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Reply Brief of Appellant Deanna Thomas

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Case No. 22-30662

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DEANNA THOMAS

Plaintiff—Appellant

v.

ROBERT TEWIS, OFFICER; KIRT ARNOLD, OFFICER

Defendants—Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRIC OF LOUISIANA, HONORABLE GREG G. GUIDRY, PRESIDING

REPLY BRIEF OF APPELLANT DEANNA THOMAS

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INTRODUCTION

Defendants-Appellants do not argue that the force used by Officer Tewis against Deanna Thomas on April 6, 2020, was reasonable. Nor could they on summary judgment, as they dispute Ms. Thomas's testimony that Defendant Tewis handcuffed her, threw her to the ground, and knelt on her shoulder with the full weight of his body all while Defendant Arnold watched. ROA.952-57, 1053-57. Instead, they argue that she fails to meet this Court's "some injury" requirement. Ms. Thomas testified that when Officer Tewis "body slammed" her to the ground and knelt on her back, her glasses broke against her face; the pain caused her to lose control of her bowels; and she suffered injuries to her face, nose, knuckles, shoulder, and wrist. ROA.1055-57, 968. Defendants nonetheless claim that she does not meet the low threshold for showing "some injury." They do so by fabricating a rule that a plaintiff in an excessive force case must produce corroborating medical evidence of her injuries. But no such requirement exists in this or any other circuit. A plaintiff's sworn testimony as to her injuries is sufficient. Brief of Plaintiff-Appellant ("Pl.'s Br.") 16-18.

Defendants next argue that Plaintiff's rights with respect to both her excessive force and property seizure claims were not clearly established. They base both arguments on the same misconception of the law of qualified immunity: that the

right at issue must have been clearly established by a case presenting identical facts to this one. *See Aguirre v. City of San Antonio*, 995 F.3d 395, 415 (5th Cir. 2021) (finding a "case presenting identical facts" unnecessary and that the "central concept is that of fair warning."). Defendants fail to frame the right at issue in Ms. Thomas's excessive force claim with any reference to the most essential facts: that she was handcuffed and not resisting arrest when Defendants threw her to the ground. Instead, they claim the right at issue to be "the right to refuse commands to clear an encampment from a protected levee and have force applied during an arrest after walking away and disobeying commands from a police officer to remove an encampment that violated Louisiana statutory law." Brief of Defendants-Appellees ("Defs.' Br.") 23. Moreover, they make no attempt to address the authority that Ms. Thomas argues clearly established her right.

Defendants make the very same errors in responding to Ms. Thomas's argument that her right not to have all her personal property destroyed by Defendants upon her arrest was clearly established. They claim the right at issue to be "the right to maintain possession of property obstructing a levee after an arrest, particularly in the midst of the COVID-19 pandemic after she reported a COVID exposure." Defs.' Br. 26-27. They do not attempt to justify their argument that Ms. Thomas is required to present a case on these identical facts, nor do they engage with the authorities that

she argues clearly establish her right. They also claim that she forfeited her argument on whether the law was "clearly established" even though both parties addressed it in the district court, the district court ruled on it, and both parties have addressed it before this Court.

ARGUMENT

I. Ms. Thomas Meets the Some Injury Standard

Defendants do not argue that the force Officer Tewis used against Ms. Thomas was reasonable, likely due to the facts that remain in dispute.[1] Instead, they argue that she cannot meet the low threshold for showing "some injury." Defendants acknowledge that under this Circuit's precedent, a plaintiff in an excessive force case need not show a significant injury but rather "some injury" to sustain their claim. Defs.' Br. 11, 14; *See, e.g.*, *Alexander v. City of Round Rock*, 854 F.3d 298,

[1] The district court did make a finding that the force used against Ms. Thomas was reasonable, devoting one sentence of its opinion to that finding. Defendants did not press that argument in the district court, nor do they press it on appeal. *See* ROA.1161. Further, the district court did not make findings as to any of the factual disputes raised by the parties. *See generally* ROA.1154-63. On Summary Judgment, Ms. Thomas presented the following disputed facts concerning her excessive force claim: (1) whether Ms. Thomas tried to pull away from Officer Tewis and resist arrest; (2) whether Ms. Thomas attempted to harm Officer Tewis; (3) the way in which Ms. Thomas went from standing to the ground; (4) how and when the officers handcuffed Ms. Thomas; (5) whether there was a struggle while Officer Tewis handcuffed Ms. Thomas; (6) whether Lieutenant Arnold participated in the handcuffing of Ms. Thomas; (7) whether Ms. Thomas's glasses broke against her face; (8) whether Ms. Thomas was ever laying partially under the police car; (9) whether Officer Tewis kneeled on Ms. Thomas's shoulder; (10) and the extent of Ms. Thomas's injuries. ROA.933-36.

309 (5th Cir. 2017) (cleaned up) ("As long as a plaintiff has suffered 'some injury,' even relatively insignificant injuries and purely psychological injuries will prove cognizable when resulting from an officer's unreasonably excessive force."). Defendants' argument that Ms. Thomas is required to produce corroborating medical evidence of her injuries (Defs.' Br. 14) runs counter to the law of this Circuit. *See* Pl.'s Br. 15-19. Defendants provide no authority for the proposition that the "some injury" standard, under which even insignificant injuries are cognizable, requires expert testimony or any evidence beyond Ms. Thomas' own statements. Moreover, Ms. Thomas's sworn testimony in both her deposition and declaration is competent summary judgment evidence of injury sufficient to sustain her excessive force claim.

A. The Fifth Circuit Does Not Require a Plaintiff to Produce Corroborating Medical Evidence of an Injury

Defendants present no authority requiring corroborating medical evidence to sustain an excessive force claim. Instead, they rely on one case that held that where causation of an injury is "outside of common knowledge," corroborating medical evidence is necessary, and another that held that where the application of handcuffs is the *only* force used, corroborating medical evidence is necessary. *See* Defs.' Br. 13-14 (citing *Moore v. LaSalle Corr., Inc.*, No. 3:16-CV-01007, 2020 WL 6382913, at *10 (W.D. La. Oct. 30, 2020), *aff'd in part, rev'd in part and remanded sub nom*.

Moore v. LaSalle Mgmt. Co., L.L.C., 41 F.4th 493 (5th Cir. 2022) and *Montes v. Ransom*, 219 Fed. Appx. 378 (5th Cir. 2007)). But this is not a case in which causation of a medically complex injury is at stake, nor is it one in which handcuffing was the only force used.

Defendants cannot and do not argue that Ms. Thomas's injuries are so complex that causation is in question; they argue that she did not suffer a cognizable injury. Defs.' Br. 10. An injury outside of common knowledge is one that requires medical testimony for a jury to rationally infer whether a defendant's conduct caused the injury. *See Moore v. LaSalle*, 2020 WL 6382913, at 10* (requiring medical evidence to show causation where decedent's injury, a subdural hematoma, could have been caused by the decedent banging his head against the wall); *Perry v. City of Bossier City*, No. CV 17-0583, 2019 WL 1782482, at *5 (W.D. La. Apr. 23, 2019) (requiring medical evidence to show causation where it was unclear whether defendant caused plaintiff's renal pseudoaneurysm). However, where the causal link between an alleged injury and a defendant's action is obvious there is no need for medical evidence. *See Ziesmer v. Hagen,* 785 F.3d 1233, 1239 (8th Cir. 2015) (cleaned up) (finding expert testimony unnecessary where the injury is not sophisticated and where inferences to be drawn from the facts are within the 'range of common experiences' of jurors). None of Ms. Thomas's physical injuries are so

medically complex as to be outside of common knowledge and medical causation has not been challenged. As such, the district court opinions in *Moore* and *Perry* have no bearing on this case.

Similarly, Defendants' reliance on *Montes v. Ransom* is inapposite. In *Montes*, the Court held that where an injury results from handcuffing alone, medical evidence is required. Defs.' Br. 14 (citing *Montes*, 219 Fed. Appx. at 380). In relying on this case, Defendants ignore the injuries at the center of Ms. Thomas's excessive force claim—those that were inflicted by Officer Tewis's use of force *after* she was handcuffed and compliant with his orders. Ms. Thomas testified that when Officer Tewis threw her to the ground with her hands cuffed behind her back, she was unable to break her fall and hit the ground face first, causing lacerations to her face. ROA.1056, 967-68. Ms. Thomas further testified that when Officer Tewis knelt on her back with the full weight of his body, she suffered injuries to her shoulder and back. ROA.1056, 967-68.

Ms. Thomas neither sustained an injury outside of common knowledge for which medical causation has been questioned, nor does she claim that the injuries she suffered stem simply from the application of handcuffs. The decisions cited by Defendants cannot establish that medical evidence is required in this case. Moreover, in her opening brief, Ms. Thomas cites to ample authority establishing that there is

no rule in this Circuit or any other, that a plaintiff needs to present corroborating medical evidence in an excessive force case. Pl.'s Br. 15-19, *see, e.g., Durant v. Brooks*, 826 F. App'x 331, 336 (5th Cir. 2020) (finding that plaintiff's "complaints of sore ribs and emotional distress, without corroborating medical evidence," was enough to establish injury), *Benoit v. Bordelon*, 596 F. App'x 264, 269 (5th Cir. 2015) (holding that plaintiff's testimony alone was sufficient to establish injury).

B. Ms. Thomas's Testimony About Her Injuries is Competent Summary Judgment Evidence

Defendants argue that Ms. Thomas's sworn testimony in both her deposition and declaration is not competent summary judgment evidence because it is "self-serving," "conclusory," and because it is "lay testimony." Defs.' Br. 15-16. The fact that Ms. Thomas's testimony is "self-serving" and amounts to "lay testimony" has no bearing on whether it is competent summary judgment evidence in this Circuit. Moreover, Ms. Thomas's testimony is not "conclusory" because she alleged specific injuries to her face, back, and shoulders, and specific psychological injuries. ROA.968.

First, Defendants are incorrect that a plaintiff cannot show evidence of injury through testimony that is self-serving and uncorroborated. *See* Defs.' Br. 10, 15. This Court has repeatedly held that a plaintiff's sworn statements are competent summary

judgment evidence, and that self-serving testimony is sufficient to establish a genuine issue of material fact for the purpose of summary judgment. Pl.'s Br. 16, 19, *Hart v. Hairston*, 343 F.3d 762, 765 (5th Cir. 2003), *Lester v. Wells Fargo Bank, N.A.*, 805 F. App'x 288, 291 (5th Cir. 2020) (citing *McClendon v. United States*, 892 F.3d 775, 785 (5th Cir. 2018) (holding that a non-conclusory affidavit can create genuine issues of material fact that preclude summary judgment, even if the affidavit is self-serving and uncorroborated).

Second, Defendants argue that because Ms. Thomas's testimony as to her injuries amounts to "lay testimony," Ms. Thomas fails to provide competent evidence of her injuries. *See* Defs.' Br. 13;15. There is no requirement in the Fifth Circuit that a plaintiff must establish "some injury" by expert testimony when that injury is not outside of common knowledge nor based solely on the application of handcuffs. *See supra* pp. 4-7. As noted above, Ms. Thomas has not alleged injuries outside of common knowledge nor injuries resulting from the application of handcuffs.

Third, Defendants claim that Ms. Thomas's testimony is conclusory and that her statements regarding injury in her declaration "essentially amount to 'I suffered injuries.'" Defs.' Br. 15-16. Not so. Ms. Thomas testified in both her declaration and deposition to specific injuries resulting directly and only from the force Officer

Tewis used against her while she was handcuffed. For example, Ms. Thomas testified that her eyeglasses broke against the bridge of her nose and that she suffered injuries to her face when Officer Tewis threw her to the ground while she was handcuffed; ROA.968, 1056; she testified that she lost control of her bowels from the pain of impact when Officer Tewis threw her to the ground; ROA.1056; and she testified that she suffered "severe pain" to her back and shoulder when Officer Tewis knelt on her with the full weight of his body while she was on the ground, handcuffed, and not resisting. ROA.967-68, 1056. Defendants' claim that, if this Court refuses to adopt a requirement that corroborating medical evidence is necessary to establish injury, civil rights plaintiffs will be able to defeat summary judgment in almost all instances, is unsubstantiated hyperbole. *See* Defs.' Br. 14-15. No such requirement exists now, and the floodgates imagined by Defendants have not opened.[2]

[2] According to one study, only 6.5% of Section 1983 brought against law enforcement officers in federal court proceeded to trial. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 46 (2017). Further, a 2008 study by the Federal Judicial Center found that the summary judgment grant rate for civil rights cases was 70%. Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 Wash. U.L. Rev. 455, 510–11 (2014).

C. Ms. Thomas Has Alleged a Cognizable Psychological Injury

Defendants argue that Ms. Thomas's claimed psychological injuries are not cognizable because she has not produced medical evidence of a psychological injury and because only *substantial* psychological injuries are sufficient to meet the injury element of an excessive force claim. Defs.' Br. 13-14. As with Defendants' arguments about corroborating medical evidence of physical injuries, they cite only to *Moore*, which holds that medical evidence may be necessary to show causation when alleging an injury outside of common knowledge. Defs.' Br. 14-15; *Moore v. LaSalle*, 2020 WL 6382913, at *10. Ms. Thomas has suffered recurring nightmares and a distrust of law enforcement that has pervaded for the years following the incident with Defendants. ROA.278, 968. These harms are not fleeting and did not cease the moment Officer Tewis dragged a handcuffed Ms. Thomas up from the ground. A reasonable jury could conclude, without corroborating medical evidence, that Ms. Thomas's fear of law enforcement and pervasive nightmares following the incident, along with her physical injuries, constitute a cognizable psychological injury. *See* ROA.968.

Additionally, there is no requirement that psychological injuries be "substantial" to meet the injury requirement in excessive force cases. The "some injury" standard applies to both physical and psychological injuries alike. *Alexander*,

854 F.3d at 309 (quoting *Brown v. Lynch*, 524 F. App'x 69, 79 (5th Cir. 2013) ("[A]s long as a plaintiff has suffered some injury, even relatively insignificant injuries and purely psychological injuries will prove cognizable when resulting from an officer's unreasonably excessive force."). In attempting to support their claim that a psychological injury must be substantial, Defendants cite only to the district court decision in *Carter v. Diamond URS Huntsville, LLC*, No. CV H-14-2776, 2016 WL 8711499, at *5 (S.D. Tex. Sept. 30, 2016), which misstates the law on injury in a string cite.[3] As with physical injuries, where an officer's use of force is unreasonable, resulting psychological injuries are cognizable for the purposes of an excessive force claim. Pl.'s Br. 22-23.

II. Ms. Thomas's Right to be Free from Excessive Force While She was Handcuffed, Not Actively Resisting Arrest for A Misdemeanor, and Posing No Immediate Threat to the Officers Was Clearly Established.

Should this Court decide to address the second prong of qualified immunity,[4] it should find that Ms. Thomas, who was arrested for a non-violent misdemeanor

[3] The court in *Carter* relied on *Flores v. City of Palacios*, 381 F.3d 391, 398 (5th Cir. 2004) to support its statement that only substantial psychological injuries are cognizable. 2016 WL 8711499 at*5. Notably, Defendants do not cite *Flores*, a published decision of this Court, to support that proposition. *Flores* does not stand for that proposition; rather it holds that psychological injuries alone can establish injury in an excessive force claim. *Flores*, 381 F.3d at 398. Defendants and the court in *Carter* mischaracterize *Flores.*

[4] Ms. Thomas maintains that because the district court declined to address the second prong of the qualified immunity analysis, this Court should not depart from its general practice of considering only those issues that the district court has addressed. Pl.'s Br. 27-31.

and not actively resisting arrest, has a right to be free from excessive force when she was already handcuffed, subdued, and no threat to officers. Pl.'s Br. 32. Defendants argue that the right at issue in this case is "the right to refuse commands to clear an encampment from a protected levee and have force applied during an arrest after walking away and disobeying commands from a police officer to remove an encampment that violated Louisiana statutory law." Defs.' Br. 23. This definition assumes there must be an identity of facts between this case and any cases relied on to clearly establish the law, a proposition that has been rejected by this Court. It also omits key facts that are germane to the question of whether the law was clearly established, namely that Ms. Thomas was handcuffed and subdued when Defendant Tewis used force against her. *See* ROA.967. Defendants fail to address Ms. Thomas's arguments that her right was clearly established and instead make general statements about the need for specificity, relying on authority that does not support their argument.

A. Defendants Define the Right at Issue in Reference to the Wrong Set of Facts

Ms. Thomas had a right to be free from the excessive force used against her when, while she was handcuffed and subdued, and when Officer Tewis threw her to the ground and kneeled on her. ROA.1056, 967-68. In defining the right at issue for

purposes of qualified immunity, Defendants ignore that Ms. Thomas testified that she was handcuffed and not resisting arrest when they used force.[5] They proceed to define the right at issue as "the right to refuse commands to clear an encampment from a protected levee and have force applied during an arrest after walking away and disobeying commands from a police officer to remove an encampment that violated Louisiana statutory law." Defs.' Br. 23. Defendants focus on the wrong moment of Ms. Thomas's arrest and conspicuously omit critical facts from their formulation of the right at issue.

"'[D]rawing inferences in favor of the nonmovant' is especially important when determining whether there is clearly established law." *Roque v. Harvel*, 993 F.3d 325, 335 (5th Cir. 2021) (quoting *Tolan v. Cotton*, 572 U.S. 650, 657 (2014)). "A court assessing the clearly established law . . . must 'properly credit' Plaintiffs' evidence." *Roque*, 993 F.3d at 335. Here, Defendants neither credit Ms. Thomas's evidence nor attempt to define the right at issue "on the basis of the specific context of the case" as the Supreme Court has instructed. *See Tolan*, 572 U.S. at 657. Instead, they focus on the earlier part of the incident, rather than on the excessive force that was used once Ms. Thomas was restrained in handcuffs. Moreover, in defining the

[5] Because Ms. Thomas testified to these facts in her deposition and her declaration (ROA.381-82, 967-68; Pl.'s Br. 22) and because no record evidence "blatantly contradicts" these facts, the factual disputes must be resolved in her favor on summary judgment. *See Garcia v. Orta*, 47 F.4th 343, 350 (5th Cir. 2022).

right at issue as they do here, Defendants mistakenly assume that the qualified immunity standard requires a plaintiff to show that "the very action in question has previously been held unlawful," which it does not. *See Taylor v. LeBlanc*, 60 F.4th 246, 251 (5th Cir. 2023) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)).

On several occasions this Court has found that even if law enforcement officers did not violate clearly established law when force was first used during an incident, they may still be denied qualified immunity for subsequent uses of force, typically after the plaintiff was either restrained or incapacitated. *See*, *e.g.*, *Roque*, 993 F.3d at 336 (finding officers who shot an armed man were not entitled to qualified immunity for firing a second and third shot after the first shot incapacitated him); *Hinson v. Martin*, 853 F. App'x 926, 931-33 (5th Cir. 2021) (finding that while initial force used was reasonable, the law was clearly established that once plaintiff was handcuffed and subdued, force was no longer reasonable). In both *Roque* and *Hinson* facts were in dispute as to whether the suspect was in fact incapacitated (*Roque*) or whether force was used after the suspect was subdued (*Hinson*) and in both cases, this Court framed the right with reference to the plaintiff's account of the facts as they were at the specific moment in time that force was used. *Roque*, 993 F.3d at 335; *Hinson*, 853 F. App'x at 931-33.

Several times in their brief, Defendants remind the Court that the right must be defined with "specificity," yet they fail to heed their own reminder. Defs.' Br. 20-21. Defendants no doubt include specific details in defining the right at issue, including that the incident involved a homeless "encampment that violated Louisiana statutory law" and that it took place on a "protected levee." However, these details are not the kind of factual distinctions that matter for the purpose of qualified immunity. *See infra* pp. 23-24. Defendants omit perhaps the most important detail —that Ms. Thomas was handcuffed when Defendant Tewis threw her to the ground.

B. Ms. Thomas has Shown that Her Right was Clearly Established

In her opening brief, Ms. Thomas argues that it has long been clearly established in this Circuit that "when a suspect is not resisting, it is unreasonable for an officer to apply unnecessary, injurious force against a restrained individual, even if the person had previously not followed commands or initially resisted the seizure." Pl.'s Br. 35 (citing *Aguirre*, 995 F.3d at 412). Despite having defined her right with particularity, Defendants do not engage with the ample authority that Ms. Thomas argues has clearly established her right. *See* Defs.' Br. 19-24; *See also* Pl.s' Br. 31-36. Instead, Defendants presented general statements on the need for specificity when defining a right for the purposes of qualified immunity, without ever stating

why the right proffered by Ms. Thomas is not adequately specific. *See* Defs.' Br. 23-24.

Neither of the two cases cited by Defendants supports an argument that Ms. Thomas has not framed the right with adequate specificity, nor do Defendants even attempt to connect the holdings of these cases to Ms. Thomas's argument that her right was clearly established. Defendants rely on *McCoy v. Alamu*, to suggest that Ms. Thomas needs to put forth a case with virtually identical facts to hers. Defs.' Br. 21-22 (citing *McCoy v. Alamu*, 950 F.3d 226, 232-33 (5th Cir. 2020) (cleaned up)). In *McCoy*, this Court held that an officer who pepper-sprayed an incarcerated person without any provocation acted unconstitutionally, but was entitled to qualified immunity because, although it was clear that unprovoked force was unlawful, the Court had not decided a case involving the "precise instrument" of pepper spray. *See Id.* at 235 (Costa, J., dissenting) ("Lawfulness of force . . . does not depend on the precise instrument used to apply it"); Defs.' Br. 22. However, more than two years ago, the Supreme Court vacated and remanded *McCoy* in light of its decision in *Taylor v. Riojas*. *McCoy v. Alamu*, 141 S. Ct. 1364 (2021). In *Riojas*, the Court held that even in the absence of directly on-point case law, a denial of qualified immunity is appropriate when a "general constitutional rule already identified in the decisional

law" applies with obvious clarity to the specific conduct in question. *Taylor v. Riojas,* 141 S.Ct. 52, 54 (2020).

The other case Defendants rely on, *Garcia v. Blevins*, is still good law, but is no more helpful to Defendants. *See* Defs.' Br. 22-23 (citing *Garcia*, 957 F.3d 596, 600 (5th Cir. 2020)). Defendants have wrongly interpreted *Garcia* to stand for the proposition that, if there are *any* factual differences between this case and cases relied upon to clearly establish the law, Defendants would be entitled to qualified immunity. *See* Defs.' Br. 22-23. In *Garcia*, this Court refused to find that a prior case finding an officer's force unconstitutional—where that force was used on a suspect who wielded a knife—clearly established the law in a case in which the suspect wielded a gun. Its rationale focused on the meaningful differences between a knife and a gun, noting that, unlike a gun, a knife does not have the ability to "[cause] fatal harm instantly at distance." *Garcia*, 957 F.3d at 601. Defendants simply characterize Garcia's rationale as "a knife is not a gun." Defs.' Br. 22. Similarly, Defendants fail to address any meaningful differences between Ms. Thomas's case and those that she relies on to clearly establish the law.

Ms. Thomas has met her burden to show that her right to be free from excessive force during an arrest for a non-violent misdemeanor, while she was handcuffed and not actively resisting, was clearly established on April 6, 2020. Pl.'s

Br. 31-36 (citing *e.g.*, *Aguirre*, 995 F.3d at 412 (holding that "it has long been clearly established that, when a suspect is not resisting, it is unreasonable for an officer to apply unnecessary, injurious force against a restrained individual, even if the person had previously not followed commands or initially resisted the seizure")); *See also Hanks v. Rogers*, 853 F.3d 738, 747 (5th Cir. 2017) (finding an incident where suspect was arrested for minor crime, posed no threat to officer, and engaged in only passive resistance to be an "obvious case" in which the *Graham* standards independently and clearly establish the law). Defendants do not even attempt to explain why these cases and others cited by Ms. Thomas in her opening brief do not clearly establish her right to be free from excessive force while handcuffed and not resisting.

III. Ms. Thomas's Right to be Free from Defendant Arnold's Unreasonable Seizure and Disposal of her Personal Property Was Clearly Established and Was Properly Preserved for Appeal.

Defendants argue that Ms. Thomas forfeited her argument that her constitutional right was clearly established, claiming that she failed to address it in the district court. Ms. Thomas has properly preserved her argument because both parties addressed it in the district court, which then ruled on it. They have also both presented it to this Court. This Court should address the "clearly established" argument and find that Ms. Thomas has met her burden. Defendants' argument that

Ms. Thomas's right was not clearly established rests on a definition of the right at issue that ignores this Court's frequent reminder that a plaintiff need not show that "the very action in question has previously been held unlawful" in order to defeat qualified immunity. *See, e.g.*, *Taylor v. LeBlanc*, 60 F.4th at 251 (quoting *Hope v. Pelzer*, 536 U.S. at 739). Here, Defendants had fair warning that it was unlawful to destroy all of an arrestee's personal belongings. *See* Pl.'s Br. 39-44.

A. Ms. Thomas did not Forfeit Her Argument that Her Right Was Clearly Established

Defendants claim that Ms. Thomas failed to address their argument that her constitutional right to her personal property was clearly established for purposes of qualified immunity, and that she has therefore forfeited this argument. Defs.' Br. 26. They are wrong. Defendants raised this argument on summary judgment, Ms. Thomas responded, and the district court ruled on the argument, erroneously finding that Ms. Thomas's right was not a clearly established right. ROA. 884-888, 944-945, 1162.

A party only forfeits an argument by "failing to raise it in the first instance in the district court—thus raising it for the first time on appeal—or by failing to adequately brief the argument on appeal." *Rollins v. Home Depot USA, Inc.*, 8 F.4th 393, 397 (5th Cir. 2021); *See also Belt v. EmCare, Inc.*, 444 F.3d 403 (5th Cir. 2006).

If an issue is raised to such a degree that the trial court may rule on it, then the argument has not been forfeited and has been properly preserved for appeal. *See United States ex rel. Vavra v. Kellogg Brown & Root, Inc.*, 848 F.3d 366, 376 (5th Cir. 2017); *See also Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) ("[forfeiture] does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue.").

Under the Fifth Circuit's standard, Ms. Thomas has properly preserved her argument on appeal. Defendants raised their affirmative defense of qualified immunity in their summary judgment briefing. ROA.872; *King v. Handorf*, 821 F.3d 650, 653 (5th Cir. 2016) (noting that qualified immunity is an affirmative defense that must be raised by defendants). Ms. Thomas then responded in her summary judgment opposition, arguing that the disposal of her property rises to the level of an unreasonable seizure in violation of the Fourth Amendment. ROA.944. Ms. Thomas pointed to the Supreme Court's decision in *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56 (1992) and the Fifth Circuit's decision in *United States v. Edwards*, 577 F.2d 883 (5th Cir. 1978) as binding precedent that clearly established her right. ROA.944. The district court ruled that Ms. Thomas failed to meet her burden to "negate the assertion of qualified immunity," not that she failed to address the argument. See ROA.1162; *See Thomas v. Ameritas Life Ins. Corp.,* 34 F.4th 395, 402 (5th Cir.

2022) (holding that "there is a significant difference between raising an issue or argument for the first time on appeal and supplementing an argument with new authority); *See also Dixon v. ATI Ladish, LLC*, 667 F.3d 891, 895 (7th Cir. 2012) ("[A] litigant does not forfeit a position just by neglecting to cite its best authority; it suffices to make the substantive argument.").

Further evidence that Ms. Thomas fully addressed qualified immunity before the district court is that Defendants did not argue to the district court in their summary judgment reply memorandum that they believed that Ms. Thomas had forfeited the argument. ROA. 1124-1125 (arguing that Plaintiff did not present any cases "squarely addressing the specific facts of the case" and not arguing forfeiture).

Even if this Court were to find that Ms. Thomas forfeited this argument, it should exercise its discretion to address it on appeal given that it was briefed below, was ruled on by the district court, and has been fully briefed on appeal. *See Thomas* 34 F.4th at 402 n.2 (holding that because forfeiture by a party is a procedural rule, the court has the authority to relax its bar and exercise its discretion to hear forfeited arguments).

B. Under the Fourth Amendment, Ms. Thomas Has a Clearly Established Right to be Free from the Unreasonable Seizure of Her Property and Permanent Deprivation of Her Possessory Interest in that Property.

Defendants claim that Ms. Thomas's right to be free from police officers' destruction of her property upon her arrest was not clearly established when Defendant Arnold ordered all of her personal belongings, including her sleeping bag, canopy, computer, legal papers and irreplaceable personal affects, to be destroyed. ROA.282, 287, 930. However, as Ms. Thomas argued in her opening brief, her right to be free from Defendant Arnold's destruction of her property was clearly established. Pl.'s Br. 39-44. Ms. Thomas argued that Defendant Arnold's destruction of her property was a seizure that, while incident to her arrest, was unreasonable because her property was not seized for evidentiary purposes and because the seizure resulted in the permanent deprivation of her possessory interests in that property. Pl.'s Br. 40-43.

As with Ms. Thomas's excessive force claim, Defendants frame the right at issue here improperly, with reference to facts that have not been established or are irrelevant to the inquiry. Defendants assert that the right at issue is the "right to maintain possession of property obstructing a levee after an arrest, particularly in the midst of the COVID-19 pandemic after [Ms. Thomas] reported a Covid exposure." Defs.' Br. 26-27.[6] Despite including both the obstruction to the levee and the

[6] The district court only addressed, and Ms. Thomas' appeal only pertains to, the April 6 destruction of her property. While Defendants contend that their concern over Ms. Thomas's possible COVID-

COVID-19 pandemic in their framing of the right at issue, Defendants fail to explain the significance of either.

In framing the right at issue as they do, Defendants oversimplify and distort the law of qualified immunity. "The law can be clearly established despite notable factual distinctions between the precedents relied on [and this case] so long as the prior decisions gave reasonable warning that the conduct before then at issue violated constitutional rights." *Aguirre*, 995 F.3d at 415 (quoting *Trammell v. Fruge*, 868 F.3d 332, 339 (5th Cir. 2017)).

Where "courts have agreed that certain conduct is a constitutional violation under facts *not distinguishable in a fair way* from the facts presented in the case at hand," qualified immunity would not be available simply because of a factual difference. *Saucier v. Katz*, 533 U.S. 194, 202-03 (2001) (emphasis added). That the cases relied upon to clearly establish Ms. Thomas's right do not include reference to a levee or a pandemic does not make them distinguishable from the facts of this case in a meaningful way. Defendants do not explain the significance of the levee or why this location might cause an officer to reasonably believe that destroying an

19 exposure motivated the destruction of her property on May 7 and May 11, Defendants put forth an entirely different justification for the April 6 destruction. Defs.' Br. 4-5. Defendant's claim that Ms. Thomas instructed them to throw away her belongings on April 6. ROA.987-88. Ms. Thomas, however, provided sworn testimony in both her declaration and deposition that she never instructed them to throw her belongings away. ROA.1051, 968. There remains a genuine issue of material fact as to whether Ms. Thomas told Defendants to dispose of her personal belongings. ROA.958.

arrestee's property was lawful. One would think the opposite is true, given that Defendant Arnold disposed of Ms. Thomas's property immediately following her arrest, contrary to the 48-hour notice period prescribed by the Louisiana statute under which Ms. Thomas was arrested. LA R.S. 38:225 ("[I]f after 48 hours' notice by an authorized representative of the state the . . . obstructions have not been removed, said objects can be removed or the menace abated . . .").

Similarly, Defendants do not explain why an officer would have thought it reasonable to seize and *destroy* Ms. Thomas's property because of COVID-19. *See* Defs.' Br. 25-27. While an officer might have thought a temporary seizure for quarantine was reasonable, it would not have been reasonable for an officer to think that the law permitted destroying all of Ms. Thomas's belongings, including her shelter, legal papers, computer, and irreplaceable personal affects.

Defendants point to no case in which a court has held that simply because a Fourth Amendment right was violated during the pandemic, the right could not have been clearly established by cases before the pandemic. *See LeBouef v. Terrebonne Par. Crim. Just. Complex*, No. CV 20-2260, 2021 WL 1200774, at *6 (E.D. La. Mar. 1, 2021), *report and recommendation adopted*, No. CV 20-2260, 2021 WL 1198259 (E.D. La. Mar. 30, 2021) (rejecting the argument that "law regarding what is—and is not—an appropriate response to the pandemic has not yet been 'clearly

established' for purposes of qualified immunity."). Finally, Defendants include in their framing of the right that the property was seized after Ms. Thomas reported an exposure to COVID-19. However, Defendants only claim that Ms. Thomas advised police of a possible COVID-19 exposure during her May 7, 2020 arrest. ROA.869. Neither party has alleged that Ms. Thomas had a possible COVID-19 exposure on April 6, 2020, nor has a COVID-19 exposure been put forth as a justification for Defendant Arnold's destruction of her property on April 6. *See supra* note 6.

As Ms. Thomas argued in her opening brief, her right to be free from the destruction of her personal belongings by Defendant Arnold was clearly established. Pl.'s Br. 39. Defendant Arnold discarded all of Ms. Thomas's personal property, including her shelter, sleeping bag, and birth certificate. Pl.'s Br. 41; ROA.950. It was clearly established that the destruction of her property was a seizure, as it was a meaningful interference with her possessory interest in that property. Pl.'s Br. 41. It was clearly established that this seizure was unreasonable because it was a warrantless seizure that, while incident to arrest, was not conducted for evidentiary purposes and resulted in the permanent deprivation of Ms. Thomas's possessory interest in her property. Pl.'s Br. 41. The Fifth Circuit and Supreme Court cases interpreting Fourth Amendment property protections regarding seizures incident to an arrest clearly establish that Ms. Thomas had a right to be free from Defendant

Arnold's unnecessary destruction of her property. Pl.'s Br. 39-44. Additionally, Ms. Thomas has argued that the permanent seizure of an unhoused person's personal possessions is an obvious violation such that there is no need to rely on a case holding that the specific action in question has been found unlawful. Pl.'s Br. 41-42 (*citing Taylor v. Riojas*, 141 S.Ct. at 54 n.2; *Tyson v. Sabine*, 42 F.4th 508, 520 (5th Cir. 2022); and *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030-31 (9th Cir. 2012) (finding that the destruction of the belongings of an unhoused person to be an obvious Fourth Amendment violation)).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully urges this Court to reverse the district court's Order granting summary judgment to the Defendant-Appellees, remand the case for further proceedings, and grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Betsy Ginsberg, do hereby certify that on this the third day of April 2023, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court for Appeals for the Fifth Circuit by using the appellate CM/ECF. All counsel of record are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ *Betsy Ginsberg*
Betsy Ginsberg

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 6,303 words, excluding the parts of the brief exempted by Fed. R. App. P. 32.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14pt for text and Times New Roman 12pt for footnotes.

/s/ *Betsy Ginsberg*
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