No. 17-4039

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEAN KENDALL,
Plaintiff and Appellant,

v.

BRETT OLSEN, LT. BRIAN PURVIS, JOSEPH ALLEN EVERETT, TOM EDMUNDSON, GEORGE S. PREGMAN, AND SALT LAKE CITY CORPORATION,
Defendants and Appellees.

On Appeal from the United States District Court
for the District of Utah No. 2:15-cv-00862-RJS
The Honorable Robert J. Shelby

REPLY BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

> *The makers of our Constitution . . . conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. . . .*
> *Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.*
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> — Justice Louis D. Brandeis, *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting)

The Search. The searches of homes and seizures of property should be strictly circumscribed. This Court has provided a clearly stated test that must be consistently applied to emergency-aid searches, rather than setting a vague "reasonableness" standard to be applied on an ad hoc basis by a police officer or a judge.

Conversely, the District Court has announced an unprecedented, dangerous rule that permits police officers to search any homes and curtilages that might be accessible to a missing person and located within an ever-growing geographical area the person might have traveled. In direct contravention of several of this Court's decisions and unsupported by *any* legal authority, the District Court held that *proximity and access* are sufficient for the search of any home or curtilage, even where there is *no* cause to believe a person in need of aid is on the premises and there is *no* cause to believe the property has an association with the emergency.

The Seizure. Appellee Brett Olsen ("Olsen") unconstitutionally seized Geist, a dog who was the best friend of Appellant Sean Kendall ("Kendall"), by killing it

without any justifying exigent circumstances. Olsen has claimed the *only* "exigency" in connection with the seizure of Geist was the report of a missing child.

Olsen likely means that the "exigency" leading him to kill Geist was Geist's conduct. However, that excuse for a warrantless seizure is unavailing to Olsen because any purported exigency was caused by Olsen. Geist had been safely secluded in Kendall's enclosed backyard before Olsen's trespass and his conduct that caused Geist to bark and run toward him. The only danger—if there were one—was created by Olsen. A police-manufactured exigency cannot justify the seizure.

The Disregard of Compelling, Contrary Material Evidence. In its ruling, the District Court erroneously viewed evidence regarding *what really happened* in the light most favorable to the City and Officers—even after Olsen's dubious accounts were shown to be inconsistent with his own and other officers' statements and entirely at odds with credible evidence. The District Court ignored the far more credible evidence presented by Kendall, all of which was material to a determination of whether Olsen's search and killing of Geist were "reasonable."

ARGUMENT

I. THE CLEARLY ESTABLISHED LAW PROHIBITED OLSEN FROM ENGAGING IN A SEARCH OF KENDALL'S ENCLOSED BACKYARD BECAUSE (1) THERE WAS NO CAUSE TO BELIEVE A PERSON IN NEED OF AID WAS ON THE PREMISES SEARCHED AND (2) OLSEN HAD NO REASON TO BELIEVE AREAS HE SEARCHED WERE CONNECTED TO THE PERCEIVED EMERGENCY.

A. The District Court Erroneously Held That *Proximity* to a Perceived Emergency and *Access* to the Curtilage of a Home Are Sufficient to Justify a Warrantless Search.

The District Court ruled[1] that because a young boy was thought to be missing, police officers could search[2] an enclosed backyard (*i.e.*, the curtilage to the home[3]), located at least ten houses away from the child's home, simply because (1) the child *might* have had access to the backyard (which was disputed by Officer Worsencroft[4]) and (2) the property was believed to be within the area the child *may* have traveled in the approximately one hour he had been missing. Regardless of the absence of any reason to believe the missing boy was in Kendall's curtilage and regardless of the absence of any reason to believe there was any connection between the curtilage and the perceived emergency,[5] the *proximity* of the property to the missing boy's home and the possible—but disputed—*accessibility* of the property to the boy was

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[1] *See* Aplt. App. at 1500–1502, 1507.

[2] As counsel for the City and Officers conceded, Olsen's entry of, and his looking around, Kendall's backyard was a "search." *See* Brief of Appellant at 16, n.49.

[3] *See* Brief of Appellant at 15–16; Aplt. App. at 844–46, 1449–51. The City and Officers persist in falsely claiming one gate was only "about three feet tall." Brief of Appellees at 5. Photos reflect that the gate is far taller than three feet and the latch is about three feet from the ground. Aplt. App. at 232, ¶ 23, 598; Aplee. Supp. App. 170–71.

[4] Brief of Appellant at 25–26; Aplt. App. at 472:4–20.

[5] Kendall has provided many references to the record where it was established there was no reason to believe the missing boy was on Kendall's curtilage and no reason to believe there was any connection between Kendall's home or curtilage and the perceived emergency. Brief of Appellant at 7 n.25.

enough for the District Court to sanction the search of the enclosed curtilage.[6] That broad, permissive rule, and the District Court's criticism about "Kendall's strict interpretation of the exigency exception,"[7] is in disregard of the rule that "searches

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[6] The District Court does not explain how or why such a loose rule would be restricted to cases of missing people—which could include not only children, but *anyone*, such as people suffering from dementia, who might disappear and be in need of aid. If searches of all homes and curtilages accessible to, and within the area possibly traveled by, a missing person are to be allowed, the same reasoning would permit such searches to protect the community from dangerous criminals believed to be somewhere in the area and who might be hiding in "accessible" homes located within the "proximity" of where they were last seen.

The District Court tried to soften the threat of warrantless searches by police every time somebody is reported missing or in need of aid. The Court noted that a "sweep of the curtilage is less intrusive than breaking down a locked door and searching a living room . . . ." Aplt. App. at 1510 (emphasis added). The Court also sought to assure that "nobody contends that Olsen could have barged into and searched any home within a fixed radius of the missing toddler." *Id.*

However, since curtilages and homes are entitled to the same Fourth Amendment protections and privacy rights, the astoundingly permissive standard declared by the District Court would mean that *any* curtilage and *any* home that might be *accessible* to a missing person and *within the area* that person might have wandered is subject to a police officer's warrantless, non-consensual search. The District Court's opinion is disturbingly consistent with the disregard for Fourth Amendment protections expressed by Olsen, as follows:

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

Aplt. App. at 375:4–9.

The District Court's approach is, unfortunately, diametrically different than that of George Pregman, one of the officers also searching for the missing boy, who recognized the crucial privacy interests at stake and the limitations on searches when he testified he was *not* entitled to open a gate and enter a backyard without consent or a warrant because "people have an expectation of privacy, and people do things to protect their property from warrantless searches." Aplt. App. 541:5–18.

[7] Aplt. App. at 1509.

conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—*subject only to a few specifically established and well-delineated exceptions*." *Katz v. United States*, 389 U.S. 347, 357 (1967) (emphasis added).

B. This Court Has Explicitly Established the Controlling Law Regarding the Constitutionality of a Search of a Home or Curtilage Sought to Be Justified Under the Emergency Aid Doctrine, Requiring that (1) There Must Be Reason to Believe a Person in Need of Aid Is Located at the Home or Curtilage to Be Searched and (2) The Search Must Be Confined to the Places in the Home or Curtilage Associated With the Emergency.

Contrary to the ad hoc application of a vague "general reasonableness requirement" by the District Court[8]—this Court has explicitly stated the test to be applied in emergency-aid search cases. That test requires that (1) there be reason to believe that the person in need of aid is on the premises of the particular home searched and (2) the search of a home must be restricted to areas in the home reasonably believed to have a connection to the emergency.[9]

In their arguments before the District Court relating to Kendall's Motion for Summary Judgment,[10] and again in the Brief of Appellees,[11] the City and Officers

[8] Aplt. App. at 1509.
[9] *United States v. Najar*, 451 F.3d 710, 718–20 (10th Cir. 2006); United *States v. Gambino-Zavala*, 539 F.3d 1221, 1225–26 (10th Cir. 2008).
[10] The sole reference to *Gambino-Zavala* by the City and Officers before the District Court was in a footnote referencing a different topic, Aplt. App. at 1466, n.25.
[11] The City and Officers have mentioned *Gambino-Zavala* in this appeal solely in a "see also" citation in a footnote for a different proposition, Brief of Appellees at 15,

wholly ignored this Court's elaboration in *Gambino-Zavala* of what is required under the test set forth in *Najar*. Likewise, the District Court brushed off the relevance of *Gambino-Zavala*, asserting that the focus of the requirements in *Gambino-Zavala* on the search of a *home*, rather than the search of all "accessible" homes "anywhere within a several-block radius,"[12] under the emergency aid doctrine was only "because in that case, the exigency was limited to one home."[13] However, as is clear from this Court's decisions in *Gambino-Zavala* and several other cases,[14] the focus on the requirements for searching a home was because *that is where the search occurred*.

The elaboration of the *Najar* test[15] in *Gambino-Zavala*, disregarded by the District Court, was clearly stated by this Court as the controlling law regarding emergency-aid searches in homes:

> To satisfy the first prong of the *Najar* test, the government must show the officers reasonably believed a person *inside the home* was in immediate

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n.83, and they recite verbatim approximately two pages from the District Court's opinion, which contains a citation to *Gambino-Zavala*. *Id.* at 19.

[12] Aplt. App. at 1509.

[13] Aplt. App. at 1508.

[14] *See* Brief of Appellant at 21–22.

[15] The test stated by this Court in *Najar* is as follows:

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

Najar, 451 F.3d at 718.

> need of aid or protection.
>
> * * *
>
> The government must also show that the manner and scope of the search was reasonable. *Najar*, 451 F.3d at 718. To satisfy this requirement, the government must show the officers "*confined the search to only those places inside the home where an emergency would reasonably be associated*." *Id.* at 720.

539 F.3d at 1225–26 (emphasis added).

C. The Search by Olsen Violated the First Prong of the *Najar/Gambino-Zavala* Test Because There Was No Cause to Believe a Person in Need of Aid Was in Kendall's Curtilage.

The articulation by this Court of the first prong of the *Najar/Gambino-Zavala* test is consistent with the requirement of the Supreme Court that for any lawful search, there must be "reasonable cause to believe that the specific 'thing' to be searched for . . . [is] located on the property" where the search is to occur. *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978). A belief that someone, *somewhere*, might be at risk of harm does not give police license to search homes and curtilages willy-nilly. They must have a reasonable belief, as to *each* home and curtilage searched, that the person in need of aid is on the particular premises to be searched.[16]

[16] The District Court erroneously suggested that Kendall conceded the first prong of the *Najar* test was met simply because Kendall recognized that "'there were reasonable grounds for . . . Olsen to believe there was an urgent situation' because 'to [his] knowledge, a two- or -three-year-old boy was missing from his home.' . . . What is in dispute is the second prong of the test . . . ." Aplt. App. at 1506–07. The City and Officers falsely assert on appeal, contrary to the extensive record, that "Kendall conceded [the first prong of the test] in his briefing to the district court." Brief of Appellees at 16 n.91. In a memorandum submitted to the District Court, Kendall addressed that "concession" claim as follows:

See, e.g., Brigham City v. Stuart, 547 U.S. 398, 403 (2006) ("[L]aw enforcement officers may enter *a home* without a warrant to render emergency assistance to *an injured occupant* or to protect *an occupant* from imminent injury." (emphasis added)); *United States v. Gambino-Zavala*, 539 F.3d at 1225–26 ("[T]he government must show the officers reasonably believed a person *inside the home* was in immediate need of aid or protection.")

No legal authority other than the District Court's opinion in this case has ever held that an emergency aid search could include every accessible home within the radius of an area where a person may have wandered during the time he or she has been missing.

> [T]he fact that [a person] was reasonably believed to be in danger of physical harm would not have given the police the authority to enter homes and conduct searches at will. Rather, those circumstances justified entry and search only if and to the extent there was an objectively reasonable

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> Defendants state Kendall has conceded "the first prong of the *Najar* test is satisfied." For that fanciful claim, Defendants cite only Kendall's concession that Purvis and Olsen believed a young boy was missing from his home. The representation that Kendall has conceded "the first prong of the Najar test" is belied by everything Kendall has presented with respect to the unconstitutionality of Olsen's search. The "first prong of the *Najar* test" cannot have been met because, to meet that prong, "the government must show the officers reasonably believed *a person inside the home* was in immediate need of aid or protection." *Gambino-Zavala*, 539 F.3d at 1225.

Aplt. App. at 1493–94. Kendall argued vigorously before the District Court, in three extensive memoranda and during oral argument, that neither the first nor the second prong of the *Najar/Gambino-Zavala* test had been met. *See* Aplt. App. at 211–12, 223–24, 238–40, 242, 244–45, 285–91, 303, 907–15, 920–26, 927–28, 931–36, 938–39, 1490–94, 1497–98, 1534, 1536, 1538–52, 1581–83, 1585–86.

> basis to believe the particular search would result in finding him or evidence leading to his location.

United States v. Bell, 357 F. Supp. 2d 1065, 1074 (N.D. Ill. 2005).[17]

The legality of any search of a home or curtilage must be viewed from the perspective of *each* home and *each* resident's right of privacy.[18] The extensive record establishes conclusively that no one had *any* reason to believe the missing child was located in Kendall's curtilage.[19] This Court has uniformly required that a warrantless search of a home sought to be justified by the emergency aid doctrine must be supported by a reasonable belief that *a person in need of immediate aid was in the particular home searched.*[20] Hence, the first prong of the *Najar/Gambino-Zavala* test was not met.

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[17] *See also Matalon v. O'Neill*, 2015 WL 1137808, No. 13–10001-LTS (D. Mass. March 13, 2015), *7 (unpublished), cited with explanation in Brief of Appellant at 22 [the citation there mistakenly reflects the case was decided in 2016 instead of 2015]; and legal authorities cited in Brief of Appellant at 19.

[18] The Fourth Amendment is intended "to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 621–22 (1989).

> [T]he principles reflected in the [Fourth] Amendment . . . "apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life." *Boyd v. United States*, 116 U.S. 616, 630 . . . [1886] . . . [T]he "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297 . . . [1972].

Payton v. New York, 445 U.S. 573, 585–86 (1980).

[19] Brief of Appellant at 7 n.25.

[20] *See* five opinions of this Court cited in the Brief of Appellant at 21–22.

D. The Search by Olsen Violated the Second Prong of the *Najar/Gambino-Zavala* Test Because There Was No Reason to Believe Any Part of Kendall's Curtilage Was Associated With the Perceived Emergency.

The City and Officers state that, under *Najar*, "[a] search is reasonable when it is confined to *places* where an emergency could reasonably be associated." Brief of Appellees at 16 (emphasis added). That is a misleading characterization. In *Najar*, this Court spoke of "confin[ing] the search to only those *places inside the home* where an emergency would reasonably be associated." 451 F.3d at 720.[21] Likewise, the District Court noted that "[t]he scope of a search is reasonable when the search is limited to 'the *locations* where a victim might likely be found . . . .'" Aplt. App. at 1507 (emphasis added). However, the District Court fundamentally misunderstood both prongs of the *Najar/Gambino-Zavala* test and erroneously defined "locations" as being not the places in *each home or curtilage searched*, but as the *entire area* within a several-block radius[22] the boy *might* have wandered in an hour or more.[23]

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[21] *See also State v. Grossi*, 2003 UT App 181, ¶ 18, n.4, 72 P.3d 686 (The "[emergency aid] doctrine only applies if . . . [t]here is some reasonable basis to associate the emergency with the area or place to be searched. That is, there must be a connection with the area to be searched and the emergency." (quoting *Salt Lake City v. Davidson*, 2000 UT App 12, ¶ 12, 994 P.2d 1283)).

[22] Aplt. App. at 1509.

[23] In *Najar*, this Court addressed the confinement of the search to the "locations" in a trailer—"those places inside the home" where "a victim might likely be found" or "where an emergency would reasonably be associated." 451 F.3d at 720. The District Court, using the word "confined" in an incredibly expansive manner that would be foreign to any lexicographer, stated as follows:

A police officer not only is forbidden from searching "accessible" homes just because they are in *proximity* to where a missing person was last seen; the officer is also forbidden from searching any place within a home other than those places *in the home* where an emergency is associated.[24]

The consistent testimony by every officer established there was no reason to believe that Kendall's home or curtilage was associated in any way with the missing boy or the circumstances of his disappearance.[25] Hence, Olsen's search did not meet the second prong of the *Najar/Gambino-Zavala* test.

II. THE CLEARLY ESTABLISHED LAW PROHIBITED THE WARRANTLESS SEIZURE OF GEIST BECAUSE IT WAS NOT JUSTIFIED BY EXIGENT CIRCUMSTANCES THAT WERE NOT CAUSED BY OLSEN.

"[T]he warrantless seizure [of Geist] must be justified under one of the narrow

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> The scope of a search is reasonable when the search is limited to "the locations where a victim might likely be found . . . ." Here, the toddler had been missing for an hour by the time Olsen began canvassing the neighborhood, and the child's mother gave officers no indication of what direction he may have wandered. Given these facts, the court finds it was reasonable for officers to *confine the scope of the search to places to which a toddler could have walked in the hour or so that had passed*, and within that radius to further confine the search to areas a toddler could have actually have [sic] accessed, like open and unlocked backyards." Aplt. App. at 1507.

The District Court did not explain in what sense Kendall's completely enclosed backyard could be characterized as "open."

[24] *Gambino-Zavala*, 539 F.3d at 1226 ("[T]he government must show the officers 'confined the search to only those places inside the home where an emergency would reasonably be associated.'" (quoting *Najar*, 451 F.3d at 718)).

[25] Brief of Appellant at 7 and n.25.

exceptions to the general requirement that seizures must be authorized by a warrant." *United States v. Fifty-Three Thousand Eight-Two Dollars*, 985 F.2d 245, 248 (6th Circuit 1993) (citing *United States v. Place*, 462 U.S. 696, 701 (1983)). There is no evidence that the killing of Geist without a warrant was justified by "hot pursuit," "plain view," or "pursuant to an arrest." Hence, his only justification can be that there were "exigent circumstances" permitting the warrantless seizure.[26] However, the City and Officers have claimed the report of a missing boy as the only "exigency" justifying Olsen's killing of Geist.[27] The reasoning of the City and Officers appears to be: "We received a report a child is missing; let's go kill a dog."

One must assume that the "exigency" actually claimed by Olsen (although neither he nor the District Court ever called it an "exigency") as a justification for the warrantless seizure of Geist was the conduct of Geist. However, if Geist's conduct indeed constituted an exigency (rather than just a playful, affectionate dog barking and running), it was an exigency caused by Olsen that cannot serve to justify Olsen's seizure of Geist. *McInerney v. King*, 791 F.3d 1224, (10th Cir. 2015); *United*

[26] The various grounds that might justify a warrantless search were outlined in *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 359 and n.21 (1977).

[27] In connection with Kendall's claim of an unconstitutional seizure, the City and Officers argued before the District Court, as follows: "Moreover, the exigency at issue in this case was the report of a missing child, which Officer Olsen did not create." Aplt. App. at 883. Likewise, on appeal, the City and Officers' only reference to an "exigency" in relation to the seizure of Geist concerns "a report that a child was missing." Brief of Appellees at 41.

States v. Martin, 613 F.3d 1295, 1304 (10th Cir. 2010); *United States v. Bonitz*, 826 F.2d 954, 957 (10th Cir. 1987).

The City and Officers, Brief of Appellees at 41, mischaracterize *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1547 (2017), which involved a claim of excessive use of force and simply rejected the Ninth Circuit's "provocation rule," pursuant to which a forceful seizure otherwise judged to be reasonable was deemed unreasonable if the "law enforcement officer violated the Fourth Amendment in some other way in the course of events leading up to the seizure." *Mendez* 137 S. Ct. at 1546. The Supreme Court did *not* hold in *Mendez* that there would not be liability for damages arising from the seizure if the unconstitutional entry "caused" the seizure and resulting injury. In fact, the Supreme Court recognized that damages would be recoverable if the unconstitutional entry was a "proximate cause" of the injury. *Id.* at 1549. Hence, on the relevant legal issue here, which was *not* addressed by *Mendez*, the law remains unchanged as applied to officer-created exigencies: Just as in *Bonitz*, where "the only immediate danger that existed was created by the officers themselves when they entered the secure area and began to handle [inert black powder and a hand grenade]," 826 F.2d at 957, Olsen's killing of Geist cannot be justified by the exigent circumstances (if there were any) that he created.

III. THE DISTRICT COURT ERRED IN APPLYING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE CITY AND OFFICERS WHEN KENDALL PRESENTED COMPELLING, CONTRARY EVIDENCE.

The District Court accepted Olsen's most recent account of what happened in Kendall's backyard, even when it contradicted what Olsen had earlier said and what another officer said, even when it was improbable on its face, and even when it was controverted by compelling evidence presented by Kendall.[28] Notwithstanding those contradictions, the Court considered the evidence about *what actually happened* to be "uncontradicted" since Olsen "was the only one to witness it." Aplt. App. at 1513. That evidence was solidly controverted by Kendall. Brief of Appellant at 25–29.

The District Court noted that "[t]he reasonableness of the search is a question of law for the court to resolve," citing *McInerney v. King*, 791 F.3d at 1232. However, that does not mean the District Court Judge supplants the jury in finding the facts. As this Court noted in *McInerney*, in determining the reasonableness of the search, the courts are to "view[ ] the facts in the light most favorable to [the plaintiff], whether exigent circumstances existed to justify [a police officer's] intrusion into her home without a warrant." *Id.* at 1232.

> In evaluating a motion for summary judgment based on qualified immunity, we take the facts "in the light most favorable to the party asserting the injury." *Scott v. Harris*, 550 U.S. 372, 377 . . . (2007). "[T]his usually means adopting . . . the plaintiff's version of the facts," *id*. at 378 . . . .

Rhoads v. Miller, 352 Fed. App'x 289, 291–92 (10th Cir. 2009) (unpublished).

[28] *See* Brief of Appellant at 25–29.

Here, a reasonable jury could certainly find that, as Officer Worsencroft testified, the backyard was *not* accessible to the missing boy because he could not have opened the latch to the gate.[29] Further, the evidence and the inferences reasonably drawn therefrom indicates Olsen knew full well that Geist was in the backyard before he entered the yard[30] and, in light of how quickly he says Geist ran toward him (the District Court estimated it to be two seconds, Aplt. App. at 1575:6–7), Olsen could not have started running, stopped, broadened his shoulders, stomped his foot, considered using a taser, then drawn his gun and shot Geist.[31] Olsen likely had his gun drawn from the outset, ready to shoot the dog he already knew was in the backyard.

Olsen's account of how Geist behaved and appeared is not credible. The facts viewed in the light most favorable to Kendall support the far more likely scenario that Geist behaved in a non-aggressive manner, as he had always behaved. That

[29] Aplt. App. at 472:4–20.

[30] *See* Brief of Appellant at 26 n.69. The City and Officers claim Kendall's argument about Olsen knowing Geist was on the property prior to entering the yard "was not raised before the district court and cannot be raised for the first time in this appeal." Brief of Appellees at 39. To the contrary, Kendall argued to the District Court as follows: "Olsen had to have heard Geist barking loudly before he entered the yard. In fact, he admits that he may have—or probably—heard Geist barking before he entered the yard. . . . From all the other relevant testimony, it is made clear that Olsen had heard Geist barking and knew Geist was in the backyard before Olsen entered it." Aplt. App. at 262.

[31] *See* a description of Olsen's improbable account and the citations thereto at Brief of Appellees at 7–8 and nn.49, 50, 52, 53.

conclusion is powerfully supported by the fact that Olsen's account changed in significant ways over time[32] and by the powerful evidence presented to the District Court by Kendall.[33] Also, Olsen's account of Geist's ears being "back,"[34] is ludicrous to anyone who has seen Geist or any Weimaraner.[35] To assess how preposterous Olsen's account is, and to imagine what a jury would find, one need merely to read Olsen's claim that a photograph of a police-trained attack dog[36] "looked exactly like Geist did" on the day Olsen killed him[37] and compare it with photos of Geist,[38] the several descriptions of Geist by those who knew him best,[39] expert opinions about how Weimaraners behave,[40] and public information readily available about Weimaraners generally.[41]

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[32] For instance, the *first* time Olsen ever claimed Geist was "leaping" toward him was during his deposition, Aplt. App. at 137:6–12, although Olsen, never mentioning Geist leaping at him, had described the events in detail in his police report and during two official proceedings previously. Aplt. App. at 435, 809–10, 97–98. Olsen also variously claimed that he saw Geist *before* Olsen started running, Aplt. App. at 195, ¶ 37 (which account was accepted by the District Court, Aplt. App. at 1501–02) and that he only saw Geist *after* Olsen started running, Aplt. App. at 128:18–129:11. That is a significant discrepancy when determining if Olsen provoked Geist to chase him and whether his conduct was reasonable. Aplt. App. at 618, ¶¶ 9–11; 796, ¶ 7.
[33] Aplt. App. at 590–91, ¶ 13; 616–17, ¶¶ 3–8; 619–24, ¶¶ 12–23, 26, 30; 709–11, ¶¶ 5–7, 10–13; 795–97, ¶¶ 2,4–10; 823–24, ¶¶ 2–11.
[34] Aplee. Supp. App at 4, ¶ 32; 135:5–6.
[35] Aplt. App. at 1214.
[36] Aplee. Supp. App. at 17.
[37] Aplee. Supp. App at 4, ¶¶ 34–36; 134:21–135:10.
[38] Aplt. App. at 1214.
[39] Aplt. App. at 590–91, ¶ 13; 795–97, ¶¶ 2, 4–10; 823–24, ¶¶ 2–11.
[40] Aplt. App. at 615–625; 708–712; 795–98.
[41] *See, e.g.*, http://www.barrettweimaraners.com/life-with-weimaraners/.

Viewing the evidence in the light most favorable to Kendall requires a reversal of the District Court's summary judgment for the City and Officers.

CONCLUSION

The District Court's Decision granting summary judgment in favor of the City and Officers and denying Kendall's motion for summary judgment should be reversed and the matter remanded for entry of an order granting Kendall's motion for summary judgment and a trial on the issue of damages sustained by Kendall as a result of the constitutional violations by Olsen.[42]

Respectfully submitted,

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Dated: September 25, 2017

[42] The Appellant's Brief, at 30, requested that the matter be remanded for "a trial on the issue of damages sustained by Kendall as a result of the constitutional violations by the City and Officers." However, because Kendall sought summary judgment only against Olsen, the remand should be for a trial on damages sustained as a result of Olsen's constitutional violations. Kendall's counsel certifies that he provided notice to Appellees' counsel, Samantha Slark, by email dated July 19, 2017, of his intention to make the revision in the relief requested in Appellant's Reply Brief.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Certificate of Compliance With Type-Volume Limit,
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1.This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f),

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Date: September 25, 2017

/s/ Ross C. Anderson
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CERTIFICATE OF PRIVACY REDACTIONS

I hereby certify that all required privacy redactions have been made within the foregoing **REPLY BRIEF OF APPELLANT**.

By: /s/ Shawn Parker
Legal Secretary

CERTIFICATE OF HARD COPY

I hereby certify that the hard copies of the foregoing **REPLY BRIEF OF APPELLANT** submitted to the clerk's office are exact copies of the ECF filing.

By: /s/ Shawn Parker
Legal Secretary

CERTIFICATE OF VIRUS SCAN

I hereby certify that the foregoing **REPLY BRIEF OF APPELLANT**, as submitted in Digital Form via the court's ECF system, was scanned for viruses with Avast Business Security, version 17.6.2525, last updated on September 25, 2017 at 10:35 AM and, according to the program, is free of viruses.

By: /s/ Shawn Parker
Legal Secretary

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **REPLY BRIEF OF APPELLANT** was furnished through (ECF) electronic service to the following on this the 25th day of September, 2017:

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By: /s/ Shawn Parker
Legal Secretary