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. 19-1343-KHV-GEB**
MARK ERICH, *et al*., *Plaintiffs,* v. HERMAN JONES, *KHP Superintendent,* *Defendants.*	**Case No. 20-1067-KHV-GEB**

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AGAINST B. SHAW AND S. SHAW'S CLAIMS

On summary judgment, law enforcement officials are only entitled to qualified immunity if they do not violate a person's constitutional rights, or if those rights are not clearly established. Here, Schulte prolonged the roadside detention of the Shaws on three occasions, without reasonable suspicion, based, in part, on travel plans including Colorado. This was a violation of constitutional rights under established precedent. Moreover, here, summary judgment is inappropriate because material facts remain in dispute. Summary judgment should be denied.

I. THE NATURE OF THE MATTER PRESENTED

This action is brought pursuant to 42 U.S.C. §§ 1983 and 1988 against two Kansas Highway Patrol ("KHP") Troopers for compensatory and punitive damages arising from alleged prolonged detentions and vehicle searches based on their travel origins and destinations. The action is also brought on behalf of a putative class and against Defendant Jones, in his official capacity, seeking injunctive and declaratory relief to address alleged unconstitutional policies and customs of prolonged detentions and vehicle searches based on travel origins and destinations. A class certification motion is pending, although the parties have stipulated that the claims could be resolved via an agency-wide injunction without certifying a class.

Trooper Schulte's Motion for Summary Judgment concerns Blaine and Samuel Shaw's claims for damages against Trooper Douglas Schulte. These claims stem from Trooper Schulte's prolonged detention of the Shaws on an exit ramp from I-70 following a traffic stop and forcing the Shaws to follow Schulte to the stations to copy some of their records. The Shaws allege that Trooper Schulte prolonged their detention without adequate reasonable suspicion in violation of the Fourth Amendment and clearly established law in this Circuit.

II. STATEMENT OF FACTS

A. Response to Trooper Schulte's Statement of Uncontroverted Facts[1]

1. Plaintiffs Blaine Shaw[2] ("B. Shaw") and Samuel Shaw ("S. Shaw") sue Kansas Highway Patrol ("KHP") Master Trooper Douglas Schulte ("Schulte") in his individual capacity. Doc. 07, ¶¶ 128-134.

RESPONSE: Uncontroverted.

[1] Trooper Schulte's Statement of Uncontroverted Facts are restated here, with Plaintiffs' responses. The contents, but not numbering, of the footnotes in this section are from Schulte's memorandum and do not represent a response or commentary by the Shaws.

[2] aka Elontah Blaine Shaw. ECF 7, ¶ 21.

2. Schulte is a seventeen-year trooper with the KHP. He graduated a 22-week training academy at the beginning of his employment, in 2004, and had received 40 hours of continuing law enforcement education annually. He has patrolled state highways and roads in north central and western Kansas since he graduated the KHP training academy. He became a Master Trooper in 2011. Exhibit 1 (Schulte Declaration), ¶ 2.

RESPONSE: Uncontroverted for purposes of this motion.

3. On December 20, 2017, at approximately 12:25 p.m., Schulte stopped Plaintiff B. Shaw for speeding westbound on Interstate 70 ("I 70"). Exhibit 1, ¶ 3.

RESPONSE: Uncontroverted.

4. Schulte's patrol vehicle had a dashboard camera. Recordings through a microphone on his uniform synchronized with the dashboard camera's video. A true and correct copy of this video/sound recording of the December 20, 2017 traffic stop, detention and search involved in this lawsuit is provided as Exhibits 2a & 2b. See Exhibit 1, ¶ 31.

RESPONSE: Uncontroverted for purposes of this motion.

5. B. Shaw is a resident of Oklahoma City, Oklahoma. Exhibit 3 (B. Shaw Deposition Excerpts), 5:16-19. He has been an Oklahoma resident since at least 1999. *Id.*, 12:2-4; 15:1-16:3; 26, ll. 8-23. When stopped, he was driving Ron Shaw's minivan, who is his father. *Id.*, 57:24-58:14. The minivan had an Osage Nation license plate. Exhibit 1, ¶ 7. The minivan was registered in the name of Ronald B. Shaw of Shawnee, Oklahoma. *Id.*, ¶ 8.

RESPONSE: Uncontroverted.

6. B. Shaw digitally recorded his encounters with Schulte on his cellular phone. Exhibit 3, 59:1-60:18; 62:13-63:13. A copy of the recording is provided as Exhibit 4.[3]

[3] The data file marked Exhibit 4 (bates number P000006) was produced by the plaintiffs in response to the defendant troopers' request for production of photographs, motion pictures, digital or other video records, diagrams,

RESPONSE: Uncontroverted.

7. S. Shaw is B. Shaw's brother. Doc. 07, ¶ 80; Exhibit 5 (S. Shaw's Deposition Excerpts), 21:16-21. S. Shaw also resides in Oklahoma City, Oklahoma. *Id.* S. Shaw was a passenger in the minivan at times relevant to his claims in this lawsuit. Doc. 07, ¶¶ 80, 91; Exhibit 5, 26:12-27:17; 35:22-36:14; 44:22-46:17.

RESPONSE: Uncontroverted.

8. Schulte clocked the minivan as traveling 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. Exhibit 1, ¶ 4. B. Shaw admits that he was speeding. Exhibit 3, 49:19-50:17.

RESPONSE: Uncontroverted. for purposes of this motion

9. Schulte turned on his patrol vehicle's overhead lights and siren to signal the minivan to pullover and stop. The minivan changed lanes to the driving (outside) lane and slowed down (braking once for traffic in front of the minivan). However, the minivan did not pull to the side of the road and stop for about a minute and one half, and not until after it had traveled about one mile. Exhibit 1, ¶ 5.

RESPONSE: Uncontroverted for purposes of this motion.

10. B. Shaw stopped the minivan on the west shoulder to I 70's Hays, Kansas Exit 159, just before the exit's intersection with Vine Street. Exhibit 1, ¶ 6.

RESPONSE: Uncontroverted.

11. While following and attempting to get the minivan driver to stop, Schulte requested the dispatch to "run" the minivan's Oklahoma Osage Nation license plate. Exhibit 1, ¶ 7.

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measurements, surveys, or reconstruction analysis the regarding the Shaw incident, any of the facts supporting plaintiff's liability claims. *See* Shaws' responses to Interrogatory # 18 and RFP # 1.

RESPONSE: Uncontroverted.

12. Schulte stopped his marked patrol vehicle behind the minivan. He repeated his license plate inquiry, received a response to the inquiry [reporting Ronald B. Shaw was the registered owner], exited his vehicle and walked to the minivan. Exhibit 1, ¶ 8.

RESPONSE: Uncontroverted.

13. Schulte observed, while walking to and from the minivan vehicle, that it was packed full, up into the front seats, with luggage, coolers, a cot, blankets and several other items. It had a lived-in appearance. Schulte's training and experience is that drug traffickers frequently limit their stops and time from their vehicle hoping to quickly obtain and transport illegal contraband. This results in a lived-in look to the vehicle. Exhibit 1, ¶ 9.

RESPONSE: Controverted that the Shaws' van had a "lived-in appearance." Ex. 1, Shaw Dash Camera Video at 45:43-47:45; Ex. 2, B. Shaw Aff. ¶ 6. To the extent Trooper Schulte is seeking an inference that the car appeared lived in based on its contents, that is not appropriate for summary judgment. *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). The remaining portion of this fact is uncontroverted.

14. Additionally, Schulte saw both the driver and a passenger, who was sitting in the front passenger seat in the minivan. Exhibit 1, ¶ 10.

RESPONSE: Uncontroverted for purposes of this motion.

15. Schulte stood by the driver's door for about one minute. While standing beside the window, he requested that B. Shaw produce his driver's license and proof of insurance. Exhibit 1, ¶ 11. The exchange went materially as follows:

[Schulte] Hello.

[B. Shaw] Hello, how are you?

[Schulte] I'm good. You come up behind me. I checked you at 91.

[B. Shaw] 91.

[Schulte] That's why you caught up with me so fast.

[B. Shaw] I'm really sorry…

[Schulte] So lights went on before you even passed me and you decided…

[B. Shaw] Well, I did not know because your lights were on ahead of me that's what threw me off so I wasn't really sure…

[Schulte] What are you supposed to do when you see red and blue lights? What does state law say? Oklahoma is the same way.

[B. Shaw] Pull off to the side.

[Schulte] There you go.

[B. Shaw] I got in the other lane. I wasn't sure…

[Schulte] We drove another mile before you tried to pull off here.

[B. Shaw] What I certainly did not mean to do anything disrespectful or… [handing officer something]

[Schulte] How about the insurance car [*sic*]?

[B. Shaw] Yes sir.

[Schulte] Your car?

[B. Shaw] This is my father's car. I am on the insurance though.

[Schulte] OK.

[Schulte] And Blaine, is your address in Oklahoma City correct?

[B. Shaw] Yes.

[Schulte] OK.

[Schulte] Sir, if you wait in your vehicle, I will be right back.

Exhibit 1, ¶ 11; Exhibit 2a; Exhibit 4.

RESPONSE: Uncontroverted.

16. While returning to his patrol vehicle, Schulte looked into minivan through its driver's side windows. Again, he saw that the back of the van was crowded with "stuff." Exhibit 1, ¶ 12.

RESPONSE: Controverted that the Shaws' van was "crowded with 'stuff'." Ex. 1, Shaw Dash Camera Video at 45:43-47:45; Ex. 2, B. Shaw Aff. ¶ 6. To the extent Trooper Schulte is seeking an inference that the car appeared lived in based on its contents, that is not appropriate for summary judgment. *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). The remaining portion of this fact is uncontroverted.

17. Once back to his patrol vehicle, Schulte called in B. Shaw's driver's license to dispatch and requested information about warrants and criminal history. Exhibit 1, ¶ 13.

RESPONSE: Uncontroverted.

18. Approximately 4 minutes after the first encounter with B. Shaw at the driver's door of minivan [*sic*], Schulte received the responses that B. Shaw's license was valid, that he was not subject an outstanding warrant [*sic*], and that B. Shaw had a 2009 felony intent to distribute narcotics on his criminal records. Exhibit 1, ¶ 14.

RESPONSE: Uncontroverted for purposes of this motion.

19. Schulte radioed a request that another trooper come to the stop for backup. Then he completed paperwork up until the time he left his patrol vehicle to walk back up to the driver's side of the minivan. Exhibit 1, ¶ 15.

RESPONSE: Uncontroverted for purposes of this motion.

20. Approximately eleven minutes after B. Shaw stopped the minivan, Schulte had a second exchange with B. Shaw at the driver's side window of the minivan. Exhibit 1, ¶ 16. That conversation lasted a little more than 30 seconds. *Id*. Schulte handed B. Shaw a ticket for speeding and returned B. Shaw's license and proof of insurance. Schulte explained the procedure for responding to the ticket and said he could not answer B. Shaw's question about the ticket's impact on auto insurance. Schulte concluded, "have a safe trip and drive safely," turned and started walking back to toward his patrol vehicle. *Id*.

RESPONSE: Uncontroverted for purposes of this motion.

21. Schulte walked along the side to the back of the minivan until it was taken out of park, and then reversed to return near the driver's window. Walking back, never touching the minivan and with his hands at his side or slightly in front of his body, Schulte stated: "Hey, Blaine can I ask you a question real quick?" S. Shaw responded quickly, "Yeah." Exhibit 1, ¶ 17; Exhibit 2a; Exhibit 4. This subsequent exchange went materially as follows:

> [Schulte] You are coming from Oklahoma; where are you headed to today?
>
> [B. Shaw] Denver. Headed to see family.
>
> [Schulte] Ok, alright. Running a little fast today, which we talked about. Alright you don't have anything in the vehicle that you are not supposed to have with you? [B. Shaw, denials] – no guns, no knives, no contraband, no illegal

narcotics, marijuana, cocaine, opioid, no meth, no large sums of cash, anything like that? [B. Shaw, denials]

[Schulte] Can we search your vehicle for such items?

[B. Shaw] I don't consent to searches. I am criminology major. It is like the number one golden rule.

[Schulte] OK. Well wait right here, I will be right back with you. OK?

Exhibit 1, ¶ 17; Exhibit 2a; Exhibit 4.

RESPONSE: Controverted that "S. Shaw responded quickly" to Trooper Schulte's question as it was B. Shaw that responded. Ex. 1, Shaw Dash Camera Video at 14:25-15:09. The remaining portion of the fact is uncontroverted.

22. Schulte felt that the passenger, sitting in the front passenger seat, S. Shaw, was acting suspiciously during both his conversations with B. Shaw at minivan. The passenger did not say anything, never looked over at Schulte, never made eye contact with him, had his hands in his lap and looked straightforward, while not moving his head. Usually a passenger looks in Schulte's direction at times and speaks with him or the driver during a stop. Exhibit 1, ¶¶ 20-21; Exhibit 5, 31:11-32:13.

RESPONSE: Controverted that S. Shaw was behaving suspiciously. Ex. 1, Shaw Dash Camera Video at 3:50-4:39; 4:25-15:45; 31:11-32:13; Ex. 3, S. Shaw Dep. at 31:11-32:13; Ex. 2, B. Shaw Aff. ¶ 17. To the extent Trooper Schulte is seeking an inference that S. Shaw was acting suspicious, that is not appropriate for summary judgment. *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).

23. The Denver destination was relevant to Schulte because, based upon his experience and knowledge, I 70 was a corridor to Colorado (*i.e.*, a source state for marijuana). Schulte believed this added to his suspicion of drug trafficking when combined with the fact that the minivan's driver was not the vehicle's owner and in light of the other circumstances. Schulte, by his experience and information from other law enforcement officers, knew that non-owned vehicles are frequently used by drug traffickers—one reason is that this avoids forfeiture of the driver's vehicle. Exhibit 1, ¶ 20. He also knew that in route drug traffickers frequently have large sums of cash, drug paraphilia [*sic*] and evidence of drugs with them when traveling to make a purchase. Exhibit 1, ¶ 20.

RESPONSE: Controverted, insofar as Trooper Schulte's deposition testimony contradicts this statement of fact, especially when each specific element is questioned. Ex. 7, Schulte Dep. 207-214. Additionally, the first two sentences of this fact are not supported by sufficient evidence because Trooper Schulte cannot recall the basis for his reasonable suspicion. Defs Ex. 1 at ¶ 20; *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.").

24. Schulte decided to detain the Shaws for a canine sniff after this last encounter. Walking back to his patrol vehicle, Schulte stated into his body microphone, "refusal." Exhibit 1, ¶ 18.

RESPONSE: Uncontroverted that Trooper Schulte did not have reasonable suspicion to detain the Shaws for a canine sniff before the last encounter or that the consent to search the Shaw vehicle was refused. To the extent this fact is intended to suggest Trooper Schulte's had reasonable suspicion or that the decision to detain to the Shaws for a canine sniff was legally appropriate, that

fact is controverted. Ex. 1, Shaw Dash Camera Video at 00:01-22:44. For the reasons stated below in the argument section, Trooper Schulte's interactions with the Shaws did not amount to reasonable suspicion.

25. Schulte repeated his request that another trooper come to the stop for backup once back to his patrol vehicle. This is a standard KHP officer safety procedure for a drug dog sniff and possible search. Exhibit 1, ¶ 19.

RESPONSE: Uncontroverted for purposes of this motion.

26. With the passage of time, Schulte does not remember each basis for his reasonable suspicion that justified the extended detention and canine search. Exhibit 1, ¶ 20. However, review of the dash camera video and documentation about the stop and search, added to the Schulte's [*sic*] incomplete memories, shows according to Schulte:

- B. Shaw, later determined to be the driver of a 2010 Chrysler Town & Country minivan, did not timely pull over.
- B. Shaw's past criminal history showed his involvement with the sale of illegal drugs.
- The minivan was not registered to B. Shaw and was traveling on I 70, a known drug trafficking corridor.
- The minivan was crammed full of stuff.
- S. Shaw, in the front passenger seat, was acting suspiciously in that he refused to look at Trooper Schulte, was unmoving—looking forward only—, [*sic*] and was not saying anything.

Exhibit 1, ¶ 20.

RESPONSE: Controverted that Trooper Schulte had reasonable suspicion that justified the extended detention and canine search. Moreover, that is a legal conclusion rather than a statement of fact, and therefore, is controverted in section V.A. below. It is uncontroverted that Trooper Schulte does not remember what he thought constituted reasonable suspicion at the time of the incident. Therefore, it is controverted that the dash camera "added" to Trooper Schulte's memory because that fact lacks foundation. Def. Exhibit 1, ¶ 20 ("With the passage of time, I do not remember each basis or factor for my reasonable suspicion."). 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. Ex. 1, Shaw Dash Camera Video at 2:00-3:25; 3:50-4:39; 4:25-15:45; 45:43-47:45; Ex. 5, S. Shaw Aff. ¶¶ 6, 7.

27. Trooper James McCord arrived at the scene of the stop about 3 minutes after Schulte had noted the refusal to provide consent for a vehicle search. While waiting on the drug dog, McCord and Schulte discussed the circumstances in a series of conversations. Schulte told McCord, "[B. Shaw] comes up behind me fast. I light him up and he drives for about a mile before pulling over." He also told McCord that B. Shaw was not married.[4] He told McCord that B. Shaw was "nervous" and "really jumpy." Schulte answered McCord's question, stating that the minivan was his "dad's", and told McCord that B. Shaw "has prior history" and "felony on his record for intent." Schulte stated his understanding that B. Shaw and his passenger were heading to visit

[4] This was a false assumption on Schulte's part. B. Shaw was married.

passenger's family and friends in Colorado. He stated that he did not know how long.[5] Schulte stated that there were blankets covering stuff in the minivan. McCord asked about the passenger (S. Shaw). Schulte told him that the passenger did not say anything, never looked over, had his hands in his lap and looks straightforward, and stated he made no eye contact, not moving his head. At this time, Schulte mistakenly believed that S. Shaw was B. Shaw's friend. Exhibit 1, ¶ 21; Exhibit 2a.

RESPONSE: Uncontroverted that the Troopers *said* those things and that they made multiple incorrect and baseless assumptions. To the extent the paragraph contains legal conclusions and citations, those do not require a factual response.

28. About a request for consent to search, Schulte stated, "broke contact and asked for consent; vehicle was in drive; when I asked for consent he said sure and put vehicle back into park." Schulte said B. Shaw says he is a criminology major and that the number one rule is no one searches your vehicles. Schulte said, "born in 83, but he is a criminal justice major." Exhibit 1, ¶ 22.

RESPONSE: Uncontroverted for purposes of this motion.

29. Schulte requested a drug-detecting dog for a sniff of the minivan immediately upon his return to his patrol vehicle after B. Shaw's refusal of consent to a search. It appears to have required a couple of minutes for dispatch to locate an available handler and dog. Trooper Ian Gray, a canine handler, and his dog, Jaxx arrived at the stop about 15-17 minutes after dispatch contracted Gray. Exhibit 1, ¶ 23.

RESPONSE: Uncontroverted for purposes of this motion.

[5] McCord appeared to think that a long distance trip just before Christmas to see his friend's family was suspicious if B. Shaw was married. Exhibit 2a at 34:33 – 35:01. *Cf. United States v. Ludwig*, 641 F.3d 1243, 1249 (10th Cir. 2011) (bizarre travel plans may contribute to reasonable suspicion of criminal activity). However, Schulte did not make this inference because he mistakenly believed that B. Shaw was single.

30. The canine sniff took place and concluded with alerts, positive indications of drugs, about 3 minutes after the drug-detecting dog and handler arrived at the scene. Exhibit 1, ¶ 24; Exhibit 6 (KHP, Police Service Dog Report, OAG000002-03). Schulte knew and had experience with Ian Gray. To his knowledge, both Ian Gray and Jax were properly trained and credentialed. Exhibit 1, ¶ 24.

RESPONSE: Uncontroverted for purposes of this motion.

31. After the dog's alerts, troopers searched the minivan. In the vehicle, they found pills—a few with different colors and sizes, not in a prescription bottle, which B. Shaw stated were Tramadol[6]; multiple plastic bags that had a marijuana smell ("smelly bags") that had been in a locked black bag/brief case; and Colorado medical marijuana paperwork (registry cards, which appeared to authorize some cultivation, and a Colorado residence identification card which were all issued to B. Shaw) that also was in the black bag/brief case. Exhibit 1 ¶ 25; Exhibit 6.

RESPONSE: Uncontroverted for purposes of this motion.

32. One of the places that Jaxx, the drug-detection dog, specifically alerted was at a cot in the back of the minivan. The locked black bag/brief case, referenced in the preceding paragraph, was located under the cot. Exhibit 1, ¶ 27; Schulte did not personally open the bag. However, it was necessary to separate the bag's zipper to determine whether there were drugs in the bag as the dog's alert suggested. Exhibit 1, ¶ 27. A picture of the bag/brief case is below.

[6] B. Shaw acknowledged the pills were his. He had the bottle for the pills in the minivan. He said that they were prescribed for pain related to injuries he suffered in an automobile accident. He claimed that the few pills of different color and size were Tramadol from Mexico or China. Exhibit 1, ¶ 26.

Exhibit 7 (Plaintiff's production, P000007).[7]

RESPONSE: Uncontroverted for purposes of this motion.

33. Schulte asked B. Shaw if he was a resident of Colorado or Oklahoma, telling B. Shaw "you can't be both," and asked B. Shaw if the black bag/brief case was his. B. Shaw would not answer the questions other than to say he had lived in Colorado in the past.[8] Exhibit 1, ¶ 28.

RESPONSE: Uncontroverted for purposes of this motion.

34. Schulte discussed the Colorado medical marijuana registry card with Trooper McCord. McCord suggested that Schulte make a copy of the paperwork and contact Colorado authorities to report that B. Shaw was lying about being a Colorado resident. Schulte suspected that B. Shaw was violating Colorado law. Exhibit 1, ¶ 29.

RESPONSE: Uncontroverted for purposes of this motion.

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[7] The photograph marked Exhibit 7 (bates number P000006) was produced by the plaintiffs in response to the defendant troopers' request for production of photographs… supporting… the nature and extent of injuries and damages alleged. *See* Shaws' responses to Interrogatory # 18 and RFP # 1.

[8] The address on the Colorado identification card is 2323 Curtis Street, Denver, CO. B. Shaw would not say whether any of family lived at that address. That address is the St. Francis Center, which is a homeless shelter. http://www.sfcdenver.org/who-we-are/. The address shown on the medical marijuana paperwork is 6120 Hearth Court, Colorado Springs, CO. The most recent registry card expired about six months before the stop. However, B. Shaw obtained renewals of the one-year license on June 5, 2017, November 13, 2017 and June 4, 2018. Documents produced by the plaintiffs bate stamped P021-023.

35. The search of the minivan and discussions between the troopers and B. Shaw after the search took approximately 30-35 minutes. At the end, Schulte directed B. Shaw to follow him to the Hays KHP headquarters [1821 Frontier Road, Hays, KS], which was about a 700 yard detour from the Shaws' trip to Denver.[9] Once there, copies were made of the paperwork found during the search and the Shaws left to continue to Colorado. Exhibit 1, ¶ 30.

RESPONSE: Uncontroverted for purposes of this motion.

36. The Shaws drove directly to the Denver area, stopping only in Hays, Kansas for gas and B. Shaw's inspection of the minivan for any damage. Exhibit 3, 69:22-70:10; Exhibit 5, 44:22-46:17. They camped out at a state park and/or in commercial parking lots. They consumed marijuana. They returned to Oklahoma on a southern route that did not go into Kansas. Exhibit 3, 55:16-57:19; Exhibit 5, 30:15-23. It was a "weekend trip." Exhibit 3, 56:12-23.

RESPONSE: Uncontroverted, however the facts are not relevant or material to Plaintiffs' claims at issue on summary judgment.

B. Additional Material Facts

Shaw Stop

37. The Shaws were traveling to Colorado to see friends and family and go camping. Ex. 4, B. Shaw Dep. at 55:3-7, 64:4-7; Ex. 3, S. Shaw Dep. at 27:18-28:3.

38. Their car was packed for camping. Ex. 2, B. Shaw Aff. ¶ 6.

39. Trooper Schulte was driving on the highway, in front of the Shaws, when he activated his patrol car lights in an attempt to pull the Shaws over. Ex. 1, Shaw Dash Camera Video at 2:00-2:30; Ex. 2, B. Shaw Aff ¶¶ 8, 9.

[9] https://www.mapquest.com/us/ks/hays/67601-9397/1821-frontier-rd-38.908170,-99.353672.

40. B. Shaw had never been pulled over by a police car that activated its lights in front of him and did not know he was to pull over immediately when a patrol car activates lights ahead of him. Ex. 2, B. Shaw Aff. ¶ 10; Ex. 6, B. Shaw Camera Video at 6:09.

41. B. Shaw slowed but did not immediately pull over because he did not understand he was the target of the stop, and B. Shaw said so while waiting for Trooper Schulte to return to the vehicle after the initial exchange between B. Shaw and Trooper Schulte. Ex. 1, Shaw Dash Camera Video at 2:00-2:30; Ex. 2, B. Shaw Aff ¶ 10; Def. Ex. 4 at 6:04-6:20.

42. Trooper Schulte did not motion for B. Shaw to pull around him or use his car's public address system to direct B. Shaw to pull over or otherwise indicate that it was B. Shaw's vehicle Schulte sought to pull over—from the front. Ex. 1, Shaw Dash Camera Video at beginning.

43. S. Shaw is disabled. He suffers from both spine damage and a traumatic brain injury. The disability causes difficulty in cognition and communication. Ex. 5, S. Shaw Aff. ¶¶ 3, 4, 6.

44. Trooper Schulte did not address S. Shaw during the first two encounters of the stop. Ex. 1, Shaw Dash Camera Video at 3:50-4:39, 4:25-15:45.

45. B. Shaw has back issues requiring him to rest and stretch while driving long distances. Ex. 2, B. Shaw Aff. ¶ 5.

46. Trooper Schulte pulled plaintiffs over for speeding. Ex. 1, Shaw Dash Camera Video at 2:00-3:25; Ex. 7, Schulte Dep. 233:10-12.

47. After approaching the driver's side window, Trooper Schulte had a conversation with B. Shaw that lasted about 50 seconds. Ex. 1, Shaw Dash Camera Video at 3:50-4:39.

48. During the conversation, Trooper Schulte told B. Shaw he was going 91 miles per hour, chided him for not pulling over fast enough, took his license and insurance, and asked about the car's owner and B. Shaw's address. Ex. 1, Shaw Dash Camera Video at 3:50-4:39.

49. B. Shaw relayed that the car belonged to his father, he was listed on the insurance, and he drove the car for his work with Uber. Ex. 1, Shaw Dash Camera Video at 3:50-4:39; 45:15-45:20.

50. Trooper Schulte then left, telling B. Shaw to wait in the vehicle. Ex. 1, Shaw Dash Camera Video at 4:39-4:45.

51. About ten minutes passed before Trooper Schulte returned. Ex. 6, B. Shaw Camera Video at 0:14-1:00 (first encounter); 10:45-11:30 (second encounter).

52. When Schulte returned, he informed B. Shaw of his court date and told him how to resolve the ticket without appearing, they briefly discussed B. Shaw's concerns about insurance, and then Trooper Schulte said, "[S]low down a little bit… have a safe trip and drive safely." Ex. 6, B. Shaw Camera Video at 10:45-11:30.

53. B. Shaw then responded, "All right. Thank you." Ex. 6, B. Shaw Camera Video at 11:28-11:35.

54. S. Shaw sat calmly and quietly in the car with his hands in plain view throughout the stop. Ex. 2, B. Shaw Aff. ¶ 17; Ex. 5, S. Shaw Aff. ¶ 7.

55. Trooper Schulte received confirmation the car was registered to B. Shaw's father before ending the traffic stop. Defendant's Statement of Fact number 12.

56. Over 11 minutes elapsed from the first time Trooper Schulte and B. Shaw spoke until B. Shaw's "Thank you," and of those 11 minutes, Trooper Schulte and B. Shaw spoke for about two minutes. Ex. 6, B. Shaw Camera Video at 0:14-11:30.

57. Three seconds after Trooper Schulte says "have a safe trip and drive safely," Schulte asks if he could inquire further. Ex. 6, B. Shaw Camera Video at 11:30-11:33.

58. When Trooper Schulte sought to ask more questions, B. Shaw's foot was still on the brake and his eyes had not left the ticket Schulte just handed him. Ex. 6, B. Shaw Camera Video at 11:30-11:33; Ex. 2, B. Shaw Aff. ¶ 13.

59. 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. Ex. 1, Shaw Dash Camera Video at 15:09-15:11; Ex. 2, B. Shaw Aff. ¶¶ 14, 15.

60. When Trooper Schulte sought to ask more questions, B. Shaw could not have pulled away without endangering Trooper Schulte. Ex. 1, Shaw Dash Camera Video at 15:09-15:11; Ex. 2, B. Shaw Aff. ¶ 15.

61. After citing B. Shaw for speeding, Trooper Schulte did not tell B. Shaw that he was free to leave or free to decline Trooper Schulte's additional questioning. Ex. 1, Shaw Dash Camera Video at 14:25-15:45.

62. Trooper Schulte prolonged the Shaws' detention in order to conduct additional questioning immediately after the traffic stop ended. Ex. 1, Shaw Dash Camera Video at 14:25-15:45.

63. The Shaws did not consent to extend the stop or be detained after receiving the speeding ticket. Ex. 1, Shaw Dash Camera Video at 14:25-15:45.

64. Trooper Schulte extended the stop to call for a drug dog. Ex. 1, Shaw Dash Camera Video at 15:09- 16:45.

65. During the additional questioning, Schulte learned that the Shaws were heading to Colorado. Ex. 1, Shaw Dash Camera Video at 15:11-15:45.

66. At no point from the time Trooper Schulte turned his lights on until the detention did Trooper Schulte see the Shaws trying to hide anything. Ex. 1, Shaw Dash Camera Video at 2:00 – 15:45; *see generally* Def. Ex. 1.

67. At no point during the stop and detention did Trooper Schulte observe the Shaws trying to confer with one another. Ex. 1, Shaw Dash Camera Video at 2:00-15:45; *see generally* Def. Ex. 1.

68. Trooper Schulte did not see or obtain any evidence that the Shaws threw anything from the car. Ex. 1, Shaw Dash Camera Video at 2:00 – 15:45; *see generally* Def. Ex. 1.

69. Trooper Schulte and the other troopers present at the scene of the canine search searched the Shaws' van after the canine alerted. Ex. 1, Shaw Dash Camera Video at 45:43-51:48.

70. The only additional information the Troopers learned during their search was the differing addresses on B. Shaw's marijuana registration cards and Colorado ID card. Ex. 1, Shaw Dash Camera Video at 45:43-51:48; Ex. 7, Schulte Dep. at 233:10-12.

71. Trooper Schulte did not ask B. Shaw why there were differences. Ex. 2, B. Shaw Aff. 19.

72. Had he, he would have learned B. Shaw formerly lived at the address on his cards. Ex. 2, B. Shaw Aff. ¶ 18.

73. The troopers did not cite the Shaws for possession of anything unlawful in the car. Ex. 7, Schulte Dep. at 233:10-12.

74. The troopers then required the Shaws to drive to Troop D headquarters to copy B. Shaw's medical marijuana card and his Colorado ID card. Ex. 7, Schulte Dep. at 231:20-232:2.

75. They used the differing addresses on B. Shaw's cards to justify forcing the Shaws to follow them to Troop D. headquarters. Ex. 7, Schulte Dep. at 231:20-232:5.

76. The trip to Troop D headquarters extended the length of the detention. Ex. 7, Schulte Dep. at 231:20-232:21.

77. Trooper Schulte kept the Shaws detained for over an hour, called out a drug dog, and had the vehicle searched top to bottom. Ex. 1, Shaw Dash Camera Video at 3:25-end of video; Ex. 8, CAD report.

78. Trooper Schulte only pulled B. Shaw over for a traffic violation, and B. Shaw was polite and cooperative. Ex. 2, B. Shaw Aff. ¶ 20; Ex. 1, Shaw Dash Camera Video at 2:00-3:25; Ex. 7, Schulte Dep. 233:10-12.

79. B. Shaw only turned down Trooper Schulte's probes when Trooper Schulte requested consent to search B. Shaw's car. Ex. 1, Shaw Dash Camera Video at 3:50-15:45.

80. At that point, B. Shaw had enough, and knew Trooper Schulte was attempting to accuse B. Shaw of criminal activity. Ex. 2, B. Shaw Aff. ¶ 16.

81. Although B. Shaw may have shifted the car into drive when Trooper Schulte turned away from the car, he immediately shifted it back to park when Trooper Schulte stepped back to the window. Ex. 6, B. Shaw Camera Video at 15:05-15:15.

82. When Trooper Schulte immediately turned back to the window, B. Shaw did not know that the encounter was going to turn into something other than what it had been and did not think that the original encounter had ended. Ex. 2, B. Shaw Aff. ¶ 14.

83. Once Trooper Schulte re-engaged, B. Shaw did not think he could leave. Ex. 2, B. Shaw Aff. ¶ 15.

KHP Training/Policies/Advice

84. KHP trains officers, including Trooper Schulte, to use the Kansas Two-Step, a maneuver where officers stopping motorists momentarily break off and end the initial traffic-stop detention, take a few steps towards the rear of the vehicle, and then turn to reengage the motorist,

asking something similar to, "Hey, can I ask you a few more questions." Ex. 7, Schulte Dep. at 156:3-159:21; Ex. 9, KHP Training "Transforming Temporary Detention into Consensual Encounter" at OAG008926-8932.

85. KHP trains officers, including Trooper Schulte, to use the Kansas Two-Step in an attempt to obtain consent for a prolonged detention that would not otherwise be valid and in the hopes of eliciting additional information to support an officer's reasonable suspicion. *Id.*

86. KHP trains officers, including Trooper Schulte, that a vehicle's "lived in" appearance can support an officer's reasonable suspicion. Ex. 10, KHP Criminal Interdiction Training at OAG002010.

87. Trooper Schulte testified that there is no state in the union "where people can't take narcotics." Ex. 7, Schulte Dep. at 208:22-24.

88. KHP trained officers, including Trooper Schulte, on the Tenth Circuit's holding in *Vasquez v. Lewis*, 834 F.3d 1132 (10th Cir. 2016), and other cases making clear that officers are not permitted to consider drivers' origin in forming reasonable suspicion. Ex. 11, KHP training OAG 000221-232, OAG 000445-463, OAG001467, OAG008910-8913; Ex. 7, Schulte Dep. at 176:8-11.

89. Trooper Schulte knew of the *Vasquez* case. Ex. 7, Schulte Dep. at 176:8-11.

90. Trooper Schulte does not recall any change in procedure regarding car stops and/or searches after *Vasquez*. Ex. 7, Schulte Dep. at 176:18-25.

91. The Kansas Highway Patrol has published a list of "What to Do If You Are Stopped," on its website. Ex. 12, "What to Do if You Are Stopped".

92. The website instructs citizens to "[k]eep your hands in plain view, and do not make any sudden movements." *Id.*

93. It also tells drivers to "[a]sk any passengers in your vehicle to remain calm . . . Instruct them to keep their hands in plain view and not make any sudden movements." *Id.*

94. It also states, "If you receive a traffic citation, a polite and cooperative attitude will make the event easier for everyone." *Id.*

95. KHP troopers are not required to fill out a narrative incident report documenting their reasonable suspicion to extend a traffic stop unless the extension results in a seizure or an arrest. Ex. 13, McMillan Dep. 94:18-25; 95:1-4; 95:11-15; 103:11-25; 106:3-7; 107:1-25; 113:7-24.

96. KHP trains troopers that moving a temporarily detained person to a police station is an automatic arrest. Ex. 14, KHP Arrest Training Excerpt at OAG000232.

III. LEGAL STANDARD

Summary judgment is appropriate only "if the movant shows that 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). This initial burden entails informing the district court of the basis for its motion, and identifying "particular parts of . . . the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or . . . showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact" (*Id.* at (c)) in order to demonstrate the absence of a genuine issue of material fact. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether [s]he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [their] 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).

"A court presented with a summary judgment motion based on qualified immunity must first answer a threshold question: 'Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?' '[T]he next, sequential step is to ask whether the right was clearly established.'" *Fogarty v. Galegos*, 523 F.3d 1147, 1150 (10th Cir. 2008) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)) (hereinafter, the "*Saucier* test");[10] *see also Vette*, 989 F.3d at 1169. "Unlike most affirmative defenses . . . the plaintiff would bear the ultimate burden of persuasion at trial to overcome qualified immunity . . ." *Est. of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014). Nonetheless, "[w]hen the defendant has moved for summary judgment based on qualified immunity, [Courts] still view the facts in the light most favorable to the non-moving party and resolve all factual disputes and reasonable inferences in its favor." *Id.*

IV. QUESTION PRESENTED

1. Viewing the facts in the light most favorable to the Shaws, did Trooper Schulte violate the Shaws' Fourth Amendment rights by detaining them after a traffic stop for additional questioning, a drug dog sniff, and then forcing them to a Highway Patrol station without reasonable suspicion? Had *Vasquez* and other authority clearly established the Shaws' Fourth Amendment rights that Trooper Schulte violated during the stop?

2. Does Trooper Schulte rely on contested, material facts in his motion for summary judgment?

[10] Pursuant to *Pearson v. Callahan*, 555 U.S. 223 (2009), the Court may answer the two prongs of the *Saucier* test in either order.

V. ARGUMENT

Trooper Schulte relies on contested material facts, avoidance of other material facts, and a series of unconfirmed hunches and suspicious to support his motion. In doing so, Trooper Schulte attempts to circumvent the fact that he relied on unconstitutional criteria to justify his prolonged detention of the Shaws thereby violating their clearly established constitutional rights. Taking the facts as a whole, and resolving any disputes in favor of the Shaws, Trooper Schulte is not entitled to summary judgment on the basis of qualified immunity as set forth below.

A. Under the first prong of the *Saucier* test, Trooper Schulte violated the Shaws' Fourth Amendment rights.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. "A traffic stop constitutes a seizure under the Fourth Amendment." *U.S. v. Villa-Chaparro*, 115 F.3d 797, 801 (10th Cir. 1997). And the Fourth Amendment's "protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *U.S. v. Arvizu*, 534 U.S. 266, 273 (2002) (citing *Terry v. Ohio*, 392 U.S. 1, 9 (1968)).

The detention should last "no longer than necessary to effectuate the purpose of the stop, and the scope [of the detention] must be carefully tailored to its underlying justification." *Vasquez v. Lewis*, 834 F.3d 1132, 1136 (10th Cir. 2016). Once complete, officers need either consent or additional reasonable suspicion for longer detentions:

> An investigative detention may be permissibly expanded beyond the reason for its inception if the person stopped consents. . . . Absent valid consent, the scope or duration of an investigative detention may be expanded beyond its initial purpose only if the detaining officer at the time of the detention has "a particularized and objective basis for suspecting the particular person stopped of criminal activity."

U.S. v. Wood, 106 F.3d 942, 946 (10th Cir. 1997) (citing *U.S. v. Lambert*, 46 F.3d 1064, 1069 (10th Cir. 1995)). "The failure to consent to a search cannot form any part of the basis for

reasonable suspicion." *Wood*, 106 F.3d at 946. Further, "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." *Rodriguez v. U.S.*, 575 U.S. 348, 350 (2015).

Under *Vasquez*, 834 F.3d at 1137-38, and the cases preceding it, officers cannot rely on the fact that a motorist is "traveling from a drug source city—or . . . a drug source state" to support reasonable suspicion. *Vasquez*, 834 F.3d at 1137 (citing *U.S. v. Guerrero*, 472 F.3d 784, 787-88 (10th Cir. 2007)). Doing so would "justify the search and seizure of the citizens of more than half of the states in our country," and the "factor is 'so broad as to be indicative of almost nothing.'" *Vasquez*, 834 F.3d at 1137-38 (citing *Guerrero*, 474 F.3d at 787). Holding a motorist's *destination* against them—as Schulte did here—makes an officer's suspicion even more attenuated as no visit has yet occured. *See U.S. v. Santos*, 403 F.3d 1120, 1132 (10th Cir. 2005) ("Our holding that *suspicious* travel plans can form an element of reasonable suspicion should not be taken as an invitation to find travel suspicious per se." (Emphasis original)).

Here, Plaintiffs do not challenge their initial traffic stop; instead, this case concerns Trooper Schulte's three extensions of the traffic stop without the requisite reasonable suspicion to do so. First, Trooper Schulte prolonged the Shaws' detention in order to conduct additional questioning immediately after the traffic stop ended. Second, after B. Shaw did not consent to a search of his car, Trooper Schulte extended the stop to call for a drug dog without sufficient reasonable suspicion. Third, after finding nothing unlawful in the car, the troopers forced the Shaws to their station, thereby extending the detention even longer.

Trooper Schulte argues that the traffic stop "concluded" when Trooper Schulte engaged in the Two-Step maneuver, and that B. Shaw consented to additional questions. Trooper Schulte also argues he had sufficient reasonable suspicion to prolong the detention at various points, including

the time it took for the canine unit to arrive and, after that, when the Shaws were forced to the KHP stationhouse to have their paperwork copied. In the light most favorable to the Shaws, the record and case law do not support Trooper Schulte's arguments.

1. Trooper Schulte detained the Shaws for additional questioning after the traffic stop ended without consent or reasonable suspicion.

Trooper Schulte originally pulled B. Shaw over for speeding. The Shaws neither consented to a longer stop nor did Trooper Schulte have adequate reasonable suspicion to extend the stop or detain the Shaws further.

"During a traffic stop for speeding, a police officer is permitted to ask such questions, examine such documentation, and run such computer verification as necessary to determine that the driver has a valid license and is entitled to operate the vehicle." *Wood*, 106 F.3d at 945. In some instances, obtaining information about the detainee's criminal history may also be appropriate. *Id.* But "the detention must be carefully tailored to its underlying justification." *U.S. v. Lee*, 73 F.3d 1034, 1038-1039 (10th Cir. 1996) (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)), overruled on other grounds by *United States v. Holt*, 264 F.3d 1215 (10th Cir. 2001). Once "the driver has produced a valid license and proof that he is entitled to operate the car, he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning." *Id.* at 1039. And, importantly, questions regarding a driver's travel plans have been held to impermissibly prolong a traffic stop if not within the scope of the traffic stop. *State v. Jimenez*, 308 Kan. 315, 328 (2018).

Thus, any prolonged detention after the original reason for the traffic stop was resolved required either the Shaws' consent or reasonable suspicion. "Typically, an officer must allow the driver to leave once the initial justification for a traffic stop has concluded. . . . Additional questioning unrelated to the traffic stop is permissible if the detention becomes a consensual

encounter." *U.S. v. Villa*, 589 F.3d 1334, 1339 (10th Cir. 2009) (internal citations omitted). Alternatively, "[t]he traffic stop may be expanded beyond its original purpose if during the initial stop the detaining officer acquires reasonable suspicion of criminal activity." *U.S. v. Sanchez*, 519 F.3d 1208, 1213 (10th Cir. 2008) (internal citations omitted). Trooper Schulte lacked both consent and reasonable suspicion to detain the Shaws for additional questioning after the traffic stop ended.

2. B. Shaw did not consent to a prolonged detention for additional questioning after the traffic stop ended.

Trooper Schulte argues B. Shaw consented to a prolonged detention once the reason for the traffic stop was resolved. But his argument concedes the use of a tactical ploy. Rather than describe a typical, consensual encounter between the public and police, Trooper Schulte's argument relies on a textbook use of the "Kansas Two-Step":

> 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 vehicle's] still open passenger window, asked [the driver] if he would answer a few more questions. This maneuver is known as the "Kansas Two Step" and is taught to all Kansas Highway Patrol officers as a way to break off an initial traffic detention and attempt to reengage the drive in what would be a consensual encounter.

State v. Gonzalez, 57 Kan. App. 2d 510, 513 (2019) (holding the detainee did not consent); Order on Def. Motion to Dismiss, Dkt. 36. And the Supreme Court of Kansas has expressed its misgivings about the Two-Step maneuver: "I write separately to express my doubt that the Fourth or Fifth Amendments to the United States Constitution permit law enforcement officers to dangle liberty in front of someone like a carrot in an attempt to secure justification for the violation of individual constitutional rights." *State v. Schooler*, 308 Kan. 333, 356 (Kan. 2018) (J. Rosen concurring). Continuing, Justice Rosen wrote:

> "You are free to go,' or anything resembling it, is a special and significant declaration. It informs a person that his or her right to freedom is once again fully intact. When used as an investigatory ploy, it undermines the significance of the liberty interest it is intended to effectuate. This is especially true when the agent of the government entrusted with the power to detain is the one proclaiming the

> detention is no longer in force. . . . The specific technique of telling [the detainee] he was free to leave when he had no intention of letting [him] depart reeks of fraud or coercion.

Id. at 357. Here, Trooper Schulte did not even go as far as to explicitly end the stop and tell B. Shaw that he was free to leave or to decline Trooper Schulte's additional questioning. SOF 61.

"In order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to . . . terminate the encounter." *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." *Id.* And 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." *U.S. v. Bradford*, 423 F.3d 1149, 1158 (10th Cir. 2005).

A reasonable person in B. Shaw's position would not have felt free to terminate their encounter with Trooper Shaw. Trooper Schulte initially pulled the Shaws over and, after approaching the driver's side window, had a conversation with B. Shaw that lasted about 50 seconds. SOF 47. During the conversation, Trooper Schulte told B. Shaw he was going 91 miles per hour, chided him for not pulling over fast enough, took his license and insurance, and asked about the car's owner and B. Shaw's address. SOF 48. Trooper Schulte then left, telling B. Shaw to wait in the vehicle. SOF 50.

About ten minutes passed before Trooper Schulte returned. SOF 51. When he did, he informed B. Shaw of his court date and told him how to resolve the ticket without appearing. SOF 52. They briefly discussed B. Shaw's concerns about insurance, and then Trooper Schulte said,

"[S]low down a little bit… have a safe trip and drive safely." SOF 52. B. Shaw responded, "All right. Thank you." SOF 53.

Trooper Schulte argues this final exchange ended the traffic stop and that a reasonable person would have known they were then free to leave. But over 11 minutes had elapsed from the first time Trooper Schulte and B. Shaw spoke until B. Shaw's "Thank you." SOF 56. B. Shaw spent most of that time waiting for Trooper Schulte—about ten minutes. SOF 51. And in total, Trooper Schulte and B. Shaw spoke for about two minutes.[11]

The length of the initial exchanges provides context for what came next. A mere three seconds after Trooper Schulte says "have a safe trip and drive safely," Schulte asks if he could inquire further. SOF 57. Moreover, when Trooper Schulte sought to ask more questions, B. Shaw's foot was still on the brake and his eyes had not left the ticket Schulte just handed him. SOF 58. Trooper Schulte was still standing next to the vehicle, less than an arm's length away from the minivan. SOF 59. And Shaw could not have pulled away without endangering Trooper Schulte. SOF 60; *see Gonzalez*, 57 Kan. App. 2d at 517-518 ("we find reasonable persons would not have known they could refuse to answer questions and leave the scene," despite the detainee already driving forward, in part because he "could have concluded that leaving the scene would physically injure" the trooper.) There is also reason to doubt how free anyone in B. Shaw's position would have felt to decline Trooper Schulte's additional questions. Trooper Schulte had just pulled B. Shaw over for a traffic violation, and B. Shaw was polite and cooperative throughout their exchange. *See State v. Carty*, 790 A.2d 903, 910 (questioning how free individuals truly feel to decline officer requests); *Brown v. United States*, 983 A.2d 1023, 1027 (D.C. 2009) (Schwelb, J.,

[11] B. Shaw's recording captured the encounter. Def. Ex. 4. The first encounter between Shaw and Schulte begins at 0:14 and ends at 1:00. The second encounter begins at 10:45 and Schulte tells Shaw to "have a safe trip and drive safely" with Shaw's response, "thank you," at 11:30.

concurring in the judgment but dissenting in part) (quoting *Lawrence v. United States*, 566 A.2d 57, 61 (D.C. 1989)) ("Implicit in the introduction of the [officer] and the initial questioning is a show of authority to which the average person encountered will feel obliged to stop and respond. Few will feel that they can walk away or refuse to answer." (alteration in original)).[12]

B. Shaw's desire to avoid conflict with Trooper Schulte makes all the more sense in light of Trooper Schulte's initial reprimand and interruption, reproaching B. Shaw for not pulling over quickly enough.[13] SOF 48. Although B. Shaw may have shifted the car into drive when Trooper Schulte turned away from the car, he immediately shifted it back to park when Trooper Schulte stepped back to the window. SOF 81. The driver in *Gonzalez* was in a similar position, having put the car into drive but returning it to park once the Trooper called out, but the Court found the exchange was not consensual nonetheless. *Gonzalez*, 57 Kan.App.2d at 513, 521.

Here, when Trooper Schulte immediately turned back to the window, B. Shaw did not know that the encounter was going to turn into something other than what it had been—a traffic stop for speeding—so did not think that the original encounter had ended. SOF 82. Once Trooper Schulte re-engaged, B. Shaw did not think he could leave. SOF 82-83. Even more, B. Shaw's cooperative attitude is also precisely how KHP tells drivers to behave: "If you receive a traffic citation, a polite and cooperative attitude will make the event easier for everyone." SOF 94.

In the context of their entire encounter, the time between the supposed end of the traffic stop and B. Shaw's alleged consent is negligible. Not only did Trooper Schulte's "conduct as

[12] In addition, third party estimations of the voluntariness of consent in any given situation may often be biased. *See generally* Roseanna Sommers and Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 Yale L.J. 1962 (2019) (discussing research into the psychology of compliance and suggesting that fact finders likely underestimate the pressure suspects feel to comply with police officer requests).

[13] B. Shaw only turned down Trooper Schulte's probes when Trooper Schulte requested consent to search B. Shaw's car. SOF 79. At that point, B. Shaw had enough, and knew Trooper Schulte was attempting to accuse B. Shaw of criminal activity. SOF 80.

perceived by a reasonable person" fail to "communicate that the person was not free to . . . end the encounter," *U.S. v. Gregoire*, 425 F.3d 872, 879 (10th Cir. 2005), a reasonable person would not have thought the conversation, much less the stop itself, was over. B. Shaw certainly did not. SOF 82-83. Shaw thus did not consent to additional questions or a prolonged detention.

3. Trooper Schulte lacked reasonable suspicion to detain the Shaws for additional questioning.

Without consent, Trooper Schulte needed reasonable suspicion to detain the Shaws further. *Wood*, 106 F.3d at 946. He needed "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Lambert*, 46 F.3d at 1069. "Inchoate suspicions and unparticularized hunches, however, do not provide reasonable suspicion." *Wood*, 106 F.3d at 946. "Reasonable suspicion requires something more than just a hunch . . . ." *Gonzalez*, 57 Kan. App. 2d at 515. Much like *Gonzalez*, tellingly, when Trooper Schulte told B. Shaw to "have a safe trip and drive safely," Schulte himself must have believed he lacked reasonable suspicion. Otherwise, he had no reason to employ the Kansas Two-Step. *See id.* at 516;[14] Order on Def. Motion to Dismiss, Dkt. 36 (describing the maneuver and its purpose); SOF 84-85.

Nonetheless, Trooper Schulte articulates the following facts in support of reasonable suspicion at this point in the encounter: (1) the Shaws' delay in pulling over, (2) B. Shaw's criminal record, (3) the fact that B. Shaw was driving his father's minivan, (4) that "the minivan was crammed full of stuff," and (5) that S. Shaw was acting suspiciously "in that he refused to look at Schulte (looking forward only)." Dkt. 140 at 9. All are innocent in their own right, and Trooper

[14] *Gonzalez*, 57 Kan.App.2d at 516, explained the lack of reasonable suspicion this way:

> [C]ontinued detention of [a driver] beyond the traffic stop was illegal unless the trooper discovered information raising a reasonable and articulable suspicion of illegal activity while performing the tasks incident to the traffic stop. The record . . . reflects that [the] Trooper . . . did not discover information raising a reasonable and articulable suspicion of illegal activity while performing the tasks incident to a traffic stop. Therefore, a continued detention of [the driver] after the conclusion of the traffic stop was illegal unless the interaction transformed into a consensual encounter.

Schulte fails to explain how they add up to reasonable suspicion.[15] And, all of these factors were known to Trooper Schulte before he engaged in the Two-Step. *See Gonzalez*, 57 Kan.App.2d at 516 (continued detention without reasonable suspicion illegal unless it was consensual).

Notably, Trooper Schulte did little to try to resolve his suspicions when engaging with the Shaws. Many of the factors he now relies on to justify the Shaws' detention could have been resolved at the time with a few more questions. Why the Shaws were travelling with a cot could have been easily answered if Trooper Schulte cared to know—they were planning to camp and B. Shaw has back issues requiring him to rest while driving long distances. SOF 37, 38, 45; *see also* SOF 36. Why S. Shaw was behaving the way he was, if in fact he was behaving suspiciously at all, could have been addressed easily. Trooper Schulte did not even address S. Shaw, much less try to find out anything about him. SOF 43-44.

The Court examines reasonable suspicion based on the "totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." *Arvizu*, 524 U.S. at 273. Defendant's motion is premised on two things: first, incorrect assumptions that Trooper Schulte never bothered to confirm, and two, cherry-picking cases that involved various reasonable suspicion factors and putting them together to justify Trooper Schulte's actions. But in doing so, Trooper Schulte ignores the context surrounding the factors as outlined in each of those decisions and how they contributed to reasonable suspicion under the totality of the circumstances *in those cases*. Under the totality of the circumstances *in this case*, and viewing the facts of each reasonable suspicion factor in the

[15] While Trooper Schulte accuses B. Shaw of violating both Kansas and Oklahoma law by failing to pull over quickly enough, he neither issues him a citation for it nor cites a source in his briefing.

light most favorable to the Plaintiffs, it is clear that the prolonged detention of B. and S. Shaw violated the Fourth Amendment.

a. B. Shaw did not pull over fast enough.

Trooper Schulte claims that it was suspicious that B. Shaw did not quickly pull over when his car's lights were activated. It is true that "a driver's failure to stop his vehicle promptly is a factor that can contribute to reasonable suspicion." *U.S. v. Ludwig*, 641 F.3d 1243, 1248 (10th Cir. 2011). "However, the weight to be accorded to that factor will vary with the facts of each case." *United States v. Hutcherson,* 17-10047-01, 2018 WL 447734, at *4, n.6 (D. Kan. Jan. 17, 2018).

Here, Trooper Schulte activated his lights while he was in front of B. Shaw on the highway—seeking to pull over a vehicle located *behind* his patrol car—and before B. Shaw passed him. SOF 39-40. Trooper Schulte did not motion for B. Shaw to pull around him or use his car's public address system to direct B. Shaw to pull over or otherwise indicate that it was B. Shaw's vehicle Schulte sought to pull over—from the front. SOF 42. In this confusing situation, B. Shaw slowed but did not immediately pull over because he did not understand he was the target of the stop. SOF 41. B. Shaw can be heard saying as much to his brother after they pulled over, while waiting for Trooper Schulte to return to the car. *Id.*

B. Shaw's delay in pulling over is also distinguishable from the detainees in in other similar cases. In *U.S. v. Ludwig*, for example, the Court held that it was not just the defendant's failure to pull over right away that added to reasonable suspicion. Instead, the defendant there, after the Trooper signaled him to pull over, "moved onto the shoulder of the highway but then, for no reason compelled by traffic conditions, continued to drive for about a quarter mile to half a mile." *Ludwig*, 641 F.3d at 1248 (internal citations omitted).

Other cases make a similar point. In *U.S. v. Walraven*, 892 F.2d 972 (10th Cir. 1989), the Court held that the defendant's failure to pull over right away was a factor to consider in the

reasonable suspicion analysis. But the failure to pull over was in the context of the deputy's testimony that the driver and passenger "seemed to be conferring between each other" while continuing to drive. *Walraven*, 892 F.2d at 973.

Similarly in both *U.S. v. Nunez*, 1:10-CR-127, 2011 WL 2357832 (D. Utah June 9, 2011) and *Hutcherson*, 17-10047-01, 22018 WL 447734, the District Courts considered the defendants' failure to pull over as a factor supporting reasonable suspicion. In both cases, however, the failure to stop immediately was not analyzed in isolation. In *Nunez*, while the defendant did not immediately pull over, the deputy "noticed movements in the vehicle, both to [defendant's] left side and right" before the vehicle finally came to a stop. *Nunez*, 22011 WL 2357832, at *5 (internal citations omitted). This led the deputy to believe that Nunez "was possibly concealing something." *Id.* (internal citations omitted). There is nothing in the record in this case indicating that the Shaws were attempting to conceal something illegal.

In *Hutcherson*, the Court did not find the delay in pulling over to be suspicious but did find what the driver did during the delay to be suspect. "The Defendant's movements toward the front passenger floorboard and the rear passenger area occurred while he was pulling over." *Hutcherson*, 2018 WL 447734, at *4.

Likewise in *U.S. v. Elkins*, 70 F.3d 81 (10th Cir. 1995), the defendant did not pull over immediately. The Court held that this added to reasonable suspicion. But more than just failing to stop immediately, "the rear door of the vehicle opened at the time the officer's marked patrol car approached from the rear." *Elkins*, 70 F.3d at 83. Together, the facts—along with the circumstance as a whole—justified the detention in *Elkins*.

In all, these cases demonstrate that while a delay in pulling over can contribute to reasonable suspicion, it is often not *merely* the delay that is at issue; there is usually something

else that made the delay in pulling over suspicious. The weight to be given this factor therefore depends on additional facts that make the delay suspicious. Here, none of these facts exists. Trooper Schulte did not see the Shaws trying to hide anything. SOF 66. He did not observe them conferring or speaking to one another. SOF 67. There is no evidence they threw anything from the car.[16] SOF 68. Instead, B. Shaw offered Trooper Schulte a straightforward explanation for his delay: Trooper Schulte's patrol car lights were already on before the Shaws ever passed. SOF 39-40; *see also* SOF 15. But rather than listen to B. Shaw and try to understand what really happened, Trooper Schulte interrupted. He did not want to hear an explanation or try to figure out if something truly suspicious was happening. Instead, Trooper Schulte asked a sarcastic question: "What does state law say? Oklahoma is the same way." SOF 15. Importantly, this immediate mention of the fact that B. Shaw was from out of state, and had plates issued by the Osage Nation, a fact mentioned by Schulte (*see* SOF 5, 11, 15, 21, 33) shows that Trooper Schulte was clearly focused on the Shaws' travel plans in finding them suspicious. And, perhaps most importantly—as with all the factors Trooper Schulte cites—Trooper Schulte does not recall whether the delay in pulling over even contributed to his reasonable suspicion at all. SOF 23 at the Response.

b. B. Shaw had a prior offense.

Next, Trooper Schulte argues that B. Shaw's criminal record made him suspicious. After Trooper Schulte's first conversation with B. Shaw, before returning to the van a second time,

[16] Defendants attempt to bolster this factor in footnote 14 of their memorandum. They write that "[i]t seems likely that some rehearsing of stories was taking place." But since the assertion requires inferences in Defendants' favor, it is inappropriate at summary judgment. *McWilliams v. Jefferson County*, 463 F.3d 1113, 1116 (10th Cir. 2006) (facts are to be liberally construed in favor of the party opposing summary judgment"). Moreover, there is no evidence in the record to support this inference, other than Trooper Schulte's hunches based on other stops he may or may not have made that resulted in seizures. Unparticularized hunches are insufficient to form the basis of reasonable suspicion.

In the same footnote, Defendants go on to accuse B. Shaw of "fashioning a lie." As an initial matter, Defendants are incorrect. SOF 39-42. But regardless, if credibility determinations are necessary to support summary judgment, Defendants' motion should be denied. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions." *Anderson*, 477 U.S. at 255.

Trooper Schulte learned that B. Shaw had an eight year old felony charge for intent to distribute. SOF 18. "Knowledge of a person's prior criminal involvement (to say nothing of a mere arrest) is alone insufficient to give rise to the requisite reasonable suspicion." *U.S. v. McRae*, 81 F.3d 1528, 1535 (10th Cir. 1996) (citing *Lee*, 73 F.3d at 1040). "If the law were otherwise, any person with any sort of criminal record—or even worse, a person with arrests but no convictions—could be subjected to a Terry-type investigative stop by law enforcement." *U.S. v. Sandoval*, 29 F.3d 537, 543 (10th Cir. 1994).

In addition, Courts often look not merely to the fact of a detainee's criminal history, but instead consider the detainee's untruthfulness about their criminal history. *See U.S. v. Santos*, 403 F.3d 1120, 1132-33 (10th Cir. 2005); *McRae*, 81 F.3d at n.7. Schulte does not suggest that B. Shaw was untruthful about his history. In fact, his criminal history was eight years old and unrelated to any of the other facts Trooper Schulte observed. "Even people with prior convictions [to say nothing of prior successful diversions] retain Fourth Amendment Rights; they are not roving targets for warrantless searches." *Santos*, 403 F.3d. at 1132.

c. B. Shaw was driving his father's minivan.

Trooper Schulte also seeks to use the fact that B. Shaw was driving his father's minivan against him. In support of the argument, Trooper Schulte cites *U.S. v. Ludwig*, 641 F.3d 1243 (10th Cir. 2011), *U.S. v. Olivares-Campos*, 276 F. App'x 816 (10th Cir. 2008), and *U.S. v. Turner*, 928 F.2d 956 (10th Cir. 1991). While the defendant in *Ludwig* apparently provided details about the car's owner, 641 F.3d at 1249, none of the cases involves facts similar to those here. In *Olivares-Campos*, the detainee "could only identify the owner by his first name." *Olivares-Campos*, 276 F. App'x at 821. And in *Turner*, the Court writes only that the defendant could say the owner gave him permission to use it, nothing more. *Turner*, 928 F.2d at 958. In contrast, B. Shaw was in a car that belonged to family, was listed on the insurance, and Trooper Schulte knew Shaw drove the

car for his work with Uber. SOF 49, *see also* SOF 5, 15, 26, 27. B. Shaw did not attempt to hide this detail. B. Shaw and his father share the same last name so his truthfulness was not in question.

A final case is instructive. In *United States v. Villa-Chaparro*, "Defendant was not the registered owner of the vehicle," and the Court held that the fact weighed in favor of reasonable suspicion. *Villa-Chaparro*, 115 F.3d at 802. But there, the Court formulated the analysis this way: "We have noted that one recurring factor supporting a finding of reasonable suspicion is the inability of a defendant to provide proof that he is entitled to operate the vehicle he is driving." *Id.* Here, B. Shaw provided exactly the proof that was missing in *Villa-Chaparro*: he was listed on the car's insurance and Trooper Schulte knew the car belonged to Shaw's father—just as B. Shaw said—before ending the traffic stop.[17] SOF 49, *see also* SOF 5, 15, 26, 27.

d. The Shaw's van had a "lived in" look.

Next, Trooper Schulte argues that the car had "a lived in look" because the back of the car had a camping cot, pillow, and blanket set up. The Shaws' undisputed explanation that they were driving to Denver to go camping explains why they brought camping equipment. SOF 37, 38; *see also* SOF 36. Additionally, B. Shaw has a back injury from a prior car accident that necessitates he take breaks from driving long distances to lay down and stretch his back. SOF 45. Again, Trooper Schulte barely inquired about any of these facts. Had he been truly interested in establishing his suspicion—rather than relying on mere hunches or guesswork—a few additional questions may have made a difference.

[17] Reasonable, innocent drivers across the state of Kansas drive cars every day that are not registered in their name. Married couples often share a single car that is registered in one person's name. Children often drive their parents' vehicles without being on the registration. Any time a person rents a car at Kansas City International Airport, they are driving a car not registered in their name but they are authorized to use. Trooper Schulte's Motion would have this Court believe that in each of these circumstances the driver is inherently suspicious, even if they are properly on the car insurance for the vehicle or otherwise authorized to be driving it. This Court should decline to reach such a broad conclusion.

Regardless, Trooper Schulte's attempt to characterize the van as having a "lived in" look requires drawing inferences in their favor and resolving disputed issues of fact.[18] The Shaws dispute that the van had a "lived in" appearance. Instead, it was packed for travelling and camping. SOF 37-38. There were perfectly reasonable explanations for the contents of the car, yet Trooper Schulte did not inquire about those inconvenient explanations and instead drew negative inferences. *See United States v. Beltran-Palafox*, 731 F.Supp.2d 1126, 1151 (D. Kan. 2010) (noting the officer's failure to inquire about facts he believed suspicious). On summary judgment, "evidence is to be liberally construed in favor of the party opposing the motion." *McWilliams*, 463 F.3d at 1116. And Courts "construe the record in the light most favorable to the non-moving party." *Gouskos v. Griffith*, 122 F. App'x 965, 967 (10th Cir. 2005) (reversing grant of summary judgment based on qualified immunity in Fourth Amendment excessive force case).

Even so, the cases Trooper Schulte cites in support of this factor show the importance of taking facts together rather than in isolation. Trooper Schulte cites *U.S. v. Gaxiola-Guevara*, No. 19-20049-1-JAR, 2020 WL 4206142, at *6 (D. Kan. July 22, 2020). Def. Memo. at 31. Notably, the Court was ruling on a motion to suppress and made Findings of Fact based after an evidentiary hearing. *Id.*, 2020 WL 4206142, at *1 and n.1. It was not ruling on a motion for summary judgment and required to resolve disputed facts in *Gaxiola-Guevara*'s favor. Even still, the Court did not rely on the "lived in" look of the vehicle alone. Instead, it wrote that "the vehicle not only appeared to be lived-in, it smelled lived-in too, with the odor of old fast food not masked by the multiple air fresheners in the vehicle." *Gaxiola-Guevara*, 2020 WL 4206142, at *6. Not so here.

[18] Trooper Schulte also takes it one step further in his footnote 17. There, in addition to drawing an inference in his favor about the state of the van, he also argues that the look of the van "seems inconsistent" with the length of the Shaws' trip. If the inference is necessary to their argument, summary judgment should be denied. *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).

The only other Tenth Circuit Case Trooper Schulte cites is *U.S. v. Cukurs*, No. 14-10199-JTM, 2015 WL 5883904, at *7 (D. Kan. Oct. 8, 2015). Def. Memo. at 31. As in *Gaxiola-Guevara*, the *Cukers* Court was ruling on a motion to suppress following an evidentiary hearing—not on a motion for summary judgment. *Id.* at 1. Also like *Gaxiola-Guevara*, the officer did not merely observe a "lived in" look. Instead, the Court described the vehicle as follows:

> First and foremost, [the officer] **smelled marijuana from inside the car.** The Suburban had a lived-in look, and a lot of clothing and trash was visible. There were also multiple cell phones and food bags present, along with a cooler with fruit and grocery store food. Finally, [the officer] noted multiple masking agents, in the form of air freshener spray, which is commonly used to cover up the odor of narcotics.

2015 WL 5883904, at *1 (emphasis added).

In short, labelling the Shaws' van "lived in" is a characterization that is inappropriate at summary judgment, and had Trooper Schulte wanted to find out why the van looked the way it did, he could have asked. Instead, he knew from his training that characterizing the van as "lived in" could justify a detention, so he stopped short of asking any further questions. SOF 86. In addition, the cases Trooper Schulte cites demonstrate the weakness of the factor in this context. The Shaws' van contained none of the other compounding characteristics of the vehicles at issue in Trooper Schulte's cited cases and is thus distinguishable from each of them.

e. S. Shaw looked forward and remained still.

Finally, before Trooper Schulte attempted to end the traffic stop and employ the Kansas Two-Step, he claims he observed one other thing that made him suspicious: the passenger in the van, S. Shaw, kept his hands in his lap, did not say anything, and did not look over at Trooper Schulte. SOF 22. Again, Trooper Schulte's account differs from that of S. Shaw. This difference should be resolved in Plaintiffs' favor on summary judgment. *McWilliams*, 463 F.3d at 1116.

But even accepting Trooper Schulte's version of events, S. Shaw's behavior during the stop is the model of citizen behavior after being pulled over by police. The Kansas Highway Patrol's list of "What to Do If You Are Stopped," published on its website, instructs citizens to "[k]eep your hands in plain view, and do not make any sudden movements." SOF 91, 92. It also tells drivers to "[a]sk any passengers in your vehicle to remain calm . . . Instruct them to keep their hands in plain view and not make any sudden movements." SOF 93. Trooper Schulte turns this on its head and argues that S. Shaw's compliance with the KHP instructions actually supports his reasonable suspicion.

Worse still, Trooper Schulte's argument would have those stopped by the police finely calibrate their behavior and affect in order for the Fourth Amendment's protections to apply. Too much nervousness or if a hand trembles when turning over identification, and an officer has reasonable suspicion to justify a detainment. *United States v. Moore*, 795 F.3d at 1230-1231. But here, S. Shaw was suspiciously too still.

If a Trooper finds someone "particularly loquacious and elliptical in his responses," then that may be suspicious. *U.S. v. Leon*, 18-cr-00020-MSK-GPG, 2019 WL 2482625, at *6 (D. Colo. June 13, 2019). But here, S. Shaw was suspiciously too quiet.

And someone putting their hands in their pockets may be a sign of a weapon. *See U.S. v. Johnson*, 07-20096-CV, 2008 U.S. Dist. LEXIS 66836 at *3 (D. Kan. July 31, 2008). But here, S. Shaw suspiciously kept his hands in his lap.

Also worth noting is Trooper Schulte's admission that he did not address or otherwise try to engage S. Shaw. SOF 44. If Trooper Schulte was curious about S. Shaw or thought he was too quiet, nothing prevented him from saying hello or asking a few questions. Given Trooper Schulte's

failure to engage with S. Shaw in any way, negative assumptions should not be made about him because he failed to speak up or look at Schulte.

Finally, in analyzing how much weight to afford a detainee's nervousness, Courts have looked to officers' familiarity with the suspect.

> Nothing in the record indicates whether [a Border Patrol agent] had any prior knowledge of Defendant, so we do not understand how [the agent] would know whether Defendant was acting nervous and excited or whether he was merely acting in his normal manner. Rather, Defendant's appearance to [the agent] is nothing more than an inchoate suspicion or hunch.

United States v. Hernandez-Lopez, 761 F.Supp.2d 1172, 1189 (D.N.M. 2010) (brackets original) (citing *U.S. v. Bloom*, 975 F.2d 1447, 1458 (10th Cir. 1992)); *U.S. v. Fernandez*, 18 F.3d 874, 879 (10th Cir. 1994) ("The lower court's heavy reliance on nervousness as an important factor establishing reasonable suspicion is even more troublesome given the complete lack of evidence in the record that [the officer] had any prior knowledge of [the defendants] to make an evaluation of their behavior.")

Here, it is undisputed that Trooper Schulte did not know S. Shaw, and that unfamiliarity made a critical difference. S. Shaw has a disability. SOF 43. And his reaction when Trooper Schulte approached the vehicle was in part because of his disability. *Id.* Of course, Trooper Schulte had no way of knowing this at the time, but that is precisely why S. Shaw's behavior should not be deemed suspicious. People behave differently in different situations for many reasons. Those differences should not condemn people to an officer's suspicion without more.

4. Trooper Schulte relied on the Shaws' travel plans to prolong further the detention in violation of the Fourth Amendment.

Although not explicitly stated in his brief, Trooper Schulte impermissibly relied on the Shaws' travel plans in determining to detain them longer for a canine unit. It was the only fact he learned about the Shaws after employing the Kansas Two-Step. SOF 65; *see also* SOF 21.

"A seizure justified only by a police-observed traffic violation . . . becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation." *Rodriguez v. U.S.*, 575 U.S. 348, 350-51 (2015) (internal citations and brackets omitted). In *Rodriguez*, the officer issued a traffic warning and returned the driver and passenger's documents. *Id.* at 1613. After doing so, the officer ordered them out of the vehicle and deployed a drug sniff dog to circle the car. "[S]even or eight minutes had elapsed from the time [the officer] issued the written warning until the dog indicated the presence of drugs." *Id.* at 1613. "The Supreme Court concluded that the dog sniff, if performed without reasonable suspicion, measurably extended the detention and noted that the officer's authority to detain the driver 'end[ed] when tasks tied to the traffic infraction are—or reasonably should have been—completed.'" *United States v. Torres*, CR 16-4138 JB, 2017 WL 3149395, at *19 (D.N.M. June 9, 2017) (citing *Rodriguez*, 575 U.S. at 354).

In *U.S. v. Guerrero*, 472 F.3d 784, 787-88 (10th Cir. 2007), the Court wrote, "The fact that the defendants were traveling from a drug source city—or as [the Deputy] first noted upon approaching the car, a drug source state—does little to add to the overall calculus of suspicion."

Later, in *Vasquez v. Lewis*, 834 F.3d 1132 (10th Cir. 2016), the Court went on to hold that "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. "Even under the totality of the circumstances, it is anachronistic to use state residence as a justification for the Officers' reasonable suspicion. 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." *Id.* The Kansas Supreme Court has previously found that travel plans, even with paired with other

factors like nervousness or operating a third party vehicle, do not amount to reasonable suspicion. *State v. Lowery*, 308 Kan. 359, 365 (2018).

While *Guerrero* and *Vasquez* were addressing the vehicles' state of origin, the common reasoning applies with even more force here. Though Trooper Schulte appears to believe that "in route drug traffickers frequently have large sums of cash, drug paraphilia [*sic*] and evidence of drugs with them when traveling to make a purchase," the factor is only weakened if the detainee has not even visited the drug source yet. Def. Facts, ¶ 23. And if *Guerrero* and *Vasquez* make considering *a state of origin* all but impermissible in the reasonable suspicion analysis, the same should be true for *a destination state*. Simply put, there is nothing inherently suspicious about traveling to or from Colorado, a popular and frequent vacation destination for families and travelers throughout the entire United States.[19]

Trooper Schulte points to multiple facts about the encounter with the Shaws to argue reasonable suspicion. But when Trooper Schulte learned those facts is telling. Trooper Schulte knew every factor but one—the Shaws' destination—before purposely ending the traffic stop and employing the Two-Step. If at the conclusion of the traffic stop Trooper Schulte did not have reasonable suspicion to call a canine unit, then one additional topic must have tipped the scale: the questions regarding the Shaws' destination. Otherwise, he would have called for a canine unit without employing the Two-Step maneuver and conducting additional questioning in order to drum up additional reasonable suspicion. SOF 62, 84, 85. During the additional questioning, Schulte learned that the Shaws were heading to Colorado. SOF 65. Trooper Schulte cites this fact,

[19] Tourism in Colorado is a $22.3 billion industry. https://www.denver.org/about-visit-denver/facts-figures/. "In 2019, Colorado welcomed a combined total of 86.9 million overnight and day visitors." https://oedit.colorado.gov/blog-post/findings-of-2019-colorado-tourism-office-research. Visitors coming from the Midwest account for about 1 in 10 overnight Colorado tourists, and Kansas was a top 10 out-of-state market for Colorado vacations in 2019. https://www.industry.colorado.com/sites/default/files/Colorado%202019%20final%20report_online.pdf (Slide 21).

calling the state "a known drug source area," in support of finding reasonable suspicion. Def. Memo. at 30. This is despite Trooper Schulte's testimony that there is no state in the union "where people can't take narcotics." SOF 87.

Allowing Trooper Schulte to avoid liability for extensively detaining the Shaws while he summoned a canine unit for the reason that the Shaws were on their way to Colorado would flip the *Vasquez* analysis on its head. As the *Vasquez* Court noted at the time, "Currently twenty-five states permit marijuana use for medical purposes, with Colorado, Alaska, Oregon, Washington, and Washington, D.C. permitting some recreational use under state law. Thus, the Officer's reasoning [that state of origin justifies] the search and seizure of the citizens of more than half the states in our country." *Vasquez*, 834 F.3d at 1137-38.[20] KHP troopers should not be allowed to hold a driver's destination against them anymore than the driver's place of origin.

Considerations of *Vasquez* aside, "[t]he Tenth Circuit has distinguished merely unusual travel plans, which do not contribute to reasonable suspicion, and 'bizarre, inconsistent and evasive' ones, which do." *State v. Schooler*, 308 Kan. at 354 (citing *U.S. v. Simpson*, 609 F.3d 1140, 1151 (10th Cir. 2010)). Here, there is nothing unusual about the Shaws' travel plans. They were going camping in Colorado and visiting family and friends who lived there. SOF 37; *see also* SOF 21, 27. These travel plans were certainly not "bizarre, inconsistent, or evasive" and Schulte has not asserted that they meet this threshold. *See Wood*, 106 F.3d at 944 (travel plans not suspicious when driver claimed to be on six-week vacation, told officer he rented the car in San Francisco instead of Sacramento but corrected the mistake when confronted, and despite a rental agreement requiring the car back in Sacramento when driver was on a one way trip).

[20] Currently, 36 state permit medical marijuana usage now and 16 states allow recreational marijuana. *See* https://www.businessinsider.com/legal-marijuana-states-2018-1#:~:text=Marijuana%20is%20legal%20for%20adults,recreational%20cannabis%20on%20March%2031 (article dated Apr. 14, 2021, last visited June 4, 2021).

5. Trooper Schulte lacked reasonable suspicion or probable cause to force the Shaws to the Station.

Finally, Trooper Schulte violated the Shaws' constitutional rights by making them drive to the KHP station so that Trooper Schulte could copy B. Shaw's paperwork. At the point at which Trooper Schulte concluded the search of the canine vehicle and instructed the Shaws to follow him to the KHP station, he effectively put them under arrest. "Whether a suspect is in custody represents an objective determination." *United States v. Jones*, 523 F.3d 1235, 1239 (10th Cir. 2008). Courts "must determine whether 'a reasonable person in the suspect's position would have understood the situation as the functional equivalent of formal arrest.'" *United States v. Chee*, 514 F.3d 1106, 1112 (10th Cir. 2008) (citing *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984)). An arrest occurs when someone "is deprived of his freedom of action in any significant way, or his freedom of action is curtailed to a degree associated with formal arrest." *Chee*, 514 F.3d at 1112 (discussing arrests in the context of the Fifth Amendment).

That is precisely what happened here. The Shaws had just endured a prolonged traffic stop, a drug dog sniff, and then a search of their vehicle. Then, at the conclusion of it all, the Troopers ordered the Shaws to the KHP station. They were never free to leave, and forcing the Shaws to the station was the "functional equivalent of formal arrest." *Id.* "Once the police told [the Defendant] to come with them to the sheriff's office, the line between detention and *de facto* arrest was crossed." *United States v. Arango*, 912 F.2d 441, 447 (10th Cir. 1990). *See Hayes v. Florida*, 470 U.S. 811, 815 (1985) (In the context of removing a suspect from their home, "transportation to and investigative detention at the station house without probable cause or judicial authorization together violated the Fourth Amendment.").

To lawfully arrest the Shaws, Trooper Schulte needed more than reasonable suspicion: he needed probable cause. *Oliver v. Woods*, 209 F.3d 1179, 1186 (10th Cir. 2000). "Probable cause

exists if facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense." *Id.* (quoting *Romero v. Fay*, 45 F.3d 1472, 1476 (10th Cir. 1995)).

Trooper Schulte lacked the appropriate legal justification to force the Shaws to follow him to the KHP station. Trooper Schulte and the other troopers present at the scene searched the Shaws' van after the canine alerted. SOF 69. After the search, the troopers did not cite the Shaws for possession of anything unlawful in the car. SOF 73. Instead, the only additional information the Troopers learned was the differing addresses on B. Shaw's ID cards, which they used to justify prolonging the detention by forcing the Shaws to follow them to the station to copy their documents, SOF 70, 74, 75.[21] By the point at which Trooper Schulte took this action, he had all but confirmed there was not criminal activity occurring. Trooper Schulte had cited the Shaws with nothing more than a speeding violation. The Troopers had kept the Shaws detained for over an hour, called out a drug dog, emptied their vehicle and conducted a top to bottom search of the van, yielding not a single criminal violations. The KHP Troopers knew unequivocally the Shaws were *not* engaged in any illegal activity, yet they seized their documents and compelled them to travel to the KHP facility in order to retrieve them. Trooper Schulte had even less reason for suspicion than when he conducted the canine search. If Trooper Schulte did not have reasonable suspicion to force the Shaws to the KHP station, he certainly did not have probable cause. *Prado Navarette v. California*, 572 U. S. 393, 397 (2014) ("Although a mere 'hunch' does not create reasonable

[21] As with many of the other factors Trooper Schulte cites to support his suspicion, he did not ask B. Shaw why there were differences. SOF 71. Had he, he would have learned B. Shaw formerly lived at the addresses on his cards. SOF 72. In addition, while Trooper Schulte cited vague concerns about the Shaws' violation of Colorado law, Trooper Schulte does not point to the Colorado law he believed was being violated—either at the time of the detention or now. *See* Def. Memo. at 37-38.

suspicion, . . . the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause . . .") (citations and quotation marks omitted) (as cited in *Kansas v. Glover*, 589 U. S. ___, 140 S.Ct. 1183, 1187 (2020)).

Most strikingly, by the point at which the KHP forced the Shaws to follow them to the KHP station, the Troopers had all but confirmed there was not criminal activity occurring, leaving them to cite the Shaws with nothing more than a speeding violation. SOF 61; *see also* SOF 20. The Troopers had kept the Shaws detained for over an hour on the roadside, called out a drug dog, emptied their vehicle and conducted a top to bottom search of the van, yielding not a single criminal violations, and citing B. Shaw with nothing other than a traffic ticket. The KHP Troopers knew unequivocally the Shaws were *not* engaged in any illegal activity, yet they seized their documents and compelled them to travel to the KHP facility in order to retrieve them. Not only was this evidence that Trooper Schulte had even less reason for suspicion than when he started his questioning of the Shaws, it constituted an illegal and unconstitutional arrest of the Shaws

This final step—forcing the Shaws to the station house after learning there was nothing criminal afoot—is revealing. It suggests that KHP is not stopping motorists in good faith for traffic violations and then, when appropriate and supported by reasonable suspicion, detaining them further. Instead, a factfinder could determine that it is the practice of the KHP to fish for unlawful activity whatever chance they get and despite not only a lack of reasonable suspicion but clear indications against criminal activity, the KHP subjects innocent people engaged in innocent activity to prolonged and coerced detentions.

In all, Trooper Schulte violated the Shaws' constitutional rights by prolonging their roadside detention without adequate reasonable suspicion, and by forcing them to the KHP station without reasonable suspicion or probable cause. The first prong of the *Saucier* test is met.

B. Under the second prong of the *Saucier* test, the Shaws' right to be free from prolonged detentions without reasonable suspicion was clearly established.

Trooper Schulte's decision to prolong the Shaws' roadside detention violated clearly established precedent, thereby precluding summary judgment in his favor on the basis of qualified immunity. Trooper Schulte knew or should have known that his conduct violated Plaintiffs' clearly established rights. Clearly established precedent shows that the reasonable suspicion factors relied on by Trooper Schulte were insufficient. *See* Section V.A., *supra*. Moreover, Trooper Schulte's decision to extend the Shaws' detention based on their travel plans is precisely what the Tenth Circuit prohibited in *Vasquez*. The prolonged detention for the canine unit was a violation of clearly established precedent.

The Supreme Court has clearly held that a dog sniff without reasonable suspicion violates the Fourth Amendment. *Rodriguez v. U.S.*, 575 U.S. at 350-51. And the Tenth Circuit has been unequivocal about the use of a driver's state of origin when officers form their reasonable suspicion: "[I]t 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 addition, the Court has long cautioned against the use of so-called "suspicious" travel plans. *See Lowery*, 308 Kan. at 365; *Wood*, 106 F.3d at 944; *U.S. v. Santos*, 403 F.3d at 1132 ("Our holding that *suspicious* travel plans can form an element of reasonable suspicion should not be taken as an invitation to find travel suspicious per se." (emphasis in original)). Here, Trooper Schulte unabashedly used the fact of the Shaws' travel and their destination against them. In fact, this was the *sole factor* that was added after Schulte performed the Two-Step.

The Court need not speculate on whether Trooper Schulte was actually aware of *Vasquez* and other cases making clear he could not rely on travel plans. He admits that he was and the KHP trains its officers on the issue. SOF 87-88. Despite his knowledge, Trooper Schulte does not recall any change in procedure regarding car stops and/or searches after *Vasquez*. SOF 90. And, of course, his treatment of the Shaws confirms he does not follow the dictates of *Vasquez*.

In fact, the totality of the circumstances in the Shaws' detention is strikingly similar to the unconstitutional detention in *Vasquez* and *Wood*.

> In both cases, [the officer] detained an individual because: he thought the car was unusual (Vasquez's older car and Wood's rented car); the car had "unusual" but typical items in it (Vasquez's items covered by blankets and Wood's trash wrappers and maps); and the driver was nervous, leaving a drug source state, and passing through Kansas. The facts of these cases are almost indistinguishable.

Vasquez, 834 F.3d at 1139. Almost the same thing could be written about the Shaws (SOF 26):

> • Trooper Schulte believed the Shaws' car was unusual—not older or rented, but borrowed.
>
> • Trooper Schulte thought the car had unusual items in it—not covered in blankets or trash wrappers and maps, but camping gear and a cot.
>
> • And while Trooper Schulte does not accuse B. Shaw of nervousness in his briefing, S. Shaw was suspiciously calm.
>
> • Finally, and most tellingly, while the Shaws were not leaving a drug source state as in *Vasquez* and *Wood*, they were heading to one—a weaker factor even if considered.

In all, the Tenth Circuit has clearly held that Trooper Schulte's repeated and prolonged detention of the Shaws, and the factors upon which he based his suspicion, are unconstitutional. Trooper Schulte's conduct was even more egregious when he arrested the Shaws without probable cause that a crime had been or was in the process of being committed and made them go to the KHP station. As explained in KHP's own training, moving a temporarily detained person to a police station is an automatic arrest requiring probable cause. SOF 96.

Vasquez put the KHP on notice that Trooper Schulte's conduct throughout his encounter with the Shaws was impermissible. Regardless of *Vasquez*, Trooper Schulte impermissibly prolonged the Shaws' detention. Trooper Schulte's conduct meets the second prong of the *Saucier* test. Qualified immunity should not apply.

VI. TROOPER SCHULTE SEEKS SUMMARY JUDGMENT ON CONTESTED, MATERIAL FACTS.

Whether Trooper Schulte had reasonable suspicion to detain the Shaws is an inherently fact intensive inquiry. "Articulating precisely what reasonable suspicion and probable cause mean is not possible. They are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Ornelas v. U.S.*, 517 U.S. 690, 695 (1996) (internal citations omitted). "[T]he mosaic which is analyzed for a reasonable-suspicion or probable-cause inquiry is multifaceted." *Id.* at 698. As a result, the determination of factual disputes, the weight to give certain evidence, and credibility determinations may all prove dispositive. These kinds of decisions are typically left to the fact finder. *Anderson*, 477 U.S. at 255.

Several genuine issues of material fact preclude summary judgment in favor of Trooper Schulte. This is especially true given that this case is in the middle of discovery, which is not set to close until December 31, 2021. Based on discovery to date, and discovery anticipated, including depositions of other individual troopers and those most knowledgeable about KHP training, summary judgment would be premature. Moreover, there are genuine disputes about the reasons that Trooper Schulte prolonged detention of B. Shaw and S. Shaw. A reasonable factfinder could believe that Trooper Schulte relied on impermissible criteria to prolong the Shaw's traffic stop, in violation of established constitutional doctrine in the Tenth Circuit. For these reasons, as set forth below, summary judgment should be denied.

A. There are credibility issues and disputed facts that a jury should decide.

To begin, Trooper Schulte admits he does not remember the reasons he had to support his reasonable suspicion. Def. Ex.1, ¶ 20. Yet his arguments for the reasonableness of the Shaws' prolonged detention relies primarily on his account of events. All but paragraphs 6-8 and 36 of his Material Facts cite his affidavit.[22] Below, the facts contradicting his recollection are set out.

Trooper Schulte's purported reasons for prolonging the Shaw's traffic stop were based on inaccuracies, misconceptions, and faulty inferences that Trooper Schulte never confirmed through questioning, and in fact, did not realize were inaccurate until this case was filed. A reasonable factfinder could find that Trooper Schulte's post-hoc justifications for prolonging the detention are pretextual and that a reasonable officer in Trooper Schulte's position would not have come to the same conclusions, *or* that Trooper Schulte devised reasonable suspicion after the filing of this lawsuit in an attempt to justify his detention of the Shaws. A factfinder could also find that Trooper Schulte was unjustified in prolonging the Shaws' roadside detention, and that he impermissibly relied on unconstitutional criteria, such as the Shaws' travel plans.

Indeed, the parties dispute key facts, particularly around the factors Trooper Schulte claims amounted to reasonable suspicion, nearly all of which were based on bad judgment and incorrect inferences—inferences that Trooper Schulte failed to confirm (and would have been unable to confirm) in his additional questioning of the Shaws. This should preclude success on Trooper Schulte's motion. *Anderson*, 477 U.S. at 255.

[22] This is telling. KHP does not require its troopers to document their reasons for prolonging a detention unless that detention results in an arrest or a seizure. SOF 95. In doing so, KHP attempts to shield itself from liability. KHP officers are free to testify, as Trooper Schulte did here, that they do not recall the specific reasons why they detained a person, and at the same time argue that they had sufficient reasonable suspicion to detain them such that qualified immunity should be granted. Although these arguments relate to KHP's pattern of conducting unconstitutional prolonged detentions, the absence of a contemporaneous account of Trooper Schulte's justifications for detaining the Shaws raise questions about Trooper Schulte's present arguments, thus rendering summary judgment inappropriate.

B. Summary judgment is premature because discovery is ongoing.

Fact discovery in this case closes December 31, 2021. Revised Phase II Scheduling Order (Dkt. 135). Plaintiffs remain in discovery conversations with Defendants regarding a host of documents and data that may be illuminating for the case as a whole, including in the Shaws' claims against Trooper Schulte. Expert reports will be forthcoming, and Plaintiffs have a retained an expert who will, in part, opine on the constitutionality of the stops and what a reasonable officer in their position should have known/believed regarding the legality of the stops. Numerous troopers' depositions will be taken, as will members of the professional standards unit and Sarah Washburn, who provided relevant training. In addition, members of the public continue to contact Plaintiffs' counsel to identify interactions with Kansas Highway Patrol that are similar to the named Plaintiffs' here. *See* Dkt. 162 (ruling on Protective Order dispute regarding these individuals). These witnesses may shed light on Kansas Highway Patrol training or practices, as implemented by KHP Troopers here, that could become relevant or cast doubt on the Troopers' explanations and motives.

Although Defendants have always treated this case as two separate ones—one for damages against the named Troopers, and one for injunctive relief against Defendant Jones[23]—discovery does not neatly break down along such categorical lines. Forthcoming depositions of other members of the KHP, taken to advance the class claims against Defendant Jones for injunctive relief, may shed light on whether Trooper Schulte knew what he was doing was wrong and in violation of the Fourth Amendment. Or, future depositions and discovery may reveal that KHP continues to instruct, encourage, or tolerate the use by KHP troopers of the Two-Step maneuver and/or reliance on out-of-state travel plans as a criteria driving reasonable suspicion to prolong

[23] *See generally*, Opp. to Mot. for Second Extension of Time, Dkt. 173.

detentions, despite the Tenth Circuit's holding in *Vasquez v. Lewis*.[24] Summary judgment in favor of the officers in the middle of discovery in this case is therefore premature.

VII. A JURY COULD INFER THAT PUNITIVE DAMAGES ARE APPROPRIATE.

Trooper Schulte argues in the alternative that summary judgment should be granted on the Shaws' claims for punitive damages. Punitive damages are appropriate if Trooper Schulte's conduct "is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Searles v. Van Bebber*, 251 F.3d 869, 879 (10th Cir. 2001). Here, even at this early point in discovery, there is distinct evidence from which a fact finder could infer just that.

Trooper Schulte has all but admitted his "indifference to the federally protected rights of others." *Id.* The KHP trained him on the holding in *Vasquez* yet he does not recall any change in procedure regarding car stops and/or searches after *Vasquez*. SOF 90; *see also* SOF 88-89.

In addition, Trooper Schulte further detained and forced the Shaws to the highway patrol station even after the troopers could be confident no illegal activity was occurring. Their search of the van revealed nothing, and Trooper Schulte's insistence on detaining the Shaws was reckless or callously indifferent to the Shaws' Fourth Amendment rights. By the time Trooper Schulte forced the Shaws to the station, the troopers should have been confident no illegal activity was occurring, yet, clinging to disproven suspicions, Trooper Schulte detained the Shaws even longer, forcing them to travel to the KHP facility to retrieve their seized documents. SOF 35, 75.

Under the circumstances, a fact finder could infer that punitive damages are appropriate.

[24] Pursuant to Federal Rule of Civil Procedure 56(d), counsel for the Shaws submits a declaration, attached hereto as Exhibit 15, in support of the argument that summary judgment is premature.

VIII. CONCLUSION

Trooper Schulte is not entitled to qualified immunity. He was aware of clear precedent in this Circuit regarding the right to be free of unreasonable searches and seizures based on one's state of origin or travel destination. He was equally aware that he prolonged a traffic stop of B. and S. Shaw in violation of that clearly established right. And he bases his decision to prolong the detention on criteria that innocent and explainable. That Trooper Schulte did not wish to have his suspicions allayed and instead remained convinced in his unsupported theories should not make him immune from suit. Moreover, due to the status of ongoing discovery and the many issues of material fact that could be decided in favor of the Plaintiffs, summary judgment is inappropriate at this time. For these reasons, Plaintiffs respectfully request that the Court deny Trooper Schulte's motion.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I certify that on this 4th day of June, 2021, I electronically filed the foregoing using the Court's CM/ECF system which will give notice of electronic filing to all counsel of record. All exhibits that were the subject of Plaintiffs' Motion to Seal were served on counsel of record, under seal, with that motion. All exhibits subject to Plaintiffs' Motion to File Conventionally will be mailed to opposing counsel at the following address:

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