IN THE
SUPREME COURT OF THE UNITED STATES

JESSE DANIEL BUCKLEY,
Petitioner,

v.

JONATHAN RACKARD,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a deputy sheriff violated the Fourth Amendment by administering three separate five-second-long direct contact "drive-stun" Taser shocks, over a two minute period, to a handcuffed, nonviolent misdemeanor traffic arrestee who had already collapsed to the ground sobbing, who never actively resisted arrest or attempted to flee, and who never posed any danger to himself, the officer or the public, when the sole purpose of the Taser shocks was to administer pain to prompt the arrestee to stand up.

2. Whether a reasonable police officer had fair notice in 2004 sufficient to deprive him of qualified immunity that it violated the Fourth Amendment to administer three separate five-second-long direct contact "drive stun" taser shocks, over a two minute period, to a handcuffed nonviolent misdemeanor traffic arrestee who had already collapsed to the ground sobbing, who never actively resisted arrest or attempted to flee, and who never posed any danger to himself, the officer or the public, when the sole purpose of the Taser shocks was to administer pain to prompt the arrestee to stand up.

PARTIES TO THE PROCEEDING

Petitioner is Jesse Daniel Buckley, plaintiff-appellee below.

Respondent is Jonathan Rackard, Deputy Sheriff of Washington County, Florida, in his individual capacity, defendant-appellant below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the court of appeals is not reported; it is reprinted in the Appendix to the Petition ("App.") at 1a-30a. The district court's opinion is not reported; it is reprinted at App. 34a-37a.

JURISDICTION

The court of appeals issued its decision on September 9, 2008, and denied a petition for rehearing and rehearing en banc on November 5, 2008. App. 31a-32a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The decision of the court of appeals authorizes police officers to inflict excruciating pain and severe burns through repeated direct contact five-second Taser discharges of 50,000 volts of electricity on limp, handcuffed, nonviolent non-resisting arrestees for not following orders to stand up. The incident at issue was captured in its entirety on respondent's patrol car video and is part of the record; it also appears at http://www.youtube.com/watch?v=SWC7iSGCk-s. Petitioner, under arrest for refus-

ing to sign a traffic citation and already handcuffed, exited his car, took several steps towards respondent's patrol car, and then fell to the ground sobbing. Respondent ordered petitioner to get up. Petitioner remained seated on the ground with his head down and his body wracked with sobs, either because he willfully refused to get up or was physically unable to do so by reason of his emotional condition, or because his hands were cuffed behind his back. Respondent repeatedly jammed his Taser into petitioner's back and chest, using it as a cattle prod to inflict a series of crackling five-second-long 50,000 volt electrical shocks that caused 16 burns severe enough to produce keloid scars. The only purpose of the electrical shocks was to inflict pain.

The court's fractured opinion – with one concurrence and a lengthy dissent – licenses officers willfully and repeatedly to inflict severe pain on handcuffed non-resisting arrestees merely to secure compliance with a command to stand up or to move. The opinion conflicts with the decisions of other courts of appeals that have held that although the Fourth Amendment permits law enforcement officers to use reasonable force to apprehend and to subdue a resisting subject, it does not permit the application of punitive force to handcuffed subjects who are already under control and not offering resistance. The Eleventh Circuit's rule turns longstanding Fourth Amendment doctrine on its head; it invites law enforcement officers to administer summary punishment to arrestees; it authorizes the use of extreme repeated pain on limp non-resisting arrestees in contravention of this Court's repeated pronouncements that the Fourth Amendment only permits the use of reasonable force to defend

against, to arrest, and if necessary, to subdue an actively resisting subject. This Court should grant the petition and restore the Fourth Amendment to its understood meaning lest law enforcement officers accept the court of appeals' invitation to abuse, through the repeated infliction of pain, handcuffed arrestees who are already under police control.

1. On March 17, 2004, respondent, a Washington County Florida Deputy Sheriff, stopped and ticketed petitioner for speeding on a road respondent characterized as "desolate" and "out in the middle of nowhere." Petitioner, already apparently distraught, refused to sign the traffic citation and told respondent to take him to jail. In accordance with Florida law, respondent placed petitioner under arrest. Petitioner voluntarily and without resistance submitted to behind-the-back handcuffing while still in his car. Again without resistance, petitioner followed respondent's lead, exited his car and began peacefully to walk towards respondent's patrol car. Petitioner never once resisted, attempted to escape, or even objected to being placed in custody. As petitioner passed the rear of his car, while still a short distance from respondent's patrol car in the grass alongside the roadway, he collapsed to the ground in a sitting position and, in abject despair, began to sob loudly and uncontrollably. Respondent left petitioner sitting on the ground, walked to his patrol car to place his citation booklet on its hood and radio a report, and then returned to attempt to lift petitioner. Petitioner went limp and began to sob even more loudly. Respondent, unable to lift him, pushed or dragged petitioner a few feet further from the side of the deserted road. Neither petitioner nor respondent was in actual or perceived

danger from potential traffic; the video shows them situated a few feet off the road between the patrol car and petitioner's car, parallel with the off-road sides of the two cars.

Respondent warned petitioner that unless he voluntarily arose, respondent would "tase" him. Between sobs, petitioner responded, "I don't care anymore, tase me." Eight minutes into the stop as shown by the video, respondent first applied his Taser to petitioner in "drive-stun" mode, causing petitioner to flinch in pain and attempt to roll away from the electrical discharge; in doing so he rolled several feet further away from the road and behind the line of the two cars. Respondent pursued him, arm outstretched holding his Taser to maintain electrical contact for each full five-second discharge, and forcefully jammed the Taser into multiple sites on petitioner's back and chest. On the video, the electrical crackles of the Taser are clearly heard as petitioner involuntarily jerked and rolled away from the source of pain.

Tasers operate in two modes and serve two different purposes. Their principal use is as a device to subdue, at a safe distance, a dangerous subject; in that mode, an officer operates a Taser by firing two darts that strike and attach to a dangerous individual; thereafter a high voltage low amperage instantaneous electrical discharge produces temporary neuromuscular incapacitation (NMI), rendering the subject harmless and immobile so that an officer can handcuff him and take him into custody without the use of a firearm and attendant deadly force. Tasers also can be used in "drive-stun" mode; as described in Taser's manual, available on its web

site, "drivestun mode will not cause NMI and generally becomes a pain compliance option." It works only when the Taser is in direct contact; for that reason, Taser's manual warns:

> Due to automatic reflex actions, most subjects will struggle to separate from the Taser device. Each time the device comes back in contact with the individual, another set of burn marks may be visible.
>
> Drive-stun Taser use produces a continuous extremely painful electrical shock useful for an officer engaged in close hand to hand combat with a resisting subject; pain forces the resisting subject to stop violently resisting and submit to handcuffing; hence the characterization of its use as pain compliance.

http://www.taser.com/SiteCollectionDocuments/Downloads/MK-INST-M26-001%20REV%20B%20M26%20Manual.pdf at 14 (last visited January 26, 2009). See also at 8-10 (last visited January 26, 2009).

At the conclusion of the first five-second electrical discharge, eight minutes into the stop, petitioner lay fully prone on his side, sobbing loudly and inconsolably. Respondent commanded petitioner to get up and threatened again to tase him; respondent continued sobbing but neither sought to move nor offered any resistance. A mere 20 seconds after first shocking petitioner, respondent again jammed the

Taser into his back. As before, petitioner again involuntarily jerked and rolled, moving even further from the road to escape the repeated electrical shocks and resulting pain even as respondent continued to reapply the device to his back and chest until the full five-second discharge was complete. Petitioner remained weeping in the grass, half-sitting, half-lying helpless and handcuffed some ten feet from the edge of the roadway. Respondent returned to his patrol car, radioed for backup and reported the use of his Taser. With backup now on the way, respondent returned to petitioner one minute after having shocked him a second time, again ordered him to get up, lifted him to a sitting position, and shoved the Taser repeatedly into his back and chest for yet a third five-second discharge, prodding him with each electrical shock even further from the road and out of camera range. Several minutes later a second officer arrived on the scene, and the two officers walked petitioner to respondent's patrol car. Photographs of petitioner show 16 Taser burns, some of which have produced keloid scars.

2. On March 3, 2006 petitioner filed a complaint against respondent and the Sheriff of Washington County, Bobby Haddock asserting claims under 42 U.S.C. § 1983; he sought damages for excessive force in violation of the Fourth and Fourteenth Amendments to the United States Constitution. Both defendants moved for summary judgment on the basis of qualified immunity. By separate orders, the district court granted summary judgment for Sheriff Haddock on petitioner's claim of supervisory liability, but denied respondent's motion, finding that his repeated use of a Taser to inflict pain on a

nonviolent non-resisting handcuffed arrestee violated already clearly established law under the Fourth Amendment. Respondent appealed from the order denying his motion for summary judgment on the basis of qualified immunity.

3.a. In an opinion written by Chief Judge Edmondson, a deeply divided panel of the court of appeals reversed. Judge Edmondson concluded that respondent's use of force was reasonable under the circumstances for three reasons: (1) because "[t]he government has an interest in arrests being completed efficiently and without waste of limited resources," (2) because the demand made by respondent that petitioner get up and walk to the car was a reasonable one with which he could easily comply, and (3) because passing cars raised safety concerns. Against those interests Judge Edmondson concluded that the extreme pain, the burns and what he characterized as minor injuries caused by the repeated application of the Taser were insufficient to violate the Fourth Amendment. More generally, he opined that officers may use "moderate, non-lethal force" to compel a passively non-compliant arrestee to comply with and cooperate in the completion of an arrest by walking to a patrol car. Writing only for himself, Judge Edmondson concluded that even though backup officers were on the way, the third application of the Taser was reasonable given that respondent was still entitled to complete the arrest without waiting for backup.

Alternatively Judge Edmondson concluded that no case decided on substantially similar facts clearly established respondent's use of force was excessive, and that therefore even if that use of force

violated the Fourth Amendment, respondent was entitled to qualified immunity. Distinguishing earlier circuit precedent that might otherwise have clearly established limits on force, Judge Edmondson noted that a reasonable officer could conclude that the time of day, location, and warning "might make a difference" in whether the use of force would violate the law, and therefore entitled the officer to qualified immunity.

b. Judge Dubina concurred specially, agreeing that the first two applications of the Taser were constitutionally permissible, but concluding that the third application, administered while backup was approaching, was constitutionally excessive force. Nevertheless, he concurred that respondent was entitled to qualified immunity absent clearly established law to the contrary.

c. Judge Martin dissented. Noting that "this was not a case about whether an officer may use a taser to subdue an unruly or dangerous individual," she insisted that "the question in the case is whether a taser gun may be used repeatedly against a peaceful individual as a pain-compliance device—that is, as an electric prod—to force him to comply with an order to move." Judge Martin described the petitioner: "Mr. Buckley's only movements after he collapsed on the ground were in response to each discharge of the taser gun. After each discharge was complete, Mr. Buckley sat or laid still, crying, and unwilling or unable to stand." Applying the three *Graham v. Connor*, 490 U.S. 386 (1989) factors, Judge Martin concluded the use of force was excessive from the beginning – petitioner had committed only a nonviolent misdemeanor, he posed no threat to respondent

or others, and at no time did he "*actively* resist arrest or attempt to flee." (emphasis in original).

Turning to qualified immunity, Judge Martin argued that clear law from multiple jurisdictions long ago established that "the Fourth Amendment prohibits the infliction of gratuitous pain and injury as a means to coerce compliance" from handcuffed non-resisting nonviolent arrestees. Moreover, she noted that a Taser is particularly unsuited for use in this fashion given that its excruciatingly painful five second jolts of electricity would prevent petitioner from complying with respondent's demand that he stand. No particularized showing of a case involving materially similar facts was necessary to clearly establish law; she concluded any reasonable officer had fair notice that the infliction of severe pain in the absence of any arguable justification violated the core and obvious principles of the Fourth Amendment.

4. The Court of Appeals denied the petitions for rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals licenses police officers repeatedly to inflict excruciating pain through multiple five-second Taser discharges on handcuffed nonviolent arrestees who are not actively resisting arrest merely to secure compliance with demands to move or to stand up. That holding conflicts with decisions of other circuits that have held that pain compliance may be employed only to capture or subdue a dangerous or actively resisting arrestee, and with decisions holding that both (1)

opinions of this Court and (2) the core principles of the Fourth Amendment provide clear notice to law enforcement officers that such conduct is unlawful. Review is warranted to resolve the conflict in the courts of appeals.

Review is also warranted because both the decision of court of appeals on the Fourth Amendment and its decision on qualified immunity are contrary to *Graham v. Connor*, 490 U.S. 386 (1989) and *Hope v. Pelzer* 536 U.S. 730 (2002) respectively. Considerations of efficiency have never warranted the gratuitous infliction of pain on nonviolent and passive arrestees. By sub silentio resurrecting the "materially similar facts" standard rejected in *Hope v. Pelzer*, the court of appeals has placed beyond remedy patently unconstitutional conduct in this and similar cases.

The questions presented are recurrent questions of ever increasing importance. Tasers have made it possible for officers to inflict pain through electrical discharges, once the exclusive province of agents and implements of torture. Tasers rapidly have become standard equipment in police departments throughout the nation. Although when used at a distance in their primary mode Tasers offer an alternative to deadly force, their drive-stun mode empowers officers to use a Taser as a cattle prod against detainees who neither threaten violence nor actively resist arrest rather than as a legitimate tool to subdue violent resistors. This Court should not allow other officers and law enforcement agencies to believe that respondent's reprehensible behavior is constitutionally permissible. Because the facts of this case were captured on the officer's own

patrol car-mounted video camera, the video offers a uniquely clear record of events against which to articulate a standard for future cases.

I. The Courts Of Appeals Are Divided On The Questions Presented.

The Eleventh Circuit has created a conflict among the circuits where none previously existed. Its ruling – that officers may inflict excruciating pain upon handcuffed nonviolent arrestees who do not actively resist arrest to "persuade" them to obey orders designed only to increase law enforcement efficiency – conflicts with the Second, Ninth, Tenth and, most recently, the Sixth Circuits' holdings that police officers may inflict pain willfully only to capture, subdue or control a violent or actively resisting arrestee; they may not otherwise do so to compel compliance with commands, and allegations of contrary conduct are sufficient to create jury questions in excessive force claims. *Amnesty America v. Town of West Hartford*, 361 F.3d 113, 118, 123-24 (2d Cir. 2004) (concluding that anti-abortion protesters who employed "passive resistance" techniques including going limp stated Fourth Amendment violation against officers who used pain compliance techniques, including choke holds and wrist-bending, because jury could conclude that "the officers gratuitously inflicted pain in a manner that was not a reasonable response to the circumstances"); *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125, 1128-30 (9th Cir.), *cert. denied*, 537 U.S. 1000 (2002) (use of pepper spray on nonviolent nonresisting arrestees violated clearly established law in 1997; "[b]ecause the officers had control over the protestors it would have been clear to any reason-

able officer that it was unnecessary to use pepper spray to bring them under control, and even less necessary to *repeatedly* use pepper spray against the protestors ...." (emphasis in original, denying qualified immunity); *LaLonde v. County of Riverside*, 204 F.3d 947, 961 (9th Cir. 2000) (using pepper spray "may be reasonable as a general policy to bring an arrestee under control, but in a situation in which an arrestee surrenders and is rendered helpless, any reasonable officer would know that a continued use of the weapon or a refusal without cause to alleviate its harmful effects constitutes excessive force") (denying qualified immunity); *Buck v. City of Albuquerque*, 549 F.3d 1269 (10th Cir. 2008) (discharging pepper gas at demonstrator facing possible misdemeanor charges who is lying the on ground violates clearly established law under Fourth Amendment) (denying qualified immunity). *See also Hickey v. Reeder*, 12 F.3d 754, 757 (8th Cir.1993) (use of stun gun upon prisoner who refused order to sweep his cell violates Eighth Amendment prohibition against cruel and unusual punishment).

The conflict among the circuits specifically encompasses the use of Tasers against nonresisting arrestees. *Landis v. Baker*, 2008 WL 4613547 (6th Cir. 2008) held that officers violated clearly established Fourth Amendment law by using a Taser against a handcuffed arrestee who lay on the ground offering no resistance. Although *Landis* represented the Sixth Circuit's first application of excessive force law to the misuse of a Taser during an arrest, the court reasoned that the law prohibiting its misuse was clearly established:

> Even without precise knowledge that the use of the taser would be a violation of a constitutional right, the officers should have known based on analogous cases that their actions were unreasonable. *See Greene v. Barber*, 310 F.3d 889, 898 (6th Cir. 2002) (holding that it may be excessive force to use pepper spray on suspect who was resisting arrest but "not threatening anyone's safety or attempting to evade arrest by flight"); *Vaughn v. City of Lebanon*, 18 Fed. Appx. 252, 266, (6th Cir. 2001) (holding that the use of a chemical spray may be unconstitutional when there is no immediate threat to the safety of the officers or others); *Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir.1994) (holding that the use of mace on a compliant suspect is constitutionally unreasonable).

See also Casey v. City of Federal Heights, 509 F.3d 1278, 1285 (10th Cir. 2007) (tasering nonviolent misdemeanant violates clearly established law even though he was not yet handcuffed because "[t]he crime was not severe, Mr. Casey was not threatening, and he was not fleeing the scene," noting that "*Graham* establishes that force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest"). All four circuits understood what the Eleventh Circuit failed to grasp – the Fourth Amendment does not permit the deliberate infliction of pain on submissive nonviolent arrestees.

The Eleventh Circuit created conflict by misapprehending the Court's long settled standards governing the use of force. *Graham v. Connor*, 490 U.S. 386 (1989) held and *Scott v. Harris*, 550 U.S. 372 (2007) reaffirmed that objective reasonableness is the touchstone against which all applications of force are to be tested. Three central factors govern the inquiry:

> 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. at 396 (emphasis added).

Rather than apply those factors, the Eleventh Circuit introduced governmental efficiency into the balancing calculus that governs the willful infliction of pain, whether euphemized as pain compliance or hyperbolized as torture. Neither *Graham v. Connor* nor *Scott v. Harris* suggests conservation of government resources can justify the deliberate infliction of pain on a nonviolent non-resisting handcuffed arrestee. *Tennessee v. Garner*, 471 U.S. 1 (1985) rejected the use of deadly force even in circumstances in which it offered the most efficient means by which to capture a fleeing subject; indeed, the very purpose of the Fourth Amendment is to subordinate the ever present interest of the government in law enforcement efficiency to the protection of individual liberty. *See Mincey v. Arizona*, 437 U.S. 385, 393 (1978) ("the mere fact that law enforcement

may be made more efficient can never by itself justify disregard of the Fourth Amendment"). By concluding that generalized considerations of efficiency trump the right to be free from the unnecessary deliberate infliction of pain, the Eleventh Circuit created circuit conflict with the several circuits that have recognized that the *Graham* holds otherwise. [1]

Respondent was entitled to use reasonable force to take petitioner into custody. None was necessary; petitioner willingly submitted to being handcuffed and to being removed from his car. Under *Graham*, respondent was no longer entitled to use force until and unless petitioner became violent, attempted to escape, or otherwise actively resisted arrest. As the video confirms more eloquently than words, petitioner did nothing but fall to the ground

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[1] The ruling below is only the most extreme example of the Eleventh Circuit's continuing failure to impose constitutional limits on the use of Tasers against nonviolent and nonresisting individuals. *Compare Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004) (officer may without warning fire taser into stopped driver who refused repeated commands to return to vehicle to retrieve insurance papers and bill of lading) *with Casey v. City of Federal Heights*, 509 F.3d 1278, 1285 (10th Cir. 2007) (tasering nonviolent misdemeanant violates clearly established law even though he was not yet handcuffed because "[t]he crime was not severe, Mr. Casey was not threatening, and he was not fleeing the scene)" After describing *Draper v. Reynolds*, Judge McConnell noted in *Casey*: "We are not sure that we would have come to the same conclusion on those facts...." 509 F.3d at 1286. Relying on *Draper*, the Eleventh Circuit also held the Fourth Amendment permits an officer to fire a Taser at a handcuffed arrestee because, in speaking to the officer while being led to a patrol car, he appeared to spray blood from his broken nose. *Zivojinovich v. Barner*, 525 F.3d 1059 (11th Cir. 2008).

sobbing. He posed no danger to himself, to respondent, or to the public; no more compelling confirmation of that is necessary than the video, where Respondent is seen twice walking back to his patrol car, ignoring petitioner who abjectly lay weeping on the ground.

Perhaps recognizing that the Fourth Amendment does not count governmental efficiency as a factor justifying the deliberate infliction of pain, the Eleventh Circuit majority strained to imagine that petitioner posed two potential threats to officer safety. The court first reasoned that because petitioner's legs were unshackled, he remained a threat to the officer even though he never once attempted to use his legs to resist or escape. But that cannot suffice to license the infliction of pain – officers ordinarily handcuff but do not hogtie arrestees when they take them into custody. Should a cuffed arrestee misuse what freedom of movement remains – by either attempting to flee or to injure an officer – the officer of course may respond with appropriate force, but absent one of those reasons, the Fourth Amendment prohibits an officer from abusing a nonviolent non-resisting subject in the name of pain compliance. Were the Eleventh Circuit's rule the law, then every arrestee whose legs are not shackled would, for that reason alone, be a threat to officer safety subject to the gratuitous infliction of pain.

Next, the court observed that the arrest took place in the vicinity of a roadway, and because roadways posed a danger to both the officer and the arrestee, the officer was authorized to use force even absent active resistance until petitioner was locked in the parked patrol car. But by design and in use,

stopped police cars are always parked on or adjacent to roadways; even arrests effected in buildings require the removal of the arrestee to a patrol car. If proximity of either a patrol car or an arrestee to a roadway justifies the use of force on a nonviolent non-resisting arrestee, then it will always justify the use of force.

Finally, the court below created unnecessary circuit conflict by mischaracterizing the holding of *Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995). *Forrester* held only that a jury reasonably could return a defense verdict at trial concluding that the use of two sticks of wood joined by a cord (an OPN) that, when wrapped around an arrestee's wrists tightened while the arrestee was pulled to a standing position until the arrestee voluntarily stood, was reasonable force, but in doing so it emphasized that the arrestee could, by standing, stop immediately any discomfort from the cord's physical pressure. *Forrester* did not license the general use of pain compliance against non-resisting arrestees; to the contrary, it specifically distinguished as clearly unconstitutional "the use of a lighted cigarette, which would create immediate and searing pain" contrasted with the gradually increasing and therefore constitutional pressure of an OPN and noted that the *Forrester* defendants "did all they could to *minimize* the pain inflicted." 25 F.3d at 808 n.5 (emphasis in original). The Ninth Circuit repeatedly has limited *Forrester*, holding it inapplicable to the use of pepper spray, police dogs, and by analogy Tasers. *See, e.g., Headwaters Forrest Defense Council v. County of Humboldt*, 276 F.3d 1125 (9th Cir.), *cert. denied*, 537 U.S. 1000 (2002) (pepper spray); *see also Mendoza*

v. Block, 27 F.3d 1357, 1362 (9th Cir. 1994) ("For example, no particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control. An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury").[2]

Distilled to its essence, the ruling below licenses police officers to use a Taser as a cattle prod to inflict gratuitous pain on a nonviolent handcuffed arrestee for no more reason than to herd him towards a patrol car. This simply cannot be the law in a civilized society.

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[2] The court below ignored undisputed evidence that respondent used his Taser in violation of departmental regulations. Both the Fifth and Ninth Circuits have held departmental regulations and analogous training materials helpful in ascertaining the reasonableness of the use of force:

> Although such training materials are not dispositive, we may certainly consider a police department's own guidelines when evaluating whether a particular use of force is constitutionally unreasonable. As the Fifth Circuit stated, "it may be difficult to conclude that the officers acted reasonably if they performed an action that had been banned by their department or of whose dangers in these circumstances they had been warned." *Gutierrez v. City of San Antonio*, 139 F.3d 441, 449 (5th Cir.1998). *See also Scott v. Henrich*, 39 F.3d 912, 916 (9th Cir.1994) ("Thus, if a police department limits the use of chokeholds to protect suspects from being fatally injured, ... such regulations are germane to the reasonableness inquiry in an excessive force claim").
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> *Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003).

II. The Court Of Appeals Resurrected Circuit Conflict By Holding That Qualified Immunity Protected Respondent Absent A Case Decided Upon Substantially Similar Facts Rather Than By Applying Hope's Clear Notice Standard.

Hope v. Pelzer, 536 U.S. 730 (2002) overruled aberrant Eleventh Circuit precedent requiring a party seeking to overcome qualified immunity to identify a case previously decided on materially similar facts. *Hope* instructed that all that is required is that the officer have fair notice that his conduct violates the constitution, excising the materially similar facts standard from qualified immunity jurisprudence. Applying *Hope*, *Landis v. Baker*, 2008 WL 4613547 (6th Cir. 2008) held on similar facts that officers who deployed a Taser in drive stun mode three times against a prone detainee who offered no active resistance violated clearly established law even though, unlike Petitioner, he was not handcuffed, stating: "[t]he district court correctly concluded that the officers should have known that the gratuitous or excessive use of a taser would violate a clearly established constitutional right." The Eleventh Circuit's qualified immunity analysis directly conflicts with *Landis*; it also conflicts with *Casey v. City of Federal Heights*, 509 F.3d 1278 (10th Cir. 2007) (tasering nonviolent misdemeanor arrestee in 2003 who was not attempting to flee or actively resist arrest violated then already clearly established law); *Buck v. City of Albuquerque*, 549 F.3d 1269 (10th Cir. 2008) (discharging pepper gas in 2003 at demonstrator facing possible misde-

meanor charges who was lying the on ground violated then already clearly established law); *Headwaters Forest Defense. v. County of Humboldt*, 276 F.3d 1125 (9th Cir.), *cert. denied*, 537 U.S. 1000 (2002) (use of pepper spray against nonviolent passive non-resisting arrestees in 1997 violated then already clearly established law).

By their nature, excessive force claims often arise from outrageous facts far beyond the pale of permissible force. As *Hope* noted in analogous Eighth Amendment litigation, cases decided on materially similar facts are least likely when conduct strays far from constitutional limits; that is so because reasonable officers already understand that such conduct is forbidden. *Landis v. Baker* is illustrative; no previous case forbidding the use of a Taser to inflict gratuitous pain was necessary to give an officer fair warning that such conduct is prohibited. *See also Mendoza*, 27 F.3d at 1362 ("An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury").

Despite the unequivocal language of *Hope* and the reasoning of other circuits, some panels within the Eleventh Circuit continue to deploy the rejected "materially similar facts" standard; this is but the latest of such cases. *See, e.g.*, *Willingham v. Loughnan*, 321 F.3d 1299, 1300 (11th Cir.), *cert. denied*, 540 U.S. 816 (2003) ("The Supreme Court decision in *Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002), did not change the preexisting law of the Eleventh Circuit much) (Edmondson, C.J.); *Snider v. Jefferson State Community College*, 344 F.3d 1325 (11th Cir. 2003) (Edmondson, C.J.);

Purcell ex rel. Estate of Morgan v. Toombs County, Ga., 400 F.3d 1313, 1324 n.25 (11th Cir. 2005) ("Unlike *Hope*, the preexisting case law here varied enough from the material facts of this case that a reasonable jailer could believe that the factual differences could make the situation at this Jail lawful even when circumstances in the earlier cases were determined to be unlawful under federal law: the precedents do not "squarely govern" the case here") (Edmondson, C.J.).

By insisting that petitioner identify a circuit case decided on similar facts to defeat qualified immunity, the Eleventh Circuit resurrected a circuit conflict that *Hope* should have interred. The same cases that establish circuit conflict on the merits of the Fourth Amendment claim also establish circuit precedent on qualified immunity. Those cases hold that the Fourth Amendment's prohibition against the willful infliction of pain on a nonviolent handcuffed arrestee is sufficiently obvious, and lies so clearly at the core of what the Amendment protects, that an officer has fair notice that he must refrain from such conduct even absent a case decided on similar facts. If Buckley had brought his case in the Sixth Circuit, the Second Circuit, or the Ninth Circuit, the court of appeals would have affirmed the district court's order denying summary judgment on the basis of qualified immunity.

III. The Questions Presented Are Recurring Questions Of Ever Increasing Importance.

Since the introduction of Tasers as a law enforcement tool, police departments across the country

have adopted them because of their unique potential to subdue at a distance an individual attempting to escape or to violently resist arrest. Because Tasers lend themselves to arbitrary and gratuitous pain as well as to legitimate law enforcement usage, Taser litigation is on the increase, with a recent Westlaw search revealing more than 100 federal court decisions adjudicating excessive force claims arising from tasers.

IV. The Case Presents An Ideal Vehicle For Review Of The Questions Presented.

The video of respondent's repeated use of a Taser to inflict pain on petitioner makes this an ideal case for this Court to reconfirm and clarify the Fourth Amendment's limits on the use of force. As in *Scott v. Harris*, 127 S. Ct. 1769 (2007), the video precludes arguments over the course of events. The indisputable record of these events facilitates clarity too often foreclosed by conflicting accounts of facts and affords an ideal opportunity to resolve the conflict between the Eleventh Circuit and the Second, Sixth and Ninth Circuits. The Court should grant the Petition, resolve the conflict, and restore the protection of the Fourth Amendment to nonviolent arrestees who do not actively resist arrest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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