

No. 09-1272

In the Supreme Court of the United States

COMMONWEALTH OF KENTUCKY, PETITIONER

v.

HOLLIS DESHAUN KING

*ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

NEAL KUMAR KATYAL
*Acting Solicitor General
Counsel of Record*

DAVID S. KRIS
LANNY A. BREUER
Assistant Attorneys General

ROY W. MCLEESE III
*Acting Deputy Solicitor
General*

ANN O'CONNELL
*Assistant to the Solicitor
General*

JOHN F. DE PUE
*Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

QUESTION PRESENTED

Whether police officers violate the Fourth Amendment by entering a residence with probable cause but without a warrant, based on a reasonable belief that evidence inside the residence is being destroyed, if it was reasonably foreseeable to the officers that persons inside the residence might destroy evidence in response to the officers' prior lawful conduct of knocking on the door and announcing their presence.

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INTEREST OF THE UNITED STATES

This case presents the question whether police officers violate the Fourth Amendment by entering a residence with probable cause but without a warrant, based on a reasonable belief that evidence inside the residence is being destroyed, if it was reasonably foreseeable to the officers that persons inside the residence might destroy evidence in response to the officers' prior lawful conduct of knocking on the door and announcing their presence. The Court's analysis and resolution of that question will affect the conduct of federal law enforcement officers and the admissibility of evidence offered in federal criminal prosecutions. Accordingly, the United States has an interest in the proper resolution of the question presented.

STATEMENT

Following a conditional guilty plea in the Fayette Circuit Court, respondent was convicted of drug trafficking and related offenses under Kentucky law. Pet. App. 37a. He was sentenced to 11 years in prison. *Ibid.* The Kentucky Court of Appeals affirmed the circuit court's denial of respondent's motion to suppress evidence seized during a warrantless search of the apartment where respondent was staying. *Id.* at 13a-14a. The Kentucky Supreme Court reversed, concluding that the evidence seized during the search was obtained in violation of the Fourth Amendment. *Id.* at 34a-50a.

1. Evidence introduced during a suppression hearing showed that, after an undercover informant purchased crack cocaine from a drug trafficker, a detective monitoring the transaction saw the seller running into the breezeway of a nearby apartment building. Pet. App. 2a-3a, 35a; J.A. 20. The detective communicated this information and a description of the suspect to uniformed officers by radio. The uniformed officers arrived at the location and, at the detective's instruction, began to move toward the apartment building to arrest the suspect. Pet. App. 3a. The uniformed officers were already outside of their vehicle when the detective said over the radio that the suspect had entered the apartment at the back of the breezeway, on the right side. *Ibid.*, J.A. 42-44. The uniformed officers therefore did not hear that information. Pet. App. 3a, 5a; J.A. 43-44. The officers heard a door shut in the back of the breezeway, but they were uncertain whether the suspect had entered the apartment on the right or the left. J.A. 21-23, 41-45; Pet. App. 3a. The officers then smelled a strong odor of marijuana emanating from the door on the left, and they concluded that the left door had re-

cently been opened. J.A. 22-23; Pet. App. 14a. One of the officers then knocked on the door and announced, “This is the police.” J.A. 23.

Although no one responded, the officers heard movement from within the apartment indicating to them, based on their past experience of hearing similar sounds, that the occupants were in the process of destroying evidence. J.A. 24, 42; Pet. App. 4a, 6a, 9a. The officers then kicked open the door, entered the apartment, and conducted a protective sweep in an unsuccessful attempt to locate the suspect. J.A. 25, 26; Pet. App. 4a. The officers did, however, find three individuals in the apartment, one of whom was smoking a marijuana cigarette. J.A. 25; Pet. App. 4a. The police also saw marijuana and powder cocaine on the coffee table and the kitchen counter, in plain view. J.A. 25-27; Pet. App. 4a. The officers placed the occupants of the apartment under arrest, including respondent. J.A. 27; Pet. App. 4a.

2. Before his trial for drug trafficking and related offenses, respondent moved to suppress the evidence seized during the search of the apartment as the fruit of an unlawful warrantless entry. The trial court denied the motion. Pet. App. 10a. The court reasoned that the odor of marijuana emanating from the apartment provided the officers with probable cause to believe that unlawful activity was occurring inside. The continued investigation, which included “knocking on the door of the apartment unit and awaiting the response or consensual entry,” triggered movement that the officers “reasonably concluded” was the result of efforts to destroy evidence. *Id.* at 9a. In the court’s view, this constituted exigent circumstances justifying a warrantless entry into the apartment. *Ibid.* After the trial court denied

the motion to suppress, respondent entered a conditional guilty plea to drug trafficking and related offenses, reserving the right to appeal the denial of his suppression motion. *Id.* at 13a, 16a.

3. The Kentucky Court of Appeals affirmed. Pet. App. 12a-33a. The court disagreed with the trial court's conclusion that the odor of marijuana permitted the officers to knock on the apartment door and, when they received no response but heard movement inside, to enter without a warrant. *Id.* at 20a. The court concluded, however, that in the circumstances of this case, the officers' conduct did not impermissibly create the exigent circumstances, reasoning that "the police did not engage in deliberate and intentional conduct to evade the warrant requirement." *Id.* at 21a.

The court stated that "[t]he correct standard [for a warrantless entry] is whether or not the officers reached a reasonable conclusion [to enter the apartment] based on the facts known to them at the time of the forced entry." Pet. App. 23a. Because the police were pursuing a suspected felony crack cocaine dealer to a particular apartment building and believed that he was about to destroy evidence of a serious crime, the warrantless entry into the apartment was valid. *Id.* at 24a.

Judge Buckingham dissented. In his view, the correct test for determining whether the police impermissibly create an exigency is whether it was foreseeable to the police that their investigative tactics would create the exigent circumstances that formed the justification for the warrantless entry. Pet. App. 26a. Judge Buckingham concluded that the officers created the exigent circumstances—fear of the destruction of evidence—by knocking on the apartment door and announcing their presence. *Id.* at 27a.

4. The Supreme Court of Kentucky reversed. Pet. App. 34a-50a. The court stated that there was “some question as to whether the sound of persons moving [inside the apartment] was sufficient to establish that evidence was being destroyed.” *Id.* at 43a. The court, however, “assume[d] for the purpose of argument that exigent circumstances existed.” *Ibid.* The court then announced a two-part test to determine whether police action impermissibly creates the exigent circumstances used to justify a warrantless search. First, a reviewing court must determine whether the police deliberately created the exigency to avoid application of the warrant requirement. *Id.* at 45a-46a. Second, even if the officers did not act in bad faith, the reviewing court must invalidate the search if it “was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify [the] warrantless entry.” *Id.* at 46a (quoting *Mann v. State*, 161 S.W.3d 826, 834 (Ark. 2004)).

Applying that standard, the court concluded that, although the officers in this case did not act in bad faith, it was reasonably foreseeable that knocking on the door and announcing “police” would prompt individuals inside the apartment to destroy evidence. Pet. App. 46a. The court stated that “[b]efore police announced their presence, there would have been no reason to destroy evidence of either the marijuana which the officers had smelled, or evidence of the original drug transaction.” *Ibid.* The court further explained that if a suspect becomes aware of police presence while “police are observing a suspect from a lawful vantage point,” and the suspect proceeds to destroy evidence, “then the exigency is generally not police-created.” *Id.* at 47a. The problem in this case, the court explained, was that the officers

“unnecessarily announce[d] their presence,” thereby creating the probability that evidence would be destroyed. *Ibid.*

SUMMARY OF ARGUMENT

A well-settled exception to the Fourth Amendment’s warrant requirement allows police to conduct warrantless searches based on probable cause if exigent circumstances require immediate action. A warrantless search conducted pursuant to that exception is reasonable if the exigency arises in the course of a lawful police investigation, without regard to whether the exigency was foreseeable.

A. 1. Where police have acted unlawfully, they may be foreclosed from reliance on exceptions to the Fourth Amendment’s warrant requirement, such as those for seizure of incriminating items in plain view, or searches conducted pursuant to consent, as well as for seizure of abandoned items. But where the police have acted lawfully, their prior conduct provides no obstacle to reliance on such exceptions. Warrantless searches conducted pursuant to the exigent circumstances exception should be analyzed in the same way. Because seeking voluntary cooperation or consent is lawful, the Fourth Amendment does not prohibit police from reasonably reacting to an exigency that arises when they knock on the door of a home to seek voluntary cooperation or consensual entry.

2. This Court has never required police officers to abstain from lawful investigatory conduct or obtain a warrant when it is foreseeable that a suspect will react illegally to a lawful request for voluntary cooperation or consent. To the contrary, this Court has rejected a foreseeability standard in the “plain view” context, and it has allowed warrantless searches pursuant to an exi-

gency that arises during the “hot pursuit” of a criminal suspect, even though the exigency was foreseeable when police attempted to make the warrantless arrest. This Court has also specifically stated that even after police officers gather sufficient evidence of criminal activity amounting to probable cause, they may continue to investigate crime and are not required to secure a warrant immediately. Police officers should be free to conduct their investigations as they deem appropriate, as long as their conduct is lawful.

3. The Court does not need to decide whether an exigent circumstances search could be rendered unlawful by a police officer’s subjective desire to circumvent the warrant requirement. The courts below found no suggestion that the officers in this case acted in bad faith, and respondent did not argue in the courts below that the officers acted in bad faith. In any event, this Court has repeatedly stated that police officers’ subjective motivations are irrelevant to the constitutional reasonableness of their actions.

B. 1. a. Permitting exigent circumstances searches based on probable cause as long as police officers’ prior conduct was lawful adequately balances the privacy interests at stake with the need to provide clear guidance to police officers in the field and the need to avoid undue interference with appropriate police investigative activity. This Court has emphasized the importance of keeping the Fourth Amendment’s requirements “clear and simple.” *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). A test based on whether police officers’ conduct was lawful under well-understood Fourth Amendment standards is easy for police officers to apply.

b. A foreseeability test, however, would be difficult to apply in the field. In the present context, such a test

would require police to determine before knocking on a suspect's door whether it is reasonably foreseeable that the occupants of that particular residence would respond to the knock by engaging in the criminal act of destroying evidence. The concept of reasonable foreseeability has no place in current Fourth Amendment law, and a foreseeability test would thus require officers, often in rapidly developing situations, to make difficult case-specific judgments using an unfamiliar standard.

c. A foreseeability test also has unacceptable consequences. It rewards people who destroy evidence in response to lawful police requests for voluntary cooperation or consent; it perversely provides more Fourth Amendment protection to persons as to whom the police have greater suspicion of criminal wrongdoing; and it deters police from engaging in lawful police work for fear that a reviewing court will exclude evidence obtained during the investigation, based on the conclusion that the officer should have foreseen any exigency that arose.

2. These detrimental effects on law enforcement are unjustified. Warrantless searches conducted pursuant to the exigent circumstances exception still must be supported by probable cause. Moreover, police officers face significant disincentives to relying on investigative strategies that call for police-created exigency, because police officers will be reluctant to risk the success of their investigations on the prediction that the suspect will react to their request for voluntary cooperation by destroying evidence.

C. Application of the test described above requires the judgment of the Supreme Court of Kentucky to be reversed. The officers in this case knocked on the door of an apartment, announced themselves, and awaited a

response. Those actions were lawful, and the Supreme Court of Kentucky erred in holding that the police were foreclosed from responding to any ensuing exigency because that exigency was reasonably foreseeable to the police.

ARGUMENT

A WARRANTLESS SEARCH CONDUCTED PURSUANT TO THE EXIGENT CIRCUMSTANCES EXCEPTION IS REASONABLE IF THE EXIGENCY ARISES IN THE COURSE OF LAWFUL POLICE CONDUCT

The Fourth Amendment, made applicable to the States through the Fourteenth Amendment, *Payton v. New York*, 445 U.S. 573, 576 (1980), protects “persons, houses, papers, and effects, against unreasonable searches and seizures” and provides that “no Warrants shall issue, but upon probable cause.” U.S. Const. amend. IV. The Amendment’s “essential purpose * * * is to impose a standard of ‘reasonableness’ upon the exercise of discretion” by law enforcement “in order to safeguard the privacy and security of individuals against arbitrary invasions.” *Delaware v. Prouse*, 440 U.S. 648, 653-654 (1979) (footnote and citation omitted). The “touchstone” of the Fourth Amendment inquiry is “the reasonableness in all the circumstances” of the law enforcement practice at issue. *Maryland v. Wilson*, 519 U.S. 408, 411 (1997) (citation omitted).

The Fourth Amendment embodies a strong preference for warrants before entry into or search of a home. See, e.g., *Kirk v. Louisiana*, 536 U.S. 635, 636, 638 (2002) (per curiam). The Court has long recognized, however, that in some circumstances “‘the exigencies of the situation’ make the needs of law enforcement so compelling that [a] warrantless search is objectively rea-

sonable.” *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978); see also *Michigan v. Fisher*, 130 S. Ct. 546, 548 (2009); *Brigham City v. Stuart*, 547 U.S. 398, 400 (2006). The existence of exigent circumstances excuses only the necessity of obtaining a warrant; police must still have probable cause to conduct a search or arrest. See, e.g., *Kirk*, 536 U.S. at 638 (“[P]olice officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home.”); *Steagald v. United States*, 451 U.S. 204, 213 (1981) (same).

It is well established that police may conduct warrantless searches under the exigent circumstances exception to prevent the destruction of evidence. *Brigham City*, 547 U.S. at 403; *Minnesota v. Olson*, 495 U.S. 91, 100 (1990); *Coolidge v. New Hampshire*, 403 U.S. 443, 477-478 (1971); *Ker v. California*, 374 U.S. 23, 40 (1963) (plurality opinion). Thus, if a police officer who has probable cause to search a home for evidence of a crime reasonably concludes that the occupants of the home are destroying evidence, the officer may enter the home without a warrant in order to prevent that destruction. See, e.g., *United States v. Etchin*, 614 F.3d 726, 733-734 (7th Cir. 2010); *United States v. Martin*, 613 F.3d 1295, 1299 (10th Cir. 2010); *United States v. Samboy*, 433 F.3d 154, 158 (1st Cir. 2005), cert. denied, 547 U.S. 1118 (2006); *United States v. Rubin*, 474 F.2d 262, 268 (3d Cir.), cert. denied, 414 U.S. 833 (1973); cf. *Brigham City*, 547 U.S. at 400 (holding that police may enter home without warrant “when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury”).

The Supreme Court of Kentucky held that police may not rely on the exigent circumstances exception to the Fourth Amendment’s warrant requirement if they sub-

jectively intend to create an exigency, or if their lawful investigative decisions could foreseeably result in an exigency. Pet. App. 45a-46a. That holding cannot be reconciled with this Court's Fourth Amendment cases. Rather, police may conduct a warrantless search based on exigent circumstances as long as the investigative steps that preceded the exigency were lawful. A lawfulness test is firmly grounded in Fourth Amendment law, and reflects a proper balance between the needs of law enforcement and the privacy interests protected by the Fourth Amendment.

A. A Lawfulness Test Is Firmly Grounded In This Court's Fourth Amendment Jurisprudence

The proper test for determining whether police impermissibly create exigent circumstances is whether the police investigation that precedes the exigent circumstances was lawful. Under that test, "when law enforcement agents act in an entirely lawful manner, they do not impermissibly create exigent circumstances." *United States v. MacDonald*, 916 F.2d 766, 772 (2d Cir. 1990) (en banc), cert. denied, 498 U.S. 1119 (1991).

1. This Court has applied a lawfulness test to determine whether prior police conduct forecloses reliance on other exceptions to the Fourth Amendment's warrant requirement. For example, under the "plain view" exception, police officers may seize incriminating evidence and contraband found in plain view, even if police did not have either a warrant to seize those items or probable cause at the outset to believe those items would be found. See *Coolidge*, 403 U.S. at 466-467. An "essential predicate" of the plain view exception is that "the officer [must] be lawfully located in a place from which the object can be plainly seen." *Horton v. California*, 496 U.S.

128, 136-137 (1990). Further, the officer “must also have a lawful right of access to the object itself.” *Id.* at 137. In contrast, a plain view seizure is invalid if, before determining that an item is incriminating, the police unlawfully search the item without probable cause. *Arizona v. Hicks*, 480 U.S. 321, 325-329 (1987). Thus, under this Court’s cases, it is reasonable to dispense with the warrant requirement to allow a police officer to seize incriminating evidence that comes into plain view during a police investigation, so long as each step in the investigation is lawful.

Warrantless searches conducted pursuant to the subject’s consent are also permitted if consent is lawfully obtained. In *United States v. Watson*, 423 U.S. 411 (1976), the Court rejected the argument that a warrantless search of a car conducted pursuant to the subject’s consent is unreasonable where the subject was arrested and not informed that he could withhold his consent to a search. *Id.* at 425. The Court held that if the arrest “comported with the Fourth Amendment,” a warrantless search of the subject’s car pursuant to his consent was reasonable under the Fourth Amendment because the consent “was not the product of an illegal arrest.” *Id.* at 424.

Police also may seize without a warrant items abandoned during a police chase, as long as no Fourth Amendment violation occurred before the suspect discarded the items. Thus, in *California v. Hodari D.*, 499 U.S. 621 (1991), the Court concluded that even if police did not have probable cause to arrest a fleeing subject (or even reasonable suspicion to stop him), *id.* at 624 & n.1, drugs discarded by the subject before he was seized by police could lawfully be recovered by police without a warrant, because no seizure occurred until *after* the

drugs were discarded. *Id.* at 629. As long as no Fourth Amendment violation preceded the suspect's abandonment, warrantless seizure of the abandoned contraband is not unlawful. *Id.* at 624, 629.

The question whether prior police conduct forecloses reliance on the exigent circumstances exception should be governed by the same lawfulness standard that applies in other comparable Fourth Amendment contexts. Specifically, police officers act lawfully under the Fourth Amendment when they knock on a door and announce their presence in an effort to obtain voluntary cooperation from the occupants. See *Florida v. Bostick*, 501 U.S. 429, 439 (1991) (“The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation.”); see also, *e.g.*, *United States v. Gould*, 364 F.3d 578, 590 (5th Cir.) (stating that so-called “knock and talk” procedure “has clearly been recognized as legitimate”), cert. denied 543 U.S. 955 (2004). Moreover, seeking consent to search “is a constitutionally permissible and wholly legitimate aspect of effective police activity.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973); *United States v. Mendenhall*, 446 U.S. 544, 558-560 (1980). If police officers encounter exigent circumstances during a lawful attempt to gain consent or voluntary cooperation, it is reasonable for them to conduct a warrantless search in response to that exigency, provided they have the requisite probable cause.

2. In contrast, this Court has never required police officers to abstain from lawful investigatory conduct or obtain a warrant when it is foreseeable that someone might react illegally to a consensual encounter. The foreseeability standard adopted by the Supreme Court

of Kentucky, and some other lower courts,¹ thus has no basis in this Court's Fourth Amendment jurisprudence. See Pet. App. 46a.

In the "plain view" context, this Court has squarely rejected a test that turned on whether the circumstances justifying the exception were foreseeable. In *Horton*, the criminal defendant argued that evidence seized from his home pursuant to the plain view exception should be suppressed, because police could have foreseen that they would come across the evidence but chose not to describe it in the warrant application. The Court rejected that argument, stating, "[t]he fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement." 496 U.S. at 138. Once the officer "has a lawful right of access * * * no additional Fourth Amendment interest is furthered by requiring that the discovery of evidence be inadvertent." *Id.* at 140.

By the same token, law enforcement officers are not precluded from taking prompt action to prevent the destruction of evidence merely because, at some point in their investigation, it may have been foreseeable that their lawful investigative efforts might lead to unlawful conduct by criminal suspects. See *Samboy*, 433 F.3d at 160 (rejecting the argument that, in setting up a controlled buy, the police should have foreseen the need for eventual entry into the subject's apartment); see also *United States v. Cresta*, 825 F.2d 538, 553 (1st Cir. 1987) ("Unforeseeability has never been recognized as an ele-

¹ See, e.g., *United States v. Mowatt*, 513 F.3d 395, 402 (4th Cir. 2008); *United States v. Cisneros-Gutierrez*, 598 F.3d 997, 1005-1006 (8th Cir. 2010).

ment of the exigent circumstances exception.”), cert. denied, 486 U.S. 1042 (1988).

In fact, a foreseeability test is inconsistent with this Court’s decisions authorizing warrantless entries into homes pursuant to an exigency that arises during a “hot pursuit” of a fleeing suspect. When police attempt to effect a warrantless arrest in a public place, see *Watson, supra*, it will often be foreseeable that the suspect might flee into a residence, where the police normally could not enter without a warrant, see *Payton*, 445 U.S. at 576. That was certainly true of the suspect in *United States v. Santana*, 427 U.S. 38 (1976), who was standing in the doorway of her home when police attempted to arrest her. *Id.* at 40. Under a foreseeability standard, the Fourth Amendment would prohibit police from entering a residence in hot pursuit of a fleeing suspect if they could have obtained a warrant before taking whatever investigative steps led to the suspect’s flight. In *Santana*, it appears that the police had probable cause to arrest Santana, and to search her residence, but instead of obtaining a warrant, they drove to Santana’s residence, got out of their vehicle, shouted “police,” displayed identification, and approached Santana’s residence. *Id.* at 39-40. Under a foreseeability test, the police would presumably have been precluded from relying on the exigent circumstances of flight and destruction of evidence, because those exigent circumstances would have been foreseeable when the police elected to go to Santana’s house without a warrant. But the Court in *Santana* determined that the warrantless arrest of the suspect inside her home was reasonable based both on the exigent need to apprehend a fleeing suspect and on

the “realistic expectation that any delay would result in destruction of evidence.” *Id.* at 42-43.²

A foreseeability requirement would, in effect, require police to obtain a warrant as soon as they have probable cause to search, instead of seeking voluntary cooperation. Law enforcement officers, however, “are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause.” *Hoffa v. United States*, 385 U.S. 293, 310 (1966). In *Cardwell v. Lewis*, 417 U.S. 583 (1974), a criminal defendant argued that the warrantless search of his car pursuant to the exigent circumstances exception was unreasonable because the police could have anticipated the need for a search and procured a warrant in advance. The Court rejected this argument, and explained that “[a]ssuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment.” *Id.* at 595. To the contrary, the Court stated that “[t]he exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation’s necessitating prompt police ac-

² A foreseeability test would make little sense in other comparable Fourth Amendment contexts. For example, the Fourth Amendment permits police officers to ask for consent to search, see *Schneckloth*, 412 U.S. at 227, even though it is foreseeable that the subject might consent, thereby eliminating the need for a warrant. The Fourth Amendment also permits police to seize items abandoned by a fleeing suspect, see *Hodari D.*, 499 U.S. at 629, even though it is foreseeable that when police arrest (or attempt to arrest) a suspect, the suspect might discard evidence.

tion.” *Id.* at 595-596; see also *United States v. Gardner*, 553 F.2d 946, 948 (5th Cir. 1977) (“[T]he reasonableness of a search [of a home] under exigent circumstances is not foreclosed by the failure to obtain a warrant at the earliest practicable moment.”), cert. denied, 434 U.S. 1011 (1978).

With or without probable cause, police may always seek voluntary cooperation. *Schneckloth*, 412 U.S. at 228. Seeking voluntary cooperation is desirable, because a consent search “may result in considerably less inconvenience for the subject of the search.” *Ibid.* A test that would prohibit seeking consent or voluntary cooperation in situations where it is foreseeable that the subject will react to the police request in a manner that requires an immediate search or seizure has no basis in Fourth Amendment law.

3. In addition to adopting a foreseeability test, the Supreme Court of Kentucky stated, as have other courts,³ that police officers cannot rely on exigent circumstances to justify a warrantless search if the officers deliberately created the exigency to avoid the necessity of obtaining a warrant. Pet. App. 45a-46a. The courts below found no suggestion that the officers in this case acted in bad faith to circumvent the warrant requirement, *id.* at 21a, 46a, and respondent did not argue that the officers acted in bad faith either in the courts below or in the brief in opposition to the petition for a writ of certiorari. The Court therefore need not decide in this case whether a search that is otherwise lawful under the

³ See, e.g., *United States v. Chambers*, 395 F.3d 563, 569 (6th Cir. 2005); *United States v. Gould*, 364 F.3d 578, 590-591 (5th Cir.), cert. denied, 543 U.S. 955 (2004); *United States v. Duchi*, 906 F.2d 1278, 1284 (8th Cir. 1990), cert. denied, 516 U.S. 852 (1995); *United States v. Socoy*, 846 F.2d 1439, 1449 (D.C. Cir.), cert. denied, 488 U.S. 858 (1988).

exigent circumstances doctrine could be rendered unlawful by the subjective intent of the police officers. See *Berenyi v. District Director, INS*, 385 U.S. 630, 635-636 (1967) (holding that Court will not revisit factual findings concurred in by two lower courts pursuant to the “two-court rule”); see also *Demarest v. Manspeaker*, 498 U.S. 184, 188-189 (1991) (declining to consider argument that respondent did not raise in courts below); *Alabama v. Shelton*, 535 U.S. 654, 660 n.3 (2002) (declining to consider alternative ground for affirmance neither decided by court below nor raised in brief in opposition). In any event, a test that considers a police officer’s subjective motivation in choosing a particular investigatory technique cannot be squared with this Court’s Fourth Amendment jurisprudence.

This Court has “repeatedly rejected” Fourth Amendment tests that turn on a police officer’s subjective intent. *Brigham City*, 547 U.S. at 404. For example, this Court has held that the “emergency aid” exception to the warrant requirement “does not depend on the officers’ subjective intent” in entering a home and “requires only an objectively reasonable basis for believing that a person [therein] is in need of immediate aid.” *Fisher*, 130 S. Ct. at 548 (citation and internal quotation marks omitted); see also *Brigham City*, 547 U.S. at 403. The Court has also made clear that a police officer’s subjective motivation for conducting a traffic stop is irrelevant where the officer had probable cause to believe that the suspect had violated a traffic law. *Whren v. United States*, 517 U.S. 806, 813 (1996). These cases follow this Court’s longstanding view that “evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that

depend upon the subjective state of mind of the officer.” See *Horton*, 496 U.S. at 138.

The Court has found it appropriate to consider the subjective motivations of police officers only in very narrow circumstances involving programmatic searches conducted without individualized suspicion. See, e.g., *Florida v. Wells*, 495 U.S. 1, 4 (1990) (“inventory search” of lawfully seized property—conducted for the limited purposes of ensuring that the property is not dangerous, securing valuables, and protecting against claims of loss or damage—must not be “a ruse for a general rummaging in order to discover incriminating evidence”). As the Court explained in *Whren*, such suspicionless searches are reasonable under the Fourth Amendment because they achieve important programmatic purposes, such as taking inventory of seized property or monitoring compliance with administrative regulations. 517 U.S. at 811-812. The Court’s inquiry into law enforcement purpose in programmatic search cases simply ensures “that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes.” *Ibid.*; see also *Brigham City*, 547 U.S. at 405 (“[The] inquiry * * * has nothing to do with discerning what is in the mind of the individual officer conducting the search.”).

Unlike such programmatic searches, a search conducted pursuant to the exigent circumstances exception must be supported by probable cause. See, e.g., *Kirk*, 536 U.S. at 636; *Steagald*, 451 U.S. at 212. Where probable cause exists, this Court’s precedents establish that an objective standard must be employed to determine whether a warrantless search is justified.

B. A Lawfulness Test Properly Balances The Privacy Interests At Stake With The Needs of Law Enforcement

To determine whether a warrantless search is reasonable under the Fourth Amendment, this Court's Fourth Amendment cases "balance the privacy-related and law enforcement-related concerns to determine if the intrusion [i]s reasonable." *Illinois v. McArthur*, 531 U.S. 326, 331 (2001). That balance mandates a test that allows police to react to exigent circumstances that arise in the course of a lawful police investigation, even when the exigency could be considered foreseeable.

1. a. Police officers in the field "have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway v. New York*, 442 U.S. 200, 214 (1979). As a result, "the object in implementing [the Fourth Amendment's] command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001); see also *Dunaway*, 442 U.S. at 213-214 (stating that rules governing police investigations should provide "[a] single, familiar standard"). A lawfulness test rooted in established Fourth Amendment law is easy for police officers to understand and apply.

In this case, the investigating officers employed a series of lawful investigative techniques during a quickly unfolding situation. They gathered information about a suspect who had just engaged in a felony drug trafficking offense and was thereafter seen running. They attempted to determine which of two apartments the suspect had entered. Being unsure, they knocked on the door that they concluded had recently been opened and

announced their presence in an effort to gain voluntary cooperation from the occupants, and waited for a response. When they concluded that the occupants were destroying evidence, they entered the apartment to respond to that exigency. At each step, the officers chose reasonable investigatory techniques based on familiar and clear rules governing what the Fourth Amendment allowed.

b. In contrast, the foreseeability test adopted by the Supreme Court of Kentucky would provide, at best, murky guidance to police officers in the field. The test would require case-by-case reasonableness inquiries without clear principles to guide evaluation of each case. Notably, this Court has specifically rejected such case-by-case inquiries in other Fourth Amendment contexts. See, e.g., *United States v. Robinson*, 414 U.S. 218, 235 (1973) (rejecting rule that would require case-by-case adjudication of whether search incident to lawful arrest was justified based on “what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found”); see also *Atwater*, 532 U.S. at 347 (“[W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations * * * lest every discretionary judgment in the field be converted into an occasion for constitutional review.”).

The Supreme Court of Kentucky’s approach to exigent circumstances would allow for unjustified judicial second-guessing of police investigative decisions. Before knocking on a door, police officers will have to predict whether a court would later determine that it was reasonably foreseeable that their chosen investigative technique would give rise to exigent circumstances in a

particular case. A rule that requires police officers to make such predictions would be far from “clear and simple.” *Atwater*, 532 U.S. at 347.

To take just one example arising from the decision below, the Supreme Court of Kentucky seemed to take the view that it is always reasonably foreseeable that drug suspects will destroy evidence when police knock at the door. Pet. App. 47a. Such a categorical rule, however, is difficult to reconcile with this Court’s rejection of the idea that it is sufficiently likely that drug suspects will destroy evidence when police announce their presence that the Court should in all drug cases excuse compliance with the requirement that police knock and announce before executing a search warrant. See *Richards v. Wisconsin*, 520 U.S. 385, 387 (1997). Similar problems can be expected to proliferate in other areas of the law under case-by-case foreseeability inquiries, particularly when there are no clear principles to govern whether a case should fall on one side of the line or the other.

c. In addition to being difficult to apply, the foreseeability test has unacceptable consequences. First, it rewards individuals who respond to lawful police investigatory decisions by destroying evidence. The Fourth Amendment’s warrant requirement is not designed to protect an individual’s ability to destroy evidence or contraband. Indeed, under 18 U.S.C. 2232(a), it is a criminal offense to “prevent[] or impair[]” the seizure or securing of property by destroying or removing it before the property is lawfully seized or secured by federal authorities. Evidence should not be suppressed to safeguard the ability of individuals to escape responsibility for one crime by destroying evidence of it, and in the process committing a second criminal offense.

In *Segura v. United States*, 468 U.S. 796 (1984), this Court rejected the premise that an individual's interest in destroying incriminating evidence is a valid basis for excluding evidence. In *Segura*, the district court held that evidence obtained during a warrantless entry into a home to secure the premises while police obtained a search warrant could not be admitted under the "independent source" doctrine, because had the police not illegally entered to secure the premises, the suspect likely would have destroyed the evidence. *Id.* at 801-802. In determining that the evidence was admissible, the Court rejected the district court's "prudentially unsound" rationale, stating that there is no "constitutional right' to destroy evidence," and that the exclusionary rule should not be extended to "protect' criminal activity." *Id.* at 816; see also *MacDonald*, 916 F.2d at 771 (exigent circumstances should not be "disregarded simply because the suspects chose to respond to the agents' lawful conduct by attempting to escape, destroy evidence, or engage in any other unlawful activity").

A foreseeability test also has the perverse result of providing greater Fourth Amendment protection to persons as to whom police have greater suspicion of criminal wrongdoing. It is undisputed that the police may lawfully seek voluntary cooperation by knocking on the door to the residence of a person as to whom they lack probable cause. Cf. *Schneckloth*, 412 U.S. at 228; *Bostick*, 501 U.S. at 439. Thus, if the police have reasonable suspicion to believe that a suspect is involved in drug trafficking, they may knock at the suspect's door and seek voluntary cooperation, and, if probable cause develops, they may respond to any ensuing exigency, even though it may have been reasonably foreseeable that the suspect might try to destroy evidence. Under the test

adopted by the Supreme Court of Kentucky, however, police would be foreclosed from responding to such an exigency if they had greater reason to suspect the occupants of criminal activity. Nothing in the Fourth Amendment requires such a counter-intuitive result.

Finally, a foreseeability standard would deter police officers from engaging in lawful police work for fear that a reviewing court would determine that the investigation created a foreseeable risk of exigency. For example, if police have an opportunity to make a public arrest of a criminal suspect outside a residence, but they foresee that another suspect inside the residence might react by destroying evidence, police may have to choose between delaying the arrest or making the arrest and being left powerless to respond to the exigency if the suspect inside begins to destroy evidence. Similarly, police sometimes will wish to continue surveillance of a suspect when they have probable cause to arrest, in order to gather evidence of a larger criminal organization. But under a foreseeability standard, delaying arrest would be risky, because it is arguably foreseeable that the suspect might detect that police have him under surveillance. These detrimental effects on effective law enforcement weigh heavily against adopting a foreseeability standard.⁴

⁴ Some lower courts have adopted standards somewhat different from the foreseeability test adopted by the Supreme Court of Kentucky. For example, some courts have evaluated “the reasonableness and propriety of [the police’s] actions and investigative tactics,” *United States v. Coles*, 437 F.3d 361, 370 (3d Cir. 2006), or held that officers may not conduct a warrantless search pursuant to the exigent circumstances exception if the officers’ prior actions were “contrary to standard or good law enforcement practices.” *Gould*, 364 F.3d at 591. Such standards are no better than the foreseeability standard. Nothing in this Court’s Fourth Amendment jurisprudence justifies the creation of

2. A rule that allows police to respond to exigencies that arise during lawful investigations does not undermine the privacy interests protected by the Fourth Amendment. Exigency excuses the police from the necessity of obtaining a warrant; it does not exempt them from the Fourth Amendment's requirement that they have probable cause to search or arrest. See, e.g., *Kirk*, 536 U.S. at 636; *Steagald*, 451 U.S. at 212. The exigent circumstances exception would therefore remain limited to situations where police have probable cause, and thus a warrant authorizing entry could lawfully have been obtained had the exigency not precipitated the need for immediate action.

Moreover, police officers will still have a strong incentive to obtain a warrant where circumstances allow. An investigative strategy that relies on the creation of exigent circumstances to justify a warrantless entry poses significant risks. The success of such a strategy would depend on the possibility that the suspect would react to the government's request for voluntary cooperation by destroying evidence. If the suspect ignores the officer's request for voluntary cooperation and takes no steps to destroy evidence, "the investigation will have reached a conspicuously low point. The officers will have to leave, and the [occupants] will have the kind of warning that even the most elaborate security system cannot provide." *United States v. Chambers*, 395 F.3d 563, 577 (6th Cir. 2005) (Sutton, J., dissenting); see also

a body of case law defining police conduct that, although lawful, is unreasonable under the Fourth Amendment because it does not comply with a court's view of "reasonable investigative tactics" or "good law enforcement practice." Moreover, such standards do not provide clear direction to law enforcement officers in the field about whether their investigative decisions are permissible under the Fourth Amendment.

Etchin, 614 F.3d at 733 (“Police who without a warrant knock on the door of a drug house seeking consent to enter take the risk that permission will be withheld and an emergency will not materialize.”). Given this possibility, police officers will have a strong incentive to secure a warrant when that option is available.

C. The Police Officers In This Case Did Not Impermissibly Create An Exigency

Under the lawfulness standard, the judgment of the Supreme Court of Kentucky must be reversed. The trial court found that the police officers “properly conducted” their investigation by “knocking on the door of [an] apartment unit and awaiting [a] response or consensual entry.” Pet. App. 9a. Knocking on the door of a residence to seek voluntary cooperation or consent “has clearly been recognized as legitimate.” *Gould*, 364 F.3d at 590; see also *Schneckloth*, 412 U.S. at 228 (seeking consent “is a constitutionally permissible and wholly legitimate aspect of effective police activity”). The Supreme Court of Kentucky erred by concluding that, even if exigent circumstances existed, the police officers’ entry was unlawful under the Fourth Amendment because it was reasonably foreseeable that the occupants might destroy evidence. For that reason, the judgment should be reversed.⁵

⁵ In opposing the petition for a writ of certiorari, respondent argued that, under the circumstances of this case, there was an insufficient factual basis for a reasonable belief that exigent circumstances existed to justify a warrantless entry. Br. in Opp. 8-10, 13, 15, 21. The trial court, however, found that, upon hearing movement in the apartment, the police “reasonably concluded * * * persons [were] in the act of destroying evidence.” Pet. App. 9a. The Kentucky Court of Appeals reached the same conclusion. Pet. App. 24a. The Supreme Court of Kentucky “assum[ed] for the purpose of argument that exigent cir-

CONCLUSION

The judgment of the Supreme Court of Kentucky should be reversed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

DAVID S. KRIS
LANNY A. BREUER
Assistant Attorneys General

ROY W. MCLEESE III
*Acting Deputy Solicitor
General*

ANN O'CONNELL
*Assistant to the Solicitor
General*

JOHN F. DE PUE
Attorney

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cumstances existed” (*id.* at 43a), and therefore did not take issue with the contrary determinations of the lower courts. This Court can appropriately reverse the judgment below, and remand the case for the lower courts to address, as appropriate, that case-specific issue. See, *e.g.*, *United States v. Cronin*, 466 U.S. 648, 666-667 & n.42 (1984) (reversing ruling of court of appeals that ineffective assistance of counsel should properly be presumed, and remanding for court of appeals to address question whether trial counsel was actually ineffective, which had not been passed upon by court of appeals); cf. *Skilling v. United States*, 130 S. Ct. 2896, 2934 (2010) (holding that indictment was flawed, but leaving for resolution on remand whether error was harmless).