No. _____

In the Supreme Court of the United States

JAMES DOUGLAS FOX,
Petitioner,

v.

MARK CAMPBELL AND SHERRIE CAMPBELL,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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March 2, 2023

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QUESTIONS PRESENTED

Petitioner James Fox performed a welfare check at the home of Respondents Mark Campbell and Sherrie Campbell. Mark stated through the closed front door that he had a gun and began to open the door. Fox fired eight shots toward the door. The shots did not strike Mark nor Sherrie who was unknown to be in the residence.

The questions presented are:

1. Does the Fourth Amendment standard for evaluating unreasonable force claims established in *Graham v. Connor*, 490 U.S. 386 (1989) or the Fourteenth Amendment standard for evaluation of actions of law enforcement announced in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) apply when law enforcement shoots, but misses the intended target and an unknown occupant of the residence?

2. Did the Sixth Circuit depart from this Court's precedents in *Brower v. County of Inyo,* 489 U.S. 593 (1989), *California v. Hodari D.*, 499 U.S. 621 (1991), *Brendlin v. California*, 551 U.S. 249 (2007) and *Torres v. Madrid*, 141 S. Ct. 989 (2021) by denying qualified immunity to Petitioner and concluding that the respondents were seized when Petitioner fired shots at Mark Campbell in his doorway but missed, and Sherrie Campbell then stayed in the home while Mark Campbell exited the home through both the front and back doors and ignored the deputies' commands?

3. If the Fourth Amendment standard applies in this case, did the Sixth Circuit properly

apply this Court's decision in *Graham* in concluding that Petitioner was not entitled to qualified immunity when he fired shots in self-defense and not to apprehend a suspect?

4. May precedent other than precedent of this Court be used in determining whether the law is clearly established and did the Sixth Circuit err in determining that it was clearly established that, under respondents' version of the facts, respondents had been seized and petitioner used excessive force in violation of the Fourth Amendment?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

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

James Douglas Fox, an individual, defendant, appellant below and petitioner here;

Mark Campbell, an individual, plaintiff and appellee below and respondent; and

Sherrie Campbell, an individual, plaintiff and appellee below and respondent.

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

Mark Campbell, Sherrie Campbell v. James Douglas Fox, United States Court of Appeals for the Sixth Circuit, Case No. 21-5044.

Mark Campbell, Sherrie Campbell v. Cheatham County Sheriff's Department, Municipal Government of Cheatham County, James Douglas Fox, Christopher Austin, and Mike Breedlove, United States District Court, Middle District of Tennessee, Case No. 3:19-cv-151.

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The district court's January 5, 2021, order denying summary judgment to Petitioner is reported as *Campbell v. Cheatham County Sheriff's Department*, 511 F. Supp. 3d 809 (M.D. Tenn. 2021) and is reproduced in the appendix ("App.") at pages 43-81. The Sixth Circuit's August 29, 2022, opinion is reported as *Campbell v. Cheatham County Sheriff's Department, et al.,* 47 F.4th 468 (6th Cir. 2022) and is reproduced in the appendix at pages 1-40. The Sixth Circuit's October 3, 2022, order denying panel and en banc rehearing is published as *Campbell v. Cheatham County Sheriff's Department, et al.*, 2022 U.S. App. Lexis 127637 and is reproduced in the appendix at 84-85.

JURISDICTION

This Court has jurisdiction to review the Sixth Circuit's August 29, 2022, decision on writ of certiorari under 28 U.S.C. § 1254(1). The petition is timely filed pursuant to the grant of an extension from Justice Kavanaugh on December 16, 2022, extending the time to file this petition to March 2, 2023.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983:

> 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.

United States Constitution, Amendment IV:

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.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

> they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Background of the Action

On August 21, 2018, around 9:15 p.m., two Cheatham County Sheriff Deputies, Petitioner James Fox, and Christopher Austin, were dispatched to the residence of respondents, Mark Campbell and Sherrie Campbell, to conduct a welfare check. (App.3). The two deputies were dispatched after a 9-1-1 dispatcher received two hang-up calls from a phone located on the property. *Id.* The deputies arrived at the Campbell's home at around 9:39 p.m. *Id.* They did not activate the emergency lights on their cars but kept their headlights pointed toward the residence. *Id.*

Fox walked up onto the small porch and knocked on the front door three times. *Id.* Fox did not announce himself as law enforcement. *Id.* After knocking, Fox walked down the steps and stood next to Austin. *Id.* Ten seconds after Fox knocked, Mark said, "You got a gun?" through the closed door. *Id.* Fox unholstered his gun in response, walked to the other side of Austin, and said "Mark…come on out Mark, what's up man." *Id.* Mark again asked, "You got a gun?" *Id.* Fox said, "What's going on Mark?" and Mark responded, "I got one too." (App.4). Fox drew his gun

and turned his back to the door as he walked behind Austin. *Id.* Three seconds after Mark said, "I got one too." Mark began to open the door. *Id.* Fox turned quickly back toward the door, said "Do what Mark?" and then fired two shots toward the door in rapid succession." *Id.* Austin tripped or jumped to the ground as Fox asked, "You good?" Fox then fired six shots toward the door in rapid succession. *Id.* From the time Fox knocked on the door to the time he fired his last shot 31 seconds elapsed. *Id.*

The parties dispute what the deputies saw when Mark began to open the door, and the video footage does not resolve the dispute. *Id.* Mark testified that he thought he "had [his] cellphone in [his] hand." (App.37). The deputies testified that they thought that Mark had something in his hand after he had said that he had a gun and after he opened the door. (App.38). The porch was lit and had a security camera. (App.36-37). Although Mark later testified that the camera was a fake, installed to deter neighbors, the deputies believed that Mark knew they were law enforcement when he announced that he had a gun and as he opened the door. (App.37).

Following Fox's first shots, Mark fell to the floor and kicked the door shut. (App.4). He yelled to his wife, Sherrie, to call 9-1-1 because somebody was shooting at them. *Id*. Sherrie was asleep in the bedroom, woke to gunshots, and heard her husband yelling. *Id.* Mark told her "not to move, to stay where [she was] at." (App.32). Sherrie called 9-1-1. (App.4). Sherrie told 9-1-1 that Mark "woke [her] up screaming, saying something about the police shot

into the house." (App.46 n.5). Although Fox fired eight shots at the home, no one was hit. (App.5).

After the shots, Fox and Austin made their way behind Fox's car as Fox reported over the radio that shots were fired. *Id.* Mark yelled profanities through the closed door. *Id.* A few minutes later, Mark walked onto his porch holding a flat reflective rectangular item. *Id.* Fox and Austin yelled at Mark to get on the ground and show his hands. *Id.* Mark yelled that his phone was in his hand and lifted his empty left hand. *Id.* He yelled that he was not getting on the ground, to shoot him, and profanities, before returning inside his home. *Id.* Mark opened the door again a minute later and stood in the doorway as he appeared to talk on the phone and pointed at the officers. *Id.* Again, Fox and Austin yelled at Mark to show his hands. *Id.* Mark yelled back and then returned inside and shut the door. *Id.*

Several other deputies soon arrived at the Campbells' home. *Id.* Mark exited the rear of his house "to see who was shooting at [him] and maybe get a jump on them." (App.29). After Mark left the house from the rear, he "walked right on past [Fox and Austin] in these vehicles." *Id.* Assisting law enforcement apprehended Mark in the yard. (App.5).

After Mark's arrest, Fox, Austin, and a detective went inside the home. *Id.* They told Sherrie, who was still in the bedroom, to come out with her hands visible. *Id.* Sherrie complied and was detained while the residence was cleared. *Id.* No firearms were found in the home. *Id.* Mark was charged with two

counts of aggravated assault, both of which were ultimately dismissed. *Id.*

B. Proceedings in District Court

On February 16, 2019, Mark and Sherrie Campbell sued Fox and others. (App.43). In Count I, Respondents asserted that Fox used excessive force against them in violation of the Fourth Amendment. (App.53). The district court denied Fox's motion for summary judgment asserting qualified immunity on the excessive force claims. (App.67). The district court held that a reasonable person would not have felt free to leave even though Mark was not hit by the gunshots. (App.57). The district court held that "Fox's shots 'ha[d] the intended effect of contributing to [Mark's] immediate restraint' within the residence." (App.58)(*quoting Jacobs v. Alam*, 915 F.3d 1028, 1042 (6th Cir. 2019). The district court concluded that "Mark was seized for Fourth Amendment purposes." *Id.*

The district court held that Sherrie was also seized. (App.60). The district court said that since Fox intentionally fired at Mark as Mark opened the front door, the "Plaintiffs' residence 'was the intended target of [Fox's] intentionally applied exertion of force.'" *Id.* (*quoting Rodriguez v. Passinault,* 637 F.3d 675, 683 (6th Cir. 2011). The district court concluded that, by shooting at Mark, Fox intended to acquire physical control over the residence, "effectively seizing everyone inside, including" Sherrie. *Id.*

The district court denied Fox qualified immunity citing Sixth Circuit precedent that deadly force is only constitutionally permissible if the officer

has probable cause to believe that the suspect poses a threat of serious physical harm. (App.61). The district court said that two of the three non-exclusive factors weighed against the use of force because the Campbells "were not committing a crime . . . and were not resisting arrest or fleeing." *Id.* It further held that there were genuine issues of fact that precluded a finding that "Fox's use of lethal force was objectively reasonable." (App.64). With respect to the "clearly established" prong of qualified immunity analysis, the district court held that *Floyd v. City of Detroit,* 518 F.3d 398 (6th Cir. 2008) was "sufficiently similar . . . where there was a dispute of fact about whether the shooting target was armed and performed a threatening act before the officers shot at him." (App.66).

C. The Appeal.

Fox appealed the district court's denial of his request for qualified immunity to the Sixth Circuit. The majority opinion written by Judge Gibbons and the dissent authored by Judge Nalbandian disagreed as to whether the Campbells were seized, whether Fox had used excessive force, and whether Fox had violated clearly established law.

The majority opinion determined that by firing immediately and repeatedly at Mark when he opened the door, Fox "terminated the Campbell's movement and 'a reasonable person would have believed that he was not free to leave.'" (App.10) (*quoting Brendlin v. California*, 551 U.S. 249, 255 (2007). The majority concluded that the Campbell's submitted to a show of authority '[b]y remaining on their property rather

than leaving after shots were fired at their door, the Campbell's submitted to Fox's show of authority and were restricted in their movement.' (App.13). The majority said that it made no difference whether Fox knew that Sherrie was in the home because, analogizing to *Brendlin*, the majority held that "shooting into a house in a manner that prevents occupants from leaving constitutes a seizure of the occupants." *Id*.

The majority concluded the discussion by citing *Jacobs v. Alam*, 915 F.3d 1028, 1042 (6th Cir. 2019) for the proposition that when law enforcement fires a gun at someone, but the bullet does not make contact, the show of authority has the intended effect of contributing to the person's immediate restraint and is a seizure. (App.14).

Turning to the issue of excessive force, the majority noted that it had authorized the use of deadly force only in rare instances in which the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others. (App.15)(*quoting Jacobs,* 915 F.3d at 1040). The majority, quoting from *Graham v. Connor*, 490 U.S. 386 (1989), stated that it looked at the circumstances of each case to determine the reasonableness of the use of force "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (App.15-16)(*quoting Graham*, 490 U.S. at 396). Since, according to the majority, the Campbells had committed no crime and were not evading arrest when

Fox used deadly force "only the threat factor [was left] for our consideration." (App.16). Even though Mark said he had a gun just before opening the door, the majority noted a dispute of fact about whether he actually had a gun or any other object in his hand. (App.18). The majority stated that "under our precedent, mere possession of a weapon is not sufficient to justify the use of deadly force." (App.17)(*citing Jacobs,* 915 F.3d at 1040). The majority concluded that accepting Respondents' version of facts, a reasonable jury could find that Fox's use of deadly force was objectively unreasonable." (App.18).

In discussing the clearly established prong, the majority quoted *Jacobs* for the proposition that "[i]t has been clearly established in this circuit for some time that individuals have a right not to be shot unless they are perceived as posing a threat to officers or others." (App.19)(*quoting Jacobs,* 915 F.3d at 1040). The majority felt that Fox's case "may be an obvious case in which the general rule on use of deadly force, enunciated in *Tennessee v. Garner*, 471 U.S. 1 (1985), provided sufficient notice to Fox that his conduct was unlawful." (App.20). The majority did not resolve that issue because it felt *Floyd v. City of Detroit,* 518 F.3d 398 (2008) had "analogous facts" which would cause any reasonable officer to know that using deadly force, under the circumstances that Respondents have asserted, was unconstitutional. (App.21).

The majority also held that it was clearly established that the Campbells were seized because "a reasonable person would have believed he was not free to leave in response to Fox's gunshots" and *Ewolski v.*

City of Brunswick "established that a reasonable person would not feel free to leave in response to police surrounding his home." (App.22) (*citing Ewolski,* 287 F.3d 492, 506 (2002)).

Judge Nalbandian dissented and would have granted summary judgment to Fox on the grounds that neither Mark nor Sherrie Campbell had been seized, and neither Respondents nor the majority identified an on-point case that gave Fox notice that his conduct was a seizure. (App.23). Judge Nalbandian noted that neither respondent was struck by the bullets fired, so a seizure required voluntary submission or termination of movement. (App.24) (*quoting Torres v. Madrid*, 141 S. Ct. 989, 1001 (2021).

The dissent argued that "Mark felt free enough to reemerge onto his front porch and yell profanities at the officers, asking them to shoot him. What's more, Mark declined to follow the officers' orders to get on the ground and show his hands. So even though Fox tried to seize Mark, his show of authority failed." (App.24). Judge Nalbandian disputed the majority's conclusion that the important time frame was what Mark did immediately after the shots were fired because the majority "erases the distinction between seizures by *control* and seizures by *force.* (App.25) (*quoting Torres,* 141 S. Ct. at 1001).

Judge Nalbandian also concluded that Mark's freedom of movement was not terminated. He noted that this Court held in *California v. Hodari D.,* 499 U.S. 621 (1991) that the *Mendenhall* free-to-leave-test "states a necessary, but not a sufficient, condition for seizure" through a show of authority. (App.26)

(quoting Hodari D., 499 U.S. at 627-28). Mark did not have his freedom of movement restrained, Judge Nalbandian reasoned, because Mark left his home first, when he yelled at the officers from his front porch and disobeyed orders to get on the ground, and then again when he exited the rear of his house "to see who was shooting at [him] and maybe get a jump on them." (App.29). Judge Nalbandian did not believe Mark's case was like the situation in *Ewolski* where Mr. Lekan was both not free to move *and* unable to leave. *Id.*

Judge Nalbandian also concluded that Sherrie was not seized because, like those not targeted by the police's gun fire in *Ewolski,* there were no facts to show that Fox restrained Sherrie's movement, but rather she stayed in the home because Mark told her to do so. (App.32).

Judge Nalbandian believed that Fox was entitled to qualified immunity on the grounds that no Supreme Court case was identified that addressed facts like the ones at issue, and Sixth Circuit precedent on which the majority relied—primarily *Ewolski*—was materially distinguishable. (App.35).

Judge Nalbandian also felt that even if Fox had seized Respondents, his actions were reasonable. He noted that Mark had said that he had a gun and nothing in the record refuted the officers' perception that, at a minimum, Mark had something in his hand. (App.37-38). Judge Nalbandian felt that Mark's close proximity to Fox "is enough of an additional circumstance to warrant the use of deadly force."

(App.38)(*citing Hicks v.* Scott, 958 F.3d 421, 436 (6th Cir. 2020).

Judge Nalbandian disputed the majority's conclusion that *Floyd* put Fox on notice that firing his weapon was unlawful. "It's clear that shooting an unarmed man with his hands out based on a stale tip is markedly different from shooting at someone feet away who announced they had a gun and opened a door without warning." (App.40).

Fox filed a petition for panel and *en banc* rehearing which was denied on October 3, 2022. (App.85). Judge Nalbandian would have granted rehearing for the reasons stated in his dissent. *Id.*

REASONS FOR GRANTING THE WRIT

This case presents the Court with the opportunity to clarify if and how the Court's seminal ruling on use of force under the Fourth Amendment, *Graham v. Connor*, 490 U.S. 386 (1989), applies, if at all, when an officer, in the course of a knock and talk, fires his weapon in self-defense but misses his target. The Court should also grant certiorari in this case to elaborate on its holding in *California v. Hodari D.*, 499 U.S. 621 (1991) with respect to two of the three tests for when a seizure occurs under the Fourth Amendment. The facts of this case offer the Court an opportunity to clarify whether a seizure by taking action to control an individual's freedom of movement requires total control of that freedom of movement as is required by the common law of false imprisonment or if something less than total control of freedom of movement may result in a seizure. This case also presents an opportunity for the Court to define what

it takes to submit to a show of authority and whether retreating to or remaining in a home is a sufficient submission to authority. This case also permits the Court to answer the question it noted but was not called upon to decide in *Plumhoff v. Rickard*, 572 U.S. 765, 778 n.4 (2014) as to whether the unintended target of a use of force is seized under the Fourth Amendment. Finally, by finding that a seizure occurred in this case and that Fox's use of force could be considered excessive if facts were taken in a light favorable to the respondents, the Sixth Circuit extended the rationale of its prior cases in unanticipated ways to deny Fox qualified immunity. The Court has articulated the question of whether precedent other than its own can clearly establish law. The case affords the Court an opportunity to decide that issue. Even if the Sixth Circuit precedent is sufficient, the Court should grant the petition as it often has to supervise the courts of appeal and reverse the lower court's denial of qualified immunity to Fox.

A. Review Is Necessary to Clarify Whether a Use of Force Claim Is Cognizable under the Fourth Amendment When Force Is Used But Not Applied.

The deputies went to the door of respondents' home to conduct this "walk and talk" just like any citizen. *See Kentucky v. King*, 563 U.S. 452, 469, 131 S. Ct. 1849, 1862 (2011). The deputies' conduct did not constitute a seizure unless they had surrounded the home and cut off all escape, which are not the facts of the case. Consequently, when Fox fired his weapon, he was not using force "in the course of making an

arrest, investigatory stop, or other 'seizure' of a person" as required for application of the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 388, 109 S. Ct. 1865, 1867 (1989). Fox may have been attempting to touch Mark with his shots, but "neither usage nor common-law tradition makes an attempted seizure a seizure." *California v. Hodari D.*, 499 U.S. 621, 626 n.2, 111 S. Ct. 1547, 1550 (1991). Even if the Campbells are deemed to have submitted to a show of authority after the shots were fired, the shots were not fired in the course of a seizure, but in self-defense, so *Graham* should not apply in this case.

Additionally, the language in the Court's use of force cases has been ambiguous about whether the Fourth Amendment applies to the use of force or to the application of force to the target. The Sixth Circuit ruminated that "this may be an obvious case in which the general rule on *use* of deadly force, enunciated in *Garner*" may have given Fox sufficient notice. (App.20). (emphasis added.) The Court in *Garner,* however, did employ the word "use" in its opinion, when Justice O'Connor, in her dissent, said:

> "I assume that the majority intends the word 'use' to include only those circumstances in which the suspect is actually apprehended. . . . I doubt that the Court intends to allow criminal suspects who successfully escape to return later with § 1983 claims against officers who used, albeit unsuccessfully, deadly force in their futile attempt to capture the fleeing suspect."

Garner, 471 U.S. at 31 (O'Connor, J., dissenting). In *Graham*, the Court explained that the analysis of an excessive force claim "begins by identifying the specific constitutional right allegedly infringed by the challenged *application* of force." *Graham*, 490 U.S. at 394 (Emphasis added.) In discussing the meaning of *Garner*, the Court in *Graham* explained: "In *Garner*, we addressed a claim [about] the use of deadly force to apprehend a fleeing suspect . . ." *Graham*, 490 U.S. at 394. The Court made clear that its holding in *Garner* involved a claim where deadly force had been applied. In other portions of the *Graham* opinion, however, the Court reverted to using the term "use of force": "The 'reasonableness' of a particular use of force must be 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.

This ambiguity about whether excessive force claims involve *use* of force or require an *applicatio*n of force has continued to the present day. *Compare Kisela v. Hughes,* 138 S. Ct. 1148, 1152 (2018) ("Here, the Court need not, and does not, decide whether *Kisela* violated the Fourth Amendment when he used deadly force against Hughes.") *with Los Angeles County v. Mendez*, 137 S. Ct. 1539, 1547 (2017) ("An excessive force claim is a claim that a law enforcement officer carried out an unreasonable seizure through a use of force that was not justified under the relevant circumstances.")

This Court has never decided whether an excessive force claim can be asserted under Section 1983 when an officer uses or threatens force, but that

force does not have a physical impact on the plaintiff. Although addressing the claim of a pre-trial detainee under the Fourteenth Amendment, the Second Circuit noted: But neither the Supreme Court, nor this Court, has clearly established that a verbal threat combined with a display of a firearm, without any physical contact, constitutes excessive force." *Gerard v. City of New York*, 843 F. App'x 380, 382 (2d Cir. 2021). This Court should grant the petition and hold that excessive force claims fail under the Fourth Amendment when force is deployed but the intended target is not physically impacted by such use of force.

Petitioner contends that the Fourth Amendment is an inappropriate vehicle for analyzing the use of force which has no physical impact on a person. The amendment is directed at "unreasonable seizures." A person's mental state, which may be impacted by an attempted use of force, cannot be seized.

The Court should grant the petition to clarify that in a case where no seizure occurred at the time the shots were fired, an unreasonable force claim is more appropriately evaluated under the Fourteenth Amendment "shocks the conscience" standard which provides the proper standard of review for allegedly arbitrary conduct not covered explicitly elsewhere. *See County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 1716 (1998).

B. The Court Should Grant Review to Clarify Among the Circuits When a Seizure Occurs and Correct the Sixth Circuit's Extension of Its Own Prior Rulings.

1. The Circuit Court Erroneously Applied the *Mendenhall* Test to Determine that the Campbells were Seized and Erroneously Applied a Per Se Seizure Rule When Shots are Fired at Someone.

Respondents have pursued their excessive force claims under the Fourth Amendment. The Sixth Circuit analyzed the Campbells' claim as arising under that amendment. The Fourth Amendment "becomes relevant" when a citizen is searched or seized. *See Terry v. Ohio*, 392 U.S. 1, 16 (1968). The majority opinion correctly noted that a seizure under the Fourth Amendment requires "(1) use of force with the intent to restrain; or (2) show of authority with acquisition of control." (App.9) (*citing Torres v. Madrid*, 141 S. Ct 989, 998, 1001 (2021)). The majority held that Respondents had to show "a seizure by acquisition of control involv[ing] either voluntary submission to a show of authority or the termination of freedom of movement." (App.9)(*quoting Torres*, 141 S. Ct. at 1001). In *California v. Hodari D.,* the Court established that there is an additional "necessary, but not a sufficient" requirement to find a seizure effected through a show of authority." *Id.* at 628. This requirement is that the so-called *Mendenhall* test must be satisfied: "[A] person has been 'seized' within

the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 627-28 (*quoting United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

The majority concluded its discussion of the seizure issue with the following quotation from *Jacobs v. Alam*, 915 F.3d 1028, 1042 (6th Cir. 2019): "When an officer fires a gun at a person," but "the bullet does not hit the person, the 'show of authority . . . ha[s] the intended effect of contributing to [the person]'s immediate restraint' and under our caselaw is a seizure." (App.14). The Sixth Circuit used this rationale in *Jacobs* to deny qualified immunity to an officer who shot at Jacobs and missed at the same time, while another officer shot at and hit Jacobs. There was no evidence that the firing of the errant shot by one officer caused the other officer to fire a shot that struck Jacobs. The *Jacobs* panel derived the above quote from *Thompson v. City of Lebanon*, 831 F.3d 366, 371 (6th Cir. 2016), but there was a key difference in *Thompson*: the firing of the first shot that missed Thompson *caused* the second officer to shoot and kill Thompson. In *Thompson* the circuit court said: "On these facts Officer McKinley's shot, leading as it did to Officer McDannald's shots, 'had the intended effect of contributing to [Thompson's] immediate restraint,' and under *Floyd* this was a seizure." *Thompson*, 831 F.3d at 371 (*quoting Floyd*, 518 F.3d at 406). The same chain of events happened in *Floyd*: the first officer shot and missed but that shot triggered a shot by the second officer which struck Floyd. *Thompson* and *Floyd* both applied causation

principles; by changing the word "had" to "has" the Sixth Circuit in *Jacobs* and in this case has reinstated the *Mendenhall* test as a sufficient test for a seizure. The majority stated, "This show of authority restricted the Campbells' movement such that a reasonable person, under these circumstances, would not feel free to leave. Therefore, Fox seized the Campbells under the Fourth Amendment." (App.15). In its discussion on whether it was clearly established that a seizure had occurred, the majority again applied the *Mendenhall* test: Since Fox's shots missed, the majority stated, "it was clearly established that a seizure occurs if a reasonable person would have believed he was not free to leave in response to Fox's gunshots." (App.22).

The majority opinion attempted to distinguish cases in which no seizure was found when police shot and missed at someone fleeing. (App.117); *see, e.g., Cameron v. City of Pontiac,* 813 F.2d 782 (6th Cir. 1987). However, the Eleventh Circuit case of *Carr v. Tatangelo*, 338 F.3d 1259 (11th Cir. 2003) cannot be distinguished. In that case, two officers were observing Romeo Carr's house while hiding in some bushes. Carr and Cedric Wymbs thought they saw something in the bushes. When the officers thought either Carr or Wymbs had "racked a round," they began firing. Carr was shot, but Wymbs was not. They both ran into Carr's house when the shooting started. Carr was held to have a Fourth Amendment claim, but Wymbs's claim was evaluated under the Fourteenth Amendment: "Because Wymbs was not shot or physically touched by the officers, his excessive force cause of action relating to the shooting is based

on substantive due process under the Fourteenth Amendment." *Id.* at 1270-71.

In *Hammett v. Paulding County*, 875 F.3d 1036 (11th Cir. 2017), the Eleventh Circuit applied *Carr* in a holding that implicitly rejects the rationale of *Jacobs* that was applied by the Sixth Circuit in this case. Four officers executed a search warrant. When they confronted Hammett in a hallway, two of the officers fired shots which struck Hammett and a third officer fired a shot and missed. With respect to the liability of the third officer whose shot had missed, the parties argued about which Sixth Circuit case, *Cameron* or *Floyd*, should provide the governing rationale. The Eleventh Circuit held, instead, that *Carr* was the binding case:

> The parties neglect, however, this Circuit's law on the subject, which is sufficient to dispose of the issue. We held in *Carr v. Tatangelo* that where police officers fire on an individual in alleged self-defense, but do not hit him or otherwise touch him, the individual has not been seized. 338 F.3d 1259, 1270-71 (11th Cir. 2003).

Hammett, 875 F.3d at 1053.

The Fourth Circuit followed *Carr* in a case where an officer shot and missed the decedent and rejected the estate's claim that the officer should be liable because he attempted to seize the decedent: "Here, there was no seizure because the bullets from Deputy Farrow's weapon never touched Rodgers."

Estate of Rodgers v. Smith, 188 F. App'x 175, 180-81 (4th Cir. 2006) (*citing Carr*).

The Court should grant the petition and provide clear guidance among the circuits as to whether firing at someone in self-defense but missing constitutes a seizure.

2. The Court Should Clarify that a Seizure by Termination of Movement Requires that There is No Safe Means of Escape as was Present in this Case.

The majority cited to *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002) as an example for when a seizure occurred by assertion of authority which resulted in a termination of movement. In *Ewolski*, John Lekan barricaded himself in his home with his wife and child. Police surrounded the home and a standoff occurred over the course of two days. The Sixth Circuit held that Lekan's freedom of movement was terminated. The court said that surrounding the home and parading an armored vehicle was "no less effective" in seizing him than would have been the case "had the police nailed shut the doors and windows of his house with him inside." *Id.* at 506. In short, Mr. Lekan had no means of escape from the home.

In contrast to the facts of *Ewolski*, only Fox and Austin were on the scene and standing outside the front door at the time Fox fired his shots. Mark retreated into the home and then came out the front door twice to confront the two deputies who had

retreated to Fox's vehicle. Of most significance, Mark then left the house from the back. Rather than disappear into the night, he decided to try to "get the jump" on the officers, walked past Fox and Austin, and was seized by another deputy who had arrived to provide backup.

This Court has turned to the common law for guidance on the meaning of a "seizure." *See California v. Hodari D.*, 499 U.S. 621, 624-26 (1991); *Torres v. Madrid,* 141 S. Ct. 989, 995 (2021). Practitioners of the common law at the founding would not unequivocally agree with the circuit court's contention that a seizure occurs if an officer "locks a suspect in a room." (App.9). If the suspect knew of a safe escape route, no tortious false imprisonment occurred. The *Restatement (Second) of Torts* § 36 puts it this way:

> (1) To make the actor liable for false imprisonment, the other's confinement within the boundaries fixed by the actor must be complete.
>
> (2) The confinement is complete although there is a reasonable means of escape, unless the other knows of it.

Id. Illustration 1 to this section is as follows: "1. A locks B, an athletic young man, in a room with an open window at a height of four feet from the floor and from the ground outside. A has not confined B." *Id.* This illustration is based on *Wright v. Wilson*, 1 Ld. Raym. 739, 91 Eng. Rep. 1394 (1699) *and Davis & Allcott Co. v. Boozer,* 215 Ala. 116, 117, 110 So. 28, 30 (1926), in both of which cases there was no false imprisonment because the plaintiffs could have exited from another

door. The Court in *Torres* noted that, at common law, "actual control is a necessary element for [a seizure by acquisition of control]." *Torres*, 141 S. Ct. at 1001. Mark and Sherrie had a safe escape route, and the Court should grant the petition to clarify that the presence of a safe escape route defeats a claim that a seizure has occurred under the Fourth Amendment.

3. The Court Should Clarify that a Seizure by Submission to Authority Requires an Unambiguous Manifestation of Submission.

The majority concluded that the Campbell's "effectively submitted to a show of authority by remaining in their home." (App.12). The only verbal command Fox gave before he fired the shots was "Mark . . . come on out." (App.3). In response to the shots, Mark fell to the floor and kicked the door shut. (App.4). A reasonable person in Mark's position would have understood that Fox felt threatened and fired shots in response to Mark's statement that he had a gun and opened the door in the dark with something in his hand. The way to submit to Fox's deterrent shots was to do exactly what the plaintiff did in *Floyd v. City of Detroit*, 518 F.3d 398, 406 (6th Cir. 2008) in response to a shot that missed: "Floyd contends that he in fact halted in his tracks upon hearing Quaine's initial shot and even backed up slightly, quickly yelling, 'I don't have a gun.'" *Id.* at 406. Distinguishing *Floyd*, the District Court for the Eastern District of Kentucky held that an officer who shot at and missed a man outside his home had not seized the man when he did not surrender:

> The facts of this case are clearly distinguishable from Floyd, and indicate that Robb's show of force did not have the intended effect of causing Robert to surrender. After Robb fired a shot at Robert, Robert briefly disappeared and then reemerged, challenging the officers to shoot him and threatening Rumford that a "vest ain't going to help [him]."

Bradford v. Bracken Cty., No. 09-115-DLB-JGW, 2012 U.S. Dist. LEXIS 81924, at *41 (E.D. Ky. June 13, 2012). Given the constitutional restrictions on entry into a residence to seize someone (*see Payton v. New York,* 445 U.S. 573 (1980)), Mark's retreat into the home after the shots were fired hardly constitutes submitting to Fox's authority.

The circuit court made note of *Brendlin v. California*, 551 U.S. 249 (2007) in its opinion, but failed to apply its admonition that "there is no seizure without actual submission." *Id.* at 254. *Brendlin* held that passengers in a stopped vehicle are seized if they submit to authority after the stop. Submission questions often arise in suppression hearings. The Sixth Circuit held that an automobile passenger did not submit to the show of authority when a vehicle was seized. "Rather, he opened the car door and 'jumped out' as though he wanted to run." *United States v. Jones*, 562 F.3d 768, 774 (6th Cir. 2009). Consequently, the majority's analogy to shooting at a car as a seizure of all passengers is incorrect because the passengers are not seized unless they submit to authority after the car is stopped. (App.13). A house is always "stopped" so its occupants are not seized

simply because the house is shot at. This Court clarified in *Torres* that the doctrine of "constructive possession" applied to touching persons at common law and under this Court's jurisprudence but never indicated that it would extend the doctrine to the touching of a residence. *See Torres v. Madrid*, 141 S. Ct. 989, 1002 (2021) (discussing the "constructive detention" of persons).

The Court should grant the petition and adopt the standard for submission enunciated by the Tenth Circuit in *Farrell v. Montoya*, 878 F.3d 933 (10th Cir. 2017). The plaintiffs in that case claimed that they intended to submit, but the court said "their intentions are irrelevant to their claim. 'A submission to a show or assertion of authority requires that a suspect manifest compliance with police orders.'" *Id.* at 939 (*quoting United States v. Martin*, 613 F.3d 1295, 1300 (10th Cir. 2010)). Mark and Sherrie never manifested submission to Fox's authority. In fact, Sherrie's presence was unknown at the time of the shots.

The circuit court's claim that the most important time frame is immediately after the shots were fired is inaccurate because a seizure by submission to authority is two acts, not one: the show of authority and the manifestation of submission to that authority. Throughout the period after the shots were fired until Mark was seized as he wandered in the yard there was no submission to authority by either Mark or Sherrie. The Court should grant the petition to clarify the analysis that is appropriate for determining if there is a submission to authority.

4. Sherrie Was Not Seized Because She Was Not an Intended Target.

Sherrie was not seized for an additional reason: she was not the target of Fox's shots; Mark was. This Court noted a conflict among the circuits on whether a passenger in a vehicle who is struck by a bullet intended to stop the driver is seized under the Fourth Amendment. *Plumhoff v. Rickard*, 572 U.S. 765, 778 n.4, 134 S. Ct. 2012, 2022 (2014). While the Sixth Circuit has held that a passenger in a moving car was seized by shots intended for the driver in *Fisher v. Memphis*, 234 F. 3d 312 (6th Cir. 2000), another panel held that a person seated in a stationary vehicle was not seized by shots fired at a person outside the vehicle. *Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000) ("the authorities could not 'seize' any person other than one who was a deliberate object of their exertion of force").

The circuit court seemed to apply the idea of transferred intent which originated in criminal law where it was determined that a person who intended to inflict injury on Person A should not escape punishment if Person B was injured instead. *See Prosser and Keeton on Torts* § 8, p. 36 (5th Ed. 1984). Fox should not be subjected to virtually unlimited liability to those in the vicinity of his shots (including Sherrie) when he fired shots in self-defense. He does not share the same culpability of a person who sets out to intentionally injure someone. The Court should grant the petition to address and resolve this issue of whether unintended individuals are seized under the Fourth Amendment when shots are fired in the

direction of buildings they occupy, but they are not struck.

C. The Court Should Grant Review to Clarify How the *Graham* Factors Apply When an Officer Uses Force in Self Defense and Should Hold that Fox's Use of Force Was Not Unreasonable.

The circuit court applied the three-factor test from *Graham v. Connor*, 490 U.S. 386 (1989) in evaluating the reasonableness of Fox's use of force. (App.15-16). *Graham* arose "in the context of an arrest or investigatory stop of a free citizen." *Graham v. Connor*, 490 U.S. at 394. The officers in *Graham* were investigating whether Graham had committed offenses in entering and leaving a convenience store hastily and then appearing disoriented when approached by police. In contrast, Officer Fox was responding to a report of two 9-1-1 hang-up calls traced to the Campbells' address when Mark asked if Fox was armed, announced that he was armed, and quickly opened the door with something in his hand. Fox fired shots to defend against the threat he perceived to himself and Austin. Counting the failure of the perceived assailant to flee in a self-defense situation is the opposite of the way that factor should work. An assailant who stands their ground is more of a threat to an officer than is an assailant who gestures with a weapon while running away.

The "seriousness of the crime" element is either irrelevant or allows the plaintiff to double count his version of events in a self-defense case. In this case,

Fox did not know what, if any, crime had been committed when he responded to the hang-up calls. 911 hang-ups can signify "that the caller is unable to pick up the phone--because of injury, illness (a heart attack, for example), or a threat of violence." *Hanson v. Dane County*., 608 F.3d 335, 337 (7th Cir. 2010). The threat to law enforcement is the same no matter what brought him face to face with a perceived threat.

If the relevant crime is the potential crime that the alleged assailant committed in threatening law enforcement, the assailant's version of events will be used in evaluating the threat for purposes of summary judgment. The alleged assailant's version of events will also be used to determine whether a crime was committed in determining the officer's motion for summary judgment. In the *Jacobs* case, relied upon by the circuit court, this point was well-illustrated in the district court. Under Jacobs's version of events, "the first Graham factor weighs in favor of Jacobs, as he was not committing any crime." *Jacobs v. Alam*, No. 15-10516, 2017 U.S. Dist. LEXIS 134810, at *19 (E.D. Mich. Aug. 23, 2017). However, the district court denied Jacobs' cross motion for summary judgment because, under the officers' view of the facts, "the first Graham factor weighs in favor of Defendants, as they testified that Jacobs was threatening a police officer at gunpoint—a serious crime." *Id.* at *22.

The Court should grant the petition and clarify that in a case where law enforcement uses force in defense of self or others, all circumstances related to the nature of the threat and the reasonableness of the response to the threat should be evaluated without requiring special consideration given to the

seriousness of the crime and flight factors. Petitioner contends that when all relevant facts are considered (including those identified by Judge Nalbandian in his dissent (App.35-39) and the fact that law enforcement were responding to two 9-1-1 hang-up calls), Petitioner's conduct should be adjudged to be reasonable. At a minimum, the case should be returned to the court of appeals for reevaluation without special weight given to the "severity of the crime" and flight factors which puts "the thumbs on the scale" in favor of the plaintiff in self-defense cases.

D. The Court Should Announce that Only Its Precedent Can Be the Source of Clearly Established Law. Alternatively, if Sixth Circuit Precedent Is Considered, It Was Not Clearly Established that Fox Seized Respondents or that He Used Excessive Force.

The Supreme Court has expressed doubts in recent years as to whether any precedent other than its own can serve as a basis for clearly established law for purposes of qualified immunity under 42 U.S.C. § 1983. The Court has questioned "*if* a controlling circuit precedent could constitute clearly established law" in determining whether a right is clearly established. *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (*quoting City and County of San Francisco v. Sheehan,* 575 U.S. 600, 614, (2015) (emphasis added). The Court has also said that "a defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have

understood that he was violating it." *Plumhoff v. Rickard*, 572 U.S. 765, 778-79 (2014). Too often what a reasonable officer is expected to know depends upon where the defendant stands. The Court should determine that only its precedent constitutes binding authority in determining whether a right is clearly established to assure that outcomes are not determined by accidents of geography but are uniform across the country. *See* Wilson, *"'Location, Location, Location': Recent Developments in the Qualified Immunity Defense,* 57 N.Y.U. Ann. Surv. Am. L. 445, 448 (2000) ("Absent Supreme Court precedent offering more direct guidance on the meaning of the nebulous 'clearly established' standard, we will likely continue to see substantial disparities among the lower courts working to develop the substantive law of qualified immunity."). In this case, Fox was found to have violated clearly established law by firing and missing at Mark while Sherrie slept. This Court has never held that firing shots and missing is a seizure, nor that law enforcement can be guilty of using excessive force without touching the plaintiff.

The Court has repeatedly reversed decisions of the circuit courts when they improperly deny qualified immunity to law enforcement by finding that the law governing an official's conduct in the specific context in which they acted was clearly established when the law was anything but clear. Qualified immunity is designed to permit law enforcement to act without undue fear of being entangled in litigation and damage awards in cases of uncertainty. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). These concerns are magnified, when, as here, a deputy perceived that

he faced a threat of serious harm to himself and must act quickly.

An official is entitled to qualified immunity if the official's conduct does not violate clearly established law of which a reasonable person would have known. *See White v. Pauly*, 137 S. Ct. 548, 551 (2017). In *Mullenix v. Luna,* 577 U.S. 7 (2015), the Court reiterated that a right is only clearly established when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Id.* at 11. "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." *White*, 137 S. Ct. at 551. When seeking precedent that puts a question beyond debate, the search must be "undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). "Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that '[i]t 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.'" *Mullenix,* 577 U.S. at 12 (*quoting Saucier v. Katz*, 533 U.S 194, 205 (2001).

As argued above, respondents and the circuit court were required to identify a Supreme Court case that "addresses facts like the ones at issue here." *Mullenix*, 577 U.S. at 12. With respect to the issue of whether it was clearly established that Fox had seized Mark and Sherrie, the circuit court cited *Brendlin* for the principle that the Campbells would not have felt free to leave in response to the gunshots. However, *Brendlin* involved the potential seizure of passengers

in a vehicle when police stopped the vehicle, they are in. *Brendlin* stated that the passengers must signal submission to the officer's authority to be seized under the Fourth Amendment. *See Brendlin,* 551 U.S. at 262. *Brendlin* provided no clear guidance that Mark and Sherrie signified compliance under the facts of this case.

Even assuming that Sixth Circuit precedent can establish clearly established law, the only circuit case the majority discussed on the seizure issue in its "clearly established" analysis was *Ewolski*. *Ewolski* held that Mr. Lekan was not free to leave because he was the target of the police activity, and his freedom of movement was terminated because the police had surrounded his home. Here, contrary to the assertion of the circuit court, Fox and Austin did not have the house surrounded when Fox fired his shots. They were standing together near the front door, and no one was covering the rear exit of the home. The situation in this case in much closer to the facts in *Scozzari v. McGraw*, 500 F. App'x 421 (6th Cir. 2012) when the Sixth Circuit found no seizure even though two officers had stationed themselves outside the front door of a cabin: "[T]he complaint does not allege that Scozzari was unable to leave his home. The complaint only alleges that the two officers positioned themselves at a door of the cabin." *Id.* at 426.

Ewolski supports Fox's position that Sherrie was not seized rather than respondents' position. The Sixth Circuit had held that Mr. Lekan was seized because he was the target of the siege established by the police. Lekan's wife and son were determined not to be seized because '[t]here was no reason for either

of them to believe that the police were preventing them from leaving the house." Fox directed no actions against Sherrie (he did not know of her presence), and she did not ask Fox if she could leave the house before or after the shots were fired. The majority admitted that Mark told Sherrie not to leave, so her movement "was restrained by [her husband] . . . . not by the police." *See Ewolski,* 287 F.3d at 507. Further, the Sixth Circuit case of *Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000) indicates that Sherrie was not seized because she was not the target of Fox's shots.

Since it was not clearly established that either Mark or Sherrie was seized and respondents have pursued their claim against Fox only as a Fourth Amendment claim, the issue of whether it was clearly established that Fox used excessive force in firing at Mark and missed need not be addressed. Even if that question is reached, respondents and the circuit court again failed to cite specific precedent that established that Fox was guilty of an excessive force violation under respondents' version of the facts. No Supreme Court case has ever held that an officer commits a Fourth Amendment violation by shooting at and missing his target. *Garner* and *Graham* are ambiguous on whether excessive force claims can be asserted when force is used but not applied.

The circuit court's opinion discussed three cases where officers shot and missed their targets and were still denied qualified immunity: *Floyd*, *Thompson,* and *Jacobs*. In all three cases, however, the targets were shot by another officer. In both *Floyd* and *Thompson*, the circuit court held that the shot of the first officer that missed caused the shots fired by the

second officer. An officer in Fox's position might well not understand that those cases establish his liability for an excessive force claim when the targets were not struck by anyone. *Jacobs* was decided after the events at issue in this case so it cannot be considered in the "clearly established" analysis. All of the other cases discussed by the majority with respect to the excessive force claim involved instances where the defendant officer shot at and struck the individual at whom they were shooting.

The majority lands on *Floyd* as clearly establishing that Fox used excessive force. Under Floyd's version of events, he was unarmed when he was shot. *See Floyd v. City of Detroit*, 518 F.3d at 402. Mark told the officers that he was armed before quickly opening the door with something in his hand. "[T]he police were justified in taking [Mark] at his word when he [said] he had a gun." *See Mullenix*, 577 U.S. at 18. It was completely dark when Fox responded to the calls, while it was dusk at the time of the incident in *Floyd* and a neighbor could see what happened. *See Floyd*, 518 F.3d at 402-03. The officers were acting on a report that Floyd had been carrying a weapon "several hours earlier," while Fox did not know what he was going to encounter during the hang-up call. *Id.* at 407. The officers went into the encounter with *Floyd* with their guns drawn, while Fox did not draw his weapon until Mark said he had a gun. *Id. Floyd* is not sufficiently analogous, and Fox would not have been on notice that his actions clearly violated the law.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

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Respectfully submitted,

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