No. 20-1002

In The
Supreme Court of the United States

CODY WILLIAM COX,

Petitioner,

v.

DON WILSON,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Clear Creek County, Colorado, Sheriff's Deputy Don Wilson ("Wilson" or "Respondent") shot Cody Cox ("Cox" or "Petitioner") after a dangerous, high speed chase on an icy, snowy mountain highway and after exiting his vehicle during a temporary stop of traffic to confront Cox. A jury rejected Cox's 42 U.S.C. § 1983 excessive force claim against Wilson. The jury found, based on the totality of circumstances, that it was not objectively unreasonable for Wilson to have shot Cox when Cox drove his vehicle toward Wilson, causing Wilson to fear that he would be crushed between his vehicle and Cox's vehicle.

On appeal to the Tenth Circuit, Cox argued that the district court erred in refusing to instruct the jury that it may consider whether Wilson's decision to exit his vehicle recklessly exposed Wilson to danger—asserting this provoked Wilson's need to use deadly force when Cox drove toward him. The Tenth Circuit affirmed the district court's refusal to give this provocation instruction, finding that qualified immunity did not support the instruction as "[n]o law, certainly no law clearly established at the time of the incident, suggests that Wilson acted unreasonably up to and including the time that he exited his vehicle and approached Cox's vehicle." Resp. App. 2–3.

Despite Petitioner's representation otherwise, the Tenth Circuit did not make its qualified immunity determination by comparing the facts of this case with a

QUESTION PRESENTED—Continued

factually dissimilar case with more egregious conduct. Rather, the Tenth Circuit expressly applied long-established precedent of this Court and looked to "the specific context of the case, not as a broad general proposition," and whether there was a "Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts," that "found the law to be as the plaintiff maintains." *Id.* at 15–16 (internal citations and quotation marks omitted).

The question presented is:

> Whether a court may, for purposes of qualified immunity, determine clearly established law—as the appellate court did here—by looking to the specific context of the case, not as a broad proposition, and whether there was a Supreme Court or Tenth Circuit decision on point or the clearly established weight of authority from other courts that found the law to be as the plaintiff maintains.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner states that the Tenth Circuit opinion is reported at 959 F.3d 1249 and provides that opinion in his Appendix at 1a–20a. But that opinion was withdrawn and reissued. Pursuant to Sup. Ct. R. 14(1)(i)(i), the operative opinion appears in Respondent's Appendix at 1–22 and is reported at *Cox v. Wilson*, 959 F.3d 1249, *opinion withdrawn and reissued*, 971 F.3d 1159 (10th Cir. 2020).

SUMMARY OF RESPONSE

The Tenth Circuit affirmed the district court's refusal to give a "provocation instruction" on the basis of qualified immunity, finding "[n]o law, certainly no law clearly established at the time of the incident, suggests that Wilson acted unreasonably up to and including the time that he exited his vehicle and approached Cox's vehicle." Resp. App. 2–3. Petitioner seeks to reverse that decision.

The Petition should be denied as it is based on the faulty premise that the Tenth Circuit made its qualified immunity decision by comparing the facts of this case with a factually dissimilar case with more egregious conduct. That did not happen and this faulty premise is easily dispelled by a review of the circuit's opinion. That opinion unambiguously applied longstanding precedent from this Court and looked to "the

specific context of the case, not as a broad general proposition" and whether there was a "Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts" that "found the law to be as the plaintiff maintains." *Id.* at 15–16 (internal citations and quotation marks omitted). And, on that issue, the Tenth Circuit observed that "Cox has not presented, nor are we aware of, any opinion by the Supreme Court or this court, or, for that matter, any other court, holding that an officer in similar circumstances acted unreasonably." *Id.* at 18.

This Court's affirmation of qualified immunity has been emphatic, frequent, and long-standing. There is no need for this Court to revisit and reverse this long-held qualified immunity jurisprudence for at least five reasons: qualified immunity is connected with the common-law background of § 1983 and historical immunities available at the time it was enacted; qualified immunity properly reflects fundamental principles of federalism; qualified immunity is consistent with the authority of this Court to make common-law judgments about the availability of damages under 42 U.S.C. § 1988(a); qualified immunity provides a necessary symmetry to an expanded § 1983 remedy; and the doctrine of statutory *stare decisis* counsels against departure from this Court's qualified immunity precedent and, instead, any revision of qualified immunity should be legislative.

Even were this Court inclined to reexamine qualified immunity, this case is ill-suited for such reexamination as the qualified immunity issue here

is layered within a challenge to the district court's use of an excessive force jury instruction routinely used in the circuits and also conceptually entangled with the question unresolved in *County of Los Angeles, California v. Mendez*, 137 S. Ct. 1539 (2017), of whether and to what extent an officer's conduct, prior to the use of force, may have recklessly provoked the need to use force. Further, the Petition is based on a faulty interpretation of the Tenth Circuit's opinion.

STATEMENT

A. Factual Background

Clear Creek County Deputy Kevin Klaus ("Klaus") was, on January 31, 2014, dispatched on reports of a reckless and dangerous driver of a Toyota pickup truck—later determined to be Cox—driving westbound on I-70 into the mountains on wet, snowy, and icy roads. Resp. App. 3. The Tenth Circuit, in its comprehensive recitation of the facts, chronicled the radio traffic heard by Wilson:

> The dispatcher said, "[W]e've got about three 9-11 calls." . . . Klaus reported that at about mileage marker 232½, Cox "just wiped out in the, uh, number one lane. He's—was all over the road." Klaus also noted that his police vehicle did not have a siren. . . . After the other officer reported that he was at Exit 228, Klaus responded, "Uh, the way he's driving, I doubt we'll make it that far." . . . Klaus then reported

> that Cox was driving 60 miles per hour, then 70, and then 80 at mileage marker 230½.
>
> After an officer reported that westbound traffic was stopped about a mile and a half ahead, Klaus said, "[W]e just caught up with this traffic. He is not going to stop." Klaus continued, "[W]e're going to have to, uh, take some physical action on this vehicle. This guy has got to be very drunk, and he is not stopping." Shortly after that, Klaus reported, "We're in bumper-to-bumper traffic now at the 229½. He is not stopping."

Id. at 3–4 (citations to the record on appeal omitted).

By the time Klaus radioed that they would have to "take some physical action on this vehicle," Wilson, whose vehicle had a siren, had caught up with Cox and taken lead in the pursuit.[1] As traffic became more

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[1] Referring to Klaus's statement that "we're going to have to . . . take some physical action on this vehicle," Wilson testified:

> At this point, I had already caught up with them and I had taken over as primary vehicle in the pursuit and so I'm right behind Mr. Cox. And when Kevin said that, I believed—I agreed with what he was saying. I did not think this guy was going to stop. I was already observing his driving in this stop-and-go traffic. He was shooting into any gap in traffic that he could find and just—just a half a car length or so, he would—he would go as far as he could towards it. He was fish-tailing wildly, losing control of the back of his car, and he just didn't seem concerned about the other drivers out there. They were having to brake very hard to avoid striking him. I saw many close accidents already.

Resp. App. 24.

congested, Wilson observed Cox "continue to drive dangerously" and "accelerate through any gaps in the cars, losing traction and fishtailing wildly nearly a dozen times and coming very close to striking nearby vehicles." *Id.* at 5. Despite Wilson's use of lights and sirens and "repeated orders over his loudspeaker that Cox stop his vehicle," Cox refused to stop. *Id.*

Wilson was eventually able "to pull along the right side of Cox's vehicle, which was in the left-hand lane about five feet from the guardrail" while traffic continued to move in a stop-and-go fashion. But, despite Wilson's repeated orders for Cox to turn off his engine, Cox refused. *Id.* At this point, the driver in front of Cox, Sarah Kincaid, "fully stopped her car, requiring Cox to stop." *Id.* at 5–6. As observed by the Tenth Circuit:

> Kincaid stopped because she thought that Wilson wanted her to do so. But Wilson and Kincaid had not communicated at any point and Kincaid kept the engine running; so Wilson had no way of knowing that Kincaid was intentionally blocking Cox and would

> continue to do so even as traffic moved forward in front of her.

Id. at 6.[2, 3]

Wilson was of the opinion that "prompt action was necessary because he believed that the next stretch of highway posed increasing dangers for the chase" including "a crossover area a mile ahead where Cox could have driven into oncoming traffic." Resp. App. 6. Wilson concluded that, while Cox's vehicle was stopped, "he had a brief window of time" to exit his vehicle, confront Cox, and take the keys to Cox's vehicle. *Id.* Although the amount of time between the moment Wilson exited his vehicle and the moment he shot Cox was disputed,[4] Wilson testified that he shot Cox when, after Wilson exited his vehicle, Cox drove forward and to the right,

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[2] Petitioner misstates that, at the time of the shooting, "Cox's vehicle was boxed in by other cars—including two police cars—*and could not get away*." Petition at 1 (emphasis added). But, as noted by the Tenth Circuit, this was not the case as "Wilson had no way of knowing that Kincaid was intentionally blocking Cox and would continue to do so even as traffic moved forward in front of her." Resp. App. 6. As these facts were disputed, Petitioner should not interpret them in a light most favorable to Petitioner, but instead should acknowledge the dispute.

[3] Both Kincaid and Wilson testified that Cox was "repeatedly reaching down for something, which they assumed was a firearm." Resp. App. 18.

[4] Petitioner misstates that Cox was shot "immediately" upon Wilson exiting his vehicle. Petition at 1, 4, 20. As stated by the Tenth Circuit, witness accounts of this time ranged from seconds to several minutes. Resp. App. 7, n.1. Petitioner again improperly states disputed facts in a light most favorable to Petitioner.

toward Wilson's patrol car, "in a manner that caused him to believe that he was going to be crushed and perhaps killed between the two vehicles." *Id.* at 7.

B. Proceedings Below

1. The District Court

Cox sued Wilson under 42 U.S.C. § 1983, alleging Wilson, in shooting him, used excessive force in violation of the Fourth Amendment. Wilson denied the force used was excessive and affirmatively pled qualified immunity. The district court denied Wilson's summary judgment motion for qualified immunity. The case proceeded to its first trial on December 6, 2016, and the jury returned a verdict for Wilson. Cox thereafter filed a motion for new trial on grounds of attorney misconduct. The district court ordered a new trial on May 2, 2017. Resp. App. 8.

With new counsel for Wilson, the case proceeded to its second trial on August 13, 2018. Following presentation of Cox's case-in-chief, Wilson made a Fed. R. Civ. P. 50(a) motion for directed verdict, raising qualified immunity. The district court reserved ruling on Wilson's Rule 50(a) motion. Wilson renewed that motion pursuant to Fed. R. Civ. P. 50(b) at the close of evidence. The district court denied both Wilson's Rule 50(a) and 50(b) motions. Resp. App. 8.

In explaining its denial of Wilson's Rule 50(a) and 50(b) motions, the district court stated that the denial "did not rely on the provocation theory. . . . [as] there

is some question in my mind about the continuing viability legally under recent decisions of the Tenth Circuit of that prong or that additional factor as a consideration under qualified immunity[.]" Resp. App. 25.

Prior to charging the jury, Cox tendered a "Factors to Consider" instruction which substantially tracked Kevin F. O'Malley, *et al., 3B Fed. Jury Prac. & Instr.* § 165:24 (6th ed.) (Aug. 2016 Update) (hereinafter "Fed. Jury Prac. & Instr. § 165:24").[5] However, Cox proposed amending the pattern instruction by including his provocation instruction.

The district court declined to give the provocation instruction, again explaining that the instruction was of questionable legal viability and that Cox's contention that Wilson's conduct before the shooting was reckless was unlikely to overcome qualified immunity. Resp. App. 11–12 ("It's my view that some subsequent decisions since the first trial call [] into question the continuing viability of that [provocation] statement and that would be, in my view, the thinnest grounds that the plaintiff would have on the qualified immunity issue.") (internal quotation marks omitted).

The district court did, as part of its comprehensive instructions to the jury,[6] give a robust excessive force jury instruction based on Fed. Jury Prac. & Instr.

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[5] Comparison of the August 2016 update, which was the template used for the instruction as given (Resp. App. 26–28) with the February 2021 update shows § 165:24 to be unchanged.

[6] The Tenth Circuit summarizes the content of these instructions in its opinion. Resp. App. 9–11.

§ 165.24[7] consistent with *Graham v. Connor*, 490 U.S. 386 (1989), and Fourth Amendment excessive force jurisprudence, advising the jury that it was to consider the totality of the circumstances in determining objective reasonableness.

On August 23, 2018, the jury returned a unanimous verdict for Wilson.

2. The Tenth Circuit

Cox's only issue on appeal to the Tenth Circuit was that the district court erred in declining to give the jury his tendered provocation instruction. Wilson argued in response that the district court did not abuse its discretion in declining to give Cox's tendered provocation instruction. Wilson contended that, viewed both individually and as a whole with the other instructions, the district court properly provided the jury with robust instructions that accurately set out the Fourth Amendment objective reasonableness standard. Opening-Answer Brief, 2019 WL 2173565 at *12. In addition, Wilson questioned whether, following *City & County of San Francisco, California v. Sheehan*, 135 S. Ct. 1765 (2015), and *Mendez*, a provocation instruction was viable where, as here, it was premised on

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[7] A red-lined version comparing 3B Fed. Jury Prac. & Instr. § 165:24 (6th ed.) with the instruction given by the district court is included at Resp. App. 26–28. This was included in the Opening-Answer Brief for Appellee/Cross Appellant at Exhibit A. Appellee/Cross Appellant's Combined Opening-Answer Brief on Cross Appeal, *Cox v. Wilson*, Nos. 18-1353, 18-1376, 2019 WL 2173565 (10th Cir., May 15, 2019) ("Opening-Answer Brief").

second-guessing an officer's tactical decision. And, Wilson argued, even if a provocation theory was viable under Tenth Circuit precedent, a jury was permitted to consider such theory only where an officer's conduct recklessly caused the suspect to act in a way he would otherwise not have acted—a circumstance not present in this case as Wilson's decision to exit his vehicle did not cause Cox to then drive his vehicle toward him. (Opening-Answer Brief, 2019 WL 2173565 at *39.) Wilson also argued that qualified immunity provided an additional basis to affirm the district court's declination of the provocation instruction as it was not "clearly established" law that Wilson's tactical decision to exit his vehicle, thereby exposing himself to danger, violated Cox's Fourth Amendment right against unlawful seizure. (*Id*. at *13.)

The Tenth Circuit, in an opinion written by Judge Hartz, determined it was not necessary to resolve the argument regarding the standard of review for the district court's declination to give the provocation instruction and associated arguments. Resp. App. 12. The Tenth Circuit also did not address whether application of the provocation instruction under the facts of this case was inconsistent with circuit precedent—though it acknowledged that, while *Mendez* cast doubt over the viability of the Tenth Circuit's provocation jurisprudence, the Tenth Circuit had not yet abandoned it. *Id.* at 13–14. Instead, the Tenth Circuit moved directly to Wilson's argument that the district court did not err in declining to give the provocation instruction as Wilson was entitled to qualified immunity on Cox's

Fourth Amendment excessive force provocation theory. Consequently, the Tenth Circuit reasoned, the district court's declination to give the provocation instruction was correct. *Id.* at 14.

The Tenth Circuit went on to discuss qualified immunity, first describing the two-prong inquiry requiring (1) a violation of a "constitutional or statutory right," and (2) that the right was "clearly established at the time of the defendant's unlawful conduct." *Id.* at 15. The Tenth Circuit observed that "the plaintiff bears the burden" to prove both prongs and that "[w]e may resolve a case on the second prong alone if the plaintiff fails to show a right was clearly established" (internal citations and quotation marks omitted). *Id.*

The Tenth Circuit, noting this Court's well-recognized precedent, held that to be "clearly established," the law must have been "sufficiently clear that, at the time of the public official's conduct, every reasonable official would have understood that the conduct was unlawful" (Resp. App. 15 (citing *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018))); "existing precedent must have placed the statutory or constitutional question beyond debate" (Resp. App. 15–16 (quoting *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S. Ct. 305, 308 (2015) (internal quotation marks omitted))); and the "clarity of the law must be viewed 'in light of the specific context of the case, not as a broad general proposition'" (Resp. App. 16 (quoting *Pauly v. White*, 874 F.3d 1197, 1222 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 2650 (2018))).

Applying that precedent, the Tenth Circuit found that, while "qualified immunity did not completely protect Wilson from Cox's [excessive force] claim," it did protect him from liability premised on his tactical decision to exit his vehicle and confront Cox. Resp. App. 16. As explained by the Tenth Circuit:

> Here, qualified immunity did not completely protect Wilson from Cox's claim. Cox was certainly entitled to an instruction on the unreasonable use of force. The jury could have inferred from the testimony of Officer Klaus and of Ms. Kincaid that, contrary to Wilson's testimony, Cox had not made any attempt to drive his vehicle at Wilson when Wilson shot him, that Cox did not pose a threat of imminent danger to Wilson after Wilson exited his vehicle, and that therefore Wilson's use of deadly force against Cox was unreasonable. But the jury found otherwise. And, in light of the doctrine of qualified immunity, it would have been contrary to law for the jury to hold Wilson liable based on his conduct before the time of the shooting. Therefore, it would have been improper to give the jury an instruction that would have allowed it to do so.

Id.

The Tenth Circuit then considered the specific facts of this case in the context of Cox's argument that Wilson should have remained in his vehicle, observing that:

> Perhaps it would have been safer for Wilson to remain in his vehicle. But there were other

> considerations at play. Cox had ignored repeated warnings from Wilson to turn off his car's engine. Wilson reasonably believed that if Cox could continue to drive on the Interstate, he would present a profound danger to other motorists. Although Cox was temporarily boxed in, there was no reason for Wilson to believe that this situation would persist for any substantial amount of time; Kincaid did not turn off her engine and had not spoken with Wilson or otherwise informed him that she intended to remain stopped in front of Cox indefinitely. If Kincaid moved forward, Cox could have continued his dangerous driving, which, according to both Wilson and Kincaid, he appeared intent on doing. And both Wilson and Kincaid testified that Cox was repeatedly reaching down for something, which they assumed was a firearm. If Cox was to be prevented from further dangerous driving, the most reasonable thing for Wilson to do may have been to expose himself to danger in order to disable Cox from driving.

Id. at 17–18.

The Tenth Circuit went on to observe that "even if the jury was persuaded by the expert's trial testimony that Wilson had acted unreasonably in leaving his vehicle, qualified immunity protected Wilson from liability on that score" as:

> Cox has not presented, nor are we aware of, any opinion by the Supreme Court or this court, or, for that matter, any other court, holding that an officer in similar circumstances

> acted unreasonably. It would have been error for the district court to instruct the jury that it could find Wilson liable on a ground for which he was protected by qualified immunity.

Id. at 18.

After finding that Wilson was entitled to qualified immunity, the Tenth Circuit then discussed *Pauly* to "*illustrate*[] the strength of the protection provided by qualified immunity" in which "the *issue* was the same." Resp. App. 18, 20 (emphasis added). The Tenth Circuit recalled that in *Pauly*, officers recklessly provoked a violent response by brothers who were threatened in their house by the officers approaching the house without identifying themselves, resulting in one of the brothers being shot and killed. Concluding this illustrative example, the Tenth Circuit stated: "Yet the *Pauly* officers were protected by qualified immunity because of the absence of clearly established law prohibiting their conduct." *Id.* at 21.

A decided majority of the Tenth Circuit judges denied a *sua sponte* call for *en banc* review. Pet. App. 21a. Judge Lucero, joined by Judge Phillips, issued a dissenting opinion decrying "profound issues with qualified immunity" that "we can no longer delay confronting. . . ." *Id.* at 31a.

REASONS TO DENY THE PETITION

A. The Petition is Based on a Misperception that the Tenth Circuit Failed to Apply This Court's Qualified Immunity Precedent

The Petition is based on the faulty premise that the Tenth Circuit determined clearly established law by comparing this case with a factually dissimilar case with more egregious conduct. Petition at 3, 14–17. But the Tenth Circuit did no such thing. Rather, the circuit followed the precedent of this Court—expressly determining clearly established law by looking to the specific factual context of this case and whether there was a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts, that would place Wilson on notice that his decision to exit his vehicle to confront Cox and end his dangerous driving conduct was unlawful.

1. This Court's Qualified Immunity Standard

Qualified immunity protects public officials from civil liability unless their actions violate a clearly established statutory or constitutional right. *Taylor v. Barkes*, 575 U.S. 822, 135 S. Ct. 2042, 2044 (2015). It is not enough that the statutory or constitutional right is "suggested by then-existing precedent." *Wesby*, 138 S. Ct. at 590. Rather, "[t]he precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Id.* This Court has "repeatedly stressed that

courts must not 'define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.'" *Id.* (citations omitted). "A rule is too general if the unlawfulness of the officer's conduct does not follow immediately from the conclusion that the rule was firmly established." *Id.* (internal citations, quotation marks, and alterations omitted).

"[S]pecificity 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)). "Use of excessive force is an area of the law 'in which the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (quoting *Mullenix*, 577 U.S. at 13). And, "[i]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force," to deny qualified immunity as "[a]n officer 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." *City of Escondido, California v. Emmons*, 139 S. Ct. 500, 503 (2019) (internal citations and quotation marks omitted).

While "a case directly on point" is not always required for a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (internal citations and quotation marks omitted). Or the facts must otherwise "apply with obvious clarity to the specific conduct in question." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). *See also Emmons*, 139 S. Ct. at 504 ("Of course, there can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances[.]") (quoting *Wesby*, 138 S. Ct. at 581).

"When properly applied, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Barkes*, 135 S. Ct. at 2044 (internal citations, quotation marks, and alterations omitted).

2. The Tenth Circuit Properly Applied This Court's Qualified Immunity Standard

The Tenth Circuit did not, as argued by Petitioner, make its qualified immunity determination by comparing the facts of this case with a factually dissimilar case with more egregious conduct. Petitioner's misperceived notion of the Tenth Circuit decision is readily dispelled by review of the Tenth Circuit opinion—and, once dispelled, the Petition is easily denied.

Petitioner contends that the Tenth Circuit failed to follow this Court's precedent that requires that

"Courts must engage in a fact-based particularized inquiry" in which, on the basis of such particularized inquiry, the Court must "identify a prior ruling by this Court or the relevant court of appeals providing notice that the conduct in question was unconstitutional[.]" Petition at 14, 16 (internal citations and quotation marks omitted).[8] Such contention is impossible to square, however, with the circuit's opinion in which the court expressly applied long-established precedent that looked to "the specific context of the case, not as a broad general proposition" and whether there was a "Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts" that "found the law to be as the plaintiff maintains." Resp. App. 15 (internal citations and quotation marks omitted).

The inability to square Petitioner's argument with the Tenth Circuit's opinion is particularly stark in viewing the circuit's finding that:

> *Cox has not presented, nor are we aware of, any opinion by the Supreme Court or this court, or, for that matter, any other court, holding that an officer in similar circumstances acted unreasonably.* It would have been error

[8] It is not lost on Respondent that Petitioner's argument that qualified immunity requires a particularized search for a prior ruling by this Court or the relevant court of appeals is inconsistent with his later endorsement of a qualified immunity standard in which such notice does not require "that facts of previous cases be materially similar or even fundamentally similar to the situation in question." Petition at 18 (internal citations and quotation marks omitted).

> for the district court to instruct the jury that it could find Wilson liable on a ground for which he was protected by qualified immunity.

Resp. App. 18 (emphasis added). Such finding came after a comprehensive discussion of this Court's and the Tenth Circuit's qualified immunity jurisprudence.[9] Not surprisingly, other courts, including this Court, have used similar language to express their qualified immunity findings. *See, e.g.*, *Saucier*, 533 U.S. at 209 ("neither respondent nor the Court of Appeals has identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did, nor are we aware of any such rule"); *Sevy v. Barach*, 815 F. App'x 58, 64 (6th Cir. 2020), *cert. denied*, No. 20-600, 2021 WL 78162 (U.S. Jan. 11, 2021) (appellee "has not pointed us to any Supreme Court or Sixth Circuit cases (nor are we aware of any)"); *Anderson v. Chapman*, 604 F. App'x 810, 814 (11th Cir. 2015) (appellee "cites no precedent, nor are we aware of any, that would have put them on notice").

It was only after the Tenth Circuit had concluded that there was no clearly established law that would have informed Wilson that his conduct in exiting his vehicle to confront Cox was unconstitutional that the circuit went on to observe that "[t]his court recently reached essentially the same conclusion on an appeal where the *issue* was the same as in this case—allegedly unreasonable police conduct leading to the use of

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[9] *See* Section A.1., *supra.*

deadly force." Resp. App. 18–19 (emphasis added). That case was *Pauly*, on remand from this Court.

It is clear from the context of the Tenth Circuit's discussion that, by the time the circuit discussed *Pauly*, it had already reached its qualified immunity conclusion. The Tenth Circuit's reference to *Pauly* was only to "illustrate[]" how the circuit had recently addressed the same provocation theory "issue." Resp. App. 20.

The Tenth Circuit did not, by its discussion of *Pauly*, expressly or by implication veer from the long-standing qualified immunity standard of this Court. Nor did it apply a new "*ad hoc*" method of assessing clearly established law. And to make sure that it was not misunderstood on this issue, the circuit amended its discussion of *Pauly* in its reissued opinion to curtail such argument.[10]

It is worth noting that other courts, in the context of a qualified immunity analysis, have for illustrative purposes similarly juxtaposed factually dissimilar cases to make a clearly established law point. This Court need look no further than its own decision in *Mullenix*. *Mullenix* involved the question of qualified immunity for an officer who shot an intoxicated driver

[10] The Tenth Circuit's reissued opinion revised the introduction and conclusion of its discussion of *Pauly*—most significantly removing from the withdrawn opinion the following sentence: "If qualified immunity protects the officers in *Pauly* against the claim of unreasonably creating a dangerous condition that led to the use of deadly force, surely Wilson is similarly protected." *Compare* Pet. App. 18a *with* Resp. App. 21.

who was driving dangerously on an interstate highway and toward other officer locations. In granting qualified immunity to Mullenix, this Court cited *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (*per curiam*), a case involving a grant of qualified immunity to an officer who shot a suspect in the back as the suspect fled from the officer in a vehicle. Noting the more egregious facts of *Brosseau*, this Court observed:

> Far from clarifying the issue, excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted. In *Brosseau* itself, the Court held that an officer did not violate clearly established law when she shot a fleeing suspect out of fear that he endangered other officers on foot who [she] believed were in the immediate area, the occupied vehicles in [his] path, and any other citizens who might be in the area. *The threat Leija* [*the suspect in Mullenix*] *posed was at least as immediate as that presented by a suspect who had just begun to drive off and was headed only in the general direction of officers and bystanders.*

Mullenix, 577 U.S. at 14 (emphasis added) (internal citations, quotation marks, alterations, and emphasis omitted).

But, of course, *Mullenix* did not, by referencing *Brosseau* as an illustrative example, engage (as Petitioner alleges the Tenth Circuit did by referencing *Pauly*) in an "aberrant approach to the clearly-established law inquiry" by applying "an *ad hoc* qualified immunity

analysis that has no grounding in this Court's precedents"[11]—and the Tenth Circuit did not do so here.

Petitioner bases his entire Petition on a misconstruction of the underlying opinion, thus challenging a straw man. This Court should not devote its resources to reviewing nonexistent issues.

3. Petitioner Misperceives This Court's Qualified Immunity Standard

Petitioner urges this Court to find, based on his view of what standard applies to determine "clearly established law," the Tenth Circuit erred in finding Wilson was entitled to qualified immunity. But Petitioner misperceives the proper clearly established law standard.

Petitioner's view is that a public official's need for "fair warning" that their conduct violated a federal law or constitutional right does not require "that 'facts of previous cases be materially similar' or even 'fundamentally similar' to the situation in question." Petition at 18. Petitioner cites in support *Hope v. Pelzer*.

To be sure, the need for a public official to have fair and clear notice that their conduct violated federal law or a constitutional right is the premise of qualified immunity. But Petitioner distorts qualified immunity's mandate for "fair and clear" notice by taking the narrow "obvious" constitutional violation issue considered in *Hope* and conflating it into an overarching qualified

[11] Petition at 20, 15.

immunity standard. In so doing, Petitioner misperceives this Court's broader qualified immunity jurisprudence.

Hope involved a claim that prison guards violated an inmate's Eighth Amendment right to be free from cruel and unusual punishment where the inmate was handcuffed to a "hitching post" for over seven hours, shirtless "while the sun burned his skin," given water "only once or twice and . . . given no bathroom breaks." In addition, a guard taunted the inmate about his thirst; bringing a water cooler close but then kicking it over and "spilling the water onto the ground." 536 U.S. at 734–35. On those facts, this Court found that, while there were analogous cases[12] that would "put a reasonable officer on notice that the use of the hitching post under the circumstances alleged . . . was unlawful," it "should have been" obvious that the "cruelty inherent in this practice" put the guards on notice that their alleged conduct "violated [the inmate's] constitutional protection against cruel and unusual punishment." *Id.* at 745–46.

Hope holds, then, that a public official is not shielded by qualified immunity, particularly in the context of the Eighth Amendment, in the narrow circumstance where the unlawfulness or unconstitutionality

[12] These cases addressed how handcuffing inmates to a fence and to cells for long periods of time and denying water as punishment for refusal to work did or could violate the Eighth Amendment. 536 U.S. at 742–43.

of the conduct would be obvious to any public official even without existing precedent.

Additionally, while "fair and clear" notice to public officials that their alleged conduct violated a federal statutory or constitutional law is the premise of qualified immunity, it is wrong to end the analysis there, as does Petitioner, because doing so ignores how this Court has fleshed out what constitutes "fair and clear" notice. For example, discussing "fair and clear" notice, this Court observed in *Kisela*, 138 S. Ct. at 1153:

> "Of course, general statements of the law are not inherently incapable of giving fair and clear warning to officers." *White* [*v. Pauly*], 580 U.S. at ___, 137 S. Ct. at 552 (internal quotation marks omitted). . . . Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer "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, 779] 134 S. Ct. 2012, 2023, 188 L. Ed. 2d. 1056 (2014).

See also Ashcroft v. al-Kidd, 563 U.S. 731, 746 (2011) ("As we have explained, qualified immunity is lost when plaintiffs point either to cases of controlling authority in their jurisdiction at the time of the incident

or to a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful. These standards ensure the officer has fair and clear warning of what the Constitution requires.") (internal citations and quotation marks omitted).

Petitioner also argues that this Court's recent decision in *Taylor v. Riojas*, 141 S. Ct. 52, 52–54 (2020) (*per curiam*), re-framed the qualified immunity landscape. Petition at 3. But this reads too much into *Riojas*. In *Riojas*, an inmate spent six days between two cells: one covered in feces from "floor to ceiling" and the other frigidly cold with a clogged drain overflowing with raw sewage. Reversing the Fifth Circuit's grant of qualified immunity that held the law wasn't clearly established that prisoners "couldn't be housed in cells teeming with human waste for only six days," this Court found that the cruelty inherent in putting the inmate in such degrading and dangerous conditions was so "obvious" that "no reasonable correctional officer could have concluded that [such conduct] was constitutionally permissible[.]" *Id.* at 53–54 (internal citations and quotation marks omitted). Rather than re-framing the qualified immunity landscape, *Riojas* simply applied *Hope* and the long-standing precedent of this Court that particularized on-point case authority was unnecessary where the conduct was so

obviously unconstitutional that every reasonable official would recognize it as unlawful.[13]

Notwithstanding his misperceived view of this Court's qualified immunity precedent, Petitioner argues that two Tenth Circuit cases, *Cordova v. Aragon*, 569 F.3d 1183 (10th Cir. 2009), and *Zia Trust Co. ex rel. Causey v. Montoya*, 597 F.3d 1150 (10th Cir. 2010), clearly establish that Wilson violated the Constitution by exiting his vehicle to confront Cox. But Petitioner failed to cite, for the purposes used here,[14] either of these cases to the Tenth Circuit. Moreover, as the Tenth Circuit applied the correct qualified immunity test, this Court's Rules[15] counsel against Petitioner's call for this Court to reconsider the circuit's application of that test to the facts of this particular record. *See Riojas*, 141 S. Ct. at 54 (Alito, J., concurring). Even if this Court were to undertake such reconsideration,

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[13] Petitioner argues that the circuits are split regarding the proper standard to determine whether a public official's conduct violates clearly established law. Petition at 20–27. But, the Petition cherry-picks language from its cited decisions to create an illusion of a circuit split. Moreover, this Court has repeatedly addressed the appropriate qualified immunity standard and, with *Riojas* reemphasizing the holding in *Hope* that "obvious" constitutional violations do not require on-point case authority, that standard is firm and clear.

[14] Petitioner cited *Cordova* in his opening brief but only as part of a string citation for the unrelated purpose of addressing the Fourth Amendment's objective reasonableness standard. Appellant/Cross Appellee's Opening Brief, *Cox v. Wilson*, Nos. 18-1353, 18-1376, 2019 WL 911519, * 12 (10th Cir., Feb. 20, 2019).

[15] Sup. Ct. R. 10 provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

these cases do not support Petitioner as both affirmed denial of summary judgment because there were disputed facts regarding whether the officer, at the time of using deadly force, faced a threat of serious physical harm to himself or others.

In *Cordova*, a police officer shot a driver, who was driving the wrong way on a highway, in the back of the head as the suspect drove by him. The Tenth Circuit concluded that the suspect did not pose an imminent threat to the officer as the fatal shot occurred after the suspect had driven by him and, at that time, there were no motorists in the vicinity. 569 F.3d at 1187.[16] In *Zia Trust*, an officer investigating a domestic violence complaint observed a van outside the residence "clearly stuck" on a pile of rocks. 597 F.3d at 1155. The officer approached the van to contact the driver, whom he did not know to be involved in the call. The officer shot the driver when the van lurched forward "less than a foot, if at all." *Id.* The Tenth Circuit affirmed denial of summary judgment as "[v]iewing the record in the light most favorable to the plaintiffs," the officer "did not have probable cause to believe that there was a serious threat of serious physical harm to himself or others." *Id.*

Cordova and *Zia Trust* involve very different facts and, more importantly, did not resolve the issue here—whether it was clearly established law that an officer

[16] The Tenth Circuit did grant the officer qualified immunity under the clearly established prong. 569 F.3d at 1193.

acts unconstitutionally in exiting his vehicle to approach a vehicle and end a dangerous pursuit.

Like *Zia Trust*, the Tenth Circuit here held Cox was entitled to have a jury decide the issue of whether, at the time Wilson shot Cox, Wilson faced an imminent threat of serious physical harm to himself or others. And on that issue the jury found for Wilson. Cox was due no more.

B. There is No Need for This Court to Revisit Its Long-Held Qualified Immunity Precedent

This Court has emphatically and frequently repeated its long-standing affirmation of qualified immunity. "In short, for decades . . . qualified immunity has been an unquestioned principle of American statutory law." Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1858 (2018) (hereinafter "*Qualified Defense*"). There is no need, as urged by the Amicus, for this Court to revisit or recalibrate this long-held qualified immunity jurisprudence for at least five reasons: qualified immunity is connected with the common-law background of § 1983 and historical immunities available at the time it was enacted; qualified immunity properly reflects fundamental principles of federalism; qualified immunity is consistent with the authority of this Court to make common-law judgments about the availability of damages under 42 U.S.C. § 1988(a); qualified immunity provides a necessary symmetry to

an expanded § 1983 remedy; and, finally, the doctrine of statutory *stare decisis* counsels against departure from this Court's long-held qualified immunity precedent and, instead, any revision of qualified immunity should be legislative.

1. Qualified Immunity is Connected With the Common-Law Background of § 1983 and Historical Immunities Available at the Time

There is no shortage of debate about the legislative history of § 1983[17] and the polar views on the issue recall the metaphor of Judge Harold Leventhal, borrowed by Justice Scalia in his concurring opinion in *Conroy v. Aniskoff*, 507 U.S. 511, 113 S. Ct. 1562 (1993), that the use of legislative history is "[t]he equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Id.* at 519 (Justice Scalia concurring in judgment).

Notwithstanding the divide regarding the historical underpinnings of qualified immunity, there is little doubt that the common-law background against which

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[17] *Compare* William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 55 (2018) ("there was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted"), *with* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan L. Rev. (Transcript at p. 5) (forthcoming 2021) (available at https://ssrn.com/abstract=3680714) (confirming "that the common law around 1871 did recognize a freestanding qualified immunity protecting all government officers' discretionary duties—like qualified immunity today").

§ 1983 is set included governmental immunities. In fact, liability for government officials' reasonable mistakes has been limited "from the earliest days of the republic." *Qualified Defense* at 1864. *See also Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 89 (1849) ("[T]he acts of a public officer . . . are to be presumed legal till shown by others to be unjustifiable. It is not enough to show . . . an error in judgment[.]"). Although "not every officer received immunity in every case," courts commonly applied good-faith principles to limit liability for official actions. *Qualified Defense* at 1865–66. In *Filarsky v. Delia*, 566 U.S. 377, 388 (2012), *citing* William L. Murfree, Sr., *A Treatise on the Law of Sheriffs and Other Ministerial Officers*, Ch. XXVII, The Constable § 1121, p. 609 (1884), this Court noted that "at common law, a special constable, duly appointed according to law, had all the powers of a regular constable so far as may be necessary for the proper discharge of the special duties intrusted to him, and in the lawful discharge of those duties, was as fully protected as any other officer." (internal citations and quotation marks omitted). *See also Crawford-El v. Britton*, 523 U.S. 574, 603 (1998) (discussing common-law immunities).

While these immunities have not, since 1871, remained stagnant, neither has the scope of § 1983 and constitutional concepts upon which § 1983 provides a civil cause of action. Such normal evolution of defenses should not be ignored while the civil remedy is left to develop.

2. Qualified Immunity Properly Reflects Fundamental Principles of Federalism

Qualified immunity was, of course, articulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). While *Harlow* grew out of a *Bivens*[18] claim, this Court applied the qualified immunity doctrine to § 1983, noting that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and [*Bivens*] suits brought directly under the Constitution against federal officials." *Harlow*, 457 U.S. at 818, n.30 (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978)).

Economou, which buttressed *Harlow*'s equivalency directive, had explained that "[t]o create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head" as the Bill of Rights originally restrained federal officials only and only later, through the Fourteenth Amendment, restrained state officials. 438 U.S. at 504. As such, absent extending qualified immunity to state officials sued under § 1983, liability would attach to state officials with federal officials escaping liability for violating the same rights.

At least one commentator, although criticizing *Harlow* and *Economou*'s equivalency directive, has attributed the directive to "[f]ederalism concerns." *See* Katherine Mims Crocker, *Qualified Immunity and*

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[18] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Constitutional Structure, 117 Mich. L. Rev. 1405, 1437 (2019). Other commentators have argued that federalism is "at the core of qualified immunity." Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 Geo. L.J. 229, 229 (2020) ("federalism helps explain the Court's emphasis on the importance of qualified immunity to society as a whole").

Whether attributable to federalism or simply prudential concerns, the maintenance of a two-tiered system of assessing the liability of state and federal officials remains as untenable today as it did in 1982 as there remains an ongoing need to "prevent the distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Wyatt v. Cole*, 504 U.S. 158, 167–68 (1992) (internal citations and quotation marks omitted).

3. Qualified Immunity is Consistent with the Authority of this Court to Make Common-Law Judgments about the Availability of Damages under 42 U.S.C. § 1988(a)

Professor Lawrence Rosenthal has recently argued that 42 U.S.C. § 1988(a) provides a statutory basis for qualified immunity that "is hiding in plain sight." Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. Rev. 547, 560 (2020) ("*Defending Qualified Immunity*"). Professor Rosenthal posits that section 3 of the *Civil Rights Act of 1866* conferred

authority on the courts to utilize common-law or state-law rules when federal statutes "are deficient in the provisions necessary to furnish suitable remedies[.]" And, he argues, this provision "authorizes the courts to supplement various civil rights statutes, including § 1983." *Id.* at 560–61.

While qualified immunity is otherwise amply supported, as set out herein, § 1988(a) provides a reasonable alternative supportive basis.

4. Qualified Immunity Provides a Necessary Symmetry to an Expanded § 1983 Remedy

Amicus argues that Justice Scalia, in his dissent in *Crawford-El*, 523 U.S. at 611, conceded that qualified immunity was not tethered to limitations existing at common law. Brief for Amicus Constitutional Accountability Ctr. at 10. While it is true that Justice Scalia (joined by Justice Thomas) observed in *Crawford-El* that the Court "has not purported to be faithful to common-law immunities that existed when § 1983 was enacted," he went on to state that, rather than rejecting qualified immunity, he endorsed it in the face of what he believed was the equally historically untethered expansion of § 1983 "invented" in *Monroe v. Pape*, 365 U.S. 167 (1961). *Crawford-El*, 523 U.S. at 611 (Scalia, J., dissenting). As stated by Justice Scalia:

> *Monroe* changed a statute that had generated only 21 cases in the first 50 years of its existence into one that pours into the federal

> courts tens of thousands of suits each year . . . Applying normal common-law rules to the statute that *Monroe* created would carry us further and further from what any sane Congress could have enacted.
>
> We find ourselves engaged, therefore, in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have invented—rather than applying the common law embodied in the statute that Congress wrote.

Id. at 611–12.

Qualified immunity then "represents a middle ground solution that endeavors to accommodate the prerogatives of state and local governments without permitting them to be heedless of their constitutional obligations." *Defending Qualified Immunity* at 589.

If this Court is inclined to revisit the statutory foundation for qualified immunity, then it should also revisit *Monroe* and its modern interpretation of § 1983. And the Court should not stop there but also should examine *Bivens*, which created federal public official liability without a statutory underpinning.[19]

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[19] "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition." *Correctional Services Corporation v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

5. Statutory *Stare Decisis* Counsels Against Departure from this Court's Qualified Immunity Jurisprudence and Any Revision of Qualified Immunity Should Be Legislative

At least as to its own decisions, this Court has "accorded heightened deference to its statutory precedent[.]" Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 319 (2005) (hereinafter "*Statutory Stare Decisis*"). It has been observed that statutory *stare decisis* "carries enhanced force" because those who think the judiciary got the issue wrong "can take their objections across the street, and Congress can correct any mistake it sees." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 456 (2015). It has also been observed that, separate from legislative deference, statutory *stare decisis* represents a prudential "restraint on judicial policymaking." *Statutory Stare Decisis* at 351.

Congress, moreover, has enacted new statutes against the backdrop of this Court's qualified immunity decisions. For example, in 1996, Congress amended § 1983[20] and, by that time, qualified immunity was well established but Congress did not amend the statute to abrogate the doctrine.

Members of Congress have introduced several bills that would amend § 1983 to revise or eliminate immunities and defenses based on qualified immunity—

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[20] *See Federal Courts Improvement Act of 1996*, Pub. L. No. 104-317, § 309(c), 110 Stat. 3847, 3853 (1996).

including most recently the *George Floyd Justice in Policing Act of 2021*, H.R.1280 § 102, 117th Congress (2021-2022). It is in that venue that qualified immunity's fate should reside.

C. This Case is Ill-Suited for Revisiting This Court's Long-Held Qualified Immunity Precedent

Even were this Court inclined to reexamine qualified immunity, this case is ill-suited for such re-examination. The qualified immunity issue does not come in the context of a determination that a law enforcement officer's use of force was wholly shielded. Indeed, here, a jury was permitted to resolve factual disputes as to whether Wilson used excessive force in shooting Cox—and determined that he did not.

Rather, the qualified immunity issue here comes in the novel and layered form of whether the district court erred in declining to give a provocation jury instruction. And that issue, in turn, is inextricably bound to the law unanswered in *Mendez* of whether and to what extent an officer's conduct, prior to the use of force, may violate the Fourth Amendment.[21] In short, the qualified immunity issue comes packaged

[21] Additionally, any review of the circuit decision would, arguably, call for an explanation of this Court's holding in *Sheehan* that "an officer's conduct leading up to a deadly confrontation" even if such conduct was "imprudent, inappropriate, or even reckless" does not defeat qualified immunity. 135 S. Ct. at 1777 (internal citations and quotation marks omitted).

with other issues which would confound any head-on reconsideration of this Court's long-standing precedent.

Additionally, Petitioner has further confounded the qualified immunity issue through advancing his misperceived notions of the basis of the Tenth Circuit's decision and factual pronouncements of the case that are inconsistent with the Tenth Circuit decision.

There is no shortage of petitions seeking review and recalibration of qualified immunity. And, while there is no reason for this Court to revisit its qualified immunity jurisprudence, should it do so, this case is ill-suited for such review.

CONCLUSION

This case is an example of the need for qualified immunity and its proper application. Qualified immunity provided, here, the needed breathing room for Wilson to make the tactical decision to exit his vehicle in a heroic effort to end the serious threat to the public posed by Cox's intoxicated and dangerous drive up I-70. The Tenth Circuit got it right.

Respondent Don Wilson respectfully requests that this Court deny the Petition for Writ of Certiorari to review the decision of the Tenth Circuit.

Date: March 26, 2021

Respectfully submitted,

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