No. 12-1217

In The Supreme Court of the United States

MIKE STANTON,

Petitioner,

vs.

DRENDOLYN SIMS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

TIMOTHY T. COATES
Counsel of Record
LILLIE HSU
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
E-Mail: tcoates@gmsr.com

PETER J. FERGUSON
FERGUSON, PRAET & SHERMAN
1631 East 18th Street
Santa Ana, California 92705-7101
Telephone: (714) 953-5300
Facsimile: (714) 953-1143

Counsel for Petitioner Mike Stanton

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INTRODUCTION

The Petition demonstrated that federal and state courts are sharply divided on whether "hot pursuit" of a fleeing suspect, in and of itself, justifies officers in entering a home without a warrant to arrest for a misdemeanor. The Brief in Opposition ("BOP") highlights the need for review. In denying that any split exists, respondent simply puts herself on one side of it and ignores the other.

Respondent argues that all cases involving exigent circumstances, including hot pursuit, should be analyzed based on the totality of the circumstances, with hot pursuit being simply one of many factors relevant to determining whether exigency justifies a warrantless entry. She ignores that numerous courts have found that factor to be dispositive, relying on this Court's decision in *United States v. Santana*, 427 U.S. 38 (1976), to hold that hot pursuit, by itself, justifies a warrantless home entry to arrest for a misdemeanor. She further ignores that numerous courts have applied qualified immunity in this scenario, expressly recognizing the law is unsettled.

Particularly telling, to make her point that all cases involving exigent circumstances – including hot pursuit – should be, and are being, analyzed based on the totality of the circumstances, she relies on cases that do *not* involve hot pursuit. This is exactly what the numerous courts on the other side of the split have done – interpreted *Welsh v. Wisconsin*, 466 U.S. 740 (1984), a case this Court expressly noted did not

involve hot pursuit, to establish a rule for cases that *do* involve hot pursuit.

There are certainly two sides to the question of whether the *Santana* hot-pursuit rule should apply to misdemeanors, but that is the point – courts across the country are manifestly divided on the issue. The result is confusion and needless litigation in the context of both civil rights suits and everyday suppression hearings. It is essential that the Court grant review to provide clarity on this important and recurring issue, and to once again compel the Ninth Circuit to adhere to this Court's precedents concerning application of qualified immunity.

ARGUMENT

I. THERE IS A CLEAR CONFLICT AMONG STATE AND FEDERAL COURTS CONCERNING WHETHER "HOT PURSUIT" INDEPENDENTLY JUSTIFIES A WARRANTLESS HOME ENTRY TO ARREST FOR A MISDEMEANOR.

The Petition established:

- In *Santana*, 427 U.S. at 42-43, this Court held that "hot pursuit" of a fleeing suspect – there, a felony suspect – in and of itself, justified officers in entering a home without a warrant to complete an arrest. Although the Court noted the presence of other exigencies, it did not rely on those exigencies to justify the entry. *Id.* at 43.

- In *Welsh,* 466 U.S. at 753, this Court held a warrantless home entry to arrest for a minor, non-felony offense could not be justified absent "rare[ ]" exigent circumstances. But the Court expressly noted the case did not involve a "hot pursuit." *Id.* at 750, 753.

- Since *Welsh*, lower courts have divided on whether hot pursuit independently justifies a warrantless home entry to arrest for a misdemeanor. The Sixth Circuit, numerous district courts, and fourteen states have answered affirmatively, reasoning that *Santana*'s rationale – that a suspect may not thwart an arrest begun in public by fleeing to a residence – applies equally to misdemeanors, and *Welsh* did not involve a hot pursuit. (Pet. 20-24.) In contrast, the Ninth and Tenth Circuits, numerous district courts and seven states view hot pursuit as only one factor to consider in determining whether exigent circumstances justify a warrantless entry, and construe *Welsh* as holding that few, if any exigencies – including hot pursuit – would justify a warrantless home entry to arrest for a misdemeanor. (Pet. 25-28.)

- Three circuits, several district courts and one state appellate court have found officers entitled to qualified immunity for warrantless home entries based on hot pursuit of a fleeing misdemeanant, precisely because the law is unsettled. (Pet. 28-30.) A scholar also has noted the clear split on the issue. (Pet. 30.)

- Nonetheless, the Ninth and Tenth Circuits have denied qualified immunity in the same circumstances, finding the law clearly established. (Pet. 33-36.)
- Whether officers may enter a home without a warrant in hot pursuit of a misdemeanor suspect is an important, recurring issue that arises routinely in suppression hearings and civil rights suits nationwide, and directly affects law enforcement officers' daily decisions in arresting suspects.

Respondent fails to refute any of these points. She does not contest that *Santana*'s justification for the hot-pursuit doctrine applies equally to misdemeanor arrests. (*See* BOP5.) Nor does she dispute that in *Welsh*, this Court expressly noted it was not confronted with a hot-pursuit situation. (*See* BOP5.) Tellingly, respondent utterly ignores the numerous cases that have applied qualified immunity expressly because the law is unsettled. (*See* Pet. 28-31.) She does not deny that whether officers may enter a home without a warrant in hot pursuit of a fleeing misdemeanant, and whether they are entitled to qualified immunity for doing so, are critical issues for law enforcement.

Instead, respondent asserts that all cases involving exigent circumstances, including hot pursuit, must be evaluated based on the totality of the circumstances, and hot pursuit is simply one factor to be considered in determining whether exigency justifies a warrantless home entry. (BOP4-13.) In effect,

respondent simply places herself on one side of the split – siding with the Ninth and Tenth Circuits, several district courts and seven states that similarly have viewed hot pursuit as only one factor in the exigent-circumstances calculus and interpret *Welsh* as holding that any exigencies, including hot pursuit, will rarely justify a warrantless home entry to arrest for a misdemeanor. (Pet. 25-28.) But the fact remains that the Sixth Circuit, numerous district courts, and fourteen states have disagreed and held that under *Santana*, hot pursuit, alone, justifies such entry. (Pet. 20-24.) Taking sides does not make the split go away.

Respondent downplays the split by asserting that courts on both sides "evaluate exigency . . . based on *all* the circumstances," and that different facts explain the different outcomes. (BOP6-7, 10.) Although courts do generally examine all of the circumstances, courts on one side of the split view certain facts as dispositive – *i.e.*, whether officers are in hot pursuit of a suspect fleeing an arrest initiated in public. *See*, *e.g.*, *LaHaye v. State*, 1 S.W.3d 149, 152 (Tex.Ct.App. 2000) ("Exigent circumstances exist when the police are in hot pursuit of a suspect"); *State v. Bell*, 28 So.3d 502, 508, 510 (La.Ct.App. 2009) (misdemeanor suspect "may not, under *Santana*, elude capture for a valid arrest . . . set in motion in a public place by escaping to a private place"); *State v. Ricci*, 739 A.2d 404, 407-08 (N.H. 1999) (entry justified because "the totality of circumstances demonstrates that the police were in hot pursuit").

Moreover, even if the cases might reach the same results had they all applied respondent's straight totality-of-the-circumstances test, cases on the "hot pursuit" side of the split are not using that analysis. Rather, they conclude that under *Santana*, hot pursuit of a fleeing misdemeanant, itself, is an exigency – rather than treating hot pursuit as simply one among many factors to be considered in determining whether exigent circumstances justify a warrantless entry. *See*, *e.g.*, *State v. Ramirez*, 814 P.2d 1131, 1134 (Utah Ct.App. 1991) (exigent circumstances justified entry because officer was in "hot pursuit" of misdemeanor suspect; *Welsh* "did not involve a hot pursuit").

Respondent also argues that this Court's decisions require that any case of alleged exigency – including hot pursuit – be evaluated based on the totality of the circumstances, and that this Court has eschewed per se rules. (BOP4-5, 11.) But none of the cases she cites involves hot pursuit. Moreover, in one of the cases she cites, *Missouri v. McNeely*, 133 S. Ct. 1552, 1570 (2013), the Court cites *Santana* as one of the cases where "the requirement that we base our decision on the 'totality of the circumstances' has not prevented us from spelling out a general rule for the police to follow."

Similarly, respondent cites *People v. Thompson*, 135 P.3d 3 (Cal. 2006), as establishing that petitioner's state has adopted a totality-of-the-circumstances test for exigent circumstances, including hot pursuit (BOP9) – but *Thompson* did not involve a hot pursuit. Its facts are virtually identical to *Welsh*: a citizen

observed defendant's drunk driving and notified police; officers went to defendant's home, found his car parked outside, and entered the home to arrest defendant. *Id.* at 5-6. The California Supreme Court held that the metabolization of alcohol constituted imminent destruction of evidence justifying the warrantless entry, and distinguished *Welsh* on the grounds that California, unlike the state in *Welsh*, classified drunk driving as a jailable offense. *Id.* at 8-9, 11-13. The court noted the hot-pursuit doctrine was inapplicable because the pursuit had not been continuous. *Id.* at 13-14.

Finally, respondent argues the Ninth Circuit correctly applied a totality-of-the-circumstances test to deny qualified immunity based on its prior en banc decision in *United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001). (BOP11-12.) Yet, *Johnson* expressly found the hot-pursuit doctrine inapplicable because the officers' pursuit was not "'immediate' and 'continuous.'" *Id.* at 907-08. Respondent notes the court nonetheless considered whether exigent circumstances justified a warrantless home entry given the case's other facts. (BOP12.) She misses the point. Because *Johnson* did not involve hot pursuit, it could not, and did not, clearly establish that hot pursuit of a misdemeanant cannot justify a warrantless home entry without additional exigent circumstances. Tellingly, respondent ignores that post-*Johnson*, district courts within the Ninth Circuit granted qualified immunity to officers for warrantless entries in hot pursuit to

arrest for misdemeanors, *because the law was unsettled*. (*See* Pet. 35 & n.15.)

State and federal trial and appellate courts are sharply divided on whether the hot-pursuit doctrine of *Santana* applies to misdemeanors. Until this conflict is resolved, officers cannot know under what circumstances they may enter a home without a warrant to arrest a fleeing misdemeanant, whether they face civil liability for doing so, or what impact their conduct will have on any subsequent criminal proceeding. Yet officers across the country must make these split-second decisions on a daily basis. And trial courts, confronted with civil rights suits and ubiquitous suppression hearings, need clear guidelines to ensure consistent application of the law and avoid wasting scarce resources in unnecessary litigation. It is vital that this Court grant review.

II. REVIEW IS NECESSARY TO BRING THE NINTH CIRCUIT INTO COMPLIANCE WITH THIS COURT'S PRECEDENTS CONCERNING APPLICATION OF QUALIFIED IMMUNITY AND TO RESOLVE THE CONFLICT AMONG APPELLATE COURTS REGARDING APPLICATION OF QUALIFIED IMMUNITY WHERE OFFICERS ENTER A RESIDENCE IN HOT PURSUIT OF A FLEEING MISDEMEANANT.

If there was ever a case where qualified immunity based on the absence of clearly established law is warranted, it is this one. State and federal courts are divided on the basic issue of whether hot pursuit of a

misdemeanant justifies a warrantless entry into a home. None of the case law cited by the Ninth Circuit or respondent comes close to meeting this Court's standard in *Anderson v. Creighton*, 483 U.S. 635 (1987) that "[t]he contours of [a] right must be sufficiently clear that a reasonable [officer] would understand that what he is doing violates that right." *Id*. at 640. It certainly cannot be said that "existing precedent" has placed the "constitutional question beyond debate." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011).

The Ninth Circuit's disregard of this Court's precedents in applying qualified immunity in the context of police officer liability for a warrantless entry made in hot pursuit of a misdemeanant is echoed in the Tenth Circuit, which has similarly rejected qualified immunity under such circumstances – a particularly puzzling result since, as noted, only three months earlier a Tenth Circuit panel had, in an unpublished disposition, applied qualified immunity in this context because the law was not "clearly established." (*See* Pet. 25-26 & n.10, 36.) In contrast, three circuits and one state appellate court have found officers entitled to qualified immunity for warrantless home arrests based on hot pursuit where the underlying offense was a misdemeanor, recognizing that the law is unsettled. (Pet. 29-30.)

Respondent utterly ignores this express conflict concerning application of qualified immunity to warrantless entries made in hot pursuit of a misdemeanant.

Instead, respondent contends that the law governing whether her front yard was curtilage was clearly established, citing *United States v. Dunn*, 480 U.S. 294 (1987). (BOP13-14.) This is irrelevant. Even assuming respondent's front yard was curtilage and equivalent to the home itself, if, under *Santana*, petitioner could lawfully enter without a warrant in hot pursuit of a misdemeanant (or given the conflict in the law could reasonably believe he could do so), respondent does not have a valid claim.

Respondent also contends that it was clearly established that petitioner could not enter Sims' front yard by kicking open the gate (BOP14-15), but conspicuously cites no case finding this manner of entry unconstitutional given the circumstances here. And, as noted, a California appellate court has held that an officer could properly hop a fence into a backyard in curtilage to detain a suspect for trespassing. (Pet. 38, discussing *People v. Thompson*, 270 Cal.Rptr. 863, 873-75 (Cal.Ct.App. 1990).)

There is a plain conflict among state and federal appellate courts concerning application of qualified immunity to warrantless entries made in hot pursuit to arrest for a misdemeanor. The conflict is clear, ongoing, and impacts day-to-day operations of police officers throughout the country. Review is warranted.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE CONFLICT CONCERNING APPLICATION OF THE *SANTANA* HOT-PURSUIT RULE TO MISDEMEANORS, AND APPLICATION OF QUALIFIED IMMUNITY IN THE CONTEXT OF HOT PURSUIT TO ARREST FOR A MISDEMEANOR.

Respondent asserts that even if a conflict exists concerning application of the hot-pursuit doctrine to misdemeanors, nonetheless the Court should deny review because the case is allegedly a poor vehicle to decide the issues given what respondent contends are underlying factual questions that would ultimately defeat qualified immunity. (BOP15.) Not so.

According to respondent, even if the Court determines that the *Santana* hot-pursuit rule applies to fleeing misdemeanants or that a reasonable officer could believe it applied, nonetheless petitioner would not be entitled to qualified immunity because there are issues of fact concerning whether he had probable cause to arrest the suspect for a misdemeanor at all. Specifically, respondent asserts that there are alleged factual issues regarding whether the suspect was aware he was being chased or whether the officer could even ask the suspect to stop in the first instance. (BOP15-17.)

As a threshold matter, this Court has not hesitated to grant review to resolve clear conflicts or provide clarification concerning important principles of law, and then remand for the lower courts to apply

the correct standards. *See*, *e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 832, 848-49 (1994) (review granted to resolve inconsistent application of "deliberate indifference" standard in Eighth Amendment cases; case remanded for lower court to apply correct standard). Here, the Ninth Circuit has outright denied qualified immunity, finding it somehow clearly established that the hot-pursuit doctrine does not apply to misdemeanors. Thus, petitioner's defense of qualified immunity has been voided *ab initio* without regard to any purported issues of fact, based upon a wantonly untenable construction of the law. There is nothing abstract about petitioner's right to have his entitlement to qualified immunity determined under the correct legal standards.

But, in any event, there is no factual dispute and it is not surprising that the Ninth Circuit did not rely on any alleged factual issues in rejecting petitioner's qualified immunity claim. As the district court found, respondent did not introduce competent evidence to create an issue of material fact in opposition to the motion for summary judgment. Respondent's factual "issue" with respect to probable cause to arrest for California Penal Code section 148 is that the suspect allegedly did not hear the officer's command, a contention based solely upon petitioner's own testimony that from where she was standing she did not hear the officer's command. (BOP17-18; App.7; ER11, 24-25.) Yet, the district court expressly found that respondent's testimony was a sham and incapable of creating a genuine issue of material fact because it

contained glaring contradictions as to where she was at what time and therefore whether she could have heard anything the officer said. (*See* App.62-66; *see* ER11, 20-21.) The district court also found that in any event, even if respondent did not hear the officer's command, that says nothing about whether the suspect heard it, and, significantly, respondent offered no testimony from the suspect concerning his interaction with petitioner. (App.66-67 n.4.)

It is similarly understandable why the Ninth Circuit paid no heed to respondent's contention that petitioner lacked articulable suspicion to conduct an investigatory stop under *Terry v. Ohio*, 392 U.S. 1 (1968) in the first place. Petitioner responded to a call at 1:00 a.m. reporting a fight involving a baseball bat in an area known for armed gang violence, and observed three men at the fight scene quickly disperse upon seeing the officers arrive. (Pet. 3.) To assert that an officer could not even attempt to question any of these individuals, let alone reasonably believe he might be able to do so under *Terry* for purposes of qualified immunity, is flatly untenable.

The Ninth Circuit resolved, and this case squarely presents, an issue that is of ongoing importance to law enforcement officials and court systems throughout the country – whether the hot-pursuit doctrine of *Santana* applies to warrantless home entries to arrest for a misdemeanor. There is no justification to further delay resolution of this important issue, and failure to clarify the law will resign state and federal court systems to continued litigation in the context of

civil suits and suppression hearings. Review should be granted.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

TIMOTHY T. COATES
Counsel of Record
LILLIE HSU
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261

PETER J. FERGUSON
FERGUSON, PRAET & SHERMAN
1631 East 18th Street
Santa Ana, California 92705-7101
Telephone: (714) 953-5300
Facsimile: (714) 953-1143

Counsel for Petitioner Mike Stanton