No. 20-10876

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

VICKI TIMPA, ET AL.,

Plaintiffs-Appellants,

v.

CITY OF DALLAS, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas
No. 3:16-cv-3089 (Hon. David C. Godbey)

BRIEF OF PROFESSOR SETH STOUGHTON AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Case No. 20-10876

The undersigned counsel of record certifies that the following listed persons and entities have an interest in this amicus brief as required by Fifth Circuit Rule 29.2. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

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INTEREST OF AMICUS CURIAE

Amicus curiae Professor Seth Stoughton is an Associate Professor at the University of South Carolina School of Law and an Associate Professor (Affiliate) in the University's Department of Criminology and Criminal Justice.[1] He is a former officer of the Tallahassee Police Department. Professor Stoughton's scholarship focuses on policing, including tactics and the use of force. His articles have appeared in the *Emory Law Journal*, *Minnesota Law Review*, the *Virginia Law Review*, and other top journals. He has written multiple book chapters and is the principal co-author of *Evaluating Police Uses of Force* (NYU Press 2020). He is a frequent lecturer on policing issues, regularly appears in national and international media, and has written about policing for *The New York Times*, *The Atlantic*, *TIME*, and other news publications.

Professor Stoughton has an interest in ensuring that the Fourth Amendment excessive force inquiry appropriately takes into account prevailing policing practices and considers the totality of the circumstances in evaluating the reasonableness of force.

[1] Professor Stoughton is participating as amicus in his individual capacity and not on behalf of the University of South Carolina.

RULE 29 CERTIFICATIONS

This brief is submitted pursuant to Federal Rule of Appellate Procedure 29(a) and Fifth Circuit Rule 29. All parties have consented to the submission of this brief.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for amicus represents that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amicus or his counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

For decades, police have known that keeping a handcuffed suspect prone—on his stomach—could lead to death by "positional asphyxia."[2] Decades of experience show that an individual may have trouble expanding his chest cavity to breathe sufficiently over time when restrained in that position, resulting in his gradually losing oxygen and falling into cardiac arrest. Police officers compound the problem, and increase the risk of positional asphyxia,

[2] Medical experts sometimes differentiate between "positional asphyxia," referring to asphyxia caused by the face-down position itself; "mechanical asphyxia," meaning asphyxia resulting from physical force; "compression asphyxia," referring to situations where the compression of the individual's back or chest contributes to breathing difficulties; and "restraint asphyxia," describing asphyxia resulting from physical restraints. For purposes of this brief, amicus will not differentiate between those terms.

when they apply additional pressure to an individual's back while he is restrained prone.

This case presents a textbook example of the danger these police practices pose. In 2016, Dallas police officers handcuffed Tony Timpa and "rolled him onto his stomach" while restraining his legs. *Timpa v. Dillard*, No. 16-3089, 2020 WL 3798875, at *2 (N.D. Tex. July 6, 2020). One of the defendants, Officer Dillard, "place[d] his left knee on Timpa's upper back and left hand between Timpa's shoulders with his right hand on Timpa's shoulders intermittently." *Id.* He continued pressing down on Timpa's back this way for 14 minutes while Timpa lay prone. *Id.* Timpa "eventually became quiet and still," and stopped breathing. *Id.* at *2–3. The Dallas County medical examiner concluded that Timpa died due to cocaine use and "the physiological stress associated with physical restraint," observing that due to "his prone position and physical restraint by an officer, an element of mechanical or positional asphyxia cannot be ruled out." *Id.* at *3. Plaintiffs' expert went one step further, opining that "Timpa died due to mechanical"—or positional—"asphyxia." *Id.*

Timpa's death is tragic—all the more so because it could have been easily avoided if the officers had heeded the well-recognized warnings about

the risk of positional asphyxia. Since the 1980s, the law-enforcement community has recognized the particular danger that prone restraint poses, particularly when combined with pressure on a suspect's back or when the suspect is under the influence of drugs, like cocaine, that can affect their heart rate or breathing. Since at least the early 1990s, police training has warned officers against keeping restrained suspects in the prone position. By 2016, there was widespread agreement in the policing community that prone restraint creates a serious risk of positional asphyxia. And police departments across the country have long instituted policies directing officers not to put weight on a prone subject's back for any longer than necessary to restrain the subject and to move prone individuals into a position that facilitates breathing—often called a "recovery position"—as soon as they are restrained. And courts across the country, including this one, have cautioned officers about the unreasonable and unsafe application of prone restraint and body weight on a subject's back, which can quickly turn into deadly force.

Amicus writes to explain the well-settled consensus among the policing community on the dangers posed by prone restraint. Because police practices and court precedent clearly establish that the Defendants should not have used deadly force under the circumstances, and that they were objectively

unreasonable in kneeling on Timpa's back for 14 minutes as he suffocated, this Court should reverse the judgment of the district court.

ARGUMENT

I. Law Enforcement Has Long Recognized the Fatal Risks from Prone Restraint.

A. Police Training Materials Have Taught Officers of This Danger for Decades.

For over three decades, the policing community has agreed that officers should not keep a restrained individual prone, and police training materials have taught officers of the danger of positional asphyxia. As early as 1985, police and medical researchers were aware of a trend of sudden deaths of individuals who were restrained and left lying face-down on their chest or stomachs—so-called "prone restraint." *See* Ronald L. O'Halloran & Janice G. Frank, *Asphyxial Death During Prone Restraint Revisited: A Report of 21 Cases*, 21 Am. J. Forensic Med. & Pathology 39, 47 (2000). As a result of this pronounced trend of deaths, "[p]rivate companies began promoting and providing products and training to law enforcement agencies addressing the risks of hogtying, positional asphyxia, and sudden in-custody deaths in the mid-1990s." *Id.*[3]

[3] "Hogtying" is a type of prone restraint where, in addition to placing a suspect facedown, officers secure the suspect's handcuffs behind his back and tie them to the suspect's leg

In 1992, a San Diego task force surveyed 223 law enforcement agencies across the country about in-custody deaths and the literature on positional asphyxia. The task force issued a series of recommendations, directing that "[o]nce an individual has been controlled and handcuffed, the officer should roll the subject onto his/her side, or into a sitting position as soon as possible to reduce the risk of positional asphyxia." San Diego Police Dep't, *Final Report of the Custody Death Task Force* 24 (1992), *Price v. Cnty. of San Diego*, No. 3:94-cv-01917 (S.D. Cal. June 30, 1997), ECF No. 129.

The task force's findings were quickly endorsed by the International Association of Chiefs of Police (IACP)—the oldest, largest, and most highly regarded association of police leadership in the world. The group disseminated a 1993 "Training Key" explaining that "positional asphyxia is the result of interference with the muscular or mechanical component of respiration," and describing how "considerable evidence . . . indicates that the

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restraints, "drawing [the suspect's] legs backward at a 90-degree angle in an 'L' shape." *Gutierrez v. City of San Antonio*, 139 F.3d 441, 444 (5th Cir. 1998). Although law enforcement initially focused on hogtying as a potential cause of positional asphyxia, "[d]espite efforts by law enforcement agencies to limit hogtying," law enforcement and medical authorities concluded that "asphyxia deaths still occur when suspects are held prone with their arms and legs restrained and weight applied to their backs for minutes." O'Halloran & Frank, at 51. Although some sources around this time focused specifically on hogtying, the risk that prone restraint other than hogtying could cause positional asphyxia was well known. The sources amicus cites here focus on prone restraint generally, and are not limited to hogtying.

practice of prone restraint does in fact lead to deaths among suspects in the custody of the police." IACP, Training Key No. 429, *Custody Death Syndrome* (1993). The group therefore recommended that "a prohibition against unqualified use of this restraint procedure for prisoners should be included in all law enforcement agency policy." *Id.*

In 1994, the New York Police Department distributed a training video for its officers entitled "Preventing In-Custody Deaths," which focused on the dangers of positional asphyxia.[4] Highlighting recent in-custody deaths from positional asphyxia, the video emphasizes to officers that when they restrain an individual, "[i]t is incumbent on those persons who have subdued the individual, as soon as safety permits, to get him into a position that facilitates breathing" by "rolling him up to his side or placing him in a sitting position." A slide underscores this point in large letters. In the video, Dr. Charles S. Hirsh, the city's chief medical examiner, educates officers on the physiological mechanism of positional asphyxia, explaining that when a person is restrained prone, "they have to lift the weight of their body" to breathe, and if "you're

[4] The *New York Times* has a copy of the video available on its web site. *See* Al Baker & J. David Goodman, *The Evolution of William Bratton, in 5 Videos*, N.Y. Times (July 25, 2016), nytimes.com/interactive/2016/07/24/nyregion/bratton-nypd-videos.html.

facedown and your abdomen is compressed" at the same time, it "makes it more difficult for the diaphragm to contract." Under these circumstances,

> [t]he individual begins to have air hunger and oxygen deficiency. The natural reaction to that is to struggle more violently. The perception of those persons trying to subdue the individual is that he needs more compression to be subdued. You then enter a vicious cycle in which compression makes air hunger, air hunger makes a greater struggle, and a greater struggle demands greater compression. Unfortunately, in some of these circumstances, the price of tranquility is death.

Id.

The New York Police Department Chief of Personnel appears on the video after Dr. Hirsh and reiterates the key lesson in simple terms:

> You all know what Dr. Hirsh is saying. As a child, who hasn't been on the bottom of a pile of friends, gasping for air, unable to catch your breath? The problem is simple: a person lying on his stomach can't breathe while pressure is applied to his back. The answer is also fairly simple: get the person off his stomach. . . . If he continues to struggle, don't sit on his back.

Id. The department emphasizes that when officers follow these instructions, they "will prevent unnecessary deaths." *Id.* "In closing," the video summarizes, "please remember the key to preventing deaths in custody: get a suspect off his stomach as soon as possible." *Id.*

In 1995, the U.S. Department of Justice issued a bulletin entitled *Positional Asphyxia—Sudden Death* that quoted the NYPD's guidance and

reiterated that "[t]he risk of positional asphyxia is compounded" when an individual is restrained using "behind the back handcuffing combined with placing the subject in a stomach-down position." U.S. Dep't of Justice, *Nat'l Law Enforcement Tech. Ctr. Bulletin: Positional Asphyxia—Sudden Death* 2 (June 1995), https://www.ncjrs.gov/pdffiles/posasph.pdf. To avoid "death as a result of body position that interferes with one's ability to breathe," the Department of Justice echoed the NYPD's instruction: "As soon as the suspect is handcuffed, get him off his stomach." *Id.*

The same year, the Chicago Police Department released a training bulletin on "Positional Asphyxia" advising officers not to "leave a subject in control restraints lying on his back or stomach." Chi. Police Dep't, *Training Bulletin: Positional Asphyxia* (Feb. 6. 1995), https://tinyurl.com/y6a8dppd. The bulletin further instructed not to "put weight on an arrestee's back, such as with your knee, for a prolonged period" because "[t]his practice adds stress to the respiratory muscles and inhibits movement of the diaphragm and rib cage." *Id.* Other cities soon followed suit. *See, e.g.*, Wichita Police Dep't, *Training Bulletin: In-Custody Sudden Deaths* (March 30, 1995) (warning against placing a suspect in a "secured, prone position" due to the risk of asphyxiation).

B. Recent Training Materials and Police Policies Continue To Warn Against the Use of Prone Restraint.

Based on this well-established understanding, training materials today consistently teach officers about the dangers of prone restraint and positional asphyxia. For example, Calibre Press—one of the largest and most popular police training providers and publishers of police media—published an article in 2015 explaining that "[m]ost officers know that when a patient is prone, their respirations may be impeded." Steve Cole, *Screaming Their Last Breath: Why First Responders Must Never Ignore The Words "I Can't Breathe,"* Dec. 10, 2015 (Calibre Press).[5] To avoid this, officers must "[m]ake sure the suspect is in a position to maximize his tidal volume" and that "[a] subject [is] never [] left prone." *Id.* Because of these well-known and potentially fatal risks, POLICE Magazine—another major police trade publication—summarizes that "[m]any law enforcement and health personnel are now taught to avoid restraining people face-down or to do so only for a short period of time." Lawrence E. Heiskell, *How to Prevent Positional Asphyxia*, POLICE Mag. (Sept. 9, 2019).

[5] Calibre reissued the article online in June 2020, emphasizing that it remained "consistent with [its] training." *See* https://tinyurl.com/y2v43ooc.

Training books repeat this warning. Steven G. Brandl's textbook *Police in America* explains that "[s]ubjects in police custody have died as a result of positional asphyxia," which "[u]sually" occurs "when the subject is face down with hands secured behind the back," citing a source from 2012. Brandl, *Police in America* 252 (2018). The solution is straightforward: "Avoid prone restraint unless absolutely necessary. . . . The person should be repositioned from the face down/prone position as soon as practical." *Id.*

Today, police department policies frequently memorialize the risk of positional asphyxia from prone restraint and instruct officers not to keep suspects prone. Indeed, the Department of Justice's Principles for Promoting Police Integrity as far back as 2001 recommended—under the heading of "Deadly Force"—that "[a]gencies should develop use of force policies that address . . . particular use of force issues such as . . . positional asphyxia." U.S. Dep't of Justice, *Principles for Promoting Police Integrity* 4 (Jan. 2001), https://www.ncjrs.gov/pdffiles1/ojp/186189.pdf. When the Department of Justice entered into recent consent decrees with police agencies, the terms of those agreements have required the adoption of policies and training to "[m]inimiz[e] the risk of positional asphyxia" and to encourage officers "to use restraint techniques that do not compromise a subject's breathing." Consent

Decree at 37, *United States v. City of Ferguson*, No. 4:16-cv-00180 (E.D. Mo. Apr. 19, 2016), ECF No. 41, https://www.justice.gov/crt/file/883846/download; *see also* Settlement Agreement at 17, *United States v. City of Cleveland*, No. 1:15-cv-01046-SO, (N.D. Ohio June 12, 2015), ECF No. 7-1, https://www.justice.gov/crt/case-document/file/908536/download (same).

As of 2015, Dallas Police policies instructed that "as soon as subjects are brought under control," officers were to "ensure . . . they are placed in an upright position (if possible) or on their side." Dallas Police Dep't, General Orders § 901.1; ROA.2199.[6] The policies further warned of the risk of positional asphyxia from prone restraint, albeit in the policies for restraining individuals who had been subject to chemical sprays like pepper spray or electronic control weapons like TASERs, which can compromise a subject's heart or breathing and further exacerbate the risk of positional asphyxiation. The policy discussed the fundamental risks of fatal asphyxiation in broad terms:

> Any time resisting or combative subjects are brought under control and handcuffed, place them in an upright seated position, if possible. . . . As soon as it is reasonably safe to do so, check the subject's vital signs (pulse and breathing) to determine any apparent medical difficulties. Place the subject in a sitting position or roll the subject onto his/her side. *Do not place in a prone*

[6] *Available at* https://tinyurl.com/yxwam4ez.

> *position as it could result in positional asphyxia.* Provide constant monitoring of the subject . . . .

Id. at §§ 902.01(D), 902.02(G) (emphasis added); *e.g.*, ROA.2201.

Other major police departments across the country have enacted policies to limit the use of prone restraint in *all* circumstances:

- **Albuquerque, New Mexico**: "In situations when the individual is forced into a face down position, officers shall release pressure/weight from the individual and position the individual on their side or sit them up as soon as they are restrained and it is safe to do so." Albuquerque Police Dep't, Procedural Orders, Use of Force, SOP 2-52 at 5 (Jan. 11, 2020), https://tinyurl.com/yxl7fcgy.

- **Denver, Colorado**: "[O]fficers will immediately cease applying body weight to an individual's back, head, neck, or abdomen once the individual is restrained and other control tactics may reasonably be utilized other than body weight. As soon as possible after an individual has been handcuffed, the individual should be turned onto his/her side or allowed to sit up, so long as the individual's actions no longer place officers at risk of imminent injury. Officers will make all reasonable efforts to ensure that the individual is not left in a prone position for longer than absolutely necessary to gain control over the resisting individual." Denver Police Dep't, Operations Manual, Force Related Policies, 105.01(5)(e), https://tinyurl.com/y28sbsrw.

- **Detroit, Michigan**: "Restrained subjects should be placed in an upright or seated position to avoid Positional Asphyxia which can lead to death, when a subject's body position interferes with breathing." Detroit Police Dep't, Use of Force, 304.2-7, Duty to Report/Render Aid (rev. 2020), https://tinyurl.com/y5kzobh9.

- **New Orleans, Louisiana**: "If a subject has been placed on his or her stomach, turn him or her on the side or in a seated position as soon as handcuffs are properly applied. If the subject continues to struggle, *do not* sit, lie or kneel on the subject's back." New Orleans Police

Dep't, Operations Manual, Handcuffing and Restraint Devices at 4 (rev. Apr. 2, 2017), https://tinyurl.com/y438hpey (emphasis in original).

- **New York, New York**: "Avoid actions which may result in chest compression, such as sitting, kneeling, or standing on a subject's chest or back, thereby reducing the subject's ability to breathe. . . . Position the subject to promote free breathing, as soon as safety permits, by sitting the person up or turning the person onto his/her side." New York City Police Dep't, Patrol Guide, Use of Force, 221-02 at 2–3 (June 27, 2016), https://tinyurl.com/yxbl78pw.

- **Washington, D.C.:** "In order to avoid asphyxiation, members shall . . . [p]osition the individual in a manner to allow free breathing once the subject has been controlled and placed under custodial restraint using handcuffs or other authorized methods. . . . Members are prohibited from: Placing a person in a prone position (i.e., lying face down) for a prolonged period of time . . . except during exigent circumstances. Prisoners shall be carefully monitored while in a prone position as a prone position may be a contributing factor to cause a prisoner to suffocate, also referred to as positional asphyxiation." District of Columbia Metro. Police Dep't, Gen. Order, Use of Force, 901.07 at 10, https://tinyurl.com/yxds5r3s.

The overwhelming, long-standing nationwide agreement in the policing community on this issue informs the evaluation of the Defendants' use of force here. Because "those charged with the enforcement of the criminal law have abjured" keeping restrained individuals in the prone position, "there is substantial basis for doubting that the use of such force is an essential attribute of" the police power. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

C. Training Materials Warn Officers that Other Factors Present Here Compound the Risk of Death from Positional Asphyxia.

Prone restraint alone can lead to an unreasonable risk of death. But other factors make it even more dangerous by compounding the potential for fatal consequences. These exacerbating factors—two of which are plainly present in this case—are also well-known to police, and have long been identified in law-enforcement training materials.

1. Law Enforcement Has Long Recognized that Adding Weight to an Individual's Back While He Is Prone Can Be Fatal.

The use of body weight to restrain a suspect can aggravate the dangers of the prone position and may quickly turn deadly. Police have long known this, too. The 1994 NYPD Training Video that warns against prone restraints also instructs that "[i]f, in addition to your own weight, you have someone else kneeling or laying on your back, that increases the amount of weight that you have to raise in order to increase the size of your chest." Baker & Goodman, *supra* note 4. And a 1995 Chicago Police Department Training Bulletin warned officers not to "put weight on an arrestee's back, such as with your knee for a prolonged period." Chi. Police Dep't, *Training Bulletin: Positional Asphyxia* (Feb. 6. 1995). That is because "[t]his practice adds stress to the respiratory muscles and inhibits movement of the diaphragm and rib cage."

Id. Further, the more officers there are "holding a person down in a prone position, the greater the risk that there will [be] pressure on a person's abdomen, making it difficult to breathe." Brandl at 252.

Because of these well-known and potentially fatal risks, "[o]fficers must be attuned to the amount and duration of any weight they place on [a prone] subject." Seth W. Stoughton et al., *Evaluating Police Uses of Force* 203 (2020). Moreover, officers must not "sit or lean on the abdomen EVER." Brandl at 252 (emphasis in original).

2. Law Enforcement Has Long Recognized that Drug Use Increases the Risk of Asphyxiation.

In addition to risks posed by adding weight to a subject's back, police have long known that drug use—and specifically cocaine use—increases the risk of asphyxiation when a suspect has been restrained in a prone position. "[C]ocaine-induced excited delirium . . . may increase a subject's susceptibility to sudden death by effecting an increase of the heart rate to a critical level." U.S. Dep't of Justice, *Nat'l Law Enforcement Tech. Center Bulletin: Positional Asphyxia—Sudden Death* (June 1995). "[S]timulant drugs . . . contribute to positional asphyxia deaths" because, when an individual is under the influence of stimulants, "any difficulty breathing can result in sudden deterioration in condition and death." Brandl at 252.

Police departments across the country have long recognized this, too. *See* Chi. Police Dep't, *Training Bulletin: Positional Asphyxia* (Feb. 6. 1995) ("There is an increased risk for positional asphyxia" from "[d]rugs (especially cocaine, or other controlled substances)"); Wichita Police Dep't, *Training Bulletin: In-Custody Sudden Deaths* (March 30, 1995) (recognizing drug use as aggravating factor that could lead to in-custody sudden death when a subject is placed in prone position); Okla. Police Dep't, *Oklahoma In-Custody Death Conditions Training Outline* at 2, 9, *Glasco v. City of Okla. City*, 5:04-cv-19 (W.D. Okla. Nov. 16, 2005), ECF No. 74-16 (calling drug use a "major risk factor" for positional asphyxia and citing "[c]ocaine [i]ntoxication" specifically). Here, too, there is a clear law-enforcement consensus that officers must be particularly attuned to the need to avoid keeping restrained individuals who are under the influence of drugs in a prone position for an extended period of time.

II. It Was Clearly Established by 2016 that Holding a Restrained Individual, Who Is Under the Influence of Cocaine, Prone by Applying Pressure to their Back, Was Excessive and Potentially Deadly Force.

The "salient question" in determining whether the officers violated clearly established law "is whether the state of the law in [2016] gave [the officers] fair warning that their alleged treatment of [Timpa] was

unconstitutional." *Amador v. Vasquez*, 961 F.3d 721, 729–30 (5th Cir. 2020) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning to officers" and "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.*

As explained above, ample authority gave officers fair warning that keeping a restrained subject like Timpa prone, while knowing he was under the influence of cocaine, and while applying pressure to his back for 14 minutes was an unreasonable use of force that could have deadly consequences. For a rule to put officers on notice, there need not be "a case directly on point," but "there must be adequate authority at a sufficiently high level of specificity to put a reasonable official on notice that his conduct is definitively unlawful." *Vincent v. City of Sulphur*, 805 F.3d 543, 547 (5th Cir. 2015). "'[I]n an obvious case,' the *Graham* excessive-force factors themselves 'can clearly establish the answer, even without a body of relevant case law.'" *Darden v. City of Fort Worth*, 880 F.3d 722, 733 (5th Cir. 2018).

Training and regulatory materials can show, contrary to the district court's holding, 2020 WL 3798875, at *5 n.8, that a particular practice is clearly established as excessive force, or provide the necessary "fair warning" to

government actors. This is true outside the use-of-force context. In *Hope v. Pelzer*, for example, the Supreme Court considered Alabama state regulations and communications between the U.S. Department of Justice and the Alabama Department of Corrections as evidence that the corporal punishment at issue was clearly prohibited. 536 U.S. at 744–45. Similarly, in *Morgan v. Swanson*, 659 F.3d 359, 413 (5th Cir. 2011), this Court looked to Department of Energy guidelines and other administration materials to show that the First Amendment's protection of student speech was "clearly established."

It is also true in the context of excessive force. In *Gutierrez v. City of San Antonio*, this Court itself considered the San Antonio Police Department's procedures and prevalent literature concerning Sudden Custody Death Syndrome before concluding that "hog-tying in these circumstances would have violated law clearly established prior to November 1994." 139 F.3d 441, 447 (5th Cir. 1998). *Gutierrez* is instructive not only because of the factual similarities between that case and this one, Appellant's Br. 27–28, but because both records emphasize that the factors commonly associated with positional asphyxia were present and known to officers.

In *Gutierrez*, officers knew the victim was "under the influence of drugs"—specifically, cocaine. 139 F.3d at 449. So, too, here. *See* 2020 WL

3798875, at *7 (assuming officers knew of Timpa's cocaine use). And under similar facts in *Gutierrez*, this Court found that the officer's conduct was not objectively reasonable as a matter of law in part because widely circulated literature at the time suggested that there is a "substantial risk of death or serious bodily harm . . . when a drug-affected person in a state of excited delirium is hog-tied and placed face down in a prone position." 139 F.3d at 451.[7] So, too, here. In *Gutierrez*, officers placed the victim "in a face-down prone position" while restrained. *Gutierrez*, 139 F.3d at 444. So, too, here. 2020 WL 3798875, at *2. In fact, officers moved Timpa from a sitting position to a prone position and "rolled him onto his stomach," thereby creating the danger of asphyxiation where none previously existed. *Id.*

For decades, it has been well established and generally accepted that prone restraint can have deadly consequences, particularly in conjunction with placing weight on a suspect's back and the suspect's known use of cocaine. The district court's erroneous treatment of *Gutierrez* as distinguishable because it

[7] This Court recently reached a similar conclusion in *Goode v. Baggett*, when determining whether the "state of the law in 2015 gave the [o]fficers fair warning that hog-tying [an individual] would constitute excessive force under the circumstances." 811 F. App'x 227, 233 (5th Cir. 2020). This Court held that "hog-tying a nonviolent, drug-affected person in a state of drug-induced psychosis and placing him in a prone position for an extended period is objectively unreasonable" based on the precedent set by *Gutierrez*. *Id.* at 237.

involved hog-tying, not other forms of prone restraint, overlooks the dangers of prone restraint more generally. *See Timpa*, 2020 WL 3798875, at *7 ("Timpa was never hog-tied. This fact is critical."). Hogtying is merely one way of putting pressure on a subject's abdomen by taking weight off the subject's lower body and forcing them to bear their weight on their chest. Other forms of pressure—like Officer Dillard's sustained kneeling on Timpa's back—have the same result. And officers' use of pressure in prone restraint is one of several factors that, like drug use, has long been known to exacerbate the danger of death.

III. The Officers' Use of Force Was Objectively Unreasonable.

The Court should also conclude that the officers' use of force was unreasonable under the circumstances presented in this case. Appellant's Br. 42–60. Training materials and other cases plainly establish that the officers' decision to keep Timpa prone and put additional weight on his back for 14 minutes was an unreasonable application of deadly force under *Tennessee v. Garner*.[8]

[8] It is well established that whether a particular technique constitutes "deadly force" in certain circumstances is a question of fact. *Gutierrez*, 139 F.3d at 446–47; *accord Goode*, 811 F. App'x at 232 (similar). So at the very least, the record here raises triable issues of material fact that are "for a jury, and not judges, to resolve." *Cole v. Carson*, 935 F.3d 444, 447, *as revised* (5th Cir. Aug. 21, 2019) (en banc) (remanding excessive-force claim).

Courts routinely look to training materials and police guidance to assess the reasonableness of police actions. Indeed, the district court agreed that "department policies have been held sufficient to create a question of fact as to whether the use of force was reasonable." 2020 WL 3798875, at *5 n.8. In *Garner* itself, the Supreme Court explained that in "evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to prevailing rules in individual jurisdictions," and engaged in an extensive review of police policies, citing the FBI, NYPD, and forty-four other departments, as well as research by the Boston Police Department, the International Association of Chiefs of Police, and academic research on prevailing practices, putting significant weight on "the rules adopted by those who must actually administer them." 471 U.S. at 15–16, 18–19.

This Court in *Gutierrez* looked to police department policies nationwide, as well as the academic and medical literature, to find "sufficient evidence that hog-tying may create a substantial risk of death or serious bodily injury in these circumstances and thereby become deadly force." 139 F.3d at 446. And other district courts have similarly noted that police training materials on positional asphyxia inform whether officers' actions were reasonable. *See LeBlanc v. City of L.A.*, No. 04-8250, 2006 WL 4752614, at *10 (C.D. Cal. Aug.

16, 2006) (noting "the danger of asphyxiation" was "specifically discussed in the police training materials" in the record); *Johnson v. City of Cincinnati*, 39 F. Supp. 2d 1013, 1019–20 (S.D. Ohio 1999) (finding information existed in law enforcement community that put officers on notice of dangers of asphyxia).

Here, officers acted unreasonably under "the totality of circumstances," *Garner*, 471 U.S. at 9, in light of the universe of training materials showing that prone restraint and putting pressure on a suspect's back for a prolonged time can lead to positional asphyxia and death. Indeed, Officer Dillard's prone restraint—with his left knee embedded in Timpa's back—lasted *14 minutes*. *Timpa*, 2020 WL 3798875, at *2. At any point, Officer Dillard could and should have done what a consensus of training materials and courts have instructed—stop applying pressure to Timpa's back, and roll him onto his side. He did not.

Critically, this is not a case where officers faced a split-second decision. To be sure, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). But this was not such a case. Here, the officers had ample time to re-evaluate their continuous use of force in light of

changing circumstances, such as Timpa being brought under control and secured. In such circumstances, "force is not an on/off switch; instead, force must be considered and reconsidered at stages during an encounter." Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 Va. L. Rev. 211, 293 (2017); *see also Lytle v. Bexar Cnty.*, 560 F.3d 404, 413 (5th Cir. 2009) ("[A]n exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for that use of force has ceased[.]"). Under these circumstances, the facts do not support what might otherwise be appropriate deference to officers' decision-making. *See Darden*, 880 F.3d at 732 (reversing grant of qualified immunity where it "was not a situation where an officer arrived at the scene with little or no information and had to make a split-second decision").

Nor is this a case where Timpa resisted arrest or posed a danger to himself or others. Although the district court observed that "[e]ven after being rolled onto his stomach, Timpa continued to yell, toss his head, and struggle to move his torso and limbs," 2020 WL 3798875, at *7, these are common symptoms of "air hunger"—the phenomenon described in the 1994 NYPD training video, which explains that oxygen deficit causes a "natural reaction" during which a prone suspect "struggle[s] more violently" to get air.

See, e.g., Baker & Goodman, *supra* note 4. Indeed, even when a suspect "continues to struggle," the NYPD video reminded officers to "get the person off his stomach," and instructed them not to sit on his back. *Id.* To the extent there are disputed facts about whether Timpa was actively resisting officers, the court must draw all inferences in Timpa's favor. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). And "case law makes clear that when an arrestee is not actively resisting arrest the degree of force an officer can employ is reduced." *Amador*, 961 F.3d at 730.

Perhaps most troublingly, Officer Dillard applied pressure to Timpa's back while keeping him facedown—an egregious deviation from prevailing practices and police training. *See supra*, pp. 5–16. Other courts have noted the availability of training materials cautioning that this practice creates an unnecessary risk of death. *See, e.g.*, *Weigel v. Broad*, 544 F.3d 1143, 1149–50 (10th Cir. 2008) ("Numerous training materials provided to the troopers addressed the risks of putting weight on an individual's back when the person is lying on his stomach."); *Richman v. Sheahan*, 512 F.3d 876, 880 (7th Cir. 2008) ("police are warned not to sit on the back of a person they are trying to restrain" due to the risk of positional asphyxia). And, as this Court itself has recognized, it is a use of excessive force where an individual "could have died

of asphyxiation resulting from the pressure exerted when [the officer] sat on his chest." *Simpson v. Hines*, 903 F.2d 400, 403 (5th Cir. 1990).

Against this backdrop, courts have held for decades that that applying weight to a handcuffed and prone suspect's back—even without a hog-tie restraint—is dangerous and objectively unreasonable. *See Simpson*, 903 F.2d at 403 (finding ample evidence of excessive force where plaintiff "could have died of asphyxiation resulting from the pressure exerted when [defendant] sat on his chest"); *Hopper v. Phil Plummer*, 887 F.3d 744, 750 (6th Cir. 2018) (denying qualified immunity where officers took turns applying pressure to prone suspect's "shoulders or upper back"); *Weigel*, 544 F.3d at 1152, 1154 ("A reasonable officer would know" that "applying pressure to [the suspect's] upper back, once he was handcuffed and his legs restrained" "present[ed] a substantial and totally unnecessary risk of death"); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004) ("Creating asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect constitutes objectively unreasonable excessive force."); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1061-62 (9th Cir. 2003) ("Any reasonable officer should have known" that "pressing their weight on [the suspect's] neck and

torso . . . despite the fact that his hands were cuffed behind his back and he was offering no resistance" constituted excessive force).

Here, the facts and law point in one direction—it was objectively unreasonable for officers to kneel on Timpa's back for 14 minutes while he suffocated to death. Not only was that use of force unwarranted under the circumstances, the potential consequences—and the tragic result—were well-known. Any reasonable officer would have understood this risk, and could have averted Timpa's death simply by removing the weight from his back and rolling him off his stomach. None did.

CONCLUSION

Amicus respectfully submits that the Court should reverse the judgment of the district court.

January 15, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the Fifth Circuit by using the appellate NextGen system. I certify that all participants in the case are registered NextGen users and that service will be accomplished by the appellate NextGen system.

January 15, 2021

/s/ Michael J. Mestitz
Michael J. Mestitz

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Rules 29 and 32 of the Federal Rules of Appellate Procedure, that the attached Amicus Brief contains 6,112 words and complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2016, in 14-point CenturyExpd BT.

January 15, 2021

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