No. 17-539

IN THE

Supreme Court of the United States

SUSAN DUFFY,

Petitioner,

v.

ANTHONY FRED MARTIN,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals deepened a circuit split by considering decisions from other federal courts of appeals, as well as district court opinions, in deciding whether the constitutional right in question was "clearly established" for purposes of qualified immunity.
2. Whether the Court of Appeals erred by concluding that its own precedent did not hold that a prisoner lacks a First Amendment right to be free from retaliation when he files a prison grievance.
3. Whether the Court of Appeals erred in applying its own law by relying on a clear consensus of persuasive authority to hold that the right in question was clearly established, notwithstanding a prior unpublished decision and district court opinions from within the Fourth Circuit that suggested uncertainty.
4. Whether the Court of Appeals erred by applying its own precedent to liberally construe a *pro se* litigant's inartful objections to a magistrate judge's report and recommendation.

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STATEMENT OF THE CASE

Petitioner Susan Duffy presents a single issue potentially worthy of this Court's review. In particular, the federal courts of appeals are split as to which decisions they may assess to determine whether a constitutional right has been "clearly established" for purposes of qualified immunity. One court of appeals refuses to consider any decisions other than its own, and those of this Court, and state supreme courts. The others generally permit consideration of decisions from sister circuits. Some courts of appeals also permit consideration of district court opinions. Indeed, some go as far as to consider non-binding unpublished decisions to determine the state of the law. Only this Court could resolve the conflict in these differing rules as to which bodies of law to examine in determining whether a right is clearly established, and this case may present an appropriate vehicle for doing so.

Petitioner's remaining arguments, however, do not support granting the petition. All three concern only how the Fourth Circuit reads its own precedent. There is no circuit split regarding those issues, and Petitioner has presented no compelling reason for this Court to intervene and decide how the Fourth Circuit must read its own cases.

1. A *pro se* plaintiff, Anthony Fred Martin, commenced this civil action by filing a complaint pursuant to 42 U.S.C. § 1983, raising, among other things, equal protection and First Amendment retaliation claims. *See* Pet. App. at 2, 5-6. On a magistrate judge's recommendation, the district court dismissed Mr. Martin's complaint in its entirety for failure to state a cognizable claim. *See id.* at 6-7. The

U.S. Court of Appeals for the Fourth Circuit reversed that decision as to Mr. Martin's First Amendment claim. *See id.* at 2-3, 14-22. To do so, the court relied on its recent precedent, which, in turn, relied on other circuit courts' decisions, and determined, contrary to the district court, that the right in question was "clearly established." *See id.* at 19-21.

2. Mr. Martin, a South Carolina state prisoner, used an electronic messaging kiosk at Perry Correctional Institution to file an informal grievance against a prison employee on or around September 11, 2014. *See id.* at 3. His grievance concerned "inappropriate and unwanted" sexual touching and "battery" by Sergeant B. Rogers during a shakedown procedure. *See id.* The following morning, Captain Susan Duffy removed Mr. Martin from the general prison population and took him to a holding cell in an administrative building, where she proceeded to question him "relentlessly" about the grievance. *See id.* After the questioning, Captain Duffy placed Mr. Martin in Pre-Hearing Detention ("PHD"), or "on segregation," which meant that Mr. Martin would be kept in solitary confinement-like housing unit pending a hearing. *See id.* Captain Duffy completed a "Notice of Placement in PHD," which explained that her reason for placing Mr. Martin in PHD was to "maintain the integrity of an investigation." *See id.*

After approximately 70 days in PHD, on or around November 18, 2014, Mr. Martin submitted a "Request to Staff Member" form to Captain Duffy. *See id.* at 3-4. In his Request, Mr. Martin asserted that Captain Duffy had no "justifiable" reason to place him in PHD and alleged that Captain Duffy had placed him in segregation as an "act of reprisal" for filing a

grievance against Sergeant Rogers. *See id.* at 4. Captain Duffy responded to Mr. Martin's request nearly a month later, stating, for the first time, that the Division of Investigations had put Mr. Martin under investigation. She also notified Mr. Martin that he was "no longer under investigation." *See id.*

On December 31, 2014, Mr. Martin was told to return to the general prison population. *See id.* Despite having spent 110 days in PHD, Mr. Martin never received a hearing regarding his segregation from the general prison population or the underlying "investigation" cited by Captain Duffy in the September 12, 2014, Notice of Placement in PHD. Mr. Martin declined to return to the general population for fear of further retaliation by prison officers, including Sergeant Rogers. *See id.* As an alternative resolution to the situation, Mr. Martin requested to be transferred to a different correctional institution. *See id.* at 5. That same day, Lieutenant G. Madden filed an "Incident Report" against Mr. Martin for "Refusing or Failing to Obey Orders." *See id.* at 4. Mr. Martin was ultimately found guilty of the offense. *See id.* at 5. Approximately five months later, he was transferred to Broad River Correctional Institution. *See id.*[1]

3. On December 14, 2015, Mr. Martin filed a complaint against Captain Duffy in the U.S. District Court for the District of South Carolina. *See id.* In his complaint, Mr. Martin alleged that Captain Duffy violated (1) his state-created liberty interest in remaining in the general prison population, (2) his

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[1] Mr. Martin has since been transferred back to Perry Correctional Institution.

right to equal protection by treating him differently from other state prisoners who had filed grievances and were not placed in segregation, and (3) his right to be free from retaliation for filing a grievance against Sergeant Rogers. *See id.* at 5–6.

On December 30, 2015, the Magistrate Judge issued a Report and Recommendation (R&R) recommending that Mr. Martin's complaint be dismissed in its entirety for failure to state a claim. *See id.* at 6. As relevant here, the R&R did not address Mr. Martin's retaliation claim. *See id.* at 6–7. On January 15, 2016, Mr. Martin timely filed his objections to the Magistrate Judge's R&R, to which he attached a document entitled "Amended Complaint." *See id.* at 7. In this "Amended Complaint," Mr. Martin reiterated, among other things, his claim that Captain Duffy had placed him in PHD in "retaliation" for filing a grievance against Sergeant Rogers. *See id.*

On January 20, 2016, the district court issued an order adopting the R&R and dismissing the complaint. *See id.* On February 1, 2016, Mr. Martin timely filed a Notice of Appeal. *See id.* The Fourth Circuit appointed the undersigned *pro bono* counsel to represent Mr. Martin.

4. On appeal, Mr. Martin argued, among other things, that the district court erred in failing to address his claim that he experienced "reprisal, harassment, and retaliation" for exercising his First Amendment rights. *See id.* at 14. In particular, Mr. Martin argued that he had pleaded sufficient facts to support his First Amendment retaliation claim—namely, that he engaged in protected First Amendment activity by filing a grievance, that he

then suffered the adverse action of being moved into segregation, and that he was moved into segregation because of his grievance. *See id.* at 15-19. Petitioner responded by asserting qualified immunity to the First Amendment claim, arguing that no First Amendment right to be free from retaliation for filing a prison grievance was "clearly established" under Supreme Court or Fourth Circuit law. *See id.* at 19-20.

On June 1, 2017, the Fourth Circuit affirmed the district court's dismissal as to Mr. Martin's due process and equal protection claims but reversed as to his First Amendment retaliation claim. *See id.* at 2–3. It reasoned that (1) when his complaint, objections, and "Amended Complaint" were liberally construed, Mr. Martin had pleaded sufficient facts to raise that claim, and (2) Ms. Duffy was not entitled to qualified immunity from the retaliation claim because, at the time the underlying conduct occurred, "it was clearly established . . . that retaliating against an inmate for filing a grievance violates the inmate's rights under the First Amendment." *Id.* at 3. To reach the latter conclusion, the court relied on *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533 (4th Cir. 2017). *See id.*

Booker, in turn, relied heavily on cases from the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits to conclude that the right in question was clearly established at least as of 2010. *See Booker*, 855 F.3d at 544–45. To start, the court explained that a prior Fourth Circuit case addressing whether inmates had a constitutional right to particular grievance procedures—*Adams v. Rice*, 40 F.3d 72 (4th Cir. 1994)—did not answer the relevant question (*i.e.*, whether they had a First

Amendment right to be free from retaliation if they used an established procedure). *See Booker*, 855 F.3d at 541–43. The court explained that *Adams* held merely that a prisoner does not have a constitutional right to a grievance procedure, but did not address whether there is a right to be free from retaliation for utilizing an existing grievance procedure. *See id.* Next, it analyzed an unpublished Fourth Circuit opinion and three district court cases that suggested the right at issue was not clearly established. *See id.* at 542–44. The court noted that its own unpublished decisions, as non-binding precedents, could not be considered in deciding whether a point of constitutional law was clearly established. *See id.* at 542–43. In addition, it explained that all four decisions had misconstrued *Adams*. *See id.* And, in any event, it held that these few opinions could not overcome the "overwhelming 'consensus of persuasive authority' that inmates possess a First Amendment right to be free from retaliation for filing a grievance." *Id.* at 545–46.

REASONS TO DENY MOST OF THE PETITION

Petitioner presents four arguments in support of her petition for a writ of certiorari. A slight variation of one argument may warrant this Court's review. In particular, this case implicates an existing circuit split regarding which decisions courts may or must consider to determine, in the absence of binding precedent, whether a law is "clearly established" for purposes of qualified immunity. Each of the remaining arguments, however, concerns how the Fourth Circuit interpreted its own precedent, which is unworthy of this Court's review. In addition, the

Fourth Circuit was plainly correct with respect to those interpretations, and Petitioner has not even attempted to show that those interpretations affect anyone outside of the Fourth Circuit.

I. There Is A Circuit Split Regarding What Decisions A Court May Consider To Determine Whether A Law Is "Clearly Established," And This Case Could Be An Appropriate Vehicle To Resolve That Split

1. This case implicates a circuit split, but not exactly the one Petitioner proposes. Instead, the split concerns what decisions courts may consider when assessing whether a law is "clearly established" for purposes of a qualified immunity analysis. This Court has previously instructed only that, in the absence of controlling authority, courts may look to "a consensus of cases of persuasive authority" to determine whether the law is clearly established. *Wilson v. Layne*, 526 U.S. 603, 617 (1999). It has not specified which cases may or must be included as "persuasive authority."

2. At the most restrictive extreme, the Eleventh Circuit has held that "the law can be 'clearly established' for qualified immunity purposes *only* by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose." *Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 827, n.4 (11th Cir. 1997) (en banc) (emphasis added) (acknowledging disagreement on this point from other circuits but concluding that the Supreme Court has not "address[ed] the extent to which decisions of the 'lower courts' must, should, or may be considered in deciding whether a constitutional right has been clearly established, nor [has] it identif[ied] any impropriety

in considering only the decisions of the circuit or highest court of the state in which the relevant events took place"); *see also Loftus v. Clark-Moore*, 690 F.3d 1200, 1206 (11th Cir. 2012) (reiterating its refusal to consider decisions from other circuits).[2]

The other circuits permit consideration of a broader universe of case law. In particular, the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits will, in appropriate circumstances, consider decisions from other federal circuit courts to determine whether a law has been "clearly established." *See, e.g.*, *Kovacic v. Villarreal*, 628 F.3d 209, 214 (5th Cir. 2010) ("[W]e consider the status of the law both in our circuit and in our sister circuits at the time of the defendants' actions."); *Williams v. Bittner*, 455 F.3d 186, 192 (3d Cir. 2006) (explaining that it "routinely consider[s] decisions by other Courts of Appeals as part of [its] 'clearly established' analysis when [it has] not yet addressed the right asserted by the plaintiff"); *Rogers v. Pendleton*, 249 F.3d 279, 287–88 (4th Cir. 2001) ("In determining whether a right is clearly established, we may rely upon cases of controlling authority in the jurisdiction in question, or a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful. . . . [I]f there are no cases of

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[2] Prior to *Jenkins*, the Eleventh Circuit appeared to have adopted the opposite rule. *See Greason v. Kemp*, 891 F.2d 829, 833 (11th Cir. 1990) ("To decide whether . . . prisoners had a clearly established constitutional right to psychiatric care, we look to the law established by the Supreme Court, the courts of appeals, and the district courts.").

controlling authority in the jurisdiction in question, and if other appellate federal courts have split on the question of whether an asserted right exists, the right cannot be clearly established for qualified immunity purposes." (internal quotation marks and citation omitted)); *El Dia, Inc. v. Governor Rossello*, 165 F.3d 106, 110 n.10 (1st Cir. 1999) (outlining the circumstances in which it will consider decisions from other circuits); *Blake v. Wright*, 179 F.3d 1003, 1007 (6th Cir. 1999) (acknowledging that it will consider other circuits' decisions, at least when they are "directly on point"); *Varrone v. Bilotti*, 123 F.3d 75, 79 (2d Cir. 1997) (acknowledging that it will consider decisions from other circuits); *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir. 1996) (same); *Albright v. Rodriguez*, 51 F.3d 1531, 1535, 1538–39 (10th Cir. 1995) (holding that a law may be clearly established by the "weight of authority from other courts" and considering decisions from other circuits in its analysis); *Norfleet By & Through Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 291 (8th Cir. 1993) (acknowledging that it will consider decisions from other circuits); *Cleveland-Perdue v. Brutsche*, 881 F.2d 427, 431 (7th Cir. 1989) (same). Thus, the initial split concerns whether to consider other circuit courts' opinions to determine whether a law is "clearly established."

3. In addition, at least the Seventh, Eighth, and Ninth Circuits take an even more expansive view and allow consideration of district court opinions. *See, e.g.*, *Osilinski*, 92 F.3d at 936 ("Absent binding precedent, we look to all available decisional law, including the law of other circuits and district courts, to determine whether the right was clearly

established."); *Norfleet*, 989 F.3d at 291 (similar); *Cleveland-Perdue*, 881 F.2d at 431 (similar). As such, there is also a secondary split about whether to consider district court opinions to determine whether a law is clearly established.

Indeed, there appears to be an additional split regarding whether to include unpublished decisions in the analysis. *Compare, e.g.*, *Ciancio v. Patton*, 617 Fed. App'x 895, 899 & n.2 (10th Cir. 2015) (unpublished) (considering unpublished Tenth Circuit opinions as part of the clearly established inquiry because such opinions, though not binding, are "persuasive"); *Prison Legal News. v. Lehman*, 397 F.3d 692, 701–02 (9th Cir. 2005) (holding that, to determine whether a right was clearly established, the court could "look at unpublished decisions and the law of other circuits, in addition to Ninth Circuit precedent"); *McCloud v. Testa*, 97 F.3d 1536, 1555 & n.28 (6th Cir. 1996) (considering its unpublished decisions as part of the analysis and noting that such decisions are "persuasive" because "they show how our court dealt with concrete examples"), *with Copper v. Brown*, 844 F.3d 517, 525 n.8 (5th Cir. 2016) (noting that an unpublished decision "does not constitute clearly established law for purposes of [qualified immunity]"); *Cerrone v. Brown*, 246 F.3d 194, 202 (2d Cir. 2001) (holding that an unpublished district court opinion "affirmed by an unpublished table decision does not determine whether a right was clearly established"); *Hogan v. Carter*, 85 F.3d 1113 , 1118 (4th Cir. 1996) (en banc) (holding that unpublished Fourth Circuit opinions "cannot be considered in deciding whether particular conduct violated clearly established law" because the court "could not allow

liability to be imposed upon public officials based on . . . opinions that we ourselves have determined will be binding only upon the parties immediately before the court").

4. On the other hand, Petitioner suggests that there is a somewhat different conflict over whether courts should examine district court decisions to determine whether a right *is not* clearly established, but must not consider district court decisions to determine whether a right *is* clearly established. *See* Pet. at 20. There is no such conflict. Petitioner's error comes in two parts.

First, Petitioner relies on a specious distinction between what courts may consider to hold that a law *is* clearly established and what they may consider to hold that a law *is not* clearly established. *See id.* But, for this prong of the qualified immunity analysis, courts must answer a single question: Is the law clearly established? It makes no sense for courts to consider one body of law to answer the question in the affirmative and a different body of law to answer in the negative. In all events, courts should consider a single body of case law and determine whether the answer is "yes" or "no." No circuit decision suggests otherwise.[3]

[3] For this reason, the Fourth Circuit did not misapply this Court's analysis in *Camretta v. Green*, 563 U.S. 692 (2011). In that case, the Court noted that, because of their limited precedential value, "[m]any Courts of Appeals . . . decline to consider district court precedent when determining if constitutional rights are clearly established for purposes of qualified immunity. Otherwise said, district court decisions—unlike those from the courts of appeals—do not necessarily settle

Second, Petitioner offers a strained reading of this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002), to argue that in-circuit district court opinions should carry more weight than other circuit courts' opinions. *See* Pet. at 21. *Hope* suggests no such thing. In that case, the Court analyzed whether a prisoner's right to be free from cruel and unusual punishment in the form of being handcuffed to a hitching post was "clearly established" for purposes of qualified immunity. *See Hope*, 536 U.S. at 739–48. As part of that analysis, the Court reviewed decisions from the Eleventh Circuit (*i.e.*, the relevant geographical court of appeals) and pre-1981 decisions from the Fifth Circuit, which are binding precedent in the Eleventh Circuit. *See id.* at 742–44. The Court held that these cases "clearly established" the right in question. *See id.* at 745–46. It then explained that "the significance of federal judicial precedent is a function in part of the Judiciary's structure." *Id.* at 747. As such, district court decisions suggesting an opposite conclusion were "no match for the Circuit precedents" it had previously discussed. *Id.* Because the Court addressed only circuit court precedent that was binding on the Eleventh Circuit, Petitioner reads this

constitutional standards or prevent repeated claims of qualified immunity." *Id.* at 709 n.7. It reached this conclusion because district court opinions are not binding precedent even upon the district judge directly involved in writing them. *See id.* The "important distinction" Petitioner advances between the cases a court may consider to determine whether a law *is* clearly established and the cases a court may consider to determine whether a law *is not* clearly established finds no support in this case. The Fourth Circuit was entitled to rely upon *Camretta*'s assessment of the precedential value of district court opinions to determine whether it should include such opinions in its analysis.

statement as being limited to situations in which district court decisions clash with *in-circuit* court of appeals decisions. *See* Pet. at 21.

To arrive at this conclusion, however, Petitioner overlooks a critical feature of the *Hope* Court's decision—namely, that "[t]here [were] apparently no decisions on similar facts from other Circuits, presumably because Alabama is the only State to authorize the use of the hitching post in its prison system." *Hope*, 536 U.S. at 747 n.13. The fact that this Court searched for case law from other circuits suggests that it did not intend to limit its holding in the manner Petitioner suggests. In addition, the Court's initial statement regarding the precedential weight of federal decisions being a function of the Judiciary's structure further undermines Petitioner's argument, as it implies that decisions from out-of-circuit courts of appeals should generally be accorded greater weight than in-circuit district court decisions. And *Camretta*'s assessment of the precedential value of district court opinions—that they are not binding "in either a different judicial district, the same judicial district, or even upon the same judge in a different case, *Camretta*, 563 U.S. 747 n.7—provides the final blow. Accordingly, no circuit court prioritizes in-circuit district court decisions over decisions from federal courts of appeals. Petitioner has offered nothing to suggest otherwise.

5. Petitioner incorrectly claims that the Fourth Circuit has "refused to consider district court decisions" or otherwise "reasoned that it should not consider district court decisions" when assessing whether a law is "clearly established" for purposes of qualified immunity. *See* Pet. at 19. The Fourth

Circuit has done no such thing. Indeed, the Fourth Circuit considered the proffered district court decisions and concluded that they misread prior Fourth Circuit case law, "erroneously . . . reject[ed] an inmate's claim that he was retaliated against for filing grievances," and, in any event, did "not alter [the court's] conclusion that the right was clearly established." *Booker*, 855 F.3d at 545.

Far from "clearly reject[ing] any consideration of district court decisions," Pet. at 22, the court weighed the persuasive value of those district court decisions against that of decisions by ten of its sister circuits and concluded that the right in question had been clearly established. *See Booker*, 855 F.3d at 544–45. In short, even in full consideration of the district court opinions, the Fourth Circuit determined that "there [was] still an overwhelming 'consensus of persuasive authority' that inmates possess a First Amendment right to be free from retaliation for filing a grievance." *Id.* at 545–46.

6. Still, this case implicates a circuit split regarding what decisions a court may or must consider to determine whether a law is "clearly established" for purposes of qualified immunity. Indeed, as demonstrated above, this case implicates three related splits among the circuit courts regarding which precedents to consider. And this case may be an appropriate vehicle for resolving the issue. It appears to be a better vehicle than *Booker*, which involves a currently pending petition for a writ of certiorari, because this case does not involve any thorny factual concessions by either party or other vehicle problems identified by the respondent there. *See* Opp'n to Pet. for Writ of Cert., *South Carolina*

Dep't of Corrections, et al. v. Booker, No. 17-307 (filed Nov. 22, 2017), at 29-31. This case also involves consideration of all three of the categories of cases that some of the courts of appeals consider in determining, in the absence of binding precedent, whether a right is clearly established: decisions of other circuit courts; decisions of district courts; and unpublished decisions.

Moreover, the parties largely agree about the underlying facts, and the decision below squarely presents the issue for this Court's review. In addition, the First Amendment claim is the only one that remains in the case, so resolution of the "clearly established" question, which turns at least in part on which cases a court may consider, is outcome determinative. Moreover, the petition and this brief suggest that the issue recurs frequently. This Court could resolve the split implicated by the decision below by granting the petition.

II. Petitioner's Disagreement With The Fourth Circuit's Reading Of Its Own Precedent Of *Adams v. Rice* Does Not Warrant This Court's Review

1. Petitioner next argues that the Fourth Circuit improperly ignored its own precedent in *Adams v. Rice*, 40 F.3d 72 (4th Cir. 1994). *See* Pet. at 5–6. Petitioner claims the court "disregarded" that decision's analysis and "never explain[ed] why *Adams* does not foreclose the First Amendment claim." Pet. at 6. But the court did not "disregard" *Adams*. Instead, as Petitioner admits, *see* Pet. at 6–7, it relied on its decision in *Booker*, which had fully explained why *Adams* did not foreclose Mr. Martin's claim.

As *Booker* explained, the issue in *Adams* was whether a prisoner "had a constitutional right to a 'particular grievance procedure.'" *Booker*, 855 F.3d at 541 (quoting *Adams*, 40 F.3d at 75). The Fourth Circuit answered in the negative and "establishe[d] a clear rule: inmates have no constitutional entitlement or due process interest in access to a grievance procedure." *Id.* As a result, a prisoner "cannot bring a § 1983 claim alleging denial of a specific grievance process." *Id.* But "*Adams* does not stand for—or even imply—that" "inmates do *not* exercise any constitutional right (under the First Amendment or otherwise) when they file a prison grievance." *Id.* Indeed, *Adams* was "entirely silent" on "whether an inmate's First Amendment right is violated when he is *retaliated against* for submitting a grievance pursuant to an existing grievance procedure." *Id.* "That a prison is not required under the Constitution to provide access to a grievance process does not mean that prison officials who retaliate against inmates for filing grievances do not violate the Constitution." *Id.* Thus, *Adams* simply "does not speak to the right at issue." *Id.* at 542.

Booker's analysis relies on the "critical distinction between the right of access or entitlement to a grievance process and the right to be free from retaliation for filing a grievance." *Id.* at 541. Petitioner overlooks this distinction entirely. In addition, the Fourth Circuit's resolution of the two issues—namely, that prisoners have no liberty interest in particular grievance procedures but possess First Amendment rights to be free from retaliation for utilizing existing grievance procedures—conforms with decisions from the Fifth,

Eighth, Ninth, and Eleventh Circuits. *See id.* at 542 (collecting cases).

2. Petitioner simply disagrees with *Booker*'s reading of *Adams*. She argues that *Adams* addressed the constitutional right implicated in this case and affirmatively held that inmates have no First Amendment right to file prison grievances free from retaliation. *See* Pet. at 7–10. And she believes the dissenting judge in *Booker*, not the majority, correctly decided the issue. *See id.* at 11. But whether the Fourth Circuit has correctly interpreted its own precedent—which, as explained above, it has—does not call for this Court's intervention.

In general, a court has "an undoubted right to construe its own decision . . . and to declare what the judgment rendered therein really meant, and to define the scope thereof." *Newport Light Co. v. City of Newport*, 151 U.S. 527, 538 (1894). For this reason, this Court generally elects not to police a circuit court's reading of its own decisions. *See, e.g.*, *Davis v. Scherer*, 468 U.S. 183, 1 n.9 (1984) ("We see no reason to doubt . . . that the Court of Appeals . . . had full knowledge of its own precedents and correctly construed them."); *see also Great N. Ry. Co. v. Minnesota*, 216 U.S. 206, 231 (1910) (according a similar latitude to state courts). Petitioner presents no reason for this Court to depart from the norm and declare how the Fourth Circuit must interpret its own precedents.

In addition, any decision this Court rendered on the merits would be of limited precedential value for two reasons. *First*, because the issue concerns only how the Fourth Circuit interpreted its own precedent to determine whether a law was "clearly established,"

any decision would apply only within that single circuit. As a general matter, however, this Court grants certiorari to resolve conflicts among the circuits, not within them. *See* S. Ct. R. 10.[4] *Second*, the Fourth Circuit has now clearly established inmates' right to be free from retaliation for filing grievances. Thus, even if the Court granted certiorari and decided that the right in question was not clearly established prior to *Booker*, its opinion would have no prospective effect. Instead, it would apply only to conduct that predated *Booker*. These limitations, coupled with the absence of any compelling reason to overturn the Fourth Circuit's reading of its own precedent, weigh strongly against reviewing this issue.

III. The Fourth Circuit's Decision To Reject A Small Number of Non-Binding Decisions That Predated Its Ruling In *Booker* Does Not Itself Warrant This Court's Review

1. Upon finding that no binding precedent addressed the right at issue, the *Booker* court sought to determine whether "the right was clearly established based on . . . a consensus of persuasive authority." *Booker*, 855 F.3d at 543. It concluded that there was a "robust" and "overwhelming" consensus that inmates have a constitutional right to file grievances free from retaliation. *See id.* at 544–45. Indeed, prior to the Fourth Circuit's decision in *Booker*, ten circuits had concluded, all in published

[4] For the same reason, this Court should not grant certiorari to determine whether the Fourth Circuit correctly applied its *Adams* decision in *Daye v. Rubenstein*, 417 Fed. App'x 317 (4th Cir. 2011).

opinions, that inmates possess a First Amendment right "to be free from retaliation in response to filing a prison grievance." *Id.* (collecting cases). Based on this reality, the Fourth Circuit felt "compelled to conclude that [the right in question] was clearly established under the First Amendment." *Id.* at 545. It noted that "[t]he unanimity among our sister circuits demonstrates that the constitutional question [was] 'beyond debate.'" *Id.*

2. Petitioner does not contest the fact that all ten circuit courts to address the issue had held that inmates have a First Amendment right to be free from retaliation when they file grievances, nor does she appear to argue that ten circuit court decisions are insufficient to clearly establish a constitutional right. Instead, Petitioner argues that "fervent disagreement" and uncertainty "among accomplished jurists," as evidenced by the dissent in *Booker*, an unpublished Fourth Circuit opinion, and a handful of district court cases, prevented a determination that the law in question was clearly established. *See* Pet. at 14–18. As an initial matter, whether a few district court decisions in the Fourth Circuit undermine the decision below is uniquely a Fourth Circuit issue and, for that reason, does not warrant this Court's review. *See supra* Part II. In addition, Petitioner is mistaken.

First, that *Booker* involved a dissent does not mean the right at issue was not clearly established. To conclude otherwise would grant a single panel member the unilateral power to render the law unclear in every case. In any event, "the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically

render the law unclear." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 378–79 (2009).

Second, the unpublished Fourth Circuit opinion in *Daye v. Rubenstein*, 417 Fed. App'x 317 (4th Cir. 2011), which cited *Adams* for the proposition that prisoners do not enjoy a constitutional right to be free from retaliation when they file grievances, does not render the law unclear. To begin with, Petitioner ignores other unpublished Fourth Circuit decisions that held that inmates can bring First Amendment claims alleging retaliation for filing a grievance. *See Booker*, 855 F.3d at 542 (citing two such opinions). In addition, the Fourth Circuit has now explained that *Daye* "misconstrued *Adams*." *Booker*, 855 F.3d at 542–43. As noted above, there is no reason to upset the Fourth Circuit's view of its own case law.

Third, three of the district court opinions Petitioner argues she was entitled to rely upon, *see* Pet. at 16–17, predate at least seven of the ten decisions the Fourth Circuit found clearly established the right at issue. *Compare* Pet. at 16 (citing two cases from 1996 and another from 2001), *with Booker*, 855 F.3d at 544–45 (relying on the Second and D.C. Circuits' opinions from 2002, the Third Circuit's opinion from 2003, the Seventh and Eleventh Circuits' opinions from 2007, the Fifth Circuit's opinion from 2008, and the Ninth Circuit's opinion from 2009). Thus, the district court cases do not even conflict with the principle that a later-developed consensus of cases clearly established the right at issue.

The fourth district court opinion Petitioner seeks to rely upon was unpublished. More importantly, it similarly misconstrued *Adams*, an issue the Fourth

Circuit has now made clear. For these reasons, it does not undermine the Fourth Circuit's conclusion.

3. In addition, Petitioner's citation to *Pearson v. Callahan*, 555 U.S. 223 (2009), to support her reliance on these—or any other—district court decisions is unavailing. *See* Pet. at 17. *Pearson*'s statement that "[p]olice officers are entitled to rely on existing lower court cases without facing personal liability for their actions" does not reference any district court opinions whatsoever. *Pearson*, 555 U.S. at 244–45. Instead, the Court discussed three decisions from the federal courts of appeals and two decisions from state supreme courts, all of which the Court described as "lower courts" and all of which held that the conduct at issue did not violate the Constitution. *See id.* The Court then held that "[t]he officers . . . were entitled to rely on *these* cases, even though their own Federal Circuit had not yet ruled" on the issue in question, and even though, once it did decide the issue, that federal circuit held that the conduct in question violated the Constitution. *Id.* (emphasis added).

Pearson nowhere suggests that officers are entitled to rely on *any* lower court decisions, including unpublished district court opinions, so long as their circuit court has not affirmatively resolved the issue. Indeed, *Pearson* suggests that, in the absence of a decision directly on point from the Fourth Circuit, Petitioner should have been aware of other courts of appeals decisions (like the ten provided in *Booker*) that addressed the right in question. In any event, the Fourth Circuit's failure to accord decisive weight to Petitioner's preferred group of district court opinions was not at all "contrary to United States Supreme Court precedent." Pet. at 17.

4. Finally, Petitioner confusingly points to several district court opinions that have held that the Fourth Circuit "has not addressed in a published opinion whether inmates have a First Amendment right to be free from retaliation for filing grievances relating to misconduct by prison officials." Pet. at 15–16 (citations omitted). If anything, these cases, all of which post-date *Adams*, undermine Petitioner's argument that *Adams* resolved the question at issue in her favor. In addition, one of the cited cases allowed an inmate's First Amendment retaliation claim based on a consensus of out-of-circuit authority. *See Stokes v. Johnson*, 3:16-cv-127, 2016 WL 3921155, at *2 (W.D.N.C. 2016) ("Although the Fourth Circuit has not issued a published opinion on the question of whether the filing of a grievance by a prisoner implicates the First Amendment, other circuits have held that prison officials may not retaliate against a prisoner for filing grievances."). In any event, these few unpublished decisions fare no better than the ones discussed above. Petitioner points to no authority suggesting that an overwhelming consensus of circuit court opinions clearly establishing a law should be upset by a few unpublished district court opinions.

Petitioner's view that the Fourth Circuit erred in failing to credit the scattered unpublished and district court authorities she invokes over the consensus of circuit court rulings does not, in itself, warrant this Court's review.

IV. Petitioner's Disagreement With The Fourth Circuit's Reading Of Its Own Precedent Of *United States v. Midgette* Does Not Warrant This Court's Review

1. Petitioner's final argument is that the Fourth Circuit read Mr. Martin's combination of objections and an "Amended Complaint," which he filed in response to the magistrate judge's R&R, too liberally. As relevant here, the Fourth Circuit had to resolve the tension between two precedents. On the one hand, the Supreme Court has clearly announced that "[a] document filed *pro se* is to be liberally construed" and that such documents, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotation marks and citations omitted). On the other hand, the Fourth Circuit has held that "a party . . . waives a right to appellate review of particular issues by failing to file timely objections specifically directed to those issues." *United States v. Midgette*, 478 F.3d 616, 621 (4th Cir. 2007).

In the decision below, the Fourth Circuit resolved this tension by reasoning that Mr. Martin had preserved all the issues presented in either his objections or his "Amended Complaint." It specifically cited both *Erickson* and *Midgette* before concluding that Mr. Martin had "sufficiently alerted the district court that he believed the magistrate judge erred in recommending dismissal" of his First Amendment retaliation, equal protection, and due process claims. In addition, it held that Mr. Martin had not preserved his claim regarding good-time credits because he had

not incorporated that claim into his objections or into the attached "Amended Complaint."

Once again, Petitioner's disagreement with the way the Fourth Circuit has construed its own precedent is no reason to grant certiorari. *See supra* Part II. As a general matter, the Fourth Circuit is best situated to assess the scope of its *Midgette* decision in light of its concomitant obligation to construe *pro se* litigants' documents liberally.

2. Moreover, Petitioner's half-hearted attempt to manufacture a circuit split falls flat. Only one of the cases it cites deals with a *pro se* litigant's objections to a R&R and, although it held, on the specific facts of the case, that the *pro se* litigants had waived appellate review by failing to make specific objections, it also noted that "the waiver rule . . . need not be applied when the interests of justice so dictate." *See United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1060 (10th Cir. 1996). There is no tension between that case and the decision below, which essentially held, in the interests of justice, that the waiver rule should not be applied in this case. The remaining cases Petitioner cites simply do not involve *pro se* litigants and are, for this reason, inapposite. *See generally Grayalde-Rijos v. Municipality of Carolina*, 747 F.3d 15 (1st Cir. 2014) (involving a represented plaintiff); *Mario v. P & C Food Market, Inc.*, 313 F.3d 758 (2d Cir. 2002) (same and concluding, in any event, that the matter was not waived because the district court reviewed it *de novo*); *Heath v. Jones*, 863 F.2d 815 (11th Cir. 1989) (affirming the denial of habeas corpus for the reasons stated in the magistrate judge's R&R, which it attached as an appendix and which included admonishments regarding objections, but not

addressing the required level of specificity, let alone for a *pro se* litigant); *Lockert v. Faulkner*, 843 F.2d 1015 (7th Cir. 1998) (expressly noting that the plaintiff retained counsel prior to filing objections). There is no circuit split on this issue, and there is no compelling reason to grant certiorari to address the manner in which the Fourth Circuit interpreted its own precedent.

CONCLUSION

The petition presents one issue on which the circuit courts are divided, and this case could be an appropriate vehicle to resolve that conflict. The petition otherwise should be denied.

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Respectfully submitted,

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