No. 02-473

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LASHAWN LOWELL BANKS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether law enforcement officers executing a warrant to search for illegal drugs violated the Fourth Amendment and 18 U.S.C. 3109, thereby requiring suppression of evidence, when they forcibly entered a small apartment in the middle of the afternoon 15-20 seconds after knocking and announcing their presence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 282 F.3d 699. The district court's order denying respondent's motion to suppress (Pet. App. 20a-21a) and the recommendation and report of the magistrate judge recommending against suppression (*id.* at 22a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2002. A petition for rehearing was denied on May 24, 2002 (Pet. App. 33a-34a). On August 14, 2002, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including September 21, 2002. The petition for a writ of certiorari

was filed on September 23, 2002 (a Monday), and was granted on February 24, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall 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.

Section 3109 of Title 18 of the United States Code provides:

> **Breaking doors or windows for entry or exit**
>
> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

STATEMENT

Respondent was charged with possession of a controlled substance with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and with possession of a firearm as an unlawful drug user, in violation of 18 U.S.C. 922(g)(3). After the district court denied his motion to suppress evidence, he pleaded guilty to both

counts, reserving the right to appeal the denial of his suppression motion. The court of appeals reversed and remanded the case to the district court, holding that law enforcement officers violated the Fourth Amendment and 18 U.S.C. 3109 by waiting only 15-20 seconds after knocking and announcing their presence before forcibly entering respondent's apartment. Pet. App. 1a-3a, 22a.

1. On Wednesday, July 15, 1998, at approximately 2 p.m., officers from the Las Vegas Police Department and the FBI executed a search warrant issued by a state court for cocaine and drug paraphernalia at respondent's apartment in North Las Vegas, Nevada. Pet. App. 2a, 25a-26a; see J.A. 59-60 (search warrant). The warrant was based on information, corroborated by a controlled drug buy, that respondent was selling cocaine at his apartment. J.A. 23-26. The officers knew the apartment to be a small, two-bedroom unit. Pet. App. 14a; J.A. 45-46. They first positioned themselves at the front and rear of the apartment building and then followed the statutory "knock and announce" procedure by loudly knocking on the front door and announcing "police search warrant." Pet. App. 2a; see 18 U.S.C. 3109. The knock and announcement were loud enough to be heard by the officers positioned at the rear of the building. Pet. App. 14a. The officers waited 15-20 seconds and, hearing no response, forcibly entered the apartment using a battering ram on the front door. *Id.* at 2a, 26a; see J.A. 73-75, 97-98.

Respondent claimed that he did not hear the officers knock and announce because he was in the shower, but that he did hear the forcible entry. J.A. 124-125; Br. in Opp. 3. Upon entering the apartment, the officers discovered respondent standing outside the bathroom, having just emerged from the shower. Pet. App. 26a;

J.A. 76, 124- 125. The search of respondent's apartment turned up a .380 caliber semi-automatic pistol with a laser sight and seven rounds in the magazine, a .40 caliber semi-automatic pistol, a .22 caliber Beretta pistol, a bullet-proof vest, a scale, approximately $6000 in cash, and approximately eleven ounces of crack cocaine. J.A. 34-38, 47, 51.

Respondent was charged with possession of a controlled substance with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and possession of a firearm as an unlawful drug user, in violation of 18 U.S.C. 922(g)(3). J.A. 11-12. He moved to suppress evidence, including statements that he made to law enforcement officers following his arrest, arguing, *inter alia*, that the officers violated the Fourth Amendment and 18 U.S.C. 3109 by failing to follow appropriate knock-and-announce procedures. See Pet. App. 23a; J.A. 13-21.[1] After the district court denied the motion, respondent pleaded guilty to both counts, reserving his right to appeal the denial of his suppression motion. See Pet. App. 1a.

2. a. A divided panel of the court of appeals reversed the district court's denial of respondent's motion to suppress. The majority held that the officers, having knocked and announced and received no response, failed to wait a reasonable amount of time before forcibly entering the apartment, thereby rendering the search

[1] In support of his motion to suppress, respondent also raised claims under the Fifth and Sixth Amendments. Those claims were rejected by the courts below, see Pet. App. 8a-11a, and are not at issue in this Court.

unconstitutional and in violation of 18 U.S.C. 3109.[2] Pet. App. 4a, 7a-8a.

The majority set forth four categories of knock-and-announce cases, each requiring a different period of delay before an officer may enter a residence after knocking and announcing and receiving no response:

> (1) entries in which exigent circumstances exist and non-forcible entry is possible, permitting entry to be made simultaneously with or shortly after announcement; (2) entries in which exigent circumstances exist and forced entry by destruction of property is required, necessitating more specific inferences of exigency; (3) entries in which no exigent circumstances exist and non-forcible entry is possible, requiring an explicit refusal of admittance or a lapse of a significant amount of time; and

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[2] Although the search warrant in this case was issued by a state court and local law enforcement officers, rather than federal agents, used force to enter respondent's apartment, the federal knock-and-announce statute, 18 U.S.C. 3109, is applicable because both federal agents and local officers participated in executing the search warrant and interviewing respondent immediately after his arrest. J.A. 34, 51; Pet. App. 25a-26a; see *United States* v. *Tavares*, 223 F.3d 911, 916 (8th Cir. 2000) (finding Section 3109 applicable to search based on state warrant where federal agents had contact with local officers before search and federal agents assisted local officers in warrant execution); cf. *Lustig* v. *United States*, 338 U.S. 74, 78-79 (1949) ("[A] search is a search by a federal official if he had a hand in it * * * . The decisive factor * * * is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means."); *Byars* v. *United States*, 273 U.S. 28, 33 (1927) (applying federal exclusionary rule to execution of a state search warrant where "the participation of the [federal] agent in the search was under color of his federal office and * * * the search in substance and effect was a joint operation of the local and federal officers").

> (4) entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or a lapse of an even more substantial amount of time.

Pet. App. 5a-6a. Thus, under the majority's scheme, whether officers have waited a sufficient period of time before entering turns on two factors: (1) whether the entry was forcible and thus involved the destruction of property, and (2) whether exigent circumstances existed. *Ibid.* The majority concluded that no exigency was present in this case, placing the entry in the fourth category (forcible entry with no exigency), requiring the maximum period of delay. *Id.* at 6a.

The majority next articulated a non-exhaustive list of factors to be considered in assessing the reasonableness of an officer's waiting period once the proper entry category has been determined. Those factors include:

> (a) size of the residence; (b) location of the residence; (c) location of the officers in relation to the main living or sleeping areas of the residence; (d) time of day; (e) nature of the suspected offense; (f) evidence demonstrating the suspect's guilt; (g) suspect's prior convictions and, if any, the type of offense for which he was convicted; and (h) any other observations triggering the senses of the officers that reasonably would lead one to believe that immediate entry was necessary.

Pet. App. 6a-7a.

Analyzing the entry in the instant case, the majority noted that sound traveled easily through respondent's small apartment, and that the officers heard no noises coming from the unit suggesting that an occupant was moving away from the door or doing anything else that

would indicate a refusal of entry. Pet. App. 7a. For those reasons and in view of its category scheme, the majority held that a 15-20 second delay after knocking and announcing was not "sufficient in duration to satisfy the constitutional safeguards." *Id.* at 8a. The majority did not indicate how much additional delay before entering was necessary to satisfy the Fourth Amendment.

b. Judge Fisher dissented, concluding that the majority had neglected its own list of delay factors. Judge Fisher emphasized that the apartment was small, the search was executed in the middle of the afternoon, the officers had strong evidence that respondent was dealing drugs out of the apartment (including corroboration from a controlled cocaine buy), and the officers could reasonably have been concerned about the destruction of evidence. Pet. App. 14a. Under those circumstances, Judge Fisher concluded, "the officers could reasonably have assumed [that respondent] had heard at least the loud knock and probably the announcement," and a 15-20 second delay was sufficient. *Id.* at 14a-15a. He also noted that because respondent was in the shower and did not hear the officers knock and announce, additional delay before entry would have made no difference in how the events unfolded. *Id.* at 16a. Finally, Judge Fisher emphasized that the majority opinion conflicted with the decisions of several other courts of appeals, which have held that similar delays before forcible entry were reasonable under similar circumstances. *Id.* at 16a-18a.

SUMMARY OF ARGUMENT

I. The Ninth Circuit's rigid, complex, and confusing four-part categorical scheme is inconsistent with this Court's longstanding recognition that the Fourth

Amendment does not "mandate a rigid rule of announcement," *Wilson* v. *Arkansas*, 514 U.S. 927, 934 (1995), and that the "general touchstone of reasonableness * * * governs the method of execution of the warrant." *United States* v. *Ramirez*, 523 U.S. 65, 71 (1998). Unlike the general reasonableness standard reflected in *Wilson* and *Ramirez*, the Ninth Circuit's categorical approach disregards the myriad factual circumstances and dangers confronting officers executing warrants, and in a variety of circumstances would reduce the knock-and-announce requirement to a "senseless ceremony," *Wilson*, 514 U.S. at 936. It also improperly relies on certain factors, such as the destruction of property, that have little or no bearing on the reasonableness of the officers' entry, while ignoring or minimizing other, highly relevant factors, such as the real risk that respondent would try to destroy evidence (by, for example, flushing the drugs down the toilet).

II. The court of appeals' emphasis, in calibrating the required period of delay, on whether officers need to destroy property in order to effectuate an entry contradicts this Court's holding in *Ramirez* that the reasonableness of a no-knock forced entry "depends in no way on whether police must destroy property in order to enter." 523 U.S. at 71. Property destruction during the course of a warrant execution may be a necessary consequence of the occupant's failure to open the door; it is not an independent factor that requires additional delay once the occupant fails to do so. The knock-and-announce rule protects the occupant's property interests by requiring officers in typical circumstances to notify the occupant of their presence and authority to enter, thus allowing the occupant the opportunity to admit the officers without property being broken. Once officers have reasonably deter-

mined that the occupant is denying them admittance, however, the resulting need to destroy property to gain entrance does not then require officers to wait an even longer time before attempting to execute the warrant.

III. Under the correct legal standard, the officers' actions in forcibly entering respondent's apartment after knocking and announcing their presence and waiting 15-20 seconds without hearing a response was reasonable. Respondent himself concedes that the officers went to his small apartment at 2 p.m. on a weekday to execute a valid search warrant for drugs, evidence that is readily disposable; that the officers "knocked loudly and announced 'Police, search warrant' in a loud authoritative tone"; that the officers did not hear any response; and that they waited at least 15-20 seconds after knocking and announcing before forcibly entering the apartment. Br. in Opp. 3. Respondent also acknowledges that he was in the shower at the time and did not hear the officers knock and announce. *Ibid.*; see Pet. App. 14a. Under such circumstances, the officers acted reasonably and did not violate the Fourth Amendment or 18 U.S.C. 3109.

IV. Finally, even if there were a knock-and-announce violation in this case, suppression of evidence would be an unjustified remedy. Because respondent was in the shower and did not hear the officers when they knocked and announced, events would have unfolded no differently had the officers delayed longer before entering. The search warrant authorized entry, and respondent would have been in the same position had the officers waited a few more moments before executing the warrant. Nor did any knock-and-announce violation lead to the discovery of the evidence in this case; the evidence was found as a result of the warrant-authorized search. Application of the exclu-

sionary rule in such circumstances places the government in a worse position than it would have been in had there been no violation and, therefore, imposes unjustified costs on society.

ARGUMENT

I. THE COURT OF APPEALS' RIGID CATEGORICAL SCHEME IS INCONSISTENT WITH THE GENERAL REASONABLENESS STANDARD GOVERNING THE KNOCK-AND-ANNOUNCE PRINCIPLE

The Ninth Circuit in this case adopted a complex, four-part matrix for determining how long officers must wait, after knocking and announcing their presence and receiving no response, before they may enter a residence to execute a valid search warrant. Under that matrix, officers executing a valid warrant must wait increasingly longer periods of time between announcement and entry depending on two factors: (1) whether the entry was forcible and thus involved some destruction of property, and (2) whether exigent circumstances existed. Pet. App. 5a-6a. The myriad other factors facing law enforcement officers in the inherently dangerous and unpredictable setting of warrant executions are given little or no weight in the court's analysis. The Ninth Circuit's rigid categorical scheme is inconsistent with the general reasonableness standard mandated by this Court's cases, which is intended to safeguard against mechanistic formalism.

A. The Knock And Announce Rule Is Part Of The Fourth Amendment's Requirement Of Reasonableness

In *Wilson* v. *Arkansas*, 514 U.S. 927 (1995), this Court recognized that "the underlying command of the Fourth Amendment is always that searches and

seizures be reasonable," and that the common-law requirement that officers announce their identity and purpose before entering a home forms part of the Fourth Amendment inquiry into the reasonableness of the officers' entry. 514 U.S. at 931 (citation omitted). In keeping with this recognition, the Court cautioned that "[t]he Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement." *Id.* at 934.

Two years later, in *Richards* v. *Wisconsin*, 520 U.S. 385 (1997), the Court rejected a proposed per se rule that, based on the special circumstances of the current drug culture, police officers are never required to knock and announce their presence when executing a search warrant during a felony drug investigation. *Id.* at 387-388, 392. The Court held instead that "to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Id.* at 394. "This standard," the court held, "strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries." *Ibid.*

In *United States* v. *Ramirez*, 523 U.S. 65 (1998), this Court reaffirmed that "[t]he general touchstone of reasonableness which governs Fourth Amendment analysis governs the method of execution of the warrant." *Id.* at 71 (citation omitted). In so doing, the Court rejected the court of appeals' conclusion that the Fourth Amendment and 18 U.S.C. 3109 hold officers to a standard higher than *Richards*' "reasonable suspicion" stan-

dard when a no-knock entry is effectuated by the destruction of property.[3]

B. The Ninth Circuit's Rule Departs From The Required Flexibility Of The Reasonableness Inquiry

The court of appeals' rigid framework for analyzing the timing of a forced entry to execute a search warrant cannot be harmonized with the flexibility inherent in the reasonableness standard. It has long been acknowledged that "[t]here is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931). Under the reasonableness standard, accordingly, courts must analyze and apply Fourth Amendment principles in a fact-sensitive, case-by-case manner. See, *e.g.*, *Ker* v. *California*, 374 U.S. 23, 33 (1963) (noting that "[e]ach case is to be decided on its own facts and circumstances," and that "[t]his Cour[t] [has a] long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application"). The need for a circumstance-specific application of the reasonableness standard applies equally to the timing of forcible warrant executions. See, *e.g.*, *United States* v. *Spikes*, 158 F.3d 913, 926 (6th Cir. 1998) ("The Fourth Amendment's 'knock and announce' principle, given its fact-sensitive nature, cannot be

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[3] The reasonableness standard applies under both the Fourth Amendment and 18 U.S.C. 3109. See *Ramirez*, 523 U.S. at 73 (concluding that because Section 3109 codifies common-law announcement requirements reflected in the Fourth Amendment, Fourth Amendment decisions "serve as guideposts in construing the statute."); *Sabbath* v. *United States*, 391 U.S. 585, 588 (1968) (noting that warrantless entries are tested by Section 3109 criteria).

distilled into a constitutional stop-watch."), cert. denied, 525 U.S. 1086 (1999); *United States* v. *Jenkins*, 175 F.3d 1208, 1213 (10th Cir.) ("[T]he amount of time that officers must wait after knocking and announcing depends on the particular facts and circumstances of each case.") (citations omitted), cert. denied, 528 U.S. 913 (1999). To test the reasonableness of a warrant execution, courts examine the totality of the circumstances surrounding the execution of the warrant. See, *e.g.*, *United States* v. *Lipford*, 203 F.3d 259, 270 (4th Cir. 2000) ("[W]e measure the period between 'knock and announce' and forcible entry for reasonableness in light of the case's particular facts. In this regard, we consider the totality of the circumstances.") (citation omitted).

The court of appeals characterizes its categorical rules as merely "aids in the resolution of the essential question whether the entry was reasonable under the circumstances." Pet. App. 6a. But by limiting its analysis to two factors and narrowly dictating when and in what manner those factors may be considered, the court of appeals' scheme arbitrarily constrains application of the reasonableness standard. The Ninth Circuit's rigid categorical scheme would require that, absent exigent circumstances, officers must allow for "a lapse of a significant amount of time" before making a *non-forcible* entry. Where, however, that same entry would require *force*, which the court equated with the need to destroy some property, the officers must receive "*explicit refusal* of admittance or *a lapse of an even more substantial amount of time*" after knocking and announcing. *Id.* at 5a-6a (emphasis added). Taking that rule at face value, it appears that the court of appeals would require officers faced with a visibly barricaded door but no exigent circumstances either to receive express refusal of admittance or to delay "an

even more substantial amount of time" before attempting to enter the premises. But in such circumstances, the barricaded door, which will have to be damaged for the officers to enter, itself may support the conclusion that their admittance was *constructively* denied or that prompt entry was reasonable. See, *e.g.*, *United States* v. *Cooper*, 168 F.3d 336, 338 (8th Cir. 1999) (upholding no-knock entry in part because house had "an iron security door on the front door and steel bars on all windows"); *United States* v. *Stowe*, 100 F.3d 494, 499 (7th Cir. 1996) (upholding no-knock entry in part because apartment protected by a steel door), cert. denied, 520 U.S. 1171 (1997); *United States* v. *Hawkins*, 102 F.3d 973, 976 (8th Cir. 1996) (upholding no-knock entry in part because house was "barricaded by barred security doors and windows"), cert. denied, 520 U.S. 1179 (1997).

Likewise, absent exigent circumstances, that same rigid rule would appear to require officers executing a search warrant at a residence they knew to be locked and empty to go through the ritual of knocking and announcing at the empty building and then waiting "an even more substantial amount of time" before forcibly entering. Such a result is contrary to the settled proposition that the knock-and-announce requirement does not compel officers to engage in "senseless ceremon-[ies]," *Wilson*, 514 U.S. at 936, including knocking and announcing where doing so would be "futile." *Richards*, 520 U.S. at 394. Cf. *United States* v. *Mendoza*, 281 F.3d 712, 717 (8th Cir.) ("[I]t belies common sense to think officers should be forced to comply with formalistic rules when the circumstances direct otherwise."), cert. denied, 123 S. Ct. 515 (2002).

Irrespective of the need to destroy property, moreover, numerous considerations bear on how long

officers should pause before they may reasonably infer that they have been constructively refused admittance to a residence. As the court of appeals itself recognized, but failed properly to consider, examples of such considerations include the size, location, and physical configuration of the dwelling, the time of day at which the warrant is executed, the nature of the alleged offense and the strength of the evidence against the occupant, the occupant's criminal history, and reasonable concerns that the occupant might attempt to destroy evidence or otherwise frustrate the purposes of the search. See Pet. App. 6a; *id.* at 16a (dissenting opinion criticizing majority below for giving "little or no weight" to many relevant factors). But under the Ninth Circuit's scheme, officers must still wait an unspecified "even more substantial amount of time" before executing a valid warrant through a forcible entry (unless they have a reasonable suspicion that their safety may be jeopardized), regardless of the presence of these other highly relevant factors. The court of appeals' framework thus places artificial constraints on the operation of the reasonableness standard, in addition to violating this Court's longstanding principle that "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant —subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'" *Dalia* v. *United States*, 441 U.S. 238, 257 (1979).

As this Court made clear in *United States* v. *Arvizu*, 534 U.S. 266 (2002), where this Court reversed a similarly flawed Fourth Amendment standard created by the Ninth Circuit, the Fourth Amendment's general reasonableness requirement cannot be reduced to a set

of rigid legal rules. *Id.* at 273. That is particularly true where, as here, those rigid rules fail to take into account the variety of situations and dangers facing law enforcement officers. As was the case in *Arvizu*, "the approach taken by the Court of Appeals" in this case is grounded in a distrust of "fact-specific weighing of circumstances," *id.* at 272, and "does not take into account the 'totality of the circumstances,' as [this Court's] cases have understood that phrase," *id.* at 274.

II. THE NINTH CIRCUIT'S EMPHASIS ON PROPERTY DAMAGE IS INCONSISTENT WITH THIS COURT'S DECISIONS

The court of appeals' decision fundamentally misconstrues the role that property destruction plays in determining the reasonableness of a delay between notice and forcible entry. Properly understood, the knock-and-announce rule provides protection for property by giving an individual a reasonable opportunity, under all the circumstances, to open the door. The need to destroy property if the door is not opened does not lengthen the period that officers must wait for such compliance.

A. Property Damage Does Not Increase The Burden On Officers To Justify A No-Knock Entry

The knock-and-announce principle serves several interests. First, it protects "the individual privacy interests intruded upon by a no-knock entry." *Richards*, 520 U.S. at 385. Although a search warrant justifies a significant intrusion on the occupant's privacy interests, an announcement before entry tempers the suddenness of the invasion of privacy. See *id.* at 393 n.5. Second, the knock-and-announce rule safeguards law enforcement officers against the possibility that the occupant will mistakenly assume that his or residence is being

invaded by criminal intruders. *Sabbath* v. *United States*, 391 U.S. 585, 589 (1968); *Miller* v. *United States*, 357 U.S. 301, 313 n.12 (1958). Third, prior announcement prevents needless damage to the residence by giving the occupant the opportunity to admit the officers peacefully. *Miller*, 357 U.S. at 307, 313. The knock-and-announce rule has also been said to protect against intrusions occasioned by law-enforcement officers' mistakes. See *Ker*, 374 U.S. at 57 (Brennan, J., dissenting) (stating that knock-and-announce rule is based in part on considerations such as possibility that police may be misinformed as to name or address of suspect); *United States* v. *Cantu*, 230 F.3d 148, 151-152 (5th Cir. 2000) (similar).

In *United States* v. *Ramirez*, *supra*, this Court made clear that although one of the interests furthered by the knock-and-announce principle is avoiding needless property damage, that interest does not justify applying a heightened standard for reasonableness in cases where a no-knock entry is forcible and therefore requires some destruction of property. Rather, the reasonableness standard is the same regardless of whether the entry is forcible or non-forcible. 523 U.S. at 69-73.

Accordingly, the Court in *Ramirez* rejected the Ninth Circuit's holding in that case that the standard for determining whether officers may enter without a prior announcement varies according to whether property must be destroyed to effectuate the entry. More specifically, the Court disagreed with the court of appeals that "while a 'mild exigency' is sufficient to justify a no-knock entry that can be accomplished without the destruction of property, 'more specific inferences of exigency are necessary' when property is destroyed." 523 U.S. at 69-70 (quoting *United States* v.

Ramirez, 91 F.3d 1297, 1301 (9th Cir. 1996)). This Court held that whether there is reasonable suspicion to justify a no-knock entry by law enforcement officers "depends in no way on whether police must destroy property in order to enter." 523 U.S. at 71.

B. The Need To Damage Property Does Not Increase The Required Period Of Delay After Officers Knock And Announce Their Presence

Although *Ramirez* involved a no-knock entry, its reasoning is equally applicable here. *Ramirez* reflects a general principle that the need to damage property in order to effectuate an entry to execute a search warrant should not be part of the analysis of whether the entry itself was reasonable. Rather, the dispositive issues in evaluating the timing of an entry are whether admittance has been effectively refused and whether other law enforcement needs render prompt entry reasonable. Cf. *United States* v. *Knapp*, 1 F.3d 1026, 1030 (10th Cir. 1993) (observing that where no exigent circumstances permitted officers to disregard knock-and-announce requirement, "the critical issue is whether the officers were constructively refused admittance under § 3109 by waiting ten to twelve seconds without receiving a response"). Thus, the proper analysis focuses on how long a reasonable officer would wait before concluding that continued delay would be futile, risk frustrating the purposes of the warrant, or expose persons to serious danger, cf. *Richards*, 520 U.S. at 394, not on whether property must be destroyed.[4]

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[4] That is not to suggest that property damage never triggers Fourth Amendment concerns. In *Ramirez*, this Court explained that "[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not

The Fourth Amendment and 18 U.S.C. 3109 already protect an occupant's property rights by requiring officers, absent reasonable suspicion justifying immediate entry, to knock and announce themselves before executing a warrant at a residence, thus permitting the occupant to answer the door before any property destruction becomes necessary. See, *e.g.*, *Richards*, 520 U.S. at 393 n.5 ("[T]he common law recognized that individuals should be provided the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry.") (citing *Wilson*, 514 U.S. at 930-932); *Spikes*, 158 F.3d at 925 ("[T]he 'knock and announce' rule serves to respect the sanctity of a person's home by affording notice to those inside so that they may open the door peaceably."). After reasonably concluding that they have been refused admittance, however, officers "may break open any outer or inner door or window of a house, or any part of a house." 18 U.S.C. 3109. Accordingly, when officers have waited a sufficient period after knocking and announcing their presence to allow a person a reasonable opportunity to answer the door, the need to destroy property to effectuate an entry is a consequence of the occupant's failure to open the door. It is not an independent reason for requiring further delay between notice and entry.[5]

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subject to suppression." 523 U.S. at 71. Here, however, there is no claim that the officers did any more damage to respondent's property than was required to enter his apartment. In any event, as the Court indicated in *Ramirez*, any such property damage would not support the suppression of evidence. *Ibid.*

[5] By the same token, the fact that an entry could be made without property destruction does not justify a premature entry into a home after announcement. Cf. *Sabbath*, 391 U.S. at 587, 589

C. Requiring Officers To Consider The Need To Damage Property Would Interfere With The Proper Execution Of Warrants

In deciding whether admittance has been constructively refused, officers take into account the specific circumstances they confront. Factors that tend to *increase* the required delay between the officers' announcement and a forcible entry are those that make it reasonable to believe that the occupant will need a longer than usual period of time to respond to the announcement—for example, if the search is at late night or early in the morning, the dwelling is unusually large, or the officers know that the occupant is in an unusual location inside the dwelling. See, *e.g.*, *United States* v. *Gallegos*, 314 F.3d 456, 460 (10th Cir. 2002). In contrast, important countervailing law-enforcement concerns may serve to *truncate* the delay period—for example, a known danger to the officers' or occupant's safety, a potential for the destruction of evidence, or evidence that a suspect is attempting to escape. See, *e.g.*, *United States* v. *Howard*, 961 F.2d 1265, 1267 (7th Cir.), cert. denied, 506 U.S. 882 (1992). Once officers have determined that a forcible entry is necessary, they have already balanced the factors that make it reasonable to delay a given period of time before entering. The need to destroy property during the course of the entry adds nothing to that balancing process. In fact, if officers were automatically required to wait a longer period because of the need to destroy property, it could have the effect of encouraging criminals to barricade their doors or take other actions to increase the amount of property that must be destroyed to effectuate an

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(opening a closed but unlocked door of apartment constituted an unannounced intrusion under 18 U.S.C. 3109).

entry. The result would be additional delays for law enforcement officers and more time for criminals to seek to escape, dispose of evidence, or otherwise resist the search. Such a result is plainly inconsistent with *Ramirez*.

Without even mentioning *Ramirez*, the court of appeals engrafted a property-destruction principle onto the knock-and-announce requirement of the Fourth Amendment and 18 U.S.C. 3109. Indeed, under the court of appeals' approach, the need to destroy property becomes the first and primary inquiry. The court stated that, as an initial matter, "we categorize entries as either forced or non-forced" based upon the need to damage property to effectuate the entry. Pet. App. 6a. After that inquiry, "[t]he reasonableness must *then* be determined in light of the totality of the circumstances surrounding the execution of the warrant." *Ibid.* (emphasis added).

Not only did the Ninth Circuit disregard this Court's holding in *Ramirez* in requiring officers (in category four of the court of appeals' matrix) to wait "an even more substantial amount of time" before forcibly entering a residence in the absence of exigent circumstances, it held (in category two of its matrix) that even where exigent circumstances exist, the need to destroy some property to effectuate an entry "necessitat[es] *more specific inferences of exigency*." Pet. App. 5a-6a (emphasis added). This latter requirement, however, is precisely the novel Ninth Circuit requirement this Court rejected in *Ramirez*. 523 U.S. at 69-70 (quoting 91 F.3d at 1301). The Ninth Circuit stands alone in its focus on property damage. See *LaLonde* v. *County of Riverside*, 204 F.3d 947, 957 (9th Cir. 2000) ("No other circuit followed our property-based exigency rule.").

Its property-driven categorical scheme conflicts with this Court's precedents.

III. THE OFFICERS' ENTRY INTO RESPONDENT'S APARTMENT AFTER KNOCKING AND ANNOUNCING THEIR PRESENCE AND WAITING 15-20 SECONDS WITHOUT HEARING A RESPONSE WAS REASONABLE

The actions of the officers who executed the search warrant on respondent's apartment complied with the Fourth Amendment and 18 U.S.C. 3109. Respondent himself concedes that the officers went to his small apartment at 2 p.m. on a weekday to execute a valid search warrant for drugs, without knowing whether anyone was in the apartment at the time; that the officers "knocked loudly and announced 'Police, search warrant' in a loud authoritative tone"; that the officers did not hear any response; and that they waited at least 15-20 seconds after knocking and announcing before forcibly entering the apartment. Br. in Opp. 3. Respondent also acknowledges that he was in the shower at the time and did not hear the officers knock and announce. *Ibid.* Under such circumstances, the officers acted reasonably and the evidence they obtained during the search of the premises should not be suppressed.

Entries like the one in this case have been routinely upheld by other courts of appeals. For example, in *United States* v. *Lucht*, 18 F.3d 541, 548, 549 (8th Cir.), cert. denied, 513 U.S. 949 (1994), the court of appeals upheld the district court's finding that law enforcement officers acted reasonably when they attempted to execute a warrant to search for methamphetamine at 7 a.m. by knocking and announcing and waiting approximately 20 seconds before forcibly entering the premises. The court explained:

> [T]he [district] court found that [the defendants'] houses were small, the occupants were awake, there was probable cause to believe [the defendants] possessed narcotics, and the officers waited twenty seconds for a response after knocking and announcing their presence and purpose. In these circumstances, the possibility was slight that those within did not hear or could not have responded promptly, if in fact they had desired to do so.

Id. at 549. The Eighth Circuit found no knock-and-announce violation when officers waited for essentially the same period as at issue here, but where the residence was larger and the forcible entry took place early in the morning, when residents are more likely to be asleep or in the shower, rather than in the middle of a weekday afternoon, as in this case.

Similarly, in *United States* v. *Spriggs*, 996 F.2d 320, cert. denied, 510 U.S. 938 (1993), the D.C. Circuit upheld the district court's denial of the defendant's motion to suppress heroin, cash, and drug paraphernalia seized from his apartment during a search that was conducted between 7:30 and 7:45 on a weekday morning. Law enforcement officers forced open the front door of the apartment after waiting approximately 15 seconds. In those circumstances, the court held that "the agents were justified in concluding that they had been constructively refused admittance when the occupants failed to respond within 15 seconds of their announcement." *Id.* at 323; see *United States* v. *Jones*, 133 F.3d 358, 361-362 (5th Cir.) (noting that courts have generally found no violation "when officers have waited more than 5 seconds," and holding that "[i]n drug cases, where drug traffickers may so easily and quickly destroy the evidence of their illegal enter-

prise by simply flushing it down the drain, 15 to 20 seconds is certainly long enough for officers to wait before assuming the worst and making a forced entry"), cert. denied, 523 U.S. 1144 (1998).

Numerous other decisions have upheld delays of 15-20 seconds (or less) in generally similar factual circumstances. See, *e.g.*, *United States* v. *Garcia*, 983 F.2d 1160, 1168 (1st Cir. 1993) (holding that "a wait of ten seconds after knocking combined with an announcement before forced entry, was reasonable" because "[t]he occupants of the apartment were reasonably believed to possess cocaine, a substance that is easily and quickly hidden or destroyed"); *United States* v. *Gatewood*, 60 F.3d 248, 250 (6th Cir.) (concluding that delay of approximately ten seconds was sufficient before entering apartment officers knew to contain cocaine), cert. denied, 516 U.S. 1001 (1995); *United States* v. *Markling*, 7 F.3d 1309, 1318 (7th Cir. 1993) (holding that delay of seven seconds was sufficient before forcing entry where "[t]here was no noise coming from the apartment * * * that would have made it difficult for [defendant] to hear" the officers' announcement, the "motel room was small," and informants indicated that defendant "was likely to flush the cocaine * * * down the toilet"); *United States* v. *Goodson*, 165 F.3d 610, 612, 614 (8th Cir.) (holding that delay of 20 seconds before forcing entry did not violate Fourth Amendment where officers searched one-story ranch house for crack cocaine at 1:44 a.m.), cert. denied, 527 U.S. 1030 (1999); *United States* v. *Jenkins*, 175 F.3d 1208, 1215 (10th Cir.) (upholding delay of 14 to 20 seconds before forcing entry where search of defendant's residence took place at 10 a.m.), cert. denied, 528 U.S. 913 (1999).

Indeed, the Ninth Circuit itself has candidly acknowledged that its decision in this case cannot be reconciled with either its own prior decisions or the decisions of other courts of appeals, all of which have upheld the constitutionality of forcible entries where the officers waited 10-20 seconds after knocking and announcing. *United States* v. *Chavez-Miranda*, 306 F.3d 973, 981-982 n.7 (2002) ("*Banks* appears to be a departure from our prior decisions. As noted by the trial court, we have found a 10 to 20 second wait to be reasonable in similar circumstances, albeit when the police heard sounds after the knock and announcement. * * * Several other circuits have upheld similar waits even without noise being heard."), cert. denied, 123 S. Ct. 1317 (2003). Consistent with this Court's precedents and those of all other courts of appeals, it is clear that, based on the totality of circumstances, the officers acted reasonably and in accord with the Fourth Amendment and 18 U.S.C. 3109 by waiting 15-20 seconds after knocking and announcing their presence before forcibly entering respondent's apartment.

IV. SUPPRESSION OF EVIDENCE IN THIS CASE WOULD IMPOSE UNJUSTIFIED COSTS ON SOCIETY

Even if law enforcement officers had violated the knock-and-announce rule in this case, the suppression of evidence ordered by the court of appeals would be an unjustified remedy, because any knock-and-announce violation did not harm respondent's constitutionally protected interests. As this Court explained in *Nix* v. *Williams*, 467 U.S. 431, 443 (1984), "the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting

the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred." See *Segura* v. *United States*, 468 U.S. 796, 814 (1984) (rejecting suppression based on allegedly illegal entry because "[h]ad police never entered the apartment, but instead conducted a perimeter stakeout to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and seized precisely as it was here"); *United States* v. *Payner*, 447 U.S. 727, 734 (1980) (noting that because "the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case," the exclusionary rule "has been restricted to those areas where its remedial objectives are most efficaciously served") (citation omitted); see also *United States* v. *Espinoza*, 256 F.3d 718, 725 (7th Cir. 2001) ("[T]he exclusionary rule should be limited only to those instances where the constitutional violation has caused actual harm to the interest * * * that the rights protect.") (internal quotation marks omitted), cert. denied, 534 U.S. 1105 (2002).

Here, as the dissent below emphasized (Pet. App. 14a), the record demonstrates that the alleged knock-and-announce violation did no harm whatsoever to any of respondent's protected interests. Indeed, it is essentially undisputed that the events related to the search of respondent's apartment would not have unfolded any differently if the officers had waited longer before entering or had knocked a second time. Respondent concedes that he was in the process of showering when the officers approached his door, and that he therefore did not hear them knock and announce. Br. in Opp. 3. Even if the officers had delayed entry for a brief time or repeated their announcement, respondent

still would not have heard them and so still would not have admitted them to execute the warrant. Accordingly, *none* of the interests furthered by the knock-and-announce principle—protecting the privacy of occupants against sudden intrusion, safeguarding law enforcement officers from being mistaken as unlawful intruders, and avoiding needless property damage—would be served by suppressing the evidence obtained in the search of respondent's apartment, since *none* of those interests was affected by the officers' forcible entry. Where, as here, there is no harm to a defendant's interests protected by the knock-and-announce requirement, society's vital interests in combating crime—in particular drug trafficking and related violence—should not be sacrificed by application of the exclusionary rule.

Indeed, as reflected in the inevitable-discovery and independent-source exceptions to the exclusionary rule, this Court has generally authorized suppression only where the constitutional violation is causally connected to the discovery of the excluded evidence. See *Nix*, 467 U.S. at 443-444; *Murray* v. *United States*, 487 U.S. 533, 537-542 (1988). Here, for the reasons described above, no such causal connection exists. The officers would have forcibly entered respondent's apartment and obtained the same evidence under the warrant-authorized search regardless of the violation found by the court of appeals. As this Court explained in *Segura*, in connection with the "fruit of poisonous tree" doctrine:

> Suppression is not justified unless 'the challenged evidence is in some sense the product of illegal governmental activity.' The illegal entry into petitioners' apartment did not contribute in any way to discovery of the evidence seized under the warrant;

> it is clear, therefore, that not even the threshold 'but for' requirement was met in this case.

468 U.S. at 815 (citation omitted) (quoting *United States* v. *Crews*, 445 U.S. 463, 471 (1980)); see *New York* v. *Harris*, 495 U.S. 14, 19 (1990). Cf. *Ker*, 374 U.S. at 39 (plurality opinion) ("[N]o basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with [the state statute].") (citation omitted).

The courts of appeals have reached different results on whether inevitable-discovery and independent-source principles authorize the admission of evidence seized under warrant after a violation of the knock-and-announce rule. Compare, *e.g.*, *United States* v. *Langford*, 314 F.3d 892, 894 (7th Cir. 2002) ("[I]t is hard to understand how the discovery of evidence inside a house could be anything but 'inevitable' once the police arrive with a warrant.") (citation omitted), and *United States* v. *Jones*, 214 F.3d 836, 838 (7th Cir. 2000) ("A warrant authorized the entry, so seizure of evidence was inevitable."), with *United States* v. *Marts*, 986 F.2d 1216, 1219-1220 (8th Cir. 1993) (rejecting in dicta application of independent-source doctrine to violation of knock-and-announce rule), and *United States* v. *Dice*, 200 F.3d 978, 985 (6th Cir. 2000) (rejecting inevitable-discovery exception in knock-and-announce violation case where there was no evidence that a second, independent investigation would have led to the evidence).[6]

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[6] The Sixth Circuit's reasoning in *Dice* appears to be in tension with that court's own prior holding in *United States* v. *Kennedy*, 61 F.3d 494, 499-500 (1995), cert. denied, 517 U.S. 1119 (1996), that "an alternate, independent line of investigation is not required for the inevitable discovery exception to apply." Cf. *United States* v.

Those established exceptions to the exclusionary rule should be held applicable to cases where the same evidence would have been discovered in the warrant-authorized search even if the officers had complied with the knock-and-announce rule. But even without those doctrines, in this case, the violation (if any) not only lacks any causal connection to the discovery of the excluded evidence, but also does not harm any of the interests protected by the Fourth Amendment. In that circumstance, there is no justification for suppression.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Koubriti, 199 F. Supp. 2d 656, 671 n.10 (E.D. Mich. 2002) (noting intra-circuit conflict in authority created by *Dice* and *Kennedy*).