No. 15-193

In the
Supreme Court of the United States

ANDREW KANE,

Petitioner,

v.

BRIAN LEWIS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF PETITIONER ANDREW KANE

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MOTION OF CATO INSTITUTE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), the Cato Institute respectfully moves for leave to file the attached brief as *amicus curiae* in support of petitioner.

Counsel of record for all parties received timely notice of the Cato Institute's intent to file under Rule 37.2(a). Petitioner consented to this filing. Respondents withheld consent.

The interest of the Cato Institute in this case arises from its mission to advance and support the rights that the U.S. Constitution guarantees to all citizens. Cato was established in 1977 as a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato has participated as *amicus curiae* in numerous cases before this Court and other courts. Cato also works to defend constitutionally guaranteed individual rights through publications, lectures, conferences, public appearances, and other endeavors, including through its Project on Criminal Justice and the annual *Cato Supreme Court Review*.

This case is of central concern to Cato because it implicates the safeguards that the Fourth Amendment provides against the use of military-style raids in criminal searches and seizures.

Accordingly, the Cato Institute respectfully requests leave to file this *amicus* brief.

Respectfully submitted,

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September 14, 2015

QUESTION PRESENTED

Whether, in a civil rights case brought under 42 U.S.C. § 1983, a federal appellate court may overturn the jury's verdict simply because the court disagrees with the jury's factual findings.

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BRIEF OF CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato has participated as *amicus curiae* in numerous cases before this Court and other courts. Cato also works to defend constitutional rights through publications, lectures, conferences, public appearances, and other endeavors, as well as through its Project on Criminal Justice and the annual *Cato Supreme Court Review*.

This case is of central concern to Cato because it implicates the safeguards that the Fourth Amendment provides against the use of military-style raids in criminal searches and seizures.

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[1] Pursuant to this Court's Rule 37.2(a), *amicus* states that all parties were timely notified of *amicus*'s intent to file this brief. Petitioner consented, and his letter of consent has been submitted to the Clerk. Respondents withheld consent, and *amicus* has therefore attached to this brief, *supra*, a motion for leave to file. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Police officers raided Andrew Cornish's apartment in the middle of the night. They were heavily armed, dressed in black, wore helmets and goggles, and carried battering rams. They stormed the residence without announcing themselves, and they killed Cornish seconds later, as he emerged from his bedroom in his underwear.

This sequence of events sounds more like the raid on Osama bin Laden's complex depicted in *Zero Dark Thirty* than ordinary police work. Yet Cornish was no terrorist. Nor was he a violent criminal suspect. In fact, he was suspected of nothing more than marijuana possession, and the police had no reason to believe that he posed any threat justifying a military-style raid in the dead of night.

Although this case is especially disturbing, it is not unusual. In recent years, it has become common for police to investigate minor, nonviolent offenses (typically involving drugs) by conducting raids, often at night, that involve assault weapons, flash-bang grenades, and battering rams. These military-style tactics threaten harms to both civilians and police officers that are vastly out of proportion to their purported justifications.

In an appropriate case, this Court should address this serious and growing problem by making clear that the Fourth Amendment imposes limits on the routine use of military-style raids to investigate nonviolent crimes. These types of raids are often sharply at odds with both the knock-and-announce rule and the constitutional requirement that searches and seizures must be reasonable. Yet the lower courts have not adequately enforced these

deeply rooted protections against the growing use of paramilitary tactics by police. It is incumbent upon this Court to take action and clarify that police are governed by the Fourth Amendment, not the rules of battlefield engagement.

The Fourth Circuit's decision in this case is manifestly erroneous because it overruled the jury's verdict based on its disagreement with the jury's factual findings. Reversing the decision below would send the critical message that citizens can hold police accountable for the harm inflicted by these types of raids, forcing police to consider whether a jury might find them liable and requiring the lower courts to address such claims with care.

The availability of civil damages actions was a significant factor in this Court's decision that violations of the knock-and-announce rule do not require exclusion of evidence. Here, a Maryland jury awarded damages in just such a case when it found that officers caused Cornish's death by failing to announce their presence. The Fourth Circuit's decision to overrule this jury verdict directly challenges the Court's view that civil liability can serve as an effective deterrent for Fourth Amendment violations. If a plaintiff cannot obtain damages in a case with facts like these, civil liability becomes a theoretical abstraction, not a real deterrent. The Fourth Circuit's error is especially egregious because it substituted its own judgment for that of the jury—the institution that the Framers viewed as critical to protecting citizens from exactly the type of official abuse that occurred here. The Court should summarily reverse.

ARGUMENT

I. THE ROUTINE USE OF MILITARY-STYLE RAIDS IN CRIMINAL INVESTIGATIONS PRESENTS A SERIOUS PROBLEM

The military-style raid in this case is representative of a broader and deeply troubling trend. SWAT team deployments have increased more than 1400% since the 1980s. Peter B. Kraska, *Militarization and Policing—Its Relevance to 21st Century Police*, 1 *Policing* 501, 507 (2007), http://goo.gl/I1hu3g. Between 1980 and 2005, the average annual number of domestic paramilitary raids increased from 3,000 to between 50,000 and 60,000. Radley Balko*, Rise of the Warrior Cop: The Militarization of America's Police Forces* 237, 308 (2014); *see also id.* at xi-xii.

This dramatic rise in the deployment of SWAT teams has been accompanied by an equally dramatic expansion of the circumstances in which they are used. SWAT teams and tactical units were originally created to address high-risk situations, such as terrorist attacks, hostage crises, and dangerous raids where the police had specific reason to believe that such tactics were justified. ACLU*, War Comes Home: The Excessive Militarization of American Policing* 31 (2014), https://goo.gl/Ji39tO; Balko, *Rise of the Warrior Cop*, at 62-63, 80, 249. Today, however, these high-risk situations account for only a small fraction of SWAT deployments. ACLU*, War Comes Home*, at 31. In fact, SWAT teams are now used primarily to serve low-level, low-risk drug search warrants, with nearly two-thirds of SWAT deployments in 2011 and 2012 for drug searches. *Id.* at 2-3, 31.

SWAT teams now commonly conduct raids relating to a variety of other nonviolent offenses (such as gambling and underage drinking) and administrative violations (including, in one case, "barbering without a license"). Balko, *Rise of the Warrior Cop*, at 280-89. They have been known to conduct raids in such unlikely settings as college fraternity houses and VFW charity poker games. *Id.* at 282, 284; *WSU Fraternity Suspended after SWAT Raid*, Seattle Times, Jan. 27, 2009, http://goo.gl/2cd34y. Police even deploy SWAT teams to provide their officers with additional "practic[e]" by conducting raids on "low-level offenders." Balko, *Rise of the Warrior Cop*, at 211.

The over-deployment of SWAT teams radically enhances the threat of harm to both civilians and officers. *See, e.g.*, Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America* 43-82 (July 17, 2006) (collecting cases), http://goo.gl/cj9hRm. In military-style raids, police often fail to knock and announce themselves before storming a residence. Kraska, *Militarization and Policing*, 1 *Policing* at 507-08; Balko, *Overkill*, at 43-82. These tactics frequently lead to avoidable confrontations between police and citizens, especially when the targets of the search may well believe that they are experiencing a home invasion. There is an "alarming tendency of paramilitary policing to escalate, rather than ameliorate, the risk of violence." ACLU, *War Comes Home*, at 39 (emphasis omitted).

Botched paramilitary raids are now distressingly common, resulting in serious and even fatal injuries to children, adults, and household pets. *See generally* Cato Institute, *Botched Military Police Raids*, http://www.cato.org/raidmap (interactive map). In

one highly publicized raid, two-year-old Bou Bou Phonesavanh suffered life-threatening injuries, including a hole in his chest, when a SWAT team tossed a flash-bang grenade into his crib. *See* ACLU, *War Comes Home*, at 14-15. In another, seven-year-old Aiyana Stanley-Jones was killed when a weapon accidentally discharged during a nighttime raid. *See id.* at 21; Steven Gray, *A 7-Year-Old's Killing: Detroit's Latest Outrage*, Time, May 18, 2010, http://goo.gl/HWHBJm.

These types of incidents have sparked growing public concern. Yet SWAT team deployments show no signs of diminishing. In fact, they are likely to continue to increase due to the federal incentives involved. *See* Balko, *Rise of the Warrior Cop*, at 300-04, 335-36; ACLU, *War Comes Home*, at 16, 24-26. For example, the Justice Department's Byrne Justice Assistance Grant Program allocates money to local police based on the total number of arrests that they make; thus, conducting more raids using paramilitary tactics, even of low-risk, low-level offenders' homes, can secure additional funds. Justice Policy Institute, *Recovery Money for Byrne JAG Won't Stimulate Greater Public Safety* 4 (2010), http://goo.gl/0fwPJm; *see also* Government Accountability Office, *RECOVERY ACT: Department of Justice Could Better Assess Justice Assistance Grant Program Impact*, App. II, at 55-56 (Oct. 15, 2010); ACLU, *War Comes Home*, at 26. In addition, the 1033 program allocates military equipment to local departments at little or no cost, and the Justice Department's Equitable Sharing Program allows local police to share in the profits of seized assets. *See* ACLU, *War Comes Home*, at 16, 24-25; Balko, *Rise of the Warrior Cop*, at 152-54, 219-22, 244, 301-

02. With these federal programs in place, police departments incur little cost to create SWAT teams, and obtain substantial financial benefits from using them as often as possible.

Under this incentive structure, military-style raids by police can be expected to become ever more routine—unless citizens can rely on courts and juries to hold police accountable when these raids violate the Fourth Amendment.

II. IN AN APPROPRIATE CASE, THIS COURT SHOULD HOLD THAT THE FOURTH AMENDMENT CONSTRAINS THE ROUTINE USE OF MILITARY-STYLE RAIDS

The dramatic rise of military-style raids contravenes several core principles of the Fourth Amendment, including the knock-and-announce rule and the requirement that searches and seizures must be reasonable. Because many lower courts have not properly enforced these safeguards against the use of paramilitary tactics, this Court's guidance is urgently needed. When cases presenting these questions arise, this Court should strengthen the knock-and-announce rule and hold that the routine use of military-style raids in investigations of minor and nonviolent criminal offenses is unreasonable under the Fourth Amendment.

A. The Court Should Reinforce the Protections of the Knock-and-Announce Rule Against Military-Style Intrusions

The knock-and-announce rule is an ancient principle of Anglo-American law that traces its roots at least as far back as *Semayne's Case*, 5 Coke Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603). *See Wilson v.*

Arkansas, 514 U.S. 927, 931-32 & n.2 (1995). The core of the rule is that, before entering a residence, "law enforcement officers must announce their presence and provide residents an opportunity to open the door." *Hudson v. Michigan*, 547 U.S. 586, 589 (2006). This requirement was "woven quickly into the fabric of early American law" through state constitutions, statutes, and common-law decisions. *Wilson*, 514 U.S. at 933; *see Miller v. United States*, 357 U.S. 301, 313 (1958) ("The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application."). The Court has since recognized that this requirement was incorporated into the Fourth Amendment. *Wilson*, 514 U.S. at 934. The knock-and-announce rule safeguards a number of interests that are central to the Fourth Amendment, including the protection of "human life and limb, . . . property, [and] those elements of privacy and dignity that can be destroyed by a sudden entrance." *Hudson*, 547 U.S. at 594.

Robustly applied, the knock-and-announce rule could help to address the overuse of military-style raids. As Part I explains, *supra*, and as this case confirms, paramilitary tactics and no-knock entries often go hand in hand. SWAT teams are known for "dynamic entries" involving battering rams and flash-bang grenades, not for ringing the doorbell.

In its current form, however, the knock-and-announce rule is scarcely a meaningful obligation, much less capable of counterbalancing the strong incentives for police to conduct no-knock raids on a routine basis. It is therefore unsurprising that there has been an extraordinary increase in these types of

raids, notwithstanding that "the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure," *Wilson*, 514 U.S. at 934.

The police and lower courts have failed to treat the knock-and-announce rule as a serious constraint on military-style raids for multiple reasons.

First, the rule is currently subject to such expansive exceptions that it often does not even apply. Law enforcement officers need not knock and announce if they have a reasonable suspicion that doing so might be dangerous or might lead to the destruction of evidence. *Richards v. Wisconsin*, 520 U.S. 385, 393-94 (1997). Courts generally accept a minimal showing from police to invoke these exceptions, and it is particularly easy to satisfy them in the drug cases in which military-style tactics are so often used. *See* ACLU, *War Comes Home*, at 24. Although this Court has rejected a "blanket rule" that would allow no-knock entries in all felony drug cases, *id.* at 393-94, some lower courts have come remarkably close to applying such a rule as a practical matter. *See, e.g.*, *United States v. Washington*, 340 F.3d 222, 227 (5th Cir. 2003) (because it is "not uncommon for drug dealers to carry weapons," officers need not have "specific knowledge that the suspect was armed or dangerous" to make a no-knock entry at the residence of a suspected drug dealer); *Whittier v. Kobayashi*, 581 F.3d 1304, 1309 (11th Cir. 2009) (no-knock entry may be based solely on suspicion that occupant sold drugs and had access to firearms); *United States v. Stevens,* 439 F.3d 983, 988-89 (8th Cir. 2006) (similar).

Second, even in cases in which an exception is unavailable and police are required to knock and announce, the requirement has become largely ministerial. This Court has recognized that, under the rule, "it is not easy to determine precisely what officers must do." *Hudson*, 547 U.S. at 590. As a result, courts are reluctant to give the rule teeth, and they have almost uniformly held that it is satisfied when officers knock and "wait[] more than 5 seconds." *United States v. Jones*, 133 F.3d 358, 361 (5th Cir. 1998). That is true even "when it was apparent the police must have known that the occupant could not possibly have answered the door in the time which had passed"—for example, "because of the time of day." 2 Wayne R. LaFave, *Search and Seizure* § 4.8(c) (5th ed.). These watered-down standards are hardly what the Court had in mind when it held that the knock-and-announce rule protects "privacy and dignity that can be destroyed by a sudden entrance" and "assures the opportunity to collect oneself before opening the door," *Hudson*, 547 U.S. at 594.

Third, even when police violate the minimal demands of the existing rule, it is still challenging to prove the violation in court. As this case illustrates, knock-and-announce violations inevitably produce confusion that makes it difficult to prove precisely what happened after the fact. Moreover, officers sometimes lie about their conduct (as the jury found in this case), yet tend to be deemed credible by judges based on their positions of authority (as the decision below reflects). And, in cases like this one, the victim of the knock-and-announce violation may no longer be alive to testify, leaving police as the primary—or only—witnesses to their own conduct.

Finally, even in the rare case in which there is sufficient evidence to prove a violation, there is such a substantial gap between rights and remedies that police are rarely held to account. For example, this Court has held that the exclusionary rule does not apply to knock-and-announce violations. *Hudson*, 547 U.S. 586. And the qualified immunity framework ensures that officers can be held accountable in money damages only in the most extreme cases. *See generally Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

In this case, petitioner overcame these numerous barriers and made the necessary showing to recover. But this case is the exception, not the rule. And the lengths to which petitioner was required to go to achieve this favorable result—only to have it snatched away on appeal—confirm that lower courts and the police do not currently understand the knock-and-announce rule as a meaningful constraint on the tactics that the jury found caused Cornish's death.

Ideally, this Court would respond to these problems by (1) narrowing the exceptions to the knock-and-announce rule; (2) giving teeth to the rule itself; and (3) imposing more substantial consequences for violations. But at the very least, the Court should carefully review the implementation of the knock-and-announce rule by the lower courts and ensure that they are not contravening this Court's prior decisions. And, as military-style raids and their associated harms become even more ubiquitous, the Court should be cognizant that the knock-and-announce rule cannot serve as a viable deterrent unless this Court ensures that it receives more vigorous enforcement.

B. The Court Should Clarify That the Routine Use of Military-Style Raids Runs Counter to the Reasonableness Required by the Fourth Amendment

Even when a SWAT team complies with the knock-and-announce rule, it is still dangerous and highly problematic to storm a residence in the dead of night using military tactics. The central problem in these cases, in other words, is the choice to execute a military-style raid in the first place. This Court should address that problem directly by holding that, under well-established Fourth Amendment principles, the police act unreasonably when they conduct military-style raids involving extreme levels of force to investigate minor, nonviolent offenses.

1. The Fourth Amendment's prohibition on unreasonable searches and seizures means that, even when the police have a warrant, "the manner in which [the] warrant is executed is subject to later judicial review as to its reasonableness." *Dalia v. United States*, 441 U.S. 238, 258 (1979). Determining whether a search or seizure is reasonable requires a balancing of interests. On one side is "the nature and quality of the intrusion on the individual's Fourth Amendment interests." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (internal quotation marks omitted). On the other is "the importance of the governmental interests alleged to justify the intrusion." *Id.*

This Court's decisions make clear that, in applying this balancing test, two related principles must be brought to bear. The first is a principle of proportionality: The manner in which police execute a search or seizure must be commensurate with the seriousness of the circumstances. The second is a

principle of particularity: The police's use of force must be justified by the individualized circumstances at issue, rather than by appeals to abstract government interests that are not implicated in the case at hand. Both principles necessarily flow from the central question of the Fourth Amendment—whether the government action was reasonable. *See, e.g.*, *Illinois v. McArthur*, 531 U.S. 326, 330 (2001). Together, they mean that police cannot use extreme levels of force simply as a matter of routine, and must instead limit that force to circumstances in which the gravity of the situation reasonably warrants such tactics.

For example, in *Garner*, the Court held that the Fourth Amendment prohibits the use of deadly force to apprehend fleeing, nonviolent felony suspects. The Court concluded that "[t]he suspect's fundamental interest in his own life" and "the interest of the individual, and of society, in judicial determination of guilt and punishment" outweighed any pertinent "governmental interests in effective law enforcement." 471 U.S. at 9. That balancing reflected the concept of proportionality: "Where the suspect poses no immediate threat to the officer and no threat to others," the Court explained, "the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Id.* at 11. The Court also concluded that police could use deadly force only when they had an individualized reason to do so—namely, "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Id.*

Similarly, in *Graham v. Connor*, 490 U.S. 386 (1989), the circumstances that the Court held should

be considered—"the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight" (*id.* at 396)—reflected the concept of proportionality. And, as in *Garner*, the Court also addressed the question of particularity, holding that the Fourth Amendment reasonableness analysis "requires careful attention to the facts and circumstances of each particular case." *Id.*

2. It follows from these foundational principles that police violate the Fourth Amendment when they routinely use military-style raids to execute searches and seizures for evidence of minor offenses. As Part I explains, *supra*, these types of raids impose grave burdens on interests at the core of the Fourth Amendment—including life, limb, and property, as well as privacy and dignity. Typically, however, these enormous costs are grossly disproportionate to the seriousness of the situation, and the use of military tactics as a matter of course often means that they have no conceivable justification in the individualized circumstances of a particular case. As a result, the Fourth Amendment interests of the individuals whose homes are invaded by police can far outweigh the government interests at stake.

Despite their immense threat of harm, military-style raids do exceedingly little to promote government interests. The justification typically invoked for military tactics is the interest in protecting the safety of officers and the general public in volatile situations. In many circumstances, however, this interest is overstated. As explained above, close to two-thirds of recent SWAT deployments were for drug searches. ACLU*, War*

Comes Home, at 2-3. "Only a small handful of deployments (7 percent) were for hostage, barricade, or active shooter scenarios." *Id.* at 31; *see also* Balko, *Rise of the Warrior Cop*, at 249 ("while SWAT teams [are] generally justified, defended, and regarded as responders to emergency situations like hostage crises and terror attacks, they [are] most commonly being used to serve drug warrants"). Ultimately, "in the majority of deployments the police d[o] not face genuine threats to their safety and security." ACLU, *War Comes Home*, at 31. Thus, in many circumstances in which SWAT teams are currently deployed, the decision to use military-style tactics cannot withstand Fourth Amendment scrutiny.

To be clear, in advocating for Fourth Amendment review of military-style raids, the objective is not to second-guess the "split-second judgments" of officers in deciding what level of force to use in "circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-97. Instead, the objective is to make clear that calculated decisions to deploy SWAT teams—decisions made well in advance of the raids themselves—should be subject to meaningful judicial scrutiny.

It is also true that, as with the knock-and-announce rule, it may sometimes be difficult in practice to apply the Fourth Amendment's reasonableness requirement to decisions to use military-style raids. The point is not that courts should second-guess police decisions in truly difficult cases. It is instead that many cases are easy because the decision to execute a disproportionate military-style raid is not supported by any particularized government interest whatsoever.

This case is a perfect example. The police made a conscious decision, well in advance of the search, to deploy a heavily armed SWAT team to Cornish's home at 4:30 in the morning based on nothing more than an anonymous tip and trace amounts of marijuana found in a trash can outside his duplex apartment. Pet. App. 20a-21a. This decision, compounded by the failure to knock and announce, ultimately resulted in Cornish's death. The police were unable to identify any specific government interest that might explain their decision to execute a military-style night raid to investigate Cornish's alleged possession of a small amount of marijuana. *See* Pet. 4-5. Sending in the SWAT team in this case was unreasonable under the Fourth Amendment.

3. Although *amicus* believes that these Fourth Amendment principles are clear, the lower courts evidently do not. Courts confronted with claims that military-style raids violate the Fourth Amendment widely agree on two points—(1) these raids are profoundly dangerous, and (2) the use of such tactics is at least subject to Fourth Amendment scrutiny. *See, e.g.*, *United States v. Folks*, 236 F.3d 384, 388 (7th Cir. 2001). That is where the agreement ends.

In applying Fourth Amendment scrutiny to the decision to conduct a military-style raid, several courts have correctly adopted a reasonableness analysis that draws on this Court's decisions and the principles identified above. For example, in *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir. 2003), the Third Circuit asked whether the decision to deploy a SWAT team was an "objectively reasonable respons[e] to th[e] situation," *id.* at 516, and considered whether that decision was proportional to any particularized danger in the circumstances at

issue. *See id.* at 517. The Second and Ninth Circuits have applied similar standards. *See Terebesi v. Torreso*, 764 F.3d 217, 231, 235-36 (2d Cir. 2014); *Alexander v. City & Cnty. of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994).

Other courts, by contrast, have refused to conduct the balancing required by the Fourth Amendment. For example, the Tenth Circuit has held that the decision to deploy a SWAT team is unconstitutional only if the police "decided to use the SWAT team knowing that [it] would use excessive force [or] intending to cause harm to any person," or if police "instructed the SWAT team to use excessive force." *Holland v. Harrington*, 268 F.3d 1179, 1190-91 (10th Cir. 2001). That court has also held that, "[w]ithout such evidence the mere decision to deploy a SWAT team, *even under a blanket rule*, does not offend the Fourth Amendment." *Whitewater v. Goss*, 192 F. App'x 794, 798 (10th Cir. 2006) (emphasis added); *see also Santistevan v. City of Colo. Springs*, 983 F. Supp. 2d 1295, 1319 (D. Colo. 2013) (same). Similarly, in *Andrade v. Chojnacki*, 65 F. Supp. 2d 431 (W.D. Tex. 1999), the court held that using a SWAT team violates the Fourth Amendment only if the "raid plans called for [officers] to shoot [suspects] without provocation," or if officers used military tactics with the "specific purpose of causing harm." *Id.* at 457.

These approaches are patently inconsistent with the Fourth Amendment because they condone the routine use of military-style raids without regard to whether such tactics are proportional to the circumstances of a particular case. They also erroneously turn on the subjective intentions and knowledge of the police, rather than the objective

and specific reasonableness analysis that the Fourth Amendment requires. *See, e.g.*, *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("We have long held that the touchstone of the Fourth Amendment is reasonableness. Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." (citation and quotation marks omitted)).

Even when courts have purported to apply the correct legal standard, they have diverged in their application of that standard. Some courts have properly concluded that military-style raids and their associated weaponry should not be used simply as a matter of routine, and instead require individualized justifications. *See, e.g.*, *Estate of Smith*, 318 F.3d at 517; *Boyd v. Benton Cnty.*, 374 F.3d 773, 784 (9th Cir. 2004). Other courts, however, have credited police justifications that are present in the ordinary case, and that would therefore authorize the widespread use of military-style raids. For example, in *Folks*, the Seventh Circuit concluded that it was reasonable for police to throw a flash-bang grenade into a residence merely because they believed that gang members lived there. 236 F.3d at 388 n.2. Similarly, in *Ramage v. Louisville/Jefferson Cnty. Metro Gov't*, 520 F. App'x 341, 346 (6th Cir. 2013), the Sixth Circuit held that it was constitutional to deploy a SWAT team and use a flash-bang grenade because the suspect had a criminal history that suggested he might be armed, and because his property had "fences," a "gate," and "security doors." *Id.* at 346.

The Fourth Amendment should not mean different things in different parts of the country—and this Court must ensure that all citizens are

afforded the Fourth Amendment's fundamental protections against the routine police use of military tactics.

III. In This Case, the Court Should Send a Message to Police and the Lower Courts About the Importance of the Fourth Amendment Issues at Stake

There is no question here that respondents violated the knock-and-announce rule even in its current form—expansive exceptions and all. It is therefore unnecessary to do anything more in this case than to reverse the Fourth Circuit's decision for the reasons explained in the petition. This section highlights one of those reasons that is of core concern to *amicus*: the proper institutional role of courts and juries in defending individual constitutional rights.

In this case, police in Cambridge, Maryland used military tactics to execute a search warrant on Andrew Cornish. These tactics—fatally exacerbated by the SWAT team's violation of the Fourth Amendment—caused Cornish's death. This police shooting was entirely avoidable, as the jury found when it awarded Cornish's father $250,000 in damages. On appeal, the Fourth Circuit reversed the jury's decision in a divided ruling. This decision conflicts with the long-established principles underlying the knock-and-announce rule, and it inappropriately displaces the jury's critical role in holding public officials accountable for their actions.

This case highlights the serious harms that result from the routine deployment of SWAT teams—particularly when police violate the knock-and-announce rule in conducting late-night raids on the homes of their targets. Absent any form of

accountability, police forces do not have the proper incentive to consider whether the purported benefits of these tactics outweigh the harms. But if police can be held accountable for the outsized harms that these types of raids cause, they have the incentive at least to *consider* whether the circumstances they face justify the use of military tactics.

The Court explored these incentives in *Hudson*. There, a criminal defendant asked the Court to exclude evidence found following an admitted violation of the knock-and-announce rule. The Court refused, holding that "[r]esort to the massive remedy of suppressing evidence of guilt is unjustified." 547 U.S. at 599. Among the reasons given for this conclusion was the availability of civil damages suits for violations of the knock-and-announce rule. As the Court noted, the "slow but steady expansion" of Section 1983 provides a remedy that was not available when the exclusionary rule first developed. *Id.* at 597. The Court also discussed the availability of attorney's fees for civil rights plaintiffs and the increased willingness of citizens and lawyers to seek relief for police misconduct. *Id.* at 597-98. Taking these factors together, the Court concluded that, "[a]s far as we know, civil liability is an effective deterrent here." *Id.* at 598.

But civil liability cannot be an effective deterrent if courts refuse to hold police accountable. In this case, the Fourth Circuit bent over backward to avoid holding respondents accountable for their violation of the knock-and-announce rule. Left undisturbed, that decision would effectively inform police that they never need concern themselves with potential liability for using military-style raids or violating the knock-and-announce rule.

The Fourth Circuit also arrogated to itself the role of the jury. This Court has repeatedly stated—including in a case involving a violation of the knock-and-announce rule—that it is guided by "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing." *Wilson*, 514 U.S. at 931. One of these traditional protections is a citizen's right to have a civil suit for damages resulting from an unreasonable search decided by a jury.

As Justice Scalia has noted, "the Framers endeavored to preserve the jury's role in regulating searches and seizures." *California v. Acevedo*, 500 U.S. 565, 581-82 (1991) (Scalia, J., concurring in the judgment). At common law, unless the jury found that his actions were reasonable, an officer was liable for trespass if he searched or seized without a warrant. *Id.* (citing Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1178-1180 (1991)). The citizens on the jury were the factfinders, and the Fourth Amendment sought to protect their role in constraining official power. *Id.* This role was consistent with the founding principle that the jury provides a critical safeguard against government overreach. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J, dissenting) ("The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary."); 3 The Writings of Thomas Jefferson 71 (Washington ed. 1861) (observing that jury trial is the "only anchor yet imagined by man, by which a government can be held to the principles of its constitution").

This Court has long recognized that two English cases, *Wilkes v. Wood,* 19 How. St. Tr. 1153 (1763) and *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765), made a particularly significant contribution to the framing of the Fourth Amendment. *See Boyd v. United States*, 116 U.S. 616, 626-27 (1886) ("As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered [*Entick*] as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the fourth amendment to the constitution."); *see also City of W. Covina v. Perkins*, 525 U.S. 234, 247 (1999) (Thomas, J., concurring) (describing *Wilkes* and *Entick* as "two celebrated cases that profoundly influenced the Founders' view of what a 'reasonable' search entailed").

These cases are most remembered for their discussion of general warrants. But the Framers would have been keenly aware that both also involved the appellate court's confirmation of a jury verdict against the king's officers. If *Wilkes* and *Entick* are truly the touchstone of our Framers' conception of the Fourth Amendment, there can be little doubt that the Framers intended a central role for the jury in determining what constitutes a reasonable search, and in holding officials accountable when they fail to meet that standard.

Here, the Fourth Circuit deprived the jury of this role, and it deprived petitioner of the jury's verdict. It held that "no reasonable jury could have found that the Officers' knock-and-announce violation proximately caused Cornish's death." Pet. App. 14a.

But the jury finding was reasonable; only by uncritically crediting the officer's disputed testimony was the panel majority able to determine otherwise. Pet. 15-24. This fundamental error—a decision by two members of the panel that they could evaluate the record evidence better than the people who were actually in the courtroom—must be reversed.

Although summary reversal in this case would not itself resolve the problems of unreasonable military-style raids and rampant violations of the knock-and-announce rule, it would send the important message that the lower courts should respect the role of juries in our constitutional structure, not contort the law to avoid holding the police accountable. Moreover, it would inform police that they must at least consider whether the use of a military-style raid is reasonable under the circumstances.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision below.

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