

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF

Last week, the Fifth Circuit issued a decision in yet another case where police officers held down a handcuffed person and pushed into his back until he died. *See Aguirre v. San Antonio*, — F.3d —, 2021 WL 1574046 (5th Cir. Apr. 22, 2021). The decision largely adopts the reasoning of *Goode v. Baggett*, 811 F. App'x 227 (5th Cir. 2020), discussed in our petition (at 2, 25), and it is fundamentally incompatible with the Eighth Circuit's decision below.

In many ways, the facts of *Aguirre* mirror the facts here: A man (*Aguirre*) “appeared mentally disturbed” and was handcuffed and moved to the ground by officers. 2021 WL 1574046, at *1. One officer restrained his legs, while another used “his body weight to hold *Aguirre* down, thus applying pressure to [his] back.” *Id.* at *2. More officers moved in, with some “placing their hands on [his] arms and back to hold him prone,” and others standing around. *Id.* Five and a half minutes later, *Aguirre* was dead. The officers “noticed that *Aguirre* was no longer breathing” and “turned him over.” *Id.* An autopsy revealed that the officers' force caused his death. *Id.* As to each of these facts, the two cases are similarly situated. *See* Pet. 15–16.

The Fifth Circuit's legal analysis, however, could not be more different than the Eighth Circuit's analysis in this case. The Fifth Circuit not only held that these facts allow a jury to find that the force was excessive, but also denied qualified immunity to the officers. The court did so even though the officers in *Aguirre* applied force for less than six minutes—not fifteen minutes, as here. And it did so, further, even though the situation was far “more tense, fast-moving, and dangerous” than here—“a busy highway, cars at high speeds, and a suspect” who had “attempted to break away from the officers in the midst of the traffic.” 2021 WL 1574046, at *17 (Jolly, J., concurring).

In analyzing the question of excessive force, the Fifth Circuit applied this Court's totality-of-the-circumstances test and held that a reasonable jury could easily find that the intrusion on Aguirre's liberty interests "outweighed the Officers' interest in placing and holding [him] in the maximal-restraint position, rendering their utilization of the technique unreasonable." *Id.* at *5. The court reviewed the same DOJ bulletin submitted into evidence in this case and explained that it was "reasonable to infer that the San Antonio Police Department received this bulletin that was distributed to local law enforcement agencies across the nation." *Id.* at *8 n.10. And the court noted that (as in this case) officers testified "that they suspected at the time of the incident that Aguirre was on narcotics," which placed him at greater risk of death by asphyxiation. *Id.* at *9.

The Fifth Circuit also addressed the officers' defense that Aguirre "was resisting and they feared that he would break away and run into traffic." *Id.* at *5. The court found that there were "genuine questions about whether it was objectively reasonable" for officers to believe that Aguirre was "even physically capable of posing an immediate safety threat that would justify" such "extraordinarily dangerous force." *Id.* "Taken in the light most favorable to Plaintiffs, th[e] summary judgment evidence indicates that a reasonable office in the Officers' position would have known that applying the maximal-restraint position to Aguirre and holding him in this position for an extended period posed a substantial risk of causing his death." *Id.* at *9. The court thus held that, "if a jury concludes that the Officers had reason to believe Aguirre was on drugs and that he posed no threat of serious bodily harm at the time the Officers used the maximal restraint position against him, the Plaintiffs will have established that the Officers violated Aguirre's constitutional right to be free from the unreasonable use of deadly force." *Id.* at *10.

All three judges then agreed that the officers were not entitled to qualified immunity, albeit for slightly different reasons. *See id.* at *10–*14 (op. of Dennis, J.) (“[A]t least five other circuits have held that . . . ‘it [is] clearly established . . . that exerting significant, continued force on a person’s back while that person is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force.’” (citing the same cases as our petition)); *id.* at *17 (Jolly, J., concurring) (opining that the violation would be “obvious” if a jury were to find that the use of force became “necessary to keep Aguirre from fleeing, given the number of officers available to prevent Aguirre from bolting into traffic”); *id.* at *18 (Higginson, J., concurring) (opining that it was “clearly established” that “the continued application of asphyxiating force may be unreasonable where there is no ongoing threat posed”).

The Eighth Circuit’s decision below is deeply at odds with the Fifth Circuit’s decision. It holds that six officers were authorized *as a matter of law* to press into the body and back of a man who was handcuffed and leg-shackled in a prone position while having a mental-health crisis inside of a secure cell—for fifteen minutes, until he died. The court reached this conclusion even though the officers testified that (1) they knew that he was “having a mental-health crisis” and (2) he “posed no threat.” Pet. 15. Still, they continued to press into his back as “he attempted to lift his body up” for air and said: “It hurts. Stop.” App. 36a. Under *Aguirre*, these facts would be more than enough to submit the case to the jury. *See* 2021 WL 1574046, at *10 (holding exactly that). But not in the Eighth Circuit.

Aguirre is also relevant for another reason: It serves as one more reminder of the “unfortunate frequency” with which these deaths recur. *Drummond v. City of Anaheim*, 343 F.3d 1052, 1063 (9th Cir. 2003). Sadly, it is not the only

recent example. Three days before the Fifth Circuit issued its opinion, police in Alameda, California killed a man by prone asphyxiation. In a subsequently released video of the incident, “officers can be seen placing arms and knees on his back to keep him restrained”—until he “goes still after police pin him to the ground for several minutes.” Jacyln Diaz, NPR, *Man Dies After Alameda, Calif., Police Pin Him To Ground For Several Minutes*, <https://perma.cc/8WMD-X57C> (Apr. 28, 2021). Then, the very next day, a Minneapolis jury found Derek Chauvin guilty of murdering George Floyd based on conduct that could have been authorized under the decision below. So as it stands, the same conduct, in the same circuit, can give rise to a murder conviction under state criminal law, and yet be deemed a reasonable use of force under federal constitutional law. That is about as sensible as it sounds.

And this is just the news from last week. Fortunately, this Court now has the chance to step in. Presented with a clean vehicle to resolve the conflict on the constitutionality of a police tactic that continues to cause so many unnecessary deaths, this Court should not sit idly by. It should grant certiorari, resolve the conflict, and reverse.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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