No. __________

In the
# Supreme Court of the United States

**ZACHERY PITTMAN,**
**Fayetteville Police Department,**
***Petitioner,***
**v.**

**HERMAN HARRIS,**
***Respondent.***

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Whether in *Scott v. Harris*, 550 U.S. 372 (2007) this Court announced an "exception" to the summary judgment standard in cases commenced under 42 U.S.C. § 1983, and if not, whether the Fourth Circuit erred when it deviated from other circuit holdings and announced that *Scott* directs the lower courts to examine whether a self-serving narrative is contradicted by individual pieces of the record, as opposed to the entire record, to discern if a genuine dispute of material fact exists.

2. Whether Respondent "clearly established" his right to be free from excess force when Respondent assaulted Petitioner in a wooded area, attempted to murder Petitioner with his service weapon, and presented a lethal threat until Petitioner fired in rapid succession.

## PARTIES TO THE PROCEEDINGS

*Petitioner* is Zachary Pittman, a City of Fayetteville, North Carolina Police Officer.

*Respondent* is Herman Harris.

Pursuant to Rule 29.6 there is no corporation involved in this proceeding, therefore there is no parent or publicly held company owning 10% or more of corporate stock.

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The opinion of the Court of Appeals is reported as *Harris v. Pittman*, 927 F.3d 266 (2019). It is reproduced in the Appendix at 1a-41a. The opinion of the District Court is unreported and reproduced in the Appendix at 42a-59a.

## JURISDICTION

On June 18, 2019, the Fourth Circuit Court of Appeals filed its opinion. Officer Pittman filed a timely petition for rehearing *en banc* on July 2, 2019. The Fourth Circuit entered an order denying the petition on July 10, 2019. (Pet. App. 60a). Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probably cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

## STATEMENT OF THE CASE

In *Harris v. Pittman*, the Fourth Circuit denied qualified immunity to a law enforcement officer nearly murdered with his own service weapon by a non-compliant suspect. Immunity could not attach, it reasoned, because the suspect's self-serving description of the event unearthed a genuine dispute of material fact. This description has no support in the record. It contradicts the allegations in the suspect's own verified complaint. Nonetheless, the Fourth Circuit discerned Officer Pittman should stand trial on this discrepancy.

Additionally, the Fourth Circuit found the suspect had a right to be free from the possibility of deadly force once he no longer presented a threat. It defined this right in a general sense and without appropriate specificity. The Fourth Circuit relied on two dissimilar cases to "clearly establish" this right. No holding by this Court or the Fourth Circuit has ever held that a suspect who disarms and tries to kill an officer with his service weapon has a "clearly established" right to be free from deadly force when the officer regains control of his weapon.

Qualified immunity cannot be sidestepped with a self-serving affidavit that is "blatantly contradicted" by the record. Constitutional rights cannot be "clearly established" with case law decided on distinct facts. The Fourth Circuit misapplied both principles and review by this Court is needed to correct these errors.

**1. Officer Pittman used Deadly Force to Save his Own Life from Attacks by Harris**

On August 26, 2012, Officer Pittman pursued Harris in a foot chase. (Pet. App. 4a; 45a). Officer Pittman identified himself and told Harris to stop. (*Id.*). Harris continued to run. (*Id.*). Officer Pittman caught up with Harris at the edge of some woods and the two men fell approximately five feet downhill and into the trees. (Pet. App. 4a, 46a). Harris struck Officer Pittman in the face as they fell. (Pet. App. 46a). The men became entangled in vines, and Officer Pittman announced he would use his Taser to subdue Harris. (*Id*). Harris continued to resist.

Officer Pittman fired his Taser, but missed because Harris pushed him away. (Pet. App. 4a, 46a). Harris wrestled the Taser away from Officer Pittman and held it out of his reach. (*Id.*). Harris attempted to use the Taser against Officer Pittman, but missed. (*Id.*). Both men felt the effect of the Taser after it discharged. (*Id.*). Harris continued to resist.

As the struggle in the vines continued, Harris placed both of his hands on Officer Pittman's holstered service weapon. (Pet. App. 46a-47a). Officer Pittman came to a chilling realization - "This guy's trying to kill me. He's not trying to get away; he's trying to kill me." (Pet. App. 46a). Officer Pittman grabbed Harris by the throat. (*Id.*) Harris responded in kind and took one hand off the gun and used it to

grab Officer Pittman by the throat. (*Id.*) Officer Pittman released Harris' throat and used both hands to try and secure his weapon. (Pet. App. 46a-47a). The gun discharged in its holster. (Pet. App. 4a-5a; 47a). Harris continued to resist.

Fight for control of the weapon persisted. (Pet. App. 46a-47a). Both men had their hands on the gun as it came out of the holster. (*Id.*). Harris took the weapon by the barrel and directed it toward Officer Pittman's face. (Pet. App. 47a). Officer Pittman, on the ground and entangled in vines, attempted to push the muzzle away. (*Id.*) Before he could do so, Harris pulled the trigger. (*Id.*) Officer Pittman heard a click. (*Id.*) The gun misfired because the shell casing from the accidental discharge had not been ejected. (*Id.*) Officer Pittman, on his back and ensnared in vines, took control of the gun and intuitively performed a malfunction drill to clear the casing. (*Id.*). He activated the weapon's light and saw Harris standing a few feet away. (*Id.*) Due to darkness, Officer Pittman could only see the silhouette of Harris from his belly button down. (*Id.*) He ordered Harris to the ground. (*Id.*) Harris did not comply, and instead, continued to resist. (*Id.*)

Officer Pittman, on his back and entwined in vines, lay feet away from a suspect who had just tried to murder him. (Pet. App. 47a-48a). Officer Pittman had been hit in the face. Impacted by his Taser. Choked. Almost killed. All of this happened in a flash – "the struggle allowed the combatants no time for a coffee break." *Harris v. Pittman*, 927 F.3d 266, 282 (Wilkinson, J. dissenting) (Pet. App. 31a). And Harris, standing feet away, still would not comply with Officer Pittman's instruction to get on the ground. Officer Pittman returned to his training. He pointed

his gun at Harris and fired until Harris fell to the ground. (Pet. App. 48a). As a result of this event, Harris pleaded guilty in North Carolina state court to assaulting Officer Pittman with a firearm and possession of a firearm by a felon.

Harris sued Officer Pittman for an alleged violation of 42 U.S.C. § 1983. In his complaint and amended complaint (both of which were verified and attested to under oath), Harris alleged that Officer Pittman took him to the ground with his Taser. At that point, Harris stated "you got me." In response, Officer Pittman stood over Harris and shot him four times.

After Officer Pittman moved for summary judgment, Harris changed his description of the shooting. He no longer claimed that Officer Pittman took him down with his Taser, heard his cry of surrender, and then shot him as he lay helpless on the ground. In an about face, Harris conceded a struggle and admitted that Officer Pittman had been knocked to the ground, but continued to deny that he touched Officer Pittman's gun. Only after pleading guilty in state court to criminal charges for possessing Officer Pittman's firearm while being a convicted felon, assaulting Officer Pittman with his own firearm, and attaining the status of being an habitual felon did Harris again change his story and acknowledge that Officer Pittman justifiably shot him in the chest.

Harris however, now alleged, in a self-serving affidavit totally unsupported by any evidence, that after Officer Pittman shot Harris, Officer Pittman got to his feet, stood over Harris, and shot him two more times. Those shots, Harris claimed, violated his civil rights.

**2. District Court Proceedings**

The District Court found that Harris failed to present evidence from which a jury could find in his favor. It further ordered that Harris' claims were barred by qualified immunity. Accordingly, the District Court granted summary judgment to Officer Pittman. (Pet. App. 42a-59a.)

**3. Decision of the Fourth Circuit**

Harris appealed the district court's grant of summary judgment. The Fourth Circuit reversed, holding that Harris' account of the shooting offered in opposition to summary judgment created a genuine dispute of material fact. Officer Pittman argued that Harris' portrayal did not withstand the motion under *Scott v. Harris* because it was "blatantly contradicted by the record, so that no reasonable jury could believe it." The Fourth Circuit disagreed. It held that *Scott v. Harris*, "is the exception, not the rule." Nonetheless, after this erroneous statement of law, the Fourth Circuit conducted a misguided attempt to apply *Scott*. Instead of considering whether Harris' self-serving narrative was "blatantly contradicted" by the record, it assessed whether any one piece of the record, standing alone, "blatantly contradicted" the story. Concluding that no one piece of evidence did so, the Fourth Circuit moved-on and found Harris "clearly established a constitutional right" to be free from excessive force. In support of this conclusion, the Fourth Circuit cited two cases where a change in circumstances resulted in a loss of immunity for officers initially justified in their first shot or shots. Neither case presented shootings that started with the suspect taking aim at the officer with the officer's own weapon. The Fourth Circuit ultimately found

that Officer Pittman had no immunity for actions taken to save his own life.

Officer Pittman timely filed a petition for rehearing *en banc*, based on the panel's failure to harmonize its opinion with other binding Fourth Circuit precedent, failure to define clearly established law at an adequate level of specificity, and misapplication of Supreme Court precedent. The petition for hearing *en banc* was denied, though Judge Wilkinson, the dissenting judge on the panel, voted for panel rehearing. (Pet. App. 60a).

## REASONS FOR GRANTING THE PETITION

Qualified immunity is a cornerstone of our democracy. It cannot be rescinded by a self-serving affidavit made-up of unsupported claims and contradictions. Likewise, no court has held that a suspect, after a failed attempt to kill an officer with the officer's weapon, has a right to be free from shots by that officer after the officer regains his weapon.

A writ of certiorari is warranted because the Fourth Circuit inaccurately described *Scott v. Harris* as an "exception" to some rule, and then compounded this error when it misapplied its holding. The result is that qualified immunity can be thwarted by a plaintiff's self-interested chronicle, even when the account is uncorroborated and contradicted by the plaintiff's complaint. Additionally, the Fourth Circuit defied this Court's numerous holdings that a plaintiff in a § 1983 lawsuit must "clearly establish" a constitutional right at the time of the encounter, and such a right must not be defined in a generalized manner. There is no case law that recognizes someone like Harris has a "clearly established" right to be free

from an officer's shots after an attempt on that officer's life in a secluded woods.

Finally, the Fourth Circuit's decision has significant public policy implications because it directs district courts to parse, second-by-second, decisions of law enforcement officers made during a tense, uncertain, and rapidly evolving situation. If permitted to stand, this opinion will eviscerate qualified immunity for law enforcement officers in use of deadly force situations.

## I. THE FOURTH CIRCUIT DECISION DISREGARDS THIS COURT'S HOLDING IN *SCOTT V. HARRIS* AND CREATES A CIRCUIT SPLIT ON ITS PROPER APPLICATION

In *Scott v. Harris*, this Court held that a plaintiff's description of police conduct that is "blatantly contradicted" by the record does not create a genuine dispute of material fact. 550 U.S. 372 (2007). The Fourth Circuit declined to apply this principle and wrote that "*Scott* is the exception, not the rule." *Harris*, 927 F.3d at 276. On this point, the court suggested that *Scott* can be limited to cases where evidence is contradicted by video, and no video exists. *Harris*, 927 F.3d at 275-76. Despite its announcement that *Scott* did not apply, the Fourth Circuit applied it anyway. But it did so improperly. Instead of considering whether Harris' narrative was blatantly contradicted" by the complete record, the court assessed whether three pieces of evidence in isolation – the affidavits of audio witnesses, Harris' DNA on the gun, and Harris' guilty pleas – individually and standing alone, "blatantly contradicted" Harris' description.

This Court should correct the Fourth Circuit's misapplication of *Scott*. *Scott* is not an "exception" to any rule, nor is its holding limited to cases where video evidence is present. Moreover, *Scott* directs the lower courts to consider whether proffered evidence is "blatantly contradicted" by the complete record. Not whether the evidence is "blatantly contradicted" by isolated portions of the record standing alone.

The impact of the Fourth Circuit's holding is two-fold. First, the opinion creates a circuit split as to how *Scott* is read and applied in the lower courts. Second, litigants in the Fourth Circuit can circumvent *Scott* with claims entirely contradicted by their own complaint, as long as the evidence is not rebuffed by video or any one piece of evidence in the record. This Court should accept Officer Pittman's petition for writ of certiorari and correct the Fourth Circuit's erroneous application of *Scott*.

A. Evidence that is "Blatantly Contradicted" by the Record does not create a Genuine Dispute of Material Fact

In *Scott*, a plaintiff in a § 1983 suit opposed summary judgment with a self-serving description of a police pursuit. 550 U.S. at 378-80. The squad video of the pursuit discredited the plaintiff's version of events, rendering it "visible fiction." This Court held that lower courts presented with this type of evidence "should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* at 380-81. Instead, a story that is "blatantly contradicted by the record, so that no reasonable jury could believe it" does not create a "genuine issue for trial." *Id.* at 380 (quoting *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,*

475 U.S. 574, 586–587 (1986) and *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–248 (1986)).

This Court did not announce any type of "exception" in *Scott*. The Fourth Circuit's description to the contrary is wrong. Additionally, this Court did not instruct lower courts to limit *Scott* to cases where evidence is repudiated by video. Not all police encounters, or for that matter, events that form the basis of a civil lawsuit, are video-recorded. *Scott* cannot be read so narrowly that a self-serving statement can only be "blatantly contradicted" by video. Finally, *Scott* teaches that when evidence is "blatantly contradicted by the record" – not individual pieces of the record standing alone – there is no "genuine dispute."

B. Harris' Account is "Blatantly Contradicted" by the Record

Harris' account –that Officer Pittman shot him to the ground and then stood over him and shot again – is "blatantly contradicted" by the record. Officer Pittman and Harris are the only eyewitnesses to the shooting. Officer Pittman has not wavered in his description of the encounter. This includes the chase, the struggle, the accidental discharge of his gun in its holster, and ultimately, his retrieval and use of his weapon to fire multiple rounds at Harris in rapid succession. Audio witnesses recall a single shot (the accidental discharge), followed by a memorable pause and then several more shots in rapid succession. Photographs and affidavits of the responding officers show Officer Pittman emerged from the woods "gasping for air and . . . in physical pain," and Harris pleaded guilty to assaulting Officer Pittman with a firearm and possession of a firearm by a felon.

For his part, Harris pleaded in his complaint that Officer Pittman took him to the ground with his Taser, ignored Harris' plea for surrender, and stood over him and shot four times. This alleges police brutality at its worst. It was not until faced with a motion for summary judgment after Harris had pleaded guilty to possessing Officer Pittman's firearm as a convicted felon, assaulting Officer Pittman with his own firearm, and attaining the status of being an habitual felon, that Harris abandoned the allegations in his complaint, admitted Officer Pittman had reason to shoot him the first time, but then claimed Officer Pittman indefensibly stood over Harris and shot again. No reasonable jury could believe Harris' self-serving account given his criminal plea, the disparity with his description in the complaint, and the balance of the record.

In dissent, Judge Wilkinson wrote that, "[t]he Supreme Court's decision in *Scott v. Harris* tees up this case perfectly." *Harris*, 927 F.3d at 284 (Wilkinson, J., dissenting) (Pet App. 36a). He opined that "the Court in *Scott* had in mind an affidavit just like the one submitted by Harris, which offers little more than conclusory assertions and wild accusations." *Id.* at 285 (Wilkinson, J., dissenting) (Pet. App. 37a). Consistent with his understanding of *Scott*, Judge Wilkinson wrote:

> There is simply no way that a reasonable juror could look at an account so devoid of independent factual development, so full of unsupported accusations, and so weakened by blatant contradiction in the record and walk away with the sense that Harris' version of events is accurate, or in any way compelling. *Scott* recognizes that while the non-moving

> party's burden of showing a "genuine" dispute is not an onerous one, it cannot rest solely on such a flimsy foundation. Without additional support in the record, the decision in *Scott* requires that we adopt the version of events that is supported by objective record evidence.

*Id.* (Pet. App. 38a).

C. *Scott* has not been viewed as an "Exception" in Other Circuits

The Fourth Circuit's description and application of *Scott* is inconsistent with its treatment in other circuits. None of those circuits have described *Scott* as some type of "exception." Only the Sixth Circuit has held that *Scott* is limited to cases where evidence is refuted by video or audio tape. *See Coble v. City of White House, Tenn*, 634 F.3d 865, 868-69 (6th Cir. 2011) (extending the reasoning in *Scott* to videotape or audiotape evidence). And none have held that *Scott* only concerns cases where one piece of evidence "blatantly contradicts" a plaintiff's description of events. To the contrary, and consistent with this Court's holding, other circuit courts have held that the salient question under *Scott* is whether the record has utterly discredited the non-moving party's version of the facts. By describing *Scott* as an "exception" and declining to follow its holding, the Fourth Circuit has created a split as to how *Scott* will be applied in the circuits.

The Fifth Circuit, in reference to *Scott*, has held that "[s]elf-serving allegations are not the type of significant probative evidence required to defeat summary judgment," and "a vague or conclusory affidavit [without more] is insufficient to create a genuine issue of material fact in the face of conflicting

probative evidence." *Koerner v. CMR Constr. & Roofing, L.L.C.*, 910 F.3d 221, 227-28 (5th Cir. 2018) (citing *Scott*, 550 U.S. at 380). Notably, *Koerner* did not involve any video evidence, but rather, a party's efforts to confuse an undisputed record with an affidavit. *See id.*

The First Circuit has applied Scott to disregard testimonial evidence that blatantly contradicts objective evidence. *Medina-Rivera v. MVM, Inc.,* 713 F.3d 132, 139-40 (1st Cir. 2013) (we cannot accept a party's version of the facts when it is blatantly contradicted by the record, so that no reasonable jury could believe it . . . ." (internal citation omitted). *Medina-Rivera* also did not involve video. *See generally id.*

The Eleventh Circuit has held that under *Scott,* a circuit court may "discard[ ] a party's account when the account is inherently incredible and could not support reasonable inferences sufficient to create an issue of fact." *Morton v. Kirkwood,* 707 F.3d 1276, 1284–85 (11th Cir. 2013) (internal quotation marks omitted)). The same view is held in the Sixth Circuit and the Eight Circuit, although those courts have applied *Scott* in cases that included video evidence. *See Kinlin v. Kline*, 749 F.3d 573, 576-77 (6th Cir. 2014); *Wallingford v. Olson,* 592 F.3d 888, 892 (8th Cir. 2010) ("Although we view the facts and any reasonable inferences in the light most favorable to [the plaintiff], we cannot ignore evidence which clearly contradicts [the plaintiff's] allegations." (citation omitted)).

In sum, no other circuit court has applied *Scott* with the same level of restriction as was done here by the Fourth Circuit. This Court should accept review

to correct this mistake and alleviate a circuit split on *Scott's* application.

D. The Opinion Creates a Heightened Standard for Qualified Immunity in the Fourth Circuit

If allowed to stand, this decision will create a different standard for application of *Scott* in the Fourth Circuit. Now in the Fourth Circuit, a self-serving narrative that has no support in the record, and is completely different from the allegations in the complaint, is sufficient to defeat qualified immunity. The undisputed record shows that Harris resisted Officer Pittman and the resistance did not end until Officer Pittman fired his weapon in rapid succession to neutralize the threat. Officer Pittman should not be forced to stand trial for protecting his own life simply because Harris crafted a new story, devoid of foundation and irreconcilable with the record, when faced with a motion for summary judgment. *Scott* directs summary judgment here. And this directive must be followed in the Fourth Circuit in the same manner it is followed in the other circuits.

## II. THE FOURTH CIRCUIT'S DECISION DEFIES THIS COURT'S REPEATED INSTRUCTION NOT TO DEFINE CLEARLY ESTABLISHED LAW AT A HIGH LEVEL OF GENERALITY

The doctrine of qualified immunity shields officials from civil liability as long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). A right is "clearly established" if "every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*,

566 U.S. 658, 664 (2012) (internal quotation marks and alteration omitted). The objective of qualified immunity is to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

For a Fourth Amendment right to be clearly established, a plaintiff must "identify a case where an officer acting under similar circumstances as [a defendant] was held to have violated the Fourth amendment." *White v. Pauly*, —— U.S. ——, 137 S. Ct. 548, 552, 196 L. Ed. 2d 463 (2017) (per curiam). This Court has held (as recently as last term) that a plaintiff must do more than "merely rely on *Graham* [*v. Connor* and *Tennessee v.*] *Garner*, . . . which . . . lay out excessive-force principles at only a general level." *Id.* "As [this] Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case." *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "Otherwise, plaintiffs would be able to convert the rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.* (internal citations, quotation marks, brackets, and ellipses omitted). Reliance on case law that has little in common with the facts facing the officer "does not pass the straight-face test" and by extension, does not "clearly establish" a right. *Kisela v. Hughes*, —— U.S. ——, 138 S. Ct. 1148, 1154, 200 L. Ed. 2d 449 (2018) (per curiam) (quotation omitted).

Despite this Court's frequent instruction on this issue, the Fourth Circuit disregards this Court's instruction. As Judge Wilkinson pointed out in his dissent:

> At some point a pattern of [Supreme] Court decisions becomes a drumbeat, leaving one to wonder how long it will take for the [Supreme] Court's message to break through. Perhaps the [Supreme] Court's patience on this point is endless, because, golly, it has been so sorely tried. The failings that have been so routinely documented by the Supreme Court rear their head once again. The majority has used the summary judgment standard once more to eviscerate qualified immunity protections. In the majority's hands, every dispute becomes genuine and every fact becomes material. Qualified immunity fades to the end of every discussion, its values reserved for lip service until little enough is left. The result? The majority has ignored Supreme Court precedent, somehow finding [Officer] Pittman's actions to save his own life something our Constitution cannot condone.

*Harris v. Pittman*, 927 F.3d at 283 (Wilkinson, J. dissenting) (Pet. App. 34a)

The Fourth Circuit relied on two factually dissimilar cases in finding that Harris "clearly established" a Constitutional right. And defined that right as a general proposition. In doing so, the Fourth Circuit misapplied this Court's mandate that in § 1983 cases the law cannot be impermissibly defined with a high level of generality. As a consequence, qualified immunity will be more elusive in the Fourth Circuit than in others.

### A. The Fourth Circuit Relied on Factually Dissimilar Case Law to Find that Harris Clearly Established a Constitutional Right

The Fourth Circuit found that Harris "clearly established" his right to be free from excessive force. Although Officer Pittman justifiably shot him the first time, a reasonable officer would not have fired again once Harris fell to the ground. It relied on *Waterman v. Batton*, 393 F.3d 471, 476 (4th Cir. 2005) and *Brockington v. Boykins*, 637 F.3d 503, 507–08 (4th Cir. 2011) for its outcome. Both cases are factually dissimilar and do not support the Fourth Circuit's opinion.

The officers in *Waterman* and *Brockington* both rightly shot at a suspect. In *Waterman*, the suspect accelerated a vehicle toward the officers. In *Brockington*, the suspect fled on foot after a crime spree. After these initial shots, however, the circumstances changed. The suspect in *Waterman* drove away from the officers and no longer presented a threat. The suspect in *Brockington* fell to the ground after he was hit, which ended any threat he posed. Once the circumstances changed, the officers had no reason to shoot. And the suspects, the driver in *Waterman* and the wounded perpetrator in *Brockington*, both had a "clearly established" right to be free from additional shots.

Unlike in *Waterman* and *Brockington*, Harris, while alone with Officer Pittman in the woods engaged in the following: (1) physically struggled with Officer Pittman; (2) made an effort to disable Officer Pittman with his own Taser; (3) caused an accidental discharge of Officer Pittman's service weapon when he tried to pull it from its holster; (4) attempted to kill

Officer Pittman with his own gun; and (5) throughout this process, and after each step of escalation in the conflict, refused to follow Officer Pittman's directive to stop and get on the ground.

The Fourth Circuit found that *Waterman* and *Brockington* "clearly establish" that a reasonable officer should not continue to shoot a suspect once "the threat no longer existed" because a suspect "shot by an officer and lying wounded on the ground," has a right not to be shot again. 927 F.3d at 281 (citations and internal quotations omitted). That may be. But that does not even remotely describe the situation that confronted Officer Pittman. As noted by Judge Wilkerson in his dissent,

> [Officer] Pittman was in an isolated patch on a dark night. He was indisputably facing a man who had struggled to grab his weapon, sought by his own admission to shoot him in the head, fought through taser wire, ignored an order to "get down, get down," and had earlier disregarded clear warnings to stop. There was no break in the action. [Officer] Pittman could well and reasonably believe that he was faced with a mortal threat and he was permitted to respond accordingly.

*Harris*, 927 F.3d at 286 (Wilkinson, J. dissenting) (Pet. App. 39a)

B. <u>Factually Disparate Case Law can be used to "Clearly Establish" a Constitutional Right in the Fourth Circuit</u>

Qualified immunity is important to "society as a whole" and it is "effectively lost if a case is erroneously permitted to go to trial." *White v. Pauly*, -- U.S. --, 137

S. Ct. 548, 551–52, 196 L. Ed. 2d 463 (2017) (citation and internal quotation marks omitted). For that reason, this Court has repeatedly reversed circuits in qualified immunity cases when rights are defined with a high level of generality instead of clearly established by case law. See, *e.g., id*. (Tenth Circuit); *City & Cty. of San Francisco, Calif. v. Sheehan,* -- U.S. --, 135 S. Ct. 1765, 1774, 191 L. Ed. 2d 856 (2015) (Ninth Circuit); *Mullenix v. Luna*, -- U.S. --, 136 S. Ct. 305, 308–09, 193 L. Ed. 2d 255 (2015) (Fifth Circuit); *Carroll v. Carman,* 574 U.S. 13 (2014) (*per curiam* ) (Third Circuit); *Wood v. Moss,* 572 U.S. 744 (2014) (Ninth Circuit); *Plumhoff v. Rickard,* 572 U.S. 765 (2014) (Sixth Circuit); S*tanton v. Sims,* 571 U.S. 3 (2013) (*per curiam*) (Ninth Circuit); *Reichle v. Howards,* 566 U.S. 658 (2012) (Tenth Circuit).

As a result of this opinion, qualified immunity will be harder to obtain in the Fourth Circuit than in the sister circuits. Case law that shares nothing more than superficial similarities with the facts of a suit – such as an officer firing multiple rounds in both *Waterman*, and *Brockington* – will permit a plaintiff to "clearly establish" a Constitutional right. This is not the law given by this Court. An officer can use deadly force against a suspect that attempts to kill the officer with the officer's own weapon. A plaintiff in a § 1983 lawsuit cannot establish a violation with such a high level of generality. The Fourth Circuit's holding to the contrary must be reversed.

## III. THIS CASE HAS SIGNIFICANT PUBLIC POLICY IMPLICATIONS FOR LAW ENFORCEMENT

The Fourth Circuit decision "shaves this incident oh so fine, parsing and segmenting the encounter

almost second by second, ultimately finding that Pittman's efforts to save his life in the final moments of the altercation were excessive." *Harris*, 927 F.3d at 282 (Wilkinson, J. dissenting) (Pet. App. 31a). The opinion says that a law enforcement officer must stop and reassess each and every moment of a struggle to determine whether he has the upper hand before continuing to defend himself. Such an outcome is an unconscionable assault on qualified immunity. As noted by Judge Wilkinson in his dissent, decisions that second guess the actions of an officer taken to save his own life, and based solely on a plaintiff's self-interested story, will make it harder for law enforcement agencies to obtain and retain officers. Judge Wilkinson shared the story of Chuck Wexler, head of the Police Executive Research Forum, who "asked a roomful of chiefs to raise their hands if they wanted their children to follow them into a law enforcement career. Not one hand went up." *Id.* (quoting Tom Jackman, Who Wants to be a Police Officer? Job Applications Plummet at Most U.S. Departments: Perceptions of Policing, Healthy Economy Contribute to Decreased Applications at 66 Percent of Departments, Wash. Post (Dec. 4, 2018)). Judge Wilkinson continued:

> Police work, like the calling of many a skilled tradesman, has often been handed down through the generations in America, but self respect depends in part upon societal respect, and that for officers is sadly ebbing. Court decisions that devalue not only police work but the very safety of officers themselves risk severing those bonds of generational transmission that have so sustained the working classes of our country. It is a shame,

> because professional police work helps to bridge the gulf between the haves and have nots in a community and protects our most vulnerable and dispossessed populations. Law must sanction officers who would abuse their power or disregard controlling law; it should not scare off those who worry that no matter what they do or whom they protect, they cannot avoid suits for money damages.

*Id.* at 286–87 (Wilkinson, J. dissenting) (Pet. App. 40a-41a).

Officer Pittman provided the Fourth Circuit with a compelling demonstration of the reason for the qualified immunity doctrine. Officer Pittman was forced to make the split-second decision of whether to use deadly force to save his own life. He could not afford the luxury of a pause. Harris had already attempted to murder Officer Pittman with his own firearm. Harris still refused to get down as directed. The deadly threat Harris presented was real and imminent. Officer Pittman's decision to use deadly force was justified. No other conclusion could be reached without transgressing the admonition against second-guessing the decisions of trained officers at risk for death or serious injury. The District Court properly concluded that Officer Pittman acted with probable cause, did not use excessive force, and did not violate Harris' clearly defined Fourth Amendment rights. Officer Pittman attempted to deescalate the situation. Harris continued to resist. And this resistance ultimately caused Officer Pittman to discharge his service weapon, in rapid succession, until Harris had been neutralized. The Fourth Circuit found that a jury must judge Officer Pittman. Judge Wilkinson correctly dissented:

> I cannot join a decision that engineers such a perverse punishment for his actions and tells future officers that they cannot preserve their very lives without having their conduct assessed through the uncomprehending lens of hindsight.
>
> The second-guessing will have no end. If not now, never.

*Harris*, 927 F.3d at 287 (Wilkinson, J. dissenting) (Pet. App. 41a)

## CONCLUSION

Because of the significance of the case for the law enforcement community—above and beyond simply the interests of the parties to this lawsuit—the Court should grant *certiorari* review. The orderly administration of justice, and the gravity of the implications of the decision nationwide, demands the Court's attention.

For the foregoing reasons, Officer Pittman respectfully requests that his writ of certiorari be granted.

Respectfully submitted,

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