No. 11-1045

IN THE
Supreme Court of the United States

MALAIKA BROOKS

Petitioner,

v.

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

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ERIC ZUBEL
ERIC ZUBEL P.C.
800 Fifth Avenue
Suite 4100
Seattle, WA 98101

MICHAEL F. WILLIAMS
Counsel of Record
AARON L. NIELSON
ASHLEY G. JAMES
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
mwilliams@kirkland.com

Counsel for Cross-Petitioner Malaika Brooks

May 2, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

As explained in the Cross-Petition, this case asks the Court to confirm its bedrock holding in *Hope v. Pelzer* that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." 536 U.S. 730, 741 (2002). It should have been obvious to Respondents that deploying a Taser against a pregnant woman, who posed no threat to anyone, simply because she refused to exit her vehicle during a routine traffic stop, constituted excessive force in violation of the Fourth Amendment. The Ninth Circuit's failure to allow Malaika Brooks to present her excessive force claim to a jury conflicts with the law of this Court, and other circuit courts, and should be reversed.

Nothing Respondents offer in response changes that bottom line. To the contrary, the officers misstate and misunderstand both the record and the law. Accordingly, far from showing that *certiorari* is inappropriate here, the Opposition Brief only underscores why this Court's review is essential.

I. Respondents Violated Ms. Brooks' Clearly Established Constitutional Rights.

Graham v. Connor, 490 U.S. 386 (1989), recognizes that because the reasonableness inquiry under the Fourth Amendment "is not capable of precise definition or mechanical application," courts must consider "the facts and circumstances of each particular case." *Id.* at 396 (quotations and internal citations omitted). The standard thus focuses on the "totality of the circumstances." *See, e.g.*, *Untalan v. City of Lorain*, 430 F.3d 312, 317 (6th Cir. 2005).

Despite the rule that the excessive force analysis is not susceptible to "mechanical application," Respondents seek to do just that. More precisely, Respondents attempt to misconstrue one of the *Graham* factors — whether Ms. Brooks was "actively resisting arrest," 490 U.S. at 396 — as both favorable to them and the be-all and end-all in the analysis. And ignoring the Court's instruction to consider "the facts and circumstances in each particular case," *id.*, Respondents downplay the significance of Ms. Brooks' pregnancy, knowing that it further drives home the unreasonableness of their actions.

A. Ms. Brooks Did Not Actively Resist Arrest.

By any measure, Respondents' use of force was unconstitutional. Officers have no business applying thousands of volts of electricity three times in rapid succession against a nonthreatening pregnant woman who has refused to sign a traffic ticket.

Respondents offer only one real argument in response — that Ms. Brooks deserved to be tased because she "actively resisted arrest." Opp'n 9. But merely because Respondents repeat that argument on almost every page of the Opposition Brief does not make it true. *See id.* at 1-2, 6-8, 11-12, 15-16, 18-21. No precedent supports Respondents' argument, and for good reason.

At the outset, Respondents' premise is wrong. Ms. Brooks did not *actively* resist arrest in any meaningful sense of the term. All Ms. Brooks did was grasp her steering wheel and instinctively honk her horn to call for help while one officer held her arm behind her back and another struck her three times in short order with a Taser. *See* App. 26a,

162a-163a. She did not threaten anyone, *compare Russo v. City of Cincinnati*, 953 F.2d 1036, 1044-45 (6th Cir. 1992); attack the officers, *compare Hinton v. City of Elwood*, 997 F.2d 774, 777 (10th Cir. 1993); aggressively confront the officers at night, *compare Draper v. Reynolds*, 369 F.3d 1270, 1276-77 (11th Cir. 2004); or pose a risk to anyone, *compare Buckley v. Haddock*, 292 F. App'x 791, 794-95 (11th Cir. 2008). It is no wonder then that courts consistently hold that officers cannot use a Taser where, as here, the victim is at most guilty of a minor crime and does not pose an immediate threat. *See, e.g.*, *Fils v. City of Aventura*, 647 F.3d 1272, 1288-89 (11th Cir. 2011); *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 664-66 (10th Cir. 2010); *Brown v. City of Golden Valley*, 574 F.3d 491, 497 (8th Cir. 2009).

Respondents cite no case to the contrary. Indeed, they cite almost no cases at all. Tellingly, the *only* case cited in the entire Opposition Brief for what is "active resistance" is *Greene v. Barber*, 310 F.3d 889 (6th Cir. 2002), which the officers characterize as holding that "[a] suspect actively resists arrest when he or she makes *any physical movement or verbal gesture* that indicates an unwillingness to cooperate with the officer's lawful commands." Opp'n 9 (emphasis added). But *Greene* says nothing of the sort. In *Greene*, a "six-foot, 300-pound" man bellowed expletives "in an aggressive manner" in a police station so loudly that "bystanders, including those 50 to 60 feet away, had all taken notice." 310 F.3d at 892-93, 899. And when officers tried to arrest that out-of-control individual, "things [ ] went ballistic," forcing the officers to use a single dose of pepper spray. *Id.* at 893. Even under those extreme facts, the court *refused* to categorically hold that there was

no "excessive force under *Graham*." *Id.* at 898. Instead *Greene* held no clearly established law prohibited the use of force in that situation because the police department's manual "permit[ed] an officer to administer pepper spray to a person who is *aggressively* resisting arrest, either verbally or physically." *Id.* at 899 (emphasis added).

The facts here could hardly be more different. Ms. Brooks was not acting aggressively towards the officers "and, behind the wheel of her car, she was not physically threatening." App. 23a. Likewise, unlike in *Greene*, Respondents *repeatedly* used force including waiting only six seconds between two of the tasings. App. 26a; *see also Graves v. Zachary*, 277 F. App'x 344, 348-49 (5th Cir. 2008) (Smith, J.) (rejecting qualified immunity as to whether an officer's *second* shot was objectively reasonable). And here, unlike in *Greene*, Respondents violated their own training. *See* App. 116a (Berzon, J., dissenting) (explaining that because Washington law did not authorize a custodial arrest, "[u]nder the Seattle Police Department's own policies … the Officers were not justified in using any force").

But even if *Greene* actually did stand for the rule ascribed to it by Respondents, that would only further highlight why this Court's review is essential. For one thing, such a breathtaking proposition of law — that "*any physical movement or verbal gesture* that indicates an unwillingness to cooperate," Opp'n 9 (emphasis added), amounts to active resistance justifying the use of force — has no basis in *Graham*. Nor is that approach consistent with the law of other circuits. In *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005) (en banc), for

instance, the court ruled against the officers even though the citizen "continually ignored the officers' requests to remove his hands from his pajamas and to place them on his head," *id.* at 703; *see also Brown*, 574 F.3d at 497 ("[N]othing in the record indicates that Sandra was actively resisting arrest as she sat in the car …. Her principal offense, it would appear, was to disobey the commands to terminate her call to the 911 operator.").

Because no precedent supports their argument, Respondents improvise by claiming that the fact that they gave Ms. Brooks a warning, demonstrated how the Taser works, and explained that it would hurt is enough to justify what they did to her. *See, e.g.*, Opp'n 12-13. But why Respondents believe those facts cut in their favor is a mystery. Rather than showing that the officers acted reasonably, the fact that they had ample time to plan and announce their violence only confirms that they were not confronted with a threat. Indeed, they knew perfectly well that Ms. Brooks was pregnant, consulted among themselves about the risks associated with tasing her, and then struck her anyway — even though she posed no risk. And it goes without saying that nothing in the officers' story comes close to justifying their *repeated* tasings without even telling Ms. Brooks that they would stop the ordeal if she would relent or giving her a chance to do so. *See* App. 26a.

B. Ms. Brooks' Pregnancy Is A Highly Relevant Factor in Determining The Reasonableness of Respondents' Actions.

Respondents also downplay Ms. Brooks' pregnancy. But because *Graham* requires courts to examine the "facts and circumstances of each

particular case," officers contemplating whether to use force must consider characteristics such as the plaintiff's age, *see, e.g.*, *Tekle v. United States*, 511 F.3d 839, 846 (9th Cir. 2007) ("[I]t should have been apparent that this eleven-year-old boy did not pose a threat and that the need for force accordingly was minimal."), and any physical disabilities, *see, e.g.*, *St. John v. Hickey*, 411 F.3d 762, 775 (6th Cir. 2005) (concluding that a reasonable jury could find in plaintiff's favor where officers knew he was "disabled and wheelchair-bound"). Accordingly, in this case, Ms. Brooks' pregnancy is certainly relevant because a reasonable officer would not have used a device that discharges 50,000 volts of electricity on a woman who was seven months pregnant, much less three times in approximately one minute.

Precedent thus confirms the significance of a woman's pregnancy in deciding whether an officer's actions were reasonable, and rightly so: if the woman is pregnant, that clearly affects the level of force that it is appropriate to use against her. *See Bridges v. Yeager*, 352 F. App'x 255, 259-60 (10th Cir. 2009) (recognizing the relevancy of pregnancy in denying qualified immunity); *cf. Valdez v. Ayers*, No. 91-16463, 1993 WL 69167 (9th Cir. Mar. 10, 1993) (pregnant prisoner was tasered and suffered a miscarriage). Even the Taser company cautions police officers that using a taser on a pregnant woman "could increase the risk of death or serious injury." TASER® X2™, X3®, X26™, and M26™ Handheld ECD Warnings, Instructions, and Information: Law Enforcement at 3, *Available at* http://www.taser.com/images/resources-and-

legal/product-warnings/downloads/law-enforcement-warnings.pdf (Last visited May 1, 2012).[1]

Respondents distort both the relevance of Ms. Brooks' pregnancy and the claims pressed in this lawsuit by characterizing her argument as being that "she was entitled to resist a lawful arrest" because she was pregnant. Opp'n 20. But Ms. Brooks' pregnancy had nothing to do with what she was "entitled" to do. Rather, her pregnancy bears on the amount of force that was appropriate for the officers to have used against her. In essence, Respondents

---

[1] Many police departments regulate or prohibit the use of tasers on pregnant women. *See, e.g.*, *Richards v. Janis*, No. CV-06-3064-EFS, 2007 WL 3046252, at *5 (E.D. Wash. Oct. 17, 2007) ("'Extra caution shall be given when considering use of a Taser on the following individuals: juveniles under 16 years of age, *pregnant females*, elderly subjects, handcuffed persons, and persons in elevated positions.'") (emphasis added); *Neal-Lomax v. Las Vegas Metro. Police Dept.*, 574 F. Supp. 2d 1170, 1176 (D. Nev. 2008) *aff'd*, 371 F. App'x 752 (9th Cir. 2010) ("[O]fficers should not use the Taser on pregnant women or the elderly absent compelling reasons to do so."). In fact, the Seattle Police Department has adopted such a policy. *See* Hector Castro, *Seattle Police Restrict Taser Use: Policy Urges Caution In Turning Stun Guns On Vulnerable People*, SEATTLE POST INTELLIGENCER (Apr. 3, 2005, 10:00 PM), http://www.seattlepi.com/local/article/Seattle-police-restrict-Taser-use-1170089.php ("The Seattle Police Department is tightening its use of Tasers, urging officers to take particular care before using the electric-shock devices on pregnant women ...."). And while the Opposition Brief claims—with no citation—that "[t]he officers were trained that the Taser would not adversely affect a pregnancy," Opp'n 7, such training was to doubtful effect. After all, the officers believed they could freely use a Taser on Ms. Brooks so long as they "d[id]n't do it in her stomach." App. 6a.

tased Ms. Brooks three times because they wanted to arrest her for refusing to sign a traffic ticket. That itself is patently unreasonable. But the fact that she was seven months pregnant sharply amplifies the unreasonableness of Respondents' behavior. No reasonable officer would have believed that it was acceptable to tase a pregnant woman three times in approximately one minute because she would not sign a traffic ticket. There is no gray area here.

II. Qualified Immunity May Be Denied Even Without "Materially Similar" Cases.

Like the Court below, Respondents fail to appreciate *Hope*'s admonition that "officials can still be on notice that their conduct violates established law even in novel factual circumstances," 536 U.S. at 741. Respondents' reliance on *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004); *Hinton v. City of Elwood*, 997 F.2d 774 (10th Cir. 1993); *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992), misunderstands *Hope*. As explained above, none of those cases have facts even remotely similar to those here. In short, Ms. Brooks, a pregnant woman, never struck or even threatened any of the officers, even after being tased repeatedly by one officer and restrained by another. [2]

---

[2] Respondents also argue that a constitutional right cannot be clearly established for purposes of the qualified immunity analysis if *any* judge concludes that there is no such right. Opp'n 16. But that is not the law: courts often find that a constitutional right is clearly established despite the disagreement of some of its members or a lower court judge. *See, e.g.*, *Friedman v. Boucher*, 580 F.3d 847 (9th Cir. 2009); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004); *Doe v. Broderick*, 225 F.3d 440 (4th Cir. 2000); *Auriemma v. Rice*, 910 F.2d 1449 (7th Cir.

Once again, Respondents ignore the Court's instruction in *Graham* to consider *all* of the facts and circumstances — facts that make it readily apparent how easily distinguishable these cases are. For instance, in *Draper*, the case on which Respondents place particular reliance, the defendant was a lone police officer who had stopped the plaintiff at night, where the plaintiff had "immediately beg[u]n shouting and complaining" without the officer having used any physical force up to that point. 369 F.3d at 1272-73. Here, the officers outnumbered Ms. Brooks three to one, it was broad daylight, and it was only when the officers tried to drag her out of the car that Ms. Brooks began to yell and honk the horn for help.

Contrary to Respondents' apparent belief, the use of a taser by a police officer does not itself make a case analogous. Nor does the Court require "materially similar" cases to overcome a qualified immunity defense. *Hope*, 536 U.S. at 739. Rather, the "relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). And in this case, it would have been clear to any reasonable officer that tasing a pregnant woman, who never threatened the officers or attempted to harm them in any way, three times in approximately one minute for a trivial offense, was a blatant violation of her constitutional rights.

1990). Indeed, this Court has determined that a right is clearly established despite the disagreement of some of its members. *See, e.g.*, *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007).

As explained in the Cross-Petition, the Ninth Circuit's qualified immunity analysis was contrary to this Court's precedent and conflicted with cases from other circuits because it turned exclusively on the absence of previous, factually similar cases. *Compare* App. 17a *with Hope*, 536 U.S. at 741 ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances …."); *Walker v. Davis*, 649 F.3d 502, 503–04 (6th Cir. 2011) (same principle); *Glik v. Cunniffe*, 655 F.3d 78, 88 (1st Cir. 2011) (same principle). Applying the wrong standard, the Ninth Circuit unsurprisingly held that Respondents were entitled to qualified immunity. This Court's review is essential to ensure that the proper standard for qualified immunity is understood and applied throughout the lower courts and to guarantee that what happened to Ms. Brooks does not become a permanent feature of how police officers interact with citizens everywhere.

CONCLUSION

For the reasons set forth in the Cross-Petition, this Court should grant a writ of certiorari.

May 2, 2012

Respectfully submitted,

ERIC ZUBEL
ERIC ZUBEL P.C.
800 Fifth Avenue
Suite 4100
Seattle, WA 98101
(206) 447-1445

MICHAEL F. WILLIAMS
Counsel of Record
AARON L. NIELSON
ASHLEY G. JAMES
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
mwilliams@kirkland.com

Counsel for Cross-Petitioner
Malaika Brooks