(ORDER LIST: 594 U.S.)

MONDAY, JUNE 28, 2021

CERTIORARI -- SUMMARY DISPOSITIONS

19-1459 POLARIS INNOVATIONS LIMITED V. KINGSTON TECHNOLOGY CO., ET AL.

20-74 IANCU, ANDREI V. LUOMA, EUGENE H., ET AL.

20-314 RPM INTERNATIONAL INC., ET AL. V. STUART, ALAN, ET AL.

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Federal Circuit for further consideration in light of *United States* v. *Arthrex*, *Inc.*, 594 U. S. ___ (2021).

20-853 IANCU, ANDREI V. FALL LINE PATENTS, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Federal Circuit for further consideration in light of *United States* v. *Arthrex*, *Inc.*, 594 U. S. ___ (2021). Justice Alito took no part in the consideration or decision of this petition.

20-7523 BRYANT, JOSEPH M. V. LOUISIANA

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Court of Appeal of Louisiana, Second Circuit for further consideration in light of *Ramos* v. *Louisiana*, 590 U. S. ___ (2020).

ORDERS IN PENDING CASES

20M99 JOHNSON, JUNE V. WELLS FARGO BANK, N.A., ET AL.

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

20M100 WHITEHEAD, DAVID L. V. USDC WD AR

The motion for leave to proceed as a veteran is denied.

20M101 RICE, RONNIE J. V. VANIHEL, WARDEN

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

20M102 DRAKES, DONTOUR D. V. UNITED STATES

The motion for leave to file a petition for a writ of certiorari with the supplemental appendix under seal is granted.

152, ORIG. MONTANA AND WYOMING V. WASHINGTON

154, ORIG. NEW HAMPSHIRE V. MASSACHUSETTS

The motions for leave to file the bills of complaint are denied. Justice Thomas and Justice Alito would grant the motions.

20-1143 BADGEROW, DENISE A. V. WALTERS, GREG, ET AL.

The motion of petitioner to dispense with printing the joint appendix is granted.

20-7883 O'DONNELL, KATHLEEN M. V. SAUL, COMM'R, SOCIAL SEC.

The motion of petitioner for leave to proceed *in forma pauperis* is denied. Petitioner is allowed until July 19, 2021, within which to pay the docketing fee required by Rule 38(a).

CERTIORARI GRANTED

20-979 PATEL, PANKAJKUMAR S., ET AL. V. GARLAND, ATT'Y GEN.

The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.

20-1029 AUSTIN, TX V. REAGAN NAT. ADVERTISING, ET AL.

The petition for a writ of certiorari is granted.

CERTIORARI DENIED

19-66 RICKS, GEORGE Q. V. IDAHO CONTRACTORS BOARD, ET AL.

19-648 CACI PREMIER TECHNOLOGY, INC. V. AL SHIMARI, SUHAIL N. A., ET AL.

19-841 HOUSE OF REPRESENTATIVES V. TEXAS, ET AL.

20-28 PRICEWATERHOUSECOOPERS, ET AL. V. LAURENT, TIMOTHY, ET AL.

20-92) COMCAST CABLE COMMUNICATIONS V. PROMPTU SYSTEMS CORP., ET AL.
)
20-271) VILOX TECHNOLOGIES, LLC V. IANCU, ANDREI
)
20-414) ROVI GUIDES, INC. V. COMCAST CABLE COMMUNICATIONS
)
20-679) MICRON TECHNOLOGY, INC. V. NORTH STAR INNOVATIONS, INC.

20-402 RICHARDSON, CHAD, ET UX. V. OMAHA SCHOOL DISTRICT

20-1013 SIMON, CLARENCE J. V. DIR., OWCP, ET AL.

20-1113 AMERICAN HOSPITAL ASSN., ET AL. V. BECERRA, SEC. OF H&HS

20-1129 FLYNN, SCOTT P. V. UNITED STATES

20-1158 NORTH AMERICAN MISSION BOARD V. McRANEY, WILL

20-1173 PINEDA-SABILLON, GLENDY Y. V. GARLAND, ATT'Y GEN.

20-1174 LIPPARD, KIM, ET VIR V. HOLLEMAN, LARRY, ET AL.

20-1183 TRI-STATE ZOO OF MD, ET AL. V. PETA

20-1203 MOOSE JOOCE, ET AL. V. FDA, ET AL.

20-1215 NORTH AMERICAN MEAT INSTITUTE V. BONTA, ATT'Y GEN. OF CA, ET AL.

20-1218 EDWARDS, DEMETRIUS W., ET AL. V. BURT, WARDEN, ET AL.

20-1286 SACRAMENTO COUNTY, CA V. HARDESTY, JOSEPH, ET AL.

20-1294 CAMPBELL, SIMON, ET AL. V. PA SCH. BDS. ASS'N, ET AL.

20-1306 WALKER, ALAN D. V. MISSISSIPPI

20-1313 SHIVKOV, DIMITRI, ET AL. V. ARTEX RISK SOLUTIONS, ET AL.

20-1354 PORTLAND, OR, ET AL. V. FCC, ET AL.

20-1357 BD. OF CTY. COMM'RS V. EXBY-STOLLEY, LAURIE

20-1376 ABATTI, MICHAEL, ET AL. V. IMPERIAL IRRIGATION DISTRICT

20-1448 CORBELLO, DONNA V. VALLI, FRANKI, ET AL.

20-1465 WANG, CHANG, ET AL. V. CARTER-GARRETT, TERILYN, ET AL.

20-1473 CRITTENDEN, ALAN W. V. CRITTENDEN, MARIKO C.

20-1475 PERKINS, WESLEY V. MISCHTIAN, JOHN, ET AL.

20-1482 MELCHIONE, CHERI L. V. TEMPLE, TIMOTHY

20-1491 LASHEEN, WAEL V. SUPREME COURT OF OH

20-1495 McINTYRE, KAREN V. V. McINTYRE, KEVIN L., ET AL.

20-1496 ELATRACHE, ALI M. V. JACKSON, WARDEN

20-1505 MERCHANT, ZAINAB, ET AL. V. MAYORKAS, SEC. OF HOMELAND

20-1508 PIERSON, SUSAN V. HUDSON INSURANCE CO., ET AL.

20-1510 TAFUTO, LOUIS V. TRUMP FOR PRESIDENT, ET AL.

20-1514 DODD, ROBERT J. V. CLARKE, DIR., VA DOC

20-1515 ASSAD, JASON V. WASMER, WARDEN, ET AL.

20-1525 ARCHER, LEWIS V. AMERICA'S FIRST FED. CREDIT

20-1535 DIAZ, KEVIN V. JOHNSON, ASHLEY

20-1537 DICKINSON, TERENCE K. V. HSBC BANK USA, N.A., ET AL.

20-1540 EDNEY, VICTOR J. V. HINES, EONDRA L., ET AL.

20-1543 McNIECE, ADAM P. V. YANKEETOWN, FL, ET AL.

20-1544 ROSS, FELICIA V. PEREGRINE HEALTH SERV., ET AL.

20-1545 TCL COMMUNICATION, ET AL. V. GODO KAISHA IP BRIDGE 1

20-1564 PERNA, JAMES M. V. HEALTH ONE CREDIT UNION, ET AL.

20-1597 CONTI, KATHRYN M. V. ARROWOOD INDEMNITY CO.

20-1609 SEATON, DAVID R. V. JOHNSON, BLAKE, ET AL.

20-1625 LILLIE, DAVID V. MANTECH INT'L CORP.

20-1637 DICKINSON, JANICE V. RYAN SEACREST PROD., ET AL.

20-1645 COLLINS, DON W. V. TEXAS

20-1656 JOHNSON, CARMEN V. UNITED STATES

20-1663 NORWOOD, MATTHEW D. V. UNITED STATES

20-1671 HO, CHI PING P. V. UNITED STATES

20-1680 ACI INFORMATION GROUP V. MIDLEVELU, INC.

20-6600 SMILEY, THRONE T. V. UNITED STATES

20-6948 CROGHAN, BEAU B. V. UNITED STATES

20-7160 GARRISON, EMMETT V. LOUISIANA

20-7189 THOMAS, BERNARD V. UNITED STATES

20-7210 CONNELL, TESFA V. NEW YORK

20-7327 WARD, TIMOTHY A. V. UNITED STATES

20-7460 RODRIGUEZ FERNANDEZ, CARLOS V. UNITED STATES

20-7522 JONES, JOSHUA R. V. UNITED STATES

20-7528 FIGUEROA-SERRANO, JONATHAN V. UNITED STATES

20-7533 JAMES, PRESTON V. UNITED STATES

20-7549 ARNOLD, SHANE V. UNITED STATES

20-7611 GARRISON, JAMAR V. UNITED STATES

20-7667 KENDRICK, TROY V. UNITED STATES

20-7815 BARBEE, SYLVESTER O. V. BOYD, JASON, ET AL.

20-7823 TROWBRIDGE, ALAN V. WOODS, WARDEN

20-7827 PLOURDE, GLEN D. V. BELLAVIA, STEPHEN C.

20-7828 MITCHELL, KEVIN N. V. SHINN, DIR., AZ DOC, ET AL.

20-7835 COOPER, STEVEN V. FLORIDA

20-7841 MANOR, SYLVIA J. V. UNITED OF OMAHA LIFE INS. CO.

20-7843 JOHNSON, TIMOTHY H. V. BAKER, WARDEN

20-7844 JOLIVETTE, PAUL P. V. USDC ND CA

20-7848 DAVIS, ASTARTE V. WILSON, JUDGE, ET AL.

20-7859 LEE, DENVER V. UNITED STATES

20-7865 FROMAN, TERRY L. V. OHIO

20-7867 GROFFEL, HOWARD A. V. VIRGINIA

20-7871 WALKER, JEMONE L. V. UNITED STATES

20-7881 OPPEL, STEVEN L. V. MINNESOTA

20-7908 KING, DERRICK M. V. SAUL, COMM'R, SOCIAL SEC.

20-7919 WEST-EL, EDWARD S. V. ONEAL, C. K.

20-7926 EL-AMIN, SADAT V. LOUISIANA

20-7971 RIVERA, DEREK A. V. HORTON, WARDEN

20-7980 BETHEA, TAKIESE N. V. WEST VIRGINIA

20-7987 CLINTON, GREGORY K. V. RILEY, CHERYL D.

20-8017 BRENHAM, SUBRINA V. KEMP, JOSEPH, ET AL.

20-8057 AIGBEKAEN, RAYMOND I. V. UNITED STATES

20-8087 ERICKSON, WILLIAM E. V. LUMPKIN, DIR., TX DCJ

20-8105 LITTLEPAGE, DANIEL V. COURT OF APPEALS OF OH

20-8112 JACKSON, RICHARD K. V. UNITED STATES

20-8129 MILLER, JOSEPH V. UNITED STATES

20-8132 VERKLER, GEORGE V. UNITED STATES

20-8136 McAFEE, EBONE J. V. UNITED STATES

20-8137 McRAE, MARILYNN M. V. HARRISON, SHERIFF

20-8138 PENA, EDDY V. UNITED STATES

20-8146 SMITH, EDWARD L. V. UNITED STATES

20-8152 MARTINEZ-FIGUEROA, MIGUEL V. UNITED STATES

20-8156 RENTERIA, RICARDO V. UNITED STATES

20-8160 BONTEMPS, TAMARAN E. V. UNITED STATES

20-8168 COLBY, ROSS V. UNITED STATES

20-8169 JIMENEZ, YESSENIA V. UNITED STATES

20-8173 McLEAN, LENROY V. UNITED STATES

20-8174 LEMO, ESAD V. PENNSYLVANIA

20-8177 BROOKS, MICHAEL T. V. AGATE RESOURCES, INC.

20-8183 SANGANZA, THEMBA B. V. WARDEN, ALLENWOOD FCI

20-8184 CENTENO, RONALD V. UNITED STATES

20-8186 YOUNG, MICHAEL J., ET AL. V. UNITED STATES

20-8189 GRIFFITH, HEATHER D. V. UNITED STATES

20-8191 HILL, STEVEN E. V. RIVERA, WARDEN

20-8192 NEWBALL-MAY, JORGE R. V. UNITED STATES

20-8194 MORENO, IRVIN V. HENDRIX, DeWAYNE

20-8209 EDWARDS, DENNIS J. V. LARSON, KIM

20-8212 BRANDAO, DANY L. V. UNITED STATES

The petitions for writs of certiorari are denied.

20-319 COMCAST CORPORATION, ET AL. V. VIAMEDIA, INC.

The petition for a writ of certiorari is denied. Justice Barrett took no part in the consideration or decision of this petition.

20-1043 UNITED STATES V. CANO, MIGUEL A.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied.

20-1138 CIMZNHCA, LLC V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Barrett took no part in the consideration or decision of this petition.

20-1163 GLOUCESTER COUNTY SCHOOL BOARD V. GRIMM, GAVIN

The petition for a writ of certiorari is denied. Justice Thomas and Justice Alito would grant the petition for a writ of certiorari.

20-1675 PHILLIPS, MELVIN L., ET AL. V. ONEIDA INDIAN NATION

The motion of Congressperson Claudia Tenney for leave to file a brief as *amicus curiae* is granted. The petition for a

writ of certiorari is denied.

20-7474 KELLEY, EZRALEE J. V. UNITED STATES

The motion of Americans for Prosperity Foundation, et al. for leave to file a brief as *amici curiae* is granted. The petition for a writ of certiorari is denied.

20-7836 ALLEN, DERRICK M. V. TED WIRE, ET AL.

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8. As the petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

20-7875 TRUONG, LISA V. UTC AEROSPACE SYSTEMS

The petition for a writ of certiorari is denied. Justice Alito took no part in the consideration or decision of this petition.

HABEAS CORPUS DENIED

20-8001 IN RE GERALD R. PIZZUTO

20-8205 IN RE JOHN L. McKENZIE

20-8222 IN RE MARSHALL D. WILLIAMS

The petitions for writs of habeas corpus are denied.

20-8198 IN RE KHAYREE SMITH

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of habeas corpus is dismissed. See Rule 39.8. As the petitioner has repeatedly

abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

20-8226 IN RE FRANCIS BOYD

The petition for a writ of habeas corpus is denied. Justice Alito took no part in the consideration or decision of this petition.

MANDAMUS DENIED

20-8157 IN RE BLAKE J. SANDLAIN

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of mandamus is dismissed. See Rule 39.8.

REHEARINGS DENIED

18-8621 INGRAM, ROUMMEL V. PRELESNIK, WARDEN

20-1194 LOPEZ, ARTHUR V. CORONA POLICE DEPT., ET AL.

20-6767 THOMAS, MARLON V. ILLINOIS

The petitions for rehearing are denied.

20-7170 IN RE ABHIJIT PRASAD

The petition for rehearing is denied. Justice Breyer took no part in the consideration or decision of this petition.

20-6929 HUGUELEY, STEPHEN V. MAYS, WARDEN

The motion for leave to file a petition for rehearing is denied.

ATTORNEY DISCIPLINE

D-3071 IN THE MATTER OF DISBARMENT OF FREDERICK J. MEAGHER, JR.

Frederick J. Meagher, Jr., of Binghamton, New York, having been suspended from the practice of law in this Court by order of March 29, 2021; and a rule having been issued and served upon him requiring him to show cause why he should not be disbarred; and a response having been filed;

It is ordered that Frederick J. Meagher, Jr. is disbarred from the practice of law in this Court.

D-3074 IN THE MATTER OF DISBARMENT OF CHARLES L. MORGAN, JR.

Charles L. Morgan, Jr., of Charlotte, North Carolina, having been suspended from the practice of law in this Court by order of April 5, 2021; and a rule having been issued and served upon him requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Charles L. Morgan, Jr. is disbarred from the practice of law in this Court.

D-3077 IN THE MATTER OF DISBARMENT OF MICHAEL CHARLES ADGES

Michael Charles Adges, of Garden City, New York, having been suspended from the practice of law in this Court by order of April 5, 2021; and a rule having been issued and served upon him requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Michael Charles Adges is disbarred from the practice of law in this Court.

D-3078 IN THE MATTER OF DISBARMENT OF RICHARD P. CARO

Richard P. Caro, of Santa Rosa Beach, Florida, having been suspended from the practice of law in this Court by order of

April 5, 2021; and a rule having been issued and served upon him requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Richard P. Caro is disbarred from the practice of law in this Court.

D-3079 IN THE MATTER OF DISBARMENT OF MICHAEL F. FASANARO

Michael F. Fasanaro, of Virginia Beach, Virginia, having been suspended from the practice of law in this Court by order of April 5, 2021; and a rule having been issued and served upon him requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Michael F. Fasanaro is disbarred from the practice of law in this Court.

Per Curiam

SUPREME COURT OF THE UNITED STATES

JODY LOMBARDO, ET AL. *v.* CITY OF ST. LOUIS, MISSOURI, ET AL.

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

No. 20–391. Decided June 28, 2021

PER CURIAM.

On the afternoon of December 8, 2015, St. Louis police officers arrested Nicholas Gilbert for trespassing in a condemned building and failing to appear in court for a traffic ticket.[1] Officers brought him to the St. Louis Metropolitan Police Department's central station and placed him in a holding cell. At some point, an officer saw Gilbert tie a piece of clothing around the bars of his cell and put it around his neck, in an apparent attempt to hang himself. Three officers responded and entered Gilbert's cell. One grabbed Gilbert's wrist to handcuff him, but Gilbert evaded the officer and began to struggle. The three officers brought Gilbert, who was 5'3" and 160 pounds, down to a kneeling position over a concrete bench in the cell and handcuffed his arms behind his back. Gilbert reared back, kicking the officers and hitting his head on the bench. After Gilbert kicked one of the officers in the groin, they called for more help and leg shackles. While Gilbert continued to struggle, two officers shackled his legs together. Emergency medical services personnel were phoned for assistance.

Several more officers responded. They relieved two of the original three officers, leaving six officers in the cell with

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[1] Because this case was decided by summary judgment, the evidence here recounted is viewed "'in the light most favorable'" to the nonmoving party (here, Gilbert's parents, the petitioners). *Tolan* v. *Cotton*, 572 U. S. 650, 655–656 (2014) (*per curiam*).

Gilbert, who was now handcuffed and in leg irons. The officers moved Gilbert to a prone position, face down on the floor. Three officers held Gilbert's limbs down at the shoulders, biceps, and legs. At least one other placed pressure on Gilbert's back and torso. Gilbert tried to raise his chest, saying, "'It hurts. Stop.'" *Lombardo* v. *Saint Louis City*, 361 F. Supp. 3d 882, 898 (ED Mo. 2019).

After 15 minutes of struggling in this position, Gilbert's breathing became abnormal and he stopped moving. The officers rolled Gilbert onto his side and then his back to check for a pulse. Finding none, they performed chest compressions and rescue breathing. An ambulance eventually transported Gilbert to the hospital, where he was pronounced dead.

Gilbert's parents sued, alleging that the officers had used excessive force against him. The District Court granted summary judgment in favor of the officers, concluding that they were entitled to qualified immunity because they did not violate a constitutional right that was clearly established at the time of the incident. *Id.,* at 895. The U. S. Court of Appeals for the Eighth Circuit affirmed on different grounds, holding that the officers did not apply unconstitutionally excessive force against Gilbert. 956 F. 3d 1009, 1014 (2020).

In assessing a claim of excessive force, courts ask "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Graham* v. *Connor*, 490 U. S. 386, 397 (1989).[2] "A court

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[2] Petitioners brought their excessive force claims under both the Fourth and Fourteenth Amendments. See, *e.g.,* First Amended Complaint in No. 4:16–cv–01637, ECF Doc. 28 (ED Mo.), p. 46. We need not address whether the Fourth or Fourteenth Amendment provides the proper basis for a claim of excessive force against a pretrial detainee in Gilbert's position. Whatever the source of law, in analyzing an excessive force claim, a court must determine whether the force was objectively unreasonable in light of the "'facts and circumstances of each particular

(judge or jury) cannot apply this standard mechanically." *Kingsley* v. *Hendrickson*, 576 U. S. 389, 397 (2015). Rather, the inquiry "requires careful attention to the facts and circumstances of each particular case." *Graham*, 490 U. S., at 396. Those circumstances include "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting." *Kingsley*, 576 U. S., at 397.

Although the Eighth Circuit cited the *Kingsley* factors, it is unclear whether the court thought the use of a prone restraint—no matter the kind, intensity, duration, or surrounding circumstances—is *per se* constitutional so long as an individual appears to resist officers' efforts to subdue him. The court 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." 956 F. 3d, at 1013. The court went on to describe as "insignificant" facts that may distinguish that precedent and appear potentially important under *Kingsley*, including that Gilbert was already handcuffed and leg shackled when officers moved him to the prone position and that officers kept him in that position for 15 minutes. See 956 F. 3d, at 1013–1015.

Such details could matter when deciding whether to grant summary judgment on an excessive force claim. Here, for example, record evidence (viewed in the light most favorable to Gilbert's parents) shows that officers placed pressure on Gilbert's back even though St. Louis instructs its officers that pressing down on the back of a prone subject can cause suffocation. The evidentiary record also includes

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case.'" *Kingsley* v. *Hendrickson*, 576 U. S. 389, 397 (2015) (quoting *Graham*, 490 U. S., at 396).

well-known police guidance recommending that officers get a subject off his stomach as soon as he is handcuffed because of that risk. The guidance further indicates that the struggles of a prone suspect may be due to oxygen deficiency, rather than a desire to disobey officers' commands. Such evidence, when considered alongside the duration of the restraint and the fact that Gilbert was handcuffed and leg shackled at the time, may be pertinent to the relationship between the need for the use of force and the amount of force used, the security problem at issue, and the threat—to both Gilbert and others—reasonably perceived by the officers. Having either failed to analyze such evidence or characterized it as insignificant, the court's opinion could be read to treat Gilbert's "ongoing resistance" as controlling as a matter of law.[3] *Id.*, at 1014. Such a *per se* rule would contravene the careful, context-specific analysis required by this Court's excessive force precedent.

We express no view as to whether the officers used unconstitutionally excessive force or, if they did, whether Gilbert's right to be free of such force in these circumstances was clearly established at the time of his death. We instead grant the petition for certiorari, vacate the judgment of the Eighth Circuit, and remand the case to give the court the opportunity to employ an inquiry that clearly attends to the facts and circumstances in answering those questions in the first instance.

It is so ordered.

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[3] While the dissent suggests we should give the Eighth Circuit the benefit of the doubt, in assessing the appropriateness of review in this fact-bound context, it is more prudent to afford the Eighth Circuit an opportunity to clarify its opinion rather than to speculate as to its basis.

SUPREME COURT OF THE UNITED STATES

JODY LOMBARDO, ET AL. *v.* CITY OF ST. LOUIS, MISSOURI, ET AL.

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

No. 20–391. Decided June 28, 2021

JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, dissenting.

I cannot approve the Court's summary disposition because it unfairly interprets the Court of Appeals' decision and evades the real issue that this case presents: whether the record supports summary judgment in favor of the defendant police officers and the city of St. Louis. The Court of Appeals held that the defendants were entitled to summary judgment because a reasonable jury would necessarily find that the police officers used reasonable force in attempting to subdue petitioner Lombardo's son, Nicholas Gilbert, when he was attempting to hang himself in his cell. In reaching this conclusion, the Court of Appeals applied the correct legal standard and made a judgment call on a sensitive question. This case, therefore, involves the application of "a properly stated rule of law" to a particular factual record, and our rules say that we "rarely" review such questions. See this Court's Rule 10. But "rarely" does not mean "never," and if this Court is unwilling to allow the decision below to stand, the proper course is to grant the petition, receive briefing and argument, and decide the real question that this case presents.

That is the course I would take. I do not think that this Court is above occasionally digging into the type of fact-bound questions that make up much of the work of the lower courts, and a decision by this Court on the question presented here could be instructive.

The Court, unfortunately, is unwilling to face up to the

choice between denying the petition (and bearing the criticism that would inevitably elicit) and granting plenary review (and doing the work that would entail). Instead, it claims to be uncertain whether the Court of Appeals actually applied the correct legal standard, and for that reason it vacates the judgment below and remands the case.

This course of action may be convenient for this Court, but it is unfair to the Court of Appeals. If we expect the lower courts to respect our decisions, we should not twist their opinions to make our job easier.

When the Court of Appeals' opinion is read in the way we hope our opinions will be interpreted, it is clear that the Court of Appeals understood and applied the correct standard for excessive-force claims. The *per curiam* acknowledges that the Court of Appeals correctly cited the factors that must be taken into account in determining whether the officers' actions were objectively reasonable. *Ante*, at 3; see 956 F. 3d 1009, 1013 (CA8 2020). But the *per curiam* finds it "unclear whether the [Court of Appeals] thought the use of a prone restraint—no matter the kind, intensity, duration, or surrounding circumstances—is *per se* constitutional so long as an individual appears to resist officers' efforts to subdue him." *Ante*, at 3.

Can the Court seriously think that the Eighth Circuit adopted such a strange and extreme position—that the use of prone restraint on a resisting detainee is always reasonable no matter how much force is used, no matter how long that force is employed, no matter the physical condition of the detainee, and no matter whether the detainee is obviously suffering serious or even life-threatening harm? Suppose officers with a combined weight of 1,000 pounds knelt on the back of a frail and infirm detainee, used all their might to press his chest and face into a concrete floor for over an hour, did not desist when the detainee cried, "You're killing me," and ended up inflicting fatal injuries. Does the Court really believe that the Court of Appeals might have

thought that this extreme use of force would be reasonable? Is there any support for that interpretation in the Court of Appeals' opinion?

The *per curiam* latches onto this sentence in the opinion below: "This Court has previously held that the use of prone restraint is not objectively unreasonable when a detainee actively resists officer directives and efforts to subdue the detainee." 956 F. 3d, at 1013; see *ante*, at 3. Read in context, its meaning is apparent.

The sentence recounts *and cites to* what the Eighth Circuit had held in an earlier case, *Ryan* v. *Armstrong*, 850 F. 3d 419 (2017), in which a resisting detainee had been held in a prone position for a period of time. In order to understand the sentence in the opinion below, it is necessary to look at that prior decision. And when the language in the decision below is read in that way, what it obviously means is that the use of prone restraint is not objectively unreasonable ***per se*** when a detainee is actively resisting. That is exactly what the appellees, citing *Ryan*, had argued: "No court has held that placing a resisting prisoner in a prone position while restrained is *per se* unreasonable." Brief for Appellees in No. 19–1469 (CA8), p. 24. That is a correct reading of *Ryan*, and that is how the opinion below interpreted it.

Ryan held only that the use of force in that case was reasonable based on "the totality of th[e] circumstances," including the detainee's resistance. 850 F. 3d, at 428. The *Ryan* court explained:

> "*Several factors* support the foregoing conclusion. *Among the most important* is the observation that [the detainee] was actively resisting the extraction procedure by ignoring directives to lie down on his bunk and resisting the defendants' efforts to subdue him once they entered his cell." *Ibid.* (emphasis added).

Thus, *Ryan* clearly did not adopt any sort of blanket rule,

and the sentence in this case that the *per curiam* seizes upon did not purport to go beyond *Ryan*.

This Court's *per curiam* refers to one other statement in the opinion below. The *per curiam* states:

> "The [Eighth Circuit] went on to describe as 'insignificant' facts that may distinguish [*Ryan*] and appear potentially important under *Kingsley*, including that Gilbert was already handcuffed and leg shackled when officers moved him to the prone position and that officers kept him in that position for 15 minutes." *Ante*, at 3 (quoting 956 F. 3d, at 1014).

Here, again, the *per curiam* strains to give the Eighth Circuit's opinion a possible interpretation that can justify a remand. But when this sentence is read in context, what it plainly means is not that the duration of the officers' use of force or the fact that Gilbert had been handcuffed and shackled were irrelevant but that certain factual differences between this case and *Ryan* were not significant in the sense that they did not call for a different result.

The court used the term "insignificant" in responding to Lombardo's efforts to distinguish *Ryan*. Lombardo argued that this case is different because Gilbert was restrained for a longer period and, unlike the detainee in *Ryan*, had already been handcuffed and shackled. See 956 F. 3d, at 1014; Brief for Plaintiffs-Appellants in No. 19–1469 (CA8), pp. 14–15. What the Eighth Circuit characterized as "insignificant" were these factual differences between the two cases.*

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*The Eighth Circuit wrote:

"Lombardo argues that *Ryan* is not on point. Specifically, Lombardo argues that, unlike *Ryan*, in which the detainee was held in prone restraint for approximately three minutes until he was handcuffed, . . . Gilbert was held in prone restraint for fifteen minutes and was placed in this position only after he had been handcuffed and leg-shackled. Lombardo also argues that she presented expert testimony that Gilbert's

Without carefully studying the record, I cannot be certain whether I would have agreed with the Eighth Circuit panel that summary judgment for the defendants was correct. The officers plainly had a reasonable basis for using some degree of force to restrain Gilbert so that he would not harm himself, and it appears that Gilbert, despite his slight stature, put up a fierce and prolonged resistance. See 956 F. 3d, at 1011–1014. On the other hand, the officers' use of force inflicted serious injuries, and the medical evidence on the cause of death was conflicting. See *id.,* at 1012.

We have two respectable options: deny review of the fact-bound question that the case presents or grant the petition, have the case briefed and argued, roll up our sleeves, and decide the real issue. I favor the latter course, but what we should not do is take the easy out that the Court has chosen.

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cause of death was forcible restraint inducing asphyxia whereas the undisputed cause of death in *Ryan* was sudden unexpected death during restraint. . . . We find these differences to be insignificant. This Court has previously noted that '[h]andcuffs limit but do not eliminate a person's ability to perform harmful acts.' *United States* v. *Pope*, 910 F. 3d 413, 417 (8th Cir. 2018), cert. denied, [589 U. S. ___ (2019)]. As discussed above, the undisputed facts show that Gilbert continued to violently struggle even after being handcuffed and leg-shackled. Specifically, after being handcuffed, he thrashed his head on the concrete bench, causing him to suffer a gash on his forehead, and he continued to violently thrash and kick after being leg-shackled. Because of this ongoing resistance, the Officers moved Gilbert to the prone position so as to minimize the harm he could inflict on himself and others." 956 F. 3d, at 1014.

Per Curiam

SUPREME COURT OF THE UNITED STATES

PEYMAN PAKDEL, ET UX. *v.* CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL.

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

No. 20–1212. Decided June 28, 2021

PER CURIAM.

When a plaintiff alleges a regulatory taking in violation of the Fifth Amendment, a federal court should not consider the claim before the government has reached a "final" decision. *Suitum* v. *Tahoe Regional Planning Agency*, 520 U. S. 725, 737 (1997). After all, until the government makes up its mind, a court will be hard pressed to determine whether the plaintiff has suffered a constitutional violation. *See id.,* at 734; *Horne* v. *Department of Agriculture*, 569 U. S. 513, 525 (2013). In the decision below, however, the Ninth Circuit required petitioners to show not only that the San Francisco Department of Public Works had firmly rejected their request for a property-law exemption (which they did show), but *also* that they had complied with the agency's administrative procedures for seeking relief. Because the latter requirement is at odds with "the settled rule . . . that exhaustion of state remedies is *not* a prerequisite to an action under 42 U. S. C. §1983," *Knick* v. *Township of Scott*, 588 U. S. ___, ___ (2019) (slip op., at 2) (brackets and internal quotation marks omitted), we vacate and remand.

I

Petitioners are a married couple who partially own a multiunit residential building in San Francisco. When petitioners purchased their interest in the property, the building was organized as a tenancy-in-common. Under that kind of arrangement, all owners technically have the right to pos-

sess and use the entire property, but in practice often contract among themselves to divide the premises into individual residences. Owners also frequently seek to convert tenancy-in-common interests into modern condominium-style arrangements, which allow individual ownership of certain parts of the building. When petitioners purchased their interest in the property, for example, they signed a contract with the other owners to take all available steps to pursue such a conversion.

Until 2013, the odds of conversion were slim because San Francisco employed a lottery system that accepted only 200 applications per year. When that approach resulted in a predictable backlog, however, the city adopted a new program that allowed owners to seek conversion subject to a filing fee and several conditions. One of these was that non-occupant owners who rented out their units had to offer their tenants a lifetime lease.

Although petitioners had a renter living in their unit, they and their co-owners sought conversion. As part of the process, they agreed that they would offer a lifetime lease to their tenant. The city then approved the conversion. But, a few months later, petitioners requested that the city either excuse them from executing the lifetime lease or compensate them for the lease. The city refused both requests, informing petitioners that "failure to execute the lifetime lease violated the [program] and could result in an enforcement action." Brief for Respondents 9.

Petitioners sued in federal court under §1983. Among other things, they alleged that the lifetime-lease requirement was an unconstitutional regulatory taking. But the District Court rejected this claim without reaching the merits. 2017 WL 6403074, *2–*4 (ND Cal, Nov. 20, 2017). Instead, it relied on this Court's since-disavowed prudential rule that certain takings actions are not "ripe" for federal resolution until the plaintiff "seek[s] compensation through

the procedures the State has provided for doing so." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 194 (1985). Because petitioners had not first brought "a state court inverse condemnation proceeding," the District Court dismissed their claims. 2017 WL 6403074, *4.

While petitioners' appeal was pending before the Ninth Circuit, this Court repudiated *Williamson County*'s requirement that a plaintiff must seek compensation in state court. See *Knick*, 588 U. S., at ___–___ (slip op., at 19–23). We explained that "[t]he Fifth Amendment right to full compensation arises at the time of the taking" and that "[t]he availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner's federal constitutional claim." *Id.,* at ___–___ (slip op., at 7–8). Any other approach, we reasoned, would conflict with "[t]he general rule . . . that plaintiffs may bring constitutional claims under §1983 without first bringing any sort of state lawsuit." *Id.,* at ___ (slip op., at 11) (internal quotation marks omitted).

Rather than remand petitioners' claims in light of *Knick*, a divided panel of the Ninth Circuit simply affirmed. Noting that *Knick* left untouched *Williamson County*'s alternative holding that plaintiffs may challenge only "final" government decisions, *Knick*, 588 U. S., at ___ (slip op., at 5), the panel concluded that petitioners' regulatory "takings claim remain[ed] unripe because they never obtained a final decision regarding the application of the Lifetime Lease Requirement to their Unit." 952 F. 3d 1157, 1163 (2020).* Although the city had twice denied their

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*The Ninth Circuit rejected several of petitioners' alternative theories on the merits. See, *e.g.,* 952 F. 3d 1157, 1162, n. 4 (2020) (considering whether "the Lifetime Lease Requirement effects an exaction, a physical taking, [or] a private taking"). On remand, the Ninth Circuit may give further consideration to these claims in light of our recent decision in *Cedar Point Nursery* v. *Hassid*, *ante*, p. ___.

requests for the exemption—and in fact the "relevant agency c[ould] no longer grant" relief—the panel reasoned that this decision was not truly "final" because petitioners had made a belated request for an exemption at the end of the administrative process instead of timely seeking one "through the prescribed procedures." *Id.*, at 1166–1167 (explaining that petitioners waited "six months after [they] had obtained final approval of their conversion . . . and seven months after they had committed to offering a lifetime lease"). In other words, a conclusive decision is not really "final" if the plaintiff did not give the agency the "opportunity to exercise its 'flexibility or discretion'" in reaching the decision. *Id.,* at 1167–1168.

Judge Bea dissented, explaining that the "'finality'" requirement looks only to whether "'the initial decisionmaker has arrived at a definitive position on the issue.'" *Id.,* at 1170. In his view, an additional demand that plaintiffs "follo[w] the decisionmaker's administrative procedures" would "ris[k] 'establish[ing] an exhaustion requirement for §1983 takings claims,' something the law does not allow." *Ibid.* And when the Ninth Circuit declined to rehear the case en banc, Judge Collins dissented along the same lines. He expressed concern that "the panel's unprecedented decision sharply depart[ed] from settled law and directly contravene[d] . . . *Knick*" by "impos[ing] an impermissible exhaustion requirement." 977 F. 3d 928, 929, 934 (2020).

II

We, too, think that the Ninth Circuit's view of finality is incorrect. The finality requirement is relatively modest. All a plaintiff must show is that "there [is] no question . . . about how the 'regulations at issue apply to the particular land in question.'" *Suitum*, 520 U. S., at 739 (brackets omitted).

In this case, there is no question about the city's position:

Petitioners must "execute the lifetime lease" or face an "enforcement action." Brief for Respondents 9. And there is no question that the government's "definitive position on the issue [has] inflict[ed] an actual, concrete injury" of requiring petitioners to choose between surrendering possession of their property or facing the wrath of the government. *Williamson County*, 473 U. S., at 193.

The rationales for the finality requirement underscore that nothing more than *de facto* finality is necessary. This requirement ensures that a plaintiff has actually "been injured by the Government's action" and is not prematurely suing over a hypothetical harm. *Horne*, 569 U. S., at 525. Along the same lines, because a plaintiff who asserts a regulatory taking must prove that the government "regulation has gone 'too far,'" the court must first "kno[w] how far the regulation goes." *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340, 348 (1986). Once the government is committed to a position, however, these potential ambiguities evaporate and the dispute is ripe for judicial resolution.

The Ninth Circuit's contrary approach—that a conclusive decision is not "final" unless the plaintiff *also* complied with administrative processes in obtaining that decision—is inconsistent with the ordinary operation of civil-rights suits. Petitioners brought their takings claim under §1983, which "guarantees 'a federal forum for claims of unconstitutional treatment at the hands of state officials.'" *Knick*, 588 U. S., at ___ (slip op., at 2). That guarantee includes "the settled rule" that "exhaustion of state remedies is *not* a prerequisite to an action under . . . §1983." *Ibid.* (internal quotation marks omitted). In fact, one of the reasons *Knick* gave for rejecting *Williamson County*'s state-compensation requirement is that this rule had "effectively established an exhaustion requirement for §1983 takings claims." *Knick*, 588 U. S., at ___ (slip op., at 12).

The Ninth Circuit's demand that a plaintiff seek "an exemption through the prescribed [state] procedures," 952

F. 3d, at 1167, plainly requires exhaustion. In fact, this rule mirrors our administrative-exhaustion doctrine, which "provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Woodford* v. *Ngo*, 548 U. S. 81, 88–89 (2006) (internal quotation marks omitted). As we have often explained, this doctrine requires "*proper* exhaustion"—that is, "compliance with an agency's deadlines and other critical procedural rules." *Id.,* at 90 (emphasis added). Otherwise, parties who would "prefer to proceed directly to federal court" might fail to raise their grievances in a timely fashion and thus deprive "the agency [of] a fair and full opportunity to adjudicate their claims." *Id.,* at 89–90. Or, in the words of the Ninth Circuit below, parties might "make an end run . . . by sitting on their hands until every applicable deadline has expired before lodging a token exemption request that they know the relevant agency can no longer grant." 952 F. 3d, at 1166.

Whatever policy virtues this doctrine might have, administrative "exhaustion of state remedies" is not a prerequisite for a takings claim when the government has reached a conclusive position. *Knick*, 588 U. S., at ___ (slip op., at 2). To be sure, we have indicated that a plaintiff's failure to properly pursue administrative procedures may render a claim unripe *if* avenues still remain for the government to clarify or change its decision. See, *e.g., Williamson County*, 473 U. S., at 192–194 ("The Commission's refusal to approve the preliminary plat . . . leaves open the possibility that [the plaintiff] may develop the subdivision according to the plat after obtaining the variances"); *Knick*, 588 U. S., at ___ (slip op., at 5) ("[T]he developer [in *Williamson County*] still had an opportunity to seek a variance from the appeals board"); cf. *Palazzolo* v. *Rhode Island*, 533 U. S. 606, 624–625 (2001) (dismissing accusations that the plaintiff was "employing a hide the ball strategy" when "submission of

[a] proposal would not have clarified the extent of development permitted . . . , which is the inquiry required under our ripeness decisions"). But, contrary to the Ninth Circuit's view, administrative missteps do not defeat ripeness once the government has adopted its final position. See *Williamson County*, 473 U. S., at 192–193 (distinguishing its "finality requirement" from traditional administrative "exhaust[ion]"). It may very well be, as Judge Bea observed, that misconduct during the administrative process is relevant to "evaluating the *merits* of the . . . clai[m]" or the measure of damages. 952 F. 3d, at 1170, n. 2 (dissenting opinion); cf. *Palazzolo*, 533 U. S., at 625. For the limited purpose of ripeness, however, ordinary finality is sufficient.

Of course, Congress always has the option of imposing a strict administrative-exhaustion requirement—just as it has done for certain civil-rights claims filed by prisoners. See 42 U. S. C. §1997e(a); *Ngo*, 548 U. S., at 84–85 ("Before 1980, prisoners asserting constitutional claims had no obligation to exhaust administrative remedies"). But it has not done so for takings plaintiffs. Given that the Fifth Amendment enjoys "full-fledged constitutional status," the Ninth Circuit had no basis to relegate petitioners' claim "'to the status of a poor relation' among the provisions of the Bill of Rights." *Knick*, 588 U. S., at ___ (slip op., at 6).

* * *

For the foregoing reasons, we grant the petition for a writ of certiorari, vacate the judgment of the Ninth Circuit, and remand the case for proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

STANDING AKIMBO, LLC, ET AL., *v.* UNITED STATES

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

No. 20–645. Decided June 28, 2021

The petition for a writ of certiorari is denied.

Statement of JUSTICE THOMAS respecting the denial of certiorari.

Sixteen years ago, this Court held that Congress' power to regulate interstate commerce authorized it "to prohibit the local cultivation and use of marijuana." *Gonzales* v. *Raich*, 545 U. S. 1, 5 (2005). The reason, the Court explained, was that Congress had "enacted comprehensive legislation to regulate the interstate market in a fungible commodity" and that "exemption[s]" for local use could undermine this "comprehensive" regime. *Id.*, at 22–29. The Court stressed that Congress had decided "to prohibit *entirely* the possession or use of [marijuana]" and had "designate[d] marijuana as contraband for *any* purpose." *Id.,* at 24–27 (first emphasis added). Prohibiting any intrastate use was thus, according to the Court, "'necessary and proper'" to avoid a "gaping hole" in Congress' "closed regulatory system." *Id.,* at 13, 22 (citing U. S. Const., Art. I, §8).

Whatever the merits of *Raich* when it was decided, federal policies of the past 16 years have greatly undermined its reasoning. Once comprehensive, the Federal Government's current approach is a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana. This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary.

This case is a prime example. Petitioners operate a med-

ical-marijuana dispensary in Colorado, as state law permits. And, though federal law still flatly forbids the intrastate possession, cultivation, or distribution of marijuana, Controlled Substances Act, 84 Stat. 1242, 1247, 1260, 1264, 21 U. S. C. §§802(22), 812(c), 841(a), 844(a),[1] the Government, post-*Raich*, has sent mixed signals on its views. In 2009 and 2013, the Department of Justice issued memorandums outlining a policy against intruding on state legalization schemes or prosecuting certain individuals who comply with state law.[2] In 2009, Congress enabled Washington D. C.'s government to decriminalize medical marijuana under local ordinance.[3] Moreover, in every fiscal year since 2015, Congress has prohibited the Department of Justice from "spending funds to prevent states' implementation of their own medical marijuana laws." *United States* v. *McIntosh*, 833 F. 3d 1163, 1168, 1175–1177 (CA9 2016) (interpreting the rider to prevent expenditures on the prosecution of individuals who comply with state law).[4] That policy

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[1] A narrow exception to federal law exists for Government-approved research projects, but that exception does not apply here. 84 Stat. 1271, 21 U. S. C. §872(e).

[2] See Memorandum from Dep. Atty. Gen. to Selected U. S. Attys., Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009); Memorandum from Dep. Atty. Gen. to All U. S. Attys., Guidance Regarding Marijuana Enforcement (Aug. 29, 2013). In 2018, however, the Department of Justice rescinded those and three other memorandums related to federal marijuana laws. Memorandum from U. S. Atty. Gen. to All U. S. Attys., Marijuana Enforcement (Jan. 4, 2018). Despite that rescission, in 2019 the Attorney General stated that he was "'accepting the [2013] Memorandum for now.'" Somerset, Attorney General Barr Favors a More Lenient Approach to Cannabis Prohibition, Forbes, Apr. 15, 2019.

[3] See Congress Lifts Ban on Medical Marijuana for Nation's Capitol, Americans for Safe Access, Dec. 13, 2009.

[4] Despite the Federal Government's recent pro-marijuana actions, the Attorney General has declined to use his authority to reschedule marijuana to permit legal, medicinal use. *E.g., Krumm* v. *Holder*, 594 Fed. Appx. 497, 498–499 (CA10 2014) (citing §811(a)); Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53688

has broad ramifications given that 36 States allow medicinal marijuana use and 18 of those States also allow recreational use.[5]

Given all these developments, one can certainly understand why an ordinary person might think that the Federal Government has retreated from its once-absolute ban on marijuana. See, *e.g.,* Halper, Congress Quietly Ends Federal Government's Ban on Medical Marijuana, L. A. Times, Dec. 16, 2014. One can also perhaps understand why business owners in Colorado, like petitioners, may think that their intrastate marijuana operations will be treated like any other enterprise that is legal under state law.

Yet, as petitioners recently discovered, legality under state law and the absence of federal criminal enforcement do not ensure equal treatment. At issue here is a provision of the Tax Code that allows most businesses to calculate their taxable income by subtracting from their gross revenue the cost of goods sold *and* other ordinary and necessary business expenses, such as rent and employee salaries. See 26 U. S. C. §162(a); 26 CFR. 1.61–3(a) (2020). But because of a public-policy provision in the Tax Code, companies that deal in controlled substances prohibited by federal law may subtract only the cost of goods sold, not the other ordinary and necessary business expenses. See 26 U. S. C. §280E. Under this rule, a business that is still in the red after it pays its workers and keeps the lights on might nonetheless owe substantial federal income tax.

As things currently stand, the Internal Revenue Service is investigating whether petitioners deducted business expenses in violation of §280E, and petitioners are trying to

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(2016).

[5] Hartman, Cannabis Overview, Nat. Conference of State Legislatures (June 22, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx. The state recreational use number does not include South Dakota, where a state court overturned a ballot measure legalizing marijuana. *Ibid.*

prevent disclosure of relevant records held by the State.[6] In other words, petitioners have found that the Government's willingness to often look the other way on marijuana is more episodic than coherent.

This disjuncture between the Government's recent laissez-faire policies on marijuana and the actual operation of specific laws is not limited to the tax context. Many marijuana-related businesses operate entirely in cash because federal law prohibits certain financial institutions from knowingly accepting deposits from or providing other bank services to businesses that violate federal law. Black & Galeazzi, Cannabis Banking: Proceed With Caution, American Bar Assn., Feb. 6, 2020. Cash-based operations are understandably enticing to burglars and robbers. But, if marijuana-related businesses, in recognition of this, hire armed guards for protection, the owners and the guards might run afoul of a federal law that imposes harsh penalties for using a firearm in furtherance of a "drug trafficking crime." 18 U. S. C. §924(c)(1)(A). A marijuana user similarly can find himself a federal felon if he just possesses a firearm. §922(g)(3). Or petitioners and similar businesses may find themselves on the wrong side of a civil suit under the Racketeer Influenced and Corrupt Organizations Act. See, *e.g., Safe Streets Alliance* v. *Hickenlooper*, 859 F. 3d 865, 876–877 (CA10 2017) (permitting such a suit to proceed).

I could go on. Suffice it to say, the Federal Government's current approach to marijuana bears little resemblance to

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[6] In their petition for a writ of certiorari, petitioners contend that the lack of a deduction for ordinary business expenses causes the tax to fall outside the Sixteenth Amendment's authorization of "taxes on incomes." Therefore, they contend the tax is unconstitutional. That argument implicates several difficult questions, including the differences between "direct" and "indirect" taxes and how to interpret the Sixteenth Amendment. Cf. *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 570–571 (2012); *Taft* v. *Bowers*, 278 U. S. 470, 481–482 (1929). In light of the still-developing nature of the dispute below, I agree with the Court's decision not to delve into these questions.

the watertight nationwide prohibition that a closely divided Court found necessary to justify the Government's blanket prohibition in *Raich*. If the Government is now content to allow States to act "as laboratories" "'and try novel social and economic experiments,'" *Raich*, 545 U. S., at 42 (O'Connor, J., dissenting), then it might no longer have authority to intrude on "[t]he States' core police powers . . . to define criminal law and to protect the health, safety, and welfare of their citizens." *Ibid.* A prohibition on intrastate use or cultivation of marijuana may no longer be necessary *or* proper to support the Federal Government's piecemeal approach.

SUPREME COURT OF THE UNITED STATES

JACOB TOWNLEY HERNANDEZ *v.* SUZANNE M. PEERY, WARDEN

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

No. 20–6199. Decided June 28, 2021

The petition for a writ of certiorari is denied.

JUSTICE SOTOMAYOR, dissenting from the denial of certiorari.

Petitioner Jacob Townley Hernandez's former codefendant became a key prosecution witness at Townley's trial.[1] The trial court, however, forbade Townley's attorney from speaking with his client about the existence or contents of a declaration executed by that witness. Although the State does not dispute that this order unjustifiably interfered with Townley's constitutional right to consult with his counsel, the California Supreme Court held that reversal of Townley's convictions would be appropriate only if he could demonstrate prejudice. Townley challenged that decision in federal habeas proceedings, but the District Court denied his petition. The U. S. Court of Appeals for the Ninth Circuit then refused to issue a certificate of appealability (COA). That was error. Because reasonable jurists could debate whether the District Court should have granted habeas relief on Townley's Sixth Amendment claim, the Ninth Circuit should have authorized an appeal. I would grant the petition for a writ of certiorari and summarily reverse the order of the Ninth Circuit denying a COA.

I

In 2006, a group of young men shot (but did not kill)

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[1] Like the petition for certiorari and the courts below, I refer to petitioner as "Townley."

Javier Lazaro. Seventeen-year-old Townley and three accomplices were subsequently charged with attempted murder. Two of those accomplices, including Noe Flores, pleaded to reduced charges in exchange for executing declarations that detailed the shooting. To protect Flores from possible retaliation, the trial court sealed the declaration and ordered that it could be opened only if the prosecution called Flores to testify.

Flores was, in fact, called to testify at Townley's trial. Although Townley's defense counsel was given copies of Flores' declaration, he was "unsuccessful in moving to withdraw the order not to discuss the contents or existence of the document with [Townley]." *People* v. *Hernandez*, 101 Cal. Rptr. 3d 414, 422 (App. 2009) (officially depublished). As a result, the trial court "prohibited counsel from sharing the statemen[t] with [Townley], investigators, or other attorneys and further ordered that the statemen[t] be used solely 'for purposes of cross-examination.'" *People* v. *Hernandez*, 53 Cal. 4th 1095, 1101, 273 P. 3d 1113, 1115 (2012).

Townley was convicted of attempted premeditated murder, with enhancements for personal use of a firearm and infliction of great bodily harm. He was sentenced to consecutive sentences of life in prison and 25 years to life.

The California Court of Appeal reversed. Relying on this Court's decision in *Geders* v. *United States*, 425 U. S. 80 (1976), the Court of Appeal explained that "when the government unjustifiably interferes with attorney-client communication, the result may be determined to be a violation of a criminal defendant's constitutional 'right to the assistance of counsel.'" *Hernandez*, 101 Cal. Rptr. 3d, at 423 (quoting *Geders*, 425 U. S., at 91). The court assumed that "'a carefully tailored, limited restriction on the defendant's right to consult counsel is permissible'" when necessary "'to protect a countervailing interest,'" such as witness safety. *Hernandez*, 101 Cal. Rptr. 3d, at 430–431. But "[e]ven under this test, the challenged order exhibit[ed] fatal defects."

Id., at 431. For one, "there was no express finding or showing of . . . good cause." *Ibid.* For another, the order "was not carefully tailored to serve the objective of keeping 'paperwork' out of the hands of prison gangs." *Ibid.* Instead, it "appear[ed] to have been tailored to allow the prosecution to produce trial testimony that was a surprise to Townley" and "to impede counsel's investigation of the accuracy of the declaration." *Ibid.* The court thus concluded that the trial court's order "unjustifiably infringed on Townley's constitutional right to the effective assistance of counsel." *Id.,* at 432. Then, relying on this Court's "clear holding" in *Perry* v. *Leeke*, 488 U. S. 272 (1989), that "'a showing of prejudice is not an essential component of a violation of the rule announced in *Geders*,'" the Court of Appeal held that reversal was necessary regardless of whether Townley could demonstrate prejudice. *Hernandez*, 101 Cal. Rptr. 3d, at 432 (quoting *Perry*, 488 U. S., at 278–279).

On appeal to the California Supreme Court, the State conceded that the trial court's order "unjustifiably interfered with Townley's access to his attorney." *Hernandez*, 53 Cal. 4th, at 1102, and n. 2, 273 P. 3d, at 1116, and n. 2. The sole issue, therefore, was "whether the deprivation of [Townley's] right to consult with his attorney about the Flores declaration was structural error," *i.e.,* an error for which no prejudice inquiry is necessary. Brief in Opposition 5. The court concluded that the deprivation was not structural error. The circumstances of Townley's case were not "comparable in magnitude to those presented in *Geders*," the court reasoned, because defense counsel did not "*entirely* fai[l] to subject the prosecution's case to meaningful adversarial testing." *Hernandez*, 53 Cal. 4th, at 1106, 273 P. 3d, at 1119 (citing *United States* v. *Cronic*, 466 U. S. 648, 659 (1984); internal quotation marks omitted). The court thus reversed and remanded the case for the Court of Appeal to determine whether, "in accordance with the standard stated in" *Strickland* v. *Washington*, 466 U. S. 668 (1984),

"there is a reasonable probability that, but for the error, the result of the trial would have been different." *Hernandez,* 53 Cal. 4th, at 1111, 273 P. 3d, at 1122. On remand, the Court of Appeal found that Townley failed to demonstrate prejudice, and it affirmed his convictions. See *People* v. *Hernandez*, 2013 WL 3939441, *1 (Cal. Ct. App., July 29, 2013).

Townley filed a *pro se* petition for a writ of habeas corpus in federal court under 28 U. S. C. §2254. Because the State again "conceded error," the question before the District Court was limited to whether "the California Supreme Court's holding that [the] trial court's order was not structural error—and prejudice had to be shown—was contrary to or an unreasonable application of federal law within the meaning of 28 U. S. C. §2254(d)(1)." 2018 WL 11251904, *4–*5 (ND Cal., Dec. 18, 2018). The District Court concluded it was not, reasoning that "[t]he Supreme Court has never held that a limited restriction . . . on the matters that defense counsel could discuss with his client amounts to structural error." *Id.,* at *5.

Townley sought permission to appeal. The Ninth Circuit denied Townley's request for a COA in a one-page order. See App. to Pet. for Cert. 2 (denying a COA because Townley "has not made a 'substantial showing of the denial of a constitutional right'" (quoting 28 U. S. C. §2253(c)(2))). Townley then petitioned for review in this Court.

II

A habeas petitioner may not appeal the denial of his habeas petition unless the District Court or Court of Appeals "issues a certificate of appealability." 28 U. S. C. §2253(c)(1); see also *Gonzalez* v. *Thaler*, 565 U. S. 134, 143, n. 5 (2012). Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a COA "may issue . . . only if the applicant has made a substantial showing of the denial

of a constitutional right." §2253(c)(2). To make that showing, a habeas petitioner must demonstrate "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack* v. *McDaniel*, 529 U. S. 473, 484 (2000) (internal quotation marks omitted). AEDPA does not "require petitioner[s] to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Miller-El* v. *Cockrell*, 537 U. S. 322, 338 (2003). Rather, "[a]t the COA stage, the only question is whether" the "claim is reasonably debatable." *Buck* v. *Davis*, 580 U. S. ___, ___, ___ (2017) (slip op., at 13, 15).

In this case, the issue confronting the Ninth Circuit was whether reasonable jurists could debate the District Court's disposition of Townley's habeas petition. That question, in turn, depends on whether reasonable jurists could argue that the California Supreme Court's decision contravened or unreasonably applied clearly established federal law. They certainly could.

This Court has decided two cases involving court-ordered interferences with attorney-client communication: *Geders* v. *United States* and *Perry* v. *Leeke*. In *Geders*, the Court held that a defendant's Sixth Amendment right to counsel was violated when the trial court prohibited him from speaking with his attorney during an overnight recess that interrupted his testimony. 425 U. S., at 91. The Court acknowledged that the trial judge had "sequestered all witnesses" and, "before each recess," had "instructed the testifying witness not to discuss his testimony with anyone." *Id.,* at 87–88. "But the petitioner was not simply a witness; he was also the defendant," and "a defendant in a criminal case must often consult with his attorney during the trial." *Id.,* at 88. The Court thus held that the "sustained barrier to communication between [the] defendant and his lawyer" unconstitutionally "impinged upon [the defendant's] right

to the assistance of counsel guaranteed by the Sixth Amendment." *Id.,* at 91. The Court reversed the defendant's conviction. *Ibid.*

Later, in *Perry*, the Court considered "whether the *Geders* rule applie[d]" to an order directing a defendant not to consult with his attorney during a 15-minute recess in the middle of the defendant's testimony. 488 U. S., at 274. The court below had declined to reverse the defendant's conviction "because the error was not prejudicial." *Id.*, at 276. *Perry* soundly rejected that reasoning. The Court observed that, "consistent with . . . the fundamental importance of the criminal defendant's constitutional right to be represented by counsel," *Geders* had "simply reversed the defendant's conviction without pausing to consider the extent of the actual prejudice."[2] 488 U. S., at 279.

Taken together, *Geders* and *Perry* require automatic reversal whenever a court unjustifiably denies a defendant access to counsel during trial. Here, the State concedes that Townley was wrongly deprived of his right to consult with his counsel about a significant witness declaration before and during that witness' testimony. See Brief in Opposition 5; 2018 WL 11251904, *4. That concession is well founded, as (save for a few exceptions not relevant here) a defendant's "right to consult with his lawyer" is "absolute" and "unrestricted." *Perry*, 488 U. S., at 281, 284. In defending the California Supreme Court's decision, therefore, the State must maintain that some court-ordered interferences with the Sixth Amendment right to counsel are constitutionally tolerable if the defendant fails to demonstrate "a reasonable probability that, but for the error, the result of

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[2] *Perry* ultimately affirmed the lower court on the ground that the defendant did not have "a constitutional right to confer with his attorney during the 15-minute break in his testimony." 488 U. S., at 280. Although a defendant "has an absolute right to . . . consultation [with his lawyer] before he begins to testify," he has no "constitutional right to discuss that testimony while it is in process." *Id.,* at 281, 284.

the trial would have been different." *Hernandez*, 53 Cal. 4th, at 1111, 273 P. 3d., at 1122 (citing *Strickland*, 466 U. S., at 686–687). Reasonable jurists could conclude, however, that such an argument contravenes *Geders* (and, by extension, *Perry*), in which the Court "simply reversed the defendant's conviction without pausing to consider the extent of actual prejudice." *Perry*, 488 U. S., at 279. Tellingly, neither the California Supreme Court, nor the District Court, nor the State in its brief before this Court has cited a single case in which a court identified an access-to-counsel error but still required the defendant to demonstrate prejudice.

In declining to apply the automatic-reversal rule adopted in *Geders* and *Perry*, the California Supreme Court relied heavily on *Strickland* v. *Washington* and *United States* v. *Cronic*. But neither case can bear the weight the California Supreme Court assigned to it. *Strickland*, for its part, requires a showing of prejudice where the defendant raises "a claim of 'actual ineffectiveness' of counsel's assistance," *i.e.,* a case in which counsel allegedly "deprive[d] a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance.'" 466 U. S., at 683, 686. *Strickland* does not address Sixth Amendment claims based on "state interference with counsel's assistance," for which "prejudice is presumed." *Id.*, at 692. This Court recognized that distinction in *Perry*, where it explained that *Strickland* "expressly noted that direct governmental interference with the right to counsel is a different matter" from "the standard for measuring the quality of the lawyer's work." 488 U. S., at 279. Indeed, *Strickland* cited *Geders* for the proposition that the "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland*, 466 U. S., at 686 (citing *Geders*, 425 U. S. 80). The same is true for *Cronic* (decided the same day as *Strickland*), which also cited

Geders in observing that "[t]he Court has uniformly found constitutional error without any showing of prejudice when counsel was . . . prevented from assisting the accused during a critical stage of the proceeding." *Cronic*, 466 U. S., at 659, n. 25.

Finally, even if no reasonable jurist would question the California Supreme Court's dubious assumption that *Strickland*'s actual-prejudice standard applies to some subset of access-to-counsel errors, they could still debate whether the California Supreme Court reasonably placed Townley's case within that category. The California Supreme Court rejected Townley's request for automatic reversal based on its determination that, because the trial court's order "at most prevented defense counsel from fully discussing the anticipated testimony of a single prosecution witness," "the circumstances present" in Townley's case "are not comparable in magnitude to those in *Geders*." *Hernandez*, 53 Cal. 4th, at 1108–1109, 273 P. 3d, at 1120–1121 (citing *Geders*, 425 U. S. 80, and *Cronic*, 466 U. S., at 659, n. 25). But reasonable jurists would rightly wonder why, if the 17-hour bar on communication at issue in *Geders* would prevent an attorney from "perform[ing] the essential functions of trial counsel," *Hernandez*, 53 Cal. 4th, at 1109, 273 P. 3d, at 1121, a total prohibition on discussing a crucial document at all relevant times would not do the same. After all, although "only a small number of discrete documents were off-limits for discussion between [Townley] and his attorney," 2018 WL 11251904, *5, those documents pertained to a witness who the California Supreme Court recognized was "key to the prosecution," *Hernandez*, 53 Cal. 4th, at 1109, 273 P. 3d, at 1121; see also *Hernandez*, 101 Cal. Rptr. 3d, at 433 (describing the witness as "significant").

In the end, regardless of how the Ninth Circuit would resolve Townley's appeal on the merits, it is beyond question

that Townley's claim is, at minimum, "reasonably debatable." *Buck*, 580 U. S., at ___ (slip op., at 15). The Ninth Circuit erred in denying Townley a COA, and this Court should not allow that error to go uncorrected. I respectfully dissent.