No. ___

IN THE

Supreme Court of the United States

JODY LOMBARDO, ET AL.,
Petitioners,

v.

CITY OF ST. LOUIS, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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September 17, 2020

QUESTION PRESENTED

Whether a reasonable jury could find that officers used excessive force when they put a handcuffed and shackled person face-down on the ground and pressed into his back until he suffocated.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Jody Lombardo and Bryan Gilbert were plaintiffs in the district court and appellants in the court of appeals.

The following respondents were defendants in the district court and appellees in the court of appeals: City of St. Louis; Ronald Bergmann; Joe Stuckey; Paul Wactor; Michael Cognasso; Kyle Mack; Erich vonNida; Bryan Lemons; Zachary Opel; Jason King; Ronald DeGregorio.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Lombardo, et al. v. St. Louis City, et al.*, No. 16-cv-1637 (E.D. Mo.) (memorandum and order granting summary judgment, issued February 1, 2019);
- *Lombardo, et al. v. City of St. Louis, et al.*, No. 19-1469 (8th Cir.) (opinion affirming summary judgment, issued April 20, 2020).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Regulations

Other Authorities

INTRODUCTION

Few legal issues have so quickly captured the attention of so many as the one presented here: If police officers put a handcuffed person face-down on the ground and push into him until he suffocates, is that excessive force?

The Eighth Circuit held that the answer in this case is no, and that no reasonable juror could disagree. It held that there was no constitutional violation *at all* when six officers pressed their collective weight into the body and back of a man who was handcuffed and shackled in a face-down position while having a mental-health crisis inside of a secure holding cell—for 15 minutes, until he died. In reaching that conclusion, the court held that both the amount and duration of force that officers applied to his back are "insignificant" to the excessive-force question—even if that force caused his death—because his "attempt to breathe" constituted "ongoing resistance," justifying *any* amount of continued asphyxiating force. App. 8a–9a.

The Eighth Circuit's holding contradicts the holdings of every other circuit to address the same issue. *See, e.g.*, *Hopper v. Plummer*, 887 F.3d 744 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 567 (2019); *McCue v. City of Bangor*, 838 F.3d 55 (1st Cir. 2016); *Abdullahi v. City of Madison*, 423 F.3d 763 (7th Cir. 2005); *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2871 (2004). In those circuits, "the law [is] clearly established that applying pressure to [a face-down person's] back, once he [has been] handcuffed and his legs restrained, [is] constitutionally unreasonable due to the significant risk of positional asphyxiation associated with such actions." *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2387 (2009). Or put conversely: "No reasonable officer would continue to put pressure on [an] arrestee's back after the arrestee was subdued by

handcuffs, an ankle restraint, and a police officer holding the arrestee's legs." *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 905 (6th Cir. 2004), *cert. denied*, 125 S. Ct. 1837 (2005). The decision below holds exactly the opposite.

The decision also diverges from other circuits by holding that (1) a struggle to breathe justifies the very conduct causing the inability to breathe in the first place, and (2) an expert opinion on the cause of death may be disregarded when the decedent struggled for air or had used a drug. Other circuits do not resolve these questions at summary judgment. Instead, they recognize that, when officers cause someone to suffocate, a jury may draw "an inference" that the person's efforts to lift his chest were "an attempt to gasp for air and escape the compressive weight of the officers on top of him." *Martin v. City of Broadview Heights*, 712 F.3d 951, 959 (6th Cir. 2013); *see also Abdullahi*, 423 F.3d at 771. In a case decided the same week as the decision below, the Fifth Circuit described the rule like so: When a handcuffed person was "pinned down by multiple officers and appeared to be struggling to breathe, a jury could find that he was 'merely trying to get into a position where he could breathe and was not resisting arrest.'" *Goode v. Baggett*, 811 F. App'x 227, 232 (5th Cir. 2020). The court explained that allowing the issue of excessive force to go to the jury, particularly when there is also a "battle of the experts," coheres with the decisions of all of "our sister circuits." *Id.* at 235 n.8. No longer.

The Eighth Circuit's contrary holding—and the split that it creates—is already making a mark. In another case involving a prone-restraint death, a district court granted the officers qualified immunity because "there is a circuit split on the constitutionality of prone restraints" that "became apparent with the Eighth Circuit's decision in *Lombardo*," which contradicts "cases from the First,

Sixth, Seventh, Ninth, and Tenth Circuits." *Timpa v. Dillard*, 2020 WL 3798875, *9-10 (N.D. Tex. July 6, 2020).

This split is intolerable. If left in place, it could vastly expand the scope of qualified immunity in prone-restraint cases, while also hindering the ability of the Department of Justice to criminally prosecute officers in such cases. The Eighth Circuit's decision will govern any case in that circuit involving the death of a handcuffed person pressed to the ground—including, potentially, any case concerning the death of George Floyd, who was killed by Minneapolis police in May. *See* Messenger, *St. Louis case of prone restraint jail death could affect outcome of George Floyd civil action*, St. Louis Post-Dispatch (June 4, 2020), https://perma.cc/KL3J-UJ8P/. The decision has already been deployed by one officer charged in Floyd's killing, who is using it to argue that Floyd's constitutional rights were not violated—because the court below "interpreted" an attempt to breathe "'as ongoing resistance.'"

Certiorari is also warranted because this fact pattern "appears with unfortunate frequency in the reported decisions of the federal courts," and "with even greater frequency on the street." *Drummond*, 343 F.3d at 1063. Yet it hasn't been directly addressed by this Court. "Although guns represent the paradigmatic example of 'deadly force,' [*Tennessee v. Garner*, 471 U.S. 1 (1985)] failed to address whether other police tools and instruments can also be characterized as 'deadly force.' Lower courts since have struggled with [that question]," including in some cases involving "restraint in a prone position." *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998). This lack of guidance has prompted disagreement in cases far closer than this one. *See, e.g.*, *Weigel*, 544 F.3d at 1169, 1176 (O'Brien, J., dissenting) ("[C]aselaw from other circuits [is] conflicting" and

"provide[s] no coherent guidance" when one officer applied three minutes of force to restrain man who reached for gun); *Abdullahi*, 423 F.3d at 776 (Evans, J., dissenting) (30–45 seconds of force to back by one officer).

Police, too, need guidance. As 21 states told this Court in urging review in 2009: "[P]olice agencies are interested . . . particularly in the reasonableness of police control techniques that pose a risk of positional asphyxia" because "officers need to know whether and to what extent" such force is permissible. Br. of Indiana, et al., in *Broad v. Weigel*, No. 08-1128, at 3. They argued that—with respect to qualified immunity (an issue not presented here)—the "[c]ircuits [were] in disarray over whether and to what extent police control techniques resulting in positional asphyxia violated clearly established" rights. *Id.* at 3–4. The decision below, and the events that have followed, make painfully clear that this Court's intervention is now necessary. As the states put it in 2009: "The Court has never addressed a positional asphyxia case, but given the unfortunate volume of such cases and the disparate views lower courts have of them, it needs to do so." *Id.* at 4.

In the decade since, "[a]t least 134 people have died in police custody from 'asphyxia/restraint.'" Wedell, Kelly, McManus, & Fernando, *George Floyd is not alone. 'I can't breathe' uttered by dozens in fatal police holds across U.S.*, USA Today, June 13, 2020, https://perma.cc/K2ZG-YYVF. Most of these deaths occurred in cases sharing features with this one: an unarmed man, suffering from "mental illness" or influenced by "drugs or alcohol," pressed face-down on the ground after being handcuffed, and held there until he died. *Id.* The decision below will only make this worse. It not only refuses to allow a jury to take into account these well-known risk factors in assessing reasonableness, but it actually turns them on

their head—using them as a perverse legal justification for engaging in the precise conduct that is so dangerous.

This case presents a perfect opportunity for this Court to send a message: "This has to stop." *Estate of Jones by Jones v. City of Martinsburg*, 961 F.3d 661, 673 (4th Cir. 2020). There is now a square split, and this case provides an unusually clean vehicle. The Eighth Circuit's decision is based solely on its constitutional holding, so there is no qualified-immunity obstacle encumbering review. And the decision is plainly wrong. The amount of force used, and for how long, are not "insignificant" to the constitutional question; they are its essence. The case also involves an egregious use of force: The officers knew that the man was having a mental-health crisis and posed no threat to them, and yet they put 1300 pounds on top of him—much of it specifically on his back—for 15 minutes as "he attempted to lift his body up" for air and said: "It hurts. Stop."

When this Court's cases speak of "resist[ance]," this is not what they mean. *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015). The officers' actions violated longstanding DOJ guidelines and are banned in states like Ohio. A reasonable jury could easily find them to be excessive.

The Eighth Circuit's holding to the contrary may even be a candidate for summary reversal. *See Tolan v. Cotton*, 572 U.S. 650 (2014). In recent years, some members of this Court have remarked on what they see as an "asymmetry" in summary reversals in excessive-force cases. *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1283 (2017) (Sotomayor, J., dissenting from denial of cert.). This case may allow the Court to address any such asymmetry—and to make clear that its cases reflect concern not only for the "breathing room" of police officers in their encounters with civilians, *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011), but also for the other way around.

OPINIONS BELOW

The Eighth Circuit's decision is reported at 956 F.3d 1009 and reproduced at 1a. The district court's decision is reported at 361 F. Supp. 3d 882 and reproduced at 11a.

JURISDICTION

The court of appeals entered judgment on April 20, 2020. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

The Fourteenth Amendment provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Section 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." 42 U.S.C. § 1983.

STATEMENT

A. Factual background

The dangers of prone restraint: the "vicious cycle" of compression and struggling for air. Police have known for decades that "keeping suspects in the prone position, meaning they lie face-down with their hands cuffed behind their backs, for an extended period of time" is a "dangerous position," "because it's known to cause what's called positional asphyxia." Andrews, *The 'knee-to-neck' move used to restrain George Floyd isn't encouraged by most police*, CNN, May 28, 2020, https://perma.cc/A68Y-YGRG. "Someone in that position can draw enough breath to gasp or speak in spurts, but they can't breathe fully, so they gradually lose oxygen and fall unconscious." *Id.*

This risk of death is exacerbated when police also put pressure on the person's back, which can make it even harder to breathe and cause compression asphyxia. The longer a person is restrained in a prone position, and the greater the force applied to their back, the more likely it is that they will suffocate. For this reason, "[o]fficers must be attuned to the amount and duration of any weight they place on [a prone] subject[']s" back. Stoughton, Noble, & Alpert, *Evaluating Police Uses of Force* 203 (2020).

This is a well-documented danger. Over 25 years ago, the DOJ's National Institute of Justice conducted an "analysis of in-custody deaths, [and] discovered evidence that unexplained in-custody deaths are caused more often than is generally known" by asphyxia. JA1930. The agency issued a bulletin to "alert officers to those factors found frequently in deaths involving positional asphyxia," to enable them "to respond in a way that will ensure the subject's safety and minimize risk of death." *Id.*

The DOJ bulletin explained that drug use is a "major risk factor because respiratory drive is reduced." It also explained that "frenzied behavior" or a "violent struggle" can further "increase a subject's susceptibility to sudden death." *Id.*; *see also* Wedell, Kelly, McManus & Fernando, *George Floyd is not alone* ("Studies dating back decades have shown that mental illness and drug intoxication increase the risk of death by 'positional asphyxia' if placed face down with the hands cuffed behind the back.").

In addition, the DOJ bulletin described the "vicious cycle of suspect resistance and officer restraint:

- A suspect is restrained in a face-down position, and breathing may become labored.
- Weight is applied to the person's back—the more weight, the more severe the degree of compression.
- The individual experiences increased difficulty breathing.
- The natural reaction to oxygen deficiency occurs—the person struggles more violently.
- The officer applies more compression to subdue the individual."

JA1930–31; *see Howe v. Town of N. Andover*, 854 F. Supp. 2d 131, 139–40 (D. Mass. 2012) (same).

1995 DOJ bulletin to police: "As soon as the suspect is handcuffed, get him off his stomach"—"do not sit on his back." The DOJ bulletin gave specific guidelines to avoid this cycle of death. It told law enforcement that "officers should learn to recognize factors contributing to positional asphyxia," and issued a clear directive: "As soon as the suspect is handcuffed, get him off his stomach." JA1931. The bulletin used guidelines adopted by the New York City Police Department as a model:

- "As soon as the subject is handcuffed, *get him off his stomach*. Turn him on his side or place him in a seated position.
- If he continues to struggle, *do not sit on his back*. Hold his legs down or wrap his legs with a strap."

JA1932 (emphasis in original); *see* Baker & Goodman, *The Evolution of William Bratton, in 5 Videos*, N.Y. Times, July 25, 2016, https://perma.cc/L8HZ-XC26 (training video on policy); *Weigel*, 544 F.3d at 1150 (discussing video and same policy of Wyoming police).

After the DOJ bulletin, police departments warn officers of the danger of "facedown compression holds." Twenty-five years later, the dangers of prone restraint are now "well known in the law enforcement community." JA1783. Because of DOJ's bulletin, "[d]epartments across the United States have for years warned officers about the risks of moves such as facedown compression holds." Baker, Valentino-DeVries, Fernandez, & LaForgia, *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe.'*, N.Y. Times, June 29, 2020, https://perma.cc/HMJ2-V2JJ.

"To alleviate potential dangers, [many] officers are told now to promptly get detainees off their stomachs and onto their sides—or up to a sitting or standing position." *Id.*; *see* Heiskell, *How to Prevent Positional Asphyxia*, POLICE Magazine, Sept. 9, 2019, https://perma.cc/7N7Q-CQRQ ("Many [officers] are now taught to avoid restraining people face-down or to do so only for a very short period of time."). Moreover, because the dangers of asphyxiation are made worse "by compressing the lungs, which the weight of several persons on one's back can do," most "police are [also] warned not to sit on the back of a person they are trying to restrain." *Richman v. Sheahan*, 512 F.3d 876, 880 (7th Cir. 2008). That is true "even if the

subject is continuing to struggle" after being handcuffed. *See* Wedell, Kelly, McManus & Fernando, *George Floyd is not alone* (describing Kansas City, Kansas police use-of-force policy, which "says any pressure on the torso and abdomen must be removed and the person rolled onto the side 'as soon as the subject is restrained and it is safe to do so, even if the subject is continuing to struggle'").

Some agencies have gone further, "banning officers from placing people in the face-down position" after handcuffing them. *Id.* In 2009, for example, Ohio outlawed prone restraint across all state agencies. JA1935. It did so because "[a]ccepted research has shown that there is a risk of death when restraining an individual in a prone position," and "[t]his research has led other states to prohibit this restraint technique." JA1970.

St. Louis City's awareness of the problem. St. Louis, which has one of the nation's highest rates of police killings, *see* http://useofforceproject.org/#analysis, is not one of those jurisdictions. It has not prohibited the use of prone restraint or pressing down on the back of someone held in that position. But its representative testified that the City, like other jurisdictions, "has known about the dangers of compression asphyxia for a long time." JA1783; *see* JA1808 (City expert: "A lot of these protocols were put in place" after DOJ bulletin "telling officers about the dangers of compression asphyxia."). The City knows that "it's dangerous to hold a citizen in the prone position for an extended period of time," and that "a citizen could be killed if too much weight is put on his back." JA1782; *see also* JA1809–10 (City expert: You "do not compress the chest . . . because if you compress the chest you can kill somebody," and "you don't hold them on the ground in a prone position handcuffed for an indefinite period of

time," but must "get them on their side as soon as you can" because "it's dangerous if you don't.").

The City's representative further testified that, because it's important that officers "receive training about positional asphyxia" and "compression asphyxia," the City tries to "teach officers that it can be dangerous to hold someone in a prone position," and they "can't just leave somebody on their stomach cuffed." JA1774–79. Officers also "receive training on how to deal with emotionally disturbed persons." JA1777. But the quality and consistency of any training varies. There is "no official block on" asphyxia, and it is "not delineated within the training manual." JA1777–78. Some officers cover it in their training; others don't. *Id.*

Years after the DOJ bulletin, the problem of in-custody asphyxia persists. Despite increased awareness of the dangers, many officers continue to put handcuffed subjects into a prone position and push down on their backs. And many people continue to die as a result. One report concluded that "[a]t least 134 people have died in police custody from 'asphyxia/restraint' in the past decade alone"—a figure that "is likely an undercount." Wedell, Kelly, McManus & Fernando, *George Floyd is not alone*. An examination of some of these incidents "show[ed] that officers in agencies big and small use restraint tactics that heighten people's risk of death," including "pressing or laying on a person's back to keep them face down." *Id.* The victims were often "stopped for minor infractions," or "because they were acting erratically due to drugs or mental illness." *Id.* "Most of those killed suffered from underlying health conditions [or] mental illness or were under the influence of drugs or alcohol—factors that could have heightened their distress and complicated their ability to understand or comply with police orders." *Id.*

A separate analysis found the same. "Most frequently, officers pushed [the decedent] face down on the ground and held them prone with their body weight." Baker, Valentino-DeVries, Fernandez, LaForgia, *Three Words. 70 Cases.* Nearly half the time, "the people who died after being restrained . . . were already at risk as a result of drug intoxication. Others were having a mental health episode or medical issues." *Id.* Further, "[a]utopsies have repeatedly identified links between the actions of officers and the deaths of detainees who struggled for air, even when other medical issues such as heart disease and drug use were contributing or primary factors." *Id.*

According to experts, these "deaths continue to occur" in "large part because of a lack of training" and a lack of accountability. *See* Wedell, Kelly, McManus & Fernando, *George Floyd is not alone*. "In virtually every case, the officers involved faced little repercussion." *Id.*

Nicholas Gilbert dies of asphyxiation at the hands of St. Louis City police. This case fits the pattern. In late 2015, a 27-year-old homeless man named Nicholas Gilbert was arrested on non-violent misdemeanors (trespassing, occupying a condemned building, and failing to appear in court for a traffic violation). App. 15a. Police brought him to a "secure holding facility" for booking and locked him in an individual cell. *Id.*

There was no video of what came next, and Gilbert would not live to tell his side of the story, but officers said that, at some point, Gilbert began to act strangely. Officer Joe Stuckey testified that he noticed that Gilbert was "exhibiting signs of impaired mental function," suggesting that he "could have mental issues," "be highly agitated," or "on [a] chemical substance." App. 16a. Officer Stuckey said that he saw Gilbert "tying an article of clothing around the bars of his cell and putting it around his neck."

Id. But rather than untying the item, taking it away, and calling EMS, Officer Stuckey took a more confrontational approach. He unlocked the cell and went inside, followed by Officer Roland DeGregorio and Sergeant Ronald Bergmann. *Id.* At that point, "Gilbert did not have any clothing tied to his neck," App. 17a—Officer DeGregorio said that it was "still tied to the door of the cell," JA1739—and Gilbert "just had his hands up." App. 18a.

A detainee in a nearby cell, however, testified that the real reason the officers went into Gilbert's cell was "to make him be quiet." JA1725. They "told him to shut up," and he "wouldn't shut up." *Id.* Even though Gilbert had said "no threatening stuff," the officers were "aggravated" and "wanted him to be quiet." JA1726. The witness saw Officer Stuckey with "his chest poked out, and he was putting his gloves on" before he "rushed in" and "tried to make [Gilbert] be quiet." JA1727. The witness then heard "rumbling," and saw "like five, six, seven other police officers run through that same door." JA1728.

Officer Stuckey testified that he opened the cell to put Gilbert in handcuffs, and Gilbert tried "to avoid being handcuffed." App. 18a. Officer Stuckey and his two fellow officers said that they were able to get Gilbert handcuffed behind his back, but they claimed that Gilbert then bashed his own head against a concrete bench and kicked Stuckey. *Id.* Two other officers came into the cell and applied leg-shackles to Gilbert, and Sergeant Bergmann requested EMS. App. 19a. One officer who applied the shackles left to radio EMS about "possible psychotic issues." App. 20a. Stuckey also left.

Shortly thereafter, Officer DeGregorio and Sergeant Bergmann had become so "winded" and "exhausted" from applying force to Gilbert ("who was five feet three inches tall and weighed 160 pounds") that they "stepped out" to

catch their breath. App. 15a, 20a–21a. They were relieved by five officers—for a total of six officers inside the cell. By the time those officers arrived, Gilbert had been moved to a prone position on the ground and had been handcuffed behind his back and shackled at the legs. App. 20a–21a.

These six officers—who together weighed more than 1300 pounds—spent the next 15 minutes pressing their weight into Gilbert's body. They kept doing so even as "he attempted to lift his body up" for air and said: "It hurts. Stop." App. 36a. Officer Michael Cognasso testified that, as he was holding Gilbert's legs, multiple other officers applied pressure to Gilbert's "upper right side" and the "lower or middle part of his torso." App. 5a. Officer Cognasso admitted that, once Gilbert was "shackled and handcuffed [], he couldn't harm anyone at that point." JA1795. Nor was Cagnasso the only officer holding down Gilbert's legs. Officer Bryan Lemons, who was a foot taller than Gilbert and had 100 pounds on him, testified that he too was holding down Gilbert's legs, making it impossible for Gilbert to kick anyone, and that Gilbert "stopped struggling . . . when we got him handcuffed and secured." JA275–80.

After 15 minutes of six officers pushing into "various parts of [Gilbert's] body," including his back, App. 5a, Gilbert succumbed to the pressure and stopped breathing. The officers finally let up, and a short time later EMS arrived. But it was too late. Gilbert had died. An autopsy revealed that he had a "fractured sternum" and contusions and abrasions on his shoulders and upper body. App. 24a. A medical report said that the "cause of death was forcible restraint inducing asphyxia," while methamphetamine and heart disease were "underlying factors." App. 5a, 38a.

Afterward, the City admitted that deadly force was not authorized because Gilbert was handcuffed and face-down

in a cell, and that the only possible government interest in using any force on Gilbert was his own "self-preservation." JA1762–71. No officer involved in the incident, however, identified any reason why they applied force specifically to his back, let alone why such force had to be applied for 15 minutes. Nor was any officer disciplined. App. 24a.

B. Procedural background

Gilbert's parents sued both the City and the officers, alleging (among other things) violations of the Fourth and Fourteenth Amendments. Jurisdiction was based on 28 U.S.C. § 1331. After the case was pared down to excessive-force claims against the officers and *Monell* claims against the City, the defendants sought summary judgment.

The district court's decision. The district court granted summary judgment as to all claims. App. 73a. In doing so, the court accepted the following facts as true:

- Gilbert "was having a mental health crisis and posed no threat," App. 32a;
- He was handcuffed and leg-shackled, and was then held on the ground of a secure holding cell "in the prone position for fifteen minutes," App. 50a, 60a;
- While on the ground, his "actions were innocent" and "based on 'air hunger,'" App. 34a;
- He "was not ignoring commands or being violent," *id.*;
- "Officers used force upon his back," App. 60a, as well as his "sides," "torso," and "other parts of his body," App. 39a;
- He "was 'yelling pleas for help' and pleading 'It hurts. Stop.'" App. 36a;
- He "remained restrained and in a prone position until he stopped breathing," App. 42a;

- Six officers "did not stop using force until after they realized Mr. Gilbert had stopped breathing," App. 53a;
- "[T]he cause of death was asphyxiation." App. 39a.

The district court did "not reach the issue of whether [these] facts demonstrate that the Defendant Officers' conduct was objectively reasonable" and thus "violated a constitutional right." App. 71a. Instead, the court held that a violation was not "clearly established" on such facts, so the officers were entitled to qualified immunity. *Id.*

The court relied on a 2-1 Eighth Circuit decision from 2017 (after the conduct here occurred) holding that "the simultaneous placing of body weight by multiple officers on a restrained, prone individual inside of a small jail cell which results in death does not amount to excessive force." App. 48a. But as the court acknowledged, *id.*, a video in that case showed that force was applied for just a few minutes (with most of it coming during an intense struggle to apply handcuffs). So the district court looked beyond the Eighth Circuit. In doing so, it did not identify any precedent indicating that the conduct here was lawful. Rather, it cited six unpublished decisions, plus two Fifth Circuit cases granting qualified immunity. Based on these decisions, the court concluded that "the circuits are split among and within themselves on cases with similar facts involving the use of force upon a prone individual." App. 69a. It thus granted qualified immunity.

The court then addressed the *Monell* claims. It concluded that, because the officers are immune, "the City cannot be held liable." App. 73a.

The Eighth Circuit's decision. The Eighth Circuit affirmed, but not on qualified-immunity grounds. It held that no reasonable jury could find that the officers used

excessive force and dismissed the claims against both the officers and the City on that basis alone.

In its decision, the Eighth Circuit did not take issue with any of the facts accepted as true by the district court, but concluded that those facts do not amount to excessive force as a matter of law. It held that the amount of time that officers held down Gilbert after he was handcuffed and shackled (15 minutes) is "insignificant" to the excessive-force question, as is his cause of death. App 8a. The same was true of the amount of force used (the weight of six officers) and the fact that "officers put weight on various parts of [Gilbert's] body, including [his] upper" and "middle" back. App. 5a. The court held that *any* amount of asphyxiating force was justified because Gilbert first resisted being handcuffed, because his "attempt to breathe" and "to tell the Officers that they were hurting him" was "ongoing resistance," and because he had "methamphetamine in his system." App. 9a.

Having held that "the Officers did not violate Gilbert's constitutional rights," the court then held that "the City cannot be held liable under § 1983" as result. App. 10a.

REASONS FOR GRANTING THE PETITION

I. The decision below creates a circuit split as to the constitutionality of suffocating a prone and handcuffed person by putting force on their back.

As courts have recognized, there is now a "circuit split" between "the Eighth Circuit's decision in *Lombardo*" and "cases from the First, Sixth, Seventh, Ninth, and Tenth Circuits." *Timpa*, 2020 WL 3798875, at *9. In contrast to the court below, those five circuits recognize that "[n]o reasonable officer would continue to put pressure on [an] arrestee's back after the arrestee was subdued by handcuffs, an ankle restraint, and a police officer holding

the arrestee's legs." *Champion*, 380 F.3d at 905. The law in those circuits is thus "clearly established that applying pressure to [a prone person's] back, once he [has been] handcuffed and his legs restrained, [is] constitutionally unreasonable due to the significant risk of positional asphyxiation associated with such actions." *Weigel*, 544 F.3d at 1155.

Seventh Circuit. Start with the Seventh Circuit. In 2005, it considered a case involving a man (Mohamed) also in a mental-health crisis. *Abdullahi*, 423 F.3d 763. Unlike Gilbert, he even posed a threat: He "stagger[ed] across three lanes of traffic" and "punched [a person] in the face" who tried to help. *Id.* at 765. He began "whipping his belt" when officers arrived. *Id.* Three officers "took him to the ground, onto his stomach," to handcuff him. *Id.* "Once on the ground, Mohamed began kicking his legs, moving his arms so they could not be handcuffed and arching his back upwards as if he were trying to escape." *Id.*

As the other officers were holding Mohamed's legs, one officer "placed his right knee and shin on the back of Mohamed's shoulder area and applied his weight to keep Mohamed from squirming or flailing." *Id.* The officer "took his weight off Mohamed after the handcuffing was complete." *Id.* The officer's "knee and shin were on the back of Mohamed's shoulder for approximately 30–45 seconds." *Id.* Multiple civilian eyewitnesses "testified that Mohamed acted aggressively and that the defendant police officers did not hit, strike or choke Mohamed." *Id.* at 767. Two minutes later, Mohamed died.

The Seventh Circuit analyzed the reasonableness of "kneeling on Mohamed's back/ shoulder area after he was already lying prone with his hands behind him." *Id.* at 768. It noted that the officer "knelt on Mohamed's shoulder or back for 30–40 seconds while Mohamed was prone on the

ground," Mohamed then died, and "[n]o one contends that deadly force was justified once Mohamed was lying prone on the ground with his arms behind him." *Id.* at 769. "Based on these straightforward facts alone," the Seventh Circuit held that "there is an issue of material fact as to whether [the officer] used an unreasonable amount of force." *Id.*

It elaborated: "The reasonableness of kneeling on a prone individual's back during an arrest turns, at least in part, on how much force is applied. Kneeling with just enough force to prevent an individual from 'squirming' or escaping might be eminently reasonable, while dropping down on an individual or applying one's full weight (particularly if one is heavy) could actually cause death." *Id.* at 771. Given the evidence of Mohamed's cause of death—which could not be "discount[ed]" at summary judgment—the court noted that Mohamed's "attempts to 'squirm' or arch his back upward while he was being restrained may not constitute resistance at all, but rather a futile attempt to breathe while suffering from physiological distress 'akin to drowning.'" *Id.* at 771–73.

The Eighth Circuit's decision below unquestionably conflicts with *Abdullahi*. If a single officer applying force to the back of a combative, not-yet-handcuffed suspect for a half-minute along the roadside may rise to the level of excessive force, the same result would have to be true here. Had Gilbert died across the river in East St. Louis, therefore, this case would have come out the other way.

Sixth Circuit. The same goes for the Sixth Circuit. Its most recent decision, *Hopper v. Plummer*, 887 F.3d 744, is the most analogous. There, a man "suffered a seizure two days after he was booked" into jail for failing to appear at a hearing. *Id.* at 745. Officers went into his cell and forced him to the ground because they were "afraid he

would . . . hurt himself." *Id.* at 749. Video evidence showed that they "cuffed him behind his back" and a half-dozen officers then "restrained him face down on the floor" until he "died after a twenty-two minute struggle." *Id.*

The Sixth Circuit held that a jury could find not only that the officers used excessive force, but also that they were not entitled to qualified immunity. The court relied primarily on its 2004 decision in *Champion*, which "considered an excessive-force claim brought by the family of a severely autistic man who died after several arresting officers restrained him, prone on the ground and handcuffed behind his back, for seventeen minutes." *Id.* at 754. *Champion* "explained that '[c]reating asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect constitutes objectively unreasonable excessive force.'" *Id.* (quoting *Champion*, 380 F.3d at 903). That was true even though the suspect "arguably posed a threat" because he "had created a disturbance in a store and 'kick[ed] violently' while on the ground." *Id.* at 755 (quoting *Champion*, 380 F.3d at 897). In *Hopper*, by contrast, there was "no dispute that [the decedent] was suffering a medical emergency, or that while he may have kicked and thrashed, defendants did not consider him a threat to anyone after he was handcuffed." *Id.*

The Sixth Circuit in *Hopper* thus concluded that "'the prohibition against placing weight on [his] body after he was handcuffed was clearly established in the Sixth Circuit." *Id.* at 754 (quoting *Martin*, 712 F.3d at 962). Because it was clearly "'unconstitutional,' on May 19, 2012, to create asphyxiating conditions by 'forcibly restraining an individual in a prone position for a prolonged period of time' when that individual posed no material threat," qualified immunity was improper. *Id.* at 756.

Other cases in the Sixth Circuit hold likewise. *See, e.g.*, *Martin*, 712 F.3d at 960–61 ("The prohibition against placing weight on Martin's body after he was handcuffed was clearly established in the Sixth Circuit," especially because he was "unarmed, minimally threatening, and mentally unstable."); *Kulpa v. Cantea*, 708 F. App'x 846, 851–53 (6th Cir. 2017) (holding same where officers handcuffed detainee having mental-health episode, placed him face-down, and put weight on his back for under 45 seconds after he'd been "squirming," causing him to die).

The Sixth Circuit's rule is thus clear: "[P]utting substantial or significant pressure on a suspect's back while that suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force"—particularly when the officers knew that he was "mentally ill" or under the influence of drugs (which "must be taken into account"). *Champion*, 380 F.3d at 903–04. And that is so even if he was "moving . . . in an attempt to breathe." *Id.* at 905; *see also Martin*, 712 F.3d at 959 (holding that jury may infer that a person's "physical movements" and "active[] struggle[]" "were an attempt to gasp for air"). "No reasonable officer would continue to put pressure on that arrestee's back after the arrestee was subdued by handcuffs, an ankle restraint, and a police officer holding the arrestee's legs." *Champion*, 380 F.3d at 905. Yet that is exactly what happened in this case.

Tenth Circuit. The Tenth Circuit has the same rule. In 2008, it decided a case not unlike *Abdullahi*—involving a dangerous roadside encounter where one officer applied force to a combative suspect. The suspect (Weigel) "fought vigorously, attempting repeatedly to take the troopers' weapons and evade handcuffing." *Weigel*, 544 F.3d at 1148. After he was finally handcuffed, Weigel "continued to struggle." *Id.* at 1158 (O'Brien, J., dissenting). "With

Weigel positioned on his stomach, his hands and feet restrained, [one officer then] held down Weigel's upper body with his hands and/or knees, [another officer] straddled Weigel's buttocks and [a civilian] was on his legs. In spite of those restraints Weigel still managed to pinch [one officer's] thighs and groin area" and "continued to struggle and fight." *Id.* He was held in that position for up to three minutes, and then died. *Id.* at 1152.

The Tenth Circuit denied summary judgment to the officers. It based its conclusion on two things: "First, there is evidence a reasonable officer would have known that the pressure placed on Mr. Weigel's upper back as he lay on his stomach created a significant risk of asphyxiation and death. His apparent intoxication, bizarre behavior, and vigorous struggle made him a strong candidate for positional asphyxiation." *Id.* "Second, there is evidence that Mr. Weigel was subjected to such pressure for a significant period after it was clear that the pressure was unnecessary to restrain him. The defendants make no claim that once Mr. Weigel was handcuffed and his legs were bound, he still would pose a threat to the officers, the public, or himself unless he was maintained on his stomach with pressure imposed on his upper back." *Id.*

The court also denied qualified immunity. It explained that, "even after it was readily apparent for a significant period of time (several minutes) that Mr. Weigel was fully restrained and posed no danger, the defendants continued to use pressure on [his] upper torso while he was lying on his stomach. A reasonable officer would know these actions present a substantial and totally unnecessary risk of death." *Id.* at 1154. The court held that it "was clearly established that applying pressure to Mr. Weigel's upper back, once he was handcuffed and his legs restrained, was constitutionally unreasonable," and observed that "cases

from other circuits" agree. *Id.* at 1155; *see also id.* (Hartz, J., concurring).

Judge O'Brien dissented, expressing disagreement with the Sixth Circuit's holding in *Champion* that "briefly applying pressure to the torso of a resisting but restrained individual is unconstitutional." *Id.* at 1174. But after *Weigel*, that is now the Tenth Circuit's rule too. *See Estate of Booker v. Gomez*, 745 F.3d 405, 424–29 (10th Cir. 2014).

Ninth Circuit. Ditto for the Ninth Circuit. In 2003, it observed that, "in what has come to be known as 'compression asphyxia,' prone and handcuffed individuals in an agitated state have suffocated under the weight of restraining officers." *Drummond*, 343 F.3d at 1056–57. The court held that a jury could find that force was excessive when "two officers continued to press their weight on [a detainee's] neck and torso as he lay handcuffed on the ground and begged for air." *Id.* at 1056.

The Ninth Circuit has held firm to this view ever since. *See Krecham v. County of Riverside*, 723 F.3d 1104, 1108 (9th Cir. 2013) (reversing judgment for four officers who restrained unarmed delusional man in prone position and put weight on his back while "he was repeatedly kicking"); *Abston v. City of Merced*, 506 F. App'x 650, 652 (9th Cir. 2013) ("A [jury] could conclude that defendants' use of body compression as a means of restraint was unreasonable and unjustified by any threat of harm or escape when Abston was handcuffed and shackled, in a prone position, and surrounded by numerous officers."); *Tucker v. Las Vegas Metro. Police Dep't*, 470 F. App'x 627, 629 (9th Cir. 2012) ("[E]xisting law recognized a Fourth Amendment violation where two officers use their body pressure to restrain a delirious, prone, and handcuffed individual who poses no serious safety threat.").

The Ninth Circuit's cases therefore "make[] plain that multiple officers' use of prolonged body-weight pressure to a suspect's back is known to be capable of causing serious injury or death," particularly when the person is having a mental-health crisis. *Garlick v. County of Kern*, 167 F. Supp. 3d 1117, 1155 (E.D. Cal. 2016); *see also Greer v. City of Hayward*, 229 F. Supp. 3d 1091, 1104, 1107 (N.D. Cal. 2017). Moreover, whether a suspect was continuing to resist or instead struggling to breathe, and how an officer should have reacted, are questions for the factfinder. *See Tucker*, 470 F. App'x at 629 ("Keith, unlike Drummond, continued to resist the officers after handcuffs were applied, but this distinction does not, by itself, suffice to bring this case out of *Drummond*'s orbit."); *Garlick*, 167 F. Supp. 3d at 1156–57; *Greer*, 229 F. Supp. 3d at 1105.

First Circuit. The First Circuit is in accord. In 2016, it confronted a case much like this one: Five officers had "attempted to restrain" someone "who initially resisted," so they put him "in a face-down, prone position for [up to four minutes] while two officers exerted weight on his back and shoulders." *McCue*, 838 F.3d at 56. He "was declared dead shortly after," and an expert "attributed the likely cause of death to prolonged restraint in the prone position 'under the weight of multiple officers, in the face of a hypermetabolic state of excited delirium.'" *Id.*

The First Circuit held that "it was clearly established" that "exerting significant, continued force on a person's back 'while [he] is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force,'" for "[a]t least four circuits had announced this constitutional rule." *Id.* at 64 (quoting *Weigel*, 544 F.3d at 1155). "[A]s the abundant case law demonstrates, a jury could find that a reasonable officer would know or should

have known about the dangers of exerting significant pressure on the back of a prone person." *Id.* at 65.

Fifth Circuit. Finally, the same week that the Eighth Circuit issued the decision below, the Fifth Circuit denied qualified immunity in a similar case. *Goode*, 811 F. App'x 227. It concluded that summary judgment was improper because the decedent had been arrested for "nonviolent misdemeanors"; was unarmed; "was already handcuffed and subdued"; and was of "small size, particularly in comparison to that of the five Officers" who restrained him. *Id.* at 232. Moreover, although the "Officers claim[ed] that [he] was kicking and trying to roll over" while they were restraining him, given the fact that he "was pinned down by multiple officers and appeared to be struggling to breathe, a jury could find that he was 'merely trying to get into a position where he could breathe and was not resisting arrest.'" *Id.* The court cited an earlier decision holding that restraining someone "in a state of drug-induced psychosis and placing him face down in a prone position for an extended period constitutes excessive force"—a rule that "comports with the decisions of our sister circuits that have considered the reasonableness of using similar restraints on nonthreatening, minimally resistant individuals showing signs of drug use or mental disability." *Id.* at 235 n.8 (citing *Gutierrez*, 139 F.3d 441).

The decision below upends this consensus, creating a circuit split that only this Court can resolve.

II. The question presented is frequently occurring and important, and this case is an ideal vehicle.

A. The split should be resolved for four reasons.

First, "[t]he compression asphyxia that resulted [here] appears with unfortunate frequency in the reported decisions of the federal courts," and "with even greater

frequency on the street." *Drummond*, 343 F.3d at 1063. That has never been more apparent than now. Within days of the decision below, a similar fact pattern appeared in *Goode*. A month later, it showed up again when police in Minneapolis—having just been given a green light by their home circuit—held down a handcuffed George Floyd for nearly nine minutes. A month after that, while many people were still in the streets expressing outrage at Floyd's death, *Timpa* provided a fresh reminder of the disturbing frequency with which these incidents recur.

Second, because the decision below adopts a clear constitutional holding, it has the potential to dramatically expand the scope of qualified immunity for officers who apply deadly force to the backs of handcuffed suspects. As *Timpa* shows, it is already having that effect.

Third, by shrinking the scope of the constitutional right to be free from excessive force, the decision below will also sharply curtail DOJ's ability to criminally prosecute prone-restraint cases under 18 U.S.C. § 242, the "criminal counterpart" of section 1983. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 929 n.13 (1982); *see Hope v. Peltzer*, 536 U.S. 730, 739–40 (2002).

This is not a hypothetical concern. The decision has already been invoked by one officer charged by state prosecutors in Floyd's killing, who is using it to argue that Floyd's constitutional rights were not violated. The officer contends that Gilbert's "claim of unreasonable restraint was rejected by the Eighth Circuit, just as Mr. Floyd's should be here . . . The fact that Mr. Gilbert announced to the jailors that they were hurting him (read 'I can't breathe') was interpreted 'as ongoing resistance' [by the Eighth Circuit]. Mr. Gilbert's 'expert testimony that the use of prone restraint was the principal cause of Gilbert's death is less significant in light of Gilbert's ongoing

resistance, his extensive heart disease, and the large quantity of methamphetamine in his system.' Mr. Floyd's profile, not coincidentally." Reply in *Minnesota v. Lane*, No. 27-CR-20-12951 (4th Dist. Minn. Aug. 17, 2020) (citations omitted), https://perma.cc/W269-NA53. If that argument were accepted, it could also hamper any attempt by DOJ to prosecute the officers responsible for Floyd's death.

Fourth, the decision cements a legal regime in which officers in St. Louis and Kansas City, Missouri, operate under radically different rules than their counterparts in East St. Louis (where *Abdullahi* governs) and Kansas City, Kansas (where *Weigel* governs). Just as bad, officers in places like New York, Philadelphia, Baltimore, and the District of Columbia are now left to wonder on which side of the divide their circuits will fall—and hence which legal rule will govern their conduct.

This uncertainty is unacceptable. This is an area of the law where guidance to lower courts and law enforcement is especially important. Even before the decision below, in closer cases discussed earlier, judges disagreed about the results, with one judge lamenting what he saw as a lack of "coherent guidance." *Weigel*, 544 F.3d at 1169 (O'Brien, J., dissenting); *see also Abdullahi*, 423 F.3d at 776 (Evans, J., dissenting). Twenty-one states urged this Court to grant certiorari in that case. As they put it: "The Court has never addressed a positional asphyxia case, but given the unfortunate volume of such cases and the disparate views lower courts have of them, it needs to do so." Br. of Indiana, in *Broad*, at 4. This Court did not grant certiorari there, perhaps because there was no split then, or because the decision was correct. But the circumstances here are different. And the need for guidance is as great as ever.

B. This case is a perfect vehicle to address the question presented and bring uniformity and clarity to the law. The constitutional issue is cleanly teed up. It isn't encumbered by a qualified-immunity holding, and the issue also served as the basis for dismissing the *Monell* claims. And, as the case comes to this Court, the most important facts are all assumed, having been taken as true by the district court.

This case also bears all the characteristics of a typical prone-restraint death by asphyxiation. So answering the question "will be 'beneficial' in 'develop[ing] constitutional precedent' in an area that courts typically consider in cases in which the defendant asserts a qualified immunity defense." *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014). Yet the case is also an egregious example of excessive force: Gilbert was in a secure facility, officers knew he was having a mental-health crisis, and lethal force was not authorized because he presented no threat. JA1762.

III. The decision below is wrong.

This leads to the last reason to grant certiorari: The Eighth Circuit's decision is outlandishly wrong. It distorts and misapplies this Court's objective-unreasonableness test for excessive force, and it reaches the wrong result.

Any excessive-force inquiry "requires analyzing the totality of the circumstances," *Plumhoff*, 572 U.S. at 774, and weighing the "nature and quality" of the intrusion on the person's constitutional right against the governmental interests "alleged to justify the intrusion." *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017). The test is one of objective reasonableness, and "[a] court (judge or jury) cannot apply this standard mechanically." *Kingsley*, 576 U.S. at 397. It must give "careful attention to the facts and circumstances of each particular case," *Graham v. Connor*, 490 U.S. 386, 396 (1989), and consider "the relationship between the need for the use of force and the

amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting." *Kingsley*, 576 U.S. at 397.

The Eighth Circuit did not apply this test. It not only refused to consider the first four factors, but it treated these factors—including the duration and "amount of force" applied to Gilbert's back, and "the extent of [his] injury," *id.*—as "insignificant." App. 8a. The court deemed it similarly irrelevant that Gilbert posed no threat to the officers, had committed no serious crime, and was in a secure facility. All that mattered, according to the Eighth Circuit, is that he had initially struggled with the officers and then moved his body in "an attempt to breathe" once six officers were on top of him. App. 9a. In its view, these facts alone justified *any* amount of continued asphyxiating force, for *any* length of time—and all the more so because the officers knew he was having a mental-health crisis. *Id.*

Every aspect of this analysis is wrong. For one thing, the amount of force applied, where it is applied, and for how long it is applied are paramount to the excessive-force question—not "irrelevant." Pushing down on the back of a prone, restrained person for even 45 seconds can be fatal, and every minute on top of that only increases the risk of death. *See Abdullahi*, 423 F.3d at 765 (30–45 seconds); *Kulpa*, 708 F. App'x at 851–53 (45 seconds).

For another thing, the Eighth Circuit's decision treats force and resistance as binary questions, rather than as questions existing along a continuum. The question is not whether any force was justified here; it's whether *six officers* could use deadly force *on the back* of a five-foot-three-inch, 160-pound man for *15 minutes* while he was

handcuffed and face-down on the ground. That question answers itself.[1]

Worse still, the decision distorts the excessive-force inquiry in a way that creates the wrong incentives. It takes what is supposed to be a totality-of-the-circumstances test for a jury and turns it into a one-factor test for a judge: If a person was initially showing any resistance—no matter the circumstances—anything goes. Should he lift his chest in "an attempt to breathe" or "tell the Officers that they were hurting him," that is "continued resistance" justifying more force, App. 9a—inviting the "vicious cycle" that DOJ has warned against. Should he be having a mental-health episode or appear to have used a drug, that is not a reason to ease up, but a license to push down. No governmental interest remotely justifies such conduct, and certainly not as a matter of law.

CONCLUSION

The petition for certiorari should be granted.

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[1] The Eighth Circuit further erred in stating that "the undisputed facts show that Gilbert continued to violently struggle even after being handcuffed and leg-shackled," and that "Officers held Gilbert in the prone position only until he stopped actively fighting against his restraints." App. 8a–9a. The district court took "as true" that Gilbert "was not ignoring commands or being violent," App. 34a, and that officers "did not stop using force until after" he "stopped breathing." App. 53a. In any event, the only evidence to the contrary comes from the defendants' own mouths. And "[e]very circuit" recognizes that a court "may not simply accept what may be a self-serving account by the police officer[s]" when "the witness most likely to contradict [their] story—the person [they killed]—is unable to testify." *Flythe v. District of Columbia*, 791 F.3d 13, 20 (D.C. Cir. 2015) (citing cases).

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