No. 20-1002

In the Supreme Court of the United States

CODY WILLIAM COX,

Petitioner,

v.

DON WILSON,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES, RULES AND REGULATIONS

Respondent is correct that we mistakenly included in the petition appendix the earlier version of the panel's opinion. We apologize for that error. The appendix to this brief includes the panel's final opinion (Appendix A) and a comparison (Appendix B) showing the two changes between the initial and final opinions. See App., *infra*, 36a, 38a. As the panel itself noted, the final opinion "contain[ed] only non-substantive changes." Pet. App. 22a.[1]

Respondent's substantive arguments only confirm the need for this Court's intervention. The panel's denial of qualified immunity rested on its application of the wrong legal standard: rather than determining whether prior decisions provided Officer Wilson with "fair warning" that his actions here violated the Constitution, "the panel satisfie[d] itself with comparing the relative perceived egregiousness of police conduct in factually dissimilar cases." Pet. App. 26a (en banc dissent). If the panel had faithfully applied this Court's precedents, it would have denied qualified immunity.

Respondent does not seriously dispute the existing conflict among the lower courts regarding the application of this Court's qualified immunity standard—regarding how much factual similarity is required between prior decisions and the case in which immunity is claimed. The Court should grant review to resolve that conflict, which the panel's decision deepens. Alternatively, the Court should grant the petition and remand this case for reconsideration in light of its intervening decision in *Taylor* v. *Riojas*, 141 S.

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[1] Respondent is wrong in asserting (Opp. 20 n.10) that the panel's revision of its opinion altered its qualified immunity analysis to reduce reliance on *Pauly* v. *White*, 874 F.3d 1197 (10th Cir. 2017). There was no substantive change. See App., *infra*, 36a, 38a.

Ct. 52 (2020). That will make clear to lower courts that *Taylor* provides general guidance on application of the qualified immunity standard.

Finally, respondent does not dispute that the panel's jury instruction decision rested entirely on its qualified immunity determination—the qualified immunity issue is therefore squarely presented here.

The shooting in this case rendered petitioner Cody Cox a quadriplegic. His opportunity to prove his claim was obstructed by an improper qualified immunity decision that exemplifies lower court confusion. Review is plainly warranted.

A. The decision below rests on the panel's "relative perceived egregiousness" test—not this Court's clearly established law standard.

The petition explains (at 15-17) that the panel failed to apply this Court's clearly established law standard. Instead, the Tenth Circuit upheld the qualified immunity claim because it had found qualified immunity appropriate in *Pauly* v. *White*, *supra*, and "[u]nlike [respondent] Wilson's" actions, "the impropriety of" the officers' actions in that case "would be apparent to most laypersons." App., *infra*, 18a. The panel thus rested its decision on "the relative perceived egregiousness of police conduct in factually dissimilar cases." Pet. App. 26a (en banc dissent).

Respondent—pointing to two sentences in the panel's lengthy discussion of qualified immunity—claims that the panel decided the case by applying the proper standard. Opp. 17-20. Respondent is wrong. The approach the panel adopted bears no relationship

to the clearly established law standard that this Court has specified for qualified-immunity cases.

The panel did state that petitioner "has not presented, nor are we aware of" an opinion "holding that an officer in similar circumstances acted unreasonably" and that respondent was "protected by qualified immunity." App., *infra*, 16a. But it is clear that the opinion does not rest on that ground.

First, the two sentences relied on by respondent are followed by multiple paragraphs discussing the *Pauly* precedent—culminating in its conclusion:

> Unlike Wilson's decision to leave his vehicle to try to disable Cox's vehicle, the impropriety of the alleged actions by the officers before the shooting in *Pauly* would be apparent to most laypersons. Yet the *Pauly* officers were protected by qualified immunity because of the absence of clearly established law prohibiting their conduct. *So too, here.*

App., *infra*, 18a (emphasis added).

Thus, it was only *after* its extended discussion of *Pauly* that the panel held that Wilson was entitled to qualified immunity. The en banc dissenters were clearly correct in concluding that "the panel relie[d] only on the facts of *Pauly*, a case that did not involve a car chase, vehicular pursuit, or any facts remotely similar to the facts of the instant case." Pet. App. 26a.

Second, it is not surprising that the panel did not rest its decision on its statement that there were no prior decisions "holding that an officer in similar circumstances acted unreasonably," App., *infra*, 16a—because the record in this case referenced decisions

involving similar factual circumstances. As the petition explains (at 6-8, 18), the district court relied on just such a factually similar ruling to deny qualified immunity: *Cordova* v. *Aragon*, 569 F.3d 1183 (10th Cir. 2009).

Third, Officer Wilson tries to justify the panel's rationale by arguing that this Court took a similar approach in *Mullenix* v. *Luna,* 577 U.S. 7 (2015) (per curiam). See Opp. 20-22.

But *Mullenix* is totally inapposite. There, this Court reversed the lower court's denial of qualified immunity because it *failed* to conduct the fact-based inquiry required by the Court's precedents and denied immunity based only on "the general principle that deadly force requires a sufficient threat." 577 U.S. at 14.

The Court discussed *Brosseau* v. *Haugen*, 543 U.S. 194 (2004), as a factually similar case in which qualified immunity was denied (both cases "involved the shooting of a suspect fleeing by car," 577 U.S. at 12) to show that the officer in *Mullenix* was not placed on notice that his behavior was unconstitutional. The Court did not reference the case—as respondents argue (Opp. 14)—as "an illustrative example" of the strength of qualified immunity.

Thus, this Court in *Mullenix* did precisely what the Tenth Circuit failed to do here: it rested its decision in favor of qualified immunity on the conclusion that factually-similar cases did not provide the officer with the necessary fair notice. See 577 U.S. at 14-15.

Fourth, a proper application of this Court's precedents required the denial of qualified immunity here.

The "salient question" under this Court's qualified immunity precedents "is whether the state of the law * * * [gives a government official] fair warning that their alleged [conduct] * * * was unconstitutional." *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002). And the Court has rejected the requirement that "the facts of [these] cases be 'materially similar'" to those at issue in order to deny qualified immunity. *Id*. at 739 (citation omitted).

Officer Wilson asserts that *Hope*'s statement of the qualified immunity standard applies only "in the narrow circumstance where the unlawfulness or unconstitutionality of the conduct would be obvious to any public official even without existing precedent." Opp. 23-24. In other words, it encompasses only government conduct that is so outrageous that an official would know it violated the Constitution even if there were no judicial decisions delineating the scope of the particular constitutional right.

But nothing in *Hope* indicates that the Court was crafting a standard with such limited applicability. Rather, it was articulating the general test for qualified immunity, which lower courts regularly apply outside of obviously unconstitutional conduct. See, *e.g.*, *L.R.* v. *Sch. Dist. of Philadelphia*, 836 F.3d 235, 248 n.64 (3d Cir. 2016); *Limone* v. *Condon*, 372 F.3d 39, 48 (1st Cir. 2004); *Phillips* v. *Community Insurance*, 678 F.3d 513, 528 (7th Cir. 2012).

Officer Wilson argues (Opp. 24) that *Kisela* v. *Hughes*, 138 S. Ct. 1148 (2018) (per curiam) narrowed *Hope*. But the Court there reiterated that "'general statements of the law are not inherently incapable of giving fair and clear warning to officers," and that

qualified immunity is not available when "'the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'" *Id.* at 1153 (citations omitted). That is the same test that this Court applied in *Hope*.

The Tenth Circuit would have had no choice but to deny qualified immunity if it applied the test articulated in *Hope* and elsewhere. We explained in the petition (at 17-20), that two Tenth Circuit decisions—*Cordova* v. *Aragon*, 569 F.3d 1183 (10th Cir. 2009) and *Zia Trust Co.* v. *Montoya*, 597 F.3d 1150 (10th Cir. 2010)—placed Officer Wilson on notice that his conduct violated clearly established law.

Officer Wilson argues that the cases "involve very different facts" from those here, and moreover, "did not resolve the issue here." Opp. 27-28. He is wrong.

The Tenth Circuit held in *Cordova* that "a distant risk to hypothetical motorists posed by a suspect's reckless driving does not alone justify shooting that suspect," and that "the threat to [the public] has to be real and concrete" in order to justify a shooting. 569 F.3d at 1195.

And in *Zia Trust*, the Tenth Circuit ruled that the officer "violated clearly established law when he used * * * force against [the suspect]" because the officer "did not have probable cause to believe that there was a serious threat of serious physical harm to himself or others." 597 F.3d at 1155 (citations and quotation marks omitted).

Here, the suspect's vehicle was immobilized and there was no threat to the public. Both *Cordova* and

Zia Trust therefore make clear that the shooting violated the Constitution.[2]

* * * * *

If the panel had applied the proper standard, it would have held that Officer Wilson was not entitled to qualified immunity. The only way it could justify a contrary conclusion was to apply the illegitimate "relative perceived egregiousness" standard.

B. The lower courts are in conflict.

Respondent does not seriously dispute the petition's description of the conflict among the lower courts. He offers only a wholly unsupported assertion that the petition's discussion of the conflict rests on "cherry-pick[ed]" quotations. Opp. 26 n.13. Not so. The conflict is clear and continuing. See Pet. 20-27.[3]

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[2] Officer Wilson argues that the vehicle was not immobilized and contends that the facts should not be construed in the light most favorable to petitioner. Opp. 6 nn. 2 & 4. But the question here is whether the jury instruction was properly refused because of qualified immunity, and Tenth Circuit precedent makes clear that a party is entitled to an instruction if they provide "more than a mere scintilla of evidence to support an instruction." *Farrell* v. *Klien Tools, Inc.*, 866 F.2d 1294, 1297 (10th Cir. 1989). The underlying facts therefore must be evaluated under that standard.

[3] Indeed, Officer Wilson's arguments themselves provide an additional reason for the Court to grant review—his contention that *Hope* sets forth a special standard limited to outrageous government conduct, a contention that is undermined by the decisions of several courts of appeals. See page 5, *supra*.

Thus, the Fifth Circuit in *Morrow* v. *Meachum*, 917 F.3d 870 (5th Cir. 2019), laid out four hurdles that courts must overcome to deny qualified immunity:

- While the Fifth Circuit acknowledged the concept of "fair notice," *id.* at 875, it repeatedly emphasized that such notice is only present when courts have previously found the "particular" conduct unlawful. *Ibid.*
- Courts must find that the established right is entrenched "beyond debate" and drawn "from holdings, not dicta." *Id.* at 875-876.
- For excessive force cases, courts must clear an even higher bar. Only precedent that "squarely governs the specific facts at issue" can clearly establish a constitutional right. *Ibid*. (internal quotation marks and citation omitted). "[E]very reasonable officer" acting "in the blink of an eye" must know it. *Ibid*. (citation omitted).
- Lower courts should "think twice before denying qualified immunity" to anyone "but the plainly incompetent or those who knowingly violate the law." *Ibid.* (internal quotation marks and citation omitted).

Following this exacting approach, the Fifth Circuit extended qualified immunity to an officer who used a "rolling block" to stop a motorcyclist, killing him. *Morrow,* 917 F.3d at 872-874. The court explained that the plaintiffs had not pointed to controlling precedent with sufficiently similar facts establishing the unreasonableness of police using deadly force to stop a high-speed chase. *Id.* at 876-877. It rejected several proffered precedents for imprecise factual fit, including

circuit precedent involving an officer who used a gun to stop a high-speed chase because the officer in the case at hand did not use a gun. *Id.* at 878-879 (distinguishing *Lytle* v. *Bexar County*, 560 F.3d 404 (5th Cir. 2009)).

If other circuits applied the Fifth Circuit's approach, many of their qualified immunity cases would have turned out differently—as the petition explains. We focus on two examples.

In *L.R.* v. *School District of Philadelphia*, 836 F.3d 235 (3d Cir. 2016), the Third Circuit denied qualified immunity to a school official who entrusted a young student to a stranger, who subsequently sexually abused her. The court rested its decision on *Kneipp* v. *Tedder*, 95 F.3d 1199 (3d Cir. 1996), a case in which police abandoned a seriously intoxicated woman to find her way home in the cold, leading her to suffer prolonged exposure resulting in brain damage—notwithstanding the different factual contexts. *L.R.*, 836 F.3d at 244. A court following *Morrow* could not have reached the same result.

Similarly, *Morrow* conflicts with the Seventh's Circuit's qualified immunity decision in *Phillips* v. *Commuity Insurance*, *supra*. There, the court denied qualified immunity to officers who repeatedly shot an unresponsive and unthreatening suspect with rubber bullets. 687 F.3d at 516-517. The court held that "[e]ven where there are 'notable factual distinctions,' prior cases may give an officer reasonable warning that his conduct is unlawful." *Id.* at 528 (citation omitted).

The *Phillips* court compared the facts before it to three prior decisions involving injuries inflicted by the police while subduing non-threatening suspects. 678 F.3d at 529. Those cases differed from the facts at hand in several crucial respects, including the fact that the plaintiff in *Phillips* was drunk, deliberately ignoring police orders, and not in police custody—but the court nonetheless denied immunity. If the court had applied the *Morrow* standard, it would have had no choice but to find that none of these precedents "squarely governed" the case at hand and would have reached the opposite conclusion on qualified immunity.

The decision below adds to this confusion—and only this Court's intervention can provide the clarity needed for uniform resolution by the lower courts of this frequently-recurring issue.

C. The qualified immunity question is squarely presented.

The petition explains (at 29-30) that the qualified immunity issue is squarely presented, because the panel affirmed the denial of the jury instruction solely on the basis that Officer Wilson was entitled to immunity.

Officer Wilson does not dispute that conclusion. He states only that the qualified immunity issue "comes in [a] novel and layered form." Opp. 36.

That is true, but irrelevant. Because the court of appeals' judgment rests entirely on the qualified immunity determination, this Court can address that issue and then remand the case for further proceedings consistent with its determination. Then, the Tenth Circuit on remand can apply ordinarily-applicable

principles to determine whether denial of the jury instruction was error.

Respondent is also wrong in asserting (Opp. 36-37) that this Court would be obligated to address the substantive issue underlying the jury instruction question—whether an officer's conduct prior to use of force is relevant in determining whether that use of force is excessive. If this Court determines that the qualified immunity decision was flawed, the case would be remanded. The Tenth Circuit's precedent would then control, which holds that a jury may consider an officer's own reckless conduct in creating the need to use force, for purposes of Fourth Amendment reasonableness inquiry. *Sevier* v. *City of Lawrence*, 60 F. 3d 695, 699 (10th Cir. 1995).

To the extent respondent wishes to dispute that precedent, he would be able to seek review, based on his theory that the officer's conduct prior to the use of force should not be considered, after the court of appeals reverses the district court's judgment. But the issue simply is not presented by the panel's decision.

In sum, this case presents an appropriate vehicle for providing much-needed guidance on the level of factual similarity required by the "clearly established" standard.

D. This Court's decision in *Taylor* v. *Riojas* provides additional support for plenary review or a remand for reconsideration.

The petition explains (at 29) that this Court's decision in *Taylor* v. *Riojas*, *supra*—rendered after the panel decision and en banc dissent in this case—provides additional justification for this Court's intervention. To the extent *Taylor* clarifies the clearly established law standard, it would be appropriate to grant

the petition and remand the case for reconsideration by the Tenth Circuit in light of *Taylor*. To the extent *Taylor* does not provide such clarification, plenary review is warranted.

Respondent asserts (Opp. 26) that *Taylor* confirms his view that the Court, in *Hope* and now in *Taylor*, has crafted a separate standard that denies qualified immunity for "obviously unconstitutional" conduct. See also page 5, *supra*. But nothing in *Taylor* supports that conclusion. Rather, *Taylor* applied *Hope*'s holding that "'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.'" 141 S. Ct. at 53-54. In other words, *Taylor* concluded that a prior decision may provide sufficient clarity to preclude qualified immunity in circumstances beyond the particular factual context addressed in that decision.

To the extent this Court agrees that *Taylor* provides additional guidance on applying the clearly established law standard, the Court should remand for further consideration in light of *Taylor*.[4]

For the foregoing reasons, and those stated in the petition, the Court should grant plenary review or grant the petition and remand for reconsideration in light of *Taylor*.

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[4] *Amicus* Constitutional Accountability Center urges the Court to grant review in this case to reform the qualified immunity doctrine. The *amicus* brief cogently explains that the current qualified immunity doctrine is inconsistent with the text and history of 42 U.S.C. § 1983. If the Court is inclined to grant plenary review, petitioner supports the addition of the issues identified in the *amicus* brief.

Respectfully submitted.

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APRIL 2021

APPENDICES

APPENDIX A

United States Court of Appeals for the Tenth Circuit

Cody William Cox,
Plaintiff-Appellant-Cross-Appellee,

v.

Don Wilson,
Defendant-Appellee-Cross-Appellant.

Nos. 18-1353, 18-1376

(Filed August 19, 2020, *nunc pro tunc* May 22, 2020)

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:15-CV-00128-WJM-NYW)

Before Hartz and Eid, Circuit Judges*

Hartz, Circuit Judge.

Plaintiff Cody Cox sued Defendant Don Wilson, a deputy in the Clear Creek County Sheriff's Department, under 42 U.S.C. § 1983. Cox alleged that when

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* The late Honorable Monroe G. McKay, United States Senior Circuit Judge, heard oral argument and participated in the panel's conference of this appeal, but passed away before its final resolution. The practice of this court permits the remaining two panel judges, if in agreement, to act as a quorum in resolving the appeal. See United States v. Wiles, 106 F.3d 1516, 1516, n* (10th Cir. 1997); 28 U.S.C. § 46(d).

Wilson shot him in his vehicle while stopped on Interstate 70, Wilson violated the constitutional prohibition against the use of excessive force by law-enforcement officers. Plaintiff appeals the judgment on the jury verdict against him. He argues that the district court erred in failing to instruct the jury to consider whether Wilson unreasonably created the need for the use of force by his own reckless conduct. We have jurisdiction under 28 U.S.C. § 1291 and affirm. Although the district court incorrectly stated that the Supreme Court had recently abrogated this court's precedents requiring such an instruction in appropriate circumstances, the evidence in this case did not support the instruction. No 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.

I. Background

A. The Shooting

Cox was shot on January 31, 2014, after a car chase on Interstate 70. It had been snowing so the Interstate was wet, and some parts were snow-packed or icy. The first officer to pursue Cox was Clear Creek County Deputy Sheriff Kevin Klaus. Although Klaus testified about his observations during the pursuit, the only evidence relevant to the propriety of Wilson's actions is what Wilson observed or what he was informed of by others. Therefore, our account of what happened before Wilson joined the pursuit is limited to what was broadcast on police radio channels that Wilson heard.

The radio traffic indicated a dangerous situation. It began as Cox's Toyota pickup passed Exit 235 on the interstate. The dispatcher said, "[W]e've got about

three 9-11 calls." Aplt. App., Vol. VII at 1566. An officer reported that Cox had "I-70 pretty-well blocked up behind him and he's having a hard time getting up the road." *Id.* at 1567. The officer described the vehicle as a "Silver Tacoma with damage all over the body and a camper shell on the back." *Id.* 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." *Id.* at 1568. Klaus also noted that his police vehicle did not have a siren. Id. Klaus then reported that near Exit 232 the pickup "got stuck, but he's trying to get away again. I'm not going to contact until I get some cover." *Id.* at 1569. He said: "I verbally told the party to turn off his car. I do have a good look of – at him, and he's taking off again. Westbound. All over the road." *Id.* An officer reported that traffic was "almost at a standstill" about 4 miles ahead. *Id.* Klaus said he needed help from someone with a siren and reported that there was "nobody in front of this guy, but we have a lot behind me." *Id.* 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." *Id.* Another officer stated that he had "spike strips" (also referred to by officers as stop sticks) and would join the two police vehicles already at Exit 228. *Id.* at 1570. 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." Id. 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." *Id.* at 1571. Shortly after that, Klaus reported, "We're in bumper-to-bumper traffic now at the 229½.

He is not stopping. He's just showing me a peace sign." *Id.* Another officer informed the others that he was at the 228 offramp with spike strips.

About that time, Wilson, whose vehicle had a siren, had caught up with Cox and taken over from Klaus as leader of the pursuit. For the next mile, traffic became heavily congested, moving slowly in a stop-and-go fashion. The pursuit proceeded at speeds between 5 and 15 miles per hour. Wilson observed Cox continue to drive dangerously. Each time Cox was momentarily stopped by the traffic, he would wait for an opening and then accelerate through any gaps in the cars, losing traction and fishtailing wildly nearly a dozen times and coming very close to striking nearby vehicles. He refused to pull over in response to Wilson's lights and sirens or Wilson's repeated orders over his loudspeaker that Cox stop his vehicle. Wilson believed that Cox was not going to stop.

Wilson was able to pull along the right side of Cox's vehicle, which was in the lefthand lane about five feet from the guardrail, while traffic continued to move very slowly in a stop-and-go fashion. Wilson had his window down and motioned for Cox to roll down his window, which Cox did. But Cox continued to ignore Wilson's repeated orders to turn off his engine. On several occasions Wilson observed Cox drop his right hand down to his right hip; given the circumstances, Wilson assumed that Cox was reaching for a firearm. Cox kept driving forward when possible, rolling up a few feet each time the traffic moved forward. Wilson believed that Cox was striking the rear bumper of the car in front of him, driven by Sarah Kincaid, and pushing her car forward each time that he pulled ahead. But Wilson testified that he was mistaken on this point; he said that his perceptions at

that moment were impaired because he was concentrating on giving Cox instructions and determining whether Cox had a weapon.

Finally, Kincaid fully stopped her car, requiring Cox to stop. 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.

Klaus stopped his vehicle about 10 feet behind Cox. By this point Wilson had drawn his firearm and pointed it at Cox, again ordering Cox to turn off his engine. While Cox was boxed in, Wilson believed he had a brief window of time to get inside Cox's car and take the keys out of the ignition. He decided that prompt action was necessary because he believed that the next stretch of highway posed increasing dangers for the chase (for example, there was a crossover area a mile ahead where Cox could have driven into oncoming traffic), and that Cox could, in the slow-moving traffic, avoid the stop sticks that police had laid out at the next exit. Based on the radio transmissions, Wilson thought that officers providing support for the chase about a half mile to a mile down the road were not coming to assist him.

Wilson said that when he exited his vehicle, it was a car length ahead of Cox in the lane to the right. With his firearm drawn he moved toward Cox, again telling Cox to turn off his engine. Almost immediately, he shot Cox through the open passenger window, striking Cox in the neck. The shooting incident, from the time Cox's vehicle came to a complete stop to the time

that Wilson shot Cox, probably took about a minute.[1] The shot to the neck rendered Cox quadriplegic.

There was no dispute at trial regarding Wilson's knowledge of the police radio traffic before he took over the lead of the pursuit; nor was there any dispute regarding the stop-and-go nature of the traffic once he took the lead, Cox's dangerous driving, or Cox's refusal to comply with Wilson's repeated orders for Cox to turn off his engine. But the eyewitness trial testimony about the moments immediately preceding the shooting was not entirely consistent. Wilson claimed that before he stepped from his vehicle onto the highway, he witnessed Cox roll his car forward and backward twice. When he stepped onto the highway, Cox had backed up to a point completely behind his patrol car. He said that he shot Cox because Cox attempted to drive forward and to the right, toward his patrol car, in a manner that caused him to believe that he was going to be crushed and perhaps killed between the two vehicles. Klaus, however, testified that Wilson stopped his patrol car right next to Cox's car, and that Cox moved his car only once (a foot backward and then a foot forward) after coming to a complete stop behind Kincaid. Kincaid testified that Wilson had not fully exited his vehicle when he shot Cox, and Cox had not

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[1] The duration of the incident, from the time that Cox's car came to a complete stop to the time of the shooting, is somewhat uncertain. Klaus testified that he watched Cox's stopped car for less than a minute before exiting his car, and that Wilson shot Cox about four seconds later. Wilson testified based on the radio transmissions that the incident took about one minute and 15 seconds. Kincaid testified that the incident took "seven and a half minutes," Aplt. App., Vol. I at 181, but admitted that her perception was affected by the stress of the moment.

moved his vehicle after stopping behind Kincaid with Wilson to his right.

Cox testified that he had no memory of the car chase or the shooting incident except that he recalled a silhouette of a person who came up to his window while he was stopped in traffic, he heard some words, and he hit the vehicle in front of him before losing consciousness.

B. Procedural History

Cox filed suit in the United States District Court for the District of Colorado asserting a single claim under 42 U.S.C. § 1983: namely, that his shooting constituted the use of excessive force in violation of the Fourth Amendment's protection against unreasonable seizure. Wilson asserted the defense of qualified immunity.

There have been two jury trials on Cox's claim. The first jury returned a verdict in favor of Wilson, but the district court vacated the judgment because of misconduct at trial by defense counsel (who has since been replaced) and ordered a new trial. After Cox rested his case in the second trial, Wilson moved under Fed. R. Civ. P. Rule 50(a) for a judgment as a matter of law on his qualified-immunity defense. He renewed this motion at the close of evidence, but the court denied the motion. The second jury also rendered a verdict in favor of Wilson.

Cox raises only one issue on appeal. He contends that the district court improperly failed to instruct the jury that it could consider Wilson's reckless conduct before the shooting in determining whether the shooting violated the Fourth Amendment. In his response to Cox's appeal and in support of his own cross-appeal,

Wilson argues that the district court committed several errors during the trial. But because we affirm the judgment in Wilson's favor, we need not address those matters.

II. Discussion

In an excessive-force case, as in other Fourth Amendment seizure cases, a plaintiff must prove that the officer's actions were "objectively unreasonable," taking into account the "totality of the circumstances." *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1259–60 (10th Cir. 2008) (internal quotation marks omitted). Cox argues that the district court erred in failing to instruct the jury that in determining the reasonableness of Wilson's use of force, it could consider whether Wilson's own reckless conduct unreasonably created the need to use such force.

According to Cox, the district court's mistake was in changing the unreasonable-force jury instruction from what the court had used at the first trial. The court's instructions were almost identical to those it had previously given regarding what Cox needed to prove to establish his claim against Wilson. In both trials the court told the juries that the burden was on Cox "to establish by a preponderance of the evidence each of the following elements" of his excessive-force claim: "*First*: [Wilson] deprived [Cox] of his federal Constitutional right not to be subjected to unreasonable force while being stopped; *Second*: [Wilson] acted under the color of state law; and *Third*: [Wilson's] acts were the proximate cause of damages sustained by [Cox]." Aplt. App., Vol. VII at 1595. The court then instructed the juries on the "Factors To Consider When Determining Whether Plaintiff Has Proven The Elements Of His Claim." *Id.* at 1596. It told the juries that they could consider whether Cox had proved at

least one of the following (each of 9 which would have sufficed to establish a violation of his Fourth Amendment rights): (1) "that deadly force was not necessary to prevent [Cox] from escaping"; (2) "that [Wilson] did not have probable cause to believe that [Cox] posed a significant threat of serious physical injury to [Wilson] or others"; or (3) "that it would have been feasible for [Wilson] to give [Cox] a warning before using deadly force, but [Wilson] did not do so." *Id.* at 1596–97. And the court told the juries that they should "consider all the relevant facts and circumstances [Wilson] reasonably believed to be true at the time of the encounter," and that the inquiry "is always whether, from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force at the time of the seizure." *Id.* at 1597.

But the court did make one change to the factors-to-consider instruction given at the first trial, and that is the basis of Cox's appeal. The second-trial instruction excluded one sentence regarding the jury's reasonableness inquiry. We set forth in regular type the pertinent paragraph from the instructions at the second trial, and italicize the sentence that was included at the first trial but not at the second:

> The reasonableness of Defendant's acts must be judged from the perspective of a reasonable officer on the scene at the time of the seizure, that is, the shooting. One of the factors you should consider is whether Defendant Don Wilson was in danger at the time that he used force. *Defendant Don Wilson's own conduct prior to the shooting can be a part of your determination of reasonableness, but only if his own reckless or deliberate conduct during the seizure unreasonably created the need to use*

> *such force*. The concept of reasonableness makes allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are sometimes tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation.

Aplt. App., Vol. I at 57 (italics), VII at 1597 (regular type). Cox objected to the instruction but was overruled. The court explained that it thought the deleted language was legally incorrect and that Cox's contention that Wilson's conduct before the shooting was reckless was unlikely to overcome qualified immunity. *See* Aplt. App., Vol. VII at 1436 ("It's my view that some subsequent decisions since the first trial call[] into question the continuing viability of that statement and that would be, in my view, the thinnest grounds that the plaintiff would have on the qualified immunity issue.").

We ordinarily review a lower court's refusal to give a particular instruction for abuse of discretion. *See Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1231 (10th Cir. 1999). "That deferential review is superseded, however, by this court's *de novo* review of the instructions given to determine whether, in the absence of the refused instruction, they misstated the applicable law." *Id.*; *see Burke v. Regalado*, 935 F.3d 960, 1009 (10th Cir. 2019) ("We review de novo whether, as a whole, the district court's jury instructions correctly stated the governing law and provided the jury with an ample understanding of the issues and applicable standards." (internal quotation marks omitted)). Wilson argues that we should review the denial of the requested instruction for abuse of discretion, while Cox argues that our

review is de novo. But we need not resolve that dispute because on de novo review we hold that the instruction would have been improper in light of the evidence.

There is some Supreme Court authority supporting the district court's view of the law. In *City & County of San Francisco, California v. Sheehan*, the Court stated that a plaintiff could not "establish a Fourth Amendment violation based merely on bad tactics that result[ed] in a deadly confrontation that could have been avoided." 135 S. Ct. 1765, 1777 (2015) (internal quotation marks omitted). "[S]o long as a reasonable officer could have believed that his conduct was justified, a plaintiff cannot avoid summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless." *Id.* (original brackets and internal quotation marks omitted).

Two years later, *County of Los Angeles, California v. Mendez* rejected the Ninth Circuit's "provocation" rule, which had "permit[ted] an excessive force claim under the Fourth Amendment where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation." 137 S. Ct. 1539, 1546 (2017) (internal quotation marks omitted). "The rule's fundamental flaw," as the unanimous Court explained, was that it "use[d] another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." *Id.* The rule went beyond the "operative question in excessive force cases,"—"whether the totality of the circumstances justifie[d] a particular sort of search or seizure," *id.* (internal quotation marks omitted)—and instead "instruct[ed] courts to look

back in time to see if there was a different Fourth Amendment violation that [was] somehow tied to the eventual use of force," *id.* at 1547.

But *Mendez* made clear that it was not deciding the validity of the proposition of law stated in the sentence omitted from the instruction by the district court in this case. A footnote to the opinion states that the Court was declining to address the view that assessing the reasonableness of the use of force requires "taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it." *Id.* at 1547 n*. And after both *Sheehan* and *Mendez* we held in *Pauly v. White* that "[t]he reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." 874 F.3d 1197, 1219 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 2650 (2018) (internal quotation marks omitted); *see also id.* at 1219 n.7 ("This has been the law in our circuit since 1995. . . . The Supreme Court very recently had an opportunity to resolve this issue [in *Mendez*] but declined to do so . . . .").

Nevertheless, the district court did not commit any error by declining to include the sentence in the instruction. A party is not entitled to a jury instruction just because it correctly states a proposition of law. It must be supported by the evidence at trial. *See Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1297 (10th Cir. 1989) ("Under federal law it is error to give an instruction when there is no evidence to support it. There must be more than a mere scintilla of evidence to support an instruction. Sufficient competent evidence is required." (citations omitted)); *Higgins v.*

Martin Marietta Corp., 752 F.2d 492, 496 (10th Cir. 1985) ("[A] party is entitled to an instruction of [its] theory of the case only if the theory is supported by competent evidence. The evidence introduced at trial must warrant the giving of the instruction." (citations omitted)). In this case, including the sentence omitted by the court would have denied Wilson the qualified immunity to which he was entitled. Before addressing the specifics of this case, we briefly summarize the doctrine of qualified immunity.

Qualified immunity shields public officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pauly*, 874 F.3d at 1214 (internal quotation marks omitted). When a defendant asserts a qualified-immunity defense, the plaintiff bears the burden of showing that (1) the defendant violated a constitutional or statutory right, and (2) this right was clearly established at the time of the defendant's unlawful conduct. *See id.* We have discretion to address these two prongs in either order, and "[w]e may resolve a case on the second prong alone if the plaintiff fails to show a right was clearly established." *Gutierrez v. Cobos*, 841 F.3d 895, 900 (10th Cir. 2016).

The law is clearly established for qualified-immunity purposes only if it was sufficiently clear that, at the time of the public official's conduct, every reasonable official would have understood that the conduct was unlawful. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). To make such a showing in our circuit, "the plaintiff must point to a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts

must have found the law to be as the plaintiff maintains." *Callahan v. Unified Gov't of Wyandotte Cty.*, 806 F.3d 1022, 1027 (10th Cir. 2015) (internal quotation marks omitted). "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (internal quotation marks omitted). The clarity of the law must be viewed "in light of the specific context of the case, not as a broad general proposition." *Pauly*, 874 F.3d at 1222 (internal quotation marks omitted).

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. We explain.

The sentence omitted from the instruction said: "Defendant Don Wilson's own conduct prior to the shooting can be a part of your determination of reasonableness, but only if his own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." Aplt. App., Vol. I at 57. Cox sought the instruction to allow him to base liability on his claim that, even if Wilson was in imminent danger

when he shot Cox, the only reason Wilson was exposed to danger was that he unreasonably exited his police vehicle and approached Cox's pickup.

At trial Cox called as an expert witness a person with excellent credentials who testified that Wilson's recklessness created the danger leading to the shooting. The expert opined that Wilson should not have left his car to approach Cox because of the danger to Wilson once he was on foot on the Interstate and in a vulnerable position between his patrol car and Cox's vehicle. He said that Wilson should have remained in his vehicle and attempted to deescalate the situation, perhaps waiting for support from additional officers. And he said that once Wilson stepped onto the Interstate, he should have moved to a position of safety at the rear of his vehicle.

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.

More importantly, 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 Wilson frames the issue, the question on appeal is whether there is:

> a controlling case finding a Fourth Amendment violation due to the officer's recklessly causing the need to use deadly force, where after participating in a high speed and dangerous chase of a suspect, the officer exited his vehicle during a temporary stop in traffic to confront the driver with a show of deadly force?

Aplee. Br. at 49. 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.

This 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 deadly force. In *Pauly* we reversed the denial of summary judgment in favor of the officers, even though the evidence would support a finding of the following events: Two women called 911 late one evening to report a drunk driver and then began to tailgate him. *See* 874 F.3d at 1203. At one point

both vehicles stopped at an exit ramp and the occupants exchanged unpleasantries. *See id.* The driver felt threatened and drove away (apparently without the women following him), going the short distance to his rural home, where he lived with his brother. *See id.* The three responding officers determined "that there was not enough evidence or probable cause to arrest [the driver], and that no exigent circumstances existed at the time. Nevertheless, the officers decided to try and speak with [the driver] to get his side of the story." *Id.* at 1203–04. The officers located and then approached the driver's home, using their flashlights only intermittently until they neared the front door. *See id*. at 1204. The driver and his brother, fearing intruders related to the prior road-rage incident, asked who was approaching, *see id.*; the officers responded hostilely, yelling "Hey, (expletive), we got you surrounded. Come out or we're coming in," *id*. As a result, the brothers, who had no reason to think the intruders were police officers, armed themselves and shouted that they had guns; one of the officers shot and killed the driver's brother after seeing him point a gun in the officer's direction. See id. at 1205. We held that the officers' reckless conduct—including approaching the suspect's home "while it was dark and raining and, without knocking on the door, ma[king] threatening comments about intruding into the home," *id.* at 1215— understandably caused the suspect and his brother to arm themselves, and therefore unreasonably created the need to use deadly force, *see id.* at 1211, 1213, 1221. We concluded that the threat "made by the brothers, which would normally justify an officer's use of force, was precipitated by the officers' own" reckless actions, and that therefore the use of deadly force was unreasonable. *Id.* at 1221.

We nevertheless held that the officers were entitled to qualified immunity because there was no clearly established law that such recklessness created liability. *Id.* at 1223. We explained:

> The statement . . . that the reasonableness inquiry includes an evaluation of an officer's actions leading up to the use of force, is absolutely relevant in determining whether a police officer acted unreasonably in effecting a seizure, as we illustrated above. But it cannot alone serve as the basis for concluding that an officer's particular use of excessive force was clearly established. . . . Because there is no case close enough on point to make the unlawfulness of [the shooting officer's] actions apparent, we conclude that [the officer] is entitled to qualified immunity.

Id. (internal quotation marks omitted).

Pauly illustrates the strength of the protection provided by qualified immunity. Unlike Wilson's decision to leave his vehicle to try to disable Cox's vehicle, the impropriety of the alleged actions by the officers before the shooting in *Pauly* would be apparent to most laypersons. Yet the *Pauly* officers were protected by qualified immunity because of the absence of clearly established law prohibiting their conduct. So too, here.

Cox argues that Wilson is procedurally barred from raising qualified immunity on appeal because his preverdict Rule 50(a) qualified-immunity motion was not followed by a postverdict Rule 50(b) motion. See *Kelley v. City of Albuquerque*, 542 F. 3d 802, 817 (10th Cir. 2008) ("[T]he precise subject matter of a party's

Rule 50(a) motion—namely, its entitlement to judgment as a matter of law—cannot be appealed unless that motion is renewed pursuant to Rule 50(b)." (emphasis added) (internal quotation marks omitted)). But Wilson had no occasion or reason to file a Rule 50(b) motion because the jury's verdict was in his favor. The motion-renewal requirement of Rule 50(b) applies only to parties dissatisfied with the verdict—that is, appellants. Now, as an appellee, Wilson can defend the judgment on any ground supported by the record, at least when it is fair to do so. *See Feinberg v. Comm'r of Internal Revenue*, 916 F.3d 1330, 1334 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 49 (2019). There is no unfairness in affirming on the ground of qualified immunity. Wilson properly invoked qualified immunity in the district court and has fully briefed the issue on appeal.

We also reject Cox's apparent assertion at oral argument that qualified immunity is a separate, nonrelevant issue, and not an issue on appeal, because the jury was not 19 presented with deciding the issue. To begin with, the argument is untimely. "Arguments that are raised for the first time at oral argument come too late to merit our attention." *United States v. DeRusse*, 859 F.3d 1232, 1240 n.3 (10th Cir. 2017) (brackets and internal quotation marks omitted). Moreover, were we to consider this argument, it would fail because the clearly-established-law component of qualified immunity is not a jury issue. *See Griess v. State of Colo.*, 841 F.2d 1042, 1047 (10th Cir. 1988) ("[W]hether constitutional rights allegedly violated were clearly established for purposes of qualified immunity . . . is a purely legal issue," and therefore "is appropriate for resolution on appeal." (internal quotation marks omitted)).

III. Conclusion

We **AFFIRM** the district court's judgment in favor of Defendant Wilson

APPENDIX B

United States Court of Appeals
for the Tenth Circuit

Cody William Cox,
Plaintiff-Appellant-Cross-Appellee,

v.

Don Wilson,
Defendant-Appellee-Cross-Appellant.

Nos. 18-1353, 18-1376

(Filed August 19, 2020, *nunc pro tunc* May 22, 2020)

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:15-CV-00128-WJM-NYW)

Before Hartz and Eid, Circuit Judges*

Hartz, Circuit Judge.

Plaintiff Cody Cox sued Defendant Don Wilson, a deputy in the Clear Creek County Sheriff's Department, under 42 U.S.C. § 1983. Cox alleged that when

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* The late Honorable Monroe G. McKay, United States Senior Circuit Judge, heard oral argument and participated in the panel's conference of this appeal, but passed away before its final resolution. The practice of this court permits the remaining two panel judges, if in agreement, to act as a quorum in resolving the appeal. See United States v. Wiles, 106 F.3d 1516, 1516, n* (10th Cir. 1997); 28 U.S.C. § 46(d).

Wilson shot him in his vehicle while stopped on Interstate 70, Wilson violated the constitutional prohibition against the use of excessive force by law-enforcement officers. Plaintiff appeals the judgment on the jury verdict against him. He argues that the district court erred in failing to instruct the jury to consider whether Wilson unreasonably created the need for the use of force by his own reckless conduct. We have jurisdiction under 28 U.S.C. § 1291 and affirm. Although the district court incorrectly stated that the Supreme Court had recently abrogated this court's precedents requiring such an instruction in appropriate circumstances, the evidence in this case did not support the instruction. No 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.

I. Background

A. The Shooting

Cox was shot on January 31, 2014, after a car chase on Interstate 70. It had been snowing so the Interstate was wet, and some parts were snow-packed or icy. The first officer to pursue Cox was Clear Creek County Deputy Sheriff Kevin Klaus. Although Klaus testified about his observations during the pursuit, the only evidence relevant to the propriety of Wilson's actions is what Wilson observed or what he was informed of by others. Therefore, our account of what happened before Wilson joined the pursuit is limited to what was broadcast on police radio channels that Wilson heard.

The radio traffic indicated a dangerous situation. It began as Cox's Toyota pickup passed Exit 235 on the interstate. The dispatcher said, "[W]e've got about

three 9-11 calls." Aplt. App., Vol. VII at 1566. An officer reported that Cox had "I-70 pretty-well blocked up behind him and he's having a hard time getting up the road." *Id.* at 1567. The officer described the vehicle as a "Silver Tacoma with damage all over the body and a camper shell on the back." *Id.* 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." *Id.* at 1568. Klaus also noted that his police vehicle did not have a siren. Id. Klaus then reported that near Exit 232 the pickup "got stuck, but he's trying to get away again. I'm not going to contact until I get some cover." *Id.* at 1569. He said: "I verbally told the party to turn off his car. I do have a good look of – at him, and he's taking off again. Westbound. All over the road." *Id.* An officer reported that traffic was "almost at a standstill" about 4 miles ahead. *Id.* Klaus said he needed help from someone with a siren and reported that there was "nobody in front of this guy, but we have a lot behind me." *Id.* 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." *Id.* Another officer stated that he had "spike strips" (also referred to by officers as stop sticks) and would join the two police vehicles already at Exit 228. *Id.* at 1570. 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." Id. 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." *Id.* at 1571. Shortly after that, Klaus reported, "We're in bumper-to-bumper traffic now at the 229½.

He is not stopping. He's just showing me a peace sign." *Id.* Another officer informed the others that he was at the 228 offramp with spike strips.

About that time, Wilson, whose vehicle had a siren, had caught up with Cox and taken over from Klaus as leader of the pursuit. For the next mile, traffic became heavily congested, moving slowly in a stop-and-go fashion. The pursuit proceeded at speeds between 5 and 15 miles per hour. Wilson observed Cox continue to drive dangerously. Each time Cox was momentarily stopped by the traffic, he would wait for an opening and then accelerate through any gaps in the cars, losing traction and fishtailing wildly nearly a dozen times and coming very close to striking nearby vehicles. He refused to pull over in response to Wilson's lights and sirens or Wilson's repeated orders over his loudspeaker that Cox stop his vehicle. Wilson believed that Cox was not going to stop.

Wilson was able to pull along the right side of Cox's vehicle, which was in the lefthand lane about five feet from the guardrail, while traffic continued to move very slowly in a stop-and-go fashion. Wilson had his window down and motioned for Cox to roll down his window, which Cox did. But Cox continued to ignore Wilson's repeated orders to turn off his engine. On several occasions Wilson observed Cox drop his right hand down to his right hip; given the circumstances, Wilson assumed that Cox was reaching for a firearm. Cox kept driving forward when possible, rolling up a few feet each time the traffic moved forward. Wilson believed that Cox was striking the rear bumper of the car in front of him, driven by Sarah Kincaid, and pushing her car forward each time that he pulled ahead. But Wilson testified that he was mistaken on this point; he said that his perceptions at

that moment were impaired because he was concentrating on giving Cox instructions and determining whether Cox had a weapon.

Finally, Kincaid fully stopped her car, requiring Cox to stop. 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.

Klaus stopped his vehicle about 10 feet behind Cox. By this point Wilson had drawn his firearm and pointed it at Cox, again ordering Cox to turn off his engine. While Cox was boxed in, Wilson believed he had a brief window of time to get inside Cox's car and take the keys out of the ignition. He decided that prompt action was necessary because he believed that the next stretch of highway posed increasing dangers for the chase (for example, there was a crossover area a mile ahead where Cox could have driven into oncoming traffic), and that Cox could, in the slow-moving traffic, avoid the stop sticks that police had laid out at the next exit. Based on the radio transmissions, Wilson thought that officers providing support for the chase about a half mile to a mile down the road were not coming to assist him.

Wilson said that when he exited his vehicle, it was a car length ahead of Cox in the lane to the right. With his firearm drawn he moved toward Cox, again telling Cox to turn off his engine. Almost immediately, he shot Cox through the open passenger window, striking Cox in the neck. The shooting incident, from the time Cox's vehicle came to a complete stop to the time

that Wilson shot Cox, probably took about a minute.[1] The shot to the neck rendered Cox quadriplegic.

There was no dispute at trial regarding Wilson's knowledge of the police radio traffic before he took over the lead of the pursuit; nor was there any dispute regarding the stop-and-go nature of the traffic once he took the lead, Cox's dangerous driving, or Cox's refusal to comply with Wilson's repeated orders for Cox to turn off his engine. But the eyewitness trial testimony about the moments immediately preceding the shooting was not entirely consistent. Wilson claimed that before he stepped from his vehicle onto the highway, he witnessed Cox roll his car forward and backward twice. When he stepped onto the highway, Cox had backed up to a point completely behind his patrol car. He said that he shot Cox because Cox attempted to drive forward and to the right, toward his patrol car, in a manner that caused him to believe that he was going to be crushed and perhaps killed between the two vehicles. Klaus, however, testified that Wilson stopped his patrol car right next to Cox's car, and that Cox moved his car only once (a foot backward and then a foot forward) after coming to a complete stop behind Kincaid. Kincaid testified that Wilson had not fully exited his vehicle when he shot Cox, and Cox had not moved his vehicle after stopping behind Kincaid with Wilson to his right.

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[1] The duration of the incident, from the time that Cox's car came to a complete stop to the time of the shooting, is somewhat uncertain. Klaus testified that he watched Cox's stopped car for less than a minute before exiting his car, and that Wilson shot Cox about four seconds later. Wilson testified based on the radio transmissions that the incident took about one minute and 15 seconds. Kincaid testified that the incident took "seven and a half minutes," Aplt. App., Vol. I at 181, but admitted that her perception was affected by the stress of the moment.

Cox testified that he had no memory of the car chase or the shooting incident except that he recalled a silhouette of a person who came up to his window while he was stopped in traffic, he heard some words, and he hit the vehicle in front of him before losing consciousness.

B. Procedural History

Cox filed suit in the United States District Court for the District of Colorado asserting a single claim under 42 U.S.C. § 1983: namely, that his shooting constituted the use of excessive force in violation of the Fourth Amendment's protection against unreasonable seizure. Wilson asserted the defense of qualified immunity.

There have been two jury trials on Cox's claim. The first jury returned a verdict in favor of Wilson, but the district court vacated the judgment because of misconduct at trial by defense counsel (who has since been replaced) and ordered a new trial. After Cox rested his case in the second trial, Wilson moved under Fed. R. Civ. P. Rule 50(a) for a judgment as a matter of law on his qualified-immunity defense. He renewed this motion at the close of evidence, but the court denied the motion. The second jury also rendered a verdict in favor of Wilson.

Cox raises only one issue on appeal. He contends that the district court improperly failed to instruct the jury that it could consider Wilson's reckless conduct before the shooting in determining whether the shooting violated the Fourth Amendment. In his response to Cox's appeal and in support of his own cross-appeal, Wilson argues that the district court committed several errors during the trial. But because we affirm the

judgment in Wilson's favor, we need not address those matters.

II. Discussion

In an excessive-force case, as in other Fourth Amendment seizure cases, a plaintiff must prove that the officer's actions were "objectively unreasonable," taking into account the "totality of the circumstances." *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1259–60 (10th Cir. 2008) (internal quotation marks omitted). Cox argues that the district court erred in failing to instruct the jury that in determining the reasonableness of Wilson's use of force, it could consider whether Wilson's own reckless conduct unreasonably created the need to use such force.

According to Cox, the district court's mistake was in changing the unreasonable-force jury instruction from what the court had used at the first trial. The court's instructions were almost identical to those it had previously given regarding what Cox needed to prove to establish his claim against Wilson. In both trials the court told the juries that the burden was on Cox "to establish by a preponderance of the evidence each of the following elements" of his excessive-force claim: "*First*: [Wilson] deprived [Cox] of his federal Constitutional right not to be subjected to unreasonable force while being stopped; *Second*: [Wilson] acted under the color of state law; and *Third*: [Wilson's] acts were the proximate cause of damages sustained by [Cox]." Aplt. App., Vol. VII at 1595. The court then instructed the juries on the "Factors To Consider When Determining Whether Plaintiff Has Proven The Elements Of His Claim." *Id.* at 1596. It told the juries that they could consider whether Cox had proved at least one of the following (each of 9 which would have

sufficed to establish a violation of his Fourth Amendment rights): (1) "that deadly force was not necessary to prevent [Cox] from escaping"; (2) "that [Wilson] did not have probable cause to believe that [Cox] posed a significant threat of serious physical injury to [Wilson] or others"; or (3) "that it would have been feasible for [Wilson] to give [Cox] a warning before using deadly force, but [Wilson] did not do so." *Id.* at 1596–97. And the court told the juries that they should "consider all the relevant facts and circumstances [Wilson] reasonably believed to be true at the time of the encounter," and that the inquiry "is always whether, from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force at the time of the seizure." *Id.* at 1597.

But the court did make one change to the factors-to-consider instruction given at the first trial, and that is the basis of Cox's appeal. The second-trial instruction excluded one sentence regarding the jury's reasonableness inquiry. We set forth in regular type the pertinent paragraph from the instructions at the second trial, and italicize the sentence that was included at the first trial but not at the second:

> The reasonableness of Defendant's acts must be judged from the perspective of a reasonable officer on the scene at the time of the seizure, that is, the shooting. One of the factors you should consider is whether Defendant Don Wilson was in danger at the time that he used force. *Defendant Don Wilson's own conduct prior to the shooting can be a part of your determination of reasonableness, but only if his own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.* The concept of reasonableness

> makes allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are sometimes tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation.

Aplt. App., Vol. I at 57 (italics), VII at 1597 (regular type). Cox objected to the instruction but was overruled. The court explained that it thought the deleted language was legally incorrect and that Cox's contention that Wilson's conduct before the shooting was reckless was unlikely to overcome qualified immunity. *See* Aplt. App., Vol. VII at 1436 ("It's my view that some subsequent decisions since the first trial call[] into question the continuing viability of that statement and that would be, in my view, the thinnest grounds that the plaintiff would have on the qualified immunity issue.").

We ordinarily review a lower court's refusal to give a particular instruction for abuse of discretion. *See Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1231 (10th Cir. 1999). "That deferential review is superseded, however, by this court's *de novo* review of the instructions given to determine whether, in the absence of the refused instruction, they misstated the applicable law." *Id.*; *see Burke v. Regalado*, 935 F.3d 960, 1009 (10th Cir. 2019) ("We review de novo whether, as a whole, the district court's jury instructions correctly stated the governing law and provided the jury with an ample understanding of the issues and applicable standards." (internal quotation marks omitted)). Wilson argues that we should review the denial of the requested instruction for abuse of discretion, while Cox argues that our

review is de novo. But we need not resolve that dispute because on de novo review we hold that the instruction would have been improper in light of the evidence.

There is some Supreme Court authority supporting the district court's view of the law. In *City & County of San Francisco, California v. Sheehan*, the Court stated that a plaintiff could not "establish a Fourth Amendment violation based merely on bad tactics that result[ed] in a deadly confrontation that could have been avoided." 135 S. Ct. 1765, 1777 (2015) (internal quotation marks omitted). "[S]o long as a reasonable officer could have believed that his conduct was justified, a plaintiff cannot avoid summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless." *Id.* (original brackets and internal quotation marks omitted).

Two years later, *County of Los Angeles, California v. Mendez* rejected the Ninth Circuit's "provocation" rule, which had "permit[ted] an excessive force claim under the Fourth Amendment where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation." 137 S. Ct. 1539, 1546 (2017) (internal quotation marks omitted). "The rule's fundamental flaw," as the unanimous Court explained, was that it "use[d] another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." *Id.* The rule went beyond the "operative question in excessive force cases,"—"whether the totality of the circumstances justifie[d] a particular sort of search or seizure," *id.* (internal quotation marks omitted)—and instead "instruct[ed] courts to look

back in time to see if there was a different Fourth Amendment violation that [was] somehow tied to the eventual use of force," *id.* at 1547.

But *Mendez* made clear that it was not deciding the validity of the proposition of law stated in the sentence omitted from the instruction by the district court in this case. A footnote to the opinion states that the Court was declining to address the view that assessing the reasonableness of the use of force requires "taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it." *Id.* at 1547 n*. And after both *Sheehan* and *Mendez* we held in *Pauly v. White* that "[t]he reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." 874 F.3d 1197, 1219 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 2650 (2018) (internal quotation marks omitted); *see also id.* at 1219 n.7 ("This has been the law in our circuit since 1995. . . . The Supreme Court very recently had an opportunity to resolve this issue [in *Mendez*] but declined to do so . . . .").

Nevertheless, the district court did not commit any error by declining to include the sentence in the instruction. A party is not entitled to a jury instruction just because it correctly states a proposition of law. It must be supported by the evidence at trial. *See Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1297 (10th Cir. 1989) ("Under federal law it is error to give an instruction when there is no evidence to support it. There must be more than a mere scintilla of evidence to support an instruction. Sufficient competent evidence is required." (citations omitted)); *Higgins v.*

Martin Marietta Corp., 752 F.2d 492, 496 (10th Cir. 1985) ("[A] party is entitled to an instruction of [its] theory of the case only if the theory is supported by competent evidence. The evidence introduced at trial must warrant the giving of the instruction." (citations omitted)). In this case, including the sentence omitted by the court would have denied Wilson the qualified immunity to which he was entitled. Before addressing the specifics of this case, we briefly summarize the doctrine of qualified immunity.

Qualified immunity shields public officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pauly*, 874 F.3d at 1214 (internal quotation marks omitted). When a defendant asserts a qualified-immunity defense, the plaintiff bears the burden of showing that (1) the defendant violated a constitutional or statutory right, and (2) this right was clearly established at the time of the defendant's unlawful conduct. *See id.* We have discretion to address these two prongs in either order, and "[w]e may resolve a case on the second prong alone if the plaintiff fails to show a right was clearly established." *Gutierrez v. Cobos*, 841 F.3d 895, 900 (10th Cir. 2016).

The law is clearly established for qualified-immunity purposes only if it was sufficiently clear that, at the time of the public official's conduct, every reasonable official would have understood that the conduct was unlawful. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). To make such a showing in our circuit, "the plaintiff must point to a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts

must have found the law to be as the plaintiff maintains." *Callahan v. Unified Gov't of Wyandotte Cty.*, 806 F.3d 1022, 1027 (10th Cir. 2015) (internal quotation marks omitted). "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (internal quotation marks omitted). The clarity of the law must be viewed "in light of the specific context of the case, not as a broad general proposition." *Pauly*, 874 F.3d at 1222 (internal quotation marks omitted).

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. We explain.

The sentence omitted from the instruction said: "Defendant Don Wilson's own conduct prior to the shooting can be a part of your determination of reasonableness, but only if his own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." Aplt. App., Vol. I at 57. Cox sought the instruction to allow him to base liability on his claim that, even if Wilson was in imminent danger

when he shot Cox, the only reason Wilson was exposed to danger was that he unreasonably exited his police vehicle and approached Cox's pickup.

At trial Cox called as an expert witness a person with excellent credentials who testified that Wilson's recklessness created the danger leading to the shooting. The expert opined that Wilson should not have left his car to approach Cox because of the danger to Wilson once he was on foot on the Interstate and in a vulnerable position between his patrol car and Cox's vehicle. He said that Wilson should have remained in his vehicle and attempted to deescalate the situation, perhaps waiting for support from additional officers. And he said that once Wilson stepped onto the Interstate, he should have moved to a position of safety at the rear of his vehicle.

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.

More importantly, 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 Wilson frames the issue, the question on appeal is whether there is:

> a controlling case finding a Fourth Amendment violation due to the officer's recklessly causing the need to use deadly force, where after participating in a high speed and dangerous chase of a suspect, the officer exited his vehicle during a temporary stop in traffic to confront the driver with a show of deadly force?

Aplee. Br. at 49. 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.

~~A recent decision of this court provides a compelling illustration of the scope of qualified immunity~~ This 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 deadly force. In *Pauly* we reversed the denial of summary judgment in favor of the officers, even though the evidence would support a finding of the following events: Two women called 911

late one evening to report a drunk driver and then began to tailgate him. *See* 874 F.3d at 1203. At one point both vehicles stopped at an exit ramp and the occupants exchanged unpleasantries. *See id.* The driver felt threatened and drove away (apparently without the women following him), going the short distance to his rural home, where he lived with his brother. *See id.* The three responding officers determined "that there was not enough evidence or probable cause to arrest [the driver], and that no exigent circumstances existed at the time. Nevertheless, the officers decided to try and speak with [the driver] to get his side of the story." *Id.* at 1203–04. The officers located and then approached the driver's home, using their flashlights only intermittently until they neared the front door. *See id.* at 1204. The driver and his brother, fearing intruders related to the prior road-rage incident, asked who was approaching, *see id.*; the officers responded hostilely, yelling "Hey, (expletive), we got you surrounded. Come out or we're coming in," *id.* As a result, the brothers, who had no reason to think the intruders were police officers, armed themselves and shouted that they had guns; one of the officers shot and killed the driver's brother after seeing him point a gun in the officer's direction. See id. at 1205. We held that the officers' reckless conduct—including approaching the suspect's home "while it was dark and raining and, without knocking on the door, ma[king] threatening comments about intruding into the home," *id.* at 1215— understandably caused the suspect and his brother to arm themselves, and therefore unreasonably created the need to use deadly force, *see id.* at 1211, 1213, 1221. We concluded that the threat "made by the brothers, which would normally justify an officer's use of force, was precipitated by the officers'

own" reckless actions, and that therefore the use of deadly force was unreasonable. *Id.* at 1221.

We nevertheless held that the officers were entitled to qualified immunity because there was no clearly established law that such recklessness created liability. *Id.* at 1223. We explained:

> The statement . . . that the reasonableness inquiry includes an evaluation of an officer's actions leading up to the use of force, is absolutely relevant in determining whether a police officer acted unreasonably in effecting a seizure, as we illustrated above. But it cannot alone serve as the basis for concluding that an officer's particular use of excessive force was clearly established. . . . Because there is no case close enough on point to make the unlawfulness of [the shooting officer's] actions apparent, we conclude that [the officer] is entitled to qualified immunity.

Id. (internal quotation marks omitted).

Pauly illustrates the strength of the protection provided by qualified immunity. Unlike Wilson's decision to leave his vehicle to try to disable Cox's vehicle, the impropriety of the alleged actions by the officers before the shooting in *Pauly* would be apparent to most laypersons. Yet the *Pauly* officers were protected by qualified immunity because of the absence of clearly established law prohibiting their conduct. ~~If qualified immunity protects the officers in Pauly against the claim of unreasonably creating a dangerous situation that led to the use of deadly force, surely Wilson is similarly protected.~~ So too, here.

Cox argues that Wilson is procedurally barred from raising qualified immunity on appeal because his

preverdict Rule 50(a) qualified-immunity motion was not followed by a postverdict Rule 50(b) motion. See *Kelley v. City of Albuquerque*, 542 F. 3d 802, 817 (10th Cir. 2008) ("[T]he precise subject matter of a party's Rule 50(a) motion—namely, its entitlement to judgment as a matter of law—cannot be appealed unless that motion is renewed pursuant to Rule 50(b)." (emphasis added) (internal quotation marks omitted)). But Wilson had no occasion or reason to file a Rule 50(b) motion because the jury's verdict was in his favor. The motion-renewal requirement of Rule 50(b) applies only to parties dissatisfied with the verdict—that is, appellants. Now, as an appellee, Wilson can defend the judgment on any ground supported by the record, at least when it is fair to do so. *See Feinberg v. Comm'r of Internal Revenue*, 916 F.3d 1330, 1334 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 49 (2019). There is no unfairness in affirming on the ground of qualified immunity. Wilson properly invoked qualified immunity in the district court and has fully briefed the issue on appeal.

We also reject Cox's apparent assertion at oral argument that qualified immunity is a separate, nonrelevant issue, and not an issue on appeal, because the jury was not 19 presented with deciding the issue. To begin with, the argument is untimely. "Arguments that are raised for the first time at oral argument come too late to merit our attention." *United States v. DeRusse*, 859 F.3d 1232, 1240 n.3 (10th Cir. 2017) (brackets and internal quotation marks omitted). Moreover, were we to consider this argument, it would fail because the clearly-established-law component of qualified immunity is not a jury issue. *See Griess v. State of Colo.*, 841 F.2d 1042, 1047 (10th Cir. 1988) ("[W]hether constitutional rights allegedly violated

were clearly established for purposes of qualified immunity . . . is a purely legal issue," and therefore "is appropriate for resolution on appeal." (internal quotation marks omitted)).

III. Conclusion

We **AFFIRM** the district court's judgment in favor of Defendant Wilson