

No. 20-391

IN THE
Supreme Court of the United States

JODY LOMBARDO, ET AL.,

Petitioners,

v.

CITY OF ST. LOUIS, ET AL.,

Respondents.

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

**BRIEF OF POLICING SCHOLARS AS AMICI
CURIAE IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICI CURIAE¹

Amici curiae are scholars and authors who study, teach, and write about policing and how it is regulated. Amici believe this case presents important and recurring issues concerning the Fourth Amendment implications of a particular police tactic: keeping a restrained (e.g., handcuffed) individual in the prone (face-down) position. They have an interest in ensuring that the Fourth Amendment excessive force inquiry takes into account prevailing policing practices and considers the totality of the circumstances in evaluating the reasonableness of force.

Amici include Seth W. Stoughton, a former officer of the Tallahassee Police Department and current law professor at the University of South Carolina, as well as other policing experts (many of whom formerly served as police officers, supervisors, or executives), and law professors at Columbia, Duke, NYU, UCLA, and the University of Virginia, among others. Appendix A includes a full list of amici.

SUMMARY OF ARGUMENT

In the decision below, the Eighth Circuit held that six officers who, for 15 minutes, pressed their body weight into a man who was face-down, handcuffed, and shackled until he suffocated to death used per se reasonable force. As that man struggled to breathe,

¹ The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

the officers continued to press his body into the ground, even though he posed no realistic threat of harm to them or anybody else. But—per the Eighth Circuit—no reasonable juror could conclude that the officers used excessive force.

The Eighth Circuit’s decision cannot be reconciled with the long-standing recognition by police departments across the country that officers should *not* keep a restrained (e.g., handcuffed) individual in the prone (face-down) position because of the significant risk that person will suffocate. The decision also cannot be squared with this Court’s command that the excessive force inquiry must take into account the totality of the circumstances, including whether the individual actually poses any realistic threat of harm.

I. Prevailing policing practices impact the reasonableness of an officer’s force. This Court held as much in *Tennessee v. Garner*, 471 U.S. 1 (1985), and circuits around the country have followed suit.

More generally, the reasonableness of an officer’s force depends on the factual context. The court must ask whether, at the moment force was employed, the individual had both the ability and opportunity to impose harm. When an individual is prone, restrained, and in a police-dominated environment, the threat is minimal; any use of force must be proportional to that minimal threat.

II. For over 25 years, the policing community has agreed that officers should *not* keep a restrained individual in the prone position because of the significant risk of positional asphyxia, e.g., suffocation because of

body position. Since at least 1992, police departments have been aware of these risks because of research demonstrating that this position interferes with an individual's ability to breathe. The DOJ, FBI, and the International Association of Chiefs of Police (IACP) all warned departments about these risks, and New York, Chicago, and other cities adopted policies prohibiting officers from keeping restrained subjects in the prone position.

Today, there is widespread agreement in the policing community that prone restraint creates a serious risk of positional asphyxia, and that this risk is exacerbated when officers apply pressure to an individual's back. As a result, police departments across the country have instituted policies that direct officers to not put weight on a prone subject's back and to move prone individuals into a position that facilitates breathing as soon as they are restrained.

III. If this Court does not intervene, the Eighth Circuit's decision will permit officers to employ disproportionate force that—in many circumstances—results in suffocation.

The Eighth Circuit's analysis ignores the reality that Mr. Gilbert, who was secured in handcuffs and leg shackles, did not pose any realistic threat of harm or escape when multiple officers spent 15 minutes pressing his body into the ground. The court also failed to evaluate the reasonableness of the force in light of the decades-long agreement in the policing community that restrained individuals should not be kept in the prone position because of the risk of asphyxia. Given that police departments across the

country warn officers to *not* apply this type of force, the Eighth Circuit’s conclusion that the officers’ actions here were reasonable as a matter of law should not stand.

ARGUMENT

I. Prevailing Police Practices And The Overall Factual Context Impact The Reasonableness Of An Officer’s Actions Under The Fourth Amendment.

Under *Graham v. Connor*, the ultimate question in excessive force cases is whether the officer’s actions were objectively reasonable, “careful[ly] balancing ... the nature and quality of the intrusion on the individual’s ... interests against the countervailing governmental interests at stake.” 490 U.S. 386, 396 (1989) (quotation marks omitted). This highly contextual inquiry asks whether the officer exercised force proportional to the situation he or she confronted, paying “careful attention to the facts and circumstances of each particular case.” *Id.*

Two aspects of this constitutional analysis are important to bear in mind.

First, as this Court held in *Tennessee v. Garner*, 471 U.S. 1 (1985), the prevailing views of the policing community impact the reasonableness of an officer’s use of force.

In *Garner*, this Court held that an officer violated the Fourth Amendment by shooting and killing an unarmed black 15-year old who was fleeing the scene of

a burglary. The Court stated that when “evaluating the reasonableness of police procedures under the Fourth Amendment, we have ... looked to prevailing rules in individual jurisdictions,” including “policies adopted by the police departments themselves.” *Id.* at 15-18. And the Court found it significant that “a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects.” *Id.* at 10-11.

Generally accepted police practices were relevant to the analysis because “if those charged with the enforcement of the criminal law have abjured the use of deadly force in arresting nondangerous felons, there is a substantial basis for doubting that the use of such force is an essential attribute of the arrest power in all felony cases.” *Id.* at 11.

Circuits around the country have followed suit, acknowledging that violations of “police department guidelines ... are relevant to the analysis of constitutionally excessive force.” *Ludwig v. Anderson*, 54 F.3d 465, 472 (8th Cir. 1995) (quotation marks omitted). “[I]t may be difficult to conclude that the officers acted reasonably if they performed an action that had been banned by their department or of whose dangers in these circumstances they had been warned.” *Gutierrez v. City of San Antonio*, 139 F.3d 441, 449 (5th Cir. 1998). And courts have reached this same conclusion in positional asphyxia cases. *See, e.g., Martin v. City of Broadview Heights*, 712 F.3d 951, 960 (6th Cir. 2013) (“[O]fficers’ failure to adhere to a departmental policy that explained the grave dangers of positional asphyxia verifies the unreasonableness of their actions.”); *Weigel v. Broad*, 544 F.3d 1143, 1152

(10th Cir. 2008) (“[T]raining materials [that] made clear that the pressure applied ... would suffice to cause ... suffocation” impacted reasonableness of force.); *Abdullahi v. City of Madison*, 423 F.3d 763, 772 (7th Cir. 2005) (“[V]iolat[ions of] standard police practices [on asphyxia] ... may also be deemed relevant to the reasonableness inquiry.”); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003) (Violations of police department guidelines on asphyxia relevant to reasonableness of force.).

Second, when evaluating excessive force, context matters. The court must evaluate “whether the totality of the circumstances justified” the specific use of force. *Garner*, 471 U.S. at 8-9.

Critically, use-of-force incidents are dynamic; reasonableness depends on the nature of the threat the individual presents at the time. “[F]orce that is reasonable while [the] suspect poses [a] threat is no longer reasonable once [the] threat is no longer present.” *Cole v. Hutchins*, 959 F.3d 1127, 1133 (8th Cir. 2020); *see also Lytle v. Bexar Cnty.*, 560 F.3d 404, 413 (5th Cir. 2009); *Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005).

In *Graham*, the Court observed that the reasonableness inquiry “must embody allowance for the fact that police officers are *often* forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary.” 490 U.S. at 396-97 (emphasis added). But this doesn’t mean that police officers are *always* “forced to make split-second judgments.” *Id.*

And when “there is nothing to indicate that [the officer] was faced with the need to make any split-second decisions,” *Brown v. City of Golden Valley*, 574 F.3d 491, 497 (8th Cir. 2009), the court should not so readily defer to the officer’s judgment. When an individual is in custody, restrained, and surrounded by officers, the situation is not “tense, uncertain, and rapidly evolving” and officers have few, if any, “split-second” judgments to make. *Graham*, 490 U.S. at 396-97.

Furthermore, any resistance by a restrained individual in a police-dominated environment² warrants a different response than does resistance by an unrestrained individual on the street. If the latter person kicks an officer, he may present a threat of physical harm or escape. But a handcuffed individual in a holding cell who kicks his legs while being held face down on the ground does not. And when an individual does not pose any realistic threat, significant force is not justified *even if* the individual is “resisting” arrest. *See, e.g., Smith v. Ray*, 781 F.3d 95, 98, 102-03 (4th Cir. 2015) (punching and throwing an arrestee to the ground not justified when the arrestee “took a single step away” and “pulled her arm away” from the officer); *Goodson v. City of Corpus Christi*, 202 F.3d 730, 734, 740 (5th Cir. 2000) (pulling away from an officer does not justify “being tackled”).

This is true because the reasonableness of force depends on “whether and to what extent the subject

² In fact, in some instances, “resistance” from a restrained individual may not be resistance at all if the individual is simply attempting to breathe. *See infra* Part II.

posed an articulable threat to a legitimate governmental interest,” and a “[t]hreat ... exists only when the subject has ... the ability, opportunity, and apparent intention to cause a particular harm.” Seth W. Stoughton, Jeffrey J. Noble, & Geoffrey P. Alpert, *Evaluating Police Uses of Force* 231 (2020). *See also*, IACP, *National Consensus Policy & Discussion Paper on Use of Force* 11 (Rev’d 2020), <https://tinyurl.com/yxrlndum> (imminent threat requires “the ability and opportunity to realize [an] intention” “to inflict serious bodily injury or death”). A restrained individual’s *ability* and *opportunity* to cause harm to the officers or escape is dramatically reduced. *See* Stoughton, Noble & Alpert, *supra* at 33-34. When the facts reflect that the individual does not pose any realistic threat, an officer’s use of force—particularly force with a foreseeable risk of death—is unreasonable.

II. For Over 25 Years, It Has Been Generally Accepted Within Policing That Officers Must Avoid Keeping Individuals Handcuffed And In The Prone Position Because Of The Risk Of Death.

Police have known for decades that keeping individuals in the prone position for an extended period of time imposes dangerous health risks because it can interfere with the individual’s ability to breathe. The individual gradually loses oxygen and may fall into cardiac arrest. This has been termed “positional

asphyxia” (the term that we will use), as well as “compression asphyxia” and “restraint asphyxia.”³

A 1995 DOJ bulletin to law enforcement communities aptly describes the “vicious cycle” that occurs when a suspect is restrained while face-down. JA1930-31.⁴ This description from the 25-year old bulletin could be describing the facts of this case:

- A suspect is restrained in a face-down position, and breathing may become labored.
- Weight is applied to the person’s back—the more weight, the more severe the degree of compression.
- The individual experiences increased difficulty breathing.
- The natural reaction to oxygen deficiency occurs—the person struggles more violently.
- The officer applies more compression to subdue the individual.

³ Medical experts sometimes differentiate these terms, using “positional asphyxia” for asphyxia caused by the face-down position itself, “compression asphyxia” for situations where pressure on the individual’s back contributed to breathing difficulties, and “restraint asphyxia” to describe asphyxia resulting from physical restraints. For purposes of this brief, we will not differentiate between those terms.

⁴ “JA” refers to the Joint Appendix filed in the Eighth Circuit, No. 19-1469.

JA1930-31. These risks of suffocation are exacerbated when combined with “alcohol and high drug use,” “particularly when physical restraint includes use of behind-the-back handcuffing combined with placing the subject in a stomach-down position.” JA1931.

A. Leaving a restrained individual in the prone position imposes significant health risks.

The risks of positional asphyxia were first described over 30 years ago by pathologist Dr. Richard Reay, who studied the impact of hog-tying (binding a subject’s hands and feet together behind their back) on a subject’s ability to breathe. *See* Donald T. Reay et al., *Positional Asphyxia During Law Enforcement Transport*, 13 Am. J. Forensic Med. & Pathology 90 (1992); Donald T. Reay et al., *Effects of Positional Restraint on Oxygen Saturation and Heart Rate Following Exercise*, 9 Am. J. Forensic Med. & Pathology 16 (1988).⁵

⁵ While there was some criticism in the 1990’s of Dr. Reay’s original research on the *degree* of danger posed by hog-tying subjects alone, these critiques suffered from their own flaws: They were based on the impact of hog-tying on young, healthy study participants without any preexisting health conditions, which is not representative of the relevant population. And as evidenced by the discussion *infra* Part II.B., the law enforcement community’s prevailing view continues to be that restraining a prone individual carries significant risks of asphyxia. *See, e.g.*, IACP, *The Prone Restraint—Still A Bad Idea*, 10 Pol’y Rev. 1 (1998) (rejecting these critiques and noting that “there is considerable evidence, both in terms of expert opinion and actual field experience, that indicates that the practice of prone restraint does in fact lead to deaths among suspects in the custody of the police”).

Dr. Reay and others' research demonstrated that when a restrained subject is lying face-down, respiration is impeded significantly; while the individual can take in *some* oxygen, he cannot take in enough oxygen to sustain bodily functions over time. At some point, the individual begins operating on an oxygen deficit. Moreover, the individual's elevated need for oxygen due to muscle activity from resistance and/or drug use exacerbates the deficit. The inability to take in enough oxygen can result in death. *See* Reay, *Positional Asphyxia*, *supra* at 95. And, as is well known in policing, the oxygen deficit does not preclude speech; an individual may be slowly suffocating even while pleading with officers, "I can't breathe." Steve Cole, *Screaming Their Last Breath: Why First Responders Must Never Ignore the Words I Can't Breathe*, Calibre Press Online Training Div. (Dec. 10, 2015).

While the early research initially focused on the risks of hog-tying specifically, this quickly evolved into a realization that keeping a handcuffed individual in the prone position for an extended period of time carries inherent dangers. For example, in 2000, two physicians conducted a review of 21 individuals who died during prone restraint, many of whom were not hog-tied. The authors concluded that asphyxia was the "likely immediate cause of death, because the sudden collapse that resulted in death occurred while the person was held in a position that would compromise breathing." Ronald L. O'Halloran & Janice G. Frank, *Asphyxial Death During Prone Restraint Revisited; A Report of 21 Cases*, 21 *Am. J. Forensic Med. & Pathology* 39, 48 (2000). They concluded that "[d]espite efforts by law enforcement agencies to limit hogtying, asphyxial deaths still

occur when suspects are held prone with their arms and legs restrained and weight applied to their backs for minutes.” *Id.* at 51.⁶

Given this research, it is generally accepted within policing that placing a restrained individual in the prone position impedes the individual’s breathing and could result in death. *Police in America*, a leading resource for generally accepted practices in policing, warns that “positional asphyxia occurs when a person’s body position prevents normal and adequate breathing,” and that this “[u]sually” occurs “when the subject is face down with hands secured behind the back.” Steven G. Brandl, *Police in America* at 252 (2018). Further, “[t]he more [police] officers there are holding a person down in a prone position, the greater the risk that there will [be] pressure on the person’s abdomen, making it difficult to breathe.” *Id.* (alterations in original). For this reason, “[o]fficers must be attuned to the amount and duration of any weight they place on [a prone] subject[s]” back. Stoughton, Noble & Alpert, *supra* at 203.

⁶ See also John Parkes, *A Review of the Literature on Positional Asphyxia as a Possible Cause of Sudden Death During Restraint*, 4 *Brit. J. Forensic Prac.* 24, 27-28 (2002).

B. Given these acknowledged risks, the policing community directs officers that they should *not* keep a handcuffed individual in the prone position for a prolonged period of time.

1. For over 25 years, police departments have instructed their officers that they should *not* leave restrained individuals in the prone position for any extended time period. Instead, as soon as the subject is secured in handcuffs, officers should move the person to a recovery position, e.g., by rolling him onto his side or having him sit up. Importantly, handcuffed subjects should be moved into one of the recovery positions *even if* they are still non-compliant or resisting.

An NYPD training video explains to officers why adherence to these directives is so important. Mirroring the 1995 DOJ directive, it describes how a restrained, prone individual's "air hunger and oxygen" deficit causes a "natural reaction" during which the person "struggle[s] more violently" to get air. This leads to the officers applying "more compression" in order "to subdue the individual." This results in a "vicious cycle in which compression makes air hunger, air hunger makes a greater struggle and a greater struggle demands greater compression." And "in some of these circumstances, the price of tranquility is death." The video directs officers that it is "incumbent" upon them to get the individual "into a position that facilitates breathing" "as soon as safety permits." See Al Baker & J. David Goodman, *The Evolution of William Bratton*, in *5 Videos*, N.Y. Times (July 25,

2016), <https://tinyurl.com/y4xyostz> (reproducing 1994 NYPD training video).

San Diego's police department was one of the first to engage with this issue, in response to the sudden death of a 16-year-old who died after being restrained by officers. In 1992, a San Diego task force surveyed 223 law enforcement agencies across the country about in-custody deaths and the literature on positional asphyxia. The task force issued a series of recommendations, directing that "[o]nce an individual has been controlled and handcuffed, the officer should roll the subject onto his/her side, or into a sitting position as soon as possible to reduce the risk of positional asphyxia." Plaintiffs' Response to Defendants' Motion in Limine No. 5 at 24, *Price v. County of San Diego*, No. 3:94-cv-01917 (S.D. Cal. June 30, 1997), ECF No. 129 (San Diego Police Dep't, Final Report of the Custody Death Task Force (1992)).

The task force's recommendations were then endorsed in 1993 by IACP—the oldest, largest, and most highly-regarded policing organization in the world. IACP directed police departments around the country that "when it is necessary to use the weight of several officers in order to subdue an individual for handcuffing, the arrestee should be freed from that weight as soon as possible in order to allow him to breathe freely. In order to facilitate the individual's breathing, he should also be rolled onto his side or into a sitting position as soon as possible." IACP, Training Key No. 429, *Custody Death Syndrome* (1993).

And, of course, the 1995 DOJ Bulletin could not be clearer on this topic: "[A]s soon as the suspect is

handcuffed, get him off his stomach.” JA1931.⁷ The DOJ bulletin reproduced model guidelines issued by the NYPD, which similarly directed officers that “[a]s soon as the subject his handcuffed, *get him off his stomach*. Turn him on his side or place him in a seated position. If he continues to struggle, *do not sit on his back*. Hold his legs down or wrap his legs with a strap.” JA1932 (emphases in original). The NYPD also issued the training video discussed above, which was widely circulated to other departments. *See, e.g., Weigel*, 544 F.3d at 1150 (describing use of NYPD training video in Wyoming); JA1932 (indicating that NYPD has agreed to make training video “available to interested law enforcement agencies”).

In 1995, Chicago issued similar warnings to its officers about the dangers of positional asphyxia, directing them: “Do not leave a subject in control restraints lying on his back or stomach.... Do not put weight on an arrestee’s back, such as with your knee, for a prolonged period. This practice adds stress to the respiratory muscles and inhibits movement of the diaphragm and rib cage.” These types of “potentially dangerous restraint positions ... must be avoided.” The Chicago Police Department, Training Bulletin,

⁷ A 1996 FBI Bulletin also warned officers nationwide that they need to be attuned to positional asphyxia’s risks because it is “insidious, and subjects might not exhibit any clear symptoms before they simply stop breathing.” Donald T. Reay, *Suspect Restraint and Sudden Death*, FBI Law Enf’t Bull., May 1996, at 23.

Vol. XXXVI, No. 2, *Positional Asphyxia* (Feb. 6, 1995).⁸

In 1998, IACP noted that “during the past decade police departments have been repeatedly warned not to permit the restraint of prisoners in the prone position.” IACP, *The Prone Restraint—Still A Bad Idea*, *supra* at 2. DOJ then reaffirmed its grave concerns regarding the risks of positional asphyxia in 2001, when it directed policing agencies that they “should develop use of force policies that address ... particular use of force issues [including] positional asphyxia” and identified the IACP training key discussed *supra* p. 13, as a model use of force policy on this issue. DOJ, *Principles for Promoting Police Integrity 4 & App. 1*, p.1 (2001).

2. Given the widespread acknowledgment of the risks posed by prone restraints, police departments across the United States “have for years warned officers about the risks of moves such as facedown compression holds.” Mike Baker, et al., *Three Words. 70 Cases. The Tragic History of I Can’t Breathe*. N.Y.

⁸ Litigation has also highlighted the extensive training materials routinely provided to officers on this subject. *See Martin*, 712 F.3d at 956 (discussing “‘Positional Asphyxia Policy’ implemented in April 2003 to inform ... officers of the dangers of asphyxiating an individual during a restraint procedure”); *Weigel*, 544 F.3d at 1149-50 (in 2002, state troopers were provided with “[n]umerous training materials” that “addressed the risks of putting weight on an individual’s back when the person is lying on his stomach”); *Drummond*, 343 F.3d at 1059-60 (in 1998, officers warned that “when one or more [officers] are kneeling on a subject’s back or neck to restrain him, compression asphyxia can result”).

Times (June 29, 2020), <https://tinyurl.com/yaoduzq7>. These types of policies and warnings remain in place today.

Police in America warns officers that they should “avoid prone restraint unless absolutely necessary: Consider alternative methods for resolution. The person should be repositioned from the face down/prone position as soon as practical. Do not sit or lean on the abdomen EVER.” Brandl, *supra* at 252. See also Lawrence E. Heiskell, *How to Prevent Positional Asphyxia*, POLICE Mag. (Sept. 9, 2019), <https://tinyurl.com/yb8y8gum> (“Once the suspect is handcuffed, get them off the face-down position.”); JA1953 (ABA Standards for Criminal Justice, Treatment of Prisoners directs that “[c]orrectional authorities should not ... restrain [prisoners] in a fetal or prone position.”).

And when DOJ recently entered into consent decrees with police departments regarding use of force, the decrees have required the institution of protocols and trainings to “[m]inimiz[e] the risk of positional asphyxia” and to encourage officers “to use restraint techniques that do not compromise a subject’s breathing.” Consent Decree at 41, *United States v. City of Ferguson*, No. 4:16-cv-00180 (E.D. Mo. Apr. 19, 2016), <https://tinyurl.com/yyosqr6o>; see also Settlement Agreement at 22, *United States v. City of Cleveland*, No. 1:15-cv-01046-SO (N.D. Ohio June 12, 2015), <https://tinyurl.com/y4fcegfs> (same).

As Petitioner noted, the state of Ohio has banned all state agencies from using a “[p]rone restraint,” defined as including “all items or measures used to limit

or control the movement or normal functioning of any portion, or all, of an individual's body while the individual is in a face-down position for an extended period of time." JA1971.

Indeed, police departments across the country have adopted policies restricting the use of prone restraints in order to guard against the risks of positional asphyxia. A sampling of these policies currently in effect includes:

- **Albuquerque, New Mexico:** "In situations when the individual is forced into a face down position, officers shall release pressure/weight from the individual and position the individual on their side or sit them up as soon as they are restrained and it is safe to do so." Use of Force, SOP 2-52 at 5, <https://tinyurl.com/yxl7fcgy>.
- **Charlotte-Mecklenburg, North Carolina:** "Avoid placing a subject in a position that is likely to contribute to positional asphyxia.... control restraints while lying on back/stomach should be avoided." Police Department Directive, 500-003, <https://tinyurl.com/yyt8joov>.
- **Denver, Colorado:** "[O]fficers will immediately cease applying body weight to an individual's back, head, neck, or abdomen once the individual is restrained and other control tactics may reasonably be utilized other than body weight. As soon as possible after an individual has been handcuffed,

the individual should be turned onto his/her side or allowed to sit up, so long as the individual's actions no longer place officers at risk of imminent injury. Officers will make all reasonable efforts to ensure that the individual is not left in a prone position for longer than absolutely necessary to gain control over the resisting individual." Operations Manual, Force Related Policies, 105.01(5)(e), <https://tinyurl.com/y28sbsrw>.

- **Detroit, Michigan:** "Restrained subjects should be placed in an upright or seated position to avoid Positional Asphyxia which can lead to death, when a subject's body position interferes with breathing." Use of Force, 304.2 -7, Duty to Report/Render Aid, <https://tinyurl.com/y5kzobh9>.
- **Indianapolis, Indiana:** "A subject placed on their chest or stomach, with the legs and arms restrained behind the back, may have difficulty breathing, leading to serious injury or death. 1. Officers should avoid leaving any prisoner on their chest or stomach for any period of time longer than is absolutely necessary, regardless of the type of restraint used. 2. The subject should be moved onto their side, allowing less interference with normal breathing, as soon as possible." General Order 8.1, Prisoner Handling, Transportation and Escape, <https://tinyurl.com/y68u2gfr>.

- **New Orleans, Louisiana:** “If a subject has been placed on his or her stomach, turn him or her on the side or in a seated position as soon as handcuffs are properly applied. If the subject continues to struggle, *do not* sit, lie or kneel on the subject’s back.” Operations Manual, Handcuffing and Restraint Devices at 4, <https://tinyurl.com/y438hpey> (emphasis in original).
- **New York, New York:** “Avoid actions which may result in chest compression, such as sitting, kneeling, or standing on a subject’s chest or back, thereby reducing the subject’s ability to breathe.... Position the subject to promote free breathing, as soon as safety permits, by sitting the person up or turning the person onto his/her side.” Patrol Guide, Use of Force, 221-02 at 2-3, <https://tinyurl.com/yxbl78pw>.
- **Washington, D.C.:** “In order to avoid asphyxiation, members shall ...[p]osition the individual in a manner to allow free breathing once the subject has been controlled and placed under custodial restraint using handcuffs or other authorized methods.... Members are prohibited from: Placing a person in a prone position (i.e., lying face down) for a prolonged period of time ... except during exigent circumstances. Prisoners shall be carefully monitored while in a prone position as a prone position may be a contributing factor to cause a prisoner to suffocate, also referred to as positional

asphyxiation.” General Order, Use of Force, 901.07 at 10, <https://tinyurl.com/yxds5r3s>.⁹

The overwhelming, long-standing nationwide agreement in the policing community on this issue informs the reasonableness of the officer’s use of force here. Because “those charged with the enforcement of the criminal law have abjured” keeping restrained individuals in the prone position, “there is substantial basis for doubting that the use of such force is an essential attribute of” the police power. *Garner*, 471 U.S. at 11.

III. The Eight Circuit’s Decision Is Wrong And Will Be Used To Condone Egregious Exercises Of Force.

If left standing, the Eighth Circuit’s decision holding that the officers’ force was reasonable as a matter of law will be used to condone uses of force that plainly go against decades of policing directives and

⁹ See also Austin, Texas, General Orders, Care and Transport of Prisoners, 321.2.3, <https://tinyurl.com/y6pbmpno> (“Officers in control of a restrained person must ... minimize the possibility of positional asphyxia.”); Berkeley, California, Law Enforcement Services Manual, Handcuffing and Restraints, 302.9, <https://tinyurl.com/y3cmrohv> (“If the person being handcuffed is on the ground or in a prone position, officers should, as soon as possible, place the person in an upright sitting position or on their side for respiratory recovery and to mitigate the potential for positional asphyxia.”); Durham, North Carolina, General Orders Manual, Use of Force, 4008 R-14 at 360, <https://tinyurl.com/y5cedmkz> (“At no time should an individual be left on their stomach or hog-tied, as this can lead to positional asphyxia.”).

practices. This decision will govern any case in that circuit regarding the death of a restrained, prone individual. This Court should intervene to make sure that officers across the country are held to the basic and widely accepted standards of professionalism by not tacitly permitting officers to ignore their training and press into a restrained individual into the ground until he suffocates.

The Eighth Circuit's decision that the officer's conduct here was reasonable *as a matter of law* cannot be reconciled with the prevailing view in the policing community that these tactics must be avoided. Nor can it be reconciled with the way the excessive force inquiry works, which requires consideration of the totality of the circumstances in light of the facts and circumstances of each particular case.

1. The Eighth Circuit's decision completely ignores the policing community's long-standing recognition that individuals should *not* be left restrained in the prone position because of the risk of death.

Further, the Eighth Circuit disregarded the significance of the evidence that Gilbert's resistance while in the prone position was "actually an attempt to breathe," concluding that "the Officers could have reasonably interpreted such conduct as ongoing resistance." App. 9a. But given the widespread recognition that applying pressure to the back of restrained, prone individuals carries a significant risk of asphyxiation, and that a suffocating individual may *involuntarily* struggle to breathe, *supra* Part II, the officer's purported interpretation of Gilbert's efforts to breathe—during the *15 minutes* that six of them

pressed Gilbert’s body into the ground—is manifestly *unreasonable*. At a minimum, reasonableness should have been left to the fact finder to determine.

As the DOJ Bulletin bluntly states, when officers apply force to a prone, restrained individual, “[t]he natural reaction to oxygen deficiency occurs—the person struggles more violently.” JA1931. Officers are generally taught that they should not “misinterpret a suspect’s struggle for oxygen as continued resistance.” *Weigel*, 544 F.3d at 1150. When officers ignore these warning signs and continue to apply pressure, positional asphyxia will likely result.

The reasonableness of use of force must be “judged from the perspective of a *reasonable* officer on the scene.” *Graham*, 490 U.S. at 396 (emphasis added). There is, at a minimum, a material dispute of fact over whether a reasonable officer would have recognized the symptoms of asphyxiation and realized, during the 15 minutes that Gilbert was struggling under the weight of the officers and yelling “It hurts,” App. 36a, that his actions were the hallmark of a man struggling to breathe.

The City of St. Louis itself admitted that the City has “known about the dangers of compression asphyxia for a long time” and that the City put “protocols ... in[] place” after the DOJ bulletin “telling officers about the dangers of compression asphyxia.” JA1783, 1808. While it has no formal policy in place, the City teaches officers “that it can be dangerous to hold someone in a prone position” and that they should not “leave somebody on their stomach cuffed.” JA 1774, 1778-79. Indeed, given the widespread

agreement in policing on the risks of positional asphyxia, the risks here would be obvious to any reasonable officer—regardless of whether a formal policy was in place.

The officers' conduct went against decades of generally accepted policing practices and the city's own understanding of the risks of prone restraints. The Eighth Circuit's conclusion that this conduct was reasonable as a matter of law cannot be squared with years of experience and research demonstrating—and years of police policy acknowledging—the risk that these *exact* tactics will result in death.

2. Under this Court's caselaw, the excessive force inquiry requires “careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Graham*, 490 U.S. at 396.

But rather than looking at these factors and the factual context, the Eighth Circuit concluded that since Gilbert was allegedly “continu[ing] to violently struggle” after being handcuffed and leg-shackled, it was *per se* reasonable for officers to hold him face-down on the ground and apply force until he suffocated. App. 9a. That conclusion is wrong on multiple fronts.

First, the “crimes” for which Gilbert was arrested were non-violent minor misdemeanors, App. 15a, but the reason why the officers originally went into the

holding cell was to prevent Gilbert from hurting himself and/or to make him “be quiet.” App. 16a-17a; JA1726. The government clearly has an interest in protecting individuals in custody from self-harm, but, just as clearly, that interest cannot justify pressing a man’s body into the ground until he dies.

Second, for the entire 15 minutes that six officers—who collectively weighed over 1300 pounds—were pressing into Gilbert’s body, he was face-down. And handcuffed. And leg-shackled. All in a secure holding cell. App. 4a-5a, 37a-38a. As discussed *supra* p. 6-8, courts assessing reasonableness should take into account whether the individual actually had the *ability* and *opportunity* to impose any harm at the time that the force was imposed. Here, the officers admitted that once Gilbert was “shackled and handcuffed . . . , he couldn’t harm anyone at that point,” JA 1795. In fact, he wasn’t even trying to; once he was “handcuffed and secured,” he “stopped struggling.” JA275.

Third, the fact that an individual was resisting in some fashion does not give officers *carte blanche* in their response. The use of force must be proportional to the threat the subject’s resistance creates. A prone, handcuffed individual in a secure holding facility offers little threat of physical harm and no realistic threat of escape. *See supra* p. 7-8. The court failed to consider whether the officers employed force that was proportional to the minimal “threat” that Gilbert posed in light of the totality of the circumstances.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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