No. 11-1045

In The
# Supreme Court of the United States

MALAIKA BROOKS,

*Petitioner,*

vs.

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

*Respondents.*

**On Conditional Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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

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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 respondents Steven L. Daman, Juan M. Ornelas, and Donald M. Jones in the above-entitled matter.

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. All parties, through their counsel, consented to the filing of this brief, and copies of their respective consent letters 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 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 appearing as *amici curiae* in this proceeding.

These *amici curiae* have a shared interest in ensuring that law enforcement officers throughout the United States continue to receive the full protection of the qualified immunity defense when they are confronted with new and unusual situations.

## LEGAL ARGUMENT

The fundamental argument of the cross-petition is the petitioner's contention that the granting of qualified immunity to the respondents by the Ninth Circuit resulted from a "flawed interpretation of this Court's recent decision in *Ashcroft v. al-Kidd,* 131 S.Ct. 2074 (2011)." Cross-Petition, page 1. But it is the petitioner who is attempting to misapply the holding in *Ashcroft,* not the Ninth Circuit.

This Court did not modify the qualified immunity defense in *Ashcroft.* It merely reiterated it and applied it to the facts before it, which is just what the Ninth Circuit did, contrary to the petitioner's argument otherwise.

> A Government official's conduct violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a]

> right [are] sufficiently clear that every reasonable official would have understood that what he is doing violates that right. We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. The constitutional question in this case falls far short of that threshold.

*Ashcroft, supra,* 131 S. Ct. at 2083; citations and internal quotation marks omitted.

The petitioner argues that, contrary to this Court's holding in *Ashcroft,* the Ninth Circuit granted qualified immunity to the respondents here simply because the petitioner failed "to identify a specific, *factually similar* case on point in order to overcome [the] qualified immunity defense." Cross-Petition, pages 10-11; emphasis added. Specificially, the petitioner argues that merely because, at the time of the incident, no court had yet held that the use of a TASER constituted excessive force, that did not preclude the courts below from finding that the use of a TASER in this particular incident was excessive.

> "[I]t should be obvious to any reasonable official that a police officer may not, consistent with the Fourth Amendment, deploy a Taser against a woman in an advanced stage of pregnancy, who poses no threat to the officers or the public, simply because the woman refused to sign a speeding ticket."

Cross-Petition, page 2.

But the petitioner's description of the incident ignores the most important aspect of it, the one that clearly made the application of the qualified immunity defense appropriate: the petitioner was actively resisting being taken into custody after having been placed under arrest. Contrary to the impression left by the petitioner, this was not a situation where an out-of-control patrol officer used a TASER as punishment for the petitioner's simple refusal to sign a ticket.

The petitioner had been warned that if she refused to sign the ticket, she would be arrested – consistent with then-existing state law. The petitioner refused to sign the ticket – repeatedly – and so was placed under arrest. The respondents then asked the petitioner to exit her vehicle. She refused. But as Chief Judge Kozinski explained in his partial concurrence in and partial dissent to the *en banc* opinion:

> 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 v. Agarano,* 661 F.3d 433, 455 (9th Cir. 2011); con. & dis. opn. of Kozinski, J.

The petitioner was actively resisting her arrest, and the respondents finally decided that the only way to take her into custody was to use the TASER. It worked.

The Ninth Circuit concluded that the use of the TASER was too high a level of force under these circumstances, but correctly recognized that no other court had previously held that a TASER was an inappropriate level of force to be used to take into custody a non-violent, but actively resisting, suspect. Hence it held that these respondents were entitled to qualified immunity.

The petitioner, in asserting that the Ninth Circuit misapplied the qualified immunity defense, is attempting to re-define and narrow that defense. The petitioner is arguing that the arrest and custody status of the supposed victim of the use of an allegedly excessive level of force should be ignored. In other words, it is irrelevant that in this case these officers repeatedly warned the petitioner what was going to happen, placed her under arrest because of her insistent refusal to comply with state law, and resorted to the use of force only when the petitioner began actively resisting being taken into custody following her arrest. According to the petitioner, they should be treated exactly the same as an officer who, without any warning and without having placed the suspect under arrest, uses a TASER on that suspect to punish her simple act of refusing to sign a piece of paper. To quote the petitioner, "to state this proposition is to refute it". Cross-Petition, page 2.

The *amici curiae* urge this Court to deny the petitioner's cross-petition for writ of certiorari because it represents an attempt to severely restrict the application of the qualified immunity defense. As this

Court stated in *Ashcroft*, 131 S.Ct. at 2083, "[w]e do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." That is hardly the case here. In evaluating whether a use of force was reasonable, the fact that the suspect was actively resisting arrest clearly is of significance.

So too then, is the absence of any clearly established law identifying whether a particular level of force – specifically, a TASER – is an appropriate response to such active resistence to arrest. Yet the petitioner is asking this Court to ignore that fact, and to deprive these respondents of qualified immunity even though they had no advance warning that using a TASER under *these* circumstances would amount to excessive force.

It needs to be remembered that:

> "officers face an ever-present risk that routine police work will suddenly become dangerous. In the last decade, more than half a million police were assaulted in the line of duty. More than 160,000 were injured, and 536 were killed – the vast majority while performing routine law enforcement tasks like conducting traffic stops and responding to domestic disturbance calls. [Citation.]

*Mattos, supra,* 661 F.3d at 453-454; con. & dis. opn. of Kozinski, J.

The *amici curiae* are deeply concerned that should this Court adopt the petitioner's position on

this issue, it will unnecessarily constrain the ability of law enforcement to safely effect arrests. As Chief Judge Kozinski warned in his partial concurrence in and partial dissent to the *en banc* opinion, this "will lead to more, worse injuries. This mistake will be paid for in the blood and lives of police and members of the public." *Mattos, supra,* 661 F.3d at 458; con. & dis. opn. of Kozinski, J.

## CONCLUSION

Accordingly, the *amici curiae* urge this Court to deny the Cross-Petition.

March 26, 2012

Respectfully submitted,

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