No. _____

In The
Supreme Court of the United States

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

Petitioners,

v.

VICKI TIMPA, individually and as representative
of the Estate of Anthony Timpa; K.T., a minor child;
CHERYLL TIMPA, as next friend of K.T.,
a minor child; JOE TIMPA,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit misapplied the Court's qualified immunity jurisprudence in holding that a police officer who held a mentally ill subject down in the prone position for the length of time it took paramedics to assess and treat the subject violated the subject's clearly established Fourth Amendment rights.

2. Whether the Fifth Circuit erred in holding that officers who were present while a fellow officer held a mentally ill subject down in the prone position had a clearly established constitutional obligation to intervene and terminate the subject's restraint such that they are subject to bystander liability under 42 U.S.C. § 1983.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the Fifth Circuit were:

Petitioners

Petitioners are Dustin Dillard, Danny Vasquez, Raymond Dominguez, and Kevin Mansell. Petitioners were defendants in the district court and appellees in the Fifth Circuit.

Respondents

Respondents are Vicki Timpa, individually, and as representative of the Estate of Anthony Timpa, K.T., a minor child; Cheryll Timpa, as next friend of K.T., a minor child, and Joe Timpa. Respondents Vicki Timpa, K.T., and Cheryll Timpa were plaintiffs in the district court and appellants in the Fifth Circuit. Respondent Joe Timpa was an intervenor in the district court and appellant in the Fifth Circuit.

Other Parties Before the Fifth Circuit

Domingo Rivera was a defendant in the district court and an appellee before the Fifth Circuit. He is not a party to this petition for a writ of certiorari.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state that no publicly held corporation is involved in this proceeding.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Timpa v. Dillard*, No. 20-10876 (5th Cir.) (opinion reversing judgment of district court in favor of Petitioners, issued on December 15, 2021); and
- *Timpa v. Dillard*, No. 3:16-CV-3089-N (memorandum opinion and order granting summary judgment to Petitioners and Domingo Rivera on qualified immunity grounds, issued July 6, 2020).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of Rule 14.1(b)(iii).

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INTRODUCTION

On May 25, 2020, George Floyd tragically lost his life when officers with the Minneapolis Police Department restrained him on his stomach while applying significant force to his neck. Floyd's death ignited a nationwide debate concerning law enforcement's use of prone restraints. *See* Cert. Pet., in *Lombardo v. City of St. Louis*, No. 20-391, at 1 ("Few legal issues have so quickly captured the attention of so many as the one presented here"). This ongoing debate is of such importance that this Court granted review in two cases involving prone restraints last year. *See generally Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021) (per curiam); *Lombardo v. City of St. Louis*, 141 S. Ct. 2239 (2021) (per curiam).

One of those cases, *Lombardo*, involved facts similar to those at issue here. In *Lombardo*, a detainee was restrained on his stomach with his hands cuffed behind his back, his feet shackled together, and the weight of at least four detention officers upon him for fifteen minutes. 141 S. Ct. at 2240. The Court summarily reversed the Eighth Circuit's holding that no constitutional violation occurred, finding that court's analysis of the issue too perfunctory and remanding for a more thorough review. *Id.* at 2241-42. In doing so, the Court "express[ed] no view as to whether the officers used unconstitutionally excessive force or, if they did, whether [the detainee's] right to be free of such force in these circumstances was clearly established at the time of his death." *Id.* at 2242. Three justices dissented, maintaining that the Court should grant plenary

review and decide the constitutional and qualified immunity issues outright instead of returning the matter to the court of appeals. *Id.* at 2242-44 (Alito, Thomas, Gorsuch, JJ., dissenting). Petitioners here ask the Court to answer the questions it explicitly left for another day in *Lombardo*. That day is now. The Court should grant certiorari and, after review of the merits, reverse the Fifth Circuit's judgment as to Petitioners.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 20 F.4th 1020 and reproduced at App.1-36. The district court's decision granting summary judgment to Petitioners is not reported but is reproduced at App.39-70.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Fifth Circuit issued its decision on December 15, 2021 (App.1) and denied a timely petition for rehearing en banc on January 27, 2022 (App.71-72).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution and 42 U.S.C. § 1983 are reproduced at App.73.

STATEMENT OF THE CASE

I. Factual Background

On the evening of August 10, 2016, the Dallas Police Department ("DPD") received several 911 calls concerning Anthony Timpa, who, in a state of paranoia, was running through and interfering with traffic on Mockingbird Lane, a major six-lane thoroughfare in the City of Dallas. (App.2-3, 40.) Timpa himself placed the first call to 911, stating he was scared and asking to be picked up. (App.2, 40.) He informed the dispatcher that he was "having a lot of anxiety," that he was schizophrenic, and that he had not taken his medication. (App.2, 40.) Timpa abruptly ended the call, and the 911 operator called him back. (App.2.) Once reconnected, Timpa informed the operator that he was off Mockingbird Lane. (*Id.*) The operator could hear cars honking in the background of the call, and as Timpa became increasingly agitated he began yelling things such as "Help!" and "He's gonna kill me!" (App.2, 40.) Timpa again abruptly terminated the call.

Meanwhile, a motorist on Mockingbird Lane also called 911, requesting that police respond because Timpa was "'running up and down the highway on

Mockingbird [Lane,] . . . stopping traffic.' " (App.2.) The motorist stated that she almost struck Timpa (App.40), and that he was "still running up and down the freeway. Cars are just hitting their breaks to keep from hitting him" (ROA.1702). She further reported that Timpa stopped and climbed up a public transit bus. (App.2, 40.) A security guard also called 911, echoing the motorist's report that Timpa was running through traffic, had stopped and climbed up a bus, and was yelling that someone was trying to kill him. (App.2-3, 40.)

DPD dispatched Petitioners to the scene to respond to a "CIT" call. (App.3, 41.) CIT (crisis intervention training) calls involve subjects suspected of experiencing mental health issues. (*Id.*) Dispatchers informed Petitioners that Timpa was a "white male with schizophrenia off his medications." (App.3.) Sergeant Kevin Mansell was the first to arrive. (App.4.) Mansell immediately requested backup and an ambulance, stating Timpa was "in traffic . . . and he's definitely going to be a danger to himself." (App.4, 41.) At this point, two private security guards had Timpa in handcuffs in the grass between the street and the sidewalk. (App.4.) Though handcuffed, "Timpa was 'thrashing' on the ground, 'kicking in the air [at] nobody that's there,' and 'hollering, 'Help me, help me, God help me.'' " (*Id.*) Timpa kept trying to roll into the street and successfully did so at least once, requiring Mansell and the security guards to physically return Timpa to the grass. (App.4-5, 41.)

Police Officers Dustin Dillard and Danny Vasquez were the next officers on scene, arriving at the same

time as paramedics. (App.5, 42.) Senior Corporal Raymond Dominguez and Police Officer Domingo Rivera arrived shortly thereafter. (App.5.) Everything that transpired following Dillard, Vasquez, and Rivera's arrival was captured on video by bodycams worn by the three officers. (*Id.*)

As Dillard and Vasquez approached, Timpa continued to yell things like "Help me!" and "You're gonna kill me!" (App.5, 42.) The two officers attempted to calm Timpa verbally. (App.5.) However, after Timpa once again rolled toward the street, Dillard and Vasquez moved in to hold Timpa in place. (*Id.*) Dillard held Timpa prone on his stomach, placing one knee on Timpa's back and one knee on the ground.[1] (App.5, 42.) Dillard also placed his hands at various places along Timpa's shoulders depending on the nature of Timpa's resistance in the moment. (*Id.*) Including the weight added by his protective vest and duty belt, Dillard weighed 190 pounds (App.5), which was less than Timpa, who weighed 223 pounds (ROA.2227). Dillard ultimately held Timpa in this position for approximately fourteen minutes (App.5), which is how long it took for Petitioners to subdue Timpa and for paramedics to complete their assessment and treatment.

Throughout his restraint, Timpa yelled and struggled. (App.6, 43-44.) He rocked his body back and forth, lifted his shoulders, bucked his body, and kicked his

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[1] Vasquez also briefly placed his knee on Timpa's back (App.5, 42), but Vasquez's use of force in this manner is not at issue.

legs to the point his shorts fell below his buttocks. (*See id.*) Timpa continued shouting things such as "I can't live," "Help me," and "We're gonna die!" (*Id.*) Dillard tried to reassure Timpa, telling him he was "ok," that he was "going to be all right," and that Petitioners were there to get Timpa help. Suspecting that Timpa was under the influence of drugs, Dillard repeatedly asked Timpa what drugs he had taken. (App.5-6, 42.) At one point, Timpa promised he would cease resisting, exclaiming, "Ok, I stop! I stop, I stop," but he quickly resumed struggling. (App.43.)

Once Dillard began restraining Timpa in the prone position, paramedics immediately attempted to assess his vitals. (App.6, 43.) However, Timpa's ongoing resistance thwarted the paramedics' first attempt to render aid. (App.6, 43.) Petitioners therefore continued to try and restrain Timpa. Vasquez switched out the security guard's handcuffs for a pair of DPD-issued handcuffs "with some difficulty because of Timpa's continued flailing." (App.6, 43-44.) Meanwhile, Dominguez and Rivera placed a pair of zip cuffs on Timpa's feet and positioned his feet underneath a bench to stop him from kicking. (*Id.*) After securing Timpa's feet, Rivera left the scene to locate Timpa's car. (App.7.) Amid the fracas, Mansell asked the paramedics if they could administer a sedative. (ROA.1995.) From the time of Timpa's initial restraint, it took Petitioners roughly seven minutes to restrain Timpa's hands and feet. (*See* App.7, 44.)

Paramedic James Flores approached for a second attempt at treating Timpa. At this juncture—seven

minutes into Timpa's restraint—Dillard sought input from the paramedics, asking: "Do you want me to roll him over?" (App.7, 44.) Flores instructed Dillard to keep Timpa in place: "Before y'all move him, if I can just get right here and see if I can get to his arm." (App.7, 44.) Dillard shifted his knee to Timpa's shoulder and right arm. (App.44.) Flores placed a blood pressure cuff on Timpa's left arm and a pulse oximeter on Timpa's finger. (*Id.*) Timpa repeatedly screamed "Help me!" as Flores assessed Timpa's vitals. (*Id.*) Timpa's pulse was at 100 beats per minute, and his blood pressure was at 150/90. (*Id.*) These numbers were within normal range, and Flores was not "alarmed or alerted" by them. (App.44-45.) Flores then stepped away to prepare a sedative. (App.45.)

Dillard continued to restrain Timpa as Flores prepared the sedative. Mansell returned to his vehicle to check whether there were any warrants for Timpa's arrest and to obtain an emergency contact number. (App.7.) Dominguez and Vasquez stood near Dillard and Timpa. A security guard standing nearby commented, "This ain't just normal crazy man. He's on something." (App.45.) Dillard and Vasquez stated that they too believed Timpa was under the influence of drugs. (*Id.*) Curtis Burnley, the second paramedic on scene, asked the officers whether they thought Timpa would be able to walk to the ambulance. (*Id.*) Dillard responded, "I highly doubt it." (*Id.*) Vasquez remarked that Timpa was "a kicker" (*id.*), and Dominguez acknowledged that Timpa had kicked Dominguez "a couple of times" during his struggle (ROA.2001).

Timpa eventually quieted. (App.7.) Dominguez asked, "Tony, are you still with us?" (App.7, 45.) Dillard confirmed Timpa was still breathing and stated he believed Timpa had fallen asleep because Timpa was snoring. (App.8, 45.) Dominguez and Vasquez expressed their surprise that Timpa had suddenly fallen asleep and made a few comments in jest along the lines of "Hey, time for school! Wake up!" (*Id.*)

Around this time, Flores returned and administered the sedative. (*Id.*) Timpa's head jerked upon receiving the injection. (*Id.*) Dillard released Timpa and stood up promptly upon Flores's administration of the sedative. (*Id.*) In total, it took Flores roughly seven minutes to check Timpa's vitals and to prepare and administer the sedative.

When the paramedics loaded Timpa onto the gurney, they discovered he was nonresponsive. (App.8, 46.) They initiated CPR, but sadly their efforts were unsuccessful, and Timpa perished. (App.46.) The medical examiner conducted an autopsy, which revealed the presence of cocaine in Timpa's blood. (App.8.) She determined that the mechanism of death was "excited delirium syndrome," and that Timpa "died as a result of sudden cardiac death due to the toxic effects of cocaine and physiologic stress associated with physical restraint." (*Id.*) The medical examiner further concluded that "due to '[Timpa's] 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 a majority of the restraint).'" (App.47.) A forensic pathologist retained as

an expert witness by Respondents opined that Timpa died as a result of mechanical asphyxia. (*Id.*)

II. Procedural Background

Respondents sued Petitioners and Rivera under 42 U.S.C. § 1983, alleging, as relevant here, that Dillard violated Timpa's Fourth Amendment right to be free from excessive force and that Mansell, Dominguez, Vasquez, and Rivera were liable as bystanders who failed to intervene. (App.9.)

1. The district court granted summary judgment to Petitioners on qualified immunity grounds. (App.50-70.) Assuming, without deciding, that Timpa's restraint offended the Fourth Amendment (App.51), the district court held Petitioners were entitled to qualified immunity because "there was no law clearly establishing Defendants' conduct as a constitutional violation prior to August 10, 2016." (App.9, 51.)

The killing of George Floyd occurred just over one month before the district court's entry of summary judgment for Petitioners. Therefore, at the outset of its decision, the district court noted the ongoing debate concerning prone restraints precipitated by Floyd's death, stating it was "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 newspaper." (App.39

n.1.) And that precedent did not clearly establish that Dillard's restraint of Timpa violated the Constitution.

The district court first considered whether binding authority clearly proscribed Dillard's restraint of Timpa, focusing its analysis on "the four most analogous Fifth Circuit cases involving prone restraints that were decided prior to August 2016[.]" (App.52.) Respondents invoked "the fourth and oldest of these cases, *Gutierrez v. City of San Antonio*, [139 F.3d 441 (5th Cir. 1998)], to argue that clearly established Fifth Circuit law prohibit[ed Dillard's] restraint used on Timpa." (App.53.) In *Gutierrez*, the Fifth Circuit issued a "very limited" holding that fact issues precluded summary judgment on qualified immunity grounds "when a drug-affected person in a state of excited delirium is hog-tied and placed face down in a prone position." 139 F.3d at 451. Noting that "the Fifth Circuit explicitly cabined *Gutierrez*'s holdings to its narrow facts, both in that case and in subsequent cases" (App.54), the district court found *Gutierrez* "inapplicable" (App.53).

The district court then reviewed the three remaining "most analogous Fifth Circuit cases" on prone restraints. (App.54-56.) Those cases, *Pratt v. City of Houston*, 822 F.3d 174 (5th Cir. 2016), *Wagner v. Bay City*, 227 F.3d 316 (5th Cir. 2000), and *Castillo v. City of Round Rock*, 177 F.3d 977, 1999 WL 195292 (5th Cir. Mar. 15, 1999), held the restraints at issue presented no Fourth Amendment violation. (App.54-56.) Concluding that "[o]n 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*" (App.56.), the district court held Petitioners were entitled to qualified immunity (App.56-62). In reaching this conclusion the court emphasized that Timpa was never hog-tied, which was the "primary factor" in *Gutierrez*. (App.58.)

Having concluded that no binding authority clearly proscribed Timpa's restraint, the district court turned to whether there was a robust consensus of persuasive authority that did so. (App.62-64.) The court looked to the Fifth Circuit's instruction that "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." (App.62 [quoting *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011) (en banc)].) In light of the Eighth Circuit's decision in *Lombardo*, the court held that "at best there is a circuit split on the constitutionality of prone restraints when employed as [Petitioners] did here" (App.63-64), such that there was not a robust consensus of persuasive authority rising to clearly established law.

Finally, because the district court found that there was no clearly established law rendering Timpa's restraint unconstitutional, it held Mansell, Dominguez, and Vasquez could not have had a clearly established obligation to intervene. (App.67-68.)

2. Respondents appealed, and the Fifth Circuit reversed as to Petitioners. The Fifth Circuit first

addressed the question of whether Timpa's restraint offended the Fourth Amendment "to provide clarity and guidance to law enforcement." (App.12.) The court deemed Timpa's restraint unconstitutional on two grounds. First, though taking no issue with the first nine minutes of Timpa's restraint, the court held that fact issues existed such that "[a] jury could find that Timpa was subdued by nine minutes into the restraint," which rendered the final moments of Timpa's restraint unconstitutional under the factors set forth in *Graham v. Connor*, 490 U.S. 386 (1989). (App.12-18.)

Alternatively, the Fifth Circuit held there were fact issues over whether prone restraint constitutes "deadly force," which the Fifth Circuit defined as force that carries "'with it a substantial risk of causing death or serious bodily harm.'" (App.18-22 [quoting *Gutierrez*, 139 F.3d at 446].) Reasoning that under *Tennessee v. Garner*, 471 U.S. 1 (1985), any force that satisfies the definition of "deadly force" can only be implemented if the subject posed a threat of serious harm, the Fifth Circuit held that Timpa's restraint would be an unconstitutional application of deadly force if a jury were to conclude (1) prone restraint constitutes deadly force, and (2) Timpa no longer presented a serious threat of harm following the first nine minutes of his restraint. (App.22-23.)

As to qualified immunity, the Fifth Circuit held three of its prior decisions[2] clearly established the

[2] The Court has yet to decide whether precedents out of the circuit courts may be relied upon as binding authority for

excessiveness of Dillard's restraint of Timpa: *Bush v. Strain*, 513 F.3d 492 (5th Cir. 2008), *Cooper v. Brown*, 844 F.3d 517 (5th Cir. 2016), and *Darden v. City of Fort Worth*, 880 F.3d 722 (5th Cir. 2018). (App.24-28.) The court found that these cases collectively stood for the broad proposition that "an officer's continued use of force on a restrained and subdued subject is objectively unreasonable." (App.24.) From this general premise, the court announced a new and previously unarticulated rule of law within the Fifth Circuit: that it is "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." (App.23.)

Finally, with respect to the bystander liability claims against Vasquez, Dominguez, Mansell, and Rivera, the Fifth Circuit pointed out its precedents recognized a claim for bystander liability when an 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.'" (App.33-34 [quoting *Joseph ex rel. Estate of Joseph v. Bartlett*, 981 F.3d 319, 343 (5th Cir. 2020)].) Because it was undisputed that Rivera was no longer in the vicinity of Timpa's restraint during the portions of the restraint with which the court took issue, the court affirmed the district court's summary

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purposes of qualified immunity. *District of Columbia v. Wesby*, 138 S. Ct. 577, 591 n.8 (2018) (citing *Reichle v. Howards*, 566 U.S. 658, 665-66 (2012)).

judgment in favor of Rivera. (App.35.) However, the court reversed as to the bystander liability claims against Mansell, Vasquez, and Dominguez, because it was undisputed that Vasquez and Dominguez were present for the entirety of Timpa's restraint and the court found fact issues existed over whether Mansell was able to witness the full duration of the restraint. (App.34-36.) The court held that its decision in *Hale v. Townley*, 45 F.3d 914 (5th Cir. 1995), provided Vasquez, Dominguez, and Mansell with fair notice that they had a duty to intervene such that they were not entitled to qualified immunity. (*Id.*)

Petitioners filed a petition for rehearing en banc on December 29, 2021, which the Fifth Circuit denied on January 27, 2022. (App.71-72.)

REASONS FOR GRANTING THE PETITION

I. This case is an ideal vehicle for the Court to answer the exceptionally important questions it left unaddressed in *Lombardo* and for which the conflicting decisions of the circuit courts fail to provide predictable guidance.

Although authorities' use of prone restraints has recently become a matter of public debate, such restraints have long been a common policing tool. "Placing a combative person in the prone position occurs numerous times daily throughout the country without the incident resulting in serious injury to the person,

let alone a sudden death." Darrell L. Ross & Michael H. Hazlett, *A Prospective Analysis of the Outcomes of Violent Prone Restraint Incidents in Policing*, 2 Forensic Research & Criminology Int'l J. 16, 16 (2016), *available at* https://medcraveonline.com/FRCIJ/FRCIJ-02-00040.pdf. Given the frequency of their use, prone restraints result in injury or death on only "statistically rare" occasions. *Id.* Though statistically rare, incidents in which prone restraint results in injury to a person "appear[] with unfortunate frequency in the reported decisions of the federal courts[.]" *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1063 (9th Cir. 2003). The Court has yet to opine on the reasonableness of prone restraints under the Fourth Amendment, and it is critically important that the Court do so as even a cursory review of cases decided by the circuit and district courts demonstrates there are no predictable standards for law enforcement officers to measure whether a court would deem a given prone restraint reasonable. Indeed, even while denying Petitioners' qualified immunity in this matter, the Fifth Circuit acknowledged that law enforcement requires "clarity and guidance" in this arena. (App.12.) *See Estate of Aguirre v. City of San Antonio*, 995 F.3d 395, 424 (5th Cir. 2021) (Higginson, J., concurring) ("clearly established law" on prone restraints "lacks clarity in some respects"); *Weigel v. Broad*, 544 F.3d 1143, 1169, 1176 (10th Cir. 2008) (O'Brien, J., dissenting) ("caselaw from other circuits [is] conflicting" and provides "no coherent guidance").

As it currently exists, the jurisprudence on prone restraints out of the circuit courts exemplifies varying and unpredictable outcomes, resulting in no reliable direction to officers who must make split-second judgments in the heat of the moment. *Compare, e.g.*, *Hutcheson v. Dallas County*, 994 F.3d 477 (5th Cir. 2021) (no constitutional violation), *cert. denied*, 142 S. Ct. 564 (2021); *Pratt*, 822 F.3d at 174 (same); *Cook v. Bastin*, 590 F. App'x 523 (6th Cir. 2014) (same); *Borndstad v. Honey Brook Township*, 211 F. App'x 118 (3d Cir. 2007) (same); *Giannetti v. City of Stillwater*, 216 F. App'x 756 (10th Cir. 2007) (same); *Wagner*, 227 F.3d at 316 (same); *Castillo*, 1999 WL 195292 (same); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir 1997) (same), *with Hanson v. Best*, 915 F.3d 543 (8th Cir. 2019) (qualified immunity applies); *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001) (same), *and Aguirre*, 995 F.3d at 395 (qualified immunity overcome); *McCue v. City of Bangor*, 838 F.3d 55 (1st Cir. 2016) (same); *Abdullahi v. City of Madison*, 423 F.3d 763 (7th Cir. 2005) (same); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893 (6th Cir. 2004) (same); *Drummond*, 343 F.3d at 1052 (same); *Gutierrez*, 139 F.3d at 441 (same).

The disparate outcomes reached in the foregoing authorities demonstrate that officers' use of prone restraint is an area in which the "result depends very much on the facts of each case[,]" *Brosseau v. Hogan*, 543 U.S. 194, 201 (2004) (per curiam), creating, at best, a "hazy legal backdrop" for the police and the public at large to draw upon, *Mullenix v. Luna*, 577 U.S. 7, 14

(2015) (per curiam). This murky legal landscape reveals myriad factors that may play into the reasonableness of any given prone restraint, including whether the suspect (1) resisted, (2) was hog-tied, (3) had weight applied to him, (4) expressed difficulty breathing or displayed physical indicia of asphyxia, (5) was under the influence of drugs or experiencing excited delirium, and (6) received treatment from paramedics. Courts must of course consider each of these factors "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. Yet courts differ wildly in their emphasis as well as their application of certain factors, necessitating clarification from the Court.

For example, the courts are split on how they treat officers' perception that a suspect being held in the prone position is resisting. Here, the Fifth Circuit held that whether Timpa's resistance eventually became a panicked reaction to his alleged inability to breathe was a question of fact for the jury to decide. (App.16-18.) *See Abdullahi*, 423 F.3d at 771 ("Viewed in this light, Mohamed's undisputed attempts to 'squirm' or arch his back upward while he was being restrained may not constitute resistance at all, but rather a futile attempt to breathe. . . ."). But this was a stark reversal from the Fifth Circuit's previous position, where, mindful that the facts must be viewed from the perspective of a reasonable officer on the scene, the court recognized: "That [a subject'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." *Castillo*, 1999 WL 195292, at *3; *see Lombardo v. St. Louis City*, 361 F. Supp. 3d 882, 897 (E.D. Mo. 2019) ("[T]he Court finds that it was not established as a matter of law that the Officers should have interpreted Mr. Gilbert's actions of kicking, thrashing, and otherwise fighting as 'air hunger' instead of resistance."), *aff'd*, 956 F.3d 1009 (8th Cir. 2020), *rev'd on other grounds*, 141 S. Ct. 2239 (2021). (*See* App.60-61.)

Similarly, the circuits diverge on whether it is reasonable for police to rely on paramedics who assess the suspect during his restraint. The Eighth Circuit has recognized that it is reasonable for officers not to conclude that a suspect they held prone and hog-tied for an extended period was experiencing excited delirium when paramedics were on scene and had performed a medical assessment. *Hanson*, 915 F.3d at 549. Yet here, the Fifth Circuit held the paramedics' presence, assessment of Timpa, and instruction to Dillard did not factor into the "calculus of objective unreasonableness" at all. (App.17 n.5.) Not only does the Fifth Circuit's conclusion conflict with that of the Eighth Circuit in *Hanson*, but it also ignores the central role paramedics played in Timpa's restraint.

Petitioners seized Timpa to get him medical treatment. The paramedics' initial attempt at treating Timpa was frustrated by Timpa's resistance. (App.6, 43.) After Timpa's feet were restrained, Dillard specifically asked the paramedics if he should roll Timpa

over, and they instructed Dillard to hold Timpa in place. (App.7, 44.) Dillard knew the paramedics were going to administer a sedative because he heard Mansell ask them to do so. (ROA.1995.) When paramedics assessed Timpa's vitals, which occurred between seven and nine minutes into Timpa's restraint, Timpa's vitals were within normal rage. (App.44.) Even Respondents' expert pathologist testified that Timpa's vitals did not signal he was in medical distress. (ROA.2577:4-8.) And given Timpa's demonstrated "'on again, off again' commitment to cease resisting," *Pratt*, 822 F.3d at 184, it was reasonable for Dillard to maintain his hold on Timpa until the paramedics prepared and administered the sedative. Respondents' own use of force expert conceded as much, when upon being asked whether it was reasonable for a police officer to hold a subject still as paramedics gave an injection, he testified: "I think a reasonable officer on the scene faced with that predicament would defer to the direction of paramedics on the scene, what they would prefer, or how they would prefer the officers proceed so . . . they can do their job." (ROA.2906:12-20.)

Simply put, law enforcement routinely uses prone restraint as a means of bringing subjects under control. Ross & Hazlett, at 16. Although instances of injury associated with prone restraint are statistically rare, *id.*, recent tragic events have placed a spotlight on this method of restraint. Twenty-one states joining as amici to urge the Court's review in a similar case put it best: "Circuits are in disarray over whether and to what extent police control techniques resulting in positional

asphyxia violate clearly established Fourth Amendment rights." Amicus Br. of Indiana, et al., in *Broad v. Weigel*, No. 08-1128, at 3-4. Such disarray warrants the Court's attention on this matter of preeminent public concern.

II. The Fifth Circuit's decision defies the Court's precedents and is plainly wrong on both the merits and on qualified immunity.

1. The Fifth Circuit held that Timpa's restraint was unconstitutional as both an unreasonable use of deadly force and, alternatively, excessive force. Neither finding comports with this Court's decisions.

The Fifth Circuit's finding that Timpa's restraint was unreasonable under *Garner* directly conflicts with the Court's decision in *Scott v. Harris*, 550 U.S. 372 (2007). The Fifth Circuit treats "[c]laims that law enforcement used deadly force . . . 'as a special subset of excessive force claims.'" (App.12 [quoting *Aguirre*, 995 F.3d at 412].) It defines "deadly force" as any force that "'carr[ies] with it a substantial risk of causing death or serious bodily harm.'" (App.19 [quoting *Gutierrez*, 139 F.3d at 446].) Relying on *Garner*, the Fifth Circuit deems any mechanism of force falling within its definition of deadly force as unreasonable per se unless there is "'probable cause to believe that the suspect poses a threat of serious physical harm.'" (App.22 [quoting *Mason v. Lafayette City-Par. Consol. Gov't*, 806 F.3d 268, 275 (5th Cir. 2015)].) Because the Fifth Circuit treats the question of whether a specific mechanism of

force meets the definition of "deadly force" as a question of fact, (App.19 [quoting *Flores v. City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004)]), this means that any time a claimant comes forward with *any* evidence to show that a mechanism of force *may* cause death or serious injury, the Fifth Circuit deems that force deadly force tantamount to shooting the suspect. Here, relying in large part on a Department of Justice bulletin not contained in the record on appeal (App.16 n.3, 19-20), the Fifth Circuit found fact issues existed over whether prone restraint combined with weight on a subject is deadly force and that, under *Garner*, Dillard violated the Fourth Amendment if a jury determines that Timpa was no longer a threat to Petitioners or motorists on Mockingbird Lane in the final moments of his restraint (App.19-23).

The Fifth Circuit's continued treatment of *Garner* as creating a special subset of deadly force cases runs afoul of this Court's precedent:

> *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." *Garner* was simply an application of the Fourth Amendment's "reasonableness test" . . . to the use of a particular type of force in a particular situation. . . . Whatever *Garner* said about the factors that *might have* justified shooting the suspect in that case, such "preconditions" have scant applicability to this case, which has vastly different facts. . . . Whether or not [petitioner's] actions constituted application of "deadly force," all that

> matters is whether [petitioner's] actions were reasonable.

Scott, 550 U.S. at 382-83 (citations omitted). As *Scott* states, the ultimate question under the Fourth Amendment is that of reasonableness, which is "'not capable of precise definition or mechanical application' . . . [and] requires careful attention to the facts and circumstances of each particular case." *Graham*, 490 U.S. at 396 (citation omitted). The Fifth Circuit's mechanical application of the *Garner* rule in the different circumstances present here directly violates *Scott*. Accordingly, this case warrants review to enforce the Court's holding in *Scott*.

The Fifth Circuit likewise erred in alternatively holding that Timpa's restraint was excessive force under *Graham*. "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of '"the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the countervailing governmental interests at stake.'" *Graham*, 490 U.S. at 396 (quoting *Garner*, 471 U.S. at 8). This determination requires careful regard for all circumstances, including, but not limited to, "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest." *Id.* (citing *Garner*, 471 U.S. at 8-9). The Fifth Circuit found the first *Graham* factor militated against the use of any force because Petitioners seized Timpa to get him medical assistance and not for any criminal investigatory

reason. (App.12-13.) But this finding took an overly narrow view of Petitioners' justification for seizing Timpa.

Police are frequently called upon to assist individuals suffering from mental illness even when such individuals are not suspected of criminal wrongdoing. Timpa's interference with traffic on Mockingbird Lane undoubtedly amounted to minor criminal infractions, *see* Tex. Penal Code § 42.03; Tex. Transp. Code §§ 552.001-.006, but Petitioners were there not to arrest Timpa for any crime but to seize him as part of their community caretaking function, *see* Tex. Health & Safety Code § 573.001. The Court has long recognized that, in addition to enforcing criminal laws, police perform community caretaking functions. *Caniglia v. Strom*, 141 S. Ct. 1596, 1598 (2021) (citing *Cady v. Dombrowski*, 413 U.S. 433 (1973)). Although the Court has only addressed the reasonableness of searches conducted pursuant to authorities' role as community caretakers, *see generally id.*, the circuit courts have recognized that seizures will occur in the police's capacity as community caretakers and that reasonable force may be used to effect such seizures. *Winters v. Adams*, 254 F.3d 758, 762-64 (8th Cir. 2001) (citing *United States v. King*, 990 F.2d 1552, 1560-61 (10th Cir. 1993); *United States v. Rideau*, 949 F.2d 718, 720 (5th Cir. 1991), *rev'd on other grounds*, 969 F.2d 1572 (5th Cir. 1992) (en banc)). Indeed, Texas law explicitly authorizes the seizure of individuals who, because of their "mental illness," present "a substantial risk of serious harm to [themselves] or to others unless [they are]

immediately restrained." Tex. Health & Safety Code § 573.001.

Timpa's persistent attempts to reenter the street even after being handcuffed as well as his refusal to engage with Petitioners verbally necessitated his physical restraint. The duration of Timpa's restraint cannot be divorced from the purpose for which he was restrained, namely, to get him medical attention. It was Timpa's resistance that thwarted paramedics' initial attempt to assess him and render aid, and Dillard only continued holding Timpa prone after his legs had been restrained because at that time—seven minutes into the restraint (a point when even the Fifth Circuit found Timpa still to be resisting)—paramedics asked Dillard to keep Timpa in place. Once paramedics began actively assessing and treating Timpa, it was reasonable for Dillard to hold him in place at their request and to believe they would alert him should Timpa display any signs of medical distress. *See Hanson*, 915 F.3d at 549.

2. Even assuming, without conceding, that the final moments of Timpa's restraint offended the Fourth Amendment as the Fifth Circuit held, Dillard is entitled to qualified immunity, as it was not clearly established that Dillard's restraint of Timpa was unconstitutional as of August 2016. Time and again, the Court has stressed that qualified immunity "'gives government officials breathing room to make reasonable but mistaken judgments,' and 'protects all but the plainly incompetent or those who knowingly violate the law.'" *Messerschmidt v. Millender*, 565 U.S. 535, 546

(2012) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)). Qualified immunity requires that a party seeking damages demonstrate that the right he claims to have been violated be one that "'is sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix*, 577 U.S. at 11 (quoting *Reichle*, 566 U.S. at 664). In other words, "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* at 12 (quoting *al-Kidd*, 563 U.S. at 741). "'[D]efin[ing] clearly established law at a high level of generality' . . . avoids the crucial question whether the official acted reasonably under the circumstances he or she faced." *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014) (quoting *al-Kidd*, 563 U.S. at 742). Thus, the Court has "repeatedly told courts not to define clearly established law at too high a level of generality." *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021) (per curiam). "It is not enough that a rule be suggested by then-existing precedent; the 'rule's contours must be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted."'" *Id.* (quoting *Wesby*, 138 S. Ct. at 590).

To overcome qualified immunity, the plaintiff must identify "controlling authority" or "a robust 'consensus of cases of persuasive authority'" holding the specific conduct in question unlawful. *Wesby*, 138 S. Ct. at 589-90 (quoting *al-Kidd*, 563 U.S. at 741-42). Such authority must provide a high degree of specificity, and factual specificity is "'especially important in the Fourth Amendment context,' where it is 'sometimes difficult

for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'" *Bond*, 142 S. Ct. at 11-12 (quoting *Mullenix*, 577 U.S. at 12).

The Fifth Circuit found that its own precedents[3]—specifically, *Bush*, *Cooper*, and *Darden*—were sufficient to clearly proscribe Timpa's restraint. (App.23-33.) Under this Court's precedents, these decisions plainly fail to have put Dillard on fair warning that his restraint of Timpa violated the Fourth Amendment.

As a threshold matter, neither *Cooper* nor *Darden* can overcome Dillard's qualified immunity because they were decided in December 2016 and January 2018, respectively, *Darden*, 880 F.3d at 722; *Cooper*, 844 F.3d at 517, well *after* the events occurring on August 10, 2016, that are at issue here. "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law *at the time of the conduct*." *Brosseau*, 543 U.S. at 198 (emphasis added). As Timpa's restraint predated *Cooper* and *Darden*, they are inapplicable to the qualified immunity inquiry in this case, and the Fifth Circuit erred in invoking them.

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[3] The Fifth Circuit hinged its qualified immunity finding exclusively upon its precedents and did not deem Timpa's restraint clearly unconstitutional based upon a clear consensus of persuasive authority. No such consensus exists, as demonstrated in section I, *supra*. Petitioners reserve the right to address the lack of consensus amongst the nonbinding authorities in its merits brief, should the Court request one.

That leaves *Bush*. In that case, the Fifth Circuit held that a police officer who violently slammed a handcuffed and compliant suspect's face into the window of a car resulting in injuries to her jaw and broken teeth clearly used excessive force. *Bush*, 513 F.3d at 495-96, 502. Dillard never slammed, punched, or otherwise struck Timpa. "Suffice it to say, a reasonable officer could miss the connection between that case and this one." *Bond*, 142 S. Ct. at 12.

Further, that the Fifth Circuit's reliance upon the factually distinguishable *Bush* was misplaced is glaringly apparent when one considers that court's preexisting precedents specifically concerning prone restraints. The Fifth Circuit all but ignored these decisions. In contrast, the district court appropriately hinged its finding that Dillard was entitled to qualified immunity upon this more applicable body of law.

Prior to August 2016, the Fifth Circuit had held a subject's prone restraint clearly violated the Fourth Amendment only once. *Gutierrez*, 139 F.3d at 441. In *Gutierrez*, the court issued a "very limited" holding, recognizing that fact issues precluded summary judgment on qualified immunity grounds when (1) a drug-affected suspect experiencing excited delirium is (2) hog-tied and (3) restrained in the prone position. 139 F.3d at 451. To date, the Fifth Circuit has never found that *Gutierrez* applied such that other prone restraints were clearly unconstitutional unless the restraint satisfied all three elements of *Gutierrez*'s holding. Indeed, the Fifth Circuit has repeatedly emphasized the "very limited" nature of *Gutierrez*'s reach, frequently holding

there was *no constitutional violation*—let alone a clearly established one—in factual situations where officers employed prone restraints that did not meet all three elements of *Gutierrez*'s limited holding. *See Pratt*, 822 F.3d at 174 (no officer awareness that suspect was under the influence drugs or alcohol); *Khan v. Normand*, 683 F.3d 192 (5th Cir. 2012) (no officer awareness that subject was under the influence of methamphetamine); *Hill v. Carroll County*, 587 F.3d 230 (5th Cir. 2009) (no drugs); *Wagner*, 227 F.3d 316 (suspect not hog-tied and no drugs); *Castillo*, 1999 WL 195292 (suspect not hog-tied); *contra Aguirre*, 995 F.3d at 395; *Goode v. Baggett*, 811 F. App'x 227 (5th Cir. 2020). Tellingly, although Respondents relied upon *Gutierrez* for their argument that Dillard is not entitled to qualified immunity in both the district court and the court of appeals, the Fifth Circuit did not find that *Gutierrez* overcame Dillard's qualified immunity. (App.23-33.)

Following *Gutierrez*, the Fifth Circuit twice held that officers that did not hog-tie but restrained suspects in the prone position did not violate the suspect's Fourth Amendment rights, even when the officers applied pressure upon the suspect's neck or back. *Wagner*, 227 F.3d at 319-24; *Castillo*, 1999 WL 195292, at *1-2.

First, in *Castillo*, officers encountered a subject, Castillo, who, like Timpa, had a history of mental illness and was interfering with traffic. 1999 WL 195292, at *1. Officers Kincaide and Ledesma responded to the call. *Id.* Upon their arrival, Kincaide "attacked"

Castillo, resulting in a struggle on the ground. *Id.* What happened next is much like the facts at issue here:

> Officer Ledesma arrived and assisted Officer Kincaide, together with citizen bystanders, in restraining Castillo in the prone position on the ground, eventually handcuffing his hands behind his back. Corporal Jacobs arrived after Castillo was handcuffed but while he was still kicking and yelling. Officer Kincaide and a male bystander climbed atop Castillo as the three officers put flex cuffs on Castillo's legs. All told, Officer Kincaide and the Good Samaritan remained on Castillo's back for four to six minutes. During the struggle, Officer Kincaide shoved his knee in the back of Castillo's neck and kept it there for some five to ten minutes. At one point, Castillo exclaimed in Spanish that he was going to die.

Id. Castillo died upon suffering a "cardiorespiratory arrest during the positional asphyxia that resulted from being laid on the ground, handcuffed and in the prone position, for four to six minutes with the weight of two adult males on his back." *Id.* at *2. Confronted with these facts, the Fifth Circuit, held there was no constitutional violation because "'[r]estraining a person in the prone position is not, in and of itself, excessive force when the person restrained is resisting arrest.'" *Id.* at *3 (quoting *Phillips*, 123 F.3d at 593).

The Fifth Circuit again found no constitutional violation where officers restrained an arrestee in the prone position and applied significant force to his neck

in *Wagner*, 227 F.3d at 316. There, officers confronted a man trying to steal food from a fast-food restaurant, when the man initiated a physical altercation. *Id.* at 318. Two officers dragged the man outside, pepper sprayed him, placed him in the prone position, and placed him in handcuffs. *Id.* at 319. A witness testified that the arrestee ceased resisting once outside. *Id.* Nevertheless, one of the officers kept "his knee on [the man's] back and 'kept pushing [his] neck and head to the ground with a stick.'" *Id.* The arrestee died as a result. *Id.* at 319, 320 n.3.

The court in *Wagner* held that the officers' actions were reasonable under the Fourth Amendment considering the suspect's initial resistance. *Id.* at 324. Importantly, the court expressly found that *Gutierrez* could not support a finding that the arresting officers violated clearly established law because the suspect in *Wagner* "was not 'hog-tied,' and, as a result, the 'very limited' holding of *Gutierrez*" did not control. *Id.* at 323. And significantly, *Wagner* came to the Fifth Circuit on summary judgment, meaning that, in light of the witness testimony that the suspect stopped resisting once outside, the court in *Wagner* had to assume the suspect was compliant for the duration of the restraint in which officers applied force to his neck and back. Yet, the Fifth Circuit still held there was no constitutional infraction.

Against this legal backdrop, it was reasonable for Petitioners—and Dillard in particular—to conclude that it was lawful to restrain Timpa in the prone

position so long as Timpa was not hog-tied. And it is undisputed that Timpa was never hog-tied.

The Fifth Circuit dismissed *Wagner*'s impact on the qualified immunity analysis by pointing out that the suspect in that case was initially more aggressive than Timpa. (App.31.) Of course, even the Fifth Circuit found Timpa's resistance justified the first nine minutes of Timpa's restraint. (*See* App.7, 14, 18, 22.) And it was reasonable for Dillard to believe the remaining moments of Timpa's restraint was constitutional in light of the Fifth Circuit's decision in *Wagner*, where that court held no constitutional violation occurred when the suspect was compliant for the full duration of the time in which officers held him prone and applied pressure to his neck and back. Dillard's actions were all the more reasonable by virtue of the fact that seven minutes into the restraint he asked the paramedics if he should roll Timpa over. The paramedics instructed Dillard not to do so, and there is no authority that exists stating it is unreasonable for a police officer to take input from paramedics on how a suspect is to be restrained while the paramedics render aid—especially when the suspect is being restrained specifically for the purpose of getting him treatment.

Ultimately, even if the Fifth Circuit were correct in deeming Timpa's restraint unreasonable, there can be no doubt that the law did not clearly proscribe Dillard's restraint of Timpa. *See Lombardo*, 361 F. Supp. 3d at 914 ("While the law on the use of force in situations involving prone restrain [sic] may ultimately move toward the direction Plaintiffs suggest, the law

as of December 8, 2015, was not clearly established."). The Fifth Circuit conceded it was necessary to "provide clarity and guidance to law enforcement" in its decision in this case. (App.12.) It is precisely these situations—where the lack of clarity requires additional guidance—that qualified immunity applies. Review is warranted to enforce the Court's qualified immunity jurisprudence.

III. This case is an ideal vehicle for the Court to address a matter of first impression: whether and under what circumstances law enforcement officers may be subject to liability under 42 U.S.C. § 1983 for another officer's use of excessive force.

The Fifth Circuit reversed the summary judgment in favor of Mansell, Dominguez, and Vasquez, reasoning, to the extent they were present for the full duration of Timpa's restraint, they could be liable as bystanders. (App.33-36.) The Court has never opined on whether officers can be subject to bystander liability under 42 U.S.C. § 1983. Some of the circuit courts, however, have decided that bystander liability claims exist. *E.g.*, *Randall v. Prince George's County*, 302 F.3d 188, 204-05 (4th Cir. 2002); *Hale*, 45 F.3d at 919; *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 207 n.3 (1st Cir. 1990) (citing *Byrd v. Brishke*, 466 F.2d 6, 10-11 (7th Cir. 1972)).

In the Fifth Circuit, a plaintiff can recover on a theory of bystander liability upon showing an 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 (citing *Whitley v. Hannah*, 726 F.3d 634, 646 (5th Cir. 2013)). Other circuits' standards for imposing bystander liability are similar. *E.g.*, *Randall*, 302 F.3d at 204. Standing alone, the circuit courts' elements for establishing bystander liability lack factual specificity and are stated with too broad a level of generality to overcome qualified immunity in the same way that "*Graham*'s and *Garner*'s standards are cast 'at a high level of generality.'" *Rivas-Villegas*, 142 S. Ct. at 8 (quoting *Brosseau*, 543 U.S. at 199). To account for the factual specificity necessary to overcome a bystander officer's qualified immunity, a plaintiff must identify a case in which a bystander officer was held to have a constitutional obligation to intervene under similar circumstances. *Bartlett*, 981 F.3d at 345. Failure to require such a showing would mean that a bystander officer effectively has no independent qualified immunity of her own, as it would impose strict liability based solely upon her presence during another officer's actions. Qualified immunity demands a showing that a bystander actually acquiesced in the constitutional violation, and *that* showing requires the plaintiff to identify a case in which bystander officers were deemed to have a constitutional obligation to intervene under similar circumstances.

Here, the Fifth Circuit held that its decision in *Hale* should have placed Mansell, Vasquez, and Dominguez

on notice that they had a duty to stop Dillard's restraint of Timpa. But *Hale* is so different on its facts that it provides no basis for Mansell, Vasquez, and Dominguez to think they had an obligation to act. In *Hale*, Hale alleged officers from various law enforcement agencies were retaliating against him for having prevailed in a civil suit against local and federal officers. 45 F.3d 916-17. During this retaliatory campaign, three officers approached Hale, asked him to step outside his place of business and, once outside, one of the officers violently beat him. *Id.* at 917, 919. The remaining two officers laughed while encouraging Hale's aggressor to continue the beating. *Id.*

Unlike Hale, Timpa did not suffer a violent assault at the hands of ill-intentioned officers. Neither the Fifth Circuit nor Respondents have identified any case law specific enough to establish that Mansell, Dominguez, and Vasquez had a constitutional obligation to intervene in Timpa's restraint. The Court should grant review to articulate the level of specificity required of case law to impose liability upon bystander officers who are not themselves accused of excessive force.

CONCLUSION

For the foregoing reasons, Petitioners request that the Court grant their petition for a writ of certiorari.

Respectfully submitted,

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