No. 23-

IN THE

Supreme Court of the United States

MICHAEL ROANE,
in his individual capacity,

Petitioner,

v.

TINA RAY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Michael Roane, a drug task force officer, was called at home in 2017 to respond to a place he had never been. As he pulled in, he saw a dog tied to a tree off his truck's passenger side. When he stepped out, the 150-pound dog aggressively chased the backpedaling Roane down the driver's side. Thinking the dog had broken free when it closed to within a step in seconds and was about to attack him, Roane fired one shot to protect himself and the dog died. Afterwards, Roane learned the dog was on a lead sliding across a zip line up in the trees. Tina Ray filed suit, claiming unreasonable seizure of her personal property in violation of her Fourth Amendment rights and state law conversion.

The District Court dismissed the case, but the Fourth Circuit reversed. After discovery, the District Court granted summary judgment. The Fourth Circuit vacated summary judgment on the Fourth Amendment claim. According to the Fourth Circuit, when it decided at the motion to dismiss stage that two allegations – Roane stopped and took a step forward before shooting – were "material," those two allegations became "critical," dictating denial of summary judgment. The Fourth Circuit disregarded the evidentiary record, showing the circumstances and Roane's perceptions when he acted to protect himself.

The questions presented are:

1. Whether Roane's act had to be the "necessary" or "unavoidable" act, rather than within a range of objective reasonableness, to be considered an act of self-protection

rather than an unreasonable seizure of personal property in violation of the Fourth Amendment or violation of clearly established law.

2. Whether the Fourth Circuit improperly vacated summary judgment for Roane on the Fourth Amendment seizure of personal property claim, disregarding the developed evidentiary record as to the objective reasonableness of Roane's perception of the threat and instead looking exclusively at two of plaintiff's allegations it had identified as "material" in ruling on the sufficiency of the Complaint at the motion to dismiss stage, in an evidentiary vacuum, to conjure an issue as to whether Roane's perception was "credible."

3. Whether the Fourth Circuit improperly denied qualified immunity to Roane on the Fourth Amendment seizure of personal property claim, citing no decision with circumstances like those shown by the evidence and relying on its own decision after the incident, reversing dismissal on the pleadings, and that decision's "general principles," as the "clearly established law."

PARTIES TO THE PROCEEDING

Petitioner Michael Roane was the appellee in the Court of Appeals.

Respondent Tina Ray was the appellant in the Court of Appeals.

RELATED PROCEEDINGS

Tina Ray v. Michael Roane, No. 5:17-cv-00093 (U.S. District Court for the Western District of Virginia) (judgment entered September 20, 2018).

Tina Ray v. Michael Roane, No. 18-2120 (U.S. Court of Appeals for the Fourth Circuit (judgment entered January 22, 2020).

Tina Ray v. Michael Roane, No. 5:17-cv-00093 (U.S. District Court for the Western District of Virginia) (judgment entered September 27, 2022).

Tina Ray v. Michael Roane, No. 22-2120 (U.S. Court of Appeals for the Fourth Circuit (judgment entered February 22, 2024).

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PETITION FOR A WRIT OF CERTIORARI

Michael Roane respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Fourth Circuit's February 22, 2024 opinion is reported at 93 F.4th 651 (App. 1a-16a), vacating the District Court's entry of summary judgment for the petitioner and denying qualified immunity to the petitioner.

The District Court's September 27, 2022 opinion is available at 2022 WL 4479253 (App. 17a-31a.)

The Fourth Circuit's January 22, 2020 opinion is reported at 948 F.3d 222 (App. 32a-46a), reversing the District Court's decision granting the petitioner's motion to dismiss on the pleadings including on the basis of qualified immunity.

The District Court's September 20, 2018 opinion is available at 2018 WL 4515893 (App. 47a-68a).

JURISDICTION

The Fourth Circuit's opinion was entered on February 22, 2024. The Fourth Circuit denied a timely petition for rehearing and rehearing *en banc* on March 19, 2024 (App. 69a). This Court has jurisdiction over this timely-filed petition for writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent claims the shooting of the dog constitutes an unreasonable seizure of her "effects" in violation of the Fourth Amendment of the United States Constitution, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., amend. IV

Respondent asserts that claim under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

A. Factual Background

On September 24, 2017, Augusta County, Virginia deputy sheriff Aaron Will was serving an assault warrant and protective order on Tina Ray and detected drug activity among Ray and her friends, Stephanie Hagy and Adam Hicks. Will called Michael Roane, a supervisor on a multi-jurisdictional drug and gang task force and also a deputy sheriff and investigator, to respond to the location. (App. 18a-19a.)

Will had Ray, Hagy and Hicks wait outside around a picnic table. Deputy sheriffs James Lotts, Scott Smith, and Christopher Kite arrived in separate vehicles for back-up and parked in the driveway of the large property and also waited. (App. 19a-22a.)

Roane was at home that Sunday morning when he unexpectedly received the call for assistance. Roane had never met Ray and had never been to her house, but he had received information previously about drug distribution and drug use at her house. (App. 19a, 21a.)

Roane arrived 30-40 minutes later, to a property where he had never been, in his work-issued truck with heavily-tinted windows that were rolled up, wearing plainclothes and a handgun as his only weapon. (App. 21a.)

Roane pulled in to the left of the officers' vehicles that took up the drive, into a grassy area, briefly seeing a dog off to the right sitting at a tree to which he thought the dog was tied. The tree and dog were on the truck's passenger

side as Roane parked. Roane thought the dog was tied to a tree far enough away to be beyond reach when Roane exited the driver's side. (App. 22a.)

The 150-pound seven-year-old German shepherd became alarmed and took off after Roane when he stepped out of the driver's side of the truck, chasing Roane down the driver's side, growling, barking, chomping and baring its teeth aggressively and in attack mode trying to bite him. Roane back-pedaled away down the driver's side as fast as he could, thinking the dog had broken free from being tied to the tree. The dog closed to within a step in seconds when Roane fired one shot to protect himself, striking the dog and it died. (App. 20a, 22a-23a.)

Not seeing anyone or anything controlling the aggressive dog in those seconds Roane had to react, and with his experience that some drug dealing operations had dogs trained to attack to protect the operation, Roane feared serious injury from the dog in the moment he fired the shot. (App. 25a-26a.)

Not until afterwards did Roane learn that the dog had not been tied to a tree at all. Instead of breaking free of being tied to the tree, as Roane thought with the dog chasing him that far in that instant, the dog was actually on a long lead sliding along a zip line trolley system strung up high between two trees, which allowed the dog to cover a large area of the property. Roane had not seen and did not know about the zip line contraption until after firing the shot. (App. 22a-25a, 29a.)

Even officers who were there with the dog waiting for Roane to arrive had thought the dog was tied to the

tree, and did not realize it was on a zip line. When Will arrived at the house, he "noticed there was a large German shepherd that was – I thought was tied to the tree right beside the house," and did not see the zip line until after the incident. Smith described it as a clear clothesline type line high in the air; "I did not see the lead until after all this occurred . . . there is a – it was, like, strung between two trees high in the air . . . you wouldn't have seen it from the ground unless you were specifically looking for it." Ray did not know anyone else with such a zip line contraption. Roane had never seen anything like it before. (App. 20a-22a.)

Ray admitted that Roane would not have known he had parked where the dog could reach. (App. 22a). Ray admitted she does not know what Roane saw or thought; she was not in Roane's position nor could she see the dog's face. No one was standing where Roane was or behind him. Hagy and Hicks were off to the passenger side front of the truck at the picnic table, while the dog was charging after Roane down the driver's side of the truck toward the rear. (App. 25a, 30a.)

Roane did not have time to surveil the area as he reacted to the threat from the dog in seconds, and there is no evidence he observed the zip line system the dog's long lead was sliding along. Nor was the threat to Roane eliminated, in any event. Ray also admitted she did not know whether the lead could have slid further one way or the other when the shot was fired, creating more slack. Roane checked the lead after the incident and observed there was much more slack in the line to allow the dog to continue towards him. And Ray admitted the dog had gotten off the lead before and he "could snap that lead and

actually get off of it if he wants off of it anytime." (App. 21a, 23a, 26a, 29a.)

B. Proceedings Below

1. Ray filed her Complaint asserting four claims – Fourth Amendment "unreasonable seizure of her personal property" and substantive due process pursuant to 42 U.S.C. § 1983, and Virginia state law claims of conversion and intentional infliction of emotional distress. (App. 51a-52a.)

Roane filed a Rule 12(b)(6) motion to dismiss. Ray abandoned her due process claim, and the District Court dismissed the Fourth Amendment claim and declined supplemental jurisdiction over the two state law claims. The District Court compared the Complaint fact allegations with the facts of other cases in which dogs were shot by officers, including the circumstances such as the distance between the dog and the officer at the time of the shooting, the conduct and size of the dog, and the quickness with which the incident had occurred, and applied this Court's precedent regarding pleading standards, Fourth Amendment reasonableness, and qualified immunity. The District Court ruled that the Complaint allegations did not make out an unreasonable seizure by Roane in violation of the Fourth Amendment, and in the alternative that Roane did not violate clearly established law and was thus entitled to qualified immunity. (App. 52a-65a.)

2. Ray appealed, and the Fourth Circuit reversed, holding "the complaint plausibly states a claim for an unconstitutional seizure of Ray's property for which Roane is not entitled to qualified immunity." (App. 33a.)

The Fourth Circuit stated, "the unlawfulness of Roane's alleged actions was established by the general principles," and based on "broader principles," "shooting a privately owned dog, *in the absence of any safety rationale at all*, is unreasonable." (App. 44a, emphasis in original.)

3. Upon completion of discovery, Roane filed a Rule 56 motion for summary judgment. Ray then abandoned her state law emotional distress claim. (App. 17a n.1.) The District Court thoroughly reviewed the fully-developed evidentiary record – comprised of audio of Ray and Roane at the scene right after the incident, depositions and affidavit testimony, contemporaneous photographs and other material – and the applicable law, and granted summary judgment to Roane on Ray's remaining Fourth Amendment and state law conversion claims. The District Court applied this Court's standards for summary judgment and for determining objective unreasonableness under the Fourth Amendment, holding that Roane's conduct was not objectively unreasonable and did not violate the Fourth Amendment, nor constitute conversion under Virginia law. (App. 17a-31a.)

4. Ray appealed, abandoning her Virginia state law conversion claim on appeal. The Fourth Circuit vacated the entry of summary judgment for Roane on the Fourth Amendment claim. (App. 1a-16a and n.3.) The Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

C. The Fourth Circuit's Opinion Vacating Summary Judgment

In vacating summary judgment, the Fourth Circuit ignored the evidentiary record fully-developed through

discovery showing the actual circumstances of the incident and what the evidence shows regarding the objective reasonableness of Roane's perception of the threat from the dog.

Instead, the Fourth Circuit fixated exclusively on "two specific allegations from Ray's Complaint: 'Roane stopped backing away from Jax [the dog] when the dog reached the end of the zip-lead, and then took a step toward the dog before firing his weapon,'" that it identified when deciding the sufficiency of the Complaint to withstand dismissal. (App. 10a-11a.)

Despite the Fourth Circuit having determined those two allegations to be the "crucial allegations" based solely on Ray's pleadings – in an evidentiary vacuum – it subsequently considered its review on summary judgment constrained solely "to whether Roane stopped back-peddling and took a step forward before firing." (App. 11a.)

The Fourth Circuit ignored the full evidentiary record before it showing that Roane did not even know about the zip line, or about the dog's long lead sliding along such a contraption, but perceived the dog as having broken free from being tied to a tree (as others at the scene there longer than Roane also perceived). And the Fourth Circuit ignored the evidence showing that the dog's long lead sliding along a zip line did not, in any event, eliminate the threat to Roane, nor his reasonable perception of the threat.

The Fourth Circuit maintained that the only thing that mattered was how the evidence fared as to the "two material allegations" it had plucked out at the pleadings

stage, in subsequently determining on summary judgment whether the "shooting was unnecessary and therefore unconstitutional under the Fourth Amendment." (App. 2a.)

The Fourth Circuit stated, "Witnesses gave similar accounts of the episode's general contours but disagreed on the details. Most significantly, they split as to the allegations we had identified as critical in our *Ray* decision: That Roane had stopped retreating and stepped forward before shooting Jax." (App. 7a.) Thus, the Fourth Circuit stated, "our previous decision in *Ray* all but settles this appeal." (App. 10a.)

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted Because The Fourth Circuit's Opinion That The Officer's Act Had To Be "Necessary" Or "Unavoidable," Instead Of Within A Range Of Objective Reasonableness, To Be Considered Self-Protection Rather Than An Unreasonable Seizure Of Personal Property In Violation Of The Fourth Amendment Or Violation Of Clearly Established Law, Contravenes The Jurisprudence Of This Court And Gives An Officer Less Right To Self-Protection Merely Because Of His Status As A Law Enforcement Officer.

The Fourth's Circuit's Opinion requires the officer's act to be the "necessary" or "unavoidable" act, in order to avoid liability for violation of the Fourth Amendment or clearly established law. (App. 2a ("shooting was unnecessary and therefore unconstitutional under the Fourth Amendment"); App. 7a ("clearly established" that reasonable only if "the use of force is unavoidable")).

The Fourth Circuit's Opinion conflicts with this Court's precedents regarding objective reasonableness. "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" or what may be viewed as "unnecessary in the peace of a judge's chambers." *Graham v. Connor*, 490 U.S. 386, 396 (1989). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make splitsecond judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

Reasonableness under the Fourth Amendment is determined using an objective standard, "requir[ing] careful attention to the facts and circumstances of each particular case" and thus "is not capable of precise definition or mechanical application[.]" *Graham*, 490 U.S. at 396 (second quotation from *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

That standard must therefore allow for a range of actions to be considered "reasonable," regardless of whether strictly "necessary" or "unavoidable."

Furthermore, the Fourth Circuit's standard accords Roane less right to self-protection, simply due to his status as a law enforcement officer, than another person in the same circumstances would have to protect oneself from being attacked by a 150-pound growling, barking, aggressive dog that had rapidly closed to within a step of Roane when he fired that shot to protect himself.

The Fourth Amendment is intended to protect people from abusive, arbitrary, *governmental* action. And "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Baker v. McCollan*, 443 U.S. 137, 146 (1979). Section 1983 "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Graham*, 490 U.S. at 393-94.

Here, however, Roane was not an animal control officer carrying out governmental action in shooting the dog, nor seizing Ray's luggage or other personal property to search for drugs. The defendants in *Altman v. City of High Point*, 330 F.3d 194 (4th Cir. 2003), cited by the Fourth Circuit (App. 5a-7a), were animal control officers.

Roane was just trying to protect himself, as anyone in those circumstances would have had the right to do. That act of self-protection does not become a constitutional violation "merely because the defendant is a state official." *Daniels v. Williams*, 474 U.S. 327, 333 (1986). And while the plaintiff's Complaint included a state law claim for conversion, for being deprived of her property interest in the dog, the plaintiff abandoned that claim by not appealing the District Court's summary judgment ruling in favor of Roane on that claim. (App. 3a n.1.)

Despite the Fourth Circuit's Opinion making a fleeting reference to officer safety, the standard it imposes is more stringent than what this Court's precedents provide, giving Roane not only less room to act for his own protection than what officers are supposed to be accorded, but also less ability to protect himself without running

afoul of the Constitution than what would be allowed for those who are not law enforcement officers acting to protect themselves in similar circumstances.

II. Contrary To This Court's Mandates, The Fourth Circuit Disregarded The Evidentiary Record As To The Objective Reasonableness Of The Officer's Perception Of The Threat, Instead Relying Entirely On Two Allegations Identified At The Pleadings Stage, In An Evidentiary Vacuum, To Conjure An Issue As To Whether The Officer's Perception Was "Credible."

The "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial' [and w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Unreasonableness is an element of Ray's Fourth Amendment claim on which she bears the burden of proof. U.S. Const. amend. IV ("[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated") (emphasis added). *See also Heien v. North Carolina*, 574 U.S. 54, 57, 60 (2014) ("Fourth Amendment prohibits 'unreasonable searches and seizures'"; "'ultimate touchstone of the Fourth Amendment is "reasonableness"'").

A court must enter summary judgment "against a party who fails to make a showing sufficient to establish

the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

An officer does not act unreasonably, and there is no Fourth Amendment violation, when, as here, Roane shot at the dog to protect himself from the threat of serious physical harm that he reasonably perceived the dog imminently posed to him based on the information he had – and the information he did not.

While the Fourth Amendment standard for reasonableness is objective, it is the officer's perceptions, considering only the information known to him, that is the lens through which the objective reasonableness of his conduct is viewed on summary judgment.

But the Fourth Circuit here disregarded what the evidentiary record as a whole showed as to the rapidly evolving circumstances, differing vantage points of those at the scene, and what Ray herself admitted about what Roane would not have known, all of which the District Court considered in granting summary judgment. And the Fourth Circuit ignored that there was plenty of evidence that Roane did not know about the zip line contraption (as others did not), and no contrary evidence indicating that he did.

And the Fourth Circuit cavalierly dismissed that even assuming Roane knew the dog's lead was sliding along a lengthy zip line, an officer (or any person) in Roane's shoes in the circumstances would not have known that the dog could not have closed that last step and attack him if he did not take action to protect himself in that moment. Even if it is assumed how that the dog could not.

Even today, one cannot say that the dog could not have caused serious injury to Roane if he had not acted to protect himself in the moment he did. This is not a circumstance in which an officer mistakenly thought someone had a gun, for example, and afterwards it turned out the person was holding a cell phone. The 150-pound aggressive dog was just as "armed" and dangerous as perceived.

That in that moment there were differing perceptions as to whether Roane took a step forward when he fired, or whether he actually took a step forward or not when he fired, is not material. The District Court correctly viewed that as not being material in the totality of the circumstances shown by the evidentiary record on summary judgment. The Fourth Circuit criticized that assessment of materiality, stating it did not comport with the Fourth Circuit's prior decision that was cabined by plaintiff's allegations at the motion to dismiss stage. (App. 11a-12a.)

The Fourth Circuit's characterization of the step as creating a credibility issue so as to defeat summary judgment is simply wrong. Construing the evidence as allowing for the inference in Ray's favor that Roane stopped back-pedaling and took a step forward when he shot at the dog, nevertheless does not make Roane's conduct unreasonable and amount to a Fourth Amendment violation.

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive

determination of every action.'" *Celotex*, 477 U.S. at 327. *Accord* Fed. R. Civ. P. 1.

The Fourth Circuit's fixation at the summary judgment stage on only the two allegations it had focused on at the pleadings stage, disregarding the evidentiary record as a whole, is contrary to this Court's standards for summary judgment, and contrary to this Court's standards for determining the objective reasonableness of the officer's actions in the circumstances shown by the evidentiary record as a whole.

III. The Fourth Circuit Vacated Summary Judgment And Denied Qualified Immunity, While Citing No Decision With Circumstances Remotely Like Those Shown By The Evidence And Relying On Its Own Decision At The Pleadings Stage, After The Incident, And "General Principles," As The "Clearly Established Law."

The Fourth Circuit viewed the District Court's summary judgment for Roane as a dead letter, asserting, "Our decision in *Ray* forecloses Roane's entitlement to qualified immunity on summary judgment." (App. 16a.)

But *Ray*, the Fourth Circuit's decision regarding the sufficiency of Ray's Complaint allegations, issued January 22, 2020 – *after* the incident. A decision after the incident "is of no use in the clearly established inquiry." *City of Tahlequah v. Bond*, 595 U.S. 9, 13 (2021).

Furthermore, *Ray* states "the unlawfulness of Roane's alleged actions was established by the general

principles," and based on "broader principles," "shooting a privately owned dog, *in the absence of any safety rationale at all*, is unreasonable." (App. 44a, emphasis in original.)

None of the decisions the Fourth Circuit cited in *Ray*, at the pleadings stage, were even from within the Fourth Circuit, nor from this Court, in addition to not dealing with circumstances like those here. (App. 44a-45a.)[1]

> [O]fficers 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." "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. In other words, existing law must have placed the constitutionality of the officer's conduct "beyond debate." This demanding standard protects "all but the plainly incompetent or those who knowingly violate the law."

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1. In determining the "clearly established" law, this Court has stated, "[w]e have not yet decided what precedents – other than our own – qualify as controlling authority for purposes of qualified immunity." *District of Columbia v. Wesby*, 583 U.S. 48, 66 n.8 (2018).

See decisions the District Court analyzed in dismissing on the pleadings including on the basis of qualified immunity (App. 56a-64a), and the Fourth Circuit's discussion of decisions in reversing the dismissal and denying qualified immunity (App. 40a, 43a-45a.)

Wesby, 583 U.S. at 62-63 (internal citations omitted). *Accord Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014) ("a defendant 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").

"It not enough that a rule be suggested by then-existing precedent," nor was such a rule prohibiting Roane's act of self-protection here, in these circumstances, even "suggested" by then-existing precedent. *City of Tahlequah*, 595 U.S. at 12.

Nor can qualified immunity on a Fourth Amendment seizure claim at the summary judgment stage be determined without considering the evidentiary record as to the circumstances. But that is what the Fourth Circuit did here, considering *Ray* dispositive notwithstanding that *Ray* was at the pleadings stage, with no evidence at all showing the circumstances as a whole.

Determining "clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 580 U.S. 73, 79 (2017) (court of appeals "misunderstood the 'clearly established' analysis: It failed to identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment"). *Accord Wesby*, 583 U.S. at 63-64 (the "'crucial question [is] whether the official acted reasonably in the particular circumstances that he or she faced'"; "[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'"); *Rivas-Villegas v. Cortesluna*,

595 U.S. 1, 5 (2021) ("inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition'").

In vacating summary judgment for Roane, the Fourth Circuit did not cite a single case involving circumstances even remotely like what is shown by the evidence here. No clearly established law gave fair notice in the particular circumstances Roane faced that he would be violating the Fourth Amendment if he fired that shot.

This is so regardless of whether Roane is viewed as having stopped back-pedaling and taken a step when he shot, or not.

There is no dispute the aggressive 150-pound dog rapidly closed within a step of Roane when he fired the shot. The law was not clearly established such that every objectively reasonable officer in Roane's position would have known that firing that shot would violate the Fourth Amendment. "[J]udges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn v. Huff*, 565 U.S. 469, 477 (2012).

Even if it were assumed that Roane erred and the error amounted to a violation of the Fourth Amendment, qualified immunity protects "mistakes in judgment," and "[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 v. Callahan*, 555 U.S. 223, 231 (2009).

Summary judgment is especially appropriate when, as here, there is a qualified immunity defense. *Saucier v. Katz*, 533 U.S. 194, 202 (2001) ("[t]he approach the Court of Appeals adopted – to deny summary judgment any time a material issue of fact remains . . . could undermine the goal of qualified immunity to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment'"). Qualified immunity is "'an *immunity from suit* rather than a mere defense to liability [and] is effectively lost if a case is erroneously permitted to go to trial.'" *Id.* at 200 (emphasis in original).

The objective reasonableness standard, whether Roane *could* have believed his conduct lawful in his circumstances, is intended to allow qualified immunity to stop cases short of trial even when there may be disagreement. *Anderson v. Creighton*, 483 U.S. 635, 640-41 and n.2 (1987).

As this Court has stressed, reliance on the objective reasonableness of an officer's conduct facilitates resolution on summary judgment, serving the purpose of avoiding the "costs of subjecting officials to the risks of trial [and] distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Accord Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982).

Yet, well over six years later, having twice prevailed in the District Court, Roane is still having to defend himself for his act of self-protection in that instant from a dangerous dog. And the Fourth Circuit opines that this is so, because all that matters out of the entire evidentiary

record is whether Roane stopped and took one step when he fired the shot at the dog in that instant. But regardless of that minutiae, even if it is assumed that Roane stopped and took a step when he shot, nothing in that removes the protection of qualified immunity on summary judgment. To hold otherwise vitiates this Court's precedents regarding summary judgment and qualified immunity, and stretches the Fourth Amendment beyond what it is intended to protect against.

While the event may seem mundane, these are the sorts of things ordinary officers on the beat face day in and day out. The Fourth Circuit's treatment of it warrants this Court's review because issues of exceptional public importance are at stake – issues important to the willingness of capable people to work in public service.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — Opinion Of The United States Court Of Appeals For The Fourth Circuit, Filed February 22, 2024

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-2120

TINA RAY,

Plaintiff-Appellant,

v.

MICHAEL ROANE, in his individual capacity,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Harrisonburg. Elizabeth Kay Dillon, District Judge. (5:17-cv-00093-EKD-JCH).

Argued: December 6, 2023 Decided: February 22, 2024

Before GREGORY and HARRIS, Circuit Judges, and FLOYD, Senior Circuit Judge.

Vacated and remanded by published opinion. Judge Harris wrote the majority opinion, in which Judge Gregory and Judge Floyd joined.

Appendix A

PAMELA HARRIS, Circuit Judge:

Michael Roane, a police officer, shot and killed Tina Ray's dog while attempting to serve an arrest warrant. In a previous decision, we reversed the dismissal of Ray's action against Roane, identifying two material allegations that, if substantiated, would support an inference that the shooting was unnecessary and therefore unconstitutional under the Fourth Amendment. Because discovery yielded a genuine dispute about those material facts, it now falls to a jury to decide which side of the dispute to credit. We therefore vacate the district court's entry of summary judgment in Roane's favor and remand for trial.

I.

A.

This case began in 2017, when four Augusta County law enforcement officers arrived at Tina Ray's house to serve an arrest warrant and protective order. They were greeted by Tina Ray; two of Ray's friends; and Ray's dog, a 150-pound German shepherd named Jax. The officers called Deputy Sheriff Michael Roane for investigative support, and the whole group waited at a picnic table in Ray's yard for 30 or 40 minutes until Roane arrived.

Jax lounged nearby, tethered somewhat unconventionally to a 25-foot "zip line" connecting two trees in the yard. He remained tethered throughout a rapidly developing episode that began when Roane arrived

and ended when Roane shot Jax dead. Ray then sued for unreasonable seizure under the Fourth Amendment.[1]

B.

Roane moved to dismiss Ray's complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. Because the ultimate disposition of that motion bears substantially on this appeal, we describe it in some detail here.

1.

At the motion to dismiss stage, a court must "accept as true all of the factual allegations contained in the complaint and draw all reasonable inferences in favor of the plaintiff." *King v. Rubenstein*, 825 F.3d 206, 212 (4th Cir. 2016). In her complaint, Ray alleged that Roane arrived dramatically on the scene in his truck, "barreling" down her driveway, "screeching to a halt" under the zip line, and "slamm[ing] the door" as he exited. J.A. 12-13. Alarmed, "Jax began barking while approaching Roane." J.A. 13. Roane drew his gun and retreated, moving backwards until "Jax had reached the end of his line and could not get any closer to Roane." J.A. 13. At that point,

1. Ray also pursued a constitutional substantive due process claim, a claim for intentional infliction of emotional distress under Virginia law, and a claim for conversion under Virginia law. She abandoned the first two in the district court, and now abandons the latter in this court. *See infra* note 3. Consequently, we address only the Fourth Amendment claim.

recognizing Jax's inability to advance further, Roane stopped his retreat, "took a step towards the dog so that he stood over Jax," and shot Jax in the head. J.A. 13, 21.

Roane moved to dismiss on the ground that he mistakenly but reasonably believed Jax to be unrestrained at the time of the shooting. Mem. in Support of Mot. to Dismiss at 8, *Ray v. Roane*, No. 5:17-cv-00093-EKD-JCH (W.D. Va. Nov. 1, 2017), ECF No. 4. In those circumstances, Roane argued, his decision to shoot fell within the bounds of Fourth Amendment reasonableness. *Id.* At a minimum, Roane contended, he was entitled to qualified immunity, because his efforts to protect himself against the threat posed by Jax were not clearly unreasonable. *Id.* at 9-14.

The district court granted Roane's motion to dismiss. *Ray v. Roane*, No. 5:17-cv-00093, 2018 WL 4515893, at *9 (W.D. Va. Sept. 20, 2018). Ray had not stated a Fourth Amendment claim, the court concluded, because Jax's size and aggression caused Roane reasonably to fear for his safety, especially given the "split-second" nature of the interaction. *Id.* at *4. The court acknowledged Ray's allegation that Roane "calmly . . . stepped towards Jax" before shooting him, which, according to Ray, evinced Roane's knowledge that Jax had reached the end of his lead and no longer posed a threat. *Id.* But "the fact that Roane was able to act calmly in the face of danger," the court reasoned, "does not mean that [Roane] did not assess Jax" — who was "within one step" of the officer — "to be a threat." *Id.* And for the same reasons, the court held in the alternative that Roane was shielded by qualified immunity. *Id.* at *8.

2.

On appeal, we reversed the judgment of the district court. As we read the complaint, its allegations would support an inference that Roane did not reasonably perceive Jax as a threat to his safety and shot him nevertheless, in violation of clearly established Fourth Amendment law. *Ray v. Roane*, 948 F.3d 222, 228 (4th Cir. 2020).

We first recognized, as the parties agree, that the Fourth Amendment protects the interest of individuals in dogs they keep as pets. *Id.* at 227 (citing *Altman v. City of High Point*, 330 F.3d 194, 203-05 (4th Cir. 2003)). To assess the constitutionality of a shooting of a family dog, we "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.* Both sides have strong interests: the individual in "Man's Best Friend," *id.* (quoting *Altman*, 330 F.3d at 205), and the government "in protecting citizens and officers from dogs that may be dangerous or otherwise a source of public nuisance," *id.* And in weighing the government's side of the balance, we recognized, we must account for the officer's need "to make split-second judgments," and consider "only the information known" to the officer "at the time of the shooting." *Id.*

We then applied those "well-settled" principles to the case before us. *Id.* If, given the information known to Roane, a reasonable officer would have believed that shooting Jax was necessary to protect the asserted

interest in officer safety, then the Fourth Amendment would permit that shooting — and if not, the shooting would violate the Fourth Amendment. *Id.* "Our task," at bottom, was to "place ourselves in the shoes of Roane and ask whether his actions were objectively unreasonable." *Id.*

And if the complaint's allegations were credited, we held, then Roane's shooting of Jax may indeed have been unreasonable. *Id.* at 228. We identified two factual allegations as especially material to this assessment: "According to the complaint, Roane stopped backing away from Jax when the dog reached the end of the zip-lead, and then took a step toward the dog before firing his weapon." *Id.* Together, those factual allegations — that Roane stopped his retreat and then stepped forward before shooting — "yield the reasonable inference that Roane observed that the dog could no longer reach him, and, thus, could not have held a reasonable belief that the dog posed an imminent threat." *Id.* Only by failing to "fully credit" these allegations "and the inferences arising therefrom," we concluded, could it be said that Ray's complaint failed to state a Fourth Amendment claim. *Id.*; *see DePaola v. Clarke*, 884 F.3d 481, 484 (4th Cir. 2018) (in considering a motion to dismiss, court must "accept as true the factual allegations set forth in [the] complaint and draw reasonable inferences therefrom in [the plaintiff's] favor").

We turned then to the question of qualified immunity. By the time of the shooting in 2017, we determined, it was clearly established by our own decision in *Altman*, 330

F.3d at 203-05, and the consensus of our sister circuits that "the use of deadly force against a household pet is reasonable only if the pet poses an immediate danger and the use of force is unavoidable." *Ray*, 948 F.3d at 230 (quoting *Robinson v. Pezzat*, 818 F.3d 1, 7 (D.C. Cir. 2016) (describing uniform circuit authority)). Roane's argument to the contrary, we explained, did not "contest [that] legal principle," but instead focused exclusively "on the underlying facts," contending that Roane's conduct was consistent with this well-established standard because he "reasonably perceived Jax as a threat at the time of the shooting." *Id.* But for the same reasons we gave in connection with Roane's merits argument, we held, we could not simply accept Roane's version of the facts over the allegations in Ray's complaint at the motion-to-dismiss stage of the proceedings, which "tests the sufficiency of the complaint, not its veracity." *Id.*

C.

To test the veracity of Ray's complaint, the parties proceeded to discovery. Witnesses gave similar accounts of the episode's general contours but disagreed on the details. Most significantly, they split as to the allegations we had identified as critical in our *Ray* decision: that Roane had stopped retreating and stepped forward before shooting Jax. Three witnesses, including Roane, testified to the effect that Roane "was backpedaling the whole time" — that is, until the moment of the shooting. J.A. 620 (Officer Smith); *see also* J.A. 61-62, 86, 112-14

(Roane); J.A. 662-63, 674 (Trooper Lotts).[2] Two witnesses testified that they were uncertain whether Roane stepped forward before firing. *See* J.A. 422 (Sergeant Will); J.A. 171-74 (Sergeant Kite). And three witnesses, including Ray, testified that Roane stopped, then stepped towards Jax, and then shot. J.A. 198, 241, 276, 313 (Ray); J.A. 465, 473, 496 (Stephanie Hagy); J.A. 549, 552-55 (Adam Hicks).

Nonetheless, in the decision now on appeal, the district court granted Roane's motion for summary judgment. *Ray v. Roane*, No. 5:17-cv-00093, 2022 WL 4479253 (W.D. Va. Sept. 27, 2022). The district court acknowledged the witness testimony that Roane "took one step forward" before he fired his weapon. *Id.* at *5. But that did not count, the court concluded, as "evidence that the threat to Roane ended before the shot was fired." *Id.* Because there was no witness "standing where Roane was standing or behind him," there was nobody (other than Roane) who could testify to Roane's perceptions — whether Roane "would have known that the lead ended and that Jax had reached the end of it," or whether, as Roane asserted, he believed Jax to be unrestrained at the time of the shooting. *Id.* And it followed, the court concluded, that as a matter of law, Roane reasonably feared Jax and made a reasonable "split-second decision" to shoot him. *Id.* Finding no Fourth Amendment violation, the court

2. Lotts also testified that he "can't say if it's true or not" that "Roane took a step back towards Jax prior to firing the shot," J.A. 673-74, but the weight of his testimony appeared to be that Roane did not take such a step.

entered summary judgment for Roane without addressing qualified immunity. *Id.* at *5 n.6.[3]

Ray timely appealed.

II.

In considering a motion for summary judgment, a district court must view the evidence in the light most favorable to the non-movant — here, Ray — and draw all reasonable inferences in her favor. *Harris v. Pittman*, 927 F.3d 266, 272 (4th Cir. 2019). The court cannot "weigh the evidence or make credibility determinations." *Id.* (quoting *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 569 (4th Cir. 2015)). That function is reserved for a jury, and only if "the movant shows that there is no genuine dispute as to any material fact" may summary judgment be awarded. Fed. R. Civ. P. 56(a); *see Jacobs*, 780 F.3d at 569.

We review de novo the district court's grant of summary judgment. *Harris*, 927 F.3d at 272. And here, we analyze the district court's decision not only against the record, but for conformity with our previous decision in *Ray*. Of course, the standards on a motion to dismiss and on summary judgment are different, and there is "nothing remarkable in concluding that some plaintiffs whose claims survive a motion to dismiss" — like Ray — "are unable

3. The court also granted Roane summary judgment on Ray's state law conversion claim. *Id.* at *5. Ray does not appeal that ruling and has therefore abandoned the claim. *See Stokes v. Stirling*, 64 F.4th 131, 137 (4th Cir. 2023).

to meet their burden to survive summary judgment." *Graves v. Lioi*, 930 F.3d 307, 317 (4th Cir. 2019). But when a plaintiff does meet her burden to substantiate allegations with facts, then the previous decision "govern[s] how the law applies to those facts." *Id.* at 318. Here, we conclude that the district court's decision is inconsistent with our decision in *Ray* and with the evidentiary record properly evaluated under Rule 56, and we therefore vacate the court's grant of summary judgment.

A.

Because the Fourth Amendment regulates officer behavior in light of their reasonable perceptions, *Jones v. Buchanan*, 325 F.3d 520, 528 (4th Cir. 2003), all agree that this case is about what Roane reasonably perceived in the moments before he shot Jax. As relevant here, there are two ways to discern those perceptions. There is Roane's word: what he says he saw. And there are Roane's actions: what his behavior suggests he saw. Roane says that he reasonably perceived Jax as unrestrained and therefore a threat. But because Ray "can point to evidence" — based on Roane's actions — from which a jury could infer that Roane "is not credible on this point," summary judgment is inappropriate. *Id.*

In reaching this conclusion, "[w]e are not writing on a blank slate," *Winston v. Pearson*, 683 F.3d 489, 498 (4th Cir. 2012), and our previous decision in *Ray* all but settles this appeal. As noted above, we relied centrally in *Ray* on two specific allegations from Ray's complaint: "Roane stopped backing away from Jax when the dog reached the end of the zip-lead, and then took a step toward the

dog before firing his weapon." 948 F.3d at 228. And we explained why those allegations were so important: If credited, this account of Roane's actions could yield "the reasonable inference" that, contrary to Roane's account of his perceptions, he in fact "observed that the dog could no longer reach him, and, thus, could not have held a reasonable belief that the dog posed an imminent threat." *Id.*

It remained to be seen, of course, whether discovery would bear out these crucial allegations. *See Graves*, 930 F.3d at 317-18. But one point of consensus in this case is that discovery has produced a genuine dispute as to the material facts we identified and emphasized in *Ray*. This much would be hard to deny; as outlined above, the many witnesses to the shooting split 3-2-3 as to whether Roane stopped back-peddling and took a step forward before firing. That means Ray has "met [her] burden to survive summary judgment," *id.* at 317 (cleaned up), generating a dispute resolvable only by crediting one group of witnesses over another — a task for a jury, not a court, *see Jacobs*, 780 F.3d at 568-69.

The district court did not question the "genuineness" of this dispute. Instead, it appeared to treat a concededly genuine dispute over Roane's alleged "step forward" as immaterial. 2022 WL 4479253, at *5. According to the district court, what mattered was that no witness — other than Roane — could testify to Roane's perceptions, given that no witness shared his vantage point. *Id.* (noting that Ray "acknowledged that she does not know what Roane saw or thought at the time because she was not in his position"). And as a result, there was no evidence that

would allow a jury to reject Roane's own account, which had him unaware that Jax was leashed at all, let alone at the end of his lead and thus unable to reach Roane. *Id.*

That assessment cannot be squared with our decision in *Ray*. *Ray* already established that the dispute on this record as to whether Roane "stopped backing away from Jax" and then "took a step toward the dog" before firing is indeed material, and highly so. *Ray*, 948 F.3d at 228. That is because a jury crediting the testimony of three witnesses that Roane stopped retreating and stepped *toward* Jax before firing could draw a "reasonable inference" that Roane recognized Jax's inability to advance further and thus the absence of any "imminent threat." *Id.* Contrary to the district court's intimations, in other words, a jury would not be required to accept Roane's account of his own perceptions without question. *See Stanton v. Elliott*, 25 F.4th 227, 234 (4th Cir. 2022) (cautioning against "simply accepting officer testimony as true"). Instead, if it credited Ray's side of the dispute over the "step forward," it could infer from Roane's actions that "Roane shot Jax at a time when he could not have held a reasonable belief that the dog posed a threat to himself or others," which would in turn establish that "Roane's seizure of Jax was unreasonable." *Ray*, 948 F.3d at 229.

In sum — and at the risk of belaboring what should be a straightforward point — the district court believed that there was no evidence in this record to contradict Roane's testimony that he "did not know about or see the lead" that restrained Jax. 2022 WL 4479253, at *5. But our decision in *Ray* identified two material allegations that would fill this purported evidentiary gap and justify a jury

in finding otherwise. Discovery then yielded a genuine dispute about those material allegations. It is time for that dispute to go to a jury for resolution.

Our decision today comes with two important caveats. First, we did not hold in *Ray*, and do not hold today, that a reasonable jury crediting the "step forward" testimony would be *compelled* to infer that Roane knew when he fired that Jax had reached the end of his lead and posed no immediate threat. That would be a "reasonable inference," *Ray*, 948 at 228, but that does not make it the only one available. Perhaps, for instance, Roane could persuade a jury that he stepped toward Jax despite believing the dog continued to charge at him unrestrained so that he could get a cleaner shot. *Cf.* J.A. 174 (Sergeant Kite denying that Roane stepped forward but explaining that he might have stopped his retreat "to fire a shot"); *but see* J.A. 86 (Roane testifying that he was "running backwards" when he fired). The point is not that the "step forward" evidence, if credited, necessarily would lead to a verdict for Ray but that it could lead to such a verdict: It "may not necessarily refute [Roane's] story, but it might be reasonably arranged by a jury into a . . . version of events that does." *Stanton*, 25 F.4th at 236. A jury, not a court, must do that arranging.[4]

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4. Our court recently discussed the respective roles of courts and juries in Fourth Amendment cases turning on the objective reasonableness of officer actions. *See Armstrong v. Hutcheson*, 80 F.4th 508, 513-15 (4th Cir. 2023). The ultimate question of objective reasonableness, we opined, is a purely legal issue for a court to decide, while disputes over material historical facts are to be decided by juries. *Id.* at 514-15. However that division of labor might apply in future cases, it has no bearing in this one, because our court

Second, as we emphasized at the outset, the fact that a plaintiff's complaint survived a motion to dismiss does not mean that summary judgment is foreclosed. *Graves*, 930 F.3d at 317. Had "[d]iscovery produced substantially different facts than [Ray] alleged in her [c]omplaint," then notwithstanding our decision in *Ray*, summary judgment could well be available to Roane. *Id.* at 318. But that is not what happened. Instead, if a jury credits the evidence produced in discovery that is most favorable to Ray — as we must assume for present purposes it will — then that jury will arrive at a scene almost identical to the one painted in the complaint. And that scene will culminate in the action that we held in *Ray* would justify an inference that Roane understood Jax to pose no immediate threat: Roane "stopping," "stepping back in," and then shooting the dog. J.A. 198 (cleaned up); *see also* J.A. 241, 276, 313, 473-74, 554.[5] Under these circumstances and given our

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already has decided the ultimate legal question. If a jury credits Ray's allegations and draws permissible inferences in her favor — finding that Roane was aware when he shot Jax that the dog could no longer reach him — then it follows, we held in *Ray*, that Roane lacked a "reasonable belief that the dog posed an imminent threat," making the shooting "an unreasonable seizure" under the Fourth Amendment. 948 F.3d at 228, 229; *see, e.g., United States v. Yengel*, 711 F.3d 392, 399 (4th Cir. 2013) (explaining importance of evidence that officer did not in fact perceive an emergency to objective reasonableness inquiry). In this case, in other words, the legal work is done, and what remains is only for the jury to decide the facts.

5. Nor is this a case in which new evidence produced in discovery, necessarily unaccounted for in our prior opinion, renders immaterial the allegations on which we previously relied. *Cf. Graves*, 930 F.3d at 318 (holding that law-of-the-case doctrine does not apply where discovery produces "substantially different facts" than alleged,

decision in *Ray*, the district court erred in holding that Roane was entitled to judgment as a matter of law on the merits of Ray's Fourth Amendment claim.

B.

We may deal more briefly with Roane's alternative argument that he is entitled to qualified immunity on Ray's Fourth Amendment claim as a matter of law. As we explained in *Ray*, a government official who violates the Constitution might nonetheless be shielded from liability under the second prong of the qualified immunity analysis if "clearly established" law would not have put a "reasonable officer" in his position on notice "that his conduct was unlawful." 948 F.3d at 228. We analyze Roane's entitlement to qualified immunity using the same evidentiary record that informed our analysis of the constitutional merits: "[U]nder either prong" of the qualified immunity inquiry, "courts may not resolve

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requiring reviewing court to "alter [its] understanding of the factual underpinnings" of the plaintiff's claim). The district court did rely in part on new testimony that Jax had "gotten off his lead" in the past, implying that Roane might reasonably have perceived Jax as a threat even if he did know that Jax was tethered at the end of the lead. 2022 WL 4479253, at *5. But as noted above, our inquiry focuses on what Roane reasonably perceived based on the information in his possession at the time of the shooting, rejecting "the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989); *see Lee v. Fort Mill*, 725 F. App'x 214, 218 nn. 4 & 5 (4th Cir. 2018). And there is of course no suggestion that Roane, who testified he was entirely unaware of the tether system restraining Jax, knew at the time of any vulnerability in that system, or believed that Jax was tethered but at risk of breaking free.

genuine disputes of fact in favor of the party seeking summary judgment." *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam); *see also Smith v. Ray*, 781 F.3d 95, 100 (4th Cir. 2015).

Our decision in *Ray* forecloses Roane's entitlement to qualified immunity on summary judgment. We explained in *Ray* that if "Roane shot Jax at a time when he could not have held a reasonable belief that the dog posed a threat to himself or others," he violated clearly established law and qualified immunity cannot protect him. 948 F.3d at 229. And as we explain above, discovery yielded a genuine dispute over facts from which a jury could infer that Roane did just that. "The question of whether a reasonable officer would have known that the conduct at issue violated" a clearly established right "cannot be decided prior to trial if disputes of the facts exist." *Id.* at 228. This is just such a case, and for the same reason that Roane's merits argument cannot be resolved as a matter of law, we cannot find, in this posture, that Roane is entitled to qualified immunity as a matter of law.

III.

For the reasons given above, the district court's judgment is vacated and the case remanded for trial.

VACATED AND REMANDED

APPENDIX B — Memorandum Opinion Of The United States District Court For The Western District Of Virginia, Harrisonburg Division, Filed September 27, 2022

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, HARRISONBURG DIVISION

Civil Action No. 5:17-cv-00093

TINA RAY,

Plaintiff,

v.

MICHAEL ROANE,

Defendant.

By: Elizabeth K. Dillon, United States District Judge

MEMORANDUM OPINION

This case arises out of an unfortunate incident where Deputy Sheriff Michael Roane shot and killed Tina Ray's dog, a German Shepherd named "Jax." Ray's primary claim is under the Fourth Amendment for an unreasonable seizure.[1] Previously, the court dismissed Ray's complaint

1. Plaintiff has abandoned her federal due process claim and her state law claim for intentional infliction of emotional distress. The only claims remaining are plaintiff 's Fourth Amendment

for failure to state a claim, but the Fourth Circuit reversed, holding that the complaint plausibly stated a claim for an unconstitutional seizure of property for which defendant was not entitled to qualified immunity. *Ray v. Roane*, 948 F.3d 222 (4th Cir. 2020).

Now before the court are defendant's motion for summary judgment and motion to exclude expert witness Roy Bedard. (Dkt. Nos. 73, 75.) Because the court finds that Roane's shooting of Jax was not objectively unreasonable as a matter of law, defendant's motion for summary judgment will be granted, defendant's motion to exclude will be dismissed as moot, and judgment will be entered for Roane.

I. FACTUAL BACKGROUND

A. Events Prior to Roane's Arrival

On Sunday morning, September 24, 2017, Augusta County Deputy Sheriff Aaron Will went to Tina Ray's house to serve a warrant for her arrest for assault on a family member and a protective order, relating to an altercation she had with her husband. (Ray dep. 50-53, 65-66, Dkt. No. 74-8; Will Dep. 10-11, Dkt. No. 74-4.)[2]

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claim and her state law conversion claim. These two claims are addressed in this opinion.

2. Deposition transcripts and declarations are located at Docket No. 74: Exhibit 2—Deputy Roane declaration; Exhibit 3—Deputy Roane deposition; Exhibit 4—Will deposition; Exhibit 5—James Lotts deposition; Exhibit 6—Scott Smith deposition;

When he arrived, Deputy Will smelled marijuana in Ray's house. (Ray Dep. 55-56; Hicks Dep. 11-12.) Ray and her friends, Stephanie Hagy and Adam Hicks, had been smoking marijuana that morning. (Nagy Dep. 67.) Another man was present and doing work on the roof. (Ray Dep. 35.)

Because of the marijuana and suspected drug activity, Deputy Will contacted Augusta County Deputy Sheriff Michael Roane for assistance. (Will Dep. 15; Roane Dep. 15, 18.) Roane was a supervisor on a multi-jurisdictional drug and gang task force, as well as a Deputy Sheriff and Investigator in the Augusta County Sheriff's Office. (Roane Decl. ¶ 2.) While Roane had never met Ray and had never been to her house, he and Deputy Will had earlier discussed a potential knock-and-talk at Ray's residence because of information Roane had received about drug distribution and drug use at her house. (Roane Dep. 37-39; Will Dep. 9-10, 15.) Roane also knew that Deputy Will previously had an encounter with Ray when she appeared to be under the influence and was found to be in possession of prescription pills. (Ray Dep. 48-49.) Ray attributes this information to her husband's attempt to cause her trouble by telling everyone she is on drugs. (Ray audio, Dkt. No. 74-22.)

On the day in question, Deputy Will asked Ray, Hagy, and Hicks to go outside with him, and he had the other person come down from the roof of Ray's house. (Ray

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Exhibit 7 Christopher Kite deposition (missing page 11 found at Dkt. No. 84-2); Exhibit 8—Ray deposition; Exhibit 9—Stephanie Hagy deposition; and Exhibit 10—Adam Hicks deposition.

Dep. 61.) Augusta County Deputies James Lotts, Scott Smith, and Christopher Kite arrived in separate vehicles to assist Deputy Will before Roane arrived. (Lotts Dep. 8; Smith Dep. 10; Kite Dep. 8-10.) Ray and the others at her house were told by the officers that another officer, from the drug task force, was coming, so they waited outside around the picnic table for his arrival. (Ray Dep. 64-65; Hagy Dep. 22, 24; Hicks Dep. 13.)

B. Jax

Jax was a seven-year-old, long-haired shepherd and weighed 150 pounds. (Ray Dep. 79, 87, 126.) He was protective of his owner and others with whom he was familiar. (*Id.* at 33.) While everyone awaited Roane's arrival, Jax was in his play area near a tree on a 25-foot zip line device or trolley system strung high between two trees with a long lead connected to this device. (*Id.* at 57-58.) Ray acknowledged that she did not know of anyone else with such a system. (*Id.* at 189.) This system, with which Hagy and Hicks were familiar having been to the house before (Hagy Dep. 13-14; Hicks Dep. 8, 14-15), allowed Jax to go from one side of the yard to the other and have access to doors on both sides of Ray's house (Hagy Dep. 14).

Ray posits that the line was visible on the tree near Jax, but she admits that the trees were in full leaf and it was at least difficult to see portions of the device. (Ray Dep. 171-72.) Officers, who were waiting on scene for Roane's arrival with Ray, her friends, and the dog, did not realize the dog was on a zip line. As Deputy Will

testified, when he arrived at the house, he "noticed there was a large German shepherd dog that was—I thought was tied to the tree right beside the house." (Will Dep. 11.) He did not see the zip line device before the incident. (*Id.* 13.) Deputy Smith described it as a clear clothesline type line high in the air (Smith Dep. 21) and stated, "I did not see the lead until after all this occurred . . . there is a—it was, like, strung between two trees high in the air . . . you wouldn't have seen it from the ground unless you were specifically looking for it." (Smith Dep. 21-22.) Deputy Kite saw a lead, but he could not tell if it was tied. (Kite Dep. 9.)

As Ray later admitted to the Sheriff and confirmed at her deposition, Jax had gotten off his lead before (Ray Dep. 124), and he could snap that lead and get off it anytime if he had wanted off (*id.* at 149).

C. Roane Arrives

Roane was at home when he received an unexpected call from Deputy Will that morning to assist at Ray's house. (Roane Decl. ¶ 4.) Roane had never been to the house before, and he responded, wearing plainclothes and with his handgun, about 30-40 minutes later, driving his office-provided pick-up truck with heavily tinted windows that were rolled up. (*Id.*; Roane Dep. 16, 17, 26, 28; Ray Dep. 95-96.) When he arrived, he saw that there were several police cars in the driveway and an unmarked police car that appeared to be in a grassy area near a picnic table where people were sitting. (Roane Dep. 19.) There were also other vehicles in the grass and on the

property. (*Id.*) He pulled into the left of the police cars parked in the driveway to the grassy area adjacent to the driveway to be nearer the people around the picnic table, so he could interview everyone separately in the pick-up truck cab. (Roane Decl. ¶ 3, Ex. A; Roane Dep. 77-78.) He unknowingly parked his truck underneath Jax's zip line. (Ray Dep. 66; Hicks Dep. 16; Hagy Dep. 30.)

As he was pulling in, Roane briefly saw a large German shepherd dog sitting next to a tree. (Roane Decl. ¶ 6; Roane Dep. 19, 50.) He thought the dog was tied to the tree with a leash. (Roane Dep. 23.) The tree was on the passenger side of the pick-up truck when Roane parked, and Roane thought the dog was far enough away to be beyond his reach when he exited his truck from the driver's side. (*Id.* at 24; Roane Decl 3, Ex. A.) Roane did not see the zip line and did not know he had parked in Jax's play area. (Roane Dep. 19-20, 76-77; Roane Decl 10-11; Ray Dep. 58, 78-79.) Ray admits that Roane would not have known that it was Jax's play area. (Ray 231.)

D. Jax Alerts And Goes After Roane; Roane Shoots And Kills Jax

While the witnesses accounts of the interaction between Roane and Jax vary slightly, everyone agrees that Jax became alarmed and took off either when Roane's truck pulled up under the tree or when Roane exited the driver's side of his vehicle. Jax went after Roane and was barking and/or growling and/or woofing. (Ray Dep. 71 and Hagy Dep. 31, 33 (dog running and barking); Hicks Dep. 19 (couple of woofs); Kite Dep. 12 (dog chasing Roane and

moving pretty quick); Kite Dep. 13 (barking and growling); Lotts Dep. 10 (barking and growling, running and jumping up); Smith Dep. 14 (growling); Will Dep. 19 (barking and growling).) People were yelling at and/or about the dog (Ray Dep. 30, 71 (let her get the dog); (Hagy Dep. 34 (Ray yelling and trying to get the lead); Ray Dep. 31 (Ray yelling "Jax, Jax"); (Hagy Dep. 28 (people screaming "The dog, the dog" after Jax took off); Hicks Dep. 16 (all yelling "Stop, stop, stop" because Jax was up and approaching); Hicks Dep. 17 (Hicks thought "hey, get back in the car—jump on back of truck").) Meanwhile, Roane was running or walking backward or backpedaling past the back end of his truck. (Hagy Dep. 35, Lotts Dep. 10, and Ray Dep. 31 (running backwards); Hicks Dep. 20 (walked steadily backwards; hard to describe); Kite Dep. 13 and Smith Dep. 15 (backpedaling).) Roane fired one shot, and Jax collapsed and died. (Roane Dep. 34.) Everyone also agrees that the events transpired very quickly—in a matter of seconds. (Ray Dep. 28-29 (happened quickly, matter of few seconds); Ray Dep. 32 (between truck stop and gunshot, a few seconds); Hagy Dep. 63 (happened very quick); Hicks Dep. 21 ("a couple minutes tops"[3] and "[i]t was fast. It all seemed like it went (witness snaps fingers)"); Lotts Dep. 14 (5 seconds between arrival and shot); Kite Dep. 17 (seconds); Roane Decl. ¶ 5 (a few seconds after got out of truck).)

On the day of the incident in a recorded conversation, Ray told Roane that she saw Jax come around the truck,

3. Hicks, who admits he was not really paying attention, includes in his estimate the time between the truck pulling into the yard and the firing of the shot, and he notes that it took Roane about one minute to exit the truck. (Hicks Dep. 19, 21.)

but she thought Roane was still in the truck. Then she heard a gunshot and did not know what it was. (Ray Dep. 26 (playing audio); Ray audio.) At her deposition, she testified to a more detailed version of the events. She stated that when the dog rounded the truck, she heard officers shouting, "Let her get the dog!", so she ran to get the end of the lead. (Ray Dep. 30.) Roane was running backward with Jax chasing him. (*Id.*) Jax was running and barking. (*Id.* at 71.) She was hollering at the dog and grabbed the lead with her right hand up in the air.[4] (*Id.* at 31, 188.) Ray, who only weighed 130 pounds at the most, was not strong enough to pull the dog back. (*Id.* at 45, 165.) She pulled on the lead the whole time until Jax was on the ground. (*Id.* at 86-87.) She could feel the dog pulling the whole time. (*Id.* at 87.) She never saw Roane draw his weapon (*id.* at 226), and she could not see Jax's face (*id.* at 89), but Jax was within one step of Roane when the shot was fired (*id.* at 155).

According to Roane, once he got out of the truck, the dog immediately came charging at him from around the front of the truck. (Roane Dep. 29.) Jax was growling, barking, and chomping and baring its teeth aggressively and in attack mode trying to bite him. (*Id.* at 29, 31.) Roane began running backward as fast as he could. (*Id.* at 31.) Roane thought the dog had broken its leash and was no longer tied to the tree. (*Id.* at 30; Roane Decl. ¶ 6.) The dog continued chasing Roane, and when the dog had closed to within inches and was still chasing Roane backward

4. Hagy testified that she does not think Ray ever got hold of the lead. (Hagy Dep. 63.)

beyond the rear of the truck, Roane fired one shot. (Roane Dep. 31-35.) The dog collapsed and died. (*Id.*)

E. Observations At The Time The Shot Was Fired

Roane had been running or backpedaling away from Jax down the driver's side of the truck and was behind the truck and facing Jax when the shot was fired. (*Id.* at 34.) Hagy and Hicks were at the picnic table off to the passenger side front of the truck. (Hagy Dep. 17-19; Hicks Dep. 13.) Roane and Jax were very close to each other when the shot was fired. (Roane Dep. 34-35 (inches away); Ray Dep. 155 (within one step); Hicks Dep. 23 (no more than one foot between dog's head and Roane); Hagy Dep. 36 (couple of feet).) According to Hagy, Jax was still barking. (Hagy Dep. 35.) The witnesses who were familiar with the zip line device testified that Jax was at the end of the lead when Roane fire the shot and that he took a step toward Jax before firing. (Ray Dep. 78 ("it seemed like" Roane stepped back toward the dog); Hagy Dep. 35-36; Hicks Dep. 17, 20-21.) Witnesses unfamiliar with the zip line system, did not observe that Jax was at the end of his lead or see a step forward. (Kite Dep. 16 (Jax still moving forward when shot); Smith Dep. 15 (heard one shot and Roane continued to backpedal and dog continued and then collapsed).) According to Roane, the dog was still coming toward him (Roane Dep. 61) and was "right at me, chomping and growling and attacking me, and I shot the dog," (Roane 20). He thought Jax must have broken free from whatever tied him to the tree. (Roane Decl. ¶ 6.) Furthermore, he feared serious injury (Roane Decl. ¶ 6) as he saw no one and nothing controlling Jax (Roane

Decl. ¶ 9) and his experience taught him that some drug dealing operations had dogs trained to attack to protect the operation (Roane Decl. ¶ 7). Hagy noted that Jax became more aggressive after seeing Roane's gun. (Hagy Dep. 35.) Roane's fears were also noted by Hicks when he initially stated that he saw what he believed to be fear on Roane's face at the time the gun was fired.[5] (*Id.* at 37.)

Following the shooting, Roane examined the zip line trolley system, the likes of which he had not seen before, and determined that "there was still much more slack that the dog could have used to keep coming at me and attack me." (Roane decl. ¶ 11.) Additionally, Ray admitted that she does not know whether the lead could have slid along the zip line a little further one way or the other when the shot was fired. (Ray Dep. 136, 175-76.) She also recognized that Roane did not come to her house to shoot her dog but that it was a spontaneous thing that happened. (*Id.* at 150.) Hagy also acknowledged that Roane told her he felt threatened when she asked him why he shot Jax. (*Id.* at 38.)

II. ANALYSIS

A. Summary Judgment

Summary judgment should be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of

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5. Hicks then noted that he was not sure that he could see Roane's face. (Hicks Dep. 37.)

law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material fact is one that "might affect the outcome of the suit under the governing law." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183 (4th Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A dispute of material fact is "genuine" if sufficient evidence favoring the non-moving party exists for the trier of fact to return a verdict for that party. *Anderson*, 477 U.S. at 248-49.

The moving party bears the initial burden of showing the absence of a genuine dispute of material fact. *Celotex*, 477 U.S. at 323. Once the moving party makes this showing, however, the opposing party may not rest upon mere allegations or denials, but rather must, by affidavits or other means permitted by the Rule, set forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(c), 56(e). All inferences must be viewed in a light most favorable to the non-moving party, but the nonmovant "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985).

B. Fourth Amendment

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Plaintiff has the burden to satisfy the required elements of her Fourth Amendment claim: an (1) unreasonable (2) seizure (3) by a government actor.

Monroe v. City of Charlottesville, 579 F.3d 380, 386 (4th Cir. 2009). There is no dispute that Jax was seized. The only question is whether plaintiff has come forward with sufficient evidence of a genuine issue of material fact regarding the objective unreasonableness of the seizure. *Id.* Whether a seizure was unreasonable is an "objective determination," and based on the "facts and circumstances confronting [the officer] without regard to [his] underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). Also, the officer's conduct "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.*

In analyzing the reasonableness of the seizure, the court must balance the highly significant private interests that an individual has with her pet, with the government's strong public interest in protecting officers from dogs that may be dangerous. *See Ray*, 948 F.3d at 227 (citing and quoting *Altman v. City of High Point, N.C.*, 330 F.3d 194, 205 (4th Cir. 2003)). "The task of this court is to put itself into the shoes of the officers at the time the actions took place and to ask whether the actions taken by the officers were objectively reasonable." *Altman*, 330 F.3d at 205. This analysis must also "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." *Ray*, 948 F.3d at 227 (citing *Altman*, 330 F.3d at 205 (quoting *Graham v. Connor*, 490 U.S. 386, 396-97 (1989)).

Appendix B

A review of the evidence, in a light most favorable to Ray, reveals that Roane parked his truck under the zip line / trolley system to which Jax was attached and, unbeknownst to Roane, in Jax's play area. Roane and some other officers did not see this system, that was high in the trees and at least partially obscured by the trees in full leaf, until after Jax was shot. Jax was alarmed by the truck and/or the driver's side door opening and closing when Roane pulled up, so he growled and/or barked and/or woofed at Roane and went after him in a walk or run. Everyone on the scene, including Roane and Ray, perceived the threat that Jax, a very large dog, posed to Roane as people were yelling warnings about the dog and yelling at the dog to get him to stop. Ray ran to grab the lead and could feel Jax pulling on it the entire time, but the dog was too strong for her. She could not control Jax. Hicks thought Roane should get back in the truck or on the truck. Roane backpedaled away from Jax with a look of what might have been fear on his face. In a matter of seconds, or in the snap of one's fingers, and with very little distance between Roane and Jax, Roane fired one shot that killed Jax. There is no indication that Roane had time to surveil the area while retreating from Jax to consider his options.

When standing in Roane's shoes, a reasonable officer sees a large dog, in the yard of a home of a suspected drug dealer, coming after him and appearing to be unrestrained. The dog continues, uncontrolled by Ray's words or efforts, while Roane retreats in fear. Roane, fearing serious injury, makes a split-second decision and fires one shot, killing the dog.

While a few witnesses who were familiar with the zip line system concluded that Jax was at the end of his lead when Roane took one step forward and fired his weapon, no one was standing where Roane was standing or behind him. No one indicated how Roane, who did not know about or see the lead, would have known that the lead ended and that Jax had reached the end of it. Finally, no one checked the lead following the incident except Roane. Roane observed that there was much more slack in the line to allow Jax to continue toward him. Ray admitted that she did not know if the lead could have slid further along the zip line when the shot was fired. And she acknowledged that she does not know what Roane saw or thought at the time because she was not in his position—she could not see Jax's face. Furthermore, there is no evidence that the threat to Roane ended before the shot was fired. Indeed, Jax had gotten off his lead before and he "could snap that lead and actually get off of it if he wants off of it anytime."

Given the undisputed facts, no reasonable jury could find a Fourth Amendment violation. As the Fourth Circuit noted in a previous case involving an officer threatened by dogs, "[t]he 'critical reality'" is that the officer "did not even have a chance to pause and consider his options," or "pause and ponder" the many factors that would affect how much of a threat was posed without "risking losing the last chance to defend" himself. *Lee v. Fort Mill*, 725 F. App'x 214, 216 (4th Cir. 2008). Such was the case here.

For these reasons, the court finds that Roane's seizure of Jax was reasonable under the Fourth Amendment.[6]

6. Because of this ruling, the court does not address defendant's qualified immunity argument.

C. State Law Conversion

In Virginia, "[a] person is liable for conversion for the wrongful exercise or assumption of authority over another's goods, depriving the owner of their possession, or any act of dominion wrongfully exerted over property in denial of, or inconsistent with, the owner's rights." *Simmons v. Miller*, 544 S.E.2d 666, 679 (Va. 2001). For the reasons already stated, Roane's exercise of control over Jax was not wrongful. Rather, he was acting to protect himself from the threat posed by Jax. Thus, the court will grant summary judgment on this claim.

III. CONCLUSION

For the reasons stated above, the court will issue an appropriate order granting Roane's motion for summary judgment, dismissing Roane's motion to exclude expert testimony as moot, and granting judgment to Roane.

Entered: September 27, 2022.

/s/ Elizabeth K. Dillon
Elizabeth K. Dillon
United States District Judge

APPENDIX C — Opinion Of The United States Court Of Appeals For The Fourth Circuit, Filed January 22, 2020

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2120

TINA RAY,

Plaintiff – Appellant,

v.

MICHAEL ROANE, in his individual capacity,

Defendant – Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Harrisonburg. Elizabeth Kay Dillon, District Judge. (5:17-cv-00093-EKD)

Argued: October 30, 2019 Decided: January 22, 2020

Before GREGORY, Chief Judge, KEENAN, and RICHARDSON, Circuit Judges.

Reversed and remanded by published opinion. Chief Judge Gregory wrote the opinion, in which Judge Keenan and Judge Richardson joined.

Appendix C

GREGORY, Chief Judge:

Appellant Tina Ray appeals the dismissal of her claim brought under 42 U.S.C. § 1983, in which she alleged that her Fourth Amendment rights were violated when Officer Michael Roane shot and killed her dog, Jax. According to the complaint, Roane shot Jax when it was in Ray's yard, tethered, and incapable of reaching or harming Roane. Bound by those facts at this stage of the proceeding, we hold that the complaint plausibly states a claim for an unconstitutional seizure of Ray's property for which Roane is not entitled to qualified immunity. Therefore, we reverse and remand for further proceedings.

I.

At the outset, we acknowledge that there is evidence in the record on appeal that appears to contradict some of the allegations in the complaint. However, because Ray's claims were dismissed for failure to state a claim, we "limit our review to the complaint itself." *Braun v. Maynard*, 652 F.3d 557, 559 (4th Cir. 2011). Further, as we do in any case alleging unreasonable use of force under the Fourth Amendment, we focus on the facts and circumstances confronting the officer "immediately prior to and at the very moment" that force was used, and disregard information not known to the officer at that time. *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991). With these principles in mind, the relevant factual allegations in the complaint are straightforward.

Appendix C

On September 24, 2017, Roane drove to Ray's property to assist with an arrest warrant that was being served on Ray for domestic abuse. When Roane arrived on Ray's property, four other officers were already present and parked in the driveway. Ray's dog—a 150-pound German Shepard named Jax—was secured by a zip-lead attached to two trees that allowed the animal limited movement within a "play area" of the yard. Rather than park in the driveway like the other officers, Roane parked his truck within the dog's "play area," prompting the other officers on scene to shout and gesture toward Roane, indicating that he should "[w]ait" and "[l]et [Ray] get her dog." Roane exited his vehicle and started walking toward the house.

As Roane emerged from his vehicle, Jax began barking at and approaching Roane. Roane responded by backing away from the dog and drawing his firearm, while Ray ran to the zip-lead and began shouting Jax's name. "In a short moment," Jax reached the end of the zip-lead and "could not get any closer" to Roane. Roane observed that the dog could not reach him, and further observed that Ray was now holding onto Jax's fully-extended lead and continuing to call Jax's name. Roane therefore stopped backing up. Roane then took a step forward, positioning himself over Jax, and fired his weapon into the dog's head. The dog died from the wound.

In her complaint, Ray asserted four claims for relief against Roane—unlawful seizure of Jax in violation of the Fourth Amendment, violation of substantive due process, conversion, and intentional infliction of emotional distress—seeking various categories of damages. Ray

later indicated she would not pursue her substantive due process claim. Roane moved to dismiss the entire action against him and answered the complaint. On September 20, 2018, the district court dismissed Ray's federal claim for unlawful seizure of Jax and declined to exercise supplemental jurisdiction over the remaining two state-law claims. In so doing, the district court concluded Roane's actions had been reasonable under the totality of the circumstances and he would be entitled to qualified immunity.

As to whether Ray sufficiently alleged that Roane's actions were unreasonable, the district court pointed to several facts in the complaint that led it to conclude the seizure was reasonable: (1) Jax was a large dog weighing approximately 150 pounds; (2) Jax was "alarmed" by Roane's arrival; (3) Jax was "barking while approaching Roane," and Roane responded by moving backward, away from him; and (4) the entire incident took only a "short moment." J.A. 362. The district court also pointed to several allegations it distinguished, such as the fact that Jax had reached the end of his zip-lead and could not reach Roane. According to the district court, "an objectively reasonable officer would have felt threatened in the circumstances immediately preceding the shot and . . . might not have been sure that Jax no longer posed a threat." J.A. 362-63. The important factor was instead Jax's proximity to Roane.

The district court also held that Roane was entitled to qualified immunity. For the same reasons it concluded that Ray failed to allege an unreasonable seizure, the court concluded that a reasonable officer would not

have known it was "clearly unreasonable" to shoot Jax in these circumstances. At worst, this was a "classic case" of a bad guess in a gray area or a reasonable but mistaken judgment. J.A. 370. Accordingly, the district court dismissed the entire action with prejudice. Ray now appeals the district's court dismissal.

II.

We review a district court's grant of a motion to dismiss *de novo. See King v. Rubenstein*, 825 F.3d 206, 214 (4th Cir. 2016) (citing *Simmons v. United Mortg. & Loan Inv., LLC*, 634 F.3d 754, 768 (4th Cir. 2011)). In reviewing a motion to dismiss for failure to state a claim, we must "accept as true all of the factual allegations contained in the complaint and draw all reasonable inferences in favor of the plaintiff." *Id.* at 212. A complaint need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Tobey v. Jones*, 706 F.3d 379, 387 (4th Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A Rule 12(b)(6) motion to dismiss 'does not resolve contests surrounding facts, the merits of a claim, or the applicability of defenses.'" *Id.* (quoting *Republican Party of N. Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992)).

We also review a qualified immunity-based grant of a motion to dismiss *de novo. Id.* at 385 (citation omitted). To determine whether a complaint should survive a qualified immunity-based motion to dismiss, we exercise "sound discretion" in following the two-prong inquiry set forth by the Supreme Court, analyzing (1) whether a

constitutional violation occurred and (2) whether the right violated was clearly established. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *Saucier v. Katz*, 533 U.S. 194, 200 (2001); *Melgar v. Greene*, 593 F.3d 348, 353 (4th Cir. 2010). A court may consider either prong of the qualified immunity analysis first. *Sims v. Labowitz*, 885 F.3d 254, 260 (4th Cir. 2018).

III.

On appeal, Ray argues the district court erred in analyzing both prongs of the qualified immunity analysis. First, she asserts the district court erred dismissing the action and concluding the allegations in the complaint were insufficient to allege Roane unreasonably seized Jax in violation of the Fourth Amendment. Ray then contends, assuming the seizure was unconstitutional, the district court also erroneously concluded Roane was entitled to qualified immunity. We agree with Ray.

A.

As an initial matter, it is well-settled that privately owned dogs are "effects" under the Fourth Amendment, and that the shooting and killing of such a dog constitutes a "seizure." *Altman v. City of High Point, N.C.*, 330 F.3d 194, 203-05 (4th Cir. 2003). Thus, we will affirm the district court's conclusion that the shooting of Ray's dog by Roane was constitutional only if we conclude it was reasonable under the circumstances alleged in the complaint.

Appendix C

"To assess the reasonableness of [a government seizure under the Fourth Amendment], '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *United States v. Jacobsen*, 466 U.S. 109, 125 (citation omitted). As we held in *Altman*, private interests in dogs—and family pets especially—are highly significant since dogs "have aptly been labeled 'Man's Best Friend,' and certainly the bond between a dog owner and his pet can be strong and enduring." 330 F.3d at 205 ("Many consider dogs to be their most prized personal possessions, and still others think of dogs solely in terms of an emotional relationship, rather than a property relationship."). Likewise, the government undoubtedly has a strong public interest in protecting citizens and officers from dogs that may be dangerous or otherwise a source of public nuisance. *Id.* at 205-06. Thus, "[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." *Altman*, 330 F.3d at 205 (quoting *Graham v. Connor*, 490 U.S. 386, 396-97 (1989)).

In weighing these competing interests, we focus on the circumstances confronting Roane at the moment he fired his weapon. *Greenidge*, 927 F.2d at 792; *see also Altman*, 330 F.3d at 205-06. Although we view the facts in the light most favorable to Ray, we disregard allegations of subjective intent in the complaint and consider only the

information known to Roane at the time of the shooting. *Altman*, 330 F.3d at 205-06; *Greenidge*, 927 F.2d at 792. Our task, as we explained in *Altman*, is to place ourselves in the shoes of Roane and ask whether his actions were objectively unreasonable. *Altman*, 330 F.3d at 205. In other words, we assess whether Roane's asserted justification of officer safety justifies his decision to shoot Jax. *Id.*

Accepting these principles, Roane argues that his actions were objectively reasonable because he was confronted with a 150-pound German Shepard that was "alarmed" by his arrival, barking, and that in a "short moment" had advanced to within a step of him. Under these circumstances, Roane asserts that he reasonably felt threatened by Jax. Roane also cites to numerous cases involving dog shootings in which the officer's conduct was deemed reasonable, despite the fact that the dogs at issue were smaller than Jax or farther from the officer at the time of the shooting. As a result, Roane reasons the district court properly determined Ray's complaint failed to allege a Fourth Amendment violation. We disagree.

The problem with Roane's argument, and thus with the district court's decision adopting it, is that it requires us to ignore certain factual allegations in Ray's complaint and to draw reasonable inferences *against* Ray on a motion to dismiss. *DePaola v. Clarke*, 884 F.3d 481, 484 (4th Cir. 2018) ("In reviewing the defendants' motions to dismiss, we accept as true the factual allegations set forth in [the] complaint and draw reasonable inferences therefrom in [her] favor."). According to the complaint, Roane stopped backing away from Jax when the dog reached the end of

the zip-lead, and then took a step toward the dog before firing his weapon. *See* J.A. 15. These factual allegations yield the reasonable inference that Roane observed that the dog could no longer reach him, and, thus, could not have held a reasonable belief that the dog posed an imminent threat. Taking these factual allegations as true and drawing these reasonable inferences in Ray's favor, Roane's seizure of Jax was unreasonable because Jax no longer posed any threat to Roane.

Tellingly, in reaching the opposite conclusion, the district court relied on cases that were all decided on summary judgment involving one or more dogs that, like here, were barking or advancing toward an officer but, unlike here, were unleashed or unrestrained and posed an immediate danger to the officer. *See, e.g., Stephenson v. McClelland*; 632 F. App'x 177, 179 (5th Cir. 2015) (per curiam); *Schutt v. Lewis*, No. 6:12-CV-1697, 2014 WL 3908187, at *1 (M.D. Fla. Aug. 11, 2014); *McCarthy v. Kootenai Cty.*, No. 08-CV-294, 2009 WL 3823106, at *1-2 (D. Idaho Nov. 12, 2009); *Dziekan v. Gaynor*, 376 F. Supp. 2d 267, 269 (D. Conn. 2005); *Warboys v. Proulx*, 303 F. Supp. 2d 111, 113 (D. Conn. 2004). The district court's extensive reliance on cases decided on summary judgment underscores our conclusion that the district court did not fully credit the allegations in Ray's complaint and the inferences arising therefrom.

Accordingly, we conclude the district court erred in holding that the complaint failed to allege a violation of Ray's Fourth Amendment rights. We next turn to whether Roane is entitled to qualified immunity at this stage of the litigation.

Appendix C

B.

Qualified immunity "shield[s] [officials] from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *see also Saucier*, 533 U.S. at 201-02. Thus, although we conclude that Ray has plausibly alleged a violation of her constitutional rights, Roane is entitled to qualified immunity unless we conclude that a reasonable officer in Roane's position would have understood that his conduct was unlawful at the time of the shooting. *Braun*, 652 F.3d at 561.

The question of whether a right is clearly established is a question of law for the court to decide. *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992). The question of whether a reasonable officer would have known that the conduct at issue violated that right, however, cannot be decided prior to trial if disputes of the facts exist. *Smith v. Ray*, 781 F.3d 95, 100 (4th Cir. 2015). Thus, "while the purely legal question of whether the constitutional right at issue was clearly established is always capable of decision at the summary judgment stage [or on a motion to dismiss], a genuine question of material fact regarding [w]hether the conduct allegedly violative of the right actually occurred . . . must be reserved for trial." *Willingham v. Crooke*, 412 F.3d 553, 559 (4th Cir. 2005) (alteration and omission in original and internal quotation marks omitted) (quoting *Pritchett*, 973 F.2d at 313).

In addition, to determine whether a right was clearly established, we first look to cases from the Supreme Court,

this Court, or the highest court of the state in which the action arose. *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004). In the absence of "directly on-point, binding authority," courts may also consider whether "the right was clearly established based on general constitutional principles or a consensus of persuasive authority." *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 543 (4th Cir. 2017); *Owens*, 372 F.3d at 279 ("[T]he absence of controlling authority holding identical conduct unlawful does not guarantee qualified immunity."). The Supreme Court has ruled against defining a right at too high a level of generality and held that doing so fails to provide fair warning to officers that their conduct is unlawful outside an obvious case. *White v. Pauly*, 137 S. Ct. 548, 552 (2017).

On appeal, Ray argues that since at least 2003, we have "placed Roane on fair notice/warning that [she] had a clearly established right to enjoy her dog Jax, free from Roane using unreasonable deadly force against Jax," particularly where her dog Jax was secured, controlled, and could no longer reach Roane. According to Ray, Roane's actions—killing a pet while that pet poses no immediate threat of harm to a law enforcement officer—are unreasonable and contravene well-recognized precedents.

In response, Roane contends neither our precedents nor the body of case law involving police-dog shooting address the "particularly unusual circumstances" Roane had faced at Ray's home. According to Roane, there is no authority involving "a 150-pound dog that had advanced toward [an officer] to within a step, 'alarmed' and barking";

a "25-foot zip-lead contraption"; or other relevant facts similar to the ones here. As a result, qualified immunity protects "mistakes in judgment" and gives officers like Roane "breathing room to make reasonable but mistaken judgments." Moreover, this Court should not engage in "Monday morning quarterback[ing]" to find an officer, like Roane, "could have or should have done something different."

We disagree with Roane's contentions with respect to qualified immunity, for the same reasons already set forth in our discussion of whether the complaint states a claim for a violation of the Fourth Amendment. Viewing all facts in the complaint and inferences arising therefrom in Ray's favor, it is clear that Roane shot Jax at a time when he could not have held a reasonable belief that the dog posed a threat to himself or others. Accepting these facts, we hold that a reasonable police officer would have understood that killing Jax under such circumstances would constitute an unreasonable seizure of Ray's property under the Fourth Amendment.

We acknowledge that there is no "directly on-point, binding authority" in this circuit that establishes the principle we adopt today. *Booker*, 855 F.3d at 543. Until now, we have never had the occasion to hold that it is unreasonable for a police officer to shoot a privately owned animal when it does not pose an immediate threat to the officer or others. Still, even without "directly on-point, binding authority," qualified immunity is inappropriate if "the right was clearly established based on general constitutional principles or a consensus of persuasive

authority." *Booker*, 855 F.3d at 543; *Owens*, 372 F.3d at 279-280. This is such a case.

First, we observe that the unlawfulness of Roane's alleged actions was established by the general principles we espoused in *Altman*. In *Altman*, we held that privately owned dogs are protected under the Fourth Amendment, and further established that the reasonableness of the seizure of a dog depends on whether the governmental interest in safety outweighs the private interest in a particular case. 330 F.3d at 203-05. Based on these broader principles alone, it would have been "manifestly apparent" to a reasonable officer in Roane's position that shooting a privately owned dog, *in the absence of any safety rationale at all*, is unreasonable. *Owens*, 372 F.3d at 279.

The consensus of our sister circuits leaves no doubt that this principle was clearly established by September 2017. *See id.* at 279-280. As the D.C. Circuit observed in 2016, prior to Roane's alleged conduct in this case, "[e]very circuit that has considered the issue . . . ha[s] invariably concluded that 'the use of deadly force against a household pet is reasonable only if the pet poses an immediate danger and the use of force is unavoidable.'" *Robinson v. Pezzat*, 818 F.3d 1, 7 (D.C. Cir. 2016) (citation omitted); *see also Brown v. Battle Creek Police Dep't*, 844 F.3d 556, 568 (6th Cir. 2016) ("[A] police officer's use of deadly force against a dog . . . is reasonable under the Fourth Amendment when . . . the dog poses an imminent threat to the officer's safety."); *Carroll v. Cty. of Monroe*, 712 F.3d 649, 652 (2d Cir. 2013) (noting that the reasonableness of

officers' conduct is contingent on there being "a genuine threat to officer safety"); *Viilo v. Eyre*, 547 F.3d 707, 710 (7th Cir. 2008) ("[C]ommon sense . . . counsel[s] that the use of deadly force against a household pet is reasonable only if the pet poses an immediate danger[.]"); *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 977-78 (9th Cir. 2005) (holding that "any reasonable officer [would know] that the Fourth Amendment forbids the killing of a person's dog, or the destruction of a person's property, when that destruction is unnecessary"); *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 210-11 (3d Cir. 2001) ("[T]he state may [not], consistent with the Fourth Amendment, destroy a pet when it poses no immediate danger[.]").

Based on this preexisting consensus of persuasive case law, together with the general principles we announced in *Altman*, we hold that a reasonable officer in Roane's position would have known that his alleged conduct was unlawful at the time of the shooting in this case. *Anderson*, 483 U.S. at 640; *Booker*, 855 F.3d at 543. Thus, we hold that the district court erred in concluding Roane is entitled to qualified immunity at this stage of the litigation.

Notably, Roane does not contest the legal principle we adopt today, namely, that it is unreasonable for an officer to shoot a privately owned dog when the dog poses no objective threat to the officer or others. Instead, Roane's arguments exclusively focus on the underlying facts, and ultimately amount to the factual assertion that Roane reasonably perceived Jax as a threat at the time of the shooting. But this is an appeal from a motion to dismiss,

which tests the sufficiency of the complaint, not its veracity. For the reasons discussed above, we cannot accept Roane's version of the facts at this stage of the proceedings, in which we must grant all reasonable inferences in favor of Ray. *DePaola*, 884 F.3d at 484.

IV.

For the foregoing reasons, we reverse the district court's dismissal of Ray's complaint and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED

APPENDIX D — Memorandum Opinion Of The United States District Court For The Western District Of Virginia, Harrisonburg Division, Filed September 20, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

Civil Action No. 5:17-cv-00093

TINA RAY,

Plaintiff,

v.

MICHAEL ROANE,

Defendant.

By: Elizabeth K. Dillon, United States District Judge

MEMORANDUM OPINION

The defendant in this case, Michael Roane, is an Augusta County deputy sheriff.[1] Roane shot and

1. Including this lawsuit, there are at least four lawsuits in this court that have been brought by Nexus or by persons represented by Nexus attorneys and that have named Roane as a defendant. In addition to this case, he was named in *Nexus Servs., Inc. v. Moran*, No. 5:16-cv-35 (W.D. Va.); *Watford v. Roane*, No. 5:17-cv-62 (W.D. Va.); and *Varner v. Roane*, No. 5:17-cv-80 (W.D. Va.). According to documents submitted with defendant's answer, moreover, Nexus and its CEO, Mike Donovan, have been active in trying to get Roane terminated from his position. (*See, e.g.*, Dkt. Nos. 5-7; 5-8.) Based on these background facts, defense counsel characterizes this lawsuit as a "strike suit." (Def.'s Mem. Supp. Mot. to Dismiss 4, Dkt. No.

killed a large dog that was in Tina Ray's yard, after he responded to Ray's home, got out of his vehicle, and the dog approached him in the yard, barking at him. Roane asserts that he did so in self-defense. Ray contends that the dog was on a zip-lead (although a long one strung up between two trees) and could not have reached Roane at the time he shot it. All claims in this lawsuit arise from this same incident.

Pending before the court are three pending motions, all filed by Roane. The first is Roane's motion to dismiss, in which he contends both that he is entitled to qualified immunity and that the complaint should be dismissed in its entirety because it fails to state a claim. (Dkt. No. 3.) The second is a motion for sanctions (Dkt. No. 16), which is based primarily on Roane's allegation that Ray included knowingly false statements in the complaint and continued to assert those statements despite documents filed with the answer and an audio recording from the day of the incident, in which Ray made a number of statements that directly contradict her lawsuit's allegations. The third motion is styled as a "motion for relief" (Dkt. No.

4.) The court acknowledges that Nexus or its president appear to have sought opportunities to name Roane as a defendant in lawsuits and that they have publicly expressed animosity toward Roane. But the court cannot conclude that the facts here—in which Roane admittedly shot and killed a dog who was on a lead at the time—are so frivolous that the suit should be characterized as a strike suit. *See also infra* at Section II.D. (denying defendant's motion for sanctions). The court further notes that, although plaintiff's counsel initially listed his law firm as Nexus Caridades Attorneys, Inc., counsel now works for a different entity that is allegedly independent from Nexus or its family of companies: Nexus Derechos Humanos Attorneys, Inc.

22), and it also asks for dismissal of the lawsuit, or other appropriate sanction, on the ground that plaintiff failed to comply with the court order directing her to file a reply to defendant's answer. As a sanction, Roane requests that the court "take appropriate action to enforce its Order, including dismissal of this action on the basis of qualified immunity." (*Id.* at 1.)

In her response to the third motion, Ray argues that she followed the court's directions and that her reply was adequate to address Roane's assertions of qualified immunity. In a footnote, counsel also accuses defense counsel of "abus[ing] this court and plaintiff" and states that this abuse "should be addressed by this Court." (Resp. to Mot. for Relief 5-6 n.1, Dkt. No. 26.) Ray has not filed any separate motion for sanctions, however. Thus, the three motions described above are the only pending motions before the court. All have been briefed, were argued before the court at a hearing, and are ripe for disposition.

Because the court concludes both that Roane's actions were reasonable and that Roane is entitled to qualified immunity on the federal claim, it will grant the motion to dismiss that claim. With regard to the state-law claims, the court will decline to exercise jurisdiction over those claims. For the reasons set forth in this opinion, the court will also deny the motion for sanctions and deny as moot the motion for relief.

Appendix D

I. BACKGROUND[2]

In the late morning on September 24, 2017, four Augusta County Sheriff's Office deputies drove to Tina Ray's residence. They were there in order to serve her with an arrest warrant and protective order. At some point after their arrival, Investigator Roane also arrived at the residence. When he did, Ray's dog, Jax,[3] was in her front yard, which also contained a trampoline and an above-ground pool. Jax is a very large dog, weighs approximately 150 pounds, and looks similar to a German Shepherd. Jax was tied to a twenty-five foot zip-lead, and the lead was attached to a wire that stretched between two trees in the yard. Thus, Jax could run past either of the trees for approximately twenty-five feet before the lead would reach its end.

According to the complaint, the other deputies had parked their cars on the street, but Roane drove down Ray's driveway and stopped suddenly in the yard, directly next to one of the trees that was connected to the lead that restrained Jax.

Ray's complaint alleges that Jax was "alarmed" as soon as Roane exited his truck and slammed the door. As Roane got out of his truck, Jax "began barking while

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2. The court takes these facts from Ray's complaint. (Dkt. No. 1.)

3. Defendant denies that the dog belonged to Ray and instead claims that the dog belonged to her estranged husband. For purposes of the motion to dismiss, however, the court credits the allegations in the complaint.

approaching Roane," although Ray denies Jax was "charging" or in any kind of attack mode. She further alleges that Roane began backing away from the dog, although she denies that Roane was *running* backward away from the dog. Ray alleges that, "in a short moment Jax had reached the end of his line and could not get any closer to Roane." At that point, Roane stopped backing up because he saw that Jax could not get any closer and saw that Ray was holding on the fully-extended zip-lead and yelling Jax's name. Roane "calmly, with an expressionless face, took a step towards the dog, . . . put his gun to the dog's head at point blank range, and shot" it. (Compl. ¶ 4.)[4] Roane fired a single shot at Jax, striking him in the head, and the shot eventually killed the dog.

The complaint contains four claims, although Ray has since abandoned the second, her substantive due process claim.[5] This leaves three claims in the case:

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4. Roane's Answer paints a slightly different picture, although many of the facts are the same. He claims that he was running backward, as the dog ran toward him while "growling, barking, and chomping with its mouth." Roane claims that he believed the dog had broken free from its lead and, in order to protect himself from serious physical injury, he had no choice but to protect himself and that the only means he had at his disposal to do so was his gun, so he pulled out his gun and fired one shot at the dog, hitting it in the head. (Answer ¶ 4.)

5. Ray has indicated that she "will not pursue her substantive due process claim." (Pl.'s Resp. to Mot. Dismiss 21 n.2, Dkt. No. 11.) Based on this, the court will grant the motion to dismiss that claim by agreement.

1. A claim under 42 U.S.C. § 1983, alleging a violation of Ray's Fourth Amendment rights because Roane "unlawfully seized her personal property";

2. A claim for conversion under Virginia law; and

3. A claim for intentional infliction of emotional distress under Virginia law.

Ray's complaint also seeks attorney fees and punitive damages. At the time Roane filed his Answer (Dkt. No. 5), he requested that plaintiff be required to file a reply to the Answer (Dkt. No. 6), pursuant to Federal Rules of Civil Procedure 7(a)(7) and 12(a)(1)(C). Plaintiff did not object to doing so, and the court directed that she file a reply to the answer. (Dkt. No. 18.) She thereafter filed her reply, which specifically addressed Roane's assertion that he is entitled to qualified immunity. (Reply to Ans., Dkt. No. 20.)

II. DISCUSSION

A. Standard of Review

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff's allegations must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This standard "requires the plaintiff to articulate facts, when accepted as true, that 'show' that the plaintiff has stated a claim entitling him to relief,

i.e., the 'plausibility of entitlement to relief.'" *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678). The plausibility standard requires more than "a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

In determining whether the plaintiff has met this plausibility standard, the court must accept as true all well-pleaded facts in the complaint and any documents incorporated into or attached to it. *Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007). Further, it must "draw[] all reasonable factual inferences from those facts in the plaintiff's favor," *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999), but it "need not accept legal conclusions couched as facts or 'unwarranted inferences, unreasonable conclusions, or arguments,'" *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) (quoting *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008)).

B. Fourth Amendment Seizure Claim

1. Roane did not act unreasonably.

Roane argues both that the complaint fails to state a Fourth Amendment claim and that the federal claim should be dismissed on the alternative basis of qualified immunity. As to the former, he argues that the seizure here was not "unreasonable" and thus that there is no viable Fourth Amendment claim. (Def.'s Mem. Supp. Mot. Dismiss 6, Dkt. No. 4 (citing *Monroe v. City of Charlottesville*, 579 F.3d 380, 386 (4th Cir. 2009).) As Roane correctly notes, whether a seizure was unreasonable is an "objective

determination," and based on the "facts and circumstances confronting [the officer] without regard to [his] underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). Also, the officer's conduct "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* The Supreme Court also has instructed that "[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.*

In evaluating similar types of claims, the Fourth Circuit has noted that the safety of law enforcement officers is a governmental interest of paramount importance. *Unus v. Kane*, 565 F.3d 103, 117 (4th Cir. 2009). Thus, in several dog-shooting cases in which an officer's reaction was held to be reasonable (and therefore not a Fourth Amendment seizure), the courts emphasized officer safety concerns. *See, e.g., Schutt v. Lewis*, No. 6:12-cv-1697, 2014 WL 3908187, at *3 (M.D. Fla. August 11, 2014) ("The touchstone for reasonableness in dog-shooting cases is typically officer safety . . . ."); *Dziekan v. Gaynor*, 376 F. Supp. 2d 267, 272 (D. Conn. 2005) (explaining that where an officer "could have reasonably assumed that the dog posed an imminent threat to his safety," his shooting of the dog was not an unreasonable seizure).

There are a number of facts in the complaint that lead the court to conclude that the seizure here was reasonable and thus that the claim should be dismissed.

This is especially true given that a determination of reasonableness under the Fourth Amendment is an objective inquiry, and so the court does not need to determine or rely on what Roane was or was not thinking. Viewing the facts in the complaint in that light, they include: (1) Jax was a large dog weighing approximately 150 pounds; (2) Jax was "alarmed" by Roane's arrival and by the slamming of his truck door; (3) Jax was "barking while approaching Roane," and Roane responded by moving backward, away from the dog; and (4) that the entire incident took only a "short moment." Although plaintiff then says that Jax reached the end of his lead and that Roane "knew" that fact when he stepped forward and shot Jax with a single shot, the court concludes that an objectively reasonable officer would have felt threatened in the circumstances immediately preceding the shot and, having to make a split-second decision, might not have been sure that Jax no longer posed a threat.

Ray repeatedly focuses on her allegation that Roane "knew" Jax was at the end of his lead and stepped forward to shoot him. She also points to the allegations in the complaint that she was "controlling Jax's lead" and "summoning" him, and her allegation that Roane saw her doing so. (Compl. ¶ 34.) She emphasizes that Roane's knowledge that Jax posed no threat is demonstrated by her allegation that he "calmly, and without expression, stepped towards Jax" and shot him at point blank range." (*Id.* ¶ 39.)[6] These facts alone are not dispositive, however.

6. Many of these facts are belied by Ray's statements in the recording produced by defendant, in which she tells Roane that she did not know he had gotten out of his car until she heard the shot.

As already noted, the court views the incident from the perspective of an objective, reasonable "officer" faced with making a quick decision. Further, the fact that Roane was able to act calmly in the face of danger does not mean that he did not assess Jax to be a threat. Moreover, at the time Roane fired his weapon, the dog was within one step of Roane, which proximity suggests a reasonable belief that the dog was an immediate threat.

The court believes that the facts here are similar to the circumstance in *Schutt v. Lewis*, No. 6:12-cv-1697, 2014 WL 3908187 (M.D. Fla. Aug. 11, 2014), in which the court determined that the officer acted reasonably in shooting a dog. There, an officer knocked on a door and then stepped back onto the lawn. He heard barking, and when the plaintiff opened the door, her two American Boxers exited the house. She called the dogs back, but only one of them came back to her. The other ran toward the officer. The officer stepped back and unholstered his gun, and the plaintiff grabbed the dog's hind legs stopping its advance. Nevertheless, the officer shot the dog three times, killing it. The incident lasted four seconds.

Based on these facts, the court held that it was not an unreasonable seizure. The court explained, "While in retrospect, trusting [the owner] to keep [the dog] at bay or attempting to use less lethal force may have been preferable to shooting [the dog], an officer's response need

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Clearly, if she had been summoning Jax and holding onto his lead, she would have noticed him moving toward Roane and Roane moving backward. Nonetheless, the court will credit the allegations of the complaint, as it must, in ruling on the motion to dismiss.

not be the best possible reaction under the circumstances to be considered reasonable." *Id.* at *3 (citing *Altman v. City of High Point, N.C.*, 330 F.3d 194, 207 (4th Cir. 2003)).

Similarly, based on the facts in the complaint, which include Jax's large size and his proximity to Roane, the fact that Jax was on a lead that Roane might or might not have trusted to hold Jax, it was not unreasonable for him to shoot the dog. This is true despite the fact that Ray alleges she was holding Jax's lead and summoning him, just as the officer in *Schutt* acted reasonably in shooting the dog, despite the fact that the owner was holding its hind legs.

Whether or not an officer's actions were "reasonable" will be heavily fact-dependent. In a number of cases where the shooting of a dog was held to be unreasonable, though, courts treat as important facts such as the dog being at least 10 feet away from the officer and/or the dog retreating. *See, e.g., Brown v. Muhlenberg Twp.*, 269 F.3d 205, 209 (3d Cir. 2001) (concluding that the shooting of the plaintiff's dog was unreasonable, where the officer "intentionally and repeatedly shot a pet without any provocation and with knowledge that it belonged to the family who lived in the adjacent house and was available to take custody" and where an independent witness had said that the dog was approximately ten to fifteen feet away from the officer, was not growling or barking, and was stationary); *Criscuolo v. Grant Cty.*, 540 F. App'x 562, 563 (9th Cir. 2013) (where the dog that was killed was stationary and was retreating, was at a distance of 10 to 20 feet from the officer and his police dog, and the

dog's owner was one to two feet away from the dog and about to leash him, it was a jury question as to whether the killing was reasonably necessary to protect the police dog); *Viilo v. Eyre*, 547 F.3d 707 (7th Cir. 2008) (where a dog had already been shot twice and hidden under a bush, and then had come out whimpering, limping, and trying to go to the back yard, away from the officer and toward its owner, the officer's shooting at the dog two more times was not reasonable). The facts in all those cases are a far cry from the facts here.

In this case, by contrast, Jax was indisputably very close to Roane. And although Ray insists she was "controlling" his lead, there is no allegation that Jax was calm or retreating. In similar circumstances, courts have held either that the officer's conduct was reasonable, and so there was no violation, or that qualified immunity applied. In *Stephenson v. McClelland*, 632 F. App'x 177 (5th Cir. 2015), for example, the court held that the officer was entitled to qualified immunity for his shooting of a dog. There, the officer got out of his car to approach a suspect, and as the suspect walked back to the house, a large dog appeared, startling the officer and showing its teeth. Although the person later said the dog was merely "smiling," the court ruled that qualified immunity applied because the officer "was forced to make a split-second judgment in a tense situation and he acted to protect himself." 632 F. App'x at 185. The court also cited to several other cases, including *Grant v. City of Houston*, 625 F. App'x 670, 674 (5th Cir. 2015), in which the court held an officer was entitled to qualified immunity where he shot a dog after being surprised when the dog showed its teeth and charged toward the officer's legs.

Similarly, in *Dziekan v. Gaynor*, 376 F. Supp. 2d 267 (D. Conn. 2005), the court held that the officer had acted reasonably and thus that no claim would lie on the plaintiff's version of the facts. According to the plaintiff, the officer approached a man and his 55 to 60-pound dog, who was not on a leash and was running toward the officer, probably at a rate of three feet per second. The officer shot the dog when it was still approximately fifteen feet from defendant, or five seconds away based on the estimated speed. Again, the court noted that the situation called for "split-second decision-making" and that the officer acted reasonably. *Id.* at 272.

In another case factually similar to the situation here, *Warboys v. Proulx*, 303 F. Supp. 2d 111 (D. Conn. 2004), an officer and his police dog were tracking a suspect. They told a young man to go inside his house, and as he went to the house, a pit bull weighing 90 to 100 pounds, escaped through the door. The man tried to grab the dog, but failed. As the dog moved toward the officers, the man yelled "he won't hurt you," but an officer fired one shot into the dog's head, killing him. He was killed approximately 30 feet from the door of the house and 5 to 10 feet from the officer. The entire incident from the time the dog escaped until the shot occurred over a 5-second interval. The court accepted as true that the dog was not barking or growling, but was in a friendly mood with his tail wagging, and that he was a loving pet that had never attacked an animal or a person. Nonetheless, the court reasoned that the law did not require the officer "to wait until the approaching animal was within biting distance or was leaping at him before taking protective action." *Id.* at 119. The court also

held that even if the act was unreasonable, the officer was entitled to qualified immunity. *Id.* at 119 n.14.

McCarthy v. Kootenai County, No. 08-cv-294, 2009 WL 3823106 (D. Idaho Nov. 12, 2009), also involved a dog that was in the yard of his residence. There, a sergeant was serving process for a civil lawsuit, and he entered a fenced yard and walked about 200 yards up the hill. When he was 30 yards from the residence, he noticed a large German Shepherd in the yard. He began walking backwards slowly, but the dog alerted and starting charging towards the officer, followed by a second dog. The officer yelled for the dogs to stop, but they continued toward him barking and growling. The officer fired one shot at the German Shepherd, striking its head and injuring it badly. The court held that he acted reasonably. The court noted that an officer "need not use the least harmful alternative in dealing with a dangerous situation in which officer safety is at issue." *Id.* at *6. It, too, noted that "the 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.* (quoting *Graham v. Connor*, 490 U.S. 386, 396-97 (1989)).

Akin to the courts in many of the above cases, the court concludes that it was not unreasonable for Roane to shoot a 150-pound, "alarmed" and barking dog that had advanced on him, closing to within feet, all in a "short moment." Especially taking into account the strong interest in officer safety and Roane's need to make a quick

decision in a tense situation, the court concludes that his actions were objectively reasonable.

For all of these reasons, the court will grant the motion to dismiss the Fourth Amendment claim on the grounds that the seizure was reasonable. In the alternative, Roane is entitled to qualified immunity, as the court discusses next.

2. Roane is entitled to qualified immunity.

Roane contends, in the alternative, that his actions as alleged by plaintiff entitle him to qualified immunity. Under the doctrine of qualified immunity, government officials "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see Smith v. Gilchrist*, 749 F.3d 302, 307 (4th Cir. 2014); *Cloaninger v. McDevitt*, 555 F.3d 324, 331 (4th Cir. 2009). Ray has admitted that, at all relevant times, Roane was performing a governmental function that involved judgment and discretion. (Reply to Answer ¶ 142.) Thus, he was performing discretionary functions. In that circumstance, an official will be protected by qualified immunity if his actions were objectively reasonable. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *Malley v. Briggs*, 475 U.S. 335, 341 (1986). "The burden of proof and persuasion with respect to a defense of qualified immunity rests on the official asserting that defense." *Durham v. Jones*, 737 F.3d 291, 299 (4th Cir. 2013). It is important to resolve the issue of qualified immunity "early

in the proceedings" because qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)); *Wilson v. Kittoe*, 337 F.3d 392, 397 (4th Cir. 2003).

Qualified immunity generally involves a two-step inquiry: (a) whether the plaintiff's allegations state a claim that the defendant's conduct violated a constitutional right; and if so, (b) whether that right was clearly established at the time of the alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). As already noted, the court does not believe that plaintiff's allegations support that Roane violated Ray's constitutional rights and thus qualified immunity is appropriate on that ground alone. The court also concludes that the second prong of the analysis, *i.e.*, whether the facts alleged show a violation of Ray's clearly established constitutional rights, also favors Roane.

As to this second prong, a law enforcement officer is not expected to know all of the legal limits of well-known constitutional rights; the officer is entitled to immunity if a reasonable officer would not have understood that what he is doing violates the plaintiff's constitutional rights. *Anderson*, 483 U.S. at 638-39. As stated by the United States Supreme Court in *Malley*, "if officers of reasonable competence could disagree" on whether the action was reasonable, immunity should be granted. 475 U.S. at 341; *Springmen v. Williams*, 122 F.3d 211, 214 (4th Cir. 1997). Under this standard, all but the "plainly incompetent or those who knowingly violate the law" are protected. *Malley*, 475 U.S. at 341.

Appendix D

Since at least 2003—and thus including the time that Roane shot Jax—it was well established that, if an officer acted unreasonably in shooting a dog, it could constitute a seizure within the meaning of the Fourth Amendment. Specifically, *Altman v. City of High Point, N.C.*, 330 F.3d 194 (4th Cir. 2003), was the first Fourth Circuit case to hold that the shooting of a dog could constitute a Fourth Amendment seizure. The court there, however, held that the shooting deaths of four dogs in separate incidents by two animal control officers were *not* unreasonable seizures. In all of those incidents, the dogs were "at large" and not in a fenced-in yard or otherwise constrained by their owners. The court noted this fact as significant in determining that the officers' conduct was reasonable. 330 F.3d at 205-06; *id.* at 207 (distinguishing other cases on that basis).

But the court must "look not to whether the right allegedly violated was established 'as a broad general proposition' but whether 'it would be clear to a reasonable official that his conduct was unlawful in the situation he confronted.'" *Raub v. Campbell*, 785 F.3d 876 (4th Cir. 2015) (quoting *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001), *as modified by Pearson*, 555 U.S. 223). *See also Bailey v. Kennedy*, 349 F.3d 731, 741 (4th Cir. 2007) ("A right is 'clearly established' if the contours of the right are sufficiently clear so that a reasonable officer would have understood, under the circumstances at hand, that his behavior violated the right.") (citations and internal quotations omitted). Roane is entitled to qualified immunity, then, if a reasonable officer in his position would not have known it was "clearly" unreasonable to shoot Jax.

The reasonableness of a defendant's belief is judged from an objective standard in light of the clearly established law at the time of the defendants' exercise of discretion, *Anderson*, 483 U.S. at 639. Moreover, the court may not judge the reasonableness of the defendants' actions "with the benefit of 20/20 hindsight." *Id.*

For the same reasons that the court concluded Roane acted reasonably, a reasonable officer also would not have known it was "clearly" unreasonable to shoot Jax in these circumstances. At worst, this is a classic case of a "bad guess in a gray area," *Raub*, 785 F.3d at 881, or a "reasonable but mistaken judgment," *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (citations omitted). Accordingly, Roane is entitled to qualified immunity.

C. State-Law Claims of Conversion and Intentional Infliction of Emotional Distress

Because the court is dismissing the only federal claim in the case, the court has discretion to decline supplemental jurisdiction over the state-law claims and to dismiss them without prejudice pursuant to 28 U.S.C. § 1367(c)(2). In exercising its discretion, the court must consider factors of judicial economy, convenience, fairness, and comity. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). Generally, though, when a case in its early stages, courts will decline to exercise jurisdiction. 13 D Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*, (3d ed., April 2018 Update) ("The commonest example of when a court might decline supplemental jurisdiction is when the jurisdiction-invoking claim is

dismissed relatively early in the proceedings."). Here, although the case has been pending for some time, no discovery has occurred (because it was stayed by the court), and so it will not save extensive judicial resources for the court to retain those other claims, as opposed to letting Ray re-file in state court if she so chooses. The court also sees no unfairness or inconvenience to either party from a dismissal without prejudice. The court finds that the comity factor also favors declining jurisdiction because the remaining claims are state-law torts between two Virginia residents that occurred in Virginia. Thus, the state courts have a significant interest in resolving these types of claims.

For these reasons, the court declines to exercise jurisdiction over the state-law claims, and so they will be dismissed without prejudice.

D. Motions for Sanctions and for Relief

The court has considered Roane's motion for sanctions, but declines to impose sanctions in this case. First of all, to the extent Roane was seeking dismissal on qualified immunity grounds as a sanction, he has obtained a dismissal of the federal claim against him.

Second, although Roane argues that the claims here were unsupported and even contradicted by other facts, the court does not believe any mischaracterizations require sanctions. It is worth noting that this case involved the use of force that admittedly killed a pet. The court cannot say that the claim was frivolous.

The court agrees that there are inconsistencies between allegations in the complaint and other facts available to plaintiff's counsel, including the recording. By way of example only, in that recording—and contrary to the allegations in the complaint—Ray tells Roane:

- "If you'd come towards me he woulda bit you."

- She did not see the incident, had not seen Roane get out of the truck, and did not think he had gotten out until she heard the shot. (If true, this would contradict that Ray was summoning Jax and holding on to his lead and also contradict the complaint's references to Roane shooting Jax while Ray looked on.)

- Roane would not have known that the dog would not bite him.

Additionally, according to the investigative report into the incident conducted by the Sheriff's Department (as conveyed in a press report from the Office of the Commonwealth's Attorney, which explains why Roane will not be prosecuted), Ray told the investigator that the dog "could snap that lead and actually get off it if he wants off of it at any time." (Dkt. No. 5-3, at 2.)

But Ray has addressed her statements on the recording and stated that they were false, repeatedly noting that her statements were given under duress and threat of arrest

and a threat of a potential search of her house. (Reply to Answer ¶ 2.) It is not clear to the court that this assertion is entirely true. For example, some of the statements that are contrary to allegations in the complaint were made *after* Roane said in the recording that the officers would not be searching her house. Additionally, Ray's comment to the investigator occurred on a different day altogether. Nonetheless, on the record of this case, and assuming that there are adequate reasons for counsel to believe the statements on the recording were given under duress, the court does not believe any of the actions or allegations questioned by defendant warrant sanctions.

To the extent that the motion for sanctions is based on some of the out-of-bounds language in the complaint, however, the court cautions plaintiff's counsel, as it has in other cases, that the type of inflammatory language used in the complaint here will not be tolerated in this court. Given the court's dismissal of the complaint in its entirety, the court will not strike any portions of the complaint. It notes, however, that language contained in paragraph 3 (describing Roane's driving approach "like a bat out of hell, screeching to a halt"); paragraph 5 ("drunk and emboldened with power"), paragraph 1 ("blowing his brains out execution style"), and paragraphs 4, 39, 40 ("execution-style"), at a minimum, would fall within the type of inflammatory characterizations not appropriate for a federal complaint.

With regard to the motion for relief, which seeks dismissal on the grounds of qualified immunity, it has

been rendered moot by the court's dismissal of the federal claim. Accordingly, that motion will be denied as moot.

III. CONCLUSION

For the reasons stated above, the court will grant defendant's motion to dismiss the Fourth Amendment claim, which will be dismissed with prejudice. The state-law claims will be dismissed without prejudice. The motion for sanctions will be denied, and the motion for relief will be denied as moot. An appropriate order will follow.

Entered: September 20, 2018.

/s/ Elizabeth K. Dillon
Elizabeth K. Dillon
United States District Judge

APPENDIX E —Denial Of Rehearing Of The United States Court Of Appeals For The Fourth Circuit, Filed March 19, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-2120
(5:17-cv-00093-EKD-JCH)

FILED: March 19, 2024

TINA RAY,

Plaintiff-Appellant,

v.

MICHAEL ROANE, in his individual capacity,

Defendant-Appellee.

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Gregory, Judge Harris, and Senior Judge Floyd.

For the Court

/s/ Nwamaka Anowi, Clerk