No. 24-1351

In the United States Court of Appeals for the First Circuit

IAN MILLER, personal representative of the Estate of Robert Joseph Miller,
Plaintiff-Appellee,

v.

SPENCER JACKSON, in his individual capacity;
SEAN ROYCROFT, in his individual capacity,
Defendants-Appellants,

TOWN OF BARNSTABLE,
Defendant.

On Appeal from the United States District Court
for the District of Massachusetts (Boston)
Case No. 1:21-cv-10738-AK (The Hon. Angel Kelley)

RESPONSE BRIEF OF PLAINTIFF-APPELLEE

HOWARD FRIEDMAN
LAW OFFICES OF
HOWARD FRIEDMAN, PC
1309 Beacon St., St. Suite 300
Brookline, MA 02446
(617) 742-4100

JEFFREY WIESNER
JENNIFER MCKINNON
WIESNER MCKINNON LLP
88 Broad Street, Suite 503
Boston, MA 02110
(617) 303-3940

MATTHEW W.H. WESSLER
ROBERT FRIEDMAN
GUPTA WESSLER LLP
2001 K Street, NW
Suite 850 North
Washington, DC 20006
(202) 888-1741
matt@guptawessler.com

October 21, 2024

Counsel for Plaintiff-Appellee

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INTRODUCTION

Concerned that her long-term partner, Robert Miller, was having a mental-health crisis, Amy Anderson called the police to her home for help. But rather than offer the requested assistance, the arriving officer, Sean Roycroft, quickly escalated the situation—one that he "did not consider [] an emergency." He first ignored Anderson's warning not to let Miller know that Anderson had been the one to call the police. And then when Miller—who to that point had been calm and welcoming to Roycroft—predictably walked back towards his home upset, Roycroft responded by grabbing Miller's arm, then putting him into an unauthorized full-body hold from behind, and finally forcing him to the ground.

Roycroft's actions to that point had turned a bad situation worse. But his next moves turned a worse situation fatal. Once Roycroft and Miller fell to the ground, Roycroft gained control of Miller. As a second officer, Spencer Jackson testified, the officers remained calm and there was no yelling. Still, Roycroft drove his body weight into Miller's back, first through his forearm and then with his knee. The pressure cut off Miller's air supply, and he let the officers know—pleading that he couldn't breathe. Despite this, Roycroft persisted. He applied pressure for more than a minute after Miller begged for air, including for nearly a minute after Roycroft had freed an arm that was initially under Miller from the fall to the ground. When Roycroft finally relented, Miller was dead.

The district court correctly denied the officers' summary judgment motion seeking qualified immunity on these facts. Because of the "unfortunate frequency" with which police encounters like this end in the fatal use of prone restraints, *see Drummond v. City of Anaheim*, 343 F.3d 1052, 1063 (9th Cir. 2003), this Court has already had occasion to address this factual scenario. Nearly a decade ago, it held (just as four other circuits had done) 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" violates the Fourth Amendment's prohibition on excessive force. *McCue v. City of Bangor, Maine*, 838 F.3d 55, 64 (1st Cir. 2016). Roycroft's conduct, as the district court held, fits squarely within *McCue*'s rule: He applied constant pressure to the back of a face-down Miller despite having full control over him. And because the record also supports a finding that Jackson did nothing but watch as Roycroft applied that asphyxiating force, the district court correctly denied him qualified immunity on Miller's failure-to-intervene claim, too.

On appeal, the officers disregard the record underlying the district court's decision. Their lead argument to distinguish *McCue* is that "the findings of the district court and the undisputed facts at summary judgment make clear that no force was used *at any point after Miller was restrained*." Op. Br. at 16–17 (emphasis added). But the district court unambiguously held the opposite: It concluded that a "reasonable jury could infer" that, "*while [Miller] was restrained* on the floor," Roycroft "used his right

arm to apply pressure on Miller's back." RA 927 (emphasis added). And that was before Roycroft used his knee. Similarly, the officers claim that *McCue* didn't provide clear warning because Roycroft's arm was under Miller until "at most" a "few seconds" before Roycroft stopped applying pressure. Op. Br. at 17, 19. But on the officers' own timeline, Roycroft freed his arm nearly a minute before he stopped applying pressure—and *McCue* recognized that even 30 seconds is enough to violate the Fourth Amendment. 838 F.3d at 64. One more: The officers assert (at 32) that they are entitled to qualified immunity because they could have "reasonably" perceived Miller as "resisting." But the district court again made the opposite finding, concluding that a jury could find that it would have been apparent that "Miller was struggling to breathe, not resisting arrest." RA 926. These are only examples; factual disputes infect the officers' arguments at every turn.

That dooms their appeal. Although a summary-judgment record must always be taken in the light most favorable to the non-moving party, in an interlocutory qualified-immunity appeal like this, accepting the district court's findings is a prerequisite to jurisdiction. Because the officers have refused to do so, this Court should dismiss the appeal.

Even if this Court reaches the merits, it should affirm. Stripped of the many factual disputes, the officers' appeal suggests—the officers do not squarely present it—only one legal argument: that *McCue*'s prohibition on sustained force to the back

does not apply before a person is handcuffed. But *McCue* itself precludes that conclusion. The plain terms of the "constitutional rule" it set forth prohibits excessive force against a "subdued" (or "incapacitated") person, not a "handcuffed" person. 838 F.3d at 64. And, removing any doubt, *McCue* provided as an example a case in which the plaintiff was not handcuffed. *See Abdullahi v. City of Madison*, 423 F.3d 763, 765 (7th Cir. 2005).

What matters is not whether a person is handcuffed, but whether they are under an officer's control such that the force is unnecessary and thus excessive. And here, where two officers had control of Miller for over a minute, he had already begged for breath, and his few movements were nothing more than a futile effort at breathing, no reasonable officer would think that they had license to continue to apply asphyxiating force (or, to sit idly by while his fellow officer did) just because Miller was not handcuffed. This Court should affirm.

JURISDICTIONAL STATEMENT

This Court lacks jurisdiction. This Court ordinarily only has jurisdiction over final judgments. *See Johnson v. Jones*, 515 U.S. 304, 309 (1995). The "collateral order doctrine" provides a limited exception for interlocutory orders that are, among other things, "completely separate from the merits." *Id.* at 310. Appeals of orders denying qualified immunity fit within that doctrine and are "separate from the merits" when they raise "purely legal" issues, but not when they raise disputed issues of fact. *Id.* at

313. Appellants in such cases must therefore accept the version of the facts most favorable to the plaintiff so that the appeal remains "purely legal" in nature. *McKenney v. Mangino*, 873 F.3d 75, 80 (1st Cir. 2017). Because, as discussed below, the officers here repeatedly contest the facts, this appeal is not "purely legal," and jurisdiction is absent.

STATEMENT OF THE ISSUES

I. Whether this Court has jurisdiction over an interlocutory appeal of an order denying qualified immunity when the appellant makes no arguments that accept the district court's findings about the record.

II. Whether the district court erred in denying qualified immunity to an officer who applied sustained pressure to the back of a person for more than a minute after that person had been restrained face down, pleaded that he could not breathe, and moved only in an attempt to breathe, not to resist.

III. Whether the district court erred in denying qualified immunity to an officer who took no action to stop another officer from applying sustained pressure to the back of a person who had been restrained face down, pleaded that he could not breathe, moved only in an attempt to breathe, not to resist, and the officers had control of both of the person's arms.

STATEMENT OF THE CASE

"Not . . . an emergency"—Roycroft's arrival. On April 16, 2019, Amy Anderson called 911 to seek help on behalf of Robert Miller, her partner of eight years. RA 194. She calmly explained that he was acting "delusional" and "needed a psych evaluation," and she gave the 911 operator her first name. Dkt. 59-19 at 0:08-46. When the operator asked her last name, Anderson didn't answer immediately. *Id.* After asking one more time, the operator requested that Anderson "hang up," and Anderson, responding "yup," complied. *Id.* The operator then entered the call into the Town of Barnstable Police Department's dispatch system as "mental health emergency." RA 590. She wrote that that the caller was "[v]ery short on phone," and said that the "[c]aller disconnected" although the operator asked her to hang up. RA 590; RA 141.

Two officers, Sean Roycroft and Spencer Jackson, responded to the dispatch. RA 591. Roycroft arrived at Anderson and Miller's home just three minutes later at 7:09 p.m., and Jackson communicated that he was on his way. RA 906.

The 911 operator's dispatch entry notes initially raised some concerns for Roycroft, but he quickly determined that he "did not consider this an emergency." RA 907; RA 622. Speaking with Anderson dispelled his concerns. She was waiting for him at the front door and explained that Miller was "out back," hallucinating and talking to people not there—a consequence, she inferred, from him not having

taken his medication for a few days. RA 593. Anderson suggested Roycroft go around the side of the home to speak with Miller, but she gave one warning: Miller would probably become angry if he knew that she was the one who had called the police. RA 594.

Despite assessing this situation as a non-emergency, Roycroft failed to follow the Barnstable Police Department's protocol for dealing with mental health crises. RA 620–22, 633–34. He didn't ask Anderson if she was afraid or if there were any weapons in the home; he didn't ask Anderson to leave the house; he didn't ask any details about how long Miller had been in his current state; and he didn't wait for Jackson, who Roycroft knew was on his way and who arrived just a minute later. RA 907, 591, 113. Roycroft had been trained to do all this only three months earlier; he disregarded it anyway. RA 634.

The "seatbelt hold"—Roycroft escalates the situation with an unauthorized tactic. As Anderson suggested, Roycroft went around back and found Miller unwell, but calm. RA 907–08. Roycroft thus confirmed his initial assessment that "there was no emergency." RA 907–08; RA 124. Wearing only sweatpants, Miller was "talking and gesturing [at] the sky." RA 597. After asking Miller "how're you doing," Roycroft asked if they could "have a conversation." RA 908. Miller was receptive and invited Roycroft on to his back deck. RA 908.

Roycroft then ignored Anderson's only warning. Once on the deck, Roycroft "began the conversation with Miller by stating that his wife had called because she had some concerns about him." RA 599. Just as Anderson had anticipated, Miller's "demeanor shifted from calm to angry." RA 908. He turned back towards his home, told Roycroft to "get the fuck away from me," and went inside. RA 909.

Roycroft knew that people experiencing mental health crises are unlikely to follow commands, but he issued them anyway. RA 909. When Miller predictably didn't respond to Roycroft's command to stop, Roycroft took it upon himself to follow him inside. RA 600–01. Claiming that he was concerned Miller would "harm[] himself," Roycroft then grabbed his arm, but Miller pulled away. RA 601. The momentum caused Miller to lurch forward towards a table in the room, but Miller neither grabbed anything nor threatened to. RA 909.

Still, Roycroft decided to put Miller in a "seatbelt hold." RA 910. The "seatbelt hold" involves grasping the restrained individual from behind, with one arm over the left (or right) shoulder, the other under the opposite arm pit, with hands connected in front. RA 627. It looks like this:

RA 626.

The Barnstable Police Department had given Roycroft training in multiple acceptable methods for controlling a person to bring them into custody, but the seatbelt hold was not among them. RA 627. Rather, Roycroft learned it from practicing jiu jitsu in his free time. RA 626. He knew it as a "starting point" that allows the user to "transition" to a "rear choke" hold. RA 118, 865.

"Keep him from creating that space"—Roycroft takes Miller to the ground and pins him down. After applying the unauthorized hold, Roycroft pulled Miller back, causing them to hit against the sliding door that led to the back porch, knocking it off its hinges. RA 604, 910. Miller instinctively struggled to free himself from Roycroft's hold, and the two men then moved forward towards a small office area, falling face down. RA 910.

Because of the positioning from Roycroft's seatbelt hold, the fall resulted in both of Miller's arms and Roycroft's left arm being under Miller's body. RA 609.

Roycroft, however, was able to keep his right leg draped over Miller and positioned his right forearm on Miller's back. RA 609, 611. Miller tried to "lift his chest" after the fall, but Roycroft applied downward pressure—with his 220 pounds of body weight and gear—"to keep [Miller] from creating that space" between his chest and the floor. RA 132, 927.

By this point, Jackson had arrived, and the two were able to speak. RA 610. Jackson, positioned to the right of Miller, asked if Roycroft wanted him to tase Miller. RA 132. Roycroft, feeling that he had the situation under control, declined. RA 612, 372 ("I just felt like I was in a—a position where I could hold him.").

Although Miller was under control, Jackson hastened to get him in handcuffs. And since Miller's hands were under his body—due to Roycroft pressing him to the ground—Jackson decided to punch Miller in his side to make it easier to reach under Miller's body. RA 62, 414. Miller's body jerked in response, allowing Jackson to see that he wasn't holding anything, but Jackson was unable to remove Miller's arms from between Miller's chest and the floor. RA 415.

"I can't breathe"—Roycroft's continuous pressure to Miller's back kills him. At the time of the punch, Miller had already been pinned to the floor for approximately thirty seconds. RA 415. Even without any weight being applied, being restrained in a face-down position decreases a person's ventilation. RA 632. But Miller wasn't just face down. Roycroft was applying downward pressure on his back

to prevent him from creating any space between his chest and the floor. RA 612. So Miller needed to be able to take deep breaths to maintain proper oxygen intake, adequately expel carbon-dioxide, and regain proper ventilation. RA 632.

But he couldn't. As Miller strained to push up to allow for deeper breaths, Roycroft pushed down to prevent it, RA 628—even though an officer with Roycroft's and Jackson's training would know that Miller's pushing up was simply his "struggling to breathe, not resisting arrest." RA 408, 926.

After about one minute and fifteen seconds of Roycroft pinning him to the ground, Miller pleaded, "I can't breathe" and begged, "Amy, help me." RA 257, 616, 629, 932.[1] Anderson, who had only an obstructed view, RA 416, heard Miller's cry for help and asked if Miller could breathe, RA 616. The officers ignored her and Miller—Roycroft didn't change his positioning or pressure and Jackson remained on the side—and they responded only with words to the effect of "if he can say the words I can't breathe, then he has enough breath to get those words out." RA 326, 616.

While Miller struggled to breathe, the officers felt "relatively calm for the situation." RA 416. Miller at no point attempted to "punch, kick, or otherwise strike." RA 912–13. The officers "weren't screaming" at Miller. RA 416. Jackson even had

[1] The district court found that Roycroft could have been on top of Miller for as long as two minutes and thirty seconds. RA 932. Anderson was uncertain about how long they were on the ground, but testified that Miller pleaded for breath "somewhere in the middle." RA 257.

time to request "another car here" on the radio, a message he delivered in the same measured "tone and calmness" that he was using to speak with Roycroft and Miller. RA 416,422; Dkt. 59-19 at 2:06. Then he punched Miller again. RA 416.

This time, the punch gave the officers the room they needed to free Roycroft's arm and grab Miller's arms to put on handcuffs. RA 416. Roycroft immediately removed his arm from under Miller. RA 416; *see also* RA 191 (police report from Roycroft stating that he freed his arm after the punch before Jackson grabbed Miller). At almost the same time, Jackson pulled Miller's right hand behind Miller's back and placed handcuffs on it. RA 416 (testimony from Jackson stating that the punch allowed him to remove Miller's right arm). Roycroft continued to apply pressure to Miller's back for nearly a minute longer as the officers applied the handcuffs, at some point shifting from driving his weight through his forearm to driving his weight through his knee. RA 613.[2]

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[2] Jackson placed his radio call at 7:11:52 p.m., and it lasted approximately six seconds. Dkt. 59-19 at 2:16–2:22. He testified that, after the call, he delivered the second punch to Miller—so, at approximately 7:11:59—and he and Roycroft both stated that Roycroft freed his arm immediately thereafter, i.e., at 7:12:00. RA 191, 416. The officers radioed for medical assistance at 7:12:58 and claim that Roycroft only got up just before that call was placed. RA 506 (stating that "just a few seconds passed" before the officers began taking off Miller's handcuffs and performing CPR); RA 182 (stating that the officers radioed for medical assistance before beginning CPR); *see also* RA 137, 617. To sum that up: According to the officers' own timeline, Jackson delivered his punch at approximately 7:11:59, Roycroft had freed his arm at approximately 7:12:00, and Roycroft got up from on top of Miller just before 7:12:58, a span of nearly a minute.

Roycroft only released the pressure from Miller's back after handcuffing was complete. But by that point—two minutes and thirty seconds from when Roycroft first pinned Miller's back to the ground, a minute and fifteen seconds from when Miller said he couldn't breathe, and nearly a minute after Roycroft freed his arm—Miller had already stopped moving. After observing that Miller's "pupils were fixed," Roycroft radioed for medical assistance. RA 630.

"[W]e stood him up and started to walk out and he collapsed"—Roycroft and Jackson change their stories. EMS arrived shortly after but were unable to save Miller. He was pronounced dead that night. RA 631. He left behind three adult children and Anderson. RA 20.

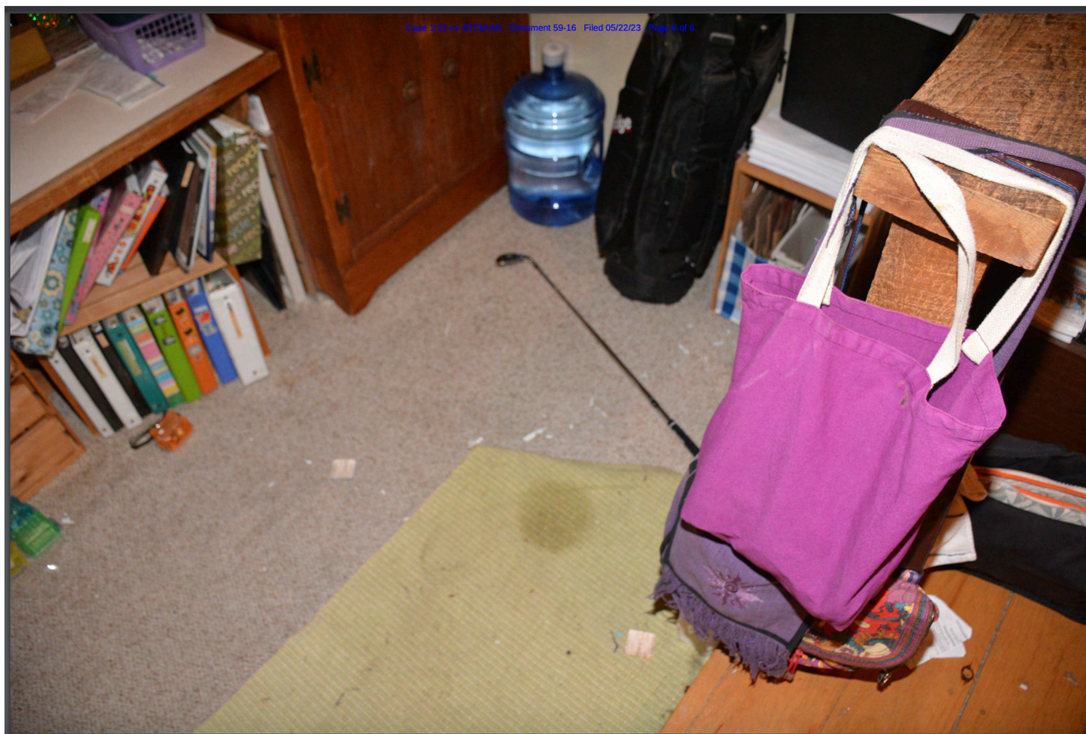
Miller died of a "prone restraint cardiac arrest" caused by the pressure Roycroft applied to his back and that prevented Miller from breathing. RA 631. Less than two months earlier, Miller had received an echocardiogram that showed he was not at an increased risk of cardiac arrest. RA 636.

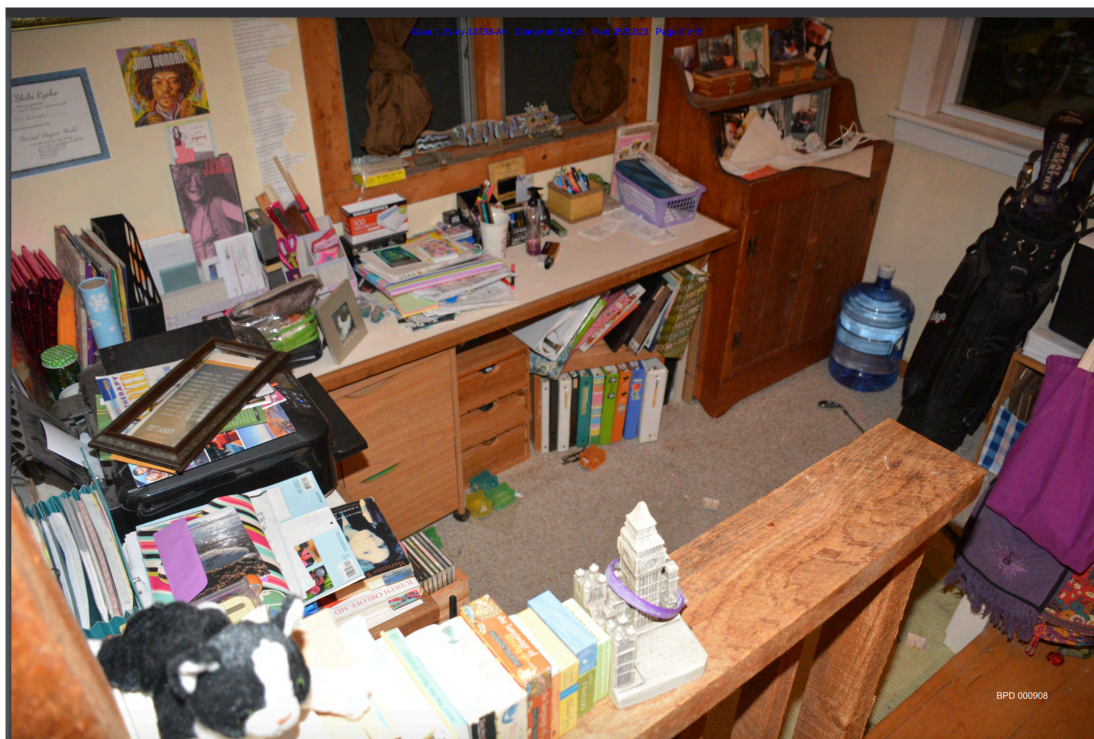
Before leaving the scene, the officers recounted to the arriving EMS personnel a story that bore little resemblance to their encounter with Miller. The ambulance report, based on conversations at the scene, states:

> Officers sts 'we were here for mental health evaluation and pt was calm and cooperative at first. He got angry and went for a golf club and we took him down and cuffed him. He was talking and we stood him up and started to walk out and he collapsed, we immediately started CPR and applied AED.'

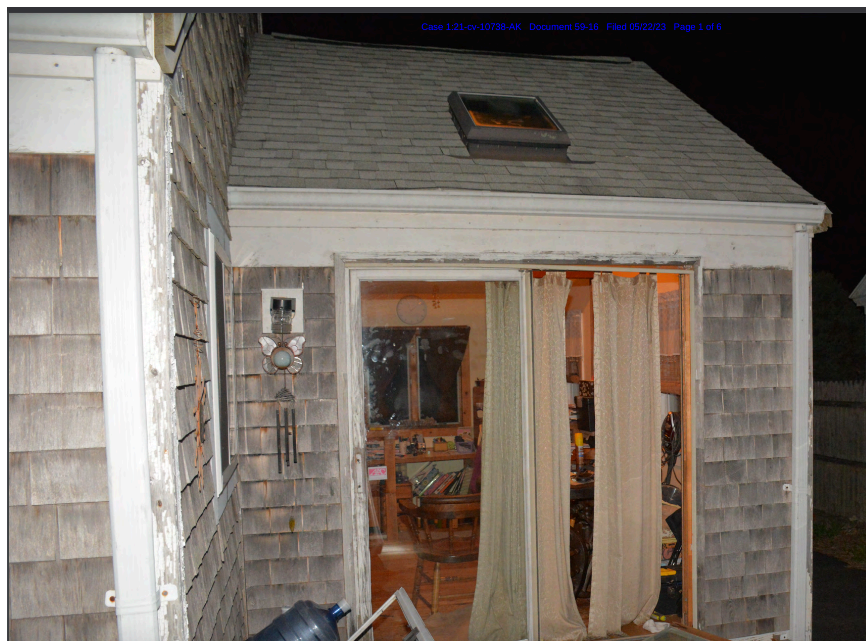
RA 631. In reality, Miller never got up off the floor after Roycroft took him down.

The officers also claimed that, when Roycroft and Miller fell to the floor, they landed on top of a golf club that Roycroft feared Miller could use against him. RA 134. Pictures taken after Miller was removed show the office area in which Roycroft subdued Miller (and the golf club):





RA 520, 534. And another picture shows that the office area was directly in front of the door that Roycroft and Miller had come in through:



RA 519. Because the golf club was on the floor underneath Miller, it was in a spot where it would have been difficult to grab and "improbable" to wield. RA 924.

This case. Miller's son, Ian, filed this lawsuit on behalf of Miller's estate in May 2021. The complaint asserted one claim under 42 U.S.C. § 1983, alleging that the officers violated Miller's Fourth Amendment rights, and a parallel state law claim for wrongful death. RA 21–22.[3]

Following discovery, the officers moved for summary judgment. The motion broke their encounter with Miller down into four discrete uses of force: (1) Roycroft's grabbing of Miller's arm, (2) the use of the seatbelt hold (3) Jackson's punches, and (4) Roycroft's use of force while Miller was face down on the ground. RA 577–81. They argued that each use of force was reasonable and, in the alternative, shielded by qualified immunity. The motion did not address Jackson's liability under a failure-to-intervene theory. And although Miller raised that basis for liability in his opposition brief, RA 656–57, the officers reply brief did not address it either, instead resting on their assertion that Roycroft did not violate Miller's rights to begin with. *See* RA 787–91.

The district court granted the motion in part and denied it in part. Applying the three-factor test for determining excessive force derived from *Graham v. Connor*,

[3] Miller also sued the Town of Barnstable for negligence, but later agreed to voluntarily dismiss that claim. Dkt. 30.

490 U.S. 386, 396 (1989)—which evaluates the severity of the crime, if any, at issue; whether the plaintiff posed a threat; and whether "he is actively resisting arrest"—the district court first concluded that a reasonably jury could find each instance of force used by the officers was unconstitutionally excessive. RA 920–27.

But the court did not reach a uniform conclusion on qualified immunity. RA 927. For the first three uses of force—the arm grab, the seatbelt hold, and Jackson's punches—the court concluded that, because there was no appellate case law that gave the officers clear notice that they were violating Miller's rights, they had qualified immunity. RA 927.

The same was not true, however, "for Defendants' last use of force when Miller was already on the floor." RA 927. The court addressed Roycroft's liability first, starting with what law was clearly established. Citing *McCue*, it explained that this Court had "found that exerting a lot of sustained pressure on the back of a restrained person is unreasonable." RA 928. And, after carefully reviewing the record, the court concluded that Roycroft's conduct, taken in the light most favorable to Miller, violated that rule. RA 927–28. The court determined that a "reasonable jury could infer" that, after they fell to the floor, Roycroft "appl[ied] pressure on Miller's back"—first "us[ing] his right arm" and then with "his knee"—all "while [Miller] was restrained." RA 927. And, the court determined, the record

supported the conclusion that Roycroft did this in response to Miller's attempt "to push up to breathe." RA 927.

The court also held that "Miller's account of the facts" supported the conclusion that "a reasonable defendant would have understood that he was violating the [clearly established] right." RA 929. Miller had submitted evidence (specifically, Anderson's testimony) that he had "said he could not breathe," but Roycroft still "deployed aggressive restraint tactics against a civilian, without any provocation beyond using profanity to abruptly end a conversation with the officer and walking away into his own home." *Id.*

The court then turned to Jackson's liability. It concluded that he had qualified immunity for not intervening until he threw his punches and therefore focused on the period "immediately after." RA 931. For that period, the court found that there were key "factual disputes" critical to the immunity analysis: "how long" Miller remained on the floor, whether Roycroft put his knee on Miller and for how long, and whether Jackson knew that Miller was struggling to breathe. RA 931–32. The court therefore concluded that Jackson would be entitled to qualified immunity "if his version of events is substantiated," but not "if the fact finder believes Miller's version of events." RA 932. "Because of these factual disputes," the court denied summary judgment on Jackson's plea for qualified immunity. RA 933.

STANDARD OF REVIEW

This Court reviews the district court's denial of summary judgment de novo. *Morse v. Cloutier*, 869 F.3d 16, 22 (1st Cir. 2017). When reviewing the denial of qualified immunity in an interlocutory appeal, this Court "take[s], as given, the facts that the district court assumed when it denied summary judgment" and does not review "which facts a party may, or may not, be able to prove at trial." *Begin v. Drouin*, 908 F.3d 829, 832 (1st Cir. 2018). "[T]o the extent the district court fails to expressly articulate a relevant finding of fact, [this Court] review[s] the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed." *Id.*

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction over the officers' appeal. Appeals from interlocutory orders denying qualified immunity fit within this Court's jurisdiction only when they present "purely legal" issues. *McKenney*, 873 F.3d at 80. The officers, however, fight the record at every turn, raising disputes about central factual issues and offering a version of the facts that conflicts directly with the district court's express findings. Because this appeal therefore turns on factual issues, not legal ones, the Court should dismiss.

II. Even on the merits, there is no basis to overturn the district court's well-reasoned decision.

Roycroft. It has long been clearly established that an officer cannot apply significant, continuous force to the back of person who is subdued in a face-down prone position. *McCue*, 838 F.3d at 64. Yet Roycroft did just that: For more than two minutes—including nearly a minute after Roycroft had freed his arm and the officers had a hold of both of Miller's arms—Roycroft applied sustained force to Miller's back. The pressure of Roycroft's bodyweight, first through his arm and then through his knee, cut off Miller's air supply until he died. That violated Miller's clearly established rights.

To avoid this straightforward application of *McCue*, the officers suggest it applies only to force being applied to people who are handcuffed. But *McCue* gave as an example of a case falling within its rule one in which a person, struggling to breathe, "mov[ed] his arms so they could *not be handcuffed* and arch[ed] his back upwards as if he were trying to escape." *Abdullahi*, 423 F.3d at 765 (emphasis added). Consistent with that, *McCue* explained that what matters is that the person "stop[s] resisting," not that they are handcuffed. 838 F.3d at 62. Thus, because the district court found that Miller (like the plaintiffs in *McCue* and *Abdullahi*) was only "struggling to breathe, not resisting," while Roycroft drove his bodyweight into Miller's back, this case fits squarely within *McCue*'s rule. RA 926.

Beyond a misreading of *McCue*, the officers offer nothing more than disputes about the record. But at summary judgment (and certainly in a qualified-immunity

appeal), the record must be construed in the non-moving party's favor—here, Miller's—not the other way around.

Jackson. The officers do not dispute that it is clearly established that an officer "aware of the use of excessive force by another officer, and able to stop it," must do so. *See Torres-Rivera v. O'Neill-Cancel*, 406 F.3d 43, 51–52 (1st Cir. 2005). Instead, they offer two factual arguments why Jackson acted reasonably in doing nothing. Neither was raised below, and they are therefore waived.

They are also at odds with the record. First, the officers claim that Jackson didn't have to intervene because he was concerned about Roycroft's arm being under Miller and the (purported) risk that Miller had a weapon. But Roycroft freed his arm, and Jackson confirmed Miller had no weapon, nearly a minute before Roycroft stopped applying pressure. Second, the officers assert that Miller's expert conceded Jackson acted properly. That's not true, but insufficient anyway. Expert evidence isn't needed for a jury to conclude that Jackson acted unreasonably in taking no action while Roycroft applied deadly asphyxiating force.

ARGUMENT

I. This Court lacks jurisdiction to entertain the officers' appeal.

A. Courts of appeals have jurisdiction over interlocutory qualified immunity appeals only if the defendant accepts the record in the light most favorable to the plaintiff.

This Court's statutory jurisdiction, absent exceptions not relevant here, extends only to "final decisions" of the district court. 28 U.S.C. § 1291. "[I]nterlocutory appeals—appeals before the end of district court proceedings—are [therefore] the exception, not the rule." *Johnson*, 515 U.S. at 309. This limitation on the court's jurisdiction recognizes that "[i]mmediate review of every trial court ruling" would "impose unreasonable disruption, delay, and expense." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985).

But the Supreme Court has recognized a narrow exception under the collateral-order doctrine for "purely legal rulings implicating qualified immunity." *Brown v. Dickey*, 117 F.4th 1, 3 (1st Cir. 2024). The collateral-order doctrine permits appeals of decisions that, among other things, are "completely separate from the merits of the [underlying] action." *Jones,* 515 U.S. at 304. "[P]urely legal" questions about qualified immunity satisfy that requirement because they concern an evaluation of what law is "clearly established," *Mitchell v. Forsyth*, 472 U.S. 511, 528, 530 (1985)—a question distinct from the merits—"not which facts the parties might be able to prove," *Jones,* 515 U.S. at 311. But if an appeal strays into "determinations of

evidentiary sufficiency," it exceeds this Court's jurisdiction. *Morse*, 869 F.3d at 22. When the facts are put at issue, the appeal is no longer "completely separate from the merits." *Jones,* 515 U.S. at 312. And that line serves the important efficiency interests of the statutory limit on this Court's jurisdiction: It spares the courts of appeals from "reading a vast pretrial record, with numerous conflicting affidavits, depositions, and other discovery materials" to determine whether there is a triable issue of fact. *Id.* at 316.

"It follows that defendants who invoke [this Court's] limited power of interlocutory review to redress denials of qualified immunity must be prepared to accept the facts in the light most favorable to the plaintiff" and refrain from questioning whether the "the district court properly analyzed the facts." *McKenney*, 873 F.3d at 81. Conversely, if the defendant "fail[s] to pose … the qualified immunity question in a manner that would permit [this Court] to conclude that the answer to it does not depend upon whose account of the facts is correct," then this Court "lack[s] the authority to provide an answer." *Cady v. Walsh*, 753 F.3d 348, 361 (1st Cir. 2014); *see also, e.g.*, *Brown*, 117 F.4th at 3; *McKenney*, 873 F.3d at 84; *Begin*, 908 F.3d at 836; *McCue*, 838 F.3d at 65.

B. Because the officers repeatedly refuse to accept the record in the light most favorable to Miller, this Court lacks jurisdiction.

Although the officers pay lip service (at 20) to accepting the district court's findings and viewing the record in the light most favorable to the plaintiff, all of their arguments "intertwin[e]" disputed issues of fact and "cherry-picked inferences." *McKenney*, 873 F.3d at 84. This Court should therefore dismiss their appeal for lack of jurisdiction. Consider each of the arguments the officers advance (under six different subheadings) in turn.

Restraint. The officers first contend (at 21–22) that the district court "erroneously focused its analysis on post-restraint . . . circuit precedent" because "no force was used at any point after Miller was restrained." Though couched as a legal argument—ostensibly focused on the misuse of "circuit precedent"—this argument fights the facts the district court found. The district court stated that "[a] reasonable jury could infer that approximately half of Roycroft's weight was on Miller's back *while he was restrained* on the floor and that Roycroft used his right arm to apply pressure on Miller's back." RA 927 (emphasis added). And that conclusion, focused as it was on "half of Roycroft's weight," is limited to before Roycroft even freed his arm so that he could apply his full body weight to Miller's back through his arm and

then knee.[4] *Supra* at 12. The central factual premise of the officers' lead argument, in other words, is flatly contradicted by the district court's decision. This court therefore lacks jurisdiction to entertain it.

Timing. In a variation on the same theme, the officers next argue (at 25–26) that no clearly established law gave warning that an officer could not put his "knee, pre-restraint" on a person for a "few seconds." This quarrels with the facts three times over. *First*, it ignores that the district court's decision was based not just on Roycroft's use of his knee, but also on his use of his arm. RA 927. *Second*, it ignores the district court's finding that Miller was "restrained" at the time Roycroft drove his forearm into Miller's back. RA 927. And since that preceded Roycroft's use of his knee—by which point even Roycroft admits that he had untangled his arm—Miller was necessarily restrained then, too.

Third, it invents—out of thin air—a finding that the force to Miller's back lasted for only a "few seconds." To be sure, the district court noted that *Roycroft claimed* that it would have lasted for only a "few seconds," but the court held that

[4] The officers consider it significant (at 22) that the district court credited that, at the time Roycroft declined to use the taser, he "believed" he "would be able to restrain" Miller without the taser—and thus, implicitly, had not yet restrained him. But Roycroft declined the taser before Jackson's punches. So even assuming (though the record doesn't support it) that the district court meant to convey that a reasonable jury would have to find Miller was not restrained at *that* point, the district court's conclusion that Roycroft applied pressure with his forearm and knee after Miller was later restrained is entirely consistent.

"there is also a dispute" over "how long" Roycroft applied pressure and that it may have been as long as two minutes and thirty seconds. RA 932 & n.2. The officers' argument therefore amounts to the kind of attack on a decision "perceived by the trial court to be an issue of fact" that is "nonreviewable." *Morse*, 869 F.3d at 22.

Indeed, even if this Court were to consider only Roycroft's use of his knee and disregard when he drove his weight through his arm—though there is no basis to do so—the officers' assertion still defies their own accounting of the record. Roycroft admits that he may have used his knee when handcuffing Miller, RA 181, and he claims that they began handcuffing once Roycroft freed his arm—nearly a minute before Roycroft finally got up. RA 136; *Supra* at 12 n.2. That's far more than the "few seconds" on which the officers' argument rests.

The officers' argument thus mirrors the flawed attempt by the officers in *McCue* to recast the record on appeal. Their "insistence" that there was only a "momentary continuance of force" "mischaracterize[d] the [magistrate] judge's statements about the facts and fail[ed] to present those facts in the light most favorable to the plaintiff." 838 F.3d at 62–63. This Court therefore held that the defendant's refusal to "accept[] the plaintiff's best version of the facts," "precludes appellate jurisdiction." *Id.* at 63. The same is true here.

Danger to Anderson. The officers' third claim (at 28–29) is that their conduct did not violate any clearly established law because they "knew Anderson

was in a dangerous situation due to Miller's behavior prior to the 911 call." As we explain below, this argument is a red herring and criticizes an aspect of the district court's decision on which the court *did* find qualified immunity. *Infra* at 41. Even still, it improperly quarrels with the facts. The district court found that a jury could conclude that Miller "did not appear to be posing a danger to anyone." RA 922.

Danger to the Officers. The officers also assert (at 29–30) that Roycroft's "low-level, empty-hand force" on Miller did not violate any clearly established rights because Miller "pinned Roycroft's arm underneath him" until "just before Miller was handcuffed" and because the nearby golf clubs, or an object the officers claimed could be in Miller's hands, could be used as a weapon. Here, too, the argument depends on a series of factual premises that conflict with the decision below:

- The force was not "low-level." It was, even before Roycroft freed his hand, "half of Roycroft's weight" of 220 pounds. RA 927. Once Roycroft freed his arm and used his knee, it was his entire weight. And by the end, it was enough to cut-off Miller's ability to breathe and to cause cardiac arrest in a person who had just been evaluated as free of any serious heart risk. RA 636, 927.

- Miller did not "pin[]" Roycroft's arm. The district court determined that there are "not sufficient facts" to "infer Miller was deliberately trapping Roycroft's arm underneath his body." RA 924.[5] Instead, Roycroft pinned his own arm—which was under Miller's body to begin with only because Roycroft applied the seatbelt hold—by "press[ing] . . . [his] body weight on [Miller]s back" each time "Miller pushed up"

[5] The officers nonetheless repeat this mischaracterization throughout their brief. *See* Op. Br. at 17 ("Miller had pinned Roycroft's arm."); *id.* at 27 ("Miller . . . was pinning an officer to the ground while twisting and kicking."); *id.* at 29 ("Miller . . . pinned Roycroft's arm underneath him.").

to try to breathe. RA 925, 927. (That is why the district court found that a jury could conclude that "Miller would not have been able to free his arms in that moment even if he had wanted to." RA 925.)

- Roycroft's arm was not underneath Miller until "just before" he was handcuffed and Roycroft stopped applying pressure. As detailed above, he freed his arm nearly a minute before he got up. *Supra* at 12 n.2.

- There was no risk from the golf clubs or any other object. The district court concluded that a reasonable jury could find it "improbable" that Miller could wield a golf club from his stomach and that there was "no objective evidence" that Miller had any other object. RA 923–24.

That's four different factual disputes that preclude this Court from entertaining this single sub-heading in the officers' brief.[6]

Intent. The officers argue (at 35) that Roycroft did not "intentionally maintain his hold of Miller—being trapped, he had no choice not to." This disregards that, as just described, it was Roycroft's own conduct preventing Miller from creating space between his chest and the floor—that is, Roycroft's "choice"—that left his arm under Miller. And it likewise ignores the nearly minute-long period where Roycroft continued to apply pressure after freeing his arm.

Jackson. Finally, the officers contend (at 34, 36–37) that there was no clearly established law that Jackson had a duty to intervene because Jackson feared Miller was holding an object and Roycroft's arm was trapped. But the district court only

[6] The officers also add in factual disputes that precede the time Miller was on the ground, claiming that Miller "shoved backward[s]" once Roycroft grabbed him, but the district court found Roycroft pulled Miller into the door. RA 910.

denied Jackson qualified immunity for the period after his punches—at which point neither of those facts were true. By the second punch, the district court found, Jackson saw that Miller did not have an object in his hand. RA 913. And immediately after the second punch, Roycroft freed his arm. *Supra* at 12. But (at the risk of redundancy) Roycroft continued to apply pressure for nearly a minute. RA 932.

* * *

Over and over, then, the officers' arguments depend on facts that conflict with what the district court held that a reasonable jury could find. This Court lacks jurisdiction to consider those claims. And because the officers have offered no argument untainted by their refusal to accept the record, this Court should dismiss the appeal in its entirety.

II. The district court correctly concluded that the officers violated Miller's clearly established right to be free from continuous pressure to his back after he had been subdued face down on the ground.

Even if this Court reaches the merits, the officers' offer no good reason to upset the district court's well-reasoned decision. "Qualified immunity seeks to balance two opposing interests: the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Berge v. Sch. Comm. of Gloucester*, 107 F.4th 33, 39 (1st Cir. 2024). It strikes this balance by holding officers accountable when they violate a constitutional guarantee that is "clearly established"—that is,

when the right is "sufficiently clear that every reasonable official would [have understood] that what he is doing violates that right." *Id.* In that circumstance, the officer has the "fair and clear warning that his conduct was unconstitutional" necessary to remove the cloak of immunity. *Alfano v. Lynch*, 847 F.3d 71, 77 (1st Cir. 2017).

To show that qualified immunity is not warranted, a plaintiff must identify "controlling authority or a consensus of cases of persuasive authority sufficient to send a clear signal to a reasonable official that certain conduct falls short of the constitutional norm." *Id.* at 75. This Court has at times described this requirement as having two "sub-part[s]." *Id.* The "contours of the right" must have been "sufficiently well-defined at the critical time," and it must "have been clear to an objectively reasonable official" that the "actions taken . . . contravened [that] right." *Haley v. City of Bos.*, 657 F.3d 39, 48 (1st Cir. 2011). The clearly established law therefore "must not be gauged at too high a level of generality." *Alfano*, 847 F.3d at 76. But the plaintiff is not required identify case law that is "entirely congruent with the scenario faced by" the officers. *Id.* at 77. It is sufficient if the case law found "a violation in a factually *similar* situation." *Berge*, 107 F.4th at 39 (emphasis in original).

The district court correctly concluded that a jury could find Roycroft and Jackson violated Miller's clearly established rights under this standard. This Court, like a consensus of its sister circuits, has held that "exerting significant, continued

force on a person's back while that person is in a face-down prone position after being subdued" constitutes excessive force. *McCue*, 838 F.3d at 64. And this Court has likewise recognized that an officer who fails to intervene in the face of "another officer's use of excessive force can be held liable under section 1983 for his nonfeasance." *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 207 n.3 (1st Cir. 1990). The facts here, taken in the light most favorable to Miller, fit comfortably within those rules—and gave the officers clear warning that they were violating Miller's rights.

A. The law was clearly established that Roycroft could not continuously apply force to Miller's back after he had been subdued and, for over a minute, struggled to breathe.

1. Miller's right to be free from sustained pressure to the back once subdued in a face-down position was clearly established at the time of the events here.

a. To start, *McCue* defined the "contours of the right" with sufficient clarity to put Roycroft on notice. *See Alfano*, 847 F.3d at 77. Although, in *McCue*, this Court ultimately concluded that it lacked jurisdiction because the defendant-officers refused to accept certain facts, it first evaluated what law was "clearly established" to determine whether those facts were "material." 838 F.3d at 55, 61. Reviewing the decisions of other circuits, this Court concluded that "exerting significant, continued force on a person's back while that [person] is in a face-down prone position after being subdued" is a clearly established violation of the Fourth Amendment. *Id.* at 64.

And to give further shape to that rule, the Court described four cases as examples of decisions that fell within it. *Id.* (discussing *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008); *Abdullahi*, 423 F.3d at 771; *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004); *Drummond v. City of Anaheim*, 343 F.3d 1052, 1057 (9th Cir. 2003)).

Of particular relevance to understanding the "constitutional rule" that *McCue* announced is its reliance on the Seventh Circuit's decision in *Abdullahi*. There, a man, Mohamed, was in an obvious mental health crisis and used a belt to attack an officer who tried to intervene. *Id.* at 765. When additional officers arrived, they got Mohamed to the ground, where he "began kicking his legs, moving his arms so they could not be handcuffed and arching his back upwards as if he were trying to escape." *Id.* As this Court summarized it, an officer then, "for 30 to 45 seconds, had 'placed his right knee and shin on the back of [Mohamed's] shoulder area and applied his weight to keep [him] from squirming or flailing.'" *McCue*, 838 F.3d at 64 (quoting *Abdullahi*, 423 F.3d at 765). Despite Mohamed's flailing, "the Seventh Circuit observed that this movement may not have constituted resistance but rather 'a futile attempt to breathe' with the officer's weight on his upper body." *Id.* (quoting *Abdullahi*, 423 F.3d at 771). The officers' conduct therefore violated Mohamed's Fourth Amendment rights. *Abdullahi,* 423 F.3d at 769.

McCue thus left officers like Roycroft with notice of a "sufficiently well-defined" right. *Haley,* 657 F.3d at 48. It defined a specific rule: do not apply sustained force to

the back of a subdued face-down person. And, by using *Abdullahi* as an example, it made clear that it extended to people who were not handcuffed and who physically pushed back in a struggle to breathe. That example is important because "an action's unlawfulness can be apparent" not just "from direct holdings," but also "from specific examples described as prohibited." *Champion*, 380 F.3d at 902.

b. An objectively reasonable officer in Roycroft's shoes also would have understood he was violating Miller's rights—the second "sub-part" of the analysis. *Alfano*, 847 F.3d at 77. The facts here fit every aspect of *McCue*'s rule. Miller was in a "face-down, prone position" when Roycroft exerted continuous force directly on his back. *McCue*, 838 F.3d at 56; RA 912. Roycroft applied "significant" force. *McCue*, 838 F.3d at 59. It was at least half of Roycroft's 220 pounds and, for nearly a minute, all 220 pounds—enough to prevent Miller from getting his chest off the floor, to force Miller to plead that he could not breathe, and to trigger Miller's cardiac arrest. RA 912, 927. The force was "continuous," exceeding the 30 to 45 seconds of force at issue in *Abdullahi*. *See supra* at 12; *McCue*, 838 F.3d at 55; *see also, e.g.*, *Rodrigues v. Sullivan*, 2024 WL 4028257, at *3 (D. Mass. Sept. 3, 2024) (concluding, after *McCue*, that applying force for 27 seconds violated a clearly established right).

And Miller was "subdued." Roycroft had Miller under sufficient control that the officers didn't need to yell; he and Jackson were able to maintain their calm while keeping Miller pinned to the floor; and for nearly a minute, Roycroft had full control

of both of his arms, the officers had control of Miller's arms, and Roycroft was able to place his full body weight on Miller. *Supra* at 10–12. To be sure, Miller tried at times to lift his chest to breathe, but as the district court concluded, a jury could find that was because Miller was simply "struggling to breathe, not resisting arrest." RA 926.

McCue also makes clear that a person can be "subdued" even while they make physical efforts to breathe. It does so in two ways. *First*, it equates being "subdued" not with being immobile but with ceasing resistance: This Court explained that the record "could support a finding that McCue *stopped resisting*," and that the officers continued to apply force "no longer necessary to *subdue*" him; in other words, once he stopped resisting, McCue was subdued. 838 F.3d at 62 (emphasis added). But ceasing resistance does not mean ceasing to move or even to struggle intensely: The Court held that a jury could find that McCue was subdued even as he "squeez[ed]" an officer's hand so tightly that it caused "serious" injury because that "squeezing" may have been only a "futile attempt to breathe," not "resistance." *Id.* at 62–63. *Second*, *McCue*'s use of *Abdullahi* confirms that a person can be "subdued" even as they attempt to breathe. Mohamed "kick[ed]" and arched his back in a way that made it appear he was attempting to "escape" as he strained to breathe. *Id.* at 64. Still, *Abdullahi* fits within *McCue*'s rule.

An objectively reasonable officer in Roycroft's position, as the district court recognized, would therefore understand that Miller was subdued and that continuing

to apply significant pressure violated the Fourth Amendment. RA 929. Indeed, it's hard to imagine a surer sign that a person has been subdued than what Miller did: beg for breath.

2. As discussed above, the officers never grapple with the district court's findings and the record in the light most favorable to Miller. But their arguments, to the extent they can be untangled from the factual disputes underpinning them, still fail.

Restraint. The officers' lead argument, as noted above, is that, at the time of Miller's death, there was no clearly established law "regarding force on a person's back while they are in a face-down prone position *prior* to being restrained." Op. Br. at 21, 23 (emphasis in original); *see also id.* at 24 ("Miller was neither subdued nor incapacitated at any point during which force was applied to him."). As explained, this argument fails from the start because the district court held that a reasonable jury could find that Roycroft applied force to Miller's back "*while he was restrained*." RA 927 (emphasis added). But in addition to ignoring this key fact, the officers' argument also appears to equate being "restrained" or "subdued" with being handcuffed. *See* Op. Br. at 22 ("[N]o force was used *at any poin*t after Miller was retrained . . . Plaintiff concedes that as soon as the handcuffs were on Miller, Roycroft told Miller he was going to help him to his feet.") (emphasis added).

That's wrong, as *McCue*'s reliance on *Abdullahi* makes clear. In *Abdullahi*, just as here, the officer applied force *before* they were able to put handcuffs on Mohamed. 423 F.3d at 765. And, just as here, "[the officer] took his weight off Mohamed after the handcuffing was complete." *Id. McCue*, by incorporating *Abdullahi* into its statement of the relevant "constitutional rule," thus gave Roycroft and Jackson ample warning that a person need not be handcuffed to be "restrained," as the officers put it, or "subdued," as *McCue* put it.[7]

Nor is *Abdullahi* alone in finding a violation where the victim was not handcuffed. *See, e.g.*, *Taylor v. City of Milford*, 10 F.4th 800, 808 (7th Cir. 2021) (citing *McCue* in holding that application of force to unhandcuffed man violated clearly established right); *Martin v. City of Broadview Heights*, 712 F.3d 951, 955, 961 (6th Cir. 2013) (record supported violation of clearly established right even though person was not handcuffed, "bit" one officer's "knuckle," and "struggled to cast the officers' weight from his back so he could breathe"); *Griffith v. Coburn*, 473 F.3d 650, 653, 659 (6th Cir. 2007) (neck restraint on face-down, unhandcuffed person violated clearly established

[7] Opinions, of course, should be "read [in] context," not "parsed" like the "language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979). And the best evidence of what *McCue* meant by "subdued," then, is that this Court deemed *Abdullahi* to fit within *McCue*'s rule. But it's noteworthy that the dictionary definitions of "subdue" and "restrain" also do not require the use of handcuffs. *See Restrain*, Cambridge Dictionary (defining "restrain" as "to control the actions or behavior of someone by force"), https://perma.cc/H7S8-CDYZ; *Subdue*, Cambridge Dictionary, (defining "subdue" as "to bring a person or group under control by using force"), https://perma.cc/8DYX-5YT7.

rights); *Simpson v. Hines*, 903 F.2d 400, 403 (5th Cir. 1990) (sitting on chest of face-up person during struggle to handcuff violated clearly established rights); *Lachance v. Town of Charlton*, 368 F. Supp. 3d 231, 240 (D. Mass. 2019), *aff'd*, 990 F.3d 14 (1st Cir. 2021) (applying *McCue* to hold that officer did not have qualified immunity for placing knee on plaintiff before handcuffing); *cf. Stamps v. Town of Framingham*, 813 F.3d 27, 42 (1st Cir. 2016) ("We acknowledge that each of these cases presented unique sets of facts . . . Nonetheless, their factual differences do not obscure or detract from the straightforward rule that, collectively, they all espouse.").

Indeed, to hold that *McCue* did not clearly establish that an officer could not apply significant force to the back of a non-resisting, but not handcuffed, person would require splitting with the Sixth Circuit. In *Champion v. Outlook Nashville, Inc.*—a case that (like *McCue*) involved someone who was handcuffed—the Sixth Circuit held that it violates the Fourth Amendment to apply significant force to "a suspect's back while that suspect is in a face-down prone position after being subdued." *See* 380 F.3d at 903. The defendant in a subsequent case, *Martin v. City of Broadview Heights*, therefore argued (like the officers here) that it was not clearly established that the same pressure could not be applied to a person who was not handcuffed. 712 F.3d at 961.

The Sixth Circuit held otherwise. *Id.* It reasoned that it was "clear" from an "examination of the principal circuit court case on which *Champion* relie[d]"—a case

that involved a person who was not handcuffed, *see Simpson*, 903 F.2d at 403—that *Champion* applied to cases involving force against people who were not handcuffed, too. *Martin*, 712 F.3d at 961.[8] The court therefore denied the officer qualified immunity. *Id.*

The same reasoning applies here. Just as *Champion*'s reliance on *Simpson* made "clear" that its rule extended to people who are not handcuffed, *McCue*'s reliance on *Abdullahi* makes clear its rule extends to people are not handcuffed.[9]

The officers never mention *Martin* at all. As for *Abdullahi*, the most they say (at 24–25) is that the case is "readily distinguishable" because the officer in *Abdullahi*

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[8] *Martin* did describe an unhandcuffed person as being not yet "subdued," 712 F.3d at 961, but *McCue*, through its application of *Abdullahi*, adopted a broader understanding of "subdued"—and an understanding consistent with its plain meaning. *Supra* at 36 n.7. And regardless, even if Miller's status falls outside of some technical definition of "subdued," *Martin* makes clear that a case like *McCue* still clearly establishes that significant force cannot be applied to a person—like Miller—who is face down, not resisting, and simply struggling to breathe, even if they aren't handcuffed.

[9] *Martin* considered the key teaching of *Champion* to be that significant force cannot be applied to a person's back if the person does "not present a serious safety risk." 712 F.3d at 962. That standard was satisfied in *Martin* even though the plaintiff "struggled to cast the officers' weight from his back so he could breathe"—including by biting an officer—and the encounter began with the plaintiff talking "nonsensically," being half-naked, and "running towards [the] patrol car." *Id.* at 954, 962. The situation here is different only to the extent that Miller was calm until Roycroft antagonized him and that Miller presented less of a risk. The district court found that Miller was not "posing a danger," RA 922, and he certainly ceased to present a "serious safety risk" once, over a minute before Roycroft relented, he made clear he was struggling to breathe.

"continued to apply force after the plaintiff stopped resisting." That's no distinction at all. Again, the district court held that a jury could find Roycroft applied force while "Miller was struggling to breathe, not resisting arrest." RA 926.[10]

Finally, even if this Court were to conclude that cases involving people not handcuffed fall outside of *McCue*'s rule, then *Martin*, *Abdullahi*, *Griffith*, and *Simpson* still show that there is a "consensus of cases of persuasive authority sufficient to send a clear signal." *See Alfano*, 847 F.3d at 75. So the end result is the same—the district court did not err in denying the officers' qualified immunity on this record.

Timing. The officers next argue (at 25) that placing a "knee on the back of a resisting suspect" is not a "*per se* impermissible police technique." This argument, again, defies the district court's conclusion that a jury could find that Miller was not resisting.

It also contorts the district court's holding. The court did not hold that placing a knee on Miller, without more, violated Miller's clearly established rights. It held—after carefully evaluating the record to determine that a jury could find that the

[10] To the extent the officers mean that *Abdullahi* is distinguishable because Mohamed laid motionless for between 10 and 25 seconds at the end of the use of force, 423 F.3d at 765, that fails, too. *McCue* made clear that it was the full 30 to 45 seconds that counted in *Abdullahi* (and even the two minutes during which McCue "serious[ly]" injured an officer by "squeezing" his hand that could count in *McCue*). 838 F.3d at 63–64. And at any rate, Miller's pupils were already "fixed" when Roycroft handcuffed him, RA 915, so a jury could easily infer that Roycroft had applied pressure for 10 to 25 seconds during which Miller was no longer moving at all.

encounter lasted two-and-a-half minutes; that Roycroft "used his right arm to apply pressure on Miller's back" as well; and that Miller was not resisting but struggling to breathe—that Roycroft violated Miller's right to be free from "compressive body weight" when he was subdued. RA 927, 929.[11]

Danger to Anderson. The officers next claim (at 27–29) that Roycroft did not violate a clearly established right because a 911 call could "reasonably be viewed as an indication that danger was present," in particular, danger to Anderson. This attacks the district court's determination that "[t]his case is not like 911 hang-up call cases in which officers had an objectively reasonable basis to conclude there was an immediate need to protect others or themselves from serious harm." RA 921.

The district court, however, made that comment when evaluating Roycroft's use of force *before* the "last stage of the altercation," i.e., before Miller was face-down on the ground. RA 921–23. It therefore had no bearing on the district court's holding that, during that last stage, the officers violated Miller's clearly established rights. And it therefore has no bearing on this appeal.

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[11] The officers emphasize (at 21–22) that, at one point, the district court articulated the right as the "right to be free from an officer kneeling on his back after he had been restrained." Of course, the record *does* show that Roycroft violated that rule, but regardless, the district court's opinion, read as a whole, makes clear that it focused on Roycroft's entire use of force, including his use of "his right arm" and body weight, not just his use of his knee.

At any rate, the district court *did* recognize the inference that the officers assert can be drawn from the 911 call. A jury, it explained, could "find on th[e]se facts that Roycroft reasonably believed that Miller posed a danger to him and Anderson." RA 922. The district court merely concluded that this wasn't the *only* permissible inference—a conclusion supported by Roycroft's own unwillingness to characterize the situation as an emergency. RA 119. The district court then went on to evaluate the officers' motion in the light most favorable to Miller—as the summary-judgment standard requires. That the officers refuse to accept those inferences does not mean that the district court erred.

Further, the suggestion that danger at the outset of an encounter precludes a finding that an officer violated clearly established rights is foreclosed by case law. *McCue*, *Abdullahi*, and essentially every case in this context involves the potential for danger in *the lead up* to the use of force on a prone person's back. But none of them countenance that the potential for danger before a person is subdued provides a justification for any and all force after the person is subdued.

Danger to the officers. The officers next criticize the district court (at 29) for relying on cases where "force continued after a subject was restrained, or no officer was immobilized or otherwise compromised by the subject he was trying to restrain." In their view (at 30), those cases do not apply because "Roycroft's left arm

was indisputably trapped under Miller throughout the struggle on the office floor until just before Miller was handcuffed."

As detailed above, this argument cannot be reconciled with the record. *Supra* at 27. The district court found that force *was* applied after the "subject [Miller] was restrained." RA 927. And Roycroft's arm was not trapped until "just before" Miller was handcuffed. Rather, the record supports a finding that Roycroft freed his arm nearly a minute before the officers handcuffed Miller. *Supra* at 12 n.2.

Factual contortions aside, that Roycroft's arm was underneath Miller for some (or even if it were all) of the period he applied force does not preclude a conclusion that Roycroft violated his clearly established rights. As discussed above, *McCue* held that a jury could find that McCue was not resisting—and thus was "subdued"—even as he was "squeezing" the officer's hand so tightly that he caused a "serious" injury because that squeezing was part of McCue's effort to breathe. 838 F.3d at 63. *Abdullahi*, likewise, held that a jury could conclude that officers there applied unconstitutional force even during the period Mohamed looked like he was trying to "escape" because it may have just been a "futile attempt to breathe." *Id.* at 64. The district court's conclusion here that a jury could find that Miller, too, was just "struggling to breathe, not resisting," thus makes this case indistinguishable from the cases on which the district court (correctly) relied. RA 926.

Seemingly recognizing this flaw in their argument, the officers try to cast the situation as one in which Miller at least "*appeared* to resist." Op. Br. at 29 (emphasis added); *see also id.* at 25 (asserting that Miller could have "been perceived" as resisting). That again defies the record. The officers conspicuously do not offer a record cite to support that assertion—presumably because they took the (hotly contested) extreme position that Miller exhibited *no* signs of distress and never pleaded that he couldn't breathe at all. RA 615. They thus never claimed below that, even on Miller's version of the facts, Miller still appeared to resist.

But the district court *did* evaluate that record and held that a reasonable jury could find that an "officer with the Defendants' training *would* have concluded"—not even "could" have concluded—"that Miller was struggling to breathe, not resisting arrest." RA 926 (emphasis added). Necessarily embedded within that finding is a determination that a jury could find not only that Miller was simply "struggling to breathe, not resisting," but that it was apparent. *Cf. Begin*, 908 F.3d at 835 ("Given the unchallengeable Rule 56 finding that a jury could find that Begin posed no immediate threat to anyone but himself, and given the ambiguous record concerning precisely where each person stood at the moment Drouin decided to fire, we have no choice but to assume that Begin could not have reached out and stabbed anyone first without advancing as many as twenty feet toward the barrel of Drouin's raised gun.").

Similar problems infect the officers' assertion (at 30) that *McCue* is inapposite because of the "potential for Miller to have a weapon" and "Miller's close contact with the single golf club underneath him." Yet again, this ignores that Roycroft continued to apply pressure for nearly a minute after Jackson's second punch allowed the officers to grasp Miller's arms and learn, unequivocally, that he had no weapon. *Supra* at 12. It also disregards the district court's findings that a jury could discredit any claim from the officers' that they were even concerned Miller had a weapon he could use. As the district court explained, that assertion was "purely speculative," there was "no objective evidence that Miller had an object in his hand or that he was armed with a weapon," and the notion that Miller could use a weapon or golf club while Roycroft maintained control over him was "improbable."[12] RA 923–24.

The officers also cite a series of cases they claim show that Miller's rights were not clearly established. But like the officers' other arguments, these cases bear no resemblance to the record here. Consider their lead case, *Gray v. Cummings*, 917 F.3d 1, 12–13 (1st Cir. 2019). It held that an officer had qualified immunity when he deployed a taser against a person who, face down on the ground, refused to give up her hands, urged the officer to "do it" when warned she would be tased, and conceded she was

[12] There are other reasons to doubt Roycroft's credibility, too. The officers gave a report to EMS personnel that bears no resemblance to what happened. *Supra* at 13. And Roycroft inconsistently claimed that Miller was both "winching" his arm to gain control but also "pushing up." RA 179.

resisting. *Id.* at 12. Here, by contrast, the record supports a finding, as the district court recognized, that it was apparent that Miller was *not* resisting. RA 926.

In fact, *Gray* supports affirmance. It held—before the events here—that, immunity aside, a "jury *could* find on the facts of this case" that the officers violated the plaintiff's rights. *Id.* (emphasis added). So it provided notice that using significant force on a face-down person who (unlike Miller) *was* resisting could violate the Fourth Amendment.

The only other case from this Circuit that the officers cite, *Justiniano v. Walker*, 986 F.3d 11 (1st Cir. 2021), is even farther afield. It didn't involve the application of force to a person on the ground at all. Instead, it concerned an officer who pepper sprayed a person who was "mov[ing] forward" toward the officer as the officer "retreat[ed]." *Id.* at 28. Because the only possible inference from the record was that the forward movement "posed a threat"—a "contrary finding, even a contrary inference, [wa]s simply not supportable"—this Court concluded that the officer had qualified immunity. *Id.*

Justiniano therefore does not undermine the clear notice that the officers had here. Not only did it involve a completely different use of force, but also the district court held, and the record shows, that a jury could find that Miller wasn't a threat. *E.g.*, RA 922. He "never threatened" the officers at all; he moved away from, not towards, Roycroft; he "did not punch, kick or otherwise strike" the officers or have

a weapon; he was struggling to even breathe for over a minute; and even when he still had his arms underneath him, it was "improbable" that he could wield an object as a weapon. RA 924, 926. That bears no similarity to *Justiniano*.

The officers' out-of-circuit precedent is of no more help. Most involved the use of force against people who were resisting, posed a threat to the officers' safety, or both. *See Est. of Armstrong ex rel. Armstrong v. Vill. of Pinehurst*, 810 F.3d 892, 909 (4th Cir. 2016) (holding—three years before the events here—that officers violated the constitution, but had qualified immunity because no prior case prohibited use of taser against a person who was "resist[ing]" being taken into custody); *Coronado v. Olsen*, 2022 WL 152124, at *5 (10th Cir. Jan. 18, 2022) (officers had qualified immunity for use of taser against a man—who was "swearing at the officers," "beating his chest," and then "advance[d]" towards the officers despite being ordered not to—because they "acted *reasonably* in believing [the man] was resisting arrest") (emphasis added); *Lombardo v. City of St. Louis*, 38 F.4th 684, 691 (8th Cir. 2022) ("[T]he right to be free from prone restraint *when resisting* was not clearly established in 2015 when the incident with Gilbert occurred.") (emphasis added); *Anderson v. Driskill*, 550 F. Supp. 3d 596, 623 (E.D. Ark. 2021) (plaintiff was "actively resisting" and "fighting with officers"). Here, of course, the district court concluded that a jury could find there was no resistance and that an officer "with the Defendants' training would have" recognized that. RA 926.

The final two out-of-circuit cases involved whether officers had qualified immunity when handcuffs caused injuries. *See Day v. Wooten*, 947 F.3d 453, 462 (7th Cir. 2020) (officers had qualified immunity where handcuffs caused breathing problems but "[t]he record contain[ed] no evidence that there was any indication the handcuffs were the cause of Day's breathing difficulty"); *Ikezi v. City of New York*, 2017 WL 1233841, at *16 (E.D.N.Y. Mar. 31, 2017) (use of "normal handcuffing procedures" did not violate clearly established law). Because it was Roycroft's sustained use of force to Miller's back that caused Miller's death here, not handcuffs, those cases are irrelevant.[13]

Intent. The officers' final parry in defense of Roycroft is that he "did not intentionally maintain his hold of Miller—being trapped, he had no choice not to." Op. Br. at 35. According to the officers, he had no choice because "acquiescing to Miller[]" would have "endanger[ed]" Roycroft. *Id.*

[13] To the extent the officers mean to suggest that these cases stand for the proposition that officers may ignore a person who "notif[ies] law enforcement officers that they have injures" so that Roycroft and Jackson could ignore Miller's pleas to breathe, Op. Br. at 33, this Court has rejected that idea. It has explained that it is "unconstitutional for police officers to increase their use of physical force after an arrestee who has been resisting arrest stops resisting for several seconds and warns them that they are" exacerbating his injuries. *Jennings v. Jones*, 499 F.3d 2, 16 (1st Cir. 2007). That's what happened here. After Miller pleaded that Roycroft was preventing him from breathing, Roycroft went from applying half his body weight through his arm to his full weight through his knee.

There is nothing to this argument beyond a disregard for the record. First, Roycroft was *not* trapped for the entirety of the struggle—for nearly a minute, his arm was freed. *Supra* at 12. Second, Roycroft *did* have a choice—Roycroft trapped himself by refusing to allow Miller to create "space" between his chest and the floor. Indeed, the district court recognized that, "[b]ased on Miller's chest being pressed to the ground and Roycroft's body weight on his back," Miller couldn't have freed his arms had he wanted to. RA 925. Third, a jury could find that allowing Miller to breathe—or in the officers' terminology, "acquiescing" to him—would not have imperiled Roycroft: The district court concluded that Miller was merely "struggling to breathe" and "never threatened" the officers, and he was face down, surrounded by two officers. RA 926.

The officers' argument is simply devoid of any content once stripped of factual premises that conflict with the record.

B. The law was clearly established that Jackson had a duty to intervene.

The district court also correctly determined that Jackson is not entitled to qualified immunity. This Court has repeatedly recognized that officers who are "aware of the use of excessive force by another officer, and able to stop it" must take action to do so. *See, e.g.*, *Torres-Rivera*, 406 F.3d at 51–52; *Gaudreault*, 923 F.2d at 207 n.3.

1. The record, taken in the light most favorable to Miller, satisfies that standard. There can be no doubt that Jackson was "aware" that Roycroft was using

unreasonable force that prevented Miller from breathing. Jackson was mere inches away; he maintained that the situation was "relatively calm"; like Roycroft, Jackson heard Miller plead that he could not breathe; and when Anderson interjected to check on Miller, one of the officers responded to her question as to whether he could breathe. *Supra* at 11. And Jackson knew—because he had been trained about the dangers—that a person lying face down and having pressure applied to their back would have difficulty breathing. RA 408. Jackson thus had ample ability to see what was going on, hear the impact, and had nothing distracting him from processing the consequences. At this point, any reasonable officer would know they needed to relieve the pressure on Miller so he could breathe.

Jackson also had the ability to "stop it." *Torres-Rivera*, 406 F.3d at 51–52. Roycroft applied force for over a minute after Miller complained of being unable to breathe—and for nearly a minute after Roycroft had freed his arm and the officers grasped a hold of each of Miller's arms. *Supra* at 12. That makes this case nothing like those in which an officer only had a "matter of seconds" and thus no "realistic opportunity" to protect a person from excessive force. *Gaudreault*, 923 F.2d at 207 n.3; *see also Abdullahi*, 423 F.3d at 774 ("Whether an officer had sufficient time to intervene . . . is generally an issue for the trier of fact unless, considering all the evidence, a reasonable jury *could not possibly conclude otherwise*.") (emphasis in original). Rather, Jackson had adequate time—during an encounter in which he and Roycroft were

able to calmly communicate—to caution Roycroft to ease off. Or, once the officers had control of Miller's arms, Jackson could have urged Roycroft to help him move Miller into a position that improved his ability to breathe. Jackson did neither.

In this way, the situation once again parallels *Abdullahi*. The Seventh Circuit held that nearby officers lacked qualified immunity because "a reasonable jury might conclude (if the plaintiff's theory of the case is credited) that the other officers should have cautioned [the officer applying force] to stop kneeling on Mohamed's back." 423 F.3d at 774. The only difference is that the officer in *Abdullahi* did not apply pressure for as long as Roycroft did; it lasted for only 30 to 45 seconds in *Abdullahi*. *Id.* at 765. But that just makes Jackson's violation of Miller's rights clearer.

2. Jackson does not claim that the duty to intervene to stop an officer from applying force to a person subdued and face-down on the ground was not clearly established. Instead, he attempts to cast his situation as different (at 34) on the theory that the law was not clearly established that he had a duty to intervene when there was still a need to "effectuat[e] Roycroft's release" and when he was "concern[ed] about [Miller] having an object in his hands."

As an initial matter, this argument is waived. Jackson never addressed the duty to intervene below, let alone argued that he was differently situated from Roycroft. He simply joined Roycroft in arguing that Roycroft did not violate Miller's clearly established rights at all. *See* RA 585–87. He cannot raise his new argument now for

the first time. *See, e.g.*, *Buenrostro v. Collazo*, 973 F.2d 39, 43 (1st Cir. 1992) (refusing to consider new qualified immunity argument not raised in the district court).

At any rate, just like Roycroft's arguments, Jackson's is incompatible with the district court's findings and the summary judgment standard. Setting aside that Roycroft's own actions trapped his arm and that it was "improbable" that Miller could use a weapon, this argument ignores the nearly minute-long period, following Jackson's second punch, after Roycroft freed his arm—the only period for which the district court actually found qualified immunity lacking. RA 931 (evaluating the period "immediately after" Jackson punched Miller). Not only was Roycroft's "release" effectuated by that point, but Jackson also confirmed that Miller had no object in his hand. RA 913. Thus, whatever Jackson's obligations prior to that point, for nearly a minute, Jackson did nothing while Roycroft—with full control of his arm—drove his body weight into a restrained, unarmed Miller. That violated Miller's clearly established rights, and any reasonable officer—especially given Miller's plea for help—would have known it.

Jackson also claims (at 36–38) that he has qualified immunity because he did "exactly what the plaintiff's use-of-force expert testified he was required to do." Once again, Jackson never mentioned this testimony—and certainly did not form any argument centered around it—below and has therefore forfeited any reliance on it here. *See, e.g.*, *Buenrostro*, 973 F.2d at 43. But unsurprisingly, Jackson mischaracterizes

the expert's opinion. He never testified that Jackson acted appropriately. He testified that Jackson acted unreasonably by not "interven[ing]" once there was a "danger" of "positional and/or compressional" asphyxiation based on Roycroft pushing his "body weight on top of Mr. Miller." RA 683.

Jackson's argument also fails for a more fundamental reason. Expert testimony "is by no means required in all excessive force cases." *United States v. DiSantis*, 565 F.3d 354, 364 (7th Cir. 2009); *Jennings*, 499 F.3d at 15 ("This case, involving force applied with bare hands, did not require expert testimony to establish whether the force used was reasonable."); *see also, e.g.*, *Lunneen v. Vill. of Berrien Springs*, 2023 WL 6162876, at *8 (6th Cir. Sept. 21, 2023) (upholding verdict in the plaintiff's favor even though "*Plaintiff's* police practice expert . . . concluded that the Officers' use of force in attempting to subdue [the plaintiff] was reasonable") (emphasis in original). So regardless of what the expert said, a jury here will be perfectly capable of determining, on its own, whether Jackson heard Miller's plea for help, could see Roycroft driving his body weight into Miller as Miller struggled to breathe, and had adequate time to tell Roycroft to stop applying fatal, asphyxiating force—yet did nothing at all.

CONCLUSION

This Court should affirm.

Respectfully submitted,

*_/s/ Matthew W.H. Wessler_*
MATTHEW W.H. WESSLER
ROBERT FRIEDMAN
GUPTA WESSLER LLP
2001 K Street, NW
Suite 850 North
Washington, DC 20006
(202) 888-1741
matt@guptawessler.com

HOWARD FRIEDMAN
LAW OFFICES OF
HOWARD FRIEDMAN, PC
1309 Beacon St., St. Suite 300
Brookline, MA 02446
(617) 742-4100

JEFFREY WIESNER
JENNIFER MCKINNON
WIESNER MCKINNON LLP
88 Broad Street, Suite 503
Boston, MA 02110
(617) 303-3940

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Counsel for Plaintiff-Appellee

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,998 words excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

October 21, 2024

/s/ Matthew W.H. Wessler
Matthew W.H. Wessler

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Matthew W.H. Wessler
Matthew W.H. Wessler