October 21, 2010

Molly C. Dwyer, Clerk of the Court
United States Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Mattos v. Agarano*, 08-15567
En Banc Rehearing Argument Date December 14, 2010
Letter of *Amici Curiae* ACLU of Hawaii Foundation and
ACLU of Washington Foundation supporting the Plaintiffs-Appellees

Dear Ms. Dwyer:

In accordance with Rule 29 of the Federal Rules of Appellate Procedure and the Circuit Advisory Committee Note to Rule 29-1, the American Civil Liberties Union of Hawaii Foundation ("the ACLU of Hawaii") and the American Civil Liberties Union of Washington Foundation ("the ACLU of Washington") respectfully submit this letter as *amici curiae* in support of the Plaintiffs-Appellees in the above-referenced case. [1] We respectfully ask you to transmit this letter to those judges assigned to rehear this case en banc for their consideration.

The ACLU of Hawaii and the ACLU of Washington write today to highlight two points: (1) as set forth by the panel in *Mattos v. Agarano*, 590 F.3d 1082 (9th Cir. 2010), the panel in *Bryan v. McPherson*, 608 F.3d 614 (9th Cir. 2010), and the dissent in *Brooks v. City of Seattle*, 599 F.3d 1018 (9th Cir. 2010), the use of a TASER *always* represents significant force that constitutes "a serious intrusion into the core of the interests protected by the Fourth Amendment," *Mattos*, 590 F.3d at 1087; and (2) TASER use is improper when the crime at issue is minor or trivial and there is no immediate threat to anyone's safety.

I. *Amici*'s Interest

The ACLU of Hawaii and the ACLU of Washington are local affiliates of the ACLU – a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU and its affiliates

[1] Counsel for both Plaintiffs-Appellees and Defendants-Appellants in *Mattos* have consented to the appearance of the ACLU of Hawaii and ACLU of Washington as *amici* and to the filing of this letter. The ACLU of Washington submitted a substantively identical letter in *Brooks v. Seattle*, 08-35526, which has been consolidated with the instant case for rehearing.

have been involved in many cases around the country challenging the use of excessive force by law enforcement officers, and the ACLU of Hawaii and the ACLU of Washington have received numerous complaints about excessive TASER use. Questions surrounding the seriousness of the harm inflicted by TASERs, and the propriety of using potentially lethal force in situations that pose no threat to the police officers or any other individual, are therefore matters of considerable concern to the ACLU of Hawaii, the ACLU of Washington, and their members.

II. TASERs Are Potentially Lethal Weapons and, Pursuant to *Graham v. Connor*, May Not Be Used on Suspects of Minor Crimes Absent an *Immediate* Threat

a. The use of a TASER, whether in dart mode or drive stun mode, constitutes significant, potentially lethal force.

TASERs are potentially lethal weapons. Hundreds of individuals have died after being "tased" – both in dart mode and in drive stun mode – with the TASER being the sole or contributory cause in at least forty cases between 2001 and 2008. AMNESTY INTERNATIONAL, 'LESS THAN LETHAL?' THE USE OF STUN WEAPONS IN US LAW ENFORCEMENT 20 (2008).[2] Just last week, on October 12, 2010, an inmate in Billings, Montana died after being subjected to a TASER in drive stun mode four times. Chelsea Krotzer, *Officials Release Details Of Sunday Stun Gun Incident*, BILLINGS GAZETTE, Oct. 14, 2010.[3] Although categorized by this Circuit as "non-lethal" force, the TASER results in the introduction of a significant amount of electrical current into a person's body, described by a police chief as "'very painful . . . there are shock waves going through your body. It's a very scary feeling.'" 'LESS THAN LETHAL?' at 8 (alteration in original). TASERs can also cause burns and permanent scarring. *See id.* at 48. The amount of electrical power delivered by a TASER is the same in drive stun and dart modes – the only difference is the distance over which the electricity travels (and, thus, the amount of body tissue exposed to the electricity), which is greater with dart mode than drive stun mode. *See id.* at 6. Both methods can cause serious, permanent injuries, however, and both methods can cause death. Furthermore, a TASER charge can cause the subject to collapse, causing additional severe (and permanent) injury from falling, as in *Bryan*.[4]

Simply put, a police officer's use of a TASER is a fundamentally different kind of force than a pressure point hold or more traditional pain compliance techniques, as seven judges of this Circuit – the *Mattos* and *Bryan* panels and the dissent in *Brooks* – have recognized in the last year alone. The en banc Court should rule that a TASER is a significant amount of force, whether used in dart or drive-stun mode.

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[2] Available at http://www.amnesty.org/en/library/asset/AMR51/010/2008/en/530be6d6-437e-4c77-851b-9e581197ccf6/amr510102008en.pdf. A discussion of the effects of TASERs on pregnant women and fetuses appears on page 85 of this detailed report.

[3] Available at http://billingsgazette.com/news/local/crime-and-courts/article_e2f11334-d7b2-11df-bb9a-001cc4c002e0.html.

[4] Jayzel Mattos, for her part, described the pain as a "ten" on a scale of zero to ten, and stated that the only thing as painful as the TASER was childbirth. *Mattos*, Plaintiffs-Appellees' Supplemental Excerpts of Record at 29.

b. The police may not use a TASER in the absence of an immediate threat to the officer's (or another person's) safety.

Where a suspect poses no immediate threat to an officer, and the crime at issue is minor or trivial, TASER use is improper. Although each situation must be analyzed to determine reasonableness under its specific facts, *Graham v. Connor*, 490 U.S. 386, 396 (1989), "[t]he 'most important' factor under *Graham* is whether the suspect posed an '*immediate* threat to the safety of the officers or others.'" *Bryan*, 608 F.3d at 622 (quoting *Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005) (en banc)) (emphasis added). Erratic and *potentially* dangerous behavior is not enough to tip this factor in the government's favor – the threat must be immediate. *See Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001) ("A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury. There must be other significant circumstances that warrant the use of such a degree of force at the time it is used."), *cert. denied*, 536 U.S. 958 (2002).

Amici do not dispute that police officers routinely encounter belligerent individuals, and that members of the public, at times, delay and annoy police officers by being uncooperative. An officer's frustration, however, is no justification for using serious, potentially lethal force on an individual. If it were, police officers could use a TASER on any individual who lawfully asserted her Fourth Amendment rights (*e.g.*, refusing the police entry to a home without a warrant) or Fifth Amendment rights (*e.g.*, refusing to answer questions without an attorney present). These actions are certainly frustrating to police, but that frustration does not authorize the use of force. An officer's desire to speed up an arrest, or make the issuance of a traffic citation easier, is simply not equivalent to an officer's duty to protect the public (or the officer's right to protect her- or himself). TASERs may have a role in supplanting otherwise deadly force; they have no role in supplanting traditional, effective police techniques for minor or trivial crimes in the absence of any cognizable, immediate threat to any individual.

III. Conclusion

For the reasons set forth herein, as well as in the ACLU of Washington's *amicus curiae* brief in support of Plaintiff-Appellee's petition for rehearing in *Brooks*, the ACLU of Hawaii and the ACLU of Washington respectfully requests that this Court rule in favor of the Plaintiffs-Appellees.

Respectfully yours,

/s/ Daniel M. Gluck

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