No. 11-898

In The Supreme Court of the United States

STEVEN L. DAMAN, JUAN M. ORNELAS, and DONALD M. JONES,

Petitioners,

v.

MALAIKA BROOKS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE THE COUNTY OF HAWAI'I IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICUS CURIAE

The County of Hawai'i ("County") is a municipality organized under the laws of the State of Hawai'i. The County consists of the Island of Hawai'i, often referred to as the "Big Island."

The County employs approximately 432 sworn Police Officers. After being trained, all Police Officers are issued an Electronic Control Device ("Taser"). The Ninth Circuit's decision in this case, as well as others, has severely restricted the use of the Taser, and the use of force in general. As a result, the safety and lives of the men and women who have sworn to protect the public are at risk. The County respectfully submits this amicus curiae brief in the interests of those Officers, as well as the public which they have sworn to protect.

SUMMARY OF ARGUMENT

The Ninth Circuit's decisions in *Brooks* and *Mattos* are in conflict with this Court's decisions as well as the Eleventh, Tenth, Eighth and Seventh Circuits. Contrary to *Graham v. Connor*, 490 U.S. 386 (1989), *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004), *Hinton v. City of Elwood, Kan.*, 997 F.2d 774 (10th Cir. 1993), *McKenney v. Harrison*, 635 F.3d 354 (8th Cir. 2011), *Forrest v. Prine*, 620 F.3d 739 (7th Cir. 2010) and *United States v. Norris*, 640 F.3d 295 (7th Cir. 2011) the Ninth Circuit failed to analyze whether the Officers utilized excessive force from the

perception of an objectively reasonable Officer on the scene faced with the same circumstances. Rather than utilizing the perception of an objectively reasonable Officer, the Ninth Circuit utilized the subjective intent of the suspects. In doing so, the Ninth Circuit concluded that since the suspect intended no harm, he posed no harm and the Officer's use of the Taser was excessive in violation of the Fourth Amendment.

As a result of the Ninth Circuit's decision in *Mattos* and *Brooks*, as well as *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010), the use of the Taser has been severely limited and the safety of Officers is at risk. Despite the undisputed scientific evidence demonstrating the Taser reduces injuries to Officers and suspects, the Ninth Circuit has essentially made the Taser "excessive force as a matter of law." *See Bryan*, 630 F.3d at 815 (Tallman dissent). In doing so, the Ninth Circuit has jeopardized the safety and lives of law enforcement Officers throughout the Ninth Circuit.

ARGUMENT

I. THERE IS SUBSTANTIAL CONFLICT AMONG THE VARIOUS CIRCUITS OF THE UNITED STATES COURT OF APPEALS WHICH WARRANTS THIS COURT'S REVIEW

One consideration in determining whether a petition for certiorari should be granted is if the

decision is in conflict with the decision of another United States Court of Appeals. *See* Rule 10(a) of the Rules of the Supreme Court of the United States. The en banc decision by the Ninth Circuit in the present case is in direct conflict with decisions rendered by the Seventh, Eighth, Tenth, and Eleventh Circuits. *See Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004); *Hinton v. City of Elwood, Kan.*, 997 F.2d 774 (10th Cir. 1993); *McKenney v. Harrison*, 635 F.3d 354 (8th Cir. 2011); *Forrest v. Prine*, 620 F.3d 739 (7th Cir. 2010); *United States v. Norris*, 640 F.3d 295 (7th Cir. 2011).

The conflict among the Circuits is apparent when the *Mattos* case is compared to the Tenth Circuit's decision in *Hinton.* In *Hinton*, the Tenth Circuit found the use of a stun gun was objectively reasonable when the plaintiff refused to talk to police and shoved a Police Officer. Prior to the Taser being deployed, the plaintiff had been informed that he was under arrest. *Hinton,* 997 F.2d at 781. The Court in *Hinton* noted:

> [Plaintiff's] own expert witness . . . testified that wrestling a defendant to the ground and using a stun gun are not inappropriate police practices when a suspect is resisting arrest.

Id.

The Court further noted that the use of the stun gun "is one of the least serious methods" to accomplish an arrest. *Id.* As a result, the Tenth Circuit had little difficulty finding the use of the Taser did not violate the Constitution. Despite analogous facts in

the *Mattos* case, the Ninth Circuit reached the opposite conclusion.

Similar to *Hinton*, the Taser in the *Mattos* case was deployed after the Officers announced Troy Mattos ("Troy") was under arrest. Rather than cooperate with the Officers, Troy's wife Jayzel ("Jayzel") chose to hinder the arrest, both by words and actions. Similar to the shove in *Hinton*, Jayzel put her hands on the chest of an Officer and extended one hand, thereby pushing the Officer. More troubling than the facts in *Hinton*, Jayzel was not alone and had her husband, a large, drunk, angry man, immediately behind her. *Mattos v. Agarano,* 661 F.3d 433, 451 (9th Cir. 2011). Therefore, the Officers were faced with two, not one, defiant and aggressive individuals. Despite the obvious danger to the Officers, the Ninth Circuit failed to address the danger Troy posed and classified Jayzel as "minimally resist[ive]." *Id.*

Similar to *Hinton*, the use of force immediately ceased once the situation was under control. However, unlike *Hinton*, the Taser in the *Mattos* case was deployed for a single time for five seconds. In *Hinton,* it was deployed repeatedly. *Id.* Therefore, the force used on *Mattos* clearly constituted less force than in *Hinton*. Despite lesser force being utilized in *Mattos,* when compared to *Hinton*, the Ninth Circuit found the force used on *Mattos* to be excessive, while the Tenth Circuit reached the opposite conclusion and found the greater force used in *Hinton* to be appropriate.

Strangely, one factor which the Ninth Circuit considered important in reaching its conclusion that the force was excessive in the *Mattos* case was that children were present during the incident. *Mattos*, 661 F.3d at 451. However, even assuming such a factor is relevant, this fact does not distinguish the present case from the Tenth Circuit's decision in *Hinton* since children were also present when force was used. *Hinton*, 997 F.2d at 776-777. Therefore, the inescapable conclusion is that the Ninth Circuit's decision is in direct conflict with the decision of the Tenth Circuit. Importantly, there is no indication the children's safety was ever at risk. Rather, it appears the Court was concerned that a minor may witness the application of force. Such a paternalistic view, although well meaning, ignores the realities faced by the Officers and the irresponsible and dangerous behavior of the parents which necessitated the use of force. The Officers had no alternative but to react to the suspects' failure to follow instructions and resistance to a lawful arrest. If the Officers failed to take action, the children present could have witnessed something far worse than the deployment of a Taser, such as an Officer being injured or killed by their parents.

The Ninth Circuit's decision is also in conflict with the Eleventh Circuit. In *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004), an Officer pulled over an individual who refused to comply with requests to produce documents and used profanity. Due to these refusals, the Officer placed the person under arrest

and used his Taser. The Eleventh Circuit found the use of the Taser appropriate due to the person's "hostile, belligerent, and uncooperative" behavior. *Draper*, 369 F.3d at 1278. The Court noted:

> Although being struck by a taser gun is an unpleasant experience, the amount of force . . . used – a single use of the taser gun causing a one-time shocking – was reasonably proportionate to the need for force and did not inflict any serious injury.

Id.

Importantly, "[t]he single use of the Taser gun may well have prevented a physical struggle and serious harm to either [the Officer or the plaintiff]." *Id.* Therefore, the use of the Taser prevented a physical struggle and thus avoided serious harm to the individuals. Similar to the circumstances in *Draper*, the use of the Taser on both *Mattos* and *Brooks* avoided a physical struggle and any serious harm to them or the Officers. Also similar to *Draper*, rather than cooperate with the police, *Mattos* and *Brooks* both attempted to control the manner in which the arrest would be conducted. Here, Jayzel demanded the Officers arrest her husband outside of the home. In *Brooks*, Brooks refused to exit the vehicle. In addition, *Draper* and *Brooks* were both traffic stops, which are particularly dangerous for Police Officers.

More troubling than *Draper*, Brooks and Mattos used physical force against the arresting Officers, Jayzel pushed an Officer and Brooks struggled

against attempts to remove her from the vehicle. Despite the additional resistance, as compared to *Draper*, the Ninth Circuit reached the opposite conclusion and found the use of the Taser to be excessive.

The inconsistency between the Ninth Circuit and the Eleventh Circuit becomes even more apparent when the *Draper* decision is compared to the Ninth Circuit's decisions in *Bryan v. MacPherson,* 630 F.3d 805 (9th Cir. 2010).[1] In *Bryan*, the plaintiff had been stopped for a seatbelt violation. He immediately became agitated, removed his shirt, and hit the steering wheel while cursing. Of great concern, the plaintiff exited the vehicle despite being told by the Officer to remain in the vehicle. *Bryan,* 630 F.3d at 816. As a result of Bryan's failure to follow police instruction and growing concern for safety, the Officer used his Taser. The Ninth Circuit found the use of the Taser to be unconstitutional in direct conflict with the Eleventh Circuit's decision in *Draper*.

Both *Bryan* and *Draper* constituted traffic stops and both involved individuals refusing to follow police instruction. However, in *Draper* the Eleventh Circuit found the use of the Taser was not excessive and in *Bryan*, the Ninth Circuit reached the opposite

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[1] The Ninth Circuit recognized some problems with the *Bryan* decision and amended and superseded the original decision on two separate occasions. *See Bryan v. McPherson*, 590 F.3d 767 (9th Cir. 2009); *Bryan v. MacPherson*, 608 F.3d 614 (9th Cir. 2010); *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010).

conclusion. This is particularly troubling given the serious and hostile behavior displayed in both *Draper* and *Bryan*. Despite the obvious safety concerns, the Ninth Circuit found the use of the Taser was unconstitutional while the Eleventh Circuit reached the opposite conclusion.

Importantly, one of the factors which the Ninth Circuit pointed to in finding force was excessive in the *Mattos* case, was the alleged lack of warning prior to utilizing the Taser. *Mattos*, 661 F.3d at 451. However, none of the other Circuits have found that a warning must be provided prior to the use of Taser. In fact, the Eleventh Circuit in *Draper*, found the use of Taser appropriate despite any indication a warning was given. *Draper*, 369 F.3d at 1273-1274. Similarly, the Tenth Circuit in *Hinton* never referred to a warning being given. *Hinton*, 997 F.2d at 776-777.

However, even when repeated warnings are given prior to the deployment of the Taser, the Ninth Circuit has still found the use of the Taser to be unconstitutional. In *Brooks*, the plaintiff was repeatedly warned that the continued failure to comply with Officer instructions would result in the use of the Taser. However, rather than complying with the Officers' instructions, Brooks chose to remain defiant and have the Taser deployed. Despite this deliberate decision and repeated warnings, the Ninth Circuit found the use of the Taser to be unconstitutional.

The Ninth Circuit's decisions also conflict with the decisions from the Seventh and Eighth Circuits.

In *McKenney v. Harrison*, 635 F.3d 354 (8th Cir. 2011), the Eighth Circuit found no constitutional violation when a suspect was attempting to flee through an open window in order to avoid arrest. Although only minor offenses were at issue and the suspect did not pose a threat to the Officers, the Eighth Circuit found the use of the Taser was reasonable. *McKenney,* 635 F.3d at 360.

Similarly in both *Brooks* and *Mattos*, the offenses were relatively minor. However, unlike *McKenney*, who was fleeing, both Mattos and Brooks were physically resisting the police and therefore posed a serious threat to the Officers. Despite the increased threat Brooks and Mattos posed, the Ninth Circuit found the use of the Taser to be excessive and therefore reached the opposite conclusion of the Eighth Circuit.

The Ninth Circuit decision in the present case is also in conflict with the Seventh Circuit's decision in *Forrest v. Prine*, 620 F.3d 739 (7th Cir. 2010) and *United States v. Norris*, 640 F.3d 295 (7th Cir. 2011). In *Forrest,* the plaintiff claimed he was not a threat to the Officer. However, it was undisputed he was pacing, clenching his fists and yelling obscenities. As a result, the Seventh Circuit recognized the Officers were faced with aggression and therefore had little difficulty finding the use of the Taser under such circumstances was appropriate. *Forrest*, 620 F.3d at 745.

Similarly, in the present case, Mattos and Brooks were both uncooperative and aggressive towards the Officers. Jayzel continually demanded the Officers not arrest her husband inside the home. Eventually, this verbal insistence escalated to physical resistance when Jayzel placed her hands on an Officer and extended one hand, thereby pushing the Officer. Likewise, Brooks refused to obey the police requests and then physically struggled against their efforts to remove her. Just like the conduct in *Forrest*, the actions by Jayzel and Brooks were aggressive and posed a threat to the Officers. However, unlike the Seventh Circuit in *Forrest*, the Ninth Circuit concluded the Officer used excessive force when the Taser was deployed.

In *United States v. Norris*, 640 F.3d 295 (7th Cir. 2011), the Seventh Circuit once again found the use of the Taser to be appropriate. In *Norris*, the Officer was faced with an individual who refused to place his hands in front of him despite being asked to do so. *Norris*, 640 F.3d at 303. After the second request, the Officer deployed his Taser. Citing this Court's decision in *Michigan v. Summers*, 452 U.S. 692 (1981), the Seventh Circuit held the use of the Taser was appropriate noting "officers may take reasonable steps to minimize the risk of harm to themselves and to others." *Norris*, 640 F.3d at 303. Disturbingly, after gaining control of the situation, the Officer discovered the individual had a pistol.

Similar to *Norris*, both *Mattos* and *Brooks* refused to follow police instruction. In addition, both

Mattos and *Brooks* physically resisted the police which jeopardized the safety of the Officers. However, despite the increased danger, the Ninth Circuit found the use of the Taser to be excessive, which is contrary to the decision by the Seventh Circuit in *Norris*.

It is apparent the Ninth Circuit's decision is in clear conflict with decisions from the Eleventh, Tenth, Eighth and Seventh Circuits. The reason for this inconsistency appears to be the Ninth Circuit's failure to apply the "objectively reasonable" test set forth by this Court and followed by other Circuits.

Over twenty years ago, this Court set forth the standard for determining when force is excessive in violation of the United States Constitution. In doing so, the Court made it clear the question is whether the Officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. *Graham v. Connor*, 490 U.S. 386, 396-397 (1989). "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.*

Even when an Officer mistakenly perceives the facts and the need for force, the force used is not excessive so long as the Officer had an objectively reasonable basis for his belief. *Saucier v. Katz*, 533 U.S. 194, 206 (2001). Therefore, it is abundantly clear that when determining whether force is excessive, the facts must be judged from the perspective of

a reasonable Officer on the scene, not from the perspective of a suspect or from 20/20 hindsight.

Despite this clear directive, the Ninth Circuit has repeatedly failed to analyze the facts from the perspective of a reasonable Officer on the scene, preferring instead to adopt the suspect's subjective intent. For example, when Jayzel put her hands on the Officer's chest and extended her arm, thereby pushing the Officer, it is obvious a reasonable Officer would perceive this act as a physical attack. However, according to the Ninth Circuit this action was merely to "stop [her] breasts from being smashed." *Mattos*, 661 F.3d at 449.

Similarly, Mattos' verbal objections to the arrest are undeniable statements of resistance. No reasonable Officer would perceive these statements simply as "expressing concern that the commotion might disturb . . . sleeping children" as the Ninth Circuit found. *Id.* Such a conclusion is illogical and contrary to common sense. Why would there be "a commotion" simply because Officers needed to handcuff someone? The acknowledgement by Mattos that there was or would be a "commotion" is further evidence the plaintiffs intended to resist the police which would concern any reasonable Officer.

Similarly, in *Brooks*, the Officers were faced with an individual who was uncooperative and increasingly agitated. *Mattos*, 661 F.3d at 444. The Ninth Circuit acknowledged Brooks was "potentially threatening" while she still had the keys in the

ignition. However, the Court found once the Officer obtained the keys, she no longer was a potential threat. *Id.* However, any Officer on the scene would perceive Brooks as a danger. Traffic stops are particularly dangerous to Officers. In addition, Brooks' behavior was not only uncooperative and aggressive, it was bizarre. As a result, the Ninth Circuit's conclusion ignores how these facts would be perceived by an Officer on the scene and instead represents improper 20/20 hindsight.

The Ninth Circuit's propensity to analyze the facts according to the suspect's subjective beliefs or intent rather than from the perspective of a reasonable Officer on the scene is also highlighted in the Court's decision in *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010), in which the opinion is written from the suspect's perspective, rather than the Officers. *Byran*, 630 F.3d at 821-822. As Judge Tallman noted, Bryan was acting in an "irrational, violent, angry and aggressive manner" when he continuously hit his steering wheel and yelled obscenities. *Id.* at 816. The Ninth Circuit concluded Bryan was swearing at himself. *Id.* at 822. However, as Judge Tallman notes, the Officer did not know what Bryan's motivations were. *Id.* at 817.

The Ninth Circuit's decisions in *Mattos*, *Brooks* and *Bryan* have created an impossible standard for law enforcement to satisfy and essentially requires the Officers to read the minds of the individuals whom they encounter. Rather than being held accountable for what a reasonable Officer would believe,

as instructed by *Graham*, Officers in the Ninth Circuit are now required to determine the subjective intent of the suspects, regardless of how bizarre and dangerous their behavior may objectively appear. For example, according to the Ninth Circuit, Officers should have perceived the push by Jayzel as a mere attempt to prevent "her breasts from being smashed." Likewise, Officers were tasked with knowing a driver hitting his thighs and cursing was simply "mad at himself." Such a requirement is clearly contrary to the decisions of this Court and virtually every other Circuit.

If this impossible standard set forth by the Ninth Circuit is left to stand it will inevitably jeopardize the safety and lives of law enforcement personnel within the Ninth Circuit.

II. THE NINTH CIRCUIT'S SEVERE RESTRICTION ON THE USE OF FORCE JEOPARDIZES THE SAFETY AND LIVES OF POLICE OFFICERS AND WARRANTS THIS COURT'S REVIEW

Claims against public officials come at a high cost to society, such as diversion from pressing public issues, deterring citizens from public service, dissuading officials from properly discharging their duties because of the fear of being sued, and of course, litigation expenses. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Qualified immunity is intended to

address these concerns and permit the quick dismissal of insubstantial lawsuits.[2]

The Ninth Circuit's decisions in *Mattos, Brooks* and *Bryan* are particularly troubling because it severely restricts when an important tool may be used in order to gain control of dangerous situations and protect Officers and suspects alike. As a result of the Ninth Circuit decisions, there is an increased risk that Officers will suffer injuries and death, a risk which has not gone unnoticed by members of the Ninth Circuit. For example, Chief Judge Kozinski voiced the following concern:

> The majority and concurrence get the law wrong, with ***dire consequences for police officers*** and those against whom they're required to use force. My colleagues cast doubt on an effective alternative to more dangerous police techniques, and the resulting uncertainty will lead to more, worse injuries. ***This***

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[2] The *Mattos* and *Brooks* matters are examples of "insubstantial" lawsuits. *Mattos* involves a single five-second deployment of the Taser on an individual who assaulted a police Officer during a lawful arrest. The initial deployment was described as a "pinch" and Mattos refused medical care. In *Brooks*, the plaintiff was repeatedly told if she failed to cooperate the Taser would be used. Brooks made the deliberate decision to have the Taser deployed. It is truly absurd that an individual can physically resist the police, be warned repeatedly that a Taser will be deployed if they fail to comply, and then be entitled to damages for a constitutional violation when the Taser is inevitably deployed. Such a result clearly encourages individuals to resist the police and jeopardizes the safety and lives of the Officers.

> ***mistake will be paid for in the blood and lives of the police*** and members of the public . . . Today's decision, though nominally a victory for the officers, is a step backward in terms of police and public safety. One can only hope the Supreme Court will take a more enlightened view (emphasis added).
>
> Chief Judge Kozinski, joined by Judge Bea, concurring in part and dissenting in part, *Mattos*, 661 F.3d at 458.

Judge Kozinski recognized the decisions in *Mattos* and *Brooks* severely limited the use of the Taser and the use of force in general. Judge Kozinski also noted:

> [O]fficers face an ever-present risk that routine police work will suddenly become dangerous. In the last decade, more than half a million police were assaulted in the line of duty. More than 160,000 were injured, and 536 were killed – the vast majority while performing routine law enforcement tasks like conducting traffic stops and responding to domestic disturbance calls.
>
> *Id.* at 453, *see also Bryan*, 630 F.3d at 815 (dissent noting Ninth Circuit's finding of the use of the Taser is excessive as a matter of law endangers Officers and citizens).

As Judge Kozinski noted, police work is dangerous and there is a risk for even "routine tasks" to become dangerous. Domestic abuse calls and traffic

stops are two "routine tasks" which are particularly dangerous to law enforcement.

As to traffic stops, such as the type involved in *Brooks* and *Bryan*, this Court has noted: "[W]e have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile." *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977). "[I]nvestigative detentions invoking suspects in vehicles are especially fraught with danger to police officers. A weapon can be concealed under the seat of a vehicle. It is readily accessible to be used to harm any police officer who approaches an automobile[.]" *United States v. Salas*, 879 F.2d 530, 535 (9th Cir. 1989) (internal citations and quotations omitted); *see also Maryland v. Wilson*, 519 U.S. 408, 413 (9th Cir. 1997); *McNair v. Coffey*, 279 F.3d 463, 464 (7th Cir. 2002) (noting that 94 Officers were killed in traffic stops between 1990 and 1998).

Similarly, domestic dispute calls, such as the type involved in *Mattos*, pose an extreme danger to Officers. In fact, more Officers are killed or injured on domestic violence calls than on any other type of call. *United States v. Martinez*, 406 F.3d 1160, 1164 (9th Cir. 2005). It is the volatility of situations involving domestic violence which makes them particularly dangerous. *Id.* "When officers respond to a domestic abuse call, they understand that violence may be lurking and explode with little warning." *Id.*, *see also Maryland v. Buie*, 494 U.S. 325, 333 (1990) (when police enter home in response to domestic violence call they become targets of fear and anger); *United*

States v. Black, 482 F.3d 1035, 1040 (9th Cir. 2007) (noting domestic abuse cases present significant dangers); *United States v. Brooks*, 367 F.3d 1128, 1136 (9th Cir. 2004), *cert. denied*, 543 U.S. 1179 (2005) (recognizing the combustible nature of domestic disputes); *Tierney v. Davidson*, 133 F.3d 189, 197 (2nd Cir. 1998) ("courts have recognized combustible nature of domestic disputes"); *State v. Greene*, 162 Ariz. 431 (1989) (domestic violence calls involve dangerous situations and possibility of physical harm escalates rapidly); *Campbell v. Babaoglu*, 2007 WL 2491826 at *4 (E.D. Tenn. 2007) ("a reasonable officer would know that domestic confrontations can be exacerbated by alcohol").

It is in these two particularly dangerous situations, domestic dispute calls and traffic stops, the Ninth Circuit has chosen to severely restrict the use of the Taser. *See* Tallman, joined with Callahan and N.R. Smith, *Bryan v. MacPherson*, 630 F.3d 805, 819 (9th Cir. 2010) (noting decision severely limits the use of tasers by law enforcement Officers throughout the Ninth Circuit). Most troubling is that in each of these very dangerous situations, the plaintiffs were refusing to follow police instruction and physically resisting the police.

Given the dangerousness of these situations, it is apparent that the Officers were entitled to use some force, particularly since in both cases the Officers were attempting to make an arrest. Not surprisingly, the right to make an arrest "necessarily carries with it the right to use some degree of physical coercion or

threat thereof to effect it." *Graham v. Connor*, 490 U.S. 386, 396 (1989). "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers . . . violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 396-397.

The force the Officers chose under these tense, uncertain and rapidly evolving circumstances was the Taser. In both cases, the use of the Taser resolved the dangerous situation quickly and without any significant injury to the Officers or the suspects. It is difficult to imagine what the Officers could have done differently, yet still have achieved such a favorable outcome.

Any other type of force would have carried additional risks. For example, if the Officers attempted to utilize hand-to-hand techniques, this would require the Officers to get in close proximity to resistive and combative individuals, which poses a significant risk to Officers. According to the U.S. Department of Justice, twelve percent of all Officers murdered were killed by their own gun. Jodi M. Brown, Patrick A. Langan, Ph.D., Bureau of Justice Statistics, *Policing and Homicide, 1976-98: Justifiable Homicide by Police, Police Officers Murdered by Felons*, iv (2001). Therefore, in order to ensure a suspect does not take an Officer's gun it is important for Officers to keep a safe

distance away and minimize physical contact with individuals who are being uncooperative and aggressive, when possible.

In the present case, when an Officer attempted hand-to-hand techniques, Jayzel became physically resistive, placing both hands on the Officer and extending at least one arm, thereby pushing the Officer. Similarly, in *Brooks*, the Officers had attempted hand-to-hand techniques; however, as a result of *Brooks'* physical resistance, these techniques were unsuccessful.

Rather than utilizing the Taser, the Officers could have attempted other traditional tools, such as choke holds, strikes, arm locks, baton strikes or pepper spray. However, these have a greater likelihood for injury for both the Officer and the suspect than the Taser. The Taser was the safe alternative, particularly because it can be deployed from a distance without engaging in personal combat.

A study by six university departments of emergency medicine found that 99.7 percent of those Tased by police suffer no injuries or, at most, mild ones. William P. Bozeman et al., *Safety and Injury Profile of Conducted Electrical Weapons Used by Law Enforcement Against Criminal Suspects*, 53 Annals Emergency Med. 480, 484 (2009). The Department of Justice concluded that Taser deployment "has a margin of safety as great or greater than most alternatives," and carries a "significantly lower risk of injury than physical force." John H. Laub, Director, Nat'l Inst. of

Justice, *Study of Deaths Following Electro Muscular Disruption* 30-31 (2011).

Numerous Courts have also recognized the Taser reduces injuries both to Officers and suspects. As the Eleventh Circuit noted in *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004), although being struck by a Taser may be unpleasant, it was reasonably proportionate to the force and prevented a physical struggle and serious harm to either the Officer or the suspect. *See also Bryan v. MacPherson*, 630 F.3d 805, 820 (9th Cir. 2010) (dissent noting Taser less likely to cause injury to Officers, suspects, and innocent bystanders than nearly any other tool at an Officer's disposal); *Mattos v. Agarano*, 661 F.3d 433, 454 (9th Cir. 2011) (dissent noting Taser significantly lowers risk of injury); *Shulgan v. Noetzel*, 2008 WL 1730091, at *11 (E.D. Wash. 2008) (alternatives such as physically overpowering, baton or chemical agents carry risks); *McDonald v. Pon*, 2007 WL 4420936, at *4 (W.D. Wash. 2007) (finding other options presented greater risk of lasting injury to Officer and plaintiff than Taser).

Based upon the undisputed evidence, the Taser not only was a reasonable choice, it represented the safest choice. However, even if the Ninth Circuit believed some other, yet unspecified, type of force would have been a better choice, such a conclusion is clearly 20/20 hindsight which *Graham* expressly prohibits. The law does not mandate the impossible nor require Officers act with perfection. Rather,

Officers are required to act reasonably. If an Officer acts reasonably, there is no constitutional violation, even if the Officer may have been mistaken as to the underlying facts. *See Saucier v. Katz,* 533 U.S. 194, at 205-206 (2001) ("If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.").

As a result, even if the Ninth Circuit believed other types of force would have been a better alternative than the Taser, no constitutional violation occurred because, at most, the Officers reasonably believed the use of the Taser was appropriate. As Judge Tallman notes: "Courts are ill-equipped to tell law enforcement officers how they must respond when faced with unpredictable and evolving tactical situations. . . . Nor should police officers be required to put life and limb at risk to avoid liability for their conduct when they are reacting to uncertain and rapidly unfolding circumstances, particularly involving mentally unstable subjects who may well attack . . . without warning." Tallman Dissent at *Bryan*, 630 F.3d at 821.

As noted, numerous studies have demonstrated the safety and benefits of the Taser. Therefore, the Ninth Circuit's aversion to the use of the Taser appears to be based upon an unfounded fear of a relatively new law enforcement device. Such fears and controversy are not new or unique. "Law enforcement agencies found themselves in similar circumstances with pepper spray in the 1990s. Human rights groups

such as Amnesty International questioned the safety and misuse of pepper spray as its use spread rapidly in American law enforcement agencies." John H. Laub, Director, Nat'l Inst. of Justice, *Police Use of Force, Tasers and Other Less-Lethal Weapons* 2-3 (2011). However, similar to the Taser, studies demonstrated the use of pepper spray lowered injuries to Officers. "[T]he empirical evidence shows that getting close to suspects to use hands-on tactics increases the likelihood of officer injuries." *Id.* at 3.

The use of the Taser is one of the most effective and safe tools an Officer can use to gain control of a dangerous situation. The Ninth Circuit's decisions in *Mattos*, *Brooks* and *Bryan* has essentially made the use of the Taser excessive as a matter of law. As a result, Officers will be forced to rely upon other types of force which require them to be in close contact with suspects and thereby subjecting the Officers to an increased risk of injury and death. As Judge Kozinski stated, the "mistake will be paid for in the blood and lives of the police and members of the public."

CONCLUSION

"Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed

in the line of duty, and thousands more are wounded." *Terry v. Ohio*, 392 U.S. 1, 23-24 (1968).

As well intentioned as the Ninth Circuit's decisions may have been, it is clear its decisions involving the Taser have created an impossible standard for law enforcement. A standard which not only conflicts with the decisions of this Court and several other Circuits, but more importantly, jeopardizes the lives and safety of the men and women who have sworn to protect the public. On behalf of the 432 sworn Officers it employs, the County respectfully requests this Court grant the petition and grant certiorari.

Respectfully submitted,

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