No. _____

In The

Supreme Court of the United States

SHELBY HAWKINS,

Petitioner,

v.

JOHNNY BANKS, III,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On February 17, 2017, Johnny Banks, and his wife, Vanessa, had a heated argument in their home over an anonymous letter she received accusing him of infidelity. During the argument, Vanessa called 911. Although Vanessa failed to speak to the 911 operator, the operator could hear yelling in the background. The City of Shannon Hills Police Officer, Shelby Hawkins, was dispatched to the Banks' home to investigate the domestic disturbance and the 911 hang-up call. Officer Hawkins knocked on the front door and announced his presence multiple times, but his knocks went unanswered. Officer Hawkins heard noises and what he described as muffled "nos." Off. Hawkins pulled his gun and began kicking the door. Banks testified that he said, "who the fuck is this?", and opened the door, "with a little bit of force" with his arm raised head high. When Banks opened the door, something hit Officer Hawkins on the head, and Officer Hawkins shot Banks in the leg.

The questions presented are:

1. Whether the Eighth Circuit wrongly denied qualified immunity to Officer Hawkins by finding the use of force was not reasonable as a matter of law when Officer Hawkins had probable cause to believe there was a threat of serious physical injury or death?

QUESTIONS PRESENTED – Continued

2. Whether the Eighth Circuit wrongly denied qualified immunity to Officer Hawkins in the absence of any precedent finding a Fourth Amendment violation based on similar facts?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceedings in the Court whose judgment is sought to be reviewed are:

- Shelby Hawkins an individual, defendant and appellant below, petitioner here.

- Johnny Banks, III, an individual, plaintiff and appellee below and respondent here.

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

- United States District Court, Eastern District of Arkansas, Central Division, Case No. 2:18-cv-00039-BSM, *Johnny Banks v. Shelby Hawkins, City of Shannon Hills*; Order denying summary judgment entered September 26, 2019.

- United States Court of Appeals for the Eighth Circuit, Case No. 19-3092, *Johnny Banks v. Shelby Hawkins*; Judgment entered May 27, 2021; Order

RELATED PROCEEDINGS – Continued

denying rehearing entered on July 2, 2021.

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UNITED STATES CONSTITUTION AND FEDERAL STATUTES

OPINIONS BELOW

The Eighth Circuit's opinion, the subject of this petition, is reported at *Banks v. Hawkins*, 999 F.3d 521 (8th Cir. 2021) and reproduced in the Petitioner's Appendix A hereto at pages 1a-29a. The Eighth Circuit's denial of petitioner's motion for rehearing *en banc* is produced in Appendix C at Pet. App. 40a. The opinion of the District Court for the Eastern District of Arkansas is reproduced at pages 30a-39a.

BASIS FOR JURISDICTION IN THIS COURT

The Eighth Circuit entered its judgment and its opinion on May 27, 2021. (Pet. App. 1a.) Petitioner timely filed a petition for panel and *en banc* rehearing, and on July 2, 2021, the court denied the petition. (Pet. App. 40a.)

This Court has jurisdiction to review the Eighth Circuit's May 27, 2021 decision on writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondent brought the underlying action under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondent alleges Petitioner violated the rights secured by the United States Constitution's Fourth Amendment, which provides:

> 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.

STATEMENT OF THE CASE

I. Facts

On February 17, 2017, Johnny Banks, and his wife, Vanessa, had a heated argument in their home over an anonymous letter she received accusing him of infidelity. During the argument, Vanessa called 911. (Pet. App. 30a.) Although Vanessa failed to speak to the 911 operator, the operator could hear yelling in the background. *Id*. The City of Shannon Hills Police Officer Shelby Hawkins was dispatched to the Banks's home to investigate the domestic disturbance and the 911 hang up call. (Pet. App. 31a.) Hawkins knocked on the front door and announced his presence multiple times, but his knocks went unanswered. *Id*. Hawkins heard noises and what he described as muffled "no's." *Id.* Hawkins pulled his gun and began kicking the door. *Id*. Banks testified that he said, "who the fuck is this?", and opened the door, "with a little bit of force" with his arm raised head high. (Pet. App. 6a.) When Banks opened the door, something hit Hawkins on the head, and Hawkins shot Banks in the leg. (Pet. App. 6a-7a.)

II. Proceedings

A. Trial Court

Banks filed suit in the United States District Court for the Eastern District of Arkansas Central Division against Officer Hawkins in his individual capacity and against the City of Shannon Hills, Arkansas, claiming, *inter alia*, that Officer Hawkins used excessive force, in violation of the Fourth Amendment when Officer Hawkins discharged his gun and struck Johnny Banks in the upper thigh. The district court granted summary judgment for the City of Shannon Hills and denied summary judgment and qualified immunity to Officer Hawkins. (Pet. App. 38a-39a.)

The district court noted, "Individuals have a right to be free from excessive force if a reasonable officer could not believe that the individual posed a serious threat to the officer or others." (Pet. App. 35a.) (*citing Ellison v. Lesher*, 796 F.3d 910, 917 (8th Cir. 2015) and *Mullenix v. Luna*, 136 S.Ct. 305, 312 (2015). (Pet. App 35a.) In denying qualified immunity to Officer Hawkins, the district court held, "When the parties dispute the officer's reasonableness in using force, qualified immunity for the officer's use of force is inappropriate." *Id. (citing Craighead v. Lee*, 399 F.3d 954, 963 (8th Cir. 2005). *Id*.

B. Court of Appeals

1. Excessive Force

The Court of Appeals affirmed the decision of the U.S. District Court. The panel majority relied on the alleged lapse of time between when Officer Hawkins heard screams inside the home and when he attempted to make entry as its basis for determining that Officer Hawkins did not have a reasonable belief that Vanessa Banks was in "imminent danger." (Pet. App. 10a-11a.) The panel majority also relied on the assumption that because Officer Hawkins did not know Vanessa Banks's location when he fired the shot that he was not acting to protect her. (Pet. App 11a.) Finally, the panel majority concluded that because there is no evidence in the record to suggest Officer Hawkins's injury was attributable to Banks, "no reasonable officer would believe he had probable cause to use deadly force." (Pet App. 14a-15a.)

Ultimately, the panel majority concluded that "Hawkins may have believed his life [was] at stake because of Banks, but on this record, the reasonableness of that belief is for the jury to decide." (Pet. App. 15a, fn. 8.)

2. Qualified Immunity

After determining that the force was either not justified, or that whether it was reasonable was a question for a jury to decide, the panel majority acknowledged this Court's instruction that, "To be clearly established, '[t]he contours of the right must be sufficiently clear that a reasonable office[er] would

understand that what he is doing violates that right,'" (Pet. App 16a.) (*citing Anderson v. Creighton*, 483 U.S. 635, 640 (1987), and that the inquiry, "must be particularized to the facts of the case." *Id. citing, White v. Pauly*, 137 S.Ct. 548, 552 (2017). The panel majority then concluded that, "Though 'earlier cases involving fundamentally similar facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding.'" (Pet. App. 16a.) *citing Hope v. Pelzer*, 546 U.S. 730, 741 (2002).

In denying qualified immunity, the panel majority relied on two Eighth Circuit cases, *Ellison v. Lesher*, 796 F.3d 910 (8th Cir. 2015) and *Nance v. Sammis*, 586 F.3d 604 (8th Cir. 2009). Neither case involved a police response to a domestic disturbance taking place behind closed doors, nor involved situations where the officers were struck in the head, and in both cases, the officers had the ability to observe what the suspects were doing throughout the entire incident before shooting. (Pet. App. 19a.)

3. Dissent

Judge Stras dissented. Judge Stras pointed out that the panel majority ignored this Court's repeated instruction that any "'generalized right . . . must be 'clearly established' in a 'particularized . . . sense' to overcome qualified immunity." (Pet. App 24a.), *citing Brosseau v. Haugen*, 543 U.S. 194, 197-99 (2004) (per curiam). Judge Stras faulted the panel majority

formulating the right at issue as, "a reasonable officer had fair warning in February 2017 that he may not use deadly force against a suspect who did not present an imminent threat of death or serious injury, even if the officer felt attacked earlier and even if he believed the suspect had previously posed a threat," noting that such a formulation risked, "sweeping too broadly," and pointing out that there were cases that fell within the panel majority's stated clearly established rule that did not involve the violation of a constitutional right, specifically noting, *Ransom v. Grisafe*, 79- F.3d 804 (8th Cir. 2015). (Pet. App. 25a.) Finally, the dissent noted that neither of the two cases relied on by the panel majority in demonstrating the law was clearly established, *Ellison v. Lesher* or *Nance v. Sammis*, involved "similar circumstances" to the case at hand, nor did they "squarely govern the issue." (Pet. App. 26a.) citing *District of Columbia v. Wesby*, 138 S. Ct. 577, 591 (2018) and *Kisela v. Hughes*, 138 S.Ct. 1148 (2018) at 1153.

4. Denial of Rehearing

Officer Hawkins petitioned for rehearing and rehearing *en banc*. (Pet. App. 40a.) The panel and Eighth Circuit denied both. *Id*.

REASONS WHY CERTIORARI IS WARRANTED

This Court should grant review because in denying qualified immunity to Officer Banks, the panel majority blatantly disregarded this Court's precedent setting forth the correct analysis to apply in deciding qualified immunity in excessive force cases. If review is not granted, the panel majority's opinion will thwart the policies underlying qualified immunity, which this Court has determined to be important to "society as a whole." *See White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam).

I. Review is necessary because the panel majority's blatant disregard of this Court's precedent in deciding qualified immunity thwarts the important public policies underlying qualified immunity.

As pointed out by the dissent below, the panel majority's decision in *Banks v. Hawkins*,

> does more than expose Officer Hawkins to liability. It stands as a warning to other officers who may need to make split second decisions to protect their own safety. The message could not be clearer: even in the absence of a clearly controlling legal rule, think twice before acting, regardless of whether your own life is at stake,

> because a court may step in later and second-guess your decision.

999 F.3d 521, 534 (8th Cir. 2021) (Stras, J., dissenting). Circumstances like the ones presented in this case are why qualified immunity exists. *Id*.

This Court recognizes that qualified immunity is important to society as a whole because it protects the public's interest in public officials' ability to take legitimately required actions, with independence, and without inhibition of discretionary action where clearly established rights are not implicated. *See White v. Pauly*, 137 S. Ct. at 551; *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 611, n.3 (2015); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 525–26. (1985). Failure to recognize these important interests, would not only risk deterring lawful decisiveness of police officers in tensely dangerous and rapidly evolving circumstances, it would also risk, "deterring able people from public service." *Harlow*, 457 U.S. at 816.

Police officers are charged with apprehending criminals and protecting the public. Many times, as in this case, the discharge of those duties requires split second decisiveness under extremely tense circumstances, and this Court has recognized, "'officials should not err always on the side of caution' because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quoting *Davis v. Scherer*, 468 U.S. 183, 196 (1984)). The panel majority's opinion risks law

enforcement officers erring on the side of caution for fear of being sued, even where their safety, or the public's safety is at risk. Moreover, it effectively limits the discretion of police officers who are considering use of force to protect themselves and/or the public in extremely tense, split-second circumstances by sending the message to those officers that their decisions will be subject to after the fact, second-guessing, by judges, without consideration for the on-the-scene judgment of the police officers who are charged with protecting the public in the face of death or serious injury. Limiting a police officer's judgment in this way does not promote the public's interests, moreover, it contradicts the policies that this Court determined underlie the necessity for qualified immunity in *Harlow*.

The important policies underlying qualified immunity are compellingly illustrated by the facts in this case: A police officer dispatched, at night, to the residence of a domestic dispute reported by means of a 911 hang up call on which yelling in the background was heard, attempting to confirm the safety and provide the necessary assistance to the occupant caller, initially unable to gain entry into the home after hearing muffled "no's" from within the residence, then immediately suffering a blow to the head by an unknown object once the door was finally forcefully opened by a seemingly aggressive assailant. Society plainly has a strong interest in allowing a police officer facing such dangerous and tense circumstances the ability to act with uninhibited discretion where this type of split

second decision making could be a matter of life or death to himself, or those he serves to protect. Therefore, this Court should grant review to ensure the important policies underlying qualified immunity as set out in *Harlow* are not thwarted by the panel majority's opinion. If the panel majority's opinion is allowed to stand as law in the Eighth Circuit, the public's safety will be at risk.

II. The panel majority blatantly contradicted this Court's precedent in determining Officer Hawkins's use of force was unconstitutional and in denying qualified immunity by failing to identify a factually similar case to support its conclusion that Officer Hawkins's use of force was unconstitutional and violated clearly established law.

The doctrine of qualified immunity shields officials from liability "unless the official's conduct violates a clearly established constitutional or statutory right of which a reasonable person would have known." *Johnson v. Carroll*, 658 F.3d 819, 825 (8th Cir. 2011). When ruling on qualified immunity, a court must first consider whether, taken in the light most favorable to the plaintiff, the facts show a violation of a particular constitutional right. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). If the court finds no constitutional violation occurred, then the official is entitled to qualified immunity; however, if the facts

as construed could make out a violation, then a second inquiry is required. *Id.* The second inquiry requires determining whether the right is clearly established. *Id.* Courts have discretion to find that an alleged constitutional right was not clearly established without having to resolve first whether there was, in fact, a constitutional violation. *Pearson v. Callahan*, 555 U.S. 223, 230 (2009).

This Court has emphasized that the second inquiry "must be taken in light of the specific context of the case, not a broad general proposition." *Brosseau v. Haugen*, 125 S. Ct. 596, 599 (2004). A right is clearly established only if "existing precedent [has] placed the statutory or constitutional question **beyond debate**." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (emphasis added). "The dispositive question is 'whether the violative nature of particular conduct is clearly established.'" *Id.* at 552 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)(emphasis added)).

When determining clearly established law, this Court has repeatedly held that factual "specificity is especially important in the Fourth Amendment context, where . . . it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Rivas-Villegas v. Cortesluna*, 595 U.S. __, 2021 WL 4822662, at *2 (2021) (quoting *Mullenix*, 577 U.S. at 12)). Given the fact specific nature of excessive force claims, "officers are entitled to qualified immunity unless existing precedent 'squarely

governs,' the specific facts at issue." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (quoting *Mullenix*, 577 U.S. at 13). Unless the case is obvious, the correct analysis for qualified immunity in a Fourth Amendment claim requires identification of a "case where an officer acting under similar circumstances as [the officer] was held to have violated the Fourth Amendment." *White*, 137 S. Ct. at 552.

Of utmost importance here, the panel majority did not conclude that Officer Hawkins's conduct, "constituted a run-of-the-mill Fourth Amendment violation." *Id.* In contrast, it recognized that the case involved, "novel factual circumstances". *Banks v. Hawkins*, 999 F.3d 521, 530 (8th Cir. 2021). Therefore, in order for the panel majority to correctly determine clearly established law, this Court's precedent required the panel majority to identify a factually similar case where the officer's conduct was determined to have violated the Fourth Amendment. *White*, 137 S. Ct. at 552; *see* also *Rivas-Villegas*, 595 U.S. __, 2021 WL 4822662, at *2.

The panel majority did not identify a case that is even remotely factually similar to demonstrate that Officer Hawkins's use of force violated clearly established law. In fact, the existing precedent clearly establishes that Officer Hawkins's use of force was constitutional. Therefore, this Court should intervene, to ensure compliance with this Court's precedent in deciding qualified immunity in order to protect the public's legitimate interests in allowing police officers to

have proper notice that their actions violate an individual's rights, and so that the correct analysis for deciding qualified immunity in use of force cases can be consistently and correctly applied in the Eighth Circuit.

A. This Court should review the panel majority's determination that Officer Hawkins's use of force was unconstitutional because that determination by the panel majority is inconsistent with Eighth Circuit precedent, blatantly contradicts this Court's precedent, and sets bad precedent controlling police officers' responses to domestic disturbances in the Eighth Circuit.

In excessive force cases, to demonstrate that a Fourth Amendment violation occurred, this Court requires a Plaintiff to show that the force used was objectively unreasonable. *Graham v. Connor*, 490 U.S. 368, 394 (1989). The use of deadly force is not constitutionally unreasonable "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). The objective reasonableness standard is judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. Courts must "allow[ ] 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." *Id*. at 397. Reasonableness is judged on the "facts and circumstances of each particular case." *Id*. at 396.

This Court should review the panel majority's determination that Officer Hawkins shooting Mr. Banks was unconstitutional, because that determination by the panel majority not only ignored precedent from the Eighth Circuit, but blatantly contradicted precedent from this Court with respect to the proper standard for determining whether deadly force is reasonable. Essentially, the panel majority cited four bases for its determination that the force was unreasonable: (1) that the time lapse between Officer Hawkins hearing noises inside the home and attempting to gain entry dissolved a belief by Officer Hawkins that there was an imminent threat, *Banks*, at 534-534 (2) that pursuant to *Craighead v. Lee*, 399 F.3d 954 (8th Cir. 2005), because Officer Hawkins fired his weapon while unable to ascertain Vanessa Banks's location, "a jury could conclude that no reasonable officer would have thought deadly force was necessary;" *Id*. at 535; (3) the panel majority's determination that Banks' demeanor when he opened the door is in dispute, *Id.* at 526; and (4) that a reasonable Officer in Hawkins's shoes would not believe he was under attack because he did not see Banks strike him. *Id.* at 527.

The panel majority's conclusion that Banks's demeanor is in dispute is blatantly contradicted by the record based on Banks's own testimony. The remaining reasons cited by the panel majority for its conclusion that the force was unreasonable are grounded in bad policy, set bad precedent controlling how police officers respond to domestic disturbances in the Eighth Circuit, and blatantly contradict precedent from this court and the Eight Circuit controlling the standard under which use of force is determined to be constitutional. Therefore, review should be granted.

1. Based on Eighth Circuit precedent in *Billingsley v. City of Omaha, Estate of Morgan v. Cook*, and *Ransom v. Grisafe*, Officer Hawkins's shooting of Mr. Banks was constitutional and did not violate clearly established law.

As stated by the panel majority, this case involves novel factual circumstances and there is no case factually on point for purposes of comparison in determining the reasonableness of Officer Hawkins's use of deadly force; however, the panel majority's error is demonstrated by comparison to cases from the Eighth Circuit where officers faced circumstances less severe than those faced by Officer Hawkins, where

the Eighth Circuit determined the officer was justified in using deadly force.

In *Billingsley v. City of Omaha*, Officer Pfeiffer was off-duty and at home when his wife observed a man, later found to be Paul Billingsley attempt to enter their front yard which was impeded by bushes. 277 F.3d 990, 992 (8th Cir. 2002). Billingsley then continued down the sidewalk, down a neighbor's driveway, then in between some houses. *Id.* Pfeiffer then observed Billingsley attempt to enter two different neighbors' homes through the back door. *Id.* Pfeiffer then retrieved his service revolver and proceeded outside. *Id*. Billingsley crossed the neighbor's yard and entered the Machals's home, and Pfeiffer then followed him inside. *Id*. Once inside, Pfeiffer informed Billingsley he was a police officer, and ordered him to put his hands up. *Id*. Billingsley had a purse in his left hand, and Pfeiffer could not observe his right hand. *Id*. Billingsley then ran out the back door and jumped off a deck to the ground fifteen feet below. *Id*. He landed in a crouched position and then rotated his left shoulder. *Id*. Pfeiffer fired a shot from fifteen feet above that struck Billingsley in the lower right back and exited out his groin. *Id*. Billingsley was found to be unarmed. *Id*.

The panel majority determined that under the circumstances, a jury could properly draw the inference of an immediate threat of death or serious bodily harm to Officer Pfeiffer from his inability to observe Billingsley's hand coupled with his shoulder

movement. *Id*. at 995. In the present case, Officer Hawkins faced even more tense, uncertain, and rapidly evolving circumstances because he did not have the opportunity to see Banks's hands before he suffered a blow to his head from an unknown source, and he did observe Banks in the doorway with his right arm raised over his head. (Pet. App. 33a.)(Aplnt. App. 63, 85-87.) If Officer Pfeiffer's use of deadly force was justified simply based on his inability to see Billingsley's right hand coupled with the turn of Billingsley's left shoulder, Officer Hawkins had to have been justified after having actually been struck by an unknown object while facing Banks who was standing with his arm raised over his head within arms-reach of Officer Hawkins.

In *Estate of Morgan v. Cook*, the Eighth Circuit held that an officer's shooting of a domestic disturbance suspect was constitutional where, when the officer responded to the scene of a domestic call, the victim was inside the house, the suspect was standing on the porch of the house with a kitchen knife six to twelve feet from the officer, and the suspect lifted his leg as if to take a step in the officer's direction. 686 F.3d 494, 496–97 (8th Cir. 2012). The totality of the circumstances facing Officer Hawkins were much more severe, tense, and rapidly evolving than the circumstances set out in *Cook* because in Cook, the officer had a clear view of the threat he was facing and more time to access the situation and prepare to respond. Additionally, there was more distance between the officer and Cook than between Banks and Officer

Hawkins in this case. Therefore, the panel's holding that Officer Hawkins's shooting of Banks was not objectively reasonable is inconsistent with the precedent set forth by *Cook*.

Finally, while there is nothing in the record to suggest that Mr. Banks *did not* strike or cause Officer Hawkins to be struck in the head, even if it had been later determined that Mr. Banks did not in fact strike Officer Hawkins, Officer Hawkins still had probable cause to believe there was a threat of serious injury or death, and he was still justified in using deadly force under the circumstances even if he was mistaken as to that belief.

In *Ransom v. Grisafe*, a 911 caller reported hearing shots fired from or near a white van. 790 F.3d 804, 807 (8th Cir. 2015). When officers arrived at the scene and identified the van, the van backfired. *Id.* Just after the backfire, the occupant of the van stepped out of the driver side door. *Id.* As soon as he did, the two officers fired eight shots at him. *Id.* The Eighth Circuit held that the officers were "justified in using deadly force to neutralize what they reasonably believed was a risk of serious physical harm, either to themselves or others." *Id.* at 811. Even though, "Ransom had done nothing wrong, and viewing the scene in his favor, the officers' fear of harm was reasonable, and their gunshots did not violate the constitution." *Id.*

In this case, given all of the circumstances, Officer Hawkins had a reasonable fear of serious harm. Specifically, he had reason to believe that a violent crime was taking place inside the home, and when he attempted to force entry, the door suddenly opened with force to reveal a seemingly aggressive assailant. He then immediately received a blow to the head. Based on these tense, rapidly evolving circumstances, even if Banks had done nothing wrong, Officer Hawkins's gunshot did not violate the constitution pursuant to *Ransom v. Grisafe*.

Most notably with respect to the reasonableness of Officer Hawkins's use of force, the panel majority expressly concluded that "Hawkins may have believed his 'life [was] at stake' because of Banks." *Banks v. Hawkins*, 999 F.3d 521, 530, n.8 (8th Cir. 2021). Given this conclusion by the panel majority, had the panel majority properly applied this Court's and the Eighth Circuit's precedent with respect to the use of deadly force to what the district court determined to be the relevant facts and inferences in this case, the only conclusion it could have reached is that the force used by Officer Hawkins was objectively reasonable and not in violation of clearly established law. *See*, *Scott v. Harris*, 550 U.S. 372, 881, n.8 (2007). Therefore, this Court should grant review to ensure compliance in the Eighth Circuit with the standard determined by this Court for determining the constitutionality of deadly force.

2. This Court should grant review because the panel majority's determination that the alleged time lapse between Officer Hawkins hearing noises inside the home and Officer Hawkins's attempted entry into the home dissolved a reasonable belief on Officer Hawkins's part that there was an imminent threat was not supported by precedent from this Court nor precedent from the Eighth Circuit and sets concerning precedent grounded in bad public policy regarding police officer responses to domestic disturbances in the Eighth Circuit.

The panel majority held that a jury "could credit" Vanessa Banks's testimony that ten minutes had elapsed between the time when Officer Hawkins heard the screams and when he attempted to make entry. *Banks,* 999 F.3d at 525. First, a jury would not make this determination because according to the timestamped 911 audio recording, Officer Hawkins arrived at the residence at 21:26:08, radioed that he was about to make forced entry at 21:28:55, and radioed that shots had been fired at 21:31:12. (Aplnt. App,

471-473.) There was nothing to suggest that this time stamped audio recording was altered in any way. This time stamped audio recording of the 911 call is the type of evidence contemplated by *Scott v. Harris* that is so reliable that it forecloses a "genuine issue for trial" as to its content. 550 U.S. 372, 379 (2007). The panel majority's determination that Vanessa Banks's testimony on this issue creates a genuine factual dispute directly contradicts this Court's holding in *Scott v. Harris*. Pursuant to *Scott v. Harris*, Vanessa Banks's testimony on this issue is immaterial as to the timing of the events which were accurately indicated in the 911 recording.

Even assuming ten minutes had elapsed between the screams and attempted entry, any reasonable and competent police officer arriving to a scene of a domestic dispute on the facts assumed by the district court, would believe he/she had probable cause to believe that there was an imminent threat to the occupant caller in the home. The succession of "no's" and/or noises coupled with no answer at the door could likely mean the occupant caller was injured or being restrained inside the home in response to law enforcement arriving, and no competent officer would simply leave this scene without taking the necessary steps to confirm the safety of the caller. At the same time, it would not be unreasonable for an officer to attempt to wait for back up before attempting to force entry, like Officer Hawkins did here.

The panel majority also stressed the fact that Officer Hawkins "never saw anyone commit a crime" *Banks*, 999 F.3d at 525. Of course, an officer in a situation like this would never have seen anyone commit a crime if he was not able to gain entry to the home where the crime was suspected to be occurring. The subsequent silence after hearing the concerning noises would only add to the perception of an imminent threat where the officer cannot confirm there is NOT a serious crime or assault occurring, or that someone was not injured, or being restrained inside the home in response to law enforcement arriving.

Regardless of the timing of the noises in relation to when Officer Hawkins began to force entry, the totality of the circumstances supported a reasonable belief that an occupant of the home was in imminent danger of death or serious injury which, in addition to the events that unfolded once the door was opened, supports a finding that his shooting of Banks was objectively reasonable. Even further, the findings by the panel majority on this point go against the public's interests in allowing a police officer to exercise on-the-scene discretion on how to properly respond in domestic disturbance situations. Thus, this Court should grant review to ensure police officers in the Eighth Circuit do not follow bad precedent set by the panel majority's opinion in responding to domestic disturbances.

3. Review is necessary because the panel majority's

reliance on *Craighead v. Lee* in determining the use of force was unreasonable blatantly contradicts this Court's precedent.

While citing to *Craighead v. Lee*, 399 F.3d 954, 962 (8th Cir. 2005), the panel majority held that because Officer Hawkins fired his weapon while unable to ascertain Vanessa Banks's location, "a jury could conclude that no reasonable officer would have thought deadly force was necessary in that moment to protect Vanessa Banks." *Banks*, 999 F.3d at 526. This holding blatantly contradicts precedent from this Court on two points.

First, the panel's reliance on *Craighead v. Lee*, 399 F.3d 954, 962 (8th Cir. 2005) as a basis for its determination that Officer Hawkins's use of deadly force was not justified to protect Vanessa Banks because Officer Hawkins could not confirm Vanessa's location when he shot at Banks blatantly contradicts this Court's precedent which holds, "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014) (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969). The question in this case is whether Officer Hawkins violated Johnny Banks's Fourth Amendment rights, not Vanessa Banks's. "If a suit were brought on behalf of [Vanessa Banks] under either § 1983 or state tort law, the risk to [Vanessa Banks] would be of central concern, not [Johnny

Banks's]." *Plumhoff*, 572 U.S. at 777. But, Vanessa Banks's presence in the house cannot, "enhance [Johnny Banks's] Fourth Amendment rights." *Id.*

Secondly, this determination based on what "a jury could conclude," should be reviewed because at the summary judgment stage, this Court has previously held that the reasonableness of an officer's use of deadly force is not a question for a jury, rather, is a pure legal question to be decided by the court by applying existing precedent to the facts that are determined to be the undisputed facts of the case. *Scott v. Harris*, 550 U.S. 372, 881, n.8 (2007). Applying the analogous precedent to the facts of the case at hand, Officer Hawkins's use of deadly force was objectively reasonable. *See Estate of Cook v. Morgan*, 686 F.3d 494 (8th Cir. 2012); *Billingsley v. City of Omaha*, 277 F.3d 990 (8th Cir. 2002); *Ransom v. Grisafe*, 790 F.3d 804 (8th Cir. 2015).

Finally, the panel majority's determination that the deadly force was not justified based on Vanessa Banks' location blatantly contradicts this Court's precedent regarding the standard for deciding the lawfulness of a use of deadly force. According to this Court's precedent, the use of deadly force is not constitutionally unreasonable "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U.S. at 11. Under the correct standard set out by *Garner*, Officer Hawkins shooting Banks under the circumstances in this case

was constitutional. Therefore, review should be granted because the panel's reliance on *Craighead v. Lee* as its basis for determining that a jury could determine Officer Hawkins's use of force was unreasonable blatantly contradicts this Court's precedent set out in *Plumhoff v. Rickard*, *Scott v. Harris*, and *Tennessee v. Garner*.

4. Review is necessary because the panel majority's determination that Banks' demeanor when he opened the door is "in dispute" is "blatantly and demonstrably false."

The panel further held that because Banks's demeanor when he opened the door was "in dispute," Officer Hawkins should not have felt "threatened by Johnny Banks's 'aggressive composure," nor thought he was "being attacked." *Banks*, 999 F.3d at 526. The panel majority's finding that Banks's demeanor when he opened the door is in dispute is "blatantly and demonstrably false." *Plumhoff v. Rickard*, 572 U.S. 765, 770 (2014). In fact, Banks aggressive demeanor when he opened the door is not in dispute, and his aggressive demeanor supports a holding that Officer Hawkins had probable cause to believe that Banks posed a significant threat of injury or bodily harm.

In deciding this issue, this Court must view "the evidence in the light most favorable to Johnny

Banks and give him the benefit of all reasonable inferences." *Banks*, 999 F.3d at 524 (citing *Edwards v. Byrd*, 750 F.3d 728, 731 (8th Cir. 2014). The record clearly shows that Banks **himself** testified that after stating, "who the fuck is this," he opened his door **with force** with his left hand while placing his **right arm on the door frame above his head**. (Pet. App. 6a.) (Aplnt. 63, 85-87.) Therefore, this Court must assume that this is what happened when Banks opened the door, rather than the district court's characterization of the facts that "all he did was open the door," or, that his demeanor upon opening the door was in dispute. *Banks*, 999 F.3d at 526. According to the district court, after the door was opened, Hawkins was struck in the head, and then Hawkins shot Johnny Banks. (Pet. App. 31a.) On those facts, as the panel conceded, "Hawkins may have believed his life was at stake because of Banks," *Banks,* 999 F.3d at 534, fn. 8. In other words, Officer Hawkins had probable cause to believe that there was a significant threat of death or serious bodily harm to himself or others, and he was justified in shooting Banks. Therefore, this Court should grant review.

5. Review is necessary because the panel majority's determination that Officer Hawkins did not have probable cause to believe that Banks posed a threat of significant injury or death because he did not

see what struck him cannot be the standard used to determine the lawfulness of use of force.

Finally, the panel held that the fact that a reasonable officer in Hawkins's shoes would not believe that he was under attack based on the fact that he was struck in the head by an unknown object because "there is nothing to suggest that the injury was attributable to Banks." *Banks*, 999 F.3d at 527. While this statement by the panel is true, it could also be argued that in a split-second moment, an objectively reasonable officer in Officer Hawkins's position had no reason to believe that whatever struck him did NOT come from Banks, given that Banks was the only person in front of him, Banks was in what could be perceived by an objectively reasonable officer as an aggressive stance, and no one was on either side of Officer Hawkins or behind Officer Hawkins. Additionally, if Banks had been holding a weapon or any other object when the door was opened, Officer Hawkins likely *could not have* actually seen it because he was struck in the head instantly when the door was opened, and he also did not have a clear view of his hands because it was dark. Under the panel's logic, even if it had been determined that Banks struck Officer Hawkins, if Officer Hawkins did not see it, his reaction in shooting Banks was unreasonable. This cannot be the standard for determining the lawfulness of police officers' uses of force. The fact of the matter remains on the scene, Officer Hawkins only

had a split second to decide, and under these circumstances, it was not unreasonable for Officer Hawkins to believe there was a threat of death or serious injury, and the panel majority even said that he "may have held" such a belief. Therefore, he was justified in shooting Mr. Banks.

B. Review is necessary because the panel majority blatantly disregarded this Court's precedent by failing to identify a factually similar case for purposes of determining clearly established law in deciding qualified immunity.

This Court should grant review because, in denying qualified immunity to Officer Hawkins, the panel majority blatantly disregarded this Court's precedent regarding the appropriate analysis to be applied to a claim for qualified immunity where the case is not obvious, by failing to identify a case where the officer was held to have violated the Fourth Amendment under similar facts.

This Court has not yet decided what precedents, other than its own, qualify as controlling authority for determining clearly established law for qualified immunity purposes. *District of Columbia v. Wesby*, 138 S. Ct. 577, 591 n. 8 (2018). Regardless, neither the panel below, or the appellee, cited to any precedent which determines clearly established law for the purpose of deciding qualified immunity in this

case because no precedent with the requisite factual similarity exists from either this Court or any United States Circuit Court. The panel majority admitted this fact by noting that this case involves a "novel factual circumstance" *Banks*, 999 F.3d at 530, which only supports the conclusion that there cannot be precedent with the requisite factual similarity that would have put Officer Hawkins on fair notice in February 2017 that his actions would violate clearly established law.

Due to the lack of a factually similar case, the panel majority blatantly disregarded this Court's instruction to federal circuit courts: in deciding clearly established law in excessive force cases, where the case is not obvious, the court must identify a case where the officer acting under similar facts was held to have violated the Fourth Amendment. *White v. Pauley*, 137 S. Ct. 548 92017);*Rivas-Villegas v. Cortesluna*, 595 U.S. __, 2021 WL 4822662 (2021). Rather than applying the requisite analysis and granting qualified immunity, the panel majority expressly disregarded this Court's mandate regarding the correct analysis to apply when deciding qualified immunity and stated, "[t]hough 'earlier cases involving fundamentally similar facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding.'" *Banks*, 999 F.3d 521, 528 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). The panel majority further disregarded this Court's mandate in stating, "Banks

does not have to point to a nearly identical case on the facts for the right to be clearly established," *Id*., and

> [t]he issue is not whether prior cases present facts substantially similar to the present case but whether prior cases would have put a reasonable officer on notice that the use of deadly force in these circumstances would violate [the plaintiff's] right not to be seized by the use of excessive force.

Id. (quoting *Craighead v. Lee*, 399 F.3d 954, 962 (8th Cir. 2005). Finally, the panel majority expressly disregarded this Court's precedent controlling qualified immunity in excessive force cases by concluding that a constitutional violation may be "sufficiently clear," even in "unique circumstances," and that "that principle repeats itself through Eighth Circuit jurisprudence." *Banks*, 999 F.3d at 529. All of these statements by the panel majority expressly disregard the express instructions set out by opinions from this Court over the past five years in *White*, *Kisela,* and *Rivas* regarding the correct analysis to apply in deciding qualified immunity in excessive force cases: unless the case is an obvious one, police officers are entitled to qualified immunity unless existing precedent "'squarely governs'" the specific facts at issue. *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (quoting *Mullenix v. Luna*, 136 S. Ct. 305 (2015)). In other words, in denying qualified immunity in a claim involving a police officer's use of force, if the case isn't obvious, as

the panel majority admitted is true in this case, a court must identify a factual similar case where it was determined the officer's use of force violated the plaintiff's civil rights. *White*, 137 S. Ct. at 552.

In applying what the panel majority determined to be the appropriate level of specificity for determining clearly established law, the panel majority concluded that

> a reasonable officer had fair warning in February 2017 that he may not use deadly force against a suspect who did not present an imminent threat of death or serious injury, even if the officer felt attacked earlier and even if he believed the suspect had previously posed a threat.

Banks, 999 F.3d at 529. Importantly, the panel majority did not cite to any case factually on point which establishes that conclusion, nor does that statement even correctly encompass the facts of this case. The facts in this case demonstrate that Officer Hawkins did reasonably believe there was an imminent threat of death or serious harm. Further, that conclusion by the panel majority is precisely the defining of the constitutional right at a high level of generality which has been explicitly rejected by this Court in cases which are not obvious. *See White v. Pauly*, 137 S. Ct. 548; *Rivas-Villegas*, No. 20-1539, 2021 WL 4822662. As the dissent noted, "[n]ot only is this formulation so broad that it risks sweeping too broadly. The proof is

in the pudding: there are cases that both fall within the court's supposed clearly established rule and do not involve the violation of a constitutional right." *Banks*, 999 F.3d at 532 (Stras, J., dissenting). As the dissent pointed out, both cannot be true and pointed to the Eighth Circuit case, *Ransom v. Grisafe*, 790 F.3d 804 (8th Cir. 2015) (per curiam) to demonstrate this point. *Id.* As set out above, *Ransom* involved a case where officers used deadly force against a suspect who did not present an imminent threat of death or serious injury, which fits within the panel majority's proposed rule below. *Id.* The panel majority in *Ransom* granted qualified immunity to the officers because, "though the driver had done nothing wrong, . . . the officers' fear of harm was reasonable." *Id.* (citing *Ransom*, 790 F.3d at 811). At the least, based on *Ransom*, a reasonable officer in Officer Hawkins's shoes would not have had "fair notice" that shooting Banks that night was constitutionally excessive based on his reasonable fear of harm. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quotation marks omitted).

Ultimately, in an attempt to demonstrate the clearly established law in this case, the panel majority relied on two cases which did not involve even remotely similar circumstances to the case at hand as the basis for its holding that Officer Hawkins's conduct violated clearly established law.

The first case, *Ellison v. Lesher*, as the dissent pointed out, did not involve similar circumstances to the present case for two reasons. *Banks*, 999 F.3d at

533. First, in the present case Officer Hawkins was called to the scene of a reported domestic disturbance which was taking place behind closed doors. *Id*. at 523–24, 532. In contrast, the officers in *Ellison*, who merely passed by the open door of Ellison's apartment while patrolling an apartment complex on foot for security, walked by the open door of an apartment and saw Mr. Ellison "'relaxed'" and "'sitting on his couch,'" and initiated contact with Ellison to make sure he was "okay." *Ellison v. Lesher*, 796 F.3d 910, 915 (8th Cir. 2015). They could fully observe him throughout their entire contact with him. *Id.* Additionally, in *Ellison*, the Eighth Circuit denied qualified immunity based on a disputed material fact, specifically, as to whether Mr. Ellison was merely holding his cane, or swinging it in a threatening manner at the moment he was shot. *Ellison v. Lesher*, 796 F.3d 910, 916–17 (8th Cir. 2015).

In this case, it is not disputed that Officer Hawkins was struck in the head immediately after Mr. Banks forcefully swung the door open, after stating, "who the fuck is this," and with his right hand raised above his head. (Pet. App. 23a.) Thus, *Ellison* is not a case with substantially similar facts for purposes of determining clearly established law in this case.

The second case, *Nance v. Sammis*, involved a fatal shooting of a twelve-year-old boy who was displaying a toy gun. 586 F.3d 604, 607–08 (8th Cir. 2009). "Viewing the facts in the light most favorable to the plaintiffs, we 'presume[d] that the officers

approached [the boy] without identifying themselves as police officers, that the toy gun was tucked in [his] pants throughout the entire confrontation, that [the officer] shot him twice without warning." *Banks*, 999 F.3d at 533 (Stras, J., dissenting) (quoting *Nance*, 586 F.3d at 610–11). Like the distinguishing factor in *Ellison,* the officers in *Nance* were never instantaneously struck by an unknown source, and the circumstances were less tense, rapidly evolving, and split-second because they "had the opportunity to observe what the boy was doing the entire time." *Id*. (citing *Nance*, 586 F.3d at 607). In this case, Officer Hawkins had no time to observe Mr. Banks before the door swung open and he was struck in the head. Therefore, Officer Hawkins had less time to contemplate a response. Thus, like *Ellison*, *Nance* is not factually similar enough to establish clearly established law in this case.

As set out above, *Ellison* and *Nance* are factually distinguishable from the present case. In *Ellison* and *Nance*, the officers had an opportunity to fully observe the suspects before engaging with them. Whereas here, Officer Hawkins had no opportunity to observe Banks before he was struck in the head with an object as the suspect opened the door.

As a result, the panel majority conducted no particularized factual analysis in order to determine clearly established law relevant to the circumstances Officer Banks faced, as required by *White* and *Rivas.*

The Eighth Circuit was not allowed to disregard this Court's prior instruction to identify a factually similar case holding that an officer acting under similar facts as Officer Hawkins violated the Fourth Amendment before denying qualified immunity. No case involving facts similar to the facts in this case holds that an officer would not be justified in using deadly force in these circumstances. Therefore, Officer Hawkins was not given fair notice that shooting Banks under the circumstances he faced violated clearly established law. Because there is no clearly established law on this point, Officer Hawkins is entitled to qualified immunity.

Notably, not even the panel judges could agree as to the state of the clearly established law as it pertains to the facts of this case, or to the constitutionality of Officer Hawkins shooting Mr. Banks. Judge Stras dissented from the panel majority's determination that the use of force was unconstitutional, and that Officer Hawkins violated clearly established law. "If judges…disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). If a panel of judges who have months to consider the reasonableness of a use of force from the comfort of their chambers cannot agree on its lawfulness, then a police officer making a split second judgment on the scene facing tensely dangerous circumstances cannot be expected to reach the correct conclusion in a split second moment.

Under these circumstances, review is necessary to ensure consistency with the mandate of this Court in applying the correct analysis for qualified immunity to which Officer Hawkins is entitled under this court's precedent. Most importantly, review of the denial of qualified immunity in this case is necessary to ensure the protection of officer discretion in taking required legitimate actions in split second circumstances where clearly established rights are not at issue, which as this Court has recognized, is important to society as a whole.

CONCLUSION

There is simply no precedential case that makes it "sufficiently clear" that Officer Hawkins's actions violated a constitutional right. Under these circumstances, Officer Hawkins should be granted qualified immunity. Officer Hawkins hereby respectfully requests review of the panel majority's opinion, so that he may be granted the protection afforded by qualified immunity and the dismissal of this instant case, and so that society's interests which underly qualified immunity will not be thwarted by the panel majority's opinion.

Respectfully submitted,

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