No. 11-898

In The Supreme Court of the United States

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

Petitioners,

vs.

MALAIKA BROOKS,

Respondent.

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

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICI CURIAE* LOS ANGELES COUNTY POLICE CHIEFS' ASSOCIATION, NATIONAL TACTICAL OFFICERS ASSOCIATION, AND THREE OTHERS IN SUPPORT OF PETITIONERS

STEVEN J. RENICK, ESQ.
Counsel of Record
MANNING & KASS, ELLROD, RAMIREZ, TRESTER LLP
801 So. Figueroa Street, 15th Floor
Los Angeles, CA 90017
Telephone: (213) 624-6900
Facsimile: (213) 624-6999
sjr@manningllp.com

Attorneys for Amici Curiae
Los Angeles County Police Chiefs' Association,
National Tactical Officers Association, and Three Others

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

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

Pursuant to Supreme Court Rule 37(2)(b), the Los Angeles County Police Chiefs' Association, the National Tactical Officers Association, the Illinois Tactical Officers Association, the Kansas City Metro Tactical Officers Association, and the Rocky Mountain Tactical Team Association respectfully move this Court for leave to file the attached brief as *amici curiae* in support of Petitioners Steven L. Daman, Juan M. Ornelas, and Donald M. Jones in the above-entitled matter.

Pursuant to Supreme Court Rule 37(2)(a), the *amici curiae,* through their counsel, ensured that the counsel of record for all parties herein received notice of their intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief. Respondent Malaika Brooks, through her counsel, refused to consent to the filing of the *amicus curiae* brief, thereby necessitating this motion.

Petitioners, through their counsel, consented to the filing of the accompanying brief, and a copy of the consent letter received from Petitioners' counsel will be submitted to the Court with this motion and *amicus curiae* brief.

These *amici curiae* have a shared interest in ensuring that law enforcement officers throughout the states of the Ninth Circuit – and the United States as a whole – are able to fulfill the role society demands of the police – arresting lawbreakers. They

seek through this brief to bring to the Court's attention their concern that the Ninth Circuit's *en banc* opinion issued in this matter will interfere with the ability of law enforcement officers to fulfill that role.

There is good cause for this Court to grant this motion. The *amicus curiae* brief does not replicate the legal arguments advanced in the Petition. Rather, the brief discusses the difficulties this opinion will create for law enforcement officers and officials throughout the Ninth Circuit. The brief also presents substantive scientific evidence about the very minimal dangers associated with the use of electronic control devices (ECDs) such as the TASER used in this incident, to respond to the impression left by the majority in their *en banc* opinion that use of a TASER represents a very serious increase in level of force being used.

For these reasons, the *amici* respectfully request that their motion for leave to file the accompanying *amicus curiae* brief be granted.

February 21, 2012

Respectfully submitted,

STEVEN J. RENICK, ESQ.
Counsel of Record
MANNING & KASS, ELLROD,
RAMIREZ, TRESTER LLP
801 So. Figueroa Street,
15th Floor
Los Angeles, CA 90017
(213) 624-6900
sjr@manningllp.com

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

OTHER AUTHORITIES AND SOURCES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

BRIEF OF *AMICI CURIAE* LOS ANGELES COUNTY POLICE CHIEFS' ASSOCIATION, NATIONAL TACTICAL OFFICERS ASSOCIATION, AND THREE OTHERS IN SUPPORT OF PETITIONERS

The Los Angeles County Police Chiefs' Association, the National Tactical Officers Association, the Illinois Tactical Officers Association, the Kansas City Metro Tactical Officers Association, and the Rocky Mountain Tactical Team Association respectfully submit the following brief as *amici curiae* in support of Petitioners Steven L. Daman, Juan M. Ornelas, and Donald M. Jones in the above-entitled matter.[1]

[1] No counsel for a party authored the following *amicus curiae* brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No persons other than the *amici curiae,* their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37(2)(a), the *amici curiae,* through their counsel, ensured that the counsel of record for all parties herein received notice of their intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief. Respondent Malaika Brooks, through her counsel, refused to consent to the filing of the *amicus curiae* brief, thereby necessitating the *amici's* motion for leave to file this brief.

Petitioners, through their counsel, consented to the filing of this brief, and a copy of the consent letter received from Petitioners' counsel will be submitted to the Court with this *amicus curiae* brief.

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The Los Angeles County Police Chiefs' Association is comprised of the chief executive officers of all of the law enforcement agencies in the County of Los Angeles, including the two largest: the Los Angeles County Sheriff's Department and the Los Angeles Police Department, which together provide law enforcement services for two-thirds of the County's population. The mission of the Association is to coordinate and standardize enforcement issues among the 47 agencies that provide law enforcement services to the residents of Los Angeles County.

The National Tactical Officers Association (NTOA) was established in 1983 in order to provide a link between SWAT units throughout the United States and, later, in other countries. Initially, membership in the Association was available exclusively to past or present law enforcement or military personnel assigned to SWAT and tactical teams and their support personnel. However, in 1996, the NTOA opened membership to all sworn active and retired law enforcement personnel and sworn correctional officers.

The mission of the National Tactical Officers Association is to enhance the performance and professional status of law enforcement personnel by providing a credible and proven training resource as well as a forum for the development of tactics and information exchange. The Association's ultimate goal is to

improve public safety and domestic security through training, education and tactical excellence.

The NTOA currently has more than 30,000 members, including more than 1,600 SWAT and tactical teams. It has affiliates in many individual states, and three of those affiliates – the Illinois Tactical Officers Association, the Kansas City Metro Tactical Officers Association, and the Rocky Mountain Tactical Team Association – are also requesting permission to appear as *amici curiae* in this proceeding.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Graham v. Connor,* 490 U.S. 386, 396 (1989), this Court explained that "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires . . . careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." In the present case, the Ninth Circuit decided that one of the factors explicitly identified by the *Graham* court – whether the suspect is actively resisting arrest – is actually not important in deciding what level of force is reasonable under the Fourth Amendment.

This unprecedented and unjustified re-writing of Fourth Amendment jurisprudence flies in the face of this Court's long-established case law and puts at risk the lives and safety of peace officers and the citizens they are sworn to protect. More than that, this decision damages the rule of law itself, because the *en banc* panel has decided that in the nearly twenty percent of the country within the Ninth Circuit's boundaries, the police are now, in certain circumstances, powerless to take into custody persons they have placed under arrest.

In *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 160 (1963), Justice Goldberg reminded us that "the Constitution . . . is not a suicide pact." That is just as true today as it was forty-nine years ago. We do not need to amputate part of law enforcement's ability to take lawbreakers into custody in order to prevent occasional instances of excessive force.

In *Graham,* this Court held that courts must evaluate *all* of the factors present at the time an officer elects to use force, as well as the nature and amount of force used by the officer, in order to determine whether or not the force used was excessive under the Fourth Amendment. This court explained that "[t]he '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" and that "[t]he 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." *Graham, supra,* 490 U.S. at 396-397; citation omitted.

For two decades now, the evaluative process established in *Graham* has been extraordinarily successful in allowing courts to objectively assess the propriety of the use of force in an endless variety of factual situations. Despite that, the Ninth Circuit has now decided to reject more than twenty years of case law to substitute its own view that at least one of the factors frequently present when officers find it necessary to use force – active resistance to being arrested – can be ignored.

The members of the groups submitting this *amicus curiae* brief are law enforcement officers and professionals, who deal with these types of situations on a daily basis. They have learned, through years of hard experience, that flexibility is the key, both for the officer on the scene and the judge thereafter reviewing the officer's actions. The sort of inflexible rule created by the *en banc* panel is unworkable, because it ignores the infinite variety of situations police officers confront on a daily basis.

As the saying goes: If it ain't broke, don't fix it. The system established by this Court two decades ago isn't broken and didn't need fixing by the Ninth Circuit. The *en banc* panel's attempt to "improve" the process created in *Graham* should be rejected by this Court.

ARGUMENT

1. THE NINTH CIRCUIT HAS ELIMINATED RESISTANCE TO ARREST AS A FACTOR TO BE CONSIDERED IN EVALUATING WHETHER EXCESSIVE FORCE HAS BEEN USED EXCEPT IN CASES WHERE THE SUSPECT IS PHYSICALLY VIOLENT TOWARDS THE ARRESTING OFFICERS

In *Graham v. Connor, supra,* 490 U.S. at 396, this Court explained that:

> Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. . . . Because [t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Citations and internal quotation marks omitted.

But the Ninth Circuit has chosen to ignore this Court's warning about "mechanical application" of a Fourth Amendment test of reasonableness. Instead of looking to the "totality of the circumstances" to see if

they justified "a particular sort of . . . seizure", *id*., quoting from *Tennessee v. Garner,* 471 U.S. 1, 8-9 (1985), the Ninth Circuit has instead decided that "the most important *Graham* factor is whether the suspect posed an immediate threat to the safety of the officers or others." *Mattos v. Agarano,* 661 F.3d 433, 441 (9th Cir. 2011); citation and internal quotation marks omitted.

This single-minded focus has resulted not only in the *en banc* panel giving short shrift to the other factors that make up the "totality of the circumstances" that led to the use of force at issue here, but to the panel actually choosing to effectively eliminate from consideration one of those factors – whether the suspect was actively resisting arrest – even though this Court explicitly identified that factor as one of the factors that *should* be considered any time a question is raised as to a use of force.

The *en banc* panel below acknowledged that the plaintiff, Malaika Brooks, "resisted arrest", pointing out that the plaintiff "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. Yet the panel minimized to insignificance this active resistance on the part of the plaintiff by "observ[ing] . . . that Brooks's resistance did not involve any violent actions towards the officers." *Ibid.*

As the Petitioners point out in Section IV of the Petition for a Writ of Certiorari, the Ninth Circuit's adoption of this position places it in conflict with at least six other circuits, each of which has clearly held that the presence or absence of active resistance on the part of the suspect is a key factor in evaluating whether the force used against the suspect was excessive. This decision puts at risk the lives and safety of peace officers and the citizens they are sworn to protect, and seriously damages the rule of law itself, because it now means that the police in the Ninth Circuit, in certain circumstances, will be powerless to take into custody persons they have placed under arrest.

2. HOW ARE OFFICERS SUPPOSED TO ENFORCE THE RULE OF LAW IF THEY ARE PREVENTED FROM TAKING THE STEPS NECESSARY TO TAKE ARRESTED PERSONS INTO CUSTODY?

Chief Judge Kozinski, in his partial concurrence in and partial dissent to the *en banc* opinion, highlighted the problems inherent in the majority's decision. As he pointed out:

> When police effect an arrest, their relationship with the citizen changes in a material way: The citizen is now subject to the officers' control and has a lawful duty to submit to their authority; failure to do so is a crime.

Mattos, supra, 661 F.3d at 455; con. & dis. opn. of Kozinski, J. Yet the majority has deprived officers of any lawful way of enforcing that authority, at least when the suspect is not engaged in violence directed towards the officers. But as Chief Judge Kozinski asks, "[w]hat were the officers supposed to do at that point?" *Ibid.*

> Brooks had shown herself deaf to reason, and moderate physical force had only led to further entrenchment. . . . Brooks was tying up two line officers, a sergeant and three police vehicles – resources diverted from other community functions – to deal with one lousy traffic ticket.

Ibid.

Chief Judge Kozinski argues that "[t]he officers couldn't just walk away – Brooks was under arrest." *Ibid.* Yet the judges in the majority "offer no alternative course of action." *Ibid.* If, as the majority seems to require, police officers will now be forced to start walking away from people they have arrested, what will this do to the rule of law? It won't be long before the word spreads throughout society's criminal underground that the Ninth Circuit hasn't simply given them a "get out of jail free" card, but a "never have to go to jail in the first place" card. Suspects in the Ninth Circuit are now free to actively resist being arrested and taken into custody, so long as they avoid acting violently towards the police.

The Ninth Circuit has unnecessarily limited the amount of force that can be used against a suspect who refrains from using violence against the police, preventing them from utilizing the so-called "intermediate" level of force represented by the TASER electronic control device (ECD), which the officers in this case used effectively to finally get the plaintiff to cooperate. Contrary to the *en banc* majority's apparent belief, the use of the TASER did not amount to a significant increase in force. As Chief Judge Kozinski put it, the TASER is "an effective alternative to more dangerous police techniques". *Mattos, supra,* 661 F.3d at 458; con. & dis. opn. of Kozinski, J.

3. THE TASER ECD IS A SAFE ALTERNATIVE FOR USE BY THE POLICE AGAINST NON-COOPERATIVE SUSPECTS

The *en banc* majority explained that, in determining whether the use of the TASER against the plaintiff amounted to excessive force, they kept "in mind the magnitude of the electric shock at issue and the extreme pain that Brooks experienced." *Mattos, supra,* 661 F.3d at 443. But the evidence reveals that the TASER is extremely safe and effective.

Any use of force carries an inherent risk. While allegations have been made that ECD use has been associated with substantial injuries to resistive subjects, similar claims have also been made about unarmed physical control methods, the use of handcuffs, baton strikes, and the use of aerosol weapons such as

OC (oleoresin capsicum) spray (pepper spray). Use of each of these alternative non-lethal devices has led, on occasion, to the hospitalization of both the officer and the subject.

Three studies have examined a total of 2,728 actual deployments of the Taser X26 device against criminal suspects by police officers in the course of their duties.[2] In these studies, only nine suspects sustained injuries severe enough to warrant medical treatment beyond just a simple evaluation, a rate of just of 0.36% (9/2,728).

The evidence also reveals that allowing law enforcement to use ECDs actually decreases the incidence of injury in encounters between officers and suspects. In a study funded by the National Institute of Justice of the U.S. Department of Justice, researchers examined 24,380 use-of-force incidents in 12 police departments across the United States. They

---

[2] Eastman AL, Metzger JC, Pepe PE, et al., Conductive electrical devices: a prospective, population-based study of the medical safety of law enforcement use, *Journal of Trauma-Injury Infection & Critical Care*, 64(6):1567-72, 2008 Jun.

Bozeman WP, Hauda WE 2nd, Heck JJ, et al., Safety and injury profile of conducted electrical weapons used by law enforcement officers against criminal suspects, *Annals of Emergency Medicine*, 53(4):480-9, 2009 Apr.

Strote J, Walsh M, Angelidis M, et al., Conducted electrical weapon use by law enforcement: an evaluation of safety and injury, *Journal of Trauma-Injury Infection & Critical Care*, 68(5):1239-46, 2010 May.

found that the use of ECDs reduced suspect injury rates by at least 65%.[3]

Another large-scale NIJ-funded study compared seven law enforcement agencies using ECDs to six agencies that did not use them. Suspect injuries severe enough to require medical attention were 79% lower in agencies using ECDs compared to those that did not use them.[4]

A third NIJ-funded study found significant injury reductions to both subjects and officers after TASERs were authorized.[5] (One of the co-authors of this study – Lorie Fridell, Ph.D. – serves as the ACLU of Florida's representative to the National ACLU Board of Directors.)

The superiority of ECDs over other forms of non-lethal weaponry has been commented on by a member of the ACLU's national board, one of the organization's four general counsel – Scott Greenwood,

---

[3] MacDonald JM, Kaminski RJ, Smith MR, The effect of less-lethal weapons on injuries in police use-of-force events, *American Journal of Public Health*, Dec 2009, 99(12): 2268-2274.

[4] Taylor B, Woods D, Kubu B, et al., Comparing safety outcomes in police use-of-force cases for law enforcement agencies that have deployed conducted energy devices and a matched comparison group that have not: A quasi-experimental evaluation, *Police Executive Research Forum*, September 2009.

[5] Smith, Kaminski, Alpert, Fridell, MacDonald, Kubu, A Multi-Method Evaluation of Police Use of Force Outcomes: Final Report to the National Institute of Justice (2010), found at: http://www.cas.sc.edu/crju/pdfs/taser_summary.pdf.

a nationally known constitutional rights and civil liberties lawyer.

> "Right now, when used properly and according to sound use of force policy, the taser is the safest tool to bring an end to confrontations with dangerous people," said Scott Greenwood, a leading civil rights lawyer and lead counsel in the Cincinnati police reform case. "I would rather face a taser than pepper spray. Tasers have a better success rate in preventing dangerous situations from ratcheting up and have the fewest injuries of all the other use of force options."[6]

Further, once an ECD is deactivated, the discomfort ends essentially immediately. In contrast, the physical discomfort that often results from the use of more traditional police control tactics – such as physical strikes with fists or a police baton, or the use of pepper spray – can last substantially longer – hours, days, even weeks. This point too has been noted by ACLU general counsel Scott Greenwood.

> According to Greenwood, the zap from a Taser is no more harmful than a shot of pepper spray to the face. "[Getting tased] is both an incredibly painful experience and a very temporary one," says Greenwood, who supports the use of the device by law

---

[6] *Ohio University Outlook,* Ohio University Police Department adds tasers to its toolbelt, April 3, 2007, found at: http://www.ohio.edu/outlook/06-07/April/484n-067.cfm.

> enforcement. "As soon as it's off, you feel nothing. But if someone attacks me with a baton, I'm going to feel that for a while afterward."[7]

In addition to all of this is the dismaying reality that physical struggles carry risks of injury to officers unknown in the past. Today's officers have to contend with HIV as well as increasing rates of hepatitis and skin infections such as necrotising fasciitis.[8] TASER ECDs allow officers to subdue suspects without having to engage in full-contact physical struggles.

All of this shows that if police are faced with an actively resisting suspect who has refused all requests that he or she cooperate, use of a TASER represents only a relatively minor escalation in the amount of force being used against the suspect.

CONCLUSION

Every encounter between a law enforcement officer and a criminal suspect is unique. As a society, we want peace officers to do their jobs efficiently and effectively while at the same time minimizing the risk

[7] *Time Magazine,* Are Tasers Being Overused?, October 31, 2007, found at: http://www.time.com/time/nation/article/0,8599,1678641,00.html.

[8] Maynor, M, Necrotizing Fasciitis, *eMedicine* (2009), found at: http://emedicine.medscape.com/article/784690-overview.

of injury to suspects, bystanders, and the officers themselves.

Such a balance can be maintained only by granting officers the maximum flexibility that the Constitution will allow. To accomplish this, officers need access to a wide variety of non-lethal weaponry, and to be able to choose to deploy the device they determine will, under the circumstances, best maintain the balance between effective and safe policing.

The Ninth Circuit has taken a different path, imposing rigid boundaries which preclude officers from using ECDs in certain situations even if that officer's training and experience reveals to him or her that an ECD would be the best mechanism for defusing an escalating situation with the minimum of risk to all concerned.

Instead of allowing for this minor increase in the level of force, the Ninth Circuit apparently expects police officers to simply walk away from the people they have arrested, even though this Court has explicitly held that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham, supra,* 490 U.S. at 396 (1989). How can the new rule created by the Ninth Circuit possibly be consistent with the role society demands of the police, or with the notion of the rule of law?

The Ninth Circuit has created a new legal scenario that will either increase lawlessness or increase

injuries to suspects, officers, and the general public. The Constitution does not require this result, and this Court should act to correct what Chief Judge Kozinski accurately describes as "a step backward in terms of police and public safety." *Mattos, supra,* 661 F.3d at 458; con. & dis. opn. of Kozinski, J.

February 21, 2012

Respectfully submitted,

STEVEN J. RENICK, ESQ.
Counsel of Record
MANNING & KASS, ELLROD,
RAMIREZ, TRESTER LLP
801 So. Figueroa Street,
15th Floor
Los Angeles, CA 90017
(213) 624-6900
sjr@manningllp.com