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 IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner Officer Grashorn shot and killed Wendy Love and Jay Hamm's 14-month-old pet dog Herkimer in a suburban neighborhood in broad daylight. Prior to being shot, the dog had displayed no aggressive behaviors and can be seen on video affiliatively trotting up to Grashorn to greet him, his ears flopping, and his tail awag. Grashorn believes he is entitled to qualified immunity for this killing. He asserts that the lower courts erred by refusing to rule as a matter of law, on these facts, that the friendly dog Herkimer was an "imminent threat" to his life and safety justifying his summary execution. The actual "questions" presented by his petition (long ago already resolved by this Court) are:

1. Whether disputes of material fact regarding the reasonableness of an officer's conduct may preclude appellate resolution of an officer's entitlement to immunity; and

2. Whether the Tenth Circuit correctly denied qualified immunity based on clearly established law imposing liability in analogous circumstances.

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INTRODUCTION

In the late afternoon of June 29, 2019, Officer Mathew Grashorn of the Loveland Police Department quietly approached husband and wife Respondents Wendy Love and Jay Hamm as they repaired a box used for their firewood delivery business next to their truck in an empty suburban business parking lot. He saw their unsecured large dog resting on the pavement. He decided not to give them an opportunity to secure it. The dog noticed him, and went to greet him. Grashorn immediately pulled out his firearm and prepared to execute it. Respondents called the dog back, and he obliged their call. But Respondents' 14-month-old puppy, Herkimer, who had been resting inside their truck, hearing the noise, hopped out of the truck and then trotted over to greet Grashorn with his tail awag. In response, Grashorn kept his gun out, closed the distance by continuing to advance (abandoning his patrol car he could have simply gotten back into), and promptly shot two bullets through Respondents' beloved pet. He put one through Herkimer's skull and the other, shot at Herkimer as he fell incapacitated to the pavement, across both walls of his chest. Herkimer's injuries were not survivable. He had to be euthanized.

Prior to being shot, Herkimer had displayed no signs of aggression. With his big ears up and flopping about, all Herkimer had done that day prior to being summarily executed was trot toward Grashorn with a wagging tail and a friendly, curious demeanor, unleashed. Since the literal minute after he shot Herkimer, Grashorn has insisted that this (being unleashed), on its own and as a matter of law, was enough to justify his killing Respondents' friendly pet

dog. He has relentlessly pressed this argument—namely, that because any dog can bite, he can kill any unsecured dog—through the entirety of this case's litigation.

Some of this incident was recorded on bodyworn camera video. The district court here, after reviewing that video and the record, denied Grashorn's motion for summary judgment, stating "there are genuine issues of material fact concerning whether [Grashorn]'s actions were reasonable." Pet. 29a. Grashorn filed an interlocutory appeal with the Tenth Circuit, which affirmed.

Decades of case law across the circuits have clearly established that killing a pet dog constitutes a seizure of property under the Fourth Amendment that must be reasonable, and that such a killing is reasonable only if the dog poses an immediate danger and the use of lethal force is unavoidable. *See infra* Part III (collecting and reviewing cases). The clearly established law set forth in these cases reflect several basic realities of our modern civilized society: (1) most pet dogs are friendly, (2) pet dogs unexpectedly become unsecured all the time, and (3) no one—police included—ought to be opening gunfire on someone's pet dog merely because it is happened upon while momentarily unsecured. To be justified, the killing must be necessary.

Ignoring this case law and basic common sense, Grashorn nevertheless petitions this Court to wade itself into a straightforward, garden-variety case of summary judgment, which was properly denied due to the existence of disputed material facts. He first attempts to manufacture a circuit split on the proper

treatment of legal versus factual questions in qualified immunity appeals. This is unsuccessful. Grashorn himself concedes that an appellate court reviewing the denial of qualified immunity must "consider[] the facts in the light most favorable to the plaintiff … and then appl[y] the relevant qualified immunity to those facts de novo." Pet. 2. And that is exactly what the Tenth Circuit did here. It recognized that the trial court had identified disputes of material fact and held that, if Respondents' version of those facts were found or held to be true, then Grashorn would not be entitled to qualified immunity. The Tenth Circuit properly reviewed that determination *de novo*, Pet. App. 4a, and even specifically recognized its jurisdiction to independently conduct that *de novo* review. Pet. App. 13a n.5. The court simply concluded, after such review, that Grashorn's arguments for qualified immunity depended on resolving all disputed material facts in *his favor*, contrary to the summary judgment standard. Pet. App. 9a-13a.

The Tenth Circuit's methodology on this point mirrors the methodology applied by other circuits, including circuits that Grashorn asserts are on the other side of a non-existent divide. No matter what Circuit a litigant finds themselves in, "imminent danger" to an officer cannot be determined as a matter of law until and unless the material historical facts are settled. And here, the courts below identified multiple factual disputes regarding whether the dog's owners were available and willing/able to assert control over Herkimer, whether or what they called out to Herkimer,[1]

[1] The first 30 seconds of Grashorn's video is muted and has no audio. The parties have many material factual disputes about

whether Herkimer posed any danger, the distance between the officer and the dogs, what non-lethal alternatives Grashorn had available, and how much time Grashorn had available to deploy them. Resolving each of those factual disputes in Respondents' favor and then applying the proper legal standard yielded the conclusion that Grashorn acted unreasonably and contrary to clearly established law in killing Herkimer. And notably, even Grashorn concedes that if Respondents' version of events is credited, this conclusion is correct, and the unconstitutionality of his actions is beyond dispute. *See* Pet. 12 ("[T]he Tenth Circuit … focused only on whether it was reasonable for an officer to shoot a pet dog that did not pose any immediate danger. That question answered itself.").

It is true that our federal courts of appeals consistently recognize that subsidiary factual questions such as the degree of danger presented may *sometimes* be able to be resolved on summary judgment as a matter of law—namely, when no reasonable jury could view the facts otherwise. *See Scott v. Harris*, 550 U.S. 372, 380 (2007). But we are not in that scenario.

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what occurred during the muted portion of the video. For example, Grashorn claimed for the first time at his deposition that Bubba "growled and barked" when he got up; Respondents dispute this. CA App. 804. Grashorn also claims that during the muted portion of his video "Herkimer was not listening to commands and kept running at" Grashorn, and that Grashorn himself "was yelling 'no' but Herkimer kept coming," which Respondents also vigorously dispute. *Id.* at 807. Respondents both testified that they heard Grashorn say *nothing* to Herkimer, and the only command given to Herkimer was Hamm's, who yelled "Herkimer, come!" after which Herkimer can be seen immediately slowing and starting to peel outwards back to them. *Id.*

Grashorn's complaint about how the Tenth Circuit analyzed the issue of imminent danger here is not a problem of misapplication of any matters of law; it is a complaint that *his* version of the disputed material facts was not what the lower courts adopted in *applying* that law.

This is why, even if the Court were to agree with Grashorn's framing of the "questions" presented here, this case is not a suitable vehicle for attempting to answer them. As to his first "question" presented, Grashorn's motion for summary judgment would have been denied even under Grashorn's preferred legal rule because genuine issues of material fact preclude a conclusive answer. And given the many factual disputes as to other facts and circumstances bearing on the reasonableness of Grashorn's killing of Herkimer (including the availability of plenary non-lethal alternatives), isolating and addressing the singular issue of immediate threat to resolve it is not logistically possible.

As to the second "question" presented, it is evident from both common sense and the case law in every single circuit to address it that this particular type of Fourth Amendment violation was clearly established, including in the Tenth Circuit. *See Mayfield v. Bethards*, 826 F.3d 1252, 1259 (10th Cir. 2016) (holding it clearly established that the unnecessary killing of a pet dog violates the Fourth Amendment). *See also Ramirez v. Killian*, 113 F.4th 415, 427-28 (5th Cir. 2024) ("Looking, therefore, to the other circuits, we find a robust consensus that an officer may not, consistent with the Fourth Amendment, kill a pet dog unless he reasonably believes that the dog poses a threat and that he is in imminent danger of being attacked.

We are far from the first to recognize and apply this rule—in fact, we are almost the last."); *see id.* at 428 (collecting over twelve pre-2019 cases across the federal circuits clearly establishing this right, and noting that "[n]o circuit court has held otherwise").

The petition should be denied.

STATEMENT OF THE CASE

I. Factual Background

On a hot, sunny, Saturday afternoon in June 2019, small-business owners Jay Hamm and Wendy Love were delivering firewood to businesses around Loveland, Colorado. CA App. 1028. As always, they traveled with their three beloved dogs: Bubba, a 16-year-old Rhodesian Ridgeback; Max, a black lab mix; and Herkimer, the smallest of the three, a 14-month-old Staffordshire Terrier/Boxer mix. CA App. 1037.

Before their last delivery of the day, Respondents Hamm and Love needed to find somewhere to stop to repair the corner of a box they intended to give to their next customer for storing the firewood. CA App. 1028. They saw an apparently vacant business surrounded by a large, empty parking lot that abutted a large neighborhood of residential homes. *Id*. at 1029. Hamm drove to the furthest back corner and parked in a nice, peaceful spot with some shade. *Id*. Respondents then laid a tarp on the pavement (to protect it from paint) while they fixed the box and then let their dogs out of the car to stretch and drink some water. *Id*. An inviting picnic table with a blue umbrella stood near their parking spot. *See* bodyworn camera video ("BWC")

00:13.[2] They let Herkimer out first. He drank some water, played for about 5 minutes, and then jumped back into the truck to settle in his favorite spot in the backseat. *Id*. at 1031. Bubba got out, stretched, and then laid down to sunbathe beside Respondents' truck on the pavement. Max (who, unlike the other two dogs, had a habit of wandering) was tied to the tree to relax in its shade. *Id*.

Unbeknownst to Respondents, the owner of this otherwise vacant business was remotely watching surveillance video of the parking lot from his home. CA App. 982. He had seen Respondents' truck park in the back corner, and he had previously had issues with people using his dumpster. He called Loveland PD's non-emergent dispatch line, and told them the following:

- There was a truck parked in the back corner of the business parking lot;
- It looked like they might be "unpacking things"; and
- "We have had a couple people come by and use our dumpster, and I just don't want to have any more of that going on."

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[2] An edited compilation of the bodyworn camera video is reference in the appellate record at CA App. 67 (citing https://www.youtube.com/watch?v=Il8BivU4rCw). Grashorn requested that the district court take judicial notice of this video. An unedited version of the same bodyworn camera video is available at https://www.youtube.com/watch?v=_wexLG6vDD0. The video citations in this brief are to the *second* video. It is readily apparent that both versions portray the same footage.

Id. at 982-84. He asked for police to go ensure the people in the lot did not use his dumpster. *Id*. at 984. Dispatch relayed this information to Officers Mathew Grashorn and Tim Nye, and they were sent to the scene to fulfill the business owner's request. *Id*. at 1032.

Grashorn arrived first. He observed that Respondents had parked nowhere near the building or its dumpster. CA App. 611, 1036. He also saw Bubba sleeping unsecured on the parking lot pavement. *Id*. at 1032.

Grashorn admits that he decided to ignore both Colorado law and police training governing how officers must approach unsecured pet dogs (which requires officers to permit owners opportunity to secure their dogs wherever practicable before approaching) and instead would try to quietly surprise them all from behind. *Id*. at 1033. He parked over 30 yards away from them in the lot. *Id*. He did not activate his red and blue lights or siren. *Id*. He did not wait for his partner to arrive before approaching. *Id*. He opened his car door as quietly as possible and attempted to also shut the door as quietly as possible. *Id*. The sound of the door nevertheless got Bubba's attention. Bubba sat up, noticed Grashorn, and like all friendly dogs tend to do, he began getting up (rather slowly, as he was quite old) to go greet him. *Id*. at 1034.

At the moment Bubba stood up, Grashorn was still right next to his patrol car. *Id*. at 997. If truly afraid of Bubba, he could have just gotten back inside it. *Id*. at 1034-35; BWC 3:24; *but see* CA App. 1034 (Grashorn disputes the distance to his car). He could have pulled out his baton, taser, or OC spray to be ready just in case. *Id*. He also could have just done

what every reasonable officer would have done: evaluate Bubba's demeanor to be that of a friendly dog (on account of the fact that thus far, all Bubba had done was behave like a friendly dog), and done nothing at all. But instead, Grashorn immediately pulled out his firearm, pointed it at Bubba, and prepared to execute him. *Id*. at 1020. Bubba was still over 30 yards away from Grashorn when he did this. *Id*. And, as Grashorn did it, he actually stepped *away* from the refuge of his patrol car and *towards* the pet dog he was pointing his gun at. *Id*. at 1036. He yelled something. This got the attention of Respondents. Naturally quite startled by the sudden appearance of a police officer who was now pointing a gun at their elderly dog, they both immediately called out to Bubba to come back to them. Bubba promptly did so. *Id*. at 1036.

But this brief bit of noise caused young Herkimer, who had been resting inside the truck, to hop out its open door to see what was going on. *Id*. at 1036; BWC 00:15-00:17. He first trotted over to Bubba and playfully bopped him with his nose. *Id*. at 1037. Herkimer then noticed Officer Grashorn who had continued his approach (now about 15-20 yards away) and who, incomprehensibly, still had his gun out pointed at everyone. *Id*. Oblivious to the firearm, Herkimer happily bounded over to greet Grashorn next. *Id*. at 1037. Everything about Herkimer's demeanor was consistent with puppy curiosity and friendly interest. *Id*. at 1038.[3] His tail was wagging and his ears were flopping. BWC 00:17-00:18. He did not growl. He did not

[3] Dr. Crosby, a police practices and canine behavior expert, characterized Herkimer's gait as "literally bounding up and down, which is extremely common in affiliative, positively-oriented dogs that are soliciting contact and play." CA App. 999.

bark. He had no hackles up. His ears were not back. He was not showing his teeth. His posture was loose and relaxed. CA App. 1038-39, 1041. Mr. Hamm immediately called for Herkimer to come back, and Herkimer can be seen on video appearing to slow and peel off to the side in response to his owner's call. CA App. 1040; 609 (Mr. Hamm stating at deposition that "I hollered for him, and he was doing a loop to come back."). *See also* CA App. 429 (Grashorn admitting at his deposition that he observed Herkimer was slowing and turning to his left at the time he shot him).

At this moment, this is what Herkimer looked like:

Then, on this otherwise peaceful day in a quiet Loveland neighborhood in June, Grashorn opened fire on Herkimer. He first shot him through the head. *Id.* at 1043. Herkimer rolled onto the pavement, incapacitated. Then, also for no good reason at all, Grashorn shot this family's defenseless dog again, now through

his chest. *Id*. Ms. Love began sobbing in horror. BWC 00:22-00:26. She begged to go to her puppy to comfort him. BWC 00:39-00:47. But Grashorn refused, now pointing his gun at Respondents and ordering Ms. Love to "get back to the truck!" CA App. 1043. Through agonized sobs, she continued to plead with Grashorn to allow her to go comfort her dying dog. Grashorn refused her request. *Id*. at 1044. He says he did this because he just assumed Herkimer would "die any second." *Id*.

Eventually, Grashorn did allow Ms. Love to approach Herkimer, but he still refused—for over 8 minutes—to let Respondents take Herkimer to their vet, who was just around the corner. BWC 00:31-08:31. And in perhaps the truest testament to his callous indifference to these Respondents, Grashorn chose to describe this portion of the encounter to the Court in his certiorari petition as: "After the shooting, Officer Grashorn allowed Plaintiffs to comfort Herkimer and take it to the vet." Pet. 7.

Herkimer's injuries were not survivable. After suffering in intensive care for four days, he had to be euthanized. CA App. 33.

II. Procedural Background

In June 2021, Ms. Love and Mr. Hamm filed a lawsuit against Officer Grashorn pursuant to 42 U.S.C. § 1983, alleging that Grashorn's execution of their pet dog Herkimer was an unreasonable seizure that violated the Fourth Amendment.

At the close of discovery in March 2023, Grashorn filed a motion for summary judgment on the basis of qualified immunity. CA App. 197. He argued that the district court could decide, based on the undisputed

facts, that he acted reasonably in shooting Herkimer. CA App. 200. He conceded that Herkimer had done-nothing aggressive (and even appeared to be slowing down to return to his owners) prior to being shot. *Id*. at 206-08; 429. His primary contention was that Herkimer was unleashed and "even friendly dogs can bite," so he can shoot any unleashed dog he encounters without consideration of a single nonlethal alternative. CA App. 206-08. Grashorn did not dispute that, at the moment he was shot, Herkimer was wagging his tail, had a happy gait with body relaxed, appeared friendly, and had not growled or even bared a tooth. CA App. 1026, 1041, 1047. Grashorn simply insisted that on such facts, qualified immunity entitled him to immediately utilize lethal force to kill Respondents' pet dog as a matter of law.

A. The District of Colorado denies Grashorn's motion for summary judgment.

The district court denied Grashorn's motion for summary judgment. The court held first that Grashorn's Fourth Amendment violation was clearly established, citing "the robust consensus of persuasive authority from other courts of appeal … that using deadly force against a dog was unlawful when the dog did not present an imminent threat to law enforcement or the public." Pet. App. 28a.

The court then discussed various factors relevant to making that determination (whether the dog presented an imminent threat) and identified several genuine issues of disputed material fact concerning whether Grashorn's actions were reasonable. Pet. App. 29a. In its totality-of-the-circumstances analysis, the court considered: (1) whether the dog's owners

were available and willing to assert control over the dog; (2) the dog's breed; (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 Herkimer; and (5) whether Herkimer posed a danger to the officer or the public. Finding several disputes of material fact as to these factors, the court denied Grashorn qualified immunity on summary judgment.

The district court made a number of findings in support of this ruling. First, it found that a reasonable factfinder could conclude that Herkimer's owners were available and willing to assert control over him. *Id.* Although Herkimer was unleashed, his owners were present and had just successfully called back their other (larger) dog Bubba. *Id.* Regarding the breed of the dog, it found that Herkimer did resemble a pit bull but noted that obviously a dog's perceived breed alone does not justify the use of lethal force. *Id.* The district court next considered whether an officer in Grashorn's position could have used non-lethal means to avoid whatever danger (if any) the dog may have posed. *Id.* It found a jury could conclude non-lethal alternatives were reasonably available and unreasonably foregone by Grashorn and concluded that there was thus a genuine dispute of material fact as to this factor. Pet App. 29a-30a. Then, turning lastly to address squarely the "most critical" question of fact in the case—that of "whether the dog posed a danger to the officer or the public," *id.*, the district court found plenary evidence in the record and disputed material facts from which a reasonable jury could find Herkimer "did not pose an immediate danger" at all. *Id.* at 30a. These realities thus necessarily precluded the court from being able to conclude as a matter of law

that Grashorn had acted reasonably, and qualified immunity was denied. *Id.*

B. The Tenth Circuit affirms.

Grashorn took interlocutory appeal of that ruling to the Tenth Circuit, insisting again that qualified immunity authorized him, as a matter of law, to kill any unleashed friendly pet dog that approached him. The Tenth Circuit affirmed both prongs of the lower court's qualified immunity analysis, and declined Grashorn's request that it reject the lower court's conclusions about what facts a reasonable jury could find and replace those conclusions instead "with solely [Grashorn's] version of the facts," Pet. App. 13a.

The court identified the key evidence the district court relied on to conclude that Respondents had sufficient evidence to create a dispute of material fact regarding whether Herkimer posed an immediate danger to Grashorn. Pet. App. 4a. That evidence was not contradicted by the record such that no reasonable juror could believe it. Pet. App. 5a. The Tenth Circuit came to the same conclusion as to the district court's identification of various material factual disputes regarding Respondents availability and willingness to assert control over Herkimer and whether Grashorn had time to consider non-lethal options to avoid any danger. Pet. App. 9a.

The Tenth Circuit also considered *de novo* whether a jury could find his killing Herkimer to have been reasonable. Pet. App. 9a-10a. In conducting that *de novo* review, the Tenth Circuit viewed the evidence in the light most favorable to the nonmoving party. Pet. App. 13a. It carefully laid out all of the factual disputes that the district court had identified. Pet. App.

10a-13a. It agreed with the district court's conclusion "that a jury could reasonably find that Herkimer had not posed an immediate danger to Officer Grashorn," *id.* at 4a, based on how it might resolve the various factual disputes. The panel took pains to explain (more than once) the nonrevelatory proposition that it was not at liberty to adopt Grashorn's version of the disputed facts on his summary judgment denial appeal. *Id.* at 13a n.5 ("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."). So long as the district court's "universe of facts" relied upon were not blatantly contradicted by the record (they were not) then the Tenth Circuit properly observed itself bound by them. *Id.* at 5a, 9a.

The court then turned to the purely legal question of whether, on those facts, a "police officer[] could reasonably believe that the Fourth Amendment allows them to shoot a dog without considering non-lethal options when there's no immediate danger." Pet. App. 14a-15a.

The court had little difficulty answering that question. It explained that every Circuit to address the issue had recognized "a constitutional violation when [killing] a dog [that] poses no immediate danger," *id.* at 15a, and further noted that even if this consensus in the case law didn't exist, a constitutional prohibition on police killing citizens' pet dogs in the absence of immediate danger still applied "with obvious clarity" based on common sense, and cited to several other Circuits' rulings to have already concluded the same, including the recent case of *Ramirez v. Killian*, in which the Fifth Circuit pointedly stated: "It should

come as no surprise to an officer that he may not go around shooting citizens' nonaggressive dogs. Indeed, it is a matter of 'common sense.'" 113 F.4th at 429.

REASONS FOR DENYING THE PETITION

Grashorn focuses his petition on the idea that the assessment on summary judgment of whether an officer faced an imminent danger is one that should be treated by lower courts as a pure question of law rather than a question of fact. But when there remain unresolved disputed facts material to making that assessment (as there are here), this is simply not possible. A court ruling on a motion for summary judgment is required to view all facts in the light most favorable to the nonmovant and resolve all disputed facts in the nonmovant's favor as well. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Once this is done, and the lower court has its universe of such facts established, it already *does* (in every circuit) determine as a matter of law whether, on those facts, the officer faced an imminent danger. This is literally how the exercise of determining whether qualified immunity applies works. There is no circuit conflict on anything here. Grashorn is simply seeking factbound error correction (where there is no error) on an issue on which this Court hasn't *just* recently denied multiple petitions for certiorari, *see Ray v. Roane*, 93 F.4th 651 (4th Cir. 2024), *cert. denied*, 145 S. Ct. 164 (2024); *Ambler v. Nissen*, 116 F.4th 351 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 2683 (2025); *Argueta v. Jaradi*, 86 F.4th 1084, 1089 (5th Cir. 2023), *cert. denied*, 145 S. Ct. 435 (2024); *Knibbs v. Momphard*, 30 F.4th 200 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 303 (2022), but upon which—even if the *certiorari* invitation were taken

up—would not change the ultimate outcome in this case.

With respect to Grashorn's first question presented—whether the presence of immediate danger can be resolved as a matter of law at summary judgment—there is no "conflict" about doing this "if the historical facts are sufficiently settled." *Rambert v. City of Greenville*, 107 F.4th 388, 393 (4th Cir. 2024), *i.e.*, if there *are no disputed material facts*, then the presence of immediate danger can be resolved as a matter of law. But when disputed material facts remain, then summary judgment on the issue is denied—in all circuits. Indeed, examination of other cases out of the very circuits that Grashorn claims to be on the other side of this purported "split" (the 4th, 5th and 8th), when assessing if an officer faced an imminent danger *where disputed facts material to that determination remain* all conduct the exact same qualified immunity analysis.

Grashorn's second question presented is not a serious one. He attempts to claim that it was not adequately "clearly established" for Grashorn to have been on notice that police may not, consistent with the Fourth Amendment, shoot and kill citizens' pet dogs that pose no imminent danger. There is, however, as the Fifth Circuit in *Killian* put it, "robust consensus that an officer may not, consistent with the Fourth Amendment, kill a pet dog unless he reasonably believes that the dog poses a threat and that he is in imminent danger of being attacked. **We are far from the first to recognize and apply this rule—in fact, we are almost the last**." 113 F.4th at 427-28 (collecting cases, finding this rule to have been clearly

established, and applying it to a dog shooting that occurred in 2016) (emphasis added). Remarkably, in making this bizarre argument that the law was not clearly established to the degree of specificity Grashorn needed in order to know not to kill Respondents' friendly dog, Grashorn in his petition accidentally concedes it, when he complains that the Tenth Circuit here "cit[ed] 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.**'" Pet. at 28 (emphasis added). That proposition truly is uncontested, and to that very point, both lower courts here identified numerous disputes of material fact in this case that a reasonable jury could resolve to mean that Grashorn had unlawfully shot Respondents' pet dog in the absence of an immediate danger.

I. The District Court and Tenth Circuit Correctly Identified Genuine Issues of Material Fact That Precluded Summary Judgment.

Grashorn's petition is premised on the fundamental error that, on the record in this case, his possible entitlement to qualified immunity can be resolved as a matter of law. Throughout this case, the parties divided on genuine issues of material fact that a jury would need to resolve before it could determine the level of threat (if any) Grashorn faced before he shot and killed a playful young dog happily wagging its tail. He has lost on this same question before the district court and the Tenth Circuit. It is *that* fact-based conclusion—not any dispute about the scope of appellate jurisdiction—that determined the outcome below.

Grashorn cannot dispute that the Tenth Circuit properly considered whether the facts, taken in the light most favorable to Respondents, established that he unreasonably shot Herkimer. The Tenth Circuit expressly stated that it conducted a "de novo review" of "the district court's conclusion that a jury could regard the shooting as unreasonable." Pet App. 9a-10a.

The existence of an immediate threat is at bottom a factual question, even though it is integrally related to the legal question regarding the reasonableness of an officer's reaction to that threat. Even Petitioner's *amicus* agrees that at a fundamental level immediate threat *is* a factual question. Enforcement Legal Defense Fund Br. at 14 ("Immediate threat is therefore not merely a factual question, but an inherently normative judgment…"). Of course, as with any other factual question, whether an officer faced an immediate threat can always be resolved as a matter of law when there are no genuine or material factual disputes that remain. *Scott*, 550 U.S. at 380.

Grashorn argues that the Tenth Circuit's opinion implicates "confusion" regarding this Court's decision in *Johnson v. Jones*, which addressed appellate jurisdiction on interlocutory appeal. 515 U.S. 304 (1995). *Johnson* held that "'evidence insufficiency' claims" by qualified immunity defendants are not immediately appealable. *Id.* at 308-09. Nothing implicated in *Johnson* is implicated here.

At bottom, Grashorn's dispute is not with any supposed confusion regarding *Johnson*, but with whether factual disputes preclude concluding that he acted reasonably *as a matter of law* when he shot Herkimer.

A. The District Court correctly identified genuine issues of disputed material fact regarding the circumstances and context in which Grashorn shot Respondents' pet dog.

Properly evaluating the Tenth Circuit's opinion starts with analyzing the decision that it affirmed. Here the district court properly identified factual disputes bearing on what danger (if any) Herkimer posed to Grashorn or anyone else. The district court did so by looking at the full timeline of events and all of the circumstances. As this Court recently reiterated, "[t]o assess whether an officer acted reasonably in using force, a court must consider all the relevant circumstances, including facts and events leading up to the climactic moment." *Barnes v. Felix*, 605 U.S. 73, 76 (2025).

Here, despite the Court's clear ruling in *Barnes*, Grashorn has consistently argued that the lower courts should have narrowly focused on only the three seconds leading up to his execution of a friendly dog, and nothing else. He ignores that the totality of the circumstances, including that Grashorn was called to the area not on report of any crime, but only because the business owner just wanted police to make sure that Respondents didn't "use [his] dumpster." Pet. App. 2a, 23a; CA App. 1031. *See Barnes*, 605 U.S. at 80 ("'severity of the crime' … can carry weight in the analysis."). Grashorn himself even admits that when he snuck up on Respondents and then pulled out his gun to execute their friendly dogs who had bothered and/or threatened absolutely no one, he also had not "yet establish[ed] what crime, if any crime, was being committed." CA App. 1046.

When Grashorn pulled up to this family, he noticed their large dog Bubba resting unsecured on the ground. Pet. App. 3a. But he nevertheless gave no warning nor tried any other means of "control[ing] the encounter." *Barnes*, 605 U.S. at 80. He did not drive up to the family, roll down his window, and ask them to leash their dogs. He did not call to them from his vehicle, put on his lights, or turn on his siren. Reasonable officers give such warnings, not just because it is common sense to do so, but because also, in Colorado, the law *requires it*. *See* Colorado Dog Protection Act, Colo. Rev. Stat. § 29-5-112(2)(b)(II) (stating that law enforcement must "[a]llow a dog owner" whenever the owner "is present and it is feasible, the opportunity to control or remove a dog from the immediate area"). Instead, the moment Bubba (the dog that had been sunbathing when Grashorn arrived) stood up and began trotting over to him, he unholstered his pistol, abandoned his patrol car and advanced on the family's pet dog, preparing to kill it. CA App. 1036.

Considering circumstances like these occurring before the shooting, the district court properly identified a factual dispute over whether Herkimer's owners were available and willing to assert control over him. Pet. App. 29a. And, while the bodyworn camera video provides important evidence, it lacks sound during the moments leading up to the shooting. BWC 00:01-00:32. Therefore, the calls of Mr. Hamm and Ms. Love in relation to the dogs' actions remain other critical material facts in dispute. *See* n.1, *supra*. The district court correctly observed that Herkimer's owners had already successfully called Bubba back to them. Pet. App. 29a. Respondents testified that they also called to Herkimer to return, CA App. 1047, but Grashorn

disputes both this, and the corroborative video evidence indicating Herkimer was responding to that call before he was shot. *Id.* The district court acknowledges these factual disputes, concluding that "the circumstances do not conclusively establish that" Herkimer was not able to be controlled by his owners. Pet. App. 28a-29a.

The district court identified factual disputes over another critical aspect of the encounter: Grashorn's options for avoiding lethal force. Respondents pointed to evidence that Grashorn could have gotten back into his vehicle, where no dog could reach him. CA App. 1034-35. On the other hand, Grashorn argues that he did not have enough time to respond differently. Pet. App. 29a-30a. He disputes that the body camera video conclusively establishes the distance from his car at the time of the shooting. CA App. 1034. Meanwhile, Respondents pointed to other option available to Grashorn if Herkimer were truly an imminent threat, such as a baton, OC spray, and a taser. Pet. App. 34a; CA App. 1050. And the District Court ruled admissible Respondents' expert opinion regarding "the possibility of using a taser under the circumstances here," Pet. App. 34a, a ruling of which Grashorn does not attempt further appeal. Given these material factual disputes, the district court similarly correctly concluded that "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." Pet. App. 29a.

Considering the totality of the circumstances and the disputes of facts as to critical aspects of the encounter, the district court correctly concluded that it

could not resolve the reasonableness of Grashorn's conduct as a matter of law.

B. The Tenth Circuit correctly applied this Court's precedents in reviewing the District Court's decision.

The Tenth Circuit affirmed, carefully dividing the issues on appeal between questions of fact and questions of law. As noted above, Grashorn argues that the Tenth Circuit, confused by this Court's decision in *Johnson*, misapplied this Court's precedents in *Plumhoff v. Rickard*, 572 U.S. 765, 773 (2014) and *Scott v. Harris*, 550 U.S. 372, in reviewing a district court's denial of summary judgment on a qualified immunity defense. But the Tenth Circuit's decision was a straightforward application of both those precedents.

Plumhoff directs appellate courts to review legal questions *de novo*, while leaving "purely factual issues" to "the trial court." 572 U.S. at 773. *Scott* confirms that where there are genuine issues of material fact, an appellate court cannot decide the question of qualified immunity as a matter of law, and the motion for summary judgment must be denied. *Scott*, 550 U.S. at 380.

Emphasizing this point, *Scott* explained that "whether respondent was driving in such fashion as to endanger human life" is a "factual issue." 550 U.S. at 380. That factual issue goes to the jury as long as there is a "*genuine* issue of *material* fact." *Id.* In some cases, there are no disputes of genuine fact, such as when one party's story "is blatantly contradicted by the record, so that no reasonable jury could believe it." *Id.* In that scenario, the *Scott* Court explained, appel-

late courts are consequently presented with only a legal question. This is why in *Plumhoff* and *Scott* this Court could resolve the issue of qualified immunity as a matter of law. *Plumhoff* confronted only a legal question because, "the record conclusively disprove[d] respondent's claim that the chase in the present case was already over when petitioners began shooting." 572 U.S. at 777. And in *Scott*, there also was no genuine dispute of material fact because the plaintiff's "version of events [wa]s so utterly discredited by the record that no reasonable jury could have believed him." 550 U.S. at 380.

In this case, the Tenth Circuit thoughtfully parsed the issues of fact from the questions of law. The Tenth Circuit reviewed "the denial of summary judgment … de novo." Pet. App. 4a. The court correctly explained that "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.'" *Id.* The court also explained that it reviews "the district court's conclusions about the facts that a jury could reasonably find." Pet. App. 13a n.5. And the Tenth Circuit considered whether the version of events the district court credited on summary judgment was "blatantly contradicted by the record"—*i.e.* that no reasonable jury could believe it, which would mean that there is no dispute of fact. Pet. App. 5a. The court also examined whether any of the factual conclusions were based on legal error. *Id.*

Applying those standards, the Tenth Circuit affirmed the district court's conclusion that a reasonable jury could find that Herkimer posed no immediate danger based on evidence that his owners were available and willing to assert control over him, that they

were in the process of doing just that (calling Herkimer back with Herkimer himself seen slowing and peeling away from Grashorn right before he was shot), that a reasonable officer could have used multiple available non-lethal means to avoid any danger, and that Grashorn had time to respond differently. Pet. App. 4a-5a. Thus, the issue of immediate danger was a factual one, with multiple material disputes of fact bound up inside it, that was not capable of being resolved in Grashorn's favor as a matter of law on appeal.

Grashorn, unhappy with the Tenth Circuit's conclusion that all these various factual disputes necessarily preclude summary judgment in this case, and perhaps aware that the Court is unlikely to grant *certiorari* on such a factbound challenge, attempts to manufacture a circuit split. But as explained below, Grashorn struggles to explain what that split might be, and how—if it even existed—it could have even been implicated or made outcome-determinative in the instant case. In truth, there is no "split." All of the circuits recognize that immediate danger is one of the "facts and circumstances" relevant to the core legal question in the Fourth Amendment analysis: reasonableness. And ultimately, every circuit recognizes that the facts and evidence in some cases may allow for resolution of the immediate-danger issue as a matter of law on summary judgment, and that, in other cases (like this one), the disputed facts and evidence may not.

II. The circuits agree that disputes of material facts can preclude summary judgment based on qualified immunity.

To start, the petition for certiorari frames the circuit split inconsistently—a sure sign that there is no split at all. The question presented suggests that the split might be over whether "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." Pet. i-ii. At another point, Grashorn asserts the split is "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." Pet. 13. Changing the story again, Grashorn later claims that the split is actually over whether 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" or "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*." Pet. 13.

These are not all the same. Some articulations appear to address whether the *officer's reasonableness* is a question of law. Others seem to address whether the existence of danger is a question of law. And yet others appear to address whether the existence of danger can ever be resolved as a matter of law at summary judgment (even if it were a factual inquiry). Whatever the split, Grashorn claims that the Fourth, Fifth, and Eighth Circuit are on one side while the First, Third,

Seventh, Ninth, Tenth, and Eleventh Circuits are on the other.

But there is no divergence among any of these circuits. All recognize that an officer's objective reasonableness is question of law. And they all recognize that the subsidiary question about the presence of an immediate danger can *sometimes* be resolved as a matter of law, so long as there is no genuine dispute of material fact.

A. The Fourth Circuit applies the same test as the Tenth Circuit.

Contrary to Grashorn's argument that the Fourth Circuit divides from the Tenth, both circuits apply the same fundamental methodology. In a strikingly similar case to this one, the Fourth Circuit considered in *Ray v. Roane* whether a law enforcement officer reasonably perceived plaintiff Tina Ray's dog as a threat. The Fourth Circuit explained that "[u]nder either prong" of the qualified immunity inquiry, "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Ray*, 93 F.4th at 658. Considering the evidence before the district court at summary judgment, the Fourth Circuit concluded that a jury could credit "the testimony of three witnesses that [the officer] stopped retreating and stepped toward [a 150-pound dog] before firing" and thus "could draw a 'reasonable inference' that [the officer] recognized [the dog's] inability to advance further and thus the absence of any 'imminent threat.'" *Id*. at 656.

Other Fourth Circuit cases reinforce that, depending on the evidence in a specific case, the question of imminent danger is susceptible to genuine disputes of

material fact that precludes summary judgment. In *Franklin v. City of Charlotte*, the Fourth Circuit considered competing evidence regarding the totality of circumstances leading to a fatal shooting and concluded that a "reasonable jury could conclude that Franklin did not pose an imminent threat to the officers or anyone else." 64 F.4th 519, 534 (4th Cir. 2023). In *Knibbs*, the court concluded that the "parties' factual disputes" regarding the threat posed by the deceased were "quintessentially 'genuine' and 'material,'" thereby precluding summary judgment for the police officer. 30 F.4th at 215. And in *Wilson v. Prince George's Cnty.*, the Fourth Circuit noted a "key disputed fact" that "further call[ed] into question whether [the law enforcement officer] faced an immediate threat," concluding that the district court erred in concluding that summary judgment was merited on that issue. 893 F.3d 213, 220 (4th Cir. 2018).

Grashorn centers his efforts to manufacture a circuit split around one case, *Rambert v. City of Greenville*, 107 F.4th 388 (4th Cir. 2024). Pet. 17. In *Rambert*, the Fourth Circuit characterized the issue of "whether the suspect poses an immediate threat to the safety of the officers or others," as one of the relevant "facts and circumstances" of a particular case—*i.e.* as an issue of fact. 107 F.4th at 397 (citation omitted). And the Fourth Circuit explained that "if the historical facts are sufficiently settled, we have jurisdiction to review a district court's denial of a motion for summary judgment based on qualified immunity. *In that situation*, whether the officer's conduct was objectively reasonable and whether it violated clearly established law are issues of law for the court." *Id.* at 393 (emphasis added). The court emphasized that "the qualified immunity question we face does not involve

disputed issues of material fact. Based on this record, it is a question of law for the court. So we have jurisdiction." *Id.* *Rambert* is therefore consistent with the Tenth Circuit's approach.

B. There is no split with the Fifth Circuit.

Grashorn points to the Fifth Circuit as supposedly in conflict with the decision below, but there too, there is none. There too the resolution of whether an officer faced an imminent threat is left to the jury when there are disputes of material fact. For example, in *Ambler v. Nissen*, the Fifth Circuit concluded that a "reasonable jury could therefore conclude that" an individual who had been fatally tased "posed little or no threat to Nissen or others during the arrest." 116 F.4th at 358-59. "The fact issues identified by the district court in this context were therefore material to Plaintiffs' Fourth Amendment claim." *Id.* And therefore the Fifth Circuit "lack[ed] jurisdiction to consider anything more." *Id.* Finding disputes of fact concerning the actions of the individual who was fatally tased, the Fifth Circuit concluded that the "dispute is reserved for a jury." *Id.*

In *Winkley v. Blackwell*, the Fifth Circuit determined that there were genuine disputes of material fact, and thus "a reasonable jury could conclude" that the individual who was fatally shot "posed little or no threat" to law enforcement officers. No. 24-60244, 2025 WL 1342001, at *7 (5th Cir. May 8, 2025). The court thus "conclude[d] that '[t]he fact issues identified by the district court in this context were [] material to [the] Fourth Amendment claim,' and 'we lack jurisdiction to consider anything more.'" *Id.*

Grashorn points to the Fifth Circuit's decision in *Argueta v. Jaradi*, in which the court determined that "whether Argueta's flight posed any risk to the officers or the public" was a legal determination. 86 F.4th 1084, 1089 (5th Cir. 2023), *cert. denied*, 145 S. Ct. 435 (2024). That is because, in *Argueta* there was no material dispute of fact.

C. The Eighth Circuit follows the consensus of the other circuits.

Grashorn lastly claims divergence with the Eighth Circuit, but here too his attempt to manufacture a split is unavailing. The Eighth Circuit acknowledges that whether an officer faced an immediate threat cannot always be determined as a matter of law. For example, in *Wallace v. City of Alexander*, the record did "not establish as a matter of law that Wallace posed a significant immediate threat to the safety of [the officer] or other bystanders." 843 F.3d 763, 768 (8th Cir. 2016). The court surveyed the factual disputes both at the time of the shooting and prior to the shooting, and concluded that "a reasonable fact finder could thus conclude" that Wallace was not threatening the officer at the time he was shot. *Id.* at 769. In *Johnson v. McCarver*, the Eighth Circuit also surveyed the disputed facts and accepted the plaintiff's "version" that he was "seated peacefully" before he was tased and thus posed no threat. 942 F.3d 405, 412 (8th Cir. 2019). That is what the Tenth Circuit did in this case as well.

Grashorn points to *Aden as trustee for Est. of Aden v. City of Bloomington*, but that case also approaches the law-fact divide in a similar way. 128 F.4th 952, 959 (8th Cir. 2025). In *Aden*, the Eighth Circuit re-

jected the district court's conclusion that genuine issues of material fact existed as to "whether Aden posed an immediate, 'meaningful[ ]' threat." *Id.* But it did so only because "the opposing 'facts' cited by the district court were "not facts at all but only inconsistent explanations for why the officers acted." *Id.* Thus the disagreement constituted a "legal dispute about the reasonableness of the officers' actions, not a factual dispute about what occurred." *Id.* The court could not "discern" any "genuinely disputed issue of material fact," *id.*, and the appellate court could thus decide whether an imminent threat existed as a matter of law.

* * *

At bottom, the courts of appeals resolve cases before them based on the facts and evidence available in those specific cases. At times, the question of whether there was an immediate threat can be resolved on summary judgment as a matter of law, and at others genuine disputes of material fact preclude doing so. Case specific factors can make the dividing line between where facts end and conclusions of law begin more or less clear. But fact-bound deviations or case-specific disagreements are rarely, if ever, worthy of this Court's review.

III. The Tenth Circuit Correctly Concluded that the Constitutional Violation was Clearly Established.

Grashorn's second question presented asks this Court to consider whether the Tenth Circuit correctly concluded that he violated clearly established law. On this issue, Grashorn plainly seeks error correction and thus does not raise a certworthy issue. Moreover, to

the extent Grashorn seeks summary reversal he provides no basis for that extraordinary action. Indeed, the Courts of Appeals overwhelmingly agree with the Tenth Circuit that the Fourth Amendment forbids officers from shooting a pet that poses no immediate danger and when the use of force is avoidable. *E.g.*, *Robinson v. Pezzat*, 818 F.3d 1, 7 (D.C. Cir. 2016) (Every circuit to consider the issue has "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.'" (citation omitted)). And even Grashorn concedes that if Herkimer truly posed no threat, then his actions would have been unreasonable. Pet. at 12 ("That question answered itself.").

Not only is the legal rule established, but so are its contours. Grashorn's position that the law is not clearly established is meritless.

In the recent case of *Ramirez v. Killian*, the Fifth Circuit addressed the question of what constitutional right was clearly established across the circuits with respect to police killing pet dogs and provided rich overview of "the legal rule they announce [being] clear: killing a pet dog constitutes a seizure of property under the Fourth Amendment, which then must be evaluated for reasonableness to determine whether the killing ran afoul of the Constitution. 113 F.4th at 427 (citing pre-2019 cases establishing this rule from every Circuit including the Tenth).

The *Killian* court further elucidated the coherent and well-defined further contours of that rule that had also been clearly established in each Circuit: that "[w]here the killing is done by a police officer while on-duty, the Fourth Amendment analysis centers on

whether the pet dog posed an immediate danger and **whether the killing was unavoidable**." *Id.* at 428 (emphasis added) (citing pre-2019 cases discussing these additional common sense contours of the rule out of the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth and D.C. Circuits).

Just as the Tenth Circuit easily concluded, the *Killian* Court stated "if ever a robust consensus of persuasive authority existed, it exists here," and that "[c]rucially, there is no disagreement that we can discern over the contours of this legal rule.… It should come as no surprise to an officer that he may not go around shooting citizens' nonaggressive dogs. Indeed, it is a matter of 'common sense.'" *Id.* at 429. *See also* Pet. App. 17a-19a (discussing the same). "Therefore, consistent with every other circuit court to have addressed the issue," the Fifth Circuit "recognize[d] that the killing of a pet dog can be a seizure," and that "[s]uch a seizure is reasonable only if the dog 'poses an immediate danger and the use of force is unavoidable." *Killian*, 113 F.4th at 429 (multiple citations and quotations omitted). In this case, we see the Tenth Circuit conduct the same analysis and have no trouble concluding the same. Pet. App. 17a-19a. The law was thus clearly established as to this common sense rule and its contours well prior to June 2019 to put all police officers, including Grashorn, on notice that killing a friendly pet dog like Herkimer in the absence of danger or need—in any Circuit—was a violation of the Fourth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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