IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Blaine Franklin Shaw, *et al*., *Plaintiffs*, v. Herman Jones, in his official capacity as the Superintendent of the Kansas Highway Patrol, *et al*., *Defendants*.	**Case No. 6:19-CV-1343-KHV-GEB**
Mark Erich and Shawna Maloney, i*ndividually and as mother and natural guardian of minors D.M and M.M*, *Plaintiffs*, v. HERMAN JONES, in his official capacity as the Superintendent of the Kansas Highway Patrol, *Defendant.*	**Case No. 20-CV-01067-KHV-GEB**

PLAINTIFFS' REPLY MEMORANDUM IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT JONES

Plaintiffs Blaine Shaw, Samuel Shaw, Joshua Bosire, Mark Erich, and Shawna Maloney submit this reply memorandum in further support of their motion for summary judgment against Defendant Jones for injunctive and declaratory relief. Defendant Jones' arguments in opposition

are unavailing for the reasons set forth below and in Plaintiffs' opening memorandum.[1] Plaintiffs' motion should be granted.

I. Plaintiffs' Statement of Material Facts[2]

The Kansas Highway Patrol (KHP)

1. KHP is a state law enforcement agency that is responsible for highway policing through "the uniform enforcement of Kansas traffic laws, statutes, and regulations." **Ex. 2**, Enforcement Guidelines at 1.

DEFENDANT JONES' RESPONSE: Uncontroverted.

2. KHP creates policies and practices to assist in its enforcement efforts. **Ex. 3**, Col. Herman T. Jones (Jones) Dep. at 29:11-30:11; 54:1-17.

DEFENDANT JONES' RESPONSE: Uncontroverted.

3. The KHP is under the direction of Superintendent Jones, who determines KHP's policies. Jones has served in his role since April 2019. **Ex. 3**, Jones Dep. at 7:25-8:4.

DEFENDANT JONES' RESPONSE: Uncontroverted.

[1] Plaintiffs maintain each of the arguments made in their Motion for Summary Judgment and Memorandum in Support. To the extent certain points of Defendant Jones' Response are not addressed here, Plaintiffs stand on the arguments made in their prior summary judgment briefing. Plaintiffs do not reiterate them here simply to avoid redundancy.

[2] Defendant Jones' response to Plaintiff's Memorandum in Support of Plaintiffs' Motion for Summary Judgment against Defendant Jones fails to comply with Local Rule 56.1(b)(1) which requires that a "memorandum in opposition to a motion for summary judgment *must begin* with a section containing a concise statement of material facts as to which the party contends a genuine issue exists." (emphasis added). Instead, Defendant Jones states an Attachment A is incorporated "to respond to Plaintiffs' statements . . . [a]s an appropriate effort to prevent the confusion, which Plaintiffs want to seed through the length of their pleadings, repetitive citations, inaccurate descriptions of testimony and citations to irrelevant information." Plaintiffs obviously disagree with Defendant Jones' characterization of the Plaintiffs' factual statements and their relevancy. Defendant Jones claims on the one hand that there are too many facts and in the argument that there are not enough. Plaintiffs include the lengthy statement of facts at the beginning of their memoranda simply because it is what is required by the rules, not for any nefarious purpose. Within this section, Plaintiffs offer replies to certain responses in which Jones misinterprets Plaintiffs' facts, the cited support, or adds additional facts or argument.

4. Jones describes his position as a "CEO" who answers to the Kansas Governor as her "vice president." **Ex. 3**, Jones Dep. at 29:11-30:4.

DEFENDANT JONES' RESPONSE: Uncontroverted.

5. Jones is atop of KHP's chain of command. While Jones has direct contact with his executive commanders and troopers at all levels below his command, Jones chooses to rely primarily on his chain of command. **Ex. 3**, Jones Dep. at 42:20-45:11.

DEFENDANT JONES' RESPONSE: Controverted as phrased. The record cited supports Jones maintains direct supervision of a small number of individuals, the key one being the Lieutenant Colonel, and he tries to operate within the chain of command.

PLAINTIFFS' REPLY: Defendant violates: (1) Fed. R. Civ. P. 56(e) because he has failed to "properly address [Plaintiffs'] assertion of fact as required by Rule 56(e)"; (2) D. Kan. Rule 56.1(b)(1) because he has failed to "refer with particularity to those portions of the record upon which [Defendant] relies . . ."; and (3) Summary Judgment Guideline No. 10 because he responds "with no accompanying citation to the record." The Court should, therefore, disregard Defendant's response.

Plaintiffs' Paragraph 5 is not about "direct supervision" as Defendant argues, but instead pertains to "direct contact." Plaintiffs' summary judgment Exhibit 3 supports that Jones "has direct contact" with executive commanders and troopers. *See also* **Ex. 3**, Jones Dep. at 45:19-46:5.

6. Below Jones in the chain of command are his assistant superintendent, who holds the rank of lieutenant colonel, and two captains, who rank above five executive commanders who hold the title of major. The executive commanders supervise regional divisions, and within each regional division are troops and teams that are supervised by captains and lieutenants. Each troop has a certain number of state troopers primarily responsible for patrolling Kansas highways. **Ex.**

3, Jones Dep. at 42:20-43:10; **Ex. 4**, Lieutenant John Douglas Rule (J. Rule) Dep. at 16:4-12; **Ex. 5**, KHP Organizational Structure.

DEFENDANT JONES' RESPONSE: Uncontroverted with the clarification, "two captains" do not rank above the majors. Rather, the captains of Troop L [protective services for the Governor[3]] and Professional Standards report to Jones. See Ex. 5.

7. Captain Brent Hogelin supervises six lieutenants and manages the day-to-day operations of six different units or teams within Troop N, and for the KHP, including the KHP's Domestic Highway Enforcement Team (also known as the criminal interdiction squad). Hogelin is the team's highest-ranking trooper by virtue of the chain of command. **Ex. 6**, Captain Brent Hogelin (Hogelin) Dep. Vol. I at 53:16–18.; 57:7-58:2; **Ex. 7**, Lieutenant Greg Jirak (Jirak) Dep. at 12:22-13:9.

DEFENDANT JONES' RESPONSE: Uncontroverted.

8. KHP's criminal interdiction squad is not limited to a geographical area or region in Kansas. **Ex. 7**, Jirak Dep. at 16:21-25.

DEFENDANT JONES' RESPONSE: Uncontroverted.

9. Within Troop N is J. Rule, who supervises the East Region Domestic Highway Enforcement Team that enforces drug interdiction. J. Rule provides KHP's drug interdiction and K-9 dog training at KHP's Academy, and trooper certifications throughout the KHP. **Ex. 4**, J. Rule, Dep. at 16:4-6; 25:16-26:2; 60:13-61:9.

DEFENDANT JONES' RESPONSE: Uncontroverted with the clarification that Lieutenant Rule has in the past provided K-9 dog training. See cited Rule deposition testimony.

[3] Defendant Jones' references a footnote 3, which refers to https://kansashighwaypatrol.org/find-a-troop/troop-location-map/general-headquarters/troop-l-protective-services/

10. KHP has employed Master Trooper Doug Schulte (Schulte) since 2004, and he works in Troop D. His immediate supervisor is Lieutenant Dennis Dinkel. Above Lieutenant Dinkel is Captain Travis Phillips, who reports to Major Michael Murphy, and above Major Murphy is Lieutenant Colonel Jason DeVore who reports to Jones. **Ex. 8**, Schulte Dep. at 21:20-22:6; 115:19-21; 87:20-88:7; **Ex. 5**, KHP Organizational Structure.

DEFENDANT JONES' RESPONSE: Uncontroverted.

11. KHP has employed Lieutenant Justin Rohr (Rohr) since 2006, and he works in Troop D. His immediate supervisor is also Captain Travis Phillips. **Ex. 9**, Rohr Dep. at 17:6-10; 35:15-36:3; **Ex. 5**, KHP Organizational Structure.

DEFENDANT JONES' RESPONSE: Uncontroverted.

12. KHP has employed Trooper Brandon McMillan (McMillan) since 2010, and he works in Troop D. His immediate supervisor is Lieutenant Mark Schroeder. **Ex. 10**, McMillan Dep. at 21:7-13; 48:23-49:1; 51:1-7; **Ex. 5**, KHP Organizational Structure.

DEFENDANT JONES' RESPONSE: Uncontroverted with the clarification that Troop D is McMillan's "host troop," but he is a member of Troop T (aircraft and fleet). Ex. 10, at 34:12-35:13.

13. Jones is the lead policymaker for KHP, is responsible for ensuring KHP troopers follow policy and the law, and holds himself accountable for setting the culture of the agency. **Ex. 3**, Jones Dep. at 36:6-23; 54:1-17; 170:3-20.

DEFENDANT JONES' RESPONSE: Uncontroverted, except this is Jones' factual understanding of his duties, role and objectives as KHP's superintendent.

PLAINTIFFS' REPLY: To the extent Defendant's response intends to suggest that Jones' "factual understanding of his duties, role and objections as KHP's superintendent" are not

correct, Defendant references no record that Jones' understanding is false. Defendant, therefore, violates: (1) Fed. R. Civ. P. 56(e) because he has failed to "properly address [Plaintiffs'] assertion of fact as required by Rule 56(e)"; (2) D. Kan. Rule 56.1(b)(1) because he has failed to "refer with particularity to those portions of the record upon which [Defendant] relies . . ." and; (3) Summary Judgment Guideline No. 10 because he responds "with no accompanying citation to the record." The Court should disregard Defendant's response.

14. Starting in early 2015 through June 2019, the Assistant Superintendent of the KHP was Lieutenant Colonel Randy Moon (Moon). Moon was in this role when *Vasquez v. Lewis* was decided by the Tenth Circuit in 2016. **Ex. 11**, Moon Dep. at 37:25-38:3, 45:20-24, and 110:14-21.

DEFENDANT JONES' RESPONSE: Uncontroverted. Further, Moon retired June of 2019. Ex. 11, 45:20-24.

PLAINTIFFS' REPLY: Defendant's fact regarding Moon is not material, and if material, Defendant should have asserted his retirement as an additional fact to Plaintiffs' statement of fact. *See, e.g.*, D. Kan. Rule 56.1(b)(2).

KHP's Policy Development and Creation

15. Jones consults with executive staff to implement KHP policies, and in his role as KHP Superintendent, has the final say on KHP's policy creation and modification. **Ex. 3**, Jones Dep. at 29:11-30:4.

DEFENDANT JONES' RESPONSE: Uncontroverted.

16. According to Jones, he regularly talks with his executive staff, who bring policy considerations before him, and "then [they] debate even further." *Id.*

DEFENDANT JONES' RESPONSE: Uncontroverted, with the clarification that the "debate" referenced concerns executive staff's input to Jones final decisions on discipline or policies. Ex. 3, 29:11-30:4.

17. Jones claims that after a newly created policy is vested and becomes at "final product," Jones "will sign off that this is the policy that goes out. Then it goes out to the field for everyone. It is disseminated for everyone to read it and check off that they have read it." **Ex. 3**, Jones Dep. at 30:12-32:17.

DEFENDANT JONES' RESPONSE: What Jones "claims" is uncontroverted.

18. KHP trains its troopers on KHP policies, including new KHP policies. Depending on the policy, this means, disseminating the policy out to the troopers. KHP's troopers "have to sign off" acknowledging "that they have read [the policy] . . ." **Ex. 3**, Jones Dep. at 34:2-35:8; *see infra* SOF ¶¶ 80-84.

DEFENDANT JONES' RESPONSE: Uncontroverted, with the clarification that there may be "training involved in collaboration with the new policy" "depending on what it is." The sign off is not dependent. See paragraph 17 and Ex. 8, 34:2-35:8.

PLAINTIFFS' REPLY: Defendant has not identified his Exhibit 8, and his quoted testimony does not derive from a source identified by any party's summary judgment Exhibit 8. Defendant's response suggests that Exhibit 8 is Schulte's deposition transcript. *See infra* Defendant's Response to Plaintiffs' Paragraph 29. However, the quoted text in Defendant's response to Plaintiffs' Paragraph 18 does not support Schulte's deposition transcript. Therefore, Defendant violates: (1) Fed. R. Civ. P. 56(e) because he has failed to "properly address [Plaintiffs'] assertion of fact as required by Rule 56(e)"and; (2) D. Kan. Rule 56.1(b)(1) because he has failed

to "refer with particularity to those portions of the record upon which [Defendant] relies . . ." The Court should disregard Defendant's response.

19. KHP also claims to trains its troopers on constitutional law, search and seizure, and the Fourth Amendment. KHP provides legal updates as directed by the KHP through the Kansas Law Enforcement Training Center. KHP claims to rely on court decisions in the development and implementation of KHP policies. **Ex. 3**, Jones Dep. at 30:12-32:17; **Ex. 12**, KHP Staff Attorney Sarah Washburn ("Washburn") Dep. at 16:24-17:14; 20:11-24:10.

DEFENDANT JONES' RESPONSE: What KHP claims is uncontroverted.

20. KHP troopers agree to a Code of Ethics "to respect the Constitutional rights of all to liberty, equality, and justice . . ." **Ex. 13**, KHP Code of Ethics at 2.

DEFENDANT JONES' RESPONSE: Uncontroverted.

21. KHP's general counsel's office works with Jones to review and evaluate court decisions for policy implementation. **Ex. 3**, Jones Dep. at 30:12-31:15; **Ex. 12**, Washburn Dep. at 33:14-34:11.

DEFENDANT JONES' RESPONSE: Uncontroverted.

KHP's response to *Vasquez*

22. In 2016, the Tenth Circuit issued its decision in *Vasquez v. Lewis*, which held that KHP troopers violated Vasquez's constitutional rights. The KHP was aware of the decision shortly after the decision was published. **Ex. 11**, Moon Dep. at 110:4-21; **Ex. 12**, Washburn Dep. at 7:2-24; 31:11-32:17; 85:10-18.

DEFENDANT JONES' RESPONSE: Controverted in part. *Vasquez* reversed summary judgment that had been premised on the troopers' qualified immunity, *Vasquez v. Lewis*, No. 12-CV-4021-DDC-JPO, 2014 WL 6685481, (D. Kan. Nov. 26, 2014), and remanded the case to the

district court. *Vasquez v. Lewis*, 834 F.3d 1132, 1139 (10th Cir. 2016). There was no finding that KHP troopers violated Vasquez's constitutional rights. That question would have needed to be determined based on the facts presented at trial. However, the case was settled without an admission of liability and dismissed with prejudice by stipulation. See Doc. 98, Case 5:12-cv-04021-DDC-JPO, filed 07/27/17.

PLAINTIFFS' REPLY: Defendant misinterprets the Tenth Circuit's decision in *Vasquez,* which addressed "whether Vasquez's continued detention after he refused the search and the subsequent search of his car violated his constitutional rights," and whether "the Officers' actions violated Vasquez's constitutional rights." 834 F.3d 1132, 1136, 1138 (10th Cir. 2016). The Tenth Circuit "conclude[d] that the Officers violated Vasquez's Fourth Amendment rights in searching his car," and "the Officers did not have reasonable suspicion based upon the articulated circumstances." *Id.* at 1138-39. The Tenth Circuit in *Vasquez* remanded to the district court for further proceedings consistent with the Tenth Circuit's decision. *Id.* at 1139. Defendant, therefore, erroneously argues that there "was no finding that KHP troopers violated Vasquez's constitutional rights" in his response to Plaintiffs' Paragraph 22.

23. KHP made no policy changes when the Tenth Circuit issued its decision in *Vasquez.* **Ex. 11**, Moon Dep. at 110:22-25; 111:13-16; **Ex. 6**, Hogelin Dep. Vol. I at 53:16–18.

DEFENDANT JONES' RESPONSE: Uncontroverted.

24. KHP training is the primary way its troopers learn about changes in the law. **Ex. 11**, Moon Dep. at 108:20-110:2.

DEFENDANT JONES' RESPONSE: Uncontroverted.

25. KHP did not distribute any legal updates in response to the Tenth Circuit's decision in *Vasquez.* **Ex. 12**, Washburn Dep. at 33:9-12.

DEFENDANT JONES' RESPONSE: Uncontroverted.

26. KHP did not initially incorporate *Vasquez* into its training materials when the Tenth Circuit decided the case. **Ex. 14**, Legal Issues in Car Stops 2020, at 50-53 (OAG000224-226); **Ex. 12**, Washburn Dep. at 31:24-32:2.

DEFENDANT JONES' RESPONSE: Uncontroverted. Discussion of *Vasquez* is in the KHP 2020 training, Ex. 14 at OAG000223-226.

27. The *Vasquez* case did not appear in any KHP training materials between 2016 and 2019. KHP first integrated *Vasquez* into its training materials in 2020, four years after the Tenth Circuit's decision, and after this lawsuit was filed. **Ex. 14**, Legal Issues in Car Stops 2020, 50-53 (OAG000224-226); **Ex. 15**, Defendants' Responses to Plaintiffs' First Set of Requests for Documents to Schulte, McMillan, and Jones at 7; (Doc. #62).

DEFENDANT JONES' RESPONSE: Uncontroverted.

KHP's residence-based policies and customs

28. At all relevant times, KHP's written policy requires that "[a]ll enforcement actions will be accomplished in a firm, fair, impartial, and courteous manner," and that "**[n]o distinction will be made between residents and nonresidents of the State of Kansas**." **Ex. 2**, Enforcement Guidelines, P000267 (emphasis added).

DEFENDANT JONES' RESPONSE: Uncontroverted.

29. However, KHP troopers believe that travel to and from Colorado, and other states or cities outside of Kansas, is an appropriate factor to consider in forming reasonable suspicion. **Ex. 9**, Rohr Dep. at 54:3-55:18; **Ex. 8**, Schulte Dep. at 187:17-188:3.

DEFENDANT JONES' RESPONSE: Controverted if the statement for an implication that travel into or out of Kansas, by itself, is believed to be a "factor" in reasonable suspicion by KHP troopers or the two troopers whose testimony Plaintiffs cite in supposed support of the

statement. It is uncontroverted that Lt. Rohr testified he has used either the motorist's origin or destination in and travel on certain highways, in combination of factors, in forming reasonable suspicion. Ex. 9, 54:2-56:16. Rohr explained:

> Q. The tag itself, and the place of registration, whether it's Kansas or Florida, would that have been an indicator or a factor in reasonable suspicion?
> A. Yes.
> Q. How so?
> A. Depends on where the origin or destination was. You know, if there was a tag out of New York, or something, and they were out of New York, or if there's a New York tag and the drivers were from Missouri, why are they driving a vehicle with a New York tag. Those are all indicators of criminal activity. It may be the vehicle is stolen.
> ***
>
> Q. The fact someone is from Colorado, in and of itself, is that a factor in your reasonable suspicion that you formed?
> A. No.
> Q. The fact that the vehicle itself has Colorado registration, is that in and of itself a factor in a reasonable suspicion?
> A. No.

Id. at 203:3-204:2. It is also uncontroverted that Schulte testified:

> Q. If -- if Mr. Bosire had provided information in that context, say he said I'm coming from Colorado, I'm headed to Wichita, would that have made you, just you, more suspicious or less suspicious?
> A. That by itself, it's -- it could go either way. With -- depends on his -- like I said -- his turnaround time, if I knew that, how long he had been out in Colorado, was he actually out there -- was he seeing family or friends or vacationing, how long did he stay. Just that as itself wouldn't make me any more suspicious.

Ex. 8, 187:17-188:3.

PLAINTIFFS' REPLY: Plaintiffs' Paragraph 29 supports the record that KHP troopers believe that the state of origin is "an appropriate factor." The Court should disregard Defendant's conditional contention response, and should treat Plaintiffs' Paragraph 29 as uncontroverted.

30. KHP troopers and supervisors believe that coming to or from a "drug source state" such as Colorado could contribute to reasonable suspicion. **Ex. 3**, Jones Dep. at 201:9-14 (agreeing

that it is permissible for KHP to consider the destination city or state in developing reasonable suspicion); (**Ex. 4**, J. Rule Dep. at 81:9-83:3 (testifying that he considers where a car is traveling from and to, and if they are traveling to or from a state that has "some form of legalized [marijuana]," that person should be considered suspicious); **Ex. 44**, Hogelin Dep. Vol. II at 36:7-17 (admitting that "destination" is an appropriate consideration to determine reasonable suspicion); **Ex. 8**, Schulte Dep. at 207:15-209:7 (testifying that coming from Oklahoma to Colorado contributes to reasonable suspicion because Colorado is a "source state"); **Ex. 9**, Rohr Dep. at 53:12-24; 55:6-23; 56:1-18 (testifying that states "known for drugs to be trafficked to" help "form[] reasonable suspicion").

DEFENDANT JONES' RESPONSE: Uncontroverted that some KHP troopers and supervisors believe that coming to or from a "drug source state" such as Colorado may contribute to reasonable suspicion. That is all the record cited by Plaintiffs.

31. KHP Trooper Ryan Wolting (Wolting) testified that traveling from Colorado is a factor he uses to form reasonable suspicion. **Ex. 38**, Wolting Dep. at 101:3-14.

DEFENDANT JONES' RESPONSE: Uncontroverted, with the clarification that Wolting testified he has considered that someone is traveling from Denver, Colorado, as one factor when forming reasonable suspicion.

32. Jirak, who works with J. Rule in supervising KHP's criminal interdiction squad, testified that the state or the city of destination is a factor in determining reasonable suspicion:

> **Q: Okay, Well, in talking about destination, and I should have asked you a minute ago, do you ever consider the state or the city of destination in determining reasonable suspicion?**
>
> A: It can be a factor.
>
> **Q: So is that a yes?**
>
> A: Yes.

Ex. 7, Jirak Dep. at 12:24-13:12; 68:25:69:6.

DEFENDANT JONES' RESPONSE: Uncontroverted.

33. Jirak testified that the state of origin can be an appropriate consideration in evaluating reasonable suspicion because drug production and distribution are more prevalent in certain areas. **Ex. 7**, Jirak Dep. at 65:21-66:4.

DEFENDANT JONES' RESPONSE: Uncontroverted, Jirak testified:

> Q. Okay. Thank you. In -- we're still talking about the totality of the circumstances. Is it ever appropriate for you, based on your experience, to consider the state of origin that someone is traveling from when you stop them?
> A. That can be a consideration.
> Q. How can that be a consideration?
> A. There are certain areas where drug production or distribution are prevalent, as opposed to other areas where it's not as prevalent.

Ex. 7, 65:21-66:4.

34. Jirak admits that drugs "could come from anywhere," and he cannot identify any state or city that he would not consider a drug source state. **Ex. 7**, Jirak Dep. at 69:12-22.

DEFENDANT JONES' RESPONSE: Uncontroverted. However, when discussing "areas where drug production or distribution are prevalent" as opposed to "drug source states," Jirak testified:

> Q. Give me a list of the areas where drug distribution is not prevalent.
> A. Generally speaking, rural areas. And this is -- this has changed, in my 34 years, it's changed a lot. 34 years ago, those drug origin areas were usually along the border, the southern border. You know, in more recent history, there are more drugs being produced in northern California, in Colorado.

Ex. 7, 66:5-13.

PLAINTIFFS' REPLY: Plaintiffs' Paragraph 34 does not pertain to "drug production or distribution." The Court should disregard Defendant's additional commentary as inapplicable to the material fact asserted in Paragraph 34.

35. Moon, who was the Assistant Superintendent of the KHP at the time *Vasquez* was decided, testified that because Kansas is "right next to a state where it's legal[,] [w]e cannot ask our troopers to ignore that fact," and it is "not an unreasonable explanation – explanation to think that people are going to come across the country to go to that state to purchase marijuana, and then leave that state and go back to where they come from, and once they do that, they are committing violations of the law." **Ex. 11**, Moon Dep. at 94:9-96:1.

DEFENDANT JONES' RESPONSE: Uncontroverted that Moon made the quoted comment to a newspaper reporter. Ex. 11, Moon Dep. at 94:9-96:1. Moon testified:

> Q. The [Vasquez] Court said, "It is wholly improper to assume that an individual is more likely to be ·engaged in criminal conduct because of his state of residence, and thus any fact that would inculpate every resident of a state cannot support reasonable suspicion." Do you see I've read that correctly?
> A. Yes.
> Q. Wasn't it the position that the Kansas Highway Patrol by training policy that the mere state of residence was not a basis for reasonable suspicion to detain a suspect to detain a motorist?
> A. Yes.
> Q. That's always been the policy, hasn't it, so long as you've been around?
> A. Yes.
> Q. Now it then went on to say, … "Accordingly, it is time to abandon the pretense that state citizenship is a permissible basis upon which to justify detention in search of out-of-state motorists, and time to stop the practice of the detention of motorists for nothing more than an out-of-state license plate." Do you see what I've read?
> A. Yes. You read that correctly.
> Q. Has it ever been the policy, either by training or practice that you're aware of at the Highway Patrol, that the state of citizenship or, for that matter, the out of-state license plate is a basis for reasonable suspicion to detain a motorist?
> A. No. It is not.
> Q. Now after the Vasquez decision which came out, according to this document, August 2016, would there have been a need to change Kansas Highway Patrol policies to comply with the instructions that we just read from the decision?
> A. No. And, in fact, that's why we didn't -- we felt like we were complying.

Ex. 11, 186:10-188:1.

36. KHP troopers consider out-of-state rental vehicles to be an appropriate factor to consider in forming reasonable suspicion. **Ex. 9**, Rohr Dep. at 57:5-58:23; **Ex. 10**, McMillan Dep. at 171:9-172:13 (testifying that "A lot of rental vehicles are used for drug trafficking.").

DEFENDANT JONES' RESPONSE: Controverted. Plaintiffs misstate Rohr's testimony. Trooper Rohr believes, through training and experience, that drug traffickers frequently use rental vehicles which can make him "a bit more suspicious" leading him to sometimes choose apparent rentals for traffic violation enforcement over other vehicles. Ex. 9, 57:1-59:5.

PLAINTIFFS' REPLY: Defendant improperly controverts Plaintiffs' Paragraph 36, which supports Rohr's belief that rental vehicles are a factor he uses to form his reasonable suspicious (rental vehicles add to his reasonable suspicion because they make him "a bit more suspicious."). Defendant's cited testimony does not support that Rohr chooses apparent rental vehicles "sometimes." Instead, Rohr relies on his "training" on "rental vehicles, so [he looks] at rental vehicles." *See* Plaintiffs' **Ex. 9**, Rohr Dep. at 58:4-11.

37. Jones reinforces his troopers' actions and beliefs, because Jones believes that state of origin or travel destination are proper considerations when forming reasonable suspicion. **Ex. 3**, Jones Dep. at 125:23-126:7; 201:9-22.

DEFENDANT JONES' RESPONSE: Controverted in part. There is no evidence that Jones has reinforced the questioned actions and beliefs. However, it is uncontroverted that he believes that it is permissible for KHP troopers to consider destination or origin city or state of the motorist in developing reasonable suspicion, so long as it is in the totality of the circumstances or the situation. Ex. 3, 201:9-22. Jones, however, noted the state of origin or the driver or the state of registration of the motor vehicle are not used as factors, by the KHP, to support reasonable

suspicion absent information that the licensed vehicle was stolen or that the license plate is given a description of vehicle driven by a criminal suspect. *Id*., 197:11-200:4.

PLAINTIFFS' REPLY: Plaintiffs refer the Court to its statement of fact Paragraphs 29 through 34, and 36, and Defendant's responses to those paragraphs, that support Jones' officers rely on the state of origin and rental cars as factors in establishing reasonable suspicion. Moreover, Defendant's counsel asked misleading and confusing questions because the questions solicits an answer that seeks to rely on information from "some [unknown] third party" statements, and is otherwise difficult to understand. Plaintiffs objected "to the form of the question" because Plaintiffs' counsel could not understand it. *See* Plaintiffs' **Ex. 3**, Jones Dep. at 197:11-198:4.

38. KHP's general counsel office supports Jones' beliefs, testifying that people traveling to, or coming from, certain states is a factor KHP troopers can use to formulating reasonable suspicion. **Ex. 12**, Washburn Dep. at 78:24-79:17.

DEFENDANT JONES' RESPONSE: Uncontroverted, with the clarification that KHP attorney Washburn trains, "it's part of the totality of the circumstances, where someone's coming from, where they're going to, and whether or not that state has legal marijuana is certainly a factor, but it's part of the totality of the circumstances": it "can be" an element of the totality of the circumstances. Ex. 12, 78:3-79:17.

39. KHP's legal department trains KHP officers that the origin and destination are appropriate elements in considering the totality of the circumstances. **Ex. 12**, Washburn Dep. at 89:5-15.

DEFENDANT JONES' RESPONSE: Uncontroverted with the clarification that Washburn believes troopers take into account location of a traveler's destination, the location of their point of origin as part of the totality of the circumstances when articulating reasonable

suspicion and probable cause and that this is appropriate "to some degree," i.e., like a driver's nervousness, with generally "very low weight." Ex. 12, 88:25-90:6.

PLAINTIFFS' REPLY: Plaintiffs clarify that Washburn only testified to nervousness as being given "very low weight," and not very low weight regarding a traveler's origin and destination. *See* Plaintiffs' **Ex. 12**, Washburn Dep. at 88:25-90:6.

40. Jones suggests that KHP has a list of source cities, but he does not know if his troopers are still relying on the list for training. **Ex. 3**, Jones Dep. at 200:25-201:8.

DEFENDANT JONES' RESPONSE: Uncontroverted.

KHP's "Two-Step" policy

41. The KHP has a policy or custom of using a maneuver called the "Two-Step" to detain drivers without reasonable suspicion. **Ex. 8**, Schulte Dep. at 156:3-159:21; **Ex. 16**, Transforming Temporary Detention into Consensual Encounter Training.

DEFENDANT JONES' RESPONSE: Controverted as stated because the cited record does not report or show a "policy." Nor does it show a custom of the use of the "Two-Step."

It is uncontroverted that the cited record supports that KHP trains and describes how a traffic stop can be properly concluded (the temporary detention from the stop ended) and a trooper may thereafter properly ask to engage the motorist in a "consensual encounter," i.e., asking questions or even, with consent, conduct a search of some or all of the motor vehicle. Ex. 8, 156:3-159:21; Ex. 16.

In the KHP's training, the so-called trooper "two step" maneuver does not block the detained vehicle from safely re-entering traffic or other coercion. Instead, it is described, in training, as the "Columbo Gambit" and a "[b]rief break in the conversation often signified by a re-engagement and a request to speak to said suspect." [Legal Issues in Car Stops 2020, at bate

stamped OAG000241-44; Reasonableness is the touchstone of the Fourth Amendment (2018), at bate stamped OAG014239] The maneuver is to help establish any consent to additional conversation, extension of a stop or a search is consensual. Per the KHP training materials, the "trooper two step" is not prohibited, but "not necessary." [Reasonableness is the touchstone of the Fourth Amendment (2018), at bate stamped OAG014239]. The materials stress consent must be knowingly, intelligently, and voluntarily made. ["Vehicle Stops – Legal Issues," Ganieany & Washburn (2021), at bate stamped OAG028924; Laws of Search & Seizure (2019), at bate stamped OAG001381]. They explain, "Consent must always be all of the following: — Knowing — Intelligent — Voluntary." ["Laws of Search & Seizure" (2021), at bate stamped OAG028672]. 2021 training at the KHP Academy explains:

> Voluntary encounters after a traffic stop get tricky.
> – You must have a sufficient break in time between the enforcement encounter and the consensual encounter.
> – Trooper Two Step is NOT ENOUGH by itself to purge the taint of the coercive nature of the traffic stop.
> • Whether a consensual encounter after a traffic stop is valid depends on whether a reasonable person would have felt free to leave.
> • This is judged on the totality of the circumstances standard.
> Voluntary encounters after a traffic stop:
> – Factors that may render the contact non-consensual:
> • You did not return all the driver's documentation.
> • You have gone straight from the traffic stop to the consensual encounter without a sufficient break.
> • Your tone of voice is accusatory.
> • You are still in your patrol car.
> • You have made physical contact with the vehicle or subject.

["Laws of Search & Seizure" (2021), at bate stamped OAG028756-58]. Among the factors listed in the training that would show lack of consent is "an attempt to control the ability to flee"

PLAINTIFFS' REPLY: Schulte testified that it is permissible and lawful for him to use the Two-Step technique, which supports the existence of a policy. *See* Plaintiffs' **Ex. 8**, Schulte Dep. at 158:8-16. There is no dispute that the Two-Step is a policy or custom. In response to

McMillan's improper stop of Plaintiff Bosire, for example, McMillan was required to ride with a Troop N supervisor to apply his one-hour legal review of the Two-Step to ensure he was current with legal standards of proof related to traffic stops and search and seizure. *See* Plaintiffs' **Ex. 10**, McMillan Dep. at 232:16-24 (testifying that he was only trained on "the two-step method. That was it."); *see also* Plaintiffs' **Ex. 61** - Jones' August 5, 2019, PSU Letter to McMillan.

42. The "Two-Step" has several names: (1) "Consensual Encounter"; (2) "The Columbo Gambit"; (3) "The Trooper Two-Step". *See* **Ex. 16**, Transforming Temporary Detention into Consensual Encounter Training at OAG008926-8928. KHP troopers call it different names. **Ex. 8**, Schulte Dep. at 155:1-12 (testifying that he has "heard it called several things.").

DEFENDANT JONES' RESPONSE: Uncontroverted, except the evidence does not support it has been called "consensual encounter." Rather, it is a way to request a consensual encounter. See e.g., Ex. 16.

PLAINTIFFS' REPLY: Schulte testified that he has heard the Two-Step called several things, including a "Consensual Encounter." Schulte testified that the process is a "consensual contact." *See* Plaintiffs' **Ex. 8**, Schulte Dep. at 155:1-12; 159:24-160:4.

43. In KHP training, troopers are instructed on the Two-Step and how to end an initial traffic-stop detention using it. They are trained to take a few steps towards the rear of the vehicle (as if walking back to the trooper's patrol car), and then turn to reengage the motorist by saying something like: "Hey, can I ask you a few more questions." **Ex. 8**, Schulte Dep. at 156:3-159:21; **Ex. 16**, Transforming Temporary Detention into Consensual Encounter Training.

DEFENDANT JONES' RESPONSE: It is uncontroverted that KHP troopers have received the training described, in part, this paragraph. Ex. 16 is not the most recent or current training on consensual encounters. See response to paragraph 41.

44. The Two Step permits a trooper, after: (1) making the initial stop; (2) conducting the officer's business; (3) and terminating the encounter, to "literally and figuratively . . . re-encounter with the individual to ask questions or inquire about certain things." **Ex. 3**, Jones Dep. at 117:25-118:6.

DEFENDANT JONES' RESPONSE: Controverted in that the "literally and figuratively" statement means the termination of the traffic stop. But Jones did describe the "two step" as (1) make the initial stop, (3) conduct the business, (4) terminate the stop, (5) "then coming back to re-encounter with the individual to ask questions or inquire about certain things. Ex. 3, 117:25-118:6. Jones explained the two step is legitimatized by court proceeding and, "if we are doing it, we are going within the legal boundaries of what the courts have allowed." *Id.*, 118:21-119:4.

PLAINTIFFS' REPLY: Defendant misinterprets Plaintiffs' Paragraph 44, which does not state that Jones describe the "two step" as "(1) making the initial stop, (3) conduct the business [*sic*], (4) terminate the stop, (5) 'then coming back to re-encounter with the individual to ask questions or inquire about certain things." [*sic*]. *See* Defendant's Response to Plaintiffs' Paragraph 44. Rather, Plaintiffs emphasize that the "literal and figurative" language applies to the Two-Step, and Plaintiffs' reference to other events occur before KHP troopers engage the Two-Step method. Moreover, while Plaintiffs agree that the literal and figurative language refers to the termination of the traffic stop, Defendant cites no record supporting that phrase applies only to the termination of the traffic stop. Rather, Jones' testimony supports that the literal and figurative language *also* applies to officers re-encountering with the individual to ask questions or inquire about certain things. *See* Plaintiffs' **Ex. 3**, Jones Dep. at 117:25-118:6.

45. Under KHP's written policy, if a reasonable person who has been stopped feels free to leave after a trooper performs the Two-Step, then the trooper can consider the remainder of the encounter consensual. **Ex. 17**, Laws of Search & Seizure: Traffic Stops, OAG030740-30741.

DEFENDANT JONES' RESPONSE: Controverted because Ex 17 is not a KHP written policy. The document is power point for KHP trooper training. But, it is uncontroverted that the training provides "whether a consensual encounter after a traffic stop is valid depends on whether a reasonable person would have felt free to leave" and "this is judged on the totality of the circumstances standard."[4]

PLAINTIFFS' REPLY: Plaintiffs refer to the information and training within KHP's PowerPoint, and not the PowerPoint itself, in referring to KHP's policies. There is no dispute that the Two-Step is a policy or custom. In response to McMillan's improper stop of Plaintiff Bosire, for example, McMillan was required to ride with a Troop N supervisor to apply his one-hour legal review of the Two-Step to ensure he was current with legal standards of proof related to traffic stops and search and seizure. *See* Plaintiffs' **Ex. 10**, McMillan Dep. at 232:16-24 (testifying that he was only trained on "the two-step method. That was it."); *see also* Plaintiffs' **Ex. 61** - Jones' August 5, 2019, PSU Letter to McMillan.

46. However, the policy is about how the driver *feels*: KHP trains its troopers that the Two-Step is permissible "as long as a reasonable person in the suspect's position would ***feel*** free to leave[,] *[e]ven if they are not*." **Ex. 18**, 4th Amendment "Reasonableness is the touchstone of the Fourth Amendment" Training at OAG020750 (emphasis in original, and added).

[4] Defendant's footnote 4 in Plaintiffs' Paragraph 45 states: "Arguably, the 'free to leave' statement is more of a Kansas courts' standard than the federal standard. But, for obvious reasons, KHP training must satisfy both standards."

DEFENDANT JONES' RESPONSE: Controverted because Ex 18 is not a KHP written policy. It is uncontroverted that troopers have been trained "so long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required." Ex. 18 (citing *State v. McGinnis*, 290 Kan. 547 (2010). Accordingly, it is also uncontroverted that troopers are told that a consensual encounter requires the reasonable person to feel free to leave and the test is not whether the trooper has determined that he or she has reasonable suspicion and will detain the motorist if a consensual encounter is declined. Ex. 18 at OAG020750.

PLAINTIFFS' REPLY: Plaintiffs refer to the information and training within KHP's PowerPoint, and not the PowerPoint itself, in referring to KHP's policies. There is no dispute that the Two-Step is a policy or custom. In response to McMillan's improper stop of Plaintiff Bosire, for example, McMillan was required to ride with a Troop N supervisor to apply his one-hour legal review of the Two-Step to ensure he was current with legal standards of proof related to traffic stops and search and seizure. *See* Plaintiffs' **Ex. 10**, McMillan Dep. at 232:16-24 (testifying that he was only trained on "the two-step method. That was it."); *see also* Plaintiffs' **Ex. 61** - Jones' August 5, 2019, PSU Letter to McMillan.

47. KHP's training causes its troopers, like, J. Rule, to attempt the Two-Step by asking for consent to search the car, even when they already plan to detain the driver. Indeed, J. Rule asks for consent after he has already decided to detain the driver, regardless of whether the driver gives such consent. **Ex. 4**; J. Rule Dep. at 109:19-111:8.

DEFENDANT JONES' RESPONSE: Controverted. Actually, some recent KHP training recommends commencing a post-traffic stop detention if there is the required reasonable suspicion without attempting to initiate a consensual encounter. Defendant Jones Statement of

Uncontroverted Facts ¶ 36. But, the choice is left to the trooper. And it is uncontroverted, depending upon the circumstances, Rohr prefers to ask for consent even when he has reasonable suspicion to detain the motorist because it is, he believes, the "less intrusive way to go about it." Ex. 4, 108:11-109:14.

PLAINTIFFS' REPLY: Plaintiffs' Paragraph 47 does not pertain to "some recent KHP training . . .," but instead refers to the training KHP troopers received, and the policies and customs they relied on, which are the subject of this litigation.

KHP's Complaint Policy and the Professional Standards Unit

48. KHP's complaint policy requires that when a person communicates to any KHP employees that they "desire to file a complaint of misconduct," that employee must "courteously provide the person with: a. One of their current Patrol business cards or give the person their name, badge or identification number (if applicable) . . . [and] b. A current Complaint Procedures pamphlet, or a brief, accurate summation of proper complaint procedures." **Ex. 19**, Complaint Reporting and Administrative Investigations Policy (Complaint Policy).

DEFENDANT JONES' RESPONSE: Uncontroverted.

49. KHP's Complaint Policy is supposed to "protect the public trust and the integrity of the agency by ensuring the professional conduct of all employees through systematic, uniform, administrative procedures, and the prompt, objective investigation of all complaints of employee misconduct." **Ex. 19**, Complaint Policy.

DEFENDANT JONES' RESPONSE: Uncontroverted, that is the policy's design.

50. In his role as commander of KHP's Professional Standards Unit (PSU), Captain Mitchell Clark (Clark) reports directly to Superintendent Jones. **Ex. 20**, Clark Dep. at 7:12-25.

DEFENDANT JONES' RESPONSE: Clark was assigned to PSU August 2000, Ex. 59, 41:24-42:42:3. Clark is no longer assigned to PSU[5], but the statement is uncontroverted as of the date Clark was deposed, Jan. 27, 2022.

51. Jones testified that the PSU "is to make sure our boat is right, is uprighted. It keeps our agency in a sense of doing the right thing." **Ex. 3**, Jones Dep. at 51:20-52:3.

DEFENDANT JONES' RESPONSE: Uncontroverted.

52. The Complaint Policy sets forth how the PSU will conduct internal investigations and accurately describes the process the PSU uses when conducting such an investigation. **Ex. 20**, Clark Dep. at 30:14-23, 31:10-12; **Ex. 19**, Complaint Policy, pp. 5-9.

DEFENDANT JONES' RESPONSE: Uncontroverted.

53. In the PSU, "[i]f a complaint comes in from a citizen," then a "captain and two lieutenants conduct the investigations . . . So if there is something that is not congruent with our policies, the PSU in their investigation will lay out the facts that are aberrant to our policies, and then that is brought over to our office, my office there, as to what we will do from that point on." **Ex. 3**, Jones Dep. at 51:20-52:18.

DEFENDANT JONES' RESPONSE: Uncontroverted, with the clarification that there were three officers in PSU and one, not all, conducts the investigation, although the PSU captain maintains operational control. Ex. 3, 51:20-52:18; Ex. 20, 72:25-75:15.

54. Clark receives, reviews, and may make recommendations on findings for each PSU complaint; then a report on the complaint is sent on internally from the PSU, eventually making

[5] Defendant's footnote 5 to Plaintiffs' Paragraph 50 states: "Captain Dan DiLoreto now holds that position. See https://kansashighwaypatrol.org/find-atroop/troop-location-map/general headquarters/professional-standards-unit/. Clark is now the captain with KHP's Public & Governmental Affairs. See https://kansashighwaypatrol.org/wpcontent/uploads/2022/06/Org-Chart.pdf.

its way to the superintendent. **Ex. 20**, Clark Dep. at 73:11-21, 74:18-21, 75:9-15; **Ex. 19**, Complaint Policy, p.8.

DEFENDANT JONES' RESPONSE: Uncontroverted.

55. From Jones' perspective, after an investigation, the PSU report goes through the trooper's "command staff" and to Jones, who testified, "then I will make the final say of what we do with that." He sees the results of every PSU investigation and "make[s] the final say" after receiving "recommendations from my command staff" about the level of discipline or corrective action for the involved trooper. **Ex. 3**, Jones Dep. at 161:1-162:18; 163:4-14.

DEFENDANT JONES' RESPONSE: Uncontroverted.

56. Jones has the final say on all PSU investigations. Jones makes the final decision on whether to discipline KHP troopers or assign other corrective action, including the level of corrective action or discipline to impose. **Ex. 3**, Jones Dep. at 162:19-21; 163:10-14.

DEFENDANT JONES' RESPONSE: Uncontroverted.

57. When the KHP's designated witness on various topics related to the PSU was asked if "the KHP view[s] a constitutional violation as a minor rule violation," the KHP's official response was, "I would like to believe that they don't view that as minor." However, that KHP witness was "not aware" of anything but corrective action—versus discipline—having been assigned following a finding of a constitutional violation during his time in the PSU. **Ex. 20**, Clark Dep. at 8:17-9:3, 149:16-20, 155:19-23; **Ex. 21**, Plaintiffs' Notice of Rule 30(b)(6) Video Deposition, pp. 2-5, ¶¶ 1-3, 16-18.

DEFENDANT JONES' RESPONSE: Uncontroverted, except Clark was the designated witness so his referenced time in PSU was from August 2000, Ex. 59, 41:24-42:42:3, to his deposition on Jan. 27, 2022. Moreover, Clark was not asked and did not testify that there had been

a constitutional violation by a KHP official during his tenure. Cf. Ex. 20, 48:18-49:7 (no complaint of violation of constitutional rights by someone stopped by a trooper was made during the 17 months Clark was at PSU).

58. KHP's policy on Discipline and/or Corrective Actions states that "disciplinary action may be assessed [sic]" for actions including, but not limited to:

> . . .
>
> c. Employees who do not maintain sufficient competency to properly perform their duties and assume the responsibility of their position.
>
> d. Employees who do not perform their duties in a manner which will maintain the highest standards of efficiency in carrying out the functions and objectives of the agency.
>
> e. Employees who lack knowledge of the application of laws required to be enforced.
>
> . . .
>
> j. Employees who disregard agency policies, procedures, or directives.

Ex. 22, Discipline and/or Corrective Actions Policy at p.3.

DEFENDANT JONES' RESPONSE: Uncontroverted

59. If Jones finds a pattern of misconduct among his troopers, Jones looks "at the [trooper's] supervisor to inquire or at least investigate why [the supervisor] is not holding [trooper] accountable for their actions." However, if there is a clear pattern of misconduct or policy violations that emerges, Jones agrees that such a situation is his responsibility, as superintendent. **Ex. 3**, Jones Dep. at 166:8-21.

DEFENDANT JONES' RESPONSE: Uncontroverted.

60. PSU's current investigation process, and KHP's handling of PSU's findings, is a "very reactive process[.]" **Ex. 3**, Jones Dep. at 52:19-24.

DEFENDANT JONES' RESPONSE: Uncontroverted.

61. Clark and the PSU are supposed to review complaint trends to determine training and academy deficiencies, and instructor issues, to see if "there was not the proper things being taught." **Ex. 20**, Clark Dep. at 98:23-99:5.

DEFENDANT JONES' RESPONSE: Uncontroverted, with the clarification that Clark looked for "anything significant" from the PSUs reports and determine if "there's anything that we feel are necessary to address through the commanders, again, through the executive command, through training." Ex. 20, 98:14-99:5.

62. By policy, the PSU is to identify and annually report to KHP command identification of employees receiving a relatively high number of complaints. Clark's report to KHP command did not follow this policy as he had followed the previous report, which did not contain that information. **Ex. 20**, Clark Dep. at 96:5-97:10. However, Clark's report to KHP command did not follow this policy. *Id.* Even after the deficiency was pointed out in Clark's deposition, the issue was not corrected in 2021. Id.

DEFENDANT JONES' RESPONSE: Uncontroverted that Clark did not include in a 2020 annual report to command that identified employees receiving a relatively high number of complaints, per ADM-07 (N). From Clark's testimony, it is unknown if that reporting should have said none or if some individuals should have been the identified (and if so, for what kinds of complaints). In contrast, there is no evidence from Clark if there had been a high number of individual complaints this was not brought to command's attention by other means. Clark testified he had looked for "anything significant" from the PSUs reports to report to command staff. Ex. 20, 98:14-99:5.

It is controverted the technical reporting issue was not corrected for 2021 after Clark's deposition. Clark's deposition testimony cannot support such a statement.

PLAINTIFFS' REPLY: The Court should strike Defendant's "unknown" and "lack of evidence" statements as argumentative and not supported by the record, and should consider Plaintiffs' Paragraph 62 as undisputed. *See* Fed. R. Civ. P. 56(e)(2).

63. By policy, the PSU is also to report to KHP command on common causes of complaints that could be addressed through public information, policy, training, and/or disciplinary issues. **Ex. 20**, Clark Dep. at 97:13-18; **Ex. 23**, Partial KHP Annual Complaint Reports (2018-2021). However, Clark's report to KHP command did not follow this policy. *Id*. Even after the deficiency was pointed out in Clark's deposition, the issue was not corrected in 2021. *Id*.

DEFENDANT JONES' RESPONSE: Controverted because the statements are not supported by the cited record. Clark testified that a report to command of a relatively high number of complaints or causes of complaints is to identify there are training deficiencies which need to be addressed as best practices and to see that things are done right. Ex. 20, 97:13-18.

Additionally, Ex. 23 is part of the 2021 KHP published Annual Report. It is not the report from PSU to command that Clark was discussing in his deposition.

PLAINTIFFS' REPLY: Plaintiffs' Paragraph 63 is properly supported by the record. Moreover, Clark testified that the PSU had several reasons to report complaints, and he provided examples, such as training deficiencies; he did not testify that the only purpose of reporting complaints was to determine training deficiencies. *See* Plaintiffs' **Ex. 20**, Clark Dep. at 97:21-98:13. Further, Plaintiffs' Exhibit 23 is not comprised of only the 2021 annual report, but includes relevant information from reports spanning between 2018 through 2021.

64. Clark, as commander of the PSU, testified that the purpose for tracking complaint trends is to identify "training deficiencies," if they "[a]re missing something in the academy," "identify . . . an instructor issue," and/or to determine if "there was not the proper things being

taught." If "anything significant" is found, it would be "address[ed] through the commanders . . . through the executive command, through training." **Ex. 20**, Clark Dep. at 97:21-98:9 and 98:23-99:5.

DEFENDANT JONES' RESPONSE: Uncontroverted, although Clark is the former commander of PSU.

PSU Reports Based on Complaint Made by Out-of-State Drivers

65. Jones and the PSU have received several complaints regarding prolonged detentions without adequate reasonable suspicion. *See, e.g.*, Exs. 25-33; *infra* SOF ¶¶ 66-74.

DEFENDANT JONES' RESPONSE: Controverted because the record cited does not support the statement. Further, if offered to prove the truth of the complaints, no sworn testimony is provided and the documentation of statements the motorists provide is inadmissible hearsay. Finally, to put Exs 25-33 in context, Plaintiffs demanded production of KHP records from 2015 and after.

PLAINTIFFS' REPLY: It is uncontroverted that Jones sees the results of every PSU investigation and has the final say on PSU complaints. *See, e.g.,* Plaintiffs' Paragraph 55, and Defendant's Response to Paragraph 55. Although Plaintiffs' Exhibits 25 through 33 include third-party citizen complaints, Plaintiffs also rely on, and included, PSU's internal investigations and findings regarding those citizen complaints. PSU's records, investigations, and findings are business records or public records. On summary judgment, evidence does not need to be submitted in a form that would be admissible at trial, but the content or substance of such evidence must be admissible. *Argo v. Blue Cross & Blue Shield of Kan., Inc*., 452 F.3d 1193, 1199 (10th Cir. 2006). PSU records, investigations, and findings for each of the citizen complaints are admissible under the business records or public records exception because the reports were prepared in the normal course of law enforcement investigations. *See Draughon v. United States*, No. 14-2264-JAR-GLR,

2017 WL 3492313, at *8 (D. Kan. Aug. 15, 2017). Defendant's responses to Plaintiffs' Paragraphs 66 through 74 repeatedly refer to PSU's investigation findings and, therefore, the Court should rely on the underlying facts regarding those findings.

66. A KHP trooper pulled over a Kentucky driver that moved to Colorado, but still had Kentucky license plates, for allegedly speeding and other traffic offenses. The driver complained that "he was profiled due to having [a] Kentucky registration plate" and for living in Colorado. The Trooper said he smelled of marijuana, and asked to search the car; the driver consented to the search, and the trooper found no marijuana. **Ex. 25**, May 14, 2016, Complaint at OAG031830-31831.

DEFENDANT JONES' RESPONSE: Controverted to the extent that the driver's statements to KHP or PSU are offered to prove the truth of the claims made (they are inadmissible hearsay in these proceedings) and the driver was not challenging the adequacy of the troopers' reasonable suspicions. Furthermore, PSU investigation confirmed there was no misconduct on the part of the trooper regarding the complaint about the May 13, 2016. Bates number OAG031833 (marked confidential).

PLAINTIFFS' REPLY: Although Plaintiffs' Exhibit 25 includes third-party citizen complaints, Plaintiffs also rely on, and included, PSU's internal investigations and findings regarding the citizen complaints. PSU's records, investigations, and findings are business records or public records. On summary judgment, evidence does not need to be submitted in a form that would be admissible at trial, but the content or substance of such evidence must be admissible. *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006). PSU records, investigations, and findings for each of the citizen complaints are admissible under the business records or public records exception because the reports were prepared in the normal course of law

enforcement investigations. *See Draughon v. United States*, No. 14-2264-JAR-GLR, 2017 WL 3492313, at *8 (D. Kan. Aug. 15, 2017). Defendant's response to Plaintiffs' Paragraph 66 refers to PSU's investigation findings and, therefore, the Court should rely on the underlying facts regarding those findings.

67. A KHP trooper pulled over a Florida driver with Florida plates for defective mirrors and failure to secure loads. After the trooper asked several drug-related questions, he thought the driver had marijuana. The trooper asked to search the vehicle, but the driver refused, so troopers conducted a canine sniff. The trooper found no drugs. **Ex. 26**, November 16, 2016, Complaint at OAG031852-31854; OAG031860.

DEFENDANT JONES' RESPONSE: Controverted to the extent that the driver's statements to KHP or PSU are offered to prove the truth of the claims made (they are inadmissible hearsay in these proceedings). Furthermore, PSU's investigation confirmed that the complaint about the November 9, 2016 encounter was "unfounded." Ex. 26 at OAG031860-62.

PLAINTIFFS' REPLY: Although Plaintiffs' Exhibit 26 includes third-party citizen complaints, Plaintiffs also rely on, and included, PSU's internal investigations and findings regarding the citizen complaints. PSU's records, investigations, and findings are business records or public records. On summary judgment, evidence does not need to be submitted in a form that would be admissible at trial, but the content or substance of such evidence must be admissible. *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006). PSU records, investigations, and findings for each of the citizen complaints are admissible under the business records or public records exception because the reports were prepared in the normal course of law enforcement investigations. *See Draughon v. United States*, No. 14-2264-JAR-GLR, 2017 WL 3492313, at *8 (D. Kan. Aug. 15, 2017). Defendant's response to Plaintiffs' Paragraph 67 refers

to PSU's investigation findings and, therefore, the Court should rely on the underlying facts regarding those findings.

68. A KHP trooper pulled over a Utah driver, with Utah plates, for an alleged speeding violation. The trooper indicated that he wanted to search the driver's car, and the driver refused. The trooper asked the driver to exit the car, and the driver complied. The trooper searched the driver's car because it smelled like marijuana. The trooper found no drugs. The trooper gave the driver a warning, and "explained to him how people use rental cars to transport marijuana . . ." **Ex. 27**, September 17, 2017, Complaint at OAG031881, OAG031884-31886.

DEFENDANT JONES' RESPONSE: Controverted to the extent that the driver's statements to KHP or PSU are offered to prove the truth of the claims made (they are inadmissible hearsay in these proceedings). Furthermore, PSU's investigation confirmed that the complaint about the September 17, 2017 encounter was "unfounded," although it was determined that the trooper had failed to timely notify dispatch of the stop per policy. Ex. 27 at OAG031892-93.

PLAINTIFFS' REPLY: Although Plaintiffs' Exhibit 27 includes third-party citizen complaints, Plaintiffs also rely on, and included, PSU's internal investigations and findings regarding the citizen complaints. PSU's records, investigations, and findings are business records or public records. On summary judgment, evidence does not need to be submitted in a form that would be admissible at trial, but the content or substance of such evidence must be admissible. *Argo v. Blue Cross & Blue Shield of Kan., Inc*., 452 F.3d 1193, 1199 (10th Cir. 2006). PSU records, investigations, and findings for each of the citizen complaints are admissible under the business records or public records exception because the reports were prepared in the normal course of law enforcement investigations. *See Draughon v. United States*, No. 14-2264-JAR-GLR, 2017 WL 3492313, at *8 (D. Kan. Aug. 15, 2017). Defendant's response to Plaintiffs' Paragraph 68 refers

to PSU's investigation findings and, therefore, the Court should rely on the underlying facts regarding those findings.

69. A KHP trooper pulled over a driver and his passenger on 1-70 for following a semi-tractor too closely, and for improper tag display. The driver alleged he was pulled over because he had Colorado tags. The trooper provided warnings to the driver and passenger, told them to have a nice day, but then initiated the Two-Step. The trooper asked questions to determine if they had drugs, and they said they did not. The driver and passenger consented to be searched, which resulted in nothing. **Ex. 28**, July 21, 2017, Complaint at OAG031910, OAG031913-31915.

DEFENDANT JONES' RESPONSE: Controverted to the extent that the driver's statements to KHP or PSU are offered to prove the truth of the claims made (they are inadmissible hearsay in these proceedings) and the driver was not challenging the adequacy of the troopers' reasonable suspicions. Furthermore, PSU's investigation confirmed that the complaint about the September 17, 2017 encounter was "unfounded," although it was determined that the trooper had failed to timely notify dispatch of the stop per policy. Ex. 28 at OAG031962-64.

PLAINTIFFS' REPLY: Although Plaintiffs' Exhibit 28 includes third-party citizen complaints, Plaintiffs also rely on, and included, PSU's internal investigations and findings regarding the citizen complaints. PSU's records, investigations, and findings are business records or public records. On summary judgment, evidence does not need to be submitted in a form that would be admissible at trial, but the content or substance of such evidence must be admissible. *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006). PSU records, investigations, and findings for each of the citizen complaints are admissible under the business records or public records exception because the reports were prepared in the normal course of law enforcement investigations. *See Draughon v. United States*, No. 14-2264-JAR-GLR, 2017 WL

3492313, at *8 (D. Kan. Aug. 15, 2017). Defendant's response to Plaintiffs' Paragraph 69 refers to PSU's investigation findings and, therefore, the Court should rely on the underlying facts regarding those findings.

70. A KHP trooper pulled over a Missouri driver and passenger on 1-70 for allegedly speeding. The trooper gave the driver a warning, and then told the driver and passenger to "have a nice trip." The trooper initiated the Two-Step, and then requested a K-9 unit, but decided to let the driver and passenger go because a K-9 would have taken too long. **Ex. 29**, September 12, 2018, Complaint at OAG031965, OAG031967-3170.

DEFENDANT JONES' RESPONSE: Controverted to the extent that the passenger's statements to KHP or PSU are offered to prove the truth of the claims made (they are inadmissible hearsay in these proceedings) and there was no challenge to the adequacy of the troopers' reasonable suspicions. Furthermore, PSU's investigation confirmed that the complaint about the September 3, 2018 encounter was "unfounded." Ex. 29 at OAG031973-75.

PLAINTIFFS' REPLY: Although Plaintiffs' Exhibit 29 includes third-party citizen complaints, Plaintiffs also rely on, and included, PSU's internal investigations and findings regarding the citizen complaints. PSU's records, investigations, and findings are business records or public records. On summary judgment, evidence does not need to be submitted in a form that would be admissible at trial, but the content or substance of such evidence must be admissible. *Argo v. Blue Cross & Blue Shield of Kan., Inc*., 452 F.3d 1193, 1199 (10th Cir. 2006). PSU records, investigations, and findings for each of the citizen complaints are admissible under the business records or public records exception because the reports were prepared in the normal course of law enforcement investigations. *See Draughon v. United States*, No. 14-2264-JAR-GLR, 2017 WL 3492313, at *8 (D. Kan. Aug. 15, 2017). Defendant's response to Plaintiffs' Paragraph 70 refers

to PSU's investigation findings and, therefore, the Court should rely on the underlying facts regarding those findings.

71. A KHP trooper pulled over an Oklahoma resident for following too closely. The trooper gave the driver a warning and told him that he was free to go. The trooper initiated the Two Step, and then suspected the driver of having drugs. The agent deployed his assigned canine, which resulted in a canine alert, but no illegal drugs were found during the search of the vehicle. **Ex. 30**, September 21, 2018, Complaint at OAG031976, OAG031979-31982.

DEFENDANT JONES' RESPONSE: Controverted to the extent that the driver's statements to KHP or PSU are offered to prove the truth of the claims made (they are inadmissible hearsay in these proceedings). Furthermore, PSU's investigation confirmed that the complaint about the September 21, 2018 encounter was "unfounded." Ex. 30 at OAG031988-90.

PLAINTIFFS' REPLY: Although Plaintiffs' Exhibit 30 includes third-party citizen complaints, Plaintiffs also rely on, and included, PSU's internal investigations and findings regarding the citizen complaints. PSU's records, investigations, and findings are business records or public records. On summary judgment, evidence does not need to be submitted in a form that would be admissible at trial, but the content or substance of such evidence must be admissible. *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006). PSU records, investigations, and findings for each of the citizen complaints are admissible under the business records or public records exception because the reports were prepared in the normal course of law enforcement investigations. *See Draughon v. United States,* No. 14-2264-JAR-GLR, 2017 WL 3492313, at *8 (D. Kan. Aug. 15, 2017). Defendant's response to Plaintiffs' Paragraph 71 refers to PSU's investigation findings and, therefore, the Court should rely on the underlying facts regarding those findings.

72. A KHP trooper pulled over a Texas resident for improper display. The trooper issued the driver a warning, and then initiated the Two-Step. The trooper suspected the driver of trafficking drugs and detained the driver. The trooper asked to search the driver's car, the driver refused, so the trooper called for a canine search. The canine did not alert for the presence of an illegal substance during the search. **Ex. 31**, September 6, 2019, Complaint at OAG032031-31936, OAG032038.

DEFENDANT JONES' RESPONSE: Controverted to the extent that the driver's statements to KHP or PSU are offered to prove the true of the claims made (they are inadmissible hearsay in these proceedings). Furthermore, PSU's investigation confirmed that the complaint about the September 6, 2019 encounter was "unfounded." Ex. 31 at OAG032060-62.

PLAINTIFFS' REPLY: Although Plaintiffs' Exhibit 31 includes third-party citizen complaints, Plaintiffs also rely on, and included, PSU's internal investigations and findings regarding the citizen complaints. PSU's records, investigations, and findings are business records or public records. On summary judgment, evidence does not need to be submitted in a form that would be admissible at trial, but the content or substance of such evidence must be admissible. *Argo v. Blue Cross & Blue Shield of Kan., Inc*., 452 F.3d 1193, 1199 (10th Cir. 2006). PSU records, investigations, and findings for each of the citizen complaints are admissible under the business records or public records exception because the reports were prepared in the normal course of law enforcement investigations. *See Draughon v. United States*, No. 14-2264-JAR-GLR, 2017 WL 3492313, at *8 (D. Kan. Aug. 15, 2017). Defendant's response to Plaintiffs' Paragraph 72 refers to PSU's investigation findings and, therefore, the Court should rely on the underlying facts regarding those findings.

73. A KHP trooper pulled over a Nebraska driver for speeding. The trooper issued the driver a warning, and then initiated the Two Step. The trooper requested a canine, and the dog alerted. The troopers searched the vehicle and found nothing, so they let the driver go. **Ex. 32**, December 5, 2019, Complaint at OAG032065-32070; OAG032072.

DEFENDANT JONES' RESPONSE: Controverted to the extent that the driver's statements to KHP or PSU are offered to prove the truth of the claims made (they are inadmissible hearsay in these proceedings). However, uncontroverted that PSU's investigation confirmed that Trooper Henrickson, regarding the December 5, 2019 encounter, after reviewing the video agreed that he had misunderstood the driver's statements and should not have detained the driver after the traffic stop had concluded. Ex. 32 at OAG032068.

PLAINTIFFS' REPLY: Although Plaintiffs' Exhibit 32 includes third-party citizen complaints, Plaintiffs also rely on, and included, PSU's internal investigations and findings regarding the citizen complaints. PSU's records, investigations, and findings are business records or public records. On summary judgment, evidence does not need to be submitted in a form that would be admissible at trial, but the content or substance of such evidence must be admissible. *Argo v. Blue Cross & Blue Shield of Kan., Inc*., 452 F.3d 1193, 1199 (10th Cir. 2006). PSU records, investigations, and findings for each of the citizen complaints are admissible under the business records or public records exception because the reports were prepared in the normal course of law enforcement investigations. *See Draughon v. United States*, No. 14-2264-JAR-GLR, 2017 WL 3492313, at *8 (D. Kan. Aug. 15, 2017). Defendant's response to Plaintiffs' Paragraph 73 refers to PSU's investigation findings and, therefore, the Court should rely on the underlying facts regarding those findings.

74. A KHP trooper pulled over a Texas driver for speeding; the driver was on her way to Utah. The trooper requested a canine after his first contact with the driver, leaving the driver to wait in her car for 20-25 minutes without being told why they were waiting. The canine alerted, and the troopers conduced a detailed search of the driver's car and her belongings. The troopers did not find anything, and she was free to go. **Ex. 33**, August 12, 2020, Complaint at OAG032113-32117; OAG032119.

DEFENDANT JONES' RESPONSE: Controverted to the extent that the driver's statements to KHP or PSU are offered to prove the truth of the claims made (they are inadmissible hearsay in these proceedings). Furthermore, PSU's investigation confirmed that the August 12, 2020 complaint was "unfounded." Ex. 33 at OAG032134-36.

PLAINTIFFS' REPLY: Although Plaintiffs' Exhibit 33 includes third-party citizen complaints, Plaintiffs also rely on, and included, PSU's internal investigations and findings regarding the citizen complaints. PSU's records, investigations, and findings are business records or public records. On summary judgment, evidence does not need to be submitted in a form that would be admissible at trial, but the content or substance of such evidence must be admissible. *Argo v. Blue Cross & Blue Shield of Kan., Inc*., 452 F.3d 1193, 1199 (10th Cir. 2006). PSU records, investigations, and findings for each of the citizen complaints are admissible under the business records or public records exception because the reports were prepared in the normal course of law enforcement investigations. *See Draughon v. United States*, No. 14-2264-JAR-GLR, 2017 WL 3492313, at *8 (D. Kan. Aug. 15, 2017). Defendant's response to Plaintiffs' Paragraph 74 refers to PSU's investigation findings and, therefore, the Court should rely on the underlying facts regarding those findings.

Defendant Jones' Response to Complaints

75. KHP and its troopers have attempted to justify treating nonresidents and residents differently, in violation of its policies. **Ex. 2**, Enforcement Guidelines, P000267; **Ex. 9**, Rohr Dep. at 52:2-21, 215:7-15.

DEFENDANT JONES' RESPONSE: Controverted because the statement is not supported by the record cited. Ex. 2, KHP policy ENF-01 (enforcement guidelines) states different treatment because of residence is prohibited. Rohr testified the origin of a motorist trip can be a circumstance in the reasonable suspicion calculus. Ex. 9, 52:9-14 (Q. And what about the state of origin is indicative of criminal activity. A. "Depending on where it is. You know, through experience and training you learn where large amounts of drugs and narcotics, or other criminal activity originates"). And he testified that he has used either the motorist's origin or destination in and travel on certain highways, with combination of factors, in forming reasonable suspicion. Ex. 9, 54:2-56:16. However, Rohr explained:

> Q. The tag itself, and the place of registration, whether it's Kansas or Florida, would that have been an indicator or a factor in reasonable suspicion?
> A. Yes.
> Q. How so?
> A. Depends on where the origin or destination was. You know, if there was a tag out of New York, or something, and they were out of New York, or if there's a New York tag and the drivers were from Missouri, why are they driving a vehicle with a New York tag. Those are all indicators of criminal activity. It may be the vehicle is stolen.
> ***
> Q. The fact someone is from Colorado, in and of itself, is that a factor in your reasonable suspicion that you formed?
> A. No.
> Q. The fact that the vehicle itself has Colorado registration, is that in and of itself a factor in a reasonable suspicion?
> A. No.

Id. at 203:3-204:2

PLAINTIFFS' REPLY: Plaintiffs' Paragraph 75 is supported by the record because, while Plaintiffs agree that KHP has an enforcement guideline that prohibits different treatment based on residency, the data supports that KHP disregards that guideline. *See infra* Plaintiffs' Paragraphs 102 through 114.

76. Plaintiffs' lawsuit, and Jones' review of the PSU complaints, show a consistent pattern of issues related to the same or similar facts, but neither Jones nor the superintendents that preceded him—have responded to the complaints by enacting new policies. **Ex. 3**, Jones Dep. at 162:19-21; 163:10-14. When asked about data collection, Jones recognized the importance of it, but struggled to relay how data was collected or used to inform policing decisions within his agency, stating "I don't deal with that personally." *Id.* at 48:1-49:7. Jones instead pointed to others under his command, including the head of the Professional Standards Unit and the commander over certain geographic areas, as the individuals within KHP who concern themselves with identifying patterns of unconstitutional policing. *Id*. at 51:20-52:24; 54:1-20. When asked what he does to ensure *Vasquez* and cases of similar import are followed, Jones remarked "that would be incumbent upon [the troopers'] supervisors." *Id*. at 127:24-128:4. Jones then referenced blanket statements made at command staff meetings "that we should be holding our folks accountable to abiding by the laws of the state and the U.S." or "maybe" sending out an email. *Id*. at 128:5-129:23. The only mechanism Jones uses to supervise the actions of troopers is those troopers' line supervisors, and when asked how Jones provides supervision to those higher in the command structure, Jones answered that he does so only "through my executive staff." *Id*. at 131:11-12.

DEFENDANT JONES' RESPONSE: Controverted because the record cited does not support the statement that this a "consistent pattern of issues related to the same or similar facts", either by Plaintiffs' lawsuit or PSU complaints, to which Jones or his processors failed to respond.

Ex. 3, 162:19-163:14 ("Q. Do the results of every investigation that's conducted by PSU make their way to you? A. No. … I will see them. There are some that are dealt with by a phone call that doesn't come to an investigation. They are just dealing with a complaint. An investigation, yes. Q. … Is it an accurate statement that the results of every PSU investigation make their way to you as superintendent? A. Correct. Q. Then once that process is completed, is it up to you only to make the decision about discipline and what level of discipline? A. I make the final say. I take on the recommendations from my command staff.").

Regarding the second sentence of this paragraph, it is uncontroverted that Jones does not personally deal with formal processes or structures that commanders employ to collect data about stops, searches or seizures. Otherwise, the record does not support the statement and the statement is controverted. *Id*., 48:1-49:7. However, the third sentence is uncontroverted.

The fourth sentence is uncontroverted with the clarification that Jones answered once a case like *Vasquez* is trained on or educated about to KHP troopers, making sure the mandates of the case are followed it is incumbent upon their immediate supervisors. *Id*., 127:24-128:4.

Regarding the Fifth and last sentences it is uncontroverted that Jones has given broad directions to this command staff that "we should be holding our folks accountable to abiding by the laws of the state and of the US", *Id*. at 128:5-129:23; and it is uncontroverted that Jones supervises immediate supervisor through directives to his executive staff. *Id*. at 131:11-12. Plaintiffs' argumentative description this testimony is not supported by the record cited.

PLAINTIFFS' REPLY: Plaintiffs have submitted several examples of a consistent pattern of issues related to the same or similar facts. *See supra* Plaintiffs' Paragraphs 66 through 74.

77. Plaintiffs' expert, Chief Hassan Aden (Chief Aden), opined that Jones' lack of response allows patterns of constitutional violations to develop and go unaddressed:

> Superintendent Jones purports to be a seasoned and experienced law enforcement executive with a . . . deep understanding of the important role [training] plays in effectively managing a law enforcement agency. . . . Despite his expertise . . . Superintendent Jones has not taken steps to correct the rampant unlawful stops, detentions, and searches occurring at the hands of KHP troopers.

Ex. 35, Aden Rep. at 19.

DEFENDANT JONES' RESPONSE: Uncontroverted that the quote is in Mr. Aden's report. The paragraph is controverted, however, in that Aden's opinion is inadmissible for the reasons stated in a pending *Daubert* motion. See Doc. 304, filed 9/8/2022. Moreover, Mr. Aden does not cite any evidence, much less sworn evidence, of "rampant unlawful stops, detentions, and searches occurring at the hands of KHP troopers," emphasis supplied, and none has been provided by Plaintiffs in there motion or response to Jones' motion for summary judgment.

PLAINTIFFS' REPLY: Defendant relies on argumentative assertions instead of facts, or the record, to controvert Plaintiffs' Paragraph 77. The Court should disregard Defendant's arguments. Plaintiffs also refer to their response and opposition to Defendant's pending *Daubert* motion to support the admissibility of Chief Aden's expert testimony. *See* Doc. 323.

78. Chief Aden's review of Jones' deposition testimony made clear that Jones:

> . . . does not take responsibility for ensuring clear direction from his office down to the road troopers carrying out enforcement actions and who are responsible for protecting the constitution instead of violating it. Rather, Superintendent Jones relies on career KHP senior commanders . . . to do so. That expectation is unreasonable and irresponsible as they are not ultimately responsible for charging the course and the culture of the KHP, [and] they are a strong part of the KHP culture that needs to be reformed.

Id. at 20.

DEFENDANT JONES' RESPONSE: Uncontroverted that the quote is in Mr. Aden's report. The paragraph is controverted, however, in that Aden's opinion is inadmissible for the reasons stated in a pending *Daubert* motion.

PLAINTIFFS' REPLY: Plaintiffs refer to their response and opposition to Defendant's pending *Daubert* motion to support the admissibility of Chief Aden's expert testimony. *See* Doc. 323.

79. Chief Aden also opined that Defendant Jones "lacks awareness of the data generated by KHP's activities," which is "critical for holding commanders and line troopers accountable to the mission of the KHP and constitutional requirements." Finally, Chief Aden concluded that Jones "does not personally get involved in matters pertaining to legal standards and his organization's compliance to those legal standards," which overall contributes to a custom of constitutional violations continuing unabated. **Ex. 35**, Aden Rep. at 24-25. *Id.* at 25. Likewise, Chief Aden reviewed testimony from Lieutenant Rohr that demonstrates supervisors under Jones' leadership do not feel it is necessary to take corrective action against troopers who violate the constitution. To Chief Aden, this demonstrated a clear failure in Jones' system of supervision that allows constitutional violations to go unchecked. *Id.* at 30-31.

DEFENDANT JONES' RESPONSE: Uncontroverted that these statements are summaries of opinions in Mr. Aden's report. The paragraph is controverted, however, in that Aden's opinion is inadmissible for the reasons stated in a pending Daubert motion. Furthermore, Rohr testimony, who Aden wants to interpret and weigh, was his former supervisor review his service dog reports. From his experience, as his canine handler reports were only changed for improved wording, grammar, punctuation and stuff like that. However, to his knowledge they were not reviewed for lawfulness of the stop or detention. Ex. 9, 149:9-150:5. This makes sense as

Police Service Dog Reports concern canine activities and the grounds for reasonable suspicion for the stop or detention are not generally included in the canine handler's report. Ex. 9, 150:20-151:1. Other reports apply to reporting reasonable suspicions. See Ex. 9, 162:15-163:1.

PLAINTIFFS' REPLY: Plaintiffs refer to their response and opposition to Defendant's pending *Daubert* motion to support the admissibility of Chief Aden's expert testimony. *See* Doc. 323. Further, Chief Aden's expert opinion highlights a very valid point: KHP supervisors are not supervising if they are only reviewing reports for grammar and spelling. Plaintiffs' **Ex. 35**, Aden Rep. at 31; Plaintiffs' **Ex. 9**, Rohr Dep. at 149:9-23. Plaintiffs cannot reply to the remainder of Defendant's statements because Defendant's response to Paragraph 79 is confusing.

KHP Trooper Training and Instruction

80. The basic responsibility of a KHP "[trooper] is to know the law. If [a trooper] is not familiar with the basic elements of the law, it is difficult to enforce the law fairly and uniformly." **Ex. 2**, Enforcement Guidelines, P000267.

DEFENDANT JONES' RESPONSE: Uncontroverted.

81. KHP provides law enforcement training for its troopers at the Kansas Law Enforcement Training Center. **Ex. 3**, Jones Dep. at 9:25-10:9.

DEFENDANT JONES' RESPONSE: Uncontroverted.

82. KHP instructs its [troopers] about traffic stops, investigations, searches and seizures, and other law-enforcement related information during training sessions. **Ex. 3**, Jones Dep. at 9:25-10:9.

DEFENDANT JONES' RESPONSE: Uncontroverted.

83. KHP primarily trains its troopers through instructor-led lectures accompanied by PowerPoint presentations. KHP also disseminates materials through Power DMS, KHP's policy

and e-learning platform, and other online and electronic platforms. **Ex. 3**, Jones Dep. at 33:25-35:8; **Ex. 12**, Washburn Dep. at 17:15-18:4.

DEFENDANT JONES' RESPONSE: Controverted in part because the statement is not supported by the cited record. Washburn says she uses PowerPoints or hard copy materials in the classes she teaches at the academy to new troopers. Ex. 12, 17:15-18:4. She and Jones do not address how the classes are conducted. She did not address how the class is conducted. Id.; Ex. 3, 33:25- 35:8.

The second sentence is uncontroverted.

PLAINTIFFS' REPLY: Defendant's response to Plaintiffs' Paragraph 83 is misleading because the paragraph does not assert facts regarding how Washburn and Jones conduct classes. Therefore, the Court should disregard Defendant's response to Plaintiffs' Paragraph 83.

84. KHP instructs on legal precedent during law enforcement training, during continuing education courses, or through other required instruction for its troopers. **Ex. 3**, Jones Dep. at 122:7-124:13; **Ex. 8**, Schulte Dep. at 29:18-30:8; **Ex. 9**, Rohr Dep. at 180:13-181:25; **Ex. 10**, McMillan Dep. at 147:13-149:4.

DEFENDANT JONES' RESPONSE: Uncontroverted.

85. KHP's policies and training define "reasonable suspicion," "probable cause," and the "totality of the circumstances," and KHP training materials cite the legal precedent from which those terms derive, as part of KHP trooper training. **Ex. 34**, Kansas Law Enforcement Training Center, Search and Seizure Course, OAG011283-11288; **Ex. 8**, Schulte Dep. at 33:24-35:7.

DEFENDANT JONES' RESPONSE: Uncontroverted.

86. After the *Vasquez* decision, KHP continued teaching its troopers that "where they [the driver] are coming from and where they are going to are the two most important questions"

KHP troopers can ask. **Ex. 36**, Domestic Highway Enforcement Training (OAG000582); **Ex. 4**, J. Rule Dep. at 83:7-84:2; 95:20-24.

DEFENDANT JONES' RESPONSE: Uncontroverted that Lt. Rule's PowerPoint for Criminal Interdiction training, prepared after, states "where they are coming from and where they are going to are the two most important questions," … "(Sets baseline for their entire story)." Ex. 4.

87. Lieutenant J. Rule's highway interdiction course instructs KHP troopers to ask two questions of all stopped motorists: (1) whether the driver is coming from a drug source area; and (2) whether the driver is going to a drug destination; those "two questions are the basis of everything we do." **Ex. 36**, Domestic Highway Enforcement Training at OAG000582.

DEFENDANT JONES' RESPONSE: Uncontroverted, see response to paragraph 86.

88. KHP did not integrate *Vasquez* into the training materials discussing car stop factors, but instead continued to rely on 2012 Kansas Court of Appeals cases. *See, e.g.*, **Ex. 18**, 4th Amendment "Reasonableness is the touchstone of the Fourth Amendment" Training at OAG020759-20761.

DEFENDANT JONES' RESPONSE: Controverted because the statement is not supported by the stated record, the date of the training cited is not stated and portions of the training cited applied to consensual encounter which was not the issue in *Vasquez*. Additionally, KHP training now discusses *Vasquez* directly. See e.g., Response to paragraph 96 and Defendant Jones Statement of Uncontroverted Facts, ¶ 31.

89. Some KHP personnel did provide piecemeal instruction on *Vasquez*. On November 7, 2018, when Rohr was still a trooper, Rohr's supervising lieutenant sent Rohr and other KHP

troopers an email that included a link to a Washburn Law Review article that discussed *Vasquez.* **Ex. 37**, Lieutenant Jason Edie's November 7, 2018, Email.

DEFENDANT JONES' RESPONSE: Uncontroverted with the clarification that the paragraph applies the period before direct KHP training on *Vasquez*.

90. Rohr was not required to sign off on reading the email. **Ex. 3**, Jones Dep. at 30:12-32:17.

DEFENDANT JONES' RESPONSE: Controverted because the cited record does not support the statement. The Jones testimony concerns development of formal policies. Ex. 3, 30:12-32:17. However, an email discussing a decision is not a KHP legal update. The legal update is placed into Power DMS, for "sign-off."

PLAINTIFFS' REPLY: Jones' testimony supports the process for how troopers are supposed to "sign off" after reading and reviewing policies. Rohr could not sign off reading and reviewing the email, including the link within the email, because KHP has no process to show that a trooper read and reviewed email updates. Plaintiffs' **Ex. 3**, Jones Dep. at 30:12-32:17;

91. Rohr, now a Lieutenant and supervisor of KHP troopers, did not know about *Vasquez* before the November 2018 email, does not recall reading any court opinions about *Vasquez,* and does not know if he has read *Vasquez* as of the date of his deposition. **Ex. 9**, Rohr Dep. at 179:5-18; 180:17-181:1.

DEFENDANT JONES' RESPONSE: Uncontroverted.

92. KHP Trooper Wolting has no memory of hearing of *Vasquez,* and if he did learn about it, he has no memory whether it changed how he does his job. **Ex. 38**, Wolting Dep. at 120:9–15.

DEFENDANT JONES' RESPONSE: Uncontroverted.

93. Although Schulte[6] has "heard about" *Vasquez*, he does not recall having any training about the case, he does not recall whether there has been a change in procedure regarding car stops or searches, he does not know about any retraining in response to *Vasquez*, and he does not recall attending a training that discussed *Vasquez*. **Ex. 8**, Schulte Dep. at 176:8-177:5.

DEFENDANT JONES' RESPONSE: Uncontroverted, with the clarification that Schulte was deposed on Feb. 25, 2021, Ex. 8, apparently before he sat through the current training that discusses *Vasquez* at length. See Ex. 44, 60:8-66:14 (the training was first provided in c. July 2019 to an interdiction class; but later to the general trooper population).

PLAINTIFFS' REPLY: Defendant has not cited any record that supports that Schulte "sat through the current training . . ." Therefore, the Court should disregard Defendant's assertion.

94. McMillan[7] understood that *Vasquez* "was an important decision for law enforcement" because "there were certain things that [KHP troopers] can't hold people . . . to be considered reasonable suspicion." Still, McMillan does not remember what those things are. **Ex. 10**, McMillan Dep. at 148:15-149:4.

DEFENDANT JONES' RESPONSE: Uncontroverted, with the clarification that McMillan was deposed on Feb. 17, 2021, Ex. 10, apparently before he sat through the current training that discusses Vasquez at length.

PLAINTIFFS' REPLY: Defendant has not cited any record that supports that McMillan "sat through the current training . . ." Therefore, the Court should disregard Defendant's assertion.

95. The KHP Commander in charge of highway interdiction confirmed that practices of KHP troopers have not changed after *Vasquez*:

[6] Schulte stopped the Shaw plaintiffs on December 20, 2017. *See infra*, SOF ¶ 129.
[7] McMillan stopped plaintiff Bosire on February 8, 2019. *See infra*, SOF ¶¶ 162, 176.

> **Q: Did the practices of the troopers under your command change after *Vasquez* came down to your knowledge?**
>
> A: No.

Ex. 6, Hogelin Dep. Vol. I at 110:7-10.

DEFENDANT JONES' RESPONSE: Uncontroverted.

96. Post-*Vasquez*, the KHP still trains troopers that a driver's state of residence is applicable to determining reasonable suspicion. **Ex. 6**, Hogelin Dep. Vol. I at 56:3–13. KHP leadership instruct officers to engage in a volume practice, where they stop a high number of cars in order to increase their odds of being able to search cars and uncover drugs. As KHP's Advanced Interdiction Training notes, "several stops are required to have any chance of making a seizure." **Ex. 24,** Advanced Interdiction Training (2020), at OAG028817.

DEFENDANT JONES' RESPONSE: The first sentence is controverted because it is not supported by the cited record. Ex. 6, 56:3-13. In fact, Hogelin testified:

> Q. Captain, what changes were made in the Kansas Highway Patrol policy, procedures, or training after Vasquez?
> ***
> Q. -- and when Vasquez was incorporated into training?
> A. I don't have a specific date. I'm sorry.
> ***
> Q. (By Mr. McInerney) Let me direct you to the upper right corner of the opinion copy on page 3 of 7. In the right-hand column near the end of that paragraph about five lines up, it says, "Accordingly, it's time to abandon the pretense that state citizenship is a permissible basis on which to justify the detention and search of out-of-state motorists and time to stop the practice of detention of motorists for nothing more than an out-of-state license plate." Did I read that accurately?
> A. Yes.
> Q. Did training that KHP instituted include that?
> A. Yes.

52:8-57:14. And Hogelin did also testified:

> Q. So if origin is information about where the driver is coming from, the next line down "Destination" is information about where the driver claims they are traveling to?
> A. Yes.

> Q. Is that an appropriate consideration pursuant to this policy in determining whether there is reasonable, articulable suspicion for the purpose of a canine sniff?
> A. It certainly be one of many depending on the circumstances of the traffic stop.

Ex. 44, 36:7-17.

The second sentence in the paragraph is uncontroverted.

PLAINTIFFS' REPLY: Hogelin's deposition transcript Volume II (Ex. 44) supports Plaintiffs' Paragraph 96, and not Hogelin's deposition transcript Volume I. *See* Plaintiffs' **Ex. 44**, Hogelin Dep. Vol. II at 56:3-13; *see also* Defendant's Response citing Hogelin's deposition transcript Volume II. Therefore, Plaintiffs' Paragraph 96 is supported by the record.

97. Likewise, KHP continues to train its troopers that the state of travel origin and is an indicator of criminal activity to be used in developing reasonable suspicion. **Ex. 9**, Rohr Dep. 53:12–20, 55:6–23, 56:1–18.

DEFENDANT JONES' RESPONSE: Rohr is not a trainer and Rohr testimony discussed his prior training, but it is uncontroverted that Lt. Rohr testified he has used either the motorist's origin or destination in travel on certain highways, in combination of factors, in forming reasonable suspicion. Ex. 9, 53:12-56:18. Rohr explained:

> Q. The tag itself, and the place of registration, whether it's Kansas or Florida, would that have been an indicator or a factor in reasonable suspicion?
> A. Yes.
> Q. How so?
> A. Depends on where the origin or destination was. You know, if there was a tag out of New York, or something, and they were out of New York, or if there's a New York tag and the drivers were from Missouri, why are they driving a vehicle with a New York tag. Those are all indicators of criminal activity. It may be the vehicle is stolen.
> ***
> Q. The fact someone is from Colorado, in and of itself, is that a factor in your reasonable suspicion that you formed?
> A. No.

Ex. 9, 203:3-204:2.

98. One of the attorneys responsible for providing legal training to KHP troopers testified that a drug source area is a factor of the totality of circumstances for reasonable suspicion. **Ex. 12**, Washburn Dep. 79:6–10.

DEFENDANT JONES' RESPONSE: Uncontroverted, with the clarification Washburn testified: "Again, it's part of the totality of the circumstances, where someone's coming from, where they're going to, and whether or not that state has legal marijuana is certainly a factor, but it's part of the totality of the circumstances." Ex. 12, 79:6-10.

99. A KHP trooper testified that he still uses the following as a basis for finding reasonable suspicion: "the state of origin of a vehicle," "travel destination," the mere "fact of travel on K-10 or I-70 or I-35," and travel to or from cities with "more criminal activity." **Ex. 9**, Rohr Dep. 52:22-25, 53:8-11, 55:6–11, 55:24-56:18.

DEFENDANT JONES' RESPONSE: Controverted as phrased. Rohr did not testify these alone are a basis for finding reasonable suspicion. Rather, it is uncontroverted that Lt. Rohr testified he has used either the motorist's origin or destination in and travel on certain highways, in combination of factors, in forming reasonable suspicion. Ex. 9, 52:22-56:18. Rohr explained:

> Q. The tag itself, and the place of registration, whether it's Kansas or Florida, would that have been an indicator or a factor in reasonable suspicion?
> A. Yes.
> Q. How so?
> A. Depends on where the origin or destination was. You know, if there was a tag out of New York, or something, and they were out of New York, or if there's a New York tag and the drivers were from Missouri, why are they driving a vehicle with a New York tag. Those are all indicators of criminal activity. It may be the vehicle is stolen.
> ***
> Q. The fact someone is from Colorado, in and of itself, is that a factor in your reasonable suspicion that you formed?
> A. No.

Ex. 9, 203:3-204:2.

100. Superintendent Jones testified that the KHP does not necessarily train troopers on issues that are "very significant" in live educational settings; instead, they use "training either in person or, with technology of today, we put it on Power DMS. Individuals have to go in. They will go through a PowerPoint, whatever it is, ask questions or whatever it is. But we use technology." **Ex. 3**, Jones Dep. at 58:20-59:18.

DEFENDANT JONES' RESPONSE: Controverted because the statements are not supported by the cited record. Jones discussed the rollout of a new policy to troopers, not training on very significant issues. Ex. 3, 58:20-59:18.

PLAINTIFFS' REPLY: Defendant misinterprets Plaintiffs' Paragraph 100, which simply supports KHP's approach of training troopers on "very significant" issues and policies. *See* Plaintiffs' **Ex. 3**, Jones Dep. at 58:20-59:18 ("But if its something very significant, it's going to be formal training either in person or, with technology of today, we put it on Power DMS.").

101. Plaintiffs' expert, Chief Aden, opined that "KHP troopers lack adult learning methods that further the absorption of the training goals and principles the trainees." Aden also opined, "[a]ll training sessions-in-service, academy, legal updates, etc.–focusing on Constitutional violations should be in person and conducted by using . . . adult learning methods." **Ex. 35**, Aden Rep. at 15; **Ex. 3**, Jones Dep. at 58:12-59:18.

DEFENDANT JONES' RESPONSE: Uncontroverted that these are quotes in Mr. Aden's report. The paragraph is controverted, however, in that Aden's opinion is inadmissible for the reasons stated in a pending *Daubert* motion. See Doc. 304, filed 9/8/2022. Moreover, it is apparent that Aden does not know the KHP training procedures. They incorporate "adult learning methods." Ex. 2 to Doc. 296, Asbe declaration, ¶ 18.

PLAINTIFFS' REPLY: Plaintiffs refer to their response and opposition to Defendant's pending *Daubert* motion to support the admissibility of Chief Aden's expert testimony. *See* Doc. 323. Moreover, Defendant cites no record supporting that "[Chief] Aden does not know the KHP training procedures . . ." so the Court should ignore Defendant's statements on this point.

KHP Targets Out-of-State Drivers

102. KHP disproportionally stops out-of-state, nonresident drivers more often than Kansas drivers, in violation of KHP's policies. **Ex. 2**, Enforcement Guidelines, P000267; *See generally* **Ex. 39**, Report of Plaintiffs' Retained Expert, Dr. Jonathan Mummolo ("Mummolo").

DEFENDANT JONES' RESPONSE: Uncontroverted that Dr. Mummolo opines KHP disproportionally stops out-of-state, nonresident drivers more often than Kansas drivers. The paragraph is controverted, however, in that Dr. Mummolo's opinion is inadmissible for the reasons stated in a pending *Daubert* motion. See Doc. 304, filed 9/8/2022. Moreover, his opinion that the stops are disproportionate does not address whether the stops/detentions of non-residents were appropriate enforcement actions, e.g., were they speeding; was the post-traffic stop detention supported by probable cause or reasonable suspicion. Thus, Plaintiffs' reference to KHP Enforcement Guidelines that prohibits making distinctions between residents and nonresidents in enforcement actions, is not pertinent to Dr. Mummolo's opinion in any event.

PLAINTIFFS' REPLY: Plaintiffs refer to their response and opposition to Defendant's pending *Daubert* motion to support the admissibility of Dr. Mummolo's expert testimony. *See* Doc. 323. Plaintiffs' response guides the Court to establish that Dr. Mummulo's opinions are based on generally accepted scientific methodologies, and that Defendant improperly attempts to exclude Dr. Mummolo's scientific and statistical analysis with baseless arguments that are unsupported by competing or rebuttal expert opinions. *See id.*

103. Dr. Mummolo reviewed traffic stop data that contained all KHP statewide stops between June 1, 2016, and August 3, 2021 (1,027,351 stops), which included the driver's state of origin. The traffic data also included all KHP stops on interstates between January 1, 2019 and May 31, 2021 (261,111 stops), which included the reason for the stops. **Ex. 39**, Mummulo Rep. at 35.

DEFENDANT JONES' RESPONSE: Uncontroverted.

104. Dr. Mummolo reviewed Kansas Department of Transportation records, mobile device location data, KHP canine search reports, and third-party canine search reports conducted on KHP's behalf. The canine reports described the circumstances and outcomes of the canine searches conducted on Kansas interstate highways between June 1, 2016, and December 31, 2019. Further, Dr. Mummulo reviewed the CDC's traffic fatality data between 1999 and 2019. **Ex. 39**, Mummulo Rep. at 35-36.

DEFENDANT JONES' RESPONSE: Uncontroverted that Dr. Mummulo says he considered this data in forming his opinions, with the exception that the "mobile device location data" was not from the service providers of the mobile devices, but was from a vendor that filtered and constructed opinions of phone usage at certain locations in Kansas. See Doc. 304, filed 9/8/2022.

PLAINTIFFS' REPLY: Plaintiffs refer to their response and opposition to Defendant's pending *Daubert* motion to support the admissibility of Dr. Mummolo's expert testimony. *See* Doc. 323. Plaintiffs' response guides the Court to establish that Dr. Mummulo's opinions are based on generally accepted scientific methodologies, and that Defendant improperly attempts to exclude Dr. Mummolo's scientific and statistical analysis with baseless arguments that are unsupported by competing or rebuttal expert opinions. *See id.*

105. Dr. Mummolo found that out-of-state drivers made up 65.9% of overall KHP stops, but only 22% of interstate traffic volume in the same area. According to Dr. Mummolo's analysis, if KHP had an enforcement policy that did not consider in- or out-of-state license plates, that policy would result in only 28.1% of the total number of out-of-state drivers stopped by KHP. **Ex. 39**, Mummolo Rep at 5-6.

DEFENDANT JONES' RESPONSE: Uncontroverted that Dr. Mummolo opines as described in the paragraph. The paragraph is controverted, however, in that Dr. Mummolo's opinion is inadmissible for the reasons stated in a pending Daubert motion. See Doc. 304, filed 9/8/2022.

PLAINTIFFS' REPLY: Plaintiffs refer to their response and opposition to Defendant's pending *Daubert* motion to support the admissibility of Dr. Mummolo's expert testimony. *See* Doc. 323.

106. Dr. Mummolo analyzed whether this disparity could be explained by differences in driving behaviors between in-state and out-of-state drivers, reasoning that if out-of-state drivers committed more speeding violations, that would offer a neutral reason why such drivers are subjected to more traffic stops. However, in the places and times examined, Dr. Mummolo found out-of-state drivers were overrepresented in speeding stops relative to their presence on the road. **Ex. 39**, Mummolo Rep. at 6.

DEFENDANT JONES' RESPONSE: Uncontroverted that Dr. Mummolo opines as described in the paragraph. The paragraph is controverted, however, in that Dr. Mummolo's opinion is inadmissible for the reasons stated in a pending Daubert motion. See Doc. 304, filed 9/8/2022.

PLAINTIFFS' REPLY: Plaintiffs refer to their response and opposition to Defendant's pending *Daubert* motion to support the admissibility of Dr. Mummolo's expert testimony. *See* Doc. 323.

107. Dr. Mummolo found that 67.8% of KHP speeding stops involved out-of-state drivers, but only such drivers made up only 35% of the total interstate speeding traffic. Dr. Mummolo estimated that 88.3% of out-of-state drivers would need to be speeding, compared to 29.1% of in-state drivers, in the places and times Dr. Mummolo examined. This would require that out-of-state drivers speed at roughly three times the rate of in-state drivers, representing an implausible gap in behavior. **Ex. 39**, Mummolo Rep. 6-7.

DEFENDANT JONES' RESPONSE: Uncontroverted that Dr. Mummolo opines as described in the paragraph. The paragraph is controverted, however, in that Dr. Mummolo's opinion is inadmissible for the reasons stated in a pending Daubert motion. See Doc. 304, filed 9/8/2022.

PLAINTIFFS' REPLY: Plaintiffs refer to their response and opposition to Defendant's pending *Daubert* motion to support the admissibility of Dr. Mummolo's expert testimony. *See* Doc. 323.

108. Mummolo found that out-of-state drivers are stopped more frequently than in-state drivers relative to their share of the total traffic on Kansas highways, and they are also subjected to canine sniffs at a higher rate. On the interstates where Dr. Mummolo could measure the overall prevalence of out-of-state drivers, 92.9% of the canine sniffs involved out-of-state drivers. Dr. Mummolo found a statistically significant disparity between the number of out-of-state drivers subjected to detentions for canine sniffs, as compared to in state drivers; where out-of-state drivers make up 76.6% of stops but 93% of canine searches). **Ex. 39**, Mummolo Rep. at 7, 19-20, 49.

DEFENDANT JONES' RESPONSE: Uncontroverted that Dr. Mummolo opines as described in the paragraph. The paragraph is controverted, however, in that Dr. Mummolo's opinion is inadmissible for the reasons stated in a pending Daubert motion. See Doc. 304, filed 9/8/2022.

PLAINTIFFS' REPLY: Plaintiffs refer to their response and opposition to Defendant's pending *Daubert* motion to support the admissibility of Dr. Mummolo's expert testimony. *See* Doc. 323.

109. Dr. Mummolo's analysis demonstrates that this level of disparity in who is subjected to a canine sniff is unlikely to be the result of policies or customs that are blind to a motorist's state of origin. **Ex. 39**, Mummolo Rep. at 8 (stating that "a canine-search policy that is blind to origin state after the initial decision to stop—cannot fully explain the disparities in canine searches.").

DEFENDANT JONES' RESPONSE: Uncontroverted that Dr. Mummolo opines as described in the paragraph. The paragraph is controverted, however, in that Dr. Mummolo's opinion is inadmissible for the reasons stated in a pending Daubert motion. See Doc. 304, filed 9/8/2022.

PLAINTIFFS' REPLY: Plaintiffs refer to their response and opposition to Defendant's pending *Daubert* motion to support the admissibility of Dr. Mummolo's expert testimony. *See* Doc. 323.

110. The data shows that although out-of-state drivers accounted for about 35% of drivers within the subject group, KHP performed canine searches 92.4% of the time on out-of-state drivers. **Ex. 39**, Mummolo Expert Report at 10, 20.

DEFENDANT JONES' RESPONSE: Uncontroverted that Dr. Mummolo opines as described in the paragraph. The paragraph is controverted, however, in that Dr. Mummolo's opinion is inadmissible for the reasons stated in a pending Daubert motion. See Doc. 304, filed 9/8/2022.

PLAINTIFFS' REPLY: Plaintiffs refer to their response and opposition to Defendant's pending *Daubert* motion to support the admissibility of Dr. Mummolo's expert testimony. *See* Doc. 323.

111. The data also supports that "[o]f the 917 interstate canine searches with complete data, 66 involved Kansas drivers, and 851 involved out-of-state drivers." **Ex. 39**, Mummolo Rep. at 21.

DEFENDANT JONES' RESPONSE: Uncontroverted that Dr. Mummolo opines as described in the paragraph. However, the data is not part of the summary judgment record.

112. Dr. Mummolo's analysis of the data showed that KHP has a pattern of targeting out-of-state drivers for traffic enforcement. **Ex. 39**, Mummulo Rep. at 16-17.

DEFENDANT JONES' RESPONSE: Uncontroverted that Dr. Mummolo opines as described in the paragraph. The paragraph is controverted, however, in that Dr. Mummolo's opinion is inadmissible for the reasons stated in a pending *Daubert* motion. See Doc. 304, filed 9/8/2022.

PLAINTIFFS' REPLY: Plaintiffs refer to their response and opposition to Defendant's pending *Daubert* motion to support the admissibility of Dr. Mummolo's expert testimony. *See* Doc. 323.

113. For drivers stopped and detained, Kansas in-state drivers have a higher rate of illegal drug recovery than out-of-state drivers. Indeed, the rate of discovery of illegal drugs among

out-of-state drivers was 51.5%, while the rate for in-state drivers was 57.6%. **Ex. 39**, Mummolo Rep. at 21.

DEFENDANT JONES' RESPONSE: Uncontroverted that Dr. Mummolo opines as described in the paragraph. The paragraph is controverted, however, in that Dr. Mummolo's opinion is inadmissible for the reasons stated in a pending Daubert motion. See Doc. 304, filed 9/8/2022.

PLAINTIFFS' REPLY: Plaintiffs refer to their response and opposition to Defendant's pending *Daubert* motion to support the admissibility of Dr. Mummolo's expert testimony. *See* Doc. 323.

114. KHP searches of out-of-state drivers to discover illegal drugs show a lower rate of recovery than searches of in-state drivers. **Ex. 39**, Mummolo Rep. at 8.

DEFENDANT JONES' RESPONSE: Uncontroverted that Dr. Mummolo opines as described in the paragraph. The paragraph is controverted, however, in that Dr. Mummolo's opinion is inadmissible for the reasons stated in a pending Daubert motion. See Doc. 304, filed 9/8/2022.

PLAINTIFFS' REPLY: Plaintiffs refer to their response and opposition to Defendant's pending *Daubert* motion to support the admissibility of Dr. Mummolo's expert testimony. *See* Doc. 323.

KHP's Incomplete Records Regarding Prolonged Detentions

115. Superintendent Jones, who is familiar with KHP's policy regarding report writing, testified that reports are not required in all circumstances. Specifically, he testified that KHP troopers do not have to write reports for all roadside detentions and that he does not know why this is the KHP's practice. **Ex. 3**, Jones Dep. at 151:22-152:8. 149:18-152:8.

DEFENDANT JONES' RESPONSE: Controverted. First, completion of the KHP Incident Narrative Report was not required in the absence of an arrest or forfeiture when Jones became the Superintendent. He testified he did not know the reason for that practice. Second, Jones had instructed that there would be a new policy requiring completion of a report that described information pertinent to a post-traffic stop detention, including the involved articulable reasonable suspicion, by the time of his deposition. Ex. 3, 151:18-152:25. See also Ex. 44 and Def. Jones Statement of Uncontroverted Facts, ¶ 34.

116. An example of Jones' response pertains to canine deployment reports, which are required to be completed by troopers that are canine handlers, and have received specialized canine handler training. **Ex. 9**, Rohr Dep. at 19:1-12; 162:11-19. When asked what Lieutenant Rohr does to supervise his troopers and whether he reviews canine reports, Rohr noted that he generally reviews such reports for grammar and spelling mistakes. **Ex. 9**, Rohr Dep 187-191.

DEFENDANT JONES' RESPONSE: The first sentence is uncontroverted with the explanation that canine handlers, who have specialized training with canines and the use of canines in KHP operations, prepare Police Service Dog Reports, and almost always those reports do not list the grounds for another trooper's decision to detain a motorist. See response to paragraph 79 and paragraphs 117-118. See also Doc. 296, Ex. 1, ¶ 26.

The second sentence is controverted because it is not supported by the cited record.

PLAINTIFFS' REPLY: With respect to the second sentence, it should have said that Lieutenant Rohr testified that his supervisor reviews for grammar and punctuation. Ex. 9 149:18-20. However, in the cited testimony, Rohr testified that he does not talk to his troopers that report to him about or require them to do as the training suggests, when they can articulate reasonable

suspicion, return to the car and explain concerns and as for consent to search. **Ex. 9**, Rohr Dep 187-191.

117. Incident narrative reports are a different type of report that contains a narrative section for the trooper involved in the incident to describe what occurred and the reasons for the trooper's actions. **Ex. 9**, Rohr Dep. at 161:22-163:1; **Ex. 40**, Sample Incident Narrative Report (HP 133) (OAG002885-2891)

DEFENDANT JONES' RESPONSE: Uncontroverted. See also Doc. 296, Ex. 1, ¶ 26.

118. Troopers that request canine sniffs are only required to complete narrative incident reports related to the canine sniff if the trooper makes a seizure or an arrest. **Ex. 9**, Rohr Dep. at 162:20-163:1.

DEFENDANT JONES' RESPONSE: Uncontroverted.

119. KHP troopers currently are not required to fill out an incident narrative report documenting their reasonable suspicion to extend a traffic stop unless the extension results in a seizure or an arrest. **Ex. 10**, McMillan Dep. 94:18-25; 95:1-4; 95:11-15; 103:11-25; 106:3-7; 107:1-25; 113:7-24.

DEFENDANT JONES' RESPONSE: Controverted. KHP's new Vehicle Detention Report Policy, FOR-44 are now fully approved and operative. Exhibit 1 to this pleading, Ganieany Declaration,, ¶¶ 3-6.

PLAINTIFFS' REPLY: Even if the Court was inclined to consider evidence that KHP made a reporting policy effective less than 10 days before filing their opposition to Plaintiffs' motion for summary judgment, and well passed the discovery deadline, the cited evidence does not move the needle. First, the affidavit at Doc. 326-1 states, "[u]pdated and new KHP policies are provided to State Troopers electronically as they are approved." This statement is clearly disputed

by the testimony in this case. Although Jones directed that KHP's Vehicle Detention Report Policy, FOR-44 be adopted in the few months before his October 6, 2021 deposition and it was "approved" in January of 2022, troopers did not have access to it until September 19, 2022. **Ex. 3**, Jones Dep. at 153:24-154:3; **Ex. 43**, Christi Asbe (Asbe) Dep. at 125:1-126:3; Doc. 326-1, Ganieany Declaration at ¶¶ 4-5. In addition, the declaration at Doc. 326-1 does not provide *any* evidence that troopers have in fact read the policy or that the form has ever been used.

120. KHP produced multiple canine deployment reports and incident narrative reports that show troopers' use and reliance on a driver's travel plans as a basis for the trooper's reasonable suspicion. **Ex. 41**, Sample Deployment and Incident Narrative Reports. While Canine handlers are required to complete canine deployment reports, *see* SOF 116, those reports frequently do not contain any explanation of the reasons the trooper called out the canine unit. *Id.*

DEFENDANT JONES' RESPONSE: The first sentence is controverted. Presumably Plaintiffs are provided all of the reports that they could locate which they contend show troopers' use and reliance on a driver's travel plans as a basis for the trooper's reasonable suspicion. However, if not, any inference that the records are a sampling is not supported by evidence. Moreover, the Police Service Dog Reports do not recite the grounds for reasonable suspicion, so reference to other trooper statements about suspicious travel is too vague to conclude another trooper used and relied upon a driver's travel plans as a basis for the trooper's reasonable suspicion. See response to paragraph 79 and paragraphs 117-118. There are two Incident Narrative Reports where the trooper lists drug corridor as part of the reasonable suspicion calculus with several other observations (Ex. 41, at OAG 03540-46 [2/24/2017 stop – c/ $23,000 of drug currency was recovered] & OAG 023273 [2/27/2017]). The report of the 2/24/2017 stop also mentions the driver

and passenger provided inconsistent descriptions of their travel plans and that it was a short turnaround trip. Ex. 41, at OAG 03540-46.

The second sentence is uncontroverted.

121. Chief Aden, Plaintiffs' retained expert, opined that KHP's failure to require the documentation of stops, detentions, and searches "allowed troopers to make up or supplement the reasonable articulable suspicion after the fact, in order to justify their actions." **Ex. 35**, Aden Rep. at 22.

DEFENDANT JONES' RESPONSE: Uncontroverted that Aden opines as described in the paragraph. The paragraph is controverted, however, in that Aden's opinion is inadmissible for the reasons stated in a pending *Daubert* motion. See Doc. 304, filed 9/8/2022.

PLAINTIFFS' REPLY: Plaintiffs refer to their response and opposition to Defendant's pending *Daubert* motion to support the admissibility of Chief Aden's expert testimony. *See* Doc. 323.

KHP Drafted a New Policy Meant to Fix Deficiencies and Create Better Data

122. "[A] little bit after th[e] complaint [in this lawsuit] was filed," Superintendent Jones decided to change KHP policy on documenting roadside detentions so they would have "better documentation of incidents." **Ex. 3**, Jones Dep. at 152:4-25.

DEFENDANT JONES' RESPONSE: Uncontroverted.

123. Specifically, KHP has drafted a new Vehicle Detention Report Policy, FOR-44, to "provide a record of events that occur when a subject or subjects are detained on articulable reasonable suspicion or probable cause for the purpose of a canine sniff." The new policy will "allow[] supervisor[s] to monitor the legality of detentions, track the frequency of detentions, show training deficiencies, and improve transparency." **Ex. 12**, Washburn Dep. at 100:22-102:12; **Ex.**

42, Vehicle Detention Report Policy (FOR-44); *see also* **Ex. 3**, Jones Dep. at 153:5-23 (the new policy will require a narrative of the grounds for reasonable suspicion).

DEFENDANT JONES' RESPONSE: Uncontroverted.

124. Although Jones directed that this new policy be adopted in the few months before his October 6, 2021 deposition and it was "approved" in January of 2022, troopers do not yet have access to it. **Ex. 3**, Jones Dep. at 153:24-154:3; **Ex. 43**, Christi Asbe (Asbe) Dep. at 125:1-126:3.

DEFENDANT JONES' RESPONSE: Controverted. FOR-44 and its associated form was effective September 19, 2022 when KHP was able to integrate the policy and its form into its electronic PowerDMS system. Troopers are required to read and acknowledge that they have received and read the policy within PowerDMS, making record that the policy has been received. The form or template for the report is now available on PowerDMS for troopers to complete. Specific training on the reporting requirement is not required. But, the new policy will be mentioned in the November 2022 interdiction training class and at the spring 2023 all-trooper in-service. Exhibit 1 to this pleading, Ganieany Declaration, ¶¶ 3-6.

PLAINTIFFS' REPLY: Plaintiffs incorporate their reply to SOF 119. In addition, the declaration cited does not state that Troopers are required to read and acknowledge that they have received and read the policy within PowerDMS, making record that the policy has been received. Doc 326-1. Rather, the declaration states that the email that was sent to all KHP on September 19, 2022 stated, "By opening this e-mail, you are attesting to the fact that you will have read and apprised yourself of the changes made to the Kansas Highway Patrol's Policy and Procedure Manual within five (5) days after opening this message." *Id.* The declaration does not state whether any of those emails were in fact opened. *Id.* It does not provide *any* evidence that the policy has been reviewed or used. *Id.* In addition, it is unclear what is even meant by the declaration's

statement that "Policy revisions will be *touched on* in Advanced Interdiction training." *Id.* Moreover, the declaration does not say the new policy *will be* mentioned at the spring 2023 all-trooper in-service – rather, it says it "will be touched on . . . *likely* at in-service training in the spring of 2023." (emphasis added). The Court should not rely on the declaration to support evidence of things that may occur in the future, especially when even the KHP claims the occurrence is speculative.

125. Nonetheless, the new policy and form are the approved policy of the KHP. **Ex. 44**, Hogelin Dep. Vol. II at 24:3-6; 38:11-14.

DEFENDANT JONES' RESPONSE: Uncontroverted.

126. Once the new policy is effective, the new form must be completed regardless of whether the search is successful, and regardless of whether the search uncovers any illegal drugs or contraband. **Ex. 44**, Hogelin Dep. Vol. II at 37:5-38:19; **Ex. 3**, Jones Dep. 153:20-23 (explaining that the new policy states a requirement).

DEFENDANT JONES' RESPONSE: Uncontroverted, with the explanation that the policy is now effective. Exhibit 1 to this pleading, Ganieany Declaration, ¶¶ 3-6.

PLAINTIFFS' REPLY: Plaintiffs incorporate their responses to SOF 119 and 124.

127. However, even when the new policy is effective, troopers will not receive immediate, in-person training on its use and meaning. Instead, KHP will "push the form out" on PowerDMS, a KHP internal electronic database—and then discuss it live at the next in-person annual training. **Ex. 3**, Jones Dep. 158:12-159:14; **Ex. 44**, Hogelin Dep. Vol. II at 25:23-26:3; **Ex. 43**, Asbe Dep. at 126:1-19.

DEFENDANT JONES' RESPONSE: Uncontroverted the policy is now effective, requiring the reporting described in paragraph 123. Exhibit 1 to this pleading, Ganieany Declaration, ¶¶ 3-6.

PLAINTIFFS' REPLY: Plaintiffs incorporate their responses to SOF 119 and 124. While the fact was accurate when stated, apparently, the KHP has changed course and is no longer committed to training on the new policy live at the next in-person training.

Trooper Schulte's Stop and Detention of Plaintiffs Blaine Shaw ("B. Shaw")[8] and Samuel Shaw ("S. Shaw")

128. B. Shaw is a resident of Oklahoma City, Oklahoma. **Ex. 45**, B. Shaw Dep. at 5:16-19. He has been an Oklahoma resident since 1999. *Id.*, 12:2-4; 15:1-16:3.

DEFENDANT JONES' RESPONSE: Uncontroverted.

129. On December 20, 2017, Schulte stopped B. Shaw for speeding westbound on Interstate 70 ("I 70"). **Ex. 8**, Schulte Dep. at 116:25-117:13; 181:8-182:8; 208:2-6.

DEFENDANT JONES' RESPONSE: Uncontroverted.

130. Schulte's patrol vehicle had a dashboard camera. Recordings through a microphone on his uniform synchronized with the dashboard camera's video. **Ex. 7**, Schulte Dep. at 197:19-198:4; 198:10-12; *see also* **Ex. 10**, McMillan Dep. at 92:1-5. Also, Schulte's activation of lights caused his dashboard camera to go back two minutes from the point of activation. *See* **Ex. 9**, Rohr Dep. at 78:18-79:1.

DEFENDANT JONES' RESPONSE: Uncontroverted with an explanation. The camera operating throughout the troopers' patrol. When the emergency lights on the trooper's vehicle are activated, the system saves a digital video recording which starts a period of time before the light's

[8] Blaine's name is Elontah Blaine Franklin Shaw, but he goes by Blaine. **Ex. 45**, B. Shaw Dep. at 5:16-19.

activation. Rohr believes this is two minutes, although there is no foundation that this is the exact period. Moreover, there is confirmation that the copy of the camera's video starts at the same time the pre-light activation commenced.

131. At the time Schulte engaged his lights, B. Shaw was behind Schulte, a U-Haul and a Dodge Chrysler 300, both of which had already passed Schulte. **Ex. 46**, Schulte Dash Cam, Pt. 1, 1:35-2:10.

DEFENDANT JONES' RESPONSE: Uncontroverted, with the explanation that the video shows B. Shaw's vehicle was passing Schulte's, in the inside passing lane, a second or so before the lights were activated. Doc. 163, Ex. 2a, Schulte Dash Cam, Pt. 1, 1:35-2:10. Moreover, the U-Haul and Dodge appear, on the video, to be more than 100 yards or more past Schulte's vehicle when he activated his emergency lights. B. Shaw's vehicle was the only vehicle close to Schulte's. *Id*. Schulte clocked B. Shaw speed on his rear-facing radar. Doc. 163, Ex. 2a, 198:18-199:4

132. B. Shaw was driving Ron Shaw's minivan, who is his father. **Ex. 45**, B. Shaw Dep. at 57:24-58:14. The minivan was registered in the name of Ronald B. Shaw of Shawnee, Oklahoma. **Ex. 45**, B. Shaw Dep. at 13:10-12; 58:2-11.

DEFENDANT JONES' RESPONSE: Uncontroverted.

133. S. Shaw is B. Shaw's brother. **Ex. 45**, B. Shaw Dep. at 21:16-21. S. Shaw also resides in Oklahoma City, Oklahoma. **Ex. 45**, B. Shaw Dep. at 13:8-9. S. Shaw was a passenger in the minivan at times relevant to his claims in this lawsuit. **Ex. 47**, S. Shaw Dep. at 26:22-27:4; 35:22-36:14; 44:22-46:17.

DEFENDANT JONES' RESPONSE: Uncontroverted.

134. After B. Shaw provided Schulte with his license and insurance, Schulte attempted to look inside the vehicle, before going to his patrol car. **Ex. 46**, Schulte Dash Cam, Pt. 1, 4:23-4:44.

DEFENDANT JONES' RESPONSE: Uncontroverted that Schulte looked into the Shaw vehicle, for a few seconds, while returning to his vehicle. Doc. 163, Ex. 2a, 4:23-4:44.

135. After nearly 10 minutes in his patrol car, Schulte emerged to inform B. Shaw that he clocked B. Shaw speeding 91 miles per hour in the passing lane of westbound I 70, 16 miles per hour in excess of the posted 75 miles per hour speed limit. **Ex. 46**, Schulte Dash Cam, Pt. 1, 14:23-15:13. B. Shaw admits that he was speeding. **Ex. 45**, B. Shaw Dep. at 49:19-50:17.

DEFENDANT JONES' RESPONSE: Uncontroverted, except Schulte told B. Shaw that he was clocked speeding for a second time and Schulte obtained information regarding B. Shaw's vehicle and criminal record, and preparing the traffic citation before returning to the Shaw vehicle. Doc. 163, Ex. 2a, 4:23-14:10.

136. After Schulte instructed B. Shaw on the ticket, Schulte told B. Shaw to "have a safe trip" and to "drive safely." **Ex. 46**, Schulte Dash Cam, Pt. 1, 15:05-15:10.

DEFENDANT JONES' RESPONSE: Uncontroverted

137. Schulte's dash cam shows B. Shaw putting his car into gear to leave. *Id.*

DEFENDANT JONES' RESPONSE: Uncontroverted

138. Schulte took a few steps towards his patrol car, but then did an immediate turn back towards B. Shaw's vehicle. **Ex. 46**, Schulte Dash Cam, Pt. 1, 15:08-15:13.

DEFENDANT JONES' RESPONSE: Uncontroverted.

139. Schulte then asked B. Shaw several questions about the contents of his vehicle, and B. Shaw answered "No" to every question regarding drugs, illegal substances, and weapons posed

by Schulte. Schulte asked if he could search the vehicle, and Blaine did not give his consent. **Ex. 46**, Schulte Dash Cam, Pt. 1, 15:14-15:42.

DEFENDANT JONES' RESPONSE: Uncontroverted.

140. B. Shaw did not believe he was free to leave at this point, and he did not believe the traffic stop was over. B. Shaw did not know the encounter was going to turn into something other than what it had been—a traffic stop. **Ex. 48**, B. Shaw Aff. at 3, ¶ 14.

DEFENDANT JONES' RESPONSE: Controverted. While B. Shaw claims that he did not feel free to leave, the objective evidence allows the factfinder to conclude his statement not credible, assuming Shaw's subjective belief is relevant. See paragraphs 136-138 and Ex. Doc. 163, Ex. 2a, 14:2:10-15:15 (Showing return of B. Shaw's paperwork and delivery of the traffic citation; Schulte telling B. Shaw "have a safe trip" and "drive safely" and then walk to the back of the minivan where he could see from the tail lights that B. Shaw had put the vehicle in gear; and Schulte's return and non-threating request to ask questions, including Schulte's physical separation from the Shaw minivan).

141. Schulte told B. Shaw to "wait," and that he "would be right back" to see B. Shaw because of B. Shaw's "refusal," according to Schulte. **Ex. 46**, Schulte Dash Cam, Pt. 1, 15:43 – 15:47.

DEFENDANT JONES' RESPONSE: Controverted that B. Shaw's "refusal" was a factor in Schulte's reasonable suspicions for the detention. See Doc. 296, Ex. 14, ¶ 20. Schulte said "refusal" into his microphone and to another trooper after he walked away from the minivan, and not to B. Shaw. Doc. 163, Ex. 2a 15:43–16:16. However, naturally, Schulte would not have needed to call for a canine sniff if B. Shaw had agreed to the search of the minivan.

PLAINTIFFS' REPLY: Schulte did not need to *say* "refusal" to B. Shaw in order for B. Shaw's refusal to *apply* to B. Shaw and, therefore, Schulte's suspicions to support his detention. Plaintiffs' **Ex. 46**, Schulte Dash Cam, Pt. 1, 15:43 – 15:47.

142. Schulte detained B. Shaw; B. Shaw was no longer free to leave. *Id.*

DEFENDANT JONES' RESPONSE: Uncontroverted

143. Nearly seven minutes later, Schulte informed B. Shaw that a canine dog was en-route to search the vehicle, and he confirmed that B. Shaw was detained. **Ex. 46**, Schulte Dash Cam, Pt. 1, 22:21-22:41.

DEFENDANT JONES' RESPONSE: Uncontroverted

144. B. Shaw asked Schulte what he did wrong, and Schulte refused to tell B. Shaw. **Ex. 46**, Schulte Dash Cam, Pt. 1, 22:40-22:44.

DEFENDANT JONES' RESPONSE: Controverted, B. Shaw said I don't see what I did wrong after Schulte told him that he was being detained and as Schulte was returning to his vehicle. Doc. 163, Ex. 2a, 22:35-22:44.

PLAINTIFFS' REPLY: The dash cam: (1) shows B. Shaw asking Schulte what he did that was wrong; (2) Schulte stopping; and (3) Schulte choosing to continue to walk to his patrol car. **Ex. 46**, Schulte Dash Cam, Pt. 1, 22:40-22:44.

145. Nearly 18 minutes later, Schulte approached B. Shaw's vehicle, informed him that the canine arrived, and directed him to turn off and exit the vehicle. **Ex. 46**, Schulte Dash Cam, Pt. 1, 40:40 – 41:10.

DEFENDANT JONES' RESPONSE: Uncontroverted.

146. Over 41 minutes after Schulte's stop, he learned for the first time that the passenger in the vehicle was not B. Shaw's "friend," but was B. Shaw's "brother." **Ex. 46**, Schulte Dash Cam, Pt. 1, 41:14-41:18.

DEFENDANT JONES' RESPONSE: Uncontroverted.

147. After a more-than five-minute search of B. Shaw's vehicle by three troopers and a canine dog, Schulte determined that B. Shaw and his brother were "pretty clean." **Ex. 46**, Schulte Dash Cam, Pt. 1, 47:30-47:37.

DEFENDANT JONES' RESPONSE: Controverted, Schulte or another officer said "pretty clean" probably in reference to a comment that the vehicle's interior side panel screws did not appear to have been "jacked with." Doc. 163, Ex. 2a, 47:30-47:37.

PLAINTIFFS' REPLY: The Court should disregard Defendant's response about what "probably" happened because the response is not a proper way to controvert a summary judgment fact. Fed. R. Civ. P 56(c).

148. Schulte remained determined, suspecting that the warm Dr. Pepper bottles and water bottles contained something illegal. Schulte continued searching for nearly ten more minutes. **Ex. 49**, Schulte Dash Cam, Pt. 2 – 00:00-7:02.

DEFENDANT JONES' RESPONSE: Uncontroverted that Schulte looked to see anything that might be drugs was in Dr. Pepper and water bottles. Doc. 163, Ex. 2a, 47:30-51:21. It is also uncontroverted that the search continued for more than ten more minutes.

149. After finding nothing, B. Shaw informed Schulte that he believed his Fourth Amendment rights had been violated, and that he wanted to leave because he was "annoyed." **Ex. 49**, Schulte Dash Cam, Pt. 2, 8:48-9:30.

DEFENDANT JONES' RESPONSE: Controverted that nothing was found during the search. Doc. 296, Ex. 14, ¶ 25. It is uncontroverted that B. Shaw stated he believed his rights had been violated and wanted to leave.

150. While B. Shaw continued voicing his frustrations, other troopers continued searching the vehicle. **Ex. 49**, Schulte Dash Cam, Pt. 2, 8:48-11:29.

DEFENDANT JONES' RESPONSE: Uncontroverted that the search continued after B. Shaw is heard on the video voicing frustrations, but not to any particular trooper.

151. One or more of the KHP troopers on scene damaged B. Shaw's property. **Ex. 45**, B. Shaw Dep. at 88:21-89:6; **Ex. 50**, Pictures of B. Shaw's Bag.

DEFENDANT JONES' RESPONSE: Uncontroverted that a law enforcement officer accessed B. Shaw's bag, and separated its zipper to do so. Doc. 163, Ex. 2a, 88:21-89:6; Ex. 50.

152. Schulte instructed B. Shaw that he wanted to photocopy B. Shaw's personal medical records and other personal belongings at Schulte's office. **Ex. 49**, Schulte Dash Cam, Pt. 2, 24:30-24:50.

DEFENDANT JONES' RESPONSE: Uncontroverted that Schulte told B. Shaw that Schulte wanted him to follow Schulte to KHP Hay's headquarters so that evidence located during the search could be copied, this included medical marijuana registration cards, which Schulte felt established that B. Shaw had lied to Colorado authorities about his residence in order to obtain the registration. Doc. 296, Ex. 14, ¶¶ 27-30; Doc. 163, Ex. 2a, 24:30-24:50

153. Schulte required the B. Shaw and S. Shaw to drive to Troop D headquarters to copy B. Shaw's medical marijuana card and his Colorado ID card. **Ex. 8**, Schulte Dep. at 231:20-232:2.

DEFENDANT JONES' RESPONSE: Uncontroverted.

154. The trip to Troop D headquarters extended the length of the detention. **Ex. 8**, Schulte Dep. at 231:20-232:21.

DEFENDANT JONES' RESPONSE: Uncontroverted as it was part of the search supported by probable cause.

155. Schulte detained B. Shaw and S. Shaw for over an hour, called out a drug dog, and had the vehicle searched from top to bottom. *See generally,* **Exs. 47 and 50**, Schulte's Dash Cam, Pts. 1 and 2.

DEFENDANT JONES' RESPONSE: Uncontroverted that the search lasted over an hour. It is also uncontroverted that it was thorough, if that is what is meant by "top to bottom." Ex. 49 & 50.

156. Schulte did not cite the Shaws for any unlawful conduct after Schulte concluded his detention at the Troop D headquarters to make photocopies. **Ex. 8**, Schulte Dep. at 232:6-233:12.

DEFENDANT JONES' RESPONSE: Uncontroverted.

157. B. Shaw and S. Shaw have been adversely affected by Schulte's stop. **Ex. 47**, S. Shaw Dep. at 24:2-26:2; **Ex. 51**, B. Shaw's Responses to Defendants Schulte's and McMillan's First Set of Interrogatories to B. Shaw; Interrogatory No. 11 (stating, "I have suffered emotional injuries as a result of my unlawful detention. I have also sustained a financial injury. Specifically, my luggage was destroyed during the unlawful search that resulted from my unlawful detention. Additionally, the anxiety I have experienced as a result of my unlawful detention has caused me to cease my work as an Uber driver for over a year from December 2017 to late February of 2019, and I have lost the primary source of my income as a result.") **Ex. 52**, S. Shaw's Responses to Defendants Schulte's and McMillan's First Set of Interrogatories to S. Shaw; Interrogatory No. 11

(stating, "I have experienced increased stress and distrust of the police since my detention."). After B. Shaw was stopped by KHP during his trip to Denver, he avoided driving through Kansas on his way home to Oklahoma City. **Ex. 45**, Blaine Shaw Dep. 56:24-57:12. In fact, he disliked driving altogether because he felt that "police were going to play by their own rules and that my stuff [is] just fair game any time." *Id*. at 89:10-14, 18-23 ("[W]hile driving, any time I would see police, get a knot in my stomach. Just feel anxious. Even though I am not doing anything wrong because I feel like I get forced to endure what I endured in the traffic stop of 2017.").

DEFENDANT JONES' RESPONSE: The claims of injury and the cause of alleged damage are subjective statements which the factfinder does not have to accept as true or accurate. It is uncontroverted that the claims have been made.

158. B. Shaw travels to and from Colorado on I-70 to see and stay with his family, and he has driven to Colorado since the December 2017 stop using out-of-state plates. S. Shaw also travels to and from Colorado on I-70, sometimes with his brother, B. Shaw. **Ex. 45**, B. Shaw Dep. at 48:19-49:18; **Ex. 53**, S. Shaw Dec. at 1, ¶ 2.

DEFENDANT JONES' RESPONSE: Uncontroverted that B. Shaw and S. Shaw made the noted statements. However, no proof of this has been provided and the factfinder can find the claims are not creditable.

PLAINTIFFS' REPLY: The Court should ignore Defendant's response that Plaintiffs have provided "no proof" to support the facts within Paragraph 158 because Plaintiff S. Shaw has submitted a declaration based on his personal knowledge, as allowed under the federal rules. *See* Fed. R. Civ. P. 56(c). Unlike many of the defendant troopers' affidavits, which have several inconsistencies and are nonsensical, thus lacking credibility, there is no reason for the Court to discount Plaintiffs' affidavits, including Plaintiff S. Shaw's declaration.

Trooper McMillan's Stop and Detention of Plaintiff Joshua Bosire

Colorado visit, and the Love's Travel Shop convenience store

159. Bosire is a Wichita, Kansas resident. **Ex. 54**, Bosire Dep. at 6:6-9.

DEFENDANT JONES' RESPONSE: Uncontroverted.

160. On February 8, 2019, Bosire drove his rental car westbound on 1-70 to visit his daughter in Littleton, Colorado. **Ex. 54**, Bosire Dep. at 6:6-9; 58:5-59:3.

DEFENDANT JONES' RESPONSE: Uncontroverted, although McMillan was not told that Bosire was visiting his daughter or even that he had been in Colorado. See Doc. 296, Ex. 13, ¶¶ 12, 27.

161. Bosire's rental car had a Missouri license plate. **Ex. 55**, February 10, 2019, Warning Ticket.

DEFENDANT JONES' RESPONSE: Uncontroverted.

162. On February 10, 2019, Bosire made his return trip to Kansas, first stopping at the Love's Travel Shop convenience store to buy gas. **Ex. 54**, Bosire Dep. at 57:2-58:4; 67:8-12.

DEFENDANT JONES' RESPONSE: Uncontroverted that Bosire stopped at Love's Travel Shop (Love's) on February 10, 2019 and that he purchased gas.

163. While Bosire attempted to purchase gas at the pump, he experienced issues pumping the gas, so he went inside and asked an attendant to help him at the pump. **Ex. 54**, Bosire Dep. at 68:12-69:20.

DEFENDANT JONES' RESPONSE: Uncontroverted that Bosire provided this testimony. It is uncontroverted that Bosire entered Loves and went to the cashier. He does not provide any corroborating evidence that he had problems with the pump or asked for help, but that should be accepted as true for the purposes of this motion.

164. The Love's convenience store attendant left the store to walk with Bosire to his car to help Bosire. **Ex. 54**, Bosire Dep. at 68:12-69:9.

DEFENDANT JONES' RESPONSE: Controverted because the cited record does not support an attendant "walk[ed] with Bosire" to his car. The Love's video shows that did not happen. Ex. 2 to this pleading (Love's Video), for conventional filing.

PLAINTIFFS' REPLY: Defendant relies on a Love's video that has unexplained gaps, as stated by defense counsel:

"MR. CHALMERS: Just so the record's clear, when I reviewed that video, there are gaps in that Love's video. And so I think to be accurate, what he is testifying is he didn't see it on the video in the excerpt you showed him . . . I don't know why there are gaps. That's just how it was provided to me. And I'm not saying it was gapped at that particular part, although I could not -- I found multiple gaps for some reason."

Plaintiffs' **Ex. 10**, McMillan Dep. at 189:22-190:8.

165. McMillan first noticed Bosire with another white male "[t]alking at the pump." **Ex. 10**, McMillan Dep. at 169:4-170:20.

DEFENDANT JONES' RESPONSE: McMillan testified as noted. But the statement is controverted because the Love's video shows McMillan looking at Bosire at the time McMillan was exiting the store and when Bosire was talking to the Love's cashier. **

166. McMillan observed nothing else between Bosire and the white mail; only talking. **Ex. 10**, McMillan Dep. at 170:18-22.

DEFENDANT JONES' RESPONSE: Uncontroverted.

167. McMillan was with Schulte at the Love's convenience store, where they stopped for a meal break. **Ex. 10**, McMillan Dep. at 161:7-14.

DEFENDANT JONES' RESPONSE: Uncontroverted.

168. McMillan believed that he observed that Bosire's vehicle had a Missouri license plate, a radar detector, and video cameras. **Ex. 10**, McMillan Dep. at 169:12-25.

DEFENDANT JONES' RESPONSE: Uncontroverted that during McMillan's first look at the Altima, which Bosire was standing by at Love's, he saw video cameras and a radar detector inside the vehicle. Further, he noticed it had a Missouri plate, stating "I mean that was not suspicious, but that's what I remember of the vehicle." Ex. 10, 169:12-25.

169. McMillan specifically observed that Bosire's rental car "had a Missouri registration plate and vehicle appeared to be a rental vehicle." **Ex. 56**, McMillan's May 17, 2019, PSU Letter to Lieutenant Bullock.

DEFENDANT JONES' RESPONSE: Ex. 56 might be introduced to at trial impeach McMillan, but otherwise it is an unsworn statement which is not properly considered in a summary judgment motion. However, it is uncontroverted that the Altima was a rental, was registered in Missouri and Missouri plates. Moreover, McMillan confirmed this by having the plate run before he left the Love's location. Ex. 10, 7-25.

170. As McMillan continued to observe Bosire's rental, McMillan claims to have seen a silver Dodge Charger that "also appeared to be a rental." **Ex. 10**, McMillan Dep. at 169:4-170:20.

DEFENDANT JONES' RESPONSE: Controverted that McMillan saw the Dodge when he was observing the Altima, where Bosire had been standing, because that statement is not supported by the cited record. Rather, McMillan saw the Dodge as McMillan was exiting the Love's parking lot. The Dodge was driving north of the Love's parking lot towards the ramps accessing I 70, and appeared to be another rental vehicle to McMillan. Ex. 10, 174:1-9. He never saw the Dodge parked. Id. 177:21-178:2.

171. McMillan did not run the Dodge Charger's plates to determine whether it was, in fact, a rental. **Ex. 10**, McMillan Dep. at 174:23-175:9.

DEFENDANT JONES' RESPONSE: Uncontroverted, nor is there information that he was close enough to the Dodge to look at his tags to do so. Additionally, Schulte ran the Dodge's tags and confirmed it was a rental. See e.g., Doc. 164, Conventional filed Ex. 2a, 8:18-8:26.[9]

172. McMillan did not observe the white male that Bosire was talking with enter the Dodge Charger. **Ex. 10**, McMillan Dep. at 174:10-22.

DEFENDANT JONES' RESPONSE: Uncontroverted.

173. McMillan considered stopping Bosire while he was at the convenience store, but he did not want to disturb the business' operations. **Ex. 10**, McMillan Dep. at 175:10-19.

DEFENDANT JONES' RESPONSE: Uncontroverted.

McMillan Stops Bosire on I-70

174. After Bosire left the convenience store, he noticed McMillan following him eastbound on I-70. **Ex. 54**, Bosire Dep. at 72:1-25.

DEFENDANT JONES' RESPONSE: Uncontroverted, with the explanation that McMillan did not see the Altima leave the Love's parking lot or enter I 70, but later came in contact with the vehicle eastbound on I 70. Ex. 183:2-21. McMillan decided to patrol the area and to watch for the Altima and Dodge; if he saw the drivers of either vehicle commit a traffic infraction, he would investigate at that point. *Id*. Therefore, it was awhile before Bosire saw McMillan's vehicle on I 70 after Bosire left Love's.

[9] Defendant's footnote 6 to Plaintiffs' Paragraph 171 states "Counsel unable to access the recording Plaintiffs' request permission to file conventionally and marked as Ex. 57. The recording produced in discovery and filed conventionally as Exh. 2a to Doc. 163 on 5/19/2021 is referenced here. Called hereafter Doc 163, Ex 4."

175. McMillan activated his lights and pulled Bosire over. **Ex. 57**, McMillan Dash Cam at 2:03 – 2:20.

DEFENDANT JONES' RESPONSE: Uncontroverted.

176. McMillan stopped Bosire while he was driving 82 miles per hour in a 75 mile per hour zone eastbound on Interstate 70. Bosire was driving a rented Nissan Altima. Pretrial Order, (Doc. #290 at 3); **Ex. 10**, McMillan Dep. at 223:9-18.

DEFENDANT JONES' RESPONSE: Uncontroverted that McMillan stopped Bosire for driving 82 mph in a 75 mph zone.

177. McMillan's patrol vehicle had a dashboard camera. Recordings through a microphone on his uniform synchronized with the dashboard camera's video. **Ex. 10**, McMillan Dep. at 92:1-5. Also, McMillan's activation of lights caused his dashboard camera to go back two minutes from the point of activation. **Ex. 9**, Rohr Dep. at 78:18-79:1.

DEFENDANT JONES' RESPONSE: Uncontroverted with the explanation provided in response to paragraph 30.

178. After McMillan asked Bosire for his license and rental agreement, McMillan asked Bosire where he was coming from, and Bosire responded that he was coming from the west, and headed east. **Ex. 57**, McMillan Dash Cam at 6:39 – 7:52.

DEFENDANT JONES' RESPONSE: Uncontroverted. Ex. 57, between 0:04:01 and 0:05:24. Bosire's phone video shows the significant pause before Bosire responded to McMillan's inquiries and supports, from an objective vantage, Bosire was being evasive. See Doc 164, Ex. 2 (Bosire 3, phone video to be conventionally filed.).

179. McMillan asked Bosire questions about his travel plans, and the purpose of his trip, before heading to his patrol car to run Bosire's information. **Ex. 57**, McMillan Dash Cam at 7:54-8:31.

DEFENDANT JONES' RESPONSE: Uncontroverted, Doc. 57, between 0:04:01 and 0:05:55. Ex. 57.

180. McMillan believed that there should have been another person in the vehicle with Bosire, and then suspected that the unknown person may have been in another car, and may have gotten off at another exit. **Ex. 57**, McMillan Dash Cam at 10:48-10:57.

DEFENDANT JONES' RESPONSE: McMillan had suspected a connection between the Altima and Dodge when he saw the Dodge driving toward I 70 from Love's. And is uncontroverted that McMillan believed there would be two people in the Altima when he pulled it over. So, then rather than a third person, McMillan suspected the man that had been seen by Bosire at Love's could be the driver of the Dodge. Ex. 57, 0:08:17-0:08:29 (McMillan notifies Schulte that the white male seen by Bosire is not in the Altima, but might be in the Dodge. He asks Schulte to check an earlier exit to see if the Dodge had stopped, who responded the Dodge had already passed.)

181. While McMillan was in his vehicle, he asked for backup, stating that Bosire was "refusing to speak" and that his vehicle had several "cameras." **Ex. 57**, McMillan Dash Cam at 11:05 – 11:10.

DEFENDANT JONES' RESPONSE: Uncontroverted, Ex. 57, 0:08:36-0:08:57. Schulte responded as backup, but immediately placed a request to dispatch that troopers lookout for the Dodge, and saying a white and black male may be in the Dodge, apparently thinking the two individuals seen at Love's could be connected to the Dodge, not the Altima. Id., 9:06-9:59. Schulte

continued to seek assistance looking for the Dodge, saying he had seen a scruffy white male driver and that a black male may also be in the vehicle which had confirmed it was a rental. Doc. 164, Ex. 4, 20:30-21:11, 22:40-23:19.

182. When Schulte arrived, McMillan informed Schulte about McMillan's responses, while also informing Schulte that McMillan could not smell any drugs. **Ex. 57**, McMillan Dash Cam at 12:57 – 13:40.

DEFENDANT JONES' RESPONSE: Uncontroverted, Ex. 57, between 0:10:38 and 0:11:01.

183. McMillan believed that Bosire placed drugs in the Dodge Charger. **Ex. 57**, McMillan Dash Cam at 13:41 – 13:44.

DEFENDANT JONES' RESPONSE: Uncontroverted that McMillan said he was "thinking it (drugs with the marijuana smell) might be in the other car. Ex. 57, 0:11:13-16.

184. After a third KHP trooper arrived on the scene, McMillan reiterated that he could not smell any drugs, and he did not believe that he could hold him for a canine, and then asked the other troopers for their thoughts. **Ex. 57**, McMillan Dash Cam at 15:50-16:42.

DEFENDANT JONES' RESPONSE: Uncontroverted that there was a conversation recorded on the dash cam between 0:14:09 and 0:15:07, Ex. 57, during which McMillan mused he could not smell anything, was not sure he could hold the driver for a dog and sought input from the other troopers. They discussed various reasons for suspicions. Schulte suggested starting the process to get a canine, if you don't know, but then decide you want to call for a canine sniff.

185. After Bosire had waited over eight minutes, McMillan asked Bosire where his "buddy" went. **Ex. 57**, McMillan Dash Cam at 18:03-19:17.

DEFENDANT JONES' RESPONSE: Uncontroverted McMillan had a second encounter with Bosire at the Altima in which McMillan asked where Bosire's buddy was and Bosire, at first, feigned ignorance. Ex. 57, 15:21-19:29. This would have been about 8 to 10 minutes after the first conversation at the Altima.

186. At that time, McMillan did not give Bosire a speeding ticket. **Ex. 57**, McMillan Dash Cam at 8:31-17:50.

DEFENDANT JONES' RESPONSE: Uncontroverted that McMillan gave Bosire a warning, not a ticket/citation.

187. McMillan informed Bosire that he was not getting a ticket for speeding, but then proceeded to engage Bosire on his suspicions related to transporting "something illegal." **Ex. 57**, McMillan Dash Cam at 20:28-20:36.

DEFENDANT JONES' RESPONSE: Uncontroverted, in the second encounter with Bosire at the Altima, McMillan relayed that he was suspicious Bosire was transporting something illegal, see dash cam, Ex. 57, at 0:18:01 to 0:18:59. See also Doc. 164, Ex. 6 & 7, mobile phone recording (Bosire's part of the conversation can be heard on his cell phone recording).

188. McMillan asked Bosire if he could search his car, and when Bosire refused, McMillan called a K-9 unit. **Ex. 57**, McMillan Dash Cam at 21:15-21:57.

DEFENDANT JONES' RESPONSE: Uncontroverted, Ex. 57 between 0:18:01 and 0:18:59.

189. After over twenty minutes later, McMillan approached Bosire, and told him to get out of the car so that the canine could search the vehicle. **Ex. 57**, McMillan Dash Cam at 40:27-40:50.

DEFENDANT JONES' RESPONSE: Uncontroverted it was approximately 20 minutes from the second encounter and the arrival of the canine. See Ex. 57, 37:59-38:05.

190. After the canine found nothing, McMillan responded by saying "you're in luck. You get to go. See ya. Thank you." **Ex. 57**, McMillan Dash Cam at 44:17-44:27.

DEFENDANT JONES' RESPONSE: Uncontroverted. See Ex. 57, 41:50-54.

191. Bosire did not immediately leave, but he instead requested information from each trooper, and requested information about how to make a complaint. Although KHP's Complaint Policy promotes troopers assisting the public with obtaining complaint-related information, McMillan attempted to prevent Bosire from obtaining such information, saying that Bosire "can get in his car now," and that he is "free to leave." **Ex. 57**, McMillan Dash Cam at 44:28 – 46:00; **Ex. 19**, Complaint Reporting and Administrative Investigations.

DEFENDANT JONES' RESPONSE: Controverted because the statements are not contained in the cited record. McMillan gave Bosire his name several times and Bosire was told information about McMillan was on the warning ticket. Ex. 57, 40:39; 42:00-03, 42:13-46. If Bosire wanted the information to make a complaint, that was not stated on the dash cam recording, nor was there a request about how to make a complaint.

192. Schulte responded that because Bosire was free to go, he should go because now Bosire was on the side of the road, and that Bosire cannot be on the side of the road. **Ex. 57**, McMillan Dash Cam at 45:25:45:35.

DEFENDANT JONES' RESPONSE: Uncontroverted that Schulte told Bosire that he was free to go and he should go because Bosire's vehicle could no longer be on the side of the highway. Ex. 57, 0:42:58-0:43:08.

193. McMillan's last word on his dash cam recording was telling his KHP colleagues, "sorry." **Ex. 57**, McMillan Dash Cam at 46:12-46:28.

DEFENDANT JONES' RESPONSE: Uncontroverted, to the canine assist, McMillan said "thank you sir, sorry." Ex. 57, McMillan Dash Cam at Ex. 57, 46:12-46:28.

Bosire's Complaint and KHP's Findings

194. After the February 10, 2019, stop, Bosire complained to KHP about racial profiling, civil rights violations, and provided additional information and allegations of trooper misconduct. **Ex. 58**, Jones' August 9, 2019, PSU Letter to Bosire.

DEFENDANT JONES' RESPONSE: Uncontroverted that Bosire made those complaints after the stop.

195. Bosire's complaints resulted in Lieutenant Bullock investigating the stop through the PSU. **Ex. 59**, Lieutenant Joseph Bullock (Bullock) Dep. at 98:5-8; 99:9-13.

DEFENDANT JONES' RESPONSE: Uncontroverted.

196. McMillan gave a written account of the stop as part of the PSU investigation**. Ex. 57**, McMillan's May 17, 2019, PSU Letter to Lieutenant Bullock.

DEFENDANT JONES' RESPONSE: Uncontroverted.

197. After the investigation, Jones and Bullock, wrote to McMillan that "under accepted protocols for criminal interdiction investigation, and the burdens of proof needed therein, there was not reason to detain Bosire further for a K-9 unit to respond to the scene for a drug sniff. This caused you to hold Bosire for a longer duration than is legally acceptable." **Ex. 60**, Jones' July 25, 2019, PSU Letter to McMillan.

DEFENDANT JONES' RESPONSE: Uncontroverted Jones wrote McMillan, in part, through Lt. Bullock as described. The letter explained Bosire's racial discrimination claim was held "unfounded," and many of the policy violations alleged by Bosire were about policies that

were not applicable or were inappropriately applied in Bosire's complaint. However, Jones stated that "under accepted protocols for criminal interdiction investigation, and the burdens of proof needed therein, there was not [a] reason to detain Bosire further for a K-9 unit to respond to the scene for a drug sniff. This caused you to hold Bosire for a longer duration than is legally acceptable." Ex. 60.

198. The KHP responded to Mr. Bosire's complaint in an August 9, 2019 letter from Superintendent Jones. **Ex. 58**, Jones' August 9, 2019, PSU Letter to Bosire.

DEFENDANT JONES' RESPONSE: Uncontroverted.

199. Jones wrote Bosire, and explained that "some of [his] concerns had merit." *Id.* at 1 (OAG008105).

DEFENDANT JONES' RESPONSE: Uncontroverted.

200. KHP found that McMillan's stop "was not what [KHP] would consider standard under the confines of investigative reasonable suspicion regarding criminal interdiction *Id.* at 2 (OAG008106).

DEFENDANT JONES' RESPONSE: Uncontroverted the Jones stated the contact with Bosire "was not what we would consider standard under the confines of investigative reasonable suspicion regarding criminal interdiction" and we feel the length of time you were detained roadside was unnecessary given the suspicions [McMillan] articulated." Ex. 58.

201. KHP found that the "length of time you were detained roadside was unnecessary given the suspicions articulated." *Id.* at 2 (OAG008106).

DEFENDANT JONES' RESPONSE: See response to 201 [*sic*].

202. KHP found that McMillan violated KHP policy during the Bosire stop but did not discipline him; instead, they directed corrective actions for McMillan. **Ex. 3**, Jones Dep. at 176:21-177:25, 179:20-180:7; **Ex. 20**, Clark Dep. at 154:4-20.

DEFENDANT JONES' RESPONSE: Uncontroverted that McMillan was given "corrective actions," not "discipline" as for the policy violations found and described in paragraphs 200-201, as those terms are defined in KHP ROC-05. Ex. 20, 150:1-154:20.

203. The executive commanders or colonels have the final say on whether a trooper who violates a person's constitutional rights should be given discipline or corrective action. **Ex. 20**, Clark Dep. at 62:3-11.

DEFENDANT JONES' RESPONSE: Uncontroverted.

204. The required corrective action for McMillan included a one-hour legal review with KHP's legal counsel regarding current legal standards of proof related to traffic stops and searches and a ride-along for practical application of what he had learned. **Ex. 61**, Jones' August 5, 2019, PSU Letter to McMillan.

DEFENDANT JONES' RESPONSE: Uncontroverted.

205. McMillan was not disciplined for his conduct during the Bosire stop. **Ex. 10**, McMillan Dep. at 227:7-228:9.

DEFENDANT JONES' RESPONSE: Controverted because the statement is not supported by the cited record.

206. Plaintiffs' expert Chief Aden noted that Jones' corrective action required of McMillan was an insufficient consequence and demonstrated Jones' overall failure to take the holdings of *Vasquez* seriously. **Ex. 35**, Aden Rep. at 154:4-20.

DEFENDANT JONES' RESPONSE: Uncontroverted that these opinions are in Mr. Aden's report. The paragraph is controverted, however, in that Aden's opinion is inadmissible for the reasons stated in a pending *Daubert* motion. See Doc. 304, filed 9/8/2022.

PLAINTIFFS' REPLY: Plaintiffs refer to their response and opposition to Defendant's pending *Daubert* motion to support the admissibility of Chief Aden's expert testimony. *See* Doc. 323.

207. McMillian completed the remedial legal training and ride along. **Ex. 10**, McMillan Dep. at 232:1-233:25.

DEFENDANT JONES' RESPONSE: Uncontroverted.

208. McMillian has not changed the way he conducts traffic stops, detentions, and searches since receiving the corrective training and ride-along. **Ex. 10**, McMillan Dep. at 235:9-236:14; 240:10-17.

DEFENDANT JONES' RESPONSE: Uncontroverted, but he no longer calls for canine sniffs. Ex. 10, 235:21-236:4.

209. Bosire developed a distrust for law enforcement after the February 10, 2019 encounter. **Ex. 54**, Bosire Dep. at 71:7-12. Bosire has altered his travel plans because of KHP's targeting of out-of-state motorists. Mr. Bosire often uses rental cars, which may have out-of-state-plates, when drives to visit his daughter in Denver each month. *Id.* at 45:16-24, 47:24-48:2. He now stays overnight in hotels rather than travel at night through Kansas, because he is "scared of what law enforcement people can do to me." *Id*. at 120:11-13. Every time he travels to Denver, he feels the need to inform others about his whereabouts in case something happens to him. *Id*. at 120:19-23.

DEFENDANT JONES' RESPONSE: The first sentence is controverted because the claims of injury and the cause of alleged damage are subjective statements which the factfinder does not have to accept as true or accurate. It is uncontroverted that the claims have been made. The balance of the paragraph should be considered uncontroverted for the purpose of the motions for summary judgment.

210. Bosire's life has been adversely affected by McMillan's February 10, 2019 stop. **Ex. 54**, Bosire Dep. at 118:21-122:15.

DEFENDANT JONES' RESPONSE: Controverted because the claims of injury and the cause of alleged damage are subjective statements which the factfinder does not have to accept as true or accurate. It is uncontroverted that the claims have been made.

211. Bosire travels to and from Colorado on I-70 on a monthly basis, sometimes using a rental vehicle that has out-of-state plates. **Ex. 54**, Bosire Dep. at 45:16-46; 48:6-25.

DEFENDANT JONES' RESPONSE: Uncontroverted for the purpose of the motions for summary judgment.

Trooper Rohr's Stop and Detention of Plaintiffs
Mark Erich, Shawna Maloney, and Minors D.M. and M.M.

212. Erich is a current resident of Willowick, Ohio. In 2018, Erich resided in Colorado. **Ex. 62**, Erich Dec. at 1, ¶¶ 2-3.

DEFENDANT JONES' RESPONSE: Uncontroverted.

213. Maloney is a current resident of Willowick, Ohio. In 2018, Maloney resided in Colorado. **Ex. 63**, Maloney Dec. at 1, ¶¶ 2-3.

DEFENDANT JONES' RESPONSE: Uncontroverted.

214. On March 9, 2018, at about 5:00 a.m., Rohr observed a 2006 Winnebago Chalet driving eastbound on I-70. Rohr's training and experience taught him that "RV's, and even older model RV's, are used to traffic narcotics." **Ex. 9**, Rohr Dep. at 76:3:10.

DEFENDANT JONES' RESPONSE: Uncontroverted.

215. Rohr was driving westbound on 1-70, and after seeing the Winnebago, Rohr crossed the grass median to follow it. **Ex. 9**, Rohr Dep. at 75:11-76:2.

DEFENDANT JONES' RESPONSE: Uncontroverted.

216. When Rohr saw the Winnebago and changed direction, he had not observed the Winnebago violate any traffic law. Rohr turned around "solely because it was an RV." **Ex. 9**, Rohr Dep. at 76:11-20.

DEFENDANT JONES' RESPONSE: Uncontroverted.

217. As Rohr approached the Winnebago, he observed the vehicle's Colorado temporary tags. **Ex. 9**, Rohr Dep. at 97:16-21.

DEFENDANT JONES' RESPONSE: Rohr saw the temporary plates as he was pulling up to the Winnebago and eventually ran the Winnebago plates for registration information. Ex. 99, 97:1-22.

218. Rohr believes that "Colorado is a known source for a large amount of illegal marijuana . . ." **Ex. 9**, Rohr Dep. at 215:7-15.

DEFENDANT JONES' RESPONSE: Uncontroverted that Colorado is a known source for a large amount of illegal marijuana. Ex. 9, 215:7-15.

219. KHP trained Rohr that the state of origin of a vehicle can be an indicia of criminal illegal activity. According to Rohr, Colorado is one of *several* states where a large amount of drugs, narcotics and criminal activity originate. **Ex. 9**, Rohr Dep. at 52:2-21.

DEFENDANT JONES' RESPONSE: It is uncontroverted that Lt. Rohr testified he has used either the motorist's origin or destination in and travel on certain highways, in combination of factors, in forming reasonable suspicion. Ex. 9, 54:2-56:16. Rohr explained:

> Q. The tag itself, and the place of registration, whether it's Kansas or Florida, would that have been an indicator or a factor in reasonable suspicion?
>
> A. Yes.
>
> Q. How so?
> A. Depends on where the origin or destination was. You know, if there was a tag out of New York, or something, and they were out of New York, or if there's a New York tag and the drivers were from Missouri, why are they driving a vehicle with a New York tag. Those are all indicators of criminal activity. It may be the vehicle is stolen.
> ***
> Q. The fact someone is from Colorado, in and of itself, is that a factor in you reasonable suspicion that you formed?
> A. No.
> Q. The fact that the vehicle itself has Colorado registration, is that in and of itself a factor in a reasonable suspicion?
> A. No.

220. Rohr activated his lights to pull the Winnebago over when it crossed the fog line on the right side of the highway. **Ex. 9**, Rohr Dep. at 191:17-22.

DEFENDANT JONES' RESPONSE: Uncontroverted, with the clarification that Rohr pulled the driver of the Winnebago over because the vehicle crossed the fog line in the early morning hours. Ex. 9, 191:17-192:2; 294:6-12

221. Rohr's patrol vehicle had a dashboard camera. Recordings through a microphone on his uniform synchronized with the dashboard camera's video. **Ex. 9**, Rohr Dep. at 74:18-75:13. **Ex. 10**, McMillan Dep. at 92:1-5. Also, Rohr's activation of lights caused his dashboard camera to go back two minutes from the point of activation. **Ex. 9**, Rohr Dep. at 78:18-79:1.

DEFENDANT JONES' RESPONSE: See response to paragraph 130.

222. Rohr approached the Winnebago and learned that Erich was the driver. Rohr informed Erich that his "reason for contact" was to ensure Erich was not sleeping. **Ex. 64**, Rohr Dash Cam at 2:45-4:00.

DEFENDANT JONES' RESPONSE: Uncontroverted with the clarification that Rohr said he noticed the driver had been driving on the fog line and wanted to make sure the driver was not sleepy and everything was OK. Ex. 64:2:45-4:00.

223. Rohr claimed to have smelled "bondo or paint" around vehicle, but Rohr's partner did not smell anything. Rohr then thought that maybe the smell was from downwind, while also claiming that Erich had paint on his hands. **Ex. 64**, Rohr Dash Cam at 4:05-5:50.

DEFENDANT JONES' RESPONSE: Rohr asked if they had just painted the Winnebago and Erich said no, but said that they had just bought it. Rohr asked if it was just painted and said it smells like paint out here. Erich responded that he did not know. Ex. 64, 3:32-3:09. The statement attributed to "Rohr's partner" if offered to try to prove there was no paint smell is inadmissible hearsay and cannot be considered in these summary judgment motions

224. Over six minutes later, Rohr emerged from his vehicle to give Erich a warning. Rohr told Erich and Maloney to "have a safe trip" and to "be careful." **Ex. 64**, Rohr Dash Cam at 10:30-10:53.

DEFENDANT JONES' RESPONSE: Uncontroverted, although the dash cam location appears to be between 0:10:45-0:10:53.

225. Rohr took a few steps towards his patrol car, but then did an immediate turn back toward Erich's vehicle. **Ex. 64**, Rohr Dash Cam at 10:54:10:59.

DEFENDANT JONES' RESPONSE: Uncontroverted, although Rohr took several steps, nearly to the back of the Winnebago

226. Rohr, Erich, and Maloney had the following exchange:

[**Rohr**]: Hey sir, can I ask you some questions? You said you guys are heading to Alabama?

[**Erich**] and [**Maloney**]: Yeah. Yeah.

[**Rohr**]: Right. And how long do you guys plan to be out there?

[**Erich**]: Uh, do I have to answer these questions?

[**Rohr**]: No, you don't have to.

[**Erich**]: Okay. I'd prefer not to.

[**Rohr**]: Okay. Can I, can I talk to you any further? Or

[**Erich**]: I'm free to go right?

[**Rohr**]: You are free to go.

[**Rohr**]: Okay, alright.

[**Erich**]: Then I'll go right now.

[**Rohr**]: Okay. Here's what I'm gonna do you, okay? I'm gonna detain you now. Okay?

[**Erich**]: Why?

[**Rohr**]: 'Cause I think that uh, you might have a false compartment in this vehicle. All right.

Ex. 64, Rohr Dash Cam at 10:57-11:26.

227. Rohr asked if he had any drugs or weapons in the vehicle, and Erich and Maloney responded that they have family in the Winnebago, including a thirteen and ten year old. Rohr informed them that he would have a K-9 unit come to inspect the vehicle. **Ex. 64**, Rohr Dash Cam at 11:26-12:24.

DEFENDANT JONES' RESPONSE: Uncontroverted. Rohr also stated that he had asked if there had been any painting done on the vehicle and they told him no (Erich responded as far as I know). Rohr asked what was on Erich's hand (Erich said I am a construction worker). Rohr stated there is fresh paint on the back of the Winnebago and asked how they explain that. Rohr offered to show Erich the paint. Ex. 64, 11:26-12:24.

228. Rohr had the entire family exit the Winnebago. **Ex. 64**, Rohr Dash Cam at 12:48-14:57.

DEFENDANT JONES' RESPONSE: Uncontroverted, this was for the canine sniff.

229. Erich, Maloney, and the kids were informed that Rohr's canine hit on drug odor. **Ex. 64**, Rohr Dash Cam at 19:58-20:12.

DEFENDANT JONES' RESPONSE: The police canine alerted for drugs all over the back of the Winnebago. Ex. 64, 17:24-19:24, 20:07-21:10. It is uncontroverted Rohr told Erich, with his wife and kids present, the dog alerted to drugs, and Rohr offered that they sit in the patrol car during a search of the vehicle.

230. Rohr and his fellow KHP troopers searched the Winnebago unzipping and rummaging through bags and personal belongings. **Ex. 64**, Rohr Dash Cam at 20:50-30:28.

DEFENDANT JONES' RESPONSE: Uncontroverted, with the clarification the cited record does not support the rummaging claim. 64:20:50-30:28.

231. Rohr and his fellow KHP troopers performed an exhaustive search of the interior and exterior of the Winnebago, and they did not find illegal drugs. *See generally,* **Ex. 64**, Rohr Dash Cam at 20:50-41:44.

DEFENDANT JONES' RESPONSE: Uncontroverted.

232. While searching, Rohr asked his partner if he smelled the paint, and his partner replied, "Not yet." **Ex. 64**, Rohr Dash Cam at 33:28-33:37

DEFENDANT JONES' RESPONSE: The statement attributed to "Rohr's partner" if offered to try to prove there was no paint smell is inadmissible hearsay and cannot be considered in these summary judgment motions. Further, the partner said "Not yet, I'm kind of stuffy." Ex. 64, 33:28-33:38.

233. Rohr approached Maloney and told her that she and her family can get back in their vehicle. Rohr repeatedly apologized for "wast[ing] [their] time." Ex. 64, Rohr Dash Cam at 38:50-41:03.

DEFENDANT JONES' RESPONSE: Uncontroverted.

234. As Erich and his family were approaching their vehicle to leave, Rohr detained Erich and his family again, telling him to wait, and directing him to the front of his patrol car, so that Rohr could climb up the Winnebago ladder to investigate the top of the vehicle. **Ex. 64**, Rohr Dash Cam at 38:50-41:31.

DEFENDANT JONES' RESPONSE: Uncontroverted.

235. Rohr used his flashlight to investigate the top for a few seconds, and then allowed Erich and his family to leave. **Ex. 64**, Rohr Dash Cam at 41:32.-41:45.

DEFENDANT JONES' RESPONSE: Uncontroverted.

236. When Maloney and her family entered the Winnebago, she and her family saw that the troopers damaged their vehicle. **Ex. 63**, Maloney Dec. at 2, ¶ 16 (attaching pictures as an Exhibit A to Maloney's Declaration).

DEFENDANT JONES' RESPONSE: Uncontroverted for the purpose of the motions for summary judgment.

237. Erich and Maloney have traveled to Colorado a few times since the March 2018 incident. However, if time permits, they will travel around Kansas because they do not feel safe driving through Kansas anymore. **Ex. 62**, Erich Dec. at 3 ¶ 19; **Ex. 63**, Maloney Dec. at 3, ¶ 19.

DEFENDANT JONES' RESPONSE: Uncontroverted for the purpose of the motions for summary judgment.

238. Erich, Maloney, and their family still suffer from anxiety when they drive on highways, and especially through Kansas. **Ex. 62**, Erich Dec. at 2-3, ¶¶16; 18; **Ex. 63**, Maloney Dec. at 2-3, ¶ 17-18.

DEFENDANT JONES' RESPONSE: Controverted because the claims of injury and the cause of alleged damage are subjective statements which the factfinder does not have to accept as true or accurate. It is uncontroverted that the claims have been made.s

II. Plaintiffs' Response to Defendants' Additional Statement of Facts

1. The KHP is a state agency with its principal function to enforce traffic and other laws of Kansas relating to highways, vehicles and drivers of vehicles. Ex. 1 (Hogelin Declaration), ¶ 3.

RESPONSE: Uncontroverted.

2. The KHP is under the direction of the superintendent, who holds the rank of colonel. Colonel Herman T. Jones stepped down as Shawnee County Sheriff and was appointed, by the Governor, as Superintendent of the Kansas Highway Patrol on April 3, 2019 and confirmed by the Kansas State Legislature on January 16, 2020. Ex. 1, ¶ 4.

RESPONSE: Uncontroverted.

3. KHP's State Troopers are certified law enforcement officers, pursuant to the Kansas Law Enforcement Training Act who enforce Kansas laws. These troopers have law enforcement jurisdiction throughout the state. Their daily responsibilities include performing

traffic stops, providing emergency medical assistance, assisting motorists, investigating crashes, detecting and deterring criminal activity, and assisting other law enforcement agencies. State Troopers assist during civil disturbances and natural disasters, provide law enforcement at the Kansas State Fair, inspect school buses and motor vehicles and educate the public about traffic safety. Ex. 1, ¶ 5.

RESPONSE: Uncontroverted.

4. There are approximately 440 KHP State Troopers. Approximately 325 are Troopers, Master Troopers or Technical Troopers. Ex. 1, ¶ 6.

RESPONSE: Uncontroverted

5. The KHP is organized into several divisions, and each are overseen by an executive commander. Each division or region is further divided by its geographical area of responsibility (known as a "troop") or its function. Each troop or functional group is overseen by a commander who holds the rank of captain. Administrative groups are overseen by a civilian director. Each troop is further divided into "zones" of one or several counties. Each zone is overseen by a field supervisor who holds the rank of lieutenant. Ex. 1, ¶ 7.

RESPONSE: Uncontroverted.

6. The Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA), a non-profit entity, was created in 1979 as a credentialing authority through the joint efforts of law enforcement's major executive associations: International Association of Chiefs of Police, National Organization of Black Law Enforcement Executives, National Sheriffs' Association and Police Executive Research Forum. Ex. 2 (Asbe Declaration), ¶ 2.

RESPONSE: Uncontroverted as to the accuracy of the fact statement. However, this statement, and all subsequent statements regarding CALEA certification, are immaterial and

therefore improperly included in Jones' statement of uncontroverted material facts, per Summary Judgment Guideline No. 3, which instructs parties to include only "facts that could affect the outcome under the governing law." Although Jones references CALEA in ten (10) of his statement of fact paragraphs, CALEA accreditation is not material to the constitutional issues in this case, *see* Doc. #315 § V.F., and Jones only mentions CALEA once in his arguments, without any substantive discussion. *See* (Doc. #296 at 55). Jones' recitation of the structure and details of CALEA accreditation is therefore immaterial, and Plaintiffs object to its inclusion.

Subject to, and without waiving Plaintiffs' objections, this paragraph is uncontroverted.

7. CALEA accredits agencies who commit to meeting national law enforcement standards. CALEA's Standards for Law Enforcement Agencies© and its Accreditation Programs has become a method for an agency to voluntarily demonstrate their commitment to excellence in law enforcement. CALEA sets standards at best practices for law enforcement. Its standards are continuously reviewed, and modified or updated as appropriate, with input from its members, related associations and interest groups. Approximately 1200 law enforcement agencies have enrolled for CALEA accreditations. Ex. 2, ¶¶ 3 & 4.

RESPONSE: Plaintiffs incorporate their objection to Paragraph 6 herein. CALEA accreditation has no bearing on the issues in this case, and this fact is therefore immaterial. *See* Doc. #315 § V.F.

Subject to, and without waiving Plaintiffs' objection, this paragraph is uncontroverted.

8. The CALEA TRI-ARC Award was created to recognize agencies that concurrently hold all three CALEA Accreditation Awards: Law Enforcement, Public Safety Communications, and Public Safety Training Academy. Ex. 2, ¶ 5.

RESPONSE: Plaintiffs incorporate their objection to Paragraph 6 herein. CALEA accreditation has no bearing on the issues in this case, and this fact is therefore immaterial. *See* Doc. #315 § V.F.

Plaintiffs further state that KHP pays for CALEA's "accreditation awards." CALEA accredits agencies who pay it substantial fees. CALEA sets its fees based on the number of employees in the agency. *See https://calea.org/law-enforcement-accreditation-cost*, last accessed 09.13.2022. For Law Enforcement Accreditation for an agency the size of KHP, the cost for accreditation is $16,125, or more if split into multiple payments. *Id.* After an agency receives its initial Law Enforcement accreditation award, it enters into a Continuation Agreement and begins paying annual continuation fees which are estimated at $5,000 a year for an agency the size of KHP. *Id.* This fee is paid even though CALEA only reaccredits an agency every four years. *Id.* and Df. SOF 16. Similar fees are also required for Public Safety Communications and Public Safety Training Academy. *Id.* at Public Safety Communications and Public Safety Training Academy tabs.

9. The KHP is a CALEA TRI-ARC Award holder. Currently, there are only about 20 United States agencies with TRI-ARC award status. The KHP is one of only four state-level agencies in the nation to receive this recognition. The KHP received law enforcement accreditation (Tier One) in July 2018, training academy in July 2020, and communications accreditation in March 2021. To achieve these accreditations, KHP was required to show compliance, after self-assessment and submission to CALEA of proof of compliance in processes, practices and desired outcomes, regarding appropriately 185 law enforcement standards, 185 training academy standards and 199 communication standards. Ex. 2, ¶ 6.

RESPONSE: Plaintiffs incorporate their objection to Paragraph 6 herein. CALEA accreditation has no bearing on the issues in this case, and this fact is therefore immaterial. *See* Doc. #315 § V.F. Plaintiffs controvert this fact to the extent it purports that KHP was required to show complete compliance with its policies or CALEA's criteria or standards. Ex. 43, Asbe Dep. 48:24-49:10, 50:3-52:1 (KHP chooses which "proofs" to submit to CALEA. In reviewing records to find proofs, if KHP finds a violation, it does not always report it to CALEA. KHP does not report "day to day policy violations" to CALEA). Subject to, and without waiving Plaintiffs' objection, the remaining portion of this paragraph is uncontroverted.

10. State troopers receive 23 weeks of training at the Kansas Highway Patrol Training Academy ("KHP Academy") in Salina, Kansas. Experienced instructors and coaches lead the recruits through a curriculum of basic and advanced law enforcement courses as outlined and approved by Troop J's superior officers and the KHP command structure. Ex. 1, ¶ 8.

RESPONSE: It is uncontroverted that KHP's superior officers train KHP State troopers at the KHP Academy in Salina, Kansas, where troopers learn from basic and advanced law enforcement courses. It is controverted that all State troopers "received 23 weeks of training . . ." Master Trooper Doug Schulte (Schulte), for example, testified that he received 22 weeks of training. Pls. Ex. 8, Schulte Dep. at 22:3-8; Trooper Brandon McMillan (McMillan) testified that he received 24 weeks of training. Pls. Ex. 10, McMillan Dep. at 24:9-20. It is uncontroverted that the KHP command structure–including Jones–is responsible for signing off on KHP's training. Pls. Ex. 3, Jones Dep. at 64:9-65:12.

11. The KHP Academy was the first academy in the state of Kansas to achieve CALEA accreditation. KHP and Topeka Police Department are the only Kansas agencies with CALEA

training academy accreditation. Additionally, the KHP is one of only six highway patrol academies across the United States that are currently accredited by CALEA. Ex. 2, ¶¶ 6 & 7.

RESPONSE: Plaintiffs incorporate their objection to Paragraph 6 herein. CALEA accreditation has no bearing on the issues in this case, and this fact is therefore immaterial. *See* Doc. #315 § V.F. Subject to, and without waiving Plaintiffs' objection, this paragraph is uncontroverted.

12. For each of three areas of accreditation, the KHP's written policies and documentation were reviewed by CALEA for compliance to the CALEA criteria and standards. Proofs were provided by the KHP, including statistics in requested categories and tests and survey results. These proofs were to show that the KHP policies, processes and practices provide the desired outcomes, in conformity with the CALEA standards. Ex. 2, ¶ 8.

RESPONSE: Plaintiffs incorporate their objection to Paragraph 6 herein. CALEA accreditation has no bearing on the issues in this case, and this fact is therefore immaterial. *See* Doc. #315 § V.F. Plaintiffs controvert this fact to the extent it purports that CALEA had the ability to review any KHP documentation or that KHP was required to show the agency's complete compliance/conformity with its own policies or CALEA's criteria or standards. Ex. 43, Asbe Dep. 48:24-49:10, 50:3-52:1 (KHP chooses which "proofs" to submit to CALEA. In reviewing records to find proofs, if KHP finds a violation, it does not always report it to CALEA. KHP does not report "day to day policy violations" to CALEA). Subject to, and without waiving Plaintiffs' objection, the remaining portion of this paragraph is uncontroverted.

13. The Kansas law enforcement training act created a commission on police officers' standards and training and a law enforcement training center, within the University of Kansas ("KLETC"). The KLETC's director, subject to changes and modifications directed by the Kansas

law enforcement training commission, determines the curriculum and minimum hours of instruction for training of persons needed obtain an active law enforcement certification. KHP troopers must have this certification. The KHP Academy is required to provide the KLETC curriculum for training in addition to its curriculum which is focused on subjects unique to a state-wide law enforcement. Ex. 2, ¶ 13.

RESPONSE: Uncontroverted.

14. The KHP Academy's curriculum includes instruction on and law enforcement officers' obligations concerning the United States Constitution's Fourth Amendment rights. The curriculum, among many other topics, includes instruction on searches, seizures, consensual encounters and reasonable suspicion for post-traffic stop detentions. Ex. 2, ¶ 16.

RESPONSE: It is uncontroverted that the KHP Academy includes instruction and curriculum on constitutional rights, and on searches, seizures, consensual encounters and reasonable suspicion for post-traffic stop detentions. However, it is controverted that the KHP Academy provides all instruction and curriculum for KHP's officers. KHP also disseminates materials and instruction through PowerDMS, KHP's policy and e-learning platform, and other online and electronic platforms. Pls. Ex. 12, Washburn Dep. at 17:15-18:4.

Moreover, the KHP Academy instruction is not complete, or up-to-date. For example, KHP has drafted a new Vehicle Detention Report Policy, FOR-44, to "provide a record of events that occur when a subject or subjects are detained on articulable reasonable suspicion or probable cause for the purpose of a canine sniff." The new policy will "allow[] supervisor[s] to monitor the legality of detentions, track the frequency of detentions, show training deficiencies, and improve transparency." Pls. Ex. 12, Washburn Dep. at 100:22-102:12; Pls. Ex. 42, Vehicle Detention

Report Policy (FOR-44); *see also* Pls. Ex. 3, Jones Dep. at 153:5-23 (the new policy will require a narrative of the grounds for reasonable suspicion).

Although Jones directed that this new policy be adopted in the few months before his October 6, 2021 deposition and it was "approved" in January of 2022, troopers do not yet have access to it. Pls. Ex. 3, Jones Dep. at 153:24-154:3; Pls. Ex. 43, Asbe Dep. at 125:1-126:3.

15. CALEA has standards for academy curriculum and training procedures or practices. The KHP Academy's curriculum and the KHP's policies and procedures regarding the training at KHP Academy were reviewed and found compliant with CALEA standards in order for the KHP Academy to become CALEA accredited. Additionally, the KHP was required to provide "proofs" that its curriculum, policies and procedures are providing the desired outcomes. These proofs included pre-instruction and post-instruction testing, survey results from students, supervisors and the community. KHP's proofs were accepted by CALEA for issuance of the academy accreditation. Ex. 2, ¶ 17.

RESPONSE: Plaintiffs incorporate their objection to Paragraph 6 herein. CALEA accreditation has no bearing on the issues in this case, and this fact is therefore immaterial. *See* Doc. #315 § V.F. Moreover, CALEA offers only a "framework;" it requires certain components with regard to training and policies, but does not supply details regarding what policies and trainings must substantively include. Pls. Ex. 65, Chief Hassan Aden Rebuttal Rep. at 3-4; *see also* Doc. #315 § V.F. This fact is controverted to the extent that it attempts to convey that CALEA reviews the substance of training to ensure its fidelity to current law. *Id.* In addition, Plaintiffs controvert this fact to the extent it purports that CALEA had the ability to review any KHP documentation or that KHP was required to show complete compliance/conformity with its own policies or CALEA's criteria or standards. Pls. Ex. 43, Asbe Dep. 48:24-49:10, 50:3-52:1 (KHP

chooses which "proofs" to submit to CALEA. In reviewing records to find proofs, if KHP finds a violation, it does not always report it to CALEA. KHP does not report "day to day policy violations" to CALEA).

16. An agency is up for reaccreditation every four years under CALEA's rules. A physical on-site audit is conducted the fourth year, in addition to the CALEA's review of the KHP annual reports and proofs. The KHP is scheduled for Law Enforcement reaccreditation in July 2022. CALEA has indicated that the KHP will receive reaccreditation. Ex. 2, ¶ 26.

RESPONSE: Plaintiffs incorporate their objection to Paragraph 6 herein. CALEA accreditation has no bearing on the issues in this case, and this fact is therefore immaterial. *See* Doc. 315 § V.F. Plaintiffs also object because Jones violates Summary Judgment Guideline No. 12 by including "[a]n affidavit . . . [that] contains [testimony] that could not be presented in a form that would be admissible at trial." The affidavit includes hearsay testimony because it provides no exhibits or other testimony supporting that "CALEA has indicated that the KHP will receive reaccreditation" and moreover, the affidavit states that the reaccreditation was three months ago. Plaintiffs also controvert that a "physical on-site audit" is always conducted. Pls. Ex. 43, Asbe Dep. at 64:5-15 (noting it has been done virtually).

17. Upon graduation from the KHP Academy, recruits begin sixteen weeks of field training with a veteran trooper (FTO). They ride along and observe a FTO for seven days, and then they have 70 working days of active training from the FTO. This is one of the longest field training periods in law enforcement. Ex. 1, ¶ 9.

RESPONSE: Uncontroverted for purposes of this motion.

18. Under Kansas statute and pursuant to KHP policy, beginning the second year after certification, every State Trooper is required to complete annually 40 hours of continuing law

enforcement education or training ("in-service training") in subjects relating directly to law enforcement. The in-service curriculum must include annual "legal updates." Ex 1, ¶ 10; Ex. 2, ¶ 23.

RESPONSE: It is uncontroverted that KHP troopers receive continuing law enforcement education or training. Plaintiffs are unable to respond to Jones' reference to "legal updates," which appears in quotes in paragraph 18, and in Christi Asbe's Declaration (Doc. # 297-7, at 4, ¶ 23). Jones' reference to "legal updates" is vague because Jones did not define or explain the phrase. Moreover, Plaintiffs dispute that KHP troopers received an annual legal update of *Vasquez v. Lewis* between 2016 and 2019; KHP did not incorporate *Vasquez* into its training materials or "legal updates" when the Tenth Circuit decided the case. Pls. Ex. 14, Legal Issues in Car Stops 2020, at 50-53 (OAG000224-226); Pls. Ex. 12, KHP Staff Attorney Sarah Washburn (Washburn) Dep. at 31:24-32:2.

19. The KHP provides the annual in-service training to its Troopers. Attendance for some classes, such as legal updates, is mandatory. A smaller portion of the offered training is elective classes. Ex. 1, ¶ 11. The KHP in-service training policy has been reviewed and found compliant with CALEA standards. Ex. 2, ¶ 23.

RESPONSE: Plaintiffs incorporate their objection to Paragraph 6 herein. CALEA accreditation has no bearing on the issues in this case, and this fact is therefore immaterial. *See* Doc. #315 § V.F. Plaintiffs also dispute this fact to the extent that it purports to demonstrate that KHP provides its "legal updates" trainings via in-person in-service classroom training. Frequently KHP sends "legal updates" via emails or PowerDMS, its online training software, for KHP troopers to review on their own, without any post-training testing to ensure the material was properly absorbed. Pls. Ex. 12, Washburn Dep. at 17:15-18:4; Pls. Ex. 35, Aden Rep. at 15.

20. The KHP also provides to its troopers a 34-hour class on advanced criminal interdiction at least once a year. Troopers have the option to take the class one or more times. Completion of the class is necessary for career advancement opportunities. Ex. 1, ¶ 12.

RESPONSE: This fact is controverted to the extent that it attempts to show KHP provides advanced criminal interdiction training to all KHP officers. The referenced 34-hour class is optional, is only for "career advancement opportunities," and is not mandatory or required like other continuing education courses. *See* Def. Ex.1 at ¶ 12 (Doc. #296-2 at 4).

21. Per current policy, after 5 years of service, troopers are eligible for promotion to Technical Trooper and receive an accompanying salary increase. Technical Troopers must meet certain qualifications and receive additional training in specialized areas. Ex. 1, ¶ 13

RESPONSE: Controverted, as this statement is vague regarding the meaning of "certain qualifications" and training "in specialized areas." Captain Hogelin's affidavit does not, for example, provide whether the qualifications require that KHP troopers receive annual and timely training of legal opinions, like *Vasquez,* or other needed qualifications. *See generally,* Def. Ex. 1, ¶ 12 (Doc. #296-2).

22. The Lieutenant field supervisors frequently review the work of the troopers under their supervision. They conduct formal annual reviews. They review and approve all Kanas Standard Arrest Reports, Kansas Standard Offense Reports, Incident Narrative Reports and Vehicle Detention reports prepared by their subordinates. They have access to and review 15-day reports prepared by their troopers that outline the troopers' activities. They are notified when troopers are required to provide testimony, including testimony at a suppression hearing or forfeiture proceeding. They are required to watch a sampling (at least 3) of each of their supervised troopers' dash cam video/recordings each quarter. Ex. 1, ¶ 14.

RESPONSE: Plaintiffs object that this fact is vague as to "frequently review." Moreover, Plaintiffs controvert that Lieutenant field supervisors frequently review the work of the troopers under their supervision. For example, field supervisors are prevented from doing so for countless detentions of canine sniffs and vehicles searches because KHP troopers are not required to fill out an incident narrative report documenting their reasonable suspicion to extend a traffic stop unless the extension results in a seizure or an arrest. Pls. Ex. 10, McMillan Dep. 94:18-25; 95:1-4; 95:11-15; 103:11-25; 106:3-7; 107:1-25; 113:7-24. This fact is also controverted to the extent that this fact purports to demonstrate that supervisory review of troopers' activities, including reports, is meaningful or substantive. Trooper Rohr testified that, as a Lieutenant, he mainly checks for spelling and grammatical errors. Pls. Ex. 9, Rohr Dep. at 149:1-23 (supporting that reports are reviewed to "make sure that the wording, check grammar, punctuation, stuff like that" and not "for the lawfulness of the stop, or detention.").

23. These field supervisors are responsible to identify, correct and issue appropriate discipline (subject to grievance processes) of any violation of KHP policy or training by their supervised State Troopers. Ex. 1, ¶ 15.

RESPONSE: Controverted. The record does not support that "[field Lieutenants] supervisors are responsible to identify, correct and issue appropriate discipline (subject to grievance processes) of 'any violation' of KHP policy or training by their supervised State Troopers." Superintendent Jones makes the final decision on whether to discipline KHP troopers or assign other corrective action, including the level of corrective action or discipline to impose. Pls. Ex. 3, Jones Dep. at 162:19-21; 163:10-14. Jones sees the results of every disciplinary investigation and "make[s] the final say" after receiving "recommendations from [his] command

staff" about the level of discipline or corrective action for the involved trooper. *Id.* at 161:1-162:18; 163:4-14.

24. The KHP maintains written policies concerning its administration, communication, equipment, forms, operations and personnel. A copy of these policies is available to all troopers on-line. Policies applicable to troopers' day-to-day activities are provided and taught during academy training. Updated and new KHP policies are provided to troopers electronically as they are approved. Troopers are required to read these policy changes and confirm that they have done so. Ex. 1, ¶ 16.

RESPONSE: It is controverted that the "KHP *maintains* written policies concerning its administration, communication, equipment, forms, operations and personnel," and that "[u]pdated and new KHP policies are provided to troopers electronically as they are approved." For example, KHP has drafted a new Vehicle Detention Report Policy, FOR-44, to "provide a record of events that occur when a subject or subjects are detained on articulable reasonable suspicion or probable cause for the purpose of a canine sniff." The new policy will "allow[] supervisor[s] to monitor the legality of detentions, track the frequency of detentions, show training deficiencies, and improve transparency." Pls. Ex. 12, Washburn Dep. at 100:22-102:12; Pls. Ex. 42, Vehicle Detention Report Policy (FOR-44); *see also* Pls. Ex. 3, Jones Dep. at 153:5-23 (the new policy will require a narrative of the grounds for reasonable suspicion).

Although Jones directed that this new policy be adopted in the few months before his October 6, 2021 deposition and it was "approved" in January of 2022, troopers do not yet have access to it. Pls. Ex. 3, Jones Dep. at 153:24-154:3; Pls. Ex. 43, Asbe Dep. at 125:1-126:3.

25. KHP Policy Number ENF-01, Enforcement Guidelines, states "[t]he basic responsibility of an officer is to know the law." Ex. 1-2 at bate stamped OAG000050. KHP Policy Number ENF-07, Criminal Interdiction Traffic Enforcement, states:

> II. **Policy**
>
> Officers are committed to the apprehension of criminals who use Kansas streets and highways in the furtherance of their criminal activity. Therefore, officers are encouraged to employ Criminal Interdiction Traffic Enforcement (CITE) procedures when, following a lawful traffic stop or other lawful encounter with the person(s), articulable suspicion exists to believe the person(s) is involved in criminal activity.
>
> III. **General provisions**
>
> ***
>
> B. Officers who are not trained in the application of criminal interdiction techniques should request the appropriate assistance when criminal activity is suspected. …
>
> ***
>
> D. Officers shall take the appropriate steps to safeguard life and property while preserving the individual dignity and constitutional rights of everyone involved.
>
> ***

ENF-07 at Bate stamped OAG000068]. Ex. 1, ¶ 17; Ex. 1-3.

RESPONSE: Uncontroverted.

26. KHP Policy Number OPS-39 states, in part:

> II. **Policy**
>
> A. **It is the policy of the Agency to conduct arrests, searches and seizures in compliance with the federal and state constitutions and state law. Members of the Agency must balance the constitutionally protected right to be free from unreasonable search and seizure, the evidentiary requirements of any given criminal case, and the need to protect the public and law enforcement officers. Stated guidelines can facilitate all interests.**
>
> ***
>
> Investigative Stop - A brief detention based on specific articulable reasonable suspicion that a crime is being, is about to be or has been committed. These

> detentions are justified by KSA 22-2402 and should only be long enough to either confirm or dispel the officer's concerns about the illegal activity. In order to confirm or dispel the officer's concerns he or she should use all reasonable investigative techniques and tools available at that time. These may include but are not limited to: holding the suspect for identification, using a canine to sniff for illegal substances, standardized tests or contact with dispatch or other law enforcement officers with relevant specialties. All detentions shall be based on the totality of the circumstances, which includes articulable reasonable suspicion and the individual officers training and experience.
>
> ***
>
> B. **Search and Seizure**
>
> ***
>
> 6. Investigative Detention
>
> **a. A brief detention based on specific articulable reasonable suspicion that a crime is being, is about to be or has been committed. These detentions are justified by KSA 22-2402 and should only be long enough to either confirm or dispel the officer's concerns about the illegal activity. In order to confirm or dispel the officer's concerns he or she should use all reasonable investigative techniques and tools available at that time. These may include but are not limited to: holding the suspect for identification, using a canine to sniff for illegal substances, standardized tests or contact with dispatch or other law enforcement officers with relevant specialties. All detentions shall be based on the totality of the circumstances, which includes articulable reasonable suspicion and the individual officers training and experience.**
>
> ***
>
> C. **Knowledge of Laws**
>
> Members of the Agency are expected to remain current in the knowledge of laws and judicial opinions as they apply to the issue of search and seizure. Whenever possible, the Agency will provide such updated information.

Ex. 1, ¶ 18; Ex. 1-4, OPS-39, at bate stamped OAG000087, -92, -94.

RESPONSE: Uncontroverted.

27. OPS-39 is not intended to be a substitute for trooper training. Its provisions are consistent with similar policies from other agencies. Ex. 2, ¶ 21.

RESPONSE: Plaintiffs object because Jones violates Summary Judgment Guideline No. 12 by including "[a]n affidavit . . . [that] contains [testimony] that could not be presented in a form

that would be admissible at trial." The affidavit specifically provides no exhibits or other testimony supporting that OPS-39's "provisions are consistent with similar policies from other agencies." The affidavit fails to identify the "similar policies" from the "other agencies," and fails to provide a foundation that the affiant, Ms. Asbe, reviewed similar policies from other agencies to support her testimony.

Subject to, and without waiving Plaintiffs' objections, it is uncontroverted that KHP's written policies, specifically OPS-39, are not intended to be a substitute for appropriate trooper training.

28. OPS-39 was reviewed by CALEA, and found by that accrediting entity to be compliant with CALEA's standards. Ex. 2, ¶ 20.

RESPONSE: Plaintiffs object because Jones violates Summary Judgment Guideline No. 12 by including "[a]n affidavit . . . [that] contains [testimony] that could not be presented in a form that would be admissible at trial." The affidavit specifically provides no exhibits or other testimony from CALEA that supports CALEA reviewed OPS-39, or that the policy met CALEA's standards. Plaintiffs further object that this statement of fact violates Summary Judgment Guideline No. 3 because it does not include material "facts that could affect the outcome under the governing law." Although Jones references CALEA in ten (10) of their statement of fact paragraphs, including paragraph 28, CALEA accreditation is not material to the constitutional issues in this case, and Jones only mentions CALEA once in their arguments without any substantive discussion. *See* (Doc. # 296 at 55). Jones' reliance on CALEA, therefore, is immaterial.

Subject to, and without waiving Plaintiffs' objections, this fact is uncontroverted.

29. It is contrary to KHP's policy and training for troopers to (a) conduct or direct a "canine[sniff of a] vehicle for drugs based solely on [the trooper's] belief that the driver is

traveling to or from Colorado"; (b) extend a vehicle stop and/or search a vehicle based only on "a driver's travel origin or destination"; (c) include the state citizenship as a permissible basis upon which to justify a detention and search of out-of-state motorists, and to detain motorists for nothing more than an out-of-state license plate. Ex. 1, ¶ 20.

RESPONSE: Plaintiffs controvert this fact. As an initial matter, this statement of fact is vague and misleading regarding subsections (a) through (c), in that Jones does not identify whether he intend to combine the subparts ((a), (b), **and** (c)), or whether he intends to segregate each subpart ((a), (b), **or** (c)). In addition, Jones statement of fact ¶ 56 states: "the fact that someone is from Colorado, in and of itself, was a factor in the reasonable suspicions [Rhor] formed" in the Erich/Maloney stop. Moreover, Lieutenant Rohr, for example, testified that traveling to or from Colorado is a basis officers use to establish their reasonable suspicion:

> Q: **The fact that they were from Colorado one of the things that led to your reasonable suspicion?**
>
> A: Yes.

Pls. Ex. 9, Rohr Dep. at 98:5-8; *see id.* at 53:12-24; 55:6-23; 56:1-18 (agreeing that states "known for drugs to be trafficked to" help "form[] reasonable suspicion"). Lieutenant Greg Jirak testified that the state or the city of destination is a factor in determining reasonable suspicion:

> **Q: Okay, Well, in talking about destination, and I should have asked you a minute ago, do you ever consider the state or the city of destination in determining reasonable suspicion?**
>
> A: It can be a factor.
>
> **Q: So is that a yes?**
>
> A: Yes.

Pls. Ex. 7, Jirak Dep. at 12:24-13:12; 68:25:69:6.

Plaintiffs further controvert this fact to the extent that it attempts to reframe Plaintiffs' claims in this case. *See* Doc. #315 § V.C.1.

30. While not an exhaustive listing, the KHP training includes instruction on the constitutional rights in traffic stops like:

> "ONLY 4 COURT-RECOGNIZED POLICE CITIZEN ENCOUNTERS [are]
>
> 1. A 'CONSENSUAL ENCOUNTER'
> 2. A 'TEMPORARY DETENTION'
> 3. A 'SAFETY STOP' or 'COMMUNITY CARETAKING FUNCTION'
> 4. An 'ARREST'" [Legal Issues in Car Stops 2020, at bate stamped OAG000205. Also "Vehicle Stops – Legal Issues," Ganieany & Washburn (2021), at bate stamped OAG028886].
>
> "Temporary Detention aka 'Terry Stop,' aka 'a car stop,' aka 'Investigative Detention,' aka a 'sidewalk detention;' requires reasonable suspicion to believe a crime has, is, or is about to be committed." [Legal Issues in Car Stops 2020, at bate stamped OAG000204].
>
> "'Reasonable Suspicion' means a particularized and objective basis for suspecting the person stopped is involved in criminal activity. It is based upon the totality of the circumstances, and is viewed in terms as understood by those versed in the field of law enforcement. It is less than probable cause but more than a gut hunch." [Legal Issues in Car Stops 2020, at bate stamped OAG000202. Also "Vehicle Stops – Legal Issues," Ganieany & Washburn (2021), at bate stamped OAG028889].
>
> "In making reasonable-suspicion determinations, reviewing courts must look at the "totality of the circumstances" of each case to see whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing.
> [ ]
> "This process allows officers to draw on their own experiences and specialized training to make inferences from and deductions about the cumulative information available to them that "might well elude an untrained person. [ ]" [2021 "4th Amendment Issues in Vehicle Stops," Luther Ganieany, at bate stamped OAG028567].
>
> "REASONABLE SUSPICION FACTORS
> • Some carry more weight for court than others
> • Little weight: nervousness, drug route, food wrappers, a cellphone or pager
> • More weight: inconsistent stories of driver vs. passengers, an incomprehensible story, a rental car with renter not present, fly one way-drive back in rental, numerous air fresheners

- Possible hidden compartment: tool marks, bondo, vehicle riding high or low, metal alterations not seen before in training/experience" [Legal Issues in Car Stops 2020, at bate stamped OAG000215].

"Indicators are seemingly innocent things heard, smelled, and/or observed during an enforcement encounter, including the contents of the vehicle, what was said, and the manner in which it is said, which when taken in there totality and compared with the innocent motoring public and traffic patterns of that particular geographical area, along with the officer's training and experience, show reasonable suspicion or probable cause that criminal activity is taking place." 2021 Advanced Interdiction, Troop N, at bate stamped OAG028421].

"Police may not extend an otherwise completed traffic stop, absent reasonable suspicion of criminal activity, in order to conduct a dog sniff." [Laws of Search & Seizure (2019), at bate stamped OAG001467; "Laws of Search & Seizure" (2021) at bate stamped OAG028754].

"You CANNOT detain a vehicle or its occupants absent reasonable articulable suspicion. THIS IS ILLEGAL!!!!" 2021 Advanced Interdiction, Troop N, at bate stamped OAG028440].

"If you 'measurably extend' the traffic stop without additional reasonable suspicion to believe there was 'other criminal activity,' any consent you get is invalid." [Laws of Search & Seizure (2019), at bate stamped OAG001465. Also "Laws of Search & Seizure" (2021), at bate stamped OAG028752].

Ex. 1, ¶ 21; Ex. 1-1 [at bates pages noted above].

RESPONSE: Controverted. Jones violates Summary Judgment Guideline 5 because he relies on a partial reference to the record to support paragraph 30. Jones relies on an apparent partial list of training documents to imply that other training documents exist. However, the Court should ignore Jones' reference to other training documents, for which no record cite was provided, and must rely on the exhibits Jones submitted in support of its summary judgment motion.

Plaintiffs further controvert Jones' exhibit Legal Issues in Car Stops 2020, at bate stamped OAG000215, which describes "drug routes" as carrying little reasonable suspicion weight. Other KHP training demonstrates the opposite. For example, KHP Troopers were instructed that they should ask two questions of all stopped motorists: (1) whether the driver is coming from a drug source area; and (2) whether the driver is going to a drug destination; those "two questions are the

basis of everything we do." Pls. Ex. 36, Domestic Highway Enforcement Training at OAG000582. After the *Vasquez* decision, KHP continued teaching its troopers that "where they [the driver] are coming from and where they are going to are the two most important questions" KHP troopers can ask. Ex. 4, J. Rule Dep. at 83:7-84:2; 95:20-24.

31. The Tenth Circuit's 2016 decision in *Vasquez v. Lewis* decision is now discussed in KHP's training. Ex. 1, ¶ 22. *See also* Ex. 10 (Washburn Depo), 106:10-109:17; Ex. 9 (D. Rule depo), 124:16-125:24. *See e.g.*, Ex.1-4, at noted bate pages (Legal Issues in Car Stops 2020, at bate stamped OAG000223-25, 2021 "4th Amendment Issues in Vehicle Stops," Luther Ganieany, at bate stamped OAG028580-96, "Vehicle Stops – Legal Issues," Ganieany & Washburn (2021), at bate stamped OAG028891). However, even before the *Vasquez* decision was rendered, KHP troopers' training had established that the reasonable suspicion required to extend a traffic stop was not supported by (a) "a driver's travel origin or destination" alone; (b) a drivers' "state citizenship" or (c) "nothing more than an out-of-state license plate." Ex. 1, ¶ 22.

RESPONSE: Controverted. Jones violates Summary Judgment Guideline No. 12 by relying on "[a]n affidavit . . . [that] contains [testimony] that could not be presented in a form that would be admissible at trial." The affidavit provides no exhibits or other testimony supporting training that KHP troopers received "before the *Vasquez* decision was rendered." Indeed, Jones has not provided training documents reflecting training provided before the inception of this case that discusses *Vasquez* or its holdings, and therefore, Jones has not shown that troopers received training as purported within paragraph 31.

32. Not contrary to this, troopers are trained that they may inquire about travel plans, either while multi-tasking during the course of a stop or in a consensual encounter. They are trained, depending upon the totality of the circumstances, the occupant(s)' travel plans—for

example implausible travel plans; travel to or from a drug source when combined with other factors and evasiveness or dishonesty about travel in some instances—can produce objective, commonsense judgments and inferences that criminal conduct is present. Ex. 1, ¶ 23.

RESPONSE: It is controverted that the KHP troopers are relying on travel plans "to produce objective, commonsense judgments and inferences that criminal conduct is present." Pls. Ex. 4, J. Rule Dep. at 81:9-83:3 (testifying that he considers where a car is traveling from and to, and if they are traveling to or from a state that has "some form of legalized [marijuana]," that person should be considered suspicious). KHP's general counsel office supports Jones' beliefs, testifying that people traveling to, or coming from, certain states is a factor KHP troopers can use to formulating reasonable suspicion. Plaintiff Ex. 12, Washburn Dep. at 78:24-79:17. Moreover, it is controverted that KHP trains troopers only to inquire about implausible or dishonest travel plans; KHP trains troopers to inquire about state-of-origin or destination to determine if the motorist is coming from, or going to, a "drug source state." *See* Pls. Ex. 36, Domestic Highway Enforcement Training at OAG000582; *see also* Pls. Ex. 3, Jones Dep. at 201:9-14 (agreeing that it is permissible for KHP to consider the destination city or state in developing reasonable suspicion); Pls. Ex. 4, J. Rule Dep. at 81:9-83:3 (confirming that he considers where a car is traveling from and to, and if they are traveling to or from a state that has "some form of legalized [marijuana]," that person should be considered suspicious); Pls. Ex. 44, Hogelin Dep. Vol. II at 36:7-17 (admitting that "destination" is an appropriate consideration to determine reasonable suspicion); Pls. Ex. 8, Schulte Dep. at 207:15-209:7 (testifying that coming from Oklahoma to Colorado contributes to reasonable suspicion because Colorado is a "source state"); Pls. Ex. 9, Rohr Dep. at 53:12-24; 55:6-23; 56:1-18 (admitting that states "known for drugs to be trafficked to" help "form[] reasonable suspicion").

33. Troopers testified that the *Vasquez* decision did not alter their practices because they have not relied on the state of vehicle's registration (*i.e.*, the state issuing the license plate) or the driver's state of residence in the reasonable suspicion calculus. Ex. 3 (Hogelin depo.), 110:1-111:11; Ex. 4 (Jirak depo.), 102:21-103:7, 105:13-14, 106:4-108:9; Ex. 6 (McMillan depo.), 147:13-148:14; 152:23-153:18; 238:6-240:17; Ex. 8 (C. Rule depo.), 100:6-101:9; Ex. 9 (J.D. Rule depo.), 130:18-131:24. Lt. J. Doug Rules' email comment, which discussed a then recent Utah district court case referenced in UF ¶ 35, explained:

> In my opinion the [Utah] trooper made a big mistake saying he was interested in the truck because it had California plates (a license plate is never a factor for a traffic stop) and failed to articulate any reasonable suspicion before calling for a dog.
>
> And
>
> The trooper made a big mistake when he testified to the fact the truck having California plates was what sparked his interest. Remember, we work an interstate highway which has cars coming from all over the county and we never do anything because of tag or race.

Depo. Ex(s). 41 & 44 (attached as Ex. 9-1) (parenthetical original); Ex. 9, 45:9-14, 48:7-20.

RESPONSE: Controverted. Captain Hogelin testified that KHP does not use out-of-state vehicles "as the ***sole*** basis for a reasonable stop or whether or not to detain someone for a canine sniff," but that destination is an appropriate consideration to determine reasonable suspicion." Pls. Ex. 44, Hogelin Dep. Vol. II at 36:7-17. Although Lieutenant Greg Jirak first stated that the KHP "never do[es] anything because of tag or race," but he testified that the state of origin can be an appropriate consideration in a reasonable suspicion calculus because drug production/distribution is more relevant in some areas. Pls. Ex. 7, Jirak Dep. at 65:21 (starting with "Is it ever . . .")-66:4. McMillan testified that he considers out-of-state rental vehicles to be an appropriate factor to consider in forming reasonable suspicion. Pls. Ex. 10, McMillan Dep. at 171:9-172:13 (testifying that "A lot of rental vehicles are used for drug trafficking" and noticing that Plaintiff Joshua

Bosire's rental vehicle "had a Missouri plate on it."). Trooper Chandler Rule (C. Rule) testified that he does not use "Colorado alone," but it does "play an effect." Pls. Ex. 66, C. Rule Dep. at 101:12-19. Colorado is part of his calculus, but it is not the only thing. *Id.* at 101:20-22. Lieutenant Justin Rohr (Rohr) testified that the Colorado residence of Plaintiffs Mark Erich and Shawna Maloney played a role in forming his reasonable suspicion):

> Q: **The fact that they were from Colorado one of the things that led to your reasonable suspicion?**
>
> A: Yes.

Pls. Ex. 9, Rohr Dep. at 98:5-8; *see id*. at 53:12-24; 55:6-23; 56:1-18 (agreeing that states "known for drugs to be trafficked to" help "form[] reasonable suspicion").

34. Col. Jones testified:

> Q. The second thing I want to talk to you about, after a traffic stop has been made and if no information is being provided during the course of the traffic stop from which there's an indication that the motorist should be detained because of, you know, some third party says, "Look, we have got a stolen plate," or "We have got an individual who is -- we think is involved in some criminal conduct that fits this description from this state," absent that information, can you think of a circumstance in which the state of origin of the driver or the state of registration of the vehicle, that is where it's licensed, is a circumstance that could support in the totality of the circumstances reasonable suspicion?
> A. No.
> Q. (By Mr. Chalmers) Are you aware of any training through the Kansas Highway Patrol that would say that in the totality of the circumstances you can consider the state of origin of the driver or the state of registration of the motor vehicle in those circumstances we just discussed that is after the traffic stop?
> A. No. None that I can think of.
> A. From what I understand of that question, no.
> Q. (By Mr. Chalmers) I will need to ask you the same question using the same definition of what is custom. In that are you aware of any custom of use of the state of origin of the driver or state of registration of the vehicle, that is where it's licensed, as a basis for reasonable suspicion at all after the traffic stop has been -- has happened and then absent some additional information from the third entity saying, "Look, you need to be looking for this vehicle or this driver"?
> A. Absent any other factor, with that being alone, no.
> Q. (By Mr. Chalmers) Are you aware of any incident that has come across your desk in which -- and we will exclude *Vasquez* because we can quarrel about whether

> it's an incident or not -- where it's been alleged that the state of origin of the driver or the state of registration of a motor vehicle was used as part of the reasonable suspicion for the extension of a traffic stop other than, again, we are making the original stop or some additional information comes in about the driver of the vehicle?
> A. No.

Ex. 5 (Jones depo.), 197:11-200:4 (objections omitted).

RESPONSE: Controverted. Lieutenant J. Rule's highway interdiction course instructs KHP troopers to ask two questions of all stopped motorists: (1) whether the driver is coming from a drug source area; and (2) whether the driver is going to a drug destination; those "two questions are the basis of everything we do." Pls. Ex. 36, Domestic Highway Enforcement Training at OAG000582. KHP continued teaching its troopers that "where they [the driver] are coming from and where they are going to are the two most important questions" KHP troopers can ask. Pls. Ex. 4, J. Rule Dep. at 83:7-84:2; 95:20-24. Moreover, Plaintiffs reassert the objections that Jones intended to omit in their paragraph 34 through "objections omitted."

35. For the last several years, notable court decisions are made known to KHP trooper by email or intra-network postings. For example, a January 2021 federal district court decision from the District of Utah, Central Division, Case No. 2:16-cr-00592-CW, was widely distributed because of its holding pertaining to drug-detection dog sniffs and the judge's citation to and reliance on the *Vasquez v. Lewis* decision. In December of 2019, a legal update was emailed to all troopers that included a discussion of the Kansas Court of Appeals November 2019 holding in *State v. Gonzalez*, which found that a KHP trooper lacked valid consent to conduct to search Mr. Gonzalez's vehicle. The court found the trooper leaned into and placed his hands in the vehicle's open passenger window in an apparent attempt to control Mr. Gonzalez's ability to leave the scene. This violated KHP training. The decision was circulated to reinforce consent to search is only valid if provided without duress or coercion, express or implied, including without an attempt to control

the ability to flee. Recently, April 28, 2022, a discussion of *United States v. Frazier* (10th Cir. April 13, 2022) was circulated to all commissioned troopers. The court found Utah troopers improperly detained a motorist. The discussion of the case emphasized, "The problem in this case began when the trooper returned to his cruiser and significantly, did not immediately begin the standard procedures necessary to issue a citation. Instead, he began trying to contact a local sheriff's deputy, a canine handler, so he could come to the scene and perform a dog sniff of the vehicle" and listed the alleged factors that the court found were not sufficient to show reasonable suspicion under the facts of the case. Ex. 1, ¶ 24. See also Ex. 1-1 ["Legal Updates," at bate stamped OAG014677].

RESPONSE: Plaintiffs object that the fact is vague as to "last several years" and "notable court decisions." Plaintiffs further object because Jones violates Summary Judgment Guideline No. 12 because paragraph 35 relies on "[a]n affidavit . . . [that] contains [testimony] that could not be presented in a form that would be admissible at trial." The affidavit specifically provides no supporting exhibits of the emails that provided KHP troopers of the notable court decisions by email or intra-network postings. Paragraph 35 provides no context or meaning as to how the January 2021 federal district court decision from the District of Utah was "widely distributed." Also, Jones fails to explain how certain cases can be "widely distributed," and other cases, like *United States v. Frazier* (10th Cir. April 13, 2022), were circulated "to all commissioned troopers." Regardless, Jones has failed to provide supporting affidavit documents of their testimony. Jones' paragraph 35 is also vague regarding "last several years, notable court decisions" because paragraph 35 does not provide any years or case names.

Subject to, and without waiving Plaintiffs' objections to Jones' statement of fact paragraph 35, Plaintiffs controvert this paragraph because Jones has not provided, or produced, all documents or information to support paragraph 35.

36. It is contrary to KHP policy and training for KHP troopers to block a detained vehicle from safely re-entering traffic after a traffic stop has or should have ended. In the KHP's training, the so-called trooper "two step" maneuver does not block the detained vehicle from safely re-entering traffic or other coercion. Instead, it is described, in training, as the "Columbo Gambit" and a "[b]rief break in the conversation often signified by a re-engagement and a request to speak to said suspect." [Legal Issues in Car Stops 2020, at bate stamped OAG000241- 44; Reasonableness is the touchstone of the Fourth Amendment (2018), at bate stamped OAG014239] The maneuver is to help establish any consent to additional conversation or extension of a stop or a search is consensual. Per the KHP training materials, the "trooper two step" is not prohibited, but "not necessary." [Reasonableness is the touchstone of the Fourth Amendment (2018), at bate stamped OAG014239]. The materials stress consent must be knowingly, intelligently, and voluntarily made. ["Vehicle Stops – Legal Issues," Ganieany & Washburn (2021), at bate stamped OAG028924; Laws of Search & Seizure (2019), at bate stamped OAG001381]. They explain, "Consent must always be all of the following: — Knowing Intelligent — Voluntary." ["Laws of Search & Seizure" (2021), at bate stamped OAG028672]. 2021 training at the KHP Academy explains:

> Voluntary encounters after a traffic stop get tricky.
> - You must have a sufficient break in time between the enforcement encounter and the consensual encounter.
> - Trooper Two Step is NOT ENOUGH by itself to purge the taint of the coercive nature of the traffic stop.
>
> • Whether a consensual encounter after a traffic stop is valid depends on whether a reasonable person would have felt free to leave.
> • This is judged on the totality of the circumstances standard.
>
> Voluntary encounters after a traffic stop:
> - Factors that may render the contact non non-consensual:
> • You did not return all the driver's documentation.

- You have gone straight from the traffic stop to the consensual encounter without a sufficient break.
- Your tone of voice is accusatory.
- You are still in your patrol car.
- You have made physical contact with the vehicle or subject.

["Laws of Search & Seizure" (2021), at bate stamped OAG028756-58]. Among the factors listed in the training that would show lack of consent is "an attempt to control the ability to flee" [Reasonableness is the touchstone of the Fourth Amendment (2018), at bate stamped OAG014238], "[p]hysical contact with the person by an officer" [Laws of Search & Seizure (2019), at bate stamped OAG001462], "[t]ouching, leaning on or into the vehicle" [Legal Issues in Car Stops 2020, at bate stamped OAG000243], "officer touching the vehicle when asking for consent" [2021 Advanced Interdiction, Troop N, at bate stamped OAG028445], "some physical touching by an officer" [2021 "4th Amendment Issues in Vehicle Stops," Luther Ganieany, at bate stamped OAG028608], "Physical contact with the person by an officer," [Laws of Search & Seizure" (2021) at bate stamped OAG028750]. Ex. 1, ¶ 25; Ex. 1-1 at bate referenced stamped numbers.

RESPONSE: Plaintiffs object to Jones' reference to "block" as vague and argumentative, and object to the entirety of this paragraph as it is an improper attempt to reformulate Plaintiffs' legal claims and/or state a legal conclusion. *See* Doc. #315 § V.D. KHP troopers block detained vehicles because the vehicles are not free to leave; KHP trains its troopers that the Two-Step is permissible "as long as a reasonable person in the suspect's position would ***feel*** free to leave[,] *[e]ven if they are not*." Pls. Ex. 18, 4th Amendment "Reasonableness is the touchstone of the Fourth Amendment" Training at OAG020750 (emphasis in original, and added). KHP's training causes its troopers, like Lieutenant J. Rule, to attempt the Two-Step by asking for consent to search the car, even when they already plan to detain the driver. J. Rule asks for consent after he has

already decided to detain the driver, regardless of whether the driver gives such consent. Pls. Ex. 4; J. Rule Dep. at 109:19-111:8. Plaintiffs' also object that the fact is vague as to what is meant by, "[t]he maneuver is to help establish any consent to additional conversation or extension of a stop or a search is consensual."

Moreover, Master Trooper Schulte's Dash Cam shows that when he used the Two-Step maneuver on Plaintiffs Blaine Shaw (B. Shaw) and Samuel Shaw (S. Shaw), Schulte first places his left arm in front of B. Shaw's rear-view mirror, and then waives his left arm in front of the mirror and front windshield, before positioning his entire body away from the vehicle and ending the maneuver, controverting Jones' statement regarding the physical positioning between troopers and motorists per KHP training. Pls. Ex. 46, Schulte Dash Cam, Pt. 1, 15:09-15:45. Finally, it is uncontroverted that the trainings provided use the words cited by Jones in paragraph 36, but controverted to the extent that this statement of fact purports to demonstrate that KHP troopers follow this training, or that this training fully comports with Tenth Circuit law, as Jones has not provided sufficient evidence for such an inference.

37. The KHP maintains a Professional Standards Unit ("PSU") which serves as an impartial fact-finding unit whose primary purpose is to safeguard and enhance the integrity of the agency. The unit receives and processes complaints against agency employees or procedures, ensuring employees are afforded due process, to ensure uniformity in their application, and identifying training and supervisory needs. Ex. 1, ¶ 28.

RESPONSE: Plaintiffs object to the meaning of "their application" as vague, as it is unclear who Jones intends to include by saying "their", and it is unclear what "application" means when Jones initially refers to "complaints." Plaintiffs also controverts the PSU "safeguards and enhances the integrity of the agency because the PSU does not track required data. By policy, the

PSU should identify and annually report to KHP command identification of employees receiving a relatively high number of complaints. Clark's report to KHP command did not follow this policy as he had followed the previous report, which did not contain that information. Pls. Ex. 20, Captain Mitchell Clark (Clark) Dep. at 96:5-97:10; Pls. Ex. 23, KHP Annual Reports Excerpt. Even after the deficiency was pointed out in Clark's deposition, the issue was not corrected in 2021. *Id.*

By policy, the PSU is also to report to KHP command common causes of complaints that could be addressed through public information, policy, training, and/or disciplinary issues. Pls. Ex. 20, Clark Dep. at 97:13-18. However, Clark's report to KHP command did not follow this policy. *Id.*; Pls. Ex. 23, KHP Annual Reports Excerpt. Even after the deficiency was pointed out in Clark's deposition, the issue was not corrected in 2021. *Id.*

It is also controverted that the PSU receives and processes all complaints, as the record establishes that the PSU does not process all complaints, and that the KHP treats certain complaints differently. Pls. Ex. 3, Jones Dep. at 162:19-163:9 (Jones testifying that he receives notice of complaints that are not handled by the PSU; there are some complaints "that are dealt with by a phone call that doesn't come to an investigation.")

38. PSU's primary function is to investigate serious allegations of misconduct involving agency employees. PSU is also responsible for monitoring the progress of all agency complaint investigations to ensure the efficient and timely completion of reports. Ex. 1, ¶ 29.

RESPONSE: *It is uncontroverted that PSU is responsible for monitoring the progress of* all agency complaint investigations to ensure the efficient and timely completion of reports. It is controverted that PSU is responsible for investigating only "serious" allegations of misconduct. KHP's Complaint Reporting and Administrative Investigations Policy (Complaint Policy) does not require "serious" allegations of misconduct. Rather, the Complaint Policy defines misconduct

broadly as "[u]nacceptable or improper behavior, including but not limited to, any action performed by an agency employee that is unethical, immoral, against established agency guidelines, prohibited by statute, unconstitutional, or criminal in nature." Pls. Ex. 19, Complaint Policy at 1.

39. Any citizen or Patrol employee may present a complaint to PSU. Complaints may be made in person, in writing, by email, or by telephone. Information about to whom and how to make a complaint is publicly available through a general inquiry with KHP and on the KHP website at https://www.kansashighwaypatrol.org/233/Professional-Standards-Unit. However, all KHP employees are required to accept a complaint if a supervisor is not immediately available to do so. All complaints then are forwarded to the PSU at General Headquarters in Topeka for appropriate action. Ex. 1, ¶ 30.

RESPONSE: Uncontroverted.

40. Investigators contact the complainant (unless the complaint is anonymous), the accused employee, and witnesses; examine physical evidence; review reports and records; and document the facts surrounding the incident. The investigator's report is provided to the PSU commander, where it is reviewed for completeness and objectivity, and then forwarded to the assistant superintendent for review. The Superintendent ultimately reaches any conclusions about the accused employee's conduct and writes a letter to the complainant summarizing the results of the investigation. Disciplinary action is initiated when deemed appropriate, but is considered a confidential matter and is not be disclosed to the complainant. Ex. 1, ¶ 31.

RESPONSE: Uncontroverted.

41. Plaintiffs will offer the following opinions from a retained expert, Dr. Jonathan Mummolo, that:

a. Data indicates that, in January 2018-November 2020, "out-of-state drivers are systematically overrepresented in KHP stops": 65.9% of overall KHP stops were of out-of-state drivers, with an estimated 22.0% out-of-state Interstate traffic volume measuring by the reported presence of out-of-state drivers at interstate- adjacent businesses.

b. Data indicates that out-of-state drivers who are speeding in a given place and time are more likely to be stopped for speeding than similarly situated in-state drivers, again estimating drivers presence on the Interstate by the presence of out- of-state drivers at interstate-adjacent businesses, but also including KDOT data concerning recorded vehicle speeds in excess of 75 mph at various locations [apparently 6] on Kansas Interstate highways. He concludes 67.8% of KHP speeding stops involved out-of-state drivers. In contrast, an estimated 35.0% of Interstate speeding traffic was out-of-state.

c. Approximately 88.3% of the out-of-state drivers would have needed to be speeding, assuming 29.1% of in-state drivers were speeding, in order to explain his findings concerning disproportionate stops for speeding. And no evidence suggests such a disparity in speeding in Kanas when Kansas's traffic fatality rates are compared with Colorado's.

d. Among the 432 canine searches conducted on Interstates, where Dr. Mummolo estimated prevalence of out-of-state drivers on the highway, 399 searches (92.4%) were of out-of-state drivers, in contrast, to an estimated 34.9% of the out-of-states drivers on the Interstate, based on the presence of out-of-state drivers at interstate-adjacent businesses.

e. Data does not suggest that searches of out-of-state drivers discover illegal drugs at different rates than searches of in-state drivers.

J. Mummolo Report, 2/28/22, pg.5-8.

RESPONSE: Jones did not include Dr. Mummolo's report in his summary judgment record, and Plaintiffs object to this fact to the extent it attempts to summarize the opinions offered by Dr. Mummolo. A copy of Dr. Mummolo's report is attached as Plaintiffs' Exhibit 39. It is uncontroverted that Plaintiffs will offer the following opinions from retained expert, Dr. Mummolo. Plaintiffs only controvert this fact to the extent it is incomplete or is intended to purport anything other than the following. Plaintiffs also controvert 6 KDOT sites were used for the analysis, *see* Pls. Ex. 39, Mummolo report at Ex. 2 analyzing 7 KDOT sites.

3 Opinions

3.1 Opinion 1: Out-of-State Drivers Are Disproportionately Stopped in General

The data indicates that out-of-state drivers are systematically overrepresented in KHP stops, relative to their measured presence along Interstate corridors. I examined places and times where KHP stops could be compared to in-state and out-of-state traffic estimates from external datasets (January 2018 - November 2020). In these contexts, 65.9% of overall KHP stops were of out-of-state drivers. In contrast, an estimated 22.0% of Interstate traffic volume was out of state, based on Kansas Department of Transportation (KDOT) logs and commercial mobile-phone data measuring in-state and out-of-state visitors to Interstate-adjacent businesses.

This disparity cannot be explained by an enforcement policy that is blind to origin state but merely happens to focus on areas of Kansas with a high concentration of out-of-state drivers. To rule out this possibility, I examined enforcement disparities in the specific contexts in which KHP enforcement occurs. In each place and time, I tabulated the number of in-state and out-of-state KHP stops, then compared this to the estimated number of in-state and out-of-state drivers along the same Interstate segment.

A hypothetical enforcement policy that stopped out-of-state drivers at the same rate as in-state drivers could explain only 28.1% of the out-of-state KHP stops examined. That is, 56,878 out-of-state stops are in excess of the number that can be explained by such a state-blind policy (71.9% of the 79,126 out-of-state KHP stops examined). This result is statistically significant ($p = 0.014$).

3.2 Opinion 2: Out-of-State Drivers Are Disproportionately Stopped for Speeding Violations

The data indicates that the overrepresentation of out-of-state drivers in KHP stops cannot be explained even after using available data to adjust for differential driver behavior in different places and times. I performed this adjustment by limiting the analysis of KHP stops between January 2019 and November 2020 made for speeding; to account for speeding prevalence, I use KDOT logs of vehicles traveling in excess of 75 miles per hour. In other words, I test whether out-of-state drivers who are speeding in a given place and time are more likely to be stopped for speeding than similarly situated in-state drivers. I conducted an in-depth analysis of speeding enforcement in particular due to the availability of high-quality KDOT traffic logs on the precise number of vehicles engaged in speeding violations.

In the places and times examined, I find that 67.8% of KHP speeding stops involved out-of-state drivers. In contrast, an estimated 35.0% of Interstate speeding traffic was out-of-state. This estimate is based on commercial mobile-phone data on visitors to Interstate-adjacent businesses, accounting for areas where more speeding occurs, assuming that out-of-state and in-state speeding rates are comparable. Under this assumption, a hypothetical enforcement policy that stopped out-of-state speeders at the same rate as in-state speeders could explain only 28.3% of the out-of-state KHP speeding stops examined. That is, 26,852 out-of-state speeding stops are in excess of the number that can be explained by a state-blind policy (71.6% of the 37,484 out-of-state speeding KHP stops examined). This result is statistically significant ($p = 0.026$).

3.3 Opinion 3: Disproportionate Speeding Stops of Out-of-State Drivers Cannot Plausibly Be Explained by Traffic Violations

I assessed that the disproportionate number of KHP speeding stops of out-of-state drivers cannot be explained by plausible differences in the rates of speeding by out-of-state drivers.

I found that to explain the observed disparities in speeding enforcement, roughly 88.3% of out-of-state drivers would need to be speeding, compared to 29.1% of in-state drivers, in the places and times I examined. This would require that out-of-state drivers speed at roughly three times the rate of in-state drivers, representing an implausible gap in behavior. For example, a difference in driving behaviors on this scale would suggest that traffic fatalities should be substantially lower in Kansas than in surrounding states, since road deaths are highly correlated with speeding.[6] In a supplementary analysis of traffic fatality data collected by the Centers for Disease Control and Prevention, I find no evidence suggesting such a disparity in speeding behavior; in fact, traffic fatality rates are somewhat higher in Kansas than Colorado.

3.4 Opinion 4: Out-of-State Drivers are Disproportionately Searched

The data indicates that out-of-state drivers represent the vast majority of canine searches. Analyzing data on canine searches between January 2018 and September 2020, I found that out-of-state drivers are systematically overrepresented relative to their estimated traffic volume. Analyzing data between June 2016 to September 2020, I also found out-of-state drivers are disproportionately searched relative to their already disproportionate number of KHP stops. That is, disparities in enforcement toward out-of-state drivers compound through successive stages of enforcement. Specifically, among the 432 canine searches conducted on Interstates where I can measure the overall prevalence of out-of-state drivers, I found that 399 searches (92.4%) are of out-of-state drivers. In contrast, only an estimated 34.9% of drivers in these places and times are from out-of-state. If KHP was executing canine searches in a state-blind manner, the likelihood of this disparity arising by chance is essentially zero ($p < .0001$).

I also demonstrated that in principle, discriminatory stopping alone could result in more out-of-state drivers being subject to search, even if there is no discrimination in the subsequent search decision. This is because over-stopping can result in more out-of-state drivers being eligible for searches, leading to out-of-state searches that could not have occurred if the initial discriminatory stop had not taken place.

However, this scenario—a canine-search policy that is blind to origin state after the initial decision to stop—cannot fully explain the disparities in canine searches. For comparison, 76.6% of KHP stops in these places and times were of out-of-state drivers; this figure is substantially larger than the estimated out-of-state share of drivers (34.9%) but still falls short of the out-of-state canine-search share (92.4%). If KHP was executing canine searches in a state-blind manner for in- and out-of-state stops, the likelihood of this disparity arising by chance is similarly, nearly zero ($p < .0001$).

3.5 Opinion 5: No Evidence that Drugs are Found at Disparate Rates after Canine Searches of Out-of-State Drivers

I found no evidence to suggest that searches of out-of-state drivers discover illegal drugs at different rates than searches of in-state drivers. If anything, drugs and paraphernalia are more often found in searches of in-state vehicles, though these differences are not statistically significant at conventional levels. I note that canine searches comprise only a fraction of all searches conducted, though the limited data produced by Defendants precludes an analysis of non-canine searches.

Pls. Ex. 39, Mummolo Report at pp. 5-8.

42. The KHP's statistics concerning traffic stops, from the digital citations software ("DigiTicket" data) that is completed by Troopers at the stop, show the following:

All traffic stops	**Ks / % of all traffic stops**	**Non-Ks / % of all traffic stops**	**Colo / % of all traffic stops**
2021 (as of 8/30/21)			
124,387	73,485	50,902	6,012
	59.1%	40.9%	4.8%
2020			
184,336	108,934	75,402	8,957
	59.1%	40.9%	4.9%
2019			
211,531	132,070	79,461	8,862

	62.4%	37.6%	4.2%
2018			
208,343	129,935	78,408	9,285
	62.4%	37.6%	4.5%
2017			
207,248	126,620	80,628	10,124
	61.1%	38.9%	4.9%
2016			
188,174	119,151	69,023	8,938
	63.3%	36.7%	4.7%

Ex. 11, Suppl. Response to Plaintiffs' Informal Interrogatory to Def. Jones, March 29, 2021.

RESPONSE: This purported fact is wholly unsupported by the record cited. Plaintiffs object (and have previously objected) that opposing counsel, Mr. Chalmers, is not the appropriate person to verify Defendants' interrogatory responses. Moreover, Plaintiffs object that the 2021 data, Colorado data, and percentages are not contained in the record cited by Jones. *See* Def. Ex. 11 (Doc. #296-17). And, the data that is contained in this paragraph does not match the data provided in the exhibit cited. With respect to the first three columns titled "all traffic stops," "Ks / % of all traffic stops," and "Non-Ks / % of all traffic stops," Plaintiffs object that each number listed does not match the number for any year listed in Def. Ex. 11 either for Defendants original interrogatory response (Doc. #296-17 p. 2) or Jones' supplemental response (Doc. #296-17 p. 3). For example, here are the two answers for 2016:

Initial answer:

Calendar Year 2016	
Total Citations	134,903
Total Warnings	143,846
KS Driver Citations	84,984
KS Driver Warnings	95,970
Out of State Citations	49,919
Out of State Warnings	47,876

Supplement:

2016	
Total Traffic Stops	178,555
Where State = Blank	69,828
Where State = KS	59,228
Where State does not = KS	49,499

43. The Kansas Department of Transportation ("KDOT") monitors and reports traffic counts at locations throughout the state. Plaintiffs' expert witness, Dr. Mummolo, relies on this KDOT data concerning 2020 traffic reported at https://www.ksdot.org/Assets/wwwksdotorg/bureaus/burTransPlan/maps/CountMaps/Districts/countmap2020.pdf. *See* J. Mummolo Report, 2/28/22, pg. 35, 38.

RESPONSE: It is uncontroverted that Dr. Mummolo relies on KDOT data concerning 2020 traffic. This fact is controverted to the extent it purports to state that 2020 was the only year of KDOT data relied on. Pls. Ex. 39, Mummolo Report at pp. 35, 38.

44. KDOT also monitors and records vehicle speeds at some of the locations where it monitors and reports traffic counts. Dr. Mummolo relied on this KDOT data from the following highway locations on Interstate 70 (I 70) and Interstate 35 (I 35). *See* J. Mummolo Report, 2/28/22, pg. 35, 38. The KDOT reported daily traffic counts at these locations, as reported at https://www.ksdot.org/Assets/wwwksdotorg/bureaus/burTransPlan/maps/CountMaps/Districts/countmap2020.pdf, are also shown.

Location monitored	**2020 Average Estimated Daily Traffic Count Across Location**
0DT453 – Kanorado – near Colo/Ks boarder – on I 70	10,442
4LGSU7 – 1 mile West of Wakeeney on I 70	11,680
7FGNB7 – West of K 232 interchange (near Wilson) on I 70	14,100
CB1U73 – 4.7 miles West of K30 interchange on I 70 (Maple Hill)	22,681
CXJUQ3 – East of Macvicar Street exit in Topeka on I 70	37,900
C01AY7 - 2 miles West of K-131 Interchange, North of Lebo, on I 35	14,606

E7PK42 - .5 miles Northeast of the Wellsville Interchange, Northeast of Ottawa on I 35	22,353
	Total: 133,762 per day; estimated 48,823,130[10] in 2020

RESPONSE: It is uncontroverted that KDOT monitors and records vehicle speeds at some of the locations where it monitors and reports traffic counts. It is uncontroverted that Dr. Mummolo relied on this KDOT data from the following highway locations on Interstate 70 (I 70) and Interstate 35 (I 35) - 0DT453, 4LGSU7, 7FGNB7, CB1U73, CXJUQ3, C01AY7, E7PK42. Plaintiffs object and controvert the remaining portion of this purported fact as it is not supported by the record cited. Specifically, Jones did not attach the record as an exhibit to his motion, and the website identified is not accessible, last accessed 9.12.2022:

In addition, the fact is controverted as stated in that over the course of a one-way journey on I-70, a motorist could activate five separate traffic sensors, for a total of ten activations in a single round trip. Pls. Ex. 67, Mummolo Dec. at ¶ 14. Therefore, to the extent Jones purports 133,762 different motorists drive on the identified locations per day, or 48,823,130 different motorists in 2020, those numbers are exaggerated and not supported by the record cited. *Id.*

[10] 133,762 times 365 equals 48,823,130.

45. Therefore, the approximately 200,000 annual traffic stops conducted by KHP troopers throughout the state, UF ¶ 42, is a very small fraction of the traffic in the state. For example, it is 0.41% of traffic only across the seven sites monitored by the KDOT, which in turn is a fraction of statewide traffic.

RESPONSE: Plaintiffs controvert this fact because the calculations are not accurate. Plaintiffs incorporate their response to Jones' SOF ¶¶ 42, 44. Plaintiffs object that "the approximately 200,000 annual traffic stops" statement made by Jones is not supported by Jones' SOF ¶ 42 or its record cited. Plaintiffs object that "very small fraction" is vague. Plaintiffs object that footnote 6 is not supported by any record cited. Plaintiffs object to the extent Jones is attempting to provide expert statistical analysis through his counsel, using data not in the record and that cannot be verified. To that end, Plaintiffs incorporate their response to Jones' SOF 47.

46. In Dr. Mummolo's review of KHP canine assistance reports, he found 1,086 canine sniffs were documented in post-traffic stop in 2014 through 2019 (6 years), *i.e.*, 181 canine sniffs per year. *See* J. Mummolo Report, 2/28/22, pg. 19-20. Records produced by Kansas county sheriffs, in the counties along I-70, I-35, U.S. Route 54, and U.S. Route 36, recorded 461 assists by their canines to KHP troopers in the September 2016 and January 2021 timeframe (about 106/year[11]). Bate ## Third Party 000001-464, produced by Plaintiffs as responses to their record subpoenas.

RESPONSE: It is uncontroverted the Dr. Mummolo considered the data KHP supplied on 1,086 canine searches that occurred on the interstates between 2014 and 2019. To the extent this fact purports to state anything else, Jones did not provide *any* record to support this fact. Plaintiffs object that Jones provides no support in the summary judgment record for his assertion that records produced by Kansas county sheriffs, in the counties along I-70, I-35, U.S. Route 54, and U.S.

[11] Some fraction of these assists do not relate to post-traffic stop canine sniffs.

Route 36, recorded 461 assists by their canines to KHP troopers in the September 2016 and January 2021 timeframe (about 106/year) or that some fraction of those do not relate to post-traffic canine sniffs.

47. 290 canine sniffs [*i.e.*, rounded 181 + 106[12]] at post-traffic stop detentions annually, is about 0.15%[13] (between 1 and 2 in 1,000) of all of the annual traffic stops. And compared to the traffic that flows past the seven sites KDOT monitors, the detentions with a canine sniff are about 0.00054%-0.00075%[14] (about 1 in 134,000 to 185,000) of the traffic.

RESPONSE: Plaintiffs incorporate their response to Jones' SOF ¶ 46. Plaintiffs object to the extent Jones is attempting to provide expert statistical analysis through his Counsel. Moreover, Dr. Mummolo has analyzed Jones' assumptions, provided for the first time in his purported Statement of Uncontroverted Facts and summary judgment arguments, and found as follows. Pls. Ex. 67, Mummolo Dec. at ¶ 6. Based on this arithmetic, Jones concludes, "[i]t is speculative that any of the Plaintiffs will again be stopped and detained by KHP troopers." (Doc. #296 at 34.) This conclusion does not follow from the analysis presented by Jones for three reasons. Pls. Ex. 67, Mummolo Dec. at ¶ 10. First, at a basic conceptual level, Jones inaccurately describes what KDOT data measures and, as a result, draws mistaken conclusions about KHP enforcement. *Id.* at ¶ 11. Jones considers the number of KHP stops per activation of a KDOT traffic sensor. He reports an estimate of 0.41% or roughly 4 per 1,000 activations. *Id.* at ¶ 12. In contrast, the Plaintiffs are concerned about the number of KHP stops that they will be subjected to over the course of their lives. *Id.* These concepts are substantially different. *Id*. Second, Jones fails to consider key factors such as plaintiffs' driving behavior (i.e., how long of a distance they are driving, or how frequently

[12] From UF ¶ 46.
[13] 290/200,000 = .00145 or 0.15%.
[14] 290/48,823,130 = 5.939807628064813e-6 or 0.00059%, about 1 in 169,000.

they may drive that route) or the locations of KDOT measurement sites on I-70. *Id.* at ¶ 13. This leads Jones to underestimate potential risks to plaintiffs by a factor of 100 or even more. *Id*. Over the course of a one-way journey on I-70, a plaintiff could activate five separate traffic sensors, for a total of ten activations in a single round trip. *Id.* at ¶ 14. Indeed, Plaintiffs in this case were driving across Kansas to or from Colorado, a trip that, according to other documents in this case, the Plaintiffs have taken and will continue to take multiple times. *Id*. If they take at least one round trip per year for the next ten years, each Plaintiff could account for 100 activations or more. *Id*. Thus, even a rough calculation immediately reveals that Jones understate the risk to Plaintiffs by several orders of magnitude. *Id.* at ¶ 15. Third, and most importantly, the Jones' calculations fundamentally assume that KHP detains in-state and out-of-state motorists equally, in contradiction of the premise of the case and the results of my study. *Id.* at ¶ 16. Jones' offer of rough calculations, without context, amounts to assuming away discrimination on the part of KHP. *Id*. More specifically, Jones calculates a single stop rate for all KDOT sensor activations, regardless of whether they are generated by in-state or out-of-state drivers. *Id.* at ¶ 17. Jones then uses this to describe risk to Plaintiffs, a group that includes *only* out-of-state drivers. *Id.* The basic premise of Defendant Jones' calculations is that both groups have an identical risk of being stopped. *Id.* at ¶ 18. However, Dr. Mummolo's analysis shows this assumption is false: out-of-state motorists are far more likely to be stopped by KHP than in-state motorists (see Opinions 1-3 in report). *Id*. Put differently, Jones' calculations do not account for the composition of drivers on the road—i.e., the proportion of motorists with in-state versus out-of-state plates—which is necessary to compute the probability of a person *similar to the Plaintiffs in this case* being detained. *Id.* at ¶ 19. In his report, Dr. Mummolo approximated these proportions using cell phone location data provided by the vendor Safegraph measuring the home-state composition of visitors

to businesses within 0.25 miles of county-interstate segments during the month that traffic stops were made. *Id.* at ¶ 20. Cell phone tracking data, and Safegraph data in particular, has been previously used to study human movement in scientific studies, including peer-reviewed work appearing in a premier scientific journal. *Id.* at ¶ 21. In addition, Safegraph data has been shown to correlate strongly with standard data sources on human movement, such as visitor surveys. *Id.* at ¶ 22. For these reasons, the calculations provided by Jones in his brief do not appear to be supported by scientific principles for analyzing disparities in policing practices, and do not support Jones' conclusion that "It is speculative that any of the Plaintiffs will again be stopped and detained by KHP troopers." *Id.* at ¶ 23.

48. The significant seizures of contraband[15] made by KHP troopers by the vehicle's state of registration is shown on Ex. 12 (Deposition Exhibit 102, OAG028379), as tabulated from KHP's seizure documentation. *See also* Ex. 3, 92:1-7, 93:5-95:9. In 2020, the last full year of data then available, 10.9% of the seizures were of associated vehicles from Kansas; and 4.2% were associated with vehicles from Colorado. While only exceeding the Kansas percentage of registered vehicles in 2017, Colorado registered vehicles have provided between 4.2% to 11.3% of the significant contraband seizures. Ex. 12.

RESPONSE: Uncontroverted.

49. On February 10, 2019, KHP Technical Trooper Brandon McMillan stopped Joshua Bosire ("Bosire") for driving 82 miles per hour in a 75 mile per hour zone eastbound on I 70 about 5 miles west of Hays, Kansas. Bosire was driving a rented Nissan Altima. Ex. 13 (McMillan Declaration), ¶¶ 5-7. After the traffic stop was complete, McMillan detained Bosire for additional questioning and then for a canine sniff of the Altima. *Id.* ¶¶ 32-35, 37-38.

[15] Significant contraband seizure is defined by El Paso Intelligence Center guidelines and generally means narcotics cash or 1 lb. or more of drugs, with lesser weights for opioid drugs and crack cocaine. Ex. 3, 98:1-25, 99:22-100:1.

RESPONSE: It is uncontroverted that on February 10, 2019, KHP Technical Trooper Brandon McMillan stopped Bosire while he was driving 82 miles per hour in a 75 mile per hour zone eastbound on I 70 about 5 miles west of Hays, Kansas, that Bosire was driving a rented Nissan Altima, and that after the traffic stop was complete, McMillan detained Bosire for additional questioning and then for a canine sniff of the Altima. Plaintiffs controvert this fact only to the extent it purports to claim that McMillan stopped Bosire merely for speeding as opposed to stopping Bosire for the purpose of conducting a canine sniff or search of the Altima. Rather, McMillan was suspicious of Bosire (a black man) after seeing him talking at a gas station with a white man. *See* Def. Ex. 13, McMillan Declaration at ¶¶ 17-21 (in part, "after [seeing Bosire at the gas station] I was suspicious that Mr. Bosire was transporting something illegal."). McMillian drove down the highway and parked on the median, waiting for Mr. Bosire to commit a traffic violation. Pls. Ex. 10, McMillan Dep. at 182:19-21; Pls. Ex. 56, McMillan's 05.17.2019 Statement to PSU at OAG000020.

50. McMillan asserts reasonable suspicion[16] from the following:

(1) McMillan and another trooper smelled a marijuana odor at a Love's Travel Shop in Ellis, which they believed might be associated with two men they saw a few minutes later standing by a rented Altima.

(2) The troopers saw the Altima had a mounted camera in the back; The Altima and vehicle that the trooper thought was a rental left Love's about the same time.

(3) Then about ten minutes later, after McMillan pulled over an Altima for speeding, he confirmed it was the Altima from Love's. McMillan did not smell the marijuana odor, but thought the Altima might be "caravanning" with the other vehicle seen leaving Love's.

(4) During the traffic stop, McMillan saw the two cameras mounted in the rental car and McMillan knew drug traffickers use surveillance cameras to facilitate

[16] This is a list of the circumstances that McMillan articulated for the post-stop detention. Plaintiffs and the Court are asked, in this motion, to approve or endorse their validity for qualified immunity or determination of the constitutionality of the detention.

caravanning, discourage a law enforcement stop, and confirm a "hired" driver appropriately transports drugs or narcotic cash.

(5) The Altima was a short-term rental. McMillan knew drug traffickers frequently use short-term rentals to transport drugs or narcotic funds.

(6) Bosire did not fully roll down his window and there was a partially covered notebook in the back of the rental car that appeared to be a ledger which drug transporters use.

(7) Bosire would only say he was traveling from the West going East, which McMillan found atypical and evasive.

(8) McMillan's suspicions were heightened in post-stop questioning. He believed Bosire had not honestly answered his questions about the second man at Love's and the cameras in the rental car.

Ex. 13, ¶¶ 21, 28.

RESPONSE: Plaintiffs object that this fact is vague as to what it is purporting. First, the footnote states: "[t]his is a list of the circumstances that McMillan articulated for the post-stop detention." Plaintiffs controvert that McMillan articulated this list of circumstances during or immediately after his stop of Bosire, and the record cited by Jones does not support that fact. To the extent Jones is purporting that McMillan articulated these facts in his written response to the PSU investigation or deposition in this case, the record cited by Jones does not support that fact. To the extent Jones is merely purporting that McMillan's declaration attached to Jones' motion articulates these reasons, that is addressed below.

The footnote further states: "Plaintiffs and the Court are asked, in this motion, to approve or endorse their validity for qualified immunity or determination of the constitutionality of the detention." This ask is wholly inappropriate in a statement of fact. Plaintiffs do not "approve or endorse" the list as anything other than an after-the-fact list of things that McMillan concocted from reviewing his dash cam video, and a disputed "recollection" in response to Bosire's claim that McMillan lacked reasonable suspicion to detain him. The Court should also decline to

"approve or endorse" the validity of this list for "qualified immunity or determination of the constitutionality of the detention" as Jones requests. First, this Court and the Tenth Circuit Court of Appeals already rejected the validity of this list for qualified immunity and constitutionality after hundreds of pages of briefing. (Doc. #237, 09.03.2021 Transcript; Tenth Circuit Opinion, Doc. #280). Remarkably, Jones relies on the same declaration from McMillan that this Court already said was "complete nonsense." (Doc. 237, 09.03.2021 Transcript at p. 27). The Tenth Circuit already discounted several of the factors allegedly relied on by McMillan in his reasonable suspicion calculus. For example, the Tenth Circuit found as a matter of law that the following factors carry little, if any, weight in determining whether McMillan had reasonable suspicion to detain Bosire: the fact that Bosire was driving a rental car (Doc. #280 at 25-26); the "notebook" on Bosire's back seat, *id*. at 27, n. 8; and Bosire's lowering of his window only partway, *id*. at 26-27. Moreover, the court found that genuine issues of material fact existed as to several other factors, including the alleged "caravanning," the small of marijuana, and Bosire's responses to McMillan's questions, and whether a jury would find these things legitimately contributed to McMillan's suspicion. *Id*. at 23-25. The Tenth Circuit plainly said, again as a matter of law, that there was insufficient undisputed facts supporting summary judgment to find for McMillan on Bosire's Fourth Amendment claim. *Id*. at 27-28. This Court is bound by the Tenth Circuit's ruling since the factual record is the same now as it was before the Tenth Circuit. Moreover, as to constitutionality, even Jones and his PSU did not approve and endorse the validity of this list for determination of the constitutionality of the detention. *See* Pls. Ex. 58, 08.09.2019 Letter from Jones to Bosire ("This contact with you was not what we would consider standard under the confines of investigative reasonable suspicion regarding criminal interdiction. And although as stated above, we cannot get into the mind of our officers at the time they were confronted with the

facts, we feel the length of time you were detained roadside was unnecessary given the suspicions [McMillan] articulated."). In fact, even McMillan knew he lacked reasonable suspicion. Pls. Ex. 57, McMillan Dash Cam at 15:50-16:42 (noting he does not think he has enough to hold Bosire for a canine).

Finally, to the extent this the fact purports that McMillan's declaration attached to Jones' motion articulates these reasons as a basis for his reasonable suspicion to detain Bosire, the fact is only partially supported by the record Jones cites. Plaintiffs object that the following potions of this fact are not supported by the record cited: McMillan and another trooper smelled a marijuana odor at a Love's Travel Shop in Ellis, which they believed might be associated with two men they saw a few minutes later standing by a rented Altima; the Altima and vehicle that the trooper thought was a rental left Love's about the same time; and then about ten minutes later, after McMillan pulled over an Altima for speeding, he confirmed it was the Altima from Love's. Plaintiffs further controvert this fact. Trooper McMillan does not offer anything other than his unsubstantiated "belief" to support the claim that Bosire was the source of the marijuana smell, and moreover, Trooper McMillan testified he did not know if Bosire was in the group that smelled of marijuana, that ultimately there was no "group", and that he did not smell marijuana when he stopped Bosire. Pls. Ex. 10, McMillan Dep. at 162:18-163:8; 212:8-22. McMillan request Bosire lower the window; Bosire rolled the window down further during the exchange; and McMillan did not smell marijuana in the vehicle. Def. Ex. 13 at ¶¶11, 13. This fact is further controverted insofar as this fact contains several presumptions, all of which were proven to be inaccurate. Mr. Bosire was not traveling with anyone else and was speaking with the gas station attendant while at the truck stop. Pls. Ex. 54, Bosire Dep. at 66:11-14; 67:13-25; 68:1-25; 69:1-23. Mr. Bosire had a bible in the back of his car, not a notebook. Pls. Ex. 68, Bosire Aff., ¶ 12. Further, characterizing Mr. Bosire's

responses as "evasive" is an improper inference in Trooper's McMillan's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see also Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1164 (10th Cir. 2021) (denying motion for summary judgment seeking qualified immunity).

51. On December 20, 2017, KHP Master Trooper Doug Schulte stopped a minivan traveling 91 miles per hour in the 75 miles per hour zone westbound on Interstate 70 ("I 70"). Ex. 14 (Shulte Declaration), ¶¶ 3-4. Blaine Shaw was driving. *Id.* ¶¶ 3 & 11. Samuel Shaw was a passenger. Doc. 7, ¶ 91. After the traffic stop was complete, Schulte detained the Shaws for a canine sniff of the minivan. *Id*. at ¶¶ 17, 18, 23-25.

RESPONSE: Uncontroverted.

52. Schulte asserts a particularized and objective basis for suspecting legal wrongdoing from the following:

(2) **Blaine Shaw did not timely pull over.**

(3) **Blaine Shaw had a criminal history for felony intent to sell narcotics.**

(4) **The minivan was registered to someone other than Blaine and Samuel Shaw and was traveling on I 70, a known corridor to drug sources in Colorado.**

(5) **The minivan was crammed full of stuff, with a lived-in look, suggesting the hard travel characteristic of drug traffickers.**

(6) **Schulte found that Samuel Shaw was acting suspiciously because he refused to look at Schulte (looking forward only).**

Ex. 14, ¶ 20.

RESPONSE: Plaintiffs object that this fact is vague as to what it is purporting. First, the footnote states: "[t]his is a list of the circumstances that Schulte articulated for the post-stop detention." Plaintiffs controvert that McMillan articulated this list of circumstances during or immediately after his stop, and the record cited by Jones does not support that fact. To the extent

Jones is purporting that Schulte articulated these facts in his deposition in this case, the record cited by Jones does not support that fact. To the extent Jones is merely purporting that Schulte's declaration attached to Jones' motion articulates these reasons, that is addressed below.

The footnote further states: "Plaintiffs and the Court are asked, in this motion, to approve or endorse their validity for qualified immunity or determination of the constitutionality of the detention." This ask is wholly inappropriate in a statement of fact. Plaintiffs do not "approve or endorse" the list as anything other than an after-the-fact list of things that Schulte concocted from review his dash cam video and disputed "recollection" in response to the Shaw's claim that Schulte lacked reasonable suspicion to detain them. The Court should also decline to "approve or endorse" the validity of this list for qualified immunity or determination of the constitutionality. First, this Court and the Tenth Circuit Court of Appeals already rejected the validity of this list for qualified immunity and constitutionality after hundreds of pages of briefing. (Doc. #237, 09.03.2021 Transcript; Tenth Circuit Opinion, Doc. #280). The Tenth Circuit already discounted several of the factors allegedly relied on by Schulte in his reasonable suspicion calculus. For example, the Tenth Circuit found as a matter of law that the following factors carry little, if any, weight in determining whether Schulte had reasonable suspicion to detain the Shaws: Blaine Shaw's failure to timely pull over, (doc. #280 at 17); his Colorado destination, *id*. at 18; and the fact that the minivan he was driving was registered to his father, *id*. at 19. The court further explained that other factors not in dispute—including Blaine's prior criminal conviction—when "combined with the minimal value attributed to other factors identified by Trooper Schulte" did not support reasonable suspicion as a matter of law. *Id*. at 20. The only two factors articulated by Schulte that could be given any weight, according to the Court, were the nervousness of Sam Shaw and the "lived in look" of the minivan—but these facts were disputed, and a reasonable jury could conclude they

were not true, or that Schulte was not credible. *Id*. at 17. This Court is bound by the Tenth Circuit's ruling since the factual record is the same now as it was before the Tenth Circuit.

Finally, to the extent the fact purports that Schulte's declaration attached to Jones' motion articulates these reasons as a basis for his reasonable suspicion to detain the Shaws, the fact is not supported by the record Jones cites. Schulte's declaration states that he "do[es] not remember each basis or factor for my reasonable suspicion that justified the extended detention and canine search." Def. Ex. 14 at ¶ 20. It is also controverted, insofar as Trooper Schulte's deposition testimony contradicts this statement of fact, especially when each specific element is questioned. Pls. Ex. 8, Schulte Dep. 207-214; *see Law Co. v. Mohawk Constr. & Supply Co*., 577 F.3d 1164, 1169 (10th Cir. 2009) (courts disregard affidavits that conflict with other evidence when "they conclude that it constitutes an attempt to create a sham fact issue.").

It is uncontroverted that: during the stop, dispatch relayed that B. Shaw had a 2009 felony for intent to distribute narcotics; during the stop, B. Shaw relayed the minivan belonged to his father; prior to the stop, the minivan was traveling on I-70; and the KHP refers to I-70 as a "known drug trafficking corridor." It is controverted that B. Shaw did not timely pull over; the minivan was crammed full of stuff, and that S. Shaw was acting suspiciously during the stop. Pls. Ex. 46, Schulte's Dash Camera Video, Part 1 at 2:00-3:25; 3:50-4:39; 4:25-15:45; 45:43-47:45; Pls. Ex. 69, S. Shaw Aff. ¶¶ 6, 7; and Doc. #280. To the extent Trooper Schulte is seeking an inference that the car appeared lived in based on its contents, S. or Shaw was acting suspicious, that is not appropriate for summary judgment. *Anderson*, 477 U.S. 242 at 255; *see also Vette*, 989 F.3d 1154 at1164 (denying motion for summary judgment seeking qualified immunity).

53. Schulte did not physically interfere with Plaintiffs' departure when B. Shaw consented to a very short conversation after Schulte handed to B. Shaw and explained a ticket for

speeding, returned B. Shaw's license and proof of insurance, said "have a safe trip and drive safely," started walking back to toward his patrol vehicle, but returned to side of the vehicle. Exh. 15, ¶¶ 20-21. *See also* Doc(s). 148 & 163, Def. Exhibit 2a (conventionally filed) at 15:08 - 15:16 (showing Schulte positioned away from the minivan when consent was requested [probably 1 to 2 feet]).

RESPONSE: Plaintiffs object that the fact is vague as to what is meant by "physically interfere." Plaintiffs controvert the fact to the extent it purports that the Shaws were free to leave. When Trooper Schulte sought to ask more questions, he was still standing next to the vehicle, less than an arm's length away from the minivan. Pls. Ex. 46, Schulte's Dash Camera Video, Part 1 at 15:09-15:11; Pls. Ex. 48, B. Shaw Aff. ¶¶ 14, 15. When Trooper Schulte sought to ask more questions, B. Shaw could not have pulled away without endangering Trooper Schulte. Pls. Ex. 46, Schulte's Dash Camera Video at 15:09-15:11; Pls. Ex. 48, B. Shaw Aff. ¶ 15. Plaintiffs also object that this purported fact is not material for purposes of Jones' Motion for Summary Judgment. *See* Doc. #315 § V.D. (The inquiry for the Court is whether or not a motorist feels free to leave. Jones has interpreted the word "block" in the First Amended Complaint to require that the KHP trooper keeps his or her hand on the vehicle or otherwise is in physical contact with the vehicle during the duration of the questioning. But Plaintiffs have never advanced this decidedly limited definition.).

54. On March 9, 2018, at 5:41 a.m., KHP Master Trooper Justin Rohr stopped an east bound Winnebago Chalet on Interstate 70 ("I 70"), at mile marker 226, for driving on and over the [shoulder's] white line. Ex. 7 (Rohr Depo), 86:5-16; ticket. Mark Erich was driving. After the traffic stop was complete, Rohr detained Erich and his passenger for a canine sniff of the Winnebago. *Id*.

RESPONSE: It is uncontroverted that on March 9, 2018, at 5:41 a.m., KHP Master Trooper Justin Rohr stopped an east bound Winnebago Chalet on I-70, at mile marker 226, when it crossed on and over the shoulder's white line. It is uncontroverted Mark Erich was driving. It is uncontroverted that after the traffic stop was complete, Rohr detained Erich, his wife, and his two minor children for a canine sniff of the Winnebago.

Plaintiffs controvert this fact only to the extent it purports to claim that Rohr stopped the Winnebago merely for crossing the white line as opposed to stopping it for the purpose of conducting a canine sniff or search. Rather, Rohr wanted to search the vehicle because he was suspicious because it was an older model RV with Colorado temporary tags. *See* Pls. Ex. 9, Rohr Dep. at 75:11-76:2, 76:11-20, 97:16-21, 215:7-15 (Rohr was driving westbound on 1-70, and after seeing the Winnebago, Rohr crossed the grass median to follow it. When Rohr saw the Winnebago and changed direction, he had not observed the Winnebago violate any traffic law. Rohr turned around "solely because it was an RV." As Rohr approached the Winnebago, he observed the vehicle's Colorado temporary tags. Rohr believes that "Colorado is a known source for a large amount of illegal marijuana . . .").

55. Rohr asserts a particularized and objective basis for suspecting legal wrongdoing from the following:

(7) **Walking to the vehicle after it pulled over, Rohr smelled the odor of very recently applied fresh paint or bondo at the rear of the Winnebago where spare tires are frequently mounted and where it appeared that the vehicle had been painted over with white paint.**[17]

(8) **Erich said he had recently purchased the older model Winnebago Chalet. Rohr's training and experience was hidden compartments are frequently added by smugglers to older model, recently purchased, larger vehicles to transport illegal drugs.**

[17] The term "bondo" is used generically—like Xerox or Kleenex—for an automotive plastic body filler or resin used to repair vehicle dents or damage.

(9) **It was early in the morning and still dark. Rohr's training and experience is that people trafficking illegal narcotics will sometimes travel overnight to attempt to avoid law enforcement because the least amount of law enforcement is out and present.**

(10) **After inquiring about the fresh paint/bondo smell, Rohr did not find credible the driver's and passenger's denial of knowledge of recent painting because they said the Winnebago had been purchased, not just a few days before, but about a month earlier.**

(11) **Rohr also saw white paint on Mr. Erich's hand suggesting he had done the painting, but again was not being honest.**

(12) **They said that they were traveling from Colorado to Alabama, which added circumstances consistent with Rohr's suspicions because Colorado was a source state for illegal narcotics at the time.**

Ex. 7, 206:11-216:3

RESPONSE: Plaintiffs object that this fact is vague as to what it is purporting. First, the footnote states: "[t]his is a list of the circumstances that Schulte articulated for the post-stop detention." Plaintiffs controvert that Rohr articulated this list of circumstances during or immediately after his stop, and the record cited by Jones does not support that fact. To the extent Jones is purporting that Rohr articulated these facts in his deposition in this case, that is addressed below.

The footnote further states: "Plaintiffs and the Court are asked, in this motion, to approve or endorse their validity for qualified immunity or determination of the constitutionality of the detention." This ask is wholly inappropriate in a statement of fact. Plaintiffs do not "approve or endorse" the list as anything other than an after-the-fact list of things that Rohr concocted from review his dash cam video and disputed "recollection" in response to the Erich and Maloney's claim that Rohr lacked reasonable suspicion to detain them. The Court should also decline to "approve or endorse" the validity of this list for qualified immunity or determination of the constitutionality because (1) qualified immunity is not an issue in this stop because Rohr is not a

current defendant; and (2) because the detention was unconstitutional for the reasons outlined below in response to this purported fact and as further detailed in Plaintiffs' affirmative motion for summary judgment and argument below.

The record cited by Jones in support of this fact is replete with leading objections asserted by counsel for Plaintiffs. Plaintiffs reassert those objections here.

Plaintiffs controvert that Rohr smelled the odor of very recently applied fresh paint or bondo at the rear of the Winnebago. Pls. Ex. 64, Rohr Dash Cam at 33:28-33:37 (While searching, Rohr asked his partner if he smelled the paint, and his partner replied, "Not yet."); Pls. Ex. 63, Maloney Dec. at ¶ 14 ("Because I was pregnant I was very sensitive to smells. Neither the inside nor outside of the vehicle smelled like wet paint."). For the same reason, Plaintiffs controvert that Rohr did not find their responses regarding fresh paint credible. *Id.* Moreover, Rohr provides no explanation for why he did not find Mr. Erich's response that he is a painter credible. It is uncontroverted that the Winnebago was recently purchased; that the stop was early in the morning and still dark; and that Rohr found the fact that they were traveling from Colorado suspicious because he claims Colorado was a source state for illegal narcotics.

To the extent Jones is seeking an inference that Erich and Maloney answers appeared not credible, that is not appropriate for summary judgment. *Anderson,* 477 U.S. 242 at 255; *see also Vette,* 989 F.3d 1154 at1164 (denying motion for summary judgment seeking qualified immunity).

56. That they had a Colorado temporary plate was not one of the things that led to Rohr's suspicions to detain the Winnebago. Ex. 7, 98:1-4. Fact registered in Colorado is not a factor in the reasonable suspicion calculus. *Id.*, 203:20-204:2. Likewise, the fact that someone is from Colorado, in and of itself, was a factor in the reasonable suspicions he formed. *Id.*, 203:3-23. However, he maintains travel to or from a known source or area for illegal narcotics can be part of

the totality of everything that infers illegal conduct. He gave the example of how it might be relevant.

RESPONSE: Uncontroverted that Rohr found someone being from Colorado, in and of itself, was a factor in the reasonable suspicions he formed. Controverted that the Colorado temporary plate was not one of the things that led to Rohr's suspicions to detain the Winnebago. Rohr's testimony is contradictory on this point. Rohr testified that as he approached the Winnebago, he observed the vehicle's Colorado temporary tags. Pls. Ex. 9, Rohr Dep. at 97:16-22. Rohr believes that "Colorado is a known source for a large amount of illegal marijuana[.]" Pls. Ex. 9, Rohr Dep. at 215:7-15. Rohr also testified he has been in vehicles seized in the past that have been older model RV that somebody had recently purchased. Pls. Ex. 9, Rohr Dep. at 214:11-24. The Winnebago's temporary tag is noted in Rohr's Canine Deployment Report. Pls. Ex. 70, OAG005990-91. Trooper Rohr regularly notes Colorado registration in canine deployment reports. Pls. Ex. 71, Rohr Canine Deployment Reports (OAG004650-51, OAG004780-81).

57. In their Count 2, Plaintiffs allege that KHP increased its scrutiny of drivers who were traveling to and from Colorado after Colorado legalized the recreational cultivation, sale and possession of marijuana. Doc. 7 (First Amended Complaint), ¶¶ 26-35. According to Plaintiffs, this resulted in disproportionate traffic stops and searches of out-of-state motorists, by KHP troopers, relative to Kansas motorists. *See* UF ¶ 41. They claim that this "practice of targeting out-of-state drivers and Colorado-travelers" violates the right to travel or right to free movement afforded under the United States Constitution. Doc. 7, at 6 & ¶¶ 120-127.

RESPONSE: Plaintiffs incorporate their response to Df. SOF ¶ 41. Further answering, it is uncontroverted that in Paragraphs 26-35 and 120-127 of the First Amended Complaint, Plaintiffs

alleged the following. To the extent this fact purports anything inconsistent with the following, it is controverted.

FACTUAL ALLEGATIONS

The KHP's General Practice of Targeting Out-of-State Drivers and Colorado-Travelers

26. Colorado legalized cultivation, sale, and possession of medicinal marijuana in 2010 and recreational marijuana in 2014.[11]

27. Kansas law enforcement quickly characterized Colorado's marijuana legalization efforts as a threat to Kansas's public health and safety.[12]

28. In 2016, Kansas Attorney General Derek Schmidt issued a survey to law enforcement agencies in an attempt to capture the impact Colorado-sourced cannabis was having on Kansas.[13]

29. KHP replied to the Attorney General's survey and reported a significant increase in their seizures of marijuana originating from Colorado—suspecting that 69% of all marijuana seized in 2015 came from Colorado.[14]

30. As a result of Colorado's decision to legalize marijuana, KHP increased scrutiny of drivers traveling to and from Colorado.[15]

31. Defense attorneys reported an uptick in clients with Colorado travel plans being targeted by KHP troopers for stops, prolonged questioning, and detentions.[16] This trend was noted as particularly true for out-of-state drivers.

32. Attorney Christopher Joseph succinctly explained KHP's practice of targeting out-of-state drivers going to or leaving Colorado, noting "It's not lawful, but they do it. They know they do it. They're trained to do it . . . ."[17]

33. KHP stop and forfeiture data demonstrates out-of-state drivers are disproportionately stopped by KHP troopers and subjected to civil asset forfeiture proceedings at higher rates.

34. Drivers with out-of-state plates made up 93% of KHP stops in 2017.[18]

35. Further, out-of-state motorists driving through Kansas on I-70 constituted 96% of all reported KHP civil forfeitures from 2018 to 2019.[19] Two-thirds of those motorists were either drivers of color or had passengers of color in their vehicle.[20]

[11] Colo. Const. Art. XVIII, Sec. 16.

[12] Oliver Morrison, *Colorado pot isn't affecting Kansas like you think,* THE WICHITA EAGLE, Oct. 12, 2016 (quoting Attorney General Derek Schmidt, "Here you have our sister state—we love them, we get along great with them most of the time. But doggone it, they have done something that federal law says they may not do, and it's Kansans who are paying a price for that.")

[13] *"Legalization" of Marijuana in Colorado: The Impact on Kansas*, Kansas Attorney General, Oct. 18, 2016 available at https://ag.ks.gov/docs/default-source/documents/colorado-marijuana-report.pdf?sfvrsn=9cadd81a_12.

[14] *Id.*

[15] Bruce Kennedy, *Colorado's legal cannabis not welcomed in neighboring states*, CBS NEWS, Jan. 17, 2014, https://www.cbsnews.com/news/colorados-legal-cannabis-not-welcomed-in-neighboring-states/.

[16] *Id.* (quoting defense attorney Brian Lenninger, "The Kansas Highway Patrol and police agencies out near the border are really looking hard for people who are bringing marijuana into the state from Colorado . . ."); Joy, n.4 *supra* (quoting defense attorney Christopher Joseph "'It works. It makes sense,' Joseph said about stopping out-of-state vehicles. 'To say that they don't do that seems silly because of course they do.'"'); Tony Rizzo, *Some note an uptick in marijuana busts near the Colorado border*, THE KANSAS CITY STAR, Feb. 12, 2014, https://www.kansascity.com/news/local/article338976.html (quoting Sean McAllister, a Denver criminal defense attorney and spokesman for the Colorado chapter of the National Organization to Reform Marijuana Laws, "I've had several clients pulled over by police in Kansas, Missouri and Nebraska," McAllister said. "I think there's been a lot of profiling of Colorado plates.")

[17] Moore, n.3 *supra*.

[18] Joy, n.4 *supra*.

[19] *See* n.5 *supra.*

[20] *Id.* (18 or the 27 KHP stops of out-of-state drivers on I-70 resulting in forfeiture included at least one person of color in the vehicle.)

120. Article IV, Section 2 of the United States Constitution provides that the citizens of each state shall be entitled to all Privileges and Immunities of citizens in the other states. The Privileges and Immunities Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall make any law which shall abridge the privileges or immunities of the citizens of the United States. Both of these clauses establish and protect the right to travel in these United States.

121. The United States Supreme Court "long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969), overruled in part on other grounds by *Edelman v. Jordan*, 415 U.S. 651 (1974). "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." *Smith v. Turner*, 48 U.S. 283, 492 (1849). "The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." *United States v. Guest*, 383 U.S. 745, 757 (1966).

122. "The 'right to travel' . . . embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). The first and second of these components are implicated by the illegal actions of the KHP addressed herein.

123. Defendants actively created and enforced a policy to target vehicles with out-of-state license plates as part of their drug interdiction program; thereby penalizing out-of-state motorists for exercising their right to travel or right to free movement.

124. Defendants did so, while acting under color of state law and without reasonable suspicion, and restricted the right of the Named Plaintiffs and the Class Members to travel freely through Kansas to and from Colorado and to be treated as a welcome visitor in Kansas, which restrictions were based in large part on travelling through Kansas to or from Colorado in a vehicle registered in another state.

125. At the time of the events described herein, each of the Named Plaintiffs and the Class Members were driving a vehicle registered in a State other than Kansas and was engaged in interstate travel when they were stopped.

126. Establishing and enforcing a policy to target vehicles with out-of-state license plates for purposes of drug interdiction activities infringes upon the right to travel under Article IV, section 2 and the Fourteenth Amendment of the United States Constitution and/or other laws of the United States.

127. The constitutional rights of the Named Plaintiffs and Class Members have been violated under the Privileges and Immunities Clauses of Article IV, section 2, and the Fourteenth Amendment of the United States Constitution by the Defendants, as described herein.

WHEREFORE, Plaintiffs ask that this Honorable Court:

a. Enter judgment against Defendant Jones for the declaratory and injunctive relief requested;

b. Award Plaintiffs attorneys' fees and costs; and,

c. Award any further relief that this Honorable Court deems just and equitable.

58. In their Count I, Plaintiffs assert variously that Jones maintains a policy, practice and custom of detaining drivers on I-70 that violates Fourth Amendment rights against unreasonable searches and seizures. In particular, this Court listed the alleged unconstitutional polices, practices or customs as follows:

A. Prolonged Detentions

> When KHP troopers suspect that a driver on I-70 is traveling to or from Colorado, they employ a maneuver called the "Kansas Two Step," in which they detain the driver after the initial purpose of the traffic stop has ended and ask questions about his or her travel plans. To conduct this maneuver, KHP troopers block the detained vehicle from safely re-entering traffic while questioning the occupants about their travel plans and whether the vehicle contains anything illegal.

B. Canine Drug Searches [sic[21]]

> If KHP troopers apply the Kansas Two Step but cannot elicit consent to search, they have canines search [sic] the vehicle for drugs based solely on their belief that the driver is traveling to or from Colorado. . .

C. KHP Training

> Despite the Tenth Circuit ruling in *Vasquez* [*v. Lewis*], KHP still instructs its troopers that when combined with other innocuous factors, a driver's travel origin or destination grants reasonable suspicion to search the vehicle. KHP does not train its troopers that using these factors to search vehicles violates the Fourth Amendment to the United States Constitution, and it does not include *Vasquez* in its training curriculum.

Shaw v. Jones, No. CV 19-1343-KHV, 2020 WL 2101298, at *1-3 (D. Kan. May 1, 2020).

RESPONSE: Plaintiffs object that the fact is vague as to what is meant by "variously." Plaintiffs also object to the fact to the extent is seeks to impose a burden on Plaintiffs for which they are not required to meet. Plaintiffs incorporate section IV, of their argument addressing why they are not required to show an "official policy or custom," which in part states, the Tenth Circuit has noted that the *Monell* standard for liability "has no applicability" to lawsuits brought pursuant to *Ex Parte Young. See Rounds v. Clements*, 495Fed. App'x 938, 941 (10th. Cir. 2012). It is uncontroverted that Plaintiffs assert Defendant Jones maintains a practice of detaining drivers using state residency and innocent-travel indicia which violates the Fourth Amendment rights of Plaintiffs. (Count 1 of Shaw/Bosire First Amended Complaint; Count 2 of Erich/Maloney Complaint). (Doc. #290 at p. 39).

The remainder of this purported fact appears to argue that Bosire and Shaw Plaintiffs' allegations in their First Amended Complaint as well as Erich, Maloney, and minor Plaintiffs' allegations in their Complaint should now be constrained by the background summary provided by the Court in its order *denying* Defendant Jones' motion to dismiss. Plaintiffs object to the extent the purported fact seeks to narrow their pending claims, and objects to the extent that Jones' attempt to do so is a legal argument, not a statement of fact. A statement of fact is not the proper procedure for such an argument. Moreover, Defendant already made the same argument during the pretrial conference, and it was overruled. The Court found that Jones has had more than enough notice of the claims in this lawsuit and that the Court's

motion to dismiss summary did not alter Plaintiffs' claims. Plaintiffs' claims are set forth in their operative complaints, have been discussed at length throughout discovery, and, most importantly, are set forth in the Court's pretrial order, Doc. #290.

59. But in their answers to interrogatories state, the Plaintiffs state:

> INTERROGATORY NO[s]. 2, [3 & 4]: Separately for each "policy" ["custom", "practice"] you contend that Defendant Jones has or maintains, which you assert violate federal constitutional rights or statutes, describe the alleged policy ["custom", "practice"], state the material and principal facts supporting your allegations that such a policy ["custom", "practice"] exists, and identify all persons with personal knowledge of some or all such facts and identify all documents or tangible things that tend to prove or constitute, describe or report such facts (excluding documents which are confidential by attorney/client or work product privilege).
>
> ANSWER: Plaintiffs' are still in the process of determining whether widespread and ratified conduct of targeting out of state drivers/drivers with travel plans to and from Colorado constitutes a policy, custom, practice, or consequence of failure to train. …

Exhibits 16, Interrogatory Answers ## 2-4. The answers have never been amended or supplemented.

RESPONSE: Plaintiffs incorporate their response to Df. SOF 58. It is uncontroverted that Bosire and Shaw Plaintiffs answered Interrogatories ## 2-4 as follows, and that Erich, Maloney, and minor Plaintiffs' like answers were attached as Def. Ex. 15.Plaintiffs further answer that their claims regarding polices, practices, and customs of the KHP have been consistently discussed in discovery, arguments, and the Pretrial Order, Doc.#290. To the extent, Jones is complaining that discovery was not supplemented, a statement of fact is not the appropriate procedure for doing so, and the deadline for a motion to compel has expired.

INTERROGATORY NO. 2: Separately for each "policy" you contend that Defendant Jones has or maintains, which you assert violate federal constitutional rights or statutes, describe the alleged policy, state the material and principal facts supporting your allegations that such a policy exists, and identify all persons with personal knowledge of some or all such facts and identify all documents or tangible things that tend to prove or constitute, describe or report such facts (excluding documents which are confidential by attorney/client or work product privilege).

ANSWER: Plaintiffs' are still in the process of determining whether widespread and ratified conduct of targeting out of state drivers/drivers with travel plans to and from Colorado constitutes a policy, custom, practice, or consequence of failure to train. To the extent the conduct is a policy, Plaintiffs' respond as follows:

For the material facts, *See* Compl. ¶¶26-57; 94-96.

Persons with personal knowledge of these facts include:

a) Sarah Washburn

b) Randy Moon

c) Doug Schulte

d) Brandon McMillian,

e) Superintendent Herman Jones

f) Lt. Col. Jason De Vore,

g) Frmr. Lt. Simone Kirk,

h) Lt. John Rule

i) Trooper Bryan Clark

Documents that tend to prove these facts include:

a) Sarah Washburn, *Advanced Interdiction Case Outline* (Kan. Highway Patrol, 2019)

b) EPIC Operation Pipeline: Passenger Vehicle Drug Interdiction, Kansas Highway Patrol

c) Kan. Bureau of Investigation, *Kansas Asset Forfeiture Reporting*, KANSAS ASSET SEIZURE AND FORFEITURE REPOSITORY

d) Affidavit of Lt. John Rule, *State of Kansas, ex. rel. Kansas Highway Patrol v. $27,000 in US Currency, M/L 3 Marijuana Cigarettes*, No. 2019-cv-000014 (Dist. Ct. Wabaunsee County Feb. 19, 2019)

e) Affidavit of Trooper Bryan Clark, *State of Kansas ex. Rel. Kansas Highway Patrol v. $16,000 in U.S. Currency, M/L*, 2019-cv-000032 (Dist. Ct. Wabaunsee County Aug. 6, 2019).

f) Affidavit of Trooper James McCord, *State of Kansas v. Beloat*, 19-cr-101 (Dist. Ct. Russell County Jun. 27, 2019).

INTERROGATORY NO. 3: Separately for each "custom" you contend that Defendant Jones has or maintains, which you assert violate federal constitutional rights or statutes, describe the alleged custom, state the material and principal facts supporting your allegations that such a custom exists, and identify all persons with personal knowledge of some or all such facts and identify all documents or tangible things that tend to prove or constitute, describe or report such facts (excluding documents which are confidential by attorney/client or work product privilege).

ANSWER: Plaintiffs are still in the process of determining whether widespread and ratified conduct of targeting out of state drivers/drivers with travel plans to and from Colorado constitutes a policy, custom, practice, or consequence of failure to train. To the extent the conduct is a custom, Plaintiffs respond as follows:

For the material facts, *See* Compl. ¶¶26-57; 94-96.

Persons with personal knowledge of these facts include:

a) Sarah Washburn

b) Randy Moon

c) Doug Schulte

d) Brandon McMillian,

e) Superintendent Herman Jones

f) Lt. Col. Jason De Vore,

g) Frmr. Lt. Simone Kirk,

h) Lt. John Rule

i) Trooper Bryan Clark

Documents that tend to prove these facts include:

a) Sarah Washburn, *Advanced Interdiction Case Outline* (Kan. Highway Patrol, 2019)

b) EPIC Operation Pipeline: Passenger Vehicle Drug Interdiction, Kansas Highway Patrol

c) Kan. Bureau of Investigation, *Kansas Asset Forfeiture Reporting*, KANSAS ASSET SEIZURE AND FORFEITURE REPOSITORY

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f) Affidavit of Trooper James McCord, *State of Kansas v. Beloat*, 19-cr-101 (Dist. Ct. Russell County Jun. 27, 2019).

INTERROGATORY NO. 4: Separately for each "practice" you contend that Defendant Jones has or maintains, which you assert violate federal constitutional rights or statutes, describe the alleged practice, state the material and principal facts supporting your allegations that such a practice exists, and identify all persons with personal knowledge of some or all such facts and identify all documents or tangible things that tend to prove or constitute, describe or report such facts (excluding documents which are confidential by attorney/client or work product privilege).

ANSWER: Plaintiffs are still in the process of determining whether widespread and ratified conduct of targeting out of state drivers/drivers with travel plans to and from Colorado constitutes a policy, custom, practice, or consequence of failure to train. To the extent the conduct is a practice, Plaintiffs respond as follows:

For the material facts, *See* Compl. ¶¶26-57; 94-96.

Persons with personal knowledge of these facts include:

a) Sarah Washburn

b) Randy Moon

c) Doug Schulte

d) Brandon McMillian,

e) Superintendent Herman Jones

f) Lt. Col. Jason De Vore,

g) Frmr. Lt. Simone Kirk,

h) Lt. John Rule

i) Trooper Bryan Clark

Documents that tend to prove these facts include:

a) Sarah Washburn, *Advanced Interdiction Case Outline* (Kan. Highway Patrol, 2019)

b) EPIC Operation Pipeline: Passenger Vehicle Drug Interdiction, Kansas Highway Patrol

c) Kan. Bureau of Investigation, *Kansas Asset Forfeiture Reporting*, KANSAS ASSET SEIZURE AND FORFEITURE REPOSITORY

d) Affidavit of Lt. John Rule, *State of Kansas, ex. rel. Kansas Highway Patrol v. $27,000 in US Currency, M/L 3 Marijuana Cigarettes*, No. 2019-cv-000014 (Dist. Ct. Wabaunsee County Feb. 19, 2019)

e) Affidavit of Trooper Bryan Clark, *State of Kansas ex. Rel. Kansas Highway Patrol v. $16,000 in U.S. Currency, M/L*, 2019-cv-000032 (Dist. Ct. Wabaunsee County Aug. 6, 2019).

f) Affidavit of Trooper James McCord, *State of Kansas v. Beloat*, 19-cr-101 (Dist. Ct. Russell County Jun. 27, 2019).

III. Plaintiffs have Standing to assert their Fourth Amendment Claims.

Jones' argument that Plaintiffs lack standing to prosecute their Fourth Amendment claims is unavailing.

Jones' factual citations in support of his standing argument are few, and moreover, unsupported. For example, Jones' states, "each year approximately 200,000 traffic stops are conducted by KHP troopers throughout the state." In support of that contention, he cites paragraph 45 of his facts, which in turn cites paragraph 42 of his facts. A simple review by the Court of Jones' Exhibit 11 and paragraph 42 show that the fact is wholly unsupported by the record. Not a single number listed in paragraph 42 matches the number for any year listed in Jones' Exhibit 11.[18] Next, citing his facts at paragraph 45, Jones states, "[t]his is a very small fraction of the traffic in the state." As noted in Plaintiffs' response to that fact, there are multiple issues, including that Jones' numbers were exaggerated in that they failed to account for the fact that a single motorist could activate five traffic sensors on just on a one-way trip or ten sensors on a round trip. Notably, both Jones' inaccurate statements of Exhibit 11 and the KDOT data issues were highlighted in Plaintiffs' Response to Defendants' Statement of Facts at Doc. 315 at pp. 36-38. Despite this, Jones' did not correct his statements or record in his later filed response to Plaintiffs' motion for summary judgment. Doc. 325 at p. 92.[19]

It is against that unsupported and inaccurate backdrop, and Jones' conclusory claim that, "[t]here is no allegation or evidence that Jones' policy or custom is that troopers are to detain people without reasonable suspicion or voluntary consent[,]" that Jones argues Plaintiffs' lack

[18] While KHP continues to assert that its data processes are not antiquated, Jones' statement of fact paragraph 42 is the third statement of yearly statistics dating back to 2016, and each time the KHP states what the historical numbers were, they inexplicably change.

[19] Without explanation, Jones changes his reference from Ex. 11 to Ex. 12. However, the supplemental responses he cites are Def. Ex. 11.

standing. As further detailed in Plaintiffs' memorandum in support of their motion for summary judgment, the evidence in this case shows KHP engages in an ongoing practice of violating motorists Fourth Amendment rights to be free from prolonged roadside detentions absent reasonable suspicion. And as further discussed in Plaintiffs' memorandum in support of their motion for summary judgment, Plaintiffs have standing to bring their claims.

IV. Ex parte young v. Monell liability

Throughout his brief, and other recent briefing in this case, Jones has asserted that Plaintiffs must meet the standard of liability generally reserved for holding *municipalities* liable in cases brought under 42 U.S.C. § 1983. This singular focus on the municipal liability standard, which derives from *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978), is misplaced. The holding of *Monell* is "limited to local government units." *Id.* at 690, n.4. This is a lawsuit brought under *Ex Parte Young* against a state official. Defendant cites no Tenth Circuit authority demonstrating that a suit brought under *Ex Parte Young* against a *state* official must meet an identical standard as a case brought against a municipality, through a municipal policymaker.[20]

Instead, Plaintiffs must show that the defendant in an *Ex Parte Young* suit has "a measure of proximity to and responsibility for the challenged state action," so that an injunction against that person will be effective for resolving the underlying claim. 17A Moore's Fed. Practice—Civil § 123.40(3)(a)(v). To be sure, Defendants are correct that Section 1983 lawsuits do not permit findings of vicarious liability against government agencies for the tortious conduct of the agency's

[20] Jones points to *Kentucky v. Graham*, 473 U.S. 159 (1985), as evidence that municipal liability standards must apply in an official capacity action against a state official under *Ex Parte Young*. (Doc. #324 at 12). But nothing in *Graham* even makes that suggestion. *Graham* was a personal capacity lawsuit. 473 U.S. at 167-68. Moreover, the decision dealt with the fee-shifting provisions of 42 U.S.C. § 1988, not the proper standard of proof for liability of a state official. The mere fact that *Monell* was discussed in the opinion lends no weight to Jones' position that Plaintiffs must meet the *Monell* standard to prevail in this *Ex Parte Young* action against Jones.

employees. But Plaintiffs are not proceeding on a theory of vicarious liability in their case against Jones. They are not attempting to hold Jones liable for the conduct of a single bad actor within his agency, over which Jones had no knowledge or control. Rather, they are arguing that Jones should be liable for the ongoing practice of constitutional violations that he himself has enabled, by failing to correct problematic tactics within his department, ignoring his responsibility to properly supervise troopers, and approving training that is not in lockstep with Tenth Circuit law.[21]

Ex Parte Young lawsuits brought under 42 U.S.C. § 1983 sound in tort. *See Monroe v. Pape*, 365 U.S. 167, 187 (1961) (Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."). This has led courts across different circuits to apply basic tort law principles of causation in examining liability for a Section 1983 defendant. *See, e.g., Malley v. Briggs*, 475 U.S. 335, 344 & n.7 (1986) (holding that a judge's decision to issue an arrest warrant does not break the causal chain between an officer's constitutionally defective warrant application and the ensuing arrest); *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 609 (6th Cir. 2007) ("Even if an intervening third party is the immediate trigger for the plaintiff's injury, the defendant may still be proximately liable, provided that the third party's actions were foreseeable."); *Herzog v. Vill. of Winnetka,* 309 F.3d 1041, 1044 (7th Cir. 2002) (holding that a § 1983 defendant can be liable for any "foreseeable

[21] Plaintiffs do not allege that Jones *directly instructed* troopers to repeatedly engage in unlawful conduct. Nor do Plaintiffs allege that Jones demands that troopers "*must* use the 'two-step'", or that troopers "*must* use destination or origin city or state in developing reasonable suspicion." (Doc. #324 at 11) (emphasis added). Such a framing by Jones in his opposition brief is an intentional oversimplification and misstatement of Plaintiffs' claims. Rather, Plaintiffs point to all the ways in which Jones *knew* of unlawful conduct, or the potential for continued unlawful conduct, within his agency, and either looked the other way or failed to exercise appropriate control over troopers' supervision and training to nip those constitutional violations in the bud. Liability for the head of a law enforcement agency in a Section 1983 suit does not require direct orders to violate the constitution. Jones' unsupported suggestion otherwise should be disregarded.

consequences" of the unconstitutional conduct because "the ordinary rules of tort causation apply to constitutional tort suits liability"); *cf. Murray v. Earle*, 405 F.3d 278, 290–91, 292 n. 51 (5th Cir. 2005) (noting that "[a] corollary of these background tenets of tort law relieves tortfeasors from liability if there exists a superseding cause"). Here, the question for the court is one that lies at the intersection of standing doctrine, per *Lyons*, and tort-based causation principles: is there ongoing unconstitutional conduct that can, in part, be attributable to Jones' action or inaction? Plaintiffs pointed to ample evidence in their summary judgment briefing to answer that question in the affirmative.

Rounds v. Clements, 495 Fed. App'x 938 (10th Cir. 2012) (unpublished), squarely addresses whether the "policy or custom" standard from *Monell* applies to official capacity suits brought against state officials under *Ex Parte Young*. Although the Tenth Circuit's analysis was primarily focused on whether Mr. Clements, the state official, was immune from suit, the court specifically addressed the applicability of *Monell*'s liability standard to *Ex Parte Young* lawsuits:

> Separately still, Mr. Clements argues that when a plaintiff sues a state employee in his official capacity, he must prove some "policy or custom" played a role in the alleged violation of federal law. Aplt. Br. at 18 (citing *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)). But at least two problems attend this line of argument. First, the "policy or custom" standard is a standard for determining liability under § 1983, not immunity from suit under the Eleventh Amendment. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). And, of course, the only question over which we have jurisdiction in this interlocutory appeal is the question of immunity, not the merits which even the district court has yet to reach. **Second, the "policy or custom" standard isn't just a liability standard, it's a liability standard for suits against municipalities — entities not immune from suit under the Eleventh Amendment — and it has no applicability to state officers who are immune from suit for damages but susceptible to suit under *Ex parte Young* for injunctive relief.** *See Monell*, 436 U.S. at 694-95.

Id. at 941 (emphasis added). This discussion is unequivocal. Justice Gorsuch, writing for the Tenth Circuit, clearly stated that the standard for *liability* in a Section 1983 case "has *no applicability to state officers*" in an *Ex Parte Young* lawsuit for injunctive relief." *Id.* (emphasis added). Although

the court did not reach the question of whether Mr. Clements was in fact liable for the injury sustained by Mr. Rounds, the court unambiguously stated that the proper standard for evaluating liability in an *Ex Parte Young* lawsuit would *not* be the "policy and custom" liability standard derived from *Monell*.[22] *Id.*

Yet, even if the Court were to decide that the *Monell* framework for municipal liability should be superimposed into an *Ex Parte Young* suit, Plaintiffs should still prevail. Plaintiffs have demonstrated that KHP continues to impermissibly consider travel to or from a drug source state as part of the reasonable suspicion calculus; KHP detains motorists without adequate reasonable suspicion, in part based on their travel plans to or from a drug source state; Jones is aware KHP troopers do this; Jones has been on notice that this violates the Fourth Amendment, via the decision in *Vasquez*; and Jones has not taken sufficient steps to curb this practice, and ensure his troopers understand their constitutional obligations. *See Finch v. Rapp*, 38 F.4th 1234, 1244 (to prove a *Monell* claim, the Plaintiff must show a policy or custom, which can include something "so entrenched in practice as to constitute an official policy," and that the policymaker was "deliberately indifferent to constitutional violations that were the obvious consequence of its policy", meaning the policymaker "had actual or constructive notice that its action or failure to act [was] substantially certain to result in a constitutional violation."). It is hard to imagine a situation

[22] Jones further cites to an unpublished case from the Eastern District of Tennessee, which has no precedential value, and an unpublished opinion from the District of Kansas, *Mullendore v. Cheeks*, No. 22-3160, 2022 U.S. Dist. LEXIS 154494 (D. Kan. Aug. 26, 2022). *Mullendore* involved a *pro se* plaintiff. The lawsuit was against various defendants and the court found the complaint was not properly pled. It was unclear whether the lawsuit was against officials in their personal capacity or official capacity, and the plaintiff sought both damages and injunctive relief. *Id.* at *8. The claims against the state medical contractor were not claims against a state official under *Ex Parte Young*. *Id.* at *8-9. Nothing in *Mullendore* stands for the proposition that an *Ex Parte Young* lawsuit against a state official for injunctive relief must meet the standard for municipal liability under *Monell*.

where a policymaker showed *greater* indifference than the one we have here: the Tenth Circuit admonished Jones' department to "abandon the pretense" that innocuous travel plans contribute to reasonable suspicion, *Vasquez*, 834 F.3d at 1137, yet Jones admits—with an air of pride—that he has made no changes to his agency's practices in response.

Defendant's main response to a claim of deliberate indifference is that KHP is accredited by the Commission on Accreditation of Law Enforcement Agencies (CALEA). For the reasons set forth in Plaintiffs' opposition to Jones' motion for summary judgment, and Plaintiffs briefing on their motion to exclude Defendants' non-retained "expert" Christi Asbe, this argument is unpersuasive. (*See* Doc. #315 at 130-133; Doc. #306 at 3-7; Doc. #329 at 4-11). Jones believes that the fact that KHP paid for a certification saying KHP is in compliance with a set of standards that do nothing to prevent unconstitutional policing should earn him a gold star and absolve him from liability in this case. (Doc. #324 at 26) (arguing that "given KHP's compliance with national standards for accreditation for best police practice," Plaintiffs' claim fails "by the affirmative proof of the lack of deliberate indifference."). But, as Plaintiffs have shown, CALEA accreditation does not bear the weight that Jones wishes to place upon it.

Jones' failure to ensure his department is policing in accordance with the constitution and clear Tenth Circuit law makes him directly—not vicariously—liable for the ongoing constitutional violations committed by KHP troopers.

V. Jones misunderstands the arguments made by Plaintiffs.

A. Plaintiffs do not claim the two step is facially unconstitutional.

Plaintiffs do not claim that the Two-Step maneuver used by the KHP is facially unconstitutional, and therefore, Jones' arguments regarding whether courts have determined that the Two-Step by itself violates the Fourth Amendment, (Doc. #324 at 15), are not relevant.

However, Plaintiffs claim—and the evidence shows—that KHP continues to use the Two-Step in a way that leads to unconstitutional detentions.

As a preliminary matter, the Court should disregard Jones' commentary that Plaintiffs' reliance on the Two-Step has somehow "shifted" from their First Amended Complaint. In the First Amended Complaint, Plaintiffs alleged, "KHP troopers typically execute the practice of impermissibly detaining a driver based on factors consistent with innocent travel after employing 'the Kansas Two Step' or a similar technique." (Doc. #7). The evidence has now proven this allegation true.

As explained in Plaintiffs memorandum in support of their motion for summary judgment, (Doc. #308 at 50), the Two-Step is part of KHP's ongoing practice of detaining drivers for questioning absent reasonable suspicion in violation of the Fourth Amendment. The way this plays out is that the trooper issues the driver a ticket or warning for an infraction, takes a step or two toward their patrol car before going back to the driver's window, the trooper then asks the driver to agree to answer "a quick question" or "a few more questions." The reason it leads to detaining drivers without reasonable suspicion is that the trooper then asks further questions about the driver's travel plans. If the driver declines to answer, or provides travel details that indicate they are coming from or going to a drug source city or state, the trooper asks if they are transporting anything illegal. When the driver denies transporting anything illegal, the trooper requests consent to search the car. If the driver declines consent, the trooper detains the driver for a canine sniff. Plaintiff's SOF ¶¶ 41-47, 69-73, 86-87, 96-100. As explained further in Plaintiffs' opening memorandum, the Two-Step is a ploy to by the trooper time to find a reason to detain the driver, but frequently, drivers are detained a) regardless of how they answer the questions following the

Two-Step, and b) in part based on their travel to or from a "drug source" state or city. (Doc. #308 at 54).

The Court should also disregard Jones' attempt to shoehorn Plaintiffs' claims regarding the Two-Step to involve only impermissible instances of when a trooper physically touched a vehicle. The Tenth Circuit has long recognized, "[a] detention for a traffic citation can turn into a consensual encounter after the trooper has returned the driver his documentation" *only if* "a reasonable person under the circumstances would believe he was free to leave or disregard the officer's request for information." *United States v. Wallace*, 429 F.3d 969, 974-75 (10th Cir. 2005) (quotation omitted); *see also United States v. Guerreroo-Espinoza*, 462 F.3d 1302, 1308 (10th Cir. 2006) (no evidence that a reasonable person in the defendant's circumstances would have felt free to leave, so continued detention for questioning was not consensual). Neither the Tenth Circuit nor Plaintiffs have placed any meaningful or dispositive emphasis on whether or not there was physical contact between the officer and the car in determining whether an encounter was consensual. Rather, the question is whether a reasonable person in the driver's circumstance would feel free to leave.

Jones' argument that B. Shaw's statement that he did not feel free to leave is "not relevant," (Doc. #324 at 15), shows that the KHP apparently misunderstands the relevant inquiry. Instead, Jones appears to argue that the only "***improper***" (emphasis in original) application of the Two-Step comes when a trooper physically touches a motorist's vehicle. And Jones asks the Court to discount B. Shaw's statement because review of the video shows that Trooper Schulte did not touch the van when reproaching. Again, that is not the relevant inquiry.

Rather, the question is whether a reasonable person in the driver's circumstance would feel free to leave. As discussed in Plaintiffs' opening memorandum, evidence in this case demonstrates

that drivers subjected to the Two-Step do not feel free to leave, and, in many cases, are physically unable to reenter traffic without putting themselves or the trooper at risk. (Doc. #308 at 52). This was the case in Trooper Schulte's stop of the Shaws. The Shaws did not free to leave once Trooper Schulte reproached their car window. Pl. SOF ¶ 138- 140. Blaine could not have safely pulled out into traffic with Trooper Schulte standing directly next to them without injuring the Trooper. *See* Doc. #177-2, B. Shaw Aff., ¶ 15-16.

This KHP's Two-Step practice contributes to ongoing violations of motorists' constitutional rights to be free from detention absent reasonable suspicion.

B. Jones' insistence that *Vasquez* is meaningless further underscores the need for injunctive relief.

Jones continues to maintain that the Tenth Circuit's decision in *Vasquez* has no meaning for KHP operations, and that KHP remains free to consider travel plans as part of the reasonable suspicion calculus. (Doc. #324 at 18-20). But Jones' arguments misread *Vasquez*, ignoring its central holding, while at the same time demonstrating why Plaintiffs should prevail: KHP still believes that it can rely on the fact that someone is coming from or going to a "drug source state" as part of an officer's reasonable suspicion calculus.

That is precisely what the Tenth Circuit told KHP it could *not* do. Jones' citation to a number of pre-*Vasquez* cases to support his argument, that "courts have found [a motorist's travel route] can add to the [reasonable suspicion] calculus," *id.* at 19, is therefore unpersuasive. While courts may have countenanced such reliance in the past, *Vasquez* admonished them from doing so in the future. In this way, *Vasquez* established principles to guide KHP going forward—principles that Jones continues to ignore. As Jones recognizes, the *Vasquez* court clearly stated that "any fact that would inculpate every resident of a state cannot support reasonable suspicion." *Vasquez*, 834 F.3d at 1137. This Court itself previously recognized the how the *Vasquez* decision should impact

KHP's consideration of state of origin or destination in the reasonable suspicion calculus, noting that under this precedent, "even when combined with other factors, a driver's status as a Colorado resident does not give KHP troopers reasonable suspicion to subject the driver to prolonged detention and a vehicle search." (Doc. #36 at 4).

This is not a case challenging an officer's ability to inquire about travel plans during a traffic stop. Nor is it a case about KHP's reliance on *implausible* travel plans in finding reasonable suspicion. (*See* Doc. #308 at 46-47). Jones' repeated attempts to argue the validity of those practices are a distraction—they are not at issue here. As Plaintiffs made clear in their opening brief, they challenge KHP's consistent and improper practice of targeting out-of-state motorists for prolonged detention without adequate reasonable suspicion, *in part* because of those motorists travel plans to or from places that KHP considers to be "drug source states." (Doc. #308 at 46-50). Plaintiffs pointed to significant evidence that KHP continues to do this, despite the holding in *Vasquez*. (Doc. #308, Pl. SOF ¶¶ 29-40).

Finally, Jones argues that even if KHP impermissibly relies on a motorist's state of origin or destination, there has been no showing that KHP unconstitutionally prolongs detentions without reasonable suspicion. (Doc. #324 at 21). This ignores the wealth of evidence offered in Plaintiffs' opening brief. And it ignores what KHP troopers will continue to do absent an injunction—impermissibly rely on innocent travel related indicia as grounds, in whole *or in part*, for prolonging roadside detentions—because Jones has failed to correct this practice, through proper oversight, training, and accountability measures, following the Tenth Circuit's holding in *Vasquez*. *See Vasquez*, 834 F.3d at 1137 ("it is time to abandon the pretense that state citizenship is a permissible basis upon which to justify the detention and search of out-of-state motorists"); (Doc. #36 at 4 (describing the holding in *Vasquez* as "*even when combined with other factors*, a driver's status as

a Colorado resident does not give KHP troopers reasonable suspicion to subject the driver to prolonged detention and a vehicle search.") (emphasis added)). Jones' insistence that nothing needed to be done in the wake of *Vasquez* and that troopers are fine to rely on a motorist's travel plans to or from "drug source" states when forming reasonable suspicion make clear precisely why an injunction is needed in this case. Jones continues to misunderstand the law, and remains willfully ignorant of the consequences of his actions on the civil rights of motorists traveling through Kansas.

C. Jones' lack of supervision and inadequate documentation practices do not amount to a new claim or theory of liability—it is merely evidence of Jones' responsibility for the ongoing constitutional violations occurring by KHP officers.

Jones takes issue with arguments made by Plaintiffs in their summary judgment motion, alleging that they amount to new claims "not presented in the First Amended Complaint." (Doc. #324 at 24). As he did in his objections to Plaintiffs' statement of facts in the Pretrial Order, (Doc. # 290), Jones confuses Plaintiffs *evidence in support of an already-stated claim* with an improper attempt to amend the complaint to add *new claims*.

In their First Amended Complaint, Plaintiffs allege that Jones "[t]hrough proper training, education and discipline . . . has the ultimate statutory authority to oversee and direct the conduct of KHP troopers and specifically to prevent future unlawful detentions of Named Plaintiffs and similarly situated individuals," (Doc. #7, ¶12), but that KHP "maintains a practice of illegally detaining drivers for questioning beyond the purpose of the stop to inquire about their travel plans, absent reasonable suspicion of criminal activity," (*id.* at ¶6). Moreover, Plaintiffs allege that Jones "is responsible for training, guiding, and directing KHP troopers in the performance of their jobs," (*id.* at ¶59), and "has the authority to end KHP's unconstitutional practices," (*id.* ¶60). Count 1 of the Amended Complaint specifies that "Defendant Jones, acting under the color of state law, has

maintained and continues to facilitate a detention practice that violates the constitutional rights of drivers and passengers[.]" (*Id.* at ¶117). Plaintiffs' responses to Defendants' contention interrogatories referred back to these allegations in the First Amended Complaint. Moreover, these facts have come up time and time again in discovery and in prior submissions to the Court. (*See, e.g.,* Doc. #81 at 9-11, 13-14, Pls. Mem. in Support of Class Cert. (describing the issues with KHP's data collection and Jones' failure to train and supervise troopers on their obligations under *Vasquez*); Doc. #92 at 17-18, Pls. Reply in Support of Class Cert. (describing, in detail, the insufficiency of KHP's reporting requirements and data collection systems); Doc. #167 at 7, Pls. Mot. to Compel (highlighting evidence to support Plaintiffs' claims that the record sought—part of an internal investigation into McMillian's unconstitutional conduct—was relevant to the claim against Jones, which addressed whether Jones ensures fidelity to the rule of law set forth in *Vasquez*)).[23]

The evidence described in Plaintiffs' motion for summary judgment—that Jones provides inadequate supervision, allowing constitutional violations to go unchecked, and that KHP's antiquated record keeping systems allow Jones to be willfully ignorant of patterns of problems—goes to the allegations described above. All of the evidence discussed on pages 56-63 of Plaintiffs' brief, (Doc. #308), supports Plaintiffs' allegation that Jones "has maintained and continues to facilitate" unconstitutional detention practices. His lack of appropriate supervision, laissez faire attitude, and deliberate decision not to collect, analyze, and review data regarding trooper activities

[23] At the pretrial conference, Jones, through his attorney, raised a similar argument as he does in his opposition to Plaintiffs Motion for Summary Judgment: that Plaintiffs were impermissibly amending their complaint and failed to adequately disclose their theories of liability through responses to Jones' contention interrogatories. Magistrate Judge Birzer rejected that argument, noting that nothing in Plaintiffs claims is surprising, and that Jones has been well aware, through prior briefing and discovery, of Plaintiffs' theories of liability in this case. Unfortunately, the pretrial conference was not recorded by Judge Birzer, and no transcript is available.

supports a finding that he contributes to constitutional violations occurring within KHP, and is thus liable in a § 1983 lawsuit brought under *Ex Parte Young*.

Perhaps tellingly, Jones concludes his arguments in this section by copying and pasting a long block quote from *Davis v. White*, 294 F.3d 1008, 1014 (2015), an Eighth Circuit decision (with no precedential value) that concerned excessive use of force by Ferguson, Missouri Police Department (FPD) officers against a person confined at the Ferguson City Jail. Importantly, Mr. Davis needed to meet the standards of municipal liability to prevail in his claim against the City of Ferguson—a threshold Plaintiffs do not need to meet in an *Ex Parte Young* suit. *See supra*, ___. And, the Eighth Circuit's conclusion was that Mr. Davis had not presented enough evidence—not that a policymaker's failure to keep records could never, under any circumstances, contribute to a finding of liability.[24]

Jones' unwillingness to properly supervise troopers, including through proper data collection and review of trooper activities, is much more similar to the facts in *Parrish v. Luckie*, 963 F.2 201, 204-05 (8th Cir. 1992), cited by the *Davis* court as an example of when evidence of

[24] Interestingly, the U.S. Department of Justice released its investigative findings of the Ferguson Police Department just months before the Eighth Circuit's decision in *Davis* was released. That report was replete with findings that Ferguson Police Department supervisors "conduct only perfunctory review of officers' actions—when they conduct any review at all," and that the lack of supervision contributed to a pattern or practice of constitutional violations. U.S. Dep't of Justice, Invest. Of Ferguson Police Dep't 25 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf. These findings resulted in the entry of a consent decree with the city, in which the City committed to numerous reforms aimed at improving supervision of officers and bolstering data collection. *See* Consent Decree (Doc. #12-2), *United States v. City of Ferguson*, No. 16-00180 (Mar. 17, 2016), https://www.justice.gov/opa/file/833431/download. This underscores the fact that the decision in *Davis* was more about the sufficiency of the evidence presented by the plaintiff than anything else. The Ferguson Police Department, like the KHP, suffered from insufficient oversight, supervision, and data collection practices, which contributed to a pervasive pattern of constitutional violations, necessitating court-ordered reform.

deliberately poor reporting systems can contribute to a finding of agency liability. *See Davis*, 794 F.3d at 1014. There, the court found that the police chief "created and maintained a use-of-force reporting system under which he would not be notified of physical force exerted by officers unless one of his lieutenants or sergeants determined the use of force was unwarranted." *Parrish*, 963 F.2d at 205. The court noted that "officers operating under this system recognized they could act with impunity unless a citizen filed a written complaint." *Id.* That is precisely what is occurring with KHP. Because Jones does not collect data, and up until last week did not mandate reporting of the reasons why troopers detained vehicles for canine sniffs, officers could unlawfully detain motorists without reasonable suspicion with impunity. That is precisely the type of hands-off, look-the-other-way approach that contributes to ongoing constitutional violations—violations for which Jones should be held liable.

VI. The Court should grant Plaintiffs' motion for summary judgment on their right-to-travel claims.

The right to travel "protects [1] the right of a citizen of one State to enter and to leave another State, [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, [3] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999); *accord Peterson v. Martinez*, 707 F.3d 1197, 1212–13 (10th Cir. 2013). Plaintiffs have moved for summary judgment under the first two components: the right to free interstate movement and the right to be treated as a welcome visitor, respectively. Jones' opposition memorandum largely ignores the points and authorities raised in Plaintiffs' motion; instead, he merely repeats the arguments raised in his own summary judgment motion. Those arguments are no more convincing now than they were before.

First, KHP's practice of targeting out-of-state drivers for prolonged roadside detentions violates the right to free interstate movement, because it directly impairs, and substantially deters, interstate travel—as Plaintiffs' own experiences demonstrate. None of the cases Jones cites to the contrary address the situation presented here. On the one hand, he relies on several cases holding that a practice of targeting out-of-state drivers for traffic stops does not violate the right to interstate travel; however, prolonged roadside detentions impose more serious burdens on interstate travel than mere traffic stops alone. On the other, he cites a number of cases stating that various burdens on interstate travel do not violate the Constitution, but those cases do not address government policies *targeting* out-of-state travelers for *discriminatory* burdens. These differences are dispositive here.

Second, KHP's practice violates the right to be treated as a welcome visitor, because it unreasonably discriminates against out-of-state residents with respect to the exercise of a fundamental right—the freedom to use the public roadways without fear of being subject to arbitrary or unjustified detention. Jones suggests that this component of the right to travel applies only to discrimination against out-of-state residents with respect to economic activities and access to basic services, but he acknowledges that the Tenth Circuit rejected that limitation. And although he argues that enforcement of the traffic laws against out-of-state residents does not affect an activity basic to the livelihood of the Union, none of the cases he cites address a law enforcement policy or practice *targeting* out-of-state drivers. Plaintiffs respectfully submit that a state law enforcement agency's arbitrary practice of targeting out-of-state residents for prolonged seizures while they are using the public roadways is a serious infringement of basic freedoms, which are themselves essential to the maintenance and well-being of the Union.

A. KHP's practice of targeting out-of-state drivers for prolonged roadside detentions, as opposed to mere traffic stops, substantially impairs the right to free interstate movement.

A law infringes the first component when it "directly and substantially impair[s] the exercise of the right to free interstate movement." *Abdi v. Wray*, 942 F.3d 1019, 1030 (10th Cir. 2019) (citing *Saenz*, 526 U.S. at 501) (internal quotations omitted); *see also, e.g.*, *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (holding that a law violates the right to travel when, among other things, it "actually deters such travel"); *Crandall v. Nevada*, 73 U.S. 35 (1867). Here, the undisputed facts show that KHP has a practice of targeting out-of-state drivers for prolonged roadside detentions while they are traveling through Kansas. (Doc. #308, Pls. Mem. 64). The undisputed facts also show that this practice substantially impairs free interstate movement by obstructing travel and causing significant fear and anxiety among interstate travelers. (Doc. #308, Pls. Mem. 65-67).

Jones relies principally on a trio of cases holding that the selective enforcement of traffic ordinances does not substantially burden interstate travel in violation of the Constitution. (Doc. #324, Def. Mem. 2-4). *See State v. Chettero*, 297 P.3d 582, 586 n.2 (Utah 2013); *United States v. Lindsey*, 2004 U.S. Dist. LEXIS 16503, at *13 (D. Kan. May 6, 2004); *United States v. Mayville*, 2018 U.S. Dist. LEXIS 38305, at *17, *aff'd*, 955 F.3d 825 (10th Cir. 2020). As Plaintiffs argued in their response to Jones' summary judgment motion, Jones has not identified any binding authority from the Tenth Circuit or the Supreme Court holding that a policy of targeting out-of-state drivers for traffic stops is consistent with the right-to-travel, and the authorities he does cite are inapposite because the prolonged roadside detentions at issue here are substantially more burdensome than traffic stops. (Doc. #315 at 135).

Jones does not dispute either point, but he argues that the more serious burdens associated with prolonged roadside detentions have no bearing on the right-to-travel analysis because, either

way, "the trip goes on." (Doc. #324, Def. Mem. 4). Yet, the test is whether government action "directly and substantially *impair[s]* the exercise of the right to interstate movement," *Abdi*, 942 F.3d at 1030 (emphasis added), not whether it obstructs interstate travel *completely*. Thus, a head tax on interstate travelers violates the right to travel, even though it does not prevent such travel from occurring or being completed. *See Crandall*, 73 U.S. at 44-47. Likewise, a government practice targeting interstate travelers for *substantial burdens*, including prolonged roadside detentions, violates the right to travel, even if a less intrusive targeting practice would not. *See United States v. Walraven*, 892 F.2d 972, 974 (10th Cir. 1989) (holding that targeting out-of-state vehicles for registration checks does not violate the right-to-travel, because "the subject remains unaware of the check and unencumbered").

Jones further cites a number of cases that do not address government policies or practices that discriminatorily target interstate travelers. *See Maryland State Conf. of NAACP Branches v. Maryland Dep't of State Police*, 72 F. Supp. 2d 560, 568-69 & n.9 (D. Md. 1999); *Roseen v. Klitch*, No. 1:14-CV-118-REB, 2015 WL 1467202, at *2; *Meyer v. City of Russell*, No. 12-1178, 2012 WL 5878613, at *6 (D. Kan. Nov. 21, 2012); *United States ex rel. Verdone v. Cir. Ct. for Taylor Cnty.*, 851 F. Supp. 345, 350 (W.D. Wis. 1993). As Plaintiffs pointed out in their opposition to Jones' summary judgment motion, these cases are irrelevant because the Supreme Court has acknowledged the fundamental distinction between the neutral application of state laws and the discriminatory targeting of interstate travelers. (Doc. #315 at 136). *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277 (1993) (holding that a restriction on intrastate movement "does not implicate the right of interstate travel, even if it is applied intentionally against travelers from other States, unless it is applied *discriminatorily* against them") (emphasis in original). Jones offers no response.

Finally, Jones cites the Tenth Circuit's decision in *Abdi* to support his argument that Jones does not impermissibly interfere with the right to travel. As Plaintiffs have already argued (Doc. #315 at 136), *Abdi* held that the plaintiff's alleged placement on the federal government's terror watchlist did not "*unreasonably* burden or restrict" interstate or international travel, 942 F.3d at 1029 (emphasis in original), largely because the plaintiff had not alleged that the associated airport security delays "substantially exceed[ed] those experienced by many air travelers," *id.* at 1031. Here, by contrast, the Tenth Circuit has already held that the targeting of out-of-state travelers is unreasonable under the Fourth Amendment, *see Vasquez*, 834 F.3d at 1138, and the same conclusion should extend to Plaintiffs' right-to-travel claim. Again, Jones offers no response.

B. KHP's practice of targeting out-of-state drivers for prolonged roadside detentions violates the right to be treated as a welcome visitor while using the public roadways.

The Supreme Court has established a two-part test for determining whether a state's discrimination against out-of-state residents violates the second component of the right to travel, the right to be treated as a welcome visitor, which arises under the Privileges and Immunities Clause of Article IV, §2 of the Constitution. First, the reviewing court must determine whether the regulated activity is "sufficiently basic to the livelihood of the Nation . . . as to fall within the purview of the Privileges and Immunities Clause." *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64 (1988); *see also Baldwin v. Fish & Game Commission*, 436 U.S. 371, 388 (1978). If so, the state must demonstrate that its discrimination against out-of-state residents is "closely related to the advancement of a substantial state interest." *Friedman*, 487 U.S. at 65.

Citing the Utah Supreme Court's decision in *Chettero*, Jones insinuates that the Privileges and Immunities Clause protects only economic interests. (Doc. #324, Def. Mem. 5). But, as Jones acknowledges, the Tenth Circuit subsequently rejected that proposition in *Peterson*, which held that the Clause protects against interstate discrimination with respect to both economic and non-

economic activities "sufficiently basic to the livelihood of the Nation." 707 F.3d at 1214-15 (quoting *Friedman*, 487 U.S. at 64). *Peterson* identified several factors to guide this analysis, including: whether the activity has "been recognized as a right," whether it has been historically restricted, and whether restrictions on the activity "hinder the formation, the purpose, or the development of a single Union." *Id.* at 1216 (quoting *Baldwin*, 436 U.S. at 383).

As Plaintiffs argued in their summary judgment motion, the right to move about freely, without fear of being subject to arbitrary or unjustified prolonged detention by law enforcement, is essential to the maintenance and well-being of the Union because it "is basic in our scheme of values," *Kent v. Dulles*, 357 U.S. 116, 126 (1958), and essential "to carry out our daily life activities," *Johnson v. City of Cincinnati*, 310 F.3d 484, 497 (6th Cir. 2002). (Doc. #308 at 69). Furthermore, Defendants cannot show that KHP's practice of targeting out-of-state motorists for prolonged detentions is closely related to the advancement of a substantial state interest, because the Tenth Circuit has already held that out-of-state residence is an impermissible basis, even when combined with other travel-related factors, for a prolonged detention in almost all cases. (Doc. #308, Pls. Mem. 70). *See Vasquez*, 834 F.3d at 1138. Accordingly, Plaintiffs are entitled to judgment as a matter of law on their claims under the second component of the right to travel.

Jones does not address Plaintiffs' arguments or authorities. Instead, repeating his own summary judgment motion, Jones contends that "enforcement of traffic or other criminal laws, even if more so against out-of-state drivers, does not encroach on activity basic to the livelihood of the Nation." (Doc. #324, Def. Mem. 6). Plaintiffs addressed this argument in their response to Jones' summary judgment motion. (Doc. #315 at 139-140). To briefly reiterate: Jones cites two Supreme Court cases holding that states may reasonably regulate the use of public roadways by motor vehicles. *See Reitz v. Mealey*, 314 U.S. 33, 36 (1941), *overruled in part on other grounds*

by Perez v. Cambell, 402 U.S. 637, 652-54 (1971); *Hendrick v. Maryland*, 235 U.S. 610, 622 (1915). These cases are inapposite because "[a] State's abstract authority to require from resident and nonresident alike that which it has chosen to demand from the nonresident alone has never been held to shield the *discriminatory distinction* from the reach of the Privileges and Immunities Clause." *Friedman*, 487 U.S. at 66-67 (emphasis added). The lower court cases cited by Jones are similarly inapplicable here, because they do not address law enforcement policies or practices *targeting* out-of-state drivers. *See Smith-Utley v. City of Toledo*, No. 3:16-CV-0977, 2018 U.S. Dist. LEXIS 53355, at *8 (N.D. Ohio Mar. 29, 2018); *Roseen*, 2015 U.S. Dist. LEXIS 43301, at *5 (D. Idaho Mar. 30, 2015); *Yahoshua-Yisrael: Yahweh v. City of Memphis*, No. 12-2897-JDT-CGC, 2014 WL 1689715, at *6 (W.D. Tenn. Apr. 29, 2014); *Maryland State Conference of NAACP Branches*, 72 F. Supp. 2d at 569. Again, Jones offers no rebuttal to Plaintiffs' points.

For these reasons, Plaintiffs are entitled to summary judgment on their right to travel claim.

VII. Conclusion

For these reasons, and for the reasons stated in Plaintiffs' memorandum in support of their motion for summary judgment, Plaintiffs respectfully request that the Court grant their motion for summary judgment on their claims for injunctive and declaratory relief against Defendant Jones.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of October, 2022, a copy of the foregoing was filed and served via the Court's electronic filing system on all counsel of record.

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