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LOWERERING STANDARDS: THE SIMULTANEOUS-SCHOOL-BOMBING-AND-SHOOTING-THREAT EXCEPTION OF ARMlJO EX REL. ARMlJO SANCHEZ V. PETERSON

Jeff Fisher*

I. INTRODUCTION

On September 22, 2006, anonymous callers made two bomb threats to Oñate High School in Las Cruces, New Mexico. Before the threats, the school’s principal had heard rumors that students planned to bring guns to school that day, call in a false bomb threat, and, as soon as the other students exited the school, open fire. Based on these facts, a tip, and ultimately some inaccurate additional information, the investigating officers concluded that Christopher Armijo was one of the callers. The officers thus went to Chris’s house, entered through an unlocked door, got Chris out of bed, handcuffed him, and took him outside to stand on the porch in his underwear while they searched his house. After the officers concluded that Chris did not make any of the calls, they removed his handcuffs and left.

The United States is considered one of the freest countries in the world and its citizens among the freest. U.S. citizens are assumed to be free, to a great extent, from unreasonable government intrusions into their lives. That freedom was important enough that the Founding Fathers memorialized it in the Fourth Amendment to the U.S. Constitution, which generally requires law enforcement officers to obtain a warrant based on probable cause before entering a person’s home.1

Nevertheless, the U.S. Court of Appeals for the Tenth Circuit found that the officers’ entry into Chris’s house absent a warrant or probable

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1. U.S. CONST. amend IV.
cause did not violate the Fourth Amendment.\textsuperscript{2} It held that the dire nature of the circumstances justified the police entrance under a lesser standard.\textsuperscript{3} For the first time, the Tenth Circuit allowed officers to use the emergency-aid exception to the probable cause requirement to enter a home in the context of a criminal investigation. The purpose of this article is to discuss the legal foundation of that case—\textit{Armijo ex rel. Armijo Sanchez v. Peterson}—its potential scope, and its consequences. That discussion will attempt to clarify the line, blurred by \textit{Armijo}, between two exceptions to the Fourth Amendment’s warrant requirements: the exigent circumstances exception and the emergency-aid exception.

Part II will introduce some general Fourth Amendment concepts, including the warrant and probable cause requirement for home searches. Part III will outline the history and scope of the exigent circumstances exceptions and a variant that the Supreme Court of the United States refers to as the emergency-aid exception. Part IV will discuss the \textit{Armijo} case, its holding, and the Honorable Mary Beck Briscoe’s dissent. Part V will review how \textit{Armijo} extended the exigent circumstances exception beyond those “specifically established and well-delineated exceptions”\textsuperscript{4} that the Supreme Court has recognized, and how that extension compromised the sanctity of the home that the Fourth Amendment was intended to protect.

\textbf{II. THE FOURTH AMENDMENT’S WARRANT AND PROBABLE CAUSE REQUIREMENTS}

The Fourth Amendment defines the liberty that the people of the United States have with respect to government searches and seizures. It states:

\begin{quote}
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall
\end{quote}

\begin{itemize}
\item \textsuperscript{2} \textit{Armijo ex rel. Armijo Sanchez v. Peterson}, 601 F.3d 1065, 1071–72, 1075 (10th Cir. 2010), cert. denied, 131 S. Ct. 1473 (2011).
\item \textsuperscript{3} \textit{Id.}
\item \textsuperscript{4} \textit{Katz v. United States}, 389 U.S. 347, 357 (1967) (“\textit{S}earches conducted outside the judicial process, without prior approval by judge or magistrate, are \textit{per se} unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”) (footnote omitted); see also \textit{Arizona v. Gant}, 129 S. Ct. 1710, 1716 (2009) (“\textit{O}ur analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are \textit{per se} unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’”) (quoting \textit{Katz}, 389 U.S. at 357).
\end{itemize}
not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.5

Broadly put, this provision protects “the people” from unreasonable government intrusions into their private lives. Its precise meaning, however, is not obvious. For example, what is a “reasonable” search or seizure? After stating that “the people [will be] secure . . . against unreasonable searches and seizures,” it states that “no Warrants shall issue, but upon probable cause.”6 The provision discusses warrants and probable cause in the same sentence as it discusses unreasonable searches and seizures, but the relationship between the two concepts is unclear. Does this language mean that searches and seizures are only reasonable when made pursuant to a warrant? Is a warrant merely one method by which a search or seizure may be reasonable? Or are the two clauses only tangentially related, and the warrant clause relates to some other aspect of government infringement on the people’s liberty? Such ambiguities were left up to the Supreme Court to resolve.

Ultimately, the Supreme Court concluded that the two clauses of the Fourth Amendment are closely linked. It is not an absolute requirement, but police generally must obtain a warrant before they execute a search or seizure.7 Courts are to presume searches executed without a warrant are unreasonable, and such searches violate the Fourth Amendment unless some exception to that general rule applies.8 The core requirement is reasonableness, but sometimes reasonableness can be

5. U.S. CONST. amend. IV.
6. Id.
7. See Kentucky v. King, 131 S. Ct. 1849, 1856 (2011) (“Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, this Court has inferred that a warrant must generally be secured.”).
8. See Michigan v. Fisher, 130 S. Ct. 546, 548 (2009) (“Although ‘searches and seizures inside a home without a warrant are presumptively unreasonable,’ that presumption can be overcome.”) (internal citation omitted); Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (“It is a ‘basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.’”) (quoting Groh v. Ramirez, 540 U.S. 551, 559 (2004)); Illinois v. McArthur, 531 U.S. 326, 330 (2001) (“We have said, for example, that in ‘the ordinary case,’ seizures of personal property are ‘unreasonable within the meaning of the Fourth Amendment,’ without more, ‘unless . . . accomplished pursuant to a judicial warrant,’ issued by a neutral magistrate after finding probable cause.”) (quoting United States v. Place, 462 U.S. 696, 701 (1983)).
achieved without a warrant. It is nevertheless helpful to begin with an understanding of how the warrant and probable cause requirements work in an average case, where a police officer needs to enter a person’s home to search for evidence of a crime.

Generally, if a citizen does not voluntarily consent to a search, the only way law enforcement may overcome the Fourth Amendment’s protection—and thereby lawfully enter a person’s home to search—is to collect information constituting probable cause to believe that there is criminal evidence inside. The officer must then take that information to a magistrate, who will review the officer’s affidavit and make an independent assessment as to whether the information therein does, in fact, constitute probable cause. If the magistrate is convinced that the warrant

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9. See McArthur, 531 U.S. at 330 (stating that the Fourth Amendment’s “central requirement” is one of reasonableness,” but noting that “[w]e nonetheless have made it clear that there are exceptions to the warrant requirement.”); see also id. (“When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable.”).

10. See Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2639 (2009) (“Probable cause exists where ‘the facts and circumstances within [an officer’s] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed, and that evidence bearing on that offense will be found in the place to be searched.’”) (quoting Brinegar v. United States, 338 U.S. 160, 175–76 (1949)) (internal citation omitted); id. (“Perhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer’s evidence search is that it raise a ‘fair probability’ or a ‘substantial chance’ of discovering evidence of criminal activity.”) (internal citations omitted); Ker v. California, 374 U.S. 23, 35 (1963) (“Probable cause . . . exists where the facts and circumstances within . . . [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.”) (citation and internal quotation marks omitted); United States v. Tobin, 923 F.2d 1506, 1510 (11th Cir. 1991) (en banc) (“Probable cause exists where the facts lead a reasonably cautious person to believe that the search will uncover evidence of a crime.”) (internal quotations omitted).

11. See e.g., Fed. R. Crim. P. 41(b)(1) (“[A] magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district[.]”). The primary import of the magistrate requirement is that the individual issuing the warrant be a judicial officer, independent of the executive branch of government, and that the independent judicial officer makes his own probable cause determination, unaffected by the probable cause determination of the police officer seeking the warrant. See Dow v. Baird, 389 F.2d 882, 884 (10th Cir. 1968) (“The Fourth Amendment requires the interposition of an impartial, disinterested magistrate between the police and the citizen.”). The judicial officer can make
affidavit reflects probable cause, a warrant will be issued that specifically defines the scope of the search it authorizes, i.e., one that “particularly describe[s] the place to be searched, and the persons or things to be seized.” It is only once the officer has the warrant in hand that there is legal authority to enter a person’s home and seize certain things—and the scope of the warrant strictly limits the officer’s authority.

the probable cause finding from the calm of his office, and thus is less likely to get caught up in “the often competitive enterprise of ferreting out crime.” Johnson v. United States, 333 U.S. 10, 13–14 (1948) (“The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.”).

12. The Supreme Court has said several times in very certain terms that the magistrate judge’s probable cause determination must be his or her own, and not merely an adoption of the investigating officer’s judgment. See United States v. Leon, 468 U.S. 897, 914 (1984) (“[T]he magistrate . . . [must] perform his neutral and detached function and not serve merely as a rubber stamp for the police.”) (quoting Aguilar v. Texas, 378 U.S. 108, 111 (1964)) (internal quotation marks omitted); id. (“A magistrate failing to ‘manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application’ and who acts instead as ‘an adjunct law enforcement officer’ cannot provide valid authorization for an otherwise unconstitutional search.”) (quoting Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326–27 (1979)); see also Dow, 389 F.2d at 884 (“When a magistrate, as in this case, acts as a mere rubber stamp for the police a basic constitutional protection with roots deep in our national history is reduced to so many empty words. That cannot be explained away, condoned, excused or tolerated.”).

13. U.S. CONST. amend. IV.

14. Wilson v. Layne, 526 U.S. 603, 611 (1999) (“[T]he Fourth Amendment does require that police actions in execution of a warrant be related to the objectives of the authorized intrusion[].”); id. at 619 (Stevens, J., concurring in part and dissenting in part) (“Police action in the execution of a warrant must be strictly limited to the objectives of the authorized intrusion.”); United States v. Verdugo-Urquidez, 494 U.S. 259, 295 (1990) (Brennan, J., dissenting) (“A warrant . . . defines the scope of a search and limits the discretion of the inspecting officers.”); Nat’l Treasury Emp’t. Union v. Von Raab, 489 U.S. 656, 667 (1989) (“A warrant serves primarily to advise the citizen that an intrusion is authorized by law and limited in its permissible scope. . . .”); Maryland v. Garrison, 480 U.S. 79, 84 (1987) (“The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications . . . .”); Walter v. United States, 447 U.S. 649, 656 (1980) (“When an official search is properly authorized—whether by consent or by the issuance of a valid warrant—the scope of the search is limited by the terms of its authorization.”) (citation omitted); United States v. Matlock, 415 U.S. 164, 181–82 (1974) (Douglas, J., dissenting) (“[A] written warrant helps ensure that a search will be limited in scope to
The Fourth Amendment is a significant limitation on the government’s police power, one that restricts police officers’ ability to investigate and stop crimes. Officers cannot rely on instinct or intuition in deciding who to search in connection with a criminal investigation. If an investigating officer has a hunch—even if years of experience and keen insight into the criminal mind make that hunch likely to be correct—the officer must still accumulate enough facts to establish probable cause. Once the officer has facts constituting probable cause, those facts must be presented to a magistrate, who will then make an independent probable cause evaluation. This procedure can be very time consuming, and it could give a criminal the chance to conceal evidence or escape. The Fourth Amendment thus represents a judgment call on the part of the drafters—one that the Supreme Court has decided merits significant respect—that individual liberty is more important than a police officer’s ability to investigate every suspicion. In other words, some things are more important than catching criminals, and individual liberty is one of those things.

The Supreme Court, on several occasions, has recognized the trade-off that the Fourth Amendment represents: decreased police effectiveness in exchange for enhanced individual liberty. It has crafted the areas and objects necessary to the search because both the ‘place to be searched’ and the ‘things to be seized’ must be described with particularity); Dow, 389 F.2d at 884 (“The constitutional requirement that no search warrants ‘shall issue but upon probable cause supported by Oath or affirmation’ is not to be cavalierly brushed aside as an empty formality.”). Even where the search is not pursuant to a warrant, the scope of the search is generally limited to the circumstances that prompted it. See Minnesota v. Dickerson, 508 U.S. 366, 373 (1993) (“[A] protective search—permited without a warrant and on the basis of reasonable suspicion less than probable cause [i.e., a Terry stop]—must be strictly ‘limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.’”) (quoting Terry v. Ohio, 392 U.S. 1, 26 (1968)).

15. See United States v. Arvizu, 534 U.S. 266, 273–74 (2002) (noting that a mere hunch is insufficient even to establish reasonable suspicion, which is a lower standard than probable cause); United States v. Sokolow, 490 U.S. 1, 7 (1989) (“The officer ... must be able to articulate something more than an ‘inchoate and unparticularized suspicion or ‘hunch.”’) (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)).

16. See United States v. Acosta, 965 F.2d 1248, 1251 (3d Cir. 1992) (“The warrant requirement guarantees our people the right of freedom from unwarranted government intrusion.”).

Fourth Amendment’s scope with that trade-off in mind. Police officers would catch more criminals if they did not need a reason to enter a home and search—they would probably even find evidence of crimes they did not know had been committed. On the other hand, neither the American people nor the Constitution would stand for giving police officers that kind of power. On the contrary, the Supreme Court has stated that “‘the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion’ stands ‘at the very core of the Fourth Amendment.’” An officer cannot break into a suspect’s home based on the mere belief that evidence of a crime might be inside, even if that belief is correct. Rather, the officer must meet both an evidentiary burden (probable cause) and a procedural requirement (the magistrate’s warrant) before the sanctity of a person’s home can lawfully be invaded. The officer cannot enter a suspect’s home based simply on a hunch or suspicion. Such searches, conducted without probable cause and a warrant, are presumed unreasonable—i.e., unconstitutional—unless one of 

Rights. It is merely a part of the price that our society must pay in order to preserve its freedom.”); Hicks, 480 U.S. at 329 (“[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.”); Leon, 468 U.S. at 941 (Brennan, J., dissenting) (“[T]he loss of that evidence . . . is the ‘price’ our society pays for enjoying the freedom and privacy safeguarded by the Fourth Amendment . . . . [I]t is not the exclusionary rule, but the Amendment itself that has imposed this cost.”) (citation omitted); Kolender v. Lawson, 461 U.S. 352, 364 (1983) (“The price of [law enforcement] effectiveness, however, is intrusion on individual interests protected by the Fourth Amendment.”). At the time of the drafting of the Constitution and the Bill of Rights, it made sense for the Founding Fathers to place personal liberty above the police power of the government. At that time, the original thirteen colonies had only recently rid themselves of an oppressive centralized government in England. They were highly suspicious of a government with too much power, and cognizant of the fact that such a government, no matter how good-intentioned, had the potential to become corrupt and rob its citizens of the liberty they so cherished. Although the technological, economic, and political climates have changed, there is no reason to believe that these concerns are any less poignant today than they were in the late 1700s.

19. See Michigan v. Clifford, 464 U.S. 287, 304 (1984) (“[I]f probable cause to believe that the owner committed arson is lacking . . . a mere suspicion that an individual has engaged in criminal activity is insufficient to justify the intrusion on an individual’s privacy that an unannounced, potentially forceful entry entails.”).
20. See Payton v. New York, 445 U.S. 573, 584 (1980) (“As it was ultimately adopted . . . the [Fourth] Amendment contained two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause.”) (citation omitted).
21. See supra notes 7–8, 15, 19.
the “specifically established and well-delineated exceptions” to this general rule applies.\textsuperscript{22}

Although the Supreme Court has concluded that “the Fourth Amendment protects people, not places,”\textsuperscript{23} people have a reasonable expectation of privacy—and thus Fourth Amendment protection—in their homes.\textsuperscript{24} The Court has referred to the right to be free from unwarranted

\textsuperscript{22} Mincey v. Arizona, 437 U.S. 385, 390 (1978) (“[S]earches conducted outside the judicial process, without prior approval by a judge or magistrate, are \textit{per se} unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”) (quoting \textit{Katz} v. United States, 389 U.S. 347, 357 (1967)); \textit{Acosta}, 965 F.2d at 1251 (“[A] basic principle of Fourth Amendment law is that warrantless searches and seizures inside a home are presumptively unreasonable.”).

\textsuperscript{23} \textit{Katz}, 389 U.S. at 351 (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”) (internal citations omitted); \textit{id.} at 361 (Harlan, J., concurring) (“My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”); \textit{see also} \textit{Kyllo} v. United States, 533 U.S. 27, 32–33 (2001) (applying Justice Harlan’s concurrence in \textit{Katz} as law).

\textsuperscript{24} \textit{See} \textit{Hudson} v. Michigan, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring) (“[P]rivacy and security in the home are central to the Fourth Amendment’s guarantees as explained in our decisions and as understood since the beginnings of the Republic.”); \textit{id.} at 629–30 (Breyer, J., dissenting) (“[O]ur Fourth Amendment traditions place high value upon protecting privacy in the home.”); \textit{Groh} v. Ramirez, 540 U.S. 551, 559 (2004) (“[T]he right of a man to retreat into his own home and there be free from unreasonable governmental intrusion stands at the very core of the Fourth Amendment . . . .”) (internal quotation marks and citations omitted); \textit{Illinois} v. \textit{McArthur}, 531 U.S. 326, 340 n.3 (2001) (Stevens, J., dissenting) (“Principled respect for the sanctity of the home has long animated this Court’s Fourth Amendment jurisprudence.”); \textit{Wilson} v. \textit{Layne}, 526 U.S. 603, 609–610 (1999) (“The Fourth Amendment embodies [the] centuries-old principle” that “the house of every one is to him as his castle and fortress, as well for his defence [sic] against injury and violence, as for his repose.”) (internal quotation marks and citations omitted); \textit{Minnesota} v. \textit{Carter}, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring) (“The Fourth Amendment protects ‘[t]he right of the people to be secure in their . . . houses,’ and it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people.”); \textit{id.} at 106 (Ginsburg, J., dissenting) (“[T]he disposition I would reach in this case responds to the unique importance of the home—the most essential bastion of privacy recognized by the law.”); \textit{Soldal} v. \textit{Cook Cnty., Ill.}, 506 U.S. 56, 61 (1992) (“[W]e have emphasized that ‘at the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home.’”) (internal citation omitted); \textit{Maryland} v. \textit{Garrison}, 480 U.S. 79, 90–91 (1987) (Blackmun, J., dissenting) (“In [Justice Harlan’s] view, the home would meet this test [of being worthy of Fourth Amendment protection] in virtually all situations.”); \textit{Payton} v. \textit{New York}, 445 U.S. 573, 586

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police intrusions into the home as being “at the core of the Fourth Amendment” and “basic to a free society.”\textsuperscript{25} And, although much of the Court’s artful language regarding the Fourth Amendment comes from cases decided in the 1950s, ’60s, and ’70s, the Court stated in 2001: “At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”\textsuperscript{26} The Court stated the principle again, in very similar words, in its 2006 decision in Groh v. Ramirez.\textsuperscript{27}

The Fourth Amendment’s protections are important enough that the Supreme Court has found them incorporated into the Fourteenth Amendment’s Due Process Clause, and has thereby held that the Fourth Amendment restricts the conduct of both state and federal law enforcement officers.\textsuperscript{28} The Fourth Amendment’s protections are said to be at

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\item[25.] \textit{Wolf}, 338 U.S. at 27 overruled on other grounds by \textit{Mapp} v. \textit{Ohio}, 367 U.S. 643 (1961); see also id. at 27 (calling the Fourth Amendment’s protection “implicit in the concept of ordered liberty”).
\item[26.] \textit{Kyllo}, 533 U.S. at 31 (quoting \textit{Silverman} v. \textit{United States}, 365 U.S. 505, 511 (1961)).
\item[27.] 540 U.S. at 559 (2004) (“\textit{T}he right of a man to retreat into his own home and there be free from unreasonable governmental intrusion stands at the very core of the Fourth Amendment . . . .” (internal quotation marks and citations omitted). 
\item[28.] \textit{Wolf}, 338 U.S. at 27 (“\textit{T}he security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the concept of ordered liberty” and as such enforceable against the States through the Due Process”); \textit{Mapp} v. \textit{Ohio}, 367 U.S. 643 (1961) (holding the Fourth Amendment’s exclusionary rule applicable to the States). For a brief description of the exclusionary rule, see infra note 39.
\end{itemize}
their strongest within the home. Courts should thus be cautious when carving exceptions to the warrant requirement that would allow officers to enter a home. Moreover, the government bears the burden of showing that such an exception applies in a given case.

III. THE EXIGENT CIRCUMSTANCES EXCEPTION TO THE WARRANT REQUIREMENT AND THE EMERGENCY-AID VARIANT

Anyone who has been in or near law enforcement, or seen a few episodes of Law and Order, realizes that time is often of the essence. But it is not always reasonable to require the officer to stop the investigation, return to the precinct and draft an affidavit explaining what has been discovered in the investigation thus far, take another one or two pages to describe what is expected to be found in the place to be searched.

29. See California v. Ciraolo, 476 U.S. 207, 212–13 (1986) (describing the curtilage doctrine and explaining that the home is “where privacy expectations are most heightened”); United States v. Johnson, 457 U.S. 537, 552 n.13 (1982) (“At least since Boyd v. United States, 116 U.S. 616, 630 (1886), the Court had acknowledged that the Fourth Amendment accords special protection to the home.”); Payton, 445 U.S. at 585 (“[T]he ‘physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.’”) (quoting United States v. United States Dist. Court, 407 U.S. 297, 313 (1972)); United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976) (stating that “the sanctity of private dwellings” is “ordinarily afforded the most stringent Fourth Amendment protection”).

30. See, e.g., United States v. Najar, 451 F.3d 710, 717 (10th Cir. 2006) (“That burden [to prove an exception to the warrant requirement] is especially heavy when the exception must justify the warrantless entry of a home.”).

31. See California v. Acevedo, 500 U.S. 565, 589 n.5 (1991) (“Because each exception to the warrant requirement invariably impinges to some extent on the protective purpose of the Fourth Amendment, the few situations in which a search may be conducted in the absence of a warrant have been carefully delineated and ‘the burden is on those seeking the exemption to show the need for it.’”) (quoting United States v. Jeffers, 342 U.S. 48, 51 (1951)); Vale v. Louisiana, 399 U.S. 30, 34 (1970) (“[O]nly in ‘a few specifically established and well-delineated’ situations may a warrantless search of a dwelling withstand constitutional scrutiny . . . . The burden rests on the State to show the existence of such an exceptional situation.”) (internal citation omitted); Jef-
sers, 342 U.S. at 51 (“Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes. Only [in limited circumstances] may an exemption lie, and then the burden is on those seeking the exemption to show the need for it”) (internal citations omitted); United States v. Huffman, 461 F.3d 777, 782 (6th Cir. 2006) (“If the police enter a home without a warrant, the entry is presumptively unreasonable unless the government proves other-
wise.”) (emphasis added).

and what items will likely be seized, take the affidavit and a draft warrant
to a magistrate, and then convince the magistrate that the information
amounts to probable cause. If all of these steps were always required, a
suspect (especially one who knows the investigation is underway) would
have time to remove fingerprints from any incriminating evidence, dump
the evidence somewhere inconspicuous, and maybe even establish an al-
ibi. A more streamlined approach is sometimes necessary.

A. The Exigent Circumstances Exception

The Supreme Court has noted this occasional need for immediate
action, which is why it recognized the exigent circumstances exception to
the warrant requirement.33 Under this exception, an officer may make
warrantless entry into a house or execute a warrantless search if certain
conditions are met. Those conditions are twofold: (1) that the officer has
probable cause to believe there will be evidence of criminality in a partic-
ular place, and (2) there is some special circumstance—i.e., an exigent
circumstance—where taking the time necessary to obtain a search war-
rant is infeasible.34 If waiting to get a warrant might, for example, result in
destruction of evidence, escape of a suspect, or serious harm or death of a
victim, the officer may postpone the magistrate’s review.35 It is not that
probable cause is not required,36 nor that the probable cause finding will

33. See, e.g., New York v. Quarles, 467 U.S. 649, 653 n.3 (1984) (“We have long
recognized an exigent circumstances exception to the warrant requirement in the
Fourth Amendment context.”).
34. See infra notes 36–99 and accompanying text.
35. See infra notes 49–54, 82, 96–99 and accompanying text.
36. On the contrary, most jurisdictions—including the Tenth Circuit—agree that
the exigent circumstances exception to the warrant requirement generally requires
both exigent circumstances and probable cause. See Kirk v. Louisiana, 536 U.S. 635,
638 (2002) (per curiam) (“As Payton makes plain, police officers need either a war-
rant or probable cause plus exigent circumstances in order to make a lawful entry into
a home.”) (emphasis added); United States v. King, 604 F.3d 125, 147 (3d Cir. 2010)
(Fuentes, J., concurring) (“When Government agents . . . have probable cause to be-
lieve contraband is present and . . . they reasonably conclude that the evidence will
be destroyed or removed before they can secure a search warrant, a warrantless
search is justified.”) (quoting United States v. Rubin, 474 F.2d 262, 268 (3d Cir. 1973))
(emphasis added); United States v. Cisneros-Gutierrez, 598 F.3d 997, 1004 (8th Cir.
2010) (stating that to justify a warrantless entry into a home to preserve evidence,
“[n]ot only must the government establish that an exigency existed, but also that there
was probable cause to search the residence”); Estate of Bennett v. Wainwright, 548
F.3d 155, 169 (1st Cir. 2008) (“A warrantless entry into a home without con-
sent . . . may not be unreasonable where the government can demonstrate, in addition
to probable cause, the existence of exigent circumstances.”); United States v.
Fiasche, 520 F.3d 694, 698 (7th Cir. 2008) (finding probable cause before doing an
exigent circumstances analysis); West v. Keef, 479 F.3d 757, 759 (10th Cir. 2007)
not be reviewed by a detached, neutral magistrate. Rather, the magistrate’s review will (most likely) occur later, probably in the context of: (1) a motion to suppress whatever evidence was found during the exigent circumstances entry; or (2) a civil action against the officer under 42 U.S.C. § 1983.

The effect of this exception is that, when exigent circumstances present themselves, an officer can forgo the magistrate’s review and rely on training and knowledge of the law to determine whether probable cause exists. If an officer’s probable cause conclusion is incorrect, any evidence found might be suppressed, or the officer may be found liable for damages in a civil suit.37 Unlike the situation where the officer first obtains a warrant, in which case the magistrate’s probable cause determination is

37. See, e.g., Rodeman v. Foster, 767 F. Supp. 2d 1176, 1183 (D. Colo. 2011) (denying summary judgment in § 1983 suit for damages because disputed factual issues existed regarding whether officer had probable cause to enter plaintiff’s home); United States v. Tatman, 615 F. Supp. 2d 664, 680, 692 (S.D. Ohio 2008) (suppressing evidence where officer failed to show exigent circumstances existed); United States v. Cruz-Roman, 312 F. Supp. 2d 1355, 1361–62 (W.D. Wash. 2004) (noting that, “even where exigent circumstances exist, the search of a residence . . . must be supported by probable cause,” and suppressing the evidence because the officer had neither probable cause nor exigent circumstances).
given deference, a court will not defer to the officer’s probable cause finding, and the good faith exception to the exclusionary rule will not apply. Moreover, if a court later concludes that there was no exigency, the exigent circumstances exception does not apply and any warrantless entry constitutes a Fourth Amendment violation. In other words, the stakes are higher and the cost of failure is greater if the officer does not comply with the warrant procedure.

1. Warden v. Hayden Introduces the Concept of an Exigent Circumstances Exception to the Warrant Requirement

One of the earliest Supreme Court cases to discuss the exigent circumstances exception to the warrant requirement is Warden v. Hayden. In that case, Mr. Hayden robbed the offices of the Diamond Cab Company at gunpoint. Two cab drivers followed Mr. Hayden and radioed in to the dispatcher that he had entered a particular home. When the po-

38. See United States v. Leon, 468 U.S. 897, 914 (1984) (“Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according ‘great deference’ to a magistrate’s determination.”) (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969) (citations omitted); United States v. Ventresca, 380 U.S. 102, 108–109 (1965) (noting that where a warrant describes underlying circumstances and the reliability of unnamed sources, a reviewing court should defer to the magistrate’s determination).

39. See Herring v. United States, 555 U.S. 135, 142 (2009) (“When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted ‘in objectively reasonable reliance’ on the subsequently invalidated search warrant.”) (citing Leon, 468 U.S. at 922). Generally speaking, the exclusionary rule is a rule of law stating that evidence that the police obtain as a but-for and proximate result of a constitutional violation is inadmissible in a criminal prosecution against the person whose constitutional rights were violated. See Murray v. United States, 487 U.S. 533, 536–37 (1988).

40. See Leon, 468 U.S. at 914 (“[W]e have expressed a strong preference for warrants and declared that ‘in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall.’”) (quoting Ventresca, 380 U.S. at 106).

41. See, e.g., United States v. Christy, No. CR 10–1534 JB, 2011 WL 2429276, at *37 n.11 (D.N.M. May 18, 2011) (Browning, J.) (“The Court thus finds that the deputies’ illegally entered Christy’s residence in violation of the Fourth Amendment, because exigent circumstances did not justify their action.”).

42. 387 U.S. 294 (1967). Incidentally, this opinion was issued earlier in the same year as the seminal Fourth Amendment case of United States v. Katz, 389 U.S. 347 (1967), which set forth the two-pronged test for determining whether a person has an expectation of privacy.

43. Warden, 387 U.S. at 297.

44. Id.
lice arrived a few minutes later and knocked on the door, Mrs. Hayden answered. The officers, without a warrant, told Mrs. Hayden that they believed a robber had entered her house and asked her for permission to come inside. She gave them permission. Inside the house, the officers found Mr. Hayden in one room, a pistol and a shotgun in another room, and clothes that matched those worn by the robber in a washing machine in a third room.

The Fourth Circuit found no constitutional violation in the entry or search, and the Supreme Court agreed. The Court based the conclusion on the fact that, “under the circumstances of this case, ‘the exigencies of the situation made [warrantless entry] imperative.’” The Court concluded that the officers had acted reasonably, stating: “The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of

45. Id.
46. Id. This fact alone should have obviated the need for any exigent circumstances exception analysis. The trial court found that Mrs. Hayden “gave the policeman permission to enter the home.” Id. at 297 n.4. The trial court in Mr. Hayden’s federal habeas case, however, “concluded that resolution of [the consent] issue would be unnecessary, because the officers were ‘justified in entering and searching the house for the felon, for his weapons and for the fruits of the robbery.’” Id. There was no reason to engage in the extensive legal discussion of whether the exigent circumstances permitted the officers to enter when it was established that police entries based on voluntary consent were constitutional. See Zap v. United States, 328 U.S. 624, 628 (1946) (“The law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived.”). Given that the trial court made the factual finding—which was not clearly incorrect—that Mrs. Hayden had given consent, it is unclear why the Supreme Court did not take this route. Perhaps the Court foresaw, and wanted to avoid, the potentially tricky issue of whether one spouse’s voluntary consent to a search would keep such a search from violating the other spouse’s Fourth Amendment rights. It would be seven years before the Supreme Court directly addressed that issue and concluded that spousal consent grants officers authority to search the marital home. United States v. Matlock, 415 U.S. 164, 171 (1974) (“When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.”); id. at 177 (holding that “the Government sustained its burden of proving by the preponderance of the evidence that Mrs. Graff’s voluntary consent to search the east bedroom was legally sufficient to warrant admitting” certain evidence against her husband).
47. Warden, 387 U.S. at 298.
48. See id. at 296–97.
49. Id. at 298 (quoting McDonald v. United States, 335 U.S. 451, 456 (1948)).
others.” 50 While the officers did not have a warrant, they had probable cause to believe Mr. Hayden was inside based on eyewitness reports from the cab drivers who followed him to the residence. 51 The exigency arose from not knowing whether the residence belonged to Mr. Hayden: if he ran into the house of a stranger, armed as he was, his presence would pose a clear danger to the resident. 52 Alternatively, the Court might arguably have based its holding on the notion of “hot pursuit.” 53 The robbery had occurred only minutes earlier, and the trail was not yet cold. Either way, the Court concluded that, in the exigent circumstances of the case, in which there was probable cause to believe the perpetrator or evidence of his crime would be found within the home, warrantless entry was permissible under the Fourth Amendment. 54

2. Schmerber v. California and Cupp v. Murphy Introduce the Likelihood of Destruction of Evidence as an Exigency Warranting Eschewal of the Warrant Requirement

In 1966, the Supreme Court in Schmerber v. California 55 introduced a specific exigent circumstance that could justify a search without a warrant: the risk that evidence will be destroyed if the officer takes the time to get a warrant. In Schmerber, Armando Schmerber had been driving while intoxicated and got into an accident. 56 The officer who responded to the accident noted that Schmerber displayed signs of intoxication and noted those signs again when he visited Schmerber at the hospital shortly thereafter. 57 Based on his observations, the officer arrested Schmerber and, over his objections, ordered a physician to draw and test a sample of

50. Id. at 298–99.
51. Id. at 297.
52. See id. at 299. In this respect, this case might be better placed in the category of emergency-aid cases, where officers enter based on an objectively reasonable belief that someone inside the home is in immediate need of medical or other assistance. See infra Part III.B. The Supreme Court’s analysis suggests that it was the danger of an armed robber in the house that justified the initial entry.
53. See United States v. Santana, 427 U.S. 38, 42–43 & n.3 (1976) (citing Warden v. Hayden and implying that it was the source of the “hot-pursuit” doctrine, but appearing to disclaim the notion that Warden involved hot pursuit). For more on the “hot-pursuit” exigency see infra Part III.A.3.
56. Id. at 758.
57. Id. at 758–59; id. at 768–69 (“The police officer who arrived at the scene shortly after the accident smelled liquor on petitioner’s breath, and testified that petitioner’s eyes were ‘bloodshot, watery, sort of a glassy appearance.’”).
Schmerber’s blood.58 The chemical analysis showed that Schmerber had been intoxicated at the time of the accident.59

Schmerber was charged in a California municipal court and eventually convicted.60 He sought to have the evidence of his blood-alcohol concentration suppressed under numerous theories. One theory was that the drawing of blood was a seizure under the Fourth Amendment that could only be constitutionally executed pursuant to a warrant.61 This theory failed at all levels, including the Supreme Court.62

The Supreme Court first concluded that the officer had probable cause to believe Schmerber was guilty and that his blood would contain sufficient alcohol to establish that he had been driving while intoxicated.63 Then, the Court analyzed whether the officer was entitled to rely on his own probable cause determination or was required to seek a warrant.64 Because an officer reasonably would be aware that the alcohol in Schmerber’s blood was dissipating, and might be gone before a warrant could be obtained, the Court found that the officer was not required to get a warrant.65 It stated:

The officer in the present case . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence . . . . We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the

58. Id. at 759.
59. Id. (“The chemical analysis of this sample revealed a percent by weight of alcohol in his blood at the time of the offense which indicated intoxication . . . .”).
60. Id. at 758.
61. Id. at 759, 766.
62. Id. at 759 (“[Petitioner] contended that . . . [admitting the evidence violated] the Fourth Amendment. The Appellate Department of the California Superior Court rejected these contentions and affirmed the conviction . . . . [W]e granted certiorari. We affirm.”).
63. Id. at 768 (“Here, there was plainly probable cause for the officer to arrest petitioner and charge him with driving an automobile while under the influence of intoxicating liquor.”).
64. Id. at 769–70.
65. Id. at 772.
attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner’s arrest.66

This type of exigent circumstance appeared again in the 1973 case of Cupp v. Murphy.67 In Cupp, police in Portland, Oregon, were investigating a strangulation murder.68 The victim was found in her home with abrasions and lacerations on her throat, but there were no signs of a break-in or a robbery.69 The victim’s husband, Daniel Murphy, voluntarily came to the police station when he heard that his wife had been killed.70 An officer noticed a dark spot under one of Mr. Murphy’s fingernails, which the officer believed might be dried blood.71 Under protest and without a warrant, officers took a sample of the material under Mr. Murphy’s fingernails, which turned out to contain traces of skin, blood cells, and fabric from the victim’s nightgown.72

Mr. Murphy challenged the evidence as being obtained in violation of the Fourth Amendment.73 The trial court, the Oregon Court of Appeals, and the federal district court on habeas review all agreed that the search was permissible because the officers had probable cause to arrest Mr. Murphy at the time that they took the scrapings from under his fingernails.74 The Ninth Circuit, reversed, assuming the officers had probable cause to arrest Mr. Murphy, but finding there were no exigent circumstances to justify the officers’ failure to obtain a warrant before taking a sample of the material under Mr. Murphy’s fingernails.75

The Supreme Court reviewed the information available to the officers and concluded that there was probable cause to arrest Mr. Murphy when they took the sample.76 It also concluded that there was an exigency.77 The Court looked to the principles underlying its then-recent decision in Chimel v. California,78 a case in which the Court authorized a

66. Id. at 770–71 (internal citations and quotations omitted).
68. Id. at 292.
69. Id.
70. Id. At that time, Mr. Murphy and his wife, the victim, were separated. See id.
71. Id.
72. Id.
73. Id.
74. Id. at 293.
75. Id.
76. Id. at 294, 296.
77. See id. at 296. Before it made that conclusion, however, it found that Mr. Murphy had been seized for Fourth Amendment purposes, and that such seizure was constitutional because it was based on probable cause to believe Mr. Murphy had committed the murder that the officers were investigating. See id. at 293–95.
search incident to an arrest on the theory that the arrestee might have a weapon or destructible evidence nearby. The Court found that Mr. Murphy’s awareness that the officers were curious about what was under his fingernails, coupled with what appeared to be attempts to clean under his fingernails when officers began asking questions, created an exigency that justified the warrantless search. It held: “[C]onsidering the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the ready destructibility of the evidence, we cannot say that this search violated the Fourth and Fourteenth Amendments.” In short, the Court in Schmerber v. California and Cupp v. Murphy established that the risk that evidence will be destroyed during the time taken obtaining a search warrant is an exigent circumstance that can justify a warrantless search.

80. Id. at 296. See also id. at 298 (Marshall, J., concurring) (“[W]hen [the officer] brought to Murphy’s attention his interest in taking [fingernail] scrapings . . . there was no way to preserve the status quo while a warrant was sought, and there was good reason to believe that Murphy might attempt to alter the status quo unless he were prevented from doing so.”).
81. Id. at 296.
82. This principle was arguably set forth earlier, in Ker v. California, 374 U.S. 23 (1963). See, e.g., Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (“We have held, for example, that law enforcement officers may make a warrantless entry onto private property . . . to prevent the imminent destruction of evidence, Ker v. California . . . .”); United States v. Francis, 327 F.3d 729, 735 (8th Cir. 2003) (“Although the exigent-circumstances exception is narrowly drawn, it does justify immediate police action without a warrant under limited circumstances, such as where . . . evidence is about to be destroyed.”) (citing Ker, 374 U.S. at 42, among several cases). In Ker, however, the issues appear to be somewhat conflated. Rather than determining if exigent circumstances justified the search, the Supreme Court appeared to be analyzing whether exigent circumstances justified a warrantless entry to arrest the Kers. See Ker, 374 U.S. at 34 (“The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful arrest, since the officers had no search warrant.”). Then, once it concluded that the arrest was justified, it analyzed whether the search of the Kers’ apartment was permissible as a search incident to an arrest. Id. at 35–37, 38. The exigent circumstances analysis was thus oriented toward entry for the purposes of arrest and not for the purposes of a search. Id. at 37–38. Indeed, most cases have construed Ker as setting forth a standard under which police may enter a home without first knocking and announcing their presence. See, e.g., Wilson v. Arkansas, 514 U.S. 927, 934 n.3 (1995) (describing Ker as “reasoning that an unannounced entry was reasonable under the ‘exigent circumstances’ of that case”) (emphasis added); United States v. Watson, 423 U.S. 411, 437 (1976) (citing Ker as an example of when the Supreme Court has “considered whether arrests were made in conformity with the Fourth Amendment”). One way or another, it is now accepted that a risk that tangible evidence might be destroyed during the time it takes officers to obtain a warrant is an exigency justifying warrantless entry. See Brigham City, 547
3. United States v. Santana Introduces the Hot-Pursuit Exigency

In United States v. Santana,83 the Supreme Court more definitively introduced the hot-pursuit exigency that it alluded to in Warden v. Hayden.84 In Santana, Gilletti, an undercover officer, arranged a drug buy with a woman named McCafferty.85 Ms. McCafferty told Officer Gilletti that the drugs would cost him $115 and that they would get them from “Mom Santana.”86 Officer Gilletti gave some marked bills to Ms. McCafferty, who went inside Ms. Santana’s house and made the buy.87 Officer Gilletti then arrested Ms. McCafferty, who told him that Ms. Santana had the marked money.88 Several officers then went to Ms. Santana’s house, where they saw Ms. Santana standing in the doorway to the house with a brown paper bag in her hand.89 The officers got out of the police van and shouted “police.”90 As officers approached Ms. Santana, she retreated into the vestibule of her home; officers followed her, crossed the house’s threshold into the vestibule, and caught her.91 When they did so, Ms.
Santana dropped some paper packets filled with a white powder that the officers later determined to be heroin.92

In her criminal case for possession with intent to distribute, Ms. Santana moved to suppress the heroin and money found during and after her arrest.93 Her theory was that, when the officers crossed the threshold and entered her house without a warrant, they had violated the Fourth Amendment.94 The federal district court granted the suppression motion based on an obscure definition of “hot pursuit” and the Court of Appeals affirmed.95 The Supreme Court determined first that the officers had probable cause to arrest Ms. Santana, and concluded that Ms. Santana’s “act of retreating into her house could [not] thwart an otherwise proper arrest.”96 The Court found that the officers were in “hot pursuit” of Ms. Santana when she retreated into her home and thus the entry was lawful.97 It also bolstered the conclusion that entry was permissible by expressing the concern that, because Ms. Santana was now aware that police were seeking to apprehend her, “there was . . . a realistic expectation that any delay would result in destruction of evidence.”98 In sum, the officers’ entry into Ms. Santana’s vestibule did not violate the Fourth Amendment.99 The Court thus established hot pursuit as another exception to the Fourth Amendment’s warrant requirement.

4. When Police Are Investigating a Crime, the Exigent Circumstances Exception Requires Probable Cause

One consistency through almost all of the exigent circumstances cases—other than the emergency-aid cases that will be discussed below—is that an exigency, without more, is insufficient to justify warrantless entry into a home. Rather, an officer generally must have probable cause to believe that a crime is being committed or that evidence of a crime will be found inside, combined with exigent circumstances, to justify a warrantless search.100 This arrangement makes sense when one considers that the

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92. Id. at 40–41.
93. Id. at 41.
94. See id. at 40–41.
95. See id. (noting that the district court construed “hot pursuit” to mean “a chase in and about the public streets”).
96. Id. at 42.
97. Id. at 42–43.
98. Id. at 43.
99. Id. (“We thus conclude that a suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place.”).
100. See, e.g., United States v. Johnson, 256 F.3d 895, 905 (9th Cir. 2001) (en banc) (“The exigent circumstance does not, however, relieve the police of the need to
touchstone of law enforcement searches and seizures is probable cause. Without probable cause, the individual’s right to be free from unwarranted police intrusion into his or her life outweighs the government’s interest in pursuing a criminal investigation. Thus, when a police officer is executing a search or seizure for an investigative law enforcement purpose, it must be done pursuant to probable cause.

In other words, the exigent circumstances exception is an exception only to the warrant requirement and not to the Fourth Amendment as a whole. When police act in their criminal investigator capacity, they ordinarily must have probable cause and a warrant to lawfully enter a person’s home. The warrant requirement can be forsaken when the exigencies of the situation demand it, but probable cause cannot be so easily dismissed. When the police engage in criminal investigation, it cannot be dismissed at all.

B. The Emergency-Aid Exception to the Warrant and Probable Cause Requirements

There is only one situation in which the Supreme Court has sanctioned entry into a person’s home by law enforcement officers without a warrant or probable cause: when the officers have an objectively reasonable basis to believe they must enter the house to avoid immediate harm to themselves or others. In short, when the officer is acting as a rescuer, i.e., entering a home to avert imminent harm or to render emergency aid, the officer need not have a warrant or probable cause.

It makes sense that probable cause is not required in an emergency-aid situation because the Supreme Court has given probable cause a very specific definition. It includes both a quantum of proof (enough to warrant a man of reasonable caution in believing the fact) and a specific underlying fact—that an offense has been or is being committed, or that

have probable cause for the search.”); see also supra note 36 (citing cases that specify that both probable cause and exigent circumstances are necessary to justify entry).

101. See Michigan v. Fisher, 130 S. Ct. 546, 548 (2009) (“[L]aw enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.”); Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (“[L]aw enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.”); Mincey v. Arizona, 437 U.S. 385, 392 (1978) (“Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.”).

102. See supra note 10; infra notes 225–227 and accompanying text.
evidence of a crime will be found. In other words, the term probable cause is only applicable in the criminal investigation context. When an officer is playing the role of a rescuer or a public protector, probable cause is an inappropriate term to use. After all, there is no guarantee that there will be criminal activity afoot or evidence of a crime in the area when a citizen needs emergency assistance.

1. Mincey v. Arizona Creates the Emergency-Aid Exception to the Fourth Amendment’s Warrant Requirement

The Supreme Court recognized the emergency-aid exception—and its highly circumscribed nature—in Mincey v. Arizona. In Mincey, Officer Headricks, an undercover police officer, was setting up a sting operation at Mr. Mincey’s apartment. Officer Headricks had arranged to buy some heroin from Mr. Mincey and showed up at the buy with nine plainclothes police officers in tow. When someone opened the door to Mr. Mincey’s apartment and saw the veritable army standing outside, they quickly tried to shut the door, but not before Officer Headricks managed to slip inside the apartment. As the officers forced their way into the apartment, Officer Headricks and Mr. Mincey engaged in a brief shootout in Mr. Mincey’s bedroom. Several individuals were wounded and in need of aid, and the officers called for emergency assistance. Officer Headricks died shortly after the incident.

The officers who entered Mr. Mincey’s apartment performed a cursory sweep of the apartment for anyone who might have been injured by a stray bullet, but, based on Tucson Police Department protocols, they refrained from further investigation. Homicide detectives, on the other hand, arrived to investigate within ten minutes and conducted a thorough

103. See Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2639 (2009) (“Probable cause exists where ‘the facts and circumstances within [an officer’s] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed, and that evidence bearing on that offense will be found in the place to be searched . . . .”) (quoting Brinegar v. United States, 338 U.S. 160, 175–76 (1949)) (internal citation omitted).
105. Id. at 387.
106. Id.
107. Id.
108. Id.
109. Id. at 388.
110. Id. at 387.
111. Id. at 388.
four-day search, which even included pulling up sections of the carpet.\footnote{112} The search yielded substantial quantities of evidence, much of which was introduced against Mr. Mincey at his trial for Officer Headricks’ murder.\footnote{113} No officer ever obtained a search warrant.\footnote{114}

Mr. Mincey sought to have the evidence suppressed as fruit of an unlawful search.\footnote{115} At all levels, the Arizona state courts found that the entry was authorized and that the four-day search was permissible, relying primarily on a special rule permitting a warrantless search of the scene of a homicide.\footnote{116} The U.S. Supreme Court rejected such an exception to the warrant requirement, and all of the other bases that the State advanced to show that the search was lawful.\footnote{117} The Supreme Court stated, however, that it did “not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.”\footnote{118} Moreover, “the police may seize any evidence that is in plain view during the course of their legitimate emergency activities.”\footnote{119} Notwithstanding the existence of such exceptions to the warrant requirement, the Court found that the exigencies of investigating a crime scene, after the individuals involved had been arrested and the scene secured, did not justify an extensive four-day search of the apartment without a warrant.\footnote{120} In other words, the Court

\begin{footnotes}
\footnotetext[112]{Id. at 388–89.}
\footnotetext[113]{Id. at 389.}
\footnotetext[114]{Id.}
\footnotetext[115]{See id. For a brief description of the exclusionary rule, under which evidence obtained as a result of a constitutional violation cannot be used against the victim of the violation, see supra note 39.}
\footnotetext[116]{Mincey, 437 U.S. at 389–90 (quoting the Arizona Supreme Court’s holding, that “a reasonable, warrantless search of the scene of a homicide—or of a serious personal injury with likelihood of death where there is reason to suspect foul play—does not violate the Fourth Amendment . . . where the law enforcement officers were legally on the premises in the first instance”).}
\footnotetext[117]{Id. at 390–91.}
\footnotetext[118]{Id. at 392; see also id. (“The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.”) (quoting Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963)).}
\footnotetext[119]{Id. at 393. “Plain view” is a term of art in the Fourth Amendment context. “Under [the plain-view] doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant.” Minnesota v. Dickerson, 508 U.S. 366, 375 (1993).}
\footnotetext[120]{Mincey, 437 U.S. at 394–96.}
\end{footnotes}
noted the existence of an emergency-aid exception, but concluded that it should not be applied under the facts of *Mincey*.

2. *Brigham City v. Stuart* Applies the Rule in *Mincey v. Arizona*

   Almost thirty years later, in *Brigham City v. Stuart*, the Supreme Court gave us an example of appropriate application of the emergency-aid exception. In this case, officers observed an altercation breaking out through a closed screen door. The officers saw four adults attempting to restrain a juvenile. When the juvenile broke free, he punched one of the adults in the face, who then spit blood into a nearby sink. One officer opened the screen door and announced his presence. The officer stepped inside the house and more loudly announced his presence when nobody appeared to notice him the first time. At that time the altercation slowed and eventually ceased. The Court held that, “regardless of the individual officer’s state of mind... the officers’ entry here was plainly reasonable under the circumstances,” because “the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning.” Furthermore, the officers’ “manner of... entry was... reasonable.” In making this determination, the Court considered the officers’ primary motivation, which was a desire to save lives and property. The Court also determined the officers’ manner of entry was reasonable because they announced their presence through the screen door, which the Court found equivalent to knocking to alert the occupants of their presence. The Court felt that under these circumstances the application of the emergency-aid exception was appropriate.

122. *Id.* at 400.
123. *Id.* at 401.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 404, 406.
129. *Id.* at 406.
130. *Id.* at 404.
131. *Id.* at 406–407.
132. *Id.* at 401–402 (referring to “the so-called ‘emergency aid doctrine’”).
The Supreme Court’s most recent exposition on the emergency-aid exception is *Michigan v. Fisher.* In *Michigan v. Fisher*, officers responded to a house at which a man was reportedly “going crazy.” When the officers arrived at the house they found “considerable chaos.” A pickup truck with its front end smashed and blood on the hood was in the driveway, fence-posts along the side of the property were damaged, three of the house’s windows were broken, glass from the windows was still on the ground, and there was blood on one of the doors to the house. Even more urgent was the fact that, through a window, the officers could see Mr. Fisher inside, “screaming and throwing things.” When an officer attempted to force his way in through the front door, Mr. Fisher aimed a gun at him, at which point the officer retreated.

Mr. Fisher was eventually arrested, and was charged under Michigan law with assault with a dangerous weapon and possession of a firearm during the commission of a felony. He sought to suppress the evidence against him as fruit of the officers’ entry into his home, which he contended was a Fourth Amendment violation. The Michigan trial court agreed, finding the officers’ entry into Mr. Fisher’s home unlawful, and suppressed the evidence against Mr. Fisher; the Michigan Court of Appeals affirmed.

Ultimately, the Supreme Court granted certiorari and reversed. Citing to *Mincey v. Arizona* and *Brigham City v. Stuart*, the Court reminded the lower courts that some emergency situations are exigent circumstances that can constitute exceptions to the usual warrant and probable cause requirements. The exception at issue under these facts, the Court found, was what it referred to as the “emergency aid exception.” As the Court explained, that exception provides that, where there exists a need

134. *Id.* at 547.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *See id.* at 547–48.
141. *Id.* at 548. The Michigan Supreme Court, after hearing oral argument, dismissed the appeal. *Id.*
142. *See id.*
143. *Id.* Again, the phrase “emergency aid exception” was mentioned in *Brigham City v. Stuart*, 547 U.S. 398, 401–402 (2006), but it was not clear until *Michigan v. Fisher* that the Supreme Court adopted the expression. *See Fisher*, 130 S. Ct. at 548
to assist persons who are seriously injured or imminently threatened with such injury, law enforcement officers may enter a home without a warrant to render emergency assistance to those persons. The Court stated that, for the exception to apply and for police entry to be lawful, the officer need have “only an objectively reasonable basis for believing that a person within the house is in need of immediate aid.” The Court found the officers’ entry to be lawful under “[a] straightforward application of the emergency aid exception”:

[The police officers here were responding to a report of a disturbance. . . . [W]hen they arrived on the scene they encountered a tumultuous situation in the house—and . . . they also found signs of a recent injury, perhaps from a car accident, outside. . . . [T]he officers could see violent behavior inside. Although Officer Goolsby and his partner did not see punches thrown . . . they did see Fisher screaming and throwing things. It would be objectively reasonable to believe that Fisher’s projectiles might have a human target (perhaps a spouse or a child), or that Fisher would hurt himself in the course of his rage. In short, we find it as plain here as we did in Brigham City that the officer’s entry was reasonable under the Fourth Amendment.]

Such a series of circumstances, we now know, can create an objectively reasonable basis for believing someone inside the house is in need of immediate aid.

(“This ‘emergency aid exception’ does not depend on the officers’ subjective intent or the seriousness of any crime they are investigating when the emergency arises.”).

144. See id. (citing Brigham City, 547 U.S. at 403–405).
145. Id. (internal quotations, citations, and alterations omitted).
146. Id. at 548–49. Clearly the facts of Fisher are very similar to those of Brigham City. The most noteworthy distinction appears to be that the officers in Fisher could not confirm whether Mr. Fisher’s rage and thrown objects were directed at someone in the house.
147. The opinion only garnered seven of the Justices’s votes. See id. at 549. (Stevens, J., dissenting). Justice Stevens wrote a dissent, in which Justice Sotomayor joined. Id. The dissent, however, did not challenge the legal principles set forth in the opinion. Id. at 550–51. Rather, they criticized the majority for second-guessing the Michigan courts’ decision on a fact-intensive question like whether the totality of the circumstances provided officers an objectively reasonable basis to conclude someone inside the home was in immediate need of assistance. Id. (“Today, without having heard Officer Goolsby’s testimony, this Court decides that the trial judge got it wrong. I am not persuaded that he did, but even if we make that assumption, it is hard to see how the Court is justified in micromanaging the day-to-day business of state tribunals making fact-intensive decisions of this kind.”).
This exception to the warrant and probable cause requirements is in apparent recognition of the broader role of law enforcement in modern society. Officers are expected to reduce the opportunities for the commission of some crimes through preventive patrol and other measures, aid individuals who are in danger of physical harm, assist those who cannot care for themselves, resolve conflict, create and maintain a feeling of security in the community, and provide other services on an emergency basis.148

The decisions in *Mincey v. Arizona*, *Brigham City v. Stuart*, and *Michigan v. Fisher* demonstrate the principle that in a very limited situation, officers can enter a person’s home without probable cause or a warrant. The only situation in which such entry is permissible, however, is when the officer is acting as a rescuer or protector of a specific individual inside the house. In *Brigham City*, officers observed a group of adults trying to restrain a struggling juvenile, and saw the juvenile break free and punch one of the adults.149 At that point, the officers had an objectively reasonable basis to believe they needed to intervene in the situation they were observing; otherwise, someone might be seriously injured. In *Michigan v. Fisher*, the officers saw a man inside screaming and throwing things, but they could not see at what or whom he was screaming and

148. 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.6 (4th ed. 2004) (internal quotation marks omitted) (quoting ABA STANDARDS FOR CRIMINAL JUSTICE § 1-2.2 (2d ed. 1980)). The United States Court of Appeals for the District of Columbia Circuit has put it in these terms:

But a warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. Fires or dead bodies are reported to police by cranks where no fires or bodies are to be found. Acting in response to reports of ‘dead bodies,’ the police may find the ‘bodies’ to be common drunks, diabetics in shock, or distressed cardiac patients. But the business of policemen and firemen is to act, not to speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process. Even the apparently dead often are saved by swift police response. A myriad of circumstances could fall within the terms ‘exigent circumstances’ referred to in *Miller v. United States*, supra, e.g., smoke coming out a window or under a door, the sound of gunfire in a house, threats from the inside to shoot through the door at police, reasonable grounds to believe an injured or seriously ill person is being held within.


throwing. The Supreme Court found it reasonable for the officers to believe that someone who was screaming and throwing things had a target, and likely a human one. Therefore, the Court found that the officers had an objectively reasonable basis to believe they needed to intervene to protect and render aid to a specific person inside the home.

C. The Tenth Circuit Recognizes the Emergency-Aid Exception

The Tenth Circuit also has recognized this subset of exigent circumstances cases that do not require probable cause, i.e., emergency-aid cases. In United States v. Najar, the court held that the exigent circumstances exception to the warrant requirement authorized a warrantless police entry in an emergency-aid situation without a showing of probable cause. The following year, the court again expressed the general rule that an officer needs exigent circumstances plus probable cause to make a warrantless entry into a private home, unless the exigent circumstance is the need for emergency aid. In Najar, however, the Tenth Circuit set forth its two-part test for determining whether the emergency-aid doctrine applies: “[O]ur test is now two-fold, whether (1) the officers have an objectively reasonable basis to believe that there is an immediate need to protect the lives or safety of themselves or others, and (2) the manner

150. See Fisher, 130 S. Ct. at 547.
151. Id. at 549.
152. Id. This conclusion is convincing. One should not wholly ignore that, as it turned out, Mr. Fisher was yelling and throwing things at nobody. It would be a strange rule, however, that required officers, when they observe half of what appears to be a violent argument, to confirm that the apparent assailant is yelling at another person. Yelling, just like speaking, is generally a form of communication and is most often engaged in with another human as its subject. In other words, talking to oneself, talking to imaginary persons, and talking to inanimate objects are the rare cases, not the norm. It would be odd to force officers to rule out all unlikely explanations for such conduct before they act. This is especially true in a situation, like that in Michigan v. Fisher, where it appeared that intervention could protect someone from serious injury or allow the officers to render aid to the victim if injury had already been inflicted. The Supreme Court was thus correct to liken Michigan v. Fisher to Brigham City v. Stuart, even though the officers in Michigan v. Fisher could not see at what or whom Mr. Fisher was yelling and throwing things. That Mr. Fisher was yelling at nobody, rather than at somebody, does not make the officers’ actions notably less reasonable.
153. See United States v. Najar, 451 F.3d 710, 719 (10th Cir. 2006).
155. West v. Keef, 479 F.3d 757, 759 (10th Cir. 2007) (“Thus the sole question in this case is, viewing the record testimony without the affidavit, whether the officers had both probable cause and exigent circumstances justifying not only their warrantless entry but also their seizure.”) (emphasis added).
and scope of the search is reasonable.” 156 The Tenth Circuit has since ap-
plied that test in emergency-aid cases.

1. Most Tenth Circuit Cases Find the Emergency-Aid Exception Applicable

The *Najar* case provided an example of this rule in action. At about
2:00 a.m., a 911 dispatcher received a hang-up 911 call. 157 The dispatcher
tried to call back several times, but, while the call went through each
time, the person who picked up did not say anything and immediately
hung-up. 158 The dispatcher sent officers to the address, who knocked on
the door and called out to anyone inside; nobody answered. 159 One of the
officers, however, could see that someone was inside. 160 The person would
walk to the door and look outside, but would not answer. 161 The officers
eventually convinced that person—Richard Najar—to open the door. 162

156. *Najar*, 451 F.3d at 718. Before *Najar*, the rule included a third element: “the
search is not motivated by an intent to arrest and seize evidence.” *Cortez v. Mc-
Cauley*, 478 F.3d 1108, 1124 n.21 (10th Cir. 2007). In light of the Supreme Court’s
decision in *Brigham City v. Stuart*, which explicitly rejected any reliance on the police
officers’ subjective intent when analyzing the emergency aid exception, the Tenth Cir-
cuit in *Najar* removed that third element. See *id*.
157. 451 F.3d at 712.
158. *Id*. The first hang-up 911 call, combined with these hang-ups in response to
the dispatcher’s attempts to reach the caller, probably suggested to the officers that
someone had intercepted the first 911 call and did not want whoever was in the house
to speak with the dispatcher. See *id*. at 720 (“[D]ispatch had been unable to make
contact with any occupant. Even more alarming, someone was answering the phone
but immediately placing it back on the receiver . . . . A reasonable person could well
be concerned that someone was trying to prevent communication with safety offi-
cials . . . .”). There are, however, other plausible explanations, such as prank calls, or
an accidental misdial and an embarrassed caller who would prefer not to talk to the
dispatcher).
159. *Id*. at 712.
160. *Id*.
161. *Id*. This observation likely heightened the officers’ suspicion that the person
inside was keeping a second person from calling 911. If the person inside had just
assaulted, or was in the process of assaulting, another person, he would be unlikely to
answer the door for the police officers. On the other hand, the person’s behavior is
also consistent with that of an embarrassed 911-caller, who called either as a prank or
by mistake, and did not want to face the police. But see *id*. at 720 n.8 (“The officers
testified it is not uncommon for a 911 call to be made by mistake. However, both
[officers] testified the common response in such situations is the occupant answering
the door, providing an explanation and . . . allowing the officers to enter in order to
assure the occupants’ safety.”).
162. See *id*. at 712.
He denied calling 911 and said he was alone in the house. Concerned that Najar was lying and trying to conceal someone inside the home who needed their assistance, the officers entered over Najar’s objection. While inside, the officers found a woman on the bedroom floor and a shotgun leaning against the wall. In Najar’s criminal prosecution for being a felon in possession of a firearm, the district court denied his motion to suppress the gun, finding that the officers’ entry into his home was proper. The Tenth Circuit affirmed, finding that the officers had the necessary reasonable basis to believe someone inside needed their help, and that they executed a search that was reasonable in manner and scope.

The Tenth Circuit has used the exception several times since its decision in United States v. Najar, though only in situations in which officers enter due to concern for the safety and welfare of someone inside the home. In West v. Keef, the Tenth Circuit found the exception authorized warrantless entry when police were responding to a 911 call in which a twelve-year-old boy reported that his mother was “going crazy,” was “trying to kill herself,” and “trying to cut her[self] with a knife.”

163. Id. Again, Najar’s denial could support either of the scenarios discussed in the prior footnotes. If his victim called 911, he could honestly say that he did not call but falsely deny that anyone was inside. If he called 911 as a prank or on accident, he might falsely deny calling, to avoid facing the embarrassment and potential punishment of admitting it to police officers, but honestly say that he is alone in the house. The existence of these other scenarios, based on facts known to the officers, suggest that an officer can form an objectively reasonable belief when the facts upon which he relies are ambiguous and could suggest more than one plausible scenario. This suggests that, at least in the Tenth Circuit, the objectively reasonable basis standard is lower than a preponderance standard.

164. Id.

165. Id. at 717.

166. Id. The district court initially held that the evidence should be suppressed because the officers needed probable cause and exigent circumstances to enter Najar’s house, and they lacked probable cause. See United States v. Najar, No. CR 03-0735 JB, 2004 WL 3426122, at *4–8 (D.N.M. July 6, 2004) (Browning, J.). But, upon a motion for reconsideration by the prosecution, the district judge applied an emergency-aid variant of the exigent circumstances exception and denied the defendant’s motion to suppress. See United States v. Najar, No. CR 03-0735 JB, 2004 WL 3426123, at *7–8 (D.N.M. Sept. 3, 2004) (Browning, J.). The rule that the district court fashioned, based largely on Mincey v. Arizona, showed impressive foresight, given that the Supreme Court would not decide Brigham City v. Stuart until 2006. Id. at *8.

167. Najar, 451 F.3d at 720 (internal alterations omitted).

168. 479 F.3d 757, 759–60 (10th Cir. 2007). This is a quintessential correct application of the emergency-aid exception. A concerned citizen with first-hand knowledge—in this case, the son of the potential victim—excitedly reported that someone was in immediate danger of being harmed and requested help. See id. at 757–58.
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States v. Layman, the court found that entry into a mobile home was authorized under the Najar exception based on the presence of strong chemical fumes and other paraphernalia outside, which indicated that the mobile home was a methamphetamine laboratory. The Tenth Circuit held that the officers could reasonably believe someone was inside, incapacitated by the fumes, or that the lab could explode at any moment, harming the officers or anyone inside; either belief would justify entry.

In United States v. Walker, the Tenth Circuit affirmed the district court’s application of the Najar exception. In Walker, officers responded to a 911 call that reported a potential gunfight brewing in the Walker home. In response to the officers’ knock at the door, the occupant shouted: “Yeah, and I got a goddamn gun.” The Tenth Circuit found the Najar exception justified the officers’ entry to disarm Walker, “who could otherwise continue to pose a danger to the officers and others.”

In United States v. Gambino-Zavala, the Tenth Circuit affirmed the district court’s denial of a suppression motion on the basis of the Najar exception. The officers were responding to several 911 calls reporting gunfire in a nearby apartment; when the officers knocked on Gambino-Zavala’s door, he answered and claimed nobody else was inside.

Officers who responded to this call were clearly acting as rescuers, and the rule is properly applied in that context.

169. 244 Fed. Appx. 206, 209 (10th Cir. 2007).
170. Id. at 211. Layman is likely an inappropriate application of the emergency-aid exception set down in Najar. In Layman, the officers were aware of no facts suggesting that anyone was inside the mobile home, unlike in Brigham City v. Stuart and Michigan v. Fisher. See id. at 208–209. Moreover, in Layman the officers were investigating criminal activity, and the “imminent danger” they allegedly were averting seems rather contrived. See id. It would have been more analytically tidy to admit the criminal-investigative motive and assert that the officers had probable cause to believe there was evidence of a crime inside the mobile home—an assertion that appears clearly true from the recited facts. See id. at 209. The government could then use the exigent circumstances exception to the warrant requirement on the basis that an explosion, however unlikely, would destroy much of the potential evidence inside. At the very least, this opinion blurs the lines between the exigent circumstances exception and the emergency-aid exception, and it is that line which this article intends to clarify.
171. 474 F.3d 1249, 1251 (10th Cir. 2007).
172. Id.
173. Id. at 1253.
174. 539 F.3d 1221, 1227 (10th Cir. 2008).
175. Id. at 1224–26 (“Based on the sequence of events here, we conclude the officers had reasonable belief, if not probable cause, to search the apartment for injured persons.”). This case also appears to be one that would have been more appropriately analyzed under the traditional schema of requiring probable cause and an exigency, although an officer could reasonably believe someone inside an apartment.
theless, the officers entered Gambino-Zavala’s apartment “just to check to make sure that there was nobody else inside that was either injured or hurt or needed assistance.”\footnote{Id. at 1225.} The Tenth Circuit held that the officers’ entry into Gambino-Zavala’s apartment was valid under the \textit{Najar} exception.\footnote{Id. at 1227.}

In \textit{United States v. Stotts}, the Tenth Circuit again affirmed the district court’s order denying a suppression motion based on the emergency-aid exception in \textit{Najar}.\footnote{346 Fed. Appx. 356, 359 (10th Cir. 2009) (“The officers had reasonable grounds to believe the welfare of a person on the premises presented an immediate need to investigate and they reasonably effected the search. Consequently, the entry and search of Stott’s [sic] backyard was lawful.”).} The officers entered Stotts’s residence based on an emergency call that reported Stotts was a convicted felon, intoxicated, passed out in the backyard, carrying a firearm, and had threatened people in the house; a household member corroborated all of these facts before the officers’ entry and arrest.\footnote{Id. at 357.} The court found these circumstances satisfied the requirements of \textit{Najar}.\footnote{Id. at 359 (holding that “[t]he officers had reasonable grounds to believe the welfare of a person on the premises presented an immediate need to investigate and they reasonably effected the search[,] [and] [c]onsequently, the entry and search of Stott’ [sic] backyard was lawful.”).}

Similarly, in \textit{United States v. Porter}, the Tenth Circuit justified an officer’s warrantless entry into a home under \textit{Najar} based on: (1) a 911 call, only minutes earlier, in which the caller claimed that Porter was drunk and had pointed a gun at her; (2) the officers’ knowledge that Porter was a person who was frequently in trouble and was potentially a violent convicted felon; (3) when the officers were talking to Porter at the door of his home, he kept his left hand hidden and would not show it to the officers upon request; and (4) Porter was otherwise belligerent.\footnote{594 F.3d 1251, 1253–54 (10th Cir. 2010).}

Finally, in \textit{Harris v. Ford}, decided a month before \textit{Armijo}, the Tenth Circuit found that the \textit{Najar} rule applied where a man—Harris—alleged that a self-inflicted gunshot wounded him.\footnote{No. 09-3272, 2010 WL 801743, at *1, *4 (10th Cir. Mar. 10, 2010).} Although the purported victim was taken to the hospital before the officer arrived at his home, the

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court found the officer’s entry authorized under *Najar*, because the officer had entered the residence looking for injured persons after observing blood on a lawn chair, on the front porch, and on the front door of the residence.\footnote{183}

2. Only Two Tenth Circuit Cases Refuse to Find the Emergency-Aid Exception Applicable\footnote{184}

Since *Najar*, there have been only two cases in which the Tenth Circuit has analyzed the emergency-aid exception and found it did not apply.\footnote{185} The first such case was *Cortez v. McCauley*, a civil suit against the police under 42 U.S.C. § 1983.\footnote{186} In *Cortez*, officers received a call from a

\begin{footnotesize}
\begin{enumerate}
\item \footnote{183} Id. at *1.
\item \footnote{184} While this article was in its final editing stages, the Tenth Circuit decided *United States v. Martinez*, 643 F.3d 1292 (10th Cir. 2011), which is a third case in which the Tenth Circuit has declined to apply the emergency-aid exception from *Najar*. In *Martinez*, the district court suppressed evidence of drugs and child pornography found in Mr. Martinez’s rural home because it found the officers’ entry into the home unconstitutional. See *United States v. Martinez (Martinez I)*, 686 F. Supp. 2d 1161 (D.N.M. 2009) (Browning, J.) (holding the officers violated the Fourth Amendment, but denying suppression for other reasons); *United States v. Martinez (Martinez II)*, 696 F. Supp. 2d 1216 (D.N.M. 2010) (Browning, J.) (suppressing the evidence).
\item Arguing before the Tenth Circuit, the United States emphasized that three factors provided an “objectively reasonable basis to believe” someone inside Mr. Martinez’s home was in need of immediate aid: (1) an open-line, static-only 911 call from Mr. Martinez’s house; (2) an unlocked sliding-glass door on the rear deck of the house; and (3) that the house was messy and had electronics boxes stacked near the door. *Martinez*, 643 F.3d at 1296. The Tenth Circuit disagreed. Id. at 1297. It noted, as the district court had, that officers in the area knew that line problems or inclement weather could cause the static-only 911 calls; as a result, neither the static call nor the untidiness of Mr. Martinez’s home provided the necessary reasonable basis to enter the home. Id. The thorough and probing analysis into the reasonableness of the officers’ belief in *Martinez* indicates a swing away from the court’s earlier pattern of liberally applying the emergency-aid doctrine. See, e.g., *Harris v. Ford No. 09-3272*, 2010 WL 801743 (10th Cir. Mar. 10, 2010); *United States v. Porter* 594 F.3d 1251 (10th Cir. 2010); *United States v. Stotts*, 346 Fed. Appx. 356 (10th Cir. 2009); *United States v. Gambino-Zavala*, 539 F.3d 1221 (10th Cir. 2008).
\item As of July 2011, there are three cases, the third being *United States v. Martinez*, mentioned supra note 184.
\item 478 F.3d 1108, 1114 (10th Cir. 2007). It is not immediately clear that cases with the procedural posture of *Cortez*—civil suits for civil rights violations that the government seeks to have dismissed on grounds of qualified immunity—are useful in determining the scope of the emergency-aid exception. *Id.* To defeat the defense of qualified immunity, a plaintiff must show that there was a constitutional violation of a right that was clearly established at the time of the challenged government conduct. See *Pearson v. Callahan*, 555 U.S. 223, 232 (2009); *Howards v. McLaughlin*, 634 F.3d 1131, 1140 (10th Cir. 2011). If the court finds the defendants are not entitled to quali-
\end{enumerate}
\end{footnotesize}
nurse who reported that a patient’s two-year-old daughter complained that her babysitter’s boyfriend had “hurt her pee pee.” Based solely on that phone call, officers went to the Cortez residence at approximately 1:00 a.m. and ordered Rick Cortez to exit the house. Once he complied, the officers handcuffed him and placed him in a patrol car. Tina Cortez, awakened by the commotion, was about to make a telephone call when one of the officers entered, grabbed her by the arm, and physically removed her from the house.

The hospital examined the alleged victim and found no evidence that the little girl had been molested, so Rick Cortez was never charged with any crime. The Cortezes sued the officers and the county, alleging that the officers violated their Fourth Amendment rights when the officers entered and searched the house and interrogated and unlawfully arrested Tina and Rick Cortez. In response, the officers asserted the defense of qualified immunity, claiming the exigencies of the situation warranted entering and searching the home and seizing and arresting Tina and Rick Cortez. The Tenth Circuit denied the defendants qualified immunity. In the court’s words, the defendants “failed to articulate

fied immunity, it must be because the plaintiff’s facts, construed in the light most favorable to the plaintiff, amount to a constitutional violation. In the cases discussed in this part, the government raised its qualified-immunity defense and argued that there was no constitutional violation because the emergency-aid exception to the warrant requirement applied. See, e.g., Lundstrom v. Romero, 616 F.3d 1108, 1115 (10th Cir. 2010); Cortez, 478 F.3d at 1123–24. The Tenth Circuit’s rejection of that argument is tantamount to a finding that, if the facts are as the plaintiff asserts, the emergency-aid exception does not apply and the officers’ conduct constitutes a constitutional violation. See Cortez, 478 F.3d at 1124; Lundstrom, 616, F.3d at 1128–29.

187. Id. at 1112–13. Rick Cortez was actually Tina Cortez’s husband, not her boyfriend. Id. at 1113.
188. Id.
189. Id.
190. Id.
191. Id. at 1114.
192. Id. at 1112.
193. Id. at 1123–24.
194. Id. at 1124. Concisely put, “[t]he doctrine of qualified immunity provides that government officials performing discretionary functions are generally shielded from liability for damages in actions under 42 U.S.C.A. § 1983 insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” 15 AM. JUR. 2D Civil Rights § 111 (2011). In other words, qualified immunity is a legal defense available to government officials in § 1983 actions. Once the government official invokes the qualified-immunity defense—often at the summary judgment stage—the plaintiff must show: (1) that the official committed a constitutional violation; and (2) that the constitutional right at issue was clearly established at the time of the violation. See Pearson v. Callahan, 129
any specific facts that led them to believe the Plaintiffs posed a threat to the officers or others.” In other words, the officers did not give the court any factual basis for applying the emergency aid or exigent circumstances exceptions.

The holding of Cortez v. McCauley does not bode well for a defendant seeking to suppress evidence, or a plaintiff seeking to hold the government liable under 42 U.S.C. § 1983. Combined with the plethora of cases applying the emergency-aid exception, Cortez suggests that the government need only present facts from which one might plausibly conclude that an emergency exists. This minimal burden for finding an “objectively reasonable basis” to support a warrantless entry in the absence of proba-

S. Ct. 808, 815–23 (2009). If the plaintiff fails to show either element—or, at the summary judgment stage, fails to create a genuine factual issue as to either element—the government official is entitled to judgment in his or her favor. See id. at 231–32 (noting that “[q]ualified immunity is applicable unless” the plaintiff can show that the alleged facts “make out a violation of a constitutional right” and that “the right at issue was ‘clearly established’ at the time of defendant’s alleged misconduct.”); see also Anderson v. Creighton, 483 U.S. 635, 640 (1987) (explaining that a right is “clearly established” when “[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right”). And, although the courts were once required to analyze the two prongs in a particular order, see Saucier v. Katz, 533 U.S. 194, 200 (2001), they are no longer so constrained. Pearson, 129 S. Ct. at 818 (“On reconsidering the procedure required in Saucier, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory.”).

195. Cortez, 478 F.3d at 1124 (emphasis added). The full analysis was as follows:

The Defendants have offered nothing, beyond innuendo and speculation, to establish objectively reasonable grounds of an emergency, i.e., an immediate need to protect their lives or others from serious injury or threatened injury. They have failed to articulate any specific facts that led them to believe the Plaintiffs posed a threat to the officers or others. In fact, the record indicates the opposite conclusion is appropriate. The record establishes that the Plaintiffs were asleep at the time the Defendants arrived at the home. The interior, as well as exterior lights, were off. Rick Cortez answered the door wearing only a pair of shorts. He cooperated with the officers as they voiced their commands. No evidence in the record suggests the presence of other people in the home. Additionally, no evidence in the record establishes actual or threatened injury to any person or imminent violence. The only basis for the search was the unsubstantiated allegation of the nurse regarding a child at another location. We do not believe this evidence establishes the existence of emergency conditions at the Cortez home. Therefore, we agree with the district court that a finding of exigency was inappropriate.

Id. It is not entirely clear why this lack of factual basis is substantially different from other cases in which a panel of the Tenth Circuit has found the officers’ basis for believing a person inside a dwelling needed immediate assistance. In particular, in Layman and Najar the officers’ basis for believing someone was in imminent danger seemed almost as speculative. See supra notes 160–163, 169–170, and accompanying text.
ble cause dramatically increases the number of situations in which such warrantless entries will be found reasonable.

The second case in which the Tenth Circuit declined to apply the emergency-aid exception was *Lundstrom v. Romero*. In *Lundstrom*, a woman called 911 and reported that she “heard a woman at Lundstrom’s residence ‘like beating [her] toddler, and [she’s] got him outside in the rain and she’s screaming at him that he can come in the house when he shuts the f*** up.’”\textsuperscript{197} The woman further reported that “she actually did not see anything but [that] she could ‘hear the sound of [the woman’s] hand striking [the child]’ and his ‘screaming.’”\textsuperscript{198} Officer Romero arrived at Mr. Lundstrom’s house shortly thereafter, aware of the facts that the woman reported to 911.\textsuperscript{199}

Once on the scene, Officer Romero heard a high-pitched voice, but could not tell whether it was a child or an adult.\textsuperscript{200} When she rang the doorbell, Mr. Lundstrom answered.\textsuperscript{201} Officer Romero told Mr. Lundstrom that she was there to check on a child’s welfare, to which Mr. Lundstrom replied that there were no children in the house.\textsuperscript{202} Other of-

\textsuperscript{196} 616 F.3d 1108 (10th Cir. 2010). This case gives some hope that the Tenth Circuit is not a mere rubber stamp of approval on law enforcement officers’ assertion that the emergency-aid exception applies. Its analysis was thoughtful, and it ultimately rejected the government’s assertion that the officers’ entry was justified under the emergency-aid exception. \textit{Id.} at 1128–29. On the other hand, the facts that the officers were aware of at the time of the search clearly suggested that they were at the wrong house, and indeed, the tone of the court’s opinion indicates that the judges on the panel were annoyed with the officers’ conduct in the case. \textit{See id.} at 1122–24 (repeatedly emphasizing that the officers had failed to interview a detained witness and failed to corroborate the tip from which they were acting); \textit{id.} at 1128–29 (noting facts, apparently ignored by the officers, that should have vitiated their belief that there was an ongoing emergency). In short, notwithstanding *Lundstrom*, the burden on law enforcement officers to justify entry under the emergency-aid exception remains minimal.

\textsuperscript{197} \textit{Id.} at 1115 (quoting from the record).
\textsuperscript{198} \textit{Id.} (quoting from the record).
\textsuperscript{199} \textit{Id.} at 1115–16.
\textsuperscript{200} \textit{Id.} at 1116.
\textsuperscript{201} \textit{Id.}
\textsuperscript{202} \textit{Id.} The facts that the Tenth Circuit recited in *Lundstrom* are somewhat more colorful. For example, the Tenth Circuit notes that Officer Romero testified that Mr. Lundstrom actually said, “there [are] no f***ing kids here” and slammed the door in her face. \textit{Id.} But, because of the posture of the case—it was a review of a district court’s grant of summary judgment in favor of the government defendants on grounds of qualified immunity—the Tenth Circuit was required to take the facts and inferences in the light most favorable to Lundstrom. \textit{Id.} at 1115, 1118. The facts recited here are described in that light as well.
ficers arrived on the scene shortly thereafter. At some point, Jane Hibner—Mr. Lundstrom’s girlfriend and the only woman in the house—came outside. Officers eventually handcuffed her and made her sit on the curb for the duration of events. Before entering Mr. Lundstrom’s home, police dispatch contacted the 911 caller who initially reported the incident, to inform the caller that there did not appear to be a child at the Lundstrom residence, to which the caller replied: “Well, then it’s the wrong address, because this was an infant and a female adult.” Some of the officers reached Mr. Lundstrom’s backyard and saw him pacing back and forth in his bedroom looking upset. By telephone, the police dispatcher eventually convinced Mr. Lundstrom to exit his home and surrender to the officers’ custody. Once they had secured Mr. Lundstrom, they entered and searched his home looking for a child, which they did not find.

Mr. Lundstrom and Ms. Hibner sued the Albuquerque Police Department officers involved, including Officer Romero, for civil rights violations under 42 U.S.C. § 1983. They alleged several violations, one of which being unlawful entry into their home. The district court granted summary judgment in favor of the officers on grounds of qualified immunity. Although the Tenth Circuit affirmed the district court as to many of the claims, it reversed on some grounds, including Mr. Lundstrom’s and Ms. Hibner’s claim of unlawful entry. The Tenth Circuit noted the lack of corroborating evidence to support the officers’ concern that someone inside the house was in need of assistance, and that “every fact presented to [the officers] since their arrival at the home indicated that

203. Id. at 1116.
204. Id. at 1115, 1116.
205. See id. at 1116–17.
206. Id. at 1117. The Tenth Circuit construed the facts to assume that the officers who entered Mr. Lundstrom’s home were aware of these facts and thus aware that there was no child in the house. See id. at 1128 (“[B]oth Lundstrom and Hibner had been handcuffed and positioned away from the house, Lundstrom had told the officers no child was at the residence, and the neighbor had indicated she might have reported the wrong address . . . . The record does not indicate the officers encountered anything suggesting someone inside Lundstrom’s house was in immediate danger or seriously injured.”).
207. Id. at 1117.
208. Id.
209. Id. at 1118.
210. Id. at 1115, 1118.
211. Id. at 1118.
212. Id. at 1115.
213. Id. at 1129.
there was no ongoing emergency.”214 The Tenth Circuit recited those facts:

[T]he neighbor reported hearing a woman—not a man—disciplining a child; Lundstrom told Officer Romero there was no child at the house; the neighbor back-tracked about her initial story and the location of the incident; Hibner had yet to be interviewed; some time had passed since the initial 911 call and nothing otherwise suggested criminal activity; and the officers did not perceive anything suggesting a child’s presence at the house.215

The Tenth Circuit concluded that “[t]he officers did not have a reasonable basis for believing Lundstrom posed an immediate threat to them, himself, Ms. Hibner, or anyone else. Nor did they have grounds to believe a child was in the home—Lundstrom denied it and Ms. Hibner’s knowledge had been ignored to this point.”216 The Tenth Circuit thus remanded the case to the district court.217

The conclusion to which these cases lead is that so long as the police weave together some facts and a plausible justification for believing that someone inside the home needed immediate assistance, the Tenth Circuit will accept that justification as objectively reasonable. As shown above, the Tenth Circuit rejects an emergency-aid entry only where there are no facts to plausibly support the officers’ belief218 or where the officer is aware of facts that undermine the belief that an emergency-aid situation exists.219 The Supreme Court might have intended such a low standard when it decided Brigham City v. Stuart and Michigan v. Fisher, but it is

214. Id. at 1123–24 (“We stress the lack of corroborating evidence at this point in the encounter.”).
215. Id. at 1124.
216. Id. at 1124–25. This statement—that the officers ignored Ms. Hibner’s knowledge—suggests that the Tenth Circuit was considering the officers’ subjective mental state in its Fourth Amendment analysis. While the Tenth Circuit regularly says that the officer’s subjective intent is irrelevant, considering the officer’s mental state is almost unavoidable, as an officer’s actions cannot be analyzed without some reference to the officer’s purpose in taking—or, in this case, not taking—those actions.
217. Id. at 1129.
218. See, e.g., Cortez v. McCauley, 478 F.3d at 1108, 1124 (10th Cir. 2007) (finding the emergency-aid exception did not justify a warrantless and probable-cause-less entry where the officers “failed to articulate any specific facts that led them to believe the Plaintiffs posed a threat to the officers or others.”) (emphasis added).
219. See Lundstrom, 478 F.3d at 1128–29 (finding the emergency-aid exception did not justify entry into a house where officers had detained both known occupants, there was no indication that anyone else was inside, and it was suggested that they might be at the wrong house).
intellectually dishonest to conclude that the language of those cases demands that conclusion.\textsuperscript{220}

D. Except in Emergency-Aid Situations, Courts Agree that Entry Under the Exigent Circumstances Exception Requires Probable Cause

In the context of a search or seizure in the course of a criminal investigation, an officer may constitutionally enter a person's home only if one of two criteria is present: (1) the officer has a search warrant supported by probable cause; or (2) the officer has probable cause and exigent circumstances.\textsuperscript{221} Moreover, what constitutes an exigency is highly circumscribed and thus some situations that appear to be emergencies will not justify warrantless entry.\textsuperscript{222} The criminal investigation exigencies that have been clearly recognized, as described above, are hot pursuit or the imminent destruction of evidence.\textsuperscript{223} It is only when the police officer is acting in her rescuer capacity that probable cause is not necessary, and that conclusion is based on the Supreme Court's decision not to analyze emergency-aid cases using the language of probable cause.\textsuperscript{224}

The Supreme Court's decision not to discuss probable cause in the emergency-aid context makes sense. The Court defined probable cause to mean a reasonable probability that a crime is being committed or that the

\textsuperscript{220} Indeed, this article will argue that the standard should be higher than what the Tenth Circuit has applied.

\textsuperscript{221} See Kirk v. Louisiana, 536 U.S. 635, 638 (2002) (holding that “police officers need either a warrant or probable cause plus exigent circumstances, in order to make a lawful entry into a home”).

\textsuperscript{222} See, e.g., Manzanares v. Higdon, 575 F.3d at 1142–43 (10th Cir. 2009) (“[E]ven when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within a home, police may not enter without a warrant absent exigent circumstances.”) (citing Groh v. Ramirez, 540 U.S. 551, 559 (2004)) (internal quotation marks omitted).

\textsuperscript{223} See supra Part III.A.

\textsuperscript{224} See United States v. Najar, 451 F.3d 710, 718 (noting that the Supreme Court in Brigham City v. Stuart, which was determining “whether the risk of personal danger created exigent circumstances,” did not “require probable cause in this type of exigent circumstances”). The Tenth Circuit expressly referenced the distinction in standards in an opinion decided a year after United States v. Najar.

[T]he sole question in this case is, viewing the record testimony without the affidavit, whether the officers had both probable cause and exigent circumstances justifying not only their warrantless entry but also their seizure. The Supreme Court has made clear, however, that police may enter a home without a warrant where they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.

West v. Keef, 479 F.3d 757, 759 (10th Cir. 2007).
officer will find evidence of criminality in a particular place. The definition has two important features. The first is the quantity of evidence or knowledge that the officer must have, which the Court described as enough to warrant a man of reasonable caution in believing that a certain fact is true. The second is of what fact or facts the officer must have evidence or knowledge; such facts include: (1) that the person to be arrested has committed or is committing a crime; or (2) that the place to be searched will contain evidence of a crime. The term probable cause thus implies that there is criminal activity afoot.

When the officer is acting in his rescuer capacity, the term probable cause is a poor fit. To demand that an officer have probable cause before entering a home to rescue a person would be to mandate that the officer only rescue suspected criminals or those associated with suspected criminals, otherwise the criminality element would be absent. Several situations come to mind in which a person might be injured or imperiled in

225. See, e.g., Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2639 (2009) (“Probable cause exists where ‘the facts and circumstances within [an officer’s] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed, and that evidence bearing on that offense will be found in the place to be searched.”) (internal citations and quotation marks omitted); id. (“Perhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer’s evidence search is that it raise a fair probability or a substantial chance of discovering evidence of criminal activity.”) (internal citation and quotation marks omitted); New Jersey v. T.L.O., 469 U.S. 325, 358 (1985) Brennan, J. dissenting) (describing probable cause as knowledge “of facts and circumstances that warrant a prudent man in believing that the offense has been committed”) (alterations and internal quotation marks omitted); Texas v. Brown, 460 U.S. 730, 741 (1983) (“[P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would ‘warrant a man of reasonable caution in the belief,’ that certain items may be contraband or stolen property or useful as evidence of a crime . . . .”) (internal citation omitted); Gerstein v. Pugh, 420 U.S. 103, 111–12 (1975) (“The standard for arrest is probable cause, defined in terms of facts and circumstances ‘sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense.’”) (quoting Beck v. Ohio, 379 U.S. 89, 91 (1964)); Ker v. California, 374 U.S. 23, 35 (1963) (“[P]robable cause . . . exists ‘where the facts and circumstances within . . . (the officers’) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that [sic] an offense has been or is being committed.’”) (quoting Brinegar v. United States, 338 U.S. 175–76 (1949)); United States v. Tobin, 923 F.2d 1506, 1510 (11th Cir. 1991) (en banc) (“[P]robable cause exists ‘where the facts lead a reasonably cautious person to believe that the search will uncover evidence of a crime.’”) (quoting United States v. Burgos, 720 F.2d 1520, 1525 (11th Cir.1983)).

226. See supra note 225.

227. Id.
the home, and yet there is no obvious crime to investigate. Imagine, for example, that a homeowner accidentally started a kitchen fire and could not reach the door of the house. There would be no probable cause to enter to rescue the homeowner, because there is no reason to believe the homeowner committed a crime or that there is evidence of a crime inside the home. Should the officers sit idly by and watch as the house burns? No.

Instead, the Court in Brigham City and Michigan v. Fisher discussed the emergency-aid doctrine in terms of having an “objectively reasonable basis to believe.” Of course, if the Court wanted to use the same quantum of evidence as it required for traditional probable cause, but change the subject matter, it could have altered its definition of probable cause, or it could have defined its objectively reasonable basis test in terms of probable cause. It did neither, however, and courts are left to ponder as to the correct quantum of evidence necessary to form a reasonable basis to believe a fact. As with most Fourth Amendment doctrines, the analysis is objective and based on the facts known to the officer at the time of the controversial conduct; the officers’ subjective intent is irrelevant.

228. Several cases illustrate this point. See, e.g., United States v. Taylor, 624 F.3d 626 (4th Cir. 2010) (“[A] warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person”) (quoting Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963)); Steigler v. Anderson, 496 F.2d 793, 795 (3d Cir. 1974) (“[W]e think it is beyond question that firemen have a right to enter a premise to suppress a fire without having to obtain a warrant . . . . Moreover, seeking out and rescuing trapped occupants . . . involve[s] [a] proper fire fighting function[] which cannot reasonably be viewed as searches under the fourth amendment.”) (emphasis added).

229. See Michigan v. Fisher, 130 S. Ct. 546, 548 (2009); Brigham City v. Stuart, 547 U.S. 398, 406 (2006). One thing the Supreme Court did not do in Brigham City or Michigan v. Fisher, unfortunately, is discuss the quantum of evidence necessary to form an objectively reasonable belief. See generally Fisher, 130 S. Ct. 546; Brigham City, 547 U.S. 398. The Court might have intended the objectively reasonable basis test to require a lower quantum of proof, or it might merely have intended to leave the existing definition of probable cause undisturbed. The latter rationale is more likely. As will be discussed below, this is one of the problems with the doctrine the Tenth Circuit set down in Armijo.

230. See Graham v. Connor, 490 U.S. 386, 397 (1989) (commenting that, for Fourth Amendment purposes, the reasonableness of an officer’s belief must be assessed in the particular circumstances confronting the officer at the time); Brigham City, 547 U.S. at 404 (“An action is ‘reasonable’ under the Fourth Amendment, regardless of the individual officer’s state of mind, ‘as long as the circumstances, viewed objectively, justify [the] action.’”) (quoting Scott v. United States, 436 U.S. 128, 138 (1978)) (alterations and internal quotation marks omitted).
IV. THE ARMijo CASE

The Armijo case involved difficult facts. On September 22, 2006, anonymous callers called in two bomb threats to Oñate High School in Las Cruces, New Mexico.231 The police officers assigned to the school had dealt with several bombing or shooting threats, as well as other unspecified “gang problems,” over the past two months.232

A. An Unknown Person Called in Bomb Threats on Oñate High School

On the morning of September 22, two female students predicted the bomb threats to the school’s principal.233 The students stated they had seen a fight between two rival gangs and heard a gang member threaten that his gang would bring guns to school, call in a bomb threat, and then open fire on students when they came outside.234 The students did not know who the gang members were, but stated that they recognized them from Oñate High School and assumed they were referring to that school.235

Later, a woman who identified herself as a mother of a student attending Mayfield High School called Oñate High School’s principal.236 She reported that her son told her that a boy named Chris planned to call in a bomb threat.237 This mother stated that she believed Chris was a member of the East Siders gang—one of the two gangs involved in the scuffle about which the female students told the principal earlier.238 She also stated that Chris had previously gone to Oñate High School but re-

231. Armijo ex rel. Armijo Sanchez v. Peterson, 601 F.3d 1065, 1068 (10th Cir. 2010), cert. denied, 131 S. Ct. 1473 (2011). The statement of facts in this article is very similar to that found in the Armijo opinion because Fourth Amendment analysis is inherently fact-intensive. The Tenth Circuit stated the facts clearly and concisely, and this article uses similar language so as not to risk changing the reader’s understanding of what occurred.

232. Id. While the opinion indicates that there had been several threats, there is nothing in the opinion to indicate that there had ever been an actual bombing or shooting at Oñate High School. See id.

233. Id.

234. Id. This rumor was apparently the only reported reference to a potential school shooting. See id.

235. Id.

236. Id.

237. Id. The officers were acting on fourth-hand information. See id. Chris’s statements were conveyed to this other student, who then conveyed them to his mother, who conveyed them to the principal at Oñate High School, who then told the officers. See id. This further underscores the weakness of the facts upon which the officers entered Chris’s home.

238. Id.
cently transferred to Mayfield. The principal of Oñate High School told the police about both tips.

At 10:35 a.m., a young-sounding male made the first bomb threat on Oñate via a 911 call. The officers, believing the shooting threat to be more dangerous than the bomb threat, had the principal keep the students inside. At 11:00 a.m., another juvenile-sounding male called Oñate and made a bomb threat. Both calls were made from disconnected cellular telephones and were therefore too difficult to trace.

Shortly after the second bomb threat, the officers concluded that Christopher Armijo was the only suspect. Chris was considered a suspect because the officers believed that: (1) Oñate High School had recently expelled him and he now attended Mayfield High School; (2) Chris was associated with the East Siders gang; and (3) no other student named “Chris” had recently transferred between those schools. Based on that information, the police dispatched four officers to Chris’s home.

B. The Police Entered and Detained Chris

Approximately twenty minutes after the second bomb threat, the officers arrived at Chris’s home, knocked on the door, loudly identified themselves, and asked anyone inside to come to the door. The officers

239. Id.
240. Id.
241. Id.
242. Id.
243. Id.
244. Id. As the Tenth Circuit explained: “All cell phones can call 911, even if their service is disconnected, but disconnected phones are harder to trace than functioning phones.” Id.
245. Id. at 1068, 1077.
246. Id. at 1068. It turned out that not all of these facts were correct, but the reasonableness of the officers’ actions is determined in the context of the facts that they knew or reasonably believed at the time of the challenged actions. As the Tenth Circuit put it:

Here, the officers had a history of gang problems, two accounts of what might occur, and the bomb threats. Some information provided a link (albeit incorrectly) to Mr. Armijo. . . . Still, the Fourth Amendment evaluates reasonableness based upon what the officers reasonably believed at the time. It does not matter that, in retrospect, information provided to the officers was wrong, and that Mr. Armijo apparently had nothing to do with the threats.

See id. at 1072 (citing Michigan v. Fisher, 130 S. Ct. 546, 549 (2009)). In other words, that the facts were incorrect is not relevant, so long as the officers’ belief in those underlying facts was reasonable. The Tenth Circuit implicitly concluded that the officers’ beliefs were reasonable.
247. Id. at 1068.
248. Id. at 1068–69.
called out and knocked on the door for two or three minutes. When nobody answered, the officers tested the door knob and found the door was unlocked. The officers radioed to a sergeant who was at the school; the sergeant thought Chris was the only suspect and authorized the officers to enter the home. The officers thus entered and began to search for Chris inside.

The officers found Chris in his bedroom, where he was sound asleep. Two of the officers brandished their guns in Chris’s face and yelled at him to get up. One or more of them pulled him out of bed. One handcuffed him, and one took him out onto his porch, where he stood wearing only his underwear and a t-shirt. After a five-minute search of the house, and an investigation of Chris’s cellular telephone and the house’s hard-line telephone, the officers concluded that neither telephone had called in the bomb threats. At that point, the officers removed Chris’s handcuffs and left.

C. Chris’s Mother Sued the Officers and Lost

Martha Armijo, Chris’s mother, sued the police officers under 42 U.S.C. § 1983, based on what she believed was an unlawful entry and search of her home and an unlawful detention of her son. In response to the suit, the defendants moved for summary judgment on the grounds of qualified immunity. The magistrate judge denied the motion, stating that there were material factual issues in dispute that necessitated a

249. Id. at 1069.
250. Id.
251. Id. The Tenth Circuit explained the sergeant’s apparent chain of reasoning for believing Chris was a suspect as follows: “From her own knowledge, the sergeant believed Oñate High School had recently expelled Mr. Armijo, that he now attended Mayfield High School, that expelled students might be angry with the school, and that bomb threats generally were made by angry or problematic students.” Id.
252. Id.
253. Id.
254. Id.
255. Id.
256. Id.
257. Id.
258. Id.
259. Armijo, 601 F.3d at 1067.
260. Id. at 1067–68, 1069.
261. The parties consented to proceed before the Honorable Robert H. Scott, United States Magistrate Judge, who ruled on the motion for summary judgment. See Armijo v. Las Cruces Police Officers, No. 09-0090 RHS/CEG, slip op. at 4 (D.N.M. Apr. 9, 2009) (Scott, M.J.).
The defendants filed an appeal challenging the magistrate judge’s qualified-immunity finding.263 The Honorable Mary Beck Briscoe, David M. Ebel, and Paul J. Kelly, Jr., U.S. Circuit Judges, presided.264 The panel, in a two-to-one decision, reversed.265

Judge Kelly’s majority opinion, in which Judge Ebel joined, began with the presumption that searches and seizures within a home and without a warrant are presumptively unreasonable.266 It then cited to Mincey v. Arizona for the proposition that sometimes exigent circumstances allow officers to dispense with the warrant requirement, and to Brigham City v. Stuart for the proposition that one such exigency is where the officers have an objectively reasonable belief that they must enter to assist persons who are seriously injured or threatened with such serious injury inside.267 To the court’s credit, it acknowledged that the Supreme Court’s precedent had gone only so far as to allow officers to enter when an occupant is in peril.268 It also acknowledged that, “[h]ere, officers acted to protect not the house’s occupants, but the students and staff at a nearby high school”—i.e., that the Court was stretching the emergency-aid doctrine to a place it had not yet gone.269 Ultimately, the Court modified existing law to hold that “the exigent circumstances exception permits warrantless home entries when officers reasonably believe that some actor or object in a house may immediately cause harm to persons or property not in or near the house.”270 With that doctrine in place, the Court concluded that “[t]he information the officers had was enough for a reasonable belief that exigent circumstances justified entry.”271 The Tenth Circuit thus reversed, holding that the officers were entitled to qualified immunity because they had committed no constitutional violation.272

262. See id. at 3–4; see also Armijo, 601 F.3d at 1069.
263. Armijo, 601 F.3d at 1069.
264. See id. at 1067.
265. Id.
266. Id. at 1067, 1070.
267. Id. at 1070.
268. Id. at 1070–71 (“The Supreme Court illustrated that ‘police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.’”) (quoting Brigham City v. Stuart, 547 U.S. 398, 400 (2006)).
269. Id. at 1071.
270. Id.
271. Id. at 1072.
D. Chief Judge Briscoe Dissents

Chief Judge Briscoe dissented from the Armijo decision. The first concern she expressed was that the majority exercised jurisdiction over an interlocutory appeal of a district court’s qualified-immunity decision, which turned on a disputed issue of material fact. She found that, “[b]y asserting jurisdiction over this appeal, the majority implicitly, but erroneously, concludes, contrary to the conclusion reached by the district court, that reasonable minds could not differ with regard to whether the facts leading up to the officers’ entry into plaintiff’s home gave rise to exigent circumstances.”

In addition to the jurisdictional issue, Chief Judge Briscoe cited three additional points on which she disagreed with the majority’s opinion. First, she faulted the majority for extending Brigham City v. Stuart to what is, essentially, an investigative law enforcement entry into a citizen’s home without probable cause or a warrant. She underscored, as this article does, that exigent circumstances generally must be coupled with probable cause where the officers are engaged in law enforcement/investigative conduct. Second, she asserted that the majority erred in finding the officers’ conduct justified under the protective-sweep doctrine. Chief Judge Briscoe argued that such protective sweeps are only authorized incident to a valid arrest and that the Tenth Circuit has refused to extend the protective sweep justification beyond circumstances involving arrests. Third, she contended that the majority erred in con-

273. It appears that Chief Judge Briscoe became Chief Judge of the Tenth Circuit in 2010, near the time that Armijo was decided. See The U.S. Tenth Circuit Court of Appeals, Chief Judge Mary Beck Briscoe, http://www.ca10.uscourts.gov/chambers/index.php?id=15 (last visited Mar. 6, 2011) (stating that Judge Briscoe “[s]erved as chief judge, 2010-present.”). Although she is not denoted as Chief Judge in the Armijo opinion, see Armijo, 601 F.3d at 1075 (“BRISCOE, Circuit Judge, dissenting”), this article will refer to her as Chief Judge.

274. Armijo, 601 F.3d at 1075.

275. Id. at 1075–76.

276. Id. at 1076 (Briscoe, C.J., dissenting). Chief Judge Briscoe’s conclusion in this regard appears correct, but this article focuses on the doctrinal underpinnings of the majority’s new rule of law.

277. Id.

278. See id. at 1079–80.

279. See id. at 1079–82.

280. Id. at 1082. An extensive discussion of the protective-sweep doctrine is beyond the scope of this article, however, Chief Judge Briscoe provides a thorough definition of it in her dissent. See id. at 1082–83.

281. See id. at 1083. It appears to be true that the protective-sweep doctrine has no place in the facts of Armijo, primarily because such sweeps are appropriate only after a valid arrest. See Maryland v. Buie, 494 U.S. 325, 333 (1990) ( contrasting a
cluding that Terry v. Ohio justified the officers’ in-home seizure of Chris. She asserted that when the officers handcuffed Chris and removed him to his porch while they conducted a search of his home, they were executing an arrest, not a Terry stop.

V. WHAT’S WRONG WITH ARMijo?

What is wrong with what the Tenth Circuit did? First, the Tenth Circuit created a new exception to the Fourth Amendment—one that the Supreme Court has alluded to in the past but never applied. It held that “the exigent circumstances exception permits warrantless home entries protective sweep with a Terry frisk: “A Terry . . . frisk occurs before a police-citizen confrontation has escalated to the point of arrest. A protective sweep, in contrast, occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime.”); United States v. Freeman, 479 F.3d 743, 750 (10th Cir. 2007) (“A ‘protective sweep’ is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others.”) (citing Buie, 494 U.S. at 327). According to the Armijo majority, Chris was never arrested. See Armijo, 601 F.3d at 1072 (majority) (“As we discuss below, the officers did not arrest Mr. Armijo, so the search could not have been incident to an arrest.”). 282. Id. at 1085 (Briscoe, C.J., dissenting).

283. See id. at 1083–85. A Terry stop is a brief investigatory detention that can be executed when an officer reasonably suspects a person is involved in criminal activity. United States v. Arvizu, 534 U.S. 266, 273 (2002) (“[T]he Fourth Amendment is satisfied if the officer’s action is supported by reasonable suspicion to believe that criminal activity may be afoot (quotations marks and citations omitted)). An officer can execute a Terry stop based on less information than would be necessary to establish probable cause, but the permissible scope of the detention is also narrower. See id. at 274 (“[T]he likelihood of criminal activity need not rise to the level required for probable cause . . . “); Ornelas v. United States, 517 U.S. 690, 693 (1996) (“An investigatory stop is permissible under the Fourth Amendment if supported by reasonable suspicion . . . “); United States v. Place, 462 U.S. 696, 714 (1983) (“It is clear that Terry, and the cases that followed it, permit only brief investigative stops and extremely limited searches based on reasonable suspicion.”) (Brennan, J., concurring); Dunaway v. New York, 442 U.S. 200, 210 (1979) (describing Terry as creating a “narrowly defined less intrusive seizure on grounds less rigorous than probable cause, but only for the purpose of a pat-down for weapons”). If the stop exceeds the permissible scope, it is a constitutional violation unless the officer had probable cause. See Minnesota v. Dickerson, 508 U.S. 366, 373 (1993) (“If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry and its fruits will be suppressed.”); Place, 462 U.S. at 709–10 (holding that under circumstances the officers’ seizure of the defendant’s luggage was unreasonable in the absence of probable cause and exceeded “the permissible limits of a Terry-type investigative stop”); Florida v. Royer, 460 U.S. 491, 500 (1983) (“[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.”).
when officers reasonably believe that some actor or object in a house may *immediately* cause harm to persons or property not in or near the house.”

While such a rule may be justified in some extreme circumstances, *Armijo* did not present those circumstances. Second, it perpetuated a trend of requiring minimal proof to apply this variant of the exigent circumstances exception. Third, and most importantly, it articulated its rule in overly broad terms that could allow officers conducting routine criminal investigations to enter individuals’ homes without probable cause. Finally, to the extent the exception correctly reflects federal law, the court’s application of the rule is questionable.

**A. The Supreme Court Has Never Allowed Entry Into a Home for the Purpose of Averting Harm to Someone Outside**

The Supreme Court has never applied the emergency-aid exception in the way that the Tenth Circuit used it in *Armijo*. As described above, the first mention of an emergency-aid exception appears to be in *Mincey v. Arizona*, and the Supreme Court did not actually apply it until 2006, in *Brigham City v. Stuart*, and 2009, in *Michigan v. Fisher*.

Even when the Court has applied the exception, in *Brigham City* and *Fisher*, it did so only in the rescuer context, i.e., in the context of a police officer entering a home to avert imminent harm to someone inside. While the Supreme Court has stated that it might be permissible for an officer to enter a home to avert imminent harm to someone outside the home, it has never applied that rule.

The Supreme Court has opined several times how exceptions to the warrant and probable-cause requirements should be highly circumscribed. Justice Scalia, in *California v. Acevedo*, asserted that the Fourth

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285. See supra Parts III.B1–B3.
286. See Minnesota v. Olson, 495 U.S. 91, 95 (1990) (“The Minnesota Supreme Court applied essentially the correct standard in . . . observ[ing] that a warrantless intrusion may be justified by . . . the risk of danger to the police or to other persons inside or outside the dwelling.”) (quoting State v. Olson, 436 N.W.2d 92, 97 (Minn. 1989)) (internal quotation marks omitted).
287. See, e.g., *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (“[S]earches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”) (emphasis added) (internal quotations marks omitted) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)); *Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971) (“[A] search or seizure carried out on a suspect’s premises without a warrant is *per se* unreasonable, unless the police can
Amendment has more than enough exceptions as it is.288 The Tenth Circuit in Armijo acknowledged that it was expanding upon, rather than applying, its existing doctrine. The court stated:

We must decide whether the exigent circumstances exception only justifies warrantless entries into a house to aid a potential victim in the house, or if it also justifies warrantless entries into a house to stop a person or property inside the house from immediately harming people not in or near the house.289

The Tenth Circuit thus understood it was navigating uncharted territory when it drafted the Armijo opinion. It should have followed established doctrine.

That is not to say that there will never exist a fact pattern in which the rule articulated in Armijo will be appropriate. Especially now, after the attacks of September 11, 2001, the United States is on heightened alert of terrorism. The concern remains fresh in American minds thanks to recent attempted attacks290 and terrorism’s incorporation into popular show that it falls within one of a carefully defined set of exceptions . . . .”) (emphasis added).


289. Armijo ex rel. Armijo Sanchez v. Peterson, 601 F.3d 1065, 1071 (10th Cir. 2010), cert. denied, 131 S. Ct. 1473 (2011). The Tenth Circuit’s use of emphasis is interesting. It does not emphasize the word “immediately,” which is the only word emphasized in its statement of the rule of law that the case sets forth. See id. (holding “that the exigent circumstances exception permits warrantless home entries when officers reasonably believe that some actor or object in a house may immediately cause harm to persons or property not in or near the house”). The Tenth Circuit’s loose definition of “immediately” is one of the primary concerns with the Armijo holding. If the term “immediately” is not well constrained, any tip stating that a person inside a house might soon commit a crime that would have a victim would allow police officers to enter that person’s house with little or no concern for the veracity of that tip.

In the context of a potential terrorist attack, perhaps involving nuclear or chemical weapons, where the authorities have fairly reliable information about an attack that could harm a substantial number of people, a rule such as that which the Tenth Circuit set forth might be proper. The facts of Armijo, however, as will be discussed in more length in Part V, do not justify this rule. Moreover, expanding the emergency-aid exception to a situation in which someone who is not in or near the home is threatened with imminent harm inserts into Fourth Amendment jurisprudence a new exception that the Supreme Court has not endorsed. Given that the Supreme Court has been vocal about how highly circumscribed exceptions to the warrant and probable cause requirements should be, the Tenth Circuit should probably have left it to the Supreme Court to expand this exception, if it saw fit to do so.

B. The Burden for Showing an Objectively Reasonable Belief That Someone Is in Immediate Need of Assistance Is Too Low

The second problem with Armijo is that it creates an exception to the Fourth Amendment that allows officers to enter a home on a substantially lower showing than probable cause. Armijo sets down a rule under which a law enforcement officer may enter a home with no more than an objectively reasonable belief that someone or something inside the home will immediately cause harm to someone not in or near the home. This begs the question: what quantum of proof must an officer have to formulate an objectively reasonable belief? In Armijo, the Tenth Circuit acknowledged that “the standard [for reasonable belief] is more lenient than . . . [the standard for] probable cause.” As was shown in Part


291. For example, the television series *24*, which prominently and repeatedly depicts terrorist attacks against the United States, premiered on November 6, 2001—less than a month after the attacks of 9/11. See *24 on TV.com*, http://www.tv.com/24/show/3866/summary.html (last visited Nov. 11, 2010). The show’s final season aired in 2010, and producers plan to make a movie based on the series. See Linda Stasi, *Last Minute; Finally, Peace for “24” . . . Until the Movie*, N.Y. Post, May 25, 2010, at 69.

292. See supra notes 22, 31 & 287.


294. Id. (quoting United States v. Gambino-Zavala, 539 F.3d 1221, 1225 (10th Cir. 2008))). Probable cause is defined as knowledge of facts sufficient “to warrant a man of reasonable caution in the belief” that a person committed a crime or that evidence of a crime will be found at a particular place. Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2639 (2009) (quoting *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949)). However, the Tenth Circuit acknowledged in *Armijo* that “the standard [for reasonable belief] is more lenient than [the standard for] probable
II.C, the reasonable belief burden is extraordinarily low. So long as the officer knows facts from which a judge, trained in both logic and Fourth Amendment doctrine, can create a plausible chain of inference to the desired fact, the Tenth Circuit tends to find the officer had an objectively reasonable basis to believe the fact existed. The Tenth Circuit has even allowed officers to engage in some degree of speculation in arriving at its objectively reasonable belief, such as speculating whether any person is inside the house they seek to enter.

It is not clear that the Supreme Court intended the standard for an objectively reasonable belief in the emergency-aid context to be lower than the standard for probable cause, or at least as much lower as the Tenth Circuit has made it. What the Supreme Court demanded, after all, was an objectively reasonable basis for believing that the fact—that someone inside the house needs immediate aid—was true. The Court did not ask merely for an objectively reasonable basis for believing that

cause.” Armijo, 601 F.3d at 1071 (10th Cir. 2010). It is not clear that this conclusion was correct, as the Tenth Circuit bases it solely on the fact that the Supreme Court in Brigham City v. Stuart did not require probable cause to enter under the emergency-aid exception. See.Gambino-Zavala, 539 F.3d at 1225 (describing the Najar opinion as “explaining the Supreme Court in Brigham City did not require the government to show the officers had probable cause”); United States v. Najar, 451 F.3d 710, 718 (10th Cir. 2006) (noting that the Supreme Court did not “require probable cause in this type of exigent circumstances [i.e., emergency aid]”) (citing Brigham City v. Stuart, 547 U.S. 398 (2006)). As discussed supra Part II.C, the Supreme Court likely used the “objectively reasonable basis to believe” standard, rather than the probable cause standard, because probable cause implies a nexus to criminal conduct and there is no reason to require criminal conduct to justify entry under the emergency-aid exception. The standards require suspicion of different things, but do not clearly require a different quantum of suspicion.

295. See supra Part III.C.1.

296. See, e.g., United States v. Layman, 244 Fed. Appx. 206, 211 (10th Cir. 2007) (permitting the officers to speculate that a person was inside a mobile home and might be incapacitated based on strong chemical fumes and evidence that someone lived there). But see Lundstrom v. Romero, 616 F.3d 1108, 1124 (10th Cir. 2010) (finding officers’ belief that a child was inside the house unreasonable in the face of the homeowner’s assertion to the contrary and the tipster’s suggestion that he might have given the officers the wrong address); Cortez v. McCauley, 478 F.3d 1108, 1124 (10th Cir. 2007) (chastising the officers for having “nothing, beyond innuendo and speculation, to establish objectively reasonable grounds of an emergency”).

297. Michigan v. Fisher, 130 S. Ct. 546, 548 (2009) (“This ‘emergency aid exception’ . . . requires only an objectively reasonable basis for believing that a person within the house is in need of immediate aid[,]”’ (emphasis added) (internal alterations, citations, and quotation marks omitted); Brigham City, 547 U.S. at 400 (“In this case we consider whether police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.”) (emphasis added).
the fact might be true. Actual belief in a fact is objectively reasonable only if there is some degree of perceived probability that the fact is true.

Moreover, the Supreme Court did not require law enforcement officers to have an objectively reasonable belief, but rather to have an objectively reasonable basis to believe. This basis must be knowledge of other facts from which one may reasonably—not possibly or plausibly—infer the ultimate fact. One would hope that a reasonable law enforcement officer would not believe a person is in immediate peril unless that officer had some non-nominal amount of information leading to that conclusion. The Tenth Circuit’s overly permissive test appears to dictate that an officer’s belief in a fact is objectively reasonable so long as there exists some fact from which one could reason that the fact is possibly true, no matter how implausible it may be in light of other circumstances.

Second, the Tenth Circuit’s rationale for holding that the objectively reasonable basis standard is more lenient than the probable cause standard leaves much to be desired. It appears that the court based this important conclusion on the fact that the Supreme Court in *Brigham City v. Stuart* and *Michigan v. Fisher* did not require probable cause in the emergency-aid context. As discussed in Parts III.B and III.D, the Supreme Court likely used the “objectively reasonable basis to believe” standard, rather than the probable cause standard, because probable cause implies criminality, and there is no reason to require criminal conduct to justify entry under the emergency-aid exception. The emergency-aid exception applies when officers reasonably believe someone is in peril, and not when they suspect that they will find criminal conduct or evidence of criminality. The two standards thus require suspicion of different things, but do not clearly require a different quantum of suspicion.

One might suggest that the “objectively reasonable belief” standard set forth in *Brigham City v. Stuart* and *Michigan v. Fisher* is a re-articulation of the “reasonable suspicion” standard used in the context of less-

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298. Again, the fact to which the Supreme Court referred was that entry is necessary to render aid to, or avert imminent harm to, someone inside the house. *See Fisher*, 130 S. Ct. at 548; *Brigham City*, 547 U.S. at 400.

299. For example, one might subjectively believe that he or she is the target of a foreign government’s assassination plot. The fact may well be true; but, without some degree of proof, few would find that belief to be objectively reasonable.

300. *See Gambino-Zavala*, 539 F.3d at 1225 (“[T]he Supreme Court has explained that the standard is more lenient than the more stringent probable cause standard.”) (citing United States v. Najar, 451 F.3d 710, 718 (10th Cir. 2006); *Najar*, 451 F.3d at 718 (noting that the Supreme Court did not “require probable cause in this type of exigent circumstances [i.e., emergency aid]”) (citing *Brigham City*, 547 U.S. 398 (2006)).
intrusive searches and seizures, such as Terry stops. That conclusion seems baseless and flawed. To satisfy the reasonable suspicion standard, an officer need have only “some minimal level of objective justification” for executing the search, “something more than an inchoate and unparticularized suspicion or hunch.” This standard is easy to meet. Probable cause, on the other hand,

“exists where the facts and circumstances within [an officer’s] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed,” and that evidence bearing on that offense will be found in the place to be searched.

In other words, probable cause is present when an officer is aware of facts sufficient to warrant a reasonable man in believing a fact is true, and the reasonable basis standard of Brigham City v. Stuart is satisfied when the officer has an objectively reasonable basis for believing a fact is true. These two standards sound the same. It is not clear that the quantum of proof necessary to apply the emergency-aid exception is less than the quantum of proof necessary to establish probable cause.

If Brigham City v. Stuart and Michigan v. Fisher are any indication, the quantum of proof necessary to have an objectively reasonable basis to believe someone is in need of immediate aid is relatively high. In Brigham City v. Stuart, the police officers observed multiple adults trying to restrain a minor, saw the minor punch one of the adults in the face, and saw the adult spit blood. The only thing left for the officers to surmise was whether the conflict was going to escalate further; there was already

301. For a description of a Terry stop, see supra note 283.
303. Alabama v. White, 496 U.S. 325, 330 (1990) (“Reasonable suspicion is a less demanding standard than probable cause . . . .”); United States v. DeJear, 552 F.3d 1196, 1200 (10th Cir. 2009) (“[T]he level of suspicion required for reasonable suspicion is ‘considerably less’ than proof by a preponderance of the evidence or that required for probable cause.”) (quoting United States v. Lopez, 518 F.3d 790, 799 (10th Cir. 2008)); Sisneros v. Fisher, 685 F. Supp. 2d 1188, 1214 (D.N.M. 2010) (Browning, J.) (“[S]howing reasonable suspicion is a low burden that is generally easy for an officer to meet.”).
violence occurring. Similarly, in *Michigan v. Fisher*, the officers were responding to a 911 call of a man “going crazy.”307 They arrived to see the front yard of the house in shambles and observed Mr. Fisher pacing around, yelling, and throwing things.308 Again, the officers could see violence occurring inside the house.309 The difference between *Brigham City v. Stuart* and *Michigan v. Fisher* is that, in *Michigan v. Fisher*, the officers could not see the would-be victim, but it was fairly inferable that there was a victim.310 In both cases, the likelihood of harm, and the immediacy thereof, were apparent. In both cases, the officers would easily satisfy the reasonable basis standard, even if the quantum of proof necessary were commensurate with that of probable cause.

By contrast, in *Armijo*, the officers were acting on a called-in bomb threat and a series of rumors, most of which suggested that there was no bomb.311 That is not to suggest that the authorities wrote off the bomb threat as harmless, but the officials acted in a manner suggesting they believed the bomb threat was a ruse. They had information, upon which their actions show they relied heavily, suggesting that the bomb threat was not the highest priority. Moreover, while it is questionable whether the officers reasonably believed that there was a bomb, their belief that Chris was involved was scarcely above the level of speculation. All they had to go on was the first-name “Chris,” a suspected gang affiliation, and a suspected connection to two particular schools, very little of which they verified.312

If Chris were a parolee,313 probationer,314 or part of any other class of persons that the Supreme Court has found to have a decreased expec-
tation of privacy in their home, the *Armijo* decision would be easier to swallow. Chris was accused of a crime, it is true, and a serious one, but the Supreme Court has rejected the idea that a person can waive their Fourth Amendment right to privacy by being accused of committing a crime, even when the evidence is clear.315 The evidence in this case was far from clear. Chris’s expectation of privacy was in full force. Moreover, this was not a case in which Chris was in his car or some other location with an inherently decreased expectation of privacy; he was asleep in his home, where the Fourth Amendment’s protections are at their strongest.316 The Fourth Amendment therefore should have protected Chris and entitled him to demand that law enforcement officers accumulate probable cause before entering his home, even if they were legitimately working under exigent circumstances. Instead, because the officers were put in a difficult position, the Tenth Circuit compromised Chris’s constitutional rights to relieve the officers of liability. Under the Supreme Court’s precedent, the officers’ conduct should have been deterred and not rewarded.

C. The Tenth Circuit’s Expansion of the Emergency-Aid Doctrine to Persons Not in or Near the Home Turns Into a Fourth Amendment Loophole

The third problem with the *Armijo* decision, which is largely a result of the first two, is that it applied the emergency-aid exception to what
was, in reality, a law-enforcement-oriented entry. As discussed above, the
general rule is that even where exigent circumstances exist, officers need
probable cause in addition to exigent circumstances to lawfully enter a
home without a warrant. It is only in the emergency-aid context—
where the law enforcement officer is acting as a rescuer rather than a
criminal investigator—that exigent circumstances can take the place of
both a warrant and probable cause. In Armijo, the Tenth Circuit took an
exception intended to except rescuers from Fourth Amendment scrutiny
and applied it to a general law enforcement investigation.

1. The Emergency-Aid Exception Should Not Apply to What Is
Clearly Investigative Conduct

The Tenth Circuit admitted that its new-found exception is aimed at
the nexus between averting crimes and protecting citizens. The court
stated: “Would-be attackers and victims are frequently not in the same
place, yet a requirement that they must be for exigent circumstances to
occur could hamper law enforcement and compromise public safety.”
Almost all crimes have victims, and stopping the criminal from commit-
ting the crime will always avert the harm to the person or property that
the crime might cause. In a sense, then, almost all preemptive law en-
forcement activities could also be categorized as emergency aid. But the
truth is that the officers in Armijo were acting in their law enforcement
capacity, not their rescuer capacity. The officers in Armijo may have be-
lieved that, by stopping the criminal who might cause harm to the victims,
the officers could avert the injuries to those victims. Based on that be-

317. See supra note 36. The majority in Armijo dismisses Chief Judge Briscoe’s
statement that the exigent circumstances exception requires probable cause by cita-
tion to the emergency-aid cases. See Armijo, 601 F.3d at 1075 (“The dissent alterna-
tively posits that, no matter whether exigent circumstances existed, the officers
needed probable cause to enter the home. Not so. Officers do not need probable
cause if they face exigent circumstances in an emergency.”) (citations omitted). The
general rule, however, is that probable cause and exigent circumstances are both re-
quired; the emergency-aid context is the exception to that general rule. See supra
Parts III.A.4 & III.D.
318. Armijo, 601 F.3d at 1071.
319. The Supreme Court has implicitly rejected such a conclusion by defining
probable cause as knowledge of facts sufficient “to warrant a man of reasonable cau-
tion in the belief that an offense has been or is being committed.” Safford Unified
Brinegar v. United States, 338 U.S. 160, 175–76)).
320. Of course, the analysis cannot focus on the subjective intent of the officer,
both because it would be infeasible to determine the officer’s subjective intent in
every case and because Fourth Amendment analysis almost always ignores the actor’s
subjective intent. See Brigham City v. Stuart, 547 U.S. 398, 404–05 (2006) (“An ac-
lief, however, they entered the home to apprehend a suspect—not to rescue a victim.321 Because the officers were acting as criminal investigators, they were bound by the probable cause and warrant requirements set forth in the Fourth Amendment. The emergency-aid exception is inapplicable in the criminal investigation context, and the exigent circumstances exception requires officers to have probable cause. The officers’ entry was thus unconstitutional.

This conclusion is not to suggest that the proper analysis involves discerning the subjective intent of the investigating officers to ascertain whether they intended to investigate a crime or to rescue a victim. As the Supreme Court has emphasized, the proper analysis is objective and the courts should not consider the subjective intent of the officers.322 Rather, by observing the facts objectively and considering the actions that the officers take, one can usually discern whether the officers are engaged in conduct intended to immediately rescue someone or conduct intended to further a criminal investigation. For example, in both Michigan v. Fisher and Brigham City v. Stuart, the officers observed a dangerous situation and immediately acted in an effort to stop a particular actor from engaging in a foreseeable act and harming a specific victim.

In Armijo, by contrast, officers followed leads and put together clues to track down an individual whom they believed might be plotting to harm a group of people. They did not know that Chris was involved, or how he might be involved; but, they wanted to find out. As discussed in Part V.D, it is unlikely that the officers believed Chris was inside the house if they also believed he was going to blow up or shoot up the school. If they did not think Chris was inside his house, their only plausible purpose in entering would be to find evidence or to learn Chris’s whereabouts. If they did believe Chris was inside the house, their only plausible purpose would be to find out how Chris was involved in plotting whatever harm was to befall Oñate High School. In either case, the officers were investigating. Entering a person’s house for that purpose re-

321. For an explanation why the officers could not have reasonably believed that their entry was immediately necessary to rescue anyone, see infra Part V.D.

322. Michigan v. Fisher, 130 S. Ct. 546, 548–49 (2009) (“This ‘emergency aid exception’ does not depend on the officers’ subjective intent or the seriousness of any crime they are investigating when the emergency arises.”); id. (“‘[T]he test, as we have said, is not what [the officer] believed, but whether there was ‘an objectively reasonable basis for believing’ that medical assistance was needed, or persons were in danger[,]’”) (quoting Brigham City v. Stuart, 547 U.S. 398, 406 (2006)).
quires probable cause and a warrant, or probable cause and exigent circumstances.

2. Avoiding the 24 Effect\textsuperscript{323}

Armijo’s holding, “that the exigent circumstances exception permits warrantless home entries when officers reasonably believe that some actor or object in a house may immediately cause harm to persons or property not in or near the house,”\textsuperscript{324} has some facial appeal, especially to a fan of the television series 24.\textsuperscript{325} One can envision Jack Bauer receiving a vital clue, which suggests that the detonator to a remote-controlled explosive device is inside a house, as seconds tick away on a digital timer. It would save hundreds or thousands of lives if he burst in and disarmed the device before it is too late. No one would fault him for entering the house under those circumstances.

The writers of 24, however, have never constrained Jack Bauer’s actions by the Constitution’s Fourth Amendment, and rightly so. He is a fictional character whose hunches are always right and who never fails to catch the bad guy and protect the country—subject to a few minor disasters throughout the season to keep the viewers interested. Moreover, one never sees Jack Bauer burst into the wrong house, spot a gun or some drugs on a table, and arrest the person inside on possession charges. In reality, however, drug and gun possession charges are standard fare in close-call Fourth Amendment cases.\textsuperscript{326}

In the real world, police officers are fallible, and that fallibility forms part of the purpose of the Fourth Amendment’s protections.\textsuperscript{327} If police


\textsuperscript{324} Armijo ex rel. Armijo Sanchez v. Peterson, 601 F.3d 1065, 1071 (10th Cir. 2010), cert. denied, 131 S. Ct. 1473 (2011).

\textsuperscript{325} See supra note 323.

\textsuperscript{326} See, e.g., United States v. Najar, 451 F.3d 710, 712 (10th Cir. 2006) (police responded to a 911 call, defendant charged with being a felon in possession of a firearm); United States v. Huffman, 461 F.3d 777, 780–81 (6th Cir. 2006) (police responded to a 911 call reporting shots fired, defendant charged with being a felon in possession of a firearm and ammunition).

\textsuperscript{327} These statements are not to suggest that the efforts of our nation’s law enforcement officers are not appreciated. They risk their lives on a daily basis to make our society safer. One would be hard-pressed to find a more noble and selfless profession. The Founding Fathers, however, believed that government actors’ conduct should be restrained, and the Fourth Amendment is one of those constraints. The Author agrees. And, when law enforcement officers or other government agents violate the Fourth Amendment, there must be repercussions.
officers only broke into the houses of criminals, always found evidence, and always made a proper arrest, the Fourth Amendment would be largely unnecessary. At least as much as the procedures required by the Fourth Amendment protect those who have committed crimes, they should also protect those of us in society who have nothing to hide, who have committed no crimes, and who are not in possession of material evidence. Just because police officers are attempting to prevent crime and injury does not mean they should receive a carte blanche to enter innocent individuals’ homes on tips and hunches. Neither logic nor the Fourth Amendment permits officers such freedom.

The policy basis for the exclusionary rule supports keeping Fourth Amendment exceptions highly circumscribed. The exclusionary rule is intended to deter police officers from forsaking the Fourth Amendment’s probable cause and warrant requirements on a hunch that there is evidence in a person’s home. To keep police officers from entering the homes of anyone whom they happen to suspect is guilty of wrongdoing, the exclusionary rule prohibits the government from using against a criminal defendant evidence obtained in contravention of the Fourth Amendment. As the Supreme Court has explained, the exclusionary rule is not an individual right, but rather is intended as a general deterrent to stop officers from violating the Fourth Amendment by withholding from them the fruits of such unlawful entries. The law does not want to withhold the evidence, but it does want to stop officers from entering people’s homes without meeting the prerequisites of probable cause and a warrant. Indeed, the Supreme Court has repeatedly emphasized that the suppression of reliable, probative evidence is the price, and a high price, for the security that the Fourth Amendment provides. Thus, the policies

328. See supra note 39.

329. See id.

330. See Elkins v. United States, 364 U.S. 206, 217 (1960) (stating that the exclusionary rule’s purpose “is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it”).

331. Id.; Herring v. United States, 555 U.S. 135, 141 (2009) (“[T]he exclusionary rule is not an individual right and applies only where it ‘result[s] in appreciable deterrence.’”) (quoting United States v. Leon, 468 U.S. 897, 909 (1984)).

332. See Leon, 468 U.S. at 979 (Stevens, J., concurring in part and dissenting in part) (“It is of course true that the exclusionary rule exerts a high price—the loss of probative evidence of guilt. But that price is one courts have often been required to pay to serve important social goals.”); Kolender v. Lawson, 461 U.S. 352, 355 (1983) (“The price of [law enforcement] effectiveness, however, is intrusion on individual interests protected by the Fourth Amendment.”); United States v. Rabinowitz, 339 U.S. 56, 67–68 (1950) (Black, J., dissenting) (“Unquestionably [the exclusionary rule] will now and then permit a guilty person to escape conviction because of hasty or ill-
undergirding the exclusionary rule also support the notion that courts should be skeptical of expanding law-enforcement-oriented exceptions to the Fourth Amendment. The Tenth Circuit should not have further cut away at the Fourth Amendment’s protections as it did in Armijo.

D. To the Extent That Armijo Properly Reflects Federal Law, the Tenth Circuit Misapplied That Law

Again, the Tenth Circuit in Armijo held “that the exigent circumstances exception permits warrantless home entries when officers reasonably believe that some actor or object in a house may immediately cause harm to persons or property not in or near the house,” even in the absence of probable cause. As was briefly mentioned above, the Supreme Court has suggested, but never held, that entry into a home might be authorized under such circumstances. It is thus possible that the Supreme Court, if presented with the proper fact pattern, would fashion a rule similar to that which the Tenth Circuit created. To the extent that Armijo properly states the law according to the Supreme Court’s standards, it misapplies that law.

It is not clear how the Tenth Circuit found that the rule was proper to apply under the facts of Armijo. The officers were investigating a bomb threat and rumors that a bomb threat—not an actual bomb—would coincide with a school shooting. First, it is not immediately apparent how the officers believed Chris could have detonated a bomb at the school, or fired a gun at the school, if he was inside his home. While remote-detonation devices exist, the odds that a sixteen-year-old boy would have one powerful enough to reach from Chris’s house to the school seem minimal. There was nothing to suggest that Chris would have such a device. In other words, the reasonableness of the officers’ belief that Chris was going to blow up Oñate High School from inside his home, based on the telephone call and two clues linking Chris to those calls, was questionable.

Moreover, the rumors about which the police were aware arguably linked Chris to a false bomb threat—not a genuine one—which was in-

advised action on the part of enforcement officers. But the same may be said of the requirements of the Fourth Amendment . . . ”).


334. See Minnesota v. Olson, 495 U.S. 91, 95 (1990) (“The Minnesota Supreme Court applied essentially the correct standard . . . observ[ing] that a warrantless intrusion may be justified by . . . the risk of danger to the police or to other persons inside or outside the dwelling.”) (quoting State v. Olson, 436 N.W.2d 92, 97 (Minn. 1989)) (internal quotation marks omitted).
tended to lure students out of the school building. It is thus even more
doubtful that the facts about which the officers were aware could have
generated an objectively reasonable belief that Chris was going to
detonate a bomb at the Oñate High School from inside his house. It is
also obvious that nobody inside Chris’s house was going to be one of the
shooters who might be taking aim at students as they exited the school.
The rumors suggested that the gang members who would open fire on the
students would bring the guns to school—i.e., they would be among the
students evacuated and not shooting from houses. It is, overall, hard to
understand how an officer could reasonably believe someone inside
Chris’s house could have immediately caused harm to a person or prop-
erty not in or near the house—i.e., could have detonated a bomb at the
school or shot at the exiting students. The officers’ belief that Chris was in
his house thus undercuts the reasonableness of their belief that he could
be one of the persons who was going to bomb or shoot-up the school, and
thus vitiates their “reasonable belief” that someone in or near the house
“may immediately cause harm to persons or property not in or near the
house.”

335. Armijo, 601 F.3d at 1071.

336. See United States v. Najar, 451 F.3d 710, 717 (10th Cir. 2006). See also Welsh v. Wisconsin, 466 U.S. 740, 749–50 (1984) (“Prior decisions of this Court . . . have emphasized that . . . the police bear a heavy burden when attempting to demon-
strate an urgent need that might justify warrantless searches or arrests.”) (internal
citation omitted).

337. See Armijo, 601 F.3d at 1071 (“The officers were between a rock and a hard
place.”).

338. Id. (“We must decide whether the exigent circumstances exception only jus-
tifies warrantless entries into a house to aid a potential victim in the house, or if it also
justifies warrantless entries into a house to stop a person or property inside the house
from immediately harming people not in or near the house.”).
VI. CONCLUSION

A person’s home is his or her castle. The Founding Fathers, through the Fourth Amendment, and the Supreme Court, through its caselaw, have emphasized how important it is to a free society that citizens be protected from unwanted governmental intrusion into their lives. That protection has been held all the more sacred when the government seeks to enter a person’s home. Over time, the Supreme Court has created a host of exceptions to the Fourth Amendment’s protection. When the government’s only plausible purpose in seeking to enter a person’s home is to investigate crime, however, the Supreme Court has consistently demanded probable cause, even when it does not require a warrant. The emergency-aid exception—the situation in which the police officer is rescuing someone in immediate peril—has, to date, been the only exception to the Fourth Amendment’s warrant and probable-cause requirements. In Armijo ex rel. Armijo Sanchez v. Peterson, the Tenth Circuit created a new exception to the Fourth Amendment’s warrant and probable-cause requirements, and it did so in the context of a police investigation rather than in the context of a rescue. By doing so, it opened the door to police entries into a person’s house, without probable cause or a warrant, based upon rumors or tips that someone inside the house might soon cause harm to someone outside the house. This holding opens a dangerous door. Law enforcement officers or federal district courts might stretch the concept of “immediacy” even further than the Tenth Circuit in order to justify warrantless searches of homes based on tips that the occupant might soon commit a crime that might have a victim. To avoid this slippery slope, the Tenth Circuit should dub this newly created rule the simultaneous-school-bombing-and-shooting-threat exception and limit it to the facts of Armijo.

339. Mincey v. Arizona, 437 U.S. 385, 390 (1978) ("[S]earches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." (quoting Katz v. United States, 389 U.S. 347, 357 (1967))); see also Welsh, 466 U.S. at 749–50 ("Prior decisions of this Court . . . have emphasized that exceptions to the warrant requirement are ‘few in number and carefully delineated,’ and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.") (quoting United States v. U.S. Dist. Court, 407 U.S. 297, 318 (1972)).