No. 13-691

In The
Supreme Court of the United States

OFC. JEFF SHELTON and CITY OF SNOHOMISH,

Petitioners,

v.

DONALD GRAVELET-BLONDIN and
KRISTI GRAVELET-BLONDIN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS AND WASHINGTON ASSOCIATION OF SHERIFFS AND POLICE CHIEFS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Washington State Association of Municipal Attorneys (WSAMA) and Washington Association of Sheriffs and Police Chiefs (WASPC) respectfully submit this amici curiae brief in support of Petitioners.[1]

INTERESTS OF THE AMICI CURIAE

Amici Curiae agree with the arguments raised by Petitioners, and offer the following analysis as to why certiorari is appropriate in this case. As discussed below, law enforcement has become not only more effective, but also safer because of the taser and other electronic control devices (ECDs). The opinion from the Ninth Circuit below undermines that increased effectiveness and jeopardizes that added safety, consequently hindering the abilities of police officers.

WSAMA is a non-profit organization of municipal attorneys in Washington State. *See* http://www.wsama.org. WSAMA members represent the 281

[1] Pursuant to Rule 37.2 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the amici curiae's intention to file this brief. All parties have consented to the filing of this brief. Those consents are being lodged herewith. Pursuant to Rule 37.6 of the Rules of the Supreme Court, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

municipalities throughout the state as both in-house counsel and as private, outside legal counsel. Often, WSAMA members represent police officers in lawsuits challenging the force employed, which increasingly involve tasers.

WASPC consists of executive and top management personnel from law enforcement agencies in Washington. *See* http://www.waspc.org. Membership includes sheriffs, police chiefs, the Washington State Patrol, the Washington Department of Corrections, and representatives from federal agencies. WASPC routinely advises its members of proper police protocol and agency policy.

Legal advisors to law enforcement must balance many significant factors when revising policies. The Ninth Circuit's 2-1 decision below negatively impacts all of the above factors, consequently affecting every agency represented by amici curiae. Amici have a strong interest in this case to ensure that police officers in the Ninth Circuit (and particularly in Washington) have the ability and flexibility to safely and effectively resolve tense, uncertain, and rapidly evolving situations, much like the examples cited by Petitioners. *See* Pet. for Cert. 13-14. The taser aids law enforcement in these endeavors.

SUMMARY OF THE ARGUMENT

Four decades ago, scientist Jack Cover developed the technology at the center of this case. Named after

Cover's childhood hero,[2] the Thomas A. Swift Electric Rifle, or "TASER," has revolutionized law enforcement since it was modernized in the early 1990s. The device is now carried by a majority of law enforcement agencies nationwide, including federal officers from the Bureau of Alcohol, Tobacco, & Firearms and the United States Marshal's Service. Research has shown that the device saves lives, reduces injuries, and enables officers to control combative suspects quickly. The ability of police to quickly control the uncertain situations they face daily is crucial not just to the police officers themselves, but also to the community in general and to private citizens who depend on the police for public safety. And to the extent that tasers help police safely control the situations to which they are responding, they are invaluable police tools. But despite its benefits, tasers are not without controversy. As illustrated by this case, tasers have become a popular target of litigants seeking compensation under 42 U.S.C. § 1983. This threat of liability, which targets both individuals and

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[2] *See* The History of TASER International, *at* http://www.taser.com/videos/taser-experience/the-history-of-taser-international (last visited Dec. 31, 2013). The term "Taser" is often used to refer to any type of conducted energy device (CEDs), conducted electrical weapons (CEWs), or electronic control device (ECDs). *See* U.S. DEP'T OF JUSTICE, REP. NO. I-2009-003 (May 2009) at i n.2, *available at* http://www.justice.gov/oig/reports/plus/e0903/final.pdf (last visited Dec. 31, 2013). However "Tasers" are specific devices manufactured by Taser International, the market leader in ECDs and the brand most often used by law enforcement. *Id.*

their employing agencies, only diminishes public safety by injecting a level of reluctance and hesitancy into "tense, uncertain, and rapidly evolving" circumstances that demand swift action to ensure safety. *Graham v. Connor*, 490 U.S. 386, 397 (1989).

The Fourth Amendment, which governs the constitutionality of police seizures, *see id.* at 394, protects "persons . . . against unreasonable . . . seizures." U.S. CONST., amend. IV. Although this Court has not hesitated to provide guidance as to what technologically-advanced police conduct crosses the threshold of "unreasonable," *e.g., Kyllo v. United States*, 533 U.S. 27, 34-35 (2001), it has yet to offer any guidance in the context of tasers despite the device's ubiquitous presence. Unfortunately, the Court's silence has led to inconsistent results, approaches, and beliefs in the various courts of appeals, as exemplified by the Ninth Circuit's conflicting majority and dissenting opinions in this case. If tasers are to be properly used by law enforcement then consistency in the law is required. Certiorari is needed to provide this clarity.

Even more regrettably, the Ninth Circuit majority took an unprecedented quantum leap to announce a misguided and dangerous bright-line rule with respect to tasers while simultaneously expressing that its view was "beyond debate" as of May 4, 2008, when Petitioner Jeff Shelton, a City of Snohomish police officer, encountered Respondent Donald Gravelet-Blondin. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1092-96 (9th Cir. 2013). And it did so

despite acknowledging that "the specific level of force involved in using a taser was not clear until 2010," a date two years subsequent to when Shelton tased Gravelet-Blondin. *Id.* at 1096. The Ninth Circuit's analysis, though misguided for all of the reasons advanced by Petitioners, *see* Pet. for Cert. 7-36, did not arise in a vacuum. Rather, it is the product of excessive reliance on a passage taken out of context from *Hope v. Pelzer*, 536 U.S. 730 (2002). In order to prevent this mistaken view of qualified immunity from continuing to invade this Court's docket, certiorari must be granted.

ARGUMENT

There are two independent reasons why a writ of certiorari should be granted here, both of which are grounded in Rule 10(c), which states a writ is warranted when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c). The Ninth Circuit has done both. It has laid down a constitutional prohibition without exception for tasers, an approach that is inconsistent from its sister circuits and this Court. More fundamentally though, the majority opinion has repeated the same error concerning the qualified immunity standard that has required this Court's reversal multiple times over the past decade.

I. IN LIGHT OF THE PERVASIVE USE OF TASERS BY LAW ENFORCEMENT, THIS COURT'S GUIDANCE IS DESPERATELY NEEDED TO CLARIFY UNSETTLED CASE LAW IN THE LOWER COURTS OVER ITS LAWFUL USE.

A. Taser Use in General

As of May 2005, over 7,000 police agencies nationwide used tasers, amounting to over 140,000 officers carrying the device. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, NO. GAO-05-464, TASER WEAPONS: USE OF TASERS BY SELECTED LAW ENFORCEMENT AGENCIES (May 2005), at 1 [hereinafter "GAO Report"].[3] As of 2011, the number of agencies employing the taser had more than doubled. GEOFFREY P. ALPERT, ET AL., POLICE USE OF FORCE, TASERS AND OTHER LETHAL WEAPONS, NAT'L INSTITUTE OF JUSTICE, at 1 (May 2011).[4] Research has shown "that 99.7 percent of people who were shocked by [conducted energy devices, also known as] CEDs [such as tasers] suffered no injuries or minor injuries only." *Id.* at 2.

When used properly, the taser discharges two metal barbs attached to wires that attach to a suspect up to 25 feet away from the officer. GAO Report, *supra* at 6. The device then delivers a charge of

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[3] *Available at* http://www.gao.gov/new.items/d05464.pdf (last visited Dec. 31, 2013).

[4] *Available at* https://www.ncjrs.gov/pdffiles1/nij/232215.pdf (last visited Dec. 31, 2013).

50,000 volts through the wires,[5] causing the suspect's muscles to involuntarily contract, resulting in a loss of muscle control for the duration of the shock. *Id.* Usually, this lasts five seconds, but can be shortened, as was the case with Officer Shelton and Mr. Gravelet-Blondin. *See* Appx. to Pet. for Cert. 119-20. Studies have found that the taser "enable[s] officers to disable and control a subject from a safe distance and cause[s] fewer injuries when compared with use of other less-lethal weapons," such as batons, pepper spray, or hand-to-hand combat. U.S. DEP'T OF JUSTICE, REP. NO. I-2009-003 (May 2009) at 7. This is so because unlike traditional methods of physical coercion that usually leave long-lasting injuries, "[o]nce the Taser weapon's shock subsides, the individual can recover completely in about 10 seconds." GAO Report, *supra* at 6-7.[6]

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[5] According to the device's manufacturer, Taser International, the device maintains its ability for safe application because it delivers the charge at a low, pulsed current rather than continuously. *See* How Does a Taser Work, *available at* http://www.taser.com/research-and-safety/how-a-taser-works (last visited Dec. 31, 2013). By way of example, static shocks "regularly exceed 30,000 volts," but are relatively innocuous given the low current. *Id.*

[6] For example, the widely publicized "Don't Tase Me Bro" incident from then-Senator John Kerry's speech at the University of Florida may be found at http://www.youtube.com/watch?v=6bVa6jn4rpE (last visited Dec. 31, 2013). The video shows Andrew Meyer resisting arrest, tased, and then fully capable of walking out of the auditorium within seconds after the tasing.

Most cases from this Court to examine new technologies have done so in the context of Fourth Amendment searches. *E.g.*, *City of Ontario v. Quon*, 560 U.S. 746, 130 S. Ct. 2619, 2629-31 (2010) (employee text messages); *Kyllo*, 533 U.S. at 34-35 (infrared technology); *Katz v. United States*, 389 U.S. 347, 353 (1967) (wiretapping). The same is not true for seizures. Despite the ubiquitous usage of this device for decades, this Court has yet to examine the constitutionality of tasers. In fact, the only case from this Court where the word "taser" is mentioned examined the propriety of sentences imposed on Los Angeles officers who abused Rodney King. *See Koon v. United States*, 518 U.S. 81, 86 (1996).

B. Neither the lower courts nor law enforcement can agree on when a police officer may constitutionally tase a suspect.

As aptly explained by Petitioners, the current state of law can best be described as blurred, indistinct, and unsettled. Pet. for Cert. 16-18, 24-28. As recently as 2011, jurists have commented that "the objective reasonableness of the use of Tasers continues to pose difficult challenges to law enforcement agencies and courts alike." *Henry v. Purnell*, 652 F.3d 524, 539 (4th Cir. 2011) (Davis, J., concurring); *see also McKenney v. Harrison*, 635 F.3d 354, 362 (8th Cir. 2011) (Murphy, J., concurring). By way of illustration, the Ninth Circuit found Officer Shelton's use of the taser to be unconstitutional because Mr.

Gravelet-Blondin was a "bystander" who stood 37 feet[7] away "and did nothing that could be deemed 'particularly bellicose.'" *Gravelet-Blondin*, 728 F.3d at 1092. Conversely, less than two weeks before Officer Shelton tased Mr. Gravelet-Blondin, the Eleventh Circuit upheld an officer's use of a taser against a man the police had *already handcuffed* and were escorting out of a hotel. *Zivojinovich v. Barner*, 525 F.3d 1059, 1064-65, 1073 (11th Cir. 2008).

Only adding to the nationwide confusion is *Cook v. City of Bella Villa*, 582 F.3d 840 (8th Cir. 2009). *Cook*, decided after the events of this case, involved facts remarkably similar to *Gravelet-Blondin*. There, a police chief (working in the field) was in the process of arresting a woman on suspicion of driving while intoxicated. Her husband, positioned in the rear passenger seat, believed he saw the chief fondling his wife. *Id.* at 845-46. Understandably, the man became upset, got out of his car, "began yelling at [the] [c]hief . . . and took one step forward." *Id.* at 849. The chief

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[7] Of course, as Judge Nguyen correctly pointed out in dissent, 37 feet is a "little more than half the distance between the pitcher's mound and home plate." *Gravelet-Blondin*, 728 F.3d at 1102 (Nguyen, J., dissenting). It is also just slightly further than the distance between two white divider lines on a highway. MANUAL OF UNIFORM TRAFFIC CONTROL DEVICES § 3A.06(4) (2009), *available at* http://mutcd.fhwa.dot.gov/pdfs/2009r1r2/part3.pdf. In hindsight from a judge's chambers (or, as here, a distance paced off a day later), 37 feet may seem like a mile, but "in circumstances that [we]re tense, uncertain, and rapidly evolving," *Graham*, 490 U.S. at 397, a reasonable officer could easily, and understandably, view 37 feet as miniscule.

then tased the man, either without warning or "simultaneous" to a warning to "get back." *Id.* at 846, 849. Unlike the Ninth Circuit, neither the district court nor the Eighth Circuit found any constitutional violation. *Id.* at 846, 849. The crucial factors cited by both courts in favor of upholding the chief's decision were the surrounding circumstances: the resistance of the arrestee (not the person who was tased), and the husband's "wayward behavior" in approaching the chief and opposing the arrest. *Id.* at 849. Also critical to the court's analysis was the absence of any significant injury resulting from the taser. *Id.* at 850 ("only minor scrapes and two taser puncture marks").

Cook is wholly inconsistent with *Gravelet-Blondin*, and exemplifies the circuits' divide in taser cases. So much is clear from the dissent in *Cook*, which functionally mirrors the reasoning of the Ninth Circuit majority. *Compare Gravelet-Blondin*, 728 F.3d at 1092 ("Even less time passed, then, between Sgt. Shelton's subsequent, unequivocal 'get back' command and the tasing. Though Blondin did not retreat during this brief period, he was perfectly passive, engaged in no resistance, and did nothing that could be deemed 'particularly bellicose.'"),[8] *with Cook*, 582 F.3d at 859 (Shepherd, J., concurring in part and dissenting in part) (opining that the plaintiff "was not meaningfully engaged in" resisting arrest "given the

[8] It is notable that the Ninth Circuit has never attempted to clarify whether just "bellicose" is enough to use a taser, baton, nonchakus, or hand-to-hand combat.

simultaneous nature of the issuance of that command and the application of the taser, [the plaintiff's] failure to comply cannot be deemed resistance").

The incompatibility between *Cook* and *Gravelet-Blondin* illustrates the dilemmas that confront courts and law enforcement alike. Many departments employ "use of force continuums" to advise their officers of when certain levels of force are appropriate and within policy. *See* GAO Report, *supra*, at 8-9. The inconsistency in the court decisions is compounded by the fact that courts often rely on a department's use of force continuum to determine whether the use of a taser in a specific instance was constitutionally reasonable. *E.g.*, *DeSalvo v. City of Collinsville*, No. 04-CV-0718-MJR, *available at* 2005 WL 2487829 (S.D. Ill. Oct. 7, 2005), at *4. Yet this Court commented less than two weeks before the incident at issue here that "if anything, . . . founding-era citizens were skeptical of using the rules for search and seizure set by government actors as the index of reasonableness." *Virginia v. Moore*, 553 U.S. 164, 169 (2008); *see also Whren v. United States*, 517 U.S. 806, 815 (1996); *California v. Greenwood*, 486 U.S. 35, 48 (1988). Given that neither the lower courts nor the police can reach any level of consensus on when the taser can be constitutionally deployed, certiorari is needed to prevent Fourth Amendment limits from varying from zip code to zip code.

II. THE NINTH CIRCUIT'S OPINION BELOW IS THE LATEST IN A SERIES OF CASES THAT HAVE MISAPPLIED AND DISTORTED QUALIFIED IMMUNITY, THUS WARRANTING THIS COURT'S REVIEW AND CORRECTION.

As this Court reaffirmed just last month, "'[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments,' and 'protects "all but the plainly incompetent or those who knowingly violate the law."'" *Stanton v. Sims*, 571 U.S. ___, 134 S. Ct. 3, 5 (2013) (per curiam) (quoting *Ashcroft v. al-Kidd*, 563 U.S. ___, 131 S. Ct. 2074, 2085 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986))). If the law was not "clearly established" at the time the public official acted in a way alleged to be unconstitutional, qualified immunity shields him or her from not only liability, but also the burdens of litigation. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). In the absence of controlling case law, "a robust 'consensus of cases of persuasive authority'" is required to satisfy the "clearly established" threshold. *al-Kidd*, 131 S. Ct. at 2084 (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). So much is true from *Stanton*, in which this Court reversed the Ninth Circuit's denial of qualified immunity. *Stanton*, 134 S. Ct. at 5. In so doing, the Court criticized the lower court's belief that the law was clearly established "despite the fact that federal and state courts nationwide [we]re sharply divided on the question." *Id*. Yet that is exactly what the Ninth Circuit did here. Again.

At the time Officer Shelton deployed his taser, there were no cases from this Court or the Ninth Circuit that had ever held its usage was contrary to the Fourth Amendment, let alone a case that had done so "'in light of the specific context of the case.'" *Brosseau*, 543 U.S. at 198 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223, 236 (2009)). On the contrary, there were numerous cases that *had* authorized its usage on suspects who either were not violent or were handcuffed. *E.g.*, *Cook*, 582 F.3d at 849-50; *Zivojinovich*, 525 F.3d at 1073. On this basis alone, qualified immunity was required. *Pearson*, 555 U.S. at 244-45 (granting immunity because the circuit in which the officers worked had not yet ruled on the issue, whereas other circuits had issued decisions sanctioning their conduct).

But according to the Ninth Circuit, Officer Shelton must have been "plainly incompetent," *Stanton*, 134 S. Ct. at 7, for failing to predict the following equation: because (a) a law enforcement officer can never use "nontrivial force" against an individual who engages in "passive resistance," (b) regardless of the surrounding circumstances, Gravelet-Blondin was unquestionably "passively resistant," and (c) a taser "in dart mode" is "nontrivial force," therefore (d) tasers must never be used against "passive resistance." *Gravelet-Blondin*, 728 F.3d at 1093-94.

Never before has this Court denied qualified immunity to a public official for failing to successfully complete long division. To be sure, the Court

admonished the Ninth Circuit two years ago for attempting to hold the United States Attorney General to the same standard. *al-Kidd*, 131 S. Ct. at 2083-85. If an experienced lawyer serving as the nation's top law enforcement officer is not expected to anticipate and manufacture court-made syllogisms, *see id.*, then a street-level police officer lacking a formal legal education most assuredly should not be either.

The Ninth Circuit's analysis also conflicts with *Reichle v. Howards*, 566 U.S. ___, 132 S. Ct. 2088 (2012). There, the Court granted qualified immunity to federal agents in a First Amendment arrest case, noting that "reasonable officers could have questioned whether" *Hartman v. Moore*, 547 U.S. 250 (2006), had overruled prior circuit precedent that had appeared to clearly establish the unlawfulness of their actions. *Reichle*, 132 S. Ct. at 2095. Here, the Ninth Circuit's decision hinged on precedent predating 2007 that determined "active resistance" was necessary before "nontrivial force" could be used. *Gravelet-Blondin*, 728 F.3d at 1093 (citing cases). But this Court held in 2007 that the Fourth Amendment does not employ "a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Scott v. Harris*, 550 U.S. 372, 382 (2007). Just as a reasonable officer could question whether *Hartman* undermined the viability of past Tenth Circuit precedent in the context of retaliatory arrests supported by probable cause, a reasonable officer could question whether *Scott* undermined past Ninth

Circuit precedent requiring "a magical on/off switch that triggers rigid preconditions" before "nontrivial force" could be used.

The Ninth Circuit's refusal to grant qualified immunity, however, does not come as a surprise given recent history. *See Stanton*, 134 S. Ct. at 7; *Ryburn v. Huff*, 565 U.S. ___, 132 S. Ct. 987, 990-92 (2012) (per curiam); *al-Kidd*, 131 S. Ct. at 2083-85; *Brosseau*, 543 U.S. at 198-201. This Court has not hesitated to reverse the Ninth Circuit on qualified immunity before, but it has yet to fully correct the apparent source of the lower court's confusion, namely undue emphasis on language from *Hope v. Pelzer*, 536 U.S. 730 (2002). As shown below, this Court has remained faithful to the underpinnings of qualified immunity, especially in recent years, while the Ninth Circuit has not.

A. Qualified immunity, both when it was embraced as an objective test 30 years ago and also today, was always intended to shield public officials from liability when the lawfulness of their actions was debatable.

Originally, both objective and subjective good faith were required before a court would grant qualified immunity. *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975). Recognizing that an official's subjectivity would often be a disputed fact not susceptible to early summary judgment, the Court abolished the component in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *Harlow* held that an official was entitled to qualified

immunity, and an early exit from litigation, if the contours of the constitutional right alleged to have been violated were not "clearly established" at the time of the alleged misconduct. *Id.* at 818-19. It was to be a purely objective test. *Id.* And like other immunities, the issue's resolution was to be resolved early in the litigation, and preferably before discovery. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam). Four years later, the Court expounded on "the *Harlow* standard," stating that immunity would be lost "if, on an objective basis, it is *obvious* that *no* reasonably competent officer" would believe the defendant's conduct was lawful; conversely, "if *officers of reasonable competence could disagree* on this issue, *immunity should be recognized*." *Malley*, 475 U.S. at 341 (emphasis added).

In the following term, the Court rejected the notion that qualified immunity could be defeated by general principles of law, such as depriving one of "due process." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Rather:

> the right the official is alleged to have violated must have been "clearly established" *in a more particularized, and hence more relevant, sense*: The contours of the right must *be sufficiently clear* that *a reasonable official* would understand that what he is doing violates that right.

Id. at 640 (emphasis added). In the abstract, the Court's choice to speak of "a reasonable official" in the singular suggested that immunity should be lost if a

single reasonable official would find the conduct to be unconstitutional. In other words, if reasonable minds differed on the law, qualified immunity was lost. Some courts actually embraced this approach. *See infra* at 23-24.

But in truth, that characterization distorted the issue *Anderson* actually decided: "whether a federal law enforcement officer who participates in a search that violates the Fourth Amendment may be held personally liable for money damages if *a* reasonable officer could have believed that the search *comported* with the Fourth Amendment." *Id.* at 636-37 (emphasis added). In other words, if *a* reasonable officer believed the conduct to be *lawful*, immunity applied. So much is clear from *Malley*, which held immunity applied if reasonable officers could disagree on the issue. 475 U.S. at 341. Thus, under both *Malley* and *Anderson*, if *a* reasonable police officer believed the action to be *lawful*, qualified immunity should be granted, not denied. *Accord Wilson*, 526 U.S. at 615 (granting immunity because "it was not unreasonable for a police officer in April 1992 to have believed that bringing media observers along during the execution of an arrest warrant (even in a home) was lawful").

B. Facing egregious facts, *Hope v. Pelzer* unnecessarily expands dicta, retracts from the particularity requirement, and suggests a single official's belief that conduct is unlawful is enough to overcome qualified immunity.

Despite emphasizing the particularity requirement inherent in qualified immunity, *Anderson* tempered its holding: "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful. . . ." *Anderson*, 483 U.S. at 640. The source of this expression was a footnote the Court introduced in dicta two years earlier, while granting the Attorney General qualified immunity for authorizing a warrantless domestic wiretapping operation:

> We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances. But in cases where there is a legitimate question whether an exception to the warrant requirement exists, it cannot be said that a warrantless search violates clearly established law.

Mitchell v. Forsyth, 472 U.S. 511, 535 n.12 (1985), *cited and quoted in Anderson*, 483 U.S. at 640.

This dicta would grow beyond its presumably intended import a decade after *Anderson*, when the Court reviewed the conviction of a former judge who

had used his position to rape and sexually assault five women. *United States v. Lanier*, 520 U.S. 259, 261 (1997). The judge argued that due process prevented him from being convicted under a statute that criminalized acting "(1) 'willfully' and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of the United States." *Lanier*, 520 U.S. at 264 (quoting 18 U.S.C. § 242). The judge argued that because there had not been a previous Supreme Court case involving "fundamentally similar facts," the statute was unconstitutionally vague. *Id.* at 261-62. Although the Sixth Circuit accepted the judge's invitation, this Court did not. The Court held that all that the Constitution required was "fair warning," which could occur regardless of "disparate decisions in various Circuits." *Id.* at 269. But contemporaneously, the Court assumed that "fair warning" under § 242 was the same inquiry as whether an official was entitled to qualified immunity under *Bivens* or § 1983. *Id.* at 270-71. Thus, relying on the passage from *Anderson* that stemmed from *Mitchell*'s footnoted dicta, the Court wrote:

> general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful[.]

Lanier, 520 U.S. at 271 (quoting *Anderson*, 483 U.S. at 640).

Five years later, the Court decided *Hope v. Pelzer*, the facts of which were, as described by the majority, quite shocking. Prison guards had handcuffed an inmate to a hitching post and left him there for several hours in scorching heat without any breaks to eat or use the restroom. Relying on *Lanier*'s "general statements of the law" quote, the Court expounded to state "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741. Ultimately, the Court denied qualified immunity, concluding that "'*a* reasonable person would have known' . . . of the violation." *Id.* at 744 (emphasis added) (quoting *Harlow*, 457 U.S. at 818). Thus, despite *Anderson*'s, *Malley*'s, and *Wilson*'s analysis that would grant immunity if "a reasonable person" believed the conduct was lawful, *Hope* denied immunity because it believed "a reasonable person" would have found the correction guards' conduct to be *unlawful*.

C. Recent decisions have reaffirmed the consensus requirement, especially that qualified immunity is the norm when a plaintiff can only point to general statements of the law.

After *Hope*, some jurists took the view that "*Malley*'s 'officers of reasonable competence' test" was no longer valid, opting instead to believe immunity was lost if a single, reasonable official would find the defendant's conduct unconstitutional. *Walczyk v. Rio*, 496 F.3d 139, 170 (2d Cir. 2007) (Sotomayor, J.,

concurring). But this Court reaffirmed *Malley* just two years ago, clarifying that unanimity among reasonable officers was indeed necessary to overcome qualified immunity: "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.'" *al-Kidd*, 131 S. Ct. at 2083 (quoting *Anderson*, 483 U.S. at 640) (emphasis added). Although the Court substituted the word "every" for "a," *al-Kidd* simply reaffirmed what *Malley* expressed 25 years earlier: "if officers of reasonable competence could disagree on [whether the conduct was lawful], immunity should be recognized." *Malley*, 475 U.S. at 341. So much is clear from what *al-Kidd* also said in the same breath: the constitutional rule must be "beyond debate" before an official is deemed "plainly incompetent" for violating it. *al-Kidd*, 131 S. Ct. at 2083.

Since *al-Kidd*, the Court has consistently upheld qualified immunity for public officials when the law was sufficiently unsettled that reasonable officials could disagree on the issue. *E.g.*, *Stanton*, 134 S. Ct. at 7 ("whether or not the constitutional rule applied by the court below was correct, it was not 'beyond debate'") (quoting *al-Kidd*, 131 S. Ct. at 2083); *Reichle*, 132 S. Ct. at 2095 (discussed *supra*); *Messerschmidt v. Millender*, 565 U.S. ___, 132 S. Ct. 1235, 1246-47 (2012) (granting qualified immunity because "it would not have been 'entirely unreasonable' for an

officer to believe, in the particular circumstances of this case, that there was probable cause to search for all firearms and firearm-related materials"); *Ryburn*, 132 S. Ct. at 992 (granting qualified immunity because "reasonable police officers in petitioners' position could have come to the conclusion" that warrantless entry was lawful under the circumstances presented).

D. The Ninth Circuit's decision below illustrates how courts have misapplied *Hope*, unreasonably demanding that officers accurately predict how the appellate courts will subsequently develop multi-part tests.

As the Fifth Circuit recently commented, "The Supreme Court's admonition in *al-Kidd* that we should not 'define clearly established law at a high level of generality' sits in tension with its earlier statement in *Hope v. Pelzer* that 'general statements of the law are not inherently incapable of giving fair and clear warning,' at least in a certain category of 'obvious' cases." *Morgan v. Swanson*, 659 F.3d 359, 373 (5th Cir. 2011) (en banc). Whether *Hope* reached the correct result need not be revisited, but its choice of language does merit this Court's attention, particularly in light of how it has been misused in the Ninth Circuit.

Rather than fully embracing what *Malley* said, what *Anderson* implied, and what *al-Kidd* explicitly reaffirmed, the Ninth Circuit instead blindly follows

the "general statements" language from *Hope* as a basis to deny immunity when it should be extended. So much is clear from the more recent decisions from the Ninth Circuit that this Court overturned, which result from an inaccurate belief that immunity is lost if a single reasonable officer would dispute the individual defendant's actions. *See Sims v. Stanton*, 706 F.3d 954, 964 (9th Cir. 2012) ("Contrary to the district court's findings, a reasonable officer should have known that the warrantless entry into Sims's front yard violated the Fourth Amendment because clearly established law afforded notice that Sims's front yard was curtilage and, was therefore, protected to the same extent as her home."), *rev'd*, 134 S. Ct. 3; *Huff v. City of Burbank*, 632 F.3d 539, 549 (9th Cir. 2011) (denying qualified immunity because "[a] reasonable officer confronted with this situation may have been frustrated by having a parent refuse them entry, but would not have mistaken such a refusal or reluctance to answer questions as exigent circumstances"), *rev'd sub nom.*, *Ryburn v. Huff*, 132 S. Ct. 987; *al-Kidd v. Ashcroft*, 580 F.3d 949, 972-73 (9th Cir. 2009) (referencing dicta from a district court's footnote, "It is difficult to imagine what, in early 2003, might have given John Ashcroft 'fair[er] warning' that he could be haled into court. . . .") (quoting *Hope*, 536 U.S. at 741) (footnote omitted), *rev'd*, 131 S. Ct. 2074; *Haugen v. Brosseau*, 351 F.3d 372, 392 (9th Cir. 2003) (denying qualified immunity because, in the Ninth Circuit's view, the officer "had 'fair warning' that [her] conduct deprived [the plaintiff] of a constitutional right'") (quoting *Hope*, 536 U.S. at 740), *rev'd*, 543 U.S. 194.

Other circuits also have relied too heavily on *Hope*'s "general statements" language, issuing decisions that required reversal. *E.g.*, *Howards v. McLaughlin*, 634 F.3d 1131, 1141 (10th Cir. 2011) (qualified immunity does "no[t] require plaintiffs to produce a factually identical case, but allow some degree of generality in factual correspondence") (citations omitted), *rev'd sub nom.*, *Reichle v. Howards*, 132 S. Ct. 2088; *Harris v. Coweta County*, 433 F.3d 807, 820 (11th Cir. 2005) ("We are satisfied that, under *Hope,* the requirement that the officers have 'fair warning' that their conduct violates a constitutional right through a general constitutional rule. . . ."), *rev'd sub nom.*, *Scott v. Harris*, 550 U.S. 372.

And the decision below is just the latest in this line. Quoting and following *Hope*, the majority believed *general* statements from past decisions about "passively resistant" suspects were enough to clearly establish the law for Officer Shelton, *Gravelet-Blondin*, 728 F.3d at 1093, despite conceding that "the specific level of force involved in using a taser was not clear until 2010," *id.* at 1096. And though the Ninth Circuit had not as of May 4, 2008, decided a relevant taser case, it found clarity because "three of our sister circuits have held that the law was clearly established, prior to 2008, that the use of a taser *can in some instances* constitute excessive force." *Id.* Of course, the same can be said about a warrantless entry into a house, *Payton v. New York*, 445 U.S. 573, 589-90 (1980), or deadly force*, Tennessee v. Garner*, 471 U.S. 1, 12-19 (1985), which "can in some instances"

violate the Fourth Amendment. But denying immunity demands more than a general statement of what "can" be unconstitutional: "We have repeatedly told courts – and the Ninth Circuit in particular . . . – not to define clearly established law at a high level of generality." *al-Kidd*, 131 S. Ct. at 2084. Concluding that a constitutional violation in *some* circumstances clearly establishes the law for a different and *specific* circumstance runs afoul of *al-Kidd*, *Brosseau*, *Anderson*, and *Malley*. It certainly does not achieve the requisite clarity "beyond debate." *al-Kidd*, 131 S. Ct. at 2083. As one commentator recently noted, the Ninth Circuit "reverses its own Taser-related decisions at an alarming rate." Bailey Jennifer Woolfstead, *Don't Tase Me Bro: A Lack of Jurisdictional Consensus Across Circuit Lines*, 29 T.M. COOLEY L. REV. 285, 317 (2012). It defies logic to conclude that the law is "clearly established" within a circuit that epitomizes instability. Yet according to the Ninth Circuit, Officer Shelton bears personal liability for "picking the losing side of the controversy," a view that is anathema to this Court's precedent on qualified immunity. *Wilson*, 526 U.S. at 618. This view is legally unsupportable and must be corrected.

Though certiorari would be independently warranted to remedy this latest misstep, the Court should take this opportunity to address and correct the problem's origin. Specifically, certiorari is needed to clarify whether and to what extent "officials can still be on notice that their conduct violates established law even in novel factual circumstances," *Hope*,

536 U.S. at 741, particularly on an issue devoid of "controlling authority" or "a robust 'consensus of persuasive authority,'" *al-Kidd*, 131 S. Ct. at 2084 (quoting *Wilson*, 526 U.S. at 617).

CONCLUSION

For all of the foregoing reasons, amici support Petitioners' request for a writ of certiorari.

Respectfully submitted,

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