No. 15-852

In the Supreme Court of the United States

BRANDON CLELAND AND FRANK MAIORANA,
PETITIONERS

v.

ALAN BAYNES

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

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND 17 OTHER STATES IN SUPPORT OF PETITIONERS

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

Ann M. Sherman
Assistant Solicitor General
Solicitor General Division

Attorneys for *Amicus Curiae*
State of Michigan

QUESTION PRESENTED

Whether "the right to be free from excessively forceful or unduly tight handcuffing" is the correct level of generality for determining whether the law is clearly established for qualified-immunity purposes?

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INTEREST OF *AMICI CURIAE*[1]

Qualified immunity is an important doctrine that shields law-enforcement officers from unnecessary liability and the burdens of suit. The doctrine is often applied when handcuffing—an important and widely used law-enforcement tool—gives rise to a § 1983 excessive-force claim based on handcuff tightness. The Sixth Circuit held that the mere existence of a "right to be free from excessively forceful or unduly tight handcuffing" is sufficiently particularized to put a reasonable officer on notice as to when and how the officer should respond to a handcuff-tightness complaint. This holding is contrary to both this Court's qualified-immunity standards and its guidance on excessive-force analysis, and it jeopardizes officers' ability to discharge their duties. It forces a bright-line rule that requires officers to immediately stop and investigate a tightness complaint, regardless of the circumstances and attendant dangers.

The attorneys general of the *Amici* States are the chief law-enforcement officers of their respective States. They understand the importance of the qualified-immunity doctrine in achieving a proper balance between preserving the rights of citizens who are handcuffed and ensuring that law-enforcement officers can take reasonable steps to ensure their own safety and that of fellow officers and citizens.

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[1] Consistent with Rule 37.2(a), the *amici* States provided notice to the parties' attorneys more than ten days in advance of filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has repeatedly granted review in qualified-immunity cases to protect police officers from being improperly subjected to personal liability based on judgment calls they make in a reasonable manner. E.g., *Mullenix* v. *Luna,* 136 S. Ct. 305 (2015) (per curiam) (reversing denial of qualified immunity on clearly established prong); *Carroll* v. *Carman*, 135 S. Ct. 348 (2014) (per curiam) (summarily reversing denial of qualified immunity on clearly established prong); *Plumhoff* v. *Rickard*, 134 S. Ct. 2012 (2014) (reversing denial of qualified immunity on both prongs); *Stanton* v. *Sims*, 134 S. Ct. 3 (2013) (per curiam) (summarily reversing on clearly established prong); see also *City and County of San Francisco* v. *Sheehan*, 135 S. Ct. 1765 (2015) (reversing denial of qualified immunity on clearly established prong as to social worker); *Taylor* v. *Barkes*, 135 S. Ct. 2042 (2014) (per curiam) (summarily reversing denial of qualified immunity on clearly established prong as to prison officials); *Wood* v. *Moss*, 134 S. Ct. 2056 (2014) (reversing denial of qualified immunity on both prongs as to Secret Service agents); *Reichle* v. *Howards*, 132 S. Ct. 2088 (2012) (reversing denial of qualified immunity on clearly established prong as to Secret Service agents).

Indeed, less than a year ago this Court reiterated that qualified immunity is important " 'to society as a whole' " and relied on this important value to explain why, in the law-enforcement context, the Court "often corrects lower courts when they wrongly subject individual officers to liability." *Sheehan*, 135 S. Ct. at 1774 n.3 (citations omitted).

This same correction is needed here. The lower court applied the wrong standard to resolve this § 1983 excessive-force case based on tight handcuffing, and consequently, improperly subjected individual officers to potential liability and the burdens of suit. The court relied too heavily on *Hope* v. *Pelzer*, 536 U.S. 730 (2002), to justify defining the right at an overly generalized level and, thus, effectively failed to apply the "beyond debate" standard from *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074 (2011).

Like many other aspects of police work, handcuffing is complex. To be sure, handcuffing is a balance of proper procedures, training, and judgment based on past experience, and handcuffs that are too tight can cause injury. But if too loose, they pose significant risk of a suspect slipping the cuffs and endangering the officer or others. Also, a complaint of tightness could be a ruse by the suspect to create an opportunity for assault or escape. And handcuff injuries are sometimes self-induced by suspects who are resisting arrest, struggling in the back seat of a patrol vehicle, or attempting to create evidence for a later lawsuit.

Accordingly, the mere fact that an officer does not immediately investigate a complaint of handcuff tightness does not mean the officer is plainly incompetent or is knowingly violating the law. The officer must remain alert to danger and rapidly developing circumstances, and balance the risk that tight handcuffs might cause an injury against the risks posed by factors such as the type of incident, the time of day, the location, the demeanor of the suspect, and the duration of transport. A decision to continue to the station may often be the competent, correct decision—not

a violation of clearly established law. And it may well be what keeps both citizens and officers safe.

In 2015, the FBI reported assault data from 11,151 law-enforcement agencies across the country, representing 533,895 officers. These agencies indicated that during 2014 alone, 48,315 officers were assaulted while performing their duties—roughly 9 per 100 sworn officers. FBI Uniform Crime Reports, *2014 Law Enforcement Officers Killed and Assaulted.*[2] A number of these assaults occurred during routine tasks such as handcuffing. And roughly 31% were responding to disturbance calls not unlike the one the deputies were responding to in this case. *Id.* Nearly 63% occurred where the officer was alone, *id.*, as was true of the transport here. These statistics about the risks officers face underscore the need to allow officers to assess the circumstances and to exercise discretion in determining the appropriate response to a handcuff-tightness complaint.

This Court should grant review, reverse the panel decision, and hold that under this Court's qualified-immunity standards a "right to be free from excessively forceful or unduly tight handcuffing" is not sufficiently particularized to satisfy the clearly established prong.

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[2] Available at https://www.fbi.gov/about-us/cjis/ucr/leoka/2014/officers-assaulted.

ARGUMENT

I. The "right to be free from excessively forceful or unduly tight handcuffing" is not sufficiently particularized to be "clearly established" for qualified-immunity purposes.

In determining qualified immunity, this Court has frequently reiterated that rather than focus on "general proposition[s]," a court must ensure that "the right the official is alleged to have violated [was] 'clearly established' in a more particularized, and hence more relevant, sense." *Saucier* v. *Katz*, 533 U.S. 194, 201-02 (2001) (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)). Indeed, "existing precedent must have placed the statutory or constitutional question beyond debate" as to " 'every 'reasonable official.' " *Ashcroft*, 131 S. Ct. at 2083 (quoting *Anderson*, 483 U.S. at 640).

A. To determine the level of generality of the contested right, a court must take into account the particular context.

This Court has explained that the operation of qualified-immunity standards "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson*, 483 U.S. at 639. In the context of the Due Process Clause, for example, there is a sense in which any action that violates the Clause (no matter how unclear it might be that the particular action is a violation) violates a clearly established right. *Id*. But this Court has warned that such an "extremely abstract right" turns this Court's "rule of qualified immunity. . . into a rule of virtually unqualified liability." *Id*. And this Court recently reiterated that the right level of "specificity is especially

important in the Fourth Amendment context, where " '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.' " *Mullenix*, 136 S. Ct. at 308 (quoting *Saucier*, 533 U.S. at 205). This Court rejected as satisfying the clearly established prong the "general test" articulated in *Tennessee* v. *Garner*, 471 U.S. 1 (1985), that a police officer may not " 'use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.' " *Id.* at 308–09 (quoting *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2014)) (some citations omitted).

Indeed, it is hard to see how a court could determine whether handcuffs were "excessively forceful" or "unduly tight" without knowing the particular circumstances where they were used. The mere existence of an injury cannot be enough. That would be like saying it is excessive force to shoot at and kill a suspect without knowing anything else about the circumstances (such as whether he was about to detonate a bomb in the middle of crowd of schoolchildren or whether he was simply jaywalking).

B. *Hope* v. *Pelzer*'s limited holding does not allow lower courts to circumvent this Court's "beyond debate" standard.

Rather than looking to the particular circumstances to determine whether the law was clearly established at the proper level of generality, the Sixth Circuit applied an overly generalized definition of a right that does not place the constitutional question "beyond debate." The Sixth Circuit relied heavily on

Hope v. *Pelzer*, where this Court explained that requiring a "fundamentally" or "materially" similar prior case is too rigid an application of the clearly established inquiry. 536 U.S. at 741.

But *Hope*'s cautionary holding that courts should not require materially identical facts does not remove the requirement, frequently reiterated by this Court, that courts must apply a particularized inquiry into the factual circumstances. E.g., *Saucier*, 533 U.S. at 202 (The relevant inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*.") (emphasis added).

Yet the published opinion below did just that. In a case involving a claim of excessive force based on handcuff tightness, the Sixth Circuit cited *Hope* to justify its holding that a "right to be free from unduly tight or excessively forceful handcuffing" was sufficiently particularized and "easily me[]t the standards" set out by [this Court], which requires the contours of a right to be sufficiently clear under preexisting law." Pet. App. 25a–26a. The panel opinion relied on the fact that "at least 10 published cases, not to mention additional unpublished cases, have stated unequivocally, for over 20 years, that a right to be free from excessively forceful or unduly tight handcuffing is clearly established law." Pet. App. 30a. "Requiring any more particularity than this," the Sixth Circuit said, "would contravene [this Court's] explicit rulings" and "allow *Hope*'s fear of 'rigid, overreliance on factual similarity' in analyzing the 'clearly established' prong' of the qualified immunity standard to be realized." Pet. App. 26a.

C. The opinion below turns qualified immunity into unqualified liability on excessive-force claims premised on handcuff tightness.

That holding misapplies *Hope*'s important but limited principle and ignores this Court's guidance before and after *Hope*. E.g., *Anderson,* 483 U.S. at 640 ("[I]n the light of pre-existing law the lawfulness must be apparent."); *al-Kidd*, 131 S. Ct. at 2085 ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions."); *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law."); *Saucier*, 533 U.S. at 206 (explaining that the defense "protect[s] officers from the 'sometimes hazy border between excessive and acceptable force' ") (internal citation omitted).

In the same way, the Sixth Circuit's overly generalized test for tight handcuffing inquiries should be rejected. The mere fact that in some sense every tight handcuff violates the "right to be free from unduly tight or excessively forceful handcuffing" would, if it satisfies the "clearly established" prong, result in unqualified liability for law-enforcement officers. Merely knowing, in a broad sense, that applying too-tight handcuffs can violate the Constitution, does not make it beyond debate that law-enforcement officers lose qualified immunity any time they exercise their training and judgment as to how to respond to complaints that cuffs are "too tight," "pinching," "hurting," or just plain "uncomfortable." Otherwise, it will be virtually impossible for officers to obtain immunity on excessive

force claims premised on tight handcuffing. They would lose the protection where they "correctly perceive[d] all of the relevant facts but ha[d] a mistaken understanding as to whether a particular amount of force [was] legal in those circumstances." *Saucier*, 533 U.S. at 205. As this Court has explained, using an overly generalized right (like the Sixth Circuit's here) allows plaintiffs "to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Anderson*, 483 U.S. at 639.

This is especially true because in many jurisdictions a plaintiff can survive summary judgment on the violations prong merely by stating that he complained of tightness, the officer ignored the complaint, and there was actual, non-de minimis injury (even if only apparent after-the-fact). E.g., *Lyons* v. *Xenia,* 417 F.3d 565, 575–76 (6th Cir. 2005); *Herzog* v. *Village of Winnetka,* 309 F.3d 1041, 1043 (7th Cir. 2002); cf. *Glenn* v. *City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001) (holding that minor, incidental injuries such as bruising do not give rise to excessive force claim based on tight handcuffing). In some circuits, the injury need only be emotional. E.g., *Cortez* v. *McCauley*, 478 F.3d 1108, 1129 (10th Cir. 2007). Thus, if not tempered, handcuffing injury can become a hindsight look at law-enforcement-officer conduct, contrary to well-established principles of qualified-immunity analysis. *Sheehan*, 135 S. Ct. at 1777; cf *Terry* v. *Ohio*, 392 U.S. l, 20–22 (1968) (asking what facts were available to the officer at the moment of seizure). Accordingly, in many jurisdictions the clearly established prong is particularly helpful in weeding out frivolous handcuff-

tightness claims. But it cannot do so if that prong can be met with an overly generalized right that encourages every suspect to complain about tight handcuffs, and encourages self-induced injury.

In this case, when the right is defined at an appropriate level of particularity—one that recognizes the right to be free from excessively forceful or unduly tight handcuffing where the duration, type of incident, demeanor of the suspect, and other relevant circumstances make it reasonable and safe to stop and check handcuff tightness—the law in the Sixth Circuit is far from clearly established. In a number of opinions, the Sixth Circuit has granted qualified immunity on the clearly established prong and properly engaged in a particularized inquiry into the circumstances the officer faced when an arrestee complained of tight handcuffs. E.g., *O'Malley* v. *City of Flint*, 652 F.3d 662, 671 (6th Cir. 2011) (noting that the suspect complained of tightness but did not ask the officer to loosen the cuffs, did not have an "obvious" physical injury, and was handcuffed for only "about two minutes"); *Fettes* v. *Henderson*, 375 F. App'x 528, 533 (6th Cir. 2010) (factoring in the 10-minute drive to the station, adherence to police handcuff protocol, and the absence of any malicious conduct) (factoring in duration of drive to police station); *Standifer* v. *Lacon*, 587 F. App'x 919, 923-24 (6th Cir. 2014) (affirming grant of qualified immunity on both prongs, noting that the plaintiff was pulling to free herself from handcuffs that were already too loose, that she represented a possible safety risk, that she said "a generic 'ow,' " and that she was handcuffed "for mere minutes").

And the Sixth Circuit has denied qualified immunity or reversed a grant of qualified immunity in circumstances more egregious than those present here. E.g. *Morrison* v. *Bd. of Trustees of Green Twp*, 583 F.3d 394, 401, 403 (6th Cir. 2009) (affirming denial of qualified immunity on both prongs and noting the forty- to fifty-minute delay); *Solovy* v. *Morabito*, 375 F. App'x 521, 523, 528 (6th Cir. 2010) (affirming denial of qualified immunity on both prongs and noting that the plaintiff complained twice and that one of the officers allegedly lifted up the incapacitated suspect by his handcuff chain).

These cases do not make it clear to every reasonable officer that circumstances such as the ones in this case—a domestic-abuse situation on the highway after dark, and the failure to stop and investigate one general utterance of handcuff tightness at some vague point after cuffing ("I told them my handcuffs were too tight . . .", Pet. App. 13a) and another ("loosen up the cuffs", Pet. App. 13a) during the seven-mile transport to the jail—would violate the suspect's right to be free of excessive force. Instead, as some panels of the Sixth Circuit have noted, " '[o]ur precedents fail to notify officers that any response to a complaint of tight handcuffing other than an immediate one constitutes excessive force . . . .' " *O'Malley*, 652 F.3d at 672 (citing *Fettes*, 375 F. App'x at 533).

D. Reliance on an overly generalized right ignores the totality of the circumstances and creates a bright-line rule.

The touchstone of excessive-force analysis has long been the "totality of the circumstances" confronting officers. *Graham* v. *Connor*, 490 U.S. 386, 396

(1989) (citing *Garner*, 471 U.S. at 8–9). Every circuit has routinely employed this approach in analyzing qualified-immunity's violations prong in § 1983 cases premised on tight handcuffing. Pet. App. 11a–15a (Sixth Circuit decision here); *Bastien* v. *Goddard*, 279 F.3d 10, 14 (1st Cir. 2002): *Lowth* v. *Town of Cheektowaga*, 82 F.3d 563, 573 (2d Cir. 1996); *Kopec* v. *Tate*, 361 F.3d 772, 777 (3d Cir. 2004); *Mozee* v. *Burley*, 113 Fed. App'x. 505, 506 (4th Cir. 2004), *Tarver* v. *City of Edna*, 410 F.3d 745, 753 (5th Cir. 2005); *Tibbs* v. *City of Chicago*, 469 F.3d 661, 665 (7th Cir. 2006); *Howard* v. *Kansas City Police Dep't*, 570 F.3d 984, 989 (8th Cir. 2009); *Ward* v. *Gates*, 52 Fed. App'x. 341, 344 (9th Cir. 2002); *Fisher* v. *City of Las Cruces*, 584 F.3d 888, 894–95 (10th Cir. 2009*); Gold* v. *City of Miami*, 121 F.3d 1442, 1446 (11th Cir. 1997). And the *Graham-Garner* analytical framework is taught in law-enforcement agencies nationwide.

It makes no sense, then, that the reasonableness calculus of the violation prong would both embody allowances for officers' split-second judgments based on "rapidly evolving circumstances" and consider officer safety, *Graham*, 490 U.S. at 396–97, yet the law in the area of handcuffing tightness could be clearly established based merely on a generalized right to be free from unduly tight handcuffs.

The " 'driving force' behind the creation of the qualified-immunity doctrine was a desire to ensure 'that insubstantial claims against government officials [will] be resolved prior to discovery.' " *Anderson* 483 U.S. at 640 n.2 (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818–19 (1982)). But this goal is not realized if, as the court below insists, a generalized "right to be

free from excessively forceful or unduly tight handcuffing" is sufficiently particularized to satisfy the clearly established prong of qualified immunity in a handcuff-tightness case.

Instead, law-enforcement agencies have an unacceptable dilemma. They can either continue training their officers to exercise professional judgment with respect to handcuffing (which will subject them to the burdens of a jury trial or force settlement in even the most frivolous handcuff-tightness cases), or they will be motivated to adapt their training procedures to existing legal precedent by adopting a bright-line rule that obligates officers to immediately investigate each and every utterance of handcuff discomfort. The social costs of either choice are too high, *Harlow,* 457 U.S. at 814—especially the latter, which eliminates officer discretion and increases safety risks.

These negative consequences illustrate the particular gravity of misapplying qualified-immunity principles (such as *Hope*'s cautionary language) in the law-enforcement context. It is not surprising, then, that this Court has articulated the importance of qualified immunity " 'to society as a whole' " and "often corrects lower courts when they wrongly subject individual officers to liability." *Sheehan*, 135 S. Ct. at 1774 n.3 (quotations and citations omitted).

II. Law-enforcement data and handcuff training underscore the need for fact-particularized analysis.

Like many aspects of law enforcement, the handcuffing inquiry is nuanced. Individual facts and circumstances should determine whether a reasonable

officer would have known he was violating the Fourth Amendment by not immediately checking or loosening handcuffs.

Handcuffs are not designed for comfort; they are designed to allow law enforcement officials to control and maintain a potential threat—for the safety of the public, the officer, and the arrestee. Police procedures on handcuffing include directives in the operation of the handcuffs, regulations as to when it is appropriate to use handcuffs, and rules for special circumstances and safeguarding the safety of the handcuffed individual.

A. Proper handcuff procedures require double-locking and checking for tightness.

Law-enforcement officials have protocols designed to ensure that handcuffs are secure without causing injury. Most handcuffs have a double-lock system, which allows law enforcement officials to lock the cuffs so they do not ratchet down more tightly, causing unnecessary injury. PPCT Defensive Tactics Student Manual developed and written by Bruce K. Siddle, Michigan Ed., Chapter 3, "PPCT Tactical Handcuffing" at 3-2.[3] Double-locking is generally recommended as soon as it is tactically safe to do so. *Id*. Importantly, even handcuffs with a double lock must be closed tightly enough to preclude the person's hands from slipping through; to be tight enough for safety, there should be room to slide a finger in between the handcuff and wrist to avoid causing temporary symptoms

[3] http://www.hfrg.org/storage/michigan/addendum.pdf.

(such as swelling and redness) or permanent symptoms (such as nerve damage).

These protocols are a universal component of handcuffing instruction across the country, at both state and local levels. In Michigan, for example, they are taught to all academy recruits enrolled in the 20 basic police academies in accordance with the mandatory curriculum of the Michigan Commission on Law Enforcement Standards (MCOLES), the regulatory agency for all of law enforcement in Michigan. MCOLES Curriculum IV.C.1.3.c & d; IV.C.4.4b(4) (attached as App. A.) They are similarly part of the police academy curriculum in California,[4] Connecticut,[5] Minnesota,[6] New Jersey,[7] and other States.

B. Handcuffs that are too loose pose an undue safety risk due to slippage.

Plaintiffs often argue that they are no threat to the police once they are handcuffed. Not surprisingly, the Plaintiff here made the same argument. (Pl.'s C.A. Br. 20). But practical experiences and available data dispel this myth that a handcuffed person is not a risk.

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[4] https://www.post.ca.gov/Data/Sites/1/post_docs/training/trainingspecs/LD33.doc, V.

[5] http://www.ct.gov/post/lib/post/basic_training/871_curriculum_hours.pdf, Table of Contents.

[6] https://dps.mn.gov/entity/post/model-policies-learning-objectives/Documents/Peace-Officer-Education-Learning-Objectives.pdf, 4.1.5, p. 46.

[7] http://www.state.nj.us/lps/dcj/njptc/pdf/Basic-Course-for-Police-Officers-BCPO.pdf, Instructional Unit 10.9, p. 174.

Applying handcuffs can be tricky business. Handcuffs that are too loose can be dangerous for the subject, causing injuries if the subject's wrist are able to rotate inside the handcuffs. (App. A 3-3.) But too-loose handcuffs also increase the possibility of the subject slipping out and hurting officers or others, as these links demonstrate:

- Police video of a woman slipping out of cuffs, https://www.youtube.com/watch?v=0ddAL2kpFDM;

- News clip of handcuffed suspect who shot at officers, http://denver.cbslocal.com/2014/05/15/police-investigating-how-suspect-shot-at-officers-while-handcuffed/;

- News clip about officer being stabbed while transporting handcuffed prisoner to a court hearing, http://www.nbcmiami.com/news/Miami-Dade-Officer-Stabbed-While-Transporting-Prisoner-in-Texas-190809421.html.

Those risks are increased where there is no cage to separate the suspect from the officer during transport. In Michigan, for example, none of the Michigan State Police's non-canine vehicles have separating cages. Numerous local jurisdictions across the country similarly report the use of some cageless vehicles. Half of the state police and highway patrol agencies informally surveyed for purposes of this amicus reported having no cages or a mix of cage and non-cage vehicles.

According to data from an FBI study on felonious killings and assaults of law enforcement officers, some offenders who had assaulted officers reported that they had "learned a variety of techniques designed to disarm law enforcement officers." U.S. Department of Justice, FBI Uniform Crime Reporting Staff, 2006 study, *Violent Encounters*: *A Study of Felonious Assaults on our Nation's Law Enforcement Officers* at 130, "Handcuffing and Escape Techniques." These offenders had "spent considerable time practicing these techniques and honing their skills to avoid being handcuffed, to remove handcuffs, and to successfully escape from custody." *Id*.

These video links demonstrate common escape techniques:

- Slipping the cuffs by springing lock with a knife, http://www.innervation.com/defensivetactics/ASPCUFF.mp4;

- Slipping the cuffs by physical movements, http://innervation.com/defensivetactics/HandcufffJumprope.mp4.

Even when handcuffs are double-locked, suspects can escape, which highlights the risk of even properly tight handcuffs. Officers have been killed or assaulted by supposedly "safely handcuffed" suspects.[8] Just over

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[8] Andrew Branca, *Busting the myth that handcuffed suspects pose no deadly danger to police*, Legal Insurrection (Sept. 21, 2014), http://legalinsurrection.com/2014/09/busting-the-myth-that-handcuffed-suspects-pose-no-deadly-danger-to-police/.

sixth months ago, while being transported to a county jail in Tennessee on charges of domestic violence and vandalism, one such suspect slipped out of his handcuffs, got into a struggle with the officer, and eventually held 30 people hostage with the officer's gun.[9]

Individuals sometimes hide weapons in locations such as the groin. According to FBI data, when suspects are handcuffed and placed in the rear of the police vehicle on their way to lock-up, they can often remove the weapon and slide it under the driver's seat. Anthony Pinizzotto, et al, *In the Line of Fire: A Study of Selected Felonious Assaults on Law Enforcement Officers*, October 1997, at 42, "Searches." They then cause some kind of a ruse, retrieve the weapon, and shoot the officer. *Id.*; PPCT Defense Tactics Student Manual, p. 3-1, "Potentially Uncooperative Subject."[10] This confirms that some subjects provide their own form of distraction to affect their escape.

In one of the FBI's studies on officer assault, an offender reported that he regularly carried a handcuff key in the watch pocket of his jeans and practiced removing it with his hands cuffed behind his back. *Violent Encounters*, at 132. Yet another described an elaborate escape technique used to assault an officer who was examining him. With hands cuffed behind

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[9] Alexander Smith, *James Richard McCutchen Attempts Custody Escape in Gallatin, Tennessee: Cops*, NBC NEWS (Sept. 2, 2015), http://www.nbcnews.com/news/us-news/james-richard-mccutchen-attempts-custody-escape-gallatin-tennessee-cops-n420786.

[10] http://www.hfrg.org/storage/michigan/addendum.pdf.

his back, he deliberately tightened the cuff, asked the officer to loosen it, then shot the officer in the face. *Id*.

C. Numerous factors influence whether an officer should stop to check handcuffs.

Law enforcement studies on officer killings and assaults reveal that a number of circumstances contribute to these unfortunate events. Duration, type of incident, suspect demeanor, possible intoxication, surroundings, time of day, location, and frequency and nature of the tightness complaint are all considerations that should factor into a reasonable officer's exercise of judgment at the scene. And the fact that all of these factors matter to how a reasonable officer should respond shows that defining the right a high level of generality—as a right to be free of unduly tight handcuffs—fails to focus on the particular conduct at issue, as this Court's cases require.

1. Duration

Courts across the country have recognized that duration is an important factor in the handcuffing inquiry. E.g, *O'Malley*, 652 F.3d at 672 (granting qualified immunity where suspect handcuffed for "about two minutes"); cf. *Martin* v. *Heideman*, 106 F.3d 1308, 1310, 1313 (6th Cir. 2010) (reversing directed verdict in favor of defendants on excessive-force claim when plaintiff's hands were injured after thirty-five minutes in tight handcuffs); *Alexander* v. *County of Los Angeles*, 64 F.3d 1315, 1320, 1323 (9th Cir. 1995) (reversing grant of qualified immunity to officers who kept plaintiff in overly tight handcuffs for thirty-five to forty minutes).

2. Type of incident

The type of incident officers are responding to also matters because it informs how violent or emotionally distraught the handcuffed suspect may be. Domestic violence, for example, is one of the most dangerous incidents an officer can handle. FBI data shows that roughly 31% of the officers killed or assaulted in 2014 were responding to disturbance calls. FBI Uniform Crime Reports, *2014 Law Enforcement Officers Killed and Assaulted.*[11] An earlier, three-year FBI study of officer killings and assaults showed that in 1995 alone, 53% of the assaults reported nationwide resulted from incidents during which officers were responding to disturbance calls, attempting arrests, or intervening where a crime was already in progress. *In the Line of Fire*, at 6.

Moreover, felonious killings of officers most often occur during arrest situations. FBI Law Enforcement Bulletin, 7/8/2014, Officer Survival Spotlight, Arrest Situations: Understanding the Dangers.[12] Data collected from 2003 through 2012 by the FBI's LEOKA (Law Enforcement Officers Killed and Assaulted) Program shows that 535 officers were feloniously killed within this 10-year period. *Id*. Of those, 24% died during arrest situations. *Id*. During the same time span, 581,239 officers were assaulted, with 18% occurring during arrest situations. *Id*. In one FBI study, two-thirds of the offenders facing arrest were looking for

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[11] Available at https://www.fbi.gov/about-us/cjis/ucr/leoka/2014/officers-assaulted.

[12] Available at https://leb.fbi.gov/2014/july/officer-survival-spotlight-arrest-situations-understanding-the-dangers.

an opportunity to assault or kill the officer. *In the Line of Fire*, at 43.

The FBI also explains that "[n]o singular profile exists of an individual who feloniously assaults or kills law enforcement officers." *Id*. Indeed, even "[a]n arrest for a minor infraction of the law can result in an assault against an officer." *Id.* Additionally, because handcuff injury can be self-induced, it is important whether the suspect was struggling at any time during arrest or transport.

Officers are intrinsically aware of these realities. When a complaint of handcuff-tightness occurs, they must be able to use their judgment based on training, procedures, past experience, current awareness, and an assessment of the suspect and the specific circumstances they find themselves in.

3. Surroundings, time of day, suspect assessment, and other circumstances

In three consecutive FBI studies on assaults of police officers, the most prevalent assault locations were streets, highway, and parking lots. *Violent Encounters*, at 7, "Assault Location"; at 11, "Conclusion." Also, according to LEOKA data, the majority of these fatal incidents and assaults occurred after dark. *Id*. at 7-8 "Tour of Duty at the Time of the Assault."

Intoxication can also be a factor in police assault. Intoxicated subjects account for over 70% of resisting incidents. PPCT Defensive Tactics Student Manual at 3-1.[13] In a 2006 FBI study, 15% of the offenders who

[13] http://www.hfrg.org/storage/michigan/addendum.pdf.

had killed or assault law-enforcement officers—roughly seven of the forty offenders studied—reported having consumed an average of ten alcoholic drinks within two hours of the assault examined. *Violent Encounters* at 32, "Use at Time of Offense." In a similar study in 1997, 60% of the forty offenders studied were using drugs, alcohol, or both, at the time of the assault. *In the Line of Fire* at 28, "Alcohol/Drug Use.

Transport can be similarly dangerous. While transports often happen without incident, some result in suspects escaping or officers being injured. According to FBI data, almost 13% of the roughly 48,000 reported officer assaults in 2014 occurred when they were handling, transporting, or maintaining custody of prisoners. FBI Uniform Crime Reports, 2014 Law Enforcement Officers Killed and Assaulted.[14] Similarly, a 2002 study of the New York Police Department found that 40% of prisoner escapes happened during a prisoner transport. Dr. Darrell L. Ross, "*Prisoner transports, officer safety & liability issues*," citing NY Times article, 2002.[15] Officers must therefore stay diligent during transport.

Studies also show that an officer working alone is at greater risk of assault. The FBI reports that in 2014, nearly 63% of the roughly 48,000 officers who were assaulted were working alone and did not have,

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[14] Available at https://www.fbi.gov/about-us/cjis/ucr/leoka/2014/officers-assaulted.

[15] Available at http://www.correctionsone.com/products/vehicle-equipment/prisoner-transport/articles/1843670-Prisoner-transports-officer-safety-liability-issues/.

or wait for, backup. FBI Uniform Crime Reports, 2014 Law Enforcement Officers Killed and Assaulted.[16]

Likewise, proximity to the suspect also factors into the assessment of risk. It is widely recognized within the law enforcement and military training communities that the most dangerous situation is one in which the officer is in close proximity with the suspect. Bruce K. Siddle, *Identifying the Limits of Firefight Performance*, Human Factor Research Group, 2013 at 1 (citing NYPD study on officers killed in firefights).[17] Roughly 70% of all fatal firefights (exchange of gunfire between an assailant and an officer) occur between 0 and 10 feet. *Id*. The FBI reports that during the 2001 to 2010 period, 541 officers were feloniously killed—over half within 0 and 5 feet and another 19.2% between 6 and 10 feet. *Id*. (citing FBI, 2010 LEOKA report, Table 12 at 1).

These circumstances demonstrate what "checking the handcuffs for tightness" might actually entail for a reasonable officer on the scene: stopping solo on the side of the road in the dark, opening the locked back seat, and with weapons accessible, getting in close proximity to a domestic-violence suspect. Significantly, in the event an officer puts himself or others in a precarious situation and then the suspect escapes, the officer's tactics and judgment could, perhaps rightly, be questioned.

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[16] Available at https://www.fbi.gov/about-us/cjis/ucr/leoka/2014/officers-assaulted.

[17] Available at http://www.hfrg.org/research-abstracts/.

4. Nature and frequency of the complaint

Handcuffs are applied to the wrists, a sensitive area of the body for most people. Because handcuffs are not designed for comfort, it is not uncommon for suspects to complain that handcuffs are uncomfortable. Anecdotally, law enforcement officers say that most people whose handcuffs are too tight complain continuously. Thus, the nature and frequency of a suspect's tightness complaint is a crucial factor in weighing possible injury against potential danger.

D. Applying these factors shows that these officers' conduct was reasonable.

Applying these crucial inquiries here, the county jail was only seven miles and, by the district court's calculation, under 20 minutes away. Pet. App. 59a. A decision to stop the vehicle and check the suspect's handcuffs, or a call for back-up (which would have been a sound officer-safety tactic), could easily have led to a delay equal to or greater than the expected duration of the ride to the jail.

Moreover, the circumstances warranted caution: the deputies were dispatched to a domestic violence in progress; the initial stop took place after dark on the shoulder of highway; the suspect appeared to be intoxicated; the transporting deputy was alone; the suspect lodged only one or two generic complaints and there is no indication that he begged, or pleaded, that he specifically complained of pain, numbness, bleeding, redness, or fingers turning blue, or that any physical injuries were visible. On these facts, and given existing precedent, these deputies should not be stripped of

qualified immunity based on an over-generalized "right to be free from excessively forceful handcuffing." They, and officers like them, should be given "breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 131 S. Ct. at 2085.

E. A bright-line rule will detrimentally effect law-enforcement operations and training, and endanger officer and citizen safety.

The detrimental effects of the holding below are not limited to the Sixth Circuit. That Circuit's misapplication of *Hope* could persuade other circuits to follow suit, which could have a trickle-down effect on training standards across the country. Law enforcement agencies stay abreast of legal developments and adjust their training to avoid losing qualified immunity.

At present no law-enforcement agency in the country reports having a bright-line rule that requires immediate investigation of handcuff complaints. Rather, officers are universally trained to check handcuffs when it is safe to do. The Michigan State Police protocol, for example, instructs state troopers that "[i]f an individual complains that handcuffs are too tight, enforcement members should, at the earliest opportunity *that can be done safely*, re-check the handcuffs once to ensure the handcuffs are double-locked and not applied too tightly." Michigan State Police Handcuffing Policy 14.5.2 (emphasis added) (attached as App. B).

Law-enforcement officers should be able to "reasonably anticipate when their conduct may give rise to liability for damages." *Davis* v. *Scherer,* 468 U.S. 183, 195 (1984) (citations omitted). Doing so should not require abandoning sound training procedures and adopting dangerous bright-line rules such as the one created by the opinion below. Qualified immunity is too important and the social costs of such a rule are too high.

In sum, when the test of "clearly established law" is applied to tight-handcuff cases at the level of generality pronounced by the court below, it bears no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Rather, it converts qualified immunity into unqualified liability for law-enforcement officers faced with the difficult decision about when, where, and how to respond to utterances of handcuff discomfort.

CONCLUSION

For the reasons set forth, the petition should be granted.

Respectfully submitted,

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

Ann M. Sherman
Assistant Solicitor General

Attorneys for *Amicus Curiae*
State of Michigan

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ADDITIONAL COUNSEL

Craig W. Richards
Attorney General
State of Alaska
P.O. Box 110300
Juneau, AK 99801

Mark Brnovich
Attorney General
State of Arizona
1275 W. Washington
Phoenix, AZ 85007

Leslie Rutledge
Attorney General
State of Arkansas
323 Center, Ste. 200
Little Rock, AR 72201

Cynthia Coffman
Attorney General
State of Colorado
1300 Broadway 10th Fl
Denver, CO 80203

Douglas S. Chin
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

Gregory F. Zoeller
Attorney General
State of Indiana
302 W. Washington St.
IGC-South, Fifth Floor
Indianapolis, IN 46204

Derek Schmidt
Attorney General
State of Kansas
120 SW 10th Avenue
2nd Floor
Topeka, KS 66612-1597

Jeff Landry
Attorney General
State of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804

Jim Hood
Attorney General
State of Mississippi
P.O. Box 220
Jackson, MS 39205

Timothy C. Fox
Attorney General
State of Montana
P.O. Box 201401
Helena, MT 59620

Adam Paul Laxalt
Attorney General
State of Nevada
100 N. Carson Street
Carson City, NV 89701

Peter F. Kilmartin
Attorney General
State of Rhode Island
150 S. Main Street
Providence, RI 02903

Alan Wilson
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211

Herbert Slattery III
Attorney General
State of Tennessee
425 5th Avenue North
P.O. Box 20207
Nashville, TN 37202

Ken Paxton
Attorney General
State of Texas
P.O. Box 12548
Austin, TX 78711-2548

Sean Reyes
Attorney General
State of Utah
350 N. State Street
Ste. 230
Salt Lake City, UT
84114

Bob Ferguson
Attorney General
State of Washington
1125 Washington, SE
P.O. Box 40100
Olympia, WA 98504

APPENDIX A

Michigan Commission on Law Enforcement Standards

Basic Training Module Specifications

Functional Area:	IV.	Police Skills
Subject Area:	C.	Police Physical Skills
Module Title:	1.	MECHANICS OF ARREST AND SEARCH
Hours:	8	

Notes to Instructor:

Review the legal basis for the objectives but the emphasis should be on techniques.

Module Objectives:

(Excerpt)
[Page 2]

IV.C.1.3. Handcuff a Suspect or Prisoner:

a. Controls subject through the use of commands and/or physical force, so that he/she is in position to be handcuffed.
   (1) ensures subject is under control prior to handcuffing.

b. Places subject in appropriate position to be handcuffed (e.g. spread-eagle, prone, kneeling, standing).

c. Applies handcuffs to subject so that the prisoner is securely restrained (i.e., locked securely, but sufficiently loose so that the subject is not injured.)

d. Ensures subject handcuffed behind back, double locked, palms out.

e. Demonstrates an understanding of the procedures that should be used to prevent Police Custody Death Syndrome (PCDS) by:
   (1) using restraints and/or procedures that will not place the subject in a position where breathing will be dangerously impaired (e.g. head down with chin on chest);
   (2) recognizing the signs and symptoms associated with PCDS (e.g., bizarre, aggressive behavior, shouting, paranoia, panic, violent behavior, use of drugs and/or alcohol, unexpected physical strength, obesity, sudden tranquility, ineffectiveness of chemical agents, etc.);
   (3) seeking medical assistance when appropriate

f. Handcuffs subjects transported long distances in front only, if a belly chain used.

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IV.C.4.4. Demonstrate Effective Subject Control Techniques.

b. Applies handcuffs on a subject by:
(1) using clear and concise verbal commands;
(2) seeking a position of advantage;
(a) controlling subject during handcuffing,
(b) off-setting the subject's balance, and
(c) handcuffing from a rear position
(3) disengaging appropriately;
(4) checking for proper tightness and double-locking handcuffs; and
(5) searching after handcuffing.

APPENDIX B

August 27, 2015

SUBJECT: Arrests, Extradition, and Prisoners

TO: Members of the Department

This Order establishes department policy and member responsibilities for the following:

(Excerpt)
[Page 32]

14.5.2 HANDCUFFING

A. Enforcement members shall use sound discretion when deciding whether to handcuff individuals who are not under arrest at the scene of an investigation.

B. Enforcement members may stop and frisk a subject when they are able to articulate a reasonable suspicion that the person may be involved in a crime and may be potentially dangerous. The courts have extended this authority to the limited use of handcuffs to control a subject if the enforcement member can articulate a sufficient and reasonable concern for his or her safety that would justify such an intrusion. The courts

will look at whether the situation might give rise to "sudden violence and the need to minimize the risk of harm to both police and citizens."

(1) Enforcement members should use the following factors to determine if the use of handcuffs is justified during a non-arrest encounter with a subject:

a. Does the subject's behavior give rise to the reasonable possibility of danger to the enforcement member or flight?

b. Does the enforcement member have information that the subject is currently armed?

c. Did the stop closely follow a violent crime?

d. Does the enforcement member have specific information that a crime potentially involving violence is about to occur?

e. How many enforcement members and/or subjects are present?

(2) Although this list should not be considered complete, it does include the most recognized reasons for handcuffing in a non-arrest situation. However, handcuffing merely to show consistency or because the incident occurred in a

"dangerous area" are not sufficient reasons to justify the use of handcuffs in a non-arrest situation.

(3) Enforcement members shall document situations in which a subject is placed in handcuffs but not placed under arrest. The following information shall be recorded: last name, first name, middle initial, race/sex, date of birth, and reason(s) for the use of handcuffs.

C. Arrested persons taken into custody shall be handcuffed.

D. Prisoners being transported shall be handcuffed. See Section 14.5.3.

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E. Circumstances surrounding initial contact with the prisoner (i.e., an arrest made on the road, transporting a prisoner from a place of incarceration to and/or from court appearances) may require different handcuffing methods.

(1) Prisoners should be handcuffed with their hands behind them. If a prisoner is handcuffed in front, Flex-Cuffs should be used to hold the prisoner's hands close to the belt.

(2) Care shall be taken that the handcuffs are not applied too tightly to the prisoner's wrists.

(3) The handcuffs shall be double-locked.

(4) Nothing in this Order shall preclude an enforcement member from handcuffing individuals in an alternative manner if, in the enforcement member's best judgment, it is deemed necessary. Alternative handcuffing techniques may involve use of the issued Welsh Hitch, Flex-Cuffs, and/or Tuff-Ties.

(5) The practice commonly referred to as "hog tying" a prisoner is prohibited. In this context, "hog tying" refers to the practice of restraining a resistive suspect's hands and ankles and securing them together behind the suspect's back while placing the prisoner in a prone position. A modified technique of restraining the hands to the ankles behind the back, utilizing a sufficient length of the Welsh Hitch to allow the prisoner to be placed in a seated position, is acceptable. Prisoners, once secured, should be placed in an upright position to avoid positional asphyxia. See Section 14.5.3A(8).

F. If an individual complains that handcuffs are too tight, enforcement members should, at the earliest opportunity that it can be done safely, re-check the handcuffs once to ensure the handcuffs are double-locked and not applied too tightly. Any complaints from an individual regarding

handcuffs being too tight and the steps taken to ensure the handcuffs are double-locked and sufficiently adjusted, or complaint of any injury sustained from the application of handcuffs, shall be documented in an incident report.