NO. 18-746

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

REPLY BRIEF OF PETITIONERS

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I. IN A 42 U.S.C. § 1983 ACTION, A PLAINTIFF'S SHOOTING INJURIES ARE NOT PROXIMATELY CAUSED BY A POLICE OFFICER'S FAILURE TO SECURE A SEARCH WARRANT.

A. The Ninth Circuit Disregarded This Court's Directives and Conflated the Risks of Separate Constitutional Violations.

This Court specifically directed the Ninth Circuit to determine whether the Deputies' "failure to secure a warrant at the outset" proximately caused Plaintiffs' shooting injuries. (App.50a.) The Ninth Circuit stated the foregoing framing of the issue was incorrect, as the proper inquiry was whether the *entry itself* caused Plaintiffs' shooting injuries. (App.7a-8a.)

However, proximate causation is not the same as causation-in-fact, *i.e.*, "but-for" causation. *Paroline v. United States*, 134 S.Ct. 1710, 1720 (2014). Proper analysis of proximate causation focuses upon the foreseeable risks resulting from the *injurious conduct alleged* and the scope of the risks created by that conduct. (App.49a.) Here, the Deputies' entry was unlawful *because the Deputies failed to obtain a search warrant.*[1] To say that the *entry itself* caused the Plaintiffs' shooting injuries is only looking at *causation-in-fact*, and not whether the harm was

[1] Consent or exigency are *exceptions* to the warrant requirement. *Kentucky v. King*, 563 U.S. 452, 459-460 (2011); *Soldal v. Cook County, Ill.*, 506 U.S. 56, 66 (1992).

within the scope of the risks which made the entry unlawful in the first place, *i.e.*, the Deputies' failure to secure a warrant at the outset.

On remand, this Court instructed the Ninth Circuit to identify the foreseeable risks associated with the relevant constitutional violation (the *warrantless* entry), and not the foreseeable risks of the constitutional violation from which the Deputies were immune from liability (the *unannounced* entry). (App.49a-50a.) Although both constitute *unlawful searches/entries*, this Court emphasized they are separate constitutional violations, for which proximate causation must be separately analyzed.[2] (App.49a-50a.)

The Ninth Circuit's failure to properly frame the proximate causation issue caused it to *again* conflate the risks associated with a knock and announce violation, *i.e.*, *risks occurring when there has been no communication to the resident that a police officer is entering*, which include the provocation of violence in supposed self-defense by a surprised resident who believes an intruder is entering, and the failure to provide the resident the opportunity to prepare himself to open the door to the police. *Hudson v. Michigan*, 547 U.S. 586, 594 (2006). For example, the Ninth Circuit stated:

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[2] Under the Ninth Circuit's misguided reasoning, the unlawful conduct for both a *warrantless* entry and an *unannounced* entry, would simply be a breach of a duty not to enter (App.8a), resulting in an *identical* proximate causation analysis focusing on risks from the *entry itself*. Such reasoning violates this Court's directions to refrain from conflating the foreseeable risks of the separate violations. (App.49a-50a.)

> The risk of injury posed by the entry of an *armed stranger* into a residence is one of the reasons the Fourth Amendment prohibits entry except under defined specific conditions.
>
> . . . .
>
> Justice Jackson was concerned that unlawful entries can invite precisely the sort of violence that occurred here, where "*an officer seeing a gun being drawn on him might shoot first*."[3]
>
> . . . .
>
> Looking to other cases involving unlawful entry—*including burglary*—can be instructive in assessing the proximate cause question.
>
> . . . .
>
> As evidenced by Justice Jackson's concurrence in *McDonald*, "*analogizing the acts of officers who unlawfully enter to those of burglars is apt*". . . . More recently, the Supreme Court has noted that "*[b]urglary* is dangerous because it can end in confrontation leading to violence". . . . *Burglary foreseeably creates the "possibility of a face-to-face confrontation between the burglar and a third party". . . . Stated another way, unlawful entry invites violence*.
>
> . . . .

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3 *This Court* cited Justice Jackson's discussion as an example of a foreseeable risk of a *knock and announce* violation. *Hudson*, 547 U.S. at 594.

> . . . It can be expected that some individuals will keep firearms in their homes to *defend themselves against intruders*.
>
> . . . .
>
> Entry by an officer, on alert, with weapon drawn, can foreseeably result in shooting injuries where the *officer mistakes an innocent implement for a weapon*.

(App.3a, 13a-15a, 18a (emphasis added) (citations omitted).) By defining the unlawful conduct too broadly, the Ninth Circuit included risks of an unlawful mode of entry in its proximate causation analysis.

Similarly, in their brief, the Plaintiffs are still addressing the foreseeable risks where a resident, "*not yet realizing that the intruder is a police officer*," attempts to defend himself against the *trespasser*. (Opp. Br.27-28, 24-25 (emphasis added).) The Plaintiffs state the Deputies entered the shed "*without giving the occupants any opportunity to recognize that they were police*." (Opp.Br.33 (emphasis added).) Review should be granted so proximate causation can be determined based only upon the *relevant* constitutional violation (the *warrantless* entry).

The Ninth Circuit alternatively held that if the Deputies had obtained a warrant they would have engaged in a "deliberate process" and likely remembered the shed was an inhabited dwelling and taken into account the "risks of armed entry." (App.20a-21a.) Not only is the Ninth Circuit's sparse analysis *complete speculation*, it improperly assesses foreseeable risks associated with the mode of entry. Moreover, the circular reasoning is nonsensical, as it assumes a police

officer who does not realize a dwelling is inhabited should obtain a warrant to search a residence so that he can remember the structure is inhabited.

B. A Plaintiff's Injuries Resulting from an Officer's Use of Force Are Not Proximately Caused by the Officer's Failure to Secure a Search Warrant.

In *Hudson*, this Court held the knock and announce requirement serves to protect *human life and limb*, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident, and it further gives the resident the opportunity to prepare for the entry of the police before answering the door. *Hudson*, 547 U.S. at 594. In other words, where there has been an *unannounced* entry and thus *no communication to the residents that police officers are entering*, it is foreseeable that tragedy may occur and that a police officer may physically injure a resident by seeing a weapon or what appears to be a weapon aimed at him. Thus, *physical injuries to a resident* from an officer's use of force are a foreseeable risk arising from a police officer's *unannounced* entry. *Id.*

Conversely, the interests protected by the search warrant requirement *do not* include the protection against *physical injuries to a resident* from an officer's use of force. *See Hudson*, 547 U.S. at 593; *compare to Brower v. County of Inyo*, 489 U.S. 593, 599 (1989); *see also United States v. Smith*, 526 F.3d 306, 311 (6th Cir. 2008); *Miller v. Albright*, 657 F.3d 733, 738 (8th Cir. 2011) (the plaintiff's warrantless entry claim did not encompass damages from the officer's use of force); and *Sebright v. City of Rockford*, 585 Fed.Appx.

905, 907 (7th Cir. 2014) (whether the officers lacked authority to enter the residence was not relevant to the excessive force analysis).

Unlike the knock and announce requirement, the warrant requirement is not meant to provide notice to residents that police officers are entering. It is not foreseeable that a *police officer's* entry into a home without a warrant, in and of itself, will result in physical injuries to a resident.

Furthermore, the incident did not occur because of the *entry itself* but because Mr. Mendez unintentionally aimed what appeared to be a BB gun rifle at the Deputies. Again, only the knock and announce requirement, and not the warrant requirement, protects against the startling of a resident who may believe an intruder has entered, or who has not had the opportunity to prepare himself for the police to enter.

A warrant protects a resident's privacy rights by providing authority for the police to enter, while the knock and announce requirement provides *notice* to a resident that *police* are entering. *Lack of authority* for the entry was not a proximate cause of the Plaintiffs' shooting injuries in this case.

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 previously *granted review* on the issue of whether an incident giving rise to a police officer's *reasonable* use of force is an intervening, superseding event which cuts off any chain of causation from a police officer's prior, unlawful entry. (App.52a.) This

substantial issue of law remains ripe for review by this Court.

Officers are not liable for all the harm caused in the "but for" sense of an illegal entry—damages stemming from an unlawful entry *do not* include damages resulting from a *reasonable* use of force. *Bodine v. Warick*, 72 F.3d 393, 400 (3rd Cir. 1995).

The Deputies' use of force under *Graham* was found to be *reasonable* by the district court. (App.136a-139a, 165a.) That ruling was not challenged by the Plaintiffs on appeal (9th.Cir.Dkt.34), and the defense judgment in favor of the Deputies on the excessive force claim under 42 U.S.C. § 1983 remains intact.[4]

The Ninth Circuit's decision directly conflicts with *Bodine*, as liability has been imposed against the Deputies for the Plaintiffs' physical injuries based upon the Deputies' warrantless entry, despite an intervening act to which the Deputies' responded with a *reasonable* use of force.

Plaintiffs maintain that a victim's behavior is not a superseding cause where the tortfeasor's actions are unlawful precisely because the victim foreseeably and innocently might act the way he acted. (Opp.Br.31.) Hence, Plaintiffs argue that *Bodine* is distinguishable, *as the plaintiffs in that case knew it was police*, rather than burglars, who were entering their home. Again, the fact that the Plaintiffs did not know police were entering their home was *solely* due to the knock and announce violation. The foreseeable risks from the

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[4] Thus, in its first decision, the Ninth Circuit addressed whether, despite the *reasonable* use of force, the Deputies could be liable under the "provocation rule." (App.58a-73a-75a.)

unannounced entry cannot be considered in analyzing proximate or superseding causation, given the Deputies are entitled to immunity from that claim.

Furthermore, Plaintiffs fail to address the law indicating that a superseding act can be innocent, and the fact that Mr. Mendez did not intend to threaten the Deputies does not prevent his conduct from being a superseding event. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 34 cmt. b ("[t]he act may be tortious or entirely innocent"); *White v. Roper*, 901 F.2d 1501, 1506 (9th Cir. 1990) (whether the plaintiff's conduct was a superseding cause of his injuries depends upon what was reasonably foreseeable to the defendant).

III. A CLEARLY ERRONEOUS STANDARD OF REVIEW APPLIES TO A DISTRICT COURT'S ULTIMATE NEGLIGENCE DETERMINATION AND THE NINTH CIRCUIT FAILED TO APPLY THE PROPER STANDARD OF REVIEW.

There is a circuit split regarding the proper standard of review to apply to a district court's finding of negligence. *See* 9C Wright & Miller, Federal Practice and Procedure: Civil § 2590 3d Ed (2018) ("There persists a surprising lack of uniformity on the scope of review of a finding of negligence."); *Grayson v. Cordial Shipping Co.*, 496 F.2d 710, 717, n.14 (7th Cir. 1974). The Second Circuit applies a *de novo* standard of review to a district court's negligence findings. *Payne v. United States*, 359 F.3d 132, 135 (2d Cir. 2004). The Second Circuit stated its standard has been heavily criticized, but is binding "unless it is rejected by the Supreme Court or by this Court after an in banc review." *Id.*

Plaintiffs cite to *In re City of New York*, 522 F.3d 279 (2d Cir. 2008), in an attempt to argue the Second Circuit no longer reviews a district court's negligence findings in a manner which conflicts with other circuits. However, that case holds the Second Circuit reviews a district court's "*ultimate conclusion of negligence de novo*." *Id.* at 82 (emphasis added). This standard *directly conflicts* with other circuits which do not apply a *de novo* standard of view to a district court's ultimate conclusion of negligence, *i.e.*, whether the defendant has *breached his duty of care*. *See e.g.*, *Vollendorff v. United States*, 951 F.2d 215, 217 (9th Cir. 1991).

Moreover, the Fourth Circuit has likewise indicated the ultimate determination of negligence is reviewed under a *de novo* standard. *See Hicks v. United States*, 368 F.2d 626, 630-31 (4th Cir. 1966); and *Cary v. United States*, 343 Fed.Appx. 926, 927 (4th Cir. 2009) (the district court's ultimate negligence finding is freely reviewable on appeal).

Defendants submit that in *McAllister v. United States*, 348 U.S. 19 (1954), this Court found a clearly erroneous standard of review applies to a district court's ultimate negligence determination, and the Plaintiffs *agree* such a decision should be reviewed for clear error. (Opp.Br.11.) As the Ninth Circuit plainly failed to apply a clearly erroneous standard of review, its decision conflicts with Supreme Court precedent, and review should be granted. Specifically, following trial, the district found in favor of the *Defendants* on the negligent use of force claim, as the Deputies did not breach their duty to use reasonable force

given the immediacy of the threat facing the officers. (App.139a, 161a.)

After the California Supreme Court decided *Hayes v. County of San Diego*, 57 Cal.4th 622 (2013), the district court re-analyzed the issue and again, after acknowledging that pre-shooting conduct was a factor to consider, found in favor of the Defendants on the negligent *use of force* claim. (App.79a-82a.) In other words, taking into consideration any negligent or reckless *pre-shooting* conduct by the Deputies *prior* to the use of force, the district court still found that the Deputies did not breach their duty to use reasonable force. *Given the immediate threat facing the Deputies, the district court did not clearly error in its decision.*

A. Plaintiffs Misconstrue the District Court's Findings and California Law.

Contrary to Plaintiffs' argument, the district court's statements that it did not view the conduct of the Defendants to be negligent apart from the unconstitutional search and unjustified failure to realize the Plaintiffs resided in the shed, cannot justify the reversal of the district court's decision that the Deputies' *use of force* was not negligent. While pre-shooting conduct may be considered in analyzing the reasonableness of the force, so too are the *Graham* factors and the immediacy of the threat facing the officers. *Hayes*, 57 Cal.4th at 622, 629-31, 637-38; *Hernandez v. City of Pomona*, 46 Cal.4th 501, 514 (2009); California Judicial Council of California Civil Jury Instruction § 440. The Ninth Circuit's review should have been limited to whether the district court's ultimate determination that the Deputies' use of force was not negligent, amounted to *clear error*.

Moreover, throughout their brief, Plaintiffs maintain the Ninth Circuit simply applied the district court's findings that the Deputies' conduct rose to a level of gross negligence or recklessness. (Opp.Br.1, 7, 13-14, 16, 18.) *Those statements by the district court were not in relation to the Deputies' use of force*. (App.161a, 164a-165a.) The district court found the Deputies' *use of force was not negligent*. (App.161a-163a.) 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. Thus, the Deputies' pre-shooting conduct, including the failure to recognize the shed was Plaintiffs' residence, the failure to knock and announce prior to entry, and/or the warrantless entry, could not, singularly or cumulatively, be an independent basis for the Plaintiffs to recover damages for their *shooting injuries*.

Instead, such conduct could only be considered as factors in determining the reasonableness of the use of force, in conjunction with the *Graham* factors, *including the immediacy of the threat facing the officers*. As the Deputies were faced with what reasonably appeared to be a deadly threat of a rifle aimed directly at them from a few feet away, the Ninth Circuit was required to affirm the defense judgment on the negligent use of force claim, as the district court did not *clearly error* in making its ultimate determination of negligence.

Indeed, even if the Ninth Circuit believed the district court did not properly consider the pre-shooting factors in determining whether the Deputies' *use of*

force was negligent (despite the fact the district court explicitly stated it did so in denying Plaintiffs' request to amend the judgment after *Hayes* was decided (App. 81a-82a)), it could not, as a reviewing court, balance the pre-shooting conduct against the immediacy of the threat facing the Deputies on appeal, and decide that the Deputies were, in fact, negligent. Rather, because the district court's decision that the Deputies' use of force was not negligent was not clearly erroneous in light of the immediacy of the threat facing the officers, the Ninth Circuit was *required* to affirm the defense judgment, under *McCallister*.[5] Thus, review should be granted as the Ninth Circuit's failure to apply the proper standard of review conflicts with Supreme Court precedent.

Finally, in contrast to Plaintiffs' claims, even if the negligence judgment on appeal stood despite the foregoing, review is warranted on the 42 U.S.C. § 1983 claim, as attorneys' fees are not available on a negligence cause of action under California law. Cal. C. Civ. Proc. § 1033.5(10). The district court awarded Plaintiffs nominal damages for the warrantless entry violation. If that finding was reinstated, Plaintiffs should not be entitled to recover attorneys' fees. *Farrar v. Hobby*, 506 U.S. 103, 112-13 (1992) (where only nominal damages are awarded, the only reasonable fee is usually no fee at all).

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[5] Notably, in its improper *de novo* review, the Ninth Circuit found the Defendants liable based upon the pre-shooting conduct alone, in essence invoking a state law "provocation" doctrine, *without even considering the immediacy of the threat facing the officers*. (App.25a.)

CONCLUSION

Respectfully, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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