June 15, 2011

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**
***Brooks v. Seattle*, 08-35526**

Letter of *Amici Curiae* ACLU of Hawaii Foundation and ACLU of Washington Foundation supporting the Plaintiffs-Appellees

Dear Ms. Dwyer:

In accordance with the Court's June 2, 2011 Order inviting existing *amici* to submit supplemental briefing as to "what effect, if any, the United States Supreme Court decision in *Ashcroft v. Al-Kidd*, 563 U.S. ____ (2011), has on the question of qualified immunity" in the instant cases, and in accordance with Rule 29 of the Federal Rules of Appellate Procedure and the Circuit Advisory Committee Note to Rule 29-1, the ACLU of Hawaii Foundation and the ACLU of Washington Foundation (collectively, "the ACLU") respectfully submit this letter[1] as *amici*

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[1] Although *amici* submit this response as a letter, rather than a brief, *amici* wish to note the following with respect to FRAP 26.1 and 29(c)(5):

- Neither the ACLU of Hawaii nor the ACLU of Washington has a parent corporation;
- No publicly held corporation controls any part of the ACLU of Hawaii or the ACLU of Washington;
- No counsel for any party authored any part of this letter or *amici*'s October 21, 2010 letter to the Court;

(continued)

curiae in support of Plaintiffs-Appellees in both *Mattos v. Agarano* and *Brooks v. Seattle*. We respectfully ask you to transmit this letter to Chief Judge Kozinski and all the Circuit Judges assigned to hear these cases.

In short, *amici* contend that *al-Kidd* does not impact the qualified immunity analysis in the instant case, or in any case. Rather, the Supreme Court confirmed long-standing precedent that "[q]ualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2080 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

I. *Al-Kidd* Did Not Change The Test For Excessive Force

The first prong of the qualified immunity test is whether a government official violated a statutory or constitutional right. *Al-Kidd* involved a much different Fourth Amendment question than that presented by the instant cases: whereas *al-Kidd* asked whether an arrest based on a material witness warrant was constitutional, the instant cases ask whether police officers used excessive force in subduing unarmed, non-threatening women. Therefore, *al-Kidd* has no bearing on whether the police officers in the instant cases violated Plaintiffs-Appellees' constitutional rights.

The test set forth by *Graham v. Connor*, 490 U.S. 386, 396 (1989), remains the proper vehicle for analyzing whether a constitutional violation occurred. For the reasons set forth in Plaintiffs-Appellees' and *amici*'s prior submissions, the police in both *Mattos* and *Brooks* violated Plaintiffs-Appellees' constitutional rights.

- No party, and no party's counsel, contributed money that was intended to fund the preparation or submission of this letter or *amici*'s October 21, 2010 letter to the Court; and
- No person other than *amici curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this letter or *amici*'s October 21, 2010 letter to the Court.

II. *Al-Kidd* Did Not Change The Test For Whether Law Was "Clearly Established"

The second prong of the qualified immunity test is whether the constitutional right at issue was "clearly established." Again, in *al-Kidd*, the Supreme Court did not change the governing law:

> A Government official's conduct violates clearly established law when, at the time of the challenged conduct, "[t]he contours of [a] right [are] sufficiently clear" that every "reasonable official would have understood that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. See *ibid.; Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

131 S.Ct. at 2083 (alternations in original). The Court reaffirmed the principle that courts should not "define clearly established law at a high level of generality," *id.* at 2084, but the Court also confirmed that there need not be a case directly on point for law to be clearly established. *Id.* at 2083.

The technology available to police officers is changing rapidly; new weapons, including Electronic Control Weapons (like TASERs) and Long Range Acoustic Devices (*i.e.*, sound weapons), are introduced every year. The existing legal test for excessive force need not be re-written, however, every time a new weapon is introduced or adjusted. For example, this Court need not weigh in every time TASER decides to change one of its weapons from "AA" batteries to "AAA" batteries. *Cf. Kyllo v. United States*, 533 U.S. 27, 34 (2001) (the Court would not "permit police technology to erode the privacy guaranteed by the Fourth Amendment").

In the instant case, the law was clearly established at the time of the incidents in question: a reasonable police officer would have known that TASERs in dart or drive-stun mode represented significant force that cannot be used in the absence of an immediate threat to the officer's (or another person's) safety.

III. *Al-Kidd* Did Not Change The Method for Applying The Qualified Immunity Test

The Supreme Court did not change the test for applying the two-prong qualified immunity test. As the Court reiterated, "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Al-Kidd*, 131 S.Ct. at 2085. Although the Supreme Court disagreed with the Ninth Circuit panel's holdings as to whether the specific conduct at issue in *al-Kidd* was constitutional and whether al-Kidd's theory of a constitutional violation was clearly established, neither of those conclusions controls this Court's qualified immunity analysis in the cases at bar. Instead, in the instant cases, every reasonable officer would know that *Graham v. Connor* prohibits the use of significant force absent an immediate threat to the officer's (or another person's) safety. *See*, *e.g.*, *Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005) (en banc), *cert. denied*, 545 U.S. 1128; *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001), *cert. denied*, 536 U.S. 958 (2002). Similarly, regardless of the precise location of the TASER on the use-of-force continuum, every reasonable officer would know that a TASER deployment is not trivial force, and therefore unconstitutional in the cases at bar per *Graham*.

IV. Conclusion

For the reasons set forth herein, in *amici*'s October 21, 2010 letter to the Court, and in the ACLU of Washington's *amicus curiae* brief in support of Plaintiff-Appellee's petition for rehearing in *Brooks*, the ACLU respectfully requests that this Court rule in favor of the Plaintiffs-Appellees in both *Brooks* and *Mattos*.

Respectfully yours,

/s/ Daniel M. Gluck

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