No. _____

In the
Supreme Court of the United States

ANTHONY MOMPHARD, JR., Individually and in his official capacity as a Deputy Sheriff of the Macon County Sheriff's Department; ROBERT HOLLAND, in his Official capacity as the Sheriff of Macon County; WESTERN SURETY COMPANY, a South Dakota Corporation; THE OHIO CASUALTY INSURANCE COMPANY, a New Hampshire Corporation,

Petitioners,

v.

MELISSA B. KNIBBS, as Personal Representative of the Estate of Michael Scott Knibbs,

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

The Fourth Circuit ruled that Deputy Anthony Momphard, Jr., a North Carolina sheriff's deputy, was not entitled to qualified immunity in a 42 U.S.C. § 1983 suit alleging unconstitutional deadly force. On April 29, 2018, Deputy Momphard responded to a property dispute between Knibbs and his neighbor in rural North Carolina. Deputy Momphard responded alone and arrived on scene around midnight. Deputy Momphard stepped onto Knibbs' porch, in full police uniform, and announced "sheriff's office." In response, Knibbs came to his door and racked a shotgun. Deputy Momphard could not see Knibbs behind the door. Deputy Momphard directed Knibbs to drop his weapon. Knibbs did not respond. Deputy Momphard then moved to his left to try and exit the porch. This caused Deputy Knibbs to pass a window, where he saw Knibbs standing and aiming the shotgun at him (a retained plaintiff's expert claims that Knibbs aimed the shotgun toward the ceiling). Deputy Momphard made the split-second decision to act and he shot Knibbs, who died from his injuries. The questions are:

1. Whether the Fourth Circuit erred in finding that a reasonable officer in Deputy Momphard's position would not have perceived a danger that justified lethal force; and

2. Whether the Fourth Circuit erred in defining Knibbs' constitutional right in a general sense when it stretched cases with superficial similarities (such as cases where a person was shot at home) to find Knibbs' right had been clearly established.

PARTIES TO THE PROCEEDINGS

Petitioners are Anthony Momphard, Jr., a Macon County, North Carolina, Sheriff's Deputy; Robert Holland, Sheriff of Macon County; Western Surety Company and The Ohio Casualty Insurance Company.

Respondent is Melissa Knibbs, as Personal Representative of the Estate of Michael Scott Knibbs.

Pursuant to Rule 29.6 Western Surety Company has parent corporations which include Continental Casualty Company, The Continental Corporation, CNA Financial Corporation, and Loews Corporation, but no parent owns 10% or more of corporate stock. The Ohio Casualty Insurance Company has no corporate parents, and therefore there is no parent or publicly held company owning 10% or more of its stock.

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JURISDICTION

On March 30, 2022, the Fourth Circuit Court of Appeals filed its opinion. It filed an amended opinion to correct spelling mistakes on April 19, 2022. This Court's jurisdiction 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.

PETITION FOR WRIT OF CERTIORARI

The Fourth Circuit held that deadly force is not justified when a person racks a shotgun after a deputy identifies himself and then refuses to drop the weapon when ordered. This decision departs from this Court's precedent. Excessive force cases, to be sure, are fact-driven. Yet the Fourth Circuit's decision cannot be reconciled with its own precedent, as well as case law from at least six other circuits which hold that deadly force is justified when an armed individual makes an objective threat and refuses to disarm.

The Fourth Circuit, in arriving at a different outcome, viewed the situation from Knibbs' perspective; not Deputy Momphard's. But Knibbs' intent, whatever it may have been, does not dictate whether a reasonable officer in Deputy Momphard's shoes would have perceived a deadly threat. After all, Deputy Momphard does not know why Knibbs racked his shotgun or why Knibbs refused to lay it down. All Deputy Momphard knows is that a man behind a door racked his shotgun after Deputy Momphard identified himself. And that man never answered Deputy Momphard's commands to drop it. Deputy Momphard was alone, it was dark, and the door

offered no shelter from a shotgun blast. So even if Knibbs shouldered his shotgun as Deputy Momphard passed the window (as his expert claims), Deputy Momphard had an instant to make his choice after he saw that Knibbs had declined to disarm.

Moreover, the Fourth Circuit denied qualified immunity because it found the constitutional violation had been clearly established. To arrive at this outcome, the court cited two cases – *Cooper v. Sheehan* and *Hensley on behalf of North Carolina v. Price* – to decide that that the contours of Knibbs' right had been set by Fourth Circuit jurisprudence. Those cases share one surface-level similarity with this case – in all three cases, an officer shot an individual who possessed a gun on their property. Yet in *Cooper* and *Hensley*, unlike this case, the officers never identified themselves and never ordered the suspects to disarm. And the suspects in those cases did not load their weapons after an officer announced their presence. In dissent, Judge Niemeyer pointed out that "reasonable officers would more likely have recognized the distinguishing facts in [*Cooper* and *Hensley*] and concluded that they do not inform the circumstances." (Pet. App. 72a).

The Fourth Circuit's opinion, in a larger sense, has minimized the margin for error inherent in qualified immunity. The court insisted, without precedent, that Deputy Momphard must prove that Knibbs actually meant harm before he could justify using deadly force. But nobody knows what Knibbs intended here. Still, Knibbs' actions presented an objective and fatal threat to Deputy Momphard. And Deputy Momphard had the right to go home to his family too. This is a tragedy and life-altering event for all involved. But qualified immunity exists to "protect[] the public from

unwarranted timidity on the part of public officials." *Richardson v. McKnight,* 521 U.S. 399, 408 (1997). If the decision below is allowed to stand, then officers across the county will be trained to exercise timidity for their own protection when faced with armed citizens who refuse commands to disarm.

This Court should grant the petition on both questions presented or, alternatively, summarily reverse the Fourth Circuit's refusal to follow precedent governing the determination of "clearly established" law.

STATEMENT OF THE CASE

Melissa Knibbs, as personal representative of the Estate of Scott Knibbs, sued Deputy Momphard, Sheriff Robert Holland, and two sheriff's bonds in the Western District of North Carolina. The Estate pleaded eight claims for relief, including a § 1983 claim against Knibbs for a Fourth Amendment violation. The suit stems from an April 29, 2018 encounter that culminated in Deputy Momphard shooting Scott Knibbs.

The District Court dismissed all claims on summary judgment. It found that Deputy Momphard was entitled to qualified immunity because he had probable cause to believe that Knibbs presented an immediate and serious threat. It further decided that Knibbs did not have a clearly established right to be free from deadly force. (Pet. App. 76a-106a)

The Fourth Circuit, in a published opinion, reversed. It found Deputy Momphard's decision objectively unreasonable. It unearthed two factual disputes to support its outcome: (1) whether Deputy Momphard was readily recognizable as a law

enforcement officer and (2) whether Knibbs aimed his shotgun at Deputy Momphard when he was shot. In addition, the Fourth Circuit found the contours of Knibbs' Fourth Amendment rights "beyond debate" when the shooting occurred, even though it could not identify any analogous case law that defined these contours. Judge Niemeyer authored a dissent. (Pet. App. 1a-75a)

1. Facts

On April 29, 2018, dispatch sent Deputy Momphard to investigate a dispute between neighbors in rural Macon County, North Carolina. He arrived on scene at 11:55 p.m. Deputy Momphard wore his sheriff's department uniform. He drove a marked sheriff's vehicle. Deputy Momphard parked 20 to 30 feet from Knibbs' home. He left his headlights on. Deputy Momphard was alone.

Deputy Momphard walked to Knibbs' home first because he saw a light inside. Deputy Momphard announced "sheriff's office" several times and knocked on the door. Nobody answered.

Deputy Momphard then walked to the neighboring home and spoke with Shelton Freeman. Freeman called police because Knibbs had placed nail-infested boards across their common driveway. Freeman also reported that Knibbs had been aggressive in past encounters, hence the need to call police. As the two men spoke, the lights went off inside Knibbs' home. Deputy Momphard then walked back to Knibbs' home to try and speak with him.

Deputy Momphard announced "sheriff's office" as he walked up to Knibbs' porch. He heard motion inside the home. Deputy Momphard then stepped

onto the porch and announced "sheriff's office" again. In response, an individual (later identified as Knibbs) racked a shotgun behind a door that led from the home to the porch. Deputy Momphard could not see behind the door. Deputy Momphard announced "drop it," or "put it down," multiple times and in a loud and forceful tone. The individual did not respond. Deputy Momphard decided not to back off the porch because the door offered no protection from a shotgun blast. With that in mind, Deputy Momphard decided to move to his left to get off the porch and away from the situation. This required him to pass a window next to the door. Deputy Momphard held his service weapon in his right hand and a flashlight in his left.

Deputy Momphard moved across the window and saw Knibbs holding his shotgun. The parties dispute how Knibbs held the weapon. Deputy Momphard saw Knibbs aim the weapon at him. Knibbs' expert has theorized that Knibbs rested the shotgun on his shoulder with the barrel facing the ceiling. Either way, Deputy Momphard saw that Knibbs had refused to comply with his instruction to disarm. Deputy Momphard had a split-second to make a decision. He fired his service weapon multiple times and fatally shot Knibbs.

Knibbs' wife Melissa was in the home when the events occurred. She heard Deputy Momphard announce "sheriff's office." In response, she testified that Knibbs retrieved his shotgun and said something like "anybody can say they are a sheriff." Knibbs then racked the shotgun and walked toward the porch door. Melissa also heard Deputy Momphard direct Knibbs to put the shotgun down. Freeman (the neighbor) also heard Deputy Momphard direct Knibbs to disarm.

2. Fourth Circuit Opinion

The Fourth Circuit reversed summary judgment and ruled that Deputy Momphard was not entitled to qualified immunity. First, it found a Fourth Amendment violation because a reasonable officer in Deputy Momphard's position would not have perceived a deadly threat. It found two genuine factual disputes: "(1) whether Knibbs aimed his gun at Deputy Momphard; and (2) whether Deputy Momphard was 'readily recognizable as a law enforcement officer on Knibbs' porch." (Pet. App. 23a). On the first point, the Fourth Circuit decided that where Knibbs' pointed his shotgun goes to whether he posed an objective threat. (*Id*). On the second point, the court found that "the record does not conclusively establish that Knibbs could have visually identified Deputy Momphard as a law enforcement officer on his porch that night." (Pet. App. 24a-25a).

These two alleged disputes led the Fourth Circuit to decide that Knibbs would not have posed a threat to Deputy Momphard unless he had made a "furtive movement." This allowed the Fourth Circuit to discount Knibbs' decision to rack his shotgun and to more or less ignored his refusal to disarm. This version supported a constitutional violation where "Knibbs was shot inside his own home while holding a loaded shotgun that was not aimed at Deputy Momphard." (Pet. App. 26a).

The Fourth Circuit also found the contours of Knibbs' constitutional right had been "clearly established" when the shooting occurred. It could not find any cases that involved similar facts. So instead, it relied on its decisions in *Cooper v. Sheehan*, 735 F.3d 153 (4th Cir. 2013) and *Hensley on behalf of*

North Carolina v. Price, 876 F.3d 573, 578 (4th Cir. 2017), which the court characterized as "materially indistinguishable." These cases "clearly establish" that even after law enforcement directs an individual to lay down their weapon, deadly force is only justified if the individual "makes some sort of furtive or other threatening movement with the weapon" that indicates an intent to use it. (Pet. App. 43a).

Judge Niemeyer dissented. First off, he disagreed that the record contained two factual disputes that give rise to a Fourth Amendment violation. Judge Niemeyer, unlike the majority, saw no dispute as to whether Deputy Momphard could have been recognized as law enforcement. He wrote that the majority's decision on this point "defies the common-sense reality presented by the facts of record." (Pet. App. 65a). Deputy Momphard loudly announced himself in uniform. And there is no evidence that Knibbs could not, or did not, know that a deputy was at his door. Besides, Judge Niemeyer noted, this question had to be analyzed from Deputy Momphard's perspective and not Knibbs' vantagepoint. Building on this observation, Judge Niemeyer found that where Knibbs aimed his shotgun did not foreclose summary judgment. "Knibbs," he wrote, "did not communicate with Deputy Momphard and had a shotgun, which he had just racked and refused to drop at the Deputy's command." (Pet. App. 68a). Deputy Momphard then passed the window, where he saw Knibbs holding the gun. This "prompt[ed] Deputy Momphard's immediate response." Having set out these facts, Judge Niemeyer wrote that "[t]he issue is not whether Deputy Momphard was actually at risk of harm *at that moment*, but whether, in the totality of the circumstances, he reasonably believed that he

was at risk of serious bodily injury." (Pet. App. 69a) (emphasis in original).

Last, Judge Niemeyer found the majority defined Knibbs' constitutional right at a general level. "*Cooper* and *Hensley*," he wrote, "hardly inform reasonable officers standing in Deputy Momphard's circumstances. Indeed, reasonable officers would more likely have recognized the distinguishing facts in them and concluded that they do not inform the circumstances." (Pet. App. 72a). Judge Niemeyer pointed out that the officers in those cases never announced their presence and never gave warning. In the end, Judge Niemeyer wrote, "[o]ur officers in uniform deserve clearer guidance than this before they are held liable, especially when they, in good faith, believe that they are performing their jobs lawfully, albeit in a manner that results in tragic consequences." (Pet. App. 74a).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to clarify Fourth Amendment standards governing an officer's reasonable apprehension as to when circumstances justify deadly force. In addition, or in the alternative, this Court should grant certiorari and summarily reverse the Fourth Circuit to ensure that qualified immunity is protected and applied.

I. The Fourth Circuit focused on Knibbs' intent, rather than facts known to Deputy Momphard, to find a Constitutional violation

A police officer does not violate the Fourth Amendment by using deadly force when the officer has "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer

or others." *Tennessee v. Garner,* 471 U.S. 1, 11 (1985). Whether fatal force is "reasonable" is "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor,* 490 U.S. 386, 396 (1989). Reviewing courts allow for the reality that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Id.* at 397. As such, courts account for the "fact that officers on the beat are not often afforded the luxury of armchair reflection." *Elliott v. Leavitt,* 99 F.3d 640, 642 (4th Cir. 1996) (citations omitted).

The Fourth Circuit framed this as a case where Knibbs did nothing more than possess a gun in his home. Sure, Knibbs racked his shotgun after Deputy Momphard announced "sheriff's office." But he had to load the gun in case he needed to defend himself. And yes, Knibbs ignored commands to drop his shotgun. But, Knibbs had doubts about whether Deputy Momphard, in fact, was an officer. So, Knibbs hedged his bets by shouldering his shotgun so the barrel pointed at the ceiling. That way, if Deputy Momphard actually was an officer, it would be clear that Knibbs meant no harm.

The problem with the Fourth Circuit's narrative is two-fold. First off, it lacks support in the record (and indeed, is entirely hypothetical). In addition, it considers the case from Knibbs' supposed (and unsubstantiated perspective); not from the vantage of a reasonable officer faced with these same facts.

Summary judgment must be reviewed on the evidence. It is not reviewed on theoretical deductions that may be gleaned from the record. The Fourth Circuit, in ignoring this rule, found that because

Knibbs' mindset could not be established from the record evidence, a jury should be allowed to draw inferences as to what he intended. But Knibbs' thinking, whatever it was, does not overcome Deputy Momphard's qualified immunity. To make out a genuine issue of material fact, a plaintiff must present probative evidence that tends to support their case. *Scott,* 550 U.S. 372, 380–81 (2007) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48 (1986)). This must be evidence on which a jury could return a verdict. *Id*. In *Scott*, this Court rejected the idea that it had an obligation to afford inferences for the nonmoving party based on an unsupported conjecture. *Id.* at 380–81 n. 8. Instead, it noted that inferences can only be drawn "to the extent supportable by the record." Whether deadly force is justified is a legal question to be decided by the court on the record evidence *Id*.

The Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh circuits have all held that officers have an objective basis for deadly force when they encounter weapon-yielding suspects who ignore commands to "drop it." These courts do not require an officer to wait for a "furtive movement" before fatal force is justified. This is true even when a suspect wields a blade as opposed to a gun. The Fourth Circuit, however, departed from this precedent to lower the standard for Fourth Amendment violations in its jurisdiction.

A. An officer need not wait for a "furtive movement" before using deadly force when an armed suspect ignores a command to drop their weapon

In *Wilson v. Meeks*, the Tenth Circuit considered a case near identical to this one. 52 F.3d 1547, 1549-50

(10th Cir. 1995) (*Wilson I*) *abrogated in part and on other grounds by Saucier v. Katz,* 533 U.S. 194 (2001)). The officer in that case encountered two men having a disagreement on private property. *Id*. One man held a gun behind his leg. *Id*. at 1550. The officer, suspecting the man could be armed, directed him to show his hand. *Id*. The man refused. *Id*. The officer again asked the man to show his hand. *Id*. The officer heard the handgun "cocking." *Id*. at 1553. The man then brought the gun forward and, in a split second, the officer shot him twice. *Id*. at 1550. The parties disputed whether the man pointed the gun at the officer when he brought it forward. *Id*. at 1550. The plaintiff's expert argued that the decedent presented the gun in a "surrender position" and that he meant no harm to the officer. *Id*. The Tenth Circuit was not persuaded. *See generally id*. "The inquiry here," it wrote, "is not [the plaintiff's decedent's] state of mind or intentions, but whether, from an objective viewpoint and taking all factors into consideration, [the officer] reasonably feared for his life." *Id*. at 1553-54. "Qualified immunity," it went on, "does not require that the police officer know what is in the heart or mind of his assailant. It requires that he react reasonably to a threat. [The officer] did so." *Id*.

The Eight Circuit dealt with similar facts in *Partlow v. Stadler*, 774 F.3d 497 (8th Cir. 2014). The plaintiff in that case exited his apartment holding a shotgun aimed at the ground. *Id*. at 500. Police outside told him to drop the firearm. *Id*. Instead, he racked a shell into the chamber and started to raise the gun. *Id*. Police shot him. *Id*. The plaintiff later testified that he did not intend to threaten the officers. *Id*. The district court, based on the plaintiff's narrative, denied summary judgment. *Id*. at 501. The

Eight Circuit reversed. *See generally id*. It reaffirmed that the plaintiff's mindset does not determine how a reasonable officer would perceive the situation. *Id*. at 502. And the objective evidence showed a "tense, uncertain, and rapidly evolving" situation that warranted law enforcement's "split-second decision to apply deadly force." *Id*. *See also Sinclair v. City of Des Moines*, 268 F.3d 594, 595 (8th Cir. 2001) (*per curiam*) (finding no Fourth Amendment violation when officers knocked on a door and announced themselves, only for the door to open and reveal a man with a rifle that officers shot and killed).

Deadly force may even be justified when there is some distance between an officer and a suspect that ignores commands to disarm. In *Ramirez v. Knoulton*, the Fifth Circuit considered a case where police ordered the plaintiff to exit his vehicle and raise his hands following a traffic stop. 542 F.3d 124, 127 (5th Cir. 2008). The plaintiff exited his car with a handgun. *Id*. Police stood near their cruisers and directed the plaintiff to drop his weapon. *Id*. The plaintiff, instead, held the gun with his arms at his side. *Id*. He then put his hands on his hips and brought them together near his waist. *Id*. At that point, one officer fired a round and shot him in the head. *Id*. The district court denied summary judgment, reasoning that the stop occurred in a remote area and the plaintiff never raised his weapon or pointed it at an officer. *Id*. at 129. The Fifth Circuit declined to armchair quarterback the situation. *Id*. It reversed and restated that rule that a person need not "raise his weapon, discharge the weapon, or even point it at the officers" to create an objectively reasonable fear justifying deadly force. *Id*. *See also Ballard v. Burton*, 444 F.3d 391, 403 (5th Cir. 2006)

(affirming summary judgment for police in case where an individual refused commands to drop his rifle, discharged his rifle in the air, and moved the weapon in the officers' general direction because "regardless of the direction in which [the suspect] pointed the rifle just before he was shot, a reasonable officer in these circumstances would have reason to believe that [he] posed a threat of serious harm").

Ignoring a command to disarm can justify deadly force even if the weapon in question is not a firearm. In *Chappell v. City of Cleveland*, the Sixth Circuit considered a case where police entered a darkened residence to look for a robbery suspect. 585 F.3d 901, 904 (6th Cir. 2009). They proceeded from one room to another with flashlights and firearms drawn. *Id.* at 915. The officers announced "Cleveland police" as they made their way through the home. *Id.* They entered a bedroom and found a knife-wielding juvenile in the closet. *Id.* They ordered the juvenile to leave the closet and show his hands. *Id.* The juvenile stepped out with his hands in the air and the knife blade pointed toward the ceiling. *Id.* He then proceeded toward the officers, who shot and killed him. *Id.* The Sixth Circuit, on review, found that the juvenile's refusal to drop the knife, coupled with his movement toward officers, justified deadly force. *Id.* at 915. *See also Rhodes v. McDannel*, 945 F.2d 117, 118 (6th Cir. 1991) (officers justified in using deadly force where suspect did not comply with commands to drop a knife).

Likewise, in *Blanford v. Sacramento County*, the Ninth Circuit reviewed a case where a man walked through a suburban neighborhood with a sword. 406 F.3d 1110, 1112 (9th Cir. 2005). Officers located the man, who ignored orders to drop the sword. *Id.* The

officers followed the man to a home, where he attempted to enter the front door. *Id.* at 1113. When that failed, the man walked around the home toward a backyard gate. *Id.* At that point, the officers shot the man and directed him to disarm. *Id.* The man ignored the command, so police shot him a second time as he walked through the gate. *Id.* Fourteen seconds passed between the shootings. *Id.* Officers later learned the man lived at this home. *Id.* The Ninth Circuit, nonetheless, held that there was no Fourth Amendment violation because the police "had cause to believe that [the man] posed a serious danger to themselves and to anyone in the house or yard … because he failed to heed warnings or commands and was armed with an edged weapon that he refused to put down." *Id.* at 1116.

Indeed, in *Long v. Slaton*, the Eleventh Circuit found no Fourth Amendment violation where a deputy fatally shot a man who had taken the deputy's vehicle and started to drive away. 508 F.3d 576, 580 (11th Cir. 2007). The man ignored the officer's command to stop the vehicle and get out. *Id.* The court, upon review, noted that an officer does not have to wait until a person "has drawn a bead on the officer or others before using deadly force." *Id.* at 581 (cleaned up). The man could have converted the vehicle to a lethal weapon with ease. *Id.* The fact that the man had not turned the vehicle into a weapon yet (and the encounter happened in a remote area) did not undermine the officer's decision to use fatal force. *Id.*

B. The alleged disputed facts found by the Fourth Circuit do not give rise to a constitutional violation

The Fourth Circuit's decision cannot be reconciled with precedent from the circuits. To refresh, the Fourth Circuit found two alleged fact disputes that gave rise to a constitutional violation: (1) whether Deputy Momphard was readily recognizable as a law enforcement officer and (2) whether Knibbs aimed his shotgun at Deputy Momphard when he was shot. No circuit would have denied summary judgment on these alleged disputes though.

To begin, the Fourth Circuit considered whether Deputy Momphard was "readily recognizable" as law enforcement. The mistake on this point is two-fold. First, the Fourth Circuit analyzed this question from Knibbs' perspective, even though it acknowledged that the question had to be considered from the deputy's viewpoint. *Compare* Pet. App. 30a n. 6 (noting that the "crucial fact is not what Knibbs subjectively believed, but rather what Deputy Momphard reasonably perceived in light of the circumstances known to him at the time") *with* Pet. App. 24a-25a (denying summary judgment because "the record does not conclusively establish that Knibbs could have visually identified Deputy Momphard as a law enforcement officer on his porch that night"). Second, there is no record evidence that suggests Deputy Momphard *should* have questioned Knibbs' ability to identify him as police. After all, officers are recognized by their uniform, badge or announced role. Knibbs checked all three boxes. Cases where officers should have understood their identity was unknown include cases where the identity of a plainclothes officer is called into question

by a suspect (*see e.g. Rogers v. Carter,* 133 F.3d 1114, 1118 (8th Cir. 1998) and cases where a uniformed officer ventures into a dark area without identifying themselves at all. *Yates v. City of Cleveland,* 941 F.2d 444, 447 (6th Cir. 1991)). Nothing like that happened here.

As to the second disputed fact – where Knibbs aimed his shotgun – the Fourth Circuit agreed that an officer need not wait for a gun to be pointed at them to use deadly force. (Pet. App. 36a). But it found this alleged dispute controlling because Knibbs did not otherwise threaten Deputy Momphard with a "furtive movement." (*Id.*). To get there, the Fourth Circuit had to decide that "[r]acking a shotgun inside one's home, without more, is no more threatening than coming to the door with any other loaded firearm." (Pet. App. 31a). The "more" here, which the Fourth Circuit ignored, was that Knibbs racked his weapon right after Deputy Momphard announced "sheriff's department." The Fifth and the Tenth Circuit have both held that loading a round into the chamber, in response to law enforcement, can be a threat to a reasonable officer. *See e.g. Wilson I*, 52 F.3d at 1553 (officer reasonably believed suspect made threat when he "cocked" his handgun); *Castorena v. Zamora*, 684 F. App'x 360, 365 (5th Cir. 2017) (officer reasonably believed suspect made threat when he racked his shotgun). And then the Fourth Circuit attached no importance to Knibbs' refusal to drop his shotgun (despite commands) and his refusal to even acknowledge Deputy Momphard. These two facts, coupled with Knibbs' decision to rack his shotgun behind a door and hidden from Deputy Momphard, caused Deputy Momphard to fear for his life. In that sense, the case is indistinguishable from the case law

set forth *supra* I.A. An officer need not wait for a "furtive movement" when an armed suspect ignores commands to disarm. This is especially true, here, where Deputy Momphard was alone, without shelter or an escape route, and Knibbs refused to acknowledge Deputy Momphard's commands.

All told, the Fourth Circuit's divergence from its sister circuits warrants certiorari to settle uncertainty in this area and bring the Fourth Circuit into compliance with constitutional standards that control nationwide.

II. The Fourth Circuit's Cited Cases Did Not Clearly Establish a Constitutional Violation

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). Qualified immunity protects "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*, 580 U.S. 73, 137 S. Ct. 548, 552 (2017) (*per curiam*). A plaintiff must do more than cite to *Graham* and *Garner*, which "lay out excessive-force principles at only a general level." *Id.* Indeed, 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)). If not, then qualified immunity can be converted to unqualified liability by alleging conduct that violates "extremely abstract rights." *Id.* (cleaned up). 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 (2018) (*per curiam*) (quotation omitted).

Because this Court has never held an officer liable for excessive force in a case like this, the Fourth Circuit would have to find clearly established law in a "robust consensus of cases of persuasive authority." *See*, *e.g., City and County of San Francisco v. Sheehan,* 575 U.S. 600, 617 (2015). Yet, as in in *Sheehan*, "no such consensus exists here." *Id.*

The Fourth Circuit relied, by and large, on two Fourth Circuit cases in its decision, *Cooper v. Sheehan*, 735 F.3d 153 (4th Cir. 2013) and *Hensley on behalf of North Carolina v. Price*, 876 F.3d 573, 578 (4th Cir. 2017). These cases, set forth below, do not clearly establish the law here.

A. <u>*Cooper* and *Hensley* are factually distinct from this case</u>

The Fourth Circuit held that its precedent "clearly establishes" that a person's failure to disarm when ordered only justifies deadly force if coupled with a "furtive movement." (Pet. App. 43a). From there, it decided that "*Cooper* and *Hensley* are materially indistinguishable" and the "few factual differences that do exist" should have caused Deputy Momphard to realize that Knibbs was just a "homeowner

possessing a firearm in a non-threatening manner in his own home while investigating a nocturnal disturbance." (Pet. App. 46a).

Yet qualified immunity in *Cooper* and *Hensley* turned on three facts not found here: (1) the officers did not announce their presence (so the officers should have realized that the suspects did not know police were outside their door); (2) the officers did not direct the suspects to surrender their firearms, and (3) the suspects took no threatening action toward the officer. These distinctions, Judge Niemeyer noted in dissent, would not have caused Deputy Momphard to believe Knibbs had a "clearly established" right to be free from deadly force.

In *Cooper*, dispatch received a call of two men screaming at each other in a mobile home. 735 F.3d at 155. Two officers responded to the call and approached the mobile home on foot. *Id*. One officer knocked on a window with his flashlight, but neither announced his presence or identified himself as a deputy sheriff. *Id. Cooper, the owner of the mobile home, called* out for anyone in the yard to identify himself. *Id*. The officers did not respond. *Id*. Cooper walked onto the porch holding a shotgun with its muzzle pointed toward the ground. *Id*. The officers saw Cooper with the shotgun and, without warning, drew their weapons and shot Cooper five or six times. *Id*. at 156. This Court held that qualified immunity did not apply because the officers had no reason to believe Cooper was dangerous when he stepped out of his home with a shotgun to ask who was there. *Id.* at 157. In fact, the officers even chose not to answer when Cooper asked who was in the yard. *Id*. Because "no reasonable officer could have believed that [Cooper] was aware that two sheriff deputies were

outside," deadly force was not justified "[a]bsent a threatening act, like raising or firing the shotgun." *Id*.

Hensley, like *Cooper*, involved officers hidden outside a suspect's home. 876 F.3d at 578. The suspect walked off his front porch carrying a handgun. *Id*. The suspect did not know the deputies were present; the deputies never ordered him to stop or drop his weapon; and the suspect did not make any threats of any kind. *Id*. As such, qualified immunity was not available. *Id*.

Put simply, this case is not *Cooper* or *Hensley*. Deputy Momphard, unlike the officers in those cases, announced himself in full uniform. He tried to engage Knibbs and did not hide from him. Furthermore, after Deputy Momphard identified himself, Knibbs racked his shotgun. As noted *supra* I.A., the Fifth and Tenth Circuits have both recognized that loading a bullet into a chamber in response to police may be perceived as a threat. And last, unlike in *Cooper* and *Hensley*, Deputy Momphard ordered Knibbs to drop his weapon and Knibbs did not comply. Indeed, by the time Deputy Momphard laid eyes on Knibbs he saw a man who, even accepting Knibbs' disputed facts, was shouldering a shotgun mere feet away and who had clearly ignored a command to drop his weapon. Deputy Momphard then had a moment to decide whether to shoot or risk getting shot. These distinctions disprove the idea that *Cooper* and *Hensley* should have caused Deputy Momphard to realize that Knibbs was just a "homeowner possessing a firearm in a non-threatening manner in his own home while investigating a nocturnal disturbance."

More than that, though, other cases from the Fourth Circuit further show that Deputy Momphard was justified in his decision to use deadly force.

B. Factually analogous Fourth Circuit precedent supports Deputy Momphard's decision to use deadly force

The Fourth Circuit read *Slattery v. Rizzo*, 939 F.2d 213, 214 (4th Cir. 1991) and *Anderson v. Russell*, 247 F.3d 125, 131 (4th Cir. 2001) as only supporting deadly force when a suspect engages in a "furtive movement." But in those cases, the officers did not know whether the person they spoke with had a gun. *Slattery*, 939 F.2d at 214-15; *Anderson*, 247 F.3d at 127-28. Both officers asked the suspect to show their concealed hands. *See generally id*. The shootings happened when the suspects made a movement without showing their hands first. *See generally id*. This threatening move, coupled with the suspect's non-compliance with the officer's directions, justified deadly force. *Id*.

Here, Deputy Momphard knew Knibbs had a shotgun. He did not need to wait for a "furtive movement" to feel threatened. He already felt threatened when Knibbs racked his shotgun after he identified himself. And then, like in *Slattery* and *Anderson*, Knibbs disregarded the command to drop his shotgun. Deputy Momphard was justified in using deadly force under those cases.

To put a finer point on it, the issue here was not beyond debate. To the contrary, the panel debated both the district court and the dissent in a 55-page majority opinion that deconstructed its precedent to engineer the "contours" of Knibbs' alleged constitutional right. But the law cannot be clearly

established for police officers who face dangerous situations in real time if judges - "far removed from the scene and with the opportunity to dissect the elements of the situation," cannot agree on it. *Ryburn,* 565 U.S. at 475. Indeed, when judges "disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne,* 526 U.S. 603, 618 (1999).

CONCLUSION

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*, 580 U.S. 73, 137 S. Ct. 548, 551–52 (cleaned up). For that reason, this Court has repeatedly reversed circuits in qualified immunity cases when rights are defined with a high level of generality rather than clearly established by case law. *See e.g. City of Tahlequah v. Bond,* 142 S. Ct. 9, 11 (2021) (*per curiam*) (Tenth Circuit); *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (*per curiam*) (Ninth Circuit); *City of Escondido v. Emmons,* –-- U.S. --, 139 S. Ct. 500 (2019) (*per curiam*) (Ninth Circuit); *Kisela, supra* (2018) (Ninth Circuit); *White*, *supra* (2017) (Tenth Circuit); *Sheehan, supra* (2015) (Ninth Circuit); *Mullenix v. Luna*, 577 U.S. 7 (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).

The Fourth Circuit, so far, has avoided reversal on qualified immunity in the last decade. Yet "[a]t some point a pattern of Court decisions becomes a

drumbeat, leaving one to wonder how long it will take for the Court's message to break through." *Harris v. Pittman*, 927 F.3d 266, 283 (4th Cir. 2019) (Wilkinson, J., dissenting). The Fourth Circuit's time has come. This Court should grant the petition on both questions presented or, alternatively, summarily reverse the Fourth Circuit's refusal to follow precedent governing the determination of "clearly established" law.

Respectfully submitted, this the 28th day of June 2022.

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