**No. 20-1118**

# UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ERIC TYLER VETTE,

*Plaintiff-Appellee,*

*-v-*

KEITH SANDERS,

*Defendant-Appellant.*

On Appeal from the United States District Court for the District of Colorado
Case No. 18-cv-01987-KMT

## APPELLEE'S RESPONSE BRIEF

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## INTRODUCTION

Defendant-Appellant Sergeant Keith Sanders appeals to this Court the denial of summary judgment in the prototypical case for a jury to decide. Plaintiff-Appellee Eric Vette alleged—in a complaint sworn under penalty of perjury, and in a factual averment opposing Sergeant Sanders's motion for summary judgment—that Sergeant Sanders punched him, struck him in the face with a dog chain, and unleashed a K-9 police dog to bite him. Sergeant Sanders—in an affidavit and an incident report appended to his motion—denied the allegations. The District Court, faced with these competing accounts, denied Sergeant Sanders's motion for summary judgment.

Sergeant Sanders now seeks to relitigate that denial before this Court, framing his appeal as presenting a pure question of law that is excepted from the final order doctrine. But, however he seeks to characterize it, Sergeant Sanders's appeal simply asks this Court to revisit the District Court's finding of a factual dispute and credit his testimony over that of Mr. Vette. Congress has not afforded this Court jurisdiction to review the denial of a motion for summary judgment in these circumstances. This Court should dismiss this appeal in its entirety.

Should this Court nonetheless exercise jurisdiction over this appeal, however, it should affirm the District Court's denial of qualified immunity. Mr. Vette and Sergeant Sanders have each submitted competent evidence in the form of testimonial

accounts. And, taking Mr. Vette's account as true, existing precedent as of December 31, 2017, clearly established that punching and striking an already-apprehended arrestee in the face, then unleashing a police dog to bite the arrestee, violates the Fourth Amendment—a point which Sergeant Sanders himself does not dispute. Thus, qualified immunity is wholly inappropriate in these circumstances.

## COUNTERSTATEMENT OF JURISDICTION

The District Court[1] exercised jurisdiction pursuant to 28 U.S.C. § 1331. Sergeant Sanders timely filed the instant interlocutory appeal of the District Court's denial of qualified immunity, invoking 28 U.S.C. § 1291 and the collateral order doctrine. Under that doctrine, this Court has jurisdiction to consider the "purely legal issues" raised by Sergeant Sanders's assertion of qualified immunity. *Quinn v. Young*, 780 F.3d 998, 1004 (10th Cir. 2015). However, this Court "lacks jurisdiction at this stage to review a district court's factual conclusions, such as the existence of a genuine issue of material fact for a jury to decide, or that a plaintiff's evidence is sufficient to support a particular factual inference," even in reviewing the denial of qualified immunity. *Fancher v. Barrientos*, 723 F.3d 1191, 1199 (10th Cir. 2013) (internal quotation marks and citation omitted). As explained below, Sergeant

[1] The parties consented to proceed before a magistrate judge on March 5, 2019. A-04. Throughout this memorandum, the term "District Court" is used interchangeably to refer to both the district judge and the magistrate judge who entered orders below.

Sanders's appeal in fact challenges the District Court's factual findings rather than any pure question of law, which means this Court lacks jurisdiction over his appeal.

## COUNTERSTATEMENT OF ISSUES PRESENTED

1. The District Court ruled that a genuine dispute of material existed as to whether (a) Sergeant Sanders intentionally released a K-9[2] and allowed it to attack Mr. Vette after he had already been apprehended by police; and (b) Sergeant Sanders intentionally punched and struck Mr. Vette in the face with a dog chain following his arrest. Does this Court have jurisdiction to review those findings?

2. If this Court reviews the merits of the District Court's finding that a factual dispute precluded summary judgment, do Mr. Vette's *pro se* Verified Complaint and his response opposing Sergeant Sanders's motion for summary judgment constitute competent evidence?

3. If Sergeant Sanders has not waived the argument that, taking Mr. Vette's account as true, qualified immunity was properly denied, does a police officer violate an arrestee's constitutional rights by using serious physical force—here, punching the arrestee, striking him in the face with a dog chain, and deploying a K-9—after the arrestee has been apprehended and detained and complies with police demands and, if so, was that law clearly established as of December 31, 2017?

[2] Throughout this memorandum, the term "K-9" is used to refer to police dogs affiliated with the Montrose County Sheriff's Office.

## COUNTERSTATEMENT OF STANDARD OF REVIEW

As the party seeking relief in this Court, Sergeant Sanders "bears the burden of establishing [this Court's] subject-matter jurisdiction." *United States v. Ceballos-Martinez*, 387 F.3d 1140, 1143 (10th Cir. 2004). If appellate jurisdiction is established, the Court "review[s] the district court's denial of summary judgment on qualified immunity grounds *de novo*, with [its] review limited to purely legal issues." *Quinn*, 780 F.3d at 1004. A district court's evidentiary determinations in resolving a motion for summary judgment—including the decision to treat submissions as competent evidence—are reviewed for abuse of discretion. *Argo v. Blue Cross & Blue Shield of Kansas, Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006). This Court "may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented . . . on appeal." *Jordan v. U.S. Dep't of Justice*, 668 F.3d 1188, 1200 (10th Cir. 2011).

## STATEMENT OF THE CASE[3]

On the evening of December 31, 2017, Sergeant Steve Gustin[4] of the Montrose County Sheriff's Department observed Plaintiff-Appellee Eric Vette driving on a public road. A-54. Believing that Mr. Vette may have stolen a wallet, Sergeant Gustin attempted to stop him and run a warrant check. *Id.* Mr. Vette fled, and after a brief chase, was arrested and charged with several nonviolent offenses. A-53.[5] At the time of his arrest, Mr. Vette was unarmed. *See* A-56 (describing pat-down, which revealed no weapons).

According to the incident report of the encounter, Sergeant Gustin (Unit MC28 in the report, *see* A-51) had "ARRVD" (arrived)[6] at the site of the arrest by

[3] Because this Court must "construe the facts in the light most favorable to the plaintiff as the non-movant," *Corona v. Aguilar*, 959 F.3d 1278, 1282 (10th Cir. 2020), the following facts are taken from Mr. Vette's Verified Complaint (A-08–A-15) and response opposing Sergeant Sanders's motion for summary judgment (A-64–A-67). As set forth *infra*, Section I(B)(1)–(2), these documents are properly treated as evidence. Mr. Vette is "entitled to all reasonable inferences from the record" in resolving this appeal. *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1180 (10th Cir. 2018).

[4] Mr. Vette named Sergeant Gustin as a defendant in his Verified Complaint, alleging that his failure to intervene to stop the beating violated the Fourth Amendment as well. *See* A-10, A-12. The District Court dismissed the claim against Sergeant Gustin on March 11, 2020. A-106–A-107.

[5] Although two of the charges against Mr. Vette were felonies, one stemmed from Mr. Vette's alleged theft of a wallet, and the other from his attempt to flee the police. *See* A-59 (discussing identity theft charge).

[6] Sergeant Sanders's submissions do not contain a key explaining what "ARRVD" means, but the most reasonable inference—and the one to which Mr. Vette is entitled—is that the term refers to the arrival time of a responding officer.

12:23 a.m. A-52 (showing MC28 arrived at 00:23:25). Defendant-Appellant Sergeant Keith Sanders (Unit MC5 in the report, *see* A-51) marked himself as "ARRVD" at the scene with a K-9 police dog at 12:35 a.m. *Id.* (showing MC5 arrived at 00:35:37). When Sergeant Sanders arrived, he observed that Sergeant Gustin "was issuing verbal commands to [Mr. Vette]," and another officer was on the scene. A-56. Sergeant Gustin and another officer apprehended Mr. Vette, after which Mr. Vette alleged that Sergeant Sanders began "punching [and] hitting [Mr. Vette] with [a] dog chain in [his] face." A-11.

"[A]fter he was done [beating Mr. Vette]," A-64, Sergeant Sanders "unlatch[ed] [the K-9's] collar," A-66, and "let[] [the] dog attack [Mr. Vette]," A-11. The K-9 proceeded to bite Mr. Vette's right shoulder multiple times. A-90–A-91. Sergeant Sanders continued to allow the K-9 to bite Mr. Vette until Sergeant Gustin said "[ok] that's enough." A-66. At that point Sergeant Sanders "pull[ed] the K-9 . . . off [Mr. Vette] and stop[ped] [the K-9] from attacking [him] any further." A-64–A-65. Having lived through that beating and witnessed Sergeant Sanders's intentional unleashing of the K-9, Mr. Vette alleged that the assault "was no accident." A-66. At no point did Mr. Vette resist or refuse the officers' commands, or otherwise act in a way to justify the use of force. There was simply "no reason why [he] was getting assaulted by [Sergeant] Sanders." A-11. As a result of the incident, Mr. Vette sustained a black eye and several lacerations to his shoulder,

which were left bleeding. A-65 (noting that Mr. Vette left blood stains on the sheet at the hospital), A-90–A-91.

Sergeant Gustin prepared the initial incident summary alone. A-53. His account of events made no reference to the other two officers at the scene and did not acknowledge that Mr. Vette sustained injuries in the course of his arrest. *See generally* A-54–A-55.[7] Almost twenty hours later, Sergeant Sanders filed a "Supplemental Narrative," in which he stated that his K-9's collar "came unlatched," and the dog "attempted to bite" Mr. Vette. A-56. Sanders's Supplemental Narrative acknowledged that the K-9 "made contact with [Mr. Vette]" and caused "some abrasions or scratches," but stated that Mr. Vette had suffered "no broken skin." A-56. The Supplemental Narrative does not explain how or why the collar "came unlatched." Officer Horn, the third officer present, did not prepare a separate narrative. *See generally* A-50–A-59. And the incident report ultimately included as attachments a photo of Mr. Vette's shoulder, showing the broken skin where the K-9 bit him. *See* A-90–A-91.

## PROCEDURAL HISTORY

On August 6, 2018, Mr. Vette, proceeding *pro se*, filed a Verified Complaint in the United States District Court for the District of Colorado, seeking damages

[7] Although the incident report itself is unclear as to the time at which Sergeant Gustin prepared the document, Sergeant Sanders argued to the District Court that the document was prepared "shortly after the incident occurred." A-42.

from Sergeant Gustin and Sergeant Sanders for violating his constitutional rights by subjecting him to excessive force.[8] A-08–A-10. He signed the Verified Complaint under penalty of perjury. A-14. On March 4, 2019, Sergeant Gustin moved to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. A-25–A-32. That same day, Sergeant Sanders moved to dismiss the Verified Complaint pursuant to Rule 12(b)(6) and asked the District Court to take judicial notice of his Supplemental Narrative prepared for the incident report. A-34–A-49. In the alternative, Sergeant Sanders moved for summary judgment pursuant to Rule 56, relying on the Supplemental Narrative and an affidavit he prepared averring that incident reports are "as complete and thorough as possible." A-62. In his affidavit, Sergeant Sanders also insisted that he "personally did not use force on Mr. Vette." *Id*. On May 10, 2019, Mr. Vette filed a document responding to both motions. In it, he supplemented the allegations in his Verified Complaint to include additional facts supporting the inference that Sergeant Sanders had intentionally unleashed the K-9, and he challenged the veracity of Sergeant Sanders's Supplemental Narrative. *See* A-64–A-67. Sergeant Gustin and Sergeant Sanders filed replies in support of their motions on May 29, 2019. A-69–A-92.

[8] Mr. Vette initially sued the K-9 as well. The District Court dismissed the K-9 as a non-suable entity on September 24, 2019. *See* A93–A-94.

On March 11, 2020, the District Court resolved both motions. The District Court granted Sergeant Gustin's motion to dismiss. A-106–A-107, A-111. The District Court declined to take judicial notice of Sergeant Sanders's Supplemental Narrative or the incident report but converted the motion to one for summary judgment and denied the motion. A-100–A-101.

The District Court's decision denying Sergeant Sanders summary judgment rested on three primary findings. First, in light of Mr. Vette's status as a *pro se* litigant, the District Court treated the allegations in Mr. Vette's Verified Complaint as evidence and compared Mr. Vette's account of the arrest to Sergeant Sanders's Supplemental Narrative and affidavit. A-97–A-98. Those allegations, it held, established a Fourth Amendment violation. Second, the District Court rejected the notion that Mr. Vette's account was contradicted by the record, noting that Sergeant Sanders's submissions were silent on key factual questions, including whether Mr. Vette had already been apprehended by two other officers at the time Sergeant Sanders's K-9 was released, A-105–A-106, and whether Sergeant Sanders had punched him and struck him in the face with the K-9 chain. A-104. These silences, the District Court concluded, would permit a reasonable factfinder to conclude that Sergeant Sanders had violated the Fourth Amendment. A-106. Third, the District Court reviewed case law regarding the use of K-9 dogs in arrests and held that a reasonable officer would have known, as of December 31, 2017, that unleashing a

police service dog to attack a suspect who had already been apprehended violates the Fourth Amendment's proscription against excessive force. A-109.

Sergeant Sanders filed a notice of appeal on March 24, 2020. A-112.

## SUMMARY OF ARGUMENT

This Court should dismiss Sergeant Sanders's appeal. Though presented under many different guises, this appeal seeks solely to relitigate the District Court's determination that a factual dispute exists as to whether Sergeant Sanders (1) struck Mr. Vette in the face with his fist and a dog chain and (2) intentionally unleashed a K-9 dog and allowed it to continue biting Mr. Vette until Sergeant Gustin intervened. But this Court has repeatedly stressed that a district court's determination that a factual dispute precludes summary judgment is the quintessential example of an interlocutory appeal foreclosed by the final order doctrine. Sergeant Sanders cannot circumvent the doctrine by artfully framing his appeal as raising solely a legal question of qualified immunity.

Sergeant Sanders attempts to invoke this Court's jurisdiction by asserting a narrow exception to the final order doctrine that allows this Court, in certain cases, to review factual determinations that are blatantly contradicted by the record. This is no such case. Sergeant Sanders protests at length that the District Court "misunderstood and misapplied the legal standards that apply to summary judgment motions" by considering the allegations in Mr. Vette's Verified Complaint. Opening

Br.[9] at 14. But this Court's precedents are clear: because Mr. Vette is a *pro se* litigant and verified his pleadings under penalty of perjury, those allegations *are* evidence that can be considered at the summary judgment stage. Sergeant Sanders's arguments to the contrary fail to acknowledge this key distinction. The testimonial evidence contained therein—and in Mr. Vette's opposition to Sergeant Sanders's motion for summary judgment, which may also be considered in light of his *pro se* status—are more than sufficient to create a genuine dispute of material fact, particularly given that Sergeant Sanders himself has presented only his own testimony.

Should this Court reach the merits of the appeal, however, the only question it may address is whether, as of December 31, 2017, a reasonable police officer would have known that striking an already-apprehended subject in the face and releasing a K-9 to bite him several times constituted excessive force. The only answer to that question is yes. This Court has repeatedly held that *any* gratuitous use of force on an already-apprehended subject violates the Fourth Amendment, regardless of the particular type of force involved.

[9] Citations to "Opening Br." refer to Appellant's Opening Brief filed on July 1, 2020, and bearing the Document Number 010110369723 on the public docket.

## ARGUMENT

This appeal presents the paradigmatic case for a jury—two contradictory testimonial accounts—and should thus be dismissed for lack of jurisdiction. In the alternative, the District Court should be affirmed in all respects.

### I. THIS COURT LACKS JURISDICTION TO REVIEW THE DISTRICT COURT'S FINDING OF A GENUINE DISPUTE OF MATERIAL FACT.

This Court is one of limited jurisdiction; it is empowered to review only final orders from lower courts. The District Court's determination that factual disputes preclude summary judgment is, under settled law, no such order. The mere fact that Sergeant Sanders frames his appeal as presenting solely a legal question—that of qualified immunity—does not allow this Court to revisit the District Court's factual conclusions unless they are "'blatantly contradicted' by the record[.]" *Walton v. Powell*, 821 F.3d 1204, 1208 (10th Cir. 2016) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007))(citation omitted). Here, contrary to Sergeant Sanders's characterization, the record is far from clear. In fact, it consists of two competing accounts of Mr. Vette's arrest: Sergeant Sanders's, as set forth in an affidavit and the Supplemental Narrative, and Mr. Vette's, set forth in his Verified Complaint and response opposing summary judgment. Because both Mr. Vette's submissions are properly treated as evidence for purposes of resolving summary judgment, Sergeant Sanders's appeal, at heart, asks this Court to simply credit his testimony over that of Mr. Vette.

But that is a paradigmatic factual dispute that neither the District Court nor this Court may resolve on a motion for summary judgment.

### A. The District Court's Finding that a Factual Dispute Exists Is Not a Final Order, Mandating Dismissal of This Appeal.

Before reaching the merits of any appeal, this Court must first assess its own jurisdiction. *United States v. Springer*, 875 F.3d 968, 973 (10th Cir. 2017) ("Jurisdiction is a threshold question that a federal court must address before reaching the merits, even if the merits question is more easily resolved and the party prevailing on the merits would be the same as the party that would prevail if jurisdiction were denied.") (citation omitted). It is well-settled that this Court may only exercise jurisdiction over appeals "from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. And "[a] denial of summary judgment is not a final order within the meaning § 1291." *Stewart v. Oklahoma*, 292 F.3d 1257, 1259 (10th Cir. 2002). In a "small class" of cases, however, interlocutory appeals from the denial of summary judgment are permitted—but only to the extent they present purely legal questions. *Auraria Student Hous. at the Regency, LLC v. Campus Village Apartments, LLC*, 703 F.3d 1147, 1150 (10th Cir. 2013). This narrow exception is not an invitation to revisit a district court's determinations about the sufficiency of the evidence: "[t]his court . . . has jurisdiction over appeals challenging the denial of a qualified-immunity-based motion for summary judgment only if a defendant-appellant does not dispute the facts a district court determines a

reasonable juror could find[.]" *Ralston v. Cannon*, 884 F.3d 1060, 1067 (10th Cir. 2018).

Sergeant Sanders simply ignores these sharp limits on appellate jurisdiction, attempting to disguise his request for wholesale review of the District Court's determinations as to what facts a jury could reasonably find as presenting a purely legal question regarding qualified immunity. But the District Court's denial of qualified immunity "has two distinct components: (1) based on the evidence before it, there is a genuine issue of fact as to what happened during the encounter between [Sergeant Sanders] and [Mr. Vette]; and (2) viewing the disputed evidence in the light most favorable to plaintiff, [Sergeant Sanders's] conduct violated clearly established law." *Walker v. City of Orem*, 451 F.3d 1139, 1155 (10th Cir. 2006). And this Court "lack[s] jurisdiction to review the district court's determination on the first point, that 'the evidence could support a finding that particular conduct occurred.'" *Id.* This is true even despite Sergeant Sanders's claims that the District Court ignored material facts or improperly weighted evidence. *See Fancher v. Barrientos*, 723 F.3d 1191, 1200 (10th Cir. 2013) (finding no jurisdiction to review district court's finding of factual dispute, even when appellant alleged "several material facts . . . the district court failed to consider when analyzing whether [plaintiff] posed a continuing threat"). The reason for this rule is clear: "evidentiary

sufficiency appeals simply do not advance the purposes of qualified immunity." *Roosevelt-Hennix v. Prickett*, 717 F.3d 751, 759 (10th Cir. 2013).

Even cursory review of Sergeant Sanders's briefing makes clear that his main dispute with the District Court is its determinations about what a reasonable jury could find. Indeed, the vast majority of Sergeant Sanders's briefing challenges the District Court's determination that Mr. Vette's Verified Complaint—which, as discussed further *infra*, Section I(B)(1), is properly treated as testimonial evidence—presented sufficient evidence, if believed, to establish a Fourth Amendment violation. Opening Br. at 15–21 (challenging District Court's determination that sufficient evidence existed showing that Sergeant Sanders intentionally released K-9 after Mr. Vette was apprehended), 25–28 (challenging District Court's finding of sufficient evidence showing that Sergeant Sanders punched and struck Mr. Vette in the face). But that is not a basis for an interlocutory appeal.

In invoking this Court's appellate jurisdiction, Sergeant Sanders bore the burden of establishing that his appeal challenged a final order of the District Court. Because he failed to meet this threshold burden, his appeal must be dismissed.

### B. A Reasonable Factfinder Could Credit Mr. Vette's Testimony About the Circumstances Of His Arrest.

Sergeant Sanders presents no argument for why his appeal of the District Court's factual conclusions may be heard. However, his briefing makes passing reference to the notion that this Court may revisit the District Court's factual findings

because Mr. Vette's allegations "are so blatantly contradicted"—by Sergeant Sanders's own affidavit and Supplemental Narrative—"that 'no reasonable jury could believe' them." Opening Br. at 10–11. It is true that this Court has recognized a "limited . . . exception" to the final order doctrine where a plaintiff's testimony is "blatantly contradicted" by the record. *Roosevelt-Hennix*, 717 F.3d at 759. But that standard "is a very difficult one to satisfy." *Cordero v. Froats*, 613 F. App'x 768, 769 (10th Cir. 2015) (unpublished). Sergeant Sanders makes no effort to do so in this appeal—nor could he.

Sergeant Sanders claims that Mr. Vette introduced no evidence into the record before the District Court to dispute the testimonial account contained in Sergeant Sanders's affidavit and Supplemental Narrative. But the District Court properly treated the allegations in Mr. Vette's Verified Complaint as testimonial evidence under settled law of this Circuit. And Mr. Vette supplemented his allegations in his response opposing Sergeant Sanders's motion for summary judgment. At bottom, therefore, the record before the District Court contained one testimonial account from Mr. Vette in his Verified Complaint and response opposing summary judgment and one from Sergeant Sanders in an affidavit and the Supplemental Narrative. Under this Circuit's authority, a defendant's competing testimony, without more, is insufficient to "blatantly contradict" a plaintiff's account. Because a reasonable juror

could credit Mr. Vette's testimony over that of Sergeant Sanders, this Court should dismiss this appeal.

*1. Mr. Vette's Verified Complaint Was Properly Treated As Testimonial Evidence in the Record Before the District Court.*

District courts are afforded broad leeway in considering or excluding evidence in resolving a motion for summary judgment. This Court reviews such decisions only for an abuse of discretion. *Mitchael v. Intracorp, Inc.*, 179 F.3d 847, 854 (10th Cir. 1999). The District Court's decision to treat Mr. Vette's Verified Complaint as an affidavit and consider it in resolving Sergeant Sanders's motion was no such abuse of discretion—in fact, it was no error at all.

This Court has squarely held that a "complaint may also be treated as an affidavit if it alleges facts based on the plaintiff's personal knowledge and has been sworn under penalty of perjury." *Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir. 1991) (citation omitted). And this Court has repeatedly approved of district courts' decisions to consider allegations in a verified complaint—sworn to under penalty of perjury—as evidence for purposes of resolving a motion for summary judgment. *See, e.g.*, *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010); *Ali v. Dinwiddie*, 437 F. App'x 695, 697 n.4 (10th Cir. 2011) (unpublished); *May v. Okla. Dep't of Corr.*, 215 F.3d 1337 (Table), (No. 99-6267), 2000 WL 633244 (10th Cir. May 17, 2000) (unpublished); *Murray v. Albany Cty. Bd. of Cty. Comm'rs*, 211 F.3d 1278 (Table), (No. 99-8025), 2000 WL 472842 (10th Cir. Apr. 20, 2000) (unpublished).

Here, there is no dispute that Mr. Vette's Verified Complaint was sworn to under penalty of perjury. *See* A-14. Nor does Sergeant Sanders claim that the allegations in Mr. Vette's Verified Complaint are based on anything other than personal knowledge. *See* A-11. Thus, the District Court committed no error—let alone an abuse of discretion—by considering its allegations. And those allegations are clear: Sergeant Sanders "punch[ed], hit[] with a dog chain in [the] face[,] and let[] [a] dog attack [Mr. Vette] after [he] was already [apprehended] by two sheriffs." *Id.*

Sergeant Sanders' argument for excluding Mr. Vette's Verified Complaint relies on generalized statements of law to suggest that Mr. Vette ignored a requirement to "go beyond the pleadings" and instead "did nothing" and "merely rested on his pleading." Opening Br. at 14. But this conclusory argument ignores the important distinction between an unverified complaint and one signed under penalty of perjury. Because the latter constitutes testimonial evidence, there is "no reason . . . to demand that [Mr. Vette] must re-label his verified complaint as an affidavit and submit essentially the same facts to the court." *Conaway v. Smith,* 853 F.2d 789, 793 (10th Cir. 1988). In fact, this Court has repeatedly reversed district courts' grant of summary judgment against *pro se* plaintiffs who rest solely on verified pleadings. *See, e.g.*, *Abdulhaseeb*, 600 F.3d at 1316–17 (reversing grant of summary judgment based solely on allegations in *pro se* plaintiff's verified complaint); *Hayes v.*

*Marriott*, 70 F.3d 1144, 1147–48 (10th Cir. 1995) (same); *Mosier v. Maynard*, 937 F.2d 1521, 1524–25 (10th Cir. 1991) (same).

Sergeant Sanders does not dispute that Mr. Vette's Verified Complaint is signed under penalty of perjury and based on his personal knowledge. Thus, far from "misunderstanding" the settled law of summary judgment practice, the District Court acted wholly within its discretion in treating Mr. Vette's sworn pleading as evidence.

*2. Mr. Vette's Response Opposing Summary Judgment May Also Be Treated as Evidence in the Record.*

Though the District Court relied solely on Mr. Vette's Verified Complaint, which is sufficient to create a genuine dispute of material fact by itself, this Court may also consider the response Mr. Vette submitted in opposition to Sergeant Sanders's motion for summary judgment as a basis for affirmance.

This Court has repeatedly stressed the importance of privileging substance over form to protect the rights of *pro se* litigants: "this circuit has expressed concern that *pro se* litigants not have their suits dismissed on summary judgment merely because they have failed to comply with the technical requirements involved in defending such a motion." *Woods v. Roberts*, 47 F.3d 1178 (Table) (10th Cir. 1995), (No. 94-3159), 1995 WL 65457 (unpublished) (citations omitted). Rather, "[t]he requirement is that the party submitting the evidence show that it will be possible to put the information, the substance or content of the evidence, into an admissible form." *Brown v. Perez*, 835 F.3d 1223, 1232 (10th Cir. 2016), *as amended on reh'g*

(Nov. 8, 2016). As such, this Court has repeatedly considered factual averments made by *pro se* parties in unsworn submissions when resolving summary judgment motions. *See, e.g.*, *Jackson v. Kan. City Kan. Pub. Sch. Unified Sch. Dist. No. 500*, 799 F. App'x 586, 590 (10th Cir. 2020) (unpublished), *cert. denied sub nom. Jackson v. Kan. City KS Pub. Sch.*, No. 19-8150, 2020 WL 2814819 (U.S. June 1, 2020) ("Jackson also contends the district court abused its discretion when it refused to consider a statement by Shannon Rinehart [in resolving motion for summary judgment] because the statement did not appear in a conforming affidavit or declaration. We agree.") (internal quotation marks and citations omitted); *Sparks v. Rittenhouse*, 314 F. App'x 104, 107 n.2 (10th Cir. 2008), (No. 07–1180), 2008 WL 4218800 (unpublished) (affirming district court's consideration of factual allegations in *pro se* litigant's response opposing summary judgment); *Sasa v. Zavaras*, 166 F.3d 1222 (Table), (No. 98-1210), 1998 WL 849764, at *3 (10th Cir. 1998) (unpublished) (considering allegations in unsworn prison grievance form submitted in connection with summary judgment opposition).

Under these relaxed standards, Mr. Vette's response opposing Sergeant Sanders's motion for summary judgment may appropriately be considered by this Court. Mr. Vette's submission presented no legal argumentation or case law. Instead, it presented direct factual counterstatements to the assertions contained in Sergeant Sanders's affidavit and Supplemental Narrative. *See generally* A-64–A-66. And the

facts Mr. Vette asserts in his submission are based on his personal observations: that Sergeant Sanders "unlatched [the K-9's] collar," allowing it to attack; that Sergeant Sanders "let [the K-9] attack [Mr. Vette's] shoulder" until "Sergeant Gustin state[d] 'ok that's enough'[;]" and that Sergeant Sanders "str[uck] [Mr. Vette] in the face with his fist and dog chain[.]" A-64. These facts are undisputedly within Mr. Vette's personal knowledge and could easily be put into admissible form. The fact that they were submitted in an unsworn document titled "Responding to [Sergeant Sanders's motion]" is of no moment.

*3. Sergeant Sanders's Contrary Evidence Merely Presents Competing Testimony, Which A Jury Must Weigh.*

If Sergeant Sanders wished to invoke the "blatantly-contradicted" exception to the final order doctrine, he faced "a heavy burden," and was required to show that the District Court's findings "constitute[d] 'visible fiction.'" *Spencer v. Abbott*, 731 F. App'x 731, 736 (10th Cir. 2017) (unpublished) (quoting *Lynch v. Barrett*, 703 F.3d 1153, 1160 n.2 (10th Cir. 2013)). Sergeant Sanders failed to do so. Mr. Vette's submissions provide ample support for the District Court's determination about how a factfinder could reasonably view the evidence. In response, Sergeant Sanders simply points to his own contrary submissions, which is precisely the kind of factual dispute that requires a trial.

This Court has generally limited application of this "blatantly-contradicted" exception to situations involving objective documentary evidence, such as video

recordings, that directly contradicts a plaintiff's testimony. *See, e.g.*, *Carabajal v. City of Cheyenne*, 847 F.3d 1203, 1207 (10th Cir. 2017) (relying on video of police encounter); *Thomas v. Durasanti*, 607 F.3d 655, 659 (10th Cir. 2010) (same). Sergeant Sanders's attempts to meet this burden through just two documents—his own affidavit and a narrative report that he himself prepared—fall far short. This Court has never applied the "blatant contradiction" exception where a defendant points solely to his own testimony or summaries. Quite the contrary; the Supplemental Narrative and affidavit submitted by Sergeant Sanders are precisely the types of documents that this Court has rejected in considering the exception. *See, e.g.*, *McCowan v. Morales*, 945 F.3d 1276, 1281 n.3 (10th Cir. 2019) (declining to apply exception where plaintiff's testimony was contradicted by intake form prepared by jailer, as recognizing that such documents are simply "recording[s] of what [the jailer] perceived, which [are] more susceptible to being mistaken, falsified or incomplete"); *Rhoads v. Miller*, 352 F. App'x 289, 291 (10th Cir. 2009) (unpublished) ("Here, there is no videotape or similar evidence in the record to blatantly contradict Mr. Rhoads' testimony. There is only other witnesses' testimony to oppose his version of the facts, and our judicial system leaves credibility determinations to the jury."). This appeal presents an even more compelling case than either *McCowan* or *Rhoads*. If concerns about the accuracy of a third-party witness's accounts are sufficient to defeat the exception, those same concerns are at

their nadir here: the accounts of the arrest that Sergeant Sanders relies on were *prepared by Sergeant Sanders himself*. *Cf. Younes v. Pellerito*, 739 F.3d 885, 889 (6th Cir. 2014) (noting that a defendant officer's "testimony about the incident is not the type of evidence in the record [that] 'utterly discredits'" a plaintiff's account) (citation omitted).[10]

* * *

At heart, Sergeant Sanders's main grievance is that the District Court did not accept his account of the arrest as true over Mr. Vette's. But "[i]t is axiomatic that a judge may not evaluate the credibility of witnesses in deciding a motion for summary judgment." *Seamons v. Snow*, 206 F.3d 1021, 1026 (10th Cir. 2000). The appeal must be dismissed.

## II. THE DISTRICT COURT PROPERLY DENIED SERGEANT SANDERS QUALIFIED IMMUNITY.

If this Court nonetheless exercises jurisdiction over Sergeant Sanders's appeal, it should affirm the District Court's order denying qualified immunity. Crediting Mr. Vette's account of the arrest as this Court must, *see Halley v. Huckaby*, 902 F.3d 1136, 1144 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1347, 203 L. Ed. 2d 570 (2019) (noting that, in reviewing a district court's decision regarding qualified

[10] Accepting Sergeant Sanders's position would essentially declare, as a matter of law, that a suspect's testimony could never be believed over than of an arresting officer.

immunity, this Court must "ordinarily accept the plaintiff's version of the facts"), no reasonable officer could have believed that, as of December 31, 2017, the Constitution permits an officer to repeatedly punch an already-apprehended subject in the face, then release a K-9 to bite him. Sergeant Sanders is not entitled to qualified immunity.

### A. The Evidence, Viewed in The Light Most Favorable To Mr. Vette, Establishes A Fourth Amendment Violation.

The District Court found—and Sergeant Sanders *does not dispute*—that intentionally striking an apprehended subject in the face and unleashing a K-9 to bite him constitutes excessive force under the Fourth Amendment. *See* A-105–A-106; Opening Br. at 15–21 (disputing only that Mr. Vette introduced sufficient evidence of an intentional application of force). Because Sergeant Sanders has waived any argument otherwise, *see Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020) (citation omitted) ("Issues not raised in the opening brief are deemed abandoned or waived."), this Court should dismiss the appeal.[11]

If the Court nonetheless reviews the District Court's holding that intentionally striking and releasing a K-9 on an apprehended subject constitutes excessive force, it should still affirm. Claims of excessive force require only that a plaintiff show that

[11] As discussed *supra*, Section I(A), this Court lacks jurisdiction to review Sergeant Sanders's challenges to the District Court's determinations about the facts a reasonable jury could find—including that Sergeant Sanders intentionally applied force to Mr. Vette.

"the officer's actions were not 'objectively reasonable' in light of the facts and circumstances confronting him." *McCowan*, 945 F.3d at 1283. As the District Court properly recognized, assessing the reasonableness of an officer's conduct "requires careful attention to the facts and circumstances of each particular case, including (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Of these, "[t]he second *Graham* factor . . . is undoubtedly the most important[.]" *Pauly v. White*, 874 F.3d 1197, 1215–16 (10th Cir. 2017) (internal quotation marks omitted). After carefully weighing each factor, the District Court concluded that Sergeant Sanders employed excessive force if Mr. Vette's account of events is true. So too should this Court.

All three *Graham* factors favor Mr. Vette. *First*, at the time of his arrest, Mr. Vette was unarmed, and was not suspected of a serious or violent crime; he was pursued on suspicion of stealing a wallet, and ultimately was arrested and charged with a number of nonviolent offenses, most of which were traffic-related violations.[12] *See* A-54. This factor thus cuts in Mr. Vette's favor.

[12] The District Court held this factor favors Sergeant Sanders because, when Sergeant Sanders arrived at the scene of Mr. Vette's arrest, he knew Mr. Vette was wanted for a felony. A-105. But this focus on whether the ultimate offense with which Mr. Vette was charged was a felony or a misdemeanor was error; as this Court has recognized, the first *Graham* factor cuts in favor of even plaintiff accused of a

*Second*, as the District Court found, Mr. Vette did not pose an immediate threat to the safety of Sergeant Sanders. Courts analyzing this factor consider the nature of the threat at the "precise moment [a police officer] used force." *Thomas*, 607 F.3d at 664. When Sergeant Sanders struck Mr. Vette in the face, hit him with a dog chain, and then released a K-9 to bite Mr. Vette, Mr. Vette had already been apprehended. Sergeant Sanders does not claim—and not a single piece of evidence suggests—that Mr. Vette was behaving threateningly towards Sergeant Sanders at any point, let alone at the point Sergeant Sanders used force. Even if any justification for some use of force existed prior to Mr. Vette's arrest, "the justification disappeared when [Mr. Vette] was under the officers' control." *Perea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016) (denying qualified immunity to officers for using a taser on a man who had already been arrested).

*Third*, Mr. Vette was not actively resisting arrest or attempting to flee at the "precise moment" Sergeant Sanders used force. To the contrary, Mr. Vette was already apprehended at the time he was assaulted. *See* A-11. That Mr. Vette had

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*nonviolent* felony—such as identity theft. *See, e.g.*, *Estate of Ronquillo v. Denver*, 720 F. App'x 434, 438 (10th Cir. 2017) (No. 16-1476), 2017 WL 6422342 (unpublished) (plaintiff accused of aggravated vehicle theft, a felony, still won out on first *Graham* factor because "[d]efendants do not contend that any of [plaintiff's] crimes were accompanied by violence"). Because the only felonies with which Mr. Vette was charged related to his alleged theft of a wallet—which Sergeant Sanders has not claimed was accompanied by any violence—the District Court erred in finding that the first *Graham* factor favored Sergeant Sanders.

*previously* fled does not alter the analysis; even if a subject initially flees, officers must consider how circumstances change once the subject is ultimately subdued. S*ee, e.g.*, *McCoy v. Meyers*, 887 F.3d 1034, 1050 (10th Cir. 2018) (opining that even if the apprehended plaintiff had previously posed a threat to officers and fled, the circumstances at the time of the seizure and use of force had changed, and the plaintiff was no longer a threat or resisting); *Osterhout v. Morgan*, 763 F. App'x 757, 762 (10th Cir. 2019), (No. 18-7023), 2019 WL 689797 (unpublished) (concluding that "[e]ven if Mr. Osterhout's operation of the motorcycle had previously posed a threat to the officers or members of the public, the circumstances had changed" such that "a reasonable officer would not have believed that Mr. Osterhout posed an immediate threat to the officers or the public" at the time force was used).

Thus, should this Court consider whether intentionally striking an apprehended subject and releasing a K-9 to attack him constitutes excessive force—despite the argument being waived by Sergeant Sanders—it should nonetheless determine that all three *Graham* factors support a finding that the force Sergeant Sanders used was objectively unreasonable.

### B. Intentionally Hitting an Already-Restrained Arrestee in the Face and Unleashing a K-9 on Him Violates Clearly Established Law.

This Court has previously established that an officer violates the Fourth Amendment when he or she uses force on an already-apprehended individual,

regardless of the particular manner of force employed in a particular case. That alone warrants affirming the denial of qualified immunity here. That conclusion is only further strengthened by surveying precedent both within this Circuit and without, which makes clear that strikes to the face of and the intentional release of a K-9 on an already-subdued person—precisely the types of force that Sergeant Sanders used on Mr. Vette after he had been apprehended—violate the Fourth Amendment. Qualified immunity is not appropriate here.

*1. The Right to Be Free from Any Form of Gratuitous Force After Being Apprehended Is Clearly Established.*

When considering qualified immunity, "[i]t is clearly established that specific conduct violates a constitutional right when Tenth Circuit or Supreme Court precedent would make it clear to every reasonable officer that such conduct is prohibited." *Perea*, 817 F.3d at 1204. The qualified immunity analysis cannot be reduced to "a scavenger hunt for prior cases with precisely the same facts"; instead, this Court must consider whether conduct is "obviously egregious" in light of prevailing constitutional principles. *Id*. (quoting *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007). Officers are not entitled to qualified immunity when the law has "put officials on fair notice that the described conduct [is] unconstitutional." *Gomes v. Wood*, 451 F.3d 1122, 1134 (10th Cir. 2006) (quoting *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004)). This rule applies with particular force in the context of Fourth Amendment excessive force claims. *Casey*,

509 F.3d at 1284 (recognizing that the uniquely fact-intensive nature of excessive force claims means that "there will almost never be a previously published opinion involving exactly the same circumstances"). Thus, "[t]he law can be clearly established even when the very action in question has not previously been held unlawful." *Estate of Booker v. Gomez*, 745 F.3d 405, 433 (10th Cir. 2014) (internal quotation marks and citation omitted).

Applying these principles, Sergeant Sanders's use of force against Mr. Vette was obviously unlawful, such that qualified immunity is not available. Indeed, this Court has repeatedly and unequivocally held that any nontrivial use of force on an already-apprehended subject violates the Fourth Amendment—regardless of the specific type of force employed. In *Fogarty v. Gallegos*, for example, this Court considered a March 20, 2003 arrest in which police officers responding to a protest encountered the plaintiff, who voluntarily began to walk with the officers. When the plaintiff began to have an asthma attack, the officers "forced [the plaintiff] to the ground, pulling his arms behind his back and forcing the palm of his hand towards his forearm" with enough force to tear a tendon in the plaintiff's wrist. 523 F.3d 1147, 1152 (10th Cir. 2008). This Court affirmed the denial of qualified immunity "even in the absence of prior circuit precedent arising under the same facts" because "it would be apparent to a reasonable officer that the use of force adequate to tear a

tendon is unreasonable against a fully restrained [subject]." *Id.* at 1162 (citation omitted).

*Fogarty*'s focus on the fact of an individual's apprehension rather than the specific force used has continued to define this Court's Fourth Amendment jurisprudence. This Court has flatly stated that "the law [is] clearly established that the gratuitous use of force against a person who is not resisting arrest violates the Fourth Amendment." *Herrera v. Bernalillo Cty. Bd. of Cty. Comm'rs.*, 361 F. App'x 924, 929 (10th Cir. 2010), (No. 09-2042), 2010 WL 226571 (unpublished) (collecting authorities). In denying officers qualified immunity for driving their knees into an already-prone suspect, the *Herrera* Court found that prior cases in which officers kicked, hit, choked, and used flashlights to strike already-restrained individuals to be sufficient to put reasonable officers on notice that the use of force against those who have submitted to police authority is impermissible under the Fourth Amendment. *Id.*

This Court reaffirmed in 2016 the immateriality of the particular type of violence at issue in denying qualified immunity to officers who use force against restrained subjects. In *Perea v. Baca*, this Court addressed a situation in which police officers searching for an individual experiencing a mental break observed the individual committing a minor traffic violation, chased him and arrested him without explanation, and then—after he was detained—shot him in the chest with a taser ten

times in two minutes. 817 F.3d at 1201. In appealing the denial of qualified immunity, the officers specifically argued that no prior authority specifically addressed the use of a taser against a restrained individual ten times in two minutes. *Id.* at 1205 n.4. This Court emphatically rejected that argument, reasoning that even absent a case addressing the specific type of force, "no reasonable officer could conclude that continuing to taser a subdued detainee is constitutional." *Id.*

Two years later, this Court again emphasized this principle in *McCoy v. Meyers*, a case in which officers struck an individual and placed them in a chokehold before and after the individual was apprehended. 887 F.3d 1034, 1046 (10th Cir. 2018). In denying the officers qualified immunity, this Court noted that its prior precedents "clearly establish that the Fourth Amendment prohibits the use of force without legitimate justification, as when a subject poses no threat or has been subdued." *Id*. at 1046-47.[13] Despite acknowledging that the case on appeal was not factually identical to its prior precedent, the Court ultimately found that its authority "nevertheless made it clear that the use of force on effectively subdued individuals violates the Fourth Amendment" as of 2011. *Id*. at 1052.

[13] The *McCoy* Court relied principally on *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991), *Casey*, 509 F.3d 1278, and *Weigel v. Broad*, 544 F.3d 1143 (10th Cir. 2008).

Similarly, in *McCowan v. Morales*, this Court adhered to its focus on whether force was applied after the apprehension of an individual rather than the specific type of force. There, an officer handcuffed an arrestee and placed them into the back of a police car without a seatbelt, then began to drive recklessly to throw the plaintiff around the back seat. 945 F.3d at 1283. In seeking summary judgment, the officer noted the absence of case law arising out of the context of an officer driving recklessly and causing attendant injuries to an arrestee. *Id.* at 1286. This Court emphatically rejected the officer's myopic view of qualified immunity, and held that "the relevant inquiry . . . [wa]s whether there were relevant Tenth Circuit cases giving [the officer] notice that the gratuitous use of force against a fully compliant, restrained, and non-threatening misdemeanant arrestee was unconstitutional." *Id.* And relying on *McCoy* and the cases cited therein, this Court denied the officer qualified immunity. *Id.*

Taken together, this Court's precedents are clear: *any* use of gratuitous force on an already-apprehended subject violates the Fourth Amendment. Sergeant Sanders's decision to punch Mr. Vette in the face, strike him with a dog chain, and unleash a K-9 to bite him should be treated no differently.

*2. Case Law from Both This Circuit and Its Sisters Has Denied Qualified Immunity to Officers Who Intentionally Punch, Strike, or Unleash a K-9 Dog on an Apprehended Subject.*

Qualified immunity is *particularly* inappropriate on Mr. Vette's Fourth Amendment claims here because courts in this Circuit and beyond have routinely held that punching and hitting, and intentionally unleashing a K-9 to attack, an already-apprehended subject each constitute excessive force.

Sergeant Sanders does not argue here that, under Mr. Vette's account of events, Sergeant Sanders did not violate clearly established law by striking Mr. Vette in the face, both with his fist and with a dog chain. *See* Opening Br. at 21–24 (discussing "clearly established" prong only in connection with allegations about release of a K-9). With good reason; this Circuit has long recognized that physically beating an apprehended subject violates the Fourth Amendment. *See, e.g.*, *Dixon v. Richer*, 922 F.2d 1456, 1458 (10th Cir. 1991) (denying qualified immunity to officers who, after stopping plaintiff in his car, "got on top of him and began to beat and choke him"); *Kalbaugh v. Jones*, 807 F. App'x 826, 829 (10th Cir. 2020) (unpublished) (denying qualified immunity to officers who repeatedly punched a plaintiff after he exited the vehicle he used to flee, dropped his guns, and placed his

hands in the air).[14] Sergeant Sanders's failure to argue his entitlement to qualified immunity under Mr. Vette's version of events alone warrants affirmance.

Sergeant Sanders instead suggests that the District Court erred in analyzing Mr. Vette's allegations regarding the release of a K-9. But the intentional[15] unleashing of a K-9 violates clearly established law for similar reasons. Though this Court has not issued any specific decisions on the deployment of dogs onto subdued individuals, it may look to both district court opinions within the Tenth Circuit and other Courts of Appeal for guidance. *See, e.g.*, *Estate of Booker v. Gomez*, 745 F.3d 405, 428 & n.29 (10th Cir. 2014) (considering district court and out-of-circuit authority in context of excessive force claim). And those other courts have consistently denied qualified immunity where an officer was alleged to have attacked a subdued individual with a K-9. *See, e.g.*, *Savannah v. Collins*, No. 12-CV-02403-RBJ-MJW, 2015 WL 4237592, at *4 (D. Colo. July 14, 2015) ("[B]oth Tenth Circuit precedent and common sense establish that giving an attack command

[14] Although *Kalbaugh* is an unpublished opinion of this Court, it is still properly considered in assessing whether the law was clearly established. *See Morris v. Noe*, 672 F.3d 1185, 1197 n.5 (10th Cir. 2012) (rejecting argument that unpublished opinions are irrelevant to determining whether a right is clearly established).

[15] To the extent Sergeant Sanders's discussion of the "clearly established" prong of the inquiry rests on his continued insistence that his own account of the arrest must be credited, *see, e.g.*, Opening Br. at 22–24 (asserting that no case law establishes the unlawfulness of an *unintentional* release of a K-9), it should be ignored. As set forth more fully *supra*, Section II(A), this Court must "accept the plaintiff's version of the facts—that is, 'the facts alleged'"—in resolving Sergeant Sanders's motion. *Halley*, 902 F.3d at 1144 (citation omitted).

to an unrestrained police dog after a suspect has been subdued would be excessive and unreasonable."); *Moore v. Summer*, No. 12-3204-SAC, 2015 WL 1470290, at *10 (D. Kan. Mar. 31, 2015) (allowing claim for excessive force to proceed where officer allegedly ordered dog to attack even though the plaintiff already had his arms raised); *Trujillo v. City of Lakewood*, No. 08-CV-00149-WDM-CBS, 2009 WL 3260724, at *4 (D. Colo. Oct. 9, 2009) (concluding that it was clearly established that allowing a dog to bite a subdued individual posing no obvious threat "was not warranted under the circumstances") (citation omitted); *Priester v. City of Riviera Beach*, 208 F.3d 919, 927 (11th Cir. 2000) (denying qualified immunity where officer, *inter alia*, ordered and allowed dog to bite plaintiff suspect in an "unprovoked attack"); *Mendoza v. Block*, 27 F.3d 1357, 1362-63 (9th Cir. 1994), *as amended* (May 31, 1994) (noting that no particular case law is necessary for an officer to know that deploying a dog on a suspect that has been handcuffed, fully surrendered, and under control is excessive force).

* * *

Put simply, it strains credulity to suggest that the Constitution permits a police officer to beat an apprehended individual or unleash a K-9 to bite them repeatedly—or that a reasonable officer could possibly have believed otherwise as of December 31, 2017. For these reasons, should this Court exercise jurisdiction over Sergeant

Sanders's appeal, the District Court's decision denying Sergeant Sanders qualified immunity should be affirmed.

## CONCLUSION

Sergeant Sanders cannot, through artful pleading, expand this Court's power to resolve disputes beyond that granted by Congress. This Court should dismiss Sergeant Sanders's appeal, which seeks solely to invite appellate review of the District Court's factual conclusions. If this Court does exercise jurisdiction, however, it should affirm that portion of the District Court's decision denying Sergeant Sanders qualified immunity.

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure, undersigned counsel certifies that this brief complies with applicable type-volume limitations contained in Rule 32(a)(7)(B). This brief contains 8,530 words, exclusive of those words excluded from calculating length by Rule 32(f). This number was calculated using the word count function of the word processing system used to prepare this brief: Microsoft Word.

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## CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, Local Rule 25.3, and Section II(J) of this Court's CM/ECF Rules, undersigned counsel certifies that: (1) all required privacy redactions have been made in accordance with Rule 25(a)(5) of the Federal Rules of Appellate Procedure and Local Rule 25.5; (2) any hard copies of this brief required to be submitted shall be exact copies of this electronically filed version; and (3) this brief has been scanned for viruses with the most recent version of a commercial virus scanning program, Webroot SecureAnywhere Endpoint Protection, version 9.0.28.48, most recently updated on May 13, 2020.

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## CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure, undersigned counsel certifies that he electronically filed the foregoing Appellee's Response Brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit on August 14, 2020 using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served electronically by the appellate CM/ECF system.

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