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' REPLY BRIEF

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INTRODUCTION

If there were any doubt that this Court must reverse the grant of summary judgment in this case, *Aguirre v. City of San Antonio*, __ F.3d __, 2021 WL 1574046 (5th Cir. Apr. 22, 2021), dispelled it.

In *Aguirre*, as in this case, police responded to reports of a mentally ill victim wandering in and out of traffic. *Id.* at *1. In *Aguirre*, as in this case, police officers were warned—by trainings, department policies, and national law enforcement bulletins—of the dangers of keeping a handcuffed suspect facedown. *Id.* at *3. Yet in *Aguirre*, as in this case, police officers not only placed the handcuffed victim on his stomach but further increased the risk of asphyxiation by kneeling on his back. *Id.* at *2. And in *Aguirre*, as in this case, an officer stayed on the victim's back as he writhed and struggled for air, and for minutes after he fell entirely silent and still. *Id.*; *see* Plaintiffs' Exhibit 1, available at https://www.ca5.uscourts.gov/opinions/pub/17/17-51031.mp4, 6:19-11:00.

The *Aguirre* court found enough evidence that the officers violated the Fourth Amendment to survive summary judgment. *Aguirre*, 2021 WL 1574046, at *8-10. And, though the three judges had different rationales as to why, all three voted to deny qualified immunity to the officers at

summary judgment based on the state of clearly established law in 2013. *Id.* at *10-14; *id.* at *17-18 (Jolly, J., concurring); *id.* at *18 (Higginson, J., concurring).

The only difference between that case and this one: In *Aguirre*, police officers kneeled on the victim's back for five and a half minutes. *Id.* at *1. In this case, Officer Dustin Dillard kneeled on Tony Timpa's back for over 14 minutes. Because clearly established law forbade Dillard's conduct, this Court must reverse the grant of summary judgment.

ARGUMENT AND AUTHORITIES

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

Defendants agree that whether deadly force was used is a fact question, decided based on the record below. AB22-23[1]; *see Aguirre*, 2021 WL 154046, at *9. They agree that the Fourth Amendment forbade using deadly force against Timpa. AB31 ("Obviously, it would have been unreasonable for Appellees to shoot Timpa to prevent him from re-entering the street."). And they do not respond to Appellants' argument

[1] Citations to appellants' opening brief are denoted OB##. Citations to appellees' answering brief are denoted AB##.

that *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998), thus clearly establishes the law and forecloses qualified immunity. OB30-37.

A. 1. Plaintiffs put forth sufficient evidence that kneeling on a facedown, handcuffed victim for more than 14 minutes was deadly force, particularly in light of his drug use, untreated mental illness, obesity, and significant exertion. OB25-28. Scientific journals, decades of warnings (including from the Department of Justice and the International Association of Chiefs of Police), the Dallas Police Department's own policies, and two expert witnesses all confirmed as much. OB26, 52-53.

Aguirre made clear that comparable evidence—in that case, an autopsy report, one medical expert, a single Department of Justice bulletin, and evidence that the police department's manual suggested officers be "mindful of positional asphyxia"—is sufficient to survive summary judgment on the question of deadly force. 2021 WL 1574046, at *3, *9-10; *see also Gutierrez*, 139 F.3d at 449; OB26. And though whether something is "deadly force" is a question of fact, not law, it's worth noting that the *Aguirre* court effectively described this case when it found a reasonable jury could conclude that it constitutes deadly force for an

officer to hold someone who appears to be on drugs prone with a knee on his back and neck and his legs pulled up. 2021 WL 1574046, at *9; *see* ROA.1702 1:45 (Timpa answers "coke" to Dillard's question "what did you take?"), 11:17-11:21 (officers comment that Timpa is "on something"), 1:30-15:16 (officer kneeling on back and neck), 1:31-3:47 (Timpa's legs held near buttocks); *see also* ROA.5113 n.9.

Faced with that evidence, Defendants attempt to impugn the credibility of Plaintiffs' experts. AB25-27. But those are questions for a jury, not for this Court at summary judgment. *See Goode v. Baggett*, 811 F. App'x 227, 235-36 (5th Cir. 2020). In any event, Defendants' criticisms miss the mark. For instance, Defendants note that one of Plaintiffs' experts, Michael Lyman, said that "restraining someone in a prone position" is not deadly force. AB26-27 (quoting ROA.2924). But on the very next page of the deposition, Lyman said "restraining someone in a prone position *and putting weight on their back*"—the type of force at issue in this case—*is* deadly force. ROA.2925 (emphasis added). They suggest Plaintiffs' other expert, Kimberly Collins, was confused about the position Timpa was in because she referred to it as a "prone 'hog-tie' position" in her report. AB27 n.8 (quoting ROA.2678-2679). But the rest

of her report and her deposition testimony make clear that she knew exactly how Timpa was restrained. *See, e.g.*, ROA.2541-42; ROA.5151.

Defendants next argue that Plaintiffs must pinpoint the precise frequency with which facedown, handcuffed victims die as a result of police kneeling on them in order to establish that Defendants used deadly force. AB25-27. That has never been the rule. In *Aguirre*, this Court relied solely on an expert's explanation of the physiological basis for death with no mention of frequency. 2021 WL 1574046, at *9. In *Gutierrez*, this Court thought evidence that "a number of persons" had died was sufficient to survive summary judgment. 139 F.3d at 446. Surely, a jury could conclude that "a number of persons" had died from the kind of force that killed Tony Timpa, given that the Department of Justice and International Association of Chiefs of Police issued nationwide bulletins on the dangers of keeping handcuffed suspects facedown, that the Dallas Police Department forbade doing so, that each of the studies cited by Plaintiffs' expert provides examples of deaths from prone asphyxiation in similar circumstances, and that multiple circuit-court cases document deaths from prone restraint. ROA.2199; ROA.2993; ROA.3017-3018; OB17 n.4.

2. Defendants do not argue that Tony Timpa "pose[d] a threat of serious physical harm, either to the officer or to others," such as would justify the use of deadly force. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). In fact, Defendants concede that "[o]bviously, it would have been unreasonable for Appellees to shoot Timpa to prevent him from re-entering the street." AB31. If a jury concludes that Dillard used "deadly force," then, it will have concluded that he violated the Fourth Amendment, which says that "deadly force" may only be used against someone who poses "a threat of death or serious physical harm to the officers or others." *Gutierrez*, 139 F.3d at 448-49.

B. Finally, Plaintiffs explained that Dillard was not entitled to qualified immunity because *Gutierrez* clearly established that his conduct was off-limits. OB30-37. *Gutierrez* held that, as of 1998, it was clearly established that officers could not use "deadly force" against a handcuffed suspect who kicks at officers but is "quiet and peaceful" during some portions of the encounter—a suspect, in other words, who was if anything more dangerous than Tony Timpa. 139 F.3d at 448-49. And *Gutierrez* explained that what constitutes "deadly force" is a question of fact, such that plaintiffs need not point to clearly established

law declaring a particular form type of force "deadly" in order to overcome qualified immunity. *Id.*

Judge Dennis' opinion denying qualified immunity in *Aguirre* confirms that Dillard is not entitled to qualified immunity here.[2] 2021 WL 1574046, at *13. That opinion relied on *Gutierrez* to deny qualified immunity even though the precise way that the prone asphyxiation occurred differed from the way it occurred in *Gutierrez*. *Id.* Judge Dennis explained that a jury could decide whether the "maximal prone restraint position" used in that case "was tantamount to and as dangerous as a

[2] Each of the three judges on the *Aguirre* panel wrote separately on the qualified immunity question. Judges Dennis and Higginson would deny qualified immunity entirely, while Judge Jolly would deny qualified immunity as to the last two minutes of the prone restraint. *Aguirre*, 2021 WL 1574046, at *10-14 (Dennis, J., writing for himself); *id.* at *17-18 (Jolly, J., concurring); *id.* at *18 (Higginson, J., concurring). Judge Higginson found the law clearly established that officers could not "put a handcuffed arrestee, no longer resisting or posing a safety threat to himself or others, and whom the officers observed in an excited state of delirium and suspected to have ingested drugs, on the ground, face down in an asphyxial position, i.e., pulling back his leg and arms into prone restraint, and simultaneously apply vertical pressure to such a prone, immobile arrestee for sufficient time to see his lips turn blue and his breathing stop." *Id.* at *18. Judge Dennis found the law clearly established that officers could not use a position "tantamount to and as dangerous as a hog-tie" against a suspect who "was not resisting, posed no immediate safety threat, and was presenting reasons to believe he was on drugs and in a drug-induced psychosis." *Id.* at *13. Plaintiffs submit that Judge Higginson's separate writing is the controlling opinion, because it adopts the position (no qualified immunity for any portion of the prone restraint) that received two votes and is a "logical subset" of Judge Dennis' separate writing. *See United States v. Duron-Caldera*, 737 F.3d 988, 994 & n.4 (5th Cir. 2013). But regardless of which of the three opinions controls, *Aguirre* requires that this Court reverse the district court's decision.

hog-tie." *Id*. And if it was, *Gutierrez* clearly established the victim's "right to be free from this position," because he "posed no immediate safety threat." *Id*. Here, too, a jury could conclude that kneeling on a handcuffed, facedown Tony Timpa was "tantamount to and as dangerous as a hog-tie"; per Judge Dennis, *Gutierrez* would thus clearly establish Timpa's right to be free of that position because he "posed no immediate safety threat."

In response, Defendants argue only that *Garner* does not clearly establish the law. AB28-31. But Plaintiffs never argued that it did. Instead, Plaintiffs argue that *Gutierrez* is clearly established law for the proposition that deadly force cannot be used on the facts of this case. As to *that* argument, Defendants do not say a single word.

II. Regardless Of Whether It Constituted Deadly Force, Kneeling On A Prone And Handcuffed Civilian For Fourteen Minutes Violated Clearly Established Law.

A. Kneeling On A Facedown, Restrained Tony Timpa Violated The Fourth Amendment.

As explained in appellants' opening brief, OB38-42, even if Dillard's conduct did not involve any deadly force, it still violated the Fourth Amendment. The Supreme Court has explained that three considerations generally inform whether force complies with the Fourth Amendment: (1)

the severity of the crime; (2) whether the suspect posed an immediate threat; and (3) whether the suspect was actively resisting arrest. *Graham v. Connor*, 490 U.S. 386, 396 (1989). *Aguirre* confirms that not one of those factors justified the use of force in this case.

Defendants concede that the first factor, the "severity of the crime at issue," did not suggest force was necessary. AB33. As in *Aguirre*, "defendants do not articulate any criminal investigatory function justifying their actions." 2021 WL 1574046, at *5.

As to the second factor, Tony Timpa posed no "immediate threat" to anyone at the point he was turned onto his stomach and asphyxiated. *See Graham*, 490 U.S. at 396. Given that Timpa was handcuffed, surrounded, and easily kept in place by a tap on the shoulder, Defendants can point to no threat that would justify the decision to flip Timpa on his stomach and smother him. AB34; OB28-30.

Again, *Aguirre* makes clear that this factor counsels against the use of force. As in *Aguirre*, Tony Timpa was "surrounded" by police officers, with several officers just "mulling around." 2021 WL 1570406, at *6; *id.* at *17 (Jolly, J., concurring). As in *Aguirre*, video footage "at minimum raise[s] genuine questions about whether it was objectively reasonable"

to believe the victim was "even physically capable of posing an immediate safety threat" that would "justify" the use of "extraordinarily dangerous force"; "it would have been very difficult for [the victim] to stand up and escape or run into traffic." *Id.* at *5-6; *see* ROA.2994-2995 ("[I]t was unlikely, if not completely impossible, for [Timpa] to roll into the street considering he was literally flanked on all sides by police officers."). And as in *Aguirre*, there were no "attempts to head butt or bite" police officers or otherwise harm them. 2021 WL 1570406, at *6. Indeed, even Dillard acknowledged that Timpa did not do "anything to try to intentionally hit or kick any officer." ROA.1364; ROA.1702 4:33-7:32, 8:07-8:14. Under those circumstances, this Court held "there are at very least genuine disputes" as to the application of the second *Graham* factor.

Defendants stress that they were following a Texas statute allowing the arrest of someone posing "a substantial risk of serious harm to himself or to others unless he is immediately restrained." Tex. Health & Safety Code §573.001(a)(1)(B); AB34-35. But that statute differs in a crucial respect from the *Graham* factor: It allows taking an individual into custody if he's a danger to *himself*, whereas the *Graham* consideration looks at the impact on *others*. For good reason, the Fourth

Amendment doesn't sanction seriously injuring someone ostensibly to prevent him from seriously injuring himself. And regardless, by the time Tony Timpa was handcuffed, with multiple officers between him and the street, it's not at all clear how he posed a "substantial risk of serious harm to himself."

Defendants rest most of their argument on the final factor, whether Tony Timpa "[wa]s actively resisting." *See Graham*, 490 U.S. at 396; AB35-36, 42-45. Defendants point to the fact that Timpa did not obey Dillard's command to "relax," AB35; that Timpa "continued [] to buck, to move, [and] to squirm," *id.*; and that he "move[d] his head from left to right," AB43.

But there is at least a genuine dispute of material fact over whether Tony Timpa was, in fact, "actively resisting arrest." Video footage captures him moving his torso, but he does not appear to be attempting to evade handcuffs or escape from officers. ROA.1702 1:30-15:37. The Dallas Police Department's own Custodial Death Report answers "no" to the question whether Timpa "resist[ed] being handcuffed or arrested …

at any time during the arrest/incident."[3] And it would be passing strange to describe Timpa as "actively resisting arrest" when Defendants themselves disclaim any intent to actually arrest him. AB8 (Defendants "did not intend to arrest or charge Timpa").

Aguirre again makes clear that the use of force in this case was unreasonable. In video footage of the *Aguirre* incident, the victim can be seen twisting his torso off the ground and jerking his body despite officers' exhortations to stop. https://www.ca5.uscourts.gov/opinions/pub/17/17-51031.mp4 at 6:23-7:37, 8:17. In that case, as in this one, defendants argued that any reasonable juror would have found that the suspect resisted arrest based on that video evidence, citing the Supreme Court's decision in *Scott v. Harris*, 550 U.S. 372 (2007). *Aguirre*, 2021 WL 15074046, at *6-7; AB43-44. This Court rejected that argument, because "*Scott* was not an invitation for trial courts to abandon the standard principles of summary judgment." *Aguirre*, 2021 WL 1574046, at *7. Even though the victim in *Aguirre* jerked his body in much the same way Tony

[3] Defendants argue that because the Custodial Death Report was "completed by an individual who was not present during Tony Timpa's restraint," it should carry no weight. AB42. Perhaps a jury will so conclude. But at the summary judgment stage, it is at least probative that Defendants' fellow officer in the Dallas Police Department, who had access to officers, body camera footage, and other evidence, concluded that Timpa was not resisting arrest. ROA.2216-2218.

Timpa did, this Court held that movement did not render the officers' conduct reasonable. *Id.*

Finally, Defendants seem to argue that the mere presence of paramedics on the scene made their conduct reasonable. AB36. That's never been the rule under the Fourth Amendment. In *Aguirre*, for instance, one of the defendants was a "medical tech officer," who was on the scene and ultimately unsuccessfully administered CPR to the victim. 2021 WL 1574046, at *2. This Court did not believe that a medical professional's presence somehow immunized defendants' conduct from Fourth Amendment scrutiny.

At a minimum, a reasonable jury could disagree that a paramedic "instructed Dillard to keep Timpa in place," as Defendants would have it. AB14, 36. After Dillard kneeled on Timpa for seven minutes, he asked a paramedic, "Do you want me to roll him over?" ROA.1997. The paramedic responded, "*Before y'all move him*, if I can just get right there and see if I can just get to his arm." ROA.1997 (emphasis added). If anything, that statement implies that the paramedic expected officers to roll Timpa over shortly—they didn't say, "Keep him down." Moreover, the paramedics themselves testified that they were acting at the direction of the police

officers, staying in "stand-by" position; they weren't "instruct[ing]" anyone. ROA.1951; *see also* ROA.2907 (paramedics on scene at officers' behest); ROA.2909 (Plaintiffs' expert opined it would not be reasonable for paramedics to make decisions for officers). And Mansell, the commanding officer on the scene, testified that Timpa was face down so that officers could swap out the security guard's handcuffs for pair of their own, not because of any guidance from the paramedics. ROA.1871 ("We knew we were going to transport him to [a hospital]. … [W]e just needed to change handcuffs so we could give the security guard his handcuffs back and he could go on his merry way, but a lot happened in between."); *see* ROA.1356; ROA.1400; ROA.1872; ROA.1900; ROA.1915; ROA.1918.

B. Clearly Established Law Forbids Inflicting Serious Injuries on an Unarmed, Subdued Civilian When The Civilian Could Be Contained By Less Brutal Means.

As explained in appellants' opening brief, the rule that *Joseph ex rel. Joseph v. Bartlett*, 981 F.3d 319 (5th Cir. 2020), extracted from a trio of cases, *Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012), *Ramirez v. Martinez*, 716 F.3d 369 (5th Cir. 2013), and *Cooper v. Brown*, 844 F.3d 517 (5th Cir. 2016), squarely governs this one. OB42-50.

In response, Defendants say only that each of the cases in that trio "involv[ed] force different and more severe than prone restraint." AB41. That's a remarkable statement—none of those three cases resulted in death, and each officer's unconstitutional conduct lasted a fraction of the time that Dillard kneeled on Timpa. *See Cooper*, 844 F.3d at 521 (dog bite lasted one to two minutes); *cf. Joseph*, 981 F.3d at 325 & n.6 (officers' beating lasted eight minutes, including time to subdue victim); OB48.

And as this Court has repeatedly explained, "[l]awfulness of force … does not depend on the precise instrument used to apply it." *Newman*, 703 F.3d at 763-64. In *Joseph*, for instance, this Court looked to a case about a dog bite to deny qualified immunity in a case about a taser and a beating. 981 F.3d at 340 (citing *Cooper*, 844 F.3d at 525, 526). In that dog bite case, this Court denied qualified immunity by looking to a case where an officer slammed the victim's face into a vehicle. *Cooper*, 844 F.3d at 524-25 (citing *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008)). And so on.

Were there any doubt, all three judges in *Aguirre* voted just last month to deny qualified immunity to officers in a virtually identical case, and two of them would have denied qualified immunity for the entirety

of the officers' conduct. Start with Judge Higginson's opinion.[4] He denied qualified immunity to officers who kneeled on a suspect's back for less than half the length of time Dillard was on Tony Timpa's back, explaining that "our caselaw had converged by spring 2013 around the clearly established proposition that while such an initial restraint is not per se unconstitutional, the continued application of asphyxiating force may be unreasonable where there is no ongoing threat posed by the suspect." *Aguirre*, 2021 WL 1574046, at *18 (Higginson, J., concurring).

That clearly established rule applies with full force here. Officers certainly "appli[ed] asphyxiating force" to Tony Timpa—officers kept him "on the ground, face down, in an asphyxial position" and "simultaneously appl[ied] vertical pressure." *Id.* at *18; ROA.1702 1:30-15:37; *see* ROA.5152 (Plaintiffs' expert explained that facedown with "load on his torso" is a position that results in asphyxiation). And Timpa posed no "ongoing threat"; handcuffed and surrounded by officers, he was not going anywhere, and there was no reason to believe he would harm any of the officers. OB28-30.

[4] As explained *supra*, 10 n.2, Plaintiffs believe that Judge Higginson's concurrence is the controlling opinion of this Court. But regardless of which of the three writings control, *Aguirre* forecloses granting officers qualified immunity in this case.

Dillard must also be denied qualified immunity under Judge Dennis's reading of the clearly established law. First, Judge Dennis explained that "[i]t has long been clearly established that, when a suspect is not resisting, it is unreasonable for an officer to apply unnecessary, injurious force against a restrained individual, even if the person had previously not followed commands or initially resisted the seizure." *Aguirre*, 2021 WL 1574046, at *11 (Dennis, J., writing for himself) (citing *Curran v. Aleshire*, 800 F.3d 656, 661 (5th Cir. 2015)). In this case, Dillard "appl[ied] unnecessary, injurious force" against Tony Timpa, "a restrained individual." OB38-42 (unnecessary), 26-28 (injurious), 6-11 (restrained).

Judge Dennis would also have denied qualified immunity because "at least five other circuits have held that, even in the absence of a previous case with similar facts, it is clearly established that exerting significant continued force on a person's back while that person is in a face-down prone position after being subdued and/or incapacitated constitutes deadly force." *Aguirre*, 2021 WL 1574046, at *11 (internal quotation marks and alterations omitted) (citing *McCue v. City of Bangor*, 838 F.3d 55, 64 (1st Cir. 2016); *Weigel v. Broad*, 544 F.3d 1143,

1155 (10th Cir. 2008); *Abdullahi v. City of Madison*, 423 F.3d 763, 765 (7th Cir. 2005); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1057 (9th Cir. 2003); and *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004)). That rule also applies here—Dillard "exert[ed] significant continued force" on Tony Timpa's back while he was "in a face-down prone position," well after he was "subdued and incapacitated," handcuffed and surrounded by other officers.

Defendants point to *Castillo v. City of Round Rock*, 1999 WL 195292 (5th Cir. 1999), and *Wagner v. Bay City*, 227 F.3d 316 (5th Cir. 2000), to argue that prone restraint is not "per se unconstitutional." AB38-40. But no one in this case has argued that it is. Subjecting a civilian to prone asphyxiation—like subjecting her to pepper spray, a Taser, or a gunshot—is constitutional in some circumstances and unconstitutional in others. And *Wagner* and *Castillo* create no doubt that subjecting Tony Timpa to 14 minutes of prone asphyxiation was the latter. In *Wagner*, the suspect began the encounter by jumping at an officer, swinging his fists, and landing multiple punches. 227 F.3d at 318. The officer had to shield himself from the onslaught of blows. *Id.* The suspect there *did* pose a danger to officers and *had* resisted arrest. Neither is true of Timpa.

Castillo is an unpublished case that does not bind this Court. In any event, the two propositions that Defendants cite *Castillo* for are irrelevant here. First, they submit that *Castillo* establishes that a suspect "actively resist[ed] by kicking and yelling…in a manner that a reasonable officer could perceive as hostile." AB38 (citing *Castillo*, 1999 WL 195292, at *3). But the full quote is: "Castillo refused to submit, actively resisting by kicking and yelling—*and bloodying the officer's nose*—in a manner that a reasonable officer could perceive as hostile." *Castillo*, 1999 WL 195292, at *3 (emphasis added). The officers in *Castillo* "struggle[d] vigorously on the ground" with the suspect, enlisting "citizen bystanders" to try to subdue him after he managed to hit one officer so hard that his nose "bled profusely." *Id.* at *1. By contrast, the video footage in this case doesn't capture Tony Timpa hitting or kicking anyone.[5]

Defendants also cite *Castillo* in response to Plaintiffs' expert testimony that Timpa's movements were a desperate struggle for air, not a sign of resistance. AB38. *Castillo* explained that the fact that the

[5] Though Officer Rivera later testified that Timpa kicked him in the shin, he complained only of a kick to the thumb during the incident itself, and the video doesn't capture that, either. ROA.1583; ROA.1702 8:07-8:13.

suspect's "struggle might eventually have become a panic reaction to his positional asphyxia changes neither its perception to reasonable officers as hostility and resistance to arrest nor the fact that it clearly began as hostile resistance to lawful and reasonable demands of police." AB38 (quoting *Castillo*, 1999 WL 195292, at *3). That analysis is doubly irrelevant here. In this case, unlike in *Castillo*, Plaintiffs presented evidence that officers were trained to recognize the dangers of prone restraint, such that "reasonable officers" should not have "perce[ived]" Timpa's movements as "hostility and resistance to arrest" but instead a struggle to breathe. OB41-42 & n.9. And regardless, Timpa's movements did not "clearly beg[i]n as hostile resistance"—whereas the *Castillo* plaintiff's encounter with the police began when he engaged in a brawl with officers and nearby citizens, Timpa's began when he was already handcuffed and lying on his back. OB6-8.

Finally, Defendants point to various Eighth Circuit cases, arguing they trigger this circuit's rule that qualified immunity must be granted "[w]here no controlling authority specifically prohibits a defendant's conduct, and when the federal circuit courts are split on the issue." AB45-51 (quoting *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011) (en

banc)). But the very language Defendants quote makes clear why the out-of-circuit cases they cite don't matter here: The rule about circuit splits only applies where there is "no controlling authority." Here, Plaintiffs have pointed to three published Fifth Circuit cases preceding Tony Timpa's death and two published Fifth Circuit cases since his death explaining how to apply those prior decisions. Those cases clearly establish the law in this circuit.

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

As appellants' opening brief explained, even absent court precedent, Dillard would still have had the "fair warning" that qualified immunity demands, based on the Dallas Police Department's general orders, various law enforcement bulletins, and the "obvious cruelty inherent" in his conduct. OB51-54.

In response, Defendants argue only that the Dallas Police Department's general orders limit prone restraint "only when officers use chemical spray or a taser on a suspect." AB27-28. But that's simply false. The Dallas Police Department's orders command that, as a blanket matter, "[o]fficers 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 *repeated* in sections regarding the use of chemical spray and tasers (and, for that matter, in sections regarding pepperball launchers, taking down suspects, and excited delirium)—but it's not limited to those sections. ROA.2201; ROA.2203; ROA.2205; ROA.2207; ROA.2211. A reasonable jury could surely find "fair warning" to Dillard in the Dallas Police Department's insistence that, virtually whatever situation its officers encounter, they avoid keeping suspects handcuffed and facedown.

This Court's decisions since the opening brief was filed only confirm that qualified immunity must be denied even if there were no precedent on point. In *Aguirre*, Judge Jolly explained that "it would have been 'obvious' to a reasonable officer that the use of such a severe tactic against this particular person would be constitutionally proscribed, and he would have no recourse to qualified immunity." 2021 WL 1574046, at *17 (Jolly, J., concurring). In *Roque v. Harvel*, 993 F.3d 325 (5th Cir. 2021), a suicidal suspect dropped the gun he was holding after an officer fired one shot, but the officer kept firing. *Id.* at 333-34. This Court held that a jury could find that the officer shot an unarmed man who was "a threat only to himself," and, if it did, "[t]hat would make this case an 'obvious' one.'"

Id. at 336. In this case, a jury could conclude that, as in *Aguirre*, Dillard used an unnecessarily severe tactic against a person at particular risk, or that, as in *Roque*, Timpa was an unarmed man who was "a threat only to himself," against whom deadly force should not have been used. This Court thus must reverse the district court's grant of qualified immunity.

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.

This Court has consistently held that "an exercise of force that is reasonable at one moment can become unreasonable in the next." *Lytle v. Bexar Cnty.*, 560 F.3d 404, 413 (5th Cir. 2009). And it has applied that rule literally, granting qualified immunity for an officer's actions at one point in time and denying it for an officer's actions in the very next minute or even the very next second. In *Aguirre*, for instance, Judge Jolly would have granted qualified immunity to defendants for three minutes of kneeling on the victim's back but denied it as to the last two minutes. 2021 WL 1574046, at *17 (Jolly, J., concurring). In *Roque v. Harvel*, this Court granted qualified immunity to defendant for the first shot he fired but denied it as to the second and third shots, fired two and four seconds later, respectively. 993 F.3d at 335-36.

Thus, even if Dillard were somehow entitled to qualified immunity for flipping Tony Timpa onto his stomach and kneeling on him in the first place, he cannot be granted qualified immunity for *continuing* to kneel on Timpa after he fell still. After Dillard kneeled on Timpa for between six and seven minutes, Timpa's torso and legs (at that point restrained) stopped moving, and only his head jerked back and forth. ROA.1702 8:14-15:37. Three and a half minutes later, Timpa was so still that officers worried he'd fallen asleep. ROA.1702 11:50-15:37; *see* ROA.2493-94. Dillard is not entitled to qualified immunity for those final minutes.

First, qualified immunity must be denied for those final minutes because Dillard's use of force became only more deadly the longer it went on and, conversely, any reason to believe Tony Timpa posed a threat of harm diminished. *See supra*, §I. Plaintiffs' experts explained that the risk of mechanical asphyxiation increases as time passes. ROA.5152. At the same time, the suggestion that Timpa posed a threat of serious physical harm to the officers or anyone else became even more implausible when his legs as well as his hands were restrained and more implausible still when he stopped moving altogether. Dillard thus cannot receive qualified immunity for his conduct during the last few minutes of Timpa's life

because he used deadly force in the absence of any risk of physical harm. *Gutierrez*, 139 F.3d at 446-47.

Second, qualified immunity must be denied for those final minutes because, by that point, there could be no argument that Tony Timpa was "resisting." *See supra*, §II. By the time Dillard had been kneeling on him for seven minutes, Timpa's whole body was still, and he was only moving his head back and forth. ROA.1702 8:14-13:02. And even if shaking his head somehow constituted resistance justifying the use of serious force, no argument can be made that when Timpa was entirely still (so still that Officer Dominguez asked, "Tony, you still with us?"), he was resisting arrest. ROA.1702 11:50-15:10, 13:01-13:04. Because not even Defendants argue that any of the *Graham* factors supported Dillard's conduct at that point, qualified immunity must be denied.

Third, qualified immunity must be denied for Dillard's conduct during the last seven minutes or, at least, the last two minutes of Tony Timpa's life because the constitutional violation had, by that point, become even more obvious. *See supra*, §III. Each of the considerations that bear on the "obviousness" of a constitutional violation—department policies, statements from national law enforcement groups, and the

"inherent cruelty" of the officer's conduct—applied with greater force during those periods of time.

Dallas Police Department general orders require that officers place suspects "in an upright position" or "on their side" as soon as they are "brought under control." ROA.2199. To the extent there's any ambiguity whether Tony Timpa was "under control" at the start of officers' encounter with him—though he was handcuffed and hemmed in on all sides—there was no ambiguity by the time his legs, as well as his hands, were cuffed (between six and seven minutes after Dillard began kneeling on him) and certainly none by the time he fell entirely still (between 11 and 12 minutes after Dillard began kneeling on him).

Warnings from the Department of Justice and the International Association of Chiefs of Police cautioning that a suspect will have trouble breathing became even more urgent after Tony Timpa had been facedown for seven minutes, let alone 11 minutes. ROA.2993; ROA.3017-3018.

The "obvious cruelty inherent" in Dillard's conduct only became more apparent when Tony Timpa's legs were restrained, neutralizing any danger from Timpa's squirming. And it was more obvious still once Timpa's face turned red, his lips turned purple, and he had fallen so still

that officers were joking about making him "rooty-tooty fruity waffles" for breakfast. ROA.11:54-14:27. Indeed, Officer Rivera testified that he would not remain on a subject's back for longer than 15 seconds; by the time Dillard had kneeled on Timpa's back for 25 times that amount—and certainly by the time he had kneeled on Timpa's back for more than 40 times that length of time, with Timpa pleading for help all the while—it would be even more obvious to a reasonable officer that his conduct was unconstitutional. ROA.1900; ROA.5100.

Judge Jolly's opinion in *Aguirre* confirms as much. Judge Jolly, unlike the other two judges on the panel, would have granted qualified immunity to officers for the first few minutes of the victim's prone restraint; "to me," he wrote, "the video indicates that Aguirre may have continued resisting for a bit" even after he was "thrown to the ground." 2021 WL 1574046, at *17. But even Judge Jolly believed that after three minutes—when the victim was surrounded by officers, most of whom were not involved in restraining him, and when "he does not appear to be resisting much, if at all"—the "need for the extreme restraint may have lessened." *Id.* For the last two minutes of the victim's life in *Aguirre*, a jury could find that keeping him facedown and pinned by an officer's

bodyweight was "unnecessary to keep Aguirre from escaping into traffic." *Id.* And if that jury so concluded, "it would have been 'obvious' to a reasonable officer that the use of such a severe tactic against this particular person would be a constitutionally proscribed, and he would have no recourse to qualified immunity." *Id.* (citing *Taylor v. Riojas*, 141 S. Ct. 52, 52-54 (2020)). So, too, here.

Defendants don't make any argument that Tony Timpa needed to be facedown—let alone facedown with an officer kneeling on his back—once his legs were restrained. And they certainly don't make any argument that he needed to remain in that position when he'd fallen so silent and still that officers thought he was asleep. At the very least, this Court must reverse the grant of summary judgment as to Dillard's conduct during the last few minutes of Timpa's life.

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

Appellants' opening brief explained that an officer is liable as a bystander if he knows that a fellow officer is violating an individual's constitutional rights and has a reasonable opportunity to act but chooses not to. OB57-61. It explained that officers Rivera, Vasquez, Mansell, and

Dominguez all saw Tony Timpa suffocate to death, had 14 minutes to intervene, and did nothing. *Id.* And, per circuit precedent, if Dillard isn't entitled to qualified immunity, his fellow officers aren't, either. OB60-61.

Defendants make no argument—nor could they—that Dominguez and Vasquez did not violate the Fourth Amendment. AB55-56. As to Rivera and Mansell, Defendants argue that they did not act unconstitutionally because they "left the scene." *Id.* But Rivera left the scene only after Tony Timpa had been struggling under Dillard's knee for over 10 minutes. ROA.2000 ("Rivera leaves scene" after 11:50 mark on body camera). Mansell left the scene still later. ROA.1702 12:34; ROA.2001 (Mansell speaking at 12:04 mark). Both of them were on the scene long enough to know that Dillard was using deadly force against an unarmed civilian who posed no threat. Both of them were on the scene long enough to hear Tony Timpa plead for help and then gradually fall still. ROA.1702 10:54, 11:26; ROA.2650-2662. And both of them had plenty of opportunity to intervene—there's no indication Dillard would have resisted efforts to turn Timpa over (and, in fact, Dillard offered to do so, but none of his fellow officers took him up on the offer). *See, e.g.*, ROA.1702 8:32.

Finally, Defendants point to *Joseph ex. rel. Joseph v. Bartlett*, in which plaintiffs "d[id] not identify a single case" in support of their argument that qualified immunity should be denied as to the bystander officers. AB56 (discussing *Joseph*, 981 F.3d 319, 345-46 (5th Cir. 2020)). But Plaintiffs *did* identify a case in support of their argument here—*Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995).

In that case, this Court denied qualified immunity to an officer who beat a suspect without justification, because clearly established Fourth Amendment law put his conduct off-limits. *Id.* at 918-19. This Court then turned to the bystander officers. It found "that an officer who is present at the scene and does not take reasonable measures to protect a suspect from another officer's use of excessive force" is liable. *Id.* at 919. And it concluded that the bystander officers were not entitled to qualified immunity by virtue of the fact that clearly established law proscribed the beating officer's conduct, yet they "stood by and laughed." *Id.* This Court did not demand any *separate* clearly established law proscribing the bystander officers' conduct—it was enough that they did nothing while a fellow officer violated clearly established law. *Id.*

This Court must thus reverse the district court's grant of qualified immunity to defendants Mansell, Dominguez, Vasquez, and Rivera.

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

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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 6,496 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: May 14, 2021

s/ Easha Anand
Easha Anand

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 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: May 14, 2021

s/ Easha Anand
Easha Anand