United States Court of Appeals
for the Fifth Circuit

No. 20-10876

VICKI TIMPA, *individually, and as representative of* THE ESTATE OF ANTHONY TIMPA; K.T., *a minor child*; CHERYLL TIMPA, *as next of friend of* K.T., *a minor child*,

Plaintiffs—Appellants,

versus

DUSTIN DILLARD; DANNY VASQUEZ; RAYMOND DOMINGUEZ; DOMINGO RIVERA; KEVIN MANSELL,

Defendants—Appellees,

versus

JOE TIMPA,

Intervenor—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC 3:16-CV-3089

(Filed Dec. 15, 2021)

Before CLEMENT, SOUTHWICK, and WILLETT, *Circuit Judges.*

EDITH BROWN CLEMENT, *Circuit Judge*:

This appeal arises from the death of Anthony Timpa while he was being restrained by law enforcement after he called 911 and asked for assistance during a mental health episode. Timpa's family (the Plaintiffs) filed this 42 U.S.C. § 1983 lawsuit, alleging that five officers (the Officers) of the Dallas Police Department (DPD) violated Timpa's Fourth Amendment rights by causing his death through the prolonged use of a prone restraint with bodyweight force during his arrest. As relevant to this appeal, Plaintiffs asserted claims of excessive force and of bystander liability. The district court granted summary judgment to the individual Defendant-Officers on all claims and held that they were entitled to qualified immunity. We REVERSE summary judgment as to the claim of excessive force, and we AFFIRM in part and REVERSE in part as to the claims of bystander liability.

I.

On the evening of August 10, 2016, Timpa called 911 and asked to be picked up. He stated that he had a history of mental illness, he had not taken his medications, he was "having a lot of anxiety," and he was afraid of a man that was with him. The call ended abruptly. When the operator called back, Timpa provided his location on Mockingbird Lane in Dallas, Texas. In the background of the call, the sounds of honking and of people arguing could be heard. A motorist then placed a 911 call to report a man "running up and down the highway on Mockingbird [Lane,] . . . stopping traffic" and attempting to climb a public bus. A private

security guard called 911 with the same report and noted his belief that the man "[was] on something." The dispatcher requested officers respond to a Crisis Intervention Training (CIT) situation and described Timpa as a white male with schizophrenia off his medications.

A CIT call informs responding officers that the situation involves an individual who may be experiencing mental health issues. DPD General Orders instructed that five officers report to CIT calls to perform the "Five-Man Takedown," which is a control technique where each of four officers secures one of the subject's limbs while a fifth officer holds the head. This technique allows officers to gain control over a subject and simultaneously prevent him from injuring himself or others. Regardless of whether officers were responding to a CIT call, DPD General Orders instructed that, for all arrestees, "as soon as [they] are brought under control, they are placed in an upright position (if possible) or on their side."

DPD General Orders reiterated this instruction for the restraint of subjects suffering from "excited delirium." Excited delirium is "a state of agitation, excitability, and paranoia . . . often associated with drug use, most commonly cocaine." *Goode v. Baggett*, 811 F. App'x 227, 233 n.6 (5th Cir. 2020) (citing *Gutierrez v. City of San Antonio*, 139 F.3d 441, 444 (5th Cir. 1998)). The Orders described the following symptoms as indicators of excited delirium: "[d]elusions of persecution," "[p]aranoia," and "[t]hrashing after restraint." Officers were instructed to "treat the arrest of a subject [in a

state of excited delirium] as a medical emergency" and to "continuously monitor[]" the arrestee because "[s]ubjects suffering from this disorder may collapse and die without warning." The Orders commanded that subjects in a state of excited delirium "will be placed in an upright position (if possible) or on their side as soon as they are brought under control." In addition, the Officers on the scene received specific training on excited delirium, which twice reiterated that officers must, "as soon as possible, move [the] subject to a recovery position (on [their] side or seated upright)" because the prolonged use of a prone restraint may result in "positional asphyxia." The training also warned that "[i]f [the] subject suddenly calms, goes unconscious, or otherwise becomes unresponsive, advise [a paramedic] immediately," because "[a] sudden cessation of struggle is a prime indicator that the subject may be experiencing fatal autonomic dysfunction (sudden death)."

Supervising Police Sergeant Kevin Mansell arrived first on Mockingbird Lane at 10:36 p.m. By that point, Timpa had already been handcuffed by two private security guards and he was sitting barefoot on the grass beside the sidewalk. Mansell called for backup and for an ambulance, stating that Timpa was "in traffic . . . and he's definitely going to be a danger to himself." According to Mansell, Timpa was "thrashing" on the ground, "kicking in the air [at] nobody that's there," and "hollering, 'Help me, help me, God help me.'" Once, before the other Officers arrived, Timpa managed to roll into the gutter of the street and Mansell and a

security guard lifted Timpa and placed him back on the grass.

Within seven to ten minutes, two paramedics, Senior Corporal Raymond Dominguez, and Officers Dustin Dillard, Danny Vasquez, and Domingo Rivera arrived. Each of the Officers was informed that Timpa was a mentally ill individual off his medications. Three of the Officers (Dillard, Vasquez, and Rivera) were wearing body cameras, which captured the following fifteen minutes.

The footage begins with Timpa handcuffed and barefoot on his back on the grass boulevard beside a bus bench, yelling: "Help me! . . . You're gonna kill me!" The Officers attempted to calm Timpa. Timpa rolled back and forth on the grass, then rolled close to the curb of the street. Dillard and Vasquez immediately forced Timpa onto his stomach and each pressed one knee on Timpa's back while a security guard restrained his legs.

Vasquez removed his knee after approximately two minutes. Dillard continued to press his knee onto Timpa's upper back in the prone restraint position for fourteen minutes and seven seconds. He pressed his left knee into Timpa's back and his left hand between Timpa's shoulders with his right hand pressing on Timpa's right shoulder intermittently. In his protective vest and duty belt, Dillard weighed approximately 190 pounds.

Approximately fifteen seconds into the restraint, Dillard asked Timpa: "What did you take?" Timpa

answered, "Coke."[1] One minute into the restraint, a paramedic attempted to take Timpa's vitals. The paramedic was unable to get a reading as Timpa continued to struggle and yelled: "I can't live!" Between three to seven minutes into the restraint, the Officers swapped out the private security guard's handcuffs with some difficulty because of Timpa's continued flailing.[2] At the same time, the Officers zip tied Timpa's ankles and forced his lower legs under the cover of a concrete bus bench. While the Officers were securing restraints on Timpa's ankles, one Defendant-Officer said: "We don't have to hogtie him, do we?" Another Defendant-Officer suggested "we could pull his legs up." The Officers ultimately left Timpa's legs under the bus bench.

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[1] Dillard testified that he did not hear Timpa reply, "coke," but the video confirms that Timpa audibly stated he had taken cocaine. The footage reflects Dillard asking Timpa what he had taken at least seven times during the restraint and concluding at least three times that Timpa "took something." Timpa was also exhibiting signs of excited delirium, such as "yelling incoherently[ ] and acting really strange." *Goode*, 811 F. App'x at 236 (internal quotation marks omitted); *see also Aguirre v. City of San Antonio*, 995 F.3d 395, 414 (5th Cir. 2021) (noting that a subject's "plainly erratic behavior" gave officers "reason to know of the substantial risk that [the subject] . . . was in a state of excited delirium"). Drawing all inferences in favor of the Plaintiffs, Dillard was aware that Timpa may have been in a state of excited delirium approximately twenty seconds into the restraint.

[2] The parties dispute whether Timpa kicked at the Officers during the arrest. Dillard testified that he did not observe Timpa intentionally kick at any Officers. The video does not clarify whether Timpa was flailing or aiming to kick. The dispute is not material because kicking in the air is still a form of resistance to arrest. *See Tucker v. City of Shreveport*, 998 F.3d 165, 182 (5th Cir. 2021).

Seven minutes into the restraint, Timpa—prone and cuffed at the hands and ankles—had calmed down sufficiently for a paramedic to successfully take his vitals. When the paramedic approached, Dillard asked: "Do you want me to roll him over?" The paramedic responded: "Before y'all move him, if I can just get right here and see if I can get to his arm." While the paramedic was taking Timpa's vitals, Rivera left the scene to find Timpa's car. By the time the paramedic had finished, approximately nine minutes into the restraint, Timpa's legs had stopped kicking, though he remained vocal and kept calling for help.

Thirty seconds later, only Timpa's head moved intermittently from side to side. He continued to cry out "Help me!" but his voice weakened and slurred. Much of what he said was too muffled to be comprehensible. Forty-five seconds later, he suddenly stilled and was quiet except for a few moans. Then, he fell limp and nonresponsive for the final three-and-a-half minutes of the restraint.

The Officers discussed what to do next. Dominguez said to Mansell: "So what's the plan? You're [in charge] out here, sir." Mansell responded that they should "strap [Timpa] to a gurney." Mansell then returned to his patrol car, "a few feet [away]," to check for warrants for Timpa's arrest. He sat in his vehicle "with the car door open."

During this time, the Officers began to express concern that Timpa was nonresponsive. Dominguez said, "Tony, are you still with us?" Vasquez said, "Is he

acknowledging you anymore?" Dominguez said, "Not really." Dillard called Timpa's name to no response. Dominguez stated that he wanted to "mak[e] sure he was still breathing 'cause his nose is buried in the [ground]." Dillard said, "I think he's asleep!" and stated that he heard Timpa "snoring." Dominguez and Vasquez expressed surprise and then made jesting comments about Timpa's loss of consciousness. A paramedic approached and asked what happened. Dillard responded: "I don't know. He just got quiet." Vasquez said: "All of a sudden, just . . . bloop." The paramedic administered a sedative and Timpa's head twitched. Then, three-and-a-half minutes after Timpa had become nonresponsive, Dillard removed his knee. Shortly after the Officers placed Timpa on the gurney, the paramedics determined that he was dead.

The Dallas County Medical Examiner conducted Timpa's autopsy and ruled his death a homicide. The report identified cocaine in Timpa's blood and concluded that he had been suffering from "excited delirium syndrome." The report further concluded that Timpa died from "sudden cardiac death due to the toxic effects of cocaine and [the] physiologic stress associated with physical restraint," which could have resulted in "mechanical or positional asphyxia." Plaintiffs' medical expert, Dr. Kim Collins, MD, a forensic pathologist, went one step further and concluded, "to a reasonable degree of medical certainty," that Timpa's death was caused by mechanical asphyxia, which occurs when an individual's torso is compressed, preventing respiration and circulation of oxygen. She

testified that Timpa's obesity, extreme exertion, and state of excited delirium exacerbated the risk of mechanical asphyxiation. She further testified that Timpa would have lived had he been restrained for the same amount of time in a prone position without force applied to his back.

Vicki Timpa, the mother of the deceased, individually and as representative of the estate of the deceased, and Cheryll Timpa, individually and as next friend of K.T., a minor child of the deceased, filed this Section 1983 lawsuit alleging, as relevant here, a claim of excessive force against Defendant-Officer Dillard and claims of bystander liability against Defendant-Officers Mansell, Vasquez, Dominguez, and Rivera. Joe Timpa, the father of the deceased, later intervened. On summary judgment, the district court granted qualified immunity to the Officers in their individual capacity on the basis that "there was no law clearly establishing Defendants' conduct as a constitutional violation prior to August 10, 2016." The district court dismissed the bystander liability claims on the same basis. On appeal, the Plaintiffs argue that the district court erred in dismissing the excessive force claim and the bystander liability claims.

II.

We review the district court's grant of summary judgment *de novo*. *See Aguirre*, 995 F.3d at 405. Summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any

material fact and [that] the movant is entitled to judgment as a matter of law." *Darden v. City of Fort Worth*, 880 F.3d 722, 727 (5th Cir. 2018) (quoting FED. R. CIV. P. 56(a)). A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The defense of qualified immunity "balance[s] two competing societal interests: 'the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.'" *Joseph ex rel. Est. of Joseph v. Bartlett*, 981 F.3d 319, 328 (5th Cir. 2020) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Where a plaintiff alleges excessive force during an arrest, "the federal right at issue is the Fourth Amendment right against unreasonable seizures." *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam).

Whether the amount of force used was objectively reasonable requires "a balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.* (cleaned up) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). A fact-specific range of permissible force emerges, "such that the need for force determines how much force is constitutionally permissible." *Bush v. Strain*, 513 F.3d 492, 501 (5th Cir. 2008). At one end of the spectrum, "a threat of serious physical harm, either to the officer or to others" may justify the use of deadly force. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

At the other end of the spectrum, when a subject has been subdued—meaning, he "lacks any means of evading custody" and does not pose a threat of immediate harm—the further use of force is not justified. *Bartlett*, 981 F.3d at 335. For the cases in between, a court should consider the "totality of the circumstances." *Darden*, 880 F.3d at 728.

But a plaintiff's showing that a constitutional violation has occurred is not enough. The doctrine of qualified immunity shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, to defeat a motion for summary judgment based on qualified immunity, the plaintiff must present evidence "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (en banc) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)).

III.

We begin with the excessive force claim against Dillard. The Plaintiffs contend that Dillard unlawfully restrained Timpa in the prone position with bodyweight force pressed on Timpa's back and that the state of the law in August 2016 clearly established that officers could not subject a subdued individual to the

use of force. Although we may begin with either prong of qualified immunity, we turn first to the merits of the excessive force claim to provide clarity and guidance to law enforcement.

The Plaintiffs contend that Dillard's restraint of Timpa constituted both excessive force and deadly force in violation of the Fourth Amendment. Claims that law enforcement used deadly force are "treated as a special subset of excessive force claims." *Aguirre*, 995 F.3d at 412 (citing *Gutierrez*, 139 F.3d at 446). We consider first whether Dillard's use of force was excessive and second whether a jury could find the force used was deadly.

A.

1.

The reasonableness of the use of force turns on our consideration of the full factual context, particularly the following three factors: (1) "the severity of the crime at issue," (2) "whether the suspect pose[d] an immediate threat to the safety of the officers or others," and (3) "whether he [was] actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). "A court . . . cannot apply this standard mechanically," but must look through the eyes of a reasonable officer on the scene. *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015).

As to the first *Graham* factor, Dillard's continued use of force was not justified by a criminal

investigatory function. The Officers concede that Timpa's criminal liability was "minor"—no more than a traffic violation. *See* TEX. PENAL CODE § 42.03; TEX. TRANSP. CODE §§ 552.001-.006, 542.301. The Officers did not intend to charge him with any crimes. The first factor weighs against the reasonableness of the prolonged use of bodyweight force. *Cf. Trammell v. Fruge*, 868 F.3d 332, 340 (5th Cir. 2017) (noting that "a minor offense militat[es] against the use of force"); *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (per curiam) (same).

In addition, we note that these facts do not present the paradigmatic circumstance of "an officer arriv[ing] at the scene with little or no information and [having] to make a split-second decision" in response to criminal activity. *Darden*, 880 F.3d at 732. The Officers had been dispatched to a CIT situation after Timpa himself had called 911 requesting to be picked up. Darden was thus equipped with the understanding that Timpa was likely experiencing a mental health crisis and needed medical assistance. He arrived to observe a barefoot, handcuffed man in distress on the grass boulevard beside the sidewalk. These perceptions were material to his assessment of "how much additional force, if any, was necessary" to control the situation. *Id.*

The second *Graham* factor considers whether the subject posed "an immediate threat" to the safety of others. *Graham*, 490 U.S. at 396. The Officers contend that the continued use of force was justified because Timpa had interfered with traffic earlier in the evening and had kicked his legs when the Officers

attempted to restrain him. But "an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased." *Lytle v. Bexar County*, 560 F.3d 404, 413 (5th Cir. 2009). Approximately nine minutes into the restraint, Timpa was cuffed at both the wrists and the ankles, his lower legs had stopped moving, and he was surrounded by five officers, two paramedics, and two private security guards—most of whom were mulling about while Dillard maintained his bodyweight force on Timpa's upper back.

As to any threat of harm to the Officers, it is obvious that Timpa could no longer kick when he was lying face down and handcuffed with his ankles restrained and confined under the bus bench. As to any threat to himself, Timpa had already calmed down sufficiently for the paramedics to take his vitals. As to any threat to passing motorists, Plaintiffs' expert 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." And when the paramedic asked if Timpa could walk to the ambulance in ankle cuffs, Dillard said: "I highly doubt it." A jury could find that no objectively reasonable officer would believe that Timpa—restrained, surrounded, and subdued—continued to pose an immediate threat of harm justifying the prolonged use of force. *Cf. Lombardo v. City of St. Louis*, 141 S. Ct. 2239, 2241 (2021) (per curiam) (noting that whether a subject "was handcuffed and leg shackled" reflects on "the security problem at issue[] and the threat—to both [the arrestee] and

others—reasonably perceived by the officers"); *Aguirre*, 995 F.3d at 409 (holding a genuine dispute of material fact existed with respect to whether a handcuffed subject surrounded by five police officers posed an immediate threat justifying the use of a maximal prone restraint). The second *Graham* factor weighs against the objective reasonableness of the prolonged use of force.

Turning to the third *Graham* factor, the Plaintiffs have raised a genuine dispute of material fact as to whether Timpa continued to actively resist arrest. The Officers first argue that the continued use of force was justified because Timpa struggled intermittently. But "even if [Timpa] failed to comply and struggled against the officers at certain points throughout the encounter, that resistance did not justify force indefinitely." *Bartlett*, 981 F.3d at 335. Officers cannot use force independent of a subject's "contemporaneous, active resistance." *Id.* Thus, even assuming that Timpa's flailing amounted to active resistance, "the force calculus change[d] substantially once that resistance end[ed]" nine minutes into the restraint. *Curran v. Aleshire*, 800 F.3d 656, 661 (5th Cir. 2015); *see also Tucker*, 998 F.3d at 181–82 ("[A] use of force that may begin as reasonably necessary in order to obtain compliance may cease to be so as a suspect becomes more compliant.").

The Officers next argue that Timpa continued to actively resist arrest by "squirm[ing]" and "mov[ing] his head from left to right" in the final minutes of the restraint. Plaintiffs contend that Timpa moved his body in order to breathe. Plaintiffs' expert, Dr. Collins,

testified that pressing down on the torso of a subject held in a prone restraint "greatly increases the work of breathing," which leads the subject to "experience[ ] air hunger, panic, and anxiety as Mr. Timpa did." She concluded: "[i]t can be anticipated that the victim will attempt to move his body in order to breathe."[3] The body camera footage does not plainly contradict the Plaintiffs' version of the facts: Timpa attempts to raise his torso and cries out repetitively: "Help me," "You're gonna kill me," "I'm gonna die," "I can't live."

The risks of asphyxiation in this circumstance should have been familiar to Dillard because he had received training on the use of a prone restraint to control subjects in a state of excited delirium. *See Darden*, 880 F.3d at 732 n.8 ("[T]he violation of police department policies . . . and corresponding notice to officers [is] relevant in analyzing the reasonableness of a particular use of force under the totality of the circumstances."). DPD training instructed that a subject in a state of excited delirium must, "as soon as possible[,] [be] mov[ed] . . . to a recovery position (on [their] side or seated upright)," because the prolonged use of a prone restraint may result in a "combination of

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[3] A jury could also consider prominent guidance circulated by the Department of Justice warning of the risk of positional asphyxia resulting from the use of a prone restraint. *See* NAT'L LAW ENF'T TECH. CTR., U.S. DEP'T OF JUST., POSITIONAL ASHYXIA—SUDDEN DEATH (1995), https://www.ncjrs.gov/pdffiles/posasph.pdf; *cf. Lombardo*, 141 S. Ct. at 2241 (noting that "well-known police guidance" warning "that the struggles of a prone suspect may be due to oxygen deficiency, rather than a desire to disobey officers' commands," reflects on whether the force used was excessive).

increased oxygen demand with a failure to maintain an open airway and/or inhibition of the chest wall and diaphragm [that] has been cited in positional asphyxia deaths." Dillard was also trained that "[i]f [the] subject suddenly calms, goes unconscious, or otherwise becomes unresponsive, . . . [a] sudden cessation of struggle is a prime indicator that the subject may be experiencing fatal autonomic dysfunction (sudden death)." A sudden cessation of struggle and lack of responsiveness is precisely what occurred in the final minutes of Timpa's restraint.[4] A jury could find that an objectively reasonable officer with Dillard's training would have concluded that Timpa was struggling to breathe, not resisting arrest.[5] *See Darden*, 880 F.3d at

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[4] The Officers contend that they believed Timpa to be faking sleep as a tactic to gain an advantage. That issue "is a factual question that must be decided by a jury." *Darden*, 880 F.3d at 730. At the summary judgment phase, it is not for us to "weigh the evidence and determine the truth of the matter," but rather, to draw all justifiable inferences in favor of the non-movant. *Liberty Lobby*, 477 U.S. at 249.

[5] That paramedics were present during the arrest and did not intervene does not change the calculus of objective unreasonableness. *See*, *e.g.*, *Aguirre*, 995 F.3d at 404, 420 (finding a Fourth Amendment violation when officers used a maximal prone restraint despite the presence of a medical tech officer); *Goode*, 811 F. App'x at 229 (finding a Fourth Amendment violation when officers used a hog-tie restraint despite the presence of medical personnel); *Gutierrez*, 139 F.3d at 442–43 (finding a Fourth Amendment violation when officers used a hog-tie restraint despite the assistance of paramedics in placing the subject in that position). And under DPD General Orders, it is not the paramedics but the "[o]fficers [that] are responsible for rendering first aid to injured subjects," including: "[m]onitoring the subject,"

730 (holding that a "jury could conclude that all reasonable officers on the scene would have believed that [the subject] was merely trying to get into a position where he could breathe and was not resisting arrest"); *see also Goode*, 811 F. App'x at 232 (same). The final *Graham* factor weighs against the objective reasonableness of the continued use of force.

Viewing the facts in the light most positive to the Plaintiffs, none of the *Graham* factors justified the prolonged use of force. A jury could find that Timpa was subdued by nine minutes into the restraint and that the continued use of force was objectively unreasonable in violation of Timpa's Fourth Amendment rights. Of course, a jury may ultimately conclude the opposite: that Timpa was not subdued and that he continued to pose an immediate threat throughout his restraint. Under that consideration of the facts, Dillard's decision to continue exercising force might be reasonable. Ultimately, it is the job of the factfinder, not of this court, to resolve those factual disputes for itself. A jury's interpretation ensures that legal judgments of reasonableness hew closely to widely shared expectations of the use of force by our police officers.

2.

The deadly force inquiry is two-pronged: First, whether the force used constituted deadly force; and second, whether the subject posed a threat of serious

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"[c]hecking pulse and skin color," and "[c]hecking for consciousness."

harm justifying the use of deadly force. *See Gutierrez*, 139 F.3d at 446 (citing *Garner*, 471 U.S. at 11). Plaintiffs argue that the prolonged use of a prone restraint with bodyweight force on the back of an individual who possessed apparent risk factors and posed no serious threat of harm constituted an objectively unreasonable application of deadly force.

a.

"[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 is whether a jury could find that the use of force "carr[ied] with it a substantial risk of causing death or serious bodily harm." *Gutierrez*, 139 F.3d at 446 (quoting *Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir. 1988)). The Plaintiffs argue that kneeling on the back of an individual with three risk factors—obesity, excited delirium, and prior vigorous exertion—carried a substantial risk of causing death or serious bodily harm. The Officers argue that the Plaintiffs have failed to set forth sufficient evidence to create a triable fact issue.

The summary judgment record includes DPD's General Orders instructing officers to place subdued subjects—particularly those in a state of excited delirium—in an upright position or on their side. The Officers were trained that the prolonged use of a prone restraint on subjects in a state of excited delirium can result in positional asphyxia death. The jury could also

consider prominent guidance from the Department of Justice instructing that, to avoid positional asphyxia, officers should, "[a]s soon as the suspect is handcuffed, get him off his stomach." DOJ, *Positional Asphyxia—Sudden Death* 1–2. The Department's guidance highlighted (1) obesity, (2) excited delirium, and (3) vigorous exertion as "predisposing factors" that "compound the risk of sudden death." *Id.*

Plaintiffs also presented expert testimony on the substantial risks of a prone restraint with weight force on an obese and physically exhausted subject in a state of excited delirium. Plaintiffs' medical expert, Dr. Collins, testified that the prone restraint position with bodyweight force is inherently lethal if used for an extended period of time. She described in detail how the use of the prone restraint with bodyweight force significantly increased the likelihood of asphyxiation:

> In the prone position, an individual is unable to effectively move the diaphragm, chest wall, and abdomen to breathe. . . . The body is also unable to adequately circulate blood resulting in engorgement and stagnation of blood flow in the upper body. . . . The face, partially or fully, pressed to the ground further decreases oxygenation. . . . When force is on the back and shoulders, . . . [i]t is extremely difficult to move the chest and abdomen. . . . When the body is prone and great force is on the back, the head, neck, and shoulders become engorged with blood while the lower part of the body is of normal color. Mr. Timpa had marked cyanosis with a clear line of demarcation

> across his chest indicative of . . . a tremendous amount of pressure to his back.

She testified that Timpa would have lived had he been restrained for the same amount of time in the prone position without force applied to his back.[6]

Dr. Collins further testified that the risk of acute respiratory failure is greater when (1) "[i]ndividuals . . . have been physically exhausted prior to this restraint," (2) "the individual is obese or has a large belly as this mass encroaches on the abdomen and diaphragm," (3) the individual suffers from untreated psychiatric illness, which may increase oxygen demand, and (4) the individual is drug-affected, which "increases metabolism" and requires "more blood pumping through [the] body" carrying "more oxygen." As Dr. Collins explained—and as Dillard had been trained—the latter two factors can result in a state of excited delirium.

A jury could find that all three of these risk factors were apparent on the night that Timpa died. The video footage reflects Timpa exerting significant effort while the Officers applied restraints. The video footage also clearly reflects Timpa's larger body size. The 911

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[6] The Officers argue that the Plaintiffs must identify the precise frequency with which death results from the use of a prone restraint combined with weight force. They cite no caselaw for that premise and we are not aware of any. *Cf. Aguirre*, 995 F.3d at 413–14 (relying on an experts' explanation of the increased risks of serious harm from the use of a maximal prone restraint); *Gutierrez*, 139 F.3d at 446 (relying on evidence that "a number of persons" had died from the use of a hog-tie restraint).

operator informed the Officers that Timpa was a "diagnosed schizophrenic" off his medications. And Timpa told the Officers that he had used cocaine.

Plaintiffs have raised a genuine issue of material fact as to whether the use of a prone restraint with bodyweight force on an individual with three apparent risk factors—obesity, physical exhaustion, and excited delirium—"create[d] a substantial risk of death or serious bodily injury." *Gutierrez*, 139 F.3d at 446. A jury could find that this use of force constituted "deadly force."

b.

Officers can use deadly force only if they have "probable cause to believe that the suspect poses a threat of serious physical harm." *Mason v. Lafayette City-Par. Consol. Gov't*, 806 F.3d 268, 275 (5th Cir. 2015) (quoting *Garner*, 471 U.S. at 11). Here, the Officers concede that the use of deadly force was not justified. But the record supports an inference that Dillard knelt on Timpa's back with enough force to cause asphyxiation.

Viewing the facts in the light most favorable to the Plaintiffs, the record supports that Timpa was subdued nine minutes into the continuing restraint and did not pose a threat of serious harm. The Officers make no argument that the use of asphyxiating pressure was necessary to maintain control of a subdued subject. In other words, the record supports the inference that, for at least five minutes, Timpa was subjected to force

unnecessary to restrain him. If a jury were, in addition, to find that the use of a prone restraint with bodyweight force on an obese, exhausted individual in a state of excited delirium carried a substantial risk of causing death or serious bodily harm, then the prolonged restraint constituted an objectively unreasonable application of deadly force.

B.

The district court determined that no precedent clearly established that the use of a prone restraint with bodyweight force to bring a subject under police control was objectively unreasonable. But the district court failed to consider the continued use of such force *after* Timpa had been restrained and lacked the ability to pose a risk of harm or flight. We hold that the state of the law in August 2016 clearly established that an officer engages in an objectively unreasonable application of force by continuing to kneel on the back of an individual who has been subdued.

Officers are entitled to qualified immunity "unless existing precedent 'squarely governs' the specific facts at issue." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam) (quoting *Mullenix v. Luna*, 577 U.S. 7, 15 (2015) (per curiam)). That does not require a showing that "the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Rather, there can be "notable factual distinctions between the precedents relied on . . . so long as the prior decisions gave reasonable warning that

the conduct then at issue violated constitutional rights." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (quoting *United States v. Lanier*, 520 U.S. 259, 269 (1997)).

Within the Fifth Circuit, the law has long been clearly established that an officer's continued use of force on a restrained and subdued subject is objectively unreasonable. *See Carroll v. Ellington*, 800 F.3d 154, 177 (2015) ("The law was clearly established at the time of the deputies' conduct that, once a suspect has been handcuffed and subdued, and is no longer resisting, an officer's subsequent use of force is excessive." (citing *Strain*, 513 F.3d at 501–02)). "[A]lthough the right to make an arrest necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it, the permissible degree of force depends on [the *Graham* factors]." *Cooper v. Brown*, 844 F.3d 517, 524–25 (5th Cir. 2016) (quoting *Strain*, 513 F.3d at 502). And "if enough time elapsed between the [subject's active resistance] and the use of force that a reasonable officer would have realized [the subject] was no longer resisting," the further use of force is unnecessary and objectively unreasonable. *Curran*, 800 F.3d at 661 (quoting *Newman v. Guedry*, 703 F.3d 757, 764 (5th Cir. 2012)). Our decisions in *Strain, Cooper*, and *Darden* clearly established the excessiveness of Dillard's continued use of force on a restrained and subdued arrestee.

In *Bush v. Strain*, we held that it was objectively unreasonable for an officer to force a subject's face into the window of a vehicle when the subject "was not resisting arrest or attempting to flee." 513 F.3d at 502.

There, the defendant-officer attempted to arrest Holly Bush for simple battery. *Id.* at 496. Partially handcuffed, Bush pulled her right arm away from the defendant-officer. *Id.* Bush alleged that, after the defendant-officer successfully handcuffed her, he "placed his hand behind her neck and head and forced her face into the rear window of a nearby vehicle." *Id.* Bush suffered severe injuries to her jaw. *Id.* Because none of the *Graham* factors justified the continued use of force, we agreed that it was objectively unreasonable for the defendant-officer to "forcefully slam [an arrestee's] face into a vehicle while she was restrained and subdued." *Id.* at 502.

Similarly, in *Cooper v. Brown*, we relied on the use of force in *Strain* to hold "that subjecting a compliant and non-threatening arrestee to a lengthy dog attack was objectively unreasonable." 844 F.3d at 525. There, Jacob Cooper was suspected of driving under the influence and fled the scene on foot when stopped by an officer. *Id.* at 521. Another officer pursued Cooper and ordered his K9 unit to bite Cooper on the calf. *Id.* Although Cooper immediately became compliant and subdued, the officer did not order the dog to release its bite until after the handcuffs were secured—one to two minutes after the bite began. *Id.* We explained that it was objectively unreasonable for the defendant-officer to "continue[ ] applying force even after Cooper . . . was on his stomach" and subdued. *Id.* at 523.

Finally, in *Darden v. City of Fort Worth*, we relied on the use of force in *Strain* and in *Cooper* to reiterate that, "it [is] clearly established that violently

slamming or striking a suspect who is not actively resisting arrest constitutes excessive use of force." 880 F.3d at 733. There, the defendant-officer punched, kicked, choked, and "forced [Jermaine] Darden—an obese man—onto his stomach, pushed his face into the floor, and pulled Darden's hands behind his back." *Id.* At the time that the defendant-officer used the prone restraint with bodyweight force, Darden was compliant and not resisting arrest. *Id.* In addition, the defendant-officer had reason to believe that he was using asphyxiating force because witnesses at the scene were yelling that Darden could not breathe. *Id.* We found that the defendant-officer's actions "were plainly in conflict with our case law" prohibiting the use of force against a subdued subject. *Id.*

We have reaffirmed again and again that this principle applies with obvious clarity to a variety of tools of force because the "[l]awfulness of force . . . does not depend on the precise instrument used to apply it." *Guedry*, 703 F.3d at 763; *see*, *e.g.*, *Bartlett*, 981 F.3d at 342 (striking an unrestrained, subdued subject in the prone position); *Ellington*, 800 F.3d at 177 (striking a restrained, subdued subject in the prone position); *Curran*, 800 F.3d at 661 (pressing a restrained, subdued subject against a wall); *Ramirez v. Martinez*, 716 F.3d 369, 379 (5th Cir. 2013) (tasing a restrained, subdued subject in the prone position); *Guedry*, 703 F.3d at 764 (striking and tasing an unrestrained, subdued subject).

Like the subject in *Strain*, Timpa was suspected of only a minor offense. *See* 513 F.3d at 496. Timpa

initially resisted arrest, similar to the subjects in *Strain* and in *Cooper*. *See Cooper*, 844 F.3d at 522; *Strain*, 513 F.3d at 496. Timpa, like the subject in *Darden*, was obese and forced to lie prone on his stomach with his hands restrained and bodyweight force applied to his back. *See* 880 F.3d at 733. As in *Darden*, Dillard had reason to believe that Timpa was struggling to breathe because Timpa told the Officers he took cocaine, which indicated a significant risk of excited delirium. *Id.* Most importantly, like the subjects in *Strain, Cooper*, and *Darden*, Timpa was subdued, unable to flee, and non-threatening during the continued use of force. *See Darden*, 880 F.3d at 733; *Cooper*, 844 F.3d at 523; *Strain*, 513 F.3d at 502.

The distinguishing facts between *Strain, Cooper, Darden*, and this case sharpen the excessiveness of Dillard's continued use of force. Unlike the subjects in *Cooper* and *Darden*, who were suspected of serious crimes, Timpa himself called the police asking for assistance. *See Darden*, 880 F.3d at 729; *Cooper*, 844 F.3d at 522. The officers had no intention of arresting him for any crime. Whereas the defendant-officers in *Strain, Cooper*, and *Darden* ceased using force shortly after the subject was restrained, Dillard continued to kneel on Timpa's back for seven minutes after he was restrained at both the wrists and the ankles, including five minutes after he ceased moving his lower legs, and three-and-a-half minutes after he lost consciousness. *See Darden*, 880 F.3d at 726; *Cooper*, 844 F.3d at 521; *Strain*, 513 F.3d at 496. Here, the use of force lasted for over fourteen minutes as compared with the

one-to-two minute dog bite in *Cooper*; the one-to-two minute use of a prone restraint with weight force in *Darden*; and the momentary use of force in *Strain*. *See Cooper*, 844 F.3d at 521; *Strain*, 513 F.3d at 496; *Darden v. City of Fort Worth*, No. 4:15-CV-221-A, 2016 WL 4257469, at *5 (N.D. Tex. Aug. 10, 2016). Finally, unlike the use of force in *Cooper* and in *Strain*, the use of a prone restraint with weight force resulted in the subject's death in *Darden* and again here. *See Darden*, 880 F.3d at 732 n.8. These cases clearly established the unreasonableness of Dillard's continued use of body-weight force to hold Timpa in the prone restraint position after he was subdued and restrained.

This conclusion comports with the decisions of our sister circuits that have considered similar facts. *See McCue v. City of Bangor*, 838 F.3d 55, 64 (1st Cir. 2016) (holding that "it was clearly established in September 2012 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 excessive force' " (citation omitted)); *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008) (holding that "the law was clearly established," by December 2002, "that applying pressure to [a subject's] upper back, once he was handcuffed and his legs restrained, was constitutionally unreasonable due to the significant risk of positional asphyxiation associated with such actions"); *Abdullahi v. City of Madison*, 423 F.3d 763, 764–66 (7th Cir. 2005) (holding that the record supported an inference of deadly force when an officer restrained a mentally ill individual in the prone

restraint position with bodyweight force for thirty to forty-five seconds until the individual lost consciousness); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004) (holding that the law in April 2000 clearly established that "putting substantial or significant pressure on a suspect's back while that suspect is in a face-down prone position after being subdued and/or incapacitated constituted excessive force"); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1061 (9th Cir. 2003) (holding that the continued use of a prone restraint with weight force "despite [the arrestee's] repeated cries for air, and despite the fact that his hands were cuffed behind his back and he was offering no resistance" constituted excessive force).[7]

The Officers argue that the Fifth Circuit "has held that [the use of a] prone restraint [on] a resisting suspect does not violate the Fourth Amendment even when pressure is applied to the suspect's back." We have never articulated this per se rule. Nor could we because the Supreme Court has specifically rejected exactly that rule. *See Lombardo*, 141 S. Ct. at 2241 (per curiam) (rejecting any per se rule that "the use of a prone restraint—no matter the kind, intensity, duration, or surrounding circumstances—is . . . constitutional so long as an individual appears to resist

[7] Only the Eighth Circuit has held in the reverse and the Supreme Court recently vacated that decision on the merits. *See Lombardo v. City of St. Louis*, 956 F.3d 1009 (8th Cir. 2020), *rev'd*, 141 S. Ct. 2239 (2021) (per curiam).

officers' efforts to subdue him"). The Officers mischaracterize our caselaw.

In *Castillo v. City of Round Rock*, an unpublished decision, we stated that "[r]estraining a person in a prone position is not, in and of itself, excessive force when the person restrained is resisting arrest." No. 90-50163, 1999 WL 195292, at *4 (5th Cir. Mar. 15, 1999) (per curiam). But this statement cannot be unmoored from its factual context. There, Jesus Castillo, an unrestrained subject holding a beer bottle above his head, had "fought" and "struggl[ed] vigorously on the ground" against an officer's attempts to subdue him, leading "citizen bystanders . . . to aid in th[e] effort" of restraining him. *Id.* at *1. During the subsequent tussle, Castillo "blood[ied] the officer's nose[ ] in a manner that a reasonable officer could perceive as hostile." *Id.* at *3. Two officers then held Castillo in the prone restraint position with bodyweight force on his back for four to six minutes while restraints were applied. *Id.* at *1–2. But once Castillo was "handcuffed and leg-shackled, [and] finally stopped struggling, the officers rolled him over" into a recovery position. *Id.* at *2. The officers realized that Castillo "appeared to be unconscious" and immediately "rushed [him] to the hospital." *Id.* at *2–4.

By contrast, here, Dillard arrived on the scene to observe Timpa handcuffed on the ground—a factor that he was required to consider when determining how much force was reasonably necessary to prevent Timpa evading arrest or posing a threat of harm. *See Darden*, 880 F.3d at 732. Whereas we held that the

officer in *Castillo* reasonably perceived the raising of a beer bottle as threatening, here, Dillard testified that he did not perceive Timpa was aiming to injure the Officers by kicking his legs. Whereas the officers placed Castillo in a recovery position as soon as he was restrained and subdued, Dillard failed to place Timpa in the recovery position for at least five minutes after he was restrained and subdued. And whereas the officers sought medical attention as soon as they realized that Castillo was nonresponsive, Dillard failed to seek medical attention for an additional three minutes after he recognized that Timpa was unconscious.

The Officers' citation to *Wagner v. Bay City* fares no better. *See* 227 F.3d 316 (5th Cir. 2000). There, Gilbert Gutierrez initiated a violent physical altercation with the defendant-officers—"swinging his fists[] [and] striking" them. *Id.* at 318. The officers responded by using pepper spray and placing Gutierrez in the prone position with bodyweight force on his back while they applied handcuffs. *Id.* at 319. Once restrained, the officers placed Gutierrez face down in the prone position in the patrol car to be transported to jail. *Id.* at 323–24. We held that the use of force was reasonable because Gutierrez had violently continued to resist arrest during the officers' use of force and "there were no apparent physical signs that Gutierrez was substantially at risk" of asphyxiation. *Id.* at 324.

Wagner did not speak to the use of force at issue here—a prone restraint with bodyweight force while Timpa was restrained and subdued. *See* 227 F.3d at 324. Unlike Gutierrez, Timpa never engaged the

Officers in a violent altercation; rather, he was already handcuffed by the time that Dillard arrived on the scene. In *Wagner*, the defendant-officers responded to Gutierrez's diminished resistance by removing their bodyweight from his back. *See* 227 F.3d at 319. Here, Dillard continued to exert asphyxiating force by kneeling on Timpa's upper back long after he had gone limp. And unlike the absence of physical signs of substantial risk of asphyxiation in *Wagner*, Dillard was aware that Timpa was obese and had used cocaine, which exacerbated the risk of asphyxiation.

Neither *Wagner* nor *Castillo* stands for a per se rule that the use of a prone restraint is objectively reasonable so long as the subject is resisting. Like any other tool of control, a prone restraint may rise to unconstitutional force depending on when and how it is used. *See Aguirre*, 995 F.3d at 411–12, 424 (Jolly, J., concurring), 424 (Higginson, J., concurring) (holding the use of a maximal prone restraint with bodyweight pressed against a subject's torso and legs constituted excessive force in violation of the Fourth Amendment); *Darden*, 880 F.3d at 733 (holding it was objectively unreasonable for an officer to "force[ ] . . . an obese man . . . onto his stomach, push[ ] his face into the floor, and pull[ ] [his] hands behind his back" where the arrestee was not "actively resisting" arrest); *Simpson v. Hines*, 903 F.2d 400, 403 (5th Cir. 1990) (holding the use of a prone restraint with bodyweight force pressed on a pre-trial inmate's back and neck constituted "grossly disproportionate" force in violation of the Fourteenth Amendment).

Here, a prone restraint was used in tandem with Dillard's body weight for over fourteen minutes. If a jury were to find that Timpa was subdued and non-threatening by nine minutes into the restraint, then the continued use of force for five additional minutes was necessarily excessive. *Cf. Aguirre*, 995 F.3d at 424 (Jolly, J., concurring) (denying qualified immunity as to the last two minutes of a maximal prone restraint); *Roque v. Harvel*, 993 F.3d 325, 335–36 (5th Cir. 2021) (granting qualified immunity for the first shot fired by an officer, but denying as to the second and third shots fired two and four seconds later, respectively); *Cooper*, 844 F.3d at 521 (denying qualified immunity as to the final one-to-two minutes of a dog bite). We recognize that our police officers are often asked to make split-second judgments about the use of force, but the Constitution demands that officers use no more force than necessary and "hold[s] [them] accountable when they exercise power irresponsibly." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Because the state of the law in August 2016 had clearly established that the continued use of force against a restrained and subdued subject violates the Fourth Amendment, Defendant-Officer Dillard is not entitled to qualified immunity.

IV.

We now consider the bystander liability claims against Officers Dominguez, Vasquez, Mansell, and Rivera. Within the Fifth Circuit, "[a]n officer is liable for failure to intervene when that officer: (1) knew a fellow officer was violating an individual's constitutional

rights, (2) was present at the scene of the constitutional violation, (3) had a reasonable opportunity to prevent the harm but nevertheless, (4) chose not to act." *Bartlett*, 981 F.3d at 343. The Plaintiffs again bear the burden to demonstrate that the state of the law in August 2016 clearly established that "any reasonable officer would have known that the Constitution required them to intervene" in this circumstance. *Id.* at 345.

Plaintiffs contend that *Hale v. Townley* provided fair notice to Dominguez, Vasquez, Mansell, and Rivera of their constitutional duty to intervene. *See* 45 F.3d 914 (5th Cir. 1995). In *Hale*, we held 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 may be liable under section 1983." *Id.* at 919. There, a defendant-officer "stood by and laughed" while another officer assaulted Billy Hale. *Id.* at 917. We agreed that liability under § 1983 attaches when a bystander-officer "had a reasonable opportunity to realize the excessive nature of the force and to intervene to stop it." *Id.* at 919. The officers had a reasonable opportunity to intervene because they were "present at the scene" and their laughter supported an inference of "acquiescence in the alleged use of excessive force." *Id.*

We begin with Vasquez and Dominguez. It is undisputed that each Officer stood mere feet away from Timpa throughout the fourteen-minute duration of the restraint. Each Officer was trained to "ensure that[,] as soon as subjects are brought under control, they are

placed in an upright position . . . or on their side." Both testified that they were aware of the risks of holding an arrestee in the prone restraint position. The Officers do not contend that Vasquez or Dominguez lacked reasonable opportunity to intervene. Indeed, both officers stood by, observed Timpa suddenly lose consciousness, expressed surprise, and then made jesting comments. That both officers "stood by and laughed" while Dillard continued to kneel on an incapacitated arrestee supports an inference of "acquiescence in the alleged use of force." *Hale*, 45 F.3d at 917, 919. Questions of fact preclude summary judgment as to the bystander liability claims against Vasquez and Dominguez.

We now turn to Supervising Officer Mansell and Rivera. Bystander liability is available only when an officer is present during an alleged constitutional violation. *See Bartlett*, 981 F.3d at 343. The Officers contend that Mansell and Rivera were absent when Timpa became subdued and thus, neither officer can be liable for failing to intervene. The record supports that Rivera left the scene approximately two-and-a-half minutes before Timpa stopped moving his legs and that he remained absent until after Dillard released the restraint. Rivera thus lacked a reasonable opportunity to intervene and is entitled to qualified immunity.

Mansell presents a tougher case. Thirty-four seconds *after* Timpa became subdued, he returned to his patrol car "a few feet away" and sat "with the car door open" while he ran a check on Timpa's license. He

testified that he did not hear Vasquez and Dominguez mock Timpa for losing consciousness. But he was observing Timpa for the critical half-minute when Timpa suddenly lost consciousness. Moreover, the record supports an inference that Mansell was aware Timpa had become incapacitated. When Timpa lost consciousness, Dominguez said to Mansell: "So what's the plan? You're [in charge] out here, sir." Mansell responded that the officers should "strap [Timpa] to the gurney" and then made jesting comments before stepping away to check Timpa's license. A jury could find that Mansell remained present on the scene and acquiesced in the violation of Timpa's Fourth Amendment rights.

Genuine disputes of material fact preclude summary judgment on the claims of bystander liability against Officers Mansell, Dominguez, and Vasquez. Summary judgment was properly granted to Officer Rivera.

* * *

We REVERSE the district court's grant of summary judgment on the claim of excessive force against Officer Dillard and the claims of bystander liability against Officers Mansell, Vasquez, and Dominguez.

We AFFIRM the district court's grant of summary judgment on the claim of bystander liability against Officer Rivera.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

VICKI TIMPA, *et. al.*, Plaintiff, v. DUSTIN DILLARD, *et. al.*, Defendant.	§ § § § § § § §	Civil Action No. 3:16-CV-3089-N

FINAL JUDGMENT

(Filed Aug. 19, 2020)

By separate Memorandum and Opinion and Order dated July 7, 2020, the Court granted summary judgment to Defendants Dustin Dillard, Danny Vasquez, Raymond Dominguez, Domingo Rivera, and Kevin Mansell (collectively, "Defendants") on Plaintiffs' claims of excessive force, denial of medical care, bystander liability, and supervisor liability. By Order of August 19, 2020, the Court granted interlocutory default judgment for Plaintiffs K.T. and Vicki Timpa against Defendants Glenn Johnson and Criminal Investigative Unit (collectively, "Default Defendants").

It is, therefore, ordered that Plaintiffs take nothing against on their claims against Defendants, and those claims are dismissed with prejudice. It is further ordered that K.T. has judgment jointly and severally against Default Defendants in the amount of $10,000,000; it is further ordered that Timpa has

judgment jointly and severally against Default Defendants in the amount of $2,000,000; it is further ordered that all awards of money damages bear post-judgment interest at the rate of .14% simple per annum. All relief not expressly granted is denied. This is a final judgment.

Signed August 19, 2020.

/s/ David C. Godbey
David C. Godbey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

VICKI TIMPA, *et al.*, Plaintiffs,	§	
v.	§	Civil Action No. 3:16-CV-3089-N
DUSTIN DILLARD, *et al.*, Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Jul. 6, 2020)

This Memorandum Opinion and Order addresses Defendants Dustin Dillard, Danny Vasquez, Raymond Dominguez, Domingo Rivera, and Kevin Mansell's (collectively, "Defendants") motion for summary judgment on qualified immunity [150].[1] For the reasons below, the Court determines that the claims Plaintiffs raise are either unsupported by the summary judgment evidence or barred by the doctrine of qualified immunity and grants the motion.

[1] The Court is aware that this case touches on issues that are currently of widespread public concern. Nonetheless, this Court must decide the issues presented in accordance with the pages of binding precedent from the Supreme Court and Fifth Circuit, rather than the pages of today's newspapers.

I. ORIGINS OF THE SECTION 1983 LAWSUIT

A. The 911 Calls

On August 10, 2016, the City of Dallas 911 Center received four calls precipitating the police officer Defendants' interaction with decedent Tony Timpa ("Timpa"). Timpa initiated the first 911 call, telling the operator that he was a thirty-two-year-old male, that he was afraid of a man he was with, and that he was "having a lot of anxiety." Defs.' Appx. Ex. B-1 [151]. He also disclosed that had schizophrenia, bipolar disorder, depression, and anxiety and that he had not taken his medications that day. *Id.* After Timpa's call ended abruptly, the 911 operator called him back. *Id.* at Ex. 1-C. Multiple car horns are audible at the 4:20 minute mark during this call. *Id.* Timpa became agitated and can be heard arguing with several males. *Id.*

A motorist also placed a 911 call reporting a white male "running up and down the highway on Mockingbird . . . and stopping traffic. I almost hit him." *Id.* at Ex. 1-D. She states that the man stood in front of a Dart bus, stopped it, and began climbing it. *Id.* A private security guard called as well, echoing the female caller's reports that a man was running in the middle of Mockingbird Lane, jumping on a DART bus, and yelling that someone is trying to kill him. *Id.* at Ex. 1-E. He also stated that he believes the man "is on something." *Id.*

B. The Officers Respond to West Mockingbird Lane

The Dallas Police Department ("DPD") dispatcher informed officers that there was a crisis intervention training ("CIT")[2] situation at 1728 West Mockingbird Lane involving a white male with schizophrenia who was off his medications. Mansell responded and arrived at 10:36 p.m. Intervenor's Resp. Brief 9 [164]. He requested backup, stating that Timpa "is in traffic on Mockingbird, and he's definitely going to be a danger to himself." Defs.' Appx. Ex. 1-G [151]. Mansell called for an ambulance before exiting his patrol car. *Id.* at Ex. 1-L; 165–66. Despite being handcuffed, Timpa repeatedly attempted to roll into the right lane of the road—where vehicles were still driving—and succeeded at one point, requiring Mansell and one or both of the security guards to lift him back to the roadside.[3] *Id.* at 167–68.

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[2] A CIT call indicates that the 911 operator believes the situation involves a citizen who may be experiencing mental health issues. Defs.' Appx. 164, 194 [151].

[3] The Intervenor asserts that the body cam recordings do not show this. However, only Dillard, Vasquez, and Rivera recorded the situation on their body cameras. The earliest of these officers arrived seven minutes after Mansell was on the scene, and their body cameras could not have captured events that occurred prior to their arrival. Further, as Vasquez walks up, his body cam records Mansell as stating, "We've been rolling around in the street and everything." *Id.* at Ex. A-1 0:36–0:38. Because there is no evidence contradicting Mansell's deposition testimony or his statement captured by the body cam, the Court holds there is no genuine dispute of fact on this point.

Approximately seven minutes after Mansell arrived, paramedics arrived with Dillard and Vasquez pulling up shortly after them. Timpa was handcuffed and sitting on the ground between a bus stop bench and the road. He was unresponsive to the officers' attempts to calm him and repeatedly yelled "you're gonna kill me!" and "help!" before lurching towards the street. *Id.* at Ex. A-1 0:50–1:24. Dillard and Vasquez then rolled him onto his stomach while a security guard restrained his legs. *Id.* at 1:24–2:05. Dominguez arrived roughly three minutes later, followed closely by Rivera.

C. Timpa's Restraint

Dillard restrained Timpa by placing 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.* at 1:30. This restraint lasted roughly fourteen minutes. *Id.* at 1:30–15:16. Vasquez assisted Dillard by placing his left knee on Timpa's lower back and right knee on his buttock for roughly 160 seconds. *Id.* at 1:44–3:55. When Timpa continued to yell, Dillard asked, "What did you take today?" Timpa replied, "Coke," although Dillard testified that he did not hear this. *Id.* at 1:43; Appx. 76. Dillard repeated his question, and Timpa responded with incoherent sounds. *Id.* at 1:45–2:00.

Roughly two minutes into the restraint, Paramedic James Flores ("Flores"), who was standing behind the bus bench with Paramedic Curtis Burnley

("Burnley"), approached to take Timpa's vitals. *Id.* at 2:26–2:53; Appx. 253. The paramedics had been standing nearby since Timpa's initial restraint and can be seen in video background intermittently. *Id.* at 1:30–1:40, 2:08–2:33, 3:38–4:10. While walking towards Timpa, Paramedic Flores warned Dillard, "I'm right behind you, don't jump up." *Id.* at 2:33–2:38. Dillard moved to the right after another officer warned that the paramedic was behind him and suggested "twist your body off to the right." *Id.* at 2:38–2:40. Timpa struggled and yelled, "I can't live! I can't live!" Flores, unable to get a reading, stepped back and said, "Damn, that's not gonna work." *Id.* at 2:46–2:53; Appx. 213, 254. Timpa shouted and attempted to thrust his body forward. *Id.* at 2:50–3:05. After Dillard and the security guard reassured him, he said "Ok, I stop! I stop, I stop! Now please leave my feet alone!" and then kept still for roughly twenty seconds. *Id.* at 3:06–3:33.

Timpa continued to shout and struggle, at one point maneuvering his legs out from under the bus bench and kicking, causing Dillard to lurch. *Id.* at 4:02–4:08. Dominguez left to retrieve leg restraints from Vasquez's patrol car while Vasquez attempted to swap the security guard's cuffs for an officer's pair so "we don't have to worry about it once he's up."[4] *Id.* at 4:08–4:24; Appx. 3. Vasquez had difficulty swapping the handcuffs and complained that Timpa was moving

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[4] *See also id.* at 170, 214 (explaining DPD officers are taught that when taking custody of a pre-handcuffed person they should replace the handcuffs with their handcuffs before transporting the person).

too much, stating "This is gonna be a pain in the ass. He's swinging his hands." and "Stop it. Tony, stop fighting me! I'm just trying to take this handcuff off." *Id.* at 4:50–7:16; *see* Appx. at 175, 219, 226–27, 230. Mansell retrieved a flashlight to assist Vasquez, and Vasquez succeeded in switching handcuffs and double-locking them to prevent Timpa from cinching them. *Id.* at 7:19–7:46.

While Vasquez and Mansell focused on the handcuffs, Dominguez and Rivera worked to place zip ties around Timpa's ankles, during which process Timpa kicked them both several times. *Id.* at 4:33–7:32; *see id.* at 8:07–8:14, Appx. 5, 12, 127. Flores approached a second time, and Dillard asked, "Do you want me to roll him over?" *Id.* at 8:30–8:33. Flores declined stating, "Before y'all move him, if I can just get in right here, and see if I can just get to his arm." *Id.* at 8:32–8:40. Dillard replied "go ahead, man" and shifted his knee to Timpa's shoulder and right arm. *Id.* at 8:41–8:42. Paramedic Flores succeeded in attaching a blood pressure cuff and pulse oximeter. *Id.* at 8:40–10:02. While the paramedic took his vitals, Timpa intermittently moved his head from side to side, made incoherent sounds, and chanted "kill me," "I need to die." *Id.* at 9:02–10:05. Timpa then began yelling "We're gonna die. Help me!" and started shouting "Help me!" repeatedly. *Id.* at 10:21–11:48. Paramedic Flores removed the pulse oximeter and left to prepare a sedative. *Id.* at 10:36–10:37; Appx. 249, 57. At this point, Timpa had a pulse of 100 beats per minute and blood pressure of 150/90,

and Paramedic Flores "wasn't alarmed or alerted by that." *Id.* at 27, 266.

As Timpa continued to yell "Help me!" repeatedly without responding to the officers' questions, the security guard noted, "This ain't just normal crazy, man. He's on something." *Id.* at 11:17–11:21. Vasquez agreed, and Dillard concluded, "Yeah, he took something." *Id.* at 11:17–11:28, 12:00. At this point, Timpa was grunting and eventually became quiet and still. When Paramedic Burnely asked if Timpa could walk to the ambulance, others responded, "I highly doubt it" and "They zip-tied his feet. He's a kicker, man." *Id.* at 12:37–12:43. Dominguez then asked, "Tony, you still with us?" *Id.* at 13:02–13:04. Someone responded, "He's breathing." "I just wanted to make sure he was still breathing. 'Cause his nose is buried in that," Dominguez clarified. *Id.* at 13:20–13:24. "I think he's just asleep," Dillard replied. "Yeah, he's still breathing. He just snorted. He's out cold." *Id.* at 12:30–13:26; Appx. 2, 7, 131, 234–35. An officer remarked "If I were squirming that much I'd be sleeping too." *Id.* at 13:45–13:47. Dominguez and Vasquez then engaged in a series of jesting comments, such as "Hey, time for school! Wake up!" to which Timpa did not respond. *Id.* at 14:06–14:30.

Paramedic Flores returned to administer the sedative, and Timpa's head jerked in response to the injection. Dillard remarked, "Oh, there he comes." *Id.* at 14:39–11:49; Appx. 257. After waiting roughly twenty seconds, Vasquez lifted his hand from Timpa's back, and Dillard moved off him shortly after. *Id.* at 15:09–15:16.

At a paramedic's prompting, the Defendants rolled Timpa onto his back and lifted him onto the gurney. *Id.* at 15:34–16:00. When they placed Timpa on the gurney, his head and torso rolled off the side uncontrollably. *Id.* at 16:00–16:32. Timpa's head hung to the side as Paramedic Burnley strapped him onto the gurney, leading Dillard to ask, "Is he knocked out, or . . . he ain't dead, is he?" *Id.* at 16:11. Vasquez replied in the negative, but Dillard again asked, "He didn't just die down there, did he?" "Is he breathing?" *Id.* at 16:19–16:27. Dominguez performed a sternum rub as the paramedics wheeled Timpa toward the ambulance, and when Timpa did not respond, Dillard exclaimed, "I hope I didn't kill him." *Id.* at 16:27–16:34. Some of the other Defendants laugh and respond, "What's this 'we' you are talking about?" "We ain't friends." *Id.* at 16:38–16:44.

After Timpa was loaded in the ambulance for treatment, Paramedic Burnley announced, "Yeah, he's not breathing." *Id.* at 17:14–17:32. Dominguez began performing chest compressions. Mansell, who had left to call Timpa's family and ask what medications he was supposed to be taking, returned at this point. Flores bluntly stated that Timpa was dead, causing Mansell to exclaim "He's what?!" and end the call with Timpa's mother. *Id.* at 17:35–17:42.

Timpa was taken to Parkland Hospital, where staff confirmed his death. *Id.* at 3. On November 3, 2016, Plaintiffs Vicki Timpa, individually and as representative of the state of Anthony Timpa, and Cheryll Timpa, individually and as next friend of K.T., a minor

("Plaintiffs") filed this section 1983 lawsuit against the Defendant Officers as well as several other defendants. Intervenor Joe Timpa ("Intervenor") later joined the lawsuit.[5]

D. Timpa's Cause of Death

The Dallas County medical examiner who conducted Timpa's autoposy determined that Timpa died due to "sudden cardiac death due to the toxic effects of cocaine and physiological stress associated with physical restraint." She acknowledged that due to "his prone position and physical restraint by an officer, an element of mechanical or positional asphyxia cannot be ruled out (although he was seen to be yelling and fighting for the majority of the restraint.)" *Id.* at 35. Plaintiffs' expert opined that Timpa died due to mechanical asphyxia, and while Defendants' experts disagree, the Defendants assume Plaintiffs' expert is correct for purposes of this motion. *Id.* at 41; *see* Defs.' Summary Judgment Mot. 23 [150].

II. LEGAL STANDARDS

A. Summary Judgment Motion

Courts "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment

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[5] Because the Intervenor and Plaintiffs raise most of the same claims and arguments, references to "Plaintiffs" in this Opinion include the Intervenor unless otherwise stated.

as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In making this determination, courts must view all evidence and draw all reasonable inferences in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The moving party bears the initial burden of informing the court of the basis for its belief that there is no genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made the required showing, the burden shifts to the nonmovant to establish that there is a genuine issue of material fact such that a reasonable jury might return a verdict in its favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). Factual controversies are resolved in favor of the nonmoving party " 'only when an actual controversy exists, that is, when both parties have submitted evidence of contradictory facts.' " *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999) (quoting *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995)).

B. Section 1983 Claims and Qualified Immunity

Section 1983 authorizes plaintiffs to bring claims "against persons in their individual or official capacity, or against a governmental entity." *Pratt v. Harris Co., Tex.*, 822 F.3d 174, 180 (5th Cir. 2012) (internal quotation omitted). A party has a colorable claim under

section 1983 if the plaintiff can "(1) allege a violation of a right secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013).

The doctrine of qualified immunity provides a defense against these claims to government officials who "make reasonable but mistaken judgments about open legal questions" and shields "all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 733 (2011). This is an exacting standard. To overcome it, plaintiffs bear the heavy burden of showing that the official both violated a constitutional or statutory right and that this right was clearly established in the law prior to the challenged conduct occurring. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009); *Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009). Courts "do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft*, 563 U.S. at 741; *see also Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) ("The dispositive question is whether the violative nature of *particular* conduct is clearly established.") (emphasis in opinion) (internal quotation omitted).

III. THE COURT DETERMINES THAT QUALIFIED IMMUNITY BARS ALL CLAIMS RAISED AGAINST THE DEFENDANTS

Plaintiffs allege excessive force,[6] denial of medical care, bystander liability, and supervisor liability claims.[7] For the reasons below, the Court holds that each of these claims are barred by qualified immunity as against these Defendants.

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[6] Plaintiffs devote roughly one page of their response brief to arguing that prone restraints constitute "deadly force" and must be assessed under this subset of excessive force. Pltfs.' Resp. Brief 29–30 [156]. The Court disagrees. Plaintiffs cite to one Fifth Circuit case which states that while "guns represent the paradigmatic example of 'deadly force,' " courts have held a variety of "police tools and instruments" may meet that definition. *Gutierrez v. City of San Antonio*,139 F.3d 441, 446 (5th Cir. 1998). The Court cites to multiple cases, including a Seventh Circuit case acknowledging prone restraints as deadly force. *Id.* The Court does not adopt these positions, however, and there is no Fifth Circuit case that directly holds that prone restraints constitute a form of deadly force. The closest the Court gets is its holding that hogtying *may* amount to deadly force. *Id.* Rather, there are multiple Fifth Circuit opinions holding that prone restraints do not even constitute excessive force. *See infra* III.A.1. Consequently, the Court declines to treat the alleged Fourth Amendment violations as deadly force claims.

[7] Defendants' opening summary judgment brief assumed that Plaintiffs' complaint also alleged an unlawful seizure claim. The complaint does not expressly raise such a claim, however, and neither Plaintiffs nor Intervenor rebut Defendants' arguments on this point. The Court thus determines that to the extent the complaint suggests an unlawful seizure claim, the Defendants are entitled to summary judgment on it.

A. Excessive Force Claims

An official's use of excessive force in effecting an arrest violates the Fourth Amendment's protection against unreasonable seizures and, if established, satisfies the first prong of the qualified immunity analysis. *Pratt*, 822 F.3d at 181. The Fifth Circuit has observed that "overcoming qualified immunity is especially difficult in excessive-force cases." *Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2018). This is true because in excessive force cases, "the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018).

Here, the Court determines that Plaintiffs' excessive force claims cannot succeed, even assuming the Defendants' conduct constitutes excessive force, because there was no law clearly establishing Defendants' conduct as a constitutional violation prior to August 10, 2016—the date that the challenged conduct occurred. The Court consequently does not decide whether Defendants' conduct amounts to a Fourth Amendment violation. *See Pearson*, 555 U.S. at 236 (permitting courts to address the prongs of the qualified immunity inquiry in whichever order they chose and not requiring courts to address both prongs if either is dispositive); *Thompson v. Mercer*, 762 F.3d 433, 437 (5th Cir. 2014).

1. Fifth Circuit caselaw decided prior to August 2016 does not clearly establish Defendants'

conduct as a Fourth Amendment violation—Conduct is clearly established as a constitutional violation only when there is either (a) binding authority or (b) a robust consensus of persuasive authority sufficient to alert every reasonable officer that the challenged conduct did in fact violate the plaintiff's constitutional rights. *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (en banc). The "focus is on whether the officer had fair notice that her conduct was unlawful" and "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (internal quotation omitted); *see also Mullenix*, 136 S. Ct. at 308 ("[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that [i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation.") (internal quotation omitted).

Here, there is no binding authority from either the Supreme Court or the Fifth Circuit holding that prone restraint is a *per se* Fourth Amendment violation or that it is a violation when performed in the manner of Defendants' restraint of Timpa. *See Castillo v. City of Round Rock*, 177 F.3d 977 (5th Cir. 1999) ("Restraining a person in a prone position is not, in and of itself, excessive force when the person restrained is resisting arrest.") (internal quotation omitted). Rather, of the four most analogous Fifth Circuit cases involving prone restraints that were decided prior to August 2016, the Court held in three of those instances that there was no Fourth Amendment violation. Plaintiffs

rely on the fourth and oldest of these cases, *Gutierrez v. City of San Antonio*, to argue that clearly established Fifth Circuit law prohibits Defendants' restraint used on Timpa.[8] 139 F.3d 441 (5th Cir. 1998). *Gutierrez* is inapplicable to this case, however, whether examined in the context of more recent caselaw or considered in isolation.

Gutierrez stands for the "very limited" proposition that officers may use excessive force "when a drug-affected person in a state of excited delirium is hog-tied and placed face down in a prone position." *Id.* at 451. Despite Gutierrez's admission that he had "shot some bad coke," officers hog-tied and placed him face down in the back seat of a patrol car while driving to the hospital, during which time they did not monitor him. *Id.* at 443, 449.

The Court focused specifically on the officers' use of a hog-tie restraint on Gutierrez—a type of restraint that was not employed in this case and one that is arguably more aggressive, as it pulls the feet towards the

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[8] Plaintiffs and Intervenor also suggest that expert testimony and policies and training used by DPD and other law enforcement organizations establishes that Defendants' conduct was clearly established as a constitutional violation prior to August 2016. Pltfs.' Resp. Brief 28, 33–36 [156]; Intervenor's Resp. 36–39 [164]. While department policies have been held sufficient to create a question of fact as to whether the use of force was reasonable, *Gutierrez*, 139 F.3d at 449–51, these sources are not sufficient to show that conduct was legally established as a constitutional violation. *Morgan*, 659 F.3d at 371 (requiring either binding legal authority or a robust consensus of persuasive authority to satisfy clearly established law prong).

back and places the legs at a ninety-degree angle in an 'L' shape. *Id.* at 443. Further, the Fifth Circuit explicitly cabined *Gutierrez*'s holdings to its narrow facts, both in that case and in subsequent cases involving hog-tie prone restraints where the Court nevertheless determined that qualified immunity applied.

Pratt v. Harris County, Texas, is the most notable such case. 822 F.3d 174 (5th Cir. 2016). Officers encountered Pratt at the scene of a minor accident, where he exhibited bizarre behavior and continued to walk away from the scene despite officer requests that he stop. *Id.* at 178. After Pratt ignored multiple requests and warnings to comply and evaded their attempts to restraint him, the officers deployed their tasers six times. *Id.* Even after being handcuffed, Pratt kicked an officer, prompting an officer to tase him again. *Id.* The officers also placed Pratt in a hog-tie prone restraint. *Id.* at 179. While the Fifth Circuit acknowledged that "hog-tying is a controversial restraint," it emphasized that the *Gutierrez* holding was heavily bound to its specific factual context. *Id.* at 182. The Court also found it significant that unlike the officers in *Gutierrez*, the officers in *Pratt* did not know the suspect was on cocaine, and the Court ultimately held that the officers' conduct in *Pratt* was not excessive force. *Id.* at 182–83.

The Fifth Circuit likewise distinguished *Gutierrez* when it applied qualified immunity in *Wagner v. Bay City.* 227 F.3d 316, 318–20 (5th Cir. 2000). The suspect in *Wagner* had been belligerent in a restaurant and swung at an officer who was trying to apprehend him. *Id.* at 318. After pepper spraying and handcuffing the

suspect, who was still struggling, two officers knelt on his back while one "kept pushing [suspect's] neck and head to the ground with a stick." *Id.* at 319. When additional officers arrived, the officers placed the suspect in the back of a patrol car on his stomach and transported him to a jail; though he appeared unconscious, the officers did not speak to him or check for injuries. *Id.*

The *Wagner* Court discussed *Gutierrez* in detail, ultimately distinguishing it on the basis that "perhaps most importantly, as defendants note, [decedent] was not 'hog-tied,' and, as a result, the 'very limited' holding of *Gutierrez* cannot support a finding that [the officers] violated clearly-established law." *Id.* at 322–23. The Court also noted the absence of cocaine and determined that the use of pepper spray and a choke hold were not clearly established as excessive force. *Id.* at 321, 323–24.

Castillo v. City of Round Rock, decided one year after *Gutierrez*, is also illuminating. 177 F.3d 977 (5th Cir. 1999). There the Fifth Circuit unequivocally held that there was no excessive force when an officer and male bystander together sat on a prone, handcuffed suspect's back for four to six minutes while three other officers placed flex cuffs on his legs. *Id.* at *2. The officer also placed weight on the suspect's neck and head for five to ten minutes. *Id.* During this time, Castillo exclaimed he was going to die. *Id.* The Court held the circumstances—which included Castillo raising a beer bottle at an officer and fighting with him prior to being handcuffed, and kicking and yelling even after being

handcuffed and placed in a prone position—merited the force used. *Id.* at *2–*4.

On balance, the facts of this case align more closely with those in *Pratt*, *Wagner*, and *Castillo* and differ in critical points from those in *Gutierrez*. Here, Timpa presented a danger to himself and others by running across traffic on Mockingbird Lane, a three-lane road. At least one motorist reported nearly colliding with Timpa and said Timpa also halted and climbed a DART bus. Mansell describing Timpa to the dispatcher as "a danger to himself," and called an ambulance before ever leaving his patrol car. While Timpa was handcuffed, Timpa was nonresponsive to the officer's questions, yelled uncontrollably, and repeatedly attempted to roll into the right lane of the road, ultimately succeeding and necessitating efforts by Mansell and the security guards to move him to safety. And prone restraint was not the Defendants' first resort—they did not roll Timpa over until he again lurched towards the road, after Vasquez and Dillard's arrival.

Even after being rolled onto his stomach, Timpa continued to yell, toss his head, and struggle to move his torso and limbs. He repeatedly kicked at officers. *See Pratt*, 822 F.3d at 184 (underscoring Pratt's "'on again, off again' commitment to cease resisting, recurring violence, and the threat he posed while unrestrained"). Further, paramedics were present during the entirety of the Defendants' roughly fourteen-minute prone restraint of Timpa and never indicated that the Defendants were harming Timpa or that they should move him. Paramedic Flores specifically

declined Dillard's offer to roll Timpa over and indicated that he should not be moved until Paramedic Flores had an opportunity to take his vitals. And Paramedic Flores was not concerned by Timpa's blood pressure and pulse, which he took roughly five minutes before Defendants ceased the prone restraint. These facts distinguish this case from *Gutierrez*, where the paramedics did not observe the officers' restraint of Gutierrez and where officers hog-tied Gutierrez, placed him face down in the back seat of a patrol car for half an hour, and did not monitor him while he was in this position.

The fact that the Defendants knew of Timpa's cocaine consumption is the biggest factual distinction between this case and *Castillo*, *Wagner*, and *Pratt*. Because there is a fact question regarding whether Defendants knew Timpa had used cocaine, the Court views the facts in Plaintiffs' favor and assumes that Defendants knew of his cocaine usage at the latest when Timpa responded to Dillard's first inquiries.[9]

Plaintiffs insist that the Defendants' awareness of Timpa's drug use means that *Gutierrez* clearly establishes their restraint of Timpa as unconstitutional. The Plaintiffs correctly note that in distinguishing *Gutierrez*, the Court in *Pratt* emphasized the officers' unawareness of the decedent's drug use at the time

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[9] Defendants admit that around the 1:45 mark, the body cam footage does suggest that Timpa replied "coke" to Dillard's initial question "what did you take?" But Dillard also testified that he did not hear this response and continued to ask Timpa what he had taken. The body cam footage shows the Defendants agreeing later, however, that Timpa was "on something."

that they used prone restraint and hog-tying. But Plaintiffs are wrong to assume that Defendants' knowledge of Timpa's cocaine use is dispositive here.

While the officers in *Pratt* employed hog-tying, the restraint method at issue in *Gutierrez*, Timpa was never hog-tied. This fact is critical. *Gutierrez* involved the fatal combination of officers who used a hog-tie restraint despite knowledge of the suspect's cocaine consumption. *Pratt* has already demonstrated that the presence of only one of these factors—even if the primary factor, hog-tying—does not present enough similarity to *Gutierrez* for it to constitute clearly established law. Adherence to the Fifth Circuit's qualified immunity analysis in *Pratt*, as well as the Supreme Court's frequent exhortation "not to define clearly established law at a high level of generality," means that *Gutierrez* does not govern this case. *Ashcroft*, 563 U.S. at 742.

Plaintiffs note some ways in which this case differs from *Castillo*, *Wagner*, and *Pratt*. But it is not enough to merely note dissimilarities between the Defendants' conduct towards Timpa and the conduct in cases where the Court did *not* find a constitutional violation. This does not meet Plaintiffs' burden to identify law that affirmatively establishes that conduct like Defendants' conduct is unconstitutional. Here, we have several cases holding similar conduct constitutional and one case self-identifying as a narrow holding that hog-tying may be unconstitutional under specific facts. And as stated above, the Court cannot read *Gutierrez* as governing this case. *See also Morrow*, 917 F.3d at

879 ("Cases cutting both ways do not clearly establish the law.").

Plaintiffs also argue that Timpa did not resist the officers.[10] Pltfs.' Resp. Brief 41 [156]. In support, they claim that Defendants "urge only that [Timpa] 'squirmed' at times"[11] and assert that Defendants' expert testified in a different case that "such movements" are just reflexive attempts to breathe. *Id.* The Court is unpersuaded. Although Timpa was not struggling for the entire duration of Defendants' restraint of him, the body cam video and audio shows that he continuously moved and yelled in contravention of the officers' directives, kicked at Officers Dominguez and Rivera, and was struggling enough that Paramedic Flores's first attempt to take his vitals was unsuccessful. The law clearly established prior to August 2016 does not suggest Timpa's reaction during his restraint falls short of

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[10] Plaintiffs briefly mention the custodial death report, which indicated that Timpa did not threaten, hit, or fight officers or resist being handcuffed or arrested. Pltfs.' Appx. 65–67 [157]. This report, however, was drafted by an officer who was not present at the scene and contradicts the events shown on the body cam videos. The Court thus holds that it does not create an issue of fact. *See Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011) ("Although we review evidence in the light most favorable to the nonmoving party, we assign greater weight, even at the summary judgment stage, to the facts evident from video recordings taken at the scene.").

[11] Even if the Court were to consider only the comments made by Defendants during their restraint of Timpa and disregard their deposition testimony, the body cam video shows this is not entirely accurate. Defendants are heard describing Timpa as "a kicker" and frequently request that he "be still" or "calm down." Defs.' Appx. Ex. A-1 [151].

resistance,[12] particularly in view of *Pratt*'s determination that use of prone restraint was not unconstitutional even where resistance was "on again, off again." *Pratt*, 822 F.3d at 184; *see also Estate of Aguirre v. City of San Antonio*, 2017 WL 6803374, at *10 (W.D. Tex. 2017) (concluding that a prone suspect actively resisted police when he "continued to strain and bob up and down . . . when he was face-down on the ground, continued to yell and move his head from left to right, as well as his body"). Courts "need not rely on the plaintiff's description of the facts where the record discredits that description but should instead consider the facts in the light depicted by the video." *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011) (internal quotation omitted).

Plaintiffs cite no law for their related argument that any "resistance" was merely Timpa's struggle for

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[12] Plaintiffs cite three cases on the constitutionality of officers' use of force for the proposition that Timpa's conduct constituted "passive resistance" that the Fifth Circuit has found insufficient to justify officers' use of force in other instances. *Trammel v. Fruge*, 868 F.3d 332 (5th Cir. 2017); *Hanks v. Rogers*, 853 F.3d 738 (5th Cir. 2017); *Deville v. Marcantel*, 567 F.3d 156 (5th Cir. 2009). Two of these cases were decided after August 2016, the date the Defendants restrained Timpa, and consequently may not be considered in the clearly established law analysis. *See Morgan*, 659 F.3d at 371 (stating that law must be clearly established "*at the time of the challenged conduct*") (emphasis added). The remaining case differs significantly from the facts of this case and is not dispositive to the Court's analysis. *Deville*, 567 F.3d at 167–68 (qualified immunity did not apply where officer broke car window and forcefully grabbed suspect stopped for minor traffic violation where there was a question of fact as to whether she physically resisted order to exit).

air rather than noncompliance. In fact, the Fifth Circuit rejected this same approach when it held that the prone restraint used in *Castillo was constitutional. Castillo*, 177 F.3d at *3 ("That Castillo'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 the police."). Even assuming Plaintiffs' description is accurate, the Court is unconvinced by Plaintiffs' citation to an expert's testimony in a different case with different factual circumstances.

Lastly, Plaintiffs reference a 2014 opinion by this Court that held that it was "clearly established that putting substantial or significant pressure on a suspect's back while that suspect is in a face-down prone position after being subdued or incapacitated constitutes excessive force." *Pena v. Dallas Co. Hosp. Dist.*, 2014 WL 12648507 (N.D. Tex. 2014). That case is inapplicable for three reasons. First, the opinion was reversed by the Fifth Circuit, although the circuit's rationale for reversal did not address this Court's excessive force determination. *Pena v. Givens*, 637 F. App'x 775, 779–81 (5th Cir. 2015). Second, this Court's *Pena* decision did not address either *Castillo* or *Wagner*, both of which suggest that within the Fifth Circuit it is not excessive force to place weight on a prone suspect if the suspect resists even after being incapacitated by handcuffs. And third, *Pena* relied on out-of-circuit authority but was decided before the circuit

split on this issue became apparent with the Eighth Circuit's decision in *Lombardo v. City of St. Louis.* 2020 WL 1915135 (8th Cir. 2020); *Pena*, 2014 WL 2014 WL 12648507, at *6. Thus, the Court remains unpersuaded that caselaw within the Fifth Circuit clearly establishes Defendants' conduct as unconstitutional.

2. Because there is a circuit split on this issue, Plaintiffs' persuasive authority does not pass muster as a "robust consensus" clearly establishing the law—The law is not clearly established when "no controlling authority specifically prohibits a defendant's conduct, and when the federal circuit courts are split on the issue"—even if the split did not develop until after the conduct occurred. *Morgan*, 659 F.3d at 372. When plaintiffs rely on "a consensus of persuasive cases from other jurisdictions" rather than binding authority, the consensus must be "robust." *Morrow*, 917 F.3d at 879. The Fifth Circuit recently explained that it has found even "widespread acceptance" of a doctrine among other circuits insufficient to clearly establish law where "the circuits were not unanimous in its contours or its application to a factual context similar to that of the instant case." *Id.* (quoting *McClendon v. City of Col.*, 305 F.3d 314, 330 (5th Cir. 2002), where the Court held that a six-circuit consensus was insufficient to clearly establish a doctrine).

Plaintiffs' argument that there is clearly established law is primarily supported by citations to cases from the First, Sixth, Seventh, Ninth, and Tenth Circuits. Each of these cases involved prone restraints followed by fatalities or severe injuries, and each court

determined that the restraints did or could constitute excessive force under the facts of the case. *Champion McCue v. City of Bangor, Maine*, 838 F.3d 55, 64 (1st Cir. 2016); *Estate of Booker v. Gomez*, 745 F.3d 405, 424 (10th Cir. 2014); *Abdullahi v. City of Madison*, 423 F.3d 763, 765, 769 (7th Cir. 2005); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004); *Drummond v. City of Anaheim*, 343 F.3d 1052, 1061–62 (9th Cir. 2003). Even if the Court were persuaded that these cases involved facts sufficiently analogous to Defendants' conduct, however, they cannot satisfy the Fifth Circuit's requirement for a "robust consensus" of persuasive authority because there is a circuit split. *Morgan*, 659 F.3d at 372; *see Morrow*, at 917 F.3d at 879. In contrast to Plaintiffs' cases, the Eighth Circuit recently upheld qualified immunity in an excessive force challenge to prone restraint similar to the restraint Defendants' used on Timpa. *Lombardo v. City of St. Louis*, 2020 WL 1915135 (8th Cir. 2020).

Officers in *Lombardo* detained the suspect, Gilbert, in a holding cell and attempted to handcuff him after they observed erratic behavior. *Id.* at 1011. Gilbert had not informed the officers that he had taken methamphetamine. *Id.* at 1012. After Gilbert began to struggle, the officers placed him in a prone position, where he continued to kick and thrash. *Id.* at 1011–12. Officers secured his limbs, shoulders, and torso with their body weight for roughly fifteen minutes before he stopped resisting; during this time, Gilbert continued to try to raise his chest up and told the officers to "stop because they were hurting him." *Id.* at 1012. When

they rolled him over, he had ceased breathing. *Id.* The Eighth Circuit held that "the use of prone restraint is not objectively unreasonable when a detainee actively resists officer directive and efforts to subdue the detainee." *Id.* at 1013.

So, at best there is a circuit split on the constitutionality of prone restraints when employed as Defendants did here. *See Lombardo v. St. Louis City*, 361 F. Supp. 3d 882, 905–15 (E.D. Mo. 2019) (providing a detailed summary of the circuit split on this issue). This is fatal to Plaintiffs' reliance on persuasive authority to argue that there is clearly established law relevant to this case. Because there is no clearly established law holding unconstitutional restraints analogous to the Defendants' restraint of Timpa, the Court holds that qualified immunity bars the excessive force claims against the Defendants.

B. Claims for Denial of Medical Care

"A pretrial detainee's constitutional right to medical care, whether in prison or other custody," is derived from the Fourteenth Amendment. *Wagner*, 227 F.3d at 324. When the challenge is based on an official's "episodic acts or omissions," the plaintiff must "prove that the official acted or failed to act with subjective deliberate indifference to the detainee's needs." *Campos v. Webb Co., Tex.*, 596 F. App'x 787, 791 (5th Cir. 2015) (internal quotation omitted). An "action is characterized properly as an 'episodic act or omission' case" if "the complained-of harm is a particular act or omission of

one or more officials." *Tamez v. Manthey*, 589 F.3d 764, 769 (5th Cir. 2009).

"Deliberate indifference is an extremely high standard to meet." *Campos*, 596 F. App'x at 792. The plaintiffs must show that the officer denied or delayed medical treatment and that this denial "resulted in substantial harm." *Petzold v. Rostollan*, 946 F.3d 242, 249 (5th Cir. 2019). Plaintiffs must also prove that the official had subjective knowledge of the risk of harm and subjectively intended that harm to occur. *Tamez*, 589 F.3d at 770; *see also Campos*, 596 F. App'x at 793 ("[F]ailure to alleviate a significant risk that [the official] should have perceived but did not is not deliberate indifference.") (internal quotation omitted).

Plaintiffs'[13] primary arguments boil down to two points: the Defendants physically blocked the paramedics' access to Timpa, and the Defendants failed to follow DPD General Orders, which required that they perform a five-man takedown.[14] Neither assertion is substantiated by the evidence.

The body cam video shows that Paramedic Flores was able to approach Timpa at least three separate times. Defs.' Appx. Ex. 1-A at 2:23–2:38; 8:31–12:32

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[13] Intervenor's brief does not respond to Defendants' summary judgment challenge to the denial of medical aid claims.

[14] A five-man takedown tactic employs five officers, with "each officer controlling one limb of the subject with the officer's body weight, until the suspect can be handcuffed" and thus does not require weight to be placed on the back of a suspect. Pltfs.' Appx. 54 [157.1].

[151]. At none of these points do any of the Defendants physically block his access to Timpa. In fact, when Paramedic Flores first approaches, an officer warns Dillard, "Don't jump back, you've got a paramedic behind you."[15] *Id.* at 2:23–2:38. Importantly, Paramedic Flores's initial inability to assess Timpa was due to Timpa's struggles. *Id.* at 2:38–2:53; Appx. 213, 254. Upon Flores's second approach, Dillard asked him, "Do you want me to roll him over?" Flores responded "Before y'all move him, if I can just get in right here, and see if I can just get to his arm." *Id.* at 8:32–8:40. Vasquez replied, "Go ahead, man." *Id.* at 8:35–8:40. Flores successfully took Timpa's vitals at this attempt and successfully administered a sedative upon a third approach. *Id.* at 14:29–14:42. The Defendants actually assisted the paramedics in lifting Timpa onto a gurney after he was sedated. *Id.* at 15:33–15:46. These interactions suggest that rather than physically block the paramedics' access to Timpa, the Defendants attempted to facilitate it.

Plaintiffs also contend that had the officers completed a five-man takedown rather than Dillard's "prolonged stay on Tony's back," the paramedics would have been able to timely access, sedate, and transfer Timpa to a medical facility, which would have saved his life. This is merely conjecture. Plaintiffs have provided no evidence that the paramedics' access to Timpa or their ability to administer a sedative and promptly

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[15] Dillard also actively encouraged Timpa to cooperate with the paramedic, stating "He's trying to help you out, okay? You're doing good, but you need to relax." *Id.* at 8:44–8:49.

transport him were delayed by the Defendants' prone restraint. Further, Plaintiffs misstate the requirements of the DPD General Orders. While General Order 903.01 acknowledges that the five-man takedown is "*an* effective restraining hold for controlling violent suspects," the order does not mandate that officers "must use" or "shall use" this method exclusively. Pltfs.' Appx. 6–67 [157.1] (emphasis added).

Lastly, Plaintiffs address Vasquez and Dominguez in particular, claiming their jokes "served no direct purpose in securing Tony or obtaining medical attention." Pltfs.' Resp. Brief 53 [156]. This allegation misses the mark. While Vasquez and Dominguez's commentary may have been offensive, their banter and attitude are not evidence that that they "actually drew the inference" that they were doing substantial harm to Timpa by not doing more to obtain medical attention or that they "subjectively intended that harm to occur" to Timpa. *See Thompson v. Upshur Co., Tex.*, 245 F.3d 447, 458 (5th Cir. 2001) ("[D]eliberate indifference cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of serious harm."). Because the evidence is insufficient to establish the elements of a denial of medical care claim, much less rebut the defense of qualified immunity, the Court grants Defendants summary judgment.

C. Bystander Liability Claims

To establish a section 1983 claim against an officer on a theory of bystander liability, a plaintiff must

establish that the officer "(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." *Whitley v. Hanna*, 726 F.3d 631, 646 (5th Cir. 2013) (internal quotation omitted). When defendants raise a qualified immunity defense to bystander liability claims, "the inquiry is whether, under the law in effect at the time of the arrest, the officers could have reasonably believed that they were not required to intervene." *Deshotels v. Marshall*, 454 F. App'x 262, 269 (5th Cir. 2011).

Because the Court has already determined that the underlying right was not clearly established in this case, the right to have a bystander officer intervene to prevent a violation cannot be clearly established either. *See Goolsby v. District of Columbia*, 317 F. Supp. 3d. 582, 595 n.3 (D.D.C. 2018) ("If it was not clearly established that the principal officer was violating constitutional rights, it follows that it is not clearly established that the bystander officer should know the officer was violating constitutional rights. Consequently, it would not be clearly established that the bystander officer would be liable for a failure to intervene."); *see also Griffin v. City of Sugar Land, Tex.*, 2019 WL 175098, at *10 (S.D. Tex. 2019) (holding in part that because the plaintiff's excessive force claim was not based on a clearly established right, the plaintiff likewise could not establish bystander liability). The Court thus grants summary judgment on these claims.

D. Supervisor Liability Claim

To establish that an officer is subject to supervisor liability, plaintiffs must show that "(1) the supervisor failed to supervise or train the subordinate official; (2) a causal link between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference." *Estate of Davis ex rel. v. City of N. Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005). Deliberate indifference requires "proof that a municipal actor disregarded a known or obvious consequence of his action." *McDonald v. McClellan*, 779 F. App'x 222, 227 (5th Cir. 2019) (internal quotations omitted). This usually requires that the plaintiff "demonstrate a pattern of violations and that the inadequacy of the [supervision] is obvious."

Plaintiffs suggest that Mansell showed indifference by looking through Timpa's wallet and phone and "completely abdicated his supervisory role by prematurely leaving the scene" to call Timpa's family. Pltfs.' Resp. Brief 57 [156]. These actions do not show that Mansell's supervision was obviously problematic and fall far short of meeting the "stringent standard of fault" necessary to prove deliberate indifference. *McDonald*, 779 F. App'x at 227. Because Plaintiffs cannot show that any supervisory failure rises to the level of deliberate indifference, the Court grants summary judgment.

CONCLUSION

Because the Court holds that qualified immunity bars Plaintiffs' excessive force and bystander liability claims and that the summary judgment evidence does not support Plaintiffs' denial of medical care and supervisor liability claims, the Court grants Defendants' motion for summary judgment on qualified immunity.

Signed July 6, 2020.

/s/ David C. Godbey
David C. Godbey
United States District Judge

United States Court of Appeals
for the Fifth Circuit

No. 20-10876

VICKI TIMPA, INDIVIDUALLY, AND AS REPRESENTATIVE OF THE ESTATE OF ANTHONY TIMPA; K.T., A MINOR CHILD; CHERYLL TIMPA, AS NEXT OF FRIEND OF K.T., A MINOR CHILD,

Plaintiffs—Appellants,

versus

DUSTIN DILLARD; DANNY VASQUEZ; RAYMOND DOMINGUEZ; DOMINGO RIVERA; KEVIN MANSELL,

Defendants—Appellees,

versus

JOE TIMPA,

Intervenor—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC 3:16-CV-3089

ON PETITION FOR REHEARING EN BANC

(Filed Jan. 27, 2022)

Before CLEMENT, SOUTHWICK, and WILLETT, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.