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 A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITIONERS' REPLY

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REPLY BRIEF FOR OFC. JEFF SHELTON AND THE CITY OF SNOHOMISH

Petitioners, Officer[1] Jeff Shelton and the City of Snohomish (collectively "Shelton"), respectfully submit this reply brief in support of their petition for certiorari.

Respondents (collectively "Blondin") highlight the need for review – perhaps better than Shelton ever could. The majority of the issues raised by Shelton are met with no substantive response. Blondin makes no attempt to justify the panel's qualified immunity analysis (he somehow reads the petition not to raise that issue). Blondin mounts no defense of the categorical rule articulated by the Ninth Circuit (he only denies its existence, and with it, the plain text of the decision). And Blondin certainly does not try to reconcile "intermediate force" with this Court's holdings (he proposes to address that another day). On the merits, it almost appears as though Blondin agrees certiorari is warranted.

The Court of Appeals' decision is dangerous, and even Blondin does not deny the importance of the issue. Review should be granted.

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[1] Blondin questions Shelton's title as officer. Opp. at 2, n.1. Jeff Shelton remains commissioned and is the ranking reserve officer at the City of Granite Falls police department.

A. Shelton Most Assuredly Did Raise Qualified Immunity In His Petition

Rather than address the merits of the petition, Blondin predicates his opposition on a procedural maneuver; namely, mischaracterizing the question presented, and going on to address a more "narrow, fact bound" issue (Opp. at 9-10).[2] But Blondin's rewrite notwithstanding, the question of qualified immunity could scarcely have been raised more emphatically.

The Question Presented was couched in terms of the Court of Appeals' conclusion that "Shelton was *not* entitled to qualified immunity." Pet. at i (emphasis in original). Shelton then not only utilized the very language of the panel majority when it considered the second step of the qualified immunity legal analysis, *id.* ("nontrivial force . . . passive resistance"), but cited the standard itself, *id.* ("clearly established"). From there, almost a third of the petition was spent addressing the panel majority's conclusion that Shelton either "knowingly violated the law" or was "plainly incompetent." Pet. at 19-29. If there is a clearer way to place an issue before the Court than: (a) stating it outright on the first page, (b) citing language from the challenged portion of the underlying decision, (c) utilizing terms-of-art from the case law, and

[2] "They conspicuously do not ask the second *Saucier* question – whether the law applied below was clearly established in May, 2008." Opp. at 9-10, n.3. This is belied by even a cursory glance at the petition.

(d) dedicating a large part of the brief to addressing it, it is not clear what that would be.

This is not a case of "smuggling" new questions into the writ. *See Irvine v. California*, 347 U.S. 128, 129 (1954) (plurality opinion). It is, rather, a case of one party refusing to address what is before him – presumably, because there is no response to be made.[3] Qualified immunity was raised, argued, and should be reviewed, notwithstanding Blondin's misapprehension of the issue.

B. The *Per Se* Rule Announced By The Divided Panel Speaks For Itself, Notwithstanding Blondin's Downplaying Of It

Blondin also closes his eyes to the language of the decision itself. Contrary to his purported "alarm" and accusation of "hyperbole," Opp. at 11, the divided panel spoke clearly (and repeatedly):

- "The right to be free from the application of non-trivial force for engaging in mere passive resistance was clearly established prior to 2008." Pet. App. at 13-14.
- "Blondin engaged in no behavior that could have been perceived . . . as threatening or

[3] *Amici* certainly do not share Blondin's confusion. They acknowledged the issue presented, and appropriately expanded on it in their insightful discussion of the tension between *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011), and *Hope v. Pelzer*, 536 U.S. 730 (2002). Br. at 12-22.

resisting. ***As a result, the use of non-trivial force of any kind was unreasonable.*** " Pet. App. at 16 (emphasis added).

- "Having determined that the right to be free from the application of non-trivial force for engaging in passive resistance was clearly established. . . ." Pet. App. at 18.

The panel did not qualify this language, nor leave room for exceptions (as other circuits have). *See Austin v. Redford Twp. Police Dept.*, 690 F.3d 490, 498 (6th Cir. 2012) (taser may be justified in the context of passive resistance to prevent "potential escape of a dangerous criminal" or when "immediate harm" is threatened); *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1285 (10th Cir. 2007) ("we do not rule out the possibility that there might be circumstances in which the use of a Taser against a nonviolent offender is appropriate."). The Ninth Circuit stands alone in its view.[4]

Blondin's decision to deny the plain language of the decision – rather than defend it – is perhaps the most instructive point of all.

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[4] Blondin certainly does not point to any other circuits concurring to this categorical rule. Quite the opposite, in fact, Blondin seems to agree that such a rule *would* be "alarming" and "hyperbolic." Opp. at 11. He further appears to concede that precedent requires a fact-sensitive inquiry, Opp. at 11-12, not judicial shortcuts. *See also Scott v. Harris*, 550 U.S. 372, 383 (2007) (rejecting "easy-to-apply legal test" in the Fourth Amendment context).

C. The Question Of Intermediate Force Should Be Addressed By The Court; There Is No Persuasive Argument To The Contrary

The question of intermediate force is also met with no substantive response.[5] Blondin instead argues that the Court should not accept review because the legal issue was not raised in the district court, and this case is, in any event, a "poor vehicle." Three responses are in order.

First, Blondin is correct that "intermediate force" was not argued to the district court. It is difficult to know why it would be. Asking a district court judge to do anything but apply binding precedent would have been little more than a somewhat frivolous gesture. As Judge Lasnik had no authority to disregard an *en banc* holding by the Court of Appeals, Shelton could do little more than concede its applicability. But that is no barrier to consideration by this Court. The practice here is to "permit review of an issue not pressed so long as passed upon." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). That is, so long as the issue was in fact addressed by the court below, this Court "ordinarily feels free to address it." *Id.* (citing *United States v. Williams*, 504 U.S. 36, 41 (1992)).

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[5] To be precise, Blondin entitles the third section of his brief "THERE IS NO DIVISION AMONG THE COURTS OF APPEALS REGARDING EITHER OF PETITIONERS' PROPOSED QUESTIONS." But in it, there is zero discussion of intermediate force, let alone, other circuits' treatment of it. *See* Opp. at 16-23.

And in this instance, the Ninth Circuit has *exhaustively* passed upon "intermediate force." In *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010), Judges Wardlaw, Pregerson, Fletcher, and Reinhardt supported its application, while Judges Tallman, Smith, and Callahan vigorously dissented. Indeed, as Judge Tallman's discussion illustrates, Shelton's concerns are nothing new:

> It is one thing to hold that, if proved, Bryan's allegations could support a jury finding of excessive force. It is another thing entirely for an appellate court reviewing the invocation of qualified immunity to make its own factual finding – based solely on inferences that must be drawn in favor of the injured party and material outside the record – that tasers represent an intermediate and substantial use of force. It is beyond the pale to then apply that judicial fact-finding to prescribe any officer's use of a taser anywhere in the Ninth Circuit.
>
> Courts are ill-equipped to tell law enforcement officers how they must respond when faced with unpredictable and evolving tactical situations. Nor should police officers be required to put life and limb at risk to avoid liability for their conduct when they are reacting to uncertain and rapidly unfolding circumstances, particularly involving mentally unstable subjects who may well attack a lone officer without warning.
>
> Rather than issuing blanket directives based on the facts of a single case, which were taken

> in the light most favorable to the plaintiff, we must adhere to well-developed Supreme Court law that requires us to analyze each case individually, looking at the totality of the circumstances from the perspective of a reasonable officer on the street. Then, we must assess whether a jury could determine that the choice the officer made in the heat of the moment fits within a range of reasonable actions. The panel's decision repeatedly applies the wrong standards to reach its desired result – a result that endangers the good faith efforts of law enforcement officers to protect themselves, the community they serve, and the subjects they encounter.

Bryan, 630 F.3d at 820-21 (internal citations omitted) (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). Taser use, including the appropriate standard, was then addressed again the following year in *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011).[6] And it was, again, subject to considerable debate – this time, between Judges Paez, Schroeder, Bea, Silverman, Clifton, and Chief Judge Kozinski.

This is by no means the "first review," as characterized by Blondin. Opp. at 16. Intermediate force

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[6] Blondin overstates the importance of this Court's denial of certiorari in *Mattos*. Opp. at 27, n.17. Not only was it just the officers seeking review (after being granted qualified immunity), but the City of Seattle actually filed an amicus brief *opposing* certiorari.

is ripe for – and indeed, cries out for – review by this Court.[7]

Second, even if Blondin were somehow prejudiced in developing a record below, he managed to completely cure it through inclusion of Mr. Burwell's report. The report constitutes the absolute best showing Blondin could have hoped to make in response to summary judgment, or at trial. Rule 26, after all, precludes him from offering anything new, different, or inconsistent with the report. *See* Fed. R. Civ. P. 26(a)(2)(B); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (upholding exclusion of expert opinion not covered in report). Thus, having presented Mr. Burwell's minority view – which runs contrary to most contemporary studies and literature (Blondin does not argue otherwise) – any complaints about factual development are now moot.

More significantly, however, the factual record is not really the issue. The problem with "intermediate force" is largely legal. Intermediate force, by its very nature, contravenes *Scott v. Harris*, 550 U.S. 372, 382 (2007), which specifically proscribes shortcut "legal tests" and "magical on/off switches" triggered by a specific type of force. The question is always objective

[7] By Blondin's logic, it is all but assured that the Ninth Circuit's rule will *never* be subject to review. Parties will not, in the ordinary course, press the district court to overturn or ignore the court of appeals.

reasonableness. And by treating tasers as *per se* "intermediate" force, which "must" be necessary, *Scott* is ignored and the underpinnings of *Graham* are turned upside-down. No amount of fact-finding will make this less true. Blondin does not, and cannot, claim otherwise.

And third, Blondin does not dispute the national importance of the issue. In fact, he touts it. *See* Opp. at 26 ("One thing the parties can all agree on is that excessive force claims involving Tasers are not rare."). This acknowledgment, while true enough, is not trivial. Police officers' careers are ended over excessive force claims. And the "burdens, stress, and time of litigation" for a civil rights claimant, *see*, *e.g.*, *Marek v. Chesny*, 473 U.S. 1, 10 (1985), is of equal importance. Excessive force claims are something the law should work to minimize or avoid, not accept as a reality of life.

Yet the trend is moving in the opposite direction because, as *amici* rightly point out, the landscape is "blurred, indistinct, and unsettled," Br. at 8-9 (collecting cases), and one in which this Court has not yet spoken.[8] This, combined with the growing ubiquity of the tool, has only confounded the problem. The police,

[8] Blondin cites only *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) – and relegates it to a footnote – in defense of the Ninth Circuit's doctrine vis-à-vis this Court's holdings. *See* Opp. at 23, n.12. *McNeely* was a case about suppressing evidence in the context of a DWI. It had nothing to do with use-of-force, Tasers, or *Graham*.

and those they protect, deserve better. Nobody should be forced to choose between liability and harm, nor suffer avoidable force because viable police procedures are judicially foreclosed.

Shelton respectfully submits that this Court can effect positive change and make people safer when interacting with the police. Certiorari should be granted.[9]

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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[9] Blondin makes much of the fact that "there will be a trial." Shelton acknowledges this, and believes he will be vindicated. But the importance of this petition transcends the parties' dispute. If it did not, Shelton would not have undertaken the costly task of pursuing this appeal while simultaneously preparing for trial.