

No. 17-905

**In The
Supreme Court of the United States**

OFFICER ROBERT MAHONEY, et al.,

Petitioners,

v.

THE CITY OF SEATTLE, including the Seattle
Police Department; ED MURRAY, individually and in
his official capacity, former Mayor of the City of Seattle;
JENNY DURKAN, in her official capacity, Mayor of the
City of Seattle; and PETER HOLMES, individually
and in his official capacity, Seattle City Attorney,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondents create a significantly misleading and inaccurate issue in their Opposition to Petition for Writ of Certiorari (“Opposition Brief,” or “Op. Br.”). Accordingly, the Petitioners respectfully submit this short Reply Brief to correct the record.

Respondents’ Opposition Brief is an attempt to characterize the Officers’ claims as not “worthy” of, and inappropriate for, consideration by the Court because, among other things, “another court has continuing jurisdiction over the implementation and potential modification of the UF Policy.” Op. Br. at 2, 8, 21.

The parties agree that the City of Seattle (“City”) reached a settlement with the Department of Justice (“DOJ”) even though the City disputed DOJ’s finding regarding Seattle police officers’ alleged pattern of excessive use of force. The parties also agree that implementation of the settlement agreement (referred to by Respondents as the “Consent Decree”), including the City’s agreement to revise its UF Policy under the supervision of a Federal Monitor, is being overseen by Judge Robart in the United States District Court, Western District of Washington. However, Respondents’ attempts to insinuate that the questions presented in the Petition should have been raised in the Consent Decree litigation, or are otherwise unripe for review by the Court, are disingenuous at best and incorrect.

First, the constitutional violations alleged by the Officers were not more appropriate to, nor required to

be decided in, another action. Second, the fact that the UF Policy may be minimally modified over time in no way precludes the Court's determination of the constitutional rights at stake, including the standards that must be applied to all policy that implicates the Officers' fundamental right of self-defense. Finally, notwithstanding the City's unfounded suggestions to the contrary, the Officers were not required to pursue their claims in the Consent Decree action.

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ARGUMENT

I. The Officers' Constitutional Claims Are Not More Appropriately Addressed in the Consent Decree Litigation.

As was jurisdictionally appropriate, the Officers filed their complaint in the same district court as the Consent Decree proceedings. Their case was assigned to Judge Pechman. Almost immediately, the City filed "A Notice of Related Case." D. Ct. Dkt. 3. If the City is correct that the more proper, or required, venue for consideration of the Officers' claims was as part of the Consent Decree, Judge Pechman would have transferred the case to Judge Robart. She did not. Instead, Judge Pechman considered the merits of the Officers' constitutional claims without hesitation, and without substantive reference to the matters being decided in the Consent Decree litigation except to confirm that "individual officers of the Seattle Police Department

were not a party to the lawsuit or the ensuing negotiations.” App. 24.¹

Similarly, the Ninth Circuit could have declined to review Judge Pechman’s Order on grounds that the claims asserted should have been decided first by Judge Robart as part of the Consent Decree litigation. It also did not. Instead, it too considered the constitutional issues head on, in fact reversing the district court’s substantive holding that the Officers’ claims bore no relation to conduct protected by the Second Amendment. App. 9-11.

The City also informs the Court that Judge Robart approved the UF Policy, “finding it constitutional,” and offers the Court glowing statements from Judge Robart regarding “national attention” to Seattle’s police reform efforts. The misleading suggestion is that everyone agrees the UF Policy has no constitutional problems and is working just fine. Nothing could be further from the truth. Judge Robart’s statement regarding the constitutionality of the UF Policy was nothing more than a conclusory sentence in a brief one and one-half page opinion. D. Ct. Dkt. 13. The serious ramifications of the UF Policy on the Officers’ fundamental, constitutional right of self-defense was never presented to, nor addressed by, Judge Robart.

Tellingly, the City offers no findings from Judge Robart regarding the life-threatening dangers facing the Officers as they attempt to carry out their sworn

¹ All “App.” citations refer to the Appendix to the Officers’ Petition for Writ of Certiorari.

duties under the flawed policy; nor findings regarding serious injuries to the Officers and the public caused by the UF Policy. The City cannot offer such because these issues were never before Judge Robart. Instead, the City confuses the issue by suggesting that the Officers are asking the Court to decide “novel constitutional issues” without benefit of a factual record, in particular, the factual record developed in the Consent Decree litigation. Op. Br. at 21.

The City’s continual reference to the factual record in the Consent Decree proceedings is a straw man. The only reason to do so is to imply that the core *factual* dispute in the Officers’ case, namely that the UF Policy puts Officers at unreasonable and dangerous risk, has been litigated and decided against the Officers. In fact, the type of evidence the Officers intend to present if their case moves forward – such as expert testimony regarding the practical realities of urban policing and the science of split-second decision-making in the face of dynamic, threatening, and dangerous circumstances, as well as Officer testimony regarding uncertainty, delay and hesitation caused by the UF Policy and the resultant unreasonable risks and serious injuries to Officers and the public – was never considered in the Consent Decree litigation. The essential point here is that the Officers have been denied the opportunity to present the relevant facts because of the improper dismissal of their complaint.

The Officers seek this Petition so that the Court can correct this injustice. The Officers argue that the court of appeals reached an incorrect *legal* conclusion

that the UF Policy was reasonable and constitutional based: (1) on an incorrect analysis of the constitutional constraints placed on public employers who require their employees consistently to encounter violent suspects so handicapped in their ability to defend themselves and the public, that their fundamental right of self-defense is defeated; and (2) because the court of appeals endorsed the policy based on a reflexive, uninformed and superficial review of the UF Policy without regard to the Officers' detailed, well-plead factual allegations.

The proper result would have been for the court of appeals to acknowledge the Officers' Second Amendment rights (as it did), and properly determine the framework of these fundamental rights in the specific context of the Officers' job requirements to regularly encounter threatening suspects and make split-second, life and death decisions. (It did not.) With these legal parameters properly established, it should then have accepted the Officers' allegations – that specific policy provisions (ignored by the court of appeals) as well as the overall effect of the overly complicated and contradictory policy (also wholly disregarded), in light of the practical realities of policing and use of force decision-making under life threatening circumstances, unreasonably burden Officers' right of self-defense. As such, it should have reversed the dismissal of the Officers' complaint, allowing the Officers to present their evidence, and instructing the district court that if the Officers' allegations are proven true, strict scrutiny should be applied.

That is all the Officers ask of the Court – to correct the mistaken legal conclusions of the court of appeals and allow the Officers to proceed and prove their case.²

II. That the Policy Might Change Does Not Preclude the Court’s Consideration of the Significant Constitutional Issues at Stake Under the Second and Fourteenth Amendments.

The Ninth Circuit was clearly aware that the UF Policy might change, and any modifications would be subsequently reviewed by Judge Robart, because the City made multiple attempts seeking judicial notice of these facts. Indeed, the Ninth Circuit denied the City’s second request for judicial notice precisely because any modifications to the UF Policy “remain[] pending court approval.” *Mahoney v. Sessions*, 871 F.3d 873, fn. 2 (9th Cir. 2017). Notwithstanding its clear acknowledgment that the UF Policy is still somewhat a moving target, the court of appeals had no hesitation considering the constitutional issues raised by the Officers. This makes perfect sense.

First, to clarify, the City was required by the Consent Decree to *revise* its UF Policy. Under direct and

² The City also states that “this case does not present the question of whether some limitations on the use of firearms by public employees beyond those contained in the UF Policy could become significant enough to warrant strict scrutiny.” The Officers are baffled by this seemingly irrelevant statement. That the UF Policy creates unreasonable limitations on the Officer’s use of force, significant enough to destroy their fundamental right of self-defense, is the essential issue in this case.

heavy-handed supervision of the Monitor, FAC ¶ 17, it created an *entirely new*, unreasonably long, multi-part, multi-factored, contradictory and confusing UF Policy. That this new policy is unreasonably dangerous and wholly unworkable in threatening police encounters is the basis of the Officers' complaint. There have been subsequent revisions to the new UF Policy (thus the City's motions for judicial notice). In their responses to the City's motions, the Officers have documented the Monitor's consistent characterization of all subsequent changes as "minimal" and "minor," and "limited" and "tailored." 9th Cir. Dkt. 31.

Small changes cannot redress the Officers' allegations that the UF Policy in its entirety is fundamentally flawed. Nor can minor policy changes impact the questions of law at the heart of the Officers' lawsuit and properly before the Court: whether the Officers have the fundamental right of self-defense when required by their job to confront dangerous suspects and life threatening circumstances; including whether use of force policies *must* be written so as to permit the Officers to make *timely* use of force decisions under rapidly unfolding circumstances, and avail them of *the full range* of objectively reasonable use of force, to protect their lives and the lives of innocent bystanders, as required by the Second and Fourteenth Amendments.

That the UF Policy keeps changing (albeit in only minor and insignificant ways) – in fact, that it seems to be an ongoing and seemingly never-ending process of revisions – only exacerbates the problem. That the City, at the Monitor's beckon, is "continually proposing"

and revising the details of an already confusing and complex UF Policy certainly makes it no safer for the Officers, or for the public they are sworn to protect.

III. The Officers Were Not Required to Pursue Their Claims in the Consent Decree Litigation.

The City asserts, as it did unsuccessfully in the district court, that the Officers should have raised “through their union” their concerns regarding the constitutionality of the UF Policy in the Consent Decree proceedings but have “elected not to do so.” Op. Br. 2. This is grossly incorrect and a misleading suggestion that the Officers have forfeited their claims.

The Officers’ union, the Seattle Police Officers Guild (“SPOG”), has *never*, at any point, been a party to the Consent Decree proceedings. Thus, the City’s cavalierly offered option has *never*, in fact, been available to the Officers. Nor has the City provided any authority for its naked assertion that the Officers “have a *right* through their union to participate” in those proceedings. Op. Br. at 2, 19 (emphasis added). The City implies, incorrectly, that the Officers, as union members, have the unrestricted ability to force their union to bring an action on their behalf.

Moreover, even if SPOG had sought to intervene, and been granted such status as suggested by the City (*citing United States v. Los Angeles*, 288 F.3d 391, 398-402 (9th Cir. 2002)), that result would not preclude the Officers’ lawsuit. As the Ninth Circuit noted in the *Los*

Angeles case, when it denied intervention status to certain individuals with arguably protectable interests related to the Consent Decree litigation to which they sought to intervene, nothing about that existing litigation prevented those individuals from initiating their own lawsuit to prove that the City of Los Angeles' policy was violating their constitutional rights. *Id.* at 402.

Similarly here, the Officers bring their case based on their constitutional rights as citizens to take timely, reasonable actions in self-defense and in defense of innocent bystanders. The Officers do not forfeit their rights as citizens because they are serving as public employees. *Garrity v. New Jersey*, 385 U.S. 493 (1967). Nor has the City provided any authority to suggest that because the Officers are represented by a union regarding some workplace matters, they have forfeited their opportunity to bring a legal action to protect fundamental rights.

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CONCLUSION

If the Court declines the Officers' Petition, the City of Seattle and other jurisdictions will have free rein to create unworkable and unreasonably dangerous policy to govern encounters between police officers and threatening suspects. They will be allowed to do so without regard for the real and present dangers faced by police officers who are daily required to confront violent and volatile individuals in order to protect the public. The Officers respectfully request that the Court

accept their Petition to correct this dangerous, life-threatening situation, and affirm that such flawed policies conflict with the Officers' fundamental right of self-defense.

Respectfully submitted,

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