No. 24-1099

Supreme Court of the United States

KYLE SMITH, *ET AL.*,
Petitioners,
v.

ROCHELLE SCOTT, INDIVIDUALLY, AND AS CO-SPECIAL ADMINISTRATOR OF THE ESTATE OF ROY ANTHONY SCOTT, *ET AL.*,
Respondents.

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

BRIEF AMICI CURIAE OF THE NATIONAL POLICE ASSOCIATION AND THE POLICE OFFICERS' DEFENSE COALITION IN SUPPORT OF PETITIONERS

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Interests of the Amici[1]

The National Police Association ("NPA") is a nonprofit corporation organized under Indiana law. The NPA pursues a general mission of advancing law enforcement interests, including participating in cases as amicus curiae when the cases raise legal questions important to law enforcement interests. The NPA is a national association representing police officers across the country.

The Police Officers' Defense Coalition ("PODC") is a nonprofit corporation organized under Virginia law. The PODC advocates for police officers, public safety officers, sheriffs and others representing the law enforcement community, with a focus on fairness in civil and criminal actions against members of the law enforcement community.

Both the NPA and the PODC are deeply committed the maintenance of law and order, and to fostering legal rules that provide the Nation's police officers with adequate discretion to maintain law and order. Both the NPA and the PODC seek to inform this Court that the application of bodyweight pressure to control those resisting law enforcement officers is

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[1] No counsel for any party authored this brief in whole or in part, nor did parties or their counsel make any monetary contribution intended to fund its preparation or submission. Timely notice was provided to the parties.

essential to the maintenance of law and order. They and their members have a keen interest in the availability of qualified immunity for the use of bodyweight pressure in law enforcement.

Summary of Argument

This is a tragic case that threatens to make bad law. The Nation's police officers, responding when delirious individuals threaten the wellbeing of themselves or others, must use force to take these individuals into custody. The video footage in the record below demonstrates success in the training and performance of these officers. Attempts to establish even higher standards by judicial fiat are not only patently unreasonable, but practically unachievable and would impose enormous costs in the loss of ability to maintain public order.

This Court should accept the petition for review of the Ninth Circuit's decision. The Ninth Circuit erred in denying summary judgment on the officers' claims of qualified immunity, contrary to the approach taken by the majority of the other federal courts of appeals, an error premised on the Court's failure to appreciate the general harmlessness of the use of bodyweight pressure in making an arrest. Unless corrected, the Ninth Circuit's decision threatens to undermine the ability of the Nation's police officers to arrest subjects called to the attention of law enforcement in all contexts.

The applicable law, requiring objectively unreasonable use of force, is clear. Characterization of a particular use of force as deadly merely because death followed in close temporal proximity undermines the entire objective approach to assessing police conduct. As more and more police techniques that have no appreciable risk of killing people fall under the "deadly force" rubric, the Nation's police officers are left with fewer and fewer options for control.

While each death in custody is a tragedy, decisions that further deter attempts to maintain public order have their own countervailing risks of death to police officers and members of the public. Where, as here, a police officer's use of his body weight to control a subject produces no characteristic injuries associated with asphyxia, this Court should permit legislatures to provide any further limitations on use of force, rather than divining limitations on the use of such force in the text of the Fourth Amendment.

Argument

I. BODYWEIGHT COMPRESSION IS GENERALLY HARMLESS AND CANNOT BE REGARDED, WITHOUT MORE, AS DEADLY FORCE.

The Petitioners' statement of facts, based on two body-camera recordings, makes it clear that Mr. Scott was experiencing a mental health crisis that required state intervention. He produced

two dangerous weapons and refused to be patted down to ensure he did not have more. The officers forcibly handcuffed him, a process that took "one to two minutes" (Pet. App. 5a), with no indication of any compression or asphyxia-related injuries from the force used—no "I can't breathe".[2] A "few minutes" after being restrained by the officers, Mr. Scott "stopped yelling and thrashing around". (*Id.* at 6a.) Paramedics took him but he died after removal from the scene; the Coroner found death due to "methamphetamine intox-ication" and "review of body camera videos did not reveal restraint

[2] It was misleading for the Ninth Circuit to mischaracterize what happened here as one to two minutes of bodyweight pressure on Scott's "back and neck" (Pet. App. 5a). The video makes it clear that Officer Huntsman is not attempting to control Mr. Scott by direct pressure to Mr. Scott's neck. Rather, he places one knee in the middle of Scott's back, and as Scott struggles, the knee slips, winding up close to the neck for a short time. While Mr. Scott may have become more incoherent over time, the video makes it clear that at no point was he "breathless" (*cf.* Pet. App. 6a).

The law is clear that a Fourth Amendment seizure represents government termination of freedom of movement involving "means intentionally applied," and no Fourth Amendment right is violated by accidents during a seizure process. *Brendlin v. California,* 551 U.S. 249, 254, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007) (citations omitted). From this perspective, the fact that Officer Huntsman's knee slipped during the arrest as Mr. Scott struggled is not constitutionally relevant—no reasonable juror could find that he intended to put his bodyweight directly on Mr. Scott's neck to control him.

procedure related to death". (Coroner's Report of Investigation at 4 (District Ct. Dkt. No. 19-10).

The District Court file contains the training records showing the detail and care with which these officers were trained, and the two bodycam videos demonstrate the success of that training. There is a total absence of any punches, strikes or any intent to injure Mr. Scott. The officers were using the minimal amount of force required to take Mr. Scott into custody in a timely fashion, because the health risks of his excited delirium were minimized by quick action. *See White Paper Report on Excited Delirium Syndrome* (American College of Emergency Physicians ["ACEP"] Sept. 10, 2009) (emphasizing need to "take the subject into custody quickly, safely and efficiently . . . the physical control methods employed should optimally reduce the time spent struggling . . .").[3]

Nevertheless, the Ninth Circuit denied summary judgment on the officers' qualified immunity defense, starting with the erroneous premise (and the Court's first explicit holding) that the officers used "deadly force," which the Court even characterizes as "severe, deadly force". (Pet. App. 10a.) This was apparently based on the Court's uninformed view that the force used

[3] This report later came under political attack, causing the ACEP to withdraw its approval of the paper, sidestep the issue of police custody and control, and shift the focus to pharmacological control means. ACEP Task Force Report on Hyperactive Delirium with Severe Agitation in Emergency Settings (ACEP June 23, 2021).

had "a substantial risk of causing death or serious bodily injury". (*Id.*; citation omitted.)

While bodyweight compression can cause death directly, the forces involved must far exceed those applied by police officers in general or those involved in this particular incident. The primary mechanism by which bodyweight compression kills people is by actually breaking the ribs, resulting in a condition known as "flail chest," but extensive research has confirmed that this does not occur even with pressures of up to 225 pounds on a subject's back. M. Kroll *et al.*, "Acute forces required for fatal compression asphyxia: A bio-mechanical model and historical comparisons," *Medicine, Science and the Law*, Vol. 57, No. 2, at 61 (2017) (hereafter, "Kroll (2017)").[4]

This study determined static and dynamic forces necessary to cause such damage, and also reviewed historical records of judicial "pressing," vending machine fatalities (machines falling on a victim), and automobile safety cadaver testing. The historical records show that subjects survived pressings far longer than police encounters (sometimes hours) and that much larger "chest masses of 182, 171 and 181 kg [401, 377 and 399 pounds] are survivable" while masses "of 284 and 320 kg [626 and 705 pounds] were fatal". *Id.* at 65. The authors conclude that "it is very difficult

[4] This weight was the maximum used on volunteer test subjects. Kroll (2017), at 65.

to generate flail chest from the weight of other humans". *Id.* at 66.[5] The present case involves no rib injuries at all, consistent with this research.

A subsequent study actually measured the weight police officers put on subject by using one or two knees to control them, finding roughly 50 pounds of pressure plus a quarter of the officer's body weight was the resulting pressure—far below the weights necessary to cause compression asphyxia. M. Kroll, Applied Force During Prone Restraint: Is Officer Weight a Factor?," *Am. J. Forensic Medicine and Pathology*, Vol. 40, No. 1 (Dec. 2018). For this reason, the term "body-weight compression," which implies that the full weight of the officer is applied to the subject, is somewhat misleading, though generally used in federal judicial decisions.

Death caused directly by extreme compressive force also has characteristic features absent in this case. An Australian study, R. Byard *et al.*, "The pathological features of circumstances of death of lethal crush/traumatic asphyxia in adults—a 25-year study," *Forensic Science International*, Vol. 159, Nos. 2-3 (June

[5] Interviewed by *Force Science News*, the lead researcher stated the research showed "it would take two 285-pound cops standing and balancing on the back or chest of a subject to produce compression asphyxia. And that's simply not going to happen in the real world." C. Remsberg, "What Does It Really Take To Kill Someone With 'Compression Asphyxia'?," *Force Science News*, Mar. 10, 2017.

2006) (hereafter "Byard (2006)"), examined seventy-nine cases, in which 51% of the victims had "only very minor bruises and abrasions," but *all* of those victims "had signs of crush asphyxia in the form of intense purple congestion and swelling of face and neck, and/or petechial hemorrhages of the skin of the face and/or conjunctivae".[6] *Id.* at 201. No such injuries were present in this case.

The subject of bodyweight compression has also been reviewed in connection with scientific analyses of the restraint techniques performed by law enforcement. Several studies have analyzed the "prone maximal restraint position" (also known as hogtie or hobble), including the effects of weight placed on the subject's back. It is possible to measure reductions in pulmonary function, but no evidence of hypoxia (insufficient oxygen to the body) or hypoventilation (respiratory depression/inadequate breathing) has been found. C. Cahn *et al.*, "Weight Force During Prone Restraint and Respiratory Function," *Am. J. Forensic Medicine and Pathology*, Vol. 25, No. 3 (September 2004) (prone test subjects with 50 pounds of pressure on their backs for five minutes). It is true that if the subject also struggles while prone and bearing weight, ventilatory function will decrease, but research

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[6] Additional cases had the "flail chest" symptoms as well. Only four of the seventy-nine cases lacked the asphyxia symptoms, but had other injuries such as "single rib fractures, bruises and abrasions. Byard (2006), at 201.

confirms that even while maximally struggling in the prone maximal restraint position, ventilatory function remains adequate to supply oxygen needs. B. Michalewicz *et al.*, "Ventilatory and Metabolic Demands During Aggressive Physical Restraint in Healthy Adults," *Journal of Forensic Sciences*, Vol 52, No. 1 (January 2007) (hereafter "Michalewicz (2007)").

Indeed, a review of twenty experimental studies found respiratory function "remained within clinically normal range in all studies". G. Vilke, "Restraint physiology: A review of the literature," *J. Forensic of Forensic and Legal Medicine*, Vol. 75 (October 2020) (hereafter, Vilke (2020)). The author also addresses limitations of the studies in that they involve healthy subjects, usually at rest, pointing out that Michalewicz (2007) simulated struggles, yet oxygen demands reached only 42% of "peak values generated during a baseline maximum exertion treadmill test"—the study "concluded that factors other than ventilatory failure likely lead to fatality in restraint incidents". *Id.* at 173.

In short, the popular conception that police officers asphyxiate suspects in the course of arresting them merely by holding them down with the weight of their bodies is almost always false. To be sure, the theory of "restraint asphyxia" has been repeatedly put forward in published literature, but the cases reviewed typically contain the characteristic petechial hemorrhages or other asphyxia injuries absent

here. *E.g.*, R. L. O'Halloran & J. Frank, "Asphyxial death during prone restraint revisited: a report of 21 cases," *Am. J. Forensic Medicine and Pathology*, Vol. 21, No. 1 (March 2000). And in the case below, there was asserted expert testimony that Mr. Scott died of "restraint asphyxia" (Pet. App. 6a), but the studies above confirm that absent specific asphyxia-related injuries not present here, such "expert opinion" is no more than labelling of the fact that death resulted shortly after the restraint.

Because the forces required to actually create "a substantial risk of causing death or serious bodily injury" (*cf.* Pet. App. 10a) are so much higher than officers simply kneeling on a subject's back (one knee, as here, or even with two), the risks of death from police officers using body weight to control a subject are miniscule. They may be roughly estimated by identifying the total number of arrests per year, the percentage of arrests involving use of bodyweight pressure, and comparing the total uses of bodyweight pressure to uses that result in death.

The FBI's most recent report concerning "Crime in the U.S." (2019) reports roughly ten million arrests per year.

There is little data available on what percentage of arrests involve the use of bodyweight pressure. The best available data appears to be from a six-jurisdiction study analyzing 7,512 arrests, with officers reporting

percentages ranging from 1.1% to 3.1% for categories described as "pressure hold," "control hold" and "wrestling". J. Garner & Chris Maxwell, "Measuring the Amount of Force Used By and Against the Police in Six Jurisdiction," at 33 (reprinted in *Use of Force by Police: Overview of National and Local Data*, at 33 (U.S. Dept. Just. Oct. 1999). Adopting a conservative figure of 2% for use of force akin to that here, gives rise to 200,000 arrests a year where officers use bodyweight pressure.

Out of those 200,000 arrests per year, there are roughly thirty asphyxia/restraint-related deaths,[7] or 0.015% of all arrests in which bodyweight compression is used to control a subject—and

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[7] The highest available recent figure of which amici are aware comes from a California report that "[b]etween 2016 and 2022, at least 22 people have died in the state after being restrained stomach-down by law enforcement officers, according to a new analysis of currently available state use-of-force data by the California Reporting Project, the California Newsroom and the *Guardian*." (E. Zentner, "Revealed: at least 22 Californians have died while being held face down by police since 2016," *The Guardian*, Feb. 28, 2024.) That is 3.1 deaths a year, and scaling up for the U.S. population (12%) would mean 26 deaths a year. A study by *USA Today* found 134 people dying from "asphyxia/restraint" over ten years—13.4 deaths per year—many of which involved other causative factors such as tasers or neck holds. (K. Wedell, "George Floyd is not alone," USA Today, June 13, 2020.) Earlier figures showing higher death rates appear to be associated with arrests involving choke holds and other restraint techniques which police have now been trained not to use.

appreciable fraction of these arrests involve factors, such as deliberate punching or striking, far beyond what happened here. Put another way, the chance of dying from the conduct challenged below is roughly 1 in 6,666, which might be compared with the risk of dying from a motor vehicle crash (1 in 95), walking down the street (1 in 471), choking on food (1 in 2,461), or drowning in a bathtub (1 in 5,975).[8] From this perspective, the Court below and other federal decisions are simply wrong in suggesting that any use of bodyweight compression represents circumstances a "reasonable officer should have known presented a significant risk of asphyxiation and death". *Weigel v. Broad*, 544 F.3d 1143, 1153 (10th Cir. 2008).

As set forth below, this Court should clarify that the legal standards for use of "deadly force" should not apply to bodyweight compression and other generally less-than-lethal uses where the actual risk of death is miniscule. *Cf. Scott v. Harris*, 550 U.S. 372, 383, 127 S. Ct. 1769, 1777, 167 L. Ed. 2d 686, 695 (2007) ("A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person;" citation omitted). This Court's legal standards for use of deadly force were devised for use of *real* deadly force, like discharging a firearm, and

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[8] These figures come from the National Safety Council's "Preventable Deaths" website (address in the Table of Authorities).

cannot reasonably be extended to common less-than-lethal arrest techniques.

II. THIS CASE OFFERS AN IMPORTANT OPPORTUNITY TO CLARIFY THE ROLE OF THE PLAINTIFF'S INJURY IN ASSESSING QUALIFIED IMMUNITY.

Mr. Scott's claim, like all claims of excessive force "in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen is to be analyzed under the Fourth Amendment and its 'reasonableness' standard". *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443, 454 (1989). This is an objective standard: "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them . . .". *Id.* at 397.

Those facts and circumstances include, but are not limited to,

> "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting."

Kingsley v. Hendrickson, 576 U.S. 389, 397, 135 S. Ct. 2466, 2473, 192 L. Ed. 2d 416, 426 (2015).

This case highlights a problem with federal jurisprudence concerning the "extent of the plaintiff's injury" factor. Granting the Petition will permit this Court to clarify the role of "the extent of plaintiff's injury" in evaluating the objective reasonableness of force. Most importantly, this Court should clarify that the "extent of the plaintiff's injury" does not mean that rules concerning application of "deadly force" should be employed when less-than-deadly force has an unexpectedly lethal result.

A. Use of a "Deadly Force" Analysis for Bodyweight Compression Is Not an Objective Approach to Assessing Use of Force.

Judicial rules fashioning constitutional duties based on rare and unintended results of less-than-lethal procedures can have profound impacts on the ability of the police to maintain order, and the rise of such rules involves an approach to duty and causation not employed in tort contexts generally. Indeed, as set forth below, the reasoning invoked by the Ninth Circuit is such a departure from classic tort principles as to raise the inference of an invidious hostility against policing from some members of the federal judiciary.

Because a Fourth Amendment seizure represents government termination of freedom of movement involving "means intentionally applied," *Brendlin*, 551 U.S. at 254, the scope of constitutional duties must focus on the intended and general effect of police control procedures—even if they do occasionally result in tragic accidents. Seizures of a person that are objectively reasonable within the meaning of the Fourth Amendment may well result in injuries for which 42 U.S.C. § 1983 can and should provide no remedy.

Drawing on classic tort law analogies, particularly the "thin skull" doctrine, makes it clear that the constitutional duties of police officers should not depend upon the injuries suffered where, as here, the injuries were very unlikely to result. A rule that assesses the constitutional duty owed by police officers by reference to the injury suffered by the victim without regard to its objective likelihood—its objectively reasonable foreseeability—is not only contrary to legal principles generally, but also unjust.

As a matter of basic tort law, the problem of the "thin skulled" plaintiff like Mr. Scott creates special rules of damages but does not create heightened legal duties. *E.g., Vaughn v. Nissan Motor Corp.* in U.S.A., 77 F.3d 736, 738 (4th Cir. 1996) ("The tortfeasor's duty of care is measured by the ordinary person, but the plaintiff's injuries may not be"). By the same principle, an unusual

extent of harm, even death, should not create heightened constitutional duties for police officers.[9]

The contrary approach taken by the Ninth Circuit is strikingly clear in its statement that "grievous injury does not serve the objective of taking an individual into custody to prevent injury to himself when he is not suspected of any crime". (Pet. App. 16a.) In substance, the Ninth Circuit and other courts are giving the "extent of plaintiffs' injury factor" dispositive weight in assessing whether the force used was unreasonable. It is a grossly inappropriate approach to Constitutional interpretation to analyze the facts here as if "grievous injury" were the means intentionally used by the officers, rather than a tragic and unexpected result.

The Ninth Circuit's approach to constitutional interpretation is also at odds with all normal judicial rules concerning causation, converting § 1983 into a sort of strict liability rule whenever death results. It is perfectly appropriate to assess "the extent of plaintiff's injury" in assessing causation, but not the scope of duty. Such an analysis may reveal that a generally less-

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[9] The "thin skull" rule can continue to provide full compensation for injuries when an objectively unreasonable use of force is found causing death, even if such force would usually only injure the victim. *Gibson v. County of Washoe*, 290 F.3d 1175, 1192-93 (9th Cir. 2002) (noting this Court's precedent interpreting § 1983 "in light of the background of tort liability").

than-lethal police restraint procedure was in fact employed in a way such that it really was "severe, deadly force".

As in the case of the old English executions, bodyweight compression can in extraordinarily rare cases constitute "severe, deadly force," and the federal judiciary can and does see such cases. *See, e.g.*, *Abdullahi v. City of Madison*, 423 F.3d 763, 766 (7th Cir. 2005) (victim "died of chest and neck trauma, including a collapsed left lung and injuries consistent with strangulation," notwithstanding claims that an officer had merely his knee and shin on the back of a victim's shoulder for 30-45 seconds).

However, the research reviewed above makes it clear that police officers using their body weight are extraordinarily unlikely to cause death at all, making liability for use of this control technique profoundly inappropriate. Death when police physically control subjects with less-than-lethal means involves a complex, multi-factor causation, which may be analogized to the common problem of identifying what agent has caused disease, in which epidemiologists "engage in a rigorous analysis of multiple factors to determine whether an association is causal". *Reference Manual on Scientific Evidence* 336 (Federal Judicial Center 2d ed. 2000) ("it should

be emphasized that an association is not equivalent to causation"). [10]

We will never know whether the effects of Mr. Scott's methamphetamine usage, heart disease, excited delirium, and exertion of struggling would have alone caused his death, so that the use of body weight by the officers here cannot be deemed a "but for" cause of the Mr. Scott's death. *Cf. Bostock v. Clayton Cnty.,* 590 U.S. 644, 656, 140 S. Ct. 1731, 1739, 207 L. Ed. 2d 218, 232 (2020) (". . . a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.") The challenged conduct of the officers might have been a contributing factor to the death, and it might not have been. What is important for qualified immunity is that research demonstrates that absent specific, asphyxia-related injuries

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[10] As the Manual notes, "[t]he factors that guide epidemiologists in making judgments about causation are

1. temporal relationship;
2. strength of the association;
3. dose–response relationship;
4. replication of the findings;
5. biological plausibility (coherence with existing knowledge);
6. consideration of alternative explanations;
7. cessation of exposure;
8. specificity of the association; and
9. consistency with other knowledge."

(*Manual* at 375.) Only the first factor is present here; all others militate against a finding of causation.

showing extreme forces, the use of bodyweight compression is not objectively unreasonable.

It is unfair to the Nation's police officers, and contrary to the law's general approach to assessing the scope of legal duties, to use a "deadly force" approach to assess police use of less-than-lethal force tactics. Even this Court has casually stated that "officers pressing on the back of a prone subject can cause suffocation" (*Lombardo v. City of St. Louis*, 594 U.S. 464, 467, 141 S. Ct. 2239, 2241, 210 L.Ed. 2d 609, 612 (2021)), without regard to the fact that the amount of force required far exceeds typical police use.

Many courts, including the court below, have simply declared, in substance, that because the subject died, "deadly force" was used, which all but assumes for purposes of the immunity analysis that the officer's conduct directly caused the death. Absent clarification of the way in which the federal judiciary should evaluate the "extent of the plaintiff's injury," qualified immunity rulings will continue to force police officers to go to trial and face the testimony of testimony of asserted experts in contexts where use of less-than-lethal force unexpectedly produced lethal results. *Cf., e.g., Suarez v. City of Hollywood*, Case No. 116-62215-CIV-DIMITITROULEAS, 2018 U.S. Dist. LEXIS 245031 (S.D. Fla. Nov. 9, 2018) (allowing expert testimony). This result undermines objective implementation of Fourth Amendment rights,

and the research discussed above suggests that officers may be exposed to expert testimony that is not even "the product of reliable principles and methods" within the meaning of Fed. R. Evid. 702.

For purposes of qualified immunity, more than mere disagreement over the unreasonability of use of an officer's force should be required to destroy that immunity. *Cf. Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271, 278 (1986) ("if officers of reasonable competence could disagree on [securing an arrest warrant], immunity should be recognized"). There will never be a shortage of asserted experts suggesting that less force could or should have been used in any particular case, but this Court's objective approach to assessing the reasonability of force used by police should uphold qualified immunity in nearly all bodyweight compression cases.

A clear rule that bodyweight compression is never an objectively unreasonable use of force to control a subject resisting arrests, unless excessive force is manifested by breaking ribs and causing "flail chest" or actually producing symptoms of asphyxia (*e.g.*, the purple congestion and swelling of face and neck, and/or petechial hemorrhages of the skin of the face and/or conjunctivae discussed above), adequately protects the constitutional rights of Americans and American police officers. Even then, the particular circumstances of the police interaction

may make such use of force reasonable. *Cf., e.g.*, *Tofano v. Reidel*, 61 F. Supp. 2d 289, 305 (D.N.J. 1999) (qualified immunity notwithstanding petechial hemorrhages when "violent resistance to arrest resulting in police officers being injured").

B. There Is Nothing Unreasonable About Using Bodyweight Compression to Take the Mentally Ill into Custody.

Finally, the opinion below may be read as promoting the radical proposition that no use of force whatsoever is appropriate to take the mentally ill into custody. (Pet. App. 15a ("there are genuine issues of fact regarding whether any force was necessary;" emphasis in original).) This position is premised on still further factual assumptions that are plainly wrong.

First, the Ninth Circuit ignores entirely the context that officers who have "probable cause to believe that the person was in a mental health crisis," are under a duty to "tak[e] the person into custody" for treatment—*whether person wants to go or not*. Nev. Rev. Stat. § 433A.160(1). The notion that a paranoid schizophrenic who does not want to go into custody does "not present a risk to officers or others" (*e.g.*, Pet. App. 14a) is so unrealistic as to suggest some sort of anti-police bias in the panel below. Officers are at significant risk of injury whenever they come into physical contact with members of the public who must be taken into custody. Mere use of hands and arms

to control a resisting suspect gives rise to a 43% risk of officer injury. (*Use of Force By Police, supra*, Exec. Summ., at xii.)

Under this Court's precedent, "the severity of the security problem at issue" (*Kingsley*, 576 U.S. at 397) is a relevant consideration, but the Ninth Circuit's suggestion that Mr. Scott and others similarly situated are not "suspected of any crime" (Pet. App. 2a), substitutes assessment of criminality for assessment of the security and safety of the public. While mental illness itself cannot be punished, police are seldom called until conduct is called to their attention that constitutes crimes against the public order, such as "disorderly conduct" or "breach of the peace". *E.g.*, Clark County (Nevada) Code 12.33.010. These are not severe crimes but applying body-weight pressure to one who commits them and then physically struggles to resist arrest almost always does not produce severe consequences. Citizens whose conduct prompts others to call the police invoke the state's fundamental interest in preserving orderly conduct and can reasonably expect to encounter use of force if they resist officers.

Those entirely unfamiliar with the realities of modern police work can imagine that even larger teams of officers and lengthy de-escalation procedures could somehow avoid any use of force to bring an individual into custody. The NPA and PODC regard the Ninth Circuit's view as naïve. *See also White Paper* (2009) ("It is not feasible for

[law enforcement officers] to wait for the [excited delirium] subject to calm down, as this may take hours in a potentially medically unstable situation fraught with scene safety concerns").

While the federal judiciary may have the raw power to declare that the Fourth Amendment right to be free of unreasonable seizures requires such an approach, sending all uses of force against the mentally ill resisting arrest to federal juries is certainly not a policy choice required by the Fourth Amendment. The real effect of continuing erosion of the doctrine of qualified immunity in this context will be less treatment of the mentally ill and more disorder.

Conclusion

For the foregoing reasons, and the reasons stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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