

1 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH  
2 CENTRAL DIVISION

3  
4 SEAN KENDALL,

5 PLAINTIFF/COUNTERCLAIM

CASE NO. 2:15-CV-862

6 DEFENDANT,

7 VS.

8 BRETT OLSEN, BRIAN PURVIS,  
9 JOSEPH ALLEN EVERETT, TOM  
EDMUNDSON, GEORGE S. PREGMAN,  
10 AND SALT LAKE CITY CORPORATION,

SALT LAKE CITY, UTAH  
FEBRUARY 7, 2017

11 DEFENDANTS/COUNTERCLAIM  
PLAINTIFFS,

12  
13 PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
BEFORE THE HONORABLE ROBERT J. SHELBY  
14 UNITED STATES DISTRICT COURT JUDGE

15 APPEARANCES:

16 FOR THE PLAINTIFF:

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17 THE JUDGE BUILDING  
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1 P-R-O-C-E-E-D-I-N-G-S

2 (1:36 P.M.)

3 THE COURT: Good afternoon, everyone. We'll call  
4 case number 2:15-CV-862. This is our Kendall versus Olsen  
5 matter.

6 And, counsel, you're all familiar to me, but why don't we  
7 take a moment and make our appearances for the record,  
8 please.

9 MR. ANDERSON: Ross Anderson representing the  
10 Plaintiff, Sean Kendall, and I'm pleased to introduce the  
11 Court to Walter Mason, a law clerk with our office who is here  
12 to help me with some of the technology as we move along.

13 THE COURT: Thank you. Welcome to you.

14 MS. SLARK: Samantha Slark on behalf of the  
15 Defendants, and here at counsel table I have Bonnie Hamp who  
16 is a paralegal with our office.

17 THE COURT: Very good, thank you. Welcome to both  
18 of you also. So this is the time set for hearing on  
19 cross-motions relating to the availability of qualified  
20 immunity for the law enforcement officers in this case, really  
21 focused on the federal claims after our last discussion. And  
22 we'll go one step at a time in this case, and following the  
23 recommendations of the Tenth Circuit, first figure out where  
24 we are on federal claims and then determine if -- if the  
25 federal claims fall, as I've already signaled, I think in most

1 instances I'm advised to allow the state courts to resolve the  
2 state claims. But if we're going to be here anyway, then we  
3 may reach the state claims.

4 We've reviewed a lot of paper. You didn't give us any  
5 shortage of things to read and consider. We're always  
6 grateful for that. We've reviewed it. We understand your  
7 arguments, and I think we understand the record that you're  
8 all relying on. We've had a chance to study the law. And as  
9 almost always the case before coming out here, I have formed a  
10 preliminary view about how the issues may be resolved based on  
11 your arguments and the materials you've submitted. I'll share  
12 that with you in a moment. That's always my preference.  
13 Ordinarily in my view that helps us sharpen and focus our  
14 argument.

15 Before I do, let me just say a word about this case more  
16 generally. It's not lost on me that this case presents in  
17 this moment some significant issues that are part of an  
18 ongoing national discussion on the one hand, for example,  
19 about officer safety and officer conduct and officer  
20 accountability. These are matters of great social importance  
21 and our nation is very focused on those issues right now.

22 On the other hand, we have a case that involves an  
23 animal, and not only an animal, though those cases are hard  
24 enough themselves, and there is a great deal of litigation in  
25 the courts right now as we begin -- not begin -- as we

1 continue to try to better understand how we're going to deal  
2 with issues involving for example speech related to animals,  
3 issues involving animal rights organizations and groups and  
4 the like.

5 Even more here we have a companion animal, and it is not  
6 lost on me that companion animals in particular are for a  
7 great many people very much like family members literally, and  
8 so for that reason there's a great deal of emotion aroused in  
9 a case involving harm to a companion animal.

10 I won't resolve any of those global issues, nor is it my  
11 place, and instead I'll be addressing the specific, discrete  
12 legal issues raised in these papers. I think I understand  
13 those issues. And as is always the case here in this trial  
14 court, I'm not a policy-making body. I'll be focused on  
15 applying the law as best I understand it to the facts that  
16 you've presented. I'll leave for other courts the policy  
17 implications. So I'm focused like a laser on the legal  
18 standards.

19 For the benefit of those who are here, this is a case of  
20 some interest. Let me take just a moment and talk about  
21 qualified immunity in very broad terms. Qualified immunity is  
22 a confounding legal doctrine. It's confusing. It's -- and  
23 it's unfamiliar to most lawyers. It's an interesting and  
24 specific area of law that arises in the context of  
25 constitutional claims asserted against law enforcement

1 officers acting in the scope of their duties. And it's a  
2 doctrine designed to strike a balance between competing  
3 interests.

4 On the one hand we necessarily and importantly demand  
5 from law enforcement officers who are vested with great  
6 authority and responsibility and among other things wear  
7 badges and carry guns, and have the power to direct citizens  
8 to do things, and they have the right to search places, they  
9 have -- there's a lot of authority with law enforcement  
10 officers, and we demand that they comply with the  
11 Constitution. And so there is a vehicle, a lawsuit, that is  
12 created by statute that enables citizens to bring claims  
13 against law enforcement officers for violations of  
14 constitutional duties.

15 But recognizing that we don't want law enforcement  
16 officers spending their day worried about the -- you know, the  
17 litigation implications of their conduct when they often have  
18 to make split second decisions, we've drawn a line, a legal  
19 line, and that is one bearing on reasonableness, the  
20 reasonableness of the officer's conduct in view of the  
21 constitutional obligations. And it's a two-part inquiry to  
22 determine whether there's a violation of some constitutional  
23 right. And then whether in the specific context in which it  
24 arose, ordinary officers under the circumstances would  
25 understand because the right that is at issue has been clearly

1 established in case law, objectively reasonable officers would  
2 know what's about to happen would be a violation of a  
3 constitutional right. So that focuses the Court's inquiry.

4 Qualified immunity means only this, that the law  
5 enforcement officers are immune from suit for their conduct.  
6 There may be other claims available, other causes of action.  
7 There may be other remedies at law. It just means that the  
8 law enforcement officers in their individual capacities cannot  
9 be held liable, in fact they can't be held to account --  
10 they're immune from suit. They don't even belong in the  
11 lawsuit. That's the issue that is before us today on these  
12 motions.

13 And, counsel, I appreciated -- this is often the case and  
14 it was surely the case here. The issues during the course of  
15 our briefing narrowed I think in focus. And the Plaintiff I  
16 think correctly conceded some of the claims that were  
17 initially asserted in view of the case law that the City came  
18 forward with. I think we're not any longer proceeding under  
19 the Fourteenth Amendment claim, nor do I believe we're  
20 proceeding under a Fifth Amendment claim. I really think the  
21 focus has drawn us to the Fourth Amendment, and I think two  
22 principle questions: Whether there was an unconstitutional  
23 search here in violation of the Fourth Amendment and/or  
24 whether there was an unconstitutional seizure when officer  
25 Olsen shot and killed Geist. And I really think that those

1 two questions really boil down to two specific questions, one  
2 for each of those analyses.

3 I'm going to urge the lawyers to jump past the question  
4 about whether the canvassing was a search or not a search  
5 under the Fourth Amendment. I don't -- I don't think we're  
6 going to reach that question because even assuming that this  
7 was a search that would otherwise be governed by the Fourth  
8 Amendment when the officers came to Mr. Olsen's home and then  
9 searched his yard, I think we're going to focus on whether  
10 exigent circumstances provides an exception for that search.

11 And that's a two-part inquiry, whether there was an  
12 emergency -- and I'm using plain language here, but I really  
13 think at bottom there's not a disagreement about that.

14 I think, Mr. Anderson, in your papers I think you embrace  
15 the notion that when a toddler has gone missing, there's an  
16 emergency. I think we'll focus instead likely today on the  
17 second prong of the exigent circumstances exception to the  
18 warrant requirement, and that has to do with whether the  
19 search that follows that emergency is reasonable in its manner  
20 and scope.

21 And this is where I really think the parties disagree on  
22 the Fourth Amendment. My view based on your submissions and  
23 the case law is that this is a search that is reasonable in  
24 manner and scope on the facts here presented. And if we even  
25 narrow the question more specifically in light of the briefing

1 by the parties, I think it comes down to this question. This  
2 house, Mr. Olsen's house, roughly 10 houses away from the  
3 house where the child had purportedly gone missing, I think  
4 about a third of a mile away, it's a short distance, within 45  
5 minutes to an hour of about a three year old child going  
6 missing, whether the proximity in space to the home where the  
7 child went missing is enough to provide a connection between  
8 the exigency, that is the emergency finding the child, and the  
9 search of this yard. And it's my view that under the case law  
10 it is enough.

11 If that's true, then we'll be focusing our attention next  
12 on whether it was a seizure. And actually I don't think there  
13 will be a debate about that. I think I agree with  
14 Mr. Anderson when a law enforcement officer shoots and kills  
15 an animal, that's a seizure. I think the City concedes that  
16 point.

17 So I think we'll again turn to the second prong of that  
18 test, and we'll be focused today on this question, whether --  
19 and, Mr. Anderson, you'll help me understand your position  
20 more specifically. I think you agree that if a law  
21 enforcement officer is presented with a situation in which  
22 there is an imminent risk of harm to the officer or another,  
23 on those facts an officer can use deadly force to kill an  
24 animal. And I think most of the cases you cite agree with  
25 that proposition. And the question here will be whether the



1 City has shown, or whether the Plaintiffs have shown the  
2 opposite I suppose because we have cross-motions, that Officer  
3 Olsen's testimony is credible and on that basis provides a  
4 foundation for the conclusion that the officers -- the officer  
5 was in risk of his personal safety and that for that reason  
6 deploying that level of force was reasonable under the  
7 circumstances.

8 To frame it another way, I think, because it's a  
9 qualified immunity motion, the question will be whether it's  
10 clearly established in the case law on these facts that it's  
11 unconstitutional for an officer to deploy his service weapon  
12 instead of some other level of force as the Plaintiffs urge.

13 And the burden is with the Plaintiff on this point as it  
14 is in qualified immunity cases. And my initial conclusion  
15 before coming out here is that on these facts the only  
16 evidence that is directly relevant to this question is the  
17 officer's testimony. There is in our record that you've all  
18 submitted a great deal of information that bears on maybe  
19 inferences that could be drawn on both sides.

20 The City points to an interaction the neighbor had with  
21 Geist earlier in the day, and an officer who purports to have  
22 seen and interacted with Geist and descriptions of the  
23 aggressive nature of the dog during the day. The Plaintiffs  
24 point to evidence about this breed and people who know the dog  
25 and its nature. Both sides invite the Court to draw

1 inferences based on that information about what happened in  
2 that yard. And of course trial courts don't draw inferences,  
3 juries do ordinarily. We do sometimes on motions to dismiss,  
4 ordinarily in favor of the Plaintiff.

5 Here we have direct evidence and direct testimony. And  
6 the only evidence and testimony is that Officer Olsen feared  
7 for his safety, attempted to flee. When he concluded he  
8 couldn't, he tried to stand his ground to see if the dog would  
9 stand down, and in Officer Olsen's judgment, split second  
10 under the circumstances, concluded that the dog was going to  
11 attack, so he used deadly force. There's no conflicting  
12 testimony.

13 And, Mr. Anderson, I thought you did an expert job in  
14 your papers isolating what you view as inconsistencies in  
15 Officer Olsen's account of this interaction in the initial  
16 police report and in the internal investigation interview and  
17 in the deposition here.

18 It's clear there are some factual inconsistencies. And  
19 it's an interesting question in this procedural posture, but  
20 my view, and I'll be interested to hear from you on this  
21 point, those inconsistencies don't seem material to me in a  
22 way that would require me to reject the officer's testimony in  
23 whole.

24 It's not inconsistent in my mind that for example the  
25 disparity at one moment saying in one context it was about a

1 30 second delay and in another context saying it might have  
2 been about a minute and a half. In one context, you know, the  
3 other officer is knocking on the door and there's no response  
4 so I go -- and that officer is saying, well, I was knocking,  
5 and while I was knocking I heard the dog bark and then the  
6 shots. And in this context in a dynamic and fluid situation,  
7 it's not -- I don't think it's a necessary or fair inference  
8 to conclude that anyone who is giving testimony under oath is  
9 necessarily lying or committing perjury, whether it's an  
10 officer or someone else who is providing that testimony.

11 So on balance I think that's insufficient to overcome the  
12 direct evidence from the officer describing the exchange with  
13 the dog in the yard.

14 If I'm right about all of that, then the qualified  
15 immunity motion should be granted, and the officers would  
16 receive the benefit of qualified immunity. And if I'm -- if I  
17 make that ruling, then I'm already -- I've already signaled  
18 I'm inclined to have the state court resolve the state  
19 constitutional issues and the questions about the governmental  
20 immunity act and the state claims.

21 And as I often say when I come out, these views are just  
22 my preliminary views based on my review of the papers and the  
23 authorities, but I'm always here with an open heart and an  
24 open mind, as I say.

25 Mr. Anderson, since that -- it's not even a tentative

1 ruling, it's just an articulation of my views about the  
2 record, are not helpful to the Plaintiff, let me invite you to  
3 start the argument then today.

4 MR. ANDERSON: Thank you, Your Honor. I assume that  
5 we can get back to the question of whether this was a  
6 search --

7 THE COURT: Everything is on the table.

8 MR. ANDERSON: -- if that gets to that point. That  
9 was going to be the logical beginning of my remarks, but I can  
10 see that we're really honing down on whether it was or wasn't  
11 a search, was it reasonable. And, Your Honor, proximity of  
12 one's home to where somebody lived and is now missing has  
13 never been and will never be enough for a finding that a  
14 search is reasonable, unless under the standard, and it  
15 couldn't have been set forth clearer by the Tenth Circuit  
16 Court of Appeals in United States versus Gambino-Zavala case,  
17 you can show that the person requiring aid or protection is  
18 inside the home to be searched, and under the second prong of  
19 the Najar test that the government must also show that the  
20 officers confined the search to only those places inside the  
21 home where an emergency would reasonably be associated.

22 So this concept of a proximity --

23 THE COURT: Before you move on though, I'm thrilled  
24 that we're starting here because I think this is the crux of  
25 where you and I view the case law differently. The Najar, if

1 I'm pronouncing that correct -- how did you pronounce it?

2 MR. ANDERSON: I said Najjar, but who knows.

3 THE COURT: That case is factually quite different  
4 from this case. I mean that involved the search of a  
5 residence, a specific place. It wasn't this case where we  
6 have a child who has gone missing in a community. And we're  
7 not talking here about the search of a home. We're talking  
8 about the search of a yard.

9 And the reason I think it is important is clearly that  
10 standard set forth by the Tenth Circuit will apply, but it  
11 depends on the nature of the search. Just as a common sense  
12 proposition, search warrants require time. And I want you to  
13 consider -- I want you to consider a hypothetical. The three  
14 year old child is in the neighbor's pool two houses away from  
15 Mr. Olsen's house, face down in the pool drowning, and every  
16 minute counts. And I think we all -- everybody will agree and  
17 be sympathetic to this scenario. A toddler has gone missing,  
18 could run in the street, could be drowning in a pool. We are  
19 not going to require officers to stop at every yard and obtain  
20 a search warrant from a court, to fill out an affidavit and  
21 sign it and submit it, wait for a court to review it, and then  
22 execute it, return it to the officer, and then enter the yard  
23 to search. If it is a place where a child could have gone,  
24 the officers are going to have the opportunity under the  
25 exigency, reasonable manner and scope, to search. Isn't that

1 true in proximity of where the child would be?

2 Now, a different question I think, to make it more  
3 similar to Najjar, and then I'm interested in your response,  
4 suppose the officers here had gone to Mr. Olsen's house and  
5 the doors are locked, and nobody answers the knock or the  
6 doorbell or whatever.

7 One of the officers goes through the backyard. And those  
8 officers, believing that they're just searching in places  
9 where a toddler might have gone, nevertheless decide to knock  
10 down the door and go search inside the house. That seems to  
11 me to present a different question and one that might fall  
12 within the ambit of that case. Our facts seem different and  
13 our search seem different. You disagree.

14 MR. ANDERSON: I do disagree.

15 THE COURT: So how do we --

16 MR. ANDERSON: Adamantly, Your Honor.

17 THE COURT: What do we do with the toddler in the  
18 pool? You can't go in the yard that's two houses away from  
19 the house where the child is missing?

20 MR. ANDERSON: If you have reason to believe that  
21 there's a connection between that house and the emergency that  
22 gives rise to the search.

23 THE COURT: More than just its proximity to the  
24 place where the child went missing?

25 MR. ANDERSON: Your Honor, proximity has to do with

1 how mobile the person who is missing is, how much time has  
2 elapsed, and then you've got the access question as you  
3 said.

4 THE COURT: Yes, I agree with that.

5 MR. ANDERSON: And the Fourth Amendment doesn't  
6 disappear radically over time. For every minute that goes by,  
7 more and more homes in a concentric circle within the radius  
8 of where that little boy's home was, you don't wipe out Fourth  
9 Amendment rights for those homes the more time that goes by  
10 and the more quickly that child could be traveling.

11 What if he'd been picked up by somebody and was seen in a  
12 car? Would we say then that the entire city, the entire  
13 intermountain west over time would be without any Fourth  
14 Amendment protection? There really is no basis for saying  
15 that you look at how fast this little boy could have traveled,  
16 and over the time period that's elapsed, and the more and more  
17 time goes by everybody within that area loses their Fourth  
18 Amendment rights. There's absolutely zero authority for  
19 that.

20 THE COURT: I disagree with your characterization of  
21 it. I don't think anybody is saying that you lose your Fourth  
22 Amendment rights. I think, if I'm reading the case law  
23 correctly, and now I'm wondering if I'm misstating this, I  
24 think what this -- what this area of the law recognizes are  
25 competing interests. So it's not that Fourth Amendment rights

1 disappear. It's that there can be a limited search in the  
2 face of an exigency.

3 And the question that we have to apply here -- this is  
4 the argument you made in your papers -- that there be no --  
5 there be no constraint that if the child goes missing under  
6 the government's theory here, we could search every house in  
7 the county. And this is where I think the Tenth Circuit when  
8 it revised this standard in 2006 really put it into focus.  
9 It's going to be the reasonableness under the facts and  
10 circumstances of the case.

11 I mean if I apply your standard here, the officers  
12 couldn't check the house next door that has a pool if there's  
13 a wooden fence and there's an open gate, but from the open  
14 gate they can't see the pool, and they could infer or conclude  
15 that the child could have gone to the next door neighbor's  
16 house and fallen in the pool. And your answer is mere  
17 proximity is not enough. You have to go get a warrant. I  
18 don't think that's what the law requires either.

19 MR. ANDERSON: You have to have reason to believe  
20 there's a connection. This has always been the case, from the  
21 Zurcher case, United States Supreme Court, forward. And --

22 THE COURT: Where can you search? Where can you  
23 search?

24 MR. ANDERSON: You can search wherever you have a  
25 reasonable cause to believe there is a connection, some nexus.



1 The courts use all sorts of different terminology. But the  
2 one thing that's invariable is you've got to be able to show a  
3 connection between the place to be searched. That doesn't  
4 mean an entire neighborhood or an entire region. It means the  
5 place to be searched, there has to be a nexus between that  
6 place and the emergency that's given rise to the need for a  
7 search.

8 THE COURT: So then I guess my response to you is it  
9 seems like your argument legally is there won't be a search  
10 when a child goes missing that could just walk out of a gate  
11 and disappear into a neighborhood. And let's say it's five  
12 minutes. Law enforcement is called. No concerns about  
13 abduction. The child is seen opening the gate and wandering  
14 off. Your answer is we can search public streets without more  
15 information about tying any other specific place you want to  
16 search to the -- there will never be that evidence.

17 MR. ANDERSON: You can do your canvassing. You can  
18 go knock door-to-door. You can ask people can we search your  
19 backyard? Can we search your home? There was an officer  
20 there that went in the other direction, and he said, no, I  
21 didn't go into people's backyards enclosed. And I said why  
22 not? And he said because people have their First Amendment  
23 rights.

24 THE COURT: That's the question we're going to  
25 decide. I mean what one officer did or another, we're asked

1 to determine the constitutionality of what Officer Olsen did.  
2 So I'm not meaning to -- I think I understand your position,  
3 and the backyards where children could -- could go are off  
4 limits to law enforcement, unless they have a specific reason,  
5 more than just the proximity, it's the next door house, but we  
6 can't even look in the backyard unless we get a warrant first.  
7 The child has gone missing.

8 MR. ANDERSON: You could look into it. But, Your  
9 Honor, the curtilage has every bit as much Fourth Amendment  
10 protection --

11 THE COURT: It's true.

12 MR. ANDERSON: -- as a house.

13 THE COURT: It does in the Tenth Circuit.

14 MR. ANDERSON: So under what --

15 THE COURT: This is why --

16 MR. ANDERSON: -- the Court's indicating right  
17 now --

18 The Court: This is why I think it's a search.

19 MR. ANDERSON: If somebody's front door were open to  
20 their home and nobody is home. They've just left it there to  
21 air out or they don't hear the doorbell. The logic apparently  
22 would be that the officers can just walk in, rifle through the  
23 house, look anywhere that they could find a two or three year  
24 old boy. They didn't even find him when he was asleep on his  
25 parent's basement floor, and all they would have had to do was

1 move a box.

2 THE COURT: I thought about this question. This is  
3 a closer question I think than the one we have in this case.  
4 Suppose -- suppose Officer Olsen goes into Mr. -- I've been  
5 saying Mr. Olsen. I've been confusing the two. Officer Olsen  
6 goes into Mr. Kendall's backyard, doesn't see the child, but  
7 the back door is open, and nobody is answering when the other  
8 officer is knocking on the front door. This is a closer  
9 question in my mind. Now you're entering a home, and I don't  
10 know what the answer to that question is. But a quick survey  
11 of a backyard where a child might have gone presents an easier  
12 question I think under the law.

13 MR. ANDERSON: I think logically they're one in the  
14 same because if the back door is open and they're saying,  
15 well, it was within this proximity where we think the child  
16 could have wandered, and he could have accessed it, maybe he  
17 could have gotten through the -- manipulated the latch and  
18 gotten into the backyard, although the gate was closed, then  
19 if he could have done that and the back door was open to the  
20 home, the logic of the City and apparently where the Court is  
21 headed here, is that they could have just walked into  
22 Mr. Kendall's home and searched throughout his home. He would  
23 have lost any Fourth Amendment protections simply because of  
24 proximity and supposed access.

25 Your Honor, the Fourth Amendment means a lot more than

1 allowing police officers to enter one's home or the curtilage,  
2 which has as much Fourth Amendment protection as the home, and  
3 saying you can go through, you can rifle through. Go ahead  
4 and go open the shed.

5 THE COURT: You're not going to get a disagreement  
6 from me about the importance of the Fourth Amendment today,  
7 but let's draw another analogy. It is equally compelling, the  
8 Fourth Amendment, in the context of a search for weapons when  
9 somebody is being arrested. What we're talking about are  
10 conflicting interests. That Fourth Amendment right is equally  
11 present when it's clear under the case law that when officers  
12 are making an arrest or a stop, and they have reason to think  
13 that there could be weapons in the surrounding area, they can  
14 do a search. They can do a cursory search to ensure that the  
15 area is safe. That doesn't mean the Fourth Amendment isn't  
16 robust. It means that we recognize a competing interest in a  
17 specific circumstance, and surely a child going missing is  
18 such a circumstance. It doesn't mean that the Fourth  
19 Amendment is surrendered invaluable or any less valuable, does  
20 it?

21 MR. ANDERSON: I think the consequence of what Your  
22 Honor is saying would be when somebody is kidnapped, everybody  
23 in the neighborhood, and the longer the person the child has  
24 been gone, the broader this free search area is going to be,  
25 where there's no Fourth Amendment protection, no right of

1 privacy simply because officers are saying, well, the child  
2 may have gone that far, the abductor may have taken that child  
3 that far and there could have been access.

4 THE COURT: What do you think is the standard that  
5 drives this question in this context? There's cross-motions  
6 for summary judgment. I'm always searching for the standard  
7 that's going to drive the Court's analysis. But it's  
8 qualified immunity at issue. The burden will rest with the  
9 Plaintiff. Doesn't the burden rest to show a clearly  
10 established constitutional right, and then that it's violated?  
11 And the trick I think -- I don't mean trick in the sense of  
12 like being tricky, I just mean the nuance here that's hard is  
13 the level of generality that you employ in defining the right  
14 I think.

15 MR. ANDERSON: Your Honor, I think the Matalon case,  
16 and although it's not in this circuit, I think the Court said  
17 it in the most common sensical fashion possible, and that is  
18 the police may not enter every residence that happens to be in  
19 the vicinity of an emergency. Again, hearkening back to  
20 Najar, and then as it was elucidated by the Gambino-Zavala  
21 case, if, number one, you don't have reason -- doesn't have to  
22 be probable cause, just reason, and every one of these  
23 witnesses, every one of the defendants said, no, we didn't  
24 have reason to believe that child was in that yard or in that  
25 home, and, no, we didn't have reason, any reason to believe

1 that there was any connection between that home and the  
2 missing child. Our sole justification was that it was  
3 somewhere in the area that we think that a child may have been  
4 able to walk and that backyard may have been accessible to  
5 that child.

6 That would be an unprecedented emasulation of the Fourth  
7 Amendment, Your Honor. That would be telling everybody that  
8 their expectations of privacy in the curtilage of their homes,  
9 which are to have the same protections under the Fourth  
10 Amendment as their own homes, that once somebody is missing  
11 that's all out the window. That's not the law, Your Honor.  
12 That's never been the law.

13 And I know there's a lot of -- we all sensed it like,  
14 well, if it was our kid, we'd want -- we'd want it all thrown  
15 out. You go do whatever it takes to find that child, but  
16 that's why we have the rule of law, and that's what the Fourth  
17 Amendment was --

18 THE COURT: Not whatever it takes, which is what  
19 draws me back to the question I asked a moment ago about the  
20 standard, because the standard here is a reasonableness  
21 standard. That's baked into this -- in the Tenth Circuit  
22 today is baked into the second prong, which is great for trial  
23 courts of course because it will change -- I'm being facetious  
24 in case that's unclear on the record. But it will have to be  
25 viewed in the specific facts and circumstances of every case,

1 otherwise we just have the hard -- we would have the bright  
2 line rule that you suggest in the case. It wouldn't be a  
3 reasonableness standard. It would be the way you've just  
4 articulated it. But that standard is not the one that I think  
5 I've been told to employ in determining whether the exigent  
6 circumstances exception applies.

7       It's not for every location where you have reason to  
8 believe there's a connection to the -- it's -- what was the  
9 language I used to start? I think I had it right the first  
10 time. There does have to be a connection, I agree with you,  
11 and I think the question is does it have to be more than just  
12 proximity.

13       You agree that on the record before us the only place  
14 where officers could have searched then without a warrant is  
15 the next door neighbor's? Is that a family member's house  
16 next door? Is that what I remember correctly?

17       MR. ANDERSON: Well, there are cases that have said  
18 it was okay to go into this particular house because clothing  
19 was found there, or there was a smell of dead flesh. There  
20 were certain indications about that place. Those are the only  
21 ways the courts have justified going into any one particular  
22 residence is that there be that specific connection, that  
23 nexus, between that place, not this entire area that grows  
24 larger and larger over time and given the mode of  
25 transportation.

1           What if this were a 13 year old boy that had a bicycle?  
2 Does that mean that every home, every curtilage in a much  
3 greater area would be exposed to the possibility of police  
4 just dropping on through, consent or no consent?

5           THE COURT: Just the opposite, right? I mean say  
6 it's a 16 year old and he's last seen getting into his car. I  
7 think on those facts it would be unreasonable to start  
8 searching the neighbors' yards. There's no reason to believe  
9 that the person would be in that vicinity. But here there's  
10 every reason to believe that a three year old child may have  
11 just walked somewhere where he could walk. No? But I  
12 understand. You and I just disagree on this point.

13           MR. ANDERSON: And I disagree with that, Your Honor,  
14 because the record shows that although they were searching the  
15 neighborhood -- and even Officer Olsen said I was mixed. It's  
16 50/50. Either he was abducted or he just wandered away. They  
17 were entertaining the possibility of an abduction.

18           THE COURT: And your answer is we're done. We can't  
19 search.

20           MR. ANDERSON: You can search. You can go through  
21 the neighborhood --

22           THE COURT: Where could they search here? One  
23 house, right? On this record -- let's not expand the record.  
24 Your position is that the only place law enforcement could  
25 search for a missing child is the next door neighbor's house.



1 Am I wrong that it's a family member next door?

2 MR. ANDERSON: It was a family member, yes.

3 THE COURT: Right. So there's a reason to believe  
4 that the child might be next door with the family, otherwise,  
5 we're done. On the facts here, there's no other search until  
6 we get a warrant, for what?

7 MR. ANDERSON: The police do exactly what they did  
8 when Elizabeth Smart went missing, when Destiny Norton went  
9 missing, and that is you go door-to-door. You search the  
10 neighborhood where you can, where there isn't this expectation  
11 of privacy in the curtilage, walking into people's homes. And  
12 if you can just see this, walking into the curtilage is the  
13 equivalent under the law of walking right through the door and  
14 searching somebody's home.

15 THE COURT: I understand that part, and especially  
16 the shed. Even if we're -- even if parts of the backyard are  
17 or are not, walking over and opening the -- I agree, Fourth  
18 Amendment extends that far.

19 MR. ANDERSON: Right. So the police have a lot they  
20 can do. They can mobilize these groups that come together  
21 now, especially after Elizabeth Smart's kidnapping, and they  
22 can go out. But they don't just walk in people's homes or in  
23 their enclosed backyards. It never happened in either of  
24 those cases.

25 And in fact it's probably why she was later found in I

1 believe it was next door, close to being next door, finally  
2 after officers did gain access to the house. But they didn't  
3 just -- they couldn't just walk through people's homes or  
4 enclosed backyards without some belief that there was reason  
5 to tie that property to the emergency giving rise to the  
6 search.

7 This -- your Honor, it would be the first case ever where  
8 the simple fact of somebody living in a certain area, with a  
9 backyard where the latch may have been manipulated by a child,  
10 or if a back door was open, that the police were allowed under  
11 the Fourth Amendment carte blanche to just go in and walk  
12 around and see what's happening. And one of the reasons for  
13 that, look what happened here. This was an officer. He had  
14 no idea if this child was there or not.

15 THE COURT: We can't --

16 MR. ANDERSON: He didn't do anything to clear, to  
17 see if a dog was there.

18 THE COURT: They're different issues in my mind.

19 MR. ANDERSON: But my point is there are a lot of  
20 reasons to protect the expectation of privacy, and this is  
21 Exhibit A. Sean Kendall kept his dog back there behind a  
22 secured -- behind secured gates, behind a secured fence. He  
23 had the clear expectation of privacy. Left for work that day  
24 thinking his dog was safe, and an officer invaded that space  
25 without any -- without meeting either of the two prong tests

1 set by the Tenth Circuit, and simply wandered in and then  
2 created the very situation that he now uses as a  
3 justification, and it's an absurd justification, to pull out  
4 his gun and kill a dog.

5 THE COURT: Let's not confuse the seizure with the  
6 search. I mean that's an appeal to emotion I think. It's  
7 improper. We're not Monday morning quarterbacking, and the  
8 case law is clear about this. We don't look at the result of  
9 the game and then question the play call. We're supposed to  
10 analyze the play call in view of the facts and circumstances  
11 that existed at that moment.

12 But let me ask you one more hypothetical about the search  
13 and then I think we should move on. I think I understand your  
14 position. But help me understand what would be the  
15 constitutional implication of this. The child goes missing  
16 from one house. Immediately next door is a house with an  
17 enclosed backyard and a gate that's open. Three year old  
18 child missing. But say it's a six foot wooden gate that you  
19 can't -- there is an expectation of privacy in this backyard.  
20 It's just cracked open. So the officer can look and see a  
21 fraction of the yard. The great majority, 95 percent of the  
22 yard, not available for view unless the officer pushes the  
23 gate open or enters. Immediately next door the gate is open.  
24 Is that the kind of thing that gives rise to belief that the  
25 child might be present? It's supposition, the same

1 supposition we have here. So that's unconstitutional, is it?  
2 You'd have to go and obtain a warrant first.

3 MR. ANDERSON: There may be some nexus. There may  
4 be some sign of connection. If the boy's trike was over  
5 there, if he customarily went over there next door. The  
6 officers in this case said nobody had any information that  
7 this child ever went to the Kendall house. It's -- that would  
8 be such an entirely different situation. But if there was  
9 some reason to believe that there was a connection between  
10 that child missing and going over there.

11 But you can't just walk through an entire neighborhood.  
12 One of these officers said, yeah, you could walk through every  
13 house, one door, two doors, three doors, a block away, you  
14 could walk through every house and search every closet --

15 THE COURT: It's the question we're answering today.  
16 I said one more. I'm going to ask one more hypothetical  
17 beyond that. Let's use -- there are populations that are  
18 known to wander, and now I'm thinking about Alzheimer's  
19 patients that walk out of senior home areas or something.  
20 There's also children I think who -- I don't think it's ASD,  
21 autism spectrum disorder. I can't think now what the  
22 specific -- but there are children or other vulnerable adults,  
23 people who have deficiencies who sometimes wander.

24 Suppose you have such a person who has gone missing  
25 before, and they always walk out, and they just walk in the

1 neighborhood, and places where they can walk in a close  
2 vicinity. Again I think you'd say without something more, you  
3 can search the public spaces and that's all, right?

4 MR. ANDERSON: I'm not sure. I think we'd need more  
5 information. Did that person customarily go to a certain  
6 place? Were they attracted to certain things? Some nexus,  
7 some connection between that specific place. Here there was  
8 zero. How far could this have extended? I've got to ask  
9 that. Would it have gone another block? They were already  
10 doing basically a concentric circle, so now we've got probably  
11 hundreds of homes that under the City's theory here saying  
12 that that's the place, confining the place -- rather strange  
13 use of the word confine -- to only those places in the home  
14 where an emergency would reasonably be associated. Nobody  
15 said neighborhood, nobody said area, region. And I think that  
16 the --

17 THE COURT: Well, but that case involves a house, so  
18 it's not surprising that we're talking about a home. Do we  
19 agree -- nobody found this case. You said this would be the  
20 first case ever where -- this case doesn't exist that I can  
21 find, this specific case. It hasn't been decided by a court,  
22 has it?

23 MR. ANDERSON: With these exact facts, no.

24 THE COURT: With a child and then a search of the  
25 immediate vicinity.

1 MR. ANDERSON: Yes. Well, the Matalon case is one  
2 where they said you can't search every resident in the area of  
3 an emergency. You can't just go wander through everybody's  
4 home in the area and say the First Amendment is out the  
5 window. You have no more justified expectation of privacy,  
6 not because of anything you did, but because somebody else did  
7 something wrong or there's a missing person.

8 So I understand that there's a lot of sympathy evoked.  
9 People want to do what they can to find somebody who is  
10 missing, whether an adult or a child. But there are the  
11 countervailing rules under the law that say before you start  
12 going through people's personal property, their homes, their  
13 curtilage to their homes, you must have reasonable belief, not  
14 probable cause, but some reasonable basis for believing that  
15 there's a nexus between that specific place to be searched and  
16 the emergency that gave rise to the search. And it's just not  
17 here, Your Honor.

18 THE COURT: Okay.

19 MR. ANDERSON: Thank you.

20 THE COURT: Well, did you want to touch on anything  
21 more relating to the search aspect? And then I think we'll  
22 hear from the City, and then why don't we talk about seizure.  
23 But you started this by saying you wanted to talk about the  
24 search. I don't know how helpful it will be today, but I  
25 agree -- I'm quite familiar with the case law about the

1 curtilage. The curtilage extends beyond the home to areas  
2 where there's a reasonable -- it's a multifactor test in the  
3 Tenth Circuit, the use that the property is put to, efforts to  
4 maintain privacy in the vicinity and the area. That clearly  
5 it applies to porches. Outbuildings on the property are  
6 included. Here there was at a minimum some exploration of a  
7 shed by opening a door or something. I mean it seems to me  
8 that we're in search land, so I don't think you have to  
9 persuade me of that, but is there anything more you wanted to  
10 say about that?

11 MR. ANDERSON: All I would say is the City has made  
12 a completely baseless argument that a search for a missing  
13 person is not a search under the Fourth Amendment. And I  
14 think to say that anybody's home in a certain area where this  
15 child may have gone, would it be twice the area if the child  
16 was gone for twice as long, or if he walked twice as fast as  
17 he normally did? This just isn't the case.

18 There have been cases. We've cited some. There are  
19 other cases holding that any search by a government  
20 official -- it doesn't matter what the purpose is. It can be  
21 for administrative compliance. It can be a search for a  
22 missing person, whether it's in a criminal context or  
23 otherwise, the intrusion by a government actor for the purpose  
24 of finding or looking for something or someone, finding  
25 information or some thing, is a search for Fourth Amendment

1 search purposes. And I doubt I have to go into that further  
2 with the Court. We've I think made that abundantly clear in  
3 our briefing.

4 And in this instance in terms of the curtilage, Your  
5 Honor is well aware this was adjacent to the house, it was  
6 enclosed, and all of the reasons that there were expectations  
7 by Sean Kendall of privacy in that area.

8 And also there's the Parkhurst Trapp case, the Third  
9 Circuit case, where it specifically said, in addition to the  
10 cases we've cited, that a search for a missing person is a  
11 Fourth Amendment search. So that then calls upon the courts  
12 in those kinds of searches to examine the standards for  
13 reasonableness. The Tenth Circuit has made it clear about the  
14 need for that connection, that nexus, which just absolutely is  
15 absent in this instance.

16 Now, I would say, if I could anticipate the Court  
17 reevaluating its initial view on this, that any seizure in  
18 this instance following this unconstitutional search was a  
19 product of the unconstitutional search.

20 The City says, well, the exigency that excuses getting a  
21 warrant for killing the dog, seizing the dog, was the missing  
22 child. Well, no. An exigency under the law, if you're going  
23 to use exigent circumstances as an excuse for not getting a  
24 warrant, is what necessitated the action being taken before  
25 you have time to get a warrant? And in this instance Officer



1 Olsen said this behavior by Geist, kind of behavior that any  
2 dog engages in under these circumstances. And, Your Honor,  
3 that justification was the product of this unconstitutional  
4 entry into the property. It was a product of what Officer  
5 Olsen did. He manufactured the exigency.

6 Geist was no different than the black powder or the hand  
7 grenade in the Bonitz case where the police said, hey, we  
8 found black powder and grenades so therefore we engaged in  
9 this extensive search of the area because we were afraid for  
10 the safety of the neighborhood.

11 And the Tenth Circuit Court of Appeals said no. That  
12 material, the black powder and the dynamite were inert. They  
13 were harmless until you went into the area, which you had no  
14 business doing, and you created the harm. If it weren't for  
15 you being there, there would have been no harm. You're the  
16 ones that started messing with the grenade and with the black  
17 powder.

18 That's exactly what happened here. Geist was, as it  
19 were, inert. He was harmless. He was back there secured  
20 behind the enclosure of that backyard before Officer Olsen  
21 took it upon himself, without a warrant, without consent,  
22 without knowing of any connection between that property and  
23 the supposed emergency, just walked right in.

24 Thank you, Your Honor.

25 THE COURT: Thank you. Ms. Slark, do you still hold

1 some firm belief that this isn't a search?

2 MS. SLARK: I think that we are in search land, as  
3 the Court's indicated, and I do think that there are kind of  
4 two prongs to the argument that the City was making, and maybe  
5 one of those prongs has been slightly lost in the mix here.

6 If we are in search land, the courts do recognize that  
7 only unreasonable searches are unconstitutional. And there is  
8 a line of cases that discusses circumstances where minimal  
9 intrusions weighed against the government's interest and  
10 balanced against the requirement of imposing a warrant are  
11 therefore not unreasonable searches.

12 THE COURT: You don't mean that as some separate  
13 analysis apart from exigent circumstances? You don't mean to  
14 suggest for example that Officer Olsen without the exigency of  
15 a missing child could go walking around through this  
16 neighborhood and opening gates and walking into yards, right?

17 MS. SLARK: Absolutely not.

18 THE COURT: So it's the exigency?

19 MS. SLARK: I really think there's kind of an  
20 interesting scenario here because there's an overlap in it and  
21 there really is the exigent circumstances/emergency aid  
22 doctrine which encompasses the scenario.

23 There is also another interesting line of cases where  
24 circumstances like searching bags at airports, patrol --  
25 automatic patrol checks where those types of stops and

1 searches have been analyzed to determine whether those are  
2 reasonable searches. And in those circumstances courts adopt  
3 a balancing test where they look at the intrusion versus the  
4 government interest and the need for a warrant.

5 THE COURT: You're not saying that it's the City's  
6 position that its officers can walk around entering backyards  
7 just on a whim?

8 MS. SLARK: No, absolutely not. They can do it for  
9 the purpose of what they were doing it here, which was the  
10 exigency of the child that was missing.

11 THE COURT: So I don't mean to be stubborn about the  
12 point. I just want to make sure I understand what you're  
13 arguing. You're arguing some separate basis for a search of a  
14 space that enjoys a Fourth Amendment protection apart from the  
15 exigency of this child having gone missing?

16 MS. SLARK: I do think that the exigency of the  
17 child having gone missing and the emergency aid doctrine are  
18 the most appropriate analysis for the Court to look at this  
19 under.

20 THE COURT: It's your best argument, you agree?

21 MS. SLARK: I agree. However, we did include in our  
22 briefing an alternative analysis the courts have adopted when  
23 there is not an exigency and there's certain sects of searches  
24 that a court adopts a reasonable analysis and a balancing test  
25 in those circumstances. We provided argument on those in

1 addition to, but I do think that the exigent  
2 circumstances/emergency aid doctrine is the most appropriate  
3 analysis in this case.

4 THE COURT: So Mr. Anderson says this would be an  
5 unprecedented application of that doctrine because it's  
6 without boundary. If a child goes missing, we just crumple up  
7 the Constitution and throw it away, and it's anarchy, it's  
8 willy-nilly. Law enforcement is out just searching any old  
9 place. There has to be some limiting principle he says, and  
10 the limiting principle is there has to be some reason for the  
11 officers to believe, in this instance it's a missing child,  
12 would be found where they're looking.

13 MS. SLARK: Well --

14 THE COURT: That's true. You agree with that first  
15 proposition? There has to be some reason to believe the child  
16 could be in a place I want to search that would otherwise  
17 enjoy Fourth Amendment protection before I can go look?

18 MS. SLARK: Of course, and that's the second part of  
19 the Najjar test. It's the reasonableness. It's the manner and  
20 scope of the search that was conducted was reasonable.

21 THE COURT: And Mr. Anderson says no court has ever  
22 found that mere proximity to a place where a person goes  
23 missing would be sufficient. There has to be more. And your  
24 response?

25 MS. SLARK: Well, I think that there's at least two

1 things going on. There's proximity and accessibility going on  
2 here. Police officers were looking in places that were  
3 proximate to where the child was last seen, and that there  
4 were places that a child of that age would likely go, and a  
5 child of that age could access, so unlocked backyards.

6 Adding to that, experience has shown backyards is one of  
7 the most likely places a child of that age will go. And in  
8 addition to this you have to look at the specific facts of  
9 every case, as you do in every other Fourth Amendment  
10 analysis, know something else about this child, which made  
11 looking and visually locating this child even more important  
12 than for any other three year old. The police officers were  
13 told that this child did not communicate verbally, and that  
14 they would have to actually visually see him and to engage  
15 him. They couldn't just call out his name and expect for him  
16 to respond.

17 THE COURT: Suppose that fact is not part of this  
18 record, does that change the result? Suppose officers are --  
19 suppose this child was able to verbally communicate -- or  
20 maybe that was the case. Maybe it was misinformation. It  
21 doesn't matter. Suppose officers aren't told that. Now is  
22 the result different if Officer Olsen goes into a backyard  
23 instead of calling out for the child?

24 MS. SLARK: I actually don't think that it is. I  
25 just think that that's just an additional fact in this

1 scenario which made it even more important. Because the  
2 concerns that you have when a missing three year old child  
3 goes missing of that age is that the child can wander into --  
4 obviously into a road. When it concerns backyards you're  
5 worried about the child going back there falling into a window  
6 well, maybe cracked his or her head, fallen into a water  
7 feature. Small children that fall down face forward, can't  
8 move, get up. If they're there for a period of time, they can  
9 drown.

10 THE COURT: So Mr. Anderson says the Matalon case  
11 from Massachusetts tells us about this. It's not enough to  
12 see accessibility and proximity. There was an open -- was it  
13 an open window in that case? And so proximity, accessibility  
14 not enough to enter the home and search.

15 MS. SLARK: Well, I think that the Najar case is  
16 actually more helpful because it's a Tenth Circuit case and it  
17 describes the purposes of why the exigent circumstances and  
18 emergency aid doctrine grew. And it describes that society  
19 has placed on police officers additional responsibilities  
20 which fall outside ordinary law enforcement tasks. And they  
21 specifically call out aiding individuals that are unable to  
22 care for themselves and helping other vulnerable individuals  
23 in society.

24 Society calls on the police officers and expects them to  
25 assist in circumstances where you have a small child that has

1 wandered away from a home, a mental health -- a patient that's  
2 wandered away from a mental health institution, possibly  
3 somebody with Alzheimer's that's wandered away from their home  
4 or a care home.

5 THE COURT: But Mr. Anderson would say that's  
6 great, and we're grateful for law enforcement serving that  
7 function within the constraints of the Constitution.

8 MS. SLARK: Well, Najjar -- sorry to cut you off.  
9 Najjar specifically recognized that there is this function, and  
10 then we have to balance between society's expectation for this  
11 help and what police officers ought to do against the  
12 intrusions that are at issue, and that's what's given rise to  
13 the second prong of the test.

14 THE COURT: So what happens if Mr. Kendall's --  
15 let's go to the hypothetical I put to Mr. Anderson. Officer  
16 Olsen enters the backyard and doesn't see the child but the  
17 back door is wide open. The child could easily have walked  
18 into a house -- if the child could have managed to get into  
19 the yard, could have walked through an open door, so can law  
20 enforcement enter Mr. Kendall's house and search anywhere in  
21 the house where a three year old might be present?

22 MS. SLARK: Well, the task of a court in every  
23 Fourth Amendment analysis is to analyze the facts that are  
24 actually before them and whether those ones violate the Fourth  
25 Amendment.

1           THE COURT: Help me understand the governing  
2 principle though. What's your view about that? Could officer  
3 Olsen have walked into Mr. Kendall's house and searched  
4 anywhere in the home where a three year old might have gained  
5 access? The rationale would be the same. You could say a lot  
6 of people in Utah have firearms in their homes. Sometimes  
7 they're out. Especially if homeowners don't have young  
8 children, firearms could be out on a counter. A three year  
9 old could grab one and accidentally shoot himself. So doesn't  
10 the same rationale justify the search of a home then?

11           MS. SLARK: I think it's a much closer question when  
12 it comes to a home. One of the reasons that backyards are  
13 searched and are part of a standard neighborhood canvass when  
14 a child is reported missing is because it's somewhere --  
15 experience has shown it's somewhere a child of that age will  
16 go. A child of that age does not necessarily wander into  
17 somebody else's home that they don't know.

18           THE COURT: So is the answer a search of the home  
19 wouldn't be justified under the case law but a search of the  
20 yard is okay? And if that's your answer, then where in the  
21 case law do we draw a distinction between the Fourth Amendment  
22 protection that's established for a residence and the  
23 curtilage? I mean I think that's considered together.

24           MS. SLARK: Well, I think a locked home is obviously  
25 a very easy question. Clearly you can't go into the locked



1 home.

2 THE COURT: The idea there would be access wasn't  
3 available to the three year old, so you can't expand -- you  
4 can't reasonably expand the search to a place where you  
5 couldn't expect a three year old to go, yes?

6 MS. SLARK: Exactly, yes.

7 THE COURT: Okay.

8 MS. SLARK: And then the next question is, okay, you  
9 have an unlocked backyard, so maybe or maybe not. You're  
10 looking at the manner and scope of it. The cases kind of go  
11 backwards and forwards on the breadth of where you -- where  
12 you can go. So you go into the backyard. These are places  
13 that a child could easily go to around the corner and over to  
14 the yard corner here, maybe over to the shed. Then you get to  
15 the open door. And then you have to ask a question --  
16 yourself a question, are we going outside the scope of this?

17 So let's have a different hypothetical back to -- to  
18 present. So for example say you had an exigency to go into  
19 the home because there was a -- there was a reasonable belief  
20 that somebody within the home was injured. The scope that the  
21 officers have to go in -- so they've heard shots fired. So  
22 they go into the home to see if anybody has been injured. So  
23 the manner and scope of the search is to go in to see if the  
24 person has been injured. Doesn't give them an opportunity to  
25 go through every drawer in the house.

1           So here I think what we're looking at is, okay, we have  
2 the open backyard. So then we go into the backyard and we  
3 take a look around in the backyard. That's kind of step  
4 number one.

5           Then we have an open door to the house. So maybe it  
6 would be okay to take a look in the porch. Maybe the next --  
7 the porch -- maybe it's an open door to a glassed patio. I  
8 think it would be okay to go and take a look in there. A  
9 child likely might go in there. Then you go to locked door,  
10 so it stops there. I mean I think it's a -- kind of a  
11 stepping analysis based on what you have. Of course you can't  
12 just go into the house and search in every cupboard and  
13 through every drawer, but it has to be kind of a reasonable  
14 scope at each stage.

15           So in this case we're looking at was there a reasonable  
16 scope for the officer to have walked into the yard, taken a  
17 look behind the house where he couldn't see from the gate,  
18 walked and taken a look where he couldn't have seen behind the  
19 garage, and then taken a look where he couldn't have seen in  
20 the shed, and then left. That's a very limited scope.

21           Under the hypothetical with the door, do we then go --  
22 can we go take a look through the door, the open door into the  
23 kitchen? Probably. Do we then have a right to walk forward  
24 into the next part of the house? Take that analysis step by  
25 step as you would in every Fourth Amendment case.

1 THE COURT: This is what Mr. Anderson wants to know,  
2 what's the limiting principle if the limiting principle is  
3 proximity and accessibility?

4 MS. SLARK: I think the limiting principle in every  
5 case is going to be reasonableness, and you have to look at  
6 it -- at the facts of the case. It's kind of a very  
7 difficult -- there's no bright line rule. There's never a  
8 bright line rule in the Fourth Amendment. You have to look at  
9 it at the facts that you knew at the time and the facts that  
10 are kind of pendent on the case that you're deciding. There  
11 is no bright line rule for a Fourth Amendment question.

12 THE COURT: That's been my experience oftentimes,  
13 and it requires, as I understand it, I'm instructed to do a  
14 case by case analysis on the facts presented in every  
15 instance.

16 Okay. Anything more on the search element?

17 MS. SLARK: Unless the Court has any particular  
18 questions with regard to the search --

19 THE COURT: I do have one more, I'm sorry. It's  
20 Mr. Anderson's question. It's a good question. It's a fair  
21 question. We're 10 houses away. What about a thousand?

22 MS. SLARK: Again, you're looking at the facts of  
23 the case that you deal with. So here we have a three year old  
24 child. By the time the family had called the police the child  
25 had been missing 45 minutes. By the time Officer Olsen had

1 reached Mr. Kendall's house it had been about an hour.

2       The other important fact which the Court -- which were in  
3 the City's papers is the fact that time is of the essence when  
4 you're looking for a child. And there's something that is  
5 referred to and known by all police officers is called the  
6 golden hour. The first hour is the most important, and  
7 chances of a good outcome reduce dramatically after that first  
8 hour. And the reason for that is the very things we've been  
9 talking about today, the kind of harm a child can come to when  
10 it's wandering alone.

11           THE COURT: So if we were -- I didn't ask this  
12 question of Mr. Anderson very artfully but this was what I was  
13 trying to get at. We're here in two competing contexts I  
14 think, which is a little bit unusual in motion practice.  
15 We're here on summary judgment. And ordinarily on summary  
16 judgment we're looking to determine whether there are facts in  
17 dispute because I don't resolve facts. Juries resolve facts.  
18 And if there are genuine issues of material fact, then we  
19 invite the jury to tell us the answers to some of these  
20 questions.

21       In the context of qualified immunity I think ordinarily  
22 the burden -- I think I understand that the burden rests with  
23 the plaintiff asserting the constitutional claim to establish  
24 both the legal existence of the right that's asserted and that  
25 it's clearly established. Those are legal questions. And

1 then I think on summary judgment the analysis will be and then  
2 on the facts of the case there is a violation.

3 On summary judgment I think the legal questions the court  
4 can decide, what do we do with those facts? Are we looking to  
5 determine whether at some point there are facts from which a  
6 reasonable jury could find that the plaintiff could establish  
7 that claim? And are those facts facts like what you and I are  
8 talking about? He entered the house, or the house was a  
9 hundred houses away from the house at issue. Are those  
10 factual issues for a jury to determine or are they purely  
11 legal?

12 MS. SLARK: Well, actually the kind of hypotheticals  
13 that were presented are sort of more of a policy implication.  
14 The facts which go to a jury are when there's a genuine  
15 dispute about something. I mean with regard to the entry into  
16 the backyard, I guess it would be -- I can't really see a  
17 dispute here because there's no dispute that Officer Olsen  
18 went in there and what he did when he was back there. And the  
19 dispute would be, sort of in the very base term, would be if  
20 Officer Olsen said I didn't go back there and Mr. Kendall said  
21 he did, that would be a question for the jury to determine is  
22 when there's two competing versions of the facts -- of the  
23 facts.

24 THE COURT: The question we're dealing with on  
25 qualified immunity I think is whether there's this -- whether

1 every reasonable -- every objectively reasonable officer under  
2 the circumstances would understand that the conduct is  
3 unconstitutional, which is a legal question in view of the  
4 factual record. Is that how you see it?

5 MS. SLARK: That's correct.

6 THE COURT: Okay, thank you.

7 Mr. Anderson, shall we talk about seizure? Do you  
8 agree -- reading your papers I believed that your position is  
9 you agree that if an officer has a reasonable apprehension of  
10 physical injury, the officer can employ force. For example  
11 let me make up a hypothetical because we're doing that today.  
12 I think you wouldn't be here today if the facts were  
13 Mr. Kendall was holding a leash of a Rottweiler and then saw  
14 the officer and yelled, "go get him," and released the leash  
15 and the dog charged at the officer barking and frothing at the  
16 mouth, and the officer pulled his firearm and shot the dog, we  
17 wouldn't be here. The question is whether or not --

18 MR. ANDERSON: I wouldn't be here.

19 THE COURT: Whether or not on this record there is  
20 evidence of reasonable apprehension of physical injury that  
21 would otherwise authorize the officer to engage with this  
22 level of force. Is that the question really that we have?

23 MR. ANDERSON: The question on the seizure is  
24 twofold. One is the reasonableness of what Officer Olsen did,  
25 and it's an objective standard of reasonableness.

1 THE COURT: Right.

2 MR. ANDERSON: And we don't have to take his word  
3 for it, especially given all the inconsistencies in his  
4 accounts of what happened. They kept changing over time.  
5 But, secondly, we know what this breed of dog is like. We  
6 know they have a very deep bark that's going to be alarming if  
7 you don't know that they're there. We were going to play that  
8 for the Court but I don't think I need to do that.

9 THE COURT: I've seen it. We went and looked. It's  
10 part of the record.

11 MR. ANDERSON: All right. And this dog in  
12 particular wasn't unlike other Weimaraners, very friendly.  
13 They chase. They chase toys. They chase other dogs. They  
14 chase people, especially like Officer Olsen who very unwisely,  
15 very unreasonably as soon as he heard the bark started running  
16 away. Now, I think any of us know that the best way to draw a  
17 dog toward you is that.

18 But getting away from those questions of reasonable  
19 conduct under the circumstances, he's the only one who was  
20 there, unfortunately, but if whatever Geist did, whatever this  
21 interaction happened, regardless of how reasonable or  
22 unreasonable Officer Olsen was, there's only one way he's able  
23 to establish that this was a constitutional seizure -- well,  
24 there would be two possible ways, one, a warrant, which  
25 didn't -- wasn't going to happen. The other is that there

1 were exigent circumstances. The City says the exigent  
2 circumstance was the missing boy, which had no connection to  
3 killing Geist.

4 So the only possibility then is what happened when  
5 Officer Olsen went into that backyard and how Geist responded  
6 and how Officer Olsen responded, all of which was a direct  
7 product of Officer Olsen being there in the first place in  
8 violation of the Constitution.

9 THE COURT: So humor me for purposes of this  
10 argument, and just assume, at least initially, that the Court  
11 concludes exigent circumstances authorized -- permitted  
12 Officer Olsen to search that yard, the places in the yard  
13 where the officer couldn't visually see from outside the gate.  
14 If that's true, then what question are we confronted with?  
15 He's there. And if we just assume for purposes of this  
16 argument that he's there lawfully, now an interaction ensues,  
17 that's going to have to be evaluated independently then under  
18 those circumstances.

19 MR. ANDERSON: Yes. And that would go to the  
20 unreasonableness of his conduct. Utility meter readers don't  
21 go around shooting dogs. Postal delivery people don't go  
22 around shooting dogs. There was no reason, no reasonable  
23 basis, for this happening, even given Officer Olsen's changing  
24 testimony. Even if you took the worst of what he testified,  
25 there's no reason to pull out a gun without using a less



1 lethal alternative, like his baton, which he admitted he  
2 didn't even think of using, or his boot or some other means,  
3 like standing there and talking to the dog. He didn't use  
4 that alternative means. And the courts have said it's not  
5 reasonable to kill a dog if it's not necessary. Necessity is  
6 equivalent to reasonableness under Fourth Amendment analysis.

7 THE COURT: Right. So you cite us to case law in  
8 your papers, and what you argue is that the law was clearly  
9 established at the time of this incident that the killing of a  
10 companion dog is an unconstitutional seizure if it's  
11 unnecessary. And then you cite us to a number of decisions  
12 all in different circuits, but that can be -- it can be  
13 sufficient in some instances to meet your burden.

14 You say when less intrusive or less destructive  
15 alternatives exist, when the pet presented no danger, and when  
16 nonlethal methods of capture would have been successful, when  
17 the dog does not pose an immediate danger, and where the use  
18 of force is avoidable. The only evidence that's in the record  
19 before us is that Officer Olsen's testimony that the dog did  
20 present danger, posed an immediate danger, and that the use of  
21 force was unavoidable after he tried first to leave the yard  
22 and then later tried to get the dog to stop by making himself  
23 large and stomping the ground. Both of those having failed,  
24 his split second determination was that the use of force was  
25 unavoidable. Those are the only facts in the record about the

1 interaction between the officer and Geist. Do you agree with  
2 that?

3 MR. ANDERSON: No, and the reason is we all know  
4 that was not the nature of Geist. That isn't the way he  
5 responded. That's not the way Weimaraners --

6 THE COURT: Can I consider that evidence? I mean I  
7 thought about this. This is funny -- not funny ha-ha funny  
8 but it's odd. It reminded me of character evidence under the  
9 Rules of Evidence. And then I think it's especially  
10 complicated here because we know there are animals and breeds  
11 that are deemed to be inherently dangerous, for example, and  
12 there are dogs who never -- there are cities where Pit Bulls  
13 are banned. And there are people who swear Pit Bulls are not  
14 dangerous. And there are people who have owned them and had  
15 them around children and there have never been problems. And  
16 people might say that's an inconsistency.

17 Here you're making the flip argument. You want the Court  
18 to make an inference based on this animal's general nature or  
19 the general nature of the breed about what happened in a  
20 specific instance, but that's not a permissible inference to  
21 draw, is it?

22 MR. ANDERSON: Your Honor, you know there's  
23 testimony about the neighbor and the officers on the other  
24 side of the fence, and they say it's a really aggressive,  
25 scary dog. Well, when you gain the wisdom of learning, that's

1 | what dogs do behind fences. When I go walk my golden  
2 | retriever every morning, that happens. We all know there is a  
3 | barrier frustration. That doesn't signal that the dog is  
4 | aggressive or mean or dangerous because they bark at something  
5 | or someone on the other side of the fence.

6 | THE COURT: Doesn't this discussion invite me to  
7 | step out of my proper role as a judge? I'm not the dog  
8 | whisperer. I'm not an expert on dogs, nor should I interpose  
9 | my own judgment or belief about dogs into a legal question.  
10 | My job I think is to constrain my analysis to the facts in the  
11 | record submitted by the parties. If I step beyond that role,  
12 | then am I not assuming an improper function in the judiciary?

13 | MR. ANDERSON: I think it would be, and that's why  
14 | we're saying there is countervailing evidence here. It's  
15 | contested, vigorously contested, what Geist did, what his  
16 | nature was, what these dogs do under the circumstances, and  
17 | you've got all the inconsistent testimony by Officer Olsen.

18 | THE COURT: At trial how -- let's think for a moment  
19 | about I mean whether anything that you're urging me to  
20 | consider would be competent evidence. And the reason I'm  
21 | focused on this of course is because we're here on a Rule 56  
22 | posture. The evidence I consider has to be admissible in some  
23 | form at trial.

24 | In this case, if it were to proceed to trial, could we  
25 | invite Mr. Kendall and 20 people, 20 of his closest friends

1 and relatives who had great experiences with Geist, to take  
2 the stand and under oath talk about what a great Christmas  
3 they had in 19 -- the dog was two and a half years old --  
4 2013? How friendly Geist was with kids? I never witnessed  
5 him be aggressive? Could we bring in a parade of witnesses  
6 talking about Geist's general demeanor? Would that be  
7 admissible in the context of this case to prove how Geist  
8 interacted with the officer at that moment?

9 MR. ANDERSON: It would because it certainly brings  
10 it into question. I wouldn't bring 20 in, but we have the  
11 affidavits or declarations of a woman who lived in the home  
12 and saw Geist every day with Sean Kendall and with his brother  
13 Shay Kendall who knew Geist ever since he was a little puppy.  
14 And then you've got the testimony from the others whose  
15 declarations we've presented, Julianne and Heather Beck.

16 THE COURT: Let's assume that -- well, now I'm  
17 interrupting your answer. I'm willing to assume for purposes  
18 of our discussion today that Geist was the kindest,  
19 friendliest dog, the best companion. What does it tell us in  
20 a court of law about what happened in the interaction between  
21 Geist and Officer Olsen?

22 MR. ANDERSON: I think what it tells you is that  
23 Officer Olsen overreacted. He used lethal force when  
24 nonlethal force would have been adequate, and that makes the  
25 seizure, the killing of Geist, unconstitutional.

1           THE COURT: Is it because Officer Olsen what? When  
2 we think in terms of constitutional analysis, he lacked a  
3 constitutional understanding about the nature of Weimaraners?  
4 Or he misinterpreted Geist's playful demeanor as he was  
5 running toward the officer barking and interpreted it as  
6 lethal, in a split second -- I mean I don't know -- two second  
7 exchange? From a constitutional analysis, when we're -- in  
8 this context. This is really the question I'm trying to get  
9 at. I'm told when I consider the conduct of officers in the  
10 circumstances of a specific moment I can't Monday morning  
11 quarterback.

12           MR. ANDERSON: Right.

13           THE COURT: I have to consider what an objectively  
14 reasonable officer could have believed at that moment with the  
15 knowledge that they had, in recognition of these split second  
16 decisions. We see it in the taser cases, the use of force  
17 with people, animals. It's the same question. What part of  
18 this is unconstitutional in view of that deference that I'm  
19 required to give to this objective reasonable officer in the  
20 circumstances?

21           MR. ANDERSON: Well, it certainly isn't just buying  
22 everything an officer says and saying, oh, it must be  
23 reasonable because you say that was your perception. Your  
24 Honor, twice -- and he's got -- he's got inconsistent  
25 testimony even on this fact. But twice, at least twice in the

1 record, he said as soon as he heard that bark -- and they're  
2 deep, loud barks. That's how they bark, even when they're  
3 friendly, standing there, wagging their tail.

4 THE COURT: I saw that in the video.

5 MR. ANDERSON: As soon as he heard it he started  
6 running. And you've read that Weimaraners are chasing  
7 animals. Throw a ball, they chase it. Dog comes by, they run  
8 after it. A person they'll run after. It's playful. And so  
9 all I'm saying is Your Honor doesn't have to decide that now,  
10 but certainly it is an issue of fact that has been hotly  
11 controverted in the record, and no one has to just take an  
12 officer's word for it because he happens to be the only one  
13 who was present at the time.

14 THE COURT: What if it's a German Shepherd? I think  
15 German Shepherds statistically have more bites than any other  
16 domestic dog breed in the United States.

17 MR. ANDERSON: Actually I looked yesterday. It's  
18 Pit Bulls, but they're both right up there.

19 The Court: Pick one. And what if it's not a  
20 Weimaraner but the facts are otherwise identical?

21 MR. ANDERSON: Well, the Branson case out of  
22 Colorado goes through all those kinds of factors that you just  
23 reviewed, and the final one was that courts will take into  
24 account is the breed of dog. And that's something that some  
25 courts have considered.

1           But we don't have any issue with that here because this  
2           was a Weimaraner. In Branson they said the breed of the dog  
3           is a factor courts have taken into account in determining the  
4           reasonableness of a seizure. Now, I've got plenty on  
5           Weimaraners, and I know Your Honor doesn't want to hear all  
6           that, but --

7           THE COURT: I'm willing to assume for purposes of  
8           our argument that it's the finest breed of domestic animal  
9           that exists. For purposes of our argument I don't think it  
10          changes the analysis. Is every officer charged with that  
11          information? As a matter of constitutional analysis do we  
12          assume then -- I'm required to determine what an objectively  
13          reasonable officer would do at the time. No such officer  
14          would have access to any of the information you've supplied on  
15          summary judgment about this animal and how gentle this animal  
16          was and how kind this animal was. None of that is known to  
17          the officer at the moment, and I think that's this question.  
18          There is information about the breed maybe, but is the officer  
19          charged with that?

20          MR. ANDERSON: Well, they would know it if they were  
21          properly trained, but that's a whole different issue.

22          THE COURT: Would they?

23          MR. ANDERSON: Certainly they would. I've talked to  
24          people who have trained and want to help train officers to  
25          understand as between breeds. But the uncontroverted record

1 is -- we're not asking Your Honor to assume anything --  
2 there's not one word in the record that controverts what both  
3 Julianne Brooks and Heather Beck have said about this dog in  
4 particular and about the breed itself.

5 THE COURT: But none of that information is known to  
6 the officer when they confront each other for the first time  
7 in Mr. Kendall's backyard, and isn't that the analysis on  
8 qualified immunity? It's the objectively reasonable officer  
9 charged with the information reasonably available to that  
10 officer at that moment? That officer has never met Geist  
11 before.

12 MR. ANDERSON: And I would submit --

13 THE COURT: Am I applying the wrong standard?

14 MR. ANDERSON: Well --

15 THE COURT: I'm focused --

16 MR. ANDERSON: Seeing what's going on around this  
17 country with a lot of shootings that should never happen, I  
18 would submit that an officer needs to know what the situation  
19 is in every aspect before that officer uses lethal force  
20 unless it's a clear case that he is threatened or she is  
21 threatened with substantial physical harm, and we know that's  
22 not what happened here.

23 THE COURT: Am I applying the wrong standard? I'm  
24 focused on the law I'm required to consider. Isn't it the  
25 information reasonably available to the objective, really,



1 reasonable officer in the moment? And that is all of the  
2 information you've supplied about Geist is unavailable to the  
3 officer except for the breed perhaps. My question is the  
4 standard. Am I on the right standard or am I wrong?

5 MR. ANDERSON: I think that's a great question, but  
6 I would submit, Your Honor, before anybody pulls a gun --  
7 postal delivery people don't shoot dogs. Utility meter  
8 readers don't go around shooting dogs. Police should be held  
9 to no different standard. Before they use lethal force to  
10 kill somebody's best friend, they need to know what they're  
11 doing. They need to know what they're dealing with.

12 And in this instance it came apparently out of the blue,  
13 even though Officer Olsen said he had heard dogs barking  
14 around the neighborhood. He didn't check, as he could have,  
15 and he knows how to do, to see if there was a dog in there,  
16 all of that. You talk about totality of the circumstances.  
17 You take the totality of the circumstances in this case,  
18 everything he did was unreasonable that led this tragic  
19 result.

20 And if I responded to the Court on that, I'd like to go  
21 back to just one thing if I may very briefly.

22 THE COURT: I still don't know that you answered my  
23 question about the standard, but maybe you're not going to.

24 MR. ANDERSON: No, no.

25 THE COURT: You're stepping past it. Is that the

1 correct legal standard?

2 MR. ANDERSON: It is. And my answer though entails  
3 the whole sense of reasonableness, objective reasonableness.  
4 We've got to stop deferring to officers pulling out their guns  
5 and shooting pets and people. There's nothing -- for them  
6 just to say after the fact, oh, I was afraid, well, yeah, he  
7 heard the bark so he started running, then he turned around  
8 and saw this dog running toward him, he pulled out his gun.  
9 He makes it sound like he had all this time to like bear his  
10 chest out. And this was, what, a second, second and a half  
11 that it would have taken for Geist to cover that ground? And  
12 all he did -- he didn't pull out his baton, didn't use his  
13 shoe. He didn't use a nonlethal alternative, which must be  
14 used if it's reasonable under the circumstances. He pulled  
15 out his gun and he killed Geist.

16 THE COURT: You wanted to touch on another  
17 subject.

18 MR. ANDERSON: Yes. And given more thought and --  
19 about the hypothetical Your Honor raised earlier about the  
20 swimming pool next door and the open gate, there are a lot of  
21 indicia there that could show there's a nexus, there's a  
22 reason for believing that there might be a connection.  
23 There's a reasonable basis for believing that there is a nexus  
24 between that property and the missing child. First of all,  
25 you've got an attractive nuisance, swimming pool. You've got

1 a gate that's open. And you've got this little child who just  
2 recently left and nobody knows where it is. That would  
3 probably pass muster. You've probably got a nexus, enough  
4 reasonable basis for believing that there may be some  
5 connection between that property and the emergency that gave  
6 rise to that emergency.

7 Your Honor, we are dealing with the -- the City would  
8 just throw out reasonableness as the second prong in Najjar  
9 did.

10 THE COURT: Where it comes straight from the  
11 language of the Tenth Circuit I'm required to apply that  
12 standard.

13 MR. ANDERSON: It does. But then they put meat on  
14 it. They've told us what that means in an emergency aid case.  
15 Thank goodness for Gambino-Zavala because after Najjar all we  
16 were left with was basically reasonable in scope and manner.  
17 But the City itself has even read Najjar as saying so you've  
18 got to know that there's a connection between the place being  
19 searched and the emergency giving rise to it. Even they read  
20 Najjar that way.

21 But in Gambino-Zavala they talk about those two prongs of  
22 Najjar. And this is the more recent case. This is the clearly  
23 controlling case. And, Your Honor, they're saying there that  
24 if you think -- first of all you have to have reason to  
25 believe, reasonably believe that a person inside the home was

1 in immediate need of aid or protection. So that translates  
2 here to was there a reason to believe that this young boy was  
3 in this particular yard?

4 And then, secondly, the Tenth Circuit -- it wasn't enough  
5 that you -- that somewhere in the house this was happening,  
6 but that you confined your search, not to the region, not to  
7 the neighborhood, not even to the same block, you have to --  
8 or even to the house, you have to confine your search to only  
9 those places inside the home where an emergency would  
10 reasonably be associated. So they're saying it's not just  
11 that you believe somebody was in the house, you can only go to  
12 those parts of the house that you believe -- where you believe  
13 that nexus existed.

14 And instead of that confinement of the search, the City  
15 is asking this Court just expand it as far as this boy may  
16 have gone and wherever he may have had access, including  
17 inside the homes and inside these curtilages, which in this  
18 instance there clearly was an expectation of privacy and it  
19 was to be treated the same as inside the home.

20 And that's totally consistent, Your Honor, with the  
21 Zurcher versus Stanford Daily case from the United States  
22 Supreme Court. It's been there throughout all of these -- all  
23 these differences between the Mitchell case and then the  
24 Brigham City case and then finally Najjar. But the United  
25 States Supreme Court --

1 THE COURT: I've heard of that court.

2 MR. ANDERSON: -- stated expressly that the critical  
3 element in a reasonable search is that there is reasonable  
4 cause to believe that the specific things to be searched for  
5 are located on the property to which entry is sought.

6 So throughout this entire period, the whole evolution of  
7 law, whether there's probable cause standard or something less  
8 than that, the nexus requirement between the particular  
9 property and the emergency has been there throughout, and the  
10 Tenth Circuit has given great specific guidance in the  
11 Gambino-Zavala case.

12 THE COURT: How do you see, Mr. Anderson, the  
13 difference in the posture in a criminal case and in a civil  
14 case? And I'm thinking now about -- I mean these are  
15 different issues, different doctrines. You know, in criminal  
16 cases we've evolved the suppression doctrine to suppress  
17 evidence in a criminal case to provide an incentive so  
18 officers don't engage in unconstitutional searches in the  
19 interest of obtaining a conviction.

20 And what courts often are focused there in that context  
21 is the incentive for officers to do the unconstitutional  
22 search because they're trying to show that the person they  
23 believe committed a crime has evidence of that crime. So  
24 there's an interest for the officer to engage in improper  
25 conduct for what we think is an improper constitutional

1 motive.

2 Do we read these cases in a different light where let's  
3 assume that the officers are engaged in a wholly worthwhile  
4 and praiseworthy objective here as opposed to what we might  
5 say is a bad context. So now I'm -- now we consider the  
6 Fourth Amendment in the context of trying to do something  
7 good, save a life say. Does it make any difference?

8 MR. ANDERSON: Well, first of all you've got a  
9 probable cause standard in the criminal context. You don't  
10 have that in the emergency aid context anymore.

11 THE COURT: Right.

12 MR. ANDERSON: So that makes a big difference.

13 THE COURT: But I mean we're concerned about officer  
14 conduct in protecting our constitutional rights where they  
15 have an incentive to do something bad. Here the incentive is  
16 to try to do something good. Does that distinction matter?

17 MR. ANDERSON: Well, I'm not sure in the criminal  
18 case that you could say that they're necessarily trying to do  
19 something bad. They're trying to find the bad guy and solve  
20 crimes.

21 Let me pose this, if I may, Your Honor, in terms of the  
22 criminal aspect. And this is utterly chilling, and I pointed  
23 that out early in this case. If the police in their -- their  
24 policy that doesn't attend to the requirements of Najjar and  
25 Gambino-Zavala, and we've challenged that policy in this case,

1 if that's what they're going to tell their officers, and in  
2 this instance the officer says, oh, I don't need a nexus. I  
3 can go through anybody's backyard. I can go through anybody's  
4 house, especially if it looks like there's access to the  
5 person who is missing, and I've got a blank check to do that.  
6 Fourth Amendment, no protection for these property owners  
7 anymore because of these circumstances.

8       Imagine if in this instance Officer Olsen had gone into  
9 that backyard, had found the little boy dead, found his  
10 abductor there with a bloody cleaver, it would have been  
11 absolutely tragic, it would have been unconscionable for the  
12 officer to have so cavalierly violated the Fourth Amendment to  
13 lead to the exclusion of that evidence.

14       There need to be clear guidelines, and there are, Your  
15 Honor, and it's not just this amorphous reasonableness where  
16 in every case people are going to come in before the court and  
17 say, well, this was reasonable because look at the  
18 countervailing considerations.

19       The Tenth Circuit in the emergency aid cases has said  
20 this is what you've got to show in every instance. This  
21 specific property you're going to search, you've got to show  
22 the nexus, the connection, the underlying emergency.

23       And I must also note, Your Honor, that the community  
24 caretaking doctrine, which is a close cousin at the very  
25 least, a lot of courts have had a tough time determining

1 what's emergency aid and what's community caretaking, and the  
2 Tenth Circuit community caretaking has no application outside  
3 the car search area. They've limited it to car searches.

4 So we're limited here to an analysis under the emergency  
5 aid doctrine, and Gambino-Zavala is absolutely dispositive,  
6 Your Honor.

7 THE COURT: Thank you.

8 MR. ANDERSON: Thank you.

9 THE COURT: Ms. Slark.

10 MS. SLARK: Would the Court like me to address any  
11 specific questions or --

12 THE COURT: Give me just a moment to think about  
13 that.

14 (BRIEF PAUSE)

15 What lawful use do you think the Court should make of the  
16 evidence submitted by Mr. Anderson -- it's really submitted by  
17 Mr. Kendall -- about the nature of Geist? Is there any  
18 application in the qualified immunity context?

19 MS. SLARK: No. Courts from other circuits have  
20 been faced with a similar question and addressed it in the  
21 same way as this Court is proposing addressing it.

22 THE COURT: I think one district court thought it  
23 was appropriate to defer issues about the nature of the  
24 specific animal to a trial, but that's an outlier, you agree?

25 MS. SLARK: I agree. There's one court in



1 California, I could name several others I have before me, but  
2 they're also in our briefing. Really the underlying issue is  
3 and that the question that the Court is asked to resolve is  
4 the objective reasonableness of the officer's actions given  
5 what the officer knew. And the issue with regard to testimony  
6 of dog behavior specialists, canine handlers, family and  
7 friends is that's not evidence that the officer knew.

8 THE COURT: So suppose on the basis of the record  
9 before us I conclude that an objectively reasonable officer  
10 under the circumstances could have believed there was an  
11 immediate risk of danger. How do we deal with the question in  
12 this context of the amount of force that the officer employs  
13 in the face of that?

14 MS. SLARK: Absolutely. And again other courts have  
15 been faced with the same question and the same kind of  
16 argument. As with regard to our Fourth Amendment analysis and  
17 indeed in the cases involving seizures of dogs, all of the  
18 same kind of overarching principles also apply.

19 The Court isn't sitting in a role of Monday morning  
20 quarterbacking. It also has to consider in light of the facts  
21 faced by the officer, is to look at the amount of time that  
22 the officer had to think about it, and also what the officer,  
23 you know, knew. It's not imputed that the officer knows the  
24 specific characteristics of every type of breed of dog.

25 And what the officer knew here is what he saw charging at

1 him, which I believe Plaintiffs have even kind of conceded  
2 that these -- this demeanor is the demeanor which is here, but  
3 the officer should have interpreted it differently. And that  
4 really falls into the realm of -- is an objective reasonable  
5 argument for the Court to decide, and you don't look at what  
6 the officer should have known but what the officer knew or  
7 reasonably should have known.

8 THE COURT: And I can find it, or maybe I can't  
9 remember if I separately tabbed it in the Government's  
10 briefing, the level of generality that -- how does -- the  
11 City's definition of the right at issue here seemed awfully  
12 narrow. What do you think is the right definition of the  
13 right at issue?

14 MS. SLARK: Well, I think the courts have warned  
15 against defining the -- the level too broadly. So a right  
16 against unconstitutional seizure would certainly be too broad.  
17 But I think that one can also define too narrowly. I think  
18 the Sixth Circuit decision *Curtis*, *Hagan*, describes kind of  
19 the analysis the Court needs to go to. It needs to go to an  
20 appropriate level of narrowing so that we're not talking about  
21 the, you know, don't violate constitutional rights at the very  
22 highest level or no unconstitutional seizures, but there needs  
23 to be sufficiently fact bound.

24 So here I think you're looking at a question of does an  
25 officer via -- constitutionally seize a dog when he sees a dog

1 that's charging at him, snarling, growling -- snarling,  
2 growling, barking, ears back and appears to be about to  
3 physically attack him?

4 THE COURT: Doesn't that definition presuppose the  
5 result though? I mean when -- those are the facts that you've  
6 argued. When you define the right as the facts in the case,  
7 you've proven the right before we even begin to ask. It's a  
8 more general question, isn't it, about whether an officer  
9 confronted with -- well, this is what I'm curious about. Do  
10 we say a reasonable apprehension of physical harm? That  
11 almost seems to presuppose too. How do we do it here?

12 MS. SLARK: Well, I mean as the Court's aware there  
13 are two questions in a qualified immunity analysis. First  
14 question is whether a constitutional right was violated and in  
15 the lights most -- in the light -- taken the facts in the  
16 light most favorable to Plaintiff. And I think here that  
17 question is answered in the negative as in there would be  
18 no -- the seizure was reasonable given the facts that the  
19 Court can consider under an objectively reasonable analysis.

20 Going to the second question, is the law clearly  
21 established? Well, clearly the law is clearly established  
22 that you can't seize a dog that doesn't present a physical  
23 threat of harm to an officer, but it is constitutional to  
24 seize a dog that does present a physical threat to an officer.  
25 So I think those are the two competing interests. And so the

1 question has to be fairly narrow in that context.

2 I don't know if the Court has any other specific  
3 questions which it would like the City to address?

4 THE COURT: None come to mind right now. Did you  
5 have anything more on the Fifth Amendment, Ms. Slark?

6 MS. SLARK: On the Fifth Amendment?

7 THE COURT: Excuse me, I'm so sorry. I mean on the  
8 seizure question.

9 MS. SLARK: Not unless the Court has questions.

10 THE COURT: Okay, thank you. Let's do this. We may  
11 have covered all of the ground, or maybe after during our  
12 short recess you'll all think of something more you'd like to  
13 add. This is the time to hear anything you'd like to tell us.  
14 But let's take about a 10 minute recess and come back and  
15 learn whether there's anything more. Thank you.

16 (RECESS TAKEN)

17 THE COURT: Your argument has been extremely helpful  
18 I think in focusing, helping me understand some of the nuance  
19 in the argument in your papers, and you've given me a lot to  
20 think about. I don't have any further questions for you, but  
21 I'm happy to receive any additional argument either of you  
22 might want to make.

23 MR. ANDERSON: If I may just make one point, and I  
24 know we've covered this.

25 THE COURT: I would have been gravely disappointed,

1 Mr. Anderson.

2 MR. ANDERSON: Gravely surprised probably. I  
3 just -- there just seems to be perhaps some disconnect, and  
4 I'm sorry if somehow we haven't communicated this, but the --  
5 when the courts talk about association or nexus or connection,  
6 they're talking about something that distinguishes this place  
7 to be searched from any others that demonstrates that there's  
8 some reasonable belief that it's connected to the emergency.

9 So the hypothetical with the house next door, yes, it's  
10 right next door, gate is open, attractive nuisance, there's  
11 probably a lot there that would justify it. That's a long  
12 ways from this case where when the officer came up to the  
13 gate, the gate was closed, there was no sign that that boy was  
14 there, there was no trike, no clothes, he'd not had a habit of  
15 going there, all of the evidence shows that nobody knew  
16 whether he'd ever been there. No reason to think that he'd  
17 ever been there, and certainly no reason to believe that he  
18 was there at the time.

19 So I guess I'm just trying to reinforce this notion that  
20 the courts, since even before Zurcher but throughout all the  
21 decisions before and after Brigham City, regardless of  
22 probable cause, reasonable cause, that there has to be some  
23 distinguishing factor where you can say you reasonably believe  
24 that there's some connection, there may be some connection  
25 between this place, in this instance Kendall's home and his

1 curtilage, to the emergency giving rise to the search.

2 THE COURT: No, I understand well I think now that  
3 that's your view. And further to that point though I think  
4 another -- I think one of the factors that I'm told to  
5 consider in the reasonableness of a search of an area though  
6 is the level of intrusion on the individual who possesses the  
7 constitutional right. And I think your view is that the  
8 search -- this is different, I understand, than the reason to  
9 believe I can search a specific area, but you think there's no  
10 constitutional difference between a search of an open yard,  
11 entering a gate and searching an open yard, as opposed to a  
12 porch, as opposed to a kitchen inside a house, as opposed to  
13 the bedroom, as opposed to a closet inside the bedroom. It's  
14 all the same. If the Constitution provides an extension and  
15 coverage to the area, the intrusion is of the similar quality  
16 to the property owner. That's your position.

17 MR. ANDERSON: It's also the United States Supreme  
18 Court's position. But I would say though that there may be,  
19 if there were a sign that that child might be in the curtilage  
20 but no sign that he might be in the house, then there's going  
21 to be a different analysis, but that has no bearing on the  
22 level of Fourth Amendment protection.

23 THE COURT: And following Najjar, if there's evidence  
24 that the child might be in the house but not in the basement,  
25 then you're limited to the area on the main floor for example?

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MR. ANDERSON: Exactly.

THE COURT: I understand.

MR. ANDERSON: Thank you, Your Honor.

THE COURT: Thank you.

Anything more, Ms. Slark?

MS. SLARK: I don't have anything unless the Court has questions.

THE COURT: I really don't. Thank you very much, counsel, for your briefing and for your argument. We'll take the matter under advisement. We will provide a written ruling. We'll be in recess.

(HEARING CONCLUDED AT 3:43 P.M.)

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Certificate of Reporter

I, Raymond P. Fenlon, Official Court Reporter for the United States District Court, District of Utah, do hereby certify that I reported in my official capacity, the proceedings had upon the hearing in the case of Sean Kendall Vs. Brett Olsen, et al., case No. 2:15-CV-862, in said court, on the 7th day of February, 2017.

I further certify that the foregoing pages constitute the official transcript of said proceedings as taken from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name this 27th day of March, 2017.

/s/ Raymond P. Fenlon