No. 20-391

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

This case presents a rare opportunity for this Court to decide the constitutionality of a police tactic that has killed hundreds of people and that serves no legitimate purpose. Outside the Eighth Circuit, there is general consensus that putting a handcuffed person face-down on the ground and pushing into his back is unreasonably dangerous. Police training materials have long recognized as much, as have many circuits. By breaking with this consensus—and doing so purely as a matter of law, based on a clear set of assumed facts—the decision below creates both a circuit split and an ideal vehicle for resolving that split.

The respondents do not confront any of this. They do not deny that, in other circuits, "applying pressure to [a person's] back, once he [has been] handcuffed and his legs restrained, [is] constitutionally unreasonable due to the significant risk of positional asphyxiation." *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008). Nor do they deny that this rule is consistent with prevailing police practices. And they hardly defend the Eighth Circuit's holding that both the amount and duration of the force applied to a person's back are "insignificant" to the excessive-force question. App. 8a.

Instead, the respondents make two moves. *First*, they claim that the question is not actually presented because "no force was exerted on Gilbert's back." BIO 7. That is false. The district court "assume[d]" that "Officers used force upon his back" in granting summary judgment. App. 39a, 60a. The Eighth Circuit did the same. App. 5a. So there is no basis for asserting otherwise in this Court.

Second, the respondents contend that the "crucial" difference between this case and the other circuits' cases is that Gilbert struggled for air. BIO 13. But that is neither a differentiating fact nor a crucial one. The other circuits'

cases do not "turn on" whether the decedent had been completely still after being handcuffed, leg-shackled, and pressed to the ground. *Id.* To the contrary, they reject the argument that pushing into the back of someone who has been "handcuffed and had his ankles tied" is justified until he becomes "still." *Rivas v. City of Passaic*, 365 F.3d 181, 200 (3d Cir. 2004). Moreover, many of the other circuits' cases involved people who struggled violently throughout the encounter and were far more combative than Gilbert. The respondents entirely ignore several of these cases, such as *Weigel* and *Abdullahi v. City of Madison*, 423 F.3d 763 (7th Cir. 2005), and mention others only to question whether they were "correctly decided." BIO 12-13.

The respondents' arguments on the merits are equally revealing. They do not attempt to justify the specific use of force to Gilbert's back after he was handcuffed, leg-shackled, and held in a prone position—even though that is the question presented. Nor do they dispute that he posed no threat once he was in that position. They focus, rather, on the force used *before* Gilbert was handcuffed, shackled, and moved to the ground. But the question is the reasonableness of the force used *after*. As to that question, the only thing that the respondents have to say (at 20) is that force was justified "until he became quiet"—that is, until he stopped breathing. That is no justification at all.

This Court should not look the other way. This petition is as clean of a vehicle as a use-of-force case will ever get. And the stakes are high. As the three amicus briefs attest, certiorari is needed to restore a uniform national rule that conforms to prevailing police practices, the Constitution's original meaning, and basic respect for human life.

ARGUMENT

I. The respondents all but concede the circuit split.

As the petition lays out (at 17-25), there is an acknowledged "circuit split" between "the Eighth Circuit's decision in *Lombardo*" and "cases from the First, Sixth, Seventh, Ninth, and Tenth Circuits." *Timpa v. Dillard*, 2020 WL 3798875, *9-10 (N.D. Tex. July 6, 2020).

The rule in those circuits is clear: "applying pressure to [a person's] back, once he [has been] handcuffed and his legs restrained, [is] constitutionally unreasonable." *Weigel*, 544 F.3d at 1155; *see Hopper v. Plummer*, 887 F.3d 744 (6th Cir. 2018); *McCue v. City of Bangor*, 838 F.3d 55 (1st Cir. 2016); *Abdullahi*, 423 F.3d 763; *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003). In addition, as the amicus brief of the National Association of Criminal Defense Lawyers and the ACLU notes (at 8), the Third Circuit has also adopted this rule. It has held that "a reasonable jury could find that the continued use of force" on someone who "was handcuffed and had his ankles tied" —"press[ing] down on [his] back" until he was "still," and he then "died of asphyxiation"— "was excessive." *Rivas*, 365 F.3d at 199-200. Six circuits, then, 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 v. Outlook Nashville, Inc.*, 380 F.3d 893, 905 (6th Cir. 2004). Yet that is what happened here. By authorizing this very conduct as a matter of law, the Eighth Circuit created a conflict with six circuits.

The respondents have no answer to the split. They pretend that four of these cases do not exist, making no mention of *Weigel*, *Abdullahi*, *McCue*, or *Rivas*. As for the others, they cite *Hopper* only to say that they "do not

concede" it was "correctly decided"; *Drummond* only to say that it is "of doubtful authority"; and *Champion* only to say that it cites cases that have been "criticized by this Court." BIO 12-13. Call that what you will, but it is closer to an acknowledgement of a split than a denial of one.

Rather than grapple with these cases, the respondents rely on the district court's decision below, which they call a "complete answer to petitioners' attempt to manufacture a division of the Circuits." BIO 11. That is mystifying. The district court did not cite three of these cases (*Abdullahi*, *McCue*, or *Rivas*). Nor did it mention the key passages from *Weigel* and *Champion*. And it said virtually nothing about *Hopper*. Even so, the district court took the view that "the circuits are split among and within themselves on cases with similar facts." App. 69a. So its description of the case law, even if it were "complete" and accurate, BIO 11, would only underscore the conflict—not undermine it.

The respondents cite two other cases in an effort to dispel the split—*Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir. 1997), and *Giannetti v. City of Stillwater*, 216 Fed. App'x. 756 (10th Cir. 2007). These cases don't undermine the split either. *Phillips* predates the Seventh Circuit's decision in *Abdullahi*, which made clear that the claim in *Phillips* was based on a "failure to monitor a physically distressed prisoner" rather than any "specific unreasonable conduct" by officers. *Abdullahi*, 423 F.3d at 770-71. And *Giannetti* is an unpublished case that predates the Tenth Circuit's decision in *Weigel*.

Finally, the respondents assert that there is no split because (in their telling) "most" of the other circuits' cases "turn on a crucial" distinction: the person who died was "not resisting," whereas "Gilbert continued to struggle" for air "during most of the time that he was prone." BIO 13. This unsupported assertion is wrong for three reasons.

First, it is simply not true that the other cases involved no resistance. Several involved confrontational and aggressive arrestees who struggled violently (like *Abdullahi* and *Weigel*), while others involved situations more analogous to this one (like *Hopper*). Specifically:

- *Abdullahi* involved an encounter with a man who was "act[ing] aggressively" while being arrested—"kicking his legs, moving his arms so they could not be handcuffed and arching his back." 423 F.3d at 765, 767. The Seventh Circuit held that a reasonable jury could find that pushing on his back for 30-45 seconds was excessive. *Id.* at 769.
- *Weigel* involved a dangerous tussle with a suspect who, after being handcuffed and bound, continued to "struggle and fight" as an officer pushed into his back. 544 F.3d at 1158 (O'Brien, J., dissenting). The Tenth Circuit held that a reasonable jury could find that this force was excessive. *Id.* at 1152.
- *Hopper* involved a 22-minute "struggle that waxed and waned in intensity." 887 F.3d at 749-50. The person was "suffering a medical emergency" inside a cell, and he "kicked and thrashed" while being held down. *Id.* at 755. The Sixth Circuit denied summary judgment to the officers. *Id.* at 756.

Other cases are in accord. *See, e.g.*, *Krecham v. County of Riverside*, 723 F.3d 1104, 1108 (9th Cir. 2013) (force to person's "back 'when he was moving and attempting to get up'" and "repeatedly kicking"); *Kulpa v. Cantea*, 708 F. App'x 846, 851-53 (6th Cir. 2017) (45 seconds of force to back of detainee "squirming" during mental-health crisis).

Second, as this discussion shows, neither the outcomes in these cases nor the rules they announce "turn on" whether the decedent became still after being handcuffed, shackled, and held on the ground. Just the opposite: the

cases reject the argument that officers may push down into the back of someone who is "handcuffed and ha[s] his ankles tied" until he is "still." *Rivas*, 365 F.3d at 200; *see also Tucker v. Las Vegas Metro. Police Dep't*, 470 F. App'x 627, 629 (9th Cir. 2012). By the same token, the governing rule of law in these circuits contains no exception for when a person moves in an "attempt to breathe," as the court below held. App. 9a.

Third, Gilbert was not in fact "resisting" after he was handcuffed, shackled, and held down by six officers—at least not in any relevant sense. BIO 13; *see* JA275 (record evidence that Gilbert "stopped struggling" after being "handcuffed and secured"). As laid out in the petition (at 15-16), the district court accepted as true that, once Gilbert was moved to the ground, he "was not ignoring commands or being violent," App. 34a; he "posed no threat," App. 32a; and he "was 'yelling pleas for help' and pleading 'It hurts. Stop.'" App. 36a. Nevertheless, the "[o]fficers used force upon his back," App. 60a, as well as his "sides" and "torso," App. 39a, and did so "for fifteen minutes," App. 50a. They "did not stop using force until after they realized [he] had stopped breathing." App. 53a.

There is no doubt that, if these same facts presented themselves in the First, Third, Sixth, Seventh, Ninth, or Tenth Circuits, summary judgment would not have been granted to the officers. Not so in the Eighth Circuit.

II. The amicus briefs confirm—and the respondents do not dispute—that a uniform rule is essential.

This division of authority is intolerable. Although the respondents weakly deny the existence of the split, they do not deny the need for a uniform rule. When the conduct at issue here took place, there *was* a uniform rule. But that consensus has now been upended. "By departing from the previously established national rule," "the Eighth Circuit

has created a regime where different deadly force standards will govern police and jails in different jurisdictions." Br. of NACDL & ACLU, at 4.

This Court should not allow that disparity to persist. The legitimacy of our criminal-justice system depends on the evenhanded distribution of justice, particularly for matters of life and death. Public confidence in that system, and the effectiveness of courts to vindicate constitutional rights, likewise depends on a uniform body of law. That confidence can be eroded by even a single wayward circuit, which can stretch the bounds of qualified immunity (and hamper DOJ's ability to criminally prosecute violations) far beyond defensible limits, and far into the future. This Court should stop that slide in its tracks.

III. The respondents' vehicle arguments are based on a clear misrepresentation of the record below.

Unable to disprove the circuit split or to diminish its significance, the respondents try to muck up the case as a vehicle. They do so in three ways. All fail.

The respondents first dispute the factual premise of the question presented. They claim that "[t]he undisputed facts show that little or no force was exerted on Gilbert's back." BIO 1. Not true. In granting summary judgment to the respondents, the district court below "assume[d]" that "[o]fficers used force upon his back." App. 39a, 60a. The Eighth Circuit did so as well, specifically citing the record evidence supporting this fact. App. 5a.

The respondents next suggest (at 15) that this case is not worth the Court's time because the officers will claim an entitlement to qualified immunity on remand. But that is no reason to deny certiorari. To begin, there is value in answering "the question whether the officers' conduct violated the Fourth Amendment," regardless of whether

they will receive immunity. *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014). An answer from this Court will be "beneficial in developing constitutional precedent" and restore uniformity to the law. *Id.* (cleaned up).

But the answer matters even for this case. The Eighth Circuit granted summary judgment to *all* respondents, including the City of St. Louis, based on its holding that there was no constitutional violation. Because cities "do not enjoy a constitutionally protected immunity from suit," *Jinks v. Richland County*, 538 U.S. 456, 466 (2003), a finding of qualified immunity for the officers would not affect the claims against the City. Moreover, when the conduct here occurred, in 2015, "the law was clearly established that applying pressure to [a person's] back, once he [has been] handcuffed and his legs restrained, [is] constitutionally unreasonable due to the significant risk of positional asphyxiation." *Weigel*, 544 F.3d at 1155. This "significant risk" had been known to law enforcement for decades, as the policing scholars' amicus brief explains (at 8-21). So it is far from certain that the Eighth Circuit on remand, while operating under a proper understanding of the law, will once again split with the other circuits and find that the facts on pages 15-16 of the petition are not a clearly established violation.

The respondents' last vehicle argument bleeds into the merits. In an effort to distract from the actual question presented, the respondents spend several pages (at 16-20) answering a question *not* presented: the constitutionality of the force used on Gilbert *before* he was handcuffed, leg-shackled, and held in a prone position. To be clear, the petition challenges only the force used *after* that—and in particular, the force to his back.

It is true that some of the officers played no role in applying that deadly force. But that does not make the

petition a flawed vehicle. The grant of summary judgment to those officers would not be disturbed by answering the question presented in the petitioners' favor. The only claims that would be revived are those against the officers who had a hand in the specific unconstitutional conduct—restraining Gilbert in a prone position for fifteen minutes and pushing on his back while doing so.

IV. The respondents' defense on the merits—that asphyxiating force is justified as a matter of law solely to make a person be "quiet"—is outrageous.

As for the actual question presented, the respondents have little to say. Their only attempt to defend the Eighth Circuit's answer is to repeatedly assert that applying force to Gilbert's back—after he had been handcuffed, shackled, and pinned to the ground by six officers—was authorized "until he became quiet." BIO 20. No matter that he "posed no threat" and "was 'yelling pleas for help' and pleading 'It hurts. Stop.'" App. 32a, 36a. No matter that the force was applied "for fifteen minutes." App. 50a. No matter that it continued "until he stopped breathing." App. 42a. What cost him his life was that he was not "quiet."

If that is the lesson that officers are taking from the decision below, this Court's review cannot come soon enough. Under this rationale (which is not unlike the Eighth Circuit's actual rationale), officers are authorized as a matter of law to push down on the back of someone who poses no threat, simply because he says: "I can't breathe." That is antithetical to a free society, and it makes a mockery of the historical right to personal security. Since the founding, detainees have been "entitled to be treated 'with the utmost humanity.'" Br. of Restore the Fourth & Rutherford Institute, at 7 (quoting 4 Blackstone, *Commentaries on the Laws of England* 297 (1773)). Suffice it to say, that did not happen here.

More broadly, the respondents claim that the officers did not use deadly force, but just "simple physical force" to "protect themselves," so death was "unexpected." BIO 1-3. None of that is right. Again, this case challenges a particular technique that has long been known to create an unreasonably high risk of death and has generated "overwhelming, long-standing nationwide agreement in the policing community." Br. of Policing Scholars, at 18-21. Neither the decision below nor the respondents' defense of it can be reconciled with this prevailing view.

Nor can they be squared with this Court's precedents. The petition spends a few pages explaining why (at 28-30), the amicus briefs add compelling reasons of their own, and the respondents offer no meaningful counter. So what it comes to is this: "No reasonable person would dispute that the police officers who encountered Nicholas Gilbert handcuffed and shackled in his jail cell could not have shot him dead, and it should be equally forbidden to employ the lethal force of compression asphyxia in the same circumstances." Br. of NACDL & ACLU, at 4. Until recently, that statement would have been uncontroversial, universally accepted by lower courts and law enforcement alike. But now the Eighth Circuit has held to the contrary, splitting with six circuits and injecting uncertainty into the law. This Court's invention is thus urgently needed.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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