COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203 (720) 625-5150 Colorado Court of Appeals Opinion: Judge Dailey Participating Judges: Judge Gabriel and Judge Rothenberg Case No.: 2012CA1112, Div. III Douglas County District Court Judge Mark D. Thompson Case No.: 09CV1954 **Plaintiff-Appellant-Petitioner:** FABIAN SEBASTIAN **v.** **Defendants-Appellees-Respondents:** DOUGLAS COUNTY, COLORADO DOUGLAS COUNTY SHERIFF'S OFFICE DAVID A. WEAVER, Douglas County Sheriff; and GREG A. BLACK, Douglas County Sheriff's Deputy	DATE FILED: February 4, 2015 9:05 PM FILING ID: ABEFF2EB5B6A3 CASE NUMBER: 2013SC902 ▲ **COURT USE ONLY** ▲
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REPLY BRIEF	

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I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

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It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

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s/ Arash Jahanian
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I. REPLY REGARDING STANDARD OF REVIEW

The Court should apply de novo review to this case. Respondents correctly state that the standard of review for a Rule 60 motion is abuse of discretion. *See Goodman Assocs., LLC v. WP Mountain Props., LLC*, 222 P.3d 310, 314 (Colo. 2010). However, this Court granted certiorari to determine only whether Mr. Sebastian was seized through means intentionally applied. Whether the trial court misunderstood or misapplied the law is a legal question which that the Court should review de novo. *People v. Webb*, 325 P.3d 566, 569 (Colo. 2014).[1]

II. REPLY REGARDING STATEMENT OF THE CASE

Respondents do not appear to dispute Mr. Sebastian's statement of the case, which presented the factual background and procedural history as it concerned the issue of whether he was seized through means intentionally applied. Rather, they merely supplement the statement of the case by alleging that that the lower courts addressed the reasonableness of the force used, and that Mr. Sebastian conceded the issue. This issue is beyond the scope of this Court's review and was not in fact addressed in the courts below.

First, the lower courts did not address the issue of reasonableness. The Court of Appeals held that "there was no actionable 'seizure' here, and, thus, **we**

[1] In any event, abuse of discretion review here produces the same result because the district court's "decision rests on a misunderstanding or misapplication of the law." *Sinclair Transp. Co. v. Sandberg*, 2014 COA 75M, P26 (Colo. App. 2014).

need not address whether the use of the dog, without a warning, constituted the use of excessive force." COA Op. 14, App'x 15 (emphasis added). Likewise, the district court also concluded that Mr. Sebastian's allegations "would not support a finding of the threshold issue, that is, an intentional seizure." *Id*. at 10, App'x 11. Second, as discussed in detail below, Respondents also are mistaken that Mr. Sebastian conceded that his seizure was reasonable.

III. SUMMARY OF REPLY ARGUMENT

This Court granted certiorari to review the specific constitutional issue of whether the "government's willful use of a police dog that turned and attacked a nearby non-resisting untargeted suspect was a 'seizure' achieved 'through means intentionally applied.'" Order Granting Petition for Certiorari, App'x 99-100. Mr. Sebastian has addressed this issue and demonstrated that he was intentionally seized. Respondents, in contrast, allocate the majority of their Answer Brief to three unrelated issues outside the scope of this Court's certiorari review: reasonableness of the force used, qualified immunity, and application of the *Goodman* factors.[2] Further, these issues have not been addressed by the lower courts, so there has been no development and initial resolution of these issues for the Court to review.

[2] The *Goodman* factors, which are employed in analysis of a C.R.C.P. 60 motion for relief from judgment, are: (1) whether the neglect that resulted in the entry of judgment by default was excusable; (2) whether the moving party has alleged a meritorious claim or defense; and (3) whether the relief from the challenged order would be consistent with considerations of equity. *Goodman*, 222 P.3d at 319.

Respondents raise these collateral issues because their response to sole issue before this Court is entirely unpersuasive. In his Opening Brief, Mr. Sebastian identified the rule that emerges from relevant case law: Law enforcement officials who intentionally deploy police canines for the purpose of seizing a person act with the intent to seize any person in the vicinity, regardless of whether that person is the intended target. In light of the overwhelming authority, Respondents resort to mischaracterizing the identified rule, citing law outside the context of dog bite cases, and making broad, unsupported public policy arguments. However, Respondents fail to cite a single case that contradicts the rule identified by Mr. Sebastian.

Even if the Court considers the three issues inappropriately raised by Respondents, their arguments are founded on misstatements of law and misrepresentations of fact. First, the correct sliding-scale qualified immunity analysis demonstrates that Deputy Black's conduct was clearly established as unconstitutional. Even if qualified immunity applied, it would not resolve Mr. Sebastian's claims against the municipal defendants.

Second, with respect to the reasonableness of the force used, Respondents rely exclusively on their assertion that Mr. Sebastian conceded that Deputy Black did not employ excessive force. But no such concession was ever made, and the

facts pled by Mr. Sebastian in his Amended Complaint are more than sufficient to support his excessive force claim.

Finally, Respondents contend that Mr. Sebastian's case should be dismissed even if this Court finds that Mr. Sebastian has a meritorious claim. But the district court could not have correctly performed the balancing required by *Goodman* if it erred in finding no meritorious claim. Indeed, the Court of Appeals stated that it would have remanded the case if Mr. Sebastian had demonstrated the presence of a meritorious claim. *See* COA Op. 16, App'x 17. Accordingly, even if the Court goes beyond the limited issue before it, which Respondents have not sufficiently addressed, it should still decide this appeal in Mr. Sebastian's favor.

IV. ARGUMENT

A. Deputy Black Seized Mr. Sebastian Through Means Intentionally Applied

Mr. Sebastian was intentionally seized under the Fourth Amendment when Officer Black deployed his K-9, Axel, with intent to effect a seizure, and Axel in turn seized Mr. Sebastian, who was seated only ten feet away. Respondents' answer brief, which mischaracterizes Mr. Sebastian's assertions and makes broad, unsupported policy arguments, does little to undermine this conclusion. The outcome that Mr. Sebastian was seized is based on clearly stated principles in case law that have not been contradicted by any legal authority presented by Respondents.

Respondents' assertion that Mr. Sebastian seeks "a bright line rule that a police officer is strictly liable for collateral damage any time he deploys a K-9" is simply untrue. Answer Br. 7; *see also id.* at 15. This argument is not found anywhere in Mr. Sebastian's opening brief or in the case law upon which he relies. Nor has Mr. Sebastian argued that he was seized based on a negligence theory that Deputy Black failed to control Axel after deployment, as Respondents repeatedly assert.[3] *See* Answer Br. 4, 6, 11, 12, 13, 18, 19, 20. Mr. Sebastian explicitly alleged that he was intentionally seized under the Fourth Amendment.[4]

Mr. Sebastian's identified rule is a limited one that naturally follows from *Brower v. County of Inyo*, 489 U.S. 593 (1989), and its progeny: Law enforcement officials who intentionally deploy police canines for the purpose of seizing a person act with sufficient intent to seize any person in the vicinity, regardless of

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[3] Respondents' reliance on *Cochran v. City of Deer Park, Tex.*, 208 F. App'x 129 (5th Cir. 2004), is misplaced because there the Fifth Circuit merely rejected the plaintiff's negligence theory. *See id.* at 130. The plaintiff *Cochran* alleged in her complaint that the defendants "were negligent in failing to control the dog" and "indicate[d] that the attack on Cochran was not intended." *Id.*

[4] The first count of Mr. Sebastian's Amended Complaint, which alleges illegal seizure and excessive force, says nothing about negligence or failure to control. Rather, it states:

> By directing the dog to subdue the occupants of the car without distinguishing those fleeing from those remaining in the vehicle Defendant Deputy Black intentionally, in direct contravention of Plaintiff's right to be free of unreasonable seizures of his person or property by the State, and without probable cause, unreasonably seized Plaintiff's person by employing excessive force and subjecting him to serious bodily injury.

Am. Compl. ¶ 23 , App'x 21-22.

whether that person is the intended target. Only once in their entire answer brief do Respondents acknowledge this rule, *see* Answer Br. 11, and they have found no case law to contradict it.

Respondents' assertions that "[a]ccidental dog bites are pretty clearly not what the *Brower* Court was addressing" and that *Brower* concerned "intentional seizure[s] of the wrong person" rather than "unintended seizures" have no basis. Answer Br. 10. In *Brower*, the U.S. Supreme Court held that "[a] seizure occurs even when an unintended person or thing is the object of the detention or taking." 489 U.S. at 596. The Court applied this rule to a roadblock set up to stop a fleeing car. There was no "wrong person" involved. The *Brower* Court held: "We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result." *Id.* at 599; *see also Youngblood v. City of Bakersfield*, No. 1:12-cv-1150, 2014 WL 1386392, at *19 (E.D. Cal. Apr. 8, 2014) ("the term 'intentionally applied' does not refer to the identity of the person seized, it refers to the use of means that are intended to seize **an individual**.") (emphasis in original).

The cases applying *Brower* in the context of K-9 attacks have found that "when officers intentionally deploy a dog . . . the officers effectively intend to seize anyone in the space where the dog was deployed." *Rodriguez v. City of Fresno*, 819 F. Supp. 2d 937, 947 (E.D. Cal. 2011); *see also Youngblood*, 2014

WL 1386392, at *7 (officers who "deployed a 'find and bite' police dog intend[ed] that the dog would find and bite any human it located as it was trained to do."). As the reasoning of these cases, and the reality concerning deployment of K-9s, makes clear, nearby bystanders like Mr. Sebastian, are "the object[s] of the detention or taking . . . ." Answer Br. 10 (quoting *Brower*, 489 U.S. at 596). Respondents attempt to dismiss these decisions solely because they are "mostly from district courts within the 9th Circuit." Answer Br. 11. However, they fail to address the substance of these cases and appear to admit that these cases support the rule identified by Mr. Sebastian. *See, e.g.*, *Rogers v. City of Kennewick*, 205 F. App'x 491, 492 (9th Cir. 2006) (holding that seizure occurred when K-9 was released into backyard and bit unintended victim); *Garcia v. City of Sacramento*, No. 10-cv-00826, 2010 WL 3521954, at *2 (E.D. Cal. Sept. 8, 2010) (finding seizure where K-9 attacked bystander in neighbor's backyard instead of fleeing suspect).

Respondents unsuccessfully attempt to distinguish other cases "because Mr. Sebastian was not the intended target of the K-9 release." Answer Br. 12. However, like Mr. Sebastian, the plaintiffs in those cases were not the suspects who were the intended targets of the K-9 deployment. *See Vathekan v. Prince George's Cnty.*, 154 F.3d 173, 178 (4th Cir. 1998) ("Simms knew there was a "human presence" behind the interior door before the dog went through it to the main floor. Simms believed at that time that the person behind that door might

have been a burglar. By allowing the dog to pass through the interior door, Simms intended that the dog find and bite that person."); *McKay v. City of Hayward*, 949 F. Supp. 2d 971, 975 (N.D. Cal. 2013) (plaintiff was in own backyard when officer lowered dog to pursue scent of fleeing armed robbery suspect). The court's finding in *Brown v. Whitman*, 651 F. Supp. 2d 1216 (D. Colo. 2009), is indicative that it is irrelevant that "Mr. Sebastian was not the intended target of the K-9 release":

> [I]t is clear that Ms. Brown was seized within the meaning of the Fourth Amendment. . . . The evidence before the Court shows that police dogs employed by the Denver Police Department respond by biting and apprehending any moving person when they are deployed to search, whether they are specifically directed to do so or not after their release. **Thus, even though Ms. Brown was not the intended suspect, her freedom to leave was terminated by Officer Titus' intentional release of his police dog into her yard.**

Id. at 1225 (emphasis added).

Respondents' citation to Tenth Circuit authority from other contexts is unpersuasive. As Mr. Sebastian explained in his opening brief, K-9 cases are unique and analyzed differently than shooting cases, due to the unpredictability of dogs as compared to bullets. *See, e.g.*, *Rodriguez*, 819 F. Supp. 2d at 947-48 (finding that dog bite cases most closely resemble the particular category of shooting cases in which an officer understands that his bullet could indiscriminately hit anyone in the area). Accordingly, *Childress v. City of Arapaho*, 210 F.3d 1154 (10th Cir. 2000), a shooting case, is inapposite.

Additionally, Respondents acknowledge that in *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304 (10th Cir. 2009), the Tenth Circuit rejected a proposed rule that "a police dog's ability to bite and hold be sufficient to make [a K-9's] release, alone, an act of deadly force." *Id.* at 1315. Whether Axel's deployment constituted deadly force is not at issue here.

Respondents also attempt to rely on Colorado tort law for a policy justification for their position. *See* C.R.S. § 13-21-124(5)(c) (barring civil liability against owner of attacking dog when "the dog is being used by a peace officer or military personnel in the performance of peace officer or military personnel duties."). As Respondents have repeatedly acknowledged, the U.S. Constitution is not a vehicle for the government to be sued under tort, and accordingly state law is not determinative of a court's interpretation of the U.S. Constitution. *E.g.*, *Pierce v. Gilchrist*, 359 F.3d 1279, 1296 (10th Cir. 2004) (rejecting defendant's "view regarding the relevance of a particular state's tort law in assessing the presence of a constitutional violation").

In sum, Respondents argue that they did not seize Mr. Sebastian because the law does not support (1) a theory of strict liability, (2) a theory of negligent failure to control, or (3) anything having to do with "unintended seizures." The first two reasons are unavailing because they are not what Mr. Sebastian argued or what is before the Court, and the third is unsupported by the law. *Brower* and its progeny

support the proposition that seizures of nearby bystanders are intentional when an officer deploys a K-9 with the intent of effecting a seizure.

Unsurprisingly, Respondents are unable to identify any alternative rule, nor have they addressed the facts in this case, which show a seizure occurred. The uncontroverted authority dictates the conclusion that Mr. Sebastian's freedom to leave was terminated when Deputy Black intentionally deployed Axel to effect a seizure on suspects who had escaped over a nearby fence, and Axel instead seized Mr. Sebastian.

B. Whether Deputy Black Intentionally Seized Mr. Sebastian Is the Only Issue Before This Court

This Court granted certiorari on one issue: whether an intentional seizure occurred. Respondents seek to expand the Court's review to include unrelated issues of qualified immunity, reasonableness, and the *Goodman* factors.[5] The Court need not consider these issues that were neither raised in the petition for certiorari nor "accepted for review when [the Supreme Court] granted certiorari." *State Pers. Bd. v. Lloyd*, 752 P.2d 559, 560 (Colo. 1998); *see also Sherman Agency v. Carey*, 577 P.2d 759, 761 (Colo. 1978); *Berge v. Berge*, 536 P.2d 1135, 1136 (Colo. 1975); *Mason v. People*, 932 P.2d 1377, 1380 n.8 (Colo. 1997); *KN Energy*,

[5] Tellingly, Respondents have not challenged Mr. Sebastian's characterization of the "statement of the issue presented for review," as they did not include this section in their answer brief. *See* C.A.R. 28(b) (appellee need not include a statement of the issue in its Answer "unless the appellee is dissatisfied with the statement of the appellant").

Inc. v. Great Western Sugar Co., 698 P.2d 769, 776 n.8 (Colo. 1985); *United States v. O'Brien*, 391 U.S. 367, 386 n.31 (1968).

The issues raised by Respondents cannot be addressed as "subsidiary issue[s] clearly comprised" within the question of whether an intentional seizure occurred. *See* C.A.R. 53(a) ("The statement of an issue presented will be deemed to include every subsidiary issue clearly comprised therein. Only the issues set forth or fairly comprised therein will be considered."). Rather, whether a person was seized through means intentionally applied is "a threshold matter" that must be determined before any of the issues raised by Respondents. COA Op. 9, App'x 10 (citing *Brower*, 489 U.S. at 596-97).

Moreover, no lower court has ruled on any of the issues raised by Respondents, and therefore this Court has no record to review insofar as these issues are concerned. *See Comm. for Better Health Care for All Colorado Citizens by Schrier v. Meyer*, 830 P.2d 884, 888 (Colo. 1992) ("It is axiomatic that in any appellate proceeding this court may consider only issues that have actually been determined by another court or agency and have been properly presented for our consideration."); *Colby v. Progressive Cas. Ins. Co.*, 928 P.2d 1298, 1301 (Colo. 1996) ("Issues not decided by the lower court may not be addressed for the first time on appeal."). Because the district court and the Court of Appeals found that no intentional seizure occurred, neither reached the issue of qualified immunity or

the reasonableness of the force used. These ancillary issues are properly left for the lower courts to decide upon remand, subsequent to this Court's determination of the threshold issue properly before it. *See Crouse v. City of Colorado Springs*, 766 P.2d 655, 663 (Colo. 1998) (remanding issue to lower court for "further development and initial resolution of this issue.").

This Court is one of limited review. It is not a forum for a party to make every conceivable argument that could possibly resolve the case. Were this not so, the Court would become embroiled in controversies of relative insignificance instead of focusing on the important issues that it has chosen to review. Respondents present no explanation for why this case presents any exception to these principles.

C. Deputy Black Is Not Entitled to Qualified Immunity

Even if the Court does consider the additional issues presented by Respondents, it would determine them in favor of Mr. Sebastian, beginning with qualified immunity. Deputy Black is not entitled to qualified immunity because he was on notice that his conduct was unconstitutional. Respondents' characterization of the qualified immunity analysis as requiring a Tenth Circuit or U.S. Supreme Court case exactly on point is based on antiquated case law that does not account for the particular nature of excessive force cases, which require "careful attention

to the facts and circumstances of each particular case." *Graham v. Connor*, 490 U.S. 386, 396 (1989).

The Tenth Circuit has explained:

> Ordinarily . . . for a rule to be clearly established there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains. However, because excessive force jurisprudence requires an all-things-considered inquiry with careful attention to the facts and circumstances of each particular case, there will almost never be a previously published opinion involving exactly the same circumstances. We cannot find qualified immunity wherever we have a new fact pattern. Indeed, the Supreme Court has warned that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). **The *Hope* decision shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional**.

Casey v. City of Federal Heights, 509 F.3d 1278, 1284 (10th Cir. 2007) (emphasis added) (citations and quotations omitted). Thus, for excessive force cases the Tenth Circuit has "adopted a sliding scale to determine when law is clearly established." *Id.*; *see also Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004); *Trujillo v. City of Lakewood*, No. 08-cv-00149, 2009 WL 3260724, at *3 (D. Colo. Oct. 9, 2009) ("[B]ecause excessive force cases are so fact sensitive . . . . the Tenth Circuit has adopted a sliding scale to determine when law is clearly established."). Under the sliding-scale standard, "[t]he degree of specificity required from prior case law depends in part on the character of the challenged

conduct. The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Pierce*, 359 F.3d at 1298.

Under this sliding scale framework, it was clearly established that Deputy Black seized Mr. Sebastian in violation of the Fourth Amendment. Deputy Black's egregious conduct requires lesser similarity to prior case law, as he intentionally released a dangerous instrumentality that "carries with it the risk of seriously injuring others," COA Op. 14, App'x 15, without a warning, and only ten feet from non-threatening, non-resisting individuals who were seated with their hands raised. Even without the sliding scale, the clear weight of authority put Deputy Black on notice that he seized Mr. Sebastian in violation of the Fourth Amendment. *See supra*, § IV(A).

Contrary to Respondents' representations, qualified immunity would also not dispose of this case because it applies only to the claims against Deputy Black. Mr. Sebastian has additionally brought constitutional claims against Douglas County, the Douglas County Sheriff's Office, and David A. Weaver, the Douglas County Sheriff. Even if Deputy Black is immunized, qualified immunity does not apply to these municipal defendants. *See, e.g.*, *Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1278 (10th Cir. 2009); *Walker v. City of Orem*, 451 F.3d 1139, 1152 (10th Cir. 2006).

D. Deputy Black Used Excessive Force Against Mr. Sebastian

Respondents are unable to undermine the conclusion that Deputy Black employed excessive force against Mr. Sebastian. First, the allegations in Mr. Sebastian's Amended Complaint are more than sufficient to support his Fourth Amendment excessive force claim. Whether an officer's conduct is excessive is assessed from the perspective of reasonable officers on the scene "in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397. Factfinders consider, among other things, "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Thomson*, 584 F.3d at 1313 (quoting *Graham*, 490 U.S. at 396).

In his Amended Complaint, Mr. Sebastian alleged that Deputy Black, without providing any warning, deployed Axel to find and bite the two individuals who ran from the vehicle where Mr. Sebastian was seated. Am. Compl. ¶ 16, App'x 21. Courts consistently find that the deployment of a K-9 without providing a warning of the dog's pending release may constitute excessive force. *See Brown*, 651 F. Supp. 2d at 1225 (listing cases); *Trujillo*, 2009 WL 3260724, at *3 (framing the relevant inquiry as "whether it was reasonable for Agent Lutman to simply release [the K-9] unrestrained into the alley with no warnings to anyone that might

be in the vicinity" and concluding that a jury "could find that such actions were not reasonable, even in light of the possible threat that was posed by the actual fleeing suspect."); *Burrows v. City of Tulsa*, 25 F.3d 1055 (Table), No. 93-5087, 1994 WL 232169, at *3 (10th Cir. June 1, 1994) (finding that a jury could conclude that an officer's failure to warn the plaintiff was not objectively reasonable). Additionally, Deputy Black intentionally released Axel after the two fleeing individuals had cleared the privacy fence. *See* Am. Compl. ¶ 16, App'x 21. Axel made no effort to jump over the fence and instead attacked Mr. Sebastian, who remained seated in the vehicle only ten feet away from the privacy fence to which Axel was directed. *Id*. ¶ 13, App'x 20. In these circumstances, a jury could find that it was unreasonable to release Axel, given the likelihood that Axel would attack Mr. Sebastian when it was unable to pursue the individuals running away.

Second, any facts that could possibly justify a determination that Deputy Black's conduct was reasonable have not yet been developed through discovery, as reasonableness is a fact-intensive inquiry. *See Cordova v. Aragon*, 569 F.3d 1183, 1188 (10th Cir. 2009) (courts must "slosh our way through the fact-bound morass of reasonableness"); *Youngblood*, 2014 WL 1386392, at *8 ("[T]he reasonableness of the use of force is usually a question for a finder of fact, rather than a question of law."). Part of this inquiry requires the factfinder to weigh the "governmental interests at stake" in order to balance them against "the nature and quality of the

intrusion on [Mr. Sebastian's] Fourth Amendment interests." *Graham*, 490 U.S. at 396; s*ee also Brown*, 651 F. Supp. 2d at 1227 (finding that municipality did not meet its burden of showing no constitutional violation because the government did not provide sufficient evidence of the governmental interests at stake).

Finally, there is no merit to Respondents' argument that Mr. Sebastian conceded that Deputy Black's deployment of Axel was reasonable, nor, as demonstrated above, has any court find that the deployment was reasonable. At a hearing, the district court asked Mr. Sebastian's counsel whether it was unconstitutional for Deputy Black to use Axel to chase the individuals running away. Counsel responded that it was unconstitutional "with regard to the car." Answer Br. 19. The district court then inquired whether it was appropriate for Deputy Black to use Axel to chase the individuals running away. Mr. Sebastian's counsel agreed, "for argument sake" that it would be appropriate to use a canine to pursue the absconding individuals. *Id*. But whether force was appropriate against the fleeing individuals is not at issue and has no bearing on whether Mr. Sebastian was subjected to excessive force.[6] Thus, Mr. Sebastian's counsel's supposed concession was a statement, made for the sake of argument, on an issue that does affect Mr. Sebastian's Fourth Amendment rights. Mr. Sebastian's counsel did not

[6] The dog bite cases cited by Mr. Sebastian in § IV(A), *supra*, illustrate that it does matter whether the officer had a legitimate purpose for deploying the dog. In those cases, the officers used the dog with the goal of seizing a person suspected of committing a serious crime.

concede that it was reasonable to deploy a K-9 without a warning only ten feet from non-threatening, non-fleeing, and non-resisting individuals.

E. Because the District Court Erred in Determining That Mr. Sebastian Lacked a Meritorious Claim, the District Court Failed to Properly Balance the *Goodman* Factors

Any error by the lower courts regarding the meritorious claim factor of the *Goodman* balancing test would not be harmless, as Respondents contend. *See* Answer Br. 22 ("Even if the accidental seizure is deemed an intentional act, such a finding would not be sufficient to undo the overall findings of the trial court."). *Goodman* requires that each factor "must be weighed and considered together as part of the question whether" relief should be afforded. COA Op. 6 n.1, App'x 7 (quoting *Goodman*, 222 P.3d at 320). The proper balancing cannot have been struck if one of the factors was erroneously decided. Indeed, the importance of a meritorious claim is especially evident from the Court of Appeals' statement that it would "have been inclined to reverse the district court order and allow [Mr. Sebastian] his day in court," if only he had asserted a meritorious claim. COA Op. 16, App'x 17. Furthermore, the Court of Appeals identified numerous errors in the district court's findings regarding equitable considerations. *Id*. at 14-16, App'x 15-17. Thus, the proper course of action would be for this Court to decide the single issue before it and remand the case to lower courts for determination of the remaining issues.

V. CONCLUSION

Based on the arguments made in the Opening Brief and in this Reply, Mr. Sebastian respectfully requests that the Court reverse the Court of Appeals' opinion that there was no intentional seizure, and remand the case to the district court in order to allow it to properly weigh the *Goodman* factors.

Respectfully submitted this 4th day of February 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2015, a true and correct copy of the foregoing **Reply Brief** was served via ICCES and/or by depositing the same in the U.S. Mail, postage prepaid, upon the following:

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