example, the need to "render emergency assistance" or to prevent the "destruction of evi-

dence"—demand a speedy response. *King*, 563 U.S. at 460 (quotations omitted). The hot-pursuit doctrine recognizes that the circumstances of a fleeing suspect create exigencies justifying an entry, *at least* when the suspect is believed to have committed a felony. But as the foregoing shows, those exigent circumstances arise without regard to the severity of the crime for which officers had probable cause to arrest the fleeing suspect in the first place. Thus, the balance comes out the same way regardless of whether the fleeing suspect committed a misdemeanor or a felony.

II. The Court should reject the totality-of-the-circumstances test that Lange and his *amici* propose.

Lange, California, and their *amici* see things differently. They say that, for suspected misdemeanor offenses, hot pursuit is not a standalone justification for warrantless entry into the home. According to them, the Fourth Amendment bars the warrantless entry into the home of a fleeing suspected misdemeanant *unless* the State can make a case-specific showing of exigency in addition to the facts that make up hot pursuit. *See* Lange Br.7.

The Court should reject this test. First, while Lange and his supporters attempt to justify their test with an appeal to the Fourth Amendment's original meaning, the test would limit the States' authority in a manner *at odds with* the Constitution as originally understood. Second, the test they propose will create practical problems: it is unworkable; it would cause the Fourth Amendment to mean different things in different States; and it would provide suspects an incentive to evade arrest.

A. Lange's rule will strip the States of authority that is theirs under the Constitution as originally understood.

The Constitution creates a union of sovereign States. By joining the Union, the States surrendered only some of their sovereign authority. They retained all the powers not expressly surrendered. U.S. Const., 10 amend. Those are the terms the States agreed to. And those are the terms that this Court—especially insofar as it approaches constitutional questions from an originalist perspective—must honor. The Court must therefore be "vigilant" in ensuring that its rulings do not "prohibit the States from exercising their lawful sovereign power." *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2096 (2018).

Lange and others argue that the Fourth Amendment, as originally understood, contained no hot-pursuit doctrine applicable to fleeing misdemeanants. Lange Br.26–31; *accord* Cal. Br.18–21. Even if that is right—and this brief takes no position on the matter—Lange *loses* under an originalist approach. Indeed, a ruling in Lange's favor will erode the reservation of state authority that the Constitution promises to the States. Originalism ought not be used to compel a result so at odds with the Constitution's original meaning.

To understand the problem, begin with the fact that this case presents a Fourth Amendment issue for one reason and one reason only: if Lange "can prove a violation of the Fourth Amendment," the Court's "precedents require the [state] courts to apply the exclusionary rule and potentially suppress the incriminating evidence against him." *Collins*,

138 S. Ct. at 1675 (Thomas, J., concurring); *see* Pet.App.2a, 14a–19a. In other words, but for the exclusionary rule, the Court would have no occasion to reach the Fourth Amendment issue. That presents a difficulty for Lange's originalist argument because, as an original matter, the Fourth Amendment does not require the exclusion of illegally obtained evidence. *Collins*, 138 S. Ct. at 1676 (Thomas, J., concurring); *accord* Akhil Reed Amar, *What Belongs in a Criminal Trial: The Role of Exclusionary Rules: Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)*, 20 Harv. J.L. & Pub. Pol'y 457, 459 (1997); Jeffrey S. Sutton, *51 Imperfect Solutions: States the Making of American Constitutional Law* 43–47 (2018). At the time of the Fourth Amendment's ratification—and when the People made it applicable against the States by ratifying the Fourteenth Amendment—there was no exclusionary rule. Instead, officers who violated the Fourth Amendment were "considered trespassers," and "individuals subject to unconstitutional searches or seizures historically enforced their rights through tort suits or self-help." *Utah v. Strieff*, 136 S. Ct. 2056, 2060–61 (2016). The exclusionary rule arose only in the 20th century. *See Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643, 643 (1961). And as this Court has acknowledged, the rule is a judge-made remedial doctrine, not a "mandate implicit in the Fourth Amendment itself." *Davis v. United States*, 564 U.S. 229, 237 (2011).

In light of all this, there is no credible argument that Lange prevails under the Fourth Amendment as it was originally understood. The best he can do is to argue that he should prevail, as an original matter, on the discrete question whether the hot-pursuit doc-

trine applies to fleeing misdemeanants. In the abstract, the *amici* States have no objection to resolving discrete issues on originalist grounds without reexamining the entire *corpus juris*. But in this case, "halfway originalism" will not work. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2470 (2018). The reason is that, in light of the exclusionary rule, adopting the discrete rule that Lange urges will "prohibit," or at least interfere with, the States' exercise of "their lawful sovereign powers." *Wayfair*, 138 S. Ct. at 2096.

Again, all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., 10 amend. "Perhaps the clearest example of traditional state authority is the punishment of local criminal activity." *Bond v. United States*, 572 U.S. 844, 858 (2014). Thus, this Court must be "vigorous" in avoiding constitutional rulings that would wrongly intrude upon that authority. *Wayfair*, 138 S. Ct. at 2096. Because of the exclusionary rule, the ruling Lange seeks will unambiguously intrude upon the States' authority to prosecute and punish local criminal activity. After all, Lange's rule will mandate the suppression of evidence in every criminal case where the rule matters. And it will do so notwithstanding the fact that the States' reserved power to prosecute criminal offenses includes the power to secure convictions and punish offenders even in cases where the incriminating evidence was wrongfully obtained. *See Collins*, 138 S. Ct. at 1676 (Thomas, J., concurring). In other words, the ruling for which Lange advocates will guarantee that the States are wrongfully restrained in the exercise of

"their lawful sovereign powers." *Wayfair*, 138 S. Ct. at 2096

To be clear, an originalist approach does not require the Court to abandon the exclusionary rule. *See* John O. McGinnis and Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 Nw. U.L. Rev. 803 (2009); Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 Va. L. Rev. 1437, 1473–74 (2007); *accord Ramos v. Louisiana*, 140 S. Ct. 1390, 1413–16 (2020) (Kavanaugh, J., concurring). But courts that embrace an originalist approach—or any other approach, for that matter—must avoid rulings that *further* diminish the powers retained by the States. *See e.g.*, *United States v. Lopez*, 514 U.S. 549, 567 (1995); *cf. Edmo v. Corizon, Inc.*, 949 F.3d 489, 506 (9th Cir. 2020) (Bumatay, J., dissenting from denial of rehearing *en banc*); *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 537 F.3d 667, 698 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). The approach to the hot-pursuit doctrine for which this brief advocates avoids that diminution. Lange's rule does not.

B. Lange's rule is neither administrable, coherent, nor necessary.

Neither Supreme Court doctrine nor the original meaning of the Constitution justifies the totality-of-the-circumstances rule that Lange and his supporters seek. *See above* 8–15 (doctrine); 16–19 (original meaning). The rule fares no better when assessed in practical terms. It would be unadministrable, it would make the Fourth Amendment mean different things in different places, and it would create perverse incentives for criminals. This brief addresses these problems in order.

1. Administrability. This Court's "general preference" is "to provide clear guidance to law enforcement through categorical rules." *Riley*, 573 U.S. at 398. That preference is justified for at least two reasons. *First*, officers are often "forced to make a split-second decision in response to a rapidly unfolding chain of events." *Ryburn v. Huff*, 565 U.S. 469, 477 (2012) (*per curiam*). In those circumstances—the very circumstances most likely to present difficult Fourth Amendment questions—there is no time to perform an "ad hoc, case-by-case" analysis that carefully accounts for all the facts; officers need "workable rules." *Riley*, 573 U.S. at 398 (quoting *Michigan v. Summers*, 452 U.S. 629, 705 n.19 (1981)). *Second*, because of the exclusionary rule, a blunder made in the face of these circumstances can cause the criminal to go free. By giving officers workable rules, this Court helps avoid the "substantial social cost" associated with the exclusion of "trustworthy evidence bearing on guilt or innocence." *Davis*, 564 U.S. at 237.

The rule that Lange and his supporters propose is the opposite of "categorical." *Riley*, 573 U.S. at 398. Again, they want the Court to hold that the hot-pursuit doctrine permits a warrantless entry into the home of a suspected misdemeanant only if the totality of the circumstances creates an additional exigency justifying the entry. Precisely because this is a "totality-of-the-circumstances test—which is really, of course, not a test at all but an invitation to make an ad hoc judgment," *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013)—it contradicts this Court's stated preference to avoid subjecting officers to tests that demand "ad hoc, case-by-case" judgments," *Riley*, 573 U.S. at 398 (quoting *Summers*, 452 U.S. at 398).

The totality-of-the-circumstances test is particularly troublesome because it will need to be applied in the middle of hot pursuits. Thus, officers will need to apply the test quickly during hectic circumstances. Even distinguishing between misdemeanors and felonies—the first step in the test Lange and his supporters envision—will prove difficult during a police chase, given "the details of frequently complex penalty schemes." *Atwater*, 532 U.S. at 348. Take, for example, even the relatively basic crime of assault. In Ohio, assault starts as a misdemeanor. Ohio Rev. Code §2901.13(C)(1). But Ohio's criminal code creates eight other categories of potentially felonious assaults, some of which then divide into subcategories. Ohio Rev. Code §2901.13(C)(2)–(9). And that does not get into potential iterations of aggravated assault, Ohio Rev. Code §2901.12, or negligent assault, Ohio Rev. Code §2901.14. Other crimes are far more complex. Ohio law contains more than fifty potential iterations of unlawful drug possession—some felonies, others misdemeanors. *See* Ohio Rev. Code §2925.11(C). Thus, for many crimes, it will not be immediately clear to the reasonable *lawyer*, let alone the reasonable police officer, whether a particular offense qualifies as a misdemeanor or a felony. Police officers preoccupied with a hot pursuit do not have the time to search Westlaw or open up the most recent edition of the state code to determine the degree of the crime they just observed. The Court should not adopt a rule that demands of police officers legal expertise that few lawyers possess.

The categorical rule that this brief proposes avoids these problems. It permits an officer engaged in a hot pursuit to make a warrantless entry into a private residence without having to analyze case-

specific facts. This easily administrable rule is already the law (at least with respect to "misdemeanors" in the sense of offenses that can result in jail time, Pet.3 n.1) in a number of States. *See, e.g.*, *City of Bismarck v. Brekhus*, 2018 ND 84 ¶¶15–28 (N.D. 2018); *Jewett*, 471 Mass. at 634; *People v. Wear,* 229 Ill. 2d 545, 567–71 (Ill. 2008); *Middletown v. Flinchum*, 95 Ohio St. 3d 43, 45 (Ohio 2002); *Ricci*, 144 N.H. at 244–45; *see also State v. Weber*, 372 Wis. 2d 202, 232–33 (Wis. 2016).

The easy-to-apply nature of the rule this brief proposes should not be misunderstood as creating a broad hot-pursuit doctrine. Even under the rule this brief proposes, the hot-pursuit doctrine applies *only* in the unusual circumstance where police lawfully try to detain a suspect in public, the suspect flees the public encounter, and the police continuously pursue the suspect into his home. *See above* 9–10. (While there might be hard cases concerning whether the chase was sufficiently continuous, the doctrine's conditions are clear and its application usually will be too. *Contra* Lange Br. 32–33). The most important limitation of all is that there can be no true hot pursuit unless police give reasonable notice that the suspect is not free to leave. *See Stoneburner*, 716 F.3d at 931. Hot pursuit occurred in *Santana*, as one example, because the suspect chose to disregard officers "shouting 'police,' and displaying their identification." 427 U.S. at 40.

Ohio's experience shows the categorical approach in action. Almost twenty years ago, the Supreme Court of Ohio confirmed that the hot-pursuit doctrine applies in its usual form even when the fleeing suspect is believed to have committed a misdemeanor. *Middletown*, 95 Ohio St. 3d at 45. Since then, police

officers pursuing misdemeanor suspects have been able to detect major drug crimes, weapons crimes, and drunk driving. *See, e.g.*, *State v. Lam*, 2d Dist. No. 26428, 2015-Ohio-4293 ¶1; *State v. Mitchem*, 1st Dist. No. C-130351, 2014-Ohio-2366 ¶1; *State v. Lake*, 7th Dist. Nos. 08CO26, 08CO27, 2009-Ohio-3057 ¶¶2, 10; *State v. Hellriegel*, 9th Dist. No. 22929, 2006-Ohio-3335 ¶2. At the same time, Ohio case law recognizes that the hot-pursuit doctrine applies only to a "rather limited" range of "situations." *City of Middletown*, 95 Ohio St. 3d at 45. Courts have thus treated the hot-pursuit doctrine as a narrow exception to the warrant requirement, refusing to expand it to cases in which any of the elements of the doctrine are missing. *See, e.g.*, *State v. Andrews*, 177 Ohio App. 3d 593, 601 (Ohio Ct. App., 11th Dist. 2008); *State v. Letsche*, 2003-Ohio-6942 ¶24 (Ohio Ct. App, 4th Dist. 2003). There is no reason to suspect that other courts around the country will fail to hold the line.

None of this is to say that pursuing a fleeing suspect into the home will always or even often be the *best* choice for an officer to make. Nor does hot pursuit excuse any police misconduct that occurs during the chase. The point is simply that the hot-pursuit doctrine, even in its application to fleeing misdemeanor suspects, is a narrow exception to the bar on warrantless entries—one that officers can be trusted to use where justified and that courts can be trusted to faithfully administer.

2. Uniformity. The next problem with any test that applies differently to felonies and misdemeanors is that it would cause the Fourth Amendment to prohibit different things in different States. The classification of crimes "varies markedly from one State to

another." *Rummel v. Estelle*, 445 U.S. 263, 284 (1980). Some might be surprised to learn, for instance, that "human trafficking" often qualifies as only a misdemeanor in Maryland. *See* Md. Code Ann. Crim. Law §3-1102(c)(1); *contra* Cal Penal Code §236.1; Ohio Rev. Code §§2905.02, 2907.21; Texas Penal Code §20A.02. The same goes for involuntary manslaughter in Pennsylvania. *See* Pa. Con. Stat. §2504(b); *contra* Ohio Rev. Code §2903.04(C); Mont. Code Ann. §45-5-104; Nev. Rev. Stat. Ann. §200.090. And while inciting a riot can be a misdemeanor in Ohio, *see* Ohio Rev. Code §2917.01(B), it is always a felony in Michigan, *see* Mich. Comp. Laws §752.545.

Given these disparities in classification, making the hot-pursuit doctrine's application turn on the label applied to the underlying crime would lead to a constitutional oddity: identical warrantless entries made in response to identical criminal conduct will be "reasonable" (and thus constitutional) in some States yet "unreasonable" (and thus unconstitutional) in others. In other words, pinning the doctrine's application to state-law labels would cause state law to "alter the content of the Fourth Amendment," making the Amendment's protections widely "variable" based on the idiosyncrasies of each State's criminal code. *See Virginia v. Moore*, 553 U.S. 164, 172 (2008). The Fourth Amendment should not "be made to turn upon such trivialities." *Id.* (quotations omitted). That amendment, after all, is part of the "charter of our liberties." *Maryland v. King*, 569 U.S. 435, 482 (2013) (Scalia J., dissenting). That charter cannot mean one thing in Maine and another in Montana.

Any reliance on state-law labels makes the limits of the hot-pursuit doctrine easy to circumvent, too: a

State need only make evading arrest a "felony." At that point, presumably, the hot-pursuit doctrine would permit a warrantless entry even if the hot-pursuit began with an attempt to arrest a suspected misdemeanant. Indeed, a State could evade a misdemeanor carveout by deeming all of its crimes "felonies" of different degrees.

This brief should not be misunderstood as arguing that States should allow warrantless entries during hot pursuits as a matter of *state law*. While the Fourth Amendment should mean the same thing in every State, that amendment sets only the "constitutional floor" against which States may legislate. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring). State and local governments "possess authority to safeguard individual rights above and beyond the rights secured by the U. S. Constitution." *Id.* (citing Sutton, *51 Imperfect Solutions*). Thus, States and localities are free to adopt more restrictive rules, either through constitutional interpretation, constitutional amendment, legislation, or local policymaking. *See, e.g.*, Sutton, *51 Imperfect Solutions* at 82; *id.* at 240–41 (compiling authority); Ill. Br.12–14 (describing the policies of a few police departments). As a result, if Illinois (for example) wants to bar officers from following fleeing misdemeanor suspects into their homes, *see* Illinois Br.1, it can do so without regard to the Court's decision in this case; it need only pass a law providing fleeing criminals with protections over and above those that this Court or Illinois's state judiciary have read into the Constitution. *See Wear,* 229 Ill. 2d at 567–71. The rule for which Ohio and its fellow *amici* advocate leaves States free to make these changes.

Adopting a misdemeanor carveout would deny them any freedom to make changes in the other direction.

3. Perverse Incentives. Lange's case-by-case approach gives suspects incentive to run from the police. Again, suspects run from the police when they determine that the costs of being arrested imminently are great enough to justify being arrested later for both evasion and the crime for which police attempted an arrest. *See above* 13–14. By giving fleeing misdemeanants who race home the time to destroy evidence or prepare to fight back while police secure a warrant, Lange's test makes the benefits of fleeing greater than they would be otherwise. And when the benefits of fleeing from police go up, so too will the rate at which offenders determine that fleeing is justified. In sum, Lange's rule means more police chases.

The urge to flee will be especially strong for drunk drivers. "[B]lood-alcohol evidence is always dissipating due to natural metabolic processes." *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2533 (2019) (plurality) (quotations omitted). So, if a drunk driver flees from police and makes it home, she also buys some added time to sober up. Or, alternatively, a driver could drink more at home and muddy the evidentiary waters. *See* Cal. Br.32. And so it is no surprise that many misdemeanor-hot-pursuit cases involve attempts to suppress evidence of driving under the influence. *See, e.g.*, *City of Bismarck*, 2018 ND 84 at ¶4; *Weber*, 372 Wis. 2d at 207; *Jewett*, 471 Mass. at 627; *Wear,* 229 Ill. 2d at 552; *City of Middletown*, 95 Ohio St. 3d at 44; *State v. Legg*, 633 N.W.2d 763, 765–66 (Iowa 2001); *Ricci*, 144 N.H. at 242; *State v. Bolte*, 115 N.J. 579, 581 (N.J. 1989); *State v. Blake*, 468 N.E.2d 548, 549 (Ind. Ct. App.

1984); *accord State v. Paul*, 548 N.W.2d 260, 266 n.4 (Minn. 1996) (collecting other examples).

The hot-pursuit doctrine, properly defined, applies in only the limited circumstances where a suspect decides to flee police and retreat into the home. A misdemeanor carveout thus promises at-most-marginal privacy benefits. Those marginal benefits are insufficient to justify the costs the rule would create, including the dangers associated with providing additional incentive for suspected misdemeanants to flee from police.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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