In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2016-0238
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Mahoning County
v.	:	Court of Appeals,
	:	Seventh Appellate District
SHERRY BEMBRY, et al.,	:	
	:	Court of Appeals
Defendants-Appellants.	:	Case Nos. 2014 MA 51; 2014 MA 52
	:	

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF APPELLEE STATE OF OHIO

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INTRODUCTION

In this case, the State does not dispute that police officers executed a search warrant in a manner that violated the "knock-and-announce rule"—the rule requiring police to knock and announce their presence before forcibly entering a home. *See Wilson v. Arkansas*, 514 U.S. 927 (1995). This appeal instead asks a question about the proper remedy: Should this Court's reading of Article I, Section 14 in the Ohio Constitution depart from the U.S. Supreme Court's holding that the "exclusionary rule" does not apply to knock-and-announce violations under the Fourth Amendment? *See Hudson v. Michigan*, 547 U.S. 586 (2006). To answer that specific question, the Court must begin with a more general one: Under what circumstances should this Court depart from the U.S. Supreme Court's interpretation of the U.S. Constitution when the Court interprets a similar provision of the Ohio Constitution? The proper resolution of that general question provides a clear answer to the specific one.

As a general matter, the Court can (indeed, must) depart from the U.S. Supreme Court's interpretation of the U.S. Constitution when this Court's traditional rules of constitutional interpretation compel that result. When interpreting the Ohio Constitution, this Court has always placed dispositive weight on the plain text of the relevant clause and on the meaning that the people would have given that clause at its framing. *E.g.*, *Toledo City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, 146 Ohio St. 3d 356, 2016-Ohio-2806 ¶ 16. In a classic formulation, the Court noted: "It is our duty to interpret the language of the Constitution according to its fair and reasonable import and the common understanding of the people who framed and adopted it." *Pfeifer v. Graves*, 88 Ohio St. 473, 487 (1913). Accordingly, this Court should depart from U.S. Supreme Court's cases when the relevant text of the two Constitutions diverge, *e.g.*, *Arnold v. Cleveland*, 67 Ohio St. 3d 35 (1993), or when the U.S. Supreme Court has diverged from the text or history, *e.g.*, *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799.

As a specific matter, the Court's text-based method of constitutional interpretation should make it wary of *expanding* the exclusionary rule beyond the reach that the U.S. Supreme Court has given it in *Hudson* and similar cases. Nothing in the plain language of Article I, Section 14 compels the exclusion of evidence for violations of its requirements. And history cannot fill in this gaping textual hole: "Evidence obtained in the course of an illegal search and seizure . . . universally was admitted in American courts for more than a century after the Revolution," including well after Ohioans adopted Article I, Section 14 in 1851. Bradford Wilson, *The Origins and Development of the Federal Rule of Exclusion,* 18 Wake Forest L. Rev. 1073, 1074 (1982). As the U.S. Supreme Court has itself observed, the Fourth "Amendment says nothing about suppressing evidence obtained in violation of [its] command[s]"; rather, the federal exclusionary rule is a "'judicially created remedy' of this Court's own making." *Davis v. United States*, 564 U.S. 229, 237-38 (2011) (citation omitted).

Because neither text nor history supports a suppression remedy, this Court long ago flatly rejected the exclusionary rule under the Ohio Constitution in a decision that it has never overruled. *State v. Lindway*, 131 Ohio St. 166, 172-82 (1936); *City of Cincinnati v. Alexander*, 54 Ohio St. 2d 248, 255 n.6 (1978). Yet the Court need not decide *Lindway*'s fate in this case. Its traditional reliance on text and history should lead the Court more narrowly to hold, like *Hudson*, that the exclusionary rule does not apply to knock-and-announce violations under Article I, Section 14. Even under the U.S. Supreme Court's more policy-oriented approach to determining when the exclusionary rule applies, *Hudson* properly balanced the costs and benefits of exclusion in the knock-and-announce context. This is not an area where "[t]he criminal [should] go free because the constable has blundered." *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926). The Court thus should affirm the Seventh District.

STATEMENT OF AMICUS INTEREST

The Ohio Attorney General has both a specific interest and a general interest in this case. As a specific matter, the Attorney General—the State's chief law officer, *see* R.C. 109.02—has an interest in preventing decisions that apply the exclusionary rule in a mistakenly aggressive manner and thus bar the introduction of truthful evidence in criminal trials that would be permitted under federal constitutional standards. As a general matter, the Attorney General—the principal defender of Ohio's laws against constitutional challenges, *see* R.C. 2721.12(A)—has an interest in the basic principles that this Court applies when interpreting the Ohio Constitution.

STATEMENT OF CASE AND FACTS

A. The "knock-and-announce rule" generally requires that police officers executing a search warrant knock on the door and announce their presence before entering the home identified on the warrant.

"At the time of the [Fourth Amendment's] framing, the common law of search and seizure recognized a law enforcement officer's authority to break open the doors of a dwelling, but generally indicated that he first ought to announce his presence and authority." *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995). As one famous case explained: "[T]he sheriff (if the doors be not open) may break [a] party's house, either to arrest him, or to do other execution of the K[ing]'s process." *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1603). But "before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . . , for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him . . . ." *Id.* at 91b, 77 Eng. Rep. at 195-96. The U.S. Supreme Court has since held that "this common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." *Wilson*, 514 U.S. at 929.

The knock-and-announce rule, however, has never established an unyielding command. *See id.* at 934. For one thing, officers may immediately enter a home if they "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or . . . would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997). For another, when officers knock and announce their presence, they need only wait a reasonable period before forcibly entering the home if there is a risk that evidence could be destroyed while they wait outside. *See United States v. Banks*, 540 U.S. 31, 37-40 (2003). In cases involving illegal drugs that can be quickly destroyed or concealed, that waiting period is short—from 15 to 20 seconds. *See id.* at 38-40.

Like Congress, *see* 18 U.S.C. § 3109, the Ohio General Assembly has placed this knock-and-announce rule in the statute books. R.C. 2935.12 expressly authorizes police officers to forcibly enter homes if they notify the occupants first:

> When making an arrest or executing an arrest warrant or summons in lieu of an arrest warrant, or when executing a search warrant, the peace officer, law enforcement officer, or other authorized individual making the arrest or executing the warrant or summons may break down an outer or inner door or window of a dwelling house or other building, if, after notice of his intention to make the arrest or to execute the warrant or summons, he is refused admittance, but the law enforcement officer or other authorized individual executing a search warrant shall not enter a house or building not described in the warrant.

R.C. 2935.12(A). Ohio statutory law also establishes exceptions to this general requirement for special circumstances, including in situations where a risk of harm would exist to the officers if they knock and announce their presence. *See* R.C. 2933.231, 2935.12(B).

B. When the police learned that Harsimran Singh was selling heroin around his apartment complex, they obtained a search warrant for his apartment and forcibly entered it after they were "constructively refused admittance."

In 2012, police officers received a tip from a confidential informant that Harsimran Singh was selling heroin out of his apartment in Boardman, Ohio. Tr. Ct. J., at 476 (May 12, 2014). Using the same informant, police conducted two controlled buys of heroin from Singh, one near Singh's apartment building and the other in the hallway outside of it. *Id.* With those buys collaborating the earlier tip, officers obtained a search warrant for the apartment. *See State v. Bembry*, 2015-Ohio-5598 ¶ 5 (7th Dist.) ("App. Op.").

Police officers executed the warrant around 8:30 a.m. on November 2, 2012. *Id.* Officers initially knocked on the door of Singh's apartment. *Id.*; *see* Mot. to Suppress Hearing Tr. at 12. Nobody answered the door for about thirty seconds. App. Op. ¶ 5; Mot. to Suppress Hearing Tr. at 12. Then, a male voice on the other side of the door asked, "who is it?" App. Op. ¶ 5; Mot. to Suppress Hearing Tr. at 12. One officer replied, "Police. Open the door." App. Op. ¶ 5; Mot. to Suppress Hearing Tr. at 12. The police officers waited an additional fifteen seconds more with no response to that command. App. Op. ¶ 5; Mot. to Suppress Hearing Tr. at 12. "At that time [they] didn't believe the door was going to be opened, so [they] forced entry to the residence." Mot. to Suppress Hearing Tr. at 12. The officers arrested Sherry Bembry and Harsimran Singh inside, and also seized several items of contraband. App. Op. ¶ 5.

C. The trial court granted a motion to suppress the contraband, but the Seventh District reversed its suppression order.

The State indicted Bembry for permitting drug abuse, and it indicted Singh for, among other things, trafficking in heroin. App. Op. ¶ 3. Bembry and Singh moved to suppress the contraband recovered from their apartment on two grounds: (1) that the search warrant for the apartment lacked probable cause; and (2) that the officers violated the knock-and-announce rule

when they forcibly entered. Tr. Ct. J. at 475. The court of common pleas disagreed on the first point, holding that the affidavit in support of the warrant provided grounds to establish probable cause that illegal drugs would be found in the apartment. *Id.* at 475-76.

The court granted the motion to suppress, however, based on the alleged knock-and-announce violation. Bembry and Singh contested the estimated amount of time that the police had waited after they had announced their presence, but the trial court credited an officer's account that they had waited about fifteen seconds. *Id.* at 477. The court thus agreed both that "the police were constructively refused admittance," and that they had "waited a sufficient period of time before they forcibly entered the residence." *Id.* Nevertheless, the court ruled that the officers violated R.C. 2935.12 because, while they had announced their *presence*, they "did not make an express announcement of their *purpose*" to search the apartment. *Id.* (emphasis added). Based on this violation, the trial court ordered the evidence suppressed. *Id.* at 477-78.

The State appealed. It opted not to challenge the trial court's finding of a constitutional knock-and-announce violation. It instead asserted that, after *Hudson v. Michigan*, 547 U.S. 586 (2006), the "law is well-settled that the exclusionary rule does not apply to violations of the knock-and announce rule." App. Op. ¶ 7. Agreeing, the Seventh District reversed. *Id.* ¶ 19. The appellate court began by recognizing that "[t]he facts in *Hudson* are virtually identical to this appeal." *Id.* ¶ 11. It added that suppression is a "last resort, not a first impulse" because of the "substantial societal costs" associated with the exclusionary rule, which means that the rule should apply only to deter significant police misconduct. *Id.* ¶ 12. Further, the court noted a basic disconnect between the interests served by the knock-and-announce rule (which is designed to avoid the destruction of property and to allow one to collect oneself before facing the police)

and an exclusion remedy (which is designed to deter police from engaging in unlawful searches that, unlike the search in this case, lack probable cause). *Id.* ¶¶ 13-14.

Bembry and Singh appealed, asking this Court to depart from the U.S. Supreme Court's *Hudson* decision by holding that a broader exclusionary rule exists under Article I, Section 14 of the Ohio Constitution than under the Fourth Amendment to the U.S. Constitution.

ARGUMENT

<u>*Amicus* Ohio Attorney General's Proposition of Law:</u>

> *Article I, Section 14 of the Ohio Constitution does not require courts to exclude evidence in criminal trials that police officers uncovered when executing a valid search warrant after a violation of the knock-and-announce rule.*

This Court's interpretation of the Ohio Constitution should depart from the U.S. Supreme Court's interpretation of the U.S. Constitution when the relevant federal precedent conflicts with this Court's traditional method for construing Ohio's charter—which places dispositive weight on the Ohio Constitution's text and history. *See* Part A. In this case, however, it is Bembry and Singh's proposed remedy to expand the exclusionary rule—a rule that the U.S. Supreme Court has conceded is a judicial creation tied to policy concerns rather than text and history—that conflicts with the Court's traditional interpretive methods. *See* Part B. The Court thus should deny their request to manufacture an exclusionary rule for the knock-and-announce setting.

A. The Court should read a provision of the Ohio Constitution in the manner that best comports with this Court's principles of constitutional interpretation, whether or not that reading adheres to, or departs from, U.S. Supreme Court decisions.

When a litigant properly raises a federal claim in state court under the *U.S. Constitution*, this Court must resolve that claim by following U.S. Supreme Court cases concerning the scope of federal rights. The Supremacy Clause makes the U.S. Constitution "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI. And the U.S. Supreme

Court's "appellate jurisdiction" extends to all cases arising under federal law, including cases arising out of state courts. *See* U.S. Const. art. III § 2; *Cohens v. Virginia*, 19 U.S. 264, 414-23 (1821); *Martin v. Hunter's Lessee*, 14 U.S. 304, 347-48 (1816). Accordingly, "the 'Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.'" *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (quoting *Howlett v. Rose*, 496 U.S. 356, 371 (1990)). If it were otherwise, "'the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states.'" *James v. City of Boise*, 136 S. Ct. 685, 686 (2016) (quoting *Martin*, 14 U.S. at 348).

State claims under the *Ohio Constitution* are another matter. The Ohio Constitution is "a document of independent force." *Arnold v. Cleveland*, 67 Ohio St. 3d 35, syl. (1993). The federal framers emphatically rejected the notion that the U.S. Constitution would establish "[a]n entire consolidation of the States into one complete national sovereignty" or that "whatever powers might remain in them would be altogether dependent on the general will." *The Federalist* No. 32, p.194 (Alexander Hamilton) (C. Rossiter ed., 2003). Ohio's Constitution, instead, represents a separate and distinct compact made by Ohioans for Ohioans. Under that charter, *this Court*—not the *U.S. Supreme Court*—is vested with the "ultimate" authority to resolve state constitutional questions arising in justiciable cases. *State v. Mole*, __ Ohio St. 3d __, 2016-Ohio-5124 ¶ 21 (plurality op.); *see* Ohio Const. art. IV, § 1. In fact, one of the U.S. Supreme Court's earliest constitutional decisions recognized that it even lacked jurisdiction under the U.S. Constitution "to determine that any law of any state Legislature, contrary to the Constitution of such state, is void." *Calder v. Bull*, 3 U.S. 386, 392 (1798) (Chase, J., op.). The U.S. Supreme Court has also found it "'fundamental'" "'that state courts be left free and

unfettered by [that Court] in interpreting their state constitutions.'" *Florida v. Powell*, 559 U.S. 50, 56 (2010) (quoting *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940)).

In recent cases, this Court has debated the circumstances in which it should (and should not) depart from the U.S. Supreme Court's reading of a provision in the U.S. Constitution when interpreting a similar provision in the Ohio Constitution. *Compare State v. Anderson*, __ Ohio St. 3d __, 2016-Ohio-5791 ¶¶ 21-30 (plurality op.), *with State v. Bode*, 144 Ohio St. 3d 155, 2015-Ohio-1519 ¶¶ 23-27. In some respects, this debate has asked the wrong question. "The right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the [U.S.] Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand." Hans A. Linde, *E. Pluribus—Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 179 (1984). More simply, the right question is: What is the "correct" interpretation of the Ohio Constitution?

When this Court answers that state-law question, it may give "respectful consideration" to U.S. Supreme Court cases interpreting similar federal provisions, just as it gives respectful consideration to cases from other state supreme courts interpreting similar state provisions. *State v. Lindway*, 131 Ohio St. 166, 174 (1936). And it generally will not depart from U.S. Supreme Court precedent absent "compelling reasons." *State v. Wogenstahl*, 75 Ohio St. 3d 344, 363 (1996). Yet the Court is "not confined by the federal courts' interpretations of similar provisions in the federal Constitution any more than [it is] confined by other states' high courts' interpretations of similar provisions in their states' constitutions." *Mole*, 2016-Ohio-5124 ¶ 21 (plurality op.); *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799 ¶ 65. Rather, federal "decisions interpreting the [U.S.] Constitution do not control" this Court's views of the Ohio Constitution. *State v. Brown* ("*Brown II*"), 143 Ohio St. 3d 444, 2015-Ohio-2438 ¶ 24.

This principle cuts both ways. On the one hand, it means that "states have the ability under their own constitutions to grant greater rights than those provided by the federal Constitution." *Bode*, 2015-Ohio-1519 ¶ 23. The framers of the U.S. Constitution, for example, placed no debt ceiling on the U.S. Congress, but the framers of the Ohio Constitution generally prohibited the Ohio General Assembly from putting Ohioans on the hook for more than $750,000 in debt. *See State ex rel. Ohio Funds Mgmt. Bd. v. Walker*, 55 Ohio St. 3d 1, 10 (1990). Likewise, the U.S. Constitution does not subject any federal laws to a right of referendum, but the Ohio Constitution grants that referendum right to Ohioans. *See State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St. 3d 322, 2009-Ohio-4900 ¶¶ 18-21. This Court may not ignore these provisions of the Ohio Constitution merely because the U.S. Supreme Court has not identified federal analogs in the U.S. Constitution. Rather, the Court has the *duty* to enforce greater limitations on state government when the Ohio Constitution's text and history command that result. *Cf. Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Yet this Court's independence should not be treated as a "one-way ratchet"—creating the possibility for a state constitutional limit to rise above a federal provision's "floor," but not the possibility for that state constitutional limit to fall below that federal floor. It is "wrong" to assert that "state courts cannot construe their constitutions to offer *less* protection than the federal guarantee." Jeffrey Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. Kan. L. Rev. 687, 712 (2011) (emphasis added). Many state courts have recognized that in any given case a state constitution's protections "may be *lesser*, greater, or the same as those of the federal constitution." *Hulit v. State*, 982 S.W.2d 431, 437 (Tex. Crim. App. 1998) (emphasis added); *Sitz v. Dep't of State Police*, 506 N.W.2d 209, 217 (Mich. 1993) (noting that "because the texts were written at different times by different people, the protections afforded [by a state

constitution] may be greater, lesser, or the same" as the protections afforded by the U.S. Constitution); *State v. Kennedy*, 666 P.2d 1316, 1323 (Or. 1983) (noting that "[a] state's view of its own guarantee may indeed be less stringent").

Of course, "[t]he Supremacy Clause means that, in practical terms, persons will always be able to avail themselves of the greater right"—federal or state—simply by asserting *both* rights in state litigation. *See Hulit*, 982 S.W.2d at 437. But that does not make the state-law issue "moot" whenever a state constitution provides less protection that its federal counterpart. Sutton, *supra*, at 712. As a matter of principle, it remains the duty of this Court to say what the law is under Ohio's Constitution and to faithfully follow that law wherever it leads. *See* Ohio Const. art. XV, § 7. As a matter of effect, a finding that a state provision provides less protection than a federal counterpart can offer useful guidance to "future litigants and courts" on the scope of the relevant state provision. Sutton, *supra*, at 712. More than that, this Court's interpretation of the Ohio Constitution can affect the U.S. Supreme Court's interpretation of the U.S. Constitution—as when that Court looks to state-court interpretations of state constitutions for guidance on the meaning of a federal provision. *Id.* Both "original-meaning" decisions and "evolving-meaning" decisions have done just that. *Compare District of Columbia v. Heller*, 554 U.S. 570, 600-03 (2008), *with Roper v. Simmons*, 543 U.S. 551, 574 (2005). Today's issue confirms this point. The U.S. Supreme Court initially held that the Fourth Amendment's exclusionary rule did not apply to the *States* based in part on the overwhelming number of States that had rejected it, *Wolf v. Colorado*, 338 U.S. 25, 29-30 (1949), but switched gears a decade later partially because of intervening state changes, *see Mapp v. Ohio*, 367 U.S. 643, 651 (1961).

In short, this Court's independence means that it must "consult [its] own law rather than mindlessly adopt[] federal constitutional standards as a floor for state constitutional analysis."

Earl Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 Hastings Const. L.Q. 429, 449 (1988). In that respect, this Court has a well-established body of law for how to interpret the Ohio Constitution. *See* Part A.1. The Court should depart from U.S. Supreme Court cases when these well-established principles for interpreting the Ohio Constitution require it to reach a result different from the U.S Supreme Court. *See* Part A.2.

1. The Court's rules of interpretation have long placed dispositive weight on the Ohio Constitution's text, structure, and history, and on the judiciary's institutional role in enforcing constitutional commands.

The Court's decisions dating back well over a century have steadfastly identified two basic rules for interpreting the Ohio Constitution. The Court should follow those bedrock rules regardless of how the U.S. Supreme Court opts to read the U.S. Constitution in a particular case.

First, the Court interprets the Ohio Constitution in the same manner that it interprets the Ohio Revised Code—by examining the plain text of the relevant constitutional provision and the meaning that the people would have given that text at the time of its enactment. *E.g.*, *Toledo City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, 146 Ohio St. 3d 356, 2016-Ohio-2806 ¶ 16. As the Court said long ago, "[i]t is our duty to interpret the language of the Constitution according to its fair and reasonable import and the common understanding of the people who framed and adopted it." *Pfeifer v. Graves*, 88 Ohio St. 473, 487 (1913); *see Lehman v. McBride*, 15 Ohio St. 573, 592 (1863). In other words, the Court assumes that a state constitutional provision "used language with reference to its popular and received signification; and applied it as it had been practically applied" before the language's incorporation into the Ohio Constitution. *Hill v. Higdon*, 5 Ohio St. 243, 247-48 (1855). Or, as this Court more recently put it, "'[t]he body enacting the [constitutional provision] will be presumed to have had in mind existing constitutional or statutory provisions and their judicial construction, touching the subject dealt with.'" *State v. Carswell*, 114 Ohio St. 3d 210, 2007-Ohio-3723 ¶ 6 (citation omitted).

This interpretive canon also illustrates what this Court *cannot* do when interpreting the Ohio Constitution. It cannot delve into "policy arguments" about what the Ohio Constitution *should* contain. *See Ohio Funds Mgmt. Bd.*, 55 Ohio St. 3d at 10; *cf.* Henry Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353 (1981). "It is not the province of [the] court to write Constitutions or to give to the language used such forced construction as would warp the meaning to coincide with the court's notion of what should have been written therein." *Cleveland Tel. Co. v. City of Cleveland*, 98 Ohio St. 358, 368 (1918). Likewise, "[w]hether an act is wise or unwise is a question not for the courts but for the General Assembly." *Olin Mathieson Chem. Corp. v. Ontario Store of Price Hill, Ohio, Inc.*, 9 Ohio St. 2d 67, 70 (1967). The Court has many cases making these points—that the plain language controls over competing policy considerations. *See, e.g., Brunner*, 2009-Ohio-4900 ¶ 50; *Wampler v. Higgins*, 93 Ohio St. 3d 111, 121 (2001); *State ex rel. Shkurti v. Withrow*, 32 Ohio St. 3d 424, 426 (1987).

Second, "[i]t is well settled that '[a]n enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.'" *Haight v. Minchak*, __ Ohio St. 3d __, 2016-Ohio-1053 ¶ 11 (quoting *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, syl. ¶ 1 (1955)). The Court has applied this rule recently. *E.g.*, *State ex rel. Ohio Civil Serv. Emps. Ass'n v. State*, 146 Ohio St. 3d 315, 2016-Ohio-478 ¶ 13. And it has applied the rule near the time of the Ohio Constitution's 1851 enactment. "[J]udicial interference can not be justified *in a doubtful case*; for 'the presumption must always be in favor of the validity of the laws, if the contrary is not *clearly demonstrated*.'" *Lehman*, 15 Ohio St. at 591 (citation omitted); *Cincinnati, Wilmington & Zanesville, R.R. Co. v. Comm'rs of Clinton Cnty.*, 1 Ohio St. 77, 83 (1852) (noting that "'the presumption must always be in favor of the

validity of the laws, if the contrary is not clearly demonstrated'" (citation omitted)). More generally, this traditional requirement of *clear* incompatibility between a law and the Constitution comports with the original understanding of "judicial review" over constitutional questions. *See* John McGinnis, *The Duty of Clarity*, 84 Geo. Wash. L. Rev. 843 (2016).

2. The Court should reject a U.S. Supreme Court case when the relevant text or history of the U.S. and Ohio Constitutions differ or when the U.S. Supreme Court case adopts a reading unmoored from that text and history.

This Court's cases have made clear that it *can* depart from a U.S. Supreme Court decision when interpreting the Ohio Constitution, *e.g.*, *Mole*, 2016-Ohio-5124 ¶ 21; it should now explain *why* it should do so. The Court can and should depart from the U.S. Supreme Court's reading of a federal constitutional provision in two general situations: (1) when the relevant provision of the Ohio Constitution embodies different text or history, or (2) when the U.S. Supreme Court's decision wrongly invokes considerations other than text or history.

Arnold—which held that the Ohio Constitution establishes an individual right to bear arms for defense—provides a good example of the first reason to depart. Before *Heller*, "[t]he question as to whether individuals have a fundamental right to bear arms ha[d], seemingly, been decided in the negative under the Second Amendment." *Arnold*, 67 Ohio St. 3d at 39 (citing, among others, *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)). Unlike the Second Amendment, however, Article I, Section 4 of the Ohio Constitution *expressly* notes that "the people have the right to bear arms for their *defense and security*." Ohio Const. art. I, § 4 (emphasis added). "The language of Section 4, Article I of the Ohio Constitution," this Court said, "is clear." *Arnold*, 67 Ohio St. 3d at 43. "Rather than focusing merely on the preservation of a militia, as provided by the Second Amendment, the people of Ohio chose to go even further." *Id.* *Arnold*—by relying on the "plain language" of the Ohio Constitution to depart from the U.S. Supreme Court's pre-*Heller* decisions—adhered to this Court's traditional textually

focused method of interpretation. *See Brunner*, 2009-Ohio-4900 ¶ 50; *see also, e.g.*, *Humphrey v. Lane*, 89 Ohio St. 3d 62, 67 (2000) (noting that "qualitative" textual differences between the religion clauses of the Ohio and U.S. Constitutions required the Court to reject *Ore. Dep't of Human Res., Emp. Div. v. Smith*, 494 U.S. 872 (1990)).

Norwood—which held that the "public use" requirement in Ohio's takings clause barred governments from relying on economic benefits alone to justify a taking for a private actor's use—provides a good example of the second reason to depart. Before *Norwood*, the U.S. Supreme Court had held that general economic benefits alone could satisfy the public-use requirement in the federal takings clause for a city's decision to transfer local homes to a pharmaceutical company. *See Kelo v. City of New London*, 545 U.S. 469, 483-90 (2005); *see also Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 239-44 (1984). In *Kelo*, the U.S. Supreme Court rested less on the plain meaning of "public use" at the time of the Fifth Amendment's enactment, and more on "the needs of society," which, it said, had "evolved over time in response to changed circumstances." 545 U.S. at 482. In *Norwood*, this Court "decline[d] to hold that the Takings Clause in Ohio's Constitution has the sweeping breadth that the Supreme Court attributed to the United States Constitution's Takings Clause in *Midkiff*" and *Kelo*. 2006-Ohio-3799 ¶¶ 65. This Court instead rested on first principles. It noted that the Ohio Constitution "expressly incorporated individual property rights," marking them '"inalienable'" and '"inviolate,'" *id.* ¶ 37, and that "a genuine public use must be present before the state invokes its right to take," *id.* ¶ 78. Neither the text of Ohio's Constitution nor the historical backdrop could transform "public use" to mean mere "economic benefits."

B. Article I, Section 14's text and history, this Court's cases interpreting the provision, and the policy arguments that Bembry and Singh invoke all prove that the exclusionary rule does not apply to violations of the knock-and-announce rule.

In *Hudson v. Michigan*, 547 U.S. 586 (2006), the U.S. Supreme Court held that the Fourth Amendment did not compel the exclusion of evidence as a remedy for a police officer's violation of the traditional knock-and-announce rule. *Id.* at 594. Bembry and Singh ask this Court to reject *Hudson* by adopting a broader exclusionary rule under Article I, Section 14 than exists under the Fourth Amendment. The Court should reject their argument both because the argument conflicts with the Court's traditional modes of constitutional interpretation and because the argument fails on even its own policy-rooted terms.

1. This Court should be wary of extending a state exclusionary rule beyond the federal rule's reach because its policy-based roots sit uncomfortably with the Court's text-focused mode of constitutional interpretation.

The U.S. Supreme Court adopted the exclusionary rule for the *federal government's* violations of the Fourth Amendment in *Weeks v. United States*, 232 U.S. 383 (1914), and extended that rule to the States in *Mapp*, 367 U.S. 643. In between, this Court chartered a different course. Independently considering this question under the Ohio Constitution, the Court disagreed with the U.S. Supreme Court by holding that Article I, Section 14 did *not* contain a constitutionally compelled exclusionary rule. *See Lindway*, 131 Ohio St. at 172-82; *see also Rosanski v. State*, 106 Ohio St. 442, 460 (1922) (noting that "neither the laws nor the courts are solicitous to aid persons accused of crime in concealing the evidence of their guilt" and do not require "rejecting competent evidence because of the method by which it was procured").

As late as 1978, this Court had recognized that *Lindway* remained good law concerning Article I, Section 14: "While this court, since *Mapp*, has frequently applied the federal exclusionary rule, the non-exclusionary rule adopted in *Lindway* under the Ohio Constitution has never been overruled." *City of Cincinnati v. Alexander*, 54 Ohio St. 2d 248, 255 n.6 (1978).

And while some later decisions have applied the exclusionary rule under Article I, Section 14 independently of the Fourth Amendment, *see Brown II*, 2015-Ohio-2438 ¶ 25; *State v. Brown* ("*Brown I*"), 99 Ohio St. 3d 323, 2003-Ohio-3931 ¶ 25; those cases considered the scope of the *right* under Article I, Section 14; they offered no reasoning on the appropriate *remedy* (other than to affirm a suppression ruling). *Cf. Toledo City Sch. Dist.*, 2016-Ohio-2806 ¶ 39 (finding that "cases lack precedential value" on issues that they do not expressly consider).

Bembry and Singh now impliedly ask this Court to overrule *Lindway entirely* in favor of a limitless exclusionary rule. Yet *Lindway* faithfully follows *this Court's* traditional methods of constitutional interpretation, in contrast with *Mapp*'s more policy-oriented approach. That fact is confirmed both (a) by the specific grounds on which *Lindway* relied, and (b) by the U.S. Supreme Court's later descriptions of *Mapp*. The Court's traditional interpretive principles thus provide no grounds for creating a broader exclusionary rule under Article I, Section 14 than already exists under the Fourth Amendment.

a. *Lindway*'s Roots. This Court's decision in *Lindway* followed its usual principles of constitutional interpretation. In particular, the Court rejected a constitutionally grounded exclusionary rule because Article I, Section 14's text and history provided no basis for such a state-law rule. Start with the text. The Ohio Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized.

Ohio Const. art. I, § 14. Nothing in Article I, Section 14 compels exclusion of evidence in criminal trials as the remedy for a violation. *Lindway* made this point: "'[T]here is nothing in [this] language changing the rule as to, or in any way affecting, the admissibility of evidence.'" 131 Ohio St. at 180 (citation omitted); *cf. State v. Walker*, 267 P.3d 210, 221 (Utah 2011) (Lee,

J., concurring) (noting that the Utah Constitution's similar language "says nothing about an exclusionary—or any other—remedy for the violation of its provisions").

Nor can the historical backdrop against which Article I, Section 14 was enacted fill in the textual void for a state exclusionary rule. Quite the contrary. This Court assumes that the founders would "'have had in mind existing constitutional or statutory provisions and their judicial construction, touching the subject dealt with.'" *Carswell*, 2007-Ohio-3723 ¶ 6 (citation omitted); *cf. Toledo City Sch. Dist.*, 2016-Ohio-2806 ¶ 19 (looking to "established meaning at the time of the ratification of the 1851 Constitution"). In 1851, no member of the public would have anticipated an exclusionary rule flowing out of Article I, Section 14. "Evidence obtained in the course of an illegal search and seizure has always been admitted in England and *universally* was admitted in American courts for more than a century after the Revolution." Bradford Wilson, *The Origins and Development of the Federal Rule of Exclusion*, 18 Wake Forest L. Rev. 1073, 1074 (1982) (emphasis added). As one constitutional scholar has noted, individuals in the 1800s would have viewed the "idea of exclusion" as "implausible"; such a notion would have "received the back of the judicial hand." Akhil Amar, *The Constitution and Criminal Procedure First Principles* 21 (1997).

Indeed, two cases predating Ohio's 1851 Constitution illustrate that the idea *did* receive the back of the judicial hand. In one, Justice Story rejected arguments for exclusion by explaining that "the right of using evidence does not depend, nor . . . has ever been supposed to depend[,] upon the lawfulness or unlawfulness of the mode[] by which it is obtained." *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 843 (C.C.D. Mass. 1822); *see* Amar, *supra*, at 21 (noting that "[w]hen the bookish Story tells us that he has never heard of a case excluding evidence because it was 'obtained by a trespass [or] illegal means,' surely we should sit up and

take notice"). A few decades later, an oft-cited Massachusetts decision reaffirmed that an officer may be held "responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence." *Massachusetts v. Dana*, 43 Mass. 329, 337 (1841). At that time, the court referred to this principle as "well established." *Id.* at 338. Over the following decades, many States adopted the same reasoning. *See* Wilson, *supra* at 1076 n.12 (collecting cases). Instead, a violation of search-and-seizure limitations historically made any search illegal, giving an injured party an "'action in trespass'" for any damages suffered against offending parties. *See Lindway*, 131 Ohio St. at 180 (citation omitted).

b. *Mapp*'s Roots. On the flip side, the U.S. Supreme Court has repeatedly observed that the federal exclusionary rule does *not* arise from the U.S. Constitution's text or history. It has acknowledged that the Fourth Amendment "'contains no provision expressly precluding the use of evidence obtained in violation of its commands.'" *Herring v. United States*, 555 U.S. 135, 139 (2009) (quoting *Arizona v. Evans*, 514 U.S. 1, 10 (1995)); *see also Davis v. United States*, 564 U.S. 229, 236 (2011) ("The Amendment says nothing about suppressing evidence obtained in violation of this command."). Instead, the U.S. Supreme Court has called the federal exclusionary rule a "'judicially created remedy' *of this Court's own making*." *Davis*, 564 U.S. at 238 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)) (emphasis added); *State v. Castagnola*, 145 Ohio St. 3d 1, 2015-Ohio-1565 ¶ 92 (noting that the "rule is a judicially created remedy"). "[T]he rule is prudential rather than constitutionally mandated," the U.S. Supreme Court has explained, and flows out of important, albeit policy-rooted, concerns with deterring police misconduct. *Pa. Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 363 (1998).

The exclusionary rule's judicially created nature is further illustrated by the "balancing test" that the U.S. Supreme Court has adopted for deciding whether the rule should apply in a

given situation. *See State ex rel. Wright v. Ohio Adult Parole Auth.*, 75 Ohio St. 3d 82, 88 (1996). Because the exclusionary rule has no textual or historical roots, the U.S. Supreme Court has created a generic cost-benefit analysis to determine the rule's scope, one that asks courts to consider whether the "deterrence benefits of suppression . . . outweigh its heavy costs." *Davis*, 564 U.S. at 237. On the benefits side, the Court has found that the exclusionary rule provides the greatest deterrence "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights," but the least deterrence when the police act reasonably albeit negligently. *Id.* at 238. On the costs side, the Court has repeatedly recognized that the substantial downside of the rule is "letting guilty and possibly dangerous defendants go free—something that 'offends basic concepts of the criminal justice system.'" *Herring*, 555 U.S. at 141 (citation omitted). In Justice Cardozo's classic phrase, "[t]he criminal is to go free because the constable has blundered." *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

This Court has repeatedly noted that this more policy-oriented approach is generally off limits for the state judiciary when interpreting the Ohio Constitution. State courts may "not do 'violence to the plain language employed'" to further what they view as sound policy, *see Ohio Funds Mgmt. Bd.*, 55 Ohio St. 3d at 10 (citation omitted), nor may they invoke public policy "'under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument,'" *see Hockett v. State Liquor Licensing Bd.*, 91 Ohio St. 176, 195 (1915) (citation omitted). Indeed, what the Court has said when interpreting statutes applies even more forcefully in the constitutional context: "It is not this court's role to apply a *judicially created doctrine* when faced with" language that does not permit it. *Wallace v. Ohio Dep't of Commerce*, 96 Ohio St. 3d 266, 2002-Ohio-4210 ¶ 33 (emphasis added).

In sum, a limitless exclusionary rule under Article I, Section 14 "cannot be reconciled with the plain language of the section or with the historical underpinnings of its enactment." *Kaminski v. Metal & Wiring Prods. Co.*, 125 Ohio St. 3d 250, 2010-Ohio-1027 ¶ 94. As a result, because Bembry and Singh request a policy-based remedy that conflicts with the Court's traditional rules of constitutional interpretation, the Court should be wary of *extending* the exclusionary rule under the Ohio Constitution beyond the reach that the U.S. Supreme Court has already given the rule under its federal counterpart.

2. Even under the general policy debate governing when the exclusionary rule's benefits exceed its costs, this Court should not depart from Hudson by unilaterally extending the rule to this knock-and-announce context under the Ohio Constitution.

Setting aside the Ohio Constitution's text and history, under *any* theory of constitutional interpretation, this Court should not depart from *Hudson* and apply the exclusionary rule to knock-and-announce violations. That rigid rule is simply unsuited to the fact-specific knock-and-announce context, as the U.S. Supreme Court has already recognized.

a. Courts have reserved the exclusionary rule for narrow circumstances because of its high societal costs.

It is settled that the question whether to apply an '"exclusionary sanction'" to a given situation is "'an issue separate from the question whether'" a constitutional violation has occurred in the first place. *Hudson*, 547 U.S. at 591-92 (citation omitted); *State v. Hoffman*, 141 Ohio St. 3d 428, 2014-Ohio-4795 ¶ 24. It is also settled that courts should consider suppression as a "'last resort,'" *Hoffman*, 2014-Ohio-4795 ¶ 25 (citation omitted), not a "first impulse," *Hudson*, 547 U.S. at 591. That is because the exclusionary rule generates "'substantial social costs.'" *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)). "It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence," *Davis*, 564 U.S. at 237; *State v. Wilmoth*, 22 Ohio St. 3d 251, 257 (1986), and thus can have the effect

of "setting the guilty free and the dangerous at large," *Hudson*, 547 U.S. at 591. This '"costly toll'" '"presents a high obstacle for those urging its application.'" *Id.* (brackets and citation omitted).

Unsurprisingly, then, courts have routinely rejected the exclusionary rule's application in a variety of circumstances. For example, the rule seeks "to deter police misconduct that flagrantly, deliberately, or recklessly violates the Fourth Amendment." *Hoffman*, 2014-Ohio-4795 ¶ 46; *see id.* ¶¶ 24, 26 (suggesting same standards under Ohio Constitution). Accordingly, it should not apply when a police officer's conduct is "at most negligent." *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016); *see Davis*, 564 U.S. at 240 (rejecting exclusionary rule because "[t]he officers who conducted the search did not violate Davis's Fourth Amendment rights deliberately, recklessly, or with gross negligence"); *Herring*, 555 U.S. at 147 (noting that a defendant's "claim that police negligence automatically triggers suppression cannot be squared with the principles underlying the exclusionary rule"). In *Strieff*, for example, the Supreme Court rejected exclusion where a police officer lacked reasonable suspicion to stop the defendant because the officer had only made "good-faith mistakes" in his decisionmaking. 136 S. Ct. at 2063.

As another example, a separate set of exceptions "involve[s] the causal relationship between the unconstitutional act and the discovery of evidence." *Id.* at 2061. A defendant must establish a but-for causal relationship between the illegal police conduct and the discovery of the challenged evidence. *Hudson*, 547 U.S. at 591-92. If officers uncovered the evidence from a source separate and independent of the illegal police action, that action cannot be characterized as the cause of the discovery. *See, e.g.*, *Murray v. United States*, 487 U.S. 533, 537 (1988); *Nix v. Williams*, 467 U.S. 431, 443-44 (1984). And even if but-for causation exists, the causal connection might still be "too attenuated to justify exclusion." *Hudson*, 547 U.S. at 592. This

can occur when, for example, "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Id.* at 593.

b. Bembry and Singh cannot establish that the exclusionary rule's benefits exceed its costs in this knock-and-announce setting.

Under their proposed policy-based approach to the exclusionary rule, Bembry and Singh cannot meet their heavy burden to justify the rule for knock-and-announce violations. This Court should reject that remedy in this case because: (1) the knock-and-announce violation was not a but-for cause of the police officers' discovery of contraband; (2) the exclusionary remedy would not serve the underlying purposes of the knock-and-announce rule; (3) a knock-and-announce violation will not typically arise from intentional misconduct; and (4) adopting conflicting rules under the U.S. and Ohio Constitutions would hinder effective police work.

But-For Causation. Since police officers had a valid warrant to search their apartment, Bembry and Singh cannot show that the failure of the police to announce that they were there for a search was a *but-for cause* of the discovery of contraband. *See People v. Stevens*, 597 N.W.2d 53, 63 (Mich. 1999) (rejecting exclusionary rule in the knock-and-announce context on causation grounds). "Whether that preliminary misstep had occurred *or not*, the police would have executed the warrant they had obtained, and would have discovered the . . . drugs inside the [apartment]." *Hudson*, 547 U.S. at 592. Indeed, "[i]t is hard to understand how the discovery of evidence inside a house could be anything but 'inevitable' once the police arrive with a warrant; an occupant would hardly be allowed to contend that, had the officers announced their presence and waited longer to enter, he would have had time to destroy the evidence." *United States v. Jones*, 149 F.3d 715, 716-17 (7th Cir. 1998). Put another way, Bembry and Singh could prove causation here *only* by suggesting that they would have hidden or destroyed the illegal

contraband once the police announced their purpose to search the apartment. Yet Article I, Section 14 should not be interpreted to affirmatively condone concealment of illegal drugs.

Attenuation. Apart from but-for causation, the connection between the illegal conduct here and the discovery of evidence is too attenuated. In that respect, Bembry and Singh cannot prove that "the interest protected by" the knock-and-announce rule would "be served by suppression of the evidence obtained" by the subsequent search. *Hudson*, 547 U.S. at 593.

On the one hand, the historical *remedy* for a knock-and-announce violation already served its historical *raison d'être.* The rule "has its origins in the English common-law protection of a man's house as his castle of defense and asylum." *AL Post 763 v. Ohio Liquor Control Comm'n*, 82 Ohio St. 3d 108, 110 n.3 (1998) (internal quotation marks and citation omitted); 3 William Blackstone, *Commentaries on the Laws of England* 288 (1768). That famous line traces to Sir Edward Coke's seminal trespass decision, *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195-96 (K.B. 1603). Coke justified this knock-and-announce rule on civil grounds: "the law . . . abhors the destruction of breaking of any house . . . by which great damage and inconvenience might ensue to the party." *Id.*; *AL Post 763*, 83 Ohio St. 3d at 110 n.3. The proper remedy for these interests (avoiding the destruction of property and obtaining the "opportunity to collect oneself before answering the door," *Hudson*, 547 U.S. at 594) has always been a civil suit, the traditional remedy for knock-and-announce violations. *State v. Upshur*, 2011 WL 1465527, at *6-7 (Del. Sup. Ct. Apr. 13, 2011) ("The appropriate remedy is the same one which apparently served the knock and announce rule in good stead for 50 years—a civil lawsuit for damages."). Today, moreover, criminal defendants may also seek remedies under 42 U.S.C. § 1983 for constitutional violations. *See Hudson*, 547 U.S. at 597-98.

On the other hand, the exclusion remedy does not serve any knock-and-announce purpose. That remedy, *Hudson* explained, "vindicates" the citizenry's entitlement to be free "from the government's scrutiny" "[u]ntil a valid warrant has issued." *Id.* at 593. Here, however, a valid warrant *had* issued for the search of Singh and Bembry's apartment. App. Op. ¶ 6. And the knock-and-announce rule "has never protected . . . one's interest in preventing the government from seeing or taking evidence described in a warrant." 547 U.S. at 594. Thus, as the Seventh District found, a sharp disconnect exists between the underlying purposes of the knock-and-announce rule and the underlying purposes of the exclusionary rule. App. Op. ¶¶ 12-14.

Non-Flagrant Conduct. In the knock-and-announce context, moreover, the divide between constitutional and unconstitutional action will often be a matter of slight degree. Should the police have waited a few more seconds before entering? *Cf. United States v. Banks*, 540 U.S. 31, 37-40 (2003). Did the police have a reasonable basis for believing that a suspect might destroy evidence if they knocked and announced their presence? *Cf. Richards v. Wisconsin*, 520 U.S. 385, 395 (1997). The standards in this area are "necessarily vague," and "it is not easy to determine precisely what officers must do." *Hudson*, 547 U.S. at 590. If those questions are so difficult as to justify repeated review by appellate courts, "it is unsurprising that," in the moment, "police officers about to encounter someone who may try to harm them will be uncertain how long to wait." *Id.* This inherent uncertainty fits poorly with the exclusionary rule.

Relatedly, "deterrence of knock-and-announce violations is not worth a lot" because there is not much to deter. *Id*. at 596. What do police officers gain from knock-and-announce violations? Those who ignore the rule "can realistically be expected to achieve absolutely nothing" by doing so. *Id*. Indeed, the only reason to ignore the rule would be "the prevention of

destruction of evidence and the avoidance of life-threatening resistance." *Id.* Yet those dangers would "suspend the knock-and-announce requirement anyway." *Id*. (emphasis removed).

This case proves these points. Here, there is no dispute that the police officers knocked on the door and waited thirty seconds. App. Op. ¶ 5. There is no dispute that they then announced their presence when Singh asked who it was and waited an additional fifteen seconds. *Id.* And there is no dispute that the officers ultimately "were constructively refused admittance," and "waited a sufficient period of time before they forcibly entered the residence." Tr. Ct. J. at 477. Instead, the only dispute here is whether the officers should have added to their announcement of "police" that they had a "search warrant." What possible advantage could the police have gained by failing to do so? The police conduct here was "at most negligent." *See Strieff*, 136 S. Ct. at 2063. The seemingly technical nature of the violation here does not provide a proper basis for the undoubtedly draconian remedy that is suppression.

Avoids Confusion. Under a policy-based approach to Article I, Section 14, moreover, there is a unique reason for not applying the exclusionary rule in this "particular context." *Hoffman*, 2014-Ohio-4795 ¶ 24. To create two different rules for the same police community would require that community to learn competing rules applicable under both the Ohio and U.S. Constitutions. It also would create practical problems when state law enforcement work with their federal counterparts (especially in the area of illegal narcotics, where cooperation is common). If this court rejects *Hudson*, the same evidence from the same investigation would be admissible in federal court but inadmissible in state court. "While the states are free to impose rules for searches and seizures that are more restrictive than the Fourth Amendment, those rules will not be enforced in a federal criminal proceeding." *United States v. Beals*, 698 F.3d 248, 263 (6th Cir. 2012). Divergent rules risk confusion for those on the front lines of stopping crime.

Perhaps for this reason, the Court has in the vast majority of cases opted to read the federal and state commands as coextensive. *E.g.*, *Hoffman*, 2014 -Ohio- 4795 ¶¶ 11, 24; *State v. Buzzard*, 112 Ohio St. 3d 451, 2007-Ohio-373 ¶ 13 n.2; *State v. Robinette*, 80 Ohio St. 3d 234, 238 (1997); *Ohio Domestic Violence Network v. Pub. Utils. Comm'n of Ohio*, 70 Ohio St. 3d 311, 318 n.3 (1994); *State v. Andrews*, 57 Ohio St. 3d 86, 87 n.1 (1991); *State v. Geraldo*, 68 Ohio St. 2d 120, 126 (1981); *State v. Kessler*, 53 Ohio St. 2d 204, 207 n.*, 208-10 (1978).

3. Bembry and Singh's arguments fail to justify the harsh exclusionary-rule penalty for knock-and-announce violations under Article I, Section 14.

Bembry and Singh offer no basis for this Court to adopt a suppression remedy for violations of the knock-and-announce rule. *First*, citing *Wilson v. Arkansas*, 514 U.S. 927 (1995), Bembry and Singh repeatedly invoke the knock-and-announce rule's ancient pedigree for their requested suppression remedy. Appellants' Br. 4, 6-8, 21-22. But this case is not about the constitutional *right*; it is about the constitutional *remedy*. In that respect, their reliance on history is quite ironic. As noted, Part B.1, history cuts strongly against Bembry and Singh's remedy. They identify no court that ever applied the exclusionary rule in this country "for more than a century after the Revolution." Wilson, *supra*, at 1074. Yet they ask for a massive expansion of that remedy. History alone should be dispositive on the meaning of Article I, Section 14.

Second, Bembry and Singh cite five cases from Ohio's lower courts that, they assert, support their position. Appellants' Br. 9-13. They do not. The first common pleas decision they cite, *Kovacs v. State*, 24 Ohio N.P. (N.S.) 1 (C.P. 1921), came down before *Lindway*. Bembry and Singh note that it "recognized" that Ohio's Constitution incorporated the "common law" knock-and-announce rule. Appellants' Br. 9. Yet that common-law rule led to a civil remedy *only*. The next decision, *State v. Vuin*, 185 N.E. 2d 506 (Ohio C.P. 1962), correctly applied the *Fourth Amendment* to exclude evidence that resulted from an invalid search warrant, but it

incorrectly stated that *Mapp* dictated the contents of the state constitution, *see id.* at 508-09. *Mapp* did not overturn *Lindway*, as this Court noted. *See Cincinnati*, 54 Ohio St. 2d at 255 n.6. The last three cited cases rely on the U.S. Constitution, not the Ohio Constitution. *See State v. Valentine*, 74 Ohio App. 3d 110, 113 (4th Dist. 1991); *State v. DeFiore*, 64 Ohio App. 2d 115, 120-21 (1st Dist. 1979); *State v. Furry*, 31 Ohio App. 2d 107, 112 (6th Dist. 1971). Those cases did not survive *Hudson*, which controls on the meaning of the Fourth Amendment.

Third, Bembry and Singh invoke this Court's cases applying the "new federalism" and explaining that the Court can depart from the U.S. Supreme Court's reading of the U.S. Constitution when interpreting the Ohio Constitution. Appellants' Br. 15-21. Yet their argument confuses description and prescription. It is one thing to say that this Court *has* departed from the U.S. Supreme Court's cases; it is quite another to say *why* it should do so. Bembry and Singh spend almost *no* time on that critical "why" question. That exposes their argument's flaws.

To begin with, Bembry and Singh overlook the *reason* that this Court provided in two recent search-and-seizure cases that have deviated from the U.S. Supreme Court's reading of the Fourth Amendment—that it should follow its binding precedent. In *Brown I*, this Court departed from the U.S. Supreme Court's decision in *Atwater v. Lago Vista*, 532 U.S. 318 (2001), because this Court's *earlier* precedent in *State v. Jones*, 88 Ohio St. 3d 430 (2000), established standards that conflicted with *Atwater*. *Brown I*, 2003-Ohio-3931 ¶ 22. In *Brown II* this Court held that it was bound to follow *Brown I* rather than U.S. Supreme Court precedent on a related issue. 2015-Ohio-2438 ¶¶ 23-24; Appellants' Br. 18-19 (*Brown II* "reiterated the principles announced in the earlier *Brown* case"). Here, however, the most relevant precedent from this Court is *Lindway*, which rejected an exclusionary remedy under the Ohio Constitution entirely. Accordingly,

unlike in *Brown I* and *Brown II*, no precedent from this Court requires it to *reject Hudson*. To the contrary, the Court's most relevant precedent requires it to *follow Hudson*.

In addition, *Brown I* and *Brown II* involved unauthorized *arrests*, which made the *entire* searches unlawful. *Brown II*, 2015-Ohio-2438 ¶ 23 (holding that the Ohio Constitution "affords greater protection than the Fourth Amendment against searches and seizures conducted by members of law enforcement *who lack authority to make an arrest*" (emphasis added)). Those cases about searches that were unauthorized *in their entirety* have no bearing on this case. Here, there is no dispute that the police officers obtained a valid search warrant and that the search *was* authorized. The only issue is whether a valid search requires exclusion whenever it is not *executed* to technical perfection. *Brown I* and *Brown II* say nothing on that issue.

Brown I and *Brown II*, lastly, offered no independent analysis over whether exclusion was the proper remedy. They did not even cite *Lindway*, let alone jettison that decision. Instead, they simply treated the suppression remedy as the automatic consequence of the state constitutional violation without independent reasoning concerning the proper remedy. *Brown II*, 2015-Ohio-2438 ¶ 25; *Brown I*, 2003-Ohio-3931 ¶ 25. In that respect, these cases have limited precedential value on that *remedy* question. *See Toledo City Sch. Dist.*, 2016-Ohio-2806 ¶ 39. Furthermore, the proper remedy is a question to be decided in the "particular context" of each case. *Hoffman*, 2014-Ohio-4795 ¶ 24. Whatever the propriety of the exclusion remedy for the broader violations in those cases, it is a separate question for the technical violation alleged here.

Fourth, Bembry and Singh suggest that suppression should follow from the U.S. Supreme Court's cost-benefit approach for determining when the exclusionary rule applies. Appellants' Br. 23-25. As explained above, that has things backwards. *See* Part B.2. It is not enough that Appellants "believe" that exclusion is the right remedy. Appellants' Br. 23, 25.

That belief and the related belief that exclusion is the "only remedy" that will deter police misconduct, *id*. at 24, are thoroughly discredited by *Hudson*. Bembry and Singh acknowledge that the purpose of the knock-and-announce rule is to protect property, resident dignity, and injury to the resident or police. Appellants' Br. 23. Yet they have no answer to *Hudson*'s response that the police "can realistically be expected to achieve absolutely nothing" by violating the rule. 547 U.S. at 596. Police get no advantage by doing so.

Fifth, Bembry and Singh suggest that state courts from Florida, Alaska, New Mexico, and Pennsylvania have rejected *Hudson* by adopting an exclusionary remedy for knock-and-announce violations under their state constitutions. Appellants' Br. 26-32. That is wrong. Ironically, Florida's constitution expressly requires that its search-and-seizure provision be read "in conformity with the 4th Amendment of the United States Constitution, as interpreted by the United States Supreme Court." Fla. Const. art. I, § 12. The case Bembry and Singh cite is a *statutory* rule of exclusion tied to the Florida Supreme Court's reading of its statute. *State v. Cable*, 51 So. 3d 434, 437-38 (Fla. 2010). The same is true of Alaska. The lower court decision that Bembry and Singh cite is a statutory ruling. *Berumen v. State*, 182 P.3d 635, 637 (Alaska Ct. App. 2008). The Alaska court expressly declined to make a constitutional one. *Id*. at 641. These cases thus provide no help for Bembry and Singh's requested *constitutional* remedy.

New Mexico and Pennsylvania have different constitutional rules, but both reached that conclusion *before Hudson* and neither has had an opportunity to reconsider their positions in light of *Hudson*. Lower courts have noted that the New Mexico Supreme Court has not looked at the "policy considerations addressed in *Hudson*" or had "occasion since *Hudson* to reconsider"; that court has itself invited parties to raise and brief the effect of *Hudson*. *State v. Jean-Paul*, 295 P.3d 1072, 1077 (N.M. Ct. App. 2013) (citing *State v. Hand*, 178 P.3d 165, 167 n.2 (N.M.

2008)). The Pennsylvania Supreme Court's ruling also preceded *Hudson*. *Pennsylvania v. Chambers*, 598 A.3d 539 (Pa. 1991). *Chambers* had "no discussion . . . of the historical context" or any attempt to link such an analysis "to the Pennsylvania Constitution." *Upshur*, 2011 WL 1465527, at *6-7 (rejecting *Chambers*). Indeed, "it is unclear precisely why" it applied the exclusionary rule. *Id*. At any rate, this Court is very different from the high courts of New Mexico and Pennsylvania, as Ohio's pre-*Hudson* precedent *disfavored* the exclusionary rule.

Bembry and Singh also overlook many cases that reject a criminal defendant's requested departure from *Hudson*. Some States have simply rejected the exclusionary rule. *E.g.*, *Padilla v. State*, 949 A.2d 68, 82 (Md. App. Ct. 2008). Others prohibit their state constitutions from departing from U.S. Supreme Court precedent. *E.g.*, *People v. Camacho*, 3 P.3d 878, 882 (Cal. 2000) ("Our state constitution thus forbids the courts to order the exclusion of evidence at trial as a remedy for an unreasonable search and seizure unless that remedy is required by the Federal Constitution."); *see also People v. Lamas*, 229 Cal. App. 3d 560, 570 (1991) ("The independent source and inevitable discovery doctrines are also applicable in situations where the prior illegal entry is in violation of 'knock-notice' rules."). Still others have specifically expressed their agreement with *Hudson* (or adopted an analogous holding before *Hudson*). *E.g.*, *State v. Roberson*, 225 P.3d 1156, 1159 (Ariz. Ct. App. 2010); *Upshur*, 2011 WL 1465527 at *25; *People v. Glorioso*, 398 Ill. App. 3d 975, 988 (2010); *Stevens*, 597 N.W.2d at 60-62; *State v. Powell*, 306 S.W.3d 761, 771 (Tex. Crim. App. 2010).

At day's end, this Court should not decide this case by polling the States and determining whether more favor *Hudson* than reject it. The Court should decide this case on first principles. Neither text nor history justifies a suppression remedy for a knock-and-announce violation. And this Court should not judicially manufacture such a knock-and-announce remedy.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Seventh District.

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