No. 20–391

IN THE

Supreme Court of the United States

JODY LOMBARDO, ET AL.,

Petitioners,

v.

CITY OF ST. LOUIS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a reasonable jury could find that officers used excessive force when they put a handcuffed and shackled person face-down on the ground and pressed into his back until he suffocated.

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal-defense attorneys to ensure justice and due process for those accused of crimes or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal-defense lawyers, public defenders, military-defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defense and private criminal-defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of criminal justice. NACDL files numerous amicus briefs each year in this Court and other federal and state courts, assisting in cases like this one, which concern constitutional standards affecting arrestees and pretrial detainees, which are of broad importance to criminal defendants, criminal-defense lawyers, and the criminal-justice system as a whole.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately two million members and supporters dedicated to defending the principles of liberty and equality embodied in the Constitution

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party has authored this brief in whole or in part and that no one other than *amici* and their counsel has made any monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief.

and nation's civil rights laws. In furtherance of those principles, the ACLU has appeared in numerous cases before this Court involving the meaning and scope of the Fourth Amendment, both as direct counsel and as amicus. Because this case directly implicates those issues, its proper resolution is a matter of concern to the ACLU and its members.

REASONS FOR GRANTING THE PETITION

This case asks whether a reasonable jury could find that police officers violate the Constitution's prohibition on excessive force when they kill a shackled and handcuffed arrestee inside of a jail cell by compression asphyxiation, a form of lethal force. This Court should grant certiorari to mandate a uniform national rule governing the use of lethal force against restrained arrestees and pretrial detainees. It should hold that the objective reasonableness standard of the Fourth and Fourteenth Amendments prohibits the use of deadly force against a restrained arrestee or detainee who poses no threat to officers or others.

A national rule is needed. After this Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), the objective reasonableness standard of *Graham v. Connor*, 490 U.S. 386 (1989), governs all claims of excessive force brought by arrestees and pretrial detainees. Whether a civilian is interacting with police officers on the street during an arrest, or with jailers at a detention facility awaiting trial, courts evaluate objective reasonableness by examining the relationship between the need for force and the amount of force used, the extent of the

civilian's injury, efforts by officials to limit the force, whether the civilian is resisting arrest or fleeing, and the severity of the threat posed by the civilian to officials or others. *Kingsley*, 576 U.S. at 397. Given that the same constitutional standard governs uses of force against all civilians suspected but not convicted of crimes, it is of paramount importance to apply a uniform standard across the country.

Before the Eighth Circuit's decision in this case, there was a national rule. All courts of appeals that had considered the issue agreed that the Fourth and Fourteenth Amendments categorically prohibit the asphyxiation of a restrained civilian who poses no threat to officers or others. Rarely in the excessive force context has there been such uniformity among the lower courts. The decision below is the first to depart from this categorical prohibition, and this Court should grant certiorari to ensure that courts continue to apply a uniform national standard.

The national rule applied outside of the Eighth Circuit is also the only rule that conforms to this Court's cases governing the use of deadly force. It is deeply rooted in the Fourth Amendment and prevailing common-law rules, and it is consistent with statutes and law enforcement policies already in effect across American jurisdictions. Compression asphyxia is deadly force, and state officials may not use deadly force against restrained civilians, even if those civilians are not fully submissive. The Eighth Circuit's decision is inconsistent with these foundational principles, and it should be corrected for those reasons as well.

Finally, a categorical prohibition on such uses of force is an essential to the fair administration of criminal justice. No reasonable person would dispute that the police officers who encountered Nicholas Gilbert handcuffed and shackled in his jail cell could not have shot him dead, and it should be equally forbidden to employ the lethal force of compression asphyxia in the same circumstances. Making Section 1983 an effective deterrent to such excessive force ensures that our justice system can adjudicate criminal cases consistent with due process, and it is essential to public trust in police and the justice system.

By departing from the previously established national rule prohibiting the use of deadly force against civilians who are restrained and pose no threat, the Eighth Circuit has created a regime where different deadly force standards will govern police and jails in different jurisdictions. The resulting accountability gap will lead to the uneven administration of criminal justice in the United States. This Court should grant certiorari to restore the sensible regime that existed before.

I. A NATIONAL RULE GOVERNING THE USE OF FORCE AGAINST ARRESTEES AND DETAINEES IS NEEDED

Although the decision below arises in the context of a use of force against an arrestee in a police holding cell, its reasoning extends to a wide swath of interactions in which individuals who are suspected or accused, but not convicted, of crimes come into contact with government officials.

Pursuant to *Graham*, 490 U.S. at 396-97, and *Kingsley*, 576 U.S. at 397, the same objective reasonableness standard governs all claims of excessive force brought against law enforcement and jail staff prior to a criminal conviction.

Graham sets forth the Fourth Amendment standard for adjudging such claims arising "in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen[.]" 490 U.S. at 395. This "settled and exclusive framework" for assessing Fourth Amendment excessive-force claims, *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017), also governs pretrial detainees' claims of excessive force arising under the due process clause of the Fourteenth Amendment, *Kingsley*, 576 U.S. at 396-97 (citing *Graham*, 490 U.S. at 396); see also *Piazza v. Jefferson County*, 923 F.3d 947, 956 & n.9 (11th Cir. 2019) (the same rules govern Fourth and Fourteenth Amendment cases "concerning the use of force against unresisting or subdued" arrestees and detainees). When government officials "create[] asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect," whether in an arrest or a jail, "the conduct at issue, the risk of death to the detainee, and the minimal threat posed by a bound and incapacitated detainee to officer safety is the same[.]" *Hopper v. Plummer*, 887 F.3d 744 (6th Cir. 2018).

As a result, any civilian asserting an excessive force claim prior to imprisonment on a conviction, no matter the context, must "show only that the force purposely or knowingly used against him was objectively unreasonable." *Kingsley*, 576 U.S. at

396-97; *Mendez*, 137 S. Ct. at 1546. To assess objective reasonableness, courts consider the relationship between the need for force and the amount of force used, the extent of the civilian's injury, efforts by officials to limit the force, whether the civilian is resisting arrest or fleeing, and the severity of the threat posed by the civilian to officials or others. *Graham*, 490 U.S. at 396; *Kingsley*, 576 U.S. at 397, 399.

This constitutional standard governs uses of force across a broad range of law enforcement and detention settings, including those against civilians during police investigative stops, arrests, and other seizures on the street, in public places, or in homes; against arrestees in police cars, processing and intake areas, and lockups; against persons released on bail pending trial; and against pretrial or civil contempt detainees held in jails and prisons. *Kingsley*, 576 U.S. at 396-99; *Graham*, 490 U.S. at 395; *Hopper*, 887 F.3d at 751-53. Most individuals who interact with our criminal justice system fall into these categories, rather than into the category of convicted prisoners. The use-of-force standards at issue in this case thus affect a staggering number of Americans each year. For instance, in 2015, the average daily population of prisoners held pre-trial in local jails exceeded 400,000.[2] In the same year, law enforcement officers made nearly 11 million

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[2] U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Zhen Zeng, Jail Inmates in 2016, at 2 (Feb. 2018) (average daily prison population in local jails in 2015 was 727,400), https://www.bjs.gov/content/pub/pdf/ji16.pdf; *id.* at 4 (62.5% of prisoners held in local jails were pretrial).

arrests,[3] initiating contacts annually with 27 million U.S. residents age 16 or older.[4]

Given that existing law applies the same constitutional standard from initial civilian-police contact until a criminal conviction is obtained, and in doing so governs a large portion of all interactions between officials and citizens, it is particularly important for this Court to mandate a uniform national rule prohibiting the use of deadly force against fully restrained arrestees and detainees who pose no threat to officers or others. The Eighth Circuit's divergence from this rule not only undermines the sensible regime governing uses of force in police holding cells but does so for uses of force in nearly all criminal justice settings.

II. THE EIGHTH CIRCUIT'S DECISION CREATES A SIGNIFICANT CONFLICT AMONG THE COURTS OF APPEALS

This Court should grant the petition because the Eighth Circuit's decision departs from the uniform conclusion of all six courts of appeals that have addressed whether officers may asphyxiate a restrained civilian who poses no threat to officers or others. Prior to the decision below, it was the

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[3] U.S. Dep't of Justice, Federal Bureau of Investigation, Uniform Crime Reporting, Crime in the U.S. 2015 (Table 29), https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-29 (last visited Oct. 25, 2020).

[4] U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Elizabeth Davis, et al., Contacts Between Police and the Public, 2015, at 1-2 (Oct. 2018), https://www.bjs.gov/content/pub/pdf/cpp15.pdf.

national rule that using force to asphyxiate a subdued or restrained individual is objectively unreasonable, whether that person is an arrestee or pretrial detainee. The Eighth Circuit's contrary decision creates a new and significant conflict among the courts of appeals.

1. The **First Circuit** concluded recently 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," drawing on authorities from four other circuits. *McCue v. City of Bangor*, 838 F.3d 55, 64-65 (1st Cir. 2016) (internal quotations and citations omitted). The **Third Circuit** in *Rivas v. City of Passaic*, 365 F.3d 181, 200 (3d Cir. 2004), similarly decided that an officer's use of compression asphyxiation would be unconstitutional if the victim "did not present a threat to anyone's safety as he lay in a prone position on the enclosed porch, hands and ankles secured behind his back." Assuming the victim "was handcuffed and had his ankles tied at that time, the court found that a reasonable jury could find that the continued use of force"—officers pressing on the decedent's back until he became "still and unconscious"—was excessive. *Id.*; see also *Giles v. Kearney*, 571 F.3d 318, 326 (3d Cir. 2009) ("[A]n officer may not kick or otherwise use gratuitous force against an inmate who has been subdued."); *Anthony v. Seltzer*, 696 F. App'x 79, 82 (3d Cir. 2017).

The **Sixth Circuit** was among the first of the courts of appeals to deem it "clearly established 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) (citing *Simpson v. Hines*, 903 F.2d 400, 403 (5th Cir. 1990)). The Sixth Circuit has repeatedly reaffirmed the national rule prohibiting asphyxiation of a restrained civilian. See, *e.g.*, *Hopper*, 887 F.3d at 754 (applying the "prohibition against placing weight on [the decedent's] body after he was handcuffed" to a claim by a jail detainee); *Martin v. City of Broadview Heights*, 712 F.3d 951, 961 (6th Cir. 2013) (noting the "prohibition against placing weight on [the victim's] body *after* he was handcuffed" and explaining that "applying pressure to the back of a prone suspect who no longer resists arrest and poses no flight risk is an objectively unreasonable use of force").

The **Seventh Circuit** also adheres to the national rule. Its leading case, *Abdullahi v. City of Madison*, 423 F.3d 763, 770-71 (7th Cir. 2005), recognized that "placing a person in a prone position while handcuffed on the floor does not, in and of itself, violate the Fourth Amendment," but that additional "specific unreasonable conduct" by an officer who "knelt on the decedent's back with chest-crushing force," causing his death, violated the Fourth Amendment. The court stressed, "No one contends that deadly force was justified once [the civilian] was lying prone on the ground with his arms behind him[.]" *Id.* at 769. Again, the national rule reflected in *Abdullahi* has been emphasized repeatedly in the Seventh Circuit. *Richman v. Sheahan*, 512 F.3d 876, 883 (7th Cir. 2008) (holding

that "a reasonably trained police officer would know that compressing the lungs of a morbidly obese person can kill the person," and that a reasonable jury could find the officers used excessive force in "a situation in which officers suffocate an obviously vulnerable person"); *Sallenger v. Oakes*, 473 F.3d 731, 741-42 (7th Cir. 2007) (finding that a reasonable jury could find officers used excessive force when, after applying leg restraints or a "hobble," they failed to turn the arrestee on his side to prevent suffocation); see also *Strand v. Minchuk*, 910 F.3d 909, 918 (7th Cir. 2018) (recognizing that "for decades" the Seventh Circuit has "emphasized that a subdued suspect has the right not to be seized by deadly or significant force"); *Miller v. Gonzalez*, 761 F.3d 822, 829 (7th Cir. 2014) ("This prohibition against significant force against a subdued suspect applies notwithstanding a suspect's previous behavior[.]").

In *Drummond v. City of Anaheim*, where "officers allegedly crushed [a civilian] against the ground by pressing their weight on his neck and torso, and continu[ed] to do so despite his repeated cries for air, and despite the fact that his hands were cuffed behind his back and he was offering no resistance," the **Ninth Circuit** held that "[a]ny reasonable officer should have known that such conduct constituted the use of excessive force." 343 F.3d 1052, 1061 (9th Cir. 2003); see also *Barnyard v. Theobald*, 721 F.3d 1069, 1073 (9th Cir. 2013) (holding that officers violate the Fourth Amendment when they "use a choke hold on a non-resisting arrestee who had surrendered, pepper-spray him, and apply such knee pressure on his neck and back

that it would cause the collapse of five vertebrae in his cervical spine"); *Krechman v. County of Riverside*, 723 F.3d 1104, 1108, 1111 (9th Cir. 2013) (reversing judgment for four officers who restrained an unarmed delusional man in prone position and put weight on his back while "he was repeatedly kicking").

Finally, the **Tenth Circuit** follows the national rule as well. It held in *Weigel v. Broad* that "the law was clearly established that applying pressure to [a civilian]'s upper back, once he was handcuffed and his legs restrained, was constitutionally unreasonable due to the significant risk of positional asphyxiation associated with such actions." 544 F.3d 1143, 1155 (10th Cir. 2008); see also *Estate of Smart v. City of Wichita*, 951 F.3d 1161, 1176 (10th Cir. 2020) (finding it was "clearly established that officers may not continue to use force against a suspect who is effectively subdued."); *McCoy v. Meyers*, 887 F.3d 1034, 1052 (10th Cir. 2018) ("[I]t should have been obvious to the Appellees that continuing to use force on [the victim] after he was rendered unconscious, handcuffed, and zip-tied was excessive."); *Estate of Booker v. Gomez*, 745 F.3d 405, 424-29 (10th Cir. 2014).

2. The remaining courts of appeals have not squarely addressed an excessive force claim arising from asphyxiating force, but they have held consistently that the continued use of force against a restrained civilian is objectively unreasonable. This is the rule in the **Second Circuit**, *Lennox v. Miller*, 968 F.3d 150, 157 (2d Cir. 2020); *Jones v. Treubig*, 963 F.3d 214, 225 (2d Cir. 2020); and in the **Fourth Circuit**, *Meyers v. Baltimore County*, 713

F.3d 723, 734 (4th Cir. 2013); *Bailey v. Kennedy*, 349 F.3d 731, 744-45 (4th Cir. 2003).[5]

While the **Fifth Circuit** has not squarely addressed the asphyxiation issue presented here, its cases are nonetheless consistent with the national rule prohibiting the suffocation of restrained suspects. *Simpson*, 903 F.2d at 403 (reasonable jury could conclude excessive force was used when 10 officers went into a cell and restrained and asphyxiated an arrestee, including by having a heavy officer sit on the arrestee's chest); see also *Darden v. City of Fort Worth*, 880 F.3d 722, 733 (5th Cir. 2018).[6]

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[5] District courts in the Second and Fourth Circuits adhere to the national rule and have found that officers who suffocate restrained detainees violate the Fourth Amendment. *McBeth v. City of Union*, No. CV 7:15-1473-BHH, 2018 WL 4594987, at *15 (D.S.C. Sep. 25, 2018); *Lawhon v. Edwards,* No. 3:19-CV-924-HEH, 2020 WL 4589195, at *13 (E.D. Va. Aug. 10, 2020) *Jackson v. Tellado*, 236 F. Supp. 3d 636, 664 (E.D.N.Y. 2017); *Keeney v. City of New London*, 196 F. Supp. 2d 190, 200 (D. Conn. 2002).

[6] Prior to the Eighth Circuit's decision in this case, district courts in the Fifth Circuit applied the national rule prohibiting asphyxiation of a fully restrained civilian. *E.g.*, *Delacruz v. City of Port Arthur*, No. 1:18-CV-11, 2019 WL 1211843, at *9 (E.D. Tex. Mar. 14, 2019). But in light of the Eighth Circuit's decision, district courts in the Fifth Circuit more recently have struggled with how to adjudicate deadly force claims arising from suffocation. *E.g.*, *Timpa v. Dillard,* No. 3:16-CV-3089-N, 2020 WL 3798875, at *5 (N.D. Tex. July 6, 2020).

In a separate line of cases, the Fifth Circuit has also addressed whether hog-tying civilians constitutes excessive

In the **Eleventh Circuit**, while mere restraint or "hog-tying" is permitted, *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1281 (11th Cir. 2004); *Cottrell v. Caldwell*, 85 F.3d 1480, 1492 (11th Cir. 1996), the use of additional force against subdued suspects is objectively unreasonable, *Skrtich v. Thornton*, 280 F.3d 1295, 1303 (11th Cir. 2002); *Young v. City of Augusta*, 59 F.3d 1160, 1163-65 (11th Cir. 1995). And the **D.C. Circuit** has held that an officer's act of violence (which did not involve asphyxiation) against a restrained and non-threatening arrestee violates the Fourth Amendment. *Johnson v. District of Columbia* 528 F.3d 969, 976-78 (D.C. Cir. 2008).[7]

The more general rule that the continued use of force against a restrained civilian is constitutionally unreasonable has been embraced by all courts of appeals. Indeed, the Eighth Circuit's decision below appears to contradict its own prior cases holding

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force. See *Gutierrez v. City of San Antonio*, 139 F.3d 441, 451 (5th Cir. 1998). Consistent with the national rule, these decisions recognize that while an initial restraint is not *per se* unconstitutional, the continued application of positional force may be unreasonable where there is no ongoing threat posed by the suspect. See *Pratt v. Harris County*, 822 F.3d 174, 184 (5th Cir. 2016) (use of hog-tie was not excessive due to evasion and violence, and where additional force applied to back was brief); *Khan v. Normand*, 683 F.3d 192, 195-96 (5th Cir. 2012) (brief use of prone restraints and without additional force was reasonable).

[7] District courts in Washington, D.C., have concluded that "a reasonable officer would have been on notice that she could not choke to death an unarmed subject who had already been subdued by fellow officers." *Ingram v. Shipman-Meyer*, 241 F. Supp. 3d 124, 145 (D.D.C. 2017).

that deadly force cannot be used against suspects who do not pose a significant threat of death or serious injury to the officer or others. See *Craighead v. Lee*, 399 F.3d 954, 962 (8th Cir. 2005).

* * *

The Eighth Circuit's decision in this case contradicts all six courts of appeals that have addressed excessive force claims arising from the asphyxiation of restrained civilians and have held uniformly that such uses of lethal force violate the Constitution. In addition, the decision below departs from the previously uniform view of all courts of appeals, including the Eighth Circuit, that continued force cannot be used against subdued or restrained individuals who pose no threat to officers or others. This Court's review is necessary to resolve this split and restore uniformity.

III. THE NATIONAL RULE IS THE ONLY ONE CONSISTENT WITH THIS COURT'S DEADLY FORCE CASES, FOUNDATIONAL FOURTH AMENDMENT PRINCIPLES, AND POLICE PRACTICES ACROSS AMERICAN JURISDICTIONS

Reestablishing a national rule prohibiting officials from using deadly force, including depriving a person of oxygen, against restrained civilians who pose no threat is also necessary to ensure adherence to this Court's cases governing the use of deadly force, to foundational Fourth Amendment principles, and to existing law and policy governing police practices in the United States.

1. *Tennessee v. Garner* prohibits the use of deadly force "unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." 471 U.S. 1, 3 (1985). Although this Court has not expressly defined what quantum of force constitutes deadly force, compression asphyxiation would satisfy any conceivable definition. Asphyxiation presents the same "near *certainty* of death" as the shooting at issue in *Garner*. *Scott v. Harris*, 550 U.S. 372, 384 (2007). It is significantly more likely to cause the death of a suspect than a police car bumping a moving car, which this Court has determined "pose[s] a high likelihood of serious injury or death." *Id.* There can be no reasonable dispute that compression asphyxiation creates a substantial risk of death or serious bodily injury, which is the definition of deadly force employed by all courts of appeals. *Smith v. City of Hemet*, 394 F.3d 689, 705-06 (9th Cir. 2005) (en banc). Officers who place their full body weight on a subdued citizen in a prone position, as he gasps for air and cries, "I can't breathe," are at substantial risk of causing serious bodily injury or death.

As Justice Scalia emphasized in *Mullenix v. Luna*, deadly force is the "directing of force sufficient to *kill at the person* of the desired arrestee." 577 U.S. 7, 19 (2015) (Scalia, J., concurring). Officers who suffocate a civilian exert a type of force "applied with the object of harming the body of the [citizen]" that is not exceeded by any other type of force. *Id.* Consider if the officers who asphyxiated Nicholas Gilbert in this case had

instead shot him in his cell, while shackled and handcuffed. No one would dispute that such a use of deadly force would be categorically unreasonable. The result should not be different when officers deploy deadly force without a gun or other weapon. After all, "[i]t is undisputed that chokeholds [and similar techniques] pose a high and unpredictable risk of serious injury or death." *City of L.A. v. Lyons*, 461 U.S. 95, 116 (1983) (Marshall, J., dissenting).

Importantly, this case is not only about the application of deadly force, but also the right to be free from continued, unnecessary force once an officer has restrained an individual. Since *Garner*, all of this Court's cases discussing the reasonableness of deadly force have focused on whether the suspect posed an immediate threat of serious bodily injury to the officers or others, but they also have all concerned suspects who were *not restrained*. See *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774-75 (2015); *Plumhoff v. Rickard*, 572 U.S. 765, 775-77 (2014); *Tolan v. Cotton*, 572 U.S. 650, 657-60 (2014); *Scott*, 550 U.S. at 383-84 (2007); *Brosseau v. Haugen*, 543 U.S. 194, 196-201 (2004). Most recently, in *Sheehan*, this Court acknowledged that the use of deadly force against a subdued suspect would be material to the determination of constitutional reasonableness. 135 S. Ct. at 1771 n.2 (noting that, although Sheehan was on the ground, "she was certainly not subdued"). Certiorari is warranted because the Eighth Circuit's decision that compression asphyxiation can be used to kill a handcuffed and shackled civilian inside of a jail cell contradicts this

Court's cases defining when officials may use deadly force.

2. Relatedly, this Court should grant certiorari because the Eighth Circuit's decision is inconsistent with foundational Fourth Amendment principles. This Court has time and again explained that the Fourth Amendment was adopted against the backdrop of English colonial oppression to set limitations on executive authority, *Stanford v. State of Tex.*, 379 U.S. 476, 480-85 (1965), and it has "long understood that the Fourth Amendment's protection against 'unreasonable . . . seizures' includes seizure of the person[.]" *California v. Hodari D.*, 499 U.S. 621, 624 (1991). In turn, this Court has understood the scope of the Fourth Amendment's prohibition on the use of force with an eye toward prevailing common-law rules and practices in American jurisdictions. *Garner*, 471 U.S. at 12-19.

At common law, deadly force could not be used against a restrained—and certainly not a jailed—civilian. For example, "where the imprisonment [was] only for safe custody *before* the conviction, and not for punishment *afterwards*. . . the public [was] entitled to demand nothing less than the highest security that can be given, viz., the body of the accused, in order to insure that justice shall be done upon him if guilty." 4 W. Blackstone, *Commentaries* *298 (emphasis in original). "In this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of

confinement only[.]" *Id.* *300. In Gilbert's case, the officers applied deadly force while Gilbert was handcuffed and shackled inside of a single-occupancy jail cell. Once restrained, he posed no threat of death or bodily injury to officers or others, including himself. Even if the use of force to handcuff and shackle Gilbert might have been justified at common law, there is simply no question that common-law rules would have prohibited the use of deadly force against him after he was fully restrained. In fact, the officers' conduct at issue here is precisely the sort of exertion of executive authority that the Fourth Amendment was intended to curtail.

3. Similarly important to understanding the scope of Fourth Amendment protections are the laws and practices adopted in American jurisdictions. *Garner*, 471 U.S. at 15-20. Governments across the United States restrict the use of oxygen-depriving restraint techniques, except where deadly force is permissible, and others go even further and prohibit such force altogether. For example, Colorado prohibits law enforcement officers from using such techniques on any citizen for any purpose. Colo. Rev. Stat. Ann. § 18-1-707 (West 2020).[8] Other states, like Minnesota, identify force that restricts the ability to breathe as deadly and prohibit its use except where deadly force is

[8] See also Cal. Gov't Code § 7286.5 (Filed with Secretary of State Sept. 30, 2020); D.C. Code Ann. §5-125.03 (West 2001) (prohibiting the use of trachea holds under any circumstances); Nev. Rev. Stat. Ann. § AB 3, § 4 (West 2020).

necessary. Minn. Stat. Ann. § 609.06 (West 2020).[9] Notably, New York and Delaware have criminalized the use of such techniques by police officers as felonies, and Utah makes it a felony for an officer to "restrain a person by the application of a knee applying pressure to the neck or throat of a person."[10]

Even where state law is silent on the matter, law enforcement agencies have implemented policies that discourage and prohibit the use of restraints that may result in asphyxiation. The eight largest police departments in the country prohibit or have a moratorium on the use of choke holds or similar restraints, unless deadly force is necessary.[11] A

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[9] See also Conn. Gen. Stat. Ann. § 53a-22 (West 2020) (adding the prohibition of choke holds or other restraints that "impede[] the ability to breathe or restricts blood circulation to the brain" unless deadly force is necessary, effective April 1, 2021); D.C. Code Ann. §5-125.03 (West 2001) (prohibiting use of carotid artery hold, except where lethal force is necessary); Iowa Code Ann. § 804.8 (West 2020); 720 Ill. Comp. Stat. Ann. 5/7-5.5 (West 2016) (prohibiting choke holds except where deadly force is justified); N.H. Rev. Stat. Ann. § 627:5 (2020) (same); Or. Rev. Stat. Ann. § Ch. 3, § 2 (West 2020).

[10] N.Y. Penal Law § 121.13-a (McKinney 2020) (aggravated strangulation where officer commits crime of criminal obstruction of breathing or blood circulation); Del. Code Ann. tit. 11, § 607A (West 2020) (similar definition of aggravated strangulation, with exception that use of chokeholds is justifiable when deadly force is necessary); Utah Code Ann. § 53-13-115 (West 2020).

[11] See New York Police Department, Force Guidelines, Procedure No. 221-01 (June 1, 2016) (prohibiting any force,

including choke holds, on a restrained individual "unless necessary to prevent injury, escape or to overcome active physical resistance or assault"), https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg221-01-force-guidelines.pdf; Los Angeles Police Department, Moratorium on Training and Use of the Carotid Restraint Control Hold (June 7, 2020), http://www.lapdonline.org/home/news_view/66659; Chicago Police Department, General Order G03-02, Use of Force (Feb. 28, 2020) (defining deadly force, in part, as "other maneuvers for applying direct pressure on a windpipe or airway" and prohibiting use of deadly force "against a person who is a threat only to himself, herself, or property"), http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-8fff-44306f3da7b28a19.pdf?hl=true; Houston Police Department, General Order No. 600-17, Response to Resistance (June 19, 2020), https://www.houstontx.gov/police/general_orders/600/600-17_ResponseToResistance.pdf; City of Phoenix, City Counsel Policy Session (June 9, 2020) (noting Police Chief Jeri Williams "suspended the use of carotid control technique effective immediately"), https://www.phoenix.gov/cityclerksite/City%20Council%20Meeting%20Files/6-9-20%20Policy%20Minutes%20-%20Online.pdf#search=%22carotid%22; Las Vegas Metropolitan Police Department, Procedural Order 046-20, Use of Force Policy (July 8, 2020) (banning chokeholds), https://www.lvmpd.com/en-us/InternalOversightConstitutionalPolicing/Documents/PO-046-20%20Use%20of%20Force.pdf; Philadelphia Police Department Directive 10.2, Use of Moderate/Limited Force (updated Sept. 1, 2020) (prohibiting neck restraints and transporting individuals in a face down position to prevent positional asphyxia), https://www.phillypolice.com/assets/directives/D10.2-UseOfModerateLimitedForce.pdf; San Antonio Police

survey conducted recently found that at least 32 of the nation's largest police departments have banned or strengthened restrictions on restraints that pose a substantial risk of asphyxiation.[12] And the Department of Justice for decades has stressed that "the use of maximal, prone restraint techniques should be avoided."[13]

This Court should grant certiorari as well because the Eighth Circuit's decision is inconsistent with the laws and rules governing law enforcement across the United States that prohibit asphyxiation of civilians by police in the circumstances presented in this case.

IV. THE NATIONAL RULE IS ESSENTIAL TO OUR SYSTEM OF CRIMINAL JUSTICE

This Court stressed in *Garner* that "[t]he use of deadly force . . . frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." 471 U.S. at 9. Preservation of the life of a civilian accused of a crime is a prerequisite to the procedural protections

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Department, General Manual, Procedure 501 Response to Resistance (Sept. 14, 2020) (prohibiting use of lateral vascular neck restraint), https://www.sanantonio.gov/Portals/0/Files/SAPD/OpenData/501-UseOfForce.pdf.

[12] Kimberly Kindy, et al., *Half of the Nation's Largest Police Departments Have Banned or Limited Neck Restraints Since June*, Wash. Post, Sept. 6, 2020, at 2, https://www.washingtonpost.com/graphics/2020/national/police-use-of-force-chokehold-carotid-ban/#survey-results.

[13] U.S. Dep't of Justice, *Positional Asphyxia—Sudden Death* (June 1995), https://www.ncjrs.gov/pdffiles/posasph.pdf.

guaranteed by our system of criminal justice. Officials in free societies do not enjoy a privilege to kill civilians. *Kerry v. Din*, 576 U.S. 86, 91 (2015) ("[W]ithout due process, 'no man [may] be taken or imprisoned'; 'disseised of his lands, or tenements, or dispossessed of his goods, or chattels'; 'put from his livelihood without answer'; 'barred to have the benefit of the law'; denied 'the franchises, and priviledges, which the subjects have of the gift of the king'; 'exiled'; or 'forejudged of life, or limbe, disherited, or put to torture, or death.'") (quoting 1 E. Coke, *The Second Part of the Institutes of the Laws of England* 46-48 (1797)).

The rule announced in *Garner* is designed to ensure that deadly force is used only in extreme circumstances where other lives are imminently and seriously threatened. Nicholas Gilbert's case is nothing of the sort. Not only was he jailed, but within his cell he was restrained with handcuffs and shackles when the defendants asphyxiated him. It would be perverse to allow officials to use deadly force when the only asserted justification was to prevent the civilian from harming himself while fully restrained. Yet the Eighth Circuit has endorsed deadly force in precisely those circumstances.

The family of an arrestee or detainee who dies at the hands of government officials outside of the normal criminal procedural process has little federal recourse other than a civil rights action under Section 1983. Criminal prosecutions of

government officials for excessive force are rare.[14] Thus, civil suits to enforce the Fourth and Fourteenth Amendments are the only effective mechanism to apply foundational constitutional limits in this context and to deter officials who might otherwise use deadly force inappropriately. *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) ("The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights[.]").

Unless the decision below is reversed, the use of deadly force by police and jailers in the Eighth Circuit will be governed by a wholly different standard than that in other jurisdictions. This gap in accountability will have the effect of delegating to individual officers in the Eighth Circuit the discretion to apply deadly force even where it is unnecessary and wholly disproportionate. More suspects will die, and public confidence in our police and criminal justice system will continue to suffer.

This Court can avoid these consequences by simply making clear that the Fourth Amendment

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[14] Marcus R. Nemeth, *How Was That Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers*, 60 B.C. L. Rev. 989, 991-92 (2019); see also Philip M. Stinson, et. al., *On-Duty Police Shootings: Officers Charged with Murder or Manslaughter 2005-2018* (Mar. 2019), Criminal Justice Faculty Publications 98, at 2 (finding that although 900-1000 people are killed each year by on-duty officers, between 2005-2018, only 97 have been arrested, and 35 convicted, of a crime resulting from an on-duty shooting), https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1097&context=crim_just_pub.

rule prohibiting the use of deadly force against persons who pose no risk of death or serious bodily injury applies whether that force is a gunshot or asphyxiation. And it will confirm the rule in the other circuits, namely that officers cannot use asphyxiation against restrained arrestees and detainees who pose no threat. A uniform standard in this context would inform law enforcement officers and jail staff of the constitutional constraints on uses of deadly force, resulting in better prepared and more effective officers and improved on-the-spot decision making. Improved policing and jail practices, in turn, would deter police misconduct and ensure the safety of both members of the public and government officials alike.

CONCLUSION

For the foregoing reasons, amici urge this Court to grant the Petition and reestablish the uniform national rule prohibiting officials from using deadly force against restrained arrestees and detainees who pose no threat to officers or others.

Respectfully submitted,

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