No. 16-369

In The
Supreme Court of the United States

COUNTY OF LOS ANGELES, et al.,

Petitioners,

v.

ANGEL MENDEZ, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* OF LOS ANGELES COUNTY POLICE CHIEFS' ASSOCIATION IN SUPPORT OF PETITIONERS

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The Los Angeles County Police Chiefs' Association respectfully submits this brief *amicus curiae*, pursuant to Supreme Court Rule 37 and the written consent of all parties.[1]

INTERESTS OF THE *AMICI CURIAE*

The Los Angeles County Police Chiefs' Association ("LACPCA") is a nonprofit mutual benefit corporation consisting of the Police Chief Executives of the 45 independent cities in Los Angeles County. LACPCA focuses on advancing the science and art of police administration and crime prevention in Los Angeles County; coordinating the implementation of law enforcement efforts by local law enforcement leaders; and developing, teaching, and disseminating professional law enforcement practices.

One of LACPCA's missions is to ensure that all 45 independent cities in Los Angeles County provide their peace officers with ongoing training that is thorough, effective, and consistent with the law and best practices. Thus, the members of LACPCA monitor and evaluate case law and legislation through the lens of how they will train officers on new legal developments. LACPCA has a strong interest in this case because the

[1] Petitioners and Respondents have consented to the filing of this brief *amicus curiae*. Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

Ninth Circuit has created a rule of liability for which it is exceedingly and unnecessarily difficult to provide clear and effective training.

SUMMARY OF THE ARGUMENT

The provocation rule allows a police officer to be held personally liable for damages for a reasonable and lawful use of force if the officer "provoked" the confrontation by violating the Fourth Amendment, even if the violation was relatively minor or technical.

The rule is confusing, and it is extremely difficult for law enforcement agencies to effectively incorporate into their training. The current best practice for training officers about the use of force is "scenario-based" training, which allows officers to practice and develop their responses in simulated dangerous situations. While scenario-based training encourages officers to remain mentally present, adapt to changing circumstances, and think creatively, the so-called provocation rule encourages officers to look backwards, and focus on their tactical decisions leading up to a confrontation. Instead of encouraging better policing, the provocation rule will encourage less policing, or at best, distracted policing. It is impossible to effectively train officers what to do when confronted with circumstances in which using force would be deemed legal yet still a basis for liability.

The provocation rule is unnecessary. The Fourth Amendment, aided by this Court's long line of cases interpreting its application to police conduct including *Graham v. Conner*, 490 U.S. 386 (1989), already effectively protects citizens against warrantless searches and excessive force, and public safety agencies are already training their officers on the consequences of violating the Fourth Amendment.

ARGUMENT

I. THE PROVOCATION RULE IS COUNTERPRODUCTIVE TO CURRENT TRAINING EFFORTS AND WILL NOT HAVE THE DESIRED RESULTS.

In *Mendez v. County of Los Angeles*, 815 F.3d 1178 (9th Cir. 2016), the district court determined that Deputies Christopher Conley and Jennifer Pederson violated the Fourth Amendment by opening the door to a wooden shack inhabited by Angel Mendez and Jennifer Garcia ("Respondents") without a warrant and without first knocking and announcing their presence. *Id.* at 1185-86. The deputies then fired their guns at Respondents, which was not excessive force in light of Deputy Conley's reasonable but mistaken fear upon seeing Mr. Mendez's BB gun. *Id.* Yet, the deputies were held individually liable for $4 million for doing so. *Id.* at 1186. On appeal, the Ninth Circuit Court of Appeals described the provocation rule as follows: "[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent

Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." *Id.* at 1193 (quoting *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002)).

In recent years, law enforcement agencies, task forces, and various organizations throughout the country have been analyzing how best to deliver policing services in a way that reduces the number of police-involved shootings and use of force incidents and increases public trust. See, e.g., *Guiding Principles on Use of Force*, Police Executive Research Forum (March 2016), http://www.policeforum.org/assets/guidingprinciples1.pdf; *Final Report of the President's Task Force on 21st Century Policing*, United States Department of Justice's Office of Community Oriented Policing Services (May 2015), https://cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf; *CBP Use of Force Training and Actions to Address Use of Force Incidents (Redacted)*, Department of Homeland Security's Office of Inspector General (September 2013), https://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-114_Sep13.pdf. "The expectation is for police officers to resolve situations safely and with the least amount of force possible." *Los Angeles Police Department 2015 Use of Force Year-End Review Executive Summary*, Los Angeles Police Department, 17 (2015), http://assets.lapdonline.org/assets/pdf/UOF%20Executive%20Summary.pdf.

The emerging answer to this is "scenario-based" training. See, e.g., *CBP Use of Force Training and Actions to Address Use of Force Incidents*, *supra*, at 11

("CBP should continue to expand the use of scenario-based training and evaluate new technologies to support agents and officers."); *Final Report of the President's Task Force on 21st Century Policing*, *supra*, at 60 ("The Federal Government should support research into the development of technology that enhances scenario-based training . . . and enables the dissemination of interactive distance learning for law enforcement."). Scenario-based training, also called reality-based training, is a type of simulation training that allows officers to learn experientially, but in a safe environment. See *Guiding Principles on Use of Force*, *supra*, at 64. For instance, the Los Angeles Police Department has begun using "Force Option Simulators" to create virtual reality scenarios in which officers can practice responding to challenging and dangerous situations that could require a use of force. *LAPD 2015 Use of Force Year-End Review Executive Summary*, *supra*, at 20. According to the Police Executive Research Forum ("PERF"),

> [a]gencies should provide use-of-force training that utilizes realistic and challenging scenarios that officers are likely to encounter in the field. Scenarios should be based on real-life situations and utilize encounters that officers in the agency have recently faced. Scenarios should go beyond the traditional "shoot-don't shoot" decision-making, and instead provide for a variety of possible outcomes, including some in which communication, de-escalation, and use of less-lethal options are most appropriate. Scenario-based training

> focused on decision-making should be integrated with officers' regular requalification on their firearms and less-lethal equipment.

Guiding Principles on Use of Force, *supra*, at 64.

In 2014, the East Bay Times reported that since 2008, when the City of Richmond began requiring its officers to train four times per year with role-playing scenarios on responding to armed residents, "the Police Department has averaged fewer than one officer-involved shooting per year," none of which have been fatal. Robert Rogers, *Use of Deadly Force by Police Disappears on Richmond Streets*, East Bay Times (Sept. 6, 2014, 6:04 PM), http://www.eastbaytimes.com/2014/09/06/use-of-deadly-force-by-police-disappears-on-richmond-streets/.

Scenario-based training requires officers to remain mentally present, constantly assessing the current threat level and how to respond. For instance, under the Critical Decision-Making model proposed by PERF, officers should be asking themselves the following questions:

- Do I need to take immediate action?
- What is the threat/risk, if any?
- What more information do I need?
- What could go wrong, and how serious would the harm be?
- Am I trained and equipped to handle this situation by myself?

- Does this situation require a supervisory response to provide additional planning and coordination?
- Do I need additional police resources (e.g., other less-lethal weaponry, specialized equipment, other units, officers specially trained in mental health issues)?
- Is this a situation for the police to handle alone, or should other agencies/resources be involved?

Guiding Principles on Use of Force, *supra*, at 82. Under the "Suspect Threat Assessment and Response Training" ("START") model, officers are trained to "constantly assess their tactics and to measure the constitutionality of their force decisions in light of information that becomes available as the situation develops." John Klein and Ken Wallentine, *A Rational Foundation for Use of Force Policy, Training and Assessment*, AELE Law Enforcement Legal Center, 5 (2013), http://www.aele.org/START.pdf. Officers are also encouraged to be creative and flexible in their efforts to de-escalate potentially dangerous situations. *Id.* at 9.

In other words, in order for a police officer to use her scenario-based training skills successfully in the field, she must avoid distractions and stay in the moment. However, the provocation rule does not encourage officers to stay in the moment. Rather, it encourages officers who are faced with life or death decisions to think back on every tactical decision *leading up to* that moment, because even if an officer assesses her current situation correctly and determines

that firing her gun is reasonable, legal, and necessary, she knows that if she shoots, she could still be liable for millions of dollars for a previous tactical error. Instead of an officer focusing her attention on the suspect, the situation, and the best possible solution, that officer will be distracted and second-guessing past decisions.

The provocation rule also discourages proactive law enforcement, and encourages officers to try to minimize liability by avoiding dangerous situations in the first place. Large damage awards against individuals can lead to "overdeterrence," and

> [t]he risk of overdeterrence is especially serious in the police context, even if damages are not set too high. Police officers ordinarily get no tangible benefit from the marginal "good" decision. Thus, if they are made to pay for bad ones, they can simply choose to minimize searches and arrests, or at least to avoid them in all but clear cases. This is a real problem, both because police have a great deal of discretionary authority, and because they often exercise that authority (and gather their information) on the street, where it is very hard to monitor them. All of which makes it easy for officers, all too often, to "drive on by" – to choose not to search or arrest at all. This means that overdeterrence probably exists even if damages are assessed accurately; a bias toward overvaluation will only aggravate the problem.

William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 Va. L. Rev. 881, 903-04 (1991). Thus, instead of encouraging better policing, the provocation rule will encourage less policing, or distracted policing.

II. THE PROVOCATION RULE IS A CONFUSING AND UNNECESSARY DOCTRINE THAT HINDERS PUBLIC SAFETY AGENCIES' ABILITY TO EFFECTIVELY TRAIN PEACE OFFICERS.

When a new law takes effect, it is the duty of public safety agencies to translate that law into guidance for their peace officers. If an officer does not leave a training session with a clear understanding of what she is supposed to do or not do with respect to a new law or new interpretations of an existing law, the training is useless to the officer, the agency, and the public.

If this Court upholds this rule, law enforcement agencies will attempt to distill it into clear instructions for their officers, but there is no clear message about what officers can (or must) do differently in the future to better protect the public and themselves. How does a law enforcement agency teach this rule to its officers in clear and helpful terms? It cannot. The provocation rule is needlessly confusing. Should the deputies in *Mendez* not have used force despite the fact that it was lawful under the Fourth Amendment?

As this Court has previously stated, it is important that officers be able to "reasonably [] anticipate when their conduct may give rise to liability for damages."

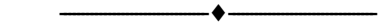
Anderson v. Creighton, 483 U.S. 635, 646 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). Similarly, effective law enforcement training informs officers of the potential risks and consequences of their mistakes. While the methods of use of force training continue to evolve (discussed above in section I), the law is clear that an officer may be held personally liable for using excessive force. See, e.g., *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 73 (1st Cir. 2016). This is an easily-explained concept: if an officer uses unreasonable force, and in doing so, causes someone harm, the officer may be liable to that person for damages.

The provocation rule throws the relative clarity of this concept into concerning uncertainty. This case, and the provocation doctrine in general, charges agencies with the perplexing task of trying to explain to their officers that if a situation calls for force against a civilian, and officers use the appropriate level of force, the officers may still be liable to that person for damages if the officers made a mistake leading up to their use of force, and they cannot expect the amount of damages to be proportional to the scope of their mistake.

Further, from a training perspective, the rule is not only confusing, but also unnecessary. There is already a rule in place to protect citizens against warrantless searches and excessive force – the Fourth Amendment – and there are already consequences in place for violating the Fourth Amendment. See, e.g., *Hector v. Watt*, 235 F.3d 154, 159 (3d. Cir. 2000) (" . . . the point of the exclusionary rule is to deter violations

of the Fourth Amendment. . . ."); see also, *Miranda-Rivera*, 813 F.3d at 73 (discussing personal liability for excessive uses of force).

Public safety agencies already train their officers on the importance of obtaining warrants, knocking and announcing their presence before conducting a search, and using an appropriate level of force to respond to a situation. They already train their officers on the consequences of failing to obtain a warrant, failing to knock and announce your presence, and using excessive force. But the provocation rule as articulated in the court below – which allows individuals to be held personally liable for the unforeseen consequences of tactical decisions – will not prevent the type of harm that occurred in this case. What additional training could the deputies have received that would have prevented Respondents' injuries? Should an agency tell an officer that, if faced with life-threatening circumstances, he should either (1) not use reasonable force, or (2) stop and consider if it is possible that he technically violated the Fourth Amendment in the last hour? Or the last two hours? From the perspective of law enforcement agencies, the doctrine is simply not workable, particularly in high stress, and potentially life-changing moments, where police officers have to focus on the situation as it is unfolding.



CONCLUSION

For the foregoing reasons, LACPCA respectfully requests that this Court overturn the lower court's decision, disapprove the provocation rule, and instead direct that cases be analyzed according to this Court's established case law interpreting the Fourth Amendment.

Respectfully submitted,

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