

No. _____

**In the
Supreme Court of the United States**

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MICHAEL SCOTT PRICE, Individually and in his Official Capacity as
Lieutenant of Haywood County Sheriff's Department; KEITH ALLEN
BEASLEY, Individually and in his Official Capacity as Deputy
Sheriff of Haywood County Sheriff's Department; WEST AMERICAN
INSURANCE COMPANY, Corporate Surety on the official bond of the
Sheriff of Haywood County; THE OHIO CASUALTY INSURANCE
COMPANY, Corporate Surety on the official bond of the
Sheriff of Haywood County,

Petitioners,

v.

TERESA ANN HENSLEY, as relator on behalf of the State of North
Carolina, and as Administrator of the Estate of David Lee Hensley;
H.H., a minor, by and through her parent and next friend;
RACHELLE FERGUSON, Individually, and as relator on behalf of the
State of North Carolina,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Patrick H. Flanagan
Counsel of Record
CRANFILL, SUMNER
& HARTZOG, LLP
P.O. Box 30787
Charlotte, NC 28230
(704) 940-3419
phf@cshlaw.com

Carl Newman
CRANFILL SUMNER
& HARTZOG LLP
P.O. Box 27808
Raleigh, NC 27611
(919) 863-8842
cnewman@cshlaw.com

Counsel for Petitioners

Counsel for Petitioners

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

QUESTIONS PRESENTED FOR REVIEW

Whether some equivalent of “Stop, or I’ll shoot!” is required by the Fourth Amendment *per se* before use of deadly force where the decedent advanced on law enforcement officers with a gun in his hand immediately after hitting his daughter in the head with the gun.

PARTIES TO THE PROCEEDING

Petitioners are the Estate of Michael Scott Price,¹ Deputy Sheriff Keith Allen Beasley, in his official and individual capacity, West American Insurance Company, and The Ohio Casualty Insurance Company (collectively “petitioners”). Respondents are the Estate of David Lee Hensley, by and through his Administratrix, Teresa Ann Hensley, H.H.,² and Rachelle Ferguson (“respondents”).

Pursuant to Rule 29.6, West American Insurance Company and The Ohio Casualty Insurance Company are not publicly held companies and no publicly held company has a 10% or greater ownership interest in either.

¹ Michael Scott Price died during the pendency of this appeal. Respondents have not yet substituted the estate, however, Petitioner’s counsel files this petition on the estate’s behalf.

² H.H. is no longer a minor, but Respondents have not yet filed any motion to reflect that fact.

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CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is reported at 876 F.3d 573 (4th Cir. 2017). (Pet. App. 1a-42a). The district court decision is reported at 167 F. Supp. 3d 753 (W.D.N.C. 2016). (Pet. App. 43a-71a).

JURISDICTION

The Fourth Circuit Court of Appeals issued its opinion and an amended opinion on November 17, 2017. (Pet. App. 1a). This petition is timely filed within ninety days of entry of the judgment pursuant to United States Supreme Court Rule 13, and this Court has jurisdiction pursuant to 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 purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

On the morning of August 9, 2012, David Lee Hensley walked out of his home to greet two Haywood County sheriff's deputies in two marked vehicles with his long-nose revolver. On the porch of his home and in full view of the deputies, Hensley had a brief struggle with his two daughters, striking his oldest child in the back of the head with the gun. Immediately after, Hensley stepped down from the porch and strode directly towards the deputies, gun in hand. As he crossed towards them, the deputies opened fire, killing Hensley. It is undisputed that this entire course of action took approximately 13 seconds.

On July 28, 2014, Respondents filed a complaint under 42 U.S.C. § 1983 and alleged that the deputies used unconstitutionally excessive force, as well as bringing state law claims against Petitioners. The United States District Court for the Western District of North Carolina exercised jurisdiction over the case pursuant to 28 U.S.C. §§ 1331 & 1367. On March 9, 2016, the district court denied Petitioners' Motion for Summary Judgment as to the Fourth Amendment

claim, concluding that “[i]f the decedent did not point his gun at Beasley as he made his way across the yard . . . then no reasonable officer could have objectively concluded that the decedent was a danger to the deputies’ lives or safety warranting the use of deadly force.” (Pet. App. 57a).

Petitioners filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit on March 22, 2016. The Fourth Circuit issued a published opinion on November 17, 2017. (Pet. App. 1a-42a). A divided panel of the Fourth Circuit affirmed the district court’s denial of summary judgment. The majority held, citing only *Tennessee v. Garner*, 471 U.S. 1 (1985), that “an officer should give a warning before using deadly force unless there is an immediate threatened danger.” (Pet. App. 18a.), and described the necessary prerequisite to “order[] Hensley to drop the gun or warn[] that [Petitioners] would shoot,” as “*Garner’s* warning admonition.” (Pet. App. 18a). Underscoring its holding that a warning was required in advance of any use of deadly force, the majority distinguished four of its own prior decisions on the same factual basis that in each case some kind of warning had been given before deadly force was used. (Pet. App. 19a). The majority also stated that Petitioners’ use of deadly force was not objectively reasonable “because Hensley never raised the gun,” and excluded from its analysis of the totality of the circumstances that Hensley struck his own daughter with the gun, asserting it had “little bearing on whether Hensley was prepared to take the substantial step of escalating a domestic disturbance into a potentially deadly confrontation with two

armed police officers.” (Pet. App. 16a).¹ With regard to a dispute over whether Hensley pointed his gun at Petitioners, the majority acknowledged that “if the *undisputed* evidence were as forecast by the Deputies, they would likely be entitled to qualified immunity.” (Pet. App. 8a, n.4). The majority opinion did not address whether the relevant Fourth Amendment law was clearly established, deciding, *sua sponte*, that Petitioners had waived that issue. (Pet. App. 10a-12a, n.5).

Judge Shedd dissented from the majority’s analysis in every meaningful respect. The dissent noted that the totality of the circumstances also included that Petitioners’ were informed by their dispatcher that

the call was a civil disturbance involving a person possibly under the influence of drugs. . . . As they approached Hensley’s home, an elderly man flagged down Lieutenant Price to tell him that Hensley had kept the neighborhood up all night. The dispatcher also called the Deputies to provide an update: [Hensley’s mother-in-law] had called 911 a second time and indicated that Hensley may have hurt her granddaughters.

(Pet. App. 27a). Furthermore, that from the moment Petitioners radioed in to report seeing Hensley had a

¹ At oral argument on March 30, 2017, Judge Duncan stated that “the assault is out of the picture,” (Arg. 7:05), and that excluding Hensley’s assault from the analysis, “the only behavior at that point is the possession of the weapon,” (Arg. 16:07). <http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments>. The majority opinion explicitly follows that understanding of what the totality of the circumstances includes.

gun when he appeared on the porch, through Hensley striking his daughter in the head with the gun, until the shots were fired, “less than fifteen seconds elapsed.” (Pet. App. 29a). The dissent was critical of the majority for ignoring Hensley’s striking his daughter with the gun, and the majority’s overreliance on the absence of a warning before opening fire. (Pet. App. 34a, n.6; 35a, n.7). In sum, the dissent concluded that, “[v]iewed without 20/20 hindsight, this case falls within the heartland of cases in which we have consistently granted summary judgment to police officers using deadly force.” (Pet. App. 35a).

REASONS FOR GRANTING THE WRIT

From the perspective of a law enforcement officer attempting to assess risk in a volatile situation, some conclusions are not just objectively reasonable, but inescapable. A person coming towards you is more dangerous than someone running away; a person with a gun in hand is more dangerous than someone who merely *could be* reaching for a gun; a person who has just assaulted someone with a weapon is more dangerous than someone who has not committed an act of violence. And a person who does each of these three things not only in full view of law enforcement officers, but also knowing that law enforcement officers are watching him do so, presents a threat of serious physical harm as a matter of law.

The majority sliced and diced these facts in a refusal to apply the governing standard – whether the deputies’ use of force was objectively reasonable under the totality of the circumstances. But beyond that glaring error, what critically calls for this Court’s review is that the majority opinion creates a *per se* rule that a single circumstance was dispositive of the

constitutional question: the absence of a verbal warning. That cannot be squared with this Court's decisions because it creates an alteration (not mere misapplication) of previously well-settled Fourth Amendment law. The majority opinion adds a necessary factual prerequisite to the use of deadly force, which creates a conflict with nearly every other circuit on the correct standard used to analyze the weightiest Fourth Amendment question that any court is ever asked. The Court should grant certiorari to clarify that only one standard –reasonableness under the totality of the circumstances– applies to all excessive force claims, including the use of deadly force, and reverse the split panel's decision.

I. The Fourth Circuit's Decision Alters The Test For Deadly Force And Is In Conflict With This Court's Decision In *Scott v. Harris* And *Graham v. Connor*.

There is no deadly force clause in the Fourth Amendment. Rightly understood, deadly force is not different in kind, but degree; occupying a position at the furthest end of a continuum of possible seizures all subject to measurement by reasonableness. While it might be simpler (for courts) to reduce excessive force claims to checklists of particular factual circumstances, that course has long since been foreclosed. "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

Contrary to these bedrock principles, the majority's decision in this case imposes one necessary circumstance before deadly force can be used, a verbal warning. The long and short of the majority opinion

is this: “Before an officer may use deadly force, he should give a warning if it is feasible. . . . More simply put, an officer should give a warning before using deadly force unless there is an immediate danger.” (Pet. App. 18a). The majority opinion makes the absence of a verbal warning conclusive on the constitutional question. Indeed, one out-of-circuit district court has already cited the majority’s decision here for the proposition that the use of deadly force requires a warning in advance. *Rodriguez v. City of Brunswick*, 2017 WL 6442097, *16 (D.N.J. Dec. 18, 2017).² The majority’s decision that a warning is always required in advance of using deadly force puts the Fourth Circuit in direct conflict with the Eleventh Circuit. *Quiles v. City of Tampa Police Dept.*, 596 Fed. Appx. 816, 820 (11th Cir. 2015) (citing *Penley v. Eslinger*, 605 F.3d 843, 854 n.6 (11th Cir. 2010)). On its own terms, the majority distinguishes four prior Fourth Circuit decisions (including two with unarmed decedents) on the ground that before use of deadly force in each case, the decedent had received “commands to stop,” (Pet. App. 20a), “verbal commands” that were not obeyed, (Pet. App. 19a), or “ignored the officers’ order to drop the weapon.” (Pet. App. 20a). The majority’s extended and explicit reliance on the absence of a warning here clarifies that the opinion is not based on mere “possession of a firearm,” (Pet. App. 16a), but rather solely the

² An additional district court decision reads the Fourth’s Circuit’s decision as turning entirely on the warning issue, and recently granted qualified immunity where an officer shot at suspects with firearms who had been given a warning, citing this case for support. *Peterson v. Prince George’s County*, 2018 WL 488827, *6 (D. Md. Jan. 19, 2018).

absence of a warning.³ This mechanical importation of “*Garner*’s warning admonition,” (Pet. App. 18a), confused an isolated factual similarity to *Garner* with a constitutional prerequisite. By doing so, the Fourth Circuit now stands alone and in conflict with this Court’s holdings that only one standard applies to all Fourth Amendment excessive force cases.

This Court has explained that “*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute deadly force.” *Scott v. Harris*, 550 U.S. 372, 382 (2007) (quotation marks omitted). “*Garner* was simply an application of the Fourth Amendment’s ‘reasonableness’ test to the use of a particular type of force in a particular situation.” *Ibid* (internal citation omitted). Nearly all of the courts of appeals recognize after *Scott*, if they did not already, that *Garner* cannot be read as “creat[ing] a special rule, separate from the usual reasonableness analysis.” *Terranova v. New York*, 676 F.3d 305, 308 (2d Cir. 2012). Instead of having one standard for deadly force under *Garner*

³ Some language in the majority opinion suggests that Hensley’s carrying (without pointing) the gun and the absence of a warning are independent grounds for finding a Fourth Amendment violation, but the decision cannot be read to stand for that proposition. The decision hinges on the absence of a warning in distinguishing cases with unarmed decedents, and cannot seriously claim that a person who has a gun in his hand is less of a threat than someone who *might be trying to* get a gun into his hand. To the extent the majority opinion can be read as resting on the combination of both factors, the majority clearly holds that a warning is always required when feasible before the use of deadly force, (Pet. App. 17a-18a), and finds that a warning was not feasible because, in the absence of having a gun pointed directly at them, the deputies were not in immediate danger. Otherwise, the entire discussion of whether or not Hensley pointed the gun is superfluous.

and another for all other excessive force claims under *Graham v. Connor*, 490 U.S. 386 (1989), this Court has steadfastly held that every Fourth Amendment use of force claim should be analyzed by the same standard to determine if the force was objectively reasonable under the totality of the circumstances. *See, e.g., Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) (citing *Graham* and *Garner*). *Graham* said as much, and quite clearly. *Graham*, 490 U.S. at 395 (“all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop or other seizure of a free citizen should be analyzed under the Fourth Amendment and its reasonableness standard . . .”) (emphasis in original). *Scott* closed the door on any other understanding of deadly force.

After this Court’s decision in *Scott* (after finding their own prior precedent had been abrogated by *Scott* in some cases), the Second, Third, Fifth, Sixth, Ninth, Eleventh, and D.C. circuits analyze deadly force cases under an overarching reasonableness standard, with a number of relevant factors, none of which is dispositive on its own. *Terranova*, 676 F.3d at 308; *Johnson v. City of Philadelphia*, 838 F.3d 343, 349 (3rd Cir. 2016) (“*Scott* abrogates our use of special standards in deadly-force cases and reinstates ‘reasonableness’ as the ultimate—and only— inquiry.”); *Lytle v. Bexar County*, 560 F.3d 404, 411 (5th Cir. 2009) (“There are few, if any, bright lines for judging a police officer’s use of force”); *Davenport v. Causey*, 521 F.3d 544, 551-52 (6th Cir. 2008); *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (en banc); *Terrell v. Smith*, 668 F.3d 1244, 1251 (11th Cir. 2012); *Flythe v. District of Columbia*, 791 F.3d 13, 18-19 (D.C. Cir. 2015).

Indeed, before *Scott* was ever decided, the First, Seventh, and Tenth circuits correctly held that only one standard applied to all excessive force claims, including deadly force, following this Court’s decision in *Graham*. *Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 694 (1st Cir. 1994) (“the use of deadly force incident to arrest depends solely on whether the officer’s conduct was ‘objectively reasonable.’”) (quoting *Graham*, 490 U.S. at 397); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 592 (7th Cir. 1997); *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995). Prior Fourth Circuit decisions appeared to follow this course. See *Smith v. Ray*, 781 F.3d 95, 100-01 (4th Cir. 2015) (citing *Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (en banc)). The majority opinion in this case is a sharp turn in the wrong direction on the correct understanding of deadly force, reinserting *Garner* as a separate standard for deadly force and leaving the Fourth Circuit’s understanding of deadly force as no other circuit has done since *Scott* was decided.

The majority opinion’s mechanical transference of “a warning, if feasible” from *Garner* to this case, where the suspect was not unarmed or running away, evinces a misunderstanding of *Garner* that this Court has long since dispelled in *Scott*.

Garner held that it was unreasonable to kill a young, slight, and unarmed burglary suspect by shooting him in the back of the head while he was running away on foot 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. Whatever *Garner* said about the factors that

might have justified shooting the suspect in that case, such “preconditions” have scant applicability to this case which has vastly different facts.

Scott, 550 U.S. at 383 (internal quotation marks and citation omitted, alterations in original).⁴ To be sure, there are some decisions suggesting that “using deadly force, without warning, on an unarmed, retreating suspect is excessive.” *Salvato v. Miley*, 790 F.3d 1286, 1294 (11th Cir. 2015) (citing *Garner*, 471 U.S. 1). But such decisions are consistent with *Scott*’s description of *Garner* as just one application of reasonableness to a particular set of facts. Where the facts are the same, the reasonableness test will produce the same result. Where two out of three of those facts are inverted (armed and advancing instead of unarmed and retreating), *Garner* cannot mandate the result.

For its part, the Fourth Circuit has never acknowledged *Scott*’s discussion of *Garner* as simply an application of an overarching reasonableness standard. As the Ninth Circuit has noted, *Scott* clarified that “there are no *per se* rules in the Fourth Amendment excessive force context.” *Mattos*, 661 F.3d at 441. Here, the majority held that the absence of a warning, rather than the totality of the circumstances, controlled the outcome. *Garner* stands for the proposition that it is unreasonable as a matter of law to use deadly force when an officer does

⁴ Further complicating the analysis (and counseling against constitutionalizing warnings), Petitioners are aware of no test for what satisfies the “if feasible” standard, which perhaps explains why the majority opinion turns entirely on the absence of a warning and the dissent flatly concludes that no warning was feasible in this case. *Ibid.*

not have probable cause that the subject presents a serious risk of physical harm. To be sure, disobedience of a verbal command by a law enforcement officer is some evidence that the subject presents such a risk, and may help establish such probable cause. But probable cause does not necessarily depend on the presence or absence of any single factual circumstance, warnings included. The majority opinion here is simply taking the fact that no warning was given in *Garner* and jamming it into the definition of reasonableness itself.

This Court has never held that a warning that an officer will shoot is a necessary prerequisite to the use of deadly force; even *Garner* does not stand for that proposition. Indeed, Respondents' correctly conceded at oral argument on March 30, 2017 that no *per se* warning requirement exists. (Oral Argument 20:50-20:57) (agreeing that "There's no case that says there's a constitutional requirement that in any and all circumstances an officer has to warn before he fires."). And that only makes sense. A person carrying a gun in his hand and advancing on the officers is not the equivalent of an unarmed person running away with respect to whether or not a warning is needed or even advisable. While a warning to a fleeing suspect (as in *Garner*) is nearly costless to the officer; a warning to an advancing suspect may be an invitation to escalate to violence "in circumstances that are tense, uncertain, and rapidly evolving," *Graham*, 490 U.S. at 397. The panel erred by treating Hensley as though he were in the same category as *Garner*, "who [was] not obviously armed or otherwise dangerous." *Garner*, 471 U.S. at 23 (O'Connor, J., dissenting). By citing *Garner* alone as support for imposing a warning requirement, the majority goes far beyond a mere misapplication of law

and evinces a complete misunderstanding of the test for objective reasonableness under a totality of the circumstances itself.

As a practical matter, the majority opinion here concludes that it was not objectively reasonable for two sheriff's deputies to believe that Hensley presented an immediate risk of serious harm when he hit his own child with a gun and advanced on the deputies with a gun in his hand. It is nearly inexplicable how a suspect advancing towards the deputies with a gun in his hand could be perceived as anything but an immediate threat of serious physical harm; the additional facts known to the deputies at the time—that Hensley appeared volatile and violent—compound to further compel the same conclusion.⁵ There could have been *even more* evidence available to the deputies at the time to establish probable cause that Hensley posed a threat to the deputies' safety, but even without disobedience of a command, the deputies' belief was objectively reasonable.

II. The Fourth Circuit's Failure To Apply The Correct Standard Led To The Wrong Result On The Merits And Will Open Deadly Force Cases To Judicial Second-Guessing Forbidden By This Court.

The panel majority's opinion follows an unwelcomely familiar pattern in Fourth Amendment cases. In part, the commonness of the majority's

⁵ The majority opinion neglects to even mention anything the deputies knew before they arrived at Hensley's home. It is one thing to say that an excessive force claim focuses on the moment that force was used, (Pet. App. 71a), but it is error to exclude from the totality of the circumstances the knowledge that the deputies brought to that moment.

errors is what calls out for review. This Court’s unanimous *per curiam* reversal in *Ryburn v. Huff*, 565 U.S. 469 (2012) is instructive. There, this Court faulted a divided Ninth Circuit panel for four reasons, three of which are present in the majority’s opinion in this case.

In *Ryburn*, this Court was critical that, “the panel majority appears to have taken the view that conduct cannot be regarded as a matter of concern so long as it is lawful It should go without saying, however, that there are many circumstances in which lawful conduct may portend imminent violence.” 565 U.S. at 477. The majority opinion’s tossing aside Hensley’s approaching the deputies with a gun in his hand as “[t]he lawful possession of a firearm by a suspect at his home,” (Pet. App. 14a), neatly fits that bill. Stated in its simplest terms, the majority’s conclusion that a man with a gun in his hand walking towards uniformed officers does not present a threat is implausible on its face.

Second, this Court in *Ryburn* faulted the Ninth Circuit because it “looked at each separate event in isolation and concluded that each, in itself, did not give cause for concern. But it is a matter of common sense that a combination of events each of which is mundane when viewed in isolation may paint an alarming picture.” 565 U.S. at 476-77. This Court has clearly and consistently admonished lower courts that in analyzing Fourth Amendment questions under the totality of the circumstances, courts absolutely cannot “view[] each fact ‘in isolation, rather than as a factor in the totality of the circumstances,’” *District of Columbia v. Wesby*, 583 U.S. ____ (2018) (slip op. 11) (quoting *Maryland v. Pringle*, 540 U.S. 366, 372 n.2 (2003)). Here, just as

in *Ryburn* and *Wesby*, “[i]nstead of considering the facts as a whole, the panel majority took them one by one.” *Wesby*, (slip op. 11). The majority opinion here explicitly excludes from the totality of the circumstances an act of violence no more than 13 seconds prior to the use of force. And deems it constitutionally irrelevant that Hensley was advancing on the deputies at the time of the shooting, apparently concluding that there is no difference between an armed subject coming towards an officer and an unarmed subject running away from an officer. Hensley assaulted his own daughter with the gun in view of the deputies no more than a few *seconds* before the use of force occurred, such that his assault and advancing on the deputies was one continuous course of action. Had the Fourth Circuit correctly analyzed the totality of the circumstances without erroneously viewing the absence of a warning as dispositive, Petitioners’ use of deadly force would have been deemed objectively reasonable as a matter of law.

Third, just as the Ninth Circuit erred in *Ryburn*, “judges should be cautious about second-guessing a police officer’s assessment, made on the scene, of the danger presented by a particular situation. With the benefit of hindsight and calm deliberation, the panel majority concluded that it was unreasonable for petitioners to fear that violence was imminent.” 565 U.S. at 477. This is no small matter. Fundamentally, the majority opinion took the absence of a single fact as conclusive of the constitutional question at issue. Egregiously, the majority breezily sweeps aside Hensley hitting his daughter with the gun in front of the deputies, as though it were unreasonable for them to believe a subject who hits someone with a gun in

front of them is potentially dangerous. As the dissent notes at length, (Pet. App. 26a, 33a-36a, 41a-42a), the majority's analysis flies in the face of the foundational principle of Fourth Amendment doctrine that courts are required to consider the use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97. When the deputies responded to a domestic disturbance call with the information that Hensley seemed unstable, and then were confronted with Hensley, armed with a handgun, moving towards them, in daylight, after hitting his own daughter in the head with his pistol, Petitioners lacked the luxury of picking apart each fact in isolation and calmly deliberating over the best course of action.

A final point warrants mention. What might otherwise be deemed interlocutory appeals from the denial of qualified immunity are justified primarily on the ground that qualified immunity serves a particularized purpose of avoiding trial and is lost if the legal questions qualified immunity presents are not answered prior to trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985). Beyond just finding that the issue of clearly established law was waived, *sua sponte* and in a two-page long footnote, (Pet. App. 10a-12a), the majority opinion goes so far as to suggest that under Fourth Circuit Mandate Rule jurisprudence the deputies must now face trial without getting a determination of whether the right

at issue was clearly established – even though it is clear that qualified immunity would bar the claim if the court had ever reached the second prong of the analysis.⁶ On the majority’s own erroneous terms, the only “clearly established law” identified that existed prior to the incident at issue was a single, unpublished opinion by the Fourth Circuit on meaningfully different facts. (Pet. App. 41a, n.8). Citing only one published decision, *Cooper v. Sheehan*, 735 F.3d 153 (4th Cir. 2013), which Respondents did not cite in the Fourth Circuit, demonstrates that the relevant law was not clearly established, as that decision was not issued until after the incident in this case. Obviously, the one unpublished decision and the post-dated published opinion are not sufficient to render “the constitutional question beyond debate.” *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)). This Court has yet to decide if the decisions of the courts of appeals can be “a dispositive source of clearly established law,” *Wesby*, slip op. 17 n.8 (quoting *Reichle v. Howards*, 566 U.S. 658, 665-66 (2012)), but even if the appellate decisions can be a source of that law, unpublished decisions cannot. Nonprecedential opinions do not establish any law for anyone beyond the parties to the case. Furthermore, *Cooper* itself did not clearly establish law that Hensley had a Fourth Amendment right in this case. In *Cooper*, the “Officers never

⁶ Petitioners readily concede that a divided panel’s finding that an argument was waived would not ordinarily warrant this Court’s involvement. However, Petitioners note that if the waiver analysis stands, removal of the clearly established law prong as an issue enhances this petition’s ability to serve as a vehicle for a single and important Fourth Amendment question.

identified themselves—even when asked by Cooper. If the Officers had 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.*” 735 F.3d at 159 (emphasis added). That reasoning alone from the later-decided *Cooper* case defeats any contention that the law at issue was clearly established within the Fourth Circuit, even after *Cooper* was decided.

CONCLUSION

For the reasons stated herein, Petitioners respectfully request that this petition be granted.

Respectfully submitted, this the 15th day of February, 2018.

/s/ Patrick H. Flanagan

Patrick H. Flanagan

Counsel of Record

N.C. State Bar No. 17407

E-mail: phf@cshlaw.com

Cranfill Sumner & Hartzog LLP

Post Office Box 30787

Charlotte, North Carolina 28230

Telephone: 704-940-3419

Carl Newman

Illinois ARDC No. 6309779

E-mail: cnewman@cshlaw.com

Cranfill Sumner & Hartzog LLP

Post Office Box 27808

Raleigh, North Carolina 27611-7808

Telephone: 919-863-8842