Ross C. Anderson (#0109)
LEWIS HANSEN
The Judge Building
Eight East Broadway, Suite 410
Salt Lake City, Utah 84111
Telephone: (801) 746-6300
Fax: (801) 746-6301
randerson@lewishansen.com

Attorney for Plaintiff/Counterclaim Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

SEAN KENDALL, Plaintiff/Counterclaim Defendant, v. BRETT OLSEN, BRIAN PURVIS, JOSEPH ALLEN EVERETT, TOM EDMUNDSON, GEORGE S. PREGMAN, and SALT LAKE CITY CORPORATION, Defendants/Counterclaim Plaintiffs.	**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON (1) PLAINTIFF'S CLAIMS OF UNCONSTITUTIONAL SEARCH AND SEIZURE BY DEFENDANT OLSEN UNDER THE FIRST CLAIM FOR RELIEF AND (2) DEFENDANT OLSEN'S ASSERTED QUALIFIED IMMUNITY DEFENSE AND SUPPORTING MEMORANDUM** Case No. 2:15-cv-00862 District Judge Robert J. Shelby Magistrate Judge Dustin B. Pead

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Rules

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Sean Kendall ("Kendall") respectfully moves the Court for entry of summary judgment as to (1) liability of Defendant Brett Olsen ("Olsen") for his unconstitutional search of the curtilage of Kendall's home; (2) liability of Olsen for his unconstitutional seizure of Geist; and (3) Olsen's asserted defense of qualified immunity. Kendall hereby submits the following Memorandum in Support of the Motion for Summary Judgment

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendant Brett Olsen ("Olsen")—without a warrant, without consent, and without any reason to believe (1) there was any connection between Kendall's home or backyard and a missing boy (referred to herein as "K.H.") or (2) that K.H. was on the premises—opened a closed gate, entered the backyard, walked around the backyard, opened and looked into a shed, and then, when he heard Kendall's beloved Weimaraner dog Geist bark, he ran. Then, after Geist ran toward Olsen, Olsen disregarded any non-lethal options of dealing with the situation and, instead, callously and unnecessarily drew his gun and shot Geist dead.

Olsen maintains he was entitled to enter Kendall's yard because Kendall's yard was, in Olsen's view, within the geographical area the missing boy *could* have wandered and because the yard *may* have been accessible to the missing boy. In other words, Olsen maintains he could enter *any* home or the curtilage to *any* home without a warrant, without consent, and without any reason to believe there was a connection between the missing boy and the property to be searched if the home or curtilage was within the range of where the missing boy could have traveled and if it appeared to be accessible to the boy. In this instance, that would mean, at the least, dozens of homes within more than 1/8 of a mile in any direction from K.H.'s home, and as much farther as

K.H. *may* have traveled, which were not locked down in such a manner that the missing boy could not possibly have gained access, would be stripped of Fourth Amendment protection from non-consensual searches by police officers.

Never has the Fourth Amendment to the Constitution been construed to allow such a promiscuous approach to the invasion by government agents of people's homes or other places where they have a reasonable expectation of privacy. Olsen's view of where he could enter and search would leave people without any Fourth Amendment protections from the invasion of government agents whenever those agents could credibly argue that a missing person *could* have traveled and had access to the property to be searched.

Kendall is entitled to the entry of summary judgment on his claim that Olsen unconstitutionally entered the curtilage of his home because of the admitted absence of any belief, and the absence of any reason to believe, the missing boy was in Kendall's home or backyard or that there was *any* connection between Kendall's home or the curtilage of his home and the missing child.

Kendall is also entitled to the entry of summary judgment on his claim that Olsen unconstitutionally seized (*i.e.*, killed) Geist on the grounds that, absent a warrant, the seizure would not have been constitutional absent exigent circumstances and the only purported exigent circumstances were directly created by Olsen's unconstitutional and otherwise illegal entry onto and search of the curtilage of Kendall's home.

Kendall is entitled to the entry of summary judgment on Olsen's assertion of a defense of qualified immunity in connection with the unconstitutional search because the law at the time was clearly established that (1) Olsen's entry into and search of Kendall's backyard was a "search" within the protection of the Fourth Amendment; (2) such a search, without a warrant and without

consent, could be considered "reasonable" under the Fourth Amendment only if there were a belief, or a reason to believe, that the missing boy was on the property and that there was a connection between the property and the missing boy or the circumstances surrounding him being missing; and (3) Olsen and every other police officer testifying regarding this issue has admitted there was no reason to believe there was any connection between Kendall's home or its adjoining curtilage and the missing boy or the circumstances surrounding him being missing.

Kendall is also entitled to the entry of summary judgment on Olsen's assertion of a defense of qualified immunity in connection with the unconstitutional seizure of Geist because the law at the time was clearly established that (1) the killing of Geist by Olsen was a "seizure" within the protection of the Fourth Amendment; (2) such a seizure, without a warrant, could be considered reasonable only if exigent circumstances existed that were not created by Olsen; and (3) the only exigent circumstances claimed by Olsen were created by his unconstitutional entry onto and search of the curtilage of Kendall's home.

II. BACKGROUND STATEMENT OF FACTS

On June 18, 2014,[1] Elise Horman called 911 and reported her son, K.H., was missing.[2] K.H., who was two or three years old,[3] was actually asleep on the floor of the family room in the

[1] The search for K.H. and the killing of Geist occurred on June 18, 2014. *See* Deposition of Joseph A. Everett ("Everett Depo."), excerpts of which are Exhibit "1" to the Declaration of Ross C. Anderson ("Anderson Decl."), Exhibit "A" hereto, 6:9–14; Deposition of Brett W. Olsen ("Olsen Depo."), excerpts of which are Exhibit "2" to Anderson Decl., 47:5–9.

[2] Deposition of Elise Horman ("Horman Depo."), excerpts of which are Exhibit "3" to Anderson Decl., 18:14–19.

[3] At her deposition on July 6, 2016 (just over two years since the search for the boy and the killing of Geist), K.H.'s mother, Elise Horman, stated he was, at the time of the deposition, four years of age. Horman Depo., 3:24–4:2. Joseph Everett ("Everett") said he was two or three years old. Everett Depo., 11:8–9. Olsen said he was three years old. Olsen Depo., 45:9; Exhibit "1" to Olsen Depo., page 3 of 18, dated June 18, 2014 ("While assisting in the search for a 3-year-old boy, I shot and killed a dog at the listed address."); Exhibit "6" to Olsen Depo. ("This is a picture of [redacted] (3 years old) who went missing from 2511 South Fillmore at 3:15 today.")

basement of his family's home and would have been in full view if anyone, including police officers, had simply walked around the room and moved some of the clutter, including an empty box.[4]

Olsen, who participated with other Salt Lake City Police Department ("SLCPD") officers in a neighborhood search for K.H., went to the home of Kendall,[5] along with Officer Gordon Worsencroft ("Worsencroft").[6] Kendall's home was approximately .133 (or over 1/8) miles (about 10 houses away) from the Horman home.[7]

Without a warrant, without consent, and without having any belief, or reason to believe, there was any connection between Kendall's backyard and K.H. or the circumstances of his supposed disappearance,[8] Olsen opened the closed latch on a gate handle, opened and walked through the gate, walked around Kendall's backyard, and opened the door to, and looked inside, a shed in Kendall's backyard.[9] His only after-the-fact explanations for engaging in a warrantless, non-consensual search of the curtilage of Kendall's home, are that (1) when looking for a missing person, "that's not really a search"[10] and (2) K.H. *could* have traveled to Kendall's home and

---

[4] Deposition of Daniel Glen Davis ("Davis Depo."), excerpts of which are Exhibit "4" to Anderson Decl., 27:19–30:21.
[5] Olsen Depo., 67:22–68:4.
[6] Deposition of Gordon Worsencroft ("Worsencroft Depo."), excerpts of which are Exhibit "5" to Anderson Decl., 19:20–20:5.
[7] *See* Defendants Olsen, Purvis and Salt Lake City Corporation's Motion for Summary Judgment (DKT No. 35) at 7, n.3, a copy of which page is Exhibit "6" to Anderson Decl. *See also* Declaration of Sean Kendall ("Kendall Decl."), Exhibit "B" to Plaintiff's Memorandum in Opposition to Defendants Olsen, Purvis, and Salt Lake City Corporation's Motion for Summary Judgment ("Plaintiff's Memorandum in Opposition") (DKT No. 46, page 285,.) (a copy of which is attached for convenience as Exhibit "B" hereto), ¶¶ 3–12.
[8] Olsen Depo., 75:1–76:24
[9] Olsen Depo., 80:22–24, 84:1–87:3, 114:9–10, 18–23; Exhibit "12".
[10] Olsen Depo., 8:5–22, 9:10–15 ("Q: And if it's a noncriminal matter like a missing person? A: Well, that's not really a search. That's more of a canvas. . . . Q: Then tell me what you mean by 'canvas' in connection with whether you need a warrant or not. A: In relation to this particular

entered the backyard, just as he *could* have travelled to and entered every other home in the general area.[11]

After Olsen unconstitutionally entered Kendall's backyard, without a warrant, without consent, without taking measures known by Olsen[12] to see if a dog were present in the yard,[13] and without even waiting to see if Worsencroft could obtain consent,[14] Olsen opened the gate, walked around the yard, opened a shed door, searched the shed, then closed the shed door.[15] At that point, Geist barked,[16] then Olsen ran.[17] Only then, after Olsen started running, Geist ran toward Olsen.[18]

---

case, a canvas meant that we were going to look anywhere a small child could reasonably be or reasonably have been taken.")

[11] Q: So, in your view, any property that's accessible and within the range of what you think a three-year-old boy could walk to, given the elapsed time, is fair game for a search by a police officer?
A: Provided he could get to it and it was very accessible, yes.
Olsen Depo. 90:4–9. *See also* Olsen Depo., 76:9–24.

[12] Olsen Depo., 24:11–26:5.

[13] Olsen Depo., 29:17–22, 87:19–21.

[14] A: And I knocked, nothing, knocked again, then I heard a growling or a bark, and then I heard two shots from a gun.
Worsencroft Depo., 38:3–5.
Q: And you'd knocked either once or twice when you heard the dog bark and the shots fired, correct?
A: Yes. Yes.
Q: So Officer Olsen had actually entered the backyard before you had an opportunity to speak to someone, if someone was, in fact, in the house?
A: Yes.
Worsencroft Depo., 57:1–7.

[15] Olsen Depo., 84:1–3, 85:6–86:18, 114:9–10, 18–23; Exhibit "12".

[16] Olsen Depo., 86:8–23.

[17] Olsen Depo., 86:18–87:5.

[18] A: When I pushed it closed, that's when I started hearing Geist, and it started barking very angrily, and so I thought there is a dog back there and so I started going around here as fast as I could. I wanted to get out of the backyard.
Q: Where did you go?
A: I started running up this way. It was kind of a sideways run because I wanted to keep an eye on what was coming, and I attempted to go through underneath this to get out of this gate.
Q: So—you were running away from the dog?
A: Yes. I started to.

That is what dogs generally, and Weimaraners specifically, do, naturally and harmlessly.[19] Unless cornered or otherwise restrained in their freedom of movement, they are all bark and no bite.[20]

Only because of Olsen's unreasonable and unfounded fear, and being far too ready to draw his gun and kill Geist, he cavalierly, unnecessarily, and unreasonably pulled out his gun (even though he had a police baton,[21] which he never even considered using,[22] and he obviously could have blocked, pushed, or kicked Geist with his shoes or boots), and shot Geist dead.

Even if there were exigent circumstances for the seizure of Geist—which there were not[23]—any exigency that may have occurred was created by Olsen's own wrongful conduct in unconstitutionally entering onto and searching the curtilage of Kendall's home. Defendant Olsen, through his counsel, curiously purports that "the exigency at issue in this case" relative to the *seizure* of Geist "was the report of a missing child, which Officer Olsen did not create."[24] Of course, Olsen did not kill Geist out of concern for a missing child. Olsen himself has appeared to

---

Q: Did you ever learn that's a good way to keep a dog from coming after you?
A: It's just instinct. So as he started charging at me, that's when I stopped.
Olsen Depo., 86:18–87:11.

[19] Declaration of Heather Beck ("Beck Decl."), Exhibit "C" to Plaintiff's Memorandum in Opposition (DKT No. 46, page 312, *et seq*.) (a copy of which is attached for convenience as Exhibit "C" hereto), ¶¶ 6–7, 9–16; 12, 18–23; Declaration of Julianne Brooks ("Brooks Decl."), Exhibit "D" to Plaintiff's Memorandum in Opposition (DKT No. 46, page 405, *et seq*.) (a copy of which is attached for convenience as Exhibit "D" hereto), ¶¶ 5–7, 10, 11, 13; Declaration of Shea Kendall ("Shea Decl."), Exhibit "E" to Plaintiff's Memorandum in Opposition (DKT No. 46, page 492, *et seq*.) (a copy of which is attached for convenience as Exhibit "E" hereto), ¶¶ 5, 7, 11.

[20] Beck Decl., ¶ 24; Brooks Decl., ¶ 6.

[21] Olsen Depo., 26:8–12.

[22] Transcript of Internal Affairs Interview of Brett Olsen ("Olsen Interview"), Exhibit "1" to Declaration of Linda Nelford, Exhibit "F" to Plaintiff's Memorandum in Opposition (DKT No. 46, page 497, *et seq*.) (a copy of which is attached for convenience as Exhibit "F" hereto), 9:18–19.

[23] Beck Decl., ¶¶ 3–8, 12–23, 26, 30; Brooks Decl., ¶¶ 5–7, 10–13.

[24] Defendants Olsen, Purvis, and Salt Lake City Corporation's Reply Memorandum in Support of Motion for Summary Judgment (DKT No. 51) ("Reply Memorandum in Support of Defendants' Motion for Summary Judgment"), at 50.

consider that the justifying exigent circumstances for his killing of Geist were the facts that Geist barked at him after Olsen invaded Kendall's enclosed yard, Geist ran toward Olsen after Olsen began running, and Geist had, according to Olsen's account, a "mean demeanor."[25] Of course, all of that would have been entirely avoided had Olsen not unconstitutionally entered and searched the curtilage of Kendall's home (*i.e.*, Geist's home). Any "exigency" relating to Olsen's brutal and unnecessary killing of Geist was created by Olsen's own wrongful conduct.

III. STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

The legal elements required for Kendall to prevail on the motion and the undisputed material facts necessary to meet each element are as follows:

A. The Elements Required for Kendall to Prevail on His Claims Under 42 U.S.C. § 1983 That Olsen Violated Kendall's Fourth Amendment Rights

1. **Kendall must first "show that [he has] been deprived of a right 'secured by the Constitution and the laws' of the United States."** *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978). *See also Schaffer v. Salt Lake City Corp*., 814 F.3d 1151, 1155 (10th Cir. 2016); *Johnson v. Rodrigues*, 293 F.3d 1196, 1201–02 (10th Cir. 2002).

Undisputed facts demonstrating that Kendall has met that element:

The facts demonstrating that Kendall was deprived by Olsen of his rights to be free from an unreasonable and unconstitutional search of the curtilage adjoining his home and from an unreasonable and unconstitutional seizure of his dog Geist are set forth below at III. B. and C., pages 11–14, 16–22, 24–26.

2. **Kendall "must secondly show that [Olsen] deprived [him] of this right acting 'under color of any statute of the [state]."** *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 155. *See also Schaffer v. Salt Lake City Corp*., 814 F.3d at 1155; *Johnson v. Rodrigues*, 293 F.3d at 1202.

[25] Olsen Depo., 91:1–3, 91:22–23, 92:1–93:10.

Liability under § 1983 can arise when a defendant acted under color of "state or local law." *Stringer v. Dilger*, 313 F.2d 536, 540 (10th Cir. 1963).

In order to determine if a police officer was acting under color of state law, "[t]he key determinant is whether the actor, at the time in question, purposes to act in an official capacity or to exercise official responsibilities pursuant to state law, or whether [the officer's] actions related in some way to the performance of a police duty." *Carlsen v. Duron*, 134 F.3d 382 (10th Cir. 1998) (unpublished) (quoting *David v. City & County of Denver*, 101 F.3d 1344, 1353 (10th Cir. 1996) (quoting *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995) and *Gibson v. City of Chicago*, 910 F.2d 1510, 1517 (7th Cir. 1990))) (inside quotation marks omitted).

Undisputed facts demonstrating that Kendall has met that element:

1. Defendant Salt Lake City Corporation has admitted that element has been established, as follows:

   "The City admits that Officers Olsen, Purvis, Everett, Edmundson, and Pregman were acting under color of law, and within the scope of their employment, from the beginning of the June 18, 2014, search of the "Filmore Street home" for a three-year-old boy until the shooting of Geist." Salt Lake City Corporation's Responses to Request for Admissions ("City's Responses to Request for Admissions"), Exhibit 7 to Anderson Decl., ¶ 1.

2. Olsen had been employed with the Salt Lake City Police Department for over 16 years as of June 23, 2016 (the date of his deposition). Olsen Depo., 4:9–12.

3. The Defendants have admitted that "Salt Lake City Corporation is a political subdivision, duly organized and existing under the laws of the State of Utah." Answer and Counterclaim (DKT No. 4), at 3, ¶ 12.

4. The Defendants have admitted that "the Salt Lake City Police Department ("SLCPD") is a department of Salt Lake City Corporation and that SLCPD employees are employees of Salt Lake City Corporation." Answer and Counterclaim (DKT No. 4), at 3–4, ¶ 12.
5. The Defendants have admitted that on June 18, 2014, Brett Olsen, Brian Purvis, Joseph Everett, Tom Edmundson, and George Pregman were police officers employed by Salt Lake City Corporation. Answer and Counterclaim (DKT No. 4), at 4, ¶ 14.
6. On June 18, 2014, Olsen was on a police motorcycle riding in the area of Sugar House Park; he spoke with Lieutenant Brian Purvis ("Purvis"), the Watch Commander, who advised Olsen he was responding to a call of a missing child; and Olsen told Purvis that if he needed the officers on the Community Intelligence Unit, Purvis should let them know. Olsen stated, "We would be happy to respond." Olsen Depo., 47:5–19.
7. A few minutes later, Olsen received word over the radio from either Purvis or the dispatcher that he and others on the Community Intelligence Unit of the SLCPD were asked to respond to the home of the missing boy. Olsen Depo., 47:20–48:7.
8. Olsen then drove to the home of the missing boy and his family, parked on the street where the home was located, and asked Purvis how Olsen could be of assistance. Olsen Depo., 48:12–24. Olsen looked for and spoke with Purvis because Purvis was a SLCPD Watch Commander. Olsen Depo., 48:22–49:8.
9. Purvis told Olsen to look for the boy. Olsen Depo., 52:7–9. After being informed by Purvis to search the neighborhood, Olsen "teamed up with Gordon Worsencroft who was also in the Community Intelligence Unit." Olsen Depo., 55:17–20.

10. During the course of his search of the neighborhood with Worsencroft, Olsen went to the Kendall home, opened a gate, and walked into the backyard, where he walked around, opened the door to a shed, searched the shed, then shot and killed Geist as the dog barked and ran toward Olsen. Olsen Depo., 66:10–18, 68:10–13, 72:19–23, 76:3–8, 84:1–4, 24–86:7, 86:16–87:11, 91:1–3, 93:11–13, 119:18–120:3.
11. As a Salt Lake City Police Officer, Olsen typed a police report about the search for the missing boy, entering and searching Kendall's backyard, and shooting Geist. Olsen Depo., 105:23–106:10; Olsen Depo., Exhibit "1".
12. As a Salt Lake City Police Officer, Olsen was interviewed in an Internal Affairs Interview by officers and agents of Salt Lake City Corporation. Olsen Interview.

B. <u>The Elements Required to Establish That Olsen's Search Violated the Fourth Amendment</u>

1. Kendall must show there was a "search" of his home (which includes the curtilage to his house) or in a place where Kendall had an expectation of privacy and where that expectation was objectively reasonable.

Wheeldin v. Wheeler, 373 U.S. 647, 649–650 (1963) (where there was no search or seizure, there was no claim of a Fourth Amendment violation).

> The [Fourth] Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred."

Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013) (quoting *United States v. Jones*, 132 S.Ct. 945, 950–951, n.3 (2012)).

> [F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates.

United States v. Jones, 132 S.Ct. at 950.

> Trespass alone does not qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information.

United States v. Jones, 132 S.Ct. at 951, n.5.

> [T]he *Katz* [*v. United States*, 389 U.S. 347, 351 (1967)] reasonable-expectation-of-privacy test has been *added* to, not *substituted for*, the common-law trespassory test.

United States v. Jones, 132 S.Ct. at 952 (emphasis in original).

> A search under the Fourth Amendment "occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). . . .
>
> It is well-settled an individual has a reasonable expectation of privacy in the interior of one's home and its curtilage. *Kyllo v. United States*, 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001); *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984); *see also [United States v.] Hatfield*, 333 F.3d [1189,] at 1196 ("[P]rivacy in the interior of a home and its curtilage are at the core of what the Fourth Amendment protects….").

Reeves v. Churchich, 484 F.3d 1244, 1254 (10th Cir. 2007).

> It is well settled that the Fourth Amendment's protection extends beyond the sphere of criminal investigations. *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). "The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government," without regard to whether the government actor is investigating crime or performing another function. *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 613–614, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).

Ontario v. Quon, 560 U.S. 746, 755–756 (2010). *See also State v. Beede*, 406 A.2d 125, 129 (N.H. 1979) ("The fourth amendment requirements . . . apply whether the officer conducting the search is looking for a missing person or for evidence of a crime.")

Undisputed facts demonstrating that Kendall has met that element:

1. While attempting to find the missing boy, Olsen was searching through the neighborhood of the boy's home. Olsen Depo., 52:7–53:3, 55:17–59:19.

2. Olsen understood Purvis's instructions to mean that Olsen was to look "inside homes" and "inside enclosed yards," "[b]ased on consent or exigency or whatever." Olsen Depo., 56:2–13, 112:23–114:8.
3. The police officers did not know if the missing boy had wandered away or if he had been abducted. Olsen Depo., 60:3–10.
4. Olsen entertained the possibility that the missing boy had been abducted. Olsen Depo., 123:1–3. In fact, he was equally concerned that the boy had wandered away or that he had been abducted; he considered them equal possibilities. Olsen Depo., 132:16–21.
5. Olsen was looking in places where he felt the missing boy could have "gotten to or been discarded." Olsen Depo., 131:12–14.
6. Olsen opened the gate to Kendall's backyard, walked around the yard, opened and searched a shed in the yard, and then shot and killed Kendall's beloved dog Geist because he barked and ran toward Olsen. Olsen Depo., 84:1–87:18.
7. Kendall's backyard, which was the curtilage to Kendall's home, was adjacent to the home where he resided. Kendall Decl., Exhibits "1" through "6"; ¶ 5. It was entirely enclosed with a tall fence, Kendall Decl., ¶ 8, and the house, with three secure gates. Kendall Decl., ¶ 6.
8. The fence of the backyard protected the backyard from observation by people passing by the residence. A portion of the fence is chain link, but opaque slats were inserted into the entire length of that portion to prevent people outside the yard from seeing into the yard. Kendall Decl., ¶ 7.
9. Kendall had an expectation of privacy in his home, his backyard, the shed in the backyard, and throughout his entire residence. He chose to move into that residence, in

part, because of the tall fence and enclosed backyard. Those characteristics were important to him so he could (a) privately enjoy activities in his backyard and (b) provide an area for Geist, who had previously joined his family, that was secured from Geist getting loose and secured from anyone harassing, harming, or interfering with Geist. Kendall Decl., ¶ 9.

10. Because the backyard of Kendall's home was enclosed with a tall fence that prevented passersby from seeing into the backyard, he expected that his activities in the backyard were private at all times. He conducted himself in the backyard of his residence, and kept Geist there much of the time, in accordance with his expectation that the backyard was private. Kendall Decl., ¶ 10.

2. There must have been no warrant or consent for the search of Kendall's backyard.

> While a police search conducted without a warrant would constitute a violation of the Fourth Amendment in other circumstances, it is well settled that "one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043–44, 36 L.Ed.2d 854 (1973).

U.S. v. Peña, 143 F.3d 1363, 1365–66 (10th Cir. 1998).

Undisputed facts demonstrating that Kendall has met that element:

1. No one, including Olsen, obtained a warrant or consent to search the curtilage of Kendall's residence. Olsen Depo., 77:22–78:16, 89:15–20, 119:18–23. City's Responses to Request for Admissions, No. 2. ("The City also admits that Officer Olsen did not have a warrant to enter the backyard of the property at 2465 South 1500 East prior to entering that property.") Defendants Olsen, Purvis, Everett, Edmundson, and Pregman's Responses to Plaintiff's First Set of Requests for Admissions, Exhibit "8" to Anderson Decl., No. 1. ("Officer Olsen admits that his entry into the backyard at 2465 South 1500 East was

> without express permission or consent of Kendall or an owner or resident of that property and without a warrant."). *See also* Olsen Depo., 119:18–120:3, 126:7–9, 130:24–131:24.

3. There must have been no exigent circumstances established by Defendants that would excuse the requirement of a warrant and overcome the presumption of unreasonableness that attaches to all warrantless home entries.

> [Police] officers bear the burden of establishing that the threats posed exigent circumstances justifying the warrantless entry.

Armijo ex rel. Armijo Sanchez v. Peterson, 601 F.3d 1065, 1070 (10th Cir. 2010) (citing *United States v. Reeves*, 524 F.3d 1161, 1169 (10th Cir. 2008)). *See also Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) ("Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.")

> That burden is especially heavy when the exception must justify the warrantless entry of a home.

United States v. Najar, 451 F.3d 710, 717 (10th Cir. 2006).

> [T]he warrant requirement is subject to certain exceptions. We have held, for example, that law enforcement officers may make a warrantless entry onto private property to fight a fire and investigate its cause, to prevent the imminent destruction of evidence, or to engage in "hot pursuit" of a fleeing suspect. [W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393–394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (citations omitted) (internal quotation marks omitted).

Since none of those categories of "exigent circumstances" are claimed by Defendants,[26] only the following described "exigency" is relevant to the element relating to "exigent circumstances" in this matter:

> One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. " 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'" [*Mincey v. Arizona*, 437 U.S.] at 392, 98 S.Ct. 2408 (quoting *Wayne v. United States*, 318 F.2d 205, 212 (C.A.D.C. 1963) (Burger, J.)). Accordingly, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.

Brigham City v. Stuart, 547 U.S. at 403. *See also United States v. Najar*, 451 F.3d at 718 ("[O]ur test is now two-fold, whether (1) the officers have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others, and (2) the manner and scope of the search is reasonable . . . .").

For a warrantless search to be justified by exigent circumstances, there must be a reasonable basis for believing the person in danger is in the premises to be searched *and* there is an association between the place to be searched and the emergency. The standards to be applied relating to the absence-of-exigent-circumstances element of Kendall's claim are as follows:

> [T]he government must show **the officers reasonably believed a person inside the home was in immediate need of aid or protection**.

United States v. Gambino-Zavala, 539 F.3d 1221, 1225 (10th Cir. 2008) (emphasis added).

> [T]he government must show the officers "confined the search to only **those places inside the home where an emergency would reasonably be associated**."

Id. at 1226 (quoting *Najar*, 451 F.3d at 718).

Undisputed facts demonstrating that Kendall has met that element:

1. No one, including Olsen, had any belief, or any reason to believe, that there was

[26] *See* Defendants Olsen, Purvis, and Salt Lake City Corporation's Reply Memorandum in Support of Motion for Summary Judgment (DKT No. 51), at 40–41.

any connection or association between (1) Kendall's residence generally, or his backyard specifically, and (2) K.H. or any of the circumstances surrounding the perceived fact that he was missing. Rather, the *only* justification provided by any officer of the SLCPD for warrantless and non-consensual entries upon and searches of private properties, including Kendall's backyard, was that the properties were within a distance from the Horman house within which K.H. was thought to be able to walk, and the properties might have been accessible to K.H. Olsen Depo., 12:14–25,[27] 13:14–25, 44:18–45:5, 53:17–24, 72:19–

[27] Q: So even **if somebody's missing, like a child from a family home, unless it was known that the child had a habit of going to a house two doors away or there was some evidence of the child going to that house, you wouldn't be able to just walk in that house without a warrant or consent and search the home, would you?**
Ms. Slark: Objection. Calls for speculation.
A: I would need to – **first of all, there would have to be some type of a connection, and then there would have to be exigency.**

* * *

Q: Okay. **You would have to have at least some reasonable cause, other than simply proximity to the home where the boy is missing, in order to conduct the search of a home two doors away?**
A: Yes.
Q: And the same would be true for the curtilage around the home, correct?
A: Yes.
Q: And you've been aware that that's the legal requirement since your second POST training?
A: I've known about that since my first POST training.
Olsen Depo., 12:14–25, 13:14–25 (emphasis added).

73:8,[28] 75:1–76:24,[29] 79:6–80:16,[30] 89:9–14, 90:4–16,[31] 119:18–120:3,[32]

---

[28] Q: And then that home is about an eighth of a mile from the home on Filmore where this supposedly missing boy and his family lived, correct?
A: I don't know the distance. It was well within walking distance of the three-year-old.
Q: And **did you have any reason to believe that there was any specific connection between the Kendall home or the yard or garage close to the Kendall home and this supposedly missing boy and the circumstances surrounding his being missing?**
Ms. Slark: Objection. Asked and answered.
A: **Yes. I did. As I said, the house was well within walking distance of a three-year-old.**

Olsen Depo., 72:19–73:8.

[29] Q: Okay. And I asked you earlier **if you knew of any specific connection between that home or the yard and the missing boy or the circumstances surrounding the supposedly missing boy. Other than the spacial proximity of the home and the yard, did you know of any connection whatsoever between that house or yard and the missing boy or the circumstances surrounding him being missing?**
A: Just the accessibility and proximity. That's the only thing. I had no reason to believe that the occupants of this house were connected to them in any way.
Q: Or that there was any connection between the house or the property around it and the missing boy other than simply the location?
A: And accessibility, the ease of being able to get there.
Q: So in terms of whether there was any connection between that house and the adjoining property, **there was no more connection to this missing boy and the circumstances surrounding him apparently being missing than, say, the house across the street on Parkway; is that correct?**
A: Well, the crossing a busier road like that is a little bit less accessible, but, yeah, they're both – they can be very accessible and they're very approximate to the house.
Q: Do you know about how many homes there were from the one that you first searched on Filmore and going down on –
A: I think –
Q: -- on the west side of Filmore to Parkway?
A: I think there are five or six.
Q: And **was there any particular connection between the Kendall house and the adjoining yard, driveway, shed, whatever in that property, and the missing boy or the circumstances surrounding him being missing, that were any different than any connections between any of the homes from where you started all the way down to the Kendall home?**
A: No. They were all about the same length out.
Q: So it was simply that they were in the neighborhood, correct?
Ms. Slark: Objection. Asked and answered.
A: It was because they were well within walking distance of the three-year-old, and it was a very accessible and easy-to-get-to gate and property.

Olsen Depo., 75:1–76:24 (emphasis added).

[30] Q: All right. You had no knowledge as to who the occupants of the Kendall home were, correct?
A: No idea.
Q: And **nobody had given you any information that this supposedly missing boy had ever gone to that home, correct?**
A: I – the only indication that I received about the boy going anywhere was possibly to a relative's or they said that they had –
Q: Right next door? [Next door to the Horman home on Filmore Street. Olsen Depo., 49:15–51:10.]
A: I believe it was right next-door. It was – I guess the boy had gone over there before or something.
Q: Ok. So I'm going to ask it again just to get a direct response.
A: That's fine.
Q: **You had no information whatsoever that that boy had ever gone to the Kendall home or the yard around the Kendall home, correct?**
A: No.
Q: That is correct, correct?
A: That's correct.
Q: And other than that home being within what you thought was walking distance of the three-year-old given the time that had elapsed at that point, **you knew of no connection whatsoever between the Kendall home or the yard around it and the missing boy or the circumstances surrounding him being missing?**
Ms. Slark: Objection. You've asked that question 15 times. He's answered it 15 times. Asked and answered.
Q: **Is that correct?**
A: Again, other than the proximity and the ease and the accessibility of that backyard, no.
Q: So it is correct?
A: Correct.

Olsen Depo., 79:6–80:16 (emphasis added).

[31] Q: So, **in your view, any property that's accessible and within the range of what you think a three-year-old boy could walk to, given the elapsed time, is fair game for a search by a police officer?**
A: Provided he could get to it and it was very accessible, yes.
Q: And it's the accessibility and the spacial proximity that constitute the sole cause that you would have for searching that property?
A: And the fact that I could not call out for him. He is a – he was inaudible. It was reported to be that he could not communicate so you actually had to look. You couldn't just call for him.

Olsen Depo., 90: 4–16 (emphasis added).

[32] Q: You opened up the door to the shed in the backyard, right?
A: Yes.
Q: **And you felt you were entitled to do that without consent or a warrant?**
A: Yes.

153:12–22; Deposition of Brian Purvis ("Purvis Depo."), excerpts of which are Exhibit "9" to Anderson Decl., 55:5–56:18,[33] 79:12–80:4;[34] Worsencroft

---

Q: And without cause for believing there was any connection between that shed and the young boy missing, other than the fact of spacial proximity and access?
A: Yes.

Olsen Depo., 119:18–120:3 (emphasis added).

[33] Q: Did you understand, as the Watch Commander, when all this was happening, that there was any specific connection between Sean Kendall's home or the surrounding backyard and the perceived emergency?

A: Yes. Um, the rings of the tree, um, if you – the time frame that we were dealing with, even a small child can travel a considerable distance in that time frame. If we've checked from ring C inward, just analogy, but if we've checked from ring C inward, now our most likely location for the child is the ring D inward.

If it's been five minutes, that's probably not a reasonable conclusion to draw, but I've been on these kinds of cases where a child's gone considerable distances, one from the "This is the Place" State Park across from the zoo was found behind the University of Utah. It was an autistic child. But the connection is that this child was known to be right here 45 minutes ago and now he's not. We've checked the possibility of the neighboring house. He's not there. We've checked the second most likely possibility which is the neighbor's yard, maybe somebody had a puppy, those kinds of things. Now, well, maybe this child beelined. We've got to speed up and start checking those outer rings of that tree, and that's the connection.

If you're entering D and we just checked ring C and we know the child's not from there into the middle, the next most likely place is that he's the next ring outward. That's why we checked that.

Q: So, **other than the location of the home, there was no connection that you know of between that property and the perceived emergency?**
A: No. I don't personally know anything about that property.
Q: **Did you know of any particular connection between any home in the neighborhood other than the one next-door and the perceived emergency?**
A: No.

Purvis Depo., 55:5–56:18 (emphasis added).

[34] Q: Okay. And in the instance of this young missing boy and the shooting of Geist, you know that no one saw a young boy going into the backyard of Sean Kendall's home, correct?

A: No, not that I know of.
Q: You were never told that?
A: No.
Q: And nobody found any of the young boy's toys or clothing in the area of Sean Kendall's home?
A: No.
Q: And no one heard the young boy in the backyard?
A: No.

Depo., 66:6–12,[35] 66:25–68:6,[36] 84:4–85:16;[37] Deposition of Christopher

---

Q: In fact, **there was no connection whatsoever between Sean Kendall's home and the backyard and the perceived emergency, other than the fact that that home was located about an eighth of a mile from the Filmore home.**
A: Correct.

Purvis Depo., 79:12–80:4 (emphasis added).

[35] Q: **Was there, to your knowledge, any connection or any nexus between the fact that there was perceived to be a missing boy and any of the homes or yards or streets in that area?**
A: No.
Q: Or anywhere else?
A: No.

Worsencroft Depo., 66:6–12 (emphasis added).

[36] Q: So the whole purpose of the search for any of these properties was to just see if the boy had wandered there or had been taken by somebody that may have abducted him?
A: Correct. Yes.
Q: And **there was no way to know whether the boy maybe had been put in a car and driven away 10 miles by then?**
A: Right. No way to know.
Q: **Did you have reason to believe that there was any connection or nexus between the Kendall residence or the yard in which Geist was shot and the missing – the supposedly missing boy?**
Ms. Slark: The same objection as previously.
A: No.
Q: So, to your knowledge, **you and Officer Olsen were looking around that property for the same reason you were looking around any other properties?**
A: Yes.
Q: Nothing in particular about that particular property?
A: No.
Q: And I'll ask – I'll make that a complete question so it's clear for the record. **There was nothing specific about the Kendall home or the backyard where Geist was shot and the belief that there was a missing boy?**
A: No.
Q: No connection at all?
A: No connection.

Worsencroft Depo., 66:25–68:6 (emphasis added).

[37] Q: And to be able to search a property and trying to find the boy –
A: Right.
Q: -- or to find out information about where the boy might be or to stop any harm from befalling that boy, isn't it the policy of the Salt Lake City Police Department that there be some reason to believe there's a connection between the property to be searched and that perceived emergency circumstance?
A: From what I'm reading right here, which is the policy from the Salt Lake City Police Department, I don't see that connection. I mean, obviously, there is, like you said, exigent

Johnson ("Johnson Depo."), excerpts of which are Exhibit "10" to Anderson Decl., 20:3–21:17;[38] Deposition of Charles Thomas Edmundson ("Edmundson Depo."), excerpts of which are Exhibit "11" to Anderson Decl., 36:13–49:25, 53:23–54:7, 55:8–56:22.[39]

---

circumstance, you have that emergency situation to find that kid, but I don't see where it's – that connection is as far as it has to be attached to – and I think, **being that it's in his neighborhood, that would be within that realm of, okay, the kid's probably – it could be here so that's why we checked those houses** in that neighborhood.

Q: So how far does that go?

A: I don't know. It depends on what information is developed, you know, as the investigation goes on, things can change, obviously. We could get – given information that completely shuts down the theory that he could even be in the neighborhood, that maybe someone saw him get in a car, and, you know, now that's gone two different directions so it just depends.

I mean, it's really up to what's developing and what happens in that situation. Up to this point **we had nothing to say that he – he wasn't, you know, not in the neighborhood**, that he didn't just open the front door and, you know, wander off so I don't know. **I mean, it's – it's all speculation. I mean, it could be anything.**

Q: It was speculation, wasn't it?

A: It could be anything, but we – one thing we were certain is a child's missing.

Worsencroft Depo., 84:4–85:16 (emphasis added).

[38] Q: **Had you been provided any evidence that the supposedly missing boy had any connection at all to Sean Kendall's residence?**

A: No.

Q: You know now where Sean Kendall's residence is, right?

A: I know where it is, yeah, right.

Q: **Did you ever hear or have any understanding that there was any connection between the young boy or the circumstances of him supposedly being missing and the enclosed backyard at Sean Kendall's residence?**

A: I didn't know of any at the time.

Q: Do you know of any now?

A: No.

Johnson Depo., 20:3–16.

[39] Q: I'm asking, given your training, are you aware of what the law provides in terms of the privacy protections –

A: Sure.

Q: -- for the curtilage around a house as compared to the house itself?

A: Yes.

Q: And what's your understanding?

A: That it's – it just has the same thing as being part of the house.

Q: So if you can walk into a backyard, you could walk in the front door without a warrant –

A: Yes.

Edmundson Depo., 38:11–23.

Q: When you walked into any of those backyards, **did you have reason to believe there was a connection between those properties, specific properties, and the missing boy or the fact that there was a supposedly missing boy?**

A: That – yes. I believe there could have been a connection between the missing boy and that he could have been in one of those properties.

Q: But I'm talking about a connection between the specific property.

A: Well, connected –

Q: Did you connect the distinction between any of the particular properties? Did you have any knowledge that the boy had been there –

A: No.

Q: -- or had a habit of going there?

A: No.

Q: Did you know if there was any evidence that he was there?

A: No.

Q: Just simply that they were in the area?

A: Yes.

Q: That was the only connection?

A: Yes.

Edmundson Depo., 45:25–46:23 (emphasis added).

Q: So you've trained to be careful to make sure that wherever you search, you better make sure that it's a lawful search or evidence might not be admissible?

A: Yes.

Q: But you didn't have that concern when you were looking for this boy because you didn't think that somebody else was involved. You just thought it was a boy that had wandered away?

A: Yes.

Q: And based on your knowledge and training today, if you thought that there might have been some criminal act, would you have had different concerns about entering a backyard without a warrant and without permission?

Ms. Slark: Objection. Calls for speculation.

A: Yes.

Q: And why would you have that concern?

A: Because there – possibly a crime's been committed.

Q: And so without a warrant and without permission the evidence may not be admissible?

A: That's correct.

Q: But you also understand, given your training and expertise, that **if you had some reason to believe that there was a particular connection between the property to be searched and potential imminent harm to someone that then you could enter that property –**

A: Yes.

Q: -- without a warrant and without consent?

A: Yes.

C. The Elements Required to Establish That Olsen's Seizure of Geist Violated the Fourth Amendment

1. Kendall Must Show Geist Was an "Effect" Subject to the Protection of the Fourth Amendment.

> The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and *effects*, against unreasonable searches and seizures." . . . In the ordinary case, the Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized.

U.S. v. Place, 462 696, 700–701 (1983) (emphasis in original).

> The term "effects" in the Fourth Amendment has been treated by the United States Supreme Court "as being synonymous with personal property."

Altman v. City of High Point, 330 F.3d 194, 202 (4th Cir. 2003) (cited by *Moore v. Town of Erie*, No. 12-cv-02497, 2013 WL 3786646, at *2 (D. Colo. July 19, 2013).

> [E]very circuit that has visited the issue has uniformly concluded that dogs are effects subject to the protection of the Fourth Amendment.

Moore v. Town of Erie, supra, at *2.

> Killing a dog meaningfully and permanently interferes with the owner's possessory interest. It therefore constitutes a violation of the owner's Fourth Amendment rights absent a warrant or some exception to the warrant requirement.

Mayfield v. Bethards, 826 F.3d 1252, 1256 (10th Cir. 2016).

Undisputed facts demonstrating that Kendall has met that element:

1. Geist belonged to Kendall. Counterclaim (DKT No. 4), ¶¶ 6, 15, 18, 23. *See also* facts set forth in paragraphs 2–8 below.

> **Q: But you didn't have that kind of connection in mind –**
> **A: No.**
> **Q: -- between the properties and this supposedly emergency situation at the time you entered those yards?**
> **A: That's correct.**

Edmundson Depo., 55:8–56:22 (emphasis added).

2. Kendall purchased Geist, a male, full-bred Wiemaraner dog, in 2012 for $500 and owned him from that date until Geist's death as a result of being shot by Brett Olsen on June 18, 2014. Declaration of Sean Kendall, dated November 17, 2016 ("Kendall Decl. II"), Exhibit "G" hereto, ¶¶ 2–3.
3. Geist was registered through the American Kennel Club. Kendall is shown on the registration papers as being Geist's owner. *Id.*, ¶ 3.
4. Geist was Kendall's only companion animal and Kendall was Geist's only owner during the entire time Geist was alive from the date Kendall purchased Geist. Kendall considered Geist to be his best friend. *Id.*, ¶ 4.
5. Geist and Kendall were very close. Geist slept in Kendall's room every night, with a dog bed at the foot of Kendall's bed. They spent a lot of time together almost every day and hiked, walked, played, went to Tanner Dog Park, kayaked, and just hung out together. *Id.*, ¶¶ 5–6.
6. Kendall cared for Geist on a daily basis and arranged for Geist's care if Kendall was going to be out of town. Kendall was the sole person responsible for Geist's care on a daily basis for several years. *Id.*, ¶¶ 7–8.
7. Geist lived with Kendall in Kendall's homes and, on the date he was killed by Olsen, and for about ten months prior to that, Geist and Kendall lived together at 2465 South 1500 East. *Id.*, ¶ 9.
8. An important factor in Kendall deciding to live at the 1500 East residence was how conducive it was for Geist to live there, including the fact that it had a private, safe, enclosed backyard in which Geist would be able to spend much

of his time. Kendall built a custom, heated dog house for Geist in that backyard.

Id., ¶ 10.

2. Kendall Must Show Geist Was "Seized," within the Meaning of the Fourth Amendment, When Olsen Killed Geist.

A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property.

United States v. Jacobsen, 466 U.S. 109, 113 (1984).

To show that Geist was killed by Olsen is sufficient to demonstrate that Geist was "seized."

Mayfield v. Bethards, 826 F.3d at 1256 (10th Cir. 2016).

Undisputed facts demonstrating that Kendall has met that element:

1. While in Kendall's backyard, Olsen, acting in his role as a SLCPD police officer, shot and killed Kendall's companion animal, Geist. Defendants' Answer (DKT No. 4), ¶¶ 3, 5, 13, 14, 74; Olsen Depo., Exhibit 1, 87:4–18, 91:1–3, 94:3–11, 97:10–23, 98:8–17, 101:3–4, 108:22–109:3, 112:3–6.

3. Kendall must show that the seizure of Geist was unreasonable, including that (a) there was no warrant for the seizure, (b) there was no consent, and (c) there were no exigent circumstances justifying the warrantless seizure that were not created by Olsen.

"Seizure" alone is not enough for § 1983 liability; the seizure must be "unreasonable."

Brower v. County of Inyo, 489 U.S. 593, 599 (1989).

> "It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 455 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (internal quotation marks omitted); *United States v. Martinez*, 643 F.3d 1292, 1295 (10th Cir. 2011). "It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.'" *Coolidge v. New Hampshire*, 403 U.S. 445, 474–75, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (plurality opinion); . . .

McInerney v. King, 791 F.3d 1224, 1231 (10th Cir. 2015).

> The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.

Brigham City, Utah v. Stuart, 547 U.S. at 403.

> [I]t is unlawful to seize a dog absent a warrant or circumstances justifying an exception to the warrant requirement.

Mayfield v. Bethards, 826 F.3d at 1256.

> "[T]he 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." *Viilo* [*v. Eyre*,] 547 F.3d [707,] 710 [(7th Cir. 2008)]; . . .

Robinson v. Pezzat, 818 F.3d 1, 7 (D.C. Cir. 2016).

> "[L]aw enforcement officers may not 'create' the exigency justifying their intrusion into a home." *United States v. Martin*, 613 F.3d 1295 1304 (10th Cir. 2010); *United States v. Bonitz*, 826 F.2d 954, 957 (10th Cir. 1987) (holding no exigent circumstances existed where "the only immediate danger that existed was created by the officers themselves when they entered the secure area and began to handle these materials"); . . .

McInerney v. King, 791 F.3d at 1235.

A warrantless seizure may be justified by exigent circumstances only if the exigency was not created by the police officer. *Kentucky v. King*, 563 U.S. 452, 469 (2011) ("[T]he exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment.").

Undisputed facts demonstrating that Kendall has met that element:

1. Olsen gained entry to Kendall's backyard by means of a clear violation of the Fourth Amendment and, by doing so, he caused the "exigent circumstances" claimed by him (i.e. Geist's behavior following Olsen's entry into, and search of, Kendall and Geist's backyard). The specific facts and citations thereto are set forth in III. B. above (pages 11–14, 16–22, *supra*).

D. The Elements Required for Kendall to Defeat Olsen's Claim of Qualified Immunity

1. Kendall must show that Olsen's conduct violated a constitutional right. *Courtney v. Oklahoma ex. rel., Dept. of Public Safety*, 722 F.3d 1216, 1222 (10th Cir. 2013).

Undisputed facts demonstrating that Kendall has met that element:

The facts demonstrating that Kendall's constitutional rights to be free from an unreasonable search and unreasonable seizure were violated by Olsen are set forth in III. B. and C. above (pages 11–14, 16–22, 24–26, *supra*).

2. Kendall must show that the constitutional rights violated by Olsen were clearly established. *Courtney v. Oklahoma ex. rel., Dept. of Public Safety*, 722 F.3d at 1222.

> The law is clearly established when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as plaintiff maintains.

Roska v. Peterson, 328 F.3d 1230, 1248 (10th Cir. 2003).

Undisputed facts demonstrating that Kendall has met that element relating to Olsen's *search* of the curtilage to Kendall's home:

1. In connection with Olsen's search of Kendall's backyard, the controlling law in the Tenth Circuit at the time was, and continues to be, as follows:

> It is well-settled an individual has a reasonable expectation of privacy in the interior of one's home and its curtilage. *Kyllo v. United States*, 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001); *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984); *see also [United States v.] Hatfield*, 333 F.3d [1189,] at 1196 ("[P]rivacy in the interior of a home and its curtilage are at the core of what the Fourth Amendment protects….").

Reeves v. Churchich, 484 F.3d 1244, 1254 (10th Cir. 2007).

> It is well settled that the Fourth Amendment's protection extends beyond the sphere of criminal investigations. *Camara v. Municipal Court of City and*

> *County of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.2d.2d 930 (1967). "The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government," without regard to whether the government actor is investigating crime or performing another function. *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 613–614, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).

Ontario v. Quon, 560 U.S. 746, 755–756 (2010).

> When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *United States v. Jones*, 565 U.S. ---- , ----, n.3, 132 S.Ct. 945, 950–951, n.3, 181 L.3d.2d 911 (2012).
>
> * * *
>
> The Fourth Amendment "indicates with some precision the places and things encompassed by its protection": persons, houses, papers, and effects. *Oliver v. United States*, 466 U.S. 170, 176, 104 S.Ct. 1735, 80 L.2d 214 (1984).
>
> * * *
>
> [W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961).
>
> * * *
>
> We therefore regard the area "immediately surrounding and associated with the home"—what we call the curtilage—as "part of the home itself for Fourth Amendment purposes." *Oliver, supra*, at 180, 104 S.Ct. 1735.
>
> * * *
>
> This area around the home is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened." *California v. Ciraolo*, 476 U.S. 207, 213, 106 S.Ct.1809, 90 L.Ed.2d 210 (1986).

Florida v. Jardines, 133 S.Ct. 1409, 1414–15 (2013).

> The **critical element in a reasonable search is . . . that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought**.

Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978) (emphasis added).

> [O]ur test [for a warrantless search where circumstances pose a significant risk to the safety of an officer or third party] is now two-fold, whether (1) the officers have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others, and (2) the manner and scope of the search is reasonable (a modification of our former third prong).

United States v. Najar, 451 F.3d 710, 718 (10th Cir. 2006). (The Court in *Najar* noted that "Sgt. Brown did not attempt to search **any place beyond the locations where a victim might likely be found.** The officers confined the search to only those places inside the home **where an emergency would reasonably be associated.**" 451 F.3d at 720 (emphasis added).)

> To satisfy the first prong of the *Najar* test, the government must show the officers reasonably believed a **person inside the home** was in immediate need of aid or protection. . . . The government must also show that the manner and scope of the search was reasonable. [Citation omitted.] To satisfy this requirement, the government must show the officers "confined the **search to only those places inside the home where an emergency would reasonably be associated**." [Citation omitted.]

United States v. Gambino-Zavala, 539 F.3d at 1225–26 (emphasis added).

2. Several Defendants and other officers testified they were aware that before they could search private property without a warrant, based on exigent circumstances, they must have an objectively reasonable belief, or good cause for believing, that there was a connection between the property to be searched and the emergency giving rise to the need for a search. Olsen Depo., 11:4–13:25, 44:18–45:5, 53:17–24;[40] Davis Depo.,

---

[40] Q: All right. And is your understanding, given all your training, that under the law the curtilage of a home has the same warrant requirements and privacy interests that the home itself has?
A: Yes.
Q: So is it your understanding, given your training in this area over the years that when searching for a person, **even if there's not understood to be any particular connection between a home and the missing person or the circumstances surrounding the person being missing, that you could simply walk in the front door of a home without consent, without a warrant, and go through drawers, closets, and search the inside of the home without a warrant or consent?**
Ms. Slark: Objection. Calls for speculation.
A: **No**.
Q: You wouldn't be able to do that?
A: Well, you asked if it's my belief that if there is no connection that I can just go how I would and search through any home. No, I don't believe that.
Q: **So even if somebody's missing, like a child from a family home, unless it was known that the child had a habit of going to a house two doors away or there was some**

9:16–11:3;[41] Deposition of George Stephen Pregman ("Pregman Depo."), excerpts of

---

evidence of the child going to that house, you wouldn't be able to just walk in that house without a warrant or consent and search the home, would you?
Ms. Slark: Objection. Calls for speculation.
A: **I would need to – first of all, there would have to be some type of a connection**, and then there would have to be exigency.
Q: Okay. And the exigency doesn't go to the cause. It goes to the fact that time is of the essence and you simply can't get a warrant?
A: Correct.
Q: But the cause requirement's still there that would justify obtaining a warrant?
Ms. Slark: Objection. Calls for a legal conclusion.
A: You're saying I would have to have a actual probable cause to just – restate how you're saying it because I got a little –
Q: Okay. **You would have to have at least some reasonable cause, other than simply proximity to the home where the boy is missing, in order to conduct the search of a home two doors away?**
A: **Yes.**
Q: And **the same would be true for the curtilage** around the home, correct?
A: **Yes.**
Q: And you've been aware that that's the legal requirement since your second POST training?
A: I've known about that since my first POST training.

Olsen Depo., 11:17–13:25.

Q: **Did you learn that even in the case of a search for a missing person that if you didn't have reasonable cause to believe that there was a connection between the specific property to be searched and the missing person or the circumstances around the person being missing, and you went onto the property and found evidence of a crime, that that evidence would be excluded?**
Ms. Slark: Objection. Calls for speculation.
A: **I understand that,** but I wasn't concerned about evidence of a crime. We weren't looking for evidence of a crime.

Olsen Depo., 44:18–45:5.

Q: But **if there wasn't any specific connection between homes or yards to be searched, even in the case of a missing child, an officer wouldn't just be able to engage in a search there without a warrant or consent; isn't that right?**
Ms. Slark: Objection. Calls for speculation. Objection. Asked and answered.
A: **Correct.**

Olsen Depo., 53:17–24 (emphasis added).

[41] Q: And did you also learn during your initial and ongoing training that in that latter instance **where there was perceived risk of serious harm to either an officer or somebody else that there must be reason to believe that there was a connection or a nexus between that specific property to be searched and the perceived danger or risk of harm?**
A: Let me make sure I understand you correctly, sir.
Q: Okay.

which are Exhibit "12" to Anderson Decl., 33:21–34:18; 35:2–36:15.[42]

A: You're saying that in these circumstances you've talked about there has to be a connection between them and the property, the specific property that you're entering?
Q: Yes. Let me give you an example.
A: Okay.
Q: You remember the Elizabeth Smart kidnapping?
A: Yes.
Q: There was certainly a pervasive fear that Elizabeth Smart was at serious risk of harm after being kidnapped.
A: Correct.
Q: **Even though there was a serious risk of harm, you wouldn't have been able to go 10 miles away and search every home in that area unless you knew that each property to be searched had some connection to either Elizabeth or facts relating to her kidnapping, correct?**
A: **Correct.**
Q: **So it's not just the fact of harm. It's the connection between the specific property and the perceived risk of harm that's required in order to search that property without a warrant?**
A: **I believe so.**
Q: And that's what you've learned from you initial training and ever since then your continued training, correct?
A: Yes.

Davis Depo., 9:16–11:3 (emphasis added).

[42] Q: And that statement is consistent with what you just testified to, is it not, that your understanding was that if you weren't entitled to enter a home without consent or a warrant, you weren't allowed to walk through a gate into an adjoining backyard?
A: Yes, that's correct.
Q: And that's always been part of your training as a police officer?
A: Yes.
Q: So you knew that, as you were searching for this young boy, you could look from where you were entitled to be –
A: Yes.
Q: -- to see if he was around, but **you weren't entitled to go over and open a gate and walk through a backyard without consent or a warrant?**
A: **Yes. I understand that.**
Q: And why is that?
A: Why I understand it or –
Q: No. Why – what's the reason?
A: Well, **people have a expectation of privacy, and people do things to protect their property from warrantless searches.**

Pregman Depo., 33:21–34:18 (emphasis added).

Q: But if you're going to open a gate and go into the curtilage, **under the circumstances we've talked about with this supposedly missing boy, you were trained and knew that**

Undisputed facts demonstrating that Kendall has met that element relating to Olsen's *seizure* (*i.e.*, killing) of Geist.

1. In connection with Olsen's seizure of Geist, the clearly established, controlling law in the Tenth Circuit at the time was, and continues to be, as follows:

> [T]he Court has recognized, as "a 'basic principle of Fourth Amendment law[,]' that searches and **seizures inside a home without a warrant are presumptively unreasonable.**"

Welsh v. Wisconsin, 466 U.S. 740, 748–49 (1984) (emphasis added) (citations omitted).

> Animals, including dogs, constitute personal property protected by the Fourth Amendment.

Mayfield v. Bethards, 826 F.3d at 1259.

> [K]illing a pet dog is a Fourth Amendment seizure.

Id. at 1259.

> [When a police officer seized a person's] personal property by killing their pet dog . . . in 2014, it was clear his actions would violate the Fourth Amendment absent a warrant 'particularly describing the . . . things to be seized," U.S. Const. amend. IV, or circumstances justifying an exception to the warrant requirement . . .

Id. at 1259.

> Exigent circumstances in an emergency situation exist when: (1) the law enforcement officers have objectively reasonable grounds to believe that there is an immediate need to protect their lives or others, and (2) "the manner and scope of the search is reasonable." *United States v. Najar*, 451 F.3d 710, 718 (10th Cir. 2006); *see also United States v. Huffman*, 461 F.3d 777, 783 (6th Cir. 2006) (in relying upon the "risk-of-danger" exception to the warrant requirement, the government "must show that there was a risk of serious physical injury posed to the officers or others that required swift action.").

> **there must be some specific connection between that particular property and the perceived emergency –**
> A: **Right.**
> Q: **-- before you could go into that property without a warrant or consent?**
> A: **Right. I understand that.**

Pregman Depo., 36:6–15 (emphasis added).

Cortez v. McCauley, 478 F.3d 1108, 1123–24 (10th Cir. 2007).

> First, "law enforcement officers may not 'create' the exigency justifying their intrusion into a home." *"United States v. Martin*, 613 F.3d 1295, 1304 (10th Cir. 2010); *United States v. Bonitz*, 826 F. 94, 957 (10th Cir. 1987) (holding no exigent circumstances existed where "the only immediate danger that existed was created by the officers themselves when they entered the secure area and began to handle these materials"); *see also United States v. Chambers*, 395 F.3d 563, 566 (6th Cir. 2005) ("[F]or a warrantless search to stand, law enforcement officers must be responding to an anticipated exigency rather than simply creating the exigency for themselves."), *overruled on other grounds by Kentucky v. King*, 563 U.S. 452, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011).

McInerney v. King, 791 F.3d 1224, 1235 (10th Cir. 2015).

2. SLCPD police officers knew that Olsen was lawfully entitled to enter Kendall's enclosed backyard only if he reasonably believed, or had good cause to believe, that there was a connection between Kendall's backyard and the missing boy or the circumstances of him being missing. III. D. 2, pages 29–32, *supra*.

ARGUMENT

The evidentiary record is uncontested as to dispositive facts relating to (1) the liability of Olsen for unconstitutionally entering and searching Kendall's backyard; (2) the liability of Olsen for unconstitutionally killing (*i.e.*, seizing) Geist; and (3) the absence of a qualified immunity defense for Olsen's violations of the clearly established constitutional rights of Kendall. Therefore, summary judgment should be entered as to those matters in favor of Kendall and against Olsen.

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[43] Here, Kendall has "show[n] that there is an absence of evidence to support [Olsen's] case,"[44] and, since Olsen cannot "set forth specific facts showing that there is a genuine issue for trial" as to the matters at issue in Kendall's Motion for Summary Judgment,[45] summary judgment should be entered in favor of Kendall and against Olsen as to Olsen's liability for his unconstitutional search and seizure and as to Olsen's assertion of a defense based on qualified immunity.

Olsen cannot show that he believed, or had reasonable cause to believe, that there was any connection between Kendall's backyard and the missing boy. Neither can Olsen contest the fact that his unconstitutional search of Kendall's backyard led to any circumstances, if there were any, upon which he might otherwise rely for seizing Geist without a warrant. Finally, it is indisputable that the law in the Tenth Circuit—and, indeed, across the nation—was clearly established that (1) if one is relying upon the emergency aid exception to the warrant requirement, he/she must demonstrate reasonable cause for believing a person in need of aid or protection was on the

[43] Fed.R.Civ.P. 56(a).
[44] *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991).
[45] *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990).

premises to be searched and there was a connection between the place to be searched and the emergency giving rise to the search, (2) a constitutional seizure by a police officer requires either a warrant or exigent circumstances justifying the absence of a warrant, and (3) a police officer may not justify a warrantless seizure by creating purported exigent circumstances through a violation of the Fourth Amendment in arriving at the place where the purported exigency occurred.

I. AS A MATTER OF LAW, OLSEN IS LIABLE TO KENDALL FOR HIS UNCONSTITUTIONAL SEARCH OF KENDALL'S BACKYARD.

The Fourth Amendment to the United States Constitution protects the right of privacy in our "persons, houses, papers, and effects." With extremely limited exceptions, for government agents to engage in searches of private homes (including curtilages), they must first obtain a warrant issued by an independent magistrate or obtain consent for the search. Under the Fourth Amendment, searches conducted without warrants "are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions."[46] "One such exception to the warrant requirement recognized by the United States Supreme Court is exigent circumstances."[47]

In contempt of that fundamental privacy protection, Olsen entered Kendall's backyard, walked around the yard, opened and searched a shed, then ruthlessly and unnecessarily killed Geist—all without a warrant, without consent, and without any reasonable cause to believe the missing boy was there or that there was any connection between Kendall's backyard and the emergency that gave rise to the perceived need for the search, all in violation of the Fourth Amendment of the United States Constitution.

[46] *Katz v. United States*, 389 U.S. 347, 357 (1967).
[47] *Mincey v. Arizona*, 437 U.S. 385, 390 (1978).

A. The Entry onto and Search of the Curtilage of Kendall's Home Was a "Search" Within the Meaning of the Fourth Amendment of the United States Constitution.

The most basic "simple baseline"[48] test for what constitutes a "search" within the meaning of the Fourth Amendment is based on the concept of trespass, particularly the intrusion upon the places and things listed in the Fourth Amendment: persons, houses, papers, and effects. "For most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates."[49] "Where . . . the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred."[50] Although that test was expanded by *Katz v. United States,*[51] broadening Fourth Amendment protections to other areas where there is an expectation of privacy, it did not alter the fundamental protection of "persons, houses, papers, and effects" against unreasonable searches and seizures. "[T]hough *Katz* may add to the baseline, it does not subtract anything from the Amendment's protections 'when the Government *does* engage in [a] physical intrusion of a constitutionally protected area.'"[52] "The *Katz* reasonable-expectation-of-privacy test has been *added to,* not *substituted for,* the common-law trespassory test."[53]

Stressing the fundamental right of people to be left alone in their homes, including the curtilages of their residences, the Supreme Court has noted the following principles:

---

[48] *Florida v. Jardines,* 133 S.Ct. at 1414.
[49] *United States v. Jones,* 132 S.Ct. 945, 950 (2012).
[50] *United States v. Jones,* 132 S.Ct. at 950–951, n. 3. "[A]n attempt to find something or to obtain information" qualifies as a search if done during the course of a trespass. *Id.* at 951 n.5.
[51] 389 U.S. 347 (1967)
[52] *Florida v. Jardines,* 133 S.Ct. at 1414 (quoting *United States v. Knotts,* 460 U.S. 276, 286 (1983) (Brennan, J., concurring in the judgment)).
[53] *United States v. Jones,* 132 S.Ct., at 952 (emphasis in original).

> [W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'[54]
>
> We therefore regard the area "immediately surrounding and associated with the home"—what our cases call the curtilage—as "part of the home itself for Fourth Amendment purposes."[55]
>
> This area around the home is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened."[56]

Even if a resident of a home searched by police were required to demonstrate a "legitimate expectation of privacy in the premises searched"[57] to be afforded the constitutional protections against unreasonable searches and seizures, Kendall has uncontrovertably demonstrated his obvious expectation of privacy in his home, including the curtilage.[58]

For purposes of determining if a search occurred by an agent of the government, the purpose of the search does not matter. It can be a search for evidence of a crime, for a suspect of a crime, to determine compliance with administrative requirements,[59] or a search for a missing person.[60] "It is well settled that the Fourth Amendment's protection extends beyond the sphere of criminal investigations."[61] "[T]he government's purpose in collecting information does not control whether the method of collection constitutes a search."[62]

---

[54] *Florida v. Jardines*, 133 S.Ct. at 1414 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961).
[55] *Id.* (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)).
[56] *Id.*, at 1415 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).
[57] *United States v. Jones*, 44 F.3d 860, 871 (10th Cir. 1995); *see also Illinois v. Caballes*, 543 U.S. 405, 409 (2005).
[58] Kendall Decl., ¶¶ 5–10.
[59] *Camara v. Municipal Court*, 387 U.S. 523 (1967).
[60] "The fourth amendment requirements . . . apply whether the officer conducting the search is looking for a missing person or for evidence of a crime." *State v. Beede*, 406 A.2d 125, 129 (N.H. 1979) (citing C*amara v. Municipal Court*, 387 U.S. 523, 528–29 (1967)); *State v. Slade*, 362 A.2d 194, 195 (N.H. 1976)). *See also State v. Yoder*, 935 P.2d 534 (Utah 1997).
[61] *Ontario v. Quon*, 560 U.S. at 755.
[62] *Grady v. North Carolina*, 135 S.Ct. 1368, 1371 (2015).

Defendants have contended that when Olsen entered through the gate of Kendall's property, walked around the private property, opened and searched the shed there, and then killed Geist, there was "not a Fourth Amendment search."[63] That curious argument is based entirely on a misreading of *Galindo v. Town of Silver City*.[64] In *Galindo* there were numerous signs of illegal activity and a likelihood that a minor who had been missing for hours was in the home being searched.[65] The decision clearly did not stand for the proposition that there was not a "Fourth Amendment 'search'" of the curtilage.

B. The Law Was Clearly Established That the Warrantless Search of the Curtilage of Kendall's Home Could Not Be Justified by Exigent Circumstances Because There Was No Cause to Believe the Missing Boy Was on the Premises or That There Was Any Association Between the Kendall Property and the Perceived Emergency.

Defendants have claimed that Olsen's entry into Kendall's backyard was justified by "exigent circumstances." At the core of those purported "exigent circumstances" is the understanding (albeit incorrect, due to the negligent search of the Horman house by police officers[66]) that a two- or three-year-old boy[67] was missing from a house about 1/8 of a mile from the Kendall residence.[68]

Under federal cases, "[g]enerally, a warrantless entry under the exigent-circumstances exception requires probable cause and exigent circumstances."[69] "The Tenth Circuit, however, appears to have recognized a subset of exigent-circumstances cases—what the Court refers to as

---

[63] Motion for Summary Judgment and Memorandum in Support (DKT No. 35), at 23.
[64] No. 03-2134, 2005 WL 762120, 127 F. App'x. 459 (10th Cir. April 5, 2005) (unpublished).
[65] *Id.* at 462–63.
[66] Note 4, *supra.*
[67] Note 3, *supra.*
[68] Kendall Decl., ¶ 12.
[69] *U.S. v. Christy*, 785 F.Supp.2d 1004, 1026 (D.N.M. 2011) (citing *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002); *Manzanares v. Higdon*, 575 F.3d 1135, 1142–43 (10th Cir. 2009)).

'emergency-aid' cases[70]—that do not require probable cause."[71] In those cases, "reasonable belief" that a person inside the premises to be searched is in need of aid or protection and "reasonable association" between the place to be searched and the emergency are required.[72]

Kendall concedes that, notwithstanding the sloppiness of the police search of the Horman home for the missing child, there were reasonable grounds for Olsen to believe there was an urgent situation: to his knowledge, a two- or three-year-old boy was missing from his home.

However, that is where any "reasonableness" ends in an analysis of what Olsen did.

The belief that there is an urgent circumstance, such as the need to find a missing toddler and make sure he is not in harm's way, is not the end of the analysis as to whether a search comports with the Fourth Amendment. Such a circumstance cannot justify, for instance, an indiscriminate search of any home, let alone all homes or curtilages in an area within as large a circumference from a missing boy's home as he might have traveled in the time he has been missing, as Olsen seems to think.[73]

---

[70] "Emergency-aid" is a variant of exigent circumstances. The situation here does not fall within the "community caretaking" exception to the Fourth Amendment. That exception applies only in cases involving automobile searches. *United States v. Maddox*, 388 F.3d 1356, 1366 n.5 (10th Cir. 2004) ("Our cases specifically limit this ["community caretaking"] doctrine to vehicle searches.") (citing *United States v. Thompson*, 354 F.3d 1197, 1200 n.1 (10th Cir. 2003); *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994)).

[71] *U.S. v. Christy*, 785 F.Supp.2d at 1026.

[72] *United States v. Najar*, No. CR 03-0735, 2004 WL 3426123, at *6 (D.N.M. Sept. 3, 2004) (Browning, J.), *aff'd*, 451 F.3d 710 (10th Cir. 2006) ("the police must be responding to a true emergency rather than a crime, and the police must *reasonably believe* a person inside needs immediate assistance, and entry is needed to protect or preserve life, or to avoid serious injury.") (Emphasis added.) *See also United States v. Gambino-Zavala*, 539 F.3d at 1225 ("[T]he government must show the officers *reasonably believed* a person inside the home was in immediate need of aid or protection") (emphasis added); *id* at 1226 ("[T]he government must show the officers 'confined the search to only those places inside the home where an emergency would *reasonably* be associated.'" (quoting *United States v. Najar*, 451 F.3d at 720)) (Emphasis added.).

[73] Olsen Depo., 90:4–16.

According to Olsen, any search of any home or curtilage (including enclosed yards) was fair game for a warrantless, non-consensual search as long as the property to be searched was within the distance the missing boy could have traveled and was accessible to him.[74]

Olsen had no reason to believe the missing boy was on the premises of Kendall's home or curtilage or that the properties to be searched, or actually searched (including Kendall's), had *anything* to do with the missing boy or the circumstances of his disappearance.[75] The homes and yards (many of them enclosed) were simply within the distance Olsen thought the boy could have wandered—and, to Olsen, that was sufficient.

As Defendants put it (using the word "confined" in an incredibly expansive sense): "Officers . . . confined their searches to places a three year old child could reasonably have wandered." Defendants' Memorandum at 27. Defendants have also made the point that "[a] child could easily reach the latches to any of the gates that lead to Kendall's backyard." *Id.* In other words, for as far away as the boy *could* have traveled and wherever he *might* have had access, any private property could be searched by the police without a warrant and without consent. Since "the possibility that he had been abducted was not ruled out," *id*. at 26, Defendants' logic and unique view of Fourth Amendment law would mean warrantless, non-consensual searches could constitutionally have been conducted by police anywhere an abductor *might* have traveled with the boy since he went missing and wherever the abductor *might* have gained access. Apparently no home or curtilage within the Wasatch Front, or perhaps beyond, would have been safe. That notion

---

[74] Q: So, in your view, any property that's accessible and within the range of what you think a three-year-old boy could walk to, given the elapsed time, is fair game for a search by a police officer?
A: Provided he could get to it and it was very accessible, yes.
Olsen Depo. 90:4–9.

[75] Olsen Depo., 72:24–73:11, 75:1–76:24, 79:6–80:16.

of virtually unbounded authority to enter into and search people's private homes and curtilages is what led to the flagrant violation by Olsen of Kendall's constitutional rights, with tragic consequences.

The law was, and continues to be, clearly established that much more than spatial proximity and access must be established before a police officer, without a warrant and without consent, can rummage around through people's homes whenever someone is missing. Regardless of what Olsen thought, it is not enough that a house is within reach of a missing boy or his possible abductor and possibly accessible to either of them.

The law requires that there must be reasonable cause to believe there is a connection between the property to be searched and the emergency giving rise to the need for a search. *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978) ("The critical element in a reasonable search is . . . that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."). In this case, there was no reason to believe K.H. was on the premises of Kendall's home or its curtilage and there was no connection, and no reason to believe there was a connection, between Kendall's property and the missing boy. None.[76]

The United States Supreme Court has made clear that the "emergency aid exception" to the warrant requirement of the Fourth Amendment requires "an objectively reasonable basis for believing" that "a person within [the house] is in need of immediate aid."[77] Noting that "the government bears the burden of proving the exigency exception to the warrant requirement

[76] Olsen Depo., 75:1–76:24, 79:6–14, 79:21–80:16, 89:9–14, 119:18–120:3, 153:12–22; Purvis Depo., 55:5–56:18, 79:24–80:4; Worsencroft Depo., 66:6–12, 66:25–67:15; Johnson Depo., 20:2–15.

[77] *Michigan v. Fisher*, 558 U.S. 45, 47 (2009) (*per curiam*).

applies," and that the "burden is especially heavy when the exception must justify the warrantless entry of a home,"[78] the United States Court of Appeals for the Tenth Circuit employs the following test for determining if non-criminal searches are reasonable: "[W]hether (1) the officers have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others, and (2) the manner and scope of the search is reasonable . . ."[79] In determining the second prong of that test was met in *Najar*, the Court noted that the officer "did not attempt to search any place beyond **the locations where a victim might likely be found**" and "[t]he officers confined the search to **only those places inside the home where an emergency would reasonably be associated**."[80]

Since at least 2008, the law has been clearly articulated by the United States Court of Appeals for the Tenth Circuit that, consistent with all the prior cases requiring at least reasonable cause to believe there is a connection between the property to be searched and the emergency creating the need for the search,[81] both prongs of the *Najar* test are met only if that nexus, which is so obviously missing in this case, is present:

---

[78] *United States v. Najar*, 451 F.3d 710, 717 (10th Cir. 2006). *See also Welsh v. Wisconsin*, 466 U.S. 740, 749–50 (1984).

[79] *United States v. Najar*, 451 F.3d 710, 718 (10th Cir. 2006).

[80] *Id.* at 720 (emphasis added).

[81] *See, e.g., United States v. Smith*, 797 F.2d 836, 840 (10th Cir. 1986) ("there must be some reasonable basis, approaching probable cause, to associate an emergency with the area or place to be searched.") The same requirement is found in Utah state decisional law:

> When a search is performed in an emergency situation, the area searched must have a close connection to the emergency. [*State v.*] *Yoder*, 935 P.2d [534,] 550 [(Utah Ct. App. 1997)] Specifically, there must be a nexus between the emergency situation and the area or place to be searched. *See id.* (noting defendant's behavior and demeanor and proximity of missing child's clothing to defendant's apartment justified search of defendant's apartment); *see* [*State v.*] *Prober*, 297 N.W.3d [297 N.W.2d 1] at 11 [(Wis. 1980), *rev'd in part on other grounds by State v. Weide*, 455 N.W.2d 899 (Wis. 1990)] (holding "emergency search may not extend to areas unrelated to the emergency.")

> To satisfy the first prong of the *Najar* test, the government *must* show the officers reasonably believed **a person inside the home** was in immediate need of aid or protection. *Najar, 451 F.3d at 718–19.*
>
> * * *
>
> The government must also show that the manner and scope of the search was reasonable. *Najar*, 451 F.3d at 718. To satisfy this requirement, **the government must show the officers "confined the search to only those places inside the home where an emergency would reasonably be associated.**" *Id.* at 720.[82]

II. OLSEN'S KILLING OF GEIST WAS AN UNCONSTITUTIONAL SEIZURE UNDER THE UNITED STATES CONSTITUTION FOR WHICH OLSEN CANNOT ESCAPE ACCOUNTABILITY BY MEANS OF QUALIFIED IMMUNITY.

A. The Law Was Clearly Established That the Killing of Geist Was a Seizure Within the Meaning of the Constitutional Protection Against Unreasonable Seizures

> "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property. *United States v. Jacobsen,* 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed. 2d 85 (1984). Killing a dog meaningfully and permanently interferes with the owner's possessory interest. It therefore constitutes a violation of the owner's Fourth Amendment rights absent a warrant or some exception to the warrant requirement.[83]

It has long been clearly established—well before June 18, 2014—that the killing of a dog is a "seizure" within the meaning of the Fourth Amendment. Not only had the U.S. Court of Appeals for the Tenth Circuit analyzed seizures of cattle and horses under the Fourth Amendment,[84] but "the clear weight of authority from other jurisdictions provided . . . adequate

---

Salt Lake City v. Davidson, 2000 UT App 12, ¶ 35, 994 P.2d 1283. *See also State v. Comer*, 2002 UT App 219, ¶ 17, n.7, 51 P.3d 55 ("The third prong of the emergency aid doctrine, on the other hand, "asks whether there was some reasonable basis to associate the place searched with the emergency." (quoting *Salt Lake City v. Davidson*, 2000 UT App 12, ¶ 15, 994 P.2d 1283)).

[82] *United States v. Gambino-Zavala*, 539 F.3d 1221, 1225–1226 (10th Cir. 2008) (emphasis added).

[83] *Mayfield v. Bethards*, 826 F.3d at 1256 (10th Cir. 2016).

[84] *See Campbell v. City of Spencer,* 682 F.3d 1278, 1280, 1285 (10th Cir. 2012); *Stanko v. Maher,* 419 F.3d 1107, 1112–15 (10th Cir. 2005); *DiCesare v. Stuart*, 12 F.3d 973, 977–78 (10th Cir. 1993).

notice that the [killing of a pet dog] implicated . . . Fourth Amendment rights." *Mayfield v. Bethards*, 826 F.3d at 1259.[85]

B. The Law Has Been Clearly Established That the Justification of Exigent Circumstances for Not Obtaining a Warrant for the Seizure of Geist Is Unavailing Because Olsen Created Any Exigency That May Have Existed.

Since Olsen did not have a warrant to seize Geist, he must be able to demonstrate "exigent circumstances" for the seizure to be constitutionally valid. Olsen, of course, now claims Geist was barking, growling, and running toward him, with his ears back and his teeth bared. Of course, a dog doing what dogs normally do under the circumstances, naturally and harmlessly, does not constitute an "exigent circumstance" justifying the killing of the dog. However, even if it did, Olsen cannot find refuge in such an "exigent circumstance" because his unconstitutional entry onto the curtilage of Kendall's home created the purported exigency.

At the time Olsen killed Geist, the law was clearly established that law enforcement officers cannot create the exigency they invoke to justify their Fourth Amendment search or seizure.[86] Here, Olsen's Fourth Amendment violation of entering and searching Kendall's backyard created the very situation he invokes as allowing him to shoot and kill Geist. Just as "it is . . . an essential

---

[85] Indeed, seven federal circuits had addressed the issue . . . , each holding that killing a pet dog is a Fourth Amendment seizure. *See Viilo v. Eyre*, 547 F.3d 707, 710 (7th Cir. 2008) ("Every circuit that has considered the issue has held that the killing of a companion dog constitutes a 'seizure' within the meaning of the Fourth Amendment."); *see also Carroll v. Cty. Of Monroe*, 712 F.3d 649, 651 (2d Cir. 2013); *Maldanado v. Fontanes*, 568 F.3d 263, 270–70 (1st Cir. 2009); *Andrews v. City of W. Branch*, 454 F.3d 914, 918 (8th Cir. 2006); *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9th Cir. 2005); *Altman v. City of High Point*, 330 F.3d 194, 203, 205 (4th Cir. 2003); *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 210 (3rd Cir. 2001).
Mayfield v. Bethards, 826 F.3d at 1259.

[86] *McInerney v. King*, 791 F.3d 1224, 1235 (10th Cir. 2015) ("law enforcement officers may not 'create' the exigency justifying their intrusion into a home.") (quoting *United States v. Martin*, 613 F.3d 1295, 1304 (10th Cir. 2010)).

predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed,"[87] so too it must be an essential predicate to the killing of Geist that Olsen did not, through unconstitutional means, place himself in the "danger" he claims as justification for the killing.

"Just as exigent circumstances are an exception to the warrant requirement, a police-manufactured exigency is an exception to an exception."[88] Here, Olsen manufactured the purported exigency (*i.e.*, Geist running toward him) by being where Olsen did not lawfully belong, which provoked Geist to react as he did with others who came into his yard.[89]

The law has long been well-established that one cannot unconstitutionally enter into an area, then utilize a risk of harm to oneself, which was created by wrongfully being in that area, as a justification for a warrantless seizure. *See United States v. Bonitz*, 826 F.2d 954, 957 (10th Cir. 1987) ("the only immediate danger that existed was created by the officers themselves when they entered the secure area and began to handle these materials").

CONCLUSION

Kendall is entitled to the entry of summary judgment as to Olsen's liability for his unconstitutional entry onto the curtilage of Kendall's home and Olsen's liability for his unconstitutional seizure of Kendall's dog Geist. Olsen's claim to a defense based on qualified immunity to escape legal accountability for his unconstitutional misconduct is unavailing because the law has been clearly established that (1) for the emergency-aid exception to the warrant

[87] *Horton v. California*, 496 U.S. 128, 136–140 (1990).
[88] *United States v. Rico* 51 F.3d 495, 502 (5th Cir. 1995).
[89] Declaration of Haley Bowen, Exhibit "G" to Plaintiff's Memorandum in Opposition (DKT No. 46, page 520, *et seq.*) (a copy of which is attached for convenience as Exhibit "H" hereto), ¶ 9 ("When guests came to our home, Geist would often initially bark loudly at and then run toward them. When he reached them, he was always friendly and harmless and never showed any aggression or threat of any harm whatsoever toward anyone."); Brooks Decl., ¶ 6.

requirement to justify a warrantless search by a police officer, there must be an objectively reasonable basis for believing that someone on the premises to be searched was in immediate need of aid or protection, and that such a search must be confined to only those places reasonably associated with the emergency giving rise to the need for a search; and (2) a warrantless seizure cannot be justified by the exigent circumstance that a police officer believed himself to be in danger when he unconstitutionally entered the place where he believed himself to be in danger, thereby creating the exigency himself.

There being no issue of fact concerning the absence of *any* belief—reasonable or otherwise—that someone in Kendall's backyard was in immediate need of aid or protection, and there being no issue of fact concerning the total lack of any association between the perceived emergency and Kendall's backyard and the shed searched by Olsen, Kendall is entitled to the entry of summary judgment as to Olsen's liability for his unconstitutional search of Kendall's backyard and shed.

Finally, there being no issue of fact concerning the lack of any exigent circumstances justifying the warrantless seizure of Geist that would not have occurred absent Olsen's unconstitutional entry into and search of Kendall's backyard, Kendall is entitled to the entry of summary judgment as to Olsen's liability for his unconstitutional seizure of Geist.

Respectfully submitted this 19th day November, 2016.

/s/ Ross C. Anderson
Ross C. Anderson
Attorney for Plaintiff/Counterclaim Defendant