No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A government official is not protected by qualified immunity from damages liability if the official "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (2004). In determining whether a right is "clearly established," the "salient question * * * is whether the state of the law * * * give[s] [a government official] fair warning that their alleged [conduct] * * * was unconstitutional." *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002).

The courts of appeals utilize conflicting standards to decide whether this "fair warning" standard is satisfied—a conflict that has deepened as a result of the Tenth Circuit's ruling in this case.

The question presented is:

Whether a court may uphold a qualified immunity claim on the ground that qualified immunity had been granted in a prior case in which the "impropriety" of the government official's conduct would be "more apparent to most laypersons"—as the panel did here—or whether this Court's "clearly established" standard obligated the court of appeals to compare the facts of the case before it to the facts of other relevant precedents to determine whether the government official would have had fair notice that his conduct was unconstitutional.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cody William Cox, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals panel (App., *infra*, 1a-20a) is reported at 959 F.3d 1249. The order of the court of appeals denying rehearing and rehearing en banc (*id*. at 21a-32a) is reported at 971 F.3d 1159. The district court's oral decision denying respondent's motion under Federal Rule of Civil Procedure 50(a)(1) for judgment as a matter of law on qualified immunity grounds (*id*. at 33a-52a) is unreported. The district court's order denying respondent's motion for summary judgment on qualified immunity grounds (*id*. at 53a-62a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2020. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT

This case involves a police shooting that made Petitioner Cody Cox a quadriplegic. The shooting occurred at the end of a car chase, when Cox's vehicle was boxed in by other cars—including two police cars—and could not get away. Deputy Don Wilson, respondent here, exited his vehicle and almost immediately shot the unarmed Cox through the passenger window of Cox's car.

Cox's evidence at trial included an expert on law enforcement tactics who testified "that Wilson's recklessness"—by leaving his vehicle rather than de-escalating the situation—"created the danger leading to the shooting." App., *infra*, 15a. The district court nonetheless refused to instruct the jury that it could consider whether Wilson's recklessness unjustifiably created the need to use force—even though circuit precedent plainly required such an instruction. The jury returned a defense verdict and Cox appealed, arguing that the failure to give the instruction constituted reversible error.

The Tenth Circuit panel declined to address the jury instruction issue, despite acknowledging that the district court's justification for its decision rested on erroneous reasoning. Instead, the panel determined that any instructional error was irrelevant because Deputy Wilson was protected by qualified immunity.

The panel's qualified immunity determination violated this Court's precedents and deepened an existing conflict regarding the standard for determining when an official is not entitled to qualified immunity because his or her actions violated clearly established law.

This Court has stated that law is clearly established if "the state of the law"—typically decisions from this Court or the courts of appeals—gives a government official "fair warning that their alleged [conduct] * * * was unconstitutional." *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002). The Court has rejected the contention that "the facts of [these] cases [must] be materially similar" to those at issue in order to deny qualified immunity. *Id.* at 739 (citation omitted).

The panel below failed to undertake the necessary inquiry. "[R]ather than compare the specific facts of the present case with those of prior cases"—as this Court requires—"the panel satisfie[d] itself with comparing the relative perceived egregiousness of police conduct in factually dissimilar cases." App., *infra,* at 26a (en banc dissent). And if it had compared the facts here to those in prior Tenth Circuit cases, it would have been obliged to hold that Deputy Wilson is not protected by qualified immunity.

Prior to the panel's decision, there was a conflict among the courts of appeals regarding the degree of factual similarity required to hold that the "clearly established law" standard is satisfied. The panel's approach expands that conflict and increases the need for this Court's intervention to provide guidance on the issue.

To be sure, this Court recently considered the issue of qualified immunity in *Taylor* v. *Riojas*, 141 S. Ct. 52 (2020). But because the misconduct by the officer there was so egregious—housing a prisoner in "deplorably unsanitary conditions for * * * an extended period of time" (*id.* at 53)—this Court's decision may not provide guidance for cases involving less extreme facts. To the extent the Court concludes that additional guidance would be useful, it should grant plenary review here. If the Court concludes that *Taylor* does provide additional guidance, it should grant the petition, vacate the judgment of the Tenth Circuit, and remand the case for further proceedings in light of *Taylor*.

A. Factual Background.

On January 31, 2014, Respondent Don Wilson—a deputy in the Clear Creek, Colorado, Sheriff's Office—

responded to reports of erratic driving on Interstate 70 by Petitioner Cody Cox. App., *infra*, 2a-4a, 34a. Deputy Wilson pursued Cox, who refused to obey Wilson's verbal requests to stop, weaving through stop-and-go traffic, until—as a result of congestion that brought traffic to a halt—Cox's car was boxed in by a civilian's vehicle immediately in front of him; the vehicle driven by another officer, Deputy Kevin Klaus, behind him; Deputy Wilson's vehicle on his right; and the highway guardrail on his left. *Id*. at 4a-5a.

Cox was unable to drive away and remained in his vehicle. Neither Sarah Kincaid, the civilian in the vehicle in front of Cox, nor Deputy Klaus, in the car behind Cox, saw Cox's vehicle move, aside from slightly rocking back and forth. App., *infra*, 5a-7a.

Deputy Wilson several times ordered Cox to turn off his vehicle. App., *infra*, 4a-5a. When Cox did not comply, Wilson exited his patrol vehicle, stepped onto the highway, and approached Cox's vehicle at the passenger window with his firearm drawn. *Id*. at 5a. Deputy Wilson fired "[a]lmost immediately," through the open window, striking Cox in the neck. *Ibid*. Cox was unarmed. *Id*. at 23a. The shooting rendered Cox a quadriplegic. *Id*. at 6a.

Deputy Klaus, who had been approaching Cox's vehicle from behind, assumed that Deputy Wilson had fired his taser; he did not think that use of a firearm was justified, given that—in his view—Cox did not pose any immediate threat to officer safety or the public. App., *infra*, 56a-57a.

Deputy Wilson testified that Cox had repeatedly rammed Ms. Kincaid's vehicle, but Ms. Kincaid had no recollection that her car had been hit by Cox's vehicle—other than slight contact after Deputy Wilson

had fired his weapon. App., *infra*, 55a-57a. Deputy Klaus testified that he did not witness Cox's car ramming Ms. Kincaid's vehicle—or any significant movement of Cox's vehicle before he heard the gunshot. *Id.* at 57a.

Deputy Wilson testified that he fired his gun because Cox's vehicle lurched forward and to the right, threatening to crush him between Cox's vehicle and his patrol car. App., *infra*, 6a. But neither Ms. Kincaid (in the car in front of Cox) nor Deputy Klaus (behind Cox's car) saw Cox's vehicle move. *Id.* at 55a-58a Indeed, the evidence showed that the vehicle and its wheels were parallel with the road, indicating that it could not have been moving to the right toward Deputy Wilson. *Id.* at 56a. Moreover, Cox's car was surrounded, making it impossible for him to drive away. *Id.* at 58a.

Finally, Wilson testified that he saw Cox drop his hand down as Wilson approached him and believed that Cox might be reaching for a weapon. App., *infra*, 4a.

Cox's expert witness on law-enforcement policies and tactics, who had "excellent credentials," testified "that Wilson's recklessness created the danger leading to the shooting." App., *infra*, 15a. The expert stated that Deputy 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.

Ibid.

B. Proceedings Below.

1. The District Court's Rulings.

Cox commenced this action against Deputy Wilson in the District Court for the District of Colorado seeking damages pursuant to 42 U.S.C § 1983 on the ground that Wilson had used force so excessive that it violated Cox's Fourth Amendment right against unreasonable seizure.

Deputy Wilson moved for summary judgment on the basis of qualified immunity. The district court stated that "[w]hen the allegedly excessive force is 'deadly force' then the force is 'justified only if a reasonable officer in the officer's position would have had probable cause to believe that there was a threat of serious physical harm to himself or others." App., *infra*, 40a-41a (footnote omitted) (quoting *Cordova* v. *Aragon*, 569 F.3d 1183, 1192 (10th Cir. 2009), cert. denied, 558 U.S. 1152 (2010)).

The court concluded that the relevant facts were in dispute, but that (1) "to the extent [Wilson] claims that he was acting in order to defend himself, the Court cannot conclude as a matter of law that [he] acted in an objectively reasonable manner"; and (2) "to the extent [Wilson] claims he acted in a manner calculated to defend third parties from harm, the Court cannot conclude that as a matter of law [he] acted in an objectively reasonable manner." App., *infra*, 44a, 48a. Thus,"[u]nder a set of facts which a reasonable jury could find to be true, Defendant did not act in an

objectively reasonable manner and, therefore, violated [Cox's] Fourth Amendment Right against unreasonable seizure." *Id*. at 48a.

Turning to whether Cox's Fourth Amendment right was clearly established—and Wilson therefore not entitled to invoke qualified immunity protection—the district court pointed to a number of decisions from the Tenth Circuit and other courts of appeals issued prior to the events in this case. Based on those decisions, the district court held that Wilson "was on notice that it was unlawful for him to use deadly force against [Cox], when he did, if the facts of the situation were as [Cox] asserts." App., *infra*, 49a. It stated:

> Under a certain view of the facts which a reasonable jury could accept, [Cox's] truck was stopped in traffic, the police had the ability to remove [Cox] from the truck or to impede the progress of his truck without a firearm, the truck never moved toward [Wilson] after he exited his patrol vehicle, and the truck was 'bound in' such that it could not pose a serious risk of physical harm to [Wilson] or others. Given those facts a reasonable jury could conclude that it was totally unnecessary to use deadly force to restrain[] the suspect or to protect officers and the public.

Id. at 49a-50a.

The case proceeded to trial, and the jury returned a verdict in favor of Deputy Wilson. However, the district court vacated the verdict because of misconduct

by Deputy Wilson's then-defense counsel during that trial. App., *infra*, 7a-8a.[1]

During the second trial, Wilson moved at the end of the plaintiff's case for judgment as a matter of law on qualified immunity. The district court denied the motion from the bench. App., *infra*, 52a-62a.

The court first held that, based on Cox's evidence, the jury could conclude that Wilson "shot [Cox] without any reasonable fear of his own or other[s'] safety," which would establish a constitutional violation App., *infra*, 58a-59a. And the court "reaffirm[ed]" its summary judgment analysis, stating that "[g]iven the facts in the light most favorable to the plaintiff, * * * a jury could decide that [Cox] posed no imminent threat at the time he was shot and that no reasonable police officer in the same circumstances could have perceived an imminent threat." *Id.* at 59a. It went on to state:

> If the jury so concludes, the clearly established law prong does not require even greater specificity, such as a case about a boxed-in motorist posing only a threat or a boxed-in motorist in jammed ski traffic on I-70 posing no immediate threat. * * * [Wilson] cannot argue that he was not fairly warned that unreasonable discharge of his firearm is just as unconstitutional against a boxed-in motorist as [it] would be against anyone else.

Id. at 59a-60a.

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[1] Wilson appealed the district court's denial of qualified immunity, but the court of appeals dismissed the appeal on the ground that it was untimely. App., *infra*, 23a.

Before the case was submitted to the jury, the district court denied Cox's request to instruct the jury that it could consider whether Wilson's unreasonable actions created the need to use force—even though in the first trial the court had instructed the jury that "[d]efendant 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." App., *infra*, 9a-10a (emphasis omitted).

The jury returned a verdict in favor of Deputy Wilson.

2. The Court of Appeals' Decision.

Cox appealed on the ground that the district court erred by refusing to instruct the jury that it could consider Deputy Wilson's unreasonable actions in determining whether Cox's Fourth Amendment rights had been violated.

The panel did not address that issue—indeed, it acknowledged that "the district court incorrectly stated that the Supreme Court had recently abrogated this court's precedents requiring such an instruction in appropriate circumstances." App., *infra*, 2a. The panel instead affirmed on qualified immunity grounds. *Id*. at 13a-20a.[2] It stated that including the instruction "would have denied Wilson the qualified immunity to which he was entitled." *Id*. at 13a.

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[2] The panel issued an initial decision, but "[a]n active judge of the court then called a poll, *sua sponte*, to consider en banc review of the panel decision. Subsequently, the panel *sua sponte* granted panel rehearing to amend its [initial] opinion for clarification purposes." App., *infra*, 21a.

The panel recognized that "qualified immunity did not completely protect Wilson from Cox's claim. Cox was certainly entitled to an instruction on the unreasonable use of force." App., *infra*, 14a. It stated, however, 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." *Id.* at 16a. It rested that conclusion on its determination that there was no sufficiently similar precedent "finding a Fourth Amendment violation due to the officer's recklessly causing the need to use deadly force," in which "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." *Ibid.*

The panel rested that determination on *Pauly* v. *White*, 874 F.3d 1197, 1214 (10th Cir. 2017), cert. denied, 138 S. Ct. 2650 (2018), which—in the panel's view—required it to uphold Wilson's claim of qualified immunity. App., *infra*, 17a-19a.

That case involved the use of deadly force by officers against drunk-driving suspects in their home. The panel stated that the *Pauly* court had "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." App., *infra*, 17a. Nevertheless, the *Pauly* defendants "were entitled to qualified immunity because there was no clearly established law that such recklessness [by itself] created liability." *Id.* at 18a.

The panel concluded that *Pauly* required it to afford qualified immunity to Wilson in the present case. It stated that, "[u]nlike 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." *Id*. at 19a. Because "the *Pauly* officers were protected by qualified immunity" notwithstanding their more egregious conduct, the same outcome was required here. *Ibid*.

Judge Lucero, joined by Judge Phillips, dissented from the denial of Cox's petition for rehearing en banc. App., *infra*, 22a-32a. The dissenters stated that the panel's qualified immunity analysis "exponentially expands in this circuit the judicially created doctrine of qualified immunity into an all-purpose, no-default, use-at-any-time defense against asserted police misconduct." *Id*. at 22a. "Instead of expressly ruling on the merits of the issues raised and granting the parties the due process to which they are entitled, the panel chose to openly entangle the previously denied and dismissed doctrine of qualified immunity into its analysis." *Id*. at 22a-23a.

They observed that the panel decision "ignore[d] that the district court denied qualified immunity to Wilson * * * because the relevant 'factual context [wa]s highly disputed'" and that, "rather than compare the specific facts of the present case with those of prior cases, the panel satisfies itself with comparing the relative perceived egregiousness of police conduct in factually dissimilar cases." App., *infra*, 26a.

"Specifically," the dissenters stated, "the panel relies 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." App., *infra*, 26a. And, "rather than attempt to compare the particular facts of *Pauly* with the particular facts of the present case, the panel compares its *assessment* of

the relative impropriety of wholly different misconduct in distinct qualified immunity cases to determine whether the clearly-established prong is satisfied." *Id.* at 27a.

Observing that "[t]he Supreme Court has repeatedly warned lower courts not to assess the clearly-established prong at a high level of generality" (*id.* at 28a), the dissenters concluded:

> At a time when "courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist" for a constitutional violation to be clearly established, the panel opinion effectively signals to lower courts that they may circumvent issues of factual fit by relying on idiosyncratic assessments of the relative impropriety of officer misconduct. Shifting the focus from "particularized" facts to nebulous notions of comparative impropriety places this case squarely into the conflict among our sibling circuits in applying the clearly-established prong.

Id. at 28a-29a (citation omitted).

The dissenters identified two significant adverse consequences from the panel's decision. *First*, "it allows panels to use qualified immunity, at any stage of litigation, to uphold an otherwise erroneous decision of the district court," "notwithstanding a substantial dispute regarding the evidence; notwithstanding the denial of a previous motion not appealed in a timely manner; and notwithstanding the district court denied qualified immunity time and again." App., *infra*, 31a.

Second, "it shields police misconduct from liability so long as any other government officer at some point

committed—in the panel's mind—more improper conduct and was not held liable." App., *infra*, 31a. They argued that the panel's decision, if left standing, would contribute to the "relentless transformation of qualified immunity into an absolute shield." *Ibid.*

REASONS FOR GRANTING THE PETITION

The court below seriously misapplied this Court's precedents in concluding that Deputy Wilson was entitled to qualified immunity—and thereby expanded the conflict among the lower courts regarding the standard for determining whether a precedent provides the fair notice that precludes qualified immunity. Moreover, that issue is squarely presented in this case. The Court should grant review to provide guidance to the lower courts regarding the proper standard. To the extent the Court concludes that additional guidance is provided by *Taylor* v. *Riojas*, *supra*—decided after the panel decision here—the Court should grant the petition, vacate the panel's judgment, and remand the case for reconsideration in light of *Taylor*.

A. The Decision Below Violates this Court's Qualified Immunity Precedents.

Recognizing that government officials often must make difficult, split-second decisions, the Court fashioned the qualified immunity doctrine to "give[] government officials breathing room to make reasonable but mistaken judgments about open legal questions" in the course of carrying out their duties. *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 743 (2011).

But the Court has balanced that concern with "the need to hold public officials accountable when they exercise power irresponsibly." *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009). It has therefore held that quali-

fied immunity protection does not extend to government officials who "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

If a court can identify a prior ruling by this Court or the relevant court of appeals providing notice that the conduct in question was unconstitutional, the court must deny qualified immunity in the case before it. *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam). Importantly, 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. *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002). Rather, "the salient question * * * is whether the state of the law * * * [gives a government official] fair warning that their alleged [conduct] * * * was unconstitutional." *Id*. at 741.

The court below failed to undertake that mandatory inquiry, substituting its own novel test. Instead, the panel concluded that qualified immunity was warranted because immunity had been upheld in a case involving what the panel believed to be more egregious conduct.

As a result, the panel erroneously granted qualified immunity to Deputy Wilson and deprived Cox of the opportunity to have his case decided under the correct legal standard. This Court should not condone the injustice arising from the Tenth Circuit's clear repudiation of its qualified immunity precedents.

1. The Tenth Circuit Failed to Undertake the Proper Inquiry.

The panel below failed to apply this Court's qualified immunity standard. Rather than compare the instant case to factually similar precedent, the Tenth Circuit engaged in an *ad hoc* qualified immunity analysis that has no grounding in this Court's precedents.

As the en banc dissenters explained, the panel based its grant of qualified immunity on *Pauly* v. *White*—whose facts were not "remotely similar to the facts of the instant case." App., *infra*, 26a.

In *Pauly*, several police officers approached the rural home of drunk-driving suspects without identifying themselves as law enforcement officers, and when asked to identify themselves by the suspects, replied, "we got you surrounded. Come out or we're coming in." 874 F.3d at 1204. Both suspects armed themselves in response, and one was shot after he pointed his weapon in the officer's direction—misperceiving the officer as an intruder. *Id.* at 1203-05.

The *Pauly* court concluded that the officers were entitled to qualified immunity, stating that there was no precedent "close enough on point to make the unlawfulness of [the officers'] actions apparent." *Id.* at 1223. It stated that the case on which the district court relied to deny qualified immunity in *Pauly*—*Allen* v. *City of Muskogee*, 119 F.3d 837 (10th Cir. 1997)—addressed the legal issue at too high a level of generality.

To support that conclusion, the *Pauly* court pointed to the district court's statement that "[s]ince 1997, it has been clearly established in the Tenth Circuit 'that an officer is responsible for his or her reckless conduct that precipitates the need to use force.'"

874 F.3d at 1222. That statement "suffers from the same lack of specificity as does the general propositions * * * that 'use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness,' which, by itself, 'is not enough.'" *Id*. at 1222-23 (citations omitted).

The panel below transposed *Pauly*'s conclusion to this case, on the theory that because qualified immunity was available for what it viewed as the egregious conduct in *Pauly*, it therefore necessarily must be available to cover the conduct here. As the panel put it:

> 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.

App., *infra*, 18a.

That analysis violated this Court's precedents. Courts must engage in a fact-based "particularized" inquiry" (*White* v. *Pauley*, 137 S. Ct. 548, 552 (2017)) to ascertain whether prior decisions provided an officer "fair warning" that conduct was unlawful. *City of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1778 (2015).

But the panel treated *Pauly* as an across-the-board determination that qualified immunity must be

available in all excessive force claims involving officer recklessness less "apparent to most laypersons" than the conduct in *Pauly*. App., *infra*, 18a. Ironically, the panel here committed the same error that led to reversal of the district court in *Pauly*—resting its decision to grant qualified immunity on a statement that is untethered to the facts of this case.

That flaw in the panel's opinion was the basis for the en banc dissent. "[R]ather than compare the specific facts of the present case with those of prior cases, the panel satisfies itself with comparing the relative perceived egregiousness of police conduct in factually dissimilar cases." App., *infra*, 26a. And "rather than attempt to compare the particular facts of *Pauly* with the particular facts of the present case, the panel compares its *assessment* of the relative impropriety of wholly different misconduct in distinct qualified immunity cases to determine whether the clearly-established prong is satisfied." *Id.* at 27a.

The panel's approach replaces this Court's clear focus on "particularized" factual fit between the instant case and prior caselaw with "nebulous notions of comparative impropriety." App., *infra*, 28a. "No precedent supports this novel, expansive inquiry." *Ibid.*

As we next discuss, if the panel *had* applied the proper standard, it would have found qualified immunity unavailable in this case.

2. Under the Proper "Clearly Established" Standard, Qualified Immunity Should Have Been Denied.

If the panel had faithfully followed this Court's guidelines for conducting the "clearly established" inquiry, it would have been compelled to deny qualified immunity here.

As explained above, the question is whether cases decided at the time of the challenged conduct provided an official "fair warning that their conduct violated the Constitution." *Hope*, 536 U.S. at 741. Importantly, that does not require that "facts of previous cases be materially similar" or even "fundamentally similar" to the situation in question. *Id.* at 739-740.

The district court conducted this inquiry twice—concluding both times that the availability of qualified immunity turned on the jury's resolution of disputed facts. See pages 6-8, *supra*. That court relied on a number of precedents, particularly *Cordova* v. *Aragon*, *supra*.

Cordova—like the present case—involved a car chase that ended with the officer shooting the suspect (in that case, fatally). There, the suspect was driving a truck pulling heavy excavation equipment and drove through red lights and in the wrong direction (opposite the traffic flow) on a highway. The suspect's truck was moving at the time the officer shot the suspect—the officer had gotten out of his car to try to use barriers to stop the suspect's vehicle and stated that he feared that the suspect was attempting to run him over.

The Tenth Circuit analyzed the facts in detail and held that, depending on how conflicting contentions were resolved, the officer could have been found to have used excessive force. 569 F.3d at 1195-1196.

If an officer employed excessive force by shooting at a moving vehicle that allegedly was threatening the public and the officer, then Wilson had more than fair notice that he was violating the Fourth Amendment when he left his car and used deadly force when Cox's

vehicle could not escape because it was surrounded by other vehicles.

To be sure, the facts of *Cordova* were not identical to the present case. Nevertheless, the *Cordova* court's conclusion that those facts were sufficient to support a constitutional violation surely sufficed to put Wilson on notice that his conduct was unconstitutional.

But, despite the clear factual similarities between *Cordova* and the instant case, the panel below ignored both *Cordova* and the district court's analysis.

Moreover, a second Tenth Circuit decision provides further support for the conclusion that Wilson had fair notice that his actions violated Cox's clearly established rights.

In *Zia Trust Co. ex rel. Causey* v. *Montoya*, 597 F.3d 1150 (10th Cir. 2010), officers responded to a dispatch informing them of a dispute between an individual with mental-health issues—Megan—and his father. Upon arriving, Officer Montoya exited his car with his gun already drawn and confronted Megan, who was operating a van in the driveway that was stuck on a pile of rocks. Officer Montoya placed himself in front of the vehicle while his partner yelled for Megan to exit the vehicle. Suddenly, the car jumped forward about a foot, and in response, Officer Montoya fired a single shot in the vehicle, fatally wounding Megan. *Id*. at 1153-1154.

The Tenth Circuit held that Montoya "violated clearly established law when he used deadly force against [the plaintiff]" because he had no "probable cause to believe that there was a serious threat of serious physical harm" to himself or others. *Zia Trust Co.*, 597 F.3d at 1155.

The factual fit between *Zia Trust Co*. and the case before the Court is clear. Deputy Wilson—like Officer Montoya—shot Petitioner Cox through an open passenger window "almost immediately." App., *infra*, 5a. As in *Zia Trust Co.*, moreover, there was little evidence to support Wilson's supposition that Cox intended to ram him with his vehicle: the car hardly moved once it was boxed in. See pages 4-5, *supra*.

Comparing *Cordova* and *Zia Trust Co.* with the facts of the present case makes clear that the Tenth Circuit would have denied qualified immunity if it had followed this Court's precedent for determining clearly established law. These cases do not merely resemble one another in an abstract sense—similarities exist as to the *specifics* of the officers' conduct and the situation to which they were responding. Simply put, the robust similarities between the *particularized* circumstances in *Cordova*, *Zia Trust*, and the present case plainly provided Wilson with fair notice that his actions violated the Constitution.

B. The Decision Below Expands the Existing Lower Court Conflict Regarding The Proper Standard for Determining Whether an Official's Conduct Violates Clearly Established Law.

The Tenth Circuit's aberrant approach to the clearly-established law inquiry exemplifies the confusion among the lower courts regarding the standard to be applied to determine when a constitutional right is clearly established. This Court must intervene to ensure that a uniform standard applies throughout the country, so that a plaintiff's ability to prevail does not depend on where his or her claim is brought.

Most circuits acknowledge that a right is clearly established if there is controlling precedent with sufficiently analogous facts to put an officer on notice—the facts need not be identical, rather the critical question is whether an officer could deduce from the decided cases that his conduct was unlawful. At least one circuit applies a severe standard that requires practically identical facts. And in several circuits, the test for determining clearly established law is uncertain.

1. Some circuits have adopted an appropriate "fair notice" standard that does not require excessive factual similarity.

The most common approach among the lower courts allows plaintiffs to show that a constitutional right has been clearly established even if the relevant precedent's facts are not directly on point. The courts applying this standard would have found that Cox had satisfied the clearly established prong, denying qualified immunity here.

The **Third Circuit** recognizes that "earlier cases involving fundamentally similar facts can provide especially strong support for a conclusion that the law is clearly established, [but] they are not necessary to such a finding." *L.R.* v. *Sch. Dist. of Philadelphia*, 836 F.3d 235, 248 (3d Cir. 2016) (quoting *Hope*, 536 U.S. at 741). In *L.R.*, even though no precedent directly established that a teacher was liable for the foreseeable harm that resulted from releasing a kindergartener into the custody of a stranger who subsequently sexually assaulted her, the court identified "sufficiently analogous cases that should have placed a reasonable official in [the teacher's] position on notice that his actions were unlawful." *Id.* at 249.

The court compared the case involving the teacher and student to one in which officers abandoned a clearly intoxicated woman on a cold night and were held liable for the injuries she subsequently suffered due to exposure to the cold. *Ibid.* (citing *Kneipp* v. *Tedder*, 95 F.3d 1199 (3d Cir. 1996)). The facts in the two cases were substantially different. One involved a child, the other an adult woman. One involved the threat of abuse by a stranger, the other exposure to the elements. Yet the court nonetheless recognized a common thread: in both cases, government officials left a vulnerable person in the path of foreseeable harm. That common thread was all the court needed to conclude that the right was clearly established.

The **First Circuit** also does not require that "facts of previous cases be materially similar to the facts sub judice in order to trump a qualified immunity defense." *Limone* v. *Condon*, 372 F.3d 39, 48 (1st Cir. 2004). Instead, the court's analysis focuses on whether facts of the previous case convey fair warning to the officer. Even general statements of the law can in appropriate circumstances be "capable of conveying fair warning." *Ibid.*; see also *Suboh* v. *Dist. Attorney's Office of the Suffolk Dist.*, 298 F.3d 81, 94 (1st Cir. 2002) ("We have no doubt that there is a clearly established constitutional right at stake, although we have found no case exactly on all fours with the facts of this case. The difference in contexts * * * does not mean such a right does not exist.").

In *Suboh*, the First Circuit denied qualified immunity to an officer who released a child to her grandparents amid a custody dispute between the grandparents and the child's mother, in defiance of instructions to place the child with the state while the custody dispute was resolved. The grandparents

subsequently removed the child to Morocco, out of reach of her mother.

The court compared the case to *Hatch* v. *Dep't for Children, Youth & Their Families*, 274 F.3d 12, 16 (1st Cir. 2001), even though *Hatch* involved a starkly different set of facts. There, the child was removed from his father under suspicion of child abuse. Nonetheless, the court in *Suboh* said that "*Hatch* settle[d] the matter." *Suboh*, 298 F.3d at 94.

The **Fourth Circuit** denied qualified immunity to an officer whose reckless driving severely injured a motorist. *See Dean* v. *McKinney*, 976 F.3d 407 (4th Cir. 2020). That officer was traveling 80 miles per hour on an unlit, curvy road, without using his lights or siren. He was not responding to an emergency or pursuing a fleeing suspect. The court explained that the officer's conduct violated rights "manifestly included within more general applications of the core constitutional principles invoked." *Id.* at 419 (internal quotation mark omitted). Though there was no precedent squarely on point, a "reasonable officer in [the defendant's] position would have known his conduct was not only unlawful, but that it created a substantial risk of serious harm to those around him." *Ibid.*

Likewise, the **Seventh Circuit** held that it was clearly established that officers could not shoot an unresponsive suspect, resting its decision on cases involving "police forc[ing] a handcuffed, drunk driving suspect who was verbally resisting arrest into a police car by breaking the suspect's ribs" and "officers who injured a disabled plaintiff while placing him in police cruiser." *Phillips* v. *Cmty. Ins. Corp.*, 678 F.3d 513, 529 (7th Cir. 2012). And the **Second Circuit** has recognized that it "'does not require a case on point con-

cerning the exact permutation of facts that state actors confront in order to establish a clear standard for their behavior.'" *Hancock* v. *County of Rensselaer*, 882 F.3d 58, 69 (2d Cir. 2018).

Under the test employed by these courts, Deputy Wilson would not be afforded qualified immunity—the Tenth Circuit would have concluded that its decisions in *Cordova* and *Zia* were sufficient to put Deputy Wilson on notice that his conduct would violate Cox's rights. That clear disparity by itself demonstrates the conflict among the lower courts.

2. The Fifth Circuit requires a high degree of factual similarity.

The Fifth Circuit applies a different rule, characterizing as "heavy" the burden of proving that a constitutional right has been clearly established. *Morrow* v. *Meachum*, 917 F.3d 870, 874 (5th Cir. 2019). The right must be defined specifically, not generally. *Id*. at 874-875. And it must be based upon holdings, not dicta. *Id*. at 875-876.

The bar is particularly high in excessive-force cases. Only a precedent whose facts "squarely govern[]" the case at hand suffices. *Id*. at 876 (internal quotation mark omitted). A lower court thinking of denying qualified immunity, should "think twice." *Ibid*.

This Court most recently confronted the Fifth Circuit's strict standard in *Taylor* v. *Riojas*, *supra*. The Court summarily reversed a Fifth Circuit decision upholding qualified immunity for corrections officers who allegedly forced an inmate to spend four days in a prison cell covered with feces, only to move him to another cell where he had to sleep in raw sewage. The

court of appeals had held that qualified immunity applied because no prior case had held that a prisoner couldn't be contained in a cell teeming with waste for six days. *Taylor* v. *Riojas*, 141 S. Ct. at 53

The facts in *Riojas* demonstrate the extreme consequences that naturally flow from the Fifth Circuit's burdensome standard. It remains to be seen whether, and to what degree, that court's approach to the clearly established law inquiry will change in light of this Court's guidance. As it stands, however, the Fifth Circuit's harsh standard presents a stark contrast to those adopted by its sister circuits.

3. Several circuits fail to apply a consistent standard.

With its decision below, the Tenth Circuit joins the group of courts of appeals that fail to apply a consistent standard in determining whether a right is clearly established.

Recent **Sixth Circuit** decisions exemplify the problem. In *Baynes* v. *Cleland*, 799 F.3d 600 (6th Cir. 2017), cert. denied, 136 S. Ct. 1381 (2016), the court denied qualified immunity to an officer who had handcuffed an arrestee too tightly. There was no precedent within the circuit with facts directly on point—the arrestee complained only once, and the duration he was handcuffed was relatively short. Nonetheless, the court recognized that its precedents had clearly established the more general principle that "unduly tight handcuffing is a constitutional violation." *Id*. at 614. Thus, the Sixth Circuit reasoned by analogy, holding that if excessively tight handcuffing was unconstitutional in other circumstances, it was unconstitutional in the novel circumstances at hand.

In *Latits* v. *Phillips*, 878 F.3d 541 (6th Cir. 2017), the court applied a different approach. The case concerned an officer, standing at the side of a car, who shot a motorist attempting to drive away who posed no threat to the officer's safety. *Id.* at 552. Circuit precedent had "clearly established that shooting a driver while positioned to the side of his fleeing car violates the Fourth Amendment, absent some indication suggesting that the driver poses more than a fleeting threat." *Id.* at 553 (internal citation omitted). But the court distinguished those cases because they involved an arrestee fleeing for the first time, while the plaintiff in *Latits* had already attempted to flee.

The **Eighth Circuit**, too, has equivocated. In most cases, the Eighth Circuit's standard resembles the Fifth Circuit's strict test, requiring that the facts from precedent "squarely govern[]." *Kelsay* v. *Ernst*, 933 F.3d 975, 980 (8th Cir. 2019) (internal quotation mark and citation omitted). In *Ernst*, the district court had denied qualified immunity to a sheriff's deputy who had tackled to the ground a woman who was walking away from him but was not violent—relying on appellate decisions establishing that officers could not use force against nonviolent arrestees. The Eighth Circuit reversed, demanding a higher degree of specificity. The court observed that none of the prior cases had involved a nonviolent arrestee who was walking away from the officer, and it relied on that distinction to find that the law was not clearly established. *Ibid.*

But Eighth Circuit panels have sometimes applied a less demanding test. In *Mountain Pure, LLC* v. *Roberts*, 814 F.3d 928 (8th Cir. 2016), the court stated that it "requir[ed] some, but not precise factual correspondence with precedent." *Id.* at 932 (quoting *Coates* v. *Powell*, 639 F.3d 471, 476 (8th Cir. 2011)).

The **Ninth Circuit** has also applied inconsistent tests. Its routine approach matches the fair notice rule applied in the majority of circuits. For instance, in *Sampson* v. *County of Los Angeles*, 974 F.3d 1012, 1019 (9th Cir. 2020), it held that the facts of previous cases need not be fundamentally or materially similar to those of the case at hand in order to overcome qualified immunity.

But in *Mattos* v. *Agarano*, 661 F.3d 433, 452 (9th Cir. 2011) (en banc), cert. denied, 566 U.S. 1021 (2012), the court required a high degree of similarity, holding that because it had never addressed an officer using a taser specifically in dart mode, it was obliged to uphold qualified immunity.

With its decision below, the Tenth Circuit adds to the collection of discordant standards that courts employ to determine whether a right is clearly established. Because of this disagreement among the courts of appeals, a plaintiff's ability to obtain justice often depends on where his or her case is filed rather than on the merits of their case. Only this Court can resolve this fundamental conflict between the circuits.

C. This Case is an Excellent Vehicle for Providing Needed Guidance on the Frequently-Recurring Issue of Identifying Clearly Established Law.

This Court has made clear that, to defeat qualified immunity, a plaintiff must point to prior case law with sufficiently similar facts to provide "fair warning" to the officers that their contested conduct is unconstitutional. But—as the conflicting decisions of the lower courts demonstrate—the Court has not provided clear guidance regarding the required degree of factual similarity.

Indeed, commentators have recognized that the current state of the law leads to significant uncertainty and unpredictability. See*, e.g.*, Alan K. Chen, *The Intractability of Qualified Immunity*, 93 Notre Dame L. Rev. 1937, 1951 (2018) (arguing that qualified-immunity doctrine allows judges to decide cases "in a manner that is heavily influenced by their own normative values about what officials ought to know and when they ought to be held accountable * * * [a possibility that] may lead to highly inconsistent decisionmaking"); Michael S. Catlett, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 Ariz. L. Rev. 1031, 1035-1036 (2005) (criticizing the *ad hoc* and arbitrary nature of qualified-immunity doctrine resulting from the absence of a uniform standard regarding the required factual similarity).

1. This case presents an appropriate vehicle for the Court to address the level of factual similarity necessary to overcome a qualified-immunity defense. In addressing that issue, the Court can also clarify that the existence or absence of the requisite fair notice turns on an appropriate degree of factual similarity between cases, not a subjective assessment of the relative egregiousness of factually dissimilar conduct.

Providing guidance in the context of excessive-force cases would be particularly beneficial. The lower courts adjudicate a large number of disputes involving official uses of excessive force, and many officers are granted qualified immunity precisely because of the inadequate guidance on factual similarity. This case, which involves excessive force by a law-enforcement officer resulting in the petitioner's paralysis, is an appropriate vehicle to provide guidance for future excessive-force cases.

2. The Court recently addressed the clearly established law issue in *Taylor* v. *Riojas*, *supra*, overturning the Fifth Circuit's grant of qualified immunity. The Court held that no reasonable officer could have concluded that the conduct in *Taylor* was constitutionally permissible given the "egregious facts." *Taylor*, 141 S. Ct at 54.

Taylor did not provide any express guidance on the level of factual similarity required under the "clearly established" inquiry. It therefore would be beneficial for the Court to take that additional step in this case.

But *Taylor* did canvass the relevant precedents and, by virtue of the Court's conclusion, demonstrated that precise factual similarity is not required. Therefore, to the extent the Court concludes that it is not appropriate to grant plenary review, it should grant this petition, vacate the court of appeals' judgment, and remand for reconsideration in light of *Taylor*'s analysis of the clearly established law issue.

D. The Question Is Properly Presented.

The qualified-immunity issue in this case arises in a somewhat unusual context. But the issue is squarely presented for this Court's resolution.

During the first trial, the district court instructed the jury to consider whether Deputy Wilson's own recklessness contributed to the danger in its reasonableness inquiry. During the second trial, however, the district court refused to give this instruction. App., *infra*, 9a-10a; pages 8-9, *supra*.

The Tenth Circuit affirmed the district court's refusal to grant this jury instruction—but only because it concluded that Wilson was entitled to qualified immunity and that permitting the jury instruction

would conflict with that determination. App., *infra*, 13a; pages 9-11, *supra*. Because Wilson is not entitled to qualified immunity—as explained (at pages 17-20)—the court of appeals erred by refusing to reverse the district court's decision based on its failure to give the jury instruction.

Indeed, the court of appeals acknowledged that the district court's decision was based on a legal error—which is why it turned to the qualified immunity analysis. App., *infra*, 2a; page 9, *supra*. Under controlling circuit precedent, a jury may consider, for purposes of the Fourth Amendment reasonableness inquiry, the officer's own reckless conduct in creating the need to use force. *Sevier* v. *City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995).

A party is entitled to a jury instruction if it has introduced sufficient competent evidence at trial. App., *infra*, 12a-13a. And both the panel and the en banc dissenters below recognized that Cox presented expert testimony that Deputy Wilson acted recklessly in exiting the police car on a highway. *Id*. at 15a; *id*. at 25a (Lucero & Phillips, JJ., dissenting from the denial of rehearing en banc). Without the panel's qualified immunity determination, therefore, Cox is entitled to the requested jury instruction at trial, and the panel therefore erred in affirming the district court's judgment.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should grant the petition, vacate the court of appeals' judgment, and remand the case for further proceedings in light of *Taylor* v. *Riojas*, *supra*.

Respectfully submitted.

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