No. _____

In the Supreme Court of the United States

SHANIKA DAY AND HARVEY MORGAN,

PETITIONERS,

V.

FRANKLIN WOOTEN AND RANDALL DENNY,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

/s/ Nathaniel Lee
Nathaniel Lee, Esq.
LEE, COSSELL & CROWLEY, LLP

Faith E. Alvarez, Esq.
Counsel of Record
LEE, COSSELL & CROWLEY, LLP
151 N. Delaware Street, Ste. 1500
Indianapolis, Indiana 46204
Phone: (317) 631-5151
Fax: (317) 624-4561

Attorneys for Petitioners

October 5, 2020

QUESTION PRESENTED

A law enforcement officer is not entitled to qualified immunity in a § 1983 excessive force action if he violated a constitutional right which was clearly established at the time of the violation.

1. Does an arrestee crying "I can't breathe!" multiple times have a clearly established right to have his difficulty breathing considered by officers in their handcuff and adverse body position, resulting in the inability to consume oxygen by the arrestee, even if the arrestee does not specifically state, prior to dying, that the position he is being held and handcuffs are causing or exacerbating his asphyxiation?

2. Does an asphyxiating arrestee have a clearly established right to be free from excessively tight handcuffs that are restricting his breathing, even if the arrestee does not specifically state, prior to dying, that the tightness of the handcuffs is the cause?

PARTIES TO THE PROCEEDINGS

Shanika Day, appellee below and petitioner here, is an individual.

Harvey Morgan, appellee below and petitioner here, is an individual.

Franklin Wooten, appellant below and respondent here, is an individual.

Randall Denny, appellant below and respondent here, is an individual.

DIRECTLY RELATED PROCEEDINGS

This case began in the Marion County Superior Court in the State of Indiana as *Day v. City of Indianapolis, et al*, No. 49D10-1709-CT-036087.

It was removed to the U.S. District Court for the Southern District of Indiana in *Day v. City of Indianapolis, et al*, No. 1:17-cv-04612-TWP-TAB.

It was subject to interlocutory appeal in the U.S. Court of Appeals for the Seventh Circuit in *Wooten, et al v. Day, et al*, No. 19-1930 and cross-appeal *Day, et al v. City of Indianapolis, et al*, No. 19-1972.

The District Court entered final judgment on July 1, 2020, after the Seventh Circuit reversed its decision in No. 19-1930 on January 10, 2020, and denied rehearing on May 7, 2020. The state court case is awaiting final judgment and the Seventh Circuit summarily dismissed No. 19-1972 on July 3, 2019.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

TABLE OF APPENDICES

PETITION FOR A WRIT OF CERTIORARI

This case is an ideal vehicle for resolving circuit splits on recurring questions of national importance—the clearly established rights of non-combative, surrendered arrestees crying "I can't breathe!" to officers who are utilizing physical restraints resulting in asphyxiation.

OPINIONS BELOW

The reversal opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Day v. Wooten*, 947 F.3d 453 (7th Cir. 2020), and is reprinted in the Appendix. App. P. 1a.

The decision of the United States District Court for the Southern District of Indiana denying summary judgment on the issue of qualified immunity is reported at *Day v. Wooten*, 380 F. Supp. 3d 812 (N.D. Ind. 2019), and is reprinted in the Appendix. App. P. 22a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion to reverse the District Court's denial of summary judgment January 10, 2020. App. P. 1a. On May 7, 2020, the Seventh Circuit denied Day's petition for rehearing or rehearing en banc. App. P. 53a. On March 19, 2020, this Court entered an Order in light of the ongoing health concerns relating to the COVID-19 pandemic extending the deadline for all petitions due after that date to 150 days from, as relevant here, the order denying a petition for rehearing. This petition is timely filed within 150 days of the denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution protects people from "unreasonable searches and seizures" by the government. U.S. Const. amend IV.

Fourth Amendment violations are actionable under 42 U.S.C § 1983, which states in part:

> 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 depravation 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.

STATEMENT OF THE CASE

This petition for certiorari will illustrate that review is warranted because an asphyxiating suspect's ability to articulate that he is dying due to his tightened handcuffs and adverse constraint position, should not determine whether police officers are entitled to immunity from suit for his death. The judicially created doctrine of qualified immunity was expanded in the court below in a way that essentially nullifies the remedial purpose of Section 1983 in positional asphyxiation cases. The new standard creates an impossible burden for a dying suspect to meet.

A. Factual Background

Practically all of the following critical events were captured on video surveillance, either from business owners or concerned citizens.

Terrell was in high school when he died. He was in police custody when his death certificate states that he "sustained respiratory compromise due to hands cuffed behind the back, obesity, underlying cardiomyopathy," contributing to the cause of his death: "Sudden Cardiac Death due to Acute Ischemic Change."[1] App. P. 32a; 80a. In other words, Terrell was arrested and asphyxiated from the positioning of his handcuffs, causing him to pass away when his heart suddenly stopped from lack of oxygen.

Prior to Terrell's death, he cried out "I can't breathe!" to the arresting officer and his supervisor, Officer Denny and Sgt, Wooten. Video evidence shows that during the time leading up to Terrell's death, Officer Denny and Sgt, Wooten stood around Terrell's asphyxiating body for approximately forty-

[1] The underlying cardiomyopathy was undiagnosed. Medically, Terrell was only diagnosed with obesity during his lifetime. Day and Morgan's summary judgment response set forth evidence that the coroner's field report erroneously stated that his maternal grandfather died from heart disease, whereas it was actually caused by kidney disease.

eight minutes, tapping his body with their feet and touching his body with their hands.

Sgt. Wooten called an ambulance to check on Terrell, but he quickly sent it away when officers were unable to support Terrell's body in a standing position for a medical exam.

Officer Denny and Sgt. Wooten received police and medical training on how to prevent positional asphyxiation and provide first aid and CPR. They testified that they were aware Terrell was medically unwell, but that their stated objective was to just improve his comfort. Officer Denny explained that Terrell defecated in his pants and he did not want to stain the seats in his police cruiser so he chose to keep Terrell on the asphalt in the sun.

Sgt. Wooten's signature on Terrell's first person "Treatment/Transport Refusal" states: "TO BE READ TO THE PATIENT/GUARDIAN." App. P. 30a. The "Treatment/Transport Refusal" states, "Emergency personnel have offered to transport me to the hospital for further evaluation and care. I refuse this service." It also states, "I understand that I have not been evaluated by a physician, and that serious medical problems may still exist which may result in disability or death."

Rather than read the Treatment/Transport Refusal to Terrell, the EMTs simply accepted Sgt. Wooten's signature and promptly left without completing a full or accurate medical assessment of Terrell's condition. The EMTs did not take Terrell's temperature, blood pressure, or use a stethoscope to check his lungs.

After the EMTs left, Sgt. Wooten and Officer Denny called a jail wagon and stood around Terrell for approximately twenty more minutes, until the wagon driver arrived. During this time, a lieutenant (from a second police department) on the scene saw signs Terrell was experiencing a medical emergency, testifying that Terrell had white on his lips and he was afraid the boy was dehydrated. He purchased a bottle of water, tried to sit Terrell up, and poured some water into his mouth. However, the lieutenant said the water just dribbled back out of his mouth. None of the Officers attempted to adjust his handcuffs to allow appropriate breathing.

When the jail wagon arrived, the Sheriff Deputy driver found Terrell lying on his back with his hands cuffed behind him in a single set of handcuffs. Terrell was physically and verbally unresponsive. The deputy performed two sternum rubs on Terrell's body, but there was no response. He told Officer Denny and Sgt. Wooten that he was

refusing to transport Terrell to jail and told them to call a medic.

Sgt. Wooten called a second ambulance and it arrived within two to four minutes. At some point after or immediately prior to Terrell's heart stopping, Officer Denny added a second pair of handcuffs on Terrell's body. The second set of EMTs found Terrell without a heartbeat and not breathing. They performed CPR on his body for thirty minutes, then pronounced him dead at 2:29 PM. App. P. 32a.

Because Terrell died in police custody, law enforcement requested and attended his autopsy; the coroner and the police are both agencies represented by the City of Indianapolis's legal department. App. P. 79a.

Terrell's parents Day and Morgan sued Officer Denny and Sgt. Wooten for excessive force by handcuffing that resulted in their son Terrell's in-custody death by positional asphyxiation. App. P. 62a. By way of background, a security guard had called the Indianapolis police dispatch and reported that Terrell attempted to shoplift from the mall. The security guard reportedly recovered an unpurchased $19.99 watch from Terrell while a few feet from the store exit. Thereafter, security guard followed Terrell outside the mall.

Officer Denny and Sgt. Wooten responded to the dispatch. They recognized that Terrell was winded from traveling approximately a half-mile on foot, from the mall to the gas station, where he ultimately died in police custody. The relevant events occurred between approximately one o'clock and two-thirty on the warm, sunny afternoon of September 26, 2015.

At approximately 1:00 PM, Officer Denny located Terrell sitting on a grassy knoll behind a gas station. He was obese, winded, sweating, and out of breath. Officer Denny arrested Terrell using a single set of handcuffs on his large body. Terrell cried out several times: "I can't breathe!" Officer Denny observed that Terrell was somewhat hyperventilating and directed him to take deep breaths. Officer Denny considered placing Terrell in his police cruiser, but he noticed Terrell had defecated his pants. Officer Denny instead positioned Terrell so he was sitting on his buttocks near the top of the knoll with his feet facing down in front of him at an angle and his hands handcuffed behind his back.

The handcuffs were tight enough that Terrell could not expand his chest enough to properly breathe. Terrell kept sliding down the knoll in an apparent attempt to get airflow into his body. Officer

Denny ultimately chose to position Terrell on his back on top of metal handcuffs, on the asphalt parking lot.

Officer Wooten, the supervisor at the scene, called an ambulance because he was concerned about Terrell's difficulty breathing. He kept hearing Terrell cry "I can't breathe" multiple times.

At approximately 1:09 PM, the first ambulance arrived and found Terrell laying on his back with his hands cuffed behind him on the grassy knoll. Terrell was unable to stand for EMTs without assistance. Importantly, Indianapolis police General Orders mandate that officers transport any prisoners who are unable to stand unassisted to the hospital. Nevertheless, officers assisted Terrell up to a standing position.

At approximately 1:19 PM, the EMTs attempted to examine Terrell in handcuffs while officers held him up. Video evidence shows that Terrell's legs buckled and officers could not support his full body weight. They laid him back down on the asphalt and Sgt. Wooten signed the EMT's form declining Terrell's medical treatment and hospital transfer and the EMTs left. Sgt. Wooten testified that he did not take the situation seriously because he presumed Terrell was feigning an inability to breathe for an unidentified tactical advantage.

Shortly after that ambulance left, Terrell died in the place where Officer Denny and Sgt. Wooten laid him. At approximately 1:30 PM, Terrell attempted to turn to his side, but he flopped back. At approximately 1:37 PM, Officer Denny and Sgt. Wooten sat Terrell up, but let him flop back down. At approximately 1:44 PM, Officer Denny reached down and touched Terrell's upper body, but did not move him. At approximately 1:48 PM, Officer Denny and Sgt. Wooten propped Terrell up to a sitting position, likely added a second set of handcuffs, and let him flop back down. At approximately 1:50 PM, Officer Denny and Sgt. Wooten gathered for a second attempt to move Terrell, but then backed away.

After Officer Denny and Sgt. Wooten laid Terrell down at approximately 1:19 PM, they did not move him off the asphalt until approximately 1:54 PM, when the second ambulance arrived. Officer Denny and Sgt. Wooten placed Terrell on the asphalt on his back with his hands cuffed behind his back—it was not Terrell's choice and he was powerless to change positions to relieve his inability to breathe.

Day and Morgan argued that viewing this evidence in a light most favorable to Terrell, it should be determined that Officer Denny and Sgt. Wooten are not entitled to qualified immunity. They violated Terrell's clearly established right to be free

from an officer's knowing use of handcuffs in a way that would inflict unnecessary pain or injury and his clearly established right to have his difficulty breathing considered by officers in their handcuff and adverse body position. Violation of these rights resulted in Terrell's inability to consume oxygen and his ultimate demise.

B. Proceedings Below

The district court denied Officer Denny and Sgt. Wooten's motions for summary judgment on Day and Morgan's excessive force claims, determining they were not entitled to qualified immunity. App. P. 47a. The district court determined it could not hold as a matter of law the officers had not violated Day's Fourth Amendment right against unreasonable seizure.

The district court concluded "reasonable officers would know they were violating an established right by leaving Day's hands cuffed behind his back after he complained of difficulty breathing." App. P. 46a.

In arriving at this conclusion, the district court cited an unreported district court case to establish that officers act unreasonably by failing to consider an injury or condition when handcuffing an arrestee. App. P. 44a (citing *Salyers v. Alexandria Police Dep't*, 2016 WL 2894438, at *3 (S.D. Ind. May 18, 2016)). The district court also quoted a decision of the Seventh Circuit court for the proposition that using excessively tight handcuffs and yanking the arms of non-resisting, non-dangerous arrestees suspected of committing only minor crimes is clearly established as unlawful. App. P. 45a (quoting *Payne v. Pauley*, 337 F.3d 767, 780 (7th Cir. 2003)). Based

on these cases, and the fact that Day complained of difficulty breathing and the officers "observed some signs of distress," the court held the officers' conduct was clearly established as a violation of Day's rights.

Officer Denny and Sgt. Wooten filed an interlocutory appeal to the Seventh Circuit challenging the district court's decision. Day and Morgan challenged the Seventh Circuit's jurisdiction to consider the purely legal question of qualified immunity. Officer Denny and Sgt. Wooten did not concede to Day and Morgan's version of the facts and they relied on several facts that Day and Morgan had disputed before the district court with credible evidence. However, the Seventh Circuit determined it could reach the issue of qualified immunity without resolving mixed questions of law and fact. App. P. 10a.

The Seventh Circuit reversed and rendered in favor of Officer Denny and Sgt. Wooten. App. P. 3. The panel found that "the officers did not violate any clearly established right." App. P. 21. The panel explained how it reached this finding,

> Our analysis hinges on whether reasonable officers under the circumstances would know their conduct violated a clearly established right. Mullenix v. Luna, 136 S. Ct. 305, 308

> (2015); Sow v. Fortville Police Dep't, 636 F.3d 293, 303 (7th Cir. 2011) (holding that, in an excessive force case, "the 'reasonableness' of the use of force is judged from the perspective of a reasonable officer on the scene"). Therefore, the only relevant question is what the paramedics communicated to the officers at the scene.

App. P. 11. The Seventh Circuit interpreted the district court's definition of Terrell's clearly defined rights as (1) a "right to be free from excessively tight handcuffs" and (2) a "right to have the officers consider his injury or condition in determining the appropriateness of the handcuff positioning." App. P. 14. The Seventh Circuit found "there is no Seventh Circuit precedent clearly establishing that the conduct the officers engaged in violated either of those rights."

As to the first right to be free from excessively tight handcuffs, the Seventh Circuit held that case law within the circuit does not clearly establish that Officer Denny and Sgt. Wooten's conduct was violative. Under certain circumstances, the use of excessively tight handcuffs might constitute excessive force in violation of the Fourth Amendment. However, "absent any indication an

officer is aware the handcuff tightness or positioning is causing unnecessary pain or injury, the officer acts reasonably in not modifying the handcuffs." App. P. 16a.

"[T]he key fact is that the officer must know the handcuffs will cause unnecessary pain or injury." App. P. 16. The importance is "multiple and specific complaints by the arrestee about the nature of his pain or injury." *Rooni v. Biser*, 742 F.3d 737 (7th Cir. 2014). App. P. 16. The Seventh Circuit found that case law within the circuit does not support finding a constitutional violation where the plaintiff complained "once about his handcuffs without elaborating on any injury, numbness, or degree of pain." *Tibbs v. City of Chicago*, 469 F.3d 661 (7th Cir. 2006). App. P. 16.

The Seventh Circuit explained that Terrell's right to be free from excessively tight handcuffs was not violated because he "never complained that the tightness of the handcuffs was restricting his breathing." App. P. 17. Before dropping a footnote on the disputed facts, the Seventh Circuit determined that "[t]he record contains no evidence that there was any indication the handcuffs were the cause of Day's breathing difficulty until the autopsy report was released." App. P. 17. Notably, the

footnote identifies the movant's version of disputed facts concerning the EMT evaluation as unreached.

REASONS FOR GRANTING THE WRIT

This Court should grant review to consider eliminating or substantially revising the Seventh Circuit's interpretation of the doctrine of qualified immunity, allowing Section 1983 to reach arrestees who repeatedly cry out "I can't breathe!" Justice should not require an asphyxiating arrestee to also specifically state the cause of his asphyxiation before dying in order to receive constitutional protection. The remedial purpose of Section 1983 supports eliminating this addition to the doctrine of qualified immunity.

I. The Seventh Circuit's opinion conflicts with the purpose of Section 1983 and other Seventh Circuit precedent by granting qualified immunity as a matter of law in this Fourth Amendment excessively tight handcuff case resulting in positional asphyxiation.

The panel decision here takes a radical departure from the purpose of Section 1983 and its own precedent to effectively insulate officers from liability for torturing and killing an arrestee through asphyxiation. The panel decision lost sight of "the crux of the qualified immunity test is whether officers have 'fair notice' that they are acting unconstitutionally." *Mullenix v. Luna*, 577 U.S. 7, 21 (2015) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)).

Under binding precedent, the Seventh Circuit was tasked with determining whether Officer Denny and Sgt. Wooten were entitled to summary judgment on their qualified immunity defense under a two-part inquiry: (1) whether a constitutional right has been violated, and (2) if so, whether the right was clearly established and one that a reasonable official should have known. *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001); *Stainback v. Dixon*, 569 F.3d 767, 770 (7th

Cir. 2009) (citing *Phelan v. Vill. of Lyons*, 531 F.3d 484, 487 (7th Cir. 2008)).

In addressing the second prong, the panel opinion came into conflict with the purpose of Section 1983 and other Seventh Circuit precedent. The panel's decision to grant qualified immunity pointed a heavy finger that Terrell did not specifically state, prior to dying, that the handcuff positioning was causing or exacerbating his asphyxiation. The panel concluded it was therefore not clearly established that Terrell had a right to be free from Officer Denny's knowing use of handcuffs in a way that would inflict unnecessary pain or injury. Consequently, the panel concluded it was not clearly established that Terrell had a right to have his difficulty breathing considered by officers in their handcuff and adverse body position.

The Seventh Circuit rejected Day and Morgan's argument that viewing the undisputed evidence in a light most favorable to Terrell, it should be determined that Officer Denny and Sgt. Wooten are not entitled to qualified immunity. The panel rejected Day and Morgan's argument that violation of Terrell's clearly established rights resulted in his inability to consume oxygen and consequently, his untimely death.

A. Contrary Purpose of Section 1983

The decision below sets a dangerous precedent by pulling the rug out from under Day and Morgan's case two weeks before trial by adding a new requirement to the "knowledge" prong of existing Fourth Amendment precedent. This Court has stressed "the importance of resolving immunity questions at the earliest possible stage in litigation." *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001).

The judicially created doctrine of qualified immunity in Section 1983 cases balances conflicting interests: an official's ability to act decisively and quickly, society and the official's interests in avoiding meritless lawsuits, and a constitutionally injured member of society's interest in seeking redress for violations of clearly established law. The decision below disrupts this balance.

Section 1983 is a vital part of the law in this country because it authorizes individuals to enforce their federal constitutional rights against state officials acting under color of law. In 1871, Section 1983 was passed as § 1 of the Ku Klux Klan Act, "apparently on the theory that Ku Klux Klan violence was infringing the right of protection" by the government. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 670 n.21 (1978); Ending Qualified Immunity Act, H.R.7085, 116th Cong. § 2(1)-(2) (2019-2020).

In 1961, the Supreme Court applied Section 1983 to state officials and articulated its three purposes: (1) "override certain kinds of state laws," (2) to provide "a remedy where state law was inadequate," and (3) "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961). Enforcing "a federal right in federal courts" is critical "because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Id.*, at 480.

In the instant case, the district court's opinion comports with the purpose of Section 1983 by providing a remedy where a state law remedy was unavailable. Under Indiana Code § 34-13-3-3(8), Officer Denny and Sgt. Wooten were immune from liability for broadly enforcing the law. App. P. 49a. However, under federal law, they were not immune from liability because "reasonable officers would know they were violating an established right by leaving Day's hands cuffed behind his back after he complained of difficulty breathing." App. P. 46a.

The district court granted summary judgment on the qualified immunity defense as to Day and Morgan's state law wrongful death claim, but denied qualified immunity as to their Section 1983 excessive force claim. App. P. 50a. In this way, the district court maintained the spirit and purpose of Section 1983, as set forth in *Monroe*, to provide Day and Morgan a remedy for their son's in-custody death due to positional asphyxiation from excessively tight handcuffs.

As further explained in the section below, the Seventh Circuit panel opinion performed legal gymnastics to remove the only available remedy under Section 1983.[2] Where state law broadly immunizes officers in the act of "enforcing the law," removing the corresponding federal remedy is inconsistent with the purposes of Section 1983. Furthermore, the panel decision made new factual findings.

The decision unfairly heightens the non-movant plaintiff's evidentiary burden to overcome the qualified immunity defense. The decision adds a new requirement to the "knowledge" prong of existing Fourth Amendment precedent granting an arrestee the right to be free from excessively tight

---

[2] The defense of qualified immunity in Section 1983 claims is addressed below.

handcuffs when the officer has knowledge of his preexisting injury or condition. Consequently, it effectively insulates officers from liability for killing an arrestee through asphyxiation and torture, unless the decedent's estate can produce evidence that the asphyxiating arrestee identified his asphyxiation and the cause of it to officers before dying.

B. Conflicting Seventh Circuit Precedent

The decision below heightened the burden of proof on the non-movant plaintiff to overcome a defendant officer's qualified immunity defense on summary judgment. Despite evidence that the arrestee had a "known injury or condition," the panel reversed for lack of evidence that the cause of the injury or condition was made known to the officer. App. P. 18a.

Prior to the decision below, Seventh Circuit precedent clearly established an arrestee's right to have a known injury or condition considered, together with other circumstances, by officers when handcuffing. *Rooni v. Biser*, 742 F.3d 737, 742 (7th Cir. 2014); *Stainback v. Dixon*, 569 F.3d 767, 773 (7th Cir. 2009); *Tibbs v. City of Chicago*, 469 F.3d 661, 666 (7th Cir. 2006).

Based on this precedent, the district court did not find it dispositive that there was a lack of

evidence that the arrestee never specifically complained about the tightness of the handcuffs. App., P. 17a. The evidentiary issue is whether the arrestee had "a known injury or condition." The district court found that "assuming the Plaintiffs' version of events occurred, reasonable officers would know they were violating an established right by leaving [Terrell]'s hands cuffed behind his back after he complained of difficulty breathing." App. P. 46a. The district court viewed the facts in a light most favorable to Terrell and found that the evidence supports a finding that the officers had knowledge that the arrestee's inability to breathe was dangerous and that the handcuffs were causing his medical distress. App. P. 46a.

The decision below reverses for want of evidence that Terrell "complained that the tightness of the handcuffs was restricting his breathing." App. P. 17a. This redefines the significance of a "known injury or condition" in a way that significantly narrows the scope of the right. The Seventh Circuit found that Terrell did not have a "known injury or condition" because although Officer Denny and Sgt. Wooten had applicable training and conceded that Terrell said "I can't breathe" multiple times, Day and Morgan cannot prove Terrell made it "known" that the handcuffs were the cause.

> Day never complained that the tightness of the handcuffs was restricting his breathing. The record contains no evidence that there was any indication the handcuffs were the cause of Day's breathing difficulty until the autopsy report was released. Thus, Day's right "to be free from an officer's knowing use of handcuffs in a way that would inflict unnecessary pain or injury" was not violated.
>
> App. P. 17a.

The panel's decision adds a new requirement to the "knowledge" prong of existing Fourth Amendment precedent granting an arrestee the right to be free from excessively tight handcuffs when the officer has knowledge of his preexisting injury or condition. The panel reversed based on Terrell's failure to tell officers why he couldn't breathe—the handcuff positioning. As such, an asphyxiating arrestee now has a heightened burden to overcome qualified immunity. An asphyxiating arrestee must now additionally inform an officer that handcuffs are the cause of his inability to breathe.

The panel added this requirement to *Tibbs v. City of Chicago*, 469 F.3d 661 (7th Cir. 2006) and *Rooni v. Biser*, 742 F.3d 737 (7th Cir. 2014), to

establish that officers act reasonably in not modifying tight handcuffs absent evidence an officer is aware the handcuff tightness or positioning is causing unnecessary pain or injury. *Tibbs* was reinterpreted to favor Officer Denny and Sgt. Wooten because they lacked knowledge the handcuffs were causing unnecessary pain or injury to Terrell.

The decision also alters *Rooni*, which focused on the importance of multiple and specific complaints by the arrestee about his pain or injury to demonstrate knowledge. *Rooni* was reinterpreted to favor Wooten and Denny because Day never complained that the tightness of the handcuffs was restricting his breathing. Thus, Day's right "to be free from an officer's knowing use of handcuffs in a way that would inflict unnecessary pain or injury" was not violated.

The decision also alters *Stainback v. Dixon*, 569 F.3d 767 (7th Cir. 2009), which held that officers were entitled to qualified immunity because a "reasonable officer cannot be expected to accommodate an injury that is not apparent or that otherwise has not been made known to him." The panel reinterpreted *Stainback* to also require evidence that the cause of an injury must also be identified. The paned noted that Officer Denny's addition of a second pair of handcuffs after the jail

wagon driver discovered Terrell unresponsive was mere speculation that Officer Denny had knowledge his asphyxiation was caused by tight handcuffs.

C. Dangerous Precedent: State Sanctioned Torture

What happened here was torture. The legal conception of torture is "the deliberate infliction of intense physical and mental suffering or acute psychiatric disturbances causing very serious and cruel suffering." *Criminal Law: Torture and Respect*, 109 J. CRIM. L. & CRIMINOLOGY 423, 438 (Summer 2019) (citing national and international code). Torture is broadly defined as "the intentional infliction of severe suffering." *Id.* at 434.

Law enforcement spent approximately forty-eight minutes restraining and slowly suffocating Terrell, who plead for oxygen. Terrell was handcuffed tight enough that he could not expand his chest enough to breathe. Equally important, when Officer Denny positioned him on his back on the asphalt, the metal handcuffs were situated in the middle of his spine. The full weight of his obese body pressed his spine into the metal handcuffs as he was rendered incapacitated in the sun. It is easily inferred that this lengthy and steady restriction of oxygen, application of spinal pressure, and heat resulted in pain.

Terrell contemplated the inevitability of his death by repeatedly crying out "I can't breathe!" to officers.[3] He collapsed in front of medics who should have transported him to the hospital pursuant to police procedure. However, as he lay collapsed at the feet of those medics, law enforcement sent them away. Then, law enforcement stood around Terrell's dying body and observed him slowly asphyxiating. In the final minutes of Terrell's life, a reasonable law enforcement officer arrived and, after finding Terrell unresponsive, requested a second ambulance. It was too late by the time those medics arrived. Terrell

---

[3] Comparisons can be made between positional asphyxiation and waterboarding as forms of torture. "Waterboarding is slow motion suffocation with enough time to contemplate the inevitability of black out and expiration." *Criminal Law: Torture and Respect*, 109 J. CRIM. L. & CRIMINOLOGY 423, 453 (Summer 2019). Both techniques incorporate restraints and pain for the purpose of psychological submission. However, positional asphyxiation via police restraints leads to a slow and sustained suffocation, while waterboarding leads to intermittent suffocation. This comparison is offered to emphasize the legal significance of positional asphyxiation as a form of torture. "Restraining someone on their back and forcing water into their mouth and nose to suffocate them until they feel like they are about to die is unlawful and violates military regulations and both domestic and international law." *Waterboarding: Issues and Lessons For Judge Advocates*, 69 A.F. L. REV. 65, 85 (2013).

had already died from a torturous asphyxiation in police restraints.

Courts "do not have a license to establish immunities from § 1983 actions in the interests of what [courts] judge to be sound public policy." *Tower v. Glover*, 467 U.S. 914, 922-923 (1984). If remedying in-custody positional asphyxiation deaths under "§ 1983 litigation has become too burdensome to state and federal institutions," congress is the proper branch of government to redefine the scope of qualified immunity. *Id.*

The Seventh Circuit's erosion of clearly established law to expand qualified immunity sets a dangerous precedent. A shockingly long forty-eight minutes of police torture by positional asphyxiation on the city streets of Indianapolis killed Terrell Day. The coroner specifically identified that the handcuff positioning, coupled with obesity, compromised Terrell's respiratory system and stopped his heart. Not only did the officers involved in his death escape criminal charges, the Seventh Circuit panel's reversal set them free from civil liability.

Asphyxiating an arrestee in police restraints despite his cries for air is torture. "They are crimes not only against law but against humanity." *United States v. Curry*, 965 F.3d 313, 346 (4th Cir. 2020). Immunizing officers from such conduct sets a

dangerous precedent. It restrains our constitutional protections from a slow and torturous in-custody death.

Crying "I can't breathe!" should be enough to protect an individual from asphyxiating at the feet of law enforcement officers. And prior to the decision below, it was. Qualified immunity could be overcome on the issue of an officer's knowledge by showing that the asphyxiating arrestee identified his inability to breathe. The panel decision doubled this showing, requiring evidence that a decedent arrestee (1) identified his inability to breathe while asphyxiating, and (2) identified the cause of his asphyxiation prior to dying.

D. Evidentiary Burden and Disputed Facts

As discussed in the section above, the panel decision is dangerous because it places an onus to speak on the asphyxiating arrestee, notwithstanding his respiratory compromise, and prior to dying. Moreover, even though this evidentiary burden increased, there were still factual issues that should have prevented grant of summary judgment here.

Summary judgment in excessive force cases should be used sparingly because it is normally a factual issue for the jury. *Abdullahi v. City of Madison*, 423 F.3d 763, 773 (7th Cir. 2005); *Smithv.*

City of Hemet, 394 F.3d 689, 701 (9th Cir. 2005); *Cavanaugh v. Woods Cross City*, 718 F.3d 1244, 1252-57 (10th Cir, 2003). Some Fourth Amendment excessive force cases may be decided on summary judgment based on a qualified immunity defense if, based on the evidence, no reasonable juror could that the officer violated the decedent's Fourth Amendment rights. *Scott v. Harris*, 550 U.S. 372 (2007).

The Seventh Circuit discredited relevant evidence that Officer Denny and Sgt. Wooten knew or should have known the handcuffs were causing Terrell to asphyxiate. The qualified immunity analysis should have analyzed all "the facts that were knowable to the defendant officers" at the time they engaged in the conduct in question. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (quoting *White v. Pauly*, 196 L. Ed. 2d 463, 466 (2017) (per curiam). However, the following relevant facts were discredited as what the officers knew at the time.

1. The officers had positional asphyxiation training.[4] In fact, Officer Denny relied on this

[4] Additionally, the panel created dangerous precedent by rendering an officer's training and departmental policy irrelevant to demonstrate their knowledge. Officers are thereby disconnected from an arrestee's asphyxiation despite training and policies enacted by the city. As a result, cities can enact policies to insulate themselves from *Monell* liability. And

training at the outset to re-position Terrell when his body rolled onto his stomach at the start of the arrest. App. P. 5a.

2. The sheriff's deputy who drove the jail wagon immediately recognized that Terrell was unresponsive and apparently helped officers add a second pair of handcuffs to the arrestee. App. P. 7a. The wagon driver requested the second ambulance which found Terrell pulseless and later pronounced him dead. App. P. 8a. This is evidence that a reasonable law enforcement officer knew or should have known that Terrell required medical attention and had excessively tight handcuffs.

3. The autopsy report confirmed the connection between Terrell's death and the excessively tight handcuffs. The panel found the autopsy report could not establish the "known" cause of asphyxiation. Terrell's cause of death was "Sudden Cardiac Death due to Acute Ischemic Change," with the contributory cause of "Sustained respiratory compromise due to hands cuffed behind

---

officers can insulate themselves from excessive force liability by ignoring their training and departmental policies. This disincentivizes peaceful surrenders to law enforcement. Officers have an interest in their safety, and benefit from an arrestee's peaceful surrender. If an arrestee can be killed regardless of his cooperation, he has no motivation to peacefully surrender to officers.

the back, obesity, underlying cardiomyopathy." App. P. 8a. Notably, law enforcement requested and attended the autopsy and the coroner and the police are both agencies represented by the City of Indianapolis's legal department. App. P. 80. The panel explained that while this is evidence of asphyxiation due to excessively tight handcuffs, it could not establish what the officers knew before Terrell's death.

4. There was disputed evidence about Officer Denny adding a second pair of handcuffs after recognizing Terrell's critical condition, just before the second ambulance arrived. The panel explained this could not establish Officer Denny knew the handcuffs were causing the asphyxiation. "[T]here is no reason to believe the second pair was added to relieve [Terrell]'s breathing as opposed to simply providing more comfort to an arrestee who, at that late point, was obviously suffering medical trauma." App. P. 19a. The panel rejected this evidence as "entirely speculative and goes well beyond a reasonable inference to which the plaintiffs are entitled." App. P. 19a.

The panel also made new factual determinations on appeal and ignored credible evidence the non-movant plaintiffs Day and Morgan

designated.[5] Despite designating time-stamped video evidence of the entire encounter, several of the panel's factual findings are disproved by video evidence. Furthermore, several of the panel's factual findings cut against the district court's factual findings. In doing so, the panel's factual findings, as highlighted below, essentially construe disputed and undisputed facts in a light most favorable to Officer Denny and Sgt. Wooten.

1. The panel made a factual finding that Terrell informed Officer Denny and Sgt. Wooten that he could not breathe, but they observed no signs of distress. App. P. 9a. However, the district court made a factual finding that Officer Denny and Sgt. Wooten did observe signs of distress and had knowledge the handcuffs were causing Terrell respiratory difficulty. App. P. 27a.

The officers acknowledged Terrell was at risk of positional asphyxiation from the handcuffs by claiming they were constantly monitoring him and repositioning him to not asphyxiate himself. App. P. 27a. The video evidence shows that Terrell was unable to stand unassisted by officers. *Id.* Other

[5] Recent public discussions on police restraints were facilitated by the circulation of videos of tragic encounters because video shows what occurred in a way that print descriptions do not. However, the Seventh Circuit's description of what happened is not consistent with the video footage of this event.

evidence shows the officers observed Terrell bleeding, with pale lips, sweating, overweight, winded, and complaining of difficulty breathing. *Id.* Officer Denny testified that Day "was on the verge of hyperventilating a little bit." *Id.*

2. The panel made a factual finding that Officer Denny and Sgt. Wooten repositioned Terrell several times when he rolled onto his stomach. App. P. 5a. However, this is not a fact determined by the court below or depicted in any of the video evidence. Terrell's body was never face-down and he essentially stayed in the same place after collapsing in front of the first ambulance. The video evidence depicts a possible attempt by Terrell to roll onto his side, but it was unsuccessful.

3. The panel found that Terrell was not cooperative by refusing to obey officer commands to sit up. App. P. 14a. However, the video evidence depicts Terrell's few attempted movements during the last hour of his life as involuntary.

4. The panel found that even though Sgt. Wooten signed Terrell's "Treatment/Transport Refusal," it was only as a witness after Terrell was evaluated by paramedics. App. P. 12a. However, the video evidence depicts Sgt. Wooten signing the refusal form immediately after Terrell collapsed. Departmental policy makes it mandatory for officers

to send arrestees who can no longer stand unassisted to the hospital.

5. The panel found that Terrell had an "underlying heart condition, which also contributed to his lack of oxygen according to the autopsy report." App. P. 4a. The autopsy states that the cause of death was Sudden Cardiac Death due to Acute Ischemic Change. Acute ischemia is not an underlying heart condition; rather, it is a term used to describe sudden death in patients without a prior history of heart disease. The coroner's field report erroneously found underlying cardiomyopathy based on a mistake that his maternal grandfather died of a heart attack; the grandfather's death certificate was designated on summary judgment to prove that he died of kidney failure. There is undisputed evidence that Terrell did not have an underlying heart condition.

6. The panel found that even if Officer Denny added a second pair of handcuffs before the second ambulance arrived, it does not give a reasonable inference of the officers' awareness that the handcuffs were causing Terrell's medical distress. App. P. 5a, 9a. However, it should when viewed in a light more favorable to Terrell, in context with other undisputed material facts. The officers stood over him for an extended period of time,

recognized he was at risk for positional asphyxiation, but left him on his back on top of restrictive metal handcuffs while prodding him.

Overall, this case should have been decided by the trier of fact. Day and Morgan challenged the Seventh Circuit's jurisdiction over this interlocutory appeal because Officer Denny and Sgt. Wooten did not concede to Day and Morgan's version of the facts and they relied on several facts that Day and Morgan had disputed before the district court with credible evidence. The Seventh Circuit could not reach the issue of qualified immunity without resolving disputed facts.

II. Other circuits adjudicate the Qualified Immunity defenses in positional asphyxiation cases based on an officer's "knowledge" without a requirement that the asphyxiating arrestee specifically state the cause of his asphyxiation.

The Seventh Circuit is now split from the Sixth Circuit's position that an officer's police training may demonstrate his knowledge that his force is causing an arrestee to asphyxiate. The Sixth Circuit found that officers' positional asphyxiation training "alerted them to the potential danger of this particular type of excessive force." *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004) (citing *Hope v. Pelzer*, 536 U.S. 730, 744-45

(2002)). The *Champion* court explained it was immaterial whether officers intended no harm and even "may have believed they were helping him," because the qualified immunity analysis is objective and the officers' motive is "irrelevant." *Id.*

The Seventh Circuit is now split from the Ninth Circuit's position that an officer's knowledge that his force is causing an arrestee to asphyxiate can be based on positioning and restraint. The Ninth Circuit in *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003), clearly established that any reasonable person should know that squeezing the breath from a compliant, prone, and handcuffed individual despite his pleas for air involves a degree of force that is greater than reasonable. Last year, the Ninth Circuit relied on *Drummond* in *Slater v. Deasey*, 776 Fed. Appx. 942 (9th Cir. 2019) to hold that a reasonable person should know that the *position* officers placed the arrestee in, coupled with the pressure of the restraint, might cause him to asphyxiate and involves a degree of force that is greater than reasonable.

Here, Officer Denny testified that he recognized from his training that Terrell was at risk of positional asphyxiation if he was not placed on his side. Yet the video evidence shows that he placed Terrell on his back and then stood within an arm's

reach for at least a half hour as he asphyxiated to death. The video evidence shows that Officer Denny never positioned Terrell on his side; at most he prodded Terrell's side.

The Seventh Circuit is now split from the Tenth Circuit's and Eleventh Circuit's position that an officer's training and certain circumstances may demonstrate his knowledge that his force is causing an arrestee to asphyxiate. The court found in *Wilson v. Meeks*, 52 F.3d 1547, 1556 (10th Cir. 1995), that taking the facts most favorable to plaintiffs, the officers took deliberate actions that delayed medical treatment which they knew would exacerbate the arrestee's medical problem of a gunshot wound.

The Eleventh Circuit in *Williams v. Matthew Sirmons*, 307 F. App'x 354, 359-60 (11th Cir. 2009), found that a reasonable officer would know that given a particular set of circumstances, an arrestee is under medical duress. It also held in *Cottrell v. Caldwell*, 85 F.3d 1480, 1491-92 (11th Cir. 1996), that only officers not trained to recognize signs of asphyxiation would be entitled to qualified immunity because they lack knowledge about the risk of an arrestee's asphyxiation.

III. This case is a good vehicle for removing the judicial requirement of "Clearly Established" from the constitutional violation subjected to the Doctrine of Qualified Immunity.

This Honorable Court recognizes that the doctrine of qualified immunity has "diverged from the historical inquiry mandated by the statute." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (citing *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring); *see also Baxter v. Bracey*, 140 S. Ct. 1862, 1865 (2020) (expressing "strong doubts about [the Supreme Court's] § 1983 qualified immunity doctrine") (Thomas, J., dissenting from denial of certiorari); *Crawford-El v. Britton*, 523 U. S. 574, 611 (1998) (Scalia, J., joined by Thomas, J., dissenting)). "Our qualified immunity precedents instead represent precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make." *Id.* at 1871-72 (quoting *Rehberg v. Paulk*, 566 U. S. 356, 363 (2012)).

This case is one in a series of circuit decisions expanding qualified immunity to shield officers and block relief that should be available under Section 1983. *See e.g. Kisela v. Hughes*, 138 S. Ct. 1148, 1155 (2018) ("the Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield" (Sotomayor, J.,

joined by Ginsburg, J., dissenting)); *Mullenix v. Luna*, 577 U.S. 7, 26 (2015) ("By sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow.") (Sotomayor, J., dissenting)).

Forty-eight minutes of positional asphyxiation meets the definition of torture, but it was not a "clearly established" constitutional violation. Consequently, qualified immunity shields the officers from liability for torture. Justice Thomas has repeatedly expressed that "In an appropriate case, we should reconsider our qualified immunity jurisprudence." *Ziglar*, 137 S. Ct. at 1872 (opinion concurring in part and concurring in the judgment). This is an appropriate case to reconsider at least the "clearly established" requirement.

Whether a constitutional right is "clearly established" is judicially required and interpreted. It is not part of the Constitution or any federal statute. The Supreme Court's determined that a "reasonable official" would not understand the illegality of his/her conduct unless it is "clearly established" and "defined with specificity" by the Supreme Court and among the circuits. *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019); *Williams v. Strickland*, 917 F.3d 763, 769 (4th Cir. 2019).

Here, the Seventh Circuit immunized officers from torturing Terrell Day by obscuring how "clearly established" an arrestee's constitutional right is to be free from excessively tight handcuffs and have a known injury or condition considered, together with other circumstances, by officers when handcuffing. The panel opinion found that no prior case law "clearly established" these rights in a factually similar way. Taking a step further, the panel also narrowed its "clearly established" definition of the right upon finding that a reasonable officer would not have known their actions were unlawful unless the asphyxiating arrestee, in addition to crying out "I can't breathe!" multiple times, also specifically identified that handcuffs were causing or exacerbating his inability to breathe.

This demonstrates several problems with the judicially created "clearly established" standard in the qualified immunity doctrine. Courts can reinterpret their own "clearly established" case law to qualify new situations for immunity and constitutional rights are inconsistently applied among the circuits.

Just the judicially created "clearly established" portion of the qualified immunity doctrine has a propensity to yield a deformed crop. This Honorable Court is in the best position to evaluate how the

"clearly established" requirement operates and determine whether it belongs in the qualified immunity doctrine. In practice, "clearly established" rights are not always clear nor established—they are often amorphous and subject to change. No two cases are the same, and the grant or denial of qualified immunity hinges on slight factual variations in case law and interpretations of the doctrine.[6]

---

[6] A recent split Fourth Circuit decision illustrates valid viewpoints in applying qualified immunity's "clearly established" requirement. The majority denied qualified immunity without a case directly on point that "clearly established" the constitutional right at issue because it was persuaded by cases outside the circuit. *Dean v. McKinney*, No. 19-1383 (4th Cir. Oct. 2, 2020). In response, the dissent highlighted the persistent issue with the majority's conclusion:

> With no clearly established law, perhaps it has less to do with the Supreme Court's qualified-immunity doctrine and more to do with misgivings about the wisdom of that doctrine. Those misgivings, to be sure, are understandable. Even after all these years, the doctrine of qualified immunity remains controversial, and there are thoughtful reasons for reconsidering or reforming it. But those are decisions for the Supreme Court (or Congress). Not us. And so, with respect for my colleagues, I cannot join an opinion that I fear will have the effect of quietly diluting and tacitly cheapening a

This is an appropriate time for change. There is an ongoing national conversation sparked by outrage, protests, and riots about how qualified immunity unfairly shields law enforcement officers from liability for use of force. On Jun 4, 2020, Congress introduced a bill to end the judicially created doctrine of qualified immunity. Ending Qualified Immunity Act, H.R.7085, 116th Cong. (2019-2020). The call to end qualified immunity resonated with lower courts who frequently grapple with applying the doctrine.[7]

Dozens of other cases where police restraints lead to suffocation deaths span the country.[8] Most

---

> doctrine that we are bound to apply so long as it remains standing. I respectfully dissent.

Id. (Richardson, dissenting).

[7] *See e.g.*, *Briscoe v. City of Seattle*, No. C18-262 TSZ (W.D. Wash. Sept. 1, 2020) ("qualified immunity jurisprudence is due for a major overhaul."); *Peterson v. Martinez*, No. 3:19-cv-01447-WHO (N.D. Cal. Aug. 12, 2020) (referring to the *Jamison* opinion as an "excellent opinion . . . describing the unhappy development of qualified immunity jurisprudence"); *Jamison v. McClendon*, No. 3:16-CV-595-CWR-LRA (S.D. Miss. Aug. 4, 2020) ("Judges have invented a legal doctrine to protect law enforcement officers from having to face any consequences for wrongdoing. The doctrine is called 'qualified immunity.' In real life it operates like absolute immunity.").

[8] E.g., Ashley Southall, *'I Can't Breathe': 5 Years After Eric Garner's Death, an Officer Faces Trial*, N.Y. TIMES (May 12,

notably among those who died in police custody after declaring "I can't breathe" include George Floyd in Minnesota and Eric Garner in New York.

George Floyd's death came after being restrained by an officer's knee on his neck for eight minutes and forty-six seconds. His torturous death, preceded by cries of "I can't breathe!", sparked national outrage and weeks of worldwide protests. Congress responded by introducing the "George Floyd Justice in Policing Act of 2020" that would eliminate qualified immunity as a defense in cases alleging excessive force by the police. George Floyd Justice in Policing Act of 2020, H.R.7120, 116th Cong. (2019-2020).

The widely circulated video of Eric Garner's death also shows him saying "I can't breathe!" multiple times while under the restraint of the police chokehold. His torturous death over a minor offense

---

2019), https://www.nytimes.com/2019/05/12/nyregion/eric-garner-death-daniel-pantaleo-chokehold.html; Meagan Flynn, *Another Black Man Who Died in Custody Told Officers, 'I Can't Breathes.'*, WASHINGTON POST (June 11, 2020), https://www.washingtonpost.com/nation/2020/06/11/derrick-scott-oklahoma-city-police/; Emily Wilder, *Phoenix Police Held Man on Hot Asphalt for Nearly Six Minutes Before He Died, Video Shows*, THE ARIZONA REPUBLIC (Aug. 18, 2020), https://www.azcentral.com/story/news/local/phoenix-breaking/2020/08/18/phoenix-police-release-video-ramon-lopez-custody-death/3396121001/.

lasted several minutes. Medical examiners determined the police chokehold caused his death and ruled it a homicide. *Department, Ethicsprosecutorial Conflicts of Interest and Excessive Use of Force By Police*, 30 Crim. Just. 47, 47 (Summer 2015). The officer who killed him escaped criminal charges, testifying to the grand jury that he was trying to use a wrestling move and not a chokehold. *Id.*

The case at hand falls squarely within the ongoing public conversation about arrestees being restrained by police, crying out "I can't breathe!" shortly before dying. The devastating footage of Terrell's death, like the footage in other similar cases, shows a group of white law enforcement officers using restraints on a detained, non-combative African American male accused of a minor infraction.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

NATHANIEL LEE
FAITH E. ALVAREZ
LEE, COSSELL & CROWLEY, LLP
151 N. Delaware Street, Suite 1500
Indianapolis, IN 46204
(317) 631-5151
nlee@nleelaw.com
falvarez@nleelaw.com
** Counsel of Record* *Attorneys for Petitioners*