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 Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the Ninth Circuit correctly held that it was excessive force in violation of the Fourth Amendment for police officers to deploy a Taser, three times over the course of less than one minute, against a woman who was seven months pregnant, was not a threat to the officers or to public safety, was not resisting arrest, and was not attempting to flee, simply because the woman refused to exit her car during a routine traffic stop?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are Steven L. Daman, Juan M. Ornelas, and Donald M. Jones. They were defendants in the original action, appellants before the Court of Appeals for the Ninth Circuit, and appellees before the *en banc* Court of Appeals. They are cross-respondents in *Brooks v. Daman, et al.*, a conditional cross-petition for certiorari that is being filed on the same day as this Brief in Opposition.

Malaika Brooks is the respondent. She was the plaintiff in the original action, appellee at the United States Court of Appeals for the Ninth Circuit, and appellant before the *en banc* Court of Appeals. Ms. Brooks is cross-petitioner in *Brooks v. Daman, et al.*, a conditional cross-petition for certiorari that is being filed on the same day as this Brief in Opposition.

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INTRODUCTION

The Court of Appeals for the Ninth Circuit issued the clear and commonsensical decision that police officers could not, consistent with the Fourth Amendment, repeatedly use a Taser against a woman who was seven months pregnant, who did not pose even a potential threat to the officers or public safety, who was not attempting to flee the officers, and who was not actively resisting arrest, simply because the woman refused to exit her car in connection with a routine traffic stop.

In finding that the officers used excessive force against Malaika Brooks, the *en banc* court considered the nature of the intrusion into Ms. Brooks' Fourth Amendment rights: namely, the application — three times over the course of a minute — of extremely painful electrical shocks that left Ms. Brooks with permanent scars on her neck. The court carefully balanced this intrusion against the government interests at stake and found them lacking, as there was no legitimate need for the officers to inflict tremendous pain upon Ms. Brooks, whose only crime consisted of refusing to sign a speeding ticket that the officers sought to issue.

The Ninth Circuit's Fourth Amendment decision is a straightforward application of this Court's precedent in *Graham v. Connor*, 490 U.S. 386 (1989). The decision is consistent with cases from other federal circuits finding constitutional violations when police employed supposedly non-lethal levels of force against individuals who did not pose a threat to the officers or public safety, particularly when the individuals committed (at most) trivial offenses. Because the Ninth Circuit's decision is plainly correct, and Petitioners cannot identify a conflict warranting this Court's review, the Court should deny the Petition for Certiorari.

OPINIONS BELOW

The *en banc* opinion of the Ninth Circuit is reported at 661 F.3d 433 (9th Cir. 2011), and is reprinted in Petitioner's Appendix ("App.") at 1a. The Ninth Circuit's panel opinion is reported at 599 F.3d 1018 (9th Cir. 2010), and is reprinted at App. 61a. The district court's order on the parties' cross-motions for summary judgment is unreported and is reprinted at App. 125a.

JURISDICTION

The Ninth Circuit entered its *en banc* decision on October 17, 2011. App. 1a. Petitioners filed their petition for certiorari on January 17, 2012, invoking this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated …."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law ...."

COUNTERSTATEMENT OF THE CASE

On the morning of November 23, 2004, Malaika Brooks drove her son to the African-American Academy, an elementary school in Seattle, Washington. App. 5a. Ms. Brooks was seven-months pregnant with her fourth child. App. 5a. The posted speed limit was 35 miles per hour, but Ms. Brooks was driving slower than the speed limit as she approached her son's school. App. 5a.

A police officer, Juan Ornelas, motioned for Ms. Brooks to pull over to the side of the road, and Ms. Brooks complied. App. 5a. The officer approached Ms. Brooks' car, and she rolled down her window. App. 5a. The officer asked Ms. Brooks if she knew why she was being stopped. When Ms. Brooks responded that she did not know, the officer asked if she knew how fast she was going. App. 5a. Ms. Brooks replied that she was traveling between 20 and 30 miles per hour before she approached her son's school. Respondent's Supplemental Appendix ("Supp. App.") 3b. The officer asked Ms. Brooks for her driver's license, and she complied. App. 5a. Ms. Brooks told her son to get out of the car and walk to his school, which was right across the street. The officer took Ms. Brooks' driver's license to his cruiser and returned a short time later to inform her that he would cite her for speeding. App. 5a. Ms. Brooks said that she would not sign the ticket because she was not speeding. App. 5a

The officer left to call for backup, and another officer, Donald Jones, arrived a few minutes later and asked Ms. Brooks if she was going to sign the speeding ticket. App. 5a-6a. Again, Ms. Brooks stated that she would not sign the ticket because she was not speeding, though she offered to accept the ticket without signing. App. 6a. Years earlier, in 1996, Ms. Brooks had previously refused to sign a speeding ticket because she did not think she was guilty of the cited traffic offense. That time, the officer allowed Ms. Brooks to leave after accepting the tickets without signing them. Supp. App. 2b.

This time, however, the officer told Ms. Brooks that if she did not sign the speeding ticket she would be arrested and taken to jail. App. 6a. By this point, the officer had become irate and was yelling at Ms. Brooks. Supp. App. 4b. Ms. Brooks asked why the officer would take her to jail for refusing to sign a

ticket. Without answering, the officer warned Ms. Brooks that if she did not sign the speeding ticket, he would call his sergeant, who would tell her the same thing. App. 6a. Ms. Brooks still would not sign the speeding ticket. The officer left, and Ms. Brooks remained waiting in her car. Supp. App. 5b.

Approximately five minutes later, a sergeant, Steven Daman, arrived. Sergeant Daman and the two other officers approached Ms. Brooks and asked whether she would sign the speeding ticket. App. 6a. When Ms. Brooks said that she would not sign, the sergeant instructed the officers to "[b]ook her." App. 6a. Officer Ornelas told Ms. Brooks to get out of her car. When she asked him why, he replied that she was "going to jail." App. 6a. Again, Ms. Brooks asked why she was going to jail, but the officer did not respond. Instead, the other officer pulled out a black object — a Taser. App. 6a. The officer yelled at Ms. Brooks, asking her if she knew what the object was, what it could do to her, and how many volts it had. Supp. App. 5b. In response to these questions, Ms. Brooks said, "No, but I have to go to the bathroom, I am pregnant, I'm less than 60 days from having my baby." App. 6a.

Officer Jones asked, "How pregnant are you?" Supp. App. 5b. All the while, Officer Jones appeared to be very agitated. He kept yelling at Ms. Brooks while displaying the black object. Supp. App. 5b. He positioned himself next to the driver's side window as he displayed the Taser to Ms. Brooks. App. 6a-7a. Both Officer Ornelas and Sergeant Daman were present while Officer Jones was yelling at Ms. Brooks. Supp. App. 6b.

Ms. Brooks told Officer Jones that she was less than 60 days from having her baby, and the officers began to speak with one another. App. 6a. Ms. Brooks overheard one of the officers say, "Well, where do you want to do it," to which the other

responded, "Well, don't do it in her stomach; do it in her thigh." App. 6a. Officer Ornelas then opened the door to Ms. Brooks' car, grabbed Ms. Brook's left arm, and held it behind her back. App. 7a.

While Officer Ornelas was holding Ms. Brooks' left arm behind her back, Officer Jones cycled his Taser. App. 7a. Meanwhile, Officer Ornelas reached into Ms. Brooks' car and removed the keys from the ignition. App. 7a. Twenty-seven seconds after he cycled the Taser, Officer Jones struck Ms. Brooks with the Taser in her left thigh. App. 7a. At the time, Officer Ornelas was still holding Ms. Brooks' arm behind her back. App. 7a. Ms. Brooks experienced tremendous pain. App. 65a, Supp. App. 6b. Instinctively, she began honking the horn with her right hand and crying out for help. Supp. App. 6b.

Thirty-six seconds later, as Officer Ornelas continued to hold Ms. Brooks' left arm behind her back, Officer Jones struck Ms. Brooks near her left shoulder with the Taser. App. 7a. Ms. Brooks was unable to get out of the vehicle because the officer was holding her arm behind her back, but she continued to cry and honk her horn.[1] App. 7a, Supp. App. 6b.

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[1] The *en banc* decision states that when Officer Ornelas grabbed her arm, Ms. Brooks "stiffened her body and clutched the steering wheel to frustrate the officers' efforts to remove her from the car." App. 7a. But Ms. Brooks testified in the district court that she was unable to exit her car, as she was being restrained by Officer Ornelas while Officer Jones struck her with the Taser. Supp. App. 6b. Because this case arises on the officers' motion for summary judgment, the Court is "required to view all facts and draw all reasonable inferences in favor of the nonmoving party." *Crawford v. Metropolitan Gov't of Nashville & Davidson Cty., Tenn.*, 555 U.S. 271, 274 n.1 (2009) (citing *Brosseau v. Haugen*, 543 U.S. 194, 195 n.2 (2004) (*per curiam*)).

Six seconds later, Officer Jones struck Ms. Brooks with the Taser for the third time, this time in her neck. App. 7a. Officer Jones held the Taser to Ms. Brooks' neck for five seconds. App. 106a. The shock was extremely painful. App. 20a. Being struck in the neck caused Ms. Brooks to jolt toward the right, but she was still unable to exit her vehicle on her own. App. 6b. The officers then dragged Ms. Brooks from her car, as Officer Ornelas continued to hold her left arm behind her back. Supp. App. 6b-7b.

After the officers dragged Ms. Brooks from her car, they laid her face-down in the street and held her to the ground. Supp. App. 7b. Ms. Brooks yelled for help, and a small crowd began to gather. Supp. App. 7b. Ms. Brooks yelled at the officers to get off of her and to get off of her stomach, but they continued to hold her to the ground until they had handcuffed her. Supp. App. 7b. At that point, the officers escorted Ms. Brooks to a patrol car and brought her to the police station. Supp. App. 7b.

At the police station, paramedics from the fire department examined Ms. Brooks. After Ms. Brooks told the paramedics about her pregnancy, she was taken by ambulance to the hospital. Supp. App. 7b. A doctor at the hospital confirmed Ms. Brooks' pregnancy and expressed concern because she had a very rapid heartbeat. App. 7a-8a. After the doctor checked the baby's heartbeat with a stethoscope, Ms. Brooks was transported to jail. Supp. App. 7b.

The City of Seattle charged Ms. Brooks with the misdemeanor offenses of refusing to sign an acknowledgement of a traffic citation, in violation of Seattle Municipal Code 11.59.090, and resisting arrest, in violation of Seattle Municipal Code 12A.16.050. Supp. App. 7b. A jury convicted Ms. Brooks on the charge of refusing to sign a speeding ticket, but it did not convict her of resisting arrest, and the charge was dismissed. Supp. App. 7b-8b.

Brooks was never tried on the speeding ticket itself, which was also dismissed at the conclusion of her trial. Supp. App. 8b.

As a result of being struck with a Taser by the officers, Ms. Brooks sustained two burn scars on her thigh. Supp. App. 8b. She also sustained burn scars on her shoulder and neck, leaving her with an unsightly scar. Supp. App. 8b. It appears her daughter is not permanently injured, though Ms. Brooks continues to worry that both she and her daughter may suffer some future illness or disability from the effects of the Taser. Supp. App. 8b.

Ms. Brooks brought suit against Officer Ornelas, Officer Jones, and Sergeant Daman for excessive force in violation of the Fourth Amendment to the United States Constitution and for state-law assault and battery. App. 8a. She also sued the City of Seattle and Seattle Police Chief Gil Kerlikowske for Fourth Amendment violations and negligence. In the district court, the officers moved for summary judgment on the grounds that their use of force was lawful and that they were entitled to qualified immunity. The district denied their motion for summary judgment, holding that the officers' use of force was excessive under the Fourth Amendment and that the officers had violated Ms. Brooks' clearly established constitutional rights. App. 8a-9a.

A divided panel of the Ninth Circuit reversed the district court both on the constitutional question and on qualified immunity. App. 89a-90a. On rehearing *en banc*, the Ninth Circuit court vacated the panel's decision and held that the officers violated Ms. Brooks' Fourth Amendment rights. App. 26a-27a. The *en banc* court also held, however, that the officers were entitled to qualified immunity because there were no cases as of November 2004 providing the officers fair warning that their conduct violated Ms. Brooks' clearly established Fourth Amendment

rights. App. 32a-33a. Because the State of Washington does not afford qualified immunity against state-law claims to officers who use excessive force to effectuate an arrest, the *en banc* Ninth Circuit remanded the case to the district court to consider Ms. Brooks' state law claims. App. 4a-5a, 42a.

On January 17, 2012, the officers filed a petition for certiorari seeking review of the Ninth Circuit's ruling that they had violated Ms. Brooks' Fourth Amendment rights. Ms. Brooks timely filed a conditional cross-petition seeking review of the Ninth Circuit's decision to find that the officers were entitled to qualified immunity on February 21, 2012.

REASONS FOR DENYING THE WRIT

I. There Is No Circuit Split.

First and foremost, the Court should deny the petition for certiorari because there is no conflict among the circuits on the issue Petitioners purport to raise. While it is undoubtedly true that different courts have reached different outcomes in cases involving the use of Tasers, there is a straightforward justification for that supposed disparity: the *facts* in the various cases have been extremely different. In short, this case — involving a very minor crime, and no threat to the police or anyone else — is wholly unlike those cases where courts have upheld the use of a Taser. Furthermore, in cases involving facts that bear some semblance to those at issue here, courts have consistently held that the officers had used excessive force in violation of the Fourth Amendment.

Let there be no mistake: Petitioners are simply incorrect in arguing the Ninth Circuit has "broadened to the point of irrelevance" the notion that tasing can be appropriate for a recipient who is "actively resist[ing] arrest." Pet. 26. The truth is

that the Ninth Circuit was keenly aware that there are times when a Taser is an appropriate police tool. But there is a world of difference between how Ms. Brooks responded to police officers during a traffic stop and how suspects in other cases reacted to police. Ms. Brooks did not threaten anyone with a weapon, *compare Russo v. City of Cincinnati*, 953 F.2d 1036, 1044-45 (6th Cir. 1992); attack the officers, *compare Hinton v. City of Elwood*, 997 F.2d 774, 776–77 (10th Cir. 1993); aggressively confront the officers at night, *compare Draper v. Reynolds*, 369 F.3d 1270, 1276-77 (11th Cir. 2004); or pose a serious risk to herself and others, *compare Buckley v. Haddock*, 292 F. App'x 791, 794-95 (11th Cir. 2008).

Indeed, all that Ms. Brooks supposedly did to "resist arrest" was to clutch the wheel involuntarily in her turned-off vehicle, and to honk her horn in a call for help — all while one police officer restrained her left arm behind her back and another police officer struck her repeatedly with a Taser. App. 26a. As the Supplemental Appendix makes clear, however, even this characterization of Ms. Brooks' reaction is inaccurate: Ms. Brooks' undisputed testimony states that she was unable to exit her car because she was being restrained by Officer Ornelas while Officer Jones struck her with the Taser. Supp. App. 6b. To lump her case into the more serious category of cases where the deployment of a Taser has been held appropriate thus defies reason. Ms. Brooks decidedly did not "*actively* resist arrest" in any meaningful sense of the term.

Petitioners' failure to appreciate that Ms. Brooks' "resistance" is wholly unlike that in the other cases involving use of a Taser is fatal to the officers' Petition for Certiorari. Petitioners can point to no case with facts that bear even a passing resemblance to those here in which a court held that the deployment of a Taser was appropriate. To the

contrary, the cases most like this one have all held that officers do not have *carte blanche* to use a Taser against citizens guilty of minor crimes who do not pose an immediate threat to anyone. *See Fils v. City of Aventura*, 647 F.3d 1272, 1288-89 (11th Cir. 2011) (Tjoflat, J.) (use of a Taser against a non-threatening citizen guilty of only a minor crime is excessive force); *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010) (same); *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 664-66 (10th Cir. 2010) (same); *Brown v. City of Golden Valley*, 574 F.3d 491, 498 (8th Cir. 2009) (same); *Parker v. Gerrish*, 547 F.3d 1, 8–11 (1st Cir. 2008) (same).

Moreover, this case involves at least two other distinguishing characteristics that Petitioners can only try to obscure: namely, the facts that Ms. Brooks was seven months pregnant at the time of her encounter with police, and that the officers repeatedly applied the Taser without giving Ms. Brooks — who posed no threat to anyone — any meaningful opportunity to relent voluntarily, *compare Buckley*, 292 F. App'x at 793 (after tasing, the officer stopped, reiterated his warning, gave the person "some time" to comply, and only *then* tased again). These key points were essential to the *en banc* court's holding, *see* App. 26a, but are wholly absent from the cases cited by Petitioners.

II. The Ninth Circuit's Fourth Amendment Analysis Is Plainly Correct.

In addition, there is no need for this Court to grant certiorari review because the Ninth Circuit's analysis of Ms. Brooks' Fourth Amendment claim is plainly correct. Officers have no business using a Taser against a seven-month pregnant woman who is not a threat to anyone — much less to do so "three times over the course of less than one minute" without giving her an opportunity "to recover from

the extreme pain she experienced, gather herself, and reconsider her refusal to comply." App. 26a.

Petitioners' cramped interpretation of the Fourth Amendment would allow officers facing no exigent circumstances to inflict "extreme pain" on a helpless citizen, even for crimes that are trivially minor. This would be true even where the individual did not "pose[ ] even a *potential* threat to the officers' or others' safety," and where the individual was not attempting to flee. App. 23a. (emphasis in original). Authorizing officials to inflict "extreme pain" in such circumstances would mark a sea change in our Fourth Amendment jurisprudence. As detailed below, Petitioners' arguments offer no legitimate basis for making that change.

A. The *Graham* Factors Confirm That Petitioners Violated Ms. Brooks' Constitutional Rights.

As the Ninth Circuit recognized, this case is governed by a straightforward application of the factors set forth in *Graham v. Connor*, 490 U.S. 386 (1989). Each of this Court's factors confirms the Ninth Circuit got the question exactly right.

First, Ms. Brooks' conduct was not "sever[e]." *Id.* at 396. The question is not even close. As the *en banc* court explained, "we have no difficulty deciding that failing to sign a traffic citation and driving 32 miles per hour in a 20-mile-per-hour zone are not serious offenses." App. 22a; *see also* App. 107a ("The majority acknowledges that that crime was not 'serious.' In fact, it was trivial.") (Berzon, J., dissenting). Because Ms. Brooks was doing nothing malicious or dangerous, the first *Graham* factor sharply cuts in favor of the Ninth Circuit's constitutional conclusion. *See, e.g.*, *Davis v. City of Las Vegas*, 478 F.3d 1048, 1055 (9th Cir. 2007) ("obstructing a police officer" is not a "serious

offense[ ]"); *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1281 (10th Cir. 2007) (McConnell, J.) ("[o]bstructing government operations" is "not a severe crime"); *Solomon v. Auburn Hills Police Dep't*, 389 F.3d 167, 174 (6th Cir. 2004) (trespass where a woman failed to obey an officer's orders is "certainly not a severe crime"). On the other hand, there can be no doubt that the Taser—*by design*—caused Ms. Brooks "extreme pain." App. 21a, 26a. In fact, Tasers can be lethal, *see, e.g.*, Byron K. Lee et al., *Relation of Taser (Electrical Stun Gun) Deployment to Increase in In-Custody Sudden Deaths*, 103 AM J. CARDIOL. 877, 877 (Mar. 2009) ("[A]lthough considered by some a safer alternative to firearms, Taser deployment was associated with a substantial increase in in-custody sudden deaths in the early deployment period …."), and they are particularly dangerous to pregnant women, *see, e.g.*, *Valdez v. Ayers*, No. 91-16463, 1993 WL 69167, at *1 (9th Cir. Mar. 10, 1993) (noting that pregnant woman suffered miscarriage following a tasing).

Second, Ms. Brooks did not pose "an immediate threat" — indeed, *any* threat — "to the safety of the officers or others." *Graham*, 490 U.S. at 396. "At no time did Brooks verbally threaten the officers. She gave no indication of being armed and, behind the wheel of her car, she was not physically threatening." App. 23a. Nor was there any danger that Ms. Brooks would use her car as a weapon. At the time she was set upon, her keys were not in the ignition. *See id.* ("[B]efore Jones applied the taser to her, Ornelas removed the keys from Brooks's car ignition and the keys dropped to the car's floor. Thus, at the time Jones applied the taser to Brooks, she no longer posed even a *potential* threat to the officers' or others' safety, much less an 'immediate threat.'") (emphasis in original); *id.* at __ ("[I]f Officer Ornelas really believed she was going to take off and

endanger people, all he had to do was hold on to the keys rather than drop them in the car.") (Berzon, J., dissenting). The truth is plain: Ms. Brooks posed no danger to anyone. *See, e.g.*, *Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005) (no immediate threat where "there was [not] any reason to believe [the victim] possessed any weapon" and where the victim "made no threats"); *Jones v. Buchanan*, 325 F.3d 520, 528, 530 (4th Cir. 2003) (no immediate threat where the victim "was neither armed *nor suspected of being armed*" even though the victim "was drunk, angry, and using foul language") (emphasis in original)).

Third, correctly following *Graham*, the *en banc* court also found that Ms. Brooks was not "attempting to evade arrest by flight," and to the extent she "resisted arrest," her conduct "did not involve any violent actions towards the officers." App. 24a-25a; *see also* App. 115a ("Although she tensed her muscles to prevent her own body from being moved, she did not use force against the Officers. This level and type of resistance, if it weighs against a finding of excessive force at all, does so only slightly.") (Berzon, J., dissenting); *see also Parker*, 547 F.3d at 9 (holding that a jury could find initial resistance "*de minimis* in light of the circumstances"). Furthermore, even the *en banc* court's characterization that Ms. Brooks had "stiffened her body and clutched her steering wheel to frustrate the officers' efforts to remove her from the car," App. 26a, is contradicted by the record in this case. According to Ms. Brooks' unrefuted testimony, she was unable to exit her car because she was being restrained by Officer Ornelas while Officer Jones struck her with the Taser. App. 7a.

Nor did "exigent circumstance[s] requiring the attention of one of the three officers exist[ ] *somewhere else*, so that the encounter with Brooks

had to be resolved as quickly as possible.'" App. at __ (emphasis in original). The officers had ample time to reason with Ms. Brooks, but opted to physically impose themselves on her instead. There was no basis for violence. *See, e.g.*, *Ciminillo v. Streicher*, 434 F.3d 461, 468 (6th Cir. 2006) (finding a constitutional violation where the victim "was not attempting to evade the police").

Fourth, the totality of the circumstances confirms that Ms. Brooks' constitutional rights were violated. In particular, and even leaving aside the fact that Tasers are especially dangerous when applied to pregnant women, the officers' use of the Taser three times "in rapid succession" on Ms. Brooks, without giving her an opportunity to "reconsider her refusal to comply," is indefensible. App. 26a. Even if the officers' initial use of the Taser were somehow appropriate — and it was not — there simply was no excuse for what the officers did next. The officers waited only six seconds between two of the tasings, and they never said a word to Ms. Brooks that they would stop using the Taser if she would only relent and get out of her car. App. 26a. Under any reasonable standard, such egregious conduct violates the Fourth Amendment. *Cf. Graves v. Zachary*, 277 F. App'x 344, 348–49 (5th Cir. 2008) (Smith, J.) (finding genuine issue of material fact regarding whether an officer's *second* shot was objectively reasonable); *Dickerson v. McClellan*, 101 F.3d 1151, 1163 (6th Cir. 1996) (finding genuine issue of material fact where there were questions "regarding the sequence of events immediately preceding the shooting").

Finally, the officers had no authority under Washington State law "to take Brooks into *custodial* arrest" at all. App. __ (Berzon, J., dissenting) (emphasis in original) (discussing WASH. REV. CODE § 46.64.015 (2004)). This fact is crucial because

"[a]ccording to the Seattle Police Department's Policy and Procedure Manual, an officer may 'use only the minimal amount of force necessary to overcome physical aggression or resistance to compliance with *a lawful process*.'" App. 115a-116a (emphasis added by Berzon, J.). The officers here thus acted contrary to their training by seeking "to remove Brooks from her car" in the first place. App. 116a-117a. Indeed, this critical and fact-bound question of state law renders the entire case inappropriate for certiorari review.

B. Petitioners' Arguments In Favor Of Certiorari Are Misplaced.

Against this backdrop, it is easy to see why the *en banc* court concluded that Ms. Brooks' rights were violated. Petitioners' attempts to obscure the court's straightforward reasoning should be rejected.

At the outset, Petitioners profoundly misstate the record when they contend that the "Taser presented a pain compliance technique that virtually eliminated the risk of lasting injury" or serious harm to Ms. Brooks or her pregnancy. Pet. 17. To the contrary, the doctor who examined Ms. Brooks "expressed some concern about Brooks' rapid heartbeat," App. ___, and as noted above, the Ninth Circuit has already documented a case where the use of a Taser on a pregnant woman appears to have resulted a miscarriage, *see Valdez*, 1993 WL 69167, at *1. That Ms. Brooks and her daughter were not permanently injured beyond Ms. Brooks' scarring is fortunate. But that does not excuse the officers' decision to take a serious chance with the health of Ms. Brooks and her unborn child when they willfully applied "thousands of volts of electricity" to Ms. Brooks. App. __ (Berzon, J., dissenting).

Petitioners' efforts to explain away their repeated applications of the Taser are also misplaced. The

officers simply announce, as if it were a self-evident fact, that "any reasonable police on the scene" could not have understood that Ms. Brooks was "unable to express her willingness to cooperate immediately after" being struck with the Taser. Pet. 16. Indeed, according to the Petition, the fact that Ms. Brooks continued "to yell, and to honk her horn" meant she might have been subjected to the Taser again and again until she passed out or was incapacitated. *Id.*; *see also* App. 50a-51a (Kozinski, C.J., dissenting). This argument lacks merit because, as the *en banc* court explained, the issue is *not* whether Ms. Brooks immediately surrendered upon the initial application of the Taser, but rather whether she had "time … to recover from the extreme pain she experienced, gather herself, and reconsider her refusal to comply." App. 26a. In other words, *of course* Ms. Brooks reacted when thousands of volts pulsed through her and in the seconds afterwards as her body adjusted to the shock. But that does not mean that after a meaningful moment of reflection, Ms. Brooks would not have reconsidered her position — particularly if the officers would have used words to restate her options instead of resorting once more to force. The police have no right to repeatedly inflict massive pain on a non-threatening citizen without even giving her a real opportunity to relent.

Nor is it true that the officers' conduct comported with their "training and experience." Pet. 17. As explained above, the State of Washington does not authorize what Petitioners did to Ms. Brooks. As such, the officers acted contrary to the Seattle Police Department's Policy and Procedure Manual. *See* App. 116a (Berzon, J., dissenting) ("Because the Officers knew they had no authority to effect a custodial arrest, they were not performing a legal duty and Brooks was not refusing to comply 'with a lawful process.' Under the Seattle Police

Department's own policies, then, the Officers were not justified in using any force."). The officers cannot hide behind their "training" when they violated their own policy manual.

In short, the Ninth Circuit's constitutional analysis was succinct and entirely correct:

> Brooks's alleged offenses were minor. She did not pose an immediate threat to the safety of the officers or others. She actively resisted arrest [only] insofar as she refused to get out of her car when instructed to do so and stiffened her body and clutched her steering wheel to frustrate the officers' efforts to remove her from her car. Brooks did not evade arrest by flight, and no other exigent circumstances existed at the time. She was seven months pregnant, which the officers knew, and they tased her three times within less than one minute, inflicting extreme pain on Brooks. …. A reasonable fact-finder could conclude, taking the evidence in the light most favorable to Brooks, that the officers' use of force was unreasonable and therefore constitutionally excessive.

App. 26a. Petitioners' arguments to the contrary are incorrect and do not warrant this Court's attention.

C. The Ninth Circuit's Fourth Amendment Analysis Is Consistent With Cases From Other Federal Circuits.

More broadly, the Ninth Circuit's constitutional holding is in line with precedent of other circuits with regard to unarmed, non-violent suspects who do not present a flight risk. The federal courts have consistently held that the use of non-lethal force — such as the use of violent arrest techniques, batons, mace, and attack dogs — on individuals such as Ms. Brooks squarely violates the Fourth Amendment.

Other circuits have repeatedly affirmed that the police have no right to inflict pain on unarmed, non-violent citizens who are not flight risks, particularly in the absence of exigent circumstances. For example, there is ample precedent confirming that pepper spray — which is far less lethal than a Taser — cannot be used against a non-threatening citizen like Ms. Brooks. *See, e.g.*, *Brown v. City of Huntsville*, 608 F.3d 724, 739–40 (11th Cir. 2010); *Grawey v. Drury*, 567 F.3d 302, 310–11 (6th Cir. 2009); *Reese v. Herbert*, 527 F.3d 1253, 1273–74 (11th Cir. 2008); *Jones v. City of Cincinnati*, 521 F.3d 555, 560 (6th Cir. 2008); *Park v. Shiflett*, 250 F.3d 843, 852–53 (4th Cir. 2001). The same constitutional principle holds true for numerous other forms of police violence that are less dangerous than a Taser. Such non-lethal applications of force include beanbag propellants, *see, e.g.*, *Deorle v. Rutherford*, 272 F.3d 1272, 1282–85 (9th Cir. 2001); *Ciminillo*, 434 F.3d at 467, 468–69; pepper balls or tear gas, *see e.g.*, *Fogarty v. Gallegos*, 523 F.3d 1147, 1160–61 (10th Cir. 2008)); attack dogs, *see e.g.*, *Watkins v. City of Oakland*, 145 F.3d 1087, 1090, 1093 (9th Cir. 1998); and dragging and throwing, *see, e.g.*, *Davis v. Williams*, 451 F.3d 759, 767 (11th Cir. 2006). Indeed, even overly-tight handcuffs might form the basis for a Fourth Amendment claim of excessive force. *See, e.g.*, *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1209 (10th Cir. 2008); *Wall v. Cty. of Orange*, 364 F.3d 1107, 1112 (9th Cir. 2004); *Kopec v. Tate*, 361 F.3d 772, 777–78 (3d Cir. 2004); *Bastien v. Goddard*, 279 F.3d 10, 16 (1st Cir. 2002); *Herzog v. Vill. of Winnetka*, 309 F.3d 1041, 1043 (7th Cir. 2002). It necessarily follows that the repeated application of thousands of volts of electricity on an unarmed, non-violent, non-fleeing pregnant woman is unconstitutional as well.

The law across the circuits is clear that the use of Tasers and their less lethal counterparts on individuals who are unarmed, who are non-threatening, and who pose no flight risk is plainly unconstitutional, particularly when the individuals have been accused only of minor crimes. The Ninth Circuit's Fourth Amendment ruling is entirely consistent with that precedent. Accordingly, the Court should deny the Petition for Certiorari.

CONCLUSION

For all of the foregoing reasons, Respondent Malaika Brooks respectfully requests that the Court deny the Petition for Certiorari.

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Respectfully submitted,

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