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No-Knock, Who's There? Why Federal Judges Do Not Have the Authority to Issue No-Knock Warrants

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NO-KNOCK, WHO'S THERE? WHY FEDERAL JUDGES DO NOT HAVE THE AUTHORITY TO ISSUE NO-KNOCK WARRANTS

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INTRODUCTION

The windows shook and the walls rattled when Louisville police officers used a battering ram to forcibly enter the home of Breonna Taylor in the midnight hour of March 13, 2020.[1] Afraid for their lives and unsure of the identity of the people "aggressively knocking" their way inside, Taylor's boyfriend, Kenneth Walker, opened fire.[2] The police officers involved that night have repeatedly asserted they knocked loudly for ninety seconds, eventually giving notice of their identity (police) and purpose (warrant) before returning fire, killing Taylor.[3] However, the 9-1-1 call Walker made that night suggests, at a minimum, he and Taylor had no idea who had barged in with guns blazing.[4] Conflicting accounts remain unresolved as to whether the officers truly announced their presence and purpose or not.[5] A state grand jury ultimately returned an indictment against one of the responding officers for wanton endangerment,[6] though a jury acquitted that officer.[7]

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1. Richard A. Oppel Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), https://www.nytimes.com/article/breonna-taylor-police.html.

2. *Id.*

3. *Id.*

4. *Id.* ("Somebody kicked in the door and shot my girlfriend.").

5. *Id.*

6. *Id.* (referencing Officer Brett Hankinson indicted for "wanton endangerment of neighbors whose apartment was hit when he fired without a clear line of sight into the sliding glass patio door and window of Ms. Taylor's apartment.").

7. On August 4, 2022—more than two years after Breonna Taylor's death—Attorney General Merrick Garland announced federal charges against four of the officers involved for crimes including violations of Taylor's civil rights, conspiracy, obstruction, and unconstitutional use of force. Attorney General Merrick Garland, Remarks Announcing Current and Former Louisville, Kentucky Police Officers Charged with Federal Crimes Related to Death of Breonna Taylor, (Aug. 4, 2022) (transcript available at https://www.justice.gov/opa/speech/attorney-general-merrick-garland-delivers-remarks-announcing-current-and-former). Former Louisville Metro Police Detective Kelly Goodlett pleaded guilty to one count of criminal conspiracy for her part in falsifying the affidavit used to support probable cause for the no-knock warrant at issue. The trial for former officers Joshua Jaynes and Kyle Meany is scheduled to begin mid-October 2022. The fourth former officer, Brett Hankinson, will face a federal jury in November 2022 for actions related to his use of force at issue in his state criminal trial. Josiah Bates, *Officer's Guilty Plea in*

Unfortunately, this is an anticipated scenario and danger posed by a no-knock warrant.[8] The events leading to Taylor's death were authorized by a no-knock warrant predicated on questionable information about an ex-boyfriend, Jamarcus Glover, who once received mail at Taylor's address.[9] Police investigated Glover for drug possession and other drug related crimes before applying for the warrant.[10] The affidavit supporting the warrant alleged Glover had once left Taylor's home with a package.[11] It further alleged United States Postal Service records corroborated that Glover received mail at Taylor's address.[12] Unfortunately for Taylor, that threadbare connection supported the inference that Taylor's home was a possible "safe house" for the drugs Glover was purportedly dealing at the time.[13] In twelve minutes' time, a state judge signed off on five nearly identical no-knock warrants describing the same anticipated dangers at each of five locations believed to be associated with Glover.[14] In half as many minutes, the police forcibly entered and returned Walker's fire, killing Breonna Taylor.[15]

At the time of Taylor's death, no-knock provisions were permissible under Kentucky state law.[16] However, the circumstances of Tay-

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Breonna Taylor Case Raises Questions About Possible Cooperation With Feds, TIME (Aug. 29, 2022), *https://time.com/6208891/breonna-taylor-officers-charged-status-updates/*.

8. Brian Dolan, Comment, *To Knock or Not to Knock? No-Knock Warrants and Confrontational Policing*, 93 ST. JOHN'S L. REV. 201, 216–17 (2019).

9. Oppel, *supra* note 1; *see also* David Alan Sklansky & Sharon Driscoll, *Stanford's David Sklansky on the Breonna Taylor Case, No-Knock Warrants, and Reform*, LEGAL AGGREGATE (Sept. 28, 2020), https://law.stanford.edu/2020/09/28/stanfords-david-sklansky-on-the-breonna-taylor-case-no-knock-warrants-and-reform/ [hereinafter *Sklansky Interview*].

10. Oppel, *supra* note 1.

11. *Sklansky Interview*, *supra* note 9.

12. *Id.*

13. Oppel, *supra* note 1.

14. Radley Balko, *Opinion, Correcting the misinformation about Breonna Taylor*, WASH. POST (Sept. 24, 2020), https://washingtonpost.com/opinions/2020/09/24/correting-misinformation-about-breonna-taylor/.

15. *Id.*

16. All Things Considered, *No-Knock Warrants: How Common They Are And Why Police Are Using Them*, NAT'L PUB. RADIO (June 12, 2020), https://www.npr.org/2020/06/12/876293168/no-knock-warrants-how-common-they-

lor's death have rightly intensified the discussion surrounding no-knock warrants.[17] In direct response to the events of March 13, 2020, the City of Louisville passed "Breonna's Law," effectively outlawing no-knock warrants.[18] Breonna's Law also requires officers to turn on his or her body camera five minutes prior to executing a warrant.[19] Many other states and localities now have laws prohibiting no-knock warrants.[20] However, federal no-knock warrants—once the congressionally approved darling of the Nixon administration[21]—have remained in a legal gray zone since 1974.[22] Since then, the constitutional question of whether federal judges may issue a warrant with a no-knock provision has gone unanswered.[23] The "War on Drugs" manufactured support for the former federal no-knock warrant.[24] It is

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are-and-why-police-are-using-them [hereinafter *All Things Considered Article*] (referencing the Louisville City Council banning no-knock warrants in June 2020, three months after Breonna Taylor's death).

17. Peter Nikeas & Kaanita Iyer, *There's a growing consensus in law enforcement over no-knock warrants: The risks outweigh the rewards*, CNN (Feb. 12, 2022, 11:03 AM), https://www.cnn.com/2022/02/12/us/no-knock-warrants-policy-bans-states/index.html.

18. LOUISVILLE, KY., CODE § 39.176 (2020).

19. LOUISVILLE, KY., CODE § 39.176(b) (2020).

20. *See generally* Racial Justice, *Banning No-Knock Warrants: A Growing Movement on Change.org*, CHANGE.ORG (Nov. 2, 2020), https://www.change.org/l/us/banning-no-knock-warrants (referencing the sixty petitions filed on Change.org in October 2020 that call for city- and state-wide bans on no-knock warrants); Nikeas & Iyer, *supra* note 17 ("At least four states . . . have banned the no-knock warrants, while other states have enacted laws that stop just short of doing so[.]").

21. *See generally* Dolan, *supra* note 8, at 211 ("The origins of no-knock warrants can be traced to the Nixon administration and the early days of the War on Drugs. . . . [N]o-knock warrants, like the War on Drugs itself, was always more about politics than effectiveness." (citing RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES 83-84, 90 (2014))).

22. *See* discussion *infra* Section III.A. *See also* United States v. Tisdale, 195 F.3d 70, 73 (2d Cir. 1999) ("[I]n light of the fact that appellant does not contend that the New York State standard is more stringent than the federal one (an issue we have not considered).").

23. *Tisdale*, 195 F.3d at 73 (determining potential constitutional issue was moot).

24. *See generally* Dolan, *supra* note 8, at 204 ("Despite the lack of empirical support, the presumption that drugs and violence are directly related is deeply rooted in our society, and this partially explains why no-knock warrants are frequently used when police search for drugs.") (internal citations omitted).

fitting then that drugs—or rather, drug cases—may be the final death knell for such warrants, at least at the federal level.[25]

The constitutional query presented by a federal authority overriding the sovereignty of a state executing its police powers is far beyond the scope of this Comment. Rather, this Comment addresses recent federal legislation—House Resolution numbers 677 and 1280—and why neither are sufficient to clarify the federal magistrate or district judge's authority to issue no-knock warrants. Part I of this Comment will begin by explaining the origin of the knock-and-announce rule. Part II will discuss the corresponding rise of a workaround known as the "exigency exception." Part III will expand on the legal nuances of case law and other legal opinions addressing no-knock warrants versus no-knock entries. Part IV will highlight the prevalence of no-knock warrants used in drug-related cases, and how conflicting state and federal laws governing marijuana may exacerbate the uncertainty surrounding federal authorization of no-knock warrants. Finally, this Comment will conclude by proposing that Congress should, at minimum, require federal agents to confirm "actual receipt of reliable information negating the existence of exigent circumstances"[26] *before* executing an otherwise lawful no-knock warrant.

I. A PRIMER ON THE ORIGIN AND EVOLUTION OF THE KNOCK-AND-ANNOUNCE RULE

The home was—and largely remains—recognized as the most sacred manifestation of a person's right to privacy.[27] The common law's "particular and tender . . . regard to the immunity of a man's house, that it stiles [sic] it his castle, and will never suffer it to be violated with impunity,"[28] runs centuries deep. However, the home-as-a-

25. George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 362(a) (as passed by H. Rep., Mar. 3, 2021).

26. *But cf.* Authority of Federal Judges and Magistrates to Issue "No-Knock" Warrants, 26 Op. O.L.C. 44, 54 (2002) ("[I]t does not follow that officers in possession of such warrants must necessarily and invariably undertake an independent reinvestigation of those circumstances prior to execution of the warrant.").

27. *But cf.* Riley v. California, 573 U.S. 373, 396–97 (2014) (positing the privacy implications of searching a cell phone outweigh those following a search of a home).

28. 4 WILLIAM BLACKSTONE, COMMENTARIES 16 § II (n.p. 1769).

castle concept has almost always included deference to the sovereign's ability to carry out justice, albeit with a strong caveat. In one of the earliest cases concerning the King's ability to "break the party's house,"[29] the presiding Lord Justices grappled with the tension between public and private interests with respect to the home.[30] In *Semayne's Case*, the Plaintiff, Peter Semayne, brought a civil writ of attachment against his then-deceased debtor, George Berisford, to recover the debts owed to Semayne. The Sheriff of London attempted to serve the writ to Richard Gresham, a joint tenant with Berisford, but Gresham denied the Sheriff entry. The Sheriff then threatened to break and enter without offering additional context. In his opinion, then-Solicitor General of the Law Officers of the Crown, Sir Edward Coke, acknowledged Gresham's property rights were violated; in doing so, Coke resurrected the premise of an English statute dating to 1275.[31] Specifically, the Statute of Westminster recognized the grievous intrusion into the home of an individual not party to the writ being executed: "for the law . . . abhors the . . . breaking [into] of any house" of an uninvolved party who, if given notice, "is to be presumed that he would obey it."[32] Therefore, held the court, agents of the King executing a writ against a subject "ought to signify the cause of his coming and to make request to open the doors."[33] Ultimately, the court gave judgment for Gresham for doing "that which he might well do by the law, . . . to shut the door of his own house."[34] Put in contemporary

29. Wilson v. Arkansas, 514 U.S. 927, 931 (1995) (quoting Semayne's Case, 77 Eng. Rep. 194 (K.B. 1604)).

30. *See* Semayne's Case, 77 Eng. Rep. 194, 195 (K.B. 1604). *See generally* G. Robert Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499, 500 (1964) (discussing the issues resolved by Semayne's Case).

31. *See* John Wesley Hall, Jr., *Today is [or maybe] the 414th anniversary of Semayne's Case and judicial recognition of knock-and-announce and the castle doctrine*, FOURTHAMENDMENT.COM (Jan. 1, 2018), https://fourthamendment.com/?p=31090 (citing 1 STATUTE OF WESTMINSTER c. 17 (1275) (repealed by Stat. L. Rev. Act 1863)).

32. *Semayne's Case*, 77 Eng. Rep. at 194.

33. *Id.*

34. *Id.* at 197.

legal lexicon, the Sheriff's actions against Gresham were unreasonable.[35]

In giving the notice requirement the force of law,[36] Coke formally introduced[37] what is now known as the "knock-and-announce" rule. Some 150 years after *Semayne's Case*, the *Case of Richard Curtis* offered additional context for the rule, requiring "[n]o precise form of words [to signal] the officer cometh not as a mere trespasser, but claiming to act under a proper authority."[38] A parallel thread throughout the case law and advisory opinions of the day remained that an officer *did* have authority to enter once denied; the officer simply had to announce who he was and why he was on the premises.[39] Provided the officer gave sufficient notice of "who" and "why," the officer's entry was no longer *unreasonable*, and therefore tolerated under English law.

A. Incorporation of Knock-and-Announce into American Law

This knock-and-announce concept from English common law was quickly codified in the constitutions and legislative acts of the newly independent American states and commonwealths.[40] In a testament to the societal importance of this rule, the Framers of the United States Constitution, and specifically of the Fourth Amendment, implicitly el-

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35. Michael R. Sonnenreich & Stanley Ebner, *No-Knock and Nonsense, an Alleged Constitutional Problem*, 44 ST. JOHN'S L. REV. 626, 627 (1970) (differentiating Semayne's civil action as one *not* justifying—and therefore unreasonable—the no-notice entry from a felony crime that would justify such an entry when in pursuit of the felon).

36. *But see id.* at 628–29 ("The sheriff 'ought' to signify why he is about to execute the King's process before he breaks and enters. But the broadest examination of English law and precedent discloses no evidence that such a suggestion was ever, in fact, a requirement which would render the subsequent entry legal. For too long this case has been read out of context; to ignore the precatory wording is to further confuse the problem.").

37. *Semayne's Case*, 77 Eng. Rep. 194 (K.B. 1604) ("[T]he house of everyone is to him as his castle and fortress, as well for his defence [sic] against injury and violence, as for his repose.").

38. Wilson v. Arkansas, 514 U.S. 927, 932 (1995) (quoting Case of Richard Curtis, 168 Eng. Rep. 67, 68 (Crown 1757)).

39. *See id.* at 932–33 (citing Lee v. Gansell, 98 Eng. Rep. 700, 705 (K.B. 1774)).

40. *Id.* at 934.

evated the rule to constitutional standing.[41] While not an explicit endorsement of a knock-and-announce requirement, the Fourth Amendment is predicated on the same idea of a government's actions being reasonable:

> 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.[42]

The concept of "reasonableness," however, continues to evolve with Fourth Amendment jurisprudence. To that end, later courts' "effort[s] to give content to [the] term ["reasonable"] may be guided by the meaning ascribed to it by the Framers of the Amendment [such that] a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering."[43]

Though it was so deeply rooted in American law, this notice requirement only became an explicit part of the Fourth Amendment reasonableness analysis in 1995 with the Supreme Court opinion of *Wilson v. Arkansas*. The facts of *Wilson* are straightforward: Sharlene Wilson sold drugs on several occasions to a police informant. Officers used the information from their informant to support their warrant applications to search and arrest Wilson and her housemate, Bryson Jacobs. With lawful warrants in hand, the officers entered through Wilson's unlocked screen door while simultaneously announcing their presence and purpose. In the *Wilson* opinion, the Court sidestepped the issue of whether the circumstances present at the time officers entered Wilson's home justified their unannounced entry.[44] However, it ultimately included notice as a countervailing factor for consideration under a Fourth Amendment analysis.[45] Put differently, those execut-

41. *Id.*

42. U.S. CONST. amend. IV (emphasis added).

43. *Wilson*, 514 U.S. at 931.

44. *Id.* at 936 ("For now, we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment.").

45. *Id.*

ing warrants were now on notice to give notice, at least in most situations.

II. EXCEPTIONS TO KNOCK-AND-ANNOUNCE AND THE RISE OF THE NO-KNOCK WARRANT

Over time, the Court expanded the meaning of "reasonable" under the Fourth Amendment to include various exceptions that would permit dispensing with the notice requirement.[46] Those exceptions include entry under the force of a lawful warrant, consent, and exigent circumstances. Simply put, "[a] search without a warrant is unreasonable per se unless it falls within an established exception."[47] This section examines the exigency exception in closer detail.

To be certain, Fourth Amendment jurisprudence generally requires a close review of the individual factual scenario to determine the reasonableness of the contested search or seizure. Deference is given to police and similar professionals because of their need to make real-time assessments of situational danger or other possible negative outcomes following their actions.[48] Therefore, the presence of "exigent circumstances" has proven to be a handy workaround to the knock-and-announce rule.[49] By its plain meaning, "exigent" connotes urgency, something requiring immediate attention.[50] The implication is that officers executing a warrant become reactive to the cir-

46. *See id.* at 934 ("This is not to say, of course, that every entry must be preceded by an announcement. The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests.").

47. People v. Byers, 6 Cal. App. 5th 856, 862 (2016). Least applicable in the context of this Comment is consent, though the evolution of that doctrine in this search and seizure context continues to evolve. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 245 (2009) (stating "the unlawfulness of the officers' [reliance on the "consent-once-removed doctrine"] was not clearly established" and the officers in that case should not be personally liable for choosing the "wrong side" of a controversy).

48. *See, e.g.*, State v. Foster, 347 Or. 1, 8 (2009) (quoting State v. Bates, 304 Or. 519, 524 (1987)).

49. *See generally* Sonnenreich & Ebner, *supra* note 35, at 627 (differentiating Semayne's civil action as one not justifying the no-notice entry from a felony crime that would justify such an entry when in pursuit of the felon).

50. *Exigent*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("requiring immediate action or aid; urgent <exigent circumstances>").

cumstances around them. Put differently, the reasonableness of the officers' actions is scrutinized differently when the officers perceive, for example, an element of danger. However, "[i]n order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence . . . would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."[51]

Drug-related crimes tend to involve situations where exigent circumstances are—or are likely to be—present at the time a warrant is executed.[52] However, this classification does not justify a blanket exception to the knock-and-announce rule.[53] The Court made this much clear in its unanimous opinion for *Richards v. Wisconsin*.[54] There, a group of undercover and plainclothes officers knocked on the motel door of a purported drug dealer under the guise of completing a maintenance check.[55] Among the plainclothes officers was one in uniform.[56] Peering through the door chain of his barely cracked door, the defendant (Richards) saw the uniformed officer and promptly slammed the door shut.[57] The trial court acknowledged the officers' predicament, specifically that Richards may dispose of the drugs or attempt to escape, thus justifying why the officers burst through Richards's door by force.[58] The Court held that the opportunity to dispose of the drugs quickly was sufficient for the purposes of justifying the officers' no-knock entry.[59] Indeed, once officers went inside, Richards *was* trying to escape through the bathroom window.[60] While "this showing [of exigent circumstances] is not high, . . . the police

51. Richards v. Wisconsin, 520 U.S. 385, 394 (1997).

52. Dolan, *supra* note 8, at 211.

53. *Richards*, 520 U.S. at 387.

54. *Id.* at 388 ("We disagree with the court's conclusion that the Fourth Amendment permits a blanket exception to the knock-and-announce requirement for this entire category of criminal activity.").

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 389.

59. *Id.* at 395 ("We agree . . . that the circumstances in this case show that the officers had a reasonable suspicion that Richards might destroy evidence if given further opportunity to do so.").

60. *Id.* at 388–89.

should be required to make it whenever the reasonableness of a no-knock entry is challenged."[61] And yet, the Court did not let this low threshold equate to carte blanche permission for officers to dispense with the notice requirement in all drug cases by invoking the issue of disposal or escape. Rather, in dicta, the Court underscored the importance of a careful factual review unencumbered by the "social norms of a given historical moment."[62] In so doing, the Court attempted to "strike[] 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."[63]

Only one year after *Richards v. Wisconsin*, the Supreme Court again addressed the scope of exigent circumstances, though in the context of a "no-knock warrant." A "no-knock warrant" effectively shifts the timeline from *reacting* to an urgent set of facts to *anticipating* whether such facts will be present when the warrant is executed. The justification for a no-knock warrant, like that of its kin, the no-knock entry, requires the same showing of reasonable suspicion.[64] In *United States v. Ramirez*, a federal marshal anticipated he would be met at the subject premises with an armed and dangerous escaped felon who had a history of assaulting officers. Accordingly, the marshal requested a no-knock provision be added to the warrant. A judge authorized the warrant, complete with its no-knock provision; the officers descended upon Ramirez's home with the authority to "break the house" even though notice would not be given. By upholding both the no-knock warrant and the officers' actions as reasonable, the *Ramirez* Court famously construed § 3109 of the United States Code to "prohibit[] nothing," instead construing the statute as "merely authoriz[ing] officers to damage property in certain instances."[65] In doing so, the Court gave the force of law to what had before been mere dicta: a "covert entry of a private home does not require authorization in

61. *Id.* at 394–95.

62. *Id.* at 396 n.4 (quoting Minnesota v. Dickerson, 508 U.S. 366, 380 (1993)).

63. *Id.* at 394.

64. United States v. Ramirez, 523 U.S. 65, 73 (1998) ("We therefore hold that § 3109 includes an exigent circumstances exception and that the exception's applicability in a given instance is measured by the same standard we articulated in *Richards*.").

65. *Id.* at 72.

a warrant to be reasonable under the Fourth Amendment."[66] To avoid any doubt to the contrary, the *Ramirez* Court held § 3109 "includes an exigent circumstances exception."[67] Crucially, however, this recognition only authorized an officer to dispense with the notice requirement based on the present circumstances. In other words, the *Ramirez* holding did not explicitly grant authority for the issuance of federal no-knock warrants.[68]

With the exigent circumstances exception now firmly embedded in American law, courts continue to tinker with the circumstances that support a no-knock entry as a reasonable response. In *United States v. Banks*, the Supreme Court recognized the following factors an officer should consider before entering the premises but *after* knocking: the size and location of the residence; the location of the officers in relation to the main living or sleeping areas of the residence; the time of day the officers executed the warrant; the nature of the suspected offense; the body of evidence demonstrating the suspect's guilt; the nature and number of the suspect's prior convictions; and any other observations triggering the senses of the officers that reasonably would lead one to believe that immediate entry was necessary.[69]

This much is clear: if an officer perceives, in real-time, the presence of exigent circumstances, he or she may forgo the knock-and-announce requirement. Less clear is why, with an exigency exception permitting an unannounced entry, a no-knock provision in a search warrant is still necessary. A no-knock provision steps in place of an officer's real-time assessment of exigent circumstances by instead *anticipating* such circumstances.[70] For example, the affidavit supporting the no-knock warrant used against Breonna Taylor referenced security cameras around her home.[71] In theory, those security cameras would

66. United States v. Moore, 956 F.2d 843, 855 n.8 (8th Cir. 1992).

67. *Ramirez*, 523 U.S. at 73.

68. Memorandum from the Off. of the Att'y Gen., *Authority of Federal Judges and Magistrates to Issue "No-Knock" Warrants*, 26 Op. O.L.C. 44, 49 (June 12, 2002), https://www.justice.gov/file/19061/download.

69. United States v. Banks, 540 U.S. 31, 34 (2003) (citing United States v. Banks, 282 F.3d 699 (9th Cir. 2002)).

70. *See* discussion *infra* Part III.A.

71. *Sklansky Interview*, *supra* note 9 ("The affidavit also said that a United States Postal Inspector reported that Glover had been receiving packages at Taylor's address. This apparently wasn't true.").

alert the drug dealers—or doers—within the home to the police presence, resulting in drug disposal or possible bloodshed.[72] However, both of those outcomes are already factored into the real-time exigency analysis. As to Breonna Taylor's case, the no-knock warrant merely provided legal justification for the Louisville police to prepare their forcible, unannounced entry by battering ram in advance. Ultimately, the state judge who issued that no-knock warrant did so in compliance with what was then state law.[73] A more interesting analysis ensues when a federal judge issues a no-knock warrant in a state where such warrants are not authorized by state law.

III. AUTHORITY TO ISSUE A NO-KNOCK WARRANT

This section considers the laws governing federal authority to issue a no-knock warrant and how two states that do not permit no-knock warrants—California and Oregon—compare in their own approaches to the knock-and-announce rule.

A. Federal

Federal authority to issue a no-knock warrant was congressionally authorized for a brief period prior to 1974. The since-repealed subsection (b)(2) of § 879 of the United States Code read as follows:

> [I]f the judge or United States magistrate issuing the warrant (1) is satisfied that there is probable cause to believe that . . . or (B) the giving of such notice will immediately endanger the life or safety of the executing officer or another person, and (2) *has included in the warrant a direction that the officer executing it shall not be required to give such notice*. Any officer acting under such warrant, shall, as soon as practicable *after* entering the premises, identify himself and give the reasons and authority for his entrance upon the premises.[74]

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72. *Id.* ("The warrant application also suggested a no-knock warrant was appropriate because Glover and his alleged partner had 'cameras on the location that compromise Detectives once an approach to the dwelling is made[.]'").

73. *See All Things Considered Article*, *supra* note 16.

74. Thomas v. United States, 501 F.2d 1169, 1173 n.2 (8th Cir. 1974) (emphasis added).

The Eight Circuit reasoned this authorization was sufficient to support the validity of a no-knock warrant issued by a United States district judge in *Thomas v. United States*. There, the reviewing court avoided the question of evidence suppression because the predicate posed by *Thomas*—that the officers did not enter lawfully—was not met. In other words, the federally authorized no-knock warrant was valid.[75] This federal authority, however, was relatively short-lived; the subsection permitting a no-knock entry was repealed and superseded in 1974 by § 3109. The timing of § 879's repeal is noteworthy due to the fact it coincided with the close of the Watergate prosecution, two years after President Nixon's resignation. Briefly, no-knock warrants entered the American lexicon following Nixon's declaration of war against drugs. After seeing the devastating aftermath of no-knock raids gone wrong,[76] Congress—denied the opportunity to impeach Nixon himself—determined at least this vestige of Nixon's administration would be shown the door.[77]

Section 3109 authorizes an officer to "break open any . . . door or window of a house, . . . 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."[78] This language—note the notice requirement—stands in stark contrast to the former authority granted to federal judges to issue no-knock warrants.[79] Though the Court has construed § 3109 to include an exigent circumstances exception,[80] this exception has not carried over to grant federal judges authorization for federal no-knock war-

75. *Id.* ("The warrant authorized a search 'in the daytime or nighttime' and authorized the executing officers 'to break and enter . . . without announcing your authority until after you have gained entrance.'").

76. Dolan, *supra* note 8, at 211.

77. *See generally All Things Considered Article*, *supra* note 16 (discussing the controversial aspects of federal no-knock warrants, including botched raids and subsequent congressional hearings).

78. 18 U.S.C. § 3109 (emphasis added).

79. *See* 21 U.S.C. § 879(b) (repealed 1974).

80. *See* discussion *supra* Part III.A. *See also* United States v. Workcuff, 250 F.Supp.2d 1160, 1166 (W.D. Mo. 2003) ("While the officers' actions are in direct violation of section 3109, exigent circumstances can excuse officers from meeting the requirements of section 3109."), *vacated on other grounds*, United States v. Workcuff, No. 02-00189-01-CR-W, 2005 WL 2043053 (W.D. Mo. Aug. 13, 2003).

rants based on the same facts anticipated ahead of execution.[81] In short: federal judges are in a no-knock no-man's land.

As it happens, federal judges also face uncertainty regarding their authority to issue no-knock warrants for joint state-federal operations. Nearly a quarter century after it was decided, the only case to confront this issue remains *United States v. Tisdale*. The improbably brief opinion of *Tisdale* is illuminating as to how future courts may turn if presented with this prickly issue head on.

In *Tisdale*, a drug dealer argued against what he deemed an insufficiently particularized showing to support the no-knock warrant executed against him by a joint federal-state task force in New York State. New York, then and now, permits no-knock warrants.[82] The court affirmed Tisdale's conviction but sidestepped an opportunity to address a primary criticism of no-knock warrants. Specifically, the court recognized the ability of the officers to consider exigent circumstances while acknowledging a "no-knock provision potentially insulates the police against a subsequent finding that exigent circumstances" were not present when the warrant was served.[83] The practical effect should be obvious: police could rely with near impunity on a no-knock provision permitting them to use force to enter unannounced. Twenty years later, this was the exact scenario in the case of Breonna Taylor, albeit without the federal presence. Unfortunately, the *Tisdale* court summarily dispensed with this criticism by suggesting an officer need only have relied in good faith on the exigencies anticipated in the warrant.[84] This "good-faith exception" is best summarized as follows:

> The officers' on-the-spot decision is of necessity a hasty judgment based upon the facts—or reasonably founded suspicion—of the moment. Severe judicial second-guessing is therefore inappropriate.

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81. *See generally* Doran v. Eckold, 409 F.3d 958, 964 (8th Cir. 2005) (acknowledging absence of no-knock authority in search warrant).

82. *See* United States v. Tisdale, 195 F.3d 70, 72 (2d Cir. 1999) (quoting N.Y.C.P.L. § 690.35(4)(b)(i) ("which permits issuance of a no-knock warrant upon a showing that 'the property sought may be easily and quickly destroyed or disposed of.'")).

83. *Id.*

84. *Id.* at 73 ("[T]he officers were entitled to rely on the no-knock provision of the warrant in good faith.").

> The officer must be given a degree of latitude for good faith judgment as to his own possible peril, . . . or as to the possibility for destruction of the evidence, fruits or instrumentalities of crime for which he is obliged to search. If the decision is reasonable under the 'exigent circumstances,' the entry is valid.[85]

Ultimately, after extending that good-faith olive branch, the *Tisdale* court sidestepped the opportunity to directly address the possible outcome of differing state and federal standards concerning knock-and-announce. Until a case that is on point for that tension works its way through the courts, it seems as though a little (good) faith can go a long way.

B. California

California's knock-and-announce rule largely tracks its federal analog: an officer executing a warrant may "break the house" if he is denied entry after first giving notice of his position and purpose.[86] The difference is how California's courts have approached no-knock provisions following the anticipated presence of exigent circumstances. Two cases from the 1970s—one before the repeal of § 879(b), one after—highlight the deference given to an officer when anticipating or facing such (exigent) circumstances.

In March of 1972, Riverside County police officers applied for a warrant to search a house where there was probable cause of drug activity.[87] A magistrate granted the warrant, effectively creating a no-knock provision by including a line that the officers "need not comply with [the notice provision of] Penal Code Section 1531."[88] The police acted on the warrant, completing a covert entry through a broken window where they promptly found ample evidence of drug use. In its analysis, the California Court first addressed the authority of a magistrate essentially to create a no-knock provision where none had been previously authorized.[89] The Court compared section 1531 with a

85. State v. Ford, 310 Or. 623, 635 (1990) (internal citations omitted).
86. CAL. PENAL CODE § 1531 (West 2022).
87. Parsley v. Super. Ct. of Riverside Cnty., 9 Cal. 3d 934, 937–41 (1973).
88. *Id.* at 937.
89. *Id.* at 938.

companion warrant provision, section 1533.[90] The latter included express language authorizing the judge to permit noncompliance with the section "upon a showing of good cause."[91] In contrast, section 1531 did not include such direct language, or any language suggesting a judicial override was permissible.[92] The Court resolved the differences between the two sections by reasoning the legislature had purposely excluded such an exception from section 1531.[93] In the year preceding the *Parsley* opinion, "12 percent of all search warrants issued in Los Angeles County contained [a no-knock] provision."[94] That percentage, the Court held, was statistically significant enough to suggest a judicial bypass of the notice requirement would only serve to swallow section 1531.[95] The primary concern was not the safety of the subjects on the receiving end of the warrant. Rather, the Court was concerned officers would abuse the judicial workaround by requesting the provisions in non-emergency situations.[96] Ultimately, in a split decision, the Court held the superior court was "without power to institute a practice of issuing [no-knock] warrants."[97]

The *Parsley* Court also emphasized the importance of a real-time evaluation of exigent circumstances by weighing the "perception and knowledge the officer acquires on the scene immediately prior to effecting entry" against an anticipated scenario used to justify a no-knock warrant.[98] In so doing, the Court acknowledged "police officers have no constitutional duty to obtain prior judicial authorization to enter without notice" when exigent circumstances exist.[99] This concept underscored the decision in *People v. Henderson* only three years later, in 1976. The *Henderson* court held that reliable knowledge of the likely presence of firearms was "sufficient to bring the officers

90. *Id.* at 938–39 (comparing CAL. PENAL CODE § 1531, "Execution; authority to break in after admittance refused," with CAL. PENAL CODE § 1533, "Nighttime Entry").

91. *Id.*

92. CAL. PENAL CODE § 1531 (West 2021).

93. Parsley v. Super. Ct. of Riverside Cnty., 9 Cal. 3d 934, 939 (1973).

94. *Id.* at 940.

95. *Id.*

96. *Id.*

97. *Id.* at 939 (4-3 decision).

98. *Id.* at 940.

99. Parsley v. Super. Ct. of Riverside Cnty., 9 Cal. 3d 934, 939 (1973).

within the no-knock [exigency] exception."[100] Therefore, even though the no-knock provision itself was invalid,[101] the officers acted reasonably under the knowledge their subject tended to be armed (and, coincidentally, also had a prior history of flushing drugs).[102] But, the *Henderson* court warned, "[t]his belief must be based on specific facts and not on broad, unsupported presumptions."[103] In other words, the *anticipation* of exigent circumstances cannot green light a judicial override of section 1531, but the *actual presence* of exigent circumstances can.

Throughout the 1970s, California courts appeared aligned regarding when entering without notice is *permissible* (emergency, a la *Parsley*[104]), but had not yet given considerable attention to when such entry was *reasonable*. California eventually confronted the latter issue when it determined the method of entry should be considered in the reasonableness analysis, nearly a decade before the Supreme Court required the same in *Wilson v. Arkansas*.

In *People v. Neer*, an officer walked up to a screen door at night, backlit by the benign activity of the inhabitants within.[105] Once at the threshold, the officer simultaneously announced his position (officer) and purpose (warrant) while walking through the unlocked door.[106] Here, again, the court emphasized the importance of evaluating the scene in real-time. That officer's entry was not objectively supported by a good faith belief that exigent circumstances—either emergency or drug flushing—existed.[107] Rather, the officer appeared to act first and justify later.[108]

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100. People v. Henderson, 58 Cal. App. 3d 349, 356 (1976).

101. *Id.* at 354.

102. *Id.* at 355–56.

103. *Id.* at 355.

104. *Parsley*, 9 Cal. 3d at 943 (Clark, J., dissenting). *See also Henderson*, 58 Cal. App. 3d at 355 (quoting People v. Dumas, 9 Cal. 3d 871, 879 (1973) ("[T]hey (the searching officers) could therefore reasonably conclude at the time of entry that they were faced with an emergency and that compliance with the announcement requirements would substantially increase their peril.")).

105. People v. Neer, 177 Cal. App. 3d 991, 995 (1986) ("He could see a woman with a child sitting on a couch and a man standing in the kitchen area.").

106. *Id.*

107. *Id.*

108. *Id.*

In *Neer*, the actions of the officer—notice and entry—were simultaneous.[109] It is appropriate then that the *Neer* court also addressed the reasonableness of the length of time between notice and denial of entry (therefore justifying the officer's "break[ing] of the house."). Forcible entry under the *Neer* court's plain reading of section 1531 is not permissible unless the occupants are "given an opportunity to surrender the premises voluntarily."[110] Again, the court took pains to underscore the importance of evaluating the circumstances for exigencies in real-time. Where a direct refusal is absent, "[i]mplied refusal exists when there is [an] unreasonable delay in responding to the officers' announcement *under the circumstances of the case*."[111] Because the record in *Neer* did not support the existence of an unreasonable delay, the officer's entry in the absence of any actual exigency was unreasonable.[112]

This theme has held firm through recent cases considered in California's courts. For example, the subject on the receiving end of a search and arrest warrant was in a peculiar position in *People v. Byers*. There, Byers's roommate gave voluntary consent to officers to search the apartment he shared with Byers.[113] However, consent of a roommate to access a home is trumped by a co-occupant who is present and denies entry to a co-occupant's private space(s).[114] Further, because Byers's roommate gave consent while physically *outside* the apartment, his consent did not absolve the officers from adhering to the knock-and-announce rule.[115] Yet the court did not give much weight to the "road [of] speculation" in determining the proper time between notice and entry, focusing instead on the remedy afforded unjustified no-knock entries.[116] The reasonableness of those officers' entry in-

109. *Id.*

110. *Id.* at 995–96.

111. *Neer*, 177 Cal. App. 3d at 996 (emphasis in original).

112. *Id.*

113. People v. Byers, 6 Cal. App. 5th 856, 860 (2016).

114. *Id.* at 862.

115. *Id.* at 862–63.

116. *Id.* at 868–69. In reaching its decision, the court relied on the case of *Hudson v. Michigan*. In *Hudson*, the Supreme Court was explicit in its explanation that it was not addressing the intricacies of the application of the knock-notice requirement but was instead providing a clear limitation on the remedy. Hudson v. Michigan, 547 U.S. 586, 601 (2006).

stead turned on whether they had reasonable suspicion of exigent circumstances present at the time they served the warrant.[117] Ultimately, such circumstances were deemed present, thereby justifying the officers' no-knock entry.[118]

On balance, California law permits its officers to forgo the knock-and-announce requirement when faced with exigent circumstances. However, those officers may not anticipate such exigencies by way of a no-knock warrant. The result: officers must make a real-time assessment of the facts on the ground when they execute a search warrant.

C. Oregon

Oregon, a relative rarity among its state peers,[119] requires much more than the standard knock-and-announce rule. This is true even though Oregon's constitutional language on unreasonable searches and seizures tracks—almost identically—with the federal Fourth Amendment.[120] Rather, Oregon requires its officers to "give appropriate notice of the identity, authority and purpose of the officer to the person to be searched, or to the person in apparent control of the premises to be searched."[121] Lest this Reader think this is a familiar standard, subsection (3) of section 133.575 of the Oregon Revised Statutes dictates the "executing officer shall read and give a copy of the warrant to the person to be searched."[122] If no one is home, the warrant must be "suitably affixed to the premises"—for example, taped to the door.[123]

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117. *See id.* at 863.

118. *Id.* at 866–67.

119. *See generally* Nikeas & Iyer, *supra* note 17 ("At least four states—Florida, Oregon, Connecticut and Virginia—have banned the no-knock warrants, while other states have enacted laws that stop just short of doing so[.]").

120. *See generally* OR. CONST. art. I, § 9 ("No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.").

121. OR. REV. STAT. § 133.575(2) (2009).

122. *Id.* at § 133.575(3).

123. *Id.*

In *State v. Gassner*, an Oregon appellate court construed this provision to require more than the minimum federal protections when it comes to the knock-and-announce rule.[124] In *Gassner*, state officers had the apartment manager open the defendant's door concurrent with a knock, but no announcement.[125] Once inside the apartment, the cops found the 1,000-odd pills they had expected to find.[126] However, the defendant gave no indication he would (or could) easily dispose of that quantity of pills.[127] The court instead recognized that drug-related offenses seem to involve a higher expectation of exigent circumstances without creating a blanket exception to the notice requirement,[128] while simultaneously recognizing the "Fourth Amendment sets the extreme outer limits on permissible unannounced searches."[129] In doing so, the Oregon court created an intermediate standard for evaluating no-knock entries in drug cases: something greater than the slight burden required by federal law,[130] but less than the stringent 1:1 factual assessment espoused by California courts. In essence, Oregon courts require a showing of probable cause that a small amount of easily disposable evidence is at the subject property. Or, if no quantity is known, the officers must reasonably believe the evidence might be destroyed after giving notice.[131]

Gassner's holding, at least for drug cases, effectively required officers to evaluate the totality of the circumstances at the time they executed the warrant. After *Gassner*, if the drugs stashed at the subject property were too much to flush within a few seconds' notice, then a

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124. State v. Gassner, 6 Or. App. 452, 460 (1971) ("(Mapp v. Ohio) established no assumption by this Court of supervisory authority over state courts . . . and, consequently, it implied no total obliteration of state laws relating to arrests and seizures in favor of federal law.") (internal quotations omitted).

125. *Id.* at 454.

126. *See id.* at 455, 464.

127. *Id.* at 464–65 ("Nothing in the record suggests this is an easily disposable amount of narcotics. Also, there is no showing the police were reasonably concerned that the evidence sought would be destroyed.").

128. *Id.* at 462.

129. *Id.* at 460.

130. State v. Gassner, 6 Or. App. 452, 459 (1971) (quoting Miller v. United States, 357 U.S. 301, 309 (1958) ("[T]he burden of making an express announcement (of authority and purpose) is certainly slight . . . .")).

131. *Id.* at 464.

no-knock entry may not be justified. The Oregon court signaled it would not abide officers who relied on a specific quantity of drugs (1,000 pills) to establish probable cause and then fail to contextualize what that quantity meant in terms of the warrant execution and a no-knock entry.

Nearly twenty years after *Gassner*, the Oregon Supreme Court expanded the exigency exception to Oregon's knock-and-announce requirement in *State v. Ford*. The *Ford* Court recognized the long tradition of Oregon's knock-and-announce rule[132] and later developments in the law encompassing property rights,[133] as well as safety[134] and privacy[135] concerns. It also acknowledged the apparent national consensus among states to uphold no-knock entries based on an officer's apprehension of peril.[136]

Ford involved an ex-convict methamphetamine user with outstanding warrants for his arrest who the police reasonably believed owned a few concealable firearms.[137] Though the felon, Charles Ford, had no prior convictions for violent activity, a SWAT-style tactical team wearing military fatigues used a battering ram to break down Ford's door.[138] The Oregon Court held probable cause that Ford had guns formed the basis of the "officers' apprehension of peril,"[139] which was sufficient to excuse their no-knock entry.[140] In so holding,

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132. *See* State v. Ford, 310 Or. 623, 631 (1990) (recognizing the similarities between OR. REV. STAT. § 133.235(5)–(6) and the 1854 Deady Code).

133. *Id.* (paraphrasing evolution in "knock and announce" jurisprudence from 1774).

134. *Id.*

135. *Id.* at 632 (quoting State v. Valentine/Darroch, 264 Or. 54, 60 (1972) ("The only right of privacy protected by the announcement requirement is the right to know who is entering, why he is entering, and a few seconds to prepare for his entry.").

136. *Id.* at 633 ("We are not aware of any state which, by statute or case law, has rejected an exception to its knock and announce rule based upon an officer's apprehension of peril.").

137. *Id.* at 627–28.

138. State v. Ford, 310 Or. 631, 639 (1990). *But see id.* at 643 n.22 ("While it is true that [Ford] has never been convicted of assaulting a police officer, his extensive criminal history contains substantial evidence of his potentially violent character.").

139. *Id.* at 630.

140. *Id.*

the Court construed Oregon's knock-and-announce rule to include an "apprehension of peril" exception.[141] To hold otherwise would be

> preposterous . . . that an officer cannot act consistent with legitimately held safety concerns when executing a warrant on a suspected drug user believed to be in possession of drugs, stolen property and weapons, unless the officer has knowledge that the person has used the weapons in a violent manner or has a history of violence.[142]

Here, the Oregon Court again appeared to recognize the duty incumbent upon officers executing a warrant to evaluate *all* the circumstances before dispensing with the notice requirement.[143] If an officer has no reason to believe their life or limb is threatened, then compliance with the notice requirement would not "create a risk to the entering officers' safety."[144]

The primary thrust of both the *Gassner* and *Ford* holdings involved the legality of no-knock entries under certain circumstances. More recently, in *State v. Foster,* the Oregon Supreme Court focused instead on the remedy following a no-knock entry. The *Foster* Court's analysis of *when* an officer evaluates the totality of circumstances is timely, at least for purposes of this Comment.

In *Foster*, Oregon state sheriffs needed to serve a restraining order on a person believed to be staying at a particular house. The home was known to the deputies for having large groups of armed people.[145] The homeowner (Foster), his father, and their comrades often became violent with law enforcement, requiring the routine deployment of at least four deputies for any one contact.[146] And so, when four deputies descended upon Foster's home just before midnight, the deputy in charge directed his officers to surround the house to mitigate the po-

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141. *Id.* at 633.

142. *Id.* at 629 (quoting State v. Ford, 99 Or. App. 1, 10–11 (1980), *rev'd*, 310 Or. 623 (1990)).

143. *Id.* at 635, 639 ("The officers' on-the-spot decision is of necessity a hasty judgment based upon the facts—or reasonably founded suspicion—of the moment . . . . The officer must be given a degree of latitude for good faith judgment as to his own possible peril.") (internal quotations omitted).

144. State v. Ford, 310 Or. 631, 637 (1990).

145. State v. Foster, 347 Or. 1, 3 (2009).

146. *Id.* at 3–4.

tential for the occupants to flee or surround the deputies.[147] One of those deputies went right up to a lit bedroom window on the side of Foster's home and looked inside.[148] After the officer saw Foster prepare a pipe with methamphetamine, the deputies entered Foster's home, without knocking, to arrest him.[149]

To be sure, the deputy saw at least a small amount of easily disposable drugs through the bedroom window, which would have sufficed to meet the exigency exception for a no-knock entry.[150] However, that deputy saw those drugs from presumably hallowed ground in Fourth Amendment[151] jurisprudence: Foster's curtilage.[152] True, each respective court assessing the facts of *Foster* recognized the inherent privacy interest that Foster had in the area immediately surrounding his home.[153] However, this privacy interest was easily overcome by the responding officers' prior knowledge of potential violence.[154] Rather than "uncharitably second-guess [the] officer's judgment"[155] about Foster and his cohort's violent history, the *Foster* Court upheld the officer's position in the flowerbed as lawful under Oregon's "officer safety doctrine."[156] This doctrine requires a showing of specific and articulable facts that the "citizen might pose an immediate threat of serious physical injury to the officers or to others then present."[157] These facts can be drawn from prior contacts with the target subject(s) over at least six years without those facts becoming "stale."[158] After all, "human tendencies [to commit violence] have a longer shelf life"

147. *Id.* at 4.

148. *Id.*

149. *Id.*

150. *Id.* ("The deputies were concerned that defendant would destroy the drugs, either by consuming them or by flushing them down the toilet.").

151. *Foster*, 347 Or. at 8 (citing State v. Bates, 304 Or. 519, 524 (1987)).

152. *Id.* at 5.

153. *Id.*

154. *Id.* at 11 ("Under those circumstances, we agree with the trial court that Hardison's actions were within the range of reasonable precautions that the officers were entitled to take against the anticipated threat.").

155. *Id.* at 8 (quoting State v. Bates, 304 Or. 519, 524 (1987)).

156. *Id.* at 5.

157. *Foster*, 347 Or. 1, 8 (2009) (quoting *Bates*, 304 Or. at 524).

158. *Id.* at 10.

than easily disposable amounts of drugs.[159] Put differently, that the officer *reasonably suspected* Foster and his house guests *could* have become violent trumped Foster's constitutional privacy right to be protected against unlawful searches. The lawful position of the officer made for a valid plain-view search through the window into Foster's home. Seeing Foster with his meth pipe provided probable cause for Foster's arrest and the potential Foster could dispose of the meth seen by the officer. However, the fact that the officers could have availed themselves of the drug-related exigency exception was inconsequential. Because of Foster and his various houseguests' violent history, the responding officers were entitled to breach Foster's curtilage and then lawfully enter his home without notice.[160]

After *Foster*, to summarize Oregon's posture on no-knock warrants and entries is to endure whiplash between two branches of its government. If, as the *Foster* Court reasons, "the timing of the officer's knowledge [of the exigent circumstances] is not the point of invoking the officer safety doctrine,"[161] then why not permit no-knock warrants? No-knock warrants based on probable cause of the *potential* for exigent circumstances are anathema to the Oregon legislature under section 133.575, subsection (3) of the Oregon Revised Statutes. However, the Oregon judiciary permits exactly that—*without* a warrant and *without* regard to when the officer became aware of the possible dangers. *Foster* does not require the officer to assess the totality of the circumstances present at the time they execute a warrant. Rather, *Foster's* holding makes lawful a trespass onto a citizen's curtilage to make a plain-view search through a bedroom window.[162] Surely the privacy, and other potential constitutional rights of Oregon's citizenry, would be better served if officers had to at least meet the higher threshold of probable cause before peering into a window at midnight. If a no-knock warrant on probable cause can still end in disaster—even tragedy—[163] then what is to say an officer's lawful snooping through a bedroom window will not end similarly?

159. *Id.*
160. *Id.* at 10–11.
161. *Id.* at 9.
162. *Id.* at 10–11.
163. *See supra* Introduction.

IV. PROPOSED LEGISLATION ADDRESSING THE INTERSECTION OF DRUG LAWS AND NO-KNOCK ENTRIES

This Comment has thus far examined the lack of explicit authority for federal judges to grant no-knock warrants and how differently states like California and Oregon approach no-knock warrants and the "exigency exception" to no-knock entries. The real rub, of course, comes when there is a tension between state and federal law on these topics. Nowhere is this more evident than in the federal criminalization of possession, cultivation, use, or sale of Schedule I drugs, including marijuana.[164] Recall that an easily disposable quantity of drugs is already sufficient to excuse compliance with the notice requirement in California and Oregon. But what results when federal judges are asked to sign off on warrants intended to enforce against said possession, cultivation, or use of marijuana in those states where marijuana is legal? This is analogous to the issue that the court avoided addressing in *Tisdale*, and one that is increasingly timely given the number of states that have legalized marijuana for various purposes.[165] To avoid any unnecessary confusion by the courts, Congress must—at minimum—pass House Resolution number 1280 (the "George Floyd Justice in Policing Act").

A. An Overview of the Legalization of Marijuana

Perhaps unsurprisingly, California, closely followed by Oregon, Alaska, and Washington, led the pack among their sister states when the group of four legalized marijuana for medical uses in 1996 and 1998.[166] Oregon again found its place near the front of the line when

164. *See generally* Memorandum from the Off. of the Att'y Gen. (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download [hereinafter *2018 Memorandum*] ("Congress has generally prohibited the cultivation, distribution, and possession of marijuana."). *But see* MORE Act, H.R. 3617, 177th Cong. § 3 (as passed by H. Rep., Apr. 1, 2022).

165. *See* Jonathan Weisman, *House Votes to Decriminalize Cannabis*, N.Y. TIMES (Apr. 1, 2022), https://nytimes.com/2022/04/01/us/politics/marijuana-legalization.html.

166. Sarah Trumble, *Timeline of State Marijuana Legalization Laws*, THIRD WAY (last updated Apr. 19, 2017), https://www.thirdway.org/infographic/timeline-of-state-marijuana-legalization-laws [hereinafter *Legalization Timeline*].

it legalized recreational use of the drug in 2014.[167] California followed in kind by 2016.[168] In the two decades sandwiched between the legalization of medical and recreational marijuana, former President Barack Obama signaled a downshift in how the Department of Justice ("DOJ") would (and should) enforce federal drug laws, specifically those involving medical marijuana.[169] Then-Attorney General Eric Holder announced at a press conference in 2009 that the DOJ effectively deprioritized cracking down on marijuana dispensaries otherwise complying with state laws.[170] This position reflected a veritable sea change from the strict enforcement under President Obama's predecessor, former President George W. Bush.[171] In his detailed memorandum released seven months after Attorney General Holder's press conference, then-Deputy Attorney General David Ogden gave a non-exhaustive list of factors that could be considered when determining whether prosecution may be warranted against marijuana dispensaries.[172] That list, and the Obama/Holder position generally, reflected a commonsense approach to the ad-hoc legalization of medicinal marijuana among the states.

In 2012, Colorado and Washington legalized recreational marijuana.[173] The advent of state ballot initiatives threatening the same result across the country prompted the DOJ to release a memorandum giving the Executive Branch-equivalent of a raised eyebrow. While purportedly preserving the status quo, the DOJ's 2013 memorandum put states on notice that it would strictly enforce federal marijuana laws if it found any state's regulatory scheme governing recreational use of the drug to be sub-par.[174] Two years later, the Government Ac-

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167. *Id.*

168. *Id.*

169. David A. Johnston & Neil A. Lewis, *Obama Administration to Stop Raids on Medical Marijuana Dispensers*, N.Y. TIMES (Mar. 18, 2009), https://www.nytimes.com/2009/03/19/us/19holder.html.

170. *Id. See also* Memorandum from the Off. of the Deputy Att'y Gen. (Oct. 19, 2009), https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf [hereinafter *2009 Memorandum*].

171. Johnston & Lewis, *supra* note 169.

172. *2009 Memorandum*, *supra* note 170.

173. *Legalization Timeline*, *supra* note 166.

174. Memorandum from the Off. of the Deputy Att'y Gen. (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf ("A sys-

countability Office ("GAO") released its findings after investigating the DOJ's efforts to monitor the effects of marijuana legalization, and factors affecting DOJ enforcement of federal drug laws.[175] If the 2013 memorandum was a raised eyebrow, the 2015 GAO report was the equivalent of a shrug. In analyzing Colorado's and Washington's approaches to regulating marijuana, the GAO highlighted those states' adequate oversight of licensing, facility location and security measures, inventory tracking, labeling and packaging, and consumer restrictions.[176] Backed by fifty pages of careful review of each state's regulatory approach, the GAO's summary findings essentially encouraged other states to simply document their plan for DOJ monitoring, and the DOJ to document its monitoring process of the same.[177]

Lest the nation's pot-users rejoice in that lame-duck policy position of the Obama era, former Attorney General Jeff Sessions snapped the country to attention by uncoupling the odd bedfellows of state and federal marijuana laws. In his 2018 memorandum, Attorney General Sessions reminded the country that the federal "statutes reflect Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime."[178] Significantly, at least for the purposes of this Comment, Attorney General Sessions's focus on marijuana meant a focus on a highly profitable and rapidly-growing market segment.[179] At least in some states, like Oregon, that rapidly growing market segment is actually run by the state itself as part of its regulatory scheme.[180]

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tem adequate to [the] task [of implementing strong and effective regulatory and enforcement systems] must not only contain robust controls and procedures on paper; it must also be effective in practice.") [hereinafter *2013 Memorandum*].

175. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-1, STATE MARIJUANA LEGALIZATION: DOJ SHOULD DOCUMENT ITS APPROACH TO MONITORING THE EFFECTS OF LEGALIZATION 39 (2015) [hereinafter *2015 GAO Report*].

176. *Id.* at 23, tbl. 2.

177. *Id.* at 39.

178. *2018 Memorandum*, *supra* note 164.

179. Andrew DePietro, *Here's How Much Money States Are Raking In From Legal Marijuana Sales*, FORBES: PERS. FIN. (May 4, 2018, 3:13 PM), https://www.forbes.com/sites/andrewdepietro/2018/05/04/how-much-money-states-make-cannabis-sales/?sh=3c8d2c77f181 ("Legalization of cannabis has opened a door to a massive, new source of revenue for state governments.").

180. *See generally* OR. REV. STAT. § 475C.057 (2017).

Though the times may *finally* be changing with respect to the decriminalization of cannabis,[181] the current Biden Administration has not yet released definitive guidelines[182] on the topic. Absent any surprise action from the Senate,[183] or an updated DOJ policy release, Attorney General Sessions's policy position still stands.[184] The result is that private citizens exercising their state-statutory right to use marijuana recreationally, à la a modern-day *Parsley*, may still remain subject to a federally issued no-knock warrant, à la *Tisdale*. Further, while unlikely, it remains possible that a Drug Enforcement Agency agent could approach a federal judge or magistrate to pre-emptively authorize a no-knock entry against a state-run dispensary in Oregon. These scenarios necessitate that Congress clarify the authority of the judicial branch to authorize no-knock warrants by passing the George Floyd Justice in Policing Act.

B. The JUSTICE Act

In the wake of Breonna Taylor's death, a few bills intending to rectify some of the wrongs contributing to that ill-fated execution of an unjustified no-knock warrant have been introduced in each chamber of Congress.[185] Among those bills is House Resolution number 677, better known by its short title: the Just and Unifying Solutions To Invigorate Communities Everywhere Act of 2021, or simply, the JUSTICE Act. The JUSTICE Act, introduced in the House of Representatives in February of 2021, addresses many of the concerns raised following the murders of George Floyd, Walter Scott, and Breonna

181. Weisman, *supra* note 165.

182. On October 6, 2022, President Joe Biden announced a mass pardon of citizens who have been federally charged with and/or convicted of simple marijuana possession; marijuana remains a Schedule I drug. *See generally* Maegan Vazquez & Aditi Sangal, *Here's Who is Not Eligible for Biden's Marijuana Pardon*, CNN: POLITICS (Oct. 8, 2022, 12:06 PM), https://www.cnn.com/2022/10/08/politics/biden-marijuana-possession-pardons/index.html.

183. *Id.* ("[T]he Marijuana Opportunity Reinvestment and Expungement Act . . . is unlikely to . . . pass the Senate.").

184. *But see* MORE Act, H.R. 3617, 177th Cong. § 3 (as passed by H. Rep., Apr. 1, 2022).

185. *See, e.g.*, Justice for Breonna Taylor Act, S. 3955, 116th Cong. § 2 (as referred to Comm. on the Judiciary, June 11, 2020). *See also* discussion *infra* Part IV.B–C.

Taylor. These include the use of chokeholds, alternatives to use-of-force, related training requirements, and no-knock warrants.[186]

The JUSTICE Act generally deals with each issue by de-emphasizing a particular law enforcement practice through onerous reporting requirements and financial penalties[187] or restricting local enforcement agencies from receiving federal spending.[188] The JUSTICE Act handles the use of no-knock warrants with the former, a combination of reporting and financial penalties.[189] Specifically, any state and local law enforcement agency receiving federal funds must complete detailed annual reports under pain of having their budgets significantly reduced. These reductions start at twenty percent after the first year of noncompliance, with incremental increases of five percent in each subsequent year of continuing noncompliance.[190] It is worth noting the JUSTICE Act does not ban the use of no-knock warrants, nor does it change the legal justification—the reasonable suspicion standard—required to request one. The JUSTICE Act merely signals to state and local enforcement agencies that they need to work a little harder on the backend to justify a no-knock warrant on the front end.

Unfortunately, the JUSTICE Act muddies the water of federal judicial authority to authorize no-knock warrants by not explicitly mentioning it. The definition of a "no-knock warrant" within section 102 of the JUSTICE Act does not clarify which court, state or federal, may authorize such a warrant.[191] Rather, there is only a passing reference to one being issued by a "court of competent jurisdiction [upon finding] reasonable suspicion that knocking and announcing" would pose a danger, inhibit the investigation, or lead to evidence destruction.[192] An equally minor reference as to which parties can execute a warrant

186. JUSTICE Act, H.R. 677, 117th Cong. §§ 105, 201, 403, 501, 502 (as introduced to H. Rep. Subcomm. on Crime, Terrorism, and Homeland Sec., Mar. 22, 2021).

187. *Id.* at § 102.

188. *Id.* at § 105.

189. *Id.* at § 102.

190. *Id.*

191. *Id.* at § 102(b)(i)(1)(B).

192. JUSTICE Act, H.R. 677, 117th Cong. § 102(b)(i)(1)(B)(i)–(iii) (as introduced to H. Rep. Subcomm. on Crime, Terrorism, and Homeland Sec., Mar. 22, 2021).

appears later in the text of the JUSTICE Act. There, the Act's text makes clear a no-knock warrant can be executed by a federal law enforcement agency, exclusive of its state counterparts.[193] True, state court judges can issue federal warrants, though that is the exception to the norm.[194] Therefore, for all its good, the JUSTICE Act falls far short of resolving the gap in federal jurisdiction over no-knock warrants in place since 1974. In any case, the JUSTICE Act has remained stalled in the House subcommittee on Crime, Terrorism, and Homeland Security since March 22, 2021.[195]

C. The George Floyd Justice in Policing Act

Another bill addressing no-knock warrants—though named for a different victim of militant policing—is House Resolution Number 1280, known as the George Floyd Justice in Policing Act of 2021 ("George Floyd Act"). The George Floyd Act addresses many of the same societal ills arising from police brutality as the JUSTICE Act. In some regard, the George Floyd Act could be considered companion legislation to the JUSTICE Act. For example, the George Floyd Act mandates trainings for federal law enforcement officers on the topics of racial profiling, bias, and procedural justice.[196] By comparison, the JUSTICE Act requires recruitment and educational programs based largely on racial reconciliation.[197] However, the George Floyd Act goes beyond the JUSTICE Act by banning outright no-knock warrants for drug-related cases.[198]

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193. *Id.* at § 102(b)(i)(3)(A)(i) (relying on the use of commas and "or" to connote a disjunctive conjunction: "[F]or each no-knock warrant carried out by a Federal law enforcement agency, State law enforcement agency, or local law enforcement agency during the preceding calendar year.").

194. *Search Warrants*, FED. LAW ENF'T TRAINING CTRS., https://www.fletc.gov/audio/search-warrants-mp3#:~:text=Solari%3A%20Yes%3B%20since%20federal%20search%20warrants%20can%20be,person%20or%20property%20located%20within%20that%20judge%E2%80%99s%20district (last visited Mar. 18, 2022).

195. *Legis. Search Results*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/677/actions?q=%7B%22search%22%3A%5B%22HR677%22%2C%22HR677%22%5D%7D&r=1&s=3 (last visited Oct. 8, 2022).

196. George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 361(a) (as passed by H. Rep., Mar. 3, 2021).

197. JUSTICE Act §§ 701, 712(c).

198. George Floyd Justice in Policing Act § 362(a).

Section 362 of the George Floyd Act—aptly titled "Ban on No-Knock Warrants in Drug Cases"—explicitly requires *any* law enforcement officer to first announce his or her authority and purpose before executing a search warrant.[199] Thus, the notice requirement implied by the history and tradition of Fourth Amendment jurisprudence is made express—at least where drugs are involved. Logically, this narrowly tailored ban also effectively nulls the drug-related exigency exception to the notice requirement at all levels of law enforcement. Further, the George Floyd Act partially dispenses with the issue of whether federal judges and magistrates can authorize no-knock bans by making the thing being sought—the no-knock warrant—itself unlawful. The simple ban, spanning only three clauses on barely more than one of the 140 pages comprising House Resolution 1280, at last makes clear the Nixon-era "no-knock law" would be gone for good.

The George Floyd Act binds non-federal enforcement agencies by withholding federal grants from any state or local government that fails to ban no-knock warrants in drug cases by the Act's deadline.[200] Fortunately, the financial repercussions for noncompliance under the George Floyd Act have teeth. Specifically, the bill withholds funds for noncompliance for each year the state or local government fails to pass bans on no-knock warrants in drug cases.[201] Unfortunately, this bill also remains stalled after being introduced to the Senate in March 2021.[202]

CONCLUSION

The George Floyd Act offers the closest view yet of what could happen, legislatively speaking, to address the lethal consequences of no-knock warrants gone wrong. But it does not go far enough. Only an express restriction of all no-knock warrants that is tethered to sig-

199. *Id.*

200. *Id.* at § 362(b).

201. *Id.* ("*Beginning in the first fiscal year* . . . [state and local governments in noncompliance] may not receive funds under the COPS grant program *for a fiscal year*.") (emphasis added).

202. *Legis. Search Results*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/1280/actions?q=%7B%22search%22%3A%5B%22HR1280%22%2C%22HR1280%22%5D%7D&r=1&s=2 (last visited Oct. 8, 2022).

nificant grants of federal funding will simultaneously resolve the issues discussed herein. Unlike in *Tisdale*, officers would no longer be insulated by their good faith belief of anticipated exigencies when later findings make clear such beliefs were either unfounded or stale.[203] A complete ban on no-knock warrants would force officers to justify their actions for bypassing notice requirements by strictly enforcing the rule that officers make real-time assessments of any apprehension of danger.[204] Moreover, federal judges and magistrates could no longer rely on whatever authority is available to authorize no-knock warrants as *Richards* or *Singer* imply in dicta.

The stakes for passing no-knock warrant reform are dangerously high. People continue to die because local, state, and federal law enforcement can lawfully subvert their ancient right to be free from a state actor's unreasonable intrusion into their homes.[205] Like Breonna Taylor, people of color are disproportionately impacted.[206] If the swell of people protesting across the country is any indication, the time is ripe for action to address how and when police, including federal officers, can interact with private citizens, especially within private homes. One such way to meaningfully address a narrow aspect of those legitimate concerns is to ban no-knock warrants. If that cannot be done, then the Senate must ban no-knock warrants for drug-

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203. *Cf.* United States v. Singer, 943 F.2d 758, 763 (7th Cir. 1991) ("If during the intervening period between the warrant's issuance and execution, the police received reliable information that Singer no longer possessed any firearms, then they would have been required to reevaluate their plan to forcibly enter Singer's home without first knocking and announcing.").

204. *See* State v. Ford, 310 Or. 623, 630 (1990) (officers lawfully bypassed notice requirement because "apprehension of peril" existed at time of warrant execution). *Cf.* People v. Henderson, 58 Cal. App. 3d 349, 354 (1976) (recognizing exigent circumstances present at time of warrant execution excuse no-knock entry, even if no-knock provision of federally issued warrant is invalid). *But see Foster*, 347 Or. at 9 (holding timing is not a critical component when assessing exigencies).

205. *Sklansky Interview*, *supra* note 9 ("If a group of private citizens broke into a house in the middle of the night and wound up shooting one of the occupants, even in self-defense, they'd all likely be charged with felony murder . . . [b]ut police violence of all kinds, including using a battering ram to break into someone's home in the middle of the night, is largely treated as a technical or tactical choice, a matter for professional judgment.").

206. *Id.* ("[No-knock warrants] appear[] to be used most frequently in drug cases, and it disproportionately impacts African Americans and other people of color.").

related cases vis-à-vis the George Floyd Act. Merely requiring onerous reporting and educational program requirements at risk of Congress closing its purse strings—à la the JUSTICE Act—is unacceptable.

The use of battering rams to forcibly enter a home without notice must never again be justified by shoddy investigative work.[207] *Richards* made clear that the showing of exigent circumstances is not high. An unscrupulous officer can still easily exploit that threshold by pointing to a "good faith," reasonable belief their life could be in danger from announcing their presence and purpose. But, absent any present dangers, officers must presume that an uninvolved party would answer the door if given the opportunity.[208] Congress should codify this presumption by banning federal no-knock warrants and requiring state officers executing a lawful no-knock warrant make real-time assessments of possible exigencies or risk forfeiture of federal funding. Hopefully, the call for no-knock warrant reform following Breonna Taylor's death will not be in vain.

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207. Oppel, *supra* note 1.

208. *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1604).

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