Standing Up to Unwarranted Police Power

What’s wrong with the police kicking in the door of an apartment after they smell marijuana drifting from it, if they knock hard, announce who they are and then hear what sounds like evidence being destroyed?

Some lower courts have said the answer is pretty much everything, because the police themselves created the pretext for barging in. But the Supreme Court ruled last week that such a warrantless search does not necessarily violate the Fourth Amendment, according to a vague new standard for determining whether the police violated the protection against unreasonable search, or threatened to do so.

They sent the case back to the Kentucky Supreme Court, which is going to have a hard time understanding the new standard — and in any case never resolved whether any evidence was, in fact, destroyed.

Ruth Bader Ginsburg, the lone dissenter in this strange decision, wisely warned that the new rule gave the police “a way routinely to dishonor” the constitutional requirement that they obtain a warrant, by manufacturing an exception to it. There are already exceptions for “exigent circumstances,” emergencies like an imminent risk of death or a danger evidence will be destroyed. But the urgency usually exists when the police arrive at the scene. In this case, the police caused the exigent circumstances themselves.

The new rule undermines the rule of law by shifting the power to approve a forced entry from a magistrate to the police. It empowers the police to decide whether circumstances allow them to kick in the door.

The majority opinion by Justice Samuel Alito Jr. says that the “exigent circumstances” rule applies even though the police triggered the danger that evidence would be destroyed. Apartment-dwellers with nothing to hide, the justice said, are at fault if they don’t take advantage of their right to refuse entry when the police knock. (As if this would be realistic even in Justice Alito’s neighborhood.)
Justice Ginsburg asks, “How ‘secure’ do our homes remain if police, armed with no warrant, can pound on doors at will and, on hearing sounds indicative of things moving, forcibly enter and search for evidence of unlawful activity?”

Her dissent is a reminder of the enduring value of privacy, as well as of her value to American law. It is unsettling that she is the only justice to insist that the law hold the line on its definition of exigent circumstances so that our “officers are under the law,” as Justice Robert Jackson once put it. But it is reassuring to have her stand up for the Fourth Amendment and to police power that is literally and constitutionally unwarranted.