No. 12-1217

IN THE SUPREME COURT OF THE UNITED STATES

MIKE STANTON,
Petitioner,
v.

DRENDOLYN SIMS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was it reasonable for a police officer to undertake a warrantless intrusion into the curtilage of a third-party's home, kicking open her gate and causing serious injury, in order to pursue an individual suspected only of failing to stop in response to the officer's order, where the officer lacked probable cause to believe that a crime had been committed at all?

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INTRODUCTION

Petitioner asks this Court to review a fact-bound application of a well-established standard. It is black-letter law that the Fourth Amendment's warrant requirement yields upon a showing of probable cause together with exigent circumstances, and that the existence of an exigency, in turn, is evaluated based on the totality of the circumstances. This standard is consistently applied by the courts of appeals and state courts, and it is the standard the court of appeals applied here.

Examining the totality of the circumstances in this case, the court of appeals held that the exigency exception did not justify an officer's late-night warrantless intrusion into the curtilage of the home of a non-suspect, Respondent Drendolyn Sims, where the officer was chasing an individual suspected of nothing more than failure to respond to the officer's order to stop walking away, where the officer could have knocked at Sims's gate, and where there was no danger to the officer or anyone else.

Petitioner complains that the court of appeals did not apply a per se rule holding that an exigency necessarily exists whenever an officer is chasing someone, no matter what the chased individual is suspected of doing and regardless of whether a third-party's rights are impinged or any other circumstances. But this Court has consistently resisted creating per se rules to govern the fact-bound inquiry into exigent circumstances, and Petitioner provides no reason to depart from that approach now.

Inherent in the nature of legal standards such as "exigent circumstances" and "clearly established law" is that they produce different outcomes in different factual scenarios. Petitioner's long list of cases purportedly showing a conflict of authority on the question of exigent circumstances demonstrates no more than this legal truism. Policing individual applications of this Court's well-settled standards regarding exigent circumstances and qualified immunity would be an inefficient use of the Court's resources.

Additionally, this case presents a poor vehicle to reconsider this Court's standard for determining exigency. Regardless of whether exigency existed, kicking open Sims's gate without a warrant violated the Fourth Amendment because Petitioner lacked probable cause to believe the individual he was chasing had committed a crime.

The petition should be denied.

STATEMENT OF THE CASE

In the early morning hours of May 27, 2008, Petitioner Mike Stanton kicked open the gate of Respondent Drendolyn Sims's small front yard, slamming her against concrete stairs and causing a head laceration, a shoulder injury, and temporary loss of consciousness or incoherence, for which Sims was taken to the hospital. Pet. App. 6-7.

Stanton had come to Sims's neighborhood to investigate a report of an "unknown disturbance" involving a baseball bat. *Id.* at 6. When Stanton and his

partner arrived, they saw Nicholas Patrick and two other men, none of whom was carrying a baseball bat or any other type of weapon, walking in the street. *Id.* The officers had no information linking Patrick to the disturbance, nor did they observe him engage in any conduct that would suggest he had been involved in the disturbance. *Id.* at 6-7. Nevertheless, according to Stanton, he called out for Patrick to stop, *id.* at 7; Sims, who was standing in her yard nearby, did not hear any such order. 9th Cir. Excerpts of Record 11, 24-26 (Sims Dep. at 125; Sims Decl.).

Patrick walked through Sims's gate, and it shut behind him. Pet. App. 7. The gate is part of a solid wood fence more than six feet high that entirely encloses the front yard to Sims's home, *id.* at 7, and ensures "complete seclu[sion]." *Id.* at 8. Sims uses the yard for socializing and for storing her wheelchair. *Id.*

After Patrick entered, Stanton kicked open the gate, injuring Sims, who was standing behind it when it flew open. *Id.* at 7. The gate struck her and knocked her into her front stairs; she was temporarily unconscious, or at least became incoherent, from the blow. *Id.*

Sims sued Stanton for damages under 42 U.S.C. § 1983 and state tort law. After discovery, the district court granted Stanton summary judgment. Regarding Sims's unconstitutional search claim (the only claim at issue here), the district court granted Stanton qualified immunity, holding that the unconstitutionality of Stanton's conduct was not clearly established. *Id.* at 62. The Ninth Circuit reversed, holding that given all the circumstances — chiefly, the minor nature of the offense

for which Stanton had pursued Patrick, but also the fact that a third party's constitutional rights were implicated, and the possibility that Stanton could have knocked on the gate and asked to speak with Patrick — the pursuit did not qualify as an exigency justifying a warrantless entry into the curtilage of Sims's home. *Id.* at 10-11 & n.4, 14-15. In the court of appeals, Sims also argued that Stanton's entry was unjustified because he lacked probable cause to believe Patrick had committed a crime, but the court of appeals found it unnecessary to reach that question because it found no exigency. *Id.* at 14 n.5. Citing both this Court's and its own case law on exigency and curtilage, the court of appeals held that the relevant law was clearly established and therefore reversed the grant of qualified immunity. *Id.* at 20-23.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Implicate A Split Of Authority Regarding The Standard For Evaluating Exigent Circumstances.

The decision below applied the totality-of-the-circumstances test prescribed by this Court, and consistently applied by lower courts, to the question whether exigent circumstances existed. This Court has repeatedly instructed that "'the fact-specific nature of the reasonableness inquiry,' demands that we evaluate each case of alleged exigency based 'on its own facts and circumstances.'" *Missouri v. McNeely*, 133 S. Ct. 1552, 1559 (2013) (quoting, respectively, *Ohio v. Robinette*, 519 U.S. 33, 39 (1996), and *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931)); *see, e.g.*, *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006); *Illinois v. McArthur*, 531

U.S. 326, 331 (2001); *Cupp v. Murphy*, 412 U.S. 291, 296 (1973). One fact relevant to this exigent-circumstances inquiry is whether the officer is engaged in a "hot pursuit": in *United States v. Santana*, 427 U.S. 38 (1976), the Court applied the exigent-circumstances exception where police pursued a drug dealer into her house to arrest her. *See id.* at 40-43. The Court has also "h[e]ld that 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." *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984). In *Welsh*, the Court refused to apply the exigent-circumstances exception because the police were investigating a traffic offense; the Court explained 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, such as the kind at issue in this case, has been committed." *Id.*

Applying this body of law, as well as its own prior decision in *United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001) (en banc), the court of appeals considered "whether the circumstances justified the warrantless entry." Pet. App. 12. The court correctly held that Stanton's pursuit of Patrick for failing to stop for an officer's order did not give rise to exigent circumstances justifying intrusion into the curtilage of a third party's home where Stanton could have knocked and asked to speak to Patrick. *Id.* at 14-15.

A. Petitioner claims that lower courts applying *Santana* and *Welsh* have created a confused body of case law applying the exigent-circumstances exception. In support of this claim, Petitioner marshals cases applying the exception in particular "hot pursuit" situations involving various non-felony offenses. *See* Pet. 20-30. But Petitioner's narrow focus on "hot pursuit" misses the forest for the trees: as Petitioner's authorities themselves reflect, courts evaluate exigency, as this Court has instructed, based on *all* the circumstances, not just the legal classification of the crime for which the suspect is being pursued. *See, e.g., State v. Alvarez*, 31 So. 3d 1022, 1024 (La. 2010) (permitting warrantless entry because "[a]lthough the crime of carrying a concealed weapon is a misdemeanor and not a felony, it is a jailable offense and one involving risk to public safety"); *LaHaye v. State*, 1 S.W.3d 149, 151-152 (Tex. Ct. App. 1999) (permitting warrantless entry where suspect was wanted for traffic violations and evading arrest but owner of apartment to which suspect fled consented to officer's entry).

That the exigency inquiry looks to the totality of the circumstances is a point of consensus, not conflict, among the cases Petitioner characterizes as in disagreement with each other. *See, e.g., State v. Bell*, 28 So. 3d 502, 508-09 (La. Ct. App. 2009) (finding exigent circumstances after considering "the circumstances of the case at bar" and noting other totality-of-circumstances evaluations of exigency by Louisiana courts); *State v. Ricci*, 739 A.2d 404, 406 (N.H. 1999) (finding exigent circumstances, and explaining that "[w]hether exigent circumstances exist is judged

on the totality of the circumstances"); *State v. Bolte*, 560 A.2d 644, 654 (N.J. 1989) (finding no exigent circumstances, and explaining that "the question whether hot pursuit by police justifies a warrantless entry depends on the attendant circumstances"); *State v. Bessette*, 21 P.3d 318, 320-21 (Wash. Ct. App. 2001) (finding no exigent circumstances after analyzing six factual factors).

Thus, the supposed conflict Petitioner reads into the cases he cites is nothing more than the repeated application of a fact-intensive standard under which difference circumstances produce different outcomes. *Compare United States v. Johnson*, 106 F. App'x 363, 367 (6th Cir. 2004) (permitting warrantless entry where suspect was armed), *Gasset v. State*, 490 So. 2d 97, 98-99 (Fla. Ct. App. 1986) (permitting warrantless entry where suspect had "jeopardized his own safety, the safety of the officers, and that of the general public" by leading officers on a high-speed chase at speeds up to eighty miles an hour through a residential area), *and State v. Ramirez*, 814 P.2d 1131, 1135 (Utah Ct. App. 1991) (permitting warrantless entry where "the circumstances of the repeated backup call and [the officer's] arrival while a chase was in progress provided reasonable justification for Officer Rowley to infer that appellant had committed a serious crime"), *with Mascorro v. Billings*, 656 F.3d 1198, 1207 (10th Cir. 2011) (finding no exigency because "the intended arrest was for a traffic misdemeanor committed by a minor, with whom the officer was well acquainted, who had fled into his family home from which there

was only one exit" and because there was no risk of destruction of evidence or public safety concerns).

Quoting snippets from this large body of jurisprudence, Petitioner suggests that certain jurisdictions apply conflicting per se rules regarding "hot pursuit." But these jurisdictions' more recent appellate cases demonstrate that no such conflict exists, as the cases apply the consensus totality-of-the-circumstances approach and make clear that exigency does not depend on the nature of the crime alone. For example, Petitioner cites a Virginia trial court decision for the proposition that, in that jurisdiction, the hot pursuit exception "applies only to . . . fleeing felons," Pet. 28 (citing *Commonwealth v. Curry*, 26 Va. Cir. 179 (Va. Cir. Ct. 1992)), and Petitioner contrasts that position with the statement in *Lepard v. State*, 542 N.E.2d 1347, 1350 (Ind. Ct. App. 1989), that "fleeing . . . a police officer creates an exigent circumstance." Pet. 23. Neither statement is representative of the case law in Virginia or Indiana. The Virginia Supreme Court has explained that "[t]he test for whether exigent circumstances were present is fact-specific," *Robinson v. Com.*, 639 S.E.2d 217, 226 (Va. 2007) (citation and internal quotation marks omitted), and has enumerated ten factors, of which seriousness of the crime is only one, to assess exigency. *See id.* And recent Indiana appellate decisions have repeatedly recognized that "[t]he validity of a warrantless arrest is determined by the facts and circumstances of each case." *McDermott v. State*, 877 N.E.2d 467, 473-74 (Ind. Ct.

App. 2007) (quoting *State v. Straub*, 749 N.E.2d 593, 598 (Ind. Ct. App. 2001); internal quotation marks omitted).

The Petition emphasizes two older cases from California's intermediate appellate court that could be read to permit arrest in any instance of "hot pursuit." *See* Pet. 21 (citing *People v. Lloyd*, 265 Cal. Rptr. 422, 424-25 (Cal. Ct. App. 1989), and *In re Lavoyne M.*, 270 Cal. Rptr. 394, 395-96 (Cal. Ct. App. 1990)); Pet. 35 (citing the same cases). The Supreme Court of California, however, has more recently explained that exigency is assessed based on the totality of the circumstances. *See People v. Thompson*, 135 P.3d 3, 13 (Cal. 2006) ("taking into account all of the circumstances" in determining that a warrantless home entry to arrest a DUI suspect was reasonable). The California high court noted a split of authority regarding a question not presented here — whether *Welsh* created "a bright-line rule limiting warrantless entries to felonies," *id.* at 11 — and the California court adopted the majority view rejecting such a rule. *See id.* at 10-11. At the same time, the court declined to impose a per se rule of the *opposite* kind, either:

> In holding that exigent circumstances justified the warrantless entry here, we need not decide — and do not hold — that the police may enter a home without a warrant to effect an arrest of a DUI suspect in *every* case. We hold merely that the police conduct here, taking into account all of the circumstances, was reasonable — with reasonableness measured as a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.

Id. at 13 (citation and internal quotation marks omitted, emphasis in original). Like the California Supreme Court, the court of appeals here embraced neither a per se

rule *against* finding exigency in cases of "hot pursuit" where the suspect is sought for a minor crime, nor a per se rule that "hot pursuit" *always* constitutes an exigent circumstance; rather, the court of appeals applied the same totality-of-the-circumstances standard that this Court has prescribed and lower courts consistently apply. *See* Pet. App. 14-15.

Petitioner cites various exigency cases in which courts have granted qualified immunity, Pet. 29-30, but cases do not conflict simply because they reach different conclusions on different facts. Thus, although Petitioner expresses surprise that a single federal court of appeals could, in the same year, grant qualified immunity in one case involving a warrantless entry and deny qualified immunity in another, *see* Pet. 25-26, these results follow easily from the fact-specific nature of the totality-of-the-circumstances inquiry. *Compare Mascorro*, 656 F.3d at 1207 (finding no exigency because "the intended arrest was for a traffic misdemeanor committed by a minor, with whom the officer was well acquainted, who had fled into his family home from which there was only one exit" and because there was no risk of destruction of evidence or public safety concerns), *with Aragon v. City of Albuquerque*, 423 F. App'x 790, 794 (10th Cir. 2011) (suspect had "threatened an officer" and then retreated into his home, so a reasonable officer could conclude he intended to arm himself).

Petitioner also cites several cases that pre-date this Court's 1984 decision in *Welsh*, *see* Pet. 24 & n.9 (citing District of Columbia, Nebraska, and Oregon cases

from 1976, 1978, and 1980, respectively). Obviously, these demonstrate nothing about the state of exigency law as it has developed since *Welsh*.

Ultimately, Petitioner, in the guise of asking the Court to sort out a conflict regarding the exigent-circumstances standard, is asking this Court to develop a new rule that "hot pursuit" for *any* crime creates an exigent circumstance no matter what the surrounding circumstances. But in this field, the Court has wisely refrained from imposing per se rules, which fail to account for the diversity of circumstances faced by law enforcement. Additionally, per se rules would create under- and over-generalizations too rigid to encapsulate the fact-intensive nature of the underlying Fourth Amendment "reasonableness" standard that the exigent-circumstances exception implements. *See McNeely*, 133 S. Ct. at 1561 (refusing to "depart from careful case-by-case assessment of exigency and adopt [a] categorical rule" and noting "the 'considerable overgeneralization' that a per se rule would reflect" (quoting *Richards v. Wisconsin*, 520 U.S. 385, 393 (1997)); *see also id.* at 1564 (plurality opinion) ("Numerous police actions are judged based on fact-intensive, totality of the circumstances analyses rather than according to categorical rules, including in situations that are more likely to require police officers to make difficult split-second judgments.").

B. The court of appeals correctly applied the totality-of-the-circumstances test to reject the defense of qualified immunity. The court of appeals had previously explained, in an en banc decision, that the minor nature of the offense for which a

suspect is pursued "weighs heavily against" finding exigency, and that the need to "encroach[] on the property of a person who did not create the exigent circumstances and was completely unrelated to the suspect and his misdemeanors" further diminishes the reasonableness of a warrantless entry. *Johnson*, 256 F.3d at 908-09 & n.6. Petitioner attempts to distinguish *Johnson* as not involving a "hot pursuit" because the pursuit was not "immediate" and "continuous," *see* Pet. 34, but the exigency analysis in *Johnson* did not end with the question of "hot pursuit." Instead, as this Court's exigent-circumstances jurisprudence instructs, the court of appeals went on to consider the other circumstances of the case, including the seriousness of the offense and the involvement of a third party (which are the main factors that led to the decision below). The court of appeals in *Johnson* considered these circumstances not in the abstract, but as they applied to Johnson's case. *See* 256 F.3d at 908 (explaining that the minor nature of the offense allegedly committed by the suspect whom the officers sought on Johnson's property "weighs heavily against" a finding of exigent circumstances); *id.* at 909 ("Johnson's lack of involvement in the situation that created the exigency is another factor weighing against the reasonableness of the warrantless entry.").

As in Petitioner's attempt to discern a circuit split, Petitioner misreads the case law by focusing exclusively on the question of "hot pursuit" rather than the entire exigency analysis, which looks to the totality of the circumstances. The Ninth Circuit's consideration of the seriousness of the offense and of the appropriateness

of an intrusion onto a third party's property was part of its exigency analysis in *Johnson* and therefore established the legal principles that should have informed Stanton that no exigent circumstances justified a warrantless intrusion here.

II. This Court's Case Law Clearly Establishes That Sims's Private Fenced-In Front Yard Was Curtilage.

Petitioner does not argue that the court of appeals was incorrect to hold that Sims's enclosed front yard was curtilage, or that there is a split of authority on the issue. Rather, Petitioner argues only that the law was insufficiently clear to overcome qualified immunity. *See* Pet. 37-40.

In this regard, Petitioner attacks the lower court's reliance on *Oliver v. United States*, 466 U.S. 170 (1984), *see* Pet. 39, but Petitioner does not even mention *United States v. Dunn*, 480 U.S. 294 (1987), upon which the court of appeals also relied. *See* Pet. App. 10-11 & n.4. It is unnecessary to debate the significance of *Oliver*, because *Dunn* is sufficient to resolve the case, as the court of appeals recognized. *Id.* at 11 n.4 ("Of course, applying the *Dunn* factors to Sims's yard leads to the same result.").

In *Dunn*, this Court instructed that

> curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

480 U.S. at 301.

Dunn easily answers the question whether Sims' fenced-in front yard was curtilage, given the proximity of the yard to the home, the enclosed nature of the yard, the high degree of privacy that Sims enjoys there, and the six-foot-high fence erected to maintain privacy in the yard. Pet. App. 11 n.4. *Dunn* was decided more than twenty years before Stanton's warrantless intrusion, and its factors so clearly indicate that Sims's yard is curtilage that Stanton should have been on notice that his warrantless entry required probable cause and exigent circumstances. *See generally Hope v. Pelzer*, 536 U.S. 730, 739-41 (2002) (rejecting requirement that a case decided on "materially similar" facts must exist for law to be "clearly established").

Petitioner attempts to muddy the waters by citing cases discussing a police officer's entitlement to approach a home in the manner customarily available to any member of the public. *See* Pet. 37-38. These cases have no application here, because no member of the public would think that a permissible way to visit Sims would be to kick in her gate. For instance, Petitioner cites *United States v. Roberts*, 747 F.2d 537 (9th Cir. 1984), for the proposition that "anyone may openly and peaceably walk up the steps and knock on the front door of any man's castle," Pet. 37 (citation, internal quotation marks, and Petitioner's alteration marks omitted), but the adverb "peaceably" easily distinguishes that case from this one, in which Stanton entered Sims's yard violently enough to send her to the hospital. In fact, one of the reasons the court of appeals held Stanton's actions to be unreasonable under the

Fourth Amendment is that he could have (as *Roberts* put it) "peaceably . . . knock[ed]," but he chose not to do so. *See* Pet. App. 15.

The court of appeals was correct to reject Stanton's argument that Sims's yard was not curtilage under clearly established law.

III. The Answer To the Questions Presented Will Not Affect The Outcome Of This Case Because Petitioner Lacked Probable Cause.

This case is a poor vehicle to consider Petitioner's argument for a new per se rule governing exigent circumstances because such a rule would not change the outcome in this case. The exigency exception to the warrant requirement depends on both probable cause and exigent circumstances, and the absence of either one dooms a warrantless home intrusion under the Fourth Amendment. *See, e.g., Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (per curiam) (citing *Payton v. New York,* 445 U.S. 573 (1980)). Here, not only was the intrusion unjustified by exigent circumstances, but Stanton also lacked probable cause to believe that Nicholas Patrick had committed a crime.

The only crime Petitioner has identified as a basis for a finding of probable cause is a violation of California Penal Code § 148, which criminalizes "willfully resist[ing], delay[ing], or obstruct[ing] any public officer . . . in the discharge or attempt to discharge any duty of his or her office or employment."* The California

* Although the existence of probable cause does not depend on the particular crime the officer subjectively believed he was investigating, *see Devenpeck v. Alford*, 543 U.S. 146, 153 (2004), the fact that Petitioner limited his probable cause argument to § 148 in the court of appeals narrows the probable cause inquiry before this Court, because arguments not raised below are waived.

courts have held that this provision applies to the failure to submit to a detention only where the detention is itself lawful and the subject is aware that the officer is attempting to detain him. *See People v. Allen*, 167 Cal. Rptr. 502, 505-06 (Cal. Ct. App. 1980); *see also People v. Ramirez*, 44 Cal. Rptr. 3d 813, 816 (Cal. Ct. App. 2006) ("*Allen* . . . permits detention when a *lawfully* stopped suspect attempts to flee, thus delaying performance of the officer's 'official duty.'" (citation omitted; emphasis in original)).

Here, as Respondent argued below, *see* Pet. App. 14 n.5 (acknowledging that the parties "fiercely debated" the issue, but finding it unnecessary to resolve), Stanton lacked probable cause to believe that Patrick had violated Penal Code § 148, for two reasons. First, the alleged initial attempt to detain Patrick was unlawful. "[A]n investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful[.]" *In re Tony C.*, 582 P.2d 957, 959 (Cal. 1978) (citing *Terry v. Ohio*, 392 U.S. 1, 22 (1968)), *corrected*, 697 P.2d 311 (Cal. 1985). When Stanton allegedly ordered Patrick to stop, Stanton was investigating a disturbance involving a baseball bat. Patrick did not have a bat or any other weapon and engaged in no conduct that suggested any connection to the reported disturbance. Pet. App. at 6-7. Stanton had no reason to suspect Patrick of any criminal activity, let alone involvement in a disturbance involving a baseball bat. Stanton thus lacked reasonable suspicion to detain Patrick. *See generally Ybarra v. Illinois*, 444 U.S. 85, 91-94, 96 n.10 (1979) (finding no reasonable suspicion for *Terry* frisk of patron in a

bar where police had a warrant to search the bar itself and evidence of drug activity implicating the bartender, but no evidence that patron himself posed any danger; the Court noted that "[t]he circumstances of this case do not remotely approach those in which the Court has said that a search may be made on less than probable cause"); *see, e.g., Romero v. Story*, 672 F.3d 880, 886, 888 (10th Cir. 2012) (no reasonable suspicion where police knew only that suspect was present in location where vandalism had been reported and was the same race as the alleged vandal); *United States v. Jaramillo*, 25 F.3d 1146, 1147-49, 1152 (2d Cir. 1994) (rejecting *Terry* frisk of patron of bar based on the fact that two *other* patrons had exchanged a gun when the officers arrived at the bar, because *Terry* does not authority officers to frisk "a person in a public place where the officers have no specific and articulable facts on which to base a suspicion of that person in particular"); *Tony C.*, 582 P.2d at 961-63 (two black males' presence in an area where robberies by three black males had been reported did not justify *Terry* stop).

Second, there is a dispute of fact regarding whether Stanton in fact instructed Patrick to stop. *See* Appellant's Opening Br., *Sims v. Stanton*, No. 11-55401, at 5-6, 10 (9th Cir. filed Aug. 17, 2011) (noting disputes of fact, including whether Stanton called for Patrick to stop); Appellant's Reply Br., *Sims*, at 5 (9th Cir. filed Oct. 17, 2011) (noting divergence of Petitioner's and Respondent's accounts). Stanton claims that he ordered Patrick to stop. Pet. App. 7. But Sims,

who was standing behind her gate, testified at deposition that she did not hear any such order. 9th Cir. Excerpts of Record 11, 24-26 (Sims Dep. at 125; Sims Decl.).

Because, as a matter of California law, a violation of Penal Code § 148 requires both a lawful detention order and the subject's knowledge of the attempt to detain him, and these elements are either lacking (the lawful order) or in doubt (knowledge), Stanton cannot establish that he had probable cause to believe a crime had been committed when he kicked open Drendolyn Sims's gate and seriously injured her. Therefore, even if Stanton could demonstrate exigency, he would still have violated Sims's clearly established Fourth Amendment rights because he lacked probable cause for his warrantless intrusion.

CONCLUSION

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

Respectfully submitted,

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