No. 19-466

IN THE

Supreme Court of the United States

ZACHERY PITTMAN,

Petitioner,

v.

HERMAN HARRIS,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the record evidence so "blatantly contradict[s]," *Scott v. Harris*, 550 U.S. 372, 380 (2007), Mr. Harris's version of the facts on which his excessive-force claim is based that no reasonable jury could believe him.

2 Whether it was clearly established as of the night Petitioner shot Mr. Harris that the use of deadly force is not justified when a suspect is injured and helpless on the ground.

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INTRODUCTION

The facts in this case are in dispute. Mr. Harris's claim of excessive force is based on his contention that, as Mr. Harris lay on the ground, wounded and subdued as a result of Petitioner's first gunshot, Petitioner stood over Mr. Harris and shot him twice more—without justification. Petitioner, by contrast, contends that Mr. Harris still posed a mortal threat when he fired the additional shots. Because of the parties' conflicting accounts and the lack record evidence supporting Petitioner's version of the facts, the decision below held that Petitioner was not entitled to summary judgment based on an affirmative defense of qualified immunity.

Despite this straightforward application of established law, Petitioner requests the Court's review. In doing so, Petitioner fails to identify a genuine circuit split and fails to present a legal question that warrants this Court's review in the absence of such a split. Instead, Petitioner argues the Fourth Circuit misapplied established legal standards to the facts of this case. That is an insufficient justification for review, and it is meritless in any event. The decision below faithfully applied this Court's precedents in holding that—at the summary judgment stage—Petitioner is not entitled to judgment on qualified-immunity grounds. The petition should be denied.

COUNTERSTATEMENT OF THE CASE

1. The altercation between Mr. Harris and Petitioner had its origin in a police report of a stolen car. According to the report, the suspect was a teenage black male. Pet. App. 4a. At the time, Mr. Harris was

38 years old, and the parties now agree that Mr. Harris played no role in the reported theft. *Id.* Regardless, an officer observed Mr. Harris walking down the street, suspected him of the crime, and began to pursue him. *Id.* In response, Mr. Harris—who was unarmed—fled. *Id.* Petitioner observed Mr. Harris run and gave chase. *Id.*

Petitioner eventually caught Mr. Harris in an isolated, wooded area. *Id.* No witnesses observed the altercation that followed. *See id.* at 13a. Petitioner and Mr. Harris first fought for control of Petitioner's taser and then for control of Petitioner's firearm. *Id.* at 4a. As they struggled, Petitioner's gun fired while in his holster. *Id.* The bullet struck Mr. Harris's right ring finger, severing part of it. *Id.* Petitioner claims that Mr. Harris then gained control of the gun and attempted to shoot Petitioner but was unable to because the gun malfunctioned. *Id.* at 5a. What happened next, however, is not in dispute: Petitioner secured control of his gun and fired at Mr. Harris at close range, striking him in the chest. *Id.*

Mr. Harris does not dispute that this initial use of deadly force was justified, and his claim of excessive force is not based on this initial gunshot. *Id.* Rather, Mr. Harris's claim is based on the gunshots that followed. And here is where the parties' accounts of the material facts diverge.

According to Mr. Harris, Petitioner's initial gunshot struck Mr. Harris in the chest and knocked him to the ground. *Id.* at 6a. Petitioner then turned on his gun light and observed Mr. Harris lying on the ground, injured and subdued. *Id.* at 16a. Petitioner

got to his feet, stood over Mr. Harris, and fired twice more—striking him in the chest and the back of his left leg. *Id.* at 6a. This final gunshot "broke [Mr. Harris's] femur on the way through his body, and exited his body near his groin, suggesting that Harris rolled onto his stomach before Pittman fired for the last time." *Id.*

Petitioner disputes these critical facts. Although he does not specify how many additional times he fired, Petitioner claims that "he fired each [gunshot] at roughly the same time and under the same circumstances"—with Petitioner on the ground, and Mr. Harris on his feet, still posing a threat. *Id.* at 5a–6a.

2. Mr. Harris initiated this action pro se. *Id.* at 6a. Petitioner moved for summary judgment, and the district court denied Mr. Harris's request to appoint counsel and granted summary judgment. *Id.* The district court found that Petitioner was entitled to qualified immunity because his use of force was objectively reasonable. *Id.*

Mr. Harris, still proceeding pro se, appealed the district court's decision to the Fourth Circuit, which reversed. *Id.* at 7a. In an unpublished opinion, the Fourth Circuit held that the district court incorrectly applied the summary judgment standard by interpreting the facts in the light most favorable to Petitioner, the moving party, rather than Mr. Harris, the non-moving party. *Id.* Specifically, the district court inappropriately had credited Petitioner's claim that he was on the ground and Mr. Harris was standing at the time of the final gunshots. *Id.* at 7a–8a. The

Fourth Circuit remanded for the district court to consider in the first instance whether Petitioner was entitled to qualified immunity after properly construing the facts. *Id.* at 8a.

On remand, the district court again granted summary judgment in favor of Petitioner on the basis that he was entitled to qualified immunity. *Id.* The district court found that even if Mr. Harris was on the ground at the time of the final gunshots, Petitioner's use of force was objectively reasonable. *Id.*

Mr. Harris appealed a second time and the Fourth Circuit once again reversed the district court. *Id.* at 2a.

3. The Fourth Circuit began by considering whether the district court correctly applied the summary judgment standard, finding it did not. *Id.* at 12a. Although the district court accepted as true that Mr. Harris was on the ground at the time of the final gunshots, it construed other evidence in Petitioner's favor, rather than Mr. Harris's. *Id.* For example, the district court inferred that Petitioner intended only to disable Mr. Harris because of the location of Mr. Harris's gun wounds—including the two wounds to his chest and a third to the back of his leg that broke Mr. Harris's femur and narrowly avoided his femoral artery. *Id.* at 13a. The district court also credited Petitioner's contention that he fired all of the gun shots "in rapid succession" rather than over a longer period of time—which required drawing inferences in Petitioner's favor. *Id.* at 13a–14a.

The Fourth Circuit next addressed Petitioner's argument—which he failed to raise the first time this

case was on appeal—that *Scott v. Harris*, 550 U.S. 372 (2007), required the court to disregard Mr. Harris's account of the facts because it was blatantly contradicted by the record evidence. Pet. App. 17a. The Fourth Circuit considered all the evidence on which Petitioner relied for this argument and concluded that this evidence did not contradict Mr. Harris's account.

First, the court addressed two police affidavits recounting statements from two other individuals who claimed to have heard (but not seen) Petitioner's gunshots. The court found that the affidavits did not contradict Mr. Harris's claim that, after he was initially shot in the chest, he fell and Petitioner stood over him before shooting him two more times. *Id.* at 19a. The court also noted that this evidence is not the kind of uncontroverted and authenticated evidence to which *Scott* applies. *Id.*

Second, the court considered evidence of Mr. Harris's DNA on Petitioner's gun and photographs of scratches and bruises that Petitioner suffered as a result of the fight. *Id.* The court found that this evidence had no bearing on the crucial dispute: whether, after the physical altercation, Petitioner continued to shoot Mr. Harris after Mr. Harris had fallen to the ground and been subdued. *Id.* at 20a.

Third, the court considered Petitioner's final piece of evidence—the summary of facts that accompanied Mr. Harris's *Alford* plea for assaulting Petitioner and

for possession of a firearm as a felon.[1] *Id.* The court determined that once again this evidence did not contradict Mr. Harris's account of the facts. *Id.* at 22a.

Because there was no basis for discrediting Mr. Harris's version of the material facts under *Scott v. Harris*, the Fourth Circuit construed the facts in favor of Mr. Harris. It then applied the familiar two-part test to determine whether a law enforcement officer is entitled to qualified immunity. *Id.* at 24a–25a. Relying on two prior Fourth Circuit decisions, the court held that even if Petitioner's initial use of force was justified, once Mr. Harris fell to the ground, injured and subdued, a reasonable jury could find that the subsequent gunshots to the chest and leg were not objectively reasonable—and thus, that the final gunshots violated Mr. Harris's constitutional rights. *Id.* at 26a–28a (citing *Brockington v. Boykins*, 637 F.2d 503 (4th Cir. 2011); *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2004)).

Finally, the Fourth Circuit considered whether Mr. Harris's constitutional right to not be shot again once he was wounded and lying on the ground was clearly established. The court concluded that it was. It noted that both *Brockington* and *Waterman* preceded the events in this case and both—in particular

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[1] An *Alford* plea permits a defendant to plead guilty while maintaining his innocence. Pet. App. 20a–21a; *see also United States v. Vonn*, 535 U.S. 55, 69 (2002) (noting that an *Alford* plea permits a defendant to "plead guilty while protesting innocence when he makes a conscious choice to plead simply to avoid the expenses or vicissitudes of trial" (citing *North Carolina v. Alford*, 400 U.S. 25 (1970))). As the Fourth Circuit noted, the distinguishing feature of an *Alford* plea is that the defendant does not confirm the factual basis for the plea. Pet. App. 21a.

Brockington—involved facts that were very similar to those here. *Id.* at 29a. Specifically, those cases established "the right of a suspect, once shot by an officer and lying wounded on the ground, not to be shot again." *Id.* Accordingly, the Fourth Circuit held that Petitioner was not entitled to qualified immunity at summary judgment.

Judge Wilkinson dissented. In his view, Mr. Harris's factual account "should be rejected" because it is "flatly contradicted" by the "whole record." *Id.* at 35a. Judge Wilkinson would have "adopt[ed] the version of events" offered by Petitioner, determined that Petitioner's actions were "reasonable," and concluded that qualified immunity bars this suit. *Id.* at 38a.

The court of appeals denied Petitioner's request for rehearing en banc, with only Judge Wilkinson dissenting. *Id.* at 60a.

REASONS FOR DENYING THE PETITION

I. IN A MANNER CONSISTENT WITH THE OTHER COURTS OF APPEALS, THE DECISION BELOW CORRECTLY HELD THAT THE RECORD EVIDENCE DOES NOT BLATANTLY CONTRADICT MR. HARRIS'S ACCOUNT OF THE FACTS.

Petitioner contends the decision below misapplied *Scott v. Harris*—and created a circuit split in the process—by crediting Mr. Harris's account of the disputed facts even though this version was "blatantly contradicted" by other record evidence. Pet. 8. Not so. Consistent with decisions from sister circuits, the Fourth Circuit correctly interpreted *Scott* to mean that a party cannot resist summary judgment on the

basis of testimony that is blatantly contradicted by uncontroverted and authenticated record evidence. But, as the Fourth Circuit reasoned, the evidence on which Petitioner relies does not contradict—much less *blatantly* contradict—Mr. Harris's testimony, so *Scott* does not mandate summary judgment in Petitioner's favor.

A. This Court in *Scott* reaffirmed that the general summary judgment standard applies in qualified immunity cases. 550 U.S. at 378. This means that "courts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion," and in "qualified immunity cases, this usually means adopting (as the Court of Appeals did here) the plaintiff's version of the facts." *Id.* (alteration, citation, and internal quotation marks omitted).[2]

Scott, however, presented the Court with "an added wrinkle" regarding the summary judgment analysis—namely, the "existence in the record of a videotape capturing the events in question." *Id.* There was no dispute that the video was authentic or that it accurately captured the events at issue. *Id.* And this

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[2] Subsequent decisions of this Court—including in cases involving qualified immunity defenses to excessive-force claims—adhere to the same longstanding rule. For example, in *Tolan v. Cotton*, the Court reiterated that "'a judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" 572 U.S. 650, 656 (2014) (per curiam) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). The Court stressed "the importance of drawing inferences in favor of the nonmovant" and the rule that "genuine disputes are generally resolved by juries in our adversarial system." *Id.* at 657, 660.

video "blatantly contradicted" the plaintiff's account of the car crash on which his excessive-force claim was based. *Id.* For example, the plaintiff argued that the defendants' use of force was excessive because, at the time of the crash, the street was empty and he was driving slowly, in control of his car. The video, however, showed that there were other cars and pedestrians on the street who were forced to evade the plaintiff as he drove recklessly and out of control. Because this authenticated and uncontroverted proof "so utterly discredited" the plaintiff's version of the facts, the Court held "that no reasonable jury could have believed him." *Id.* at 380–81.

B. Neither this Court nor the lower courts have extended *Scott* in the way Petitioner seeks, to discredit a non-moving party's testimony on the basis of circumstantial evidence that does not relate to the material facts. Rather, the Courts of Appeals consistently have relied on *Scott* to grant summary judgment in a defendant's favor only when uncontroverted and authenticated evidence that is not susceptible of multiple reasonable interpretations discredits the non-moving party's account of the material disputed facts.

In *Ramirez v. Martinez*, for example, the Fifth Circuit concluded that "*Scott* does not control" where the contents of the defendant's videotape were "unclear" and failed to capture the "element[s] of the altercation" that were material to the plaintiff's claim. 716 F.3d 369, 374 (5th Cir. 2013). In *Coble v. City of White House*, the Sixth Circuit similarly concluded that *Scott* did not control where an audio recording failed to capture all of the relevant facts on which the plaintiff based his claim. 634 F.3d 865, 869 (6th Cir. 2011).

And in *Patterson v. City of Wildwood*, the Third Circuit reasoned that "[t]he limited exception set forth by the Supreme Court in *Scott v. Harris*" did not apply where the defendant relied on a videotape that did not "portray the actual incident" at issue and on the testimony of a third party who claimed to have witnessed the incident. 354 F. App'x 695, 697–98 (3d Cir. 2009).

The cases that Petitioner cites do not support his argument because they too interpreted *Scott* in this limited manner. In *Morton v. Kirkwood*, the Eleventh Circuit *rejected* an argument similar to Petitioner's. 707 F.3d 1276, 1284 (11th Cir. 2013). Stating that *Scott* applies "where an accurate video recording completely and clearly contradicts a party's testimony," the court found that the "forensic evidence" on which the defendant relied did not rise to this level because it "reasonably [could] be harmonized" with the plaintiff's testimony. *Id.*

By contrast, the cases that relied on *Scott* when granting summary judgment to the defendant demonstrate the narrowness of its holding. In both *Wallingford v. Olson*, 592 F.3d 888, 893 (8th Cir. 2010), and *Kinlin v. Kline*, 749 F.3d 573, 579 (6th Cir. 2014), uncontroverted and authenticated video evidence contradicted the plaintiff's account of the facts. In *Medina-Rivera v. MVM, Inc.*, the plaintiff based a retaliation claim on an assertion that she was suspended from work. 713 F.3d 132, 139 (1st Cir. 2013). But uncontroverted and authenticated documentary evidence in the form of earnings statements established that in fact she had worked during that period—a fact the plaintiff conceded in her summary judgment papers. *Id.*

Finally, in *Koerner v. CMR Construction & Roofing, L.L.C.*, the Fifth Circuit did not apply *Scott*; rather, the court merely included *Scott* as a citation when reciting the applicable legal standard. 910 F.3d 221, 228 (5th Cir. 2018). And the court did not find that the record evidence contradicted the plaintiff's account of the facts—it found that the plaintiff's testimony was not based on personal knowledge or supported by any other evidence. *Id.*

C. Consistent with these decisions from other Courts of Appeals, the Fourth Circuit faithfully applied the Court's holding in *Scott*. Contrary to Petitioner's assertions, the decision below did not hold that *Scott* is limited to videotape evidence or that evidence must be considered in isolation, divorced from the record. Rather, the court carefully considered the entire record before it, examining all of the evidence that, according to Petitioner, contradicted Mr. Harris's account of the facts, and explained why this is not so. *See* Pet. App. 18a–20a.

Critically, unlike the videotape in *Scott*, "none of [the evidence on which Petitioner relies] actually contradicts, blatantly or otherwise, Harris's crucial contention on summary judgment: that . . . Pittman gained control over the weapon, used it to shoot Harris once in the chest, and *then*, after Harris fell to the ground badly wounded, stood over Harris and shot him twice more." *Id.* at 20a. Simply put, other than Petitioner's account, which Mr. Harris disputes, there is no evidence in the record that supports Petitioner's version of the facts on which Mr. Harris's claim is based—i.e., the facts regarding the circumstances of Petitioner's second and subsequent gunshots. To the

extent Petitioner maintains that *Scott* permits a court—rather than the fact finder—to assess witness credibility and find Petitioner's account more credible than Mr. Harris's, the decision below explained why doing so would violate the standard that applies when deciding a motion for summary judgment. *Id.* at 11a. Indeed, Petitioner's argument is at odds with this Court's admonition in *Tolan* that courts must *not* "weigh the evidence and determine the truth of the matter" at the summary-judgment stage, even when a defendant seeks qualified immunity. *Tolan*, 572 U.S. at 656 (quoting *Anderson*, 477 U.S. at 249).

In sum, no uncontroverted and authenticated record evidence contradicts Mr. Harris's account of the material facts in dispute. The Fourth Circuit thus correctly concluded—in line with the other Courts of Appeals—that a reasonable jury could believe Mr. Harris's account of the facts and that *Scott* does not dictate a different result here. Petitioner's disagreement with that conclusion amounts to a request for either fact-bound error correction or a dramatic, unbounded expansion of *Scott*'s carefully tailored rule. In essence, Petitioner asks this Court to weigh the evidence and determine the truth of the matter at the summary judgment stage—exactly what Rule 56 prohibits. Were *Scott* to operate in that way, it would swallow the general rule expressed in *Anderson* and reaffirmed countless times since. The Court should reject Petitioner's extraordinary request to rewrite the rules governing summary judgment.

II. PETITIONER'S DISAGREEMENT WITH THE FOURTH CIRCUIT'S APPLICATION OF SETTLED LAW DOES NOT WARRANT REVIEW AND IS MERITLESS.

Petitioner does not even attempt to identify a circuit split with respect to his second question presented. Rather, he merely criticizes the decision below, asserting that it incorrectly applied the Court's qualified immunity precedents. Pet. 14–16. Those criticisms do not warrant the Court's review and, in any event, are unpersuasive.

A. Petitioner does not object to the legal standard that the Fourth Circuit applied—nor could he, as the decision below applied the "familiar two-step inquiry" to assess Petitioner's qualified immunity defense. Pet. App. 25a. Instead, Petitioner takes issue with how the Fourth Circuit applied settled law to the facts of this case. According to Petitioner, the decision below "misapplied" the Court's precedents holding that, when analyzing a qualified immunity defense, courts are not to define "clearly established law" at too high a level of generality. Pet. 14, 16. The Court, however, "rarely grant[s] review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case." *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in the denial of certiorari); *see also* Sup. Ct. R. 10.

Petitioner also misconstrues the decision below. The Fourth Circuit concluded that Mr. Harris's constitutional right was "clearly established" precisely because the facts in this case so "closely resembl[e]" the facts in two Fourth Circuit decisions that predated

the events at issue here. Pet. App. 27a. The decision below correctly concluded that the facts in *Brockington v. Boykins* were almost "an exact factual match," *id.* at 29a, to the "situation [Petitioner] confronted," *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015). Thus, the decision below bears no resemblance to cases where the Court has reversed a lower court because it defined the constitutional right at too high a high level of generality.

B. In any event, the decision below did not misapply the Court's qualified immunity precedents.

The Court has held that a constitutional right is "clearly established" if its contours are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Although "clearly established law" should not be defined "at a high level of generality," *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), the Court repeatedly has rejected the notion that an officer is entitled to qualified immunity "unless the very action in question has previously been held unlawful," *Creighton*, 483 U.S. at 640; *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (Supreme Court precedent "does not require a case directly on point for a right to be clearly established"). Instead, "[p]recedent involving similar facts" may "provide an officer notice that a specific use of force is unlawful." *Kisela*, 138 S. Ct. at 1153. And if the constitutional violation is "obvious," even precedent laying out excessive-force principles at a "general level" may suffice. *White v. Pauly*, 137 S. Ct. 548, 552 (2017); *see Hope v. Pelzer*, 536 U.S. 730, 741 (2002)

("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

The constitutional right here was "clearly established" because in *Brockington* "an officer acting under similar circumstances as [Petitioner] was held to have violated the Fourth Amendment." *White*, 137 S. Ct. at 552. *Brockington* "squarely governs the specific facts at issue" here, *Kisela*, 138 S. Ct. at 1153—indeed, the relevant facts in the two cases are nearly identical. In *Brockington*, as here, a police officer's initial use of deadly force was justified in light of the preceding serious confrontation between the officer and the plaintiff. 637 F.3d at 505. There, as here, the officer justifiably shot the plaintiff in the torso. *Id.* There, as here, the force of the gunshot knocked the plaintiff off his feet. *Id.* There, as here, the plaintiff was unarmed as he lay on the ground, seriously wounded. *Id.* There, as here, the fact the plaintiff was unarmed was apparent. *Id.* at 507. There, as here, the officer then stood over the plaintiff and shot him several more times. *Id.* at 505. On these facts, the Fourth Circuit held that the officer in *Brockington* violated a clearly established constitutional right—"the right of a suspect, once shot by an officer and lying wounded on the ground, not to be shot again." Pet. App. 29a.

A second Fourth Circuit decision, *Waterman v. Batton*, further demonstrates that Mr. Harris's right not to be shot again once he was lying wounded on the ground was clearly established. In *Waterman*, police officers on foot fired shots at the plaintiff as his vehicle accelerated towards them, and then continued shooting at plaintiff after his vehicle had passed them by.

393 F.3d at 475. Although the officers were justified in initially shooting at the plaintiff, "once [the plaintiff's] vehicle passed the officers, the threat to their safety was eliminated and thus could not justify the subsequent shots." *Id.* at 482. Thus, the Fourth Circuit held that "force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated." *Id.* at 481.

Brockington and *Waterman* squarely govern the facts in this case and put Petitioner on notice that even if his initial use of deadly force was justified, his decision to continue shooting Mr. Harris once Mr. Harris was subdued was not.

C. Petitioner argues that *Brockington* and *Waterman* are "factually dissimilar," Pet. 16–18, but that argument depends on an erroneous interpretation of disputed facts. According to Petitioner, *Brockington* and *Waterman* are distinguishable because, in those cases, "the circumstances changed" once the officers fired their initial shots—after that point, the suspects no longer presented a threat. *Id.* at 17. Here, Petitioner argues, the "circumstances" never "changed" because there was "no break in the action" and Mr. Harris still posed a mortal threat even after Petitioner shot him in the chest. *Id.* at 18.

Petitioner's argument fails because it depends on adopting *his* version of the facts—even though, as the non-moving party on summary judgment, the facts must be construed in favor of Mr. Harris. According to Mr. Harris, "the circumstances changed significantly" once Petitioner shot him in the chest—after that

point, Mr. Harris was "lying bleeding and subdued on the ground" while Petitioner stood over him, holding a gun. Pet. App. 6a. Construing the facts in favor of Mr. Harris, *Brockington* and *Waterman* are not "factually dissimilar" but rather govern the outcome here.

Petitioner also suggests that *Brockington* and *Waterman* are distinguishable because he faced a more severe threat than the officers in those cases. *See* Pet. 17–18. Petitioner is mistaken—in all three cases, officers initially faced a serious and imminent threat to their lives, which justified the use of deadly force. And in all three cases, the officers continued using deadly force after the suspect no longer posed a threat to their safety, violating the suspect's constitutional rights.

III. THE DECISION BELOW IS NOT THE APPROPRIATE VEHICLE TO CONSIDER PETITIONER'S MANUFACTURED POLICY ARGUMENT.

Petitioner contends that the decision below is bad policy because it requires an officer to "stop and reassess each and every moment of a struggle to determine whether he has the upper hand before continuing to defend himself." Pet. 20–21. Regardless of the merits of this argument, the decision below does not implicate it. Thus, this case is not the appropriate vehicle for addressing Petitioner's policy concerns.

Petitioner attempts to manufacture a policy dispute by construing the facts in *his* favor. He claims that he fired the gunshots "in rapid succession" and that Mr. Harris posed a mortal threat the entire time he fired his gun. And he maintains that it is unfair to deny qualified immunity to an officer who acts in self-defense under such circumstances. But the Fourth

Circuit refused to credit those allegations because there is a genuine dispute regarding whether Petitioner was in fact acting in self-defense when he fired the second and subsequent shots.

Instead, the decision below is premised on the fact—credited as true because of the procedural posture of this case—that Petitioner shot Mr. Harris two additional times after the conclusion of the struggle. Specifically, it is premised on the fact that "[Petitioner] got to his feet and took aim at Harris, now lying on the ground wounded, unarmed, and not trying to escape or showing any further resistance before firing two more shots into his chest and the back of his leg." Pet. App. 26a (alterations, citation, and internal quotation marks omitted). The decision below in no way suggests that an officer is not entitled to qualified immunity for using deadly force to defend himself when faced with threat to his life in the midst of an ongoing and serious physical struggle. In other words, the decision below does not apply to an officer who acts in the manner that Petitioner claims he acted.

For that reason, even if Petitioner's policy argument were worthy of the Court's consideration, this case is not an appropriate vehicle for addressing the issue.[3] The decision below stands for an unremarkable proposition: that an officer cannot continue shooting a

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[3] Because there is a genuine dispute as to the facts, this case also does not present a clear opportunity to consider concerns regarding the lawfulness and scope of the qualified immunity doctrine. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871–72 (2017) (Thomas, J., concurring in part and concurring in judgment); William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018).

suspect once he is lying on the ground, wounded and no longer a threat. A contrary rule—one that allows an officer to stand over an injured suspect and fire at will—clearly is untenable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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