No. 19-1765

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

WILLIAM MCKINNEY
Plaintiff-Appellant,
v.

CITY OF MIDDLETOWN, et. al.,
Defendants-Appellees.

On Appeal from the U.S. District Court for the District of Connecticut

BRIEF FOR THE NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

Scott A. Korenbaum Esq.
14 Wall Street, Suite 1603
New York, NY 10005
(212) 587-0018
scott@korenbaumlaw.com

Lauren Bonds
Eliana Machefsky
National Police Accountability Project
2022 St. Bernard Ave., Suite 310
New Orleans, LA 70116
(504) 220-0401
Legal.npap@nlg.org

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Amicus curiae is the National Police Accountability Project (NPAP), a non-profit § 501(c)(3) corporation formed under the laws of New York. *Amicus curiae* does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF INTEREST[1]

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address misconduct by law enforcement officers through coordinating and assisting civil-rights lawyers. NPAP has approximately 550 attorney members practicing in every region of the United States, including dozens of members who represent clients that have been seriously injured or died from police force other than firearms.

Every year, NPAP members litigate the thousands of egregious cases of law enforcement abuse that do not make news headlines as well as the high-profile cases that capture national attention. NPAP provides training and support for these attorneys and resources for non-profit organizations and community groups working on police and correction officer accountability issues. NPAP also advocates for legislation to increase police accountability and appears regularly as *amicus curiae* in cases, such as this one, presenting issues of particular importance for its members and their clients.

[1] Pursuant to FRAP 29, no counsel for either party authored this brief in whole or in part. No one other than amicus made monetary contributions to its preparation or submission.

SUMMARY OF THE ARGUMENT

The majority panel's decision enlarges the realm of police encounters where less lethal force can be applied for a long enough period to become deadly. In light of the number of deaths that result from prolonged police dog maulings, tasings, and restraint holds, immunizing these forms of force against a subdued individual could lead to more avoidable police killings in the Second Circuit. While the majority's opinion seeks to justify its divergence from other circuits because the officers may have feared a subdued Mr. McKinney would resume resistance, that possibility was equally present in the out-of-circuit cases denying qualified immunity for continued canine force. Finally, the majority opinion is alarming given the prevalence of police brutality against people experiencing mental health crises—a group that is often on the receiving end of unjustifiable police violence. The Court should grant *en banc* reivew on this issue of exceptional importance.

ARGUMENT

I. This Case Raises An Issue of Exceptional Importance Given the Deadly Consequences of Applying "Lesser" Forms of Force for Extended Periods of Time.

While shootings have traditionally dominated the public discourse on police brutality, the murder of George Floyd and killing of Eric Garner have shed a light

on the lethal effects of prolonged application of other forms of force. Many force tactics are relatively safe when used briefly to subdue an individual but become increasingly more deadly the longer that they are applied. By immunizing continued force after an individual is subdued, the panel's decision significantly expands the encounters in which deadly force can be used without legal accountability.

Tasers, canine use of force, and other less-lethal techniques have been recognized as effective means of subduing noncompliant individuals without creating a high risk of death. *See* Brandon Garrett, *et al.*, *A Tactical Fourth Amendment*, 103 Va. L. Rev. 211, 248 (2017). However, long-standing police guidance cautions against the prolonged use of these tactics as the risk of death and serious harm increases the longer an individual is subject to these methods of force. *See, e.g.*, Police Executive Research Forum, *2011 Electronic Control Weapon Guidelines* 13 (2011) (recommending tasing be limited to three ECW cycles or 15 seconds of exposure total to minimize the risk of death or serious of injury);[2] International Association of Chiefs of Police ("IACP"), *Patrol Canines* 12 (May 2015) (noting the risk of serious injury that could result if a canine is not

[2]http://www.policeforum.org/assets/docs/Free_Online_Documents/Use_of_Force/electronic%20control%20weapon%20guidelines%202011.pdf

commanded to disengage as soon as a suspect is subdued).[3] Prone restraint holds, chokeholds, and hogtying also all become more dangerous the longer they are applied. *See, e.g.*, IACP, *The Prone Restraint Still A Bad Idea*, 10 Pol'y Rev. 1 (1998) ("when it is necessary to use the weight of several officers to subdue an individual for handcuffing, the arrestee should be freed from that weight as soon as possible"). A review of headlines and case law reveals how frequently people die when officers continue using force against a subdued suspect. Several people have died in recent years from extended police dog maulings. *See, e.g.*, Melissa Brown, *A Police Dog Killed Joseph Pettaway. His Family Now Fights for Bodycam Footage*, Montgomery Advertiser (Oct. 1, 2020) (Alabama man died from lacerated femoral artery after officer allowed K9 to attack him for two minutes);[4] Amber Ruch, *Mo. State Highway Patrol reviewing Kennett arrest after suspect dies on the way to the hospital*, KFVS 12 News (Aug. 31, 2022);[5] Megan Gallegos, *Cops Still on the Hook for Deadly Dog Bite*, Courthouse News (Jun. 18, 2013).[6] Taser deaths are also not uncommon when a person is tased for too long. Jay Croft and Kay Jones, *2 Oklahoma officers are charged with second-degree murder in*

[3] https://www.theiacp.org/sites/default/files/2020-06/Patrol%20Canine%20FULL%20-%2006232020.pdf
[4]https://www.montgomeryadvertiser.com/story/news/2020/10/01/joseph-pettaway-alabama-police-dog-family-fight-body-cam-footage/5802839002/
[5] https://www.kfvs12.com/2022/08/31/kennett-man-taken-into-custody-dies-way-hospital/
[6] https://www.courthousenews.com/cops-still-on-hook-for-deadly-dog-bite/

man's 2019 death, CNN (July 4, 2020) (man died after he was tased dozens of times over nine minutes);[7] *Batchel v. Taser, Inc.*, 747 F.3d 965, 969 (8th Cir. 2014) (young man died after being "extended" tasing in his chest); *Jones v. Las Vegas Metro. Police Dep't*, 873 F.3d 1123,1131 (9th Cir. 2017) (plaintiff died after being subjected to repeated tasings for over 90 seconds); Taylor Dobbs, *Two Years After Son's Stun Gun Death Mason's Mother Sues*, Vermont Public Radio (Jun. 18, 2014).[8] Additionally, dozens of deaths that have resulted from overly long applications of restraint holds. Chris Vanderveen, *At least 121 people died while held prone. Why?*, 9News, (Jun. 25, 2021);[9] *Lombardo v. City of St. Louis*, 141 S. Ct. 2239, 2241 (2021); *Walton v. Gomez*, 745 F.3d 405, 425 (10th Cir. 2014)(collecting cases); *Coley v. Lucas County*, 799 F.3d 530, 540 (6th Cir. 2015).

There is clearly a direct link between the duration for which force is applied and the risk of death. Legal limitations on the duration of lesser force are critical to reducing police killings. If the panel's decision is left to stand, officers will be able to use force for time periods that will elevate a subdued individual's risk of death.

---

[7] https://www.cnn.com/2020/07/03/us/oklahoma-officers-charged-murder-trnd/index.html

[8] https://www.vermontpublic.org/vpr-news/2014-06-18/two-years-after-stun-gun-death-masons-mother-sues

[9]https://www.9news.com/article/news/investigations/prone-restraint-police-deaths/73-a4ae192c-ceb6-4815-9e72-2f8a8072765c

II. The Majority's Decision That an Officer Is Entitled to Immunity for Continued Use of Canine Force against a Subdued Individual Is at Odds with Every Other Circuit to Consider the Question.

The panel decided that there is no clearly established law regulating the duration of a canine bite of a subdued individual if an officer fears they will resume resistance. This holding directly conflicts with decisions from the Fourth, Fifth, Ninth, and Eleventh Circuits where the courts found a subdued plaintiff had a clearly established right to be free from a continued bite even though the possibility of resumed resistance was equally present. Unlike the majority, other courts analyzed whether continued canine force was proportional to the potential threat of resumed resistance posed by a plaintiff under the control of multiple officers. *Amicus* do not suggest that this Court must accept out-of-Circuit decisions as clearly established law. However, the consensus of other Circuits demonstrates the appropriate method for evaluating ongoing force where multiple officers have a plaintiff cornered, on the ground, or otherwise restrained prior to being fully handcuffed.

An individual generally poses a limited threat to officers when they are in a restrained or subdued position. *Kitchen v. Dallas Co.*, 759 F.3d 468, 479 (5th Cir. 2016); *Grawey v. Drury*, 567 F.3d 302, 314 (6th Cir. 2009) ("need for force is nonexistent" when plaintiff is subdued)(quoting *McDowell v. Rogers*, 863 F.2d 1302, 1307 (6th Cir. 1988)); *Perea v. Baca*, 817 F.3d 1198, 1204 (10th Cir.

2016)(noting threat posed to officers "disappeared" after plaintiff was subdued); *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (application of force is reduced when a person is restrained in Eighth Amendment use of force context). Even if officers fear a subdued individual might resume resistance, the potential risk would be minimal and an officer may only use a reasonable degree of force to respond to the limited threat posed by the plaintiff at the time. *See Andrews v. City of Henderson*, 35 F.4th 710, 717 (9th Cir. 2022)("Our precedent…we consider the danger a suspect poses *at the time force is applied*."); *Anthony v. Seltzer,* 696 F. App'x 79, 82 (3d Cir. 2017); *Perea*, 817 F.3d at 1204 (10th Cir. 2016). Indeed, courts have found force against subdued individuals that *actually* attempted to resume resistance was excessive in light of the low threat they posed while under officer control. *See, e.g.*, *Meyers v. Baltimore County*, 713 F.3d 723, 728 (4th Cir. 2013) (tasing plaintiff that had wielded a baseball bat at officers after he had been taken to the ground with three officers holding him on the ground while he continued to refuse to offer his wrists for handcuffing while reaching for the bat); *Landis v. Baker*, 297 Fed. Appx. 453, 456 (6th Cir. 2008) (baton strikes and tasing an individual that had fled officers, attempted to grab one of their throats, and resisted providing both hands for handcuffing was objectively unreasonable since he was unarmed and surrounded by several officers).

The panel failed to engage in this analysis when it greenlit the officers' continued use of canine force against Mr. McKinney. Instead, the majority treated the situation as if Mr. McKinney were not already detained by two officers and partially handcuffed when he surrendered relying on two factually inapposite cases. *Johnson v. Scott*, 576 F.3d 658, 659 (7th Cir. 2009)(officers were 6-8 feet behind the plaintiff when they deployed challenged force to detain him); *Moya v. Clovis*, 18 Civ. 494, 2019 U.S. Dist. LEXIS 202834 at *17-18 (D.N.M. Nov. 22, 2019) (officers were at least 20 seconds behind plaintiff when the challenged force was deployed), *aff'd*, 829 Fed. Appx. 346 (10th Cir. Oct. 5, 2020).

Attempts to evade detention by physical resistance, flight, and other forms of noncompliance can all raise doubts about the sincerity of subsequent surrender. *See, e.g.*, *Salazar v. Molina*, 37 F.4th 278, 284 (5th Cir. 2022); *Johnson*, 576 F.3d at 569 (7th Cir. 2009); *Smith v. City of Minneapolis*, 754 F.3d 541, 547 (8th Cir. 2014); *Hernandez v. Town of Gilbert*, 989 F.3d 729, 745 (9th Cir. 2022); *Crenshaw v. Lister*, 556 F.3d 1283, 1286-7 (11th Cir. 2009). Those facts are present in most cases where a canine is deployed–including the cases where other circuits found the plaintiff had a clearly established right to be free from continued canine force.

For instance, in *Kopf v. Wing*, the Fourth Circuit reversed summary judgment for police officers that failed to call off a police dog that had been

deployed to detain a plaintiff that had ran and hid from officers, refused to raise his hands, and then proceeded to flail and strike officers as well as kick the dog as they tried to remove him from his hiding place. 942 F.2d 265, 267 (4th Cir. 1991). The Court held that a reasonable jury could find the continued use of canine force was excessive because the plaintiff was surrounded by three officers with batons. *Id.* at 269. The Fourth Circuit also acknowledged that canine force can be counterproductive to full compliance noting a jury could find it "objectively unreasonable to require someone to put his hands up and calmly surrender while a police dog bites his scrotum." *Id.* at 268.

The Fifth Circuit reached a similar conclusion in *Cooper v. Brown*, where a plaintiff fled an officer trying to execute an arrest and failed to comply with a command to show his hands. 844 F.3d 517, 523 (5th Cir. 2016). Instead of showing his hands, the plaintiff was using them to "fend[] off a dog attack." *Id.* at 523, n.3. The court found that the officer violated clearly established law by not calling off the dog in the period between when the plaintiff was lying on the ground unarmed and when he had been secured in handcuffs. *Id.* at 526. Notably, the Court reached this conclusion despite the existence of flight and resistance facts that would suggest the plaintiff's surrender was not genuine.

The Ninth Circuit denied qualified immunity on a similar set of facts where a plaintiff was not complying with officer commands, first by fleeing and then by

fighting off the police dog. *Watkins v. City of Oakland*, 145 F.3d 1087, 1089 (9th Cir. 1998). The prolonged bite violated clearly established law in part because the plaintiff was surrounded by two police officers that would have been capable of keeping him subdued and handcuffing him without canine assistance. *Id.* at 1093. In *Edwards v. Shanley*, the Eleventh Circuit found that even where an officer's initial release of a dog was reasonable, the duration of the bite became unreasonable when the two officers stood over him and could have handcuffed him without canine support. 666 F.3d 1289, 1295 (11th Cir. 2009).

The consistency in these decisions is not surprising since an unarmed suspect on the ground surrounded by armed officers is unlikely to be able to fight or flee their way out of a subdued position. The majority panel's deviant result cannot be explained by any principled interpretation of the facts.

III. The Majority's Opinion Is Alarming Given the Frequency of Police Killings of People in Mental Health Crisis.

The panel's opinion is particularly alarming in light of the frequency with which police officers use force against people in mental health crisis. The opinion perpetuates the harmful misperception that people with mental illness are violent and must be subdued with aggressive police force.

People living with serious mental illness are 16 times more likely to be killed during interactions with law enforcement than civilians with no mental

health conditions. Treatment Advocacy Center, *Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters* 1 (Dec. 2015), tinyurl.com/36sx96e5. More than one in four of the people shot and killed by police officers between 2015 and 2020 had a known mental illness. National Alliance on Mental Illness, *988: Reimagining Crisis Response*, https://tinyurl.com/3v7j24jd. Police officers also tend to use greater amounts of non-lethal force on people with mental illness—and with greater frequency—than they do on people not displaying signs of mental illness. Michael T. Ross and William Terrill, *Mental Illness, Police Use of Force, and Citizen Injury*, Police Quarterly 11 (June 2017); Ayobami Laniyonu and Phillip Atiba Goff, *Measuring disparities in police use of force and injury among persons with serious mental illness*, 21 BMC Psychiatry 500 (Oct. 2021).

The disproportionate use of force against people with mental illness is not justified by legitimate public safety concerns. Police officers tend to misinterpret behaviors of people with mental illness as aggressive and non-compliant, but in reality, the "belief that the risk of violence is much higher with people with mental illness" is "illusionary." Glenn Lipson et. al., *A Strategic Approach to Police Interactions Involving Persons with Mental Illness*, 10 J. Police Crisis Negot. 30, 32 (2010). Police officers are very rarely injured while responding to calls involving individuals with mental illness. And when injury does occur, it is most

often does not require medical attention. Amy N. Kerr *et al.*, *Police Encounters, Mental Illness and Injury: An Exploratory Investigation*, 10 J. Police Crisis Negot. 116 (2010). Many studies suggest it is officers' lack of adequate knowledge and de-escalation techniques, not any heightened danger posed by people with mental illness, that leads to this disproportionate use of force. *Id.*; Lipson, *supra* at 36. The success of programs employing crisis intervention specialists in lieu of police officers as first responders to mental health calls confirms that it is officer lack of expertise, not the unique risks posed by a mentally unwell person, that escalates these encounters. *See, e.g.,* White Bird Clinic, *What is CAHOOTS?* (Oct. 29, 2020), https://whitebirdclinic.org/what-is-cahoots/ (in the 33 years CAHOOTS has been operative, no personnel have been harmed on the job). Courts have also recognized that officers should consider the likely reduced threat posed by people with known mental illness and adjust their force accordingly. *See, e.g.*, *Palma v. Johns*, 27 F.4th 419, 437 (6th Cir. 2022) ("behavior that ordinarily seems threatening may present a lower risk of harm if the officer has reason to believe that the behavior is a symptom of a mental condition); *Crawford v. City of Bakersfield*, 944 F.3d 1070, 1075 (9th Cir. 2019); *Gibson v. County of Washoe*, 290 F.3d 1175, 1190 (9th Cir. 2002).

Here, the defendants in this case knew that Mr. McKinney was in crisis yet the majority found there was no need to moderate force even after he was subdued.

The majority's opinion unjustifiably excuses the continued use of force against people with mental illness.

CONCLUSION

For the foregoing reasons, and those in the Appellant's petition, the Court should grant *en banc* review.

Dated: October 16, 2022
New York, New York

Respectfully submitted,

SCOTT A. KORENBAUM, ESQ.
Counsel of Record Amicus Curiae National Police Accountability Project
14 Wall Street, Suite 1603
New York, NY 10005
(212) 587-0018
scott@korenbaumlaw.com

By: Scott A. Korenbaum
Scott A. Korenbaum

Lauren Bonds
Eliana Machefsky
National Police Accountability Project
2022 St. Bernard Ave., Suite 310
New Orleans, LA 70116
(504) 220-0401
Legal.npap@nlg.org

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(b)(4), I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 2,598 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Times New Roman typeface.

Date: October 16, 2022
New York, New York

Scott A. Korenbaum
Scott A. Korenbaum