No. ____

IN THE

Supreme Court of the United States

VICTOR GRANDIA GONZALEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In four precedents between 1885 and 1976, this Court recognized the "ancient common-law rule" that an officer could make a warrantless arrest for a misdemeanor only if the offense was committed in his presence. *United States v. Watson*, 423 U.S. 411, 418 (1976); *see Carroll v. United States*, 267 U.S. 132, 156–57 (1925); *John Bad Elk v. United States*, 177 U.S. 529, 534–35 (1900); *Kurtz v. Moffitt*, 115 U.S. 487, 498–99 (1885). Citing these precedents, the Court in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) referred to that common-law rule yet again. *Id*. at 340–41. But, in a footnote, the Court declined to "speculate whether the Fourth Amendment entails an 'in the presence' requirement for purposes of misdemeanor arrests." *Id*. at 340 n.11. After *Atwater*, the Court has stated that the common law provides the "baseline for our own day," such that the Fourth "Amendment 'must provide *at a minimum* the degree of protection it afforded when it was adopted.'" *Lange v. California*, 594 U.S. 295, 309 (2021) (quoting *United States v. Jones*, 565 U.S. 400, 411 (2012)).

The question presented is the one left open in *Atwater*:

Whether a warrantless arrest for a misdemeanor offense violates the Fourth Amendment where the offense did not occur in the presence of an officer.

RELATED PROCEEDINGS

The following proceedings are related under this Court's Rule 14.1(b)(iii):

- *United States v. Grandia Gonzalez*, No. 23-10578 (11th Cir. July 19, 2024);
- *United States v. Grandia Gonzalez*, No. 22-cr-20314 (S.D. Fla. Feb. 10, 2023).

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Petitioner Victor Grandia Gonzalez respectfully seeks a writ of certiorari to review a judgment issued by the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is published at 107 F.4th 1304 and reproduced as Appendix ("App.") A, 1a–23a. The district court did not issue a written opinion.

JURISDICTION

The Eleventh Circuit issued its decision on July 19, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. Constitution provides in full:

> 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.

INTRODUCTION

In *Atwater v. City of Lago Vista*, 532 U.S. 318, 340 n.11 (2001), the Court left open the question presented here: whether the Fourth Amendment contains an in-the-presence requirement for warrantless misdemeanor arrests. This Court's precedent now compels an affirmative answer. After *Atwater*, the Court has explained that the Fourth Amendment cannot be less protective than the common law at the Founding. And no less than five of this Court's precedents—stretching back well over a century—have explained that the common law had an in-the-presence requirement.

Joining six other circuits, however, the Eleventh Circuit below held that the Fourth Amendment does *not* contain such a requirement. Notwithstanding this Court's precedent, it believed that the common law was unclear. That court therefore dismissed history and substituted its own view of what was reasonable. This Court should not allow lower courts to discard the common law and this Court's precedent.

The question presented is otherwise overdue for resolution. Officers conduct warrantless arrests for misdemeanor offenses every day, but they have no guidance from this Court. Filling that void is a legal patchwork of disparity and confusion. For example, most states retain an in-the-presence requirement. In those states, then, the admissibility of evidence obtained in violation of that requirement may now turn on whether a case is charged in state or federal court. This case illustrates that disparity. Meanwhile, other states have eliminated an in-the-presence requirement, and state courts of last resort have divided over whether that departure from the common law is constitutional. This Court should grant review and hold that it is not.

This is an ideal vehicle to do so. Procedurally, Petitioner fully preserved his argument in the lower courts, relying on this Court's precedent and the common law. The court of appeals squarely rejected that argument in a published opinion. And the court of appeals did not affirm on any alternative ground. To the contrary, the court of appeals stated that, absent any in-the-presence requirement, there likely would *not* have been probable cause to support the arrest. Thus, this case squarely tees up the Fourth Amendment question that this Court reserved 23 years ago in *Atwater*.

STATEMENT

A. Facts

The material facts of this case are undisputed. In July 2022, two Miami Dade police officers were dispatched to a residential neighborhood in response to a report of a white male casing the area. Officer Sanchez began canvassing the area in his police vehicle, and he saw a man matching the description. That man was Petitioner.

All Officer Sanchez observed was a man walking down the middle of a public, residential street. It was 5:22 a.m. Because Petitioner matched the complainant's description, the officer stopped him. The officer observed that he was wearing black, carrying a backpack and water bottle, and had a shiny metal object on his waistband. Petitioner was sweating as if he had been walking awhile, and he appeared nervous.

The events from that point on were captured on Officer Sanchez's body-worn camera. Exiting his police car at a distance, the officer told Petitioner that he just wanted to ask him some basic questions. The officer then asked if Petitioner lived in the area and why he was walking around. Petitioner responded that he was living

out of his car, which was parked at a restaurant about 8–10 blocks away. Petitioner further responded that he thought that he was allowed to walk down the street.

As that conversation between Officer Sanchez and Petitioner was occurring, Officer Exantus met with the complainant. According to the officer's testimony, the complainant advised that, while his wife had been walking their dog, she saw a Latin male with a backpack in black clothing come out of the gate of a neighbor's house who was out of town, look into mailboxes, and then conceal himself between cars after noticing the complainant's wife. At that point, Officer Exantus learned that Officer Sanchez had located the suspect, and Exantus proceeded to that nearby location.

Upon his arrival, Officer Exantus first asked Petitioner if he had a weapon; he responded that he did not. The officer then patted down Petitioner and found a pair of scissors on his waistband. When asked why he was walking around, Petitioner responded that he could not sleep. The officers then asked if the man had identification. Petitioner responded that it was in his car, but he told them his name and produced a picture of his driver's license on his phone. In addition to confirming his name, the license showed an address from another county about 30 minutes away.

At that point, Officer Exantus arrested Petitioner for loitering and prowling, a misdemeanor offense under Fla. Stat. § 856.021. The officer decided to make the arrest because he was alarmed based on the complainant's report of a man looking into mailboxes. And Petitioner did not dispel that alarm because his identification showed an address from another county. Officer Exantus then conducted a search incident to that arrest. In Petitioner's backpack, the officer found mail addressed to

residents in the neighborhood. Petitioner was ultimately charged in federal court with four counts of possessing stolen mail, a felony offense under 18 U.S.C. § 1708.

B. District Court Proceedings

Petitioner moved to suppress the evidence discovered as a result of the search incident to arrest. He argued that the arrest was unlawful because the officers lacked probable cause of loitering and prowling. His argument proceeded in two parts: 1) the Fourth Amendment prohibits warrantless arrests for misdemeanor offenses that are not committed in an officer's presence; and 2) the only conduct that occurred in an officer's presence was Petitioner walking down the street at 5:22 a.m., which was not loitering and prowling under Florida law. *See* Dist. Ct. ECF Nos. 23, 34.

In response, the government did not dispute that the Fourth Amendment contained an in-the-presence requirement for warrantless misdemeanor arrests. But it argued that there was probable cause based on the *complainant's* observations, which did not occur in an officer's presence. *See* Dist. Ct. ECF No. 32 at 3–4.

After the parties reiterated their arguments at the evidentiary hearing, the district court denied the motion from the bench. Dist. Ct. ECF No. 63 at 92–95. The district court first agreed that, because loitering and prowling was a misdemeanor, it "must be committed in the officers' presence prior to arrest." *Id*. at 92. But the court then proceeded to rely heavily on the complainant's observations. The court emphasized that Petitioner matched the complainant's description of man looking into mailboxes and concealing himself between cars. The court acknowledged that, "while that wasn't the officer's observation, I believe that the officer can certainly

take the information provided to match the description." *Id*. at 93–94. Based on that conduct, observed only by the complainant, the court found probable cause of loitering and prowling. And it further found that Petitioner did not dispel the officers' alarm.

Petitioner subsequently entered a written plea agreement, agreeing to plead guilty to one of the four counts in the indictment. The plea agreement was expressly conditioned on Petitioner's right to appeal the denial of his suppression motion. Dist. Ct. ECF No. 45 at 1–2 ¶¶ 2–3. The district court later sentenced Petitioner to time served, followed by two years of supervised release. App. 25a–26a. At sentencing, the court observed that Petitioner had "no criminal history," had been "battling the substance abuse" that "directly led to the commission of this offense," and had made a "compelling statement" expressing remorse. Dist. Ct. ECF No. 62 at 13–18.

C. Appellate Proceedings

On appeal, Petitioner reiterated his arguments: 1) the Fourth Amendment contains an in-the-presence requirement for warrantless misdemeanor arrests; and 2) the only conduct that occurred in an officer's presence here was Petitioner walking down the middle of the street at 5:22 a.m., and that conduct did not support probable cause to arrest for a loitering-and-prowling misdemeanor under Florida law. As to the Fourth Amendment component, he argued that: a) this Court had repeatedly recognized that the common law contained an in-the-presence requirement for warrantless misdemeanor arrests; and b) this Court had more recently stated that the Fourth Amendment cannot be less protective than the common law was at the Founding. *See* Pet. C.A. Initial Br. 15–17, 42–53; Pet. C.A. Reply Br. 1–15.

Following oral argument, the Eleventh Circuit affirmed in a published opinion.

The court of appeals determined that, "[s]tripped of the complainant's observations, the officers likely lacked probable cause to arrest Gonzalez under Florida's prowling statute." App. 15a. This rendered the arrest "suspect" under Florida law, which contained an in-the-presence requirement. App. 14a & n.6. But, the court of appeals continued, "this violation" of Florida law did not necessarily violate the Fourth Amendment. App. 15a. Accordingly, as the court explained at the outset, "[t]his case requires us to determine whether the Fourth Amendment contains an in-the-presence requirement for a warrantless misdemeanor arrest." App. 2a.

The court of appeals then repeatedly and expressly held that the Fourth Amendment does not contain such a requirement. App. 2a ("we conclude that while an in-the-presence observation may be sufficient for a warrantless misdemeanor arrest, it is not necessary under the Fourth Amendment"); App. 10a ("hold[ing] that the Fourth Amendment does not require a misdemeanor to occur in an officer's presence to conduct a warrantless arrest"); App. 12a ("We find that the Fourth Amendment does not contain an in-the-presence requirement for all warrantless misdemeanor arrests."); App. 16a ("We hold that there is no in-the-presence requirement for warrantless misdemeanor arrests under the Fourth Amendment.").

The court of appeals agreed with Petitioner that the analysis must "begin . . . with the common law." App. 7a. It also agreed that, under this Court's precedent, "the Fourth Amendment 'must provide *at a minimum* the degree of protection it afforded when it was adopted.'" App. 6a (quoting *Lange v. California*, 594 U.S. 295, 309

(2021)). So the court would consider "traditional standards of reasonableness" only if history did not provide a "conclusive answer." App 6a–7a. (citation omitted).

The court of appeals also acknowledged that there was support for Petitioner's common-law rule. It explained that "formulations" in treatises by Hale, Blackstone, and Halsbury "tend to suggest that an officer may conduct warrantless arrests for felonies not committed outside of their presence, while misdemeanors arrests may not." App. 7a. And a "string of Supreme Court cases dating back to the nineteenth century" also "used stark language" to describe that same rule. App. 8a (citing *Carroll v. United States*, 267 U.S. 132, 156–57 (1925); *United States v. Watson*, 423 U.S. 411, 418 (1976); *John Bad Elk v. United States*, 177 U.S. 529, 534–35 (1900); and *Kurtz v. Moffitt*, 115 U.S. 487, 498–99 (1885)). The Eleventh Circuit itself, as well as the former Fifth Circuit, had recognized that common-law rule too. App. 8a (citing cases).

However, the court of appeals determined that "constitutional jurisprudence has retreated from this restrictive reading." App. 9a. The court emphasized that this Court in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) reserved the Fourth Amendment question in footnote 11. App. 9a & n.3. And, it thought, this Court had since "softened" its language, stating that an officer's presence was constitutionally sufficient but not necessary. *Id.* (citing *Maryland v. Pringle*, 540 U.S. 366, 370 (2003)).

"Perhaps this is why," the court speculated, all of the circuits to address the issue had found no in-the-presence requirement. App. 9a–10a. But, the court acknowledged, only one circuit had devoted "more than a line or two" to the issue. *Id.* (quotation omitted). And that circuit, which the others followed, did not dispute the

common-law rule but rather found that this Court had never given it "constitutional force." App. 10a (citing *Street v. Surdyka*, 492 F.2d 368, 371–73 (4th Cir. 1974)).

The Eleventh Circuit gave three reasons for expressly joining those circuits. First, and most relevant here, its "reading of the common law lacks the per se rule that Gonzalez claims." App. 11a. The court observed that this Court had once referred to the common-law rule as the "usual" rule that was "sometimes expressed," and none of this Court's cases "dealt with the issue at bar." *Id*. The court of appeals continued that, as a general matter, statements about the common law of misdemeanor arrests were "not uniform." *Id*. And the court cited Hale for one example where the common law did not require an officer's presence. *Id*. The court concluded that this Court's cases contained only "dicta" that should not be "read for more than it is worth." *Id*.

Second, and third, the court determined that rejecting an in-the-presence requirement "accords with traditional standards of reasonableness" in light of the technical distinctions between felonies and misdemeanors, as well as the law's preference for a totality-of-the-circumstances inquiry for probable cause. App. 11a–12a. Considering the totality of the circumstances here, and "[w]ithout such [an in-the-presence] requirement," the court concluded that "the officers had probable cause to arrest Gonzalez for loitering and prowling." App. 16a. Those circumstances "include[d] not only the officers' observations and conversations, but also the resident's contemporaneous complaint and Gonzalez's proximity to the resident's home. Taken together," those circumstances established probable cause that Petitioner had engaged in loitering and prowling under Florida case law. App. 15a.

Writing only for himself, Judge Luck concurred in the judgment. He agreed with the majority that the common-law rule was not clear-cut. App. 18a–20a, 22a. He also opined that the rule would not apply here because it would allow officers to arrest where the misdemeanor *partially* occurred in their presence, and the "officers arrested Gonzalez in the middle of loitering and prowling." App. 17a–18a, 21a–22a.

REASONS FOR GRANTING THE PETITION

Seven courts of appeals are contravening this Court's precedent and disregarding our common-law history. The Fourth Amendment question presented is otherwise important and recurring. And this case offers a perfect vehicle to decide it.

I. The decision below contravenes this Court's precedent.

Between 1885 and 2001, this Court has recognized—not once, not twice, but at least *five* times—that the common law contained an in-the-presence requirement for warrantless misdemeanor arrests. And this Court has more recently recognized that the Fourth Amendment cannot be less protective than the common law was at the time of the Founding. Taken together, these two lines of precedent resolve the question presented here. Seven circuits refuse to abide by this Court's precedent.

1. Below are this Court's precedents recognizing the common-law rule.

a. In *Kurtz v. Moffitt*, 115 U.S. 487 (1885), the Court expressly identified the common law rule: "By the common law of England, neither a civil officer nor a private citizen had the right, without a warrant, to make an arrest for a crime not committed in his presence, *except in the case of felony*, and then only for the purpose of bringing the offender before a civil magistrate." *Id.* at 498–99 (emphasis added).

This was not some passing comment. Rather, the Court cited numerous historical authorities to support that proposition, including Blackstone, Hale, and two English cases. *Id.* at 499. For the next century, the Court repeatedly recognized that the common law included an in-the-presence requirement for misdemeanor arrests.

b. The Court did so 15 years later in *John Bad Elk v. United States*, 177 U.S. 529 (1900). The Court stated that "an officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence." *Id.* at 534. For support, the Court cited five treatises and five cases. *Id.* at 534–35. Referencing a South Dakota statute, the Court further observed that "the common law is therein substantially enacted." *Id.* at 535. In the margin, the Court quoted the statute, which authorized arrests "[f]or a public offense committed or attempted in his presence" and arrests "[w]hen the person arrested has committed a felony, although not in his presence." *Id.* at 535 n.†. Under the common law, then, there was an in-the-presence requirement for misdemeanors but not for felonies.

c. The Court reiterated that understanding 25 years later in *Carroll v. United States*, 267 U.S. 132 (1925). The Court stated: "The usual [common law] rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence." *Id.* at 156–57. In so stating, the Court cited both *Kurtz* and *Bad Elk*. *Id.* at 157. And the Court block quoted a reformulation of the same common-law rule from Halsbury's treatise. *Id.*

d. Another quarter-century later, four Justices in dissent reiterated the common-law rule: "Under the English common law, a police officer had power without a warrant to arrest persons committing a misdemeanor in the officer's presence and persons whom the officer had reasonable cause to believe had committed a felony." *Trupiano v. United States*, 334 U.S. 699, 713 (1948) (Vinson, C.J., dissenting). Chief Justice Vinson continued: "This rule, which had its origin in the ancient formative period of the common law, was firmly established at the time of the adoption of the Fourth Amendment. Since that time it has received general application by state and federal courts. Indeed, this Court has heretofore given specific recognition to the rule." *Id*. (emphasis added; footnotes omitted). He cited *Carroll* and *Kurtz*, as well as several historical authorities, including Hale and Blackstone. *Id*. at 713 & nn.4, 6.

e. Another quarter-century later—and now nearly a full century after *Kurtz*—the Court again acknowledged the common-law rule in *United States v. Watson*, 423 U.S. 411 (1976). In that case, the Court upheld a federal statute authorizing warrantless arrests for felonies. In doing so, the Court emphasized that this practice was consistent with its precedents as well as the common law. *Id*. at 416–17. Again citing numerous historical authorities, including Hale and Blackstone, the Court repeated: "The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest." *Id*. at 418–19. Even the Justices in dissent agreed that "[t]he common law

was indeed as the Court states it." *Id.* at 439 (Marshall, J., dissenting). A few years later, the Court quoted with approval *Watson*'s articulation of the common-law rule, as well as the authorities it cited. *Payton v. New York*, 445 U.S. 573, 590 n.30 (1980).

f. Over twenty years later, the Court reiterated the common-law rule in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). The Court held that the Fourth Amendment did not prohibit warrantless arrests for misdemeanors. *Id.* at 323. The petitioner argued that warrantless arrests could be made only for misdemeanors involving breaches of the peace because the common law was so limited. *Id.* at 326–27. The Court did not accept petitioner's historical account of the common law; at best, the common law was equivocal. *See id.* at 327–45. In the course of the Court's extensive historical analysis, it observed: "Although the Court has not had much to say about [common law] warrantless misdemeanor arrest authority, what little we have said" had "focused on the circumstance that an offense was committed in an officer's presence, to the omission of any reference to a breach-of-the-peace limitation." *Id.* at 340. For support, the Court favorably cited the statement of the common-law rule in *Watson*, *Carroll*, *Bad Elk*, and *Kurtz*. *Id.* at 340–41. Thus, while the Court in *Atwater* ultimately reserved the Fourth Amendment question here, *id.* at 340 n.11, it nonetheless reaffirmed its understanding of the common-law rule.

2. A decade after *Atwater*, the Court made clear for the first time that the common law sets the constitutional floor. In *United States v. Jones*, 565 U.S. 400 (2012), the Court stated that the Fourth Amendment's "guarantee against unreasonable searches . . . must provide *at a minimum* the degree of protection it

afforded when it was adopted." *Id.* at 411 (emphasis in original). Nearly a decade later, and in a case about misdemeanors no less, the Court reiterated that understanding yet again. The Court explained that, in determining what searches are "reasonable," "the Framers' view provides a baseline for our own day: The Fourth Amendment 'must provide *at a minimum* the degree of protection it afforded when it was adopted.'" *Lange v. California*, 594 U.S. 295, 309 (2011) (quoting *Jones*, 565 U.S. at 411). The upshot is that, where the protections afforded by the common law are "clear," those protections are incorporated into the Fourth Amendment itself. *Id.* at 309; *see id.* at 309–13; *see also id.* at 316 (Thomas, J., concurring in part and concurring in the judgment) (emphasizing the "rule that history—not court-created standards of reasonableness—dictates the outcome whenever it provides an answer").

That is the case here. This Court has repeatedly recognized that the common law prohibited warrantless misdemeanor arrests unless the offense was committed in an officer's presence. And this Court has since made clear that the Fourth Amendment cannot be less protective than the common law was at the time of the Founding. As a result, the Fourth Amendment prohibits warrantless misdemeanor arrests that are not committed in an officer's presence. That should resolve this case.

3. In the decision below, however, the Eleventh Circuit ruled otherwise. The court of appeals agreed with Petitioner that, under this Court's precedent, the Fourth Amendment cannot be less protective than the common law. App. 6a–7a. But the court of appeals concluded that the common law did not clearly contain an in-the-

presence-requirement for warrantless misdemeanor arrests. *See* App. 9a–11a. The court's reasons for reaching that conclusion conflict with this Court's precedent.

a. The Eleventh Circuit acknowledged that "a string" of this Court's precedents had "used stark language" to articulate the common-law rule. App. 8a. But the court then proceeded to dismiss that language as "dicta." App. 11a. Not so.

In *Carroll*, for example, the Court upheld the warrantless search of car based on probable cause that it contained contraband—the first appearance of the so-called "automobile exception." But that doctrinal innovation was necessary only because the Court recognized that, under the common law, the search could not be upheld as a search incident to a warrantless arrest. And that was so because the offense was a misdemeanor not committed in an officer's presence. *Carroll*, 267 U.S. at 156–58. Indeed, the Court acknowledged that, if the seizure could be justified only as a search incident to arrest, then it would have been invalid. *Id*. at 158–59; *see* Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 731 & n.525 (1999) (explaining this aspect of *Carroll*). Thus, the common-law rule formed a necessary part of *Carroll*'s reasoning and constituted part of the Court's holding.

The same was true in *Bad Elk*. The Court held that the jury was erroneously instructed that an officer killed during an arrest had the right to make the arrest, and that the defendant therefore had no right to resist. The Court explained why that error was prejudicial: at common law, if a defendant killed an officer who had no right to make an arrest, then the charge could be reduced from murder to manslaughter. *Id*. at 534, 537. It was in that context that the Court explained that "an officer, at

common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence." *Id.* at 534. The Court also found no statutory authority for the officer to make the arrest in that case, noting that the state statute had codified the common-law rule. *Id.* at 535 & n.†. Thus, the statement of the common-law rule again formed part of the Court's reasoning there too.

b. The Eleventh Circuit also thought that this Court had recently "retreated" from its reading of the common law. App. 9a. The court gave two reasons for this, but they conflate the common-law rule with the Fourth Amendment question.

First, the court of appeals emphasized that *Atwater* left open the Fourth Amendment question. App. 9a. However, this Court still reiterated its understanding of the common law. When *Atwater* was decided, the common law was not necessarily dispositive of the Fourth Amendment question. While this Court had looked to the common law in pre-*Atwater* cases, the Court had not yet made clear that the Fourth Amendment could not be less protective than the common law. But that is clear now.

Moreover, whether the Fourth Amendment incorporated the common law's in-the-presence rule was not before the Court in *Atwater*. Plus, Chief Justice Rehnquist joined *Atwater*'s bare 5-4 majority, and he had previously taken the view that the Fourth Amendment did not contain an in-the-presence requirement. *Welsh v. Wisconsin*, 466 U.S. 740, 756 (1984) (White, J., joined by Rehnquist, J., dissenting). The *Atwater* Court was aware of this, twice citing the *Welsh* dissent in this part of the opinion. 532 U.S. at 340 n.11, 341. This dynamic may explain why *Atwater* reserved the Fourth Amendment question, even as it reiterated the common-law rule.

Second, the court of appeals thought that this Court had "softened" its language about the common-law rule. App. 9a. But, for support, the Court cited *Maryland v. Pringle*, 540 U.S. 366 (2003), which said nothing about the common law at all. Rather, *Pringle* merely followed what *Atwater* had said about minimum constitutional requirements: a warrantless arrest for a misdemeanor committed in an officer's presence "is consistent" with the Fourth Amendment. *Pringle*, 540 U.S. at 370; *Atwater*, 532 U.S. at 354. The Court reiterated that point in *Virginia v. Moore*, 553 U.S. 164, 171, 176, 178 (2008). But neither *Pringle* nor *Moore* said anything about the common-law rule, much less "softened" the Court's earlier articulation of it.

Moreover, it is difficult to see how these cases *support* the Eleventh Circuit's Fourth Amendment conclusion. To be sure, they emphasized the importance of probable cause. But each time they did so, they also included an in-the-presence qualification. If anything, by carefully and invariably including that qualification, these cases suggest that a warrantless arrest for a misdemeanor *not* committed in an officer's presence would *not* be consistent with the Fourth Amendment. At the very least, though, that question was not presented in *Atwater*, *Pringle* or *Moore*. And all three of these cases (not just *Atwater*) preceded *Jones*, where the Court first made clear that the Fourth Amendment cannot be less protective than the common law.

c. Refusing to accept this Court's articulation of the common-law rule, the Eleventh Circuit did its own research and purported to find common-law "exceptions to any generalized presence requirement." App. 11a. But the only example it cited was taken from Hale. And this Court has already considered that treatise (twice), and

found that it supported (not refuted) a common-law in-the-presence requirement for warrantless misdemeanor arrests. *Watson*, 423 U.S. at 418; *Kurtz*, 115 U.S. at 499; *see also Trupiano*, 334 U.S. at 713 n.4 (Vinson, C.J., dissenting). The Eleventh Circuit should not have second-guessed this Court's reading of Hale's treatise or the history more generally. *See Moore*, 553 U.S. at 168 n.2 (declining to "revisit" the same common-law sources that the Court had considered in *Atwater*). Each time this Court recognized the common-law rule, it cited *numerous* historical sources for support: various treatises (not just Hale), law review articles, and case law. *See Watson*, 423 U.S. at 418–19; *Carroll*, 267 U.S. at 157; *Bad Elk*, 177 U.S. at 534–55; *Kurtz*, 115 U.S. at 499; *see also Trupiano*, 334 U.S. at 713 n.4 (Vinson, C.J., dissenting). In any event, the only exception to the common law the Eleventh Circuit purported to identify was for "incontinency crimes"; whatever that might entail, it would not apply to this case.

d. Finally, the Eleventh Circuit emphasized that several other circuits to address the question have held that the Fourth Amendment does not contain an in-the-presence requirement for warrantless misdemeanor arrests. App. 9a–10a; *see Graves v. Mahoning*, 821 F.3d 772, 778–79 (6th Cir. 2016) (citing cases from the First, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits). But the Eleventh Circuit acknowledged that only the Fourth Circuit in *Street v. Surdyka*, 492 F.2d 368 (4th Cir. 1974) had "devoted much more than on a line or two to this issue," and the other circuits had simply followed suit. App. 9a–10a (quotation omitted). So too did Justice White in his *Welsh* dissent, where he opined in one conclusory sentence that an in-

the-presence requirement for warrantless misdemeanor warrants was "not grounded in the Fourth Amendment." 466 U.S. at 756 (White, J., dissenting) (citing *Street*).

But *Street* is unpersuasive. The Fourth Circuit acknowledged (even before *Watson*) that this Court had recognized the common-law rule, and the Fourth Circuit did not dispute that this Court had correctly stated the rule. *Street*, 492 F.2d at 371 & n.2. Instead, the Fourth Circuit emphasized that this Court had "never given constitutional force to th[e] [presence] element of the common law rule." *Id.* at 371. However, the Fourth Circuit's decision came before the advent of originalism and (decades) before this Court clarified that the Fourth Amendment cannot be less protective than the common law. Thus, even if *Street* was persuasive back in 1974, it is no longer persuasive today. To the contrary, *Street* casually jettisoned history because, in its view, the misdemeanor-felony distinction was "no longer as significant as it was at common law," and it was "impractical and illogical." *Id.* at 372. This Court recently rejected similar arguments in *Lange*, relying instead on its precedent and the common law to constitutionalize the distinction between fleeing misdemeanants and felons in the context of warrantless home entries. *Lange* teaches that the lower courts today may not cast aside precedent and history, only to substitute their own policy judgments based on "traditional standards of reasonableness." App. 11a–12a.

* * *

"As this Court has explained" time and time again: "'If a precedent of this Court has direct application in a case' . . . , a lower court 'should follow the case which directly controls, leaving to this Court the prerogative of overruling its own

decisions.'" *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). That is particularly true here, where there are *multiple* precedents stating the common-law rule. If this Court has gotten the history so wrong so many times, then it is up to this Court to say so. Seven circuits are violating this cardinal rule of vertical precedent.

II. The question presented is important and recurring.

1. This Court has previously granted certiorari to decide related Fourth Amendment questions about the warrantless arrest authority. *See, e.g.*, *Moore*, 553 U.S. at 176, 178 (holding that the violation of a state arrest statute does not necessarily violate the Fourth Amendment); *Atwater*, 532 U.S. at 323, 354 (holding that the Fourth Amendment permits warrantless arrests for misdemeanors other than for breaches of the peace); *Watson*, 423 U.S. at 414–24 (upholding federal statute authorizing warrantless felony arrests). In none of these opinions did the Court note any conflict among the lower courts. That omission suggests that the issues there were cert.-worthy because they were important. The same is true of the issue here.

Moreover, as explained below, this Court's most recent precedents (especially *Moore*) have led to some confusion. *Atwater*, *Pringle*, and *Moore* repeatedly stated—including as part of the formal holdings in *Atwater* and *Moore*—that a warrantless arrest *satisfies* the Fourth Amendment when there is probable cause to believe that a misdemeanor *has* been committed in an officer's presence. *Moore*, 553 U.S. at 171, 176, 178; *Pringle*, 540 U.S. at 370; *Atwater*, 532 U.S. at 354. But those statements have led to confusion because they do not address the converse issue: whether a

warrantless arrest *violates* the Fourth Amendment when the misdemeanor has *not* been committed in an officer's presence. It has now been 23 years since this Court in *Atwater* reserved that question. The time has come for the Court to decide it at last.

That question is recurring. Indeed, misdemeanor arrests happen every day. Just at the federal level, moreover, at least seven circuits have addressed the question presented. The leading appellate decision, *Street v. Surdyka*, is now 50 years old. And, more recently, respected lower-court jurists like Judge Sutton have gone out of their way to observe that the question continues to be an "open question at the Supreme Court," with "valid competing arguments that deserve to be addressed." *Graves*, 821 F.3d at 778–79. He further noted that Judges Easterbrook and Colloton had "flagged the issue" as well. *Id*. at 780 (citing their opinions from 2010 and 1986, respectively).

2. The legal landscape in the States further bolsters the need for review.

As a matter of state law, "most states hold to the view that a warrantless misdemeanor arrest may be made only for an offense committed 'in the presence'" of an officer. Wayne R. LaFave, 3 Search & Seizure § 5.1(c) (6th ed. Mar. 2024 update). This Court has recognized this fact. In *Watson*, the Court acknowledged that the common-law rule has "been the prevailing rule under state constitutions and statutes." 423 U.S. at 419. And, in *Atwater*, the Court included a statutory appendix listing warrantless arrest statutes in every state, with the vast majority containing an in-the-presence requirement. 532 U.S. at 355–60. Federal arrest statutes have one too. *See, e.g.*, 18 U.S.C. §§ 3052 (FBI), 3053 (Marshals). The predominance of this requirement is not a coincidence; it reflects and carries forward the common-law rule.

But the specifics vary by state. Summarizing the landscape several years ago, one commentator observed that "[m]ost jurisdictions . . . retain the in-the-presence rule in some form." William A. Schroeder, Warrantless Misdemeanor Arrests and the Fourth Amendment, 50 Mo. L. Rev. 771, 777 (1993). "Many jurisdictions have a general in-the-presence rule and, in addition, authorize warrantless arrests for misdemeanors not committed in the arresting officer's presence if specified circumstances exist or if the arrest is for specified misdemeanors." *Id*. at 777–78 & nn.12–13 (collecting statutes). Meanwhile, a "few jurisdictions have completely eliminated the in-the-presence requirement." *Id*. at 783 & n.18 (collecting statutes).

a. In the many states that *do* have an in-the-presence requirement, the current landscape produces arbitrary disparities on the ground. In those states, arrests for misdemeanors that did not occur in an officer's presence may lead to the suppression of evidence in an ensuing *state* prosecution. But the very same evidence, discovered during the very same arrest, would be deemed admissible in an ensuing *federal* prosecution. After all, no federal circuit has deemed such a warrantless misdemeanor arrest to violate the Fourth Amendment. The admissibility of evidence may therefore turn entirely (and arbitrarily) on whether a case is brought in state or federal court. And that decision will be left entirely to local prosecutors. *See Gamble v. United States*, 587 U.S. 678 (2019) (reaffirming the "dual-sovereignty" doctrine).

This case provides a perfect example. The Eleventh Circuit acknowledged that Petitioner's "arrest is suspect under Florida law." App. 14a. The court of appeals explained that Florida law appeared to contain an in-the-presence requirement for

misdemeanor arrests. App. 14a & n.6. And it concluded that, "[s]tripped of the complainant's observations, the officers likely lacked probable cause to arrest Gonzalez under Florida's prowling state" based on the conduct in their presence. App. 15a. Thus, had Petitioner been prosecuted in *state* court in Miami, *see* Fla. Stat. § 812.014 (Florida theft statute), the evidence discovered in the search incident to his arrest would have been suppressed, and the state prosecution could not have gone forward. *See* Pet. C.A. Reply Br. 19–20 n.1 (citing Florida cases reversing the denial of suppression motions due to a lack of probable cause of loitering/prowling). But because this case was prosecuted across the street in *federal* court in Miami, the evidence was admissible. The admissibility of the evidence in this case thus depended on whether prosecutors decided to charge the case in state or federal court. This Court alone should be the one to decide whether such intra-state/city disparities continue.

There are also some states that have an in-the-presence requirement, but that do not suppress evidence obtained in violation of that requirement unless federal law would also require suppression. *See, e.g.*, *State v. Harker*, 240 P.3d 780, 782, 784 (Utah 2010); *People v. Donaldson*, 42 Cal. Rptr. 2d 314, 317 (Cal. Ct. App. 1995). In those states, then, the enforceability of the state-law, in-the-presence requirement turns on the Fourth Amendment question here. Thus, resolving that question would determine whether evidence is admissible not only in federal prosecutions but in some state prosecutions as well. And if the Fourth Amendment itself does not contain an in-the-presence requirement, then that will effectively nullify these state laws. This Court alone should be the final arbiter of this important question of federal law.

b. In the states that have eliminated an in-the-presence requirement, that break from the common law is unconstitutional for the reasons above. Granting review would make clear that the Fourth Amendment prohibits such a departure.

But clarity is needed either way because "[t]he judicial response to attempts to eliminate the in-the-presence requirement has been mixed. Several state courts have held unconstitutional statutes purporting to authorize warrantless arrests for misdemeanors not committed in the presence of the arresting officer. Other courts have upheld statutes that removed the in-the-presence requirement." Schroeder, *supra*, at 790–91 & nn.39–40 (collecting cases). Thus, notwithstanding the uniformity among the federal circuits, whether such a requirement is constitutionally mandated has long divided state courts of last resort. That conflict alone warrants review.

That division, moreover, has tracked the fault lines outlined above. In holding that an in-the-presence requirement *is* constitutionally mandated, state courts of last resort have long relied on the common law, including this Court's precedent articulating the common-law rule. *See, e.g.*, *Orick v. State*, 105 So. 465, 469–71 (Miss. 1925); *Ex Parte Rhodes*, 79 So. 462, 462–63 (Ala. 1918); *In re Kellam*, 41 P. 960, 961 (Kan. 1895). Meanwhile, state courts more recently taking the opposing view have done what the Eleventh Circuit did here. They have relied on *Street* and the consensus in the federal circuits. *See State v. Walker*, 138 P.3d 113, 120–21 (Wash. 2006). And they have over-read this Court's decision in *Moore* to hold that probable cause alone satisfies the Fourth Amendment, regardless of whether it is based on conduct occurring outside of an officer's presence. *See Harker*, 240 P.3d at 786–87.

III. This case is an ideal vehicle.

This case is an ideal vehicle because the question presented was preserved below, was squarely resolved by the Eleventh Circuit, and is dispositive of this case.

1. There is no dispute that Petitioner fully preserved his argument below. In the district court, he argued that the arrest was unlawful because loitering and prowling was a misdemeanor, and that offense did not occur in an officer's presence. *See* Dist. Ct. ECF Nos. 23, 32; Dist. Ct. ECF No. 63 at 55–79. On appeal, Petitioner reiterated that position. He elaborated that the Fourth Amendment contains an in-the-presence requirement because that was the rule at common law, as this Court had articulated it, and the Fourth Amendment cannot be less protective than the common law. *See* Pet. C.A. Initial Br. 15–17, 42–53; Pet. C.A. Reply Br. 1–15. Because Petitioner fully preserved his argument in the courts below, there is no risk that plain-error review would obstruct the Court's ability to decide the question presented.

2. The Eleventh Circuit also expressly resolved that Fourth Amendment question, repeating its holding numerous times. *See* App. 2a ("we conclude that while an in-the-presence observation may be sufficient for a warrantless misdemeanor arrest, it is not necessary under the Fourth Amendment"); App. 10a ("hold[ing] that the Fourth Amendment does not require a misdemeanor to occur in an officer's presence to conduct a warrantless arrest"); App. 12a ("We find that the Fourth Amendment does not contain an in-the-presence requirement for all warrantless misdemeanor arrests."); App. 16a ("We hold that there is no in-the-presence

requirement for warrantless misdemeanor arrests under the Fourth Amendment."). And the Eleventh Circuit did not identify or rely on any alternative grounds to affirm.

3. The Fourth Amendment question is otherwise dispositive of this case.

a. The complainant reported seeing Petitioner coming out from behind the gate of a neighbor's house, looking into mailboxes, and concealing himself between cars. There is no dispute that, had this conduct occurred in the presence of the officers, they would have had probable cause to arrest him for loitering and prowling. But there is no dispute that this conduct did *not* occur in their presence. All they saw was a man walking down a residential street at 5:22 a.m. Yet the officers determined that he had been loitering and prowling based on the suspicious conduct that the *complainant* had observed. Indeed, that conduct formed the basis of the decision to arrest him. *See* Dist. Ct. ECF No. 63 at 29–30 (testimony of arresting officer).

At no point in this litigation has anyone seriously argued that the officers had probable cause based *solely* on what they saw—without considering the complainant's report. For example, even though the district court appeared to accept that there was an in-the-presence requirement, the court was *still* forced to rely heavily on the complainant's report in order to find probable cause. *See* Dist. Ct. ECF No. 63 at 92–94 (ruling that the officers were entitled to rely on the complainant's report when seeing a man matching the description). Similarly, the government's probable-cause argument on appeal also invariably relied on the suspicious conduct that the complainant had observed and reported. *See, e.g.*, U.S. C.A. Br. 1 (framing the issue on appeal as whether the arrest of Petitioner—"who matched the description of a man

casing a residential neighborhood and emerging from behind a home that was not his own . . . —was consistent with the Fourth Amendment"); *id*. at 12 ("walk out from behind a house that is not their own"); *id*. ("behind other people's houses"); *id*. at 13 ("An area resident had reported a suspicious man matching Grandia Gonzalez's description casing the neighborhood and walking out from behind a home").

Accordingly, the Eleventh Circuit recognized that, if the Fourth Amendment contained an in-the-presence requirement, there likely would have been no probable cause to support the warrantless arrest for the misdemeanor offense of loitering and prowling. App. 15a ("Stripped of the complainant's observations, the officers likely lacked probable cause to arrest Gonzalez under Florida's prowling statute."). That was so, the court explained, because "all the officers saw was a man walking down a neighborhood street in the early morning hours." App. 14a–15a; *see* App. 15a ("Even considering the officer's conversations with Gonzalez regarding his living situation, we are skeptical that these interactions give rise to ongoing or imminent criminal activity," as required to establish loitering-and-prowling offense under Florida law).

Since that conduct standing alone—without considering the complainant's observations—would have been insufficient, the court of appeals recognized that "[t]his case *requires* us to determine whether the Fourth Amendment contains an in-the-presence requirement for a warrantless misdemeanor arrest." App. 2a (emphasis added). After the court held that there was no such requirement, it then proceeded to consider the "totality of the circumstances," focusing on "the resident's contemporaneous complaint." App. 15a. Only after considering all of the

circumstances, including the complainant's observations, did the court conclude that there was probable cause for the arrest. *Id*. In its final paragraph, the court reiterated that its probable-cause determination depended on the lack of an in-the-presence requirement. App. 16a ("*Without such a requirement*, the officers had probable cause to arrest Gonzalez for loitering and prowling under § 856.021.") (emphasis added).

b. No other member of the panel joined Judge Luck's concurrence in the judgment, but it is unpersuasive in any event. Although the government never made this argument, he opined that, even if there was an in-the-presence requirement, it would not apply here because it is satisfied where the offense *partially* occurs in an officer's presence. App. 17a–18a, 21a–22a. But he failed to cite any Founding-era authority for that proposition; instead, he cited a handful of 20th century state-court decisions. App. 22a. Regardless, not even part of the offense conduct here occurred in the presence of an officer. Again, all the officers saw Petitioner do was walk down the middle of a residential street at 5:22 a.m.; that is simply not loitering and prowling. The loitering and prowling for which Petitioner *was* arrested occurred *before* the officers arrived—*i.e.*, when the complainant saw him coming out from the neighbor's house, looking into mailboxes, and concealing himself between cars. And while the officers later determined that Petitioner did not dispel their alarm—again, alarm arising only from the conduct seen by the complainant—that failure merely negated a potential affirmative defense under § 856.021(2); it did not go to one of the offense elements under § 856.021(1). *See State v. Ecker*, 311 So.2d 104, 110 (Fla. 1975). Those elements were satisfied based on conduct that did *not* occur in any officer's presence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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