NO. 18-_____

In the Supreme Court of the United States

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

Petitioners,

v.

ANGEL MENDEZ and JENNIFER LYNN GARCIA,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

MELINDA CANTRALL
COUNSEL OF RECORD
THOMAS C. HURRELL
HURRELL CANTRALL LLP
300 SOUTH GRAND AVENUE,
SUITE 1300
LOS ANGELES, CA 90071
(213) 426 2000
MCANTRALL@HURRELLCANTRALL.COM

NOVEMBER 30, 2018 *COUNSEL FOR PETITIONERS*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

This matter was previously before this Court and resulted in the decision *County of Los Angeles v. Mendez*, 137 S.Ct. 1539 (2017), wherein this Court disapproved the "provocation rule" created by the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"). Although the Deputies' use of force was found to be reasonable under the Fourth Amendment, the "provocation rule" allowed the Plaintiffs to recover damages under 42 U.S.C. § 1983 for injuries sustained after being shot by two Los Angeles County Sheriff's Department Deputies, due to an earlier constitutional violation.

In addition, this Court vacated the Ninth Circuit's decision to award the same damages to the Plaintiffs based upon the Deputies' warrantless entry into the shed in which the Plaintiffs were residing. This Court remanded the case to the Ninth Circuit to determine whether the Plaintiffs' shooting injuries were proximately caused by the Deputies' failure to secure a search warrant at the outset, cautioning the Ninth Circuit to refrain from conflating the foreseeable risks stemming from other constitutional violations in its analysis.

THE QUESTIONS PRESENTED ARE:

1. Whether the Ninth Circuit disregarded this Court's clear directives on remand and whether, in a 42 U.S.C. § 1983 action, a plaintiff's injuries resulting from a police officer's use of force may be proximately caused by the officer's failure to secure a search warrant?

2. Whether, in an action brought under 42 U.S.C. § 1983, conduct giving rise to an officer's *reasonable* use of force is an intervening, superseding event which breaks the chain of causation for damages stemming from the officer's failure to secure a warrant?

3. Whether a federal Court of Appeals may reverse a district court's determination under Rule 52(a) of the Federal Rules of Civil Procedure that an officer did not breach his duty of care to use reasonable force in a negligence action, without applying a clearly erroneous standard of review?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

Petitioners

- Deputy Jennifer Pederson, Defendant, Appellant and Cross-Appellee below
- Deputy Christopher Conley, Defendant, Appellant and Cross-Appellee below
- County of Los Angeles, Defendant, Appellant and Cross-Appellee below

---

Respondents

- Angel Mendez, Plaintiff, Appellee and Cross-Appellant below
- Jennifer Lynn Garcia (Mendez), Plaintiff, Appellee and Cross-Appellant below

---

There are no corporations involved in this proceeding.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS – Continued

Page

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

9TH CIRCUIT PROCEEDINGS ON REMAND

SUPREME COURT PROCEEDINGS

INITIAL PROCEEDINGS IN THE NINTH CIRCUIT AND DISTRICT COURT

TABLE OF CONTENTS – Continued

Page

REHEARING ORDER

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The July 27, 2018 opinion and judgment of the Ninth Circuit is reported at *Mendez v. County of Los Angeles*, 897 F.3d 1067 (9th Cir. 2018), and reproduced in the Appendix at pages 1a-28a.

The May 30, 2017 opinion of this Court is reported at *County of Los Angeles v. Mendez*, 137 S.Ct. 1539 (2017), and reproduced in the Appendix at pages 38a-50a.

The March 2, 2016 opinion and judgment of the Ninth Circuit is reported at *Mendez v. County of Los Angeles*, 815 F.3d 1178 (9th Cir. 2016), and reproduced in the Appendix at pages 53a-78a.

The district court's September 17, 2013 order denying Plaintiffs' request for an amended judgment was not reported, and is reproduced in the Appendix at pages 79a-83a. The August 27, 2013 district court judgment was not reported, and is reproduced in the Appendix at pages 84a-86a. The district court's August 13, 2013 findings of fact and conclusions of law was not reported, and is reproduced in the Appendix at pages 87a-166a.

BASIS FOR JURISDICTION IN THIS COURT

On July 27, 2018, the Ninth Circuit issued its opinion in this matter. (Appendix ("App.")1a-28a.) On August 10, 2018, Petitioners timely filed a petition for rehearing and rehearing *en banc*, which the Ninth

Circuit denied on September 6, 2018. (App.167a-168a.) Pursuant to 28 U.S.C. § 1254(1), jurisdiction is conferred upon this Court to review on writ of certiorari the July 27, 2018 opinion of the Ninth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondents alleged Petitioners violated their rights under the Fourth Amendment to the United States Constitution, which provides:

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

- U.S. Const. amend. IV

The underlying action was brought by the Respondents pursuant to 42 U.S.C. § 1983, which states:

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

> brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. District Court Rulings and Judgment

During a search for a felony parolee-at-large, Petitioners Los Angeles County Sheriff's Deputies Christopher Conley and Jennifer Pederson ("Deputies") shot Respondents Angel Mendez and Jennifer Lynn Garcia ("Plaintiffs"). (App.89a, 96a, 101a.) The Plaintiffs were shot while inside a shed in which they were living, located within the backyard of a residential home. (App.91a-92a, 101a.) Plaintiffs sought to recover damages under 42 U.S.C. § 1983 for a violation of their constitutional rights, and also pursued a negligence claim against the Deputies and Petitioner the County of Los Angeles (collectively referred to as "Defendants"). (App.84a-86a, 104a, 161a, 165a-166a.) Plaintiffs alleged the Deputies violated their Fourth Amendment rights based upon separate theories of liability for excessive force, warrantless entry, and an unlawful entry caused by the Deputies' failure to "knock and

announce" their presence. (App.84a-86a, 106a-139a, 165a-166a.)

A bench trial took place, and the district court made findings of fact and conclusions of law under Federal Rules of Civil Procedure, Rule 52(a). (App.87a-166a.) The district court found that on October 1, 2010, Los Angeles Sheriff's Department officers from the Target Oriented Policing ("TOP") Team were searching for a parolee-at-large named Ronnie O'Dell, a wanted felony suspect who was categorized as "armed-and-dangerous." (App.88a-89a.) There was a warrant out for Mr. O'Dell's arrest. (App.89a.) Mr. O'Dell had evaded prior attempts to apprehend him. (App.89a.) The Deputies were assisting the TOP Team on the day of the incident. (App.90a-91a.)

Following an officer sighting of Mr. O'Dell at a nearby grocery store, another officer received a confidential tip that a man believed to be Mr. O'Dell was riding a bicycle in front of a private residence owned by a woman named Paula Hughes. (App.89a-90a.) Officers observed a bicycle on the lawn when they responded to the residence. (App.94a-124a.)

Ms. Hughes and Mr. Mendez were high school friends, and she allowed Mr. Mendez to build a shack on her property in the area behind her home. (App.92a.) Mr. Mendez constructed the windowless shack, which was about seven feet wide, seven feet long and seven feet tall, out of wood and plywood. (App.92a-93a.) The shack had a single doorway entrance which was about six feet tall and three feet wide. (App.93a.) Mr. Mendez kept a BB gun rifle in the shack in order to shoot rats and pests. (App.94a.) The BB gun rifle closely resembled a small caliber rifle. (App.94a.)

There was nothing about the confidential informant's tip which was specific to the Hughes residence as opposed to the rear of the property. (App.124a.) Based upon the evidence presented at trial, the district court found "the officers had probable cause to search for Mr. O'Dell inside the Hughes residence, and Deputy Conley had probable cause to search for Mr. O'Dell inside the shack." (App.124a.)

Although they had an arrest warrant, the officers did not have a search warrant to search the property. (App.89a, 95a, 97a.) As other officers approached the front door of the main (Hughes) residence, the Deputies were assigned to clear the rear of the property for the officers' safety, should Mr. O'Dell be hiding thereabouts, and to cover the back door of the residence for containment, should Mr. O'Dell try to escape the rear of the Hughes property. (App.91a, 124a.)

There was debris throughout the rear of the property, including abandoned automobiles located in the northwest corner. (App.92a.) While clearing the backyard, the Deputies checked three storage sheds between the main residence and a concrete wall bordering the property to the south. (App.97a.) While continuing to clear the backyard, the Deputies came upon the shed at issue. (App.98a.) The district court found the Deputies believed the structure was an uninhabitable storage shed, but that their belief was unreasonable. (App.98a-99a.)

Deputy Conley opened the door to the shack and pulled back a blue blanket hanging from the top of the door frame, at which time he saw the silhouette of an adult male (Mr. Mendez) holding what appeared to be a rifle (App.99a), about three feet away. (App.94a,

99a.) The district court found the barrel of the BB gun rifle would necessarily have been pointed toward Deputy Conley. (App.100a.) Mr. Mendez was holding the gun when shot by the Deputies because, when he perceived the wooden door being opened, *he thought it was his friend, Ms. Hughes, playing a joke, and he was in the process of moving the rifle so he could put his feet on the floor and sit-up*. (App.100a.)

Deputy Conley yelled "Gun!" and both Deputies fired their guns in the direction of Mr. Mendez, fearing they would be shot and killed. (App.101a.) Gunshots injured both Plaintiffs, who suffered severe injuries. (App.101a-102a.)

The district court concluded the Plaintiffs did not prove a violation of their Fourth Amendment rights based upon an excessive use of force under the factors set forth in *Graham v. Connor*, 490 U.S. 386 (1989). (App.136a-139a, 165a.) The district court found the Deputies' use of force was reasonable, as they reasonably believed the BB gun was a firearm rifle, and "*reasonably* believed that the man (Mr. Mendez) holding the firearm rifle (a BB gun rifle) threatened their lives." (App.100a-101a, 139a.)

Notwithstanding the reasonableness of the Deputies' use of force, the district court awarded Plaintiffs approximately four million dollars in compensatory damages on their 42 U.S.C. § 1983 cause of action for their shooting injuries, based upon the Ninth Circuit's then-existing provocation rule. (App.139a-153a, 165a-166a.) Although also ruling in favor of Plaintiffs on the warrantless entry and "knock and announce" violation claims, the district court found the Plaintiffs were only entitled to recover nominal damages on those

claims. (App.165a) This Court noted the district court found "'the act of pointing the BB gun' was a superseding cause 'as far as damage [from the shooting was] concerned.'" (App.42a.)

The district court ruled in favor of the Defendants on the Plaintiffs' negligence cause of action, finding the Deputies' use of force was reasonable as the Deputies reasonably believed their lives were threatened. (App.139a, 161a.) In evaluating Plaintiffs' claim for an intentional infliction of emotional distress, the district court noted the Deputies' pre-shooting conduct was reckless, but found the shooting (use of force) was justified. (App.139a, 161a, 164a-165a.)

The district court noted that whether an officer owed a duty of care for pre-shooting conduct under a negligence theory and whether California recognized a state law "provocation rule" analogous to the Ninth Circuit's provocation rule, was not established but was pending before the California Supreme Court in *Hayes v. County of San Diego*. (App.161a-163a.) The district court stated it would reconsider the issue when *Hayes* was decided and amend the judgment, if appropriate. (App.163a.)

After judgment was entered, *Hayes v. County of San Diego*, 57 Cal.4th 622 (2013) was decided, and the Plaintiffs requested that the district court amend the defense judgment on their negligence claim. (App.79a-80a.) The district court correctly noted *Hayes* did not hold that a negligence claim could be sustained by an independent pre-shooting violation of duty, because the plaintiff did not allege a separate pre-shooting injury other than the damages inflicted by the officer's use of force. (App.81a-82a.) The district court empha-

sized that instead, the California Supreme Court held an officer's pre-shooting conduct could be considered as part of the totality of the circumstances and the reasonableness of an officer's use of force, *but should not be considered in isolation*. (App.82a.) Thus, the district court ruled that *Hayes* did not provide a basis to amend the negligence judgment. (App.82a.)

The district court reiterated the Deputies' *use of force* was not negligent based upon their overall conduct. (App.82a ("[t]he Court does not view the *overall conduct* of either Defendants or the Sheriff's Department as negligent, apart from the unconstitutional search and their unjustified failure to realize that the disputed shack/shed/structure/home was not another storage shed . . . ") (emphasis added).) The district court further stated: "*In general, the Court has never shared the sense of outrage that Plaintiffs' counsel evidently feel concerning the parolee search*." (App.82a (emphasis added).)

B. Ninth Circuit's First Published Opinion (March 2, 2016)

The Ninth Circuit affirmed the district court's judgment based upon the provocation rule. (App.54a, 73a-75a.)

The Ninth Circuit reversed the district court's finding of a constitutional violation based upon the "knock and announce" violation, finding the Deputies were entitled to qualified immunity. (App.54a-55a, 70a, 72a, 78a.)

The Ninth Circuit affirmed the district court's finding of a constitutional violation based upon a warrantless entry, and further found the Plaintiffs

could recover damages for their shooting injuries on that claim "under basic notions of proximate cause." (App.54a, 70a, 75a-76a.) However, despite finding the Deputies were entitled to qualified immunity on the "knock and announce" claim, the Ninth Circuit focused upon the risks of a "startling entry," and found "the situation in this case, where Mendez was holding a gun when the *officers barged into the shack unannounced*, was reasonably foreseeable." (App.76a-77a (emphasis added).)

As the Plaintiffs waived their cross-appeal challenging the defense judgment on the negligence claim if the judgment on the 42 U.S.C. § 1983 cause of action was affirmed, the Ninth Circuit did not address the negligence judgment. (App.54a, 59a, 78a.)

C. This Court's Decision Following Certiorari (March 30, 2017)

This Court vacated the Ninth Circuit's decision to award damages for the Plaintiffs' shooting injuries on the warrantless entry claim. (App.49a-50a.) This Court stated the proximate cause question required consideration of the "foreseeability or the scope of the risk created by the predicate conduct," and that there must be "some direct relation between the injury asserted and the injurious conduct alleged." (App.49a.) However, with respect to the Ninth Circuit's decision, this Court stated:

> The court reasoned that when officers make a "startling entry" by "barg[ing] into" a home "unannounced," it is reasonably foreseeable that violence may result. *But this appears to focus solely on the risks foreseeably associated*

> *with the failure to knock and announce*, which could not serve as the basis for liability since the Court of Appeals concluded that the officers had qualified immunity on that claim. By contrast, the Court of Appeals did not identify the foreseeable risks associated with the relevant constitutional violation (the *warrantless entry*); nor did it explain how, *on these facts*, respondents' injuries were proximately caused by the warrantless entry.

(App.49a-50a (citations omitted) (emphasis added).)

In finding the Ninth Circuit's proximate causation analysis was tainted, this Court stated the Ninth Circuit "conflated distinct Fourth Amendment claims and required only a murky causal link between the warrantless entry and the injuries attributed to it." (App.50a.) This Court ordered that "[o]n remand, the court should revisit the question whether proximate cause permits respondents to recover damages for their shooting injuries *based on the deputies' failure to secure a warrant at the outset*." (App.50a (emphasis added).)

D. Ninth Circuit Orders After Remand and Second Published Decision (July 26, 2018)

On September 29, 2017, the Ninth Circuit ordered the parties to file letter briefs addressing whether the Deputies' failure to secure a warrant at the outset was a proximate cause of the Plaintiffs' shooting injuries. (App.29a-31a.)

On January 23, 2018, the Ninth Circuit ordered the parties to prepare letter briefs addressing whether the damages were proximately caused by the "unlawful

entry itself," and whether the Plaintiffs could recover under a negligence theory. (App.32a-34a.)

On February 15, 2018, the Ninth Circuit directed Defendants to file another letter brief regarding whether the "unlawful entry itself" proximately caused the Plaintiffs' injuries, without revisiting "the analytically distinct question of whether the failure to get a warrant was the proximate cause of the injuries." (App.35a-37a.)

On July 27, 2018, the Ninth Circuit issued its published decision, finding the Plaintiffs' shooting injuries were proximately caused by the Deputies' warrantless entry, in violation of the Fourth Amendment. (App.2a.) Notably, the Ninth Circuit stated that whether the Plaintiffs' shooting injuries were proximately caused by the Deputies' failure to secure a warrant at the outset—*the issue framed by this Court*—was not the proper issue for it to decide. (App.7a-8a.) Instead, the Ninth Circuit stated the proper issue to determine was whether the Deputies' entry itself proximately caused the Plaintiffs' shooting injuries, and "what would have happened had the officers not unlawfully entered." (App.8a, 11a.)

In its analysis, the Ninth Circuit focused on "the risk of injury posed by the entry of an armed *stranger* into a residence," and *repeatedly equated a police officer's entry to that of a burglar*. (App.13a-14a (emphasis added).) The Ninth Circuit stated that "analogizing the acts of officers who unlawfully enter to those of burglars is apt," and further emphasized that "[b]urglary is dangerous because it can end in confrontation leading to violence." (App.14a.)

Furthermore, the Ninth Circuit repeatedly discussed the risks of a high alert entry into a home by police officers, *with their weapons drawn*. (App.14a-18a.) The Court of Appeals stated the possibility of misperceiving a threat is among the reasons why entry into a home "by armed police officers with *weapons drawn is dangerous*." (App.23a (emphasis added).)

In addition, the Ninth Circuit found that even if it were to decide the issue as framed by this Court, it would determine proximate causation was satisfied. (App.18a.) Specifically, the Ninth Circuit speculated that, had the officers secured a warrant, they would have devised a different *manner of entry* by taking "account of the risk of armed entry into an inhabited building," and "would likely have taken additional steps to prevent avoidable injuries to innocent third parties." (App.20a-21a.) Thus, "the failure to engage in this deliberate process foreseeably led to the Mendezes' injuries." (App.20a-21a.)

Furthermore, although the district court found *in favor of the Deputies* on the use of force claim under a negligence theory due to the immediate threat facing the Deputies and denied the Plaintiffs' request to amend the judgment after the California Supreme Court decided *Hayes* because liability could not be based upon pre-shooting conduct alone, the Ninth Circuit reversed the defense judgment on the negligence cause of action. (App.7a, 24a-26a.) In doing so, the Court of Appeals failed to apply a clearly erroneous standard of review. (App.24a-26a.)

REASONS TO GRANT THE PETITION

1. Review is necessary as the Ninth Circuit disregarded this Court's instructions on remand and *again* conflated the foreseeable risks of distinct constitutional violations in analyzing whether the Plaintiffs' shooting injuries were proximately caused by the Deputies' failure to secure a search warrant. The Ninth Circuit repeatedly discussed the foreseeable risks associated with an officer's failure to comply with the "knock and announce" requirement by focusing on the risks of an unannounced entry where the resident does not realize that a *police officer* is at the door. The Ninth Circuit further considered the foreseeable risks relating to a police officer's *manner of entry*, by also addressing the showing of force by police officers during a search.

In addition, review should be granted as the Ninth Circuit's decision conflicts with precedent by this Court regarding the foreseeable risks meant to be protected against by the warrant requirement, as set forth in *Hudson v. Michigan*, 547 U.S. 586, 594 (2006). While the interests protected by the knock and announce requirement may include preventing an *unreasonable seizure of a person from an officer's use of force*, the interests protected by a warrant to search property, do not.

Moreover, the Ninth Circuit's analysis was further flawed, as it focused upon the wrong conduct by addressing whether it was foreseeable that a police officer who has entered a home without a warrant may mistake a threat and discharge his weapon. However,

an officer may mistake a threat while performing a search *with or without a warrant*. In other words, there was no direct causal link between the Deputies' conduct in failing to secure a warrant and the shooting of the Plaintiffs. Rather, it was the *BB gun rifle aimed at the Deputies* which precipitated and was the direct cause of the shooting. Thus, the relevant issue is not whether it was foreseeable that an officer's warrantless presence could cause the officer to misperceive a threat and shoot a resident, but whether it was foreseeable that the officer's failure to secure a warrant could *cause a resident to point what appears to be a weapon at the police*.

A resident's inadvertent aiming of a weapon, or an object that reasonably appears to be a weapon, at a police officer, is a risk solely foreseeably associated with a knock and announce violation. The knock and announce requirement protects against the startling of a resident who may believe that an intruder, rather than a police officer, is entering, and further gives the resident an opportunity to ready himself to answer the door for the police, which a plaintiff may argue would include putting down any real weapons or items that could be mistaken for weapons.

Nevertheless, the Ninth Circuit erroneously held that a police officer, whose use of force was reasonable under *Graham*, may be held liable in a 42 U.S.C. § 1983 action for a plaintiff's shooting injuries based only on the officer's failure to secure a warrant before performing a search. Respectfully, this Court should resolve this substantial issue of federal law.

2. Review is further necessary to determine whether an incident which led to an officer's *reasonable*

use of force is a superseding event, cutting off any chain of causation for damages stemming from the officer's warrantless entry. This Court previously *certified this question for review* in relation to an unlawful entry, but did not decide the issue as the matter was remanded to the Ninth Circuit to re-assess proximate causation. (App.49a-52a.)

On remand, the Court of Appeals held the fact that Deputy Conley was faced with a gun pointed at him was not a superseding cause of the damages for Plaintiffs' shooting injuries. The Ninth Circuit's opinion directly conflicts with decisions by other Courts of Appeals regarding superseding causation in a 42 U.S.C. § 1983 action. The Third, Fourth, Sixth and Tenth Circuits have issued opinions holding that officers who unlawfully enter a home are not liable for harm caused by a *reasonable* use of force, as the event triggering the need for a reasonable use of force is a superseding cause of the harm. *Bodine v. Warick*, 72 F.3d 393, 400 (3d Cir. 1995); *Kane v. Lewis*, 604 Fed. Appx. 229, 234-35 (4th Cir. 2015), *cert. denied*, 136 S.Ct. 358 (2015); *Estate of Sowards v. City of Trenton*, 125 Fed. Appx. 31, 40-42 (6th Cir. 2005); and *James v. Chavez*, 511 Fed. Appx. 742, 747-48 (10th Cir. 2013).

Review should be granted to establish consistency regarding superseding causation in a 42 U.S.C. § 1983 action, where a plaintiff is injured from a *reasonable* use of force, which took place following a warrantless entry.

3. Review is further necessary to settle the proper standard of review when a federal Court of Appeals reviews a district court's findings of fact and conclusions of law under Rule 52(a) of the Federal Rules of Civil

Procedure and its determination that a police officer did not breach his duty to use reasonable force in a negligence action. The proper standard of review for a federal Court of Appeals to apply is a substantial issue of federal law which this Court should resolve.

Notably, there is a conflict among the circuit courts regarding the proper interpretation of this Court's decision in *McAllister v. United States*, 348 U.S. 19 (1954) regarding the correct standard of review to apply to negligence findings, and this Court should resolve the issue to provide uniformity of decision. The Second and Fourth Circuits indicate a *de novo* standard of review should apply, but the Second Circuit has questioned its interpretation of *McAllister* and indicated a desire for this Court to review and rule on the issue. *Payne v. U.S.*, 359 F.3d 132, 135-138 (2d Cir. 2004) (whether negligence should be reviewed under a clearly erroneous or *de novo* standard is an issue ripe for review by the Supreme Court).

Conversely, the First, Fifth, Seventh, Eighth, Eleventh and D.C. Circuits apply a clearly erroneous standard of review to negligence findings. *Clement v. U.S.*, 980 F.2d 48, 53 (1st Cir. 1992); *Gavagan v. U.S.*, 955 F.2d 1016, 1019 (5th Cir. 1992); *Grayson v. Cordial Shipping Co.*, 496 F.2d 710, 717 (7th Cir. 1974); *Sterling Drug, Inc. v. Yarrow*, 408 F.2d 978, 991 (8th Cir. 1969); *Hercules, Inc. v. Stevens Shipping Co.,* 765 F.2d 1069, 1073 (11th Cir. 1985); and *Hitchcock v. United States*, 665 F.2d 354, 359, n.3 (D.C. Cir. 1981).

Still other circuits have conflicting decisions. *See Davidson v. O'Lone*, 752 F.2d 817, 820 (3d Cir. 1984), *aff'd sub nom. Davidson v. Cannon*, 474 U.S. 344 (1986) (applying clear error standard to negligence finding);

but see Nolan v. Sullivan, 372 F.2d 776, 778 (3d Cir. 1967) (district court's conclusion of contributory negligence was not subject to clearly erroneous rule); and *Hicks v. U.S.*, 368 F.2d 626, 631 (4th Cir. 1966) (judge's negligence determination is freely reviewable on appeal); *but see Otis Elevator Co. v. Kass Realty Co.*, 353 F.2d 674, 675 (4th Cir. 1965) (the clearly erroneous rule applies to a finding of negligence); *see also Paducah Towing Co., Inc.*, 692 F.2d 412, 422, n.17 (6th Cir. 1982) (noting a circuit conflict and reviewing negligence findings for clear error, but the standard of care under a *de novo* review).

The Ninth Circuit has held that whether a defendant has breached a duty of care should be reviewed for clear error (*see Armstrong v. U.S.*, 756 F.2d 1407, 1409 (9th Cir. 1985)), but the Court of Appeal's published decision below fails to apply a clearly erroneous standard of review, in violation of *McAllister* and its own precedent. Indeed, the Ninth Circuit failed to even address the proper standard of review in its decision. Under a clearly erroneous standard, the Ninth Circuit was required to affirm the defense judgment on the negligence claim.

I. IN A 42 U.S.C. § 1983 ACTION, A PLAINTIFF'S INJURIES FROM AN OFFICER'S USE OF FORCE ARE NOT PROXIMATELY CAUSED BY THE OFFICER'S FAILURE TO SECURE A SEARCH WARRANT.

In a 42 U.S.C. § 1983 action, where a police officer has violated a plaintiff's Fourth Amendment rights by arresting the plaintiff without probable cause or by entering a residence without a warrant for which a neutral judicial officer has found probable cause for a search, there is no proximate causation between that

constitutional violation and any subsequent physical injury to the plaintiff. *See Brower v. County of Inyo,* 489 U.S. 593, 599 (1989) (unlike the *manner* in which a seizure was effectuated, a seizure solely lacking in probable cause is not the proximate cause of a plaintiff's physical injuries).

A physical injury due to a use of force is not within the scope of the risks of a police officer entering a home without a warrant as a matter of law, where the wrongful conduct at issue is not based upon the *manner of entry*, but the fact that the entry was without a warrant, in and of itself. Thus, the district court's finding that the warrantless entry did not cause the damages for Plaintiffs' shooting injuries (App.84a-85a), should have been affirmed. Nevertheless, the Ninth Circuit reached the opposite conclusion by conflating the foreseeable risks of separate constitutional violations and focusing upon the wrong conduct.

A. The Ninth Circuit Failed to Follow This Court's Directives on Remand and Conflated Risks Associated with an Officer's *Manner of Entry.*

This Court directed the Ninth Circuit to analyze whether the Plaintiffs' shooting injuries were proximately caused by the Deputies' *failure to secure a warrant at the outset*. (App.50a.) However, the Ninth Circuit stated the issue, *as framed by this Court*, was not the correct issue to be decided. (App.7a-8a.) Instead, the Ninth Circuit assessed whether the *entry itself* caused the Plaintiffs' shooting injuries, and repeatedly stated that if the Deputies had not entered the Plaintiffs' shed, the entire incident would have been avoided. (App.8a, 11a.) In finding liability, the Ninth Circuit

improperly confused "but-for" causation[1] (but for the Deputies' entry, the incident would have been avoided), with proximate causation (whether the injury occurred within the scope of the risks which make the conduct unlawful). *Bodine*, 72 F.3d at 400 (an officer is not liable for all harm caused in the "*but-for*" sense of an illegal entry). Nevertheless, under either framing of the issue, the shooting was not a foreseeable risk of the warrantless entry.

This Court has held the interests protected by the knock and announce requirement are: (1) *the "protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident*"; (2) the avoidance of the destruction of property occasioned by a forcible entry; and (3) "the elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the opportunity to prepare themselves for the entry of the police" and "*it assures the opportunity to collect oneself before answering the door*." *Hudson*, 547 U.S. at 594 (emphasis added). Thus, a recognized interest protected by the knock and announce requirement—the protection of life and limb—includes the protection against *the unreasonable seizure of a person from an officer's use of force*.

This Court has already specifically held the interests protected by the warrant requirement—to be free from unwarranted government intrusion—are *quite different* than the interests protected by the knock and

---

[1] A plaintiff pursuing a 42 U.S.C. § 1983 must prove but-for *and* proximate causation. *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 837 (9th Cir. 1996).

announce requirement. *Hudson*, 547 U.S. at 593; *see also United States v. Smith*, 526 F.3d 306, 311 (6th Cir. 2008) ("[t]he interests served by the knock-and-announce rule—protection of life and limb, protection of property and the opportunity to collect oneself before answering the door . . . *have nothing to do with whether the Fourth Amendment required the officers to obtain a warrant*.") (emphasis added). The interests protected by a search warrant *do not* include the protection against *the unreasonable seizure of a person from an officer's use of force*.

Despite the fact that this Court vacated the Ninth Circuit's prior decision in part because it conflated the foreseeable risks associated with the Deputies' separate constitutional violation of failing to comply with the knock and announce requirement, the Ninth Circuit *again* conflated those risks, addressing the risks foreseeable when a resident does not know a *police officer* is entering. Specifically, the Ninth Circuit focused upon "the risk of injury posed by the entry of an armed *stranger* into a residence," and repeatedly equated a police officer's entry to that of a *burglar*. (App.13a-14a (emphasis added).) However, those risks are clearly solely associated with a police officer's failure to knock and announce his presence before entering.

Moreover, the Ninth Circuit again cited to the concurrence in *McDonald v. United States*, 335 U.S. 451, 460-61 (1948) (Jackson, J., concurring), in which Justice Jackson stated that when a woman sees a *strange man, in plain clothes*, climbing in her bedroom window, her natural impulse would be to shoot, triggering a response by the officer (App.13a-14a.)

Justice Jackson was clearly referencing a scenario where the resident does not know it is a *police officer* who is entering. Indeed, in *Hudson*, this Court cited the same passage to show that a purpose of the *knock and announce requirement* is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident. *Hudson*, 547 U.S. at 594.

Furthermore, throughout the decision, the Ninth Circuit discussed the risks of entry into a home by armed police officers *with weapons drawn*. (App.14a-18a, 23a.) However, reasonableness under the Fourth Amendment involves separate inquiries regarding *when* an intrusion may be made, *i.e.*, whether there was probable cause for a search or seizure, and *how* the intrusion occurred, *i.e.*, whether the search was carried out with an excessive show of force, an excessive detention, compliance with the knock and announce requirement, etc. *See Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *Cameron v. Craig*, 713 F.3d 1012, 1021 (9th Cir. 2013) (apart from probable cause, a search may be invalid if carried out in an unreasonable manner based upon an excessive show of force); *U.S. v. Ankeny*, 502 F.3d 829, 836 (9th Cir. 2007).

Here, the Ninth Circuit speculated the officers would have devised a different *manner of entry* if they had obtained a warrant and therefore had more time to consider how they were going to enter, and concluded "the failure to engage in this deliberate process foreseeably led to the Mendezes' injuries." (App.20a-21a.) But, the trier-of-fact did not find the Deputies' manner of entry was unreasonable due to an *excessive show of force* (App.85a), and the record is

undisputed that Mr. Mendez did not point his BB gun rifle at the Deputies because they had their weapons drawn. (App.100a.) Rather, the incident occurred when Mr. Mendez sat up while moving his BB gun rifle as he was readying himself to open the door for his friend. (App.100a.) *Only* the knock and announce requirement protects against a surprise entry which startles a resident or which does not give him the opportunity to ready himself to open the door (which a plaintiff may argue would include putting away any weapons or items that reasonably appear to be weapons and refraining from pointing such objects at the police). *Hudson*, 547 U.S. at 594.

The Ninth Circuit conflated separate constitutional violations regarding the failure to secure a search warrant at the outset, and an officer's *manner of entry* into a home.[2] While it is conceivable the failure to comply with the knock and announce requirement may

---

[2] The Ninth Circuit cited *Attocknie v. Smith*, 798 F.3d 1252 (10th Cir. 2015), *cert denied*, 136 S.Ct. 2008 (2016) to state it was not alone in recognizing that an armed officer's "high-alert entry" can foreseeably lead the officer to use deadly force in response to a misapprehended threat. (App.14a.) In *Attocknie*, however, the officer "barged" into the decedent's home without knocking and announcing his presence, and shot the resident, who was holding a knife. *Attocknie*, 798 F.3d at 1256-57. The Tenth Circuit stated that because the use of force was only necessary as a result of the entry, a jury could properly find the unlawful entry caused the decedent's death. *Id.* However, the Tenth Circuit specifically stated that even if the officer had a search warrant, it "*would not overcome the requirement that the officer must knock and wait a reasonable time before entering*." *Id.* at 1257, n.3 (emphasis added). Accordingly, it appears liability was based upon the officer's failure to comply with the knock and announce requirement.

be the proximate cause of a plaintiff's injuries due to an officer's use of force, it is not foreseeable that an officer's failure to secure a search warrant, in and of itself and apart from the *manner of entry*, will cause physical injuries to residents inside a home due to an officer's use of force.

B. Misperceiving a Threat Is Not a Foreseeable Risk of a Warrantless Search.

The Ninth Circuit found that "armed officers entering a house will necessarily present a substantial risk to anyone in the house they perceive as being armed." (App.15a.) However, the Ninth Circuit focused upon the wrong conduct in analyzing whether the shooting of the Plaintiffs was within the scope of the risks of the warrantless entry, by attributing the shooting simply due to the fact of the *Deputies' entry/ presence*. But, the Deputies' warrantless entry, in and of itself, did not trigger the shooting of the Plaintiffs. Rather, the Deputies shot the Plaintiffs because Mr. Mendez unintentionally pointed what appeared to be a rifle at Deputy Conley. (App.100a.) Thus, the issue to be determined was whether it is foreseeable that a police officer's warrantless entry would *cause a resident to unintentionally point an object appearing to be a real weapon at the police officer*. As addressed above, the *inadvertent* aiming of a weapon at a police officer, either because the resident mistakenly believes an intruder is entering or because he did not have an opportunity to collect himself and put away any weapons or objects he is holding which appear to be real weapons before opening the door, is a risk solely associated with a police officer's failure to knock and announce his presence.

Moreover, the *intentional* aiming of a weapon at the police (which is not what happened here in any event) is clearly not within the scope of the risks for which the warrant requirement was meant to prevent, as a resident may only passively resist a warrantless intrusion, as a matter of law. However, the Ninth Circuit erroneously found the Plaintiffs' shooting injuries resulted as a normal course of the Deputies' unlawful acts, which *invited violence*. (App.15a-16a.) But, just as a citizen is not allowed to forcefully resist an unlawful arrest, he is likewise not allowed to forcefully resist a *police officer* who fails to secure a warrant before searching his home. *James*, 511 F. App'x. at 747 (a homeowner does not have a legal right to defend his home with deadly force against entry by *police officers* engaged in the performance of their duties, versus unknown intruders, simply because of the unlawfulness of the entry); *cf.* CAL. PENAL CODE § 834a (if a person knows or should know that he is being arrested by a peace officer, he must refrain from using force or any weapon to resist); and *Estate of Sowards v. City of Trenton*, 125 F. App'x. 31, 42 (6th Cir. 2005) (the warrantless entry violated only privacy interests and was not the proximate cause of the resident's death resulting from the officers' defensive use of force after he posed a deadly threat).

To the contrary, if a police officer conducts a warrantless search, the resident who questions the legality of the officer's actions must resolve the dispute peacefully through a civil action, *not by way of a physical attack on the officer*. *James*, 511 F. App'x. at 748 (citations omitted); *see also Gasho v. United States*, 39 F.3d 1420, 1427, n.12 (9th Cir. 1994) (citizens may *passively* resist a warrantless search); *Commonwealth*

v. Gomes, 59 Mass. App. Ct. 332, 342-43 (2003) (an individual may not forcibly resist a warrantless entry into his residence by a police officer—a rule to the contrary would encourage violence and result in grave consequences for all); and *Dolson v. United States*, 948 A.2d 1193, 1201-04 (D.C. App. 2008) (no one has the right to forcibly resist an unlawful arrest or an unlawful entry). Moreover, the Fourth Amendment does not require officers to present a warrant *before* commencing a search, in any event. *Groh v. Ramirez*, 540 U.S. 551, 562, n.5 (2004); and *United States v. Grubbs*, 547 U.S. 90, 98-99 (2006). Thus, a resident intentionally aiming a gun at a police officer is not within the scope of the risks, or a normal consequence of, an officer's entry into a home without a search warrant.

While the warrant requirement ensures a search is justified by probable cause and requires the detached scrutiny of a neutral magistrate to justify the intrusion (*Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 622 (1989)), it does not protect against a police officer misperceiving a threat and shooting residents during a search. Speculating that an officer will misperceive a threat if he fails to secure a warrant is too remote of a risk and is not directly related to the warrant requirement, and proximate causation cannot be established. An armed officer may misperceive a threat while performing a search with or without a warrant, or any time he performs any aspect of his official duties. As with any excessive force claim, if the officer acted unreasonably under the *Graham* factors, he will be liable for the use of force; otherwise, he will not bear responsibility for the use of force.

Review should be granted to settle the substantial issue of federal law regarding whether a police officer's failure to secure a search warrant may proximately cause a plaintiff's injuries resulting from an officer's use of force, in a 42 U.S.C. § 1983 action.

II. AN INCIDENT GIVING RISE TO A REASONABLE USE OF FORCE IS A SUPERSEDING EVENT CUTTING OFF CAUSATION OF DAMAGES FROM A WARRANTLESS SEARCH.

This Court should again grant review on the issue of whether a plaintiff's conduct which triggers a police officer's *reasonable* use of force is an intervening, superseding event which cuts off any chain of proximate causation from the warrantless entry.

A. Causation in a 42 U.S.C. § 1983 Action Is a Substantial Issue of Federal Law Which Should Be Settled by This Court.

A superseding act cuts off all liability from the defendant's wrongful act. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996). The act may be tortious or entirely innocent. 1 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 34 cmt. b. An event giving rise to an officer's *reasonable* use of force is a superseding act cutting off the chain of causation for damages stemming from an entry without a warrant.

It was not foreseeable to the Deputies that someone in the shed would attempt to shoot them simply for opening the door without a search warrant, and Mr. Mendez's unintentional act of pointing what appeared to be real rifle directly at the Deputies was a super-

seding cause of the Plaintiffs' shooting injuries. *White v. Roper*, 901 F.2d 1501, 1506 (9th Cir. 1990) (whether the plaintiff's own conduct was a superseding cause of his injuries depends upon what was reasonably foreseeable to the defendant).

While the Ninth Circuit speculated that an officer's presence inside a home could lead to the officer shooting someone he mistakenly perceives as a threat, it has already been determined the Deputies acted *reasonably* in believing the gun aimed at them was a deadly threat to their lives. That event was a superseding cause of the Plaintiffs' shooting injuries, and review should be granted.

B. The Ninth Circuit's Decision Conflicts with Decisions by Other Circuit Courts.

The Ninth Circuit's decision finding that conduct which precipitates an officer's *reasonable* use of force was not a superseding cause of a plaintiff's damages from a warrantless entry directly conflicts with decisions by the other circuit courts. *Bodine*, 72 F.3d at 400 (an event giving rise to the *reasonable* use of force is a "superseding cause" of damages stemming from an unlawful entry); *Lamont v. New Jersey*, 637 F.3d 177, 186 (3d. Cir. 2011) (if the officer's use of force was reasonable given the plaintiff's acts, the plaintiff's conduct would be a superseding cause, despite the illegal entry); *Hector v. Watt*, 235 F.3d 154, 160 (3d Cir. 2000) (same); *Kane v. Lewis*, 604 Fed. Appx. 229, 234-35 (4th Cir. 2015), *cert. denied*, 136 S.Ct. 358 (2015); *Estate of Sowards v. City of Trenton*, 125 Fed. Appx. 31, 40-42 (6th Cir. 2005) (irrespective of the warrantless entry, the handgun pointed at the officers was

a superseding cause of the Plaintiffs' shooting injuries); and *James*, 511 Fed. Appx. at 750.

Notably, the Ninth Circuit misconstrued *Bodine*, stating that in *Bodine*, then-Judge Alito set forth a hypothetical in which a resident intentionally shot at a police officer, whereas in this case, Mr. Mendez inadvertently aimed the BB gun rifle at the officers. (App. 22a-23a.) *However, in both scenarios, the officers' use of force was reasonable*. Because the Deputies *reasonably* believed their lives were threatened, they were allowed to use deadly force and that event cut off any damages caused from the warrantless entry. Review should be granted to ensure uniformity of decision.

III. A Federal Court of Appeals Must Apply a Clearly Erroneous Standard of Review to a District Court's Determination That a Defendant Did Not Negligently Breach a Duty of Care to Use Reasonable Force.

Under a clear error standard of review, the Ninth Circuit would have been required to affirm the judgment in favor of the Deputies on the Plaintiffs' negligence claim, as the district court's findings were plausible in light of the record.

A. The Proper Standard of Review of a District Court's Negligence Determination Is a Substantial Issue of Federal Law.

The proper standard of review for federal Courts of Appeals to apply is a substantial issue of federal law which should be resolved this Court. *See Pierce v. Underwood*, 487 U.S. 552, 558 (1988) (it must first be

decided whether a Court of Appeals has applied the correct standard of review, particularly when determining how to treat mixed questions of law and fact); and *Myers v. County of Lake, Ind.*, 30 F.3d 847, 851 (7th Cir. 1994) (federal law supplies the standard of review, while state law supplies the substantive standard of liability on a negligence claim).

Of course, resolution of factual disputes by a district court under Rule 52(a) of the Federal Rules of Civil Procedure are subject to a clearly erroneous standard of review. Fed. R. Civ. Proc. 52(a)(6); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Id.* Rather, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573-574 (emphasis added) (citations omitted).

However, a finding of negligence involves resolution of mixed law and facts. *See Exxon Co. v. Sofec, Inc.* 54 F.3d 570, 576 (9th Cir. 1995), *aff'd* 517 U.S. 830. In *McAllister*, this Court applied a clearly erroneous standard of review to a district court's determination of negligence (in an admiralty action) before a trial court without a jury. *McAllister*, 348 U.S. at 20-21; *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990) (negligence is generally reviewed deferentially). Thus, the Ninth Circuit's opinion, which fails

to apply a clear error standard, conflicts with decisions by this Court, and review should be granted.

B. There Is a Circuit Conflict Regarding the Proper Standard of Review to Apply to a District Court's Negligence Determination.

There is a conflict among the Courts of Appeal regarding *McAllister* and the proper standard of review to apply to negligence claims. For example, the Second Circuit has interpreted *McAllister* as applying the clear error standard only to causation findings and not to the issue of negligence. *Payne v. U.S.*, 359 F.3d 132, 136, n.3 (2d Cir. 2004). Hence, the Second Circuit applies a *de novo* standard of review to a district court's negligence findings. *Id.* at 135; *Ching Sheng Fishery Co., Ltd. v. U.S.*, 124 F.3d 152, 157 (2d Cir. 1997). However, the Second Circuit stated its reading of *McAllister* has been heavily criticized by the other circuits and that, even if its rule was reconcilable with *McAllister*, it may no longer be consistent with prevailing tort law, wherein the factfinder (court or jury) should assess what is reasonable under the circumstances. *Payne*, 359 F.3d at 135.

In *Hicks v. U.S.*, 368 F.2d 626 (4th Cir. 1966), the Fourth Circuit stated the ultimate conclusion to be drawn from the basic facts, *i.e.*, the existence or absence of negligence, is actually a question of law, freely reviewable on appeal. *Id.* at 630-631. However, subsequent Fourth Circuit decisions question *Hicks*, and indicate that a district court's findings of negligence are generally treated as findings of fact under Rule 52(a), reviewable for clear error. *See Bonds v. Mortensen and Lange*, 717 F.2d 123, 125 (4th Cir. 1983).

Furthermore, the First, Fifth, Seventh, Eighth and D.C. Circuits apply a clearly erroneous standard of review to a district court's negligence findings. *Clement v. U.S.* 980 F.2d 48, 53 (1st Cir. 1992); *La Esperanza de P.R., Inc. v. Perez y Cia. de Puerto Rico, Inc.*, 124 F.3d 10, 15 (1st Cir. 1997) (questions of negligence decided in a bench trial are reviewed under the clearly erroneous standard); *Gavagan v. U.S.*, 955 F.2d 1016, 1019 (5th Cir. 1992) (same); *Grayson v. Cordial Shipping Co.*, 496 F.2d 710, 717 (7th Cir. 1974); *Sterling Drug, Inc. v. Yarrow*, 408 F.2d 978, 991 (8th Cir. 1969); and *Hitchcock v. United States,* 665 F.2d 354, 359 n.3 (D.C. Cir. 1981).

The Sixth Circuit has held that although an appellate court will not overturn a district court's finding of negligence unless clearly erroneous, it is not so restricted when it considers whether a district court properly defined the standard of care. *Complaint of Paducah Towing Co., Inc.*, 692 F.2d 412, 422 (6th Cir. 1982).

In *Armstrong v. U.S.*, 756 F.2d 1407, 1409 (9th Cir. 1985), the Ninth Circuit stated the existence and extent of a duty of care are questions of law but whether such a duty has been *breached* is a question for the factfinder, whose determination is binding on appeal unless clearly erroneous. *See also Vollendorff v. U.S.*, 951 F.2d 215, 217 (9th Cir. 1991); *Louie v. U.S.*, 776 F.2d 819, 822 (9th Cir. 1985) (although the determination of whether established facts constitute negligence involves a mixed question of law and fact, the issue is reviewed for clear error); *Exxon*, 54 F.3d at 576 (a district court's findings of negligence are reviewed for clear error).

Despite the foregoing, the Ninth Circuit in this case did not apply a clearly erroneous standard of review to the district court's determination that the Deputies did not breach their duty of care to use reasonable force on the Plaintiffs' negligence claim. Specifically, because California follows the primary right doctrine, Plaintiffs could only recover damages for their shooting injuries by proving the Deputies' *use of force* was unreasonable—liability could not be based upon pre-shooting conduct alone. *Hayes*, 57 Cal. 4th at 622, 629-31, 637-38. While pre-shooting conduct could be a factor in determining the reasonableness of a use of force, *so is the immediacy of the threat facing an officer*. *Id.*; *Hernandez v. City of Pomona*, 46 Cal.4th 501, 514 (2009); California Judicial Council of California Civil Jury Instruction ("CACI") § 440.

In its findings of fact and conclusions of law, the district court found the Deputies' use of force was not negligent, due to the immediacy of the threat facing the officers. (App.139a, 161a.) The district court also re-analyzed the reasonableness of the Deputies' use of force after *Hayes* was decided and specifically considered the California Supreme Court's holding that pre-shooting conduct should not be considered in isolation, but only as part of the totality of circumstances. (App.79a-82a.) The district court concluded its negligence finding in favor the Deputies should stand on substantive grounds, based on the Deputies' overall conduct. (App.79a-82a.)

Nevertheless, the Ninth Circuit erroneously decided anew the reasonableness of the Deputies' use of force, based solely upon the Deputies' pre-shooting conduct in failing to knock and announce their presence

before entering. (App.25a.) However, under *Hayes*, the trier of fact must weigh the pre-shooting conduct along with the *Graham* factors used to determine the reasonableness of force under the Fourth Amendment, *including the immediacy of the threat facing the officers*. *Hayes*, 57 Cal.4th at 632, 639; CACI § 440. The Ninth Circuit did not consider the threat facing the officers in its *de novo* review. (App.25a.)

Plainly, based upon the undisputed, immediate threat facing the Deputies, the district court's decision that the Deputies' use of force was reasonable under the totality of the circumstances was not *clearly erroneous* and should have been *affirmed*, regardless of whether the Ninth Circuit would have weighed the evidence on the negligence claim differently. *See Biscotti v. Yuba City*, 636 Fed. Appx. 419, 424 (9th Cir. 2016) (Callahan, J., dissenting) (irrespective of pre-shooting conduct, defense judgment on negligence claim should have been affirmed based on threat posed to officers, who had a reasonable (even if incorrect) belief that the decedent threatened them with a shotgun); *see also Clark v. Ziedonis*, 513 F.2d 79, 82 (7th Cir. 1975) (Rule 52(a) determinations regarding the reasonableness of a use of force cannot be overturned on appeal in the absence of clear error); *Jacobs v. City of New Orleans*, 484 F.2d 24, 25 (5th Cir. 1973) (same).

The Ninth Circuit's decision conflicts with this Court's precedent and decisions by other circuit courts as well as other Ninth Circuit decisions regarding the applicable standard of review, and review should be granted to resolve this important issue of federal law and to provide uniformity of decision.

CONCLUSION

Based upon the foregoing, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MELINDA CANTRALL
COUNSEL OF RECORD
THOMAS C. HURRELL
HURRELL CANTRALL LLP
300 SOUTH GRAND AVENUE,
SUITE 1300
LOS ANGELES, CA 90071
(213) 426 2000
MCANTRALL@HURRELLCANTRALL.COM

COUNSEL FOR PETITIONERS

NOVEMBER 30, 2018