No. 16-369

IN THE

Supreme Court of the United States

COUNTY OF LOS ANGELES, DEPUTY CHRISTOPHER CONLEY, AND DEPUTY JENNIFER PEDERSON,

Petitioners,

v.

ANGEL MENDEZ AND JENNIFER LYNN GARCIA,

Respondents.

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

BRIEF FOR PETITIONERS

Mary C. Wickham
Rodrigo A. Castro-Silva
Jennifer Lehman
Millicent Rolon
OFFICE OF THE COUNTY COUNSEL
648 Kenneth Hahn Hall of Administration
Los Angeles, CA 90012

Thomas C. Hurrell
Melinda Cantrall
HURRELL CANTRALL LLP
300 South Grand Avenue
Los Angeles, CA 90071

E. Joshua Rosenkranz
Counsel of Record
Thomas M. Bondy
Andrew D. Silverman
Matthew L. Bush
Cynthia B. Stein
Benjamin F. Aiken
Logan Dwyer
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioners

QUESTIONS PRESENTED

Two Sheriff's Deputies searching for an armed fugitive opened the door to a backyard shack to be confronted by a man pointing a gun at them. Fearing for their lives, they discharged their weapons. The courts below found—and the parties all agree—that the shooting was reasonable under the Fourth Amendment framework this Court set out in *Graham v. Connor*, 490 U.S. 386 (1989). Nevertheless, the Deputies have been held personally liable under the Ninth Circuit's so-called "provocation rule," on the ground that they provoked the confrontation by failing to secure a warrant to search the shack. The questions presented are:

1. The Ninth Circuit's provocation rule holds officers liable under the Fourth Amendment for objectively reasonable force, vitiates qualified-immunity protections, and permits tort liability in the absence of proximate cause. Should this Court reject the provocation rule and continue to analyze police use of force under the established legal framework set out in *Graham*?

2. The Court of Appeals held alternatively that the Deputies were liable for the shooting "under basic notions of proximate cause." Did the court err in holding that the failure to secure a warrant proximately caused the shooting, particularly where the Deputies shot in reasonable self-defense after one of the Plaintiffs pointed a gun at them and the outcome would not have changed if the Deputies had a warrant?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

Statutes

Other Authorities

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals affirming in part and reversing in part the judgment of the district court is reported at 815 F.3d 1178 and reprinted at Pet. App. 1a-26a. The district court's unpublished findings of fact and conclusions of law are available at 2013 WL 4202240 and reprinted at Pet. App. 55a-136a.

JURISDICTION

The Court of Appeals entered judgment on March 2, 2016, and denied rehearing on June 23, 2016. The petition for a writ of certiorari was timely filed on September 16, 2016, and granted on December 2, 2016. This court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides:

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

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ….

INTRODUCTION

It was a tragic happenstance.

Petitioners Los Angeles County Sheriff's Deputies Christopher Conley and Jennifer Pederson (the "Deputies") were dispatched to a specific address to locate a fugitive considered armed and dangerous. In the backyard, they encountered a run-down shack. The district court found—and for present purposes, it is undisputed—that the Deputies had probable cause to believe the fugitive was in the shack. So they opened the door to peer inside. What they saw was every officer's nightmare: a man pointing a gun at them at point-blank range. What they did is what every officer is trained to do: They fired their weapons in self-defense. The courts below found—and all the parties agree—that this response was reasonable.

Yet, the Deputies have been hit with millions of dollars in personal liability for excessive force. Turns

out, the man in the shack was not the fugitive, but a homeless man using the shack as shelter. He was not holding a rifle, but a BB gun. And he was not intentionally pointing it at the Deputies, but shifting it as he sat up thinking the homeowner was at the door. The Deputies peered in at the worst possible moment.

Everyone agrees that the Deputies did not use excessive force under the standard this Court has been following for 25 years. Under *Graham v. Connor*, a court must put itself in the shoes of a reasonable officer on the scene and, without the benefit of hindsight, evaluate the reasonableness of the Deputies' conduct "at the moment" they applied force. 490 U.S. 386, 396 (1989). The only way the Ninth Circuit was able to find the Deputies liable for their *reasonable* use of force was by rolling the clock back to before that critical moment. The court invoked its so-called "provocation rule," which holds an officer liable for the use of otherwise reasonable force if the officer provoked a violent confrontation.

The supposed "provocation" here was that the Deputies did not secure a search warrant before opening the shack door. Never mind that there was nothing provocative about that or about the manner in which they opened the door; the Ninth Circuit held that no actual provocative conduct is required, just a constitutional violation that was in the chain of events eventually leading to the shooting. And never mind that the shack's occupant was not provoked to violence at all.

As this Court has observed, circuits have "sharply questioned" the provocation rule. *City & Cty. of San*

Francisco v. Sheehan, 135 S. Ct. 1765, 1776 n.4 (2015). The vast majority of them reject it. This Court should as well. Officers need to be free to make split-second decisions to respond to threats of force without hesitating to replay all their prior actions to assess whether someone might later accuse them of provoking the confrontation.

This Court should also reject the Court of Appeals' alternative holding that the failure to secure a search warrant proximately caused the shooting. Search warrants are designed to protect privacy interests; they are not designed to prevent injuries due to use of force. And the outcome here would have been the same even if the Deputies had a warrant in their back pocket.

STATEMENT OF THE CASE

Police Search For A Wanted, Armed-And-Dangerous Parolee

On the morning of October 1, 2010, a Los Angeles police officer reported that he believed he had seen a missing parolee at a grocery store. Pet. App. 57a. The parolee, Ronnie O'Dell, was wanted on felony charges, including child endangerment and evading capture. *Id.*; JA 74. Twelve officers, including a special team charged with tracking and apprehending wanted parolees, responded to the scene. Pet. App. 57a-58a. They knew O'Dell "had evaded prior attempts to apprehend him" and was considered "armed and dangerous." Pet. App. 57a. By the time they arrived, O'Dell was gone. Pet. App. 57a-58a.

While the team was debriefing, an officer received a tip that O'Dell was spotted riding a bicycle in front of the nearby home of Paula Hughes. Pet. App. 58a. The team was shown a flyer that described O'Dell as "armed and dangerous" and listed his outstanding felony charges. JA 74, 214. The officers then divided into two teams: one to the Hughes residence and the other to a different house on the same street that officers knew O'Dell had previously visited. Pet. App. 58a.

The team that went to the Hughes property consisted of five officers, including Deputies Conley and Pederson. Pet. App. 59a. Although the deputy who received the tip announced to the officers that a man named Angel lived in the backyard with a pregnant woman, *id.*, Deputy Conley testified that he did not hear this announcement, JA 174, 182; Deputy Pederson recalled hearing only that some people "sometimes hung out in the back" of the house, not that they lived there. JA 212. A third officer (not a party) testified that she heard no announcement on the topic. JA 166.

When the officers arrived at the Hughes house, "they observed a bicycle on the front lawn." Pet. App. 63a; JA 77. The officer-in-charge assigned Deputies Conley and Pederson to clear the back of the property for the officers' safety, in case O'Dell was hiding there, and to cover the back door, in case O'Dell was in the house and attempted to escape. Pet. App. 59a, 63a.

The other officers knocked on Ms. Hughes's front door. Pet. App. 63a. Ms. Hughes refused to open the door, but she spoke with the officers, who told her that they were looking for O'Dell. *Id.* While speaking to

Ms. Hughes, one of the officers heard "running within the Hughes residence, toward the back of the [house]" and "believed Mr. O'Dell was [inside]." Pet. App. 64a. They prepared to "ram" the door down, but Ms. Hughes opened the door and allowed them to enter. *Id.* The officers looked through the house but did not find O'Dell. *Id.*

The Deputies Fire In Response To A Drawn Gun

Meanwhile, Sheriff's Deputies Conley and Pederson were searching the backyard. Pet. App. 65a. They were in uniform, JA 98-99, 108-09, and kept "their guns drawn because" they believed "O'Dell … to be armed and dangerous," Pet. App. 65a. The backyard was a jumble of junk and sheds. A large, dirt-covered area was littered with "debris throughout," including "abandoned automobiles." Pet. App. 60a; JA 78-82 (photos). The Deputies first encountered and cleared three storage sheds where O'Dell could have been hiding. Pet. App. 65a. Then they approached a small, windowless plywood shack with a wooden door. Pet. App. 60a-61a.

JA 82.

As depicted, surrounding this shack were various odds-and-ends: a hand truck, a plastic locker with clothing, an office chair, an empty plastic tub, a step-ladder, another plastic tub with a trash bag lying on top, a hose, a shovel, and other miscellaneous items. JA 81-82 (photos); Pet. App. 61a. A thin white wire, partially obscured by dirt and garbage, ran into the shack. JA 82 (photo). An air conditioning unit, mounted into a hole, was on the opposite side of the shack, and therefore not visible to the Deputies. *See* Pet. App. 62a, 66a; JA 81 (photo).

The Deputies approached the shack's doorway. Pet. App. 66a. The shack had a screen door that was open, but its wooden door was closed. *Id.* Neither Deputy "perceive[d] the shack to be a habitable structure"; rather, both "believed the shack to be simply another storage shed," like "the three … that they had

already searched." Pet. App. 66a-67a. "Therefore, it was their perception that the only person who might have been in the shack would have been Mr. O'Dell, trying to remain hidden." Pet. App. 67a.

Deputy Conley opened the shack's wooden door and pulled back a blue blanket obstructing the doorway. *Id*. The Deputies were instantly confronted with "the silhouette of an adult male … holding—what they believed to be—a rifle." *Id.* Deputy Pederson thought "whoever was in that shack … [is] going to shoot us, and possibly kill one or both of us." JA 217. Deputy Conley "thought to [him]self[:] This is where I'm going to die." JA 179.

Deputy Conley yelled "Gun!" and both Deputies began firing at the man with the gun while backing away from the door. Pet. App. 69a-70a. Consistent with their training, the Deputies fired until they perceived that "there was no [longer a] threat." Pet. App. 70a. Both Deputies stopped shooting with unused ammunition remaining in their weapons. JA 197. The whole shooting lasted only 2-3 seconds. JA 196-97.

It turns out the man holding the gun was not O'Dell but Respondent Angel Mendez. Mr. Mendez had been living in the shack with his then-girlfriend (now wife) Respondent Jennifer Garcia.[1] The couple had been napping on a futon inside the shack. Pet. App. 67a-68a. The gun Mr. Mendez pointed toward

[1] In keeping with the convention of the courts below, we refer to Ms. Garcia as "Mrs. Mendez." We refer to the couple as "Plaintiffs."

the officers was a black BB gun that "closely resembled a small caliber rifle." Pet. App. 62a; *see* JA 89 (photo). Mr. Mendez used it "to shoot rats, mice, and other pests." Pet. App. 62a. When the door opened, Mr. Mendez thought it was Ms. Hughes playing a joke, and he grabbed the gun next to him on the futon to move it as he sat up. Pet. App. 68a. In doing so, Mr. Mendez "pointed" the "BB gun rifle … towards Deputy Conley." Pet. App. 69a. The district court found that in the shadows of the windowless, unlit shack, the Deputies "perceived Mr. Mendez holding the BB gun rifle," "*reasonably* believed that the BB gun rifle was a firearm rifle," and "*reasonably* believed that the man … holding the firearm rifle … threatened their lives." *Id.*

The bullets hit Mr. Mendez in his forearm, back, hip, leg, and foot, requiring amputation of his right leg below the knee. Pet. App. 70a. Mrs. Mendez was shot in her right shoulder and grazed on the left hand. *Id.* She was pregnant at the time of the shooting and later gave birth to a healthy boy. JA 152.

The District Court Finds That The Deputies Used Reasonable Force But Nevertheless Holds Them Liable

Plaintiffs sued Deputies Conley and Pederson and Los Angeles County under 42 U.S.C. § 1983. Plaintiffs claimed the Deputies infringed their Fourth Amendment rights by searching the shack without a warrant, not knocking and announcing their presence immediately before entering the shack, and employing excessive force. *See* Pet. App. 74a-75a, 88a, 99a, 106a-07a, 109a, 135a-36a (District Court's

Findings & Conclusions); Pet. App. 52a-53a (District Court Judgment). The district court ruled for the County on summary judgment. JA 3-4.

The district court conducted a bench trial on the claims against the Deputies and found for Plaintiffs on their warrantless-entry and knock-and-announce claims. Pet. App. 74a-105a. The court found as fact that the Deputies believed the shack was uninhabitable, uninhabited, and "simply another storage shed[] similar to the three … they had already searched." Pet. App. 66a-67a. Two other experienced officers (in addition to Deputies Conley and Pederson) stated that none of them perceived the plywood shack as a place where people might be living. *See* JA 70, 165, 176, 215-16. Nevertheless, the court concluded that Deputies Conley and Pederson's sincerely held belief was "not reasonable," Pet. App. 67a, and that they should have known the makeshift structure was a dwelling, Pet. App. 78a-85a. The court then rejected the exceptions to the warrant requirement that the Deputies had invoked—including Ms. Hughes's consent, parolee search, exigency, and emergency circumstances. Pet. App. 88a-99a. The court concluded that Deputy Conley violated Plaintiffs' clearly established right to be free from an unreasonable search. Because "Deputy Pederson, however, did not search the shack," the district court did not hold her liable on the warrantless-entry claim. Pet. App. 88a, 128a.

As to the knock-and-announce claim, having found that the Deputies should have known the shack was a dwelling, the district court held that the Deputies were obligated to knock and announce their presence a second time (after their colleagues had already

knocked and announced at the front door of the Hughes house). Pet. App. 99a-104a. The court also denied the Deputies qualified immunity, holding that the requirement to knock and announce at the shack was clearly established. Pet. App. 105a.

The district court awarded Plaintiffs only nominal damages of $1 against Deputy Conley on the warrantless-entry claim and $1 against Deputies Conley and Pederson on the knock-and-announce claim. Pet. App. 135a. The court explained that Plaintiffs suffered no harm as a result of the warrantless-entry or knock-and-announce claims. JA 238. The court elaborated that the damages Plaintiffs suffered as a result of the shooting were not compensable as part of the warrantless-entry or knock-and-announce claims because Mr. Mendez's "act of pointing the BB gun [at the Deputies] would have superseded th[ose] claim[s] as far as damage is concerned." *Id.*

As to excessive force, the court found no "violation of [Plaintiffs'] constitutional right to be free from excessive force" because the Deputies' "use of force was reasonable given their belief that a man was holding a firearm rifle threatening their lives." Pet. App. 108a-09a. Indeed, the court noted that Plaintiffs had "conceded" as much in closing arguments. Pet. App. 108a (discussing JA 230). The court explained that "[i]f the only issue in the case was simply what occurred at the moment of the shooting, then the verdict would have been in favor of the defendants." JA 237.

The court nevertheless found for Plaintiffs on their Fourth Amendment excessive-force claim. Pet. App. 109a-23a. The court invoked the Ninth Circuit's

provocation rule, that an officer "may be held liable for his *otherwise defensive* [i.e., *reasonable*] use of deadly force" if he "intentionally or recklessly provokes a violent confrontation" through "an independent Fourth Amendment violation." Pet. App. 109a (emphasis added) (quoting *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002)).

Since the court had already found Deputy Conley liable on the warrantless-entry claim and both the Deputies liable on the knock-and-announce claim, the court concluded that the Deputies had thereby "provoked" the shooting, Pet. App. 112a, and so their "otherwise reasonable (and lawful) defensive use of force [became] unreasonable as a matter of law," Pet. App. 111a. It did not matter that the purported provocation was not intentional, Pet. App. 113a, or that the only reason the court considered the conduct "reckless" was that the search was "unreasonable under the Fourth Amendment," Pet. App. 116a, 118a, 122a. It likewise did not matter that the purported provocation was not violent—it consisted of the Deputies entering the shack by merely opening the door and moving the blue blanket without first knocking and announcing—nor that it provoked no violence from Mr. Mendez, who testified that he picked up the BB gun merely to move it as he sat up in bed. *See* Pet. App. 121a. For the district court, all that mattered was that the warrantless entry and failure to knock and announce were "predicate … constitutional violations [that] render[ed] [the Deputies'] 'otherwise reasonable defensive use of force unreasonable.'" *Id.*

The court awarded damages of $4.1 million for Plaintiffs' excessive-force claim, even though it had

found the use of force reasonable. Pet. App. 135a-36a; *see also* Pet. App. 52a-54a (Judgment).

The Court Of Appeals Upholds The Award

The Court of Appeals reversed in part and affirmed in part. It reversed the judgment on the knock-and-announce claim. Pet. App. 18a-20a. Noting that officers had "announce[d] their presence at Hughes's front door," the court held that it was not clearly established at the time of the events in question that "the deputies needed to announce their presence again before entering the shack in the curtilage." Pet. App. 19a. The Deputies were therefore entitled to qualified immunity. *Id.*

On the other hand, the court affirmed the district court's holding that Deputy Conley's warrantless entry of the shack violated Plaintiffs' clearly established Fourth Amendment rights. Pet. App. 8a-18a.

The Court of Appeals also affirmed the district court's principal holding on excessive force. The court stressed that "the shooting itself was not unconstitutionally excessive force under the Fourth Amendment." Pet. App. 25a. But it nonetheless affirmed the judgment against the Deputies, invoking the Ninth Circuit's doctrine that a constitutionally reasonable use of force becomes unreasonable if "an officer intentionally or recklessly provokes a violent confrontation" by committing "an independent Fourth Amendment violation." Pet. App. 22a (quotation marks omitted).

The Court of Appeals, however, did not require any actual provocation, much less provocation of "a *violent* response." *Id.* As the court observed, Mr. Mendez was "not 'provoke[d],'" did not respond violently, and "did not intend to threaten the officers with his gun"—he simply sat up in bed with his gun pointed towards the door. *Id.* For the Court of Appeals, a provocation negating the otherwise justifiable use of force "simply require[s] that the deputies' unconstitutional conduct *created a situation which led to the shooting*." *Id.* (emphasis added; quotation marks omitted). Under this approach, the court found its provocation rule applicable.

The Court of Appeals did not make any separate determination that any provocation was "intentional or reckless." Rather, the court explained that, "because qualified immunity protects all but the plainly incompetent or those who knowingly violate the law, our determination that the deputies are not entitled to qualified immunity on the warrantless entry claim necessarily indicates that they acted recklessly or intentionally with respect to Mendez's rights." Pet. App. 23a (quotation marks and citation omitted).

The court ended with an alternative holding that even if there were no provocation rule, the Deputies were still "liable for the shooting under basic notions of proximate cause." Pet. App. 24a. Though the court had already held that the knock-and-announce claim could not be the basis for § 1983 liability because it implicated no violation of clearly established law, the court found proximate cause because "where [as here] Mendez was holding a gun when the officers barged

into the shack *unannounced*, [it] was reasonably foreseeable" that the Deputies' "unconstitutional entry" would lead to a shooting. Pet. App. 25a (emphasis added). On this basis, the court held both Deputies liable for the full $4.1 million award.

SUMMARY OF THE ARGUMENT

I. Analysis of Plaintiffs' excessive-force claim is straightforward under the approach this Court has followed for 25 years. "The 'reasonableness' of a particular use of force," this Court has emphasized, "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" from "the peace of a judge's chambers." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quotation marks omitted). Reasonableness must therefore be evaluated as of "the moment" the force was used. *Id.*

There is no dispute about the result of this Fourth Amendment reasonableness analysis on these facts. This Court has squarely held: "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to … us[e] deadly force." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). The district court found as fact that Mr. Mendez was pointing the BB gun "towards" the Deputies; the Deputies saw Mr. Mendez "holding the BB gun rifle"; they "*reasonably* believed that the BB gun rifle was a firearm rifle"; they "*reasonably* believed that … Mr. Mendez[] holding the firearm rifle … threatened their lives"; accordingly, the Deputies

"fired their guns in the direction of Mr. Mendez, fearing that they would be shot and killed" otherwise. Pet. App. 69a. That is the end of the matter.

II. The Court of Appeals held that the Deputies' indisputably reasonable use of force to protect themselves from the perceived threat of death became unreasonable under a provocation rule that this Court has never condoned. The provocation rule holds officers liable for their reasonable use of defensive force to protect themselves and others from the imminent prospect of bodily injury or death *if* some officer first committed an act that provoked no violent response but simply ended in a situation where the officers had to use force.

A. Most basically, the provocation rule is contrary to the Fourth Amendment because it declares that the use of force violates the Fourth Amendment even when the force was reasonable under—and therefore in compliance with—the Fourth Amendment. The provocation rule also overlooks that a significant component of the Fourth Amendment reasonableness analysis is the "temporal perspective of the inquiry." *Saucier v. Katz*, 533 U.S. 194, 206 (2001), *overturned in part on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). This Court's recent post-*Graham* excessive-force cases illustrate that the officer's actions before the seizure—even in the seconds immediately before the seizure—are not relevant to the reasonableness of the seizure. *See Scott v. Harris*, 550 U.S. 372 (2007); *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Brower v. Cty. of Inyo*, 489 U.S. 593 (1989).

This Court's repeated emphasis on the "moment" of the seizure in its excessive-force cases serves an important practical purpose, which the provocation rule squanders. The "reasonableness" inquiry under the Fourth Amendment is designed to "allow[] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-97.

B. The whole dynamic the provocation rule creates is similarly inconsistent with critical qualified immunity protections. Under the provocation rule, a court imposes liability merely because there was "an independent Fourth Amendment violation," Pet. App. 22a (quoting *Billington*, 292 F.3d at 1189), without ever asking whether the violation in question was a violation of clearly established law. This is no abstract concern. Although the Court of Appeals' analysis is opaque at points—particularly with regard to the relationship between the provocation rule and its causation analysis—the court ultimately imposed liability here based largely on the Deputies' *legally immunized* conduct: the Deputies' failure to separately knock and announce at the shack.

C. The Court of Appeals' provocation rule is also invalid because it does not require proximate cause—only but-for cause. Plaintiffs will almost always be able to meet that low bar. Officers will thus face potential liability for everything that happens after a predicate constitutional violation, however remote or unforeseeable the injury.

III. The Court of Appeals hedged its bet on the provocation rule by adding that "even without relying on our circuit's provocation theory," it would hold the Deputies "liable for the shooting under basic notions of proximate cause." Pet. App. 24a. This analysis is wrong as a matter of law.

A. Injuries resulting from the subsequent use of objectively reasonable force are not within the scope of the risk of the failure to secure a warrant. Plaintiffs' only actionable constitutional claim was the failure to secure a warrant before searching the shack. A search warrant is not, however, directed at preventing physical injuries. One would not ordinarily say, "You better get a search warrant, or else people will get hurt." That is why the district court awarded only nominal damages for the Deputies' failure to secure a warrant—an acknowledgment that the violation did not proximately cause their physical injury.

The Court of Appeals at no point identified the risks the warrant requirement protects. Rather, the court skipped that critical step and merely held that it was "reasonably foreseeable" that Mr. "Mendez [would be] holding a gun when the officers *barged* into the shack *unannounced*." Pet. App. 25a (emphasis added). Here, again, the Court of Appeals was impermissibly leveraging immune conduct—the failure to knock and announce—into liability for a separate constitutional violation.

B. Even if Plaintiffs' injuries were within the scope of risk of the warrant requirement, they still could not establish proximate cause because Mr. Men-

dez's act of pointing a gun at the Deputies was a superseding cause of Plaintiffs' ensuing injuries, and therefore cut off any possibility of liability for the shooting. Under this principle, when an individual points a gun at a law enforcement officer, that is a superseding event that breaks the chain of causation from prior unlawful conduct. Officers should not and cannot be held liable for the damages resulting from their ensuing *reasonable* response.

ARGUMENT

I. Under This Court's Traditional Analysis, The Deputies' Use Of Force Was Constitutional Because It Was Reasonable In Light Of The Circumstances At The Moment The Force Was Used.

Analysis of Plaintiffs' excessive force claim is straightforward under the approach this Court has followed for 25 years. Consideration of a § 1983 claim must "begin[] by identifying the specific constitutional right allegedly infringed." *Graham v. Connor*, 490 U.S. 386, 393-94 (1989). Plaintiffs claim that the Deputies' use of force violated their Fourth Amendment rights. The Fourth Amendment, however, does not govern all police conduct or tactics. It governs only "searches" and "seizures," and prohibits only those searches and seizures that are "unreasonable." U.S. Const. amend. IV; *accord Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998).

Under this Court's traditional Fourth Amendment analysis, Plaintiffs cannot prevail without satisfying a two-step analysis. At step one, they must

specify the accused conduct and demonstrate whether it was a "search" or a "seizure." This step is straightforward with respect to the claim of excessive force, which challenges the Deputies' firing shots upon seeing Mr. Mendez pointing a gun at them. At least with respect to Mr. Mendez, everyone agrees, that was a seizure—not a search—because apprehension of a person by the intentional "use of deadly force is a seizure." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). Though questionable, we accept for purposes of argument that Mrs. Mendez was also seized when the Deputies inadvertently struck her with stray gunfire, without even knowing she was there. Pet. App. 69a.[2]

Once a seizure has been identified, the second step is to "[d]etermin[e] whether the force used to effect [that] particular seizure is 'reasonable'" at the time the force was applied. *Graham*, 490 U.S. at 396. The answer to this second question is indisputably "yes." Plaintiffs conceded—and the courts below found—that the Deputies applied reasonable force under the circumstances at the time that they dis-

[2] *But see Brower v. Cty. of Inyo*, 489 U.S. 593, 596-97 (1989) ("[Seizure occurs] only when there is governmental termination of freedom of movement *through means intentionally applied*."); *accord Blair v. City of Dallas*, __ F. App'x __, No. 16-10202, 2016 WL 6775942, at *3 (5th Cir. Nov. 15, 2016) (collecting cases) ("[The] circuits have typically concluded that where the seizure is directed appropriately at the suspect but inadvertently injures an innocent person, the innocent victim's injury or death is not a seizure that implicates the Fourth Amendment because the means of the seizure were not deliberately applied to the victim." (quotation marks omitted)).

charged their weapons. Under this Court's established analysis, there is no basis for imposing § 1983 liability.

Graham v. Connor sets out the proper mode of analysis for whether a particular use of force was reasonable and therefore constitutional. 490 U.S. at 394-97. "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. This objective reasonableness analysis "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (quotation marks omitted). Courts must pay "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

"The 'reasonableness' of a particular use of force," this Court has emphasized, "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" from "the peace of a judge's chambers." *Id.* Reasonableness must therefore be evaluated as of "the moment" the force was used. *Id.* This Court has likewise stressed that the "reasonableness" analysis must "allow[] for the fact that police officers are often forced to make split-second judgments—in circumstances that are

tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation," *id.* at 396-97, and thus that officers' conduct can be reasonable in those instances even if "the officers may have made some mistakes," *Sheehan*, 135 S. Ct. at 1775 (quotation marks omitted). In other words, "[t]he proper perspective in judging an excessive force claim, *Graham* explained, is that of 'a reasonable officer on the scene' and 'at the moment' force was employed." *Saucier v. Katz*, 533 U.S. 194, 210 (2001) (Ginsburg, J., concurring).

There is no dispute regarding the result of this Fourth Amendment reasonableness analysis. Both the district court and Court of Appeals held that the Deputies' use of force was objectively reasonable under the circumstances. *See* Pet. App. 22a ("[T]he district court held that the deputies' shooting of the Mendezes was not excessive force under *Graham v. Connor*."); Pet. App. 25a ("[T]he shooting itself was not unconstitutionally excessive force under the Fourth Amendment ...."). "Indeed, in their closing argument, counsel for Mr. and Mrs. Mendez conceded that (again, at the time Deputy Conley opened the shack door), Deputies Conley and Pederson's use of force was reasonable given their belief that a man was holding a firearm rifle threatening their lives," Pet. App. 108a—even admitting that any contention that the Deputies' use of force was unreasonable at the time would itself be an "unreasonable argument to make." JA 230.

This Court has squarely held: "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer

or to others, it is not constitutionally unreasonable to … us[e] deadly force." *Garner*, 471 U.S. at 11 ("[I]f the suspect threatens the officer with a weapon … deadly force may be used."); *accord Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014) (when a person "pose[s] a grave public safety risk, … the police act[] reasonably in using deadly force to end that risk"); *Sheehan*, 135 S. Ct. at 1775 ("Nothing in the Fourth Amendment bar[s] [officers] from protecting themselves, even [if] it mean[s] firing multiple rounds.").

The district court found as fact that Mr. Mendez was pointing the BB gun "towards" the Deputies; the Deputies saw Mr. Mendez "holding the BB gun rifle"; they "*reasonably* believed that the BB gun rifle was a firearm rifle"; they "*reasonably* believed that … Mr. Mendez[] holding the firearm rifle … threatened their lives"; and the Deputies "fired their guns in the direction of Mr. Mendez, fearing that they would be shot and killed" otherwise. Pet. App. 69a. The district court found that, under the circumstances, the Deputies "did nothing wrong" in discharging their firearms. JA 237; *see Saucier v. Katz*, 533 U.S. 194, 205-06 (2001) (officers can act on "reasonable, but mistaken, beliefs … and in those situations courts will not hold that they have violated the Constitution," including in the context of "using … force"), *overturned in part on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). As the district court put it: "If the only issue in the case was simply what occurred at the moment of the shooting, then the verdict would have been in favor of the defendants." JA 237. That is the end of the matter.

Under the Fourth Amendment, "all that matters" is whether the officers' use of force was objectively "reasonable," *Scott v. Harris*, 550 U.S. 372, 383 (2007)—judged not in "hindsight" but rather "from the perspective of a reasonable officer on the scene," evaluated as of "the moment" the force was applied, *Graham*, 490 U.S. at 396. Everyone agrees that under this settled Fourth Amendment analysis, the force used to seize Plaintiffs was objectively reasonable at the time it was applied given the Deputies' reasonable belief that Mr. Mendez had a rifle pointed at them and that their lives were in imminent danger. *See* JA 179 (Deputy Conley) ("I thought to myself[:] This is where I'm going to die."); JA 217 (upon seeing the rifle barrel, Deputy Pederson thought, "whoever was in that shack … [is] going to shoot us, and possibly kill one or both of us"). Imposition of § 1983 liability notwithstanding this acknowledged reasonable use of force is incongruous with the Fourth Amendment and is legally unsustainable.

II. The Provocation Rule Contravenes This Court's Fourth Amendment Jurisprudence, Undermines Crucial Qualified Immunity Protections, And Disregards Fundamental Tort Principles.

The Court of Appeals held that the Deputies' indisputably reasonable use of force to protect themselves from the perceived threat of death became unreasonable under a provocation rule that this Court has never condoned. This Court has observed that the provocation rule has been "sharply questioned," *Sheehan*, 135 S. Ct. at 1776 n.4 (collecting

cases), and the vast majority of the circuits reject it.[3] This Court should reject it as well.

We describe below the multiple problems with a rule that transmogrifies force that is objectively reasonable under the Fourth Amendment into force that is deemed objectively *un*reasonable under the Fourth Amendment. At the outset, however, it is important to note precisely what the provocation rule is—and is not.

The few circuits that recognize a provocation rule adopt different versions of it. In one version, courts may find an otherwise reasonable use of force to be unreasonable if "reckless or deliberate [officer] conduct during the seizure unreasonably created the need to use such force." *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2004) (quotation marks omitted). Under this version, the provocative act need not even be a constitutional violation. *Id.* Thus, for example, the First Circuit found there could be provocation in an officer's decision to "le[ave] cover." *Young v. City of Providence*, 404 F.3d 4, 22 (1st Cir. 2005). Similarly, the Tenth Circuit found that officers may have provoked violence merely because they confronted the plaintiff "knowing that he was armed and distraught

---

[3] *See* Pet. 14-21 (collecting cases); *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996); *Bodine v. Warwick*, 72 F.3d 393, 400 (3d Cir. 1995); *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005); *Rockwell v. Brown*, 664 F.3d 985, 992-93 (5th Cir. 2011); *Livermore v. Lubelan*, 476 F.3d 397, 406-07 (6th Cir. 2007); *Schulz v. Long*, 44 F.3d 643, 647-48 (8th Cir. 1995); *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994); *cf. Smith v. LePage*, 834 F.3d 1285, 1298 (11th Cir. 2016); *Menuel v. City of Atlanta*, 25 F.3d 990, 997 (11th Cir. 1994).

over problems he was having with his girlfriend." *Sevier v. City of Lawrence*, 60 F.3d 695, 701 n.10 (10th Cir. 1995); *see Allen v. Muskogee*, 119 F.3d 837, 841 (10th Cir. 1997) (recognizing that a lawful act, such as running towards the plaintiff's car screaming, can be a provocation). The Ninth Circuit, for its part, has held that an officer can be liable for his otherwise reasonable use of force because *another officer* acted provocatively. Pet. App. 122a (discussing *Glenn v. Washington Cty.*, 673 F.3d 864, 869, 878-79 (9th Cir. 2011)).

In this case, the Ninth Circuit articulated the rule as follows: "Where 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." Pet. App. 22a (quoting *Billington*, 292 F.3d at 1189). But even while reciting that rule, that is not the rule the Court of Appeals followed here.

For one thing, the Court of Appeals held that the provocation rule—curiously enough—does not require actual provocation. Pet. App. 22a-23a. As the district court accurately reported, "the Ninth Circuit has indicated that the predicate constitutional violation (here, illegal entry) need not be menacing or 'provocative' in the sense of inciting a violent response." Pet. App. 118a. The provocation rule simply "require[s] that the deputies' unconstitutional conduct '*created a situation which led to the shooting* and required the officers to use force that might have otherwise been reasonable." Pet. App. 22a (emphasis added) (quoting *Espinosa v. City & Cty. of San Francisco*, 598 F.3d 528, 539 (9th Cir. 2010)).

Moreover, the Ninth Circuit's provocation rule does not require a showing that the police conduct actually provoked a violent reaction. As the court explained: "Our case law does not indicate that liability may attach only if the plaintiff acts violently." *Id.* Thus, the court applied the rule here even though the Deputies' conduct did not provoke anyone to "act[] violently"; Mr. Mendez was merely shifting his BB gun in response to what he thought was a joke. Pet. App. 68a. The Court of Appeals found it enough that, through a tragic coincidence, Mr. Mendez's weapon happened to be in a menacing pose when the police pulled back the curtain. Pet. App. 23a.

Taken together, then, the provocation rule holds officers liable for their reasonable use of defensive force to protect themselves and others from the imminent prospect of bodily injury or death *if* some officer first committed an act that provoked no violent response but simply ended in a situation where the officers had to use force. "[W]e simply require that the deputies' unconstitutional conduct created a situation which led to the shooting." Pet. App. 22a (quotation marks omitted).

Neither the rule the Court of Appeals articulated nor the rule it applied can be sustained. No matter the formulation, the provocation rule holds officers liable for the otherwise reasonable use of force if there has been some other infraction along the way to the subsequent use of force. Such a theory of liability is fundamentally at odds with bedrock principles. It attaches liability for *reasonable* uses of force, in violation of *Graham* (§ II.A). It improperly erodes the venerable defense of qualified immunity (§ II.B.). And it

creates potentially open-ended liability for law enforcement officers under § 1983, in derogation of governing tort precepts of proximate cause (§ II.C). The provocation rule is untenable, and this Court should reject it.

A. The provocation rule contravenes this Court's settled Fourth Amendment jurisprudence.

The provocation rule "render[s] … 'otherwise *reasonable* defensive uses of force *unreasonable* as a matter of law.'" Pet. App. 121a (emphasis added) (quoting *Billington*, 292 F.3d at 1190-91). This incongruous rule is at odds with this Court's Fourth Amendment jurisprudence, which is rooted in the critical need to allow officers to make split-second judgments in life-or-death circumstances.

1. Most basically, the provocation rule is contrary to the Fourth Amendment because it declares that the use of force violates the Fourth Amendment even when the force was reasonable under—and therefore in compliance with—the Fourth Amendment. As this Court has explained, an officer is constitutionally permitted to—indeed, is expected to—use "deadly force" when he "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U.S. at 11. Yet under the provocation rule, an officer is forbidden to use any force—much less deadly force—even when confronted with the risk of or death to himself, his fellow officers, or innocent civilians.

The Court of Appeals did not discuss *Garner* or *Graham*. Pet. App. 22a-24a. That is because a provocation finding trumps the inquiry set out in this Court's authoritative excessive-force cases. But there simply is no escaping that a rule that holds a reasonable use of force unreasonable because of some separate action by the officer "is plainly at odds with language in *Garner* [and, later, in *Graham*] emphasizing that the use of deadly force in effecting an arrest is constitutional when the officer has probable cause to believe that the suspect poses a threat to the officer." *Sampson v. Gilmere*, 476 U.S. 1124, 1125 (1986) (Burger, C.J., and O'Connor, J., dissenting from the denial of certiorari) (cited by *Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir. 1996), in rejecting the provocation rule).

2. The provocation rule overlooks that a significant component of the Fourth Amendment reasonableness analysis is the "temporal perspective of the inquiry." *Saucier*, 533 U.S. at 206. An unbroken line of cases applying *Graham* assesses whether the officer's use of force is reasonable as of "the moment" the force was applied. *Graham*, 490 U.S. at 396; *accord Plumhoff*, 134 S. Ct. at 2022 (considering the threat posed "at the moment when the shots were fired"); *Saucier*, 533 U.S. at 210 (Ginsburg, J., concurring) ("The proper perspective in judging an excessive force claim, *Graham* explained, is that of 'a reasonable officer on the scene' and 'at the moment' force was employed." (quoting *Graham*, 490 U.S. at 396)); *Saucier*, 533 U.S. at 206 (collecting Fourth Amendment search and seizure cases looking at the officer's knowledge "at the moment" of the search or arrest).

This Court's repeated reference to that "moment" is not sloppy language. It is fundamental to how the Fourth Amendment operates. A seizure occurs the moment an officer "appl[ies] ... physical force to restrain movement." *California v. Hodari D.*, 499 U.S. 621, 626 (1991). It is therefore only that action—applying "force … to effect a particular seizure"—that a court evaluates to determine whether the seizure is "reasonable." *Graham*, 490 U.S. at 396.

This Court's post-*Graham* Fourth Amendment excessive-force cases illustrate that the officer's actions before the seizure—even in the seconds immediately before the seizure—are not relevant to the reasonableness of the seizure. In each of those cases, the reasonableness analysis focused on the circumstances "at the moment" of the seizure—i.e., at the moment the force was applied.

Scott v. Harris, for example, involved a car chase that lasted six minutes over nearly 10 miles. 550 U.S. 372, 375 (2007). But it was only the final step—"terminat[ing] the car chase by ramming [the officer's] bumper into respondent's vehicle"—that "constituted a seizure." *Id.* at 381. Thus, it was only that action, the "manner in which [the] seizure was effected," that the Court evaluated for reasonableness. *Id.* at 383; *accord id.* at 374 (stating the issue was whether "ramming the motorist's car from behind" was constitutional); *id.* at 386 (concluding that the officer's "attempt to *terminate* the chase *forcing respondent off the road* was reasonable" (emphasis added)). The Court did not consider the reasonableness of the officer's conduct in initiating the chase. Nor did it evaluate his conduct during the entire six-minute chase.

Neither the initial approach nor the high-speed pursuit was the seizure—and thus the reasonableness of that conduct was not at issue under the Fourth Amendment.

This Court made the point explicit in *Plumhoff v. Rickard*, where it rejected a provocation rule of sorts. That case, too, involved a high-speed car chase, lasting over five minutes. 134 S. Ct. at 2021. After several unsuccessful attempts to end the chase, the officers finally were able to momentarily stop the car they were chasing. *Id.* at 2017. Thereafter, as two officers approached the car on foot, the driver put his car in reverse and attempted to escape, crashing into another police cruiser. *Id.* In the ensuing 10 seconds, the officers fired 15 shots, leading the driver to crash the car. *Id.* at 2018. In the resulting § 1983 litigation, this Court evaluated only whether the officers' actions in those final 10 seconds were reasonable, concluding that, "*at the moment* when the shots were fired," the officers acted reasonably. *Id.* at 2022 (emphasis added); *accord id.* at 2024 (holding reasonable "the deadly force that they employed *to terminate* the dangerous car chase" (emphasis added)).

In so ruling, the Court explicitly rejected the argument that it should evaluate whether the officers' conduct leading up to the chase, or their conduct throughout the chase, was reasonable. The district court there had relied on a provocation argument, insisting that the officers were not justified in using deadly force because "th[e] danger was caused by the officers' decision to continue the chase." *Id.* at 2021 n.3. In assessing the danger the driver posed to the public, the district court refused to consider the

driver's attempt to exit the interstate quickly, his swerving at high speeds, and even his disregard for the safety of others because, in the court's view, those "were caused by the [officers'] pursuit." *Estate of Allen v. City of W. Memphis*, No. 05-2489, 2011 WL 197426, at *8 (W.D. Tenn. Jan. 20, 2011). This Court held that this line of argument was improper, focusing instead on the moment of the shooting.

Brower v. County of Inyo involved yet another car chase, this one extending over 20 miles and ending when the fleeing car crashed into a police roadblock. 489 U.S. at 594. The question was whether the suspect had been seized, and the Court concluded that he had. *Id.* at 599. The Court then remanded for the reasonableness determination. Its direction was to determine whether "the roadblock" at the end of the chase that caused "[the] seizure … was 'unreasonable,'" *id.* at 599-600, not whether the officers' conduct leading up to the chase, or throughout the chase, was reasonable. Consistent with this Court's precedent, the focus had to be on the act of seizure, not the preceding events. *Id.*; *accord Hodari D.*, 499 U.S. at 628 ("We did not even consider [in *Brower*] the possibility that a seizure could have occurred during the course of the chase because, as we explained, that 'show of authority' did not produce his stop.").

That limitation, too, was not loose language. The plaintiffs' argument to this Court revolved largely around the proposition that the "pursuit," in addition to the roadblock, was unreasonable. Brief for Petitioners at i, 7-14, 26-33, *Brower*, 489 U.S. 593 (No. 87-248), 1988 WL 1025841. The plaintiffs contended that the officers "were [e]nsuring a high speed chase by

continuing the pursuit," and that they "should not now be permitted to justify the use of deadly force to protect against a danger they themselves created." *Id.* at 30-31. If this Court had thought that this sort of provocation was appropriately part of the reasonableness analysis, it would not have limited the reasonableness inquiry to the final moment of the ultimate seizure.

Consistent with these decisions and the Court's focus on "the moment" the force was applied, the district court here expressly found for the Deputies on what it styled as the "excessive force claim (based on conduct at the moment of the shooting)." Pet. App. 135a; *see* Pet. App. 106a-08a; *see also* Pet. App. 22a-25a (Court of Appeals holds the Deputies' force unreasonable even though "the shooting itself was not unconstitutionally excessive force under the Fourth Amendment"). But, critically, the district court then "mov[ed] back from the moment of shooting," JA 238, to consider the use of force in light of the earlier unannounced warrantless entry of the shack. On that basis, the court imposed liability on, as the court put it, the "excessive force claim (based on *Alexander*/*Billington* provocation)." Pet. App. 135a. That approach is directly contrary to the temporal dictates of *Graham* and this whole line of cases.

3. This Court's repeated emphasis on the "moment" of the seizure in its excessive-force cases serves an important practical purpose, which the provocation rule squanders. The "reasonableness" inquiry under the Fourth Amendment is designed to "allow[] for the fact that police officers are often forced to make split-second judgments—in circumstances that are

tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-97. When an officer's life is on the line—or when he is protecting others—we want him to make the right decision for that moment, without fear that judges or juries will engage in "armchair quarterbacking" of his every move with "the benefits of hindsight." *Gardner v. Buerger*, 82 F.3d 248, 251 (8th Cir. 1996).

Take this case: A deputy searching for a suspect believed to be armed and dangerous pushes aside a curtain to reveal the silhouette of a man with a rifle aimed dead at him at point-blank range. At that crucial moment when it strikes him, "This is where I'm going to die," JA 179, what do we him to do? The Fourth Amendment cases say we want the deputy to behave reasonably at that moment, based on what he knows then and there. Some would say that the only reasonable decision is to fire. But even if one might advocate some other course of conduct, and believe "the officers may have made some mistakes," the Fourth Amendment leaves officers room to make reasonable judgments. *Sheehan*, 135 S. Ct. at 1775 (quotation marks omitted); *see Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994) (noting that "[r]econsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred").

The provocation rule, however, makes no such allowance for split-second judgments and affords no such leeway for what judges and advocates may later characterize as mistakes when examining the matter in the serenity of their chambers and offices with the benefit of hindsight. The practical consequence is that

an officer is no longer free to make the best judgment for that moment in time. In that split second while seeing a silhouetted figure with a rifle pointing his way, the provocation rule directs the officer *not* to take the action that is most advisable then and there. The provocation rule requires him to pause and replay the day's events in search of an earlier decision that a judge might later deem a provocation—to conduct in a split second the constitutional analysis that the district court took 45 pages and 16 weeks to complete.

If the very hesitation is not deadly, the ultimate decision will be. A ruling that the shooting was unreasonable because of the earlier violation means that the Deputies were legally obligated not to shoot. Imagine that the person at the end of that gun had been a fugitive (such as O'Dell) willing to kill to avoid capture. The result could be two dead Sheriff's Deputies.

Then-Judge Alito offered a spine-tingling illustration:

> Suppose that three police officers go to a suspect's house to execute an arrest warrant and that they improperly enter without knocking and announcing their presence. Once inside, they encounter the suspect, identify themselves, show him the warrant, and tell him that they are placing him under arrest. The suspect, however, breaks away, shoots and kills two of the officers, and is preparing to shoot the third officer when that officer disarms the suspect and in the process injures him.

Bodine v. Warwick, 72 F.3d 393, 400 (3d Cir. 1995). The court asked whether "the third officer necessarily [would be] liable for the harm caused to the suspect?" *Id.* "The obvious answer is 'no.'" *Id.*

Under the provocation rule, however, the law would prohibit the third officer from using force, much less shooting. It would certainly prohibit him if the failure to knock and announce was what precipitated the suspect's violent response. The officer would also be forbidden to use force if the officers did knock and announce and the only constitutional violation was that the warrant did not incorporate the necessary attachments, which is a clearly established Fourth Amendment violation. *Groh v. Ramirez*, 540 U.S. 551, 563 (2004). A rule that prohibits an officer—under any of these circumstances—from firing on a cop-killer in the officer's own defense makes no sense and is incompatible with this Court's excessive-force framework and with the important practical considerations it embodies.

B. The provocation rule undermines qualified immunity.

The whole dynamic the provocation rule creates—holding officers liable for reasonable use of force, forcing them to hesitate and reassess all their conduct while making split-second life-or-death decisions, and, worse, compelling them to make the wrong decision on threat of crushing liability—is inconsistent with critical qualified immunity protections.

The whole point of qualified immunity is to "shield [officers] from undue interference with their

duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). Law enforcement officers are thus entitled to qualified immunity if their conduct does not violate "clearly established" law. *Id.* at 818. This protection eliminates "the danger that fear of being sued will dampen the ardor of all but the most resolute … public officials, in the unflinching discharge of their duties." *Id.* at 814 (quotation marks and brackets omitted). The immunity "gives government officials breathing room to make reasonable but mistaken judgments." *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)).

These principles are "especially important in the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Saucier*, 533 U.S. at 205); *see White v. Pauly*, 580 U.S. __, No. 16-67 (Jan. 9, 2017) (per curiam). Particularly here, the qualified-immunity protection is important "to society as a whole." *Sheehan*, 135 S. Ct. at 1774 n.3 (quoting *Harlow*, 457 U.S. at 814). We need officers to protect themselves—and protect us—when confronted with the threat of deadly force. We need them to do their best to apply the degree of force called for under the circumstances, *see Graham*, 490 U.S. at 396 (identifying factors to consider in determining whether the force applied was reasonable), not to treat the entire encounter like a law school issue-spotting exam.

The very nature of the provocation rule undermines qualified immunity principles, but the Ninth Circuit's version of the rule negates the protection outright. Under that rule, a court imposes liability merely because there was "an independent Fourth Amendment violation." Pet. App. 22a (quoting *Billington*, 292 F.3d at 1189). Notably, the rule does not say the predicate constitutional infraction must be a "violation of clearly established Fourth Amendment law." A court can conduct its entire provocation analysis—and hold an officer individually liable for crushing monetary damages—without ever asking whether the violation in question was a violation of clearly established law.

This is no abstract concern. Although the Court of Appeals' analysis is opaque at points—particularly with regard to the relationship between the provocation rule and its causation analysis—the court ultimately imposed liability here based largely on the Deputies' *legally immunized* conduct: the Deputies' failure to separately knock and announce at the shack. The court faulted the "officers [for] barg[ing] into the shack *unannounced*." Pet. App. 25a (emphasis added). "Had this [knock-and-announce] procedure been followed," the court observed, "the Mendezes would not have been shot." Pet. App. 22a. That lapse was what the court viewed as causing Plaintiffs' injuries. But the Court of Appeals had already correctly concluded that the Deputies were legally entitled to qualified immunity on the knock-and-

announce claim because they violated no clearly established law. Pet. App. 18a-20a.[4]

The reliance on this immunized conduct is in no way mitigated by the Court of Appeals' conclusion that Deputy Conley violated a *different* right that was clearly established—by failing to secure a warrant. Pet. App. 8a-18a. If that had sufficed to establish the requisite provocation, there would have been no need to emphasize the knock-and-announce lapse, as the Court of Appeals repeatedly did. The court emphasized knock-and-announce because (for reasons explained below, at 48-51) the failure to secure a warrant could not qualify as sufficient provocation under any rational understanding of a provocation rule or basic tort principles.

What then of the portion of the Ninth Circuit's rule that asks whether the "officer intentionally or recklessly provoke[d] a violent confrontation"? Pet. App. 22a (quoting *Billington*, 292 F.3d at 1189). The Ninth Circuit suggested this phrase ensured the officers were held liable only for conduct that was a violation of clearly established law. *See* Pet. App. 23a-24a. But we know that is not the case, since the Court of Appeals counted against the Deputies conduct that

[4] We are not seeking to raise here the question in the petition on which the Court denied certiorari—i.e., whether the Deputies are entitled to qualified immunity because it was not clearly established that a provocation need not provoke a violent act from the plaintiff. The point here is a more general one that the provocation rule inherently and improperly undercuts qualified immunity as a categorical matter, not that the Deputies in this case were specifically entitled to qualified immunity on Plaintiffs' provocation-rule claim.

was legally immune—i.e., the knock-and-announce violation. Nor did the Court of Appeals suggest that any provocation here was "intentional" or "reckless" in any colloquial sense. The Deputies did not intend to inflame or arouse anyone, but merely opted not to get a warrant before opening a door to a backyard shack that (as the district court found) they did not believe was a residence. Whatever the meaning of the Court of Appeals' opaque reference to "intentional" or "reckless" constitutional violations, the court's rule does nothing to undo the harm to fundamental principles of qualified immunity wrought by the provocation rule.

C. The provocation rule overrides basic tort principles of proximate cause.

Section 1983 "creates a species of tort liability," *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976), and therefore incorporates proximate cause, a "standard aspect of … the law of torts," *Paroline v. United States*, 134 S. Ct. 1710, 1720 (2014); *see Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012) ("Of course, constitutional torts, like their common law brethren, require a demonstration of both but-for and proximate causation."); *Bodine*, 72 F.3d at 400 (Alito, J.) (officers can be liable only "for the harm 'proximately' or 'legally' caused by their tortious conduct (i.e., by their illegal entry)" (citing Restatement (Second) of Torts §§ 431 & 871 cmt. 1)); *Gierlinger v. Gleason*, 160 F.3d 858, 872 (2d Cir. 1998) (similar). "[N]ot every injury in which a state official has played some part is actionable under [§ 1983]." *Martinez v. California*, 444 U.S. 277, 285 (1980). Any liability rule must require, at a minimum, that the constitutional

violation proximately cause the injuries complained of.

The "requirement of proximate cause is more restrictive than a requirement of factual ['but-for'] cause alone." *Paroline*, 134 S. Ct. at 1720. "Every event has many"—if not infinite—"[factual] causes, … only some of [which] are proximate [causes]." *Id.* at 1719; *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011) ("'[P]roximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability.").

The Court of Appeals' provocation rule is invalid because it does not require proximate cause. Here, again, is the rule the court recited: "Where 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." Pet. App. 22a (quotation marks and brackets omitted). This formulation does not mention proximate cause (or causation at all). And we know that the word "provokes" does not fill the gap, because, as discussed above (at 26-27), "provokes" in this context does not even mean "provokes"; it means "simply … created a situation which led to the shooting." *Id.* (quotation marks omitted). That is nothing but factual causation. The Court of Appeals confirmed as much by writing a *separate* alternate holding based on proximate cause, Pet. App. 24a-25a, which, for reasons discussed below (at 44-47), also bore no resemblance to standard proximate cause analysis. If the court had already required and

found proximate cause, there would have been no reason to try thereafter to demonstrate proximate cause and the consequences of such a finding.

Because the Ninth Circuit's provocation rule has no proximate cause requirement, plaintiffs will almost always be able to meet the low bar of but-for causation:

> Other than random attacks, all [excessive-force] cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.

Plakas, 19 F.3d at 1150. Officers will thus face potential liability for everything that happens after a predicate constitutional violation. This Court has never approved of such sweeping and open-ended liability for constitutional torts—and should not do so now.

III. The Deputies' Decision To Enter The Shack Without A Warrant Did Not Proximately Cause The Injuries Inflicted When They Reasonably Responded To A Gun Pointed At Them.

The Court of Appeals hedged its bet on the provocation rule by adding that "even without relying on

our circuit's provocation theory," it would hold the Deputies "liable for the shooting under basic notions of proximate cause." Pet. App. 24a. Thus, the Court of Appeals held the Deputies "liable" for Plaintiffs' injuries "for the shooting … even though the shooting itself was not unconstitutionally excessive force under the Fourth Amendment." Pet. App. 25a.

This analysis is wrong as a matter of law. The decision not to secure a warrant before opening the door to the shack—the only violation for which the Deputies were not immune—was not a proximate cause of Plaintiffs' injuries (§ III.A). And, independently, Mr. Mendez's own act of pointing the gun at the Deputies was a superseding cause that severed any causal nexus between the decision to enter without a warrant and the later use of force (§ III.B).

A. Injuries resulting from the subsequent use of objectively reasonable force are not within the scope of the risk of the failure to secure a warrant.

1. Plaintiffs could not establish proximate cause unless they proved a "direct relation between the injury asserted and the injurious conduct alleged"—not simply a causal relationship, "but one with a sufficient connection to the result." *Paroline*, 134 S. Ct. at 1719; *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014) (proximate cause requires "a sufficiently close connection" between "the harm alleged" and the tortious "conduct"). To determine whether there is a sufficient connection, this Court has adopted the tort-law principle that

proximate cause requires proof that the injuries complained of were within "the scope of the risk created by the predicate [tortious] conduct." *Paroline*, 134 S. Ct. at 1719. The tort rule is that the defendant can "be held liable only for harm that was among the potential harms—the risks—that made the actor's conduct tortious." Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 29, cmt. d. The scope of the risk is measured by "the reasons for holding the actor liable in the first place." *Id.*

Applying this principle in the § 1983 context, this Court has held that a plaintiff can recover only such damages as are "tailored to the interests protected by the particular right in question." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). An injury that does not reflect the interests that the pertinent constitutional right was designed to protect is "too remote a consequence of … officers' actions," and is not compensable under § 1983. *Martinez*, 444 U.S. at 285. Thus, Plaintiffs had to prove that "the scope of the risk created by" the violation included that they would be shot by the police in reasonable self-defense. *Paroline*, 134 S. Ct. at 1719.

Plaintiffs' only actionable constitutional claim was the failure to secure a warrant prior to searching the shack. The purpose of the search warrant requirement generally is "to protect privacy interests" by (1) ensuring that the search is justified by probable cause and is not just "the random or arbitrary act[] of government agents"; (2) "provid[ing] the detached scrutiny of a neutral magistrate, and thus ensur[ing] an objective determination whether an intrusion is

justified in any given case"; and (3) "assur[ing] the citizen that the intrusion is … narrowly limited in its objectives and scope." *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 622 (1989); *accord Steagald v. United States*, 451 U.S. 204, 213 (1981) (purpose of search warrant approved by neutral magistrate judge is to "safeguard[] an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police").

But here, a warrant would have served only the second purpose ("the detached scrutiny of a neutral magistrate"). The first purpose is not implicated, because the district court found that the Deputies "had probable cause to search … the shack." Pet. App. 93a. And the third purpose (limiting the scope) is not implicated because the Deputies approached in broad daylight and merely opened the door to see if O'Dell was hiding inside.

Where a search is unreasonable because the officers lacked probable cause (the first purpose) or exceeded the permissible scope (the third purpose), the sorts of damages a plaintiff can recover relate to the harms one might suffer from the resulting invasion of privacy—for example, "humiliation, embarrassment, and mental suffering." *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389-90 (1971); *see Sims v. Mulcahy*, 902 F.2d 524, 532 (7th Cir. 1990) (discussing plaintiff's claims of "pain, suffering and mental anguish" resulting from feeling "violated and humiliated" by a warrantless entry). But where the only violation was the failure to have a judge find probable cause in advance rather than confirming it after the fact, as happened here,

damages are often unavailable because no concrete injury exists. *See, e.g.*, *George v. City of Long Beach*, 973 F.2d 706, 709 (9th Cir. 1992).

A search warrant is not, however, directed at preventing physical injuries. One would not ordinarily say, "You better get a search warrant, or else people will get hurt." Certainly, obtaining independent verification of probable cause from a judicial officer has nothing to do with avoiding violence during a search. And because the purpose of the warrant requirement is not limiting the force directed at individuals, much less at protecting against physical injury, injuries from an officer shooting during a search are not within the scope of the risk in failing to obtain magistrate approval for a search warrant. In that situation, injuries from an officer's discharge of a firearm are simply beyond "the reasons for holding [officers] liable [on a warrantless-entry claim] in the first place." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29, cmt. d.

There is no way to stretch the constitutional violation that was found here to embrace the risk of the sort of injury for which Plaintiffs seek compensation. *Cf. Miller v. Albright*, 657 F.3d 733, 738 (8th Cir. 2011) (holding that plaintiff's claims for warrantless entry and excessive force "are separate and distinct" and the "damages resulting from the excessive force claim are not sufficient to show that [plaintiff] suffered damages as a result of the officers' unlawful entry into his home"). When an officer inflicts a physical injury on an individual, the constitutionally cognizable claim for that injury is ordinarily not a claim of unreasonable search—and certainly not a claim of

failure to get a warrant—but rather a claim of unreasonable seizure. *See Brower*, 489 U.S. at 599 (observing that a plaintiff could recover damages from an unreasonable seizure that was set up "in such manner as to be likely to kill").

That is why the district court awarded only nominal damages for the Deputies' failure to secure a warrant—an acknowledgment that the violation did not proximately cause Plaintiffs' physical injuries and thus the warrantless-entry claim "in and of itself [is] only worth a dollar in nominal damages." JA 238. As this Court has explained, nominal damages are appropriate where constitutional deprivations "are not shown to have caused actual injury." *Carey*, 435 U.S. at 266. Any injury that ended up occurring during the search—and especially the injury that occurred because of the Deputies' concededly *reasonable* use of force—is unfortunate, even tragic. But, as the district court understood, it is not compensable as part of the damage caused by the violation of the warrant requirement.

This is exactly how the scope-of-risk analysis works under tort law. Under basic tort principles, an act that may be wrong for some reason does not create liability for every injury that results; the plaintiff has to prove a connection between the duty breached and the injury. Take this illustration from the Restatement:

> Richard, a hunter, finishes his day in the field and stops at a friend's house while walking home. His friend's nine-year-old daughter, Kim, greets Richard, who hands

> his loaded shotgun to her as he enters the house. Kim drops the shotgun, which lands on her toe, breaking it. Although Richard is negligent for giving Kim his shotgun, the risk that makes Richard negligent is that Kim might shoot someone with the gun, not that she would drop it and hurt herself (the gun was neither especially heavy nor unwieldy). Kim's broken toe is outside the scope of Richard's liability, even though Richard's tortious conduct was a factual cause of Kim's harm.

Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29, illus. 3. Similarly, here, the risk from the constitutional violation (the failure to secure a warrant before opening the shack's door) bears no relation to the injury that, through sheer fluke, came to pass when the Deputies reasonably defended themselves against a person pointing a gun at them.

2. The Court of Appeals at no point identified the risks the warrant requirement protects against. Rather, the court skipped that critical step and merely held that it was "reasonably foreseeable" that Mr. "Mendez [would be] holding a gun when the officers *barged* into the shack *unannounced*." Pet. App. 25a (emphasis added). And it noted that a "*startling* entry into a bedroom will result in tragedy." Pet. App. 24a-25a (emphasis added). This was in keeping with the view the Court of Appeals expressed a couple of pages earlier as to what caused the injury: "Indeed, here an announcement that police were entering the shack would almost certainly have ensured that Mendez

was not holding his BB gun when the officers opened the door. Had this procedure been followed, the Mendezes would not have been shot." Pet. App. 21a-22a.

Here, again, the Court of Appeals was impermissibly leveraging immune conduct—the failure to knock and announce—into liability for a separate constitutional violation. The sole constitutional violation on which liability can be based had nothing to do with "barg[ing]," "startling," or announcing. It had to do with the failure to obtain a warrant indicating a magistrate's approval before opening a shack door. Since that piece of paper—as important as it is—is not designed to prevent bodily injury, it is simply not foreseeable that the failure to secure a warrant to look inside a shack would lead the shack's occupant to draw a gun as uniformed officers draw the curtain in broad daylight.

The distinction between the two violations the Court of Appeals conflated is crucial, for the purpose of the knock-and-announce requirement—unlike the warrant requirement—*is* to protect "human life and limb." *Hudson v. Michigan*, 547 U.S. 586, 593-94 (2006). The premise of knock-and-announce is that "an unannounced entry may provoke violence in supposed self-defense by the surprised resident." *Id.* at 594. Knocking and announcing, when required, also affords individuals "the opportunity to comply with the law" when the police announce their presence and an intention to enter, and thus "gives residents the opportunity to prepare themselves for the entry of the police." *Id.* (quotation marks omitted). Thus, while the failure to knock and announce bears at least some relationship to the injury that resulted, the presence or

absence of a warrant was not even a cause—much less a proximate cause—of Plaintiffs' injuries from the Deputies' reasonable use of force.

The only other authority the Court of Appeals invoked was off base for similar reasons. The court quoted Justice Jackson's condemnation of a particular law enforcement "method … [that] not only violates [the] legal rights of defendant but is certain to involve the police in grave troubles if continued." Pet. App. 25a (quoting *McDonald v. United States*, 335 U.S. 451, 460-61 (1948) (Jackson, J., concurring)). The police tactic was an officer "in plain clothes, prying up [a] bedroom window and climbing in." *McDonald*, 335 at 460-61 (Jackson, J., concurring). "When a woman sees a strange man, in plain clothes," *id.* at 460, "breaking and entering" like a common burglar, *id.* at 459, Justice Jackson warned, "her natural impulse would be to shoot," *id.* at 461. What the officer did there was a knock-and-announce violation on steroids—as this Court has since recognized, *see Hudson*, 547 U.S. at 594. Justice Jackson was not suggesting that uniformed police officers, like the Deputies here, JA 98-99, 108-09, should expect to be shot upon entering a backyard shack in the middle of the day—or upon executing any other sort of search.

The Court of Appeals' own logic about what caused the injuries here confirms that the violation of the warrant requirement was not the cause. The court concluded that "the Mendezes would not have been shot" had the "[knock-and-announce] procedure been followed." Pet. App. 22a. The same cannot be said of failing to get a warrant. Even if the Deputies had a warrant in their back pockets when they opened the

shack door without announcing their presence, the outcome would have been the same: Mr. Mendez would still have thought it was Ms. Hughes at the door and would have picked up his gun to move it while sitting up in bed. Deputy Conley would still have seen the gun pointing at him, and the Deputies would still have fired shots in reasonable self-defense. *See* Pet. App. 68a-69a. Same if the Deputies had established an exception to the warrant requirement—e.g., by validly securing Ms. Hughes's consent to search the shack or permissibly entering the shack in hot pursuit.

B. In any event, Mr. Mendez's act of pointing a gun at the Deputies was a superseding cause of the injuries.

Even if Plaintiffs' injuries were within the scope of risk of the warrant requirement, they still could not establish proximate cause because Mr. Mendez's act of pointing a gun at the Deputies was a superseding cause of Plaintiffs' ensuing injuries, and therefore cut off any possibility of liability for the shooting.

Superseding cause is one of the proximate cause precepts that prevents "infinite liability," D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 41, p. 264 (5th ed. 1984), by ensuring that "not all [causes] should give rise to legal liability," *CSX Transp.*, 564 U.S. at 692. The superseding cause doctrine instructs that an "independent act [that] is also a factual cause of harm" separates an official's misconduct from the injury. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 34; *see Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837

(1996). Where the intervening act is "sufficient to sever the causal nexus" between the official misconduct and the injury, it "cut[s] off all liability." *Archer v. Warner*, 538 U.S. 314, 326 (2003) (Thomas, J., dissenting); *see Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016) (discovery of outstanding arrest warrant broke the causal link between an unconstitutional stop and the discovery of incriminating evidence).

This Court in *Brower* illustrated how a superseding cause interacts with a claim of unreasonable seizure. There, the Court considered what would have happened if the plaintiff in a high-speed car chase "had the opportunity to stop voluntarily at [a police] roadblock" but "negligently or intentionally [drove] into it" instead. 489 U.S. at 599. The Court explained that the plaintiff's driving into the roadblock would be a superseding act cutting off "proximate causality." *Id.*

This fundamental tort principle of "a superseding cause, as traditionally understood in common law tort doctrine, will relieve a [§ 1983] defendant of liability." *Warner v. Orange Cty. Dep't of Prob.*, 115 F.3d 1068, 1071 (2d Cir. 1997) (collecting cases). Under this principle, numerous cases have held that when an individual acts in a manner that law enforcement officers reasonably perceive as a threat, that conduct is a superseding event that can break the chain of causation from prior unlawful conduct. *See, e.g.*, *Lamont v. New Jersey*, 637 F.3d 177, 185-86 (3d Cir. 2011); *Hundley v. District of Columbia,* 494 F.3d 1097, 1104-05 (D.C. Cir. 2007); *Kane v. Lewis*, 604 F. App'x 229, 234-35 (4th Cir. 2015); *James v. Chavez*, 511 F. App'x 742, 747-51 (10th Cir. 2013); *Estate of Sowards v. City of*

Trenton, 125 F. App'x 31, 42 (6th Cir. 2005); *see also Cameron v. City of Pontiac*, 813 F.2d 782, 786 (6th Cir. 1987).

Then-Judge Alito addressed the superseding-cause rubric in a similar situation in *Bodine*. The plaintiff there brought a § 1983 claim alleging that officers illegally entered his home without first knocking and announcing their presence and then used excessive force to effectuate his arrest. 72 F.3d at 393. The district court ruled that the plaintiff was entitled to judgment on the illegal entry claim, and then instructed the jury that it need not determine whether the officers used excessive force because their unlawful entry by itself rendered any use of force unreasonable. *Id.* at 393-94.

The Third Circuit reversed, admonishing that, even if the initial entry had been illegal, the officers were not liable "for harm produced by a 'superseding cause.'" *Id.* at 400. Without deciding the question, the court strongly suggested that, if the officers' use of force to arrest the plaintiff was "reasonable," this "non-tortious" act would break any chain of causation between the illegal entry and the injuries arising from the subsequent use of force. *Id.* The court explained that "the suspect's conduct [in creating the need for reasonable force] would constitute a 'superseding' cause, *see* Restatement (Second) Torts § 442 (1965), that would limit the officer's liability." *Id.* The court made that assessment even though, unlike here, the knock-and-announce violation was a possible basis for liability.

The D.C. Circuit came to a similar conclusion in *Hundley*. There, an off-duty officer drew his gun and ordered the driver and passenger out of a car after the car had attempted to run the officer over. 494 F.3d at 1099-100. After the driver exited the car, he made a threatening movement towards the officer, who in response shot and killed him. *Id.* The court held that, even if the officer had acted unreasonably in initially ordering the driver and passenger out of the car, the suspect's ensuing conduct was a superseding cause breaking the chain of causation between the initial stop and the subsequent shooting. *Id.* at 1104-05 & n.5; *accord Lamont*, 637 F.3d at 185-86 (applying *Bodine* and *Hundley* to conclude no proximate cause existed where plaintiff's quick hand movements—though he was not actually holding a weapon—broke the chain of causation).

Under these principles, Mr. Mendez's own conduct—picking up a gun and pointing it at the Deputies—broke any chain of proximate causation. When an officer confronting that situation reasonably thinks, "This is where I'm going to die," JA 179, he should not and cannot be held liable for the resulting injuries—at least where, as here, the officer has no reason to expect that his conduct would lead a law-abiding occupant, knowing he was an officer, to respond with a gun. A "[h]olding otherwise would, as noted in *Hundley*, tend to deter police officers" from carrying out their duties or protecting themselves and others in self-defense. *Lamont*, 637 F.3d at 186.

Courts have, at times, defined a superseding event as an unforeseeable event. *See, e.g.*, *Exxon*, 517 U.S. at 837 (quoting 1 T. Schoenbaum, Admiralty and

Mar. Law § 5-3, pp. 165-166 (2d ed. 1994)). To the extent this notion applies, it is satisfied here. Resisting or threatening a uniformed police officer who does nothing to incite a violent response is not only unforeseeable, it is tortious and even criminal. "[I]t is not ordinarily reasonable to foresee that a citizen will react to a police stop by attacking the detaining officer, thereby triggering a situation that requires the officer to use deadly force in self-defense." *Hundley*, 494 F.3d at 1104-05; *see Duran v. City of Maywood*, 221 F.3d 1127, 1131 (9th Cir. 2000) ("[O]fficers simply walk[ing] up a driveway silently with their guns drawn" should not "have provoked an armed response."); *James*, 511 F. App'x. at 747 (homeowner has no right to use force to "resist[]"even "an unlawful arrest or entry into his home, simply because of its unlawfulness").

Indeed, many criminal codes, including the California Penal Code, *prohibit* an individual from forcibly resisting arrest by a peace officer, even if the arrest itself is unlawful. *See* Cal. Penal Code § 834a; Model Penal Code § 3.04(2)(a)(i) ("The use of force is not justifiable … to resist an arrest that the actor knows is being made by a peace officer, although the arrest is unlawful."). "[A] person usually has no reason to foresee the criminal acts of another." *Sosa v. Coleman*, 646 F.2d 991, 993 (5th Cir. 1981). Thus, when the Deputies saw Mr. Mendez pointing a gun at them at point blank range—and reasonably interpreted that as a criminal act—Mr. Mendez's act "br[oke] the chain of causation," severing any "proximate cause" from the Deputies' warrantless entry and Plaintiffs' "injury resulting from the intervening criminal act." *Id.* at 993-94; *see also, e.g.*, *Gaines-Tabb v.*

ICI Explosives, USA, Inc., 160 F.3d 613, 620 (10th Cir. 1998).

For all these reasons, Mr. Mendez's act of pointing a gun at uniformed Deputies was a superseding event that broke the chain of causation. The Deputies therefore cannot be held liable for the ensuing harm when they applied reasonable force in response.

It was a tragic happenstance.

CONCLUSION

The Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

E. Joshua Rosenkranz
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Date: January 17, 2017