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 OF AMICUS CURIAE CITY OF SEATTLE IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST OF AMICUS CURIAE THE CITY OF SEATTLE AND SUMMARY OF THE ARGUMENT

Amicus Curiae the City of Seattle, not the Petitioners, is financially responsible for the outcome of this case. The City respectfully urges this Court to deny certiorari because atypical facts underlie the Ninth Circuit's decision.[1] The Petitioners in this case are members of the Seattle Police Department and city employees. They became defendants in the District Court proceedings below as a result of conduct in the course of their duties as city employees. The City paid all costs of Petitioners' defense through the en banc decision of the United States Court of Appeals for the Ninth Circuit, which granted them qualified immunity from all federal claims. The City continues to indemnify Petitioners for the remaining state law claims.[2]

Petitioners assert that the Ninth Circuit decision established a blanket prohibition on the use of pain

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[1] The City notified counsel of record for the parties of its intent to file this amicus curiae brief on February 11, 2012. Pursuant to Rule 37.4, the City is not required to seek leave to file this brief because it is being filed by the City's authorized law officer.

[2] The City was initially a party defendant in the District Court proceeding – represented by the same private law firm as the Petitioners – but the District Court dismissed Plaintiff's claims against the City on June 12, 2008. The Petition for Certiorari was filed against the City's wishes. Substitute private counsel now represents Petitioners, and the City Attorney has resumed representation of the City.

compliance techniques. That is not correct. The Ninth Circuit applied an established multi-factor test to a specific use of force under the particular and quite atypical facts alleged in this case: the rapid and repeated use of a Taser in drive-stun mode on a pregnant woman accused of a low-level offense who, while resisting arrest, posed no threat to officer safety and was not attempting to flee.[3]

It is the unenviable challenge of every police officer and every police department to determine what level of force may be appropriate in the myriad encounters that occur every day between the police and citizens. The City is responsible for establishing, employing, and enforcing police department policy on the use of force. Petitioners' broad reading of the Ninth Circuit's decision puts the City in a difficult position by making the decision appear much more significant and far-reaching than it really is. As such, it is important for the City to clarify that the Ninth Circuit's decision is much more narrow and fact-specific than the "sky is falling" interpretation presented by Petitioners.

[3] As the Petition for Certiorari requests review of a decision granting qualified immunity to the Petitioners stemming from a motion for summary judgment, the facts referenced in this brief are those alleged by Plaintiff Brooks and viewed in the light most favorable to her.

REASONS WHY CERTIORARI SHOULD BE DENIED

I. The Ninth Circuit's decision does not conflict with precedent recognizing law enforcement's authority to use force or the threat of force to make arrests

In *Graham v. Connor*, this Court explained that "Fourth Amendment jurisprudence has long recognized 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."[4] Petitioners contend that the Ninth Circuit's decision directly conflicts with this Court's decision in *Graham* because it "held that the least injurious pain compliance option available to the officers . . . was unconstitutional,"[5] and then argue that, as a result, the Ninth Circuit's decision forbids the use of *any* force against an individual in the unusual circumstances of Plaintiff Brooks.[6]

Petitioners misread the Ninth Circuit's decision. Rather than establishing a blanket prohibition on the use of pain compliance techniques, the decision only addressed the use of Tasers in drive-stun mode in the particular, atypical circumstances of this case. The Ninth Circuit's decision does not address whether other types of force would have been appropriate

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[4] 490 U.S. 386, 396 (1989) (citing *Terry v. Ohio*, 392 U.S. 1, 22-27 (1979)).

[5] Petition for Certiorari at 7.

[6] *Id.* at 11.

under the same circumstances, nor does it address the differences in pain levels or injury risk between Tasers in drive-stun mode and other types of force. This narrow interpretation is supported by the Ninth Circuit's lack of comment on the other force used to effectuate Brooks' arrest, including pulling her from the car and laying her face down to handcuff her.[7]

Thus, the Ninth Circuit's decision does not minimize the authority police departments and officers have to use force to effectuate an arrest, even when the suspect is barely resisting and the officers are under no threat. The decision cautions that three applications of a Taser in drive-stun mode in less than a minute on a pregnant woman who does not pose a safety threat is the type of claim that may be heard by a jury in the future (but not in this case, because the Ninth Circuit granted Petitioners qualified immunity).

In the second section of their petition, Petitioners present a variation on their initial argument, asserting that the Ninth Circuit violated its own precedent by not determining the level of force used when Tasers are deployed in drive-stun mode and not addressing alternatives to the type of force used.[8] The Ninth Circuit should be permitted to clarify its own ruling in future cases.

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[7] *See* App. 7.

[8] Petition for Certiorari at 12-13.

Petitioners also argue that the Ninth Circuit erred by not applying its own precedent requiring an assessment of alternatives available to the officers to overcome an arrestee's "active" resistance.[9] The cases cited make it clear that this assessment is not required; moreover, inconsistencies in the Ninth Circuit's own decisions are not a basis for certiorari.[10] Whether the Ninth Circuit followed its own precedent is a matter for the Ninth Circuit to decide. Because the Ninth Circuit's decision does not conflict with *Graham* or the decisions from other circuits, certiorari is not appropriate.

II. The Ninth Circuit's decision is a fact-specific application of a multi-factor test, not an incorrect statement of law appropriate for review

The decision below is fundamentally an application of the law to a specific and unusual set of facts. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual

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[9] *See id.* at 13-14 (citing *Glenn v. Washington County*, No. 10-35636, ___ F.3d ___, 2011 WL 6760348 (9th Cir. Dec. 12, 2011); *Davis v. City of Las Vegas*, 478 F.3d 1048 (9th Cir. 2007)).

[10] *See* Rule 10(a) (identifying a case where "a United States court of appeals has entered a decision in conflict with the decision of *another* United States court of appeals on the same important matter" as the type of case more suited for certiorari) (emphasis added).

findings or the misapplication of a properly stated rule of law."[11]

Here, the Ninth Circuit applied an established – and unchallenged – multi-factor test to determine the reasonableness of Petitioners' actions. First, the Ninth Circuit "consider[ed] the governmental interests at stake" by examining "(1) how severe the crime at issue was, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight."[12] These three factors stem directly from this Court's decision in *Graham*.[13]

Second, the Ninth Circuit examined the totality of the circumstances and considered "whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*."[14] This "totality of the circumstances" test also derives from *Graham*, where this Court noted, quoting *Tennessee v. Garner*,[15] that "the question is whether the totality of

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[11] Rule 10.

[12] App. 21 (citing *Deorle v. Rutherford*, 272 F.3d 1272, 1279-80 (9th Cir. 2001)).

[13] *See Deorle*, 272 F.3d at 1280 (citing *Chew v. Gates*, 27 F.3d 1432, 1440-41 n.5 (9th Cir. 1994), in turn citing *Graham*, 490 U.S. at 396).

[14] App. 25 (quoting *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010)).

[15] 471 U.S. 1, 8-9 (1985).

the circumstances justifies a particular sort of seizure."[16]

The Ninth Circuit applied each of the three *Graham* factors to the facts of this case, determining that (1) the offense for which Brooks was being arrested, refusing to sign a traffic ticket, was minor,[17] (2) Brooks did not pose a potential or immediate threat to the officers' or the public's safety,[18] and (3), while Brooks was resisting arrest, she was neither doing so violently nor attempting to flee.[19] The Ninth Circuit then found two additional "specific factors in this case . . . overwhelmingly salient": Brooks was seven months pregnant, which the officers knew, and they tased her three times within less than one minute, not giving her sufficient time "to recover from the extreme pain she experienced, gather herself, and reconsider her refusal to comply."[20] Given these special and unusual facts, the Ninth Circuit determined that 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."[21]

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[16] *Graham*, 490 U.S. at 396.

[17] App. 22.

[18] App. 23.

[19] App. 24-25.

[20] App. 25-26.

[21] App. 26-27.

The Ninth Circuit's careful attention to all the facts makes the Petitioners' generalizations unwarranted. Alterations in any of the facts would make a critical difference to the analysis. If the keys had still been in the ignition, if only one application of the Taser had been used, if the applications had been farther apart, if Brooks had not said she was pregnant, if she had banished a weapon – any of these changes in circumstances could have changed the result. The City recognizes that its police department and individual officers have difficulty applying such a fluid standard. One unusual case, however, cannot be read so broadly as to cripple a department's law enforcement function.

Notably, Petitioners do not challenge the legal standard the Ninth Circuit applied; they challenge *how* that standard was applied. This Court disfavors certiorari under these circumstances.[22] The factual nature of the Ninth Circuit's decision in this case is particularly ill-suited to certiorari since this combination of facts is unusual.[23]

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[22] *See* Rule 10.

[23] For example, police in Washington no longer have occasion to arrest someone for the crime Brooks committed since refusal to sign a traffic citation has been decriminalized. *See* 2006 Wash. Sess. Laws, Ch. 270 (removing Revised Code of Washington § 46.61.021(c)(3)'s requirement that a "person requested to identify himself or herself to a law enforcement officer pursuant to an investigation of a traffic infraction has a duty to . . . sign an acknowledgement of receipt of the notice of infraction.").

If this Court wishes to address the use of Tasers as a pain compliance technique, such guidance will be most helpful in the context of a case that has a more typical or commonly-occurring fact pattern than this unusual case.

CONCLUSION

As Chief Judge Kozinski noted in his partial dissent, police officers are confronted with "an ever-present risk that routine police work will suddenly become dangerous."[24] That said, we expect officers to continually weigh each evolving encounter and calibrate their response to the "totality of the circumstances" so that citizens' Fourth Amendment rights are not violated. These are difficult standards to apply, but applying difficult standards is simply one of the challenges inherent in operating a police department. This Court has decided many police use of force cases and will undoubtedly decide many more in the future, but this unusual, fact-specific decision should not be one of them. The City of Seattle respectfully urges this Court to deny certiorari in this instance and choose a different use of force case involving Tasers with more representative facts as a vehicle for further guidance on this important issue.

[24] App. 45.

Respectfully submitted this 21st day of February 2012.

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