IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 20-10876

VICKI TIMPA, Individually, and as Representative of the Estate of Anthony Timpa; KT, a Minor Child; CHERYLL TIMPA, as Next of Friend of K.T., a Minor Child
Plaintiffs – Appellants

v.

DUSTIN DILLARD; DANNY VASQUEZ; RAYMOND DOMINQUEZ; DOMINGO RIVERA; KEVIN MANSELL
Defendants – Appellees

v.

JOE TIMPA
Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION
NO. 3:16-CV-3089

APPELLANTS' BRIEF

Geoff J. Henley
HENLEY & HENLEY, P.C.
3300 Oak Lawn Avenue, Suite 700
Dallas, TX 75219
(214) 821-0222
ghenley@henleylawpc.com

Susan E. Hutchison
James Robert Hudson, Jr.
HUTCHISON & STOY PLLC
505 Pecan Street, Suite 101
Fort Worth, TX 76102
(817) 820-0100
hutch@hsjustice.com
jr@hsjustice.com

Easha Anand
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
2443 Fillmore Street, #380-15875
San Francisco, CA 94115
(510) 588-1274
easha.anand@macarthurjustice.org

ATTORNEYS FOR PLAINTIFFS-APPELLANTS & INTERVENOR-APPELLANT

ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the Judges of this Court may evaluate any potential disqualification or recusal.

Name of Interested Party	**Connection and Interest**
Robert Addison	Attorney for Plaintiffs
Easha Anand	Counsel for Plaintiffs-Appellants
Gerald Bright	Attorney for Defendant Vasquez (terminated)
James Carroll Butt	Counsel for Defendants (terminated)
David Craft	Attorney for Defendant Vasquez (terminated)
Criminal Investigative Unit LLC	Defendant
The City of Dallas	Defendant (terminated)
Dallas County District Attorney's Office	Movant
The Dallas Morning News Inc.	Amicus
John Doe #1	Defendant (terminated)
John Doe #2	Defendant (terminated)
John Doe #3	Defendant (terminated)

John Doe #4	Defendant (terminated)
John Doe #5	Defendant (terminated)
Dustin Dillard	Defendant-Appellee
Raymond Dominquez	Defendant-Appellee
Ashley Fourt	Attorney for Movants
Mark Goldstucker	Attorney for Defendant Mansell (terminated)
Lindsay Gowin	Counsel for Defendants-Appellees
Geoff J. Henley	Counsel for Plaintiffs-Appellants
James Hudson, Jr.	Attorney for Intervenor
Jennifer Huggard	Attorney for Defendants (terminated)
Susan Hutchison	Attorney for Intervenor
Glenn Johnson	Defendant
KT	Plaintiff-Appellant (terminated)
Lone Star Multi-Theatres Ltd. d/b/a New Fine Arts	Defendant (terminated)
Kevin Mansell	Defendant-Appellee
Amy Messer	Attorney for Defendants
Emily Ogden	Movant
Nicholas Dane Palmer	Counsel for Defendants-Appellees

James Bickford Pinson	Counsel for Defendants-Appellees
Domingo Rivera	Defendant-Appellee
The Southwest Institute of Forensic Science	Movant
Shannon Teicher	Attorney for Amicus
Cheryll Timpa	Plaintiff-Appellant
Joe Timpa	Intervenor-Appellee
Vicki Timpa	Plaintiff-Appellant
Danny Vasquez	Defendant-Appellee
Edward Voss	Attorney for Defendant Dillard (terminated)
Paul Watler	Attorney for Amicus
Tatia R. Wilson	Counsel for Defendants-Appellees
Eric Wong	Attorney for Amicus

s/ Easha Anand
Easha Anand
Counsel for Plaintiffs-Appellants & Intervenor-Appellant

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument because this case concerns a legal issue of national importance: when is a law enforcement official liable for using prolonged deadly force against an unarmed, non-threatening subject.

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STATEMENT OF JURISDICTION

The district court had jurisdiction over plaintiffs' 42 U.S.C. §1983 suit under 28 U.S.C. §1331. The district court granted summary judgment to defendants-appellees. ROA.26. On August 19, 2020, the district court granted default judgment against the remaining defendants and issued final judgment. ROA.26. Plaintiff and intervenor-plaintiff timely filed notices on August 24, 2020, appealing the summary judgment ruling. ROA.26-27. This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF ISSUES PRESENTED

The law enforcement community has known for decades that placing a handcuffed person facedown risks asphyxiation and that putting weight on the back of such a person is riskier still. In fact, the Dallas Police Department trains all its officers to position subjects upright as soon as possible.

On August 10, 2016, Dallas police officer Dustin Dillard not only placed a handcuffed Tony Timpa facedown, but kneeled on his back. He did so even though Timpa was supine, restrained, and barefoot by the time Dillard arrived on the scene, even though one officer with one hand

was able to push Timpa back into place any time he moved off his back, and even though Timpa yelled for help some 44 times as he writhed under Dillard's knee. Dillard kept Timpa under his knee for fourteen minutes and seven seconds, including some seven minutes after Timpa's legs were restrained and more than two minutes after Timpa was completely still and silent. Timpa died of asphyxiation.

The issues in this appeal are:

1) Whether clearly established law prohibited Dillard from using what a jury could find was deadly force against a handcuffed Timpa who posed no immediate threat.

2) Whether clearly established law prohibited Dillard from employing serious force against Timpa where Timpa had committed no crime, posed no risk to officer safety, and was not resisting arrest according to even the Dallas Police Department's own custodial death report.

3) Whether kneeling on Timpa's back was obviously unconstitutional, given that the law enforcement community has effectively outlawed it and that Timpa was unarmed, restrained civilian yelling for help.

4) Whether, at the very least, Dillard should be denied qualified immunity for the time he kneeled on Timpa when Timpa was entirely restrained and still.

5) Whether four officers who watched Dillard slowly asphyxiate Timpa and mocked Timpa's dying gasps but did not intervene are liable as bystanders.

INTRODUCTION

The last words Tony Timpa spoke were "help me," pleaded 15 times over. Dallas police officer Dustin Dillard had been kneeling on Timpa's back for 11 minutes—ignoring Timpa's pleas and gasps for breath—when Timpa finally stopped talking. Dillard would kneel on Timpa for three more minutes, even after Timpa fell so silent and still that the other officers joked about feeding him "rooty-tooty fruity waffles" for breakfast when he "woke up." In total, Timpa would spend fourteen minutes and seven seconds under Dillard's knee, facedown and handcuffed the whole time.

Tony Timpa should not have been facedown at all. The Dallas Police Department's orders bar Dillard's conduct: "Officers will ensure that as soon as subjects are brought under control, they are placed in an upright position." The orders specifically warn, at least twice, that officers may "not place in a prone position as it could result in positional asphyxia." Every officer at the scene had received at least two trainings on the risks of prone restraint. And the broader law enforcement community has known for at least a quarter century that keeping a restrained subject facedown—let alone putting weight on his back—is deadly; bulletins and

articles from the Department of Justice and the International Association of Police Chiefs dating back to at least 1995 call it a matter of "[b]asic [p]hysiology."

Given those risks, a jury could find that placing Tony Timpa facedown was clearly unreasonable. Timpa had called 911 himself to ask for help. He was not armed and had not threatened or hurt anyone. By the time police officers arrived, Timpa was handcuffed on a strip of grass between the sidewalk and the road. Officers easily contained him—body camera footage shows that, at one point, Timpa tried to roll to his knees, and one officer with one hand pushed him back down. But Dillard nonetheless flipped Timpa onto his stomach, pressed his face and neck into the ground, kneeled on his back, and smothered him to death over the next fourteen minutes.

This Court's precedents clearly establish such conduct is unconstitutional. Because kneeling on a facedown subject who has already been restrained carries with it a significant risk of death, clearly established law forbids using that technique unless there's a serious risk of physical injury to others. *See Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998). There was no reason to believe Tony Timpa

posed such a risk. Even if the Court declines to treat kneeling on a facedown, restrained subject as deadly force, this Court has repeatedly held that using *any* meaningful force against a subdued, unarmed subject, who is not fleeing and is being arrested for a minor offense, is forbidden unless lesser uses of force have been unsuccessful. *See, e.g.*, *Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012). And it should go without saying that suffocating a non-threatening victim pleading for help is unconstitutional. *See Taylor v. Riojas*, 141 S. Ct. 52 (2020).

The district court nonetheless granted Dillard summary judgment, holding that no prior case had found that the precise *way* Dillard killed Tony Timpa—by handcuffing him, placing him face down, and placing weight on his chest, in contravention of police department orders—violated the Fourth Amendment. But "[l]awfulness of force does not depend on the precise instrument used to apply it." *Newman v. Guedry*, 703 F.3d 757, 764 (5th Cir. 2012).

The district court's grant of summary judgment must be reversed. When police officers kneeled on a man's back for eight minutes and forty-six seconds, the country convulsed. A jury should be allowed to decide

whether any reasonable officer could have thought it constitutional to kneel on Tony Timpa's back for yet five minutes longer.

STATEMENT OF THE CASE

I. Tony Timpa's Killing.

Viewed in the light most favorable to plaintiffs, the evidence at summary judgment showed the following: On the night of August 10, 2016, Anthony "Tony" Timpa called 911 in the midst of a mental health crisis. ROA.5098-99. He told the operator that he was 32, that he had a history of mental illness, and that he hadn't taken his medication. ROA.5098-99. The dispatcher sent a "Crisis Intervention Training" team to Timpa, letting them know Timpa was "on something." ROA.5099, 5101. Crisis Intervention Training teams are trained to quickly and safely get a mentally ill subject to a hospital; they typically consist of five officers, in order to employ a "five-man takedown"—a maneuver that enables officers to subdue an individual without putting any weight on his back. ROA.2365-70.

Kevin Mansell, the supervisor of the team, was first on the scene. ROA.2156, 5099. By the time he arrived, a pair of security guards from a nearby store had handcuffed Tony Timpa and corralled him onto a strip

of grass between the sidewalk and the road. ROA.1867. The barefoot Timpa was "kicking in the air" and "hollering, 'Help me,'" according to Mansell. ROA.1867. On one occasion, Timpa rolled into "the curb or gutter part" of the street, and Mansell and a security guard "physically put him back" on the grass without "any particular difficulty." ROA.1868-69.

The rest of the Crisis Intervention Team arrived shortly thereafter. ROA.5100. Dustin Dillard and Danny Vasquez arrived seven minutes after Mansell; Domingo Rivera and Raymond Dominguez arrived a few minutes later. ROA.5100; ROA.1868 Three of the four officers were wearing body cameras, and those cameras captured much of the last 15 minutes of Tony Timpa's life. ROA.1702.[1] Two paramedics, James Flores and Curtis Burnley, were also on the scene. ROA.1702 2:26-2:53; ROA.1678. Flores testified that the paramedics "kind of just were in a stand-by position" and "held off" on doing anything at Mansell's direction. ROA.1951; *see also* ROA.1702 2:26-2:53 (Flores attempts to take Timpa's

[1] A merged video of footage from all three body cameras was filed with defendants' summary judgment motion at ROA.1702.

vitals but fails); ROA.1702 10:05-10:35 (Flores' second attempt to take vitals; success unclear); ROA.1954-56.

At the start of the footage, Timpa was sitting on the grass, handcuffed, crying out, "Help me!" and "Don't hurt me!" ROA.1702 0:30-1:19. A security guard was between Timpa and the road. ROA.1702 0:30-1:19. Timpa rolled into a seated position on the grass. ROA.1702 1:18-1:24. Vasquez tapped Timpa's shoulder to move him back onto the ground. ROA.1702 1:24-1:30. Although Dillard would later testify that Timpa "kicked" at Vasquez during this movement, the video appears to show Timpa's legs bent throughout this interaction, and Vasquez did not recoil or exhibit any pain. ROA.1702 0:50-1:24; ROA.1351.

Though one officer with one hand was able to quickly return Tony Timpa to his back, Dillard and Vasquez nonetheless proceeded to roll Timpa into his stomach and kneel on his back. ROA.1702 at 1:24-2:05. Timpa would remain in that position—face, neck and chest pressed into the grass, with at least one of the defendant officers on his torso—for fourteen minutes and seven seconds. ROA.1702 1:30-15:37.

Immediately after flipping Tony Timpa onto his stomach, Dillard put a knee on Timpa's upper back, pressing his 160 pounds of body weight

and 30 pounds of body gear above Timpa's chest and pinning Timpa's neck with one hand. ROA.1702 1:30-2:30, ROA.1757-58. Dillard remained on Timpa's back the entire time Timpa was facedown. ROA.1702 1:30-15:37. For the first two minutes Timpa was facedown, Vasquez also pressed a knee into his back. ROA.1702 1:44-3:55; ROA.1757-1758.

During those first few minutes, Tony Timpa was vocal. When Dillard asked him what he took, he answered "coke." ROA.1702 1:43-2:00; ROA.767. He yelled, "I can't feel," "help me," "I can't live," "I stop! I stop! I stop! Please leave!" "Don't hurt me," and "We're gonna die." ROA.1702 1:30-3:16. A few minutes after flipping Tony Timpa onto his stomach, Dillard added another knee to Timpa's upper back. ROA.1702 2:09-2:30. At that point, Timpa's sounds became more guttural, more muffled, and harder to understand. ROA.1702 2:10.

Around three minutes after Dillard began kneeling on Tony Timpa's back, officers swapped out Timpa's handcuffs, replacing the security guard's cuffs for their own. ROA.1702 4:08-7:46; ROA.3535. Around the same time, officers applied leg restraints. ROA.1702 4:33-7:32. As they swapped out Timpa's cuffs and restrained his legs, the four

officers surrounding Dillard and Timpa joked about how tired Timpa was going to be the next day, about the "cocktail special" sedative he would receive, and about whether he had "a Mercedes somewhere." ROA.1702 5:45; 7:04; 9:15. They also commented on his drug use. *E.g.*, ROA.1702 6:53 ("Surely he's had enough of those," in response to a request to administer drugs to Timpa), 11:17-11:21 ("This ain't just normal crazy, man. He's on something.").

As officers replaced his handcuffs and restrained his legs, Tony Timpa moved his lower body—what Dillard described as "squirming." ROA.1702 3:02-3:06. Though Rivera would later testify that Timpa kicked him in the shins, the video only captures him complaining that Timpa "kicked my thumb." ROA.1649; ROA.1702 8:13. Dillard would testify that he did not see Timpa try to kick any officer once he was facedown, and the video shows that Timpa was not aiming kicks at anyone—the position of his head meant he could not see where his legs were flailing. ROA.2284; ROA.1702 3:04-11:30. Plaintiffs' expert later described Timpa's movements—torso writhing and limbs flailing—as evidence of air hunger, a desperate attempt to move the body in order to breathe. ROA.1741.

Around seven minutes after he was flipped onto his stomach, Tony Timpa's torso and legs stopped moving. ROA.1702 8:40-15:16. His head shifted from side to side. ROA.1702 8:40-11:48. Timpa moaned incoherently, grunted, and yelled, "We're gonna die. Help me! Help me!" ROA.1702 8:40-11:48. Timpa's last 30 words were "help me," repeated 15 times over. ROA.1702 11:17-11:43.

By 11 minutes into the footage, Timpa's face was red; 30 seconds later, his ears were purple. ROA.1702 10:54; 11:26; *see* ROA.2650-2662 (plaintiffs' expert report). By the 12-minute mark, Timpa was still. ROA.1702 11:48-15:16. Having said, "You're gonna kill me" some eight times and "I'm gonna die" or "I'm dead" at least five, he fell quiet. ROA.1702 11:50. Defendants quickly realized Timpa had gone limp: Dillard asked if he was conscious; Dominguez suggested checking if he was still breathing "cause his nose is buried"; and Vasquez asked if he was asleep, pointing to his "snoring." ROA.1702 13:33-13:50. (Defendants' expert would later explain that "snoring" was "agonal breathing"—gasping for breath. ROA.3047.)

While Tony Timpa lay unresponsive, defendants continued bantering. ROA.1702 14:05-14:30. "It's time for school—wake up," said

one officer. "We made . . . scrambled eggs," quipped another officer. ROA.1702 14:20 "And waffles—rooty-tooty fruity waffles."[2] ROA.1702 14:27. Though Timpa was by this point entirely still—so still that officers were joking about him being asleep—paramedic Flores administered a sedative at Vasquez' request. ROA.1702 6:53, 14:30.

The officers continued to crack wise as Dillard kept his full body weight on Timpa for three minutes and twenty-six seconds after Timpa ceased moving. ROA.1702 11:50-15:16. When later asked what he was "waiting for," Dillard said he was "waiting for [Timpa] to calm down and talk to me." ROA.2287. Fourteen minutes and seven seconds after he began kneeling on Tony Timpa's back, Dillard finally stood. ROA.1702 15:16. Defendants rolled Timpa onto a gurney. ROA.1702 15:34-16:32. Dillard said, "I hope I didn't kill him"; other officers laughed and responded, "What's this 'we' you are talking about? We ain't friends." ROA.1702 16:19-16:44. A few minutes later, Flores told the officers Timpa was dead. ROA.1702 17:35.

[2] One of the officers later testified that the jokes were an attempt to arouse Timpa using "verbal judo." ROA.5017. But another denied that the Dallas Police Department endorsed such a technique. ROA. 3552-53.

One of plaintiffs' experts, a pathologist and the author of several standard autopsy textbooks, concluded "to a reasonable degree of medical certainty" that Tony Timpa's death was caused by mechanical asphyxia—that is, he was unable to draw breath or circulate blood due to the pressure on his torso and his prone position. ROA.5152-53. The Dallas County Medical Examiner ruled Timpa's death a homicide and agreed that "[d]ue to his prone position and physical restraint by an officer, an element of mechanical or positional asphyxia cannot be ruled out." ROA.2233. Defendants' expert opined that Timpa had a heart attack, concluding that mechanical asphyxia was unlikely because "[a]t no time in the videos, can Mr. Timpa be heard saying, 'I can't breathe'"—even though Timpa *did* yell, "I can't live," "I'm gonna die," and, at least 44 times, "Help!" ROA.1773; ROA.1702 2:46-2:53, 9:02-10:05, 10:21-11:48.

The Dallas Police Department submitted a Custodial Death Report the morning after Tony Timpa was killed. ROA.2216. In response to the question, "At any time during the arrest/incident, did the deceased . . . [r]esist being handcuffed or arrested?" the report writer responded, "No." ROA.2217.

II. Prone Asphyxiation.

Plaintiffs' experts—one a medical doctor and pathologist, the other an expert in policing—testified that medical and law enforcement experts have long warned of the risks of prone asphyxiation. ROA.5152; ROA.2927; ROA. 2994. "Prone restraint"—that is, "[p]lacing a detained subject in a face-down, prone position"—"is dangerous and life-threatening." ROA.2994. It can lead to "positional asphyxia," where the position of the suspect's body makes him unable to draw breath. ROA.2852-53, 2916. Positional asphyxia is common in, for instance, cases where suspects are "hog-tied," with ankle shackles attached to handcuffs. ROA.5152.

Prone restraint becomes even more dangerous when pressure is added; in such cases, known as "mechanical" or "traumatic asphyxia," compression on an individual's torso prevents both respiration and circulation. ROA.5152; *see also* ROA.2540 ("Q. In your opinion, would Mr. Timpa have lived if he had been restrained for the same amount of time in a prone position but there had been no pressure applied to his back? . . . A. Yes."). As even defendants' expert testified in a different case, "[t]he more weight" on a victim's back, "the more severe the degree of

compression"; "[t]he remedy seems relatively simple; get off his back." ROA.3022. One of plaintiffs' experts explained:

> Asphyxia occurs due to the inability of an individual to achieve the work of breathing with the load on his torso and results in insufficient circulation, respiratory muscle fatigue, and acute respiratory failure. . . . The death is slow, and the victim experiences considerable pain and the panic of air hunger.

ROA.5152.[3]

In addition to weight on a subject's back, plaintiffs' experts identified four factors that make the risks of asphyxiation for a prone, restrained suspect even higher. First, the use of drugs—particularly cocaine—makes it more likely that a prone restraint will result in suffocation because "cocaine increases your metabolism," so that "[y]ou need more blood pumping through your body" and "more oxygen." ROA.2539-2540. Second, untreated mental illness can increase the "need for oxygen" and circulation, again making asphyxiation more likely. ROA.2545-2547. When both of the first two factors are present, a subject's

[3] Defendants' expert contested that mechanical asphyxia causes death in prone restraint cases. ROA.1748. At summary judgment, of course, all inferences are drawn in plaintiffs' favor. In any event, plaintiffs' experts explained that the experiments that defendants' expert relied on were performed in a "controlled environment with controlled subjects" and don't account for the real-life agitation of many victims of prone asphyxiation. ROA.2617-2618.

susceptibility to asphyxiation is often shorthanded as "excited delirium." ROA.2537-2538; *see also* ROA.2170. Third, having a "large belly" increases the risk of suffocation, because "the mass encroaches . . . into the chest cavity"; per plaintiffs' expert, Tony Timpa's physique put him at risk. ROA.5152. And finally, where a suspect has "exerted substantial energy . . . prior to being restrained," their reserves are already depleted, and death by asphyxiation is more likely. ROA.2993. Officers knew that Tony Timpa had all four of those risk factors. *Supra*, 9 (cocaine usage); 6 (untreated mental illness); 9-10 (substantial exertion).

The dangers of prone restraint have been known for at least a quarter-century. In 1995, the Department of Justice issued a bulletin about positional asphyxia. ROA.3017-3018. In a section entitled "Basic Physiology," the bulletin warns that "a person lying on his stomach has trouble breathing when pressure is applied to his back." ROA.3017. Over the next two decades, various law enforcement organizations—including the International Association of Chiefs of Police—would periodically issue warnings of the dangers of positioning someone who is handcuffed facedown in a prone position. ROA.2993. Courts, too, routinely handled

cases in which prone restraints ended with a subject suffocating and often found police officers' actions unreasonable.[4]

The Dallas Police Department's own policies reflect that understanding. General Order 901.01 bars Dillard's conduct: "Officers will ensure that as soon as subjects are brought under control, they are placed in an upright position (if possible) or on their side." ROA.2199. That prohibition is mentioned in the same breath as such fundamental use-of-force rules as "only reasonably *necessary* control techniques are justified." ROA.2199. It's repeated thrice in the Dallas Police Department general orders. ROA.2207. Rivera, one of the officers on the scene, testified that he would not keep a handcuffed subject facedown for longer than 10-15 seconds. ROA.3534-3535.

[4] *See, e.g.*, *Hopper v. Plummer*, 887 F.3d 744, 756-58 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 567 (2018); *Estate of Booker v. Gomez*, 745 F.3d 405, 424 (10th Cir. 2014); *Martin v. City of Broadview Heights*, 712 F.3d 951, 960-63 (6th Cir. 2013); *Krechman v. Cty. of Riverside*, 723 F.3d 1104, 1107-08 (9th Cir. 2013); *McCue v. City of Bangor, Me.*, 838 F.3d 55, 64-65 (1st Cir. 2016); *Weigel v. Broad*, 544 F.3d 1143, 1152-55 (10th Cir. 2008); *Richman v. Sheahan*, 512 F.3d 876, 880, 883 (7th Cir. 2008); *Abdullahi v. City of Madison*, 423 F.3d 763, 769-70 (7th Cir. 2005); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1054, 1056 (9th Cir. 2003); *Cruz v. City of Laramie, Wyo.*, 239 F.3d 1183, 1188-89 (10th Cir. 2001); *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446-47 (5th Cir. 1998).

The general orders also include a section on "excited delirium," the combination of cocaine use and untreated mental illness that plaintiffs' expert opined was particularly dangerous. ROA.2207. That section states that arrests of subjects in a state of excited delirium will be treated "as a medical emergency" because "[s]ubjects suffering from this disorder may collapse and die" if they are not placed upright. ROA.2207. And each of the defendants received "Crisis Intervention" and "Excited Delirium" trainings, which reiterated the warnings against prone restraint. ROA.2170-72; ROA.2175; ROA.2177-2195; ROA.1337-1339.

By the time of Tony Timpa's death, then, the dangers of prone restraint—particularly when accompanied by pressure on a subject's back—were widely known in the law enforcement community in general and to defendants in particular.

III. Proceedings Below.

Three months after Tony Timpa's death, his mother, Vicki; his child, KT; and the mother of his child, Cheryll, filed a civil rights suit under 42 U.S.C. §1983. ROA.10. Joe Timpa, Tony's father, intervened in the suit in 2017. ROA.15-16. As relevant here, the Timpa family alleged

that Dillard, Vasquez, Mansell, Dominguez, and Rivera violated Tony's Fourth Amendment right to be free from excessive force.

One year after the Timpa family filed suit, a Dallas County grand jury indicted Dillard, Vasquez, and Mansell for "Deadly Conduct." ROA.961-65. The Dallas County District Attorney dismissed charges against all three officers. ROA.1147.

Defendants moved for summary judgment in their civil suit, which the district court granted. The district court did not reach the question whether any officer had violated the Fourth Amendment. ROA.5108. Instead, the district court held that, whether or not defendants violated the Fourth Amendment, Dillard was entitled to qualified immunity because "there was no law clearly establishing Defendants' conduct as a constitutional violation prior to August 10, 2016." ROA.5108. Because Dillard received qualified immunity on the excessive force claim, the district court held, the other officers were also immune from claims that they were liable as bystanders to the Fourth Amendment violation. ROA.5123.

SUMMARY OF THE ARGUMENT

I. A.1. "[D]eadly force" is any "force carry[ing] with it a substantial risk of causing death or serious bodily harm." *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998) (internal quotation marks omitted). Whether a use of force is deadly is a question of fact. *Flores v. City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004)., Viewed in the light most favorable to the Timpa family, the evidence below—including medical studies, warnings from law enforcement associations, and testimony from expert witnesses—established that kneeling on a prone, restrained suspect is deadly force.

A.2. The Fourth Amendment prohibits "deadly force" unless an officer has "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Here, there was *no* reason, let alone probable cause, to believe Tony Timpa posed a threat of serious physical harm. The Fourth Amendment thus prohibited Dillard's use of deadly force.

B. *Gutierrez* clearly established that Dillard's conduct was unconstitutional. 139 F.3d at 446. Police officers in *Gutierrez* used deadly

force against a suspect who, as in this case, intermittently kicked at officers. *Id.* at 443. This Court held the subject's intermittent kicking did not constitute "probable cause to believe [he] pose[d] a threat of serious physical harm." *Id.* So, too, here.

II. Even if kneeling on Tony Timpa did not constitute deadly force, the Fourth Amendment would still clearly prohibit Dillard's actions. **A.** Three considerations are relevant to whether the use of force is "reasonable": The severity of the crime at issue; any "immediate threat" posed by the suspect; and whether the suspect was resisting arrest. *Graham v. Connor*, 490 U.S. 386, 396 (1989). None justify using force here. The district court relied primarily on the fact that Tony Timpa was "resisting arrest." But a jury wouldn't have to conclude as much; among other things, the Dallas Police Department's own report said Timpa wasn't resisting arrest, and Dillard himself testified that Timpa was merely "squirming" under his knee.

B. This Court's cases clearly establish that when faced with a suspect who (1) struggles with police by moving his limbs and (2) does not follow orders, but (3) is being arrested for a minor offense, (4) has not fled or attempted to flee, (5) is subdued, (6) has not hurt or attempted to

hurt anyone, and (7) is unarmed, an officer violates the Fourth Amendment by (8) using force that carries the risk of serious injury to the suspect, at least where (9) officers have not unsuccessfully tried to contain the suspect with lesser uses of force. *See, e.g.*, *Joseph v. Bartlett*, 981 F.3d 319, 324 (5th Cir. 2020); *Newman v. Guedry*, 703 F.3d 757, 764 (5th Cir. 2012). Tony Timpa was such a suspect; Dillard thus is not entitled to qualified immunity.

III. This case falls squarely within the rule of *Hope v. Pelzer*, 536 U.S. 730, 741-42 (2002), that no case on point is necessary to deny an officer qualified immunity where his conduct falls afoul of department regulations, outside experts have warned of the dangers of his conduct, and his conduct is inherently cruel. In this case, the Dallas Police Department repeatedly exhorted its officers never to leave a restrained suspect prone; outside experts from the Department of Justice to the International Association of Chiefs of Police had cautioned of the dangers of prone asphyxiation; and a jury could find that smothering an unarmed, handcuffed man pleading for help was inherently cruel.

IV. At the very least, Dillard is not entitled to qualified immunity for his conduct during the final minutes of Tony Timpa's life. Whatever

the initial justification for flipping Timpa onto his stomach and pressing an officer's worth of body weight onto his back, that justification was gone seven minutes later, when not only Timpa's hands but also his legs were restrained, or, at the very latest, twelve minutes later, when Timpa was so still officers joked about him falling asleep. Yet Dillard continued kneeling on Timpa.

V. Finally, officers Rivera, Vasquez, Mansell, and Dominguez are all liable as bystanders. Each witnessed Dillard violate Tony Timpa's clearly established Fourth Amendment rights. Each had time and opportunity to intervene and stop Timpa's slow suffocation. None did. That's enough to go to a jury.

This Court should thus reverse the grant of summary judgment to defendants and remand for further proceedings.

STANDARD OF REVIEW

This court reviews the district court's grant of summary judgment to defendants *de novo* and should affirm only if, viewing all evidence in the light most favorable to the Timpa family, defendants are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

ARGUMENT AND AUTHORITIES

I. It Was Clearly Established That Using Deadly Force Against A Prone, Restrained Civilian Violated The Fourth Amendment.

The Fourth Amendment prohibits "unreasonable . . . seizures." U.S. CONST. amend. IV. When a seizure is effectuated using "deadly force," the rule is simple: It is unreasonable, and thus prohibited by the Fourth Amendment, unless "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *see Mason v. Lafayette City-Parish Consol. Gov't*, 806 F.3d 268, 278 (5th Cir. 2015). Viewed in the light most favorable to the Timpa family, the evidence showed that kneeling on the back of a facedown, handcuffed person was deadly force, likely to result in a slow and painful killing. I.A.1. And a jury could conclude there was no probable cause to believe Tony Timpa posed any threat. I.A.2. Under this Court's cases, that's sufficient to overcome qualified immunity at summary judgment. I.B.

A. Drawing All Inferences In The Timpa Family's Favor, Dillard Unreasonably Used Deadly Force Against Tony Timpa.

1. A jury could find that Dillard used deadly force when he pressed Timpa's face and neck into the ground for over fourteen minutes.

Deadly force is any "force carry[ing] with it a substantial risk of causing death or serious bodily harm." *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998) (internal quotation marks omitted). "[W]hether a particular use of force is 'deadly force' is a question of fact, not one of law." *Flores v. City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004). The question at summary judgment is whether a jury could find that the force used in this case—kneeling for more than fourteen minutes on a facedown, handcuffed man who had various risk factors—"carr[ied] with it a substantial risk" of death or serious bodily harm. It could.

In *Gutierrez*, this Court evaluated the risks of one particular use of force—"hog-tying" a suspect by tying his ankles to his wrists. 139 F.3d at 449. Plaintiffs pointed to a study, one bulletin from a law enforcement journal, and a memo from the defendant police department, promulgated after the death of the victim, "reminding" officers hog-tying was prohibited. *Id.* This Court found those three pieces of evidence sufficient

to survive summary judgment on the question whether hog-tying constituted "deadly force." *Id.* at 446-47.

Plaintiffs in this case have presented at least as much evidence as the *Gutierrez* plaintiffs. Where the *Gutierrez* plaintiffs focused on one study, plaintiffs here presented multiple studies explaining the risks of prone restraint and the heightened risks of putting weight on a subject's back. *Supra*, 16-18; ROA.2992 (summarizing literature). Where the *Gutierrez* plaintiffs presented a single law-enforcement bulletin, the Timpa family presented decades of warnings, including from the Department of Justice, which called the dangers of kneeling on a subject's back a matter of "[b]asic [p]hysiology." ROA.3017; ROA.2993. Where the *Gutierrez* plaintiffs presented a single letter, postdating the victim's death, as evidence of the police department's policies, plaintiffs here identified three separate general orders and multiple trainings by the Dallas Police Department requiring officers to position a suspect upright. ROA.2199-2211. And where the plaintiffs in *Gutierrez* put on no expert witnesses, in this case, two experts—one a medical doctor and pathologist, the other a professor of policing practices—testified for plaintiffs about the substantial risks of Dillard's actions. ROA.5152;

ROA.2539-2547; ROA.2993. Because the *Gutierrez* plaintiffs survived summary judgment, so should the Timpa family.

Plaintiffs also put on evidence that at least four risk factors made kneeling on Tony Timpa's back especially deadly: drug use, untreated mental illness, obesity, and significant exertion. *Supra*, 14-18. A jury could find that all four were apparent on the night Timpa died. Timpa told officers he'd taken coke, and officers at the scene joked about his drug use. *Supra*, 6-13. Timpa's 911 call flagged that he had not taken his medication, and Mansell told officers he was a "diagnosed schizophrenic off his meds." *Supra*, 6-13; ROA.1702 2:24-2:34. Timpa's "large belly" (plaintiffs' expert's words) made his obesity apparent. *Supra*, 14-18. And video footage captures Timpa significantly exerting himself. *Supra*, 6-13.[5]

[5] The question whether a particular use of force is deadly is a question of fact, not law, and is thus for a jury, not a court, to decide. But it's worth noting that over the past two decades, courts around the country have denied summary judgment on the question whether keeping a handcuffed subject facedown constitutes deadly force even when the use of force at issue was *less* dangerous than that at issue in this case—where, for instance, no weight was put on a suspect's back or where a suspect had not taken drugs. *See supra*, 14-18; ROA.2993 (risks higher when "a knee or hand" is "pressed into the back of the individual in prone position"); ROA.2539-2540 (risks higher when subject has taken cocaine); *Gutierrez*, 139 F.3d at 446-47 (no weight); *Goode v. Baggett*, 811 F. App'x 227, 229-230 (5th Cir. 2020) (no weight); *Cruz v. City of Laramie, Wyo.*, 239 F.3d 1183, 1188-89 (10th Cir. 2001) (no weight); *Weigel v. Broad*, 544 F.3d 1143, 1166 (10th Cir. 2008) (O'Brien, J., dissenting) (no drugs); *Abdullahi v. City of Madison*, 423 F.3d 763, 764-67 (7th Cir. 2005) (no drugs).

In sum, the force that Dillard used against Tony Timpa (applying a full body weight's worth of pressure to the back of a person who was facedown and handcuffed and who had various risk factors) carried with it a "substantial risk of death"—or, at the very least, a jury could so find.

2. Timpa posed no threat of serious physical harm, either to the officers or to others.

"[T]o reasonably use *deadly* force, an officer must, at the very least, have 'probable cause to believe that the suspect poses a threat of serious physical harm.'" *Mason*, 806 F.3d at 275 (quoting *Garner*, 471 U.S. at 11). In this case, there was *no* reason—let alone probable cause—to believe Tony Timpa posed a risk.

Timpa himself was the one who dialed 911, asking for help. *Supra*, 6-13. By the time Dillard arrived, Timpa was supine, barefoot, and handcuffed. *Supra*, 6-13. He was unarmed and terrified, yelling "don't hurt me." *Supra*, 6-13. When Timpa rolled around, Vasquez easily pushed him back into place with one hand. *Supra*, 6-13. There was no reason to believe he was a threat of any sort.

The district court opined that Tony Timpa "presented a danger to himself and others by running across traffic." ROA.5112. Timpa may have "run[] across traffic" prior to officers' arrival, but he was handcuffed

and flat on his back by the time Dillard encountered him. The question under *Garner* is the threat at the moment deadly force is employed, not what threat was previously posed. *See* 471 U.S. at 11. And at the moment Dillard flipped him onto his stomach and kneeled on him, Timpa wasn't "running" anywhere.

The district court posited that Tony Timpa was "lurch[ing] toward the road." ROA.5112. But that threat wasn't particularly "immediate," either. Mansell testified that, prior to the start of the video footage, Timpa once "lurch[ed]" into the "curb or gutter," but Mansell "physically put him back on" the grass, without "any particular difficulty." ROA.1868-1869. Body camera footage captured Timpa "lurch[ing]" a second time, but not toward the road, and in any event, an officer easily put him back in place with a tap on his shoulder. ROA.1702 0:50-1:24. And one of plaintiffs' experts opined that, "it was unlikely, if not completely impossible, for [Timpa] to roll into the street considering he was literally flanked on all sides by police officers." ROA.2994-2995.

The district court also claimed Tony Timpa was resisting arrest by flailing while Dillard kneeled atop his back. ROA.5115-5116. But "resisting arrest" is not a justification for the use of deadly force. Where

less serious force is used, the Fourth Amendment allows officers to balance various considerations—including whether a suspect has resisted arrest—against the severity of the force. *Mason*, 806 F.3d at 278; *Graham v. Connor*, 490 U.S. 386, 396 (1989). But where *deadly* force is used, the *only* question is whether the suspect poses "a threat of serious physical harm."[6] *Mason*, 806 F.3d at 278. And on *that* question—whether Tony Timpa writhing under Dillard's knee created a "threat of serious physical harm"—there is no evidence that a reasonable officer would have so believed.

Viewed in the light most favorable to the Timpa family, the record below supplies *no* reason, let alone probable cause, to believe that Tony Timpa posed *any* threat, let alone an immediate threat of serious physical injury, to anyone.

B. Clearly Established Law Prohibited Using Deadly Force Against Timpa.

Police officers are entitled to qualified immunity only if they do not have "fair warning" that their conduct was unconstitutional. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014). "Fair warning" can come from precedent

[6] In any event, as explained *infra*, §II, even that "second, more complex inquiry" resolves in plaintiffs' favor.

"clearly establish[ing]" a particular constitutional right. *Id.* "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Amador v. Vasquez*, 961 F.3d 721, 730 (5th Cir. 2020).

Gutierrez explains exactly how the "clearly established law" analysis should proceed in this case. Surveying the state of the law in 1998, this Court held it was clearly established that "police use of deadly force violates the Fourth Amendment unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." 139 F.3d at 446 (internal quotation marks omitted). It was clearly established that "deadly force" is "force carry[ing] with it a substantial risk of causing death or serious bodily injury." *Id.* (internal quotation marks omitted) The critical question was whether hog-tying—the type of force at issue in that case—"creates a substantial risk of death or serious bodily injury, and hence, becomes deadly force." *Id.* That question was one of fact, not law; that no prior cases had addressed whether hog-tying was deadly force was not relevant. *Id.* at 445.

So, too, here. The legal standards for what constitutes deadly force ("force carry[ing] with it a substantial risk of causing death or serious bodily injury") and for when deadly force may be used (only where there is "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others") were clearly established, leaving only the factual question whether kneeling on a prone suspect carries the requisite "substantial risk" to trigger the "probable cause" rule.[7]

[7] *Gutierrez* went on to ask whether a reasonable officer would have known that what he was doing risked serious injury or death. 139 F.3d at 447. Subsequent cases have disavowed such an analysis, holding that whether or not an officer would have known the force they were using was deadly is irrelevant. *See Flores*, 381 F.3d at 401-02. But assuming plaintiffs must show that a reasonable officer in Dillard's position would have known kneeling on Tony Timpa constituted deadly force, they have done so here. The perspective of a reasonable officer includes, for instance, the training materials or other literature that an officer has been exposed to. *See Gutierrez*, 139 F.3d at 447; *Darden v. City of Fort Worth, Tex.*, 880 F.3d 722, 732 & n.8 (5th Cir. 2018). *Gutierrez* found enough evidence to deny summary judgment on the question whether a reasonable officer would have known the force in that case was deadly based on the fact that one study and one bulletin had been mailed to the defendants' police department. 139 F.3d at 449. Here, the evidence that a reasonable officer in Dillard's position would have known kneeling on Timpa was deadly force was far stronger—the Dallas Police Department expressly instructed its officers, in multiple orders and through multiple trainings, to position suspects upright as soon as possible. *Supra*, 14-18. Indeed, one of Dillard's fellow officers testified that he would never remain on a subject's back for longer than 15 seconds. ROA.1900. Dillard kneeled on Tony Timpa's back for 50 times as long. ROA.5100. In addition, officers were specifically instructed that suspects who ingested cocaine and had untreated mental illness were particularly susceptible to prone asphyxiation. *Supra*, 14-18. A jury could thus find that a reasonable officer in Dillard's shoes would know that kneeling on a facedown, handcuffed person for more than fourteen minutes carried a substantial risk of

In *Gutierrez*, this Court then considered whether the officer had fair warning that there was no "probable cause" to believe the suspect posed an immediate threat of serious physical harm. *Id.* at 446. That portion of the analysis is legal—that is, there must be precedent making clear that a set of factual circumstances don't amount to the requisite probable cause in order to deny qualified immunity. *See Mason*, 806 F.3d at 278. *Gutierrez* provides that precedent here.

In *Gutierrez*, the suspect had "kick[ed an officer] in the chest" and was described as "one of the most agitated and violent persons that I have ever seen." 139 F.3d at 449. He "attempted to kick the back of the driver's seat, the metal cage, and the windows of the patrol car" and medical personnel thus refused to transport him. *Id.* at 448. On the other hand, the suspect was "quiet and peaceful" during some portions of the encounter, and other police officers at the scene of the encounter did not attempt to assist the officers in any way, "thereby suggesting that the other officers did not consider [the suspect] to be violent." *Id.* at 449. This Court denied summary judgment over a defense of qualified immunity.

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serious bodily injury or death, particularly where that person had ingested cocaine and was suffering from untreated mental illness.

In this case, Tony Timpa posed *less* of a threat than the victim in *Gutierrez*. Defendants claimed that he kicked one of them (although video evidence and testimony contradict that claim). *Supra*, 6-13. In any event, as in *Gutierrez*, Timpa was "quiet and peaceful" at various points (so still and silent at one point that officers joked he'd fallen asleep), and other officers did not believe they needed to rush to Dillard's assistance. *Supra*, 6-13. This Court found that the facts of *Gutierrez* weren't even close—it not only found a Fourth Amendment but also denied qualified immunity, because it was clearly established that deadly force cannot be used against a thrashing or kicking, but restrained, subject. 139 F.3d at 446. Timpa posed even less of a threat than the victim in *Gutierrez*, and Dillard's use of deadly force against him was thus even more unreasonable.

The district court thought that *Gutierrez* could not clearly establish the law on point because the victim in *Gutierrez* was hog-tied, whereas Tony Timpa's arm and leg restraints were not bound to one another, and because no one put weight on the victim in *Gutierrez*, whereas Dillard kneeled on Timpa's back. ROA.5109-5110; ROA.5114. But *Gutierrez* itself rejected the same argument—that a particular kind of force had to be

proscribed as excessive in order to defeat qualified immunity—as "dogmatic" and "unjustified." 139 F.3d at 445. *Gutierrez* denied qualified immunity despite no prior cases considering hog tying because the question whether a particular use of force is deadly force is a question of fact, not law—no clearly established precedent is required.

In *Flores*, for instance, a police officer "fir[ed] a single gunshot at a suspect's car." 381 F.3d at 401. As in this case, the officer was "on notice . . . that using force carrying with it a substantial risk of causing death or serious bodily harm is deadly force" and that "deadly force would only be justified by a reasonable belief that he or the public was in imminent danger." *Id.* (internal quotation marks omitted) (citing *Gutierrez*, 139 F.3d at 446; *Garner*, 471 U.S. at 3). "The only thing he did not know for sure was whether shooting at [the suspect's] car in the way he did carried with it a substantial risk of death or serious bodily harm." *Id.* This Court rejected the notion that the last question was an adequate basis to grant qualified immunity: "The flaw in [defendant's] argument is that this last question is one of fact, not one of law." *Id.* The same "flaw" requires reversal here—as *Gutierrez* and *Flores* make clear, the district court erred in demanding clearly established law to demonstrate that a

particular use of force constitutes deadly force; that question is answered solely by reference to the record at summary judgment. *See also Goode v. Baggett*, 811 F. App'x 227, 235 (5th Cir. 2020) ("[W]hether a particular use of force is 'deadly force' is a question of fact."); *Meadours v. Ermel*, 483 F.3d 417, 423 (5th Cir. 2007) (fact question whether beanbag gun constituted deadly force); *Omdahl v. Lindholm*, 170 F.3d 730, 733 (7th Cir. 1999) (same).

Defendants pointed below to various studies purportedly finding no "substantial risk" to kneeling on a facedown, handcuffed subject. ROA.1743-1767. But plaintiffs' expert explained those studies were irrelevant because the test subjects were calm and healthy, a far cry from the agitated, mentally ill subjects with whom police officers often deal. ROA.2594, 2617-18. That sort of battle of the experts presents a quintessential jury question, not a question about qualified immunity. *Gutierrez*, 139 F.3d at 447.; *Goode*, 811 F. App'x at 235-36. Indeed, this Court has previously denied summary judgment in a case where defendants' expert cited many of the same studies, agreeing that the question whether those studies were valid was a question for the jury, not a qualified immunity issue. *Goode*, 811 F. App'x at 235-36 & n.7.

The district court also pointed to a trio of cases—*Pratt v. Harris Cty., Tex.*, 822 F.3d 174 (5th Cir. 2016), *Wagner v. Bay City, Tex.*, 227 F.3d 316, 318-20 (5th Cir. 2000), and *Castillo v. City of Round Rock, Tex.*, 177 F.3d 977 (5th Cir. 1999) (unpublished)—that it thought justified qualified immunity. But none of those cases involved *deadly* force, so none were resolved at the "threshold issue—under *Garner*" of "whether [the victim] objectively posed an immediate threat." *Mason,* 806 F.3d at 278. Instead, each involved "[t]he second, more complex inquiry dictated by *Graham*—balancing the severity of the threat against other factors." *Id.*[8]

II. It Was Clearly Established That Kneeling For Fourteen Minutes On A Prone, Handcuffed Civilian Violated The Fourth Amendment, Whether Or Not It Constituted Deadly Force.

As this Court reiterated most recently in *Joseph v. Bartlett* "[a] disproportionate response is unreasonable," whether or not it involves deadly force. 981 F.3d 319, 324 (5th Cir. 2020). Tony Timpa hadn't hurt or threatened anyone and was handcuffed and surrounded when Dillard

[8] Of note, the use of force in each case was apparently less risky than the use of force here: In each case, either the suspect hadn't taken cocaine or officers didn't know the suspect had taken cocaine. *See Wagner*, 227 F.3d at 323-24; *Pratt*, 822 F.3d at 184; *Castillo*, 1177 F.3d at *1-2. Cocaine use substantially increases the risk of asphyxiation from a prone restraint, per plaintiffs' expert. ROA.2540.

began fourteen minutes of asphyxiation. That use of force was disproportionate and therefore unreasonable whether or not it constituted "deadly force."

A. It Was Unreasonable To Kneel On A Facedown, Restrained Timpa.

Though "[t]he test for reasonableness [under the Fourth Amendment] is not capable of precise definition or mechanical application . . . *Graham v. Connor*, [490 U.S. 386, 396 (1989),] outlined a few considerations that inform the need for force: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight." *Id.* at 332 (internal quotation marks omitted). Those "considerations" apply whether or not deadly force is used. *Id.* Viewing the facts in this case in the light most favorable to the Timpa family, not one of the *Graham* factors indicate a need for force.

Start with the severity of the crime. Dillard acknowledged that Tony Timpa's "crimes," such as they were, were "relatively minor"— low-level misdemeanors regarding pedestrians in roadways. ROA.2035 & n.3; *see Trammell v. Fruge*, 868 F.3d 332, 340 (5th Cir. 2017) (class C

misdemeanor "is a minor offense militating against the use of force"). Defendants weren't even trying to arrest Timpa for those misdemeanors, but instead were trying to get him medical and mental health treatment. ROA.2025-2026. As defendants have more or less conceded, then, the "crime" factor listed in *Graham* would not have supported their use of force.

Nor does the second factor, whether the suspect posed an immediate threat, weigh in Dillard's favor. The district court concluded that "Timpa presented a danger to himself and others by running across traffic." ROA.5112. But as explained *supra*, §I.A.2, whatever threat Timpa had *previously* posed by running into traffic certainly wasn't an "immediate" threat—he was handcuffed by the time Dillard arrived on the scene, and five officers plus two security guards were easily containing him.

The district court relied primarily on the third *Graham* factor, whether the suspect was actively resisting arrest or attempting to evade arrest by flight, to justify Dillard's use of force. ROA.5112-17. But factual disputes foreclose summary judgment on that basis. No one has contended that Tony Timpa attempted to "evade arrest by flight." And

prior to Dillard rolling Timpa onto his stomach, any "resistance" was easily contained: One officer with one hand was able to prevent him from rolling away, and although Dillard testified that Timpa kicked an officer before being rolled over, the body camera footage appears to show Timpa's legs bent throughout, and the officer does not recoil. *Supra*, §I.A.2. Evasion or resistance, therefore, would not have justified Dillard's decision—in contravention of his training and decades of research—to turn Timpa over and kneel on him.

Even if "resistance" *after* Dillard's decision to escalate to mechanical asphyxiation could somehow justify Dillard's decision to escalate in the first place, *but see Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008), a jury could easily conclude that there was no such "resistance." For starters, even the Dallas Police Department's own custodial death report answered "no" to the question whether Timpa "[r]esist[ed] being handcuffed or arrested." ROA.2217. Dillard himself characterized Timpa as merely "squirming" under his knee, ROA.1702 6:01-6:14, 13:47, and though Rivera later testified that Timpa kicked him in the shin, the video captures him complaining only of a kick to the thumb, ROA.1583, ROA.1702 8:07-8:13. Moreover, the district court had

no basis in the record to conclude that Tony Timpa "repeatedly kicked *at* officers." ROA.5112 (emphasis added). Dillard testified that he did not see Timpa do "anything to try to intentionally hit or kick any officer," and even if Timpa's legs were moving, a jury could conclude from the video footage that he couldn't see what was happening behind him and so couldn't be aiming at an officer. ROA.1364; ROA.1702 4:33-7:32, 8:07-8:14.

All of this was enough to at least create a dispute of material fact. This Court has held time and again that even a suspect who "squirmed, wiggled, and flailed" does not "resist arrest, at least not actively." *Joseph*, 9831 F.3d at 328, 333-34; *see also Trammell*, 868 F.3d at 341 (movement of "a few inches" not resistance); *Hanks v. Rogers*, 853 F.3d 738, 746 (5th Cir. 2017) (victim "displayed, at most, passive resistance" where moved foot in violation of officer command). And in this case, the idea that Tony Timpa was "resisting" is even less plausible than in prior cases: Given Timpa's gasps for breath and cries for help and Dallas's training about the dangers of prone restraint, a jury could conclude that a reasonable officer in Dillard's position should have known not only that Timpa

wasn't resisting but that he was struggling to breathe. ROA.1702 4:33-11:28; ROA.2489-91; ROA.3022-3037; ROA.5152.[9]

In short, not one of the *Graham* factors counseled in favor of using *any* force against Tony Timpa, let alone fourteen minutes of mechanical asphyxiation.

B. Clearly Established Law Forbids Inflicting Serious Injuries On An Unarmed, Subdued Civilian When The Civilian Can Be Contained By Less Brutal Means.

Again, police officers may be held liable if the state of the law at the time of the incident "clearly establish[es]" that particular conduct is unconstitutional. *See Tolan v. Cotton*, 572 U.S. 650, 656 (2014). "[T]he *Graham* excessive-force factors themselves can clearly establish the answer, even without a body of relevant case law" in a case where "[n]one of the *Graham* factors justifies" a particular use of force. *See Newman v. Guedry*, 703 F.3d 757, 764 (5th Cir. 2012) (internal quotation marks

[9] *See also Darden v. City of Fort Worth, Tex.*, 880 F.3d 722, 726 n.3, 730 (5th Cir. 2018) ("A jury could conclude that all reasonable officers on the scene would have believed that [the victim] was merely trying to get into a position where he could breathe and was not resisting arrest" where victim "pushed himself up on his hands and eventually onto his knees" and "pull[ed] his arm away from the officers when they were trying to handcuff him"); *Goode v. Baggett*, 811 F. App'x 227, 232 (5th Cir. 2020) (same); *Abdullahi v. City of Madison*, 423 F.3d 763, 771 (7th Cir. 2005) (victim's arching of back may not have been resistance but instead "a futile attempt to breathe").

omitted). This is such a case: *Graham* itself clearly forbade Dillard's conduct because not one of the *Graham* factors support any use of force, let alone the serious force Dillard used.

Even if *Graham* itself does not provide the requisite "clearly established law," though, this Court's precedents do. In *Joseph*, 981 F.3d at 319, this Court concluded that it was clearly established well before Tony Timpa's death[10] that where a suspect (1) struggles with police by moving his limbs and (2) does not follow orders, but (3) is being arrested for, at most, a minor traffic violation, (4) has not fled or attempted to flee, (5) is subdued, (6) has not hurt or attempted to hurt anyone, and (7) is unarmed, an officer violates the Fourth Amendment by (8) using force that risks serious injury to the suspect, at least where (9) officers have not unsuccessfully tried to contain suspect with lesser uses of force. The *Joseph* court relied for that conclusion on three cases: *Newman*, 703 F.3d 757; *Ramirez v. Martinez*, 716 F.3d 369 (5th Cir. 2013); and *Cooper v. Brown*, 844 F.3d 517 (5th Cir. 2016).

[10] Qualified immunity is evaluated with reference to the state of the law at the time of the unconstitutional conduct. *Joseph* was not decided until 2020, and it considered an incident in 2017. However, it ultimately concluded that the relevant rule "was clearly established in 2013," because it examined cases giving qualified immunity to officers in incidents that predated that year.981 F.3d at 342.

Start with *Newman*, decided in 2012 and considering clearly established law as of August 2007. 703 F.3d at 759. In that case, an officer conducted a protective pat-down search of the suspect. *Id.* at 760. The suspect (1) struggled with police, grabbing the officer's hands and pushing himself backward onto the officers. *Id.* at 760, 763. He also (2) disobeyed orders repeatedly, first refusing to remain in his car when officers requested he do so, then refusing to let go of an officer's hand despite two commands. *Id.* at 759-60.

But (3) the suspect was stopped only because the car he was in had failed to yield to oncoming traffic. *Id.* And he (4) had not fled or attempted to flee; (5) was subdued, trapped between two officers and a car (though not handcuffed); (6) had not hurt or attempted to hurt any police officer; and (7) was unarmed (officers testified that the suspect was reaching for his waistband, but no gun was found). *Id.*

So this Court held that resorting to (8) a taser and nightstick—instruments of force that risked serious injury, though officers followed their training and hit only the suspect's upper arms and legs to minimize that risk—(9) without attempting to use other tactics first violated the Constitution. *Id.* at 759-60, 762-63. And it was so clearly unconstitutional

that officers were denied qualified immunity, notwithstanding their protests that the suspect "struggled and was noncompliant." *Id.* at 763.

Ramirez and *Cooper* are of a piece.[11] In *Ramirez*, the suspect (1) struggled with police, pulling his arm away when they tried to handcuff him, and (2) disobeyed orders to put his hands behind his back. 716 F.3d at 372. But he (3) was arrested only for resisting arrest, (4) hadn't fled, (5) was eventually subdued (tackled to the ground and handcuffed), (6) hadn't attempted to hurt any police officers, and (7) was unarmed. *Id.* at 373, 375-76. Thus (8) using significant force (tasing the suspect) without (9) attempting any less intrusive tactics violated the Constitution, and the officer was denied qualified immunity. In *Cooper*, (1) the suspect not only struggled with police but actually escaped and (2) disobeyed orders by refusing to show his hands on command and to "submit." 844 F.3d at 521, 523. Unlike in *Newman* and *Ramirez*, he was being arrested for (3) a DUI, which this Court considered a "serious offense," and (4) had not only attempted to flee but successfully fled. *Id.* at 521-22. But he was (5) effectively subdued (though not handcuffed, he was cornered in a

[11] Although *Cooper* was decided after Tony Timpa's death, it considered a 2013 incident and held that the law it applied was clearly established as of 2013.

cubbyhole), (6) hadn't attempted to hurt police, and (7) was unarmed. *Id.* at 521. Officers therefore violated the Fourth Amendment by (8) siccing a dog on the victim without (9) attempting to detain the suspect using a less brutal method than a K-9 bite to the calf. *Id.* at 522-23. This Court denied the officers qualified immunity.

The *Joseph* court applied the rule from that trio of cases to a case where a mentally ill suspect fled into a convenience store. 981 F.3d at 326. Police chased him down and sat on, punched, and tased him as he was curled up behind the convenience store counter. *Id.* at 326-27. The case differed from *Newman*, *Ramirez*, and *Cooper* in its particulars. The suspect "flailed his legs and wiggled his body," a different form of struggle than pulling away an arm (as in *Newman* and *Ramirez*) or fleeing (as in *Cooper*). *Id.* at 334. The officers used tasers and punches, rather than a K-9 (as in *Cooper*) to inflict the injuries. *Id.* at 339. And, unlike in *Ramirez*, the victim wasn't handcuffed, though he was cornered. *Id.* at 335. But this Court nonetheless held that the salient facts matched the rule clearly established by *Newman*, *Ramirez*, and *Cooper*: Where a suspect (1) struggles with police by moving his limbs and (2) does not follow orders, but (3) is being arrested for, at most, a minor offense, (4)

has not fled, (5) has been subdued, (6) has not attempted to hurt anyone, and (7) is unarmed, an officer violates the Fourth Amendment by (8) using substantial force, at least where (9) officers have not tried to contain suspect with lesser uses of force.[12]

This case falls squarely within that rule. It's true that (1) Tony Timpa moved his legs after being handcuffed and that (2) he didn't immediately follow orders to "chill." ROA.1702 1:30-8:14. But (3) Timpa's "crime" was a low-level traffic violation (certainly less serious than the DUI in *Cooper*). *See supra*, §II.A; 844 F.3d at 521. He (4) never attempted to flee. *Supra*, 6-13. He was (5) subdued—far more subdued than the victims in *Joseph*, *Cooper*, and *Newman*, who were "cornered" or "surrounded," but not handcuffed. 981 F.3d at 335 ("Notably, 'subdued' does not mean handcuffed.' If the suspect lacks any means of evading custody . . . force is not justified."); 844 F.3d at 521; 703 F.3d at 759-60.

[12] Other cases subsequent to Tony Timpa's death illustrate variants on the same rule. In one case, this Court explained that by February 26, 2013, "clearly established law demonstrated that an officer violates the Fourth Amendment if he abruptly resorts to overwhelming physical force rather than continuing verbal negotiations with an individual who poses no immediate threat or flight risk, who engages in, at most, passive resistance, and whom the officer stopped for a minor traffic violation." *Hanks*, 853 F.3d at 747. In another, evaluating the law as of May 16, 2013, this Court held that "[o]ur case law makes clear that when an arrestee is not actively resisting arrest the degree of force an officer can employ is reduced." *Darden*, 880 F.3d at 731.

He (6) never attempted to harm an officer (as explained *supra*, §II.A). And (7) he was unarmed.

Dillard nonetheless (8) mechanically asphyxiated Timpa over the course of fourteen minutes. ROA.1702 1:30-15:16. As explained *supra*, §I.A.1, that force was deadly. But even if it were not, it was at least as serious as the dog bite in *Cooper*, the taser in *Ramirez*, and the nightstick in *Newman*. In fact, it was far more serious—in *Newman*, for instance, the officer "employed his baton in accordance with department policy, striking only at the upper arm and leg, to avoid causing [the victim] serious or permanent injury," whereas in this case, Dillard broke with department policy in a way that maximized the risk of causing "serious or permanent injury." *See* 703 F.3d at 768-69 (Barksdale, J., dissenting); *supra*, 17-18.

And Dillard did so even though (9) lesser types of force hadn't been unsuccessfully attempted. In fact, viewed in the light most favorable to the Timpa family, video footage shows officers were quite successfully containing Tony Timpa without prone restraint—without virtually any use of force at all. *See supra*, §II.A. He was surrounded, and one officer with one hand easily kept him in place. *Supra*, §I.A.2. In short, Dillard

used *more* force against a suspect who was *more* subdued than in cases where officers' use of force was found not only unconstitutional, but clearly so.

The district court denied qualified immunity based on *Pratt v. Harris Cty., Tex.*, 822 F.3d 174 (5th Cir. 2016), *Wagner v. Bay City, Tex.*, 227 F.3d 316 (5th Cir. 2000), and *Castillo v. City of Round Rock, Tex.*, 177 F.3d 977 (5th Cir. 1999) (unpublished). But each differs in crucial respects from this one. Most importantly, it was undisputed that factor (6)—that the suspect had not attempted to hurt anyone—was absent in each of the three: In *Pratt*, the suspect kicked an officer in the groin twice even after being handcuffed, 822 F.3d at 178; in *Wagner*, the suspect landed several blows on officers, 227 F.3d at 318; and in *Castillo*, the suspect managed to bloody an officer's nose, 177 F.3d at *1. In this case, by contrast, a jury could conclude that Tony Timpa didn't even attempt to hurt an officer. *See supra*, §II.A.

Pratt and *Castillo* are even further afield, because of factor (9)—whether officers unsuccessfully attempted to use lower levels of force. *Pratt* in fact "provides a helpful counterexample" because in *Pratt*, officers "responded with measured and ascending actions that

corresponded to [the suspect's] escalating verbal and physical resistance." *Joseph*, 981 F.3d at 340-41. In *Pratt*, officers used verbal commands, then a taser, then handcuffs, then ankle cuffs, then *another* taser before engaging in prone restraint, and even then, officers kept the suspect facedown for only seconds. 822 F.3d at 178-79. In *Castillo*, the suspect bloodied an officer's nose even after he was knocked to the ground, making it reasonable to employ more force. 177 F.3d at *1. In this case, viewed in the light most favorable to the Timpa family, officers had Tony Timpa under control—hemmed in and easily kept in place—yet Dillard *still* proceeded to turn Timpa over and kneel on him.

The *only* thing that *Pratt*, *Wagner*, and *Castillo* have in common with this case is that the victim in each died of asphyxiation. "Lawfulness of force, however, does not depend on the precise instrument used to apply it." *Newman*, 703 F.3d at 763. In *Joseph*, for instance, this Court held that a case about dog bites clearly established the law in a case about a taser. 981 F.3d at 340. *Pratt*, *Wagner*, and *Castillo* thus simply aren't the salient precedents for purposes of the qualified immunity analysis.

Dillard thus is not entitled to qualified immunity at the summary judgment stage.

III. Asphyxiating An Unarmed, Nonthreatening Civilian Calling Out For Help Is An Obvious Constitutional Violation.

The Supreme Court has explained in some cases, a violation may be "so obvious" that no precedent is necessary to give defendants the requisite "fair warning" qualified immunity demands. *Hope v. Pelzer*, 536 U.S. 730, 741-42 (2002). Just last year, the Supreme Court summarily reversed this Court in just such a case. *Taylor v. Riojas*, 141 S. Ct. 52, 52-54 (2020). In this case, too, Dillard's conduct was "so obviously" unconstitutional that no precedent was necessary to give him "fair warning."

In *Hope*, the Supreme Court found that correctional officials had "fair warning" that tying a prisoner to a "hitching post" for hours was obvious unconstitutional, based on three considerations. First, officers violated department of corrections regulations limiting the use of the hitching post. 536 U.S. at 743-44. Those regulations provided "fair warning" that officers' conduct violated the Constitution—not because every violation of a department regulation violates the Eighth Amendment, but because it supported the conclusion that the officers were "fully aware of the wrongful character of their conduct." *Id.* at 744.

In this case, too, department regulations limited the use of prone restraint in ways that were not followed the night Dillard killed Tony Timpa. A jury could find that the Dallas Police Department's general orders, which thrice repeat that subjects should be "placed in an upright position" or, if that's not possible, "on their side"—unequivocally barred Dillard's conduct. *Supra*, 14-18. Those department regulations—far more extensive than the ones at issue in *Hope* and reiterated through officer trainings, *supra*, 14-18—would have made a reasonable officer in Dillard's position "fully aware of the wrongful character of their conduct." 536 U.S. at 744.

Second, *Hope* noted that the United States Department of Justice had "specifically advised" that using a hitching post was "improper." *Id.* at 744-45. "Although there is nothing in the record indicating that the DOJ's views were communicated to respondents, this exchange lends support to the view that reasonable officials . . . should have realized that the use of the hitching post under the circumstances alleged . . . violated the Eighth Amendment." *Id.* at 745.

In this case, too, the United States Department of Justice "specifically advised" that prone restraints are improper. ROA.3017-

3018. A 1995 bulletin specifically "alert[ed] officers" to the dangers of positional asphyxia; in a section entitled "Basic Physiology," the bulletin warned that "a person lying on his stomach has trouble breathing when pressure is applied to his back." ROA.3017. That warning was echoed by other organizations, including the International Association of Chiefs of Police, the nation's largest professional policing organization. ROA.2993; *see supra*, 9-10. Even more than the correctional officials in *Hope*, a reasonable police officer in Dillard's position "should have realized" that what he was doing to Tony Timpa violated the Constitution.

Finally, *Hope* pointed to "[t]he obvious cruelty inherent in th[e] practice." 536 U.S. at 745-46; *see also Taylor*, 141 S. Ct. at 53-54. In this case, Tony Timpa cried, "Help!" 44 times over the fourteen minutes Dillard kneeled on his neck, grunting, moaning, and writhing as breathing became harder. ROA.1702 1:30-15:16. Though Timpa hadn't hurt or threatened an officer or anyone else, Dillard would not get off Timpa's back until he was dead, a death that plaintiffs' expert said entailed "a great deal of pain and suffering." ROA.5152 And this wasn't a case where Dillard had to make split-second decisions in the face of real danger; to the contrary, the officers were so relaxed during the fourteen

minutes that they were able to joke about whether Timpa would be eating "rooty-tooty fruity waffles" if he recovered consciousness.

A jury could find that, as in *Hope* and *Taylor*, no reasonable officer could have thought it constitutionally permissible to asphyxiate Timpa. This case is even clearer than *Taylor*—while *Taylor* relied solely on the egregious facts of the case itself, in this case, the egregious facts are supplemented by reports and regulations, which *Hope* held can render a conclusion of unconstitutionality even more obvious.

One final point: The doctrine of qualified immunity, in its current form requiring a factually similar case, has been criticized as atextual and ahistorical by jurists (on both this Court and the Supreme Court) and scholars.[13] Qualified immunity isn't mentioned in the text of 42 U.S.C. §1983, and at common law, qualified immunity arguably wouldn't have applied to officers like Dillard; to torts like assault and battery; or to conduct committed with knowledge it was dangerous, whether or not

[13] *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring); *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring); *Morrow v. Meachum*, 917 F.3d 870, 874 n.4 (5th Cir. 2019) (Oldham, J.); Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. (forthcoming 2021), at *38-46, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3680714; Will Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 50-53 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801-03 (2018).

clearly established law had so held. *See Beckwith v. Bean*, 98 U.S. 266, 275 (1878); Will Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 73 STAN. L. REV. ONLINE (forthcoming 2021), at *5-9, *available at*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3746068; Scott A. Keller, *Qualified and* Absolute *Immunity at Common Law*, 73 STAN. L. REV. (forthcoming 2021), at *38-46, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3680714. Qualified immunity's "clearly established law" analysis remains the law, of course. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (Thomas, J., concurring). But this Court should be particularly wary of abrogating the Timpa family's Seventh Amendment right to a trial by jury in favor of a doctrine of such dubious statutory and historical provenance.

IV. At The Very Least, Dillard Should Not Receive Qualified Immunity For The Minutes He Kneeled on Tony Timpa After Timpa Was Entirely Restrained And Still.

"[A]n exercise of force that is reasonable at one moment can become unreasonable in the next," *Lytle v. Bexar Cty.*, 560 F.3d 404, 413 (5th Cir. 2009), and just a minute or two of excessive force can violate the Constitution, *Cooper v. Brown*, 844 F.3d 517, 525 (5th Cir. 2016). Even if this Court were to somehow conclude that flipping Tony Timpa onto his

stomach and beginning his slow asphyxiation was reasonable, *but see supra*, §§I-III, that "exercise of force" became unreasonable well before Dillard released Timpa.

After Dillard had been kneeling on him for between six and seven minutes, Tony Timpa stopped moving most of his body. ROA.1702 8:14-13:02. His legs were restrained. ROA.1702 8:14-13:02. Yet Dillard remained on his back for nearly seven more minutes. ROA.1702 8:14-15:10.

After Dillard had been kneeling on him for between eleven and twelve minutes, Timpa was entirely still—so still that Officer Dominguez asked, "Tony, you still with us?" ROA.1702 11:50-15:10, 13:01-13:04. Yet Dillard remained on Timpa for more than three more minutes. ROA.1702 11:50-15:10.

Because "[a]n exercise of force that is reasonable at one moment can become unreasonable in the next," *Lytle*, 560 F.3d at 413, this Court must evaluate not just Dillard's decision to kneel on Tony Timpa initially, but his decision to remain on Timpa for more than fourteen minutes. And the arguments made *supra*, §§I-III, apply with more force to the last seven minutes of Timpa's asphyxiation and with still more to the last two. First,

Dillard's use of force only became deadlier the longer it went on and, conversely, any reason to believe Timpa posed a threat of harm diminished. *See supra*, §I. Second, the only *Graham* factor that Dillard even argued justified his conduct—the notion that Timpa was "resisting arrest"—had disappeared by the time he was not only handcuffed, but his legs were also restrained, or, at the *very* latest, by the time he was entirely still. *See supra*, §II; *Carroll v. Ellington*, 800 F.3d 154, 177 (5th Cir. 2015) ("The law was clearly established…that, once a suspect has been handcuffed and subdued, and is no longer resisting, an officer's subsequent use of force is excessive."). And third, Dillard's disobedience of his own department's orders and the obvious cruelty of his conduct only became more egregious as time went on. *See supra*, §III.

At the very least, this Court must reverse the district court's grant of qualified immunity to Dillard as to the last few minutes of Tony Timpa's life.

V. A Jury Could Find Four Officers Liable As Bystanders Because They Stood By While Dillard Violated The Fourth Amendment.

Video footage confirms that defendants Rivera, Vasquez, Mansell, and Dominguez were aware of everything Dillard did and had both the

access and time—more than fourteen minutes—to act yet chose not to. That's exactly the case for which 42 U.S.C. §1983 contemplates bystander liability.

An officer who "(1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act," is liable as a bystander. *Kitchen v. Dallas Cty., Tex.*, 759 F.3d 468, 480 (5th Cir. 2014). Drawing all inferences in the Timpa family's favor, there is a triable question as to each of the four officers.

Start with the first element, that the officers knew "that a fellow officer is violating an individual's constitutional rights." *Id.* Each of the four bystander officers could see that Timpa posed no threat (defendant Mansell witnessed defendant Vasquez easily containing Timpa with a tap on the shoulder, and defendants Rivera and Dominguez saw Timpa handcuffed), ROA.1702 0:50-1:30; each could see that Dillard was flipping Timpa onto his stomach, in a dangerous position, and putting weight on Timpa, contrary to Dallas police orders and training, ROA.1702 1:24-2:05; and all four of the officers heard Tony Timpa's moans, grunts, gasps, and cries for help, ROA.1702 4:30-12:04. Rivera

even testified that he would not keep a handcuffed person facedown for longer than just fifteen seconds. ROA.3534-3535.

A jury could easily find the second element, as well—that defendants had "a reasonable opportunity to prevent the harm." *See Kitchen*, 759 F.3d at 480. This isn't a case where a bystander had a split second to intervene. *See Reyes v. Bridgwater*, 362 F. App'x 403, 409 (5th Cir. 2010). Defendants had more than ten minutes to stop Dillard from slowly smothering Tony Timpa to death, but they did nothing. And there's no indication that, had any of the officers said or done something to help Timpa, it would have been met with anything other than compliance. This Court has explained that the question whether there was "time or opportunity for [bystander officers] to intervene" falls into "the category of factual disputes that a jury must decide." *Joseph v. Bartlett*, 981 F.3d 319, 344 (5th Cir. 2020). Here, a jury would be hard-pressed to find that officers *didn't* have time or opportunity to intervene.

Finally, it's undisputed that plaintiffs have proven the third element—that defendants "chose not to act." Aside from one half-hearted offer from Vasquez to "roll him out," none of the defendants intervened to prevent Tony Timpa's unconstitutional death. *See* ROA.1702 8:19. This

Court has held that officers who "yelled encouragement," *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995); who "observed" an unconstitutional use of force, *Joseph*, 981 F.3d at 344-45; or who are even merely "present at the scene" of a constitutional violation, *Carroll v. Ellington*, 800 F.3d 154, 177 (5th Cir. 2015); are liable as bystanders. In this case, Vasquez, Mansell, Dominguez, and Rivera were not only "present at the scene" of Timpa's killing; they affirmatively assisted and encouraged Dillard's use of deadly force, Vasquez by pressing his knee onto Timpa's back and shoulder, Dominguez and Rivera by zip tying Timpa's ankles, and all four by ridiculing Timpa and making off-color jokes at his expense. ROA.1702 1:29-4:06, 7:50.

Qualified immunity does not shield defendants here from liability. At the time defendants watched Dillard asphyxiate Tony Timpa, "it was clearly established in the Fifth Circuit that an officer could be liable as a bystander in a case involving excessive force if he knew a constitutional violation was taking place and had a reasonable opportunity to prevent the harm." *Hamilton v. Kindred*, 845 F.3d 659, 663 (5th Cir. 2017); *see also Carroll*, 800 F.3d at 177. The district court found otherwise only because it found—wrongly, as explained *supra*, §§I-IV—that Dillard was

entitled to qualified immunity. ROA.5122-5123. This Court has been clear that where the perpetrating officer is not entitled to qualified immunity, bystander officers aren't, either. *Hale*, 45 F.3d at 919.

Even if no precedent had said so, Rivera, Vasquez, Mansell, and Dominguez would still be liable. An officer who commits an obvious constitutional violation is not entitled to qualified immunity, even in novel factual circumstances. *See supra*, §III; *Hope v. Pelzer*, 536 U.S. 730, 741, (2002); *Cole v. Carson*, 935 F.3d 444, 453 (5th Cir. 2019); *Alexander v. City of Round Rock*, 854 F.3d 298, 305 (5th Cir. 2017). Just as a reasonable officer would not need case law to tell him that the Constitution forbids smothering a civilian who poses no threat, *see supra* §III, any officer in defendants' position would know that standing by and laughing while that civilian is being smothered is wrong.

Under both clearly established law and the rules of common sense, an officer who acquiesces in a clear constitutional violation that occurs in his presence is liable as a bystander. Rivera, Vasquez, Mansell, and Dominguez saw what Dillard was doing, had an opportunity to stop it, and did nothing. The district court's judgment should be reversed.

CONCLUSION

For the foregoing reasons, the district court erred in granting summary judgment on the Timpa family's excessive force and bystander liability claims and should be reversed.

Respectfully Submitted,

s/ Easha Anand

Easha Anand
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
2443 Fillmore Street, #380-15875
San Francisco, CA 94115
(510) 588-1274
easha.anand@macarthurjustice.org

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: January 8, 2021

s/ Easha Anand
Easha Anand

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a) and 5th Cir. R. 32.3, I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,964 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook typeface.

Date: January 8, 2021

s/ Easha Anand
Easha Anand