No. 09-1272

IN THE

Supreme Court of the United States

KENTUCKY,

Petitioner,

v.

HOLLIS DESHAUN KING,

Respondents.

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF OF RESPONDENT HOLLIS DESHAUN KING

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QUESTION PRESENTED

Three uniformed officers entered an apartment complex in pursuit of a cocaine dealer. The officer in charge of the investigation knew which apartment the cocaine dealer entered, but his attempt to relay that information to the uniformed officers was unsuccessful. The uniformed officers lost track of the cocaine dealer and had no idea which apartment, of a number of possible apartments, he had entered. Midway down the breezeway leading to those apartments, the uniformed officers detected the odor of burnt marijuana. They believed that the odor emanated from Mr. King's apartment, so they banged on the door as loudly as they could, announced either "Police, police, police," or "This is the police," and they demanded to be let inside. As soon as they started banging, the uniformed officers heard "people moving around" inside so they kicked in the door and searched the apartment. The question presented is:

May officers in the field rely solely on the sound of "people moving around" in response to their loud banging on the door, announcement of "Police, police, police" or "This is the police," and demand to be let inside in order to justify an exigency and thus a warrantless entry by kicking the door in?

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STATEMENT OF THE CASE

This case is about the warrantless, forcible, nighttime entry into a home to prevent the destruction of whatever evidence might still exist of a completed, nonviolent, victimless, misdemeanor offense.

The police suspected that someone inside Mr. King's apartment had recently smoked marijuana and they speculated that additional evidence of marijuana possession might exist. They banged on the door as loudly as they could, announced their presence, and demanded to be let inside. As soon as the police started banging, they heard "people moving around" so they kicked in the door and searched the apartment. The Commonwealth claims that this search was justified by the exigent circumstances exception to the warrant requirement. Pet. BOM 17.

The warrantless search of a home is presumptively unreasonable, and the Commonwealth has failed to carry its "heavy burden" of rebutting that presumption. The odor of burnt marijuana did not authorize the officers to demand entry into Mr. King's apartment, and the unremarkable sound of "people moving around" in response to the officers' banging and demand to be let inside did not suggest that the destruction of evidence was imminent or underway. With at least equal probability, the sound of "people moving around" suggested that someone was attempting to comply with the officers' demand to be let inside. There was no exigency. The police were not excused from obtaining a warrant.

Alternatively, even if this Court were to decide that the odor of burnt marijuana and "people moving around" supported the conclusion that exigent

circumstances existed – a conclusion Mr. King vigorously contests – the exigency was one of the officers' own creation. When the police engage in conduct that would cause a reasonable person to believe that entry into the home was imminent and inevitable, the police cause the occupant to "move." The Commonwealth may not then rely on that "movement" as a justification for a warrantless search.

FACTUAL BACKGROUND

At around 9:50 p.m. on October 13, 2005, the Lexington Police kicked in the door to Mr. King's apartment. They did not have a warrant.

The events that night began when a person sold cocaine to an informant outside of Mr. King's apartment complex. Pet. App. 2a, 35a. An undercover police officer radioed to several other uniformed officers, who were waiting nearby, that the cocaine dealer entered the back right apartment of the complex. Pet. App. 2a, 35a. The uniformed officers heard only part of the radio broadcast. They did not hear (and did not independently know) which apartment the cocaine dealer entered. Pet. App. 2a, 35a. As the uniformed officers proceeded down the breezeway of the apartment complex, they heard a door slam. Pet. App. 2a, 35a. But, the officers did not know which apartment door they heard shut, and they did not know which apartment the cocaine dealer entered. Pet. App. 3a, 35a.

Midway down the breezeway, the uniformed officers detected the odor of burnt marijuana, which they believed emanated from the back left apartment. Pet. App. 2a, 35a. Officer Cobb, who was the only witness to testify at the hearing on Mr. King's motion

to suppress, gave the following account of what happened next:

> As we got into the hallway, about midway, there was a very strong odor of burnt marijuana inside the breezeway.
>
> As we got closer to back left apartment, we could tell that it seemed to be the source of that, almost as if the door had been slammed right there.
>
> Detective Maynard made contact with the door, announced our presence, banged on the door as loud as we could, announced, "Police, police, police."

J.A. 22. In response to further questioning by the prosecutor about exactly how the officers' announced their presence at the door, Officer Cobb testified:

> Detective Maynard banged on the door, said, "This is the police."

J.A. 23. Officer Cobb explained what happened next:

> As soon as we started banging on the door, Detective Maynard turned to Sergeant Simmons to let him know that we could hear people inside moving. It sounded as – things were being moved inside the apartment. …
>
> * * * * *
>
> We knew that there was possibly something that was going to be destroyed inside the apartment.
>
> At that point, Detective Maynard, with the – Sergeant Simmons – and we explained to them we were going to make entry inside the apartment. Detective Maynard attempted to get

> the – to go – to enter through the door, wasn't able to, and that's when I entered to through the door.
>
> * * * * *
>
> I kicked the door open.

J.A. 24-25.[1] Mr. King and two other people were inside, one of whom was sitting on the couch still smoking marijuana. J.A. 25-26; Pet. App. 4a. The police observed marijuana on the coffee table in the middle of the room and cocaine sitting out on the kitchen counter. J.A. 27, 49-50; Pet. App. 4a-5a. After the occupants' arrest, a subsequent search of the apartment revealed additional drugs, drug paraphernalia, and $2,500 in cash. Pet. App. 5a.

The police later entered the back right apartment and arrested the cocaine dealer. Pet. App. 6a, 35a.

At the suppression hearing, the parties and the trial court asked Officer Cobb to explain what exactly he heard that lead him to believe that the destruction of evidence was imminent or underway. Initially, Officer Cobb testified:

> It sounded as – things were being moved inside the apartment.

J.A. 24. In response to further questioning by the trial court, Officer Cobb clarified that he "couldn't discern exactly" what it was that he heard after all:

> Q: When you were at the door of Apartment 78 and you said that you heard things being

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[1] The Solicitor General's claim that the police "knocked on the door…in an effort to gain voluntary cooperation from the occupants, and waited for a response" is misleading and wrong. S.G. Br. 20-21.

> moved or heard movement inside the apartment, at first I thought you were talking about somebody moving furniture, but you're talking about people moving around?
>
> A: Correct. Now, whether – Your Honor, whether they were moving furniture or things were being moved, we were just –
>
> Q: I just – I just didn't know whether you were talking about the screeching of couches being moved on the floor or whether it was just – just foot traffic. That's all I was asking.
>
> A: I couldn't discern exactly.

J.A. 58. Officer Cobb also candidly admitted that he believed only that the occupants of Mr. King's apartment were "possibly" destroying evidence. Officer Cobb testified:

> Q: What did you-all do once you heard these things being moved around in the apartment?
>
> A: We knew that there was possibly something that was going to be destroyed inside the apartment.

J.A. 24. Later, Officer Cobb reiterated:

> Q: What was your basis for believing you could enter the apartment that these defendants were in?
>
> A: There was a crime occurring inside and also possible destruction of evidence.
>
> Q: And isn't it true that you actually wrote in your report that "We could hear persons inside that apartment and noises possibly consistent" – is that right – "possibly consistent with the

> destruction of potential evidence"?
>
> A: Yes, I wrote "possibly consistent with the destruction of potential evidence."

J.A. 40-41. Officer Cobb further acknowledged that as a matter of course, "people move in apartments" and that "[m]ost people answer the door when the police knock at the door also." J.A. 41.

The trial court made extensive, written findings of fact. Regarding the manner of entry, the trial court found:

> Det. Maynard, who was accompanying Officer Cobb in the breezeway attempting to locate and arrest the suspect in question, banged on the door of the apartment on the back left of the breezeway identifying themselves as police officers and demanding that the door be opened by the persons inside.
>
> * * * * *
>
> After Det. Maynard announced the presence of the police officers at the door…Officer Cobb and the others heard "things being moved in that apartment (78)".

Pet. App. 3a-4a (emphasis in original).[2]

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[2] The Commonwealth's assertion that, "[t]he officers neither demanded entry nor threatened the occupants, but merely announced that the police were at the door," is not a fair characterization of the record. The trial court specifically found – and Officer Cobb testified – that the officers' "banged on the door as loud as [they] could" and "demand[ed]" to be let inside. J.A. 22-24; Pet. 3a-4a.

Regarding the noises that Officer Cobb heard, the trial court found:

> After Det. Maynard announced the presence of the police officers at the door of the back left apartment, Apt 78, Officer Cobb and the others heard "things being moved in that apartment (78)". Officer later described the noise as people moving around as opposed to furniture being moved.

Pet. App. 3a-4a (emphasis in original).[3]

At the suppression hearing, counsel for Mr. King asked the prosecutor to "delineate" her theory of the case, *e.g.* whether the officers entered Mr. King's apartment in hot pursuit or to prevent the destruction of evidence. J.A. 71. The prosecutor responded:

> Officer Cobb testified here today that he entered the apartment based on the smell of marijuana that was coming from the apartment and the fact that he believed people were destroying evidence and he heard the movement inside.

J.A. 71.[4] Regarding the officers' reason for entering Mr. King's apartment, the trial court found:

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[3] The Commonwealth's assertion that, "the officers heard things inside the apartment being moved around," is also wrong. Pet. BOM 3. The trial court specifically found – and Officer Cobb testified – that he heard "people moving around." J.A. 58; Pet. 4a.

[4] The prosecutor did not mention hot pursuit for good reason. The undercover officer in charge of the investigation knew that the cocaine dealer did not enter Mr. King's apartment and he radioed that information to his fellow officers before Officer Cobb kicked down Mr. King's door, although Officer Cobb testified that he had not heard this information at the time.

> When asked directly to articulate the reasons which he thought justified the forced entry into Apt 78 (apartment on the back left of hall) by knocking down the door, Officer Cobb testified that he and the other officers thought that there was a crime occurring inside Apt 78 based on the strong odor of burnt marijuana being detected from under the door and, from the noise heard through the door, that its occupants were engaging in the destruction of evidence.

Pet. App. 6a. The trial court denied Mr. King's motion to suppress the evidence found inside his apartment. Pet. App. 24a. Mr. King entered a conditional plea of guilty to the charges of trafficking in a controlled substance, possession of marijuana, and persistent felony offender in the second degree. Mr. King was sentenced to serve eleven years in prison. He promptly appealed.

Mr. King emphasizes that the Commonwealth's strained characterizations of the record version of

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Pet. App. 35a. Neither the Commonwealth nor the Solicitor General address this fact or its collective knowledge implications in the briefing. *See e.g. United States* v. *Gillette*, 245 F.3d 1032, 1034 (8th Cir. 2001) ("Where officers work together on an investigation, we have used the so-called 'collective knowledge' theory to impute the knowledge of one officer to other officers.... Under this rationale, the validity of a search may be based on the collective knowledge of all of the law enforcement officers involved in an investigation if…come degree of communication exists between them." (internal citations omitted). Moreover, although Officer Cobb testified that the smell of marijuana may have indicated that a door had recently been opened, at bottom, the trial court found – and Officer Cobb repeatedly testified – that he did not know which apartment the cocaine dealer entered. J.A. 32, 59, 61-62; Pet. App. 3a, 5a, 6a, 8a, 36a.

events distorts the legal issues actually presented by this case. Despite the fact that the Kentucky Supreme Court rejected the Commonwealth's contention that the police entered Mr. King's apartment in pursuit of the cocaine dealer in the section of its opinion titled, "The Police Were Not In Hot Pursuit of a Fleeing Suspect," see Pet. App. 40a, and despite the fact that this Court rejected the Commonwealth's Second Question Presented, which pertained to the hot pursuit doctrine, see Pet. i, the Commonwealth clings to the notion that the police entered Mr. King's apartment in pursuit of the cocaine dealer in order to create the erroneous impression that the circumstances were truly exigent.

The Commonwealth claims: "Believing that they were in hot pursuit of a fleeing felon, that the felon had recently entered the left apartment, and that the felon was now destroying physical evidence of his crime of trafficking, the police entered the [ ] apartment." Pet. BOM 3.

Any discussion about the cocaine dealer is a red herring. This is not a hot pursuit case.[5] This case is

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[5] The problem with the Commonwealth's hot pursuit claim – aside from the fact that it is not supported by the record – is that if the police were in hot pursuit, then their banging would be of no legal consequence. See *Ker* v. *California*, 374 U.S. 23, 55 (1963) (Brennan, J., plurality opinion) (when the police are in hot pursuit, "pausing at the threshold to make the ordinarily requisite announcement and demand would be a superfluous act which the law does not require.") The reality is that while police may have been in pursuit of someone, Officer Cobb lost contact with that individual and did not know which apartment he had entered. See supra n.4. If the police entered Mr. King's apartment in pursuit of a cocaine dealer – a fact Mr. King vigorously contests – then any discussion about created exigencies or the destruction of evidence would be unnecessary.

about the warrantless, forcible, nighttime search of a home based on an officer's equivocal belief that the occupants were "possibly" destroying misdemeanor crime evidence.

PROCEDURAL HISTORY

The Kentucky Court of Appeals concluded that "because the police were pursuing a suspected felony crack cocaine dealer following a 'buy-bust' operation to a particular apartment building door and believing that the suspect was about to destroy evidence of a serious crime…the warrantless entry into Mr. King's apartment was valid." Pet. App. 24a.

The Kentucky Supreme Court reversed the judgment of the Court of Appeals. The court reviewed the record and found that the trial court's "findings of fact were supported by substantial evidence, and are therefore conclusive." Pet. App. 38a.

The court reiterated that pursuit of the cocaine dealer played no role in the officers' decision to forcibly enter Mr. King's apartment:

> As the circuit court noted in its findings of fact, when asked to articulate the reasons which he thought justified the forced entry, Officer Cobb testified that the officers thought (1) that a crime was occurring based on the strong odor of marijuana, and (2) that evidence was possibly being destroyed based on the sound of movement inside the apartment.

Pet. App. 36a. The court "assumed for the purpose of argument that exigent circumstances existed" in order to "proceed to the more important question of

whether police created their own exigency." Pet. App. 43a. The court then held:

> While probable cause existed for police to obtain a warrant to enter the apartment occupied by Mr. King, police did not have proper exigent circumstances to justify a warrantless entry. Police were not in hot pursuit of a fleeing suspect. Further, the entry was not justified by imminent destruction of evidence. The odor of marijuana alone did not provide a justification, and any exigency arising from the sounds of movement inside the apartment was created by police, and therefore cannot be relied upon as a justification.

Pet. App. 49. The court reversed the decision of the Court of Appeals, reversed the decision of the trial court, and remanded the case for further proceedings consistent with its opinion.

ARGUMENT SUMMARY

The facts of this case are indistinguishable from those in *Johnson* v. *United States*, 333 U.S. 10 (1948), this Court's seminal Fourth Amendment decision. The reasoning in *Johnson* and its extensive progeny is sound, and it controls the outcome here. Mr. King prevails regardless of which created-exigency test this Court adopts because the odor of burnt marijuana and the ambiguous, commonplace noise of "people moving around" inside the home do not support the inference that the destruction of evidence is imminent or underway.

Even if *Johnson* were not controlling, when the government relies on sounds as a basis for an officer's belief that the destruction of evidence is imminent or underway, evidence regarding those sounds must be

specific enough to enable a reviewing court to determine that the officer had an objectively reasonable basis for proceeding without a warrant. Testimony that the police heard "people moving around" is insufficient to rebut the strong presumption that a warrantless search of a home is unreasonable.

Moreover, any exigency was one of the officers' own creation. The police caused the occupants of Mr. King's apartment to "move around" when they loudly banged on the door, announced their presence, and demanded to be let inside. The Commonwealth is thereby precluded from relying on the "movement" that it caused as a justification for searching Mr. King's apartment without a warrant. In the context of a warrantless entry into the home, the police impermissibly create exigent circumstances when, as here, they engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable.

This Court should reject the Commonwealth's categorical "unlawfulness" test, under which the Commonwealth apparently asserts that an officer may lawfully bang on the door to a person's home and demand entry regardless of the circumstances. That test is tautological and fails to adequately protect the most fundamental of Fourth Amendment rights – the right to be secure in one's home. That test is ignores the basic requirement that a warrantless search must be strictly circumscribed by the exigency that justifies its initiation, and it provides no real guidance to the police or courts.

ARGUMENT

I. *JOHNSON* V. *UNITED STATES* CONTROLS THIS CASE.

On its facts and as a matter of rudimentary Fourth Amendment jurisprudence, this case is squarely controlled by *Johnson*, an opinion written by Justice Robert Jackson which this Court has cited more than one hundred times as a leading exposition of Fourth Amendment law. *Johnson's* holding has never been questioned; there is no reason to question it; this case should be affirmed on the authority of *Johnson* and its extensive progeny.

The facts of this case are identical to the facts in *Johnson*, except that in this case the police banged on the door as loudly as possible, demanded entry, and then forced their way inside. In *Johnson*, the police entered and searched a hotel room because they smelled the "distinctive and unmistakable" order of burning opium. After knocking on the door and announcing their presence, they heard "some 'shuffling or noise' inside the room." 333 U.S. at 12. This Court held that the search was unlawful:

> No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a moveable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time will disappear. But they were not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before the search was adequate and the testimony of the officers to that effect would not perish from the delay of getting a warrant.
>
> If the officers in this case were excused from

> the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required.

Id. at 15. This Court has repeatedly reaffirmed the reasoning in *Johnson* and should do so again here.

The Solicitor General suggests that the existence of probable cause to believe that a crime has occurred is a reasonable foothold on the slippery slope to a blanket rule that the sound of "people moving around" justifies a warrantless, forcible, nighttime entry into a person's home. Brief for the United States as Amicus Curiae in Support of Petitioner (S.G. Br.) 25. This Court rejected that argument in *Johnson*, and it has continued to reject that argument ever since. Criminal activity does not, without more, establish both probable cause and exigent circumstances. *Welsh* v. *Wisconsin*, 466 U.S. 740, 753 (1984) ("[N]o exigency is created simply because there is probable cause to believe that a serious crime has been committed.") *Payton* v. *New York*, 445 U.S. 573, 587-588 (1980) ("[A]bsent exigent circumstances, a warrantless [search for evidence] is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within.")

The "plain smell" of incriminating evidence does not give rise to exigent circumstances, either. See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 468 (1971) ("Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure."); *Taylor* v.

United States, 286 U.S. 1, 6 (1932) ("Prohibition officers may rely on a distinctive odor [of whiskey] as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees…against unreasonable search.")

If the odor of burnt drugs were enough to supply both the probable cause *and* exigent circumstances necessary to effectuate a warrantless entry into a person's home, then the Warrants Clause would be devoid of all meaning. Ex ante, the government could justify a warrantless search simply by presenting evidence that the officer in question was qualified to detect the odor of narcotics. Nothing more would be required. The potential for abuse and pretextual searches would be intolerably high.

Likewise, if the sound of "people moving around" without some nexus to the act of destruction can give rise to an objectively reasonable belief that evidence is being destroyed, then for all practical purposes, the police will have a per se exemption from seeking a warrant in drug cases. But see *United States* v. *Karo*, 468 U.S. 705, 717 (1984) (people suspected of drug offenses are protected by the Warrants Clause to the same degree as people suspected of nondrug offenses). The police will be able to kick down the door and forcibly enter almost any home they want after knocking, as long as they have probable cause and the person inside moves.

Johnson and its progeny instruct that ambiguous, commonplace household sounds do not suggest that the destruction of evidence is imminent or underway, and they do not justify the entry of a private residence without a warrant. This Court presumes that movement will follow an officer's knock at the

door. See *e.g. Hudson* v. *Michigan*, 547 U.S. 586, 594 (2006) (the knock and announce rule "assures the opportunity to collect oneself before opening the door"); *Richards* v. *Wisconsin*, 520 U.S. 385, 393 n. 5 (1997) ("The brief interlude between announcement and entry…may be the opportunity that an individual has to pull on clothes or get out of bed.")

If "moving around" justifies a warrantless entry, then ordinary citizens can never be sure how to respond when the police knock at the door. See generally *New York* v. *Belton*, 453 U.S. 454, 459-460 (1981) ("When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection"); *Kyllo* v. *United States*, 533 U.S. 27, 39 (2001) ("The people in their houses, as well as the police, deserve…precision.") Officer Cobb stated the obvious when he testified that, in his experience, "[m]ost people answer the door when the police knock at the door." J.A. 41. If "movement" in response to a police presence suggests that the destruction of evidence is imminent or underway, which, in turn, justifies a warrantless entry, then the upshot of the Commonwealth's argument is that a person who wants to assert her Fourth Amendment rights should ignore the police and simply hope that they will go away.

If the Commonwealth prevails, the right to privacy and security in one's own home will hinge on an occupant's ability to remain frozen in place. In Judge Sutton's words, a criminal investigation "will have reached a conspicuously low point" only if no one inside the home ever moves. *United States* v. *Chambers*, 395 F.3d 563, 577 (6th Cir. 2005) (Sutton, J., dissenting). But that scenario is wholly

unrealistic and certainly should not apply to an innocent homeowner who arises from his or her couch to respond to police banging at the door. The result in all such instances is that the police can lawfully kick the door in.

This case illustrates perfectly why it would be misguided to permit a warrantless entry into a home based solely on probable cause and an officer's conjecture about the significance of ambiguous, commonplace sounds. The record reflects that everything Officer Cobb believed about the supposedly exigent nature of the situation was wrong. Officer Cobb's training and experience failed him. Nothing inside Mr. King's apartment corroborated his belief that the occupants attempted to destroy evidence. After the police kicked in the door to Mr. King's apartment, they found someone sitting on the couch smoking marijuana and narcotics evidence conspicuously located on the coffee table in the middle of the room and sitting out on the kitchen counter. J.A. 27, 49-50; Pet. App. 4a-5a. The people inside Mr. King's apartment made no attempt to conceal evidence, much less destroy it.

Even Officer Cobb lacked confidence in his own assessment about what the occupants of Mr. King's apartment might have been doing. Officer Cobb conceded that he "couldn't discern exactly" what he heard, and he candidly admitted that whatever he heard was only "possibly" consistent with the destruction of evidence. J.A. 40-41, 58. Officer Cobb equivocated for good reason. Who wouldn't "move around" if at night, the police "banged on the door as loud as [they] could," announced either "Police, police, police" or "This is the police," and "demand[ed] that

the door be opened by the persons inside"? J.A. 22; Pet. App. 3a-4a.

The Commonwealth has no answer to *Johnson* or its considerable progeny. The Commonwealth simply ignores *Johnson* altogether. *Johnson* is one of this Court's leading Fourth Amendment cases, it is indistinguishable from this case, and it controls the outcome here.

II. EVEN IF *JOHNSON* WERE NOT CONTROLLING, NONSPECIFIC TESTIMONY ABOUT AMBIGUOUS AND COMMONPLACE HOUSEHOLD SOUNDS IS INSUFFICIENT TO OVERCOME THE STRONG PRESUMPTION THAT THE WARRANTLESS SEARCH OF A HOME IS UNREASONABLE.

The exigent circumstances exception does not justify the warrantless entry into a private residence – forcibly and at night – simply because a police officer heard the sound of "people moving around" inside. It is "a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable," *Payton*, 445 U.S. at 586 (internal quotation marks omitted), and the Commonwealth does not meet its "heavy burden" of overcoming that presumption without providing specific and articulable facts about what it was that caused them to believe an exigency existed. *Welsh*, 466 U.S. at 479-450.

The Commonwealth was required to demonstrate that Officer Cobb had an "objectively reasonable basis" for believing that the destruction of evidence

was imminent or underway. *Cf. Brigham City* v. *Stuart*, 547 U.S. 398, 400 (2006) (the emergency aid exception applies only when the police "have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury"). Officer Cobb's conclusory testimony about ambiguous and commonplace household sounds is insufficient to rebut the presumption of unreasonableness.

When the government relies on sounds to justify a warrantless search, the evidence it presents regarding those sounds must be specific enough to enable a reviewing court to conclude that the decision to forgo a warrant was objectively reasonable. Every time this Court has held that exigent circumstances justified a warrantless entry, the government has provided detailed information about what the police observed. See *e.g. Michigan* v. *Fisher*, 130 S. Ct. 546, 547 (2009) (the warrantless entry was justified to render emergency aid where the police found extensive property damage that appeared to be recent, blood on the hood of a truck and on one of the doors to the house, they observed respondent screaming and throwing things, and noticed that he had a cut on his hand); *Brigham City*, 547 U.S. at 400-02 (the warrantless entry was justified to render emergency aid where the police heard shouting and saw a juvenile hit an adult in the face, after which other adults tried to restrain the juvenile by pressing him against a refrigerator with such force that the refrigerator began moving across the floor); *United States* v. *Santana*, 427 U.S. 38, 40-41 (1976) (in this consolidated case, the warrantless entry was justified, *inter alia*, to prevent the destruction of evidence where, after one respondent saw the police, she attempted to retreat inside her home and as she

tried to pull away from police drugs fell to the floor, prompting the other respondent to try and make off with the drugs); *Warden* v. *Hayden*, 387 U.S. 294, 297 (1967) (the warrantless entry was justified by the hot pursuit exception where a cab driver followed a robbery suspect from the bank to a particular house on Cocoa Lane and then relayed that information to the police); *Schmerber* v. *California*, 384 U.S. 757, 758-759 (1966) (taking the petitioner's blood without a warrant was justified given the evanescent nature of blood alcohol evidence where the petitioner was at the hospital receiving treatment for injuries he suffered in an automobile accident, the police smelled liquor on his breath, and his eyes had a bloodshot, watery, glassy appearance).

Here, by comparison, Officer Cobb testified that he heard "people moving around" and that the noise was "consistent" with his "experience of people who do destroy evidence inside apartments or other structures when we're outside." J.A. 41. When pressed, Officer Cobb acknowledged that he "couldn't discern exactly" what he heard, and Officer Cobb conceded that whatever he heard was only "possibly" consistent with the destruction of evidence. J.A. 40-41, 58. Officer Cobb was unable to articulate any concrete characteristics about the sound that he heard that distinguished it from a person "collecting" herself by pulling on clothes or getting out of bed. Officer Cobb simply referred to his "experience" with "people who have destroyed evidence," without describing or explaining those experiences further. J.A. at 40-42. Officer Cobb's testimony that he thought evidence could be destroyed "[j]ust based upon the nature of what it is we were there for" has a truer ring. J.A. 24.

The Commonwealth failed to present sufficient evidence from which a reviewing court could conclude that Officer Cobb's belief that the occupants of Mr. King's apartment were "possibly" destroying evidence was objectively reasonable. Under the circumstances, it was at least as likely that the occupants "moved around" in an attempt to answer the door. The Commonwealth has failed to satisfy its "heavy burden" to rebut the presumption that the warrantless search of Mr. King's apartment was unlawful.

Every police-created exigency case necessarily presents two questions: (1) did an exigent circumstance exist and, *if so* (2) did the police impermissibly create the exigency. To avoid issuing an advisory opinion, this Court must answer the first question in the affirmative before proceeding to the second question. See *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 345-46 (1936) (The Court has "no power to give advisory opinions."). Contrary to the Commonwealth's suggestion, this Court cannot simply assume that exigent circumstances existed. See Pet. Reply 3 ("This Court routinely grants *certiorari* to review legal issues that a lower court decided after assuming the existence of a predicate fact or legal conclusion."). For the remainder of this brief, Mr. King assumes *arguendo* that the sound of "people moving around" does not suggest that the occupants of his apartment were destroying evidence.

III. THE POLICE IMPERMISSIBLY CREATE EXIGENT CIRCUMSTANCES WHEN THEY ENGAGE IN CONDUCT THAT WOULD CAUSE A REASONABLE PERSON TO BELIEVE THAT ENTRY IS IMMINENT AND INEVITABLE.

Nothing in the historical record suggests that the Framers contemplated either warrantless searches to prevent the destruction of evidence or a test for evaluating manufactured exigencies. The Framers' intent is not conclusive of the issue here,[6] but this Court's case law is instructive.

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[6] Courts have always recognized exigent circumstances. See e.g. *Accarino* v. *United States*, 179 F.2d 456, 462 (D.C. Cir. 1949) (at common law, police were authorized to enter a residence to prevent threatened crimes of violence and quell disturbances of the peace). The notion that warrants or their execution might yield in emergency situations emerged as a doctrinal theme in early knock and announce cases. See *Wilson* v. *Arkansas*, 514 U.S. 927, 935-937 (1995) (collecting cases). But, the "destruction of evidence" species of exigency was not recognized as a basis for dispensing with the knock and announce rule until Prohibition. See Jennifer M. Goddard, Note, *The Destruction of Evidence Exception to the Knock and Announce Rule: A Call for Fourth Amendment Rights*, 75 B.U. L. Rev. 449, 464, n. 80 (1995) (collecting cases). The notion that destruction of evidence might justify dispensing with warrants altogether crystallized in 1948 with *Johnson*, 333 U.S. at 15 ("exceptional circumstances" did not justify the search because "[n]o evidence or contraband was threatened with removal or destruction"); *Trupiano* v. *United States*, 334 U.S. 699, 706 (1948), (the search was unlawful because "the property was not of a type that could have been dismantled and removed"); and *McDonald*, 339 U.S. at 454-55 (the warrantless search was unlawful because property was not "in the process of destruction nor…likely to be destroyed.")

When – as here – an officer conveys the impression that entry into the home is inevitable and imminent, the officer is acting as though he has a warrant. And, when "a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion – albeit colorably lawful coercion." *Bumper* v. *North Carolina*, 391 U.S. 543, 550 (1968). But, when an officer claims authority to search a home under a warrant, *and he does not actually have a warrant*, the situation is simply "instinct with coercion" that the law will not abide.

The police may not rely on the fruits of coercive conduct in order to justify their decision to forego a warrant. See *e.g. Williams* v. *United States*, 401 U.S. 646, 662 (1971) ("When coercion, impermissible under the Fifth Amendment, has actually produced an involuntary statement, we have invariably held that the fruits of that unconstitutional coercion may not be used to prosecute the individual involved for crime."); *Wong Sun* v. *United States*, 371 U.S. 471, 486 (1963) (a statement following an illegal arrest must be suppressed as a fruit of that arrest unless it results from "an intervening independent act of a free will," and is "sufficiently an act of free will to purge the primary taint of the unlawful invasion"); cf. *Kyllo*, 533 U.S. at 40 (information about the amount of heat emanating from the Commonwealth's house, which was obtained through an unlawful search using thermal imaging, could not be used to form the basis for probable cause to obtain a warrant for a subsequent search of the home).

Accordingly, in the context of a warrantless entry into the home, the police impermissibly create

exigent circumstances when, as here, they engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable.

In this case, despite the fact that he did not actually have a warrant, Officer Cobb and his fellow officers banged on the door to Mr. King's apartment as loudly as they could, announced themselves as police officers, and demanded that the occupants let them inside. Pet. App. 3a-4a. Officer Cobb's behavior would have caused a reasonable person to believe that forcible entry into the apartment was imminent and inevitable and that "submission to the law" was required. *Bumper*, 391 U.S. at 550 n. 14. Accordingly, the Commonwealth is precluded from relying on the fruits of the officers' conduct, *e.g.* the sound of "people moving around" inside the apartment, in order to justify the warrantless search of Mr. King's home.

The analysis focuses on what a reasonable person would infer about police conduct – what the police subjectively intended is irrelevant, see *Brigham City*, 547 U.S. at 404 – considering the totality of the circumstances. The distinguishing feature between the investigative tactic known as a "knock and talk" and what the police did in this case is not simply the intensity of the officers' knock. The totality of the circumstances, *i.e.*, loud banging, announcement in the form of either "Police, police, police" or "This is the police," and a demand to be let inside, are all relevant.

The job for a reviewing court is simply to determine whether the police had a warrant and, if not, whether, under the totality of the circumstances, a person would reasonably believe that entry into his or her home was imminent and inevitable. This task is

familiar. Courts are routinely called on to determine how a person would interpret, and respond to, a challenged police action. See *e.g. United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (the test for evaluating when a seizure occurs is, *inter alia*, whether, in light of all the surrounding circumstances, "a reasonable person would have believed that he was not free to leave.").

Because Officer Cobb and the other officers manufactured the exigency, the Commonwealth may not rely on the exigent circumstances exception to justify the warrantless search. *Cf. Santana*, 427 U.S. at 45 (Marshall, J., dissenting) (courts should consider whether "police conduct was justifiable or was solely an attempt to circumvent the warrant requirement.").

Although Mr. King proposes an alternative to the Kentucky Supreme Court's foreseeability test, it is worth noting that the Commonwealth's critique of that test proves too much.[7] If an officer reasonably conveys to the occupant of a home that any resistance will be futile and that a forcible entry is imminent and inevitable, then it should come as no surprise that some occupants may respond by destroying evidence. Yet the Commonwealth would have this Court draw such an inference for all cases, so that once the police have alerted the occupants of a home to their presence, the sound of "people moving around" is sufficient to support the conclusion that the occupants were destroying evidence and an

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[7] The Question Presented fairly invited the articulation of the proper test for evaluating when and under what circumstances the police create exigent circumstances. Respondent is not limited to discussing the merits of the test proposed by the Kentucky Supreme Court.

exigency therefore exists. Put differently, what is foreseeable in some cases justifies a rule of entry in all cases.

IV. THE COMMONWEALTH'S "UNLAWFULNESS" TEST CONTAINS NO IDENTIFIABLE LIMIT ON POLICE ACTIVITY AND STRETCHES THE EXIGENT CIRCUMSTANCES EXCEPTION TOO FAR.

The Commonwealth's "unlawfulness" test is so permissive that it threatens to abrogate all Fourth Amendment protection for the home aside from probable cause. Yet, even as to that slim qualification, the Commonwealth would preclude any real review. Pet. BOM 25 ("An officer's determination of probable cause should not be open to questioning in hindsight by a reviewing court.")

Neither the Commonwealth nor it's amici offer any examples of how the unlawfulness test might serve a balancing function. The Commonwealth itself offers no examples of conduct that might violate the rule. The Solicitor General offers only citations to circumstances that are clearly inapposite because, among other distinguishing factors, they do not involve unlawful entry of the home. S.G. Br. at 11-12. In reality, the Commonwealth's unlawfulness test is a tautology: In all cases a motion to suppress will be denied so long as police are credited with having heard indistinct sounds of people moving around in response to their knocking at the door.

The unlawfulness test further represents a way for the Commonwealth and the Solicitor General to work an implicit overruling of *Richards*, 520 U.S. at 392.

In that case, the Solicitor asked this Court to adopt a "blanket exception" to the knock and announce rule in "felony drug cases" "because of…the destruction of [evidence]." *Richards*, 520 U.S. at 392. Having lost that argument in the context of the "knock and announce," the government now asks this Court to adopt the same rule in the context of warrantless entry, so that police would have a "blanket exception" to the warrant requirement where drugs are suspected and "sounds of people moving around" are heard in response to the police knocking at the door. See S.G. Br. 23 ("The fact that the police are searching for drugs that are easily disposable is sufficient to warrant a reasonable belief that the officers will face a significant risk of destruction of evidence if they allow a grace period to the occupants of the dwelling."); see also Pet. BOM 18-22.

The Commonwealth's categorical "unlawfulness" test fails for the same reason that the government's "blanket rule" failed in *Richards*. Both arguments ignore the balancing that the Fourth Amendment requires. See *e.g. Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996) ("[W]e have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry"); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931) ("There is no formula for determining reasonableness. Each case is to be decided on its own facts and circumstances.")

Nor can a categorical "unlawfulness" test be reconciled with the fundamental principle that a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation." *Terry* v. *Ohio*, 392 U.S. 1, 25-26 (1968). The "method of law enforcement" must be commensurate with the

government's interests. *Welsh*, 466 U.S. at 751 (quoting *McDonald* v. *United States*, 335 U.S. 451 459-460 (1948) (Jackson, J., concurring)). For example, in *Illinois* v. *McArthur*, 531 U.S. 326 (2001), the police believed that the respondent might destroy evidence relating to the crime of marijuana possession, so they prevented him from entering his home while they all waited outside for a magistrate to issue a search warrant. *Id.* at 331. This Court approved of what they police did because they "tailored" their response to the goal of preserving evidence and "made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy" by "preventing McArthur only from entering the trailer unaccompanied," thereby leaving "his home and his belongings intact." *Id.* at 331-332.[8]

The facts of this case illustrate perfectly a why this Court should reject a categorical rule that permits the police to do whatever they want as long as each individual act is "lawful." Even assuming exigent circumstances, the warrantless, forcible, nighttime entry into a residence to protect persons suspected of an offense that did not "endanger life or security," "displays a shocking lack of all sense of proportion." *Welsh*, 466 U.S. at 750-751 (quoting *McDonald*, 335 U.S. at 459-460 (Jackson, J., concurring)).

The Commonwealth offers no explanation as to why the forcible, nighttime entry into Mr. King's home was a reasonable and measured response to prevent the destruction of evidence relating to a completed, nonviolent, victimless, misdemeanor offense. It was

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[8] In *McArthur*, this Court specifically reserved the question of whether the government's interest in preventing the destruction of evidence relating to marijuana possession could ever justify a warrantless entry into a home. 531 U.S. at 336.

not. See William Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791*, 748 (2009) ("Second to the requirement for specificity in warrants, the hidden unconstitutionality of nocturnal searches was the most certain feature of the amendment's original understanding. … The creators of the amendment did not renounce all searches without a warrant, but they impliedly renounced all searches on land at night, whether by warrant or without."); see *also Mincey* v. *Arizona*, 437 U.S. 385, 394 (1978) (exigent circumstances did not justify the warrantless search of a home because the police guard at the apartment minimized the possibility that homicide evidence would be destroyed); *United States* v. *Jeffers*, 342 U.S. 48, 52 (1951) (exigent circumstances did not justify the warrantless search of a home because "the officers admit they could have easily prevented [the] destruction or removal [of narcotics evidence] merely by guarding the door."); *and* Pet. App. 40a-41a (the Kentucky Supreme Court found that: "Nothing…would have made it impracticable for the police to post officers in the breezeway and obtain a warrant.")

Moreover, to the extent that the "unlawfulness" test allows for any balancing at all, it assigns that task to the individual police officer rather than a neutral and detached magistrate. Such a shift contravenes this Court's precedent. *E.g.*, See *McDonald*, 335 U.S. at 455-456 (The Fourth Amendment "has interposed a magistrate between the citizen and the police…so that an objective mind might…pass on the desires of the police before they violate the privacy of the home."). Privacy and security in one's home – the "central concern underlying the Fourth Amendment" – is "too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of

criminals." *Arizona* v. *Gant*, 129 S. Ct. 1710, 1720 (2009); *McDonald*, 335 U.S. at 455-456.

Entrusting the police to protect the sanctity of the home is particularly problematic where the police are given no meaningful guidance. See *Kyllo,* 533 U.S. at 40 ("The Fourth Amendment draws 'a firm line at the entrance of the house,' " which "must be not only firm but also bright," providing "clear specification" to the police). Simply commanding the police to "be lawful" is neither helpful nor informative. The Commonwealth provides very little information about how its test would actually work, and it articulates no limit on what the police may, or may not, do. Apparently the Commonwealth would have this Court hold that the police may bang as loudly as possible on a person's door, at night, and demand entry, as long as the individual officer believed that his actions were "lawful."

The Commonwealth devotes much of its brief to a straw man argument about the lawful component parts of an investigative technique known as a "knock and talk." Pet. 12-18; 23-26. The police do not offend the Fourth Amendment simply by knocking on a person's door and Mr. King does not contend otherwise. But, that is not what happened here.

Likewise, the notion that the police "attempted to initiate a consensual encounter with [the] suspects," is legally unsupported and factually inaccurate. Pet. BOM 23. When an officer conveys the impression that entry into the home is imminent and inevitable, the officer is acting as though he has a warrant. And, "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the

search" and "there cannot be consent." *Bumper*, 391 U.S. at 550.

The Commonwealth has failed to satisfy its "heavy burden" of rebutting the presumption that the warrantless search of Mr. King's apartment was unreasonable. The Kentucky Supreme Court correctly suppressed the evidence in question.

CONCLUSION

This Court should affirm the decision of the Kentucky Supreme Court.[9]

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[9] The Solicitor General argues that this case should be remanded for a finding of whether exigent circumstances existed. S.G. 26-27 n. 5. The Commonwealth has already had ample opportunity to present whatever evidence it wanted in support of the officers' warrantless search. The Solicitor General has failed to explain why a remand would amount to anything other than a second bite at the apple for the Commonwealth.

Respectfully submitted,

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