COURT DECISIONS

Per Curiam

SUPREME COURT OF THE UNITED STATES

ANDREW KISELA *v.* AMY HUGHES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17–467. Decided April 2, 2018

PER CURIAM.

Petitioner Andrew Kisela, a police officer in Tucson, Arizona, shot respondent Amy Hughes. Kisela and two other officers had arrived on the scene after hearing a police radio report that a woman was engaging in erratic behavior with a knife. They had been there but a few minutes, perhaps just a minute. When Kisela fired, Hughes was holding a large kitchen knife, had taken steps toward another woman standing nearby, and had refused to drop the knife after at least two commands to do so. The question is whether at the time of the shooting Kisela's actions violated clearly established law.

The record, viewed in the light most favorable to Hughes, shows the following. In May 2010, somebody in Hughes' neighborhood called 911 to report that a woman was hacking a tree with a kitchen knife. Kisela and another police officer, Alex Garcia, heard about the report over the radio in their patrol car and responded. A few minutes later the person who had called 911 flagged down the officers; gave them a description of the woman with the knife; and told them the woman had been acting erratically. About the same time, a third police officer, Lindsay Kunz, arrived on her bicycle.

Garcia spotted a woman, later identified as Sharon Chadwick, standing next to a car in the driveway of a nearby house. A chain-link fence with a locked gate separated Chadwick from the officers. The officers then saw another woman, Hughes, emerge from the house carrying a large knife at her side. Hughes matched the description

of the woman who had been seen hacking a tree. Hughes walked toward Chadwick and stopped no more than six feet from her.

All three officers drew their guns. At least twice they told Hughes to drop the knife. Viewing the record in the light most favorable to Hughes, Chadwick said "take it easy" to both Hughes and the officers. Hughes appeared calm, but she did not acknowledge the officers' presence or drop the knife. The top bar of the chain-link fence blocked Kisela's line of fire, so he dropped to the ground and shot Hughes four times through the fence. Then the officers jumped the fence, handcuffed Hughes, and called paramedics, who transported her to a hospital. There she was treated for non-life-threatening injuries. Less than a minute had transpired from the moment the officers saw Chadwick to the moment Kisela fired shots.

All three of the officers later said that at the time of the shooting they subjectively believed Hughes to be a threat to Chadwick. After the shooting, the officers discovered that Chadwick and Hughes were roommates, that Hughes had a history of mental illness, and that Hughes had been upset with Chadwick over a $20 debt. In an affidavit produced during discovery, Chadwick said that a few minutes before the shooting her boyfriend had told her Hughes was threatening to kill Chadwick's dog, named Bunny. Chadwick "came home to find" Hughes "somewhat distressed," and Hughes was in the house holding Bunny "in one hand and a kitchen knife in the other." Hughes asked Chadwick if she "wanted [her] to use the knife on the dog." The officers knew none of this, though. Chadwick went outside to get $20 from her car, which is when the officers first saw her. In her affidavit Chadwick said that she did not feel endangered at any time. *Ibid.* Based on her experience as Hughes' roommate, Chadwick stated that Hughes "occasionally has episodes in which she acts inappropriately," but "she is only seeking attention." 2

Record 108.

Hughes sued Kisela under Rev. Stat. §1979, 42 U. S. C. §1983, alleging that Kisela had used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Kisela, but the Court of Appeals for the Ninth Circuit reversed. 862 F. 3d 775 (2016).

The Court of Appeals first held that the record, viewed in the light most favorable to Hughes, was sufficient to demonstrate that Kisela violated the Fourth Amendment. See *id.*, at 782. The court next held that the violation was clearly established because, in its view, the constitutional violation was obvious and because of Circuit precedent that the court perceived to be analogous. *Id.*, at 785. Kisela filed a petition for rehearing en banc. Over the dissent of seven judges, the Court of Appeals denied it. Kisela then filed a petition for certiorari in this Court. That petition is now granted.

In one of the first cases on this general subject, *Tennessee* v. *Garner*, 471 U. S. 1 (1985), the Court addressed the constitutionality of the police using force that can be deadly. There, the Court held that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id.*, at 11.

In *Graham* v. *Connor*, 490 U. S. 386, 396 (1989), the Court held that the question whether an officer has used excessive force "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the

20/20 vision of hindsight." *Ibid.* And "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.*, at 396–397.

Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity.

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *White* v. *Pauly*, 580 U. S. ___, ___ (2017) (*per curiam*) (slip op., at 6) (alterations and internal quotation marks omitted). "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Brosseau* v. *Haugen*, 543 U. S. 194, 198 (2004) (*per curiam*).

Although "this Court's caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *White*, 580 U. S., at ___ (slip op., at 6) (internal quotation marks omitted). "In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law." *Ibid.* (internal quotation marks omitted). This Court has "'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'" *City and County of San Francisco* v. *Sheehan*, 575 U. S. ___, ___ (2015) (slip op., at 13) (quoting *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 742 (2011)); see also *Brosseau*, *supra*, at 198–199.

"[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Mullenix* v. *Luna*, 577 U. S. ___, ___ (2015) (*per curiam*) (slip op., at 5) (internal quotation marks omitted). Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. *Id.*, at ___ (slip op., at 6) (internal quotation marks omitted and emphasis deleted). Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful. *Id.*, at ___ (slip op., at 12) (internal quotation marks omitted).

"Of course, general statements of the law are not inherently incapable of giving fair and clear warning to officers." *White*, 580 U. S., at ___ (slip op., at 7) (internal quotation marks omitted). But the general rules set forth in "*Garner* and *Graham* do not by themselves create clearly established law outside an 'obvious case.'" *Ibid.* Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff* v. *Rickard*, 572 U. S. ___, ___ (2014) (slip op., at 12). That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to imple-

ment in a correct way.

Kisela says he shot Hughes because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick. Kisela had mere seconds to assess the potential danger to Chadwick. He was confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911 and then flag down Kisela and Garcia. Kisela was separated from Hughes and Chadwick by a chain-link fence; Hughes had moved to within a few feet of Chadwick; and she failed to acknowledge at least two commands to drop the knife. Those commands were loud enough that Chadwick, who was standing next to Hughes, heard them. This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment.

The Court of Appeals made additional errors in concluding that its own precedent clearly established that Kisela used excessive force. To begin with, "even if a controlling circuit precedent could constitute clearly established law in these circumstances, it does not do so here." *Sheehan*, *supra,* at ___ (slip op., at 13). In fact, the most analogous Circuit precedent favors Kisela. See *Blanford* v. *Sacramento County*, 406 F. 3d 1110 (CA9 2005). In *Blanford*, the police responded to a report that a man was walking through a residential neighborhood carrying a sword and acting in an erratic manner. *Id.*, at 1112. There, as here, the police shot the man after he refused their commands to drop his weapon (there, as here, the man might not have heard the commands). *Id.*, at 1113. There, as here, the police believed (perhaps mistakenly), that the man posed an immediate threat to others. *Ibid.* There, the Court of Appeals determined that the use of deadly force did not violate the Fourth Amendment. *Id.*, at 1119. Based on that decision, a reasonable officer could have

believed the same thing was true in the instant case.

In contrast, not one of the decisions relied on by the Court of Appeals—*Deorle* v. *Rutherford*, 272 F. 3d 1272 (CA9 2001), *Glenn* v. *Washington County*, 673 F. 3d 864 (CA9 2011), and *Harris* v. *Roderick*, 126 F. 3d 1189 (CA9 1997)—supports denying Kisela qualified immunity. As for *Deorle*, this Court has already instructed the Court of Appeals not to read its decision in that case too broadly in deciding whether a new set of facts is governed by clearly established law. *Sheehan*, 572 U. S., at ___–___ (slip op., at 13–14). *Deorle* involved a police officer who shot an unarmed man in the face, without warning, even though the officer had a clear line of retreat; there were no bystanders nearby; the man had been "physically compliant and generally followed all the officers' instructions"; and he had been under police observation for roughly 40 minutes. 272 F. 3d, at 1276, 1281–1282. In this case, by contrast, Hughes was armed with a large knife; was within striking distance of Chadwick; ignored the officers' orders to drop the weapon; and the situation unfolded in less than a minute. "Whatever the merits of the decision in *Deorle*, the differences between that case and the case before us leap from the page." *Sheehan*, *supra*, at ___ (slip op., at 14).

Glenn, which the panel described as "[t]he most analogous Ninth Circuit case," 862 F. 3d, at 783, was decided after the shooting at issue here. Thus, *Glenn* "could not have given fair notice to [Kisela]" because a reasonable officer is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the Fourth Amendment are far from obvious. *Brosseau*, 543 U. S., at 200, n. 4. *Glenn* was therefore "of no use in the clearly established inquiry." *Brosseau*, *supra,* at 200, n. 4. Other judges brought this mistaken or misleading citation to the panel's attention while Kisela's petition for rehearing en banc was pending before the Court of Appeals. 862

F.3d, at 795, n. 2 (Ikuta, J., dissenting from denial of rehearing en banc). The panel then amended its opinion, but nevertheless still attempted to "rely on *Glenn* as illustrative, not as indicative of the clearly established law in 2010." *Id.*, at 784, n. 2 (majority opinion). The panel failed to explain the difference between "illustrative" and "indicative" precedent, and none is apparent.

The amended opinion also asserted, for the first time and without explanation, that the Court of Appeals' decision in *Harris* clearly established that the shooting here was unconstitutional. *Id.*, at 785. The new mention of *Harris* replaced a reference in the panel's first opinion to *Glenn*—the case that postdated the shooting at issue here. Compare 841 F. 3d 1081, 1090 (CA9 2016) ("As indicated by *Glenn* and *Deorle*, . . . that right was clearly established"), with 862 F. 3d, at 785 ("As indicated by *Deorle* and *Harris*, . . . that right was clearly established").

The panel's reliance on *Harris* "does not pass the straight-face test." 862 F. 3d, at 797 (opinion of Ikuta, J.). In *Harris*, the Court of Appeals determined that an FBI sniper, who was positioned safely on a hilltop, used excessive force when he shot a man in the back while the man was retreating to a cabin during what has been referred to as the Ruby Ridge standoff. 126 F. 3d, at 1202–1203. Suffice it to say, a reasonable police officer could miss the connection between the situation confronting the sniper at Ruby Ridge and the situation confronting Kisela in Hughes' front yard.

For these reasons, the petition for certiorari is granted; the judgment of the Court of Appeals is reversed; and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17–467. Decided April 2, 2018

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

Officer Andrew Kisela shot Amy Hughes while she was speaking with her roommate, Sharon Chadwick, outside of their home. The record, properly construed at this stage, shows that at the time of the shooting: Hughes stood stationary about six feet away from Chadwick, appeared "composed and content," Appellant's Excerpts of Record 109 (Record), and held a kitchen knife down at her side with the blade facing away from Chadwick. Hughes was nowhere near the officers, had committed no illegal act, was suspected of no crime, and did not raise the knife in the direction of Chadwick or anyone else. Faced with these facts, the two other responding officers held their fire, and one testified that he "wanted to continue trying verbal command[s] and see if that would work." *Id.,* at 120. But not Kisela. He thought it necessary to use deadly force, and so, without giving a warning that he would open fire, he shot Hughes four times, leaving her seriously injured.

If this account of Kisela's conduct sounds unreasonable, that is because it was. And yet, the Court today insulates that conduct from liability under the doctrine of qualified immunity, holding that Kisela violated no "clearly established" law. See *ante,* at 5–6. I disagree. Viewing the facts in the light most favorable to Hughes, as the Court must at summary judgment, a jury could find that Kisela violated Hughes' clearly established Fourth Amendment rights by needlessly resorting to lethal force. In holding

otherwise, the Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield. I therefore respectfully dissent.

I

This case arrives at our doorstep on summary judgment, so we must "view the evidence . . . in the light most favorable to" Hughes, the nonmovant, "with respect to the central facts of this case." *Tolan* v. *Cotton*, 572 U. S. ___, ___ (2014) (*per curiam*) (slip op., at 8). The majority purports to honor this well-settled principle, but its efforts fall short. Although the majority sets forth most of the relevant events that transpired, it conspicuously omits several critical facts and draws premature inferences that bear on the qualified-immunity inquiry. Those errors are fatal to its analysis, because properly construing all of the facts in the light most favorable to Hughes, and drawing all inferences in her favor, a jury could find that the following events occurred on the day of Hughes' encounter with the Tucson police.

On May 21, 2010, Kisela and Officer-in-Training Alex Garcia received a "'check welfare'" call about a woman chopping away at a tree with a knife. 862 F. 3d 775, 778 (CA9 2016). They responded to the scene, where they were informed by the person who had placed the call (not Chadwick) that the woman with the knife had been acting "erratically." *Ibid.* A third officer, Lindsay Kunz, later joined the scene. The officers observed Hughes, who matched the description given to the officers of the woman alleged to have been cutting the tree, emerge from a house with a kitchen knife in her hand. Hughes exited the front door and approached Chadwick, who was standing outside in the driveway.

Hughes then stopped about six feet from Chadwick, holding the kitchen knife down at her side with the blade pointed away from Chadwick. Hughes and Chadwick

conversed with one another; Hughes appeared "composed and content," Record 109, and did not look angry. See 862 F. 3d, at 778. At no point during this exchange did Hughes raise the kitchen knife or verbally threaten to harm Chadwick or the officers. Chadwick later averred that, during the incident, she was never in fear of Hughes and "was not the least bit threatened by the fact that [Hughes] had a knife in her hand" and that Hughes "never acted in a threatening manner." Record 110–111. The officers did not observe Hughes commit any crime, nor was Hughes suspected of committing one. See 862 F. 3d, at 780.

Nevertheless, the officers hastily drew their guns and ordered Hughes to drop the knife. The officers gave that order twice, but the commands came "in quick succession." *Id.,* at 778. The evidence in the record suggests that Hughes may not have heard or understood the officers' commands and may not have been aware of the officers' presence at all. Record 109–110, 195, 323–324 (Officer Kunz's testimony that "it seemed as though [Hughes] didn't even know we were there," and "[i]t was like she didn't hear us almost"); *id.*, at 304 (Officer Garcia's testimony that Hughes acted "almost as if we weren't there"). Although the officers were in uniform, they never verbally identified themselves as law enforcement officers.

Kisela did not wait for Hughes to register, much less respond to, the officers' rushed commands. Instead, Kisela immediately and unilaterally escalated the situation. Without giving any advance warning that he would shoot, and without attempting less dangerous methods to deescalate the situation, he dropped to the ground and shot four times at Hughes (who was stationary) through a chain-link fence. After being shot, Hughes fell to the ground, screaming and bleeding from her wounds. She looked at the officers and asked, "'Why'd you shoot me?'" *Id.,* at 308. Hughes was immediately transported to the hospital,

where she required treatment for her injuries. Kisela alone resorted to deadly force in this case. Confronted with the same circumstances as Kisela, neither of his fellow officers took that drastic measure.

II

Police officers are not entitled to qualified immunity if "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia* v. *Wesby*, 583 U. S. ___, ___ (2018) (slip op., at 13) (quoting *Reichle* v. *Howards*, 566 U. S. 658, 664 (2012)). Faithfully applying that well-settled standard, the Ninth Circuit held that a jury could find that Kisela violated Hughes' clearly established Fourth Amendment rights. That conclusion was correct.

A

I begin with the first step of the qualified-immunity inquiry: whether there was a violation of a constitutional right. Hughes alleges that Kisela violated her Fourth Amendment rights by deploying excessive force against her. In assessing such a claim, courts must ask "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Graham* v. *Connor*, 490 U. S. 386, 397 (1989). That inquiry "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.,* at 396; see also *Tennessee* v. *Garner*, 471 U. S. 1, 11 (1985). All of those factors (and others) support the Ninth Circuit's conclusion that a jury could find that Kisela's use of deadly force was objectively unreasonable. 862 F. 3d, at 779–782. Indeed, the panel's resolution of

this question was so convincing that not a single judge on the Ninth Circuit, including the seven who dissented from denial of rehearing en banc, expressly disputed that conclusion. See *id.*, at 791–799 (opinion of Ikuta, J.). Neither does the majority here, which simply assumes without deciding that "a Fourth Amendment violation occurred." *Ante*, at 4.

First, Hughes committed no crime and was not suspected of committing a crime. The officers were responding to a "check welfare" call, which reported no criminal activity, and the officers did not observe any illegal activity while at the scene. The mere fact that Hughes held a kitchen knife down at her side with the blade pointed away from Chadwick hardly elevates the situation to one that justifies deadly force.

Second, a jury could reasonably conclude that Hughes presented no immediate or objective threat to Chadwick or the other officers. It is true that Kisela had received a report that a woman matching Hughes' description had been acting erratically. But the police officers themselves never witnessed any erratic conduct. Instead, when viewed in the light most favorable to Hughes, the record evidence of what the police encountered paints a calmer picture. It shows that Hughes was several feet from Chadwick and even farther from the officers, she never made any aggressive or threatening movements, and she appeared "composed and content" during the brief encounter.

Third, Hughes did not resist or evade arrest. Based on this record, there is significant doubt as to whether she was aware of the officers' presence at all, and evidence suggests that Hughes did not hear the officers' swift commands to drop the knife.

Finally, the record suggests that Kisela could have, but failed to, use less intrusive means before deploying deadly force. 862 F. 3d, at 781. For instance, Hughes submitted

expert testimony concluding that Kisela should have used his Taser and that shooting his gun through the fence was dangerous because a bullet could have fragmented against the fence and hit Chadwick or his fellow officers. *Ibid.*; see also *Bryan* v. *MacPherson*, 630 F. 3d 805, 831 (CA9 2010) (noting that "police are required to consider what other tactics if any were available to effect the arrest" and whether there are "clear, reasonable, and less intrusive alternatives" (internal quotation marks and alteration omitted)). Consistent with that assessment, the other two officers on the scene declined to fire at Hughes, and one of them explained that he was inclined to use "some of the lesser means" than shooting, including verbal commands, because he believed there was time "[t]o try to talk [Hughes] down." Record 120–121. That two officers on the scene, presented with the same circumstances as Kisela, did not use deadly force reveals just how unnecessary and unreasonable it was for Kisela to fire four shots at Hughes. See *Plumhoff* v. *Rickard*, 572 U. S. ___, ___ (2014) (slip op., at 8) ("We analyze [the objective reasonableness] question from the perspective of a reasonable officer on the scene" (internal quotation marks omitted)).

Taken together, the foregoing facts would permit a jury to conclude that Kisela acted outside the bounds of the Fourth Amendment by shooting Hughes four times.

B

Rather than defend the reasonableness of Kisela's conduct, the majority sidesteps the inquiry altogether and focuses instead on the "clearly established" prong of the qualified-immunity analysis. *Ante*, at 4. To be "'clearly established' . . . [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987). That standard is not nearly as onerous as the majority makes it out to be. As

even the majority must acknowledge, *ante,* at 4, this Court has long rejected the notion that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful," *Anderson*, 483 U. S., at 640. "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope* v. *Pelzer*, 536 U. S. 730, 741 (2002). At its core, then, the "clearly established" inquiry boils down to whether Kisela had "fair notice" that he acted unconstitutionally. See *ibid.*; *Brosseau* v. *Haugen*, 543 U. S. 194, 198 (2004) (*per curiam*) ("[T]he focus" of qualified immunity "is on whether the officer had fair notice that her conduct was unlawful").

The answer to that question is yes. This Court's precedents make clear that a police officer may only deploy deadly force against an individual if the officer "has probable cause to believe that the [person] poses a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U. S., at 11; see also *Graham*, 490 U. S., at 397. It is equally well established that any use of lethal force must be justified by some legitimate governmental interest. See *Scott* v. *Harris*, 550 U. S. 372, 383 (2007); *Mullenix* v. *Luna,* 577 U. S. ___, ___–___ (2015) (SOTOMAYOR, J., dissenting) (slip op., at 2–3). Consistent with those clearly established principles, and contrary to the majority's conclusion, Ninth Circuit precedent predating these events further confirms that Kisela's conduct was clearly unreasonable. See *Brosseau*, 543 U. S., at 199 ("[A] body of relevant case law" may "'clearly establish'" the violation of a constitutional right); *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 746 (2011) (KENNEDY, J., concurring) ("[Q]ualified immunity is lost when plaintiffs point either to 'cases of controlling authority in their jurisdiction at the time of the incident' or to 'a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful'" (quoting

Wilson v. *Layne*, 526 U. S. 603, 617 (1999))). Because Kisela plainly lacked any legitimate interest justifying the use of deadly force against a woman who posed no objective threat of harm to officers or others, had committed no crime, and appeared calm and collected during the police encounter, he was not entitled to qualified immunity.

The Ninth Circuit's opinion in *Deorle* v. *Rutherford*, 272 F. 3d 1272 (2001) proves the point. In that case, the police encountered a man who had reportedly been acting "erratically." *Id.,* at 1276. The man was "verbally abusive," shouted "'kill me'" at the officers, screamed that he would "'kick [the] ass'" of one of the officers, and "brandish[ed] a hatchet at a police officer," ultimately throwing it "into a clump of trees when told to put it down." *Id.,* at 1276–1277. The officers also observed the man carrying an unloaded crossbow in one hand and what appeared to be "a can or a bottle of lighter fluid in the other." *Id.,* at 1277. The man discarded the crossbow when instructed to do so by the police and then steadily walked toward one of the officers. *Ibid.* In response, that officer, without giving a warning, shot the man in the face with beanbag rounds. *Id.,* at 1278. The man suffered serious injuries, including multiple fractures to his cranium and the loss of his left eye. *Ibid*.

The Ninth Circuit denied qualified immunity to the officer, concluding that his use of force was objectively unreasonable under clearly established law. *Id*., at 1285–1286. The court held, "Every police officer should know that it is objectively unreasonable to shoot . . . an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals." *Id.*, at 1285.

The same holds true here. Like the man in *Deorle*,

Hughes committed no serious crime, had been given no warning of the imminent use of force, posed no risk of flight, and presented no objectively reasonable threat to the safety of officers or others. In fact, Hughes presented even less of a danger than the man in *Deorle*, for, unlike him, she did not threaten to "kick [their] ass," did not appear agitated, and did not raise her kitchen knife or make any aggressive gestures toward the police or Chadwick. If the police officers acted unreasonably in shooting the agitated, screaming man in *Deorle* with beanbag bullets, *a fortiori* Kisela acted unreasonably in shooting the calm-looking, stationary Hughes with real bullets. In my view, *Deorle* and the precedent it cites place the unlawfulness of Kisela's conduct "'beyond debate.'" *Wesby*, 583 U. S., at ___ (slip op., at 15).

The majority strains mightily to distinguish *Deorle*, to no avail. It asserts, for instance, that, unlike the man in *Deorle*, Hughes was "armed with a large knife." *Ante*, at 7. But that is not a fair characterization of the record, particularly at this procedural juncture. Hughes was not "armed" with a knife. She was holding "a kitchen knife—an everyday household item which can be used as a weapon but ordinarily is a tool for safe, benign purposes"—down at her side with the blade pointed away from Chadwick. 862 F. 3d, at 788 (Berzon, J., concurring in denial of rehearing en banc). Hughes also spoke calmly with Chadwick during the events at issue, did not raise the knife, and made no other aggressive movements, undermining any suggestion that she was a threat to Chadwick or anyone else. Similarly, the majority asserts that Hughes was "within striking distance" of Chadwick, *ante*, at 7, but that stretches the facts and contravenes this Court's repeated admonition that inferences must be drawn in the exact opposite direction, *i.e.,* in favor of Hughes. See *Tolan*, 572 U. S., at ___ (slip op., at 8). The facts, properly viewed, show that, when she was shot,

Hughes had stopped and stood still about six feet away from Chadwick. Whether Hughes could "strik[e]" Chadwick from that particular distance, even though the kitchen knife was held down at her side, is an inference that should be drawn by the jury, not this Court.

The majority next posits that Hughes, unlike the man in *Deorle*, "ignored the officers' orders to drop the" kitchen knife. *Ante*, at 7. Yet again, the majority here draws inferences in favor of Kisela, instead of Hughes. The available evidence would allow a reasonable jury to find that Hughes did not hear or register the officers' swift commands and that Kisela, like his fellow officers on the scene, should have realized that as well. See *supra,* at 3–4. Accordingly, at least at the summary-judgment stage, the Court is mistaken in distinguishing *Deorle* based on Hughes' ostensible disobedience to the officers' directives.

The majority also implies that *Deorle* is distinguishable because the police in that case observed the man over a 40-minute period, whereas the situation here unfolded in less than a minute. *Ante*, at 7. But that fact favors Hughes, not Kisela. The only reason this case unfolded in such an abrupt timeframe is because Kisela, unlike his fellow officer, showed no interest in trying to talk further to Hughes or use a "lesser means" of force. See Record 120–121, 304.

Finally, the majority passingly notes that "this Court has already instructed the Court of Appeals not to read [*Deorle*] too broadly." *Ante,* at 7 (citing *City and County of San Francisco* v. *Sheehan*, 575 U. S. ___, ___–___ (2015) (slip op., at 13–14)). But the Court in *Sheehan* concluded that *Deorle* was plainly distinguishable because, unlike in *Deorle*, the officers there confronted a woman who "was dangerous, recalcitrant, law-breaking, and out of sight." 575 U. S.*,* at ___ (slip op., at 14). As explained above, however, Hughes was none of those things: She did not threaten or endanger the officers or Chadwick, she did not

break any laws, and she was visible to the officers on the scene. See *supra,* at 2–4. Thus, there simply is no basis for the Court's assertion that "'the differences between [*Deorle*] and the case before us leap from the page.'" *Ante,* at 7 (quoting *Sheehan*, 575 U. S., at ___ (slip op., at 14)).

Deorle, moreover, is not the only case that provided fair notice to Kisela that shooting Hughes under these circumstances was unreasonable. For instance, the Ninth Circuit has held that the use of deadly force against an individual holding a semiautomatic rifle was unconstitutional where the individual "did not point the gun at the officers and apparently was not facing them when they shot him the first time." *Curnow* v. *Ridgecrest Police*, 952 F. 2d 321, 325 (1991). Similarly, in *Harris* v. *Roderick*, 126 F. 3d 1189 (1997), the Ninth Circuit held that the officer unreasonably used deadly force against a man who, although armed, made "no threatening movement" or "aggressive move of any kind." *Id.,* at 1203.* Both *Curnow* and *Harris* establish that, where, as here, an individual with a weapon poses no objective and immediate threat to officers or third parties, law enforcement cannot resort to excessive force. See *Harris*, 126 F. 3d, at 1201 ("Law enforcement officers may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officers, or is fleeing and his escape will result in a serious threat of injury to persons").

If all that were not enough, decisions from several other Circuits illustrate that the Fourth Amendment clearly

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*The majority insists that reliance on *Harris* fails the "'straight-face test'" because *Harris* involved an FBI sniper on a hilltop who shot a man while he was retreating to a cabin during a standoff. *Ante*, at 8 (quoting 862 F. 3d, at 797 (opinion of Ikuta, J.)). If anything, though, the context of *Harris* could be viewed as more dangerous than the context here because, unlike Hughes, the suspect in *Harris* had engaged in a firefight with other officers the previous day, during which an officer was shot. See 126 F. 3d, at 1193–1194.

forbids the use of deadly force against a person who is merely holding a knife but not threatening anyone with it. See, *e.g., McKinney* v. *DeKalb County*, 997 F. 2d 1440, 1442 (CA11 1993) (affirming denial of summary judgment based on qualified immunity to officer who shot a person holding a butcher knife in one hand and a foot-long stick in the other, where the person threw the stick and began to rise from his seated position); *Reyes* v. *Bridgwater*, 362 Fed. Appx. 403, 404–405 (CA5 2010) (reversing grant of summary judgment based on qualified immunity to officer who shot a person holding a kitchen knife in his apartment entryway, even though he refused to follow the officer's multiple commands to drop the knife); *Duong* v. *Telford Borough*, 186 Fed. Appx. 214, 215, 217 (CA3 2006) (affirming denial of summary judgment based on qualified immunity to officer who shot a person holding a knife because a reasonable jury could conclude that the plaintiff was sitting down and pointing the knife away from the officer at the time he was shot and had not received any warnings to drop the knife).

Against this wall of case law, the majority points to a single Ninth Circuit decision, *Blanford* v. *Sacramento County*, 406 F. 3d 1110 (2005), as proof that Kisela reasonably could have believed that Hughes posed an immediate danger. But *Blanford* involved far different circumstances. In that case, officers observed a man walking through a neighborhood brandishing a 2½-foot cavalry sword; officers commanded the man to drop the sword, identified themselves as police, and warned "'We'll shoot.'" *Id.,* at 1112–1113. The man responded with "a loud growling or roaring sound," which increased the officers' concern that he posed a risk of harm. *Id.,* at 1113. In an effort to "evade [police] authority," the man, while still wielding the sword, tried to enter a home, thus prompting officers to open fire to protect anyone who might be inside. *Id.,* at 1113, 1118. The Ninth Circuit concluded that use of deadly

force was reasonable in those circumstances. See *id.,* at 1119.

This case differs significantly from *Blanford* in several key respects. Unlike the man in *Blanford*, Hughes held a kitchen knife down by her side, as compared to a 2½-foot sword; she appeared calm and collected, and did not make threatening noises or gestures toward the officers on the scene; she stood still in front of her own home, and was not wandering about the neighborhood, evading law enforcement, or attempting to enter another house. Moreover, unlike the officers in *Blanford*, Kisela never verbally identified himself as an officer and never warned Hughes that he was going to shoot before he did so. Given these significant differences, no reasonable officer would believe that *Blanford* justified Kisela's conduct. The majority's conclusion to the contrary is fanciful.

* * *

In sum, precedent existing at the time of the shooting clearly established the unconstitutionality of Kisela's conduct. The majority's decision, no matter how much it says otherwise, ultimately rests on a faulty premise: that those cases are not identical to this one. But that is not the law, for our cases have never required a factually identical case to satisfy the "clearly established" standard. *Hope*, 536 U. S., at 739. It is enough that governing law places "the constitutionality of the officer's conduct beyond debate." *Wesby*, 583 U. S., at ___ (slip op., at 13) (internal quotation marks omitted). Because, taking the facts in the light most favorable to Hughes, it is "beyond debate" that Kisela's use of deadly force was objectively unreasonable, he was not entitled to summary judgment on the basis of qualified immunity.

III

For the foregoing reasons, it is clear to me that the

Court of Appeals got it right. But even if that result were not so clear, I cannot agree with the majority's apparent view that the decision below was so manifestly incorrect as to warrant "the extraordinary remedy of a summary reversal." *Major League Baseball Players Assn.* v. *Garvey*, 532 U. S. 504, 512–513 (2001) (Stevens, J., dissenting). "A summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker* v. *Hansen*, 450 U. S. 785, 791 (1981) (Marshall, J., dissenting); *Office of Personnel Management* v. *Richmond*, 496 U. S. 414, 422 (1990) ("Summary reversals of courts of appeals are unusual under any circumstances"). This is not such a case. The relevant facts are hotly disputed, and the qualified-immunity question here is, at the very best, a close call. Rather than letting this case go to a jury, the Court decides to intervene prematurely, purporting to correct an error that is not at all clear.

This unwarranted summary reversal is symptomatic of "a disturbing trend regarding the use of this Court's resources" in qualified-immunity cases. *Salazar-Limon* v. *Houston*, 581 U. S. ___, ___ (2017) (SOTOMAYOR, J., dissenting from denial of certiorari) (slip op., at 8). As I have previously noted, this Court routinely displays an unflinching willingness "to summarily reverse courts for wrongly denying officers the protection of qualified immunity" but "rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases." *Id.,* at ___–___ (slip op., at 8–9); see also Baude, Is Qualified Immunity Unlawful? 106 Cal. L. Rev. 45, 82 (2018) ("[N]early all of the Supreme Court's qualified immunity cases come out the same way—by finding immunity for the officials"); Reinhardt, The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development

and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 Mich. L. Rev. 1219, 1244–1250 (2015). Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.

The majority today exacerbates that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just under the law about this, I respectfully dissent.

Per Curiam

SUPREME COURT OF THE UNITED STATES

RAY WHITE, ET AL. *v.* DANIEL T. PAULY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SAMUEL PAULY, DECEASED ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 16–67. Decided January 9, 2017

PER CURIAM.

This case addresses the situation of an officer who—having arrived late at an ongoing police action and having witnessed shots being fired by one of several individuals in a house surrounded by other officers—shoots and kills an armed occupant of the house without first giving a warning.

According to the District Court and the Court of Appeals, the record, when viewed in the light most favorable to respondents, shows the following. Respondent Daniel Pauly was involved in a road-rage incident on a highway near Santa Fe, New Mexico. 814 F. 3d 1060, 1064–1065 (CA10 2016). It was in the evening, and it was raining. The two women involved called 911 to report Daniel as a "'drunk driver'" who was "'swerving all crazy.'" *Id.,* at 1065. The women then followed Daniel down the highway, close behind him and with their bright lights on. Daniel, feeling threatened, pulled his truck over at an off-ramp to confront them. After a brief, nonviolent encounter, Daniel drove a short distance to a secluded house where he lived with his brother, Samuel Pauly.

Sometime between 9 p.m. and 10 p.m., Officer Kevin Truesdale was dispatched to respond to the women's 911 call. Truesdale, arriving after Daniel had already left the scene, interviewed the two women at the off-ramp. The women told Truesdale that Daniel had been driving recklessly and gave his license plate number to Truesdale.

The state police dispatcher identified the plate as being registered to the Pauly brothers' address.

After the women left, Officer Truesdale was joined at the off-ramp by Officers Ray White and Michael Mariscal. The three agreed there was insufficient probable cause to arrest Daniel. Still, the officers decided to speak with Daniel to (1) get his side of the story, (2) "'make sure nothing else happened,'" and (3) find out if he was intoxicated. *Id.*, at 1065. The officers split up. White stayed at the off-ramp in case Daniel returned. Truesdale and Mariscal drove in separate patrol cars to the Pauly brothers' address, less than a half mile away. Record 215. Neither officer turned on his flashing lights.

When Officers Mariscal and Truesdale arrived at the address they had received from the dispatcher, they found two different houses, the first with no lights on inside and a second one behind it on a hill. *Id.,* at 217, 246. Lights were on in the second one. The officers parked their cars near the first house. They examined a vehicle parked near that house but did not find Daniel's truck. *Id.,* at 310.

Officers Mariscal and Truesdale noticed the lights on in the second house and approached it in a covert manner to maintain officer safety. Both used their flashlights in an intermittent manner. Truesdale alone turned on his flashlight once they got close to the house's front door. Upon reaching the house, the officers found Daniel's pickup truck and spotted two men moving around inside the residence. Truesdale and Mariscal radioed White, who left the off-ramp to join them.

At approximately 11 p.m., the Pauly brothers became aware of the officers' presence and yelled out "'Who are you?'" and "'What do you want?'" 814 F. 3d, at 1066. In response, Officers Mariscal and Truesdale laughed and responded: "'Hey, (expletive), we got you surrounded. Come out or we're coming in.'" *Ibid.* Truesdale shouted once: "'Open the door, State Police, open the door.'" *Ibid.*

Mariscal also yelled: "'Open the door, open the door.'" *Ibid.*

The Pauly brothers heard someone yelling, "'We're coming in. We're coming in.'" *Ibid.* Neither Samuel nor Daniel heard the officers identify themselves as state police. Record 81–82. The brothers armed themselves, Samuel with a handgun and Daniel with a shotgun. One of the brothers yelled at the police officers that "'We have guns.'" 814 F. 3d, at 1066. The officers saw someone run to the back of the house, so Officer Truesdale positioned himself behind the house and shouted "'Open the door, come outside.'" *Ibid.*

Officer White had parked at the first house and was walking up to its front door when he heard shouting from the second house. He half-jogged, half-walked to the Paulys' house, arriving "just as one of the brothers said: 'We have guns.'" *Ibid.*; see also Civ. No. 12–1311 (D NM, Feb. 5, 2014), App. to Pet. for Cert. 75–78. When White heard that statement, he drew his gun and took cover behind a stone wall 50 feet from the front of the house. Officer Mariscal took cover behind a pickup truck.

Just "a few seconds" after the "We have guns" statement, Daniel stepped part way out of the back door and fired two shotgun blasts while screaming loudly. 814 F. 3d, at 1066–1067. A few seconds after those shots, Samuel opened the front window and pointed a handgun in Officer White's direction. Officer Mariscal fired immediately at Samuel but missed. "'Four to five seconds'" later, White shot and killed Samuel. *Id.,* at 1067.

The District Court denied the officers' motions for summary judgment, and the facts are viewed in the light most favorable to the Paulys. *Mullenix* v. *Luna*, 577 U. S. ___, ___, n. (2015) (*per curiam*) (slip op., at 2, n.). Because this case concerns the defense of qualified immunity, however, the Court considers only the facts that were knowable to the defendant officers. *Kingsley* v. *Hendrickson*, 576 U. S.

___, ___ (2015) (slip op., at 9).

Samuel's estate and Daniel filed suit against, *inter alia*, Officers Mariscal, Truesdale, and White. One of the claims was that the officers were liable under Rev. Stat. §1979, 42 U. S. C. §1983, for violating Samuel's Fourth Amendment right to be free from excessive force. All three officers moved for summary judgment on qualified immunity grounds. White in particular argued that the Pauly brothers could not show that White's use of force violated the Fourth Amendment and, regardless, that Samuel's Fourth Amendment right to be free from deadly force under the circumstances of this case was not clearly established.

The District Court denied qualified immunity. A divided panel of the Court of Appeals for the Tenth Circuit affirmed. As to Officers Mariscal and Truesdale, the court held that "[a]ccepting as true plaintiffs' version of the facts, a reasonable person in the officers' position should have understood their conduct would cause Samuel and Daniel Pauly to defend their home and could result in the commission of deadly force against Samuel Pauly by Officer White." 814 F. 3d, at 1076. The panel majority analyzed Officer White's claim separately from the other officers because "Officer White did not participate in the events leading up to the armed confrontation, nor was he there to hear the other officers ordering the brothers to 'Come out or we're coming in.'" *Ibid.* Despite the fact that "Officer White . . . arrived late on the scene and heard only 'We have guns' . . . before taking cover behind a stone wall," the majority held that a jury could have concluded that White's use of deadly force was not reasonable. *Id.,* at 1077, 1082. The majority also decided that this rule—that a reasonable officer in White's position would believe that a warning was required despite the threat of serious harm—was clearly established at the time of Samuel's death. The Court of Appeals' ruling relied on general

statements from this Court's case law that (1) "the reasonableness of an officer's use of force depends, in part, on whether the officer was in danger at the precise moment that he used force" and (2) "if the suspect threatens the officer with a weapon[,] deadly force may be used if necessary to prevent escape, and if[,] where feasible, some warning has been given." *Id.*, at 1083 (citing, *inter alia*, *Tennessee* v. *Garner*, 471 U. S. 1 (1985), and *Graham* v. *Connor*, 490 U. S. 386 (1989); emphasis deleted; internal quotation marks and alterations omitted). The court concluded that a reasonable officer in White's position would have known that, since the Paulys could not have shot him unless he moved from his position behind a stone wall, he could not have used deadly force without first warning Samuel Pauly to drop his weapon.

Judge Moritz dissented, contending that the "majority impermissibly second-guesses" Officer White's quick choice to use deadly force. 814 F. 3d, at 1084. Judge Moritz explained that the majority also erred by defining the clearly established law at too high a level of generality, in contravention of this Court's precedent.

The officers petitioned for rehearing en banc, which 6 of the 12 judges on the Court of Appeals voted to grant. In a dissent from denial of rehearing, Judge Hartz noted that he was "unaware of any clearly established law that suggests . . . that an officer . . . who faces an occupant pointing a firearm in his direction must refrain from firing his weapon but, rather, must identify himself and shout a warning while pinned down, kneeling behind a rock wall." 817 F. 3d 715, 718 (CA10 2016). Judge Hartz expressed his hope that "the Supreme Court can clarify the governing law." *Id.,* at 719.

The officers petitioned for certiorari. The petition is now granted, and the judgment is vacated: Officer White did not violate clearly established law on the record described by the Court of Appeals panel.

Qualified immunity attaches when an official's conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix* v. *Luna*, 577 U. S., at ___–___ (slip op., at 4–5). While this Court's case law "'do[es] not require a case directly on point'" for a right to be clearly established, "'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Id.,* at ___ (slip op., at 5). In other words, immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *Ibid.*

In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. See*, e.g., City and County of San Francisco* v. *Sheehan*, 575 U. S. ___, ___, n. 3 (2015) (slip op., at 10, n.3) (collecting cases). The Court has found this necessary both because qualified immunity is important to "'society as a whole,'" *ibid.*, and because as "'an immunity from suit,'" qualified immunity "'is effectively lost if a case is erroneously permitted to go to trial,'" *Pearson* v. *Callahan*, 555 U. S. 223, 231 (2009).

Today, it is again necessary to reiterate the longstanding principle that "clearly established law" should not be defined "at a high level of generality." *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 742 (2011). As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987). Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.,* at 639.

The panel majority misunderstood the "clearly established" analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment. Instead, the majority relied on *Graham*, *Garner*, and their

Court of Appeals progeny, which—as noted above—lay out excessive-force principles at only a general level. Of course, "general statements of the law are not inherently incapable of giving fair and clear warning" to officers, *United States* v. *Lanier*, 520 U. S. 259, 271 (1997), but "in the light of pre-existing law the unlawfulness must be apparent," *Anderson* v. *Creighton*, *supra*, at 640. For that reason, we have held that *Garner* and *Graham* do not by themselves create clearly established law outside "an obvious case." *Brosseau* v. *Haugen*, 543 U. S. 194, 199 (2004) (*per curiam*); see also *Plumhoff* v. *Rickard*, 572 U. S. ___, ___ (2014) (slip op., at 13) (emphasizing that *Garner* and *Graham* "are 'cast at a high level of generality'").

This is not a case where it is obvious that there was a violation of clearly established law under *Garner* and *Graham*. Of note, the majority did not conclude that White's conduct—such as his failure to shout a warning—constituted a run-of-the-mill Fourth Amendment violation. Indeed, it recognized that "this case presents a unique set of facts and circumstances" in light of White's late arrival on the scene. 814 F. 3d, at 1077. This alone should have been an important indication to the majority that White's conduct did not violate a "clearly established" right. Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here.

On the record described by the Court of Appeals, Officer White did not violate clearly established law. The Court notes, however, that respondents contend Officer White arrived on the scene only two minutes after Officers

Truesdale and Mariscal and more than three minutes before Daniel's shots were fired. On the assumption that the conduct of Officers Truesdale and Mariscal did not adequately alert the Paulys that they were police officers, respondents suggest that a reasonable jury could infer that White witnessed the other officers' deficient performance and should have realized that corrective action was necessary before using deadly force. Brief in Opposition 11, 22, n. 5. This Court expresses no position on this potential alternative ground for affirmance, as it appears that neither the District Court nor the Court of Appeals panel addressed it. The Court also expresses no opinion on the question whether this ground was properly preserved or whether—in light of this Court's holding today—Officers Truesdale and Mariscal are entitled to qualified immunity.

For the foregoing reasons, the petition for certiorari is granted; the judgment of the Court of Appeals is vacated; and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

RAY WHITE, ET AL. *v.* DANIEL T. PAULY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SAMUEL PAULY, DECEASED ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 16–67. Decided January 9, 2017

JUSTICE GINSBURG, concurring.

I join the Court's opinion on the understanding that it does not foreclose the denial of summary judgment to Officers Truesdale and Mariscal. See 814 F. 3d 1060, 1068, 1073, 1074 (CA10 2016) (Court of Appeals emphasized, repeatedly, that fact disputes exist on question whether Truesdale and Mariscal "adequately identified themselves" as police officers before shouting "Come out or we're coming in" (internal quotation marks omitted)). Further, as to Officer White, the Court, as I comprehend its opinion, leaves open the propriety of denying summary judgment based on fact disputes over when Officer White arrived at the scene, what he may have witnessed, and whether he had adequate time to identify himself and order Samuel Pauly to drop his weapon before Officer White shot Pauly. Compare *id.*, at 1080, with *ante,* at 8. See also Civ. No. 12–1311 (D NM, Feb. 5, 2014), pp. 7, and n. 5, 9, App. to Pet. for Cert. 75–76, and n. 5, 77 (suggesting that Officer White may have been on the scene when Officers Truesdale and Mariscal threatened to invade the Pauly home).

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DISTRICT OF COLUMBIA ET AL. *v.* WESBY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15–1485. Argued October 4, 2017—Decided January 22, 2018

District of Columbia police officers responded to a complaint about loud music and illegal activities in a vacant house. Inside, they found the house nearly barren and in disarray. The officers smelled marijuana and observed beer bottles and cups of liquor on the floor, which was dirty. They found a make-shift strip club in the living room, and a naked woman and several men in an upstairs bedroom. Many partygoers scattered when they saw the uniformed officers, and some hid. The officers questioned everyone and got inconsistent stories. Two women identified "Peaches" as the house's tenant and said that she had given the partygoers permission to have the party. But Peaches was not there. When the officers spoke by phone to Peaches, she was nervous, agitated, and evasive. At first, she claimed that she was renting the house and had given the partygoers permission to have the party, but she eventually admitted that she did not have permission to use the house. The owner confirmed that he had not given anyone permission to be there. The officers then arrested the partygoers for unlawful entry.

Several partygoers sued for false arrest under the Fourth Amendment and District law. The District Court concluded that the officers lacked probable cause to arrest the partygoers for unlawful entry and that two of the officers, petitioners here, were not entitled to qualified immunity. A divided panel of the D. C. Circuit affirmed.

Held:

1. The officers had probable cause to arrest the partygoers. Pp. 7–13.

(a) Considering the "totality of the circumstances," *Maryland* v. *Pringle*, 540 U. S. 366, 371, the officers made an "entirely reasonable inference" that the partygoers knew they did not have permission to

be in the house, *id.*, at 372. Taken together, the condition of the house and the conduct of the partygoers allowed the officers to make several "'common-sense conclusions about human behavior.'" *Illinois v. Gates,* 462 U. S. 213, 231. Because most homeowners do not live in such conditions or permit such activities in their homes, the officers could infer that the partygoers knew the party was not authorized. The officers also could infer that the partygoers knew that they were not supposed to be in the house because they scattered and hid when the officers arrived. See *Illinois* v. *Wardlow*, 528 U. S. 119, 124–125. The partygoers' vague and implausible answers to questioning also gave the officers reason to infer that the partygoers were lying and that their lies suggested a guilty mind. Cf. *Devenpeck* v. *Alford*, 543 U. S. 146, 149, 155–156. Peaches' lying and evasive behavior gave the officers reason to discredit everything she said. The officers also could have inferred that she lied when she said she had invited the partygoers to the house, or that she told the partygoers that she was not actually renting the house. Pp. 7–11.

(b) The panel majority failed to follow two basic and well-established principles of law. First, it viewed each fact "in isolation, rather than as a factor in the totality of the circumstances." *Pringle*, *supra*, at 372, n. 2. Second, it believed that it could dismiss outright any circumstances that were "susceptible of innocent explanation," *United States* v. *Arvizu*, 534 U. S. 266, 277. Instead, it should have asked whether a reasonable officer could conclude—considering all of the surrounding circumstances, including the plausibility of the explanation itself—that there was a "substantial chance of criminal activity," *Gates, supra,* at 244, n. 13. Pp. 11–13.

2. The officers are entitled to qualified immunity. Pp. 13–19.

(a) As relevant here, officers are entitled to qualified immunity under 42 U. S. C. §1983 unless the unlawfulness of their conduct was "clearly established at the time," *Reichle* v. *Howards*, 566 U. S. 658, 664. To be clearly established, a legal principle must be "settled law," *Hunter* v. *Bryant*, 502 U. S. 224, 228, and it must clearly prohibit the officer's conduct in the particular circumstances before him, see *Saucier* v. *Katz*, 533 U. S. 194, 202. In the warrantless arrest context, "a body of relevant case law" is usually necessary to "'clearly establish' the answer" with respect to probable cause. *Brosseau* v. *Haugen*, 543 U. S. 194, 199.

Even assuming that the officers lacked actual probable cause to arrest the partygoers, they are entitled to qualified immunity because, given "the circumstances with which [they] w[ere] confronted," they "reasonably but mistakenly conclude[d] that probable cause [wa]s present." *Anderson* v. *Creighton*, 483 U. S. 635, 640, 641. The panel majority and the partygoers have failed to identify a single precedent

Syllabus

finding a Fourth Amendment violation "under similar circumstances." *White* v. *Pauly,* 580 U. S. ___, ___. And this is not an "obvious case" where "a body of relevant case law" is unnecessary. *Brosseau, supra*, at 199. Pp. 13–16.

(b) Instead of following this straightforward analysis, the panel majority reasoned that, under clearly established District law, a suspect's bona fide belief of a right to enter vitiates probable cause to arrest for unlawful entry. Thus, it concluded that the "uncontroverted evidence" of an invitation in this case meant that the officers could not infer the partygoers' intent from other circumstances or disbelieve their story. But looking at the entire legal landscape at the time of the arrests, a reasonable officer could have interpreted the law as permitting the arrests here. There was no controlling case holding that a bona fide belief of a right to enter defeats probable cause, that officers cannot infer a suspect's guilty state of mind based on his conduct alone, or that officers must accept a suspect's innocent explanation at face value. And several precedents suggested the opposite. Pp. 16–19.

765 F. 3d 13, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, ALITO, KAGAN, and GORSUCH, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in part and concurring in the judgment. GINSBURG, J., filed an opinion concurring in the judgment in part.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 15–1485

DISTRICT OF COLUMBIA, ET AL., PETITIONERS *v.* THEODORE WESBY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January 22, 2018]

JUSTICE THOMAS delivered the opinion of the Court.

This case involves a civil suit against the District of Columbia and five of its police officers, brought by 16 individuals who were arrested for holding a raucous, late-night party in a house they did not have permission to enter. The United States Court of Appeals for the District of Columbia Circuit held that there was no probable cause to arrest the partygoers, and that the officers were not entitled to qualified immunity. We reverse on both grounds.

I

Around 1 a.m. on March 16, 2008, the District's Metropolitan Police Department received a complaint about loud music and illegal activities at a house in Northeast D. C. The caller, a former neighborhood commissioner, told police that the house had been vacant for several months. When officers arrived at the scene, several neighbors confirmed that the house should have been empty. The officers approached the house and, consistent with the complaint, heard loud music playing inside.

After the officers knocked on the front door, they saw a

man look out the window and then run upstairs. One of the partygoers opened the door, and the officers entered. They immediately observed that the inside of the house "'was in disarray'" and looked like "'a vacant property.'" 841 F. Supp. 2d 20, 31 (DC 2012) (quoting Defs. Exh. A). The officers smelled marijuana and saw beer bottles and cups of liquor on the floor. In fact, the floor was so dirty that one of the partygoers refused to sit on it while being questioned. Although the house had working electricity and plumbing, it had no furniture downstairs other than a few padded metal chairs. The only other signs of habitation were blinds on the windows, food in the refrigerator, and toiletries in the bathroom.

In the living room, the officers found a makeshift strip club. Several women were wearing only bras and thongs, with cash tucked into their garter belts. The women were giving lap dances while other partygoers watched. Most of the onlookers were holding cash and cups of alcohol. After seeing the uniformed officers, many partygoers scattered into other parts of the house.

The officers found more debauchery upstairs. A naked woman and several men were in the bedroom. A bare mattress—the only one in the house—was on the floor, along with some lit candles and multiple open condom wrappers. A used condom was on the windowsill. The officers found one partygoer hiding in an upstairs closet, and another who had shut himself in the bathroom and refused to come out.

The officers found a total of 21 people in the house. After interviewing all 21, the officers did not get a clear or consistent story. Many partygoers said they were there for a bachelor party, but no one could identify the bachelor. Each of the partygoers claimed that someone had invited them to the house, but no one could say who. Two of the women working the party said that a woman named "Peaches" or "Tasty" was renting the house and had given

them permission to be there. One of the women explained that the previous owner had recently passed away, and Peaches had just started renting the house from the grandson who inherited it. But the house had no boxes or moving supplies. She did not know Peaches' real name. And Peaches was not there.

An officer asked the woman to call Peaches on her phone so he could talk to her. Peaches answered and explained that she had just left the party to go to the store. When the officer asked her to return, Peaches refused because she was afraid of being arrested. The sergeant supervising the investigation also spoke with Peaches. At first, Peaches claimed to be renting the house from the owner, who was fixing it up for her. She also said that she had given the attendees permission to have the party. When the sergeant again asked her who had given her permission to use the house, Peaches became evasive and hung up. The sergeant called her back, and she began yelling and insisting that she had permission before hanging up a second time. The officers eventually got Peaches on the phone again, and she admitted that she did not have permission to use the house.

The officers then contacted the owner. He told them that he had been trying to negotiate a lease with Peaches, but they had not reached an agreement. He confirmed that he had not given Peaches (or anyone else) permission to be in the house—let alone permission to use it for a bachelor party. At that point, the officers arrested the 21 partygoers for unlawful entry. See D. C. Code §22–3302 (2008). The police transported the partygoers to the police station, where the lieutenant decided to charge them with disorderly conduct. See §22–1321. The partygoers were released, and the charges were eventually dropped.[1]

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[1] In their merits brief, the partygoers attempt to dispute several of these facts. See Brief for Respondents 26–30. But the facts they now

II

Respondents, 16 of the 21 partygoers, sued the District and five of the arresting officers. They sued the officers for false arrest under the Fourth Amendment, Rev. Stat. §1979, 42 U. S. C. §1983, and under District law. They sued the District for false arrest and negligent supervision under District law. The partygoers' claims were all "predicated upon the allegation that [they] were arrested without probable cause." 841 F. Supp. 2d, at 32.

On cross-motions for summary judgment, the District Court awarded partial summary judgment to the partygoers. *Id.*, at 48–49. It concluded that the officers lacked probable cause to arrest the partygoers for unlawful entry.[2] *Id.,* at 32–33. The officers were told that Peaches had invited the partygoers to the house, the District Court reasoned, and nothing the officers learned in their investigation suggested the partygoers "'knew or should have known that [they were] entering against the [owner's] will.'" *Id.*, at 32. The District Court also concluded that the officers were not entitled to qualified immunity under

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contest were presented in the petition for a writ of certiorari, and the partygoers did not contest them in their brief in opposition. Under this Court's Rule 15.2, the partygoers' failure to contest these factual assertions at the certiorari stage waived their right to do so at the merits stage. See *Carcieri* v. *Salazar*, 555 U. S. 379, 395–396 (2009).

Furthermore, although both parties moved for summary judgment, the undisputed facts here are sufficient to resolve both probable cause and qualified immunity. Our analysis thus would not change no matter which party is considered the moving party. Cf. *Scott* v. *Harris*, 550 U. S. 372, 378–379 (2007) (explaining that, at summary judgment, courts must view the facts and draw reasonable inferences in favor of the nonmoving party).

[2] Because probable cause is an objective standard, an arrest is lawful if the officer had probable cause to arrest for any offense, not just the offense cited at the time of arrest or booking. See *Devenpeck* v. *Alford*, 543 U. S. 146, 153–155, and n. 2 (2004). Because unlawful entry is the only offense that the District and its officers discuss in their briefs to this Court, we likewise limit our analysis to that offense.

§1983.[3] It noted that, under District case law, "probable cause to arrest for unlawful entry requires evidence that the alleged intruder knew or should have known, upon entry, that such entry was against the will of the owner." *Id.*, at 37. And in its view, the officers had no such evidence. *Id.,* at 32–33, 37–38.

With liability resolved, the case proceeded to trial on damages. The jury awarded the partygoers a total of $680,000 in compensatory damages. After the District Court awarded attorney's fees, the total award was nearly $1 million.

On appeal, a divided panel of the D. C. Circuit affirmed. On the question of probable cause, the panel majority made Peaches' invitation "central" to its determination that the officers lacked probable cause to arrest the partygoers for unlawful entry. 765 F. 3d 13, 21 (2014). The panel majority asserted that, "in the absence of any conflicting information, Peaches' invitation vitiates the necessary element of [the partygoers'] intent to enter against the will of the lawful owner." *Ibid.* And the panel majority determined that "there is simply no evidence in the record that [the partygoers] had any reason to think the invitation was invalid." *Ibid.*

On the question of qualified immunity, the panel majority determined that it was "perfectly clear" that a person with "a good purpose and bona fide belief of her right to enter" lacks the necessary intent for unlawful entry. *Id.*, at 27. In other words, the officers needed "some evidence" that the partygoers "knew or should have known they were entering against the will of the lawful owner." *Ibid.*

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[3]The District Court granted summary judgment against two of the officers, but denied summary judgment against the other three because there were triable issues regarding qualified immunity. See 841 F. Supp. 2d 20, 32–46 (DC 2012). The partygoers voluntarily dismissed their claims against those three officers. See 765 F. 3d 13, 17 (CADC 2014).

And here, the panel majority asserted, the officers must "have known that uncontroverted evidence of an invitation to enter the premises would vitiate probable cause for unlawful entry." *Ibid.*

Judge Brown dissented. She concluded that summary judgment on the false-arrest claims was improper because, under the totality of the circumstances, a reasonable officer "could disbelieve [the partygoers'] claim of innocent entry" and infer that they knew or should have known that they did not have permission to be in the house. *Id.*, at 34. She also disagreed with the denial of qualified immunity, contending that a reasonable officer could have found probable cause to arrest in this "unusual factual scenario, not well represented in the controlling case law." *Id.*, at 36.

The D. C. Circuit denied rehearing en banc over the dissent of four judges. The dissenters focused on qualified immunity, contending that the panel opinion "contravene[d] . . . emphatic Supreme Court directives" that "police officers may not be held liable for damages unless the officers were 'plainly incompetent' or 'knowingly violate[d]' clearly established law." 816 F. 3d 96, 102 (2016) (quoting *Carroll* v. *Carman,* 574 U. S. ___, ___ (2014) (*per curiam*) (slip op., at 4)). The panel majority—Judges Pillard and Edwards—responded in a joint concurrence. 816 F. 3d, at 96–101. They insisted that the panel opinion did not misapply the law of qualified immunity, and that their disagreement with the dissenters was a mere "case-specific assessment of the circumstantial evidence in the record." *Id.,* at 100.

We granted certiorari to resolve two questions: whether the officers had probable cause to arrest the partygoers, and whether the officers were entitled to qualified immunity. See 580 U. S. ___ (2017). We address each question in turn.

III

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Because arrests are "seizures" of "persons," they must be reasonable under the circumstances. See *Payton* v. *New York*, 445 U. S. 573, 585 (1980). A warrantless arrest is reasonable if the officer has probable cause to believe that the suspect committed a crime in the officer's presence. *Atwater* v. *Lago Vista*, 532 U. S. 318, 354 (2001).

To determine whether an officer had probable cause for an arrest, "we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Maryland* v. *Pringle*, 540 U. S. 366, 371 (2003) (quoting *Ornelas* v. *United States*, 517 U. S. 690, 696 (1996)). Because probable cause "deals with probabilities and depends on the totality of the circumstances," 540 U. S., at 371, it is "a fluid concept" that is "not readily, or even usefully, reduced to a neat set of legal rules," *Illinois* v. *Gates*, 462 U. S. 213, 232 (1983). It "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.*, at 243–244, n. 13 (1983). Probable cause "is not a high bar." *Kaley* v. *United States*, 571 U. S. ___, ___ (2014) (slip op., at 18).

A

There is no dispute that the partygoers entered the house against the will of the owner. Nonetheless, the partygoers contend that the officers lacked probable cause to arrest them because the officers had no reason to believe that they "knew or should have known" their "entry was unwanted." *Ortberg* v. *United States*, 81 A. 3d 303, 308 (D. C. 2013). We disagree. Considering the totality of the circumstances, the officers made an "entirely reason-

able inference" that the partygoers were knowingly taking advantage of a vacant house as a venue for their late-night party. *Pringle*, *supra*, at 372.

Consider first the condition of the house. Multiple neighbors, including a former neighborhood official, informed the officers that the house had been vacant for several months.[4] The house had no furniture, except for a few padded metal chairs and a bare mattress. The rest of the house was empty, save for some fixtures and large appliances. The house had a few signs of inhabitance—working electricity and plumbing, blinds on the windows, toiletries in the bathroom, and food in the refrigerator. But those facts are not necessarily inconsistent with the house being unoccupied. The owner could have paid the utilities and kept the blinds while he looked for a new tenant, and the partygoers could have brought the food and toiletries. Although one woman told the officers that Peaches had recently moved in, the officers had reason to doubt that was true. There were no boxes or other moving supplies in the house; nor were there other possessions, such as clothes in the closet, suggesting someone lived there.

In addition to the condition of the house, consider the partygoers' conduct. The party was still going strong when the officers arrived after 1 a.m., with music so loud that it could be heard from outside. Upon entering the house, multiple officers smelled marijuana.[5] The party-

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[4] At oral argument, the partygoers argued that the house was not formally "vacant" under District law. Tr. of Oral Arg. 34. But a reasonable officer could infer that the complaining neighbors used the term "vacant" in the colloquial, not the legal, sense.

[5] The panel majority dismissed this fact because the officers "did not see any evidence of drugs" and did "not attempt to justify [the] arrests" based on drug use. 765 F. 3d, at 23, n. 5. But a reasonable officer could infer, based on the smell, that marijuana had been used in the house. See *Johnson* v. *United States*, 333 U. S. 10, 13 (1948) (noting that "the odor" of narcotics can "be evidence of the most persuasive character").

goers left beer bottles and cups of liquor on the floor, and they left the floor so dirty that one of them refused to sit on it. The living room had been converted into a makeshift strip club. Strippers in bras and thongs, with cash stuffed in their garter belts, were giving lap dances. Upstairs, the officers found a group of men with a single, naked woman on a bare mattress—the only bed in the house—along with multiple open condom wrappers and a used condom.

Taken together, the condition of the house and the conduct of the partygoers allowed the officers to make several "'common-sense conclusions about human behavior.'" *Gates*, *supra*, at 231 (quoting *United States* v. *Cortez*, 449 U. S. 411, 418 (1981)). Most homeowners do not live in near-barren houses. And most homeowners do not invite people over to use their living room as a strip club, to have sex in their bedroom, to smoke marijuana inside, and to leave their floors filthy. The officers could thus infer that the partygoers knew their party was not authorized.

The partygoers' reaction to the officers gave them further reason to believe that the partygoers knew they lacked permission to be in the house. Many scattered at the sight of the uniformed officers. Two hid themselves, one in a closet and the other in a bathroom. "[U]nprovoked flight upon noticing the police," we have explained, "is certainly suggestive" of wrongdoing and can be treated as "suspicious behavior" that factors into the totality of the circumstances. *Illinois* v. *Wardlow*, 528 U. S. 119, 124–125 (2000). In fact, "deliberately furtive actions and flight at the approach of . . . law officers are *strong* indicia of *mens rea*." *Sibron* v. *New York*, 392 U. S. 40, 66 (1968) (emphasis added). A reasonable officer could

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And the officers could consider the drug use inside the house as evidence that the partygoers knew their presence was unwelcome.

infer that the partygoers' scattering and hiding was an indication that they knew they were not supposed to be there.

The partygoers' answers to the officers' questions also suggested their guilty state of mind. When the officers asked who had given them permission to be there, the partygoers gave vague and implausible responses. They could not say who had invited them. Only two people claimed that Peaches had invited them, and they were working the party instead of attending it. If Peaches was the hostess, it was odd that none of the partygoers mentioned her name. Additionally, some of the partygoers claimed the event was a bachelor party, but no one could identify the bachelor. The officers could have disbelieved them, since people normally do not throw a bachelor party without a bachelor. Based on the vagueness and implausibility of the partygoers' stories, the officers could have reasonably inferred that they were lying and that their lies suggested a guilty mind. Cf. *Devenpeck* v. *Alford*, 543 U. S. 146, 149, 155–156 (2004) (noting that the suspect's "untruthful and evasive" answers to police questioning could support probable cause).

The panel majority relied heavily on the fact that Peaches said she had invited the partygoers to the house. But when the officers spoke with Peaches, she was nervous, agitated, and evasive. Cf. *Wardlow*, *supra*, at 124 (explaining that the police can take a suspect's "nervous, evasive behavior" into account). After initially insisting that she had permission to use the house, she ultimately confessed that this was a lie—a fact that the owner confirmed. Peaches' lying and evasive behavior gave the officers reason to discredit everything she had told them. For example, the officers could have inferred that Peaches lied to them when she said she had invited the others to the house, which was consistent with the fact that hardly anyone at the party knew her name. Or the officers could

have inferred that Peaches told the partygoers (like she eventually told the police) that she was not actually renting the house, which was consistent with how the partygoers were treating it.

Viewing these circumstances as a whole, a reasonable officer could conclude that there was probable cause to believe the partygoers knew they did not have permission to be in the house.

B

In concluding otherwise, the panel majority engaged in an "excessively technical dissection" of the factors supporting probable cause. *Gates*, 462 U. S., at 234. Indeed, the panel majority failed to follow two basic and well-established principles of law.

First, the panel majority viewed each fact "in isolation, rather than as a factor in the totality of the circumstances." *Pringle*, 540 U. S., at 372, n. 2. This was "mistaken in light of our precedents." *Ibid.* The "totality of the circumstances" requires courts to consider "the whole picture." *Cortez*, *supra,* at 417. Our precedents recognize that the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation. See *United States* v. *Arvizu*, 534 U. S. 266, 277–278 (2002). Instead of considering the facts as a whole, the panel majority took them one by one. For example, it dismissed the fact that the partygoers "scattered or hid when the police entered the house" because that fact was "not sufficient *standing alone* to create probable cause." 765 F. 3d, at 23 (emphasis added). Similarly, it found "nothing in the record suggesting that the condition of the house, *on its own*, should have alerted the [partygoers] that they were unwelcome." *Ibid.* (emphasis added). The totality-of-the-circumstances test "precludes this sort of divide-and-conquer analysis." *Arvizu*, 534 U. S., at 274.

Second, the panel majority mistakenly believed that it

could dismiss outright any circumstances that were "susceptible of innocent explanation." *Id.,* at 277. For example, the panel majority brushed aside the drinking and the lap dances as "consistent with" the partygoers' explanation that they were having a bachelor party. 765 F. 3d, at 23. And it similarly dismissed the condition of the house as "entirely consistent with" Peaches being a "new tenant." *Ibid.* But probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts. As we have explained, "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *Gates*, 462 U. S., at 244, n. 13. Thus, the panel majority should have asked whether a reasonable officer could conclude—considering all of the surrounding circumstances, including the plausibility of the explanation itself—that there was a "substantial chance of criminal activity." *Ibid.*

The circumstances here certainly suggested criminal activity. As explained, the officers found a group of people who claimed to be having a bachelor party with no bachelor, in a near-empty house, with strippers in the living room and sexual activity in the bedroom, and who fled at the first sign of police. The panel majority identified innocent explanations for most of these circumstances in isolation, but again, this kind of divide-and-conquer approach is improper. A factor viewed in isolation is often more "readily susceptible to an innocent explanation" than one viewed as part of a totality. *Arvizu*, *supra*, at 274. And here, the totality of the circumstances gave the officers plenty of reasons to doubt the partygoers' protestations of innocence.

For all of these reasons, we reverse the D. C. Circuit's holding that the officers lacked probable cause to arrest. Accordingly, the District and its officers are entitled to

summary judgment on all of the partygoers' claims.[6]

IV

Our conclusion that the officers had probable cause to arrest the partygoers is sufficient to resolve this case. But where, as here, the Court of Appeals erred on both the merits of the constitutional claim and the question of qualified immunity, "we have discretion to correct its errors at each step." *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 735 (2011); see, *e.g., Plumhoff* v. *Rickard*, 572 U. S. ___ (2014). We exercise that discretion here because the D. C. Circuit's analysis, if followed elsewhere, would "undermine the values qualified immunity seeks to promote." *al-Kidd*, *supra*, at 735.[7]

A

Under our precedents, officers are entitled to qualified immunity under §1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was "clearly established at the time." *Reichle* v. *Howards*, 566 U. S. 658, 664 (2012). "Clearly established" means that, at the time of the officer's conduct, the law was "'sufficiently clear' that every 'reasonable official would understand that what he is doing'" is unlawful. *al-Kidd*, *supra,* at 741 (quoting *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987)). In other words, existing law must have placed the constitutionality of the officer's conduct "beyond debate." *al-Kidd*, *supra*, at 741. This demanding standard protects "all but the plainly

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[6]The partygoers do not contest that the presence of probable cause defeats all of their claims.

[7]We continue to stress that lower courts "should think hard, and then think hard again," before addressing both qualified immunity and the merits of an underlying constitutional claim. *Camreta* v. *Greene*, 563 U. S. 692, 707 (2011). We addressed the merits of probable cause here, however, because a decision on qualified immunity alone would not have resolved all of the claims in this case.

incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U. S. 335, 341 (1986).

To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be "settled law," *Hunter* v. *Bryant*, 502 U. S. 224, 228 (1991) (*per curiam*), which means it is dictated by "controlling authority" or "a robust 'consensus of cases of persuasive authority,'" *al-Kidd*, *supra*, at 741–742 (quoting *Wilson* v. *Layne*, 526 U. S. 603, 617 (1999)). It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. See *Reichle*, 566 U. S., at 666. Otherwise, the rule is not one that "every reasonable official" would know. *Id.*, at 664 (internal quotation marks omitted).

The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U. S. 194, 202 (2001). This requires a high "degree of specificity." *Mullenix* v. *Luna*, 577 U. S. ___, ___ (2015) (*per curiam*) (slip op., at 6). We have repeatedly stressed that courts must not "define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff*, *supra,* at ___–___ (slip op., at 12–13) (internal quotation marks and citation omitted). A rule is too general if the unlawfulness of the officer's conduct "does not follow immediately from the conclusion that [the rule] was firmly established." *Anderson*, *supra*, at 641. In the context of a warrantless arrest, the rule must obviously resolve "whether 'the circumstances with which [the particular officer] was confronted . . . constitute[d]

probable cause.'" *Mullenix*, *supra,* at ___ (slip op., at 6) (quoting *Anderson*, *supra*, at 640–641; some alterations in original).

We have stressed that the "specificity" of the rule is "especially important in the Fourth Amendment context." *Mullenix, supra*, at ___ (slip op., at 5). Probable cause "turn[s] on the assessment of probabilities in particular factual contexts" and cannot be "reduced to a neat set of legal rules." *Gates*, 462 U. S., at 232. It is "incapable of precise definition or quantification into percentages." *Pringle*, 540 U. S., at 371. Given its imprecise nature, officers will often find it difficult to know how the general standard of probable cause applies in "the precise situation encountered." *Ziglar* v. *Abbasi*, 582 U. S. ___, ___ (2017) (slip op., at 28). Thus, we have stressed the need to "identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." *White* v. *Pauly*, 580 U. S. ___, ___ (2017) (*per curiam*) (slip op., at 6); *e.g., Plumhoff*, *supra,* at ___. While there does not have to be "a case directly on point," existing precedent must place the lawfulness of the particular arrest "beyond debate." *al-Kidd*, *supra*, at 741. Of course, there can be the rare "obvious case," where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. *Brosseau* v. *Haugen*, 543 U. S. 194, 199 (2004) (*per curiam*). But "a body of relevant case law" is usually necessary to "'clearly establish' the answer" with respect to probable cause. *Ibid.*

Under these principles, we readily conclude that the officers here were entitled to qualified immunity. We start by defining "the circumstances with which [the officers] w[ere] confronted." *Anderson*, 483 U. S., at 640. The officers found a group of people in a house that the neighbors had identified as vacant, that appeared to be vacant, and that the partygoers were treating as vacant. The

group scattered, and some hid, at the sight of law enforcement. Their explanations for being at the house were full of holes. The source of their claimed invitation admitted that she had no right to be in the house, and the owner confirmed that fact.

Even assuming the officers lacked actual probable cause to arrest the partygoers, the officers are entitled to qualified immunity because they "reasonably but mistakenly conclude[d] that probable cause [wa]s present." *Id.*, at 641. Tellingly, neither the panel majority nor the partygoers have identified a single precedent—much less a controlling case or robust consensus of cases—finding a Fourth Amendment violation "under similar circumstances." *Pauly*, *supra*, at ___ (slip op., at 6). And it should go without saying that this is not an "obvious case" where "a body of relevant case law" is not needed. *Brosseau*, *supra*, at 199. The officers were thus entitled to qualified immunity.

B

The panel majority did not follow this straightforward analysis. It instead reasoned that, under clearly established District law, a suspect's "good purpose and bona fide belief of her right to enter" vitiates probable cause to arrest her for unlawful entry. 765 F. 3d, at 26–27. The panel majority then concluded—in a two-sentence paragraph without any explanation—that the officers must have known that "uncontroverted evidence of an invitation to enter the premises would vitiate probable cause for unlawful entry." *Id.*, at 27. By treating the invitation as "uncontroverted evidence," the panel majority assumed that the officers could not infer the partygoers' intent from other circumstances. And by treating the invitation as if it automatically vitiated probable cause, the panel majority assumed that the officers could not disbelieve the partygoers' story.

The rule applied by the panel majority was not clearly established because it was not "settled law." *Hunter*, 502 U. S., at 228. The panel majority relied on a single decision, *Smith* v. *United States*, 281 A. 2d 438 (D. C. 1971).[8] The defendant in *Smith*, who was found trespassing in a locked construction site near midnight, asserted that he was entitled to a jury instruction explaining that a bona fide belief of a right to enter is a complete defense to unlawful entry. *Id.,* at 439–440. The D. C. Court of Appeals affirmed the trial court's refusal to give the instruction because the defendant had not established a "reasonable basis" for his alleged bona fide belief. *Ibid.* *Smith* does not say anything about whether the officers here could infer from all the evidence that the partygoers knew that they were trespassing.

Nor would it have been clear to every reasonable officer that, in these circumstances, the partygoers' bona fide belief that they were invited to the house was "uncontroverted." The officers knew that the partygoers had entered the home against the will of the owner. And District case law suggested that officers can infer a suspect's guilty state of mind based solely on his conduct.[9] In *Tillman* v.

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[8] We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity. See, *e.g., Reichle* v. *Howards*, 566 U. S. 658, 665–666 (2012) (reserving the question whether court of appeals decisions can be "a dispositive source of clearly established law"). We express no view on that question here. Relatedly, our citation to and discussion of various lower court precedents should not be construed as agreeing or disagreeing with them, or endorsing a particular reading of them. See *City and County of San Francisco* v. *Sheehan*, 575 U. S. ___, ___, n. 4 (2015) (slip op., at 14, n. 4). Instead, we address only how a reasonable official "could have interpreted" them. *Reichle*, *supra*, at 667.

[9] The officers cited many of these authorities in their opening brief to the Court of Appeals. See Brief for Appellants in No. 12–7127 (CADC), pp. 28–29. Yet the panel majority failed to mention any of them in its analysis of qualified immunity.

Washington Metropolitan Area Transit Authority, 695 A. 2d 94 (D. C. 1997), for example, the D. C. Court of Appeals held that officers had probable cause to believe the plaintiff knowingly entered the paid area of a subway station without paying. *Id.,* at 96. The court rejected the argument that "the officers had no reason to believe that [the suspect] was 'knowingly' in the paid area" because the officers "reasonably could have inferred from [the suspect's] undisputed conduct that he had the intent required." *Ibid.* The court emphasized that officers can rely on "the ordinary and reasonable inference that people know what they are doing when they act." *Ibid.* The court also noted that "it would be an unusual case where the circumstances, while undoubtedly proving an unlawful act, nonetheless demonstrated so clearly that the suspect lacked the required intent that the police would not even have probable cause for an arrest." *Ibid.* And the fact that a case is unusual, we have held, is "an important indication . . . that [the officer's] conduct did not violate a 'clearly established' right." *Pauly*, 580 U. S., at ___ (slip op., at 7).

Moreover, existing precedent would have given the officers reason to doubt that they had to accept the party-goers' assertion of a bona fide belief. The D. C. Court of Appeals has held that officers are not required to take a suspect's innocent explanation at face value. See, *e.g.*, *Nichols* v. *Woodward & Lothrop, Inc.*, 322 A. 2d 283, 286 (1974) (holding that an officer was not "obliged to believe the explanation of a suspected shoplifter"). Similar precedent exists in the Federal Courts of Appeals, which have recognized that officers are free to disregard either all innocent explanations,[10] or at least innocent explanations

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[10] See, *e.g.*, *Borgman* v. *Kedley*, 646 F. 3d 518, 524 (CA8 2011) ("[An officer] need not rely on an explanation given by the suspect"); *Cox* v. *Hainey*, 391 F. 3d 25, 32, n. 2 (CA1 2004) ("A reasonable police officer is

that are inherently or circumstantially implausible.[11] These cases suggest that innocent explanations—even uncontradicted ones—do not have any automatic, probable-cause-vitiating effect.

For these reasons, a reasonable officer, looking at the entire legal landscape at the time of the arrests, could have interpreted the law as permitting the arrests here. There was no controlling case holding that a bona fide belief of a right to enter defeats probable cause, that officers cannot infer a suspect's guilty state of mind based on his conduct alone, or that officers must accept a suspect's innocent explanation at face value. Indeed, several precedents suggested the opposite. The officers were thus entitled to summary judgment based on qualified immunity.

* * *

The judgment of the D. C. Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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not required to credit a suspect's story"); *Marx* v. *Gumbinner*, 905 F. 2d 1503, 1507, n. 6 (CA11 1990) ("[Officers a]re not required to forego arresting [a suspect] based on initially discovered facts showing probable cause simply because [the suspect] offered a different explanation"); *Criss* v. *Kent*, 867 F. 2d 259, 263 (CA6 1988) ("A policeman . . . is under no obligation to give any credence to a suspect's story . . . ").

[11] See *e.g.*, *Ramirez* v. *Buena Park*, 560 F. 3d 1012, 1024 (CA9 2009) (holding that "innocent explanations for [a suspect's] odd behavior cannot eliminate the suspicious facts" and that "law enforcement officers do not have to rule out the possibility of innocent behavior" (internal quotation marks omitted)); *United States* v. *Edwards*, 632 F. 3d 633, 640 (CA10 2001) (holding that probable cause existed where the suspect "offered only implausible, inconsistent explanations of how he came into possession of the money"); *Bradway* v. *Gonzales*, 26 F. 3d 313, 321 (CA2 1994) (holding that "[a] reasonable officer who found the [stolen items], and who heard [the suspect's] implausible explanation for possessing them, would have believed that probable cause existed").

SUPREME COURT OF THE UNITED STATES

No. 15–1485

DISTRICT OF COLUMBIA, ET AL., PETITIONERS *v.* THEODORE WESBY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January 22, 2018]

JUSTICE SOTOMAYOR, concurring in part and concurring in the judgment.

I agree with the majority that the officers here are entitled to qualified immunity and, for that reason alone, I concur in the Court's judgment reversing the judgment of the Court of Appeals for the District of Columbia. But, I disagree with the majority's decision to reach the merits of the probable-cause question, which it does apparently only to ensure that, in addition to respondents' 42 U. S. C. §1983 claims, the Court's decision will resolve respondents' state-law claims of false arrest and negligent supervision. See *ante,* at 13, n. 7. It is possible that our qualified-immunity decision alone will resolve those claims. See Reply Brief 20, n. 7. In light of the lack of a dispute on an important legal question and the heavily factbound nature of the probable-cause determination here, I do not think that the Court should have reached that issue. The lower courts are well equipped to handle the remaining state-law claims in the first instance.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January 22, 2018]

JUSTICE GINSBURG, concurring in the judgment in part.

This case, well described in the opinion of the Court of Appeals,* leads me to question whether this Court, in assessing probable cause, should continue to ignore why police in fact acted. See *ante,* at 4, n. 2. No arrests of plaintiffs-respondents were made until Sergeant Suber so instructed. His instruction, when conveyed to the officers he superintended, was based on an error of law. Sergeant Suber believed that the absence of the premises owner's consent, an uncontested fact in this case, sufficed to justify arrest of the partygoers for unlawful entry. See App. 60 (Suber deposition) (officers had probable cause to arrest because "Peaches did not have the right, nor did the [partygoers] have the right[,] to be inside that location"). An essential element of unlawful entry in the District of Columbia is that the defendant "knew or should have known that his entry was unwanted." *Ortberg* v. *United States*, 81 A. 3d 303, 308 (D. C. 2013). But under Sergeant Suber's view of the law, what the arrestees knew or should have known was irrelevant. They could be arrested, as he comprehended the law, even if they believed their entry

*The Court's account of the undisputed facts goes beyond those recited by the Court of Appeals. Compare *ante,* at 1–3, with 765 F. 3d 13, 17–18 (CADC 2014).

was invited by a lawful occupant.

Ultimately, plaintiffs-respondents were not booked for unlawful entry. Instead, they were charged at the police station with disorderly conduct. Yet no police officers at the site testified to having observed any activities warranting a disorderly conduct charge. Quite the opposite. The officers at the scene of the arrest uniformly testified that they had neither seen nor heard anything that would justify such a charge, and Sergeant Suber specifically advised his superiors that the charge was unwarranted. See 765 F. 3d 13, 18 (CADC 2014); App. 56, 62–63, 79, 84, 90, 103.

The Court's jurisprudence, I am concerned, sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection. A number of commentators have criticized the path we charted in *Whren* v. *United States*, 517 U. S. 806 (1996), and follow-on opinions, holding that "an arresting officer's state of mind . . . is irrelevant to the existence of probable cause," *Devenpeck* v. *Alford*, 543 U. S. 146, 153 (2004). See, *e.g.,* 1 W. LaFave, Search and Seizure §1.4(f), p. 186 (5th ed. 2012) ("The apparent assumption of the Court in *Whren*, that no significant problem of police arbitrariness can exist as to actions taken with probable cause, blinks at reality."). I would leave open, for reexamination in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry. Given the current state of the Court's precedent, however, I agree that the disposition gained by plaintiffs-respondents was not warranted by "settled law." The defendants-petitioners are therefore sheltered by qualified immunity.

18-3775
Jones v. Treubig

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2019

(Argued: December 11, 2019 Decided: June 26, 2020)

No. 18-3775

MATTHEW JONES,

Plaintiff-Appellant,

— v. —

LIEUTENANT CHRISTOPHER TREUBIG,

Defendant-Appellee,

CITY OF NEW YORK, POLICE OFFICER ADAM MUNIZ, POLICE OFFICER MICHAEL VACCARO, UNDERCOVER OFFICER #349, POLICE OFFICER JOHN DOE #1, POLICE OFFICER JOHN DOE #2, POLICE OFFICER JANE DOE, OFFICER JOHN DOE #2,

Defendants.

Before: CABRANES, BIANCO, *Circuit Judges,* and REISS, *District Judge*.[*]

Plaintiff-appellant Matthew Jones appeals from a judgment of the United States District Court for the Southern District of New York (Koeltl, *J.*). The complaint, brought under 42 U.S.C. § 1983, alleged that defendant-appellee

[*] Judge Christina Reiss, of the United States District Court for the District of Vermont, sitting by designation.

Lieutenant Christopher Treubig and other police officers used excessive force during the course of an arrest. The jury found that Lt. Treubig used excessive force against Jones when he deployed two taser cycles against him, but found that the other officers were not liable. On November 21, 2018, the district court granted Lt. Treubig's motion for judgment as a matter of law on qualified immunity grounds. Because we conclude that at the time of the incident, the law was clearly established that a police officer cannot use significant force against an individual who is no longer resisting arrest and poses no safety threat, and the evidence allowed the jury to reasonably conclude that Jones was no longer resisting arrest and was not a safety threat to the officers or others at the time of Lt. Treubig's second use of the taser against him, we **REVERSE** the district court's judgment and **REMAND** for proceedings consistent with this opinion.

AMIR ALI, Roderick & Solange MacArthur Justice Center, Washington, DC (David Zelman, The Law Office of David Zelman, Brooklyn, NY, and Alexis Padilla, The Law Office of Alexis Padilla, Brooklyn, NY, *on the brief*) *for Plaintiff-Appellant*.

SUSAN PAULSON (Richard Dearing, Devin Slack, and Eric Lee, *on the brief*) *for* James E. Johnson, Corporation Counsel of the City of New York, New York, NY, *for Defendant-Appellee*.

JOSEPH F. BIANCO, *Circuit Judge*:

Matthew Jones ("Jones") appeals from the judgment entered on November 27, 2018 in the United States District Court for the Southern District of New York in favor of Lieutenant Christopher Treubig ("Lt. Treubig"). After a jury found that

Lt. Treubig used excessive force against Jones, the district court granted his motion for judgment as a matter of law on qualified immunity grounds.

The underlying claims stem from an arrest that occurred on April 7, 2015 in Jones's apartment building in East Harlem, New York, during which Jones was subjected to force by the police, including the use of a taser by Lt. Treubig. Jones filed the instant lawsuit under 42 U.S.C. § 1983, alleging that Lt. Treubig and other police officers (collectively, "defendants") deprived him of his rights under the Fourth and Fourteenth Amendments by using excessive force against him during the arrest. At the close of evidence at trial, defendants made a motion for judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 50(a), on qualified immunity grounds. The district court denied the motion without prejudice and submitted the case to the jury. The jury returned a verdict, holding Lt. Treubig liable for excessive force, awarding nominal and punitive damages against Lt. Treubig, and finding in favor of the remaining defendants. After Lt. Treubig renewed his Rule 50(b) motion for judgment as a matter of law, the district court granted the motion, finding Lt. Treubig was entitled to qualified immunity because, at the time of the arrest, there was no clearly established law that using a taser two times in rapid succession constituted excessive force under the particular

circumstances of this case. Jones appeals from the judgment. Because we conclude that it was clearly established at the time of the incident that an officer could not use significant force against an individual who was no longer resisting arrest and posing no threat to the safety of officers or other individuals, and the evidence allowed the jury to reasonably conclude that Jones was no longer resisting arrest and was not a safety threat at the time of Lt. Treubig's second use of the taser against him, we reverse the judgment of the district court and remand for proceedings consistent with this opinion.

BACKGROUND

I. Factual Background

The following facts are drawn from the record on appeal and are construed in the light most favorable to Jones unless otherwise noted. *See Kerman v. City of New York*, 374 F.3d 93, 114 (2d Cir. 2004). Jones lives in an apartment building in East Harlem, New York. On the evening of April 7, 2015, he was descending the stairs of his apartment building to meet his uncle to return a bottle of prescription medication and $70 in cash. As Jones met his uncle in the stairwell, New York Police Department ("NYPD") Officers Michael Vaccaro and Adam Muniz encountered them while patrolling the building. The officers instructed Jones and

his uncle to step from the stairwell into the building hallway, and both men complied. Jones then consented to be searched, and the officers found the bottle of medication that Jones was returning to his uncle. According to Jones, Officer Vaccaro said "jackpot" upon finding the pill bottle, and arrested Jones. J. App'x at 26. At that point, Jones's uncle ran, and the officers handcuffed Jones's right arm as Jones questioned what he did wrong. The officers asserted that Jones then "tried to turn around" and "take a swing at" Officer Vaccaro, and Officer Vaccaro conducted a "sweep kick" in response, bringing Jones to the ground. J. App'x at 49-50. As Jones was on the floor, Officer Vaccaro was on top of him, keeping Jones pinned to the ground face down. Jones's left arm remained uncuffed during the incident, despite the officers' attempts to handcuff it.

Other police officers quickly arrived at the scene in response to a radio call from Officer Vaccaro, including Undercover Officer #349 ("UC #349") and her partner. As Jones remained pinned down by Officer Vaccaro, another officer hit Jones with an expandable metal baton (referred to as an "asp") until Jones's left arm went numb. Officer Vaccaro testified that, as the officers attempted to secure Jones's left arm for cuffing, Jones stated, "I'm not going to jail." J. App'x at 51. One of the officers then pepper-sprayed Jones in his face. The officer who used

the asp and the officer who used the pepper spray were never identified. Although the officers testified that Jones was actively resisting arrest and refusing to produce his arms for handcuffing, Jones disputed those facts at trial, testifying that he was beaten with a baton and sprayed in the face with pepper spray after he had fallen to the ground and could not give them his left arm for handcuffing because it was under his body.

Lt. Treubig and his partner then arrived on the scene, and Lt. Treubig announced that he was going to use his taser. Jones claimed that he did not hear the warning, and managed to "force [himself] up off the ground" when he heard someone say, "hit him." J. App'x at 28, 42. At that point, Lt. Treubig used his taser against Jones in "cartridge mode."[1] J. App'x at 87, 89. When Lt. Treubig deployed the taser the first time, two metal prongs struck Jones in his lower back, and an

[1] Lt. Treubig explained "cartridge mode" as follows:

> When you want to deploy it you put the "on" switch on. Depress the trigger. The prongs come out of the cartridge and then into the subject and then there's an electrical current that goes through and from the two prongs and it completes a circuit so the electric charges [enter] into the subject's body.

J. App'x at 87. Lt. Treubig further testified that the taser model that he deployed would result in approximately 1,200 to 1,600 volts of electricity entering Jones's body when he pressed the trigger.

electric charge cycled through him for five seconds. Jones testified that, as a result, "[he] fell back on the ground with [his] arms sprayed out in the air."[2] J. App'x at 28.

According to Lt. Treubig, the initial tasing "didn't stabilize [Jones] enough to the point where the officers were able to grab his hands." J. App'x at 84. Lt. Treubig then "[r]eassess[ed] the situation" and depressed the trigger of the taser again, thereby re-cycling the taser and sending another electrical charge into Jones's body.[3] J. App'x at 54, 84. After the second tasing cycle, Jones was handcuffed and brought to the hospital by ambulance. Approximately three minutes passed between the time that Officer Vaccaro radioed for assistance and the time that Lt. Treubig called for an ambulance. Jones was later charged with a controlled substance offense and resisting arrest. He was released without bond, and all charges were ultimately dismissed.

II. Procedural History

[2] Although Officer Vaccaro asserted that Jones was still trying to pull his arm under his body to prevent handcuffing, he agreed that Jones was on the ground face down after the first tasing.

[3] Re-cycling the taser in cartridge mode did not entail deploying the taser a second time because the taser prongs were already in Jones's back; rather, Lt. Treubig only had to press the trigger of the taser again.

On October 16, 2016, Jones commenced this action in the United States District Court for the Southern District of New York, alleging that the police officers used excessive force in beating him, pepper-spraying him, and tasing him, in violation of 42 U.S.C. § 1983. The officers did not claim qualified immunity at either the motion to dismiss or summary judgment stage.[4]

A jury trial commenced on May 21, 2018, and the jury reached a verdict on May 24, 2018. At trial, Jones and the police officers vigorously disputed the degree of resistance that Jones offered during the incident; Jones claimed that he repeatedly inquired why he was under arrest, did nothing to resist, and was unable to provide his arm for cuffing because it was pinned under him on the ground, while the officers who testified claimed that he resisted arrest "aggressively and actively." J. App'x at 82. Defendants argued to the jury that they should not be held liable for two principal reasons. First, they contended that Jones could not identify which specific officer beat him with the asp and pepper-sprayed him, so no one could be held accountable for the force that preceded the tasing. Second, defendants urged the jury to credit their version of events in which

[4] "The absence of a motion for summary judgment is not a defect, however, as the absence of a motion for a directed verdict would be." *Krause v. Bennett*, 887 F.2d 362, 368 n.3 (2d Cir. 1989).

Jones was actively resisting arrest and such resistance justified their reasonable use of force.

a. Jury Trial and Verdict

Following deliberations, the jury found that only Lt. Treubig used excessive force in violation of Jones's constitutional rights.[5] It found that Officers Vaccaro, Muniz, and UC #349 did not use excessive force against Jones. The jury did not award compensatory damages, and initially awarded Jones solely punitive damages against Lt. Treubig in the amount of $30,000. After the district court instructed the jury to reconsider the award of nominal damages, the jury awarded Jones twenty-five cents.

At the close of evidence, Lt. Treubig had requested that the district court dismiss the excessive force claim on qualified immunity grounds, and he renewed that motion after the jury returned its verdict. Over Jones's objection, the district court asked the following questions to the jury in a special verdict form to assist the district court in resolving the qualified immunity issue, and the jury provided the following answers:

1. Did Lieutenant Treubig say he would use the taser before he used it?

[5] On appeal, Lt. Treubig does not contest the jury's finding that he used excessive force.

A: Yes.

2. Was a second taser cycle needed to gain control of the plaintiff's arms?
   A: No.
3. Did Lieutenant Treubig believe that a second taser cycle was needed to gain control of the plaintiff's arms?
   A: Yes.
4. Was the plaintiff resisting arrest when Lieutenant Treubig used the taser the first time?
   A: Yes.
5. Did Lieutenant Treubig believe that the plaintiff was resisting arrest when Lieutenant Treubig used the taser the first time?
   A: Yes.
6. Was the plaintiff resisting arrest when Lieutenant Treubig used the taser the second time?
   A: No.
7. Did Lieutenant Treubig believe that the plaintiff was resisting arrest when Lieutenant Treubig used the taser the second time?
   A: Yes.

J. App'x at 137-38, 185-88. In short, the jury found that Jones was resisting arrest at the time that Lt. Treubig first used the taser. The jury also found that Jones was not resisting when Lt. Treubig used the taser the second time and that the second taser cycle was not needed to gain control of Jones's arms for handcuffing, but that Lt. Treubig believed the opposite to be true as to both facts.

As to his renewed motion for judgment as a matter of law, Lt. Treubig argued that the jury's answers demonstrated that he was entitled to qualified immunity. Given his belief that Jones was resisting arrest throughout the entire

incident, Lt. Treubig asserted that the district court should find that his mistaken belief was reasonable under the circumstances even as it related to the second use of the taser. In response, Jones argued, in part, that subjective beliefs were not relevant to qualified immunity; rather, the reasonableness of any perceived facts related to whether Lt. Treubig used excessive force in the first place—a question already answered against Lt. Treubig by the jury. Moreover, even though the jury found that Jones was resisting before the first taser cycle, Jones asserted that it was not clear from the verdict form whether "resisting arrest" meant passive resistance, in line with Jones's theory, or active resistance, in line with defendants' theory. In particular, Jones highlighted a portion of Lt. Treubig's testimony when he was asked for details of Jones's "active" resistance, to which Lt. Treubig responded that Jones had refused to "comply with the officers' orders" and "to place his hands behind his back and he was refusing those orders." J. App'x at 82. Such passive resistance, according to Jones, did not justify the use of force applied. Jones further contended that, even if qualified immunity applied to the first use of the taser, it did not apply to the re-cycling of the taser when Jones (as the jury found in the special interrogatory) was no longer resisting.

b. The District Court's Ruling

On November 21, 2018, the district court granted Lt. Treubig's motion for judgment as a matter of law on qualified immunity grounds. The district court stated that the "operative question" was whether "the law was clearly established" at the time of the incident in April 2015 "such that his use of a taser two times in rapid succession while assisting in the arrest of the plaintiff constituted excessive force in violation of the Fourth and Fourteenth Amendments, so that any reasonable officer in the defendant's position would have understood that the officer was violating the plaintiff's rights." J. App'x at 159-60. As to the first taser cycle, the district court found that Lt. Treubig did not violate clearly established law because he had "no 'fair warning' that the first use of the taser violated the plaintiff's constitutional rights" given Jones's resistance. J. App'x at 163 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

Turning to the second tasing, the district court held that Lt. Treubig was entitled to qualified immunity because "there is nothing in the cases from the Supreme Court or the Court of Appeals for the Second Circuit that gave 'fair warning' that the second use of the taser was unconstitutional at the time of the plaintiff's arrest." J. App'x at 164. First, the district court found that the re-cycling of the taser was reasonable because the first tasing did not "subdue the plaintiff

sufficiently to finish placing handcuffs on him" and "[t]he plaintiff was rising from the floor at the time." J. App'x at 164. Moreover, although the jury found in a special interrogatory that Jones was not resisting arrest, the district court noted that the jury also found in those interrogatories that Lt. Treubig mistakenly believed otherwise. The district court further concluded that Lt. Treubig's mistaken view of resistance at the point when he re-cycled the taser was "reasonably believed," and did not preclude his entitlement to qualified immunity. J. App'x at 174. Thus, after examining the record and the case law, the district court concluded that "[t]here is no basis to find that Lt. Treubig was an unreasonable officer." J. App'x at 165.

After reaching this reasonableness conclusion, the district court explained that the punitive damages award did not prevent the court from granting judgment as a matter of law. Specifically, the district court stated that qualified immunity is a question of law for courts that pertains to the conduct of reasonable officers, while punitive damages pertain to the "subjective motivation of a defendant's actions." J. App'x at 177-78.

This appeal followed.

DISCUSSION

Jones appeals the district court's order granting judgment as a matter of law to Lt. Treubig on qualified immunity grounds. Jones argues on appeal that, in its decision, the district court incorrectly drew inferences in favor of Lt. Treubig, despite the standard of review that applies to motions for judgment as a matter of law. For example, Jones asserts that the district court erred when it stated that "[t]he parties agree that despite being tased, the plaintiff was not incapacitated." J. App'x at 153. Jones contends that the parties agreed that Jones attempted to push himself off the ground at the time of the *first* tasing, but "whether the initial deployment of the taser incapacitated Mr. Jones was a hotly disputed issue." Appellant Br. at 18 n.6. The district court further stated that, after the first tasing, "[t]he plaintiff maintained control of his arms and began pushing himself off the ground." J. App'x at 153. However, Jones highlights portions of the testimony in which he asserted that he was lying face down at the time of the second tasing. Jones argues accordingly that, when the jury's findings and the evidence supporting those findings are correctly construed in the light most favorable to him, Lt. Treubig is not entitled to qualified immunity because he violated clearly established law by (1) using his taser the first time even though Jones was only

engaged in "passive resistance," and by (2) re-cycling his taser when Jones had already been subdued on the ground and could not be reasonably perceived as continuing to resist arrest.

We review *de novo* a district court's decision on a Rule 50(a) motion for judgment as a matter of law, as well as its decision to grant qualified immunity, *Dancy v. McGinley*, 843 F.3d 93, 105 (2d Cir. 2016), and we apply the "same standard as the district court itself was required to apply," *Diesel v. Town of Lewisboro*, 232 F.3d 92, 103 (2d Cir. 2000). Accordingly, in the context of a Rule 50(a) motion, we must "consider the evidence in the light most favorable to the party against whom the motion was made and . . . give that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence." *Black v. Finantra Capital, Inc.*, 418 F.3d 203, 209 (2d Cir. 2005) (quotation marks omitted).

I. The Qualified Immunity Standard

Qualified immunity protects government officials from civil damages liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818

(1982)). Thus, pursuant to the two-step framework articulated by the Supreme Court in *Saucier v. Katz*, 533 U.S. 194 (2001), when an official raises qualified immunity as a defense, the court must consider whether: "(1) . . . the official violated a statutory or constitutional right, and (2) . . . the right was 'clearly established' at the time of the challenged conduct." *Ricciuti v. Gyzenis*, 834 F.3d 162, 167 (2d Cir. 2016) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)).

As it relates to the second step, the focus is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202.[6] The Supreme Court has explained that the "clearly established right," particularly in excessive force cases, "must be defined with specificity." *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019). Indeed, "[a]n officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'" *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 778-79 (2014)). Although the Supreme Court "do[es] not require a case directly on point, . . .

[6] We have noted that this question is not a separate inquiry, but rather part of the second step of the qualified immunity analysis. *See Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 433 n.11 (2d Cir. 2009); *see also Southerland v. City of New York*, 680 F.3d 127, 142 (2d Cir. 2012).

existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. The immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 743 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)); *see also Francis v. Fiacco*, 942 F.3d 126, 145-46 (2d Cir. 2019). In determining whether a right is clearly established at the time of the conduct in question, we can consider Supreme Court decisions and our own decisions, as well as "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

The Second Circuit has set forth the procedure by which district courts should resolve disputes on factual issues at trial that are relevant to the qualified immunity analysis. In particular, "[i]f there are unresolved factual issues which prevent an early disposition of the defense [of qualified immunity], the jury should decide these issues on special interrogatories." *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir. 1990); *see also Stephenson v. Doe*, 332 F.3d 68, 81 (2d Cir. 2003) ("We believe that use of special interrogatories in this case resolves the difficulty of requiring the jury to decide what the facts were that the officer faced or perceived and

requiring the court to make the ultimate legal determination of whether qualified immunity attaches on those facts." (quotation marks omitted)).

II. Clearly Established Law and the Use of Tasers

The first step of the qualified immunity test—namely, whether the defendant violated a statutory or constitutional right—was determined by the jury in this case, which found that Lt. Treubig used excessive force against Jones in violation of the Fourth and Fourteenth Amendments. As stated above, Lt. Treubig does not appeal this finding. Accordingly, our task here is to determine whether the right at issue was "clearly established"—that is, whether "it was objectively reasonable for [Lt. Treubig] to believe [his] acts did not violate those rights." *See Oliveira v. Mayer*, 23 F.3d 642, 648 (2d Cir. 1994).

Before the incident at issue here in April 2015, it was clearly established in this Circuit that it is a Fourth Amendment violation for a police officer to use significant force against an arrestee who is no longer resisting and poses no threat to the safety of officers or others. *Tracy v. Freshwater*, 623 F.3d 90, 98-99 (2d Cir. 2010). In *Tracy*, we confronted an arrest that occurred in 2000 and involved the use of pepper spray against an individual who asserted that he was already in handcuffs and "offering no further active resistance." *Id.* at 98. We concluded that

disputed issues of fact regarding the timing and circumstances of the officer's use of pepper spray precluded summary judgment on the excessive force claim. *See id*. ("[W]e conclude that a reasonable juror could find that the use of pepper spray deployed mere inches away from the face of a defendant already in handcuffs and offering no further active resistance constituted an unreasonable use of force."). With respect to step two of the qualified immunity analysis, even though that issue was not raised by the defendant officer, we "note[d] that it was well established at the time of the underlying altercation that the use of entirely gratuitous force is unreasonable and therefore excessive, and in light of this precedent, we presume[d] that no reasonable officer could have believed that he was entitled to use pepper spray gratuitously against a restrained and unresisting arrestee." *Id*. at 99 n.5 (citation omitted).

Notwithstanding that the focus of this appeal is the use of a taser, not pepper spray, we have warned that "[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." *Terebesi v. Torreso*, 764 F.3d 217, 237 (2d Cir. 2014) (quoting *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994)); *see also Hope*, 536 U.S. at 741 ("[O]fficials can still be on notice that their conduct violates [clearly] established

law even in novel factual circumstances."). To that end, we have observed that "[s]ome measure of abstraction and common sense is required with respect to police methods and weapons in light of rapid innovation in hardware and tactics." *Terebesi*, 764 F.3d at 237 n.20; *see also Muschette ex rel. A.M. v. Gionfriddo*, 910 F.3d 65, 69 n.1 (2d Cir. 2018) ("[N]ovel technology, without more, does not entitle an officer to qualified immunity." (quoting *Edrei v. Maguire*, 892 F.3d 525, 542 (2d Cir. 2018))).

It is beyond doubt that any reasonable police officer would know that the use of a taser, like pepper spray, constitutes significant force. *See, e.g.*, *Abbott v. Sangamon Cty.*, 705 F.3d 706, 726 (7th Cir. 2013) ("[T]he use of a taser, like the use of pepper spray or pain-compliance techniques . . . falls somewhere in the middle of the nonlethal-force spectrum."); *Bryan v. MacPherson*, 630 F.3d 805, 825 (9th Cir. 2010) ("The physiological effects, the high levels of pain, and foreseeable risk of physical injury lead us to conclude that the [Taser] X26 and similar devices are a greater intrusion than other non-lethal methods of force we have confronted" including, among other things, pepper spray.). This obvious fact was known to Lt. Treubig, who testified that he was trained to "deploy the taser on individuals that are actively resisting, active aggression" or for "perceived violent threats." J.

App'x at 87. It follows then that, after *Tracy*, any reasonable officer would understand that, because it violated clearly established law to use pepper spray against a non-resisting and non-threatening individual, the same would be true for the use of a taser.

In fact, *Tracy* itself made the broad scope of its holding abundantly clear. For example, in addressing the Fourth Amendment issue in *Tracy*, we did not only refer to pepper spray, but rather noted that the use of such a weapon constitutes a "significant degree of force" and emphasized that "a number of our sister circuits have made clear that [pepper spray] should not be used lightly or gratuitously against an arrestee who is complying with police commands or otherwise poses no immediate threat to the arresting officer." 623 F.3d at 98 (collecting cases). Thus, the language in *Tracy* left no question that, on the issue of significant force against an arrestee no longer posing an immediate threat, we joined our sister circuits in concluding that summary judgment on the excessive force claim relating to the use of pepper spray was unwarranted for the defendant officer. *See id.* at 99. Moreover, in briefly addressing the second step of the qualified immunity analysis, we restated our holding "that the use of entirely gratuitous force is unreasonable and therefore excessive," *id*. at 99 n.5, and then, in *dicta*, noted that

our holding "was well established at the time of the underlying altercation,"[7] i*d*. In other words, the explicit focus of *Tracy*'s Fourth Amendment analysis was on the officer's significant use of force in a gratuitous and excessive manner during an arrest, rather than the particular mode of that force. Therefore, following *Tracy*, it was clearly established that an officer's significant use of force against an arrestee who was no longer resisting and who posed no threat to the safety of officers or others—whether such force was by pepper spray, taser, or any other similar use of significant force—violates the Fourth Amendment. *See generally Garcia v. Dutchess Cty.*, 43 F. Supp. 3d 281, 297 (S.D.N.Y. 2014) (concluding, after analyzing *Tracy* and other case authority, that "[i]t was . . . clearly established law in the Second Circuit as of April 2000 that it was a Fourth Amendment violation to use 'significant' force against arrestees who no longer actively resisted arrest or posed a threat to officer safety, regardless of whether that significant force

[7] We emphasize that we do not rely on any *dicta* in *Tracy* for the purpose of determining clearly established law; rather, we cite to this portion of the opinion, which reiterated the Court's holding under the Fourth Amendment, only to highlight the pervasive and clear nature of that holding throughout the opinion.

emanated from a pepper spray canister or the trigger of a taser"), *aff'd in part, dismissed in part sub nom. Garcia v. Sistarenik*, 603 F. App'x 61 (2d Cir. 2015).

In light of *Tracy*, we have held, as it relates to tasers, that it was clearly established before April 2015 that "officers may not use a taser against a compliant or non-threatening suspect." *Muschette*, 910 F.3d at 69-70 (citing *Tracy*, 623 F.3d at 96-98); *see also Soto v. Gaudett*, 862 F.3d 148, 158 (2d Cir. 2017) ("Though the use of force may be reasonable against a suspect who is fleeing, it may be objectively unreasonable against that suspect when he has been stopped and no longer poses a risk of flight." (citing *Tracy*, 623 F.3d at 96-98)). Although Lt. Treubig argues that these decisions are inapposite because they were issued after the conduct at issue here in April 2015, we disagree. For this argument, Lt. Treubig relies on the Supreme Court's decision in *Kisela*, which emphasized that cases published after the incident should not be considered in determining clearly established law "because a reasonable officer is not required to foresee judicial decisions that do not yet exist." *Kisela*, 138 S. Ct. at 1154. However, the Supreme Court's concern specifically related to opinions published after the officer's conduct at issue that establish the right *in the first instance*. *See id*. Consistent with the holding in *Kisela*, we have considered cases published after the conduct at issue that do not establish

a right in the first instance, but rather address whether a right was clearly established by case authority *before* the time of such conduct. *See Cobb v. Pozzi*, 363 F.3d 89, 111 (2d Cir. 2004) (concluding that the law "was clearly established in 1999" by relying on a 2002 decision that reaffirmed "a clearly established constitutional right" based on "conduct that had taken place *in 1998*" (quotation marks omitted)); *see also Terebesi*, 764 F.3d at 237 (relying in part on a 2010 decision that addressed the clearly established law as of 2005, although the conduct at bar occurred in 2008). In other words, we can rely on decisions that post-date Jones's arrest if they address whether the law concerning the use of a taser against a non-resisting individual was already established by *Tracy* in connection with police conduct that occurred prior to April 2015. Therefore, because both *Muschette* and *Soto* concluded that the right of a non-resisting, non-threatening arrestee to be free from an officer's use of a taser was clearly established for conduct in 2013 (in *Muschette*) and in 2008 (in *Soto*)—which are both prior to Lt. Treubig's conduct in 2015—those decisions have precedential force on this issue. In any event, we

independently reach the same conclusion regarding clearly established law under *Tracy* for the reasons already discussed.

III. Clearly Established Law in the Particular Context of this Case

Our holding regarding *Tracy* as it applies to tasers, however, does not end our analysis. The Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *al-Kidd*, 563 U.S. at 742. Instead, "[t]he dispositive question is whether the violative nature of *particular* conduct is clearly established," and, thus, "[t]his inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quotations marks omitted). Accordingly, we now turn to whether the right articulated in *Tracy* was clearly established in the more particular context in which the challenged conduct regarding the taser occurred in this case.

With respect to the second tasing cycle, the district court concluded that "there is nothing in the cases from the Supreme Court or the Court of Appeals for the Second Circuit that gave 'fair warning' that the second use of the taser was unconstitutional at the time of the plaintiff's arrest." J. App'x at 164. As discussed below, in reaching this conclusion, the district court erroneously relied upon a

factual finding—namely, that Jones was continuing to resist after the first tasing—that was rejected by the jury in a special interrogatory and is inconsistent with the trial evidence as construed most favorably to Jones, which is the applicable standard on a Rule 50 motion. Moreover, the district court relied upon the fact that "[t]he jury found that Lt. Treubig believed—although incorrectly—that the plaintiff was resisting arrest and that the second use of the taser was needed to gain control of the plaintiff's arms." *Id*. A mistake of fact, however, in the absence of an additional jury finding that the mistake was reasonable (when there are disputed material facts on that question) is insufficient to support an officer's claim that he is entitled to qualified immunity, and no such finding of reasonableness was made by the jury here. Similarly, for the reasons provided below, the fact that the re-cycling of the taser followed in rapid succession after the first tasing and that Jones was unhandcuffed at the time of the re-cycled taser does not undermine our qualified immunity analysis in this case. For the reasons explained below, we hold that, after considering the jury's factual findings in the special interrogatories and construing the evidence regarding the remaining factual disputes most

favorably to Jones, Lt. Treubig's second use of the taser under the particular circumstances he confronted violated clearly established law.[8]

a. The Level of Resistance Before the Second Tasing

A critical fact for purposes of qualified immunity in this case is whether Jones was resisting arrest in any way at the time of the second tasing, because there was no clearly established law that would fairly warn police officers that a taser could not be used against a resisting arrestee. Indeed, to the contrary, "[o]ur precedents suggest that it is *not* excessive force to deploy tasers, after a warning, against arrestees who are dangerous or resisting arrest." *Penree by Penree v. City of Utica*, 694 F. App'x 30, 33 (2d Cir. 2017) (addressing a 2012 incident); *see also MacLeod v. Town of Brattleboro*, 548 F. App'x 6, 8 (2d Cir. 2013) (concluding that the use of a taser "to subdue an actively non-compliant suspect . . . who posed a real and imminent threat to the safety of the officers and any bystanders" was objectively reasonable where the officers gave "repeated, clear commands that [the plaintiff] return to the ground"); *Crowell v. Kirkpatrick*, 400 F. App'x 592, 595 (2d

[8] Jones also argues that the district court erred in holding that Lt. Treubig was entitled to qualified immunity with respect to the first tasing. Given our conclusion that there is no qualified immunity for the second tasing and that the jury's verdict on the excessive force claim should be reinstated, we need not address this alternative argument.

Cir. 2010) (concluding that the use of taser was reasonable where protestors "were actively resisting their arrest" when they chained themselves to a barrel drum and the "apparently imminent arrival of some number of their compatriots added a degree of urgency" to the situation). On the other hand, if Jones was no longer resisting arrest and posed no threat to the safety of police officers or others after the first tasing, then qualified immunity would not protect Lt. Treubig when he re-cycled the taser in violation of the clearly established law under *Tracy*.

Thus, a factual lynchpin to the district court's qualified immunity analysis was its post-trial conclusion, with respect to the second tasing cycle, that "[t]he plaintiff was rising from the floor at the time." J. App'x at 164. In connection with this factual finding, the district court suggested that Jones conceded that he still exhibited a certain level of ongoing resistance after the first tasing:

> The parties agree that despite being tased, the plaintiff was not incapacitated. The taser did not stabilize the plaintiff enough for the officers to be able to grab his hands. The plaintiff continued to try to pull his right arm away from the officers and under his body after the first taser cycle. The plaintiff maintained control of his arms and began pushing himself off the ground. The defendant reassessed the situation and believed that the plaintiff was still resisting arrest. The defendant then recycled the taser.

J. App'x at 153 (citations omitted).

There was no such concession, however, to these facts by Jones. It is correct that the parties agreed that Jones was pushing himself off the ground at the time of the *first* tasing. *See* J. App'x at 148 (defense counsel conceding that "[a]t least with respect to the initial taser cycle, the record is clear that, from the stipulated facts, . . . the plaintiff was pushing up off of the ground"). In contrast to the first tasing, Jones asserts on appeal, and argued to the jury below, that he was already "subdued face down, arms spread" at the time of the *second* tasing. Appellant Br. at 22; *see also* J. App'x at 107 (plaintiff's counsel arguing to the jury that Jones was "lying face down on the ground unarmed posing no threat" at the time of the second tasing). Thus, there was no agreement by the parties regarding the circumstances immediately prior to the second tasing; rather, Jones's level of resistance at the time of the second tasing, if any, was a disputed key issue at trial.

Even in the absence of an agreement on this factual issue, Lt. Treubig suggests that the uncontroverted evidence still demonstrated that Jones continued to resist arrest at the time of the second tasing. Lt. Treubig supports his position by pointing to Jones's own trial testimony in which he stated that, after the first tasing, though he felt the muscles in his legs and his back "lock[] up," the muscles in his arms did not. J. App'x at 43. Accepting Lt. Treubig's argument, the district

court failed to view that fact, and the other evidence surrounding the circumstances of the second tasing, in the light most favorable to Jones. As an initial matter, there was testimony that a single taser use has the capacity to completely incapacitate an individual. *See, e.g.*, J. App'x at 53-54 (explaining that the electricity from a single taser cycle can contract the victim's muscles or "lock up a person" to make them "go stiff"); J. App'x at 84 (Lt. Treubig affirming that a single tasing can "fully incapacitate a grown man"). More importantly, consistent with that capacity, Jones specifically testified that, after the first tasing, he "fell out" and dropped "on the ground with [his] arms sprayed out." J. App'x at 28. Testimony from Officer Vaccaro also established that Jones was face down at the time of the second tasing (although Officer Vaccaro disputed other aspects of Jones's account).

Although Lt. Treubig places great weight on the fact that Jones also testified that his arm muscles did not lock up when he was on the ground after the first tasing, that alone cannot possibly establish that he was resisting arrest in any way at the time of the second tasing. Indeed, Jones counters that "the jury plainly could have inferred that a man lying face down with his back and legs locked up is incapacitated irrespective of the sensation he recalled in his arms." Reply Br. at 8.

We agree with Jones's assertion regarding this permissible inference by the jury from the record. In other words, the question is not how Jones's arms felt, but rather what, if anything, his arms were doing as he lay on the ground after the first tasing, and what Lt. Treubig reasonably observed in that regard. On that issue, Jones testified that his arms were "sprayed out" as he dropped to the ground, J. App'x at 28, and thus doing nothing, which would not have provided a reasonable officer with any basis to conclude from the outward appearance of Jones's arms that he was resisting arrest or posing any ongoing threat to the officers after the initial tasing.[9]

Not only was there evidence in the record to support that Jones was no longer resisting arrest at the time of second tasing, but the jury made that specific factual finding in a special interrogatory. Because that jury finding was rationally supported by the above-referenced evidence in the record (if credited), it must be accepted for purposes of the qualified immunity analysis utilizing, to the extent any other factual issues remain, the underlying evidence in the light most favorable to Jones. *See Kerman*, 374 F.3d at 114. Upon doing so here, our qualified

[9] In addition, the testimony at trial established that there were six officers on the scene when Lt. Treubig used his taser both the first and second time, thus allowing for the reasonable inference that even if the charge did not fully incapacitate Jones's arms, there was a sufficient number of officers present to effect the arrest.

immunity analysis must assume that, even though Jones may have been resisting arrest during the initial parts of the police encounter up to the time of the first tasing, when Lt. Treubig re-cycled his taser and sent another electric shock through Jones, he was no longer trying to get off the ground, no longer actively resisting arrest, and no longer posing a threat to the police officers. Instead, construing the evidence most favorably to Jones, at that point, he was face down on the ground with his arms spread. On those facts, no reasonable officer could believe that the use of the taser a second time against Jones was lawful.

b. Lt. Treubig's Belief Regarding the Level of Resistance Before the Second Tasing

In reaching this conclusion, we have also carefully considered the second ground for qualified immunity articulated by the district court—namely, even though the jury found that Jones was not resisting arrest at the time of the second tasing, Lt. Treubig is still entitled to qualified immunity because the jury also found Lt. Treubig mistakenly believed that Jones was continuing to resist. The district court explained that Lt. Treubig's mistaken belief in that regard "does not preclude a determination that Lt. Treubig is entitled to qualified immunity." J. App'x at 164. However, in the absence of more detailed findings by the jury, we conclude that this mistaken belief does not shield Lt. Treubig from liability because

the evidence in the record, when construed most favorably to Jones, would have allowed the jury to rationally find that Lt. Treubig's subjective belief regarding ongoing resistance at the time of the second tasing was unreasonable.

The Supreme Court has made clear that "[t]he protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson*, 555 U.S. at 231 (quotation marks omitted). However, qualified immunity only protects "reasonable mistakes." *Saucier*, 533 U.S. at 206; *Moore v. Vega*, 371 F.3d 110, 117 (2d Cir. 2004) ("[D]efendants believed they were entering the residence of an absconded parolee. If such belief was reasonable, qualified immunity protects them from liability, even if that belief was mistaken."); *accord Singh v. Cordle*, 936 F.3d 1022, 1033 (10th Cir. 2019) ("A mistake of fact must, of course, be a reasonable one."); *Henry v. Purnell*, 652 F.3d 524, 532 (4th Cir. 2011) ("[I]t is not the honesty of [the police officer's] intentions that determines the constitutionality of his conduct; rather it is the objective reasonableness of his actions. It is certainly true that mistaken, but reasonable, decisions do not transgress constitutional bounds. All actions, however, mistaken or otherwise, are subject to an objective test." (citation omitted)).

Here, after finding in a special interrogatory that Jones was not resisting arrest at the time of the second tasing, the jury also found that Lt. Treubig believed that Jones was resisting arrest. J. App'x at 187. The jury was not asked, however, whether that mistaken belief was reasonable. Instead, the district court, in its post-trial Rule 50 decision, independently concluded that Lt. Treubig "reasonably believed that the plaintiff was still actively resisting arrest when he cycled the taser the second time," J. App'x at 174, without any additional findings by the jury in the special interrogatories to support the reasonableness determination. That was error.

As a threshold matter, we have explained that the reasonableness of a mistake of fact regarding the use of force does not pertain to the ultimate qualified immunity determination, but rather whether there was a constitutional violation in the first instance—which is "step one" of the *Saucier* inquiry. *See Stephenson*, 332 F.3d at 78 ("[A]s the Supreme Court clarified in *Saucier*, claims that an officer made a reasonable mistake of fact that justified the use of force go to the question of whether the plaintiff's constitutional rights were violated, not the question of whether the officer was entitled to qualified immunity."); *see also Saucier*, 533 U.S. at 205 ("If an officer reasonably, but mistakenly, believed that a suspect was likely

to fight back, for instance, the officer would be justified in using more force than in fact was needed."). This question is in contrast to an officer's mistaken belief about the legality of the conduct, which is analyzed at "step two" in the *Saucier* framework. *See Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756, 762 (2d Cir. 2003) ("Whether the officer is entitled to qualified immunity is resolved by the latter part of the *Saucier* analysis, which looks at an 'officer's mistake as to what the law requires[.]'" (quoting *Saucier*, 533 U.S. at 205)); *see also Stephenson*, 332 F.3d at 80 n.15 ("Qualified immunity is a difficult concept; it looks to the reasonableness of an officer's belief that he acted lawfully after the officer is found to have been unreasonable in his conduct.").

And, importantly, disputed material issues regarding the reasonableness of an officer's perception of the facts (whether mistaken or not) is the province of the jury, while the reasonableness of an officer's view of the law is decided by the district court. *See Green v. City of New York*, 465 F.3d 65, 83 (2d Cir. 2006) ("If there is a material question of fact as to the relevant surrounding circumstances, the question of objective reasonableness is for the jury. If there is no material question of fact, the court decides the qualified immunity issue as a matter of law." (citations omitted)); *see also Cugini v. City of New York*, 941 F.3d 604, 614 n.6 (2d Cir.

2019) (concluding that, with respect to an excessive force claim regarding handcuffing, "[a] reasonable jury could also find that it was unreasonable for [the officer] to assume that the plaintiff was all right based on her silence following the handcuffing").

For example, in *Wilkins v. City of Oakland*, 350 F.3d 949, 953, 956 (9th Cir. 2003), the Ninth Circuit held that summary judgment on qualified immunity grounds was unwarranted, where officers mistakenly shot a fellow plain-clothes officer, because the jury needed to decide the reasonableness of that mistake. The court explained:

> The objective reasonableness of the officers' conduct in this case turns on their mistake of fact with regard to [the plain-clothes officer's] status and purpose at the scene that night. In turn, whether this mistake of fact was reasonable depends on which version of the facts is accepted by a jury. . . . The only question for resolution is whether their belief in the necessity of their actions was objectively reasonable. That is, was it reasonable for them not to understand that the person they were shooting was another police officer? Because the answer to that question depends on disputed issues of material fact, it is not a legal inquiry, but rather a question of fact best resolved by a jury.

Id. at 955; *see also Curley v. Klem*, 499 F.3d 199, 214 (3d Cir. 2007) ("At the risk of understating the challenges inherent in a qualified immunity analysis, we think the most helpful approach is to consider the constitutional question as being whether the officer made a reasonable mistake of fact, while the qualified

immunity question is whether the officer was reasonably mistaken about the state of the law.").

Therefore, in determining whether Lt. Treubig used excessive force with respect to tasering Jones, it was the jury's role to consider the reasonableness of Lt. Treubig's stated belief regarding Jones's continued resistance at the time of the second tasing. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene . . . at the moment" the force is used. (citations omitted)). In the instant case, consistent with that legal framework, the district court specifically instructed the jury on the need to consider the evidence at the arrest scene from the perspective of a reasonable officer. *See* J. App'x at 116 (instructing the jury that, "[b]ecause police officers are often forced to make split-second judgments about the amount of force that is necessary in a given situation, the reasonableness of a particular use of force must be judged from the perception of a reasonable officer on the scene rather than with the 20/20 vision of hindsight"). Given that the jury reached its verdict under the correct instructions, the district court cannot "substitute its view for adequately supported findings that were

implicit in the jury's verdict." *Zellner v. Summerlin*, 494 F.3d 344, 371 (2d Cir. 2007) (quoting *LeBlanc–Sternberg v. Fletcher*, 67 F.3d 412, 430 (2d Cir. 1995)).

Although it is the jury's province to resolve the reasonableness of an officer's perception of the facts that confronted him, we recognize that those same facts, or some portion thereof, can also sometimes be critical in deciding the qualified immunity analysis at step two of *Saucier*. Put another way, the reasonableness of a particular mistake of fact may dictate whether any reasonable officer would have understood that his conduct was unlawful. In situations where the court may not be able to discern from the general verdict how the jury may have resolved a particular disputed issue that is a dispositive part of the step-two *Saucier* analysis, it is necessary (as the district court did here) to ask additional questions to the jury through special interrogatories. *See Stephenson*, 332 F.3d at 81.

Jones argues that, in finding in his favor on the excessive force claim, the jury necessarily implied that it found unreasonable any mistaken belief by Lt. Treubig about the facts (including additional resistance after the first taser) that allegedly prompted him to re-cycle the taser. Jones further asserts that any conceivable doubt about the jury's view on the reasonableness of Lt. Treubig's beliefs was eliminated by its award of punitive damages which required the jury

to conclude, at the very least, Lt. Treubig acted with "reckless disregard" for Jones's constitutional rights. J. App'x at 117; *see also id.* at 183. In the proceedings below, Jones thus objected to the district court even posing questions on this issue to the jury in the form of special interrogatories following the jury's general verdict in Jones's favor on the excessive force claim.[10] *See* J. App'x at 131 (plaintiff's counsel arguing, with respect to submitting special interrogatories to the jury, that "[i]t seems to me that those questions have already been answered through the jury's verdict, your Honor. All of those questions were part of this trial. They were all put to the jury. . . . So to the extent that I can object to those questions, I do. They're unnecessary.").

Jones's argument goes too far. In particular, Jones overlooks the fact that the jury was considering multiple uses of force by Lt. Treubig as part of one excessive force claim (i.e., an initial tasing and a re-cycling of the taser), and the

[10] Although the verdict form returned here by the jury on liability and damages was labeled as a "Special Verdict Form," J. App'x at 181, it was in reality a general verdict because it did not ask the jury for specific findings on any particular issue of fact on the excessive force claim, but rather simply asked whether the plaintiff proved the claim as to each defendant, *see* Fed. R. Civ. P. 49 (distinguishing between special and general verdicts); *see also Babcock v. Gen. Motors Corp.*, 299 F.3d 60, 63 (1st Cir. 2002) (noting that, "[a]lthough the Verdict Form is entitled 'Special Verdict Form,' it seems clear that it was not a true 'special verdict,' as described in Rule 49(a) of the Federal Rules of Civil Procedure" because it contained no questions regarding specific findings of fact).

jury's general verdict against Lt. Treubig did not necessarily find that both acts violated the Fourth Amendment. Similarly, even assuming the general verdict against Lt. Treubig related to the second tasing, we would still not necessarily know from the general verdict how the jury resolved particular disputed issues, including the reasonableness of Lt. Treubig's belief that Jones was resisting arrest after the first tasing. For example, based upon the general verdict alone, the jury could have concluded that Lt. Treubig reasonably believed Jones was continuing to resist arrest, but that the re-cycling of the taser was an unreasonable amount of additional force given the level of resistance.

Here, for purposes of determining whether Lt. Treubig should have known that he violated clearly established law under *Tracy* as it relates to the second tasing, the critical issues at step two of *Saucier* are whether: (1) Jones was still resisting arrest at that time, or (2) even if Jones was no longer resisting arrest at that point, Lt. Treubig reasonably believed he was still resisting. Thus, in order to ensure that the jury decided both of those issues against Lt. Treubig within its general verdict, it was entirely appropriate to utilize special interrogatories to address those precise questions. As to the first issue, the jury's special interrogatory made clear that the jury concluded that Jones was not resisting arrest

at the time of the second tasing. However, as to the second issue regarding any reasonable mistaken belief as to that fact, the question was incorrectly phrased to the jury. The jury was asked, "Did Lieutenant Treubig believe that the plaintiff was resisting arrest when Lieutenant Treubig used the taser the second time?" J. App'x at 138, 187. Although the jury answered affirmatively to that question, such an answer is insufficient to shield Lt. Treubig with qualified immunity because his subjective mistake of fact, like a mistake of law, must be reasonable. *See generally Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (stating that, for purposes of qualified immunity, the officer's "subjective beliefs about the [circumstances] are irrelevant"); *see also Outlaw v. City of Hartford*, 884 F.3d 351, 369 (2d Cir. 2018) ("[T]he federal standard for qualified immunity is what a reasonable officer in [the officer's] position would have believed, not what [the officer] himself believed.").

Thus, the jury should have been asked, "Did Lieutenant Treubig *reasonably* believe that the plaintiff was resisting arrest when Lieutenant Treubig used the taser the second time?" In fact, when considering how to frame these questions following the jury's general verdict, defense counsel framed the proposed question to include the word "reasonable." *See* J. App'x at 127 (defense counsel proposing the question: "[D]id Lieutenant Treubig reasonably believe, even if

mistakenly, the plaintiff was resisting arrest when the taser was used?"). In addition, during discussions with the district court regarding the phrasing of the questions to submit to the jury, defense counsel stressed the importance of the jury being asked not only about Lt. Treubig's subjective belief, but also determining the reasonableness of that belief. *See* J. App'x at 131 (defense counsel noting: "And whether [Lt. Treubig] had a reasonable, even if mistaken, belief is a question of fact. So the jury could say you were mistaken. He is pushing himself up but you know perhaps that was some kind of active [resistance]—perhaps you could say that. . . . He could reasonably, even if mistakenly, interpret that as more resistance and so it is a fact that needs to be determined."); *see also* J. App'x at 134 (defense counsel noting, after the district court suggested it would decide the reasonableness of the mistake of fact rather than the jury, that "we do maintain that the language needs to be reasonable even if mistaken"). Nevertheless, defense counsel ultimately agreed with the district court that the word "reasonable" should be removed from the question to the jury.

Because qualified immunity is an affirmative defense, "[t]o the extent that a particular finding of fact is essential to a determination by the court that the defendant is entitled to qualified immunity, it is the responsibility of the defendant

to request that the jury be asked the pertinent question." *Zellner*, 494 F.3d at 368. Having agreed to submit the non-pertinent question to the jury, Lt. Treubig cannot then have the district court, in addressing a Rule 50 motion, usurp the jury's role by substituting its own finding on the pertinent question. *See Outlaw*, 884 F.3d at 371 ("[T]he court accordingly made findings as to facts about which the jury was deliberately not asked. We cannot allow [the officer] now to put words in the jury's mouth."); *Zellner*, 494 F.3d at 368 ("If the defendant does not make such a request, he is not entitled to have the court, in lieu of the jury, make the needed factual finding.").

In other words, in light of Jones's testimony that he offered no resistance after the first tasing because he was on the ground with his arms spread, the district court could only find that Lt. Treubig's mistaken belief regarding continued resistance was reasonable by construing the conflicting evidence in the light most favorable to Lt. Treubig rather than Jones, which the district court was not permitted to do. *See Zellner*, 494 F.3d at 371 (emphasizing that the district court is not "permitted to make findings on factual questions not submitted to the jury where those findings take the evidence in the light most favorable to the moving party, rather than the opposing party"); *Stephenson*, 332 F.3d at 78 (refusing to

"reweigh the evidence in [the officer's] favor" where the officer argued that the jury may have concluded that "[the plaintiff] did not objectively pose a threat of harm to [the officer] but that [the officer's] subjective belief of threatened harm was a mistake of fact that, in view of the evidence, the jury credited as reasonable"); *see also Curley*, 499 F.3d at 213 (noting that, on a Rule 50(a) motion, "any ambiguity in the interrogatories and the answers to them must, at this stage, be interpreted against [the moving party]").[11]

Accordingly, given the absence of any finding by the jury as to the reasonableness of the mistaken factual belief by Lt. Treubig regarding resistance

[11] We emphasize that, in connection with a summary judgment or Rule 50 motion, a district court is not required to have the jury make this reasonableness determination if no rational jury could find the officer's belief regarding the facts at issue to be unreasonable even when the evidence is construed in the light most favorable to the plaintiff, and that such facts—reasonably perceived by the defendant—establish the reasonableness of the use of force under the Fourth Amendment. *See Tracy*, 623 F.3d at 97 (concluding that the officer's use of flashlight before the arrest was reasonable as a matter of law based upon the uncontroverted facts relating to the officer's perspective, and warranted summary judgment in his favor on that particular claim); *see also Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1261 (10th Cir. 2008) (affirming grant of summary judgment where the undisputed facts demonstrated that, "even if [the officer's] assessment of the threat was mistaken, it was not objectively unreasonable"). Such is not the case here because, as discussed *supra*, the jury could have rationally found Lt. Treubig's belief regarding ongoing resistance to be unreasonable if, crediting Jones's version of events, it determined that Jones was face down on the ground with his arms spread out at the time of the second tasing.

by Jones after the first tasing, and given that a jury could find such a mistaken belief unreasonable when the facts are construed most favorably to Jones, any such mistake cannot be a proper basis for affording Lt. Treubig qualified immunity on the Rule 50 motion.[12]

c. Two Taser Cycles in Rapid Succession

Lt. Treubig also contends, and the district court agreed, that the two taser cycles occurred within rapid succession of each other, and as a result, it was reasonable for Lt. Treubig to act in the heat of the moment as he did with respect to re-cycling the taser against Jones. However, we conclude that, in light of the undisputed facts in this record, the rapid succession of the two taser cycles does not change the qualified immunity analysis.

We certainly recognize that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-97. As the Supreme Court has emphasized, it

[12] We note that the jury's separate finding in the special interrogatories that Lt. Treubig also mistakenly believed that a second taser cycle was needed to gain control of Jones's arm suffers from the same legal defect for purposes of a qualified immunity defense. That is, the lack of a finding of the reasonableness of that belief by the jury, and the evidence presented at trial on that issue, would have allowed the jury to find that subjective belief was unreasonable. Thus, that mistaken fact similarly cannot be a basis for qualified immunity here.

is extremely important to evaluate the record "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396; *see also id*. ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." (quotation marks and citation omitted)). It is equally important that courts not isolate a particular act of force by an officer if it was intertwined with other acts of force in rapid succession where there was no reasonable opportunity to re-assess. However, where such an opportunity to re-assess reasonably exists, officers must consider whether additional force is necessary under the circumstances confronting the officer—a point made clear under the circumstances in *Tracy*. *See Tracy*, 623 F.3d at 97-99 (granting summary judgment on, *inter alia*, the use of force while the fugitive plaintiff was still resisting arrest, but denying summary judgment regarding the use of pepper spray because it was disputed whether the plaintiff was actively resisting arrest at that point).

This is not a case where a police officer did not have a reasonable opportunity to re-assess the circumstances before utilizing additional force. Notwithstanding the fact that Lt. Treubig's two uses of the taser occurred in rapid succession, there was clear evidence that he had enough time to re-assess the

situation between the first and second use of the taser. Specifically, Lt. Treubig testified that, after the first use of the taser for five seconds, he "[r]eassess[ed] the situation" and then re-cycled the taser. J. App'x at 84; *see also id*. ("You had to depress the trigger for five cycles and then re-assess and then press the trigger again for five seconds.").

It was clearly established at the time of the incident here that, under the Fourth Amendment, the reasonableness of the amount of force used is assessed "at the moment" the force is used. *Graham*, 490 U.S. at 396; *see also Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) ("The reasonableness inquiry depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force."). Thus, any reasonable officer would have understood in April 2015 that, if he or she has an opportunity to re-assess a situation after firing a taser, any additional force (such as re-cycling the taser) must be justified under the Fourth Amendment based upon the totality of the circumstances that existed at the time of the re-assessment.

This fundamental Fourth Amendment rule of law was not only clear at the time of Lt. Treubig's conduct from Supreme Court cases and this Court's decisions, but also was reinforced by a compelling consensus of cases in our sister circuits,

including cases where courts held that additional tasing(s) in a rapidly evolving situation could violate the Fourth Amendment if the prior tasing(s) of the suspect would have been sufficient in light of the circumstances.[13] *See Meyers v. Baltimore Cty.*, 713 F.3d 723, 733 (4th Cir. 2013) ("Our conclusion that [the officer's] first three uses of the taser were objectively reasonable does not resolve our inquiry into the reasonableness of the seven additional taser shocks that he administered, because force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated." (quotation marks omitted)); *Abbott*, 705 F.3d at 729, 731, 733 (holding, in a "rapidly unfolding situation," that qualified immunity did not protect an officer who squeezed the taser trigger a second time after the tased suspect, prone on the ground, did not

[13] Although Lt. Treubig objects to reliance on cases outside this Circuit for purposes of the qualified immunity, we have previously held that "[e]ven if this or other circuit courts have not explicitly held a law or course of conduct to be unconstitutional, the unconstitutionality of that law or course of conduct will nonetheless be treated as clearly established if decisions by this or other courts 'clearly foreshadow a particular ruling on the issue.'" *Scott v. Fischer*, 616 F.3d 100, 105 (2d Cir. 2010) (quoting *Varrone v. Bilotti*, 123 F.3d 75, 79 (2d Cir. 1997)); *see also Terebesi*, 764 F.3d at 231 n.12 ("Though not directly binding on this Court, the decisions of other circuits may reflect that the contours of the right in question are clearly established."). Therefore, we are permitted to consider this consensus of authority outside the Circuit although, as noted above, we conclude that the right was clearly established by Supreme Court and Second Circuit precedent independent of this consensus of other circuits.

follow an order to roll over, and emphasizing that "the fact that an initial use of force may have been justified does not mean that all subsequent uses of that force were similarly justified"); *Mattos v. Agarano*, 661 F.3d 433, 445 (9th Cir. 2011) (finding that reasonable factfinder could conclude force was excessive because "[t]hree tasings in such rapid succession provided no time for [the plaintiff] to recover from the extreme pain she experienced, gather herself, and reconsider her refusal to comply"); *see also Goodwin v. City of Painesville*, 781 F.3d 314, 324 (6th Cir. 2015) ("Even if a jury were to credit the Officers' assertions that [the suspect] posed a danger to them and that he had resisted at the apartment door, the force used against him could still be found to be excessive. We have held that even previously-resisting suspects have a constitutional right to be free of a gratuitous application of a Taser once they have stopped all resistance.").

Accordingly, because there was evidence (from Lt. Treubig himself) that he had time to re-assess whether Jones was still resisting arrest before using the taser a second time against Jones, the rapidly evolving nature of the situation as a whole does not cloak Lt. Treubig with qualified immunity for the unreasonable use of force following that re-assessment.

d. The Need to Handcuff Jones

Lt. Treubig's argument that qualified immunity should also attach here because Jones was still uncuffed at the time of the second use of the taser is similarly flawed. In making this assertion, Lt. Treubig points to the fact that the holding in *Tracy* addressed a situation where there was evidence that the plaintiff was already handcuffed at the time the pepper spray was used. Thus, Lt. Treubig suggests that a reasonable officer would not understand from *Tracy* that the officer could violate the Fourth Amendment by re-cycling a taser into an arrestee who had been resisting and was still uncuffed. As discussed earlier, such a narrow reading of *Tracy* is simply incompatible with the language in *Tracy* which, while referencing the evidence that the plaintiff was handcuffed when pepper sprayed, made clear that it was relying on a broader Fourth Amendment principle that "a significant degree of force . . . should not be used lightly or gratuitously against an arrestee who is complying with police commands or otherwise poses no immediate threat to the arresting officer." *Tracy*, 623 F.3d at 98. It was established long before *Tracy* that, although the fact that an individual initially resists arrest "no doubt justifies the officer's use of *some* degree of force, . . . it does not give the

officer license to use force without limit." *Sullivan v. Gagnier*, 225 F.3d 161, 165-66 (2d Cir. 2000).

Thus, although the fact that a previously resisting arrestee had not yet been handcuffed may be an important factor in assessing the reasonableness of an officer's force, we have never held that the need to complete the arrest authorizes an additional level of force which would not be reasonably necessary to allow the officers to handcuff that arrestee safely and without further incident. *See generally Brown v. City of New York*, 798 F.3d 94, 102 (2d Cir. 2015) ("The officers could be entitled to a summary judgment only if there existed a *per se* rule that an arrestee's refusal to submit to the easy application of handcuffs always permitted police officers to use substantial force, including taking a person to the ground and incapacitating her with pepper s[p]ray, to accomplish handcuffing. We know of no such rule.").

Here, even though Jones's hands were not yet cuffed at the time of the second tasing, there was more than sufficient evidence for a rational jury to conclude that he was no longer resisting arrest after the first tasing or posing an ongoing threat to the safety of the officers or others. Thus, any belief by Lt. Treubig that the second tasing was necessary to effectuate handcuffing Jones was

unreasonable. Accordingly, we conclude that, at the time of Lt. Treubig's conduct in April 2015, no reasonable officer would believe that, if an arrestee was no longer resisting and face down on the ground with his arms spread after the first tasing (as Jones testified here), the Fourth Amendment would permit an additional use of the taser simply because the arrestee still needed to be handcuffed by the surrounding officers. Therefore, construing the evidence most favorably to Jones, the fact that he was not yet handcuffed at the time of the second tasing provides no grounds for the doctrine of qualified immunity to disturb the jury's finding of excessive force relating to Lt. Treubig's conduct in this case.

This Court's analysis as it relates to the scope of *Tracy*'s holding for purposes of qualified immunity, as applied to the particular factual circumstances of this case (including the need to handcuff an arrestee who had been resisting), is completely consistent with our decision in *Soto v. Gaudett*, 862 F.3d 148 (2d Cir. 2017). In *Soto*, we held that one officer, who tased a fleeing suspect, was entitled to qualified immunity as a matter of law. *Id.* at 156. On the other hand, the Court found that two different officers who tased the suspect a second time after he fell "flat on his face" were not entitled to qualified immunity as a matter of law at the summary judgment stage because of disputed issues of material fact. *Id.* at 153,

156, 161. With respect to the latter officers, the complaint alleged that Officer Robinson "tased Soto '[w]hen Mr. Soto, who posed no physical threat to the officers pursuing him, attempted to return to his feet.'" *Id.* at 159 (alteration in original). Although *Soto* was decided after the events in this case, the incident in *Soto* occurred in 2008, seven years before the incident here, and we held it was clearly established at that time that officers violated the Fourth Amendment when they tased a subject who was already "on the ground, completely entangled in taser wires," in close proximity to the officers, and "struggling even to get into a push-up position." *Id.* at 160. In so holding, citing *Tracy*, we emphasized that "[t]hough the use of force may be reasonable against a suspect who is fleeing, it may be objectively unreasonable against that suspect when he has been stopped and no longer poses a risk of flight." *Id.* at 158 (citing *Tracy*, 623 F.3d at 96-98). Therefore, in *Soto*, as is the situation here, we concluded that qualified immunity would not immunize an officer for tasing an uncuffed arrestee a second time where the arrestee was no longer resisting and was not posing a threat to the safety of officers or others.

Lt. Treubig seeks to distinguish *Soto* because, unlike the plaintiff there, "Jones suffered no injuries from the taser at all." Appellee Br. at 32. We find that

argument unpersuasive. Jones testified to temporary injury—that is, he felt numb for 30 to 40 minutes after being tased by Lt. Treubig. And, in any event, it is well established that, although the absence of significant injury is relevant to the question of excessive force, it is not dispositive under a Fourth Amendment analysis. *See Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 (2d Cir. 1999) ("While the main purpose of a § 1983 damages award is to compensate individuals for injuries caused by the deprivation of constitutional rights, a litigant is entitled to an award of nominal damages upon proof of a violation of a substantive constitutional right even in the absence of actual compensable injury."); *Robison v. Via*, 821 F.2d 913, 923-24 (2d Cir. 1987) (concluding that excessive force claim survived summary judgment where bruising resulted from the arrest, but required no medical treatment). Thus, if the jury rationally finds that a constitutional violation occurred because the officer's significant use of force was excessive and awards nominal damages (as the jury did here), the absence of a compensable injury does not alone provide a ground for qualified immunity.

Although we hold that Lt. Treubig had fair warning of this clearly established law based upon our decision in *Tracy* years before his conduct, we again note the additional warning provided by the overwhelming persuasive

authority in other circuits that, prior to Lt. Treubig's conduct in April 2015, consistently reached the same conclusion with respect to the use of a taser, even where a formerly resisting suspect had not yet been handcuffed. *See, e.g.*, *Smith v. Conway Cty.*, 759 F.3d 853, 860-61 (8th Cir. 2014) (holding that, even though the first tasing of the prisoner was justified because he had just kicked a guard, the second tasing would be unreasonable if he was no longer actively resisting, posing a security concern, or disobeying orders); *Abbott*, 705 F.3d at 732 (concluding that "it was clearly established on June 25, 2007, that it is unlawful to deploy a taser in dart mode against a nonviolent misdemeanant who had just been tased . . . and made no movement when, after the first tasing, the officer instructed her to turn over"); *Meyers*, 713 F.3d at 735 (concluding, in a case involving ten tasing incidents against mentally ill man initially holding a baseball bat, that, although the first three tasings were reasonable because of the threat the man posed, it was clearly established in 2007 that it was excessive force to use a taser against a suspect once he was "unarmed and effectively . . . secured with several officers sitting on his back"); *Bryan*, 630 F.3d at 828, 830 (finding it unreasonable to use a taser against an uncuffed suspect who was unarmed, non-threatening, and not resisting); *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009) ("[T]he law was sufficiently

clear to inform a reasonable officer that it was unlawful to Taser a nonviolent, suspected misdemeanant who was not fleeing or resisting arrest, who posed little to no threat to anyone's safety, and whose only noncompliance with the officer's commands was to disobey two orders . . . ."). Accordingly, existing precedent from this Court, as well as the overwhelming consensus of cases from other circuits, "placed the . . . constitutional question beyond debate," such that it was "'sufficiently clear' that every 'reasonable official would [have understood] that what he [was] doing violate[d] that right,'" *al-Kidd*, 563 U.S. at 741 (first alteration in original) (quoting *Anderson*, 483 U.S. at 640), under the factual circumstances that we must assume for purposes of the Rule 50 motion in this case.

In sum, upon a review of the relevant legal authority, we hold that it was clearly established as of April 2015 that a police officer cannot use significant force, such as a taser, against an individual who is no longer resisting or posing a threat to the officers or others. In light of the jury's findings and viewing the record on the remaining factual disputes in the light most favorable to Jones, we must assume for the qualified immunity analysis that Jones was subdued when Lt. Treubig re-cycled his taser, in that Jones was no longer resisting arrest or posing a threat to the officers or others, but rather lying face down on the ground with his

arms spread. No qualified immunity can thus exist on those facts. As a result, we reverse the district court's grant of judgment as a matter of law, and instruct that the jury verdict against Lt. Treubig should be reinstated.

CONCLUSION

Based on the foregoing, we conclude that Lt. Treubig is not entitled to qualified immunity for the second tasing of Jones. Accordingly, the judgment of the district court is **REVERSED**, and this case is **REMANDED** for proceedings consistent with this opinion.