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Lange v. California 141 S. Ct. 2011 (2021)

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I. INTRODUCTION

The Fourth Amendment of the United States Constitution has long been the shield for the people of the United States against unreasonable, warrantless intrusion in their homes and persons from police officers.[1] Contrarily, police maintain an interest in entering the homes of citizens to effectuate the safety of the general public and occupants in an expedient and effective fashion.[2] Therefore, the privacy interest of United States citizens and the law enforcement interest of police officers are often directly at odds.[3] It falls on the judiciary to quell the battle at the interstices of the Fourth Amendment between the privacy interests of citizens and the law enforcement concerns of police officers.[4]

One of such interstices involves determining what constitutes a sufficient circumstance in allowing a police officer to enter a home without a warrant.[5] The Supreme Court has long held that particular circumstances arise to a level of exigency justifying the immediate entry of a police officer into a person's home without a warrant.[6] Some of these exigent circumstances recognized by the Court include imminent destruction of evidence,[7] to render emergency aid to an injured occupant,[8] to protect an occupant from imminent injury,[9] to ensure an officer's safety,[10] and, seemingly, the hot pursuit of a fleeing person.[11]

The Court has failed to be consistent in identifying what underlying crimes justify the hot pursuit exigency overriding the warrant requirement of the Fourth Amendment, or if the underlying crimes should even factor into

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1. U.S. CONST. amend. IV.
2. Nathan Vaughan, *Overgeneralization of the Hot Pursuit Doctrine Provides Another Blow to the Fourth Amendment in Middletown v. Flinchum*, 37 AKRON L. REV. 509, 510-512 (2004).
3. *Id*.
4. *Id*.
5. John Mark Huff, *Warrantless Entries and Searches Under Exigent Circumstances: Why Are They Justified and What Types of Circumstances Are Considered Exigent?*, 87 U. DET. MERCY L. REV. 373, 376 (2010).
6. Katz v. United States, 389 U.S. 347, 357 (1967).
7. Ker v. California, 374 U.S. 23, 39-40 (1963).
8. Brigham City v. Stuart, 547 U.S. 398, 403 (2006).
9. *Id*.
10. Riley v. California, 573 U.S. 373, 383 (2014).
11. Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 298 (1967).

the exigency analysis conducted by a reviewing court.[12] After all, if hot pursuit, in and of itself, qualifies as an exception to the warrant requirement of the Fourth Amendment, no consideration needs to be given to the underlying offense.

The Supreme Court of the United States considered the hot pursuit exigency and whether the category of the underlying offense should factor into a reviewing court's "reasonableness" analysis in *Lange v. California*.[13] The Court also considered whether hot pursuit is an exigency sufficient to categorically override the warrant requirement bestowed upon any warrantless entry by the Fourth Amendment.[14] Specifically, *Lange* involved interpretation of the Fourth Amendment and how it applied to a misdemeanor suspect who fled into their home during a police pursuit.[15] The Court held that hot pursuit of a fleeing misdemeanor suspect did not categorically constitute an exigent circumstance sufficient to override the warrant requirement of the Fourth Amendment, and affirmed its conviction that the underlying offense is an important factor in determining whether or not a warrantless police entry is reasonable.[16]

II. STATEMENT OF FACTUAL AND PROCEDURAL HISTORY

In the case at bar, petitioner Arthur Lange drove past a California highway patrol officer in the City of Sonoma while listening to loud music and honking his horn.[17] The officer then followed Lange, turned on his overhead lights, and signaled to Lange to pull over.[18] Rather than stopping, Lange pulled into the garage attached to his home, which was about 100 feet from where the officer signaled him to pull over.[19] The officer entered the garage of the home without a warrant and began questioning Lange.[20] The officer observed signs of intoxication and administered field sobriety tests on Lange, which he failed.[21] Lange was subsequently blood-tested, revealing that his blood-alcohol content was more than three times above the legal limit.[22]

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12. *See generally* Dale Joseph Gilsinger, Annotation, *When Is Warrantless Entry of House or Other Building Justified Under "Hot Pursuit" Doctrine*, 17 A.L.R.6th 327.
13. Lange v. California, 141 S. Ct. 2011, 2017 (2021).
14. *Id*. at 2021.
15. *Id*. at 2016.
16. *Id*. at 2024.
17. *Id*. at 2016.
18. *Lange*, 141 S. Ct. at 2016.
19. *Id.*
20. *Id*.
21. *Id*.
22. *Id*.

Lange was charged with two misdemeanors, one for driving under the influence of alcohol, and the other for a low-level noise infraction.[23] Lange thereafter moved to suppress all evidence obtained after the officer entered the garage of his home, arguing that the entry had violated his Fourth Amendment rights.[24] The State contested this proposition of law, arguing that pursuit of a fleeing misdemeanor suspect categorically qualifies as an exigent circumstance authorizing warrantless home entry.[25]

The Superior Court of California denied Lange's motion, and the Superior Court's appellate division affirmed.[26] The California Court of Appeals thereafter affirmed, fully accepting the State's argument.[27] The California Supreme Court subsequently denied review, and the United States Supreme Court granted certiorari.[28] California abandoned its defense in response to Lange's petition, so the Court appointed an *amicus curiae* to defend the Court of Appeals's judgment.[29]

III. THE COURT'S DECISION AND RATIONALE

A. The Majority Opinion

Justice Kagan delivered the opinion of the Court, joined by Justices Breyer, Sotomayor, Gorsuch, Kavanaugh, and Barrett, and in which Thomas joined to all but Part II-A.[30] Justice Kavanaugh filed a separate concurring opinion.[31] Justice Thomas also filed a separate opinion concurring in part and concurring in the judgment, in which Justice Kavanaugh joined as to Part II.[32] Chief Justice Roberts filed an opinion concurring in the judgment, in which Justice Alito joined.[33]

In this case, the Court majority held that, although most misdemeanor pursuits involve exigencies justifying a warrantless entry of a dwelling, whether a certain warrantless entry is justified turns on the particular facts of the case.[34] In so holding, the Court clarified confusion bred from conflicting language of previous decisions involving hot pursuit exigency and denied the categorical application argued by the *amicus*.[35] As a result of this holding,

23. *Lange*, 141 S. Ct. at 2016.
24. *Id.*
25. *Id*.
26. *Id*.
27. *Id*.
28. *Lange*, 141 S. Ct. at 2017.
29. *Id.*
30. *Id*. at 2016.
31. *Id*. at 2025 (Kavanaugh, J., concurring).
32. *Id*. (Thomas, J., concurring).
33. *Lange*, 141 S. Ct. at 2028 (Roberts, C.J., concurring).
34. *Id.* at 2024.
35. *Id*.

the Court requires that lower courts consider the gravity of the offense committed when analyzing a warrantless search made pursuant to a hot pursuit of a misdemeanant.[36]

In reaching this decision, the Court explained that at the Fourth Amendment's very core, "stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion,"[37] and that "physical entry of the home is the chief evil in which [it] is directed."[38] The Court stated, they, "are not eager – more the reverse – to print a new permission slip for entering the home without a warrant."[39] The Court utilized the Fourth Amendment's high bar that every search be reasonable and the minor nature of a majority of misdemeanors to further justify their conclusion.[40]

The *amicus* contended that the Court has already held pursuit of a fleeing suspect to be a categorical exigent circumstance in *United States v. Santana*.[41] In *Santana*, the Court held that the defendant's "act of retreating into her house, could not defeat an arrest that had been set in motion in a public place."[42] The Court in *Lange* disagreed with what they called the *amicus's* "broad understanding" of *Santana*.[43] In support of its statement, the Court relied on *Stanton v. Sims*, wherein it stated that "[t]he law regarding warrantless entry in hot pursuit of a fleeing misdemeanant is not clearly established."[44] The Court also cited *Welsh v. Wisconsin* to support their argument, wherein the Court held, "[t]hat an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made."[45]

In holding that pursuit of a fleeing misdemeanor suspect does not categorically qualify as an exigent circumstance, the Court found two facts about misdemeanors persuasive, namely that they are generally minor and vary widely.[46] Furthermore, the Court reasoned that although a suspect's flight makes the "calculus change," it did not change the calculus enough to justify a categorical rule.[47] The Court in *Lange* clearly suggested that the circumstances which distinguish a felony from a misdemeanor offense

36. *Id*. at 2021.
37. *Id.* at 2018 (quoting Collins v. Virginia, 138 S. Ct. 1663, 1670 (2018)).
38. *Lange*, 141 S. Ct. at 2018 (quoting Payton v. New York, 445 U.S. 573, 585, 587 (1980)).
39. *Id*. at 2019.
40. *Id*. at 2018, 2020.
41. *Id.* at 2019.
42. *Id.* (quoting United States v. Santana, 427 U.S. 38, 43 (1976)).
43. *Lange*, 141 S. Ct. at 2019.
44. *Id.* (quoting Stanton v. Sims, 134 S. Ct. 3, 8 (2013)).
45. *Id.* at 2020 (quoting Welsh v. Wisconsin, 466 U.S. 740, 753 (1984)).
46. *Id.*
47. *Id*. at 2021-2022.

indicate that they should be treated differently when performing an exigency analysis.[48]

The Court then continued to justify its holding by delving into the common law in place at the founding of the Constitution.[49] The majority stated, "[t]he common law did not recognize a categorical rule enabling such an entry in every case of misdemeanor pursuit,"[50] and because each Amendment "[m]ust provide at a minimum the degree of protection it afforded when it was adopted," such a categorical rule could not stand.[51] Furthermore, the Court reasoned that although there was a common law exception to the rule, entry of a dwelling to pursue a felon, such an exception was much narrower than it is now.[52]

The Court then delivered its conclusion that "[t]he flight of a suspected misdemeanant does not always justify a warrantless entry into a home. An officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency."[53] The Court subsequently vacated the judgment of the California Court of Appeals and remanded the case for further proceedings consistent with the Court's opinion.[54]

B. Concurrence by Chief Justice Roberts

Chief Justice Roberts, joined by Justice Alito, wrote a substantial opinion concurring in the judgment of the majority.[55] Chief Justice Roberts's primary argument was that the majority opinion is incorrect in holding that the underlying offense is what justifies the warrantless search, rather than the flight itself.[56] Doing so, he stated leads to an "[a]bsurd and dangerous result," in which police officers must stop and think about what offense was committed and add other exigencies, while, "[t]he suspect may stroll into the home and then dash out the back door. Or, for all the officer knows, get a gun and take aim from inside."[57] Furthermore, Chief Justice Roberts argued the majority's decision departs from the precedent that pursuit of a fleeing suspect in and of itself is an exigent circumstance that justifies warrantless entry into a home, and overrides decades of guidance provided by previous court decisions in favor of a new rule which provides none.[58] He, like the

48. *Lange*, 141 S. Ct. at 2021.
49. *Id*. at 2022.
50. *Id.*
51. *Id*. (quoting United States v. Jones, 565 U.S. 400, 411 (2012)).
52. *Id.* at 2023.
53. *Lange*, 141 S. Ct. at 2024.
54. *Id*. at 2024-2025.
55. *Id.* at 2028 (Roberts, C.J., concurring).
56. *Id*.
57. *Id*.
58. *Lange*, 141 S. Ct. at 2029-2030 (Roberts, C.J., concurring).

majority, cited *Santana*, in which he argued, "[the Court's] interpretation of the Fourth Amendment did not hinge on whether the offense that precipitated [Santana's] withdrawal was a felony or a misdemeanor."[59] Chief Justice Roberts argued that *Santana* should be given a broad meaning consistent with what he called a "slew" of cases reaffirming its broad nature.[60]

In Part I-B of his concurrence, Chief Justice Roberts continued to argue that it is the pursuit itself that implicates substantial government interests, irrespective of the underlying offense.[61] He echoed concerns of the difficulties law enforcement officers may face when trying to determine exigencies in the heat of pursuit and emphasized the dangers that fleeing suspects bring in general.[62] In addition, he argued that other exigencies would be allowed to manifest themselves if officers are forced to wait for a warrant, which causes an inherent danger to the officer's safety.[63]

Chief Justice Roberts argued, in Part I-C of his concurrence, that "the home is not immune from the application of such rules consistent with the Fourth Amendment" and emphasized the fact that officers must always take care to ensure that every entry is objectively reasonable.[64] He also stated that, "[a]dditional safeguards limit the potential for abuse," and that Lange should be given an opportunity to argue that the general, categorical hot pursuit rule did not justify warrantless entry in his particular case.[65]

In Part II of his concurrence, Chief Justice Roberts argued against the Court's application of *Welsh* to the facts in *Lange*.[66] He contended that "[the Court] has already declined to apply *Welsh* to cases involving misdemeanors because of the 'significant' distinction between nonjailable offenses and misdemeanors"[67] and that "nothing in [*Welsh*] establishes that the seriousness of the crime is equally important *in cases of hot pursuit*."[68] He continued, explaining that the Court's rule is incredibly difficult to apply and that the Court should not meddle in the business of "craft[ing] constitutional rules based on the distinction between misdemeanors and felonies."[69]

In Part III of his concurrence, Chief Justice Roberts disputed the majority's interpretation of the common law, stating that "[c]ountless sources support the proposition that officers could and did pursue into homes those

59. *Id*. at 2029.
60. *Id.* at 2030.
61. *Id*.
62. *Id.* at 2031.
63. *Lange*, 141 S. Ct. at 2032 (Roberts, C.J., concurring).
64. *Id*. at 2033.
65. *Id.* at 2023-2034
66. *Id*. at 2034.
67. *Id.*
68. *Lange*, 141 S. Ct. at 2034-2035 (Roberts, C.J., concurring).
69. *Id*. at 2035- 2036.

who had committed all sorts of offenses that the Court seems to deem 'minor.'"[70] He further explained that the Court failed to cite an instance in which warrantless entry made pursuant to a hot pursuit was held to be unlawful in the common law.[71] He also argued that the treatment of the topic in the case at bar is incomplete, given that common law did not recognize exclusion of evidence in a criminal case, which Lange sought in the present case.[72]

C. *Concurrence by Justice Kavanaugh*

Justice Kavanaugh penned a short concurrence only to state that the difference between the majority opinion and Chief Justice Roberts's opinion is almost purely academic in nature.[73] Justice Kavanaugh stated such a difference was purely academic, "because cases of fleeing misdemeanants will almost always also involve a recognized exigent circumstance—such as risk of escape, destruction of evidence, or harm to others—that will still justify warrantless entry into a home," and because the approach adopted by the majority, "will still allow the police to make a warrantless entry into a home 'nine times out of 10 or more' in cases involving pursuit of a fleeing misdemeanant."[74] Justice Kavanaugh also wrote to reaffirm that the Court was not disturbing the status of the fleeing *felon* as a categorical exigency.[75]

D. *Concurrence by Justice Thomas*

Justice Thomas also penned a concurrence.[76] Primarily, Justice Thomas wrote a separate opinion only to note two primary things; that the case-by-case inquiry the majority set forth has several categorical, historical exceptions, and that the federal exclusionary rule does not apply to evidence discovered when an officer is pursuing a fleeing suspect.[77] Justice Thomas took note of several of such categorical exceptions, including when a person is arrested and escapes, when an officer is in hot pursuit of someone who committed an affray, "pre-felonies," and when officers are in pursuit of someone who previously breached the peace.[78] Justice Thomas's

70. *Id*. at 2037.
71. *Id*. at 2038.
72. *Id.*
73. *Lange*, 141 S. Ct. at 2025 (Kavanaugh, J., concurring).
74. *Id*.
75. *Id.*
76. *Id*. (Thomas, J., concurring).
77. *Id*.
78. *Lange*, 141 S. Ct. at 2026 (Thomas, J., concurring).

concurrence emphasized that *Lange* did nothing to overrule or modify these historical exceptions.[79]

In Part II of his concurrence, Justice Thomas explained that "[e]stablishing a violation of the Fourth Amendment. . . does not automatically entitle a criminal defendant to exclusion of evidence."[80] Further, he stated, "the rule 'does not apply when the cost of exclusion outweigh its deterrent benefits.'"[81] To the benefits, Justice Thomas stated that "[t]he exclusionary rule developed to deter '*intentional* conduct that was *patently* unconstitutional'"[82] and to the costs, he mentioned the obstruction of the truth-finding abilities of juries and judges, which "makes exclusion under [the Court's] precedent rarely appropriate."[83] He then explained that cases of fleeing suspects contain enough costs to outweigh the benefits of excluding the evidence obtained pursuant to an illegal search, thus rendering the exclusionary rule inapplicable.[84] These costs, Justice Thomas explained, include the encouragement of bad conduct by the criminal defendant, as well as providing a shield for their bad conduct in the form of evidence exclusion.[85]

IV. ANALYSIS

A. Introduction

Courts in the United States have long considered several exigent circumstances sufficient in overriding the warrant requirement of the Fourth Amendment.[86] One of these longstanding circumstances is the pursuit of a fleeing suspect; however, whether or not the underlying offense factors into a reviewing court's exigency analysis has been hotly contested by the Court, and the Court has not always been consistent in its holdings.[87] The Court's majority holding in *Lange v. California*, that the category of the underlying offense *is* a factor to consider when determining the exigencies of a warrantless search, works to cement the reasonableness analysis as integral to every case where a Fourth Amendment violation is alleged and curtails the creeping expansiveness of the hot pursuit exception.[88] The necessity in granting certiorari, in this case, was produced from inconsistent language in

79. *Id*.
80. *Id.*
81. *Id*. at 2027 (quoting Utah v. Strieff, 136 S. Ct. 2056, 2059 (2016)).
82. *Id*. (quoting Herring v. United States, 555 U.S. 135, 143 (2009)).
83. *Lange*, 141 S. Ct. at 2027 (Thomas, J., concurring).
84. *Id*.
85. *Id.*
86. Huff, *supra* note 5, at 373, 380.
87. *See* Gilsinger, *supra* note 12.
88. *Lange*, 141 S. Ct. at 2024.

previous cases, which appeared to reach opposite conclusions on whether the underlying crime factored into a reviewing court's exigency analysis and bred confusion in crafting an analysis of warrantless searches and applying the exigency.[89] This case is also important in that it backpedals from an ever-expanding jurisprudence that tends to interpret the Fourth Amendment in an increasingly narrow manner.[90] Furthermore, although this totality of the circumstances approach may be difficult to apply in reality, especially in the line of duty, it will have little practical effect on police responsibilities and the outcomes of future Fourth Amendment cases.[91]

This analysis will argue that the majority opinion in *Lange* was: (1) A reasonable, and correct, extension of the Court's Fourth Amendment jurisprudence (2) crucial in avoiding further erosion of Fourth Amendment protections, and (3) difficult to apply, but will have little practical effect on the law enforcement occupation.

B. The Holding in Lange is a Reasonable, and Correct, Extension of the Court's Fourth Amendment Jurisprudence

The Court's holding in Lange should be relatively uncontroversial. The *Lange* majority opinion is consistent with a plethora of decisions rendered by the Court both in recent years and far into the past, that refuse to impose a categorical exception to the Fourth Amendment.[92] Repeatedly, the Court has held that whether or not an emergency exists sufficient to justify a warrantless entry "requires case-by-case determinations."[93] "A fact-intensive, totality of the circumstances, approach is hardly unique within [the] Court's Fourth Amendment jurisprudence."[94]

The holding that the underlying offense be considered in tallying the exigencies is a logical outgrowth of many landmark Fourth Amendment cases decided by the Court.[95] One of such cases that laid the groundwork for *Lange*

89. *Compare Santana*, 427 U.S. at 42-43 (holding hot pursuit, alone, is sufficient to justify warrantless entry) *with Welsh*, 466 U.S. at 753 (holding gravity of the underlying offense for which the arrest is being made is a crucial factor in determining if an exigency exists).

90. George M. Dery III & Ryan Evaro, *The Court Loses its Way with the Global Positioning System: United States v. Jones Retreats to the "Classic Trespassory Search"*, 19. MICH. J. RACE & L. 113, 116 (2013) (". . . in defining the privacy right protected by the Fourth Amendment, the Court clung to a focus on the visible and tangible, thus missing an opportunity to address the entire range of privacy concerns implicated by today's ever-increasing intrusions on the individual.").

91. Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 475 (1991) ("Rather than mold a body of reliable fourth amendment [*sic*] law, the Supreme Court has created a makeshift solution. Instead of providing direction and guidance to lower courts, the Court has rendered amorphous case-by-case, fact-specific adjudications.").

92. Orin S. Kerr, *Cross-Enforcement of the Fourth Amendment*, 132 HARV. L. REV. 471, 521 (2018) (". . . the reasonableness inquiry generally acts as a rough cost-benefit test.").

93. Birchfield v. North Dakota, 136 S. Ct. 2160, 2180 (2016).

94. Missouri v. McNeely, 569 U.S. 141, 143 (2013).

95. *See generally Welsh*, 466 U.S. 740; *McNeely,* 569 U.S. 141; *Stuart*, 547 U.S 398.

is *Welsh*.[96] True enough, and as Chief Justice Roberts opines in his concurrence, *Welsh* did not involve hot pursuit.[97] However, the wording in *Welsh*[98] did not turn on the category of the exigency the officer relied on entering the home of someone without a warrant, and instead strongly suggests that the category of the underlying offense should *always* be considered when performing an exigency analysis.[99]

Welsh does not stand alone in support of this position.[100] The majority in *Lange* used several decisions rendered by the Court to further support their position that the underlying crime should factor into an exigency analysis, leaving the majority to stand on solid ground.[101] However, Chief Justice Roberts's belief that it is the flight itself, rather than the underlying crime, that justifies the warrantless entry of a home, is not without merit.[102] Chief Justice Roberts, too, pulls from several cases to support his argument that the flight itself is the exigency that justifies warrantless entry, rather than the underlying offense.[103] Ultimately, in what is a close call borne from inconsistent use of language in previous opinions, the majority's approach makes more logical sense.[104] If the requirement posed on every warrantless entry is "objective reasonableness," then it is intuitive that the underlying offense, a major factor in whether an immediate entry is necessary, be considered when conducting an exigency analysis.[105] As this Note will argue in more detail later, it makes little sense to treat a fleeing domestic battery perpetrator and a serial litterer the same.[106] The underlying offense is the clear differentiator between them.[107]

The majority's position on this issue is the more difficult one to justify under the Constitution, as it is silent as to the issue of exigency.[108] The easier

96. *See generally Welsh*, 466 U.S. 740.

97. *Lange*, 141 S. Ct. at 2034 (Roberts, C.J., concurring).

98. *Welsh*, 466 U.S. at 750 ("Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause to arrest is relatively minor.").

99. *Id.*

100. *See generally McNeely,* 569 U.S. 141; *Stuart*, 547 U.S 398.

101. *Lange*, 141 S. Ct. at 2019-2021.

102. *Id.* at 2028 (Roberts, C.J., concurring) (citing *King*, 563 U.S. at 460 ("It is the flight, not the underlying offense, that has always been understood to justify the general rule: 'Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect.'")).

103. *Id*. at 2030 (citing Carpenter v. United States, 138 S. Ct. 2206, 2223; *Collins*, 138 S. Ct. at 1674; *Birchfield*, 136 S. Ct. at 2173; *King*, 563 U.S. at 460; Steagald v. United States*,* 451 U.S. 204, 221).

104. *Compare Carpenter*, 138 S. Ct. at 2222-2223 (2018) (holding that "hot pursuit" constitutes an exigency making a warrantless search objectively reasonable) *with McNeely*, 569 U.S. at 150 (stating that each case of alleged exigency must be based on specific facts and circumstances in accordance with the fact-specific inquiry required by the Fourth Amendment).

105. Florida v. Jimeno, 500 U.S. 248, 251 (1991).

106. *See infra* Part IV-C.

107. *Id*.

108. U.S. CONST. amend. IV.

question to answer for the majority was whether or not hot pursuit qualifies as a categorical exigency sufficient to overcome the warrant requirement imposed by the Fourth Amendment. They easily disposed of this contention, answering it in the negative.[109]

The *amicus's* contention, that hot pursuit of a misdemeanant should qualify categorically as an exigency sufficient to override the warrant requirement of the Fourth Amendment, was both extreme and unnecessary, as well as inconsistent and violative of the Court's Fourth Amendment jurisprudence and purported adherence to *stare decisis*.[110] A categorical rule would provide a sweeping over-generalization that the Court has repeatedly sought to avoid in its precedent.[111] Furthermore, it would deny a reviewing court the opportunity to examine and consider the facts of each particular warrantless entry, which is antithetical of the Fourth Amendment's requirement that every warrantless entry is "reasonable."[112] Further still, allowing a categorical exception to the Fourth Amendment and ignoring the facts and circumstances of a particular case gives police officers a "free pass" to violate the privacy of American citizens.[113] As a general proposition, categorical rules are contrary to everything the Fourth Amendment stands for.[114] Allowing them to stand, and even more distressing, increase, is so improper one must hope such arguments never win the day with the Supreme Court.[115] Divesting judges of the power to consider the factual sphere surrounding a warrantless entry patently contradicts the Court's continued recitation that, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[116] Holding otherwise would give the Court an appearance of hypocrisy and lack of respect for precedent.

C. Lange was a Crucial Decision in Avoidance of Further Erosion of the Fourth Amendment's "Reasonableness" Requirement, but Likely will have Little Staying Power

The Fourth Amendment of the Constitution provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against

109. *Lange*, 141 S. Ct. at 2024.
110. *Id.* at 2018.
111. Richards v. Wisconsin, 520 U.S. 385, 393 (1997).
112. Graham v. Conner, 490 U.S. 386, 395 (1989).
113. Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, abstract (2015) ("The Fourth Amendment, which secures a 'right' against 'unreasonable searches and seizures,' is replete with categorical rules protecting police conduct from judicial review; more case-by-case analysis of the 'unreasonableness' or disproportionality of police conduct would better protect rights and rule of law.").
114. *Id.*
115. *Id*. at 3136.
116. United States v. United States District Court, 407 U.S. 297, 313 (1972).

unreasonable searches and seizures, shall not be violated."[117] Warrantless searches are therefore considered per se unreasonable.[118] The Fourth Amendment has long been the "gorilla in the room[,]"[119] the Court being reluctant to confront it head-on and diminish its protections in a brash manner.[120] This, however, has not stopped the Court from whittling away at it.[121] Despite its stringent requirements, it is no secret that courts throughout the United States have continually interpreted the Amendment more and more narrowly throughout the past several decades.[122] This continual reduction of Fourth Amendment protections has gradually tipped the balance from private citizens in favor of the police.[123] The Court's holding in *Lange* was a crucial decision in tipping the balance the opposite way, insofar as it requires that lower courts consider the particular circumstances of each case rather than applying a bright-line rule.[124]

The Court's holding in *Lange* aids in reaffirming the importance of the "reasonableness" requirement of the Fourth Amendment, that every warrantless search is "objectively reasonable."[125] In so holding, the Court reversed a troubling trend of disintegrating the foundation of the Fourth Amendment, requiring that officers and courts keep reasonableness at the core of every warrantless search of someone's home.[126] As Justice Kagan noted in the majority opinion, "misdemeanors run the gamut of seriousness."[127] While exigent circumstances may exist when police are pursuing a fleeing domestic battery perpetrator, those exigent circumstances likely will not exist when the police are pursuing a serial litterer. Those two situations are fundamentally disparate, and the differentiator is the lack of a compelling and immediate law enforcement need to enter in the latter.[128] Refusing to consider the underlying offense in hot pursuit cases as integral to a reviewing court's analysis in these cases would allow police to treat these two suspects the same, which, as previously stated, is substantively offensive to the "reasonableness" requirement of every warrantless search.[129] The

117. U.S. CONST. amend. IV.

118. Camara v. Municipal Court of San Francisco, 387 U.S. 523, 528-529 (1967).

119. *See* interview notes from Bryan H. Ward, Professor of Law (Oct. 22, 2021) (on file with the Law Review of Ohio Northern University, Ada, Ohio).

120. Bookspan, *supra* note 91, at 474 ("While it may be premature to sound the death knell for the fourth amendment, [*sic*] it is no exaggeration to suggest that unless drastic action is taken to remedy the destructive erosion of the fourth amendment, [*sic*] it may as well be buried.").

121. *Id*.

122. Vaughan, *supra* note 2, at 510.

123. *Id*. at 511.

124. *Lange*, 141 S. Ct. at 2021-2022.

125. *Id*. at 2017 (quoting *Stuart*, 547 U.S. at 403).

126. *Id*. at 2024.

127. *Id*. at 2020.

128. *Id.* at 2016.

129. U.S. CONST. amend. IV.

Court's decision was soundly grounded in concern for the further erosion of this requirement, and, one can only hope, will lead to further decisions in which they keep reasonableness at the core of any Fourth Amendment analysis.[130]

Regrettably, it appears unlikely that *Lange* will turn the tides of the war against the Fourth Amendment. *Lange* is but one case in a sea of many decisions that further increase the multitude of exceptions to the warrant requirement.[131] Continual *laissez-faire* interpretation of the originally ironclad Fourth Amendment is a strong movement of which a small nuance carved out of yet another exception to the warrant requirement will do little to extinguish.[132] Even in this holding, the Court seemingly allows the hot pursuit exception to continue to apply categorically to fleeing felons, which severely limits the reach that this holding will have.[133] This point is emphasized by Justice Kavanaugh in his concurrence, in which he states, "the Court's opinion does not disturb the long-settled rule that pursuit of a fleeing *felon* is itself an exigent circumstance justifying warrantless entry into a home."[134] The Supreme Court's proclivity to disregard the stringent requirements of the Fourth Amendment suggests that the list of exceptions will continue to increase, but American citizens must remain hopeful that this overwhelming conglomeration of exceptions will be quelled, lest American privacy concerns continue to be minimized and destroyed.[135]

D. The Practical Consequences of Lange and Impact on Law Enforcement

By refusing to impose a categorical rule that all hot pursuits of fleeing misdemeanants qualify as an exigent circumstance to override the warrant requirement of the Fourth Amendment, it would seem that the Court has denied police officers the opportunity to make their job easier.[136] Gone are the days when a hot pursuit alone would justify the warrantless entry of the home of someone who flees.[137] Here are the days when officers, while in the

130. *Lange*, 141 S. Ct. at 2021-2022.

131. *See generally* Di Jia, *An Analysis and Categorization of U.S. Supreme Court Cases Under the Exigent Circumstances Exception to the Warrant Requirement*, 27 GEO. MASON U. CIV. RTS. L.J. 37 (2016).

132. Tyler M. Ludwig, *Out for Blood: The Expansion of Exigent Circumstances and Erosion of the Fourth Amendment*, 85 MO. L. REV. 883, 890 (2020).

133. *Lange*, 141 S. Ct. at 2025 (Kavanaugh, J., concurring).

134. *Id*.

135. Melanie D. Wilson, *The Return of Reasonableness: Saving the Fourth Amendment from The Supreme Court*, 59 CASE W. RES. 1, 2 (2008) (". . . when the Court assesses 'reasonableness,' the floor protection guaranteed by the Fourth Amendment, the Court has certainly rendered some inconsistent, seemingly result-oriented, common-sense-defying opinions.").

136. *Lange*, 141 S. Ct. at 2028 (Roberts, C.J., concurring).

137. *Id*.

heat of an imminent pursuit, must make split-second decisions and conduct an exigency analysis all while pursuing a fleeing misdemeanant.[138]

A categorical rule allowing all hot pursuits to qualify for warrantless entry would be infinitely easier to follow for law enforcement than the decision the Court promulgated in *Lange*.[139] Chief Justice Roberts's concern with *Lange*'s majority holding is echoed throughout his concurrence, emphasizing that the requirement that police tally exigencies, consider the gravity of the crimes committed, and contemplate the danger a fleeing suspect poses to the officer and society, in general, is not required by the Fourth Amendment.[140] As Chief Justice Roberts states in his concurrence, clearly concerned with the impact the *Lange* decision would have on police officers: "I would not override decades of guidance to law enforcement in favor of a new rules that provide no guidance at all."[141] The categorical rule suggested by the *amicus* in *Lange* would make the job of law enforcement more painless, but implementing such a rule would come at the price of privacy protections guaranteed to citizens of the United State by the Fourth Amendment.[142] Such a cost must be forbidden from passing muster.

The concerns for the difficulty this holding imposes on law enforcement in application are largely moot. As previously stated, law enforcement officers will still be faced with any number of other exigent circumstances when a misdemeanant flees which will allow them to enter the home of the misdemeanant irrespective of the offense they committed.[143] If a police officer cannot identify those other exigent circumstances in pursuit of someone who committed a minor offense, then it can hardly be argued that warrantless entry of a home clears the high bar imposed upon it by the reasonableness requirement of the Fourth Amendment. As Justice Kagan opines in the majority opinion, "[our] approach will in many, if not most, cases allow a warrantless home entry."[144] This statement made by the

138. *Id*.

139. Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Throughout the Least Intrusive Alternative Analysis*., 63 N.Y.U.L. REV. 1173, 1186-1187 (1988) ("A third general disadvantage of resolving constitutional cases through ad hoc balancing rather than fixed, categorical rules is that the case-by-case nature of balancing undermines the consistency and predictability of judicial rulings.").

140. *Lange*, 141 S. Ct. at 2028 (Roberts, C.J., concurring).

141. *Id*. at 2030.

142. Thomas Y. Davies, *"Justice" in Action: The Supreme Court Giveth and The Supreme Court Taketh Away: the Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 996 (2010) ("This shift to the use of "reasonableness" rhetoric to justify categorical rules that empower government intrusions, rather than the fact-based, case-by-case analyses usually associated with that concept, would become a hallmark of the conservative drive to expand government search authority.").

143. *Lange*, 141 S. Ct. 2025 (Kavanaugh, J., concurring).

144. *Id*. at 2021.

majority only helps to affirm the fact that this holding will do little to impede police responsibilities.

Additionally, this decision is consistent with many past decisions decided by the Court that required the officer to "tally the exigencies" in many stress-inducing situations.[145] Officers are already adept in applying this case-by-case framework, as they are required to do so when considering every other exigency.[146] Furthermore, this "case-by-case inquiry that governs in other exigency contexts has already proven equally workable in this one."[147] Additionally, this case-by-case standard grants pursuing officers sufficient laxity to effectuate the safety of the public.[148]

The holding in *Lange* seemingly still allows pursuing officers to enter the home of a fleeing felon without exception, so their efforts will be thwarted by *Lange* in only the most minute of instances.[149] It follows that, because an arresting officer was required by the Fourth Amendment's reasonableness requirement to consider the totality of circumstances in determining whether or not to enter a home without a warrant even before *Lange*, the Court's holding should have little practical effect on police duties post-*Lange*.[150] Truthfully, all the holding on the issue of the categorical proposition serves to do in *Lange* is reaffirm this fundamental principle.[151] In nearly all conceivable circumstances, other exigent circumstances will be present in the pursuit of a fleeing misdemeanant or the warrantless entry have never cleared the high standard the Fourth Amendment demands.[152]

V. CONCLUSION

The majority in *Lange* emphasized, "[a] great many misdemeanor pursuits involve exigencies allowing warrantless entry. But whether a given one does so turns on the particular facts of the case" in announcing flight is not, in and of itself, an exigency sufficient to override the warrant requirement.[153] This holding is a reasonable projection of the Court's Fourth Amendment jurisprudence, which arguably already required the underlying crime to be considered in hot pursuit exigency analysis.[154] Moreover, *Lange*

145. *See generally Welsh*, 466 U.S. 740; *Stuart*, 547 U.S. 398.
146. *McNeely*, 569 U.S. at 149.
147. Petitioner's Br. 34.
148. *Stuart*, 547 U.S. at 406.
149. *Lange*, 141 S. Ct. at 2025 (Kavanaugh, J., concurring).
150. *McNeely*, 569 U.S. at 150.
151. Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 404 (1998) ("traditional probable cause [has] surrendered the fourth amendment [*sic*] limelight to the broad inquiry of reasonableness.").
152. *Lange*, 141 S. Ct. at 2024 (Kavanaugh, J., concurring).
153. *Id.* at 2016.
154. *See generally Welsh*, 466 U.S. 740; *Stuart*, 547 U.S. at 405.

was essential to protecting the privacy interests of citizens suspected of having committed a minor offense, and aids in protecting them from unreasonable intrusion by law enforcement officers.[155] If the Court were to deny the underlying offense as a circumstance to consider in analyzing a hot pursuit case, it would only escalate the number of unreasonable searches and invasions of privacy.[156]

Unfortunately, the holding in *Lange* is but one small caveat carved out of yet another exception to the warrant requirement of the Fourth Amendment, exceptions that continue to, "[risk] diminution of the rights that existed at the Founding [of the Fourth Amendment]."[157] Only time will tell if the Court will continue to reign in the ever-growing list of exceptions and loopholes that threaten the very foundation of the once incorruptible Fourth Amendment and its guaranteed protections.[158]

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155. *See supra* Part IV-C.
156. Vaughan, *supra* note 2, at 511.
157. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1185 (2016).
158. U.S. CONST. amend. IV.