

No. 11-1032

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IN THE  
**Supreme Court of the United States**

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DARREN AGARANO, *et al.*,

*Petitioner,*

*v.*

TROY MATTOS,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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**BRIEF IN OPPOSITION**

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**QUESTIONS PRESENTED**

Whether the Court of Appeals for the Ninth Circuit correctly applied the *Graham v. Connor* multi-factor test in holding that the officers' use of a taser on Jayzel Mattos was excessive force under the Fourth Amendment to the U.S. Constitution?

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## COUNTERSTATEMENT OF THE CASE

At approximately 11:20 pm on August 23, 2006, Maui police officers Darren Agarano, Stuart Kunioka, and Halayudha MacKnight ("Officer Agarano," "Officer Kunioka," and "Officer MacKnight" respectively) were assigned to respond to a telephone call about a possible domestic abuse case at a residence in Wailuku, Maui. Maui police officer Ryan Aikala ("Officer Aikala"), having overheard the assignment over his police radio, decided on his own to respond.

When Officers Agarano, Kunioka, and MacKnight arrived at the Mattoses' home they observed Troy Mattos ("Troy") sitting at the top of the stairs just outside the front door. Officer Kunioka approached Troy first and informed Troy about the call received by the police. When Officer Kunioka asked Troy what was going on, Troy replied that he and his wife, Jayzel Mattos ("Jayzel") had an argument, but that nothing physical had occurred.

Officer Kunioka requested to speak to Jayzel. Troy entered his house, closing the door behind him, and proceeded to the couple's room. Officer Agarano followed Troy, uninvited, opening the door and entering the residence without invitation or permission. Officers Kunioka, MacKnight and Aikala remained outside.

A few moments later Officer Agarano saw Troy coming down the hallway toward the front door with Jayzel directly behind him. Troy proceeded down the hallway first but was passed by Jayzel as Troy entered the living room and continued to walk toward Officer Agarano. As the Mattoses approached Officer Agarano,

Jayzel was standing in front of Troy. Jayzel and Troy's son was sleeping in the living room throughout this entire interaction between the officers and the Mattoses.

When Troy saw that Officer Agarano was inside his home, Troy told Officer Agarano that he was not invited into his home and loudly ordered him out. While Troy was talking to Officer Agarano, Officer Agarano turned to Jayzel and asked if he could talk to her outside.

As the Mattoses were complying with Officer Agarano's request to go outside, Officer Aikala rushed into the house and bumped into Jayzel who was standing in front of Troy. Officer Aikala pushed Jayzel up against her husband with Officer Aikala pressing on her chest. Upon this contact with Jayzel, Officer Aikala asked Jayzel, "Are you touching an officer?"

As this interaction with Officer Aikala was occurring, Jayzel simultaneously continued to speak with Officer Agarano, asking why Troy was being arrested and attempting to calm the situation by suggesting that everyone "just go outside" and "calm down." Jayzel was particularly concerned about her sleeping children and asked that the officers "don't make noise in my house."

While Jayzel was talking to and looking at Officer Agarano, and without warning to Jayzel, Officer Aikala shot Jayzel with his Taser weapon in dart-mode. After being tased, Jayzel fell to the ground screaming. When she came out of the paralysis caused by the Taser, she noticed her son sitting in a frog stance staring at her. Jayzel asked Officer Aikala to remove the Taser prongs. Officer Aikala informed Jayzel, "If you want it out, pull it out yourself."

The Mattoses were both taken into custody, and Troy was charged with harassment and resisting arrest. Jayzel was charged with harassment and obstructing government operations. All criminal charges were dismissed before trial.

The Mattoses brought suit against Officers Agarano, Kunioka, MacKnight, and Aikala for violations of their Fourth, Fifth, and Fourteenth Amendment rights based on the officers' warrantless entry into their home, their arrests, and Officer Aikala's use of the Taser on Jayzel. The district court granted summary judgment to the Officers on some, but not all, of the Mattoses' claims. On their Fourth Amendment excessive force claim for the tasing, the district court concluded that there were material questions of fact critical to deciding whether the tasing was constitutionally reasonable, which precluded a ruling on the issue of qualified immunity. Supp. Appx. at 42.

Defendant Officers filed an interlocutory appeal challenging the denial of their claims to qualified immunity. A panel of the Ninth Circuit reversed the district court on the constitutional question holding that "[t]he Mattoses failed to offer specific facts that would establish...that the force used was constitutionally unreasonable." *Mattos v. Agarano*, 590 F.3d 1082 (9th Cir. 2010). On rehearing *en banc*, the Ninth Circuit vacated the panel's decision and held that the officers violated Jayzel's Fourth Amendment rights, Appx. at 19033; however, the *en banc* court, also held that the Officers were entitled to qualified immunity because there were no cases as of August 2006 providing the officers fair warning that their conduct violated Jayzel's clearly established Fourth Amendment rights. Appx. at 19034.



On January 11, 2012, the Officers filed a petition for certiorari seeking review of the Ninth Circuit's ruling that they violated Jayzel's Fourth Amendment rights; and on February 22, 2012, this petition was docketed.

### **REASONS FOR DENYING THE PETITION**

This Court should deny Petitioners' request for certiorari because the Ninth Circuit's *en banc* ruling does not leave an important question of federal law unsettled. Nor does the Ninth Circuit's opinion present a decision in conflict with the decisions of other United States courts of appeals on the *Graham v. Connor, supra*, test that should apply when determining whether the use of a Taser in fact-specific circumstances is excessive force in violation of the Fourth Amendment. Finally, the petition for certiorari should be denied because Petitioners' request abounds with misstatements of facts that reflect disagreement with the outcome of applying the *Graham v. Connor* test but provides no fundamental challenge to the application of this test as an incorrect statement of the law.

#### **I. The Ninth Circuit's *En Banc* Ruling Does Not Leave An Important Question of Federal Law Unsettled**

The main thrust of Petitioners' request for certiorari is that the Ninth Circuit's "*en banc* panel failed to determine the level of force Taser use represents" and "[a]s a result, the opinion has left a void which makes it impossible for police officers to determine when Taser use is appropriate." Petitioners' Writ of Certiorari ("Writ") at p.6. Presumably this "void" in the decision-making processes of police officers across the nation is the "important question of federal law [that] has not been, but

should be settled by this Court.” *Id.* at p.5 (quoting Rule 10(c) of the U.S. Supreme Court Rules). Petitioners point to the order of the Ninth Circuit’s three judge panel that initially “determined that the Taser was an intermediate level of force” and that this earlier “decision gave officers guidance as to when Taser use was appropriate.” *Writ* at p.7. Petitioners further criticize the Ninth Circuit’s *en banc* ruling as “failing to address this issue[,]” not providing “a clear ruling on when Taser deployment would be appropriate” and “mak[ing] it impossible for officers to determine when Taser use would be legal.” *Id.*

These arguments patently mischaracterize the Ninth Circuit’s opinion and its effect. First, a closer reading of the Ninth Circuit’s *en banc* opinion reveals that the Ninth Circuit quoted twice from its prior holding in *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010) that Tasers “employed in dart-mode...constitute an intermediate, significant level of force.” *Appx.* at 19018 and 19028. Nowhere in its opinion does the Ninth Circuit retract or modify this holding and, in its final summation of the use of the Taser on Jayzel, the Court stated “Aikala used the *intermediate force* of a taser in dart-mode on Jayzel[.]” *Appx.* at 19032 (emphasis added). Therefore, based on this closer reading of the Ninth Circuit opinion, it is simply not true that the “*en banc* panel failed to determine the level of force Taser use represents.” *Writ* at p.6.

Second, the argument of whether the Ninth Circuit labels the use of a taser in dart-mode as intermediate force deliberately ignores the substance of the Ninth Circuit’s opinion and analysis which was the application of the *Graham v. Connor* multi-factor test in determining that the use of the Taser on Jayzel Mattos was constitutionally

excessive in violation of the Fourth Amendment. Although the bulk of the Ninth Circuit's analysis of the Mattos fact pattern is a discussion of the *Graham v. Connor* multi-factor test, *see* Appx. at 19028-19032, nowhere in their Petition for Certiorari do the Petitioners criticize this application of the *Graham v. Connor* test as an incorrect statement of the law.

As discussed *infra* the application of this multi-factor, reasonableness test is the appropriate measure for analyzing Fourth Amendment excessive force cases and the appropriate "guidance" for officers who deploy force in the attempt to seize an individual in accordance with the Fourth Amendment.

## **II. The Ninth Circuit's Decision Correctly Applies the *Graham v. Connor* Multi-Factor Test to Use of Taser as Excessive Force Claims, is Not an Incorrect Statement of Law, and Does Not Conflict with Precedent Applying the Multi-Factor Test**

As the Ninth Circuit recognized, the lawfulness of Officer Aikala's use of force against Jayzel was governed by a straightforward multi-factor test established by this Court in *Graham v. Connor*, 490 U.S. 386 (1989), *supra*. Appx. at 19028-19033. Petitioners do not challenge that the Ninth Circuit incorrectly misstated this test. Instead, Petitioners simply disagree with the factual analysis adopted by the Ninth Circuit.

The Ninth Circuit correctly considered the various governmental interest factors at stake including "the severity of the crime[,]" "whether 'the suspect posed an intermediate threat to the safety of the officers or

others[,]" and "whether Jayzel was actively resisting arrest or attempting to evade arrest by flight." Appx. at 19028-19030 (quoting and citing to *Deorle v. Rutherford*, 272 F.3d 1272, 1280 (9th Cir. 2001)). The Ninth Circuit also correctly considered the totality of the circumstances including: (1) "the volatility of situations involving domestic violence[;]" (2) that there was "no threat that either [Troy or Jayzel had] a weapon[;]" (3) "the officers' knowledge that there were children present in the home at the time[;]" and (4) that "[Officer] Aikala gave no warning to Jayzel before tasing her[.]" Appx. at 19032.

In addition to the proper application of the well-established *Graham v. Connor* test to the specific facts in this case, the Ninth Circuit's decision does not conflict with well-settled precedent of this Court and decisions of other Federal Circuits that have also correctly applied the *Graham v. Connor* multi-factor test, albeit with different conclusions that the Taser use was constitutional. Petitioners cite to *Draper v. Reynolds*, 369 F.3d 1270 (11th Circuit) and *Hinton v. City of Elwood, Kan.*, 997 F.2d 774 (10th Cir. 1993) as evidence that "[o]ther circuits have found Taser use, under similar circumstances, constitutional." Writ at p.7.

Both these cases, however, applied the *Graham v. Connor* test in their reasoning. In *Draper*, the Eleventh Circuit correctly stated that the appropriate test for the application of force is that "the force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for that force, which is measured by the severity of the crime, the danger to the officer, and the risk of flight." 369 F.3d at 1278, n.13 (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1198 (11th Cir. 2002) as an

interpretation of *Graham v. Connor*). Hence, in applying this test, the Eleventh Circuit properly concluded that the “use of the taser gun to effectuate the arrest...did not constitute excessive force” where the suspect was “hostile, belligerent, and uncooperative” from the first moment of encounter with the police officer, repeatedly “used profanity, moved around and paced in agitation,” and repeatedly refused to comply with multiple verbal commands. *Draper*, 369 F.3d at 1278.

Similarly, in *Hinton*, the Tenth Circuit cited to the *Graham v. Connor* test of reasonableness with the following “three criteria to be used by the courts in undertaking this [reasonableness] inquiry: 1) ‘the severity of the crime at issue,’ 2; ‘whether the suspect poses an immediate threat to the safety of the officers,’ and 3) ‘whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.’” 997 F.2d at 780 (quoting *Graham*, 490 U.S. at 396). Although the Eleventh Circuit weighed the first two criteria in favor of the suspect, the third criterion of active resistance to arrest distinguishes *Hinton* from the facts in the *Mattoses*’ case. The Eleventh Circuit noted that the suspect “admits...that he was actively and openly resisting [the officers’] attempts to handcuff him, even to the extent of biting the officers.” *Hinton*, 997 F.2d at 781. In contrast, based on the differing versions of the events leading up to the tasing in the facts of this case, Jayzel was cooperative and attempting to comply with Officer Agarano’s request to go outside when Officer Aikala burst into the residence, pushed into Jayzel, and tased her without warning. See discussion *infra* at III. These factual distinctions in *Draper* and *Hinton*, while leading to different conclusions about the constitutionality of the officers’ use of force, clearly illustrates how the Tenth

and Eleventh Circuits appropriately applied the *Graham* multi-factor test in reaching their conclusions that the officers' use of force was "reasonably proportionate to the difficult, tense and uncertain situation," *Draper*, 369 F.3d at 1278, and "clearly commensurate with the level of resistance" by the suspects. *Hinton*, 997 F.2d at 781.

### **III. Petitioners' Arguments in Favor of Certiorari Misstate the Facts as Relied Upon and Determined by the Ninth Circuit Pursuant to the Proper Standard of Review Upon a Motion for Summary Judgment**

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10, U.S. Supreme Court Rules. This Court would be well within its discretion to deny certiorari in this case insofar as Petitioners' request abounds with misstatements of fact.

Petitioners' statement of the case in their petition for certiorari correctly states that the events of August 23, 2006, began with a call to the police, Writ at p.1; however, the similarities between the Petitioners' statement of the case and the facts set forth in the Ninth Circuit's *en banc* opinion virtually end with this first fact.

Petitioners would have this Court believe that the situation at the Mattoses' residence was extremely volatile based upon the following misstatements of fact that were not found by the Ninth Circuit: (1) "During the 911 call, [C.M.] sounded very scared[;]" (2) when the officers initially arrived on the scene, Troy was irritated,

uncooperative and intoxicated as indicated by the smell of alcohol, and his red and watery eyes; (3) upon request by Defendant Officers to speak to Jayzel, Troy was reluctant to get her and was, therefore, being untruthful and hiding something; (4) Troy falsely claimed that Jayzel had been in the shower based upon Jayzel being “completely dry and fully clothed” when she eventually came to the hallway; and (5) the situation in the Mattoses’ home escalated with Jayzel becoming the antagonist who repeatedly refused to listen to officers’ instructions to “move out of the way,” ignored Officer Aikala’s warning that he would tase her, and, ultimately, shoved Officer Aikala in his chest, thereby precipitating the use of the Taser on Jayzel. *See Writ at pp.2-5.*

In contrast, the Ninth Circuit’s characterization of the facts, based upon reasonable inferences drawn in favor of Jayzel Mattos as the non-moving party, paints a more reasonable scene that does not make inappropriate inferences about Troy’s state of intoxication, whether Troy was attempting to hide something, or whether Jayzel had been in the shower or not. Appx. at 19011. Similarly, the account of the events before the tasing relates that Jayzel was cooperative and attempting to comply with Officer Agarano’s request to go outside when Officer Aikala burst into the residence, announced that Troy was under arrest, and pushed up against Jayzel causing her to extend her arm to stop her breasts from being smashed against Officer Aikala’s body. *Id.* Finally, in direct contradiction with Petitioners’ statement of facts, the Ninth Circuit notes that Officer Aikala shot his taser at Jayzel without warning even as she was attempting to defuse the situation by saying that everyone should calm down and go outside. *Id.*

These wildly different versions leading up to the tasing of Jayzel make this petition uncertworthy to the extent that Petitioners' writ is merely a challenge to the Ninth Circuit's opinion because Petitioners disagree with the Ninth Circuit's factual findings.

**CONCLUSION**

For all the foregoing reasons, Respondents Troy and Jayzel Mattos respectfully request that the Court deny the Petition for Certiorari.

April 23, 2012

Respectfully submitted,

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