

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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