No. 10–264

In the Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

CONRAD KRUSE, JR.

Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals, Western District

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Did the intermediate state court of appeals err in concluding, based on all of the circumstances, that police officers violated respondent's Fourth Amendment rights because the warrantless search of respondent's property was unreasonable?

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Petitioner, the State of Missouri, seeks review of a unanimous decision by an intermediate state court of appeals. The Missouri Court of Appeals for the Western District held that police officers obtained evidence in violation of respondent Conrad Kruse's Fourth Amendment rights. The decision correctly applied settled law to the particular facts of this case. It did not create any conflict, nor did it raise any question of general principle or importance. The Missouri Supreme Court denied petitioner's request for review. Pet. App. A1. This Court should do the same.

STATEMENT

1. Two officers searched Kruse's property in an attempt to locate and arrest Jeremy Beel, a person with whom Kruse had no known association. Pet. App. A4. A confidential informant alleged that Beel was "involved in the theft of some anhydrous ammonia," a compound used to manufacture meth-amphetamine. *Id.* at A3. The informant also claimed that Beel would be at a particular location in Pettis County that evening. *Ibid.* This tip was relayed to two local law enforcement officers who ran a back-ground check on Beel and discovered an active warrant for his arrest. *Ibid.* When the officers went to the location identified by the informant, however, Beel was not there. *Ibid.*

With no further information regarding Beel's whereabouts, the officers proceeded to drive to the residences of persons they believed might be "involved with methamphetamine." Pet. App. A4. There was "no information connecting Beel with Kruse." *Ibid.* Nonetheless, because Kruse "had previously violated the nine[-]gram Sudafed law," which regulates purchases of an over-the-counter medicine that is used in the manufacture of methamphetamine, they decided to visit his home. *Ibid.* One officer explained: "we figured * * * we would just stop and try our luck. It was a shot in the dark." *Id.* at A38.

It was shortly after midnight when the officers arrived at Kruse's home. Pet. App. A4. The property consisted of a mobile home facing the road, an abandoned trailer, and a shed in the backyard, which was largely hidden from view by the residence and surrounding trees. *Ibid.* There were no exterior lights on and no visible activity on the property. *Id.* at A13. Two "No Trespassing" signs were posted on the property. *Id.* at A4. In the driveway, the officers found a "van registered to Beel's father," but it was immobilized by a flat tire. *Ibid.*

The officers then left the property to meet two more deputies. Pet. App. A4. Together, the officers decided to search for and apprehend Beel on Kruse's property. They specifically decided "not to apply for a search warrant" for Kruse's property. *Ibid.*

When the officers returned to Kruse's property it was still "very dark." Pet. App. A37. Two officers

planned to go the front door, and two others planned to go into the back yard. *Id.* at A4. Before the officers reached the front door, the two others had reached the back and encountered Kruse coming out of the shed. *Ibid.* One officer yelled "Sheriff's department" and "put [Kruse] down on the ground at gunpoint." *Id.* at A36-A37. The other officer moved towards the shed, "ordered everyone out," including Beel, and "glanced in[side]," where he observed "various plastic jars and glasses with liquids in them" and "a hot plate." *Id.* at A4. Based on this discovery, the officers obtained a search warrant for the property, which yielded "evidence associated with the manufacture of methamphetamine." *Id.* at A6.

2. Before trial, Kruse moved to suppress the evidence. Pet. App. A6. The trial court granted the motion following a hearing. It concluded that the officers' search of Kruse's property was unreasonable and unsupported by exigent circumstances. *Id.* at A6, A9.

3. The State appealed, arguing the officers' entry onto Kruse's curtilage was reasonable and thus did not violate the Fourth Amendment. Pet. App. A8-A9. After a thorough examination of the record, the court of appeals unanimously affirmed the decision below. *Id.* at A16-A17. Based on the evidence, the court upheld as not "clearly erroneous" the trial court's conclusion that the officers had acted unreasonably. *Id.* at A17.

The court of appeals affirmed the lower court's finding that Fourth Amendment protections applied

to Kruse's backyard. At the suppression hearing, the State had conceded that "th[is] area * * * constituted curtilage." Pet. 4-5. In analyzing whether Kruse had a reasonable expectation of privacy in his backyard, the court focused on the particularities of his property at the time of the officers' search. It observed that Kruse's backyard was hidden from plain view by his residence on one side and wooded areas on the other three sides. Pet. App. A15. In addition, Kruse posted "No Trespassing" signs on his residence and shed, and when the "officers arrived [at the property] after midnight * * * [n]o exterior lights were on to welcome the public to come on the premises." *Id.* at A14-A15. Based on these facts, the court rejected petitioner's claim "that there was no expectation of privacy in the backyard." *Id.* at A15.

The court of appeals next examined whether the officers acted reasonably by entering the curtilage. The State claimed that this intrusion was reasonable because it was solely to "prevent the potential escape of Beel," Pet. App. A8, an explanation it has not consistently advanced for the officers' actions. See, *e.g.*, Pet. 13 (claiming that those officers entered the back yard to "maintain[] officer safety"). Indeed, the court noted that it was unclear whether the officers even knew the trailer had a back door before they entered the back yard. Pet. App. A5. The court also observed that "Beel was presumably unaware of police presence, and his van was essentially immobile" at the time of intrusion. *Id.* at A15. Based on the evidence and its "observ[ations of] the testimony," the trial court found that the officers

conducted an unconstitutional search, and the court of appeals affirmed. *Id.* at A17.

The court of appeals noted that there were several reasonable alternatives available to the officers. Pet. App. A12. The officers might have knocked on the front door "and inquire[d] whether Beel was present" instead of going "into the backyard before trying the front door." Pet. App. A13-A14; but see Pet. i (premising the question presented on a claim that the officers were simultaneously "conduct[ing] a 'knock and talk' at the front door."). Alternatively, the officers could have waited to "knock[] on the front door in the daylight." Pet. App. A14. Or they could have obtained "a warrant to enter on the premises to search for Beel." *Ibid.* The court of appeals held that the officers acted unreasonably in searching Kruse's property in part because of those other options.

The court next considered whether exigent circumstances justified the officers' intrusion. This too required a fact-intensive inquiry, the court recognized, as "[t]here is no absolute test for exigent circumstances." Pet. App. A9 (citation omitted). At the time, Beel was presumably unaware of their presence and thus "had no motive to flee or destroy evidence." *Id.* at A15. Furthermore, the State did not claim—either at trial or on appeal—that the intrusion was motivated by safety concerns. *Id.* at A8, A23. Thus, because "[t]he officers did not fear present danger or present destruction of evidence," *id.* at A15, and their actions in temporarily leaving the property were an "acknowledge[ment] that the situation did not call for immediate action," *ibid.*, the

court concluded that "we cannot say that the trial court was required to regard these circumstances as exigent." *Id.* at A16. Instead, "[t]he officers had time to seek a warrant." Pet. App. A15.

Finally, petitioner argued that because the officers did not intend to conduct a search, this was not the kind of case where the exclusionary rule should apply. Pet. App. A16-A17. The court of appeals rejected this claim, reasoning that the officers had "enter[ed] onto the property as to which there was a privacy interest protected by the Fourth Amendment," and that "the intention [o]f the officers was a factual inference drawn by the trial court based on observing the testimony." *Ibid.*

4. In March 2010, the State of Missouri sought further review before the Missouri Supreme Court. Pet. App. A18. The State argued that the intermediate court had adopted a *per se* rule that any warrantless entry without an exigency onto a person's curtilage was unreasonable. *Id.* at A20. Additionally, it claimed the lower court "applied the exclusionary rule without first determining if [doing so] was appropriate." *Id.* at A29. Petitioner did not argue, however, that the decision improperly extended this Court's holding in *Steagald.* Compare *id.* at A26-A29, with Pet. 7-17 (arguing the lower court erred because its analysis "rel[ied] primarily upon *Steagald*").

The Missouri Supreme Court denied the application for transfer on April 20, 2010. Pet. App. A1.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW PROPERLY APPLIED FOURTH AMENDMENT PRINCIPLES TO THE SPECIFIC FACTS OF THIS CASE

The decision below rests upon the specific facts of this case and does not warrant review by this Court. Petitioner claims that the decision of an intermediate appellate court created a *per se* rule that will "preclude[] law enforcement officers' entry onto a person's curtilage for a legitimate law enforcement purpose." Pet. 6. Petitioner is wrong. The court below merely determined that, under the particular circumstances of this case (as described by the trial court's amply supported factual findings), the police officers' search of Kruse's backyard was unreasonable. Indeed, the court concluded only that there was "sufficient evidence from which the trial court could make factual findings to support the conclusion reached." Pet. App. A17.[1]

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[1] The only court to have addressed the decision below expressly declined to accept it as establishing a *per se* rule against warrantless entries onto curtilage. See *United States* v. *Gonzalez*, No. 3:09-cr-00115-JAJ, 2010 WL 3732941, at *6-7 (S.D. Iowa June 4, 2010). The district court stated that the officers' decision in *Kruse* to proceed onto curtilage without knocking on the front door, in the middle of the night, and without exigent circumstances, rendered the case factually atypical. *Ibid.*

The decision below was merely the correct application of the Fourth Amendment's reasonableness requirement to the specific facts of this case. This Court has stated that the Fourth Amendment's "central requirement is one of reasonableness." *Illinois* v. *McArthur*, 531 U.S. 326, 330 (2001) (citing *Texas* v. *Brown*, 460 U.S. 730, 739 (1983)). The court below thus "balance[d] the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable" under the particular circumstances of this case. *McArthur*, 531 U.S. at 331.

First, the court below appropriately recognized Kruse's "expectation of privacy in his backyard." Pet. App. A12-A13. Contrary to petitioner's suggestion, the court below did not adopt a *per se* rule that a home's curtilage should "always [be] treated as harboring the same expectations of privacy as the actual residential unit." Pet. 8. Rather, the court merely stated that, under the specific facts of this case, Kruse had a reasonable "expectation of privacy in his backyard." Pet. App. 13. As the court explained, "[t]his is not a case where the police officers merely knocked on the front door to ask whether Beel was present." *Ibid.* The officers arrived after midnight at a residence where "[n]o exterior lights were on to welcome the public to come on the premises." *Ibid.* The entrance to the residence was in the front yard, and the back yard "was not in plain view." *Ibid.* Indeed, "[t]he back yard and backdoor were enclosed by trees on three sides and the home on the fourth side." *Ibid.* Additionally, a number of "No Trespassing" signs were posted on the property, and they

were properly "understood to assert a privacy interest on the entire property." *Ibid.*

Next, the court held that no exigent circumstances justified the search of Kruse's curtilage for Beel. Pet. App. A13. In reaching this conclusion, the court observed that the officers "did not fear present danger or present destruction of evidence." *Ibid.* Before the officers' entry into Kruse's backyard, "Beel had no motive to flee or destroy evidence." *Ibid.* Indeed, at the time of the incident, the officers "called for and took the time to wait for additional officers to arrive." *Ibid.* As the officers themselves acknowledged, "the situation did not call for immediate action." *Ibid.* Indeed, Beel's van was immobilized by a flat tire. *Id.* at A4. Only after reaching the conclusion that there were no exigent circumstances—based on a six-factor test[2]—did the court conclude that the trial court properly deemed this specific search unreasonable. *Ibid.*

Petitioner claims that the existence or non-existence of exigent circumstances is irrelevant

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[2] The factors considered were whether:

> (1) a grave offense is involved, particularly a violent crime; (2) the suspect is reasonably believed to be armed; (3) a clear showing of probable cause to believe the suspect committed the offense; (4) strong reason to believe the suspect is in the premises to be entered; (5) a likelihood the suspect will escape if not swiftly apprehended; (6) the entry, though not consented, is made peaceably.
>
> Pet. App. A8.

"[b]ecause the officers who entered [Kruse's] curtilage were not conducting a search." Pet. 12. This claim overlooks the fact that the trial court specifically found that the officers who entered onto Kruse's curtilage *were* conducting a search for Beel. Pet. App. A6 ("The [trial] court found that the officers conducted a warrantless search of Kruse's backyard."). Thus, petitioner's claim requires this Court to overturn the fact-bound determinations of the trial court. But see *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980) (noting that this Court has a "settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and court of appeals have concurred"); *Easley* v. *Cromartie*, 532 U.S. 234, 242 (2001) (same).

In addition, the court below observed that the police officers had a variety of alternative options to ensure "the safety of the officers knocking on the door." Pet. App. A12. In lieu of proceeding without a search warrant onto Kruse's residential property in the middle of the night, "the officers could have knocked on the front door in the daylight, which would have been both safer and more likely to preclude escape by Beel." *Ibid.* Alternatively, and significantly given the lack of need for "immediate action," *id.* at A13, the officers "could have presented to a magistrate a persuasive request for a warrant to enter on the premises to search for Beel." *Id.* at A12. This approach would have allowed the officers to "cover[] the back yard while knocking on the front door." *Ibid.* (internal quotation marks omitted).

In reaching its decision, the court below appropriately relied on this Court's reasoning in *Steagald* v. *United States*, 451 U.S. 204 (1981). Indeed, this case directly implicates the concerns animating that decision. The Court in *Steagald* feared that police officers "[a]rmed solely with an arrest warrant for a single person * * * could search all the homes of that individual's friends and acquaintances." *Id.* at 215. Furthermore, the Court was concerned that "an arrest warrant may serve as the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place." *Ibid.*

The facts of this case highlight the "significant potential for abuse" of allowing law enforcement officers, "acting alone and in the absence of exigent circumstances, [to] decide when there is sufficient justification for searching the home of a third party for the subject of an arrest warrant * * * for a single person." *Steagald*, 451 U.S. at 215. First, the police officers went to Kruse's residence only because it was a "place[] known to be involved with methamphetamine." Pet. App. A4. The officers—based on a mere suspicion that illegal activity was occurring—used Beel's arrest warrant to enter onto the curtilage of Kruse's home without a search warrant. Second, the police officers did not previously have "information connecting Beel with Kruse." *Ibid.* Kruse was not known to be a friend or acquaintance of Beel; he had merely violated the "nine[-]gram Sudafed law." *Ibid.* This potential for abuse further supports the determination of the court below that the police officers' entry onto the curtilage of Kruse's home—

based on "judicially untested determinations"—was unreasonable under the circumstances. *Steagald*, 451 U.S. at 213.

II. THE DECISION BELOW CREATED NO CONFLICT WITH FEDERAL COURTS OF APPEALS OR STATE COURTS

Petitioner alleges that the decision below conflicts "specifically" with decisions in two federal circuits and "generally" with others. Pet. 17-19. Petitioner is wrong. Petitioner's assertion of a conflict is little more than an argument that the court below should have held *this* entry reasonable solely because *other* courts have held *other* entries reasonable in *other* circumstances. Indeed, the cases petitioner cites only confirm the fact-bound nature of the decision below.

Neither of the cases petitioner identifies as "specifically" in conflict with the decision below, see Pet. 19, is anything of the sort. One case dealt exclusively with whether it was reasonable for law enforcement officers to approach the *front* door of a residence, while the other court never reached the question of whether entry onto curtilage was reasonable because it held the officers never entered the curtilage at all.

In *United States* v. *Weston*, the Eighth Circuit held that officers could approach the front door of a residence because it "was a reasonable investigative technique under these circumstances." 443 F.3d 661, 667 (2006). The Eighth Circuit never considered the question in this case—whether it was reasonable for

officers to walk around to the *back* of a house, in which the resident was found to have an expectation of privacy, without even attempting to contact the resident at the front door. Indeed, far from expressing disagreement with *Weston*, the decision below strongly indicated that the Fourth Amendment analysis would have come out differently had this been "a case where the police officers merely knocked on the front door." Pet. App. A15.

So too with *United States* v. *Cavely*, which did not even involve an intrusion onto curtilage. 318 F.3d 987, 993-994 (10th Cir. 2003). The Tenth Circuit held that there was no entry onto curtilage and so never reached the question whether such an intrusion would be reasonable under the circumstances. *Ibid.* *Cavely* thus cannot conflict with the decision below; petitioner has conceded that the officers did intrude onto curtilage, Pet. App. A41, and both the trial court and Missouri Court of Appeals determined that the entry was unreasonable in these particular circumstances. *Id.* at A6, A16.

Indeed, far from conflicting with the reasoning below, the Tenth Circuit's decision explicitly endorsed the rationale this applied Court in *Steagald*. *Cavely*, 318 F.3d at 993. The *Cavely* court explained that, "[u]nder the circumstances, the officers would have had no authority to search appellant's home even if they had reason to suspect that the woman named in the arrest warrant might be there. * * * The same rule would apply to a search of the curtilage of a home." *Ibid.* (citing *Steagald*, 451 U.S. 204, 205-206

(1981); *United States* v. *Dunn*, 480 U.S. 294, 301 (1987)).

The cases petitioner claims as creating "general" conflict fare no better. Some actually support respondent. In *Estate of Smith* v. *Marasco*, the Third Circuit reversed a grant of summary judgment for officers who attempted to contact a resident at his front door before walking to the back of the house. 318 F.3d 497, 502 (3d Cir. 2003). Instead of holding, as petitioner asserts, that "the law enforcement conduct was reasonable," Pet. 17, the Third Circuit "reject[ed] the * * * argument that [the officers' right to go to the front door] necessarily extended to the officers the right to enter into the curtilage." *Id.* at 520. The court remanded the case to the trial court precisely to determine whether, in light of all the facts, the intrusion was reasonable. *Id.* at 523.

Petitioner relies upon several cases that do not involve entry onto curtilage at all. In *United States* v. *French*, a probation officer observed evidence indicative of a methamphetamine lab from a walkway between the driveway and a shed. 291 F.3d 945, 948 (7th Cir. 2002). In contrast to the decision below—in which petitioner conceded that there *was* an entry onto curtilage—the Seventh Circuit held that "the walkway from which [the probation officer] made his observations *was not* within the curtilage of [the resident's] home." *Id.* at 954-955 (emphasis added). In any event, like the decision below, *French* turned on a specific decision about what was reasonable under the circumstances; the search in *French* was reasonable because the resident "had no legitimate

expectation of privacy," *ibid.*, while the search at issue here was unreasonable in part because there *was* a legitimate expectation of privacy, Pet. App. A15.

Similarly, in *United States* v. *Knight*, there is no discussion of "curtilage" at all. 451 F.2d 275 (5th Cir. 1971). The *Knight* court never held, as did the court below, that the officers entered onto the curtilage of the residence. Given the circumstances in *Knight*, the court held it was reasonable for officers to be on the property "for the purpose of making a general inquiry," *id.* at 278, a conclusion which obviously does not conflict with the decision below.

In *Alvarez* v. *Montgomery County*, officers responding to a 911 call walked to the backyard without first knocking at the front door only because a "sign, affixed to a lamppost in the front driveway, read 'Party in Back'; [and] an arrow on the sign pointed toward the backyard." 147 F.3d 354, 357 (4th Cir. 1998). The Fourth Circuit deemed the entry onto the curtilage reasonable because "circumstances indicated [officers] might find the homeowner there." *Id.* at 359. The officers at Kruse's residence faced no analogous circumstances; indeed, here the property displayed two "No Trespassing" signs. Pet. App. A4.

Petitioner also cites as in "general" conflict a number of cases in which officers entered onto the curtilage only *after* unsuccessfully attempting to contact the resident at the front door. These decisions do not conflict with the holding below that the entry in this case was unreasonable in part

because "[t]he officers went into the back yard *before* trying the front door." Pet. App. A13 (emphasis added). See *United States* v. *Daoust*, 916 F.2d 757, 758 (1st Cir. 1990) (officers "found the front door inaccessible" and had to walk to a back door); *United States* v. *Reyes*, 283 F.3d 446, 452 (2d Cir. 2002) (probation officers "repeatedly knocked on the front door and called out" and "called [the resident] by cellular telephone" before walking to the back of the house); *Hardesty* v. *Hamburg Twp.*, 461 F.3d 646, 649 (6th Cir. 2006) (officers "pounded on the front door" and called the home before walking around back); *United States* v. *Anderson*, 552 F.2d 1296, 1298 (8th Cir. 1977) (federal agents "walked to the front door" and "rang the doorbell and knocked" before walking to the back); *United States* v. *Raines*, 243 F.3d 419, 420 (8th Cir. 2001) ("[a]fter receiving no response at the front door, but seeing several cars parked in the driveway" a deputy sheriff walked to the back); *United States* v. *Hammett*, 236 F.3d 1054, 1056 (9th Cir. 2001) (officers "knocked on the door and shouted 'Police'" before circling the home to look for a back door); *United States* v. *Taylor*, 458 F.3d 1201, 1203 (11th Cir. 2006) (a deputy sheriff "walked up to the front door, and knocked several times" before walking to meet the resident as he approached from behind a barn).

Finally, the decades-old decision in *United States* v. *Johnson*, 561 F.2d 832 (D.C. Cir. 1977), does not conflict with the decision below because the circumstances that justified the entry in *Johnson* were not present in this case. Police officers received a detailed tip that a large quantity of narcotics was

present in the basement of a certain address "and that it was visible through the lighted basement window on the right hand side of the front of the house." *Id.* at 834. The court held that it was reasonable for an officer who arrived and observed a lighted basement window, corroborating the tip, to step off a walkway and "look[] through the window for not more than 10 seconds." *Id.* at 835. The officers here neither had such detailed information—indeed, the tip they received directed them to an entirely different house, Pet. App. A3—nor needed to confirm anything; instead, they searched for Beel on Kruse's property.

Petitioner's argument is, in essence, that other courts, facing the circumstances of this case, would have found the entry reasonable. But petitioner finds no support in the reasoning of the cited cases, and some of the cases cut directly against that position. In any event, this argument only emphasizes the fact that each case, including the decision below, turned on the specific facts presented.

III. THE FACT-BOUND DECISION BELOW RAISES NO ISSUE OF BROAD IMPORTANCE

The court below applied traditional Fourth Amendment principles by balancing privacy and law enforcement interests in light of the circumstances to determine that the officers' entry was unreasonable. See pp. 7-12, *supra*. The court neither stated nor suggested that it was adopting any sort of *per se* rule. See *ibid.* Thus, even if there were the least merit to

petitioner's fact-specific claims of error, this case would present no issue of broad significance. Further, the court of appeals cautioned that its review was limited to "an abuse of discretion," and explained that it held only that there was "sufficient evidence from which the trial court could make factual findings to support the conclusion reached." Pet. App. A17.

In addition to seeking review of a decision that is factbound, petitioner is attempting to relitigate the factual findings of the trial court. Specifically, petitioner asks this Court to review an intrusion which it contends was necessary to ensure "officer safety" and was "unconnected with a search of the property." Pet. 8, 13, 24. But the courts below concluded that the intrusion was not justified by concerns about officer safety and that the officers did intend to conduct a search of respondent's curtilage. Pet. App. A14, A16-A17.

Although petitioner repeatedly makes the conclusory argument that entry onto respondent's curtilage was necessary to ensure "officer safety," see, *e.g.*, Pet. 13, 24, the trial court and court of appeals painstakingly considered officer safety concerns in determining the reasonableness of the intrusion and ultimately concluded that such concerns were simply not present here. For example, the court of appeals observed that the officers did not "fear present danger," that Beel was "presumably unaware of police presence," and that his van had a flat tire that rendered it "essentially immobile." Pet. App. A15. The extent to which petitioner even raised the issue of officer safety before seeking review by the Missouri

Supreme Court is unclear. See Appellant's Reply Br., at 7 ("Their *only* purpose in [entering respondent's backyard] was to prevent the possible escape of Mr. Beel upon the announcement of the officers' presence.") (emphasis added); see also Appellant's Mot. for Reh'g or Transfer to the Mo. Sup. Ct. ¶ 4. Thus, petitioner's appeals to officer safety not only ignore factual findings in the record, but also appear to be little more than an afterthought.

The courts below also concluded that the officers did conduct a search. As the court of appeals stated, "[b]y entering into the back yard, the police were entering onto property as to which there was a privacy interest protected by the Fourth Amendment" and that the "intention of the officers [to conduct a search] was a factual inference drawn by the trial court based on observing the testimony." Pet. App. A16-A17. In arguing that no search occurred, petitioner is attempting to turn this case into one different from the one actually decided. Indeed, the only way even to reach the question presented in the petition is to reject or ignore the factual and legal premises upon which the opinion below rests. See Pet. 12 (acknowledging that "the rule of *Steagald* should be applied * * * if the officers' entry onto respondent's curtilage can properly be considered a 'search' under the Fourth Amendment").[3]

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[3] Relatedly, petitioner spends several pages arguing that the exclusionary rule should not apply here, but the petition does not properly present this question. Pet. i, 22-26. Supreme Court Rule 14.1(a) provides that the "statement of any question presented is deemed to comprise every subsidiary question fairly

Finally, even if review were otherwise warranted, it would be premature. Not only does the decision fail to create any conflict, it does not even represent the final word in Missouri. The Missouri Court of Appeals, Western District, which decided this case, is one of three intermediate courts in that state. The Missouri Supreme declined review. But should this issue arise again, or should another intermediate court of appeals in Missouri reach a different conclusion, the Missouri Supreme Court remains free to review that case. See, *e.g.*, *Ameristar Jet Charter, Inc.* v. *Dodson Int'l Parts, Inc.*, 155 S.W.3d 50, 55 (Mo. 2005) (noting that the state court granted transfer to resolve a split of authority among the courts of appeals); *State* v. *Wurtzberger*, 40 S.W.3d 893, 894 (Mo. 2001) (same); see also Mo. Sup. Ct. R. 83.03 (allowing a single dissenting court of appeals judge to transfer a case to the Missouri Supreme Court where the majority opinion is "contrary to any previous decision of an appellate court of this state").

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included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court." A question is subsidiary only if it would "assist in resolving" the question presented. *Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992). The question presented, which asks only whether the conduct it describes is "reasonable," Pet. i, has nothing to do with the applicability of the exclusionary rule. Nor would addressing the exclusionary rule assist in resolving the question presented. In any event, this case, as the court below correctly concluded, involves just the sort of "deliberate" conduct that "exclusion can meaningfully deter." *Herring* v. *United States*, 129 S.Ct. 695, 702 (2009). Petitioner, moreover, does not suggest that the lower court's case-specific determination on this issue implicates any split of authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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