No. 16-369

In the Supreme Court of the United States

COUNTY OF LOS ANGELES, CALIFORNIA, ET AL.,
Petitioners,

v.

ANGEL MENDEZ, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

The National Police Accountability Project ("NPAP") is a nonprofit organization that has no parent company and does not issue stock.

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INTEREST OF *AMICUS CURIAE*[1]

NPAP is a nonprofit organization founded by members of the National Lawyers Guild. Members of NPAP represent plaintiffs in police misconduct and prison condition cases, and NPAP often presents the views of victims of civil rights violations through *amicus* filings in cases raising issues that transcend the interests of the parties before the Court. NPAP has more than five hundred attorney members throughout the United States.

SUMMARY OF ARGUMENT

The central purpose of 42 U.S.C. § 1983 is to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an Official's abuse of his position." *Monroe v. Pape*, 365 U.S. 167, 172 (1961). Petitioners' proposed rule—that the reasonableness of Fourth Amendment seizures be evaluated without regard to any facts but those at the exact moment an officer applies force—flies in the face of this purpose, as well as the Court's longstanding precedent. If adopted, this rule would prevent innocent parties injured or killed by police during a stop or arrest from presenting *any* evidence of the officers' conduct leading up to the

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[1] Counsel for the *amicus* provided counsel of record for Petitioners and Respondents written notice of the intent to file this brief under Supreme Court Rule 37.2(a). The parties have consented and have executed blanket consents, the record of which has been lodged with the Court. In addition, no counsel for any party authored any part of this brief, and no party or counsel to a party made a monetary contribution intended to fund the preparation or submission of the brief.

moment of violence, even if that earlier conduct was a violation of well-established constitutional law.

This Court should reject the Petitioners' reductionist, outcome-oriented approach, and affirm that Section 1983 Fourth Amendment claims are to be evaluated under the totality of the circumstances, using ordinary principles of proximate cause.

ARGUMENT

I. Fourth Amendment Claims Must Be Evaluated Under the Totality of the Circumstances and Using Ordinary Proximate Cause Principles

1. This Court has long held that the determination of whether a police officer's use of force is reasonable under the Fourth Amendment "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." *Graham v. Connor,* 490 U.S. 386, 396 (1989) (quotations omitted). The Court has further explained that, because the reasonableness of a seizure "is not capable of precise definition or mechanical application,"

> its proper application requires 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.

Graham, 490 U.S. at 396.

Consequently, the question to be answered in an excessive force case is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure," *id*. (quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)). That is, "reasonableness depends on not only when a seizure is made, but also how it is carried out." *Garner,* 471 U.S. at 8. The Court has applied these same principles to searches, as well. *See Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (evaluating suppression of evidence obtained following officers' failure to knock and announce; "we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure").

More recently, in *Kingsley v. Hendrickson*, the Court ruled that a Section 1983 plaintiff "must show only that the force purposely or knowingly used against him was objectively unreasonable," but need not prove that the officer subjectively believed it to be excessive. It went on to explain how to apply this objective standard consistent with its prior precedent:

> A court (judge or jury) cannot apply this standard mechanically. Rather, objective reasonableness turns on the "facts and circumstances of each particular case."

135 S. Ct. 2466, 2473 (2015) (quoting *Graham* at 396; citing *Sacramento v. Lewis*, 523 U.S. 833, 850 (1998)).

Under both this Court's decades-old and newer authority, then, all of the facts surrounding a police officer's use of force, seen objectively, must be

considered when determining whether that officer acted reasonably.

2. Consistent with this authority, the Courts of Appeals for the First, Third, Seventh, Ninth, Tenth and Eleventh Circuits (and more recently the Sixth Circuit) look to police conduct in the events preceding and logically connected to the use of deadly force.

In the First Circuit, "[t]he rule ... is that once it is clear that a seizure has occurred, 'the court should examine the actions of the government officials leading up to the seizure.' Thus, police officers' actions for our purposes need not be examined solely at the 'moment of the shooting.' This rule is most consistent with the Supreme Court's mandate that we consider these cases in the 'totality of the circumstances.'" *Young v. City of Providence*, 404 F.3d 4, 22 (1st Cir. 2005) (quoting *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995) (internal citations omitted)).

Similarly, the Third Circuit's view is that "where an officer's conduct amounted to more than a minor departure from internal department policy, and in particular where the officer engaged in intentional misconduct, . . . the officer's acts creating the need for force are important in evaluating the reasonableness of the officer's eventual use of force." *Abraham v. Raso*, 183 F.3d 279, 295 (3d Cir. 1999). The *Abraham* court ruled that "[a]ll of the events transpiring during the officers' pursuit of [plaintiff] can be considered in evaluating the reasonableness of [the officer's] shooting [of plaintiff]," and rejected cases excluding consideration of pre-seizure conduct:

> [W]e do not see how these cases can reconcile the Supreme Court's rule requiring examination of the 'totality of the circumstances' with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished. 'Totality' is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer's use of force.

Abraham at 291.

The Fourth Circuit, analyzing a defendant officer's argument that his acts of force should be viewed in segments, separating the victim's resistance "from the rest of the story," observed:

> This approach seems to us to miss the forest for the trees. The better way to assess the objective reasonableness of force is to view it in full context, with an eye toward the proportionality of the force in light of all the circumstances. Artificial divisions in the sequence of events do not aid a court's evaluation of objective reasonableness.

Rowland v. Perry, 41 F.3d 167, 173 (4th Cir. 1994). *See also Smith v. Ray*, 781 F.3d 95, 103 (4th Cir. Va. 2015) (rejecting a "segmented approach" where officer reacted with disproportionate violence toward female plaintiff and "created the very real possibility that ... [his] attack would continue to meet with frightened resistance, leading to an event further escalation of the violence").

The law of the Seventh Circuit is to the same effect. The assessment of the reasonableness of a police shooting is not "limited to the precise moment when

[the officer] discharged his weapon." *Deering v. Reich*, 183 F.3d 645, 649 (7th Cir. 1999). Rather, a court must assess "all of the events that occurred around the time of the shooting." *Id*. at 652. The actions of the police officer that led to the shooting are thus relevant, and an officer who shoots a suspect in an effort to protect himself cannot escape liability if the danger he faced was created by his own unreasonable conduct. *Estate of Starks v. Enyart*, 5 F.3d 230, 233-34 (7th Cir. 1993). *Accord Catlin v. City of Wheaton*, 574 F.3d 361, 369 n.7 (7th Cir. 2009); *Sledd v. Lindsay*, 102 F.3d 282, 287-88 (7th Cir. 1996).

The Ninth Circuit has long held that an officer's own acts in creating a dangerous situation are factors to be considered in the reasonableness analysis. *See*, *e.g.*, *Alexander v. City & County of San Francisco*, 29 F.3d 1355, 1364-1367 (9th Cir. 1994) (whether it "was unreasonable for the officers to storm the house of a man whom they knew to be a mentally ill, elderly, half-blind recluse who had threatened to shoot anybody who entered" was a factor in determining whether their subsequent use of deadly force was actionable); *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002) ("[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force."); *see also Glenn v. Washington County*, 673 F.3d 864, 879 (9th Cir. 2011); *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 548 (9th Cir. 2010).

The Tenth Circuit has also emphasized that events preceding the seizure are relevant to the reasonableness analysis. In *Sevier v. City of Lawrence*,

60 F.3d 695 (10th Cir. 1995), the court held that "[t]he reasonableness of Defendants' actions depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Id*. at 699 (citing *Bella v. Chamberlain*, 24 F.3d 1251, 1256 & n.7 (10th Cir. 1994)); *see also Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997) (holding that officer is liable for excessive force if his or her own "reckless or deliberate conduct during the seizure unreasonably created the need to use such force"); *Romero v. Board of County Comm'rs,* 60 F.3d 702, 704-05 (10th Cir. 1995).

In similar fashion, the Eleventh Circuit, in *Gilmere v. Atlanta*, concluded that an officer's "moment of legitimate fear should not preclude liability for a harm which largely resulted from his own improper use of his official power," and thus upheld the lower court's finding that while an officer's fear of bodily injury was subjectively reasonable, such belief was "objectively unreasonable and could not justify the killing" where "any fear on the officer's part was the fear of retaliation against his own unjustified physical abuse." 774 F.2d 1495, 1501 (11th Cir. 1985).

The reasoning of these decisions finds a solid foundation in *Graham*.

3. This Court has long applied ordinary tort principles, including the requirement of proximate cause, to excessive force actions. It has explained that Section 1983 creates a "species of tort liability" and "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of

them." *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (citing *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). Accordingly, where proximate cause is lacking, it has rejected liability. *See Brower v. County of Inyo*, 489 U.S. 593, 599 (1989) (remanding for determination of reasonableness of roadblock; "if Brower had had the opportunity to stop voluntarily at the roadblock, but had negligently or intentionally driven into it, then, because of lack of proximate causality, respondents, though responsible for depriving him of his freedom of movement, would not be liable for his death"); *see also Martinez v. State of Cal.*, 444 U.S. 277, 285 (1980) (affirming judgment dismissing wrongful death case based on release of parolee who later murdered a teenage girl; "appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law").

When reaching this determination in *Brower*, consistent with its "totality of the circumstances" precedent, the Court looked to the officers' pre-seizure conduct. It considered not just the moment the decedent struck the roadblock, but also plaintiffs' allegations that the officers "set[] up the roadblock in such manner as to be likely to kill him" by placing an 18-wheel tractor-trailer across both lanes of a two-lane highway in the path of Brower's flight, concealing it behind a curve and leaving it unilluminated, and positioning a police car, with its headlights on, between Brower's oncoming vehicle and the truck, so that Brower would be "blinded" on his approach. 489 U.S. at 594, 598.

Several circuits have also addressed the Fourth Amendment's objective reasonableness test in excessive

force cases as an application of common law principles of proximate causation. The Sixth Circuit, for example, has held that even when intervening factors of third parties are at play, "the requisite causal connection is satisfied if the defendant[s] set in motion a series of events that the defendant[s] knew or reasonably should have known would cause" the deprivation of plaintiff's constitutional rights. *Trask v. Franco*, 446 F.3d 1036 (10th Cir. 2006) (quoting *Conner v. Reinhard*, 847 F.2d 384, 397 (7th Cir. 1988)). *See also Abraham*, 183 F.3d at 292 ("We are not saying, of course, that all preceding events are equally important, or even of any importance. Some events may have too attenuated a connection to the officer's use of force. But what makes these prior events of no consequence are ordinary ideas of causation…"). Similarly, the Ninth Circuit's so-called "provocation doctrine" is, at its core, just one part of a proximate cause analysis, asking whether the harm suffered by a plaintiff is the foreseeable result of an officer's initial unconstitutional conduct that led to the defendant's ultimate use of force. *See Billington*, 292 F.3d at 1189-90. This is not to say that *every* unlawful or reckless act of a police officer that starts a chain of events resulting in a police shooting will lead to liability; rather, as in tort law, but-for causation is reined in to a significant degree by the proximate cause concepts of foreseeability and superseding cause. *See generally Bodine v. Warwick*, 72 F.3d 393, 400 (3rd Cir. 1995).

II. Petitioners' Proposed Rule Fails to Consider the Totality of the Circumstances, and Abandons Ordinary Proximate Cause Principles

1. Petitioners seek an interpretation of *Graham* under which liability for any use of excessive force turns on its objective reasonableness "evaluated as of 'the moment' the force was used," without allowing the factfinder to examine *any* events preceding that decision to use force. This position finds no support in the Court's jurisprudence, which has never foreclosed the consideration of relevant context prior to the split-second decision-making process of an officer who opts, reasonably or unreasonably, to use force in effecting a seizure.[2] And it flies in the face of *Graham*'s exhortation to pay "careful attention to the facts and circumstances of each particular case" and to evaluate the "totality of the circumstances" that may justify, or not, a particular Fourth Amendment seizure. In evaluating the totality of facts to determine the reasonableness of force, the decisions of this Court and the Courts of Appeals described above properly include an assessment of the police officer's own actions, and

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[2] It does not even find support in all of its own *amici*. Although the government filed an *amicus* brief in support of Petitioners, it concedes that officer conduct before the moment force is applied may be relevant. *See* Br. for the United States at 26 (acknowledging "the relevance of some earlier events, including in some cases the actions of police, in analyzing the reasonableness of the use of force"). *See also* Br. of Major County Sheriffs at 5 (arguing that it is always reasonable for an officer to respond to a threatened shooting, "[s]hort of some grotesque encounter where law enforcement stages a violent encounter").

weigh in the balance unreasonable conduct that foreseeably leads to the use of force.

2. Petitioners' proposed rule also strips from the factfinder the ability to even engage in a proximate cause analysis when excessive force is alleged. Petitioners ask this Court to adopt the absolute rule that "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." Pet. Br. 19. This is precisely the type of mechanist approach that violates *Graham*'s requirement to allow the fact-finder to analyze the "totality of the circumstances," 490 U.S. at 396, and impinges on the Seventh Amendment jury trial right, *see Abraham*, 183 F.3d at 290 ("reasonableness under the Fourth Amendment should frequently remain a question for the jury"); *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994) ("reasonableness traditionally is a question of fact for the jury").

Without doubt, a plaintiff's own intentional, negligent, or reckless actions can intervene and, in some cases, cut off the liability of a defendant for injuries suffered due to the defendant's actions. Perhaps the most frequently cited example of this is the hypothetical posed by the Third Circuit in *Bodine*:

> 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. Is the third officer necessarily liable for the harm caused to the suspect on the theory that the illegal entry without knocking and announcing rendered any subsequent use of force unlawful? The obvious answer is "no."

The *Bodine* analysis is proper, and takes into account an important aspect of the law of superseding causation that is missing from the Petitioners' proposed rule: the culpability of the victim.

This is important, because not every intervening force will operate as a superseding cause to break the chain of proximate causation.[3] If the intervening force is not within the scope of risk caused by defendant's earlier actions, or if the party causing the intervening force is himself somehow culpable in his acts (intentionally, criminally, or recklessly), then that intervening action will be considered a superseding cause. *See* Restatement § 442. On the other hand, if the intervening actions are foreseeable, then they "are within the scope of the original risk, and…will not supercede the defendant's responsibility." W. Page Keeton et al., Prosser and Keeton on Torts § 44, at 303-04 (5th ed. 1984).

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[3] An "intervening force" is "one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." Restatement (Second) of Torts § 441 ("Restatement"). "Superseding cause" refers to only those intervening acts which "prevent[] the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." Restatement § 440.

Where, as in the present case, the intervening force is purely innocent conduct on the part of the victim, courts should be particularly skeptical of a claim that such innocent conduct is in fact a "superseding cause" that breaks the chain of proximate causation.

> Where the…conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.

Restatement § 442B. It is hard to see how, under common law tort principles, an innocent victim's act of moving a BB gun from one part of his bed to another, when he was wholly unaware of a police intrusion into his home, can be a "superseding cause" of the victim being shot by police. He did nothing wrong. His acts were not criminal or reckless; they were not even negligent.[4]

In the end, whether or not the actions of a victim of police force such as Mr. Mendez constitute a superseding cause is a question that must be resolved

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[4] The same could be said even if Mr. Mendez had been handling a real gun, and pointed it at the doorway as two apparent intruders entered unannounced. *See District of Columbia v. Heller*, 554 U.S. 570, 630 (2008) (finding unconstitutional a law "that firearms in the home be rendered and kept inoperable at all times" because it "makes it impossible for citizens to use them for the core lawful purpose of self-defense").

by the trier of fact. "The issues of proximate causation and superseding cause involve application of law to fact, which is left to the factfinder, subject to limited review." *Exxon Co. USA v. Sofec Inc.*, 517 U.S. 830, 840-41 (1996). Thus, even where a plaintiff's acts do constitute an intervening cause of the harm (such as by handling a rifle at the time of police entry), whether or not this rises to the level of a *superseding* cause sufficient to relieve the defendant of all liability is an issue best reserved for the jury after being instructed on the law and evaluating the totality of the circumstances.

3. The policy rationales advanced by Petitioners and their *amici* cannot rescue their proposed rule.

Law enforcement *amici* contend that officer safety will be threatened if the decision below is upheld, because it forces officers to "look backwards" rather than "remain mentally present" during a potentially violent confrontation, and "think back on every tactical decision *leading up to* that moment" rather than "focusing her attention on…the situation," Br. of Los Angeles County Police Chiefs' Association at 2, 7-8 (emphasis in original). *See also* Br. of California State Sheriffs' Association, California Police Chiefs' Association and California Peace Officers' Association at 18 (officers will "second guess" themselves, leading to "hesitation" and "tragic, life-ending results…").

This is a straw man. The "totality of the circumstances" test does not ask officers to consider, in the moments before firing, whether they have committed an earlier constitutional violation. *Cf.* Br. of Major County Sheriffs at 12. It does not ask that they put their lives at risk, or stand down when

confronted with deadly force. It asks them instead to adhere to the constitutional limitations on their authority (such as by not searching homes without warrants), and avoid taking actions that foreseeably start or escalate a violent confrontation (such as entering a room silently with guns drawn). It also provides compensation to citizens who are maimed or killed when the officers violate clearly established law and cause harm.[5]

Considering whether an officer foreseeably created the violent situation in which he finds himself is also more consistent with the trend towards de-escalation in modern law enforcement, which these same *amici* cite with approval as a way to "deliver policing services in a way that reduces the number of police-involved shootings and use of force incidents and increases public trust" (Br. of Los Angeles County Police Chiefs' Association at 4), and which the United States Department of Justice has promoted through consent decrees. *See* Resp. Br. 2 n.2. *See also* Police Chiefs at 5 (officer training "[s]cenarios should go beyond the traditional 'shoot-don't shoot' decision-making, and instead provide for a variety of possible outcomes, including some in which communication, de-escalation, and use of less-lethal options are most appropriate").

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[5] As Respondents point out, this compensation is universally paid by the cities and counties that employ, train, and supervise the officers, not the officers themselves. Resp. Br. 16 n.10.

III. The Petitioners' Proposed Rule Would Result in Substantial Injustice for Victims of Police Violence

1. Petitioners' proposed rule would result in substantial injustice for victims of police violence. If the "segmented moment" test were followed, innocent parties (or their estates) who are foreseeably injured or killed after officers create or escalate a dangerous situation would have no recourse. As the following examples drawn from NPAP members' practices show, this is a real-world concern.

a. Montana Police investigating a vehicle theft and burglary spotted a vehicle which they had a "hunch" might have been involved in a crime. They followed the vehicle without lights or sirens on a snow-covered road into the hills. When the police SUV became stuck in the snow, the officers learned from local teens that the "suspect" was traveling down a dead end road and would have to return past the officers' location. Rather than activate their lights or sirens to indicate a road block, the officers moved their vehicle into the center of the roadway and armed themselves with shotguns and assault rifles "to be ready" when the car returned. When it did, the officers positioned themselves in the roadway with their guns aimed at the oncoming vehicle. Video shows that as the vehicle came into view of the deputies, it appeared to slow down and veer left, away from them. Nonetheless, they approached and fired their weapons. When the vehicle spun out of control, the officers continued to fire, emptying their magazines and barely avoiding shooting each other. One of the shots entered the back of the driver, Loren

Simpson's neck, severed his brain stem, and killed him.[6]

b. Hatalio Serrano, father of 5 children, was experiencing a mental disturbance, and so his family called the police to check on him. Although no crime had been committed, the police officers who responded ordered Mr. Serrano to the ground. He complied, going to his knees and placing his hands behind his head. Nonetheless, the officers attempted to force him down on the ground, employing tasers collectively 7 times for 42 seconds. He fell to the ground, rolled to his back and cried out in pain. Three officers tried to roll him over and handcuff him from behind while he struggled, yelling to the officers to stop that he could not breathe. Onlookers, including the immediate family, also yelled at the officers to stop. After 3 more minutes of struggle, during which the officers applied bodily weight on Mr. Serrano and pinned his arms behind his back, they finally succeeded in handcuffing him. When they rolled him over, he was no longer breathing. He died of positional asphyxia. No crime had been committed and Mr. Serrano presented no danger to himself, the officers, or others.[7]

c. Responding to a 911 call from the mother of a 16-year-old schizophrenic who seemed to be experiencing a nervous breakdown, officers rushed the apartment without non-lethal weapons, leaving a taser and a bean bag shotgun in the trunk. The teen, who was alone in the apartment, told the officers that he did not wish to

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[6] *Simpson v. Yellowstone Co.*, No. 15-99 (D. Mont.)

[7] *Serrano v. Colton*, No. 13-0519 (C.D. Cal.)

talk to them and attempted to slam the door in their face. One officer stuck his foot in the door and kicked it open. The three officers entered the apartment without a warrant and without exigent circumstances. When they saw that the young man was in the kitchen holding knives, they shot him 10 times. He lived, but suffered extensive and permanent injuries.[8]

d. Bill Scozzari was elderly, disabled, blind in one eye, and hard of hearing. While walking in the woods near his home, he encountered the chief of police, who was investigating possible shots fired. The chief, despite having no legal authority to stop Mr. Scozzari, attempted to engage him. Having no reasonable suspicion that Mr. Scozzari had or was about to engage in any criminal activity, the chief allowed him to return to his cabin, where he entered and closed his door. The chief then requested back up, who arrived and decided to arrest Mr. Scozzari, who the chief claimed had raised his cane in a threatening manner and exposed a knife on his belt during their earlier encounter. They obtained no warrant. The backup officer knocked on the door with his taser drawn and ordered Mr. Scozzari out of his home in order to submit to arrest. Mr. Scozzari opened the door, but declined to leave the home and started to shut the door when the backup deployed his taser. The officer then kicked the door, in response to which Mr. Scozzari opened it again and was met with a barrage of gunfire. He died. The officers' claim that the decedent was armed with a hatchet or knife was disputed by several witnesses.[9]

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[8] *Palacios v. Park Forest*, No. 14-04661 (N.D. Ill.)

[9] *Scozzari v. City of Clare*, No. 08-10997 (E.D. Mich.)

In these and numerous other cases, unconstitutional police conduct results in the use of needless and fatal force. The rule proposed by the Petitioners would immunize that conduct, always resulting in a finding of no liability when officers respond to an apparent threat to their safety—even in the presence of the most blatantly illegal antecedent conduct which foreseeably resulted in the "need" to use force. Carried to its logical conclusion, the Petitioners' position would even give cover to those who knowingly violate the law or act out of malice, by signaling that no matter how egregious officer conduct, the use of force is justifiable so long as, in the final "segment," the victim behaves in a way that can be interpreted as a threat. That has never been, and should not be, the law of this Court.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals for the Ninth Circuit, and reaffirm the principle that Fourth Amendment seizure cases, including those alleging excessive force, must be adjudicated based on an objective reasonableness standard; that such adjudication requires not only a finding of constitutional violation, but also proximate causation of the plaintiff's injury; and that evaluating the chain of causation is a fact-specific inquiry involving the totality of circumstances. Application of mechanical rules that operate to shield the police from liability as a matter of law whenever they engage in perceived self-defense is flatly inconsistent with this Court's precedent, and constitutes an invitation to abuse.

Respectfully submitted,

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