No. 25-216

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

BRIEF FOR *AMICI CURIAE* PEACE OFFICERS RESEARCH ASSOCIATION OF CALIFORNIA, PEACE OFFICERS RESEARCH ASSOCIATION OF CALIFORNIA LEGAL DEFENSE FUND, LAW ENFORCEMENT LABOR SERVICES INC., MICHIGAN ASSOCIATION OF POLICE ORGANIZATIONS, NATIONAL TROOPERS COALITION, AND MONTANA POLICE PROTECTIVE ASSOCIATION IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

A police officer responded to a call from a business owner concerned about a truck in his parking lot when his business was closed. Upon arrival, the officer saw a large, unleashed dog get up from where it had been lying on the ground and begin moving toward him. As the dog's owner called off the dog, a second dog suddenly emerged from the truck and ran toward the large dog. The large dog turned away in response to the owner's call, but the second dog – resembling a pit bull – turned and ran directly toward the officer. When the second dog got within a few feet of the officer, the officer shot the dog. The entire incident lasted 8-10 seconds, with only three seconds between when the second dog emerged from the truck and when the officer fired the first shot.

This Court has long acknowledged 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." *Graham v. Connor*,

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[1] Pursuant to Sup. Ct. R. 37.6, no counsel for any party authored this brief in whole or in part, and no party or counsel for a party, or any other person, other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* timely notified the parties of their intent to file an *amici curiae* brief more than ten (10) days prior to filing. Sup. Ct. R. 37.2.

490 U.S. 386, 396-397 (1989). *Amici* collectively represent thousands of police officers who are regularly called upon to make such split-second decisions. As a result, they have a strong interested in obtaining clear guidance from this Court relating to the circumstances in which deadly force can be used when, while investigating a potential crime, the officer encounters a dog that, despite its owner's command, continues to run directly toward him, with the officer having mere seconds to evaluate whether the dog is a friendly puppy or a vicious pit bull.

The issues presented in this case implicate the limits of the reasonable exercise of discretion by officers who frequently face volatile situations, having very little information, and make immediate decisions with serious potential consequences. These situations are often complicated by liability concerns and/or hindsight bias, with little deference given to the officer's on-scene perspective.

Review is necessary to address the issue of Fourth Amendment seizure of dogs. The Fourth Amendment standard applies to federal, state and municipal law enforcement officers. *Amici curiae*, as set forth below, are associations that represent and defend law enforcement officers who face potential personal liability for alleged Fourth Amendment violations.

- The Peace Officers Research Association of California ("PORAC") was incorporated in 1953 as a professional federation of local, state, and federal law enforcement agencies, and represents over 78,000 law enforcement and public safety professionals in California. It is the largest law enforcement organization in California and the largest statewide

association in the Nation. PORAC's mission is to identify the needs of the law enforcement community and provide programs to meet those needs through conducting research, providing education and training, and defining and enhancing standards for professionalism. PORAC has a significant presence in Sacramento, California where it lobbies on behalf of its membership, advocating for the proposal and refinement of new legislation, or amendment of existing laws and regulations, and assisting lawmakers in analyzing the merits of ideas by providing history, context, and perspective on key issues unique to law enforcement professionals.

- The Legal Defense Fund of the Peace Officers Research Association of California ("PORAC LDF") is an ERISA Trust, founded in 1974. PORAC LDF is the nation's oldest, largest, and most respected public safety legal plan, serving more than 160,000 members nationwide in all 50 states as well as the U.S. territories of Puerto Rico and the U.S. Virgin Islands, including representing over 60,000 peace officers in California, and approximately 8,500 public safety members in the State of Minnesota. PORAC LDF protects the rights of its individual members through direct legal representation in active criminal, civil, and administrative matters. PORAC LDF also provides its law enforcement members legal representation in defense of civil rights actions filed pursuant to 42 U.S.C. section 1983, including allegations of unlawful use of force in violation of the Fourth Amendment.

- The National Troopers Coalition ("NTC") represents 42,000 Troopers from 47 organizations in 43 states. The NTC is the preeminent national law enforcement organization assisting state associations with national representation and cooperation, developing standards and policies, improving benefits and programs, equipment procurement, training expansion and advancing working conditions.

- Founded in 1977 as a 501(c)(5) labor organization, Law Enforcement Labor Services Inc. ("LELS") is the largest public safety labor union in the State of Minnesota and represents approximately 7,752 licensed peace officers, firefighters, corrections officers, emergency dispatchers, and public safety support staff. Throughout Minnesota, LELS provides representation in disciplinary proceedings, mediations, grievances, arbitrations, contract negotiations, and labor advocacy for its 522 locals, which are primarily composed of essential public sector employees.

- The Michigan Association of Police Organizations ("MAPO") is a coalition of groups formed to assist in promoting and introducing legislation that could impact the Michigan public safety community and/or the criminal justice system. The MAPO is not affiliated with any political party, and is organized on a voluntary, non-partisan basis to further the interests of police officers as determined by the Board of Directors. Member organizations in the MAPO include the Police Officers Labor Council; Detroit Police Officers Association; Michigan State Police Troopers Association; Michigan

Association of Police; Detroit Police Lieutenants & Sergeants Association; Grand Rapids Police Officers Association; Michigan State Police Command Officers Association; Warren Police Officers Association; Detroit Police Command Officers Association; and Kalamazoo Public Safety Officers Association.

- The Montana Police Protective Association ("MPPA") was founded in 1930 to advocate for police officers and their interests. MPPA currently represents 28 police departments, totaling nearly 800 municipal police officers throughout the state of Montana. MPPA provides legal defense, legislative advocacy, training opportunities, life insurance, scholarships for children of police officers, and financial assistance for medical or unexpected significant family events.

Dogs occupy a unique status legally, as property, but emotionally, often as a cherished member of the family. At the same time, dogs can be extremely dangerous to law enforcement and/or the public. Officers follow different policies and procedures according to jurisdiction and encounter wildly varying situations due to the unpredictable nature of all criminal and many civil incidents. Consequently, it is paramount that officers have uniform and consistent standards of Constitutional enforcement to protect their liberty and financial interests, as well as the safety and confidence of the community they protect. *Amici curiae* therefore have a substantial interest in the Court's resolution of this case, interpreting the Fourth Amendment as it applies to law enforcement shooting dogs.

I.

SUMMARY OF ARGUMENT

Similar to the use of deadly force against a person, officers who encounter dogs in the course of their duties "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" and, of course, whether to use force in the first place. *Graham*, *supra*, 490 U.S. at 396-97.

The standard for reasonableness, as a matter of law, regarding an officer's warrantless seizure of a domestic dog should be whether, given the totality of the circumstances and viewed from the perspective of an objectively reasonable officer in light of all facts and circumstances confronting him at the time, the officer reasonably believed the dog posed an imminent threat to the officer's or the public safety.

The decision below exemplifies the unjust outcome that results from lack of clear qualifying standards for what constitutes a reasonable belief that a dog may pose an imminent threat. Critically, even accepting the District Court's "universe of facts," there are no cases clearly establishing that an officer acts so unreasonably as to commit a constitutional violation when he has a mere three seconds to respond to an unanticipated, second dog (looking like a pit bull), running at him unrestrained.

II.

ARGUMENT

This Court has yet to address qualified immunity in the context of an alleged Fourth Amendment seizure arising out of police officers shooting pet dogs. Police officers regularly confront uncertain and potentially dangerous situations involving dogs. Arguably, dogs are more unpredictable than people, with greater likelihood that dogs will not respond to officer commands. A dog can also distract from human criminal activity, further endangering the safety of the officer and/or public. At the same time, as the Fourth Circuit noted, "the private Fourth Amendment interests [against seizure of dogs] are appreciable" given the typically emotional relationship, rather than strictly property, between owner and pet dog. *Altman v. City of High Point, NC,* 330 F.3d 194, 205 (2003).

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). To overcome qualified immunity, a plaintiff must show (1) that the officer violated a constitutional right; and (2) that the right was clearly established at the time of the alleged misconduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). The "lower courts have discretion to decide which of the two prongs of qualified-immunity analysis to tackle first." *Ibid*. citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Here, the Tenth Circuit failed to properly analyze whether Officer Grashorn shooting a dog was objectively reasonable based on all the facts and

circumstances he faced in the three seconds he had to decide how to address the dog advancing toward him. The Tenth Circuit further erred in finding a clearly established right, based on the general conclusion that it is unreasonable to shoot a dog that is not an imminent threat. Officer Grashorn did not have time to provide the constitutional consideration the lower courts assumed. Police officers need bright line rules and standards to guide them through the tense, uncertain, rapidly-evolving situations they encounter in the line of duty – protecting both the officers and the public. The Tenth Circuit's opinion leaves more questions than answers. This Court should grant review.

A. The Tenth Circuit's Opinion Has No Practical or Legal Value for Police Officers Who Must Make Split-Second Decisions in Responding to Dogs

A qualified immunity defense requires "that a reasonable officer with the information [Officer Grashorn] had at the time of the shooting would have believed his conduct was lawful under clearly established case law." *Love v. Grashorn*, No. 21-cv-02502, 2023 WL 7686299, at *3 (D. Colo. November 15, 2023) citing *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 211 (3rd Cir. 2001). The District Court concluded that Officer Grashorn's conduct was not reasonable because (1) Respondents were available and willing to exert control over the second dog, Herkimer, that emerged from the truck; (2) Officer Grashorn had time to consider non-lethal options to stop Herkimer; and (3) Herkimer posed no immediate danger to Officer Grashorn. *Id.* at *3. Upon finding the constitutional violation, that is, that shooting the dog was

unreasonable, the District Court did not expressly address how Officer Grashorn would have/should have understood that his conduct was not lawful under clearly established case law.

The Tenth Circuit concluded that, based on the District Court's "universe of facts," the clarity of the established constitutional violation was self-evident: "In our view, common sense should have alerted police officers that they couldn't shoot a pet dog in the absence of immediate danger." *Love v. Grashorn*, 134 F.3d 1109, 1112, 1116 (10th Cir. 2025).

Perhaps never has a more universal truth been uttered in American constitutional jurisprudence. However, the Tenth Circuit's opinion does nothing to help police officers assess the constitutionality of their options when confronted by dogs. The Court should grant *certiorari* to provide clarity and consistency to the Fourth Amendment analysis of what is reasonable and clearly established in the context of police shooting dogs.

B. Specific, Rather Than General, Clearly Established Case Law is Necessary for Police Officers to Quickly and Safely Address Dog Incidents

As the Tenth Circuit acknowledged, "[a] right is clearly established if 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Love*, *supra*, 134 F.4th at 1116 quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001). "This is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful; but … the "contours of

the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal citations omitted). Additionally, the right must have been recognized by either the Supreme Court or the Circuit in which the incident occurs. *Ashcroft, supra,* 563 U.S. at 741.

Courts cannot define clearly established law at "too high a level of generality." *City of Tahlequah, Oklahoma v. Bond*, 595 U.S. 9, 12–13 (2021). "It is not enough that a rule be suggested by then-existing precedent; the "rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' " *Id.* at 13 quoting *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018), *Saucier, supra,* 533 U.S. 194 at 202. Such specificity is "especially important in the Fourth Amendment context," where it is "sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (internal quotation marks omitted) (emphasis added).

It would be difficult, if not impossible, for Officer Grashorn to conduct an analysis of what constitutes unconstitutional seizure in the three seconds he had to address Herkimer. Police officers are human beings, not machines. Their physiological limitations include an inevitable temporal lag between perception of external facts, decision to act on that perception, and action. These are all discrete steps, and they all take time, leaving little time for the type of

intellectual, constitutional analysis in which the Tenth Circuit apparently expected Officer Grashorn to engage.

Police officers need bright line legal rules of specific conduct that they can learn, train with and instinctively apply in chaotic situations. Qualified immunity protects them unless they unreasonably depart from those rules. To say it is clearly established that police cannot shoot a pet dog in the absence of imminent danger is the same as saying it is clearly established that an unreasonable search or seizure violates the Fourth Amendment. Accord *Ashcroft*, *supra*, 563 U.S. at 742; *Saucier*, *supra*, 533 U.S. at 201–202; *Wilson v. Layne*, 526 U.S. 603, 615 (1999). Both are "of little help in determining whether the violative nature of particular conduct is clearly established." *Ashcroft*, *supra*, 563 U.S. at 742.

Here, Tenth Circuit improperly affirmed overly broad factual findings based on the District Court's overly narrow construction of the record, ignoring relevant, undisputed facts, and the realities of police work. Though Herkimer's owners were available and willing to exert control over Herkimer, it is undisputed that Herkimer did not respond to Plaintiff Hamm's command and continued to charge unencumbered at Officer Grashorn. Even if Officer Grashorn had time to consider non-lethal options to stop Herkimer, he could not implement them in three seconds. And, ultimately, the conclusion that Herkimer posed no immediate danger to Officer Grashorn was a fact to which the District Court could only second guess in hindsight.

No case law addresses these factual circumstances or provided Officer Grashorn necessary guidance. The totality of the circumstances establishes that Officer Grashorn was not on notice that his conduct was unlawful and thus, he should not be subjected to suit. *Pearson, supra*, 555 U.S. at 243–44 citing *Hope v. Pelzer,* 536 U.S. 730, 739 (2002).

1. The Tenth Circuit Erred in Adopting the District Court's Factual Findings, Ignoring Evidence of Undisputed Authenticity

The Tenth Circuit concluded it was bound by the District Court's "universe of facts" and "lack[ed] jurisdiction to reverse based on Officer Grashorn's version of the facts". *Love*, *supra*, 134 F.4th at 1111-1115. However, in *Scott v. Harris,* 550 U.S. 372 (2007), this Court found that where video capturing the events in question "quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals," this Court was not bound by the lower court's universe of facts. See 378–379 ("Indeed, reading the lower court's opinion, one gets the impression that respondent, rather than fleeing from police, was attempting to pass his driving test ...."). Here, the Tenth Circuit noted, without explanation, that "the record doesn't blatantly contradict the district court's conclusions about what a reasonable jury could find." *Love*, *supra*, 134 F.4th at 1112, fn. 2.

Amici respectfully disagree. The District Court adopted Plaintiffs' sanitized version of the incident despite lack of support in the record as a whole. Accord *Wilkinson v. Torres*, 610 F.3d 546, 551-552 (9th Cir. 2010). The District Court concluded that Herkimer was not "at large," though unleashed on private

property,[2] because "his owners were present and they had already successfully called off one of their other dogs." 2023 WL 7686299 at *3. The District Court further found that it was "debatable whether [Officer Grashorn] had enough time to respond differently [rather than using lethal force]" to Herkimer. *Ibid*. The District Court concluded that, without further explanation (other than Herkimer had not yet attacked Officer Grashorn when Officer Grashorn shot him), a reasonable jury could decide that Herkimer did not pose an immediate danger. *Ibid*.

The District Court's conclusions assume that Officer Grashorn could devote his full attention to Herkimer and that Plaintiffs could have "called off" Herkimer before he reached Officer Grashorn, such that both parties could assess and respond to Herkimer's reaction. To use the Ninth Circuit's language in *Wilkinson*, *supra*, "[w]hile perhaps true as far as it goes, this version omits the urgency of the situation. After all, the record is uncontroverted that this entire episode occurred in [three] seconds." 610 F.3d at 552.

Irrespective of the District Court's conclusions, the following evidence (in the light most favorable to the Plaintiffs) is undisputed:[3]

1. Officer Grashorn responded to a call from a property/business owner who could see on video

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[2] The District Court did not reference that the "private property" was not Herkimer's home, where he would have been familiar and possibly retreated to his crate or preferred corner.

[3] From the PACER Electronic Case Files ("ECF"), docket number 134, Statement of Undisputed Material Facts.

surveillance that there was a truck on his property with people "unpacking something". Opposing Party's Response re: Statement of Undisputed Material Facts ("OSUMF") Nos. 4, 6; Moving Party's Statement of Undisputed Material Facts ("MSUMF") Nos. 4-7.

2. The caller stated there should not be anyone on the property over the weekend and that people had previously used his business dumpster and he did not want it to happen again. MSUMF Nos. 8-9.

3. Upon arriving at the property, Officer Grashorn exited his police vehicle, which took five (5) seconds. MSUMF No. 11.

4. There is no evidence that Officer Grashorn was aware there would be any dogs on the property before he arrived;

5. Officer Grashorn's body-worn camera ("BWC") video shows one dog (Bubba) lying on the pavement of the parking lot when Officer Grashorn arrives. MSUMF/OSUMF No. 12. The dog is not secured (e.g., by a leash, crate, fence or person within range of grabbing his collar). OSUMF No. 23.

6. A grey truck is parked on the property facing Officer Grashorn, with three doors open and one person near the truck. MSUMF/OSUMF No. 12.

7. Herkimer cannot be seen near the truck when Officer Grashorn arrives. MSUMF No. 12.

8. As Officer Grashorn begins to approach the grey truck, Bubba stands up, appearing to be a relatively large and fairly substantial dog. MSUMF Nos. 13, 31. Bubba is a Rhodesian Ridgeback dog breed, 16 years old. MSUMF No. 13, OSUMF No. 90.

9. Bubba begins to "trot" towards Grashorn. OSUMF No. 14.

10. Plaintiff Hamm takes a couple of steps in Officer Grashorn's direction and calls to Bubba; Plaintiffs estimate Hamm or Bubba (or both) were "~20 yards away." OSUMF No. 14.

11. Officer Grashorn pulls out his duty firearm and points it in the direction of Bubba. MSUMF No. 15. Four (4) seconds have elapsed since Officer Grashorn got out of his vehicle. MSUMF Nos. 11, 15.

12. Herkimer emerges from the grey truck and begins "bounding," first toward Bubba. OSUMF No. 16. Herkimer is 14 months old and appears to be a pit bull-mix dog breed. OSUMF @ Nos. 16, 104. There is no evidence Officer Grashorn was previously aware that there was another dog besides Bubba on the property.

13. Herkimer's breed is a Staffordshire bull terrier/boxer mix. OSUMF No. 33.

14. Bubba turns around and walks back toward his owner in response to being called. Herkimer continues "bounding," now toward Officer Grashorn. OSUMF Nos. 18, 34.

15. If Plaintiff Hamm "called off" Herkimer, Herkimer does not respond. Moving Party's Reply ("RSUMF") No. 18.

16. Officer Grashorn fires at Herkimer when the dog is "a few feet away" from him and Herkimer falls to the ground. MSUMF No. 19.

17. As Herkimer is rolling to his stomach, Officer Grashorn fires a second shot. MSUMF No. 20.

18. Between the time Herkimer first can be seen on the BWC video and Officer Grashorn's first shot, three (3) seconds have passed. MSUMF No. 22.

19. From the time Officer Grashorn arrives and gets out of his vehicle to his first shot, eight (8) to eleven (11) seconds have passed. MSUMF Nos. 11, 16.

The District Court's findings ignore the time pressure of the situation. It is undisputed that Officer Grashorn had to digest the scene (including the number of people, whether they were committing a crime, the untethered large dog on the pavement [Bubba], the surprise appearance of Herkimer) and make multiple decisions about his own safety within a span of approximately ten seconds overall and three seconds with respect to Herkimer. To use non-lethal force against Herkimer, Officer Grashorn would have had to holster his firearm and pull out his baton or pepper spray, likely impossible in such a short period of time. As the Fourth Circuit noted in *Elliott v. Leavitt*, 99 F.3d 640, 644 (4th Cir. 1996), "the Fourth Amendment does not require omniscience," and absolute certainty of harm need not precede an act of self-protection.

The District Court's "universe of facts" is too limited, too general and ignores significant undisputed evidence contradicting the conclusion that Herkimer did not pose an immediate threat to Officer Grashorn.

2. There is No Clearly Established Law Fairly Putting Officer Grashorn on Notice That His Conduct Would Violate the Constitution and Instead, Case Law Supports Qualified Immunity

Contrary to the Tenth Circuit's opinion, this is not the "'rare obvious case' in which a general legal principle makes the unlawfulness of the [officer]'s conduct clear despite a lack of precedent addressing similar circumstances." *West v. City of Caldwell,* 931 F.3d 978, 983, 985 (9th Cir. 2019) quoting *City of Escondido, Cal. v. Emmons*, 586 U.S. 38, 44 (2019). Because the "clearly established" analysis focuses on "settled law," the right at issue "must be clearly established by controlling authority or a robust consensus of cases of persuasive authority." *Tuuamalemalo v. Green*, 946 F.3d 471 (9th Cir. 2019) citing *Wesby*, *supra*, 583 U.S. at 64-65.

There is no clearly established law under controlling Tenth Circuit authority.

In *Moore v. Town of Erie*, No. 12–cv–02497, 2013 WL 3786646 (D.Colo., July 19, 2013), on plaintiff's property, two dogs "approached" an officer, who then drew his gun and shot and killed one. Though concluding plaintiff stated a viable Fourth Amendment claim, the court did not conduct a qualified immunity or reasonableness analysis.

In *Branson v. Price*, No. 13-cv-03090, 2015 WL 5562174 (D.Colo., September 21, 2015), the court found a clearly established right where video showed officers standing close to a pit bull, formulating a plan to seize the dog, while the dog did not attack or act

aggressively. The lack of exigency negated allowance for a tense, rapidly-evolving situation where the officer needed to make split second decisions.

In *Mayfield v. Bethards*, 826 F.3d 1252 (10th Cir. 2016), the court denied qualified immunity where deputies saw two dogs lying in the unfenced front yard of plaintiffs' residence, got out of their vehicle, approached the dogs and began firing as the dogs fled. One of the deputies killed plaintiffs' white Malamute Husky on the front porch and plaintiffs alleged that the deputies tried to hide the body.

Subsequently, however, the court granted summary judgment in the shooting deputy's favor based on evidence that there were actually three dogs, unrestrained, with no owners present, and while two fled, the third behaved aggressively and threatened to attack. *Mayfield v. Harvey County Sheriff's Department*, 732 Fed.Appx. 685 (10th Cir. 2018). The court concluded that the deputy reasonably believed the dog posed an imminent threat and the use of deadly force was unavoidable.

As for whether there is a "robust consensus of cases of persuasive authority"[4] outside the Tenth Circuit, the cases cited below all found a clearly established constitutional violation when the pet poses no immediate danger; however, they are all too factually disparate to provide fair warning to Officer Grashorn that his conduct was unlawful. See *Viilo v. Eyre*, 547 F.3d 707, 708 (C.A.7 (Wis.), 2008) (officers responded to residence looking for a wanted felon accompanied

[4] *Wesby*, *supra*, 583 U.S. at 64-65.

by a pit bull, instead a Labrador Retriever/Springer Spaniel came out "to greet them;" officer fired two shots, injured dog retreated to the bushes for 10 minutes; while dog was hiding, neighbors shouted he was not a bad dog; dog emerged limping and whimpering; owner screamed "No" and sergeant ordered officer to shoot dog); *Ramirez v. Killian*, 113 F.4th 415, 419 (C.A.5 (Tex.), 2024) (officers responded to domestic disturbance call, officer shot pit bull that walked up to him, wagging tail; immediately shot German Shepherd that appeared in kitchen); *Brown v. Muhlenberg Tp.*, 269 F.3d 205, 209 (C.A.3 (Pa.), 2001) (Rottweiler got out of yard; did not display aggressive behavior, not growling or barking; officer knew dog belonged to family and was available to take custody); *Ray v. Roane*, 948 F.3d 222, 225 (C.A.4 (Va.), 2020) (German Shepherd tethered on owner's property by zip-lead; incapable of reaching officer; owner was holding dog's lead; officer stopped backing away from dog when dog reached the end of zip-lead and then took a step toward dog before shooting dog); *Andrews v. City of West Branch, Iowa*, 454 F.3d 914, 916 (C.A.8 (Iowa), 2006) (call about large black dog running loose; police chief chased dog around neighborhood; saw large black dog in enclosed, fenced backyard and shot it, while owner was standing just a few feet away; was not the same dog that had been running loose); *Criscuolo v. Grant Cnty.*, 540 Fed.Appx. 562, 563 (C.A.9 (Wash.), 2013) (Right before officer fired, dog was was stationary or retreating at a distance of 10–20 feet from officer and police dog, and owner was one to two feet away, about to leash dog).

The theme for these cases is that the dogs are on or close to their owners' property; the owner is

attempting to take custody of the dog or yelling at the officer not to shoot; or the dog(s) are incapacitated or restrained by location (inside house). No such situation existed in the present case.

Accordingly, there is no clearly established right by a factually similar case. In contrast, the case of *Dziekan v. Gaynor*, 376 F.Supp.2d 267, 269 (D.Conn., 2005) is on point. Plaintiff, with his son and two dogs, was at a site known for drug activity. An off-duty officer noticed a vehicle toward the rear of the dirt lot. Upon parking, he saw plaintiff 60 feet away and a Louisiana Catahula Leopard dog, weighing 55 to 60 pounds, 30 feet away, unleashed. The dog began to bark and came within 15 feet of the officer. The officer yelled to "Get your dog;" plaintiff responded that he would and the dogs do not bite. The officer shot the dog. The court noted the whole incident occurred in approximately five seconds. There is no mention of the whereabouts of the second dog, a Neopolitan Mastiff, during the incident.

The court noted that the dog shot advanced toward the officer approximately 15 feet in five seconds and would have closed the remaining distance in another five seconds. Thus, "this situation called for split-second decision-making." *Id*. at 272.

The court found that the officer could have reasonably concluded that the dog posed an imminent threat to his safety. *Ibid*. Despite the owner informing the officer that the dog would not bite, the officer "had no way to ascertain the truth of that representation within the time period at issue. Under such circumstances, the law does not require the officer to wait until the approaching animal is within biting distance

or is leaping at him before taking protective action." *Ibid*. citing *Warboys v. Proulx*, 303 F.Supp.2d 111, 118 (D.Conn., 2004).

In *Warboys, supra*, the court acknowledged that a pit bull "may indeed have approached the officer and his police canine merely to greet and sniff them or to receive a friendly pat on the head. At the same time, however, the court notes that had [the officer] refrained from shooting the pit bull when he did and had [the dog's] behavior turned out to have been hostile, it would have been too late for [the officer] to use his firearm safely in order to defend himself and his police dog."[5] 303 F.Supp.2d at 118. The *Warboys* court concluded that the law did not require the officer "to wait until the approaching animal was within biting distance or was leaping at him before taking protective action. The fact that the approaching dog was a pit bull is another factor that supports the court's conclusion that it was objectively reasonable for [the officer] to have responded to the situation as he did." *Ibid*.

Even if "common sense, the consensus of case law, and [ ] precedents on the shooting of persons"[6] dictate that qualified immunity turns on the existence of an imminent threat to the officer, there is inconsistent application of what constitutes an imminent threat when a dog is involved. As set forth below, it was objectively reasonable for Officer Grashorn to have acted

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[5] Even if the dog had no intent to harm the officer in that moment, the officer could not have known the dog's intent. *Niesen v. Garcia*, No. 2:14-2921, 2016 WL 4126382 at *10 (E.D.Cal. July 5, 2016).

[6] 134 F.4th at 1118.

the way he did, making a split-second decision in a tense, rapidly-evolving situation.

C. The Objective Reasonableness Under the Totality of the Circumstances Controls

To be constitutional under the Fourth Amendment, the shooting and killing of a dog "must have been reasonable under the circumstances." *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose ("Hells Angels")*, 402 F.3d 962, 975 (9th Cir. 2005). "The reasonableness calculus is objective in nature; it does not turn upon the subjective intent of the officer." *Altman, supra,* 330 F.3d 194 at 205 citing *Graham*, *supra*, 490 U.S. at 397. To decide whether the seizure was objectively reasonable, generally the court must ask if the totality of the circumstances justified that kind of search or seizure. *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985).

Both the District Court and the Circuit Court address whether Herkimer actually posed an immediate danger to Officer Grashorn and barely, if at all, discuss whether Officer Grashorn's perception of the situation, with the information – or lack thereof – that he possessed was objectively unreasonable. The law "does not require the court to determine whether an officer was in actual, imminent danger of serious injury, but rather, whether 'the officer reasonably believe [d] that the [dog] pose[d] a threat of serious harm to the officer or to others." *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir.2014), quoting *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir.2011). "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather

than with the 20/20 vision of hindsight.' " *Graham*, *supra*, 490 U.S. at 396 (emphasis added).

"The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham*, *supra*, 490 U.S. at 396-397. "Requiring the least intrusive alternative is not a realistic approach where law enforcement officers have to make split-second decisions regarding their safety." *McCarthy v. Kootenai County*, No. CV08–294, 2009 WL 3823106 at *6 (D.Idaho, November 12, 2009) citing *Graham, supra*, 490 U.S. at 396).

Thus, qualified immunity applies "if 'a reasonable officer could have believed [the action] to be lawful, in light of clearly established law and the information the ... officer[ ] possessed.' " *Lawrence v. United States*, 340 F.3d 952, 956–957 (9th Cir.2003); see also *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). "Whether the law was 'clearly established' and whether an officer could have a reasonable, albeit mistaken, belief that the conduct was lawful are questions of law for the court to decide when the pertinent material facts are undisputed." *J.P. ex rel. Balderas v. City of Porterville*, 801 F.Supp.2d 965, 980 (E.D.Cal., 2011); accord *Saucier, supra,* U.S. at 205-206.

Finally, as the Fourth Circuit noted in *Altman*, *supra*,

> we are not saying the officers' responses in these cases were the best possible responses. … In retrospect, it may have

> been preferable if the officers attempted first to use nonlethal force in every instance. Such nonlethal force may have been successful, but, tellingly, it may not have been. Even dog owners can find their pets to be unpredictable at times. How much more so a person who is not intimately familiar with the behavior of the particular animal … and who is forced to confront the dog for the first time in an unsupervised, unenclosed environment.

330 F.3d at 207.

Officer Grashorn did not have advance notice there would be a dog on the property, much less two. See *Altman*, *supra*, 330 F.3d at 206 ("Obviously, the danger presented by a dog increases significantly when that dog joins others in a pack"). When he arrived on the scene of a potential crime in progress, Officer Grashorn had to keep tabs on two people and one large dog, along with a truck full of stuff. Then came a surprise second dog, which closed the distance to Officer Grashorn in a matter of seconds – while Bubba and his owners remained a potential threat.

Neither lower court analyzed the objective reasonableness of Officer Grashorn's perception of imminent danger under the totality of the circumstances. The Tenth Circuit sanctioned the District Court's unsupportable single-step approach, leaving police officers to ascertain the specific legal standards at their own peril. *Amici* respectfully ask this Court to provide law enforcement with the security of a bright line rule for

imminent threat posed by dogs encountered in the line of duty.

III.

CONCLUSION

For the foregoing reasons, as well as those set forth by the Petitioner, this Court should reverse the judgment of the Tenth Circuit and provide clarification of the applicable standards for a clearly established right of imminent danger to police officers from pet dogs.

Respectfully submitted,

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