No. 09-1272

IN THE

Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

HOLLIS DESHAUN KING,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

BRIEF OF THE STATES OF INDIANA, DELAWARE, FLORIDA, HAWAII, IDAHO, IOWA, LOUISIANA, MICHIGAN, NEVADA, NORTH DAKOTA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. 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?

2. Does the hot pursuit exception to the warrant requirement apply only if the government can prove that the suspect was aware he was being pursued?

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INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Delaware, Florida, Hawaii, Idaho, Iowa, Louisiana, Michigan, Nevada, North Dakota, Ohio, South Carolina, South Dakota, Utah, Vermont, and Wyoming respectfully submit this brief as *amici curiae* in support of the Petitioner. There is a deep and longstanding split among the circuit and state courts regarding when exigent circumstances justify a warrantless residential search under the Fourth Amendment, resulting in an uneven application of individuals' Fourth Amendment rights. This is especially problematic where state courts and their regional circuits apply different tests, as is true in Kentucky. *Contrast* Pet. App. at 45a-46a (holding that in Kentucky, courts must first determine "whether the officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement" and then "[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") *with Ewolski v. City of Brunswick*, 287 F.3d 492, 504 (6th Cir. 2002) (finding that police do not impermissibly create exigent circumstances unless the court can find "deliberate conduct on the part of the police evincing an effort intentionally to evade the warrant requirement").

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received notice of the *amici* states' intention to file this brief more than 10 days prior to the due date of this brief.

The *amici* states have substantial interests in both consistent application of Fourth Amendment rights to all citizens irrespective of jurisdiction and clear rules for police officers who encounter situations where evidence may be destroyed unless they take immediate action. The differing standards that are in place throughout the country put significant burdens on both law enforcement officers and citizens.

As Wayne R. LaFave notes, "[i]n deciding whether . . . to search for or seize property, the police are in actuality called upon to make decisions which are quite varied in their character and effect and which are influenced by a vast range of factors and considerations." Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 Mich. L. Rev. 442, 442-43 (1990). These factors include weighing the likely consequences of doing nothing—both in terms of the concrete potential for immediate danger to persons and property and in terms of addressing crime more abstractly—against the risks associated with multiple available tactics for talking to a suspect or securing evidence. Particularly because such split-second decisions are inherent in police work, officers and citizens alike deserve consistency in the application of the Fourth Amendment. Accordingly, the *amici* states have an interest in urging the Court to take this case to set forth a uniform national standard for analyzing exigent circumstances.

SUMMARY OF THE ARGUMENT

The question of when the potential destruction of evidence justifies a warrantless search is currently being decided in a highly disjointed manner across the country. The result is that individual Fourth Amendment rights depend on the jurisdiction. The Kentucky Supreme Court's decision below exacerbates existing lower-court conflicts regarding the exigent circumstances exceptions to the warrant requirement. It is time for the Court to step in to explain when the potential destruction of evidence justifies police action of entering a private residence without a warrant.

Furthermore, the Kentucky Supreme Court's determination that the exigent circumstances exception to the warrant requirement is unavailable where the exigency is a "reasonably foreseeable" result of lawful police action rewards criminals and essentially converts legitimate police inquiry into complicity in the destruction of evidence. The Court should grant the petition and reject this standard.

REASONS FOR GRANTING THE PETITION

I. Lower Courts are Fatally Split as to When Police Conduct "Creates" Exigent Circumstances and Thereby Precludes a Warrantless Search on That Basis

For over forty years, lower courts have been grappling with whether and when the exigent circumstances exception to the warrant requirement applies if police have arguably caused the exigency

by their own conduct. As more and more courts have considered the issue, a deeper and deeper conflict has developed among the federal courts of appeals and state high courts. Moreover, the conflict has yielded not merely *two* differing approaches to the exigent circumstances exception; rather, as the Petition explains, there are currently *five* different tests applied by the federal circuits alone. *See* Pet. at 9-19. State high courts have added their own Fourth Amendment approaches, some adopting tests applied by various circuits and others combining various aspects of different tests to create entirely new tests. *See* Pet. at 19-24. This degree of divergence demands resolution by this Court.

1. Lower-court inconsistency on this issue originates with the dearth of cases from this Court explaining when the destruction of evidence justifies a warrantless search. At least as far back as *Johnson v. United States*, 333 U.S. 10 (1948), the Court suggested that destruction of evidence may justify a warrantless search in some circumstances, affirming the suppression of evidence obtained from a warrantless hotel search because "[n]o evidence or contraband was threatened with removal or destruction" immediately preceding the search. *Johnson*, 333 U.S. at 15. Similarly, in *McDonald v. United States*, the Court suppressed evidence obtained when police raided a hotel room after observing illegal lottery paraphernalia through a transom because the evidence was not "in the process of destruction." *McDonald. v. United States*, 335 U.S. 451, 455 (1948); *cf. United States v. Jeffers*, 342 U.S. 48, 52 (1951) (suppressing 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"). Yet these cases did not facilitate a uniform doctrine as to when destruction of evidence justifies a warrantless residential search.

Following the application of the exclusionary rule to state courts in *Mapp v. Ohio*, 367 U.S. 643 (1961), 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. In *Ker*, the plurality said that 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; *see also Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (characterizing the *Ker* plurality as holding "that law enforcement officers may make a warrantless entry onto private property *** to prevent the imminent destruction of evidence . . ."). Not even the plurality, however, said definitively that imminent destruction of evidence justifies a warrantless residential search.

Then, in *Schmerber v. California*, 384 U.S. 757 (1966), the Court permitted a warrantless extraction of blood from a suspected drunk driver who was seeking medical treatment. The Court upheld the warrantless search on the theory that the body's relatively fast absorption and discharge of alcohol constituted the imminent destruction of evidence. *Id.* at 770-71. *Schmerber* thus provides what appears to be the first unambiguous use of the

imminent destruction of evidence as a rationale for an exception to the warrant requirement.

In *Vale v. Louisiana*, 399 U.S. 30, 33 (1970), however, the Court held that no exigent circumstances existed where police conducted an initial warrantless security sweep inside a home, sent for a warrant authorizing a more thorough search, but then searched the home without a warrant anyway once the residents returned. The mere possibility that the residents, fully apprised of the officers' presence and intention to search the home, might destroy evidence while police awaited a warrant was not enough to justify the search. *Id.* at 34-35. As the LaFave treatise has observed, "[g]iven the curious analysis in *Vale* it is to be hoped that it will not be the last word from the Court on this important issue." 3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 6.5 (4th ed. 2004).

2. Lower courts have understood these cases generally to bless an exigent circumstances exception to the warrant requirement—even for purposes of a residential search—where destruction of evidence is imminent. But without more detailed guidance as to the contours of that doctrine, the circuits and state high courts have splintered in their application of the exception. *See, e.g.*, *United States v. Coles*, 437 F.3d 361, 369 (3d Cir. 2006) (acknowledging that circuits "have adopted different inquiries for purposes of deciding whether police impermissibly create exigent circumstances"); *id.* at 372 (Roth, J., dissenting) (commenting on "conflicting Fifth and Second Circuit precedent").

The Petition sets forth details of the multivariate state and federal court tests, but it is worth stressing how long this issue has been around, and just how intractable it has become. More than twenty years ago, Professor Barbara Salken observed that when it comes to defining exigent circumstances involving destruction of evidence, "the Supreme Court has infrequently considered the question and has never provided a clear standard for determining when warrantless action is justified." 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, 288 (1988). Even then, "the courts of appeals ha[d] developed conflicting solutions to the problem." *Id.* (footnote omitted).

By 2003, lower court decisions had only grown more fragmented, leading one student to write that "the destruction of evidence exigent circumstance exception to the warrant requirement has created a great deal of confusion within the circuit courts of appeals." Geoffrey C. Sonntag, Note, *Probable Cause, Reasonable Suspicion, or Mere Speculation?: Holding Police to a Higher Standard in Destruction of Evidence Exigency Cases*, 42 Washburn L. J. 629, 656 (2003). In particular, Sonntag observed that lower courts disagree as to when police can be said to have created the exigent circumstances themselves—and thereby undermine reliance on the exception. *Id.* at 640.

An even more recent scholarly analysis calls attention to lower-court conflicts in so-called "knock and talk" situations, where police knock on suspects'

doors with the alleged purpose of prompting a search-justifying fracas. *See* Bryan M. Abramoske, Note, *It Doesn't Matter What They Intended: The Need for Objective Permissibility Review of Police-Created Exigencies in "Knock and Talk" Investigations*, 41 Suffolk U. L. Rev. 561, 563 (2008). Among other things, Abramoske marshals circuit decisions both for and against inquiring into an officer's subjective motivations when the issue is whether police themselves improperly created the exigent circumstances they use to justify a warrantless search. *Id.* at 571-79.

The conflicts exemplified in this case have been around for decades, but the Court has not yet attempted to explain when the imminent destruction of evidence can justify a warrantless search. Issues surrounding exigent circumstances determinations are not resolving themselves, and continued percolation only generates more and more layers of differences among courts.

3. Not only is the issue not going away, but it arises frequently. The *amici* states have been able to find scores of state and federal appellate opinions going back decades referencing exigent circumstances doctrine, nearly two-thirds of which were decided in the last twenty years.[2] That tally, of

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[2] *Brigham City v. Stuart*, 547 U.S. 398 (2006); *Payton v. New York*, 445 U.S. 573 (1980); *Vale v. Louisiana*, 399 U.S. 30 (1970); *Schmerber v. California*, 384 U.S. 757 (1966); *Ker v. California*, 374 U.S. 24 (1963) (plurality opinion); *United States v. Jeffers*, 342 U.S. 48 (1951); *Johnson v. United States*, 333 U.S. 10 (1948); *McDonald v. United States*, 335 U.S. 451 (1948); *United States v. Mowatt*, 513 F.3d 395 (4th Cir. 2008); *United*

States v. Gomez-Moreno, 479 F.3d 350 (5th Cir. 2007); *United States v. Collins*, 510 F.3d 697 (7th Cir. 2007); *Fisher v. City of San Jose*, 509 F.3d 952 (9th Cir. 2007); *United States v. Castro*, 225 F. App'x 755 (10th Cir. 2007) (unpublished opinion); *United States v. Coles*, 437 F.3d 361 (3d Cir. 2006); *United States v. Chambers*, 395 F.3d 563 (6th Cir. 2005); *United States v. Samboy*, 433 F.3d 154 (1st Cir. 2005); *United States v. Gould*, 364 F.3d 578 (5th Cir. 2004); *United States v. Flowers*, 336 F.3d 1222 (10th Cir. 2003); *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002); *United States v. Ojeda*, 276 F.3d 486 (9th Cir. 2002); *United States v. Campbell*, 261 F.3d 628 (6th Cir. 2001); *United States v. Vega*, 221 F.3d 789 (5th Cir. 2000); *United States v. Scroger*, 98 F.3d 1256 (10th Cir. 1996); *United States v. Wihbey*, 75 F.3d 761 (1st Cir. 1996); *United States v. VonWillie*, 59 F.3d 922 (9th Cir. 1995); *United States v. Rico*, 51 F.3d 495 (5th Cir. 1995); *United States v. Richard*, 994 F.2d 244 (5th Cir. 1993); *United States v. Lopez*, 937 F.2d 716 (2d Cir. 1991); *United States v. Templeman*, 938 F.2d 122 (8th Cir. 1991); *United States v. Carr*, 939 F.2d 1442 (10th Cir. 1991); *United States v. Tobin*, 923 F.2d 1506 (11th Cir. 1991); *United States v. Halliman*, 923 F.2d 873 (D.C. Cir. 1991); *United States v. MacDonald*, 916 F.2d 766 (2d Cir. 1990); *United States v. Duchi*, 906 F.2d 1278 (8th Cir. 1990); *United States v. Sangineto-Miranda*, 859 F.2d 1501 (6th Cir. 1988); *United States v. Rengifo*, 858 F.2d 800 (1st Cir. 1988); *United States v. Socey*, 846 F.2d 1439 (D.C. Cir. 1988); *United States v. Aquino*, 836 F.2d 1268 (10th Cir. 1988); *United States v. Gallo-Roman*, 816 F.2d 76 (2d Cir. 1987); *United States v. Munoz-Guerra*, 788 F.2d 295 (5th Cir. 1986); *United States v. Collazo*, 732 F.2d 1200 (4th Cir. 1984); *United States v. Dowell*, 724 F.2d 599 (7th Cir. 1984); *United States v. Hultgren*, 713 F.2d 79 (5th Cir. 1983); *United States v. Segura*, 663 F.2d 411 (2d Cir. 1981); *United States v. Allard*, 634 F.2d 1182 (9th Cir. 1980); *United States v. Callabrass*, 607 F.2d 559 (2d Cir. 1979); *United States v. Curran*, 498 F.2d 30 (9th Cir. 1974); *United States v. Rubin*, 474 F.2d 262 (3d Cir. 1973); *Niro v. United States*, 388 F.2d 535 (1st Cir. 1968); *Mann v. State*, 161 S.W.3d 826 (Ark. 2004); *People v. Daughhetee*, 211 Cal. Rptr. 633 (Cal. Ct. App. 1985); *Shuey v. Superior Court*, 106 Cal. Rptr. 452 (Cal. Ct. App. 1973); *People v. Aarness*, 150 P.3d 1271 (Colo. 2006); *Hornblower v. State*, 351 So.2d 716 (Fla. 1977); *Alvarado v.*

course, does not include unappealed federal district court or state trial court opinions, or cases that would have presented exigent circumstances issues but were resolved prior to litigation, such as through plea bargains prompted by doubts about how courts would rule on the search.

The issue is sufficiently important that the LaFave Fourth Amendment treatise devotes an entire Subsection to it. 3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 6.5 ("Warrantless Entry and Search for Evidence") (4th ed. 2004). LaFave summarizes the state of the law this way: "[I]t is closer to the truth to say that the emergency circumstances exception is 'established,' but it has not been 'well delineated.'" *Id.* at 393 (internal quotation omitted).

The deep well of appellate opinions discussing exigent circumstances issues proves LaFave's point. To be sure, it is generally accepted that imminent

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State, 466 So.2d 335 (Fla. Dist. Ct. App. 1985); *People v. Wilson*, 408 N.E.2d 988 (Ill. App. Ct. 1980); *Latham v. Sullivan*, 295 N.W.2d 472 (Iowa Ct. App. 1980); *State v. Schur*, 538 P.2d 689 (Kan. 1975); *Washington v. Commonwealth*, 231 S.W.3d 762 (Ky. Ct. App. 2007); *Dunnuck v. State*, 786 A.2d 695 (Md. 2001); *Commonwealth v. Cataldo*, 868 N.E.2d 936 (Mass. App. Ct. 2007); *State v. Alaon*, 459 N.W.2d 325 (Minn. 1990); *Howe v. State*, 916 P.2d 153 (Nev. 1996); *State v. Santana*, 586 A.2d 77 (N.H. 1991); *State v. Wong*, 486 A.2d 262 (N.H. 1984); *State v. Hutchins*, 561 A.2d 1142 (N.J. 1989); *State v. Price*, 759 P.2d 1130 (Or. Ct. App. 1988); *Commonwealth v. Melendez*, 676 A.2d 226 (Pa. 1996); *State v. Carter*, 160 S.W.3d 526 (Tenn. 2005); *State v. Bender*, 724 N.W.2d 704 (Wis. Ct. App. 2006) (unpublished opinion).

destruction of evidence can justify a warrantless search, but no agreement exists as to prerequisites for, or limits to, applying that general principle. In reviewing the cases cited in the margin, one cannot even trace logical development of the doctrine over time. For example, circuit courts have gone from considering the pretextual motivations of police officers, *see United States v. Rubin*, 474 F.2d 262 (3d Cir. 1973), to eschewing such an inquiry, *see United States v. MacDonald*, 916 F.2d 766, 771 (2d Cir. 1990), and back again to looking at bad faith, *see United States v. Rico*, 51 F.3d 495, 502 (5th Cir. 1995), and then on to ignoring bad faith but considering foreseeability, *see United States v. Mowatt*, 513 F.3d 395, 400-03 (4th Cir. 2008).[3]

There is, in short, very little rhyme or reason to the development of lower-court approaches in this area of the law. The Court should step in and address when it is proper to search a residence without a warrant because, following a knock on the door, police could hear evidence being destroyed.

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[3] With regard to questions about the bad faith of police officers, it is worth noting that the decision below and the cases cited in the main text stand in tension with this Court's recent decision in *Brigham City v. Stuart,* 547 U.S. 398 (2006), which held that *all* individualized-suspicion Fourth Amendment inquiries—even exigent circumstances inquiries—depend exclusively on objective reasonableness, *not* on the subjective motivations of police officers. In this case, the Kentucky Supreme Court inquired whether the police acted with good-faith intentions, Pet. App. at 46a, but ultimately decided the case based on the objective foreseeability of the suspects' actions, *id.*

II. Blaming Police for the Foreseeable Illegal Actions of Others Cannot be the Proper Fourth Amendment Test

Among all the varying tests developed by the lower courts, the heart of the conflict appears to be whether courts look to the foreseeability of the actions of the suspect in light of police conduct. The Fourth and Eighth Circuits both consider foreseeability in their analyses, and the Kentucky Supreme Court adopted this approach as the second part of its test in the decision below. *See United States v. Mowatt*, 513 F.3d 395, 400-03 (4th Cir. 2008); *United States v. Duchi*, 906 F.2d 1278, 1284-85 (8th Cir. 1990); Pet. App. at 45a-46a.

In contrast, none of the various tests adopted by other circuits look to foreseeability as part of their analyses. Rather, other courts have adopted tests that consider whether there was unreasonable delay in obtaining a warrant (*see United States v. Rengifo*, 858 F.2d 800, 804 (1st Cir. 1988); *United States v. Berkwitt*, 619 F.2d 649, 654 (7th Cir. 1980)), whether there was unreasonable delay coupled with deliberate conduct in an attempt to evade the warrant requirement (*see Ewolski v. City of Brunswick*, 287 F.3d 492, 504 (6th Cir. 2002); *United States v. VonWillie*, 59 F.3d 922, 926 (9th Cir. 1995); *United States v. Carr*, 939 F.2d 1442, 1448 (10th Cir. 1991); *United States v. Tobin*, 923 F.2d 1506, 1511-13 (11th Cir. 1991); *United States v. Socey*, 846 F.2d 1439, 1449 (D.C. Cir. 1988)), whether there was bad faith and unreasonable police action (*see United States v. Gould*, 364 F.3d 578, 590 (5th Cir. 2004); *United States v. Coles*, 437 F.3d 361, 368-69 (3d Cir.

2006)), and whether the police have acted in a lawful manner (*see United States v. MacDonald*, 916 F.2d 766, 772 (2d Cir. 1990)).

A foreseeability inquiry will almost always doom an exigent circumstances search. It is nearly always foreseeable that a suspect will react illegally to legal police behavior such as a knock on the door. More specifically, any time drugs are in a house, it is foreseeable that residents of the house will become nervous when a police officer knocks at the door and might decide to flush or otherwise dispose of the drugs. Thus, any court that adopts a foreseeability inquiry as part of its test for determining whether the exigent circumstances exception applies will nearly always be at odds with courts who do not apply a foreseeability test.

Moreover, police officers will often fail a foreseeability test, resulting in many criminals going free because they chose to break additional laws when the police came knocking. Courts take the Fourth Amendment prohibitions against warrantless searches too far when they blame police officers for destruction of evidence by a suspect. The test set forth by the Kentucky Supreme Court in effect treats police officers as accessories to illegal destruction of evidence.

Instead of treating officers as catalysts for the destruction of evidence, "courts must show deference to the judgment exercised by a qualified professional. . . ." *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982). If, as in *Youngberg*, the professional judgment of an administrator in a state hospital is entitled to

deference, surely "deference to professional judgment is likewise appropriate regarding police officials who . . . 'have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.'" LaFave, 89 Mich. L. Rev. at 505 (quoting *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 454 (1990)).

The Court should grant the Petition in order to resolve the conflict regarding whether and when the exigent circumstances exception should apply and, more specifically, whether the foreseeability that exigent circumstances may result from police conduct, or the subjective motivations of police officers, should be part of that inquiry.

CONCLUSION

The Court should grant the Petition and reverse the decision below.

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