No. ___

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

PETITION FOR A WRIT OF CERTIORARI

JOHN G. SIMON
KEVIN M. CARNIE, JR.
PATRICK R. MCPHAIL
The Simon Law Firm, PC
800 Market Street
Suite 1700
St. Louis, MO 63101
(314) 241-2929

ANDREW W. CALLAHAN
P.O. Box 15159
St. Louis, MO 63110
(618) 791-5501

JONATHAN E. TAYLOR
Counsel of Record
ALISA TIWARI
Gupta Wessler PLLC
2001 K Street, NW
Suite 850 North
Washington, DC 20006
(202) 888-1741
jon@guptawessler.com

Counsel for Petitioners

November 28, 2022

QUESTION PRESENTED

When officers put a handcuffed and shackled person face-down on the floor and push into his back until he dies, are they entitled to qualified immunity as a matter of law because the person struggled to breathe before dying?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Jody Lombardo and Bryan Gilbert were plaintiffs in the district court and appellants in the Eighth Circuit. The following respondents were defendants in the district court and appellees in the Eighth Circuit: City of St. Louis; Ronald Bergmann; Joe Stuckey; Paul Wactor; Michael Cognasso; Kyle Mack; Erich vonNida; Bryan Lemons; Zachary Opel; Jason King; Ronald DeGregorio.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Lombardo, et al. v. St. Louis City, et al.*, No. 16-cv-1637 (E.D. Mo.) (memorandum and order granting summary judgment, issued February 1, 2019);
- *Lombardo, et al. v. City of St. Louis, et al.,* No. 19-1469 (8th Cir.) (first opinion affirming summary judgment, issued April 20, 2020);
- *Lombardo, et al. v. City of St. Louis, et al.*, No. 20-391 (U.S.) (opinion granting certiorari, vacating the Eighth Circuit's judgment, and remanding the case with specific instructions for the Eighth Circuit to reconsider the issue in light of certain evidence in the record, issued June 28, 2021);
- *Lombardo, et al. v. City of St. Louis, et al.*, No. 19-1469 (8th Cir.) (opinion on remand again affirming summary judgment and again failing to analyze any of the evidence specifically identified in this Court's opinion, issued June 29, 2022).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTION

Twice now, the Eighth Circuit has held that there is no claim for unconstitutionally excessive force when officers put a handcuffed and shackled person face-down on the floor and pushed on his back for 15 minutes until he died.

The first time, this Court granted certiorari, vacated the Eighth Circuit's judgment, and instructed the court on remand to reconsider its holding in light of various factors that it had failed to discuss. *Lombardo v. City of St. Louis*, 141 S. Ct. 2239, 2241–42 (2021). Even the three members of this Court who dissented agreed that certiorari was warranted. *Id.* at 2242 (Alito, J., dissenting).

Now the case returns to the Court after the same panel reached the same result on remand. Although this time the panel invoked the "clearly established" prong of the qualified-immunity inquiry, it again held that a person's struggle to breathe constitutes "ongoing resistance" as a matter of law, and that the defendants are entitled to summary judgment for that reason alone. In defiance of this Court's mandate, the panel did so without analyzing any of the factors that it had been instructed to consider. And it did so even though multiple circuits had just held to the contrary. *See Timpa v. Dillard*, 20 F.4th 1020, 1036 & n.7 (5th Cir. 2021) (noting the consensus on the question presented, and that "[o]nly the Eighth Circuit has held in the reverse and the Supreme Court recently vacated that decision"), *cert. denied*, 142 S. Ct. 2755 (2022); *Hyde v. City of Willcox*, 23 F.4th 863, 871–72 (9th Cir. 2022).

This Court's review is even more warranted now. The Court should grant certiorari to protect the integrity of its mandate, ensure uniformity on a frequently recurring legal question, and promote public confidence in the criminal-justice system. And it should make clear that, in a civilized society, the panel's answer is indefensible.

OPINIONS BELOW

The Eighth Circuit's decision on remand is reported at 38 F.4th 684 and reproduced at 1a, while its initial decision is reported at 956 F.3d 1009 and reproduced at 27a. The district court's decision is reported at 361 F. Supp. 3d 882 and reproduced at 37a.

JURISDICTION

The Eighth Circuit entered judgment on June 29, 2022. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

The Fourteenth Amendment provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

STATEMENT

A. Factual background

Nicholas Gilbert suffocates at the hands of St. Louis City police. In December 2015, a 27-year-old homeless man named Nicholas Gilbert was arrested on non-violent misdemeanors. *Lombardo*, 141 S. Ct. at 2240. St. Louis city police brought him to a holding facility for booking and locked him in an individual cell. *Id.*

There was no video of what came next, and Gilbert would not live to tell his side of the story, but officers said that, at some point, Gilbert began to act strangely. Officer Joe Stuckey testified that he noticed that Gilbert was "exhibiting signs of impaired mental function," suggesting that he "could have mental issues," "be highly agitated," or be on a "chemical substance." App. 42a. Officer Stuckey said that he "saw Gilbert tie a piece of clothing around the bars of his cell and put it around his neck." *Lombardo*, 141 S. Ct. at 2240. But rather than untying the item, taking it away, and calling EMS, Officer Stuckey took a more confrontational approach. He unlocked the cell door and went inside, followed by Officer Roland DeGregorio and Sergeant Ronald Bergmann. *Id.* At that point, "Gilbert did not have any clothing tied to his neck," App. 43a—one officer said that it was still "tied to the door of the cell," JA1739—and Gilbert "just had his hands up." JA2007.

A detainee in a nearby cell, however, testified that the real reason the officers went into Gilbert's cell was "to make him be quiet." JA1725. They "told him to shut up," and he "wouldn't shut up." *Id.* Even though Gilbert had said "no threatening stuff," the officers were "aggravated" and "wanted him to be quiet." JA1726. The witness saw Officer Stuckey with "his chest poked out, and he was putting his gloves on" before he "rushed in" and "tried to make [Gilbert] be quiet." JA1727–28. The witness then

heard "rumbling," and saw "like five, six, seven other police officers run through that same door." *Id.*

Officer Stuckey testified that he opened the cell to put Gilbert in handcuffs, and Gilbert tried "to avoid being handcuffed." App. 44a. Officer Stuckey and his two fellow officers said that they were able to get Gilbert handcuffed behind his back, but they claimed that Gilbert then bashed his own head against a bench and kicked Stuckey. *Id.* Two other officers came into the cell and applied leg-shackles to Gilbert, and Sergeant Bergmann requested EMS. App. 5a. One officer who applied the shackles left to radio EMS about "possible psychotic issues." *Id.* Stuckey also left.

Shortly thereafter, Officer DeGregorio and Sergeant Bergmann had become so "winded" and "exhausted" from applying force to Gilbert ("who was five feet three inches tall and weighed 160 pounds") that they "stepped out" to catch their breath. App. 41a, 46a–47a. They were relieved by five officers—"leaving six officers in the cell with Gilbert," who was "handcuffed and in leg irons" by then. *Lombardo*, 141 S. Ct. at 2240. "The officers moved Gilbert to a prone position, face down on the floor." *Id.*

These six officers spent the next 15 minutes pressing down on Gilbert's body. *Id.* They kept doing so even as "Gilbert tried to raise his chest" for air and said: "It hurts. Stop." *Id.* "Three officers held Gilbert's limbs down at the shoulders, biceps, and legs," while "[a]t least one other placed pressure on Gilbert's back and torso." *Id.* Officer Michael Cognasso testified that, as he was holding down Gilbert's legs, other officers applied pressure to Gilbert's "upper right side" and the "lower or middle part of his torso." JA1794. Officer Cognasso admitted that, once Gilbert was "shackled and handcuffed [], he couldn't harm anyone at that point." JA1795. Officer Bryan Lemons, who was a foot taller than Gilbert and had 100 pounds on him,

admitted the same. He testified that he too was holding down Gilbert's legs, making it impossible for Gilbert to kick anyone, and that Gilbert "stopped struggling . . . when we got him handcuffed and secured." JA275–80.

After 15 minutes of six officers pushing into "various parts of [Gilbert's] body, including [his] back," App. 14a, Gilbert succumbed to the pressure and stopped breathing. The officers finally let up, and a short time later EMS arrived. But it was too late. Gilbert had died. An autopsy revealed that he had a "fractured sternum" and contusions and abrasions on his shoulders and upper body. App. 8a. A medical report said that the "cause of death was forcible restraint inducing asphyxia," while methamphetamine and heart disease were "underlying factors." App. 8a, 64a.

Afterward, the City admitted that deadly force was not authorized because Gilbert was handcuffed and face-down in a cell, and that the only possible government interest in using any force on Gilbert was his own "self-preservation." JA1762–71. No officer involved in the incident, however, identified any reason why they applied force specifically to his back, let alone why such force had to be applied for 15 minutes. Nor was any officer disciplined. App. 50a.

The dangers of prone restraint. What happened to Gilbert should not have come as a surprise. "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," causing "positional asphyxia." *Id.* at 8–9. Someone held in a prone position "gradually loses oxygen," which "can result in death." Br. of Policing Scholars in *Lombardo*, No. 20-391, at 8–12. This risk of death rises exponentially when police also "press[] down on the [person's] back," which "can cause suffocation" more easily. *Lombardo*, 141 S. Ct. at 2241.

This is a well-documented danger. Over 25 years ago, the United States Department of Justice conducted an "analysis of in-custody deaths, [and] discovered evidence that unexplained in-custody deaths are caused more often than is generally known" by asphyxia. JA1930. It issued a bulletin to "alert officers to those factors found frequently in deaths involving positional asphyxia," to enable them "to respond in a way that will ensure the subject's safety and minimize risk of death." *Id.* The DOJ bulletin explained that drug use is a "major risk factor because respiratory drive is reduced," and that "frenzied behavior" or a "violent struggle" can further "increase a subject's susceptibility to sudden death." *Id.*

In addition, the DOJ bulletin described the "vicious cycle of suspect resistance and officer restraint:

- 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."

JA1930–31.

The DOJ bulletin gave specific guidelines to avoid this cycle. It told law enforcement that "officers should learn to recognize factors contributing to positional asphyxia," and issued a clear directive: "As soon as the suspect is handcuffed, get him off his stomach." JA1931. Even "[i]f he continues to struggle, *do not sit on his back*." JA1932.

After the DOJ bulletin, police departments warn officers of the danger of "facedown compression holds," but the problem of in-custody asphyxia persists. Nearly three decades later, the dangers of prone restraint are now "well known in the law enforcement community." JA1783. Because of DOJ's bulletin, "[d]epartments across the United States . . . have for years warned officers about the risks of moves such as facedown compression holds." Baker, Valentino-DeVries, Fernandez, & LaForgia, *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe.'*, N.Y. Times, June 29, 2020, https://perma.cc/HMJ2-V2JJ.

"To alleviate potential dangers, [many] officers are told now to promptly get detainees off their stomachs and onto their sides—or up to a sitting or standing position." *Id.*; *see* Heiskell, *How to Prevent Positional Asphyxia*, POLICE Magazine, Sept. 9, 2019, https://perma.cc/7N7Q-CQRQ. Moreover, because the dangers of asphyxiation are made worse "by compressing the lungs, which the weight of several persons on one's back can do," most "police are [also] warned not to sit on the back of a person they are trying to restrain." *Richman v. Sheahan*, 512 F.3d 876, 880 (7th Cir. 2008); *see* Brandl, *Police in America* 252 (2018) ("Do not sit or lean on the abdomen EVER."); Br. of Policing Scholars in *Lombardo*, at 18–21 (compiling examples from police departments across the country). That is true "even if the subject is continuing to struggle" after being handcuffed. *See, e.g.*, Wedell, Kelly, McManus, & Fernando, *George Floyd is not alone. 'I can't breathe' uttered by dozens in fatal police holds across U.S.*, USA Today, June 13, 2020, https://perma.cc/K2ZG-YYVF (describing Kansas City police use-of-force policy).

Some agencies have gone further, "banning officers from placing people in the face-down position" after handcuffing them. *Id.* In 2009, for example, Ohio outlawed

prone restraint across all state agencies. JA1935. It did so because "[a]ccepted research has shown that there is a risk of death when restraining an individual in a prone position," and "[t]his research has led other states to prohibit this restraint technique." JA1970.

Despite increased awareness of the dangers, many officers continue to put handcuffed subjects into a prone position and push into their backs. And many people continue to die as a result. One report concluded that, as of 2020, "[a]t least 134 people have died in police custody from 'asphyxia/restraint' in the past decade alone," which "is likely an undercount." Wedell, Kelly, McManus & Fernando, *George Floyd is not alone*. An examination of some of these incidents "show[ed] that officers in agencies big and small use restraint tactics that heighten people's risk of death," including "pressing or laying on a person's back to keep them face down." *Id.* The victims were often "stopped for minor infractions" or "because they were acting erratically due to drugs or mental illness." *Id.*; *see also* Baker, Valentino-DeVries, Fernandez, LaForgia, *Three Words. 70 Cases* (finding similar results).

St. Louis City's awareness of the problem. Like other jurisdictions, the City of St. Louis "has known about the dangers of compression asphyxia for a long time." JA1783; *see* JA1808 (City expert: "A lot of these protocols were put in place" after the DOJ bulletin "telling officers about the dangers of compression asphyxia."). The City knows that "it's dangerous to hold a citizen in the prone position for an extended period of time," and that "a citizen could be killed if too much weight is put on his back." JA1782; *see also* JA1809–10.

The City also knows that this is an area where training matters. Its representative testified that the City tries to "teach officers that it can be dangerous to hold someone in

a prone position" and that they "can't just leave somebody on their stomach cuffed." JA1774–79. Its representative further testified that the City "instructs its officers that pressing down on the back of a prone subject can cause suffocation," *Lombardo*, 141 S. Ct. at 2241; JA1785, and also teaches them "how to deal with emotionally disturbed persons," JA1777. One officer said that he covers it in his training block and that it's "been there forever." JA1777–79.

B. Procedural background

Nicholas Gilbert's parents sued both the City of St. Louis and the individual officers, alleging (among other things) violations of the Fourth and Fourteenth Amendments. Jurisdiction was based on 28 U.S.C. § 1331. After the case was pared down to excessive-force claims against the officers and *Monell* claims against the City, the defendants sought summary judgment.

The district court's decision. The district court granted summary judgment on all claims. App. 100a. In doing so, the court accepted the following facts as true:

- Gilbert "was having a mental health crisis and posed no threat," App. 58a;
- He was handcuffed and leg-shackled, and was then held on the ground of a secure holding cell "in the prone position for fifteen minutes," App. 87a, 76a;
- While on the ground, his "actions were innocent" and "based on 'air hunger,'" App. 60a;
- He "was not ignoring commands or being violent," *id.*;
- "Officers used force upon his back," App. 87a, as well as his "sides," "torso," and "other parts of his body," App. 65a;

- He "was 'yelling pleas for help' and pleading 'It hurts. Stop.'" App. 62a;
- He "remained restrained and in a prone position until he stopped breathing," App. 68a;
- Six officers "did not stop using force until after they realized Mr. Gilbert had stopped breathing," App. 79a–80a;
- "[T]he cause of death was asphyxiation." App. 65a.

The district court did "not reach the issue of whether [these] facts demonstrate that the [officers'] conduct was objectively reasonable" and thus "violated a constitutional right." App. 97a–98a. Instead, it held that a violation was not "clearly established" on these facts. *Id.* Citing several unpublished decisions and a pair of Fifth Circuit cases as support, the district court concluded that "the circuits are split among and within themselves on cases with similar facts." App. 95a. It therefore granted qualified immunity.

As for the *Monell* claims, the district court concluded that, because the officers are immune, "the City cannot be held liable" under Eighth Circuit precedent. App. 99a.

The Eighth Circuit's first decision. On appeal, the Eighth Circuit held that there was no excessive force as a matter of law. The court did not take issue with any of the facts accepted as true by the district court. Yet it believed that the case was controlled by a 2017 Eighth Circuit opinion, which it read as holding that "prone restraint is not objectively unreasonable when a detainee actively resists." App. 33a. "The court went on to describe as 'insignificant' facts that may distinguish that precedent and appear potentially important," "including that Gilbert was already handcuffed and leg shackled when officers moved him to the prone position and that officers kept him in that position for 15 minutes." *Lombardo*, 141 S. Ct. at

2241. Nor did the court ascribe any significance to the amount of force used (the weight of six officers) and the fact that "officers put weight on various parts of [Gilbert's] body, including [his] upper" and "middle" back. App. 31a. The court held that the full amount of force used was justified as a matter of law because Gilbert had initially resisted being handcuffed, and because his "attempt to breathe" constituted "ongoing resistance." App. 35a.

This Court's decision. This Court granted certiorari. It vacated the Eighth Circuit's judgment and "remand[ed] the case to give the court the opportunity to employ an inquiry that clearly attends to the facts and circumstances in answering [two] questions"—"whether the officers used unconstitutionally excessive force" and, "if they did, whether Gilbert's right to be free of such force in these circumstances was clearly established at the time of his death" in December 2015. *Lombardo*, 141 S. Ct. at 2242.

The Court made clear that the panel should consider several "facts and circumstances" in particular: (1) "that Gilbert was already handcuffed and leg shackled when officers moved him to the prone position," (2) "that officers kept him in that position for 15 minutes," (3) "that officers placed pressure on Gilbert's back even though St. Louis instructs its officers that pressing down on the back of a prone subject can cause suffocation," and (4) the "well-known police guidance recommending that officers get a subject off his stomach as soon as he is handcuffed because of that risk" and "further indicat[ing] that the struggles of a prone suspect may be due to oxygen deficiency, rather than a desire to disobey officers' commands." *Id.* at 2241.

The Court explained that this evidence "may be pertinent" to the two questions. *Id.* Because the panel "either failed to analyze such evidence or characterized it as insignificant," the Court remanded the case for the

panel to conduct a more "careful, context-specific analysis"—not simply "treat Gilbert's 'ongoing resistance' as controlling as a matter of law." *Id.* at 2241–42.

Three members of this Court favored a plenary grant. *Id.* at 2242 (Alito, J., dissenting). They preferred to decide the "real issue": "whether the record supports summary judgment" for the defendants. *Id.* Although they did not know how they would answer that question, *id.* at 2244, they believed that a "decision by this Court on the question presented here could be instructive," *id.* at 2242.

Developments on remand. On remand, the petitioners requested the opportunity to submit supplemental briefing to help the panel decide whether, as other circuits have uniformly held, "the law was clearly established that applying pressure to [a person's] back, once he [is] handcuffed and his legs [are] restrained, [is] constitutionally unreasonable due to the significant risk of [suffocation]." *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2387 (2009). The panel declined.

In the months that followed, the consensus in the other circuits only strengthened. The Fifth Circuit held that it was "clearly established" that "continuing to kneel on the back of an individual who has been subdued"—"meaning, he lacks any means of evading custody and does not pose a threat of immediate harm"—is excessive. *Timpa*, 20 F.4th at 1029, 1034. Though the officers argued that the decedent had "continued to actively resist," the court held that a "jury could find that an objectively reasonable officer with [their] training would have concluded that [he] was struggling to breathe, not resisting arrest." *Id.* at 1030–31. A month later, the Ninth Circuit agreed. Denying qualified immunity, it held that a jury could find that when someone is "handcuffed," "shackled," and

"surrounded by seven officers," the officers "should have recognized" that he "could no longer resist" and "posed no threat." *Hyde*, 23 F.4th at 871–72.

The Eighth Circuit's second decision. The panel again broke from the consensus. Despite this Court's opinion, the panel did not discuss the significance of Gilbert's being "already handcuffed and leg shackled when officers moved him to the prone position," or articulate how he could have meaningfully resisted at that point. 141 S. Ct. at 2241. It did not discuss the significance of the "officers ke[eping] him in that position for 15 minutes" or "plac[ing] pressure on [his] back even though St. Louis instructs its officers that pressing down on the back of a prone subject can cause suffocation." *Id.* It did not discuss any of the "well-known police guidance" saying the same. *Id.* And it did not discuss the defendants' concessions that deadly force was not authorized, JA1762–71, and that once Gilbert was "shackled and handcuffed [], he couldn't harm anyone at that point," JA1795.

Instead, the panel relied on a 2019 Eighth Circuit decision that involved none of these facts and that was decided several years after Gilbert's death. App. 11a–12a. Because of that decision—and because Gilbert had tried to breathe while he was on the floor handcuffed, shackled, and surrounded by six officers—the panel held that he did not have a clearly established right to be free of force to "various parts of his body, including his back." App. 14a. The court also held that "there is no robust consensus of persuasive authority that would render the right clearly established." App. 12a. It did not mention *Timpa*, *Hyde*, or numerous other circuit cases holding to the contrary.

Having "concluded that the constitutional right at issue here was not clearly established," the panel further

held that the petitioners "cannot prevail on [their] claims against the City." App. 15a (cleaned up).

REASONS FOR GRANTING THE PETITION

Despite this Court's mandate, the Eighth Circuit has again held that a person's attempt to breathe while bound on the floor constitutes "ongoing resistance" as a matter of law. App. 14a. It has again treated this "resistance" as controlling, absolving the very conduct that caused the inability to breathe in the first place (and that then caused the person's death). And it has again failed to analyze any of the key factors identified in this Court's opinion. The only difference this time is that the panel invoked step two of the qualified-immunity inquiry, holding that a person engaged in such "ongoing resistance" has no "clearly established right" to be free of deadly force to his back. *Id.*

This decision is even more in need of review than the first. Disregarding this Court's mandate is reason enough to grant certiorari. *See Yates v. Aiken*, 484 U.S. 211, 214 (1988). But the panel's decision does more than that: It also conflicts with the law of the other circuits and with prevailing police practices. *See Timpa*, 20 F.4th at 1036 & n.7 ("Only the Eighth Circuit has held in the reverse."). And it does so on a question that recurs with "unfortunate frequency," *Drummond v. City of Anaheim*, 343 F.3d 1052, 1063 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2871 (2004), where a decision from this Court "could be instructive" to lower courts and law enforcement alike, *Lombardo*, 141 S. Ct. at 2242 (Alito, J., dissenting).

I. The decision below again creates a circuit split.

A. Like last time, the panel's decision conflicts with the uniform rule in the other circuits. Every other circuit to have addressed the question holds that "[n]o reasonable officer would continue to put pressure on [an] arrestee's

back after the arrestee was subdued by handcuffs, an ankle restraint, and a police officer holding the arrestee's legs." *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 905 (6th Cir. 2004), *cert. denied*, 125 S. Ct. 1837 (2005). In those circuits, it has long been "clearly established that applying pressure to [a prone person's] back, once he [is] handcuffed and his legs restrained, [is] constitutionally unreasonable due to the significant risk of positional asphyxiation." *Weigel*, 544 F.3d at 1155; *see, e.g.*, *Timpa*, 20 F.4th at 1029–38; *Lawhon v. Mayes*, 2021 WL 5294931, *2 & nn.1–2 (4th Cir. 2021); *Hopper v. Plummer*, 887 F.3d 744, 755 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 567 (2019); *McCue v. City of Bangor*, 838 F.3d 55, 64 (1st Cir. 2016); *Abdullahi v. City of Madison*, 423 F.3d 763, 765–69 (7th Cir. 2005); *Rivas v. City of Passaic*, 365 F.3d 181, 199–200 (3d Cir. 2004). And that is true even if—indeed, *especially* if—the person is struggling to lift his chest up for air.

Fifth Circuit. The Fifth Circuit's recent decision in *Timpa* provides a good starting place. The "facts and circumstances" of that case are indistinguishable from those here. *See Lombardo*, 141 S. Ct. at 2241–42. Like this case, it involved someone who, after being bound at his hands and feet, was put in "a prone position" for 14 minutes as an officer "placed pressure on [his] back" despite his pleas to stop. *Id.* at 2240. And like this case, the record in *Timpa* included the same "well known police guidance" and evidence showing that "officers placed pressure on [his] back even though [the city] instruct[ed] its officers that pressing down on the back of a prone subject can cause suffocation." *Id.* at 2241.

Unlike the Eighth Circuit, however, the Fifth Circuit denied qualified immunity. It held that, by 2016 (when the incident there occurred), the law had long been "clearly established that an officer engages in an objectively

unreasonable [use] of force by continuing to kneel on the back of an individual who has been subdued"—"meaning, he lacks any means of evading custody and does not pose a threat of immediate harm." *Timpa*, 20 F.4th at 1029, 1034. "This conclusion," Judge Clement explained in her opinion for the court, "comports with the decisions of our sister circuits that have considered similar facts." *Id.* at 1036 & n.7 (noting *Lombardo* as the only outlier).

In reaching this conclusion, the Fifth Circuit expressly rejected the same argument accepted by the panel below. It held that there was a factual dispute as to whether the decedent had "continued to actively resist arrest" in "the final minutes of the restraint" (as the officers contended) or whether he was instead trying "to move his body in order to breathe" (as the plaintiffs contended). *Id.* at 1030–31. Were it the latter, the Fifth Circuit held, the jury could find that the officers were not entitled to qualified immunity. It could find that "[t]he risks of asphyxiation in this circumstance should have been familiar" to them, so "an objectively reasonable officer with [their] training would have concluded that [the decedent] was struggling to breathe, not resisting arrest." *Id.* at 1031. And the jury could find, further, that if he "lacked the ability to pose a risk of harm or flight," the continued force to his back "constituted deadly force,'" which was "necessarily excessive," defeating immunity. *Id.* at 1032, 1034, 1038.

Other Fifth Circuit cases hold likewise. *See Fairchild v. Coryell County*, 40 F.4th 359, 368 (5th Cir. 2022) (two minutes of force to back); *Aguirre v. City of San Antonio*, 995 F.3d 395, 416 (5th Cir. 2021) (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.'"); *Goode v. Baggett*, 811 F. App'x 227, 232 (5th Cir. 2020) (holding that when a handcuffed person was "pinned down by multiple officers and appeared to be struggling to breathe, a jury could find that he was 'merely trying to get into a position where he could breathe and was not resisting arrest'").

The panel's decision squarely conflicts with these cases. It holds that the officers are entitled to qualified immunity *even if* a jury were to find that Gilbert "was not ignoring commands or being violent," and that his "actions were innocent" and "based on 'air hunger.'" App. 60a. The Fifth Circuit has repeatedly held the opposite.

Ninth Circuit. So has the Ninth Circuit. Two decades ago, it observed that, "in what has come to be known as 'compression asphyxia,' prone and handcuffed individuals in an agitated state have suffocated under the weight of restraining officers." *Drummond*, 343 F.3d at 1056–57. The court held that a jury could find that the force was excessive when "two officers continued to press their weight on [a detainee's] neck and torso as he lay handcuffed on the ground and begged for air." *Id.* at 1056.

The Ninth Circuit has held firm to this view ever since. *See Krecham v. County of Riverside*, 723 F.3d 1104, 1108 (9th Cir. 2013) (reversing judgment for officers who put someone in a prone position and pushed on his "back 'when he was moving and attempting to get up'" and "repeatedly kicking"); *Abston v. City of Merced*, 506 F. App'x 650, 652 (9th Cir. 2013) ("A [jury] could conclude that defendants' use of body compression as a means of restraint was unreasonable and unjustified by any threat of harm or escape when Abston was handcuffed and shackled, in a prone position, and surrounded by numerous officers."); *Tucker v. Las Vegas Metro. Police Dep't*, 470 F. App'x 627, 629 (9th Cir. 2012) ("[E]xisting law recognized a Fourth

Amendment violation where two officers use their body pressure to restrain a delirious, prone, and handcuffed individual who poses no serious safety threat.").

The Ninth Circuit's cases therefore "make[] plain that multiple officers' use of prolonged body-weight pressure to a suspect's back is known to be capable of causing serious injury or death." *Garlick v. County of Kern*, 167 F. Supp. 3d 1117, 1155 (E.D. Cal. 2016). Moreover, whether a suspect was continuing to resist or instead struggling to breathe, and how officers should have reacted given their training, are questions for the factfinder. *See Tucker*, 470 F. App'x at 629 ("Keith, unlike Drummond, continued to resist the officers after handcuffs were applied, but this distinction does not, by itself, suffice to bring this case out of *Drummond*'s orbit.").

Just last year, the Ninth Circuit reaffirmed the point in *Hyde*, 23 F.4th 863 (Bea, Lee, Bennett, JJ.). It denied qualified immunity to officers who continued using force on a handcuffed and shackled detainee, causing him to suffocate, even though he had initially resisted. Judge Lee explained that when someone is "handcuffed," "shackled," and "surrounded by seven officers," a jury could find that he "posed no threat" and "could no longer resist," and that the officers "should have recognized" as much. *Id.* at 871–72; *see id.* ("[W]e have never required that a suspect's every inch be immobilized before he is considered restrained for a reasonable force analysis."). Were the jury to do so, the officers would not be entitled to qualified immunity because it has long been clearly established that using even "intermediate force" is "unreasonable when [the person] had both his hands and feet shackled for two minutes and no longer could resist." *Id.* at 872.

Sixth Circuit. The Sixth Circuit's cases reflect the same understanding. They too recognize that, when

officers cause someone to suffocate, a jury may draw "an inference" that the person's efforts to lift his chest were "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 or get away." *Martin v. City of Broadview Heights*, 712 F.3d 951, 959–63 (6th Cir. 2013).

The Sixth Circuit's most recent case, *Hopper*, is its most analogous. There, a man "suffered a seizure two days after he was booked" into jail on a non-violent offense. 887 F.3d at 745. Officers went into his cell and forced him to the ground because they were "afraid he would . . . hurt himself." *Id.* at 749. Video evidence showed that they "cuffed him behind his back" and a half-dozen officers "restrained him face down on the floor" until he "died after a twenty-two minute struggle." *Id.* at 745.

The Sixth Circuit held that a jury could find that the officers were not entitled to qualified immunity. It relied primarily on its 2004 decision in *Champion*, involving "an excessive-force claim brought by the family of a severely autistic man who died after several arresting officers restrained him, prone on the ground and handcuffed behind his back, for seventeen minutes." *Id.* at 754. *Champion* "explained that '[c]reating asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect constitutes objectively unreasonable excessive force.'" *Id.* (quoting *Champion*, 380 F.3d at 903). That was true even though the suspect "arguably posed a threat" because he "had created a disturbance in a store and 'kick[ed] violently' while on the ground." *Id.* at 755 (quoting *Champion*, 380 F.3d at 897). In *Hopper*, by contrast, there was "no dispute that [the decedent] was suffering a medical emergency, or that while he may have kicked and thrashed, defendants did not consider him a

threat to anyone after he was handcuffed." *Id.* The court thus denied qualified immunity as a matter of law, holding that "the prohibition against placing weight on [his] body after he was handcuffed was clearly established in the Sixth Circuit as of May 2012." *Id.* at 754 (cleaned up).

As *Hopper* itself illustrates, that clearly established prohibition applies even if the person being restrained was "moving . . . in an attempt to breathe." *Champion*, 380 F.3d at 905; *see also Martin*, 712 F.3d at 959 (holding that a jury may infer that a person's "physical movements" and "active[] struggle[]" "were an attempt to gasp for air"); *Kulpa v. Cantea*, 708 F. App'x 846, 851–53 (6th Cir. 2017) (denying qualified immunity to officers who pushed on the back of a handcuffed detainee for under 45 seconds after he'd been "squirming," causing him to die).

Seventh Circuit. The Seventh Circuit has the same rule. In 2005, it considered a far closer case than this one, involving a man (Mohamed) who "stagger[ed] across three lanes of traffic" and "punched [a person] in the face." *Abdullahi*, 423 F.3d at 764–65. Three officers "took him to the ground, onto his stomach," to handcuff him. *Id.* "Once on the ground, Mohamed began kicking his legs, moving his arms so they could not be handcuffed and arching his back upwards as if he were trying to escape." *Id.* As the other officers were holding his legs, one officer "placed his right knee and shin on the back of Mohamed's shoulder area and applied his weight to keep Mohamed from squirming or flailing." *Id.* The officer "took his weight off Mohamed after the handcuffing was complete." *Id.* His "knee and shin were on the back of Mohamed's shoulder for approximately 30–45 seconds." *Id.* Civilian eyewitnesses "testified that Mohamed acted aggressively and that the defendant police officers did not hit, strike or choke Mohamed." *Id.* at 767. Two minutes later, he died.

The Seventh Circuit reversed a grant of summary judgment to the officers. It noted that the officer "knelt on Mohamed's shoulder or back for 30–40 seconds while Mohamed was prone on the ground," Mohamed then died, and "[n]o one contends that deadly force was justified once Mohamed was lying prone on the ground with his arms behind him." *Id.* at 769. "Based on these straightforward facts alone," the Seventh Circuit held that summary judgment was improper. *Id.* It explained that Mohamed's "attempts to 'squirm' or arch his back upward while he was being restrained may not constitute resistance at all, but rather a futile attempt to breathe while suffering from physiological distress 'akin to drowning.'" *Id.* at 771–73.

Tenth Circuit. The Tenth Circuit has held similarly. In 2008, it decided a case not unlike *Abdullahi*, involving a dangerous roadside encounter where one officer applied force to a combative suspect. The suspect (Weigel) "fought vigorously, attempting repeatedly to take the troopers' weapons and evade handcuffing." *Weigel*, 544 F.3d at 1148. After he was finally handcuffed, Weigel "continued to struggle." *Id.* at 1158 (O'Brien, J., dissenting). "With Weigel positioned on his stomach, his hands and feet restrained, [one officer then] held down Weigel's upper body with his hands and/or knees, [another officer] straddled Weigel's buttocks and [a civilian] was on his legs. In spite of those restraints Weigel still managed to pinch [one officer's] thighs and groin area" and "continued to struggle and fight." *Id.* He was held in that position for up to three minutes, and then died. *Id.* at 1152.

The Tenth Circuit denied summary judgment to the officers. It based its conclusion on two things: "First, there is evidence a reasonable officer would have known that the pressure placed on Mr. Weigel's upper back as he lay on his stomach created a significant risk of asphyxiation and

death. His apparent intoxication, bizarre behavior, and vigorous struggle made him a strong candidate for positional asphyxiation." *Id.* "Second, there is evidence that Mr. Weigel was subjected to such pressure for a significant period after it was clear that the pressure was unnecessary to restrain him. The defendants make no claim that once Mr. Weigel was handcuffed and his legs were bound, he still would pose a threat to the officers, the public, or himself unless he was maintained on his stomach with pressure imposed on his upper back." *Id.* The court held that the law "was clearly established that applying pressure to [his] upper back, once he was handcuffed and his legs restrained, was constitutionally unreasonable" because it posed a "substantial and totally unnecessary risk of death," while observing that "cases from other circuits" agree. *Id.* at 1154–55.

Judge O'Brien dissented, expressing disagreement with the Sixth Circuit's holding in *Champion* that "briefly applying pressure to the torso of a resisting but restrained individual is unconstitutional." *Id.* at 1174. But after *Weigel*, that is now the Tenth Circuit's rule too. *See Est. of Booker v. Gomez*, 745 F.3d 405, 424–29 (10th Cir. 2014).

Third Circuit. The same goes for the Third Circuit. For nearly 20 years, it has held that "a reasonable jury could find that the continued use of force" on someone who "was handcuffed and had his ankles tied"—namely, "press[ing] down on [his] back" until he was "still," causing him to "die[] of asphyxiation"—is excessive under "clearly established" law. *Rivas*, 365 F.3d at 199–201.

First Circuit. The First Circuit, too, is in accord. In 2016, it confronted a case much like this one: Five officers "attempted to restrain" someone "who initially resisted," so they put him "in a face-down, prone position for [up to four minutes] while two officers exerted weight on his

back and shoulders." *McCue*, 838 F.3d at 56. He "was declared dead shortly after," and an expert "attributed the likely cause of death to prolonged restraint in the prone position 'under the weight of multiple officers, in the face of a hypermetabolic state of excited delirium.'" *Id.*

The First Circuit held that "it was clearly established" that "exerting significant, continued force on a person's back 'while [he] is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force,'" for "[a]t least four circuits had announced this constitutional rule." *Id.* at 64 (quoting *Weigel*, 544 F.3d at 1155)). "[A]s the abundant case law demonstrates, a jury could find that a reasonable officer would know or should have known about the dangers of exerting significant pressure on the back of a prone person." *Id.* at 65.

Fourth Circuit. Finally, the Fourth Circuit has also taken note of this "abundant case law." *Id.*; *see Lawhon*, 2021 WL 5294931, at *2 n.1. It denied qualified immunity to officers who had "applied varying degrees of force" for "nearly six minutes" to someone who was "handcuffed in the prone position." *Id.* at *1. The court held that, under "[c]ontrolling authority," the officers "had abundant notice that they could not continue to use force against a restrained individual in these circumstances," a conclusion that was "amplifie[d]" by the training that they'd received. *Id.* at *2 & n.2. Simply put: "There is no doubt 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, constitutes excessive force in violation of the Fourth Amendment." *Id.* at *2.

B. The decision below upends the consensus, creating an undeniable circuit conflict. Although the Eighth Circuit panel on remand tried to distinguish three of these cases on their facts—*Weigel*, *Champion*, and *Drummond*—it

did not deny that the rule of law articulated in them would apply here. Nor did it make any effort to discuss any of the other cases that squarely conflict with its holding.

II. The question presented is frequently occurring and important, and this case is an ideal vehicle.

A. The split should be resolved for five reasons.

First, the panel contravened not only the decisions of many other circuits in many other cases, but also the mandate of this Court in this case. That is an independent reason to grant certiorari. *See, e.g.*, *Yates*, 484 U.S. at 214 ("We granted certiorari because we were concerned that the [court below] had not fully complied with our mandate.").

Second, the question is important. "The compression asphyxia that resulted [here] appears with unfortunate frequency in the reported decisions of the federal courts," and "with even greater frequency on the street." *Drummond*, 343 F.3d at 1063. That remains true today.

Third, while the issue is frequently recurring in lower courts, it hasn't been decided by this Court. "Although guns represent the paradigmatic example of 'deadly force,' [*Tennessee v. Garner*, 471 U.S. 1 (1985)] failed to address whether other police tools and instruments can also be characterized as 'deadly force.' Lower courts since have struggled with [that question]," including in some cases involving "restraint in a prone position." *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998). Early prone-restraint cases prompted disagreement and confusion among judges in cases far closer than this one. The dissenting judge in *Weigel*, for example, lamented what he saw as a lack of "coherent guidance" caused by "conflicting" decisions. 544 F.3d at 1169 (O'Brien, J., dissenting); *see also Abdullahi*, 423 F.3d at 776 (Evans, J.,

dissenting). And 21 states urged this Court to grant certiorari in *Weigel*, explaining that "officers need to know whether and to what extent" forcible prone restraint is permissible. Br. of Indiana, et al., in *Broad v. Weigel*, No. 08-1128, at 3. They argued that the "[c]ircuits [were] in disarray over whether and to what extent police control techniques resulting in positional asphyxia violated clearly established" rights, and the Court "need[ed] to" resolve the question "given the unfortunate volume of such cases." *Id.* at 4. Since this Court denied certiorari nearly 15 years ago, a strong consensus has emerged in the circuits. The panel decision below, and the outlier view that it reflects, threatens this consensus, injecting uncertainty into an area of the law where a lack of guidance is unacceptable.

For that reason, an opinion from this Court "could be instructive." *Lombardo*, 141 S. Ct. at 2242 (Alito, J., dissenting). It could help to make these incidents less frequent, by sending a clear and unmistakable message that the Constitution forbids such an unjustifiable use of lethal force. In addition, granting certiorari would allow the Court to clarify how courts should handle assertions of qualified immunity at summary judgment, including how to assess an officer's claim that a subject was resisting, which could affect cases well beyond the context here.

Fourth, the panel's decision could hinder DOJ's ability to criminally prosecute prone-restraint cases under 18 U.S.C. § 242, the "criminal counterpart" of section 1983, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 n.13 (1982), which contains the same "clearly established" requirement, *Hope v. Peltzer*, 536 U.S. 730, 739–40 (2002).

Finally, if left standing, the panel's decision will likely have ramifications the next time an officer in the Eighth Circuit—whether in Minneapolis or Ferguson—puts a handcuffed person face to the ground and suffocates him.

The legitimacy of our criminal-justice system depends on the evenhanded distribution of justice, particularly for matters of life and death. Public confidence in that system, and the effectiveness of courts to vindicate constitutional rights, likewise depends on a uniform body of law. That confidence can be eroded by even a single wayward circuit. The Court should not hesitate to set that circuit right.

B. This case is an excellent vehicle to address the question presented and bring uniformity and clarity to the law. The Court is already familiar with the record in the case, and the most important facts are all assumed, having been taken as true by the district court. And granting certiorari in this case, as opposed to a future Eighth Circuit case, is preferable because (1) it allows the Court to simultaneously reinforce the integrity of its mandates, and because (2) the incident here occurred before the 2017 Eighth Circuit case that the panel initially found to be controlling and that Justice Alito discussed in his opinion, *see* App. 33a–35a, so that case can have no complicating effect on the "clearly established" question here.

In addition, this case bears all the characteristics of a typical prone-restraint death by asphyxiation. So deciding the constitutionality of the force used "will be 'beneficial' in 'develop[ing] constitutional precedent' in an area that courts typically consider in cases in which the defendant asserts a qualified immunity defense," as in this case. *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014). Yet the case is also an egregious example of excessive force: Gilbert was in a police-dominated facility, officers knew that he was having a mental-health crisis, and lethal force was not authorized by the City because he presented no threat once he was handcuffed and shackled. JA1762.

III. The decision below is wrong.

This leads to the last reason to grant certiorari: The Eighth Circuit's decision is deeply wrong. It cannot be reconciled with precedent, history, original public meaning, or widely accepted police practice.

Under this Court's precedents, a right is "clearly established" when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam). "Precedent involving similar facts can help move a case beyond the otherwise 'hazy borders between excessive and acceptable force' and thereby provide an officer notice that a specific use of force is unlawful." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam). Alternatively, "in an obvious case," a violation can be clearly established "even without a body of relevant case law." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam); *see Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020) (per curiam).

Here, viewing the record in the light most favorable to the petitioners, there is no question that the officers had notice that pressing into Gilbert's back for 15 minutes was unreasonably excessive, in violation of the Constitution. Eight circuits have recognized that the right at issue in this case was clearly established at the time of Gilbert's death. No precedent from any circuit had held to the contrary at that time. And prevailing police practices—including the very training that the officers received in this case—embodied the same recognition. It is hard to imagine a case with clearer notice than that.

In any event, it is obvious that officers may not use a significant amount of force on an individual who poses no threat to anyone, and the record here would allow a jury to find that the officers did just that. That sets this case

apart from a situation requiring an officer to make a split-second decision in response to a potential threat to officer safety or to the safety of others. *See Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021); *Kisela*, 138 S. Ct. 1148. In contrast with that situation, a jury could easily find that Gilbert was not "actively resisting" and that a trained officer would not have "reasonably perceived" him to be resisting for 15 minutes or posing a real threat once he was handcuffed, shackled, and surrounded by six officers. *Lombardo*, 141 S. Ct. at 2241. Instead, a reasonable officer would have understood, consistent with the City's training and with "well-known police guidance," that Gilbert's struggles were "due to oxygen deficiency, rather than a desire to disobey officers' commands," and would have stopped applying force to his back. *Id.*

In addition, "[t]he [Eighth] Circuit identified no evidence that the" officers' actions "were compelled by necessity or exigency." *Riojas*, 141 S. Ct. at 54. Nor could it: The defendants themselves conceded that, once Gilbert was "shackled and handcuffed [], he couldn't harm anyone at that point," and that deadly force was not authorized. JA1762–71, 1795. Neither the defendants nor the Eighth Circuit pointed to *any* governmental interest that was advanced by applying *any* force to Gilbert's back—much less force that was so significant that it killed him. *See Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015); *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017).

If the Eighth Circuit were somehow correct that the officers in this case are all entitled to qualified immunity under existing doctrine, that would only underscore the need for this Court to grant certiorari. Were that the case, it would be appropriate for the Court to reexamine the modern qualified-immunity doctrine, and the degree to which it has strayed from the text of section 1983 and the

common law, to bring it closer in line with "historical standards." *Wyatt v. Cole*, 504 U.S. 158, 170–72 (1992) (Kennedy, J., concurring); *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

JONATHAN E. TAYLOR
Counsel of Record
ALISA TIWARI
Gupta Wessler PLLC
2001 K Street NW
Suite 850 North
Washington, DC 20006
(202) 888-1741
jon@guptawessler.com

JOHN G. SIMON
KEVIN M. CARNIE, JR.
PATRICK R. MCPHAIL
The Simon Law Firm, PC
800 Market Street, Suite 1700
St. Louis, MO 63101
(314) 241-2929

ANDREW W. CALLAHAN
P.O. Box 15159
St. Louis, MO 63110
(618) 791-5501

Counsel for Petitioners

November 28, 2022