No. 09-1272

IN THE
Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,
v.
HOLLIS DESHAUN KING,
Respondent.

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF OF THE STATES OF INDIANA, ALABAMA, ARIZONA, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, KANSAS, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WISCONSIN, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When does lawful police action impermissibly "create" exigent circumstances which preclude warrantless entry; and which of the five tests currently being used by the United States Courts of Appeals is proper to determine when impermissibly created exigent circumstances exist?

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The States of Indiana, Alabama, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming respectfully submit this brief as *amici curiae* in support of the Petitioner. As the principal agents of criminal prosecutions across the country, States have a compelling interest in clear rules for police officers who encounter situations where evidence may be destroyed unless they take immediate action.

SUMMARY OF THE ARGUMENT

Police frequently conduct, and lower courts affirm as reasonable, warrantless residential searches where the destruction of evidence appears imminent. This exception to the warrant requirement is very important for successful police work and criminal prosecution. Without the exception, much tangible evidence would be destroyed and the police would be forced to "resort to such other sources of evidence as eyewitness identifications and confessions," thus increasing the possibility "that the innocent will be convicted and the guilty go free." Note, *Police Practices and the Threatened Destruction of Tangible Evidence*, 84 Harv. L. Rev. 1465, 1465 (1971). The Court should confirm that it is reasonable under the Fourth Amendment for police to conduct a search of a home without a warrant where a reasonable

observer would believe the search necessary to prevent the imminent destruction of evidence.

The decision below accepted the general proposition that police may conduct a warrantless search of a dwelling where they reasonably fear the imminent destruction of evidence. The Kentucky Supreme Court even accepted that the police in this case did reasonably fear the imminent destruction of evidence. Pet. App. at 46a. The court, however, ruled that the police effectively manufactured that exigent circumstance by knocking on the door of the dwelling they ultimately searched and announcing themselves as police officers. *Id.* The police, the court ruled, should have foreseen that this action would prompt individuals within the dwelling to begin the very destruction of evidence that prompted the subsequent warrantless search. *Id.* Where such destruction is a reasonably foreseeable consequence of police conduct, the Kentucky Supreme Court ruled, it cannot justify the warrantless search. *Id.* Thus, the central question of this case is whether courts may blame police for prompting individuals to destroy evidence as a pretext for conducting a warrantless search.

The *amici* States agree with Kentucky that, when police action sparks a chain of events ending with a warrantless search based on exigent circumstances, courts should ask only whether the police initially acted in an objectively lawful manner. In no event, moreover, should courts inquire as to the subjective motives of police, or the foreseeability of the exigent circumstances that police action supposedly

precipitated, when examining whether a warrantless search is reasonable.

A bad faith test in exigent circumstances cases would be inconsistent with Fourth Amendment precedents generally, where the subjective motivations of the police are never relevant. A foreseeability inquiry would frequently doom warrantless searches because it is nearly always foreseeable that a suspect will react to a sudden police presence—even when perfectly lawful—by destroying evidence of guilt. Yet if police prompt such behavior merely by lawfully carrying out their duties, preventing them from acting upon others' foreseeable reactions would protect no core Fourth Amendment values. Particularly because split-second decisions are inherent in police work, officers and citizens alike deserve a test that is reasonably predictable, easy to apply, and geared toward protecting only those Fourth Amendment privacy interests the Court has recognized as legitimate.

ARGUMENT

I. The Reasonable Fear of the Destruction of Evidence Provides an Important Exception to the Warrant Requirement

For decades courts have deemed it reasonable for police to enter a dwelling without a warrant where they reasonably fear the imminent destruction of evidence. *See* 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 6.5(b) (4th ed. 2004). In such cases, the compelling government interest in preserving evidence of crime,

which for purposes of terminating criminal enterprises can be just as important as arresting suspects, outweighs the legitimate privacy expectations of residents. *Id*. at 321. This exception to the warrant requirement is very important if police are to continue with their mission of detecting and disrupting crime.

1. It is axiomatic that "warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona,* 437 U.S. 385, 393-94 (1978). The category of permissible warrantless "exigent circumstances" searches includes, for example, entering residences to aid an individual in need of assistance, *see id.*, breaking up a drunken brawl, *see Brigham City v. Stewart*, 547 U.S. 398, 404 (2006), and fighting a fire and discovering its causes, *see Michigan v. Tyler,* 436 U.S. 499, 509 (1978). It also includes hot pursuit of suspects into a residence. *See United States v. Santana*, 427 U.S. 38, 42 (1976).

The Court has stated that "[w]here there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation." *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973). More to the point, "[i]n a wide range of fast-breaking situations—hot pursuits, crimes in progress, and the like—a warrant requirement would be foolish." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L.

Rev. 757, 768 (1994). Such "necessarily swift action predicated upon the on-the-spot observations of the officer . . . historically has not been, and as a practical matter could not be, subjected to the warrant procedure." *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

2. The destruction-of-evidence exception to the warrant requirement goes back at least to *Johnson v. United States*, 333 U.S. 10 (1948), and *McDonald v. United States*, 335 U.S. 451 (1948), where the Court affirmed the suppression of evidence obtained from warrantless residential searches because, among other reasons, "[n]o evidence or contraband was threatened with removal or destruction" immediately preceding the search. *Johnson*, 333 U.S. at 15; *see also McDonald*, 335 U.S. at 455 (concluding that officers had ample time to procure a warrant and noting that the evidence was not "in the process of destruction").

A few years later in *United States v. Jeffers*, 342 U.S. 48, 52 (1951), the Court suppressed evidence obtained through a warrantless search of a hotel room because the officers could have "easily prevented any . . . destruction or removal [of evidence] by merely guarding the door." *See also Preston v. United States*, 376 U.S. 364, 367 (1964) ("The rule allowing contemporaneous searches is justified, for example, by . . . the need to prevent the destruction of evidence of the crime"); *Wong Sun v. United States*, 371 U.S. 471, 483-84 (1963) (noting that the "Government claims no extraordinary circumstances—such as the imminent destruction of vital evidence[.]").

Confirming that ongoing or imminent destruction of evidence can justify a warrantless search, a plurality of the Court in *Ker v. California*, 374 U.S. 24, 40 (1963), affirmed a warrantless search based in part on officers' fears that evidence was about to be destroyed. The officers' conduct in the "particular circumstances" of the case—including "the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed"—was reasonable. *Id.* at 40-41. Even the *Ker* dissenters allowed that "unannounced police intrusion into a private home" is reasonable "where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted." *Id.* at 47 (Brennan, J., dissenting).

In *Schmerber v. California*, 384 U.S. 757 (1966), the Court deemed reasonable a warrantless extraction of blood from a suspected drunk driver in light of the body's relatively fast absorption and discharge of alcohol. *Id.* at 770-71. As the Court observed, "[t]he officer in the present case . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence[.]'" *Id.* at 770. The Court later ruled, however, that the need to preserve evidence of blood-alcohol-content does not always justify a warrantless residential search because the "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 [a traffic offense], has been committed." *Welsh v. Wisconsin,* 466 U.S. 740, 753 (1984).

Over the years, a destruction-of-evidence exception has essentially become axiomatic. *See, e.g., Brigham City*, 547 U.S. at 403 (citing *Ker* for the proposition that a warrantless residential search is justified by "imminent destruction of evidence"); *Georgia v. Randolph*, 547 U.S. 103, 117 n.6 (2006) ("a fairly perceived need to act on the spot to preserve evidence may justify entry and search under the exigent circumstances exception to the warrant requirement"); *Tyler*, 436 U.S. at 509 (same); *United States v. Watson*, 423 U.S. 411, 435 (1976) ("When law enforcement officers have probable cause to believe that an offense is taking place in their presence and that the suspect is at that moment in possession of the evidence, exigent circumstances exist. Delay could cause the escape of the suspect or the destruction of the evidence.").

Yet the standard for this exception has not always been articulated in the same way. In *Vale v. Louisiana*, 399 U.S. 30, 33 (1970), the Court invalidated a residential search where "the goods ultimately seized were not *in the process* of destruction . . . nor were they about to be removed from the jurisdiction." *Id.* at 35 (emphasis added). More recently the Court has suggested that merely perceiving a reasonable risk of destruction is enough. In *Illinois v. McArthur*, 531 U.S. 326 (2001), the Court ruled that keeping the suspect from entering

his house while police awaited a warrant did not violate the Fourth Amendment because "the police had good reason to fear that, unless restrained, McArthur would destroy the drugs before they could return with a warrant." *Id.* at 332; *see id.* at 337 (Souter, J., concurring) ("This probability of destruction in anticipation of a warrant exemplifies the kind of present risk that undergirds the accepted exigent circumstances exception to the general warrant requirement."). Similarly, in *Georgia v. Randolph*, 547 U.S. 103, 116 n.6 (2006), the Court noted that one tenant's objection to a residential search when the other tenant consented might create exigent circumstances justifying a warrantless search unless the tenant could be incapacitated from destroying evidence.

Lower courts have generally understood *Schmerber* and its antecedents to bless warrantless searches when police reasonably fear the imminent destruction or removal of evidence—where, for example, there is a "great likelihood that the evidence will be destroyed or removed before a warrant can be obtained" or evidence is "threatened with imminent removal or destruction." *See, e.g.*, LaFave, *supra*, at 394; *State v. Patterson*, 192 Neb. 308, 316 (Neb. 1974); *United States v. Blake*, 484 F.2d 50, 54 (8th Cir. 1973). The Third Circuit, for example, found that when officers "reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant, a warrantless search is justified." *United States v. Rubin*, 474 F.2d 262, 268 (1973). Although the tests used by the lower courts vary, "the emergency circumstances exception is 'established[,]'" and

accepted as a valid exception to the warrant requirement. LaFave, *supra*, at 393 (internal quotation omitted).

3. Preventing the destruction of evidence—which is a crime in itself—is an important law enforcement goal. "The strongest justification for restricting the destruction of evidence is that destruction reduces the likelihood that the judicial process will reach accurate results." Lawrence B. Solum & Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 Emory L.J. 1085, 1138 (1987).

The destruction-of-evidence exception has become exceedingly important to proper police work. "[T]angible evidence" is rightly considered a more "trustworthy—'scientific'—method of proving guilt[,]" and if the police must stand idly by while suspects destroy this evidence, "the possibility is increased that the innocent will be convicted and the guilty go free." Note, *Police Practices and the Threatened Destruction of Tangible Evidence*, 84 Harv. L. Rev. 1465, 1465 (1971). Without the exception, "drug dealers [can] flush evidence down the toilet, often frustrating meticulous police investigations, denying police the tactical element of surprise, and increasing the peril police officers face[.]" Charles Patrick Garcia, Note, *The Knock and Announce Rule: A New Approach to the Destruction-Of-Evidence Exception*, 93 Colum. L. Rev. 685, 702 (1993).

The exception is especially important in drug cases because "[u]nlike most other evidence, drugs

can usually be destroyed with the flush of a toilet or the opening of a tap." Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Protect Destruction of Evidence: The Need for a Rule*, 39 Hastings L. J. 283, 284 (1988). Even if the police are able to arrest the main suspect, the threat of destruction is often not over because "[p]ersons not theretofore involved in a particular criminal scheme may nonetheless be expected to dispose of evidence when doing so will possibly aid a friend or relative[.]" LaFave, *supra*, at 404.

The Court should reaffirm the destruction-of-evidence exception to the warrant requirement where officers have a reasonable fear that evidence will be destroyed pending a warrant. As the Court has long understood, "[s]uspects have no constitutional right to destroy or dispose of evidence." *Ker*, 374 U.S. at 39.

II. Neither the Subjective Intent of Police Officers Nor the Foreseeability of the Destruction of Evidence Is Relevant to Fourth Amendment Analysis

Whether police may enter and search a residence without a warrant based on reasonable concern for the imminent destruction of evidence should turn only on objective circumstances, not on the subjective motivations of the officers or foreseeable consequences of lawful police conduct.

A. Subjective intent never taints an objectively proper search predicated on individualized suspicion

The Kentucky Supreme Court held that in destruction of evidence cases, courts must first determine "whether the officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement," but ultimately found no bad faith. Pet. App. at 45a-46a. Recently, however, in *Brigham City v. Stuart*, 547 U.S. 398 (2006), the Court rejected exactly this approach and upheld a long line of Fourth Amendment doctrine when it affirmed an asserted "bad faith" warrantless residential police entry to stop a fight. The Court reaffirmed that "[a]n action is reasonable under the Fourth Amendment regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify action.'" *Id.* at 404 (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)). In short, "[t]he officer's subjective motivation is irrelevant." *Id.*

This rule has prevailed at least since *United States v. Robinson*, 414 U.S. 218 (1973), where the Court upheld a search incident to arrest that was objectively justified by concern for the officer's safety, despite the officer's apparent subjective lack of fear during the encounter. Said the Court, "it is of no moment that [the officer] did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed." *Id.* at 236.

A few years later, in *Scott v. United States*, 436 U.S. 128 (1978), the Court, citing *Robinson*, upheld a wiretap search where officers intercepted extraneous conversations. These unauthorized interceptions were reasonable "because the court could not conclude that some conversation was intercepted which clearly would not have been intercepted had reasonable attempts at minimization been made." *Id.* at 134 (internal quotation omitted). Having concluded that the interceptions were objectively reasonable, the Court refused even to entertain whether the police acted in bad faith, stating that "[s]ubjective intent alone does not make otherwise lawful conduct illegal or unconstitutional." *Id.* at 136.

Significantly, the *Scott* Court observed that *Robinson* "held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Id.* at 138. *See also Horton v. California*, 496 U.S. 128, 138 (1990) ("The 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."); *Graham v. Connor*, 490 U.S. 386, 397 (1989) ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force[.]"); *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (Court ignored as "irrelevant" the fact that the police were specifically looking for

the marijuana when they flew over the yard and saw it in plain sight); *Maryland v. Macon*, 472 U.S. 463, 471 (1985) ("Objectively viewed, the transaction was a sale in the ordinary course of business. The sale is not retrospectively transformed into a warrantless seizure by virtue of the officer's subjective intent to retrieve the purchase money to use as evidence.").

The Court confirmed the exclusive Fourth Amendment relevance of objective justification (rather than subjective intent) in *Whren v. United States*, 517 U.S. 806 (1996), where police stopped a car for a traffic violation and observed illegal narcotics in plain view. The defendants accepted that the officer had probable cause for the traffic code violation, but argued that the test should be whether a police officer acting in good faith would have made the stop for that reason rather than as a pretext for conducting a plain-view search. The Court rejected that argument, holding that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* at 813. Indeed, "[t]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 814; *see also Bond v. United States*, 529 U.S. 334, 339 n.2 (2000) ("the issue is not [the agent's] state of mind, but the objective effect of his actions.").

The reason for the Court's consistent adherence to the objective justification standard is straightforward. Retrospective subjective inquiry into the knowledge and beliefs of police officers as their work unfolds produces irreconcilable problems

for the officers and the finders of fact. It is simply not possible to "neatly unravel[]" a person's subjective motivations. *Brigham City*, 547 U.S. at 405. "Moreover, police enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable." *Whren*, 517 U.S. at 815; s*ee also Scott*, 436 U.S. at 756 ("The subjective intent of the monitoring agents is not a sound basis for evaluating the legality of the seizure."). As the Court observed in *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (quoting *Horton v. California*, 496 U.S. at 138), "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."

These concerns are as applicable to fears of destruction of evidence as they are to findings of probable cause. A court cannot effectively or consistently determine whether a police officer acted with bad faith in conducting a warrantless search because of a perceived exigency. Indeed, a bad faith test requires the court to engage in ad hoc, fact-specific balancing in every case as it determines whether it believes the police acted with good intentions. And in any event, the Fourth Amendment's concern for reasonableness is by nature an objective inquiry that precludes considerations of officers' subjective bad faith. Accordingly, in other contexts, the Court has precluded reliance on exigent circumstances to justify a warrantless search only where it was

objectively apparent that the exigency had passed. *See, e.g., Michigan v. Clifford*, 464 U.S. 287 (1984); *Michigan v. Tyler*, 436 U.S. 499 (1978). The bad-faith test applied by the Kentucky Supreme Court contravenes the Court's longstanding precedents and should be rejected.

B. The foreseeability of others' destruction of evidence is not a barometer of reasonableness

If the subjective intent of a police officer does not determine the constitutionality of a search, it makes even less sense to find a Fourth Amendment violation based on the (often illegal) reaction by the suspect to lawful police action, as the decision below did. Pet. App. at 46a (holding that courts must determine "[w]hether, regardless of good faith, it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify a warrantless entry"); *see also United States v. Mowatt*, 513 F.3d 395, 402 (4th Cir. 2008) (holding that officers should have avoided "set[ing] up the wholly foreseeable risk that the occupants, upon being notified of the officers' presence, would seek to destroy the evidence of their crimes"); *United States v. Duchi*, 906 F.2d 1278, 1285 (8th Cir. 1990) ("The heightened danger of destruction upon discovery was, however, reasonably foreseeable . . . [and because] that danger was created by the officers' investigative strategy, it cannot justify their warrantless entry.").

A foreseeability inquiry does not protect any particular Fourth Amendment values, but it will

almost always doom an exigent circumstances search. Particularly in drug cases, it is arguably *always* foreseeable that residents of a house where drugs are present will become nervous when a police officer knocks at the door and might flush or otherwise dispose of the drugs, yet police would be powerless to react because of that foreseeability. Procuring a warrant at that point would be in vain as the evidence would be destroyed in the interim, resulting in needlessly failed enforcement of the law. Indeed, requiring the police to take such extra steps before interceding would provide criminals with an incentive to destroy evidence. This result would be particularly galling since Fourth Amendment doctrine requires police to knock and announce themselves prior to forcing entry into a dwelling. *See Wilson v. Arkansas*, 514 U.S. 927, 930 (1995) (holding that the "common-law knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry."). It would be unreasonable to require police to announce their presence, and then forbid them from preventing the obvious destruction of evidence that follows based on the foreseeability of suspects' reactions to the announcement.

Moreover, what particular legitimate privacy expectations would a foreseeability rule protect? If the normal privacy interest in one's dwelling is not strong enough to resist a warrantless search based on "unforeseeable" destruction of evidence, that interest does not become greater simply because the destruction of evidence is "foreseeable." There is no Fourth Amendment privacy interest in destroying evidence inside one's home. *See Ker*, 374 U.S. at 39.

As the Second Circuit observed twenty years ago, "[e]xigent circumstances are not to 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." *United States v. MacDonald*, 916 F.2d 766, 771 (2d Cir. 1990).

The question whether the foreseeable destruction of evidence can justify a warrantless search calls to mind the ethical debate among journalists as to whether a reporter whose very presence may have prompted an event to occur can objectively construct a report of that event. *See* SPJ News, *SPJ cautions journalists: Report the story, don't become part of it*, available at http://www.spj.org/news.asp?ref=948 ("injecting oneself into the story or creating news events for coverage is not objective reporting"). Given the nature of newsgathering and reporting, this is no doubt an important ethical question. Many reporters understandably strive not to become the story or to "alter the narrative," for that defeats the ideal of the newsgatherer as an objective, unbiased reporter whose recitations of facts can be relied upon. *Id.* Law enforcement officers, however, are not like newsgatherers. Their whole intention is to use their presence to "alter the narrative" for the good of society. They are charged with a task fundamental to maintaining social order, and they do not have the luxury of pondering the precise nature of their existential impact on events.

Nor is the Fourth Amendment a code of ethics concerned with the moral rectitude of the police. The Founders did not include it in the Bill of Rights

principally so that officers would be held accountable for their internal motivations. Yet the only reason to impose a foreseeability test would be to punish police, not to protect legitimate Fourth Amendment interests. The Fourth Amendment is concerned instead with protecting legitimate privacy interests, and the foreseeability of a suspect's reaction to police "knock and talk" has no bearing on those interests. A foreseeability inquiry is merely a proxy for the subjective motivations inquiry the Court has already rejected. *See* Part II.A, *supra*. It tells nothing about the objective reasonableness of a search, yet allows courts to punish what they perceive to be dishonest police behavior. The Fourth Amendment does not permit that.

What is more, including a foreseeability component in an exigent circumstances test compromises the tools available to the police and forces them to hesitate in potentially dangerous or criminal situations. "To disallow the exigent circumstances exception in these cases would be to tie the hands of law enforcement agents who are entrusted with the responsibility of combating grave, ongoing crimes in a manner fully consistent with the constitutional protection afforded to all citizens." *MacDonald*, 916 F.2d at 772-73. Indeed, by blaming police officers for destruction of evidence by a suspect, foreseeability tests treat police officers as accessories to illegal destruction of evidence—for no compelling reason connected to legitimate Fourth Amendment interests.

Such treatment would contravene the Court's prior deference to legitimate snap decisions by

police. In *United States v. Sharpe,* 470 U.S. 675, 686 (1985), a vehicle search case, the Court emphasized that courts should "take care to consider whether the police are acting in a swiftly developing situation, and in such cases, the court should not indulge in unrealistic second-guessing." *See also Graham v. Connor*, 490 U.S. 386, 396-97 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving"). Asking whether a suspect's search-justifying destruction of evidence was a foreseeable result of an on-the-fly police decision amounts to such an indulgence. It injects the judiciary's skeptical eye exactly where the Court has said it does not belong—in the midst of addressing ongoing, active police work where any number of uncontrollable circumstances can threaten lives and public peace. It is reasonable to allow police to take control of some of these exigencies—including destruction of evidence—without worrying about their existential proximate cause.

The Court has already rejected a form of foreseeability analysis in another Fourth Amendment context. The issue in *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000), was whether the police develop reasonable suspicion justifying an investigatory stop when they see a man flee from them in a high crime area. The defendant argued that minorities and others residing in high crime areas might run from the police because of a fear, justified or not, of police brutality. *Id.* at 132 (Stevens, J., concurring in part and dissenting in

part). The Court held that although "there are innocent reasons for flight from police[,]" it was reasonable for the police to suspect that Wardlow was involved in criminal activity because of his unprovoked flight. *Id.* at 125. Thus, in that case, the police were held not responsible for a foreseeable—even possibly innocuous—reaction prompted by their presence. Similarly, police who merely announce their lawful presence should not be blamed for causing, and suspects who hear that announcement should not be rewarded for undertaking, destruction of evidence—which destruction is itself an illegal act (unlike Wardlow's flight).

Fourth Amendment reasonableness tests based on police bad faith or the foreseeability of others' reactions to police would tip the delicate, long-established balance for warrantless entries. The Court should accordingly reject those inquiries and focus only on whether police presence is lawful.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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