No. _____

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

PETITION FOR A WRIT OF CERTIORARI

TED BUCK
Counsel of Record
KAREN L. COBB
STEPHEN P. LARSON
STAFFORD FREY COOPER
601 Union Street, Suite 3100
Seattle, WA 98101
(206) 623-9900
(206) 624-6885 (fax)
tbuck@staffordfrey.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The plaintiff was under arrest and actively resisting officers' efforts to remove her from her car. Officers determined the best alternative to overcome her resistance was pain compliance by use of a drive-stun Taser. They warned her and then applied the Taser. Plaintiff was taken into custody without injury.

1. Did the Ninth Circuit err in finding the Taser use unconstitutional where (a) it was the least risky pain compliance option available, and (b) the decision is in conflict with *Graham v. Connor's* holding that an arrest necessarily carries with it the authority to use some degree of force?

2. Did the Ninth Circuit err in holding that the plaintiff stated a Fourth Amendment excessive force claim despite declaring that the record was insufficient to assess the level of force presented by the drive-stun Taser, particularly where the court failed to address whether any less-risky alternatives were available to the officers?

3. Where the officers chose the least risky force option, should the Ninth Circuit have found the use of the Taser constitutional as a matter of law, the result reached by the original Ninth Circuit panel?

4. Does the Ninth Circuit's opinion conflict with other circuits' decisions on Taser pain compliance applications in similar circumstances?

PARTIES TO THE PROCEEDING BELOW

The names of the Petitioners are Steven L. Daman, Juan M. Ornelas, and Donald M. Jones.

Steven Daman, Juan Ornelas and Donald Jones were defendants in the original action, appellants at the Ninth Circuit and appellees on *en banc* review.

The name of the Respondent is Malaika Brooks.

Brooks was plaintiff in the original action, appellee at the Ninth Circuit and appellant on *en banc* review.

This matter was consolidated for the *en banc* rehearing with *Mattos v. Agarano*, also the subject of a writ for certiorari. The underlying orders in that matter are filed therein.

The district court's order on summary judgment is in the appendix (App. 125). The original panel decision, *Brooks v. City of Seattle*, 599 F.3d 1018 (9th Cir. 2010), is also in the appendix (App. 61). Finally, the *en banc* decision, *Mattos v. Agarano, Brooks v. City of Seattle*, 661 F.3d 433 (9th Cir. 2011) is in the appendix (App. 1).

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STATEMENT OF JURISDICTION

The *en banc* Ninth Circuit Court of Appeals filed its opinion on October 17, 2011. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on writ of certiorari as the reasonableness of the use of the officers' force is challenged under 42 U.S.C. § 1983 and the Fourth Amendment to the Constitution of the United States. This petition is filed under this Court's Rule 10(a) and (c).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States (as applicable):

> 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 Constitution of the United States (as applicable):

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . .

42 U.S.C. § 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivations of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Seattle Police Officers Juan Ornelas, Donald Jones and Steven Daman contend that the Ninth Circuit's holding that declared the officers' decision to apply the least risky force option to overcome the plaintiff's resistance unconstitutional is in direct conflict with this Court's precedent allowing use of force to effect arrest. They also assert that the decision is unsupported by the record and is in conflict with decisions of other circuits in similar circumstances.

The undisputed record established that the officers' actions were constitutional as a matter of law.

An officer stopped the plaintiff for a traffic violation. The plaintiff refused to sign the citation claiming she believed if she did it would be an admission of guilt. The officer pointed out language on the citation that specifically noted that signing was not an admission of guilt. He also told her that failure to sign would subject her to arrest under state law. She still refused to sign. Another officer and the officers' sergeant arrived and discussed the citation with her. The plaintiff continued to refuse to sign and was placed under arrest.

When the officers ordered the plaintiff out of the car she refused to exit. She actively resisted officers' efforts to remove her with an arm-hold technique by holding the steering wheel and wedging herself into the seat. Plaintiff was a large (230 pounds), strong woman and the officers recognized that trying to manually extract her from the car presented a risk of injury to her and themselves. To avoid that risk, the officers considered alternatives. They decided to use a Taser in drive-stun mode, a device that the officers knew from training and experience provides a localized pain compliance option without risk of lasting physical injury. They also knew from training that the Taser would have no adverse effect on a pregnant woman; plaintiff had claimed to be pregnant, a claim the officers could not objectively verify due to the plaintiff's size. One officer pulled his Taser device, removed the dart cartridge and showed the device to

the plaintiff. He warned her that if she did not obey their orders to get out of the car she would be subject to the Taser device. He warned her it would hurt. He cycled the Taser to show the plaintiff the electrical arc between the probes of the device. She continued to resist arrest.

Officer Jones applied the drive-stun Taser. The plaintiff shouted and honked the car horn, but continued to refuse to get out of the car. After waiting nearly half a minute, he applied it a second time with the same result. He applied it a third time and the officers were able to pull the plaintiff from the car. The three applications occurred over the course of approximately one minute.

The plaintiff admits she suffered no lasting physical injury from the Taser, though she does claim a minor scar at one application site. She was pregnant at the time and also admits the incident had no effect on her now-seven-year-old child. She sued the officers claiming excessive force under federal and state law.

The district court dismissed most of plaintiff's claims on summary judgment but denied the officers' motion to dismiss the excessive force claims. The officers appealed. The Ninth Circuit's original panel held that the officers' use of force was reasonable and constitutional as a matter of law and that the officers were entitled to immunity. Plaintiff sought *en banc* review. By a thin margin the *en banc* panel held that while the officers were entitled to qualified immunity,

the plaintiff had stated a claim for violation of her Fourth Amendment rights.

The *en banc* Ninth Circuit failed to analyze or even mention any of the alternative techniques available to the officers to overcome the plaintiff's admitted resistance. It also determined that the record before it was "not sufficient for us to determine what level of force is used when a Taser is deployed in drive-stun mode," yet then made a constitutional finding notwithstanding its concern over the record. The decision that the force stated a constitutional claim was directly contrary to the undisputed record showing that the officers knew the Taser presented the least risk of lasting injury to a resisting arrestee under the circumstances.

REASONS FOR GRANTING THE WRIT

A petition for a writ of certiorari will be granted only for compelling reasons. When a circuit court prohibits a particular use of force but fails to explain why the force was improper or to provide any guidance for law enforcement officers as to a more appropriate alternative response – i.e., "the range of reasonable conduct" – and when its decision conflicts with *Graham v. Connor* and other circuits' holdings regarding the use of force, a compelling reason under Supreme Court Rule 10 is established.

It is well settled that police officers have the right to use some degree of physical coercion to effect an

arrest. *Graham v. Connor*, 490 U.S. 386, 396 (1989). The Ninth Circuit has also recognized that officers are not required to employ the least intrusive means available so long as they act reasonably. *See Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). The original Ninth Circuit panel found that because the plaintiff was admittedly actively resisting arrest the officers acted reasonably when they applied a Taser in drive-stun mode to overcome her resistance after verbal and hands-on techniques had failed. The *en banc* panel, to the contrary, found that the plaintiff stated a claim of excessive force but did so without an explanation as to why, and without any mention or analysis of what would have been an appropriate alternative response.

Appellate opinions provide the foundation of police department policies and direction to officers on important issues like force applications. When an appellate court declares a particular use of force unconstitutional, departments and officers are deemed to be on notice of the ruling; they must determine the extent of the ruling's impact on the specific force at issue and on closely related force options. Here the Ninth Circuit abolished application of a useful pain compliance technique without describing why the technique was unreasonable and without evaluating or even discussing alternatives that the officers could have used to reasonably effect their lawful duties. Further, the ambiguity of the Ninth Circuit's decision leads to the risk that other courts will deem the ruling to prohibit the use of any low-level physical force against an actively resisting suspect who does not present an imminent threat of harm to officers, a

result that could strip law enforcement of reasonable and practical means of enforcing the law.

Review is warranted.

I. The Ninth Circuit's decision conflicts with this Court's decisions that law enforcement officers' have the right to use force to effect an arrest. The Ninth Circuit should not have ruled that the use of the Taser stated a claim under the Constitution.

In *Graham v. Connor*, 490 U.S. 386, 396 (1989) this Court held that making an arrest "necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Here, however, the Ninth Circuit held that the use of the least injurious pain compliance option available to the officers to overcome the plaintiff's resistance was unconstitutional; it did so without considering alternatives available to the officers. That decision is in direct conflict with *Graham*. The wisdom of *Graham's* holding is manifest – absent the ability to resort to some use of force when needed officers would be unable to overcome a subject's active resistance. *See Jackson v. City of Bremerton*, 268 F.3d 646, 651 (9th Cir. 2001) (no constitutional violation when police officers sprayed chemical that ran in suspect's face, pushed her to the ground with their knees, handcuffed her tightly, and fractured her finger after plaintiff resisted arrest); *Winters v. Adams*, 254 F.3d 758, 765 (8th Cir. 2001) (no constitutional violation when officer broke car window and punched

unrestrained subject in eye when subject was erratic and flailing his arms and legs to avoid being removed from his vehicle, despite officer's lack of probable cause to arrest).

It was Brooks' recalcitrance and resistance that prompted her treatment. Asked why she did not simply get out of the car, she answered that she "*just didn't want to*" and "*felt I didn't have a reason to get out of the car*." Under both state and federal law she did not have a right to resist her arrest. *State v. Valentine*, 132 Wn.2d 1, 21, 935 P.2d 1294, 1304 (Wash. 1997); *State v. Holeman*, 103 Wn.2d 426, 430-31, 693 P.2d 89 (Wash. 1985); *Luchtel v. Hagemann*, 623 F.3d 975, 981 (9th Cir. 2002); *United States v. Willfong*, 274 F.3d 1297, 1301 (9th Cir. 2001), *citing United States v. Cunningham*, 509 F.2d 961, 963 (D.C. Cir. 1975) (" . . . Legal detention by government agents obviously implies a subjection to their moment-to-moment directions. . . ." Arrestees may not resist "even if the resister turns out to be correct that the resisted actions should not in fact have been taken."). Brooks' refusal to comply with the officers' directions, including her refusal to exit the car, also constituted obstruction under Revised Code of Washington 9A.76.020; *State v. Contreras*, 92 Wn.App. 307, 966 P.2d 915 (Wash. 1998).

The officers, not Brooks, had the legal right (and necessity) to dictate the terms of her arrest. *Buckley v. Haddock*, 292 Fed. Appx. 791, 794-95 (11th Cir. 2008) (crediting the government with a significant interest in enforcing the law on its own terms, rather than

on terms set by the arrestee; the government has an interest in arrests being completed efficiently and without waste of limited resources); *Crowell v. Kirkpatrick*, 667 F.Supp.2d 391, 410 (D. Vt. 2009) (plaintiff dismissed the most obvious alternative, to follow police orders; a person being placed under arrest has a legal obligation to comply with an officer's orders); *Schumacher v. Halverson*, 467 F.Supp.2d 939, 951 (D. Minn. 2006) (A person being placed under arrest has no right to prescribe the conditions under which he will comply with an officer's orders). The *Crowell* court specifically noted that it was reasonable for officers engaged with resisting subjects to conclude that any more time spent on a non-forceful resolution would amount to nothing more than a continued waste of law enforcement resources. *Crowell*, *supra*, *citing Buckley*, *supra*.

The record below established that pain compliance techniques represent the lowest level of physical force available to officers to overcome a subject's resistance. While no use of force option is risk-free, pain compliance techniques present less risk of serious injury than other force alternatives. The record below established that while wrist-locks, counter-joint techniques, arm-bars and other traditional pain compliance techniques are generally safe and effective, they do carry the risk of dislocations, broken bones, torn tendons and ligaments, and other strain-related physical injuries. The more an arrestee struggles the more force officers must apply to overcome her resistance. The associated increases in stress, strain and force magnitude elevate the risk of lasting injury

like torn ligaments and dislocations – to both the subject and the officers.

The record established that the Taser can be used in two ways, dart mode and drive-stun mode. In dart mode the device ejects two needle-like darts that are attached by wires to the Taser. The wires then transmit the electrical charge when the darts contact the suspect. If the darts are far enough away from each other when they contact the subject neuromuscular incapacitation (NMI) can result, commonly called "lock up." If the subject locks up, she is unable to control the movement of major muscle groups during the five-second cycle in which the Taser transmits a current. (App. 161).

Alternatively, in drive-stun mode the darts are removed and the Taser itself is pressed against a subject. The charge is delivered through two blunt contact probes rather than the darts. Lock up cannot occur in drive-stun mode because the probes are too close together. The drive-stun mode, consequently, delivers only a localized pain that ends with the termination of the Taser's five second cycle or when the Taser loses contact with the subject. The only condition-specific risk to applying a Taser to a pregnant woman is that a dart mode application that results in lock up could cause an uncontrolled fall and related injury. (App. 162). That risk was not present here; the plaintiff was seated and the Taser in drive-stun mode.

While a drive-stun Taser application is undeniably painful, the officers in this matter were trained

and the record below establishes that a drive-stun Taser presents less of a risk of lasting physical injury to a resisting suspect under these circumstances than traditional manual pain compliance techniques. The plaintiff did not argue that the officers should have used some alternative force to overcome her resistance; she instead argued they could use no force whatsoever. The Ninth Circuit also failed to even consider any alternatives. Instead the court simply stated that the option the record showed to be the least risky was not acceptable. The decision, consequently, provides no guidance whatsoever as to what should have been done differently, or why the choice made was improper.

In effect, the Ninth Circuit's decision establishes that the use of any form of pain compliance that presents a risk of injury that is equal to or greater than that of the drive-stun Taser is not permissible where a subject is actively resisting arrest but does not present an imminent risk to the officers. That would potentially include all other pain compliance techniques based on the record below. That conclusion effectively strips officers of the authority to use any pain compliance technique to control an actively resisting arrestee. In other words, no use of force is appropriate. The result directly conflicts with this Court's pragmatic holding in *Graham*.

II. The Ninth Circuit's decision was unfounded given (1) the court's statement it lacked a sufficient record to quantify the Taser as a use of force, and (2) the court's failure to evaluate existing alternatives.

The Ninth Circuit's decision plainly stated that it did not believe the record was sufficient to evaluate the degree of force a drive-stun Taser application constituted. "The record is not sufficient for us to determine what level of force is used when a Taser is deployed in drive stun mode." *Mattos v. Agarano*, 661 F.3d 433, 443 (9th Cir. 2011). Notwithstanding this recognition, the court determined the Taser use stated a claim for constitutional violation.

It has long been established as a practical matter that an appellate court may act only upon a competent record. *See*, *e.g., United States v. Soueiti*, 154 F.3d 1018 (9th Cir. 1998); *Pacific Express, Inc. v. United Airlines, Inc.*, 959 F.2d 814, 819 (9th Cir. 1992); *A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc., Bumble Bee Seafoods Div.,* 852 F.2d 493, 497 (9th Cir. 1988). If the Ninth Circuit actually believed the record below was insufficient to evaluate the force level presented by a drive-stun Taser, it should not have made a pronouncement on the issue.

Moreover, the court did not consider what alternative(s) may have been available to the officers to overcome plaintiff's active resistance. The opinion

conspicuously sidesteps that question despite the circuit's own precedent holding that such analysis is important in assessing *Graham's* "totality of the circumstances." *See Glenn v. Washington County*, ___ F.3d ___, 2011 WL 6760348, *6 (9th Cir. Dec. 12, 2011) (emphasis added):

> We "examine the totality of the circumstances and consider 'whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*.'" *Id*.[1] (quoting *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir.1994)). **Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given**. . . .

In *Glenn*, the Ninth Circuit clarified that officers are not "required" to attempt any purportedly less intrusive alternative(s), but that "the available lesser alternatives are, however, relevant to ascertaining that reasonable range of conduct." *Id.* *12 ("Accordingly, the availability of those alternatives is one factor we consider in the *Graham* calculus"), *citing Bryan*, 630 F.3d at 831. This additional *Graham* factor is organic to the Ninth Circuit, drawn from a 1994 opinion that cites to no authority for the prospect.[2] This additional factor in itself is objectionable under this Court's precedent in that it implies that whenever a less-intrusive means of enforcement is

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[1] *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010).

[2] *Chew v. Gates*, 27 F.3d 1432, 1443 (9th Cir. 1994).

available a fact issue on reasonableness arises. This Court's opinions reject that notion:

> a creative judge engaged in post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of police might have been accomplished. But "[t]he fact that the protection of the public might, in the abstract, have been accomplished by less intrusive means does not, by itself, render the search unreasonable."

United States v. Sharpe, 470 U.S. 675, 686-87 (1985) (quoting *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973)).

Regardless of the propriety of its "alternatives available" analysis, there is no question the Ninth Circuit has adopted the requirement. *See Davis v. City of Las Vegas*, 478 F.3d 1048, 1054 (9th Cir. 2007). It is accordingly unusual indeed that the court did not consider alternatives that it thought might be available to these officers. The factor is not independently conclusive, but given the dearth of authority described by the Ninth Circuit as to the use of Tasers in general – much less in drive-stun mode for pain compliance – it is hard to imagine a case where a discussion of the officers' reasonable alternatives and direction from the court as to the potential use of those alternatives would have been more relevant or beneficial.

The record established without conflict that the officers considered alternatives and determined the Taser in drive-stun mode to be the best available under the

circumstances; there was no evidence a "reasonable officer at the scene" would have disagreed, the applicable standard under *Graham*, 490 U.S. at 396. Absent evidence of a better alternative and given that the officers warned the plaintiff (another of the Ninth Circuit's extra factors), there was no basis to find the application unconstitutional. The record established that available alternatives to the drive-stun Taser included manual pain compliance (which failed), impact efforts (strikes to the body) or pepper spray, all of which have the potential for more serious injury and aftercare. (App. 162-63). Had the Ninth Circuit undertaken its own analysis of alternatives it would necessarily have reached the same conclusion as the officers, lacking any contrary evidence from Brooks.[3]

As a result, law enforcement agencies and officers are left with no information to evaluate when a drive-stun Taser might be properly used and no direction as to what force is appropriate to control an actively resisting subject not presenting an imminent physical threat. Indeed, by rejecting the drive-stun Taser, a low risk force option, the Ninth Circuit's decision exposes resisting arrestees to a greater risk of lasting injury than they might otherwise face. Alternatively, it suggests that any other use of force that creates as great or greater risk of injury would

[3] Brooks did not submit *any* evidence related to the Taser, but simply stated that no force was appropriate.

also be unreasonable. The effect is to potentially leave officers with no force option to overcome an arrestee's active resistance.

Finally, the court's statement that the rapidity of application prevented the plaintiff from "collecting herself" and allowing her to express a willingness to cooperate is simply unfounded. The record showed that once a Taser cycle ends or the Taser loses contact with the subject the pain immediately stops. The record established that the officer gave the plaintiff 31 seconds after the first application to cease her resistance. When she refused, it was applied again, and when she still resisted one final time. (App. 163-66). No evidence shows that any reasonable police officer on the scene would have understood the plaintiff to be unable to express her willingness to cooperate immediately after an application. To the contrary, the evidence showed that the plaintiff was able to act in the aftermath of applications; rather than expressing cooperation she chose to continue to resist, to yell, and to honk her horn.

III. Instead of ignoring the factual record, the Ninth Circuit should have accepted it and found that the use of the Taser was constitutional as a matter of law.

The record established the following undisputed, seminal facts related to the officers' use of force:

(1) the plaintiff was under arrest and actively resisting efforts to take her into custody;

(2) the officers' manual efforts to extricate her from the car were unsuccessful;

(3) the officers' training and experience instructed that manual pain compliance efforts created an enhanced risk of lasting, serious injury to the plaintiff under the circumstances given her resistance and her size;

(4) the drive-stun Taser presented a pain compliance technique that virtually eliminated the risk of lasting injury;

(5) the drive-stun Taser inflicts a localized, transitory pain that ends completely the instant the Taser cycle ends or when the device loses contact with the subject, unlike pain associated with manual pain compliance techniques;

(6) the officers' training and experience showed that the application of a drive-stun Taser would at most leave small marks that were the equivalent of sunburns, marks that fade completely in the majority of cases; and

(7) the officers were trained that the Taser device would have no adverse impact on a fetus, a fact borne out by the plaintiff's uneventful pregnancy after the event and the birth of her healthy (now-seven-year-old) daughter.

It is these objective facts that form the legitimate basis for the evaluation of the reasonableness of the

officers' use of force decision. "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." *Graham v. Connor*, 490 U.S. 386, 396 (1989), *citing Terry v. Ohio*, 392 U.S. 1, 20-22 (1968). The officers' deliberate choice of the least injurious option combined with their right to use force to effect the arrest of a resisting suspect was constitutional as a matter of law.

Moreover, it is well established that police officers need not use the least amount of force necessary in effecting arrest. *Luchtel v. Hagemann*, 623 F.3d 975, 982 (9th Cir. 2010), *citing Scott v. Henrich*, 39 F.3d 912, 915 (1994). Even if the Ninth Circuit had evidence that a lesser amount of force was available and could have been used, consequently, it would not have rendered the choice made by these officers unconstitutional. The reality is that the Ninth Circuit did not find a lesser force alternative that would have accomplished the officers' lawful aims; neither did the plaintiff argue or present evidence that one existed.

Once the facts in the record are established and all inferences supported by the record are drawn in favor of the non-moving party, the calculus of the constitutionality of a use of force becomes a "pure question of law." *Scott v. Harris*, 550 U.S. 372, 381-82 & n. 8 (2007). Since no evidence in the record suggests a reasonable officer at the scene would have done anything different than the officers here, the Ninth Circuit should have found the application of force constitutional as a matter of law.

IV. The Ninth Circuit's decision is contrary to other circuits' decisions on similar Taser applications.

The Ninth Circuit's decision also conflicts with the decisions of other circuits as to the propriety of the use of Tasers to overcome suspects' active resistance. The Ninth Circuit recognized that no previous precedent suggested that the use of a drive-stun Taser would be inappropriate in overcoming an arrestee's active resistance. Despite that recognition, the Ninth Circuit crafted an opinion that conflicts with other circuits' decisions on Taser applications, which decisions have upheld the propriety of the use of the Taser against actively resisting arrestees. As a result law enforcement officers in the Ninth Circuit are now curtailed in the use of an effective pain compliance tool that often offers less risk of injury to a resisting arrestee than other options. This conflict adversely affects both law enforcement officers and the citizens of the Ninth Circuit. By prohibiting the use of the Taser, the Ninth Circuit has exposed resisting arrestees and suspects to pain compliance techniques that may be more likely to result in lasting or permanent injury.

The *en banc* decision referenced cases from three other circuits – the Sixth, Tenth, and Eleventh – "rejecting claims that the use of a taser constituted excessive force," and further noted that "there were no circuit taser cases finding a Fourth Amendment violation." *Mattos*, *supra*, 661 F.3d at 448. While it attempted to distinguish those cases, the court did not

explain why it rejected their unanimous conclusion that active resistance was a key factor in justifying the officers' use of a Taser.

The Sixth Circuit, in *Russo v. City of Cincinnati*, 953 F.2d 1036, 1044 (6th Cir. 1992), did not address this issue directly. It simply quoted this Court's seminal explanation in *Graham v. Connor*, 490 U.S. 386, 396 (1989), that in excessive force cases "a court should look to the 'facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, ***and whether he [was] actively resisting arrest or attempting to evade arrest by flight***.'" (emphasis added)

The Tenth Circuit, in *Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 780 (10th Cir. 1993), cited to this same portion of *Graham* and emphasized the plaintiff's active resistance in affirming summary judgment for the defendants:

> After grabbing Hinton, Myer and White increased their application of force. Not only did they wrestle him to the ground but they used a stun gun on him. However, the appellant admits at this point that he was actively and openly resisting Myer and White's attempts to handcuff him, even to the extent of biting the officers. Hinton's own expert witness on police conduct, Noah Goddard, testified that wrestling a defendant to the ground and using a stun gun are not inappropriate police practices when a suspect is

> resisting arrest. Goddard testified that once a police officer sets about to effect an arrest he is obligated to complete it, and that use of a stun gun is one of the least serious methods of accomplishing this task.

Id. at 781 (footnote and citations omitted).

The Ninth Circuit's own description of the facts underlying the Eleventh Circuit's decision in *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004), makes clear that the plaintiff's active resistance was a critical factor in that court's decision to affirm summary judgment for the defendant.

> During the ensuing traffic stop, the plaintiff "acted in a confrontational and agitated manner, paced back and forth, and repeatedly yelled at [the officer]." When the plaintiff failed to comply with the officer's fifth request to produce certain documents, the officer tased him. The Eleventh Circuit held that the "use of the taser gun to effectuate the arrest of [the plaintiff] was reasonably proportionate to the difficult, tense and uncertain situation that [the defendant officer] faced in this traffic stop, and did not constitute excessive force."

Mattos, *supra*, 661 F.3d at 448 (citations omitted).

At least three other circuits have also focused on active resistance as being a – actually the – key element of the excessive force analysis. In *Parker v. Gerrish*, 547 F.3d 1, 3 (1st Cir. 2008), the defendant officer appealed from a jury's excessive force verdict

against him for tasing the plaintiff during a DUI arrest. The First Circuit affirmed because Parker was *not* actively resisting.

The plaintiff voluntarily exited his vehicle and was ordered to turn around and place his hands behind his back. (*Id.* at 4.) "Parker complied, turned around, and clasped his right wrist with his left hand." (*Ibid.*)

> Caldwell then proceeded to cuff Parker's left wrist in two seconds. Caldwell then ordered Parker to release his own clasped right wrist. At first, Parker did not comply. . . . [¶] Caldwell then applied force to Parker's right hand in an effort to get Parker to release his wrist. Parker testified that at this point he released his grip and was then shot with the Taser.

Id. at 4-5.

> Though the offense of resisting arrest could certainly pose a risk to an arresting officer, the evidence presented to the jury could allow it to find that Parker was not meaningfully engaged in this offense. First, Parker testified that he voluntarily released his hands. Second, as police expert Ryan testified, officers routinely encounter difficulty getting suspects to align their hands for cuffing.
>
> Even to the extent Parker initially resisted releasing his hands for cuffing, a jury could find this resistance de minimis in light of the circumstances. Caldwell's attempt to get Parker to release his hand lasted only a few

> seconds. Parker testified that he released his hand and was then immediately shot with the Taser.

Id. at 9. The First Circuit made clear that the *lack of* active resistance on the part of the plaintiff was a key element in its decision that the use of the Taser amounted to excessive force.

The Eighth Circuit similarly concentrated on the lack of active resistance in denying an officer's summary judgment motion after he applied a Taser following a traffic stop in *Brown v. City of Golden Valley*, 574 F.3d 491, 493 (8th Cir. 2009). There the plaintiff's actions were starkly differently than those of this plaintiff. She was a passenger in her husband's car when he was pulled over for possible drunk driving. *Id.* at 493. "She thought that the officers were aggressive and that the traffic stop was different from any that she had previously witnessed. . . . Shortly after Richard was handcuffed, Sandra called 911 on her cell phone." *Id.* at 494.

> As the 911 operator tried to reassure Sandra, Zarrett, who was accompanied by two other officers, yanked open the passenger's side door and yelled, "Get off the phone." Sandra replied that she was very frightened and that she wanted to stay on the phone with the 911 operator. Zarrett again ordered Sandra to get off the phone, to which she repeated that she was frightened.
>
> Without another word, Zarrett applied the prongs of his Taser to Sandra's upper right

> arm, grabbed her phone and some of her hair, and threw the phone out the driver's side door onto the shoulder.

Ibid.

> Sandra posed at most a minimal safety threat to Zarrett and the other officers and was not actively resisting arrest or attempting to flee. . . . In a word, then, nothing in the record indicates that Sandra was actively resisting arrest as she sat in the car or that she was attempting to evade arrest by flight. Her principal offense, it would appear, was to disobey the commands to terminate her call to the 911 operator.

Id. at 497. Like the First Circuit in *Parker*, the Eighth Circuit made clear that the *lack of* active resistance on the part of the plaintiff was a key element in its decision that the use of the Taser amounted to excessive force.

The Second Circuit in a recent unpublished case similarly concentrated on the subjects' active resistance in affirming a summary judgment granted to the defendant officers in an excessive force case:

> In this case, Plaintiffs were arrested for relatively minor crimes of trespass and resisting arrest and were not threatening the safety of any other person with their behavior. However, they were actively resisting their arrest at the time they were tased by the officers in this case, having chained themselves to a several hundred pound barrel drum and

> having refused to free themselves, even though they admitted they were able to release themselves from the barrel at any time throughout the encounter. . . . [B]oth Plaintiffs admitted that the officers at the scene considered and attempted several alternate means of removing them from the property before resorting to use of their tasers, that the officers expressly warned them that they would be tased and that it would be painful, and that the officers gave them another opportunity to release themselves from the barrel after this warning.

Crowell v. Kirkpatrick, 400 Fed. Appx. 592, 594-95 (2d Cir. 2010).

Until the current case, even the Ninth Circuit followed this same rule. *Bryan v. MacPherson*, 630 F.3d 805, 821 (9th Cir. Cal. 2010), arose from the defendant officer's use of a Taser "during a traffic stop for a seatbelt infraction."

> There is no dispute that Bryan was agitated, standing outside his car, yelling gibberish and hitting his thighs, clad only in his boxer shorts and tennis shoes. It is also undisputed that Bryan did not verbally threaten Officer MacPherson and, according to Officer MacPherson, was standing twenty to twenty-five feet away and not attempting to flee.

Id. at 822.

> Turning to Bryan's "resistance," we note that Bryan in fact complied with every command issued by Officer MacPherson except the one he asserts he did not hear – to remain in the car. Even if Bryan failed to comply with the command to remain in his vehicle, such noncompliance does not constitute 'active resistance' supporting a substantial use of force. Following the Supreme Court's instruction in *Graham*, we have drawn a distinction between passive and active resistance.

Id. at 829-830. In the present case, the Ninth Circuit abandoned this method of analysis – or rather, broadened it to the point of irrelevance. The *en banc* majority acknowledges that the plaintiff actively resisted arrest. "Brooks refused to get out of her car when requested to do so and later stiffened her body and clutched her steering wheel to frustrate the officers' efforts to remove her from her car." *Mattos*, *supra*, 661 F.3d at 445. "She actively resisted arrest insofar as she refused to get out of the 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." *Id*. At 446. But then, instead of acknowledging the importance of her active resistance the majority minimized its significance to virtually zero by adding other requirements that must be present if active resistance is to have any relevance in the excessive force calculation.

> We observe, however, that Brooks's resistance did not involve any violent actions towards the officers. In addition, Brooks did not attempt

> to flee, and there were no other exigent circumstances at the time. The facts reflect that the officers proceeded deliberately and thoughtfully, taking an aside in the midst of the incident to discuss where they should taser Brooks after they found out she was pregnant. There is no allegation that an exigent circumstance requiring the attention of one of the three officers existed somewhere else, so that the encounter with Brooks had to be resolved as quickly as possible.

Ibid. With these added requirements the Ninth Circuit essentially erased active resistance in evaluating whether or not a use of force is excessive. This places the Ninth Circuit in clear conflict with the standards recognized in at least six other circuits. Had these officers done the same thing in those circuits, those appellate courts would have found no constitutional violation. The officers should not be mere victims of geography. Accordingly, this Court should hear this case in order to resolve this conflict.

CONCLUSION

Having disregarded this Court's direction in *Graham v. Connor*, ignored its own declaration of insufficiency in the record, failed to consider even the existence of possible alternatives and having charted a course in conflict with six other circuits, the Ninth

Circuit's decision has shown itself to be an action in emotion, not law. Review is warranted.

Respectfully submitted,

TED BUCK
Counsel of Record
KAREN L. COBB
STEPHEN P. LARSON
STAFFORD FREY COOPER
601 Union Street, Suite 3100
Seattle, WA 98101
(206) 623-9900
(206) 624-6885 (fax)
tbuck@staffordfrey.com