

**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

**PLAINTIFF BOSIRE'S MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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, Trooper McMillan prolonged the roadside detention of Josh Bosire without reasonable suspicion, based in part on Mr. Bosire's travel plans, and Trooper Schulte failed to intervene. This was a violation of Mr. Bosire's constitutional rights under established precedent. Moreover, here,

summary judgment is inappropriate because material facts remain in dispute. Summary judgment should be denied.

I. 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 and McMillan’s Motion for Summary Judgment concerns Joshua Bosire’s claims for damages against them. These claims stem from the troopers’ prolonged detention of Mr. Bosire on I-70 following a traffic stop. Mr. Bosire alleges the troopers prolonged his 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 and McMillan’s Statement of Uncontroverted Facts.¹

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

Response: Uncontroverted.

2. Trooper 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 [Trooper McMillan Declaration], ¶ 2.

Response: Uncontroverted for purposes of this motion.

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

Response: Uncontroverted.

¹ Trooper Schulte and McMillan’s Statement of Uncontroverted Facts are recited here, with Plaintiffs’ responses. Footnotes contained in this section are from Trooper Schulte’s statement of facts and do not represent a response or commentary by Mr. Bosire.

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

Response: Uncontroverted for purposes of this motion.

5. On February 10, 2019, at approximately 8:35 p.m., Trooper 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.

Response: Uncontroverted.

6. Bosire is a resident of Wichita, Kansas. Dkt. 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].² Bosire had been driving a rented 2019 blue Nissan Altima. The vehicle had a Missouri license plate. *Id.*

Response: Uncontroverted.

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

Response: Uncontroverted.

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

Response: Uncontroverted.

² Foundation for the exhibit is at Exhibit 1, ¶ 5 and its attachment.

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

Response: Uncontroverted.

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.

Response: Uncontroverted for purposes of this motion.

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.

Response: Uncontroverted for purposes of this motion.

12. Bosire digitally recorded his encounters with McMillan on his Apple iPhone. Exhibit 5, 19:12-20:23. There are two video recordings.³ They are provided as Exhibits 6 & 7.⁴

Response: Uncontroverted.

³ 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.

⁴ 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.

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; 75:12-18.⁵ 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; 74:6-25.⁶

Response: Controverted as to the footnote that Bosire discarded the cameras' SD Card so that verification the cameras had no relevant data pertaining to the stop or his trip is lost. Ex. 1, Bosire Dep. at 75:15-76:23 (The cameras are activated by G Force, or in other words they are activated by something hitting or running into the car. That did not happen during the February 10, 2019 stop. Bosire verified there was nothing recorded pertaining to the February 10, 2019 stops). While the second and third sentences are irrelevant to the issues in this motion, they are uncontroverted for purposes of this motion.

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.

⁵ 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.

⁶ 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.

Response: Controverted. A short while before the stop, Trooper McMillan observed Bosire at a convenience store and even placed an inquiry to confirm that the vehicle Bosire was driving was a rental car. Def. Ex. 1, ¶ 8; Ex. 2, McMillan Dep. at 165:20-166:8; 173:7-23. McMillan drove down the highway and parked on the median, waiting for Mr. Bosire to commit a traffic violation. Ex. 2, McMillan Dep. at 182:19-21; Ex. 3, McMillan Statement at OAG000020.

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:

[Trooper McMillan] Roll you window [*sic*] down please. Kanas 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.

[Trooper 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 your travel plans are [*sic*]; 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 what you are saying [*sic*]?

[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.

Response: Uncontroverted for purposes of this motion.

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.

Response: Uncontroverted but to the extent any inferences are to be drawn from the fact that the window was partly rolled down, it should be noted that February in Kansas is known to be cold.

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.

Response: Uncontroverted.

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.

Response: Uncontroverted.

19. McMillan saw a camera mounted in the front windshield and a camera mounted on the rear passenger's side headrest. Exhibit 12, ¶ 16.

Response: Uncontroverted for purposes of this motion.

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.

Response: Controverted. Trooper McMillan does not offer anything other than his unsubstantiated "belief" to support the claim that Bosire was the source of the marijuana smell,

and moreover, Trooper McMillan testified he did not know if Bosire was in the group that smelled of marijuana, that ultimately there was no “group”, and that he did not smell marijuana when he stopped Bosire. Ex. 2, McMillan Dep. at 162:18-163:8; 212:8-22.

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.

Response: Controverted. Trooper McMillan testified he could not tell if the Altima was a rental car when he was at the convenience store. Ex. 2, McMillan Dep. at 171:9-14. When he ran the license plate, he confirmed it was a rental car. Def. Ex. 1, ¶ 19.

22. As McMillan drove out of the convenience store parking lot, he saw a second camera mounted on rear passenger’s side headrest [*sic*]. Trooper McMillan ran the Missouri license plate and determined the vehicle was registered to EAN Holdings. Exhibit 1, ¶ 19.

Response: Uncontroverted for purposes of this motion.

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.

Response: Controverted. Trooper McMillan offers nothing other than his unsubstantiated “belief” to support the claim that the silver Dodge Charger was rented.

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.

Response: Controverted insofar as this fact contains several presumptions, all of which were proven to be inaccurate. Mr. Bosire was not traveling with anyone else and was speaking with the gas station attendant while at the truck stop. Ex. 1, Bosire Dep. at 66:11-14; 67:13-25; 68:1-25; 69:1-23. Mr. Bosire had a bible in the back of his car, not a notebook. Ex. 4, Bosire Aff., ¶ 12. Further, characterizing Mr. Bosire's responses as "evasive" is an improper inference in Trooper's McMillan's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see also Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1164 (10th Cir. 2021) (denying motion for summary judgment seeking qualified immunity).

The remainder of Fact 24 is uncontroverted.

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.

Response: Uncontroverted that Trooper McMillan continued to make baseless and unfounded assumptions.

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.

Response: Uncontroverted for purposes of this motion.

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.

Response: Subparts (a), (b), and (c) are uncontroverted for the purposes of this motion. The remaining portion of this fact is controverted. Trooper McMillan offers nothing other than his unsubstantiated “belief” to support the claim that the silver Dodge Charger was rented. Trooper McMillan does not offer anything other than his unsubstantiated “belief” to support the claim that Bosire was the source of the marijuana smell, and moreover, Trooper McMillan testified he did not know if Bosire was in the group the smelled of marijuana, that the “group” did not in fact exist, and that he did not smell marijuana when he stopped Bosire. Ex. 2, McMillan Dep. at 162:18-163:8; 212:8-22.

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.

Response: Uncontroverted for purposes of this motion.

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.

Response: Controverted that Schulte did not hear what was said in any of the encounters between McMillan and Bosire. Rather, McMillan relayed part of the conversation, including that McMillan had asked about travel plans and that Bosire had "said he was going form the west to the east." Ex. 5, Bosire Dash Camera Video at 13:05-13:35, 22:08-23:12.

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.

Response: Uncontroverted for purposes of this motion.

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.

Response: Uncontroverted for purposes of this motion.

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.

Response: Uncontroverted.

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

[McMillan] Hey, were did you buddy [*sic*] go?

[Bosire] [No response]

[McMillan] They guy [*sic*] 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 says hi [*sic*], 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 [*sic*] with a hoodie oh talking to you at the gas pump. He walked right 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 me 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 [*sic*] 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.

Response: Uncontroverted.

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.

Response: Controverted. McMillan states during the stop that the second man at the gas pump “might have been” a gas station attendant. Ex. 5, Bosire Dash Camera Video at 22:45-23:00. The remaining portion of this fact is uncontroverted. To the extent Defendants are seeking an inference of the truthfulness of Bosire’s answers or how they were perceived, 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). Moreover, Mr. Bosire answered Trooper McMillan’s questions honestly, even though he was upset that Trooper McMillan had targeted him for seemingly no reason. Ex. 4, Bosire Aff., ¶¶ 7-9.

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.

Response: Uncontroverted for purposes of this motion.

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.

Response: Controverted. Ex. 6, Schulte Dep. at 190:14-195:9 (in part, A. “at that point just from what I knew at the time, I would have said no. Q. That there was not reasonable suspicion? A. Correct.”).

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.

Response: Uncontroverted for purposes of this motion.

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.

Response: Uncontroverted for purposes of this motion.

B. Additional Material Facts.

39. Mr. Bosire’s daughter lives in Denver, Colorado with her mother. Ex. 1, Bosire Dep. at 33:12-22.

40. Mr. Bosire tries to visit his daughter once a month. Ex. 1, Bosire Dep. at 45:16-20.

41. When visiting his daughter in Denver, Mr. Bosire travels by either air or he drives. Ex. 1, Bosire Dep. at 45:21-24.

42. Mr. Bosire drives rental cars to Colorado in the winter because his personal car does not have good snow traction. Ex. 1, Bosire Dep. at 48:10-16, 60:13-17.

43. Trooper McMillan pulled Mr. Bosire over on February 10, 2019. Ex. 1, Bosire Dep. at 57:4-7. Mr. Bosire was skeptical of Trooper McMillan because he felt Trooper McMillan had identified him at the gas station and targeted him for a traffic stop. Ex. 4, Bosire Aff., ¶¶ 6-7

44. Mr. Bosire was driving east towards Wichita, Kansas at the time of the stop. Ex. 1, Bosire Dep. at 57:4-13.

45. Mr. Bosire was driving back from visiting his daughter in Colorado. Ex. 1, Bosire Dep. at 58:1-13.

46. Shortly before Trooper McMillan pulled him over, Mr. Bosire had been at a Love's Truck Stop in Ellis, Kansas. Ex. 1, Bosire Dep. at 57:14-25. While at the gas station, Mr. Bosire had problems with his pump and spoke to an attendant from the gas station for assistance. Ex. 4, Bosire Aff., ¶ 5.

47. After the stop, Plaintiff Bosire made a complaint to the KHP that his search constituted a prolonged unjustified detention. Ex. 7, PSU Closing Letter to McMillan.

48. That complaint resulted in his stop being investigated by Lieutenant Bullock of KHP's Professional Standard's Unit. Ex. 7, PSU Closing Letter to McMillan.

49. Trooper McMillan gave a written account of the stop, and his suspicion, as part of the Professional Standards Unit's investigation. Ex. 3, McMillan Statement at OAG 000020-OAG000022.

50. In his written account, Trooper McMillan describes first encountering Mr. Bosire at the Love's Travel Shop in Ellis, Kansas. Trooper McMillan was there on a break with Trooper Schulte. Ex. 3, McMillan Statement at OAG000020.

51. Trooper McMillan wrote, "As we were walking towards the doors, there was a group of several people walking inside the shop, as we were still inside. We waited by the doors until we could exit. As the individuals entered the store, I smelled the odor of marijuana emitting from one or more of them as they walked by Master Trooper Schulte and I. We exited the store when we were clear to do so." Ex. 3, McMillan Statement at OAG000020.

52. At his deposition, Trooper McMillian admitted there was no group of people walking past Trooper Schulte and Trooper McMillan as they exited the Love's Travel Shop. Ex. 2, McMillan Dep. at 188:23-189:21; Ex. 8, Video from Loves.

53. In Trooper McMillan's written account, he never claims the marijuana smell was coming from Mr. Bosire. Ex. 3, McMillan Statement at OAG000020-OAG000022.

54. Trooper McMillan never saw Mr. Bosire inside the Love's Travel Shop. Ex. 2, McMillan Dep. at 191:3-5.

55. After the Kansas Highway Patrol's investigation, Colonel Herman Jones, Superintendent, and Lieutenant Joseph Bullock, wrote to Trooper McMillan that "under accepted protocols for criminal interdiction investigation, and the burdens of proof needed therein, there was not reason to detain Mr. Bosire further for a K-9 unit to respond to the scene for a drug sniff. This caused you to hold Mr. Bosire for a longer duration than is legally acceptable." Ex. 7, PSU Closing Letter to McMillan.

56. The Kansas Highway Patrol responded to Mr. Bosire's complaint in an August 9, 2019 letter from Superintendent Jones. Ex. 9, PSU Findings Letter to Bosire.

57. The letter states, "we have determined some of your concerns had merit." Ex. 9, PSU Findings Letter to Bosire.

58. The letter further states, "This contact with you was not what we would consider standard under the confines of investigative reasonable suspicion regarding criminal interdiction." Ex. 9, PSU Findings Letter to Bosire.

59. It also states, "we feel the length of time you were detained roadside was unnecessary given the suspicions articulated." Ex. 9, PSU Findings Letter to Bosire.

60. The portion of the complaint that the KHP determined was unfounded was the racial discrimination claim. Ex. 9, PSU Findings Letter to Bosire.

61. Because Trooper McMillan held Bosire longer than necessary during his traffic stop and subsequent K9 sniff, he was required to complete a one-hour legal review with legal counsel regarding current legal standards of proof related to traffic stops and search as well as complete a ride along for the legal review be put into practice application. Ex. 7, PSU Closing Letter to McMillan.

62. Trooper McMillian completed the remedial legal training and ride along. Ex. 10, Captain Vanderweide Email.

63. Trooper McMillian has not changed the way he conducts traffic stops, detentions, and searches since receiving the remedial legal training and ride along. Ex. 2, McMillan Dep. at 235:9-236:14; 240:10-17.

64. Trooper McMillan read *Vasquez* through an email a legal update course at the academy. Ex. 2, McMillan Dep. at 147:13-24.

65. Trooper McMillan has not changed the way he conducts traffic stops, detentions, and searches since reviewing the *Vasquez* opinion. Ex. 2, McMillan Dep. at 235:9-236:14; 240:10-17.

66. KHP trained officers, including Troopers McMillan and 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 slides, OAG 000221-232, OAG 000445-463, OAG001467, OAG008910-8913; Ex. 6, Schulte Dep. at 176:8-11; Ex. 2, McMillan Dep. at 147:13-24.

67. Trooper McMillan knew of the *Vasquez* case. Ex. 2, McMillan Dep. at 147:13-24.

68. Trooper McMillan does not recall any change in procedure regarding car stops and/or searches after *Vasquez*. Ex. 2, McMillan Dep. at 235:9-236:14; 240:10-17.

69. 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. 2, McMillan Dep. 94:18-25; 95:1-4; 95:11-15; 103:11-25; 106:3-7; 107:1-25; 113:7-24.

70. Mr. Bosire had a bible in his back seat, not a notebook. Ex. 4, Bosire Aff., ¶ 12.

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”)⁷; *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. QUESTIONS PRESENTED

1. Viewing the facts in the light most favorable to Mr. Bosire, did Trooper McMillan violate Mr. Bosire’s Fourth Amendment rights by detaining him during a traffic stop for additional questioning and a drug dog sniff without reasonable suspicion? Had *Rodriguez*, *Vasquez* and other authority clearly established Mr. Bosire’s Fourth Amendment Rights that Trooper McMillan violated during the stop?

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

3. Viewing the facts in the light most favorable to Mr. Bosire, did Tooper Schulte know, or should he have known, that Trooper McMillan was about to violate Mr. Bosire’s

⁷ Pursuant to *Pearson v. Callahan*, 555 U.S. 223 (2009), the Court may answer the two prongs of the *Saucier* test in either order.

constitutional rights and fail to intervene to protect those rights? If so, was it clearly established at the time that Trooper Schulte had an obligation to do so?

V. ARGUMENT

Trooper McMillan 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 McMillan attempts to circumvent the fact that he relied on unconstitutional criteria to justify his prolonged detention of Mr. Bosire thereby violating his clearly established constitutional rights. Moreover, Trooper Schulte knew that McMillan lacked reasonable suspicion to prolong the detention, yet failed to intervene. Taking the facts as a whole, and resolving any disputes in favor of Mr. Bosire, Troopers McMillan and Schulte are 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 McMillan violated Mr. Bosire's 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*, 392 U.S. at 9.

The detention should last “no longer than necessary to effectuate the purpose of the stop, and the scope 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). “[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).

Here, Trooper McMillan subjected Mr. Bosire to a greatly prolonged traffic encounter in violation of the Fourth Amendment. Trooper McMillan pulled Mr. Bosire over for a valid traffic infraction, but then twice extended Mr. Bosire’s stop without sufficient reasonable suspicion. First, he should not have kept Mr. Bosire for additional questioning after admitting he lacked reasonable suspicion to prolong the detention. SOF ¶ 32 (Trooper McMillan admitted he did not have reasonable suspicion following the traffic stop). The admission should be dispositive. Without sufficient reasonable suspicion to extend the traffic stop, the detention became unlawful. *Rodriguez*, 575 U.S. at 351, citing *Illinois v. Cabellas*, 543 U.S. 405, 407 (2005) (“The Court so recognized in *Cabellas*, and we adhere to the line drawn in that decision.”).

Second, Trooper McMillan further detained Mr. Bosire for nearly 20 additional minutes to await a canine unit and conduct a canine sniff of the perimeter of Mr. Bosire’s vehicle that turned up nothing. SOF ¶¶ 37, 38. Because Trooper McMillan twice extended Mr. Bosire’s stop without sufficient reasonable suspicion, and relied on impermissible criteria to justify that detention, Trooper McMillan committed a constitutional violation and the first prong of the *Saucier* test is satisfied.

1. Trooper McMillan conceded he did not have reasonable suspicion to extend the traffic stop.

Trooper McMillan stopped Mr. Bosire for a valid traffic infraction, but prolonged the stop past the point at which the traffic infraction had been resolved, without adequate reasonable suspicion, in violation of the Fourth Amendment.

“The investigative detention usually must ‘last no longer than is necessary to effectuate the purpose of the stop,’ and ‘the scope of the detention must be carefully tailored to its underlying justification.’” *U.S. v. Hunnicutt*, 135 F.3d 1345, 1349 (10th Cir. 1998), citing *Florida v. Rover*, 460 U.S. 491, 500 (1983). “The authority for the seizure therefore ends when the officer completes – ‘or reasonably should have completed’ – the tasks tied to the traffic infraction. *U.S. v. Torres*, CR 16-4138, 2017 U.S. Dist. LEXIS 88662, at *60 (D.N.M. June 9, 2017), citing *Rodriguez*, 135 U.S. at 1614.

Once the purpose of the stop is complete, the driver must be allowed to leave unless there already exists reasonable suspicion to detain him further. *Rodriguez*, 575 U.S. at 350-51 (a stop “justified only by a police-observed traffic violation, therefore, ‘become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission’ of issuing a ticket for the violation.”), quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

Trooper McMillan’s first unreasonable extension of the traffic stop came when he decided to reapproach Mr. Bosire to ask additional questions. Before doing so, Trooper McMillan conceded that he lacked reasonable suspicion to hold Mr. Bosire “for a dog.” SOF ¶¶ 30, 31. If he lacked suspicion to hold Mr. Bosire for a canine unit, he also lacked reasonable suspicion to

continue to prolong the detention at all, given that the original traffic stop had not yet concluded.⁸ The Fourth Amendment does not permit an officer to detain someone for further questioning in order to “either abate suspicion... or establish” reasonable suspicion, as Defendant admits was his purpose. SOF ¶ 32. Instead, it is the purpose of the stop itself—speeding in this instance—that, without more, sets the parameters of the detention.

Trooper McMillan concedes that he did not have reasonable suspicion at that moment in time. SOF ¶¶ 30, 31. Yet, he still goes back to ask additional questions. SOF ¶ 32. Doing so violated impermissibly extended the traffic stop in violation of the Fourth Amendment.

2. Independent analysis of the criteria offered by Trooper McMillan to justify the prolonged detention for further questioning demonstrates that he did not have reasonable suspicion to extend the traffic stop.

Even if this Court were to ignore Trooper McMillan’s concession, an independent analysis of the criteria offered by Trooper McMillan as his reasons for continuing to detain Mr. Bosire for questioning confirms that reasonable suspicion was not present.

Many of the criteria cited by Trooper McMillan to justify the prolonged detention are innocent and noncriminal, and Defendant does not explain how their combination is suspicious. “Even though reasonable suspicion may be founded upon factors consistent with innocent travel, *Sokolow*, 490 U.S. at 9-10, ‘some facts must be outrightly dismissed as so innocent or susceptible to varying interpretations as to be innocuous.’” *Wood*, 106 F.3d at 946, citing *U.S. v. Lee*, 73 F.3d 1034, 1039 (10th 1996), *overruled on other grounds by United States v. Holt*, 264 F.3d 1215, n.6 (10th Cir. 2001).

⁸ At this point, Trooper McMillan had not yet returned Mr. Bosire’s license or issued a citation, and had not yet concluded the traffic stop. SOF ¶ 37 (Trooper McMillan returns Bosire’s upon the K9 unit’s arrival).

As an initial matter, Defendants’ brief often combines various facts to demonstrate one factor in Trooper McMillan’s reasonable suspicion analysis. For example, Trooper McMillan combines the fact that Mr. Bosire had cameras in his car with the fact that the car was a rental vehicle to argue that, together, they create a factor in support of reasonable suspicion. *See* Dkt. 144, Def. Mem. at 29. Yet in other documents, Trooper McMillan cites these facts individually, as each contributing separately to reasonable suspicion. SOF ¶ 49, *see* Ex. 3, McMillan Statement at OAG000020-OAG000022. It is therefore unclear whether Trooper McMillan found Mr. Bosire suspicious because of the cameras, or the rental car, or because there were cameras in a rental car.

Nevertheless, Mr. Bosire responds individually to the various factors articulated by Trooper McMillan in his Memorandum in support of his Motion for Summary Judgment, Dkt. 144. A close examination of each fact and justification Trooper McMillan offers demonstrates how they, alone or in combination, did not justify the prolonged detention of Mr. Bosire.

a. Mr. Bosire was driving a rental car.

Trooper McMillan argues that Mr. Bosire’s use of a rental car made him suspicious. But innocent drivers rent cars daily. Rental cars are a \$31.87 billion industry in 2019.⁹ To find a driver’s rental car suspicious would allow officers to justify the detention of nearly anyone at some point. The Courts agree: “The mere fact that [a suspect’s] vehicle was rented, is of no value in assessing whether the trooper had objectively reasonable suspicion of criminal activity, and is not a factor on which reasonable suspicion can be legitimately predicated.” *U.S. v. Kaguras*, 183 Fed.Appx. 783, 790 (10th Cir. 2006); *see also State v. Lowery*, 308 Kan. 359, 363 (2018) (finding that the use

⁹ Auto Rental News, *U.S. Car Rental Achieves Record Revenues for 2019*, <https://www.autorentalnews.com/346748/u-s-car-rental-achieves-record-revenues-for-2019-1#:~:text=The%20U.S.%20car%20rental%20industry,%2430.27%20billion%2C%20set%20last%20year> (last accessed June 4, 2021).

of a third-party vehicle does not justify further detention, even when combined with other factors such as implausible travel plans and nervousness); *State v. DeMarco*, 263 Kan. 727, 734-35 (1998) (finding that use of a rental car did not justify further detention, even when combined with other factors such as nervousness and inconsistent or unlikely travel plans). And Trooper McMillan does not explain, nor cite a case explaining, how any of the other facts he cites suddenly turn this innocent activity into evidence of crime.¹⁰

b. Mr. Bosire had cameras in the car.

Trooper McMillan then cites four cases to support his assertion that cameras in a car are suspicion. Dkt. 144, Def. Mem. at 29. While he argues that the cameras were suspicious in part because of Mr. Bosire’s rental car, none of the cases Trooper McMillan cites support the assertion. *See* Dkt 144, Def. Mem. at 29 citing *U.S. v. Murphy*, 901 F.3d 1185, 1195 (10th Cir. 2018); *U.S. v. Taylor*, 813 F.3d 1139, 1144 (8th Cir. 2016); *U.S. v. Clark*, No. CR 2018-0009, 2019 WL 3456813, at *9 (D.V.I. July 30, 2019); and, *U.S. v. Johnson*, 364 F.3d 1185, 1193 (10th Cir. 2004). Each of these cases is inapplicable to the facts at issue here.

First, *U.S. v. Murphy*, is not a Fourth Amendment case; instead, the opinion addresses a criminal sentence enhancement. Second, *Murphy* did not involve cameras in a vehicle; but instead “surveillance cameras in . . . [a] residence.” 901 F.3d at 1194. Nonetheless, even in context, *Murphy* does not suggest the mere presence of cameras is suspicious. The defendant there had, in addition to cameras, “digital scales, baggies” and he “conveniently admit[ted] to being a methamphetamine addict and offer[ed] his addiction as an explanation for many of the drugs and

¹⁰ Trooper McMillan convinced himself that Mr. Bosire was travelling in a drug caravan because Mr. Bosire was driving a rental car and Trooper McMillan saw another car at the gas station that appeared to be a rental car. SOF ¶¶ 22-24. In fact, Trooper McMillan would never learn if the other car was rented, and there is nothing about the mere fact of Mr. Bosire driving a rental that is suspicious. See Part II, below.

associated paraphernalia uncovered in his home or otherwise under his control.” *Id.* Put simply, *Murphy* is a different case.

Next, in *U.S. v. Taylor*, like *Murphy*, the court did not review a Fourth Amendment claim or analyze an officer’s reasonable suspicion. Also, like *Murphy*, the case involved residential surveillance cameras. *Taylor*, 813 F.3d at 1144. Instead, the Eighth Circuit reviewed a jury verdict against codefendants for “distribution of cocaine and marijuana and two counts based on a murder for hire conspiracy.” *Id.* And again, the presence of surveillance cameras was only relevant when combined with “large quantities of drugs . . . [.] firearms, ammunition, digital scales, [and] plastic bags,” all uncovered after the police executed a search warrant on the three houses one of the defendants “ran his Kansas City operations out of.” *Id.* at 1144. Again, not similar to the facts here.

The third also did not include cameras in a vehicle. *Clark*, 2019 WL 3456813, at *2 (describing the defendant’s property and surveillance cameras located on it). More to the point, while officers noticed surveillance cameras, they also noticed “the fact that most, if not all, of the windows on Defendant’s property were blacked-out by plastic bags; the sound of an air conditioner running; the fact that ventilation system was coming out from one window; and **the smell of marijuana that permeated the air.**” *Id.* at *9 (emphasis added). In addition, one of the officers, upon approaching the property, “noticed what appeared to be two mature marijuana plants—about three to four feet tall—located a couple of feet in front of the door of [defendant’s] residence.” *Id.* at *2. Trooper McMillan cannot point to similar circumstances here.

Lastly, Defendant turns to *U.S. v. Johnson*. There, the Court did not discuss cameras at all. Instead, a walkie-talkie was at issue. 364 F.3d at 1187.

In all, Defendant points to no case in the Tenth Circuit or elsewhere, in which the presence of cameras in a car supported an officer’s reasonable suspicion to detain someone after a traffic

stop should have ended. And, as noted below, *see* Section I.C., Mr. Bosire eventually offered an explanation for the cameras, thereby abating any suspicion that the cameras were there for drug trafficking purposes.

c. Mr. Bosire did not fully roll down his window, and instead, only rolled it down one-third of the way.

Trooper McMillan next claims Mr. Bosire’s failure to roll down his window all the way supported his reasonable suspicion. Trooper McMillan argues that “[p]artially rolling down the window suggested that Bosire might be trying to hide something in the vehicle.” Dkt. 144, Def. Mem. at 30. However, Defendant admits there was no drug odor and does not describe how his view of the car was impaired. SOF ¶ 16. Moreover, Trooper McMillan says Mr. Bosire rolled his window down one third of the way, SOF ¶ 16, which is plenty of space to have a conversation and exchange documents—especially given that the stop occurred at night, in the winter. SOF ¶ 5.

Trooper McMillan’s written report about the stop is even more revealing. There, Trooper McMillan writes that the partially rolled down window added to his suspicion initially because “people with marijuana in their vehicles will try to confine the odor of marijuana inside the vehicle or will open all windows completely to air out the odor.” SOF ¶ 49; Ex. 3, McMillan Statement, OAG000021. But Trooper McMillan then asked Mr. Bosire to roll the window down all the way. *Id.* Mr. Bosire did, and Trooper McMillan smelled no marijuana. SOF ¶¶ 16, 49, Ex. 3, McMillan’s Statement, OAG000021 (“I asked Bosire to roll his window down, which he did”). Despite this, Trooper McMillan continues to argue that Mr. Bosire’s one-third rolled down window added to his suspicion. In his report Trooper McMillan wrote, “I did not smell marijuana, but was still suspicious of his actions.” Ex. 3, McMillan Statement, OAG 000021. He is unable to explain why a window rolled down one third of the way in the middle of a winter night serves as reasonable suspicion. Trooper McMillan’s argument is not supported by the facts of this case.

d. Mr. Bosire has a partially covered notebook.

Trooper McMillan next claims Mr. Bosire’s possession of a notebook, partially covered in the backseat of his car, supported his reasonable suspicion.

Trooper McMillan cites no case using a partially covered notebook or a similar fact to support a reasonable suspicion analysis. And Trooper McMillan’s explanation—that it could be a ledger of some kind used to document drug trafficking activity—would make any paper in any car suspicious.¹¹ Even if combined with other criteria, the fact that there was a “notebook” in the backseat does not constitute to reasonable suspicion.

e. Mr. Bosire did not give detailed answers about his travel plans.

Finally, Trooper McMillan takes issue with Mr. Bosire’s answers regarding his travel plans. Trooper McMillan claims that Mr. Bosire’s answers were evasive.¹²

Trooper McMillan would like this Court to hold that Mr. Bosire was inherently suspicious because he refused to provide detailed information regarding his travel origin or destination during the course of a traffic stop. But Mr. Bosire’s travel plans alone, or the lack of detail he provided about them, should not be held against him. “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.” *U.S. v. Santos*, 403 F.3d 1120, 1132 (10th Cir. 2005). And while Defendant points to authority considering the evasiveness of answers in determining reasonable suspicion, it is also true that

¹¹ In fact, the “notebook” in the back of Mr. Bosire’s car was his bible. SOF ¶ 70. But, according to KHP’s training materials, having a bible or other religious material in the car *also* may make a driver inherently suspicious. See Ex. 12, KHP Training, Domestic Highway Enforcement: Criminal Interdiction, OAG 000531 *et seq.* (noting that having “religious effects” such as a “bible on dash” may be an “indicator” of criminal activity, at OAG 000615).

¹² Notably, Mr. Bosire’s refusal to discuss his travel occurred *before* Trooper McMillan admitted he lacked reasonable suspicion to Trooper Schulte. SOF ¶¶ 15, 30, 32. In Trooper McMillan’s second questioning, he hardly talks about Mr. Bosire’s travel plans at all. SOF ¶ 33.

someone approached by the police “need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answers does not, without more, furnish those grounds.” *Fla. v. Rover*, 460 U.S. 491, 498 (1983) (discussing consensual encounters between police and citizens).¹³

Importantly, in his written report of the stop, Trooper McMillan admits that he relied on what he **presumed** to be Mr. Bosire’s travel plans in finding Mr. Bosire to be suspicious:

I thought Bosire possibly made a quick trip to Colorado, which is where numerous marijuana purchases are made in large amounts and brought back east through Kansas. I asked Bosire where he was coming from and he would only say from the west and going to the east. I felt Bosire didn’t want me to know he was coming from Colorado because he had possibly made a purchase of marijuana (it was never confirmed at the time of the traffic stop that he was actually in Colorado).

SOF ¶ 49; Ex. 3, McMillan Statement at OAG 000021.

Trooper McMillan did not like the fact that Mr. Bosire had failed to give him detailed information about his travel plans; but had Mr. Bosire offered that information up, Trooper McMillan would have still found him suspicious.

Trooper McMillan assumed Mr. Bosire was coming from Colorado, and used that assumption to justify detaining Mr. Bosire on the basis of his travel plans, even though doing so violates clearly established law: “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

¹³ In *Royer*, the Court was discussing a situation where officers approach people on the street without reasonable suspicion at all in an attempt to engage them in consensual conversations. Here, Trooper McMillan had already pulled Mr. Bosire over for a legitimate traffic stop and could arguably ask minimally intrusive questions related to the context of the traffic stop. Even still, Mr. Bosire was under no obligation to answer the questions, and his mere refusal to provide details of his travel plans—without more—does not support Trooper McMillan’s suspicion.

add to the overall calculus of suspicion.” *U.S. v. Guerrero*, 472 F.3d 784, 787-88 (10th Cir. 2007). Later, in *Vasquez v. Lewis*, 834 F.3d 1132 (10th Cir. 2016), the Court would 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.*

Trooper McMillan’s admitted use of Mr. Bosire’s travel origin should be fatal to his motion.¹⁴ In addition to being completely unsubstantiated at the time, the consideration violated Mr. Bosire’s constitutional rights.

f. Trooper McMillan smelled marijuana at a gas station, and inferred Mr. Bosire was “caravanning” with another car that departed the gas station.

In reality, the majority of Trooper McMillan’s reasonable suspicion was likely based on these last two factors, both of which turned out to be inaccurate assumptions about Mr. Bosire drawn from information Trooper McMillan “observed” at the Love’s gas station. SOF ¶ 27. First, Trooper McMillan claims generally that he smelled marijuana at the gas station. Second, Trooper McMillan saw Mr. Bosire talking to another person at the gas station, and that another car departed the gas station. SOF ¶¶ 20, 23. Trooper McMillan puts these two facts together to assume that Mr.

¹⁴ Trooper McMillan’s consideration of what he presumed to be Mr. Bosire’s travel plans from Colorado are noticeably absent from Defendants’ motion. This is perhaps because Trooper McMillan’s consideration of travel plans as part of his reasonable suspicion analysis violates clearly established law. This Court should not overlook Trooper McMillan’s prior statements of his reasonable suspicion factors. Trooper McMillan should not be allowed to create an alternative narrative—eliminating prohibited considerations—about why he detained Mr. Bosire in order to avoid constitutional liability.

Bosire was traveling in a “caravan” with the other car. But both of these assumptions were incorrect and deeply flawed.

On summary judgment, the Court views the facts in the light most favorable to Plaintiff. *Scott v. Harris*, 550 U.S. 372, 378 (2007). “In qualified immunity cases, this usually means adopting . . . the plaintiff’s version of the facts.” *Id.*; *see also, Linin v. Neff*, No. 2:15-CV-298-JNP-PMW, 2017 WL 3972982, at *7 (D. Utah Sept. 7, 2017) (finding that facts asserted by a trooper “to give rise to reasonable suspicion—watery and glassy eyes and the odor of alcohol” were disputed and could not support summary judgment.)

First, Trooper McMillan points to no case law saying that a general odor of marijuana, not linked to the physical presence of a particular person, can create reasonable suspicion. Indeed, Trooper McMillan offers no evidence that he *ever* smelled marijuana near Mr. Bosire or even in Mr. Bosire’s general vicinity. As discussed further below there are genuine issues of material fact regarding whether Trooper McMillan smelled marijuana at all in relation to Mr. Bosire. *See Part II.B.2.*

Second, Trooper McMillan claims that his suspicion was partially based on the fact that Mr. Bosire talked to another person at the gas pump, and that there was another vehicle at the gas station that left (the silver Dodge Charger). SOF ¶ 24. Yet there is nothing inherently suspicious about two people talking at a gas pump, or about two rental vehicles being at a gas station off a major interstate highway at the same time. Indeed, as Mr. Bosire later confirmed for Trooper McMillan, the person he was talking to was **a gas station attendant**. SOF ¶ 46. Trooper McMillan apparently took his observation of two people talking and two rental cars to mean that Mr. Bosire was “caravanning” with the second person to traffic drugs from Colorado. To consider this as part of the reasonable suspicion would require logical leaps based on flimsy assumptions.

g. Trooper McMillan learned that Mr. Bosire had no criminal record.

Perhaps most importantly, Trooper McMillan’s brief fails to note facts that should have reduced, rather than increased, his suspicion. Before returning to speak to Mr. Bosire for a second time, Trooper McMillan learned that Mr. Bosire had no criminal history. After his their first conversation, but before the second, Trooper McMillan requested a criminal history for Mr. Bosire. SOF ¶ 49; Ex. 3, McMillan Statement at OAG000021 (“At 2048 hours, dispatch provided [Trooper McMillan] the requested information and advised Bosire had no criminal history.” Rather than take this in to consideration and reduce his suspicion, Trooper McMillan ignores the information altogether.¹⁵

Accordingly, at the conclusion of Trooper McMillan’s first interaction during his detention of Mr. Bosire, Trooper McMillan did not have reasonable suspicion to prolong the detention any further.

h. Additional information gleaned during follow-up questioning did not give Trooper McMillan reasonable suspicion to prolong the detention in order to call for a canine unit.

Trooper McMillan admitted that he did not have reasonable suspicion to call a canine unit prior to approaching Mr. Bosire in his vehicle for the second time. An independent analysis of the factors known to Trooper McMillan at the time reconfirms that reasonable suspicion did not exist.

¹⁵ Importantly, a person’s criminal history, without more, does not provide reasonable suspicion that criminal activity is afoot. *U.S. v. McRae*, 81 F.3d 1528, 1535 (10th Cir. 1996) (citing *Lee*, 73 F.3d at 1040) (“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. Sandoval*, 29 F.3d 537, 543 (10th Cir. 1994) (“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.”). However, the fact that Mr. Bosire had no criminal record should have dispelled, at least in part, Trooper McMillan’s notion that Mr. Bosire was so experienced in trafficking drugs that he drove with a drug trafficking ledger in his back seat and cameras mounted in his car. *See* Dkt. 144, Def. Mem. at 29-30.

It follows then that the information gleaned during that additional questioning must have contributed significantly to Defendant McMillan's reasonable suspicion calculus. Yet, the only information Trooper McMillan received from the additional questioning should have abated, rather than confirmed, whatever suspicion he may have had.

Upon reapproaching the car, Trooper McMillan first asked Mr. Bosire where his "buddy" went. SOF ¶ 33. What follows is an exchange in which Mr. Bosire is clearly confused by Trooper McMillan's vague and hostile questioning. Trying to figure out who Trooper McMillan is referring to as Mr. Bosire's "buddy", Mr. Bosire asks Trooper McMillan various questions, trying to understand to whom Trooper McMillan was referring. *Id.* After a few back and forths, Trooper McMillan finally reveals that he was referring the person Mr. Bosire was speaking to at the gas pump at Loves. *Id.* Once Trooper McMillan actually describes who he was talking about, Mr. Bosire immediately explains that the person was a gas station attendant. *Id.* Trooper McMillan offers no reason in his brief why Mr. Bosire's explanation was not believable.

Next, Trooper McMillan asks Mr. Bosire about the cameras in the car.¹⁶ Again, Mr. Bosire calmly offers a reason why he chooses to have cameras present while driving on the highways—because, as a Black man, he is afraid of being targeted by the police. While it may not be an answer Trooper McMillan liked or agreed with, the answer was not indicative of criminal behavior, and Defendant does not claim Mr. Bosire's responses to questions about the camera added to Trooper McMillan's suspicion. *See* Dkt. 144, Def. Mem. at 29.

¹⁶ Trooper McMillan saw the cameras after his initial interaction with Mr. Bosire at the gas station. SOF ¶ 21. He saw them again when he first approached the vehicle. SOF ¶ 30. He therefore knew about the cameras at the time he remarked to Trooper Schulte that he "[didn't] have enough to hold him" for a canine unit. SOF ¶ 30. The cameras therefore could not have significantly contributed to Trooper McMillan's reasonable suspicion.

In all, Trooper McMillan discounted multiple factors demonstrating that Mr. Bosire was not engaged in anything criminal: there was no odor of marijuana; Mr. Bosire explained that the second man at the pump was the gas station attendant; he gave a reasonable explanation for the cameras; and, he had no criminal history. Rather than view the totality of the circumstances, Trooper McMillan ignored these explanations. A reasonable officer, viewing all the information together, would have concluded that his reasonable suspicion was abated. Instead, Trooper McMillan was intent on calling out a canine unit, regardless of whatever information Mr. Bosire provided.

Doing so violated Mr. Bosire's clearly established rights. Trooper McMillan continued to prolong Mr. Bosire for a canine search without adequate reasonable suspicion. Trooper McMillan did not have reasonable suspicion before the additional questioning, and Mr. Bosire's answers to the additional questions were honest and reasonable. Based on what appears to be a hunch or supposition, Trooper McMillan simply chose not to believe him. This should not shield Trooper McMillan from liability. Summary judgment is therefore inappropriate.

3. KHP's Professional Standards Unit concluded that Trooper McMillan's conduct was impermissible and disciplined him accordingly, thereby confirming that Trooper McMillan violated the Fourth Amendment.

One strong signal that Trooper McMillan violated Mr. Bosire's constitutional rights is that the Highway Patrol concluded he did. SOF ¶ 56, Ex. 7, PSU Closing Letter to McMillan; Ex. 9, PSU Findings Letter to Bosire. After an investigation into the stop, the Professional Standards Unit found that Trooper McMillan held Mr. Bosire "for a longer duration than is legally acceptable." Ex. 9, PSU Findings Letter to Bosire. Superintendent Herman Jones wrote that Trooper McMillan's contact was "not what we would consider standard under the confines of investigative reasonable suspicion regarding criminal interdiction." *Id.* He further wrote that "the length of time

you [Mr. Bosire] were detained roadside was unnecessary given the suspicions he [Trooper McMillan] articulated.” *Id.* In his letter to Trooper McMillan summarizing the findings of the investigation, Superintendent Jones and Lieutenant Joseph Bullock of the PSU wrote:

It was determined that under accepted protocols for criminal interdiction investigation, and the burdens of proof needed therein, there was not reason to detain Mr. Bosire further for a K-9 unit to respond to the scene for a drug sniff. This caused you to hold Mr. Bosire for a longer duration than is legally acceptable.

SOF ¶ 61, Ex. 7, PSU Closing Letter to McMillan.

All of this should be dispositive. From the perspective of other KHP officers, and the Superintendent of the KHP, Trooper McMillan’s conduct violated the Fourth Amendment. The first prong of the *Saucier* test is therefore met.

B. Under the second prong of the *Saucier* test, Mr. Bosire’s right to be free from a prolonged detention was clearly established.

Mr. Bosire’s right to be free from a prolonged roadside detention based on inadequate reasonable suspicion was clearly established at the time of Trooper McMillan’s misconduct. Caselaw in this Circuit and state are clear that Trooper McMillan’s actions violated the Fourth Amendment, and Trooper McMillan even recognized this himself when he admitted that he did not have enough suspicion to hold Mr. Bosire any 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*, 575 U.S. at 350. Many of the factors relied on by Trooper McMillan fail to provide reasonable suspicion, even in combination with one another. *See U.S. v. Kaguras*, 183 Fed.Appx. 783, 790 (10th Cir. 2006) (rental car not inherently suspicious); *State v. Lowery*, 308 Kan. 359, 363 (2018) (finding that the use of a third-party vehicle does not justify further detention, even when combined with other factors such as implausible travel plans and nervousness); *State v. DeMarco*, 263 Kan. 727, 734-

35 (1998) (finding that use of a rental car did not justify further detention, even when combined with other factors such as nervousness and inconsistent or unlikely travel plans). Other factors cited by Trooper McMillan have no basis in the law, or if taken as legitimate, would deem large swaths of interstate drivers inherently suspicious.

This clearly violates established precedent: “Even though reasonable suspicion may be founded upon factors consistent with innocent travel, *Sokolow*, 490 U.S. at 9-10, ‘some facts must be outrightly dismissed as so innocent or susceptible to varying interpretations as to be innocuous.’” *Wood*, 106 F.3d at 946, citing *U.S. v. Lee*, 73 F.3d 1034, 1039 (10th 1996), *overruled on other grounds by United States v. Holt*, 264 F.3d 1215, n.6 (10th Cir. 2001).

Moreover, Trooper McMillan *did* rely on an unconfirmed hunch that Mr. Bosire was traveling from Colorado in deeming Mr. Bosire suspicious. SOF ¶ 49, Ex. 3, McMillan Statement at OAG000021 (“I thought Bosire possibly made a quick trip to Colorado”). This plainly violates caselaw in this Circuit of which all KHP officers are, or should have been, aware. SOF ¶ 66. “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.” *Guerrero*, 472 F.3d at 787-88. The 10th Circuit further confirmed this in its ruling in *Vasquez*. 834 F.3d at 1138 The Kansas Supreme Court has also held that travel plan statements—even where potentially inconsistent or implausible—do little to move the needle on the reasonable suspicion analysis. *See Lowery*, 308 Kan. at 365-370.

The second prong of the *Saucier* test is further bolstered by KHP’s own conclusions that “under accepted protocols for criminal interdiction investigation, and the burdens of proof needed therein, there was not reason to detain Mr. Bosire further for a K-9 unit to respond to the scene for a drug sniff. This caused you to hold Mr. Bosire for a longer duration than is legally acceptable.”

SOF ¶ 61, OAG 008503. KHP itself recognized that Mr. Bosire’s right to be free from this unconstitutionally prolonged roadside detention was clearly established.

Summary judgment on the basis of qualified immunity is therefore inappropriate.

VI. DEFENDANTS SEEK SUMMARY JUDGMENT ON CONTESTED, MATERIAL FACTS.

Summary judgment is also inappropriate here because there are contested, material facts. Reversing a District Court’s grant of summary judgment on an unlawful arrest claim, the Tenth Circuit wrote, “[W]e will not grant a defendant official qualified immunity if material facts are in dispute.” *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1313 (10th Cir. 2002). The Court went on to write, “Because we believe that a jury must resolve disputed facts, the court erred in granting judgment on qualified immunity grounds.” *Id.* Here, because discovery is not done, there is an outstanding motion addressing production of documentation directly relevant to this motion, and there are factual disputes that must be resolved, summary judgment is premature and inappropriate.

A. A factfinder could conclude that Trooper McMillan’s stated reasonable suspicion was insufficient or pretextual.

A factfinder could conclude that Trooper McMillan lacked reasonable suspicion and violated Mr. Bosire’s clearly established rights. Trooper McMillan’s reasonable suspicion analysis is based on contested facts. He contends that Mr. Bosire was at the Love’s convenience store with another man and thought the two may have been “caravanning” together to transport drugs. SOF ¶ 24. He formed this suspicion based only on the facts that (1) he smelled marijuana at the station, (2) he thought the two cars the men were driving were rented, and (3) he believed the two men spoke with each other. SOF ¶ 20. There is evidence controverting these facts.

1. Defendant does not describe why he believed Mr. Bosire to be the source of the marijuana smell and, soon after, smelled no marijuana on Mr. Bosire at all.

Regarding the marijuana smell, Trooper McMillan can only say that “[w]hile exiting the store, [he] and Trooper Schulte smelled the odor of marijuana seeming to come from persons who were or had been near the store’s entrance.” SOF ¶ 20. He goes on to describe how he noticed “two men (one black and the other white) standing and talking by the Altima.” SOF ¶ 20. Without further elaboration, Trooper McMillan states he “believed that one or both of these men could have been the source of the marijuana that he smelled in the store.” SOF ¶ 20.

There are notable gaps in Trooper McMillan’s description. First, while Trooper McMillan believed the marijuana smell came from “persons who were or had been near the store’s entrance,” this fact alone would indict every customer there, and Trooper McMillan offers nothing tying that smell to Mr. Bosire himself. Nor does Trooper McMillan even say he observed Mr. Bosire near the store’s entrance—where he believed the odor came from. SOF ¶ 20. The only observation of Mr. Bosire at Love’s cited by Trooper McMillan describes seeing Mr. Bosire near the gas pump. SOF ¶ 20

There is nothing in the record describing why Trooper McMillan believed Mr. Bosire, particularly, was the source of the smell. And after smelling the marijuana odor, Trooper McMillan stood “outside the convenience store for less than five minutes” before first noticing Mr. Bosire. SOF ¶ 20. Trooper McMillan does not describe who else he saw in the intervening five minutes, who else passed in and out of the store, how far away Mr. Bosire was from the door, or why it was only upon noticing Mr. Bosire that he developed a hunch about the smell’s origin.

Moreover, Trooper McMillan himself had reason to doubt that Mr. Bosire was the source of the odor. Trooper McMillan stopped Mr. Bosire on the side of I-70 shortly after they both left Love’s and walked to the window of Mr. Bosire’s car approximately a minute and a half later.

SOF ¶ 14. Trooper McMillan claims to have only just observed Mr. Bosire at the gas station slightly before that. SOF ¶ 20. But when Trooper McMillan stood next to Mr. Bosire and his car, Trooper McMillan admits there was no odor at all. SOF ¶ 30.

These questions of fact should be fatal to Defendants' motion. Why Trooper McMillan originally believed Mr. Bosire to be the source of the marijuana odor is crucial to determining whether his suspicion of Mr. Bosire was reasonable. *See Massey v. Ebix, Inc.*, No. 2:14-cv-00897, 2016 WL 3661231, at *3 (D. Utah July 5, 2016) (holding that summary judgment is inappropriate when there are "unanswered questions of fact that will need to be resolved at trial"). In addition, by Trooper McMillan's own account, he knew Mr. Bosire was not the source of the odor as soon as he went back to his patrol car following his first interaction with Mr. Bosire. SOF ¶ 30. Yet, for reasons that are not explained in his brief, Trooper McMillan persisted in his unsubstantiated belief that the odor had come from Mr. Bosire. *See Linin*, 2017 WL 3972982, at *8 (finding, on summary judgment, that the facts gave rise "to a suggestion of deliberate falsehood in [the Trooper's] assertion that he smelled alcohol" when he did not confront the driver about the smell at the beginning of the traffic stop.").

These inconsistencies and issues of material fact make summary judgment inappropriate.

2. Trooper McMillan's story about the source of the marijuana smell changed over time.

Trooper McMillan originally wrote that "there was a group of several people walking inside" the gas station as he and Trooper Schulte were near the exit. SOF ¶ 49, Ex. 3, McMillan Statement, OAG 00020. Trooper McMillan claims that he and Trooper Schulte "waited by the doors until they could exit." *Id.* Then, according to Trooper McMillan's first account, "As the individuals entered the store, [he] smelled the odor of marijuana emitting from one or more of them." *Id.*

At his deposition, Trooper McMillan was confronted with video from the store, and Trooper McMillan admitted there was no group walking in as Trooper McMillan left. Ex. 2, Trooper McMillan Dep., 188-189. In his declaration in support of Summary Judgment, Trooper McMillan's story changes. Rather than claim the marijuana smell came from the people passing him at the store entrance, Trooper McMillan now claims that, "While exiting the store, Trooper Schulte and I smelled the odor of marijuana *seemingly coming* from people *around or who had been around* the entrance of the store." Def. Ex. 1, ¶ 17 (emphasis added). "Then, after standing outside the convenience store for less than five minutes, [Trooper McMillan] noticed two men." *Id.* He candidly goes on to declare, "*While not knowing if either man was one of the people that I associated with the marijuana smell*, I believed that one or both could have been." *Id.* (emphasis added). No longer able to claim that the marijuana smell came from a group passing him at the entrance to the store, Trooper McMillan offers no explanation for why he *believed* one or both of the two men he then observed could be its source.

This changing explanation should preclude Trooper McMillan's reliance on this factor.

3. Defendant does not describe why he believed the car he thought was "caravanning" with Mr. Bosire was also rented.

Additionally, there are genuine issues of material fact regarding another one of Trooper McMillan's purported reasonable suspicion criteria: that Mr. Bosire appeared to be "caravanning" with a second car, a silver Dodge Charger, that "appeared to be rented." SOF ¶ 23. According to Trooper McMillan, this fact played an important role in his analysis because he believed "persons transporting drugs frequently use short-term rented vehicles for the transport." SOF ¶ 24. But at the time Trooper McMillan observed the second vehicle, he could not be sure it was rented and, even if it was, Trooper McMillan could not have known the duration of the rentals. And "[t]he mere fact that [a suspect's] vehicle was rented, is of no value in assessing whether the trooper had

objectively reasonable suspicion of criminal activity, and is not a factor on which reasonable suspicion can be legitimately predicated.” *Kaguras*, 183 Fed.Appx. at 790.

Trooper McMillan confirmed that Mr. Bosire’s car was rented while still at the convenience store, but whether the other car—the silver Dodge Charger—was rented remains an open question. The troopers never pulled it over, and Trooper McMillan’s belief that it was rented in the first place is an unsubstantiated hunch. Without more, Trooper McMillan presented no evidence that the two cars were rented, both for short durations, and thus a possible “drug caravan.”

4. Defendant does not explain why he both believed Mr. Bosire was “caravanning” with the other man and expected to find the other man in Mr. Bosire’s vehicle.

Trooper McMillian has not even attempted to explain why he allegedly believes Mr. Bosire was caravanning with this person seen at the pump and who may have driven off in silver Dodge Charger, yet immediately reported to Trooper Schulte over the radio that “the white man seen at the convenience store is ‘no longer in the car’”. SOF ¶ 25. Trooper McMillian apparently expected to find this other man in Mr. Bosire’s car. These two positions are in direct opposition to each other.

“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255. In short, a jury should decide whether Trooper McMillan was truthful in why he found Mr. Bosire suspicious based on these incongruent explanations for his actions. *Id.*

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 Bosire's claims against Troopers Schulte and McMillan. Expert reports will be forthcoming, and Plaintiffs have 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 KHP's 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 KHP 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 KHP's training or practices, as implemented by KHP Troopers here, that could become relevant or cast doubt on the Troopers' explanations and motives. In addition, there is a motion to compel that is fully briefed, and Mr. Bosire incorporates that motion here. As stated in that motion, the documents and information being withheld directly pertains to findings of KHP members related to the investigation of Bosire's stop. That information is extremely relevant.

Although Defendants have, since the inception of this case, treated the case as two separate ones—one for damages against the named Troopers, and one for injunctive relief against Defendant Jones—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 Troopers Schulte and McMillan knew what they were 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 reliance on out-of-state travel plans as a criteria driving reasonable

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

Pursuant to Federal Rule of Civil Procedure 56(d), counsel for Mr. Bosire submits a declaration, attached hereto as Exhibit 13, in support of the argument that summary judgment is premature.

VII. TROOPER SCHULTE HAD AN OBLIGATION TO INTERVENE.

In addition to Trooper McMillan's misconduct, Trooper Schulte also faces liability for failing to intervene when he knew that Trooper McMillan was prolonging the detention of Mr. Bosire without probable cause in violation of the law.

"All law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence." *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1210 (10th Cir. 2008), quoting *Anderson v. Branen*, 17 F.3d 552, 557 (2nd Cir. 1994). The Tenth Circuit has found this duty applicable in claims of excessive force as well as unlawful entry. *See Anderson v. Campbell*, No. 95-6459, 1996 WL 731244, *4 (10th Cir. Dec. 20, 1996) and *Reid v. Wren*, Nos. 94-7122, 94-7123, 94-7124, 1995 WL 339401, *2 (10th Cir. June 8, 1995), where it was written:

It is widely recognized that all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence. Thus, an officer who is present but fails to intervene to prevent another law enforcement official from infringing a person's constitutional rights is liable if the "officer had reason to know . . . that any constitutional violation has been committed by a law enforcement official[] and the officer had a realistic opportunity to intervene to prevent the harm from occurring." . . . These two officers were present . . . yet they did not act to stop the allegedly unconstitutional action. Under these facts, defendants are not entitled to summary judgment on the ground they are not personally responsible.

(Internal citations and quotation marks); *but see Harris v. Mahr*, 838 Fed.Appx. 339, 343 (10th Cir. 2020) (holding these cases insufficient to establish a clearly defined constitutional violation for an officer’s failure to intervene in unlawful entry cases.)

To be liable for failing to intervene, Trooper Schulte “must have ‘observe[d] or ha[d] reason to know’ of a constitutional violation and have had a ‘realistic opportunity to intervene.’” *Jones v. Norton*, 809 F.3d 564, 576 (10th Cir. 2015), citing *Vondrak*, 535 F.3d at 1210.

Here, Trooper Schulte was in the best possible position to know of Trooper McMillan’s constitutional violation: Trooper McMillan admitted he lacked reasonable suspicion to Trooper Schulte before prolonging Mr. Bosire’s detention. Trooper McMillan previewed that he was about to extend the detention without reasonable suspicion. Trooper Schulte did nothing to stop it. Had Trooper McMillan done the same with in excessive use of force case, Trooper Schulte clearly would be liable. *See Vondrak*, 535 F.3d at 1210. The Court should not reach a different conclusion here.

The law has been settled for some time. “The investigative detention usually must ‘last no longer than is necessary to effectuate the purpose of the stop,’ and ‘the scope of the detention must be carefully tailored to its underlying justification.’” *Hunnicut*, 135 F.3d at 1349, citing *Florida*, 460 U.S. at 500. And, “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*, 575 U.S. at 350.

After Trooper McMillan himself, Trooper Schulte had the best vantage point to know a constitutional violation was occurring, yet he took no action to stop it. Trooper Schulte is not entitled to qualified immunity for his failure to intervene.

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

Punitive damages are appropriate if Defendants' 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, there is evidence from which a fact finder could infer just that.

At bottom, Trooper McMillan saw Mr. Bosire, a Black man, with an out of state license, in the western part of Kansas, and decided to target him. Mr. Bosire had only vague suspicions—the smell of marijuana generally at a gas station, a mistaken belief about Mr. Bosire's interaction with the station attendant, an unconfirmed hunch that two cars were short term rentals and caravanning across the state. With little more to go on, Trooper McMillan decided Mr. Bosire was a drug trafficker and that he would confirm that decision during a traffic stop. Trooper McMillan sat in wait for Mr. Bosire to commit a traffic violation on I-70. Once he pulled Mr. Bosire over—for driving a mere 6-7 miles over the speed limit, while passing another car—Trooper McMillan refused to be deterred from his goal. Mr. Bosire was never going to be seen as innocent in Trooper McMillan's eyes: not after Trooper McMillan learned the marijuana smell was not from Mr. Bosire; not after he learned that Mr. Bosire was speaking with a gas station attendant, not a criminal accomplice; and not after he learned that Mr. Bosire had no criminal history. Trooper McMillan called out a drug dog anyway. Once he did, the canine sniff revealed nothing.

And while he ignores it in his briefing, Trooper McMillan admits he used a hunch about Mr. Bosire's travel origins against him. He thought Mr. Bosire was travelling from Colorado and thought it was suspicious. Reliance on this supposition violated Mr. Bosire's clearly established rights. Relying on these sorts of unsubstantiated hunches and cobbling together of innocent facts to detain people for humiliating and prolonged detentions for canine searches is precisely what the

Tenth Circuit warned against in *Vasquez*. 846 F.3d at 1136. But Trooper McMillan did not care: by his own admission, he does nothing different when conducting traffic stops post-*Vasquez*, and apparently learned nothing from the remedial legal training and ride along that he was required to complete after KHP’s PSU found his conduct to be unlawful. SOF ¶¶ 61-63.

On these facts, a jury could infer that Trooper McMillan actions involve “reckless or callous indifference to the federally protected rights of others.” *Searles*, 251 F.3d at 879.

IX. CONCLUSION

Trooper McMillan unlawfully prolonged the roadside detention of Mr. Bosire in violation of Mr. Bosire’s clear Fourth Amendment rights. The prolonged detention was based on insufficient reasonable suspicion and a reliance on criteria that the Tenth Circuit has previously held cannot amount to reasonable suspicion. KHP recognized as such when it found that Mr. Bosire’s claims of unlawful detention had merit. Moreover, genuine issues of fact remain, and discovery is ongoing. Summary judgment should therefore be denied.

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 Plaintiff's Motion to Seal were served on counsel of record, under seal, with that motion. All exhibits subject to Plaintiff's Motion to File Conventionally will be mailed to opposing counsel at the following address:

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