No. 22–510

In the Supreme Court of the United States

JODY LOMBARDO, ET AL.,

Petitioners,

v.

CITY OF ST. LOUIS, ET AL.,

Respondents.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether public officers were on notice that putting a person who is handcuffed and in leg shackle face-down on the ground and applying sustained force by pressing into their back until that person suffocated and died is unconstitutional.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal-defense attorneys to ensure justice and due process for those accused of crimes or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal-defense lawyers, public defenders, military-defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defense and private criminal-defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of criminal justice. NACDL files numerous amicus briefs each year in this Court and other federal and state courts, assisting in cases like this one, which concern constitutional standards affecting arrestees and pretrial detainees, which are of broad importance to criminal defendants, criminal-defense lawyers, and the criminal-justice system as a whole.

REASONS FOR GRANTING THE PETITION

This case asks whether officers were on notice they may violate the Constitution's prohibition on excessive force when they kill a handcuffed and leg-

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[1] Pursuant to Rule 37.6, *amicus* certifies no counsel for a party has authored this brief in whole or in part and that no one other than *amicus* and its counsel have made any monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief.

shackled arrestee inside a cell by compression asphyxiation, a form of lethal force. This Court previously granted certiorari in this case and remanded to permit the Court of Appeals to either provide appropriate rationale for its grant of summary judgment to the officers or reach a different conclusion. The basis for remand was concern the lower court erroneously applied a *per se* rule to conclude no reasonable jury could find a constitutional violation as such a "per se rule would contravene the careful, context-specific analysis required" by this Court's precedents. Pet. App. 20a.

On remand, the Eighth Circuit held the constitutional violation at issue in this case was not "clearly established" by 2015 entitling the officers to qualified immunity and judgment as a matter of law.

The remand decision demands this Court's intervention more strongly than before. For one, the decision below again contradicts the national consensus that the prolonged use of force against restrained arrestees and pretrial detainees to the point of death is unconstitutional where, as here, the restrained person poses no threat to the officers. In addition, and despite this Court's clear ruling, the Eighth Circuit again granted summary judgment for the officers by applying a *per se* rule that contravenes this Court's precedent. In particular, the lower court's *per se* rule provides that any form of "resistance" by a restrained arrestee—even if such "resistance" constitutes the very attempt to live by trying to take a breath—justifies lethal force, even today. Thus, Nicholas Gilbert's death could not have violated "clearly established" law in 2015.

This Court should again intervene and confirm it was clearly established in 2015 that the objective reasonableness standard of the Fourth and Fourteenth Amendments prohibits the use of deadly force against a restrained arrestee or detainee who poses no threat to officers or others.

The decision below has profound implications. After this Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), the objective reasonableness standard of *Graham v. Connor*, 490 U.S. 386 (1989), governs all claims of excessive force brought by arrestees and pretrial detainees. As such, it is of paramount importance to apply a uniform standard across the country.

Before the Eighth Circuit's decision in this case, the courts of appeals agreed the Fourth and Fourteenth Amendments categorically prohibit the asphyxiation of a restrained civilian who poses no threat to officers or others. The decision below departs from these universal rules *prohibiting* lethal force and instead invokes a categorical *authorization* for deadly force when a restrained person is not perfectly submissive. Compression asphyxia is deadly force, and officials may not use deadly force against restrained civilians, even if those civilians are not fully submissive. Under this Court's precedents, no reasonable person would dispute it was clearly established by 2015 that the officers who encountered Gilbert handcuffed and shackled in a cell could not have shot him dead. The same must be true of applying deadly force by asphyxiation. The Eighth Circuit's contrary rule cannot stand.

For a second time, certiorari is warranted.

I. A NATIONAL RULE GOVERNING THE USE OF FORCE AGAINST ARRESTEES AND DETAINEES IS NEEDED

Although the decision below arises in the context of a use of force against an arrestee in a police holding cell, its reasoning extends to a wide swath of interactions in which individuals who are suspected or accused, but not convicted, of crimes come into contact with government officials. Pursuant to *Graham*, 490 U.S. at 396–97, and *Kingsley*, 576 U.S. at 397, the same objective reasonableness standard governs all claims of excessive force brought against law enforcement and jail staff prior to potential conviction.

Graham sets forth the Fourth Amendment standard for adjudging claims arising "in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen[.]" 490 U.S. at 395. This "settled and exclusive framework" for assessing Fourth Amendment excessive-force claims, *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017), also governs pretrial detainees' claims of excessive force arising under the due process clause of the Fourteenth Amendment, *Kingsley*, 576 U.S. at 396–97 (citing *Graham*, 490 U.S. at 396). When government officials "create[] asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect," whether in an arrest or a jail, "the conduct at issue, the risk of death to the detainee, and the minimal threat posed by a bound and incapacitated detainee to officer

safety is the same[.]" *Hopper v. Plummer*, 887 F.3d 744, 754-55 (6th Cir. 2018) (citations omitted).

Accordingly, all civilians asserting an excessive force claim for official conduct prior to potential conviction must "show only that the force purposely or knowingly used against him was objectively unreasonable." *Kingsley*, 576 U.S. at 396–97; *Mendez*, 137 S. Ct. at 1546. To assess objective reasonableness, courts consider the relationship between the need for force and the amount of force used, the extent of the civilian's injury, efforts by officials to limit the force, whether the civilian is fleeing or actively resisting arrest (and by what means), and the severity of the threat posed to officials or others. *Graham*, 490 U.S. at 396; *Kingsley*, 576 U.S. at 397, 399.

This constitutional standard governs uses of force in a broad range of law enforcement and detention settings, including uses of force against civilians during police investigative stops, arrests, and other seizures on the street, in public places, or in homes; against arrestees in police cars, processing and intake areas, and lockups; against persons released on bail pending trial; and against pretrial or civil contempt detainees held in jails and prisons. *Kingsley*, 576 U.S. at 396-99; *Graham*, 490 U.S. at 395; *Hopper*, 887 F.3d at 751-53. Most individuals who interact with our criminal justice system fall into these categories. The use-of-force standards at issue in this case thus affect a staggering number of Americans each year. For instance, in 2015 the average daily population of prisoners held pre-trial

in local jails exceeded 400,000.[2] In the same year, law enforcement officers made nearly 11 million arrests,[3] and initiated contacts with 27 million U.S. residents age 16 or older.[4]

Given the wide breadth of the constitutional rule at issue, it is essential this Court intervene to confirm the uniform national rule prohibiting the use of deadly force against fully restrained arrestees and detainees who pose no threat to officers or others constitutes clearly established law.

II. THE EIGHTH CIRCUIT'S DECISION CREATES A SIGNIFICANT CONFLICT AMONG THE COURTS OF APPEALS

This Court should grant the petition because the Eighth Circuit has again conflicts with the circuits' governing rule that it is clearly established officers may not use sustained force to asphyxiate restrained civilians who pose no threat to officers or others.

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[2] U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Zhen Zeng, Jail Inmates in 2016, at 2 (Feb. 2018) (average daily prison population in local jails in 2015 was 719,500), https://www.bjs.gov/content/pub/pdf/ji16.pdf; *id.* at 4 (62.5% of jailed prisoners were pretrial).

[3] U.S. Dep't of Justice, Federal Bureau of Investigation, Uniform Crime Reporting, Crime in the U.S. 2015 (Table 29), https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-29 (last visited Dec. 28, 2020).

[4] U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Elizabeth Davis, et al., Contacts Between Police and the Public, 2015, at 1-2 (Oct. 2018), https://www.bjs.gov/content/pub/pdf/cpp15.pdf.

A. Nicholas Gilbert Was Restrained and Posed No Threat But Was Nonetheless Killed By A Bevy Of Officers Pressing Down on His Neck and Back For More than Ten Minutes Until He Suffocated

The facts in this case, construed in the light favorable to Petitioner, focus on the officers continued use of force against Gilbert *after* he had been placed prone on the floor, in handcuffs, and in leg restraints. At that point, Gilbert's "actions were innocent, he was not ignoring commands or being violent, and his actions were based on 'air hunger'"; *i.e.* "a struggle to breathe while being restrained." Pet. App. 60a. Gilbert's body was pressed upon by six jailers for more than 10 minutes, though he posed no threat and was pleading for the officers to stop applying force because they were hurting and suffocating him. The continued pressure against Gilbert did not abate until he stopped breathing, causing death by asphyxiation. *Id.* at 62a. At most, the whole of Gilbert's "resistance" was that "he raised his chest up off the floor," in part of his struggle to breathe as an expression of "air hunger." *id.* at 6a, 60a.

B. The Eighth Circuit's Decision Again Directly Conflicts With Many Decisions Of Other Circuits

Prior to the decision below, it was the uniform—and clearly established—national rule that asphyxiating restrained or subdued civilians is objectively unreasonable. The Eighth Circuit's contrary decision creates a significant conflict among the circuits.

1. The **First Circuit** holds it was "clearly established in September 2012 that exerting significant, continued force on a person's back while that [person] is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force," drawing on authorities from four other circuits. *McCue v. City of Bangor*, 838 F.3d 55, 64-65 (1st Cir. 2016) (internal quotations and citations omitted).

In *Rivas v. City of Passaic*, 365 F.3d 181, 200 (3d Cir. 2004), the **Third Circuit** held an officer's use of compression asphyxiation would be unconstitutional if the victim "did not present a threat to anyone's safety as he lay in a prone position on the enclosed porch, hands and ankles secured behind his back." As here, the continued use of force after restraint—officers pressing on the decedent's back until he became "still and unconscious"—could be deemed constitutionally unreasonable. *Id.* Such a constitutional violation is clearly established. See *Giles v. Kearney*, 571 F.3d 318, 326 (3d Cir. 2009) (the rule prohibiting gratuitous force against a restrained inmate was clearly established in 2001); *Anthony v. Seltzer*, 696 F. App'x 79, 82 (3d Cir. 2017) (citing *Rivas* and cases from the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits to find 2013 conduct violated clearly established law).

The **Fourth Circuit** holds that it is "clearly established that officers could not continue to apply force to an already-restrained person who posed no threat." *Lawhon v. Mayes*, No. 20-1906, 2021 WL 5294931, at *2 (4th Cir. Nov. 15, 2021). In *Lawhon*, officers applied force on the decedent's back while he was handcuffed and prone, causing death by

asphyxia. *Id.* at *1. Given its own precedent, and confirmed by the national consensus, immunity was unavailable. See *id.* *2 (quoting *Est. of Jones ex rel. Jones v. City of Martinsburg*, 961 F.3d 661, 668 (4th Cir. 2020)); *id.* at *1 n.1 (citing *McCue v. City of Bangor*, 838 F.3d 55, 64 (1st Cir. 2016), *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008), and *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004)).

Several recent cases from the **Fifth Circuit** address excessive force claims involving a detainee's asphyxiation. First, pointing to precedent from 2008 concerning conduct in 2016, *Timpa v. Dillard* held it was "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." 20 F.4th 1020, 1034 (5th Cir. 2021) (citing, among other cases, *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008)). Likewise, *Estate of Aguirre v. City of San Antonio* concerned a handcuffed person placed prone on the ground with their legs restrained—called a "maximal restraint position"—for more than 5 minutes until he suffocated. 995 F.3d 395, 402-03 (5th Cir. 2021). While there was some discord among the panel about whether the initial decision to place the arrestee in the prone position was lawful, there was no dispute that it was clearly established by 2013 that the continued restraint and compression of a civilian who posed no threat to the officers may violate the constitution. *Id.* at 415-20 (Dennis, J.); *id.* at 423-24 (Jolly, J., concurring in the judgment); *id.* at 424-25 (Higginson, J., concurring in the judgment) ("[O]ur caselaw had converged by spring

2013 around the clearly established proposition that while such an initial restraint is not *per se* unconstitutional, the continued application of asphyxiating force may be unreasonable where there is no ongoing threat posed by the suspect." (citing *Pratt v. Harris County*, 822 F.3d 174, 184 (5th Cir. 2016), and *Khan v. Normand*, 683 F.3d 192, 195–96 (5th Cir. 2012))). See also *Fairchild v. Coryell Cty.*, 40 F.4th 359, 368 (5th Cir. 2022) (holding it clearly established that guards who used bodyweight to subdue a detainee in the prone position for approximately two minutes causing her to asphyxiate and die may violate the constitution).

The **Sixth Circuit** was among the first of the courts of appeals to deem found it clearly established that "[c]reating asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect constitutes objectively unreasonable excessive force." *Champion*, 380 F.3d at 903 (citing *Simpson v. Hines*, 903 F.2d 400, 403 (5th Cir. 1990)). The Sixth Circuit has repeatedly reaffirmed this rule. See, *e.g.*, *Hopper*, 887 F.3d at 754 (applying the "prohibition against placing weight on [the decedent's] body after he was handcuffed" to a claim by a jail detainee); *Martin v. City of Broadview Heights*, 712 F.3d 951, 961 (6th Cir. 2013) (reaffirming the "prohibition against placing weight on [the victim's] body *after* he was handcuffed").

The **Seventh Circuit** adheres to the same rule. Its leading case, *Abdullahi v. City of Madison*, 423 F.3d 763, 770-71 (7th Cir. 2005), recognized that "placing a person in a prone position while handcuffed on the floor does not, in and of itself,

violate the Fourth Amendment," but that additional "specific unreasonable conduct" by an officer who "knelt on the decedent's back with chest-crushing force," causing his death, does violate the Fourth Amendment. The court stressed, "No one contends that deadly force was justified once [the civilian] was lying prone on the ground with his arms behind him[.]" *Id.* at 769. This rule has been emphasized repeatedly. *E.g.*, *Taylor v. City of Milford*, 10 F.4th 800 (7th Cir. 2021) (viewing all of the evidence in the light most favorable to the plaintiff, the officer continued to apply significant restraints to the decedent even *after* he was restrained on the bed and had vomited and lost consciousness); *Richman v. Sheahan*, 512 F.3d 876, 883 (7th Cir. 2008) (holding that "a reasonably trained police officer would know that compressing the lungs of a morbidly obese person can kill the person," and that a reasonable jury could find the officers used excessive force in "a situation in which officers suffocate an obviously vulnerable person"); see also *Strand v. Minchuk*, 910 F.3d 909, 918 (7th Cir. 2018) (recognizing that "for decades" the Seventh Circuit has "emphasized that a subdued suspect has the right not to be seized by deadly or significant force"); *Miller v. Gonzalez*, 761 F.3d 822, 829 (7th Cir. 2014) ("This prohibition against significant force against a subdued suspect applies notwithstanding a suspect's previous behavior[.]").

In *Drummond v. City of Anaheim*, "officers allegedly crushed [a civilian] against the ground by pressing their weight on his neck and torso, and continu[ed] to do so despite his repeated cries for air, and despite the fact that his hands were cuffed

behind his back and he was offering no resistance." 343 F.3d 1052, 1061 (9th Cir. 2003). The **Ninth Circuit** held "[a]ny reasonable officer should have known that such conduct constituted the use of excessive force." *Id.*; see also *Krechman v. County of Riverside*, 723 F.3d 1104, 1108, 1111 (9th Cir. 2013) (reversing judgment for four officers who restrained an unarmed delusional man in prone position and put weight on his back while "he was repeatedly kicking"); *Barnyard v. Theobald*, 721 F.3d 1069, 1073 (9th Cir. 2013) (similar regarding choke hold).

Finally, the **Tenth Circuit** also follows the national rule. It held in *Weigel v. Broad* that "the law was clearly established that applying pressure to [a civilian]'s upper back, once he was handcuffed and his legs restrained, was constitutionally unreasonable due to the significant risk of positional asphyxiation associated with such actions." 544 F.3d 1143, 1155 (10th Cir. 2008); see also *Estate of Smart v. City of Wichita*, 951 F.3d 1161, 1176 (10th Cir. 2020) (finding it "clearly established that officers may not continue to use force against a suspect who is effectively subdued."); *McCoy v. Meyers*, 887 F.3d 1034, 1052 (10th Cir. 2018) (similar); *Estate of Booker v. Gomez*, 745 F.3d 405, 424-29 (10th Cir. 2014).

2. The remaining circuits have not squarely addressed an excessive force claim arising from asphyxiation but uniformly hold the continued use of force against a restrained civilian posing no threat to officials is unconstitutional. In *Lennox v. Miller*, the **Second Circuit** addressed force against a handcuffed arrestee on the ground who alleged the officer kneeled with full body weight on their back

and denied qualified immunity because such force was not justified in that circumstance. 968 F.3d 150, 157 (2d Cir. 2020); accord *Jones v. Treubig*, 963 F.3d 214, 225 (2d Cir. 2020). In the **Eleventh Circuit**, while mere restraint or "hog-tying" is permitted, *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1281 (11th Cir. 2004); *Cottrell v. Caldwell*, 85 F.3d 1480, 1492 (11th Cir. 1996), the use of additional force against subdued suspects is objectively unreasonable, *Skrtich v. Thornton*, 280 F.3d 1295, 1303 (11th Cir. 2002); *Young v. City of Augusta*, 59 F.3d 1160, 1163-65 (11th Cir. 1995). Finally, the **D.C. Circuit** has held that an officer's act of violence (which did not involve asphyxiation) against a restrained and non-threatening arrestee violates the Fourth Amendment. *Johnson v. District of Columbia* 528 F.3d 969, 976-78 (D.C. Cir. 2008).[5]

Contrary to the remand decision, all Courts of Appeals, including the Eighth Circuit before this case, *e.g.*, *Craighead v. Lee*, 399 F.3d 954, 962 (8th Cir. 2005), have embraced the conclusion that it is clearly established the continued use of force against restrained civilians posing no threat to officers is unconstitutionally unreasonable.

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[5] District courts in Washington, D.C., have concluded that "a reasonable officer would have been on notice that she could not choke to death an unarmed subject who had already been subdued by fellow officers." *Ingram v. Shipman-Meyer*, 241 F. Supp. 3d 124, 145 (D.D.C. 2017).

III. THE DECISION BELOW CONTRADICTS THIS COURT'S PRIOR RULING IN THIS CASE AND IS AN OUTLIER

Certiorari is warranted here because the Eighth Circuit's decision applied the same rule this Court already held was erroneous, and because the decision is an extreme outlier.

1. In its prior decision, this Court held the Eighth Circuit's first decision "could be read to treat Gilbert's 'ongoing resistance' as controlling as a matter of law." Pet. App. 19a-20a. As a result, it was "unclear" whether the court of appeals "thought the use of a prone restraint—no matter the kind, intensity, duration, or surrounding circumstances—is *per se* constitutional so long as an individual appears to resist officers' efforts to subdue him." *Id.* at 18a-19a. However, this Court held "[s]uch a *per se* rule would contravene the careful, context-specific analysis required by this Court's excessive force precedent." *Id.* at 19a. The Court of Appeals was given the opportunity to apply the correct, context-specific rule on remand in place of an erroneous *per se* rationale.

On remand, and despite its footnote to the contrary, *id.* at 10a n.3, the Eighth Circuit repeated its error and again invoked a *per se* rule that any form of resistance—even if such resistance is someone's effort to avoid suffocation—is controlling as a matter of law. The panel reasoned that the "right to be free from prone restraint *when resisting* was not clearly established in 2015 when the incident with Gilbert occurred." *Id.* at 12a (emphasis

added). Contrary to this Court's decision, no qualifiers or analysis about the "kind, intensity, duration, or surrounding circumstances" of the prone restraint was part of the calculus. *Id.* Nor did the Court address the extent of "resistance" offered by Gilbert, which was innocent, non-violent, and constituted his efforts to simply take a breath. *Id.* Instead, the Eighth Circuit's logic rendered irrelevant the circumstances related to the officers' force, however extreme, as well as the circumstances of Gilbert's "resistance," however slight. See *id.* at 14a ("Gilbert's right to be free from prone restraint while engaged in ongoing resistance, even where officers applied force to various parts of his body, including his back, was not clearly established in 2015 when the incident with Gilbert occurred.").

The Eighth Circuit thus applied a *per se* rule that any resistance—even if that resistance includes the mere fact of trying to breathe—justifies deadly force. To the Eighth Circuit, even though he was restrained, Gilbert was entitled to a death sentence via compressional asphyxiation merely because he failed to lie flat in complete submission and, instead, struggled to raise his chest to breathe and called out in pain and for help. Such a rule directly contradicts this Court's prior decision, warranting certiorari.

2. The decision below is an extreme outlier among the court of appeals. The Eighth Circuit left no room in its decision to imply or suggest it was applying the context-specific analysis required by this Court's prior decision in this case (and that is demanded under bedrock principles in this Court's other decisions, discussed below).

The Eighth Circuit's discussion of sister-circuit cases applying the national rule confirms the opinion is at odds with established law. The remand decision acknowledges cases, cited above, from the Fifth, Sixth, Ninth, and Tenth Circuits. Pet. App. 12a-14a. But, it refused to apply them. Instead, the only stated reason for departing from the established national rule was the notion Gilbert had inadequately "ceased resisting" despite the fact he was in handcuffs, leg restraints, and held by 6 officers who pressed on his back and chest as he laid prone for more than 10 minutes. *See id.* ("Each of these cases is distinct because they involve instances where the subject had ceased resisting while officers were still applying force to a subject in prone position.").

That was not the rationale of these decisions, or the law of these other circuits. None other circuit applies the *per se* rule invoked below. Applying its long-held rule from *Champion*—where the arrestee was kicking as the leg restraints were applied, 380 F.3d at 387, the Sixth Circuit has emphasized that "the prohibition against placing weight on [a detainee's] body after he was handcuffed was clearly established in 2012." *Hopper*, 887 F.3d at 754. As a result, the Court denied qualified immunity where there was no dispute the detainee was suffering a medical emergency and even though "he may have kicked and thrashed," because the officers "did not consider him a threat to anyone after he was handcuffed." *Id.* at 755.

The Ninth and Fifth Circuits have not applied the rationale ascribed to them by the Eighth Circuit, either. In *Krechman*, the Ninth Circuit held

compression asphyxiation unlawful even though the detainee "was repeatedly kicking." 723 F.3d at 1111. Analogous to this case, the Ninth Circuit in *Drummond* emphasized any reasonable officer should have known that "crush[ing] Drummond against the ground … and continuing to do so despite his repeated cries for air … constituted the use of excessive force." 343 F.3d at 1061–62. The Fifth Circuit relied on a similar analysis in *Simpson*; the arrestee begged for help and screamed while prone to no avail. 903 F.2d at 402–03.

Finally, in *Weigel* the Tenth Circuit also did not apply a *per se* rule like the one invoked by the Eighth Circuit here. Instead, the court held "a reasonable officer would have known that the pressure placed on Mr. Weigel's upper back as he lay on his stomach created a significant risk of asphyxiation and death." 544 F.3d at1149. In so holding, *Weigel* recognized the suspect's bizarre behavior after being restrained and "vigorous struggle made him a strong candidate for positional asphyxiation." *Id.* Despite this "vigorous struggle," the constitutional violation was evident because continued pressure on a prone and restrained suspect was unnecessary as he posed no threat to the officers or others. *Id.*

* * *

The remand decision contradicts this Court's ruling in this very case. The remand decision also creates a conflict with many decisions of other Courts of Appeals, whose holdings it refused to follow and plainly misconstrued. This Court's intervention is necessary to correct these conflicts.

IV. THE NATIONAL RULE IS THE CONSISTENT WITH THIS COURT'S DEADLY FORCE CASES AND WIDESPREAD POLICE PRACTICES

Reestablishing a national rule prohibiting officials from using deadly force, including depriving a person of oxygen, against restrained civilians who pose no threat is also necessary to ensure adherence to this Court's cases governing the use of deadly force and to existing law and policy governing police practices in the United States.

1. *Tennessee v. Garner* prohibits the use of deadly force "unless it is necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." 471 U.S. 1, 3 (1985). Although this Court has not expressly defined what quantum of force constitutes deadly force, compression asphyxiation would satisfy any conceivable definition. Asphyxiation presents the same "near *certainty* of death" as the shooting at issue in *Garner*. *Scott v. Harris*, 550 U.S. 372, 384 (2007). It is significantly more likely to cause the death of a suspect than a police car's bumping of a car, which this Court has determined "pose[s] a high likelihood of serious injury or death." *Id.* There can be no reasonable dispute that compression asphyxiation creates a substantial risk of death or serious bodily injury, which is the definition of deadly force employed by all courts of appeals. *Smith v. City of Hemet*, 394 F.3d 689, 705-06 (9th Cir. 2005) (en banc). Officers who place their full body weight on a subdued citizen in a prone position, as he gasps

for air and cries, "I can't breathe," are at substantial risk of causing serious bodily injury or death.

As Justice Scalia emphasized in *Mullenix v. Luna*, deadly force is the "directing of force sufficient to *kill at the person* of the desired arrestee." 577 U.S. 7, 19 (2015) (Scalia, J., concurring). Officers who suffocate a civilian exert a type of force "applied with the object of harming the body of the [citizen]" that is not exceeded by any other type of force. *Id.* Consider if the officers who asphyxiated Nicholas Gilbert in this case had instead shot him in his cell, while shackled and handcuffed. No one would dispute that such a use of deadly force would be categorically unreasonable. The result should not be different when officers deploy deadly force without a gun or other weapon. After all, "[i]t is undisputed that chokeholds [and similar techniques] pose a high and unpredictable risk of serious injury or death." *City of L.A. v. Lyons*, 461 U.S. 95, 116 (1983) (Marshall, J., dissenting).

Importantly, this case is not only about the application of deadly force, but also the right to be free from continued, unnecessary force once an officer has restrained an individual. Since *Garner*, this Court's cases discussing the reasonableness of deadly force have focused on whether the suspect posed an immediate threat of serious bodily injury to the officers or others, but they also have all concerned suspects who were *not restrained*. See *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018); *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774-75 (2015); *Plumhoff v. Rickard*, 572 U.S. 765, 775-77 (2014); *Tolan v. Cotton*, 572 U.S. 650, 657-60 (2014); *Scott*, 550 U.S. at 383-84; *Brosseau v.*

Haugen, 543 U.S. 194, 196-201 (2004). Certiorari is warranted because the Eighth Circuit's decision that compression asphyxiation can be used to kill a handcuffed and shackled civilian inside of a jail cell contradicts this Court's cases defining when officials may use deadly force—all of which require a threat to the officers or others.

2. Relatedly, this Court should grant certiorari because the Eighth Circuit's decision is inconsistent with foundational Fourth Amendment principles. This Court has time and again explained that the Fourth Amendment was adopted against the backdrop of English colonial oppression to set limitations on executive authority, *Stanford v. State of Tex.*, 379 U.S. 476, 480-85 (1965), and it has "long understood that the Fourth Amendment's protection against 'unreasonable . . . seizures' includes seizure of the person[.]" *California v. Hodari D.*, 499 U.S. 621, 624 (1991). In turn, the Fourth Amendment's prohibition on the use of excessive force has been enumerated with eye toward common-law rules and American practices. *Garner*, 471 U.S. at 12-19; see also *Torres v. Madrid*, 141 S. Ct. 989, 995-97 (2021).

At common law, deadly force could not be used against a restrained—and certainly not a jailed—civilian. For example, "where the imprisonment [was] only for safe custody *before* the conviction, and not for punishment *afterwards*. . . the public [was] entitled to demand nothing less than the highest security that can be given, viz., the body of the accused, in order to insure that justice shall be done upon him if guilty." 4 W. Blackstone, *Commentaries* *298 (emphasis in original). "In this dubious interval between the commitment and trial, a prisoner ought

to be used with the utmost humanity." *Id.* *300. In Gilbert's case, the officers applied deadly force while Gilbert was handcuffed and shackled inside of a single-occupancy jail cell. Once restrained, he posed no threat of death or bodily injury to officers or others, including himself. Even if the use of force to handcuff and shackle Gilbert might have been justified, there is simply no question that common-law rules would have prohibited the use of deadly force against him after he was fully restrained. The conduct at issue here is the sort of exertion of executive authority the Fourth Amendment was intended to prevent.

3. Important to understanding the scope of Fourth Amendment protections are the laws and practices adopted in American jurisdictions. *Garner*, 471 U.S. at 15-20. Governments across the United States restrict the use of oxygen-depriving restraint techniques, except where deadly force is permissible, and others go even further and prohibit such force altogether. For example, Colorado prohibits law enforcement officers from using such techniques on any citizen for any purpose. Colo. Rev. Stat. Ann. § 18-1-707 (West 2020).[6] Other states, like Minnesota, identify force that restricts the ability to breathe as deadly and prohibit its use except where deadly force

[6] See also Cal. Gov't Code § 7286.5 (Filed with Secretary of State Sept. 30, 2020); D.C. Code Ann. §5-125.03 (West 2001) (prohibiting the use of trachea holds under any circumstances); Nev. Rev. Stat. Ann. § AB 3, § 4 (West 2020).

is necessary. Minn. Stat. Ann. § 609.06 (West 2020).[7] Notably, New York and Delaware have criminalized the use of such techniques by police officers as felonies, and Utah makes it a felony to "restrain a person by the application of a knee applying pressure to the neck or throat of a person."[8]

4. Many law enforcement agencies have implemented policies that discourage and prohibit the use of restraints that may result in asphyxiation. The eight largest police departments in the country prohibit or have a moratorium on the use of choke holds or similar restraints, unless deadly force is necessary.[9] A survey recently found at least 32 of the

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[7] See also Conn. Gen. Stat. Ann. § 53a-22 (West 2020) (adding the prohibition of choke holds or other restraints that "impede[] the ability to breathe or restricts blood circulation to the brain" unless deadly force is necessary, effective April 1, 2021); D.C. Code Ann. §5-125.03 (West 2001) (prohibiting use of carotid artery hold, except where lethal force is necessary); Iowa Code Ann. § 804.8 (West 2020); 720 Ill. Comp. Stat. Ann. 5/7-5.5 (West 2016) (prohibiting choke holds except where deadly force is justified); N.H. Rev. Stat. Ann. § 627:5 (2020) (same); Or. Rev. Stat. Ann. § Ch. 3, § 2 (West 2020).

[8] N.Y. Penal Law § 121.13-a (McKinney 2020) (aggravated strangulation where officer commits crime of criminal obstruction of breathing or blood circulation); Del. Code Ann. tit. 11, § 607A (West 2020) (similar definition of aggravated strangulation, with exception that use of chokeholds are justifiable when deadly force is necessary); Utah Code Ann. § 53-13-115 (West 2020).

[9] See New York Police Department, Force Guidelines, Procedure No. 221-01 (June 1, 2016) (prohibiting any force, including choke holds, on a restrained individual "unless necessary to prevent injury, escape or to overcome active

nation's largest police departments have banned or strengthened restrictions on restraints that pose a substantial risk of asphyxiation.[10] And the Department of Justice for decades has stressed that

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physical resistance or assault"), https://tinyurl.com/48szedjh; Los Angeles Police Department, Moratorium on Training and Use of the Carotid Restraint Control Hold (June 7, 2020), https://tinyurl.com/ydvwcuaf; Chicago Police Department, General Order G03-02, Use of Force (Feb. 28, 2020) (defining deadly force, in part, as "other maneuvers for applying direct pressure on a windpipe or airway" and prohibiting use of deadly force "against a person who is a threat only to himself, herself, or property"), https://tinyurl.com/ydvwcuaf; Houston Police Department, General Order No. 600-17, Response to Resistance (June 19, 2020), https://www.houstontx.gov/police/general_orders/600/600-17_ResponseToResistance.pdf; City of Phoenix, City Counsel Policy Session (June 9, 2020) (noting Police Chief Jeri Williams "suspended the use of carotid control technique effective immediately"), https://tinyurl.com/2k6ercxd; Las Vegas Metropolitan Police Department, Procedural Order 046-20, Use of Force Policy (July 8, 2020) (banning chokeholds), https://tinyurl.com/yxdcn9hh; Philadelphia Police Department Directive 10.2, Use of Moderate/Limited Force (updated July 11, 2022) (prohibiting neck restraints and transporting individuals in a face down position to prevent positional asphyxia), https://www.phillypolice.com/assets/directives/D10.2-UseOfModerateLimitedForce.pdf; San Antonio Police Department, General Manual, Procedure 501 Response to Resistance (Sept. 14, 2020) (prohibiting use of lateral vascular neck restraint), https://www.sanantonio.gov/Portals/0/Files/SAPD/OpenData/501-UseOfForce.pdf.

[10] Kimberly Kindy, et al., *Half of the Nation's Largest Police Departments Have Banned or Limited Neck Restraints Since June*, WASH. POST, Sept. 6, 2020, at 2, https://www.washingtonpost.com/graphics/2020/national/police-use-of-force-chokehold-carotid-ban/#survey-results.

"the use of maximal, prone restraint techniques should be avoided."[11]

This Court should grant certiorari because the Eighth Circuit's decision is inconsistent with the widespread laws and rules governing law enforcement that prohibit asphyxiation of restrained civilians.

CONCLUSION

The Petition should be granted, and this Court should confirm the national rule prohibiting officials from using deadly force against restrained arrestees and detainees who pose no threat.

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[11] U.S. Dep't of Justice, *Positional Asphyxia—Sudden Death* (June 1995), https://www.ncjrs.gov/pdffiles/posasph.pdf.