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

REPLY IN SUPPORT OF CERTIORARI

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March 30, 2023

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INTRODUCTION

For the second time, this case presents the Court with an opportunity to decide the constitutionality of a police tactic responsible for more in-custody deaths than any other. Outside the Eighth Circuit, there is a strong and growing consensus that it is unconstitutional to put a handcuffed person face-down on the ground and press into his back until he suffocates, and that this has been clearly established for years. Police training materials have long recognized as much, as have many circuits. By breaking with this consensus for a second time—while defying this Court's mandate—the decision below manages to be even more worthy of this Court's review than the last one was.

In opposing certiorari, respondents make no effort to show that the Eighth Circuit heeded this Court's mandate. Their contention, instead, is that the other circuits' cases involved people who were entirely still when officers pushed on their backs, whereas Gilbert was "actively fighting with the officers." BIO 9. But that is wrong. It misstates both the facts of those cases and their rules. It also misstates the facts of this case. The critical point in the other circuits' cases wasn't whether the decedent had made any movement after being bound on the ground. The critical point was exactly what it should have been here—that he no longer posed a threat that could possibly justify such extraordinarily dangerous force.

Since the opposition was filed, moreover, the conflict between the Eighth Circuit and everyone else has grown only starker. Seven officers were recently indicted for murder for the *exact same conduct* as here.

Respondents also try to attack this case as a vehicle. But their arguments contradict this Court's opinion, as well as Justice Alito's dissent. With no barrier to review, certiorari is once again warranted.

ARGUMENT

I. Respondents cannot dispel the split.

As the petition details, there is now a circuit split on whether it is clearly established that no "reasonable officer would continue to put pressure on [a person's] back after [he] was subdued by handcuffs, an ankle restraint, and a police officer holding [his] legs." *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 905 (6th Cir. 2004).

Eight circuits answer yes. In those circuits, it has long been "clearly established that applying pressure to [one's] back, once he [is] handcuffed and his legs restrained, [is] constitutionally unreasonable." *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008). "Only the Eighth Circuit" disagrees. *Timpa v. Dillard*, 20 F.4th 1020, 1036 n.7 (5th Cir. 2021)

Respondents try to deny the split by claiming that this case is distinguishable from the other circuits' cases. The other cases, they say (at 2-3), "each involved force exerted on a prone subject for sustained periods *after* the subject was completely subdued and was no longer a threat," whereas Gilbert "resisted" after he was handcuffed, leg-shackled, and pinned down by six officers.

For two reasons, this proposed distinction collapses.

First, none of the other circuits require a person to be totally still—after being handcuffed, shackled, and held to the ground—to have a right to be free of deadly force to the back. To the contrary, the other circuits reject the argument that officers may push down on someone who is "handcuffed [with] his ankles tied" until he is "still." *Rivas v. City of Passaic*, 365 F.3d 181, 200 (3d Cir. 2004). So when other circuits use the word "subdued," they mean that the suspect "lacks any means of evading custody and does not pose a threat of immediate harm," *Timpa*, 20

F.4th at 1029—not that his "every inch [is] immobilized," *Hyde v. City of Willcox*, 23 F.4th 863, 871 (9th Cir. 2022). The other circuits further recognize that a decedent's "physical movements" after being handcuffed and pinned down may be found to have been "an attempt to gasp for air and escape the compressive weight of the officers on top of him, not an effort to fight with the officers." *Martin v. City of Broadview Heights*, 712 F.3d 951, 959-63 (6th Cir. 2013).

Each circuit mentioned in the petition recognizes these principles—many in cases involving a continued struggle even after the decedent was handcuffed and held down:

Fifth Circuit: *Timpa*, 20 F.4th at 1029-31 (holding that prone decedent was "subdued" once handcuffed—despite "squirming," "moving his head," and "rais[ing] his torso"—and denying immunity because a "jury could find that a [trained officer] would have concluded that [he] was struggling to breathe, not resisting arrest"); *Fairchild v. Coryell County*, 40 F.4th 359, 368 (5th Cir. 2022) (denying immunity for force to back of man who was "handcuffed," held down, and thus "subdued").

Ninth Circuit: *Hyde*, 23 F.4th at 871 (holding that, because decedent "had his hands handcuffed behind his back," "his legs shackled," and "seven officers surrounded him," the officers "should have recognized that [he] had effectively stopped resisting and posed no threat"); Pet. 17-18 (citing three other Ninth Circuit cases).

Sixth Circuit: *Hopper v. Plummer*, 887 F.3d 744, 755 (6th Cir. 2018) (denying immunity because, "while [decedent] may have kicked and thrashed, defendants did not consider him a threat to anyone after he was handcuffed"); *Martin*, 712 F.3d at 959 (denying immunity where decedent "actively struggled" while pinned to the ground); *Kulpa v. Cantea*, 708 F. App'x 846, 851-53 (6th

Cir. 2017) (denying immunity for 45 seconds of force to back of "squirming" detainee).

Seventh Circuit: *Abdullahi v. City of Madison*, 423 F.3d 763, 771 (7th Cir. 2005) (denying immunity for 30-45 seconds of force to back of aggressive suspect, because his "attempts to 'squirm' or arch his back upward … may not constitute resistance at all, but rather a futile attempt to breathe").

Tenth Circuit: *Weigel*, 544 F.3d at 1152 (denying immunity for force to back of aggressive suspect because, once he was handcuffed and bound, there was no basis to believe that he "still pose[d] a threat to the officers, the public, or himself unless he was maintained on his stomach with pressure imposed on his upper back").

Third Circuit: *Rivas*, 365 F.3d at 199-201 (holding that "a reasonable jury could find that the continued use of force" on someone who "was handcuffed and had his ankles tied"—"press[ing] down on [his] back" until he was "still," causing him to die—is excessive under "clearly established" law).

First Circuit: *McCue v. City of Bangor*, 838 F.3d 55, 63-64 (1st Cir. 2016) (holding that prone decedent was "subdued and/or incapacitated" once his "wrists and ankles [were] cuffed, thus minimizing his range of movements and the danger that he posed to his own and others' safety," and his continued "movements," including "squeezing" an officer, "may not constitute resistance at all, but rather a futile attempt to breathe").

Fourth Circuit: *Est. of Armstrong v. Village of Pinehurst*, 810 F.3d 892, 905 (4th Cir. 2016) ("[W]e [have consistently] declined to equate conduct that a police officer characterized as resistance with an objective threat to safety" justifying force, because "'physical resistance' is not synonymous with 'risk of immediate danger'");

Lawhon v. Mayes, 2021 WL 5294931, *2 (4th Cir. 2021) (applying this rule, denying immunity, and holding that "continuing to apply force to a secured unarmed man, to effectuate a seizure for which the individual's own benefit provides the only justification, [is] excessive").

Second, this case fits comfortably alongside these other cases. Despite respondents' repeated assertions to the contrary, Gilbert was not "resisting" after he was handcuffed, shackled, and held down by six officers—at least not in any relevant sense. BIO 2; *see* JA275 (Gilbert "stopped struggling" after being "handcuffed and secured"); JA1795 (Gilbert "couldn't harm anyone" once "shackled and handcuffed"). As laid out in the petition (at 9-10), the district court accepted as true that, once Gilbert was moved to the ground, he "was not ignoring commands or being violent," App. 60a; he "posed no threat," App. 58a; and he "was 'yelling pleas for help' and pleading 'It hurts. Stop.'" App. 62a. Nor did he try to bang his head on the floor at that point. Even if he began "wiggling" and "tried to righten his posture," JA1520, he did so only "off and on" and "stop[ped] for a while," JA443-44—conduct that was "based on 'air hunger,'" App. 60a. Nevertheless, the "[o]fficers used force upon his back," App. 87a, "sides," and "torso," App. 65a, and did so "for fifteen minutes," App. 76a, 87a. They "did not stop using force until after they realized [he] had stopped breathing." App. 79a-80a.

There is no doubt that, if these same facts presented themselves in any of the other circuits, the officers would not be entitled to immunity. Not so in the Eighth Circuit.

II. Respondents do not deny that the question recurs frequently, a uniform rule is necessary, and adherence to this Court's mandates is essential.

This division of authority is unacceptable. Although respondents dispute the existence of the split, they do not

deny the need for uniformity—a point reinforced by NACDL in its brief. Nor do respondents deny that prone-restraint deaths recur with "unfortunate frequency." *Drummond v. City of Anaheim*, 343 F.3d 1052, 1063 (9th Cir. 2003).

Indeed, just last week, a video from yet another such death was released. It involved facts just like those here: Seven officers pressed down on a handcuffed and shackled man during a mental-health crisis—for "11 minutes until he stop[ed] moving." Rizzo, Vozzella, & Oakford, *Video shows Va. deputies pile on top of Irvo Otieno before his death*, Wash. Post (Mar. 22, 2023), https://perma.cc/79PL-T2H6. He then "died of asphyxia." *Id.* In the video, the man can be seen moving throughout, with "the group [of officers] los[ing] its grip" on him at one point, after which he continued to struggle. *Id.* But whereas a grand jury indicted those officers for murder, the Eighth Circuit held that a civil jury was required to find that the officers here are immune from civil liability—*for the same conduct.*

This disparity is intolerable. As the petition put it: "The legitimacy of our criminal-justice system depends on the evenhanded distribution of justice, particularly for matters of life and death," as does "[p]ublic confidence in that system." Pet. 26. Respondents have no rebuttal.

Nor do respondents dispute the need for compliance with this Court's mandates, or make any effort to show that the Eighth Circuit did that here. For that reason, too, certiorari is warranted.

III. Respondents' vehicle arguments contradict both this Court's opinion and Justice Alito's dissent.

Unable to disprove the split or diminish its importance, respondents try to muck up the case as a vehicle. They do so in three ways. All fail.

Respondents first contest the factual premises of the question presented. They claim that no force was used on Gilbert's back and that he never struggled to breathe. BIO 8, 23-24. But this Court has already explained that "record evidence … shows that officers placed pressure on Gilbert's back"; he "tried to raise his chest, saying, 'It hurts. Stop.'"; and his struggles may have been "due to oxygen deficiency, rather than a desire to disobey officers' commands." *Lombardo v. St. Louis*, 141 S. Ct. 2239, 2240-41 (2021). The district court also assumed that "[o]fficers used force upon [Gilbert's] back" and his struggles were "based on 'air hunger.'" App. 60a, 87a. The Eighth Circuit begrudgingly did so too. App. 6a-7a. By highlighting these factual predicates, then, respondents only underscore a strength of this case as a vehicle: The key facts are all assumed and have already been identified by this Court.

Next, respondents claim that answering the question presented here would be "fact-intensive" and "not provide helpful guidance." BIO 22. But any case presenting this question will entail examination of a specific record. Even so, a "decision by this Court on the question presented here could be instructive." *Lombardo*, 141 S. Ct. at 2242 (Alito, J., dissenting). That is especially true because this case has all the features of a typical prone-restraint death: A person with underlying health problems had a mental-health crisis, was initially combative, and then thrashed trying to breathe. *See* JA1930-31 (DOJ bulletin describing the "cycle of suspect resistance and officer restraint").

Even if the Court were to find that the officers are all entitled to immunity, it could still provide useful guidance. The Court could—and should—answer the constitutional question, which would leave no doubt that officers have clear notice going forward and "be beneficial in developing constitutional precedent" in an area where uniformity is

essential. *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014) (cleaned up). Were the Court to do so, it could also address one or more related questions of broader importance. Like: What constitutes deadly force? To what extent can deadly force be justified by a concern about self-harm? How should courts analyze assertions of resistance? How should courts exercise their discretion to avoid deciding the constitutionality of the officers' actions? And so on.

Finally, respondents point out that qualified immunity requires an officer-by-officer assessment of wrongdoing, BIO 25. But even if some officers played no role in the challenged conduct, that is no barrier to review. The grant of summary judgment to those officers would not be disturbed by answering the question presented in favor of petitioner. The only claims that would be revived are those against the officers who had a hand in the unconstitutional conduct—restraining Gilbert in a prone position for 15 minutes and pushing on his back while doing so.[1]

IV. Like the Eighth Circuit, respondents ignore this Court's instructions.

On the merits, respondents defend the decision below as "manifestly correct." BIO 28. But they make the very error that they claim to condemn: defining the right at too high a level of generality. The question isn't whether "the use of a prone restraint" was clearly unconstitutional, or

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[1] To be clear, petitioners are not challenging "the use of prone restraint" in general. *Contra* BIO 1, 22, 34. They are challenging the use of prone restraint *plus* force to the back, causing someone's death. At least six officers played a role in that conduct, while one or both of two officers (Mack and Opel) applied force to Gilbert's back. *See* JA1794 (one officer applied force to "upper right side" while another applied force to "torso"); JA341 (230-pound Opel "controlled [Gilbert's] right side" and pushed on "shoulder"); JA206 (Mack on "upper portion" of Gilbert); JA304 (Mack on "upper left shoulder").

whether "this Court has … held that prone restraint is generally unconstitutional." BIO 29-30. The question is whether, in late 2015, it was "clearly established that applying pressure to [a person's] back, once he [is] handcuffed and his legs restrained, [is] constitutionally unreasonable." *Weigel*, 544 F.3d at 1155. By the same token, the question isn't whether the person had been struggling or "resisting" the compressive force; it is whether the person posed a risk that justified that force.

Respondents barely try to answer these questions. They do not argue that Gilbert was a threat to the officers once he was handcuffed, shackled, and surrounded. Their argument, rather, is that "he was a threat to himself." BIO 3. Yet they cite no evidence that he tried to hit his head on the floor at any point during the 15 minutes he was prone. Nor do they articulate how pushing on his back—causing his death—was necessary to serve this asserted interest. And it plainly was not. By then, he "was not combative, posed no threat to others, and, to the extent []he posed a risk to h[im]self, that risk could have been managed by simply holding [his] head to prevent injury." *Helm v. Rainbow City*, 989 F.3d 1265, 1274-75 (11th Cir. 2021).

Nor do respondents meaningfully address the facts and circumstances identified in this Court's opinion. The "well-known police guidance" on prone restraint, for example, is not mentioned in their brief. *Lombardo*, 141 S. Ct. at 2241. As the policing scholars' brief lays out in detail (at 3): "Officers are routinely cautioned that a prone suspect's movement is *not* resistance, but an involuntary reaction as the pressure of being held prone forces the oxygen from their lungs and makes it impossible to breathe." Respondents entirely ignore this point.

They instead rely on Eighth Circuit precedent. *See* BIO 32-34 (citing *Ryan v. Armstrong*, 850 F.3d 419 (8th

Cir. 2017), and *Hanson as Tr. for Layton v. Best*, 915 F.3d 543 (8th Cir. 2019)). But neither *Ryan* nor *Hanson* had been decided at the time of Gilbert's death, so neither case could have affected the officers' behavior. And although *Hanson* held that "there is no clearly established right against the use of prone restraints for a suspect that has been resisting," 915 F.3d at 548, this case involves not just "the use of prone restraints," but also force to the back.[2]

Further, while the officers wouldn't have been aware of these cases, they should have known about *Henderson v. Munn*, 439 F.3d 497 (8th Cir. 2006). There, a resisting suspect was put "face down on the ground with both arms handcuffed behind his back." *Id.* at 503. The Eighth Circuit explained that, "in this compromising position, [he] posed little or no threat to the safety of the officers or others. By the time [he] was handcuffed and pinned face down on the ground, a reasonable jury could decide [he] was no longer resisting arrest, even if he had resisted arrest before being subdued." *Id.* So even in the Eighth Circuit, the law was clear: Gilbert was "subdued." Force to his back was thus unconstitutional under the "clearly established" rule prohibiting the use of such force on a "subdued" person. *McCue*, 838 F.3d at 64. Because the panel below has again held otherwise, this Court should again intervene, either summarily or with a plenary grant.

CONCLUSION

This Court should grant the petition.

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[2] If anything, these cases show the need for this Court to act now, before *Ryan*, *Hanson*, and *Lombardo* are allowed to complicate the clearly-established analysis in a future Eighth Circuit case.

Respectfully submitted,

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