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JAMESA J. DRAKE, ESQ., Assistant Public Advocate,  
Frankfort, Kentucky; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (11:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next this morning in Case 09-1272, Kentucky v. King.

5 Mr. Farley.

6 ORAL ARGUMENT OF JOSHUA D. FARLEY

7 ON BEHALF OF THE PETITIONER

8 MR. FARLEY: Mr. Chief Justice, and may it  
9 please the Court:

10 The issue before you today, of whether or  
11 not police can impermissibly create exigent  
12 circumstances, arises from the improper suppression of  
13 reasonably seized evidence after a reasonable  
14 warrantless entry. The test set forth by the Kentucky  
15 Supreme Court is improper for several reasons, the first  
16 of which is that this Court has routinely held that the  
17 subjective intent of police officers when effecting a  
18 warrantless entry is irrelevant.

19 JUSTICE GINSBURG: Where did the -- where  
20 did the Kentucky Supreme Court -- where did the Kentucky  
21 Supreme Court say that it was looking to a subjective  
22 state of mind on the part of the police?

23 MR. FARLEY: Well, the Kentucky Supreme  
24 Court's first prong of their test -- and I believe it's  
25 in our petition appendix on page 26 -- I'm sorry.

1 Their -- their discussion starts on page 44a and carries  
2 over to 46a. The first question of their test is  
3 whether or not the officers acted in bad faith in an  
4 attempt to purposefully evade the warrant requirements.

5 JUSTICE GINSBURG: That didn't -- that  
6 didn't apply in this case?

7 MR. FARLEY: That is correct.

8 The second prong of the Kentucky Supreme  
9 Court's test is whether or not the actions of the  
10 Respondent in this case or the occupant of the home  
11 would have been foreseeable by the police officers  
12 before they knocked and announced their presence.

13 Now, the problem with the foreseeability  
14 test --

15 JUSTICE GINSBURG: But why is -- why is that  
16 subjective? Why isn't that -- would it be foreseeable  
17 to a reasonable police officer similarly situated?

18 MR. FARLEY: Well, Justice Ginsburg, it --  
19 it isn't directly a subjective inquiry. However, police  
20 officers are trained to expect and foresee illegal  
21 activity so that they may carry out the duties of their  
22 job in protecting the citizens. So under a  
23 foreseeability test, a reasonable officer will always  
24 foresee illegal activity in response to his actions, be  
25 it walking down the street or knocking on your door. A

1 reasonable officer will always foresee illegal activity,  
2 and for that reason, the Kentucky Supreme Court's test  
3 is completely unworkable.

4               Several of the other circuits and the lower  
5 courts have adopted tests that also attempt to add an  
6 extra exception, an unwarranted closure of the exigent  
7 circumstances exception that narrows the use of that  
8 exception by police officers. The test that the  
9 Commonwealth would propose is a simple lawfulness test.

10              Now, under this test, as long as an officer  
11 behaves lawfully, there should be no suppression of  
12 evidence seized after an otherwise reasonable search.

13              CHIEF JUSTICE ROBERTS: So, you have an  
14 apartment building where the police know from experience  
15 there's a lot of illegal activity, a lot of drugs, drug  
16 transactions. Every 2 weeks, they walk through and  
17 knock on every door and wait for evidence of the  
18 destruction of -- of drugs. Is that all right?

19              MR. FARLEY: Well, there's -- I would say  
20 "yes," if there's probable cause as well as exigent  
21 circumstances.

22              CHIEF JUSTICE ROBERTS: Well, the probable  
23 cause, of course, comes when they hear the, you know,  
24 flushing and the, you know, hiding or whatever behind  
25 the door.

1           MR. FARLEY: Well, I would assert that there  
2 are -- there are two separate issues here. You must  
3 have probable cause separate from the existence of  
4 exigent circumstances. In this case, there was probable  
5 cause due to the smell of marijuana.

6           JUSTICE GINSBURG: They go to the apartment  
7 building, and they sniff at every door, and when they  
8 sniff, when a strong smell of marijuana emanates from  
9 the door, then they go through this routine, but they do  
10 it as a matter of every 2 weeks, as the Chief said, as a  
11 routine matter. They don't just knock on every door,  
12 but they knock on the doors where they smell marijuana,  
13 and they do that just as a routine, in all the buildings  
14 where they suspect there may be drug -- drugs being  
15 stashed.

16          MR. FARLEY: Justice Ginsburg, under a  
17 simple lawfulness test, since the officers have not  
18 violated the Fourth Amendment prior to the exigency  
19 arising, there would be no need to suppress any  
20 evidence. That would be perfectly fine for the officers  
21 to do that. It may not be the most --

22          JUSTICE SOTOMAYOR: -- to the Chief Justice  
23 when he said -- and I think this was the Solicitor  
24 General's position -- that the police can routinely  
25 knock at a door and wait to see if they hear a toilet

1 flushing. I -- I've taken it out of this case but --  
2 because I don't know what noise means. But your answer  
3 would be "yes"?

4 MR. FARLEY: Yes, if -- if probable cause  
5 exists, because --

6 JUSTICE SCALIA: Well, that's what --

7 JUSTICE SOTOMAYOR: Well, why -- why do you  
8 need the probable cause inquiry? What does it have to  
9 do with anything?

10 MR. FARLEY: Well, under the Fourth  
11 Amendment, for a reasonable warrantless search to occur,  
12 a police officer must have --

13 JUSTICE SOTOMAYOR: Before they can go in --

14 MR. FARLEY: Yes. The police officer must  
15 have --

16 JUSTICE SOTOMAYOR: -- because they've just  
17 heard the toilet flushing?

18 MR. FARLEY: They must have probable cause  
19 coupled with exigent circumstances.

20 CHIEF JUSTICE ROBERTS: I'm sorry. I think  
21 I've got two different probable causes that's caused --  
22 causing me some confusion. I understand their  
23 requirement of probable cause, and that they hear sound  
24 of evidence being destroyed and therefore enter. Is  
25 that -- or are you talking about the probable cause to

1 think there's something going on in the first place?

2 MR. FARLEY: There are two separate issues  
3 here. They must have probable cause aside from exigent  
4 circumstances. Then they must also have --

5 JUSTICE KENNEDY: To knock on the door?

6 MR. FARLEY: -- a reasonable belief --

7 JUSTICE KENNEDY: They must have probable  
8 cause to knock on the door?

9 MR. FARLEY: No, Justice Kennedy.

10 JUSTICE KENNEDY: No. All right.

11 MR. FARLEY: They can -- just as citizen  
12 could --

13 JUSTICE KENNEDY: Okay. Take us --

14 MR. FARLEY: -- they could knock on the  
15 door. However --

16 JUSTICE KENNEDY: Take us through it -- take  
17 us through it chronologically. The policeman is walking  
18 through the hallway. He has no probable cause. He --  
19 he --

20 MR. FARLEY: He could knock on the door.

21 JUSTICE KENNEDY: He smells marijuana --

22 MR. FARLEY: The smell of --

23 JUSTICE KENNEDY: -- then he knocks on the  
24 door. When did the probable cause arise and when must  
25 it arise?



1                   MR. FARLEY: Well, the smell of marijuana  
2 would give probable cause to obtain a search warrant.  
3 Once he knocks on the door and hears noises consistent  
4 with the destruction of physical evidence, then an  
5 exigency has arisen. Now the officer has both probable  
6 cause and an exigent circumstance. And under the --

7                   JUSTICE KAGAN: But I don't understand why  
8 the smell of marijuana is necessary. This goes back to  
9 what Justice Sotomayor was saying, you don't need  
10 probable cause to knock on a door. Knocking on a door  
11 is perfectly lawful. So, if there's just a lawfulness  
12 test, the knock is fine. And then when you hear  
13 whatever it is that you hear that you think creates  
14 exigent circumstances, whether it's a toilet flushing or  
15 whether it's just noise, that, too, gives you the  
16 ability to go right in.

17                   So -- so if it's just lawfulness, you don't  
18 need the marijuana smell even, do you?

19                   MR. FARLEY: Well, I think -- I think we're  
20 confused. In order to enter with exigent circumstances,  
21 you must also have separate probable cause, and it's  
22 that you could have gotten --

23                   JUSTICE KAGAN: Probable cause beyond  
24 thinking that the evidence --

25                   MR. FARLEY: Beyond the reasonable belief --  
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1 JUSTICE KAGAN: -- is being destroyed?

2 MR. FARLEY: Yes. Correct.

3 JUSTICE KAGAN: Okay.

4 MR. FARLEY: That is correct.

5 JUSTICE SCALIA: It might just be somebody  
6 going to the toilet, right?

7 (Laughter.)

8 MR. FARLEY: It could be. It could be. It  
9 could very well be.

10 JUSTICE SCALIA: So, you have to suspect  
11 that the reason the toilet is flushing is somebody is  
12 trying to get rid of evidence. And in order for that to  
13 be the case, you have to have smelled the marijuana?

14 MR. FARLEY: Yes, Justice Scalia, you're  
15 absolutely correct.

16 CHIEF JUSTICE ROBERTS: So there's only one  
17 probable cause, right?

18 MR. FARLEY: Yes.

19 CHIEF JUSTICE ROBERTS: Okay.

20 MR. FARLEY: Yes. The exigent circumstances  
21 is a reasonable belief based upon the totality of the  
22 surrounding circumstances. Here, given that the  
23 officers had a reasonable belief that they were chasing  
24 a fleeing felon, they had a reasonable belief that this  
25 was the doorway he had entered, then you couple that

1 with the noises that they heard, they testified were  
2 based on their training --

3 JUSTICE GINSBURG: May --

4 MR. FARLEY: -- and experience --

5 JUSTICE GINSBURG: May we just go back  
6 over -- you're putting in the fleeing felon, but as far  
7 as I understand from this record, it was never shown  
8 that the dealer that the police were following was aware  
9 that he was following and that he was fleeing from them.  
10 This is the -- it's not part of the question you  
11 presented, because we granted only on the exigent  
12 circumstances, but I didn't think that there was -- the  
13 dealer wasn't called, and he wasn't asked did you even  
14 know that the police were following you?

15 MR. FARLEY: That -- that's correct, Justice  
16 Ginsburg. However -- and we cannot divorce the  
17 officers' chase of this suspect, regardless of whether  
18 he knew of their hot pursuit or not, we cannot divorce  
19 those facts from what the officers knew when they  
20 knocked on the door.

21 CHIEF JUSTICE ROBERTS: Sure, you can.  
22 There's nothing illegal about walking down the hall and  
23 knocking on somebody's door. And if as a police officer  
24 you say I smell marijuana, and then you hear the  
25 flushing, then there's probable cause. You don't need

1 any business about the dealer and the breezeway and all  
2 that at all.

3 MR. FARLEY: Certainly. Certainly, Mr.  
4 Chief Justice. You're absolutely correct. I was -- I  
5 was just speaking in terms of this case, saying that  
6 there were -- there was ample evidence that exigent  
7 circumstances existed here, coupled with the probable  
8 cause.

9 JUSTICE GINSBURG: May I ask a question --

10 JUSTICE SOTOMAYOR: And in your view --

11 JUSTICE GINSBURG: May I ask a question that  
12 goes back to what you said? You have clarified very  
13 nicely that there has to be probable cause to think that  
14 there's something wrong going on in the -- the  
15 apartment. And you said that is, at that point when  
16 they -- the marijuana -- a strong smell comes from the  
17 door, at that point the police could go and get a  
18 warrant. Then they don't have to, because then they  
19 knock on the door.

20 We start out with a strong presumption that  
21 the Fourth Amendment requires a warrant, a strong  
22 preference for getting the warrant. So why in this  
23 situation wouldn't the first response of the police  
24 be -- instead of knocking, because once they knock they  
25 alert the people in there: Let's get a warrant; we'll

1     come back.

2                   MR. FARLEY:   Well, the officers testified  
3     under these circumstances that they believed that they  
4     were in hot pursuit of this felon.  So at the time they  
5     were at the door, they believed he had entered this  
6     apartment and was aware of their presence and was  
7     destroying evidence of his deal of crack cocaine, so  
8     this is a fluid, evolving --

9                   JUSTICE SOTOMAYOR:  Counsel, how does this  
10    -- how does this holding by us not become a simple  
11    warrantless entry in any drug case?  Meaning:  Police  
12    knock on the door, suspect doesn't answer it, gets up  
13    and moves to their bedroom.  Because there's no noise  
14    that was described by this police officer.  It was  
15    simply not answering the door and moving.  So if that's  
16    all it takes, any police officer will come in and say:  
17    In my experience, most drug dealers destroy the evidence  
18    when we knock.

19                   MR. FARLEY:  Well --

20                   JUSTICE SOTOMAYOR:  Aren't we just doing  
21    away with Johnson?  And aren't we just simply saying  
22    they can just walk in whenever they smell marijuana,  
23    whenever they think there's drugs on the other side?  
24    Why do we even bother giving them a -- a warrant?

25                   MR. FARLEY:  Well, I would disagree with  
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1     you. I think that when determining whether an exigent  
2     circumstance exists, you look at the totality of the  
3     circumstances. So -- and there would be a myriad of  
4     cases in which a court would determine that, simply  
5     based upon the testimony or the noises that were heard,  
6     with no surrounding circumstances, that exigent  
7     circumstances may not have existed.

8             JUSTICE SCALIA: What if -- what if the  
9     defendants here had not flushed the evidence down but  
10    had answered the door and said "Yes?"?

11            (Laughter.)

12            JUSTICE SCALIA: Would the policemen have  
13    been able to do anything just because they had smelled  
14    marijuana?

15            MR. FARLEY: They could have sought a  
16    consensual encounter with the occupant.

17            JUSTICE SCALIA: Oh, yes, but they'd say:  
18    Oh, heck, no, you can't come in --

19            MR. FARLEY: Well, then --

20            JUSTICE SCALIA: -- do you have a warrant?

21            MR. FARLEY: Then the officers would not  
22    have been able to force entry.

23            JUSTICE SCALIA: So basically the -- the  
24    police were taking advantage of the stupidity of the  
25    criminals; is that right?

1 MR. FARLEY: Well, I don't know about --

2 JUSTICE SCALIA: That's terrible. That's  
3 not fair, is it?

4 MR. FARLEY: I don't know that I would  
5 phrase it -- there is no -- there is not a requirement  
6 to inform an occupant of a right to denial. However,  
7 the officers could not have forced their way into the  
8 home. That would have made this a case like Johnson.

9 JUSTICE SOTOMAYOR: What if the officers had  
10 simply knocked, said "We're going to kick the door in if  
11 you don't open it"?

12 MR. FARLEY: I believe that's still fine  
13 under a lawfulness test, unless the occupant of the home  
14 submits to that show of authority and comes to the door  
15 and allows entry. Now, if that --

16 JUSTICE SCALIA: Well, after -- after  
17 they've heard the -- the movement inside or the flushing  
18 or whatever. You can't just kick it in because you've  
19 smelled marijuana. You -- can you do it, because you --  
20 you knock on the door because you smell marijuana,  
21 nobody answers, and you kick the door in?

22 MR. FARLEY: Well, I believe that the noises  
23 that they heard were consistent with destruction of  
24 physical evidence based upon their training and  
25 experience.

1 JUSTICE SCALIA: Yes, but without that  
2 noise. Just --

3 MR. FARLEY: Then, no. No.

4 JUSTICE SCALIA: No, of course not.

5 MR. FARLEY: No, of course not. They would  
6 have to obtain a warrant at that point. If the person  
7 came to the door and denied them consent, they would  
8 have to obtain a warrant. If the person did not come to  
9 the door and made -- no exigency arose, then the  
10 officers would still have to go and obtain a warrant --

11 JUSTICE KENNEDY: But -- this may be a bit  
12 rudimentary, but can you tell me why isn't the evidence  
13 always being destroyed when the marijuana is being  
14 smoked? Isn't it being burnt up?

15 (Laughter.)

16 MR. FARLEY: I -- Justice Kennedy, I -- I  
17 would tend to -- I would tend to agree with you.  
18 However, I know this Court in Johnson stated that the  
19 smell of burning opium was not the destruction of  
20 evidence, and the only thing they could have obtained  
21 would have been the fumes or the vapors. I tend to  
22 agree -- disagree with that personally. However, from a  
23 legal viewpoint, the simple smell of burning marijuana  
24 is not --

25 JUSTICE KENNEDY: So the distinction is  
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1 being destroyed as opposed to being consumed?

2 MR. FARLEY: Correct, that is -- that is  
3 correct.

4 JUSTICE GINSBURG: And how is it -- you  
5 mention Johnson.

6 MR. FARLEY: Yes.

7 JUSTICE GINSBURG: And I think the other  
8 side says it was the same thing except it was a hotel  
9 room instead of an apartment building. The police  
10 smell -- in that case, it was -- what was it?

11 MR. FARLEY: Well, what occurred in Johnson,  
12 I believe, is -- is completely different than what  
13 occurred here. What occurred in Johnson was the  
14 officers forced their way into the occupant's apartment  
15 -- the occupant's hotel room and then said: Consider  
16 yourself under arrest.

17 JUSTICE GINSBURG: Didn't they smell  
18 marijuana or opium or something?

19 MR. FARLEY: Well, they did, and they  
20 knocked on the door, and she came to the door and  
21 they -- they forced their way in. There was no -- there  
22 was no "let us in," there was no demand for entry, there  
23 was no even ask-for consent to enter. They then said:  
24 Consider yourself under arrest. They searched, and then  
25 held her under arrest based upon the evidence that they

1     obtained.

2                   JUSTICE GINSBURG:   You left out one thing.  
3     I thought they heard ruffling noises before they  
4     attempted to get into the apartment -- into the hotel  
5     room.   There was something about noises.

6                   MR. FARLEY:   Well, I believe they heard  
7     sounds when they knocked on the door.   But she actually  
8     came to the door, and then the officers forced entry.  
9     Here we don't have that.   We have no forced entry.  
10    These are two different circumstances.   In Johnson, an  
11    exigency did not exist.   Here an exigency does exist.

12                   If there are no further questions, I'd like  
13    to reserve the remainder of my time.

14                   CHIEF JUSTICE ROBERTS:   Thank you, Mr.  
15    Farley.

16                   MR. FARLEY:   Thank you.

17                   CHIEF JUSTICE ROBERTS:   Ms. O'Connell.

18                   ORAL ARGUMENT OF ANN O'CONNELL,  
19           ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
20                   SUPPORTING THE PETITIONER

21                   MS. O'CONNELL:   Mr. Chief Justice, and may  
22    it please the Court:

23                   If police officers act lawfully in  
24    conducting their investigation, they may respond to any  
25    exigencies that arise.   It is up to police officers to

1 determine how they will collect evidence in any given  
2 case as long as they stay within the confines of the  
3 Fourth Amendment. Although securing a warrant --

4 JUSTICE SOTOMAYOR: Could you -- does a  
5 ruling in this case that any lawful conduct by the  
6 police mean that the police knock, somebody gets up on  
7 the other side and walks through a closed door, and  
8 closes a door in the back, and police say, "In my  
9 experience it's -- it's consistent with the destruction  
10 of property that drug dealers will go into a closed room  
11 to get rid of it" -- is that enough?

12 MS. O'CONNELL: I don't think so, Justice  
13 Sotomayor. I think that in any case --

14 JUSTICE SCALIA: Why -- why not? I mean  
15 people -- you know, when there's a knock on -- on the  
16 door, is the normal human reaction to walk into the  
17 other room and shut the door?

18 MS. O'CONNELL: Well, a person might not --

19 JUSTICE SCALIA: I mean, that's peculiar  
20 behavior, isn't it?

21 MS. O'CONNELL: A person doesn't have to  
22 answer the door. A person might come to the door; they  
23 might also ignore whoever is at the door. Both of those  
24 options are fine.

25 JUSTICE SCALIA: Is that a common

1 experience, that you knock on a door and all you hear is  
2 somebody walking out of the room and shutting a door?

3 MS. O'CONNELL: I mean, I -- I guess that a  
4 person is entitled to do that.

5 JUSTICE SCALIA: I don't recall it ever  
6 happening to me, but maybe -- maybe I'm a likable fellow  
7 and people open the door.

8 (Laughter.)

9 MS. O'CONNELL: I mean, I think that that --  
10 that's certainly a lawful option that somebody has when  
11 the police officers knock at their door. And,  
12 certainly, in this case --

13 JUSTICE SCALIA: They could say "Go away."  
14 They could do a lot of stuff. But walk in the other  
15 room and shut the door?

16 MS. O'CONNELL: That's --

17 JUSTICE SCALIA: Strange.

18 MS. O'CONNELL: I guess some people might do  
19 that if they don't want to give consent to police entry.  
20 I think that in order to go in, based on an exigent  
21 circumstance, the police would have to be able to  
22 articulate to a court that they objectively, reasonably  
23 believed that there was destruction of evidence  
24 occurring inside.

25 JUSTICE GINSBURG: And what was that here?

1 Because it was kind of vague. They heard movement.  
2 What kind -- what kind of movement? It didn't -- it  
3 said nothing about a toilet flushing --

4 MS. O'CONNELL: Justice Ginsburg, it's our  
5 position that the Court should assume that there was an  
6 exigency in this case.

7 In the Respondent's brief in opposition, he  
8 argued that there was insufficient evidence of exigency.  
9 The Court nonetheless granted cert on the question of  
10 whether a police-created exigency would be okay under  
11 the Fourth Amendment. The Solicitor General believes  
12 that the Court should assume there was an exigency, and  
13 if it agrees with Kentucky on the question presented and  
14 then reverses, it should remand to the Kentucky Supreme  
15 Court for a determination of whether an exigency  
16 existed.

17 The trial court in this case certainly found  
18 that the movement inside of the apartment was enough for  
19 the officer to reasonably conclude that somebody inside  
20 was destroying evidence. The Kentucky Supreme Court  
21 assumed that that was so in order to reach the question  
22 presented in this case that the Court granted cert on.

23 JUSTICE KAGAN: Ms. O'Connell, if I could  
24 ask you about the government's proposed standard: You  
25 say that as long as each step in the police conduct is

1 lawful, that's sufficient. And each step would -- the  
2 way the Fourth Amendment works, each step -- we're  
3 asking, essentially, whether each step is reasonable.

4           What some courts have done, in addition to  
5 that -- and this was not the approach of the court  
6 below -- but what some courts have done is to say we  
7 also ask a more holistic reasonableness question. We  
8 say: Is the whole process by which the police operated  
9 with respect to this person reasonable? So, for  
10 example, we might say, you know, was there time to get a  
11 warrant, or did it look like the police were just --  
12 they preferred not to have to deal with a magistrate?

13           So what's wrong with that sort of standard?  
14 In addition to asking whether each step is reasonable,  
15 to say, look, is the whole pattern here of what the  
16 police did to come up with this evidence reasonable?

17           MS. O'CONNELL: I think the problem with  
18 that test, Justice Kagan, is that police officers have  
19 options of how they can conduct searches and seizures.  
20 Getting a warrant is one way that they could do that.  
21 Getting consent to conduct a search or a seizure is  
22 another way. There's no justification in this Court's  
23 precedents for requiring police officers to choose one  
24 of those options over another if both options are  
25 lawful.

1           In this case, the police officers knocked on  
2     the door, not sure which apartment the person that they  
3     were pursuing fled into, in order to determine whether  
4     that was the correct apartment. There's no reason why  
5     they needed to get a warrant before knocking on the door  
6     and seeking cooperation of the people inside.

7           JUSTICE KENNEDY: Is it your position that  
8     the police can do anything that's lawful, even if the  
9     purpose of doing so is to create exigent circumstances?

10          MS. O'CONNELL: Yes, I think that under this  
11     Court -- the way that this Court has interpreted Fourth  
12     Amendment warrant exceptions, as long as there is no  
13     violation of the Fourth Amendment, that is okay. The  
14     police officers can rely on any ensuing exigency.

15          JUSTICE KENNEDY: The -- the question  
16     presented in the blue brief used the word  
17     "impermissible," and we're talking about "unlawful." I  
18     take it that there is a difference in those -- or no  
19     difference?

20          MS. O'CONNELL: Well, yes, there is a  
21     difference. I think that that comes up in Respondent's  
22     argument that if there was an impermissible demand for  
23     entry -- for example, if the police officer said "I have  
24     a warrant, let me in," even though he didn't, as in  
25     Bumper v. North Carolina -- that that could still be

1     okay under a lawfulness test as long as the suspect  
2     reacted by destroying evidence instead of by coming to  
3     the door, like in Bumper or Johnson, and going about  
4     with a --

5                 JUSTICE BREYER:   What are the objections to  
6     adding in the alternative "or in bad faith"?

7                 MS. O'CONNELL:   Justice Breyer, the  
8     objection to that is simply that in all cases that are  
9     founded upon probable cause that are not programmatic  
10    searches that are conducted without any individualized  
11    suspicion, this Court has repeatedly rejected prongs of  
12    a Fourth Amendment test that -- that rely on the  
13    subjective assessment --

14                JUSTICE BREYER:   Objectively?   I mean, what  
15    we're trying to rule out is they -- they hitch -- they  
16    get this bright idea, the police:   We'll go knock at  
17    every door.   You know.   So what about that, objectively  
18    determined bad faith?

19                MS. O'CONNELL:   I'm sorry.   I don't --

20                JUSTICE BREYER:   My point is a solely  
21    unlawfulness test would allow the police to get into the  
22    habit of just knocking at every door, but if you say  
23    that also it has to survive a bad-faith test, where bad  
24    faith is objectively, not subjectively, determined, then  
25    you will rule out the possibility of the police



1     hatching -- which I don't know if they would, but  
2     hatching such a plan.

3                   MS. O'CONNELL: I guess that it's not  
4     totally clear what bad faith would mean in this  
5     context --

6                   JUSTICE BREYER: Well, there are circuits  
7     who have adopted a bad-faith test in the alternative  
8     with other things than the word "unlawful." The Second  
9     Circuit uses only the word "unlawful," and I thought we  
10    took this case to iron out that discrepancy. And if we  
11    did, I'd like to know your objection to ironing it out  
12    by taking the Second Circuit test but adding on an  
13    objectively determined bad-faith rule.

14                  MS. O'CONNELL: Justice Breyer, I don't -- I  
15    don't know what it means to act in bad faith in a case  
16    like this as a police officer.

17                  JUSTICE ALITO: Maybe it could mean having  
18    no reason for knocking on the door other than to create  
19    exigent circumstances.

20                  MS. O'CONNELL: Well, Justice Alito, I think  
21    that it would be difficult to determine objectively  
22    whether that was the case. Certainly --

23                  JUSTICE BREYER: Well, the police say: Oh,  
24    I don't want to get a warrant. It's such a bore. We  
25    have other things to do. I have a great idea; let's

1 knock at the door, and then as soon as he starts moving  
2 around, I know what his going to the -- going into the  
3 bathroom means, and we'll hear that, and we'll be able  
4 to get in.

5 MS. O'CONNELL: I think that --

6 JUSTICE BREYER: Hey, great idea.

7 Okay? Now suppose that's the record.

8 MS. O'CONNELL: I think that there's already  
9 a significant risk built into the Fourth Amendment that  
10 police officers, if they knock on the door and they  
11 don't hear somebody destroying evidence inside, they're  
12 going to have to leave and get a warrant. I think  
13 that's enough of a deterrent.

14 JUSTICE SCALIA: You don't know that they're  
15 destroying evidence unless you have reason to believe  
16 that there is contraband inside. I mean, the -- the  
17 hypothetical is an unrealistic one. They knock on the  
18 door, and somebody moves inside -- that doesn't give  
19 them any exigency --

20 JUSTICE BREYER: No, no. I mean to add:  
21 And, in fact, there's probable cause.

22 JUSTICE SCALIA: Okay. They --

23 JUSTICE BREYER: In addition, he smelled the  
24 marijuana. I just was trying to stick to the relevant  
25 points.

1 JUSTICE SCALIA: Well, that's a different  
2 hypothetical.

3 JUSTICE BREYER: Yes. All right. Add that  
4 to the hypothetical.

5 JUSTICE SCALIA: There's a hypothetical in  
6 which they knock on every door under which they smell  
7 marijuana.

8 JUSTICE BREYER: Correct. That's what I  
9 mean, and I don't always spell it out.

10 JUSTICE SCALIA: Perfectly okay?

11 MS. O'CONNELL: Right, and I think that  
12 there's -- the Court shouldn't be concerned, and  
13 certainly shouldn't be concerned enough to adopt a  
14 bad-faith or a subjective motivation prong to a test  
15 that it creates which is --

16 JUSTICE SOTOMAYOR: But what makes that  
17 different than knocking on the door and saying "Open the  
18 door or I'm going to kick it in"? You're saying that's  
19 lawful because until the person submits, you're  
20 suggesting there's no coercion in that whatsoever.

21 MS. O'CONNELL: That's true, and, Justice  
22 Sotomayor, to be clear --

23 JUSTICE SOTOMAYOR: So why wouldn't that  
24 objectively be bad faith if what we find out is that  
25 they now have a tactic which is they go through this

1 building, and every time they smell marijuana, hash, or  
2 -- I don't know if crack cocaine smells or not when  
3 they're smoking it -- but whenever they smell something,  
4 they just do that.

5 MS. O'CONNELL: I think the -- the fact that  
6 if the person actually does what the police officer says  
7 and answers the door will mean that the evidence would  
8 be excluded as a coerced consent search is enough of a  
9 deterrent to that sort of conduct.

10 JUSTICE SOTOMAYOR: So there's no bad-faith  
11 measure whatsoever in your analysis --

12 MS. O'CONNELL: I don't think it's  
13 necessary.

14 JUSTICE SOTOMAYOR: -- and lawfulness is  
15 defined by actual physical seizure. So if we have cases  
16 that suggest something else, a command to submit, your  
17 argument would be lost, correct?

18 MS. O'CONNELL: I think that's right, if the  
19 person submits to the command.

20 JUSTICE SOTOMAYOR: No, no. I --

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 Ms. O'Connell.

23 Ms. Drake.

24 ORAL ARGUMENT OF JAMESA J. DRAKE

25 ON BEHALF OF THE RESPONDENT  
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1 MS. DRAKE: Mr. Chief Justice, and may it  
2 please the Court:

3 The odor of burnt marijuana, coupled with  
4 Officer Cobb's cursory and equivocal testimony about the  
5 sounds of movement he couldn't discern exactly and that  
6 his training and experience led him only possibly to  
7 conclude was consistent with the destruction of  
8 evidence, is insufficient to establish exigent  
9 circumstances.

10 CHIEF JUSTICE ROBERTS: Although you're --

11 JUSTICE SCALIA: The -- I'm sorry.

12 CHIEF JUSTICE ROBERTS: You're describing  
13 what you think the evidence was to support exigency, and  
14 the suggestion we've heard on the other side is that  
15 that's an issue that can be addressed on remand once we,  
16 according to the other side, correct the State court's  
17 error in that this -- you -- the police cannot create  
18 exigent circumstances.

19 So I -- I don't know that it's terribly  
20 relevant what the underlying facts about what they heard  
21 was. That will be relevant depending, or not --  
22 depending on what our opinion says.

23 MS. DRAKE: It's relevant because it goes to  
24 whether exigent circumstances existed. And as to the  
25 question of whether a remand would be appropriate in

1     this case, the question of whether exigent circumstances  
2     existed is logically antecedent in any created exigency  
3     case.

4                 CHIEF JUSTICE ROBERTS:  No, it's -- it's not  
5     at all.  The court said:  I don't care whether exigent  
6     circumstances existed; you cannot create exigent  
7     circumstances; so I don't care whether they were or not.

8                 The legal standard is antecedent to the  
9     application of the facts.

10                MS. DRAKE:  There's no point in delving into  
11     whether an exigency was created by the police if there  
12     is no exigency to begin with.

13                JUSTICE KENNEDY:  Well, I -- I think the  
14     Court is interested in taking the case on the question  
15     whether or not the police may create exigent  
16     circumstances and use those exigent circumstances to  
17     enter.  Now, whether or not there were exigent  
18     circumstances here because of the sound is -- is, it  
19     seems to me, a subsidiary question.

20                MS. DRAKE:  The other problem with remanding  
21     this case for further determination on this issue is, as  
22     this Court is aware, the procedural posture of this case  
23     is troubling.  The case has already been dismissed.  
24     There is no potential for further proceedings here.  
25     There is no --

1 CHIEF JUSTICE ROBERTS: Oh, sure, there is.  
2 It was dismissed because the State supreme court held  
3 you can't bring this evidence in. If we say, oh, yes,  
4 you can, then the issue becomes live again.

5 MS. DRAKE: That conclusion is dependent on  
6 the notion that an indictment is merged with the  
7 judgment such that a decision in the Commonwealth's  
8 favor in this case would vacate the decision of the  
9 Kentucky Supreme Court, which in turn vacates the  
10 underlying suppression order. But there is no authority  
11 for the notion that an indictment and a judgment merge  
12 as a matter of Kentucky law, and so a decision --

13 CHIEF JUSTICE ROBERTS: This is the argument  
14 you presented to us in the letter, right?

15 MS. DRAKE: Yes, Your Honor.

16 CHIEF JUSTICE ROBERTS: And yet, we  
17 nonetheless decided to have argument.

18 MS. DRAKE: Yes, Your Honor.

19 CHIEF JUSTICE ROBERTS: So maybe it would  
20 be -- it's your case, but maybe it would be best to move  
21 on to the legal issue.

22 MS. DRAKE: If we move to the question of  
23 whether the police have created exigent circumstances,  
24 it's important that we're all operating on the same  
25 understanding, the facts in this case. This case does

1 not involve a simple knock at the door, and -- and the  
2 distinction is important. In this case, at 9:50 p.m.,  
3 the officers banged on the door as loudly as they could.

4 JUSTICE SOTOMAYOR: Did the trial court make  
5 those findings? I know that you said it in your brief,  
6 and I thought I read the trial court record. I know  
7 they knocked loudly.

8 MS. DRAKE: Yes.

9 JUSTICE SOTOMAYOR: But what else did they  
10 do?

11 MS. DRAKE: Yes. And this is located at the  
12 appendix to the petition in the bottom of page 3a  
13 carrying on to 4a. The trial court found: Detective  
14 Maynard, who was accompanying Officer Cobb in the  
15 breezeway attempting to locate and arrest the suspect in  
16 question, banged on the door of the apartment on the  
17 back left of the breezeway, identifying themselves as  
18 police officers and demanding that the door be opened by  
19 persons inside.

20 Officer Cobb testified at the suppression  
21 hearing -- and this is at page 22 of the joint appendix:  
22 Detective Maynard made contact with the door, announced  
23 our presence, banged on the door as loud as we could,  
24 announced "Police, police, police."

25 This is not the case where --



1 CHIEF JUSTICE ROBERTS: Where's -- no "Open  
2 up." I thought you said earlier they said "Open up."

3 MS. DRAKE: Yes. Then Officer Cobb later  
4 goes on to explain -- and this is on page 24 of the  
5 joint appendix: Detective Maynard with Sergeant  
6 Simmons, we explained to them -- referring to the  
7 occupants of the apartment -- we were going to make  
8 entry inside the apartment.

9 CHIEF JUSTICE ROBERTS: Is that after --  
10 after the exigent circumstances or the alleged exigent  
11 circumstances were presented? And that's after they  
12 heard what they thought -- and I know you disagree --  
13 was the destruction of evidence.

14 MS. DRAKE: It's -- it's unclear from the  
15 trial court's factual finding what the order of events  
16 was. The trial court found: Banged on the door of the  
17 apartment, identified themselves as police officers,  
18 and --

19 JUSTICE SCALIA: Loudly. Is any of that  
20 unlawful? Is -- is knocking loudly on the door  
21 unlawful?

22 MS. DRAKE: It's unreasonable conduct.

23 JUSTICE SCALIA: Is it -- is it unlawful?  
24 Is -- is saying "Open up, police" -- is that unlawful?

25 MS. DRAKE: Well, it's certainly not  
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1 unlawful in the sense that it violates any provision of  
2 the penal code. But this is a Fourth Amendment case, so  
3 the question is whether it's reasonable.

4 JUSTICE SCALIA: Ms. Drake, the problem I  
5 have is there are a lot of constraints on -- on law  
6 enforcement, and the one thing that -- that it has going  
7 for it is that criminals are stupid.

8 (Laughter.)

9 JUSTICE SCALIA: And we had a case some  
10 years ago in which the issue was whether the Washington  
11 police could enter buses arriving from -- from the south  
12 and -- and randomly ask passengers, do you mind if we  
13 look in your luggage? And the -- the -- the mules who  
14 were carrying marijuana were stupid enough to say, oh,  
15 of course. Just to show that they had nothing to fear.  
16 And an enormous number of arrests were -- were effected  
17 in that fashion.

18 We didn't say that's not fair because you're  
19 taking advantage of the -- of the ignorance of these --  
20 these poor criminals. We said that's perfectly okay.  
21 And it seems to me the same thing is going on here.

22 These people could have answered the door --  
23 there's a policeman knocking on the door; all he's  
24 saying is "Open the door, open the door" -- and say  
25 "Yes, what do you want?" Say -- you know, blah, blah,

1     blah. They say "Well, get a warrant." Shut the door.

2                     They didn't do that. But everything done  
3     was perfectly lawful. It's unfair to the criminal? Is  
4     that -- is that the problem? I really don't understand  
5     the problem.

6                     MS. DRAKE: I have two responses to Your  
7     Honor's question. The first is that -- and along with  
8     this notion that criminals are stupid and so that's why  
9     we get all these criminal cases, there is no difference  
10    between what happened in this case and how an innocent  
11    person would respond.

12                    Recall Officer Cobb's testimony is simply  
13    that, after banging, he heard movement. Any innocent  
14    person at 10:00 at night would have to move in order --

15                    JUSTICE ALITO: Could I ask you this? It  
16    might -- it might make a difference to me whether the  
17    police demanded entry prior to the time when the alleged  
18    exigent circumstances arose. And the only testimony on  
19    this point that I am aware of is on pages 22 and 23 of  
20    the appendix, when police banged on the door as loud as  
21    they could and announced "Police, police, police," and  
22    then Detective Maynard banged on the door and said "This  
23    is the police."

24                    Now, is there any -- anything more in the  
25    record? Any evidence that they -- prior to the time

1     when they heard what they allegedly heard, that they  
2     said "Open the door"?

3                 MS. DRAKE:   The portion of the Joint  
4     Appendix that I quoted to the Court -- we explained to  
5     them we were going to make entry -- appears on page 24.

6                 JUSTICE ALITO:   Right.

7                 MS. DRAKE:   So, if Your Honor keeps  
8     reading --

9                 JUSTICE ALITO:   It starts -- it says:   We  
10    knew that there was possibly something that was going to  
11    be destroyed inside the apartment.   At that point  
12    Detective Maynard -- this is after they heard the  
13    sounds, after they claim to have heard the sounds.

14                MS. DRAKE:   Yes.   Officer Cobb's testimony  
15    suggests that the demand came after they heard the sound  
16    of movement.   The finding by the trial court, however,  
17    is that this was all happening simultaneously and in  
18    very quick fashion.

19                JUSTICE ALITO:   Is there any -- is there any  
20    evidence of that?   Did anybody else testify to what  
21    happened?

22                MS. DRAKE:   No, Your Honor.   Officer Cobb's  
23    testimony was -- was all the Commonwealth offered.

24                But the chronology of the demand is not  
25    dispositive in this case because the demand itself is

1 not dispositive. The demand removes any doubt that the  
2 officers were not seeking a consensual encounter, but  
3 you still have the behavior of banging on the door.

4 JUSTICE ALITO: Well, does it -- does it  
5 turn on how loudly they knocked? If they just knock on  
6 the door and say "This is the police," is -- is that --  
7 is there anything wrong with that?

8 MS. DRAKE: It -- it depends entirely on  
9 whether a reasonable person would interpret that  
10 behavior as the officer conveying the impression that  
11 entry was imminent and inevitable. And this feeds back  
12 to Justice Scalia's question, which is, well, what --  
13 what is unreasonable about what the officers did here?

14 JUSTICE ALITO: What was there here to make  
15 a reasonable person believe that -- that entry was  
16 imminent and inevitable, if -- if all that's done is a  
17 knock on the door and they say "Police, police, police,  
18 this is the police"? Maybe it turns on how loudly they  
19 spoke or how loudly they -- they knocked; is that the  
20 point?

21 MS. DRAKE: That is the point. Those are  
22 all relevant criteria because, in every Fourth Amendment  
23 case, we're considering the totality of the  
24 circumstances.

25 CHIEF JUSTICE ROBERTS: It seems to me that  
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1     you're trying to change the case. I mean, this is not a  
2     case where they come in and, in effect, demand entry.  
3     My understanding is that the issue in the case is  
4     whether or not, after a request for entry, they can then  
5     base probable cause in dispensing with the warrant based  
6     on what they hear from behind the door.

7                 Now, I know you think that they -- whatever  
8     they hear is perfectly innocent; but the issue is  
9     whenever they knock on the door, "Police" or "Can we  
10    come in" or whatever, and then they hear that, the  
11    activity behind the door, they have reason and can --  
12    can enter.

13                Now, what you're -- it seems to me what  
14    you're arguing is, well, they did something else. They  
15    banged on the door, they yelled "Police"; it wasn't  
16    simply knocking on the door and seeking entry. And you  
17    may be right, again, on the facts, but it seems to me  
18    that's for -- for later on.

19                I want to know what your position is on  
20    whether they can assume, at least for me, they knock and  
21    say "Can we come in" or knock and say "Police" -- no  
22    demand to get in.

23                MS. DRAKE: If I understand Your Honor's  
24    question, the officers are engaging in what we would  
25    call a true "knock and talk." They're seeking --

1     they're on -- the scenario is such that no one would  
2     doubt they're attempting a consensual encounter.

3             Our position is because that behavior is  
4     reasonable, it is not made unreasonable by the fact that  
5     evidence may be destroyed, and so suppression would not  
6     be the remedy. Well, then, here --

7             JUSTICE BREYER: All right. So you agree  
8     that -- that the court below is wrong because what they  
9     say, as I read it, is irrespective of how reasonably the  
10    police behave, if it is reasonably foreseeable that  
11    their tactic will create exigent circumstances -- and I  
12    would think it's reasonably foreseeable, when you knock  
13    on the door very politely and say "The police," that  
14    somebody might shout out "Hide the pot"; all right?

15            (Laughter.)

16            JUSTICE BREYER: That if that's reasonable  
17    foreseeable, says the court, then that violates the  
18    Fourth Amendment. But we have the Second Circuit that  
19    says as long as the police behaved unlawfully, it --  
20    lawfully, lawfully -- it does not violate the Fourth  
21    Amendment; and we have the First Circuit that has some  
22    kind of bad-faith test plus an unreasonable or improper  
23    test; and we have the Fourth and Eighth circuits that  
24    yet have some different kind of test.

25            And one of the things I'd be interested in  
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1   hearing your view on at some point is just what the  
2   Chief Justice said, that assuming from your point of  
3   view this is a hypothetical case, nonetheless we would  
4   like your view on which of those tests or some other  
5   test is the appropriate test and why. That was the  
6   question he started with and Justice Kennedy started  
7   with, and I'd also be interested in your view on that.

8                   MS. DRAKE: The appropriate test is the test  
9   that we propose. Under our test, the police act  
10  unreasonably when they convey the impression to an -- to  
11  a reasonable person that entry is imminent and  
12  inevitable. Our test follows directly from the Fourth  
13  Amendment requirement that people in their homes deserve  
14  precision.

15                   By conveying the impression that entry is  
16  imminent and inevitable, the police are -- and they  
17  don't have judicial authority for doing that -- there --  
18  there's no warrant -- they are engaging in behavior that  
19  would confuse an ordinary citizen and make him or her  
20  uncertain about whether the assertion of right to  
21  privacy and security in the home --

22                   JUSTICE KAGAN: Well, Ms. Drake if that's  
23  the case, in some way you're agreeing with the  
24  Government. You, too, are saying that -- that there's a  
25  lawfulness test. You're just disagreeing about what's



1 lawful.

2 MS. DRAKE: And to the extent that "lawful"  
3 is defined as a synonym for "unreasonable" and to the  
4 extent that there does not need to be a completed  
5 antecedent Fourth Amendment violation, we would agree.  
6 There is area of agreement between the Commonwealth and  
7 I, and it is on the issue of this "knock and talk." Of  
8 course, police officers need to have the investigative  
9 tool of a knock and talk. There's nothing wrong with an  
10 officer attempting to gain consensual entry. And our  
11 position is that that's not made unreasonable by factors  
12 outside the officer's control, no matter how  
13 foreseeable.

14 JUSTICE ALITO: So what took this outside of  
15 the category of the ordinary knock and talk?

16 MS. DRAKE: This is not a knock and a --  
17 knock and talk case; this is a knock and announce case  
18 or a knock and demand case, which is how the trial court  
19 characterized it. And the staff --

20 JUSTICE ALITO: Well, I don't know about the  
21 labels, but what did they -- what did the police do that  
22 went beyond what would be permitted under your  
23 understanding of a pure knock and talk? It's -- it's  
24 the volume of the -- of the knocking?

25 MS. DRAKE: Yes, it's the -- it's the  
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1     banging, not knocking.  It's announcement --

2                     JUSTICE ALITO:  Banging, not knocking?

3                     MS. DRAKE:  Banging, not a soft -- not the  
4     knock that you would expect a reasonable person to  
5     engage in, in the ordinary discourse with another  
6     person, or that you would expect from an officer  
7     attempting to gain consensual --

8                     JUSTICE SCALIA:  But I -- you -- you might  
9     have considerable support on the Court for the  
10    proposition that if the exigent circumstance is created  
11    by unlawful activity by the police, which would include  
12    conveying the impression that they are about to kick the  
13    door in, then -- then you have a different case.  But --  
14    but I thought the case we had before us is what if the  
15    police officers are behaving perfectly lawfully and  
16    they're not threatening to kick down the door, and they  
17    smelled the marijuana and then they hear the motion  
18    inside, does that justify their going in?

19                    And that's what I thought we took the case  
20    for, and that's a different question.  You're trying to  
21    -- you're trying to make the police officers' actions  
22    unlawful, and I will stipulate that if their actions  
23    were unlawful you have a different case, and probably  
24    the evidence would have to be suppressed, but I didn't  
25    think we were here to decide that, whether they knocked

1 too loud, whether they threatened to kick in the door.  
2 The opinion below says if they created the exigent  
3 circumstances, whether they did so lawfully or  
4 unlawfully, they cannot go in. And that's, that's the  
5 issue.

6 MS. DRAKE: What the officers did in this  
7 case is the functional equivalent of saying "We're going  
8 to kick in the door." Now, I wouldn't go that -- that  
9 far, but it -- it's the functional equivalent of a knock  
10 and announce, which is exactly the behavior the police  
11 engage in when they are executing a warrant. And it is  
12 that behavior that conveys the impression that an  
13 occupant has no authority to keep the officers at arm's  
14 length.

15 JUSTICE SCALIA: That wasn't the basis for  
16 the decision below, though. The court below didn't say  
17 these police officers were behaving as though they had a  
18 warrant and were about to kick in the door. The opinion  
19 below just said, yes, there were exigent circumstances,  
20 but they were the result of the police knocking on the  
21 door and saying "We're the police."

22 MS. DRAKE: I don't disagree that the lower  
23 court did not analyze the problem in this fashion, did  
24 not analyze the question in this fashion, but it's a  
25 legal question that calls for an examination of how a

1 reasonable person would interpret the behavior, and  
2 so --

3 JUSTICE SOTOMAYOR: But what does that have  
4 to do with the -- the police officers' lawfulness? Now,  
5 I -- I grant you that attempting -- that there is  
6 something troubling about the police attempting to  
7 coerce entry as opposed to requesting entry, but as my  
8 colleagues have pointed out, it's not clear from this  
9 record which of the two the police did, in a loud voice  
10 or not.

11 You're saying just a loud knock, a scream,  
12 "Police," that that would be coercive? That's how I'm  
13 reading you.

14 MS. DRAKE: I --

15 JUSTICE SOTOMAYOR: Or -- or are you going  
16 further and trying to say that, as a matter of fact, the  
17 testimony's critically clear that they knocked loudly,  
18 said "Police," and said "Let us in or we're going to  
19 bust it"?

20 MS. DRAKE: The factual record is clear.  
21 The -- Officer Cobb testified he banged as loud as  
22 possible. This is -- this not the normal knock that an  
23 officer engages in when he's seeking consensual --  
24 consent, you know, consent to search, and this is at  
25 10:00 at night. He's saying we announced "Police,

1 police, police!" -- exclamation point. That -- that's  
2 how it appears in the record. Again --

3 CHIEF JUSTICE ROBERTS: So just assume, for  
4 my sake, that the police comes to the door. It's not  
5 10:00 at night; it's, you know, 6:00 at night. Knocks  
6 quietly on the door and says "We're the police. Can we  
7 talk?" And then there was the smell of marijuana. And  
8 then he hears the sounds that do convey to a reasonable  
9 police officer that evidence is being destroyed. At  
10 that point can they enter without a warrant?

11 MS. DRAKE: Yes.

12 CHIEF JUSTICE ROBERTS: Okay.

13 JUSTICE BREYER: But you said -- just add on  
14 to that. Look, the question presented that they raised:  
15 Which of the five tests currently being used by the U.S.  
16 court of appeals is proper? Now, you've said something  
17 about your view on that, but I'd like you to say  
18 anything else you'd like to say about that, which of the  
19 five tests, or some sixth test if you like, and you tell  
20 me the words that you would like us to use when we  
21 answer that question.

22 MS. DRAKE: I would like this Court to adopt  
23 the test that we have proposed.

24 JUSTICE BREYER: Which is?

25 MS. DRAKE: Which is that an officer acts

1     unreasonably when he or she conveys the impression that  
2     entry into a home is imminent and inevitable.

3                 JUSTICE BREYER:  No, no, no.  But the test  
4     you're using there, the key word is "unreasonable."

5                 MS. DRAKE:  Yes, Your Honor.

6                 JUSTICE BREYER:  Okay.  And the reason you  
7     choose the word "unreasonable" rather than the Second  
8     Circuit's test of "unlawful" is?

9                 MS. DRAKE:  Because, frankly, I'm not sure  
10    what that means, and I think that's become clear in the  
11    context of this briefing.  Does "unlawful" mean the  
12    police have had to violate a portion of the penal code?  
13    Does "unlawful" mean, as the Commonwealth is contending,  
14    that there has to be a completed Fourth Amendment  
15    violation --

16                CHIEF JUSTICE ROBERTS:  You know -- you  
17    don't know what --

18                MS. DRAKE:  -- the seizure went forward.

19                CHIEF JUSTICE ROBERTS:  You don't know what  
20    "unlawful" means, but you know what "unreasonable"  
21    means.

22                MS. DRAKE:  Yes.  Unreasonable is the  
23    touchstone of every, you know, Fourth Amendment case,  
24    and so we're saying there does not have to be an  
25    antecedent completed Fourth Amendment violation.  The

1 question is, as is the case in every Fourth Amendment  
2 case, did the officers act --

3 JUSTICE SCALIA: Do you have any doubt that  
4 it's unlawful for a police officer to threaten to burst  
5 into a home?

6 MS. DRAKE: No, Your Honor.

7 JUSTICE SCALIA: So why do you need  
8 unreasonable? If, indeed, there -- there was a threat  
9 of imminent entry -- we're going to bust down the -- if  
10 that was the threat, then it's unlawful, surely.

11 MS. DRAKE: Yes, and that's why my answer to  
12 Justice Kagan's question was to the extent that  
13 "unlawful" and "unreasonable" are synonyms, we would  
14 agree.

15 Now, if the Court is not terribly -- does  
16 not find our test convincing, the next-best test, we  
17 believe, is a foreseeability test.

18 JUSTICE GINSBURG: Is your test is something  
19 novel? I mean, Justice Breyer mentioned that there are  
20 some five tests in the different circuits, and the  
21 foreseeability test is the one that the Kentucky Supreme  
22 Court used, but is your -- does your test coincide with  
23 the tests of any other circuits, or is it different?

24 MS. DRAKE: Our test is a novel test. It  
25 has not been, to my knowledge, considered by any of the

1 other circuits.

2 JUSTICE BREYER: But your test is -- I mean,  
3 it's not wild. It just says it says "unreasonable" in  
4 the Fourth Amendment. Probably when they act lawfully,  
5 they are acting reasonably and not unreasonably, but it  
6 could be sometimes they're not. That's your view?

7 MS. DRAKE: That's correct, and by the  
8 way --

9 JUSTICE BREYER: No test. All right.

10 MS. DRAKE: -- we're not saying that --  
11 we're essentially saying the police shouldn't act as  
12 though they have a warrant when they don't have one,  
13 which is exactly what they did in this case. And that  
14 proposition is not new. In Bumper, this Court made  
15 clear that if the police act as though they have a  
16 warrant when they don't have one, any consent would be  
17 coerced.

18 So reviewing courts are already making these  
19 determinations about how loud was the knock and how  
20 aggressive was the demand, simply in another context.  
21 And by the other -- on the other hand, police officers  
22 are already receiving the same instruction that they  
23 would need in order to apply our rule, which is, don't  
24 act as though you have a warrant. Don't engage in the  
25 functional equivalent of a knock and announce if you do



1 not have prior judicial authority.

2 And what is appealing about our test, unlike  
3 the foreseeability test, which we believe it's a  
4 refinement of, is it allows for conduct by the police  
5 that's reasonable at its inception to remain reasonable  
6 regardless of the suspect's response, no matter how  
7 foreseeable.

8 CHIEF JUSTICE ROBERTS: What is -- what is  
9 an example of conduct that you would consider  
10 unreasonable resulting in suppression of the evidence  
11 that would not be unlawful?

12 MS. DRAKE: Well, it's very hard -- it's  
13 very hard to conceive of where the daylight would be --

14 CHIEF JUSTICE ROBERTS: Right.

15 MS. DRAKE: -- between those terms,  
16 "reasonable" and "unlawful," so long as "unlawful"  
17 doesn't mean violation of a penal code provision and so  
18 long as it doesn't mean, as the Commonwealth is  
19 suggesting, that there has to be -- that the defendant  
20 would have to first demonstrate that the police were  
21 seized in order to be able to convincingly argue that  
22 the search was unreasonable.

23 CHIEF JUSTICE ROBERTS: So you can't --  
24 can't give me one example of some conduct that's  
25 unreasonable under your test that would not be unlawful?

1 MS. DRAKE: I can't -- I can't think of one,  
2 Your Honor.

3 JUSTICE SCALIA: The problem is that as  
4 reasonable as the test is, it's not the test that was  
5 used by the court below, and you want us to affirm the  
6 decision below, which simply said if the exigent  
7 circumstances are -- are the consequence of the police  
8 action, whatever the police action was -- lawful,  
9 reasonable, whatever -- the evidence has to be excluded.  
10 How can we affirm that decision as you want  
11 us to do, even -- even applying your test?

12 MS. DRAKE: Well, the factual record in this  
13 case is fully developed, and how a reasonable person  
14 would interpret the scenario is a mixed question of law  
15 and fact, which -- this Court would review the decision  
16 of the Kentucky Supreme Court in that regard de novo  
17 anyway. In that regard, it's no different than any  
18 other case that makes its way to this Court where this  
19 Court is asked to review the record, make a  
20 determination of how an ordinary person would interpret  
21 the officers' conduct.

22 It is simply unreasonable and unlawful for  
23 purposes of the Fourth Amendment for an officer to  
24 convey the impression that he has the authority of a  
25 warrant when he doesn't have one and when that prompts,

1 as it obviously would, an occupant of a home to move,  
2 and then that movement is used as evidence that exigent  
3 circumstances exist and warrantless search is justified.  
4 If this Court were to, you know, adopt the framework the  
5 Commonwealth is arguing for, the exception to the  
6 warrant requirement would be the rule.

7 So we would ask this Court to affirm the  
8 decision of the Kentucky Supreme Court.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Farley, you have 4 minutes remaining.

11 REBUTTAL ARGUMENT OF JOSHUA D. FARLEY

12 ON BEHALF OF THE PETITIONER

13 MR. FARLEY: My time is short, so I would  
14 just like to make a few quick points.

15 I believe Mr. Chief Justice and Justice  
16 Kennedy were absolutely, absolutely correct. The  
17 question before this Court is: Can lawful police action  
18 impermissibly create exigent circumstances? And the  
19 answer to that question is no.

20 There is never a circumstance in which  
21 lawful police behavior under a Fourth Amendment analysis  
22 can impermissibly create an exigency. I would point the  
23 Court to *Hodari D.*, which I believe Justice Scalia wrote  
24 for the Court, that we should not punish police officers  
25 for attempted Fourth Amendment violations or Fourth

1 Amendment violations that do not reach fruition, because  
2 it does not serve the point of the exclusionary rule.

3 JUSTICE KAGAN: Mr. Farley, one of the  
4 points of the Fourth Amendment is to ensure that when  
5 people search your home, they have a warrant. And, of  
6 course, there are exceptions to that. But if there is  
7 one place where the warrant requirement has real force,  
8 it's in the home.

9 And I think that the concern here -- and you  
10 have some strong arguments on your side, but the concern  
11 here is that your test is going to enable the police to  
12 penetrate the home, to search the home, without a  
13 warrant, without going to see a magistrate, in a very  
14 wide variety of cases, that all the police really have  
15 to say is: We saw pot, we heard noise. Or: We think  
16 there was some criminal activity going on for whatever  
17 reason, and we heard noise.

18 How do you prevent that from happening? How  
19 do you prevent your test from essentially eviscerating  
20 the warrant requirement in the context of the one place  
21 that the Fourth Amendment was most concerned about?

22 MR. FARLEY: Well, Justice Kagan, I would  
23 disagree with you. I don't think that it would. I  
24 believe that what the Commonwealth is asking for is no  
25 more or no less than reviewing courts have done for

1 generations. You look to determine whether there was a  
2 Fourth Amendment violation, whether there was an  
3 unlawful entry, whether there was an unlawful seizure,  
4 or whether there was a coercion that then they gained  
5 consent for entry.

6 If those things occurred, they are clearly  
7 Fourth Amendment violations. There should be a  
8 suppression of the evidence. The exigent  
9 circumstances --

10 JUSTICE SCALIA: It wouldn't technically be  
11 a Fourth Amendment violation, would it, if the police  
12 gave the impression that they had a warrant and were  
13 about to kick in the door? Is that a Fourth Amendment  
14 violation in and of itself?

15 MR. FARLEY: I don't believe so.

16 JUSTICE SCALIA: So your -- the -- the  
17 unlawfulness test would not prevent that then?

18 MR. FARLEY: No, Justice Scalia, it would  
19 not.

20 JUSTICE SCALIA: It would not prevent it?

21 MR. FARLEY: It would not prevent --

22 JUSTICE SCALIA: Oh, whoa. Maybe we have to  
23 come up with an unreasonable test, then.

24 MR. FARLEY: Well, I believe, under  
25 Hodari D., if the officers demand entry and there is no

1 response to that demand, there is no -- been no  
2 completion of the Fourth Amendment violation. The  
3 officers could stand outside the door --

4 JUSTICE SCALIA: Oh, it's perfectly okay for  
5 officers to do that? To pretend that they have a  
6 warrant and "Open the door or we'll kick it in" --  
7 that's perfectly okay?

8 MR. FARLEY: Well, I believe that there are  
9 -- there are large restrictions and prohibitions to  
10 that, that officers are well aware of, because if the  
11 person does answer the door, the officers know, well,  
12 everything is going to be suppressed. Or if the  
13 officers do --

14 JUSTICE SCALIA: But why? You say that what  
15 they've done is not unlawful. Why would it be  
16 suppressed?

17 MR. FARLEY: Well, if they demand entry and  
18 entry is given, that is then a Fourth Amendment  
19 violation, because they've demanded entry without a  
20 warrant. And in that case, suppression -- once they  
21 have entry, the evidence would be suppressed.

22 CHIEF JUSTICE ROBERTS: But they can't gain  
23 entry by deception. They can't knock on the door and  
24 say "Pizza"; right?

25 (Laughter.)

1 MR. FARLEY: No.

2 CHIEF JUSTICE ROBERTS: No, no? Okay.

3 MR. FARLEY: We would just assert that under  
4 the lawfulness test, we aren't asking for anything more  
5 or less than this Court has done or other reviewing  
6 courts have done for generations, and this is a simple  
7 Fourth Amendment analysis.

8 There was no demand in this case. This was  
9 a simple knock-and-announce case, regardless of the time  
10 of day. There was no coercion. There was no seizure.  
11 There was no consent given. Officers should not be held  
12 accountable for unlawful reactions by suspects.

13 Thank you very much.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 You will have noticed that Justice Kennedy  
16 left the bench a few minutes early. He is going to  
17 Tucson to represent the Court as the Circuit Justice for  
18 the Ninth Circuit at the memorial service there. He  
19 will review the tapes and transcripts of the rest of the  
20 argument and fully participate in the decision.

21 This case is submitted.

22 (Whereupon, at 11:58 a.m., the case in the  
23 above-entitled matter was submitted.)

24

25

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