No. 21-1559

In the

***Supreme Court of the United State*s**

‡

SHARON POWELL, AS EXECUTRIX OF THE ESTATE OF WILLIAM DAVID POWELL, AND SHARON POWELL,

Petitioners,

v.

JENNIFER SNOOK, AS EXECUTRIX FOR THE ESTATE OF PATRICK SNOOK

Respondent.

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

RESPONSE IN OPPOSITION TO PETITION FOR CERTIORARI

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COUNTERSTATEMENT TO QUESTIONS PRESENTED

This qualified immunity case concerns whether the Fourth Amendment clearly required, "beyond debate," that police officer Patrick Snook had to announce his presence and police status within the first moments of encountering decedent Mr. Powell, where Snook (1) was a uniformed officer dispatched at night to a 911 "shots fired" call that involved domestic violence and perhaps a murder, and (2) shortly after emerging from his garage with a handgun, Mr. Powell stopped, faced Sergeant Snook and began to lift his loaded semi-automatic handgun toward Snook. Snook fired in self defense and in defense of a nearby officer.

The Eleventh Circuit Court of Appeals found no case clearly supporting Petitioner's new Fourth Amendment rule. In fact, circuit precedent supports the legality of Sergeant Snook's action. This Court's precedent says nothing to the contrary.

The question, then, is whether the Court of Appeals erred in affirming qualified immunity, where "[n]either the panel majority nor the [petitioner] identified a single precedent finding a Fourth Amendment violation under similar circumstances." *City of Tahlequah v. Bond*, 142 S. Ct. 9, 12, 211 L.Ed.2d 170, 174 (2021) (*per curiam*).

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STATEMENT OF THE ISSUE

This qualified immunity case concerns whether the Fourth Amendment clearly required, "beyond debate," that Sergeant Patrick Snook had to announce his presence and police officer status within the first moments of encountering decedent Mr. Powell, where Snook (1) was a uniformed police officer dispatched to a 911 "shots fired" call that involved domestic violence and perhaps a murder and (2) within seconds of emerging from his garage, Mr. Powell stopped, faced Sergeant Snook and began to lift his semi-automatic handgun toward Snook.

STATEMENT OF THE CASE

Introduction

At the time of this incident Defendant Patrick Snook was a sergeant at the Henry County Police Department. Doc. 81 at 4. Petitioner Sharon Powell claims that Sergeant Snook used excessive force when he fatally shot her husband David Powell. Doc. 1 (Complaint).

The District Court's order recites the basic facts underpinning the lawsuit as a whole, and provides appropriate evidentiary citations to the largely undisputed background facts in this case. Consequently, the statement below largely reproduces the factual details recited in the District

Court's thorough order. See Doc. 81 at 3-10.

911 Domestic Violence and Shots Fired Call

Around midnight on June 7, 2016, Henry County 911 received a call from a woman stating that she lived at 736 Swan Lake Road in Stockbridge and heard screaming and gunshots "a few houses down." Doc. 81 at 3. The caller reported that "we've had to call before because they were fighting so bad." *Id.* The initial dispatcher, Annie Davis ("Annie Davis"), looked at the history of 911 calls from 736 Swan Lake Road but did not find this previous call. *Id.*

The caller reported hearing a woman scream "help me please," hearing three gunshots, and then not hearing any more screaming. Doc. 81 at 3. The caller reported that the nearest intersecting street was Fairview Road and the shots came from "the second or third house past us towards Fairview." *Id.* When Annie Davis asked, "if I'm looking at your house where exactly would their house be?" the caller replied, "[a] couple houses down on the right towards Fairview Road. It's what it sounds like. It's either the second or third house past ours." *Id.*

Based on this information, a second 911 dispatcher, Carrie Denio, dispatched police officers, telling them:

> [Person screaming] at 736 Swan Lake

> Road, 736 Swan Lake Road, across from Melanie Drive and Eulaya Court, caller heard [person screaming], three [discharges of a firearm], heard a female screaming "please help," then the [discharges of a firearm], and they haven't heard anything since. Advised ongoing problems with [domestic] at this location. . . . It's at 736 Swan Lake Road, 736 Swan Lake Road. She said if you're looking at this location, it's two houses down to the right, maybe three houses.

Doc. 81 at 4. Henry County Police officers Mathew Davis, Ashley Ramsey f/k/a/ Ashley Janicak ("Ramsey"), and Snook—the sergeant over the uniform patrol division for Henry County for that shift, responded to the call. *Id.*

The officers parked their vehicles along the Swan Lake Road roadway. Doc. 81 at 4. None of their vehicles' blue lights were on. *Id.* Before approaching the residence at 736 Swan Lake Road, Mathew Davis asked the 911 dispatcher why 911 believed this was the correct location and asked 911 to get more information from the caller. Doc. 81 at 4-5.

Andrew Talbert ("Talbert"), the 911 dispatch manager, called the 911 caller's telephone number and spoke to the 911 caller's mother. Doc. 81 at 5. Following this call, Talbert called the officers and

told them the caller and others were "standing in their backyard and [the shots and screaming] was behind them, like, so away from the roadway, that's why they believe it is two or three houses down." Doc. 81 at 6. From the perspective of a person looking from the roadway at the 911 caller's residence at 736 Swan Lake Road, the Powell residence at 690 Swan Lake Road was to the right and toward Gardner Road. *Id.* The configuration of the Powells' house, far from the road on a "flagpole" lot, was consistent with the 911 descriptions of the location of the screaming and gunshots. Doc. 81 at 6-7.

Officers Approach the Powell Residence

Based on the 911 dispatch information, the officers approached the Powell residence. Doc. 81 at 7. The officers wore police uniforms. *Id.* The Powell residence had a long driveway and the house could not be seen from the road. *Id.* No lights were on inside or outside the house, and it was very dark. *Id.*

Because the officers were responding to a call involving domestic violence with shots fired, they approached cautiously and attempted to avoid allowing themselves to be targeted by a shooter.[1] Doc. 81 at 7. Sergeant Snook carried a rifle due to

1 Domestic violence calls are among the most dangerous types of calls that police officers face, and many officers have been killed by domestic violence suspects. Doc. 94 (Libby Dep.) at 162 & Exhibit D-1 (verifying expert report); Doc. 54-4 (verified Libby Report) at 6 & nn. 1, 2.

the severity of the call and in case long-range shots were necessary. *Id.*

There were two trucks at the residence, and Snook asked dispatch to provide information about them. Doc. 81 at 7. The dispatcher reported that the trucks were registered to the Powells. *Id.* The dispatcher also reported that the previous 911 calls for the Powell residence involved an ambulance and an alarm, and that the Powells were in their 60s. Doc. 81 at 7-8.

Sergeant Snook was aware that sometimes alarm or ambulance calls were related to domestic violence incidents. Doc. 81 at 8. Snook was also informed that police had not previously been dispatched to the Powell residence for a domestic violence incident. See Doc. 59 (Snook Dep.) at 94.

Sergeant Snook whispered to Officer Ramsey to go to the back of the residence and cover that area. Doc. 81 at 8. Snook stood facing the front of the house, to the right-hand side of the house close to the driveway. Doc. 59 (Snook Dep.) at 66. Snook approached a window close enough to shine a flashlight around. Doc. 81 at 8. He did not see anything overturned, any damage to the house, any broken windows or broken glass, or any kicked-in doors. *Id.* Nor did he hear any screaming or see any lights on. *Id.*

The Powells Respond to the Officers

Officer Davis testified that he went to the front door of the residence, rang the doorbell, and knocked. Doc. 60 (Mathew Davis Dep.) at 24-25. However, Ms. Powell testified that she did not hear a doorbell ring or any knocking on the door. Doc. 81 at 8. The Powells did not check their front door. *Id.* at 9. The Powells got out of bed, and Mr. Powell went to the laundry room door, looked out the window, and told Ms. Powell that he saw someone outside. Doc. 81 at 9. Mr. Powell then went to his closet, put on his pants, and got his handgun. *Id.* The Powells had no reason to believe that someone was trying to break into their house. Doc. 62 (Powell Dep.) at 57:12-14.

Mr. Powell walked through the kitchen door into the attached garage and activated the garage door opener. Doc. 81 at 9. Activating the garage door opener caused the garage door light to come on. *Id.* All other lights around the house remained off. *Id.* The Powells stood in the garage, Mr. Powell on the side of a truck parked inside and Ms. Powell at the end of the ramp. *Id.*

According to Ms. Powell, it took approximately 8.8 seconds for the garage door to open. Doc. 81 at 9. The garage door was noisy when it was opening. Doc. 62 (Powell Dep.) at 98:21-23. Ms. Powell says that her hearing is excellent and there was no sound from anyone while the garage

door was opening. Doc. 81 at 9.

Mr. Powell Confronts the Officers With His Gun

After the garage door opened, Mr. Powell exited the garage. Doc. 59 (Snook Dep.) at 88. Mr. Powell held his handgun in his right hand. Doc. 81 at 10. Mr. Powell was not wearing a shirt. *Id*. From this point Ms. Powell's memory differs about certain details recalled by Sergeant Snook and Officer Davis.

Ms. Powell testified that she followed Mr. Powell outside the garage, and she says that Mr. Powell walked at a normal pace. Doc. 81 at 10. According to Ms. Powell, Mr. Powell walked about ten or fifteen steps over "only a few seconds," was standing straight up, was not hunched over, and was not running. Doc. 81 at 10; Doc. 62 (Powell Dep.) at 82:12-19 (from the garage to his final standing position Mr. Powell took approximately 10 steps within a few seconds).

On the other hand, Sergeant Snook and Officer Davis testified that Mr. Powell exited the garage aggressively, hunched and leaning forward "in an aggressive manner taking an offensive action." Doc. 59 (Snook Dep.) at 88; Doc. 53-2 (Snook Decl.) at ¶9; Doc. 53-2 (Mathew Davis Decl.) at Ex. 1 (Report ¶4); Doc. 60 (Mathew Davis Dep.) at 55:5-9. Sergeant Snook testified that Mr. Powell moved "in

a quick and deliberate manner." Doc. 53-2 (Snook Decl.) at ¶8. Snook observed Mr. Powell seemed agitated and had a scowl on his face. Doc. 59 (Snook Dep.) at 101.

Ms. Powell averred that she followed Mr. Powell out of the garage and was about four or five feet behind him when he stopped in the driveway. Powell Decl. ¶6. Ms. Powell testified that between the time of Mr. Powell leaving the garage and being shot, she did not hear anything. Doc. 62 (Powell Dep.) at 124. Ms. Powell avers that no one said anything.[2]

After Mr. Powell stopped, all parties agree that Mr. Powell started to raise his right arm holding his gun. Doc. 62 (Powell Dep.) at 87; Doc. 81 at 11. The handgun was a semi-automatic with a bullet in the chamber and the hammer cocked in the firing position. Doc. 53-2 (Snook Decl.) at ¶14; Doc. 61 (Ramsey Dep.) at 82:9-15. Ms. Powell testified at her deposition that Mr. Powell "didn't even get [the gun] to his waist. It was probably at his hip." Doc.

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2 By contrast, Sergeant Snook testified at his deposition that he shined the light attached to his rifle on Mr. Powell and stated, "Henry County Police" loudly enough for anybody at that distance to hear it. Doc. 59 (Snook Dep.) at 102, 121. Officer Davis also testified that Snook said "Henry County Police" in a voice that anyone could hear at that distance. Doc. 60 (Mathew Davis Dep.) at 49. Officer Ramsey was on the other side of the house, so she did not hear any of this. Doc. 61 (Ramsey Dep.) at 45 & Exhibit 1, 60:4-6, 85:3-9, 115:17-20.

62 (Powell Dep.) at 87. She avers that "at no time was the gun pointed at anyone and was always pointed at the ground before [Mr. Powell] was shot." Doc. 81 at 11. On the other hand, Sergeant Snook and Officer Davis testified that Mr. Powell was in a firing position with his gun pointed at Snook. Doc. 53-2 (Mathew Davis Decl.) at ¶4 & Ex. 1 (Report ¶4); Doc. 53-2 (Snook Decl.) at ¶11.

Sergeant Snook Responds to Mr. Powell and the Gun

In response to Mr. Powell raising his gun, Sergeant Snook went down to one knee to make himself a smaller target and fired three shots. Doc. 59 (Snook Dep.) at 96, 101. A very short time, approximately one second or less, elapsed between Mr. Powell beginning to raise his gun and Snook firing. Doc. 81 at 11. After Snook fired, Mr. Powell dropped to the ground. *Id.* Ms. Powell screamed, ran into the house, locked the door, and called 911. *Id.* The officers rendered aid to Mr. Powell and called for an ambulance. *Id.* Mr. Powell was transported to a hospital, where he died the next day. *Id.*

Police Expert Testimony

Both parties retained a police use of force specialist to provide expert testimony. Both experts agreed that prevailing police standards allow an officer in Sergeant Snook's position to use deadly force when suddenly confronted with a man raising

a handgun under the circumstances of this case. Doc. 66 (Serpas Dep.) at 95:9-25–96:1-13 (Petitioner's expert answering hypothetical using officers' account), 101:15-25–103:1-9 (Petitioner's expert answering hypothetical using Ms. Powell's account); Doc. 65 (Libby Dep.) at 162 & Exhibit D-1 (verifying expert report); Doc. 54-4 (verified Libby Report) at 7-8.

REASONS FOR DENYING CERTIORARI

This case presents a tragedy, but not a good reason for this Court's review. Petitioner presents two major questions, which she improperly conflates. First, Petitioner argues that the Fourth Amendment requires a police officer to *announce his presence and his police status* to an armed, potentially hostile person who is suspected of involvement in a recent "shots fired" domestic violence incident. Petitioner calls this a "warning," but that label is extremely misleading. Petitioner's position is a proposed bright line Fourth Amendment rule about *police tactics*. The Court has already rejected the notion that police tactics can be a basis for finding subsequent use of force unreasonable under the Fourth Amendment. *Cty. of Los Angeles, Calif. v. Mendez*, —— U.S. ——, 137 S. Ct. 1539 (2017); *City & Cty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765 (2015). This case does not present a compelling reason to revisit that point.

Second, Petitioner moves to what accurately can be called argument about a "warning." Petitioner contends that the "feasible warning" element of *Tennessee v. Garner*'s deadly force holding applied to this situation and required Sergeant Snook to warn Mr. Powell of impending deadly force before shooting him. *Garner* did not require a warning before exercising self defense against imminent deadly force, and for good reason.

Delay in exercising self defense is likely to be deadly when the threat is a gun being raised for imminent use. In such a circumstance a warning is neither feasible nor reasonable. *Garner* did not involve an officer faced with a hostile person raising a gun at the officer. *Garner* involved an unarmed suspect running away.

A third question concerns qualified immunity, which protects officers who make arguably reasonable decisions in the large gray zone that often exists between black letter constitutional law and their particular circumstances. Here, Eleventh Circuit precedent supported Sergeant Snook's decision to fire in self defense without first identifying himself or warning that he would use deadly force. No binding authority clearly established Petitioner's position beyond debate, so the lower courts properly granted qualified immunity. That is an unremarkable result that is fully consistent with the Court's precedent.

The upshot is that Petitioner's issues do not involve an identified circuit split or a matter that cries out for clarification from the Court. The Court normally leaves officer tactics to officer judgment. Likewise, the Court has never even hinted that the Fourth Amendment restricts a police officer's inherent right of self defense by requiring him to provide a warning while hoping his gun-wielding attacker will wait to hear him out. In the absence of binding support for Petitioner's position, the lower courts followed this Court's directives and properly granted qualified immunity.

I. *GARNER* DID NOT TELL SERGEANT SNOOK THAT HE HAD TO ANNOUNCE HIS PRESENCE AND POLICE OFFICER STATUS WITHIN THE FIRST 20 SECONDS OF THIS ENCOUNTER

A. Petitioner Confuses *Garner*'s Warning About Impending Deadly Force with a Nonexistent Duty to Provide Immediate Officer Identification

Petitioner hangs her hat on the deadly force rule in *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), where an officer shot a fleeing, unarmed burglary suspect in the back of the head. By its own terms *Garner's* holding is limited to the circumstances under which police lawfully may use deadly force to *prevent escape*. *Garner* holds

"if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary *to prevent escape*, and if, where feasible, some warning has been given." *Garner*, 471 U.S. at 11-12, 105 S. Ct. 1694 (emphasis supplied).

The Court has recognized *Garner*'s limits.

> *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." *Garner* was simply an application of the Fourth Amendment's "reasonableness" test, *Graham*, supra, at 388, 109 S.Ct. 1865, to the use of a particular type of force in a particular situation. *Garner* held that it was unreasonable to kill a "young, slight, and unarmed" burglary suspect, 471 U.S., at 21, 105 S.Ct. 1694, by shooting him "in the back of the head" while he was running away on foot, *id*., at 4, 105 S.Ct. 1694, and when the officer "could not reasonably have believed that [the suspect] ... posed any threat," and "never attempted to justify his actions on any basis other than the need to prevent an escape," *id*., at 21, 105 S.Ct. 1694.

Scott v. Harris, 550 U.S. 372, 382–83, 127 S. Ct. 1769, 1777 (2007).

More recently the Court reiterated the point.

> *Graham*'s and *Garner*'s standards are cast "at a high level of generality." *Brosseau*, 543 U. S., at 199, 125 S. Ct. 596, 160 L. Ed. 2d 583. "[I]n an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law." *Ibid.* But this is not an obvious case. Thus, to show a violation of clearly established law, [plaintiff] must identify a case that put [the officer] on notice that his specific conduct was unlawful.

Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 8, 211 L.Ed.2d 164, 168 (2021) (alterations supplied).

Consistently, the Eleventh Circuit has remarked that "*Garner* says something about deadly force but not everything, especially when facts vastly different from *Garner* are presented." *Long v. Slaton*, 508 F.3d 576, 580 (11th Cir. 2007). Needless to say, the facts of this case are "vastly different" from *Garner*.

Garner's text and fact pattern immediately reveal that Petitioner misunderstands *Garner*'s scope and the nature of its "warning" provision.

As for scope, *Garner*'s "feasible warning"

provision was designed for escape situations. An escape attempt involves a high probability that the fleeing suspect is most concerned about getting away and is not posing an imminent threat of deadly harm to a pursuing officer(s). When that is the case, and when communication is possible, then a warning is likely to be "feasible."

On the other hand, *Garner* says nothing about a situation where an armed suspect intentionally confronts an officer with imminent deadly force. Here, Mr. Powell was not running away. By walking outside with a gun and raising it at Sergeant Snook, Mr. Powell created a deadly confrontation that *Garner* says nothing about.

Sergeant Snook quickly found himself on the wrong side of Mr. Powell's loaded, cocked semi-automatic pistol. Mr. Powell was not fleeing, and he placed these officers in immediate deadly peril. *Garner* did not tell Sergeant Snook that he had to warn Mr. Powell before protecting his own life and the life of Officer Davis.

Petitioner also misunderstands the basic content of *Garner*'s warning provision. *Garner* tells officers that, where deadly force is appropriate, they should warn fleeing suspects that *deadly force will be used* if they fail to surrender. *Garner* directs police to give fleeing felons a chance to comply before being shot, if that chance can be extended safely and conveyed effectively.

By contrast, Petitioner reads *Garner* for something that is simply not there, namely the idea that the Fourth Amendment requires police officers to reveal their presence and announce police officer status within the early moments of an encounter.

Garner says absolutely nothing about whether or when the Fourth Amendment requires police officers to reveal their presence and announce their police officer status. In *Garner* the fleeing suspect apparently knew that the police were after him, otherwise he would not have been running away.

In some situations it may make sense for an officer to announce his presence and police officer status early in an encounter. That is often what happens.[3] On the other hand, some situations provide sound reasons for an officer to delay or conceal announcement of his presence and/or status as a law enforcement officer. Neither this Court nor the Eleventh Circuit Court of Appeals have ever clearly held that the Fourth Amendment constrains an officer's choices in that regard.

At most an officer's tactical decision whether, when and how to reveal his presence and/or announce his police officer status may be factors in whether a subsequent search or seizure is ruled

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3 In fact Sergeant Snook and Officer Davis testified that *is* what happened in this case.

"reasonable." But that is no more than a highly general principle, and indeed *Garner* does not even go that far.

The upshot is that *Garner* says almost nothing relevant about this case, and plainly nothing in the Court of Appeals decision conflicts with *Garner*. Consequently, Petitioner's fundamental reliance upon *Garner* is misplaced and she offers no compelling reason for the Court's review.

B. Case Law Provided Discretion For Sergeant Snook to Conceal or Delay Announcing His Presences or Identifying Himself as a Police Officer Under These Circumstances

Petitioner argues that the Court's precedents "establish that government officials are not immune from liability for clear constitutional violations simply because the courts have never had an occasion to enforce the relevant constitutional right on materially similar facts." *Petition* at 19. That idea is unremarkable but beside the point in this case. This case does not feature a "clear constitutional violation", and indeed clear precedent has thoroughly rejected Petitioner's basic Fourth Amendment theory.

Petitioner's fundamental theory is that the Fourth Amendment required Sergeant Snook to use

different tactics (announce his presence and police officer status) before Mr. Powell threatened him with a cocked, loaded handgun. The Court has foreclosed arguments that pre-shooting tactics can ground liability for excessive force. In *City & Cty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765 (2015), the Court held that a plaintiff "cannot establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided." *Id. at* 615, 135 S. Ct. at 1777 (quoting *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002)).

Later, in *Cty. of Los Angeles, Calif. v. Mendez*, —— U.S. ——, 137 S. Ct. 1539 (2017), the Court soundly rejected the "provocation rule," which would permit a Fourth Amendment excessive force claim "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation." *Id.* (quoting *Billington,* 292 F.3d at 1189).

Between *Mendez* and *Sheehan*, Petitioner has no basis to argue that the Fourth Amendment imposes liability due to Sergeant Snook's pre-shooting tactical decisions.

Consistent with *Mendez* and *Sheehan*, the Eleventh Circuit repeatedly has rejected arguments that officers can be liable for pre-shooting tactics or decisions. Eleventh Circuit precedent soundly rejects Petitioner's attempt to hold Sergeant Snook

liable based on her claim that Snook failed adequately to identify himself as a police officer before firing. See *Carr v. Tatangelo*, 338 F.3d 1259, 1269, 1272-73 (11th Cir. 2003) (affirming the grant of qualified immunity where officers—without having identified themselves, without having made themselves visible, and without having issued a warning—shot suspect who the officers reasonably, but mistakenly, believed was pointing a gun in the officers' direction and was chambering a bullet); *Beckman v. Hamilton*, 732 F. App'x 737, 742 (11th Cir. 2018) (based on extremely similar facts, stating "we cannot say it was constitutionally unreasonable for Deputy Hamilton to use deadly force without first identifying himself verbally or issuing a verbal warning that deadly force would be used.").[4]

The upshot is that all relevant precedent told

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4 See also *Penley v. Eslinger*, 605 F.3d 843, 853 n. 5 (11th Cir. 2010) (rejecting argument "that because the officers had adequate cover and Mr. Penley was contained in the bathroom, any threat posed by Mr. Penley was 'eliminated or significantly reduced.' "); *Garczynski v. Bradshaw,* 573 F.3d 1158, 1167–68 (11th Cir. 2009) (rejecting contentions that officers' "dynamic approach" and decision to engage the suspect rendered use of deadly force unreasonable); *Robinson v. Arrugueta*, 415 F.3d 1252, 1256 (11th Cir.2005) (finding no Fourth Amendment violation where plain clothes officer put himself in front of car to stop suspect and then fired); *Jackson v. Sauls*, 206 F.3d 1156 (11th Cir.2000)(granting qualified immunity to plain clothes officer who shot unarmed suspect, where identification as an officer was disputed); *Menuel v. City of Atlanta*, 25 F.3d 990, 996-997 (11th Cir.1994) (holding that pre-shooting conduct by police cannot support liability, and explaining at length that society requires officers to instigate situations that might become dangerous).

Sergeant Snook that no clear Fourth Amendment rule compelled him to announce his position and status as a police officer within the early moments of this encounter. Indeed, these tactical decisions did not involve a "search" or "seizure," which rendered it doubtful whether the Fourth Amendment had any application.

Consequently, Petitioner's assertion that qualified immunity can be denied even in novel situations not previously considered by precedent is beside the point. That general idea is true, but it has no application in a case where binding precedent has already foreclosed plaintiff's basic theory.

The Fourth Amendment considers only whether an officer's decision to use deadly force is objectively reasonable "at the moment" he makes the decision, without second-guessing the officer's pre-shooting tactics. *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872, 104 L.Ed.2d 443, 455 (1989); *Sheehan*, 575 U.S. at 615, 135 S. Ct. at 1777. Petitioner does not seriously contend that Sergeant Snook lacked the basic right of self defense at the moment he had to fire or risk being shot. Consequently, there is no basis for Petitioner's contention that *Garner* foreclosed Sergeant Snook's qualified immunity defense.

II. THE COURT OF APPEALS PROPERLY RULED THAT NO PRECEDENT REQUIRED SERGEANT SNOOK TO ANNOUNCE HIS PRESENCE AND POLICE OFFICER STATUS WITHIN THE FIRST 16 SECONDS OF THIS ENCOUNTER

Petitioner's second basic contention is that the Eleventh Circuit moved the qualified immunity goalpost by asking whether prior precedent required Sergeant Snook to issue a warning "at the earliest possible time." *Petition* at 26. The reality is that the Court of Appeals decided the precise issue raised by Petitioner.

The Eleventh Circuit's basic qualified immunity holding in this case is summarized in this passage:

> There is no obviously clear, any-reasonable-officer-would-know rule that when faced with the threat of deadly force, an officer must give an armed suspect a warning at the earliest possible moment. … When David Powell started to raise his pistol while facing in Officer Snook's direction, Snook had the authority to use deadly force. [Cit] It would not be clear and obvious to any reasonable officer that a warning was required in the 17.8 seconds between when David Powell

> pushed his garage door button and raised his loaded pistol in Snook's direction. A reasonable officer could have decided, as Snook did, that the safest thing to do as David came out of his garage with a pistol at his side was to wait and see what he did with the pistol before Snook drew attention to himself and potentially escalated the situation by shouting a warning.

Powell v. Snook, 25 F.4th 912, 924 (11th Cir. 2022).

The Eleventh Circuit accurately summed up and rejected Petitioner's fundamental contention, which turns on alleged lack of police identification or warning about use of deadly force within a very short time frame. Petitioner's story is that less than 20 seconds elapsed between Mr. Powell starting to open his garage door and Sergeant Snook firing. Petitioner argued to the Eleventh Circuit that the Fourth Amendment required Sergeant Snook to identify himself as a police officer and warn about use of deadly force before firing in self defense.

In response, the Eleventh Circuit precisely and accurately addressed Plaintiff's case theory head-on. Petitioner's fundamental argument is that no "warning" was provided, by which she really means that Sergeant Snook did not identify himself as a police officer before Mr. Powell started pointing his gun at Snook. The Eleventh Circuit found no

case requiring such a "warning" in this type of situation. In fact, as discussed in § I above, binding precedent indicated that neither police identification nor a deadly force warning were required under the particular circumstances of this case.

In sum, the Eleventh Circuit fairly considered Petitioner's case theory and concluded that Sergeant Snook was entitled to qualified immunity under controlling law. That was not erroneous, and the Court of Appeals' qualified immunity ruling raises no basis for the Court's review.

III. THE FOURTH AMENDMENT DID NOT OBVIOUSLY REQUIRE SERGEANT SNOOK TO ANNOUNCE HIS PRESENCE AND POLICE OFFICER STATUS WITHIN THE FIRST 16 SECONDS OF THIS ENCOUNTER

Having failed to identify any relevant cases for denial of qualified immunity, Petitioner's last argument is that Sergeant Snook's conduct was "obviously unconstitutional," so that he forfeited qualified immunity regardless of prior precedent. Petitioner therefore pleads for "summary reversal."

Some cases are so egregious that everyone should know better. The Eleventh Circuit uses the label "obvious clarity" for such cases, in honor of *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L.Ed.2D 666 (2002) ("a general constitutional

rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question").

In the qualified immunity context the rare "obvious clarity" case is a "narrow exception" to the normal requirement of clear, pre-existing case law, and applies "only when the conduct in question is so egregious that the government actor must be aware that he is acting illegally." *Thomas v. Roberts*, 323 F.3d 950, 955 (11th Cir. 2003). In an "obvious clarity" case claiming excessive force, the Eleventh Circuit holds that "the qualified immunity defense can be successfully overcome ... 'only if the standards set forth in *Graham* and our own case law inevitably lead every reasonable officer in [the defendant's] position to conclude the force was unlawful." *Corbitt v. Vickers*, 929 F.3d 1304, 1312 (11th Cir. 2019) (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1199 (11th Cir. 2002), alteration in original, citation and internal quotation marks omitted).

This Court has sent the same basic message on multiple occasions. See, *e.g.*, *Mullenix v. Luna*, 577 U. S. 7, 12, 136 S. Ct. 305, 193 L. Ed. 2D 255 (2015) ("[S]pecificity is especially important in the Fourth Amendment context, where ... it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." (alterations and internal quotation marks omitted)).

As noted in *Coffin v. Brandau*, 642 F.3d 999 (11th Cir. 2011), a case is not "obviously clear" where there exist authoritative "decisions … concluding that no [constitutional] violation occurred in circumstances very similar to those facing the deputies in this case." *Id.* at 1016. If the matter is not clear to judges, there is no way it can be clear to a police officer. As the Court said in *Wilson v. Layne*, 526 U.S. 603, 618, 119 S. Ct. 1692, 1701, 143 L.Ed.2d 818, 832 (1999), "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."

Applied to this case, Eleventh Circuit precedent overwhelmingly allowed Sergeant Snook to use deadly force when Mr. Powell threatened him with a pistol. See § I *supra*; *Powell v. Snook*, 25 F.4th 912 (11th Cir. 2022) (thoroughly discussing supporting case law). This Court's precedent said nothing to the contrary.

Circuit precedent established over and over again that an officer faced with an imminent threat of death from a man with a gun can fire in self defense. That is so regardless whether the officer identified himself, gave a warning, or even wore a police uniform. *Carr v. Tatangelo*, 338 F.3d 1259, 1270 (11th Cir.2003) (finding that officer concealed in bushes could fire without warning when faced with deadly threat); *Jackson v. Sauls*, 206 F.3d 1156 (11th Cir. 2000) (granting qualified immunity to plain

clothes officer who shot unarmed suspect, where identification as an officer was disputed).

In light of the extraordinary similarity between this case and *Beckman v. Hamilton*, 732 F. App'x 737 (11th Cir. 2018), there can be no serious argument that Sergeant Snook's decision to defend himself was "so egregious that [he] must [have been] aware that he [was] acting illegally." *Thomas*, 323 F.3d at 955. If this was an "obvious clarity" case, then numerous Eleventh Circuit panels missed many opportunities to say so. Instead, the Court of Appeals repeatedly found no Fourth Amendment violation. See *Beckman*, 732 F. App'x at 743.

Consequently, there is no serious argument that this is an "obvious clarity" case. There is no reasonable ground for summary reversal.

CONCLUSION

This case presents a tragedy, but not a legal error in the Eleventh Circuit's application of the qualified immunity doctrine. Sergeant Snook was entitled to protect himself and his fellow officer from Mr. Powell's imminent attack with a cocked, loaded handgun.

The Fourth Amendment did not require Sergeant Snook to identify himself in the early moments of this incident, and Snook had no time to

warn Mr. Powell when it became clear that Powell was poised to fire on the officers.

Accordingly, there is no compelling reason for the Court to review this case. Respectfully, the Court should deny this petition for certiorari.

Respectfully submitted,

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