No. 24-5577

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR JAVIER GRANDIA GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the arrest of petitioner -- whom police encountered in the predawn darkness dressed in black and carrying a backpack; who matched the description of a man casing a residential neighborhood and emerging from a property that was not his own; and who had scissors in his waistband -- was permissible under the Fourth Amendment by probable cause of a state-law misdemeanor.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 107 F.4th 1304.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2024. The petition for a writ of certiorari was filed on September 16, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted on

one count of possessing stolen mail, in violation of 18 U.S.C. 1708. Judgment 1. He was sentenced to time served of one day, to be followed by two years of supervised release. Judgment 2-3; see C.A. App. 187. The court of appeals affirmed. Pet. App. 1a-23a.

1. Around 5 a.m. one morning in Florida, police dispatch directed two officers to a residential neighborhood after a 911 caller reported having seen a man "casing the area." Pet. App. 2a; see Pet. 3. One of the officers met with the caller, who reported that his wife had seen a man in black clothing with a backpack looking into mailboxes, hiding between cars, and coming out of the neighbors' gate. Pet. App. 3a. The neighbors "were away" at the time, and their home "had previously been burglarized." Ibid.

The second officer went to canvass the neighborhood and, "[a]bout a half block away from the [caller's] home," saw petitioner walking in the middle of the street. Pet. App. 2a. The officer approached and observed that petitioner "wore dark clothing, carried a plastic bottle and a backpack, and had a shiny metal object in his pocket." Id. at 3a. Petitioner told the officer that he lived out of his car eight to ten blocks away. Ibid. "When asked why he was walking down the street, [petitioner] responded that he thought he was allowed to do so." Ibid. The officer thought petitioner "looked sweaty and nervous." Ibid.

The first officer then rejoined the second and patted petitioner down, finding the metal object in his pocket to be

scissors. Pet. App. 3a. Petitioner "told the officers he was walking because he couldn't sleep" and showed them identification listing his address as a location 30 minutes away. Id. at 4a. Based on their observations and the 911 caller's report, the officers arrested petitioner for "loitering and prowling," a misdemeanor under state law. Ibid.; see Fla. Stat. § 856.021(1) ("It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity."). A search of petitioner's backpack incident to his arrest found "37 pieces of sealed mail belonging to neighborhood residents," which petitioner admitted to stealing. Pet. App. 4a.

2. A grand jury in the Southern District of Florida returned an indictment charging petitioner with four counts of possessing stolen mail, in violation of 18 U.S.C. 1708. Pet. App. 4a. Petitioner moved to suppress the stolen mail and his admission, arguing that "the Fourth Amendment prohibits a warrantless arrest for a misdemeanor unless committed in an officer's presence." Ibid. The district court denied the motion. Ibid. Petitioner pleaded guilty to one count of possessing stolen mail, in violation of 18 U.S.C. 1708, and reserved his right to appeal the denial of his suppression motion. Id. at 4a-5a. The district court sentenced him to time served -- one day of imprisonment -- to be

followed by two years of supervised release. Judgment 2-3; see C.A. App. 187.

3. The court of appeals affirmed. Pet. App. 1a-23a. The court rejected petitioner's claim that the arrest violated the Fourth Amendment, explaining that a warrantless arrest supported by probable cause complies with the Fourth Amendment even if the arrest is for a misdemeanor committed outside the presence of the police. Id. at 10a. After noting that this Court has not "explicitly decide[d] whether the Fourth Amendment demands an in-the-presence requirement for warrantless misdemeanor arrests," id. at 9a (citing Atwater v. City of Lago Vista, 532 U.S. 318, 340 n.11 (2001)), the court of appeals joined "every circuit to face this issue" and declined to impose such a constitutional requirement, ibid.

The court of appeals identified "three grounds" for doing so. Pet. App. 10a. First, while accepting that the Founding-era common law sheds light on the meaning of the Fourth Amendment, the court found that there was no uniform presence requirement for warrantless misdemeanor arrests at common law. See id. at 6a-7a, 11a. Second, the court observed that such a requirement would not "accord[] with traditional standards of reasonableness" because a rule turning on the technical distinctions between felonies and misdemeanors would be "impracticable." Id. at 11a; see ibid. (noting that "[m]any misdemeanors involve conduct as violent and dangerous as felonies, or classifications turn on post-arrest

determinations such as weight of seized contraband"). Third, the court reasoned that the requirement of probable cause for warrantless arrests is sufficient protection for individuals, and observed that "[c]ategorical exceptions based upon a crime's classification" would be inconsistent with the traditional Fourth Amendment reasonableness inquiry. Id. at 12a.

The court of appeals then found that the officers had probable cause to arrest petitioner for loitering and prowling based on their observations and interactions with him, the 911 caller's "contemporaneous complaint," and petitioner's "proximity to the [caller's] home." Pet. App. 15a; see id. at 15a-16a. The court accordingly affirmed the denial of the suppression motion. Id. at 16a.

Judge Luck concurred in the judgment. Pet. App. 17a-23a. He agreed with the panel majority that "the rule was not clear" at common law "that an officer could not arrest a person who commits a misdemeanor if the crime was committed outside the officer's presence." Id. at 17a; see id. at 18a-20a. And he emphasized that even if there were such a rule, it "would not apply to this case," because petitioner's offense was committed in the presence of the officers, who encountered petitioner while he was still engaged in loitering and prowling. Id. at 21a; see id. at 21a-22a.

ARGUMENT

Petitioner contends (Pet. 10-20) that the Fourth Amendment permits a warrantless arrest for a misdemeanor only if the offense occurs in the presence of the arresting officer. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. And even if the question presented merited this Court's review, this case would be a poor vehicle for considering it. Further review is unwarranted.

1. The court of appeals correctly recognized that the Fourth Amendment does not impose a rule under which probable cause of a misdemeanor offense can support a warrantless arrest only if it is committed in the presence of the arresting officer. Pet. App. 10a.

a. The Fourth Amendment provides, in pertinent part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV. "In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." Devenpeck v. Alford, 543 U.S. 146, 152 (2004). Here, petitioner does not dispute that the officers had probable cause to arrest him for loitering and prowling. See Pet. 26. Yet he claims his arrest was inconsistent with a common-law rule

prohibiting warrantless arrests for misdemeanors committed outside the arresting officers' presence, which he views as dispositive of the Fourth Amendment inquiry. See Pet. 10.

Petitioner's theory lacks merit. While the Court has described the common law as "instructive," Lange v. California, 594 U.S. 295, 309 (2021) (citation omitted), here "[t]he historical record does not reveal a limpid legal rule" governing warrantless misdemeanor arrests, ibid. As the court of appeals explained, notwithstanding common-law commentators' "tend[ency] to suggest that an officer may conduct warrantless arrests for felonies," but not misdemeanors, "committed outside of their presence," Pet. App. 7a, that was not a uniform rule. Instead, "exceptions to any generalized presence requirement existed at common law." Id. at 11a. And the existence and variety of practices undermines petitioner's efforts to impose a categorical Fourth Amendment rule.

As this Court has itself observed, "statements about the common law of warrantless misdemeanor arrest simply are not uniform." Atwater v. City of Lago Vista, 532 U.S. 318, 329 (2001). In discussing arrests "for breach of the peace and some misdemeanors, less than felony," for example, Sir Matthew Hale noted that a constable could make arrests for certain sexual ("incontinency") crimes based on information provided to him by others. 2 The History of the Pleas of the Crown 88-89 (1736); see Pet. App. 11a. Judge Luck, in his opinion below, likewise cited

(among other examples) a Massachusetts colonial law authorizing warrantless arrests of individuals who "are overtaken with drink, swearing, Sabbath breaking, [l]ying vagrant persons, and night-walkers, provided they be taken in the manner either by the sight of the constable, or by present information from others." Pet. App. 20a (brackets and citation omitted); see Graves v. Mahoning County, 821 F.3d 772, 778-779 (6th Cir. 2016) (collecting additional examples).

That lack of clarity in the historical record is fatal to petitioner's claim. As petitioner himself acknowledges, common-law protections must be "'clear'" to be deemed "incorporated into the Fourth Amendment itself." Pet. 14 (quoting Lange, 594 U.S. at 309); see Virginia v. Moore, 553 U.S. 164, 171 (2008) (explaining that "traditional standards of reasonableness" apply "[w]hen history has not provided a conclusive answer"). In Atwater, for instance, this Court emphasized a similar absence of historical clarity in rejecting the claim that the Fourth Amendment prohibits warrantless arrests for "minor criminal offenses" like seatbelt violations. 532 U.S. at 326; see id. at 329. And here, the ad hoc exceptions adopted by States at least show that a presence requirement for warrantless misdemeanor arrests was not well established.

b. Petitioner makes no effort to show that such a rule would otherwise be justified. This Court generally assesses the reasonableness of arrests and other seizures by conducting a

flexible "totality-of-the-circumstances inquiry" rather than by applying categorical rules. Pet. App. 12a; see, e.g., Plumhoff v. Rickard, 572 U.S. 765, 774 (2014). But petitioner's approach would make the scope of the police's arrest authority turn, as a constitutional matter, on whether the relevant offense is classified as a felony or a misdemeanor -- "a very unsatisfactory line of difference," given how much less clear and salient the felony/misdemeanor distinction has become since the Founding Era. Carroll v. United States, 267 U.S. 132, 157-158 (1925).

Today, that distinction is often technical, obscure, and "difficult (if not impossible)" for the "officer on the street" to resolve. Atwater, 532 U.S. at 348; see ibid. (noting that "penalties for ostensibly identical conduct can vary" based on facts unknown at the time of arrest); Berkemer v. McCarty, 468 U.S. 420, 430 (1984) ("The police often are unaware when they arrest a person whether he may have committed a misdemeanor or a felony."). Under petitioner's rule, a warrantless arrest for a misdemeanor committed outside the officer's presence would be invalid even if the officer had exceptionally strong evidence of the arrestee's guilt, whereas an arrest for a similar felony would be valid even if based on a much weaker showing of probable cause.

While many state and federal laws incorporate a presence requirement for warrantless misdemeanor arrests, see Pet. 21-22,

many others do not.[1] "Many states," for example, "in an effort to encourage arrests in domestic abuse cases, now allow officers to arrest without a warrant if they have probable cause to believe that the person to be arrested has committed a misdemeanor that is an act of domestic violence." William A. Schroeder, Warrantless Misdemeanor Arrests and the Fourth Amendment, 58 Mo. L. Rev. 771, 785-786 (1993).

The States that do have a statutory in-the-presence requirement can address any practical problems that arise through legislation. But imposing a one-size-fits-all, unadjustable presence requirement as a federal constitutional rule would conflict with this Court's prevailing approach to the Fourth Amendment and unduly hinder law enforcement.

c. Petitioner errs in suggesting (Pet. 10-20) that this Court has already decided the question presented in his favor. To the contrary, the Court specifically reserved that question in Atwater, declining to "speculate whether the Fourth Amendment entails an 'in the presence' requirement for purposes of misdemeanor arrests." 532 U.S. at 340 n.11. The Court even "seem[ed] to go out of its way not" to suggest that such a requirement exists, 3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 5.1(b) (6th ed. Nov. 2024

[1] E.g., 18 U.S.C. 3050; Colo. Rev. Stat. § 16-3-102(1)(c); 725 Ill. Comp. Stat. 5/107-2(1)(c); La. Code Crim. Proc. Ann. art. 213(A)(3); Mo. Rev. Stat. § 43.195; N.Y. Crim. Proc. Law § 140.10(1)(b); N.C. Gen. Stat. § 15A-401(b)(2); Or. Rev. Stat. § 133.310(1)(b); R.I. Gen. Laws § 12-7-3; Wis. Stat. § 968.07(1)(d).

update), by citing Justice White's prior statement that a presence requirement for warrantless misdemeanor arrests "is not grounded in the Fourth Amendment," Welsh v. Wisconsin, 466 U.S. 740, 756 (1984) (White, J., dissenting); see Atwater, 532 U.S. at 340 n.11.

Petitioner nonetheless relies on decisions predating Atwater to insist that the Court has actually embraced his rule. See Pet. 10-13 (citing, e.g., Kurtz v. Moffitt, 115 U.S. 487 (1885); Bad Elk v. United States, 177 U.S. 529 (1900); Carroll, supra; and United States v. Watson, 423 U.S. 411 (1976)). But those decisions were already part of the backdrop when the Court declined to endorse an in-the-presence requirement in Atwater.[2] And even on petitioner's own accounting, mention of the issue was dictum in all but two cases -- Bad Elk v. United States and Carroll v. United States. See Pet. 15-16. Atwater addressed Carroll at length, see 532 U.S. at 328-329, 340-341, and cited Bad Elk, see id. at 341, and neither case adopts the rule that petitioner proposes.

Carroll described a presence requirement as the "usual rule" at common law, and the Court did not settle whether the Fourth Amendment incorporated it because the search at issue was lawful under the automobile exception to the warrant requirement; there

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[2] Petitioner errs in downplaying Atwater by suggesting (Pet. 2, 13, 16) that it predates cases looking to the common law in applying the Fourth Amendment, such as United States v. Jones, 565 U.S. 400 (2012). For decades before Atwater, this Court had "often looked to the common law in evaluating the reasonableness, for Fourth Amendment purposes, of police activity." Tennessee v. Garner, 471 U.S. 1, 13 (1985) (citing, e.g., Watson and Carroll, supra).

was thus no need to resolve "the validity of the arrest" for purposes of the search-incident-to-arrest doctrine. 267 U.S. at 156, 158; see id. at 156-159. Nor was there any need to apply a presence requirement in Bad Elk, which held invalid an attempted arrest that was entirely unsupported by probable cause. 177 U.S. at 531 ("No reason for making the arrest was given."); see id. at 531-532, 537. If anything, that case undercuts petitioner's position by implying that any presence requirement "could be relaxed by statute." Street v. Surdyka, 492 F.2d 368, 371 (4th Cir. 1974); see Bad Elk, 177 U.S. at 535.

2. The question presented does not warrant this Court's review for other reasons as well. As petitioner acknowledges (Pet. 24), his claim implicates no disagreement among the courts of appeals. Instead, "every circuit to face this issue has 'held that the Fourth Amendment does not include an in-the-presence requirement for warrantless misdemeanor arrests.'" Pet. App. 9a (citation omitted); see Budnick v. Barnstable County Bar Advocates, Inc., 989 F.2d 484, 1993 WL 93133, at *3 n.7 (1st Cir. Mar. 30, 1993) (Tbl.) (per curiam); Street, 492 F.2d at 371-373 (4th Cir.); Fields v. City of S. Houston, 922 F.2d 1183, 1189 (5th Cir. 1991); Graves, 821 F.3d at 778-779 (6th Cir.); Woods v. City of Chicago, 234 F.3d 979, 992-995 (7th Cir. 2000), cert. denied, 534 U.S. 955 (2001); Barry v. Fowler, 902 F.2d 770, 772 (9th Cir.

1990); Bickford v. Hensley, 832 Fed. Appx. 549, 554 n.4 (10th Cir. 2020); Pet. App. 10a.[3]

Petitioner cites (Pet. 24) a few aged state-court decisions as applying a common-law presence requirement, but those cases do not ground any such requirement in the Fourth Amendment. See Orick v. State, 105 So. 465, 469-471 (Miss. 1925); Ex parte Rhodes, 79 So. 462, 462-463 (Ala. 1918); In re Kellam, 41 P. 960, 961 (Kan. 1895). And the fact that many States have imposed a presence requirement as a matter of state law, see Pet. 21-22, simply reflects the States' prerogative to "impos[e] more stringent constraints on police conduct than does the Federal Constitution," California v. Greenwood, 486 U.S. 35, 43 (1988); see Moore, 553 U.S. at 171-172. Indeed, such statutory provisions would have been largely unnecessary if States understood the Fourth Amendment to already impose a blanket rule. They do not raise a concern requiring this Court's intervention.

3. At all events, this case would be an unsuitable vehicle for considering the question presented because the lawfulness of petitioner's arrest does not depend on the answer to that question.

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[3] Cf. Vargas-Badillo v. Diaz-Torres, 114 F.3d 3, 6 (1st Cir. 1997) (finding no "clearly established" presence requirement for qualified-immunity purposes); Noviho v. Lancaster County, 683 Fed. Appx. 160, 165 n.25 (3d Cir. 2017) (approvingly citing Woods); Veatch v. Bartels Lutheran Home, 627 F.3d 1254, 1258 (8th Cir. 2010) (noting that "the weight of authority holds that the Fourth Amendment does not impose an 'in the presence' requirement of this type" and reserving the issue).

First, even assuming the Fourth Amendment imposed a presence requirement for warrantless misdemeanor arrests, Judge Luck correctly recognized that petitioner did commit his loitering and prowling offense in the presence of the police. Pet. App. 21a-22a (Luck, J., concurring in the judgment). An officer encountered petitioner "walking in the middle of the street in a residential neighborhood" that he did not live in "at 5:20 in the morning," and he was "wearing dark clothes," acting nervously, and carrying scissors. Id. at 21a. Petitioner has not shown that any common-law rule barred a warrantless arrest for a misdemeanor that was ongoing when the police arrived. See ibid.

Nor does petitioner substantiate his conclusory assertion (Pet. 28) that the conduct that the officers saw was separate from the conduct constituting the offense. Cf. Fla. Stat. § 856.021(1) (prohibiting "loiter[ing] or prowl[ing] in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity"). In that respect, petitioner's arrest was particularly consonant with historical tradition. At the time of the Founding and for centuries before, "nightwalker" statutes authorized the warrantless arrest of suspicious people found in public at night. See Atwater, 532 U.S. at 333-334 (nightwalker laws were made "in affirmance of the common law") (citation omitted); Minnesota v. Dickerson, 508 U.S. 366, 380-381 (1993) (Scalia, J., concurring).

Second, as the government explained in the court of appeals, the officers also had probable cause -- based on their observations and the 911 caller's report, which petitioner "d[id] not dispute" below, Pet. App. 3a n.1 -- to believe petitioner had committed felony trespass in addition to the misdemeanor loitering-and-prowling offense. See Gov't C.A. Br. 23-26; Fla. Stat. § 810.09; cf. Pet. App. 16a n.7 (declining to reach that issue). Petitioner accepts (Pet. 20) that there is no in-the-presence requirement for warrantless felony arrests, and it is immaterial that the police did not identify the felony offense as the basis for petitioner's arrest, see Devenpeck, 543 U.S. at 153.

This Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties. Supervisors v. Stanley, 105 U.S. 305, 311 (1882). It should not do so here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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