No. _____

In The
Supreme Court of the United States

JOHNNY BARNES,

Petitioner,

vs.

JOSEPH GERHART et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

GARY E. FRIEDMAN
Counsel of Record
G. TODD BUTLER
PHELPS DUNBAR LLP
4270 I-55 North
Jackson, Mississippi 39211
Telephone: (601) 352-2300
Facsimile: (601) 360-9777
friedmag@phelps.com
butlert@phelps.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

In the summer of 2010, Officer Johnny Barnes participated in a joint drug-surveillance operation. A confidential informant was sent into the home of a white male who had been involved in three drug deals over the course of the preceding month. Inside the home, the confidential informant was ordered to use drugs at knife point. Officer Barnes attempted to save the confidential informant but mistakenly entered a home two houses away after a white male was observed running inside.

(1) Did the Fifth Circuit wrongly hold that Officer Barnes' mistake was "unreasonable" under the Fourth Amendment?

(2) In the alternative, did the Fifth Circuit wrongly deny Officer Barnes qualified immunity?

(3) At a minimum, should this case be GVR'd in light of *Sause v. Bauer*, 138 S.Ct. 2561 (June 28, 2018), *Kisela v. Hughes*, 138 S.Ct. 1148 (Apr. 2, 2018), and *District of Columbia v. Wesby*, 138 S.Ct. 577 (Jan. 22, 2018).

PARTIES TO THE PROCEEDING

The Petitioner is Johnny Barnes, a police officer in Pearl, Mississippi. Pearl is a municipality with approximately 25,000 residents. Respondents are Joseph Gerhart, Amanda Jo Gerhart, Brett Gerhart, Ian Gerhart, and Sarah Robillard – a family that resides in Pearl, Mississippi. Deputy Brett McAlpin and Agent Brad McLendon are law enforcement officers who are co-defendants in this case.

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PETITION FOR WRIT OF CERTIORARI

The Fourth Amendment forgives mistakes that are "reasonable." In this case, the Fifth Circuit held that Officer Barnes' mistaken entry of a home was unreasonable, even though he made efforts to determine the correct house, even though he made the mistake while attempting to save someone's life, and even though he entered the wrong home only after a suspicious individual disobeyed his fellow law enforcement officers. The Fifth Circuit's application of the reasonable-mistake rule distorts this Court's precedent and directly conflicts with holdings from other Courts of Appeals.

The Fifth Circuit compounded its error by refusing to grant Officer Barnes qualified immunity. Relying on non-binding decisions and this Court's general statement of the law in *Maryland v. Garrison*, 480 U.S. 79 (1987), the Fifth Circuit held that Officer Barnes' actions were unconstitutional under "clearly established" law. This result ignores repeated warnings from this Court that, to qualify as clearly established law, a decision must be both "authoritative" and "specific."

Certiorari should be granted on both questions presented or, at a minimum, a grant-vacate-and-remand order should be entered. Twice this Term, this Court reminded lower courts that they must be more careful in considering questions of qualified immunity. The Fifth Circuit refused to listen, despite Officer Barnes' reliance on both *Kisela v. Hughes*, 138 S.Ct. 1148 (Apr.

2, 2018) and *District of Columbia v. Wesby*, 138 S.Ct. 577 (Jan. 22, 2018).

OPINIONS BELOW

The Fifth Circuit's judgment and order denying en banc rehearing are provided at App. 28-29, 90-91. The Fifth Circuit's original opinion is unreported but provided at App. 30-49. The Fifth Circuit's substituted, amended opinion is available at 724 Fed. App'x 316 (5th Cir. Apr. 26, 2018) and provided at App. 1-27. The district court's order is unreported but provided at App. 50-53.

The separate Fifth Circuit opinion regarding Co-Defendant McLendon is available at 714 Fed. App'x 327 (5th Cir. Oct. 25, 2017). The district court's order regarding Agent McLendon is available at 2017 WL 1238028.

STATEMENT OF JURISDICTION

The Fifth Circuit issued its original opinion on March 12, 2018 and issued its substituted opinion on April 26, 2018. App. 30-49, 1-27. Officer Barnes' timely petition for en banc rehearing was denied on June 25, 2018. App. 90-91. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]"

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

STATEMENT OF THE CASE

I. Facts

This mistaken entry case grew out of a joint drug-surveillance operation conducted in the summer of 2010. ROA.4283. Participants in the operation included individuals employed by the following law enforcement agencies: the Pearl Police Department, the Rankin County Sheriff's Department, the State Narcotics Bureau, and the District Attorney's Office. ROA.4283, ROA.1542-1546.

Officer Johnny Barnes, a member of the Pearl Police Department, was one of the participants. ROA.1542-1546. The "target" of the operation was David Michael Reed, a white male who resided at 473 Robert Michael Drive. ROA.1542-1546, ROA.1547-1551. Reed had been involved in three previous drug deals over the course of the preceding month. ROA.1542. The plan was to make a fourth "buy" through a confidential informant and then to execute a warrant on Reed's residence. ROA.1542.

A pre-operation briefing took place at the Pearl Police Department. ROA.1542-1546, ROA.4002. Officers were informed by Detective Scouten of Reed's prior drug activities as well as potential harms that could be inside of Reed's house. ROA.1542-1546. The confidential informant described the layout of Reed's residence and drew a sketch of the interior and exterior of the home. ROA.1542-1546, ROA.1541. Officer Barnes was present at the briefing and relied on the information he obtained from Detective Scouten and the confidential informant. ROA.1542-1546, ROA.4001-4004.

Following the briefing, on the evening of June 7, 2010, officers from the four agencies assembled in separate vehicles. ROA.1542-1546. After the confidential informant proceeded to Reed's home, the law enforcement vehicles parked in different locations in anticipation of the informant making the buy and returning the drugs to the officers. ROA.1542-1546.

One of the vehicles, a black SUV, parked at the end of Robert Michael Drive approximately 200 yards away

from the target home. ROA.1544. Officer Barnes was in the backseat, Deputy Brett McAlpin with the Rankin County Sheriff 's Department was in the front passenger seat, and Agent Brad McLendon with the Narcotics Bureau was in the front driver's seat. ROA.1613. Prior to parking for the stakeout, the SUV followed the confidential informant's vehicle to the area surrounding Reed's house. ROA.1542-1546, ROA.4004.

Things did not go according to plan inside of Reed's residence. After the confidential informant purchased five grams of crystal meth, Reed told her to sit down on the couch by his friend – a man who was holding a knife. ROA.1629. Reed ordered the informant to use drugs with them, which understandably made her "really scared[.]" ROA.1629. The informant sent a text message to Detective Scouten, notifying him that she was in danger. ROA.1544-1545. Detective Scouten, in turn, proceeded to Reed's residence and dispatched the other vehicles for back-up. ROA.1545.

Unfortunately, the black SUV occupied by Officer Barnes, Agent McLendon, and Deputy McAlpin went to the wrong house. As the SUV proceeded down Robert Michael Drive, Brett Gerhart (a white male like Reed) was in the front of 481 Robert Michael Drive – two houses away from Reed's residence. ROA.1542-1546, ROA.4286-4287, ROA.1570-1574, ROA.1630-1631. Brett Gerhart heard the SUV's screeching tires and began running. ROA.4286-4287, ROA.1633-1635. He testified that he was ordered to get down but that he nonetheless continued running and went inside of his

house. ROA.1636. Once inside, Brett Gerhart deadbolted the door closed. ROA.1637-1638.

The officers gave pursuit and entered the Gerharts' home. Deputy McAlpin kicked in the door to make entry, and Agent McLendon followed Deputy McAlpin inside. ROA.1645-1646, ROA.1649-1651. Officer Barnes was last to enter the home, after hitting his leg against the SUV's running board and falling while exiting the SUV. ROA.1617-1622. Deputy McAlpin detained Brett Gerhart inside of the home, and Agent McClendon detained Joseph Gerhart. ROA.4287-4288. Officer Barnes proceeded to the hallway of the Gerharts' home upon entry. ROA.1657-1659.

Officer Barnes quickly realized he was in the wrong house when he confronted Amanda Jo Gerhart holding a small child. ROA.1657. He went into the living room to inform the other officers, apologized to the Gerharts, and exited the house. ROA.1624-1627, ROA.1662-1664.

Meanwhile, the other law enforcement officers involved in the operation were at the correct house. ROA.1542-1546. The confidential informant was rescued, and Reed was apprehended. ROA.1542-1546, ROA.1547-1551. Drugs and other contraband were seized. ROA.1547-1551. Reed eventually pled guilty and was sentenced to 30 years in prison. ROA.1666-1669. Prior to the filing of this lawsuit, the City of Pearl paid for repairs to the Gerharts' door and issued another apology through the Pearl Police Chief. ROA.1670-1672, ROA.1664.

II. Proceedings

Trial Court. The Gerharts' original complaint was filed in September 2011. ROA.32-54. Over the course of the proceedings, the Gerharts amended their complaint four different times. ROA.55-76, ROA.487-509, ROA.845-926, ROA.4278-4301. The Gerharts brought federal and state law causes of action against a variety of governmental entities and individual law enforcement officers. ROA.1-54, ROA.55-76, ROA.487-509, ROA.845-926, ROA.4278-4301.

In March 2017, the district court ruled on the remaining defendants' summary judgment requests. ROA.4488-4515. The district court's first order addressed Officer Barnes' and Deputy McLendon's summary judgment motions but did not provide a written analysis of Officer Barnes' and Deputy McLendon's arguments. App. 50-53. The district court's second order addressed Agent McClendon's summary judgment motion but did provide a written analysis of Agent McClendon's arguments. *See* 2017 WL 1238028 at *9-13.

As a result of the district court's rulings, the Gerharts' unlawful entry claim was allowed to proceed against Agent McLendon, Deputy McAlpin, and Officer Barnes. *Id*. at *10-12; App. 50-53. Oddly, the district court ruled that the Gerharts' unlawful entry claim against Agent McLendon would proceed under the Fourth Amendment while the Gerharts' unlawful entry claim against Officer Barnes and Deputy McLendon would proceed under the Fifth Amendment. *Id*. Officer Barnes had explained in his summary

judgment brief that the Fifth Amendment applied only to federal actors, not municipal police officers like him. ROA.1682. The district court's order did not address this distinction or explain why Officer Barnes was not entitled to qualified immunity. App. 50-53.

Fifth Circuit. Officer Barnes, Deputy McAlpin, and Agent McLendon all filed notices of appeal, ROA.4516-4518, ROA.4521-4525, but the Fifth Circuit docketed Officer Barnes' and Deputy McAlpin's appeal separately from Agent McLendon's appeal. The appeals ultimately were decided by different panels. *Compare Gerhart v. McLendon*, 714 Fed. App'x 316 (5th Cir. Oct. 25, 2017) *with* App. 1-27.

A panel consisting of Judges King, Elrod, and Higginson affirmed the district court's denial of qualified immunity to Agent McLendon after finding that he made *no* efforts whatsoever to identify the correct house. *See McLendon*, 714 Fed. App'x at 334. The opinion was issued on October 25, 2017, prior to this Court's January 2018 decision in *Wesby*.

A panel consisting of Judges Barksdale, Dennis, and Elrod affirmed the district court's denial of qualified immunity to Officer Barnes and Deputy McAlpin on March 12, 2018. App. 30-49. The panel relied heavily on the opinion from Agent McLendon's appeal, *see* App. 32-38, even though it is undisputed that, unlike Agent McLendon, Officer Barnes *did* make efforts to identify the correct house.[1] The panel interpreted the district

[1] In their Fifth Circuit briefing, the Gerharts argued "that McAlpin and McLendon made no effort whatsoever to ascertain

court's reliance on the Fifth Amendment as "a scrivener's error" and held that the unlawful entry claim remained viable under the Fourth Amendment. App. 39-40.

Prior to the opinion being issued, Barnes filed several letters of supplemental authorities pursuant to F.R.A.P. 28(j). App. 92-99. One of the letters brought this Court's decision in *Wesby* to the panel's attention. App. 92-94. The panel nonetheless did not acknowledge *Wesby* in its opinion. App. 30-49. Another letter brought the Fifth Circuit's decision in *Thomas v. Williams*, 719 Fed. App'x 346 (5th Cir. Feb. 1, 2018) to the panel's attention, a decision holding that an officer had been granted qualified immunity under circumstances far less reasonable. App. 95-96. The panel nonetheless did not acknowledge *Thomas* in its opinion, even though one of the panel members in this case filed a sharp dissent in the *Thomas* case. App. 30-49.

Barnes moved for rehearing, focusing on the clear tension between *Thomas* and the panel opinion. *Thomas*, on the one hand, rejected Judge Dennis' dissenting argument that this Court's decision in *Garrison* supplied the "clearly established" law necessary to defeat qualified immunity in an unlawful entry case. *See* 719 Fed. App'x at 352-59. The panel opinion, on the other hand, implicitly endorsed Judge Dennis' dissenting argument that *Garrison* was enough. App. 42-43.

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and identify the" correct house but argued that Barnes' efforts were just insufficient. *Compare* Gerharts' Br., 2017 WL 3670683, *21 (5th Cir. Aug. 17, 2017) *with* Gerharts' Br., 2017 WL 3670683 at *28.

While Barnes' rehearing petition was pending, this Court decided *Kisela*. Barnes promptly filed another letter of supplemental authorities to bring it to the Fifth Circuit's attention. App. 97-99.

The Gerharts were ordered to respond to the rehearing petitions, and the panel withdrew its original opinion on April 26, 2018. App. 2. An amended opinion was substituted, but it did nothing to cure the defects pointed out by Barnes' rehearing petition. App. 11-20. The amended opinion still did not acknowledge *Wesby*, did not acknowledge *Kisela*, and still did not acknowledge *Thomas*. App. 11-20. Although the amended opinion purported to add a "robust consensus" of persuasive authority to *Garrison*'s general statement of the law, the panel grossly misapplied the robust-consensus principle. App. 14. Only unpublished opinions and two dissimilar, out-of-circuit cases were cited. App. 14-20.

Barnes' rehearing petition was not immediately denied upon the panel's issuance of the amended opinion. Instead, it was not denied until June 25, 2018. App. 90-91. This Court decided *Sause v. Bauer*, 138 S.Ct. 2561 (June 28, 2018) – another qualified immunity case – on June 28, 2018. The plaintiff from the *Thomas* case petitioned this Court for a writ of certiorari on June 4, 2018, and the petition remains pending.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to clarify the reasonable-mistake principle from *Garrison*. Additionally or alternatively, this Court should grant certiorari to clarify what decisions constitute "clearly established" law for purposes of qualified immunity. At a minimum, this case should be GVR'd for further consideration in light of *Sause*, *Wesby,* and *Kisela*.

I. By failing to credit Officer Barnes' efforts to save the confidential informant and to identify the correct house, the Fifth Circuit undermined the rationale behind the Fourth Amendment's reasonable-mistake rule as well as other Circuits' application of the rule.

Reasonable police mistakes do not violate the Fourth Amendment.[2] This principle stems from *Brinegar v. United States*, 338 U.S. 160 (1949), where a criminal defendant challenged probable cause. It was explained that probable cause necessarily "deal[s] with probabilities" and thus affords police "fair leeway" in conducting their duties. *See Brinegar*, 338 U.S. at 175-76. "[R]oom must be allowed for some mistakes[,]" this Court said, so long as "the mistakes [are] those of reasonable men." *Id*. at 176.

After *Brinegar*, the reasonable-mistake principle was applied in other factual contexts. One case

[2] In *Heien v. North Carolina*, 135 S.Ct. 530, 534 (2014), this Court held that the Fourth Amendment permits both reasonable mistakes of fact and reasonable mistakes of law.

involved an officer who arrested the wrong person. *See Hill v. California*, 401 U.S. 797 (1971). This Court held that, because the identity mistake was reasonable under the circumstances, the Fourth Amendment had not been violated. *Id*. at 804 ("[O]n the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time."). Another case involved an officer who relied on consent from a third party. *See Illinois v. Rodriguez*, 497 U.S. 177 (1990). This Court held that, because it was reasonable under the circumstances for the officer to believe that the third party possessed authority over the premises, the Fourth Amendment had not been violated. *Id*. at 185 ("[W]e have not held that the Fourth Amendment requires factual accuracy.").

Of particular significance here is this Court's decision in *Garrison*, which dealt with a mistaken entry of a residence. *See* 480 U.S. at 85. Officers wrongly believed there was only one apartment on the third floor of a building and accordingly searched an apartment not covered by their warrant. *Id*. at 80. This Court held that there was no Fourth Amendment violation, relying on "the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants." *Id*. at 87.

Garrison was the focal point of the Fifth Circuit's decision in this case, but the panel distorted *Garrison*'s reasoning. Two particular errors are glaring: (1) the panel's belief that the well-being of the confidential informant was irrelevant to the reasonableness inquiry

and (2) the panel's conflation of the three officers' conduct.

The panel did not, because it could not, dispute that this case involved an emergency. It was readily acknowledged that "[t]he danger facing [the confidential informant] was undoubtedly an exigent circumstance." App. 19-20 (quoting *McLendon*, 714 Fed. App'x at 336). Nonetheless, the panel held that Officer Barnes could not benefit from the exigency because the confidential informant was not in the house that Officer Barnes ultimately entered. App. 19-20. Such reasoning finds no support in law or the realities of police work.

Underlying the Fourth Amendment's reasonable-mistake principle is the question of *why* the mistake occurred. In holding that the mistaken entry in *Garrison* was reasonable, this Court highlighted the "dangerous and difficult" circumstances that police officers face on a daily basis. *See* 480 U.S. at 87. Similarly, in the excessive force context, this Court offered the following example: "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, [ ] the officer would be justified in using more force than in fact was needed." *See Saucier v. Katz*, 522 U.S. 194, 205 (2011) (later overruled on unrelated grounds). The logic of these decisions cannot be squared with the Fifth Circuit discounting the fact that Officer Barnes' mistake was made in the process of attempting to save someone's life from a dangerous drug dealer.

Aside from running afoul to doctrinal underpinnings, the panel's decision conflicts with decisions from the Courts of Appeals too. No other Circuit has questioned the just-referenced passages from *Garrison* and *Saucier*. And the Ninth Circuit has explicitly acknowledged that courts must consider surrounding exigencies when deciding if a mistake is reasonable. *See, e.g.*, *Torres v. City of Madera*, 648 F.3d 1119, 1127 (9th Cir. 2011) (holding a mistake to be unreasonable, in part, because of "the non-exigent circumstances surrounding [the] deadly shooting"); *Johnson v. Hawe*, 388 F.3d 676, 686 (9th Cir. 2004) (holding that "[n]o exigent circumstances existed in this case that could justify a reasonable mistake on the part of [C]hief Nelson"). The Fifth Circuit's rationale sits on an island unto itself.

Complicating matters further is the panel's conflation of the three officers' actions who entered the wrong home. The Gerharts argued that Agent McLendon and Deputy McAlpin failed to make any efforts whatsoever to identify the correct home, but it is undisputed that Officer Barnes did make efforts to gain knowledge about the confidential informant's location. *Compare* Gerharts' Br., 2017 WL 3670683 at *21 w*ith* Gerharts' Br., 2017 WL 3670683 at *28. In particular, the following facts are uncontested:

- The drug-surveillance operation involved a white male who was a known crystal meth dealer and who eventually would be sentenced to 30 years in prison. ROA.1542-1546, ROA.1547-1551, ROA.1666-1669.

- Prior to conducting the surveillance, Barnes attended a detailed briefing at the police department, where he was provided information from Detective Scouten, who was leading the operation, as well as from a confidential informant who had been to the dealer's house on prior occasions. ROA.1542-1546, ROA.4002-4004. Such information included the dealer's prior drug activities, an oral description of the layout of the dealer's house, a written sketch of the interior and exterior of the dealer's house, and potential harms inside the dealer's house. ROA.1541-1546, ROA.4002-4004.

- Barnes was an occupant in the backseat of the vehicle that followed the confidential informant to the area surrounding the dealer's house before the surveillance began. ROA.1542-1546, ROA.1613, ROA.4004.

- The vehicle Barnes was in was dispatched to the dealer's house after the confidential informant sent a text message to Detective Scouten, notifying him that she was in danger. ROA.1544-1545, ROA.1629.

- As the vehicle proceeded down the street, a white male (like the dealer) began running. ROA.4286-4287, ROA.1633-1635. The white male was ordered to get down but refused, ran in the house, and deadbolted the door shut. ROA.1636-1638.

- Barnes fell upon exiting the vehicle but eventually followed the other two officers inside the wrong house, which was two houses away from the right house. ROA.1617-1622,

ROA.1542-1546, ROA.1570-1574, ROA.1630-1631, ROA.4286-4287.

The panel's failure to distinguish between the pre-entry efforts of the three officers produces more Circuit strife. Like the panel opinion in Agent McLendon's appeal, other Circuits have held that no effort equates to unreasonableness. *Compare McLendon*, 714 Fed. App'x at 334 ("McLendon made no effort whatsoever – let alone a reasonable one – to correctly identify the place to be searched.") *with Hartsfield v. Lemacks*, 50 F.3d 950 (11th Cir. 1995) (holding that a mistake was unreasonable, where the officer "did nothing to make sure that he was leading the other officers to the correct residence"). This makes sense because someone who makes no effort at all necessarily has not made a "reasonable" effort to do something. But the result is different when, like in Officer Barnes' situation, some efforts are made. In that situation, the question becomes whether the efforts were reasonable or not. *See Garrison*, 480 U.S. at 88. Other Circuits have recognized this distinction, but the panel in this case ignored it. *Compare* App. 12-20 *with White v. McLain*, 648 Fed. App'x 838 (11th Cir. 2016) (distinguishing *Hartsfield* on the basis that, in "contrast [to *Hartsfield*, the officer] did attempt to ascertain and verify that he had the right house").

Certiorari is warranted to address the Fifth Circuit's distortion of the Fourth Amendment. For nearly 70 years, this Court has acknowledged that reasonable mistakes are constitutionally permissible. The Fifth Circuit's interpretation of the word "reasonable" is

incompatible with the standard that controls the actions of police officers throughout the rest of the country.

II. In determining that Officer Barnes violated "clearly established" law, the Fifth Circuit relied on non-binding and non-specific cases. The former implicates a question left open by this Court in *Reichle v. Howards*, 566 U.S. 658 (2012), and the latter has led this Court to reverse 13 cases in the past seven years.

Not only did the Fifth Circuit misapply a constitutional rule, it also exposed a small-town police officer to civil damages. Because of qualified immunity's importance "to society as a whole[,][3]" *see Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), this Court repeatedly has emphasized the requirement of identifying "clearly established" law. Cases will *not* constitute clearly established law unless they are both "authoritative" and "specific." *See Wesby*, 138 S.Ct. at 589-90. The Fifth Circuit's denial of qualified immunity here thwarted both components of the clearly-established framework.

Nowhere in the panel opinion did the Fifth Circuit recite this Court's familiar formulation of the qualified immunity rule – namely, that a police officer cannot be

[3] The societal interests include not only exposing Officer Barnes to monetary damages but also potential harm to his career in law enforcement. *See, e.g.*, *City & County of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1774 n.3 (2015).

held liable for civil damages unless he was "plainly incompetent" or "knowingly violate[d]" the law. *See, e.g., Kisela,* 138 S.Ct. at 1152 (quoting cases). It is undisputed that Officer Barnes' entry into the Gerharts' home was a mistake, so the "plainly incompetent" standard was the Gerharts' only viable option. Tellingly, however, the Fifth Circuit made no finding of "incompetence." *See* App. 11-20. Such a finding would have been impossible given the exigent facts of this case. *See Plumhoff v. Rickard*, 134 S.Ct. 2012, 2023 (2014) (explaining that the "crucial question" is "whether the official acted reasonably in the particular circumstances that he or she faced").

The cornerstone of the panel's analysis is *Garrison*, which (ironically enough) held that a group of law enforcement officers did *not* violate the Fourth Amendment by entering the wrong apartment. *See* 480 U.S. at 88-89. The mistaken entry was reasonable, this Court explained, because the officers made "reasonable efforts" to identify the correct residence. *Id*. at 88. In the panel's view, this "reasonable-efforts" phrase was sufficient to put every police officer in Louisiana, Mississippi, and Texas on notice about when a factual mistake would be deemed permissible. App. 20.

The panel's belief that *Garrison* alone was sufficient is apparent from a different panel's decision just months' earlier. *See Thomas*, 719 Fed. App'x at 346. In *Thomas*, over Judge Dennis' dissent, the panel held that an officer was entitled to qualified immunity for entering the wrong house, even though the officer knew that the house he was entering had a different

address from the house identified on the warrant. 719 Fed. App'x at 351-52. Judge Dennis argued that *Garrison* sufficed to "clearly establish" the law because it "applies to specific factual circumstances and provides every reasonable officer with fair notice of what they may not do[.]" *Id*. at 356 (Dennis, J., dissenting). That reasoning was rejected by the *Thomas* majority, but resurrected by the panel in this case, of which Judge Dennis also was a member. *Compare id*. at 351-52 *with* App. 1.

White v. Pauly, 137 S.Ct. 548 (2017) underscores why the *Thomas* panel was right and why the panel in this case was wrong. In *White*, an excessive force case, the Tenth Circuit denied qualified immunity under *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989). *See* 137 S.Ct. at 551. Despite both being watershed Supreme Court precedents, they are ones that "lay out excessive-force principles at only a general level." *Id*. at 552. *White* reversed the Tenth Circuit's denial of qualified immunity, explaining that neither *Garner* nor *Graham* was "particularized" enough. *Id*.; *see also Wesby*, 138 S.Ct. at 590 ("We have repeatedly stressed that courts must not 'define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.'"). So it is with *Garrison* as well.

To be sure, *Garrison* is this Court's seminal mistaken entry case. Like many of this Court's cases, however, it articulated a constitutional standard. It did not,

by contrast, flesh out how the standard was to be applied in different factual scenarios. This latter point dilutes *Garrison*'s utility within the "clearly established" framework.

When *Garrison* is stripped away, only non-binding decisions remain. App. 12-20. The original panel opinion cited one unpublished Fifth Circuit decision, and the amended panel opinion added two more, in addition to two published decisions from other Circuits. App. 39-43, 12-20. But none of these count as "clearly established" law.

The starting point is what was left open in *Reichle v. Howards*, 566 U.S. 658 (2012). Although this Court acknowledged the "controlling authority" requirement, the opinion specifically declined to address what amounts to "a dispositive source of clearly established law[.]" *See Reichle*, 566 U.S. at 665. More recently in *Wesby*, this Court again acknowledged that the question remains unanswered. *See* 138 S.Ct. at 591 n.8 (explaining that "[w]e have not yet decided what precedents – other than our own – qualify as controlling authority for purposes of qualified immunity[,]" and "[w]e express no view on that question here").

This case offers a vehicle for providing an answer. Other Circuits have rejected the panel's attempt to use unpublished cases to "clearly establish" the law. *See, e.g.*, *Hogan v. Carter*, 85 F.3d 1113, 1118 (4th Cir. 1996) (en banc) (explaining through Judge Luttig that "[w]e could not allow liability to be imposed upon public officials based upon unpublished opinions that we

ourselves have determined will be binding only upon the parties immediately before the court"). And the Fifth Circuit itself has rejected the panel's attempt to use two cases from other Circuits, even if published, to "clearly establish" the law. *See Vincent v. City of Sulphur*, 805 F.3d 543, 549 (5th Cir. 2015) (explaining that "two out-of-circuit cases . . . hardly constitute persuasive authority adequate to qualify as clearly established law sufficient to defeat qualified immunity in this circuit"). It is time for this Court to weigh in.

Ultimately, there are a variety of reasons why certiorari is warranted. This Court has twice acknowledged, but not decided, the open question of what constitutes "controlling authority." *Reichle*, 566 U.S. at 665; *Wesby*, 138 S.Ct. at 591 n.8. And this Court repeatedly has reversed decisions that misapply the specificity rule. *See, e.g.*, *Wesby v. District of Columbia*, 816 F.3d 96, 102 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (collecting, prior to this Court's decisions in *Wesby* and *Kisela*, 11 cases within the past five years where this Court reversed qualified immunity denials, "including five strongly worded summary reversals"). This case involves the Fourth Amendment, and qualified immunity is "especially important in the Fourth Amendment context." *See Wesby*, 138 S.Ct. at 590 (quoted case omitted).

III. The Fifth Circuit denied Officer Barnes qualified immunity without mentioning the qualified immunity decisions decided this Term.

Just five months ago, this Court "stress[ed] that lower courts 'should think hard, and then think hard again,'" about the issue of qualified immunity. *Id*. at 589 n.7. The fact that the Fifth Circuit failed to discuss (or even cite) the qualified immunity cases decided this Term shows that the panel did not adhere to this Court's mandate. App. 11-20. At a minimum, this case is worthy of a GVR.

Sause, *Wesby,* and *Kisela* are – like this case – Fourth Amendment ones. And these cases, like this one, involve the contours of the qualified immunity defense. The Fifth Circuit should reconsider this case in light of this Court's recent pronouncements. *See Lawrence v. Chater*, 516 U.S. 163, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996) (explaining that "the GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices").

IV. That the Fifth Circuit decided this case through an unpublished opinion, and that the unpublished opinion itself relied on so many other unpublished opinions, only strengthens the justification for further review.

There might be temptation to discount this Petition because it grows out of an unpublished opinion. But this Court should resist. In denying Officer Barnes qualified immunity, the panel relied on unpublished opinions that are not factually similar to this case yet ignored the unpublished case that is factually similar and that one of its panel members had dissented from just months earlier. *Compare* App. 11-20 *with Thomas*, 719 Fed. App'x at 354-59 (Dennis, J., dissenting). There can be no confidence that the panel's errant analysis will not be used as a weapon in the future.

Under lesser circumstances, members of this Court have called for action. *See Plumley v. Austin*, 128 S.Ct. 828 (2015) (Thomas and Scalia, JJ., dissenting from denial of certiorari). In *Plumley*, two Justices found it "disturbing" that the Fourth Circuit had resolved the case through an unpublished opinion when, like here, there was intra-Circuit turmoil over the issue presented. *See* 128 S.Ct. at 831 ("It is hard to imagine a reason that the Court of Appeals would not have published this opinion except to avoid creating binding law for the Circuit."). This case involves not only intra-Circuit conflict between the panel opinion and *Thomas*, but it also conflicts with other Circuits' application of the reasonable-mistake rule and the

qualified immunity defense as well as this Court's doctrinal underpinnings with respect to both.

CONCLUSION

Officer Barnes made a mistake while trying to save someone's life. It consisted of entering the wrong house, quickly realizing that the person he was trying to rescue was not there, and apologizing to the family for his mistake. Without intervention by this Court, Officer Barnes will face the prospect of civil damages, harm to his law enforcement career, and many more years of litigation. This Court should grant his Petition.

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Respectfully submitted,

GARY E. FRIEDMAN
Counsel of Record
G. TODD BUTLER
PHELPS DUNBAR LLP
4270 I-55 North
Jackson, Mississippi 39211
Telephone: (601) 352-2300
Facsimile: (601) 360-9777
friedmag@phelps.com
butlert@phelps.com

Counsel for Petitioner