No. 24-10271

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAVID BAKUTIS, as temporary administrator for the ESTATE OF ATATIANA JEFFERSON,

Plaintiff–Appellee,

v.

AARON DEAN

Defendant–Appellant.

On Appeal from the United States District Court for the Northern District of Texas Fort Worth Division
No. 4:21-cv-665; Hon. Terry R. Means

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

(1) Case No. 24-10271; David Bakutis, as Temporary Administrator for the Estate of Atatiana Jefferson, Plaintiff-Appellee v. Aaron Dean, Defendant-Appellant.

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Name of Interested Party	**Connection and Interest**
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David Bakutis, as Temporary Administrator for the Estate of Atatiana Jefferson	Plaintiff-Appellee
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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff respectfully suggests that oral argument is unnecessary because this interlocutory appeal from a denial of qualified immunity at the motion to dismiss stage calls for a straightforward application of this Court's longstanding and clearly-established Fourth Amendment law.

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INTRODUCTION

Officer Aaron Dean shot and killed Atatiana Jefferson in her home, while she was playing video games with her nephew.

Called to the house by a neighbor, simply because the front door was open, Dean investigated all around the property and observed no signs of a disturbance. Yet Dean then opened a gate, crept into Ms. Jefferson's fenced-in side yard, and approached the window of the room she was in. Noticing movement in her yard, Ms. Jefferson went to the window to look out. As soon as Dean saw Ms. Jefferson's "figure," and before even finishing a command for her to put her hands up, he shot her through the window. Ms. Jefferson never pointed any weapon of any kind at Dean or his partner. Ms. Jefferson bled out and died in front of her nephew.

As the district court correctly concluded, Ms. Jefferson's estate plausibly alleged two Fourth Amendment claims—an excessive force claim and an unlawful search claim—and Dean is not entitled to qualified immunity. This Court should affirm.

STATEMENT OF ISSUES

1. Whether the district court properly denied qualified immunity as to Plaintiff's excessive force claim, where Dean shot Ms. Jefferson immediately upon seeing her "figure"—and before issuing a warning—and where she did not point any weapon at Dean or his partner, and did not pose a threat to anyone?
2. Whether the district court properly denied qualified immunity as to Plaintiff's unlawful search claim where Dean intruded upon Ms. Jefferson's curtilage without a warrant and without probable cause or exigent circumstances, where nothing at the home suggested a disturbance?

STATEMENT OF THE CASE

I. Factual Background[1]

On October 12, 2019, after 2:00 am, Atatiana Jefferson was at home playing video games with her nephew. ROA.525. The front door was open to allow a cool breeze inside. ROA.525.

[1] These facts are drawn primarily from the district court's order; however, this brief cites to the complaint where necessary to provide additional background. At the motion to dismiss stage, this Court takes all well-pleaded facts from the complaint as true, and construes them in the light

A neighbor called the Fort Worth Police Department's non-emergency line to report the open front door at Ms. Jefferson's home. ROA.865. The neighbor did not give any other indication that anything suspicious was going on; he only stated that the door was usually closed. ROA.865; ROA.525. A few minutes later, Officer Aaron Dean and an unidentified officer arrived at Ms. Jefferson's home, responding to what was dispatched as an "open structure" call. ROA.865. The officers parked a block away, out of view of the residence and without activating their emergency lights or sirens, ROA.866, so that they could not be identified as police officers, ROA.526. The officers did not have a warrant. ROA.866.

Once Dean arrived, he approached the home and looked through the screen window at the open front door. ROA.526. He did not knock on the door, announce himself as a police officer, or give Ms. Jefferson and her nephew any indication that he was there. ROA.526. Dean proceeded to walk around the home and look into another screen door on the other side of the home—again, without knocking or announcing his presence. ROA.526. He continued to look around the outside of the property,

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most favorable to the plaintiff. *Lincoln v. Barnes*, 855 F.3d 297, 300-01 (5th Cir. 2017).

inspecting the cars in the driveway, the garage, and the door on the fence next to the garage. ROA.526-27; ROA.866. Throughout these investigations, "Dean did not observe any indications of a disturbance." ROA.866.

Despite this, Dean opened Ms. Jefferson's fence gate and proceeded into the side yard. ROA.866. By this time, Ms. Jefferson became aware that there were individuals outside, and she approached the window facing the side yard to see what was going on. ROA.866; ROA.527. Dean saw Ms. Jefferson's figure in the window and immediately drew his weapon, pointing it at Ms. Jefferson. ROA.866. Dean was simultaneously shining his flashlight into the window, and the reflection obstructed his view. ROA.866; ROA.527. He began to shout, "Put your hands up! Show me your hands!" without announcing himself as a police officer. ROA.866. Before he had even finished issuing his command, and certainly without giving Ms. Jefferson a chance to respond, Dean fired a single shot through the window, hitting Ms. Jefferson. ROA.866; ROA.528. Ms. Jefferson never pointed any weapon of any kind at Dean or his partner. ROA.527.

Ms. Jefferson bled to death on the floor of her home, in front of her nephew. ROA.528. She was pronounced dead at the scene. ROA.528.

Two days after the shooting, Dean resigned from the Fort Worth Police Department (FWPD) and was arrested and charged with murder. ROA.528. He was convicted of manslaughter and sentenced to nearly twelve years in prison. ROA.528.[2]

II. Procedural History

The Administrator of Ms. Jefferson's estate (hereinafter "Plaintiff") sued.[3] The operative complaint alleges two 42 U.S.C. § 1983 Fourth Amendment claims against Dean—an excessive force claim and an unlawful search claim; a municipal liability claim against the City of Fort Worth; and Texas state law claims. *See* ROA.522-547.[4]

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[2] Even before this tragedy, there were warning signs regarding Dean. The FWPD hired him despite knowing that he had sexually assaulted a woman previously, a charge to which he pled no contest. ROA.540. When asked in his interview whether he would be able to kill a person if he had to, Dean callously answered "[n]o problem," without a second's hesitation. ROA.540. And once on the job, Dean's supervisors expressed serious concerns about his performance, saying he had "tunnel vision" and communication problems. ROA.540-41.

[3] This case was consolidated with a case against Dean on behalf of Ms. Jefferson's nephew, Z.C., who witnessed her shooting and death. *See* ROA.285. That case settled for $3.5 million and was dismissed. ROA.854-55.

[4] The *Monell* claim is not at issue on appeal; it remains pending in the district court. Specifically, the City of Forth Worth did not move to dismiss, and answered the operative complaint. ROA.602. Discovery is

Dean moved to dismiss, asserting, as relevant here, that he was entitled to qualified immunity on Plaintiff's excessive force and unlawful search claims. *See generally* ROA.571-93.

The district court denied Dean's motion. ROA.865. As to Plaintiff's claim that Dean unlawfully used excessive force when he shot and killed Ms. Jefferson, the court explained, "the force was clearly unreasonable because Jefferson posed no serious threat of physical harm to Defendant." ROA.870. In his motion to dismiss, Dean placed great weight on the fact that Plaintiff failed to specifically plead that Ms. Jefferson was unarmed. ROA.870. But the district court rejected that argument, noting that "Defendant's position misplaces—and indeed elevates—the plaintiff's burden at this stage." ROA.870. That is, the district court concluded, "Plaintiff need not plead that Jefferson was **unarmed**, but must only plead that Defendant acted unreasonably when he deployed excessive force." ROA.871. The court concluded that the complaint met that standard. ROA.871. The district court noted that "Plaintiff specifically pleads" the following facts:

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ongoing as to the City, but Dean is immune from discovery during the pendency of his interlocutory appeal.

(1) Dean "drew his weapon the moment he saw Jefferson's 'figure' in the . . . window";

(2) Dean's "view of Jefferson was obstructed by the reflection of his flashlight";

(3) Dean "did not announce himself as a police officer when he drew his weapon"; and

(4) Dean "fired at Jefferson before finishing his command for her to '[p]ut [her] hands up."

ROA.871 (quoting ROA.527-28). Based on these facts, the district court went on, "[i]t is arguable . . . that [Dean] could not see Jefferson's person at all—only her 'figure'—which would preclude him from seeing whether she was armed," and therefore "Plaintiff state[d] a plausible claim that Defendant lacked the reasonable fear of serious injury necessary to justify his use of lethal force." ROA.872. The district court concluded that the law has "long been clear" that "[w]here the suspect poses no immediate threat to the officer and no threat to others," deadly force is not warranted, and therefore Dean "had fair notice that such force was constitutionally impermissible." ROA.872.

The district court also concluded that Dean was not entitled to qualified immunity on Plaintiff's unlawful search claim. ROA.874. Warrantless searches of a home's curtilage, the district court observed, are unreasonable absent exigent circumstances. ROA.873. The district

court held that Plaintiff had sufficiently alleged a lack of exigency; the court emphasized that Dean was not responding to an emergency burglary-in-process call; rather, he was responding to an "open-structure call placed on the police department's **non-emergency** line." ROA.873-74. As such, the court observed, Dean was not entitled to qualified immunity because it is clearly established that a warrantless entry into the curtilage of a home absent exigent circumstances is unconstitutional. ROA.874.[5] Dean timely filed his notice of interlocutory appeal. ROA.902.

SUMMARY OF THE ARGUMENT

Plaintiff has plausibly alleged two Fourth Amendment claims, for which Dean is not entitled to qualified immunity.

Dean is not entitled to qualified immunity as to Plaintiff's excessive force claim. Plaintiff adequately pled that Dean's use of deadly force violated Ms. Jefferson's Fourth Amendment rights because, on the facts alleged, Ms. Jefferson did not pose a threat to Dean or anyone else. He saw only her "figure," he fired before finishing his command for her to

[5] The district court also denied Dean's motion to dismiss Plaintiff's Texas state law claims. ROA.875-76. Dean also raised, and the district court rejected, a challenge to Plaintiff's damages on the search claim. ROA.874. Neither of these issues are relevant to this appeal.

put her hands up, and she did not point any weapon of any kind at Dean or his partner. As the district court correctly concluded, Dean did not have a reasonable basis to use deadly force.

The unconstitutionality of the use of deadly force here was clearly established. For decades, this Court's precedent has been clear that lethal force cannot be used in response to movement that is not threatening—even if the person is potentially armed. It is also clear that a warning is required before using deadly force, where feasible.

Dean is also not entitled to qualified immunity as to Plaintiff's unlawful search claim. Plaintiff adequately pled that Dean's warrantless search of Ms. Jefferson's curtilage with neither probable cause nor exigent circumstances violated Ms. Jefferson's Fourth Amendment rights. After his initial investigations, Dean had no reason to think that a burglary was ongoing or that an exigency existed. Quite the opposite—he saw no evidence of a disturbance of any kind. Under these facts, his warrantless entry into Ms. Jefferson's curtilage was unreasonable.

This Court's caselaw clearly established the constitutional violation. That precedent informs officers that they must observe or

receive information on the ground in order to justify a warrantless entry; a call alone is not enough.

Dean was on notice that he could neither shoot a "figure" that wasn't pointing a gun at him or otherwise threatening him, and that he couldn't enter curtilage just because a front door was open. This Court should affirm.

ARGUMENT

I. Dean is not entitled to qualified immunity as to Plaintiff's excessive force claim.

A. Plaintiff adequately pled that Dean's use of lethal force violated Ms. Jefferson's Fourth Amendment rights.

The Fourth Amendment prohibits law enforcement from using excessive force in the course of an arrest or seizure. *See Graham v. Connor*, 490 U.S. 386, 394-95 (1989). "[D]eadly force is permitted only to protect the life of the shooting officer or others." *Cole v. Carson*, 935 F.3d 444, 453 (5th Cir. 2019) (en banc). That is, "[w]here the suspect poses no immediate threat to the officer and no threat to others," deadly force cannot be used. *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)). Wherever feasible, an officer must issue a warning before employing deadly force. *Id.* Because the constitutionality of force often turns on factual issues relating to the danger posed by the victim of the force, this

Court generally encounters excessive force cases in the more developed summary judgment posture. *See, e.g.*, *Baker v. Putnal*, 75 F.3d 190, 199 (5th Cir. 1996); *Cole*, 935 F.3d at 452; *Flores v. City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004); *Westfall v. Luna*, 903 F.3d 534, 548 (5th Cir. 2004).

As the district court correctly concluded, on the facts alleged, Ms. Jefferson did not pose a threat to Dean or anyone else, and therefore stated a claim that deadly force was not warranted. ROA.525-28; ROA.871-72. The district court observed that Ms. Jefferson pled the following facts:

(1) Dean "drew his weapon the moment he saw Jefferson's 'figure' in the . . . window";

(2) Dean's "view of Jefferson was obstructed by the reflection of his flashlight";

(3) Dean "did not announce himself as a police officer when he drew his weapon"; and

(4) Dean "fired at Jefferson before finishing his command for her to '[p]ut [her] hands up.'"

ROA.871 (quoting ROA.527-28). Additionally, Plaintiff alleged that "Ms. Jefferson did not point any weapon of any kind at Dean or his partner."

ROA.527.[6]

From these facts, the district court concluded that Dean "did not have a reasonable basis to discharge his weapon before finishing his command." ROA.872. In particular, the district court concluded that seeing only Ms. Jefferson's figure "would preclude him from seeing whether she was armed." ROA.872; *see also* OB 17 (acknowledging complaint's allegation that Dean saw only "a figure in the window"). As such, Dean "lacked the reasonable fear of serious injury necessary to justify his use of lethal force." ROA.872. These are "specific facts showing that the use of force . . . was excessive to the need and objectively unreasonable," *Baker*, 75 F.3d at 195, and Plaintiff therefore stated a plausible Fourth Amendment claim.[7]

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[6] Dean suggests that Ms. Jefferson was "raising a gun toward" him. *See* Opening Brief (hereinafter "OB") 21. That is not a reasonable inference to draw from the complaint, which alleges that "Ms. Jefferson did not point any weapon of any kind at Dean or his partner." ROA.527.

[7] Dean asserts that "Appellee never alleges facts, only broad, general conclusions, claiming that Dean" used excessive force. OB 21. This is accurate (and appropriate) as to the *causes of action* section of the complaint, which mirror the elements of the claim. *See* ROA.544-45. But it is exceedingly misleading insofar as Dean suggests it applies to the *factual recitations* in the complaint. *See* ROA.526-28.

Dean concedes—as he must—that the deadly force he employed was unconstitutional if he did not reasonably perceive an immediate threat of serious bodily harm or death to himself or others. *See* OB 18, 24. But in an apparent attempt to avoid this straightforward conclusion, Dean puts forth arguments that run contrary to the fundamentals of civil procedure and decades of this Court's Fourth Amendment caselaw.[8]

First, Dean argues that somehow Plaintiff's allegations are insufficient to support an excessive force claim because the complaint does not specify whether Ms. Jefferson was armed. OB 17. The district court rejected this argument, ROA.870-71, and so should this Court.

Plaintiff was not required to plead that Ms. Jefferson was unarmed for Dean's shooting of her to have been unreasonable. *See* ROA.870 (Dean's "position misplaces—and indeed elevates—the plaintiff's burden at this stage"). Plaintiff needed only to plead facts sufficient to raise a

[8] At the outset, despite Dean spilling much ink on the issue, OB 20-23, Plaintiff is not attempting to bring Dean's errors leading up to the shooting into the equation for purposes of the excessive force claim, because this Court's precedent forecloses such an argument. However, a petition for certiorari is currently pending on this issue, Petition for Certiorari, *Barnes v. Felix*, No. 23-1239 (U.S. filed May 22, 2024), and should it be granted and this Court's precedent on this point overruled, Plaintiff reserves the right to assert such an argument.

plausible inference that Ms. Jefferson "made no threatening or provocative gesture to the officers and posed no immediate threat to them." *Cole*, 935 F.3d at 455. In other words, Plaintiff plausibly pled that Dean "lacked the reasonable fear of serious injury necessary to justify his use of lethal force." ROA.872. *see also* ROA.871 ("Plaintiff need not plead that Jefferson was **unarmed**, but must only plead that Defendant acted unreasonably when he deployed deadly force.").

Indeed, this Court has routinely made clear that force may be excessive even when used against a person who is armed. For example, in *Baker*, disputed facts included whether the decedent was ordered "to 'freeze' or to drop the pistol" or whether he "was even holding the pistol or pointing it at" the officer. 75 F.3d at 198. In particular, the plaintiffs put forward evidence "that the decedent took no threatening action toward" the officer in advance of the shooting, and therefore did not pose a threat sufficient to justify lethal force. *Id.*; *see also* ROA.527 ("Ms. Jefferson did not point any weapon of any kind at Dean or his partner.") This Court concluded that in this situation "[t]here are simply too many factual issues to permit the [plaintiffs'] § 1983 claims to be disposed of at

summary judgment," and reversed the district court's order granting qualified immunity. 75 F.3d at 198.

Or take *Cole v. Carson*. There, this Court denied summary judgment to officers who shot a teenager even though they observed him holding a gun. 935 F.3d at 448-49, 457. The Court held that the officers' use of force would be excessive if it was true that the teenager "never pointed a weapon at the [o]fficers," did not "ma[k]e a threatening or provocative gesture towards [them]," and was not given a warning and sufficient time to respond. *Id.* at 448-49 (internal quotations omitted).

Dean's case citations on this point are inapposite. *See* OB 19. This Court's unpublished decision in *Jones v. Shivers*, 697 F. App'x 334 (5th Cir. 2017), does not even reach the constitutionality of the shooting in question given the "highly unusual fact pattern" in that case. *Id.* at 335. And in *Salazar-Limon v. City of Houston*, 826 F.3d 272 (5th Cir. 2017), the officer presented uncontested evidence that he shot the plaintiff—after a physical struggle and plaintiff's refusal to comply with officer commands—when the plaintiff "reached for his waistband and turned toward him" because "he believed that [plaintiff] had a gun and would shoot." *Id.* at 276. Neither of these opinions suggest that being armed,

alone, constitutes a threat sufficient to justify the use of excessive force, or—as Dean argues—that a plaintiff needs to allege they were unarmed to state a Fourth Amendment claim.[9]

Second, in a more bizarre variant of this insufficient-pleadings argument, Dean asserts Plaintiff was required to plead what "Ms. Jefferson did when at the window" and, if she was armed, specify with what. OB 17, 25. But this too is wrong for the reason discussed above, *see supra* at 13-14: "Plaintiff must only plead enough facts to state a plausible claim" and has met that standard by alleging facts indicating "that Defendant lacked the reasonable fear of serious injury necessary to justify his use of lethal force." ROA.871-82.[10]

* * *

In short, whether or not Ms. Jefferson was armed, she "did not point any weapon of any kind at Dean or his partner," ROA.527, and therefore

[9] Such a rule would not only impede Fourth Amendment rights, but Second Amendment rights as well. *See infra* at 22.

[10] That Plaintiff was given an opportunity to file an amended complaint under *Schultea* has exactly zero impact on the traditional *Twombly* and *Iqbal* pleading standard, *see, e.g.*, *Arnold v. Williams*, 979 F.3d 262, 267 (5th Cir. 2020), despite Dean's apparent desire for something more, OB 25 & n.2.

more than adequately pled that she "made no threatening or provocative gesture to the officers and posed no immediate threat to them," *Cole*, 935 F.3d at 455. In these circumstances, Plaintiff plausibly alleged Dean violated Ms. Jefferson's Fourth Amendment rights by shooting her dead.

B. The unconstitutionality of Dean's use of deadly force was clearly established.

The second prong of the qualified immunity test requires the Court to determine whether the law was clearly established at the time of the violation at issue. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Whether the law was clearly established turns on "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). The law is clearly established by controlling authority or a "robust consensus of persuasive authority." *Linicomn v. Hill*, 902 F.3d 529, 538 (5th Cir. 2018).

"One need not find a case squarely on point to show that a right was clearly established." *Parker v. Blackwell*, 23 F.4th 517, 522 (5th Cir. 2022). Rather, "precedent must provide that the existence of the right is not debatable." *Id.* "[T]he central concept" here "is that of 'fair warning.'" *Lytle v. Bexar Cnty.*, 560 F.3d 404, 417 (5th Cir. 2009) (quoting *Kinney v.*

Weaver, 367 F.3d 337, 350 (5th Cir. 2004) (en banc)). That is, "[t]he law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.'" *Id.* Furthermore, "in an obvious case," fair warning exists "even without a body of relevant case law." *Cooper v. Brown*, 844 F.3d 517, 524 (5th Cir. 2016) (quoting *Newman v. Guedry*, 703 F.3d 757, 764 (5th Cir. 2012)).

Dean does little to contest that, at the time he shot Ms. Jefferson, it was clearly established that an officer may not shoot an individual who—armed or not—made no threatening gestures and was not given any warnings by officers despite an opportunity to do so. *See* OB 24 ("Dean certainly is not arguing that he had a right to shoot someone whether or not they were apparently armed or apparently threatening in any way."). Nor could he: Cases holding as much abound. *See, e.g.*, *Baker*, 75 F.3d at 198; *Cole*, 935 F.3d at 453-57 (discussing cases).

Baker v. Putnal established in 1996, more than two decades before Dean shot Ms. Jefferson, that lethal force cannot be used in response to movement that is not threatening—even if the person is potentially

armed. *See* 75 F.3d at 190. In that case, the defendant officer heard gunfire soon after being told that someone on a crowded beach was armed. *Id.* at 193. The officer was directed to a parked car, where, according to witnesses, he fatally shot the suspect. *Id.* In denying the officer qualified immunity, this Court made clear that "mere motion to turn and face [the officer]" by a potentially armed plaintiff does not render the officer's force legal. *Id.* at 198.[11] Similarly here, Ms. Jefferson's movement toward a window to see who was in her yard did not justify lethal force, whether or not she was armed. ROA.872.

Similarly, *Cole v. Carson* recognized that *for nearly a decade* before Dean shot Ms. Jefferson it had been clearly established that lethal force is unlawful where there is no threatening movement—even if the person is armed. *See* 935 F.3d at 448-49 (internal quotations omitted).

These cases clearly establish that an officer cannot just shoot to kill a person who may be armed simply for looking at him; that person must

[11] Whether the plaintiff was even armed and, if so, what he was doing with the weapon, were two of the many facts in dispute that precluded summary judgment in *Baker*. 75 F.3d at 198. These factual questions meant the case was destined for a jury not, as Dean would have it, thrown out at a motion to dismiss. *See supra* at 13-16.

actually pose a threat in some concrete way. Seeing a "figure" is simply not enough. *See Allen v. Hays*, 65 F.4th 736, 745 (5th Cir. 2023) ("[A]n officer cannot escape liability any time he claims he saw a gun.").[12]

This Court's precedent is in line with a robust consensus of circuit precedent. *See, e.g.*, *Cole Est. of Richards v. Hutchins*, 959 F.3d 1127, 1134-5 (8th Cir. 2020) ("A robust consensus of persuasive authority . . . confirms that . . . a person in possession of a firearm is not an immediate threat unless he appears 'ready to shoot.'"); *Cooper v. Sheehan*, 735 F.3d 153, 159 (4th Cir. 2013) ("[A]n officer does not possess the unfettered authority to shoot a member of the public simply because that person is carrying a weapon."); *Campbell v. Cheatham Cnty. Sheriff's Dep't*, 47 F.4th 468, 480 (6th Cir. 2022) ("Under our precedent, possession of a weapon is not sufficient to justify the use of deadly force."); *George v. Morris*, 736 F.3d 829, 838-39 (9th Cir. 2013) (explaining that an officer's

[12] Insofar as Dean means to argue that *Jones* and *Salazar-Limon* suggest otherwise, *see* OB 19, he is wrong. Both of those cases involve fact patterns that are dramatically different from the situation here (lethal force used on an armed individual who climbed over a fence into yard during execution of an arrest warrant; lethal force used on individual who physically struggled with officer and then reached towards his waistband), and neither case's reasoning can be interpreted to conclude that it is lawful to use lethal force in the absence of a threat or just because someone is armed. *See supra* at 15-16.

use of deadly force would be unlawful if it were true that an individual had a gun "trained on the ground" and was not making threatening gestures or "serious verbal threats"); *Rosales v. Bradshaw*, 72 F.4th 1145, 1152-53 (10th Cir. 2023) (denying qualified immunity, holding possession of a gun alone did not create a threat sufficient to justify the use of force); *Perez v. Suszczyniski*, 809 F.3d 1213, 1220 (11th Cir. 2016) ("[T]he mere presence of a gun or other weapon is not enough to warrant the exercise of deadly force and shield an officer from suit."); *McKenney v. Mangino*, 873 F.3d 75, 82, 84 (1st Cir. 2017) (holding the use of deadly force may be unconstitutional even when used on someone who is holding a gun); *Weinmann v. McClone*, 787 F.3d 444, 449-50 (7th Cir. 2015) (same); *Bennett v. Murphy*, 120 F. App'x 914, 918 (3d. Cir. 2005) (same).

This Court's cases also clearly establish that it was unconstitutional for Dean to shoot Ms. Jefferson without a warning. This Court has stressed that "[e]ven when a suspect is armed, a warning must be given, when feasible, before the use of deadly force." *Allen*, 65 F.4th at 744 (alteration in original) (quoting *Poole v. City of Shreveport*, 13 F.4th 420, 425 (5th Cir. 2021)); *see Cole*, 935 F.3d at 453 ("*Garner* . . . requires a warning before deadly force is used 'where feasible.'" (citing *Garner*,

471 U.S. at 11-12)). Indeed, such warnings are a "critical component of risk assessment and de-escalation," and this Court has required such a warning across police shooting cases, regardless of the specific "fact pattern[]" at issue. *Id.* Against this backdrop, Dean's decision to "fire[] at [Ms.] Jefferson before finishing his command for her to '[p]ut [her] hands up'" violated clearly established law. ROA.871.

This precedent makes good sense. People have a Second Amendment right to own and carry guns both inside and outside the home. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 8-10 (2022) (holding that the Second Amendment protects an individual's right to carry a handgun for self-defense outside in addition to inside the home). Ms. Jefferson's rights were protected by Texas state law as well. *See* Tex. Const. art. 1, § sec. 23 ("Every citizen shall have the right to keep and bear arms in the lawful defence of himself or the State."); Tex. Penal Code Ann. § 9.32 (deadly force in defense of person); *id.* § 9.33 (defense of third person); *id.* § 9.42 (deadly force to protect property allowed "to prevent the other's imminent commission of . . . burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime"). Allowing the police to shoot anyone who

possessed or held a weapon in their own home would obliterate these rights.

So, this Court's precedent makes clear that Dean had fair—indeed conclusive and repeated—warning that shooting Ms. Jefferson under the circumstances was unconstitutional. But even without that precedent, the unconstitutionality of Dean's actions was sufficiently "obvious" to satisfy prong two. As this Court has explained, the unconstitutionality of using deadly force without an immediate threat "can be sufficient [to meet prong two] in obvious cases," even "without dependence on the fact pattern of other cases." *Cole*, 935 F.3d at 453 & n.48 (citing *Mason v. Lafayette City-Par. Consol. Gov't*, 806 F.3d 268, 277-78 (5th Cir. 2015); *Newman v. Guedry*, 703 F.3d 757, 764 (5th Cir. 2012)); *see also Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Where there is no reason to suspect an imminent threat or danger *of any kind*, the use of lethal force is obviously unconstitutional.

Dean's conduct becomes even more of an "obvious" constitutional violation when the allegations are viewed in a light most favorable to Plaintiff and all inferences are made in his favor, as required. *See Cole*, 935 F.3d at 453 ("This case is obvious when we accept the facts as we

must."). That is because, under that standard, Dean had no information to think Ms. Jefferson was armed. As the district court noted, because Dean's view of Ms. Jefferson was obstructed by the reflection of his flashlight, "[i]t is arguable . . . that he could not see Jefferson's person at all—only her 'figure'—which would preclude him from seeing whether she was armed." ROA.871-72.[13] And it has been clearly established for decades that using deadly force against an unarmed, unthreatening person is unconstitutional. *See, e.g.*, *Garner*, 471 U.S. at 11 ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead."); *Allen*, 65 F.4th at 745 ("It was well established, at the time of the shooting, that such use of deadly force against a person who the officer knows is not dangerous is a constitutional violation."); *Poole*, 13 F.4th at 424 (noting that it is "manifest[ly] unreasonable[]" to "shoot[] an individual the officer can see is unarmed and not aggressive"); *see also Crane v. City of Arlington*, 50 F.4th 453, 467 (5th Cir. 2022) ("[U]sing deadly force on an unarmed, albeit non-compliant, driver" who posed no threat "was a constitutional violation beyond debate.").

[13] Likewise, the complaint alleged that Dean began shouting "Put your hands up! Show me your hands!," which suggests that he did not see her hands at all. ROA.528.

On the facts alleged—a "figure" appears in a window, ROA.872—no reasonable officer would think it was reasonable to shoot to kill before even finishing issuing a warning.

II. Dean is not entitled to qualified immunity as to Plaintiff's unlawful search claim.

A. Plaintiff adequately pled that Dean's warrantless search of Ms. Jefferson's curtilage with neither probable cause nor exigent circumstances violated Ms. Jefferson's Fourth Amendment rights.

"[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). "At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Id.* (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)); *see also Wanger v. Bonner*, 621 F.2d 675, 682 (5th Cir. 1980) ("An individual's privacy interests are nowhere more clearly defined or rigorously protected by the courts than in the home."). "To give full practical effect to that right," the law "considers curtilage—'the area immediately surrounding and associated with the home'—to be 'part of the home itself for Fourth Amendment purposes." *Collins v. Virginia*, 584 U.S. 586, 592 (2018) (quoting *Jardines*, 569 U.S. at 6). Because of the strong protections

afforded the home, warrantless searches of a home or the home's curtilage are "presumptively unreasonable," *Payton v. New York*, 445 U.S. 573, 586 (1980), and government officials bear a "heavy burden" to overcome that presumption, *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984).

As the district court noted, Dean's conduct undoubtedly amounts to a "search" of Ms. Jefferson's curtilage within the meaning of the Fourth Amendment. ROA.874. There is no question that Ms. Jefferson's fenced-in side yard was within the curtilage of her home. *See Jardines*, 569 U.S. at 6 (defining curtilage as "the area 'immediately surrounding and associated with the home'"); *Collins*, 584 U.S. at 593 ("Just like the front porch, side garden, or area 'outside the front window,' the driveway enclosure . . . is properly considered curtilage." (internal citations omitted)); *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (fenced-in yard adjacent to suburban home was within curtilage); *Sauceda v. City of San Benito*, 78 F.4th 174, 184 (5th Cir. 2023) (holding that fenced-in side yard constituted curtilage). What is more, for over 60 years this Court has recognized that an officer looking into a person's window without a warrant violates the Fourth Amendment. *Brock v. United States*, 223 F.2d 681, 685 (5th Cir. 1955) (bedroom); *see also State of Tex. v. Gonzales*,

388 F.2d 145, 146-47 (5th Cir. 1968) (dining room). Here, Dean opened Ms. Jefferson's fence gate, proceeded into her side yard, and looked through her window. ROA.866. This is a search.[14]

Having established that Dean trespassed on and searched the curtilage of Ms. Jefferson's home, there must have been both probable cause to believe a crime had been committed and exigent circumstances to justify a warrantless search. *See Kirk v. Louisiana*, 536 U.S. 635, 638 (2002); *United States v. Lim*, 897 F.3d 673, 687 (5th Cir. 2018) ("A 'search of a dwelling is presumptively unreasonable unless consent is given or probable cause *and* exigent circumstances justify the encroachment.'"

[14] At one point, Dean appears to concede his conduct amounted to a search, OB 27 (referring to Dean's "perimeter search"), but in another he seems to press the issue, *see* OB 38 ("[I]t is far from clearly-established that such activity even rises to the level of an actual 'search' at all for Fourth Amendment purposes."). To the extent Dean attempts to contest he did not conduct a warrantless search here, that argument falls flat under this Court's and Supreme Court precedent. *See Sauceda*, 78 F.4th at 184; *Ciraolo*, 476 U.S. 213. Dean's alleged case support is both out-of-circuit and distinguishable. *See Taylor v. Mich. Dep't of Nat'l Res.*, 502 F.3d 452, 454, 457 (6th Cir. 2007) (conservation officer's "administrative or regulatory investigation" on apparently-unoccupied rural property, as distinguished from "criminal investigation").

(quoting *United States v. Santiago*, 410 F.3d 193, 198 (5th Cir. 2005))).[15] Neither were present here.

Probable cause requires "something more than 'mere suspicion.'" *United States v. Gordon*, 580 F.2d 827, 832 (5th Cir. 1978) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)). It requires the existence of facts 'sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Id.* (cleaned up). Here, Dean lacked probable cause—or even reasonable suspicion. *See* ROA.873 (noting complaint's allegations, at ROA.543). He was responding to a report of an open door, in which the neighbor "gave

[15] Probable cause is not necessary under the "emergency aid" exception to the warrant requirement. Dean does not argue that exception applies—and for good reason. The emergency aid exception requires an "objectively reasonable basis for believing that an occupant is seriously injured or imminently threated with such injury." *Brigham City v. Stuart*, 547 U.S. 398, 400 (2006). Here, until viewing Ms. Jefferson's figure in the window, Dean had no reason to believe anyone was even inside the home, let alone that they needed immediate aid, and this Court has "declined to apply the emergency aid exception absent strong evidence of an emergency." *Linicomn v. Hill*, 902 F.3d 529, 536 (5th Cir. 2018); *see also United States v. Troop*, 514 F.3d 405, 410 (5th Cir. 2008) ("Without objective evidence of physical distress, the failure of anyone to respond to the agents' knocking" is "insufficient to create exigent circumstances.").

no other facts indicative of suspicious activity." ROA.865.[16] Upon arriving at Ms. Jefferson's residence, Dean inspected the open front door, the screen window at the front door, another screen door, the outside of the property, cars in the driveway, the garage and garage doors, and the door on the fence next to the garage—all before the search in question. ROA.866, 873, 526-27. Throughout this time, the district court correctly explained, "Dean did not observe *any indications* of a disturbance consistent with a burglary in progress." ROA.866 (emphasis added); ROA.873 (Dean "observed no signs of disturbance or visible evidence of a break-in" (cleaned up)). In fact, the complaint alleges that Dean observed "no evidence of a disturbance *of any kind*," ROA.526-27 (emphasis added), let alone the type of disturbance necessary to establish probable cause to believe a burglary was currently ongoing. This is not enough to establish probable cause under this Court's caselaw, which requires police on-scene

[16] The district court was correct in concluding that Dean "was not responding to an active alarm at the residence" or "responding to an emergency burglary-in-progress call." ROA.873-84. The complaint alleges that Dean responded to an "open structure" call. ROA.525. FWPD policy may instruct officers to *investigate* reports of "open doors" the same way they would a silent alarm call, ROA.541, but that does not mean that Dean was responding to a burglary in progress call, as Dean at times seems to suggest*, see* OB 5.

to corroborate suspicion of a crime in order to establish probable cause. *See, e.g.*, *United States v. Morales*, 171 F.3d 978, 981-82 (5th Cir. 1999) (officers on scene lacked probable cause because they "did not see anything outside the warehouse to corroborate the 911 call" of cocaine trafficking).[17]

Not only did Dean did not have probable cause to conduct a search by entering Ms. Jefferson's gated side yard and peering through the window, but there were not exigent circumstances to justify his intrusion. This is a demanding standard that applies only when "the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable." *Lange v. California*, 594

[17] Cases from other circuits and state supreme courts are in accord. *See, e.g.*, *Reardon v. Wroan*, 811 F.2d 1025, 1028 (7th Cir. 1987) (triable issue as to lack of probable cause where radio call indicated a burglary was in progress, but upon arrival officer's "preliminary inspection of the house uncovered nothing suspicious"); *Murdock v. Stout*, 54 F.3d 1437, 1441 (9th Cir. 1995) (holding that "report of suspicious activity indicating a possible burglary" plus an open door at the house was, without more, insufficient to support probable cause), *abrogated on other grounds by United States v. Ramirez*, 523 U.S. 65 (1998); *Hunsberger v. Wood*, 570 F.3d 546, 555 (4th Cir. 2009) ("[A]n open door alone does not create a reasonable belief that a burglary is taking place."); *State v. Bransom*, 765 P.2d 824, 826 (Or. 1988) (en banc) ("The broken door screen and open front door would not have led a prudent officer to believe that a burglary was being or had been committed.").

U.S. 295, 301 (2021) (quoting *Kentucky v. King*, 563 U.S. 452, 460 (2011)). And it is Dean's burden to demonstrate the existence of an exigency to justify the warrantless entry. *See United States v. Rico*, 51 F.3d 495, 500-01 (5th Cir. 1995).

He cannot, because there was no exigency here. This Court generally considers five factors in determining if there were exigent circumstances, all of which relate to either destruction of evidence or danger to others. *See United States v. Menchaca-Castruita*, 587 F.3d 283, 289-90 (5th Cir. 2009) (setting out factors, holding no exigent circumstances, and noting that "[a]s a general rule, exigent circumstances exist when there is a genuine risk that officers or innocent bystanders will be endangered, that suspects will escape, or that evidence will be destroyed if entry is delayed until a warrant can be obtained"). Dean had no reason to believe anyone was even in the house, let alone that someone inside was likely to hurt another person or destroy evidence. All he knew was that he was responding to an "open-structure" call. ROA.874. This is nowhere near enough to meet his burden of proving exigency. *See Menchaca-Castruita*, 587 F.3d at 292 ("If anything, the circumstances suggested just the opposite, *viz.*, that no one was in the

residence and that there was no risk that the evidence might be destroyed.").

Dean argues that, because FWPD directs its officers to investigate reports of "open doors" the same way as they would a "silent alarm," he had a reasonable belief that exigent circumstances existed. OB 27-28. Putting aside the merits of FWPD's policy—which is, of course, the subject of an ongoing *Monell* claim, ROA.541-42; *supra* at 5 n.4—the fact that blame can be *also* be placed elsewhere does not shield him from liability. *See, e.g.*, *Harris v. Clay Cnty.,* 47 F.4th 271, 277 (5th Cir. 2022) (rejecting "jailer's just-following-orders defense[]" to unlawful detention claim). That is why *Monell* liability based on a municipality's practice and individual liability stemming from an officer following that practice can exist in the same case. *See, e.g., Ford v. Anderson Cnty.*, 102 F.4th 292, 311-12, 320-21 (5th Cir. 2024); *Moore v. LaSalle Mgmt. Co., L.L.C.*, 41 F.4th 493, 502, 510-12 (5th Cir. 2022).[18] At any rate, notwithstanding

[18] To the extent the existence of a municipal policy aids in defense to an individual § 1983 claim, that only holds where the constitutional violation requires a defendant to *know* they were acting badly. *See, e.g.*, *Ford*, 102 F.4th at 312 n.10 (an officer's compliance with municipal policy "by no means immunizes his actions from liability under § 1983, [but] it militates against a finding of *deliberate* indifference" (emphasis added)).

what Dean may have been justified in thinking upon first arriving at the scene, no reasonable officer would have thought that an ongoing burglary or exigent circumstances existed after inspecting the open front door, another door, the outside of the property, cars in the driveway, the garage and garage doors, and the door on the fence next to the garage, and seeing "no signs of disturbance [or] . . . visible evidence of a break-in." ROA.873.

This Court's decision in *Linicomn* is instructive here. In *Linicomn*, a woman placed a 911 call reporting a "disturbance" relating to her children, who were at her ex-husband's residence. 902 F.3d at 534. The ex-husband answered the door and said the children were "asleep and did not need medical assistance," but the police entered without a warrant anyway. *Id.* (The children were fine; the ex-wife, who lost custody due to mental health issues, had a history of making exaggerated claims about the children's welfare.) The ex-husband brought a Fourth Amendment claim under § 1983, and the district court denied defendants' motion for judgment on the pleadings on the basis of qualified immunity. *Id.* at 535.

The objective reasonableness standard for a search claim does not fit the bill. What is more, even a "just following orders" defense in the deliberate indifference context does not hold if those orders are "facially outrageous," as may be the case here. *Id.*

This Court affirmed, rejecting the defendants' claim of exigent circumstances. *Id.* at 536-37. The officers could not rely on the ex-wife's 911 call alleging a "disturbance" because "the officers had the burden of proving the existence of exigency, and *failed to corroborate her call*." *Id.* at 537 (emphasis added). Thus, *Linicomn* teaches that even if Dean had been responding to a burglary call—and he wasn't; he was responding to an "open structure" call, ROA.535—he would need to confirm facts that suggested exigent circumstances before entering the curtilage without a warrant. And indeed, Dean was confronted with overwhelming evidence suggesting the *opposite*, as he "did not observe *any indications* of a disturbance consistent with a burglary in progress." ROA.866 (emphasis added).

Without attempting to distinguish *Linicomn*, Dean relies exclusively on out-of-circuit decisions—and an unpublished district court decision to boot—to support his bid for exigency. OB 27-28. As the district court correctly pointed out, none of the cases he cites are on point. ROA.873-74. For one, in those cases the officers were responding to an *actual alarm or report of burglary*. *See Bilida v. McLeod*, 211 F.3d 166, 171 (1st Cir. 2000) (security alarm); *United States v. Johnson*, 9 F.3d 506,

507 (6th Cir. 1993) (neighbor called, reporting "seeing individuals crawl through the window"); *United States v. McCullough*, 457 F.3d 1150, 1156 (10th Cir. 2006) (alarm signal); *Sumner v. Darrin*, No. CV 03-40080-FDS, 2006 WL 8458645, at *9 (D. Mass. June 29, 2006) (security alarm); *Chey v. LaBruno*, 608 F. Supp. 3d 161, 182 (D.N.J. 2022) (burglar alarm). What's more, the alarms were accompanied by *additional evidence* on scene suggesting burglary or unlawful entry. *See Johnson*, 9 F.3d at 509 (describing broken kitchen window, police knocks not responded to though there were people inside, and people inside stating they could not open the door because they lacked the key); *McCullough*, 457 F.3d at 1156 (describing the police seeing two "grungy" and "nervous" people exiting the house from the basement and their inability to identify the homeowners); *Barocio v. State*, 158 S.W.3d 498, 498 (Tex. Ct. Crim. App. 2005) ("an illegally parked car, with its driver's door open and the keys in the ignition," "pry marks on the front door," and "a lot of noise inside the home" while officers were waiting for someone to answer). And *Bilida*, which Dean puts forward as his lead case, recognizes that even if an initial entry onto the property was justified because of an alarm, a subsequent search was not because "[t]he original concern about the

silent alarm had entirely dissipated" by that point. 211 F.3d at 172. So even if these cases were precedential, they would be unhelpful to Dean, where he was responding only to a call indicating an open door, and found no corroborating evidence to suggest foul play. ROA.865-66.

In short, Dean had neither probable cause to believe a crime had occurred, nor any exigent circumstances, as he discovered a completely undisturbed home after responding to an "open structure" call. ROA.866. Despite this, he intruded on Ms. Jefferson's curtilage and in doing so violated her Fourth Amendment rights. ROA.874.

B. The unconstitutionality of Dean's search was clearly established.

As the district court correctly concluded, a reasonable officer in Dean's position would have understood that entering the curtilage of Ms. Jefferson's home without a warrant, probable cause, or an exigency was unconstitutional. For decades both the Supreme Court and courts in this Circuit have recognized the clarity of the law on this point. *See, e.g.*, *Kirk*, 536 U.S. at 638 ("[P]olice officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home."); *Lim*, 897 F.3d at 687 ("A 'search of a dwelling is presumptively unreasonable unless consent is given or probable cause *and* exigent

circumstances justify the encroachment.'" (quoting *Santiago*, 410 F.3d at 198)); *Harris v. Canulette*, 997 F.2d 881, 1993 WL 261085, at *2 (5th Cir. 1993) (per curiam) ("There is no question that the . . . freedom from warrantless searches and seizures within the home is clearly established."). Because of this clarity, Dean would have been on notice that when he entered the gate into Ms. Jefferson's fenced-in yard and peered through the window, despite seeing no signs of any disturbance in his prior investigation of the premises, ROA.866, he was violating Ms. Jefferson's Fourth Amendment rights.

The above caselaw alone was sufficient to clearly establish the law; no further specificity is required. Indeed, this Circuit has previously—and repeatedly—identified the Fourth Amendment right to be free from unreasonable searches for qualified immunity purposes at this level of specificity. *See, e.g.*, *Smith v. Lee*, 73 F.4th 376, 384 (5th Cir. 2023) ("Smith's right to not have her home searched without a warrant, consent, or some other legal justification was clearly established in 2018."); *Von Derhaar v. Watson*, 109 F.4th 817, 828 (5th Cir. 2024) (concluding officers were not entitled to qualified immunity because "[t]he law regarding . . . exigent circumstances has been clearly

established for some time"); *Hogan v. Cunningham*, 722 F.3d 725, 733 (5th Cir. 2013) (holding "[a]t the time of the Officers' conduct, the Supreme Court and this court had made it abundantly clear that either a warrant or probable cause and exigent circumstances is required to" enter an individual's home); *Fontenot v. Cormier*, 56 F.3d 669, 675-76 (5th Cir. 1995) ("At the time of the incident in this case, it was well-established that warrantless, nonconsensual entry into a home is presumptively unreasonable."); *Gorsky v. Guajardo*, No. 20-20084, 2023 WL 3690429, at *6 (5th Cir. May 26, 2023) (holding that an entry into the home without a warrant or consent "would violate clearly established law from this circuit holding that a warrantless entry into a home without consent is presumptively unreasonable"). This Court's precedent is abundantly clear that Dean's warrantless entry without probable cause and exigent circumstances violated Ms. Jefferson's rights.

Even if a higher degree of specificity were required, this Court's caselaw put Dean on notice that what he knew at the time of the incident in this case was insufficient to justify intruding on Ms. Jefferson's curtilage. *Linicomn*, decided a year before the events in question in this case, clearly established that a warrantless entry is not justified on the

basis of exigency by a non-emergency call alone; rather, a police officer responding to such a call must "corroborate" the call by "observ[ing] or receiv[ing] . . . information" that suggested an exigency, before entering the home without a warrant. 902 F.3d at 537-38.[19]

Likewise, in *Hogan v. Cunningham*, this Court held that when what brings the police to a property is not an emergency, the call alone is not enough to constitute an exigent circumstance. 722 F.3d at 733 ("Standing alone, the fact that the Officers were sent to Hogan's apartment to deal with a child-custody matter cannot create the exigency that would make the Officers' warrantless entry constitutionally permissible."); *see also, e.g.*, *Troop*, 514 F.3d at 410 ("Without any objective evidence of physical distress, the failure of anyone to respond to the agents knocking . . . also becomes insufficient to create exigent circumstances."). *Linicomn* and *Hogan* provided notice to Dean that he

[19] This Court in *Linicomn* granted qualified immunity to the officers, concluding that the law was not clearly established at the time of the officers' entry into the home in that case. 902 F.3d at 538-39. But because the Court reached the constitutional question before doing so, Dean had the benefit of this Court's wisdom in *Linicomn* when he acted here. *See Von Derhaar*, 109 F.4th at 827 (holding clearly established law is assessed at the time of the incident).

needed to corroborate or otherwise have received additional evidence of exigency before entering the curtilage of Ms. Jefferson's home.[20]

In addition to this Court's clearly-established precedent existing at the time that would have sufficiently put Dean on notice, other opinions also "aptly illustrate[] the established right" at issue here. *Cooper*, 844 F.3d at 525 n.8; *see also Marks v. Hudson*, 933 F.3d 481, 486 (5th Cir. 2019) ("[T]o the extent any of those opinions are restating what was clearly established in precedents they cite or elsewhere, the unpublished opinions can properly guide us to such authority."). So, for example, this Court has quite recently in *Von Derhaar*—looking back in time for qualified immunity purposes to less than one year after Dean acted—held that an officer was not entitled to qualified immunity where he entered a home without a warrant on the basis of the plaintiff's "erratic" behavior alone, where the officer "observed no safety threat." 109 F.4th at 828; *see also Kearns v. Kite*, No. 3:17-CV-0023-GHD-RP, 2018 WL 6613803, *5 (N.D. Miss. Dec. 17, 2018) (reading this Court's caselaw

[20] *King v. Montgomery Cnty.,* 797 F. App'x 949 (6th Cir. 2020), which Dean cites, *see* OB 33-34, is not to the contrary. In that case, an officer seized dogs he found in "horrific disrepair" and "squalid" and "appalling conditions" that he *observed* and *corroborated* once on the ground before acting. *Id.* at 955-56.

existing in 2018 to clearly establish that, where "there is no evidence of physical distress," a reasonable officer would know that "he could not enter a closed door into the home" or curtilage); *Ybarra v. Davis*, 489 F. Supp. 3d 624, 628 (N.D. Tex. Sept. 24, 2020) (officer who jumped the fence onto plaintiff's curtilage not entitled to qualified immunity, where complaint plausibly supported a lack of exigent circumstances).

For the law to be clearly established it is not necessary "that the officers in this circuit had faced this precise situation before" in a published opinion; rather, officials can be on notice in novel factual circumstances where the "relevant factors" from this Court's prior cases would have put a defendant on notice. *Hankins v. Wheeler*, 109 F.4th 839, 851 (5th Cir. 2024) (cleaned up). Simply put, it is clearly established in this Circuit that "suspicions" are not enough to justify a warrantless intrusion into the sanctity of the home; corroborating evidence is required. Because Dean saw no signs of a disturbance once arriving at the scene, ROA.873-74, his warrantless search was clearly unconstitutional under this Court's precedent.

CONCLUSION

For these reasons, the Court should affirm the district court's order denying qualified immunity and remand for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

All counsel of record are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Date: August 26, 2024 */s/ Devi M. Rao*
Devi M. Rao

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a) and 5th Cir. R. 32.3, I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7) because this brief contains 8,953 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the 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 2019 in 14-point Century Schoolbook typeface.

Date: August 26, 2024

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