

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 COUNTY OF LOS ANGELES, :

4 CALIFORNIA, ET AL., :

5 Petitioners : No. 16-369

6 v. :

7 ANGEL MENDEZ, ET AL., :

8 Respondents. :

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10 Washington, D.C.

11 Wednesday, March 22, 2017

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:21 a.m.

16 APPEARANCES:

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18 of the Petitioners.

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23 LEONARD FELDMAN, ESQ., Seattle, Wash.; on behalf of
24 the Respondents.

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P R O C E E D I N G S

(10:21 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in case 16-369, County of Los Angeles v. Mendez.

Mr. Rosenkranz.

ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

ON BEHALF OF THE PETITIONERS

MR. ROSENKRANZ: Thank you, Mr. Chief Justice, and may it please the Court:

Your Honor, when a police officer reasonably thinks to himself, as Deputy Conley did here, this is where I'm going to die, he has to be free to make the split-second decision to defend himself and those around him. Any legal rule that says that is unreasonable is untenable.

JUSTICE SOTOMAYOR: You know, I have a -- it is a very moving statement, and one that I totally agree with, but we're not asking the police officers to make that choice. When they feel in danger, they are going to take the step that's important to them, and I think that's absolutely right.

The issue is who's going to suffer that loss? Who's going to take the financial penalty of that loss, not that that's the -- the death of the officer.

1 And so the question to me is not that one. The question
2 is when does the police officer pay the victim who is
3 suffering for that loss if the victim had nothing to do
4 with causing the loss?

5 MR. ROSENKRANZ: Understood.

6 JUSTICE SOTOMAYOR: Or -- or was justified
7 in whatever he or she did to protect themselves.

8 So let's take the situation, which I think
9 you concede in your brief, that of the police officer
10 who, in the dead of night, in -- dressed in casual
11 clothes, breaks a window in someone's home and walks
12 into their home.

13 And we have given them the Second Amendment
14 right to victims, people who own homes, to possess
15 firearms to protect themselves. And the victim sees a
16 stranger breaking in who doesn't announce themselves,
17 doesn't have a uniform, and is standing there breaking
18 in. The victim shoots that police officer, or points a
19 gun at that police officer, and the police officer takes
20 a gun and shoots them and injures them or kills them.

21 Now who bears the financial loss in that
22 situation? The homeowner, who has a right to defend him
23 or herself and say it's my life or yours, or the police
24 officer who has taken unreasonable action in breaking
25 into a home in the middle of the night without

1 announcing him or herself? That's the question for me.

2 MR. ROSENKRANZ: Understood, Your Honor.

3 And the answer to that question is quite likely the
4 officer, but not because of the provocation rule, but
5 rather because the officer has committed a clearly
6 unconstitutional act, which is not just entering, but
7 also failing to knock and announce, clear violation of
8 clearly established law, which then proximately causes
9 what -- what unfurls next.

10 JUSTICE SOTOMAYOR: Well, let's -- let's
11 break that down, because I see two scenarios in this for
12 which a victim could -- could recover.

13 One is an unconstitutional violation that
14 proximately causes an injury. Okay? That's the theory
15 you come to. And the second is, if there was an
16 unreasonable use of force by the police officer. You're
17 taking out of the equation the second way of -- of
18 recovering?

19 MR. ROSENKRANZ: Yes, Your Honor. The use
20 of force by the police officer at that moment was
21 reasonable. But the police officer can be held liable
22 for violating clearly established law, and in particular
23 here, failing to inform the homeowner that this is an
24 officer entering and what proximately flows from that.

25 The problem with the latter theory, that is,

1 the provocation theory, as an excessive force matter,
2 is -- there are multiple problems.

3 The first is it imposes liability under
4 Plaintiffs' approach for a new breed of constitutional
5 tort, which is creating a dangerous situation without
6 regard to whether it's a search or a seizure, or, under
7 your scenario, Justice Sotomayor, even the Ninth
8 Circuit's test, there is something very incongruous
9 about holding an officer liable for a use of force that
10 is not excessive at the moment at which it is used, and
11 therefore is reasonable, and therefore, in compliance
12 with the Fourth Amendment, and this goes --

13 JUSTICE SOTOMAYOR: That's where I have -- '

14 JUSTICE KAGAN: Can I --

15 JUSTICE SOTOMAYOR: I'm sorry. Go ahead.

16 JUSTICE KAGAN: Can I ask about the first
17 theory, because you said if there was a violation --
18 excuse me -- of the knock-and-announce rule, and a death
19 or an injury proximately caused by that violation, then
20 there could be recovery.

21 Is that what you said?

22 MR. ROSENKRANZ: That is what I said.

23 JUSTICE KAGAN: Yes.

24 MR. ROSENKRANZ: So let me just -- let me
25 just amend with one -- I said one additional thing.

1 Knock-and-announce violation, and that
2 violation is a violation of clearly -- clearly --

3 JUSTICE KAGAN: Yeah, yeah, yeah, of course.

4 MR. ROSENKRANZ: -- established law.

5 JUSTICE KAGAN: And this is qualified
6 immunity context; everything has to be a violation of
7 clearly established law, quite right.

8 So I guess the question is, why is this case
9 any different? In other words, this case you don't have
10 the knock-and-announce violation; you have a different
11 constitutional violation, which is an unauthorized
12 entry. And why would it not be the case that the --
13 that the death or injury in such a case is also
14 proximately caused by that violation?

15 In other words, proximate cause says what
16 kind of things are foreseeable, and it says -- it sets
17 an outer bound, and it says totally flukey, random
18 things we're not going to say are proximately caused.
19 But it doesn't seem to me a flukey or random thing to
20 say when there is an authorized entry into somebody's
21 home, violence may well result. And so the proximate
22 cause analysis seems to flow in much the same way, maybe
23 not to quite the same -- like with -- quite the same
24 obviousness, but in much the same way as in your
25 knock-and-announce example.

1 MR. ROSENKRANZ: Your Honor, so -- let's
2 just be clear where we are. We're not talking about
3 starting with the violation; that is, the
4 knock-and-announce violation, or the violation of -- of
5 --

6 JUSTICE KAGAN: It's -- it's a simple
7 question, Mr. Rosenkranz.

8 MR. ROSENKRANZ: Yes.

9 JUSTICE KAGAN: You said something about
10 knock and announce. I say why isn't the same theory
11 applicable when the constitutional violation is
12 unauthorized entry into somebody's home?

13 MR. ROSENKRANZ: For a very simple reason,
14 Your Honor. We've got to start with a clearly
15 established violation. Here the only one in play is a
16 failure to call a judge in advance and, for example, get
17 a telephonic warrant.

18 JUSTICE KAGAN: That is an unauthorized
19 entry into somebody's home.

20 MR. ROSENKRANZ: Yes, it is.

21 JUSTICE KAGAN: So that is the clearly
22 established constitutional violation.

23 MR. ROSENKRANZ: Correct.

24 JUSTICE KAGAN: Why isn't the proximate
25 cause -- why it -- why wouldn't it be that a death or

1 injury that results when somebody barges into, goes into
2 somebody's home without legal authorization, that one of
3 the things that foreseeably can result from that is a
4 shooting?

5 MR. ROSENKRANZ: Well, Your Honor, the
6 answer is that calling the judge in advance would not
7 have made a bit of difference in this case.

8 JUSTICE KENNEDY: Well suppose --

9 MR. ROSENKRANZ: The facts --

10 JUSTICE KENNEDY: Suppose this case, police
11 arrest without a warrant a man who's having dinner with
12 his family and friends, white collar crime. They did
13 not get a warrant. They did have probable cause. They
14 could have gotten a warrant. And he sues -- and later
15 the charges are dismissed, it was a mistake, but there
16 was still probable cause. And he sues for fright and
17 humiliation. Under your theory, you'd say, well, even
18 if he got a warrant, he'd have the same fright and
19 humiliation, so there's -- there's no damage.

20 MR. ROSENKRANZ: That's correct, Your Honor,
21 because the warrant requirement --

22 JUSTICE KENNEDY: Then -- then we simply
23 have no way to enforce the warrant requirement. So --
24 so you stand by the proposition that if there is an
25 unlawful entry, an unlawful arrest because of a lack of

1 a warrant, no damage because the arrest would have
2 happened with -- with the warrant anyway.

3 MR. ROSENKRANZ: Your Honor, I'm not
4 saying --

5 JUSTICE KENNEDY: You want us -- you want us
6 to write that in the law.

7 MR. ROSENKRANZ: I'm not saying no damage,
8 but certainly not the physical injury that occurred
9 here. But let me play out the reason for the answer,
10 Your Honor.

11 JUSTICE KENNEDY: Yeah, let's stick with
12 this -- with this hypothetical. Under your view, we're
13 saying that you cannot sue for damages and humiliation
14 if there's an entry without a warrant if there had been
15 probable cause otherwise. That's -- that's the rule you
16 want us to announce.

17 MR. ROSENKRANZ: If the search --

18 JUSTICE KENNEDY: And if that's -- and if
19 that's so, I'd like the citation for that case.

20 MR. ROSENKRANZ: Your Honor, if the
21 search --

22 JUSTICE KENNEDY: For -- for that.

23 MR. ROSENKRANZ: If the search would have
24 happened no matter what, yes, there may be humiliation,
25 sure, because, I mean, if -- if the warrant would have

1 prevented that humiliation, then you could sue for it.

2 JUSTICE KENNEDY: Now, let's assume that it
3 wouldn't. In fact, it would have been even worse
4 because a judge would have ordered the arrest.

5 MR. ROSENKRANZ: Then -- then there's
6 definitely no damage. But let -- let me just link
7 your -- your --

8 JUSTICE GINSBURG: Can -- can you tell me if
9 Paula Jones on your theory -- Paula Hughes -- Paula
10 Hughes, the homeowner, who was -- there was no warrant
11 and she was placed in a car and treated rather badly,
12 would she have a 1983 claim?

13 MR. ROSENKRANZ: She may well have a 1983
14 claim, Your Honor, for -- for the poor treatment when
15 she was not actually a criminal. But I do need to -- I
16 do want to get to Justice Kennedy's question and link it
17 to the answer that I never got to, to Justice Kagan.

18 On the facts presented in this appeal, the
19 judge would have granted the warrant no matter what
20 because the deputies had probable cause. And the
21 deputies then would have done exactly what they did
22 here, and the result would have been exactly the same.
23 Calling the judge would not have changed the outcome.
24 And that's why there's no probable cause.

25 And it's telling that the --

1 JUSTICE KAGAN: But it might very well
2 change --

3 MR. ROSENKRANZ: Proxima --

4 JUSTICE KENNEDY: -- proximate -- proximate.

5 MR. ROSENKRANZ: As proximate cause. Sorry.

6 JUSTICE KAGAN: It might very well change
7 the outcome. When somebody shows up with a warrant,
8 they show it -- they show the warrant, they have legal
9 authority, people act very differently than when
10 somebody shows up with no warrant and says, I don't have
11 authority. I'm coming in anyway. That's a very
12 different set of circumstances that a homeowner has to
13 respond to.

14 And what is for -- what foreseeably happens
15 where there is a warrant is not the same thing. When
16 somebody -- when a police officer has legal authority,
17 tells the homeowner he has legal authority, the set of
18 results that happens is just not the same as when a
19 police officer just says, "I'm here, I don't have any
20 legal authority, I'm coming in anyway".

21 MR. ROSENKRANZ: Your Honor, every fact that
22 you've recited beyond not having the warrant is a fact
23 that you've inserted into the scenario that is all about
24 giving notice to the -- to the suspect. Warrants are
25 not designed to give notice to anyone. You could show

1 up with a telephonic warrant that shows -- that shows
2 the homeowner nothing at all. This Court said in Grubbs
3 it is not the perfect -- the premise of --

4 JUSTICE KAGAN: Well, it's -- it's possible.
5 I mean, I take the point, Mr. Rosenkranz, it's possible
6 that you have a warrant in your pocket and you don't say
7 anything about it, although that would seem like very
8 silly -- stupid police work. But the prototypical case
9 when somebody has a warrant is that they tell a
10 homeowner they have a warrant and that they have a right
11 to be on the premises. That's what usually happens.

12 And similarly, what often happens is that
13 when somebody doesn't say that to a homeowner, they are
14 making it far more likely that violence will ensue. And
15 certainly the kind of violence that could ensue is not
16 the kind of flukey, random stuff that is filtered out by
17 a proximate cause inquiry.

18 MR. ROSENKRANZ: Your Honor, I -- I
19 disagree. The reason officers announce themselves
20 before executing a warrant is not the fact that they
21 have a warrant, but because there is a separate
22 constitutional command of knocking and announcing with
23 or without a warrant. That was a separate mistake that
24 the officers made here. That was held to be not a
25 violation of clearly established law, and therefore,

1 cannot be the basis of liability. And it is telling
2 that every time plaintiffs refer to what caused this
3 injury and every time the Ninth Circuit refers to what
4 caused this injury, it is a reference to startling,
5 unannounced, without warning, without notice, all of the
6 things that you've woven -- woven into your
7 hypothetical.

8 That is not the violation of clearly
9 established law here. The violation of clearly
10 established law here was the failure to get a search
11 warrant in advance. And search warrants, this Court
12 held in *Grubbs*, are not designed to provide a topic of
13 conversation or to provide notice to the suspect.
14 Knock-and-announce is designed to provide notice, but
15 that can't be a basis of liability here.

16 JUSTICE BREYER: Why -- why do you break --
17 why is everyone breaking it down in this way? That's
18 what I'm having trouble with.

19 MR. ROSENKRANZ: Well, Your Honor --

20 JUSTICE BREYER: Why -- why -- why not just
21 say, look, there was a seizure. It killed him or
22 wounded him. It's a seizure. In fact, the question is,
23 was that seizure -- i.e., shooting him -- was that
24 seizure unreasonable and clearly unreasonable? And the
25 answer to yes is, yeah, look at all the circumstances.

1 There's one, they went into the house
2 without even telling the woman. Then they break into --
3 they go into the other house without a warrant, without
4 telling anybody. I'm -- I'm not saying that those are
5 independently violations of the Constitution, though
6 they might be.

7 MR. ROSENKRANZ: Well, Your Honor --

8 JUSTICE BREYER: If you look at the whole
9 situation and say, you know what this is like? It's
10 like the classic tort case. Somebody pushes somebody
11 else into the street where he is run down by a negligent
12 driver. Is the individual -- there's a supervening
13 cause, negligent driver. Of course they're liable,
14 because that's what happens. You expect negligent
15 drivers, and similarly, you expect people to defend
16 themselves.

17 That's a -- why -- why -- what's wrong with
18 that?

19 MR. ROSENKRANZ: Well, Your Honor, what's
20 wrong with that is -- is that this Court's methodology
21 is to -- especially in cases involving personal
22 liability to officers, is you start with a violation of
23 clearly established law. You started, Justice Breyer,
24 with the seizure. The seizure was not a violation of
25 clearly established law.

1 JUSTICE BREYER: I mean, if you break it
2 down temporally, second by second. But if you look at
3 the whole situation?

4 MR. ROSENKRANZ: Right. So I -- I see my --
5 my rebuttal time has started. Let me answer very --

6 JUSTICE BREYER: Save your rebuttal.

7 MR. ROSENKRANZ: But let me answer very
8 briefly, though, that -- that what you've done now with
9 the excessive force piece is to focus not on the
10 decision that the officer makes at that moment, which is
11 the critical decision under Graham, but to find that
12 what he did was unreasonable, even though the court of
13 appeals and the district court found it to have been
14 reasonable at that moment.

15 Thank you, Your Honors.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Ms. Saharsky.

18 ORAL ARGUMENT OF NICOLE A. SAHARSKY

19 FOR UNITED STATES, AS AMICUS CURIAE,

20 SUPPORTING THE PETITIONERS

21 MS. SAHARSKY: Mr. Chief Justice, and may it
22 please the Court:

23 We have two questions in this case. And I
24 think I'd like to pick up with that -- where my
25 co-counsel left off, which was with Justice Breyer's

1 question, which I think goes to the first question
2 presented. And I think the question was, why can't we
3 just say that we can consider the facts of causing the
4 situation as part of the reasonableness inquiry?

5 And the answer there is because the question
6 that we're answering under Graham is, was the officer's
7 force -- use of force reasonable in the circumstances
8 that he faced? And those -- those depend really on two
9 sets of facts.

10 One: What was the individual doing? Was
11 the person a threat? Did he have a weapon? A
12 propensity to use it? Was a member of the public at
13 risk? Was he fleeing, committing a crime, et cetera?

14 And two: How did the officer respond to it?
15 What were the officer's options? What did the -- was
16 the officer's use of force proportional, et cetera?

17 It doesn't ask whether the police officer
18 created the situation. It takes stepping into the
19 shoes, the situation --

20 JUSTICE SOTOMAYOR: So, why is it that every
21 Graham case we look at, all the car chase cases, every
22 single one of them, we -- when we're talking about the
23 situation facing the officer, we look at everything the
24 officer and the victim did that led up to the moment of
25 confrontation. Because all of the facts that you point

1 to as the police officer's knowledge of the victim are
2 facts that usually are intertwined with what led up to
3 the incident.

4 So if you look at a car chase, you're
5 looking at a person who, over an extended period of
6 time has driven a car crazily, has put other people at
7 risk, has swerved and missed other cars, done a series
8 of things that the officer is aware of because he
9 participated in the chase, and at the moment that he is
10 looking at what the victim -- what the defendant is
11 doing, he's saying he drove the car and almost hit
12 another car, he's pointing the car at me, he's going to
13 hit me.

14 And -- but you're looking at both sides of
15 that equation. You're not ratcheting it up on one side

16 MS. SAHARSKY: Well, you're right that
17 you're looking at all of the facts and circumstances,
18 but those that bear on whether the use of force is
19 reasonable.

20 And just to give an example, in Plumhoff,
21 which is one of the car chase cases that the Court
22 addressed, the district court in that case said well,
23 the police officer was chasing him, so the police
24 officer helped create the dangerous situation, and this
25 Court in footnote 3 of its opinion said: No. Police,

1 by doing their jobs, don't -- aren't responsible for
2 creating the dangerous situation and don't forfeit the
3 ability to defend themselves --

4 JUSTICE SOTOMAYOR: But why isn't --

5 MS. SAHARSKY: -- from the public.

6 JUSTICE SOTOMAYOR: -- how they do their
7 job, because they have to know -- they have to know what
8 reasonable people will do. I mean, if -- if a 1983
9 claim is a tort claim, and if they jump in front of a
10 car, of a total stranger on the street, and the person
11 is coming at them, should that person behind the wheel
12 bear the brunt of an injury because the police officer
13 says the car was coming towards me, so to save myself, I
14 pulled the gun and shot them, even though this is Joe
15 Blow who's never been arrested, doesn't own a gun, never
16 knew the officer had jumped into the street? If a
17 normal person did that, they'd pay for that victim's
18 injury. Why does a police officer get a pass on that?

19 MS. SAHARSKY: Well, as a general matter,
20 Section 1983 is about courts setting clearly established
21 constitutional rules for the police that the police have
22 to follow. It's not a question of asking whether the
23 police just behaved reasonably in the abstract, but in
24 terms of each thing that the police officer did and
25 whether it followed the established rule, the

1 established rule --

2 JUSTICE SOTOMAYOR: So is it --

3 CHIEF JUSTICE ROBERTS: Counsel --

4 JUSTICE SOTOMAYOR: -- for a police officer
5 to pull a gun and shoot a driver that has no guilt
6 associated with him or her? Not an armed felon, just a
7 normal person to stumble into the street and say, I'm a
8 police officer, I'm going to seize that person and stop
9 myself by being injured by shooting that person?

10 MS. SAHARSKY: Well, I think you would ask
11 in that question what -- whether there really was a
12 threat that the officer was responding to, and I think
13 you're positing a situation where there really wasn't a
14 threat there. But I think in this circumstance,
15 everyone recognized that there was a threat facing these
16 officers who are going about doing their police business
17 in good faith, and they see a person pointing what
18 appeared to be a gun at them. And what the Ninth
19 Circuit said is: We're going to second-guess everything
20 else that you did that day, and even though this use of
21 force was reasonable under Graham, we're going to hold
22 you liable for it.

23 CHIEF JUSTICE ROBERTS: Counsel, it -- it --
24 I just want to put the discussion so far this morning in
25 the right framework. We're talking about the second

1 question presented, right? None of this, it seems to
2 me, to be involved the provocation rule in the Ninth
3 Circuit, at least the question about did they get a
4 warrant, did they knock, announce. How do you
5 understand the Ninth Circuit's provocation rule in
6 distinction to what we've been talking about in terms of
7 proximate cause and things like that?

8 MS. SAHARSKY: Sure. The provocation rule
9 takes, under the Ninth Circuit's precedence, a
10 reasonable use of force and deems it unreasonable
11 because the police made an earlier constitutional
12 mistake, and we think that that is just flatly wrong.
13 You should --

14 CHIEF JUSTICE ROBERTS: So as -- as that's
15 describe -- is the label what's wrong? I -- I would
16 think of provocation is something fairly immediate,
17 something that causes the pulling of the gun by the --
18 the victim or something like that. I don't think of it
19 as provocation that you should have gotten a search
20 warrant earlier in the day but you didn't, and that led
21 to this.

22 MS. SAHARSKY: I mean the thing that's wrong
23 is what the Ninth Circuit is doing, which is saying the
24 police created the situation by doing things that are
25 not constitutional violations, but that the Ninth

1 Circuit later finds, with the benefit of 20/20
2 hindsight, to be reasonable -- unreasonable. And that's
3 actually what we've seen.

4 We've had this doctrine in the Ninth Circuit
5 for 20 years now. It's incredibly ill-defined, does not
6 put in place clear rules for the police. And the kinds
7 of things that the Ninth Circuit is second-guessing is,
8 maybe the police should have used a hostage negotiator
9 for longer before going into the house in Alexander.
10 That's the one with the sewage seeping outside of the
11 house. They tried to spend a month trying to talk to
12 that guy. They went to his house. Used a hostage
13 negotiator.

14 Or the situation in Sheehan where there was
15 a very difficult situation with a mentally ill woman who
16 was threatening the police, and the Ninth Circuit said
17 the police should have tried to calm down the situation
18 for longer. I mean, these are incredibly difficult
19 determinations that are being made. And under the Ninth
20 Circuit's rule, the Ninth Circuit's just second-guessing
21 doing exactly what this Court has said shouldn't be
22 done.

23 JUSTICE KENNEDY: But isn't --

24 MS. SAHARSKY: So the best --

25 JUSTICE KENNEDY: -- isn't that a little bit

1 different than the provocation rule at 25(a) where they
2 say there was no warrant and therefore there's -- those
3 are two different things, right.

4 MS. SAHARSKY: Right. We understand those
5 to be the two alternative holdings from the first
6 question presented and the second question presented.

7 So the second question presented isn't
8 talking about whether the use of force is
9 constitutionally excessive, clearly established
10 violation. It's talking about, was there a violation
11 with the entry and did that proximately cause the
12 damages at issue. And if I can address that question.

13 We just think there's a fundamental
14 problem --

15 JUSTICE KAGAN: Do you --

16 MS. SAHARSKY: -- with the Ninth's --

17 JUSTICE KAGAN: -- before -- can I just --
18 do you agree in general, before you address the question
19 in particular, do you agree in general what that
20 framing -- that if there is an independent
21 constitutional violation and if it does proximately
22 cause the injury, then there's a 1983 action?

23 MS. SAHARSKY: In general, yes. I mean,
24 1983 imposes liability and damages for clearly
25 established constitutional violations, and although this

1 Court has had very few opportunities to address
2 causation in the Section 1983 context, it has said as a
3 general matter it would start with tort law principles,
4 and I think those would include proximate causation and
5 superseding-cause principles.

6 But we have a problem in this case in what
7 the Ninth Circuit found was the proximate cause of the
8 injuries in this case was the failure to knock and
9 announce. But the fail -- failure to knock and announce
10 was not a violation of clearly established law. The
11 officers have qualified immunity for that.

12 JUSTICE KAGAN: So that seems fair enough.
13 But then the question might become, whether here or on
14 remand, whether an unauthorized entry, where there was a
15 clearly established violation, whether one could say
16 that that was the proximate cause of the shooting.

17 MS. SAHARSKY: Yes. And I think there's two
18 answers to that question, one about this case and
19 second, more generally.

20 About this case, the analysis by the Ninth
21 Circuit was that it was the knock-and-announce and not
22 the warrant, and if I could just illustrate this. In
23 this case, you had officers that did not have a warrant
24 and did not knock and announce. But imagine that they
25 did have a warrant and still didn't knock and announce.

1 What the Ninth Circuit said was the problem was the
2 startling entry. So with or without the warrant, you
3 would have had this problem from the knock-and-announce,
4 but as we discussed, the knock-and-announce is
5 immunized.

6 As a general matter, I think the point that
7 Petitioners were making at argument and in their -- in
8 the brief is well taken, that the scope of the risks for
9 a warrant violation as opposed to the scope of the risk
10 for a knock and a -- knock-and-announce violation are
11 very different.

12 JUSTICE KAGAN: But one of -- a warrant
13 violation is just -- it's -- it's just saying
14 unauthorized entry. And the question is whether it's
15 within the normal scope of the risk, but an unauthorized
16 entry produces violence, not that it always or probably
17 produces violence, but that it might produce violence in
18 the way we kind of ask when we do proximate cause
19 analysis.

20 MS. SAHARSKY: Right. And I don't think
21 that we would say that an unauthorized entry itself
22 normally produces violence when you're talking about --

23 JUSTICE KAGAN: Doesn't have to, normally.
24 It doesn't have to --

25 MS. SAHARSKY: Proximate cause --

1 JUSTICE KAGAN: Or -- you know, proximate
2 cause is just we filter out the really fluky stuff.

3 MS. SAHARSKY: Well, I -- we understand
4 proximate cause in the scope of the risks as being what
5 are the natural and probable consequences of your
6 actions, what are the risks that make the conduct
7 tortious, what bad things do you think are going to
8 occur if you do this.

9 And in the warrant context, we're talking
10 about police showing up at the door. And, no, we don't
11 think that it is generally a reasonable reaction when
12 police show up at the door with or without a warrant
13 that you'd react violently. And that's what Grubbs said
14 is that when the police come to your door, you submit at
15 that time, and that you can challenge the warrant in
16 court later.

17 Could I have one more sentence?

18 CHIEF JUSTICE ROBERTS: Well -- and also if
19 you could get to Justice Kennedy's hypothetical.

20 MS. SAHARSKY: Okay. Just to finish this,
21 but the Court has recognized that you have a problem in
22 the knock-and-announce context that you don't know that
23 they are the police. And so in that context there
24 really is a potential risk of violence. Once you know
25 that they're the police, a citizen is expected to stand

1 down.

2 Justice Kennedy's hypothetical, if I
3 remember it, I think is an arrest without probable cause
4 and the damages that --

5 CHIEF JUSTICE ROBERTS: No, no --

6 JUSTICE KENNEDY: There -- there is probable
7 cause --

8 MS. SAHARSKY: Oh, I'm sorry.

9 JUSTICE KENNEDY: But there was a failure to
10 get a warrant.

11 MS. SAHARSKY: Yes.

12 JUSTICE KENNEDY: And there should have been
13 a warrant.

14 MS. SAHARSKY: Right. I think that the
15 question you would ask in that case is the normal
16 proximate cause question about what kind of damages, you
17 know, would there be from a failure to get a warrant in
18 those circumstances, what's natural and foreseeable. So
19 I'm -- I wouldn't say --

20 JUSTICE KENNEDY: And if the humiliation is
21 the same either way, no damage?

22 MS. SAHARSKY: I'd -- I'm not saying that it
23 depends on whether proximate cause and you could have
24 gotten a warrant. I'm just saying that you look at what
25 actually happened and determine the -- the natural and

1 probable consequences from that.

2 I mean, the Court -- just maybe one more
3 sentence.

4 The Court has not had a lot of opportunities
5 in the 1983 concept -- context to work out these
6 probable cause cases. I think in some of the Court's
7 other opinions you've said probable cause is a very
8 flexible concept. Courts of appeals have a lot of
9 experience doing it, this Court less, and that's why we
10 would say to decide the second question presented very
11 narrowly and not get into all of these questions.

12 CHIEF JUSTICE ROBERTS: Thank you --

13 JUSTICE ALITO: Can I ask a follow-up
14 question on that?

15 CHIEF JUSTICE ROBERTS: Sure.

16 JUSTICE ALITO: Isn't -- if, in
17 Justice Kennedy's hypothetical that there had been an
18 application for a warrant, isn't it entirely possible,
19 particularly under the facts that he hypothesized, that
20 the judge would say you don't need an arrest warrant in
21 this situation? You can ask the defendant's attorney to
22 bring the defendant in and surrender. I know that
23 that's happened quite a few times.

24 MS. SAHARSKY: Sure. That's something that
25 could happen.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Feldman.

4 ORAL ARGUMENT OF LEONARD J. FELDMAN

5 ON BEHALF OF THE RESPONDENTS

6 MR. FELDMAN: Thank you, Mr. Chief Justice,
7 and may it please the Court:

8 If the Court reaches the constitutional
9 issue in the case, we believe that the Court should
10 adopt the following standard: Where a government
11 official takes action that foreseeably creates a need
12 for the use of force and results in that use of force,
13 Graham Scott balancing should be applied to determine
14 whether that action is objectively unreasonable.

15 And we are not, as Petitioners' counsel
16 suggested, suggesting to this Court that it adopt a new
17 breed of a constitutional tort. This Court has always
18 focused on the totality of the circumstances and there
19 is a long line of cases culminating in *Kentucky v. King*
20 that recognizes the constitutional significance of
21 predicate acts.

22 JUSTICE SOTOMAYOR: Can you repeat that
23 standard?

24 MR. FELDMAN: The standard that we suggest
25 that this Court adopt is that where a government

1 official takes action that foreseeably creates a need
2 for the use of force and results in that use of force,
3 Graham Scott balancing should be applied to determine
4 whether that action is objectively unreasonable.

5 Under Graham and Scott, courts would, of
6 course, consider the governmental interest at stake, the
7 nature and quality of the intrusion on the individual's
8 Fourth Amendment interests, and the relative culpability
9 of those affected by the decision.

10 JUSTICE KENNEDY: Are you defending the
11 Ninth Circuit's statement at page 22A of the Petition
12 Appendix? "Here the District Court held that, because
13 the officers violated the Fourth Amendment by searching
14 the shack without a warrant, which proximately caused
15 the plaintiff's injuries, liability was proper."

16 MR. FELDMAN: That is an appropriate way to
17 find liability in this case.

18 JUSTICE KENNEDY: I -- I just don't see the
19 proximate cause between failure to get the warrant and
20 what happened here.

21 MR. FELDMAN: Well, there were two proximate
22 causes here. One proximate cause was the unlawful
23 entry. The entry was unlawful because there was no
24 warrant. The second proximate cause, as the lower
25 courts recognized, was the failure to announce. And it

1 was those circumstances that are the objectively
2 unreasonable behavior of the officers --

3 CHIEF JUSTICE ROBERTS: Well, not the second
4 one. I thought the -- the failure to announce they
5 determined -- and I understand you to accept it -- that
6 that was not a violation of clearly established law.

7 MR. FELDMAN: That's right. And so what
8 that means is that the cause of action cannot be
9 brought, but the conduct doesn't disappear. And
10 proximate cause principles are not based on whether a
11 legal violation proximately caused harm, but whether the
12 conduct caused harm. And the conduct that caused harm
13 in this case was the entry without giving notice. If
14 you take either one of those away, then, of course, the
15 harm doesn't occur. That's another way of saying they
16 are both necessary proximate causes as well as but-for
17 causes.

18 And when we look at the Kentucky v. King
19 line of cases, what we see is that this Court has
20 recognized that there are circumstances in which events
21 allow police officers to take certain actions.

22 JUSTICE ALITO: That's -- that was a
23 different context. It had to do with an exception to
24 the warrant requirement. But the problem with your
25 test, as you articulate it, and as I understand it, is

1 that you start out with something that is said to be
2 unreasonable, but it is not a violation of the Fourth
3 Amendment. And you impose liability for that decision,
4 not for the ultimate decision to use deadly force.

5 And -- and this has come up in a situation
6 like Sheehan where there's a dispute about whether it's
7 reasonable for -- you have a -- a mentally disturbed
8 person and let's say the person has a hostage in a house
9 or there's an innocent person there and the mentally
10 disturbed person is acting in a way that seems to
11 present a serious threat to the -- the innocent person
12 in the house. And there's a dispute about whether it's
13 reasonable for the police to enter as opposed to waiting
14 for a -- a psychological expert or -- or they only have
15 negotiations for a short period of time before they
16 enter and it's argued that wasn't reasonable, that's not
17 good police practice, they should have waited a longer
18 period of time, and you end up imposing liability.

19 And then once they go in, then they're in
20 a -- in a life-threatening situation and they use force.
21 You end up imposing liability for what is arguably a
22 violation of best police practices, or something that is
23 recommended by experts in this situation. That's what's
24 anomalous about the rule that you've -- that you've
25 suggested.

1 MR. FELDMAN: I wouldn't agree that it's
2 anomalous, but I also think that, at least in this case,
3 unlike in Sheehan, the Court doesn't have to decide
4 whether objectively unreasonable behavior alone is
5 enough because we also happen to have an unlawful entry,
6 which wasn't present in the Sheehan case.

7 When the officers entered, they were no
8 different than trespassers. And some --

9 JUSTICE ALITO: Well, but that's a different
10 way of looking at the situation. And I agree, that
11 that's a -- you know, that's -- that's the question that
12 you would think you would address under the Fourth
13 Amendment. You start out with the Fourth Amendment
14 violation, and then you say, did it proximately cause
15 the use of deadly force? But not the rule that you
16 suggested where you start out with something that isn't
17 a violation of the Fourth Amendment, whether or not it
18 represents best police practices or not.

19 MR. FELDMAN: Let me give you a few
20 examples, Justice Alito, of why it's important to focus
21 on the predicate conduct. These are real-world examples
22 and decisions that have been -- and circumstances --
23 that have been addressed by the Department of Justice
24 and -- and this Court.

25 In Chicago, there's a problem with officers

1 who jump out of unmarked cars wearing plain clothes
2 brandishing guns. It's not a constitutional violation.
3 There's no seizure, but it's clearly unreasonable and it
4 leads to the use -- unnecessary use of force.

5 JUSTICE ALITO: Well, it may very well be a
6 seizure. If they -- if they interfere with the liberty
7 of the person who they approach, then it's a -- then
8 it's a seizure, it's a stop.

9 MR. FELDMAN: It -- it --

10 JUSTICE ALITO: And that would be the
11 situation in the hypothetical that Justice Sotomayor
12 mentioned, which was presented in your brief, where the
13 police officer jumps in front of a car and doesn't allow
14 the driver enough time to stop. And then as the driver
15 is approaching the police officer, the police officer
16 shoots. That's a seizure. And so you look at the
17 entire seizure, the jumping in front of the car, plus
18 the ultimate shooting to determine whether it's
19 reasonable.

20 MR. FELDMAN: And there's nothing wrong with
21 that approach either in the Kentucky v. King argument.
22 I think Justice Kagan referred to that as the holistic
23 unreasonableness approach. If you look at the -- from
24 the moment of time that the officers interact with
25 somebody to the moment that there is a seizure, here

1 that's the moment that the officers arrived at the
2 Mendez's home until the moment that the officers fired
3 their weapons into the Mendez's home and injured them,
4 which effectuated the seizure.

5 JUSTICE ALITO: But the Fourth Amendment
6 doesn't prohibit unreasonable interactions. What it
7 prohibits is unreasonable searches and seizures. So
8 it's entirely appropriate to look at the whole seizure,
9 but not this chain of interactions that includes a lot
10 of things that happened before there ever is conduct
11 that implicates the Fourth Amendment.

12 MR. FELDMAN: Well, in the examples that
13 we've given where the police officer goes into someone's
14 home in the middle of the night or stands outside
15 someone's home brandishing weapons or jumps out of a car
16 brandishing weapons, that's the beginning of the
17 interaction. And if we look at the totality of the
18 circumstances, as this Court has repeatedly mandated,
19 among those circumstances is the objectively
20 unreasonable behavior of the officers that foreseeably
21 and directly leads to the use of force.

22 So whether we look at it through the
23 Kentucky v. King framework, which is really where
24 unreasonable or unconstitutional conduct prevents an
25 officer from relying on certain circumstances to avoid

1 liability or we look at it holistically, there is an
2 enormous amount of evidence in this record what the --
3 what these officers did was unreasonable.

4 JUSTICE BREYER: So how? How is that? That
5 is, what I think the argument on the other side is in
6 response, I was looking saying look holistically. The
7 seizure is the shooting and his -- and his injury, okay?

8 MR. FELDMAN: Right.

9 JUSTICE BREYER: The question is, would any
10 reasonable person think that that was unreasonable?

11 Now, we break it down. Not unreasonable to
12 the shoot in the situation. That wasn't unreasonable.
13 Seems, too, they -- they say not unconstitutional or
14 unreasonably wrong not to knock and announce, because
15 that's what the Ninth Circuit found, and the part that
16 was wrong, not getting a warrant, made no difference.
17 So they're saying zero plus zero plus zero, it must
18 equal zero. Okay? That, I think, is the argument I'm
19 trying to -- to put that I -- that I want to hear the
20 answer to.

21 MR. FELDMAN: Right. And I think the flaw
22 in the reasoning is that what we have here are two
23 necessary proximate causes. So what that means is, if
24 you take one away, the harm doesn't occur. If you take
25 the other away, the harm doesn't occur. So it really

1 isn't zero plus zero plus zero equals zero. Each of
2 these actions, the entry, and the entry without notice,
3 were necessary --

4 CHIEF JUSTICE ROBERTS: I don't see --

5 MR. FELDMAN: -- for harm to occur.

6 CHIEF JUSTICE ROBERTS: I don't see you say
7 if you take away one that -- if you take away the
8 failure to get the -- the search warrant, the -- the
9 harm still occurs.

10 MR. FELDMAN: Right. Because what the --

11 CHIEF JUSTICE ROBERTS: So -- so why do you
12 look at that as the basis for 1983 liability?

13 MR. FELDMAN: Because what they're doing,
14 Mr. Chief Justice, is they are changing the legality of
15 the conduct, but they are not changing the conduct.
16 When you change the legality of the conduct, but you
17 don't change the conduct, of course this --

18 CHIEF JUSTICE ROBERTS: Well, then it's
19 not -- it's -- it's -- and this, I think, is the
20 argument on the other side. Then it's irrelevant. In
21 other words, the search warrant is not going to change
22 the conduct. But the failure to get the search warrant
23 is the only thing that violated the standards under
24 1983.

25 So it's not a proximate cause at all of the

1 conduct, because, as you just said, it wouldn't have
2 changed it in any way.

3 MR. FELDMAN: The conduct is what we use to
4 define proximate cause.

5 CHIEF JUSTICE ROBERTS: Okay.

6 MR. FELDMAN: The entry --

7 CHIEF JUSTICE ROBERTS: Right.

8 MR. FELDMAN: -- or the entry without
9 notice.

10 CHIEF JUSTICE ROBERTS: Right.

11 MR. FELDMAN: That either did or did not
12 proximately cause the harm.

13 CHIEF JUSTICE ROBERTS: Right.

14 MR. FELDMAN: It has to be illegal.

15 CHIEF JUSTICE ROBERTS: But -- but then why
16 are we talking about the failure to get a search
17 warrant? Why -- why did that make a difference?

18 MR. FELDMAN: It made a difference in this
19 case because it is what makes the conduct of the police
20 officers unconstitutional.

21 CHIEF JUSTICE ROBERTS: That does not
22 proximately cause --

23 MR. FELDMAN: Well, the conduct of the
24 officers proximately caused the injury.

25 JUSTICE KAGAN: I guess I'm not

1 understanding, Mr. Feldman, why you're quite making this
2 distinction. I mean, it -- it -- why isn't it just,
3 look, the entry without authority, the entry without a
4 warrant, that's a clear but-for cause of the shooting?
5 The shooting wouldn't have happened if there hadn't been
6 the entry; right?

7 MR. FELDMAN: Right.

8 JUSTICE KAGAN: Now the question is, is it a
9 but -- is it a proximate cause of the inquiry? And
10 it -- and it seems to me that you have to make a case --
11 and tell me if you agree or don't agree: You have to
12 make a case that unauthorized entry, that one of the --
13 one of the things that foreseeably can happen with an
14 unauthorized entry is that the person whose home it is
15 will react with violence.

16 MR. FELDMAN: I agree with you completely.
17 And, of course --

18 CHIEF JUSTICE ROBERTS: Well --

19 MR. FELDMAN: -- the foreseeability issue
20 was the issue that was extensively litigated in the
21 trial courts.

22 CHIEF JUSTICE ROBERTS: Well, but I don't
23 see how you can agree -- I don't think it's -- addresses
24 at least my concern, which -- why and in what way did
25 the failure to get a warrant cause everything that

1 followed?

2 MR. FELDMAN: It was the entry that
3 caused --

4 CHIEF JUSTICE ROBERTS: It was the entry.
5 I'm with you there.

6 MR. FELDMAN: Yeah.

7 CHIEF JUSTICE ROBERTS: I understand that.
8 But the failure to get a warrant did not cause the
9 entry.

10 MR. FELDMAN: As I understand courts'
11 applying proximate cause analysis, we begin with the
12 conduct and we ask ourselves, did that conduct
13 directly -- that's the proximate cause issue -- did that
14 conduct directly lead to the harm?

15 CHIEF JUSTICE ROBERTS: Right.

16 MR. FELDMAN: If we answer that question
17 yes, we then look at whether that conduct was illegal.

18 CHIEF JUSTICE ROBERTS: Okay. Now, there --
19 and maybe I'm just asking the same thing over and over
20 again. And, if so, I apologize. But how did the
21 conduct, the failure to get the warrant, lead to the
22 entry in this case?

23 MR. FELDMAN: The -- the entry -- I
24 apologize. I'm saying the same thing over and over
25 again.

1 CHIEF JUSTICE ROBERTS: Well, I'm asking the
2 same thing over and over again.

3 JUSTICE KAGAN: Can I say this --

4 MR. FELDMAN: -- same thing --

5 CHIEF JUSTICE ROBERTS: But I guess maybe I
6 just -- you -- you -- as I understand your theory, the
7 failure to get a warrant caused -- that's why we call it
8 a provocation, I guess -- caused the -- the entry which
9 caused the -- the confrontation; is that right?

10 MR. FELDMAN: I wouldn't say that the
11 failure to get a warrant caused the entry. The
12 officers' --

13 CHIEF JUSTICE ROBERTS: Right.

14 MR. FELDMAN: -- decision to enter is what
15 caused the entry.

16 CHIEF JUSTICE ROBERTS: Exactly. So I don't
17 know why the failure to get a warrant matters.

18 JUSTICE KAGAN: Well, can I suggest why it
19 might matter? I mean, there are two kinds of entry:
20 One is -- let's -- for these purposes, one is an
21 authorized entry and one is an unauthorized entry.

22 Now the question is, what kind of conduct
23 does each of those kinds of entries provoke? If you're
24 an authorized entry, you don't really think that it's
25 going to provoke violence. But if you're an

1 unauthorized entry, you do think it's going to provoke
2 violence. So the --

3 MR. FELDMAN: Well --

4 JUSTICE KAGAN: -- proximate cause -- the --
5 the proximate results of each of those two different
6 kinds of entry are very different.

7 CHIEF JUSTICE ROBERTS: Counsel, if I could
8 interrupt you to ask a question.

9 (Laughter.)

10 CHIEF JUSTICE ROBERTS: Why is it that
11 whether it's authorized or not, you don't think it's
12 going to prompt violence? The fact that you have a
13 search warrant, you may have a search warrant, say, I've
14 got to execute a search warrant to pick up this armed
15 and dangerous felon; you may still think that's going to
16 prompt violence. That doesn't have anything to do with
17 the nature of the entry you're going to have to make
18 later on. Knock-and-announce does, because if you just
19 burst in, the person may reasonably think this is a
20 burglar. But if you knock and announce, it doesn't.
21 That does affect the -- the -- the nature of -- of the
22 conduct. But I think a warrant, whether it's authorized
23 or not, doesn't.

24 MR. FELDMAN: If the officers don't have a
25 warrant and they enter, they are trespassers. The

1 purpose of the Fourth Amendment is to treat them as
2 trespassers.

3 JUSTICE ALITO: Well, let me give you two
4 situations.

5 Situation A: The officers get a warrant,
6 they go to the residence, they knock on the door. The
7 resident opens the door. They say: We have a search
8 warrant. We're going to search your house.

9 All right?

10 Situation B: They don't get a search
11 warrant. They think they have exigent circumstances.
12 They knock on the door. And they -- in both cases,
13 they're uniformed police officers. They say: We're
14 police officers. We're here; we're going to search your
15 house. We don't have a warrant. We think we have -- we
16 can search your house without a warrant because we have
17 an exception to the warrant requirement.

18 Now, is there more -- is it more likely that
19 there's going to be violence in the second situation
20 than in the first situation? I -- I -- I don't see why
21 there is.

22 MR. FELDMAN: I would agree, Your Honor,
23 that in those circumstances, it would not be more likely
24 that there would be violence in one situation or the
25 other.

1 JUSTICE ALITO: Well, then, then I don't see
2 where there's proximate cause.

3 MR. FELDMAN: Well, the proximate cause
4 comes from the two things that the officers did that led
5 directly and foreseeably to the confrontation and the
6 violent confrontation with the homeowners. One is that
7 they decided to enter, and that was unconstitutional.
8 And the other is that they went in without giving any
9 notice. And if you look at that through --

10 JUSTICE SOTOMAYOR: You're making a
11 presumption there that I think you have to address,
12 which is, yes, they entered without a warrant. You're
13 assuming it's unconstitutional. No one's addressed it,
14 and I don't think the Court did below, whether that
15 entry had an exception for unconstitutionality. Was it
16 an exigent circumstance or not?

17 You're assuming that they didn't have a
18 legal motive for entry. I'm willing to start with that
19 assumption, but let's assume that a court below could
20 say that the entry was lawful because it was pursuant to
21 exigent circumstances.

22 What would happen to your argument then?

23 MR. FELDMAN: Well, let me start by
24 clarifying that the courts below did, in fact, address
25 the full panoply of exceptions to the warrant clause.

1 JUSTICE SOTOMAYOR: So we're assuming that
2 the entry was unlawful. There were no exceptions to it
3 in this case.

4 MR. FELDMAN: Correct.

5 JUSTICE ALITO: Yeah. And in my
6 hypothetical, the -- what I -- I neglected to say but
7 should have said was that there weren't exigent
8 circumstances. So the -- the entry was unlawful, but
9 they had a warrant -- they -- they -- but you still have
10 those two situations. In one case, they have a warrant.
11 The other case, they say: We think -- and they turn out
12 to be wrong -- that we don't need a warrant.

13 But I don't -- I asked you whether there's a
14 greater risk of violence in one than the other, and I --
15 I'd like to hear your -- your answer. Why would there
16 be a greater risk of violence in the situation where
17 the -- the resident knows that it's -- that they are
18 police officers and they're going to conduct a search,
19 as opposed to the situation where there's -- where
20 there's a warrant? Any -- any violence that the
21 resident directs at the police officer is illegal in
22 both situations; right?

23 MR. FELDMAN: Right.

24 JUSTICE ALITO: It's not justified for them
25 to attack the police. They -- "Well, I know" --

1 MR. FELDMAN: They know that they're police
2 officers --

3 JUSTICE ALITO: "You know, I know -- I know
4 you're a police officer, but I don't think you really
5 have an exception to the warrant requirement, so I'm
6 going to shoot you."

7 They can't do that, can they?

8 MR. FELDMAN: No.

9 JUSTICE ALITO: So --

10 JUSTICE KAGAN: Mr. Feldman, you said there
11 are two kinds of entrance; right? One is a trespasser
12 entrant, and one is a nontrespasser entrant.

13 MR. FELDMAN: Right.

14 JUSTICE KAGAN: A guest entrant, let's call
15 the person; right?

16 MR. FELDMAN: Right.

17 JUSTICE KAGAN: And when a trespasser enters
18 your home, different sets of things foreseeably
19 happen --

20 MR. FELDMAN: Correct.

21 JUSTICE KAGAN: -- than when a guest enters
22 your home.

23 MR. FELDMAN: Correct.

24 JUSTICE KAGAN: So it's not just an entry.
25 The question is, who's entering: a trespasser or a

1 guest?

2 MR. FELDMAN: Correct. And that is the
3 problem with this case, is that when the officers pulled
4 back the blanket, there was no indication and -- and no
5 reason for them to know that the Mendezes knew that they
6 were police officers.

7 So in the trespasser example, if the
8 homeowner has a Second Amendment right -- obviously, she
9 does -- to point that weapon at the trespasser and the
10 trespasser then shoots the homeowner, that's murder.

11 JUSTICE BREYER: But -- but here, wait,
12 wait. Ordinary tort law, let's pick up on this for a
13 second.

14 MR. FELDMAN: Uh-huh.

15 JUSTICE BREYER: And don't answer it if it's
16 a red herring. But, look, everybody is talking about
17 causation. Maybe this isn't about causation. Perhaps
18 it's about whether a reasonable person -- namely, a
19 reasonable policeman -- namely, any reasonable
20 policeman -- would know in the circumstances that what
21 he was doing was unconstitutional. What was he doing?
22 Shooting someone.

23 Why would he know it was unconstitutional?
24 Well, here in ordinary tort law, Case 1, the trespasser
25 reasonably believes, but wrongly believes, that he is an

1 invited guest.

2 Case 2: He knows he's a trespasser. Okay?

3 Does that make a difference to the result?

4 MR. FELDMAN: It absolutely does make a
5 difference to the result.

6 JUSTICE BREYER: Because?

7 MR. FELDMAN: Because the legal principles
8 that apply in those circumstances are different. The
9 homeowner has a right to use force against an unlawful
10 entrant. If the entrant is known to be a police
11 officer, not because of the knock-and-announce rule, but
12 because he sees the uniform, then the rules change.
13 If the trespasser comes in and says, wait a second, I'm
14 just your neighbor and I'm looking for some, you know,
15 need to use your telephone, the rules would change.

16 JUSTICE BREYER: What -- just thinking, you
17 know, we want policemen to protect themselves. They
18 have to. Of course they do. But there can be
19 circumstances where, of course, that's true that they
20 have a right to protect themselves, but the background
21 circumstances are such that there's no justification for
22 the whole ball of wax.

23 MR. FELDMAN: Correct. And that --

24 JUSTICE BREYER: That's, I think, what your
25 argument is in respect to the warrant, if not the knock

1 and announce, you can't deal with that anymore. So it's
2 the whole ball of wax which has less justification, and
3 it is clear that the action from A to Z is what caused
4 the death. Now, would -- you haven't really strongly
5 argued that, so I'm a little hesitant to bring it up.

6 MR. FELDMAN: Well, in a sense that's the
7 Petitioners' test, but -- but not quite. I mean, what
8 the Petitioners would tell you is that you can at least
9 give these officers knowledge of what has happened
10 beforehand. And here's the four things those officers
11 knew, which I think goes to the holistic reasonableness.

12 First, they knew they were entering
13 someone's house, not -- not subjectively, objectively.
14 The reasonable officer on the scene knew that they were
15 going into someone's house. The objectively reasonable
16 officer on the scene knew it was an unlawful entry. The
17 objectively reasonable officer on the scene knew that
18 this was the Mendezes' house. And the objectively
19 reasonable officer on the scene knew that the Mendezes
20 had no way of knowing that the officer was a police
21 officer. So in that circumstance, it is objectively
22 unreasonable and it is a Fourth Amendment violation to
23 use force.

24 If we look at it holistically, if we look at
25 it through sort of the segmented approach of Kentucky v.

1 King, then it's the unreasonable actions that got the
2 police officer into that situation that preclude him
3 from avoiding liability based on the fact that
4 Mr. Mendez moved a gun.

5 And I would agree with the comments that
6 were made earlier that this isn't about telling police
7 officers they can't take actions to protect themselves.
8 We know that they will. The question in the end is who
9 bears the brunt of the officers' unreasonable conduct?
10 Because there's no allegation here that the Mendezes did
11 anything wrong.

12 If somebody comes into your house and you
13 move a gun, you have a Second Amendment right to do
14 that. If you're in the privacy of your own home, the
15 Fourth Amendment tells you that you can do anything you
16 want as long as it's not illegal. And moving a gun
17 certainly isn't illegal.

18 So in the end, what happened here was
19 prompted by the officers, not by the Mendezes. The only
20 exception to that, of course, is the superseding cause
21 doctrine. And we believe that this Court can resolve
22 this entire case based on the superseding cause doctrine
23 and the fact that the proximate cause doctrine, we
24 submit, was not properly --

25 JUSTICE SOTOMAYOR: Let's go to that

1 superseding cause document. Earlier you said to Justice
2 Alito that if a police officer unlawfully enters your
3 home, announces him or herself, shows you a badge, and
4 you pull out a gun and point it at him or her, that that
5 officer would not be liable for shooting you because,
6 presumably, that person, knowing that you're a police
7 officer, if they pull a gun on you, they are responsible
8 for the consequences, correct?

9 MR. FELDMAN: Correct.

10 JUSTICE SOTOMAYOR: All right. So what's
11 the difference between that scenario and this one? Why
12 aren't -- why isn't Mr. Mendez's -- I don't think
13 there's a dispute that he was moving the gun not because
14 he heard the police officers, but he just wanted to get
15 it out of the way -- that there was no intent on his
16 part? What -- why isn't it just like the other person
17 who points the gun at someone?

18 MR. FELDMAN: The difference is culpability.
19 The test that we have proposed for superseding cause
20 allows police officers to avoid liability if they can
21 show either that the intervening act was unforeseeable
22 or culpable. If somebody --

23 JUSTICE SOTOMAYOR: This is standard tort
24 law, right?

25 MR. FELDMAN: Yes, it is. It flows directly

1 from the restatement, and this Court has addressed these
2 issues in the Exxon case and the Staub case. And
3 culpability is significant. And so if an officer enters
4 someone's house, whether it's illegal or not, and the
5 occupants know that the police officer is a police
6 officer and yet they point a weapon at the police
7 officer, our concession, if you can call it that, would
8 be that that was a superseding cause. And when you look
9 at the case law, all of the cases, I think, address the
10 issue the same way, including, of course, the Bodine
11 decision.

12 JUSTICE KENNEDY: Well, why wasn't there --
13 what was the super -- why wasn't there superseding cause
14 here after the failure to get the warrant?

15 MR. FELDMAN: There was no superseding
16 cause --

17 JUSTICE KENNEDY: You -- you -- my
18 understanding of your argument is you have not -- that
19 you are defending the Ninth Circuit's holding that
20 because the officers violated the Fourth Amendment by
21 searching the house without a warrant, that was the
22 proximate cause, you're defending that.

23 MR. FELDMAN: I believe that is a correct
24 holding.

25 JUSTICE KENNEDY: I -- I think that's a

1 difficult position to defend.

2 MR. FELDMAN: Well, had it not been for the
3 entry, there would not have been any shooting. And I
4 recognize that's but-for causation, and I don't mean to
5 rely on but-for causation because then we have to go to
6 the next step, which is proximate cause.

7 And that's a question of directness on the
8 one hand versus remoteness on the other. The unlawful
9 entry, the entry, that's the action, the entry led
10 directly to this shooting. And so the proximate cause
11 chain is not attenuated. It is extremely direct.

12 JUSTICE KENNEDY: Well, I -- I think that's
13 the correct way to argue the case, and based on that,
14 then we can have our discussion as to whether or not
15 it -- the -- it was indeed proximate.

16 MR. FELDMAN: Thank you.

17 If the Court doesn't have any questions, I
18 will conclude simply by saying that this is a case,
19 quite specifically, about how citizens ought to act when
20 they are dealing with known law enforcement officers.
21 When people know that they are dealing with known law
22 enforcement officers, nobody goes anywhere near a gun
23 for fear of being shot. But Mr. and Mrs. Mendez never
24 had that opportunity because the Petitioners here
25 decided to enter their home without warning, without a

1 warrant or consent, and in violation of clearly
2 established Fourth Amendment law. We ask that the
3 damages award be upheld.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Four minutes, Mr. Rosenkranz.

6 REBUTTAL ARGUMENT OF E. JOSHUA ROSENKRANZ
7 ON BEHALF OF THE PETITIONERS

8 MR. ROSENKRANZ: Thank you, Mr. Chief
9 Justice.

10 Let me start with Justice Kagan's question.
11 Does a warrantless opening of a door create a different
12 risk from an opening of a door, having called a judge
13 and -- and received approval in advance? The answer is
14 no, and it goes directly to one of the last things
15 Mr. Feldman was saying. An officer, in broad daylight,
16 in full uniform, when he simply opens a door, is not
17 expecting to be faced with a gun a foot away from him.

18 JUSTICE SOTOMAYOR: Wait a minute. This
19 wasn't in the middle of the day.

20 MR. ROSENKRANZ: Yes, it was, Your Honor.
21 It was 1 p.m.

22 JUSTICE SOTOMAYOR: 1 p.m. in the afternoon?

23 MR. ROSENKRANZ: Yes, Your Honor, middle of
24 the day. He's drenched in sunlight. Now, he does not
25 know that Mr. Mendez will not recognize him as a police

1 officer. That goes to Mr. Feldman's point about
2 culpability. Culpability has to be viewed from the
3 perspective of the officer. That is what we are doing
4 in 1983 cases and that's what Graham says you have to
5 do. From his perspective --

6 JUSTICE GINSBURG: He didn't have the
7 technicality about the knock and announce. Let's assume
8 that this was a separate house, so it -- it required a
9 knock and announce. There's nothing about the closure
10 or any -- then -- then would you recognize that they had
11 a good 1983 case?

12 MR. ROSENKRANZ: They -- they would have a
13 much better 1983 case, Your Honor, which --

14 JUSTICE GINSBURG: Is it much better or
15 would they -- would they have --

16 MR. ROSENKRANZ: There would still be a
17 discussion to be had about whether when an officer shows
18 up in full uniform someone should expect to understand
19 that he is an officer.

20 But -- but let's just go broaden that to --
21 to Justice Breyer's question about looking at all of
22 this holistically. First, this Court has said you don't
23 look at it holistically. Hudson says you break up the
24 warrant requirement from the knock-and-announce
25 requirement. That is what this Court did. And that's

1 what this Court should certainly do in a liability case,
2 but let's go holistically.

3 Put yourselves in the shoes of these
4 deputies, which is what 1983 says, and this -- and
5 Graham says we're supposed to do. You are not looking
6 to hurt anyone. You're doing your job, which is to
7 apprehend someone you believe to be armed and dangerous.

8 You look at a shack. You believe there's no
9 way on God's earth that anyone would live in that shack,
10 a conclusion that a judge later concludes was
11 unreasonable but credits that that was a firmly held
12 belief by these deputies.

13 You move a curtain back, in broad daylight,
14 but in the darkness you see the silhouette of a gun
15 pointed at you, and it's only a foot away from your
16 face. You think it's O'Dell, the armed and dangerous
17 person who you think -- who you think is hiding in this
18 shack. You reasonably think this is where I'm going to
19 die, and you have only a second to decide what to do.
20 Any rule that says that you can't fire in that
21 circumstance is an untenable rule.

22 Whether you look at it from the perspective
23 of proximate cause going forward, or you look at it from
24 the perspective of the provocation doctrine moving
25 backwards, when this Court talks about the totality of

1 the circumstances, yes, an officer should be absorbing
2 the totality of the circumstances, but only with a view,
3 when you're talking about the seizure, only with a view
4 toward understanding what is the risk I'm facing here
5 and now. That's the question he has to answer in that
6 split second.

7 And the risk that he is facing here and now
8 has nothing to do with whether he committed a mistake
9 earlier on. His life and the lives of the people he is
10 protecting do not matter any less just because there was
11 a mistake en route to the confrontation.

12 If there are no further questions, we
13 respectfully request that the Court reverse the Ninth
14 Circuit's judgment. Thank you, your Honor.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 The case is submitted.

17 (Whereupon, at 11:21 a.m., the case in the
18 above-entitled matter was submitted.)

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