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' MEMORANDUM IN OPPOSITION TO DEFENDANT JONES' MOTION FOR SUMMARY JUDGMENT

I. NATURE OF THE MATTER PRESENTED

This is a case brought under 42 U.S.C. § 1983 against Colonel Herman Jones, Superintendent of the Kansas Highway Patrol, for engaging in a practice, policy, or custom of violating motorists' Fourth Amendment and Fourteenth Amendment rights by prolonging roadside detentions without adequate reasonable suspicion. Plaintiffs seek injunctive and declaratory relief

against Jones, in his official capacity, based on this ongoing practice, policy, or custom. Specifically, Plaintiffs seek to enjoin the KHP's continued practice of relying on out-of-state plates or travel plans and KHP's use of a maneuver called the Two-Step to unlawfully prolong roadside detentions. Plaintiffs also seek monetary damages against two troopers, Trooper McMillan and Trooper Schulte, for their role in the individual stops of Mr. Bosire and the Shaw brothers, respectively. The matter is now before the Court on Jones' Motion for Summary Judgment regarding Plaintiffs' claims for injunctive relief.

II. PLAINTIFFS' RESPONSE TO JONES' STATEMENT OF UNCONTROVERTED FACTS[1]

Statement of Uncontroverted Facts ("UF")

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

[1] Plaintiffs' Index of Exhibits is attached as Exhibit 1. The parties filed cross motions for summary judgment. For convenience of the parties and the Court, with the exception of the indices, Plaintiffs are referencing exhibits by the same number used in Plaintiffs' affirmative motion. Any additional exhibits used in support of Plaintiffs' Memorandum in Opposition to Defendant Jones Motion for Summary Judgment are added sequentially to the end of the Index of Exhibits, Ex. 1.

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 infra* § 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 infra* § 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 infra* § 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.

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

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 infra* § 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 infra* § 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 infra* § 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 infra § 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 infra* § 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 infra* § 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 infra* § 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.

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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.

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B. **Search and Seizure**

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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 infra* § 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 infra* § 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.

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[2] 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

[2] 133,762 times 365 equals 48,823,130.

48,823,130 different motorists in 2020, those numbers are exaggerated and not supported by the record cited. *Id.*

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.[3]

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[4]). Bate ## Third Party 000001-464, produced by Plaintiffs as responses to their record subpoenas.

[3] 200,000/48,823,130 = 0.004096 or 0.41%.
[4] Some fraction of these assists do not relate to post-traffic stop canine sniffs.

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. 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[5]] at post-traffic stop detentions annually, is about 0.15%[6] (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%[7] (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,

[5] From UF ¶ 46.
[6] 290/200,000 = .00145 or 0.15%.
[7] 290/48,823,130 = 5.939807628064813e-6 or 0.00059%, about 1 in 169,000.

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 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[8] 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

[8] 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.

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.

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[9] 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 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

[9] 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.

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:

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

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

(3) **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.**

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

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

Ex. 14, ¶ 20.[10]

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

[10] This is a list of the circumstances that Schulte 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.

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 infra* § 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:

(1) **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.**[11]

(2) **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.**

(3) **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.**

[11] 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.

(4) **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.**

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

(6) **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.[12]

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

[12] This is a list of the circumstances that Rohr 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.

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 in a two-day lengthy trip from Indiana to Nevada or California. *Id.*, 204:10-205:15.

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. No request was made to amend Plaintiffs' complaints at the time of the final pretrial conference and no amendment was granted. Doc. 290, at 48.

RESPONSE: Uncontroverted.

59. Plaintiffs assert variously that Jones maintains a policy or practice of detaining drivers that violates Fourth Amendment rights against unreasonable searches and seizures.

Doc. 290, at 40. They were not required to specifically identify the policies and customs in the pretrial order. *Id.* at 40-41. Yet, as no amendment was permitted to the Plaintiffs' complaints, the Court's listing the alleged unconstitutional policies, practices or customs should be controlling. The Court summarized these policies, 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[13]]**
>
> 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 V.B., of their argument addressing why they are not required to show an "official policy or custom," which

[13] Plaintiffs are referring to canine sniffs, not searches. *United States v. Morales-Zamora*, 914 F.2d 200, 203 (10th Cir. 1990) (canine sniff of exterior of vehicle is not a "search" within the meaning of the fourth amendment).

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*, 495 Fed. 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). Plaintiffs controvert Jones' assertion that Plaintiffs were not required to specifically identify the policies or practice alleged. *Id*. at 40-41. Counsel for Defendant included an objection to Plaintiffs claim in the proposed pretrial report submitted to the Court. Counsel for Plaintiffs and Defendant argued the issue at the pretrial conference. The Court overruled Defendant's objection and found that Plaintiffs had sufficiently identified the policies and practices at issue in this action. Plaintiffs' statement of the policy or practice is found at 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 objections 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.

60. But in their answers to interrogatories, 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. …

Ex. 15, Interrogatory Answers ## 2-4. The answers have never been amended or supplemented.

RESPONSE: Plaintiffs incorporate their response to Df. SOF 59. 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

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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. 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)

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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' ADDITIONAL STATEMENT OF UNCONTROVERTED FACTS

The Kansas Highway Patrol (KHP)

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

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

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

4. 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. Pls. Ex. 3, Jones Dep. at 42:20-45:11.

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

6. 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. Pls.

Ex. 6, Captain Brent Hogelin (Hogelin) Dep. Vol. I at 53:16–18.; 57:7-58:2; Pls. Ex. 7, Lieutenant Greg Jirak (Jirak) Dep. at 12:22-13:9.

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

8. 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. Pls. Ex. 4, J. Rule, Dep. at 16:4-6; 25:16-26:2; 60:13-61:9.

9. 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. Pls. Ex. 8, Schulte Dep. at 21:20-22:6; 115:19-21; 87:20-88:7; Pls. Ex. 5, KHP Organizational Structure.

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

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

12. 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. Pls. Ex. 3, Jones Dep. at 36:6-23; 54:1-17; 170:3-20.

13. 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. Pls. Ex. 11, Moon Dep. at 37:25-38:3, 45:20-24, and 110:14-21.

KHP's Policy Development and Creation

14. 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. Pls. Ex. 3, Jones Dep. at 29:11-30:4.

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

16. 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." Pls. Ex. 3, Jones Dep. at 30:12-32:17.

17. 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] . . ." Pls. Ex. 3, Jones Dep. at 34:2-35:8; *see infra* SOF ¶¶ 80-84.

18. 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. Pls. Ex. 3, Jones Dep. at 30:12-32:17; Pls. Ex. 12, KHP Staff Attorney Sarah Washburn ("Washburn") Dep. at 16:24-17:14; 20:11-24:10.

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

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

KHP's response to *Vasquez*

21. 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. Pls. Ex. 11, Moon Dep. at 110:4-21; Pls. Ex. 12, Washburn Dep. at 7:2-24; 31:11-32:17; 85:10-18.

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

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

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

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

26. 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. Pls. Ex. 14, Legal Issues in Car

Stops 2020, 50-53 (OAG000224-226); Pls. Ex. 15, Defendants' Responses to Plaintiffs' First Set of Requests for Documents to Schulte, McMillan, and Jones at 7; (Doc. #62).

KHP's residence-based policies and customs

27. 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**." Pls. Ex. 2, Enforcement Guidelines, P000267 (emphasis added).

28. 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. Pls. Ex. 9, Rohr Dep. at 54:3-55:18; Pls. Ex. 8, Schulte Dep. at 187:17-188:3.

29. KHP troopers and supervisors believe that coming to or from a "drug source state" such as Colorado could contribute to reasonable suspicion. 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 (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); 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 (testifying that states "known for drugs to be trafficked to" help "form[] reasonable suspicion").

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

31. 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.

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

32. 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. Pls. Ex. 7, Jirak Dep. at 65:21-66:4.

33. 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. Pls. Ex. 7, Jirak Dep. at 69:12-22.

34. 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." Pls. Ex. 11, Moon Dep. at 94:9-96:1.

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

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

37. 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. Pls. Ex. 12, Washburn Dep. at 78:24-79:17.

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

39. 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. Pls. Ex. 3, Jones Dep. at 200:25-201:8.

KHP's "Two-Step" policy

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

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

42. 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." Pls. Ex. 8,

Schulte Dep. at 156:3-159:21; Pls. Ex. 16, Transforming Temporary Detention into Consensual Encounter Training.

43. 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." Pls. Ex. 3, Jones Dep. at 117:25-118:6.

44. 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. Pls. Ex. 17, Laws of Search & Seizure: Traffic Stops, OAG030740-30741.

45. 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*." Pls. Ex. 18, 4th Amendment "Reasonableness is the touchstone of the Fourth Amendment" Training at OAG020750 (emphasis in original, and added).

46. 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. Pls. Ex. 4; J. Rule Dep. at 109:19-111:8.

KHP's Complaint Policy and the Professional Standards Unit

47. 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." Pls. Ex. 19, Complaint Reporting and Administrative Investigations Policy (Complaint Policy).

48. 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." Pls. Ex. 19, Complaint Policy.

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

50. 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." Pls. Ex. 3, Jones Dep. at 51:20-52:3.

51. 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. Pls. Ex. 20, Clark Dep. at 30:14-23, 31:10-12; Pls. Ex. 19, Complaint Policy, pp. 5-9.

52. 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." Pls. Ex. 3, Jones Dep. at 51:20-52:18.

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

54. 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. Pls. Ex. 3, Jones Dep. at 161:1-162:18; 163:4-14.

55. 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. Pls. Ex. 3, Jones Dep. at 162:19-21; 163:10-14.

56. 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. Pls. Ex. 20, Clark Dep. at 8:17-9:3, 149:16-20, 155:19-23; Pls. Ex. 21, Plaintiffs' Notice of Rule 30(b)(6) Video Deposition, pp. 2-5, ¶¶ 1-3, 16-18.

57. 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.

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

58. 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. Pls. Ex. 3, Jones Dep. at 166:8-21.

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

60. 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." Pls. Ex. 20, Clark Dep. at 98:23-99:5.

61. 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. Pls. 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.

62. 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. Pls. Ex. 20, Clark Dep. at 97:13-18; Pls. 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*.

63. 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." Pls. Ex. 20, Clark Dep. at 97:21-98:9 and 98:23-99:5.

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

64. 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.

65. 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. Pls. Ex. 25, May 14, 2016, Complaint at OAG031830-31831.

66. 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. Pls. Ex. 26, November 16, 2016, Complaint at OAG031852-31854; OAG031860.

67. 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 . . ." Pls. Ex. 27, September 17, 2017, Complaint at OAG031881, OAG031884-31886.

68. 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. Pls. Ex. 28, July 21, 2017, Complaint at OAG031910, OAG031913-31915.

69. 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. Pls. Ex. 29, September 12, 2018, Complaint at OAG031965, OAG031967-3170.

70. 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. Pls. Ex. 30, September 21, 2018, Complaint at OAG031976, OAG031979-31982.

71. 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. Pls. Ex. 31, September 6, 2019, Complaint at OAG032031-31936, OAG032038.

72. 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. Pls. Ex. 32, December 5, 2019, Complaint at OAG032065-32070; OAG032072.

73. 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. Pls. Ex. 33, August 12, 2020, Complaint at OAG032113-32117; OAG032119.

Defendant Jones' Response to Complaints

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

75. 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. Pls. 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.

76. 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.

Pls. Ex. 35, Aden Rep. at 19.

77. 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.

78. 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. Pls. 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.

KHP Trooper Training and Instruction

79. 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." Pls. Ex. 2, Enforcement Guidelines, P000267.

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

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

82. 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. Pls. Ex. 3, Jones Dep. at 33:25-35:8; Pls. Ex. 12, Washburn Dep. at 17:15-18:4.

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

84. 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. Pls. Ex. 34, Kansas Law Enforcement Training Center, Search and Seizure Course, OAG011283-11288; Pls. Ex. 8, Schulte Dep. at 33:24-35:7.

85. 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. Pls. Ex. 36, Domestic Highway Enforcement Training (OAG000582); Pls. Ex. 4, J. Rule Dep. at 83:7-84:2; 95:20-24.

86. 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.

87. 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.*, Pls. Ex. 18, 4th Amendment "Reasonableness is the touchstone of the Fourth Amendment" Training at OAG020759-20761.

88. 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.* Pls. Ex. 37, Lieutenant Jason Edie's November 7, 2018, Email.

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

90. 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. Pls. Ex. 9, Rohr Dep. at 179:5-18; 180:17-181:1.

91. 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. Pls. Ex. 38, Wolting Dep. at 120:9–15.

92. Although Schulte[14] 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,*

[14] Schulte stopped the Shaw plaintiffs on December 20, 2017. *See infra*, SOF ¶ 129.

and he does not recall attending a training that discussed *Vasquez*. Pls. Ex. 8, Schulte Dep. at 176:8-177:5.

93. McMillan[15] 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. Pls. Ex. 10, McMillan Dep. at 148:15-149:4.

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

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

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

95. Post-*Vasquez*, the KHP still trains troopers that a driver's state of residence is applicable to determining reasonable suspicion. Pls. 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." Pls. Ex. 24, Advanced Interdiction Training (2020), at OAG028817.

96. 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. Pls. Ex. 9, Rohr Dep. 53:12–20, 55:6–23, 56:1–18.

[15] McMillan stopped plaintiff Bosire on February 8, 2019. *See infra*, SOF ¶¶ 162, 176.

97. 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. Pls. Ex. 12, Washburn Dep. 79:6–10.

98. 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." Pls. Ex. 9, Rohr Dep. 52:22-25, 53:8-11, 55:6–11, 55:24-56:18.

99. 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." Pls. Ex. 3, Jones Dep. at 58:20-59:18.

100. 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." Pls. Ex. 35, Aden Rep. at 15; Pls. Ex. 3, Jones Dep. at 58:12-59:18.

KHP Targets Out-of-State Drivers

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

102. 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. Pls. Ex. 39, Mummulo Rep. at 35.

103. 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. Pls. Ex. 39, Mummulo Rep. at 35-36.

104. 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. Pls. Ex. 39, Mummolo Rep at 5-6.

105. 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. Pls. Ex. 39, Mummolo Rep. at 6.

106. 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. Pls. Ex. 39, Mummolo Rep. 6-7.

107. 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). Pls. Ex. 39, Mummolo Rep. at 7, 19-20, 49.

108. 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. Pls. 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.").

109. 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. Pls. Ex. 39, Mummolo Expert Report at 10, 20.

110. 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." Pls. Ex. 39, Mummolo Rep. at 21.

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

112. 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%. Pls. Ex. 39, Mummolo Rep. at 21.

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

KHP's Incomplete Records Regarding Prolonged Detentions

114. 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. Pls. Ex. 3, Jones Dep. at 151:22-152:8. 149:18-152:8.

115. 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. Pls. 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. Pls. Ex. 9, Rohr Dep 187:1-191:25.

116. 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. Pls. Ex. 9, Rohr Dep. at 161:22-163:1; Pls. Ex. 40, Sample Incident Narrative Report (HP 133) (OAG002885-2891)

117. 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. Pls. Ex. 9, Rohr Dep. at 162:20-163:1.

118. 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. 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.

119. 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. Pls. 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.*

120. 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." Pls. Ex. 35, Aden Rep. at 22.

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

121. "[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." Pls. Ex. 3, Jones Dep. at 152:4-25.

122. 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." 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).

123. 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, Christi Asbe (Asbe) Dep. at 125:1-126:3.

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

125. 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. Pls. Ex. 44, Hogelin Dep. Vol. II at 37:5-38:19; Pls. Ex. 3, Jones Dep. 153:20-23 (explaining that the new policy states a requirement).

126. 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. Pls. Ex. 3, Jones Dep. 158:12-159:14; Pls. Ex. 44, Hogelin Dep. Vol. II at 25:23-26:3; Pls. Ex. 43, Asbe Dep. at 126:1-19.

CALEA[16]

127. CALEA is merely a framework for policing. Pls. Ex. 65, Aden Rebuttal Rep. at p. 3,.

128. CALEA Accreditation does not mean that the framework of policies and procedures are being followed or complied with by all members of an accredited law enforcement agency. Pls. Ex. 65, Aden Rebuttal Rep. at p. 4.

129. CALEA accreditation does not guarantee that an agency is holding its officers accountable to policies and standards, and while CALEA does review proofs of compliance, those proofs are largely selected by the agency itself. Pls. Ex. 65, Aden Rebuttal Rep. at p. 4; *see also* Ex. 43, Asbe Dep. at 180:11-181:1 (when deposed on the question, KHP's accreditation manager Christi Asbe admitted that accredited agencies commit constitutional violations and said, "if [CALEA] unaccredited every [police] agency that had an officer that did something wrong, nobody would be accredited.").

130. CALEA does not manage an organization's accountability structure, it simply provides the framework for the organization to hold itself accountable. Pls. Ex. 65, Aden Rebuttal Rep. at p. 4.

131. The KHP has demonstrated compliance with CALEA standards but has not demonstrated that it is holding its members accountable to Constitutional policing based on the facts presented in this case. Pls. Ex. 65, Aden Rebuttal Rep. at p. 4.

132. Many CALEA standards are broad and govern the need to have particular policies or procedures. CALEA standards do not typically prescribe what, precisely, those

[16] This is included for purposes of rebutting Jones' Motion for Summary Judgment only. Plaintiffs maintain that CALEA accreditation, and all facts related to it, are not material, in that they are not probative of the constitutional issues in this case

standards should be or how they should comport with applicable law. Pls. Ex. 65, Aden Rebuttal Rep. at p. 4.

133. As with enforcement of the policies, whether an agency has lawful policies and procedures is largely left to the discretion and integrity of the agency itself. Pls. Ex. 65, Aden Rebuttal Rep. at p. 4.

Trooper Schulte's Stop and Detention of Plaintiffs Blaine Shaw ("B. Shaw")[17] and Samuel Shaw ("S. Shaw")

134. B. Shaw is a resident of Oklahoma City, Oklahoma. Pls. 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.

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

136. Schulte's patrol vehicle had a dashboard camera. Recordings through a microphone on his uniform synchronized with the dashboard camera's video. Pls. Ex. 7, Schulte Dep. at 197:19-198:4; 198:10-12; *see also* Pls. 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* Pls. Ex. 9, Rohr Dep. at 78:18-79:1.

137. 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. Pls. Ex. 46, Schulte Dash Cam, Pt. 1, 1:35-2:10.

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

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

139. S. Shaw is B. Shaw's brother. Pls. Ex. 45, B. Shaw Dep. at 21:16-21. S. Shaw also resides in Oklahoma City, Oklahoma. Pls. 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. Pls. Ex. 47, S. Shaw Dep. at 26:22-27:4; 35:22-36:14; 44:22-46:17.

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

141. After nearly 10 minutes in his patrol car, Shulte 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. Pls. Ex. 46, Schulte Dash Cam, Pt. 1, 14:23-15:13. B. Shaw admits that he was speeding. Pls. Ex. 45, B. Shaw Dep. at 49:19-50:17.

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

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

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

145. 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. Pls. Ex. 46, Schulte Dash Cam, Pt. 1, 15:14-15:42.

146. 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. Pls. Ex. 48, B. Shaw Aff. at 3, ¶ 14.

147. 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. Pls. Ex. 46, Schulte Dash Cam, Pt. 1, 15:43 – 15:47.

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

149. 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. Pls. Ex. 46, Schulte Dash Cam, Pt. 1, 22:21-22:41.

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

151. 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. Pls. Ex. 46, Schulte Dash Cam, Pt. 1, 40:40 – 41:10.

152. 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." Pls. Ex. 46, Schulte Dash Cam, Pt. 1, 41:14-41:18.

153. 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." Pls. Ex. 46, Schulte Dash Cam, Pt. 1, 47:30-47:37.

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

155. 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." Pls. Ex. 49, Schulte Dash Cam, Pt. 2, 8:48-9:30.

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

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

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

159. 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. Pls. Ex. 8, Schulte Dep. at 231:20-232:2.

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

161. 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.

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

163. B. Shaw and S. Shaw have been adversely affected by Schulte's stop. Pls. Ex. 47, S. Shaw Dep. at 24:2-26:2; Pls. 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.") Pls. 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. Pls. 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.").

164. 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. Pls. Ex. 45, B. Shaw Dep. at 48:19-49:18; Pls. Ex. 53, S. Shaw Dec. at 1, ¶ 2.

Trooper McMillan's Stop and Detention of Plaintiff Joshua Bosire

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

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

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

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

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

169. 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. Pls. Ex. 54, Bosire Dep. at 68:12-69:20.

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

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

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

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

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

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

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

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

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

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

McMillan Stops Bosire on I-70

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

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

182. 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); Pls. Ex. 10, McMillan Dep. at 223:9-18.

183. McMillan's patrol vehicle had a dashboard camera. Recordings through a microphone on his uniform synchronized with the dashboard camera's video. Pls. 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. Pls. Ex. 9, Rohr Dep. at 78:18-79:1.

184. 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. Pls. Ex. 57, McMillan Dash Cam at 6:39 – 7:52.

185. 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. Pls. Ex. 57, McMillan Dash Cam at 7:54-8:31.

186. 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. Pls. Ex. 57, McMillan Dash Cam at 10:48-10:57.

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

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

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

190. 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. Pls. Ex. 57, McMillan Dash Cam at 15:50-16:42.

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

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

193. 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." Pls. Ex. 57, McMillan Dash Cam at 20:28-20:36.

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

195. 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. Pls. Ex. 57, McMillan Dash Cam at 40:27- 40:50.

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

197. 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." Pls. Ex. 57, McMillan Dash Cam at 44:28 – 46:00; Pls. Ex. 19, Complaint Reporting and Administrative Investigations.

198. 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. Pls. Ex. 57, McMillan Dash Cam at 45:25:45:35.

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

Bosire's Complaint and KHP's Findings

200. 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. Pls. Ex. 58, Jones' August 9, 2019, PSU Letter to Bosire.

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

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

203. 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." Pls. Ex. 60, Jones' July 25, 2019, PSU Letter to McMillan.

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

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

206. 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).

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

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

209. 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. Pls. Ex. 20, Clark Dep. at 62:3-11.

210. 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. Pls. Ex. 61, Jones' August 5, 2019, PSU Letter to McMillan.

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

212. 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. Pls. Ex. 35, Aden Rep. at 154:4-20.

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

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

215. Bosire developed a distrust for law enforcement after the February 10, 2019 encounter. Pls. 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.

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

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

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

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

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

220. 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." Pls. Ex. 9, Rohr Dep. at 76:3:10.

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

222. 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." Pls. Ex. 9, Rohr Dep. at 76:11-20.

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

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

225. 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. Pls. Ex. 9, Rohr Dep. at 52:2-21.

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

227. Rohr's patrol vehicle had a dashboard camera. Recordings through a microphone on his uniform synchronized with the dashboard camera's video. Pls. Ex. 9, Rohr Dep. at 74:18-75:13. Pls. 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. Pls. Ex. 9, Rohr Dep. at 78:18-79:1.

228. 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. Pls. Ex. 64, Rohr Dash Cam at 2:45-4:00.

229. 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. Pls. Ex. 64, Rohr Dash Cam at 4:05-5:50.

230. 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." Pls. Ex. 64, Rohr Dash Cam at 10:30-10:53.

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

232. 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.

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

233. 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. Pls. Ex. 64, Rohr Dash Cam at 11:26-.12:24.

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

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

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

237. 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,* Pls. Ex. 64, Rohr Dash Cam at 20:50-41:44.

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

239. 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." Pls. Ex. 64, Rohr Dash Cam at 38:50-41:03.

240. 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. Pls. Ex. 64, Rohr Dash Cam at 38:50-41:31.

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

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

243. 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. Pls. Ex. 62, Erich Dec. at 3 ¶ 19; Pls. Ex. 63, Maloney Dec. at 3, ¶ 19.

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

IV. QUESTIONS PRESENTED

1. Do Plaintiffs have standing to sue Jones for injunctive relief, because they can demonstrate a risk of future injury absent an injunction?

2. Is there sufficient evidence demonstrating that Jones maintains a practice within KHP of detaining drivers absent reasonable suspicion, such that summary judgment in favor of Jones is improper?

3. Is there sufficient evidence demonstrating that Jones' practice of subjecting drivers to prolonged detentions absent reasonable suspicion interferes with their constitutional right to travel, such that summary judgment in favor of Jones is improper?

ARGUMENT AND AUTHORITIES

V. Legal Standard

Summary judgment is appropriate if "the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Rule 56 requires summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *United States ex rel. Smith v. Boeing Co.*, No. CIV A 05-1073-WEB, 2009 WL 2486338, at *2 (D. Kan. Aug. 13, 2009) (unreported). A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citation omitted). An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Britvic Soft Drinks Ltd. v. ACSIS Techs., Inc.*, 265 F. Supp. 2d 1179, 1184 (D. Kan. 2003); *Adler*, 144 F.3d at 670 (citation omitted). The court views the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Britvic Soft Drinks Ltd. v. Acsis Tech., Inc.*, 265 F. Supp. 2d 1179, 1184 (D. Kan. 2003).

A. The Plaintiffs have standing to pursue their claim for injunctive relief against Defendant Jones.

The Court has already determined Plaintiffs have standing to pursue their claim for injunctive relief against Defendant Herman Jones, Superintendent of the KHP ("Jones"). (Order at Doc. #36 at 10-17). Jones' continued attempts to challenge standing are unavailing for the same reasons the Court has already stated and because the evidence uncovered in discovery further supports Plaintiffs' standing.

Article III standing is established when a plaintiff demonstrates "(1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a

'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014) (alteration in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). A plaintiff establishes standing to sue for injunctive relief by demonstrating a "realistic threat" that he will be wronged in a similar way in the future. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 109 (1983) (setting the standard that a plaintiff must make a "showing that he is realistically threatened by a repetition of his experience" in order to "meet the requirements for seeking an injunction in a federal court . . ."); *Harris v. Champion*, 51 F.3d 901, 907 (10th Cir. 1995) (abrogated on other grounds; citing the test from *Lyons*); *Tandy v. City of Wichita*, 380 F.3d 1277, 1284 (10th Cir. 2004) (the plaintiff "established that she is under a realistic threat of experiencing a" similar situation in the next year, "suffic[ing] to establish an injury in fact.").[18]

Importantly, the fact that a plaintiff has only been subjected to the future harm they are seeking to enjoin once in the past does not undermine their standing to sue for prospective relief. *Aid for Women v. Foulston*, 441 F.3d 1101, 1110 (10th Cir. 2006) (finding plaintiffs alleged

[18] A future injury does not need to be certain to establish standing for prospective relief. In fact, "[e]ven a small probability of injury is sufficient to create a case or controversy . . . ." *Massachusetts v. EPA*, 549 U.S. 497, 525 n. 23 (2007) (emphasis added) (quoting *Vill. of Elk Grove Vill. v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993)). Courts have consistently found standing to sue for prospective relief against law enforcement profiling practices even where the statistical likelihood of the plaintiff being stopped again was unknown or low. *See Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 979 (D. Ariz. 2011) (finding plaintiffs had standing to challenge stop policy where "likelihood that any particular named Plaintiff will again be stopped in the same way may not be high."); *Smith v. City of Chicago*, 143 F. Supp. 3d 741, 752 (N.D. Ill. 2015) (addressing standing and holding that "Plaintiffs have alleged ongoing constitutional violations pursuant to an unconstitutional policy or practice in tandem with allegations . . . which lead[] to the reasonable inference of the likelihood that CPD officers will unlawfully stop and frisk Plaintiffs in the future."); *Maryland State Conference of NAACP Branches v. Maryland Dep't of State Police*, 72 F. Supp. 2d 560, 564 (D. Md. 1999) (distinguishing *Lyons*, because the plaintiffs had "allege[d] a pattern and practice of racially discriminatory stops, [and] 'clearly . . . made a reasonable showing that there was a pattern and practice of stops by the Maryland State Police based upon race' . . . . The *Lyons* complaint, on the other hand, did not assert that there was a pattern and practice . . . ."); *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (granting injunction to reform NYPD's stop and frisk program, even though the total number of stops and frisks each year was small as compared to the total population of New York City).

realistic threat of a future constitutional injury absent no previous enforcement); *Leadholm v. City of Commerce City*, No. 16-CV-02786-MEH, 2017 WL 1862313, at *8 (D. Colo. May 9, 2017) (one alleged occasion of excessive force during traffic stop was sufficient to establish standing against city); *Roe v. City of New York*, 151 F. Supp. 2d 495, 503 (S.D.N.Y. 2001) ("there is no per se rule requiring more than one past act . . . as a basis for finding a likelihood of future injury"); *Floyd v. City of New York*, 283 F.R.D. 153, 170 (S.D.N.Y. 2012) ("Even [a] single stop, in light of the tens of thousands of facially unlawful stops, would likely confer standing.")

A remote future harm confers injunctive standing where the risk of injury would be reduced if the court granted the relief sought by the plaintiff. *See, e.g.*, *Massachusetts*, 549 U.S. at 526 (2007) (finding standing for prospective relief where "[t]he risk of catastrophic harm, though remote, is nevertheless real" and "[t]hat risk would be reduced to some extent if petitioners received the relief they seek"); *Baur v. Veneman*, 352 F.3d 625, 633 (2d Cir. 2003) ("threatened harm in the form of an increased risk of future injury may serve as injury-in-fact for Article III standing."). Stated another way, the threat of harm is realistic where enjoining the defendant's practice will decrease the likelihood of the harm occurring.

Jones' attempt to argue away Plaintiffs' future risk of harm is unavailing and should be given no weight. Here, there is a risk of each Plaintiff being detained in the future. Pl. SOF ¶¶ 164, 217, 243. And, even if that risk is low, the requested injunctive relief would reduce that risk: an injunction barring KHP's practice of unconstitutionally detaining motorists would lower the probability that Plaintiffs will again be unlawfully detained during their travels to and from Colorado—and such a "reduc[tion] to some extent" is sufficient to confer standing. *See Baur*, 352 F.3d at 633.

In addition to analyzing whether a defendant's conduct exposes a plaintiff to an increased risk of harm, courts consider whether: (1) the defendant has authorized the challenged practice; (2) the plaintiff has alleged they will engage in activities that would expose them to defendant's policies in the future; and (3) the frequency of alleged injuries pursuant to defendant's policies. *See, e.g., Lyons*, 461 U.S. at 105-6 (noting standing would have been established for prospective relief had plaintiff "allege[d] that he would have another encounter with the police" and "that the City ordered or authorized police officers to act in such manner."); *Honig v. Doe*, 484 U.S. 305, 320-21 (1988) (defendant was likely to re-inflict unconstitutional suspension on disabled plaintiff where plaintiff alleged he would continue to engage in classroom behavior that precipitated his suspension).

As discussed below, the evidence in this case shows KHP engages in a practice of violating motorists' Fourth Amendment rights to be free from prolonged roadside detentions absent reasonable suspicion. *See infra* § V.C-D. KHP, through Jones, not only authorizes the unconstitutional conduct Plaintiffs challenge but actively trains its officers to engage in it. Because Plaintiffs are precisely the class of traveler KHP's practices target, they face a realistic threat of being stopped and detained during future trips. Jones' standing arguments should be overruled.

B. Lawsuits brought against state officials under *Ex Parte Young* do not need to make the same showing as lawsuits brought under *Monell*.

This is a suit brought against a state official in his official capacity for prospective relief only, which is an exception to the general principle that states are immune from suit pursuant to the Eleventh Amendment. *See Ex Parte Young*, 209 U.S. 123 (1908). Jones acknowledges as much, (Doc. #296, Def. Mem. p. 32), yet spends the majority of his argument using language and case

law related to claims made against municipal governments, not state officials.[19] Because municipal liability standards have no bearing in a suit brought under the *Ex Parte Young* doctrine, as set forth below, Jones' attempts to change the standard Plaintiffs must meet should be rejected.

When "determining whether the doctrine of *Ex Parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U.S. 635, 645, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002) (internal quotation marks omitted). To be liable in a lawsuit brought against a *state* official under 42 U.S.C. § 1983, the state official must have some nexus of involvement with the alleged constitutional violation. "[T]he requirement that the defendant have a measure of proximity to and responsibility for the challenged state action ensures that a federal injunction will be effective with respect to the underlying claim." 17A Moore's Fed. Practice – Civil §123.40(3)(a)(v); *Ex parte Young*, 209 U.S. at 157 ("The fact that the state officer by virtue

[19] *See, e.g.*, Def. Mem 33, 40 (citing municipal liability cases for the proposition that Plaintiffs must show Jones engaged in a "an official policy or custom"), 44 (incorrectly asserting that Plaintiffs need to show a practice "so permanent and well settled as to constitute a custom or usage with the force of law," and citing a municipal liability case), 45 (imputing a standard of "deliberate indifference" which is used in the municipal liability context), 46 (relying on the "policy or custom" language from *Kentucky v. Graham*, 473 U.S. 159 (1985), a municipal liability case), 52-56 (again, arguing for judgment of Plaintiff's claims against standards set by municipal liability cases).

Jones appears to rely on *Bd. Of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 403 (1997), for the proposition that municipal liability and liability under *Ex Parte Young* are one and the same. *See* Def. Mem. 40. But Jones misquotes *Bryan County* in a way that disingenuously suggests the case is helpful for their point. It is not. The correct quote is as follows: "[W]e have required a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." *Bd. Of Cnty. Comm'rs of Bryan Cnty.*, 520 U.S. at 403. As the quote and the rest of the opinion make clear, that case concerned municipal liability of a local government, and had nothing whatsoever to say about the showing a Plaintiff must make in an *Ex Parte Young* action against a state government official. Throughout his brief, Jones uses inserted brackets into language from municipal liability litigation to argue, incorrectly, that the showing Plaintiffs must make in this case is identical to municipal liability cases. *See, e.g.*, Def. Mem. 53 (quoting *Connick*, 563 U.S. 51, 61 (2011), and *Murphy v. City of Tulsa*, 950 F.3d 641, 655 (10th Cir. 2019), two municipal liability cases, but inserting bracketed language into the quotations in a misleading attempt to argue the holdings apply to claims against state officials).

of his office has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists."); *Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013) (state official sued had no duty with regard to the challenged law, so not a proper defendant); *Top Flight Entm't Ltd. v. Schuette*, 729 F.3d 623, 634 (6th Cir. 2013) (in an *Ex Parte Young* suit brought under 42 U.S.C. § 1983, the "plaintiff must allege facts showing how a state official is connected to, or has responsibility for, the alleged constitutional violations."). This is different from the standard that must be met to demonstrate *municipal liability* under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978) (finding that municipalities can be liable for constitutional violations committed by municipal employees only if plaintiffs demonstrate an official policy or custom created the violation at issue). In fact, 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*, 495 Fed. App'x 938, 941 (10th. Cir. 2012) (J. Gorsuch) (citing *Monell*, 436 U.S. at 694-95); *see also Spann v. Hannah*, No. 20-3027, 2020 U.S. App. LEXIS 28845, at *8 (6th Cir. Sept. 10, 2020) (citing *Rounds*, 495 Fed. App'x at 941); *Cain v. City of New Orleans*, No. 15-CV-4479, 2017 U.S. Dist. LEXIS 15124, at *53 (E.D. La. Feb. 3, 2017) (same).

This is because the holding of *Monell* "is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes." *Monell*, 436 U.S. at 690 n.54; *see also Chaloux v. Killeen*, 886 F.2d 247 (9th Cir. 1989) (cited with approval in *Santiago v. Miles*, 774 F. Supp. 775, 792-793 (W.D.N.Y. 1991) (rejecting argument by defendant state officials that they were not liable "unless the Court finds that defendants acted pursuant to [a] policy or custom," and finding that defendants were liable because "Plaintiffs have convinced

me that these officials were responsible, under *Williams v. Smith* principles, for the federal law violations relating to discrimination at the prison")).

Throughout his brief Jones repeatedly argues that Plaintiffs need to make the same showing as in municipal liability cases, citing to cases applying the test from *Monell*.[20] But Jones' reliance on municipal liability and the standards from *Monell* is wrong as a matter of law; the heightened requirements for municipal liability need not be met.[21] Here, Plaintiffs need only show an ongoing risk of constitutional violations (i.e., Plaintiffs have standing for an injunction, *see supra* Section I); that Jones has a causational nexus to that ongoing violation; and that the relief sought is properly characterized as prospective (i.e., an injunction). *Verizon Md. Inc.*, 535 U.S. at 645; *Ex parte Young*, 209 U.S. at 157. As set forth in greater detail below, Plaintiffs can more than meet their burden, making summary judgment in favor of Jones improper.

C. There is ample evidence to suggest that Defendant Jones allows KHP to engage in a practice of impermissibly detaining drivers absent reasonable suspicion, based in part on their travel plans.

The Fourth Amendment to the United States Constitution protects the people from unreasonable searches and seizures by the government. U.S. Const. amend. IV. As such, it

[20] Jones also, inexplicably, attempts to insert the standard for evaluating the application of qualified immunity into Plaintiffs' claims against Jones—claims which are for prospective injunctive relief only. *See* Def. Mem. 45-46 ("Jones cannot be deliberately indifferent to violation [sic] of a constitutional right unless the right is clearly established."). Even assuming that municipal liability standards were appropriate here—which they are not—whether a right is "clearly established" is relevant for determining whether an officer is immune from suit for *damages*, not injunctive relief. *Quintana v. Santa Fe Cnty. Bd. of Comm'rs*, 973 F.3d 1022, 1033-34 (10th Cir. 2020) (holding that a municipality can be liable even if an officer is entitled to qualified immunity on the damages claim). Qualified immunity and its "clearly established right" line of inquiry is not a defense to injunctive relief under Section 1983. *See Wood v. Strickland*, 420 U.S. 308, 314 n.6 (1975).

[21] "*Monell* liability is difficult to establish precisely because of the care the law has taken to avoid holding a municipality responsible for an employee's misconduct. A primary guardrail is the threshold requirement of a plaintiff showing that a municipal policy or custom caused the constitutional injury." *J.K.J. v. Polk Cty.*, 960 F.3d 367, 377 (7th Cir. 2020). "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee[s]." *Bryan County*, 520 U.S. at 405.

prohibits the police from detaining individuals in the absence of individualized, objective, and articulable reasonable suspicion of criminal activity. The Amendment's protections extend to detentions that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *Vasquez v. Lewis*, 834 F.3d 1132, 1136 (10th Cir. 2016). More specifically, the Constitution prohibits police from extending a traffic stop in order to question a driver about issues beyond the scope of the stop absent reasonable suspicion or consent. *United States v. Villa*, 589 F.3d 1334, 1339 (10th Cir. 2009); *United States v. Hunnicutt*, 135 F.3d 1345, 1349 (10th Cir. 1998). The Fourth Amendment also protects against detentions for the purpose of conducting a canine search absent reasonable suspicion. *Rodriguez v. United States*, 575 U.S. 348 (2015).

Jones' arguments in favor of summary judgment suffer from several fatal flaws. First, Jones misconstrues Plaintiffs' claim regarding KHP's practice of relying on out-of-state travel plans as part of troopers' reasonable suspicion calculus, and in doing so, sidesteps ample evidence demonstrating such a practice is in contravention of Tenth Circuit law. Second, Jones attempts to limit Plaintiffs' claims regarding the Two-Step by unilaterally restricting Plaintiffs' concerns to that of *physical contact* with motorists at the conclusion of a traffic stop. Third, Jones attempts to argue—bizarrely—that "training about *Vasquez* is irrelevant to this case," doc. #296, Def. Mem. 53, and then goes on to misinterpret the case's holding and misapply *Vasquez* to the facts of this case. Finally, Jones ignores ample evidence regarding his failure to adequately supervise KHP troopers and ensure *Vasquez* is followed, deciding instead to suggest that because KHP is certified by a membership organization, Jones could not possibly be allowing a practice of unconstitutional conduct to occur within KHP ranks. For the reasons set forth below, each of these arguments is erroneous and are not grounds for granting Jones the summary judgment order that he seeks.

1. Jones misconstrues Plaintiffs' Fourth Amendment Claim, sidestepping the fact that KHP impermissibly relies on innocent travel plans as a factor in the reasonable suspicion calculus.

Jones' first error is claiming that Plaintiffs challenge the use of travel plans or out-of-state plates *only* when such factors are the *sole* indicia of reasonable suspicion in a given stop. That is not Plaintiffs' claim.

As the First Amended Complaint ("Complaint" or "Compl.") makes clear, Plaintiffs challenge KHP's continued practice of using innocent travel indicia *as part of the reasonable suspicion calculus,* alone *or in combination* with other factors. (Doc. #___, Compl.).[22] Contrary to Jones' assertions, Def. Mem. 46-52, Plaintiffs can point to ample evidence in the record to demonstrate that Jones allows—indeed, encourages—KHP troopers to detain individuals based in part on their innocent travel plans. Pl SOF ¶¶ 1-126; 134-244. This runs contrary to the Tenth Circuit's admonition in *Vasquez*, a case brought against KHP Troopers and decided more than five years ago: "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." *Vasquez,* 834 F.3d at 1138. In contravention of this clear precedent, undisputed facts make clear that KHP maintains a practice of relying on a motorist's state of origin or destination in establishing reasonable suspicion.

Vasquez was unequivocal. Four years before the inception of this case and between one and three years before the stops at issue in this case occurred, the Tenth Circuit held that innocent-travel criteria such as state of origin or destination are "so broad as to be indicative of almost

[22] Compl. ¶ 7 (alleging that KHP unlawfully detains drivers based on out-of-state plates or Colorado-based travel plans absent other facts that would support reasonable suspicion); ¶ 44 ("KHP maintains a practice of impermissibly relying on innocent-travel indicia to justify detaining innocent travelers"); ¶ 54 ("Targeting drivers traveling from or destined for Colorado is consistent with KHP's long-standing practice of relying on a driver's origin and destination as indicia of criminal activity"); ¶ 55 ("KHP trains its troopers to use a driver's origin or destination to justify reasonable suspicion, directing troopers that a driver's travel plans ***in conjunction with other factors****"* is "sufficient to justify a search") (emphasis added); ¶ 56 (KHP does not train troopers that using travel origin state "***plus other factors consistent with innocent travel*** violates the Fourth Amendment.") (emphasis added).

nothing." 834 F.3d at 1137. Observing that it "cannot think of a scenario in which a combination of otherwise innocent factors becomes suspicious" because a driver happens to be coming from a state where marijuana is legal, the court ruled that continued reliance on these criteria is "impermissible" in almost all circumstances. *Id.* at 1138. That holding was reaffirmed by the Tenth Circuit in Defendants Schulte and McMillian's appeal earlier in this case. *Shaw v. Schulte*, 36 F.4th 1006, 1015 (10th Cir. 2022) (destination and state of origin are factors with "minimal value" even when combined with other factors). Although Jones believes otherwise, the Tenth Circuit has, indeed, "closed the door on consideration" of travel to or from a drug source state as part of forming reasonable suspicion. (Doc. #296, Def. Mem. at p. 49).

Yet there is ample evidence in the record that KHP continues to ignore the Tenth Circuit's admonition that travel plans and/or out-of-state plates are constitutionally impermissible criteria to consider, even within the totality of the circumstances.[23] Pl. SOF ¶¶ 21-26, 28-39, 64-73, 86-98. Although *implausible* or *contradictory* travel plans can contribute to reasonable suspicion, *United States v. Pettit*, 785, F.3d 1374, 1381 (10th Cir. 2015), a driver's state of origin or state of destination cannot, *Vasquez*, 834 F.3d at 1137.[24] Troopers under Jones' supervision and leadership

[23] Notably, the language in the *Vasquez* decision itself—"it is time to abandon" the practice of prolonging detentions based in part on travel plans—indicates the Tenth Circuit's awareness of KHP's longstanding custom of relying on these impermissible criteria in developing reasonable suspicion. *See Vasquez*, 834 F.3d at 1137. It stated, "[e]ven under the totality of the circumstances, it is anachronistic to use state residence as a justification for the Officers' reasonable suspicion." *Vasquez*, 834 F.3d at 1138. Jones seems to be under the mistaken belief that, so long as troopers offer other factors to justify the detention, their reliance on out-of-state plates or travel destinations is permissible. Def. Mem. 49, 54. But that is not what the Tenth Circuit has held; as this Court has already recognized, the *Vasquez* court "held that 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). The cases cited by Jones in support of his arguments are all pre-*Vasquez* and should therefore be given little weight. Even if the Tenth Circuit allowed consideration of drug source states as part of reasonable suspicion at one time, it has changed course, and Jones is responsible for following current, rather than outdated, law. Pl. SOF ¶ 79 (Jones Dep – troopers jobs to know the law).

[24] Jones states that cases showing that a "motorist's travel combined with other circumstances to establish reasonable suspicion . . . are ubiquitous." Def. Mem. 47. But the cases Jones relies on to support this point are about *suspicious* or *implausible* travel plans; they do not condone the use of travel plans to or from a drug source state as part of the reasonable suspicion calculus, and in many cases, directly reject such considerations. *See,*

ignore this distinction with impunity. Multiple KHP troopers and supervisors testified during depositions that coming to or from a "drug source state" such as Colorado could contribute to reasonable suspicion. Pl. SOF ¶¶ 27-39. Jones himself testified that this was permissible, as did Sarah Washburn, KHP's legal counsel and lead trainer on legal issues surrounding interdiction. *See* Pl. SOF ¶¶ 36-38.

The findings of Plaintiffs' expert, Dr. Jonathan Mummolo, provide significant further evidence that Jones maintains a policy or custom of prolonging roadside detentions in part based on innocent-travel indicia. Dr. Mummolo's analysis of KHP's traffic stop data and canine sniff reports show that KHP has a pattern of targeting out-of-state drivers for traffic enforcement, and then subjecting them to prolonged detentions at a rate far higher than that of in-state motorists. *See* Pl. SOF ¶¶ 101, 107, 111. Dr. Mummolo's analysis demonstrates that there is a statistically significant difference in the proportion of out-of-state drivers stopped and subjected to prolonged detentions, relative to their share of the total travel population, and that the 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. Pl. SOF ¶¶ 107-108. ("[T]his 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."). Instead, the disparities indicate that KHP regularly and systematically targets out-of-state drivers for stops and prolonged detentions in violation of the Fourth Amendment. Jones has offered no evidence or expert testimony to rebut Dr. Mummolo's study or its

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e.g., *United States v. Mercado-Gracia*, 989 F.3d 829, 839 (10th Cir. 2021) ("The fact that Mercado-Gracia was from Phoenix, which authorities consider a 'source' city, is not entitled to much weight."); *United States v. Torres*, 786 Fed. App'x. 726 (10th Cir. Aug. 23, 2019) (unpublished) (discusses consideration of *implausible* travel plans); *United States v. Ma*, 254 Fed. App'x 752, 756 (10th Cir. 2007) (unpublished) (discusses *inconsistent answers* about travel plans); *United States v. Mendoza*, 817 F.3d 695, 700 (10th Cir. 2016) (discusses how "travel plans made no sense). Nothing in the cases cited by Jones counters Plaintiffs' claim that KHP impermissibly detains drivers in part because of their state of origin or destination

conclusions. *See, e.g.*, *Rogers v. Colorado Dep't of Corr.*, No. 16-CV-02733-STV, 2019 U.S. Dist. LEXIS 159001, at *44-45 (D. Colo. Sept. 18, 2019) (granting summary judgment on the plaintiffs' Americans with Disabilities Act and Rehabilitation Act claims, partly because the government "present[ed] no expert evidence to rebut [Plaintiffs' expert] opinions, or any of the factual assertions on which those opinions rest").[25]

KHP's training materials also support Plaintiffs' claims. KHP trains its officers to ask about travel plans in the initial encounter for a traffic stop. Pl. SOF ¶¶ 84-85, 95-98. In fact, in Lieutenant Doug Rule instructs KHP troopers in his Domestic Highway Enforcement training that "where they [the driver] are coming from and where they are going to are the two most important questions" KHP troopers can ask. Pl. SOF ¶¶ 84-85. Lieutenant Rule's training states that whether the driver is coming from a drug source area or going to a drug destination area are two questions that "are the basis of everything we do." Pl. SOF ¶ 86. Lieutenant Rule's highway enforcement training, which Jones endorses as the head of the agency, demonstrates how KHP still places significant weight on travel plans when deciding whether or not to detain someone for a canine sniff. Pl. SOF ¶¶ 12, 84-86; Pl. Resp. to Df. SOF ¶ 10.

This case is not about whether KHP considers travel destination *alone* to be grounds for reasonable suspicion. Nor is it a case challenging the consideration of *suspicious* travel plans. Rather, it is about whether Jones maintains a practice of permitting—or, indeed, encouraging—

[25] The canine reports that contributed to Dr. Mummolo's analysis lay this bare, too. These reports include narrative sections completed by troopers which describe the reasons why a driver was detained for a canine unit. Many of these narrative sections list travel to/from a drug source state among the reasons a driver was suspicious enough to detain for a canine sniff, demonstrating that KHP maintains a custom of relying on this impermissible criteria to justify detentions. Pl. SOF ¶ 119. These reports are the only contemporaneous record created by KHP troopers of their reasons for detaining drivers, Pl. SOF ¶¶ 114, 117, and therefore paint the most accurate picture of the types of criteria troopers rely on to justify such detentions. Despite the need to "abandon the pretense" that innocent-travel indicia are a permissible consideration, alone or in combination with other factors, *Vasquez*, 834 F.3d at 1138, Jones's own records demonstrate a continuing practice of relying on these indicia.

troopers to use innocent travel plans involving travel to or from so-called "drug source states" as part of their totality of the circumstances analysis for reasonable suspicion. Jones' efforts to redefine Plaintiffs' claims is self-serving. The Court should not countenance Jones' ignorance of Plaintiffs' claims, nor his clear misunderstanding of *Vasquez*.

D. Defendant incorrectly narrows the scope of Plaintiffs' allegations regarding the Two-Step.

Plaintiffs' First Amended Complaint alleges the following with regard to the Two-Step: (1) Jones and KHP "maintain[] a practice of detaining drivers on I-70 after the initial purpose of their traffic stop has been resolved in order to question them about their travel plans absent consent or reasonable suspicion of criminal activity," Compl. ¶ 38; (2) KHP does this through the Two-Step maneuver, Compl. ¶ 39; (3) The Two-Step involves re-approaching the vehicle and asking additional questions of driver, during which time the KHP trooper "block[s] the detained vehicle from safely re-entering traffic," Compl. ¶ 42.[26] 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. (*See* Doc. #296, Def. Mem. 36, 44-45). But Plaintiffs have never advanced this decidedly limited definition. This is another example of Jones unilaterally redefining Plaintiffs' claims in a self-serving manner: Plaintiffs have not pointed to a practice of physically touching cars during the Two-Step, because that is not a part of Plaintiffs' claims.

Rather than centering their claims on troopers' physical contact with cars, as Jones wrongfully suggests, Plaintiffs have repeatedly pointed to how KHP uses the Two-Step to create

[26] The Kansas Court of Appeals has described the Two-Step as follows: "After telling [the driver] to have a safe trip," the trooper "turned his body, took two steps toward his patrol vehicle, turned back around, and, through [the car's] still open passenger window, asked [the driver] if he would answer a few more questions." *State v. Gonzalez*, 455 P.3d 419, 423 (Kan. Ct. App. 2019); (Doc. #36 at 3).

an unequal power dynamic between the trooper and the driver where drivers do not feel free to leave, or cannot safely leave, once the traffic stop has concluded. *See generally* Doc. # 177 at 28-30 (describing Trooper Schulte's use of the Two-Step as a "tactical ploy," and describing how "[a] reasonable person in [Blaine] Shaw's position would not have felt free to terminate their encounter with Trooper Schulte."). The Shaws did not feel free to leave once Trooper Schulte reapproached their car window, and regardless, they could not have safely pulled out into traffic with a trooper standing directly next to them—even if that trooper's arm was not inside their car window, as it was in *State v. Gonzalez*, 57 Kan. App. 2d 510, 455 P.3d 419 (2019). *See* Doc. #177-2, B. Shaw Aff., ¶ 15-16. The KHP trains its troopers to use the Two-Step to attempt to gain consent to search a vehicle, or at the very least, to drum up additional reasonable suspicion to hold the driver for a canine sniff.[27] *See* Pl. SOF ¶¶ 40-26. Indeed, the KHP uses the Two-Step maneuver to detain drivers like the Shaws, without reasonable suspicion, by creating a dynamic between the trooper and the driver where drivers do not feel free to leave, or cannot safely leave, once the traffic stop has concluded.[28] Pl. SOF ¶¶ 146. KHP training created *after* the inception of this lawsuit seems to recognize this point. *See* Pl. SOF ¶¶ 42-45. Yet KHP still trains its officers to do the Two-Step,

[27] The Two-Step is also called the "Columbo Gambit." *See* Pl. SOF ¶ 41. A "gambit" is a calculated move . . . in an attempt to earn an advantage later over one's opponent. *See* "Gambit," Oxford English Dictionary, https://www.oxfordlearnersdictionaries.com/us/definition/american_english/gambit.

[28] As 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. Guerrero-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); *United States v. Bradford*, 423 F.3d 1149, 1158 (10th Cir. 2005) ("An unlawful detention occurs only when the driver has an objective reason to believe he or she is not free to end the conversation with the officer and proceed on his or her own way.") (internal quotations omitted). Tenth Circuit jurisprudence does not place any emphasis on whether or not there was physical contact between the officer and the car in determining whether an encounter was consensual. *See United States v. Gomez-Arzate*, 981 F.3d 832, 842 (10th Cir. 2020). Instead, the central question is whether the driver felt free to leave.

and numerous KHP troopers deposed in this case indicated that they think it is a legitimate tool to prolong a traffic stop. Pl. SOF ¶¶ 40, 42-45, 68-69, 71. By intentionally reframing Plaintiffs' claims, Jones avoids grappling with the reality the Two-Step creates for drivers, who are parked on the shoulder of a highway, with fast moving traffic, little room to merge, and an armed, uniformed officer at the side of their car who clearly wants them to remain and continue answering questions.[29]

Plaintiffs need not demonstrate that in each instance in which the Two-Step was used, the trooper made physical contact with the vehicle, because that is not the claim set forth in their Amended Complaint. Plaintiffs have pointed to sufficient evidence that the Two-Step maneuver, endorsed by Jones and used throughout the KHP, contributes to KHP's practice of unlawfully prolonging roadside detentions without adequate reasonable suspicion. *See supra*; *see also* (Doc. #308 at 50-55). At the very least, there is a genuine dispute as to whether drivers subjected to the Two-Step would feel free to leave, making summary judgment for Jones improper. For these reasons, Jones' attempt to unilaterally limit Plaintiffs' claims to that of *physical* blocking of Two-Stepped drivers should be rejected.

[29] The circumstances drivers face in the majority of these highway stops must be considered in determining whether such drivers would feel free to leave. *See United States v. Mercado-Gracia*, 989 F.3d 829, 836 (10th Cir 2021) (listing several non-exclusive factors used to evaluate whether an objectively reasonable person would feel free to leave or disregard the officer's request for information, and noting that no single factor is dispositive, but rather the courts look at the "coercive effect" on "taken as a whole on a reasonable person."); *see also United States v. Sandoval*, 29 F.3d 537, 544 (10th Cir. 1994) ("whether the driver was informed of his right to refuse consent or to proceed on his way" is an important factor); *United States v. Gomez-Azrate*, 981 F.3d 832, 842-43 (10th Cir. 2020) (reasonable driver would feel free to leave where deputies twice told driver he was free to go); *United States v. Mendenhall*, 446 U.S. 544, 558, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980) (although not required, express statement to defendant that she could decline consent was "especially significant"); *U.S. v. Little*, 60 F.3d 708, 711 (10th Cir. 1995) ("The test is objective and fact specific, examining what the police conduct would have communicated to a reasonable person based on all the circumstances surrounding the encounter."); *Gonzalez*, 455 P.3d at 423 (use of Two-Step *did not* create a consensual encounter, based on other circumstances). While "a traffic stop may not be deemed consensual unless the driver's documents have been returned . . . [t]he return of a driver's documentation is not . . . always sufficient to demonstrate that an encounter has become consensual." *Bradford*, 423 F.3d at 1158.

E. The evidence demonstrates that Jones enables ongoing constitutional violations by failing to provide adequate training, supervision, and oversight of employees.

Jones incorrectly argues that Plaintiffs cannot demonstrate deficiencies in training sufficient to show municipal liability for failure to train under *Monell*, and that there is insufficient evidence to find Jones "deliberately indifferent." (*See* Doc. #296, Def. Mem. 45, 52-56). These arguments are both misplaced *and* unavailing. Again, Plaintiffs do not need to show *Monell* failure-to-train liability, because they did not plead a Section 1983 municipal liability claim against Jones predicated on his failure to train. Relatedly, Jones' repeated focus on "deliberate indifference" attempts to assert the standard for municipal liability where it does not belong.

Rather, Plaintiffs point to Jones' deficiencies in training, supervision, and oversight to support their claim that there is an ongoing constitutional violation, and that Jones is not exercising his "authority [over KHP troopers] to stop the Kansas Two-Step and canine searches that are based on driver travel origins or destinations." (Doc. #36 at 5). This evidence is relevant to showing how Jones' actions allow constitutional violations to occur unabated, and why an injunction against KHP's practices is necessary.

Even if the municipal liability legal framework *did* provide the correct standards by which to evaluate Plaintiffs' claims, there is more than enough evidence in the record to allow these claims to proceed to trial. As explained in more detail below, Jones' arguments to the contrary should be overruled.

1. Jones' lack of oversight and supervision over KHP troopers contributes to the ongoing practice of constitutional violations.

Jones fails to adequately supervise KHP leadership and troopers; fails to ensure that troopers follow recent case law interpreting the Fourth Amendment; and fails to take constitutional violations seriously when they are brought to his attention. Through his leadership of the KHP,

Jones allows constitutional violations to continue unabated, demonstrating the need for an injunction to prevent continued violations of federal law.

Jones asserts that "there is no evidence that anything Jones is doing, has done or failed to do . . . will cause the alleged future constitutional violations." (Doc. #296, Def. Mem. 46). But a simple review of the undisputed facts in this case—facts relayed by Jones himself, and those under his command—undercut this bald assertion. In his capacity as Superintendent of the Kansas Highway Patrol, Jones "has statutory authority to direct the conduct of KHP troopers, and is responsible for training, guiding, and directing KHP troopers. Jones therefore has the authority to stop" the practices at issue in this case. (Doc. #36 at 5). Jones is responsible for signing off on agency policies and the discipline of officers. Pl. SOF ¶¶ 14-16. Jones sets agency culture and is responsible for ensuring that troopers are following the law when interacting with the public. Pl. SOF ¶ 12. Despite all of this, Jones does not play an active role in managing his agency.

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." Pl. SOF ¶ 75. 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*. 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.*. Even after being pushed to explain this further, Jones only spoke in vague terms, referencing 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 his "maybe" sending out an email. *Id.* The only mechanism Jones uses to supervise the actions of troopers is those troopers' line

supervisors, but when pushed to describe how Jones provides supervision to those higher in the command structure, Jones answered that he does so only "through my executive staff." *Id.*

Plaintiffs' expert, Chief Hassan Aden, opined that this type of hands-off leadership is inconsistent with best practices for policing and allows patterns of constitutional violations to develop and go unaddressed.[30] "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 . . . Jones has not taken steps to correct the rampant unlawful stops, detentions, and searches occurring at the hands of KHP troopers." Pl. SOF ¶ 76. Chief Aden's review of Jones' deposition testimony made clear 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 charting the course and the culture of the KHP, [and] they are a strong part of the KHP culture that needs to be reformed.

Pl. SOF ¶ 77. Chief Aden also opined that 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." Pl. SOF ¶ 78. [31] Finally, Chief Aden concluded that

[30] District courts analyzing evidence in municipal liability injunctive relief cases regarding unconstitutional stop and detention policies have likewise looked at the adequacy of leadership's supervision of the rank-and-file for evidence of unconstitutional policing. *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 561 (S.D.N.Y. 2013) (noting that "[m]uch evidence was introduced regarding inadequate monitoring and supervision of unconstitutional stops," including that "[s]upervisors routinely review the *productivity* of officers, but do not review the facts of a stop to determine whether it was legally warranted" or "ensure that an officer has made a proper record of a stop so that it can be reviewed for constitutionality" despite "mounting evidence" of constitutional violations.)

[31] Jones recognizes that it is his responsibility, as Superintendent, to recognize patterns of misconduct or policy violations that emerge. Pl. SOF ¶ 58. To that end, the head of the Professional Standards Unit (PSU) Captain Mitchell Clark is 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." Pl. SOF ¶¶ 60-63. By policy, the PSU is to identify and annually report to KHP command the names of employees receiving a relatively high number of complaints. Pl. SOF ¶ 61. 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.*

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 practice of constitutional violations continuing unabated. *Id.* at 25.

Two examples provide clear evidence of Jones' failure to correct constitutional violations occurring within his department and his failure to properly supervise KHP troopers and command staff. First, when the PSU determined that Trooper McMillan violated Mr. Bosire's constitutional rights, Jones signed off on the action taken in response, which included a remedial class (in which Trooper McMillan admittedly learned nothing that changed his policing practices) and one ride along with a Field Training Officer. Pl. SOF ¶¶ 54-57, 209, 210. The KHP did not consider this discipline, but rather, corrective action, despite finding that Trooper McMillian violated a motorist's constitutional rights. Pl. SOF ¶ 209-211. This was an "insufficient consequence" and demonstrates Jones' overall failure to take the holdings of *Vasquez* seriously. Pl SOF ¶ 212.

Similarly, testimony from Lieutenant Rohr—who was promoted post-*Vasquez* and now oversees a troop of highway interdiction troopers—demonstrates that supervisors under Jones' leadership do not feel it is necessary to take corrective action against troopers who violate the constitution. When asked what Lieutenant Rohr does to supervise his troopers and whether he reviews canine reports, Trooper Rohr noted that he generally reviews such reports for grammar and spelling mistakes. Pl. SOF ¶¶ 115. To Chief Aden, this demonstrated a clear failure in Jones' system of supervision which allows constitutional violations to go unchecked. Pl. SOF ¶ 120.[32]

[32] Indeed, as the U.S. Department of Justice has repeatedly noted, the failure of supervisors to review reports and ensure that policing activities are compliant with the constitution can be indicative of a broader pattern or practice of constitutional violations. *See generally* U.S. Dep't. of Just. C.R. Div. & U.S. Atty's Off. Dist. of N.M., *Findings Letter on Investigation of the Albuquerque Police Department* (Apr. 10, 2014) at 4, https://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf ("We found only a few instances in the incidents we reviewed where supervisors scrutinized officers'" reports, and "In nearly all cases, supervisors endorsed officers' version of events, even when officers' accounts were incomplete, were inconsistent with other evidence, or were based on canned or repetitive language."); U.S. Dep't. of Just. C.R. Div. & U.S. Atty's Off. N. Dist. of Ill., *Findings Letter on Investigation of the Chicago Police Department* (Jan

These facts demonstrate that there is sufficient evidence to find Jones liable for the ongoing practice of constitutional violations within KHP. At the very least, it is more than enough to withstand Jones' motion for summary judgment.

2. Training about *Vasquez* is plainly relevant to this case, and Defendant Jones does not ensure that KHP officers follow *Vasquez*.

Bizarrely, Jones asserts that "[t]raining about *Vazquez* is irrelevant to this case." Def. Mem. 53. Yet in denying Jones' earlier motion to dismiss, the Court clearly recognizes the relevance of *Vasquez* to Plaintiffs' claims. (Doc. #36 at 12). As noted above, the Tenth Circuit held in *Vasquez* that detaining a driver because of their travel origin or destination and a combination of other facts consistent with innocent travel violates the Fourth Amendment. *Vasquez*, 834 F.3d at 1138. *Vasquez* was not just an influential case; it was an influential case *against a KHP trooper*. Despite the fact that *Vasquez* was directed at the KHP, the agency did not make any policy changes as a result of *Vasquez*, Pl. SOF ¶¶ 21-26, and did not incorporate *Vasquez* into KHP training until after this lawsuit was filed, Pl. SOF ¶¶ 21-26, further demonstrating Jones' failure to abate the practice, policy, or custom of constitutional violations within KHP.

In fact, KHP's post-*Vasquez* training still instructs that state of residence of a driver is a proper consideration in determining reasonable suspicion, and remarkably, KHP trains that where a driver is coming from and where they are going to are *the two most important* questions in drug

13, 2017) at 41, https://www.justice.gov/opa/file/925846/download ("The failure to ensure the accurate reporting, review, and investigation of officers' use of force has helped create a culture in which officers expect to use force and never be carefully scrutinized about the propriety of that use."); U.S. Dep't. of Just. C.R. Div. & U.S. Atty's Off. N. Dist. Ohio, *Findings Letter on Investigation of the Cleveland Division of Police* (Dec. 4, 2014) at 29-30, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf ("Officers . . . [do] not describe with sufficient particularity the type of force they used. […] This language does not adequately describe the level and type of force used for a supervisor to review and ensure that the force was within constitutional limits. […] These shortcomings in CDP's policies inhibit supervisors' ability to review force and ensure that it is within constitutional limits.").

interdiction. Pl. SOF ¶ 85. KHP continues to train its troopers that certain travel origins and destination are an indicator of reasonable suspicion and to find certain travel origins and destinations to be indicative of criminal activity. Pl. SOF ¶¶ 27-39, 85-87, 95-98.

Testimony from KHP shows troopers—and Jones himself–lack awareness and/or understanding of the law post-*Vasquez.* For example, some troopers do not remember receiving any training on *Vasquez*, and even troopers who admit knowing about the *Vasquez* case testified they do not recall *any* change in procedure or their own respective practices regarding car stops and searches after *Vasquez*. Pl. SOF ¶¶ 90-92. Testimony indicates KHP continues to labor under the mistaken impression that travel to or from a "drug source state" may be properly considered in the reasonable suspicion calculus so long as the trooper articulates other factors as well—even where those factors are also wholly consistent with innocent travel. Pl. SOF ¶¶ 27-39, 95-98.

Again, this is not a case about consideration of travel plans *in any capacity* in the reasonable suspicion calculus. *See supra* § V.C. It is a case about consideration of state-of-origin or destination. For these reasons, it is clear that Jones fails to ensure that troopers are following Tenth Circuit law regarding what may, and may not, be considered in forming reasonable suspicion. This failure to ensure troopers are aware of and following the law contributes to an ongoing practice, policy, or custom of constitutional violations which may be properly enjoined by the Court.

F. CALEA certification has no bearing on whether or not there is a practice of violating the constitutional rights of motorists through prolonged detentions without adequate reasonable suspicion.

Finally, Jones places significant emphasis on the fact that KHP is certified by the Commission on the Accreditation of Law Enforcement Agencies (CALEA), arguing that CALEA certification indicates a lack of unconstitutional conduct. *See generally* Def. SOF ¶¶ 6-9; Doc. #296, Def. Mem. 55 (asking rhetorically, "[w]hat basis is there to conclude Jones is deliberately indifferent having made this commitment [to become CALEA TRI-ARC accredited]?"). But such

arguments are a distraction: CALEA certification has no bearing on the constitutionality of KHP's practices.

Courts have previously rejected the proposition that accreditation with a membership organization like CALEA has any legal significance in evaluating whether organization is operating in a constitutional manner. *See, e.g. Bell v. Wolfish*, 441 U.S. 520, 543 n.27 (1979) (noting that "while the recommendations of these various groups may be instructive in certain cases, they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question."). For example, the American Correctional Association (ACA) and the National Commission on Correctional Healthcare (NCCHC) are two accreditation organizations that promulgate suggested standards for prisons and jails.[33] Courts considering cases involving constitutional violations inside of prisons and jails have clearly held that accreditations by ACA and NCCHC do not immunize a prison or jail from constitutional challenges. *E.g., Graves v. Arpaio*, 48 F. Supp. 3d 1318, 1338 (D. Ariz. 2014) ("Compliance with NCCHC standards is not equivalent to complying with constitutional standards. Nationally recognized best practices may exceed constitutional standards in some areas and fall short in others."); *Gates v. Cook*, 376 F.3d 323, 337 (5th Cir. 2004) ("it is absurd to suggest that the federal courts should subvert their judgment as to alleged Eighth Amendment violations to the ACA whenever it has relevant standards"); *LaMarca v. Turner*, 662 F. Supp. 647, 655 (S.D. Fla. 1987) (finding ACA accreditation has "virtually no significance" to lawsuit, because accredited prisons have been found unconstitutional.); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 902 (S.D. Tex. 1999),

[33] American Correctional Association, *Welcome to the Standards and Accreditation Department*, https://www.aca.org/ACA_Member/ACA/ACA_Member/Standards_and_Accreditation/SAC.aspx (last visited Aug. 30, 2022); National Commission on Correctional Healthcare, *Accreditation*, https://www.ncchc.org/accreditation/ (last visited Aug. 30, 2022).

rev'd on other grounds, 243 F.3d 941 (5th Cir. 2001) (holding that NCCHC accreditation "simply cannot be dispositive" of the question of whether medical care provided by a correctional facility is constitutional.). These cases confirm that there is no logical relationship between accreditation by a trade group like CALEA and constitutional compliance.

Finally, Jones' reliance on KHP's CALEA certification is especially meaningless when one considers how several CALEA-certified agencies have been found to be engaging in a pattern or practice of constitutional violations at or around the time they became CALEA accredited. For example, the Chicago Police Department (CPD) received its initial CALEA accreditation on July 28, 2018,[34] approximately one and a half years after the U.S. Department of Justice found that CPD engaged in a widespread pattern and practice of constitutional violations, including excessive use of force. *See* U.S. Dep't of Justice, *Investigation of the Chicago Police Department* (Jan. 2017), https://www.justice.gov/opa/file/925846/download. Similarly, the New York Police Department (NYPD) Training Academy was CALEA certified in 2006, 2009, 2012, 2015, and 2019,[35] but in 2013, a federal court found that NYPD's training contributed to a widespread practice of Fourth Amendment violations. *Floyd*, 959 F. Supp. 2d at 660.

This is because CALEA is merely a *framework* for policing; it does not provide a constitutional floor. *See* Pl. SOF ¶ 127. And, while CALEA sets minimum standards for its member agencies, "[i]t is important to note that achieving CALEA Accreditation, does not mean that the framework of policies and procedures are being followed or complied with by all members of an accredited law enforcement agency." Pl. SOF ¶ 128. Indeed, when deposed on the question,

[34] CALEA, Search Agencies, Chicago Police Department, available at https://search.calea.org/Details.aspx?ProgramID=14112502.

[35] CALEA, Search Agencies, New York Police Department Training Academy, available at https://search.calea.org/Details.aspx?ProgramID=02070304.

KHP's accreditation manager Christi Asbe admitted that many accredited agencies commit constitutional violations. Pl. SOF ¶ 129. Ms. Asbe also confirmed that CALEA certification does little to prevent constitutional violations, stating, "if [CALEA] unaccredited every [police] agency that had an officer that did something wrong, nobody would be accredited." *Id.* As noted by Plaintiffs' expert Chief Aden, CALEA certification focuses on whether or not policies exist; "whether an agency has *lawful* policies and procedures is largely left to the discretion and integrity of the agency itself." Pl. SOF ¶¶ 133. And, more significantly, CALEA certification does not guarantee that those policies are followed. Pl. SOF ¶ 129 ("CALEA certification does not guarantee an agency is holding its officers accountable to policies and standards.").

For these reasons, Jones' emphasis on KHP's CALEA accreditation has no bearing on the constitutional questions before the Court, and provides no meaningful justification to grant Jones' motion for summary judgment.

For all the foregoing reasons, Defendant's Motion for summary judgment on Plaintiffs' Fourth Amendment claim should be denied.

VI. Jones is not entitled to summary judgment on Plaintiffs' right-to-travel claim.

"The 'right to travel' . . . embraces at least three different components. It 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 allege that KHP's practice of targeting drivers with out-of-state license plates and other innocent travel indicia implicates the first and second components of the right to travel. (Doc. # 7, ¶ 122). The undisputed facts do not support Jones' motion for summary judgment on these claims.

A. There is sufficient evidence to find that Jones' practice violates the right to enter and leave a state.

The first component protects the "right of a citizen of one State to enter and to leave another State." *Saenz*, 526 U.S. at 500. "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). 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"). For instance, in *Crandall v. Nevada*, 73 U.S. 35 (1867), the Supreme Court struck down a Nevada law that imposed a head tax on each passenger of any commercial vehicle leaving or passing through the state, holding that the tax unjustifiably burdened interstate travel. *See id.* at 44-47. As Plaintiffs argued in their summary judgment motion, KHP's practice of targeting out-of-state drivers for prolonged roadside detentions while they are traveling through Kansas directly and substantially impairs free interstate movement. (Doc. #308 at 64-68).

Jones argues that his practice targeting out-of-state drivers does not violate the right to enter and leave a state, because it does not amount to an "actual barrier" on interstate movement. *See* Doc. #296 at 28–30. Jones primarily relies on cases holding that the selective enforcement of traffic ordinances does not substantially burden interstate travel. *See State v. Chettero*, 297 P.3d 582, 586 n.2 (Utah 2013) (noting that case law "limits the reach" of the first component of the right to travel to "significant impediments on the right to freely traverse a state—impediments

beyond the mere threat of a traffic stop for a violation of the traffic laws"); *United States v. Lindsey*, 2004 U.S. Dist. LEXIS 16503, at *13 (D. Kan. May 6, 2004) ("Even if an officer focuses on out-of-state plates, the existence of a traffic violation justifies a traffic stop without violating the driver's right to travel.") (quoting *United States v. Hare*, 308 F. Supp. 2d 955, 1001-02 (D.Neb.2004)); *U.S. v. Mayville*, 2018 U.S. Dist. LEXIS 38305, at *17 (D. Utah Mar. 7, 2018) (holding: "[b]eing legally stopped for a traffic violation while travelling through a foreign state does not constitute" an infringement of the right to travel), *aff'd*, 955 F.3d 825 (10th Cir. 2020).

The Tenth Circuit has not addressed this issue; however, assuming for the sake of argument that the selective enforcement of traffic ordinances against out-of-state drivers would not itself violate the right to interstate travel, Jones' authorities would still be inapposite because the prolonged roadside detentions at issue here are significantly more odious than a traffic stop. As Plaintiffs' own experiences demonstrate, many of these prolonged detentions are not supported by reasonable suspicion and some of them last for well over an hour, even in winter. Pl. SOF ¶¶ 135, 161, 166, 195-197, 220, 234 (in the Shaws' stop, over an hour elapsed between when they were pulled over on December 20, 2017, and the completion of the search of the vehicle; Erich and Maloney were forced to stand outside their vehicle for long period of time; Bosire stood on side of the highway at night in the winter during the canine sniff). The substantial burdens imposed by KHP's systematic targeting of out-of-state drivers for prolonged roadside detentions meaningfully alter the right-to-travel analysis. *Cf. United States v. Walraven*, 892 F.2d 972, 974 (10th Cir. 1989) (holding that the targeting of out-of-state vehicles for registration checks does not violate the right-to-travel, because "the subject remains unaware of the check and unencumbered").

Many of the other cases relied on by Jones are inapposite because they do not address state policies or practices targeting interstate travel or out-of-state travelers.[36] KHP's selective targeting of out-of-state drivers makes a dispositive distinction. As the Supreme Court held in *Bray v. Alexandria Women's Health Clinic*, 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." 506 U.S. 263, 277 (1993) (emphasis in original).

Finally, Jones' reliance on the Tenth Circuit's decision in *Abdi* is misplaced. There, the court 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 he had not alleged that the associated airport security delays "substantially exceed[ed] those experienced by many air travelers," *id.* at 1031. By contrast, the Tenth Circuit squarely held in *Vasquez* that the targeting of out-of-state drivers for prolonged roadside detentions is an unreasonable seizure under the Fourth Amendment. 834 F.3d at 1138 ("Absent a demonstrated extraordinary circumstance, the continued use of state residency as a justification for the fact of or continuation of a stop is impermissible."). It is an equally unreasonable infringement of the right to travel.

[36] *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) (held plaintiffs failed to state a right-to-travel claim, where they alleged that the defendants engaged in racially discriminatory stops of motorists, but did not allege that the stops targeted out-of-state drivers); *Roseen v. Klitch*, No. 1:14-CV-118-REB, 2015 WL 1467202, at *2 (D. Idaho Mar. 30, 2015) ("While it is plausible that Plaintiff was a part of an 'identifiable group' (that of being a traveler in a vehicle with license plates identifying a state that had legalized marijuana) that was adversely effected, Plaintiff has not alleged facts that other persons from other states could have been followed and pulled over, but were not."); *United States ex rel. Verdone v. Cir. Ct. for Taylor Cnty.*, 851 F. Supp. 345, 350 (W.D. Wis. 1993) ("That plaintiff is subject to Wisconsin's traffic laws does not mean that his right to travel has been violated; the right to travel is not a right to travel in any manner one wants, free of state regulation.").

B. There is sufficient evidence to find that Defendant's practice violates the right to be treated as a welcome visitor.

The second component of the right to travel, which is expressly protected by the Privileges and Immunities Clause of Article IV, § 2 of the Constitution, is "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State." *Saenz*, 526 U.S. at 500. The Supreme Court has established a two-part test for determining whether a state's discrimination against out-of-state residents violates this right. 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); *Baldwin v. Fish & Game Commission*, 436 U.S. 371, 388 (1978) (central question in a claim under the privileges and immunities clause is whether the right at issue is "basic to the maintenance or well-being of the Union."). 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.

Jones does not contend that KHP's practice of targeting out-of-state drivers for prolonged roadside detentions is "closely related to the advancement of a substantial state interest." *Friedman*, 487 U.S. at 65. Nor could he, given that the Tenth Circuit has already concluded that such broad-based targeting is "anachronistic" and "impermissible" under the Fourth Amendment. *Vasquez*, 834 F.3d at 1138. His motion for summary judgment on this claim therefore rests solely on his assertion that the activities at issue are not protected by the Privileges and Immunities Clause.

Jones acknowledges, as he must, that the Privileges and Immunities Clause's protections are not limited to economic activities. (Doc. #296 at 31). In *Peterson v. Martinez*, the Tenth Circuit made clear that the Clause protects both economic and non-economic activities that are

"sufficiently basic to the livelihood of the Nation." 707 F.3d 1197, 1214-15 (10th Cir. 2013) (quoting *Friedman*, 487 U.S. at 64). *Peterson* also identified several factors guiding the analysis about whether an activity is protected under the Privileges and Immunities Clause, 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).[37]

All of these factors strongly support application of the Privileges and Immunities Clause to the activity at issue—the right to move about freely on the roads without being subject to arbitrary prolonged detention by law enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (observing that an anti-loitering statute, which required individuals to provide "credible and reliable" identification upon request by a police officer, "implicate[d] consideration of the constitutional right to freedom of movement"). As set forth in Plaintiffs' summary judgment motion, (Doc. #308 at 69) "[f]reedom of movement is basic in our scheme of values" and "part of our heritage." *Kent v. Dulles*, 357 U.S. 116, 126 (1958). It is also "an everyday right, a right we depend on to carry out our daily life activities. It is, at its core, a right of function." *Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002). A agency's practice of systematically targeting out-of-state residents for arbitrary and often unjustified prolonged roadside detentions is at least as detrimental to the formation, purpose, and development of the Union as residency restrictions on National Guard service. *See Nelson v. Geringer*, 295 F.3d 1082, 1090 (10th Cir. 2002).

[37] Insofar as *Chettero* suggests that the Privileges and Immunities Clause's protections are limited to access to economic rights or essential services, 297 P.3d at 586, it is inconsistent with the Tenth Circuit's subsequent decision in *Peterson*, which is binding on this Court. Moreover, the traffic stops in *Chettero* are distinguishable from prolonged roadside detentions, for the reasons discussed in the preceding section of this memorandum.

Jones argues 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. #296 at 31). To support this proposition, Jones cites 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). Of course, states may also reasonably regulate many activities, such as the practice of law, that are nonetheless protected by the Privileges and Immunities Clause. *See Friedman*, 487 U.S. at 66-67 (holding that a state's authority to regulate the practice of law did not confer the authority to discriminate against bar applicants on the basis of residency or citizenship). As the Supreme Court held in *Friedman*, "[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." *Id.* (emphasis added).

Jones' other authorities are similarly inapposite 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) (holding that plaintiff "confus[ed] the constitutional right to travel with the qualified privilege to drive an automobile," where he claimed that defendants interfered with his right to travel "by initiating a traffic stop or arresting him, [which] prevented him from driving away"); *accord Yahoshua-Yisrael: Yahweh v. City of Memphis*, No. 12-2897-JDT-CGC, 2014 WL 1689715, at *6 (W.D. Tenn. Apr. 29, 2014); *see also Roseen*, 2015 U.S. Dist. LEXIS 43301, at *5 (D. Idaho Mar. 30, 2015) (noting that the plaintiff had failed to allege facts supporting an inference that he was targeted on the basis of his out-of-state license plates); *Maryland State Conference of NAACP*

Branches, 72 F. Supp. 2d at 569 ("The essence of the plaintiffs' complaint remains that they, both Maryland residents and non-residents alike, have experienced the same unlawful treatment by the defendants based on race. Accordingly, the defendants are not discriminating on the basis of residency, and the second [right-to-travel] component is not implicated.").

For these reasons, Defendant's motion for summary judgment on Plaintiffs' right to travel claim should be denied.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 2022, a copy of the foregoing was filed and served via the Court's electronic filing system on all counsel of record. Exhibits to the statement of facts were all served electronically to counsel for Defendant Jones at Art.Chalmers@ag.ks.gov.

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