No. 21-770

# In The
# Supreme Court of the United States

SHELBY HAWKINS,

*Petitioner,*

v.

JOHNNY BANKS, III,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI


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## COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether qualified immunity shields a police officer from a claim of excessive force when that officer shoots an unarmed person who is in his home and who does not pose an immediate threat of death or serious bodily injury to the police officer or to anyone else.

2. Whether a case involving identical facts is the sole means of putting a public official on notice that his conduct is unlawful or whether cases involving materially similar facts suffice to provide that notice.

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## STATEMENT OF THE CASE

On February 17, 2017 shortly before 10:00 p.m., Vanessa Banks ("Mrs. Banks") called 911 during an argument she had with her husband, Johnny Banks ("Mr. Banks"), in their home. (Pet'r's App. 6a). The 911 operator heard arguing in the background, but did not hear anything to indicate a physical altercation. (Pet'r's App. 6a). Shelby Hawkins ("Officer Hawkins"), an officer with the Shannon Hills, Arkansas police department, responded to the 911 call and drove to the Banks' home. (Pet'r's App. 6a). When he arrived, he saw a vehicle parked in the driveway with its hazard lights activated. (Pet'r's App. 6a). He called for backup, and as he approached the Banks home, he heard a female voice say in a muffled tone, "no, no, no." (Pet'r's App. 6a). He knocked on the Banks' front door and announced his presence, but no one answered. (Pet'r's App. 6a).

He then walked around the perimeter of the Banks' home and heard a loud noise near the Banks' back yard, but that noise was not a human voice. (Pet'r's App. 6a). After spending approximately ten minutes outside the Banks' home, Officer Hawkins approached the Banks' front door a second time, but this time he drew his firearm and started kicking the door. (Pet'r's App. 6a). He heard someone from inside say "who the f*** is this?," but he did not answer. (Pet'r's

App. 6a). Mr. Banks then opened the door,[1] something[2] hit Officer Hawkins on the head, and Officer Hawkins shot Mr. Banks. (Pet'r's App. 7a). It is undisputed that Mr. Banks was unarmed, and it is undisputed that he

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[1] Officer Hawkins said Mr. Banks " . . . opened the door, 'with a little bit of force' . . . " (Pet. for a Writ of Cert. at i, 3). This is a misrepresentation of what actually happened and what the district court and the Eighth Circuit found. Neither the district court nor the circuit court said anything remotely close to Mr. Banks " . . . open[ing] the door [to his home], 'with a little bit of force' . . . " Only the dissenting Eighth Circuit judge used this locution, and with due respect to his Honor, the only reason the door opened with any "force" was because Officer Hawkins was kicking it. Put another way, it was Officer Hawkins's violent kicking that caused the door to open with "force," not anything that Mr. Banks did.

[2] Officer Hawkins says, " . . . there is nothing in the record to suggest that Mr. Banks *did not* strike or cause Officer Hawkins to be struck in the head." (Pet. for a Writ of Cert. at 19) (emphases in original). This is demonstrably false. The Eighth Circuit stated no fewer than six times that Mr. Banks did not strike Officer Hawkins or throw anything at him. (Pet'r's App. 7a) ("It is undisputed that Johnny Banks was unarmed and did not hit Hawkins or throw anything at him"; "There is nothing in the record to suggest that anyone threw an object at Hawkins"); (Pet'r's App. 14a) (" . . . there is nothing in the record to suggest that [Hawkins's'] injury was attributable to Banks."; "Hawkins repeatedly stated in his deposition that he knew – at the time of the incident – that whatever struck him could not have come from Banks . . . "; " . . . it is undisputed that . . . Hawkins did not see Banks holding a weapon or any other object when the door opened, and [ ] Banks never swung at or touched Hawkins."); (Pet'r's App. 15a) (" . . . an unknown object that did not come from Banks hit Hawkins on the head . . . "); (Pet'r's App. 21a) (" . . . Hawkins suffered a blow to the head from a source he knew was not Banks . . . "); (Pet'r's App. 23a) (" . . . something hit Hawkins on the head . . . that 'something' did not come from Banks . . . "); (Pet'r's App. 27a) (" . . . the blow did not come from Banks . . . ").

did not hit Officer Hawkins or throw anything at Officer Hawkins. (Pet'r's App. 7a).

Mr. Banks survived Officer Hawkins's use of lethal force, but he did suffer serious bodily injuries. (Pet'r's App. 7a). On February 2, 2018, Mr. Banks sued Officer Hawkins for excessive force. (Pet'r's App. 7a). On August 5, 2019, Officer Hawkins filed a motion for summary judgment, asserting that qualified immunity barred Mr. Banks's excessive force claim. (Pet'r's App. 7a). On September 26, 2019, the district court entered an order denying Officer Hawkins's assertion of qualified immunity, finding that genuine issues of material fact are disputed regarding the facts and circumstances surrounding Officer Hawkins's arrival at the Banks' residence and whether Mr. Banks posed an immediate threat when Officer Hawkins shot him. (Pet'r's App. 30a-39a). On May 27, 2021, the United States Court of Appeals for the Eighth Circuit affirmed the district court's order. (Pet'r's App. 5a-29a).

## REASONS FOR DENYING THE PETITION

### I. The Petitioner has not identified a conflict in the United States Courts of Appeals on the questions presented in this case, nor has he identified an important question of federal law that has not been, but should be, settled by this Court, nor has he persuasively argued that the Eighth Circuit decided this case in a way that conflicts with relevant decisions of this Court.

The district court and the Eighth Circuit both decided the qualified immunity issue in this case based on the specific facts of this specific case. Neither court announced a new rule of law, and neither court engaged in novel legal reasoning. Instead, each court correctly identified the controlling legal principles, applied them, and concluded that Officer Hawkins violated clearly established law when he shot Mr. Banks in his home at a time when he was unarmed and not posing an immediate threat of death or serious bodily injury to Officer Hawkins or to anyone else. (Pet'r's App. 5a-29a, 30a-39a).

Officer Hawkins is asking this Court to decide the same qualified immunity question the district court and the Eighth Circuit decided, and that it do so " . . . entirely on an interpretation of the record in one particular case." *Taylor v. Riojas*, 141 S. Ct. 52, 55 (2020) (Alito, J., concurring in the judgment). This case "is a quintessential example of the kind [of case] [this Court] . . . almost never review[s]." *Taylor*, 141 S. Ct. at 55 (Alito, J., concurring in the judgment).

Rule 10 of this Court's rules says, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Officer Hawkins's arguments in favor of this Court granting his petition consists entirely of assertions that the Eighth Circuit made erroneous factual findings and misapplied properly stated rules of law. At bottom, he simply disagrees with how the Eighth Circuit applied this Court's qualified immunity precedents to the specific facts in this specific case. In his concurring opinion on *Taylor v. Riojas*, Justice Alito said:

> Every year, the courts of appeals decide hundreds if not thousands of cases in which it is debatable whether the evidence in a summary judgment record is just enough or not quite enough to carry the case to trial. If we began to review these decisions we would be swamped, and as a rule we do not do so.

141 S. Ct. 52, 55 (2020)

This case does not satisfy this Court's criteria for granting review. *Taylor*, 141 S. Ct. at 55 (Alito, J., concurring in the judgment). Officer Hawkins has not identified a conflict in the United States courts of appeals on the questions presented in this case, nor has he identified an important question of federal law that has not been, but should be, settled by this Court, nor has he persuasively argued that the Eighth Circuit decided this case in a way that conflicts with relevant decisions of this Court. Instead, he is asking this Court to intervene in order to correct what he thinks is an

incorrect result in a single case. This is not a case where either the district court or the Eighth Circuit " . . . conspicuously disregarded governing Supreme Court precedent . . . [,]" therefore, this is not a case warranting this Court's review. *Taylor*, 141 S. Ct. at 55 (Alito, J., concurring in the judgment).

## II. The Eighth Circuit correctly decided this case because when the Petitioner shot the Respondent, the law was clearly established that a police officer responding to what he thinks is an emergency cannot shoot a person who does not pose an immediate threat of death or serious bodily injury to the officer or to others.

The Eighth Circuit properly determined that Officer Hawkins cannot raise the shield of qualified immunity for his shooting Mr. Banks because when he shot him, the law was clearly established that a police officer responding to what he thinks is an emergency cannot shoot a person who does not pose an immediate threat of death or serious bodily injury to the officer or to others.

### A. The Petitioner used excessive force when he shot the Respondent because the Respondent had not committed a crime, he was not suspected of having committed a crime, he did not pose an immediate threat of death or serious bodily injury to anyone, and he did not resist or evade the Petitioner.

In assessing Mr. Banks's excessive force claim, one has to determine whether Officer Hawkins's actions were objectively reasonable in light of the facts and circumstances he faced when he encountered Mr. Banks. *Graham v. Connor*, 490 U.S. 386, 397 (1989) (citing *Scott v. United States*, 436 U.S. 128, 137-139 (1978); *Terry v. Ohio*, 391 U.S. 1, 21 (1960)). That inquiry requires careful attention to the facts and circumstances of Officer Hawkins's encounter with Mr. Banks, including whether Mr. Banks had committed a crime or was suspected of having committed one, whether Mr. Banks posed an immediate threat to the safety of Officer Hawkins or to others, and whether Mr. Banks actively resisted or attempted to evade Officer Hawkins. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)). The record in this case demonstrates that a jury could find that Officer Hawkins's shooting of Mr. Banks was objectively unreasonable, and an application of the framework this Court established in *Graham* proves as much. 490 U.S. at 396 (citing *Garner*, 471 U.S. at 8-9).

When Officer Hawkins arrived at the Banks' home, he did not immediately knock on the door to see for

himself if a domestic disturbance was ongoing or whether any other of kind of emergency existed; instead, he walked around the exterior of the Banks' home for five to eight minutes, and during this time period, he did not observe anything that one could objectively describe as evidence of criminal activity or domestic violence. (Pet'r's App. 6a). At the end of this five to eight minute time period, he knocked on the Banks' door and announced himself, but no one answered. (Pet'r's App. 6a). And when he knocked on the door, he did not hear a sound emanate from the interior of the Banks' home, which further demonstrates that nothing was happening in the Banks' home that can be objectively described as evidence of criminal activity or domestic violence. (Pet'r's App. 6a).

At this juncture, Officer Hawkins should have left the Banks' home because he had no lawful reason to continue to be there, for whatever emergency he may have had reason to think existed when he received the 911 dispatch operator's call ceased to exist by the time he arrived at the Banks' home. *Neal v. Ficcadenti*, 895 F.3d 576, 581 (8th Cir. 2018) (an officer who responds to an emergency is not permitted to ignore changing circumstances and information that emerges once he arrives on the scene) (citing *Ngo v. Storlie*, 495 F.3d 597, 603 (8th Cir. 2007) ("[E]ven though Storlie was responding to a severe crime – a fellow officer had been shot – a reasonable officer arriving at the scene would have recognized that Ngo did not pose an immediate threat to the officers' safety or the safety of others.")).

Officer Hawkins claims that the 911 call, the manner in which Mr. Banks's parked his vehicle, the flashing emergency lights on Mr. Banks's vehicle, and his hearing a muffled "no, no, no" sound evidenced a "life or death" situation. His own actions, however, demonstrate the speciousness of this claim. Had Officer Hawkins encountered a genuine "life or death" situation when he arrived at the Banks' home, he would not have spent ten minutes milling around the exterior of their home; after all, it was obvious when he arrived that nothing was going on outside that remotely resembled criminal activity or domestic violence, yet outside is where he remained ten minutes before knocking on the door. (Pet'r's App. 6a). And when he did knock on the door, he did not hear a sound from anyone or anything in the Banks' home. (Pet'r's App. 6a).

Rather than leave as he should have, Officer Hawkins searched the exterior of the Banks' home a second time; this time for approximately two minutes, and at no point during this time period did he see any evidence of domestic violence or any other crime. At the end of what was not a ten minute period of time, Officer Hawkins heard a muffled "no, no, no" sound coming from inside the Banks' home. (Pet'r's App. 6a). Assuming a muffled "no, no, no" could be interpreted as a distress call, that still does not make it objectively reasonable for Officer Hawkins to have shot Mr. Banks because when Officer Hawkins shot Mr. Banks, Mr. Banks had not committed a crime, he was not suspected of having committed a crime, and Officer

Hawkins did not observe him commit a crime. (Pet'r's App. 10a-11a).

Moreover, Mr. Banks did not threaten Officer Hawkins or anybody else, nor did he attempt to resist or evade Officer Hawkins. (Pet'r's App. 10a-15a). All Mr. Banks did was open the door and immediately upon doing so, Officer Hawkins shot him. (Pet'r's App. 10a-11a). When Mr. Banks opened the door, something struck Officer Hawkins in the head, but whatever struck him, it did not come from Mr. Banks, and Officer Hawkins affirmed this fact multiple times under oath. (Pet'r's App. 14a) ("Hawkins repeatedly stated in his deposition that he knew – at the time of the incident – that whatever struck him could not have come from Banks . . . "). Mr. Banks was unarmed when he opened the door, and he was unarmed when Officer Hawkins shot him. (Pet'r's App. 7a, 14a). Officer Hawkins does not know how he was struck in the head or what struck him in the head, yet he intentionally shot Mr. Banks nevertheless. (Pet'r's App. 7a, 14a).

From the time Officer Hawkins entered the Banks' residence until the moment he shot Mr. Banks, Mr. Banks was in front of Officer Hawkins. (Pet'r's App. 14a). Whatever hit Officer Hawkins could not have come from Mr. Banks because Mr. Banks was forty-two inches in front of Officer Hawkins, and Officer Hawkins never saw Mr. Banks hit him or attempt to hit him. (Pet'r's App. 7a, 14a). At bottom, there is no evidence in the record of this case that Mr. Banks hit Officer Hawkins in the head or caused him to be hit in the head. (Pet'r's App. 7a, 14a).

It is undisputed that when Officer Hawkins shot Mr. Banks, Mr. Banks had not committed a crime, he had not been suspected of committing a crime, he did not pose an immediate threat of death or serious bodily injury to Officer Hawkins or to anyone else, and he did not attempt to resist or evade Officer Hawkins, therefore, it was objectively unreasonable for Officer Hawkins to shoot Mr. Banks. *Ellison v. Lesher*, 796 F.3d 910, 916-917 (8th Cir. 2015) (it has been clearly established since at least December 2010 that a person who does not pose an immediate threat to an officer or to others has a federal right not to be shot by the officer).

In order for Officer Hawkins to be liable for shooting Mr. Banks, however, Mr. Banks must demonstrate that on February 17, 2017, the law was clearly established that a police officer responding to what he thinks is an emergency cannot shoot a person who does not pose an immediate threat of death or serious bodily to the officer or to others. *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) (citing *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam)). He will now demonstrate just that.

### B. When the Petitioner shot the Respondent, the law was clearly established that a police officer responding to what he thinks is an emergency cannot shoot a person who does not pose an immediate threat of death or serious bodily injury to the officer or to others, therefore, qualified immunity does not shield the Petitioner from a claim of excessive force.

Qualified immunity shields a government official from liability when the official's conduct does not violate clearly established federal statutory or constitutional rights that a reasonable person should have known. *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) (citing *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam)). A plaintiff is not required to rely on case law that is directly on point in order for a right to be clearly established, but existing precedent must have placed the statutory or constitutional question beyond debate. *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) (citing *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam)).

Persons who are plainly incompetent or who knowingly violate the law are not entitled to qualified immunity. *White*, 137 S. Ct. at 551 (citing *Mullenix*, 577 U.S. at 11). In ascertaining whether the law is clearly established, courts cannot define the law at a high level of generality. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (citing *Brosseau v. Hogan*, 543 U.S. 194, 198-199 (2004) (per curiam); *Wilson v. Layne*, 526 U.S. 603, 615

(1999); *Anderson v. Creighton*, 483 U.S. 635, 639-640 (1987); *Sawyer v. Smith*, 497 U.S. 227, 236 (1990)).

General statements of law, however, can at times give an officer a fair and clear warning that certain conduct is unlawful. *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam) (citing *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam)). If the contours of a right are sufficiently definite, a reasonable official is charged with understanding those contours, and if he acts outside of them, he loses the protection of qualified immunity. *Kisela*, 138 S. Ct. 1148, 1153 (2018) (per curiam) (citing *Plumhoff v. Rickard*, 572 U.S. 765, 778-779 (2014)). An official can lose the protection of qualified immunity even if the very action in question has not been previously held to be unlawful. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985)). Officials can still be on notice that their conduct is unlawful even in novel factual circumstances. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (citing *United States v. Lanier*, 520 U.S. 259, 268-272 (1997)). And in looking to determine whether the law is clearly established, not only do cases that are controlling in a jurisdiction provide notice regarding what conduct is permissible, so can a consensus of persuasive authority from other jurisdictions. *Wilson v. Layne*, 526 U.S. 603, 617 (1999). At bottom, the qualified immunity analysis asks whether the government official had fair notice that his conduct was unlawful prior to him engaging in that very conduct. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam).

The qualified immunity question in this case is properly framed as whether the law was clearly established on February 17, 2017 that an officer responding to a domestic disturbance call is prohibited from shooting a person who does not pose an immediate threat of death or serious bodily injury to the officer or to others. Authority existed on February 17, 2017 establishing that even when a law enforcement officer responds to a domestic disturbance call, he cannot use deadly force against a person who does not pose an imminent threat of death or serious bodily injury to the officer or to others. *Thompson v. Dill*, 930 F.3d 1008, 1010-1015 (8th Cir. 2019) (it is not objectively reasonable for an officer to shoot a person who does not pose an immediate threat to the officer or to others, even if the officer is responding to a domestic disturbance call) (citing *Raines v. Counseling Assocs. Inc.*, 883 F.3d 1071, 1074 (8th Cir. 2018) (quoting *Ellison v. Lesher*, 796 F.3d 910, 916, (8th Cir. 2015))); *Ellison v. Lesher*, 796 F.3d 910, 913-918 (8th Cir. 2015) (it has been clearly established since at least December 2010 that a person who poses no immediate threat to an officer and no threat to others has a federal right not to be shot by that officer, and this is so even if the officer is responding to a domestic disturbance call); *Cole v. Hutchins*, No. 4:17CV00553 JLH, 2019 WL 903844, at *1-4 (E.D. Ark. Feb. 22, 2019) (denying a police officer's claim of qualified immunity arising from the officer fatally shooting a person in response to a domestic disturbance call, and holding that "[i]t was clearly established on October 25, 2016, that a law enforcement officer may use deadly force only to protect himself or another person from an imminent

threat of serious physical injury or death") (citing *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (deadly force unjustified "[w]here the suspect poses no immediate threat to the officer and no threat to others"); *Craighead v. Lee*, 399 F.3d 954, 962-963 (8th Cir. 2005) (collecting cases holding that deadly force may not be used unless the officer reasonably believes it is necessary to prevent serious injury)); *Frederique v. Cty. of Nassau*, 168 F. Supp. 3d 455, 465-473 (E.D.N.Y. 2016) (officers used excessive force in responding to a domestic disturbance call, therefore, the officers could not invoke the shield of qualified immunity); *Roccisano v. Twp. of Franklin*, No. 11-6558 (FLW), 2013 WL 3654101, at *1-10 (D.N.J. July 12, 2013) (same); *Johnson v. Town of Nantucket*, 550 F. Supp. 2d 179, 180-185 (D. Mass. 2008) (same); *Pagan v. Twp. of Raritan*, No. 04-1407 (FLW), 2006 WL 2466862, at *1-7 (D.N.J. Aug. 23, 2006) (same).

It is beyond debate that responding to a domestic disturbance call does not authorize a police officer to deploy deadly force against a person who does not pose an immediate threat of death or serious bodily injury to the officer or to other persons, and this proposition was clearly established on February 17, 2017. *Thompson v. Dill*, 930 F.3d 1008, 1010-1015 (8th Cir. 2019) (8th Cir. July 23, 2019); *Ellison v. Lesher*, 796 F.3d 910, 913-918 (8th Cir. 2015); *Cole v. Hutchins*, No. 4:17CV00553 JLH, 2019 WL 903844, at *1-4 (E.D. Ark. Feb. 22, 2019); *Frederique v. Cty. of Nassau*, 168 F. Supp. 3d 455, 465-473 (E.D.N.Y. 2016); *Roccisano v. Twp. of Franklin*, No. 11-6558 (FLW), 2013 WL 3654101, at *1-10 (D.N.J. July 12, 2013); *Johnson v.*

*Town of Nantucket*, 550 F. Supp. 2d 179, 180-185 (D. Mass. 2008); *Pagan v. Twp. of Raritan*, No. 04-1407 (FLW), 2006 WL 2466862, at *1-7 (D.N.J. Aug. 23, 2006).

Officer Hawkins violated clearly established law on February 17, 2017 because he shot Mr. Banks despite the fact that Mr. Banks did not pose an immediate threat of death or serious bodily injury to himself or to anybody else, therefore, he is not shielded by qualified immunity. *Ellison v. Lesher*, 796 F.3d 910, 913-918 (8th Cir. 2015).

## CONCLUSION

Officer Hawkins has not identified a conflict in the United States courts of appeals on the questions presented in this case, nor has he identified an important question of federal law that has not been, but should be, settled by this Court, nor has he persuasively argued that the Eighth Circuit decided this case in a way that conflicts with relevant decisions of this Court, thus, this Court should deny his petition to review this case. Officer Hawkins used excessive force when he shot Mr. Banks because Mr. Banks had not committed a crime, he was not suspected of having committed a crime, he did not pose an immediate threat of death or serious bodily injury to anyone, and he did not resist or evade Officer Hawkins. Finally, when Officer Hawkins shot Mr. Banks, the law was clearly established that a police officer responding to what he thinks is an

emergency cannot shoot a person who does not pose an immediate threat of death or serious bodily injury to the officer or to others.

Officer Hawkins's petition for a writ of certiorari should be denied.

Respectfully submitted,

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