No. 22-848

In the Supreme Court of the United States

JAMES DOUGLAS FOX,

Petitioner,

v.

MARK CAMPBELL AND SHERRIE CAMPBELL

Respondents,

On Petition for A Writ of Certiorari To The United States Court of Appeals For the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

While conducting a questionable "welfare check" at the home of Respondents Mark Campbell and Sherrie Campbell, Petitioner sheriff's deputy officer James Fox shot eight rounds through the front door of the home. Fox never announced that he was law enforcement. He stated, as recorded on bodycam footage, immediately after shooting that he could not tell what Mark Campbell had in his hand when he peeked out of his door. Fox then retrieved his rifle from his police vehicle and took up a tactical defensive position with his weapon trained on the Campbell home. Mr. Campbell was arrested a short time later. Based on these facts, the district court and Sixth Circuit concluded that Fox violated the Campbells' clearly established Fourth Amendment right to be free from unreasonable seizures.

The question presented is:

> Whether this Court should second-guess the Sixth Circuit's and district court's highly fact bound conclusion that Respondent James Fox was not entitled to qualified immunity on the Respondents' excessive force claim.

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INTRODUCTION

Petitioner James Fox shot eight rounds into the front door of Mark and Sherrie Campbell's home for no good reason. Before taking that drastic step, Fox did not announce that he was law enforcement. He did not attempt to use nonlethal alternatives before resorting to deadly force. He did not see a gun in Mark Campbell's hand when Mark peeked out of his front door. And he did not have any reason to believe that the Campbells posed a threat to him or his fellow officer. Instead, he unloaded his firearm into the Campbell residence and then arrested Mark Campbell a short time later. That behavior was not reasonable. It was patently unreasonable and plainly inconsistent with the Fourth Amendment's prohibition against unreasonable deadly force. Both the district court and the Sixth Circuit agreed and held that Fox was not entitled to qualified immunity for his reckless conduct.

In a thinly veiled attempt to relitigate the arguments he lost below, Petitioner presents four questions for this Court's review. But none implicates a genuine Circuit split or otherwise meets this Court's traditional criteria for certiorari. Rather, Petitioner all but admits that his petition invites this Court to engage in highly fact bound error correction of a decision where no error (much less plain error) is apparent. The Court should decline that invitation. The Sixth Circuit faithfully applied this Court's settled precedent and correctly concluded, based on the summary judgment record, that Fox's conduct was objectively unreasonable. Petitioner offers no persuasive basis to disturb that ruling. The petition should be denied.

STATEMENT OF THE CASE

A. Factual Statement

At 9:40 PM on Tuesday, August 21, 2018, Cheatham County, Tennessee sheriff deputies James Fox and Christopher Austin were dispatched to the rural home of Mark and Sherrie Campbell on a "welfare check" after the county Emergency Communications Center received two 9-1-1 hang-up calls from a disconnected cell phone, which they claimed was in the general vicinity of the Campbell home. When the officers arrived at the home, they pulled into the driveway with their headlights facing the front of the home. The officers did not activate their emergency lights. They approached the Campbells' home, and Fox walked up onto the porch, knocked on the front door three times, and then stepped back off of the porch. He did not announce that he was law enforcement. App. 3 (see table with timeline App. 3-4)

Mr. Campbell, not knowing who was at his door at this hour, asked from the behind the closed door, "You got a gun?" At this point, Fox unholstered his weapon, began walking away from the front door past Austin, and said, "Mark…come on out Mark, what's up man?" Mr. Campbell again inquired from behind his closed door, "You got a gun?" Fox responded, "What's going on Mark?" Mr. Campbell then said, "I got one too." Fox then drew his sidearm and walked a few steps away from the door. Meanwhile, as depicted on Austin's body camera footage, Mr. Campbell cracked the door open a few inches and peaked out. Fox turned rapidly back toward the door and fired two shots in rapid succession at the door. When Austin fell

to the ground, Fox paused briefly and asked him, "You good?" and then fired six more rounds in rapid succession at the front door. App. 3-4

As the hail of gunfire began flying through his front door, Mark Campbell dove to the floor and kicked the door shut. He yelled to his wife, Sherrie, to call 9-1-1 because somebody was shooting at them. Sherrie, who was asleep at the time in the bedroom, woke to hear Mark yelling and called 9-1-1. Fortunately, nobody was struck by Fox's frenzied gunfire, which would later be found to have pierced the front door from about two feet from the ground to the top of the doorway. App. 4

After firing on the Campbell home, Fox and Austin retreated to their police vehicles. Fox reported over the radio that shots were fired and then retrieved his "AR" assault rifle from his vehicle. Mark could be heard in the background yelling profanities. A few minutes later, Mark walked out onto his porch with his cell phone in his hand. The officers yelled at him to show his hands and get on the ground. In response, Mark told the officers that he had his cell phone. App. 5.

During these events, both officers asked each other on numerous occasions what Mark had in his hand when he opened the front door. However, after numerous other officers arrived at the scene, including a supervisor, this uncertainty evolved into the dubious claim that Mr. Campbell was holding and pointing a gun. App. 5; App 18. Based on the officers' shifting account, Mr. Campbell was subsequently arrested in his yard after coming out of his home and approaching the collected officers from the shadows of the wooded

area in the front yard. After his arrest, Fox, Austin, and a detective went into the home and told Sherrie Campbell to come out of the bedroom with her hands visible. She complied and was detained while they cleared the house. No firearms were found. App 5; App 18. Mark didn't own any firearms. Mark was charged with two counts of aggravated assault, both of which were ultimately dismissed at a probable cause hearing in state court. App. 5.

B. Proceedings in District Court

In February 2019, petitioners filed a civil-rights complaint in the United States District Court for the Middle District of Tennessee against officers Fox and Austin, the Cheatham County Sheriff's Department, the Municipal Government of Cheatham County, and the elected sheriff, Mike Breedlove. The complaint included allegations of the use of excessive force against Fox; failure of his duty to protect against Austin; failure to properly train, supervise or discipline against the sheriff's department, the county and sheriff Breedlove; and Reckless/Intentional Infliction of Emotional Distress against all defendants. App. 43-44

The defendants filed two motions for summary judgment, one on behalf of the County, the Sheriff's Department (the "County's motion"), and Sheriff Breedlove and the other on behalf of officers Fox and Austin (the "officers' motion"). The District Court granted the County's motion in whole. App. 44

The District Court dismissed all claims against deputy Austin and the negligent/intentional infliction of emotional distress claim against both officers.

However, in a well-reasoned opinion, the court denied summary judgment for Fox on the excessive force claim. App. 82.

In its memorandum opinion, the District Court reasoned that Mark Campbell was seized for Fourth Amendment purposes because "Fox's shots had the intended effect of contributing to Mar's immediate restraint within the residence," citing *Jacobs v. Alam,* 915 F.3d 1029, 1042 (6th Cir. 2019). App. 58. The court rejected Fox's arguments that no seizure occurred because his bullets did not strike Mark Campbell. In so doing, the court pointed out that other cases involved officers shooting at fleeing suspects, whereas Mark and Sherrie Campbell were in their home. App. 58-59 (see footnote). The court equally found that Sherrie Campbell was seized pursuant to established 6th Circuit precedent. App. 60.

The District Court next reasoned that Fox's actions were not reasonable under the circumstances presented because "it was not reasonable for Fox to perceive Mark as posing an immediate threat of severe physical harm. App. 62. The court also rejected the argument that Fox was firing in "self-defense," stating that "genuine factual disputes exist as to whether Mark mad a menacing gesture…reasonably interpreted as demonstrating an intention to shoot." App. 65 (internal quotes and citations omitted).

Finally, the District Court determined that a clearly established right existed at the time of the shooting. It stated, "At the time Fox fired into Plaintiffs' residence, it was clearly established that "using deadly force against a suspect who does not pose a threat to anyone and is not committing a crime

or attempting to evade arrest violates the suspect's Fourth Amendment rights." App. 65. The court analogized the facts in this case to those in *Floyd v. City of Detroit*,518 F.3d 398 (6th Cir. 2008). App. 66. It again pointed out that there was "an important factual dispute about Mark's appearance to Fox when Mark opened the front door." *Id.* The court then properly concluded that summary judgement was inappropriate on the excessive force claim. *Id.*

C. Sixth Circuit Appeal

On August 29, 2022, the United States Court of Appeals for the Sixth Circuit affirmed the district court's ruling. First, as threshold matter, the Sixth Circuit held that the Campbells were seized within the meaning of the Fourth Amendment. App. 15. In view of all the circumstances presented, the Court reasoned, "a reasonable person would not believe that he or she was free to leave a house while an officer repeatedly fired at the front door." App. 10. In support of that conclusion, the Sixth Circuit relied on its longstanding clearly established precedent, *Ewolski v. City of Brunswick,* 287 F.3d 492 (6th Cir. 2002). App. 10-11.

The Sixth Circuit further held that Fox's actions were not reasonable under the facts presented. The Court of Appeals based that determination on a wall of clearly established authority—including *Mullins v. Cyranek*, 805 F.3d 760, 766 (6th Cir. 2015), *Floyd v. City of Detroit*, 518 F.3d 398 (6th Cir. 2008), *Dickerson v. McClellan*, 101 F.3d 1151 (6th Cir. 1996), and *Tennessee v. Garner,* 471 U.S. 1 (1985). Applying that precedent, the Sixth Circuit concluded that a reasonable officer would not have "believed deadly

force was justified" under the circumstances of this case, since "there was no probable cause to believe that Mark posed a threat to anyone's safety simply by virtue of informing the officers that he had a gun and then opening the door as they asked him to do." App. 16.

Finally, the Sixth Circuit correctly determined that Fox was not entitled to qualified immunity given that existing precedent made it beyond clear that his conduct was unreasonable under the circumstances. But given Fox's patently irresponsible conduct, the Sixth Circuit also explained that this case may fall within the definition of "… 'obvious cases where general standards are sufficient to clearly establish that an officer's conduct is unconstitutional, even without a body of relevant case law. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curium)." App. 19. Judge Nalbandian dissented. App. 23 et seq.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS A POOR CANDIDATE FOR CERTIORARI BECAUSE PETITIONER HAS FAILED TO IDENTIFY ANY COMPELLING REASONS FOR THIS COURT TO REVIEW THE SIXTH CIRCUIT'S DECISION.

Petitioner does not allege a conflict among the Circuits or state courts of last resort. He has failed to identify any important unresolved question of federal that in need of this Court's resolution. Instead, by his own admission, Petitioner asks this Court to second-guess the Sixth Circuit's careful and well-reasoned application of settled Supreme Court and Circuit precedent. *Pet. i-ii.* But that is not a basis to grant certiorari in this case. *See* Sup. Ct. R. 10 (providing

that certiorari "is rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law"). As Members of this Court have explained, "this Court is not equipped to correct every perceived error coming from the lower federal courts." *Boag v. MacDougall*, 454 U.S. 364, 366 (1982) (O'Connor, J., concurring); *see also* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* § 5.12(c)(3), p. 352 (10th ed. 2013) ("error correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari")). This case is no exception.

Straining to manufacture a question worthy of this Court's review, Petitioner urges this this Court to grant certiorari to "clarify" its well-established holdings in *Graham v. Connor*, 490 U.S. 386, "elaborate" on its holding in *California v. Hodari D.*, 499 U.S. 621 (1991), and "define what it takes to submit to a show of authority." Pet. 12-13. But this Court has already addressed those issues and answered those questions (many times over)—most recently in *Torres v. Madrid*, 141 S. Ct. 989 (2021), where the Court held that an individual may be seized for a brief time despite later demonstrating freedom of movement. *Id* at 1002.

Finally, in a last-ditch effort to present a certworthy issue, Petitioner suggests that this Court has inferred that Circuit precedent does not count as "clearly established" law for purposes of the qualified immunity analysis. But that suggestion is not the subject of a genuine Circuit split. For good reason: it collides with this Court's repeated statements that "a controlling Circuit precedent could constitute clearly

established federal law." *City & Cty. of S.F. v. Sheehan*, 575 U.S. 600, 614, (2015). (see also *Carroll v. Carman*, 574 U.w.13, 17 (2014); *Reichle v. Howards,* 566 U.S. 658, 665-66 (2012); *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019)). As this Court has explained, "[t]o be clearly established," a rule must be "settled law"— "which means it is dictated by 'controlling authority' or 'a robust consensus of cases of persuasive authority.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018). If a robust consensus of *persuasive* authority can clearly establish a rule of law, then *a fortiori*, governing Circuit precedent surely can. But even if that were not true, the Sixth Circuit's decision would not contravene that rule since it relied upon and applied *this* Court's cases in denying qualified immunity to Petitioner.

Ultimately, Petitioner simply seeks highly fact bound error correction, where (as we explain below) there is no error (much less clear error) apparent in the decision below. That is reason enough to deny certiorari.

II. THE DECISION BELOW WAS CORRECT.

Even if this Court were to overlook its ordinary criteria for granting review, there is no basis to disturb the Sixth Circuit's decision. At every turn, the Sixth Circuit carefully applied longstanding precedent, rejected Petitioner's arguments, and concluded that Fox was not entitled to qualified immunity on the Campbells' excessive force claims.

a. The Sixth Circuit Correctly Concluded That the Campbells Were "Seized"

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. U.S. Const. amend. IV. As relevant here, a seizure can occur in one of two ways: (1) use of force with the intent to restrain; or (2) show of authority with acquisition of control. *Torres*, 141 S.Ct. at 998, 1001. In *United States v. Mendenhall*, 446 U.S. 544 (1982), this Court defined a necessary condition for a seizure by show of authority. It explained "that a person has been 'seized'" under the Fourth Amendment if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id* at 554. One quintessential example of a seizure, the Court noted, included "…the display of a weapon by an officer." *Id*.

This Court further developed the analysis of a seizure by "show of authority" in *California v. Hodari D.*, 499 U.S. 621 (1991), stating that a necessary condition for seizure through a show of authority was "…whether the officer's words and actions would have conveyed that [*restriction of movement*] to a reasonable person." (parenthetical added) *Id* at 628. A seizure additionally requires that "the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quoting *Terry v. Ohio*, supra, 392 U.S. at 19 n.16 (1968)).

More recently, this Court reaffirmed this form of seizure, stating, "Unlike a seizure by force, a seizure

by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement. *Torres v. Madrid*, 141 S. Ct. 989, 1001 (2021). Similar to the arguments made by the Petitioner here, the officers in *Torres* argued that a seizure did not occur because of subsequent actions which occurred. This Court rejected this argument in *Torres*, as is should here, stating, "None of this squares with our recognition that [a] seizure is a single act, and not a continuous fact.'" *Id*. at 1002. (internal citations and quotations omitted).

Applied here, these principles confirm that Fox seized the Campbells. He repeatedly yelled at Mark Campbell, brandished his weapon, and used deadly force by firing his eight rounds through the front door of the Campbell home. Mark barely avoided being struck, but only by diving to the floor. And when he finally realized that Fox and Austin were law enforcement officers, he did not "flee" or feel free to leave the vicinity; he remained in his home until additional law enforcement arrived. The Sixth Circuit correctly held that under these circumstances, Fox's actions terminated the Campbells' movement and thus rose to the level of a "seizure" under the Fourth Amendment. *Torres*, 141 S. Ct. at 1002 (quoting *Hodari D.*, 491 U.S. at 625); *see also Brendlin v. California*, 551 U.S. 249, 255 (2007); *Rodriguez v. Passinault*, 647 F.3d 675 (6th Cir. 2011); *Fisher v. City of Memphis*, 234 F.3d 312 (6th Cir. 2000).

As the Sixth Circuit aptly explained:

> "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." *Jacobs v. Alam*, 915 F.3d 1028, 1042 (6th Cir. 2019) (alterations in original) (quoting *Thompson v. City of Lebanon*, 831 F.3d 366, 371 (6th Cir. 2016)). By firing at the Campbells' home, Fox made a show of authority. 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. 14-15.

Accordingly, contrary to Petitioner's repeated assertions, the Sixth Circuit correctly held that the Campbells were seized under clearly established precedent.

b. The Sixth Circuit Correctly Determined that the Force Used by Deputy Fox Was Objectively Unreasonable Under the Circumstances

Equally unavailing is Petitioner's attack on the Sixth Circuit's conclusion that Fox's use of deadly force was objectively unreasonable. The use of deadly force by a police officer is generally authorized only in rare instances where an officer believes that an individual poses a threat of serious physical harm either to the officer or to others. *Graham*, 490 U.S. at 396; *Jacobs v. Alam*, 915 F.3d 1028, 1041 (6th Cir. 2019). To determine the reasonableness of such force, courts must consider multiple factors, "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." *Graham*, 490 U.S. at 396.

The *Graham* factors firmly support the district court's conclusion that Fox acted in an objectively unreasonable manner: The Campbells had committed no crime, nor were they suspected of any. They were residing quietly inside of their home when Fox used deadly force. Nor did the Campbells present a potential threat to Fox when he needlessly rained gunfire on their home. When he arrived on the premises, Fox failed to announce that he was an officer and instead knocked on the door. Mark asked whether Fox had a gun and also informed Fox that he had one. Fox immediately unsnapped the safety strap on his weapon and placed his hand on it, ready to draw. Seconds later, after turning away from the door and walking a few steps away (and without taking less deadly measures), he turned and opened fire on the home. According to unrebutted record evidence, Fox and Austin did not see a gun in Mark's hands and had no objective reason to believe he or his wife were a threat to officer safety. App. 3-4.

On these facts, the Sixth Circuit correctly concluded that Fox's use of deadly force was patently unreasonable. To be sure, Mark Campbell told the officers that he had a gun, but as the Sixth Circuit properly determined (based on settled precedent) "there was no probable cause to believe that Mark posed a threat to anyone's safety simply by virtue of informing the officers that he had a gun and then opening the door as they asked him to do." App. 16. (citing *Floyd*, 518 F.3d at 405-07; *Dickerson v.*

McClellan, 101 F.3d 1151, 1163 (6th Cir. 1996)). Ultimately, viewing the record in the light most favorable to the Campbells, no reasonable officer would have believed they posed a risk to officer safety such that deadly force was justified.

c. The Sixth Circuit Correctly Determined that the Relevant Law Was "Clearly Established" at the Time of Fox's Unconstitutional Seizure

Qualified immunity shields law enforcement officers from liability when their conduct "'does not violate clearly established statutory or constitutional [law].'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). A law is "clearly established" if it is "sufficiently clear that every reasonable official would [have understood] that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (quotation marks omitted). In determining whether that standard is met, courts must focus "on whether the officer had fair notice that [their] conduct was unlawful." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). As this Court has acknowledged, "general statements of the law are not inherently incapable of giving fair and clear warning to officers." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam).

For the reasons articulated above, Fox violated clearly established law when he rushed to violence and seized the Campbells by unleashing deadly force on them and their home.

Even if this Court were to determine that the copious precedent relied upon by the Sixth Circuit was insufficient to confirm clearly established law, the Respondents submit that this case involved a right that is so clearly obvious, and the actions so clearly egregious, that no additional precedent is required. The legal concept of the inviolability of the home has been known in Western civilization since the age of the Roman Republic. *La Cité Antique*, Numa Denis Fustel de Coulanges, published 1864. In English common law the term is derived from the dictum that "an Englishman's home is his castle." *Semayne's Case* (January 1, 1604) 5 Coke Rep. 91. English law recognized this concept in the writings of the eminent 17th century jurist Sir Edward Coke, in his *The Institutes of the Laws of England*, 1628, in which he stated, "For a man's house is his castle, *et domus sua cuique est tutissimum refugium* [and each man's home is his safest refuge]."

Justice Stewart also recognized the deep historical significance of this right when he stated, "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). This Court aptly expounded on this venerable concept in *Payton v. New York*, 445 U.S. 573 (1980):

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an

> individual's home -- a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.' *Id* at 589.

The inquiry into the existence of a "clearly established" right should end here. Any reasonable officer would have known (and even found it obvious) that shooting at someone through their front door violated the Campbells' longstanding and clearly established right to be free from unreasonable seizures and to be secure in their home. Even if existing precedent were not sufficiently clear to put Fox on notice of the unconstitutionality of his conduct, this case presents an "'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Wesby*, 138 S. Ct. at 590.

Regardless, as the Sixth Circuit correctly determined, existing precedent *was* clear enough to put Fox on notice that his conduct fell beyond the constitutional pale. *See Floyd v. City of Detroit*, 518 F.3d 398 (6th Cir. 2008). Because Petitioner fails to identify any error (much less clear error) warranting review or summary reversal, the Court should deny certiorari.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully Submitted,

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