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 OF *AMICUS CURIAE* MAJOR COUNTY SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONERS

JOSEPH JOHN SUMMERILL IV
MAJOR COUNTY SHERIFF'S ASSOCIATION
1450 Duke Street
Alexandrea, VA 22314
(202) 237-2000
jsummerill@sheriffs.com

GAËTAN GERVILLE-RÉACHE
Counsel of Record
CONOR B. DUGAN
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street N.W.
Grand Rapids, MI 49503
(616) 752-2000
greache@wnj.com

Counsel for Amicus Curiae

QUESTION PRESENTED

This brief will address the following question:

Whether the Ninth Circuit's "Provocation Rule" should be barred as it conflicts with *Graham* v. *Connor* regarding the manner in which a claim of excessive force against a police officer should be determined in an action brought under 42 U.S.C. § 1983 for a violation of a plaintiff's Fourth Amendment rights, and has been rejected by other Courts of Appeals?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

BRIEF OF *AMICUS CURIAE* MAJOR COUNTY SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONERS

Amicus curiae, Major County Sheriffs' Association respectfully submits that the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.[1]

INTEREST OF THE *AMICUS CURIAE*

The Major County Sheriffs' Association, a 26 U.S.C. § 501(c)(4) non-profit, is an association of elected sheriffs representing the nation's largest counties with populations of 500,000 people or more, serving over 100 million Americans. The Major County Sheriffs' Association works to promote a greater understanding of law-enforcement strategies to address future problems and identify law-enforcement challenges facing the members of its organization.

SUMMARY OF ARGUMENT

Under *Graham* v. *Connor*, 490 U.S. 386, 396 (1989), law enforcement agents who use force—including lethal force—to subdue a free person are engaged in a "seizure," and the reasonableness of that seizure under the Fourth Amendment is determined by "a careful balancing" of the government's

[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and blanket letters of consent are on file with the Clerk's Office.

interest against the individual right at stake. *Id*. The government *always* has a profound and legitimate interest in subduing those who threaten the lives of law enforcement agents or others. That interest in the seizure does not diminish merely because the search is without a warrant, nor is a person's individual right to be free from unreasonable seizures of their person greater when agents lack a search warrant. Consequently, an agent's use of lethal force to stop a violent attack should still be considered a reasonable seizure under the Fourth Amendment, whether the search is reasonable or not.

There is no dispute that if the deputies had fired shots at Mendez in the course of a reasonable search, this would not have been an unreasonable seizure under the balancing required in *Graham*. The Court of Appeals nevertheless held that the seizure was unreasonable in this case, merely because the *search* was unreasonable, based on a so-called "Provocation Rule" articulated in *Billington* v. *Smith*, 292 F.3d 1177, 1190–91 (9th Cir. 2002). This rule allows a court to treat an otherwise reasonable shooting as *unreasonable* if an earlier constitutional violation—in this case, failure to get a warrant—created the situation which led to the shooting. In addition to the flaws already elaborated in the Petitioners' brief, this rule is untenable for three more reasons that Petitioners only touched upon.

First, on its face, the Provocation Rule exposes law enforcement officers and the public to greater risk of injury and death by (a) requiring agents to diminish their response to violent attack and (b) condoning violence against law enforcement for violations of the right to privacy. Second, it unreasonably

expects law enforcement agents to apply a complicated calculus to determine the amount of force allowed, leaving no room for the split second decision-making required in such tense and deadly situations. Third, it discourages officers from performing their duties and completing their mission by holding them liable for the outcome of any violent confrontation that follows from any constitutional violation, foreseeable or not.

For these reasons, and others given in the Petitioners' brief, this Court should reject the Provocation Rule and apply the ordinary balancing of interests required under *Graham*.

ARGUMENT

I. The Provocation Rule improperly denies the government's interest in protecting law enforcement agents or others and puts agents at much greater risk of harm.

Law enforcement is an inherently risky profession. As this Court recognized in *Terry* v. *Ohio*, 392 U.S. 1, 23–24 (1968), "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded." In 2015 over 50,000 law enforcement officers were assaulted in the line of duty in the United States. See FBI, *Law Enforcement Officers Killed & Assaulted* 2015, tbl. 70, https://ucr.fbi.gov/leoka/2015/tables/table_70_leos_assltd_region_and_geographic_division_2015.xls (last visited Jan. 19, 2017). That is nearly one tenth of all law enforcement officers in the country. See *id.*

While the rate of fatal injuries in all American occupations remained below 5 fatalities per 100,000 full-time workers every year between 2006 and 2014, police officers suffered fatalities at more than double that rate. Bureau of Labor Statistics, *Injuries, Illnesses, and Fatalities,* https://www.bls.gov/iif/oshwc/cfoi/police-officers-2014.htm#1 (last modified Aug. 2, 2016). Of the 41 law enforcement officers who died from injuries they incurred in the line of duty in 2015, nearly all of those deaths (38) resulted from firearms. See FBI, Law Enforcement Officers Killed & Assaulted 2015, tbls. 1, 28, https://ucr.fbi.gov/leoka/2015/officers-feloniously-killed/felonious_topic_page_-2015 (last visited Jan. 19, 2017).

Despite these risks, the use of force by law enforcement is rare. In "only 1.6% of all citizen-police interactions" did officers use some type of force. J. PETE BLAIR ET AL., *Reasonableness and Reaction Time*, 14 POLICE QUARTERLY 4: 323–42, 324 (2011). And law enforcement shootings are even rarer, some say "exceedingly rare." *Id*. Still, the use of force—even lethal force—is at times justified. All persons have the right "to be secure in their person[] . . . against unreasonable . . . seizures" of the person. U.S. Const. amend. IV; *Graham*, 490 U.S. at 394. But only seizures that are unreasonable. Determining whether such a seizure is reasonable involves "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 (quoting *Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985) (internal quotations omitted)).

This Court has recognized that one of the factors that comes into play is "whether the suspect poses an immediate threat to the safety of the officers or others." *Id*. at 396. The government has a profound interest in protecting the safety of those who risk their lives on a regular basis to enforce the laws of this country, not to mention innocent bystanders. As this Court said in *Pennsylvania* v. *Mimms*, 434 U.S. 106, 110 (1977), "[w]e think it too plain for argument that the State's proffered justification—the safety of the officer—is both legitimate and weighty."

That justification is never weightier than in the situation presented here—the aiming of a firearm at law enforcement agents. Short of some grotesque scenario where law enforcement stages a violent encounter, it can never be considered unreasonable for officers to use lethal force against a person threatening their lives with a firearm. *Never*. For that very reason, there is no dispute that had the deputies possessed a warrant when they happened upon an unexpected inhabitant pointing a gun at them, their interest in using lethal force to stop the perceived shooter and prevent harm to the agents would be paramount and therefore reasonable under *Graham*.

The Ninth Circuit nevertheless concluded the shooting in this case was unreasonable under its so-called "Provocation Rule," because the officers did not either obtain a warrant or knock and announce before entering. In its strictest form, this Provocation Rule provides that when agents intentionally or recklessly provoke the attack, and that provocation is a violation of constitutional rights, the use of force that would otherwise be reasonable becomes

excessive. *Billington*, 292 F.3d at 1189, 1190. As aptly explained in the Petitioners' brief, the Ninth Circuit applied a much more liberal version of the rule in this case, one that turned the deputies' reasonable use of force into an unreasonable one merely because the constitutional violation "created a situation which led to the shooting." Pet. App. 22a.

The Provocation Rule in any form is inconsistent with *Graham*, because it involves no balancing of the relevant interests for a seizure, only those for a search, which are completely different. Pet'rs' Br. 4, 44–45. The rule applied by the Ninth Circuit is also inconsistent with the right to qualified immunity, because liability attaches regardless of whether the constitutional right at issue is well-established. Pet'rs' Br. 38.

But the more disturbing attributes of the rule are (1) the demand that law enforcement agents accept greater risk of harm and death than they already do in carrying out their duties when a violation of constitutional rights triggers violent conflict, and (2) the suggestion that those whose rights were infringed suddenly acquire a superior right to use lethal force against law enforcement. These notions logically follow if the Ninth Circuit's holding is correct under *Graham*. For the deputies' otherwise reasonable use of lethal force to become *unreasonable*, the deputies' conduct must somehow alter the balance of relevant interests so that they weigh against the deputies' use of force. The lack of a warrant and failure to follow "knock and enter" protocols had to either (1) significantly diminish the weight of the government's interest in protecting the life of agents and others, or (2) grant the individual a superior right to use lethal

force against the deputies. Obviously, neither of these propositions can be reasonably accepted.

The first proposition smacks of a penalty imposed on law enforcement for unconstitutional conduct, in the vein of an "eye for an eye." It requires law enforcement agents to forfeit some right to self-defense and accept greater risk of serious injury or death when they deny someone else's right to privacy. This tit for tat has no place in American jurisprudence. The only consequence of this requirement is a change in tactics, from shooting to retreating, and that greater risk of harm created by this rule can be avoided. At least over 30% of officer firearm fatalities occur when the suspect is within 5 feet of the officer. See FBI, *Law Enforcement Officers Killed & Assaulted 2015*, tbl. 31. The close quarters in which officers often find themselves do not allow for any other option but to subdue the violent attacker with deadly force. Moreover, common moral sensibilities cannot countenance the notion that the government's interest in the agent's safety diminishes where he or she violates a constitutional right to privacy.

The second proposition is equally perverse, if not more so. It is difficult to imagine a policy more antithetical to civil society than one that condones violent retaliation against law enforcement. But that is exactly what the Provocation Rule appears to do. To hold that the protective use of lethal force in response to a perceived violent attack is unreasonable because the attack was "provoked by" or triggered by a constitutional violation suggests there is a Fourth Amendment right to resist with violence against an invasion of constitutional rights. Those

willing to accept the risk of exercising this newfound constitutional right will do so not only when their rights are actually violated, but also whenever they *perceive* their rights to be violated. Such a policy can only be expected to increase the number of violent confrontations with law enforcement and the incidents of serious injury and death.

II. The Provocation Rule places officers at greater risk by overcomplicating the use of force calculus.

As this Court explained in *Graham*, "[t]he calculus of reasonableness must embody allowance 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. Officers must already engage in a complex calculus in order to take all relevant circumstances into account when determining how much force is reasonably necessary. Requiring officers on top of that to discount the amount of force by engaging in a legal analysis of whether their conduct or that of others triggered the response and whether it was constitutional is not only unrealistic but potentially deadly for law enforcement.

A. Officers rely on well-established use of force models to avoid dangerous delay or lethal overreaction.

There are several models that guide these decisions and provide a paradigm for rapid execution. One model is the "continuum of force." This model is a "spectrum of control tactics" that an officer uses to subdue a suspect. PAUL W. BROWN, *The Continuum of Force in Community Supervision*, 58 FED. PROB.

31, 31 (No. 4, Dec. 1994). This can range from "body language and oral communications" all the way to using "lethal measures." *Id.* The goal of the use of force continuum is to "control the subject and situation, without over-reaction." *Id.* A well-trained officer facing a "critical situation . . . can mentally review the continuum of force options in a fraction of a second and come up with the proper reaction." *Id.*

A second model is the "deadly force triangle decision model." "The deadly force triangle is a decision model designed to enhance an officer's ability to respond to a deadly force encounter while remaining within legal and policy parameters." DEAN T. OLSON, *Improving Deadly Force Decision Making*, FBI L. ENFORCEMENT BULL., Feb. 1998, at 2. This model requires that three elements or sides of the triangle are present in order to "justify the use of deadly force." BRIAN R. JOHNSON, *Crucial Elements of Police Firearms Training*, 32 (2008). Each side of the triangle "must be present to justify deadly force." OLSON, *supra*, at 2. These three elements are ability, opportunity, and jeopardy. The ability prong asks whether the suspect has the ability to cause death or great bodily harm. The opportunity prong "deals with the suspect's potential to inflict death or great bodily harm." JOHNSON, *supra*, at 32. For instance, an "unarmed but very large and powerfully built suspect might have the ability to injure seriously or kill a smaller, less well-conditioned officer." OLSON, *supra*, at 2. The jeopardy prong is present when a suspect takes "advantage" of his or her "ability and opportunity to place an officer or another innocent person in imminent physical danger." *Id.*

The deadly force triangle is used in training officers. They are given a "variety of scenarios" and "must determine if and when justification for deadly force exists." OLSON, *supra*, at 2. The deadly force triangle along with the use of force continuum are the split-second calculus that officers must undertake to determine whether to use force in a given situation.

When faced with a situation requiring force, every millisecond counts. For instance, "[a]nalysis of deadly traffic stops has demonstrated that a suspect in the driver's seat can draw a weapon and fire at an officer in as little as .23 seconds (s), with an average time of .53 s." W. LEWINSKI ET AL., *Ambushes Leading Cause of Officer Fatalities—When Every Second Counts: Analysis of Officer Movement from Trained Ready Tactical Positions*, 15 LAW ENFORCEMENT EXECUTIVE FORUM 1, 2 (2015). On the other hand, an officer in such a situation, who is "faced with a complex decision-making process . . . will take an average of anywhere from .46 to .70 s to begin" his or her response. *Id.* As one study of ambushes on police officers concluded, law enforcement officers need "to be prepared to respond as quickly as possible to potentially deadly situations." *Id.* at 13.

To understand the risk officers face in prolonging their decision-making process, consider the time it takes for a trained officer to respond to a simple stimulus, a green light, when he or she has been instructed to pull the trigger on the flashing of the light. In other words, the reaction time in such ideal conditions helps to illustrate the gravity of use of force situations. A study of a simple stimulus and response, in which officers were standing with guns drawn and aware that they were to fire when they

saw a green light, illustrates the difficulties faced by officers in the much more complex situations on the streets. In that experiment, the duration between the green light being turned on and the first movement of the trigger at the beginning of the trigger pull averaged .25 seconds. See WILLIAM J. LEWINSKI ET AL., *Police Officer Reaction Time to Start and Stop Shooting: The Influence of Decision-Making and Pattern Recognition*, 14 LAW ENFORCEMENT FORUM 1 (2014).

The above study demonstrated the reaction time in "perfect" conditions. Thus, reaction time in real world circumstances involving "many stimuli at once" is "much more complex" especially given that "these stimuli are often high stress inducing." *Id.* at 2. Accordingly, in real life, "reaction time, which includes decision processes, is greatly increased in comparison to when only one or two action choices are present." *Id.*

Indeed, in one study of more complex circumstances, officers encountered armed suspects. The suspects were aiming their guns down—not at the officers—while the officers had their guns aimed at the suspect. The study then had the suspect either surrender or attempt to shoot the officer. The study examined the "speed with which the officer fired if the suspect chose to shoot." BLAIR, *supra* at 323. The results of the study were not encouraging for law enforcement officers. "[O]fficers were generally not able to fire before the suspect." *Id.* As the researchers concluded, the "process of perceiving the suspect's movement, interpreting the action, deciding on a response, and executing the response for the officer generally took longer than it took the suspect to

execute the action of shooting, even though the officer already had his gun aimed at the suspect." *Id.* at 336.

B. The Provocation Rule puts officers at greater risk by adding unnecessary complexity to the use of force calculus.

The Ninth Circuit's Provocation Rule injects another level of complexity and analysis into this process. Instead of determining whether the threat posed by a suspect in the moment justifies or even necessitates the use of deadly force, the Ninth Circuit's rule requires an officer to analyze the circumstances that led to that moment. The officer is required to ask whether his or her actions—or the actions of other officers—may have caused the threat posed by the suspect and whether those actions were constitutional. Instead of a deadly force triangle, the Ninth Circuit effectively asks officers to apply a deadly force square. An additional factor or side that officers must consider is whether their own or others' actions "intentionally or recklessly" caused the "violent confrontation." *Billington*, 292 F.3d at 1189. If they did, then even if the other three sides—ability, opportunity, and jeopardy—are present, the officer may be required to stand down and use something less than deadly force.

This will put officers (and the public) at risk for two related but independent reasons. First, by adding a layer of complexity to the already complex decision-making process whether to use force, the Ninth Circuit's rule necessarily will increase the reaction time of officers. As demonstrated above, every millisecond counts in the life-and-death situations faced by officers. Officers will take longer

to make the difficult decision to use lethal force. This increase in time will put the lives of officers and the public in graver danger than they already are.

Second, the Provocation Rule will lead officers to stand down and refrain from using force when it is justified because of their fears and concerns that they may have contributed to the violent confrontation. While a suspect's threat may well justify the use of lethal force, officers will have the seed of doubt planted in their minds. They will ask whether their actions may have contributed to the situation. And given that the Ninth Circuit's Provocation Rule dispenses with normal proximate-cause analysis, see *infra*, II.B., this is all the more likely. This will put officers' lives at risk—and the lives of the public too.

C. The Provocation Rule discourages law enforcement from completing the mission after even the most technical violation has occurred.

Because the Provocation Rule eliminates the proximate-cause analysis, it significantly alters the calculus for law enforcement agents in yet another way. Under ordinary tort principles, an officer's potential liability for a constitutional tort is readily apparent because the proximate-cause principle limits liability to the direct and foreseeable consequences. The Provocation Rule overrides that element and makes officers automatically liable for the outcome of any violent confrontation that follows from their constitutional tort, foreseeable or not.

As Petitioners point out (Pet'rs' Br. 40–42), this Court has held that under Section 1983 common law tort principles of damages and causation apply. See, *e.g.*, *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 306, 308 (1986). That includes the principle of

proximate causation. *Malley* v. *Briggs*, 475 U.S. 335, 344 n.7 (1986). "[A] proximate cause . . . means that it was not just any cause, but one with a sufficient connection to the result." *Paroline* v. *United States*, 134 S. Ct. 1710, 1719 (2014). While proximate cause is "'a flexible concept,'" it "generally 'refers to the basic requirement that . . . there must be some *direct* relation between the injury asserted and the injurious conduct alleged.'" *Id.* (internal citations and quotation marks omitted) (emphasis added). Requiring "proximate cause . . . serves, inter alia, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Id.*

As one treatise puts it, a plaintiff in a "tort case must show that the wrongdoing is both a cause in fact and a proximate cause of the injuries" suffered. 74 AM. JUR. 2D TORTS § 27. This means that the plaintiff bears the burden of showing "(1) that without the misconduct, the injury would not have occurred, commonly known as the 'but for' rule; (2) that the injury was the natural and probable result of the misconduct; and (3) that there was no efficient intervening cause." *Id.*; see also DAN B. DOBBS ET AL., DOBBS' LAW OF TORTS § 198 (2d ed. 2014) (a defendant "is not a proximate cause of, and therefore not liable for, injuries that were unforeseeable). The Ninth Circuit's Provocation Rule collapses this distinction. Indeed, the Provocation Rule explicitly cuts out any sort of proximate-cause analysis. The rule states that "where an officer intentionally or recklessly provokes a violent confrontation . . . he may be held liable for his otherwise defensive use of deadly force" so long as that "provocation is an independent Fourth Amendment violation." *Billington*, 292 F.3d at 1189.

Thus, even where "officers reasonably fired back in self-defense, they could still be held liable for using excessive force because their reckless and unconstitutional provocation created the need to use force." *Id.*

This is a but-for causal analysis. There is no inquiry into whether the violent confrontation was a "natural and probable result of the misconduct," nor is there any analysis of whether there was any sort of intervening cause. Rather, the Ninth Circuit's test simply asks whether the intentional or reckless violation of the Constitution was the cause *in fact*—i.e., the but-for cause—of the violent confrontation.[2]

The effect of this will be deadly. Officers will be discouraged from following through on their duties to protect and safeguard themselves and the public. If the Provocation Rule stands, an officer who realizes that his entry onto property was unconstitutional but who then discovers an armed man pointing a gun at him or her, will be incentivized to retreat or withhold fire. Otherwise, if he shoots and hurts or kills the suspect, he likely will be liable for any injury. It was, after all, his unconstitutional entry onto the property that gave rise to the violent confrontation. That cannot be the law. This is yet another reason that the Ninth Circuit's decision should be reversed.

---

[2] The Ninth Circuit's opinion in this case is not even subtle about collapsing this distinction. Indeed, the Ninth Circuit's decision recognized that the Provocation Rule does not include a proximate-cause analysis when it applied the proximate-cause analysis separately from the Provocation Rule. See App. 24a.

CONCLUSION

For the reasons given above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

GAËTAN GERVILLE-RÉACHE
Counsel of Record
CONOR B. DUGAN
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street N.W.
Grand Rapids, MI 49503
(616) 752-2000
greache@wnj.com

Counsel for Amicus Curiae

JANUARY 2017