No. 20-1908

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANGELA L. LAWHON,
as Administrator of the Estate of Joshua L. Lawhon

Plaintiff-Appellee,

v.

JOHN EDWARDS, *ET AL.*,

Defendants-Appellants.

On Appeal From the United States District Court for the Eastern District of Virginia, Richmond Division
(Hon. Henry E. Hudson, Senior United States District Judge)

BRIEF OF THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS & URBAN AFFAIRS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
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No. 20-1908 Caption: Lawhon v. Edwards, et al.

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Washington Lawyers' Committee for Civil Rights and Urban Affairs
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Jonathan Smith Date: November 19, 2020

Counsel for: Washington Lawyers' Committee

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Washington Lawyers' Committee for Civil Rights & Urban Affairs (the "WLC") was founded in 1968 to provide *pro bono* legal services to address issues of discrimination and entrenched poverty. Since then, it has successfully handled thousands of civil rights cases on behalf of individuals and groups.

Many of the WLC's clients bring claims that their constitutional rights were violated by government officials. In many of these cases, like in Mr. Lawhon's case, the WLC's clients face an immediate qualified immunity challenge. Accordingly, the WLC has an interest in ensuring that the qualified immunity doctrine is not applied in an overbroad fashion that precludes relief for plaintiffs whose constitutional rights were plainly violated under any reasonable understanding of the law.

Moreover, the WLC's clients are geographically diverse. As such, the WLC has an interest in having this Court further clarify the application of the qualified immunity doctrine in the Fourth Circuit and to align its approach with other federal courts of appeals. The alleged facts causing Mr. Lawhon's death resemble facts that generated clear law in other circuits and provide this Court the opportunity to do the same.

STATEMENT OF COMPLIANCE WITH RULE 29(a)

The WLC obtained consent to file this brief from both Plaintiff-Appellee Angela Lawhon and Defendants-Appellants John Edwards and Lashaun Turner.[1]

This brief is submitted pursuant to Rule 29 of the Federal Rules of Appellate Procedure. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amicus curiae, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

[1] The WLC also obtained consent to file this brief from Defendants Christopher Tenley and Alexander Mayes, although they are not parties to this appeal.

SUMMARY OF THE ARGUMENT

This case presents the opportunity for this Court to align itself with its sister circuits and provide direct guidance to district courts by confirming that qualified immunity does not insulate public officials from liability when they asphyxiate and kill individuals, such as Joshua Lawhon, who pose no threat. In determining whether the defense of qualified immunity shields a public official from liability, a court must determine: (1) whether there was a violation of a constitutional right, and (2) whether the law was clearly established so as to put the government official on notice that he or she was violating the law. *Ray v. Roane*, 948 F.3d 222, 226 (4th Cir. 2020). This Court should answer both questions in the affirmative.

In the seventeen years prior to Mr. Lawhon's death, five courts of appeals uniformly held that it is objectively unreasonable to "[c]reat[e] asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect" and that the application of such pressure "constitutes objectively unreasonable excessive force." *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004); *accord McCue v. City of Bangor*, 838 F.3d 55, 64 (1st Cir. 2016); *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008); *Abdullahi v. City of Madison*, 423 F.3d 763, 770 (7th Cir. 2005); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003). This Court has issued similar decisions, noting that police officers cannot continue to use

force on individuals after they are handcuffed and restrained on the ground. *Estate of Jones ex rel. Jones v. City of Martinsburg*, 961 F.3d 661, 668 (4th Cir. 2020); *see also Young v. Prince George's Cnty.*, 355 F.3d 751, 757–58 (4th Cir. 2004). This abundance of authority provided clear notice to Appellants that the conduct alleged in the Complaint was unreasonable.

Moreover, this case exemplifies why a qualified immunity "defense faces a formidable hurdle" on a motion to dismiss. *See Owens v. Balt. City State's Att'y's Office*, 767 F.3d 379, 396 (4th Cir. 2014). Accepting the allegations in the Complaint as true, which this Court must, Appellants caused Mr. Lawhon's death by pressing his face into the ground and applying force to his body for nearly six minutes—all after he was handcuffed and despite never being suspected of committing a crime. On its face, therefore, the Complaint provides sufficient facts to state a plausible claim for relief under 42 U.S.C. § 1983, and the lower court appropriately denied the motion to dismiss. Further, Appellants' arguments that their actions were objectively reasonable rest on factual disputes, which are not properly addressed at the motion to dismiss stage. At this early stage, Plaintiff need not introduce evidence to support her allegations, nor may Appellants undermine those allegations with their own, unsupported assertions of fact.

The district court correctly rejected Appellants' defense of qualified immunity on their motion to dismiss. This Court should affirm the district court's decision.

ARGUMENT

On the night of January 18, 2018, Officers John Edwards and Lashaun Turner (collectively, Appellants), as well as two EMTs,[2] arrived at the home of Joshua Lawhon in response to a 911 call from Mr. Lawhon's roommate, who sought medical care for Mr. Lawhon. Mr. Lawhon had not committed a crime. He was not suspected of possessing a weapon. He did not pose a threat to Appellants. Yet, as a result of unnecessary and forceful conduct taken by Appellants and the EMTs, by the end of that night, doctors pronounced Mr. Lawhon brain dead. He died two days later. The alleged cause: asphyxiation and cardiac arrest resulting from the nearly six minutes that Appellants pushed Mr. Lawhon face-down into a pillow with his hands cuffed behind his back. Shockingly, Appellants claim that this reckless conduct was an attempt to render aid to Mr. Lawhon.

Sadly, Mr. Lawhon's story is not unique. Indeed, this past Memorial Day, it was the death of George Floyd at the hands of four members of the Minneapolis Police Department, which sparked protests across the nation. *See* Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. Times (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html. In the

[2] Defendants Alexander Mayes and Christopher Tenley separately filed notices of appeal from the district court's denial of their motions to dismiss. *See Lawhon v. Mayes*, No. 20-1906 (4th Cir. filed Aug. 24, 2020); *Lawhon v. Tenley*, No. 20-1907 (4th Cir. filed Aug. 24, 2020). Although the WLC has not concurrently filed this brief in each action, the arguments presented apply with equal force to each.

aftermath of Mr. Floyd's death, a USA Today investigative report revealed as many as 134 individuals have died from asphyxiation while in police custody over the past decade. Katie Wedell et al., *George Floyd is Not Alone. "I Can't Breathe" Uttered by Dozens in Fatal Police Holds Across U.S.*, USA Today (June 25, 2020), http://www.usatoday.com/in-depth/news/investigations/2020/06/13/george-floyd-not-alone-dozens-said-cant-breathe-police-holds/3137373001/. Many of these individuals—like Mr. Lawhon—never committed a crime but instead suffered from underlying mental health issues or were under the influence of narcotics or alcohol. *See id.*

For the past twenty years, courts across the nation have consistently reached the same legal conclusion: it is objectively unreasonable to use force sufficient to asphyxiate an individual who has been handcuffed and restrained on the ground, who has committed no crime, and who poses no threat. Indeed, prior to the night that Appellants interacted with Mr. Lawhon, at least five courts of appeals had concluded that the same type of force that allegedly killed Mr. Lawhon violates an individual's rights under the Fourth Amendment. Thus, contrary to Appellants' assertions, the district court did not reach a revolutionary conclusion in denying their motion to dismiss. Rather, the district court's order closely tracked nearly two decades of persuasive authority, which makes clear that Appellants violated Mr. Lawhon's constitutional rights. Appellants—or any other public official—should

not be allowed to continue to plead ignorance. This Court should affirm the district court's denial of Appellants' motion to dismiss, and emphasize that qualified immunity provides no safe harbor, to anyone, for the egregious conduct alleged in this case.

I. A Brief History of Qualified Immunity

The history underlying the qualified immunity doctrine may assist the Court in understanding the WLC's view that this case is an opportunity for this Court to join its sister circuits and determine that qualified immunity does not insulate public officials from liability when they asphyxiate and kill individuals. Indeed, "[w]ading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal court judges routinely face." Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. Ann. Surv. Am. L. 445, 447 (2000). However, courts were not always required to consider qualified immunity defenses. Indeed, 42 U.S.C. § 1983, as originally conceived, did not contain any reference to immunities or defenses and was not generally understood as providing any at the time of its enactment. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45 (2018). Instead, it provided an avenue for citizens to bring cases against public officials for civil rights and constitutional violations. Nevertheless, in 1967, the Supreme Court, in *Pierson v. Ray*, 386 U.S. 547 (1967), borrowed from the common

law to make the qualified immunity defense available to defendants facing Section 1983 liability.

In *Harlow v. Fitzgerald*, the Court introduced the objective inquiry that is used today. 457 U.S. 800, 818 (1982). As such, the Court required lower courts to determine whether a violation of a constitutional right had occurred and whether such right was "clearly established" at the time of the violation. *Id.* In a sharp departure from the common law justification for qualified immunity, the *Harlow* Court found that too many meritless Section 1983 claims were being allowed to reach trial. *Id.* at 815. The Court noted that courts were too frequently questioning officials' subjective good faith as grounds to deny motions for summary judgment, which require genuine disputes of material fact to go to the jury. *Id.* at 816. This inquiry created "substantial" litigation costs, which the Court deemed unjustifiable when balanced against the need to consider officials' subjective motives. *Id.* at 816–17. It reasoned that an objective standard, measured by whether an official's conduct violated "clearly established" statutory or constitutional rights, would more efficiently dispose of meritless Section 1983 claims. *Id.* at 818. Animating the *Harlow* Court's move towards an objective standard was a fear of "excessive disruption of government." *Id.*

However, the Court was quick to note that an objective qualified immunity test was not a "license to lawless conduct." *Id.* at 819. Instead, "[w]here an official

could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Id.* The key questions, then, were whether the "public interest" would best be served by granting qualified immunity and whether the government official was put on notice that his or her conduct violated constitutional rights.

The Court's qualified immunity jurisprudence has been the subject of numerous calls for reconsideration. *See, e.g.*, *Cole v. Carson*, 935 F.3d 444, 470 (5th Cir. 2019) (Willett, J., dissenting) ("The entrenched, judge-invented qualified immunity regime ought not be immune from thoughtful reappraisal."); *Jamison v. McClendon*, __ F. Supp. 3d __, 2020 WL 4497723, at *29 (S.D. Miss. Aug. 4, 2020) ("Just as the Supreme Court swept away the mistaken doctrine of 'separate but equal,' so too should it eliminate the doctrine of qualified immunity."); Hon. James A. Wynn Jr., *As a Judge, I Have to Follow The Supreme Court. It Should Fix This Mistake.*, Wash. Post (June 12, 2020), http://www.washingtonpost.com/opinions/2020/06/12/judge-i-have-follow-supreme-court-it-should-fix-this-mistake/ ("The judge-made law of qualified immunity subverts the Civil Rights Act of 1871 . . . .").

Indeed, members of the Supreme Court have registered their discomfort with the doctrine, either because of its divergence from Section 1983's original meaning, *see Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part

and concurring in the judgment) ("In the decisions following *Pierson*, we have 'completely reformulated qualified immunity along principles not at all embodied in the common law.'" (quoting *Anderson v. Creighton*, 483 U.S. 635, 645 (1987))), or its ubiquitous and one-sided application, *see Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (noting that such a "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers"). And this Court has recently made clear that it is tired of police officers using their authority, and the shield of qualified immunity, to kill people with impunity. *See Estate of Jones*, 961 F.3d at 673 ("This has to stop."). With this in mind, this Court can establish, once and for all, that conduct like the police officers' alleged conduct here, which led to Mr. Lawhon's death, must also stop.

II. The District Court Correctly Concluded that the Officers are Not Entitled to Rely on Qualified Immunity to Dismiss the Complaint.

Given the Supreme Court's continued adherence to the qualified immunity doctrine, the district court was required to analyze Appellants' qualified immunity defense. However, the district court correctly determined that Appellee's claims should not be dismissed at the motion to dismiss stage. To determine whether the defense requires dismissal of a plaintiff's claim for relief, this Court conducts a two-part inquiry. *Ray*, 948 F.3d at 226; *Estate of Jones*, 961 F.3d at 667 (applying qualified immunity standard at summary judgment). First, it must determine

whether the defendant has demonstrated that the complaint does not "allege[] or show[] facts that 'make out a violation of a constitutional right.'" *Owens*, 767 F.3d at 395 (quoting *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)); *see also Estate of Jones*, 961 F.3d at 667. Second, this Court determines whether "the right violated was clearly established" at the time of the violation. *Ray*, 948 F.3d at 226. Courts are free to address these questions in any order. *Pearson*, 555 U.S. at 227.

Each prong of the Court's qualified immunity analysis turns heavily on the facts of the particular case. *See Reed v. Palmer*, 906 F.3d 540, 548–49 (7th Cir. 2018). Thus, courts should be wary before dismissing a complaint under Federal Rule of Civil Procedure 12(b)(6) on qualified immunity. *Id.*; *see also Owens*, 767 F.3d at 396 ("A qualified immunity defense can be presented in a Rule 12(b)(6) motion, but . . . when asserted at this early stage in the proceedings, 'the defense faces a formidable hurdle' and is usually not successful.'" (quoting *Field Day, LLC v. Cnty. of Suffolk*, 46 F.3d 167, 191–92 (2d Cir. 2006)); *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 428 F.3d 223, 235 (6th Cir. 2005) (Sutton, J., concurring) ("Absent any factual development beyond the allegations in a complaint, a court cannot fairly tell whether a case is 'obvious' or 'squarely govern[ed]' by precedent, which prevents us from determining whether the facts of this case parallel a prior decision or not." (alteration in original)).

Because the Complaint plausibly alleges that Appellants violated Mr. Lawhon's constitutional rights, and because those rights were clearly established, Defendants' assertion of qualified immunity fails at both steps of the Court's analysis.

A. A Consensus of the Courts of Appeals Clearly Establishes That It Is Objectively Unreasonable to Suffocate a Nonthreatening, Prone, and Handcuffed Individual.

The defense of qualified immunity is only intended to shield public officials from liability where "their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). This means that public officials will be held liable for violations of "clearly established" constitutional rights—i.e., a right that is "sufficiently clear that a reasonable official would understand that what he is doing violates" it. *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004). In determining whether a right was clearly established, defendants often argue, as Appellants do here, that the plaintiff must point to a prior precedential case with almost identical facts. Edwards Br. at 20. If accepted, this narrow interpretation of the "clearly established" requirement makes it practically impossible for any new factual situation to be considered clearly established. This serves only to justify excessive force, no matter how abhorrent, simply because that exact unconstitutional behavior has not been previously litigated.

But this is not the law, and a court need not identify a perfectly identical set of facts for a right to be clearly established. As the Supreme Court recently confirmed, public officials can violate clearly established law even in factually novel scenarios. *See Taylor v. Riojas*, __ U.S. __, 2020 WL 6385693, at *2–3 (Nov. 2, 2020) (per curiam); *see also Owens*, 372 F.3d at 279 ("[T]he absence of controlling authority holding identical conduct unlawful does not guarantee qualified immunity."). In *Taylor*, the Court rejected the Fifth Circuit's narrow interpretation of the clearly established requirement, which rested on factual distinctions between the case before it and its own precedent. 2020 WL 6385693, at *1. In doing so, the Court reiterated that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question," particularly when that conduct is egregious. *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). *Taylor* thus reinforces this Court's precedents holding that even in the absence of binding authority or an "obvious" case, this Court may look to the decisions of the courts of appeals to determine whether a "consensus of cases of persuasive authority" clearly establishes the right in question. *Booker v. S.C. Dep't of Corrs.*, 855 F.3d 533, 543 (4th Cir. 2017) (quoting *Owens*, 372 F.3d at 280); *Ray*, 948 F.3d at 229 (concluding that defendants were not entitled to qualified immunity despite "no 'directly on-point, binding authority' in this circuit that establishes the principle" adopted); *accord District of Columbia v. Wesby*, 138 S. Ct. 577, 589–90

(2018) ("The rule must be settled law, which means it is dictated by controlling authority, or a robust consensus of cases of persuasive authority." (internal citations and quotation marks omitted)).

Here, the consensus of persuasive authority disposes of Appellants' qualified immunity defense. Prior to the night that Appellants interacted with Mr. Lawhon, at least five courts of appeals had concluded that conduct similar to that alleged to have killed Mr. Lawhon violates an individual's right to be free from the use of excessive force under the Fourth Amendment. Contrary to Appellants' assertions, the district court did not reach a radical conclusion in denying their motion to dismiss.[3]

As early as 2003, courts began to address factual scenarios similar to the circumstances alleged here, and have uniformly concluded that the application of force to a restrained individual violates the Fourth Amendment. In *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003), a trio of officers attempted to take a hallucinating, mentally-ill individual into custody pursuant to

[3] To the contrary, it would have been radical to grant a motion to dismiss on qualified immunity grounds. A study reviewing the dockets of nearly 1,200 lawsuits filed against state and local law enforcement defendants from 2011 and 2012 found that defendants raised qualified immunity approximately twice as often at the summary judgment stage as at the motion to dismiss stage, and only seven cases in the dataset were dismissed on qualified immunity grounds at the motion to dismiss stage. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 30, 45, 48 (2017).

California's involuntary psychiatric detention statute. *Id.* at 1054. During the course of the arrest, the officers held the man face-down on the ground and cuffed his arms behind his back. *Id.* Despite the fact that the man offered minimal resistance once he was handcuffed, two of the officers continued to apply force, placing their knees into his back and putting the weight of their body on him. *Id.* Even after the man began to suffer distress and complain that he could not breathe, the officers further restricted his ability to move by applying a hobble restraint to his legs. *Id.* at 1054–55. Shortly thereafter, he went limp, lost consciousness, and fell into a permanent vegetative state from brain damage—a result experts attributed to "a lack of oxygen to his heart . . . caused by mechanical compression of his chest wall." *Id.* at 1055.

The Ninth Circuit held that this conduct proved sufficient to demonstrate a violation of the man's Fourth Amendment right to be free from excessive force, particularly where, as here, the arrestee committed no crime and offered minimal (if any) resistance after handcuffing. As it explained, "[t]he officers—indeed, any reasonable person—should have known that squeezing the breath from a compliant, prone, and handcuffed individual despite his pleas for air involves a degree of force that is greater than reasonable." *Id.* at 1059. The court, however, did not stop there; it also concluded that the plaintiff's constitutional right was clearly established given the obviousness of the violation, publicity surrounding similar instances, and prior

federal cases "describ[ing] the dangers of pressure on a prone, bound, and agitated detainee." *Id*. at 1061.[4]

The Sixth Circuit followed suit the next year, affirming a jury verdict against a group of officers that caused an autistic man's death by applying force to his upper back as they restrained him face-down and handcuffed on the ground. *Champion*, 380 F.3d at 905. Although he was restrained, evidence available at summary judgment indicated that the officers "continued to sit or otherwise put pressure on [the decedent's] back while he was prone on the ground with his face in the carpet." *Id.* at 898. This, the Sixth Circuit concluded, was "not objectively reasonable," explaining 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.* at 903. Moreover, the court readily concluded, even without an in-circuit case directly on point, that the right was "clearly established." *Id.* at 903–04.

[4] The Ninth Circuit continues to invoke *Drummond* as clearly establishing that creating asphyxiating conditions constitutes excessive force, even when the suspect does not specifically "plead for air." *See Slater v. Deasey*, 789 F. App'x 17, 21 n.3 (9th Cir. 2019), *as amended on denial of reh'g en banc*, *cert. denied* (Oct. 13, 2020); *see also Abston v. City of Merced*, 506 F. App'x 650, 652 (9th Cir. 2013) ("A reasonable fact-finder 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 [decedent] was handcuffed and shackled, in a prone position, and surrounded by numerous officers."); *Arce v. Blackwell*, 294 F. App'x 259, 261–62 (9th Cir. 2008).

More courts followed in the wake of *Drummond* and *Champion*. In 2005, the Seventh Circuit reversed a district court's grant of summary judgment to a group of officers where the evidence created a triable issue of fact as to whether the defendant-officer "knelt on [the decedent] with enough force to inflict lethal injuries." *Abdullahi*, 423 F.3d at 770.[5] In 2008, the Tenth Circuit concluded that the evidence supported a finding that two Wyoming highway patrolmen violated clearly established law when they killed a suspected drunk driver by using compressional force to restrain him face down after handcuffing his hands behind his back and restraining his legs. *Weigel*, 544 F.3d at 1152–53. Indeed, as the court noted, at the time of the arrest "the law was clearly established that applying pressure to [the decedent'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." *Id.* at 1155.

[5] The Seventh Circuit's earlier decision in *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir. 1997), does not call into question the consensus of authority on this issue. *Contra* Edwards Br. at 18–19. The plaintiff's "theory of liability [in *Phillips*] rest[ed] … on the police's … failure to monitor a physically distressed prisoner." *Abdullahi*, 423 F.3d at 771 (discussing *Phillips*). In contrast, the plaintiff in *Abdullahi*, alleged that "[the defendant] knelt on the decedent's back with chest-crushing force" and that the decedent's injuries were "consistent with a crushing or squashing[-]type trauma." *Id.* Such is the difference between *Phillips* and the present case. Thus, because *Phillips* involves "different facts, a different theory of liability, and a crucial difference" in the alleged cause of death, *id.*, it has no bearing on the district court's qualified immunity inquiry here. *See McCue*, 838 F.3d at 64 n.3 (distinguishing *Phillips*).

Most recently—and barely a year before Mr. Lawhon's death—the First Circuit joined the Sixth, Seventh, Ninth, and Tenth Circuits when it dismissed an interlocutory appeal from the district court's denial of qualified immunity. *McCue*, 838 F.3d at 57. In *McCue*, officers were alleged to have killed an unarmed individual after restraining him on his chest under their collective weight. *Id.* at 56–57. The First Circuit held, in light of *Drummond*, *Champion*, *Abdullahi*, and *Weigl*, that it was 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.'" *Id.* at 64 (alteration in original) (quoting *Weigel*, 544 F.3d at 1155). Because the plaintiff introduced evidence sufficient to show that the "officers continued to exert force on [the] nonresisting" decedent, the court rejected the officers' qualified immunity defense and dismissed the appeal. *Id.* at 59, 63.[6]

Taken together, this consensus of authority plainly establishes the following principle: that it is objectively unreasonable to exert significant, continued force on a handcuffed, compliant individual lying prone on his stomach. *See*, *e.g.*, *id.* at 64;

[6] Consistent with *McCue*, this Court has recognized that it lacks jurisdiction to consider Appellants' interlocutory appeal to the extent their challenge turns on the district court's assessment of the factual record. *See Hicks v. Ferreyra*, 965 F.3d 302, 312 (4th Cir. 2020) ("'[*F*]*act*-related dispute[s] about the pretrial record' fall outside our limited jurisdiction." (second alteration in original) (quoting *Johnson v. Jones*, 515 U.S. 304, 307 (1995)).

Weigel, 544 F.3d at 1155; *Abdullahi*, 423 F.3d at 770; *Champion*, 380 F.3d at 901; *Drummond*, 343 F.3d at 1059. Although this Court has not yet had the opportunity to offer guidance as explicit as these circuits, its own precedent is consistent. For example, this Court has repeatedly held that "officers using unnecessary, gratuitous, and disproportionate force to seize a secured, unarmed citizen, do not act in an objectively reasonable manner." *Meyers v. Balt. Cnty.*, 713 F.3d 723, 734–35 (4th Cir. 2013) (quoting *Bailey v. Kennedy*, 349 F.3d 731, 744–45 (4th Cir. 2003)). And, as early as 2013, "it was already clearly established that suspects can be secured without handcuffs when they are pinned to the ground, and that such suspects cannot be subjected to further force." *Estate of Jones*, 961 F.3d at 668 (citing *Kane v. Hargis*, 987 F.2d 1005, 1008 (4th Cir. 1993)); *see also Young*, 355 F.3d at 753 (finding that officers' use of force against a cooperating, handcuffed individual created a question of fact as to whether the officers violated the Fourth Amendment). Thus, although these decisions do not address facts identical to those alleged in this case, the principles underlying this Court's prior holdings comport with the clear consensus of out-of-circuit authority addressing this identical issue. *See Owens*, 372 F.3d at 279.

Appellants' conduct, as alleged here, is no different than conduct that has repeatedly been held to be unconstitutional by courts of appeals across the nation. As the Complaint alleges, Appellants continued to apply force to Mr. Lawhon's

upper body over the course of several minutes, as he lay on the ground with his hands cuffed behind his back. And they applied this force until the results were fatal. Thus, the district court's decision was no aberration. Rather, it is the latest in a line of nearly twenty years of consensus: police officers act unreasonably when they use compressional force to restrain handcuffed, prone, and nonthreatening individuals. This Court should affirm the lower court's finding that Appellants are not entitled to a pre-discovery dismissal on qualified immunity grounds.

B. The District Court Correctly Concluded that Plaintiff Plausibly Alleged Appellants Violated Mr. Lawhon's Fourth Amendment Rights

In light of the precedent cited above, the question of whether Appellee has plausibly alleged a constitutional violation is simple. Accepting the allegations in the Complaint as true, which this Court must on a motion to dismiss, *Ray*, 948 F.3d at 226, Appellants applied a quantum of force sufficient to kill Mr. Lawhon. In light of the surrounding circumstances, this was objectively unreasonable, thereby violating Mr. Lawhon's Fourth Amendment right to be free from excessive force.

In determining whether an officer's use of force was objectively reasonable, this Court must balance the amount of force employed against (1) "the severity of the crime at issue"; (2) "the extent to which the suspect poses an immediate threat to the safety of the officers or others"; and (3) "whether [the arrestee] is actively resisting arrest or attempting to evade arrest by flight." *Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst*, 810 F.3d 892, 899 (4th Cir. 2016) (citing *Graham v*

Connor, 490 U.S. 386, 396 (1989)). For reasons offered in Appellee's brief, each of the *Graham* factors weighs in favor of this Court concluding that the substantial force allegedly used against Mr. Lawhon was not objectively reasonable. Mr. Lawhon had committed no crime; he had no weapon; he posed no immediate threat to the officers once handcuffed; and he offered little resistance in the nearly six minutes that Appellants applied suffocating pressure to his body. *See* Lawhon Resp. Br. at 37–49.

At bottom, Appellants' challenge to the district court's decision demonstrates why the question of qualified immunity is particularly inapt for resolution on a Rule 12(b)(6) motion to dismiss. Multiple courts recognize that the qualified immunity analysis is fact-dependent and is difficult to resolve at the motion to dismiss stage. Schwartz, *supra* note 3, at 53 n.128–29 (collecting cases). As the Seventh Circuit noted in *Abdullahi*, "[t]he reasonableness of [applying weight] on a prone individual's back during an arrest turns, at least in part, on how much force is applied" to that individual. *Abdullahi*, 423 F.3d at 771. But determining the amount of force applied is a question of fact, *see id.*, as it turns on medical evidence indicating the cause of death and whether that cause is consistent with asphyxiation. *See, e.g.*, *id.* ("medical experts . . . agree that [the decedent] died of a collapsed lung and other injuries consistent with extreme external pressure"); *McCue*, 838 F.3d at 60 ("expert witness[] attributed the likely cause of death to 'prolonged prone

restraint under the weight of multiple officers, in the face of a hypermetabolic state of excited delirium.'"); *Drummond*, 343 F.3d at 1053 (expert opined that the plaintiff's permanent coma was caused by a "lack of oxygen . . . caused by mechanical compression of his chest wall"). Additionally, medical evidence may reveal trauma—or a lack thereof—that is consistent with a significant use of force. *See Abdullahi*, 423 F.3d at 766, 769.[7]

But a plaintiff need not present such evidence at this stage of the litigation, and the Court must look only to the sufficiency of the allegations on the face of the complaint and any exhibits that have been incorporated. *See Ray*, 948 F.3d at 226. Here, Appellee's pleading makes two critical allegations, each of which is entirely consistent with the incorporated evidence: (1) that Appellants applied force to Mr. Lawhon for a substantial period of time after his initial seizure, during which he was restrained, **JA 25–28**; and (2) that Appellants' use of force was sufficient to kill Mr. Lawhon, **JA 28–31.** Although Appellants offer a different interpretation of the

[7] Questions remain at this stage in the litigation about Appellants' training that might inform whether "a reasonable officer" would have understood that Appellants' actions violated Mr. Lawhon's constitutional rights. *See Owens*, 372 F.3d at 279. Resolving cases such as this at the motion to dismiss stage, without the benefit of discovery, will frequently leave plaintiffs unable to demonstrate facts regarding the defendant's training or the reasons that such training was implemented—both of which may be relevant to whether the defendant's actions were objectively reasonable and whether the law was clearly established. *See Weigel*, 544 F.3d at 1155 (concluding that training implemented in response to that circuit's caselaw indicated that the law was clearly established).

minutes leading to Mr. Lawhon's death, "[a] Rule 12(b)(6) motion to dismiss does not resolve contests surrounding facts." *Ray*, 948 F.3d at 226 (quoting *Tobey v. Jones*, 706 F.3d 379, 387 (4th Cir. 2013)). Accordingly, the district court properly concluded that Appellee's pleading plausibly alleged a constitutional violation, and therefore, correctly denied Appellants' motion to dismiss.

CONCLUSION

The WLC respectfully submits that this case presents the Court with an ideal vehicle to confirm, consistent with the view of five other circuits, that an officer who "[c]reates asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect" uses a level of force that is objectively unreasonable. *Champion*, 380 F.3d at 902. This Court should conclude, as did the district court, that Mr. Lawhon's constitutional right to be free from such force was clearly established and that, based on the facts alleged in the Complaint, the force applied to Mr. Lawhon—who had committed no crime, had no weapon, and posed no threat to Appellants—was objectively unreasonable. Such a ruling will not only assist the lower courts in future cases, but will also provide necessary and unequivocal notice to the many police departments in this Circuit that this type of conduct violates the Constitution.

For these reasons, this Court should affirm the district court's denial of Appellants' motion to dismiss.

Date: November 19, 2020

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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