No. 13-691

IN THE

Supreme Court of the United States

OFC. JEFF SHELTON AND
THE 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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certiorari should be granted to review the Ninth Circuit's allegedly "unique treatment of tasers" in Fourth Amendment cases, when the petitioners accepted and did not challenge the Circuit's controlling precedents on that issue in either of the courts below, and when those precedents are fully consistent with the law in other Circuits.

2. Whether the Court of Appeals correctly held that a jury could find that it was unreasonable and violated the Fourth Amendment to shoot barbed Taser darts carrying a high voltage electric shock into the chest of a "perfectly passive" bystander standing 37 feet away from the scene of a police action, solely because the bystander had asked police officers what they were doing to his neighbor and then momentarily froze in place when given contradictory orders to stop or move back.

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STATEMENT OF THE CASE

Petitioners' Statement of the Case uses vague and misleading language that obscures the facts and arguments underlying the decision below. Pursuant to Supreme Court Rule 15(2), respondents provide the following corrections and clarifications:

1. Petitioners say that Respondent Donald Gravelet-Blondin "interjected himself," "interpose[ed]" himself, and "ignor[ed] multiple commands" for a "considerable time." Petition at i, 3, 5. According to the plaintiffs' evidence, however, Mr. Blondin's "interposition" consisted of asking police officers a single question—"What are you doing to Jack?"—while standing 37 feet away from the scene of the detention of his 79-year-old neighbor, separated from the police action by an armed officer and a parked automobile. See Pet. App. 6. According to the officers themselves, the "multiple commands" given to Mr. Blondin consisted of contradictory shouted orders to "stop" or "get back". Pet. App. 6. No one contends what petitioners imply with the prefix "inter"––that Mr. Blondin placed himself in between officers and the neighbor; he didn't. According to eyewitnesses, Mr. Blondin's response to the shouts was either to stop where he was—already well away from the scene—or to move back a few steps and then stop, visibly "frozen with fear." *Id.* The "considerable time" Mr. Blondin stood frozen before Petitioner Shelton shot him with the Taser was less—possibly much less—than fifteen seconds. Pet. App. 11.

These facts, based on evidence properly construed in favor of the plaintiffs as non-moving parties on summary judgment, *Saucier v. Katz*, 533 U.S. 194, 201 (2001), are

detailed in the opinions of both courts below. Pet. App. 4-7, 48-52. This is the factual summary from the decision of the Court of Appeals panel majority:

> In the early evening of May 4, 2008, Sergeant Jeff Shelton[1] and four other officers from the Snohomish, Washington Police Department were dispatched to respond to a 911 call of a suicide in progress made by family members of an elderly suspect, Jack. When the officers arrived at Jack's home he was sitting in his car, which was parked in the side yard of his house, with a hose running from the exhaust pipe into one of the car's windows. The officers had been warned that Jack owned a gun and would have it with him. Sgt. Shelton took precautions to ensure officer safety and then asked Jack to get out of the car.
>
> After several requests Jack finally complied, turning his car off and stepping out with his hands at his sides. When Jack refused multiple commands to show his hands, Sgt. Shelton—concerned that Jack might gain access to a

1. Petitioner Shelton was a Sergeant at the time of this incident, but he was later demoted and then fired from the Snohomish Police Department for unrelated acts of misconduct, and he is no longer employed as a police officer. He was identified by his former rank in plaintiffs' complaint and the captions and bodies of the pleadings and decisions below, but for some unexplained reason the caption to his petition to this Court identifies him as "Officer Shelton." *See also* Pet. ii. Petitioners refer to him simply as "Shelton" in the body of their brief; we will do the same.

gun—instructed another officer to tase Jack in dart mode. Jack fell to the ground and, as officers attempted to restrain and handcuff him, he pulled his arms underneath him. He was then tased a second time.

Donald and Kristi Gravelet–Blondin ("the Blondins"), Jack's neighbors, were watching TV at home when the police arrived at the scene. They heard noise coming from the direction of Jack's house and went outside—Donald Blondin ("Blondin") in shorts, a t-shirt, and slippers—to investigate and make sure their neighbor was all right. When they stepped into the yard between Jack's house and their own, the Blondins heard Jack moaning in pain, and Blondin saw officers holding Jack on the ground.

Blondin called out, "what are you doing to Jack?" He was standing some thirty-seven feet from Jack and the officers at the time, with Jack's car positioned in between. At least two of the officers holding Jack yelled commands at Blondin: one instructed him to "get back," while another told him to "stop." According to a bystander watching the scene unfold, Blondin took one or two steps back and then stopped. Blondin recalls that he simply stopped. Sgt. Shelton then ran towards Blondin, pointing a taser at him and yelling at him to "get back." Blondin froze. The bystander testified that Blondin "appeared frozen with fear," and Defendants have conceded that he made no threatening gestures.

> Sgt. Shelton began to warn Blondin that he would be tased if he did not leave, but fired his taser before he had finished giving that warning. Sgt. Shelton tased Blondin in dart mode, knocking him down and causing excruciating pain, paralysis, and loss of muscle control. Blondin, disoriented and weak, began to hyperventilate. Sgt. Shelton asked Blondin if he "want[ed] it again" before turning to Ms. Blondin and warning, "You're next." Sgt. Shelton then ordered another officer to handcuff Blondin. Paramedics called to the scene removed the taser's barbs from Blondin's body and tried to keep him from hyperventilating. Blondin was arrested and charged with obstructing a police officer, a charge that was ultimately dropped.

Pet. App. 4-7.

2. Mr. and Mrs. Blondin brought the action below against both City of Snohomish ("the City") and then-Sgt. Jeff Shelton. Mr. Blondin claimed that he was arrested without probable cause and with excessive force, in violation of the Fourth Amendment, and that he was subjected to malicious prosecution for obstruction of justice, in violation of Washington law. Pet. App. 7. Mrs. Blondin claimed Shelton committed the state law tort of "outrage," or intentional infliction of emotional distress, by tasing her husband in her presence and then threatening to tase her as well. *Id.*

The excessive force claim against the City was based in part on a written policy that classified the use of Tasers in dart mode at the lowest level of force on a "use of force" continuum—according to Shelton, who was then the City's Taser trainer, comparable to "hands on" or a "firm grip" on the arm. See Pet. App. 64 n.5.[2] In their summary judgment briefing and argument in District Court, the defendants conceded that this policy was unconstitutional and inconsistent with Circuit precedent, which treated Tasers as an "intermediate" use of force requiring substantial justification under *Graham v. Connor*, 490

2. In deposition, Shelton actually testified that, under the City's policy, shooting a person with taser darts is considered an even lower use of force than a "firm grip" or "hands on." See Shelton Dep., *Gravelet Blondin v. Shelton*, U.S. Dist. Ct. W.D. Wa. (hereinafter "Dist. Ct.") Dkt. 74-19 at 28-29:

> Q: So back to my original question, which was what kinds of force are lower than a taser with Snohomish?
>
> A: As far as equipment?
>
> Q: Or force.
>
> A: Nothing.
>
> Q: So firm grip?
>
> A: No, that's above taser.
>
> Q: Verbal commands?
>
> A: That could be considered below taser …
>
> Q: So firm grip is above taser?
>
> A: Hands-on to me would be above taser.
>
> Q: Anything hands-on?
>
> A: Yeah.

U.S. 386 (1989).[3] The defendants never made or reserved an argument that the Ninth Circuit precedent is wrong or that it is reasonable to consider shooting persons with taser darts and shocking them with electricity a "low level" use of force.

In light of this, on the cross-summary judgment motions below, the plaintiffs did not submit the testimony of their FRCP 26(a)(2)(B) Taser expert, who would have explained in detail the manner in which Taser darts "seize" a person,[4] and described prevailing law enforcement industry standards which, consistent with Ninth Circuit precedent, treat Tasers in "probe mode" as a type of force which "should only be used to stop a threat" and "should never be used for coercion of any type," force "equivalent to an attack from a police canine, a strike from a baton, being sprayed with tear

3. *See, e.g.,* Def. Motion for Summary Judgment, Dist. Ct. Dkt. 71 at 13: "The City readily admits that its use of force policy, which characterized use of the taser as low level force, is at odds with the Ninth Circuit holding in *Bryan v. MacPherson*, [630 F.3d 805 (9th Cir. 2010)]—which characterized taser use as 'intermediate or medium, though not insignificant, quantum of force.' *Bryan* at 622 citing [sic] *Sanders v. City of Fresno*, 551 F.Supp. 2d 1149, 1168 (E. Dist. of CA 2008)."

4. Excerpts from FRCP 26(a)(2)(B) Report of Taser Expert Ernie Burwell (hereinafter "Burwell Report"), Appendix A at 4a: "[W]hen the Taser is used in probe mode the human body has two straitened fish hooks that have impacted and entered the body at nearly 160 feet per second. At the same time the person becomes totally incapacitated and collapses to the ground, unable to catch their fall. At the same time this is occurring, 50,000 volts are entering the body, along with low amperage, and 26 watts. The pain is excruciating."

gas or pepper spray, or shot with a bean bag." *See id.* at App. 4a.[5] Instead, because defendants did not challenge the governing law on these points, plaintiffs argued that summary judgment should be granted in Mr. Blondin's favor on the excessive force claim, as a matter of law. *See* Pet. App. 42; Dist. Ct. Dkt. 73.

The District Court assumed the City policy was unconstitutional (as then admitted by the petitioners), and held that the tasing of Mr. Blondin was unreasonable and unconstitutional. Pet. App. 64, 60. However, it decided that the City's policy did not cause the tasing of Mr. Blondin[6] and that Shelton should be granted qualified immunity

5. As noted, because of petitioners' concessions, Mr. Burwell's FRCP 26(a)(2)(B) Report was provided to the defendants in discovery but was not filed in the District Court with reference to the summary judgment motions. The attached excerpts are appended here in light of petitioners' newly-made challenge to the Circuit precedents they accepted below. For reference, a complete copy of the expert disclosure and Burwell Report has now been filed with the District Court as Dist. Ct. Dkt. 117 (filed January 6, 2014).

6. The District Court based this in part on Shelton's deposition testimony that he could have used even more force to arrest Mr. Blondin. Pet. App. 64. Shelton testified "I could have used OC. I could have used a stick. I could have used an ASP.... I could have pushed him, punched him, kicked him." D. Ct. Dkt. 78 at 25. "An ASP is a, like a kaleidoscope [sic] type thing that comes out; it has sections." *Id.*

> Q So you could have struck him with a baton?
>
> A Yes.
>
> Q You would have been justified in doing so?
>
> A Yes. I believe so; yes.

because the law was not clearly established at the time of this incident. Pet. App. 65, 62. The District Court also rejected Mr. Blondin's claims that he was arrested and prosecuted without probable cause, and Mrs. Blondin's outrage claim. Pet. App. 68, 70.

On plaintiffs' appeal, the City and Shelton expressly "conceded … that the City's pre-*Bryan* policy was unconstitutional,"[7] but argued that the policy did not cause of the tasing of Mr. Blondin, which it claimed was in any event factually justified. Again, the defendants neither made nor reserved an argument that the Circuit precedent on the subject was wrong or contrary to the decisions of this Court or other circuits.

> Q Under the circumstances with him standing there and not getting back to your commands to get back?
>
> A Yes.
>
> Q And you could have hit him with an ASP?
>
> A Yes.
>
> Q And you could have punched him, kicked him. all those things?
>
> A Yes.

Id.

7. See Appellees' Brief (9th Cir. Dkt. 14) at 40: "Here, it is true, and was appropriately conceded, that the City's pre-*Bryan* policy was unconstitutional. It characterized tasers as 'low force,' whereas *Bryan* later held that they were 'intermediate' force." *See also id.* at 2-3: "It is true that during the events in question, the City of Snohomish characterized the taser as 'low level' force. And while this cannot be squared with the Circuit's subsequent holdings, this is where the analysis begins, not ends;" *id.* at 16: "The City's use-of-force policy in 2008 was indeed inconsistent with *Bryan*, a 2010 decision. We accept that."

The Court of Appeals majority reversed the District Court, holding that a reasonable juror could conclude that the tasing of Mr. Blondin was unreasonable and excessive, and was caused by the City's Taser policy. Pet. App. 21, 23. It also held that Shelton was not entitled to qualified immunity, because "it was clearly established as of 2008 that the use of a taser in dart mode against a passive bystander amounts to unconstitutionally excessive force within the meaning of the Fourth Amendment." Pet. App. 4. It also held that a jury could find that there was no probable cause for Mr. Blondin's arrest and prosecution, and that Shelton's conduct was outrageous. Pet. App. 28, 31.

Petitioners did not move the Court of Appeals for rehearing or rehearing en banc. Petitioners seek certiorari review only of the denial of summary judgment on Mr. Blondin's excessive force claim, and only on questions relating to the constitutionality of the City's Taser policy and Shelton's use of the Taser on Mr. Blondin.[8]

8. Petitioners' Questions Presented are oddly phrased. They use what sounds like qualified immunity language ("whether it is—or should be—clearly established"), but they raise only substantive questions about what "violate[s] the United States Constitution" and whether the Ninth Circuit's Taser precedents are correct. Pet. i. They conspicuously *do not* ask the second *Saucier* question–– whether the law applied below was clearly established in May, 2008. *See Saucier*, 533 U.S. at 201. Presumably, this is because the City would face trial on the excessive force claim even if Shelton is given qualified immunity. *See Owen v. City of Independence*, 445 U.S. 622 (1980).

REASONS FOR DENYING THE PETITION

The questions the petitioners seek to present to this Court are narrow, fact bound and procedurally clouded.

As noted above, petitioners' sole challenge is to the Court of Appeals' ruling on the merits of the excessive force claim. They are asking this Court to rule that it was constitutionally reasonable as a matter of law for Jeff Shelton to shoot Don Blondin with Taser darts, and that no rational juror could find otherwise. They do not argue that Shelton should be given qualified immunity because the law has changed since 2008.

Nor do petitioners challenge the ruling below that a rational juror could find that there was no probable cause to believe Mr. Blondin was guilty of obstruction, and therefore no constitutional basis for his arrest, forcible or otherwise. Nor do they challenge the ruling that Mrs. Blondin's outrage claim should proceed to jury trial. That means those claims will proceed to a trial about exactly the same actions and events that would govern the trial on excessive force petitioners are here seeking to avoid.

In addition, as explained below, petitioners' arguments on the excessive force claim are very different from those they made below. Because of this, no record was made on the factual underpinnings of the Court of Appeals' precedents, which petitioners are trying to challenge for the first time here.

For these and the following reasons, this petition should be denied.

I. PETITIONERS ARE CHALLENGING A "PER SE" RULE THAT THE DECISION BELOW DID NOT ANNOUNCE OR APPLY.

The petition's first reason for granting the writ is the alarming claim that "the Ninth Circuit has read all flexibility out of *Graham* in the context of 'passive resistance'" by creating a "newly-minted rule" that "non-trivial force can never be constitutional in the context of passive resistance—irrespective of the circumstances." Pet. 7, 12. That is beyond hyperbole; the opinion below does no such thing.

This is apparent from a glance at the Court of Appeals' majority opinion, which goes to considerable lengths to consider and apply *Graham*'s "non-exhaustive of factors to consider in determining the governmental interests at stake," and concludes that "[e]ach factor reveals the unreasonableness" of the force used of force against Mr. Blondin. Pet. App. 9.

The Court of Appeals' opinion nowhere bluntly rules out the use of significant force whenever a crime is not "severe", as petitioners suggest. Pet. 10. Instead—applying one of *Graham's* listed factors, "the severity of the crime at issue"—it quite reasonably noted that, even if considered criminal,[9] Mr. Blondin's "failing to immediately comply with an officer order to get back from the scene of arrest, when he was already standing thirty-seven feet away—was far from severe." Pet. App. 9.

9. As noted above, the Court of Appeals separately ruled that a jury could find that there was no probable cause to arrest Mr. Blondin (Pet. App. 28) and petitioners have not sought review of that aspect of its ruling.

Nor does the opinion state, or even suggest, that the use of significant force was forbidden because "Blondin "did not resist arrest in a 'particularly bellicose'" way. Pet. 10. What it did was take account of two of *Graham's* other listed factors—that Mr. Blondin "did not resist arrest or attempt to escape" and in fact "was perfectly passive, engaged in no resistance." Pet. App. 10, 11. In so doing, the opinion emphasized—just as petitioners contend it should have—that "the level of force an individual's resistance will support is dependent on the factual circumstances underlying that resistance." *Id.*

The Court of Appeals' circumstance-specific analysis included consideration of every one of the *Graham* factors, but did not stop there. It also weighed two additional factors presented by the evidence in this case: the allegedly "unique risks" of suicide calls and "the absence of a warning of the imminent use of force, when giving such a warning is plausible …." Pet. App. 12. Again, it did not simply recite these factors categorically but considered them in a fact-specific manner—finding that the first consideration is inconclusive because "Blondin was a bystander thirty-seven feet away without any perceptible connection to the … attempted suicide," and the second "weighs in favor of finding a constitutional violation" because "though Sgt. Shelton gave such a warning, he did so as he fired his taser, leaving Blondin no time to react and rendering the warning meaningless." *Id.*

In short, one searches the Court of Appeals decision in vain for any "rule"—or even signs of an "unstated premise"—that "nontrivial force can never be constitutional in the context of passive resistance – irrespective of the circumstances." Pet. 12. To the contrary, the Court of

Appeals opinion went out of its way to distinguish the facts of this case—in which Mr. Blondin "engaged in *no* behavior that could have been perceived by Sgt. Shelton as threatening or resisting," Pet. App. 16 (emphasis added)—from those in other cases involving what could be called "passive resistance."

> Though none of the plaintiffs in *Bryan* and *Mattos* [*v. Agarano*, 661 F.3d 433 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2682 (2012)] engaged in serious resistance, each either took an affirmative step to contravene officer orders or engaged in behavior that posed some threat to officer safety. In *Bryan*, after being pulled over for a seatbelt infraction and ordered to stay in the car, Bryan exited his car, acted belligerent, and ignored repeated orders to get back in the car. 630 F.3d at 822. We interpreted even this behavior as "passive" or "minor" resistance, rather than "truly active resistance." *Id.* at 830.
>
> Like Bryan, Brooks, the first of two plaintiffs addressed in *Mattos*, was pulled over for a traffic violation after which she refused to comply with officer orders. 661 F.3d at 443. Brooks then physically resisted officers' attempts to remove her from the car by keeping her hands on the steering wheel. *Id.* at 443, 445 (noting that "Brooks engaged in some resistance to arrest").
>
> Finally, Mattos, a suspected domestic violence victim, was physically blocking officer access to the suspect, her husband, and put her hands on an officer when he tried to pass by her to arrest

> her husband. *Id.* at 439. When the officer asked Mattos if she was "touching an officer," she did not respond, did not move aside, and, ignoring the officer, urged another officer to move the confrontation outside. *Id.*
>
> Here, evaluating the situation from Sgt. Shelton's perspective, Blondin—who, unlike Bryan, Brooks, and Mattos, had no connection to the underlying crime—committed no act of resistance. He took no affirmative step to violate an officer order (Bryan), did not physically resist officers (Brooks), and neither made physical contact with an officer nor tried to interfere with efforts to arrest a suspect (Mattos). His momentary failure to move farther than thirty-seven feet away from officers arresting his neighbor, after merely inquiring into what those officers were doing, can hardly be considered resistance. This is especially so given evidence that Blondin was visibly frozen with fear.

Pet. App. 16-17.

In sum, the "rigid rule" that petitioners claim needs review is nowhere to be found in the opinion of the Court of Appeals.

II. PETITIONERS NEVER ARGUED BELOW THAT "THE NINTH CIRCUIT'S UNIQUE TREATMENT OF TASERS" AS "INTERMEDIATE FORCE AS A MATTER OF LAW" IS ERRONEOUS OR CONTRARY TO THIS COURT'S PRECEDENTS.

The petitioners' second question presented raises an issue which they never raised or argued in either court below: a challenge to the Court of Appeals' precedents that treat the use of Tasers in "dart mode" as an "intermediate" level of force, the use of which is reasonable only with substantial justification.

As noted, in their arguments below petitioners repeatedly conceded that "the City's pre-*Bryan* policy was unconstitutional." Br. of Appellees (9th Cir. Dkt. 14) at 40. The decision below relied on this ("the City concedes that its former policy was unconstitutional," Pet. App. 22) and the validity of Circuit precedent was not a subject of debate between the majority and dissenting opinions below.

Plaintiffs relied on petitioners' concession as well. As noted above, plaintiffs had previously disclosed an expert witness who was prepared to testify that the City policy (and the tasing of Mr. Blondin) violated industry standards which, like the Court of Appeals' precedents, hold that Tasers in dart mode constitute a level of force that "should never be used for coercion of any type," a type of force, "equivalent to an attack from a police canine, a strike from a baton, being sprayed with tear gas or pepper spray, or shot with a bean bag," App. 4a. In light of the defense concession, plaintiffs argued the tasing of Mr. Blondin was unconstitutional as a matter of law (*see* Pet. App. 47) and did not submit their expert's testimony on the cross motions for summary judgment.

Petitioners should not be permitted to reverse course at this late stage, and withdraw their concession now. This Court "is one of final review, 'not of first view.' " *Ford Motor Co. v. United States*, 134 S. Ct. 510 (2013) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) and *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005)). Petitioners' concessions below deprived plaintiffs, and the courts below, of the opportunity to argue and consider whether the law applied below was legally or factually flawed. As a result of those concessions, the record below is bare of evidence on that subject.[10] For this Court to take up an issue on such a barren record would be both unfair and unwise. Petitioners simply did not preserve a challenge to the Ninth Circuit precedents on Taser use, and that issue is not properly before this Court.

III. THERE IS NO DIVISION AMONG THE COURTS OF APPEALS REGARDING EITHER OF PETITIONERS' PROPOSED QUESTIONS.

Try as petitioners might to conjure one, there is no division among the lower courts with regard to either of their proposed Questions Presented.

Petitioners cite two circuit decisions they claim "outright rejected" an "absolute rule against nontrivial force in the context of passive resistance" created by the

10. Petitioners' *Amici* ask the Court to compound this problem by taking up, in the first instance, all manner of factual issues about the relative safety and severity of Tasers and other forms of "less lethal" force which were never joined below. *See* Brief of *Amici* Washington State Association of Municipal Attorneys and Washington Association of Sheriffs and Police Chiefs at Arg. I (hereinafter "Brief of *Amici Curiae*").

Court of Appeals in this case. Pet. 15. But both of these decisions are fully consistent with the decision below, in analysis and in result.

In *Austin v. Redford Twp. Police Dep't*, 690 F.3d 490 (6th Cir. 2012), just as here, the court denied qualified immunity against a claim that it was constitutionally unreasonable (in 2005) to use a Taser on a suspect who was "not resisting." *Id.* at 498. In so doing, the *Austin* decision said:

> "Absent some compelling justification—such as the potential escape of a dangerous criminal or the threat of immediate harm—the use of such a weapon on a non-resistant person is unreasonable." *Kijowski v. City of Niles,* 372 Fed.Appx. 595, 600 (6th Cir.2010) (discussing use of a Taser). Although Defendants cite non-binding authority from other courts for the proposition that use of a Taser to obtain compliance is objectively reasonable, each of those cases involved the potential escape of a dangerous criminal or the threat of immediate harm, neither of which is present here.

Id. The Court of Appeals' decision in this case reached the same result and said much the same thing, emphasizing that "Blondin did not resist arrest or attempt to escape" and "engaged in no behavior that could have been perceived by Sgt. Shelton as threatening or resisting." Pet. App. 16. It also described the Ninth Circuit's precedents that give police even more leeway with regard to "the use of a Taser to obtain compliance" than the *Austin dictum* would suggest, by granting qualified immunity in cases

involving such use where there was no risk of escape or threat of immediate harm. *See* Pet. App. 15-17 (discussing *Bryan v. McPherson* and *Brooks v. Seattle*).

Casey v. City of Federal Heights, 509 F.3d 1278, 1285 (10th Cir. 2007), similarly denied qualified immunity to an officer who (in 2003) tased a suspect who (unlike Mr. Blondin) was involved in a physical struggle with other officers. Much like the Court of Appeals below, the *Casey* court found it significant and troubling that the officer gave the suspect "no opportunity to comply with her wishes before firing her Taser." *Id.*; compare Pet. App. 12. It is true that the *Casey* decision said, in *dictum* quoted by petitioners, that it would not "rule out the possibility that there might be circumstances in which the use of a Taser against a nonviolent offender is appropriate." *Id.* But neither did the decision below anywhere rule out that possibility. To the contrary, it took pains to distinguish this case, where the plaintiff committed no crime at all, from those of the nonviolent offenders whose claims the Circuit had previously rejected on the basis of qualified immunity. Pet. App. 17-18.

As these decisions suggest, there is no appreciable division among the lower courts regarding the circumstances under which it is constitutionally permissible to shoot a person with Taser darts. To the contrary, the various circuit decisions draw lines that are quite consistent with each other and with the line drawn by the decision below, between the use of Tasers to overcome threats or resistance and their use to gain compliance. The Court of Appeals decision below listed and briefly described some of these:

> *See Shekleton v. Eichenberger*, 677 F.3d 361, 366–67 (8th Cir.2012) (clearly established as of 2008 that tasing "an unarmed suspected misdemeanant, who did not resist arrest, did not threaten the officer, did not attempt to run from him, and did not behave aggressively towards him" was excessive); *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 667 (10th Cir.2010) (clearly established as of 2006 that a police officer could not tase "a nonviolent misdemeanant who did not pose a threat and was not resisting or evading arrest without first giving a warning"); *Brown v. City of Golden Valley*, 574 F.3d 491, 497 (8th Cir.2009) (clearly established as of 2005 that tasing an individual who "posed at most a minimal safety threat ... and was not actively resisting arrest or attempting to flee" was unconstitutional); *Oliver v. Fiorino*, 586 F.3d 898, 906–08 (11th Cir.2009) (clearly established as of 2004 that it was excessive to tase multiple times an individual who had engaged in a brief physical struggle with a police officer, because, after the first tasing, the individual was immobilized).

Pet. App. 15 n.6. *See also Abbott v. Sangamon County*, 705 F.3d 706, 732 (7th Cir. 2013) ("Prior to 2007, it was well-established in this Circuit that police officers could not use significant force on nonresisting or passively resisting suspects." (citing numerous cases)) *Lyttle v. Riley*, 524 F.App'x. 226, 2013 WL 1798983 (6th Cir. Apr. 29, 2013) (dismissing as "frivolous" an appeal from the denial of qualified immunity by officers who in 2009 used a Taser on a suspect who allegedly was unresisting, and

pointing out that prior cases granting qualified immunity all involved "evidence that supported the use of the Taser, such as the suspect struggling with police, evading arrest or attempting to flee or putting others in danger." *Id.* at *2.); *Eldridge v. City of Warren*, 533 F. App'x 529, 533 (6th Cir. 2013) ("under our precedent it is unreasonable to tase a nonresisting suspect" (citing *Hagans v. Franklin Cnty. Sheriff's Office*, 695 F.3d 505, 509 (6th Cir.2012)); *Bennett v. Krakowski*, 671 F.3d 553, 559 (6th Cir. 2011) (denying qualified immunity in a 2008 incident in which the suspect had "surrendered and voluntarily lay on the ground with his arms extended"); *Parker v. Gerrish,* 547 F.3d 1, 10 (1st Cir. 2008) (upholding excessive force verdict for 2005 use of taser on suspect who was "was not actively resisting or attempting to flee"); *see also* Pet. App. 20-21 (describing *Beaver v. City of Fed. Way*, 507 F. Supp. 2d 1137, 1144 (W.D. Wash. 2007), *aff'd*, 301 F. App'x 704 (9th Cir. 2008); and *Harris v. Cnty. of King*, 2006 WL 2711769, at *3 (W.D. Wash. Sept. 21, 2006)); *Brown v. Haddock*, 2011 WL 1655580 (N.D. Fla. May 2, 2011) (denying qualified immunity in 2008 case of plaintiff who was shot with a Taser although he "had no time to respond to the officer's command and there is no indication that [he] … was acting out of control").

Although it is true that there are cases that reach different results, that is hardly surprising when the application of the constitutional rule at issue "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989).

In light of that, there is actually relatively little conflict among the lower courts.

That is apparent from the fact that neither petitioners nor their *amici* can find any case in which a lower court approved the use of a Taser on a "perfectly passive" person like Don Blondin. The best they can do is *Cook v. City of Bella Villa*, 582 F.3d 840 (8th Cir. 2009), a case where the officer was alone on a rural road after midnight, "outnumbered four to one and was experiencing yelling and non-compliance from three of four individuals when [the plaintiff] … exited the car and took a step toward" him from just a few feet away, yelling "Oh, hell no!" and, "You can't be touching [my wife] … thataway." *Id.* at 846, 851. In contrast, Shelton was with several other armed officers, in daylight, when he tased Don Blondin, who was with his wife and visibly unarmed; Mr. Blondin was more than twelve yards from the arrest scene and standing still rather than moving toward the officers; he merely asked what the officers were doing and said nothing indicating he was going to try to interfere. The panel majority in *Cook* found no constitutional violation because the officer reasonably perceived the plaintiff as a threat. *Id.* at 852. In this case, "*Blondin* did not personally pose a threat." Pet. 10 (original emphasis). All the judges in *Cook* agreed that it is unconstitutional to coerce compliance by shooting taser darts into a person who "posed no threat." 582 F.3d at 859-60 (citing *Hickey v. Reeder*, 12 F.3d 754 (8th Cir.1993)).

Draper v. Reynolds, 369 F.3d 1270 (11th Cir. 2004)—petitioners' next best case—is similar. There the defendant officer was on his own and the plaintiff—who had committed both a traffic infraction and the crime

of obstructing an officer—was "hostile, belligerent, and uncooperative" "'threatening' and 'putting [the officer] on the defensive;'" the plaintiff was tased only after he refused to comply with orders "[n]o less than five times" and "used profanity, moved around and paced in agitation, and repeatedly yelled at" the officer. *Id.* at 1273, 1278. A jury could find that Don Blondin, in contrast, committed no crime, asked one question, made no threats, and stood "frozen with fear" for just a few seconds after being screamed at, before Shelton shot him with the Taser.

Petitioners' other cases are not even that close. *Russo v. City of Cincinnati*, 953 F.2d 1036, 1044 (6th Cir. 1992) upheld the tasing of a mental patient who was known to be "homicidal and suicidal" and was "facing the officers a few feet within his apartment doorway with a knife in each hand." *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993) found no violation because the plaintiff was actively resisting a lawful arrest, "shoved [an officer] out of his way" and "continued to struggle …by kicking his feet, flailing his arms, and biting the officers...." *Id.* at 776, 777. *Schumacher v. Halverson*, 467 F. Supp. 2d 939 (D. Minn. 2006)—an unappealed District Court case—involved the use of a taser by an officer acting alone at night, who was trying to effect the lawful arrest of a suspect plaintiff whose "continued physical and verbal resistance to commands, … intoxicated state, and the darkness of night created a threatening situation …." *Id.* at 951.[11]

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11. *Zivojinovich v. Barner*, 525 F.3d 1059, 1073 (11th Cir. 2008), cited by petitioners' *amici*, involved the use of a Taser, apparently in "drive stun" mode, on a suspect who was actively attempting to spray his blood on officers who were lawfully arresting him for resisting.

None of these cases are remotely similar to this one factually, and none say or suggest that it is permissible to shoot Taser darts into a person like Don Blondin, who "was perfectly passive, engaged in no resistance, and did nothing that could be deemed 'particularly bellicose.'" Pet. App. 11. Petitioners' attempt to demonstrate a lower court conflict on this issue disproves itself. There is little if any meaningful division among the Circuits—and no inconsistency with between the decision below and this Court's precedents[12]—on either of the questions presented by the petition in this case.

IV. EVEN IF THERE WAS A NEED FOR CLARIFICATION IN THE LAW REGARDING TASERS, THIS CASE WOULD BE A POOR VEHICLE THROUGH WHICH TO PROVIDE IT.

Even if there was a lower court division that called for this Court's review petitioners' questions, this case does not present a good opportunity to provide it, for several reasons.

First, as noted above, because this case comes up on pre-trial review, and because of the defense concessions below, this record is unusually barren of evidence regarding the effects of Taser darts, comparable force

12. Even apart from the high voltage shock they carry, the fact Taser darts are barbed hooks shot into the human body at high speed, alone would seem to foreclose petitioners' argument that their use is constitutionally trivial. This Court has "never retreated … from our recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests." *Missouri v. McNeely,* 133 S. Ct. 1552, 1565 (2013).

modalities, and industry standards regarding its use, see App. 3a-5a—the kinds of data the Court should have before setting a national standard on such a subject. If such an issue is to be resolved in this case, that would be much better done after a trial where that evidence can be aired and tested—which there will be because of the other claims in this case, in any event.[13]

Second, the extreme facts of this case make it an outlier. Don Blondin did not engage in active or passive resistance, but put up "no resistance" at all. It has not even been determined whether there was probable cause to believe he was obstructing the officers, to justify his arrest and prosecution. *See* Pet. App. 28-29. If the jury concludes that there was no such probable cause and he was not obstructing, any possible justification for the Taser will disappear.

Third, the petitioners' justification for arresting and tasing Mr. Blondin is illogical at best and separately unconstitutional at worst. They claim he was tased and arrested because he created a "dangerous distraction" (Pet. 3) by asking what was being done to his neighbor and then standing for a few seconds ten yards from the scene. But the officers own testimony shows that the

13. As noted above, because the Court of Appeals found this case presents triable issues on plaintiffs' probable cause and state law outrage claim, and petitioners have not challenged those rulings, there inevitably will be a trial in this case on issues including the effects and proper use of a Taser and the events that allegedly justified its use here. Because defendants did not timely seek a stay of the mandate, trial is now set to begin March 24, 2014. *See* Dist. Ct. Dkt. 114.

much greater "distraction" was caused by Shelton. That testimony indicates main "distraction" was the yelling. *See* Dist. Ct. Dkt. 74-20 at 3, 6 (Officer Whalen), Dkt. 74-21 at 13, 25 (Bowman), Dkt. 74-23 at 10 (Wellington).[14] It was the officers, primarily Shelton, who did all the yelling after Mr. Blondin's one question about what the officers were doing to his neighbor. None of the four officers dealing directly with Mr. Hawes claimed any distraction or obstruction after Shelton positioned himself to address Mr. Blondin—until Shelton fired his Taser, of course. That was the only thing that actually caused one of the other officers (Officer Whalen) to leave what he was doing.[15] Moreover, to the extent Mr. Blondin's question contributed to a "distraction," that cannot justify his forcible arrest without running afoul of this Court's decision in *City of Houston v. Hill*, 482 U.S. 451, 461 (1987), that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."

Finally, petitioners' decision to seek review only of the merits of the constitutional issue, and not the qualified immunity ruling below, narrows any opportunity this case may present for clarification of the relevant law, by depriving the Court of flexibility in resolving that issue, *see Pearson v. Callahan*, 555 U.S. 223, 242 (2009), and by

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14. Officer Scott said he was distracted by Mr. Blondin's mere presence in the area. Dist. Ct. Dkt. 74-22 at 14.

15. Officer Whalen, who was originally named as a defendant, testified in deposition that he was "obstructed" because the *tasing and arrest* of Mr. Blondin "took me away from Mr. Hawes, trying to secure him, to assist Sgt. Shelton." Dist. Ct. 74-20 at 16.

insulating from review any dispositive issues there may be regarding the Court of Appeals' qualified immunity analysis.[16]

One thing the parties can all agree on is that excessive force claims involving Tasers are not rare. As argued

16. Petitioners' *Amici* urge the Court to review the qualified immunity ruling in this case and use it as a vehicle to revisit a cornerstone of its qualified immunity jurisprudence, *Hope v. Pelzer,* 536 U.S. 730 (2002), claiming that the Court of Appeals has taken language from that case out of context that contravenes the Court's more recent precedents in this area. Brief of *Amici Curiae,* Arg. II. Were qualified immunity questions presented by the Petition, we would argue that (1) the Court of Appeals analysis used an appropriate "level of generality" ("whether it was clearly established as of 2008 that the use of a taser in dart mode against a passive bystander amounts to unconstitutionally excessive force within the meaning of the Fourth Amendment," Pet. App. 4) and applied the correct standard (whether "it was 'beyond debate' that using non-trivial force in response to such passive bystander behavior would be unconstitutionally excessive," Pet. App. 21); (2) the tasing of a completely passive person who presents no threat and has committed no crime was unconstitutional under law that was clearly established prior to May 2008; (3) because shooting Taser darts into a person's skin and giving him a high voltage shock for creating a mere "distraction" is so obviously unconstitutional Shelton did not need a case to tell him so, *see United States v. Lanier*, 520 U.S. 259, 271 (1997); and (4) the difficulties in applying modern qualified immunity analysis to fact-intensive excessive force claims are such that this aspect of the Court's decision in *Saucier v. Katz*, 533 U.S. 194, 204, should be reconsidered (*see generally id.* at 214-16 (concurring decision of Justice Ginsburg). But because petitioners' questions do not include qualified immunity issues, none of these matters are properly before the Court. *See U.S. Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1551 (2013) (dissenting opinion of Justice Thomas) (citing *Yee v. Escondido*, 503 U.S. 519, 535 (1992)).

above, we believe the lower courts' treatment of such cases, most of which fail as a matter of law, is quite consistent. This Court declined review of the Ninth Circuit decisions that are the root of petitioners' complaints here.[17] In the event that some clear inter-circuit conflict arises in the decisional law, there will be no shortage of cases in which to resolve it. But this case, in this posture, is not a good candidate for that job.

V. THIS CASE BEARS NO RELATION TO *PLUMHOFF V. RICKARD*, 12-1117

Petitioners' final suggestion is that this case should be granted and consolidated with *Plumhoff v. Rickard,* No. 12-1117. Pet. 36-37. That makes little sense.

Plumhoff involves gunshots fired to stop an escaping automobile. *See Estate of Allen v. City of W. Memphis,* 509 F. App'x 388, 390 (6th Cir. 2012). It has nothing to do with Tasers, which are the exclusive subject of both petitioners' questions presented. See Pet. i. Both of the questions presented in *Plumhoff* involve qualified immunity, and as noted above petitioners have chosen not to raise qualified immunity questions here. The issues in *Plumhoff* surround the fact that, like the similar case of *Scott v. Harris*, 550 U.S. 372 (2007), the events were videotaped and therefore minimally subject to factual dispute. *Estate of Allen*, 509 Fed. App'x at 391. Here, there was no such taping or record and most of the material facts are in substantial dispute. That includes the core question of whether there

17. *See Damon v. Brooks*, 132 S.Ct. 2681 (2012); *Brooks v. Damon*, 132 S.Ct. 2682 (2012); *Agarano v. Mattos*, 132 S. Ct. 2682 (2012); *Mattos v. Agarano*, 132 S. Ct. 2684 (2012).

was probable cause to arrest Mr. Blondin for even a minor offense, and therefore whether there was any justification to use force to seize him. Pet. App. 29. There is no such question in *Plumhoff*, where it is undisputed that the seizing officers had probable cause to believe that the plaintiffs' decedent had committed multiple, aggravated vehicular assaults. *Estate of Allen*, 509 F. App'x at 389.

In short, this case has nothing in common with *Plumhoff* except that they both involve excessive force claims. That is no basis on which to grant *certiorari* or to consolidate the cases for argument.[18]

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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18. Even if consolidation were otherwise called for, it would make no practical sense. *Plumhoff* is set for argument March 4, 2014.

APPENDIX — EXCERPTS FROM FRCP 26(A)(2)(B) REPORT OF PLAINTIFFS' TASER EXPERT ERNEST BURWELL*

Donald Gravelet-Blondin vs City of Snohomish, Case number NO.C09-1487 RSL

Date: August 11, 2010

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My Qualifications for this case:

I am familiar with and have personal knowledge and experience regarding the use of Tasers, their proper use by officers, and the proper training of officers regarding the use of Tasers. ... My qualifications include the following:

I joined the Los Angeles County Sheriff's Department on January 21, 1977 and was a Deputy Sheriff for almost 30 years. For 20 years, I was assigned to the Special Enforcement Bureau ("SEB"), which included assisting S.W.A.T. calls. During this period of time, I taught both supervisory and lower ranking law enforcement personnel how to use the Taser weapon and how to download data

* As explained in the Brief, this Report was timely disclosed in discovery but was not submitted in District Court in relation to the summary judgment motions below, because in those motions the petitioners conceded that the City of Snohomish Taser policy was unconstitutional under Court of Appeals precedent they are seeking to challenge for the first time in this Court. In light of petitioners' changed position, the full Report has been filed in District Court for reference. D. Ct. Dkt. 117 (filed January 6, 2014).

therefrom. I was also in charge of managing the Tasers for the canine unit of SEB. I have been tased and have deployed the Taser on individuals and animals, both during training and in the field. I hold a California Peace Officer Standards and Training ("POST") Advanced Certificate.

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As a Taser Instructor for several years, I was specifically authorized by Taser International, the manufacturer of the same type weapon (the M26 Taser) used by the Defendants against the Plaintiff in this case, to teach law enforcement personnel regarding the use of the Taser. I am also knowledgeable as to the employment of the X26 Taser weapon. I own both the X26 and the M26 Tasers.

I trained 46 deputies and six sergeants of the Special Enforcement Bureau of the Los Angeles County Sheriff's Department regarding the use of the Taser. I have written articles, lectured, designed, and developed systems to improve training procedures, customs, and practice of the Los Angeles Sheriff's Department regarding the practical use of canine units, whose officers were equipped with the Taser weapon. I have studied numerous Taser related cases involving persons being injured or where death is involved. I have also studied numerous department Taser Policies.

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Appendix

The following bullet points are my opinions based on my 30 years experience as a deputy sheriff, canine trainer, Taser instructor, SWAT deputy, field training deputy, tactical expert to a 9000 man department, and reading the facts of this case:

- At no time during this incident was there any reason to use the Taser weapon on Mr. Blondin. See [City of Snohomish] use of force policy 1.3.1 and 1.3.4 sec IV.

- The use of the Taser in this incident was excessive, unreasonable, and an unnecessary use of force by Sergeant Shelton.

- The Snohomish Police Department is inconsistent with Taser International training and guidelines, the training and model policy of the International Association of Chiefs of Police, the 9th Circuit Court of Appeals, the training given to all officers in the State of Washington regarding the use of force and the Taser, and many other large police and sheriff's departments which policies I have examined and opined on. The Chief of Police of Snohomish Police Department states the Taser is a very low form of force and is equivalent to a firm grip or hands on. This is simply not true. Taser International's own attorney states **"Tasers are an intermediate or medium use of force".** The Snohomish Police Department places the Taser in a category of level which is pain compliance. If the Taser was used in "drive stun mode" then it would certainly be pain compliance. However, when the Taser is used in probe mode the human body has two straitened

fish hooks that have impacted and entered the body at nearly 160 feet per second. At the same time the person becomes totally incapacitated and collapses to the ground, unable to catch their fall. At the same time this is occurring, 50,000 volts are entering the body, along with low amperage, and 26 watts. The pain is excruciating. When the Taser is used in this manner it is equivalent to an attack from a police canine, a strike from a baton, being sprayed with tear gas or pepper spray, or shot with a bean bag.

- The policy of the Snohomish Police Department policy is flawed which influences the officers behavior regarding the use of force (the Taser in this incident) on which form of force to use, the amount of force to use, and the instrument of force to be used on a person. Placing the Taser at a "very low form of force" as this department places the Taser, causes officers to use the Taser unnecessarily. **The deposition of Chief John Turner clearly establishes the policy is flawed.**

- The Snohomish Police Department has failed to recognize the U.S. Court of Appeals regarding the *Bryan* case. This case clearly indicates the Taser in probe mode is more than hands on, and much higher on the use of force continuum than Snohomish Police Department trains their officers.

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- The Snohomish Police Department knew Sergeant Shelton was out of control with the use of the Taser. I read in his evaluation where the rater stated the following:

Rater:

Officers have told me Sgt. Shelton is too quick to apply the Taser when basic hands-on defensive tactics would have brought the subject into compliance.

Rebuttal by Sergeant Shelton: #28.

I have never Tased anyone inappropriately or out of policy. You have approved all use of force reports involving my Tasing's and have not talked to me about any of them. Also the Taser is at the same level as "hands on."

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- The Taser is not the same as hands on as Sergeant Shelton (the Taser Instructor for the department) believes. The Snohomish Police Department places the Taser in the category with less than lethal force tools. The policy states "*The Taser is on the same force continuum as OC Spray". A less lethal weapon is any weapon other than a firearm or knife used to control persons or defend the member or others from harm. Only authorized less lethal weapons may be used.*

- The Snohomish Police Department failed to train Sergeant Shelton, their own Taser Instructor, regarding the placement of the Taser on the use of force continuum or use of force options.

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- Sergeant Shelton failed to follow Taser International training as shown in the attached Taser International Power Point Instruction below.

Taser Training, the Decision to Deploy:

ONLY USE TO STOP A THREAT. The ADVANCED TASER should only be used to stop a threat. This would include threats to the officer's safety, threats to others, or even if the suspect is posing a threat of injuring himself. It should never be used for coercion of any type. The ADVANCED TASER gives you a non-injurious way of averting dangerous situations.

NEVER USE FOR PHYSICAL COERCIONS. The department should develop strong policies to deter misuse.