No.

In the Supreme Court of the United States

JODY LOMBARDO, ET AL.
Applicants,

v.

CITY OF ST. LOUIS, ET AL.
Respondents.

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

APPLICATION FOR A 60-DAY EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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September 9, 2022

TO: The Honorable Brett Kavanaugh, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Eighth Circuit

Applicants Jody Lombardo and Bryan Gilbert respectfully seek a 60-day extension of time within which to file a petition for a writ of certiorari to review the Eighth Circuit's judgment in this case, to and including November 28, 2022. Absent an extension, the deadline for filing the petition will be September 27, 2022. This application is being filed on September 9, 2022—more than 10 days before the petition is due. *See* S. Ct. R. 13.5.

In support of this request, the applicants state as follows:

1. The Eighth Circuit entered judgment and issued its opinion on June 29, 2022, a copy of which is attached. This Court has jurisdiction under 28 U.S.C. § 1254(1).

2. This case arises out of the death of the applicants' son, Nicholas Gilbert, at the hands of six St. Louis police officers while Gilbert was having a mental-health crisis inside a secure holding cell in late 2015. After he was handcuffed, leg-shackled, and pressed face-down on the floor of the cell, the officers put their collective weight on top of Gilbert—and applied force specifically to his back—for 15 minutes as "he attempted to lift his body up" for air and said: "It hurts. Stop." By the time they stopped, it was too late. Gilbert had died.

3. After his death, the applicants brought excessive-force claims against the officers and *Monell* claims against the city of St. Louis. On April 20, 2020, the Eighth Circuit held that summary judgment was properly granted to all defendants because no reasonable jury could find that the officers' force was excessive. The Eighth Circuit concluded that the force was justified as a matter of law because Gilbert had initially resisted being handcuffed and because his "attempt to breathe" while bound on the floor constituted "ongoing resistance."

4. On June 28, 2021, this Court granted the applicants' petition for certiorari, vacated the Eighth Circuit's judgment, and "remand[ed] the case to give the court the opportunity to employ an inquiry that clearly attends to the facts and circumstances in answering [two] questions in the first instance"—first, "whether the officers used unconstitutionally excessive force," and second, "if they did, whether Gilbert's right to be free of such force in these circumstances was clearly established at the time of his death." *Lombardo v. City of St. Louis,* 141 S. Ct. 2239, 2242 (2021).

5. In its opinion, the Court directed the Eighth Circuit on remand to consider several "facts and circumstances" in particular: (1) "that Gilbert was already handcuffed and leg shackled when officers moved him to the prone position," (2) "that officers kept him in that position for 15 minutes," (3) "that officers placed pressure on Gilbert's back even though St. Louis instructs its officers that pressing down on the back of a prone subject can cause suffocation," and (4) that there was "well-known police guidance recommending that officers get a subject off his stomach as soon as he is handcuffed because of that risk" and "further indicat[ing] that the struggles of a prone suspect may be due to oxygen deficiency, rather than a desire to disobey officers' commands." *Id.* at 2241. This Court explained that these facts, when taken together, "may be pertinent to the relationship between the need for the use of force and the amount of force used, the security problem at issue, and the threat—to both Gilbert and others—reasonably perceived by the officers." *Id.* Because the Eighth Circuit "either failed to analyze such evidence or characterized it as insignificant," this Court remanded the case with instructions to conduct a more "careful, context-specific analysis," as "required by this Court's excessive force precedent." *Id.* at 2242.

6. Justice Alito dissented, joined by Justices Thomas and Gorsuch. They preferred "to grant the petition, receive briefing and argument, and decide the real question that this case presents": "whether the record supports summary judgment in favor of the defendant police officers and the city of St. Louis." *Id.* (Alito, J., dissenting).

7. On remand, the applicants filed a motion for supplemental briefing to address the "facts and circumstances" highlighted by this Court, which the Eighth Circuit denied in September 2021. The applicants pointed out that such briefing would allow the court to consider whether, as other circuits have uniformly held, "the law was clearly established that applying pressure to [a person's] back, once he [is] handcuffed and his legs restrained, [is] constitutionally unreasonable due to the significant risk of positional asphyxiation associated with such actions." *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008).

8. A few months later, in December 2021, the Fifth Circuit added to this consensus. The court held that, by 2016, it had long been "clearly established that an officer engages in an objectively unreasonable application of force by continuing to kneel on the back of an individual who has been subdued"—"meaning, he lacks any means of evading custody and does not pose a threat of immediate harm." *Timpa v. Dillard*, 20 F.4th 1020, 1029, 1034 (5th Cir. 2021). "This conclusion," Judge Clement explained, "comports with the decisions of our sister circuits that have considered similar facts." *Id.* at 1036 & n.7 (citing five circuits' cases and noting the Eighth Circuit's vacated decision in *Lombardo* as the only outlier).

9. The Fifth Circuit further held that "[t]he risks of asphyxiation in this circumstance should have been familiar to [the officers]." *Id.* at 1031. Though the officers argued that the decedent (Timpa) "continued to actively resist arrest," a "jury could find that an objectively

reasonable officer with [their] training would have concluded that [he] was struggling to breathe, not resisting arrest." *Id.*; *see id.* at 1030 ("[I]t is obvious that Timpa could no longer kick when he was lying face down and handcuffed with his ankles restrained."). A jury could therefore conclude that he "had been restrained and lacked the ability to pose a risk of harm or flight," and that the continued force "constituted deadly force,'" which was "necessarily excessive," defeating qualified immunity. *Id.* at 1032, 1034, 1038; *accord Fairchild v. Coryell County*, 40 F.4th 359, 368 (5th Cir. 2022) (holding same for two minutes of force to back).

10. The next month, the Ninth Circuit (Bea, Lee, Bennett, JJ.) similarly denied immunity to officers who had continued using force on a handcuffed and shackled detainee, causing him to suffocate. *Hyde v. City of Willcox*, 23 F.4th 863 (9th Cir. 2022). Like Gilbert, the detainee was having a mental-health crisis and initially resisted officers. Once he had "both his hands and feet restrained," the officers "should have recognized that [he] had effectively stopped resisting and posed no threat to the officers surrounding him." *Id.* at 871. The court thus held that when a person is "handcuffed," "shackled," and "surrounded by seven officers," a jury could find that he "could no longer resist." *Id.* at 871–72. And because it had long been clearly established that using even "intermediate force" is "unreasonable when [a person] had both his hands and feet shackled for two minutes and no longer could resist," the court held that qualified immunity was inappropriate. *Id.* at 872.

11. On June 29, 2022—one year after this Court's decision—the Eighth Circuit again broke from the consensus and affirmed summary judgment for the defendants. This time, the court "rel[ied] on the clearly established prong of the qualified immunity analysis." Op. 8. Despite this Court's clear instructions, the Eighth Circuit's legal analysis does not discuss

the significance of Gilbert being "already handcuffed and leg shackled when officers moved him to the prone position," or articulate how he could have meaningfully resisted at that point. 141 S. Ct. at 2241. It does not discuss the significance of the "officers ke[eping] him in that position for 15 minutes." *Id.* It does not discuss the significance of the "officers plac[ing] pressure on Gilbert's back even though St. Louis instructs its officers that pressing down on the back of a prone subject can cause suffocation." *Id.* It does not discuss the significance of the "well-known police guidance recommending that officers get a subject off his stomach as soon as he is handcuffed because of that risk" and "further indicat[ing] that the struggles of a prone suspect may be due to oxygen deficiency, rather than a desire to disobey officers' commands." *Id.* And it does not discuss the defendants' concession that deadly force was not authorized, CA8 JA1762–71, and that once the officers had "shackled and handcuffed [Gilbert], he couldn't harm anyone at that point," JA1795.

12. Instead, the court relied on a prior Eighth Circuit decision that involved none of these facts and that was decided three years after Gilbert's death. Op. 9–10. Because of that decision—and because Gilbert had moved his body in an attempt to breathe while he was on the floor handcuffed, leg-shackled, and surrounded by six officers—the Eighth Circuit held that he did not have a clearly established right to be free of excessive force, including "force to . . . his back." Op. 11. In reaching that conclusion, the court held that "there is no robust consensus of persuasive authority that would render the right clearly established." Op. 10. The court did not mention *Timpa*, *Hyde*, or many of the other circuit cases squarely holding to the contrary—all of which the applicants had brought to the court's attention in their motion for supplemental briefing and in subsequent letters of supplemental authority.

13. The Eighth Circuit then turned to the claims against the city. Having held that the officers were entitled to summary judgment because no reasonable jury could find that Gilbert's clearly established constitutional rights were violated, the court held that the same must be true for the city—even though cities (unlike officers) have no immunity. Op. 12.

14. The applicants' Supreme Court counsel respectfully requests a 60-day extension of time to file a petition for a writ of certiorari seeking review of the Eighth Circuit's ruling and submits that there is good cause for granting the request. The applicants' counsel of record, Jonathan E. Taylor, is on parental leave during September and October. Because of unforeseen circumstances, he will already be engaged with several other matters during much of that time. He submitted a brief in the Third Circuit on Tuesday, September 6 (*In Re: LTL Management*, No. 22-2006). He is preparing a motion for preliminary approval of a nationwide class-action settlement in the District Court for the District of Columbia, due Monday, September 26 (*National Veterans Legal Services Program et al. v. United States*, No. 16-745). He is presenting oral argument in the Ninth Circuit on Friday, October 21 (*Clarkson v. Alaska Airlines*, No. 21-35473). He also has briefs currently due in the Texas Supreme Court on Monday, October 24 (*LG Chem v. Morgan*, No. 21-994), and in the Eighth Circuit on Wednesday, November 2 (*Kiel v. Bearden*, No. 22-2694; *Betz v. Bearden*, No. 22-2697; *Zieser v. Bearden*, No. 22-2698; *George v. Bearden*, No. 22-2699).

15. Extending the deadline to November 28, 2022, will allow the applicants' counsel sufficient time to carefully research and prepare the petition.

CONCLUSION

For the foregoing reasons, the applicants respectfully request that the Court extend the time within which to file a petition for a writ of certiorari in this matter to and including November 28, 2022.

Dated: September 9, 2022

Respectfully Submitted,

/s/ Jonathan E. Taylor

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CERTIFICATE OF SERVICE

I, Jonathan E. Taylor, a member of the Supreme Court Bar, hereby certify that on September 9, 2022, a copy of the accompanying Application for a 60-Day Extension of Time to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit was sent by commercial carrier and by electronic mail to:

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All parties required to be served have been served.

September 9, 2022

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