No. 24-5577

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The question presented is whether a warrantless arrest for a misdemeanor violates the Fourth Amendment where it did not occur in an officer's presence. Pet. i.

While this Court reserved that question 23 years ago in *Atwater v. City of Lago Vista*, 532 U.S. 318, 340 n.11 (2001), the Court's precedent effectively answers it. After *Atwater*, the Court made clear for the first time that the Fourth Amendment cannot be less protective than the common law was at the time of the Founding. And this Court has numerous precedents recognizing that the common law contained an in-the-presence requirement for misdemeanor arrests. That should resolve this case. Nonetheless, the courts of appeals and the government are brazenly disregarding this Court's precedent and substituting their own policy views for those of the Framers.

This defiance of precedent and history is hardly the only reason to grant review. Each year, tens of millions of Americans are arrested for misdemeanors, which significantly restrict their liberty. Yet citizens and officers lack basic guidance about the Fourth Amendment. Filling that void is a confusing legal patchwork. As this case illustrates, the admissibility of evidence found during misdemeanor arrests may now turn arbitrarily on whether a case is brought in state or federal court. And state supreme courts have reached different conclusions on the question presented.

As for this case, it is undisputed that the question presented is fully preserved, and that it was the exclusive basis of the decision below. The government's vehicle arguments would at best be for remand (not this Court), and they are unsupported in any event. No better vehicle will come to the Court, and there is no reason for delay.

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

Petitioner's argument is based on a simple syllogism: 1) this Court has held that the Fourth Amendment cannot be less protective than the common law was at the Founding; and 2) this Court has recognized that the common law prohibited warrantless misdemeanor arrests where it was not committed in an officer's presence. Taken together, these two lines of precedent establish that the Fourth Amendment itself contains an in-the-presence requirement for warrantless misdemeanor arrests. The Eleventh Circuit's contrary decision below conflicts with this Court's precedent.

A. The common law sets the constitutional floor.

As petitioner emphasized, the common law at the time of the Founding sets the constitutional floor for purposes of the Fourth Amendment. *See* Pet. i, 13–14, 16. As this Court has twice explained, "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 (2021) (quoting *United States v. Jones*, 565 U.S. 400, 411 (2012) (emphasis in original)).

Although the Eleventh Circuit below acknowledged this binding precedent (Pet. App. 6a), the government refuses to do so. The government admits only that "the common law is 'instructive'" for determining the scope of the Fourth Amendment. BIO 7. But while the government quotes *Lange* for this proposition, it conspicuously ignores the key passage in *Lange* reaffirming that the Fourth Amendment cannot be less protective than the common law was at the time of the Founding. The Court must therefore ascertain what the common law provided on the question presented here.

B. The common law contained an in-the-presence requirement.

Fortunately, this Court has already done so—numerous times. As explained in the petition, the Court has numerous precedents stretching back well over a century, all of which consistently articulate the following common-law rule: an officer could make a warrantless arrest for a misdemeanor only if the offense occurred in his presence. *See* Pet. 10–13 (discussing *Kurtz v. Moffitt*, 115 U.S. 487, 498–99 (1885); *John Bad Elk v. United States*, 177 U.S. 529, 534–35 (1900); *Carroll v. United States*, 267 U.S. 132, 156–57 (1925); *Trupiano v. United States*, 334 U.S. 699, 713 (1948) (Vinson, C.J., dissenting); *United States v. Watson*, 423 U.S. 411, 418–19 (1976); *Payton v. United States*, 445 U.S. 573, 590 n.30 (1980); *Atwater*, 532 U.S. at 340–41).

Unable to dispute that these many precedents do articulate this common-law rule, the government responds that they all existed when *Atwater* was decided, and *Atwater* reserved the Fourth Amendment question. BIO 10–11. But while this Court often "look[ed] to the common law" by that time (BIO 11 n.2), it was not yet clear that the common law set the constitutional floor. As petitioner emphasized, the Court did not make that clear until *Jones*—a decade after *Atwater*. *See* Pet. i, 13, 16. This chronology may explain why *Atwater* itself reaffirmed the common-law rule—citing *Kurtz*, *Bad Elk*, *Carroll*, and *Watson*—but still reserved the Fourth Amendment question. 532 U.S. at 340–41 & n.11. And because Chief Justice Rehnquist supplied the fifth vote in *Atwater* but had previously joined Justice White's dissent opposing an in-the-presence requirement, that too may help explain why *Atwater* cautiously reserved the Fourth Amendment question "not at issue" there. *Id*. at 341; *see* Pet. 16.

Notwithstanding *Atwater*'s reservation, the Court effectively *did* resolve that question back in *Carroll*. The Court agreed with the defendants that, if the search could be upheld only as one incident to an arrest, then it would be invalid. *See Carroll*, 267 U.S. at 158 ("If [the defendants'] theory were sound, their conclusion would be."). And that was so because the arrest was for a misdemeanor not committed in an officer's presence, as required by the common law. *See id*. at 156–57. Thus, contrary to the government's assertion (BIO 11–12), *Carroll did* pass on the validity of the arrest there. *See* Pet. 15. Indeed, the Court resorted to the "automobile exception" only because the misdemeanor arrest was unlawful. At the very least, even if *Carroll* did not definitively resolve the Fourth Amendment question presented here, its articulation of the common-law rule could not be characterized as dicta, since that rule is what led the Court to affirm based on the automobile exception. And, again, we now know post-*Jones* that the common law sets the Fourth Amendment baseline.

The common-law rule was not dicta in *Bad Elk* either. The government does not dispute that the Court held that the defendant had a right to resist because the arrest was unlawful. The government argues that the arrest was unlawful only because there was no probable cause of any crime at all. BIO 12. But the Court emphasized the rule 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." *Bad Elk*, 177 U.S. at 534. The Court added that there was also no statutory authority permitting officers "to arrest an individual without a warrant, on a charge of misdemeanor not committed in their presence," and that "the common law" was

"substantially enacted" in the state statute. *Id*. at 535 & n.†. Were the government's reading correct, there would have been no reason to even mention the common law or misdemeanors at all; the Court could have simply said that there was no probable cause for any crime and stopped there. Nor did the Court hold that legislatures could depart from the common-law rule; it merely observed that, in addition to there being no common-law authority for the arrest, there was no statutory authority either.

C. There is no basis to discard this Court's common-law precedent.

The government's real response to this Court's precedents on the common law is that they should be disregarded because they: 1) are wrong; and 2) are bad policy.

1. As for the common law, the government fails to mention that, each time this Court articulated the common-law rule, it cited numerous historical authorities: various treatises, English cases, and law review articles. *See* Pet. 18. The Court's articulation of the common law was by no means ill-conceived or careless. Yet the government now boldly asks the Court to discard this mountain of well-considered precedent. That is a tall order. At a minimum, the government should be required to come forward with compelling historical evidence to the contrary. It has not done so.

a. The government points to *Atwater*'s comment that "statements about the common law of misdemeanor arrest simply are not uniform." BIO 7 (quoting *Atwater*, 532 U.S. at 329). But the government takes that comment out of context. The Court was referring only to whether the common law contained a breach-of-the-peace limitation for misdemeanor arrests. The sentences immediately preceding and following that comment in *Atwater* are about the type of misdemeanors subject to

warrantless arrest, not an in-the-presence requirement. In fact, the Court observed that, in *Carroll*, it had "conspicuously omitted any reference to a breach-of-the-peace limitation in stating the 'usual rule' at common law," but that same statement *did* reference an in-the-presence requirement. *Atwater*, 532 U.S. at 329 (cleaned up).

b. The government does not actually dispute that, as a general matter, the common law did have an in-the-presence requirement for misdemeanor arrests. The most the government can do is purport to identify two limited "exceptions" to that rule. BIO 7–8.[1] But, unlike *Atwater*, they do not render the common law inconclusive.

i. Although inapplicable to the facts of this case, the government relies on a reference to "incontinency" crimes from the second volume of Hale's treatise. BIO 7. But the government ignores the broader context. As petitioner explained below, the first and second volume of Hale's treatise are replete with statements recognizing an in-the-presence-requirement for misdemeanor arrests. *See* Pet. C.A. Reply Br. 7–10. Perhaps that is why this Court has repeatedly cited Hale to support its view of the common-law rule. *See 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 government fails to explain why the Court should (or even could) reconsider the same historical source that it has repeatedly read to support an in-the-presence requirement. *See* Pet. 17–18. Indeed, in the context of misdemeanor arrests, the Court has previously declined to reconsider historical sources that it has already considered. *See Virginia v. Moore*,

[1] The government separately refers to "nightwalker" statutes (BIO 14), but it does not argue that they authorized arrest for conduct occurring outside the officer's presence.

553 U.S. 164, 168 n.2 (2008) ("Particularly since *Atwater* considered the materials on which Justice Ginsburg relies, we see no reason to revisit the case's conclusion.").

In any event, the lone reference in the Hale treatise on which the government relies is, at worst, a dubious outlier. It does not cite any supporting authority or examples. And the government does not cite any other source recognizing an exception for sexual crimes. Meanwhile, other authorities squarely reject such an exception. *See, e.g.*, *Pinkerton v. Verberg*, 44 N.W. 579, 585–86 (Mich. 1889) (holding, in the context of prostitution, that "[a]n arrest for misdemeanor, without a warrant, by one who does not see the offense committed, is illegal"; stating that "at the common law no such right existed"; and adding that "there is no distinction, in this respect, between one kind of misdemeanor and another") (citing sources, including Hale).

ii. The government relies on a colonial Massachusetts law that made an exception for swearing, vagrancy, Sabbath breaking, etc... BIO 8. But the government omits that this law is from 1646—the era of the Puritans, not the Framers.[2] It predates ratification of the Fourth Amendment by 145 years. And the Court has explained that only "statutes enacted in the years immediately before or after the Amendment was adopted shed light on what citizens at the time of the Amendment's enacted saw as reasonable." *Moore*, 553 U.S. at 169 n.3. Even for those statutes, there was still "no historical indication that those who ratified the Fourth Amendment understood it as a redundant guarantee of whatever limits on search and seizures

[2] Notably, 1646 is the same year that the Massachusetts Bay Colony made it a capital crime for children to disobey their parents—innocuously dubbed The Stubborn Children Law. *See* M. Farrand, The Laws and Liberties of Massachusetts 6 (1929).

legislatures might have enacted." *Id*. at 168. Rather, the Fourth Amendment was "little more than the affirmance of a great constitutional doctrine of the common law, which [Joseph] Story defined in opposition to statutes." *Id*. at 169 (quotation omitted).

2. Unable to overcome this Court's many precedents and the overwhelming historical record, the government relies primarily on its policy views about what it is "reasonable" today. *See* BIO 8–10. The Court should not entertain this argument at all, for the Court's "regular rule [is] that history—not court-created standards of reasonableness—dictates the outcome whenever it provides an answer." *Lange*, 594 U.S. at 316 (Thomas, J., concurring in part and concurring in the judgment).

In any event, the government's main policy argument is also foreclosed by precedent. It argues that petitioner's rule is unsatisfactory "given how much less clear and salient the felony/misdemeanor distinction has become since the Founding Era." BIO 9. "Today," the government continues, "that distinction is often technical" and "obscure." *Id*. In *Lange*, however, this Court recently rejected these arguments, which were forcefully made in the Chief Justice's separate opinion. He emphasized that the felony/misdemeanor distinction was "famously difficult to apply" and "esoteric," and that the Court had "not crafted constitutional rules based on the distinction between modern day misdemeanors and felonies." *Lange*, 594 U.S. at 331–33 (Roberts, C.J., concurring in the judgment). Nonetheless, the Court did just that, relying on both its precedent and the common law to draw a constitutional distinction between fleeing felons and misdemeanants for warrantless home entries. The Court should follow the same course here because its precedent and the common law are again dispositive.

The government's policy arguments are even weaker in this context because the government acknowledges that "many state and federal laws incorporate a presence requirement for warrantless misdemeanor arrests." BIO 9. In fact, the vast majority of state laws have such a requirement, as this Court previously recognized in *Watson* and *Atwater*. *See* Pet. 21–22. While the government identifies a minority of state-law arrest provisions that do not (BIO 10 n.1), the key fact is that numerous state misdemeanor arrests have long been subject to an in-the-presence requirement. And yet the government fails to identify any practical difficulties in administration.[3]

The government nonetheless speculates that petitioner's rule would "unduly hinder law enforcement," and that it would prevent States from adjusting any in-the-presence requirement through legislation. BIO 10. But this pure policy argument overlooks an obvious legislative solution to any problems that may arise: States can reclassify misdemeanors as felonies. If a State deems an offense serious enough to dispense with a presence requirement—*i.e.*, serious enough for officers to rely only on third-party accounts—then the State could enact legislation reclassifying that offense as a felony. Faithfully adhering to the common law and the Court's precedent would thus not tie the hands of States. In fact, it might even spur overdue legislative reform.

[3] Moreover, the predominance of an in-the-presence requirement further reinforces petitioner's view of the common law; the States simply carried it forward. *See* Pet. 21. The government responds that such state laws would have been unnecessary had the Fourth Amendment contained such a presence requirement. BIO 13. But this Court has never employed such reasoning. To the contrary, where the "States had enacted statutes specifically embracing the common-law view," the Court has used that as evidence that the Fourth Amendment itself incorporated the common law. *Wilson v. Arkansas*, 514 U.S. 927, 933 (1995); *cf. Atwater*, 532 U.S. at 338–39 (converse).

II. The question presented warrants review.

A. The question presented is recurring and important.

1. The most comprehensive national study of misdemeanors reported over 13 million cases filed per year—with over 40 cases filed per 1,000 people. Sandra G. Mayson & Megan T. Stevenson, Misdemeanors by the Numbers, 61 B.C. L. Rev. 971, 979 (2020). And that is just the number of cases filed, not the number of arrests made.

"Racial disparities, meanwhile, were pervasive," affecting people of color and the poor. *Id*. Moreover, even the most "[m]inor misdemeanors can trigger massive collateral consequences, often without adequate notice or meaningful process." Eisha Jain, Proportionality and Other Misdemeanor Myths, 98 B.U. L. Rev. 953, 954 (2018). That includes "hefty civil penalties," "license suspension, pension loss, loss of public housing, and deportation." *Id*. at 958. And while misdemeanors are often "punished with little to no prison time," [j]ail time . . . is another story; many misdemeanants are jailed or face the threat of jail time while their cases are pending." *Id*. at 956–57.

In short, misdemeanor arrests happen every day, they are marked by racial and economic disparity, and they have a significant effect on liberty. The government accordingly does not dispute that the question here is both recurring and important.

2. There are more undisputed factors supporting review. The government does not dispute that this Court has granted review in several Fourth Amendment arrest cases without noting a conflict. *See* Pet. 20. The government does not dispute that this Court's cases have led to confusion on the question here, since they hold that compliance with an in-the-presence requirement satisfies the Fourth Amendment—

without clarifying whether non-compliance with that requirement would violate the Fourth Amendment. *See* Pet. 20–21. And the government does not dispute that respected lower-court jurists like Judge Sutton have encouraged the Court to resolve the question here. *See* Pet. 21. After all, and as the government emphasizes, the Court left this question open 23 years ago in *Atwater*. Given that misdemeanor arrests are a routine and daily occurrence, the time for resolving the question is long overdue.

3. The government argues only that review is not warranted because, on its count, at least eight circuits uniformly reject petitioner's position. BIO 12–13 & n.3. But that landscape *supports* the need for review here. It reflects that the vast majority of federal courts are defying this Court's precedent and disregarding the common law. Even if this Court ultimately agreed with their conclusion, it should not remain idle in the face of such intransigence by the lower courts. As explained, this Court—and only this Court—may modify its supreme precedent. *See* Pet. 10, 19–20.

B. The landscape in the States bolsters the need for review.

1. While there is no conflict among the circuits, that does not mean there is no disparity on the ground. There is. Because many States have an in-the-presence requirement, and federal law (erroneously) does not, the admissibility of evidence in much of the country now turns on whether a case is charged in state or federal court. Indeed, the evidence in this case would have been suppressed had it been brought in state court. *See* Pet. 22–23. Revealingly, the government ignores these intra-state (and intra-city) disparities. But under the current landscape, the admissibility of evidence can now turn on this wholly arbitrary criterion left to the sole discretion of

prosecutors. Worse still, the status quo perversely incentivizes prosecutors to charge local garden-variety state crimes in federal court just to avoid suppression. Only this Court can decide whether this undesirable legal regime should continue to govern.

2. The government also does not dispute that state courts of last resort have split on whether an in-the-presence requirement may be eliminated by statute. Three state supreme courts have held that it may not be. *See* Pet. 24 (citing *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)). The government does not dispute that these cases remain good law. Instead, it responds that they were based on the state (not federal) Constitution. BIO 13. But it omits that they relied not on state-law considerations but on the common law. Indeed, the Mississippi Supreme Court relied on this Court's precedents in *Kurtz* and *Bad Elk*. *Orick*, 105 So. at 470. And, critically, it added that the search-and-seizure provision in its Constitution is "governed by the same rules and principles" as the federal Constitution. *Id*. at 471. Nor is there any daylight with the Fourth Amendment in Alabama or Kansas, as they have "never extended state constitutional protections beyond [the] federal guarantees." *State v. Schultz*, 850 P.2d 818, 824 (Kan. 1993); *see* Michael J. Gorman, Survey: State Search and Seizure Analogs, 77 Miss. L.J. 417, 418 (2007) ("Although the Supreme Court of Alabama recognizes its authority to interpret its state analog differently, it has not diverged from federal interpretations of the Fourth Amendment"); *id*. at 431 (same for Kansas). Meanwhile, the government does not dispute that, on the other side of the split, the Utah and Washington Supreme Courts have relied on the more recent

precedents of this Court and the federal circuits to hold that the Fourth Amendment does not contain an in-the-presence requirement. *See* Pet. 24. As a practical matter, then, the lower courts are divided on the federal Fourth Amendment question here.

III. This case is an ideal vehicle.

The government's vehicle objections are makeweight; they are easily overcome.

1. To begin, the government does not dispute that petitioner properly preserved his argument below. *See* Pet. 25. Nor does the government dispute that the Eleventh Circuit resolved the question presented in a published opinion, expressly and repeatedly holding that the Fourth Amendment lacks an in-the-presence requirement. Key here, that was the sole basis for the decision below. *See* Pet. 25–26.

2. The government nonetheless argues that the legality of petitioner's arrest does not depend on whether there is an in-the-presence requirement. BIO 13. This argument fails for a simple reason: it finds no support in the decision below. Not only did the Eleventh Circuit uphold the arrest on the exclusive ground that the Fourth Amendment lacks an in-the-presence requirement; the court went out of its way to explain that there likely would *not* have been probable cause if there was such a requirement. The petition documented these many key passages in the decision below. *See* Pet. 7, 27–28. Inexplicably, the government acts like they do not exist. But they make this case a pristine vehicle: the presence requirement was case dispositive.

At the very least, because the question presented here formed the sole basis of the decision below, any arguments for why there would still be probable cause even with an in-the-presence requirement would be addressed in the first instance on

remand were petitioner to prevail here. After all, this Court is a "court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). So those arguments are not properly before this Court now. And the Court routinely grants review on threshold legal issues notwithstanding unresolved arguments that could defeat relief on remand—including in Fourth Amendment cases like this one. *See, e.g.*, *Collins v. Virginia*, 584 U.S. 586, 601 (2018); *Byrd v. United States*, 584 U.S. 395, 411 (2018).

3. In any event, the government's arguments are entirely unsupported.

a. Relying on Judge Luck's solo concurrence, the government argues that petitioner *did* commit a misdemeanor in the officer's presence. BIO 14. But, again, the other panel members did not agree, opining that there likely would not have been probable cause if there was an in-the-presence requirement. Judge Luck's opinion was also premised on the theory that only *part* of the offense had to be committed in an officer's presence, but neither he nor the government have supported that theory with any framing-era authority. *See* Pet. 28. Regardless, all the officer saw here was petitioner walking down the street at 5:20 a.m. He cited *dozens* of Florida cases below establishing that this conduct does not even come close to the misdemeanor offense of loitering and prowling. *See* Pet. C.A. Initial Br. 24–40; Pet. C.A. Reply Br. 19–20 & n.1. Tellingly, the government does not cite a single Florida case to the contrary.[4]

[4] The only authority that the government cites here are the "nightwalker" statutes. BIO 14. Ironically, they were the progenitor of the vagrancy ordinance that this Court struck down in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). In response to that decision, the Florida Legislature enacted the loitering-and-prowling statute at issue here. And Florida courts have since strictly construed that criminal statute to capture only incipient criminal conduct and to exclude vagrant conduct like merely walking down the street. *See* Pet. C.A. Initial Br. 18–29 (discussing Florida law).

b. In a last-ditch effort, the government asserts that there was probable cause of a different crime: felony trespass. BIO 15. But the government acknowledges that the Eleventh Circuit expressly "declin[ed] to reach that issue." BIO 15 (citing Pet. App. 16a n.7). So that issue not before this Court. Regardless, the government forfeited it by failing to raise it in the district court. *See* Pet. C.A. Reply Br. 27. And the government also omits that, to be a felony, the person must be armed during the trespass with a firearm or a "dangerous weapon." Fla. Stat. § 810.09(2)(c). The latter is limited to objects used or intended to be used to cause great bodily harm/death. Here, the complainant did not observe petitioner trespassing with any object at all, let alone a "dangerous weapon." *See* Pet. C.A. Reply Br. 27–29 (applying Florida law).

* * *

In sum, this case is the perfect vehicle. Petitioner's argument is fully preserved. The decision below squarely resolved the question presented. And that decision went out of its way to indicate that the misdemeanor arrest could not otherwise be upheld.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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