No. 11-1165

In The Supreme Court of the United States

TROY MATTOS, and JAYZEL MATTOS,

Conditional Cross-Petitioners,

v.

DARREN AGARANO, RYAN AIKALA, STUART KUNIOKA, and HALAYUDHA MACKNIGHT,

Conditional Cross-Respondents.

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

MEMORANDUM IN OPPOSITION TO CROSS-PETITIONERS' CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Cross-Petitioners' brief omitted, and misstated, a number of significant facts that are critical to an analysis of this case. The following is a complete version of the facts.

Cheynice Ruidas ("Cheynice"), Jayzel Mattos' ("Mrs. Mattos") 14-year-old daughter, called 911 after hearing her mother scream "Troy, don't whack me!" followed by the sound of someone hitting another person. Cheynice heard her mother say "call the police!" and heard several items being thrown within the residence.

Cheynice told the 911 dispatcher that her parents were in a physical fight and that she could hear things being thrown around.[1] Cheynice stayed in her room because she was afraid to come out. During the 911 call, Cheynice sounded very scared. Police were assigned to respond at approximately 11:20 p.m. on Wednesday August 23, 2006. Officers Agarano, MacKnight, and Kunioka arrived at the residence approximately eight minutes after the 911 call, at 11:28 p.m. Officer Kunioka was the first to approach the residence and observed Troy Mattos ("Mattos") standing near the doorway. Mattos is a soldier who had recently returned from Iraq.[2] He is an imposing

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[1] Consistent with Cheynice's statement, police observed the residence in disarray as if things had been thrown. Mattos admits to "bumping into" a chair and a box.

[2] Mattos received training in hand-to-hand combat.

6'3" tall and weighs approximately two hundred pounds.

As Officer Kunioka approached, Mattos sat down on the top of the stairs. There were two bottles of Moosehead beer near Mattos, one appeared to be full and the other appeared empty.

Mattos smelled of alcohol, his eyes were red and watery, and he appeared intoxicated. Mattos was irritated, uncooperative, agitated, and his voice became louder. Mattos had been drinking for four or five hours prior to the police arriving and was feeling the effects of the alcohol. Officer Kunioka asked what was going on and Mattos replied "nothing."

Officer Kunioka informed Mattos that a 911 call indicated there was a physical altercation. Mattos responded "who called, those guys over there?" while pointing to the adjacent apartments. Mattos was told the call came from a 14-year-old. Mattos finally admitted he had an argument with his wife about "personal things." Officer Kunioka asked what the personal things were and Mattos did not respond. Officer Kunioka asked if it was a physical argument and Mattos denied it was. Mattos was asked where his wife was and he replied "in the shower." Police informed Mattos that they needed to talk with his wife to make sure she was all right and confirm his story. Mattos called out to his wife twice, but there was no response.

It appeared that Mattos did not want to get his wife. Based on Mattos' behavior, Officer Kunioka

believed Mattos was being untruthful and hiding something. Officer Agarano told Mattos the police could not leave until they talked to his wife. Mattos entered the residence and closed the door behind him stating "wait right here." Officer Agarano became concerned because of Mattos' evasive answers, his behavior, and because this was a domestic abuse call.[3] Concerned for the welfare of the individuals within the residence as well as officer safety, Officer Agarano opened the door and stepped into the doorway. Aikala was at the residence when Officer Agarano stepped into the doorway, having arrived at the scene at approximately two minutes after the other officers.

Shortly after Officer Agarano opened the door, Mattos walked out of the hallway with his wife behind him. Mrs. Mattos was completely dry and fully clothed. There was no indication that she had been in the shower as her husband had claimed.

Upon observing Officer Agarano in the doorway, Mattos began screaming "Get the fuck out of my house! You have no right to be in my house!" and "what is your probable cause?" Mattos also stated "But I never invite you guys in!"

Officer Agarano attempted to calm Mattos and stated the police had the right to enter the residence and offered to talk to his wife outside. Mattos continued

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[3] More officers are killed or injured responding to domestic violence calls than any other call. *United States v. Martinez*, 406 F.3d 1160, 1164 (9th Cir. 2005).

screaming "Get the fuck out of my house!" and "Fuck you! Fuck you guys!" While screaming at the Officers, Mattos walked towards Officer Agarano with his arms in the air. At this point, Officer Agarano informed Mattos he was under arrest. Aikala entered the residence.

Mrs. Mattos immediately moved in front of her husband and attempted to prevent his arrest by putting her arms behind her in a shielding fashion. She stated "you not going to take my husband." Both Cross-Petitioners admit Mrs. Mattos was in the way of police attempts to arrest Mattos. The living room area was small and cramped.

Aikala pulled out his Taser, transferred it to his left hand and attempted to pull Mrs. Mattos away. As Aikala approached, Mrs. Mattos put her hands onto Aikala's chest and extended at least one of her arms.

Aikala then stepped back, turned on his Taser, and deployed it for five seconds. Mrs. Mattos slowly fell to the ground.

At 11:34 p.m., in accordance with Maui Police Department ("MPD") policies, Aikala notified dispatch his Taser had been deployed and requested a supervisor and medics.

Even after being tased, Mrs. Mattos continued to be defiant and refused to follow police directions. She

insisted Aikala remove the prongs to the Taser.[4] Aikala refused and advised her an ambulance was on the way. Despite being told medics were coming, she pulled the prongs out herself. According to Cross-Petitioners, Aikala also told her to stop moving or he would "tase her again." She refused to do so and sat up defiantly stating "go ahead and tase me." Despite her defiance, Aikala did not tase her again. When the ambulance arrived, she refused medical care.

Mrs. Mattos continued to be defiant and uncooperative with the police. She stated "If you think that you and your badge is intimidating me, you're not."

Consistent with his prior aggressive behavior towards his wife and police, Mattos continued to be physically aggressive. Mattos screamed "You can't do that to my wife!" and moved towards Aikala. Officers Agarano and MacKnight attempted to restrain Mattos who was physically resisting. Mattos admits he pulled his arms and tried to prevent the handcuffing. The Officers repeatedly told Mattos not to resist and to "calm down." However, Mattos continued to struggle. Eventually, Officers Agarano and MacKnight were able to handcuff him.

While being transported to the police station, Mattos stated "I like see you guys take me down without that badge. That wouldn't happen."

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[4] One prong hit Mrs. Mattos' right breast. Oddly, Cross-Petitioners argue that Aikala was obligated to touch her breast and remove the prongs.

The entire encounter happened very quickly and lasted only a few minutes.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

Qualified immunity protects officers from liability unless they violate a clearly established constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). It must be shown that the law at the time of the alleged violation gave "fair warning" that such conduct would be illegal. *Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002).

In this case, there was no fair warning to the officers that their conduct was improper or a violation of law. As such, the Ninth Circuit's grant of qualified immunity was appropriate.

I. THE NINTH CIRCUIT'S DECISION TO GRANT QUALIFIED IMMUNITY WAS APPROPRIATE

The grant of qualified immunity was appropriate in this case based on the precedent established by this Court. There was no "misapplication" of cases nor an "overcompensation" for prior rulings. *See* Cross-Petitioners' Petition at pages 8-9.

In determining that qualified immunity was appropriate, the Ninth Circuit looked to this Court's decision in *Ashcroft v. al-Kidd*, 131 S.Ct. 2074 (2011)

for guidance. The *Ashcroft* case provided clarification of the qualified immunity doctrine by emphasizing what plaintiffs must prove to show a violation of a clearly established right. In relevant part, the *Ashcroft* decision explained:

> 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."

Id., at 2083, *quoting, Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (emphasis added).

Although Cross-Plaintiffs claim otherwise, the Ninth Circuit did *not* require a factually similar case in order to find that a law was clearly established. Instead, the Ninth Circuit agreed that it did " . . . not require a case directly on point. . . ." Ninth Circuit *en banc* opinion Appendix 1 to Petitioner Agarano, et al.'s Petition for Writ of Certiorari ("Appendix") at 19016.

Instead, consistent with this Court's order, the Ninth Circuit held that " . . . existing precedent must have placed the statutory or constitutional question ***beyond debate***." *Ashcroft*, *id*. at 2083, *citing, Malley v. Briggs*, 475 U.S. 335, 341 (1986) (emphasis supplied). Absent directly controlling authority, there must be " . . . a robust 'consensus of cases of persuasive authority.'" *Ashcroft*, *supra*, at 2084, *quoting, Wilson v. Layne*, 526 U.S. 603, 617 (1999).

The Ninth Circuit's order did not obliterate this Court's ruling in *Hope v. Pelzer*, 536 U.S. 730 (2002). Instead, the Ninth Circuit carefully examined the ruling in the *Hope* case, which permits notice in "novel factual circumstances," within the context of a Fourth Amendment case. In its analysis, the Ninth Circuit weighed the "clearly established" rule against the ruling in *Graham v. Connor*, 490 U.S. 386 (1989).[5]

In determining whether the law was clearly established, the Ninth Circuit held that *Graham*'s excessive force rule " . . . cannot always, alone, provide fair notice to every reasonable law enforcement officer that his or her conduct is unconstitutional." *See Brousseau v. Haugen*, 543 U.S. 194, 198-99 (2004) (per curiam) (explaining that *Graham* and *Tennessee v. Garner*, 471 U.S. 1 (1985) "are cast at a high level of generality" and cannot, in every case, "offer a basis for decision."). The exception to the *Graham* standard may exist in an "obvious" case but the bar for finding obviousness " . . . is quite high." Appendix at 19017.

In the case at bar, the law regarding Taser use by police officers was not so clear as to place the constitutionality of Officer Aikala's actions "beyond debate." As discussed in its opinion, the Ninth Circuit acknowledged that in 2006, there were only three

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[5] The *Graham* Court acknowledged 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. *Id*. at 396-97.

circuit court opinions regarding Taser use. *See Draper v. Reynolds*, 369 F.3d 1270, 1277-78 (11th Cir. 2004); *Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 781-82 (10th Cir. 1993); *Russo v. Cincinnati*, 953 F.2d 1036, 1044-45 (6th Cir. 1992). All three cases found that the use of the Taser was constitutional.

Likewise, in *Bryan v. MacPherson*, 630 F.3d 805, 833 (9th Cir. 2010) a panel of the Ninth Circuit held that a police officer was entitled to qualified immunity for his use of a Taser, noting " . . . the dearth of prior authority," on the use of Tasers. As the court in *Bryan* explained, at the time of the incident in 2005, " . . . there was no Supreme Court decision or decision of our court addressing whether the use of a Taser . . . in dart mode constituted an intermediate level of force." *Id*.

Officer Aikala faced a tense and rapidly escalating situation.[6] Jayzel Mattos exacerbated that situation by interfering with the Officers' effort to arrest her angry and intoxicated husband, and by making physical contact with Officer Aikala. Here, as in *Bryan*, the absence of authority to guide Officer Aikala under these circumstances forecloses a finding that the constitutional issue was so clear as to be

[6] Adding to the tense nature of the situation was the fact that the Officers were responding to a domestic violence call. The Ninth Circuit has noted the " . . . volatility of situations involving domestic violence" makes them particularly dangerous. *United States v. Martinez,* 406 F.3d 1160, 1164 (9th Cir. 2005).

"beyond debate," as required under *Ashcroft*. *Ashcroft*, *supra*, at 2083. Rather, as illustrated by *Ashcroft* and *Bryan*, the constitutional issue in this matter was unsettled at the time of the incident in 2006, entitling the Officers to qualified immunity.

II. THERE ARE NO CONFLICTS BETWEEN THE RULING OF THE NINTH CIRCUIT AND OTHER FEDERAL CIRCUITS

Cross-Petitioners claim that the Ninth Circuit's finding that the law was not clearly established is in conflict with other circuits. This claim is misleading.

Cross-Petitioners cite *Casey v. City of Federal Heights*, 509 F.3d 1278 (10th Cir. 2007) as an example of a conflict with the Ninth Circuit. In *Casey*, Plaintiff was unsuccessful in challenging a traffic citation. Plaintiff informed the court that he would appeal the decision, was given his court file, told to take it to the cashier and make payment. Plaintiff's 8-year-old daughter went to the restroom while he went to his vehicle to get money. On his way out of the building, Plaintiff was told to not remove the file from the building. Plaintiff stated that he would be right back and pointed out that his daughter was in the restroom.

An officer was informed that Plaintiff had taken the file into the parking lot. The officer saw Plaintiff in the parking lot and ordered him back to his vehicle. Plaintiff explained that he needed to return the file and retrieve his daughter. Plaintiff showed the

officer his briefcase with the file clearly visible in an outside pocket. Without warning, the officer put Plaintiff into an arm lock. Plaintiff moved his arm and began walking to the courthouse. The officer then jumped on Plaintiff's back, ripping his shirt. Another officer arrived at the scene and immediately Tasered Plaintiff. Plaintiff was taken to the ground, handcuffed, had his face banged into the concrete, and was Tasered again.

The *Casey* court found that, even though there was no specific case law on point, the law was clearly established:

> The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.

Id. at 1284, *quoting, Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004). Because the officer's violation of the Fourth Amendment was clear under *Graham*, *supra*, the *Casey* court held that a second decision was unnecessary to establish the law. *Id*. at 1284.

Based on the facts in the *Casey* case, there is no conflict with *Ashcroft*, *supra*. Instead, the *Casey* facts present a clear example of an obvious constitutional violation. In addition, *Casey* bears absolutely no resemblance to the case at bar. The *Casey* plaintiff was not involved in a domestic violence dispute, he was not intoxicated or in a cramped area, and he was not fighting with police. Instead, the *Casey* plaintiff

was alone in a parking lot holding a file. It appears as though the *Casey* plaintiff would have complied with police orders, unlike the Cross-Petitioners.

Cross-Petitioners next cite *Walker v. Davis*, 649 F.3d 502 (2011) as another case in conflict with the Ninth Circuit's ruling. In *Walker*, decedent was riding his motorcycle in rural Kentucky just after midnight when police clocked him going 70 miles per hour in a 55 mile per hour zone. A pursuit began with decedent never going faster than 60 miles per hour and running one red light. The chase lasted for approximately 5 minutes. Decedent turned off the road and into an empty field. The officer followed then intentionally rammed his patrol car into the motorcycle. Decedent was thrown from his motorcycle and dragged under the cruiser, crushing him to death. The *Walker* court denied qualified immunity, finding that in the absence of an immediate threat, the use of deadly force was not justified under *Tennessee v. Garner*, *supra*. The court stated that, even in the absence of similar cases, the officer was provided with clear and fair warning that his conduct was unconstitutional. *Walker*, *supra*, at 504, *citing*, *Smith v. Cupp*, 430 F.3d 766, 776-77 (6th Cir. 2005).

The *Walker* case bears absolutely no resemblance to the case at bar. In *Walker*, decedent was in an empty field on his motorcycle when deadly force was used. *Tennessee v. Garner*, *supra*, clearly prohibits the use of deadly force in this type of situation. *Tennessee v. Garner*, *supra*, is not applicable in the case at bar.

Instead, the case at bar would be analyzed under *Graham*, *supra*. Nothing in *Graham*, *supra*, would have put the officers on notice that the use of the Taser would be unconstitutional. Police were at the Mattos residence at their request, to deal with a domestic violence dispute. Mattos was intoxicated and non-compliant. Mrs. Mattos was preventing officers from doing their job by shielding her husband from arrest. Prior to being Tasered, Mrs. Mattos put her hands on Officer Aikala's chest and extended at least one arm. In a cramped living room with such a volatile situation, the use of the Taser appeared reasonable to the officer.

III. THE FORCE USED WAS NOT EXCESSIVE UNDER *GRAHAM v. CONNOR*

Cross-Petitioners argue that Officer Aikala rushed into a situation that he did not understand before immediately deploying his Taser. This rendition of the facts is incorrect.

Officer Aikala arrived at the Mattos home only 2 minutes after Officers Kunioka, MacKnight and Agarano. When Officer Aikala got to the Mattos' residence, Mattos was walking into his home while Officer Agarano was stepping into the doorway. Officer Aikala knew that this was a domestic violence call and heard Mattos screaming profanities at Officer Agarano as he walked up the stairs to the residence.

When Officer Aikala entered the residence, he saw Officer Agarano inform Mattos that he was under arrest. He then saw Mrs. Mattos step in front of her husband, with her arms outstretched behind her, to prevent the arrest of her husband. Officer Aikala attempted to move Mrs. Mattos, who put her hands on his chest and extended at least one arm before she was Tasered. Contrary to Cross-Petitioners' argument, Officer Aikala was well aware of what was happening in the Mattos residence.

Claims of excessive force are analyzed under the Fourth Amendment to the U.S. Constitution.[7] *Graham v. Connor*, 490 U.S. 386, 395 (1989). The test is whether the officers' actions were "objectively reasonable in light of the facts and circumstances confronting them. . . ." *Id*. at 397.

In *Graham v. Connor,* 490 U.S. 386 (1989), the Court stated:

> The 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 . . . The 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*** –

[7] Tasers do not constitute cruel and unusual punishment under the Eighth Amendment. *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988).

> about the amount of force that is necessary in a particular situation (citations omitted, emphasis added).

Id. at 396-97.

When analyzing the reasonableness of force used, the "nature and quality of the intrusion on the individual's Fourth Amendment interests" must be balanced "against the countervailing governmental interests at stake." *Id*. at 396.

Careful attention must be paid to the facts and circumstances of each case, including "the severity of the crime . . . whether the suspect poses an immediate threat to the safety of the officers . . . and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*. at 396. Officers' safety is viewed as the most important of the three factors. *Miller v. Clark County*, 340 F.3d 959, 964 (9th Cir. 2003).

The second two factors, the immediate threat to the safety of the officers and whether there is active resistance, both favor the Officers. Cross-Petitioners were refusing to follow Officers' instructions and attempting to avoid arrest. Mrs. Mattos repeatedly stated that she was not going to let police arrest her husband and even pushed Officer Aikala. Although Cross-Petitioners attempt to argue that Mrs. Mattos is a small woman, this argument ignores the danger she posed.

Simply because Mrs. Mattos was a woman does not equate to her not being a danger. For example, if

she was able to obtain a weapon from the Officers, the weapon would cause the same amount of damage irregardless of her sex or size.

Furthermore, Mrs. Mattos was not alone in her resistance towards the police. Mattos, a 6'3" two hundred pound soldier, was immediately behind her. Therefore, Officers were faced with not one, but two individuals who were not following instructions. Obviously, if the Officers began to struggle with Mrs. Mattos, her husband would have assisted his wife. As a result of the struggle, the Cross-Petitioners would be in close proximity to the Officers' duty belts and their weapons. Approximately fifteen percent of all officers murdered are killed with their own gun. The use of the Taser avoided the risk that Cross-Petitioners would have access to Officers' weapons.

Mrs. Mattos made it perfectly clear that she would do whatever she could to prevent the Officers from arresting her husband. She repeatedly stated "you not taking my husband" and pushed Officer Aikala in the chest when he tried to pull her out of the way. The Officers had no alternative but to use force. The use of the Taser is a relatively low level of force and deploys an average of 0.0021 amps/second. The actual voltage applied to the body is less electricity than a single bulb on a string of Christmas tree lights. It is powered by two 3-volt batteries similar to batteries in a digital camera. In fact, Mrs. Mattos described the initial feeling as a "pinch."

Officers respond according to the subject's behavior. The higher the resistance, the higher the reasonable force options. Mrs. Mattos refused to follow verbal commands and physically resisted the police. She admits she was right in front of her husband when she was Tasered.

The Officers never struck Mrs. Mattos or utilized a baton, pepper spray, or a gun. Rather, Officer Aikala utilized verbal commands, followed by an attempt to pull, followed by the use of the Taser.[8] Under a Fourth Amendment analysis, the force used by the Officers to restrain Mrs. Mattos was reasonable.

The Ninth Circuit has repeatedly found police are entitled to use force when someone resists or defies police instructions. *See Miller v. Clark County*, 340 F.3d 959, 968 (9th Cir. 2003) (force reasonable when dog ordered to "bite and hold" when suspect defied order to stop and actively resisted); *Gibson v. County of Washoe*, 290 F.3d 1175, 1198 (9th Cir. 2002) (pepper spray not excessive when suspect fighting against efforts to restrain him); *White v. Pierce County*, 797 F.2d 812, 816 (9th Cir. 1986) (force used reasonable because individual resisting).

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[8] The Taser has been extensively tested and found not to cause any significant injuries. The Taser has been subjected to more testing than most pacemakers and has been used on over one million human subjects. It has an "extremely high safety profile."

It is important to note that an officer has a range of options available to deal with any situation. An officer does not have to use the minimum amount of force necessary.

In *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994), the Court noted:

> Requiring officers to find and choose the least intrusive alternative ***would require them to exercise superhuman judgment***. In the heat of the battle with lives potentially in the balance, an officer would not be able to rely on training and common sense . . . Imposing such a requirement would inevitably ***induce tentativeness by officers, and thus deter police from protecting the public and themselves***. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment (emphasis added).

Id. at 915.

Therefore, an Officer is not held to the impossible standard of using the least amount of force necessary. In *Draper v. Reynolds*, 369 F.3d 1270, 1277-78 (11th Cir. 2004), an officer pulled over an individual who refused to comply with requests to produce documents and used profanity. Due to these refusals, the officer placed the person under arrest and used his Taser. The court found the use of force appropriate

due to the person's "hostile, belligerent, and uncooperative" behavior. *Id*. at 1278. The Court held the use of the Taser was not excessive.

The Court noted: "[t]he single use of the Taser gun may well have prevented a physical struggle and serious harm to either [the officer or the plaintiff]." *Id*.

Furthermore:

> Although being struck by a taser gun is an unpleasant experience, the amount of force . . . used – a single use of the taser gun causing a one-time shocking – was reasonably proportionate to the need for force and did not inflict any serious injury.

Id.

Therefore, the use of the Taser generally prevents physical struggles and avoids serious harm to the individuals.[9] Officer Aikala's deployment of the Taser avoided any significant injuries.[10]

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[9] Studies have shown the use of the Taser lowers the rate of injuries to both police and suspects.

[10] Mrs. Mattos refused medical treatment when the ambulance arrived.

IV. THERE ARE NO DISPUTED FACTS TO PREVENT THE OFFICERS FROM RECEIVING QUALIFIED IMMUNITY

Cross-Petitioners argue that the Ninth Circuit should have denied the Officers qualified immunity on the basis of "hotly disputed" facts. However, Cross-Petitioners do not offer even one of these allegedly disputed facts. Instead, Cross-Petitioners claim a jury should have been allowed to decide whether the behavior of Mrs. Mattos justified the use of force. That question, though, has nothing to do with whether the use of force violated ***clearly established*** law.

Whether a right is clearly established is a "purely legal question." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). As such, a jury plays no role in this determination. Indeed, qualified immunity is effectively lost if a case is permitted to go to trial. *Scott v. Harris*, 550 U.S. 372, 376 n.2 (2007), *quoting, Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Ninth Circuit construed all facts in Cross-Petitioners' favor, but determined the use of a Taser under the circumstances did not violate clearly established law. There was no error in this decision.

The goal of qualified immunity is to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. *Saucier v. Katz*, *supra*, 533 U.S. at 202, *citing*, *Harlow*, 457 U.S. at 818. Therefore, the question of whether an officer should receive qualified immunity "ordinarily should be decided by the court

long before trial." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).

The doctrine protects "all but the plainly incompetent or those who knowingly violate the law," and "gives ample room for mistaken judgments." *Malley v. Briggs*, 475 U.S. 335, 341-43 (1986). Determining whether an officer is protected by qualified immunity requires a two-step analysis. The first question is whether the plaintiff's allegations, if true, establish a constitutional violation. *Saucier v. Katz*, *supra*, 533 U.S. at 201.

The second question is whether the officer's conduct violated a clearly established right. That is, "would it be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Wilkins v. City of Oakland*, 350 F.3d 949, 954 (9th Cir. 2003), *cert. denied*, 543 U.S. 811 (2004), *quoting*, *Saucier*, *supra*, 533 U.S. at 202 (emphasis in *Wilkins*). This question requires determining whether the law at the time of the alleged violation gave the officer "fair warning" that such conduct would be illegal. *Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002).

In the case at bar, the Ninth Circuit correctly found that the law on Taser use at the time of the incident was not clearly established. Accordingly, the grant of qualified immunity was appropriate.

CONCLUSION

For the reasons contained herein, Cross-Respondents respectfully request that Cross-Petitioner's petition for writ of certiorari be denied.

April 25, 2012

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