

2-5-2018

# Los Angeles v. Mendez: Proximate Cause Promise for Police Shooting Victims

Katherine MacFarlane

*University of Idaho College of Law*, [kmacfarlane@uidaho.edu](mailto:kmacfarlane@uidaho.edu)

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## Recommended Citation

118 Colum. L. Rev. Online 48 (2018)

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*LOS ANGELES V. MENDEZ: PROXIMATE CAUSE PROMISE  
FOR POLICE SHOOTING VICTIMS**Katherine A. Macfarlane\**

County of Los Angeles v. Mendez, the Supreme Court's recent decision rejecting shooting victims' excessive force claims, has been written off as yet another case in which police violence has no civil rights consequences. The Court found that the deputies who shot Jennifer Garcia and Angel Mendez fifteen times used reasonable force because Mendez was holding a BB gun. But the deputies barged in on Garcia and Mendez while they were napping on a futon in their home, and Mendez grabbed his BB gun to stand up and steady himself. The Court remanded the case with instructions to consider whether the defendants' warrantless entry into the plaintiffs' home, a constitutional violation not entitled to qualified immunity, was the proximate cause of the deputies' deadly force. Justice Alito, writing for the Court, advised plaintiffs that "there is no need to dress up every Fourth Amendment claim as an excessive force claim." The invitation to attempt recovery through an alternative legal theory could prove revolutionary for victims of police-involved shootings. So long as they can rely on common law tort principles to show that their injuries were proximately caused by an earlier constitutional violation, they might avoid excessive force precedent's insurmountable hurdles, which, in recent cases like Plumhoff v. Rickard and Brosseau v. Haugen, have sanctioned nearly all forms of law enforcement deadly force. If plaintiffs can recover damages for shootings, then 42 U.S.C. § 1983 might once again serve some real deterrent purpose, forcing police officers to think before they shoot.

## INTRODUCTION

County of Los Angeles v. Mendez<sup>1</sup> is the Supreme Court's most recent decision rejecting excessive force liability. Mendez overturned a \$4 million

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\* Associate Professor of Law, University of Idaho College of Law. I would like to thank Professor Kate Evans for her thoughtful comments and Alexandra Hodson for her excellent research assistance. Carey and Jacob Tolleson kept me smiling while I wrote. Finally, I am grateful to the *Columbia Law Review* editors for their superb editing work and the care they took with this piece.

1. 137 S. Ct. 1539 (2017).

shooting-related damages award obtained by civil rights plaintiffs at trial.<sup>2</sup> Plaintiffs Angel Mendez and Jennifer Garcia were asleep in their home, a one-room shack, when Los Angeles County Sheriff's deputies searching for a parolee-at-large entered without a warrant and without announcing their presence.<sup>3</sup> Mendez grabbed hold of a BB gun to steady himself; the deputies reacted by shooting fifteen rounds at the plaintiffs, hitting both Mendez and Garcia, who was pregnant, multiple times.<sup>4</sup> Mendez's right leg was eventually amputated below the knee.<sup>5</sup> The Court held that the deputies did not use excessive force when they shot Mendez and Garcia—even though the shooting victims were not the parolee-at-large the deputies sought.<sup>6</sup>

The Ninth Circuit, by contrast, had previously held that though it was reasonable to shoot the plaintiffs because of the BB gun, the plaintiffs could nevertheless recover shooting damages because the shooting was provoked by the deputies' unconstitutional entry into the shack.<sup>7</sup> Pursuant to the Ninth Circuit's "provocation rule," even if the use of force is determined to be reasonable, any provocation of the force attributable to law enforcement becomes its own Fourth Amendment violation.<sup>8</sup> Under the provocation rule, an independent constitutional violation can render a reasonable use of force unreasonable as a matter of law.<sup>9</sup> The Supreme Court rejected the Ninth Circuit's provocation rule, upending the theory upon which the plaintiffs' damages award was based.<sup>10</sup> It remanded *Mendez* to the Ninth Circuit with instructions to revisit the appellate court's prior proximate cause analysis—in particular, "whether proximate cause permits [plaintiffs] to recover damages for their shooting injuries based on the deputies' failure to secure a warrant at the outset."<sup>11</sup>

The reflexive reaction to *Mendez* is that it narrowed civil rights plaintiffs' excessive force recovery chances,<sup>12</sup> making it more difficult to

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2. David G. Savage, U.S. Supreme Court Makes It Harder to Sue Police for Barging into Homes, L.A. Times (May 30, 2017), <http://www.latimes.com/politics/la-na-pol-court-police-shoot-20170530-story.html> [<http://perma.cc/VRL8-25DE>].

3. *Mendez*, 137 S. Ct. at 1544–45.

4. *Id.*

5. *Id.* at 1545.

6. *Id.* at 1549.

7. *Mendez v. County of Los Angeles*, 815 F.3d 1178, 1193 (9th Cir. 2016), vacated and remanded, 137 S. Ct. 1539.

8. *Id.*

9. *Mendez*, 137 S. Ct. at 1548.

10. *Id.* at 1549.

11. *Id.*

12. See, e.g., Debra Cassens Weiss, Supreme Court Overturns 9th Circuit 'Provocation Rule' that Expanded Police Liability, ABA J. (May 30, 2017), [http://www.abajournal.com/news/article/supreme\\_court\\_overturns\\_9th\\_circuit\\_provocation\\_rule\\_that\\_expanded\\_police\\_liability](http://www.abajournal.com/news/article/supreme_court_overturns_9th_circuit_provocation_rule_that_expanded_police_liability) [<http://perma.cc/PJ95-78CE>] (reporting on the recent overturn of "the 'provocation

sue officers who “barg[e] into a home and provok[e] a shooting.”<sup>13</sup> *Mendez* has been treated as yet another case in which the Court unjustly ruled in favor of officers whose “poor choices led to preventable harm.”<sup>14</sup>

Perhaps the negative reaction to *Mendez* is deserved. Lower courts have already applied *Mendez* to reject plaintiffs’ provocation-based excessive force theories.<sup>15</sup> Civil rights defendants have begun to cite *Mendez* in support of their liability-defeating arguments.<sup>16</sup> Moreover, *Mendez* left the plaintiffs, innocent victims of a law enforcement shooting, empty-handed. The outcome feels all too familiar, reminiscent of how no criminal convictions have been obtained against the officers who shot and killed other innocent individuals, like twelve-year-old Tamir Rice<sup>17</sup> and Minnesota resident Philando Castile.<sup>18</sup>

Even the Court acknowledged that, though legally unsound, the provocation rule “may be motivated by the notion” that officers should be held liable when their constitutional torts have foreseeable consequences.<sup>19</sup> As Professor Rory Little has highlighted, there are hints of compromise in the *Mendez* opinion, acknowledgments that the shooting

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rule’ . . . that gave victims of police shootings an additional route to sue for alleged excessive force”).

13. Savage, *supra* note 2; see also Lawrence Hurley, U.S. Top Court Sides with Police over Shooting of Homeless Couple, Reuters (May 30, 2017), <http://www.reuters.com/article/us-usa-court-police-idUSKBN18Q1SX> [<http://perma.cc/3A4Q-92FY>] (describing *Mendez* as a case in which the Court once again “sided with police”).

14. Chiraag Bains, After Creating Danger, Can Cops Use Force with Impunity?, Marshall Project (June 15, 2017), <http://www.themarshallproject.org/2017/06/15/after-creating-danger-can-cops-use-force-with-impunity#2FCCjAIMw> [<http://perma.cc/7MPK-BSKQ>].

15. See, e.g., *Kaur v. City of Lodi*, No. 2:14-CV-00828-TLN-AC, 2017 WL 2833403, at \*16 (E.D. Cal. June 30, 2017); *Taylor v. Shields*, No. CV 13-2241, 2017 WL 2633427, at \*13 n.8 (E.D. Pa. June 19, 2017).

16. See, e.g., Reply to Brief in Opposition at 8, *Peyton v. Burwell*, No. 16-1283, 2017 WL 1494721 (U.S. filed June 8, 2017), 2017 WL 2546462; Answering Brief of Appellee at 14, *Ferguson-Cassidy v. City of Los Angeles*, No. 15-56573 (9th Cir. filed June 8, 2017), 2017 WL 2537211.

17. Twelve-year-old Tamir Rice died on November 22, 2014, after he was shot twice by a Cleveland police officer; Rice was killed while playing with a toy weapon in a park. Bains, *supra* note 14 (explaining that the officer who shot Rice, as well as his partner, were never charged); Wesley Lowery, Black Lives Matter: Birth of a Movement, Guardian (Jan. 17, 2017), <http://www.theguardian.com/us-news/2017/jan/17/black-lives-matter-birth-of-a-movement> [<http://perma.cc/3WRD-5NFA>].

18. Mark Berman, Minn. Officer Acquitted in Shooting of Philando Castile During Traffic Stop, Dismissed from Police Force, Wash. Post (June 17, 2017), [http://www.washingtonpost.com/news/post-nation/wp/2017/06/16/minn-officer-acquitted-of-manslaughter-for-shooting-philando-castile-during-traffic-stop/?utm\\_term=.601740ca205b](http://www.washingtonpost.com/news/post-nation/wp/2017/06/16/minn-officer-acquitted-of-manslaughter-for-shooting-philando-castile-during-traffic-stop/?utm_term=.601740ca205b) (on file with the *Columbia Law Review*).

19. *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1548 (2017); Rory Little, Opinion Analysis: Finding Fourth Amendment Unanimity While Allowing Fourth Amendment Justice, SCOTUSblog (May 31, 2017), <http://www.scotusblog.com/2017/05/opinion-analysis-finding-fourth-amendment-unanimity-allowing-fourth-amendment-justice> [<http://perma.cc/SW5J-N7LN>].

might have offended certain Justices, including Justice Sotomayor. At oral argument, she noted that the plaintiffs “‘had nothing to do with’ the event” that brought deputies to the plaintiffs’ shack.<sup>20</sup>

Yet there is more to *Mendez* than judicial compromise. The opinion rejected the plaintiffs’ damages award *only* to the extent that it was based on a provocation theory.<sup>21</sup> *Mendez* expressly notes how the plaintiffs themselves, and others like them, might use an alternative argument to support a successful bid for shooting-related damages.<sup>22</sup> *Mendez* is clear that if the warrantless search proximately caused the shooting, then that violation could support the recovery of damages.<sup>23</sup> This acknowledgment offers plaintiffs a way to avoid difficult-to-overcome excessive force precedent. It opens a door that seemed to be not only closed but locked for good.

For this reason, on remand, the *Mendez* plaintiffs face fewer obstacles than they would if excessive force were their only path to relief. They need argue only that their shooting damages were proximately caused by the warrantless entry. The plaintiffs already obtained a ruling at trial that the warrantless entry into their home “violated Plaintiffs’ clearly established Fourth Amendment rights.”<sup>24</sup> This holding was affirmed on appeal.<sup>25</sup> There is no qualified immunity hurdle left to overcome on this claim. They may be able to once again obtain a multimillion-dollar verdict.

In some ways, *Mendez* simply allows plaintiffs to use provocation facts to support proximate cause conclusions. Whether an officer created the situation that led to a shooting was relevant to proving provocation and may still be relevant to proving proximate causation. But *Mendez*’s concession does not overturn the officer-friendly rationale present in prior excessive force precedent, under which officers perhaps faced more-dangerous circumstances than a one-room shack and less sympathetic plaintiffs than *Mendez* and *Garcia*. By asking plaintiffs to proximately connect shooting damages to prior constitutional violations, the Court preserved the principle that a reasonable use of force cannot be the foundation upon which plaintiffs recover damages.

Still, inviting plaintiffs to use a different theory of recovery is a far cry from precluding all shooting damages. Therefore, this Piece contends that *Mendez* is an exciting development for civil rights plaintiffs

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20. Little, *supra* note 19 (explaining that the Court avoided a 4-4 tie by rejecting the Ninth Circuit’s provocation rule and restating the basic principle that reasonableness controls excessive force analyses).

21. *Mendez*, 137 S. Ct. at 1548.

22. *Id.*

23. *Id.*

24. Brief for Petitioners at 13, *Mendez*, 137 S. Ct. 1539 (No. 16-369), 2017 WL 280864 [hereinafter *Mendez* Brief for Petitioners].

25. *Mendez*, 137 S. Ct. at 1549.

injured by law enforcement shootings. Part I begins by summarizing the difficult precedent plaintiffs who seek to recover damages for law enforcement shootings face and why, in light of that precedent, even the outrageous *Mendez* facts could have resulted in a complete win for defendants. Part II then describes the alternative recovery theory *Mendez* invites plaintiffs to use. Finally, Part III presents the argument the *Mendez* plaintiffs could have made to successfully prove that their shooting injuries were proximately caused by the deputies' warrantless entry.<sup>26</sup>

#### I. THE PROVOCATION RULE DIES, BUT PROXIMATE CAUSE PROMISE REMAINS

*"[T]here is no need to dress up every Fourth Amendment claim as an excessive force claim."*<sup>27</sup>

Victims of police shootings generally frame their 42 U.S.C. § 1983<sup>28</sup> civil rights claims as Fourth Amendment excessive force violations.<sup>29</sup> Yet the Court's recent excessive force precedent makes it nearly impossible to imagine a set of facts under which an excessive force plaintiff might prevail.

Claims alleging that law enforcement used excessive force in violation of the Fourth Amendment are brought under § 1983 as claims "concerning the overall reasonableness of a seizure."<sup>30</sup> As *Mendez* emphasized, the Court's 1989 *Graham v. Connor*<sup>31</sup> holding sets forth "a settled and exclusive framework for analyzing whether the force used in making

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26. See *infra* note 82 and accompanying text (noting the parties jointly moved to refer the case to the Ninth Circuit's mediation program before remand proceedings began).

27. *Id.* at 1548 (Alito, J.).

28. Section 1983 creates a civil action for damages and injunctive relief against those "who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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." 42 U.S.C. § 1983 (2012).

29. See M. Amanda Racines, Case Note, Constitutional Law—To Chase or Not to Chase: What "Shocks the Conscience" in High-Speed Police Pursuits?—*County of Sacramento v. Lewis*, 523 U.S. 833 (1998), 73 Temp. L. Rev. 413, 428 (2000) (explaining that "apprehension by the use of deadly force is a seizure that is subject to the reasonableness requirement of the Fourth Amendment"); see also *Woodward v. City of Tucson*, 870 F.3d 1154, 1155 (9th Cir. 2017) (reversing the district court's denial of qualified immunity with respect to plaintiff's § 1983 excessive force claim arising out of use of deadly force); *DJahspora v. City of Jackson*, No. 16-6593, 2017 WL 3659028, at \*1 (6th Cir. Aug. 14, 2017) (affirming judgment in favor of the defendant police officer sued pursuant to § 1983 for excessive force in connection with a shooting death); *Mitchell v. City of Chicago*, 862 F.3d 583, 584 (7th Cir. 2017) (affirming judgment for the defendant police officers sued for excessive force under § 1983 after they fatally shot plaintiff's son during a traffic stop triggered by a missing front license plate), petition for cert. filed, No. 17-6652 (U.S. Oct. 2, 2017).

30. *Velazquez v. City of Long Beach*, 793 F.3d 1010, 1024 (9th Cir. 2015).

31. 490 U.S. 386 (1989).

a seizure complies with the Fourth Amendment.”<sup>32</sup> To determine whether force was reasonable, relevant government interests are balanced against an individual’s Fourth Amendment interests.<sup>33</sup> In this context, courts consider the totality of the circumstances and judge the force’s reasonableness from a reasonable officer’s perspective “rather than with the 20/20 vision of hindsight.”<sup>34</sup> If a seizure was reasonable, “there is no valid excessive force claim.”<sup>35</sup>

As Professor Avidan Cover has recently explained, the right to be free from excessive force has been so curtailed by the Supreme Court that it is “exceedingly difficult for victims of police brutality to overcome defendants’ motions to dismiss or motions for summary judgment.”<sup>36</sup> Two “doctrinal shifts” have limited plaintiffs’ recovery chances:

First, the Court has diminished a victim’s civil rights remedy through a substantive constitutional standard under the Fourth Amendment that privileges the police perspective in excessive force cases, affording latitude to escalation of violence and to police biases. Second, the Court has developed a qualified immunity doctrine that approaches “absolute immunity” for police, holding only “the plainly incompetent or those who knowingly violate the law” potentially responsible for excessive force and avoiding development of constitutional limitations on police violence.<sup>37</sup>

As a result, there have been no findings of law enforcement excessive force liability for police-involved shootings even when the facts begged for some sort of legal consequence. For example, in *Plumhoff v. Rickard*, the Court excused shooting into a fleeing suspect’s car fifteen times following a high-speed chase.<sup>38</sup> The shooting killed the driver and passenger.<sup>39</sup> *Plumhoff* began as a traffic stop—one of the vehicle’s headlights was not working—and ended in two deaths.<sup>40</sup>

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32. *Mendez*, 137 S. Ct. at 1546.

33. *Id.*

34. *Id.*

35. *Id.* at 1547.

36. Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 Fla. L. Rev. 1773, 1777 (2016).

37. *Id.* (footnotes omitted) (first quoting Alan K. Chen, *The Facts About Qualified Immunity*, 55 Emory L.J. 229, 232 (2006); then quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

38. 134 S. Ct. 2012, 2020 (2014).

39. Erwin Chemerinsky, *Closing the Courthouse Door: How Your Constitutional Rights Became Unenforceable* 90 (2017) (discussing *Plumhoff* and other recent civil rights decisions that have interpreted qualified immunity in a way that is so forgiving of government officials’ conduct that it forecloses most, if not all, civil rights claims); Lorenzo G. Morales, Note, *Heien v. North Carolina* and Police Mistakes of Law: The Supreme Court Adds Another Ingredient to Its “Freedom-Destroying Cocktail,” 52 Cal. W.

In *Brosseau v. Haugen*, an officer pursued a suspect on foot for thirty to forty-five minutes and shot the suspect after he entered a car and began to drive away.<sup>41</sup> “[T]he officer fired one shot through the rear driver’s side window, hitting the suspect in the back.”<sup>42</sup> As Justice Stevens noted in his dissent, the plaintiff “was not a person who had committed a violent crime[,] nor was there any reason to believe he would do so if permitted to escape.”<sup>43</sup> The only explanation for the officer’s use of deadly force was that the plaintiff, while fleeing, might have “accidentally collide[d] with a pedestrian or another vehicle.”<sup>44</sup> However, as Justice Stevens noted, “the risk of such an accident surely did not justify an attempt to kill the fugitive.”<sup>45</sup> Still, there was no excessive force liability in *Brosseau*.

Like the shootings in *Plumhoff* and *Brosseau*, the *Mendez* shooting should never have occurred. Even the *Mendez* defendants described it as “tragic.”<sup>46</sup> In October 2010, around noon, the Los Angeles County Sheriff’s Department arrived at the home of Paula Hughes in Lancaster, California, where a parolee-at-large, Ronnie O’Dell, had been sighted.<sup>47</sup> Deputies Christopher Conley and Jennifer Pederson were assigned to search the back door and rear of the Hughes home, while three different officers knocked on Hughes’s front door.<sup>48</sup> Hughes opened her front door and was placed under arrest while her home was searched.<sup>49</sup> O’Dell was not inside.<sup>50</sup>

Before arriving at the Hughes residence, Conley and Pederson, along with other members of the task force assigned to locate O’Dell, were briefed on a plan for finding O’Dell.<sup>51</sup> During the briefing, “it was

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L. Rev. 79, 93 (2015) (describing the *Plumhoff* holding as one of many in which the Supreme Court has eroded Fourth Amendment protections).

40. Erwin Chemerinsky, Closing the Courthouse Doors, A.B.A. Hum. Rts Mag. (2015), [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/2015-vol-41/vol-41-no-1-lurking-in-the-shadows-the-supreme-court-s-qui/closing-the-courthouse-doors.html](http://www.americanbar.org/publications/human_rights_magazine_home/2015-vol-41/vol-41-no-1-lurking-in-the-shadows-the-supreme-court-s-qui/closing-the-courthouse-doors.html) [<http://perma.cc/VL9A-DCHW>] (arguing that death became an acceptable punishment for those who “mak[e] the extremely poor choice to begin a high-speed chase”).

41. 543 U.S. 194, 196 (2004) (per curiam).

42. Tahir Duckett, Note, Unreasonably Immune: Rethinking Qualified Immunity in Fourth Amendment Excessive Force Cases, 53 Am. Crim. L. Rev. 409, 424 (2016) (citing *Brosseau*, 543 U.S. at 196–97).

43. *Brosseau*, 543 U.S. at 204 (Stevens, J., dissenting).

44. *Id.*

45. *Id.* at 204–05.

46. *Mendez* Brief for Petitioners, *supra* note 24, at 2 (describing the *Mendez* shooting as “a tragic happenstance”).

47. *Mendez*, 137 S. Ct. at 1544.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*



announced that a man named Angel Mendez lived in the backyard of the Hughes home with a pregnant woman named Jennifer Garcia (now Mrs. Jennifer Mendez).<sup>52</sup>

Conley and Pederson proceeded to the home's rear and came upon three metal storage sheds and a one-room shack.<sup>53</sup> No one was inside the sheds.<sup>54</sup> They approached the shack's wooden door, which was covered by a blue blanket.<sup>55</sup> Mendez and Garcia were inside the shack, though the deputies did not know this when they approached.<sup>56</sup> They had no warrant to search the shack, nor did they knock or announce their presence.<sup>57</sup> Instead, Conley pulled back the blue blanket and opened the wooden door.<sup>58</sup>

Mendez and Garcia were napping on a futon inside.<sup>59</sup> Mendez, who kept a BB gun in the shack "for use on rats and other pests," thought that Ms. Hughes had entered and picked up the BB gun "so he could stand up and place it on the floor."<sup>60</sup> When Conley entered the shack, Mendez was holding the BB gun, pointing it "somewhat south towards Deputy Conley."<sup>61</sup> Conley yelled "Gun!" and then Conley and Pederson discharged fifteen rounds, injuring both Mendez and Garcia.<sup>62</sup> Mendez's right leg was later amputated below his knee.<sup>63</sup>

Mendez and Garcia brought suit under § 1983, alleging Fourth Amendment violations based on the warrantless shack entry, the deputies' failure to knock and announce their presence outside the shack, and the use of excessive force after entering the shack.<sup>64</sup> Following a bench trial, the district court ruled for plaintiffs with respect to their warrantless entry and knock-and-announce claims, awarding nominal damages.<sup>65</sup> It also found that the defendants' use of force was excessive and awarded around \$4 million as to that claim.<sup>66</sup> The Court of Appeals for the Ninth Circuit reversed the knock-and-announce ruling, finding

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52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1544–45.

61. *Id.* at 1545.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Mendez*, 815 F.3d at 1192–93.

66. *Id.*

that the officers had qualified immunity.<sup>67</sup> However, like the district court, the Ninth Circuit held that the officers were liable for the warrantless entry.<sup>68</sup> It also found the officers liable for excessive force because they brought about the shooting by entering the shack without a warrant.<sup>69</sup>

Much of the Court's opinion, written by Justice Alito and joined by all members save for Justice Gorsuch, who took no part in the decision, is devoted to overruling the Ninth Circuit's "provocation rule." Pursuant to the provocation rule, even if an officer's use of force is deemed reasonable under the Fourth Amendment, a previous Fourth Amendment violation tied to the later use of force "may then serve as the foundation of the plaintiff's excessive force claim,"<sup>70</sup> as it provoked the use of force. In *Mendez*, the Ninth Circuit found that the shooting of Mendez and Garcia was reasonable and not excessive. Nevertheless, it could create excessive force liability because the warrantless shack entry "intentionally and recklessly brought about the shooting."<sup>71</sup>

In rejecting the provocation rule, the Court reaffirmed that reasonableness is the exclusive standard under which Fourth Amendment use of excessive force claims are judged.<sup>72</sup> The reasonableness inquiry is objective, "based upon the information the officers had when the conduct occurred."<sup>73</sup> An unsuccessful excessive force claim cannot be converted into a successful one because of a separate constitutional violation.<sup>74</sup> Therefore, Mendez and Garcia should not have been awarded damages for excessive force.<sup>75</sup> However, the Court did not hold that Mendez and Garcia were barred from recovering damages. Rather, they could still recover damages "proximately caused by the warrantless entry."<sup>76</sup>

Section 1983 "creates a species of tort liability,"<sup>77</sup> and rules derived from the common law of torts "provide the appropriate starting point for the inquiry under § 1983."<sup>78</sup> The Court instructed that, on remand, the Ninth Circuit should "revisit the question whether proximate cause

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67. *Mendez v. County of Los Angeles*, 815 F.3d 1178, 1192–93 (9th Cir. 2016), vacated and remanded, 137 S. Ct. 1539.

68. *Id.* at 1193.

69. *Id.*

70. *Mendez*, 137 S. Ct. at 1547.

71. *Id.* at 1545.

72. *Id.* at 1546.

73. *Id.* at 1546–47 (internal quotation marks omitted) (quoting *Saucier v. Katz*, 533 U.S. 194, 207 (2001)).

74. *Id.* at 1547.

75. *Id.* at 1548.

76. *Id.*

77. *Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (internal quotation marks omitted) (quoting *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986)).

78. *Carey v. Phipus*, 435 U.S. 247, 257–58 (1978).

permits respondents to recover damages for their shooting injuries based on the deputies' failure to secure a warrant at the outset."<sup>79</sup> The Ninth Circuit, the Court held, had failed to apply the proper proximate cause analysis, which "required consideration of the 'foreseeability or the scope of the risk created by the predicate conduct'" and analysis of whether there existed "some direct relation between the injury asserted and the injurious conduct alleged."<sup>80</sup> The Court further identified the parties' arguments and those made by the United States as amicus as "a useful starting point" for the proximate cause inquiry.<sup>81</sup>

Despite this invitation to reexamine the viability of shooting damages, on June 19, 2017, the parties jointly moved to refer the case to the Ninth Circuit's mediation program before any remand proceedings occur.<sup>82</sup>

## II. *PAROLINE V. UNITED STATES* AND THE PARTIES' BRIEFS INTRODUCE PLAUSIBLE PROXIMATE CAUSE ARGUMENTS

If the parties resolve their dispute through mediation, there will be no chance to examine whether, on the *Mendez* facts, a warrantless search can proximately cause shooting damages. However, other plaintiffs whose shooting damages arise in similar situations should pay close attention to the Court's proximate cause blueprint. This Part follows the Court's suggestion, looking to *Paroline v. United States*, which set forth the "[p]roper analysis of [the *Mendez*] proximate cause question," and also summarizes the United States' brief and the parties' briefs, which the Court considered a "useful starting point."<sup>83</sup>

*Paroline v. United States* examined what kind of causal relationship must exist between a child pornography possessor's conduct and the victim's abuse to entitle a child pornography victim to restitution.<sup>84</sup> *Paroline* is not a case about proximate cause; rather, it grappled primarily with but-for causation.<sup>85</sup>

*Paroline* offers only general guidance about proximate cause. The relevant portions cited by *Mendez* set forth basic standards, including that a court must consider (1) "foreseeability or the scope of the risk created by the predicate conduct" and (2) whether "there was 'some direct relation between the injury asserted and the injurious conduct alleged.'"<sup>86</sup>

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79. *Mendez*, 137 S. Ct. at 1549.

80. *Id.* at 1548–49 (quoting *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014)).

81. *Id.* at 1549.

82. Joint Motion to Refer Matter to Ninth Circuit Mediation Program, *Mendez v. County of Los Angeles*, Nos. 13-56686, 13-57072 (9th Cir. filed June 19, 2017).

83. *Mendez*, 137 S. Ct. at 1548–49.

84. 134 S. Ct. 1710.

85. *Id.* at 1722.

86. *Mendez*, 137 S. Ct. at 1548–49 (quoting *Paroline*, 134 S. Ct. at 1719).

*Paroline*'s foreseeability principle is derived from the Third Restatement of Torts,<sup>87</sup> which provides that "[a]n actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious."<sup>88</sup> *Paroline*'s direct relation requirement is pulled from Chief Justice Roberts's dissenting opinion in *CSX Transportation, Inc. v. McBride*.<sup>89</sup> *CSX Transportation* breaks no new ground, itself citing to well-known causation sources, including *Holmes v. Securities Investor Protection Corp.*<sup>90</sup> In other words, *Paroline* does not introduce a novel way to argue proximate causation for shooting damages.

In addition to citing *Paroline*, the *Mendez* Court directed the Ninth Circuit to consider the proximate cause arguments made by the parties and the United States as amicus.<sup>91</sup> Their proximate cause theories come closer to the kind of analysis the Court seemed to invite. Defendants argued that the failure to secure a search warrant did not proximately cause the injuries because "[a] search warrant is not . . . directed at preventing physical injuries."<sup>92</sup> As a result, the scope of the risk created by the officers' failure to obtain a warrant did not include the risk that plaintiffs "would be shot by the police in reasonable self-defense."<sup>93</sup> Defendants contended that even if a warrant had been obtained, and the deputies had one in their pockets, "the outcome would have been the same: Mr. Mendez would still have thought it was Ms. Hughes at the door and would have picked up his gun to move it while sitting up in bed," and therefore "Deputy Conley would still have seen the gun pointing at him, and the Deputies would still have fired shots in reasonable self-defense."<sup>94</sup> Alternatively, defendants argued that "because Mr. Mendez's act of pointing a gun at the Deputies was a superseding cause of Plaintiffs' ensuing injuries," his actions "cut off any possibility of liability for the shooting."<sup>95</sup>

Unlike defendants, plaintiffs argued that the warrant clause does aim "to avoid serious confrontations because of uncertainty regarding

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87. *Paroline*, 134 S. Ct. at 1719 (citing Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 29 (Am. Law Inst. 2005)).

88. Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 29.

89. *Paroline*, 134 S. Ct. at 1719 (citing *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 707 (2011) (Roberts, C.J., dissenting)).

90. *CSX Transp.*, 564 U.S. at 706–07 (quoting *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 266 n.10 (1992)).

91. *Mendez*, 137 S. Ct. at 1549 (directing the Ninth Circuit to review "Brief for Petitioners 42–56; Brief for Respondents 20–31, 51–59; Reply Brief 17–24; Brief for United States as *Amicus Curiae* 26–32").

92. *Mendez* Brief for Petitioners, *supra* note 24, at 46.

93. *Id.* at 44.

94. *Id.* at 50–51.

95. *Id.* at 51.

the legal authority for a non-consensual search.”<sup>96</sup> Unlawfully entering the plaintiffs’ home could lead to a foreseeable violent confrontation.<sup>97</sup> Plaintiffs also contended that the act of holding a BB gun was not culpable; therefore, it was not a superseding cause of the shooting.<sup>98</sup> Plaintiffs refuted defendants’ conclusion that the shooting would still have happened if a warrant had been obtained, explaining:

*First*, had Conley and Pederson recognized, as any competent officer would have, that they were required to obtain a warrant before entering the Mendezes’ home, they would surely have decided to seek consent from the Mendezes rather than waiting for a warrant. If Mr. or Mrs. Mendez had been asked to consent to the search, there would have been no shooting. *Second*, if the deputies had requested a warrant as Petitioners’ hypothetical envisions, it would have taken time to obtain one, during which time Mr. and Mrs. Mendez (even if not alerted by a request to enter) would surely have left their home and noticed the deputies. . . . In this scenario too, if Petitioners had waited until they had a warrant, there would have been no shooting.<sup>99</sup>

In the relevant passages of their reply, defendants argued that plaintiffs conflated the risks created by a failure to knock and announce, for which the deputies were not liable, with the limited risks created by a failure to obtain a warrant.<sup>100</sup> Defendants also disputed plaintiffs’ argument that a superseding cause cuts off liability only when the actor’s conduct is culpable, instead contending that a “superseding cause . . . may be tortious or entirely innocent.”<sup>101</sup> In support of defendants, the United States argued that “it is generally not foreseeable that entering a home without a warrant would lead to violence.”<sup>102</sup>

### III. THE MENDEZ COURT’S PROXIMATE CAUSE BLUEPRINT

The Court’s citation to *Paroline* and the above-referenced briefs suggest that a successful proximate cause analysis would demonstrate that (1) avoiding violence is one of the interests protected by the warrant requirement; (2) the risk of violence is a foreseeable consequence of a

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96. Brief of Respondents at 55, *Mendez*, 137 S. Ct. 1539 (No. 16-369), 2017 WL 696103.

97. *Id.* at 23.

98. *Id.* at 21–22.

99. *Id.* at 58–59 (citations omitted).

100. Reply Brief for Petitioners at 19, *Mendez*, 137 S. Ct. 1539 (No. 16-369), 2017 WL 975393.

101. *Id.* at 23 (internal quotation marks omitted) (quoting Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 34 cmt. b (Am. Law Inst. 2005)).

102. Brief for the United States as Amicus Curiae Supporting Petitioners at 29, *Mendez*, 137 S. Ct. 1539 (No. 16-369), 2017 WL 371930.

warrantless entry; and (3) a second actor's conduct may not supersede a tortfeasor's original wrong if the second actor's conduct is innocent.

The parties struggled to identify a case on point. They relied on *Attocknie v. Smith*, a Tenth Circuit opinion holding that a warrantless entry may proximately cause a shooting.<sup>103</sup> In *Attocknie*, a drug-court compliance officer entered Aaron Palmer's home in Seminole, Oklahoma, in the course of executing an arrest for Palmer's father, Randall.<sup>104</sup> Believing that he saw Randall run into Aaron's home, the officer "sped to the front door of the house with gun drawn, pushed the door open, and fired his gun at Aaron, who was standing a few feet from the door, allegedly with a knife in his hand."<sup>105</sup> Aaron Palmer died as a result of the shooting.<sup>106</sup> The Tenth Circuit affirmed the district court's unlawful entry holding, as the entry "was clearly contrary to well-established law" and "a reasonable jury could determine that the unlawful entry was the proximate cause of the fatal shooting of Aaron."<sup>107</sup> However, the opinion affirmed only the denial of defendants' motion for summary judgment, not a plaintiffs' verdict.<sup>108</sup>

Plaintiffs might argue that a warrantless entry is the proximate cause of injuries related to a later shooting as follows. First, as to the scope of the interests protected by the warrant requirement, plaintiffs should argue that it is not unreasonable to include the interests of an innocent individual's safety. Professor Donald Beci has emphasized that "the warrant process benefits the innocent, law-abiding citizen because it provides a check on a government agent's actions *before* the agent conducts an unconstitutional search or seizure."<sup>109</sup> A warrant saves "the law-abiding citizen from overzealous government officials."<sup>110</sup>

The language of the Fourth Amendment itself suggests that a warrant does intend to protect *persons*, arguably, persons like Angel Mendez and Jennifer Garcia. The parties did not focus on the purpose of the Amendment's particularity requirement, even though it "categorically prohibits the issuance of any warrant except one 'particularly describing the place to be searched and the persons or things to be seized.'"<sup>111</sup>

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103. 798 F.3d 1252, 1258 (10th Cir. 2015).

104. *Id.* at 1254.

105. *Id.*

106. *Id.*

107. *Id.* at 1258.

108. *Id.* at 1260.

109. Donald L. Beci, *Fidelity to the Warrant Clause: Using Magistrates, Incentives, and Telecommunications Technology to Reinvigorate Fourth Amendment Jurisprudence*, 73 *Denv. U. L. Rev.* 293, 310 (1996).

110. *Id.*

111. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) ("By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored . . . and will not take on the

There is some argument that a general, unfettered search, with no known limits, violent or nonviolent, is a risk against which the Fourth Amendment protects. Mendez and Garcia could be presented as victims of a general search.

Second, a plaintiff might argue that violence is a foreseeable consequence of a warrantless entry. Put another way, would a warrant have avoided the shooting in *Mendez*? Arguably, yes. The team briefing that preceded the search of the Hughes residence included information about two individuals who lived in the backyard, one of whom was pregnant. Wouldn't a warrant for the shack have included the same information? If armed with a warrant, the deputies would likely have read it. If the deputies had been reminded of the presence of two individuals, neither of whom was the parolee they were searching for, they likely would not have pulled back the blue blanket on the shack's door. Rather, they would have presumably knocked and announced their presence. Had they done so, Mendez could have decided whether to grab his BB gun. Realizing that officers were nearby, he would have likely kept his BB gun far away from his person. Without the BB gun element, the deputies would not have felt the need to use deadly force, and no one would have opened fire on the shack's occupants.

Third, it is possible to construct an argument under which Mendez's act of holding the BB gun is not a superseding cause. As plaintiffs intimated, Mendez did not intentionally aim his BB gun at the deputies. Rather, he thought that someone who knew that he might be holding a BB gun and would not be threatened by it had entered his home. As a result, his actions, which occurred after he was awoken from a midday nap, are not the kind of "free, deliberate, and informed" acts that break the chain of causation between a wrongdoer's conduct and a foreseeable consequence.<sup>112</sup>

These arguments are not perfect. Perhaps the *Mendez* facts, on remand, would still have fallen short of those required to connect a

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character of the wide-ranging exploratory searches the Framers intended to prohibit."); see also Kurt Stallings, Fishing Allowed: No Basis Required for Investigatory Stops on Inland Waters with Access to Open Sea—*United States v. Villamonte-Marquez*, 9 Mar. Law. 137, 138 n.4 (1984) (describing how the particularity requirement "reflects the unpleasant experience of the American colonials subject to the 18th century English general warrant, a device declared unconstitutional in England itself").

112. Brian Neill, A Retributivist Approach to Parental Responsibility Laws, 27 Ohio N.U. L. Rev. 119, 139 (2000) (internal quotation marks omitted) (quoting H.L.A. Hart & Tony Honore, Causation in the Law 326 (2d ed. 1985)); see also Spearman v. Dutchess County, No. 05-CV-148 (FJS/RFT), 2008 WL 2945991, at \*5 n.11 (N.D.N.Y. July 25, 2008) ("A plaintiff's exercise of free will, which directly precipitates his own injury, may be a superseding act that breaks a chain of causation."); Caroline Mala Corbin, Nonbelievers and Government Speech, 97 Iowa L. Rev. 347, 395 (2012) ("[I]ntervening acts of third parties do not relieve a defendant of liability for its own conduct if the intervening cause itself was foreseeable.").

warrantless entry to a shooting. However, the invitation to present shooting damages as something other than excessive force damages is one that civil rights plaintiffs should seize. If they can overcome qualified immunity with respect to a Fourth Amendment claim that is not based on excessive force, then there might be a way of finally fulfilling § 1983's deterrent purpose. More shooting damages may eventually mean fewer shootings.

#### CONCLUSION

At a recent speech delivered to Suffolk, New York, police officers, President Trump made light of the officers' obligation to use care when placing a suspect in a police vehicle. "Please don't be too nice," he advised them.<sup>113</sup> Some officers applauded, and others even laughed. For victims of police violence, Trump's comments might have been perceived as the ultimate insult—the suggestion that *less care* is needed when police interact with the citizenry is a heartbreaking response to rampant police violence. Excessive force precedent can at times inspire the same sense of hopelessness that President Trump's comments did. In recent cases, even the most egregious and regrettable uses of force, arising out of what started out as innocuous encounters with the police but nevertheless resulted in someone's death, have been found to be reasonable.

Enter the *Mendez* case. At first blush, it is yet another example of the Supreme Court refusing to find excessive force, even though the two individuals who were shot had no connection to the crime or individual the deputies sought when they crossed the deputies' path. Yet *Mendez* merits a second look. First, it opens the door to recovering shooting damages outside of the excessive force framework. Second, it signals a desire to strictly adhere to tort principles in § 1983 precedent, but in a plaintiff-friendly way.

The *Mendez* opinion does not announce a need to provide a meaningful remedy for every instance of police violence. But it does at least acknowledge the belief, held by some, perhaps even by some members of the Court, that "it is important to hold law enforcement officers liable for the foreseeable consequences of all of their constitutional torts."<sup>114</sup> This alone is a concession that officer accountability is a legitimate goal of social policy and even the law. Perhaps the next § 1983 case will go even further, refusing to blindly accept an officer's use of force that results in avoidable injury or death.

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113. "Don't Be Too Nice": Trump Seems to Back Rougher Policing in Immigration Speech, *Guardian* (July 28, 2017), <http://www.theguardian.com/us-news/2017/jul/28/donald-trump-police-long-island-speech> [<http://perma.cc/7U7A-58M4>].

114. *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1548 (2017).