No. 16-369

In the Supreme Court of the United States

COUNTY OF LOS ANGELES, CHRISTOPHER CONLEY AND 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 RESPONDENTS

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QUESTIONS PRESENTED

1. Does the legal framework set out in *Graham v. Connor*, 490 U.S. 386 (1989), apply to actions by police that foreseeably create a need for the use of force?

2. In an action under 42 U.S.C. § 1983, where a house search that violates the Fourth Amendment results in the shooting of an innocent resident who did not know that the intruders were sheriff's deputies, does a resident's nonculpable response to the intrusion constitute a superseding cause that bars relief for the residents' injuries?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

Other Authorities

INTRODUCTION

This appeal concerns a complex and deeply troubling line of cases. In many situations in which police are called upon to use lethal force, the victim was at fault, having created the need for such force by shooting at officers, refusing to put down a weapon, or other highly culpable conduct. But there have been repeated instances in which the police, not the victim, created the need (or more often merely the apparent need) for force, resulting in death or grave injury to an entirely blameless, law-abiding individual. In some instances, as here, police did so by committing a constitutional violation that foreseeably led to the apparent (but mistaken) need for the use of force. This problem arises most often when police fail to identify themselves as law enforcement officers. In some of those cases, the unidentified officers have entered private homes and startled innocent residents—with tragic consequences.

That is precisely what happened here. Both courts below found that Petitioners' conduct was unconstitutional and violated clearly established law, and those determinations are now judicially final. In contrast, Petitioners recognized below and the district court found that Mr. and Mrs. Mendez[1] did nothing wrong. Yet as a direct result of

[1] Consistent with the district court decision, this brief refers to Respondent Jennifer Lynn Garcia as "Mrs. Mendez" because she and Mr. Mendez "were living together as a couple when the shooting occurred and thereafter married." Pet. App. 56a.

Petitioners' unlawful conduct, Mr. Mendez was shot numerous times, his right leg was amputated below the knee, he can no longer work yet has substantial, ongoing medical expenses, and Mrs. Mendez (who was pregnant at the time) was shot in the back and also has significant medical expenses.

In recent years, the Department of Justice has commendably attempted to deal with this type of problem by entering into a series of consent decrees that require municipal police departments to take steps to reduce police-created need for force.[2] In its January 2017 report on the Chicago Police

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[2] *E.g.,* Consent Decree, *United States of America v. City of Ferguson*, at 30 ("FPD will ensure … that FPD officers … [u]se de-escalation techniques and tactics to minimize the need to use force."); Settlement Agreement, *United States of America v. City of Cleveland*, at 12 ("[O]fficers will use de-escalation techniques whenever possible and appropriate, before resorting to force and to reduce the need for force."); Settlement Agreement and Stipulated Order of Resolution, *United States v. City of Seattle*, at 12 ("Officers should use de-escalation techniques, when appropriate and feasible, in order to reduce the need for force."); Consent Decree Regarding the New Orleans Police Department, *United States of America v. City of New Orleans*, at 15 ("[W]hen feasible based on the circumstances, officers will use disengagement; area containment; surveillance; waiting out a subject; summoning reinforcements; and/or calling in specialized units, in order to reduce the need for force and increase officer and civilian safety."); Agreement in Principle Between The United States and the City of Baltimore Regarding the Baltimore City Police Department, at 4 ("BPD will ensure its policies train and incentivize officers to use community policing and problem-solving techniques, including de-escalation, to decrease the need for officers to resort to force.").

Department, the Justice Department similarly objected to practices there which, by needlessly creating a need for force, had resulted in a number of civilian deaths. United States Department of Justice, Investigation of the Chicago Police Department at 5, 28, 37, 151 (Jan. 13, 2017). Those decrees and related proceedings would rest on a solid legal foundation if this Court were to hold, as Respondents urge, that the reasonableness standard in *Graham v. Connor,* 490 U.S. 386 (1989), applies to police action that foreseeably leads to the need for force. Such a holding would also protect police and the public by imposing liability where, as here, an officer's objectively unreasonable conduct foreseeably leads to a violent confrontation.

STATEMENT

1. The events giving rise to this action were the subject of a five-day bench trial, which involved a number of important factual disputes. The district court issued three detailed opinions: first a ruling from the bench (J.A. 234-42), then a lengthy set of findings of fact and conclusions of law (Pet. App. 55a-136a), and finally a substantial opinion in response to Petitioners' motion to amend the judgment or make additional findings (Pet. App. 27a-51a). Petitioners do not contend that any of the findings were clearly erroneous. *See* Fed. R. Civ. P. 52(a)(6) ("Findings of fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."); *Anderson v. City of Bessemer City,*

N.C., 470 U.S. 564, 573 (1985) (same). Respondents identify the pertinent findings below.

The shooting of Mr. and Mrs. Mendez arose out of a search for someone else, Ronnie O'Dell, with whom they had no confirmed connection. Dkt. 301 at 159; J.A. 160-61, 210. O'Dell was a parolee-at-large, meaning that he was out of compliance with the terms of his parole. Dkt. 291 at 23-24. Apprehension of parolees-at-large was the responsibility of the Target Oriented Policing ("TOP") team in the Los Angeles County Sheriff's Department. Dkt. 299 at 77; Dkt. 291 at 23-24; Dkt. 300 at 34. The TOP team had an arrest warrant for O'Dell, but no search warrant to look for him in any house. Dkt. 291 at 20, 54; Dkt. 300 at 35; Pet. App. 57a, 63a, 66a.

Petitioners—Deputies Christopher Conley and Jennifer Pederson—were not members of the TOP team; on the day in question, they were assigned to work with that unit in the search for O'Dell. Pet. App. 56a-58a. "Prior to October 1, 2010, Deputies Conley and Pederson did not have any information regarding Mr. O'Dell." Pet. App 58a. On October 1, 2010, Conley was given no information indicating that O'Dell was armed or dangerous.[3]

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[3] A few months after the shooting, Conley told investigators he had not been given any information about whether O'Dell was armed or dangerous:

> Kim: What kind of crimes was that suspect wanted for?
>
> Conley: To my understanding, it was numerous thefts and possibly some narcotics related charges.

(continued . . .)

Pederson also testified that she was not given any such information at the time of the search. Dkt. 300 at 85 ("Q. Were you given any information about Mr. O'Dell? Did you know anything about him before this time? A. That he was a parolee at large. That was it."). The dozen deputies involved were merely "shown" a flyer with O'Dell's photograph. Dkt. 300 at 88.[4]

(. . . continued)

> Kim: Did you have any information that he was armed and/or dangerous?
>
> Conley: I heard in passing that he had been in times before, but as far as that day, I don't know whether he was armed or not and I didn't receive any information that he was.

Exh. 232-000052. At trial, Conley testified he could not recall being given any information at the time about whether O'Dell was armed or dangerous.

> Q Somebody told you you were looking for a parolee-at-large.
> A Yes, sir.
> Q Did you know anything about Mr. O'Dell before that day?
> A No prior history specifically on his criminal past.
> Q Were you given any information that day that Mr. O'Dell was considered to be armed and dangerous?
> A That I do not recall.
> Q . . . [Y]ou stated on direct that you don't recall any information received at the briefing that Ronnie O'Dell was armed or dangerous; right?
> A Not that I can recall.

Dkt. 291 at 50, 66.

[4] Petitioners state with regard to the officers who were involved in the search that "*[t]hey* knew O'Dell . . . was considered 'armed and dangerous.' Pet. App. 57a." Pet. Br. 4 (continued . . .)

The deputies looking for O'Dell first went to a store where he reportedly had been seen. Pet. App. 57a. Despite Petitioners' claim that O'Dell was armed and dangerous, no effort was made to clear the store, call a SWAT team, or take any other precautions before searching it. Dkt. 298 at 41. O'Dell was not found in the store. Pet. App. 58a. At about this time, one of the deputies, Claudia Rissling, told the other deputies that she had received by phone a tip from an informant that O'Dell had been seen riding a bicycle in front of a nearby house. *Id.* Rissling had a pre-existing

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(. . . continued)
(emphasis added). But the portion of the opinion at page 57a refers to the TOP team, not to anyone else involved in the search. The district court found that the TOP team "categorized" O'Dell as armed and dangerous. Pet. App. 57a. That categorization was not based on information about any particular parolee-at-large and was instead a "standard statement for all P.A.L. notifications." Pet. App. 37a-38a; Dkt. 301 at 99. Neither Conley, Pederson, nor anyone else testified that a member of the TOP team had told Conley or Pederson about that routine categorization. Petitioners also state that "[t]he team was shown a flyer that described O'Dell as 'armed and dangerous….'" Pet. Br. 5. There is no evidence that the twelve deputies were given individual copies to read, only that a copy of the flyer was used to show the deputies what O'Dell looked like: "They passed around a picture of him so we knew exactly what he looked like." J.A. 173. Neither Conley nor Pederson testified that either had done more than look at the photograph. J.A. 173, 214. Lastly, Petitioners' brief refers to O'Dell as "a wanted, armed-and-dangerous parolee." Pet. Br. 4 (emphasis omitted). Conley and Pederson knew only that O'Dell was a wanted parolee; in the courts below, Petitioners never asserted that O'Dell was armed and there is no evidence to support such a claim.

interest in that location and had conducted surveillance and observed who lived there. J.A. 205-06, 209. Rissling briefed Conley, Pederson, and the others about the location. There were, she told them, two residences: a larger house near the street and a smaller home in back. J.A. 208-09.

Rissling also told Conley and Pederson—and they heard her say—that the Mendezes lived in the smaller home. Pet. App. 59a. Addressing that precise issue, the district court found:

> Deputy Rissling announced to the responding officers that a male named Angel (Mendez) lived in the backyard of the Hughes resident with a pregnant lady (Mrs. Mendez)…. *Deputies Conley and Pederson heard Deputy Rissling make this announcement.* Deputy Pederson testified that she heard the announcement. Deputy Conley testified that he did not recall any such announcement. Either he did not recall the announcement at trial or he unreasonably failed to pay attention when the announcement was made.

Id. (emphasis added); *see also id.* at 85a ("Conley and Pederson had information that a man and woman lived in the rear of the Hughes property."), 98a ("Conley had information that people lived in the rear of the Hughes property.").

Substantial evidence supports these findings. In an interview conducted after the shooting, Conley informed the investigating officer that he had been provided "info persons in rear shed." J.A.

72. In the transcribed interview, Conley stated: "we received information that there were sheds in the back yard and that someone might be staying in one of the sheds." J.A. 99. Pederson, too, told the investigator that he had been informed that "[p]ersons are known to loiter or stay in sheds on prop" (J.A. 73) and that both she and Conley were advised that "there was a shed back there"—referring to the backyard—and that "sometimes people stay in that shed or hang out in that shed" (J.A. 110). Deputy Rissling likewise testified: "I conducted a briefing and … advised the deputies that … there [were] sheds in the backyard and there was a male Hispanic named Angel that lived in one of the sheds along with a pregnant lady." Dkt. 300 at 69; *see also id.* at 77 ("Q. And you told them that a male Hispanic named Angel lives in the shed along with his female pregnant lady, correct? A. Correct.").[5]

Sergeant Gregg Minster led the group that went to the front of the main house. As the district court found:

> Sergeant Minster banged on the security screen outside the front door…. From within the Hughes residence, a woman

[5] Petitioners point to testimony by Conley and Pederson that they did not hear this part of Rissling's briefing (Pet. Br. 5), and the United States asserts that Conley did not hear Rissling's statement about the Mendezes living behind the house (U.S. Br. 2). As indicated in the findings quoted above, the district court did not credit that testimony and expressly found otherwise based on substantial evidence. Pet. App. 59a.

> (Ms. Hughes) asked what the officers wanted.... Sergeant Minster asked Ms. Hughes to open the door.... Ms. Hughes asked if the officers had a warrant.... Sergeant Minster said that they did not, but that they were searching for Mr. O'Dell and had a warrant to arrest him.

Pet. App. 63a. Minster "then heard running within the Hughes residence, toward the back of the residence." Pet. App. 64a. Minster decided to break into the house, and got a pick and ram from a police car. *Id.* Minster again asked Hughes to permit the officers to search her home, and now Hughes—knowing that the police were about to break down her door—agreed. *Id.* The district court found that her consent was coerced. Pet. App. 89a. After the deputies entered the house, Hughes "was pushed to the ground and handcuffed" and then confined in a patrol car. Pet. App. 64a. The search revealed no one else in her home. *Id.*[6]

Meanwhile, in the back yard, Conley and Pederson, after inspecting three small storage sheds along the side of the house, came to the shack where Respondents lived. J.A. 213. Specifically addressing Petitioners' arguments

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[6] Petitioners assert that "[*w*]*hile* 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." Pet. Br. 5-6. If the running occurred at the back of the house while Hughes was in the front talking to Minster, there would have to have been a second person in the house. There was not. The conjunction in the district court's findings is "then," not "while." Pet. App. 64a.

regarding the shack, the district court found that Conley and Pederson "could not have 'reasonably assumed' that the shack was another storage shed." Pet. App. 85a. That was so, the court explained, for three reasons:

> First, Deputies Conley and Pederson differentiated (or should have differentiated) the shack from the three storage sheds next to (to the south of) the Hughes residence. The shack was located in a different area of the rear of the Hughes property at a distance from the Hughes residence and the storage sheds. The storage sheds were metal. The shack was wood.
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> Second, Deputies Conley and Pederson observed (or should have observed) a number of objective indicia demonstrating that the shack was a separate residential unit: the shack had a doorway; the shack had a hinged wooden door and a hinged screen door; a white gym storage locker was located nearby the shack; clothes and other possessions also were located nearby the shack; a blue tarp covered the roof of the shack; an electrical cord ran into the shack; a water hose ran into the shack; and an air conditioner was mounted on the side of the shack.
>
> Third, and importantly, Deputies Conley and Pederson had information that a man and woman lived in the rear of the

> Hughes property. In light of this information … Deputies Conley and Pederson could not have "reasonably assumed" that the shack was another storage shed.

Id.; *see also* Pet. App. 96a (discussing Petitioners' "unreasonable belief that the shack was not a dwelling"), 122a (noting "the multiple indicia of residency—including being told that someone lived on the property").

While Petitioners testified to a contrary perception, the district court did not find that testimony persuasive: "having listened to the testimony and examined numerous photographs of the Hughes property, the Court finds that this perception of Deputies Conley and Pederson was not reasonable." Pet. App. 67a. During the post-trial hearing to announce the decision, the district court likewise found that "the most important issue in the case … was whether the failure of the deputies to recognize the shack as a dwelling was reasonable. And I have found and do now find that it was not." J.A. 239.

Petitioners continue to devote considerable effort to describing evidence regarding this issue (Pet. Br. 6-8, 10), but they do not suggest that the district court's findings were reversible error or that the existence of any such error would be within the scope of the question presented. *See Hana Fin. Inc. v. Hana Bank*, 135 S. Ct. 907, 911 (2015) ("the delicate assessments of the inferences a reasonable [person] would draw ... are peculiarly one[s] for the trier of fact") (internal quotation

marks and brackets omitted). Nor are the district court's findings unsupported by evidence: the air conditioner can easily be seen in the photographs at J.A. 82 and 83, and the electrical cord, water hose, and white gym storage locker are plainly visible in the photograph at J.A. 82.[7]

Although the officers who wanted to search the main house had asked permission to do so, Conley and Pederson made no such request at the entrance to the Mendezes' home. Instead, as the district court found, Conley simply "opened the door (and pulled back the blanket) to a dwelling in which he knew—or should have known—people lived." Pet. App. 98a. As he entered the home, Conley did not identify himself as a police officer; he was completely silent. Dkt. 291 at 55-56. Because the Mendezes' home was only seven by seven feet, a reasonable person would have known that anyone inside would be only a few feet away when he entered. Conley also could have foreseen

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[7] Petitioners and the United States assert that the deputies could not have seen the air conditioner because it was on the north side of the Mendezes' home and they approached from the south. Pet. Br. 7; U.S. Br. 3. No such argument was made in the district court. To the contrary, Petitioners argued that the deputies could not have seen the air conditioner because it was "partially covered by tarps" (Pet. App. 49a), an argument that necessarily assumed the appliance was in their line of sight. Petitioners also assert that the electrical wire was "partially obscured by dirt and garbage." Pet. Br. 7. It can easily be seen at J.A. 82-83. In any event, as discussed in the text above, the district court rejected all such arguments based on the testimony and evidence at trial.

that the interior of the windowless shack might be dark, and Conley testified that his gun was drawn when he entered and that there was a light on the gun. *Id.* at 55.

When Conley began to enter the Mendezes' home, Mr. and Mrs. Mendez were resting on a futon with Mr. Mendez positioned closer to the door. Pet. App. 68a. Mr. Mendez had next to him a BB gun rifle, which he used to shoot at pests. Pet. App. 62a, 68a. "As the wooden door opened, Mr. Mendez picked up the BB gun rifle to put it on the floor of the shack so that he could put his feet on the floor of the shack and sit up." Pet. App. 68a.[8] Sadly, Conley could not tell that what Mendez was holding was a BB gun, and he mistakenly concluded that Mendez was holding a firearm with hostile intent. Pet. App. 67a, 69a.

Conley then shouted "gun," and both deputies began firing their weapons into the Mendezes' home. Pet. Br. 69a. The deputies fired a total of 15 bullets. Pet. App. 70a. "Mr. Mendez was shot in

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[8] Petitioners misleadingly refer to the BB gun as a "drawn gun" (Pet. Br. 6), describe Mr. Mendez as pointing the BB gun at Conley (Pet. Br. i ("a man pointing a gun at them"), 43 ("Mr. Mendez's own act of pointing the gun at the Deputies")), and even characterize Mr. Mendez as having "aimed" the BB gun (Pet. Br. 34). Mr. Mendez did not "draw" the BB gun, and there is no evidence, or contention, that he intended to point or aim it in any particular direction. The United States similarly describes Mr. Mendez as holding a "gun." *E.g.,* U.S. Br. 1 ("law enforcement officers . . . shot a man pointing a gun at them"). Whatever the government's intent, such language depicts circumstances fundamentally different than the facts of this case.

the right forearm, right shin, right hip/thigh, right lower back, and left foot…. Mr. Mendez's right leg was amputated below the knee…. Mrs. Mendez was shot in the right upper back/clavicle, and a bullet grazed her left hand." *Id.* Badly injured, Mr. Mendez shouted to the deputies, "I didn't know it was you guys. It was a BB gun, I didn't know." Exh. 232-000080.[9] "O'Dell was not in the shack or captured elsewhere that day." Pet. App. 70a.

2. Mr. and Mrs. Mendez brought this action against the County of Los Angeles and the two deputies, asserting both unreasonable search and excessive force claims. Starting with the Mendezes' unreasonable search claim based on the deputies' entry into the Mendezes' home without consent or a warrant, the district court found that the Mendezes' shack was a home within the protections of the Fourth Amendment and that Conley's entrance into the home violated the Fourth Amendment. Pet. App. 74a-99a. The deputies had

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[9] In describing the deputies' actions, Petitioners repeatedly refer to and invoke their subjective intent and perceptions. As the United States correctly notes, the reasonableness inquiry under the Fourth Amendment "is an objective one; it does not depend on the officer's 'underlying intent and motivation.'" U.S. Br. 8 (quoting *Graham*, 490 U.S. at 397). If an officer's subjective state of mind were a factor in these analyses, summary judgment would often be impossible. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982). No party is urging this Court to hold that an officer's state of mind should be part of the reasonableness analysis in a Fourth Amendment case. A reference by this Court to the deputies' subjective beliefs would plainly set in motion a sea change in this area of the law.

no warrant to search the home and had not obtained consent to do so. The district court concluded that the search did not fall within any of the exceptional circumstances permitting such intrusions. Pet. App. 89a-97a. The court further held that the deputies had violated the "knock and announce" rule in *Wilson v. Arkansas*, 514 U.S. 927 (1995). Pet. App. 99a-105a.

As the district court correctly noted, the Mendezes also asserted two distinct excessive force claims. First, Respondents contended that the deputies' conduct at the moment of the shooting—evaluated without regard to the deputies' decision to enter the home—was by itself unconstitutional. The district court referred to this claim as "Fourth Amendment: Excessive Force (At the Moment of Shooting)." Pet. App. 106a. As Petitioners and the government note, Respondents largely conceded this claim in closing argument. Pet. Br. 11 (citing J.A. 230); U.S. Br. 12 (citing Pet. App. 108a). The district court rejected the claim. Pet. App. 135a.

Second, having effectively conceded the above claim, Respondents asserted "instead" that the deputies' actions constituted excessive force because they had created the incident that led to the need for force by entering their home in violation of the Fourth Amendment and without identifying themselves as police officers. Pet. App. 108a. The district court referred to this claim as "Fourth Amendment: Excessive Force (Provocation)." Pet. App. 109a. The district court found that Respondents had established this claim. Pet. App. 135a. The district court also found that the deputies' actions were the proximate cause of

Respondents' injuries and that Mr. Mendez's action in picking up the BB gun did not constitute a superseding cause. Pet. App. 123a-127a.

Lastly, the district court turned to the issue of damages. Referencing California Gov't Code § 825, the court had previously recognized (correctly) that "through the direct operation of the government code -- the county will write the check." Dkt. 300 at 24.[10] At the conclusion of the trial, the district court determined that the damages award would be roughly $4 million, which includes over $816,000 for medical bills and over $500,000 for future medical care for both Mr. and Mrs. Mendez and prosthesis upkeep and replacement for Mr. Mendez. Pet. App. 135a-136a. At the post-trial hearing to announce the court's decision, the court expressed the hope that the amount of the award "will go a long way towards making you financially whole" and "restore … the dignity and self-sufficiency that you feel you have lost." J.A. 241-42.

3. Petitioners appealed, and a unanimous Ninth Circuit panel affirmed the district court's damages award on two independent grounds.

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[10] Indemnification of police officers is a universal practice. *See* Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014) ("Between 2006 and 2011, in forty-four of the country's largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs' favor, and their contributions amounted to just .02% of the over $730 million spent by cities, counties, and states in these cases.").

First, the court of appeals agreed with the district court that "because the officers violated the Fourth Amendment by searching the shack without a warrant, which proximately caused the plaintiffs' injuries, liability was proper." Pet. App. 22a. Second, the court of appeals also held that "the deputies are liable for the shooting under basic notions of proximate cause." Pet. App. 24a. Like the district court, the court of appeals concluded that "the situation in this case, where Mendez was holding a gun when the officers barged into the shack unannounced, was reasonably foreseeable." Pet. App. 25a.

4. Petitioners thereafter filed a timely petition for rehearing en banc, which the Ninth Circuit denied. Pet. App. 137a-138a.

SUMMARY OF ARGUMENT

I. The third Question Presented in the Petition was "[w]hether, in an action brought under 42 U.S.C. § 1983, an incident giving rise to a *reasonable* use of force is an intervening, superseding event which breaks the chain of causation from a prior, unlawful entry in violation of the Fourth Amendment?" Pet. ii. As can be seen, the question expressly referred to *intervening* and *superseding* cause principles and said nothing whatsoever about any other challenge to proximate causation. The Court did not grant certiorari—nor was it asked to do so—regarding the Ninth Circuit's holding that the deputies' unlawful conduct "proximately caused the plaintiffs' injuries." Pet. App. 22a. The Court also expressly

declined to grant certiorari regarding Petitioners' second Question Presented in the Petition (regarding qualified immunity), thus leaving in place the Ninth Circuit's holding that Petitioners violated clearly established law when they entered the Mendezes' home. Pet. App. 10a-15a.

Accordingly, the only causation issue before the Court is the one for which the Court granted certiorari: superseding cause. Because the lower courts' liability and proximate cause determinations are judicially final, the superseding cause issue—if decided in Respondents' favor—would be wholly dispositive of the appeal and would eliminate the need to reach the constitutional issue raised by Petitioners' first Question Presented. *See Jean v. Nelson*, 472 U.S. 846, 854 (1985) ("Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision. This is a fundamental rule of judicial restraint." (internal quotation marks and citations omitted)). Respondents therefore submit that the Court should begin with the superseding cause issue (*infra* § I) and reach the constitutional issue (*infra* § II) only if it is necessary to do so. Lastly, the Court should not address the proximate cause issue newly raised by Petitioners and their supporting amici because it is not fairly encompassed within the Questions Presented (*infra* § III).

II. As to each of these issues, Petitioners' arguments fail:

A. In this context, for a victim's conduct to be a superseding cause of injury, the conduct must be

unforeseeable or culpable. The district court repeatedly found that entering Mr. Mendez's home without warning could lead to a violent confrontation. The court also found that Mr. Mendez's conduct was not culpable—an issue that Petitioners in any event rightly conceded below. For these reasons, Mr. Mendez's conduct was not a superseding cause of Respondents' injuries.

B. The Ninth Circuit's consideration of events that precede the use of force is consistent with this Court's reasonableness test for deciding Fourth Amendment claims, including the required focus on the totality of the circumstances. Petitioners' proposed approach is not only inconsistent with the totality of the circumstances analysis, it leads to perverse and untenable results. Here, the deputies' pre-shooting conduct was objectively unreasonable (as well as unconstitutional) and foreseeably led to the use of force. If the Court reaches this constitutional issue, it should uphold the lower courts' liability rulings.

C. If the Court reaches the proximate cause issue (even though the issue is not fairly encompassed within the third Question Presented in the Petition), it should uphold the lower courts' rulings that Petitioners' unlawful conduct was a proximate cause of Respondents' injuries. Petitioners attempt to parse Respondents' claims and discern the underlying "purposes" of each constitutional right at issue. That analysis is both unnecessary and improper because Respondents prevailed on their excessive force claim and no one denies that gunshot wounds are within the scope of the risk created by an unlawful shooting. In any

event, an *additional* purpose served by the warrant clause is to avoid serious confrontations because of uncertainty regarding the legal authority for a non-consensual search. For these reasons and others, Petitioners' proximate cause argument also fails.

ARGUMENT

I. MR. MENDEZ'S STARTLED RESPONSE TO THE UNLAWFUL INTRUSION INTO HIS HOME BY INDIVIDUALS WHOM HE DID NOT KNOW WERE POLICE OFFICERS IS NOT A SUPERSEDING CAUSE.

A. Applying The Principles Of Foreseeability And Culpability To The Facts Presented Here Confirms That Mr. Mendez's Conduct Was Not A Superseding Cause Of Respondents' Injuries.

1. Because the Question Presented regarding superseding cause is wholly dispositive, it should be addressed before turning to the constitutional issue. The parties appear to agree on several bedrock principles governing superseding cause. Section 1983 was adopted against a background of tort law. Accordingly, Petitioners and Respondents agree that, under § 1983 as in other tort claims, a superseding cause protects the tortfeasor from liability. Pet. Br. 51-52. As this Court instructed in 1877, "[t]he inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury." *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475

(1877). Furthermore, the parties appear to agree that two principles drive that inquiry in this context: foreseeability and culpability.

First, all parties agree that courts look to the foreseeability of the potentially superseding cause. Pet. Br. 54-55; U.S. Br. 28. "A cause can be thought 'superseding' only if it is a 'cause of independent origin that was not foreseeable.'" *Staub v. Proctor Hosp.*, 562 U.S. 411, 420 (2011) (internal quotation marks and citation omitted); *see also* Restatement (Second) of Torts: Negligence § 442A, Westlaw (database updated Oct. 2016) (where defendant's conduct "creates … the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause"); Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 34 cmt. e, Westlaw (database updated Oct. 2016) (factors in analysis include unforeseeability of the intervening act). Moreover, the law is equally clear that an event is not a superseding cause if it led to the type of harm that was a foreseeable risk, even if that harm was brought about in an atypical manner. Restatement (Second) of Torts: Negligence § 442B cmt. b; Restatement (Third) of Torts § 34 cmt. e.

Second, Petitioners appear to recognize that the culpability of the allegedly superseding actor is a key factor in the analysis. *See* Pet. Br. 55 (arguing that tortious or criminal reaction to police constitutes superseding cause). The United States, in turn, expressly states that whether an intervening act supersedes the original tortious

conduct depends on "a variety of factors," including "whether the intervening act is 'unforeseeable, unusual, or *highly culpable*." U.S. Br. 28 (emphasis added) (quoting Restatement (Third) of Torts § 34 cmt e, at 572-73, and citing Restatement (Second) of Torts § 442, at 467-68). This Court, too, has looked to the culpability of a person's response to police action. *See Brower v. County of Inyo*, 489 U.S. 593, 599 (1989) (officers would not be liable for death if plaintiff "had negligently or intentionally driven into" roadblock despite having opportunity to stop).

2. Petitioners and Respondents diverge, however, on how the principles of foreseeability and culpability apply to the facts here. Contrary to the position of Petitioners and some of their supporting amici (but notably not the United States[11]), it was foreseeable that entering the Mendezes' home without warning could lead to a violent confrontation, and Mr. Mendez's startled response was not culpable. For these reasons, Mr. Mendez's conduct was *not* a superseding cause of Respondents' injuries.

First, it was foreseeable that entering the Mendezes' home without warning could lead to a violent confrontation. The district court made *repeated* findings addressing this precise issue. At the conclusion of the trial, the court commented:

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[11] The United States indicates only that Mr. Mendez's conduct "may" be a superseding cause that precludes liability, but does not address the issue further. U.S. Br. 32 n.4.

> [T]he Second Amendment gives Americans the right to have firearms in their own home for their protection. And this is particularly true out in the Antelope Valley where there's obviously a lot of ex military and a lot of ex law enforcement. But any American can sleep with a firearm, many Americans do.

J.A. 224-25. In comments to the lawyers about post-trial briefing, the court similarly noted:

> [E]specially since there's a Second Amendment right to have firearms in the home for protection, you know, there must be hundreds of thousands of bedrooms in which if law enforcement or anyone, you know, went in without announcing themselves would have provoked reaction. You know, there's many, many people, you know, sleep with firearms within arms' reach. It's not a rare occurrence

J.A. 231. The district court likewise found in its written findings that it was "foreseeable" that unlawfully entering the Mendezes' home "could lead to a violent confrontation." Pet. App. 126a.

In so holding, the court recognized, "[a]s Justice Jackson foretold," that "a foreseeable risk of an unreasonable search is that the offending officers will be threatened by the resident." Pet. App. 126a (citing *McDonald v. United States*, 335 U.S. 451, 460-61 (1948) (Jackson, J., concurring). The district court similarly recognized that "[a] startling entry into a bedroom will result in

tragedy." Pet. App. 127a. These findings—amply supported by evidence, legal precedent, and common sense—are not clearly erroneous.

Indeed, the state of California specifically recognizes that an unlawful and forcible entry of the home—such as someone unlawfully barging in with a drawn gun—may result in the resident using deadly force against the intruder. *See* Cal. Penal Code § 198.5 (resident using deadly force against person who "unlawfully and forcibly enters" home shall be presumed to have reasonably feared imminent peril of death or great bodily injury); Cal. Civ. Proc. § 1159 (person guilty of "forcible entry" who breaks open doors "or by any kind of violence or circumstance of terror enters"). Thus, a deputy with a drawn gun entering a home without consent could reasonably anticipate finding himself face-to-face with a resident threatening or appearing to threaten deadly force.

Second, Mr. Mendez's moving his BB gun in response to hearing Conley open the door to his home was not culpable (and it certainly was not "highly culpable," U.S. Br. 28). The record shows—without dispute—that Mr. Mendez had *no idea* that the person coming into his home was a deputy sheriff. Instead, as Mr. Mendez testified and the district court found, he was "startled" and thought it was Hughes. Pet. App. 68a; JA 139; Dkt. 302 at 51. Conley and Pederson did not ask for consent to enter, and they were completely silent. Dkt. 291 at 55-56. A few seconds and fifteen bullets later, Mr. Mendez painfully confirmed: "I didn't know it was you guys. It was a BB gun, I didn't know." Exh. 232-000080. Consistent with this evidence,

Petitioners' counsel expressly conceded during his closing argument that Mr. Mendez "didn't do anything wrong." J.A. 233. The district court said the same thing: "Mr. Mendez, you and your wife did nothing wrong." Dkt. 302 at 57. Mr. Mendez's conduct was entirely *nonculpable*, and for that additional reason is not a superseding cause of Respondents' injuries.

B. The Superseding Cause Arguments Of Petitioners And Their Supporting Amici Are Without Merit.

Despite their admission that Mr. Mendez "didn't do anything wrong" (J.A. 233), Petitioners argue for a bright-line 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. On Petitioners' view, a homeowner has only himself or herself to blame, and no legal recourse whatsoever, if he or she picks up a firearm (or what appears to be a firearm) to fend off an unidentified and unlawful intruder (or for any other reason) and is then shot by an unidentified police officer. That argument is untenable.

1. Petitioners' primary argument is that, in many confrontations with police, an individual's reaction that the police reasonably perceive as a threat may constitute a superseding cause. Pet. Br. 52-53; *see also* U.S. Br. 29-30. In some circumstances (not presented here), that may be true. But the cases relied on by Petitioners and their amici do not support their argument that superseding cause would exist in *all* such

circumstances. To the contrary, the cited cases find superseding cause when individuals created a perceived threat to police officers *despite knowing or having reason to know that they were officers*:

- In *Kane v. Lewis*, 604 F. App'x. 229 (4th Cir. 2015), the officers repeatedly yelled "police" and the court of appeals reasoned that the resident's deliberate attack on the police was a superseding cause of his death precisely "[*b*]*ecause* [he] must have known that the men in his apartment were police officers, yet advanced toward them with a knife." *Id.* at 230, 237 (emphasis added).
- In *James v. Chavez*, 511 F. App'x. 742, 747 (10th Cir. 2013), it was "apparent from the numerous interactions between [the decedent] and the people outside his home that he knew they were police officers." The court specifically commented that a homeowner is not entitled under state law to "resist[] an unlawful arrest or entry into his home, simply because of its unlawfulness, *by individuals he recognizes to be the police*." *Id.* (emphasis added).
- The confrontation in *Lamont v. New Jersey*, 637 F.3d 177 (3d Cir. 2011), began when the decedent approached a police officer to ask for directions. *Lamont v. New Jersey*, Civil No. 04-2476, 2009 WL 483899, at *2 (D. N.J. Feb. 25, 2009). The situation evolved into a police chase down the freeway and then a pursuit by foot, before officers surrounded the decedent and shot

him for moving his hand as if drawing a gun. *Lamont*, 637 F.3d at 179-80.

- In *Hundley v. District of Columbia*, 494 F.3d 1097, 1100 (D.C. Cir. 2007), the officer yelled "police" when he ordered the driver to stop and get out of his car. The court concluded that it was the decedent's "intentional misconduct" in refusing to comply with orders to place his hands on the car and instead lunging at the police officer that constituted a superseding cause of the shooting. *Id.* at 1104-05.
- In *Estate of Sowards v. City of Trenton*, 125 F. App'x 31 (6th Cir. 2005), one of the officers "*identified himself as a Trenton Policeman* and requested that [the decedent] exit his apartment to speak with the officers." *Estate of Sowards v. City of Trenton*, No. 02-CV-71899-DT, Order Granting in Part and Denying in Part Defendants' "Motion for Summary Judgment," at *3 (E.D. Mich. Mar. 14, 2003) (emphasis added). The decedent refused and was shot after pointing a hand gun at police when they forced open his door. 125 F. App'x at 34.
- In *Cameron v. City of Pontiac*, 813 F.2d 782, 783-84 (6th Cir. 1987), "uniformed" officers, "while on regular patrol," "identified themselves as police" before ordering fleeing suspects to halt. The decedent's choice to instead scale a fence and attempt to cross a freeway on foot was,

according to both the district court and the court of appeals, a superseding cause of his death. *Id.* at 786.

- Finally, the oft-cited hypothetical in then-Judge Alito's opinion in *Bodine v. Warwick*, 72 F.3d 393, 400 (3d Cir. 1995), involved police officers who "encounter the suspect, identify themselves, [and] show him the warrant."

If Conley and Pederson had done what then-Judge Alito posited in *Bodine*, Mr. Mendez's conduct *could have been* a superseding cause of his injuries. But on the facts presented here, Petitioners were and remain liable for their actions.

2. Petitioners also argue that Mr. Mendez's conduct constituted a superseding cause of the shooting because "[r]esisting or threatening a *uniformed* police officer who does nothing to incite a violent response is not only unforeseeable, it is tortious and even criminal." Pet. Br. 55 (emphasis added). The United States likewise argues that "[s]ociety generally expects a person confronted by a *uniformed* police officer to follow the officer's instructions rather than violently resisting." U.S. Br. 29 (emphasis added). Here again, a key assumption is built into the word "uniformed," which is that the person understands that the officer *is* an officer. It is culpable and not usually foreseeable for a person to react violently towards someone whom he or she *knows is a law enforcement officer*. But that is not what happened here.

Although Petitioners cite California Penal Code § 834a and Model Penal Code § 3.04(2)(a)(i) in support of their arguments (Pet. Br. 55), neither statute prohibits resistance to arrest if the arrestee does not know that the officer *is* an officer. *See* Cal. Penal Code § 834a (duty to refrain from resistance "[i]f a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer"); Model Penal Code § 3.04(2)(a)(i) (use of force not justified "to resist an arrest which the actor knows is being made by a peace officer"). The statutes of numerous states are to the same effect.[12]

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[12] *See*, *e.g.*, Ala. Code § 13A-3-28 ("a peace officer who is known or reasonably appears to be a peace officer"); Ark. Code Ann. § 5-54-103(a)(1) ("a person known by him or her to be a law enforcement officer"); Colo. Rev. Stat. Ann. § 18-8-103(3) ("a peace officer in uniform or, if out of uniform, one who has identified himself by exhibiting his credentials as such peace officer to the person"); Del. Code. Ann. tit. 11, § 464(d) ("an arrest which the defendant knows or should know is being made by a peace officer"); Fla. Stat. Ann. § 776.051(1) ("known, or reasonably appears, to be a law enforcement officer"); 720 Ill. Comp. Stat. Ann. 5/7-7 ("arrest which he knows is being made either by a peace officer or by a private person summoned and directed by a peace officer"); Iowa Code Ann. § 804.12 (arrest "which the person knows is being made either by a peace officer or by a private person summoned and directed by a peace officer"); Mont. Code Ann. § 45-3-108 ("arrest that the person knows is being made either by a peace officer or by a private person summoned and directed by a peace officer"); Neb. Rev. Stat. § 28-1409(2) ("arrest which the actor knows is being made by a peace officer"); N.H. Rev. Stat. Ann. § 594:5 ("has reasonable ground to believe . . . that the arrest is being made by a peace officer"); N.Y. Penal Law § 35.27 ("when it would reasonably appear that the latter is a police officer or peace officer"); Or. Rev. Stat. § 161.260 ("a

(continued . . .)

Moreover, in *Sparks v. City of Compton*, 134 Cal. Rptr. 684, 688 (Cal. Ct. App. 1976), the California Court of Appeal confirmed that officers who "fail[] to identify themselves as officers either by word or indicia of authority" relieve a person of the statutory obligation to yield to arrest. Society, then, recognizes that a person confronted by an unknown individual (particularly one who unlawfully enters a residence) may defend himself or herself if it is not discernible that the unknown individual is a police officer. Here, it was not discernible to Mr. Mendez. "I didn't know it was you guys. It was a BB gun, I didn't know." Exh. 232-000080.

3. Finally, some of Petitioners' amici contend that, in light of the tragic frequency of violence directed at law enforcement officers, the mere probability that violent conflicts will elicit the use of defensive force by police should not be dispositive. Nat'l Ass'n of Counties Br. 26. The superseding cause doctrine addresses that concern. In a case of this type, the superseding cause analysis is appropriately informed by both foreseeability and culpability principles. Here, the

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peace officer who is known or reasonably appears to be a peace officer"); 18 Pa. Cons. Stat. Ann. § 505(b)(1)(i) ("an arrest which the actor knows is being made by a peace officer"); R.I. Gen. Laws § 12-7-10 ("has reasonable ground to believe . . . that the arrest is being made by a peace officer"); Tex. Penal Code § 38.03(a) ("a person he knows is a peace officer or a person acting in a peace officer's presence and at his direction").

district court made repeated foreseeability findings and did not find culpability (a point that was in any event conceded based on the evidence). For all these reasons, Mr. Mendez's conduct is not a superseding cause of Respondents' injuries.

II. THE LEGAL FRAMEWORK SET OUT IN *GRAHAM* PERMITS COURTS TO CONSIDER WHETHER ACTIONS BY POLICE FORESEEABLY CREATE A NEED FOR THE USE OF FORCE.

If the Court reaches the constitutional issue in Petitioners' first Question Presented, it should likewise uphold the district court's judgment in Respondents' favor. The parties agree that *Graham* provides the controlling rule of decision, but disagree as to whether that rule permits consideration of events that precede the use of force. As set forth below, the better reasoned authority permits consideration of such events, and Respondents respectfully urge the Court to so hold.

As Petitioners note, lower courts have applied a variety of standards in evaluating the constitutionality of officials' actions that foreseeably create a need for force. The Ninth Circuit below clarified that liability may attach if a police officer's "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. In *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002), the court likewise held that if a plaintiff can establish such unconstitutional conduct, then "liability is established, and the question becomes the scope of

liability, or what harms the constitutional violation *proximately caused*." *Id.* at 1189-90 (emphasis added).

Other circuits have sustained excessive force claims based on official action creating a need for force *without* requiring that the prior action itself be a separate constitutional violation. In *Tenorio v. Pitzer*, 802 F.3d 1160, 1164 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 1657 (2016), the Tenth Circuit held that "[t]he reasonableness of [an officer's] actions depends both on whether the officers were in danger at the precise moment that they used force and on whether [the officer's] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." Courts have emphasized that this approach "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 ex rel. Napolitano*, 404 F.3d 4, 22 (1st Cir. 2005) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)); *see also Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) ("This approach is simply a specific application of the 'totality of the circumstances' approach inherent in the Fourth Amendment's reasonableness standard." (quoting *Garner*, 471 U.S. at 8-9)). Other appellate courts have likewise adopted this approach.[13]

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[13] *See, e.g., Ribbey v. Cox*, 222 F.3d 1040, 1043 (8th Cir. 2000) (finding fact issues regarding an excessive force claim based on evidence that the officer caused the conduct (the suspect "turn[ed] reflexively down and away from the breaking window" and thereby appeared to be "reaching for a weapon")

(continued . . .)

Conversely, as Petitioners and their amici note, some other circuits hold that "[t]he proper approach … is to view excessive force claims in segments" and "disregard" events in earlier segments when determining whether an officer used excessive force in a later segment. *Livermore v. Lubelan*, 476 F.3d 397, 406-07 (6th Cir. 2007). Despite *Livermore*, the Sixth Circuit subsequently held in *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008), that "[w]here a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive." Petitioners nonetheless claim that the "segmenting" approach is mandated by both *Graham* and this Court's post-*Graham* cases. For the reasons that follow, Petitioners are incorrect.

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that arguably permitted the use of deadly force); *Sledd v. Lindsay*, 102 F.3d 282, 288 (7th Cir. 1996) ("Viewed in the light most favorable to Sledd, the evidence shows that Baker's act of shooting Sledd at the top of the stairs was unjustified, even assuming that the police still had some right of self defense after they had broken into the house and failed to identify themselves or to announce their purpose."); *Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993) (officer cannot lawfully use deadly force to protect himself if he "unreasonably created the encounter that ostensibly permitted the use of deadly force"); *Sigley v. City of Parma Heights*, 437 F.3d 527, 534-35 (6th Cir. 2006) (citing *Starks* with approval and recognizing, as in *Starks*, that "determining whether the officer placed himself in danger is a factual inquiry that should be resolved by the factfinder").

A. Petitioners' Proposed Framework Is Contrary To Decisions Of This Court, Including *Graham*, And Leads To Indefensible Results.

1. Despite their assertion that the Court should "continue to analyze police use of force under the established legal framework set out in *Graham*" (Pet. Br. i), Petitioners' proposed approach is not consistent with *Graham*. The Court in *Graham* emphasized that "proper application" of the reasonableness test under the Fourth Amendment "requires careful attention to the facts and circumstances of each particular case." 490 U.S. at 396. Quoting *Garner*, 471 U.S. at 8-9, the Court reiterated that the question is "whether the *totality of the circumstances* justifie[s] a particular sort of ... seizure." *Graham*, 490 U.S. at 396 (emphasis added; brackets and ellipsis in original). The Court thus required lower courts to carefully consider *all* of the relevant facts and circumstances and *did not hold* that any facts or circumstances should be ignored in deciding Fourth Amendment claims.

Petitioners assert a contrary interpretation of *Graham*. Because *Graham* refers to the reasonableness of an officer's actions "at the moment" (*id.*), Petitioners argue that an officer's actions before the seizure are not relevant. Pet. Br. 29. That is a misreading of *Graham*. As the rest of the passage in question makes clear, the "at the moment" phrase was not intended to preclude consideration of what preceded the use of force, but only to focus the analysis on "the perspective of a reasonable officer on the scene, rather than with

the 20/20 vision of *hindsight*." *Graham*, 490 U.S. at 396 (emphasis added). The Court added that "[n]ot every push or shove, even if it may *later* seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Id.* (emphasis added; internal quotation marks and citation omitted). The "at the moment" requirement is properly read to preclude lower courts from second-guessing the actions of police officers after the fact; it does not require courts to pretend that critically important events leading to the use of force did not occur.

Petitioners' proposed framework is also contrary to any reasonable interpretation of the phrase "totality of the circumstances." As the Third Circuit noted in *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999), it is not possible to reconcile this 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." *Id.* Moreover, if the seizure is the bullet striking Mr. and Mrs. Mendez, then the circumstances before that moment—which Petitioners claim should be disregarded—would include "what [the officer] saw when she squeezed the trigger." *Id.* As the court in *Abraham* noted, courts that disregard pre-seizure circumstances "are left without any principled way of explaining when 'pre-seizure' events start and, consequently, will not have any defensible

justification for why conduct prior to that chosen moment should be excluded." *Id.* at 291-92.

The government appears to recognize the problem that the court identified in *Abraham*. Addressing the relevance of prior events, the government states:

> This is not to say that courts and officers should be blind to the events that lead to a use of force. The objective reasonableness test accounts for "the facts and circumstances of each particular case," *Graham*, 490 U.S. at 396, including "what the officer knew at the time" he decided to use force, *Kingsley*, 135 S. Ct. at 2473; *see Plumhoff*, 134 S. Ct. at 2023 (The "crucial question" is "whether the official acted reasonably in the particular circumstances that he or she faced.").

U.S. Br. 25. Here, the relevant "facts and circumstances" and "what the officer knew at the time" would include Rissling's announcement (which Conley and Pederson heard) that "a male named Angel (Mendez) lived in the backyard of the Hughes resident with a pregnant lady (Mrs. Mendez)" and clear signs that the shack was precisely that residence. Pet. App. 59a, 85a. Yet Conley and Pederson decided to enter the Mendezes' home with guns drawn and without asking permission, identifying themselves, or even knocking on the door.

Indeed, in cases such as this one, the pre-use-of-force conduct by the officer and victim (and perhaps others) is as a practical matter the *only*

action to which *Graham* could meaningfully be applied. Petitioners stress that police officers are often "forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." Pet. Br. 17 (quoting *Graham,* 490 U.S. at 396-97). But in this case, the person who "forced" Conley to make that decision was Conley himself, by entering a small, dark residence without examining the shack and area around it—which would have confirmed that the shack was inhabited—and without first alerting the occupants. Although there may be a need for a split-second decision once an officer is in an apparently life-threatening situation, the decision that got the officer into that situation is often far less hurried. And here, that pivotal decision was manifestly unreasonable—as both courts below found. Pet. App. 13a-14a, 135a.

2. Far from supporting Petitioners' segmented approach, this Court's post-*Graham* cases suggest (without expressly holding) that an excessive force claim can properly be based on official action foreseeably creating a need for force. In *Scott v. Harris*, 550 U.S. 372, 384-85 (2007), for example, the plaintiff based his excessive force claim in part on an argument that police had created the need for force by unreasonably chasing him at a high rate of speed. Petitioners assert that the Court refused to consider that claim and that "it was only the final step—'terminat[ing] the chase by ramming [the officer's] bumper into respondent's vehicle'—that … the Court evaluated for reasonableness." Pet. Br. 30 (quoting *Scott*, 550 U.S. at 381, 383). That is not correct. The Court in

Scott devoted two paragraphs to the reasonableness of the officer's pre-crash actions; it rejected the plaintiff's contentions *not as legally irrelevant* as Petitioners assert, but on the merits. 550 U.S. at 384-85.

In *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), the plaintiff likewise argued that the police had improperly created the asserted need for force by initiating a high speed chase. Addressing this portion of *Plumhoff*, Petitioners assert that "[t]his Court held that this line of argument was improper" and "explicitly rejected the argument that it should evaluate whether the officer's conduct leading up to the chase, or their conduct throughout the chase, was reasonable." Pet. Br. 31-32. To the contrary, the Court in *Plumhoff* expressly did evaluate that line of argument and rejected it as *factually unpersuasive* rather than as legally irrelevant. 134 S. Ct. at 2021 n.3 (citing *Scott*, 550 U.S. at 385-86).

Likewise, in *Brower*, the Court held that the use of the roadblock in that case constituted a seizure and remanded the case for an assessment of the reasonableness of the police actions. 489 U.S. at 599-600. Petitioners insist that the remand in *Brower* "limited the reasonableness inquiry to the final moment of the ultimate seizure." Pet. Br. 33. That assertion, too, is incorrect: contrary to Petitioners' assertion, the issue on remand was the reasonableness of the official actions "*setting up* the roadblock in such manner as to be likely to kill him." *Brower*, 489 U.S. at 599 (emphasis added). The creation of that roadblock had necessarily occurred well before the final moment of the

seizure. It simply is not the case that *Scott*, *Plumhoff*, and *Brower* hold that an "officer's actions before the seizure—even in the seconds immediately before the seizure—are not relevant to the reasonableness of the seizure." Pet. Br. 16.

3. In other contexts, the Court's Fourth Amendment analysis also encompasses preceding events. In *Kentucky v. King,* 563 U.S. 452 (2011), for example, the Court held that a warrantless search of a home is ordinarily permissible if "the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable." *Id.* at 460 (internal quotation marks and citation omitted; brackets in original). But the Court held that police can invoke exigent circumstances only "when the conduct of the police *preceding the exigency* is reasonable" and "the police did not *create the exigency* by engaging or threatening to engage in conduct that violates the Fourth Amendment." *Id.* at 462 (emphases added). As can be seen, the Court expressly considered whether the officer's prior conduct is reasonable in determining whether the officer can lawfully search a home under the Fourth Amendment.

In so holding, the Court expressly recognized that "[w]e have taken a similar approach in other cases involving warrantless searches." *Id.* For example, the Court has "held that law enforcement officers may seize evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made." *Id.* at 462-63 (citing *Horton v. California*, 496 U.S. 128, 136–40 (1990)).

It has likewise held that officers may seek consent-based encounters only "if they are lawfully present in the place where the consensual encounter occurs." *Id.* at 463 (citing *INS v. Delgado*, 466 U.S. 210, 217, n.5 (1984)). As can be seen, the Court has previously recognized that an officer's prior conduct is relevant in assessing whether the officer violated the Fourth Amendment. There is no reason to apply a different rule to excessive force claims.

Because the prohibitions now embodied in the Fourth Amendment first emerged through common law tort actions against government officials, tort principles are important in interpreting the constitutional requirements. In tort, the assessment of a defendant's liability also is not limited to the very moment when the defendant took the action that injured the plaintiff. It is not usually a tort for A to defend himself from a threat of force by B, but A cannot do so if (1) he is a trespasser, (2) B is threatening force because he reasonably believes A is dangerous, and (3) A is either dangerous or is responsible for B's mistake in thinking A to be dangerous. *See* Restatement (Second) of Torts §§ 65, 72, 79; *see also id.* § 72 cmts. a-c. Likewise, in criminal law, if A starts a fight with B and B fights back, A's subsequent use of force is tortious unless A first made clear his intent to withdraw from the fight. *See* 2 Charles E. Torcia, *Wharton's Criminal Law* § 135, Westlaw (database updated Sept. 2016); Model Penal Code § 3.09(2) (1985). Lower courts have applied that tort principle—which requires consideration of

events before the moment force is employed—to police officers who started fights.[14]

4. A holding by this Court that the analysis of an excessive force claim is limited to the knowledge and actions of the officer at the precise moment that force is used also would bar redress in a troubling range of situations. If a plainclothes police officer climbed through a bedroom window in the middle of the night without identifying himself and then killed a resident who pointed a weapon in fear, the officer's fatal shooting of the resident would constitute a reasonable use of force. *But see McDonald*, 335 U.S. at 460-61 (Jackson, J., concurring). And if a police officer jumped in front of a moving car and then shot the driver to stop the car, the killing of the motorist would constitute a reasonable use of force. *But see Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993). And if a police officer were called to the house of a deranged man, who was home alone shouting incoherently and swinging a golf club, the officer was warned that if he entered the house the man would attack him with the club, and the officer nonetheless entered the house and was attacked as predicted, the officer's killing of the mentally ill man would

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[14] *See, e.g., Claybrook v. Birchwell*, 274 F.3d 1098, 1103-05 (6th Cir. 2001); *Plakas v. Drinski*, 19 F.3d 1143, 1147-48 (7th Cir. 1994); *Gilmere v. City of Atlanta, Ga.*, 774 F.2d 1495, 1501 (11th Cir. 1985) (en banc), *abrogated on other grounds by Graham v. Connor*, 490 U.S. 386 (1989); *Miller v. Leesburg*, Nos. 97APE10-1379, 97APE10-1380, 1998 WL 831404 at *1 (Ohio Ct. App. Dec. 1, 1998).

constitute a reasonable use of force. *But see Estate of Crawley v. McRae,* No. 1:13-CV-02042-LJO-SAB, 2015 WL 5432787, at *28-33 (E.D. Cal. Sept. 15, 2015).

Similarly, assume that the officer in *Scott* had driven up alongside Harris's car, in plain clothes and an unmarked car, and began screaming and pointing a gun at Harris. Harris would reasonably have concluded that the other driver was dangerous, if not deranged, and might well have tried to escape. This Court's decision in *Scott* cannot properly be read to hold that in those circumstances—evaluated "at the moment" the driver was seeking to escape from the unidentified officer—Harris would have had no claim if the officer had run him off the road to end the chase. Yet that is the logical outcome of Petitioners' proposed "in the moment" framework. That framework is not only inconsistent with the "totality of the circumstances" analysis, it leads to perverse results.

B. The Court Should Adhere To The General Standard Of Reasonableness Established By *Graham* And *Scott*.

1. Respondents respectfully submit that the Court should adopt the following standard: in resolving excessive force claims, courts may entertain a claim that police action foreseeably created the need for the use of force against a claimant and should apply to the police action the general standard of reasonableness established by *Graham* and *Scott*. Under *Graham*, whether that prior police action was reasonable "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*, 490 U.S. at 396 (internal quotation marks and citation omitted). Consideration would also be given to the "relative culpability" of involved individuals (*Scott,* 550 U.S. at 384), and all such issues would be assessed from the perspective of "a reasonable officer on the scene" (*Graham,* 490 U.S. at 396).

Petitioners and the United States focus their arguments largely on the Ninth Circuit standard that *preceded* the appellate court's decision below, which clarified that the Ninth Circuit "does not indicate that liability may attach only if the plaintiff acts violently; we simply require 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 (internal quotation marks and citation omitted). In any event, disputes about the details of the Ninth Circuit standard are not helpful in delineating the correct standard, which is the balancing test set forth in *Graham* and repeatedly applied by lower courts. That test differs from the Ninth Circuit's analysis in that it requires objectively unreasonable conduct rather than an independent constitutional violation. But because the deputies' search of the Mendezes' home in this case was both an independent constitutional violation and objectively unreasonable, that difference is immaterial here.

Applying such a balancing test is simple and straightforward. Action involving a high likelihood

of creating a need for force would be justified in circumstances involving culpable conduct, such as police entering a room in which armed robbers are holding a hostage. Conversely, a relatively modest likelihood of creating a need for force would *not* be justified if the action in question served no apparent governmental interest, such as the failure of plainclothes officers to identify themselves as police when they accost civilians.[15] It would not be relevant whether the officer intended that his or her action would create a need for force. *See supra* at note 9. Instead, as the government states, the "crucial question" is and remains "whether the official acted reasonably in the particular circumstances that he or she faced." U.S. Br. 25 (quoting *Plumhoff*, 134 S. Ct. at 2023).

2. Applying this balancing test to the facts presented in this case, the district court's detailed findings amply support its judgment based on the deputies' unreasonable conduct leading to the use of force. Pet. App. 109a-127a, 135a. Starting with the governmental interest at issue, Petitioners contend that the person police were searching for was "armed and dangerous parolee." Pet. Br. 4. But neither Conley nor Pederson had information that the parolee was armed or dangerous, so it is

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[15] *See* United States Department of Justice, Investigation of Chicago Police Department at 31 (Jan. 13, 2017) (criticizing "jump out" tactic, in which a group of gun wielding officers suddenly accost a group of pedestrians to see who will flee, noting that it "can be particularly problematic when deployed by [the Chicago Police Department] using unmarked vehicle[s] and plainclothes officers").

irrelevant to an analysis of "the perspective of a reasonable officer on the scene." *Graham*, 490 U.S. at 396. Moreover, "the deputies lacked any credible information that [O'Dell] was in Plaintiffs' shack." Pet. App. 14a. Indeed, Conley admitted in the district court that he "didn't have a specific belief that [O'Dell] was in fact in there." Pet. App. 37a (quoting Dkt. 291 at 85). Any governmental interest in entering the Mendezes' home without the deputies first seeking consent or identifying themselves (as the officers at Ms. Hughes' home had done moments earlier) was attenuated at best

Conversely, the deputies' intrusion on the Mendezes' Fourth Amendment rights was profound. In *Payton v. New York*, 445 U.S. 573 (1980), the Court recognized that the Fourth Amendment "unequivocally establishes the proposition that 'at the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Id.* at 589-90 (alterations and citation omitted). In a passage that is particularly fitting here—from William Pitt's address in the House of Commons in 1763 that "echoed and re-echoed throughout the Colonies"—the Court added:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement.

Id. at 601 n.54 (internal quotation marks omitted). This case concerns the modest dwelling of which Pitt spoke. The deputies nevertheless decided to enter "the unambiguous physical dimensions" of the Mendezes' home (*id.* at 589), and they did so without a warrant, without consent, without warning, and with guns drawn—conditions that were likely to result in serious injury or death to Mr. and Mrs. Mendez. This conduct violated the Mendezes' constitutional rights, as both courts below found. Pet. App. 13a-15a, 135a.

Lastly, the balance of culpability also favors Respondents. Mr. Mendez's conduct, as noted previously (*supra* at 24-25), was entirely and *admittedly* nonculpable. Indeed, unlike many police shooting cases, Mr. and Mrs. Mendez had not committed *any* crime and were not even suspected of doing so; they were simply resting on a futon in their own home. App. 56a. Petitioners, in contrast, engaged in an unconstitutional search—and the unlawfulness of that conduct is now judicially final. But for that unlawful conduct, the use of force would not have been necessary, Mr. and Mrs. Mendez would not have been repeatedly shot by Conley and Pederson, and Mr. Mendez would still be able to work and would not be saddled with ongoing medical expenses for prosthesis upkeep and replacement, pain medication for significant nerve damage, and future surgeries. Dkt. 299 at 41-44; Pet. App. 135a-136a. This balance of culpability consideration, like the other relevant considerations, confirms the district court's finding that Petitioners' actions were unreasonable.

3. Considering events that precede the use of force also does not undermine qualified immunity or proximate cause principles or threaten the safety of officers or the public, as Petitioners and their amici claim.

a. Starting with qualified immunity, the required analysis is simple and straightforward. As the Ninth Circuit noted, "'the salient question … is whether the state of the law' at the time of the events (here, October 2010) gave the deputies 'fair warning' that their conduct was unconstitutional." Pet. App. 7a-8a (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). The courts below had no difficulty applying that analysis to the deputies' conduct (Pet. App. 7a-15a, 97a-99a, 123a), and this Court expressly declined to review that determination when it limited the grant of certiorari to Petitioners' first and third Questions Presented. Petitioners' qualified immunity argument (Pet. Br. 36-40) is thus incorrect as well as procedurally improper.

b. Nor does consideration of events that precede the use of force somehow "override" basic tort principles of proximate cause and superseding cause, as Petitioners also claim. Pet. Br. 40-42. With or without the Ninth Circuit's so-called provocation analysis, excessive force claims are and remain subject to the same limitations as other Fourth Amendment claims: the plaintiff must establish that the action in question was a proximate cause of the injury at issue, and the defendant can avoid liability by establishing that some other event was a superseding cause.

The problem for Petitioners here is that *the facts* do not support their arguments. As noted previously (*supra* at 22-24), the district court squarely addressed this precise issue and made *repeated* findings that it was foreseeable that the actions of the deputies in entering the home without consent and without identifying themselves as police officers could lead to a violent confrontation. In addition to the district court's remarks during trial regarding the prevalence of firearms in the surrounding area (J.A. 224-25, 231), the court expressly found based on the evidence and testimony at trial that it was "foreseeable" that unlawfully entering the Mendezes' home "could lead to a violent confrontation." Pet. App. 126a. The Ninth Circuit agreed with that finding and similarly so held. Pet. App. 24a-25a. And as the above discussion also shows (*supra* § I), Mr. Mendez's *nonculpable* response to Petitioners' unlawful conduct is not a superseding cause of Respondents' injuries.

c. Lastly, considering events that precede the use of force also does not undermine officer safety. To the contrary, a rule that imposes liability for *objectively unreasonable* conduct protects both police and the public. As the Sixth Circuit noted in *Yates v. City of Cleveland*, 941 F.2d 444, 447 (6th Cir. 1991), "[a]n officer who intentionally enters a dark hallway in the entrance of a private residence in the middle of the night, and fails to give any indication of his identity, is more than merely negligent." The same reasoning applies here, where Conley and Pederson unreasonably decided to enter the Mendezes' home—despite Rissling's

announcement and signs of habitation—and did so with guns drawn, without consent, without a warrant, and without identifying themselves as police officers. Both officers and the public alike are safest when police respect such boundaries.

* * *

In sum, the objective reasonableness test is based on existing precedent (including *Graham* and *Scott*), has been applied by lower courts, is expressed in terms that police officers can easily understand and apply, and will appropriately resolve the safety concerns identified by Petitioners' supporting amici. Respondents respectfully urge the Court to adhere to that test.

III. IF THE COURT ADDRESSES PROXIMATE CAUSE, THE ISSUE SHOULD BE RESOLVED IN RESPONDENTS' FAVOR.

A. Petitioners' Proximate Cause Argument Is Not Fairly Encompassed Within The Question Presented.

The third Question Presented in the Petition related solely to whether "an incident giving rise to a reasonable use of force is an intervening, superseding event." Pet. ii (emphasis omitted). The petition asserted that there was a conflict regarding superseding cause and asserted that "[r]eview is … warranted to determine whether an incident giving rise to a *reasonable* use of force is an intervening, superseding event…." Pet. 15, 33-35. Petitioners have now *rewritten* that Question Presented to refer to "proximate cause" rather than an "intervening, superseding event." *Compare* Pet.

Br. i *with* Pet. ii. The United States has done the same. *See* U.S. Br. I.

This Court has repeatedly admonished parties not to introduce at the merits stage additional legal issues which they chose not to proffer as questions at the certiorari stage. *E.g., Fry v. Pliler,* 551 U.S. 112, 120 (2007) (refusing to consider issue "not fairly encompassed within the question presented"). That admonition is entirely applicable to this case. Petitioners advance no contention that the proximate cause issue is fairly encompassed in the original third Question Presented. It is not. Superseding cause is a single aspect of the larger proximate causation analysis, not the other way around. Had Petitioners sought—and the Court granted—certiorari on the question whether the courts below correctly found proximate cause, Petitioners might now properly argue both proximate causation and the narrower, subsidiary issue of superseding cause. But they violate Supreme Court Rule 24(1)(a) by attempting to move in the other direction, from the narrow question of superseding cause to other aspects of the proximate cause doctrine.

Moreover, the proximate cause issue was not properly presented below and is intensely factual. Petitioners object that "[t]he Court of Appeals at no point identified the risks the warrant requirement protects against" and that it "skipped that critical step." Pet. Br. 48. But Petitioners did not ask the Ninth Circuit to take that step. Moreover, the Court has recognized that "proximate causation … involve[s] application of law to fact, which is left to the factfinder, subject to limited review." *Exxon*

Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 840-41 (1996). Yet Petitioners did not raise in the district court the proximate cause argument that they now seek to argue before this Court. Consistent with the Court's practice, it should limit its analysis to the superseding cause and excessive force issues addressed in Sections I and II above.

B. If The Court Addresses The Proximate Cause Issue, Petitioners' Proximate Cause Argument In Any Event Fails.

1. As the United States notes (U.S. Br. 27), proximate cause is typically explained "in terms of foreseeability or the scope of the risk created by the predicate conduct." *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014). The Court in *Paroline* further explained that the proximate cause requirement serves "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.* Again, the focus on foreseeability is paramount. And here, as noted *supra* at 22-24, the district court *repeatedly* found that it was "foreseeable" that the actions of the deputies in entering the Mendezes' home without permission and without identifying themselves as police officers could lead to a violent confrontation.

2. Petitioners and the United States attempt to avoid those findings by asking the Court to impose on the remedies available for constitutional violations an unprecedented and far-reaching limitation. The only injuries that are "proximately caused" by the violation, they urge, are injuries

connected to the particular interest that the constitutional right was designed to protect. Pet. Br. 43-44; U.S. Br. 27-30. Thus, any other injuries that occurred would not be redressable even though those injuries were entirely foreseeable and even if the violation was devised to inflict a particular harm. This proposed rule of law is not limited to the Fourth Amendment; it would extend to any constitutional claim against state and local officials and also to *Bivens* actions against federal officials.

The cases cited by Petitioners provide no support for their proposed limitation:

- Citing *Carey v. Piphus*, 435 U.S. 247 (1978), Petitioners argue that plaintiffs "can recover *only* such damages as are tailored to the interests protected by the particular right in question." Pet. Br. 44 (emphasis added) (quoting *Carey*, 435 U.S. at 259). But the term "only" does not appear in *Carey*. Rather, *Carey* holds that in a § 1983 action, in addition to "common law tort … damages," plaintiffs may need further relief where the common law remedy does not sufficiently vindicate the particular constitutional right involved. 435 U.S. at 258.
- Citing *Martinez v. California*, 444 U.S. 277 (1980), Petitioners claim that injuries outside the scope of the interests protected by a constitutional right are "too remote a consequence of … officers' actions." Pet. Br. 44 (quoting *Martinez*, 444 U.S. at 285). But the Court in *Martinez* held that the

consequences complained of in that case were "too remote" from the official action only because they were unforeseeable and too distant in time. 444 U.S. at 285.

- Citing *Paroline*, 134 S. Ct. at 1719, Petitioners assert that plaintiffs must prove that being injured was within "the scope of the risk created by" the search, as if "scope of the risk" referred narrowly to certain specific "interests" protected by the warrant clause, not to any foreseeable harm. Pet. Br. 44. But the quoted passage in *Paroline* treats "scope of the risk" as synonymous with "foreseeability" (134 S. Ct. at 1719), the very traditional standard of proximate cause that Petitioners are trying to avoid.

Petitioners do not point to any instance in a century and a half of § 1983 litigation in which this Court or any other court has denied relief for foreseeable and proven injuries based on the asserted interest protected by the constitutional right at issue.

Nor should the Court do so here, because Petitioners' "interest" analysis ignores the breadth of the district court's liability finding and the appellate court's ruling affirming the judgment in Respondents' favor. As Petitioners note (Pet. Br. 11), the district court awarded only nominal damages based on Respondents' knock-and-announce claim and their warrantless entry claim. The award of substantial damages was instead premised on one of Respondents' "excessive force"

claims. Pet. App. 135a. The Ninth Circuit, in turn, "affirm[ed] the district court's conclusion that the deputies *are liable for the shooting* following their unconstitutional entry." Pet. App. 26a (emphasis added). Critical here, no one denies that gunshot wounds are within the scope of the risk created by such a shooting.

But even if the Court focuses on Petitioners' violation of the warrant clause, Petitioners' attempt to provide an exclusive list of the interests protected by that clause demonstrates the unworkability of this proposed limitation on remedies for constitutional violations. Petitioners insist that the warrant clause has only three purposes: protecting privacy, assuring that a detached magistrate assesses the justification for the search, and limiting the scope of the search. Pet. Br. 44-45. But those are not the only interests protected by the warrant clause. Critical here, a "warrant also assures the individual whose property is searched or seized of the *lawful authority* of the executing officer, his need to search, and the limits of his power to search." *Groh v. Ramirez*, 540 U.S. 551, 561 (2004) (internal quotation marks and citation omitted). This, in turn, would avoid "lawful resistance by bystanders or the target of his intrusion." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 625 (1999). In *Utah v. Strieff,* 136 S. Ct. 2056 (2016), this Court similarly recognized that "[b]ecause officers who violated the Fourth Amendment were traditionally considered trespassers, individuals subject to unconstitutional searches or seizures historically enforced their

rights through tort suits or *self-help*." *Id.* at 2060-61 (emphasis added); *see also Wolf v. Colorado*, 338 U.S. 25, 30 n.1 (1949) ("One may also without liability use force to resist an unlawful search.") (citing cases), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643 (1961).[16]

In other words, an *additional* purpose served by the warrant clause is to avoid serious confrontations because of uncertainty regarding the legal authority for a non-consensual search. Thus, contrary to Petitioners' colorful refrain (Pet. Br. 46), both the framers of the Fourth Amendment and the Congress that enacted § 1983 *would* assuredly have agreed that "[y]ou better get a search warrant, or else people will get hurt." This analysis not only demonstrates the infirmity of Petitioners' insistence that the warrant clause has nothing to do with avoiding physical injuries, but

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[16] The Court has recognized that "Section 1983 is a codification of § 1 of the Civil Rights Act of 1871" and intended by Congress to be "construed in the light of common-law principles that were well settled at the time of its enactment." *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). In 1871, resistance to searches and seizures was not uncommon in the absence of proper notice. *See State v. Belk*, 76 N.C. 10, 14 (1877) ("[I]f the officer has no authority to make the arrest, or having the authority, is not known to be an officer and *does not in some way notify the party that he is an officer and has authority*, the party arrested may *lawfully resist* the arrest as if it were made by a private person.") (emphases added); *see generally* 1 Edward Hyde East, *A Treatise of the Pleas of the Crown*, ch. V, § 81, at 314-15 (Philadelphia, P. Byrne 1806) (recognizing that subject upon whom process is to be executed may resist arrest unless there is "due notice of the officer's business").

also demonstrates the complexity and impossibility of the task that courts would face if they attempted to fashion an exclusive list of the "interests" served by a constitutional provision.

3. Petitioners acknowledge that serious injuries may result if officers enter a house unannounced, but insist that this is an interest wholly and exclusively protected by the "knock and announce" doctrine. Pet. Br. 50. But there is no historical basis for connecting this interest solely to the "knock and announce" rule or for ignoring other constitutional provisions that address similar concerns. Nor did the Court so hold in *Hudson v. Michigan*, 547 U.S. 586, 594 (2006), cited by Petitioners on this point. Pet. Br. 50.

Moreover, there is no reason to distinguish between a knock-and-announce violation, on the one hand, and an unlawful entry violation, on the other. At bottom, searches and seizures may be challenged as unreasonable in their execution whether or not they are conducted pursuant to a warrant, permitted by an exception to the warrant requirement, conducted in compliance with the knock-and-announce rule, or justified at their inception by probable cause or reasonable suspicion. The Court recognized that legal principle in *Terry v. Ohio*, 392 U.S. 1, 28 (1968): "The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all." Here, as noted *supra* at 44-46, the deputies' actions were objectively unreasonable under the circumstances. And it is wholly foreseeable—as the district court also found and the Ninth Circuit agreed—that such

a search can result in a violent confrontation. Moreover, "it is common for injuries to have multiple proximate causes." *Staub,* 562 U.S. at 420. The knock-and-announce violation is clearly not the *only* cause of Respondents' injuries.

Nor did the lower courts rely solely on the deputies' violation of the knock-and-announce rule, as Petitioners claim. Pet. Br. 38, 49. To the contrary, the district court expressly held that Petitioners "violated Mr. and Mrs. Mendez's right to be free from an unreasonable search in the absence of a proper knock-and-announce…." Pet. App. 122a. The court added:

> [T]he multiple indicia of residency—including being told that someone lived on the property—means that the conduct rose beyond even gross negligence. And it is inevitable that a *startling* armed intrusion into the bedroom of an innocent third party, with no warrant or *notice*, will incite an armed response.

Id. (emphases added). The critical point is that Petitioners failed to give *some sort of notice*—by knock-and-announce, identifying themselves as police officers, requesting consent, or otherwise. As the district court explained, "[i]f the Deputies had announced themselves, then this tragedy would never have occurred." *Id.* The Ninth Circuit expressly agreed: separate and apart from its knock-and-announce analysis, the court stated: "the situation in this case, where Mendez was holding a gun when the officers barged into the shack *unannounced*, was reasonably foreseeable."

Pet. App. 25a (emphasis added). That ruling, too, is not tied exclusively—or even "largely" (Pet. Br. 38)—to the knock-and-announce violation.

4. Lastly, Petitioners and the United States assert that the result in this case would have been the same if the deputies had obtained a search warrant and approached the Mendez home with a copy in their pockets. Pet. Br. 50-51; U.S. Br. 32. Thus, they reason, the unconstitutional search itself could not be a proximate cause of the shooting. This argument is unsound for at least two reasons. First, had Conley and Pederson recognized, as any competent officer would have, that they were required to obtain a warrant before entering the Mendezes' home, they would surely have decided to seek consent from the Mendezes rather than waiting for a warrant. *See* Dkt. 298 at 31 ("Waiting in order to get a warrant would have defeated the purpose of pursuing Mr. O'Dell…."). If Mr. or Mrs. Mendez had been asked to consent to the search, there would have been no shooting. Exh. 232-000080 ("I didn't know it was you guys."). Second, if the deputies had requested a warrant as Petitioners' hypothetical envisions, it would have taken time to obtain one, during which time Mr. and Mrs. Mendez (even if not alerted by a request to enter) would surely have left their home and noticed the deputies. After all, it was the middle of the day, the shack had no bathroom, and Mrs. Mendez was seven months pregnant. J.A. 88-92; Dkt. 298 at 97; Dkt. 301 at 161. In this scenario

too, if Petitioners had waited until they had a warrant, there would have been no shooting.[17]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[17] Moreover, whether the deputies could have obtained a warrant is and remains a disputed issue. Respondents cross-appealed on that point below, and the Ninth Circuit did not reach it. Pet. App. 2a, 11a n.5