IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Blaine Franklin Shaw, *et al*. Plaintiffs, v. Herman Jones, in his official capacity as the Superintendent of the Kansas Highway Patrol, *et al.,* Defendants.	Case No. 6:19-CV-01343
Mark Erich, *et al*. Plaintiffs, v. Herman Jones, in his official capacity as the Superintendent of the Kansas Highway Patrol, *et al.,* Defendants.	Case No. 20-CV-01067

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF BOSIRE'S CLAIMS

This is a constitutional tort case, brought under 42 U.S.C. § 1983, arising from the extension of a traffic stop for a drug-detection dog sniff.

Defendants Brandon McMillan and Douglas Schulte are entitled to summary judgment under the doctrine of qualified immunity. Plaintiff Joshua Bosire's constitutional rights were not abridged. Defendant McMillan had the required reasonable suspicion to investigate possible trafficking in contraband.

Alternatively, no clearly established federal law demonstrated that the detention, under the facts and circumstances, was unconstitutional.

Defendant Schulte cannot be liable for failing to intervene to prevent infringement of Mr. Bosire's federal rights because Mr. Bosire's constitutional rights were never infringed. Furthermore, no clearly established federal law required Schulte to intervene or required him to intervene based on the facts that he knew.

Alternatively, summary judgment should be entered against the plaintiff's punitive damage claims because there are no evidence of reckless or callous indifference to the plaintiffs' federally protected rights.

Statement of Uncontroverted Facts

1. Kansas Highway Patrol ("KHP") Technical Trooper Brandon McMillan ("McMillan") and KHP Master Trooper Douglas Schulte ("Schulte") are sued by Plaintiff Joshua Bosire ("Bosire") in their individual capacities. Doc. 07, ¶¶ 28-135.

2. McMillan is an eleven-year trooper with the KHP. He had been a Garden City police officer for approximately four years up to the time he started his employment with the KHP. He graduated a 22-week KHP training academy at the beginning of his employment, in 2010, and has 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, but he is one of the KHP's pilots. He became a Technical

Trooper (this relates to his pilot responsibilities) in 2015. Exhibit 1 [McMillan Declaration], ¶ 2.

3. 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 has 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 2 [Schulte Declaration], ¶ 2.

4. Technical Trooper and Master Trooper are the same rank within the KHP. Exhibit 1, ¶ 3; Exhibit 2, ¶ 3.

5. On February 10, 2019, at approximately 8:35 p.m., McMillan stopped Plaintiff Joshua Bosire ("Bosire") for speeding eastbound on Interstate 70 ("I 70") at marker 153, which is about 5 miles west of Hays, Kansas. Exhibit 1, ¶ 4.

6. Bosire is a resident of Wichita, Kansas. Doc. 07, ¶ 20. At the time of the stop, Bosire's address was 999 N Silver Springs Blvd., # 503, Wichita, Kansas. Exhibit 3 [Warning Ticket, Bates # AG000014].[1] Bosire had been driving a rented 2019 blue Nissan Altima. The vehicle had a Missouri license plate. *Id.*

7. McMillan clocked the Altima traveling 82 miles per hours, seven miles per hour in excess of the posted 75 miles per hour speed limit. After he clocked the vehicle speeding, McMillan saw that it was a blue Nissan. He thought

[1] Foundation for the exhibit is at Exhibit 1, ¶ 5 and its attachment.

it could be the blue Nissan, which he had seen earlier that evening at a convenience store in Ellis, Kansas. Exhibit 1, ¶ 6.

8. Bosire admits that he was speeding. Exhibit 5 [Bosire Deposition Excerpt], 72:1-13.

9. Bosire pulled over to the outside shoulder of the four-lane highway at approximately mile marker 183. Exhibit 1, ¶ 7; Exhibit 3.

10. McMillan parked his marked patrol vehicle behind the Altima. He placed a license plate inquiry, received a response to the inquiry, exited his vehicle and walked to the Altima. By this time, McMillan had confirmed that the Altima stopped was the one that he had seen in Ellis earlier that evening. Exhibit 1, ¶ 8.

11. McMillan'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 Bosire's February 10, 2019 traffic stop and detention is provided as Exhibit 4. See Exhibit 1, ¶ 9.

12. Bosire digitally recorded his encounters with McMillan on his Apple iPhone. Exhibit 5, 19:12-20:23. There are two video recordings.[2] They are

[2] Bosire added pixel distortions to the recordings to conceal his face. He claims the original recordings were lost. The phone is in Kenya and his copy on his computer is no longer available because it "crashed." Exhibit 5, 18:22-20:23; 86:8-89:18.

provided as Exhibits 6 & 7.[3]

13. Bosire mounted two cameras in the rented Altima. He says that they did not record any of the involved traffic stop or detention. Exhibit 5, 62:9-63:5, 70:1-71:6; 75:12-18.[4] He testified that the cameras were activated by change in G force, but not normal braking, and then for only a few seconds. *Id.,* 70:1-71:6; 74:6-25.[5]

14. McMillan first approached the Altima's passenger side about a minute and a half after Bosire pulled over. McMillan shined his flashlight and looked into the interior of the car as he circled, counterclockwise, to the driver's door. Before McMillan shined his flashlight into the vehicle, he did not know how many occupants were in the vehicle or their race. With the flashlight's assistance, he saw only one occupant in the Altima, which was one of the two men that he had seen standing and talking by the Altima earlier that evening, as described in paragraphs 20-21, *infra*. He saw a notebook partially covered by a blanket in the backseat of the Altima. Exhibit 1, ¶ 10.

[3] The data files marked Exhibits 6 & 7 were produced by the Plaintiffs in response to the Defendant troopers' request for production of documents which are photographs, motion pictures, digital or other video records, diagrams, measurements, surveys, or reconstruction analysis concerning the Bosire incident, any of the facts supporting your liability claims. See Bosire's responses to Interrogatory # 18 and RFP # 1.

[4] Bosire discarded the cameras' SD Card so that verification the cameras had no relevant data pertaining to the stop or his trip is lost. Exhibit 5, 75:19-77:7.

[5] He testified that he purchased the cameras after he had problems resolving an insurance claim concerning a collision with a coyote. Exhibit 5, 71:13-25.

15. McMillan stood by the driver's door for about two minutes. When McMillan first arrived at the driver's door, it appeared that the window was down less than an inch. While standing beside the window, he requested that Bosire lower the window, took Bosire's Kansas driver's license, and received and reviewed the rental agreement. Exhibit 1, ¶ 11; Exhibit 4; Exhibit 6. The exchange went materially as follows:

> [McMillan] Roll you window down please. Kansas Highway Patrol, I checked your speed at 82, speed limit is 75. May I see your driver's license please? Do you have your rental agreement with you? Let me see you other right hand [sic] please. Where are you coming from tonight?
>
> [Bosire] [after a pause of about 7 seconds] – sighs, "west."
> [McMillan] Ok, where are you coming from tonight?
>
> [Bosire] West.
>
> [McMillan] Where at?
>
> [Bosire] West.
>
> [McMillan] You were coming from west?
>
> [Bosire] Yes, I am heading east.
>
> [McMillan] Is that in Kansas; is that in Colorado; where is west?
>
> [Bosire] Do I have to answer that question?
>
> [McMillan] I am asking what your travel plans are.
>
> [Bosire] I am coming from the west. I'm heading east.
>
> [McMillan] What is that?
>
> [Bosire] I am coming from the west. I'm heading east.
>
> [McMillan] You are coming from the west, heading east?

[Bosire] Yes.

[McMillan] OK, What is the purpose of your trip, sir?

[Bosire] Do I have to have …

[McMillan] I am asking what you travel plans are; I have the right to ask you these questions.

[Bosire] And I have the right to remain silent.

[McMillan] OK, you are telling me you are not going to answer the questions. Is that want you are saying?

[Bosire] No.

[McMillan] Then don't make me stand out here if you are not going to answer my questions. I am not going to keep asking you.

[Bosire] You have my driver's license …

[McMillan] OK, I noticed you are not wearing your seatbelt also.

[Bosire] I just took it off because I saw you coming.

Exhibit 1, ¶ 12; Exhibit 4; Exhibit 6.

16. During the exchange, Bosire only partly (about 1/3) rolled down the Altima's driver side window. Exhibits 1 & 5. McMillan did not smell marijuana in the vehicle. Exhibit 1, ¶ 13; Exhibit 6.

17. Bosire's driver's license showed that he had a Wichita, Kansas address that is approximately 185 highway miles from the involved stop. Exhibit 1, ¶ 14.

18. McMillan noted that the rental agreement was for a two-day rental, and that the vehicle, per the agreement, had been due back to Wichita earlier that day. Exhibit 1, ¶ 15.

19. McMillan saw a camera mounted in the front windshield and a camera mounted on the rear passenger's side headrest. Exhibit 1, ¶ 16.

20. McMillan had seen the blue Nissan Altima at a gas pump in Love's Travel Shop in Ellis, Kansas (sometimes referred to as a convenience store) about ten minutes before the stop. McMillan and Master Trooper Doug Schulte ("Schulte") had been at the convenience store on a food break. While exiting the store, McMillan and Schulte smelled the odor of marijuana seeming to come from persons who were or had been near the store's entrance. Then, after standing outside the convenience store for less than five minutes, McMillan noticed two men (one black and the other white) standing and talking by the Altima. McMillan believed that one or both of these men could have been the source of the marijuana that he smelled in the store. Exhibit 1, ¶ 17; Exhibit 2, ¶ 4.

21. McMillan thought that the Altima was a rental vehicle because of its apparent age, appearance and Missouri license plate. At that time, he saw a camera mounted in the windshield, but thought it was a speed detector at that time. Exhibit 1, ¶ 18.

22. As McMillan drove out of the convenience store parking lot, he saw a second camera mounted on rear passenger's side headrest. McMillan ran the

Missouri license plate and determined the vehicle was registered to EAN Holdings. Exhibit 1, ¶ 19.

23. As McMillan left the convenience store's parking lot, he saw a silver Dodge Charger, which appeared to be another rental vehicle, driving west on a street just north of the convenience store parking lot. Exhibit 1, ¶ 20.

24. After McMillan's first exchange with Bosire ended, McMillan was suspicious that Bosire was transporting something illegal. From his law enforcement experience, he knew persons transporting drugs frequently use short-term rented vehicles for the transport. Likewise, he knew that people engaged in the delivery or acquisition for delivery of large amounts of drugs will travel in two or more vehicles (caravan), whereby one vehicle can attempt to distract law enforcement from the vehicle transporting the drugs. McMillan found that the mounted cameras in a rental car (particularly a short-term rental) were not only odd, but could possibly be an attempt to (a) facilitate caravanning, (b) make the drug transporter accountable to his or her principal, and/or (c) discourage law enforcement stops. He felt that the silver Dodge Charger he saw leaving the convenience store could be associated with the white man at the gas pump talking with Bosire and, therefore, caravanning with Bosire. Further, McMillan believed that Bosire's responses to his questions about travel raised suspicion about the legality of Bosire's activities in that, according to McMillan, they were entirely atypical of usual conversations with the persons he had stopped during his 13 years in law enforcement. Bosire had been non-responsive

and evasive. That Bosire did not fully roll down his window and the partial covered notebook in the back of the rental car added to McMillan's suspicion based on his law enforcement experience. Exhibit 1, ¶ 21.

25. McMillan called in an inquiry about Bosire's license and possible warrants, and he radioed Master Trooper Doug Schulte ("Schulte") to come to the stop. McMillan wanted backup, for officer safety, if a search of the Altima happened. McMillan also radioed Schulte that the white man seen at the convenience store is "no longer in the car." Exhibit 1, ¶ 22.

26. Schulte sent out a request that other troopers keep a look out for the silver Charger. He arrived at the stop about four minutes after McMillan had returned to his vehicle. Exhibit 2, ¶¶ 8 & 10.

27. Schulte had found it noteworthy that the drivers of two rented vehicles (which he thought was the case) were talking together at the gas pumps because (a) he had smelled the odor of marijuana in the convenience store, (b) rental cars are frequently used to transport drugs and (c) drug traffickers sometimes caravan (using one vehicle to attempt to distract law enforcement as necessary). Exhibit 2, ¶ 7.

28. Schulte arrived at the scene of the stop approximately 7 minutes after McMillan had stopped Bosire. Schulte is not McMillan's supervisor. McMillan solely made the decisions to stop and then detain Bosire. Exhibit 1, ¶ 23; Exhibit 2, ¶ 13.

29. Schulte never spoke to Bosire. On I 70, Schulte first saw Bosire after the drug dog arrived. Schulte did not hear what was said in any of the encounters between McMillan and Bosire. Exhibit 2, ¶ 14.

30. McMillan told Schulte that he could not smell marijuana in Bosire's vehicle when Schulte came to scene of the stop. McMillan mused, to Schulte, that the marijuana smell could be in the other car, referencing the silver Dodge Charger. McMillan told Schulte that he saw a notebook in back of the car, partly under a blanket. McMillan told Schulte that there were several cameras in Bosire's car and Bosire was refusing to answer questions. Schulte responded "he is playing the game" which McMillan understood to relate to Bosire's non-responsiveness as Schulte intended. Defendant Schulte asked McMillan if he had requested consent to search the Altima and McMillan said he had not, but Bosire would not give consent. McMillan also told Schulte, "if he does let me [search], I don't think I can hold him for a dog." However, McMillan asked Schulte to locate the nearest available drug-detention dog. Exhibit 1, ¶ 24; Exhibit 2, ¶ 12; Exhibit 4.

31. McMillan received responses on the license and warrant inquires about 2½ minutes after Schulte arrived at the stop. McMillan then completed the paperwork to give Bosire a warning for speeding. Exhibit 1, ¶ 25; Exhibit 4.

32. McMillan then walked to the passenger side window of the Altima and spoke to Bosire for a second time. By this time, while McMillan had stated to Schulte that he did not believe that he had sufficient reasonable suspicion to

extend the stop to conduct a dog sniff, McMillan felt that he had reasonable suspicion to detain Bosire for additional questions. He believed additional questioning would either abate suspicion that Bosire was involved in criminal activity or establish that it was reasonable to detain Bosire ten or more minutes more for a dog sniff. At this point, about 12 minutes passed from the time of the stop of the Altima. Exhibit 1, ¶ 26.

33. The second exchange, which took about 4 minutes, went materially as follows:

[McMillan] Hey, were did you buddy go?

[Bosire] [No response]

[McMillan] They guy you were with at Loves?

[Bosire] Loves?

[McMillan] The gas station you were at.

[Bosire] Did you see two people?

[McMillan] Yeah when you were getting gas.

[Bosire] You saw two people?

[McMillan] I saw two people. Did he get in another car or what?

[Bosire] (Laughs) oh wow, …

[McMillan] You don't know where he went?

[Bosire] I don't know what we are talking about.

[McMillan] You don't know what I am talking about?

[Bosire] No.

[McMillan] You don't remember talking to the guy at loves, at the gas pump?

[Bosire] A state trooper.

[McMillan] What?

[Bosire] There were 3 state troopers, I say that one say hi, I said hi and walked away

[McMillan] OK I am not talking about any troopers, I said the guy at the gas pump that was with you. I was at loves, I saw you.

[Bosire] Me?

[McMillan] Yes, you were getting gas in this car.

[Bosire] Correct.

[McMillan] There was white guy with a hoodie oh talking to you at the gas pump. He walked right by beside you.

[Bosire] [Shakes head side-to-side] unum. I opened the door for somebody, but

[McMillan] No at the gas pump.

[Bosire] What? Oh, was one of the attendants, … pump.

[McMillan] OK. I wasn't seeing things.

[discussion about speeding omitted]

[McMillan] I am not going to give you a ticket for that you were going 6 over. So, you are making me a little suspicious here because you are not telling me what you are doing. You know what I mean, you got all of these cameras mounted, like why?

[Bosire] Because police f--k with people.

[McMillan] We have cameras too. What are we trying to hide?

[Bosire] Police f--k with people all of the time.

[McMillan] Anyway.

[Bosire] I am just saying. You saw me at the gas station that was the reason. I saw the way you guys looked at each other like yeah we are going to get him. But…

[McMillan] You saw that?

[Bosire] Yeah.

[McMillan] You could hear us thinking that in our heads?

[Bosire] No, I saw, I saw the head…

[McMillan] I am not giving you a ticket for speeding, but you are making my highly suspicious that you are transporting something illegal. Is that the case? Is that why you don't want to answer any questions?

[Bosire] No cause, according the Constitution you have the right to remain silent.

[Discussion about *Miranda* and bill of rights and their applicability omitted.]

[McMillan] You make me suspicious, you're not telling me your travel plans, leading me to believe that you are transporting something you shouldn't be transporting, is that the case?

[Bosire] No.

[McMillan] So you don't mind if I look?

[Bosire] Unless you have a warrant.

[McMillan] OK then we'll call a canine here.

[Discussion about trooper wasting time omitted]

[McMillan] … it will be about 10 minutes.

Exhibit 1, ¶ 27; Exhibit 4; Exhibit 7

34. During this encounter, McMillan formed the belief that Bosire had not honestly (or, at the least, likely not honestly) answered his questions about the second man at the gas pump at Loves. He did not believe that Bosire's explanation for the cameras in the rental car undermined from their possible use in criminal activities. McMillan felt, in combination with all other factors, the second encounter showed reasonable suspicion of criminal activity that justified continued detention for a dog sniff. Exhibit 1, ¶ 28.

35. Immediately returning to his vehicle, McMillan asked Schulte to tell a county sheriff's deputy, who had the nearest available dog, to come to the stop for a canine sniff. Exhibit 1, ¶ 29.

36. Schulte did not believe that he had sufficient information to either approve or challenge whether McMillan's conclusions were reasonable. He formed no opinion about the constitutionality of Bosire's detention, including the dog sniff. Rather, Schulte assumed and trusted that McMillan possessed information that amounted to reasonable suspicion needed to detain Bosire after the work for the traffic stop was complete. Exhibit 2, ¶ 15.

37. The deputy and his dog arrived about 17 minutes after they were requested. At that time, McMillan returned Bosire's paperwork and gave him a written warning for speeding. Exhibit 1, ¶ 30; Exhibit 4.

38. The canine sniff took place and concluded without an alert about 5 minutes after the dog and deputy arrived at the scene. Bosire was immediately told that he could leave. Exhibit 1, ¶ 31; Exhibit 4.

Argument

1. *The plaintiff must show that the defendants' actions violated his Fourth Amendment right[6] as clearly established at the time.*

A government official sued under § 1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). A defendant's assertion of qualified immunity from suit under 42 U.S.C. § 1983 results in a presumption of immunity. *Bond v. City of Tahlequah, Oklahoma*, 981 F.3d 808, 815 (10th Cir. 2020). Accordingly, when a defendant asserts a qualified immunity defense, the burden shifts to the plaintiff to satisfy a two-part test: (1) the plaintiff must show that the defendant's actions violated a constitutional or statutory right; and (2) the plaintiff must show that this right was "clearly established" at the time of the conduct at issue. *Rojas v. Anderson*, 727 F.3d 1000, 1003 (10th Cir. 2013). "If, and only if, the plaintiff meets this two-part test does a defendant then bear the traditional burden of the movant for summary judgment. . . ." *Clark v. Edmonds*, 513 F.3d 1219, 1222 (10th Cir. 2008).

"[A court] may address the two prongs of the qualified-immunity analysis in either order: If the plaintiff fails to establish either prong of the two-pronged qualified-immunity standard, the defendant prevails on the defense." *Cummings*

[6] Bosire claims that McMillan and Schulte violated his Fourth Amendment right to be free from unreasonable seizures. Doc. 07, ¶¶ 130-132 (Count 3) and ¶¶ 136-139 (Count 4).

v. Dean, 913 F.3d 1227, 1239 (10th Cir. 2019) (brackets and internal quotation marks omitted).

In our circuit, "the plaintiff must point to a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Callahan v. Unified Gov't of Wyandotte Cty.*, 806 F.3d 1022, 1027 (10th Cir. 2015) (internal quotation marks omitted). Courts "do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (internal quotation marks omitted); *accord, Carroll v. Carman*, 574 U.S. 13, 16 (2014). A general test defining the elements of a statutory or constitutional violation will almost never provide clearly established law. Instead, the jurisprudence upon which plaintiff relies must be "particularized to the facts of the case." *Davis v. Unified Sch. Dist. No. 512*, 335 F. Supp. 3d 1230, 1238 (D. Kan. 2018), *aff'd*, No. 18-3199, 799 F. App'x 566 (10th Cir. Nov. 7, 2019) (unpublished) (*citing White v. Pauly*, 137 S.Ct. 548, 552 (2017), *quoting Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

Tenth Circuit panels have found that a plaintiff, in the present context, must show that the defendant "lacked even arguable reasonable suspicion" to overcome the qualified immunity defense. *See Leon v. Summit Cty.*, 755 F. App'x 790, 794 (10th Cir., *unpub.*, Nov. 28, 2018); *Stoedter v. Gates*, 704 F. App'x 748, 755 (10th Cir. 2017) (each citing *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1207 (10th Cir., *unpub.*, August 3, 2008)). *See also, Anderson v. Willis*, 917 F.

Supp. 2d 1190, 1196 (D. Kan. 2013) ("courts ask whether there was 'arguable' reasonable suspicion for an investigative detention. If there was, then the defendant is entitled to qualified immunity.").

However, even applying an "arguable" standard, the law is clearly established for qualified-immunity purposes only if it was sufficiently clear that, at the time of the public official's conduct, *"*every*"* reasonable official would have understood that the conduct was unlawful. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). "This demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Wesby*, 138 S. Ct. at 589 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

2. *No Fourth Amendment right was violated.*

a. Applicable traffic stop standards.

A traffic stop is a seizure for Fourth Amendment purposes, subject to the reasonableness requirement therein. *United States v. Cortez*, 965 F.3d 827, 833 (10th Cir. 2020). To be reasonable, a traffic stop must be justified at its inception and the officer's actions must be "reasonably related in scope" to the "mission of the stop." *Id.* (citing *United States v. Mayville*, 955 F.3d 825, 829 (10th Cir. 2020), *quoting Rodriguez v. United States*, 575 U.S. 348, 356 (2015)).

An officer's authority to seize the occupants of a vehicle ends when "tasks tied to the traffic infraction are—or reasonably should have been—completed." *Rodriguez*, 575 U.S. at 354. A traffic stop may "last no longer than is necessary" to complete the mission of the stop. The mission of the stop includes both

addressing the traffic violation warranting the stop and attending to "related safety concerns." *Cortez*, 965 F.3d at 837.

However, our Circuit explained:

> "*Rodriguez* does not prohibit all conduct that in any way slows the officer from completing the stop as fast as humanly possible." *United States v. Campbell*, 912 F.3d 1340, 1353 (11th Cir. 2019). Although it is appropriate to consider police diligence, *Rodriguez*, 575 U.S. at 354 [ ], the mere fact that an officer could, conceivably, have performed a task more quickly than he did fails, on its own, to generate a Fourth Amendment violation. "This is because reasonableness—rather than efficiency—is the touchstone of the Fourth Amendment." *Mayville*, 955 F.3d at 827; *see also Rodriguez*, 575 U.S. at 354 [ ] (holding that "[a]uthority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed").

Cortez, 965 F.3d at 837-38 (emphasis removed).

And both the Supreme Court and the Tenth Circuit have noted that, even with a traffic infraction, running records checks is an important valid activity that does not necessarily prolong a valid traffic stop or push that stop into the realm of unreasonably lengthy. Beyond writing the traffic citation, an officer's mission includes "ordinary inquiries incident to [the traffic] stop." *Illinois v. Caballes*, 543 U.S. 405, 408 (2005). Typically, these inquiries involve checking the driver's license, registration, and proof of insurance, as well as determining whether any outstanding warrants for the driver exist. *Delaware v. Prouse*, 440 U.S. 648, 658-60 (1979). These checks serve the same purpose as the traffic code: to ensure that vehicles on the road are operated safely and responsibly. *Id.*; *see also* 4 Wayne R. LaFave, Search and Seizure § 9.3(c), at 507-517 (5th ed. 2012).

An officer may also inquire about the driver's travel plans and the identity of the individuals in the vehicle. *Cortez*, 965 F.3d at 838 (citing *Pettit*, 785 F.3d at 1379). See also *United States v. Moore*, 795 F.3d 1224, 1229, n. 3 (10th Cir. 2015) (An officer may generally inquire about the driver's travel plans, such questions ordinarily fall within the scope of a traffic stop); *United States v. Cone*, 868 F.3d 1150, 1154 (10th Cir. 2017) (finding general questions regarding travel

plans and identity reasonable under the Fourth Amendment[7]); *United States v. Morgan*, 855 F.3d 1122, 1126 (10th Cir. 2017) (holding officer's questions regarding identity did not exceed the scope of a *Terry* stop).

In addition, because "[t]raffic stops are especially fraught with danger to police officers," law enforcement personnel may take "certain negligibly burdensome precautions in order to complete [their] mission safely." *Rodriguez*, 575 U.S. at 356. These may include conducting criminal record checks, searching for outstanding warrants, or asking limited questions directed at ensuring officer safety. *Cortez*, 965 F.3d at 838; *Cone*, 868 F.3d at 1153-54. See e.g., *United States v. Torres*, 786 F. App'x 726, 731 (10th Cir., *unpub.*, 2019)

[7] *Cortez*, 965 F.3d at 839 ("Such questioning is consistent with both the public's expectations regarding ordinary inquiries incidental to traffic stops and taking the least burdensome approach to ensuring officer safety"). See also *United States v. Moore*, 795 F.3d 1224, 1229 (10th Cir. 2015) (holding "[a]n officer may ... generally inquire about the driver's travel plans" without violating the Fourth Amendment); *United States v. Holt*, 264 F.3d 1215, 1221 (10th Cir. 2001) (*en banc), overturned on other grounds by Muehler v. Mena*, 544 U.S. 93 (2005) (such inquiries are justified because "[t]ravel plans typically are related to the purpose of a traffic stop"); *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1259 (10th Cir. 2006) ("[A]n officer may routinely ask about travel plans ... during a lawful traffic stop."); *United States v. Rice*, 483 F.3d 1079, 1084 (10th Cir. 2007) (travel questions are permissible as the type of "negligibly burdensome" inquiries directed at ensuring officer safety).

(approving Triple I check for criminal history).[8] An officer may constitutionally prolong a stop after the traffic stop is or should be complete when (1) the seized individual consents or (2) the officer has independent reasonable suspicion of criminal wrongdoing on behalf of the seized individual that justifies further investigation. *Cortez*, 965 F.3d at 833 (*citing Mayville*, 955 F.3d at 830, citing *Rodriguez*, 575 U.S. at 354-57).

b. ***McMillan had reasonable suspicion sufficient to prolong the traffic stop for more questions and then to further prolong the stop for a dog sniff.***

Bosire admits he had been speeding. Uncontroverted Facts ("UF") ¶ 8. Therefore, there can be no Fourth Amendment issue about his initial stop. Rather the battleground is whether reasonable suspicion existed to extend the stop after the traffic stop was "complete."

i. ***Reasonable suspicion is not an onerous standard***.

Reasonable suspicion accrues when an officer possesses a "particularized and objective basis for suspecting criminal conduct under a totality of the

[8] *See also United States v. Mayville*, 955 F.3d 825 (10th Cir. 2020). *Mayville* reports:

> This court has routinely permitted officers to conduct criminal-history checks during traffic stops in the interest of officer safety. See, e.g., *United States v. Burleson*, 657 F.3d 1040, 1046 (10th Cir. 2011) ("[A]n officer may run a background check on a motorist to check for warrants or criminal history even though the purpose of the stop had nothing to do with the motorist's history."); *United States v. Rice*, 483 F.3d 1079, 1084 (10th Cir. 2007) ("While a traffic stop is ongoing ... an officer has wide discretion to take reasonable precautions to protect his safety. Obvious precautions include running a background check on the driver ....

Id. at 830 (citations omitted).

circumstances." *Pettit*, 785 F.3d at 1379 (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)).[9] "This is not an onerous standard." *Cortez*, 965 F.3d at 834 (*citing United States v. Kitchell*, 653 F.3d 1206, 1219 (10th Cir. 2011)). Reasonableness of suspicion requires "considerably less" than a preponderance of the evidence and "obviously less" than probable cause. *Id*. (*citing Pettit*, 785 F.3d at 1379). *See also Kansas v. Glover*, 140 S. Ct. 1183, 1187 (2020) ("Although a mere 'hunch' does not create reasonable 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," *citing Prado Navarette v. California*, 572 U.S. 393, 397 (2014)). "The reasonable suspicion inquiry falls considerably short of 51% accuracy, for, as we have explained, to be reasonable is not to be perfect." *Glover*, 140 S. Ct. at 1187 (citations and internal quotation omitted).

> The standard depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Courts cannot reasonably demand scientific certainty where none exists. Rather, they must permit officers to

[9] In a criminal prosecution, the burden to prove reasonable suspicion rests with the government. However, as least when qualified immunity is raised in an § 1983 action, the burden of persuasion on this issue is plaintiff's. *See Henderson v. Glanz*, 813 F.3d 938, 952 (10th Cir. 2015) ("Unlike most affirmative defenses, however, the plaintiff would bear the ultimate burden of persuasion at trial to overcome qualified immunity by showing a violation of clearly established federal law"); *Knopf v. Williams*, 884 F.3d 939, 946 (10th Cir. 2018) (same); *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014) (same). *Cf. Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 309 (2001) (courts must place the burden of persuasion on the plaintiff, not the defendant, to prove the elements of a § 1983 claim). *Compare*, *Barrera v. Kroskey*, No. 12-1376, 2013 WL 3013654 * 1, n. 2 (D. Kan. June 17, 2013) (discussing lack of clarity in the Tenth Circuit about the burden of proof in decisions which predated *Henderson*, *Knopf* and *Gomez*).

> make commonsense judgments and inferences about human behavior.

Glover, 140 S. Ct. at 1188 (citations and internal quotation omitted). *See also*, *United States v. Berg*, 956 F.3d 1213, 1218 (10th Cir. 2020), *cert. denied sub nom. Berg v. United States*, 2020 WL 6037395 (U.S. Oct. 13, 2020) ("Even though Berg is correct that 'common sense and ordinary experience are to be employed' in the reasonable suspicion analysis, this court defers 'to a law enforcement officer's ability to distinguish between innocent and suspicious actions,'" *citing United States v. Hernandez*, 847 F.3d 1257, 1269 (10th Cir. 2017)).[10]

"[R]easonable suspicion may exist even if it is more likely than not that the individual is not involved in any illegality." *United States v. Madrid-Mendoza*, 824 F. App'x 588, 593 (10th Cir. 2020) (*quoting Mocek v. City of Albuquerque*, 813 F.3d 912, 923 (10th Cir. 2015) (quotations omitted)). And "[t]he existence of reasonable suspicion does not require the officer to rule out the possibility of innocent conduct, and in assessing reasonable suspicion [courts] defer to a police officer's training and ability to discern innocent conduct from suspicious behavior." *Id.* (*citing and quoting United States v. Simpson*, 609 F.3d 1140, 1146 (10th Cir. 2010)). See *Glover*, 140 S. Ct. at 1188 (an officer need not rule out the possibility of innocent conduct).

[10] This is not to imply that the reasonable suspicion must be determined from "experiences in law enforcement." See *Glover*, 140 S. Ct. at 1190 (expressly rejecting this requirement, while not minimizing the significant role that specialized training and experience routinely play in law enforcement investigations).

Further, the Supreme Court has rejected a "divide-and-conquer" approach in evaluating the totality of the circumstances. See *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (whether reasonable suspicion exists to support a traffic stop must be based on the totality of the circumstances; rejecting appellate court's evaluation of disparate facts in isolation from each other in deciding whether reasonable suspicion existed). "The relevant question is not whether each fact taken in isolation may have an innocent explanation; rather we look to the facts as a whole to decide whether they support the enhancement." *United States v. Murphy*, 901 F.3d 1185, 1195 (10th Cir. 2018). Stated another way, "determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct." *United States v. Arvizu*, 534 U.S. 266, 277 (2002), *overruled in part on other grounds by Davis v. Washington*, 547 U.S. 813 (2006).

The Supreme Court, in *United States v. Sokolow*, 490 U.S. 1, 10 (1989) (*quoting Illinois v. Gates*, 462 U.S. 213, 245 n. 13 (1983)), explained that "'innocent behavior will frequently provide the basis for a showing of probable cause,' and that '[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts.' That principle applies equally well to the reasonable suspicion inquiry." *See also Donahue v. Wihongi*, 948 F.3d 1177, 1188 (10th Cir. 2020) ("A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct."

"[R]easonable suspicion may exist even if it is more likely than not that the individual is not involved in any illegality," citations omitted).

Moreover, the existence of required reasonable suspicion is not negated by law enforcement's articulation of factors which are too innocuous to support reasonable suspicion of criminal activity. *E.g. Berg*, 956 F.3d at 1219-20. *See also United States v. Santos*, 403 F.3d 1120, 1133 (10th Cir. 2005) (finding reasonable suspicion while concluding some offered factors were "pure makeweights"). And the constitutional reasonableness of traffic stops does not depend on actual motivations of the officer involved. *Whren v. U.S.*, 517 U.S. 806, 811-816 (1996). See also, *United States v. Wilkinson*, 633 F.3d 938, 943 (10th Cir. 2011) (admitted pretext to investigate drug transportation was irrelevant); *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir.1995) (*en banc*) ("[i]t is ... irrelevant that the officer may have had other subjective motives for stopping the vehicle"); *United States v. Ingram*, 721 F. App'x 811, 818 (10th Cir. 2018) (subjective motivation to obtaining evidence of drug trafficking irrelevant to Fourth Amendment). *See also State v. Lutz*, 312 Kan. 358, 474 P.3d 1258, 1262 (2020) (alleged pretext to investigate suspicion of drug activity was not relevant reasonable suspicion of criminal activity in traffic stop); *State v. DeMarco*, 263 Kan. 727, 731, 952 P.2d 1276 (1998) (allegation that officer only stopped cars with out-of-state tags was irrelevant subjective motive).

ii. The totality of circumstances established reasonable suspicion.

There were numerous factors that a reasonable officer could have concluded established reasonable suspicion, under the totality of the circumstances, to extend the stop for McMillan's second encounter with Bosire. *See e.g., United States v. Williams*, No. 14-CR-40094-DDC, 2015 WL 541559, at *9 (D. Kan. Feb. 10, 2015) ("While defendants correctly assert that a traffic stop '*generally* ends when the officer returns the driver's license, registration, and insurance information,' *see United States v. Manjarrez*, 348 F.3d 881, 885 (10th Cir. 2003) [emphasis original], this rule is subject to important exceptions. Significantly, the officer may ask questions unrelated to the original purpose of the traffic stop if there exists an 'objectively reasonable and articulable suspicion illegal activity has occurred or is occurring.'" [*United States v.*] *Hunnicutt*, 135 F.3d [1345,] at 1349 [(10th Cir. 1998)].")[11] *E.g., United States v. Williams*, 271 F.3d 1262, 1271 (10th Cir. 2001) (questioning after return of license and rental agreement and indication to driver that he was free to go).

First, the smell of marijuana at the Love's convenience store and Bosire's conversation with another man at the gas pump suggested possible drug

[11] The traffic stop had effectively concluded by the time McMillan returned to the Nissan for the second time even though McMillan did not provide a warning ticket and return Bosire's paperwork until the dog sniff began.

trafficking. The troopers thought that the smell could have been[12] from Bosire or another man observed talking to Bosire at the gas pumps. UF ¶¶ 20-23. See also UF ¶ 30 (Schulte's observations about possible caravanning). And McMillan knew that people hauling large amounts of drugs often travel in two vehicles (caravan) where one vehicle can be used to attempt to distract law enforcement from the vehicle transporting the drugs or large amounts of money. *See United States v. Dilley*, No. 02-40121-01-SAC, 2003 WL 356054, at *3 (D. Kan. Jan. 31, 2003) (reasonable suspicion based in part on observation caravanning, *i.e.*, "cars involved in drug trafficking will travel in caravans for protection and diversion purposes"). *Cf. United States v. Rodriguez-Rodriguez*, 550 F.3d 1223, 1228 (10th Cir. 2008) ("sufficient evidence that two vehicles are driving in tandem plus evidence that one vehicle contains contraband can provide probable cause sufficient to support arresting the driver of the other vehicle").

In McMillan's initial encounter with Bosire, the trooper learned that Bosire was the only person in the Nissan. UF ¶ 14. This left his caravanning suspicion in place. Troopers timely attempted to locate a rented silver Dodge Charger seen leaving the convenience store, which McMillan felt could be associated with the second man at the gas pump seen talking with Bosire. UF ¶¶ 23-27, 30.

[12] A search or seizure may be permissible even though the justification for the action includes a reasonable factual mistake. *Heien v. North Carolina*, 574 U.S. 54, 57 (2014). Accord, *United States v. Karam*, 496 F.3d 1157, 1164 (10th Cir. 2007); *United States v. Herrera*, 444 F.3d 1238, 1246 (10th Cir. 2006).

Second, mounted cameras on a rental vehicle added to the possibility of drug trafficking activities. The Nissan was a rental. McMillan confirmed this before leaving the convenience store in Ellis. UF ¶ 6. The rental vehicle had cameras, mounted in the front and the back. Mounted cameras in a rental car were not only odd, but could possibly have been an attempt to facilitate caravanning, discourage a law enforcement stop, or confirm that a "hired" driver appropriately transported the drugs or large amounts of cash. UF ¶¶ 19 & 24. See *United States v. Murphy*, 901 F.3d 1185, 1195 (10th Cir. 2018) ("taken together, digital scales, baggies, and ***surveillance cameras*** are 'tools of the trade,'" citations omitted, emphasis added). *See also United States v. Taylor*, 813 F.3d 1139, 1144 (8th Cir. 2016) ("he stored large quantities of drugs and various 'tools of the trade' such as firearms, ammunition, digital scales, plastic bags, and ***surveillance cameras***," emphasis added); *United States v. Clark*, No. CR 2018-0009, 2019 WL 3456813, at *9 (D.V.I. July 30, 2019) (surveillance cameras contributed to circumstances showing reasonable suspicion of illegal drug activity). *Cf. United States v. Johnson*, 364 F.3d 1185, 1193 (10th Cir. 2004) (presence of walkie-talkie added to reasonable suspicion criminal activity was afoot).

Third, after Bosire produced a copy of the rental agreement, McMillan learned that Bosire had rented the Nissan in Wichita, Kansas and that it was a short-term rental (2 days), in fact the vehicle's return was overdue by about one day. UF ¶¶ 15, 17, 18 & 24. A short-term rental is frequently used to transport

drugs or the funds needed for the purchase of drugs. *See* UF ¶ 27; *United States v. Davis*, 636 F.3d 1281, 1291 (10th Cir. 2011) ("our cases note drug traffickers often use rental vehicles to transport narcotics," citations omitted). *See also State v. Arceo-Rojas*, 57 Kan.App.2d 741, 458 P.3d 272 (2020) (reasonable suspicion based in part on short-term rental).

Fourth, McMillan saw that Bosire did not fully roll down his window and that there was a partially covered notebook in the back of the rental car. Partially rolling down the window suggested that Bosire might be trying to hide something in the vehicle.[13] UF ¶¶ 14, 24 & 30. A partially covered notebook in the back seat looked like a ledger drug transporters frequently use. *Id*. Neither observation is independently significant to the reasonable suspicion calculus. However, the observations were confirming of possible drug trafficking activity.

Fifth, Bosire's response and non-response to McMillan's questions about Bosire's travel were atypical of usual conversations with the persons McMillan had stopped during his 13 years in law enforcement. UF ¶¶ 15 & 33. At first, Bosire appeared to ignore the questions about his travel plans, and then he would say only that he was traveling from the West going East. UF ¶ 15 (in particular Exhibit 6 at time 1:49-2:49). *See United States v. Torres*, No. 18-2026, 786 Fed. Appx. 726 (10th Cir., *unpub*., Aug. 23, 2019) (where a defendant does

[13] This was less a concern in this case where drug odors were not present. Compare *United States v. Ludlow,* 992 F.2d 260, 262 (10th Cir. 1993) (not lowering window completely contributed to circumstances establishing reasonable suspicion for detention); *United States v. Frazier*, 467 F. Supp. 3d 1144, 1166 (D. Utah 2020) (same).

not provide an explanation, significant travel for a short visit may give rise to reasonable suspicion).[14] *See also United States v. Cortez*, 965 F.3d 827, 833 (10th Cir. 2020) (holding evasiveness with respect to their traveling companions contributed to the reasonableness of officer's suspicion); *United States v. Cash*, 733 F.3d 1264, 1275 (10th Cir. 2013) (holding evasiveness in response to questioning supported reasonable suspicion); *United States v. Torres*, No. 18-2026, 786 Fed.Appx. 726 (10th Cir., *unpub.*, Aug. 23, 2019) (holding reasonable suspicion in part because the defendant did not tell the officer where he was driving from). Cf. United States v. Santos, 403 F.3d 1120, 1132 (10th Cir. 2005) (stating "refusal to cooperate, ***without more***, does not furnish he minimal level of objective justification needed for a detention or seizure," but finding the detention was constitutional under the totality of circumstances which included vague answers and attempts to deflect officer's questions).

Recently, a Tenth Circuit panel found the driver's failure to identify a specific destination contributed to support reasonable suspicion. *United States v. Orozco-Rivas*, No. 19-6074, 810 Fed.Appx. 660, 667 (10th Cir., *unpub.*, April 21, 2020) (*citing United States v. Kopp*, 45 F.3d 1450, 1454 (10th Cir. 1995)). Additionally, "[u]nusual behavior, coupled with other factors, supports reasonable suspicion." *United States v. Frazier*, 467 F. Supp. 3d 1144, 1166 (D. Utah 2020).

[14] McMillan reasonably inferred that Bosire was traveling to Bosire's then address in Wichita, which was approximately 185 miles away from the stop, after a short turn-round trip from some place West. UF ¶ 17.

McMillan was not ready to detain Bosire for a drug dog sniff until their second encounter. Although McMillan need not have waited until after the second encounter to request a dog sniff against a reasonable officer standard, McMillan's subjective view was that more questioning was prudent. He believed that additional questioning would either abate suspicion that Bosire was involved in criminal activity or justify detention of an additional ten or more minutes for a dog sniff.

During this second encounter, McMillan asked about the second man at the gas pump at Love's convenience store. UF ¶¶ 32-33. Bosire initially having denied talking to anyone at the pumps. McMillan formed the belief that Bosire had not honestly answered his questions. UF ¶ 34. *See United States v. Simpson*, 609 F.3d 1140, 1149 (10th Cir. 2010) ("lies, evasions or inconsistencies about any subject while being detained may contribute to reasonable suspicion"). McMillan asked why cameras were in the rental car. He did not believe Bosire's explanation, *i.e.*, "because police f--k with people," "Police f--k with people all of the time," detracted from the possible use of the cameras in criminal activities. Bosire persisted in refusing to provide details about his travels. Combining the factors demonstrating reasonable suspicion with the results of the questioning in the second encounter, McMillan requested a drug-detection dog sniff. UF ¶¶ 34-

35.[15]

In summary, the factors going into McMillan's suspicions, in aggregate, demonstrated that McMillan had a particularized and objective basis for suspecting Bosire of criminal activity to extend the stop for a drug dog sniff. *United States v. Arvizu*, 534 U.S. 266, 277-78 (2002) (again, it is the totality of the circumstances which determines reasonable suspicion).

c. The seventeen-minute wait for the drug-detention dog was reasonable.

"[A] detention's duration 'must be temporary and last no longer than is necessary to effectuate the purpose of either dispelling or confirming the officer's reasonable suspicion.'" *United States v. Morales*, 961 F.3d 1086, 1091-92 (10th Cir. 2020) (quoting *United States v. White*, 584 F.3d 935, 954 (10th Cir. 2009). In assessing duration, courts ask whether law enforcement "diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly," but "do not impose a rigid time limit." *United States v. Paetsch*, 782 F.3d

[15] Analysis of these second encounter factors is required in a § 1983 case (as opposed to a criminal case) even if McMillan's suspicions were not sufficient to detain Bosire for the second encounter. Stated another way, even if we pretend that Bosire should not have been detained for about 4 minutes for additional questions, the detention for the dog sniff is a separate question. A § 1983 plaintiff is limited to damages associated with an illegal detention, and may not recover damages which arise from subsequent legal conduct. *Martin v. Marinez*, 934 F.3d 594, 598 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 1115 (2020); *Hector v. Watt*, 235 F.3d 154 (3d Cir. 2000); *Townes v. City of New York*, 176 F.3d 138, 148 (2d Cir. 1999). See also *Dalcour v. Gillespie*, No. 08-CV-00747, 2013 WL 2903399, at *7 (D. Colo. June 14, 2013) ("Plaintiffs cannot recover for injuries that arise from lawful conduct simply because it was preceded by unlawful conduct"). Cf. *Lingo v. City of Salem*, 832 F.3d 953, 959 (9th Cir. 2016); *Black v. Wigington*, 811 F.3d 1259, 1268 (11th Cir. 2016) (the fruit-of-the-poisonous-tree exclusionary rule does not apply in a civil suit against police officers).

1162, 1175-76 (10th Cir. 2015) (*quoting United States v. Sharpe*, 470 U.S. 675, 686 (1985)).

McMillan had Schulte request the closest available drug dog handler immediately after the second encounter with Bosire. UF ¶ 35. The handler dog arrived about 17 minutes later. UF ¶ 37. The seventeen-minute wait was reasonable under settled Tenth Circuit law.

Our Circuit has found waits of up to 51 minutes for the drug dog to arrive are reasonable. *United States v. Orozco-Rivas*, No. 19-6074, 810 F. App'x 660, 665 (10th Cir., *unpub.*, April 21, 2020) (*citing United States v. Mendoza*, 468 F.3d 1256, 1261 (10th Cir. 2006) (holding a 40-minute delay was reasonable "[g]iven the distance between the scene of the detention and the nearest [dog-]handler"); *United States v. Villa-Chaparro*, 115 F.3d 797, 803 (10th Cir. 1997) (upholding a denial of a motion to suppress where police detained the defendant for 43 minutes, 38 minutes of which was spent awaiting a drug-sniffing dog)).

4. ***Qualified immunity bars Bosire's claim against McMillan.***

McMillan is immune because Bosire cannot show that McMillan's actions violated a constitutional or statutory right for the reasons described. However, even still, Bosire must additionally show lack of an "arguable reasonable suspicion," pointing to a Supreme Court or Tenth Circuit decision on point, or clearly established weight of authority from other courts, to overcome the qualified immunity. Bosire cannot do this.

The cases that the plaintiffs cite in the First Amended Complaint, Doc. 07 at ¶¶ 111-114, concerning Fourth Amendment principles do not approach the required showing that McMillan's conduct violated clearly established federal law.

Rodriguez v. United States, 575 U.S. 348 (2015), rejected lower decisions that had found the Fourth Amendment was not violated by a *de minimis* intrusion. But the Court did not reach the question of whether reasonable suspicion existed to justify a dog sniff and the consequence if it did not.[16] There is no claim here that Bosire's detention after the traffic stop concluded was *de minimis*. And *Rodriguez* offers no factual analogy to our case.

Plaintiffs state that the Constitution prohibits police from extending a traffic stop in order to question a driver about issues beyond the scope of the stop absent reasonable suspicion or consent, *citing United States v. Villa*, 589 F.3d 1334, 1339 (10th Cir. 2009), and *United States v. Hunnicutt,* 135 F.3d 1345, 1349 (10th Cir. 1998). This general proposition is not in dispute.[17] However, neither *Villa* nor *Hunnicutt* establish law which placed the constitutional question about Bosire's detention beyond debate.

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[16] On remand, the circuit court held that exclusionary rule did not apply to search conducted in reliance on then-binding precedent that had not required reasonable suspicion or consent for a *de minimis* intrusion on personal liberty by a dog sniff. *United States v. Rodriguez*, 799 F.3d 1222 (8th Cir. 2015).

[17] Other case law expands on this the general proposition, including (1) whether officers may multi-task, engaging in investigation, so long as the stop is not "extended" and (2) what inquiries are within the scope of the stop as part of the measurement of whether the duration of the stop was reasonable. See discussion, *supra*, at 17-20.

Villa found that a trooper's questions about a driver's travel plans ordinarily fall within the scope of a traffic stop. 589 F.3d at 1339. The court concluded that the trooper had reasonable suspicion of criminal activity from inconsistent and unusual statements from the driver and passenger about their travel plans and the driver's nervousness [implicitly unusual nervousness]. *Id.* at 1340-41.

Hunnicutt, among other things, held that (1) a police officer had reasonable suspicion that the defendant had violated statutes governing proper use of lanes or that defendant was driving under the influence of alcohol; (2) the officer had reasonable articulable suspicion of illegal activity supporting the continued detention of defendant and his questioning of defendant about presence of guns or drugs; and (3) no individualized reasonable suspicion of criminal activity was required to call canine unit. Concerning the suspicion for the detention and dog sniff, the court stated:

> When the officer asked Mr. Hunnicutt about guns and drugs, he was confronted with a driver who had no proof he was the vehicle's owner, no registration, and no proof he was otherwise authorized to operate the vehicle. The person he claimed to have purchased the vehicle from was not the registered owner. He failed to stop promptly, which led the officer to wonder whether the occupants were stuffing things under the seats; and after the stop, the passengers repeatedly moved back and forth and leaned over.

135 F.3d at 1349.

Finally, *Vasquez v. Lewis*, 834 F.3d 1132 (10th Cir. 2016), does not establish law that Bosire's rights were violated, much less show the alleged violation was beyond debate such that only the "plainly incompetent" would think otherwise. McMillan's suspicion is not alleged to have been supported by any of

the factors that *Vasquez* found insufficient under the facts and circumstances of that case.

The *Vasquez* defendants argued that the following factors created reasonable suspicion: (1) Vasquez was driving alone late at night; (2) he was travelling on I-70, "a known drug corridor"; (3) he was from Colorado and was driving from Aurora, Colorado, "a drug source area"; (4) the back seat did not contain items the Officers expected to see in the car of someone moving across the country; (5) the items in his back seat were covered and obscured from view; (6) he had a blanket and pillow in his car; (7) he was driving an older car, despite having insurance for a newer one; (8) there were fresh fingerprints on his trunk; and (9) he seemed nervous. 834 F.3d at 1136.

The Tenth Circuit panel found this conduct, taken together, "was hardly suspicious, nor is it particularly unusual." *Id.* at 1136-37. About 4, 5 & 6, the court found that "the Officers' reasoning is contradictory at points. Officer Jimerson claimed that Vasquez's car contained items that were covered by blankets, but Officer Lewis found suspicious that the car was uncharacteristically empty and lacking in sundries common for someone moving cross-country." *Id.* at 1138. Regarding justifications 2 and 3, *Vasquez's* majority stated:

> It is wholly improper to assume that an individual is more likely to be engaged in criminal conduct because of his state of residence, and thus any fact that would inculpate every resident of a state cannot support reasonable suspicion. Accordingly, 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, and time to stop the practice of detention of motorists for nothing more than an out-of-state license plate.

Id.

In this case, out-of-state citizenship was no factor in McMillan's stop and detention of Bosire.[18]

5. *Qualified immunity bars Bosire's claim against Schulte.*

Bosire sues both McMillan and Schulte. Schulte did not stop Bosire. He is not McMillan's supervisor. UF ¶ 28. He did not make the decision to detain Bosire for additional questioning or for the subsequent dog sniff. *Id.* He did not hear anything Bosire said or communicate with Bosire until after the dog sniff was complete. UF ¶ 29. Schulte did not determine whether there was reasonable suspicion because he had not seen Bosire or heard the conversations between Bosire and McMillan. UF ¶ 36. He trusted McMillan to apply the correct Constitutional standard for extending the traffic stop. *Id.*

While it is true that a law enforcement officer must intervene if the officer sees a person's constitutional rights against excessive force and unlawful arrests being violated by a fellow officer and has an opportunity to do so, *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1210 (10th Cir. 2008), officers may not be liable "merely because he [or she] was present at the scene of a constitutional violation. *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1433 (10th Cir. 1984), *judgement vacated on other grounds by City of Lawton, Okla. v. Lusby*, 474 U.S. 805 (1985).

[18] (1) Bosire is and was a Kansas resident, UF ¶ 6; (2) Bosire's the driver's license, which he produced to McMillan, showed a Wichita address, UF ¶¶ 15-17; and (3) The rental agreement showed a Wichita return for the vehicle even though it had Missouri tags, UF ¶ 18.

Even when the duty to intervene is present, the officer must know a constitutional violation is being committed and have a "realistic opportunity to intervene to prevent the harm from occurring." *Lanigan v. Village of East Hazel Crest*, 110 F.3d 467, 477 (7th Cir.1997).

Obviously, there can be no failure to intervene if a constitutional right has not been violated. *See, e.g., Harper v. Albert*, 400 F.3d 1052, 1064 (7th Cir.2005) ("[i]n order for there to be a failure to intervene, it logically follows that there must exist an underlying constitutional violation"). That is the case here for the reasons expressed. The result is that Schulte is entitled to qualified immunity under the first prong of that two-part analysis. *See Franco v. City of Boulder*, No. 19-CV-02634-MEH, 2021 WL 857601, at *13 (D. Colo. Mar. 8, 2021) (the qualified immunity defense may be asserted in response to a failure to intervene claim).

The second prong is also is in play. At an initial level, Bosire's failure to show that his allegedly abridged right was "clearly established" at the time by the conduct at issue with respect to McMillan, defeats any claim that it was clearly established for his claim against Schulte. And then at another level, the general proposition that officers have a duty to intervene, at least in some settings, when they see a constitutional violation does not answer whether Schulte's asserted obligation to intervene would have been clearly established to an officer in Schulte's position—who is only potentially derivatively liable if there is a primary violation. See *Franco*, 2021 WL 857601, at *13.

In *Harris v. Mahr*, No. 20-1002, 2020 WL 7090506, at *3 (10th Cir. Dec. 4, 2020), the court held that the broad duty to intervene lacks any specificity, especially as to the alleged unlawful entry and search claims before the court. It affirmed dismissal of the claim that the defendants failed to intervene to prevent an unlawful, warrantless search of the plaintiff's apartment on qualified immunity grounds. The court distinguished the cases involving failure to intervene to prevent use of excessive force and unlawful arrests, finding they did not address unlawful searches. Although *Harris* is unpublished (not controlling authority), it is persuasive that a federal duty to intervene to prevent an extended traffic stop is not clearly established.

Moreover, while McMillan discussed some of his observations with Schulte, Schulte could properly assume that not all of McMillan's knowledge was conveyed to him. UF ¶¶ 28 & 36. There is no basis in the applicable case law that Schulte was required to do otherwise. There is no clearly established case law (in fact, we have found no case) that an officer must investigate facts and circumstances, and then reevaluate whether reasonable suspicion exits for extending a staff stop detention. *Cf. Stearns v. Clarkson*, 615 F.3d 1278, 1285 (10th Cir. 2010) ("When one officer requests that another officer assist in executing an arrest, the assisting officer is not required to second-guess the requesting officer's probable cause determination, nor is he required to independently determine that probable cause exists"). *Accord*, *Howards v.*

McLaughlin, 634 F.3d 1131, 1150 (10th Cir. 2011), *rev'd on other grounds and remanded sub nom. Reichle v. Howards*, 566 U.S. 658 (2012).

6. There is no basis for a punitive damage award.

This Court stated:

> Under 42 U.S.C. § 1983, plaintiffs can recover punitive damages when they show that defendants' conduct was "motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Eisenhour v. Cty.*, 897 F.3d 1272, 1280-81 (10th Cir. 2018) (citations omitted). This does not mean that defendants must engage in "egregious misconduct" or even "any intentional misconduct beyond that required" for compensatory damages. *Id.* at 1281. Instead, it is defendants' mental states – not the scope of the harm – that triggers liability for punitive damages. *Id.* Accordingly, defendants can be liable for punitive damages if they acted in the face of a perceived risk that their actions will violate federal law. *Id.*

Shaw v. Jones, No. CV 19-1343-KHV, 2020 WL 2296752, at *2 (D. Kan. May 7, 2020). The uncontroverted facts do not support any reasonable inference that either defendant acted with reckless or callous indifference to Bosires' federally protected rights.

Conclusion

Defendants McMillan and Schulte each request that the Court enter summary judgment against Plaintiff Bosire's claims against them. Alternatively, they request entry of summary judgment against Bosire's punitive damage claims. They make this alternative request to avoid waiver of summary judgment against the punitive damage claims, although the Court should not reach the question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April 2021, I electronically filed the foregoing with the Clerk by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

s/ Arthur S. Chalmers