No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *United States v. Santana*, 427 U.S. 38, 42-43 (1976), this Court held that when police officers initiate a lawful arrest in public and the suspect flees to a private residence, the officers may pursue the suspect into the residence without a warrant to complete the arrest. The Court reasoned that "a suspect may not defeat an arrest . . . set in motion in a public place . . . by the expedient of escaping to a private place." *Id.* at 43. *Santana* involved a felony suspect. *See id.* at 41; *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984).

The questions presented are:

1. Does the "hot pursuit" doctrine articulated in *Santana* apply where police officers seek to arrest a fleeing suspect for a misdemeanor?

2. Is a police officer entitled to qualified immunity where he pursued a suspect fleeing the officer's attempt to arrest him for a jailable misdemeanor committed in the officer's presence, into the front yard of a residence through a gate used to access the front door, and the officer had reason to believe the suspect might have been just involved in a fight involving weapons?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Drendolyn Sims, plaintiff, appellant below, and respondent here.
- Mike Stanton, defendant, appellee below, and petitioner here.

No corporations are involved in this proceeding.

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The Ninth Circuit's amended opinion, the subject of this petition, is reported at 706 F.3d 954 (9th Cir. 2013). (Appendix ["App."]1-23.) The Ninth Circuit's initial opinion was not published in the official reports. (App.24-44.) Its order amending the opinion and denying rehearing, filed January 16, 2013, is published at 706 F.3d 954, 956-57 (9th Cir. 2013). (App.3-4.) The district court's decision granting summary judgment to petitioner was not published in the official reports. (App.45-69.)

JURISDICTION

The Ninth Circuit initially filed its opinion on December 3, 2012. (App.24-44.) Petitioner timely petitioned for rehearing, and on January 16, 2013, the Ninth Circuit denied the petition and issued an amended opinion. (App.1-23.) This Court has jurisdiction to review the Ninth Circuit's January 16, 2013 decision on writ of certiorari under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondent brought the underlying action under 42 U.S.C. §1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of

> any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondent alleges petitioner violated her rights under the United States Constitution's Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. The Pursuit Into Plaintiff's Front Yard.

On May 27, 2008 around 1:00 a.m., Officer Mike Stanton and his partner responded to a call regarding a fight involving a baseball bat in the street in an area of La Mesa, California known for gang violence, where gang members were known to be armed with weapons including guns and knives. (App.6; ER 1-2, 4.)[1] The officers were driving a marked car and wearing police uniforms. (App.6.)

When they arrived at the fight scene, the officers saw three men walking in the street. (App.6; ER 1.) Two turned into a nearby apartment complex immediately upon seeing the patrol car. (App.6; ER 1.) The third crossed the street and quickly walked or ran toward the open front gate of an apartment located in the direction of the car. (App.6, 17; ER 1, 5.)

Officer Stanton exited the patrol car, announced "police," and repeatedly ordered the man to stop in a voice loud enough that anyone in the area would have heard his commands. (App.7; ER 1, 5.) From 25 feet away, the man looked directly at the officer, but instead of stopping, quickly entered the gate. (App.7, 17; ER 1, 5.) The gate, part of a solid wood fence over six feet high enclosing the apartment's small front

[1] "ER" denotes the excerpts of record, and "SER" the supplemental excerpts of record, filed in the Ninth Circuit.

yard, quickly shut behind him within a few feet of Officer Stanton. (App.7, 70; ER 1.)

Believing the suspect was disobeying a lawful police order – which, under California Penal Code §148, was the jailable misdemeanor of resisting or obstructing an officer[2] – and fearing for his safety, Officer Stanton made a "split-second decision" to kick open the gate. (App.7; ER 1-3.) Plaintiff and respondent Drendolyn Sims, who lived in the apartment, was standing behind the gate and was injured. (App.7.)

B. Plaintiff's Front Yard And Entryway.

Plaintiff states she "enjoy[s] a high level of privacy in [her] front yard." (App.7-8.) The fence prevents persons on the street from seeing into the yard and renders the space "completely secluded." (App.8.) Plaintiff uses the yard for storing her wheelchair and socializing. (App.8.)

A person standing on the street outside the gate can see plaintiff's front porch and door. (App.11 n.4, 70; ER 3, 6; SER 12.)[3] Before Officer Stanton entered

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[2] California Penal Code §148 makes "willfully resist[ing], delay[ing], or obstruct[ing]" an officer discharging his duties a misdemeanor punishable by up to one year's imprisonment and a maximum $1,000 fine. §148; *In re M.M.*, 278 P.3d 1221, 1222 (Cal. 2012).

[3] To enter, a person pulls on a string hanging outside the gate, which opens the latch. (Pltf.'s Opp. to Summ. Jdgmt, Ex.2, district court docket #42-3 ["Pltf's Opp."], at 6; App.70.) Beyond

(Continued on following page)

the gate, he believed the suspect was about to go up the stairs to the front door. (ER 3.)

C. The Lawsuit And Appeal.

Plaintiff sued Officer Stanton under 42 U.S.C. §1983, alleging the warrantless entry into her yard violated her Fourth Amendment rights. (App.5.) The district court granted summary judgment to Stanton, holding the entry was constitutional and Stanton was entitled to qualified immunity. (App.55-62.)

Specifically, the court held exigent circumstances justified the entry because when Stanton observed three men at the fight scene quickly disperse upon seeing the officers, he had articulable suspicion for an investigatory stop, and when one suspect ignored his commands and fled, Stanton had grounds to detain and arrest under California Penal Code §148. (App.56-58.) The court held the entry was further justified by the lesser expectation of privacy in the curtilage of plaintiff's residence, as opposed to the home itself. (App.57-58.) The court explained:

> [T]he expectations of privacy for entry onto one's property by . . . a gate are markedly different from entry of the home by . . . the dwelling's front door. . . . [O]ne reasonably anticipates that the public may enter a gate . . . without first obtaining permission

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the gate is a flat landing about 1½ yards long, leading to a few steps going up to the porch. (Pltf.'s Opp., at 8.)

> in order to approach the home itself. However, under no circumstance[s] does one reasonably anticipate that the public may enter one's home without permission.

(App.57-58 n.2.)

On qualified immunity, the district court concluded Stanton had not violated any clearly established right, partly because under *United States v. Santana*, 427 U.S. 38 (1976), "[a] 'suspect may not defeat an arrest . . . set in motion in . . . public . . . by escaping into a private place.'" (App.58-60.)

Plaintiff appealed. (App.5.)

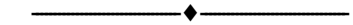
On December 3, 2012, the Ninth Circuit reversed. (App.44.) Stanton petitioned for rehearing, and on January 16, 2013, the court denied the petition and issued an amended opinion, again reversing. (App.3-4.)

First, the Ninth Circuit held plaintiff's front yard was curtilage and therefore entitled to the same degree of Fourth Amendment protection as her home, so the warrantless entry was presumptively unconstitutional. (App.9-12.)

Second, the court held "hot pursuit" of the fleeing suspect did not justify entry because the offense of disobeying the officer's order to stop was a misdemeanor. (App.13-15.) The court reasoned "escape of a fleeing misdemeanant . . . is not . . . generally[ ] a serious enough consequence to justify . . . warrantless

entry," and nothing about the facts warranted a departure from this general rule. (App.14.)

Finally, the court denied qualified immunity, finding it "clearly established" that (1) under *Oliver v. United States*, 466 U.S. 170 (1984), plaintiff's front yard was curtilage and "therefore[ ] protected to the same extent as her home"; and (2) under *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) a warrantless home entry "cannot be justified by pursuit of a suspected misdemeanant except in the rarest of circumstances," not present here. (App.21-22.)



REASONS TO GRANT THE PETITION

In *United States v. Santana*, 427 U.S. 38, 42-43 (1976), this Court held that when police officers initiate a lawful arrest in public and the suspect flees to a private residence, the officers may pursue the suspect into the residence without a warrant to complete the arrest. The Court reasoned that "a suspect may not defeat an arrest . . . set in motion in a public place . . . by the expedient of escaping to a private place." *Id.* at 43. *Santana* involved a felony suspect. *See id*. at 41; *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984). In *Welsh v. Wisconsin*, 466 U.S. at 753, the Court held that a warrantless entry into a home to arrest for a minor, non-felony offense could not be justified absent extremely "rare[ ]" exigent circumstances. The Court was careful to note in *Welsh* that the case did not involve a "hot pursuit." *Id*.

Here, petitioner Mike Stanton, a police officer, responded to the scene of a fight and attempted to detain a suspect. The suspect resisted Officer Stanton, committing a jailable misdemeanor, and fled into the fenced front yard of a residence through a gate used to access the front door. Stanton followed to arrest the suspect, and respondent Drendolyn Sims was injured while standing on the other side of the gate. In Sims's action under 42 U.S.C. §1983, the district court granted summary judgment to Officer Stanton based on qualified immunity. The Ninth Circuit reversed. Judge Reinhardt, writing for the court, held that it was clearly established that the front yard was curtilage subject to the same Fourth Amendment protection as the home itself, and, citing *Welsh*, that the "hot pursuit" doctrine of *Santana* does not apply to misdemeanors. (App.9-15.)

It is essential that this Court grant certiorari to review the Ninth Circuit's decision, because it reflects an ongoing conflict among the state and federal courts at every level on the issue of whether the hot pursuit doctrine applies to misdemeanors, and represents the latest in an unfortunately long line of Ninth Circuit departures from this Court's decisions dictating qualified immunity under precisely these circumstances.

The courts of 14 states – including California, the jurisdiction where this case arose – as well as the Sixth Circuit and numerous district courts have held that *Santana*'s hot pursuit rule applies to misdemeanors, thus allowing officers attempting to arrest a

suspect for a misdemeanor to pursue the suspect into a residence without a warrant. These courts reason that *Santana*'s justification for the rule, *i.e.*, that a suspect should not be allowed to flee a lawful arrest begun in a public place simply by retreating into a residence, applies with equal force to misdemeanors. The courts often note that in *Welsh*, this Court was careful to state that it was not confronted with a hot pursuit situation.

In contrast, two circuits – the Ninth and Tenth – along with the courts of seven states have held that *Santana*'s hot pursuit doctrine is limited to felonies, and that warrantless arrests inside the home for misdemeanors are governed by *Welsh*'s requirement that there be extraordinary exigent circumstances to justify a warrantless entry.

Not surprisingly, given this conflict and the fact that this Court has not expressly addressed the issue of whether hot pursuit in and of itself allows a warrantless entry into a home to arrest for a misdemeanor, three circuits – the First, Fifth and Eighth – along with one state court and several district courts, have found that qualified immunity shielded officers from liability for a warrantless entry made in hot pursuit to arrest for a misdemeanor, because the law is unclear.

Whether an officer may enter a home without a warrant in hot pursuit of a misdemeanor suspect is a recurring issue that arises routinely in suppression hearings and civil rights suits across the country,

directly affecting law enforcement officers' day-to-day decisions in detaining and arresting suspects. The ubiquity of this issue is evidenced by the more than 21 state appellate court opinions addressing the issue, the opinions of six circuit courts, and numerous district court opinions – and even these reflect only the tip of the iceberg, given that they represent only reported decisions and not the multitude of trial court suppression proceedings where the issue arises on a daily basis. It is essential that this Court grant review to address the issue left open in *Welsh*, namely whether hot pursuit in and of itself permits warrantless entry into a home to arrest for a misdemeanor.

Review is also warranted because the Ninth Circuit has once again departed from the basic principles governing qualified immunity, and in so doing has contributed to a circuit split on application of qualified immunity to cases involving hot pursuits to arrest for misdemeanors. This Court has repeatedly held that public officers are entitled to qualified immunity unless their conduct violates "clearly established law" – *i.e.*, unless "at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083 (2011) (*quoting Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). For the law to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft*, 131 S.Ct. at 2083.

Here, the Ninth Circuit denied petitioner Stanton qualified immunity, finding that it was "clearly established" that the hot pursuit doctrine did not apply to misdemeanors and hence a warrantless entry to arrest for a misdemeanor would be permissible only in rare exigent circumstances not present here, citing *Welsh*. (App.22; *see* App.14-15.) Yet, in *Welsh*, this Court noted that the case before it did not involve a hot pursuit, and hence did not address the issue of whether *Santana*'s hot pursuit exception applied to a misdemeanor. *Welsh*, 466 U.S. at 753. The Ninth Circuit also cited its prior opinion in *United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001) (en banc) as clearly holding that the hot pursuit doctrine did not apply to misdemeanors. (App.22; *see* App.14-15.) Yet, in *Johnson*, the Ninth Circuit acknowledged that the case did not involve a hot pursuit. 256 F.3d at 907-08.

Moreover, as noted, a majority of the state courts that have considered the issue – 14, including California – as well as one circuit court and several district courts, have held that the hot pursuit doctrine applies to misdemeanors. Indeed, as noted, three circuit courts, one state appellate court, and several district courts have applied qualified immunity precisely because the issue is unsettled. It is untenable to assert, as the Ninth Circuit does, that the law concerning application of the hot pursuit doctrine to misdemeanors is "clearly established."

The Ninth Circuit has again recklessly departed from the standards governing qualified immunity, and it is essential that this Court grant review to

compel adherence to its precedents and to resolve the clear circuit split on application of qualified immunity to cases involving hot pursuit for a misdemeanor. *Ryburn v. Huff*, 132 S.Ct. 987, 990 (2012) (per curiam) (reversing Ninth Circuit's denial of qualified immunity for warrantless home entry because officers' conduct did not violate clearly established law); *Messerschmidt v. Millender*, 132 S.Ct. 1235 (2012) (reversing Ninth Circuit's denial of qualified immunity because officer's procurement of allegedly overbroad warrant did not violate clearly established law); *Ashcroft*, 131 S.Ct. at 2085 (reversing Ninth Circuit's denial of qualified immunity because Attorney General's conduct did not violate clearly established law); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (reversing Ninth Circuit's denial of qualified immunity because law was not clearly established concerning officer's use of deadly force against a felony suspect fleeing in a vehicle); *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 378 (2009) (reversing Ninth Circuit's denial of qualified immunity because law concerning strip search of minor schoolchildren was not clearly established).

I. REVIEW IS NECESSARY TO RESOLVE A CONFLICT AMONG STATE AND FEDERAL COURTS AT EVERY LEVEL CONCERNING WHETHER "HOT PURSUIT" OF A FLEEING SUSPECT, IN AND OF ITSELF, ALLOWS POLICE OFFICERS TO ENTER A HOME WITHOUT A WARRANT TO ARREST FOR A MISDEMEANOR.

A. In *United States v. Santana*, This Court Held That "Hot Pursuit" Of A Fleeing Suspect Independently Justifies A Warrantless Home Entry, Because A Suspect May Not Frustrate An Arrest Begun In A Public Place By Fleeing To A Residence.

In *United States v. Santana*, 427 U.S. 38 (1976), police officers had probable cause to believe a suspect had just sold them narcotics. *Id.* at 39, 41. The suspect was standing in the doorway of a residence, and when the officers approached to arrest her, she retreated into the house and the officers followed. *Id.* at 40-41. This Court held that when the police first sought to arrest the suspect, she was in a "public place" where the police could constitutionally arrest her without a warrant, and the suspect's "act of retreating into her house could [not] thwart [the] otherwise proper arrest." *Id.* at 42. The Court reasoned:

> [A] suspect may not defeat an arrest which has been set in motion in a public place . . .

> by the expedient of escaping to a private place.

Id. at 43.[4]

The Court also noted that once the suspect saw the police, there was "a realistic expectation that any delay would result in destruction of evidence." *Id.* But the Court did not rely on such exigencies to justify the entry. Rather, "'hot pursuit'" of the suspect was, in itself, "sufficient to justify the warrantless entry into [her] house." *Id.*[5] *Santana* involved an arrest for violation of 21 U.S.C. §841, a felony. *Id*. at 41; *see Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984).

In the intervening years, the Court has repeatedly reaffirmed *Santana*'s hot pursuit exception to the warrant requirement. *See Payton v. New York*, 445 U.S. 573, 574-75 & n.1 (1980) (addressing open issue on warrantless arrests in a home, but noting via "*cf.*" citation that *Santana* resolved one aspect of the question); *Steagald v. United States*, 451 U.S. 204, 221-22 (1981) (warrant generally required for entry

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[4] In so holding, the Court relied on its decision in *Warden v. Hayden*, 387 U.S. 294 (1967), where the Court had upheld the warrantless entry into a home to arrest an armed robbery suspect whom witnesses had seen enter the home several minutes before officers arrived. *Santana*, 427 U.S. at 42-43.

[5] Indeed, in dissent, Justice Marshall criticized the Court's "hot pursuit justification," because it "disregard[ed] whether exigency justified the police" in entering a home. *Id.* at 45, 47 (Marshall, J., dissenting); *see also id.* at 47 ("the Court's approach does not depend on whether exigency justifies an arrest on private property").

into third-party residence to effect arrest, but "a warrantless entry of a home would be justified if the police were in 'hot pursuit' of a fugitive"); *Kentucky v. King*, 131 S.Ct. 1849, 1856 (2011) ("Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect"). However, as we discuss, the Court has never expressly addressed whether the hot pursuit exception applies to misdemeanors, and its discussion of the exigent circumstances exception to the warrant requirement as applied to misdemeanors in *Welsh v. Wisconsin*, 466 U.S. 740, has spawned wholesale confusion among courts across the country.

B. *Welsh v. Wisconsin* Creates Ambiguity As To Whether Hot Pursuit, In And Of Itself, Justifies A Warrantless Home Entry To Effect An Arrest For A Misdemeanor.

In *Welsh v. Wisconsin*, 466 U.S. 740, a witness notified police after seeing a motorist drive erratically, then exit the car and leave the scene. *Id.* at 742. Officers procured the driver's address from the vehicle registration and went to his home a short distance away. *Id*. at 742-43. The police entered the home without a warrant and arrested him for driving while intoxicated, which was only a civil, non-jailable offense under Wisconsin law. *Id.* at 743, 754.

In *Payton v. New York*, 445 U.S. 573, the Court had held that a warrantless arrest in a home could

not be justified absent probable cause and exigent circumstances. *Id*. at 583-90. The question in *Welsh* was whether the warrantless entry to arrest a suspect for a civil offense was justified by exigent circumstances. 466 U.S. at 753. The Court observed that while it had previously suggested that various exigent circumstances might justify a warrantless entry to search or arrest, such as destruction of evidence[6] or ongoing fire,[7] it had "actually applied only the 'hot pursuit' doctrine to arrests in the home," citing *Santana*, 466 U.S. at 750.

The State argued that the warrantless entry was justified by continuation of a hot pursuit, the need to prevent destruction of evidence through dissipation of alcohol in the suspect's bloodstream as time passed, and protection of the public from an impaired driver. *Id*. at 753.

Significantly, the Court rejected the first contention because there was no hot pursuit at issue in the case, since "there was no immediate or continuous pursuit of the [suspect] from the scene of a crime." *Id.* The Court then addressed the claimed exigent circumstances for which there was at least a factual basis in the record.

The Court found that protection of the public was not a valid justification because the suspect was

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[6] *Schmerber v. California*, 384 U.S. 757, 770-71 (1966).

[7] *Michigan v. Tyler*, 436 U.S. 499, 509 (1978).

found at home and had abandoned his car. *Id.* The Court then held that preservation of evidence was not a sufficiently weighty concern to offset the significant invasion into the core Fourth Amendment-protected sanctity of the home, because the offense at issue was so minor – merely a civil, non-jailable offense. *Id*. at 754. In so holding, the Court, in a passage that would sow the seeds of confusion over the next 29 years, observed that the severity of the offense had been deemed relevant in evaluating a wide range of exigent circumstances:

> [C]ourts have permitted warrantless home arrests *for major felonies* if identifiable exigencies, independent of the gravity of the offense, existed at the time of the arrest. [Citation.] But of those courts addressing the issue, *most have refused to permit warrantless home arrests for nonfelonious crimes*. See, e.g., *State v. Guertin*, 190 Conn. 440, 453, 461 A.2d 963, 970 (1983) ("The [exigent-circumstances] exception is narrowly drawn to cover cases of real and not contrived emergencies. The exception is limited to the investigation of serious crimes; misdemeanors are excluded"); *People v. Strelow*, 96 Mich.App. 182, 190-193, 292 N.W.2d 517, 521-522 (1980). See also *People v. Sanders*, 59 Ill.App.3d 6, 16 Ill.Dec. 437, 374 N.E.2d 1315 (1978) (burglary without weapons not grave offense of violence for this purpose); *State v. Bennett*, 295 N.W.2d 5 (S.D. 1980) (distribution of controlled substances not a grave offense for these purposes). *But cf.*

> *State v. Penas, 200 Neb. 387, 263 N.W.2d 835 (1978) (allowing warrantless home arrest upon hot pursuit from commission of misdemeanor in the officer's presence; decided before Payton); State v. Niedermeyer, 48 Ore.App. 665, 617 P.2d 911 (1980) (allowing warrantless home arrest upon hot pursuit from commission of misdemeanor in the officer's presence). The approach taken in these cases should not be surprising. Indeed, without necessarily approving any of these particular holdings or considering every possible factual situation, we note that it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor.*

Id. at 752-53 (emphasis added).

The confusion stems from the Court's observation that most lower court decisions had permitted warrantless home arrests for felonies if exigencies existed, but had refused to permit warrantless home arrests for non-felonies, although it noted via a *cf.* citation two state decisions allowing a warrantless home arrest based upon hot pursuit for a misdemeanor committed in an officer's presence. *Id.* The Court's caution that it was not "necessarily approving any of these particular holdings," coupled with the admonition that "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed," *id.*

at 753, cast doubt on whether *Santana*'s hot pursuit exception, in and of itself, allowed a warrantless home entry to arrest for a minor offense. This uncertainty was magnified by the Court's suggestion that there might be an open issue as to whether the Fourth Amendment imposes an "absolute ban on warrantless home arrests for certain minor offenses," though noting that it had "no occasion to consider" the issue here. *Id*. at 749 n.11.

Following *Welsh*, state and federal courts have been sharply divided on whether hot pursuit, in and of itself, allows a warrantless entry to arrest for a misdemeanor. Courts finding that hot pursuit in and of itself justifies a warrantless entry to arrest for a misdemeanor note that *Santana*'s justification for the rule – that the target of a lawful arrest in a public place should not be able to escape simply by fleeing to a residence – applies with equal force to misdemeanors, and that in *Welsh* this Court expressly noted it was not confronted with a hot pursuit. In contrast, other courts (including the Ninth Circuit here) have viewed hot pursuit as simply one among various exigencies and construed *Welsh* as holding that few, if any exigencies – including hot pursuit – would justify warrantless entry to arrest for a misdemeanor.

C. Federal And State Courts Are Divided On Whether Hot Pursuit Of A Fleeing Misdemeanant, In And Of Itself, Justifies A Warrantless Home Entry.

1. The Sixth Circuit, Numerous District Courts And 14 State Courts Have Held That Hot Pursuit, In And Of Itself, Justifies A Warrantless Home Entry To Arrest For A Misdemeanor.

The Sixth Circuit has held that hot pursuit of a fleeing misdemeanant justified a warrantless home entry. In *United States v. Johnson*, 106 F.App'x 363, 364-65 (6th Cir. 2004), officers pursued a suspect into his home after seeing him fire a shotgun into the air from the porch. The officers searched the home and arrested the suspect for violating state misdemeanor laws and city ordinances. *Id.* at 365. The court held that "hot pursuit" of the fleeing suspect justified the warrantless entry. *Id*. at 367-68. Because the suspect was armed and the officers had searched the home, the court relied on this Court's decision in *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967), which had upheld a warrantless home entry to arrest a fleeing armed robbery suspect and a search of the home, and which this Court relied on in *Santana*, 427 U.S. at 42-43. *Id*. at 367. The Sixth Circuit further noted that *Welsh* had not "foreclosed the possibility that [warrantless home entries] may be made to search for misdemeanants." *Id*.

Several district courts have also held that under *Santana*, officers may pursue a fleeing misdemeanant

into a home to prevent the suspect from frustrating the arrest, without additional exigent circumstances.[8]

Fourteen states – including California, Officer Stanton's jurisdiction – have also held that hot pursuit of a fleeing misdemeanant independently justifies a warrantless home entry, without additional exigent circumstances. *See*:

- *People v. Lloyd*, 265 Cal.Rptr. 422, 424-25 (Cal.Ct.App. 1989) (resisting detention for traffic violations; where hot pursuit into home is based on arrest begun in public, "that the offenses . . . were misdemeanors is of no significance"; *Welsh* did not "involve pursuit into a home after the initiation of a detention or arrest in . . . public"); *In re Lavoyne M.*, 270 Cal.Rptr. 394, 395-96 (Cal.Ct.App. 1990) (similar facts and holding);
- *Gasset v. State*, 490 So.2d 97, 98-99 (Fla.Dist.Ct.App. 1986) (DUI suspect "waived any expectation of privacy . . . by . . . leading the officers directly to [his home]"; "enforcement of our criminal laws . . . is not a game where . . . one is

[8] *See*, *e.g.*, *Griffin v. City of Clanton*, 932 F.Supp. 1359, 1366-67 (M.D. Ala. 1996); *Lockett v. City of Akron*, 714 F.Supp.2d 823, 831-32 (N.D. Ohio 2010); *Haupricht v. Contrada*, No. 3:08CV2961, 2009 WL 5061762, at *3 (N.D. Ohio Dec. 15, 2009); *St. Laurent v. Town of Sturbridge*, No. CIV.A. 89-30005-F, 1990 WL 92470, at *6-7 (D. Mass. June 18, 1990); *Cooper v. Smith*, No. CIV.A. 905CV157, 2007 WL 339174, at *5-6 (E.D. Tex. Jan. 31, 2007).

'safe' if one reaches 'home' before being tagged"; *Welsh* involved "a civil non-jailable offense" and "no immediate and continuous pursuit"), 99-100 (dissent concluded no exigencies justified entry);

- *State v. Paul*, 548 N.W.2d 260, 264-68 (Minn. 1996) (DUI; "a bright-line felony rule" would (1) "send a message . . . that . . . an arrest . . . can be thwarted by beating the police to one's door"; (2) hinder law enforcement by "forc[ing]" officers to determine whether an offense is a felony or misdemeanor "on the spot in the tense and often dangerous circumstances of hot pursuit"; and (3) prohibit warrantless home arrests for misdemeanors where "the underlying conduct is serious" or the suspect's "activity . . . during . . . flight . . . elevates the situation to a serious one"), 268 (dissent concluded "even with hot pursuit and exigent circumstances," entry for misdemeanor is "unreasonable");

- *State v. Alvarez*, 31 So.3d 1022 (La. 2010) (carrying concealed weapon; citing *Santana* policy and distinguishing *Welsh*); *State v. Bell*, 28 So.3d 502, 508-10 (La.Ct.App. 2009) (marijuana possession; *Santana* "recognized the exigent circumstances inherent in a . . . hot pursuit"; distinguishing *Welsh*);

- *City of Middletown v. Flinchum*, 765 N.E.2d 330, 332 (Ohio 2002) (traffic

offenses and resisting arrest; suspect should not get "a free pass merely because he was not charged with a more serious crime"), 333-34 (dissent applied *Welsh*, and reasoned *Santana* involved a felony and destruction of evidence);

- *Lepard v. State*, 542 N.E.2d 1347, 1350 (Ind.Ct.App. 1989) (DUI and resisting officer; "fleeing . . . a police officer creates an exigent circumstance" justifying in-home arrest);
- *LaHaye v. State*, 1 S.W.3d 149, 152-53 (Tex.Ct.App. 2000) (DUI; under *Santana*, "[e]xigent circumstances exist when the police are in hot pursuit"; distinguishing *Welsh* as involving nonjailable offense and no hot pursuit);
- *People v. Wear*, 893 N.E.2d 631, 645-46 (Ill. 2008) (DUI; entry justified under *Santana* because officer "had probable cause to arrest [suspect] at the threshold and [suspect] continued inside"; distinguishing *Welsh* as involving nonjailable offense and no hot pursuit), 647-52 (concurrence concluded hot pursuit cannot justify entry without considering seriousness of crime and totality of circumstances);
- *Brock v. State*, 396 S.E.2d 785, 786-87 (Ga.Ct.App. 1990) (traffic violation; hot pursuit justified entry under *Santana*);

- *State v. Ramirez*, 814 P.2d 1131, 1134-35 (Utah Ct.App. 1991) (backup officer could reasonably believe suspect committed misdemeanor; suspect "cannot reduce a legitimate arrest to a game of 'tag' by reaching 'home' a few steps ahead of the police"; *Welsh* involved no hot pursuit and did not limit entry to felonies);
- *City of Kirksville v. Guffey*, 740 S.W.2d 227, 228-29 (Miss.Ct.App. 1987) (DUI; finding exigent circumstances based on hot pursuit; distinguishing *Welsh* as involving nonjailable offense and no hot pursuit);
- *State v. Ricci*, 739 A.2d 404, 407-08 (N.H. 1999) (disobeying officer; suspect "cannot trigger the need for a warrant by racing the police" to home);
- *State v. Penas*, 263 N.W.2d 835, 837-38 (Neb. 1978) (DUI and evading officer; "'hot pursuit'" is "an exigent circumstance" justifying entry under *Santana*);
- *State v. Niedermayer*, 617 P.2d 911, 913 (Or.Ct.App. 1980) (traffic misdemeanors; citing *Santana*).[9]

[9] The District of Columbia has held that hot pursuit justified a warrantless home entry under *Santana* where a suspect fled a *Terry* stop, suggesting that *a fortiori*, such entry would be justified based on hot pursuit of a fleeing misdemeanant. *Edwards v. United States*, 364 A.2d 1209, 1214 (D.C. 1976).

2. The Ninth And Tenth Circuits, Several District Courts And The Courts Of Seven States Have Held That Hot Pursuit, In And Of Itself, Cannot Justify Warrantless Entry Into A Home To Arrest For A Misdemeanor.

As noted, here the Ninth Circuit concluded that while there might be a hot pursuit under *Santana*, nonetheless it could not justify a warrantless entry into areas of a home – here the curtilage area of the front yard – simply to arrest for a misdemeanor. (App.13-15.) The court distinguished *Santana* as "involv[ing] a fleeing felon and the exigency of potential destruction of evidence," and reasoned *Welsh* "made it clear that the exigency exception to the warrant requirement generally applies only to a fleeing felon." (App.15.) The court denied qualified immunity, reasoning that *Welsh* "clearly established" pursuit of a suspected misdemeanant would "rarely, if ever, justify warrantless entry." (App.22.)

The Ninth Circuit is not alone in this view. In *Mascorro v. Billings*, 656 F.3d 1198 (10th Cir. 2011), the Tenth Circuit denied qualified immunity under similar circumstances. There, officers pursued a suspect into his home after attempting to stop him for a traffic violation. *Id.* at 1202. The court reasoned the offense was, at most, a nonviolent misdemeanor raising no concerns about destruction of evidence. *Id.* at 1205 n.9. The court construed *Santana*'s justification for warrantless entry as resting on exigent circumstances, including potential destruction of

evidence and a fleeing felon. *Id.* at 1207 & n.12, 1209. Relying on *Welsh*, the court found "[t]he warrantless entry based on hot pursuit" unjustified because no exigencies existed – specifically, the intended arrest was for a minor offense and there was little risk of escape, destruction of evidence, or safety concerns. *Id.* at 1207.

The Tenth Circuit also denied qualified immunity, finding it clearly established that hot pursuit of a fleeing suspect cannot justify home entry without additional exigent circumstances, and that *Welsh* held the gravity of the offense "is a vital component of *any* exigent circumstances justifying warrantless [home] entry" – including hot pursuit. *Id.* at 1208-09 (original emphasis). This holding was somewhat surprising, given that only three months earlier, a different panel of the same court had held in an unpublished opinion that an officer was entitled to qualified immunity under similar circumstances, because the law was not clearly established.[10]

Numerous district courts have similarly held that hot pursuit of a fleeing misdemeanant does not justify a warrantless home entry absent additional exigent circumstances.[11]

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[10] *Aragon v. City of Albuquerque*, 423 F.App'x 790, 795 (10th Cir. 2011).

[11] *See*, *e.g.*, *Kolesnikov v. Sacramento County*, No. CIVS-06-2155 RRB EFB, 2008 WL 1806193, at *5 (E.D. Cal. Apr. 22, 2008); *Smith v. City of Sturgis*, No. 1:11-CV-390, 2012 WL

(Continued on following page)

The courts of seven states have joined the Ninth and Tenth Circuits in holding that hot pursuit of a fleeing misdemeanant cannot justify a warrantless home entry without additional exigencies. *See*:

- *State v. Bolte*, 560 A.2d 644, 654-55 (N.J. 1989) (traffic and disorderly persons offenses were "minor"; "hot pursuit alone" cannot justify entry without exigent circumstances);
- *State v. Dugan*, 276 P.3d 819, 830, 832-33 (Kan.Ct.App. 2012) (nonviolent, jailable traffic offense; hot pursuit "alone" does not furnish "absolute exception" to warrant requirement);
- *Butler v. State*, 829 S.W.2d 412, 415 (Ark. 1992) (no exigency where officer pursued a suspect into home to arrest for disorderly conduct allowing 30 days' imprisonment, a "minor offense");
- *State v. Bessette*, 21 P.3d 318, 320-21 (Wash.Ct.App. 2001) (no exigency justified entry in pursuit of a minor possessing alcohol);

3010939, at *8 (W.D. Mich. Jul. 23, 2012) (denying qualified immunity); *Knowles v. City of Benicia*, 785 F.Supp.2d 936, 946-50 (E.D. Cal. 2011) (same); *Sero v. City of Waterloo*, No. C08-2028, 2009 WL 2475066, at *8-9, 11 (N.D. Iowa Aug. 11, 2009) (same); *see Croal v. United Healthcare of Wisconsin, Inc.*, No. 07-CV-837, 2009 WL 913641, at *13-14 (E.D. Wis. Mar. 31, 2009); *Hameline v. Wright*, No. 1:07-CV-69, 2008 WL 2696920, at *6 (W.D. Mich. June 30, 2008).

- *State v. Wren*, 768 P.2d 1351, 1354-55, 1358 (Idaho Ct.App. 1989) (remanding for findings, but holding "hot pursuit, by itself," insufficient to justify warrantless entry);
- *Commonwealth v. Curry*, Nos. 91-429, 430 & 431, 1992 WL 884417, at *2-5 (Va.Cir.Ct. Jan. 6, 1992) (no exigency justified entry for DUI and evading officer; hot pursuit exception "applies only to . . . fleeing felons"; equating "'minor' with misdemeanor and 'serious' with felony");
- *State v. Greer*, No. C.R. 0604013367, 2007 WL 442228, at *3 (Del.Com.Pl. Feb. 6, 2007) (no exigency justified entry for traffic offenses; hot pursuit doctrine applies only to felons).

D. Review Is Necessary to Resolve The Ongoing Conflict Among The Courts And Clarify Whether Hot Pursuit, In And Of Itself, Justifies Warrantless Entry Into A Home To Arrest For A Misdemeanor.

Courts across the country are plainly divided on whether hot pursuit, in and of itself, justifies a warrantless home entry to arrest for a misdemeanor. Not surprisingly, three circuits and one state appellate court have found officers entitled to qualified immunity for warrantless home entries based on hot pursuit

where the underlying offense was a misdemeanor, precisely because the law is unsettled. *See*:

- *Greiner v. City of Champlin*, 27 F.3d 1346, 1351, 1353-54 (8th Cir. 1994) (arrest for public nuisance, disorderly conduct and obstructing legal process; *Welsh* did not "flatly" prohibit warrantless misdemeanor home arrests, circuit and state courts "differed" on "how much uncharted territory *Welsh* [left] open," and state courts in officers' jurisdiction had approved warrantless misdemeanor home arrests based on "hot pursuit");
- *Joyce v. Town of Tewksbury*, 112 F.3d 19, 20, 22 (1st Cir. 1997) (en banc) (arrest for violating domestic restraining order; "hot pursuit" may justify home entry under *Santana*, and domestic-violence crimes are "grave offenses"), 24 (concurrence concluded "hot pursuit" justified warrantless entry, reasoning under *Santana*, it was "reasonable" to follow suspect into home when he refused to cooperate with arrest);
- *Payne v. City of Olive Branch*, 130 F.App'x 656, 661-62 (5th Cir. 2005) (back-up officer could reasonably assume fleeing suspect committed jailable misdemeanor; under *Santana*, "hot pursuit" justifies warrantless entry, whereas *Welsh* involved a less serious offense);
- *Goines v. James*, 433 S.E.2d 572, 576-78 (W.Va. 1993) (*Welsh* did not "clearly

> establish under what circumstances a warrantless home arrest upon hot pursuit from a commission of a misdemeanor" is unconstitutional).

Several district courts have also applied qualified immunity where officers pursued fleeing misdemeanants into a home, because it could not be said that the law was "clearly established."[12]

One scholar has noted the clear division of courts on the issue and observed that it is "unclear whether [*Welsh*] intended to limit *Santana* to fleeing felons." William A. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations*, 38 U.Kan.L.Rev. 439, 469-70 (1990). He further noted that *Welsh* "implicitly suggested that a warrantless home arrest for a minor offense might be reasonable" based on hot pursuit. *Id.* at 446, 469-70.

Petitioner submits that review of this Court's decisions supports the conclusion that *Santana*'s hot pursuit doctrine applies to misdemeanors for the very reason recognized by the majority of courts that have considered the question: A lawful arrest in a public place should not be defeated merely by running into a

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[12] *See*, *e.g.*, *Bash v. Patrick*, 608 F.Supp.2d 1285, 1299-1300 (M.D. Ala. 2009); *Garcia v. City of St. Paul*, No. CIV.0983 (JNE/AJB), 2010 WL 1904917, at *6 (D. Minn. May 10, 2010); *Kolesnikov v. Sacramento County*, No. CIVS-06-2155 RRB EFB, 2008 WL 1806193, at *7 & n.20 (E.D. Cal. Apr. 22, 2008); *Garcia v. City of Imperial*, No. 08CV2357 BTM PCL, 2010 WL 3834020, at *6 (S.D. Cal. Sept. 28, 2010).

residence. It is flatly against the public interest to encourage suspects to flee from arrest by taking refuge in any nearby yard or residence, either their own or, worse yet, someone else's – the latter scenario particularly fraught with the potential to increase exponentially the danger to officers and innocent citizens.

Yet, regardless of how the issue is ultimately resolved, it is plain that the law is unsettled and lower courts are in conflict over whether the hot pursuit doctrine applies where the underlying offense is a misdemeanor. The confusion imposes a particularly onerous burden on law enforcement officers within the Ninth Circuit, like Stanton in California and his colleagues in Oregon, who face the prospect of federal civil rights liability under circumstances where their own states' courts have expressly authorized warrantless home entries in hot pursuit to arrest for a misdemeanor. Law enforcement officers across the country require clear rules in making daily split-second decisions concerning pursuits and arrests that may, in some circumstances, be a matter of life or death. Trial courts, whether confronted with civil rights suits or the ubiquitous suppression hearings of day-to-day criminal court practice, require firm guidelines to assure uniform application of the law, and to avoid the expenditure of scarce public, private and judicial resources in needless litigation. It is essential that this Court grant review.

II. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S DENIAL OF QUALIFIED IMMUNITY CONTRAVENES THIS COURT'S PRECEDENTS AND IT IS NECESSARY TO RESOLVE THE CONFLICT AMONG APPELLATE COURTS CONCERNING APPLICATION OF QUALIFIED IMMUNITY WHERE OFFICERS ENTER A RESIDENCE IN HOT PURSUIT OF A FLEEING MISDEMEANANT.

A police officer is entitled to qualified immunity if "a reasonable officer could have believed [his actions] lawful, in light of clearly established law and the information the . . . officer[ ] possessed." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). This Court has admonished that to be clearly established, "[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. In other words, "existing precedent must have placed the . . . constitutional question beyond debate." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083 (2011). Moreover, clearly established law must be determined "'in light of the specific context of the case, not as a broad general proposition.'" *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). Qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft*, 131 S.Ct. at 2085.

Just last term, this Court summarily reversed the Ninth Circuit's denial of qualified immunity for a warrantless home entry because the Circuit failed to apply these principles. *Ryburn v. Huff*, 132 S.Ct. 987,

990 (2012). This Court reasoned that none of its prior decisions had "found a Fourth Amendment violation on facts even roughly comparable" to those before the Circuit, and indeed a reasonable officer could read this Court's opinions as "pointing in the opposite direction." *Id.* The Ninth Circuit's denial of qualified immunity here again violates these principles and requires intervention by this Court.

1. The Law Concerning Application Of *Santana*'s Hot Pursuit Doctrine To Misdemeanors Is Not Clearly Established, And It Is Necessary To Resolve The Conflict Among Appellate Courts Concerning Application Of Qualified Immunity In Such Cases.

The Ninth Circuit's conclusion that it was clearly established that an officer cannot make a warrantless entry into areas of the home protected by the Fourth Amendment, in hot pursuit of a suspect fleeing arrest for a misdemeanor, is untenable. The Ninth Circuit cited *Welsh* as establishing this rule (App.21-22), but as previously discussed, *Welsh* did not involve a hot pursuit, and its discussion of the hot pursuit doctrine as applied to misdemeanors is, at best, ambiguous – a fact confirmed by the decisions of the appellate courts of 14 states and the Sixth Circuit, which have applied *Santana*'s hot pursuit exception to misdemeanors.[13]

[13] *See* §I.C.1, *supra*.

Safford Unified Sch. Dist. v Redding, 557 U.S. 364, 378-79 (2009) (applying qualified immunity where "cases viewing [the constitutional issue] differently . . . are numerous enough . . . to counsel doubt that [this Court was] sufficiently clear in the prior statement of law"). Indeed, three circuits and one state appellate court have found officers entitled to qualified immunity under similar circumstances post-*Welsh* precisely because the law on the question is not clearly established.[14]

The Ninth Circuit also cited its prior en banc decision in *United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001) as having established that under *Welsh*, hot pursuit would not justify a warrantless entry to arrest for a minor offense. (App.22.; *see* App.15.) However, in *Johnson*, the court expressly noted that it was not confronted with a hot pursuit. 256 F.3d at 907-08. There, an officer attempted to arrest a suspect based on outstanding arrest warrants for misdemeanors including intoxicated driving, driving with a suspended license, resisting arrest, malicious mischief, and criminal impersonation. *Id.* The Ninth Circuit found the hot pursuit exception inapplicable because the exception "only applies when officers are in 'immediate' and 'continuous' pursuit of a suspect from the scene of the crime," and when the officers entered defendant's property, no one had seen the suspect for over half an hour. *Id.* at 907-08. That

[14] *See* §I.D, *supra*.

Johnson did not "clearly establish" that *Santana*'s hot pursuit doctrine was inapplicable to misdemeanors is underscored by the fact that even post-*Johnson*, district courts within the Circuit granted qualified immunity to officers for warrantless entries in hot pursuit to arrest for misdemeanors, because the law was unsettled.[15]

Given the lack of clarity on the issue, Officer Stanton could reasonably believe that he could lawfully enter a home, not just a gated front yard, in hot pursuit of a suspect fleeing arrest for a misdemeanor. Indeed, Stanton's belief was particularly reasonable given that he was trained to follow California law, and California appellate courts have expressly applied *Santana*'s hot pursuit exception to misdemeanors. *People v. Lloyd*, 265 Cal.Rptr. 422, 424-25 (Cal.Ct.App. 1989) (under *Santana*, suspect's refusal to comply with lawful detention for traffic citation justified "hot pursuit" into house to complete arrest; hot pursuit is an exigent circumstance and "the fact that the offenses . . . were misdemeanors is of no significance"); *In re Lavoyne M.*, 270 Cal.Rptr. 394, 395-96 (Cal.Ct.App. 1990) (hot pursuit justified warrantless home entry to arrest for misdemeanor of resisting officer attempting to detain for traffic violations).

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[15] *Kolesnikov v. Sacramento County*, No. CIVS-06-2155 RRB EFB, 2008 WL 1806193, at *7 & n.20 (E.D. Cal. Apr. 22, 2008); *Garcia v. City of Imperial*, No. 08CV2357 BTM PCL, 2010 WL 3834020, at *6 (S.D. Cal. Sept. 28, 2010).

The absence of clearly established law concerning application of *Santana*'s hot pursuit doctrine to misdemeanors, in and of itself, entitles Stanton to qualified immunity.

Unfortunately, the Ninth Circuit is not alone in its refusal to apply qualified immunity in these circumstances. As noted, in *Mascorro v. Billings*, 656 F.3d 1198 (10th Cir. 2011), the Tenth Circuit similarly found that the law governing hot pursuit for misdemeanors was "clearly established" and denied qualified immunity – a holding all the more remarkable (and ironic) given that only three months earlier a panel of the same court had, in an unpublished disposition, applied qualified immunity in similar circumstances because the law was not "clearly established."[16]

There is a clear circuit split on the issue of whether the law governing hot pursuit to arrest for a misdemeanor is clearly established, and it is vital that this Court grant review to assure proper application of the doctrine of qualified immunity and to resolve the ongoing conflict among the courts.

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[16] *See* §I.C.2 & n.10, *supra*.

2. The Law Concerning An Officer's Ability To Enter Portions Of The Curtilage Used To Access A Residence In Order To Effect An Arrest For A Jailable Offense Was Not Clearly Established At The Time Of The Incident.

Even putting aside qualified immunity based solely on the lack of clarity concerning the hot pursuit doctrine, Officer Stanton is still entitled to qualified immunity based on the absence of clearly established law concerning officers' ability to enter portions of the curtilage used for access to a residence in order to effect an arrest for something more than a minor, non-jailable offense.

As a threshold matter, Stanton could reasonably believe he was entitled to enter plaintiff's front yard because it was used to access the residence. Ninth Circuit cases predating the incident had held that officers, without a warrant, may enter portions of curtilage used for ingress to a residence. For example, in *United States v. Roberts*, 747 F.2d 537, 540, 542 (9th Cir. 1984), the court held officers did not violate the Fourth Amendment by approaching a residence's front door through the front yard in the curtilage. The court noted that "anyone may 'openly and peaceably . . . walk up the steps and knock on the front door of any man's "castle"'" to question the occupant – "'whether the questioner be a pollster, a salesman, or an officer of the law.'" *Id.* at 543; *see also United States v. Magana*, 512 F.2d 1169, 1170-71 (9th Cir. 1975) (officers constitutionally entered driveway in

curtilage to investigate and position themselves to "follow up" with arrest or search); *United States v. Garcia*, 997 F.2d 1273, 1279-80 (9th Cir. 1993) (officers were "no different from any other member of the public" when they constitutionally entered back porch, believing it was front entrance, to investigate).

Similarly, the California Supreme Court had held officers may constitutionally enter areas adjacent to a residence used for ingress, such as a front porch or driveway. *People v. Edelbacher*, 766 P.2d 1, 20 (Cal. 1989) (officer constitutionally entered front porch, driveway, and front yard on "the normal route used by visitors approaching the front doors"); *see also Lorenzana v. Superior Court*, 511 P.2d 33, 35 (Cal. 1973) ("A sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public [and officers] to enter").

Moreover, a California appellate court had held that an officer could properly hop a fence into a backyard in the curtilage to detain a suspect for trespassing, reasoning that (1) an entry into the curtilage does not per se violate the Fourth Amendment, (2) residents have no reasonable expectation of privacy in areas "furnishing normal access to the house," and (3) the officer did not unreasonably "depart[ ] from a normal [access] route" considering "the public concern for . . . prevention of crime" served by the detention. *People v. Thompson*, 270 Cal.Rptr. 863, 873-75 (Cal.Ct.App. 1990); *see also People v. Chavez*, 75 Cal.Rptr.3d 376, 381 (Cal.Ct.App. 2008) ("'police with legitimate business may enter areas of the

curtilage which are impliedly open, such as access routes to the house' ").

Here, from outside plaintiff's front gate, Officer Stanton could see the front porch and door and believed the suspect was about to go up the stairs to the door. (App.11 n.4, 70; ER 3, 6; SER 12.) The gate opens by pulling on a string hanging outside and leads directly to the front door. *See* n.3, *supra*. Thus, although the yard was enclosed, plaintiff could reasonably expect the public – *e.g.*, visitors, solicitors, or delivery persons – to open the gate and enter the yard to reach the front door. Since the public could do so, an officer could reasonably believe he also could enter without a warrant.

The Ninth Circuit denied qualified immunity because it concluded that *Oliver v. United States*, 466 U.S. 170 (1984), clearly established plaintiff's front yard was curtilage entitled to the same degree of Fourth Amendment protection as the home, and therefore Stanton's warrantless entry was "presumptively unconstitutional." (App.21-22.) Yet, in *Oliver*, a case involving the "open fields" doctrine, the Court expressly declined to consider "the scope of the curtilage exception to the open fields doctrine or *the degree of Fourth Amendment protection afforded the curtilage, as opposed to the home itself*." 466 U.S. at 180 n.11 (emphasis added).

Two years later, in *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986), where the Court found that officers could validly look into a fenced yard from the

air without violating the Fourth Amendment, the Court held that depending on the nature and extent of public access, curtilage may be entitled to a lesser expectation of privacy, and thus a lesser degree of Fourth Amendment protection, than the residence itself. *Ciraolo* established – consistent with the Ninth Circuit and California cases discussed above – that merely declaring an area "curtilage" does not *ipso facto* entitle it to the same protection as the home; rather, this Court suggested that where the public may access the area in a particular way, the police may also do so without a warrant.

To be sure, this Court recently suggested that officers may violate the Fourth Amendment by physically entering a home's curtilage without a warrant for purposes other than to knock on the front door. *Florida v. Jardines*, No. 11-564, 2013 WL 1196577, at *4-5 ___ U.S. ___ (Mar. 26, 2013). But in 2008, when the incident here occurred, Officer Stanton could reasonably have believed his conduct was constitutional.

Moreover, even if *Welsh* and *Johnson* are construed as requiring additional exigencies besides hot pursuit of a misdemeanant to justify entering a home, a reasonable officer could conclude such circumstances existed here. *Welsh* did not foreclose the possibility that sufficient exigency could exist even where the offense is "minor," nor even define "minor" to include misdemeanors. *See Welsh*, 466 U.S. at 749 n.11, 753. Since *Welsh* involved a civil, non-jailable traffic offense, *id.* at 754, Stanton could reasonably conclude the jailable misdemeanor here was not "minor."

Stanton could also reasonably conclude additional exigencies justified entry. He was called to investigate a fight involving a baseball bat at 1:00 a.m., in a gang-ridden area where gang members were armed with guns and knives. (App.6; ER 1-2, 4.) Stanton saw the suspect, one of three men at the fight scene, cross the street upon seeing the police car and hurry toward plaintiff's apartment, ignoring the officer's commands to stop and concealing himself behind a six-foot-high, solid wood gate. (App.6-7, 17; ER 1, 5.) Stanton could reasonably believe the suspect might have been involved in the fight, might be carrying a concealed weapon, or might have entered the home to arm himself and then return to the street; or someone armed inside the residence might attempt to interfere with the arrest; or the suspect might escape. Since *Welsh* involved none of these circumstances, Stanton could reasonably believe the circumstances were exigent.

In short, no clearly established law put Officer Stanton on notice that he could not pursue a suspect he was attempting to arrest in public for a jailable misdemeanor, through a gate apparently used by the public to reach a residence's front door, particularly where the suspect might have been involved in violence moments before.

The Ninth Circuit's rejection of qualified immunity contravenes this Court's precedents. It conflicts with the decisions of other circuits applying qualified immunity, numerous decisions finding that "hot pursuit" of a fleeing misdemeanant justifies a warrantless home entry, and prior Ninth Circuit and California

decisions holding officers may enter areas of curtilage used by the public for ingress to a residence. Review is essential to again compel the Ninth Circuit to adhere to this Court's precedents, to resolve the confusion concerning warrantless arrests for misdemeanors and clarify application of qualified immunity in these circumstances.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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