No. 11-677

IN THE
Supreme Court of the United States

DAVID L. MOORE,
in His Official and Individual Capacity,

Petitioner,

v.

ESPERANZA GUERRERO, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court have jurisdiction to decide whether Petitioner Moore is entitled to qualified immunity when multiple genuine issues of material fact remain disputed?

2. Did the United States Court of Appeals for the Fourth Circuit correctly affirm the district court's denial of qualified immunity?

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STATEMENT OF JURISDICTION

Respondents agree with Petitioner that this Court has jurisdiction to review the narrow holding of the United States Court of Appeals for the Fourth Circuit under the collateral order doctrine and by writ of certiorari. *See* 28 U.S.C. 1254(1);[1] *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). But because multiple genuine disputes of material fact remain, this Court lacks jurisdiction to determine whether Petitioner Moore had a reasonable belief that Respondent's relative, Antonia Munguia, resided at the Guerrero home and would be present at the time he attempted service of the summons. *See Johnson v. Jones*, 515 U.S. 304, 311 (1995) (providing that an appellate court has no jurisdiction to hear an interlocutory appeal concerning "which facts the parties might be able to prove"). If resolution of these issues becomes necessary, this Court lacks jurisdiction, providing an additional reason to deny the Petition.

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[1] Petitioner cites to "42 U.S.C. § 1254(1)" as the basis for this Court's jurisdiction. Pet. at 1. This, however, appears to be a typographical error, as that section does not exist and Title 42 of the United States Code pertains to Public Health and Welfare.

STATEMENT OF THE CASE

A. Factual Background

On November 24, 2007, Prince William County, Virginia Police Sergeant David Moore blindly grabbed from the police station a handful of summonses and other court documents to be served. The documents included a truancy summons for Antonia Munguia, the mother of an allegedly truant Prince William County student, to appear at a court hearing. Truancy is a Class 3 misdemeanor in Virginia, the second least serious offense category. *See* Va. Code Ann. § 18.2-11. To serve the summons, Virginia law required Petitioner Moore to physically hand it to Ms. Munguia. If Petitioner Moore was unable to reach Ms. Munguia, he could arrange for her to come to the police station to sign the summons, or he or another officer could attempt service at another time. He did neither.

Without reading the specifics of the document in his hand related to Ms. Munguia or attempting to contact her ahead of time, Petitioner Moore went to the address listed on the summons. Ms. Munguia, however, did not reside at that address. That address was the home of Juan and Esperanza Guerrero, Ms. Mungia's sister, which they have owned and lived in with their four children and aging parent for fourteen years.

When Petitioner Moore knocked on the Guerrero's door on this Saturday morning, Esperanza Guerrero answered. Petitioner Moore did

not show her the summons or otherwise explain why he was at her home. He did not show her any identification. Instead, he simply asked Ms. Guerrero, "Is Antonia Munguia here?" J.A. 296.[2] Ms. Guerrero replied, "No, she does not live here. Do you want to leave a business card?" J.A. 295-96. In response, Petitioner Moore retorted, "My business is I'm a police officer." *Id.* He then reached for his handcuffs and entered the Guerrero foyer. J.A. 68 ("I stepped into the residence."). Petitioner Moore testified that he entered the home because he believed Ms. Munguia was inside and wanted to enter the Guerrero home to look for her. J.A. 321. He never communicated that intent to Ms. Guerrero. Nor did he ask to enter the home. He never even bothered to try to give her the business card she suggested he leave. Instead, he put his foot in her residence and without explanation started to enter.

To prevent this intruder from further entering her home, Ms. Guerrero attempted to shut the door. But Petitioner Moore continued to force his way farther into the Guerrero home by shifting his position and wedging himself between her front door and her door frame. J.A. 69, 277. He called for police backup and then tried to force open the door to the Guerrero home. Meanwhile, Ms. Guerrero's four-year-old son came downstairs, saw this stranger trying to force his way into their home, became upset, and ran upstairs to get his father. The other Guerrero children witnessed the incident and were

[2] Citations to the "J.A." are to the Joint Appendix, which was part of the record before the Fourth Circuit Court of Appeals.

likewise terrified. Scared, nervous, and upset, one of the Guerrero children called 911 for help because this individual dressed in a police uniform refused to explain why he was trying to enter their home. 911 Recording at 0:32 ("[He] is trying to get in our house and he has no right . . . he doesn't have a warrant . . . .").[3]

Upon hearing the commotion, Mr. Guerrero came downstairs and asked his wife, in Spanish, what was happening. Ms. Guerrero replied, "I believe he thinks I'm Antonia Munguia." J.A. 69, 277. Mr. Guerrero then told Petitioner Moore, "This is Esperanza Guerrero. I'll get her ID." J.A. 307.

Despite hearing that Ms. Guerrero was not Antonia Munguia, Petitioner Moore refused to leave the entryway to the Guerrero home. He continued to use his body to prevent the door from fully closing. J.A. 77. Three police officers then responded to Petitioner Moore's emergency "Signal One" call for backup — the most serious call an officer can make. Together with Petitioner Moore, the Prince William County police officers forced the door open and invaded the Guerrero home. J.A. 75. The inward thrust from the door threw Ms. Guerrero against the stairs, and Petitioner Moore pinned her down on the floor. The remaining officers rushed into the Guerrero home. J.A. 305. When Mr. Guerrero returned to the foyer with his wife's identification to prove that she was not Antonia Munguia, the officers

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[3] The audio recording of the 911 call was likewise part of the record before the Fourth Circuit.

pepper sprayed his eyes, which temporarily blinded him and caused him great pain. The officers then searched the Guerrero home, presumably for Antonia Munguia, but — as Ms. Guerrero told Petitioner Moore when he first arrived at her home — Antonia Munguia was not there because she did not live there. J.A. 984-86; 295-96.

After invading and searching the Guerrero home and apparently finding nothing improper, the officers arrested Mr. and Ms. Guerrero. They handcuffed and paraded the husband and wife in front of their children and neighbors. Mr. Guerrero required medical attention to treat his eyes. Ms. Guerrero was taken directly to the adult detention facility, where she was denied medical treatment and held in jail for three days. Given the turmoil in Prince William County caused by the local governing body's recent enactment of an anti-illegal immigrant resolution charging the police with ferreting out illegal immigrants, Ms. Guerrero felt like Petitioner Moore and the other officers did not treat her "like a citizen." J.A. 209, 305.

Ms. Guerrero was charged with felony assault and battery on an officer and misdemeanor obstruction of justice. At Ms. Guerrero's bench trial, the Prince William County General District Court acquitted her of obstruction of justice and dismissed the felony assault charge.[4] The state court held that Petitioner Moore did not have "the right to step over the threshold." J.A. 126. The court reasoned that

[4] The state did not reinstate the dismissed charge.

"the evidence indicate[d] that [Officer Moore's] entry was unlawful." J.A. 127. Because Petitioner Moore's entry was unlawful, the court found that the charges against Ms. Guerrero could not stand. J.A. 127. Prince William County also charged Mr. Guerrero with misdemeanor obstruction of justice. Mr. Guerrero was similarly acquitted. J.A. 208.

B. Proceedings in the District Court

Following the state court proceedings, the Guerreros filed this lawsuit. Pertinent to the present appeal, the Guerreros allege that Petitioner Moore violated their Fourth Amendment protection against unreasonable searches when he forced his way into their home without a warrant. The parties cross-moved for summary judgment. The district court correctly held that Petitioner Moore was not entitled to qualified immunity because his warrantless entry into the Guerrero home was an unconstitutional search. *Guerrero v. Deane*, 750 F. Supp. 2d 631, 644, 649 (E.D. Va. 2010).

In its fifty-four page opinion — consistent with case law in the Eastern District of Virginia and the Fourth Circuit — the district court explained that qualified immunity determinations are made at the summary judgment stage. *Id.* at 643-44 (citing *Ware v. James City County*, 652 F. Supp. 2d 693, 702 (E.D. Va. 2009)). Courts are therefore required to consider the facts in the light most favorable to the non-moving party and reserve any issues of material fact regarding the reasonableness of an officer's conduct for trial. *Id.* Relying on the two-prong test

that this Court set forth in *Saucier v. Katz*, the district court then analyzed whether Petitioner Moore was entitled to qualified immunity. *Id.* at 642-50; *see also Saucier v. Katz*, 533 U.S. 194, 201-02 (2001). It explained that absent a valid warrant, a search "is per se unreasonable . . . subject only to a few specifically well-delineated exceptions." *Guerrero*, 750 F. Supp. 2d at 644 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)). The district court then held, consistent with Virginia case law, that a summons is neither an arrest nor a search warrant. *Id.* at 650. Because this was clearly established in 2007, the district court denied qualified immunity.

C. The Fourth Circuit's Summary Affirmance

Following the district court's holding that Petitioner Moore was not entitled to qualified immunity, Petitioner Moore filed an interlocutory appeal with the Fourth Circuit. In an unpublished opinion, the Fourth Circuit summarily affirmed the district court's holding that Petitioner Moore is not entitled to qualified immunity because a summons is not equivalent to a warrant. *Guerrero v. Moore*, No. 10-2177, 2011 U.S. App. LEXIS 16178, at *4 (4th Cir. Aug. 4, 2011). Accordingly, the Fourth Circuit agreed that Petitioner Moore unconstitutionally searched the Guerrero home. *Id.* at *4-5.

Petitioner harshly criticizes the Fourth Circuit's holding. Pet. at 12-14. He contends that the Fourth Circuit's opinion overlooked the Virginia

Attorney General's 1982 opinion, which stated that officers could enter a residence to serve a summons. *Id.* at 13. But, as the Fourth Circuit explained, "[t]he presence of an earlier opinion of the Virginal Attorney General . . . does not upset [current] precedent, especially in light of the more recent superseding statement of the law by the same [Attorney General's] office [in 2003]." *Guerrero*, 2011 U.S. App. LEXIS 16178, at *4. That 2003 opinion and the case law that had developed since 1982 made clear that a summons was not equivalent to a warrant and therefore could not authorize a search. *Id.*

Petitioner Moore further criticizes the Fourth Circuit for finding that the "right at issue was clearly established." Pet. at 13. But in reaching its conclusion, the Fourth Circuit had before it this Court's decision in *Knowles v. Iowa*, the Supreme Court of Virginia's holding in *Lovelace v. Commonwealth*, and *Farrow v. Commonwealth*, a Virginia Court of Appeals case. *See Knowles v. Iowa*, 525 U.S. 113, 118-19 (1998) (holding that a search incident to citation was unconstitutional); *Lovelace v. Commonwealth*, 522 S.E.2d 856, 860 (Va. 1999) (concluding that a search incident to issuance of a summons is unconstitutional); *Farrow v. Commonwealth*, 525 S.E.2d 11, 11-13 (Va. App. 2000) (applying the holding in *Lovelace*).

The Fourth Circuit denied Petitioner Moore's suggestion for rehearing *en banc* on September 6, 2011.

REASONS TO DENY THE PETITION FOR WRIT OF CERTIORARI

This case in an improper candidate for invocation of this Court's power of discretionary review. There is no great unaddressed gap in the law. The Virginia state courts have held for more than a decade that a summons is not a warrant and, citing to a decision of this Court, have further held that an officer may not conduct a search incident to the service of a summons. Even were this Court to disagree, it would lack jurisdiction to resolve the ultimate question: whether qualified immunity applies. Petitioner Moore's petition for certiorari should therefore be denied.

I. THIS CASE IS AN IMPROPER VEHICLE TO CONSIDER WHETHER PETITIONER MOORE IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE OF SERIOUS JURISDICTIONAL QUESTIONS

As his main issue, Petitioner seeks for this Court to find that qualified immunity shields him from his otherwise unconstitutional actions. But when deciding qualified immunity, this Court must evaluate the reasonableness of Petitioner's actions. To benefit from the protection of qualified immunity, thirty years of case law requires an officer possessing a valid warrant, rather than a summons, to demonstrate that he had 1) a "reasonable belief" that the subject of the warrant resided in the home searched; and 2) a "reasonable belief" that the suspect was present at the time of attempted service.

Steagald v. United States, 451 U.S. 204, 216 (1981); *Payton v. New York*, 445 U.S. 573, 588 (1980). Given the number of factual issues that exist here, this case requires a jury's determination. *See Johnson*, 515 U.S. at 311 (holding that, where the application of qualified immunity depends on "which facts the parties may be able to prove," an appellate court lacks jurisdiction to hear an interlocutory appeal (citation omitted)). It is therefore an inappropriate vehicle to consider the question raised by Petitioner.

Multiple factual questions exist about the reasonableness of Petitioner Moore's actions, including: 1) whether Petitioner Moore had a reasonable belief that Ms. Munguia resided at the Guerrero home; 2) whether Petitioner Moore had a reasonable belief that Ms. Munguia would be present at the Guerrero home when he attempted to serve her with the summons; and 3) whether Petitioner Moore's version of events is credible when, as described below, his testimony about the events in question has dramatically waivered from one courtroom to the next.

As the district court recognized, the summary judgment record raised a genuine issue of material fact regarding whether Petitioner Moore had a reasonable belief that Ms. Munguia resided at the Guerrero home. *Guerrero*, 750 F. Supp. 2d at 639. ("[T]he parties dispute whether Ms. Munguia lived at the Guerrero residence on November 24, 2007 . . . . "). A cornerstone of American jurisprudence rests on the premise that a search warrant is required to search for the subject of an arrest warrant inside a third party's house. *See Steagald*, 451 U.S. at 216

(requiring a search warrant to search a third-party residence for the subject of an arrest warrant). Indeed, the superseded 1982 Attorney General Opinion on which Petitioner Moore bases his Petition acknowledges that a search warrant is required to search a third-party residence. 1982 WL 175892, at *3 n.1 (Va. A.G.) (Aug. 20, 1982) ("This authority would not extend to search of a third party's premises in the absence of a search warrant."). Because, as the district court recognized, there is a genuine factual dispute regarding whether Petitioner Moore searched a first or third-party residence and the application of qualified immunity would turn on this fact, this Court lacks jurisdiction to determine the qualified-immunity question and the Petition should be denied. *See Johnson*, 515 U.S. at 311.

Additional issues of fact exist about whether Petitioner had a reasonable belief that Ms. Munguia would be present at the time he attempted service. Over the course of this litigation, Petitioner Moore's testimony has dramatically diverged about 1) whether he heard additional voices in the Guerrero home; 2) whether Ms. Guerrero's demeanor was suspicious; and even 3) whether Petitioner Moore felt threatened as he spoke with Ms. Guerrero. Only a jury can settle Petitioner Moore's internal debate and thus determine qualified immunity's proper application.

In his Petition and before the Fourth Circuit, Petitioner Moore asserts that he heard other voices in the house and that Ms. Guerrero's demeanor at the door was suspicious. Pet. at 9. But only two

months after the incident, Petitioner Moore had a vastly different recollection when he testified under oath at Ms. Guerrero's state court trial. When questioned by counsel if "[o]ther than the fact that a piece of paper said that address corresponded to the house you went to, [did] you have ***any other reason*** to think that Antonia Munguia ***was there at that time***?" Petitioner Moore gave a straightforward answer: "No, sir." J.A. 106-07 (emphasis added). Unlike in his Petition, there was no mention of voices or Ms. Guerrero's demeanor. *Id.*

This is hardly the only issue on which Petitioner Moore has misstated, if not contradicted, prior testimony. A cursory review of the record reveals that Petitioner Moore's testimony is awash with inconsistencies. For example, he has asserted under oath that he had no reason to believe Ms. Guerrero presented any threat to him when he attempted to serve the summons and that he "was in a dangerous position" because Ms. Guerrero may have had a gun. *Compare* Pet. at 15-22 (making no argument that he felt he was in danger or asserting exigent circumstances) *and* J.A. 107 (testifying at Ms. Guerrero's state court trial that he had no reason to believe he was in danger), *with* J.A. 340 (affidavit to the district court stating that someone "may even have [had] a gun").

Petitioner Moore's own contradictory testimony under oath prevents this Court from determining as a matter of law that he had a reasonable belief that Antonia Munguia was present. *See Johnson*, 515 U.S. at 311; *Bonner v. Anderson*, 81 F.3d 472, 476 (4th Cir. 1996) (holding that

"contradictory testimony of [a] principle participant[]" raises a genuine issue of disputed material fact and prevents an appellate court from entertaining an interlocutory appeal from the denial of qualified immunity). Thus, even were this Court to agree, despite clear Virginia case law to the contrary, that a summons and a warrant were equivalent, this Court would lack jurisdiction to determine the ultimate question of whether Petitioner Moore is entitled to qualified immunity. The result, thus, would be the same as that ordered by the Fourth Circuit: remand to the district court for trial. Consequently, this case is an improper vehicle for the questions raised by Petitioner Moore's Petition, and that Petition should be denied.

II. PETITIONER HAS FAILED TO IDENTIFY ANY CONFLICTING CASE LAW OR OTHER COMPELLING REASON FOR REVIEW

One isolated instance of a police officer arguing that he believed — after the fact — that a summons gave him the authority to enter and search a home does not provide a compelling reason for this Court's review. Indeed, in none of the block quotations summarizing the purpose and legislative history of various non-Virginia statutes does Petitioner point to a single case conflicting with the Fourth Circuit's holding, including nothing from this Court, a circuit court, or Virginia's state court of last resort. *Id.* Consequently, the Court should deny the petition for certiorari.

It has long been established that "jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given to this Court in order to 'secure uniformity of decision . . . . '" *Rhulin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938) (quoting *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923)); *see also* Sup. Ct. R. 10(a). "[A] showing of a conflict of circuits" is therefore the most compelling reason to grant a writ of certiorari. *Rhulin*, 304 U.S. at 206. But Petitioner has made no attempt to demonstrate that the Fourth Circuit's holding conflicts with another circuit court or a state court of last resort. Pet. at 15-22. To the contrary, the only way a conflict would exist is if the Fourth Circuit had ruled in Petitioner's favor because it would have been inconsistent with the Ninth Circuit's holding in *Perez v. Simmons*, 884 F.2d 1136, 1142 (9th Cir. 1988), *amended by* 900 F.2d 213 (1990), *and* 998 F. 2d 775 (1993).[5]

In *Perez*, a Hispanic woman, Irma, sued police officers for illegally searching her home for her brother, Albert. *Id.* at 1137. Officers had spotted Albert walking in the same block where Irma lived and, unlike the instant case, knew that Albert had multiple outstanding arrest warrants. *Id.* Albert seemed to head in the direction of Irma's apartment after seeing the officers. *Id.* But, in contrast to this case, the officers knew Irma lived nearby, had spotted Albert in the same area before, and confirmed that Albert had been arrested at Irma's

[5] The final version of the reported opinion, which includes all corrections to the text, can be found at 1988 U.S. App. LEXIS 19365.

apartment three years earlier. *Id.* at 1137-38. The officers therefore proceeded to Irma's apartment to search for Albert.

When the officers knocked on Irma's door, they specifically informed her that they had an arrest warrant for her brother and asked for her consent to search for him. *Id.* at 1138. Irma told the police that Albert "was not there, did not live there, and had never lived there." *Id.* The California officers refused to accept her response and searched her apartment. *Id.* But Albert was not there, and the officers instead arrested Irma for "harboring a fugitive." *Id.* On appeal, the Ninth Circuit reversed the district court's directed verdict for the officers, finding that the jury had to decide whether the officers' belief that Albert was at Irma's house was reasonable. Therefore, whether the officers were entitled to qualified immunity was a factual question only for the jury. *Id.*

In contrast, Petitioner Moore had no reason to suspect that Ms. Munguia was present in the Guerrero home. But like the officers in California, Petitioner Moore invaded the Guerrero home, searched the home, and unjustifiably caused the arrest of Mr. and Ms. Guerrero. Thus, as with *Perez*, it is for a jury to decide whether Petitioner Moore's belief was objectively reasonable. The Fourth Circuit's concurring holding, far from creating a circuit conflict, prevented one. It also prevents Petitioner from having a compelling case for this Court's exercise of its power of discretionary review. Because Petitioner has failed to demonstrate the presence of conflicting case law among the circuit

courts and the Fourth Circuit's holding is consistent with that of Virginia case law, his petition for certiorari should be denied. *See* Sup. Ct. R. 10(a)-(b).

III. THERE IS NO UNADRESSED GAP IN THE LAW — ONLY A GAP IN PETITIONER MOORE'S PETITION.

Petitioner Moore's petition for certiorari is more notable for what it omits than for what it addresses. Petitioner takes this Court on a tour of Nebraska, Ohio, and Tennessee law while conspicuously omitting the state actually in question: Virginia. There is a reason for this silence. Thirty years of case law from this Court makes clear that an officer must have a warrant to enter a home to make an arrest. *Payton*, 445 U.S. at 602. This Court has rejected the argument that there is a search-incident-to-citation exception to the warrant requirement. *Knowles*, 525 U.S. at 118-19. The Virginia Supreme Court similarly has rejected Petitioner's argument that a police officer has an automatic right to conduct a search subsequent to the service of a summons. *Lovelace*, 522 S.E.2d at 860. Furthermore, Petitioner's own expert witness and the chief of his police department have both testified that, absent consent, an officer may not enter a residence to serve a summons. The department's training materials confirm this. Thus, despite Petitioner's claims to the contrary, there is no great unaddressed gap in the law, and Petitioner Moore's petition for certiorari should be denied.

For more than thirty years, this Court has made clear that, absent exigent circumstances which do not exist here, an officer must have an arrest warrant to enter a suspect's home to make an arrest. *Payton*, 445 U.S. at 602. It is similarly clear that, in addition to an arrest warrant, an officer also must possess a search warrant to arrest a suspect if that suspect is located in a third-party's residence. *Steagald*, 451 U.S. at 216. Despite this clear case law, which speaks only in terms of warrants, Petitioner Moore argues that a summons is good enough. As the federal and state courts have made plain for more than a decade, that view is wrong.

Fourteen years ago in *Knowles*, this Court faced the question of whether the Fourth Amendment permits police officers to conduct a full search of a suspect and his immediate surroundings when issuing a citation for a minor offense. *Knowles*, 525 U.S. at 114. Knowles received a citation for speeding. *Id.* Although Iowa law permitted officers to arrest speeders, the officer chose the far-more-common procedure of issuing a citation. *Id.* Iowa statutory law explicitly permitted officers to conduct a full search incident to the service of any citation. *See State v. Meyer*, 543 N.W.2d 876, 879 (Iowa 1996); *State v. Becker*, 458 N.W.2d 604, 607 (Iowa 1990). During their search, officers discovered marijuana and drug paraphernalia, resulting in Knowles's arrest on additional charges. *Knowles*, 525 U.S. at 114.

On review, this Court declined to extend the "bright line rule" allowing a search incident to an arrest to a "search incident to citation." *Id.* at 118-

19. It refused to do so because the historic justifications for searches incident to actual arrests — the protection of officer safety and the preservation of evidence — are simply not present when officers enforce minor offenses by citation. *Id.* at 116-18. There was thus no justification, generally or specific to Knowles's case, to justify a search incident to the service of a citation; and this Court held that the Iowa officers' search violated the Fourth Amendment. *Id.* at 118-19.

Following *Knowles*, this Court ordered the Virginia Supreme Court to review *Lovelace* in light of the new holding. *See Lovelace v. Virginia*, 526 U.S. 1108 (1999) (granting petition for certiorari and remanding to the Virginia Supreme Court for further review in light of *Knowles*). *Lovelace* required the Virginia Supreme Court to analyze the very provisions of Virginia law at issue here, those authorizing the service of a summons rather than an arrest warrant. *See* 522 S.E.2d at 859 (citing Va. Code Ann. § 19.2-74(A)(2)). For minor offenses, Virginia law explicitly provides that a summons, rather than an arrest warrant, is the only appropriate means of notifying an individual of a violation. Va. Code. Ann. § 19.2-74(A)(2) ("Whenever any person is detained . . . for a violation of any provision of this Code, punishable as a Class 3 or 4 misdemeanor or any other misdemeanor for which he cannot receive a jail sentence . . . the arresting officer shall . . . issue a summons."). Violation of Virginia's compulsory attendance law, with which the summons charged Ms. Munguia, is a Class 3 misdemeanor, punishable only by a maximum fine of

$500 and no jail time. *Id.* §§ 18.2-11(c); 22.1-279.3(G)(2).

In *Lovelace*, the Virginia Supreme Court considered the language of § [and confirmed that it means that a summons and a warrant are not equivalent because a summons does not permit an officer to effect "an actual custodial arrest." 522 S.E.2d at 860. An officer may only take a party's name and address during a "relatively brief" encounter. *Id.* The only exception to this rule is when the person against whom the summons is directed "refuses to discontinue the unlawful act." *Id.*; *see also* Va. Code Ann. § 19.2-74(A)(2) (providing that, "if any such person shall fail to discontinue the unlawful act," only then may an officer arrest the party). Petitioner has never argued that this exception applies, nor could he. As Petitioner admits, he has neither seen Ms. Munguia nor has Petitioner ever contended that Ms. Guerrero was violating the law at the time of his initial entry into her home. *See* J.A. 87 (admitting at state court trial that he has never met Ms. Munguia either before or after his attempted service of the summons); Pet's Fourth Cir. Opening Br. at 8, 12-27 (failing to argue that Petitioner Moore was justified in his initial entry into the Guerrero home because Ms. Guerrero was in violation of the law).

Virginia's Supreme Court went on to hold that a summons is "similar in nature" to the traffic citation in *Knowles*. *Lovelace*, 522 S.E.2d at 860. Because a summons does not authorize a custodial arrest, it cannot authorize a full search incident to its service. *Id.* Thus, the Virginia Supreme Court

explicitly held that a search incident to an attempt to serve a summons violates the Fourth Amendment and invalidated Lovelace's conviction on that ground. *Id.* ("[W]e therefore conclude that the search of Lovelace was not consistent with the Fourth Amendment . . . and dismiss the indictment."). The holding was so clear that, three months later, Virginia's intermediate appellate court needed only eight paragraphs to invalidate a search subsequent to service of a summons. *See Farrow v. Commonwealth*, 525 S.E.2d 11, 11-13 (Va. App. 2000). Thus, by 2000, it was crystal clear that a summons could not by itself authorize a search. *Knowles*, 525 U.S. at 118-19; *Lovelace*, 522 S.E.2d at 860; *Farrow*, 525 S.E. 2d at 13.

These three cases, all cited to the Fourth Circuit, are not the only relevant citations missing from Petitioner Moore's Petition. Although Petitioner Moore argues that a police officer could not know the decade-old rule that a summons did not authorize a search, the evidence before the district court and the Fourth Circuit showed that his own fellow Virginia officers disagreed. Charles Dean, chief of the Prince William County Police Department and Petitioner's boss, testified on behalf of the Department about the distinctions between both a summons and an arrest warrant and a summons and a search warrant. J.A. 443-44. Chief Dean stated that a summons is not the equivalent of either. *Id.*

Indeed, Petitioner's own designated expert, twenty-three-year police veteran Sergeant Bruce Livingston, confirmed that an officer could not enter

a private residence to serve a summons absent consent. *Id.* at 533. Fellow Prince William County Officer Adam Hurley stated the same. *Id.* at 1144-46.

Finally, the Prince William County Police Department's own training materials refer exclusively to warrants — and make no mention of summonses — when discussing the requirements for entering a person's home. J.A. 1236-39; *id.* at 1237 ("The authority to make warrantless arrest[s] ends at their doorstep."). A superseded attorney general's opinion from 1982 cannot override a decision of the Virginia Supreme Court or this wealth of other authority that would put a reasonable officer on notice that one may not enter a home to serve a summons.

Despite his efforts to convince this Court otherwise, this is not a case where Petitioner has fallen victim to a court-created rule applied retroactively. His absolute silence before this Court about the relevant precedents cited below is deafening. As the Virginia trial court recognized when acquitting Respondents, Petitioner's entry "was unlawful." J.A. 127 (oral ruling of state trial court). Petitioner entered the home of a third party, without consent, to serve a summons. The Virginia Supreme Court, Virginia Court of Appeals, Virginia Attorney General, Petitioner's own chief of police, and Petitioner's own expert witness all agree this is impermissible. It is little wonder that the Fourth Circuit could dispose of Petitioner's case summarily, and this Court should do the same by denying his petition for certiorari.

CONCLUSION

Despite Petitioner's claims to the contrary, this is not a case of an officer who was haled into court on the basis of two conflicting attorney general opinions. This is the case of an officer who violated decade-old case law and whose own expert witness testified that his actions were improper. His denial is such that to this day Petitioner refuses even to acknowledge the on-point case law repeatedly cited to the courts below. Because there is no great unaddressed gap in the law and serious jurisdictional questions would prevent this Court from deciding the ultimate question of the proper application of qualified immunity, this case is an unsuitable candidate for the exercise of this Court's discretionary review. This Court should therefore deny Petitioner Moore's petition for certiorari.

Respectfully submitted,

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