No. _____

In the Supreme Court of the United States

CITY OF CHARLOTTE; DAVID GUERRA, individually and officially,

Petitioners,

v.

AZUCENA ZAMORANO ALEMAN, individually and as Administrator of the Estate of RUBIN GALINDO CHAVEZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Steven A. Bader
Counsel of Record
CRANFILL SUMNER LLP
P.O. Box 27808
Raleigh, NC 27611
(919) 828-5100
sbader@cshlaw.com

Counsel for Petitioners

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

QUESTIONS PRESENTED

The Fourth Circuit ruled that Charlotte police officer David Guerra is not entitled to qualified immunity in a 42 U.S.C. § 1983 deadly force case. It held that Ruben Galindo (a man who was armed, delusional, and intoxicated) had a "clearly established right" to be free from deadly force, even after he refused Officer Guerra's repeated commands to drop his gun.

The Fourth Circuit engineered this "clearly established right" from eight precedents. Two precedents were decided *after* the shooting in this case. Of the remaining six, five cases did not find a constitutional violation at all. And the one case that found a violation is distinct on its facts.

Against that backdrop, the issue is:

> Whether the Fourth Circuit erred in the process it used to find a "clearly established" Fourth Amendment right because it used cases: (1) decided after the shooting; (2) where no violation was found; and (3) that involved different facts.

PARTIES TO THE PROCEEDINGS

Petitioners are City of Charlotte and David Guerra

Respondent is Azucena Zamorano Aleman, individually and as the Administrator of the Estate of Ruben Galindo Chavez

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of United States Supreme Court, the undersigned counsel of record certifies that Petitioners City of Charlotte is a government agency and David Guerra is an individual, and there is no parent company or other entity required to be listed in this statement that has a financial interest in the outcome of this case.

STATEMENT OF RELATED CASES

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases:

Statutes:

Constitutional Provisions:

OPINIONS BELOW

The Fourth Circuit Court of Appeals' opinion is reported as *Aleman v. City of Charlotte*, 80 F.4th 264 (4th Cir. 2023). It is reproduced in the Petition Appendix at 1a-71a. The District Court opinion is unreported and reproduced in the Petition Appendix at 72a-96a. The Fourth Circuit Court of Appeals' order denying the petition for rehearing is unreported and reproduced in the Petition Appendix at 97a-98a.

JURISDICTION

On August 16, 2023, the Fourth Circuit Court of Appeals filed its opinion. It filed an order denying the petition for rehearing on September 12, 2023. 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 probable 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

It happened again. A circuit court, contrary to this Court's repeated instruction, denied qualified immunity to a police officer for a constitutional violation that was not "clearly established."

The misguided court this time is the Fourth Circuit. The officer here directed a delusional, drunk, and armed suspect to drop his gun. Rather than comply, the man raised the weapon above his shoulder, which compelled deadly force from the officer.

The Fourth Circuit did not cite precedent that "clearly established" a Fourth Amendment right on these facts. Instead, it mashed together eight cases (two decided after the fact, five where no violation was found, and one that is distinct) to create a "clearly established right" in the mold of Frankenstein's monster. In the process, the Fourth Circuit cast the right in such non-specific terms that no reasonable

officer would know their conduct violated the Constitution. This result should not stand.

In the last decade or so, this Court has reversed qualified immunity denials in numerous cases where a constitutional right was not clearly established. *See e.g. City of Tahlequah v. Bond*, 595 U.S. 9 (2021) (*per curiam*) (Tenth Circuit); *Rivas-Villegas v. Cortesluna*, 595 U.S. 1 (2021) (*per curiam*) (Ninth Circuit); *Mullenix v. Luna*, 577 U.S. 7 (2015) (Fifth Circuit); *Carroll v. Carman*, 574 U.S. 13 (2014) (*per curiam*) (Third Circuit); *Plumhoff v. Rickard*, 572 U.S. 765 (2014) (Sixth Circuit).

The Fourth Circuit, so far, has avoided this fate. But that does not mean all is well in the South Atlantic states. Since 2017, the Fourth Circuit has issued four opinions in qualified immunity shooting cases (including this one) that have sparked a dissent because the right at issue was not clearly established. (App. 63a-71a); *Knibbs v. Momphard*, 30 F.4th 200, 233 (4th Cir. 2022) (Niemeyer, J., dissenting); *Harris v. Pittman*, 927 F.3d 266, 282 (4th Cir. 2019) (Wilkinson, J., dissenting); *Hensley v. Price*, 876 F.3d 573, 588 (4th Cir. 2017) (Shedd, J., dissenting).

This discord has eroded qualified immunity in the Fourth Circuit. After all, a right cannot be clearly established for police officers in the field if judges, "far removed from the scene and with the opportunity to dissect the elements of the situation," cannot agree on it. *Ryburn v. Huff*, 565 U.S. 469, 475 (2012).

The Fourth Circuit's time has come. This Court should grant the petition for certiorari or, in the alternative, summarily reverse the Fourth Circuit's refusal to follow precedent that dictates when a constitutional violation is "clearly established."

STATEMENT OF THE CASE

Azucena Zamorano Aleman, individually and as the Administrator of the Estate of Ruben Galindo Chavez, sued the City of Charlotte and David Guerra, in his individual and official capacity, for an alleged 42 U.S.C. § 1983 Fourth Amendment violation, along with various state law torts.

The District Court dismissed all claims on summary judgment. It found that Officer Guerra was entitled to qualified immunity because he had probable cause to believe that Galindo presented an immediate and fatal threat. It further decided that Galindo did not have a clearly established right to be free from deadly force under these circumstances.

The Fourth Circuit reversed. It held that Galindo had a clearly established Fourth Amendment right to be free from deadly force. Judge Julius Richardson dissented.

I. Facts

On September 6, 2017 at about 9:04 p.m., Galindo called 911 from the Hunter Pointe Apartments, unit 1918-E. (App. 6a) Galindo was transferred to a Spanish-speaking dispatcher. (*Id.*) Galindo asked dispatch to send police to his apartment so he could turn himself in. (*Id.*) Galindo reported that he had a "gun in my hand." (*Id.*) Dispatch asked Galindo what he intended to do with his gun and Galindo answered "are you going to help me or are you not going to help me?" (*Id.*) Galindo told dispatch that he had been drinking and he identified himself as "El Dios Estrella" (which translates to "the Star God"). (App. 7a) Galindo complained that police officers and others had been "following" him and that he "can't take it

any longer." (*Id.*) Dispatch learned that there was a female in the apartment with Galindo. (*Id.*)

Officer Guerra and three colleagues were assigned to Galindo's call. (App. 10a) The officers gathered to devise a plan for their response. (*Id.*) One officer, David Batson, located a prior report where Galindo had been arrested on suspected assault with a gun. (App. 11a) The officers also learned the Galindo did not have any outstanding warrants, which raised suspicions about why Galindo wanted to turn himself in. (J.A. 130-31, 179-80, 185) They also looked at a photograph of the Hunter Pointe Apartments and saw that Galindo's apartment was at the end of building 1918, abutted by woods, and only accessible from one direction. (*Id.*) The officers were wary about the situation, given these circumstances. (*Id.*)

Galindo had a second call with 911 a few minutes after the first call ended. (App. 8a) The second call focused on Galindo's firearm. (*Id.*) Galindo told dispatch that the gun was "in my bag" but "if you want I will take it out." (*Id.*) Dispatch told Galindo at least six times to leave his gun in the apartment. (*Id.*) Galindo, however, told dispatch that he intended to bring his gun when he met the officers. (*Id.*) Galindo asked dispatch "how do you want me to show a firearm?" (*Id.*) He also told dispatch "as long as [the officers] don't shoot me I will throw them the gun," and "look I know that you are nervous, and all of that, I know, well me too." (App. 8a-9a)

Dispatch updated Officer Guerra as it learned more. (App. 9a-10a) Among other things, dispatch told Officer Guerra that Galindo had been drinking, that he was uncooperative, and that a female was in the apartment with him. (*Id.*) Dispatch told Officer

Guerra to "use caution. [Galindo] sounds delusional." (App. 10a) At about 9:18 p.m., officers decided to approach the residence because they were concerned that the situation could escalate to domestic violence. (App. 11a) Officer Guerra did not speak Spanish, but he knew enough simple phrases to communicate with Galindo and that a bilingual officer would be on scene soon. (*Id.*)

At about 9:30 p.m., the officers arrived at Hunter Pointe Apartments. (App. 12a) They parked several buildings away from Galindo's unit. (*Id.*) Officer Guerra and his colleagues approach Galindo's apartment on foot and in full uniform. (*Id.*) Each officer took cover, and Officer Guerra positioned himself about 10 yards from Galindo's patio apartment door. (*Id.*) Officer Guerra called out "Ruben" to a man behind the patio door. (App. 13a) That man (Galindo) opened the door. (*Id.*) Officer Guerra called out "Ruben, policia, manos, manos" (which translates to "Ruben, police, hands, hands"). (*Id.*) Officer Guerra then stepped out from his cover to face Galindo in full uniform. (*Id.*) Galindo stood in the doorframe with his arms at his side and a gun in his left hand. (*Id.*) Officer Guerra said "manos" twice more and lifted his right hand off his rifle to demonstrate for Galindo. (*Id.*)

At that, Galindo quickly raised his left arm to his waist and showed the gun in his left hand. (App. 13a) Officer Guerra then shouted "put it down, drop the gun, put it down" in English. (App. 14a) In response, Galindo quickly lifted his left arm above his shoulder and extended it so that the muzzle pointed at another apartment building and about 45 degrees away from Officer Guerra. (*Id.*) Galindo quickly raised his right arm above his shoulder too. (*Id.*) The officers then

yelled "drop the gun" and "put it down." (*Id.*) Galindo did not comply. (App. 14a-15a) Officer Guerra then made the split-second decision to fire twice. (App. 15a) Galindo died at the scene. (*Id.*)[1]

II. Fourth Circuit Opinion

The Fourth Circuit reversed summary judgment for Officer Guerra and held that he was not entitled to qualified immunity. (App. 62a) On the first prong, the court held that the evidence created genuine issues of material fact as to whether Officer Guerra's use of deadly force was objectively reasonable. (App. 36a-58a)

On the second prong, the court held that Galindo had a "clearly established" Fourth Amendment right to be free from deadly force. (App. 58a-61a) It defined this right with a quote from *Knibbs v. Momphard*, a decision issued in 2022, more than four years after the shooting:

> the failure to obey commands by a person in possession of, or suspected to be in possession of, a weapon only justifies the use of deadly force if that person makes some sort of furtive or other threatening movement with the weapon, thereby signaling to the officer that the suspect intends to use it in a way that imminently threatens the safety of the officer or another person.

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[1] Each officer recorded the event on their body camera. The Fourth Circuit recognized limitations or disagreement about what the cameras show. The most probative facts – that Galindo had a gun, that Officer Guerra told him to drop it, and that Galindo quickly raised his arm and did not drop the weapon – are not disputed. (App. 12a-15a)

(App. 59a-60a). The Fourth Circuit noted that *Knibbs* derived this right from six pre-shooting cases, "along with" *Hensley ex rel. North Carolina v. Price*, an opinion issued two months after the shooting. (App. 59a) The Fourth Circuit quoted *Knibbs* for the idea that these seven cases "together *clearly establish*" the right. (*Id.*) (emphasis in original)

From there, the Fourth Circuit backtracked on the need for all seven cases. It claimed, without support, that the right announced in *Knibbs* was actually "clearly established" by the six pre-shooting cases and all *Hensley* did was make that right "even clearer." (App. 60a)

Judge Julius Richardson dissented. (App. 63a-71a) In his view, Galindo did not have a clearly established Fourth Amendment right. (*Id.*) Judge Richardson pointed out that a "clearly established right" must come from a case where a violation was found "under similar circumstances," or a "body of relevant case law." (App. 63a) The Fourth Circuit did not identify a "clearly established right" through these means. (App. 63a-71a)

At first, Judge Richardson disagreed with the majority's revisionist approach to *Knibbs*. (App. 64a-65a) Contrary to the majority's claim, *Knibbs* did not hold that the six pre-shooting cases alone "clearly established" the right it announced. (*Id.*) Rather, *Knibbs* held that these six cases "*together*" with *Hensley* establish the right. (*Id.*) And *Hensley* is a post-shooting case. (*Id.*) So "if it takes all seven cases 'together' to clearly establish the right, and the majority can't rely on all seven, then the majority can't rely on *Knibbs*." (App. 65a)

Judge Richardson also took issue with the majority's attempt to downplay *Hensley* as an opinion that only made the right at issue "even clearer." (App. 66a) In Judge Richardson's view, all the majority did with this analysis was "add[] its gloss to *Knibbs's* gloss. And if our precedent needs that many coats to paint a right as clearly established," he wrote, "it's obvious that right was never clearly established at all." (*Id.*)

From there, Judge Richardson turned to the six pre-shooting cases. (App. 66a-70a) One by one, he pointed out these six cases, together or separate, do not make it clear to "every reasonable official" that Officer Guerra's use of deadly force was unreasonable. (*Id.*)

Judge Richardson started with *Cooper v. Sheehan*, the one case where the Fourth Circuit found a constitutional violation. (App. 66a-67a) He wrote that "*Cooper* actually suggests that Officer Guerra acted reasonably." (App. 67a) The officers in *Cooper* never identified themselves before the shooting. (*Id.*) Had they done so, "they might have been safe in the assumption that a man who greets law enforcement with a firearm is likely to pose a deadly threat.'" (*Id.*) *Cooper* also says that "an armed suspect need not engage in some specific action—such as pointing, aiming, or firing his weapon—to pose a threat." (*Id.*) Given this, Judge Richardson concluded that "Officer Guerra might have reasonably assumed he could respond with deadly force to a man approaching him with a drawn weapon. Doubly so since Galindo was in fact drunk, delusional, and had repeatedly ignored commands to leave the firearm in his home." (*Id.*)

Judge Richardson then noted that the Fourth Circuit did not find a constitutional violation in the other five pre-shooting cases. (App. 67a-70a) In turn, the majority erred when it used these cases as evidence of what an officer *cannot* do. (App. 70a) Plus, Judge Richardson pointed out that these five cases, like *Cooper*, supported Officer Guerra's actions. (App. 67a-70a)

In the end, Judge Richardson concluded that Officer Guerra should be entitled to qualified immunity because a reasonable officer in his shoes would not have known that the use of deadly force was "clearly unlawful beyond debate." (App. 70a-71a)

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari review because the Fourth Circuit denied a police officer qualified immunity, even though the constitutional right at issue was not "clearly defined" when the shooting occurred.

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

A police officer has qualified immunity from excessive force claims if their conduct does not violate a "clearly established" Fourth Amendment right. *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5-6 (2021). A right is "clearly established" if "every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (*per curiam*).

In this way, courts cannot rely on rights merely "suggested by then-existing precedent." *City of Tahlequah, Oklahoma v. Bond*, 595 U.S. 9, 12 (2021). Instead, the "rule's contours must be so well defined

that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* (cleaned up) (citations omitted). This principle is critical in Fourth Amendment cases, where facts on the ground will dictate whether force is excessive. *Id.* at 12-13 (citing *Mullenix*, 577 U.S. at 12).

A Fourth Amendment qualified immunity analysis can go astray several different ways. For one thing, courts should not use a case decided *after* an event to decide whether a right was clearly established. *Bond*, 595 U.S. at 13. For another, it is a fraught endeavor to use cases where deadly force *was* approved as authority for when deadly force is clearly *not* approved. *Mullenix*, 577 U.S. at 18. And, perhaps most important, a right cannot be "clearly established" by cases that are distinct on their facts. *White v. Pauly*, 580 U.S. 73, 79 (2017) (*per curiam*).

Here, the Fourth Circuit held that Galindo had a right to be free from deadly force (even after he refused Officer Guerra's direction to drop his gun), unless and until he made a "furtive or other threatening movement with his weapon." To affix this right, the Fourth Circuit used cases: (1) decided after the shooting; (2) where no violation was found; and (3) that involved different facts. In turn, it defined a constitutional right "at too high a level of generality" to assist officers in the field. *Bond*, 595 U.S. at 12.

A. Post-conduct cases do not inform whether a right was clearly established

Cases decided after an alleged violation do not inform whether a right was clearly established. *Bond*, 595 U.S. at 13; *Brosseau v. Haugen*, 543 U.S. 194, 200, n. 4 (2004) (*per curiam*).

The Fourth Circuit veered at the start when it defined Galindo's right with a quote from *Knibbs*, a case decided more than four years after the events at issue here. On top of that, the right announced in *Knibbs* was established with *Hensley*, a second opinion that came out after Officer Guerra's encounter with Galindo. So in truth, the Fourth Circuit used two post-shooting opinions to define Galindo's clearly established right.

The Fourth Circuit acknowledged this itself, at least at first. In its lead up to the quote from *Knibbs*, the majority wrote, "[p]recisely on point, we have held that those six decisions – along with our November 2017 decision in *Hensley* – "together *clearly establish*" [the right]. (App. 59a-60a) This is a plain admission that the majority used post-shooting cases to find a "clearly established right."

To try and undo this damage, the majority re-wrote *Hensley's* place in *Knibbs's* holding. The majority claimed that "[a]t best, *Hensley* simply made even clearer the right that was clearly established by [the six pre-shooting cases]." (App. 60a) But, as Judge Richardson pointed out in dissent

> *Knibbs* doesn't say that our pre-shooting cases clearly establish the right; it says that our pre-shooting cases *plus one post-shooting case* do. And if it takes all seven cases 'together' to clearly establish the right, and the majority can't rely on all seven, then the majority can't rely on *Knibbs*.

(App. 65a)

If Galindo's right was "clearly established" in September 2017, there was no reason for the Fourth

Circuit to rely on *Hensley* or *Knibbs* at all. Indeed, this Court reversed the Tenth Circuit two years ago because it relied on a post-shooting case to find a "clearly established right". *Bond*, 595 U.S. at 13. *See also Brosseau*, 543 U.S. at 200, n. 4 (pointing out that post-shooting cases cannot "give fair notice to" an officer and thus "are of no use in the clearly established inquiry").

The Fourth Circuit erred in its process when it used two post-shooting cases to find a "clearly established right." This Court should reverse on that point.

In addition, the six pre-shooting cases cited in *Knibbs* – *Cooper v. Sheehan*, 735 F.3d 153 (4th Cir. 2013); *Anderson v. Russell*, 247 F.3d 125 (4th Cir. 2001); *Sigman v. Town of Chapel Hill*, 161 F.3d 782 (4th Cir. 1998); *Elliott v. Leavitt*, 99 F.3d 640 (4th Cir. 1996); *McLenagan v. Karnes*, 27 F.3d 1002 (4th Cir. 1994); and *Slattery v. Rizzo*, 939 F.2d 213 (4th Cir. 1991) – do not "clearly establish" Galindo's Fourth Amendment right, either together or separate.

B. Cases where a court did *not* find a Fourth Amendment violation do not clearly establish what conduct would be a constitutional violation

A Fourth Amendment right can be clearly established by a case where an officer, acting under similar circumstances, was found to have violated the right. *White*, 580 U.S. at 80. The inverse, however, is not true. *Mullenix*, 577 U.S. at 18. This Court has cautioned that "the mere fact that courts have approved deadly force in more extreme circumstances says little, if anything, about whether such force was

reasonable in the circumstances [of a different case]." *Id*.

In five of the six pre-shooting cases, (*Anderson*, *Sigman*, *Elliott*, *McLenagan*, and *Slattery*), the court did not find a constitutional violation. So, as stated in *Mullenix*, it was imprudent for the Fourth Circuit to use these cases to find that Galindo had a "clearly established right." More than that, the facts in these five cases suggest that Officer Guerra's actions were reasonable:

- *Anderson* (2001)

  The officer believed that the suspect had a concealed weapon, so he ordered the suspect to get on his knees and raise his hands. 247 F.3d at 127-28. The suspect started to raise his hands, but then reached toward his waist. *Id*. The officer shot the suspect who, it turned out, was unarmed. *Id*. The officer had qualified immunity because the suspect did not follow instruction and the officer had reason to believe the suspect could be dangerous. *See generally id*.

- *Sigman* (1998)

  The officer was dispatched to a home where an intoxicated and erratic suspect had threatened violence with a knife. 161 F.3d at 784. The officer directed the suspect to calm down and exit the house. *Id*. The suspect left the house with knife in hand and walked toward the officer, who shot and killed him. *Id*. The officer had qualified immunity because the suspect did not follow instruction and the officer had

reason to believe the suspect could be dangerous. *See generally id.*

- *Elliott* (1996)

  Law enforcement handcuffed a drunk motorist and seat belted him into a squad car with the doors and windows closed. 99 F.3d at 641. The suspect, while cuffed, retrieved a handgun. *Id.* at 642. The officer ordered the suspect to drop the gun and the suspect did not respond. *Id.* The officer shot and killed the suspect. *Id.* The officer had qualified immunity because the suspect did not follow instruction and the officer had reason to believe the suspect could be dangerous. *See generally id.*

- *McLenagan* (1994)

  A deputy yelled "the man has got a gun" after a handcuffed suspect made his way into an office where a gun was stored. 27 F.3d at 1004-05. A second handcuffed suspect (the plaintiff) heard this and ran. *Id.* at 1005. Another deputy in the building heard the cry as well and then saw the plaintiff running at him. *Id.* The second deputy shot the plaintiff, even though he did not see if the plaintiff had a gun. *Id.* The officer had qualified immunity because he had an objective basis to believe the plaintiff could be dangerous. *See generally id.*

- *Slattery* (1991)

  An officer approached a parked vehicle during a drug bust. 939 F.2d at 214-15. He ordered the front seat passenger to raise his hands and the passenger turned away. *Id.* at 215. The passenger then turned toward the officer and

> the officer thought the passenger was coming at him with a weapon, so he shot him in the face. *Id*. The suspect did not have a weapon. *Id*. The officer had qualified immunity because the suspect did not follow instruction and the officer had reason to believe the suspect could be dangerous. *See generally id.*

No reasonable officer versed on these cases would conclude that an armed suspect has a "clearly established right" to be free from deadly force *after* the suspect refuses a command to disarm, so long as the suspect does not make a "furtive or other threatening movement." If anything, the opposite is true. A reasonable officer who read these five cases would conclude that qualified immunity is available if an armed suspect does not follow instructions to disarm and the officer has reason to believe the suspect could be dangerous.

Hensley, in fact, puts a finer point on *Anderson* and *Slattery*, the two cases that best-match the situation faced by Officer Guerra. "In both cases," the Fourth Circuit wrote, "once the officer issued a verbal command, the character of the situation transformed." 876 F.3d at 585. And in that transformed situation, "[i]f an officer directs a suspect to stop, to show his hands or the like, the suspect's continued movement likely will raise in the officer's mind objectively grave and serious suspicions about the suspect's intentions." *Id*. That is the precise situation faced by Officer Guerra here.

In *Mullenix*, this Court discussed the folly with using cases where no violation was found to find a "clearly established right." 577 U.S. at 18. At best, reliance on such cases puts an officer's conduct in the

"hazy border between excessive and acceptable force." *Id*. (cleaned up) But in that "hazy border," a constitutional right is not established "beyond debate" and qualified immunity attaches. *Id*. at 19. Here, like in *Mullenix*, the Fourth Circuit erred when it used these five cases where no violation was found to identify a "clearly established right."

The sixth pre-shooting case, *Cooper*, is so distinct on its facts that it does not "clearly establish" the right given by the Fourth Circuit.

C. Cases that are factually distinct do not inform whether a Fourth Amendment right is "clearly established"

In *Cooper*, two officers responded to a complaint about two men screaming at each other in a trailer home. 735 F.3d at 155. One officer knocked on the trailer, but he did not identify himself. *Id*. The plaintiff called out who's there, but the officers did not respond and retreated into the yard. *Id*. The plaintiff then walked onto the porch with a shotgun aimed toward the ground. *Id*. The officers, without warning, emerged and shot the plaintiff. *Id*.

Those facts gave rise to a Fourth Amendment violation because "no reasonable officer could have believed that [the plaintiff] was aware that two sheriff deputies were outside," and "[a]bsent a threatening act, like raising or firing the shotgun" the officers had no reason to shoot. *Cooper*, 735 F.3d. at 157.

This case is not *Cooper*. Officer Guerra stepped out from his cover, in full uniform, and told Galindo to show his hands. This caused Galindo to bring his hands (and his gun) to his waist. Then Officer Guerra told Galindo to drop his gun. In response, Galindo

raised his gun above his head. Officers then told Galindo to drop the weapon again, and he did not comply.

Cooper turned on the fact that the officers did not announce themselves or step out so the suspect knew that police were present. Had the officers done that, "they might have been safe in the assumption that a man who greets law enforcement with a firearm is likely to pose a deadly threat." *Cooper*, 735 F.3d at 159. On top of that, *Cooper* did not announce the need for a "furtive or other threatening movement" before deadly force could be justified. Quite the opposite. The court recognized that "an armed suspect need not engage in some specific action—such as pointing, aiming, or firing his weapon—to pose a threat." *Id.* at 159 n.9. So if anything, *Cooper* supports qualified immunity for Officer Guerra.

The outcome in *Cooper* tracks with this Court's 2018 decision in *Kisela v. Hughes*, 584 U.S. --, 138 S. Ct. 1148, 1151 (2018). There, 911 received a report of an erratic woman with a knife. *Id*. The officers responded to the scene and found a woman (later identified as Sharon Hughes) in a driveway and holding a knife at her side. *Id*. Hughes stood six feet away from another woman (later identified as Sharon Chadwick). *Id*. A chain link fence separated the officers from the two women. *Id*. The officers shouted at Hughes to drop the knife, but she did not react or respond. *Id*. Hughes may not have heard them. *Id*. Either way, Chadwick responded "take it easy" to both the officers and Hughes. *Id*. Hughes still did not drop the knife though. *Id*. And after Hughes declined to disarm, one officer shot Hughes four times. *Id*.

On certiorari review, this Court held that the Ninth Circuit erred when it denied the officer qualified immunity. *Kisela*, 584 U.S. --, 138 S. Ct. at 1153. In particular, this Court took exception to the Ninth Circuit's efforts to concoct a clearly established right from its precedent. *Id* at --, 138 S. Ct. at 1154. Among other things, the Ninth Circuit relied on cases with different facts to unearth a "clearly established right." *Id*. That is the same trap the Fourth Circuit fell into here.

Galindo raised his gun quickly above his shoulder when he was told to disarm. Then he refused to drop his gun. A gun positioned at that height, by a drunk and delusional man, poses a threat. It is a threat to officers, who have the right to go home to their families. It is a threat to apartment residents, who have the right to live in peace and safety. And it is a threat to anyone near that apartment, who could be shot because Galindo jerked his gun above his shoulder and refused to drop it. Galindo did not have a "clearly established right" to be free from deadly force. The Fourth Circuit cited no cases – not one – that found a "clearly established right" under similar facts.

CONCLUSION

This Court has not wavered in its position on qualified immunity. The doctrine 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. at 79 (cleaned up). For those reasons, 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 precedent. *See e.g. Bond, supra* (*per curiam*) (Tenth

Circuit); *Rivas-Villegas v. Cortesluna*, *supra* (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); *City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600 (2015); *Sheehan, supra* (2015) (Ninth Circuit); *Mullenix, supra* (2015) (Fifth Circuit); *Carroll, supra* (2014) (*per curiam*) (Third Circuit); *Wood v. Moss*, 572 U.S. 744 (2014) (Ninth Circuit); *Plumhoff, supra* (2014) (Sixth Circuit); *Stanton v. Sims*, 571 U.S. 3 (2013) (*per curiam*) (Ninth Circuit); *Reichle v. Howards*, 566 U.S. 658 (2012) (Tenth Circuit).

And 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." *Pittman*, 927 F.3d at 283 (Wilkinson, J., dissenting) So far, the message has not broken through in the Fourth Circuit.

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

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/s/ Steven A. Bader
STEVEN A. BADER
Counsel of Record
N.C. State Bar No. 55931
CRANFILL SUMNER LLP
P.O. Box 27808
Raleigh, NC 27611
(919) 828-5100
sbader@cshlaw.com
Counsel for Petitioners