No. 22-510

In the Supreme Court of the United States

JODY LOMBARDO ET AL.,
PETITIONERS

v.

CITY OF ST. LOUIS, MISSOURI ET AL.,
RESPONDENTS

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

BRIEF FOR PROFESSOR SETH STOUGHTON AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*[*]

Amicus curiae Professor Seth Stoughton is a Professor at the University of South Carolina School of Law and a Professor (Affiliate) in the University's Department of Criminology and Criminal Justice.[1] He is a former officer of the Tallahassee Police Department. Professor Stoughton's scholarship focuses on policing, including tactics and the use of force. His articles have appeared in the *Emory Law Journal*, *Minnesota Law Review*, the *Virginia Law Review*, and other top journals. He has written multiple book chapters and is the principal co-author of *Evaluating Police Uses of Force* (NYU Press 2020). He is a frequent lecturer on policing issues, regularly appears in national and international media, and has written about policing for *The New York Times*, *The Atlantic*, *TIME*, and other news publications.

Professor Stoughton has an interest in ensuring that the Fourth Amendment excessive force inquiry appropriately considers prevailing policing practices and considers the totality of the circumstances in evaluating the reasonableness of force. For this reason, Professor Stoughton appeared as an *amicus* when this case previously came before this Court. *See* Br. of Policing Scholars in *Lombardo v. City of St. Louis*, No. 20-391, at 1.

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[*] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3, *amicus* affirms that all parties consented to the filing of this *amicus* brief.

[1] Professor Stoughton is participating as *amicus* in his individual capacity and not on behalf of the University of South Carolina.

SUMMARY OF ARGUMENT

In this case's prior trip to this Court, the Court reversed the Eighth Circuit's grant of qualified immunity and instructed it to conduct "an inquiry that clearly attends to the facts and circumstances." Pet.App.20a. This Court observed that the Eighth Circuit previously "cited Circuit precedent for the proposition that 'the use of prone restraint is not objectively unreasonable when a detainee actively resists officer directives and efforts to subdue the detainee.'" Pet.App.19a. But, this Court noted, the Eighth Circuit's analysis "could be read to treat Gilbert's 'ongoing resistance' as controlling as a matter of law," which "would contravene the careful, context-specific analysis required by this Court's excessive force precedent." Pet.App.19a-20a.

On remand, the Eighth Circuit again granted qualified immunity to the officer defendants, and again treated the decedent's supposed ongoing resistance as dispositive of the case. It held that there is no "clearly established right of a detainee to be free from prone restraint *while resisting*," Pet.App.11a (emphasis added), and distinguished the robust consensus of case law from other circuits because in those cases, the decedents were not "struggling," or did not offer "sustained resistance" once prone, Pet.App.13a-14a.

Petitioner amply explains why the Eighth Circuit's reasoning once again requires reversal. Chief among the Eighth Circuit's errors is the treatment of a decedent's "ongoing resistance" as factually or legally dispositive in these circumstances. For decades, federal and state law enforcement agencies have not only acknowledged that the fatal results of prone restraint necessitate removing restrained individuals from the prone position *even if* they are not fully compliant, but have also taught officers that

a prone suspect may begin to thrash and jerk as they succumb to fatal oxygen starvation. Officers are routinely cautioned that a prone suspect's movement is *not* resistance, but an involuntary reaction as the pressure of being held prone forces the oxygen from their lungs and makes it impossible to breathe.

As this Court has repeatedly explained, "[i]n assessing a claim of excessive force, courts ask 'whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them.'" Pet.App.18a (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). No reasonable officer could have been ignorant of the danger of restraining Mr. Gilbert prone. Nor could any reasonable officer have been ignorant that "air hunger" can lead a suspect to struggle involuntarily. To the extent there is any factual question about whether Mr. Gilbert was actually offering resistance, a jury must resolve that question, and a court should not brush it under the rug as part of the qualified immunity analysis. *See* Pet. at 27-28. The Eighth Circuit's approach instead gives officers constitutional license to hold suspects prone despite the well-known dangers of doing so and to use suspects' own death throes to escape legal liability. This Court should reject that grotesque result.

ARGUMENT

I. Law Enforcement Has Long Recognized the Fatal Risks from Using Prone Restraint Tactics

Police have known for decades that keeping individuals in the prone position for an extended period of time can kill them. The individual gradually loses oxygen and

may fall into cardiac arrest.[2] This has been termed "positional asphyxia" as well as "compression asphyxia" and "restraint asphyxia."[3]

A. Historical policing materials have taught this danger for decades

For over three decades, the policing community has agreed that officers should not keep a restrained individual prone, and police training materials have taught officers of the danger of positional asphyxia—that is, the danger that an individual will suffocate when they are restrained prone and unable to shift positions to allow easy breathing. For just as long, federal and state law enforcement have acknowledged prone restraint can instigate an oxygen starvation response in the individual, leading officers to mistake such a response as resistance. They have cautioned officers that when an individual "struggles," the remedy is to move them from a prone position—not to apply more pressure, which will lead to fatal results.

As early as 1985, police and medical researchers were aware of a trend of sudden deaths of individuals who were

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[2] More recent medical research has suggested that the mechanism for positional asphyxia is not the inability to draw in oxygen, but rather the inability to expel carbon dioxide, resulting in metabolic acidosis. From the perspective of police practices, the precise mechanism by which prone restraint causes serious bodily injury or death is less relevant than the simple intervention to prevent such serious bodily injury or death: removing restrained subjects from the prone position.

[3] Medical experts occasionally differentiate between "positional asphyxia," caused by the face-down/prone position itself; "mechanical asphyxia," resulting from physical force; "compression asphyxia," where the compression of the individual's back or chest contributes to breathing difficulties; and "restraint asphyxia," which results from physical restraints. For purposes of this brief, *amicus* does not differentiate between these terms.

restrained and left lying face-down on their chest or stomachs—so-called "prone restraint." *See* 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, 47 (2000). As a result of this pronounced trend of deaths, "[p]rivate companies began promoting and providing products and training to law enforcement agencies addressing the risks of hogtying, positional asphyxia, and sudden in-custody deaths in the mid-1990s." *Id.*

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 the 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." San Diego Police Dep't, *Final Report of the Custody Death Task Force* 14 (1992), *Price v. County of San Diego*, No. 3:94-cv-01917 (S.D. Cal. June 30, 1997), ECF No. 129.

The International Association of Chiefs of Police (IACP)—the oldest, largest, and most highly regarded association of police leadership in the world—quickly endorsed the task force's findings. The group disseminated a 1993 "Training Key" explaining that "positional asphyxia is the result of interference with the muscular or mechanical component of respiration," and describing how "considerable evidence . . . indicates that the practice of prone restraint does in fact lead to deaths among suspects in the custody of the police." IACP, Training Key No. 429, Custody Death Syndrome (1993). The group recommended that "a prohibition against unqualified use of this restraint procedure for prisoners should be included

in all law enforcement agency policy." *Id.* Finally, the group communicated to police departments around the country that, if an officer resorted to using such a technique, "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." *Id.*

In 1994, the New York Police Department distributed a training video for its officers entitled "Preventing In-Custody Deaths."[4] It focused on the dangers of positional asphyxia and highlighted recent in-custody deaths from asphyxia. The video emphasized to officers that when they restrain an individual, "[i]t is incumbent on those persons who have subdued the individual, as soon as safety permits, to get him into a position that facilitates breathing" by "rolling him up to his side or placing him in a sitting position." A slide underscores this point in large letters. In the video, Dr. Charles S. Hirsh, the city's chief medical examiner, educates officers on the physiological mechanism of positional asphyxia, explaining that when a person is restrained prone, "they have to lift the weight of their body" to breathe, and if "you're facedown and your abdomen is compressed" at the same time, it "makes it more difficult for the diaphragm to contract." Under these circumstances,

> [t]he individual begins to have air hunger and oxygen deficiency. The natural reaction to that is to struggle more violently. The perception of those persons try-

[4] The *New York Times* has a copy of the video available on its web site. *See* Al Baker & J. David Goodman, *The Evolution of William Bratton, in 5 Videos*, N.Y. Times (July 25, 2016), nytimes.com/interactive/2016/07/24/nyregion/bratton-nypd-videos.html.

> ing to subdue the individual is that he needs more compression to be subdued. You then enter a vicious cycle in which compression makes air hunger, air hunger makes a greater struggle, and a greater struggle demands greater compression. Unfortunately, in some of these circumstances, the price of tranquility is death.

Id.

The New York Police Department Chief of Personnel appears on the video after Dr. Hirsh and reiterates the key lesson in simple terms:

> You all know what Dr. Hirsh is saying. As a child, who hasn't been on the bottom of a pile of friends, gasping for air, unable to catch your breath? The problem is simple: a person lying on his stomach can't breathe while pressure is applied to his back. The answer is also fairly simple: get the person off his stomach. . . . If he continues to struggle, don't sit on his back.

Id. The department emphasizes that when officers follow these instructions, they "will prevent unnecessary deaths." *Id.* "In closing," the video summarizes, "please remember the key to preventing deaths in custody: get a suspect off his stomach as soon as possible." *Id.*

In 1995, the U.S. Department of Justice issued a bulletin that reiterated "[t]he risk of positional asphyxia is compounded" when an individual is restrained using "behind-the-back handcuffing combined with placing the subject in a stomach-down position." U.S. Dep't of Justice, Nat'l Law Enforcement Tech. Ctr. Bulletin: Positional Asphyxia—Sudden Death 2 (June 1995), https://www.ncjrs.gov/pdffiles/posasph.pdf. The bulletin describes how placing someone in the prone restraint can trigger an oxygen starvation response that leads an individual to

"struggle[] more violently," leading to an officer applying more force to subdue them. *Id.* at 1-2. To avoid "death as a result of body position that interferes with one's ability to breathe," the Department of Justice echoed the NYPD's instruction: "As soon as the suspect is handcuffed, get him off his stomach." *Id.*

The same year, the Chicago Police Department released a training bulletin on "Positional Asphyxia" advising officers not to "leave a subject in control restraints lying on his back or stomach." Chi. Police Dep't, Training Bulletin: Positional Asphyxia (Feb. 6, 1995), https://tinyurl.com/y6a8dppd. The bulletin further instructed not to "put weight on an arrestee's back, such as with your knee, for a prolonged period" because "[t]his practice adds stress to the respiratory muscles and inhibits movement of the diaphragm and rib cage." *Id.* At bottom, the Chicago Police Department warned that these types of "potentially dangerous restraint positions . . . must be avoided." *Id.* Other cities soon followed suit. *See, e.g.*, Wichita Police Dep't, Training Bulletin: In-Custody Sudden Deaths (Mar. 30, 1995) (warning against placing a suspect in a "secured, prone position" due to the risk of asphyxiation).

B. These teachings have persisted, warning against the use of prone restraint

Given these well-known facts and policies, training materials have consistently taught officers about the dangers of prone restraints and their relationship to oxygen starvation and positional asphyxia. For example, one of the largest and most popular police training providers and publishers of police media, Calibre Press, reported in 2015 that "[m]ost officers know that when a patient is prone, their respirations may be impeded." Steve Cole, *Screaming Their Last Breath: Why First Responders Must*

Never Ignore the Words "I Can't Breathe," Dec. 10, 2015 (Calibre Press). To avoid this, officers must "[m]ake sure the suspect is in a position to maximize his tidal volume" and that "[a] subject [is] never [] left prone." *Id.* In 2020, Calibre reissued the article, emphasizing that it remained "consistent with [its] training." https://tinyurl.com/y2v43ooc. POLICE magazine echoed this training, reporting that "[m]any law enforcement and health personnel are now taught to avoid restraining people face-down or to do so only for a short period of time." Lawrence E. Heiskell, *How to Prevent Positional Asphyxia*, POLICE Mag. (Sept. 9, 2019).

Books used to train police repeat this warning. "Subjects in police custody have died as a result of positional asphyxia," which "[u]sually" occurs "when the subject is face down with hands secured behind the back," citing a source from 2012. Steven G. Brandl, *Police in America* 252 (2018). To avoid this, the textbook provides a straightforward solution: "Avoid prone restraint unless absolutely necessary. . . . The person should be repositioned from the face down/prone position as soon as practical." *Id.* As a final warning, it instructs, "Do not sit or lean on the abdomen EVER." *Id.*

Today, police department policies frequently memorialize the risk of positional asphyxia from prone restraint and instruct officers not to keep suspects prone. Indeed, the Department of Justice's Principles for Promoting Police Integrity as far back as 2001 recommended—under the heading of "Deadly Force"—that "[a]gencies should develop use of force policies that address . . . particular use of force issues such as . . . positional asphyxia." U.S. Dep't of Justice, *Principles for Promoting Police Integrity* 4 (Jan. 2001), https://www.ncjrs.gov/pdffiles1/ojp/186189.pdf. When the Department of Justice entered into

recent consent decrees with police agencies, the terms of those agreements have required the adoption of policies and training 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 37, *United States v. City of Ferguson*, No. 4:16-cv-00180 (E.D. Mo. Apr. 19, 2016), ECF No. 41, https://www.justice.gov/crt/file/883846/download; *see also* Settlement Agreement at 17, *United States v. City of Cleveland*, No. 1:15-cv-01046-SO, (N.D. Ohio June 12, 2015), ECF No. 7-1, https://www.justice.gov/crt/case-document/file/908536/download (same).

As petitioner noted, the state of Ohio has banned all state agencies from using a prone restraint. And police departments across the country have followed suit by adopting policies to restrict officers' use of prone restraints to guard against the risks of positional asphyxia. As of 2016, a sampling of these policies that were in effect includes:

- **Kansas City, Missouri**: "Once a subject is . . . handcuffed, Department members will place the subject on his/her side or in a seated position…. At no time will Department members handcuff and leg shackle an arrest's hand and feet together . . . ." Procedural Instruction, Response to Resistance (July 27, 2016), https://www.kcpd.org/media/1840/pi-16-04.pdf.

- **Little Rock, Arkansas**: "With the use of all forms of restraint, officers must remain aware that Positional Asphyxia can occur if a person is restrained in such a position, as to constrain breathing. The practice of 'hog tying' is specif-

ically prohibited. Officers will constantly monitor the physical condition of any restrained person and will render aid, as appropriate." General Order 306, Handling of Prisoners at C.1.b (Nov. 4, 2015), https://public.powerdms.com/LITTLEROCKPD/documents/82.

- **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 (Oct. 27, 2015), 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 (rev. Apr. 2, 2017), https://tinyurl.com/y438hpey.

- **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 (June 27, 2016), https://tinyurl.com/yxbl78pw.

- **Durham, North Carolina**: "At no time should an individual be left on their stomach or hog-tied, as this can lead to positional asphyxia." General Orders Manual, Use of Force, 1001 R-8 at 419 (Jan. 1, 2016), https://tinyurl.com/5ejzb74v.

And other cities have candidly acknowledged the danger since:

- **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 (rev. Jan. 11, 2021), 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 (Feb. 6, 2020), https://tinyurl.com/yyt8joov.

- **Denver, Colorado**: "[O]fficers will immediately cease applying body weight to an individ-

ual'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) (rev. Sept. 1, 2020), 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 (rev. 2020), https://tinyurl.com/y5kzobh9.

- **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 (Jan. 1, 2022), https://tinyurl.com/yxds5r3s.

This list is by no means exhaustive. But it is illuminating. Indeed, this Court observed that the officers in this case "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." Pet.App.19a. "The evidentiary record also includes well-known police guidance recommending that officers get a subject off his stomach as soon as he is handcuffed because of that risk." Pet.App.19a. And "[t]he guidance further indicates that the struggles of a prone suspect may be due to oxygen deficiency, rather than a desire to disobey officers' commands." Pet.App.19a.

The Court cannot ignore this overwhelming, long-standing nationwide agreement in the policing community —reflected in the record of this very case—in evaluating the unconstitutional behavior of the defendants in this case.

II. Nationwide Knowledge of the Dangers of Prone Restraint, Reflected in the Consensus Among Circuits, Shows That the Eighth Circuit's Decision Cannot Stand

Officials cannot receive qualified immunity when they violate clearly established statutory or constitutional rights that reasonable people then knew. *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam). 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) (citation omitted). While "'general

statements of the law are not inherently incapable of giving fair and clear warning' to officers," *White*, 137 S. Ct. at 552 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)), clearly established law cannot be "define[d] at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015)). In excessive force cases, existing precedent must "*squarely govern*[]" the specific facts at issue. *Mullenix*, 577 U.S. at 13 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per curiam)). For a police officer to violate a clearly established right, "the right's contours [must be] sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff v. Rickard*, 572 U.S. 765, 778-79 (2014).

A. It was clearly established in 2016 that holding a person in handcuffs and shackles in a prone position and applying pressure on their back is excessive force

This Court has long held that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985); *see also Graham v. Connor*, 490 U.S. at 394. In *Garner* itself, the Court explained that "in evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to prevailing rules in individual jurisdictions," and engaged in an extensive review of police policies, citing the FBI, NYPD, and forty-four other departments, as well as research by the Boston Police Department, the International Association of Chiefs of Police, and academic research on prevailing practices, putting significant weight on "the rules adopted by those who must actually administer them." 471 U.S. at 15-16, 18-19. Similarly, in *Hope v. Pelzer*, the Court considered Alabama state regulations

and communications between the U.S. Department of Justice and the Alabama Department of Corrections as evidence that the corporal punishment at issue was clearly prohibited. 536 U.S. at 744-45.

By 2016, the police community had known for decades that positional asphyxia was a potentially fatal consequence of keeping a suspect prone, and that air hunger might cause a suspect to thrash or struggle as the air is forced out of their lungs.

Indeed, the consensus of circuit courts of appeal, applying this Court's excessive-force jurisprudence, is that it was clearly established law by 2016 "that putting substantial or significant pressure on a suspect's back while that suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force." *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004).

In 2003, the Ninth Circuit held it clearly established that two officers kneeling on an individual's neck and back and then binding his legs twenty minutes later until he lost consciousness constituted excessive force. *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1054-55, 1062-64 (9th Cir. 2003); *see also Tucker v. Las Vegas Metro. Police Dep't*, 470 F. App'x 627, 629 (9th Cir. 2012) (holding that "existing law recognized a Fourth Amendment violation where two officers used their body pressure to restrain a delirious, prone, and handcuffed individual who pose[d] no serious safety threat" even though the individual "continued to resist the officers after handcuffs were applied"); *Hyde v. City of Willcox*, 23 F.4th 863, 873 (9th Cir. 2022).

In 2004, the Sixth Circuit found excessive force clearly established where "five different lay witnesses testified that the Officers continued to sit or otherwise put pressure on [decedent's] back while he was prone on the ground . . . [and] that they did not see [decedent] struggle during this time." *Champion*, 380 F.3d at 898. That same year, the Third Circuit found that—even in a struggle—exerting force on a handcuffed person whose ankles are bound by "press[ing] down on [his] back" until he loses consciousness and asphyxiates is excessive. *Rivas v. City of Passaic*, 365 F.3d 181, 186-87, 199-201 (3d Cir. 2004).

In *Weigel v. Broad*, the Tenth Circuit held in 2008 that clearly established law provided that two officers used excessive force when they held down a handcuffed and leg-bound decedent for three minutes by applying pressure to his shoulders or neck and legs "after it was clear that the pressure was unnecessary to restrain him." 544 F.3d 1143, 1152 (10th Cir. 2008); *cf. Abdullahi v. City of Madison*, 423 F.3d 763, 765-69 (7th Cir. 2005) (holding that "it would be difficult to say that, as a matter of law, a reasonable officer could not have known" that an officer violated decedent's constitutional rights when he pressed on decedent's back and "placed his right knee and shin on the back of [decedent's] shoulder area" "for approximately 30-45 seconds"—half of which decedent was not struggling—to handcuff him behind his back while another officer held his legs for approximately two more minutes until the individual died).

In 2016, the First Circuit came to the same conclusion in *McCue v. City of Bangor*, where two officers—attempting to bring into protective custody a man they had identified as possibly having used bath salts—tased him, handcuffed him behind his back, laid him face down, sat and applied significant weight on his shoulders and neck

for up to five minutes while his resistance waned. 838 F.3d 55, 59, 62-64 (1st Cir. 2016).

And in 2021, the Fifth Circuit similarly concluded in *Timpa v. Dillard* that an officer violated clearly established law as of 2016 because his kneeling on decedent's back "for at least five minutes . . . [with] force unnecessary to restrain him" constituted excessive force. 20 F.4th 1020, 1034 (5th Cir. 2021). The Fourth Circuit held the same one month earlier in *Lawhon v. Mayes*, where officers and paramedics "applied varying degrees of force to [decedent] . . . handcuffed in the prone position for nearly six minutes . . . the last three minutes [of which, he lay] motionless and silent." Nos. 20-1906, 20-1907, 20-1908, 2021 WL 5294931, at *1 (4th Cir. Nov. 15, 2021).

B. The Eighth Circuit's decision ignored long-established practice and law across the country and its own circuit concerning the danger of asphyxiation from prone restraint

The circumstances of Mr. Gilbert's death are far from "novel factual circumstances." *See Hope*, 536 U.S. at 741. This is not a scenario in which it is difficult to determine whether the law was clearly established; on the contrary, this Court's decisions establishing a right to be free from excessive force are clear. *See, e.g.*, *Graham*, 490 U.S. at 396. And case law from across the circuits, applying this Court's excessive-force jurisprudence, confirms that the majority of circuits have had no difficulty concluding on similar facts that prone restraint violates the Fourth Amendment's guarantee. *See* Part II.A, *supra*. Here, six officers spent fifteen minutes applying pressure to a nonviolent man who, while suffering a mental health crisis and voicing his pain, was held face-down, handcuffed behind his back, and shackled at the legs, until he stopped breathing.

The Eighth Circuit's decision completely ignores the policing community's long-standing recognition that because of a serious risk of death, officers should not leave individuals restrained in the prone position. Previously, in considering whether the officers' force was excessive, the Eighth Circuit disregarded the significance of the evidence that Mr. Gilbert's resistance while prone was "actually an attempt to breathe," concluding that "the Officers could have reasonably interpreted such conduct as ongoing resistance." Pet.App.35a. This Court took issue with the Eighth Circuit's characterization of the details that left Mr. Gilbert dead as "insignificant," because "[s]uch details could matter when deciding whether to grant summary judgment on an excessive force claim." Pet.App.19a. This time, the Court must assess whether the officers' force was clearly established as excessive, but the Eighth Circuit's error is the same: ignoring and erroneously dismissing factually similar precedent[5] and long-

[5] The Eighth Circuit cited four cases to support its holding that "Gilbert's right to be free from prone restraint while engaged in ongoing resistance, even where officers applied force to various parts of his body, including his back, was not clearly established in [December] 2015 when the incident with Gilbert occurred": *Weigel*, *Champion*, *Drummond*, and *Simpson v. Hines*, 903 F.2d 400, 401-03 (5th Cir. 1990). But the individuals in *Weigel*, *Champion*, and *Simpson*—all restrained by hand and foot—resisted before and after being restrained, and those courts held that "the law was clearly established that applying pressure to [an individual's] upper back, once he was handcuffed and his legs restrained" constituted excessive force, without providing any limitation based on struggle post-restraint that the Eighth Circuit reads into those opinions. *Weigel*, 544 F.3d at1155 (accounting for "the significant risk of positional asphyxia associated with such actions"); *see Champion*, 380 F.3d at 903 (holding the application of such force clearly unconstitutional against a person who has been "*subdued* and/*or* incapacitated" (emphases added)); *Simpson*, 903 F.2d at 402 (noting that restrained decedent was first strug-

established police policy across the circuits, including its own. *See* Part I, *supra*. The details, of course, remain far from "insignificant." Rather, widespread recognition that applying pressure to the back of restrained, prone individuals creates a serious risk of asphyxiation, and that a suffocating individual may involuntarily struggle to breathe renders the officers' supposed interpretation of Mr. Gilbert's efforts to breathe as resistance clearly unreasonable. At a minimum, reasonableness should have been left to the factfinder to determine.

By all indications, the reasonable officer today is trained that applying pressure to an individual restrained in the prone position can cause asphyxiation. As this Court has already noted, the City of St. Louis "instructs its officers that pressing down on the back of a prone subject can cause suffocation." Pet.App.19a. Indeed, the City has "known about the dangers of compression asphyxia for a long time" and put "protocols . . . in[] place" after the DOJ bulletin "telling officers about the dangers of compression asphyxia." JA1783, 1808. The DOJ bulletin was released in 1995, which means that the City has been teaching officers "that it can be dangerous to hold someone in a prone position" and that they should not "leave somebody on their stomach cuffed" for over twenty years. JA1774, 1778-79. Indeed, the risks here would be obvious to any reasonable officer.

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gling in self-defense, then begging for help and screaming, before falling silent). Only in *Drummond* did resistance not play a role, but the Ninth Circuit has applied *Drummond* where suspects have resisted after being restrained. *See Tucker*, 470 F. App'x at 629. More recent case law decided before the Eighth Circuit's decision, and *Timpa* from the Fifth Circuit in 2021 in particular, only further disrupts the Eighth Circuit's untenable reading of the law.

As the DOJ Bulletin explains, when officers apply force to a prone, restrained individual, "[t]he natural reaction to oxygen deficiency occurs—the person struggles more violently." JA1931. Thus, 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. Yet, the Eighth Circuit's explanation for Mr. Gilbert's suffocation was that "officers did not respond to Gilbert's complaints, nor did they appear to recognize that Gilbert's struggles could be due to oxygen deficiency, something well-known police guidance cautions officers to look for, rather than a continued desire to disobey commands." Pet.App.7a. There is, at a minimum, a material dispute of fact as to whether a reasonable officer would have recognized the symptoms of asphyxiation and realized, over the entirety of the *fifteen minutes* that Mr. Gilbert was struggling under the weight of the officers and yelling "It hurts," Pet.App.17a, that his actions were the hallmark of a man struggling to breathe.

The officers' conduct eschewed decades of commonly accepted policing practices and their city's own understanding of the risks of prone restraints. The Eighth Circuit's conclusion that the officer's force was not clearly established as excessive defies years of experience and research demonstrating—and years of police policy and circuit caselaw acknowledging—the risk that these exact tactics result in death. Moreover, the fact that an individual was resisting in some fashion—especially when that resistance is involuntary and the result of oxygen starvation—gives neither the officers nor the Eighth Circuit the ability to indemnify excessive force as lawful.

This Court should grant certiorari to correct the Eighth Circuit's egregious misreading and misapplication of the law.

CONCLUSION

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

Respectfully submitted,

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