No. 20-477

In the
Supreme Court of the United States

SHANIKA DAY and HARVEY MORGAN,
Petitioners,
v.

FRANKLIN WOOTEN and RANDALL DENNY,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Do police officers violate clearly established Fourth Amendment rights by handcuffing a winded arrestee and leaving his hands cuffed behind his back when (a) medics evaluate him, determine he is breathing normally, express no concern about the handcuffs, and clear him for transportation to jail and (b) the arrestee himself never complains that the handcuffs are causing any discomfort or making breathing difficult?

2. If the Court wishes to reconsider decades of qualified-immunity precedents, should it do so in a case that (a) does not turn on the existence of clearly established law, (b) presumably would require one of the Court's justices to recuse, and (c) would short-circuit a robust qualified-immunity debate taking place in the politically accountable branches?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution forbids unreasonable seizures:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Federal civil-rights protections create a cause of action for those believing they were unlawfully seized:

> 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, except that in any action brought against a

> judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

SUMMARY OF REASONS FOR DENYING THE WRIT

Terrell Day was eighteen years old when a sudden cardiac event ended his life. In the moments preceding his death, he was in police custody with his hands cuffed behind his back. An autopsy report later identified three factors that contributed to his death: obesity, an undiagnosed heart condition, and having his hands cuffed behind his back. Tragically, that autopsy report was the first and only indication that handcuffs were contributing to a problem. Day never expressed any concerns about the handcuffs. Neither did two medics who examined him at the scene and determined he was breathing normally. In fact, the medics concluded that he was not experiencing any medical issues at all.

The events culminating in Day's untimely death began when mall security officers believed they caught him shoplifting. Day fled the mall on foot,

leading the security officers on a chase through a parking lot and across the street. He then collapsed on a grassy slope (Day weighed 312 pounds and presumably was exhausted). When an Indianapolis police officer arrived, he found Day sweating and breathing heavily. He handcuffed Day's arms behind his back without difficulty. When Day said he was having trouble breathing, the officer noted the exertion from his run and told him to take deep breaths. When Day again said he was having trouble breathing a few minutes later, officers called an ambulance to the scene. Although medics examined Day and cleared him for transportation to jail, he died at the scene before that could happen.

Day's parents and estate sued two Indianapolis police officers, alleging that they used excessive force by handcuffing Day's hands behind his back and leaving him in handcuffs after he said he was having trouble breathing. They have never identified any authority suggesting that police officers cannot leave an arrestee's hands cuffed behind his back absent some indication that doing so would exacerbate a medical issue. Nor have they identified any authority suggesting police officers cannot rely on medical professionals who medically clear an arrestee. So the Seventh Circuit held that both officers are entitled to qualified immunity.

As the decision below explains, the officers used handcuffs "in a manner that would not have harmed the average arrestee, and there is no evidence that officers were aware that the handcuffs were causing Day's breathing trouble." App. 21a. The petition asks

the Court to grant certiorari to reverse that decision. It also asks the Court to use this case as a vehicle to reconsider qualified immunity altogether (albeit without including that among its questions presented).

There are no good reasons to grant certiorari here and many good reasons to deny it. The petition identifies neither a circuit split nor a significant, unsettled question of law meriting the Court's attention. *Cf.* Sup. Ct. R. 10(a). It asks the Court to engage in fact-bound error correction, and it roots that argument in serious mischaracterizations of the record. The Court routinely denies certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. That usual approach is particularly apt here, where the petition also fails to present the record accurately. *Cf.* Sup. Ct. R. 14.4.

Should the Court wish to reexamine its qualified-immunity precedents, this case is a poor vehicle for at least three reasons. First, the outcome does not turn on the existence of clearly established law. The claims here fail because the record reveals no Fourth Amendment violation. Second, Justice Barrett has indicated that she will recuse in a case like this one—a case where she served on the panel below. The Court receives a steady stream of qualified-immunity petitions and need not reevaluate forty years of settled law shorthanded. Third, the enhanced version of *stare decisis* governing the Court's statutory-interpretation decisions suggests qualified immunity is a ball thrown into Congress's court. The Court should be reluctant to short-circuit the robust qualified-immunity debate

currently taking place in the politically accountable branches.

STATEMENT OF THE CASE

I. Factual background

Terrell Day was eighteen years old on September 26, 2015. App. 4a.[1] The series of events culminating in his untimely death began around lunchtime when he tried to steal a watch from a Burlington Coat Factory store. *Id.* The store's loss-prevention officer, and eventually a mall-security officer, confronted Day outside an entrance connecting the store to a shopping mall. *Id.* Accounts of the confrontation vary, but two things are undisputed. *See* App. 4a, 25a. First, the mall security officer saw that Day had a gun. App. 4a. Second, the loss-prevention officer called 911 after Day refused to return to the store and fled the mall on foot. App. 4a-5a, 25a-26a.

During Day's flight, a radio dispatch reported an armed shoplifter running from the mall toward a nearby gas station. App. 5a, 26a. Day ran through a parking lot and across a street before either slipping or collapsing on a grassy slope near the gas station. App. 4a-5a, 25a-26a. When a Cumberland Police Department officer, John Covington, arrived moments

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[1] "App." citations refer to the petitioners' appendix filed in this Court. "App. Below" citations refer to the three-volume joint appendix filed with the Seventh Circuit in *Day, et al. v. Wooten, et al.*, No. 19-1930, and appearing on the Seventh Circuit's docket at ECF Nos. 16-1, 16-2, and 16-3.

later, Day was lying on the ground with his arms out. App. 26a. Covington told him to show his hands and point out where his gun was. *Id.* Day complied with both commands, pointing to a gun in the nearby grass. *Id.*

An Indianapolis Metropolitan Police Department officer, Randall Denny, arrived on scene next and had primary contact with Day for a few minutes. App. 5a; App. Below 166-67. He approached Day and placed him in a single set of handcuffs. App. 5a, 27a. Day was a large young man weighing about 312 pounds, but his hands came together easily behind his back. App. 4a-5a; App. Below 137-38. Denny observed that he was overweight, sweating, and breathing heavily. App. 5a, 27a. Day said he was having trouble breathing, and Denny noted that he had exerted himself while running and asked him to take deep breaths in and out to slow his heart rate. App. 5a, 27a. Denny did not otherwise observe any signs that Day was in distress or having trouble breathing. App. 5a, 27a.

Officer Denny then repositioned Day so he was "sitting on his behind" at the top of the grassy slope. App. 5a, 27a. Day's legs were out in front of him, and his hands were cuffed behind his back. App. 5a, 27a. Denny preferred that position because it would be comfortable for Day and minimized the risk that he could flee or attack the officers. App. 5a, 27a. As Denny repositioned him, he noticed Day had defecated on himself. 5a, 27a. Denny attributed that to Day's having overexerted himself during his run from the mall. App. 5a, 27a-28a.

Wary that a handcuffed suspect lying on his stomach or chest faced an increased risk of asphyxiation, Officer Denny instructed Day to remain seated upright at the top of the slope. App. 5a, 27a-28a. Day did not maintain that position, twice lying on his back then starting to roll down the slope. App. 5a. The first time, Denny sat him back up in the middle of the slope. App. 28a. The second time, he decided it would be better to have Day lie on his side. App. 5a, 28a.

About three minutes after Denny arrived, his supervising sergeant, Franklin Wooten, arrived. 5a, 28a; App. Below 166-67. Either Wooten or a Cumberland officer then monitored Day while Denny completed various investigative tasks as the arresting officer. App. 5a, 28a. Wooten and the Cumberland officers repositioned Day several times when he rolled onto his stomach. App. 5a-6a, 28a.

Within a few minutes, Day complained to Sergeant Wooten that he could not breathe. App. 6a. Wooten was skeptical because Day was also claiming he did nothing wrong and demanding to be released. App. 6a, 28a-29a; App. Below 230, 232. He had also appeared to calm down and breathe normally after his earlier exertion. App. 6a; 29a. Even so, Wooten took the cautious approach and requested an ambulance. App. 6a, 29a. At that point, Day had been in custody for about five minutes. App. 6a, 29a.

An ambulance staffed by an emergency-medical technician and a paramedic arrived several minutes later. App. 6a, 29a. When the medics encountered Day, he was lying on his back with his hands cuffed

behind him. App. 29a. He said he was having trouble breathing, and the medics began to examine him. App. 6a, 29a. Their examination involved several elements.

- They spoke with Day and determined he was lucid and speaking in clear, full sentences. App. 6a, 29a.

- They observed that, despite his complaints, Day showed no signs of difficulty breathing. App. 6a, 29a; App. Below 549, 551, 565, 613.

- They checked Day's vitals, including his heart rate, respiratory rate, and blood-oxygen saturation levels. App. 6a, 29a. Day's blood-oxygen saturation was a "very good" ninety-seven percent, meaning he did not need any oxygen. App. Below 513-14.

- They listened to Day's lungs with a stethoscope and found bilateral breath sounds to be present and clear. App. 29a.

- They conducted a Glasgow Coma Scale analysis to determine how oriented and responsive Day was. App. 29a. He scored a perfect fifteen. App. 29a-30a.

- They asked Day about his medical background, and he reported no underlying medical conditions (by all accounts unaware of his underlying heart conditions). App. 6a, 8a, 29a; App. Below 809, 812-13.

Despite his earlier complaints, Day never asked to go to a hospital. App. Below 554. And the medics concluded he was breathing "regularly and normally" and required no further medical attention. App. 6a, 29a-30a.

After making that determination, the medics asked Sergeant Wooten to sign a "signature of release" or "SOR." App. 6a, 30a; App. Below 258-59, 552-54 613-14. When medics clear an arrestee for transportation to jail, they have an officer sign as a witness that they are returning the arrestee to police custody. App. 6a-7a, 12a, 30a; App. Below 749-50. The officer signs a box on a tablet-computer screen as a witness to the transfer, not as the arrestee's representative. App. 6a-7a, 30a.

Wooten's electronic signature was attached to a treatment-refusal form typically signed by a patient who refuses treatment. App. 6a, 30a. But the first responders on scene that day—from the medics to the officers—were familiar with the "signature of release" process and testified that Wooten signed as part of that usual process. *See* App. Below 160-65, 182, 249-51, 256-67, 307-09, 335, 375-81, 421-25, 483-86, 552-58, 580, 595-96, 601-03, 613-14. And both medics testified that they asked Wooten to sign only after completing their examination and determining that Day needed no further care. *See* App. Below 549-58, 613-14.

With Day cleared for transportation to jail, Officer Denny requested a jail van. App. 7a, 31a. Marion County Sheriff's Deputy Steve Monday

arrived in the van and spoke with Wooten about the arrest and the medical evaluation. App. 31a. He approached Day, who was still lying on his back, and began searching him for contraband. App. 7a, 31a. Day was generally unresponsive toward Monday, and his legs fell to the ground after Monday removed his shoes. App. 31a. Monday asked if he was okay, and Day never responded. App. 31a. Day's legs then locked while Monday and Sergeant Wooten tried to stand him up. App. 7a, 31a.

At that point, Monday was unsure whether Day was being obstinate and uncooperative or was experiencing a medical issue. App. 31a. He performed a sternum rub—a painful stimulus to the chest—to see whether Day would respond. App. 7a, 31a. Getting no response, he lifted Day's shirt and performed another one. App. 7a, 31a. Although Day's eyes were open and he was breathing, his lack of response to either sternum rub caused Monday to ask Sergeant Wooten for a second ambulance. App. 7a, 31a-32a.

When the second ambulance arrived, Day's eyes were still open and he was still breathing. App. 7a-8a. But his pulse was weak. *Id.* Medics loaded him into the back of the ambulance and began CPR. App. 8a, 32a. After thirty minutes, they pronounced him dead. App. 8a. The coroner dispatched to the scene examined Day's body and found no visible signs of trauma. App. 8a, 32a.

An autopsy later revealed that Day suffered from apparently-undiagnosed cardiomegaly, a medical term for an enlarged heart, and another heart

condition called cardiomyopathy. App. 8a; App. Below 809, 812-13. The autopsy report determined the cause of Day's death to be "Sudden Cardiac Death due to Acute Ischemic Change." App. 8a, 32a. It listed three contributing factors: "Sustained respiratory compromise due to hands cuffed behind the back, obesity, underlying cardiomyopathy." App. 8a; App. Below 808. The autopsy found no encircling contusions or lacerations on either of Day's wrists and no overlying imprints of handcuffs. App. 8a; App. Below 809.

The autopsy report is the only indication anywhere in the record that handcuffs were contributing to a medical issue. *See* App. 8a. Throughout his time in custody, Day never complained that the handcuffs were causing him discomfort or difficulty breathing. *Id.* He told the officers and the medics that he was having trouble breathing, but he never suggested the handcuffs were exacerbating that problem. *Id.* And although his arms remained cuffed behind his back throughout the medics' examination, they never asked the officers to remove or modify them or to add a second pair. App. 6a, 8a, 30a. That was something they could have done had they believed it prudent because medics, not police officers, "are in control of what is going on" until they release their patient back into police custody. App. Below 549-50, 612.

II. Procedural background

The petitioners filed their first lawsuit alleging various state-law claims in Marion Superior Court under Cause Number 49D01-1512-CT-042303. After more than eighteen months with little activity, they

voluntarily dismissed that lawsuit and filed this one under Cause Number 49D10-1709-CT-036087. This nearly identical lawsuit named Sergeant Wooten, Officer Denny, the City of Indianapolis, the Town of Cumberland, and two Cumberland police officers. The petitioners later amended their complaint to allege various federal civil-rights violations.

Cumberland timely removed the amended lawsuit to the United States District Court for the Southern District of Indiana, invoking that court's federal-question jurisdiction under 28 U.S.C. § 1331. App. 59a-60a. Wooten, Denny, and the City of Indianapolis eventually moved for summary judgment. On the Fourth Amendment claim at issue here, Wooten and Denny argued that they did not violate Day's Fourth Amendment rights and were entitled to qualified immunity in any event. App. 39a, 43a. The district court granted summary judgment on every claim but that one, holding that a reasonable jury could have found a Fourth Amendment violation and that the officers were not entitled to qualified immunity. App. 39a-47a.

Sergeant Wooten and Officer Denny took an interlocutory appeal under the collateral-order doctrine, and the petitioners cross-appealed entry of summary judgment on their state-law claims. The United States Court of Appeals for the Seventh Circuit dismissed the cross-appeal in a July 3, 2019 order. App. 56a-57a. It then reversed the denial of qualified immunity in a January 10, 2020 opinion. *Id.* at 13a-21a. Because 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," the panel below held that leaving Day's hands cuffed behind his back "did not violate any clearly established right." App. 17a, 21a.

The petitioners sought rehearing and rehearing en banc. No judge called for a vote to rehear the case en banc, and all panel members voted to deny rehearing. App. 54a. The district court entered final judgment on July 1, 2020. App. 73a. The petition for certiorari was timely filed under the extended deadline authorized in this Court's March 19, 2020 order in response to the COVID-19 pandemic.

REASONS FOR DENYING THE WRIT

I. The petitioners misunderstand the decision below.

The petition rests on a faulty premise. It claims the decision below adopted a rule that would require a struggling arrestee to "specifically state the cause of his asphyxiation before dying in order to receive constitutional protection." Pet. 19, 21, 24-25, 27, 44. It then argues that such a rule conflicts with decisions from the Sixth, Ninth, Tenth, and Eleventh Circuits. Pet. 25-29, 39-41. Both the premise and the conclusion are unsound.

A. The Seventh Circuit simply held that officers must have some reason to believe handcuffs were causing a problem.

The Seventh Circuit held that Sergeant Wooten and Officer Denny are entitled to qualified immunity because 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." App. 17a (emphasis added).[2] That decision adopts no draconian rule barring relief to an asphyxiating arrestee unless he can pinpoint the specific cause of his medical problems. It stands for the unremarkable proposition that officers must have at

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[2] *See also* App. 21a ("As already discussed, the handcuffs were used in a manner that would not have harmed an average arrestee, and there is no evidence the officers were aware the handcuffs were causing Day's breathing trouble.").

least *some* reason to believe handcuffs are causing a problem.

Evidence that Day had complained about the handcuffs might have strengthened the petitioners' case. But it was hardly the only evidence that could have alerted officers that Day's hands should not be cuffed behind his back. Had Day become winded only after being handcuffed, that might have suggested that handcuffs were contributing to a problem. Had Day told officers that the handcuffs were causing discomfort or making it hard to breathe, that also might have suggested that handcuffs were causing a problem. Had the medics who examined Day expressed concern about the handcuffs or the positioning of Day's arms, that almost certainly would have put the officers on notice of a problem.

None of that happened here. The evidence shows that Day was already winded from his run when Denny arrived to handcuff him. App. 5a, 27a. By all outward appearances, Day's breathing became calmer and more regular after Denny handcuffed him. *See* App. Below 230, 551, 565. When medics examined him, they never asked officers to remove the handcuffs or expressed any concerns about them. App. 8a; *see also* App. Below 528-29, 608, 619-20. Instead, they concluded that Day was not having breathing problems and cleared him for transportation for jail. App. 6a, 11a-12a, 29a. And although Day proclaimed his innocence and demanded to be released, he never raised any concerns about the handcuffs or his arm positioning. App. 8a; *see also* App. Below 230, 232.

Because the officers had no reason to believe that handcuffs were causing a medical issue, the Seventh Circuit held that they were entitled to qualified immunity. That outcome traces directly to earlier Seventh Circuit decisions holding that police officers are not liable for handcuffing an arrestee absent some indication that doing so would exacerbate a preexisting medical issue.[3]

B. The circuits are not split.

The purported circuit split is dubious on its own terms. *See* Pet. 39-41. Evaluated against the actual holding below, it is altogether illusory.

The petition first points to decisions from the Sixth and Ninth Circuits, but they evidence no split. The Sixth Circuit denied qualified immunity where officers placed "substantial or significant" weight on an arrestee's back while he was lying face down with his hands cuffed behind his back and his ankles restrained in a hobble. *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903-05 (6th Cir. 2004). The Ninth Circuit's decisions in *Slater* and *Drummond* also involved officers applying prolonged pressure to a prone arrestee's neck or torso. *See Slater v. Deasey*,

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[3] *See Stainback v. Dixon*, 569 F.3d 767, 773 (7th Cir. 2009) (no Fourth Amendment violation despite nonspecific complaints of pain); *Tibbs v. City of Chicago*, 469 F.3d 661, 665-66 (7th Cir. 2006) (same); *see also Rooni v. Biser*, 742 F.3d 737, 743 (7th Cir. 2014) (assuming Fourth Amendment violation but affirming qualified immunity even where multiple specific complaints identified handcuffs as source of pain).

789 F. App'x 17, 21 (9th Cir. 2019), *cert. denied*, --- S. Ct. ----, 2020 WL 6037209 (Oct. 13, 2020); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003). Those cases look nothing like this one. The officers here never positioned Day on his stomach and never placed their weight on him. They kept him off his stomach and called an ambulance when he complained of breathing trouble.

The petition's Tenth and Eleventh Circuit cases fall even further afield. Each held that officers were entitled to qualified immunity despite far more troubling facts. The officers in *Wilson* left a handcuffed arrestee lying on his stomach and provided no aid after shooting him twice. *Wilson v. Meeks*, 52 F.3d 1547, 1550 (10th Cir. 1995). The arresting officer then delayed treatment when medics asked him to remove the handcuffs because he did not want blood on his hands. *Id.* The officers in *Cottrell* placed a man suffering psychological issues in handcuffs and leg restraints then forced him into the back of a police car with his feet on the seat and his upper body on the floorboard. *Cottrell v. Caldwell*, 85 F.3d 1480, 1488 (11th Cir. 1996). Even though officers forced him into that unorthodox position, which caused him to asphyxiate, the Eleventh Circuit held that they were entitled to qualified immunity. *Id.* at 1491-92. The officers in *Williams* kneeled on the back of a prone, seven-month-pregnant woman going into premature labor at the entrance to a hospital emergency room. *Williams v. Sirmons*, 307 F. App'x 354, 356 (11th Cir. 2009). Despite her obvious pregnancy and ongoing medical issue, the Eleventh Circuit held that those

officers were entitled to qualified immunity too. *Id.* at 361-62.

None of those cases addresses a right to have handcuffs removed or modified. Much less such a right on these facts—where officers had no indication that handcuffs were causing a problem even after medics examined Day. There is no circuit split.

II. The decision below resolves no important unsettled questions of law and conflicts with no decisions from this Court.

A. The Seventh Circuit faithfully applied this Court's qualified-immunity decisions.

Public officials are immune from suit under Section 1983 unless they violated a federal right that was clearly established at the time of their conduct. *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 1774 (2015). An official "cannot be said to have violated a clearly established right" unless existing precedent "placed the statutory or constitutional question beyond debate." *Id.* This qualified-immunity doctrine allows public officials room to make reasonable but mistaken judgments and protects "all but the plainly incompetent or those who knowingly violate the law." *Id.*

This Court has explicitly or implicitly reaffirmed the qualified-immunity test twenty times in

the past decade alone.[4] In several of those cases, most recently in *Kisela*, the Court issued a pair of warnings to lower courts. First, they must not "define clearly established law at a high level of generality." *Kisela*, 138 S. Ct. at 1152. Second, they must pay special attention to the specificity of the alleged right in the Fourth Amendment context, "where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Id.* Because the boundary between excessive and permissible force is often "hazy" and fact specific, "police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Id.* at 1153 (internal quotation marks omitted).

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[4] *See Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (per curiam); *Kisela v. Hughes*, 138 S. Ct. 1148, 1152-53 (2018) (per curiam); *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018); *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (per curiam); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866-67 (2017); *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam); *Mullenix v. Luna*, 577 U.S. 7, 11-12 (2015) (per curiam); *Taylor v. Barkes*, 575 U.S. 822, 135 S. Ct. 2042, 2044 (2015) (per curiam); *Sheehan*, 135 S. Ct. at 1774; *Carroll v. Carman*, 574 U.S. 13, 16-17 (2014) (per curiam); *Lane v. Franks*, 573 U.S. 228, 243 (2014); *Wood v. Moss*, 572 U.S. 744, 757-58 (2014); *Plumhoff v. Rickard*, 572 U.S. 765, 778-79 (2014); *Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014) (per curiam); *Stanton v. Sims*, 571 U.S. 3, 5-6 (2013) (per curiam); *Reichle v. Howards*, 566 U.S. 658, 664-65 (2012); *Filarsky v. Delia*, 566 U.S. 377, 389-90 (2012); *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012); *Ryburn v. Huff*, 565 U.S. 469, 473-74 (2012) (per curiam); *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 741 (2011).

The Seventh Circuit faithfully applied those rules here. The petitioners have never identified any precedent with analogous facts. They point to no case suggesting police officers cannot handcuff a winded arrestee. They point to no case suggesting nonspecific complaints about breathing trouble put officers on notice that handcuffs were causing the problem. They point to no case suggesting that calling an ambulance is a constitutionally defective response to complaints about difficulty breathing. And they point to no case suggesting that officers violate the Fourth Amendment when they rely on medical professionals' determinations that a handcuffed arrestee is breathing normally and can be transported to jail.

Instead, the petitioners lean on three Seventh Circuit decisions that undercut their argument. In *Stainback* and *Tibbs*, the Seventh Circuit held that police officers do *not* violate the Fourth Amendment when they keep an arrestee in handcuffs despite multiple nonspecific complaints of pain. *Stainback*, 569 F.3d at 773; *Tibbs*, 469 F.3d at 665-66. In *Rooni*, an officer told an arrestee to "shut up" when he complained that handcuffs were too tight and were causing pain. 742 F.3d at 739. The officer then "twisted the handcuffs so that they would hurt him," leaving visible injuries on his wrists. *Id.* at 739-40. Even there, the Seventh Circuit was unwilling to hold that the Fourth Amendment required more. *Id.* at 743. It sidestepped the issue and held that the officer was entitled to qualified immunity. *Id.*

The Seventh Circuit had no trouble distinguishing the petitioners' lone authority coming out the

other way. In *Payne v. Pauley*, the record required the court to assume that police officers grappled over a non-resisting arrestee's arm for thirty minutes while arguing about who should handcuff her. 337 F.3d 767, 774 (7th Cir. 2003). After violently jerking her arm and eventually handcuffing her, the officers then ignored specific complaints that the handcuffs were too tight, were causing her pain, and were making her lose feeling in her hands. *Id.* at 774-75, 780. Here, officers never violently jerked Day or fought over his arms. And there was no evidence—whether a statement from Day or anything else—putting the officers on notice that handcuffs were causing any problems.

Far from breaking new ground on important legal questions, the decision below is a straightforward application of this Court's qualified-immunity precedents. The petitioners were unable to identify any remotely analogous case finding a Fourth Amendment violation, much less one that "squarely governs" these facts. *Cf. Kisela*, 138 S. Ct. at 1153.

B. The petition asks the Court to engage in fact-bound error correction where there has been no error.

The Court's rules caution that certiorari is "rarely granted" when "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Yet most of the petition's arguments seek fact-bound error correction. *See* Pet. 25-39. Worse, those arguments mischaracterize the record at nearly every turn. They

derive from a factual-background section managing only five record citations across more than seven single-spaced pages. *See* Pet. 6-13. Untethered from the record, the petition describes an encounter that never happened.

As the petition tells it, Sergeant Wooten and Officer Denny tortured Day. Pet. 29. It claims they deliberately restrained his arms so tightly behind his back that he "could not expand his chest enough to properly breath." Pet. 10. It then suggests that Wooten stopped the examination and sent medics away while officers stood watching Day asphyxiate—all despite having been trained that he was "was at risk of positional asphyxiation from the handcuffs." *See* Pet. 7-8, 11, 29-30, 33-34, 36.

The record tells a different story. Uncontroverted evidence shows that Day's arms came together easily behind his back when Denny handcuffed him. App. 5a. It also confirms that Day had none of the contusions, abrasions, or other marks on his wrists that one would expect had he been pulling on handcuffs fighting to breathe. App. 8a; App. Below 137-38, 811. As to the officers' training, it never suggests that handcuffing an arrestee's arms behind his back risks asphyxiation. That training speaks of increased positional-asphyxia risk when a handcuffed person lies prone on the chest or stomach. App. 5a, 28a; App. Below 95-96, 108-09, 117, 177-78, 796-97. That is why the officers allowed Day to sit on his buttocks, lie on his side, or lie on his back but never allowed him to lie on his stomach. App. 5a, 28a.

When Day first said he was having trouble breathing, Officer Denny sat him up and instructed him to take deep breaths to slow his heart rate. App. 5a; App. Below 79. Each time Day rolled onto his stomach, the officers repositioned him. App. 5a-6a, 27a-28a; App. Below 76-77, 159, 232, 255. As Day sat talking with the officers, he appeared to calm down and breathe normally. App. 6a; App. Below 230. Even so, Wooten promptly called an ambulance to the scene when Day repeated his complaint that he was having trouble breathing. App. 6a; App. Below 230.

The record likewise confirms that officers neither sent the medics away nor interfered with their examination. *Contra* Pet. 7-8, 11, 30. The medics not only examined Day, they determined based on their examination that he was breathing normally. App. 6a, 29a; App. Below 549-52, 613-14. Among other things, they checked his heart and respiratory rates and determined his blood-oxygen saturation was a "very good" ninety-seven percent. App. 6a, 29a; App. Below 513-14. They also listened to his lungs and found bilateral breath sounds to be present and clear. App. 29a.[5]

The EMT testified that medics, not police officers, are in control until they release an arrestee back into police custody. App. Below 611-12. The paramedic gave similar testimony. He needs no

[5] *See also* App. Below 574, 589-90, 612-13 (EMT testifying nearly three years later that, although he had no specific memory of using a stethoscope, he must have because his report notes "clear and equal bilateral breath sounds," something he could have determined only with a stethoscope).

approval from police if he determines an arrestee should go to the hospital. App. Below 549-50, 558. This encounter was no exception. The undisputed evidence confirms that the medics concluded their evaluation and determined Day needed no further medical attention. App. 12a, 30a. Only then, according to the medics' own testimony, did they ask Sergeant Wooten to sign their tablet as a witness that they were returning Day to police custody. App. 6a-7a, 12a, 30a; App. Below 552-54, 613-14.

The petition contradicts the record again when it suggests Deputy Monday "immediately recognized" that Day was unresponsive—implying Day was in obvious medical distress. *Contra* Pet. 8-9, 34. The evidence shows that Monday saw no immediate signs of distress when he arrived (much less signs of distress caused by handcuffs). He found Day lying on his back and began to search him for contraband. App. 31a. His eyes were open, and he was breathing. App. Below 715, 718. Monday began to suspect a problem only after Day's legs locked while he and Wooten helped him to his feet. App. 31a. Even then, Monday was unsure whether Day was being obstinate or experiencing a medical issue. *Id.* He asked for a second ambulance only after two unsuccessful sternum rubs implied the latter. App. 7a, 31a-32a.

Nor does the record support erasing the autopsy report's conclusion that an underlying heart condition contributed to Day's death. *Contra* Pet. 38. The petition appears to claim Day could not have suffered from cardiomyopathy because his maternal grandfather died from kidney failure and not a heart attack.

See id. That argument is confusing, but the evidence is clear. Day's cardiomyopathy is recorded in clinical findings after an autopsy (not in a field report and not based on family history, as the petition suggests). *Compare* App. Below 808-09, *with* App. Below 821-25. Indeed, the autopsy revealed a second heart condition too—one called cardiomegaly. App. Below 809, 812.

Scattered references to video evidence fare no better. Those claims characteristically lack citation—with the lone exception citing an unrelated page in the district court's decision. *See*, *e.g.*, Pet. 36-37. Regardless, the videos in the record do not "disprove" any "factual findings" in the decision below. *Contra id.* For the most part, those distant, silent videos do not resolve any material issues one way or the other. App. Below 1038 (Filing Nos. 76-4, 76-16, 76-17). To the limited extent they do, they contradict some of the petition's central claims.

For example, the theory that medics never examined Day rests on the claim that Sergeant Wooten "quickly" sent them away. Pet. 7. He purportedly did that "immediately after" Day "collapsed" to the ground. Pet. 37. Videos do depict officers and at least one medic helping the 312-pound, handcuffed Day return to the ground during the medics' interactions with him. App. Below 1038 (Filing Nos. 76-4, 76-16). But it is not evident from any of those videos when medics asked Sergeant Wooten to sign witnessing the return of custody. *See* App. Below 1038 (Filing Nos. 76-4, 76-16). On the other hand, the videos do show medics continuing to interact with Day after he returned to the ground. *See* App.

Below 1038 (Filing Nos. 76-4, 76-16). One confirms that they remained on scene with Day for about eight minutes after he returned to the ground. App. Below 1038 (Filing No. 76-16).[6]

Simply put, this is not a case about police officers torturing an asphyxiating man with handcuffs. It is a case about officers who sought medical care when an arrestee complained of breathing trouble and then relied on the medical professionals who cleared him to go to jail. On almost every material factual issue, the petition describes a different case than the one decided in two courts below. That is reason enough to deny it. *See* Sup. Ct. R. 14.4.

III. The petition presents a poor vehicle for reevaluating forty years of settled law.

A. The record below reveals no Fourth Amendment violation.

If the Court wishes to reconsider its qualified-immunity precedents, it should do so in a case that turns on the existence of clearly established law. This case does not. The record here establishes that neither Sergeant Wooten nor Officer Denny violated Day's Fourth Amendment rights.

The petitioners have never challenged the district court's holding that "Officer Denny's first

[6] The video is distant and grainy, but it shows officers or medics help Day to his feet at about the 21:00 mark and help him return to the ground at about the 22:25 mark. The medics do not return to their ambulance until roughly the 30:15 mark.

handcuffing of Day was unquestionably reasonable." *See* App. 41a. And although they never say exactly what they think the officers should have done differently, they apparently believe the Fourth Amendment required something more after Day complained of trouble breathing. Whether labeling that an excessive-force claim or a conditions-of-confinement claim, the question under the Fourth Amendment is whether Day's seizure was reasonable.[7] To prove a violation, the petitioners must show that the officers' actions were objectively unreasonable under the circumstances they faced.

They cannot meet that burden. When a winded Day complained about difficulty breathing after fleeing the mall, Denny asked him to take deep breaths to calm his heart rate. App. 5a, 27a. When Day repeated his complaint a few minutes later, Sergeant Wooten called for an ambulance. App. 6a, 29a. When medical professionals examined Day, they expressed no concern about the handcuffs and concluded that he was breathing normally. *See* App. 6a, 29a-30a. When the medics cleared Day for transportation to jail, the officers called for a jail van. App. 7a, 31a. The jail deputy found Day lying on his back. App. 7a. He was breathing, and his eyes were open. App. 7a, 31a-32a. When his legs locked as the officers helped him to his feet, and two sternum rubs elicited no reaction, the officers called for a second ambulance. App. 7a, 31a-32a.

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[7] *See Pulera v. Sarzant*, 966 F.3d 540, 550 (7th Cir. 2020) (conditions of confinement); *Tibbs*, 469 F.3d at 665 (excessive force).

Terrell Day's untimely death is a tragedy. But not all tragedies amount to constitutional violations, and this record reveals none. Sergeant Wooten and Officer Denny had no reason to believe the handcuffs were causing any problems. And the actions they took based on the information they did have—things like summoning medics to the scene and relying on their examination—were objectively reasonable.

B. The Court should not be eager to reevaluate decades of precedents shorthanded—especially in an area of law so often before it.

One of the Court's justices has already cast two votes in this case. Justice Barrett sat on the panel below and joined its unanimous opinion. App. 2a. She also joined the unanimous vote denying the petition for rehearing. App. 54a.

Justice Barrett recently explained her approach to recusal in response to a questionnaire from the Senate Judiciary Committee. *See* S. Comm. on the Judiciary, 116th Cong., Questionnaire for Nominee to the Supreme Court (2020), *available at* https://www.judiciary.senate.gov/imo/media/doc/Amy%20Coney%20Barrett%20Senate%20Questionnaire%20(Public)%20(002).pdf. She explained that she would recuse "from matters in which [she] participated while a judge on the court of appeals." *Id.* at 52. That approach tracks federal law, which requires any "justice . . . of the United States" to recuse if the justice "has served in governmental employment and in such capacity . . . expressed an opinion concerning the

merits of the particular case in controversy." 28 U.S.C. § 455(b)(3).

Recusals leave courts of last resort short-handed. "If an appeals court or district court judge withdraws from a case, there is another federal judge who can serve in that recused judge's place." John G. Roberts, Jr., *2011 Year-End Report on the Federal Judiciary* 9 (December 31, 2011), *available at* https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf. "But the Supreme Court consists of nine Members who always sit together, and if a Justice withdraws from a case, the Court must sit without its full membership." *Id.*

Should the Court wish to reevaluate decades of qualified-immunity precedents, it should await a case permitting all nine members to participate. It will have ample opportunity. The Court has decided twenty qualified-immunity cases during the past decade. *Supra* at n.4. And while it is hard to find comprehensive public data, the selected certiorari petitions available through Westlaw include over 200 qualified-immunity petitions during the past three years. There is no reason to believe that volume will dwindle anytime soon.

C. The Court should be reluctant to short-circuit the robust debate taking place in the political branches.

Whatever else one may think about them, the Court's landmark qualified-immunity decisions interpret a statute.[8] The already-significant interests underlying *stare decisis* carry "enhanced force" when this Court's decisions interpret a statute. *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015). "Then, unlike in a constitutional case, critics of [the Court's] ruling can take their objections across the street, and Congress can correct any mistake it sees." *Id.* That is equally true whether the decision hinges on the statutory text, examines the policies or purposes animating the law, or "announce[s] a 'judicially created doctrine' designed to implement a federal statute." *Id.* (citing *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014)).

As the Court explained in *Kimble,* its "interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change." *Id.* Those interpretive decisions are "balls tossed into Congress's court, for acceptance or not as that branch elects." *Id.* It therefore takes some "special justification" rising above even the usual force of *stare decisis* to disturb them. *Id.*

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[8] *See*, *e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Pierson v. Ray*, 386 U.S. 547 (1967).

Here, the petition rightly points to the debate over qualified immunity taking shape in the politically accountable branches. Pet. 22, 47. If anything, the petition understates the debate. At least seven bills and two resolutions directly addressing qualified immunity were pending before the 116th Congress when it drew to a close just days ago.[9]

That is as it should be. The "enhanced" statutory *stare decisis* doctrine tells us this ball has been tossed into Congress's court. *See Kimble*, 576 U.S. at 456.[10] The flurry of bills and resolutions introduced during the 116th Congress—ranging from calls to reform or abolish qualified immunity to an effort to codify a strengthened version of it—confirms beyond cavil that Congress understands its prerogative. The Court should be reluctant to short-circuit the robust debate under way in the politically accountable

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[9] Restoration of Civil Rights Act of 2019, H.R. 7115, 116th Cong. § 6 (2019); Ending Qualified Immunity Act, H.R. 7085, 116th Cong. § 4 (2020); George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. § 102 (2020); Qualified Immunity Act of 2020, H.R. 7951, 116th Cong. § 3 (2020); Justice in Policing Act of 2020, S. 3912, 116th Cong. § 102 (2020); Reforming Qualified Immunity Act, S. 4036, 116th Cong. § 4 (2020); Ending Qualified Immunity Act, S. 4142, 116th Cong. § 4 (2020); H.R. Res. 702, 116th Cong. (2019); S. Res. 602, 116th Cong. (2020).

[10] *See also* Aaron Nielson & Christopher J. Walker., *Qualified Immunity and Federalism*, 109 Geo. L.J. (forthcoming 2020), *available at* https://ssrn.com/abstract=3544897; Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1856-1863, 1874-77 (2018).

branches. Congress's decision to act, or its decision not to act, will determine qualified immunity's fate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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