No. _____

IN THE

# Supreme Court of the United States

MATHEW GRASHORN,

*Petitioner*,

v.

WENDY LOVE, et al.,

*Respondents.*

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Under this Court's well-established qualified-immunity framework, courts conduct a two-part analysis to resolve an officer's qualified-immunity defense on summary judgment. First, a court takes the historical facts "in the light most favorable to the party asserting the injury" and then determines, as a matter of law, whether these facts "show the officer's conduct violated a constitutional right." *Scott* v. *Harris*, 550 U.S. 372, 377 (2007). Thus, in Fourth Amendment cases like this one, a court determines at the first step whether the historical facts, viewed in plaintiff's favor, show the officer's actions were objectively unreasonable as a matter of law. *Id.* at 381 n.8.

Second, a court determines whether the officer's conduct "violate[s] clearly established statutory or constitutional rights." *Rivas-Villegas* v. *Cortesluna*, 595 U.S. 1, 5 (2021) (per curiam). This "inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Id.* at 5–6. "[S]pecificity is especially important in the Fourth Amendment context," *id.* at 6, particularly where "split-second judgments" are concerned, *Barnes* v. *Felix*, 145 S. Ct. 1353, 1363 (2025) (Kavanaugh, J., concurring).

The questions presented are:

1. Whether, when conducting an objective reasonableness analysis to determine if an officer is entitled to qualified immunity, a reviewing court lacks jurisdiction over a district court's determinations

regarding imminent danger because imminent danger is a question of fact rather than a question of law.

2. Whether the Tenth Circuit departed from this Court's decisions in cases like *Kisela* v. *Hughes*, 584 U.S. 100 (2018) (per curiam), by denying qualified immunity despite the lack of clearly established law imposing liability in analogous circumstances?

## PARTIES TO THE PROCEEDING

Petitioner Mathew Grashorn was defendant in the district court and appellant below.

Respondent Wendy Love was plaintiff in the district court and appellee below.

Respondent Jay Hamm was plaintiff in the district court and appellee below.

## RELATED PROCEEDINGS

- *Love* v. *Grashorn*, No. 21-cv-02502, U.S. District Court for the District of Colorado. Order entered on November 15, 2023.
- *Love* v. *Grashorn*, No. 23-1397, U.S. Court of Appeals for the Tenth Circuit. Judgment entered on April 22, 2025.

There are no other proceedings in state or federal courts, or in this Court, that are directly related to this case within the meaning of this Court's Rule 14(b)(1).

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

## OPINIONS BELOW

The November 15, 2023 decision of the District Court for the District of Colorado is not reported and is reproduced in the appendix to this petition ("Pet.App.") at pages 22a–35a. The Tenth Circuit's opinion of April 22, 2025 is reported, *Love* v. *Grashorn*, 134 F.4th 1109 (10th Cir. 2025), and is reproduced in the appendix at pages 1a–21a.

## STATEMENT OF JURISDICTION

The Court has jurisdiction to review the Tenth Circuit's April 22, 2025 decision on writ of certiorari under 28 U.S.C. § 1254(1). The petition is timely filed per the Court's July 11, 2025 order extending the time to file any petition to August 20, 2025.

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Plaintiffs-Respondents brought the underlying action under 42 U.S.C. § 1983, which states in relevant part:

> 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 … .

Plaintiffs allege Petitioner violated their rights under the Fourth Amendment, which states in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated … .

## STATEMENT OF THE CASE

### I. Legal Background

**A.** Because "qualified immunity is an immunity from suit rather than a mere defense to liability" *Plumhoff* v. *Rickard*, 572 U.S. 765, 771–72 (2014) (quoting *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009)), "pretrial orders denying qualified immunity generally fall within the collateral order doctrine," thus allowing an interlocutory appeal, *id.* at 772. This Court has long held that on such an appeal, when reviewing a summary-judgment decision denying immunity, the reviewing court considers the historical facts in the light most favorable to the plaintiff, in line with Rule 56, and then applies the relevant qualified-immunity law to those facts *de novo*. See *Hunter* v. *Byrant*, 502 U.S. 224, 227–29 (1991) (per curiam).

In *Johnson* v. *Jones*, this Court held that the collateral-order doctrine did not extend to an order that, while not denying a qualified-immunity defense, denied a summary-judgment motion based on "a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." 515 U.S. 304, 313 (1995). In *Johnson*, three officers sought summary judgment on the basis not of qualified immunity from suit but rather that they played no role in an alleged beating; the district court denied the motion. *Jones* v. *Vill. of Villa Park*, 1993 WL 437415, at *2 (N.D. Ill. Oct. 27, 1993); see also 515 U.S. at 307 ("Three of the officers (the petitioners here) moved for summary judgment arguing that, whatever evidence Jones might have about the *other* two officers, he could point to no evidence that *these three* had beaten him or had been present while others did so."). On review from the Seventh Circuit, this Court held that the district court's summary-judgment order was not immediately appealable because, rather than denying a qualified-immunity defense, it held that there was a material question of historical fact regarding liability. *Id.* at 307–08. The ordinary rules of jurisdiction, this Court held, required the officers to wait for final judgment to appeal, and they could not dispense with the final-judgment rule simply because they had also interposed a qualified-immunity defense. *Id.* at 317.

After *Johnson*, this Court continued to review *de novo* questions about whether lower courts had properly applied qualified-immunity law to the historical facts, and also continued to independently evaluate those facts under the summary-judgment

standard. For instance, this Court in *Scott* reiterated that "once [the appeals court has] determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record," reasonableness, including, "[w]hether [an officer's] actions have risen to a level warranting deadly force, is a pure question of law." 550 U.S. at 381 n.8 (citations and emphasis omitted). The Court then engaged in a lengthy discussion of the relevant factual record so that it could properly assess reasonableness, including an assessment of the speed at which the driver was moving and his refusal to obey traffic laws and prior warnings from officers, based upon its review of video footage. *Id.* at 383–86.

In *Plumhoff*, the Court made clear that *Johnson*'s ruling did not narrow the scope of appellate review over summary-judgment orders rejecting a qualified-immunity defense. This Court explained in *Plumhoff* that courts of appeals must assess as a matter of law whether an officer's "conduct did not violate the Fourth Amendment" or "clearly established law," *Plumhoff*, 572 U.S. at 773, which requires an objective assessment of whether an officer's behavior was "reasonable," *id.* at 775–78. In considering that legal question, moreover, a court considering an appeal must evaluate the factual record for itself while drawing all reasonable inferences in the plaintiff's favor. *Id.* at 776–77 (assessing the driver's speed and evasive maneuvers and the length of the chase, before concluding that, "[u]nder the circumstances … , all that a reasonable police officer could have concluded was that [the driver] was intent on resuming his flight and that, if

he was allowed to do so, he would once again pose a deadly threat for others on the road").

**B.** Although courts determine the relevant historical facts on summary judgment—such as whether a person was standing or on their knees—by drawing all inferences in favor of the nonmoving party, see *id.*; *Tolan* v. *Cotton*, 572 U.S. 650, 655–56 (2014) (per curiam), the two parts of the qualified-immunity test, as noted, are determined as questions of law without deferring to the non-moving party or the district court.

Thus, courts assess reasonableness in a Fourth Amendment case "from the perspective of a reasonable officer on the scene," *Kisela*, 584 U.S. at 103 (quoting *Graham* v. *Connor*, 490 U.S. 386, 396 (1989)). This assessment requires courts to allow "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*, 490 U.S. at 396–97). It also prohibits courts from looking at the facts "with the 20/20 vision of hindsight." *Id.* (quoting *Graham*, 490 U.S. at 396).

Courts apply this same approach when assessing whether an officer's conduct violates a clearly established constitutional right. To determine that a right is clearly established, courts are required to find that the situation is one in which it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right," *Mullenix*, v. *Luna*, 577 U.S. 7, 11 (2015) (per curiam) (quoting *Reichle* v. *Howards*, 566 U.S. 658, 664 (2012)), because

"[q]ualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," *ibid.* (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)).

## II. Factual Background

In June 2019, a business owner in Loveland, Colorado called the police to report that he observed people and a truck in the parking lot of his business via his security cameras. Pet.App. 23a; Statement of Undisputed Material Facts ¶ 6, ECF No. 134, *Love* v. *Grashorn* (D. Colo. June 20, 2023) ("SUMF"). The caller informed the police that no one should be on the property over the weekend and requested that an officer stop by. Pet.App. 23a. Officer Grashorn, a patrol officer with the Loveland Police Department, was dispatched to the location. *Id.* He arrived in his patrol car, parked several yards away from Plaintiffs' truck, and exited his vehicle. *Id.*; SUMF ¶ 11.

The following events then occurred, as captured on the officer's body camera, within a seven-second period (the time stamps correspond to the body-camera footage, SUMF, Ex. C):

- Officer Grashorn begins to approach Plaintiffs' grey truck and a large dog lying on the pavement ("Bubba") gets up. Pet.App. 23a; SUMF ¶ 13 (0:00:10).
- Bubba begins "running toward" Officer Grashorn, who "withdrew his firearm and

pointed it at Bubba." Pet.App. 23a; SUMF ¶¶ 14–15 (0:00:11-12).

- Plaintiff "Hamm called off Bubba, who turned around." Pet.App. 23a; SUMF ¶ 18 (0:00:15).
- "Meanwhile, another dog ('Herkimer'), resembling a pit bull, emerged from Plaintiffs' truck. It ran first toward Bubba and then in [Officer Grashorn's] direction." Pet.App. 23a; SUMF ¶¶ 16–18 (0:00:13-15).
- Unlike Bubba, Herkimer did not turn around. *Id.* (0:00:13-15).
- Officer Grashorn did not fire at Bubba, but "[o]nce [Herkimer] was a few feet away from [Officer Grashorn], [Officer Grashorn] shot him twice" in two seconds. Pet.App. 23a; SUMF ¶¶ 19–20 (0:00:16-17).
- Officer Grashorn had three seconds to react between Herkimer emerging from the truck (0:00:13) and Herkimer coming within a few feet of Officer Grashorn (0:00:16). Pet.App. 23a; SUMF ¶¶ 16–19.
- Neither Bubba nor Herkimer were leashed. Pet.App. 23a, 29a.

After the shooting, Officer Grashorn allowed Plaintiffs to comfort Herkimer and take it to the vet. *Id.* at 23a–24a. Herkimer was later euthanized. *Id.*

## III. Proceedings Below

**A**. Plaintiffs sued in the United States District Court for the District of Colorado, accusing Officer Grashorn of unlawful seizure under state and federal law. Officer Grashorn moved for summary judgment on his qualified-immunity defense. Pet.App. 22a–23a. The district court denied his motion.

The district court first addressed step two. The court's analysis consisted of stating that "[i]t is clearly established in this Circuit that a police officer's shooting of a pet dog is [an unlawful] 'seizure' under the Fourth Amendment" unless the shooting was reasonable, Pet.App. 27a, and then citing an Eighth Circuit case and a District of Colorado case that found a dog shooting reasonable when the dog posed an "imminent danger." *Id.* at 23a–24a (citing *Andrews* v. *City of W. Branch*, 454 F.3d 914, 918 (8th Cir. 2006); *Branson* v. *Price*, 2015 WL 5562174, at *7 (D. Colo. Sept. 21, 2015)).

The district court then conducted the step-one analysis (assessing whether Officer's Grashorn's seizure was reasonable) by analyzing five factors, which it drew from *Branson*, 2015 WL 5562174, at *5:

> (1) Whether the dog was "at-large" or whether the owner was available and willing to assert control over the dog.
>
> (2) The breed of the dog.
>
> (3) Whether there was time to find an alternate solution to gain control of the dog.

> (4) Whether non-lethal means were available to control the dog.
>
> (5) Whether the dog posed a danger to the officer or the public.

With regard to the first factor, the court noted that "a reasonable fact finder could conclude that Herkimer was not 'at-large' when Defendant shot him," because, "[a]lthough he was unleashed on private property, his owners were present, and they had already successfully called off one of their other dogs." Pet.App. 29a. The court recognized that "[i]t is impossible to know what [the dog] would have done had he not been shot," yet still determined that this "this factor weighs in [ Plaintiffs'] favor." *Id.*

Second, the district court noted that the dog looked like a pitbull, "a breed that is widely perceived as unpredictable and dangerous," thus counting in Officer Grashorn's favor. *Id.*

The court next determined the third and fourth factors "weigh[ed] slightly in [Plaintiffs'] favor" because "the circumstances do not conclusively establish that a reasonable officer in [Officer Grashorn's] position could not have used non-lethal means available to avoid whatever danger the approaching dog posed." *Id.* at 29a–30a. It therefore found that even though "the situation evolved rapidly," it was "debatable whether [Officer Grashorn] had enough time to respond differently." *Id.* The district court did not identify what those non-lethal means were or how Officer

Grashorn should have known that such means were available to him in the seconds that he had to act.

Finally, the court noted the fifth factor—whether the dog posed a danger to the officer—is "the most critical in assessing the reasonableness of [Officer Grashorn's] conduct," and concluded that in this case it weighed in Plaintiffs' favor because Herkimer had not yet attacked a person. *Id.* at 30a. The court concluded that "although a reasonable jury could decide that [the dog] posed a danger to [Officer Grashorn] demonstrating the type of 'tense, rapidly evolving situation where allowance is given for the police to make split-second decisions,' it could also decide that he did not pose an immediate danger." *Id.* (quoting *Branson*, 2015 WL 5562174, at *6).

Considering these factors, the court concluded that Officer Grashorn was not entitled to qualified immunity because "a reasonable jury could conclude that [Officer Grashorn's] conduct was unreasonable." *Id.*

**B**. Officer Grashorn appealed the denial of his qualified-immunity defense at summary judgment, arguing, *inter alia*, that the district court erred in its step-one (objective reasonableness) analysis because, even viewing the facts in the light most reasonable to Plaintiffs, Officer Grashorn "acted reasonably under the circumstances facing him in the span of **three (3) seconds** that he had for his decision-making." Tenth Circuit Opening Br. at 18. As for step two, Officer Grashorn argued that "the District Court [separately] erred by finding that the law was clearly established as to [his] actions" because "there is no Supreme Court

or Tenth Circuit precedent dealing with the exact, or similar factual scenario." *Id.* at 10, 15.

The Tenth Circuit affirmed. Although it claimed to conduct "de novo review," *id.* at 4a, and although the relevant historical facts were recorded on video, the court's step-one analysis hardly discussed the video and instead was expressly "based on the district court's conclusions about what a reasonable jury could find" on key issues, *id.* Among other things, the court rejected Officer Grashorn's arguments that "the existence of an immediate danger and *at large* status are legal questions" subject to *de novo* review, *id.* at 5a–6a. The Tenth Circuit deemed itself "bound by the district court's conclusion that the jury could reject the presence of an immediate danger" because, under Circuit law, "[t]he existence of an immediate danger is an issue of fact, not law." *Id.* at 6a. The Tenth Circuit deemed itself also bound by the district court's conclusions that a reasonable jury could find that "plaintiffs were available and willing to assert control over Herkimer" and "Officer Grashorn had time to consider non-lethal options to stop Herkimer." *Id.* at 9a.

Indeed, the court determined it "lack[ed] jurisdiction to reverse" based on Officer Grashorn's arguments that "Danger was imminent," "No non-lethal options existed," and "Herkimer was *at large*." *Id.* at 9a–13a. Although the Tenth Circuit did not cite *Johnson* directly, it relied on prior Circuit decisions dismissing cases for lack of jurisdiction when a party challenges a district court's determination regarding

evidence sufficiency. *Id.* at 13a (citing *Castillo* v. *Day*, 790 F.3d 1013, 1018 (10th Cir. 2015)).

Having so circumscribed its role, the Tenth Circuit's objective-reasonableness analysis, to the extent there was any, focused only on whether it was reasonable for an officer to shoot a pet dog that did not pose any immediate danger. *Id.* at 9a–13a. That question answered itself.

The Tenth Circuit's step-two analysis was similarly predicated on the holding that the Circuit "lack[ed] jurisdiction to consider" Officer Grashorn's challenges to "facts" like the existence of "immediate danger." *Id.* at 15a. As a result of the perceived limits on its jurisdiction, the Circuit again stated that the "question [was] simply whether police officers could reasonably believe that the Fourth Amendment allows them to shoot a dog (without considering non-lethal options) when there's no immediate danger." *Id.* In response to Officer Grashorn's arguments that no analogous precedent put him on notice, the Tenth Circuit held that "the constitutional prohibition applies with obvious clarity based on common sense, persuasive case law in other circuits, and our precedents addressing the shooting of persons." *Id.* at 17a.

The Tenth Circuit continued its assessment of step two at this high level of generality, concluding that case law "recogniz[es] a constitutional violation when a dog poses no immediate danger," *id.* at 15a (collecting cases), while holding that "officers may enjoy qualified immunity when an aggressive dog poses an immediate threat," *id.* at 18a. And because "the

district court concluded that a jury could reasonably find no immediate danger to Officer Grashorn"—a conclusion supposedly binding on the appellate tribunal—"a constitutional violation [was] clearly established." *Id.* at 20a.

Finally, the Tenth Circuit rejected Officer Grashorn's argument that he "might have acted reasonably even if he had mistakenly perceived an immediate danger." *Id.* at 20a. Once again, the court cited the district court's conclusions as decisive. *Id.* at 21a ("the district court's universe of facts would prevent qualified immunity based on a potential mistake").

## REASONS FOR GRANTING THE PETITION

The Court should grant review to address two separate issues in the Tenth Circuit's deeply flawed decision. First, the Tenth Circuit deepened a circuit split over whether a court of appeals assessing objective reasonableness may evaluate the historical facts (viewed in the light most favorable to the plaintiff) to determine as a matter of law whether the danger faced by the officer made the use of force reasonable. Although some circuits (correctly) understood this Court's decision in *Scott* to require courts to evaluate as a matter of law whether the facts (viewed in the non-moving party's favor) showed an officer faced a danger permitting them to use force, a majority of circuits, including the Tenth, continue to treat the question of whether immediate danger exists as a question of fact that should either be reviewed in the light most favorable to the plaintiff or that is not subject to any review in light of this Court's decision in *Johnson*.

Appeals courts have recognized the divide, as well as the confusion about how to apply *Scott* and *Johnson*.

The Court should grant certiorari to make clear that, consistent with *Scott*, lower courts must assess as a matter of law the threat an officer faces, as this forms a core aspect of the objective reasonableness analysis, and that they may evaluate the historical facts without being bound by the district court's conclusions, with this Court's decision in *Johnson* posing no obstacle. Otherwise, step one of the qualified-immunity defense will provide little to no protection, as courts will continue to deem danger, and thus reasonableness, to be an issue for the jury, even in a case, like this one, where the material facts are on video.

Second, the Tenth Circuit's analysis of the second step repeats the mistake that this Court has repeatedly instructed lower courts not to make: "defin[ing] clearly established law at too high a level of generality." *City of Tahlequah, Oklahoma* v. *Bond*, 595 U.S. 9, 12 (2021) (per curiam). Indeed, this Court reversed the Tenth Circuit just four years ago for "contraven[ing] these settled principles" by failing to "identif[y] a single precedent finding a Fourth Amendment violation under similar circumstances." *Id.* at 13–14. Despite this reversal, the Tenth Circuit made the same mistake here. It again failed to identify a single precedent finding a Fourth Amendment violation under analogous circumstances, and wrongly relied on a broad statement of law about the use of force against pets that pose no immediate danger. E.g.,

*Mullenix*, 577 U.S. at 12–13 (reversing due to similar error).

## I. The Decision Below Deepens A Divide Over The First Question Presented.

As discussed above, in *Scott* v. *Harris*, this Court made clear that "the reasonableness of [an officer's] actions—or, [to put it another way], whether [a plaintiff's] actions have risen to a level warranting deadly force—is a pure question of law," with the Court reviewing footage from an officer body-cam to make that determination. 550 U.S. at 381 n.8. And in *Plumhoff*, the Court clarified that appellate courts have jurisdiction to determine whether an officer's conduct was reasonable, even if the parties dispute whether a set of facts shows officers faced a threat that justified the use of deadly force, in which case the appeals court should construe the record to evaluate the facts in the non-movant's favor. 572 U.S. at 773, 777 (concluding respondent continued to pose a threat justifying the use of deadly force because he "never abandoned his attempt to flee" in a car). That is so despite the Court having earlier stated in *Johnson* that there is no immediate appellate jurisdiction to consider summary-judgment orders that, rather than denying qualified-immunity defenses, focus only on historical facts bearing on liability. 515 U.S. at 313.

Despite this Court's guidance in *Scott*, *Plumhoff*, and other cases, courts of appeals continue to struggle with the fact-law distinction while reviewing denials of qualified immunity on summary judgment, a struggle compounded by circuit-court misreadings of

*Johnson* as limiting appellate jurisdiction over qualified-immunity (rather than liability) rulings. E.g., *Est. of Anderson* v. *Marsh*, 985 F.3d 726, 737 (9th Cir. 2021) (W. Fletcher, J. dissenting) ("*Johnson* has created persistent confusion as courts of appeals, including our own, have struggled to reconcile its apparent holding with the purpose of qualified immunity."); *id.* at 732 (opinion of the court) (agreeing with the dissent that "the Supreme Court's explication of the relevant jurisdictional principles has not always been clear"); *Heeter* v. *Bowers*, 99 F.4th 900, 909 (6th Cir. 2024) ("Our sister circuits also struggle to apply and have criticized the *Johnson* standard").

As a result, although three circuits correctly apply this Court's precedents and treat imminent danger as a question of law, in at least six circuits, including the Tenth Circuit, courts wrongly treat the question of what threat an officer faced based on a set of historical facts as itself a factual question, with some further circumscribing their review by giving undue deference to the district court's conclusions or by misreading *Johnson*, thus abdicating their responsibility to "slosh [their] way through the factbound morass of 'reasonableness,'" *Scott*, 550 U.S. at 383, and address reasonableness *de novo* "from the perspective of a reasonable officer." *Kisela*, 584 U.S. at 103; *Plumhoff*, 572 U.S. at 773 (deciding whether conduct violates the Constitution is "a core responsibility of appellate courts").

### A. The Fourth, Fifth, and Eighth Circuits properly treat imminent danger as a question of law.

Three circuits correctly treat imminent danger as a question of law to be decided *de novo* without any deference to the district court.

Begin with the Fourth Circuit. In *Rambert* v. *City of Greenville*, the Circuit first addressed its jurisdiction over the appeal, concluding that "if the historical facts are sufficiently settled," it has jurisdiction to consider the question of "whether the officer's conduct was objectively reasonable and whether it violated clearly established law." 107 F.4th 388, 393 (4th Cir. 2024). In doing so, it disagreed with the district court, which "believed that the reasonableness of [the officer's] conduct—in other words, whether his use of deadly force was justified—was a question of fact to be resolved by the jury." *Id*. at 396. Although it recognized that its prior cases "have not been consistently clear about the responsibilities of judges and juries on the issue of objective reasonableness for purposes of qualified immunity in Fourth Amendment cases," it thought "the Supreme Court has" been clear. *Id*. at 397 n.2 (citing *Scott*, 550 U.S. at 381 n.8). See also *Armstrong* v. *Hutcheson*, 80 F.4th 508, 513 (4th Cir. 2023) (same); *id*. at 514 n.10 ("[F]or Fourth Amendment claims, the mixed question of applying the facts to the law to determine reasonableness, a question

that goes to the jury in most other areas of the law, is assigned to judges.").

The Fourth Circuit in *Rambert* then addressed the merits of a reasonableness challenge in a Fourth Amendment case concerning deadly force by cataloguing the historical facts, which it viewed in the light most favorable to the plaintiff, and by then assessing whether the officer's response to those facts, including his use of force and assessment of whether the plaintiff posed an immediate threat, was objectively reasonable as a matter of law. See *Rambert*, 107 F.4th at 399–400. It addressed this legal question while keeping in mind that the officer "had mere seconds to judge the risk and determine how to respond." *Id*. at 400.

The Fifth Circuit follows a similar approach, in line with this Court's precedents. In *Argueta* v. *Jaradi*, it determined that it had jurisdiction to consider "whether [the plaintiff] posed any risk to the officers or the public" when assessing whether the officer was entitled to qualified immunity. 86 F.4th 1084, 1089, 1093–94 (5th Cir. 2023), *cert. denied*, 145 S. Ct. 435 (2024). It separated historical facts (viewed in the light most favorable to plaintiff) from the legal question of "whether the motions that [the plaintiff] made were threatening," holding that "an assessment of whether a suspect's physical actions amount to threatening behavior bearing on an excessive-force claim is a question of law." *Id*. at 1090. As the Fifth Circuit "repeatedly" explained, "the risk an individual poses to officers or others is part of our objective-reasonableness analysis, a legal inquiry." *Id*. at 1092–93

(quoting *Harmon* v. *City of Arlington*, 16 F.4th 1159, 1163 (5th Cir. 2021) ("The question for this court is whether [the officer] could reasonably believe that [the fleeing suspect] posed a serious threat of harm.")).

The Eighth Circuit is in accord. It also considers the assessment of the threat an officer faced as a question of law subsumed within the objective reasonableness analysis. See *Est. of Aden* v. *City of Bloomington*, 128 F.4th 952, 959 (8th Cir. 2025) (explaining "deadly force" is "reasonable" if an officer "has probable cause to believe that a suspect poses a threat of serious physical harm" and "[o]bjective reasonableness is not a factual question"). And when assessing the question of "whether [the plaintiff] posed an immediate, meaningful threat," the Eighth Circuit has rejected the argument that "officers might have chosen another course of action" because "[q]ualified immunity gives law enforcement breathing room to make reasonable but mistaken judgments." *Id.* at 959 (cleaned up). And in its review of the facts, the Circuit makes every inference in favor of the nonmoving party, but does not consider itself bound by the district court. E.g. *id.* at 960.

### B. The Sixth Circuit has taken an inconsistent approach.

The Sixth Circuit has not been consistent in its treatment of imminent danger, or in its view as to the scope of its jurisdiction over related factual issues.

Several decisions treat reasonableness as a question of law in the excessive-force context. See *Clark* v.

*Louisville-Jefferson Cnty. Metro Gov't*, 130 F.4th 571, 580 (6th Cir. 2025) ("[W]e routinely consider whether the historical facts in the summary-judgment record (read in the light most favorable to the plaintiff) rise to the level required to show that an officer used excessive force or had probable cause under the Fourth Amendment."); *Gambrel* v. *Knox Cnty.*, 25 F.4th 391, 400 (6th Cir. 2022) ("whether the use of force was excessive" is a "legal question[] suitable for resolution on summary judgment").

But other decisions treat aspects of the reasonableness analysis as questions of fact. See, e.g., *Meadows* v. *City of Walker*, 46 F.4th 416, 421–22 (6th Cir. 2022) (stating that disputes about whether the officers "perceive[d] [the plaintiff] as refusing to comply or resisting arrest" are issues "of fact"); *id.* at 424–27 (Nalbandian, J. dissenting) (critiquing the majority for treating whether the plaintiff was resisting as "a question for the jury" when it is a "mixed question the courts resolve … as part of [their] reasonableness inquiry"); *Heeter*, 99 F.4th at 913 ("A jury could find these actions would indicate to a reasonable officer that [the plaintiff] was not threatening to the officers in the room.").

Moreover, the Sixth Circuit has read *Johnson* as abridging its jurisdiction over factual issues that arise on appeals from orders denying qualified immunity. See, e.g., *Meadows*, 46 F.4th at 421 ("We are therefore bound by the district court's determination that a reasonable jury could conclude that [the officers] did not perceive [the plaintiff] as refusing to comply or

resisting arrest."); *Gillispie* v. *Miami Twp., Ohio*, 18 F.4th 909, 916 (6th Cir. 2021) ("If disputed factual issues are crucial to a defendant's interlocutory qualified immunity appeal, we may not simply ignore such disputes; we remain obliged to dismiss [the appeal] for lack of jurisdiction." (cleaned up)).

Considering the state of the law, the Circuit lamented in *Heeter* that "[d]eciphering whether an officer's appeal challenges 'evidence sufficiency' or is 'purely legal' sounds much easier than it often is." 99 F.4th at 909. It stated that "[d]etermining where an interlocutory challenge to a qualified immunity denial lands on this fact-law spectrum," to be "a contentious issue." *Id.* And it noted that "the Supreme Court has forgone numerous opportunities to clarify *Johnson* by not discussing or explaining it in subsequent cases involving appeals from district court denials of qualified immunity at summary judgment." *Id*. at 910.

### C. The First, Third, Seventh, Ninth, Tenth, and Eleventh Circuits wrongly treat the level of danger an officer faced as a question of fact.

As is clear from the decision below, the Tenth Circuit considers the threat an officer faces to be a factual question over which it lacks jurisdiction. Pet.App. 6a ("The existence of an immediate danger is an issue of fact, not law."). See also, e.g., *Packard* v. *Budaj*, 86 F.4th 859, 867 (10th Cir. 2023) (district court's conclusion that "a reasonable jury could conclude neither [plaintiff] posed a threat to officers or others" is a

"factual finding" that "binds the panel on interlocutory appeal"); *Finch* v. *Rapp*, 38 F.4th 1234, 1242 (10th Cir. 2022) ("Whether [the officer] reasonably believed [the plaintiff] presented any threat is a genuine issue of fact for the jury to determine."); *Clerkley* v. *Holcomb*, 121 F.4th 1359, 1364 (10th Cir. 2024) (rejecting an argument for *de novo* review because "the reasonableness of an officer's belief that a plaintiff posed a threat [is] a factual question").

Five additional circuits similarly fail to properly assess *de novo* whether an officer faced imminent danger as a question of law—with those Circuits further circumscribing their review based on a misreading of *Johnson*.

**1.** Consider first the Seventh Circuit. In *Smith* v. *Finkley*, that Circuit considered an appeal from an order denying qualified immunity on summary judgment; the Circuit dismissed the appeal for lack of jurisdiction because there were "factual disputes … . about how much of a threat [the plaintiff] posed and how actively he was resisting." 10 F.4th 725, 729 (7th Cir. 2021). Citing *Johnson*, the Seventh Circuit noted that its "jurisdiction on interlocutory appeal extends to pure questions of law, not mixed questions of law and fact." *Id.* at 735. And, although it acknowledged that "[t]he line between a non-appealable factual dispute and an appealable abstract legal question is not always clear," *id.*, the court thought an unreviewable "factual dispute exist[ed] as to whether, from the perspective of a reasonable officer on the scene, [the plaintiff] appeared to pose an immediate threat to

their safety or the safety of others," *id*. at 740; *see also id*. at 741 ("To a reasonable officer in these circumstances, whether [the plaintiff] continued to present a threat, how immediate that threat was, and whether [the plaintiff] continued to resist and how much, are uncertainties and unresolved material questions of fact.").

In reaching the conclusion, the Seventh Circuit acknowledged that Supreme Court precedent and prior Seventh Circuit cases had treated objective reasonableness as a question of law. *Id*. at 746 ("It can be argued that the inquiry here is purely legal and may be answered on this record.") (citing *Mullenix*, 577 U.S. at 11 ). Yet, it declined jurisdiction because it found, over the dissent's objection, that the threat posed by the plaintiff was a "historical fact"—namely, the "why"—that was in dispute. *Id*. at 747 ("The majority here parts ways with the dissent as to how the issue in this case is characterized: what the dissent sees as a legal issue, the majority views as a factual dispute precluding appellate jurisdiction.").

By contrast, the dissent in *Smith* would have found jurisdiction to be proper, and would have ruled in favor of the officers. Chief Judge Sykes first noted that the majority overread *Johnson*, which should be considered "a narrow exception to the general rule that a pretrial order denying qualified immunity is an immediately appealable final order." *Id*. at 750–51 (Sykes, C.J. dissenting). Finding that "*Plumhoff* controls here," Chief Judge Sykes determined that the court need only "make a legal determination about the

officers' entitlement to immunity," *i.e.*, "answer only the question whether a reasonable officer would have clearly understood that using lethal force in this situation was unlawful." *Id.* at 753. With respect to the presence of an imminent threat, Chief Judge Sykes explained that the question is not a factual assessment of whether a threat actually existed; rather it is a legal assessment of whether it was objectively reasonable for the officers to have believed there was a threat based given the historical facts and the standards for reviewing officer conduct. *Id.* at 755–56.

**2**. The First, Third, and Eleventh Circuits make the same mistake as the *Smith* majority and the Tenth Circuit in the decision below. For example, in *Rush* v. *City of Philadelphia*, the Third Circuit rejected the officer's arguments about the level of threat posed by the plaintiff stating that it "lack[s] jurisdiction over factual challenges to the definition of the right at issue in evaluating qualified immunity—including as to whether a victim of excessive force was a threat to officers or the public." 78 F.4th 610, 617 (3d Cir. 2023). But see *Plumhoff*, 572 U.S. at 777–78 (assessing threat victim of shooting posed to public).

The First Circuit engages in a similarly flawed analysis. See *Begin* v. *Drouin*, 908 F.3d 829, 834 (1st Cir. 2018) ("Whether an immediate threat exists is a question of fact for the jury as long as the evidence is sufficient to support such a finding."); *McKenney* v. *Mangino*, 873 F.3d 75, 84 (1st Cir. 2017) (no jurisdiction when "the defendant has woven factbound arguments regarding both the immediacy of the threat

posed by [the plaintiff] and the feasibility of less drastic action into the warp and woof of his challenge to the district court's qualified immunity analysis").

The Eleventh Circuit similarly treats the issue of danger as a factual issue over which it lacks jurisdiction under *Johnson*. See *English* v. *City of Gainesville*, 75 F.4th 1151, 1156–57 (11th Cir. 2023) (dismissing appeal for lack of jurisdiction when the "dispute is whether [the plaintiff]—in fact—posed a danger when the shooting occurred").

**3**. Finally, the Ninth Circuit also considers the "level of threat [the plaintiff] posed" to be a "quintessential question of fact … reserved for the jury." *Aguirre* v. *Cnty. of Riverside*, 29 F.4th 624, 626 (9th Cir. 2022). In *Aguirre*, the Ninth Circuit affirmed the district court's denial of qualified immunity because it "cannot assume the jury's role to resolve the disputed question [of] whether [the plaintiff] presented an immediate threat." *Id.* at 630.

The Ninth Circuit has also expressed concern over confusion it thought wrought by *Johnson*. In *Peck* v. *Montoya*, the Ninth Circuit explained that the proper application of *Johnson* "has perplexed courts for years." 51 F.4th 877, 885 (9th Cir. 2022). The dissent in *Anderson* v. *Marsh* put it more plainly. 985 F.3d at 735 (W. Fletcher J. dissenting). Beginning with "*Johnson* strikes again," Judge Fletcher explained that, in his view, "the law in this area is extraordinarily confused," *id.*, and appellate courts "have struggled to reconcile [*Johnson*'s] apparent holding with the purpose of qualified immunity," *id.* at 737. Judge

Fletcher noted that *Plumhoff* should have cleared up this confusion but made "a plea to the Supreme Court," asking this Court to "tell [the courts] clearly, in an appropriate case, whether and in what circumstances an interlocutory appeal may be taken when the district court, viewing disputed evidence in the light most favorable to plaintiff, has denied a motion for summary judgment based on qualified immunity." *Id*. at 742.

* * *

This Court should take up the first question presented. This would ensure the courts of appeals are properly assessing the reasonableness of an officer's actions on appeals from denial of summary judgment based on qualified immunity—including assessing, as a matter of law, whether it was objectively reasonable for an officer to have believed there was a threat justifying the level of force used. It would clear up "confusion" among the courts of appeals regarding *Johnson*, see *Anderson*, 985 F.3d at 737 (W. Fletcher, J. dissenting). And it would clarify that, in keeping with *Plumhoff* and *Scott*, *Johnson* does not prevent an appellate court reviewing historical facts in an appeal from the denial of a qualified immunity defense to assess whether an officer behaved reasonably (rather than summary judgment on a liability question).

## II. Separately, The Tenth Circuit's Decision Flouts This Court's Decisions Instructing Courts Not To Define "Clearly Established Law" At A High Level Of Generality.

Even assuming Officer Grashorn's conduct violated the Fourth Amendment under a step one analysis (it does not), he is entitled to qualified immunity unless his conduct "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." *Rivas-Villegas*, 595 U.S. at 7. It did not, and the Tenth Circuit ignored this Court's controlling instructions.

**A.** It is settled that "courts [can]not define clearly established law at too high a level of generality." *City of Tahlequah*, 595 U.S. at 12. A police officer is "entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue" and makes clear such facts constitute unlawful conduct. *Kisela*, 584 U.S. at 104 (quoting *Mullenix*, 577 U.S. at 12); *see also Rivas-Villegas*, 595 U.S. at 6 (clearly established law requires cases that "address[] facts like the one at issue here"). That is because "[t]he correct inquiry" is "whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the situation [he] confronted." *Mullenix*, 577 U.S. at 13 (cleaned up).[1]

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[1] This Court has "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).

Such fact-specific analysis "is especially important in the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'" *Id.* at 12 (quoting *Saucier* v. *Katz*, 533 U.S. 194, 205 (2001)).

**B.** The Tenth Circuit's analysis fails this Court's test. The Tenth Circuit does not cite a case with analogous facts, let alone a body of persuasive authority. Indeed, it all but admits "a factually similar case doesn't exist," Pet.App. 14a, before citing a string of materially dissimilar out-of-circuit cases standing for the uncontested proposition that police officers cannot "shoot a pet dog in the absence of an immediate danger." *Id.* at 15a–16a.

A review of the cited cases shows just how inapposite they are, and thus how they failed to put Officer Grashorn on notice his conduct was unlawful, even assuming out-of-circuit precedent suffices to clearly establish law. One case involved police officers with prior knowledge a dog would be present at the location the officers were headed (a family's home). *Viilo* v. *Eyre*, 547 F.3d 707, 708 (7th Cir. 2008). There, an officer (Carter) brought a shotgun because he thought "the best weapon for a dog is a shotgun through my experience." *Id.* When the house owner's dog ran towards the officers, Carter fired two shots at the dog, hitting it once, which broke its front leg. *Id.* at 709. The dog then hid in the bushes for ten minutes, during which time "a crowd" of the owners' neighbors came

over, some of whom told the officers that the injured dog was not "a bad dog." *Id.* Witnesses also testified that when the dog emerged from the bushes "limping and whimpering" and "just trying to get back to [his owner]," Carter fired two more shots, killing it. *Id.* The court concluded the officer's "third and fourth" shots were not reasonable under the historical facts. *Id.* at 709–10. Obviously, these facts are nothing like the circumstances Officer Grashorn faced here.

In another case, one witness testified that the police officer shot a dog lying on the floor of the owner's home, which led to the court to conclude that under the step one analysis, a jury could find the officer acted unreasonably. *Robinson* v. *Pezzat*, 818 F.3d 1, 11 (D.C. Cir. 2016). In another, a police officer *sua sponte* pulled over after spotting a dog, got out of his car, and then shot the dog despite it allegedly being "stationary" and otherwise unaggressive. *Brown* v. *Muhlenberg Tp.*, 269 F.3d 205 (3d Cir. 2001).[2]

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[2] The Tenth Circuit's other cases also lack similar facts—none involved anything like a split-second decision about whether to shoot an unleashed pitbull running in the direction of a police officer responding to a call about trespassers on private property. *E.g.*, *Ray* v. *Roane*, 948 F.3d 222, 225, 229–30 (4th Cir. 2020) (shooting dog in owners' yard that was "tethered, and incapable of reaching or harming [police officer]"); *Ramirez* v. *Killian*, 113 F.4th 415, 419–20, 428–29 (5th Cir. 2024) (shooting dog walking in owner's home wagging tail after ordering owner to "face that g—d—n wall, b—h" and stating "I'll shoot your dog")); *Andrews* v. *City of W. Branch*, 454 F.3d 914, 916, 918 (8th Cir. 2006) (shooting dog in "fenced-in backyard" from outside yard with "no warning"); *Criscuolo* v. *Grant Cnty.*, 540 F. App'x 562, 563–64 (9th Cir. 2013) (shooting dog that witnesses said was "stationary or retreating at a distance of 10–20 feet from [police officers]").

To the extent any kind of body of persuasive case law exists, that case law would show Officer Grashorn's conduct was reasonable. E.g., *Lee* v. *Fort Mill*, 725 F. App'x 214, 218 & n.5 (4th Cir. 2018) (finding officer shooting of dogs reasonable where he "faced two large dogs running aggressively at him at full speed, and he had no indication that they were under anyone's control" despite allegations that "dogs were in fact kind and gentle"); *Carroll* v. *County of Monroe*, 712 F.3d 649, 650–52 (2d Cir. 2013) (shooting "a dog growling, barking, and quickly and aggressively approaching" police officer executing no-knock warrant).

And, in fact, "the most analogous [Tenth] Circuit precedent favors [Petitioner]." *Kisela*, 584 U.S. at 106. In *Kendall* v. *Olsen*, the Tenth Circuit analyzed a case where an officer entered a home's backyard and encountered the owner's large dog, which was "20-25 feet from [the officer] when [the officer] first saw him." 727 F. App'x 970, 971–72 (10th Cir. 2018). The dog "charge[d] him aggressively," and the officer "shot and killed the dog a few feet from him." *Id.* at 972. The owner disputed whether his dog acted aggressively, but the court held that "[e]ven under [the owner's] version of the facts, however, Geist, a large dog, appeared suddenly approximately 20-25 feet from Olson, barking loudly, and then ran at Olsen when the officer

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The Tenth Circuit also pointed to "[its] precedents addressing the shooting of persons," but did not discuss the facts of any such case, let alone explain how such cases could be analogous given the very different interests people have in their bodily integrity versus their pets, as well as the differences in how one analyzes the threat a person poses versus a dog. Pet.App. 17a–18a.

started to run from him." *Id.* at 974. Thus, "[w]hile [the officer] perhaps could have reacted differently, we cannot say that his split-second decision to use lethal force was objectively unreasonable." *Id.* at 975 (affirming decision to grant officer qualified immunity).

**C.** In any event, the Tenth Circuit did not rest its decision on case law with facts analogous to the facts of this case—rather, it rested its conclusion on the premise that it was clearly established that Officer Grashorn could not shoot a dog that posed no immediate danger. Pet.App. 15a. But "[t]he general principle that deadly force requires a sufficient threat hardly settles [the] matter." *Mullenix*, 577 U.S. at 14. Rather, as this Court has *repeatedly* instructed while summarily reversing lower courts, one must identify cases with similar facts that put an officer on notice that "the relevant legal doctrine, here [unlawful seizure], will apply to *the factual situation the officer confronts*." *City of Tahlequah*, 595 U.S. at 13–14 (emphasis added). Because the Tenth Circuit has not done so, its decision should join the list of cases summarily reversed.[3]

**D.** This is also not the "rare 'obvious case[]' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *District of Columbia* v. *Wesby*, 583 U.S. 48, 64 (2018) (quoting *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004)). That standard applies only

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[3] E.g., *id.*; *Rivas-Villegas*, 595 U.S. at 7–8; *Kisela*, 584 U.S. at 107–08; *White* v. *Pauly*, 580 U.S. 73, 78 (2017) (per curiam); *Mullenix*, 577 U.S. at 18.

to cases where no reasonable person could think their actions were unlawful. See *Plowright* v. *Miami Dade County*, 102 F.4th 1358, 1361–62 (11th Cir. 2024) (holding police officer's alleged shooting of a "less than 40 pounds … dog … already down from [a] [t]aser, … killing the dog for no reason," to be "one of the rare cases in which the unconstitutional nature of [the police officer's] actions was clearly established to the point of obvious clarity").

Here, even the district court acknowledged this case was a close call, such that the jury could find the shooting a reasonable "split-second decision[]." Pet.App. 30a. In no way is shooting an unleashed pit-bull running in a police officer's direction that is just a few feet away from the officer obviously unlawful.

* * *

In sum, if the Court does not grant certiorari on question presented one, it should grant certiorari or summarily reverse on question two because the Tenth Circuit's decision flies in the face of this Court's precedent on what constitutes clearly established law.

## III. The Questions Presented Are Exceedingly Important And Frequently Recur.

**A.** Both questions presented are important. As this Court has often recognized, "qualified immunity is important to society as a whole" and "as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial." *White* v. *Pauly*, 580 U.S. 73, 79 (2017) (per curiam) (cleaned up); *accord City and County of San Francisco* v.

*Sheehan*, 575 U.S. 600, 611 n.3 (2015). One reason it is important is that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences." *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985) (cleaned up).

The need for space to exercise judgment is particularly important where it comes to the "split-second judgments" of police officers "on the ground, 'in circumstances that are tense, uncertain, and rapidly evolving.'" *Barnes*, 145 S. Ct. at 1363 (Kavanaugh, J., concurring) (quoting *Graham*, 490 U.S. at 397).

Unfortunately, the position of the Tenth and like-minded circuits greatly weakens qualified immunity, by causing courts to abdicate their responsibility to evaluate whether an officer acted reasonably when making a split-second decision based on the historical facts. Instead, the Tenth Circuit rule defaults to treating core aspects of the reasonableness analysis—such as whether a reasonable officer would have believed he faced danger justifying his use of force—as questions of fact, thus unjustly narrowing the availability of qualified immunity before trial, while effectively eliminating all forms of appellate review. Similarly, the Tenth Circuit's mistaken view of "clearly established" will also result in many more unnecessary trials, even though qualified immunity "is an *immunity from suit* rather than a mere defense to liability; and … it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526.

The decision below also risks increasing the cost of lawful self-defense in a way that will harm the effectiveness of law enforcement. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982) (discussing how the failure to apply qualified immunity inflicts "social costs").

**B.** Both questions also frequently recur. It is well understood that law enforcement officers must make split-second decisions about whether to use force all the time. See, e.g., *Barnes*, 145 S. Ct. at 1360–61 (Kavanaugh, J., concurring) (discussing the dangers of traffic stops). This includes split-second decisions involving threats posed by animals, as evidenced by the fact that almost every circuit has addressed (multiple times) issues around officer-involved dog shootings.

## IV. This Case Presents An Ideal Vehicle To Decide The Questions Presented.

Finally, both questions presented are pure questions of law that are cleanly presented. The Tenth Circuit made clear that the dispositive factor in its reasonableness analysis was that it lacked jurisdiction to review the district court's "[f]actual [c]onclusion" that a reasonable jury could find that "[d]anger was not imminent." Pet.App. 6a, 9a. Separately, the Tenth Circuit's decision on step two also indisputably rests on its legal conclusion that "a constitutional violation [was] clearly established" based on "common sense" and nonbinding "case law." *Id.* at 15a.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari or summarily reverse the Tenth Circuit's decision given that it contradicts clearly established Supreme Court precedent.

Respectfully submitted,

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# APPENDIX

## TABLE OF APPENDICES

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED APRIL 22, 2025**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 23-1397

WENDY LOVE; JAY HAMM,

*Plaintiffs–Appellees,*

v.

MATHEW GRASHORN,

*Defendant–Appellant.*

Filed April 22, 2025

**OPINION**

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:21-CV-02502-RM-NRN)

Before MATHESON, BACHARACH, and FEDERICO, *Circuit Judges.*

BACHARACH, *Circuit Judge.*

*Appendix A*

This case arose when a police officer shot a pet dog. The parties agree that the shooting implicates the Fourth Amendment. The disagreement involves

- whether a jury could reasonably find that the police officer had violated the Fourth Amendment and

- whether a constitutional violation would have been clearly established.

To resolve these disagreements, we draw guidance from common sense and case law, which would have created a constitutional violation in the absence of an immediate danger.

The district court considered the immediacy of a danger and denied summary judgment to the police officer. In reviewing this ruling, we rely on the district court's assessment of what the jury could reasonably find. Under that assessment, the jury could reasonably find no immediate danger, which would render the shooting a clearly established violation of the Fourth Amendment.

**1. An officer shoots the plaintiffs' dog.**

The shooting occurred after a business owner called the police, reporting a truck in his parking lot after business hours.

In response, Officer Mathew Grashorn came to investigate. Upon entering the parking lot, he saw a truck owned by the plaintiffs, Ms. Wendy Love and Mr. Jay

Hamm. The officer parked and got out of his car. A large dog (Bubba) had been lying on the ground, but got up and ran toward Officer Grashorn.

Officer Grashorn pointed his gun at Bubba. Mr. Hamm called for Bubba, and the dog returned to his owners. Another dog (Herkimer) then emerged from the truck, darting toward Bubba and then running toward Officer Grashorn. When Herkimer was a few feet away, Officer Grashorn fired two shots, injuring the dog. Herkimer was later euthanized as a result of the injuries.

**2. The district court rejects the officer's argument for qualified immunity.**

Ms. Love and Mr. Hamm sued Officer Grashorn for violating the Fourth Amendment,[1] and he moved for summary judgment based on qualified immunity. The district court denied Officer Grashorn's motion; and he appeals, contending that

- the shooting of Herkimer was reasonable because the dog posed an imminent danger,
- Officer Grashorn didn't violate a clearly established right, and
- Officer Grashorn had qualified immunity even if he had been mistaken about the danger.

1. Ms. Love and Mr. Hamm also sued other parties and asserted other claims. The other parties and claims aren't involved in the appeal.

**3. Our review is based on the district court's conclusions about what a reasonable jury could find.**

In addressing the denial of summary judgment, we conduct de novo review, applying the same standard that governed in district court. *See Grubb v. DXP Enters., Inc.*, 85 F.4th 959, 965 (10th Cir. 2023). Under that standard, Officer Grashorn is entitled to summary judgment if he "shows that there is no genuine dispute as to any material fact and [he] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Because Officer Grashorn asserted qualified immunity, the plaintiffs bear the initial burden of showing that (1) Officer Grashorn violated the Constitution and (2) this violation was clearly established. *Verdecia v. Adams*, 327 F.3d 1171, 1174 (10th Cir. 2003).

In assessing the plaintiffs' effort to satisfy that burden, we can consider only "abstract questions of law." *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1162 (10th Cir. 2021). Generally, it is the district court's job, not ours, "to determine which facts a jury could reasonably find from the evidence presented to it by the litigants." *Lewis v. Tripp*, 604 F.3d 1221, 1225 (10th Cir. 2010).

The district court concluded that a jury could reasonably find that Herkimer had not posed an immediate danger to Officer Grashorn because

- Herkimer had not been *at large*,
- Ms. Love and Mr. Hamm may have been able to gain control of the dog,

- a reasonable officer in Officer Grashorn's position could have used non-lethal means to avoid any danger, and

- Officer Grashorn had time to respond differently.

Appellant's App'x vol. 6, at 1065.

On an appeal from the denial of qualified immunity, we rely on this universe of facts unless an exception applies. *See Lewis*, 604 F.3d at 1225. Three exceptions exist:

1. The district court fails to identify the facts underlying the decision.

2. The district court's version of events is blatantly contradicted by the record.

3. The district court based its factual conclusions on a legal error.

*McWilliams v. DiNapoli*, 40 F.4th 1118, 1122 (10th Cir. 2022).

Officer Grashorn acknowledges that we are not ordinarily "at liberty to review a district court's factual conclusions." Appellant's Opening Br. at 19 (quoting *Fogarty v. Gallegos*, 523 F.3d 1147, 1154 (10th Cir. 2008)). But he contends that we shouldn't confine ourselves to the district court's universe of facts because

- the existence of an immediate danger and *at large* status are legal questions and

- the district court didn't identify facts that could have vitiated an immediate danger.[2]

We reject both contentions.

The existence of an immediate danger is an issue of fact, not law. *See Clerkley v. Holcomb*, 121 F.4th 1359, 1364 (10th Cir. 2024) (observing that "we have previously characterized the reasonableness of an officer's belief that the plaintiff posed a threat as a factual question"); *Finch v. Rapp*, 38 F.4th 1234, 1242 (10th Cir. 2022) ("Whether [the officer] reasonably believed [the plaintiff] presented any threat is a genuine issue of fact for the jury to determine."). So we are bound by the district court's conclusion that the jury could reject the presence of an immediate danger. *See Packard v. Budaj*, 86 F.4th 859, 866-67 (10th Cir. 2023) (explaining that the court was "bound" by the district court's finding as to "whether officers 'reasonably believed' a subject 'presented any threat'" (quoting *Finch v. Rapp*, 38 F.4th 1234, 1242 (10th Cir. 2022))).

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2. Officer Grashorn also argues that the plaintiffs' "version of events" is contradicted by the record. Appellant's Reply Br. at 12. But in an interlocutory appeal like this one, we consider whether the record contradicts the court's factual conclusions rather than the plaintiffs' version of events. *See* pp. 1111-12, above. And Officer Grashorn doesn't argue that the record contradicts the district court's factual conclusions. In any event, the record doesn't blatantly contradict the district court's conclusions about what a reasonable jury could find.

The district court also drew conclusions about the possibility that Herkimer had been *at large*. The court appeared to use the term *at large* in the general sense of being free and outside the owner's control.[3] Though the court apparently used the term in a general sense, a dog's *at large* status may involve a legal characterization for purposes of municipal ordinances. For example, Larimer County, which is where the incident took place, has an ordinance classifying a dog as *at large* if the dog hadn't immediately responded to the owner's command. Larimer Cnty. Code, art. I, § 6-1. But our case doesn't involve enforcement of Larimer County's ordinance, and the district court didn't suggest that it was relying on the county's use of the term *at large*.

Granted, the district court may have relied partly on the legal meaning of the term *at large*. Even if the court

3. The district court's use of the term *at large* comports with the definitions used in leading legal dictionaries. One such dictionary defines *at large* status "in the legal sense" as "someone or something unconfined, unsupervised, and generally at liberty. Thus, an animal at large is either not in confinement or not under the supervision of a minder but free to roam (even if it becomes stuck elsewhere than its owner's pen by its own volition)." I *Bouvier's Law Dict.* (Sheppard gen. ed. 2012). Another leading legal dictionary defines *at large* as "[f ]ree; unrestrained; not under control." *Black's Law Dictionary* (11th ed. 2019) (Garner gen. ed.).

State courts have defined the term *at large* in a similar way. For example, the Connecticut Supreme Court has concluded that animals are *at large* when they "are suffered to roam about without a keeper and without restraint." *Dixon v. Lewis*, 94 Conn. 548, 109 A. 809, 810 (1920). And the Oregon Supreme Court has characterized animals as *at large* when they "roam and feed at will, and are not under the immediate control of anyone." *Keeney v. Or. Ry. & Nav. Co.*, 19 Or. 291, 24 P. 233, 234 (1890).

had used the legal meaning, however, classification of Herkimer as *at large* would turn on facts, creating a mixed question of law and fact. *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 227, 140 S.Ct. 1062, 206 L.Ed.2d 271 (2020). "Mixed questions are not all alike." *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 395-96, 138 S.Ct. 960, 200 L.Ed.2d 218 (2018). Some mixed questions "require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard." *Id.* at 396, 138 S.Ct. 960. Other mixed questions require courts to weigh "case-specific factual issues – compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address . . . 'narrow facts that utterly resist generalization.'" *Id.* (quoting *Pierce v. Underwood*, 487 U.S. 552, 561-62, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)); *see United States v. Norton*, 130 F.4th 824, 834 (10th Cir. 2025) (applying this distinction between mixed questions based on whether the determination is primarily legal or factual).

The district court may have considered the legal definition of *at large*, but applied that definition based on factual conclusions involving

- whether the owners had been available and willing to assert control over the dog and
- "what Herkimer would have done had he not been shot."

Appellant's App'x vol. 6, at 1065. Given the primacy of these factual conclusions, we are bound by the district

court's universe of facts involving the plaintiffs' ability to control Herkimer. *See* p. 1112, above; *see also DiMarco v. Rome Hosp. & Murphy Mem'l Hosp.*, 952 F.2d 661, 665 (2d Cir. 1992) (concluding that if a defense of qualified immunity presents "mixed questions of fact and law, an immediate appeal will not lie, and review of the qualified immunity determination will have to await the district court's resolution of the factual questions").

We also reject Officer Grashorn's contention that the district court failed to identify the material facts that a jury could find. The court pointed to three factual conclusions that could be drawn:

1. The plaintiffs were available and willing to assert control over Herkimer.

2. Officer Grashorn had time to consider non-lethal options to stop Herkimer.

3. Herkimer posed no immediate danger to Officer Grashorn.

So in considering Officer Grashorn's arguments for qualified immunity, we accept the district court's view of the facts that a jury could reasonably find.

**4. We lack jurisdiction to consider Officer Grashorn's version of the facts.**

Officer Grashorn challenges the district court's conclusion that a jury could regard the shooting as unreasonable. For this challenge, we conduct de novo

review. *See Clerkley v. Holcomb*, 121 F.4th 1359, 1364 (10th Cir. 2024).

We have held that "[k]illing a dog meaningfully and permanently interferes with the owner's possessory interest." *Mayfield v. Bethards*, 826 F.3d 1252, 1256 (10th Cir. 2016). Given the interference with a possessory interest, the killing violates an owner's rights under the Fourth Amendment "absent a warrant or some exception to the warrant requirement." *Id.* A warrant is unnecessary when exigent circumstances exist, such as "th[e] need to guarantee the safety of [police officers] and others." *United States v. Thomas*, 372 F.3d 1173, 1177 (10th Cir. 2004).

Officer Grashorn contends that he acted reasonably under the circumstances because

- Herkimer had posed an immediate danger,
- there hadn't been enough time to find a non-lethal solution, and
- Herkimer had been *at large*.

These arguments contradict the district court's universe of facts[4]:

4. Officer Grashorn also argues "that Herkimer was a Pitbull and Pitbulls can be at times unpredictable even if they appear friendly." Appellant's Reply Br. at 16. The parties disagree on Herkimer's breed, but the district court acknowledged that the dog "looked like a pit bull, a breed that is widely perceived as unpredictable and dangerous." Appellant's App'x vol. 6, at 1065.

*Appendix A*

| Officer Grashorn's Argument | District Court's Factual Conclusion |
|---|---|
| Danger was imminent | Danger was not imminent |
| "The imminency of danger perceived by Appellant is depicted in his [body-worn-camera-footage]. Appellant had 3 seconds to make a decision as to a course of action." Appellant's Opening Br. at 30 (bolding omitted). | "Although a reasonable jury could decide that Herkimer posed a danger to Defendant demonstrating the 'type of tense, rapidly evolving situation where allowance is given for the police to make a split-second decision,' it could also decide that he did not pose an immediate danger." Appellant's App'x vol. 6, at 1066. |
| No non-lethal options existed | Non-lethal options existed |
| "Prior to shooting, Appellant considered alternatives other than deadly force, but he did not have time to use other alternatives because of how fast the incident unfolded and he also ruled them out as ineffective under the circumstances." Appellant's Opening Br. at 4. | "Although the situation evolved rapidly, the circumstances do not conclusively establish that a reasonable officer in Defendant's position could not have used nonlethal means available to avoid whatever danger the approaching dog posed. At the very least, it is debatable whether Defendant had enough time to respond differently." Appellant's App'x vol. 6, at 1066. |

| | |
|---|---|
| "The [body-worn-camera] footage clearly shows there was no time to find an alternative solution to control Herkimer, as the entire incident unfolded in three (3) seconds." Appellant's Opening Br. at 26 (bolding omitted). | |
| "Appellant did not want to take a chance with alternative methods because they might not have worked, and he did not have time to transition to an alternative." Appellant's Opening Br. at 26. | |
| Herkimer was *at large* | Herkimer was not *at large* |
| "Herkimer was 'at-large' and not on his own property." Appellant's Opening Br. at 14. | "First, a reasonable fact finder could conclude that Herkimer was not 'at-large' when Defendant shot him. Although he was unleashed on private property, his owners were present, and they had already successfully called off one of their other dogs. It is impossible to know what Herkimer would have done had he not been shot, but the circumstances do not conclusively establish |

| | |
|---|---|
| | that he was 'at-large.'" Appellant's App'x vol. 6, at 1065. |
| "Here, Appellant did show that Herkimer was indeed 'at-large' at the time of the shooting because 1) he was not physically controlled by a human via a leash while on someone else's property and 2) because he did not respond to a verbal command of the accompanying person." Appellant's Opening Br. at 23. | |

We lack jurisdiction to reverse based on Officer Grashorn's version of the facts. *See Castillo v. Day*, 790 F.3d 1013, 1018 (10th Cir. 2015) (dismissing an appeal based on "[a defendant's] version of the facts and the inferences that can be drawn therefrom").[5]

5. We do have jurisdiction to

   - consider the district court's conclusions about the facts that a jury could reasonably find and
   - determine whether those conclusions would entail a constitutional violation.

*See Clerkley v. Holcomb*, 121 F.4th 1359, 1363 (10th Cir. 2024). But when Officer Grashorn argues that he didn't violate the Constitution, he relies solely on his version of the facts rather than the district court's conclusions about what a jury could reasonably find.

**5. Under the district court's universe of facts, a constitutional violation would have been clearly established.**

Officer Grashorn also argues that a constitutional violation wouldn't have been clearly established. For this argument, we conduct de novo review. *See Clerkley v. Holcomb*, 121 F.4th 1359, 1364 (10th Cir. 2024).

A right is *clearly established* if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). A claimant can typically show a clearly established violation by identifying a factually similar precedent already in existence. *See Frasier v. Evans*, 992 F.3d 1003, 1014 (10th Cir. 2021). A right may also be clearly established by the "consensus of cases of persuasive authority" from other jurisdictions. *Ullery v. Bradley*, 949 F.3d 1282, 1294 (10th Cir. 2020) (quoting *Wilson v. Layne*, 526 U.S. 603, 617, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999)).

But a factually similar case isn't always required. *See Mullenix v. Luna*, 577 U.S. 7, 12, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015) ("[W]e do not require a case directly on point."). Even when a factually similar case doesn't exist, a right may be clearly established when case law applies "with obvious clarity." *United States v. Lanier*, 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).

We must determine the clarity of a constitutional violation based on the district court's universe of facts. Under that universe of facts, Officer Grashorn didn't face an immediate danger and had time to consider non-

lethal options. *See* pp. 1111-12, above. Officer Grashorn challenges those factual determinations, but we lack jurisdiction to consider those challenges. *See* p. 1115, above. So our question is simply whether police officers could reasonably believe that the Fourth Amendment allows them to shoot a dog (without considering non-lethal options) when there's no immediate danger.

In our view, common sense should have alerted police officers that they couldn't shoot a pet dog in the absence of an immediate danger. *See Viilo v. Eyre*, 547 F.3d 707, 710 (7th Cir. 2008) (stating that "common sense . . . counsel[s] 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"); *see also Ramirez v. Killian*, 113 F.4th 415, 429 (5th Cir. 2024) (stating that "it is a matter of common sense" that an officer cannot "go around shooting citizens' nonaggressive dogs").

This understanding reflects not only common sense, but also case law recognizing a constitutional violation when a dog poses no immediate danger. *See Ramirez*, 113 F.4th at 428. Other "circuits have 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) (quoting *Viilo v. Eyre*, 547 F.3d 707, 710 (7th Cir. 2008)). For example, five circuits have considered the issue and recognized a clearly established constitutional violation when the pet poses no immediate danger[6]:

6. Another circuit (the D.C. Circuit) has also recognized a constitutional violation when the pet posed no immediate danger. *Robinson v. Pezzat*, 818 F.3d 1, 41-43 (D.C. Cir. 2016).

*Appendix A*

| **Circuit** | Case/Year | Clearly-Establish Violation | Imminent Danger |
|---|---|---|---|
| **3d** | *Brown v. Muhlenberg*, 269 F.3d 205, 211-12 (3d Cir. 2001) | Yes | No |
| **4th** | *Ray v. Roane*, 948 F.3d 222, 229-30 (4th Cir. 2020) | Yes | No |
| **5th** | *Ramirez v. Killian*, 113 F.4th 415, 428-29 (5th Cir. 2024) | Yes | No |
| **8th** | *Andrews v. City of W. Branch*, 454 F.3d 914, 918 (8th Cir. 2006) | Yes | No |
| **9th** | *Criscuolo v. Grant Cnty.*, 540 F. App'x 562, 564 (9th Cir. 2013) (unpublished) | Yes | No |

The parties did not cite the opinions in

- *Ray v. Roane*,
- *Ramirez v. Killian*, or
- *Criscuolo v. Grant County*.

But once the plaintiffs urged a clearly established right based on the absence of an immediate danger, we incurred an obligation to conduct our own legal research to determine the clarity of a constitutional violation. *See*

*Elder v. Holloway*, 510 U.S. 510, 516, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994) (stating that when reviewing rulings on qualified immunity, courts should use full knowledge of their "own [and other relevant] precedents" (quoting *Davis v. Scherer*, 468 U.S. 183, 192 n.9, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984))).

Until now, we haven't squarely decided whether the Fourth Amendment prohibits the police from shooting a dog in the absence of an imminent danger. But we have addressed the constitutionality of a shooting when the victim is a person (rather than a dog). For example, in *Morris v. Noe*, we concluded that an officer had violated clearly established law by conducting a forceful takedown of the plaintiff. 672 F.3d 1185, 1196-98 (10th Cir. 2012). We found no cases involving the kind of force used by the officer. *Id.* But based on the facts assumed by the district court, the plaintiff had posed no threat to the officers and had not resisted or fled. *Id.* So we held that the alleged takedown would have violated a clearly established requirement for officers to act reasonably under the circumstances. *Id.* at 1198. The constitutional violation is just as obvious when the shooting involves a dog rather than a person.

Officer Grashorn points out that we lack any binding precedents on this issue. But a general rule may apply with obvious clarity. *See Buck v. City of Albuquerque*, 549 F.3d 1269, 1290 (10th Cir. 2008). Here the constitutional prohibition applies with obvious clarity based on common sense, persuasive case law in other circuits, and our precedents addressing the shooting of persons. *See Ray*

*v. Roane*, 948 F.3d 222, 229-30 (4th Cir. 2020) (concluding that a police officer's shooting of a privately owned animal, which doesn't "pose an immediate threat to the officer or others," constitutes a clearly established violation of the Fourth Amendment even without a "directly on-point, binding authority" in the circuit (quoting *Booker v. S.C. Dep't of Corrs.*, 855 F.3d 533, 543 (4th Cir. 2017))); *Plowright v. Miami Dade Cnty.*, 102 F.4th 1358, 1361 (11th Cir. 2024) (concluding that a police officer's shooting of an incapacitated dog, in the absence of a reasonable threat of imminent danger, constituted a clearly established violation of the Fourth Amendment "even in the absence of directly-on-point caselaw").

Granted, officers may enjoy qualified immunity when an aggressive dog poses an immediate threat. *Kendall v. Olsen*, 727 F. App'x 970, 974-75 (10th Cir. 2018) (unpublished); *Mayfield v. Harvey Cnty. Sheriff's Dep't*, 732 F. App'x 685, 689-90 (10th Cir. 2018) (unpublished). For example, we've upheld qualified immunity when the undisputed evidence showed that the dogs posed an imminent danger by behaving aggressively and trying to attack a law-enforcement officer. *Kendall*, 727 F. App'x at 974-75; *Mayfield*, 732 F. App'x at 689-90. Even when appellate courts have upheld qualified immunity for officers shooting dogs, however, the courts have relied on imminent dangers to police officers. *E.g.*, *Brown v. Battle Creek Pol. Dep't*, 844 F.3d 556, 568-72 (6th Cir. 2016); *Brooker v. Abate*, No. 20-3123, 2021 WL 4622399, at *2 (7th Cir. Oct. 7, 2021) (unpublished); *Buschmann v. Kansas City Bd. of Pol. Comm'rs*, 76 F.4th 1081, 1084-85

(8th Cir. 2023);[7] *Ex parte City of Vestavia Hills*, 372 So. 3d 1143, 1148-49 (Ala. 2022).

Given common sense, the consensus of case law, and our precedents on the shooting of persons, the availability of qualified immunity turns on the existence of an imminent danger to Officer Grashorn.[8] But the

7. Officer Grashorn points to a different Eighth Circuit opinion upholding a grant of qualified immunity. *Bloodworth v. Kan. City Bd. of Police Comm'rs*, 89 F.4th 614, 626-27 (8th Cir. 2023). There too the Eighth Circuit relied on the existence of an imminent danger to police officers. *Id.*

8. The district court considered the reasonableness of the shooting based on five factors:

1. the dog's *at large* status and the availability of the owner to control the dog
2. the breed of the dog
3. the existence of time for the officer to find an alternative solution
4. the availability of non-lethal means to control the dog
5. the existence of a danger to the officer or the public

Appellant's App'x vol. 6, at 1066 (quoting *Branson v. Price*, No. 13-cv-3090-REB-NYW, 2015 WL 5562174, at *7 (D. Colo. Sept. 21, 2015) (unpublished)). But neither the Supreme Court nor our court has adopted this five-factor test.

When considering deadly force against people, we've assessed reasonableness based on a totality of the circumstances. *E.g.*, *Reavis v. Frost*, 967 F.3d 978, 988 (10th Cir. 2020). In considering the reasonableness of deadly force, we assign greatest importance to the threat of serious physical harm to the officer or others. *See id.* We hesitate to tell district courts how to decide whether a dog poses an imminent threat.

district court concluded that a jury could reasonably find no immediate danger to Officer Grashorn, rendering a constitutional violation clearly established.

**6. The officer's allegation of a mistake does not trigger qualified immunity.**

Officer Grashorn argues that an officer might have acted reasonably even if he had mistakenly perceived an immediate danger. We reject this argument because it disregards the district court's universe of facts. The district court concluded that a jury could reasonably find that

- Herkimer had not presented an immediate danger and
- the lack of an immediate danger could support a finding that the officer's conduct had been unreasonable.

*See* pp. 1111-12, above. If Officer Grashorn had made an unreasonable mistake, he would not be entitled to qualified immunity. *See Singh v. Cordle*, 936 F.3d 1022, 1033 (10th Cir. 2019) (stating that for qualified immunity, "[a] mistake of fact must . . . be a reasonable one").

To assess the reasonableness of Officer Grashorn's alleged mistake, we must defer to the district court's universe of facts. *Clerkley v. Holcomb*, 121 F.4th 1359, 1363 (10th Cir. 2024). Under that universe of facts, a jury could regard the purported mistake as unreasonable.

*See id.* (concluding that the reasonableness of an officer's mistaken perception involved a question of fact preventing qualified immunity at the summary judgment stage); *accord Floyd v. Detroit*, 518 F.3d 398, 401, 408 (6th Cir. 2008) (concluding that a police officer's mistake in shooting an unarmed man wouldn't trigger qualified immunity through a summary judgment motion because the objective reasonableness of the mistake would have been for the fact-finder to resolve); *Wealot v. Brooks*, 865 F.3d 1119, 1128 (8th Cir. 2017) (concluding that a mistake by police officers, who shot an unarmed man, didn't entitle them to qualified immunity at the summary judgment stage because a reasonable fact-finder could regard the mistake as unreasonable given the existence of conflicting accounts); *Wilkins v. Oakland*, 350 F.3d 949, 955 (9th Cir. 2003) (stating that the reasonableness of an officer's factual mistake, for purposes of qualified immunity, "depends on disputed issues of material fact" that are better resolved by a jury rather than the court as a matter of law). So the district court's universe of facts would prevent qualified immunity based on a potential mistake.

* * *

We thus affirm the district court's denial of Officer Grashorn's motion for summary judgment.

## APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, SIGNED NOVEMBER 15, 2023

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Civil Action No. 21-cv-02502-RM-KLM

WENDY LOVE, AND JAY HAMM,

*Plaintiffs,*

v.

MATHEW GRASHORN,

*Defendant.*

Signed November 15, 2023

### ORDER

This action brought under 42 U.S.C. § 1983 arises out of Defendant's shooting of Plaintiffs' dog. It is before the Court on Defendant's Motion for Summary Judgment (ECF No. 101), asserting that Defendant is entitled to qualified immunity. The Motion has been fully briefed. (ECF Nos. 117, 133.) Defendant has also filed a Motion to Exclude (ECF No. 110), seeking to exclude certain testimony of Plaintiff's expert witness, James W. Crosby. That Motion has been briefed as well. (ECF Nos. 125, 135.)

Both Motions are granted in part but otherwise denied for the reasons below.

## I. BACKGROUND

In June 2019, Defendant was on duty as a patrol officer with the Loveland Police Department. (ECF No. 134, ¶ 1.) On the day of the shooting, a Loveland property owner called the police because, via video surveillance, he observed people and a truck in the parking lot of his business. (*Id.* at ¶¶ 5, 7.) The caller reported that no one should be on the property on weekends and requested that a unit stop by. (*Id.* at ¶¶ 5, 8.) Defendant and another officer were dispatched to the location; Defendant arrived first in his patrol vehicle. (*Id.* at ¶ 11.)

Subsequent events occurred in a matter of seconds and are observable from Defendant's "body cam" footage. Defendant parked several yards away from Plaintiffs' truck and exited his vehicle. A large dog ("Bubba") that had been lying on the ground got up and began running toward him. Defendant withdrew his firearm and pointed it at Bubba. Plaintiff Hamm called off Bubba, who turned around. (*Id.* at ¶ 30.) Meanwhile, another dog ("Herkimer"), resembling a pit bull, emerged from Plaintiffs' truck. It ran first toward Bubba and then in Defendant's direction. Once he was a few feet away from Defendant, Defendant shot him twice. While Herkimer lay on the ground, Plaintiff Love began walking toward him. Defendant initially ordered Plaintiffs to get back to the truck but then allowed Plaintiff Love to console the wounded dog.

Several other officers soon arrived at the scene. About ten minutes after the shooting, Plaintiffs were allowed to take Herkimer to the vet, although they asked for permission to do so sooner. Herkimer was later euthanized.

Plaintiffs filed their initial complaint in state court, asserting claims against Defendant and three other officers. After the case was removed to this Court, the claims against the other officers were dismissed, leaving only Plaintiffs' claims against Defendant for unlawful seizure under Colorado and federal law. (*See* ECF No. 90.) The case has proceeded through discovery and is set for a five-day jury trial in November 2024.

## II. LEGAL STANDARDS

### A. Summary Judgment

Summary judgment is appropriate only if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Gutteridge v. Oklahoma*, 878 F.3d 1233, 1238 (10th Cir. 2018). Applying this standard requires viewing the facts in the light most favorable to the nonmoving party and resolving all factual disputes and reasonable inferences in its favor. *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013). However, "[t]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no

genuine issue of material fact." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

"The substantive law of the case determines which facts are material." *United States v. Simmons*, 129 F.3d 1386, 1388 (10th Cir. 1997). A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable jury could return a verdict for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Whether there is a genuine dispute as to a material fact depends upon whether the evidence presents a sufficient disagreement to require submission to a jury or is so one-sided that one party must prevail as a matter of law. *Id.* at 251-52; *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1136 (10th Cir. 2000).

**B. Qualified Immunity**

Qualified immunity shields individual defendants named in § 1983 actions from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Gutteridge*, 878 F.3d at 1238; *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014). "Once the qualified immunity defense is asserted, the plaintiff bears a heavy two-part burden to show, first, the defendant's actions violated a constitutional or statutory right, and, second, that the right was clearly established at the time of the conduct at issue." *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014) (quotation omitted). "If, and only if, the plaintiff meets this two-part test does a defendant then

bear the burden of the movant for summary judgment—showing that there are no genuine issues of material fact that he or she is entitled to judgment as a matter of law." *Gutteridge*, 878 F.3d at 1238 (quotation omitted).

### C. Expert Testimony

"The proponent of expert testimony bears the burden of showing that its proffered expert's testimony is admissible." *United States v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir. 2009). "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. The Court has the duty to act as a gatekeeper by ensuring that an expert's testimony rests on a reliable foundation and is relevant to the task at hand. *Bill Barrett Corp. v. YMC Royalty Co., LP*, 918 F.3d 760, 770 (10th Cir. 2019).

If the Court determines that an expert is sufficiently qualified to render an opinion, it must then determine whether the expert's opinion is reliable by assessing the underlying reasoning and methodology. *See Nacchio*, 555 F.3d at 1241. In doing so, the Court considers (1) whether the testimony is based on sufficient facts or data; (2) whether it is the product of reliable principles and

methods; and (3) whether the expert has reliably applied the principles and methods to the facts of the case. *See* Fed. R. Evid. 702(b)-(d).

If the evidence is sufficiently reliable, the Court then evaluates whether the proposed evidence or testimony is sufficiently relevant that it will assist the jury in understanding the evidence or determining a fact at issue. *See Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 884 (10th Cir. 2005). But even relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. The Court has discretion in how it performs its gatekeeper function. *See Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000).

## III. ANALYSIS

### A. Summary Judgment Motion

#### 1. Federal Claim

It is clearly established in this Circuit that a police officer's shooting of a pet dog is a "seizure" under the Fourth Amendment. *Mayfield v. Bethards*, 826 F.3d 1252, 1258-59 (10th Cir. 2016); *see also Brown v. Muhlenberg Twp.*, 269 F.3d 205, 210 (3rd Cir. 2001). Whether the seizure here violated Plaintiffs' constitutional rights depends on whether it was reasonable under the circumstances. *See Andrews v. City of W. Branch*, 454 F.3d 914, 918 (8th Cir.

2006); *see also Branson v. Price*, No. 13-cv-03090-REB-NYW, 2015 WL 5562174, at *7 (D. Colo. Sept. 21, 2015) (unpublished) ("[T]he robust consensus of persuasive authority from other courts of appeal demonstrates that the defendant had fair notice, even in this novel factual circumstance, that using deadly force against a dog was unlawful when the dog did not present an imminent threat to law enforcement or the public."). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer; it does not turn on the subjective intent of the officer." *Andrews*, 454 F.3d at 918 (citing *Graham v. Conner*, 490 U.S. 386, 396-97 (1989)). To defeat Defendant's claim of qualified immunity, Plaintiffs must show that a reasonable officer with the information Defendant had at the time of the shooting would have believed his conduct was lawful under clearly established law. *See Brown*, 269 F.3d at 211.

Factors courts consider in analyzing whether a seizure of a dog is reasonable under the totality of the circumstances include the following:

> (1) Whether the dog was "at-large" or whether the owner was available and willing to assert control over the dog.
>
> (2) The breed of the dog.
>
> (3) Whether there was time to find an alternative solution to gain control of the dog.
>
> (4) Whether non-lethal means were available to control the dog.

> (5) Whether the dog posed a danger to the officer or the public. *Branson*, 2015 WL 5562174, at *5 (citations omitted).

Considering these factors and viewing the evidence—including the video footage—in the light most favorable to Plaintiffs, the Court finds there are genuine issues of material fact concerning whether Defendant's actions were reasonable. First, a reasonable fact finder could conclude that Herkimer was not "at-large" when Defendant shot him. Although he was unleashed on private property, his owners were present, and they had already successfully called off one of their other dogs. It is impossible to know what Herkimer would have done had he not been shot, but the circumstances do not conclusively establish that he was "at-large." Therefore, this factor weighs in Plaintiffs' favor.

Second, Herkimer looked like a pit bull, a breed that is widely perceived as unpredictable and dangerous. This factor weighs in Defendant's favor, but it is not dispositive. *See id.* at *6 ("Even though [the officer] reasonably perceived the dog to be a dangerous breed, that fact alone does not justify a seizure in the form of shooting the dog.").

The third and fourth factors do not weigh heavily in either side's favor. Although the situation evolved rapidly, the circumstances do not conclusively establish that a reasonable officer in Defendant's position could not have used non-lethal means available to avoid whatever danger the approaching dog posed. At the very least, it is debatable whether Defendant had enough time to

respond differently. Thus, these factors weigh slightly in Plaintiffs' favor.

The Court finds that the fifth factor is the most critical in assessing the reasonableness of Defendant's conduct here. "Incidents involving a dog that has not actually attacked a person are closer cases and can demonstrate that the deadly force was unreasonable." *Branson*, 2015 WL 5562174, at *5 (quotation omitted). Although a reasonable jury could decide that Herkimer posed a danger to Defendant demonstrating the type of "tense, rapidly evolving situation where allowance is given for the police to make split-second decisions," it could also decide that he did not pose an immediate danger. *Id.* at *6. Because there is sufficient evidence of the latter, this factor weighs in Plaintiffs' favor at this stage. On balance, a reasonable jury could conclude that Defendant's conduct was unreasonable, and therefore the Court finds he is not entitled to qualified immunity.

**2. State Claim**

According to the operative Complaint (ECF No. 31), Plaintiffs' state unlawful seizure claim is premised on Colo. Rev. Stat. § 13-21-131 and mirrors their federal unlawful seizure claim with respect to Defendant. In his Motion, Defendant argues that the statute was not yet in effect when the shooting occurred and that there is no evidence of legislative intent to overcome the presumption that statutes operate prospectively. (*See* ECF No. 101 at 16-19.) In their Response, Plaintiffs do not address, much less refute, Defendant's position. Thus, the Court

finds they have abandoned this claim. In the alternative, the Court further finds there is no indication that § 13-21-131 was intended to apply retroactively, and therefore Plaintiffs' reliance on it here is inapposite. Accordingly, Defendant is entitled to summary judgment on Plaintiffs' state claim.

### B. Motion to Exclude

In his Motion to Exclude, Defendant asserts that the Court should exclude certain opinion testimony by Plaintiffs' retained expert, James W. Crosby, who is endorsed as an expert in police training, police practices, police use of force, and canine behavior. Defendant contends that various opinions of Mr. Crosby should be excluded because they usurp the function of the jury in deciding the facts, opine as to the credibility of Defendant's position and testimony, state legal conclusions, and are irrelevant. He further contends that Mr. Crosby lacks specialized knowledge or training in taser use and therefore should not be permitted to opine on this topic. Defendant objects to dozens of excerpts from Mr. Crosby's report. Rather than address each of them individually, the Court will endeavor to highlight illustrative examples that demonstrate how the Court intends to allow—but cabin—Mr. Crosby's testimony at trial.

First, the report states that Plaintiffs were acting in a "peaceful and lawful manner" when Defendant arrived at the parking lot, even though they were trespassing on private property and two of their dogs were unleashed. Equally problematic is that Mr. Crosby has no personal

knowledge about what Plaintiffs were doing that day before Defendant arrived. Further, his statements on this topic do not seem to implicate his specialized knowledge about police practices or canine behavior. Accordingly, the Court will exclude any statements by Mr. Crosby about events that occurred before Defendant arrived at the parking lot or the legality of, or reasons for, Plaintiffs' presence there.

Second, the report states that Defendant "shot and killed" Herkimer. Although the shooting is not disputed, the record reflects that Herkimer was subsequently euthanized. Mr. Crosby has not shown that he has any pertinent qualifications that would allow him to opine as to the cause of Herkimer's death, and the Court finds that the probative value of his statements about Defendant killing Herkimer is substantially outweighed by the danger of unfair prejudice. *See* Fed. R. Evid. 403. Accordingly, these statements are properly excluded.

Third, the reports states that Defendant did "not attempt to secure or deploy any less-lethal means of deterrent" before withdrawing his firearm. The report makes similar statements about Defendant's state of mind during the episode and about things he did or did not consider or decide. For example, Mr. Crosby asserts that "it was improper and incorrect for [Defendant] to claim that he perceived Herkimer as 'aggressive.'" (ECF No. 118-2 at 13.) But aside from the problem that Mr. Crosby can only surmise Defendant's thought process during this episode, the relevant question here is what a reasonable officer would have done in this situation, and Defendant's

subjective beliefs are not relevant to the inquiry of whether his conduct violated Plaintiffs' constitutional rights. *See Andrews*, 454 F.3d at 918. Thus, Mr. Crosby may offer his opinions about what a reasonable officer would have perceived and how a reasonable officer might have reacted under these circumstances, but he may not state his opinions on what Defendant was or was not thinking at the time. This includes any statements by Mr. Crosby about the "approach" Defendant appears to have adopted with respect to dog encounters generally and what Defendant may have believed Plaintiffs were up to when he arrived. (*Id.*) In addition to the relevance concerns the Court has about such statements, they are objectionable because they would encroach on the jury's duty to assess the credibility of witnesses and because they state or come very close to stating legal conclusions that are at the heart of this case. "Expert testimony crosses the line between the permissible and impermissible when it 'attempts to define the legal parameters within which the jury must exercise its fact-finding function.'" *Lippe v. Howard*, 287 F. Supp. 3d 1271, 1285 (W.D. Okla. 2018) (quoting *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1246 (10th Cir. 2000)). Accordingly, Mr. Crosby can testify to facts from which the jury can infer Defendant's motive, intent, or state of mind, but he cannot testify directly as to Defendant's motive, intent, or state of mind. *See Liberty Mut. Fire Ins. Co. v. Michael Baker Int'l, Inc.*, No. 19-cv-881-JNP, 2022 WL 973079, at *11 (D. Utah Mar. 31, 2022) ("Courts routinely exclude expert testimony as to intent, motive, or state of mind as impermissible.").

Fourth, the Court agrees with Defendant's contention that Mr. Crosby's opinions as to whether Defendant complied with the Loveland Police Department's policy, procedures, and training are not relevant to the issue of whether a constitutional violation occurred. (*See* ECF No. 110 at 15.) The protections of the Fourth Amendment do not vary from place to place and from time to time as police enforcement practices do. *Whren v. United States*, 517 U.S. 806, 815 (1996). Similarly, the Court agrees with Plaintiffs' contention that the Department's internal review following the shooting is not relevant to the claims remaining in this case.

Fifth, the Court will not preclude Mr. Crosby from testifying about tasers. Defendant cites no authority to support the bizarre suggestion that an experienced police officer must have used a taser on an animal as a prerequisite to testifying about the possibility of using a taser under the circumstances here. In any event, the Court finds that arguments and evidence pertaining to Mr. Crosby's degree of familiarity with tasers go to the credibility of any testimony he might offer on the topic, not its admissibility.

Subject to these limitations, Mr. Crosby may offer his opinions on whether Herkimer posed a danger to Defendant and whether Defendant's actions were consistent with those of a reasonable officer, including his shooting of Herkimer a second time and his refusal to allow Plaintiffs to get Herkimer to a veterinarian. Mr. Crosby may also help the jury understand best practices for canine interactions. "Ultimately, the rejection of

expert testimony is the exception rather than the rule." *O'Sullivan v. GEICO Cas. Co.*, 233 F. Supp. 3d 917, 922 (D. Colo. 2017) (quotation omitted). To the extent such testimony may be cumulative or objectionable for reasons not addressed in this Order, the Court will consider appropriate objections at trial.

## IV. CONCLUSION

Accordingly, both Motions (ECF Nos. 101, 110) are GRANTED IN PART, as set forth in this Order, but otherwise DENIED.