No. 20-391

In The
Supreme Court of the United States

JODY LOMBARDO, ET AL.,

Petitioners,

v.

CITY OF ST. LOUIS, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* RESTORE THE FOURTH, INC. & THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
THE RUTHERFORD INSTITUTE
109 Deerwood Rd.
Charlottesville, VA 22911
(434) 978-3888

MAHESHA P. SUBBARAMAN
Counsel of Record
SUBBARAMAN PLLC*
222 S. 9th St., Ste. 1600
Minneapolis, MN 55402
(612) 315-9210
mps@subblaw.com

* *Counsel for Restore the Fourth, Inc.*

October 26, 2020

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF THE *AMICI CURIAE*[1]

Restore the Fourth, Inc. is a national, nonpartisan civil liberties organization dedicated to robust enforcement of the Fourth Amendment to the U.S. Constitution. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects and that modern changes to technology, governance, and law should foster—not hinder—the protection of this right.

To advance these principles, Restore the Fourth oversees a network of local chapters, whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises a variety of grassroots activities designed to bolster political recognition of Fourth Amendment rights. On the national level, Restore the Fourth also files *amicus curiae* briefs in significant Fourth Amendment cases.[2]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W.

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[1] This amici brief is filed with the consent of Petitioners and Respondents. No counsel for a party authored this brief in whole or in part; nor has any person or entity, other than Restore the Fourth, the Rutherford Institute, and their counsel, contributed money intended to fund the preparation or submission of this brief.

[2] *See*, *e.g.*, Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Torres v. Madrid*, No. 19-292 (U.S. filed Feb. 7, 2020); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Mitchell v. Wisconsin*, No. 18-6210 (U.S. filed Mar. 4, 2019); Brief of *Amicus Curiae*, Restore the Fourth, Inc. in Support of Petitioner, *Collins v. Virginia*, No. 16-1027 (U.S. filed Nov. 17, 2017).

Whitehead, the Institute provides free legal representation to individuals whose civil liberties have been violated. The Institute further educates the public about constitutional and human rights issues. The Institute tirelessly resists tyranny and threats to freedom, ensuring government abides by the rule of law and is held accountable when it infringes on rights guaranteed to persons by the Constitution and laws of the United States.

SUMMARY OF THE ARGUMENT

"I can't breathe."

From Eric Garner in New York City to George Floyd in Minneapolis, this chilling declaration exposes the grave stakes that many Americans face in dealing with law enforcement today. As the *New York Times* observes, while the Garner and Floyd cases have "created national outrage over the use of deadly police restraints," there are dozens of other cases that people have not heard about.[3]

Cases like Byron Williams. Police officers stopped Williams because his bicycle "did not have a light on it."[4] After Williams "compl[ied] with orders to drop face down in the dirt," the officers "used their hands and

[3] Mike Baker, et al., *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe.'*, N.Y. TIMES, June 29, 2020, https://nyti.ms/3koIumX.

[4] *Id.*

knees to pin him down."[5] The officers then ignored Williams's plea that he could not breathe—a plea that Williams "repeated . . . 17 times" before he "lapsed into unconsciousness and died."[6]

Williams's death is no outlier. Cases of suffocation-by-police exist from coast to coast. They include "a chemical engineer in Mississippi, a former real estate agent in California, a meat salesman in Florida and a drummer at a church in Washington State."[7] Also "an active-duty soldier who had survived two tours in Iraq."[8] Even a doctor and a registered nurse.[9]

And now they include Petitioners' case. Police officers arrested Nicholas Gilbert on minor charges and put him in a secure holding cell.[10] During this detention, Gilbert suffered "a mental health crisis" that "posed no threat" to any officer. Pet. 15. Despite this reality, "[s]ix officers pressed their collective weight" into Gilbert's "handcuffed and shackled" face-down body "for 15 minutes" until Gilbert died. Pet. 1. The officers did this as Gilbert yelled "for help" and cried: " 'It hurts. Stop.' " Pet. 15.

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[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] The charges were "suspicion of trespassing and occupying a condemned building" and "failing to appear in court for an outstanding traffic ticket." Pet. App. 3a.

Gilbert's family thus sued the officers who killed Gilbert for violating Gilbert's Fourth Amendment rights. Just so: the Amendment secures the people against all "unreasonable . . . seizures" of "persons," including police uses of excessive force. But the Eighth Circuit rejected the Gilbert family's claim, holding that officers may "[r]easonably interpret" as "resistance" a person's "attempt to breathe" and "to tell [o]fficers that they [are] hurting him." Pet. App. 9a.

Those "who wrote the charter of our liberties" did not agree. *Maryland v. King*, 569 U.S. 435, 482 (2013) (Scalia, J., dissenting). They recognized that nothing could be "as clear a right as that of breathing"—a right that could "never be justly taken from men but as a punishment for some atrocious crime."[11] For this reason, they drafted the Fourth Amendment: to protect an "indefeasible right of personal security" against all arbitrary "invasions on the part of the government and its employés." *Boyd v. United States*, 116 U.S. 616, 630 (1886).

The decision below stands against this right. So does "the reason of the common law" that the Fourth Amendment codifies. *Carpenter v. United States*, 138 S. Ct. 2206, 2243 (2018) (Thomas, J., dissenting). The common law affirms the right of every person to preserve their own life. The common law also demands proper care of pre-trial prisoners.

[11] Letter from Benjamin Franklin to Edward Newenham (May 27, 1779), https://bit.ly/37BQIEP.

ARGUMENT

I. The Court should grant review to uphold the common law's foundational respect for the right to preserve one's life.

At the center of the common law rests "the right of personal security," which consists of "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, [and] his health." 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129 (1768). "[I]nherent by nature in every individual," this right naturally implies the right to preserve one's life. *Id.* at 129. After all, "no suitable atonement can be made for the loss of [one's] life." *Id.* at 132.

The common law subsequently recognizes that "whatever is done by a man to save either life or member" is done by "the highest necessity and compulsion." *Id.* at 130. A person's "well-grounded apprehension of losing his life" requires the law's "indulgence" in a manner that other fears do not (e.g., fears of "being beaten" or "having one's goods taken away"). *Id.*

This indulgence informed the "robust body of common-law rules" at the founding that regulated seizures of persons. *Carpenter*, 138 S. Ct. at 2243 (Thomas, J., dissenting). For example, these rules established that mere "flight" from arrest for a simple misdemeanor (without any "assault" on the arresting officer) is not "resistance." 2 SIR MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 117 (1736). This made it "murder" for an officer to kill a person who "flies and will not yield" to an arrest for "trespass or breach of the

peace"—crimes similar to Nicholas Gilbert's alleged offenses here. *Id.*

The common law deemed such flight excusable because of a person's "natural desire of liberty"—i.e., desire to preserve himself. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 130 (1773). And in construing the Fourth Amendment, the Court has expanded on this idea. Rejecting the notion that "shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life," the Court has ruled: "officer[s] may not seize an unarmed, nondangerous suspect by shooting him dead." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

The common law's foundational respect for the right to preserve one's life does not end with arrests. It also extends into the jailhouse. The common law establishes that "if a prison be on fire" and a prisoner escapes "to save his life," the prisoner "shall be excused" from the statutory felony of escape, even if this is "contrary to the letter of the statute." 4 MATTHEW BACON, NEW ABRIDGMENT OF THE LAW 650 (1793).[12]

This reasoning then points to the other critical principle that supports review here. The common law recognizes that "confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown

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[12] *See*, *e.g.*, *Reniger v. Fogossa* (1551), 75 Eng. Rep. 1, 21 (Exchequer Chamber) (statement of Robert Brook, the Recorder of London) (explaining "the law of reason" required this result even if "the words of the statute are against it").

or forgotten, is a less public, a less striking, and therefore a **more dangerous engine of arbitrary government**." 1 BLACKSTONE, COMMENTARIES 136 (bold added). The common law thus expresses substantial concern for the proper care of pre-trial prisoners.

II. The Court should grant review to uphold the common law's concern for the proper care of pre-trial prisoners.

The common law affirms that imprisonment pending trial "is only for safe custody, and not for punishment." 4 BLACKSTONE, COMMENTARIES 297. Pre-trial prisoners (like Nicholas Gilbert) are then entitled to be treated "with the utmost humanity." *Id.* Officers may not impose any "hardships" on pre-trial prisoners beyond those "**absolutely requisite** for . . . confinement only." *Id.* (bold added).

In this context, the common law acknowledges "the [jailer's] discretion." *Id.* But the common law likewise acknowledges the limits of this discretion: for instance, "[t]he laws will not justify . . . fettering a prisoner unless . . . he was unruly or ha[s] attempted to escape." *Id.*; *cf. Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) ("Discretion is not whim, and limiting discretion according to legal standards helps promote . . . justice . . . .").

These limits stand against viewing a pre-trial prisoner's attempt to breathe or pleas for his life as "resistance." A concrete illustration of this may be seen in *Rex v. Huggins* (1790), 92 Eng. Rep. 518 (KB). Warden

John Huggins employed James Barnes to take "care of the prisoners" at Fleet jail. *Id.* at 519. While doing this job, Barnes locked prisoner Edward Arne into a "damp" room "situate[d] over the [jail's] common sewer"—in essence, a room in which Arne could not breathe. *Id.* ("[T]he room was unwholesome, and dangerous to the life of any person detained in it."). Barnes then kept Arne in this pestilent room for six weeks, during which time Arne fell sick and died. *See id*.

The Crown indicted and convicted Barnes of murder.[13] *Id.* In sustaining this conviction, the court explained: "If a prisoner by duress of the gaoler [i.e., jailer] comes to an untimely end, it is murder. It is not necessary, to make it duress, that there should be actual strokes or wounds." *Id.* at 521. Rather, "[i]f a man die[s] in prison" and "the [coroner's] inquisition" finds the jailer's care brought "the person . . . nearer to death," it is a "felony." *Id.* at 522.

The court then emphasized its "plain" reason for finding that Barnes acted with malice, as required for a murder conviction: because Barnes breached "the trust" reposed in him as a jailer. *Id.* at 522. The common law required Barnes to recognize that "[a] prisoner is not to be punished in [jail], but to be kept safely." *Id.* at 522. Barnes treated Arne otherwise by locking Arne in a room in which Arne could not

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[13] The Crown also indicted Warden Huggins for murder. *See Huggins*, 92 Eng. Rep. at 519. The court acquitted Huggins, finding insufficient evidence to show that Huggins both knew of and ratified Barnes's mistreatment of Arne. *See id.* at 526.

breathe—a "deliberate" and "cruel" action against a prisoner who could not "help himself." *Id.*

"[W]hat's past is prologue." W. SHAKESPEARE, THE TEMPEST, act 2, sc. 1. A Reuters examination of mortality "in more than 500 U.S. jails" reveals a death rate that has risen 35% from 2008 to 2018.[14] This examination also reveals "[a]t least two-thirds of the dead inmates"—or 4,998 pre-trial prisoners—"were never convicted of the charges on which they were being held."[15] And in many of these instances, the deaths involved what Edward Arne suffered over 200 years ago and what Nicholas Gilbert suffered just five years ago: an inability to breathe.[16]

This reality "subverts a fundamental tenet of the U.S. criminal justice system: innocent until proven guilty."[17] That tenet comes from the common law, further emphasizing the common law's concern for the proper care of pre-trial prisoners. *See Coffin v. United States*, 156 U.S. 432, 455 (1895) (explaining that the presumption of innocence "has existed in the common law from the earliest time").

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[14] Peter Eisler, et al. *Why 4,998 Died in U.S. Jails Without Getting Their Day in Court*, REUTERS, Oct. 16, 2020, https://reut.rs/3jnAL7z.

[15] *Id.*

[16] *See id.*

[17] *Id.*

CONCLUSION

The authorities behind the Fourth Amendment confirm that when police restraint denies a person the ability to breathe—forcing them to plead for their life—the common law does not turn away.

Neither should this Court.

Respectfully submitted,

MAHESHA P. SUBBARAMAN
Counsel of Record
SUBBARAMAN PLLC*
222 S. 9th St., Ste. 1600
Minneapolis, MN 55402
(612) 315-9210
mps@subblaw.com

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
THE RUTHERFORD INSTITUTE
109 Deerwood Rd.
Charlottesville, VA 22911
(434) 978-3888

* *Counsel for Restore the Fourth, Inc.*

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