REENA RAGGI, *Circuit Judge*, concurring in part and dissenting in part:

I concur in so much of the panel decision as concludes that the district court acted within its discretion in excluding testimony regarding police protocols and prior instances in which Officer Wilson fired his weapon. *See* Majority Op., *ante* at 25–30. I respectfully dissent, however, from that part of the decision identifying reversible charging error in reliance on *Rasanen v. Doe*, 723 F.3d 325 (2d Cir. 2013). *See* Majority Op., *ante* at 11–24.

At the outset, I recognize that this panel is bound by *Rasanen*'s holding that in a civil action against a police officer for the unconstitutional use of deadly force, a district court cannot charge a jury that the standard for assessing the officer's use of such force is simply "reasonableness." Rather, the court must charge that the constitutional use of deadly force requires the officer to have had probable cause to believe that the person killed posed a significant threat of death or serious injury to the officer or to others. *See Rasanen v. Doe*, 723 F.3d at 334, 337; *see generally Harper v. Ercole*, 648 F.3d 132, 140 (2d Cir. 2011) (stating that panel is bound by prior decisions of court unless reversed *en banc* or by Supreme Court). I, therefore, do not repeat here my reasons for dissenting in *Rasanen*. *See Rasanen v. Doe*, 723 F.3d at 338–46 (Raggi, J., dissenting).

I note only that *Rasanen* continues to set this court apart from our sister circuits, which construe the Supreme Court's decision in *Scott v. Harris*, 550 U.S. 372 (2007), to "abrogate" the use of any special standards for deciding when the use of deadly force is constitutionally excessive and to "reinstate[] 'reasonableness' as the ultimate—and only—inquiry."[1] *Johnson v. City of Philadelphia*, 837 F.3d 343, 349 (3d Cir. 2016); *see Acosta v. Hill*, 504 F.3d 1323, 1324 (9th Cir. 2007) ("*Scott* held that there is no special Fourth Amendment standard for unconstitutional deadly force. Instead, all that matters is whether [police] actions were *reasonable*." (emphasis in original) (internal quotation marks omitted)); *see also Noel v. Artson*, 641 F.3d 580, 587 (4th Cir. 2011) (rejecting argument for special charge on use of deadly force where district court "submitted the case to the jury under the general rubric of reasonableness" because "*all* claims that law enforcement officers have used excessive force . . . should be analyzed under the Fourth Amendment and its 'reasonableness'

[1] In *Scott v. Harris*, 550 U.S. 372 (2007), the Supreme Court clarified that *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (holding that where 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"), "did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force[]'"; rather, "*Garner* was simply an application of the Fourth Amendment's 'reasonableness' test," *Scott v. Harris*, 550 U.S. at 382.

standard" (emphasis in original)); *Penley v. Eslinger*, 605 F.3d 843, 849–50 (11th Cir. 2010) (holding that "Fourth Amendment's 'objective reasonableness' standard supplies the test to determine whether the use of force was excessive").

Moreover, since *Rasanen*, the Supreme Court has reiterated that the "settled and *exclusive* framework" for analyzing claims of excessive force is "reasonableness." *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017) (emphasis added) (rejecting Ninth Circuit rule that otherwise reasonable defensive use of force is unreasonable as a matter of law where officers provoked violence to which they then responded with deadly force); *see Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) ("A claim that law-enforcement officers used excessive [deadly] force to effect a seizure is governed by the Fourth Amendment's 'reasonableness' standard."). Insofar as neither *Mendez* nor *Plumhoff* spoke to the issue of how juries should be charged in excessive force cases, the majority concludes that they do not overrule *Rasanen*. *See* Majority Op., *ante* at 15. But neither did *Tennessee v. Garner*, 471 U.S. 1 (1985), or *O'Bert ex rel. O'Bert v. Vargo*, 331 F.3d 29 (2d Cir. 2003)—the cases on which *Rasanen* relied to identify a probable-cause charging requirement—speak to jury charges. Indeed, *Garner* arose in the context of a bench trial, and the issue in *O'Bert* was

the denial of summary judgment to a defendant who invoked qualified immunity to avoid trial. *See Rasanen v. Doe*, 723 F.3d at 340 (Raggi, J., dissenting).

I do not pursue the matter further, however, because even following *Rasanen*'s holding, as this panel must, I would not identify charging error in this case. The jury instructions on the reasonable use of deadly force in *Rasanen* failed to make *any* mention of a need for probable cause to believe that the suspect posed a significant threat of death or serious physical injury. *See id.* at 330–31 (majority opinion). By contrast, the district court here cited such probable cause as the *only* example of when an officer might permissibly use deadly force:

> A police officer is entitled to use reasonable force. A police officer is not entitled to use any force beyond what is necessary to accomplish a lawful purpose. Reasonable force may include the use of deadly force.
>
> A police officer *may use deadly force against a person if a police officer has probable cause to believe that the person poses a significant threat of death or serious physical injury to the officer or others.*

App'x 605 (emphasis added). The majority nevertheless concludes that this charge is constitutionally inadequate because the jury could have construed "may," in the italicized text, as merely illustrative and, therefore, thought that deadly force might also be "reasonable" in other circumstances where the cited probable cause was lacking. *See* Majority Op., *ante* at 18–22. I cannot agree.

The context in which the probable cause instruction was given indicates that the word "may" was used to convey legal authorization rather than mere illustration. *See, e.g.*, Black's Law Dictionary 1068 (9th ed. 2009) (defining "may" as "[t]o be permitted to"); Webster's Third New International Dictionary (Unabridged) 1396 (1986 ed.) (defining "may" as to "have power," or "be able" and to "have permission to"). Thus, when the two quoted paragraphs were heard together, a reasonable jury would understand that (1) it can sometimes be "reasonable" for an officer to use deadly force, and (2) when such force may be used, *i.e.*, when it is constitutionally authorized, is when the officer has "probable cause to believe that the person poses a significant threat of death or serious physical injury." App'x 605. This was sufficient to avoid the prejudicial error identified in *Rasanen*, *i.e.*, the district court's failure in that case "to instruct the jury with regard to the justifications for the use of deadly force articulated in *O'Bert* and *Garner*." *Rasanen v. Doe*, 723 F.3d at 334.

Nor do I think a different conclusion is compelled by *Rasanen's* determination that the instruction's omission in that case was not rectified by inclusion in the record of a police manual provision advising officers that they "may use deadly physical force against another person when they reasonably

believe it to be necessary to defend" themselves or others "from the use or imminent use of deadly physical force." *Id.* at 336 (quoting N.Y. State Police Admin. Manual § 16B1(A)); *see id.* at 337 (observing that manual's language was not framed in "exclusive and restrictive terms"). As *Rasanen* itself concluded, a jury's opportunity to consider a manual provision that is in evidence is not the same as receiving an instruction from the court. *See id.* at 337 (noting that manual provisions were of little relevance in any event, as they could "not substitute for an instruction" to the jury).[2]

More to the point, whatever a jury could have inferred from these manual provisions in *Rasanen*, where the district court provided no instructions as to the probable cause required to use deadly force, a similar concern is not warranted

[2] The majority states that the district court in *Rasanen* told the jury "that certain manual provisions, including the deadly force provision, 'apply to the case.'" Majority Op., *ante* at 20 n.9 (quoting *Rasanen v. Doe*, 723 F.3d at 336). I respectfully submit that the circumstances are more complex than our decision in *Rasanen* reports. While the deliberating *Rasanen* jury sent the district court a note referencing manual provision § 16B1(A) (Self Defense or Defense of Others) in evidence, what it asked was whether "certain other provisions" of the manual applied, *id.* at 336, specifically, "[§16B1](C), (E), (F), [and] (H)," App'x 1490, *Rasanen v. Doe*, 723 F.3d 325 (No. 12-680-cv). With no further mention of § 16B1(A), the district court told the jury that § 16B1(C) (Prevention of Termination of Felonies) did not apply to the case, but that subdivisions (E), (F), and (H), which related to the feasibility of using warnings or alternatives to deadly force and an officer's responsibility for the use of force, did apply. *See id.* at 1501–04; *see also Rasanen v. Doe*, 723 F.3d at 336–37.

here. Not only did the district court follow its general reasonableness charge with the specific instruction that an officer may use deadly force when he has the probable cause to believe that a person poses a significant threat of death or serious physical injury to him or others, but also, that was the only justification for the use of deadly force that was identified for the jury. The district court's charge did not suggest, and the parties did not argue, the existence of any other circumstances in which deadly force might reasonably be used.

Indeed, even if there was charging error in the district court's failure to employ "only if" language respecting such probable cause, I would think that error harmless beyond a reasonable doubt in this case because the parties' singular focus at trial and on summation was the presence or absence of probable cause for Officer Wilson to believe that the deceased Callahan posed a significant threat to the officer's life at the time he used deadly force.

Plaintiffs' counsel told the jury that he did not even dispute that Officer Wilson held a "subjective" fear for his life when he discharged his firearm, thereby killing Callahan. App'x 573. Counsel argued only that the circumstances failed—"objectively"—to demonstrate probable cause for that fear. *Id.*; *see Dancy v. McGinley*, 843 F.3d 93, 116 (2d Cir. 2016) (observing that

"Supreme Court [has] made clear" that standard for assessing propriety of officer's use of force is "objective reasonableness"). Repeatedly, plaintiffs' counsel emphasized that Wilson could not lawfully "use deadly physical force, firing a gun, unless there's probable cause to believe that his life is at risk, somebody else is going to use deadly force against him, or that somebody is going to cause serious physical injury to him or somebody else." App'x 576; *see id.* at 580 ("The law says . . . you're to rule for the plaintiff, . . . unless there's probable cause, reasonably, objectively, probable cause to believe that [the officer's] life was in danger or that someone else was in danger, and that's clearly not the case here, clearly not the case.").

The defense, in its summation, neither objected to these statements of the applicable legal standard nor argued otherwise. To the contrary, defense counsel embraced the probable cause standard, telling the jury that his summation would "discuss with you how the evidence has shown that on that day in September 2011, Tom Wilson had probable cause to believe that he was facing a significant threat of death or serious injury and . . . that it was reasonable and necessary to use deadly force." *Id.* at 584. Counsel then argued how discrete evidence satisfied that standard. He maintained that (1) the call reporting a dispute

involving "a man with a gun" at Callahan's home, (2) the officers' observation of a cleaver in plain view in the home, and (3) the officers' failure to receive a response upon announcing their presence in the home objectively supported Officer Wilson's belief of "a real and present threat of danger . . . that there may be a person there that had a gun." *Id.* at 585. Counsel further argued that when Callahan slammed a bedroom door on Officer Wilson, "pinning him with his gun inside that room," the officer "was facing a real fear that the person behind that door could get his weapon and use it against him or, more significantly, was armed himself and was going to shoot [the officer] through that door." *Id.* at 586. Thus, he maintained, the officer confronted "a significant threat of death," *id.* at 594, that put him "in fear of a real threat of death," *id.* at 595. Moreover, in response to the plaintiffs' argument that Officer Wilson's real subjective fear of risk to his life did not equate to objective probable cause to hold such a fear, defense counsel argued that "[a]ny other officer would have faced that same threat and would have had that same reasonable fear." *Id.*

It was for the jury to decide how persuasive counsel were in arguing that the evidence did or did not establish probable cause, but the cited record

convincingly demonstrates that the singular issue in dispute was whether such probable cause existed.[3]

That distinguishes this case from *Rasanen*. There, the jury "did not know, because it was not told," to frame the reasonableness of the officer's actions in terms of probable cause. *Rasanen v. Doe*, 723 F.3d at 336. Here, the jury was so told, both by the court and by counsel. After generally charging the jury that the use of deadly force could be reasonable, the district court cited a single circumstance in which such a conclusion would be warranted: when an officer had probable cause to fear a risk to life or serious physical injury. Meanwhile, counsel for both parties, in summation, told the jury that the determinative issue in the case was whether the officer had probable cause to believe that he was facing a significant threat of death or serious injury. On this record, I identify no charging error. But even if I were to do so, I would find the error harmless beyond a reasonable doubt because I think that on the charge given and the

[3] As the Supreme Court has instructed, probable cause is a "flexible, common-sense standard." *Florida v. Harris*, 568 U.S. 237, 240 (2013). While it requires more than "mere suspicion," its focus is on "probabilities," not "hard certainties." *Walczyk v. Rio*, 496 F.3d 139, 156 (2d Cir. 2007) (internal citations and quotation marks omitted). Thus, it does not demand "proof beyond a reasonable doubt or by a preponderance of the evidence," standards that "have no place in a probable cause determination." *Id.* (internal quotation marks and citations omitted); *accord Zalaski v. City of Hartford*, 723 F.3d 382, 393 (2d Cir. 2013).

arguments made, the verdict can only have been based on the jury's finding that, when Officer Wilson shot Callahan, the officer had probable cause to believe that Callahan posed a significant threat of death or serious physical injury to the officer or to others.

Accordingly, I vote to affirm the judgment in favor of defendants.