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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented by Petitioners is misleading, impermissibly framed at a high level of generality, and pays no heed to the facts which the lower courts found admitted or uncontroverted by Petitioners below. The actual questions presented are much narrower:

First, whether officers who participated in restraining a suicidal and violent arrestee before he was prone, but who did not participate in and were not present for a later temporary prone restraint by different officers, are entitled to qualified immunity from a claim alleging that the prone restraint they were not present for was a violation of the arrestee's Fourth Amendment Rights under 42 U.S.C. § 1983.

Second, whether police officers, acting to protect themselves and the arrestee from the arrestee's suicidal, thrashing and violent behavior while under the influence of methamphetamine, violate the Fourth Amendment by using non-lethal physical force to restrain the arrestee, including placing him temporarily in a prone position, while awaiting the arrival of medical assistance, such that the officers are not entitled to qualified immunity against a claim of constitutional deprivation under 42 U.S.C. §1983.

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INTRODUCTION

This case comes to this Court again, after a third ruling in favor of Respondents. As before, Petitioners' renewed bid for plenary review depends on a false premise: that the Eighth Circuit held the use of prone restraint is *per se* constitutional no matter the kind, intensity, duration, or surrounding circumstances, so long as the restrained subject appears to resist restraint – even where the subject does nothing more than struggle to breathe. Of course, the Eighth Circuit did no such thing.

To the contrary, the Eighth Circuit explicitly held on remand that it has "never held, nor do we now hold, that '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." *Lombardo v. City of St. Louis*, 38 F.4th 684, 690 n.3 (8th Cir. 2022) (citing *Lombardo v. City of St. Louis*, 141 S. Ct. 2239, 2241 (2021)). After explicitly rejecting the false premise upon which the instant Petition depends, the Eighth Circuit faithfully adhered to this Court's instruction by rejecting Petitioners' invitation to define clearly established law at a high level of generality, painstakingly analyzing the record in the light most favorable to Plaintiffs, and paying "careful attention to the facts and circumstances" before correctly deciding that the defendant officers are entitled to qualified immunity under the specific and unique circumstances at issue *in this case*. *Id*; *Graham v. Connor*, 490 U.S. 386, 396 (1989).

In this case, decedent Nicholas Gilbert ("Gilbert"), while under the influence of a substantial quantity of methamphetamine, tried to hang himself from the bars in his police holding cell, assaulted officers when they attempted to stop him from harming himself, gashed his own head on a concrete bench and injured an officer before he was brought to a prone position for his own safety pending the arrival of urgently summoned Emergency Medical Services ("EMS"), and continued to kick and thrash throughout the entirety of the time he was prone. As soon as he stopped actively resisting, kicking, and thrashing, the remaining officers immediately turned Gilbert on his side and then on his back. At no time during Gilbert's prone restraint, which consisted primarily (if not exclusively) of restraining Gilbert's limbs, did Gilbert's breathing appear abnormal to any officer.

Unlike the thorough opinions of the three lower courts that affirmed summary judgment in favor of Respondents on this record, Petitioners' renewed bid to secure plenary review by this Court pays no heed to the actual material facts in this case, many of which they either admitted below or failed to controvert by citation to admissible evidence as required, and instead distort the record to attack a straw man holding which exists only in the imaginations of Petitioners and their *amici*.

Not only do Petitioners ignore the record in this case, they also ignore materially different facts and circumstances underlying other appellate circuit decisions to conjure a circuit split warranting this Court's

review where none exists. Even assuming appellate decisions in other circuits may clearly establish law for purposes of qualified immunity, which they cannot, the Eighth Circuit readily distinguished the facts in this case from the materially different out-of-circuit decisions upon which Petitioners rely by noting that, in stark contrast to the facts of this case, each involved force exerted on a prone subject for sustained periods *after* the subject was completely subdued and was no longer a threat. None involved a subject attempting to commit suicide such that he was a threat to himself and could not be safely left restrained alone lest he continue to thrash his skull against exposed concrete. Notwithstanding Petitioners' insistence otherwise, the circuits are no more split over whether prone restraint is constitutional than they are split over whether any other broadly defined use of force is constitutional. To the contrary, there is consensus across the circuits that the objective reasonableness of each use of force is analyzed in light of all the facts and circumstances confronting the officer in each case pursuant to established Fourth Amendment jurisprudence. This Court should recognize Petitioners' unsupported cry of a circuit split for what it is: a pretext to entice this Court to needlessly interpose its judgment on the Eighth Circuit in a fact-intensive case.

At bottom, this case involves the application of properly stated Fourth Amendment and qualified immunity principles to a particular factual record. Review of this record would be of little aid to courts tasked with analyzing different kinds of prone restraint under

different circumstances in the future. Even if this Court were to undertake a plenary review of this record to issue a fact-specific decision with no uniform applicability, it would apply settled law to inevitably reach the status quo: the application of qualified immunity and summary judgment in favor of Respondents.

The Petition for a Writ of *Certiorari* should be denied.

STATEMENT OF THE CASE

Petitioners' narration paints this case in broad strokes, without regard to the requisite individualized analysis of each officer's conduct, and without regard to the facts determined undisputed by the district court. Respondents rely on the facts as stated by the district court, reserving the right to contest facts in the event of further proceedings in this Court or below.

A. Factual Background

Nicholas Gilbert, who suffered from severe heart disease and had ingested a substantial quantity of methamphetamine, actively resisted police officers before first breathing erratically *after* he was placed on his side from the prone position.

On December 8, 2015, Gilbert suffered from severe heart disease and had ingested a substantial quantity

of methamphetamine. JA1995-996(¶¶108-09). Gilbert was arrested that day for trespass and occupying a condemned building. JA1976(¶13). He was also subject to outstanding traffic arrest warrants. JA2193(¶1). Arresting officers delivered him to a holdover booking area at a police district station and he was booked at 4:45 p.m. JA1976(¶14), 1977-78(¶23). The holdover is a temporary holding area and has no medical staff on site. In case of medical emergencies, officers must summon EMS. JA1977(¶¶19-21).

Gilbert denied any health problems and gave no indication of drug use. JA1978(¶25), 1979(¶30). He displayed no erratic behavior until after he had been placed alone in a cell. JA1979(¶¶31-32). No defendant knew of Gilbert's heart disease or meth use.

Early in the evening, Gilbert began exhibiting unusual behavior. He waved his hands and grabbed at the air, rattled the bars of his cell, threw his shoe, and bobbed up and down. JA1979(¶31), JA1979-80(¶36), 1980(¶42). Shortly thereafter, Officer King saw Gilbert tie clothing around his neck and attach it to the cell bars. JA1979(¶32). King called out to Officers Stuckey, DeGregorio, and Wactor that Gilbert appeared to attempt suicide. *Id.*(¶33). Stuckey, DeGregorio, and Wactor then noticed the same behavior. JA1979-80. Two other prisoners could not see Gilbert from their cells, but heard noisy behavior by Gilbert. JA1724-25, 1729. They later heard noise consistent with a physical struggle. *Id*. Officers testified in accord that their purpose in entering Gilbert's cell was to protect Gilbert from self-harm. JA1979-81(¶¶33-47).

Sergeant Bergmann, also came to the holdover. With Stuckey in the lead, Bergmann and DeGregorio proceeded to Gilbert's cell, which was opened by the booking clerk. JA1981(¶47). Stuckey entered the cell and tried to handcuff Gilbert by grabbing Gilbert's left wrist. JA1982(¶52). A struggle then commenced with Bergmann, Stuckey, and DeGregorio. In the process, Gilbert was brought to a kneeling position over the concrete bench in the cell and handcuffed. JA1982(¶¶53-54). After he was handcuffed, Gilbert continued to resist the officers, tried to stand up, kicked the officers, and reared backwards off of the bench. JA1983(¶58). At this time, Gilbert kicked Stuckey in the groin, injuring him. JA1984(¶¶60, 61). Gilbert then continued to thrash about, striking his head on the bench and suffering a gash which bled. JA1983(¶59). Whatever Gilbert's subjective intent, there is no dispute that Gilbert kicked the officers, thrashed about, reared back against them, and was otherwise physically defiant. JA1982-83(¶¶53, 58-60).

Sergeant Bergmann then called for additional help and leg shackles. JA1984(¶61). Officers King and Wactor responded, with Wactor bringing the leg shackles. JA1985(¶62). Gilbert continued to struggle over the bench with multiple officers. *Id*. Finally, King and Wactor succeeded in shackling Gilbert's legs, and King left the cell. JA1985(¶63). Officer Stuckey also left the cell, called for more help and did not return. JA1986(¶¶67, 69).

After Gilbert's legs were shackled, Bergmann requested EMS be summoned. JA1985(¶64). King notified

the police dispatcher to summon EMS, referencing Gilbert's possible "psychotic issues." JA1985-86(¶66). The call for EMS went out from dispatch at 6:15 p.m. *Id*. At this point, Gilbert was not in a prone position, but remained crouched over the bench. JA1986(¶72). In further response to Sergeant Bergmann's request for help, Officer Stuckey yelled at the booking clerk to sound the holdover alarm, which was eventually activated. JA1986(¶¶67-68).

In response to the holdover alarm and Officer Stuckey's calls for help, Officers Mack, Opal, Cognasso, Lemons and vonNida came to Gilbert's cell. JA1987. Officer Mack relieved an exhausted Officer DeGregorio, who left the cell and had no further contact with Gilbert. JA1987(¶74). Officer Mack took control of Gilbert's upper left arm and assisted Sergeant Bergmann in moving Gilbert from the bench to a prone position, which was more secure. JA1987(¶75). Sergeant Bergmann, who had ahold of Gilbert's right arm, was then relieved by Officer Opal. JA1983(¶¶56-57), JA1987(¶76). Thereafter, Sergeant Bergmann left the cell. JA1987(¶77). Officer Cognasso responded to find Gilbert thrashing his shackled legs back and forth, kicking the officers, and moving his body around. JA1988(¶79).

At this point, there is no dispute that Gilbert was on the floor in the prone position thrashing about and kicking in spite of the leg shackles. *See, e.g.*, JA197, 199. Petitioners proffered putative expert testimony that Gilbert's combative behavior was due to "air hunger," i.e., difficulty breathing due to his prone position, but

the district court excluded this testimony – a ruling is not challenged on appeal. JA1988-90.

After Gilbert was placed in the prone position, the actions of the defendant officers in the cell at that time are clear. Officer Wactor helped to place Gilbert's legs in shackles, he did not kneel on Gilbert or apply any additional force. JA488. Officer Opal took over for Sergeant Bergmann who was controlling Gilbert's right arm. JA341, JA1983(¶56), JA1987(¶76). Officer Lemons knelt on Gilbert's leg to stop the kicking. JA1988(¶81). Officer vonNida held an arm or leg to prevent Gilbert from thrashing about. JA1988(¶82). Officer Cognasso knelt on Gilbert's calves to prevent him from striking anyone. JA1988(¶80). Officer Mack restrained Gilbert's upper left shoulder. JA304, 307.

There is no evidence that any of the officers in the cell at that time placed even minimal weight directly on Gilbert's neck or back or otherwise compressed his neck or chest. JA808-15. With respect to Petitioners' assertion that an unidentified officer pushed on the lower or middle part of Gilbert's torso, no such testimony was elicited. Rather, Officer Cognasso merely stated that, to the best of his recollection, there was an officer positioned near the "lower or middle part of [Gilbert's] torso." JA1794. Notably, Cognasso denied that he or anyone else pressed down on Gilbert in such a

way as to compress his neck, chest, or stomach. JA0804.[1]

After actively fighting with the officers on the ground for several minutes, Gilbert stopped kicking and flailing. As soon as Gilbert stopped resisting, the officers immediately rolled him onto his side. JA1989(¶84). Gilbert was never in a prone position at any point thereafter and, at this time, he was breathing normally. JA1991(¶88).

Although it is not possible to determine from the record exactly how long Gilbert was prone, the Eighth Circuit noted that recorded EMS calls indicate it was less than ten minutes. When Officer King called for EMS at 6:15 p.m., King had just placed Gilbert in leg restraints; Gilbert was positioned at the bench, not yet prone. JA1985(¶¶63-66); JA245. Officer Mack, who helped place Gilbert prone on the floor, JA1986-87(¶¶72-75), estimated he was in the cell for less than a minute before he relieved DeGregorio, JA308, and that Gilbert struggled for several minutes while Mack was engaged with him. JA307. Gilbert was placed on his side when he stopped struggling. JA1989(¶84). However, it took some time after Gilbert was placed on his side for officers to determine that he had begun experiencing a medical emergency. During that period, officers monitored Gilbert's breathing, performed a sternum rub, laid him on his back, and checked his

[1] Even assuming that an unidentified officer placed some degree of weight on Gilbert's back, the Defendant Officers remain entitled to qualified immunity.

pulse. JA1991-93(¶¶89-93). By the time Sergeant Bergmann radioed EMS at 6:27 p.m. to say Gilbert "may not be breathing," Gilbert had likely already been out of the prone position for at least several minutes.

Sergeant Bergmann again radioed for the status of EMS response and asked that they "step it up." JA1990(¶86). This broadcast occurred at 6:26 p.m. *Id.* Officer Cognasso, who heard Sergeant Bergmann's request to EMS, left the holdover to wait outside for EMS to respond. JA1990(¶¶86-87). At some point after being rolled onto his side, Gilbert's breathing appeared erratic to the officers. JA488-89, 1991-93. This was the first time any defendant officer had any indication Gilbert was having difficulty breathing. At 6:27 p.m., Sergeant Bergmann again radioed to expedite EMS. JA1993-94(¶96). After monitoring his breathing and determining that Gilbert was no longer a threat, Officer Mack removed Gilbert's handcuffs, rolled him onto his back, and checked for a pulse. JA1992-93(¶¶91-93). Officer Mack found a pulse and Gilbert was still breathing – albeit erratically. Shortly thereafter, however, Gilbert stopped breathing and Officer Mack could not find a pulse. JA1994. Officers went to obtain a defibrillator, started CPR and rescue breathing, and attempted to shock Gilbert's heart. JA1994. Officers vonNida and Wactor attempted to use the defibrillator machine to shock Gilbert's heart, but the machine never signaled a shockable heart. JA1994. Sergeant Bergmann again radioed for the status of EMS at 6:36 p.m. JA1994-95(¶102). Officers Mack and Wactor continued CPR until EMS arrived. JA1995(¶103). Gilbert

was eventually transported to a hospital where he was pronounced dead at 7:32 p.m. JA1995(¶105).

On December 8, 2016, the City Medical Examiner, Dr. Jane Turner, performed an autopsy. JA2079-90. Turner determined Gilbert's cause of death was "arteriosclerotic heart disease exacerbated by methamphetamine and forcible restraint." JA1995-96, 2088. Petitioner's expert, Dr. Francisco Diaz, found the primary cause of death to be forcible restraint, but acknowledged Gilbert's heart disease and methamphetamine use were underlying factors to his death. JA2015. Neither the medical examiner nor Petitioners' expert opined that there was any indication of serious injury to the chest attributable to the forcible restraint. JA2013-14, 2088.

The City police division investigated Gilbert's death to determine if the officers involved violated the City's detailed and constitutional policy regarding the use of force which mandates that officers use the least amount of force necessary to accomplish lawful objectives and to protect the public, officers, and arrested persons. JA1996-97. The City also has a policy regarding prisoners in a holdover who exhibit violent behavior to the point of being self-destructive or who attempt suicide. JA1998. The policy requires that suicidal prisoners not be left alone. JA1998(¶119). While there was no specific policy at the time forbidding prone restraint, the City trained officers to minimize the time a person is restrained in a prone position. JA1764-66. Officers were also trained to work in teams to control combative persons by restraining the person's limbs –

which the defendant officers did in this case. JA2000(¶130). City's investigation determined that none of the defendant officers violated policy.

B. Procedural Background

The district court entered a thorough opinion, painstakingly analyzing the record. The court did not attempt to resolve any factual disputes, but treated Petitioners' unsupported denials regarding Gilbert's "air hunger" as admissions of the facts that he was flailing or thrashing about. App.Pet.Cert. 45a, n.8, also 60a, n.12. After a thorough review of the record, the district court elected to resolve the case on the question of whether the defendant officers had violated a right that was clearly established as of December 8, 2015. App.Pet.Cert. 54a. The court canvassed the authorities, including a comprehensive review of cases cited here by Respondents. *Id*. 69a ff. The district court granted qualified immunity to all individual defendants on the clearly-established prong, which collapsed any claim against City for unconstitutional custom or failure to train. App.Pet.Cert. 97a, 99a.

The U.S. Court of Appeals for the Eighth Circuit affirmed on other grounds, holding that the officers' actions under the circumstances did not amount to unconstitutional force. App.Pet.Cert. 36a. This Court granted *certiorari*, vacated judgment, and remanded, giving the Eighth Circuit an opportunity to clarify its position as to whether the officers used unconstitutional force or whether Gilbert's right to be free of such

force in these circumstances was clearly established at the time of his death. App.Pet.Cert. 20a. On remand, the Eighth Circuit did exactly that. The Eighth Circuit again granted qualified immunity to the officers, holding that Gilbert's right to be free of force under the circumstances was not clearly established at the time of his death. App.Pet.Cert. 14a.

ARGUMENT

I. The 8th Circuit's order does not create a circuit split.

The Eighth Circuit's order does not create a circuit split warranting this Court's review. To the contrary, all circuits apply the same objective reasonableness standard when analyzing force used by police officers – paying careful attention to the totality of the circumstances as required by *Graham v. Connor*.

Here, the circuit decisions relied upon by Petitioners do not conflict, and instead uniformly apply the same rule of law to unique and varied fact patterns. This Court's excessive force precedent requires such context-specific analyses, which will necessarily yield different outcomes depending on the unique fact patterns presented. *Lombardo*, 141 S. Ct. at 2242. No circuit holds that a prone restraint is, in and of itself, unconstitutional when employed to arrest a resisting subject. *See Est. of Phillips v. City of Milwaukee*, 123 F.3d 586, 593 (7th Cir. 1997).

Because Petitioners refuse to address the materially different facts underlying the decisions upon which they rely, Respondents do so below and note, as the Eighth Circuit did, that all decisions denying qualified immunity in prone restraint cases involved, among other important differences, sustained force applied *after* the subject was subdued, stopped resisting, and no longer a threat to the officers or themselves. Not so here.

First Circuit

In *McCue v. City of Bangor*, the officers "continued to employ significant force after Mr. McCue ceased resisting and no longer posed a threat to the officers or himself." 838 F.3d 55, 65 (1st Cir. 2016). For nearly five minutes *after* McCue had stopped his brief resistance, officers pressed their knee into his neck, sat on his back, and punched him at times – all while he was hog-tied and prone. *Id.* at 59. On these distinguishable facts, qualified immunity did not apply.

Third Circuit

In *Rivas v. City of Passaic*, the Third Circuit denied officers qualified immunity when they placed the suspect in a prone position and used force on him after he fell off a stretcher, and the officers continued to use force as the suspect evacuated his bowels and bladder in what the officer knew was obviously a series of debilitating seizures. 365 F.3d 181, 198 (3d Cir. 2004). The *Rivas* court did not make any findings relating to

whether the use of a prone restraint is *per se* excessive force. *Id*. at 199-201. On these extreme and materially different facts, qualified immunity was denied.

Fourth Circuit

In *Lawhon v. Mayes*, the officers "did not cease the use of force even after Lawhon became motionless and unresponsive." No. 20-1906, 2021 WL 5294931, at *2 (4th Cir. Nov. 15, 2021). The officers "applied varying degrees of force to his body while Lawhon remained handcuffed in the prone position for nearly six minutes, with his face pushed into a pillow on the floor for most of that time." *Id.* at *1. Here, unlike *Lawhon*, three lower court decisions have found that, as soon as Gilbert's perceived resistance stopped, the officers ceased using any force and turned Gilbert on his side. JA1989(¶84).

Fifth Circuit

Perhaps no circuit more clearly demonstrates how and why the specific record of each case must drive the constitutional analysis than the Fifth Circuit. In *Timpa v. Dillard*, a 2021 order found that an officer who kept his knee and bodyweight on a suspect's back for nearly three minutes after he was non-responsive, was not entitled to qualified immunity. 20 F.4th 1020, 1030 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 2755 (2022). The suspect became non-responsive after officers heard his cries for help became slurred, and he fell limp. *Id*.

In *Gutierrez v. City of San Antonio*, officers who "hog-tied" a suspect and left him prone in the back of their vehicle after they knew that he had consumed drugs and was having a psychotic episode were not entitled to qualified immunity. 139 F.3d 441, 443 (5th Cir. 1998). The Fifth Circuit clearly noted that this holding was limited to the facts in that particular record. *Id.* at 451-52.

In *Goode v. Baggett*, the court reversed a grant of summary judgment after officers put a hog-tied suspect they knew suffered from asthma into a squad vehicle face down, and continued his face-down hog-tie restraint while in the hospital for nearly *two hours*. 811 Fed. App'x 227, 229-30 (5th Cir. 2020).

In *Fairchild v. Coryell County*, the Fifth Circuit reversed a grant of summary judgment to officers who pepper sprayed a suspect multiple times, took her to the ground, struck her with their knees, punched her in the face, and maintained pressure on the suspect's back and neck for two minutes *after* she was subdued. 40 F.4th 359, 364 (5th Cir. 2022).

In *Aguirre v. City of San Antonio*, the Fifth Circuit reversed a grant of summary judgment for officers who held a subject they knew to be in mental distress and who *never resisted* the officers in a prone position while hog-tied and applied pressure to his back and neck. 995 F.3d 395, 403-05; 420 (5th Cir. 2021).

By contrast, the record in two other Fifth Circuit cases supported qualified immunity. In *Hill v. Carroll Cnty., Miss.*, the Court found that officers who "hog-tied"

and placed the suspect face down in a squad car did not violate a constitutional right. 587 F.3d 230, 234-38 (5th Cir. 2009). In that case, the officers applied the "hog-tie" while the suspect was actively resisting, but kept her in that position, prone, in their vehicle after the resistance ended. *Id*. at 232-33.

In *Pratt v. Harris County*, placing a subject who was not suspected of a violent felony prone and hog-tied was reasonable. 822 F.3d 174, 184 (5th Cir. 2016). Though the suspect in *Pratt* was not suspected of a felony, he did violently resist the officers attempts to restrain him multiple times, and the force by officers ceased at the same time as the resistance. *Id.* at 178-89. Additionally, in *Khan v. Lee*, the District Court found that use of a prone restraint for the length of time necessary to get a suspect hog-tied was not objectively unreasonable. No. CV 07-7272, 2010 WL 11509283, at *11 (E.D. La. Dec. 2, 2010), *aff'd sub nom. Khan v. Normand*, 683 F.3d 192 (5th Cir. 2012). These cases track the facts in the instant case, where the force used by the officers ceased at the same time Gilbert's resistance, and support the application of qualified immunity.

Sixth Circuit

On its face, the Sixth Circuit may appear to have a more restrictive view of the use of prone restraints than other circuits. But it becomes clear that the Sixth Circuit is substantively aligned with the other circuits

that look into whether the suspect was subdued or incapacitated.

In *Hopper v. Phil Plummer*, for example, officers placed weight on various body parts of a handcuffed and disoriented subject, who they knew had suffered a seizure, including holding his head down; but it was undisputed the suspect did not pose any threat to himself or resist once cuffed. 887 F.3d 744, 749-55 (6th Cir. 2018). On those distinguishable facts, the Court found that qualified immunity did not apply *Id*. at 756.

In reaching this conclusion, the *Hopper* court expressly relied on two previous Sixth Circuit cases, *Martin v. City of Broadview Heights*, 712 F.3d 951 (6th Cir. 2013), and *Champion v. Outlook Nashville, Inc*, 380 F.3d 893 (6th Cir. 2004). In *Champion*, officers laid on top of an autistic subject who "had stopped resisting arrest and posed no flight risk, and sprayed him with pepper spray even after he was immobilized by handcuffs and a hobbling device." *Id.* at 901. Under those circumstances, the Court found that the use of force on a non-resisting, non-threatening individual was excessive. *Id*.

In *Martin*, officers struck the suspect several times in the ribs and face; he did not fight or resist the officers. 712 F.3d at 955. Further, the officers held him in a prone position, with the full bodyweight of at least one officer on his back. *Id.* On these materially different facts, qualified immunity did not apply.

Seventh Circuit

The Seventh Circuit has expressly articulated the proper, well-established standard for analyzing the use of prone restraint. In *Abdullahi v. City of Madison*, 423 F.3d 763, 768 (7th Cir. 2005); *Richman v. Sheahan*, 512 F.3d 876, 882 (7th Cir. 2008); *Est. of Phillips*, 123 F.3d at 592; and *Catlin v. City of Wheaton*, 574 F.3d 361, 366 (7th Cir. 2009), the Seventh Circuit begins its analysis with the *Graham* factors. "Viewed at a high level of generality, *Abdullahi* stands for the rather unsurprising proposition that a knee-to-the-back restraint may or may not be reasonable depending on the circumstances." *Catlin*, 574 F.3d at 367. The Court explicitly stated that "[k]neeling with just enough force to prevent an individual from 'squirming' or escaping might be eminently reasonable, while dropping down on an individual or applying one's full weight (particularly if one is heavy) could actually cause death." *Abdullahi*, 423 F.3d at 771.

In *Abdullahi*, the Court reversed a grant of qualified immunity when the officers knelt on the suspect's back while he was in a prone position and restrained and there was admissible medical expert testimony that linked the force to the suspect's death. 423 F.3d at 769.[2]

More like the instant case is *Estate of Phillips*, where the Seventh Circuit found that officers who used

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[2] Here, the District Court excluded the testimony of Mr. Gilbert's expert in a ruling that has not been challenged. App.Pet.Cert. 45a, n.8, also 60a, n.12.

enough force on the back of a subject who was in a prone restraint to prevent him from continuing to violently resist were entitled to qualified immunity. 123 F.3d at 593-92.

Ninth Circuit

In *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1056 (9th Cir. 2003), the Ninth Circuit found officers, who placed their full body weight on a suspect who was handcuffed and hobble restrained in a prone position as well as mentally distressed and *did not resist* or try to flee, were not entitled to summary judgment. This is in stark contrast to this case, where Gilbert was violently resisting throughout the time he was prone.

Tenth Circuit

In *Weigel v. Broad*, two state troopers tackled a suspect, placed him in a prone restraint and handcuffed him. 544 F.3d 1143, 1148 (10th Cir. 2008). *After* the subject was subdued and no longer resisting, one trooper kept the subject face down with pressure on his back, which led to the denial of qualified immunity. *Id*. at 1148-49. In *Estate of Booker v. Gomez*, the Tenth Circuit again applied the specific record to deny officers qualified immunity where officers used a knee on the suspect's back, the use of a carotid restraint,[3] a taser,

[3] A carotid restraint is pressure on the throat specifically designed to cut off blood flow to the brain. *Estate of Booker*, 745 F.3d at 413.

and a pain compliance device, all while the suspect was in a prone position and not resisting. 745 F.3d 405, 423-25 (10th Cir. 2014).

These cases do not demonstrate a circuit split.

Contrary to Petitioners' assertion, the cases they cite do not conflict with the Eighth Circuit's decision in this case. As the Eighth Circuit correctly held, there are obvious distinctions between this case and others that Petitioners fail to note, but which demonstrate the continuing vitality of *Graham*'s totality of circumstances approach when assessing different kinds of prone restraint. In these cases, courts always found significant factual distinctions, such as the suspect was experiencing an obvious seizure, or that the resistance had ceased while the use of force continued. Many of the cases involved officers hog-tying the subject, which did not occur in this case.

Here, the Eighth Circuit employed the legal framework prescribed by this Court. It applied that framework to the specific record presented, as required by this Court. *See Lombardo*, 141 S. Ct. at 2242. Because there is no discernible circuit split on any legal issue, this Court should decline to grant *certiorari*.

While individuals have the right to be free from the continued application of force, whether in a prone restraint or otherwise, when they are incapacitated, or when they are subdued and no longer resisting, the officers in this case ceased using force on Gilbert when his perceived resistance stopped. *See Timpa*, 20 F.4th

at 1036. Simply put, the Petitioners urge this Court to abandon the prescription of *Graham v. Connor*, and declare the use of prone restraint is *per se* unconstitutional once a subject is handcuffed, regardless and without consideration of any other fact or circumstance that existed. *See Graham*, 190 U.S. at 397. Such a radical departure from established law is untenable, and *certiorari* should be denied.

II. This case is a poor vehicle to address the question presented.

This case is a poor vehicle to address the question presented for three separate reasons.

First, this case is a poor vehicle to address the highly general question presented because it demands this Court apply a properly stated rule of law to a fact-intensive record that will not provide helpful guidance to other appellate circuits or district courts.

By way of their broad question presented, Petitioners strain to frame this case as a vehicle for this Court to "bring uniformity and clarity to the law" in what they call a "typical prone restraint" case, and thereby suggest that this Court's consideration may provide a silver bullet with broad-reaching national implications. Pet. 26. Not so.

As an initial matter, there is no need to bring "clarity to the law" because the objective reasonableness standard under Fourth Amendment jurisprudence is well-settled, and federal courts of appeal are

well-equipped to justly apply it and have done so – both by denying and granting qualified immunity depending on the totality of the circumstances in each case involving some manner of prone restraint. Neither would granting *certiorari* here aid in other prone restraint cases, because prone restraint is itself an incredibly broad term encompassing a wide variety of restraint under vastly different circumstances.

Supreme Court Rule 10 explains that a "petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10. Petitioners request this Court do just that – apply a properly stated rule of law to a particular factual record. *Lombardo*, 141 S. Ct. at 2242 (2021) (Alito, J., dissenting). While Rule 10 admittedly does not mandate this Court "never" re-apply properly stated law in fact-intensive cases, this case does not warrant review because it will not provide helpful guidance to other appellate circuits in other cases involving prone restraint under vastly varied circumstances.

Second, the question presented is so broad, overgeneralized, and unsupported that this Court could not answer it on the undisputed record in this case. Petitioners ask this Court whether defendant officers are entitled to qualified immunity as a matter of law where officers put "a handcuffed and shackled person facedown on the floor and push[ed] into his back until he die[d] . . . because the person struggled to breath before dying." Pet. i. Petitioners assume that Gilbert was

non-combative throughout his prone restraint, but neglect to acknowledge that they admitted Gilbert's combative behavior continued throughout the entirety of his prone restraint. JA1991(¶88). Of course, Petitioners argue that Gilbert was "simply tr[ying] to open his lungs up to breathe" – and further speculate that "any reasonable officer would [have] recognized this from their training and knowledge of the police community." *See, e.g.*, JA1983(¶58). But, Petitioners ignore that they effectively admitted Gilbert was breathing normally throughout the entire time he was restrained prone. JA1983(¶58). And, the District Court excluded the expert testimony upon which Petitioners' "air hunger" argument relied, and correctly held that Petitioners otherwise failed to dispute Defendants' assertions of material fact as to Gilbert's combative behavior by citation to admissible evidence as required by Rule 56. App.Pet.Cert. 45a, n.8, also 60a, n.12. Because Gilbert indisputably continued to kick, flail, and thrash about before and throughout the time he was prone, the officers reasonably perceived his actions as resistance or a continued effort to harm himself. On this record, this Court cannot answer the broad question presented even if it were to perform a fact-intensive review of the voluminous record in this case.

Third, this case is an inappropriate vehicle for addressing Petitioners' Fourth Amendment question because Petitioners fail to identify any specific officer who acted with inappropriate force, and so even if this Court conducted a record-intensive review, it would necessarily reach the same result as the Eighth Circuit:

that all officers are entitled to qualified immunity. A hallmark of section § 1983 actions is that, to be liable, each defendant must be personally involved in the unconstitutional action and their conduct individually assessed. *See, e.g.*, *Madewell v. Roberts*, 909 F.2d 1203, 1208 (8th Cir. 1990); *see also Jones v. Williams*, 297 F.3d 930, 935 (9th Cir. 2002) ("[A] plaintiff could not hold an officer liable because of his membership in a group without a showing of individual participation in the unlawful conduct."). "[V]icarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each government-official defendant, through the official's own actions, has violated the constitution." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009). Each defendant's conduct "must be independently assessed and Section 1983 does not sanction tort by association." *Smith v. City of Minneapolis*, 754 F.3d 541, 547-48 (8th Cir. 2014).

Here, there is no evidence that any of the defendant officers in the cell at that time – namely, Officers Wactor, Mack, Opal, Cognasso, Lemons, and vonNida – placed even minimal weight directly on Gilbert's neck or back or otherwise compressed his neck or chest after Gilbert was maneuvered onto the floor. JA808-15. Officer Opal took over for Sergeant Bergmann who was controlling Gilbert's right arm. JA341. Officer Lemons knelt on Gilbert's leg to stop the kicking. JA1988(¶32). Officer vonNida held an arm or leg to prevent Gilbert from thrashing about. JA1988(¶82). Officer Cognasso knelt on Gilbert's calves to prevent him from striking anyone. JA1988(¶80). And, Officer Mack restrained

Gilbert's upper left shoulder. JA304, 307. Petitioners point to the testimony of Officer Cognasso, whom they assert testified that an unidentified officer pushed on the lower or middle part of Gilbert's torso. But, Officer Cognasso merely stated that there was an officer, to the best of his recollection, positioned near the "lower or middle part of [Gilbert's] torso." JA1794. Notably, Cognasso denied that he or anyone else pressed down on Gilbert in such a way as to compress his neck, chest, or stomach. JA0804. But, even assuming Cognasso's testimony is sufficient to establish that an unidentified officer was pressing on Gilbert's back while he was in the prone position, Cognasso's testimony does not establish who applied such pressure, what pressure was applied, or for how long. Petitioners' failure to identify which defendant officer, if any, allegedly pushed on Gilbert's back should be disqualifying of this Court's review because the inevitable result of such review would be that reached by the lower courts – that the defendant officers, none of which have been identified as placing any discernible weight on Gilbert's back, are entitled to qualified immunity. *See, e.g.*, *Jutrowski v. Twp. of Riverdale*, 904 F.3d 280, 291-92 (3d Cir. 2018) (no police officer could be liable under § 1983 for excessive force, absent identification of specific officer who kicked arrestee in face); *Pineda v. Hamilton Cnty., Ohio*, 977 F.3d 483, 492 (6th Cir. 2020) (three sheriff's deputies were not liable for use excessive force under § 1983, absent plaintiff's identification of specific deputy who struck him).

Because this case demands the Court apply a properly stated rule of law to a fact-intensive record that will not provide helpful guidance to other appellate circuits, the question presented cannot be answered on the undisputed record in this case, and Petitioners fail to identify any specific officer who acted with inappropriate force, the petition for writ of *certiorari* should be denied.

III. The decision below is correct.

The undisputed facts, taken in the light most favorable to Petitioners, are such that the Eighth Circuit originally held that every defendant officers' use of force was objectively reasonable. These undisputed facts include that Gilbert tried to hang himself from his cell bars, that Gilbert assaulted officers when they attempted to stop Gilbert from harming himself, that Gilbert gashed his own head on a concrete bench before he was brought to a prone position for his own safety and that of the officers pending the arrival of EMS, that Gilbert continued to kick and thrash at remaining officers who held his limbs throughout the entirety of the time he was prone, and that the remaining officers immediately turned Gilbert on his side and then on his back as soon as Gilbert stopped kicking and thrashing. On remand, the Eighth Circuit correctly held that, on this record, the Defendant officers did not violate clearly established law and are entitled to qualified immunity. No amount of obfuscation, overgeneralization, or unsupported insistence from Petitioners will change that the Eighth Circuit's decision on

remand is manifestly correct. Indeed, it is mandated by this Court's precedent.

In *White v. Pauly*, this Court sternly reiterated the long-standing principle that "'clearly established law' should not be defined 'at a high level of generality.'" *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 742 (2011)). After noting it had reversed a number of qualified immunity opinions in the preceding five years, this Court held that the Tenth Circuit misunderstood the "clearly established" analysis where it relied on general excessive force principles in denying qualified immunity and failed to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment. *Id*. *White* presented a "unique set of facts and circumstances," and "[t]his alone should have been an important indication to the majority that White's conduct did not violate a 'clearly established' right." *Id*. More recently, this Court admonished, as it had before, that "[s]pecificity is especially important 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." *Kisela v. Hughe*s, 138 S. Ct. 1148, 1152-53 (2018) (quoting *Mullenix v. Luna*, 136 S. Ct. 305 (2015)).

Here, on each of the three occasions that lower courts decided this case in favor of Respondents, each opinion faithfully adhered to this Court's instruction by rejecting Petitioners' invitation to define clearly established law at a high level of generality,

painstakingly analyzing the record in the light most favorable to Plaintiffs, and paying "careful attention to the facts and circumstances" before correctly deciding that the defendant officers are entitled to qualified immunity under the specific and unique circumstances *in this case*. *Graham*, 490 U.S. at 396. Indeed, in the most recent opinion from the Eighth Circuit affirming summary judgment in favor of Respondents, and in response to the Majority of this Court's apparent concern that the Eighth Circuit may have "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," the Eighth Circuit explicitly clarified on remand that it has "never held, nor do we now hold, that '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." *Lombardo*, 38 F.4th at 690 (citing *Lombardo*, 141 S. Ct. at 2241).[4] After explicitly rejecting the premise that prone restraint of an apparently resisting subject is always constitutional no matter the circumstances, the Eighth Circuit correctly held, in accordance with this Court's teaching in *White* and *Kisela*, that "the precedent in this area [of prone restraint] is insufficient to demonstrate that the facts *in this case* show a violation of a clearly established right of a detainee to

[4] Of course, the dissenting opinion of this Court correctly surmised that the Eighth Circuit never adopted such a "strange and extreme" blanket rule authorizing prone restraint on resisting detainees no matter the circumstances.

be free from prone restraint while resisting." *Lombardo*, 38 F.4th at 690 (emphasis added). So, the defendant officers are necessarily entitled to qualified immunity. This conclusion is inescapable and manifestly correct pursuant to this Court's controlling qualified immunity precedent when one considers, as the Eighth Circuit and District Court did, the unique facts in this case and the lack of controlling law holding any officer liable for violating the Fourth Amendment under sufficiently similar circumstances.

As the District Court recognized, once qualified immunity is raised, "the burden is on Plaintiffs, not Defendants, to demonstrate the law was clearly established." App.Pet.Cert. 94a (citing *Smith*, 754 F.3d at 546). Petitioners wholly failed to meet their burden under these circumstances, and the Eighth Circuit's most recent decision proficiently explains why it was impossible for Petitioners to do so.

The Eighth Circuit began its "clearly established" analysis by noting this Court has "not yet decided what precedents – other than [Supreme Court decisions] – qualify as controlling authority for purposes of qualified immunity." *District of Columbia v. Wesby*, 138 S. Ct. 577, 591 n.8 (2018) (citing *Reichle v. Howards*, 566 U.S. 658, 665-66 (2012) (reserving the question whether court of appeals decisions can be "a dispositive source of clearly established law")); *see also City of Escondido v. Emmons*, ___ U.S. ___, 139 S. Ct. 500, 503 (2019) (per curiam). It thereafter noted that this Court has never held that prone restraint is generally unconstitutional, which alone mandates the application of

qualified immunity. *Lombardo*, 38 F.4th at 690 (citing *City of Escondido*, 139 S. Ct. at 503).

Of course, this Court need not decide whether a Supreme Court decision is required to clearly establish law because the panel went on to correctly hold that, even assuming a court of appeals decision may constitute clearly established law, "the right to be free from prone restraint when resisting was not clearly established in 2015 when the incident with Gilbert occurred." *Lombardo*, 38 F.4th at 691. That conclusion cannot be credibly challenged given the absence of any case holding prone restraint unconstitutional in the Eighth Circuit under circumstances similar to this case – which include the distinguishing facts that Gilbert was indisputably trying to harm himself and continued to actively resist by kicking and thrashing at officers while breathing normally throughout the entirety of his prone restraint. Remarkably, the Petitioners do not rely on a *single case* from the Eighth Circuit, either at the district court level or in the Court of Appeals, to support their assertion that the officers violated clearly established law. Indeed, the Petition *does not cite to any Eighth Circuit case at all* other than the three opinions in this case affirming summary judgment in Respondents' favor. Petitioners' failure to cite to any Eighth Circuit law compels the obviously correct conclusion below that the defendant officers did not violate clearly established law.

Respondents need not rehash the painstakingly thorough "clearly established" analysis conducted by the District Court, which meticulously addressed every

case cited by every party and could hardly be improved upon. Neither do Respondents need address the essential Eighth Circuit authority impelling the application of qualified immunity here because Petitioners' utter failure to present or address any of the essential Eighth Circuit authority underlying the opinion they challenge is alone sufficient reason to deny *certiorari*. Sup. Ct. R. 14.4. Still, Respondents assert that the Eighth Circuit's conclusion in this case necessarily follows from the controlling Eighth Circuit authority that Petitioners ignore. Thus, even if this Court were to conduct a fact-intensive plenary review of this voluminous record, it would necessarily conclude, based on Eighth Circuit authority, the defendant officers are entitled to qualified immunity.

Among the Eighth Circuit precedent ignored by Petitioners is *Ryan v. Armstrong*, where the Eighth Circuit held that the simultaneous placing of body weight by multiple officers on a restrained, prone individual inside of a small jail cell accompanied by repeated tasing resulting in death did not amount to excessive force. 850 F.3d 419, 427 (8th Cir. 2017). *Ryan's* holding precludes a denial of qualified immunity because "existing precedent must have placed the statutory or constitutional question beyond debate" and "qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *De La Rosa v. White*, 852 F.3d 740, 745 (8th Cir. 2017) (quoting *Mullenix*, 136 S. Ct. 305 (per curiam)).

Likewise, in *Hanson as Tr. for Layton v. Best*, which the Eighth Circuit decided nearly four years

after Gilbert's tragic accidental death, officers repeatedly tased a resisting suspect, restrained him in a prone position while handcuffed and in a hobble restraint for twenty minutes, and pressed his shoulders to the ground for twenty minutes before he died. 915 F.3d 543, 547 (8th Cir. 2019). The Court noted that it "has not deemed prone restraint unconstitutional in and of itself the few times we have addressed the issue." *Id*. at 548 (citing *Ryan*, 850 F.3d at 427-28; *Mayard v. Hopwood*, 105 F.3d 1226, 1228 (8th Cir. 1997) (affirming the reasonableness of force used in placing a resisting, hobbled suspect in a prone position to transport her to the jail)). Thus, the Court held "there is no clearly established right against the use of prone restraints for a suspect that has been resisting." *Id*. at 548.

In light of *Ryan*, *Hanson*, and the other authority cited therein and by the District Court in its thorough order below, the application of qualified immunity here is certain. And, even if appellate decisions from other circuits could clearly establish law for purposes of qualified immunity, it is equally certain that appellate decisions in other circuits have not produced a sufficiently particularized 'robust consensus' about prone restraint of resisting subjects that could possibly warrant the denial of qualified immunity on this record. In fact, the weight of authority in other circuits supports the conclusion originally reached by the panel below – that the officers in this case acted reasonably. *See, e.g.*, *Giannetti v. City of Stillwater*, 216 Fed. App'x 756, 760-62 (10th Cir. 2007) (holding that officers' use of prone restraint against resisting misdemeanor detainee

coupled with an officer's use of his knee to place pressure on detainee's back was objectively reasonable when detainee, who was mentally ill and obese, was held in prone position for nearly twenty minutes, voiced her distress to no avail, and ultimately died from the encounter); *Estate of Phillips*, 123 F.3d 586; *Bornstad v. Honey Brook Twp.*, 211 Fed. App'x 118 (3d Cir. 2007) (officer who pressed knee into detainee's chest while detainee yelled for help and that he was having trouble breathing held constitutionally reasonable even assuming the officer's actions caused asphyxia and death); *Pratt*, 822 F.3d at 178-79. Indeed, no court has held that placing a resisting prisoner in a prone position while restrained is *per se* unreasonable, which appears to be the position advanced by Petitioners here.[5] On this record if this Court reviews the judgment below, it will necessarily arrive at the same point as it did in *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1868-69 (2017), having to conclude that respondent officers could not, in 2015, have understood their actions as violative of a clearly established constitutional right.

Facing this insurmountable hurdle, Petitioners resort to relying on distinguishable cases with obviously

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[5] There is no consensus in the literature on the issue, either. That some arrestees may be at risk from prone restraint does not establish that the technique is any more dangerous than any other use of force that must be exerted on resisting arrestees. Compare JA 1930 (Justice Dept. circular) with JA 2269 ("A Prospective Analysis of the Outcomes of Violent Prone Restraint Incidents in Policing"). Neither does conflicting hearsay literature constitute clearly established law sufficient to deny qualified immunity.

different material facts. For example, Petitioners rely heavily on the Fifth Circuit's recent decision in *Timpa*, decided long after the incident at issue in this case and so could not have put the Defendants on notice that they violated clearly established law. *Timpa*, 20 F.4th at 1026. *Timpa* involved an officer who continuously pressed his knee into Timpa's upper back for over fourteen minutes, and thereby placed approximately 190 pounds of concentrated weight onto Timpa's back for this prolonged period – including five minutes during which Timpa was not resisting. *Id*. at 1027. During these five minutes, Timpa cried for help, his voice weakened and slurred, and then he suddenly stilled, fell limp, and was quiet except for a few moans. *Id*. After Timpa fell limp, the officer continued to press his full weight into Timpa's back for another three and a half minutes. *Id*.

Here, unlike *Timpa, Weigel*, and the other distinguishable cases relied upon by Petitioners (*see* Section I, *supra*), Gilbert continued to thrash and kick at the five officers who held his limbs throughout the entirety of the time he was restrained prone.[6] As soon as Gilbert

[6] The district court carefully reviewed each individual officer's conduct in this case, including those that had no involvement in restraining Gilbert while prone, and correctly concluded that no officer violated clearly established law. App.Pet.Cert. 69a-74a. Still, Petitioners continue to paint with an impermissibly broad brush, without regard for the individualized assessment of liability mandated by this Court's § 1983 precedent, *e.g.*, *Wood v. Moss*, 572 U.S. 744, 764 (2014), and their blunderbuss effort to secure *certiorari* without meaningfully addressing the particular conduct of each officer involved in the prone restraint or acknowledging that Officers Bergmann, Stuckey, King, and DeGregorio

stopped kicking and thrashing, the officers turned him on his side and then onto his back. Only then, once Gilbert was turned onto his side, did Gilbert exhibit any sign of erratic breathing. Of course, giving Petitioners every benefit and assuming all facts the District Court and Eighth Circuit did, the defendant officers remain entitled to qualified immunity here. Gilbert continued to kick and thrash at the remaining officers throughout the time he was restrained prone and, in the absence of any indication that Gilbert was struggling to breath during his combative behavior, it was objectively reasonable for the remaining defendant officers to perceive Gilbert's combative behavior as active resistance or an effort to harm himself warranting continued restraint for his own protection. *See, e.g.*, *Loch v. City of Litchfield*, 689 F.3d 961, 966 (8th Cir. 2012) (citing *Krueger v. Fuhr*, 991 F.2d 435, 439 (8th Cir. 1993) (holding "act taken based on a mistaken perception or belief, if objectively reasonable, does not violate the Fourth Amendment")); *Dooley v. Tharp*, 856 F.3d 1177 (8th Cir. 2017).

With regard to the Eighth Circuit's affirmation of summary judgment in favor of the City of St. Louis on remand, that decision is likewise correct. Because it was not clearly established that the officers in this case could not restrain Gilbert as they did under these circumstances, the City of St. Louis could not have been deliberately indifferent in allegedly failing to

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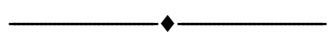
were indisputably not involved in the prone restraint at all warrants denial of the Petition *ab initio*.

train its officers not to take such actions. As the Eighth Circuit held in this case, "in the absence of 'clear constitutional guideposts' for municipalities in the area," a deliberate indifference claim necessarily fails. *Lombardo*, 38 F.4th at 692 (citing *Szabla v. City of Brooklyn Park*, 486 F.3d 385, 394 (8th Cir. 2007)); *see also*, *Graham v. Barnette*, 5 F.4th 872, 891 (8th Cir. 2021). A plenary review of the record would likewise reveal that Petitioners wholly failed to adduce admissible evidence sufficient to establish that any constitutional violation was directly caused by a municipal policy or custom, and failed to otherwise satisfy the "rigorous" standards of culpability and causation that must be applied to ensure that the municipality is not held liable solely for the actions of its employees. *Board of County Commissioners v. Brown*, 520 U.S. 397, 405 (1997).

For these reasons, the decision below is manifestly correct and *certiorari* should be denied.



CONCLUSION

When all is said and done, this case remains aptly summarized by Dickens: "it is always the person not in the predicament who knows what ought to have been done in it, and would unquestionably have done it too." A Christmas Carol, "Stave Three." Petitioners' continued efforts to condemn St. Louis Police Officers who strove to save Gilbert from himself under these tense

and rapidly evolving circumstances should end now with the denial of *certiorari*.

Respectfully submitted,

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