

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

Blaine Franklin Shaw, *et al.*,

Plaintiffs,

v.

Herman Jones, in his official capacity as
the Superintendent of the Kansas Highway
Patrol, *et al.*,

Defendants.

Case No. 6:19-CV-1343-KHV-GEB

Mark Erich and Shawna Maloney,
*individually and as mother and natural
guardian of minors D.M and M.M,*

Plaintiffs,

v.

HERMAN JONES, in his official capacity
as the Superintendent of the Kansas
Highway Patrol,

Defendant.

Case No. 20-CV-01067-KHV-GEB

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AGAINST DEFENDANT JONES**

I. NATURE OF THE MATTER BEFORE THE COURT

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

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

II. Plaintiffs' Statement of Material Uncontroverted Facts¹

The Kansas Highway Patrol (KHP)

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

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

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

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

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

6. Below Jones in the chain of command are his assistant superintendent, who holds the rank of lieutenant colonel, and two captains, who rank above five executive commanders who

¹ Hereinafter, Plaintiffs refer to Plaintiffs' Statement of Material Uncontroverted Facts as Pl. SOF; An Index of Exhibits is attached as Exhibit 1.

hold the title of major. The executive commanders supervise regional divisions, and within each regional division are troops and teams that are supervised by captains and lieutenants. Each troop has a certain number of state troopers primarily responsible for patrolling Kansas highways. **Ex. 3**, Jones Dep. at 42:20-43:10; **Ex. 4**, Lieutenant John Douglas Rule (J. Rule) Dep. at 16:4-12; **Ex. 5**, KHP Organizational Structure.

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

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

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

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

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

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

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

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

KHP's Policy Development and Creation

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

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

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

18. KHP trains its troopers on KHP policies, including new KHP policies. Depending on the policy, this means, disseminating the policy out to the troopers. KHP's troopers "have to

sign off” acknowledging “that they have read [the policy] . . .” **Ex. 3**, Jones Dep. at 34:2-35:8; *see infra* SOF ¶¶ 80-84.

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

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

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

KHP’s response to *Vasquez*

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

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

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

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

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

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

KHP's residence-based policies and customs

28. At all relevant times, KHP's written policy requires that "[a]ll enforcement actions will be accomplished in a firm, fair, impartial, and courteous manner," and that "**no distinction will be made between residents and nonresidents of the State of Kansas.**" **Ex. 2**, Enforcement Guidelines, P000267 (emphasis added).

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

30. KHP troopers and supervisors believe that coming to or from a "drug source state" such as Colorado could contribute to reasonable suspicion. **Ex. 3**, Jones Dep. at 201:9-14 (agreeing that it is permissible for KHP to consider the destination city or state in developing reasonable suspicion); (**Ex. 4**, J. Rule Dep. at 81:9-83:3 (testifying that he considers where a car is traveling from and to, and if they are traveling to or from a state that has "some form of legalized [marijuana]," that person should be considered suspicious); **Ex. 44**, Hogelin Dep. Vol. II at 36:7-17 (admitting that "destination" is an appropriate consideration to determine reasonable suspicion); **Ex. 8**, Schulte Dep. at 207:15-209:7 (testifying that coming from Oklahoma to Colorado

contributes to reasonable suspicion because Colorado is a “source state”); **Ex. 9**, Rohr Dep. at 53:12-24; 55:6-23; 56:1-18 (testifying that states “known for drugs to be trafficked to” help “form[] reasonable suspicion”).

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

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

Q: Okay, Well, in talking about destination, and I should have asked you a minute ago, do you ever consider the state or the city of destination in determining reasonable suspicion?

A: It can be a factor.

Q: So is that a yes?

A: Yes.

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

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

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

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

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

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

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

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

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

KHP’s “Two-Step” policy

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

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

43. In KHP training, troopers are instructed on the Two-Step and how to end an initial traffic-stop detention using it. They are trained to take a few steps towards the rear of the vehicle

(as if walking back to the trooper’s patrol car), and then turn to reengage the motorist by saying something like: “Hey, can I ask you a few more questions.” **Ex. 8**, Schulte Dep. at 156:3-159:21; **Ex. 16**, Transforming Temporary Detention into Consensual Encounter Training.

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

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

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

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

KHP’s Complaint Policy and the Professional Standards Unit

48. KHP’s complaint policy requires that when a person communicates to any KHP employees that they “desire to file a complaint of misconduct,” that employee must “courteously provide the person with: a. One of their current Patrol business cards or give the person their name, badge or identification number (if applicable) . . . [and] b. A current Complaint Procedures

pamphlet, or a brief, accurate summation of proper complaint procedures.” **Ex. 19**, Complaint Reporting and Administrative Investigations Policy (Complaint Policy).

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

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

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

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

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

54. Clark receives, reviews, and may make recommendations on findings for each PSU complaint; then a report on the complaint is sent on internally from the PSU, eventually making its way to the superintendent. **Ex. 20**, Clark Dep. at 73:11-21, 74:18-21, 75:9-15; **Ex. 19**, Complaint Policy, p.8.

55. From Jones’ perspective, after an investigation, the PSU report goes through the trooper’s “command staff” and to Jones, who testified, “then I will make the final say of what we

do with that.” He sees the results of every PSU investigation and “make[s] the final say” after receiving “recommendations from my command staff” about the level of discipline or corrective action for the involved trooper. **Ex. 3**, Jones Dep. at 161:1-162:18; 163:4-14.

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

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

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

...

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

...

- j. Employees who disregard agency policies, procedures, or directives.

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

59. If Jones finds a pattern of misconduct among his troopers, Jones looks “at the [trooper’s] supervisor to inquire or at least investigate why [the supervisor] is not holding [trooper]

accountable for their actions.” However, if there is a clear pattern of misconduct or policy violations that emerges, Jones agrees that such a situation is his responsibility, as superintendent.

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

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

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

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

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

64. Clark, as commander of the PSU, testified that the purpose for tracking complaint trends is to identify “training deficiencies,” if they “[a]re missing something in the academy,” “identify . . . an instructor issue,” and/or to determine if “there was not the proper things being taught.” If “anything significant” is found, it would be “address[ed] through the commanders . . .

through the executive command, through training.” **Ex. 20**, Clark Dep. at 97:21-98:9 and 98:23-99:5.

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

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

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

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

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

69. A KHP trooper pulled over a driver and his passenger on 1-70 for following a semi-tractor too closely, and for improper tag display. The driver alleged he was pulled over because he

had Colorado tags. The trooper provided warnings to the driver and passenger, told them to have a nice day, but then initiated the Two-Step. The trooper asked questions to determine if they had drugs, and they said they did not. The driver and passenger consented to be searched, which resulted in nothing. **Ex. 28**, July 21, 2017, Complaint at OAG031910, OAG031913-31915.

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

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

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

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

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

Defendant Jones' Response to Complaints

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

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

supervisors, and when asked how Jones provides supervision to those higher in the command structure, Jones answered that he does so only “through my executive staff.” *Id.* at 131:11-12.

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

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

Ex. 35, Aden Rep. at 19.

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

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

Id. at 20.

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

KHP Trooper Training and Instruction

80. The basic responsibility of a KHP “[trooper] is to know the law. If [a trooper] is not familiar with the basic elements of the law, it is difficult to enforce the law fairly and uniformly.”

Ex. 2, Enforcement Guidelines, P000267.

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

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

83. KHP primarily trains its troopers through instructor-led lectures accompanied by PowerPoint presentations. KHP also disseminates materials through Power DMS, KHP’s policy and e-learning platform, and other online and electronic platforms. **Ex. 3**, Jones Dep. at 33:25-35:8; **Ex. 12**, Washburn Dep. at 17:15-18:4.

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

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

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

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

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

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

89. Some KHP personnel did provide piecemeal instruction on *Vasquez*. On November 7, 2018, when Rohr was still a trooper, Rohr's supervising lieutenant sent Rohr and other KHP troopers an email that included a link to a Washburn Law Review article that discussed *Vasquez*. **Ex. 37**, Lieutenant Jason Edie's November 7, 2018, Email.

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

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

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

93. Although Schulte² has “heard about” *Vasquez*, he does not recall having any training about the case, he does not recall whether there has been a change in procedure regarding car stops or searches, he does not know about any retraining in response to *Vasquez*, and he does not recall attending a training that discussed *Vasquez*. **Ex. 8**, Schulte Dep. at 176:8-177:5.

94. McMillan³ understood that *Vasquez* “was an important decision for law enforcement” because “there were certain things that [KHP troopers] can’t hold people . . . to be considered reasonable suspicion.” Still, McMillan does not remember what those things are. **Ex. 10**, McMillan Dep. at 148:15-149:4.

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

Q: Did the practices of the troopers under your command change after *Vasquez* came down to your knowledge?

A: No.

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

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

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

² Schulte stopped the Shaw plaintiffs on December 20, 2017. *See infra*, SOF ¶ 129.

³ McMillan stopped plaintiff Bosire on February 8, 2019. *See infra*, SOF ¶¶ 162, 176.

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

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

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

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

KHP Targets Out-of-State Drivers

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

103. Dr. Mummolo reviewed traffic stop data that contained all KHP statewide stops between June 1, 2016, and August 3, 2021 (1,027,351 stops), which included the driver’s state of origin. The traffic data also included all KHP stops on interstates between January 1, 2019 and

May 31, 2021 (261,111 stops), which included the reason for the stops. **Ex. 39**, Mummulo Rep. at 35.

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

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

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

107. Dr. Mummolo found that 67.8% of KHP speeding stops involved out-of-state drivers, but only such drivers made up only 35% of the total interstate speeding traffic. Dr. Mummolo estimated that 88.3% of out-of-state drivers would need to be speeding, compared to 29.1% of in-state drivers, in the places and times Dr. Mummolo examined. This would require that

out-of-state drivers speed at roughly three times the rate of in-state drivers, representing an implausible gap in behavior. **Ex. 39**, Mummolo Rep. 6-7.

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

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

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

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

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

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

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

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

KHP's Incomplete Records Regarding Prolonged Detentions

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

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

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

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

119. KHP troopers currently are not required to fill out an incident narrative report documenting their reasonable suspicion to extend a traffic stop unless the extension results in a

seizure or an arrest. **Ex. 10**, McMillan Dep. 94:18-25; 95:1-4; 95:11-15; 103:11-25; 106:3-7; 107:1-25; 113:7-24.

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

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

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

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

123. Specifically, KHP has drafted a new Vehicle Detention Report Policy, FOR-44, to "provide a record of events that occur when a subject or subjects are detained on articulable reasonable suspicion or probable cause for the purpose of a canine sniff." The new policy will "allow[] supervisor[s] to monitor the legality of detentions, track the frequency of detentions, show training deficiencies, and improve transparency." **Ex. 12**, Washburn Dep. at 100:22-102:12; **Ex. 42**, Vehicle Detention Report Policy (FOR-44); *see also* **Ex. 3**, Jones Dep. at 153:5-23 (the new policy will require a narrative of the grounds for reasonable suspicion).

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

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

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

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

**Trooper Schulte’s Stop and Detention of Plaintiffs
Blaine Shaw (“B. Shaw”)⁴ and Samuel Shaw (“S. Shaw”)**

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

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

130. Schulte’s patrol vehicle had a dashboard camera. Recordings through a microphone on his uniform synchronized with the dashboard camera’s video. **Ex. 7**, Schulte Dep. at 197:19-

⁴ Blaine’s name is Elontah Blaine Franklin Shaw, but he goes by Blaine. **Ex. 45**, B. Shaw Dep. at 5:16-19.

198:4; 198:10-12; *see also* **Ex. 10**, McMillan Dep. at 92:1-5. Also, Schulte's activation of lights caused his dashboard camera to go back two minutes from the point of activation. *See* **Ex. 9**, Rohr Dep. at 78:18-79:1.

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

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

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

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

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

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

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

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

139. Schulte then asked B. Shaw several questions about the contents of his vehicle, and B. Shaw answered "No" to every question regarding drugs, illegal substances, and weapons posed by Schulte. Schulte asked if he could search the vehicle, and Blaine did not give his consent. **Ex. 46**, Schulte Dash Cam, Pt. 1, 15:14-15:42.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

157. B. Shaw and S. Shaw have been adversely affected by Schulte's stop. **Ex. 47**, S. Shaw Dep. at 24:2-26:2; **Ex. 51**, B. Shaw's Responses to Defendants Schulte's and McMillan's First Set of Interrogatories to B. Shaw; Interrogatory No. 11 (stating, "I have suffered emotional injuries as a result of my unlawful detention. I have also sustained a financial injury. Specifically, my luggage was destroyed during the unlawful search that resulted from my unlawful detention. Additionally, the anxiety I have experienced as a result of my unlawful detention has caused me to cease my work as an Uber driver for over a year from December 2017 to late February of 2019, and I have lost the primary source of my income as a result.") **Ex. 52**, S. Shaw's Responses to Defendants Schulte's and McMillan's First Set of Interrogatories to S. Shaw; Interrogatory No. 11 (stating, "I have experienced increased stress and distrust of the police since my detention."). After B. Shaw was stopped by KHP during his trip to Denver, he avoided driving through Kansas on his way home to Oklahoma City. **Ex. 45**, Blaine Shaw Dep. 56:24-57:12. In fact, he disliked driving altogether because he felt that "police were going to play by their own rules and that my stuff [is] just fair game any time." *Id.* at 89:10-14, 18-23 ("[W]hile driving, any time I would see police, get a knot in my stomach. Just feel anxious. Even though I am not doing anything wrong because I feel like I get forced to endure what I endured in the traffic stop of 2017.").

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

Trooper McMillan's Stop and Detention of Plaintiff Joshua Bosire

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

McMillan Stops Bosire on I-70

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Bosire's Complaint and KHP's Findings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

209. Bosire developed a distrust for law enforcement after the February 10, 2019 encounter. **Ex. 54**, Bosire Dep. at 71:7-12. Bosire has altered his travel plans because of KHP's targeting of out-of-state motorists. Mr. Bosire often uses rental cars, which may have out-of-state-plates, when drives to visit his daughter in Denver each month. *Id.* at 45:16-24, 47:24-48:2. He

now stays overnight in hotels rather than travel at night through Kansas, because he is “scared of what law enforcement people can do to me.” *Id.* at 120:11-13. Every time he travels to Denver, he feels the need to inform others about his whereabouts in case something happens to him. *Id.* at 120:19-23.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Rohr]: You are free to go.

[Rohr]: Okay, alright.

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

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

[Erich]: Why?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Statement of the Questions Presented

1. Does KHP have a practice, policy, or custom of violating drivers' Fourth Amendment rights by detaining them for canine sniffs without reasonable suspicion, by relying in part on drivers' travel to or from other states in combination with other innocent travel indicia? Does the KHP's Two-Step maneuver contribute to this practice, policy, or custom, resulting in prolonged detentions in the absence of reasonable suspicion?

2. Does KHP's practice, policy or custom of detaining drivers without reasonable suspicion violate drivers' right to travel through Kansas unimpeded and be treated as a welcome visitor?

IV. ARGUMENT AND AUTHORITIES

A. Summary Judgment Standard

Summary judgment is appropriate if “the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Rule 56 requires summary judgment “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” *United States ex rel. Smith v. Boeing Co.*, No. CIV A 05-1073-WEB, 2009 WL 2486338, at *2 (D. Kan. Aug. 13, 2009) (unreported). Once the movant has met this initial burden, the burden then shifts to the nonmoving party to “set forth specific facts showing that there is a genuine issue for trial.” *Britvic Soft Drinks Ltd. v. Acsis Tech., Inc.*, 265 F. Supp. 2d 1179, 1184 (D. Kan. 2003) (citing *Anderson*, 477 U.S. at 256). The nonmoving party cannot rest on its pleadings to satisfy its burden. *Id.*

B. The KHP engages in a practice, policy, or custom of violating motorists’ Fourth Amendment rights to be free from prolonged roadside detentions absent reasonable suspicion.

The Fourth Amendment to the United States Constitution protects the people from unreasonable searches and seizures by the government. U.S. CONST. AMEND. IV. As such, it prohibits the police from subjecting a person to a stop in the absence of individualized, objective, and articulable reasonable suspicion of criminal activity. The Amendment’s protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest. *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *Vasquez v. Lewis*, 834 F.3d 1132, 1136 (10th Cir. 2016). More specifically, the Constitution prohibits police from extending a traffic stop in order to question a driver about issues beyond the scope of the stop absent reasonable suspicion or consent. *United States v. Villa*, 589 F.3d 1334, 1339 (10th Cir. 2009); *United States v. Hunnicutt*, 135 F.3d 1345, 1349 (10th Cir. 1998). The Fourth Amendment also protects Plaintiffs from detentions for the

purpose of conducting a canine search absent reasonable suspicion. *Rodriguez v. United States*, 575 U.S. 348 (2015).

Plaintiffs bring these consolidated lawsuits against Defendant Jones in his official capacity as five individuals involved in three stops where KHP troopers subjected them to prolonged detentions without adequate reasonable suspicion.⁵ Because Plaintiffs intend to travel through Kansas again in the future, and because they face a meaningful risk of being stopped and detained by KHP troopers without reasonable suspicion again, in violation of their constitutional rights, Plaintiffs have standing to seek injunctive relief. Plaintiffs face this meaningful risk because, as set forth below, Defendant Jones endorses a practice, policy, or custom within KHP of detaining drivers beyond the end of traffic stops for the purposes of conducting a canine sniff, without reasonable suspicion, in violation of the Fourth Amendment. Because the uncontroverted evidence demonstrates that Defendant Jones ignores the Tenth Circuit's holding in *Vasquez*, permits troopers to detain individuals in part based on innocent travel plans, and is otherwise deliberately indifferent to KHP troopers' ongoing failures to follow the law, summary judgment is proper.

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

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

⁵ This is a suit brought against a state official in his official capacity for prospective relief only, which is an exception to the general principle that states are immune from suit pursuant to the Eleventh Amendment. *See Ex Parte Young*, 209 U.S. 123 (1908). Importantly, the Tenth Circuit has noted that the standard for *municipal liability* under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978), "has no applicability" to lawsuits brought pursuant to *Ex Parte Young*. *See Rounds v. Clements*, 495 Fed. App'x 938, 941 (10th Cir. 2012) (citing *Monell*, 436 U.S. at 694-95); *see also Spann v. Hannah*, 2020 U.S. App. LEXIS 28845, at *8 (6th Cir. Sept. 10, 2020) (citing *Rounds*, 495 Fed. App'x at 941); *Cain v. City of New Orleans*, 2017 U.S. Dist. LEXIS 15124, at *53 (E.D. La. Feb. 3, 2017) (same).

Article III standing is established when a plaintiff demonstrates “(1) an ‘injury in fact,’ (2) a sufficient ‘causal connection between the injury and the conduct complained of,’ and (3) a ‘likel[i]hood’ that the injury ‘will be redressed by a favorable decision.’” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014) (alteration in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). A plaintiff establishes standing to sue for injunctive relief by demonstrating a “realistic threat” that he will be wronged in a similar way in the future. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 109 (1983) (setting the standard that a plaintiff must make a “showing that he is realistically threatened by a repetition of his experience” in order to “meet the requirements for seeking an injunction in a federal court . . .”); *Harris v. Champion*, 51 F.3d 901, 907 (10th Cir. 1995) (abrogated on other grounds; citing the test from *Lyons*); *Tandy v. City of Wichita*, 380 F.3d 1277, 1284 (10th Cir. 2004) (the plaintiff “established that she is under a realistic threat of experiencing a” similar situation in the next year, “suffic[ing] to establish an injury in fact.”); *In re Motor Fuel Temperature Sales Practices Litig.*, 2012 WL 1672994, at *6 (D. Kan. May 14, 2012) (citing and applying the “realistic threat” standard cited in *Tandy*).

A future injury does not need to be certain to establish standing for prospective relief. In fact, “[e]ven a small probability of injury is sufficient to create a case or controversy” *Massachusetts v. EPA*, 549 U.S. 497, 525 n. 23 (2007) (emphasis added) (quoting *Vill. of Elk Grove Vill. v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993)). Courts have consistently found standing to sue for prospective relief against law enforcement profiling practices even where the statistical likelihood of the plaintiff being stopped again was unknown or low. *See Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 979 (D. Ariz. 2011) (finding plaintiffs had standing to challenge stop policy where “likelihood that any particular named Plaintiff will again be stopped in the same way may not be high.”); *Smith v. City of Chicago*, 143 F. Supp. 3d 741, 752 (N.D. Ill. 2015) (addressing standing and holding that “Plaintiffs have alleged ongoing constitutional violations pursuant to an

unconstitutional policy or practice in tandem with allegations . . . which lead[] to the reasonable inference of the likelihood that CPD officers will unlawfully stop and frisk Plaintiffs in the future.”); *Maryland State Conference of NAACP Branches v. Maryland Dep’t of State Police*, 72 F. Supp. 2d 560, 564 (D. Md. 1999) (distinguishing *Lyons*, because the plaintiffs had “allege[d] a pattern and practice of racially discriminatory stops, [and] ‘clearly . . . made a reasonable showing that there was a pattern and practice of stops by the Maryland State Police based upon race’ The *Lyons* complaint, on the other hand, did not assert that there was a pattern and practice”); *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (granting injunction to reform NYPD’s stop and frisk program, even though the total number of stops and frisks each year was small as compared to the total population of New York City).

Similarly, the fact that a plaintiff has only been subjected to the future harm they are seeking to enjoin once in the past does not undermine their standing to sue for prospective relief. *Aid for Women v. Foulston*, 441 F.3d 1101, 1110 (10th Cir. 2006) (finding plaintiffs alleged realistic threat of a future constitutional injury absent no previous enforcement); *Leadholm v. City of Commerce City*, No. 16-CV-02786-MEH, 2017 WL 1862313, at *8 (D. Colo. May 9, 2017) (one alleged occasion of excessive force during traffic stop was sufficient to establish standing against city); *Roe v. City of New York*, 151 F. Supp. 2d 495, 503 (S.D.N.Y. 2001) (“there is no per se rule requiring more than one past act . . . as a basis for finding a likelihood of future injury”); *Floyd v. City of New York*, 283 F.R.D. 153, 170 (S.D.N.Y. 2012) (“Even [a] single stop, in light of the tens of thousands of facially unlawful stops, would likely confer standing.”)

A remote future harm confers injunctive standing where the risk of injury would be reduced if the court granted the relief sought by the plaintiff. *See, e.g., Massachusetts*, 549 U.S. at 526 (2007) (finding standing for prospective relief where “[t]he risk of catastrophic harm, though remote, is nevertheless real” and “[t]hat risk would be reduced to some extent if petitioners

received the relief they seek”); *Baur v. Veneman*, 352 F.3d 625, 633 (2d Cir. 2003) (“threatened harm in the form of an increased risk of future injury may serve as injury-in-fact for Article III standing.”) Stated another way, the threat of harm is realistic where enjoining the defendant’s practice, policy, or custom will decrease the likelihood of the harm occurring.

Here, there is a risk each Plaintiff will be detained in the future. Pl. SOF ¶¶ 158, 211, 237. Even if the risk is low, the injunctive relief they have requested would reduce that risk. In particular, an injunction barring KHP’s practice, policy, or custom authorizing and directing troopers to unconstitutionally detain motorists would lower the probability that Plaintiffs will again be unlawfully detained during their travels to and from Colorado—and such a “reduc[ti]on to some extent” is sufficient to confer standing. *See Baur*, 352 F.3d at 633.

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

As discussed further below, the evidence in this case shows KHP engages in a practice, policy, or custom of violating motorists Fourth Amendment rights to be free from prolonged roadside detentions absent reasonable suspicion. KHP not only authorizes the unconstitutional conduct Plaintiffs challenge but actively trains its officers to engage in it. Because Plaintiffs are

precisely the class of traveler KHP’s practice, policy, or custom targets, they face a realistic threat of being stopped and detained during future trips to Colorado.

2. KHP impermissibly relies on innocent travel plans as a factor in the reasonable suspicion calculus.

In *Vasquez v. Lewis*, the Tenth Circuit held that “[i]t is time to abandon the pretense that state citizenship is a permissible basis upon which to justify the detention and search of out-of-state motorists.” *Vasquez v. Lewis*, 834 F.3d 1132, 1138 (10th Cir. 2016). In contravention of this clearly established law, the undisputed facts make clear that KHP maintains a practice, policy, or custom of relying on a motorist’s state of origin or destination in establishing reasonable suspicion.

Vasquez was unequivocal. Four years before the inception of this case and between one and three years before the stops at issue in this case occurred, the Tenth Circuit held that innocent-travel criteria such as state of origin or destination are “so broad as to be indicative of almost nothing,” 834 F.3d at 1137. Observing that it “cannot think of a scenario in which a combination of otherwise innocent factors becomes suspicious” because a driver happens to be coming from a state where marijuana is legal, the court ruled that continued reliance on these criteria is “impermissible” in almost all circumstances. *Id.* at 1138. The Tenth Circuit reaffirmed that holding in Defendants Schulte and McMillian’s appeal earlier in this case. *Shaw v. Schulte*, 36 F.4th 1006, 1015 (10th Cir. 2022) (destination and state of origin are factors with “minimal value”).

Yet there is ample evidence in the record that KHP continues to ignore the Tenth Circuit’s admonition that travel plans and/or out-of-state plates are constitutionally impermissible criteria to consider, even within the totality of the circumstances.⁶ Pl. SOF ¶¶ 22-27, 29-39, 65-74, 86-88,

⁶ Notably, the language in the *Vasquez* decision itself—“it is time to abandon” the practice of prolonging detentions based in part on travel plans—indicates the Tenth Circuit’s awareness of KHP’s longstanding custom of relying on these impermissible criteria in developing reasonable suspicion. *See Vasquez*, 834 F.3d at 1137. It stated, “Even under the totality of the circumstances, it is anachronistic to use state residence as a justification for the Officers’ reasonable suspicion.” *Vasquez*, 834 F.3d at 1138. KHP troopers seem to be under the mistaken belief that, so long as they offer other factors to justify the detention, their reliance on out-of-state plates or travel

91-99, 102-114, 128-238. Multiple KHP troopers and supervisors testified during depositions that coming to or from a “drug source state” such as Colorado could contribute to reasonable suspicion. Pl. SOF ¶ 30. Defendant Jones himself testified that this was permissible, as did Sarah Washburn, KHP’s legal counsel and lead trainer on legal issues surrounding interdiction. Pl. SOF ¶¶ 30, 38-39. Although *implausible* or *contradictory* travel plans can contribute to reasonable suspicion, *United States v. Pettit*, 785, F.3d 1374, 1381 (10th Cir. 2015), a driver’s state of origin or state of destination cannot, *Vasquez*, 834 F.3d at 1137. Troopers under Defendant Jones’ supervision and leadership ignore this distinction with impunity.

The findings of Plaintiffs’ expert, Dr. Jonathan Mummolo, provide significant further evidence that Defendant maintains a practice, policy, or custom of prolonging roadside detentions in part based on innocent-travel indicia. Pl. SOF ¶¶ 102-114. Dr. Mummolo’s analysis of KHP’s traffic stop data and canine sniff reports show that KHP has a pattern of targeting out-of-state drivers for traffic enforcement, and then subjecting them to prolonged detentions at a rate far higher than that of in-state motorists. Pl. SOF ¶¶ 102, 105-108, 110-111. Specifically, Dr. Mummolo conducted an analysis of KHP traffic stops and canine searches in certain locations along interstate highways (where KHP does the majority of its interdiction policing) and compared rates of out-of-state drivers for each of those categories to a dataset that examined the number of in- versus out-of-state motorists on the road in the same locations. Pl. SOF ¶¶ 103-104. Dr. Mummolo found that out-of-state drivers made up 65.9% of overall KHP stops, but only 22% of interstate traffic volume in the same area. Pl. SOF ¶ 105. According to Dr. Mummolo’s analysis, if KHP had an enforcement policy that was completely blind to whether a driver had in- or out-of-state license

destinations is permissible. But that is not what the Tenth Circuit has held; as this Court has already recognized, the *Vasquez* court “held that even when combined with other factors, a driver’s status as a Colorado resident does not give KHP troopers reasonable suspicion to subject the driver to prolonged detention and a vehicle search.” (Doc. #36 at 4).

plates, that policy would result in only 28.1% of the total number of out-of-state drivers stopped by KHP. Pl. SOF ¶ 105. In other words, normal traffic volume in the areas studied indicates that 71.9% of KHP's out-of-state stops cannot be explained by a policy that is neutral regarding its stops of in- versus out-of-state drivers. Pl. SOF ¶¶ 105-109.

Dr. Mummolo analyzed whether this disparity could be explained by differences in driving behaviors between in- and out-of-state drivers: if out-of-state drivers committed more speeding violations, that would offer a neutral reason why such drivers are subjected to more traffic stops. Pl. SOF ¶ 106. But, in the places and times examined, Dr. Mummolo found out-of-state drivers were overrepresented in speeding stops relative to their presence on the road. Although out-of-state drivers made up only 35% of the total interstate speeding traffic, they accounted for 67.8% of KHP speeding stops. Pl. SOF ¶ 107. If this was attributable to disparate speeding behavior among out-of-state drivers, Dr. Mummolo estimated that roughly 88.3% of out-of-state drivers would need to be speeding, compared to 29.1% of in-state drivers, in the places and times Dr. Mummolo examined. *Id.* This would require that out-of-state drivers speed at roughly three times the rate of in-state drivers, representing an implausible gap in behavior. *Id.* This disparity suggests that KHP has a practice, policy, or custom of targeting out-of-state drivers for traffic stops.

Importantly, when out-of-state drivers are stopped more frequently than in-state drivers relative to their share of the total traffic on Kansas highways, they are also subjected to canine sniffs at a higher rate. Pl. SOF ¶ 108. On the interstates where Dr. Mummolo could measure the overall prevalence of out-of-state drivers, 92.9% of the canine sniffs involved out-of-state drivers. Pl. SOF ¶ 108 (finding a statistically significant disparity between the number of out-of-state drivers subjected to detentions for canine sniffs, as compared to in state drivers; where out-of-state

drivers make up 76.6% of stops but 93% of canine searches).⁷ Dr. Mummolo’s analysis demonstrates that this level of disparity in who is subjected to a canine sniff is unlikely to be the result of practices, policies, or customs that are blind to a motorist’s state of origin. Pl. SOF ¶ 109 (“[T]his scenario—a canine-search policy that is blind to origin state after the initial decision to stop—cannot fully explain the disparities in canine searches.”). Instead, the disparities indicate that KHP regularly and systematically targets out-of-state drivers for stops and prolonged detentions in violation of the Fourth Amendment. Defendant has offered no evidence or expert testimony to rebut Dr. Mummolo’s study or its conclusions. *See, e.g., Rogers v. Colorado Dep’t of Corr.*, 2019 WL 4464036, at *16 (D. Colo. Sept. 18, 2019) (granting summary judgment on the plaintiffs’ Americans with Disabilities Act and Rehabilitation Act claims, partly because the government “present[ed] no expert evidence to rebut Plaintiffs’ expert opinions...”).

The canine reports that contributed to Dr. Mummolo’s analysis lay this bare, too. *See e.g.*, Exhibits cited in Pl. SOF ¶ 120. These reports include narrative sections completed by troopers that describe the reasons why a driver was detained for a canine sniff. Pl. SOF ¶ 116, 120. Many of these narrative sections list travel to/from a drug source state among the reasons a driver was suspicious enough to detain for a canine sniff, or simply list “suspicious travel plans” and the fact that the driver was from out-of-state, demonstrating that KHP maintains a practice, policy, or custom of relying on this impermissible criteria to justify detentions. Pl. SOF ¶¶ 102-112, 120. These reports are the only contemporaneous record created by KHP troopers of their reasons for detaining drivers, Pl. SOF ¶¶ 115-120, and therefore paint the most accurate picture of the types of criteria troopers rely on to justify such detentions. In addition, KHP is well-aware of the issues

⁷ KHP leadership instruct officers to engage in a volume practice, where they stop a high number of cars in order to increase their odds of being able to search cars and uncover drugs. As KHP’s Advanced Interdiction Training notes, “several stops are required to have any chance of making a seizure.” Pl. SOF ¶ 96, Ex. 24, Advanced Interdiction Training (2020), OAG 028817.

because it has received several complaints from out-of-state drivers about this practice. Pl. SOF ¶¶ 65-74. Despite the need to “abandon the pretense” that innocent-travel indicia are a permissible consideration, alone or in combination with other factors, *Vasquez*, 834 F.3d at 1138, Defendant’s own records demonstrate a continuing practice of relying on these impermissible indicia.

KHP’s training materials also support Plaintiffs’ claims. KHP trains its officers to ask about travel plans in the initial encounter for a traffic stop. Pl. SOF ¶¶ 86-87. In fact, Lieutenant Doug Rule instructs KHP troopers in his Domestic Highway Enforcement training that “where they [the driver] are coming from and where they are going to are the two most important questions” KHP troopers can ask. Pl. SOF ¶¶ 86-87; Ex. 36, Domestic Highway Enforcement Training, at 51. Lieutenant Rule’s training states that whether the driver is coming from a drug source area or going to a drug destination area are two questions that “are the basis of everything we do.” *Id.* Lieutenant Rule’s highway enforcement training, which is part of Defendant Jones’ practices, policies and customs as the head of the agency, demonstrates how KHP still places significant weight on travel plans when deciding whether or not to detain someone for a canine sniff.

The uncontroverted evidence in this case makes clear that Defendant Jones maintains a practice, policy, or custom of permitting—indeed, endorsing—troopers’ use of innocent travel plans to or from so-called “drug source states” as part of their totality of the circumstances analysis for reasonable suspicion. This violates the Fourth Amendment, entitling Plaintiffs to summary judgment.

3. The Two-Step is part of KHP’s practice, policy, or custom of detaining drivers for questioning absent reasonable suspicion in violation of the Fourth Amendment.

The KHP has a practice, policy, or custom of using the Two-Step maneuver to detain drivers without reasonable suspicion. Pl. SOF ¶¶ 41-42. The Two-Step creates an unequal power dynamic between the trooper and the driver in which drivers do not feel free to leave, or cannot

safely leave, once the traffic stop has concluded. Despite the fact that the KHP trains officers that the Two-Step terminates a traffic encounter and converts it to a consensual conversation, uncontroverted evidence demonstrates that this maneuver subjects individuals to detention without adequate reasonable suspicion and is an improper investigatory ploy that dangles liberty before a person when they, in fact are not free to leave, in violation of the Fourth Amendment.

The Kansas Court of Appeals has described the Two-Step as follows: “After telling [the driver] to have a safe trip,” the trooper “turned his body, took two steps toward his patrol vehicle, turned back around, and through [the car’s] still open passenger window, asked [the driver] if he would answer a few more questions. *State v. Gonzalez*, 455 P.3d 419, 423 (Kan. Ct. App. 2019); (Doc. #36 at 3.). KHP trains its troopers to use the Two-Step to attempt to gain consent to search a vehicle, or at the very least, to manufacture additional reasonable suspicion to hold the driver for a canine sniff.⁸ *See* Pl. SOF ¶¶ 46-47.

The Tenth Circuit has long recognized, “[a] detention for a traffic citation can turn into a consensual encounter after the trooper has returned the driver his documentation” **only** if “a reasonable person under the circumstances would believe he was free to leave or disregard the officer’s request for information.” *United States v. Wallace*, 429 F.3d 969, 974-75 (10th Cir. 2005) (quotation omitted); *see also United States v. Guerrero-Espinoza*, 462 F.3d 1302, 1308 (10th Cir. 2006) (no evidence that a reasonable person in the defendant’s circumstances would have felt free to leave, so continued detention for questioning was not consensual); *United States v. Bradford*, 423 F.3d 1149, 1158 (10th Cir. 2005) (“An unlawful detention occurs only when the driver has an objective reason to believe he or she is not free to end the conversation with the officer and proceed on his or her own way.”) (internal quotations omitted). Tenth Circuit

⁸ The Two-Step is also called the “Columbo Gambit.” *See* Pl. SOF ¶ 42. A “gambit” is a calculated move that . . . to earn an advantage later over one’s opponent. *See* “Gambit,” Oxford English Dictionary, https://www.oxfordlearnersdictionaries.com/us/definition/american_english/gambit.

precedent does not place any emphasis on whether or not there was physical contact between the officer and the car in determining whether an encounter was consensual. *State v. Gomez-Arzate*, 981 F.3d 832, 842 (10th Cir. 2020). Instead, the central question is whether the driver felt free to leave.⁹

Evidence in this case demonstrates that drivers subjected to the Two-Step do not feel free to leave, and, in many cases, are physically unable to reenter traffic without putting themselves or the trooper at risk. Pl. SOF ¶ 140. This was the case in Trooper Schulte’s stop of the Shaws. The Shaws did not free to leave once Trooper Schulte reapproached their car window. Pl. SOF ¶ 138-140. When Trooper Schulte sought to ask more questions, Blaine Shaw’s foot was still on the brake and his eyes had not left the ticket Schulte just handed him. Pl. SOF ¶¶ 137-138. Blaine could not have safely pulled out into traffic with Trooper Schulte standing directly next to them without injuring the Trooper. *See* Doc. #177-2, B. Shaw Aff., ¶ 15-16; *see also State v. Gonzalez*, 57 Kan. App. 2d 510, 517-18 (2019) (“[W]e find reasonable persons would not have known they could refuse to answer questions and leave the scene,” despite the detainee already driving forward, in part because he “could have concluded that leaving the scene would physically injure [the t]rooper[.]”).

Indeed, in many circumstances, reasonable motorists subjected to the Two-Step would feel they could not safely pull back into traffic after the maneuver has been employed. In such circumstances, questioning occurring after the Two-Step is not within the scope of a consensual encounter, and requires reasonable suspicion. The circumstances drivers face in many of these highway stops must be considered in determining whether such drivers would feel free to leave.

⁹ KHP training produced *after* the inception of this lawsuit seems to recognize this point. *See* Pl. SOF ¶¶ 45. Yet KHP still trains its officers to do the Two-Step, Pl. SOF ¶¶ 41-47, and Defendant offers no evidence demonstrating that objectively reasonable individuals subjected to the Two-Step would feel free to leave once re-approached for additional questioning.

See United States v. Mercado-Gracia, 989 F.3d 829, 836 (10th Cir 2021) (listing several non-exclusive factors used to evaluate whether an objectively reasonable person would feel free to leave or disregard the officer’s request for information, and noting that no single factor is dispositive; rather, courts look at the “coercive effect . . . taken as a whole on a reasonable person”); *see also United States v. Sandoval*, 29 F.3d 537, 544 (10th Cir. 1994) (“whether the driver was informed of his right to refuse consent or to proceed on his way” is an important factor); *United States v. Gomez-Azrate*, 981 F.3d 832, 842-43 (10th Cir. 2020) (reasonable driver would feel free to leave where deputies twice told driver he was free to go); *United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (although not required, express statement to defendant that she could decline consent was “especially significant”); *United States v. Little*, 60 F.3d 708, 711 (10th Cir. 1995) (“The test is objective and fact specific, examining what the police conduct would have communicated to a reasonable person based on all the circumstances surrounding the encounter.”). And while “a traffic stop may not be deemed consensual unless the driver’s documents have been returned . . . [t]he return of a driver’s documentation is not . . . always sufficient to demonstrate that an encounter has become consensual.” *United States v. Bradford*, 423 F.3d 1149, 1158 (10th Cir. 2005).

When motorists like the Shaws are subjected to the Two-Step, they are faced with a choice: answer the questions asked, or decline and attempt to merge back into highway traffic, with a uniformed, armed officer at their window who clearly wants them to remain and continue answering questions, and who has not told them that they are free to leave. In this way, Blaine Shaw and countless others subjected to the Two-Step are not engaged in consensual encounters with KHP.¹⁰ They are detained, prevented from “proceed[ing] on [their] way,” *Bradford*, 423

¹⁰ In the motion to suppress context, numerous courts in this district have found that a trooper’s use of the Two-Step does not necessarily result in a non-consensual encounter, but many—if not all—of these cases are distinguishable from the stops at issue in this case. *See, e.g., United States v. Lopez*, 2021-CR-40026, 2021 U.S.

F.3d at 1158, by virtue of the circumstances they are in. This is true even if there is no physical contact between the trooper and the driver’s car.

The Two-Step is essentially a ploy to buy the trooper time to find a reason to detain the driver. Pl. SOF ¶¶ 44-47. But often, the troopers do not care whether or not consent is given after they use the Two-Step: the consent given or declined is meaningless. KHP’s own training recognizes as much. Pl. SOF ¶ 46; Ex. 18, 4th Amendment “Reasonableness is the touchstone of the Fourth Amendment” Training (describing Two-Step as attempting to make the driver feel like they are free to go, “even if they are not.”). One trooper who trains other KHP troopers on criminal interdiction testified that he attempts the consensual encounter and asks for consent to search the car even when he already plans to detain the driver—that is, he asks for consent, but he is going to detain the driver regardless of whether consent is given. Pl. SOF ¶¶ 47. This is precisely what happened to Plaintiffs Erich and Maloney: when asked by Lieutenant Rohr if they would consent to answering additional questions, Mr. Erich asked if he could decline. Lieutenant Rohr said yes. Mr. Erich attempted to proceed on his way. Lieutenant Rohr then told him he was being detained. Pl. SOF ¶¶ 224-226.

Justice Rosen of the Supreme Court of Kansas has expressed misgivings about the Two-Step maneuver: “I write separately to express my doubt that the Fourth or Fifth Amendments to the United States Constitution permit law enforcement officers to dangle liberty in front of

Dist. LEXIS 219341, at *27-28 (D. Kan. Nov. 12, 2021) (defendant *voluntarily reengaged with the officer*, indicating encounter was consensual); *Gomez-Arzate*, 981 F.3d at 843 (driver asked if he was free to go and trooper said yes, twice, indicating the subsequent interaction was consensual); *United States v. Wallace*, 429 F.3d 969, 975 (10th Cir. 2005) (trooper told driver “that’s all I’ve got,” didn’t display weapon, didn’t touch driver, or use commanding tone of voice). Here, in the Shaws’ stop, Trooper Schulte did not expressly tell Blaine Shaw that he was free to leave, and the totality of the circumstances indicate that a reasonable person would not feel free to leave. This Court is not bound by a totality of the circumstances analysis conducted at independent criminal suppression hearings, with facts different from those in this case. In any event, Trooper Schulte did not have adequate reasonable suspicion to detain the Shaws *even after* he re-engaged them with additional questions, then still called out a canine unit, indicating that the Two-Step was just the first part of Schulte’s unlawful detention of the Shaws. Pl. SOF ¶¶ 130-144.

someone like a carrot in an attempt to secure justification for the violation of individual constitutional rights.” *State v. Schooler*, 308 Kan. 333, 356 (Kan. 2018) (J. Rosen concurring).

Continuing, Justice Rosen wrote:

“You are free to go,” or anything resembling it, is a special and significant declaration. It informs a person that his or her right to freedom is once again fully intact. When used as an investigatory ploy, it undermines the significance of the liberty interest it is intended to effectuate. This is especially true when the agent of the government entrusted with the power to detain is the one proclaiming the detention is no longer in force. . . . The specific technique of telling [the detainee] he was free to leave when he had no intention of letting [him] depart reeks of fraud or coercion.

Id. at 357. And, often, KHP troopers do not even go so far as to tell the driver directly that they are free to leave. Pl. SOF ¶¶ 117, 120, 136. Although such magic words are not required, the failure to inform drivers of their right to leave mitigates against finding that these encounters are truly consensual. *See United States v. Mendenhall*, 446 U.S. 544, 558 (1980).

KHP’s practice, policy, or custom of manipulating drivers and detaining them without reasonable suspicion using the Two-Step is a part of KHP training. Defendant Jones himself endorsed it. Pl. SOF ¶ 44, 13. Every day it is used on Kansas highways to contribute to ongoing violations of motorists’ constitutional rights to be free from detention absent reasonable suspicion.

4. Defendant Jones did and does not, ensure that KHP officers follow Vasquez.

As noted above, the Tenth Circuit held in *Vasquez* that detaining a driver because of their travel origin or destination and a combination of other facts consistent with innocent travel violates the Fourth Amendment. *Vasquez*, 834 F.3d at 1138. *Vasquez* was not just an influential case; it was an influential case *against two KHP troopers*. Despite the fact that *Vasquez* was directed at the KHP, the agency did not make any policy changes as a result of *Vasquez*, Pl. SOF ¶ 23, and did not incorporate *Vasquez* into KHP training until after this lawsuit was filed, Pl. SOF ¶ 27, further demonstrating an utter failure to abate the practice, policy, or custom of constitutional violations within KHP.

In fact, KHP's post-*Vasquez* training still instructs that state of residence of a driver is a proper consideration in determining reasonable suspicion, and remarkably, KHP trains that where a driver is coming from and where they are going to are *the two most important* questions in drug interdiction. Pl. SOF ¶ 86. KHP continues to train its troopers that certain travel origins and destination are an indicator of reasonable suspicion and to find certain travel origins and destinations to be indicative of criminal activity. Pl. SOF ¶¶ 97-99.

Testimony from KHP shows that troopers—and Defendant Jones himself—lack awareness and/or understanding of the law post-*Vasquez*. For example, some troopers do not remember receiving any training on *Vasquez*, and even troopers that admit knowing about the *Vasquez* case testified they do not recall *any* change in procedure regarding car stops and/or searches after *Vasquez*. Pl. SOF ¶¶ 92-93. The testimony indicates that KHP continues to labor under the mistaken impression that travel to or from a “drug source state” may be properly considered in the reasonable suspicion calculus so long as the trooper articulates other factors as well - even where those factors are also wholly consistent with innocent travel. Pl. SOF ¶¶ 91-100.

For these reasons, it is clear that Defendant Jones is deliberately indifferent to ensuring that troopers are following Tenth Circuit law regarding what may, and may not, be considered in forming reasonable suspicion. This failure to ensure troopers are aware of and following the law contributes to an ongoing practice, policy, or custom of constitutional violations that may be properly enjoined by the Court.

5. Defendant Jones fails to provide adequate supervision of employees, allowing constitutional violations to go unchecked and uncorrected

Jones fails to adequately supervise KHP leadership and troopers, fails to ensure that troopers follow recent case law interpreting the Fourth Amendment, and fails to take constitutional violations seriously when they are brought to his attention. All of this creates a practice, policy, or

custom of constitutional violations that Defendant Jones explicitly endorses and fails to correct as the leader of the KHP.

In his capacity as Superintendent of the Kansas Highway Patrol, Defendant Jones plays a key role in the ongoing constitutional violations at issue in this case. (Doc. #36 at 5)(“As Superintendent of the KHP, Herman Jones is the chief officer of the statewide police force. Accordingly, Jones has statutory authority to direct the conduct of KHP troopers, and his responsible for training guiding, and directing KHP troopers. Jones therefore has the authority to stop” the practices at issue in this case). Defendant Jones is responsible for signing off on agency policies and the discipline of officers. Pl. SOF ¶¶ 15-17, 55-56. Jones takes the lead in setting agency culture and vision, and holds responsibility for ensuring that troopers are following the law when interacting with the public. Pl. SOF ¶ 13. And Jones is ultimately responsible for ensuring officers follow the law. *Id.*

Yet Jones does not play an active role in managing his agency. When asked about data collection, Jones recognized the importance of it, but struggled to relay how data was collected or used to inform policing decisions within his agency, stating, “I don’t deal with that personally.” Pl. SOF ¶ 76. Jones instead pointed to others under his command, including the head of the Professional Standards Unit and the commander over certain geographic areas, as the individuals within KHP who concern themselves with identifying patterns of unconstitutional policing. Pl. SOF ¶¶ 51, 76.

In his role as commander of KHP’s Professional Standards Unit (PSU), Captain Mitchell Clark (Clark) reports directly to Superintendent Jones, and Jones testified that the purpose of the PSU is to ensure the agency is doing the right thing. Pl. SOF ¶¶ 50-51. When Clark testified as KHP’s designated witness on various topics related to the PSU, he was asked if “the KHP view[s] a constitutional violation as a minor rule violation.” Pl. SOF ¶ 57. The KHP’s official response

was, “I would like to believe that they don’t view that as minor.” *Id.* However, that KHP witness was “not aware” of anything but corrective action—versus discipline—having been assigned following a finding of a constitutional violation during his time in the PSU. *Id.*

If Jones finds a pattern of misconduct among his troopers, Jones looks “at the [trooper’s] supervisor to inquire or at least investigate why [the supervisor] is not holding [trooper] accountable for their actions.” However, if there is a clear pattern of misconduct or policy violations that emerges, Jones agrees that such a situation is his responsibility, as superintendent. Pl. SOF ¶ 59. To that end, Clark and the PSU are supposed to review complaint trends to determine training and academy deficiencies, and instructor issues, to see if “there was not the proper things being taught.” Pl. SOF ¶ 61. By policy, the PSU is to identify and annually report to KHP command identification of employees receiving a relatively high number of complaints. Pl. SOF ¶ 62-63. However, Clark’s report to KHP command did not follow this policy. *Id.* Even after the deficiency was pointed out in Clark’s deposition, the issue was not corrected in 2021. *Id.*

In addition, when Jones asked what he does to ensure *Vasquez* and cases of similar import are followed, Defendant Jones remarked, “that would be incumbent upon [the troopers’] supervisors.” Pl. SOF ¶¶ 59, 76. Even after being pushed to explain this further, Defendant Jones only spoke in vague terms, referencing blanket statements made at command staff meetings “that we should be holding our folks accountable to abiding by the laws of the state and the U.S.” or “maybe” sending out an email. Pl. SOF ¶ 76. The only mechanism Defendant Jones uses to supervise the actions of troopers is those troopers’ line supervisors, but the when pushed to describe how Jones himself provides supervision to those higher in the command structure, Jones answered that he does so only “through my executive staff.” Pl. SOF ¶ 76.

Plaintiffs’ expert, Chief Hassan Aden, opined that this type of hands-off leadership is inconsistent with best practices for policing and allows patterns of constitutional violations to

develop and go unaddressed.¹¹ “Superintendent Jones purports to be a seasoned and experienced law enforcement executive with a . . . deep understanding of the important role [training] plays in effectively managing a law enforcement agency. . . . Despite his expertise . . . Superintendent Jones has not taken steps to correct the rampant unlawful stops, detentions, and searches occurring at the hands of KHP troopers.” Pl. SOF ¶ 77. Chief Aden’s review of Defendant Jones’ deposition testimony made clear that Jones:

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

Pl. SOF ¶ 78. Chief Aden also opined that Defendant Jones “lacks awareness of the data generated by KHP’s activities,” which is “critical for holding commanders and line troopers accountable to the mission of the KHP and constitutional requirements.” *Id.* at 79. Finally, Chief Aden concluded that Jones “does not personally get involved in matters pertaining to legal standards and his organization’s compliance to those legal standards,” which overall contributes to a practice of constitutional violations continuing unabated. *Id.* at 79.

¹¹ District courts analyzing evidence in injunctive relief cases regarding unconstitutional stop and detention policies have likewise looked at the adequacy of leadership’s supervision of the rank-and-file for evidence of a policy or custom of unconstitutional policing. *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 561:

Much evidence was introduced regarding inadequate monitoring and supervision of unconstitutional stops. Supervisors routinely review the *productivity* of officers, but do not review the facts of a stop to determine whether it was legally warranted. Nor do supervisors ensure that an officer has made a proper record of a stop so that it can be reviewed for constitutionality. Deficiencies were also shown in the training of officers with respect to stop and frisk and in the disciplining of officers when they were found to have made a bad stop or frisk. Despite the mounting evidence that many bad stops were made, that officers failed to make adequate records of stops, and that discipline was spotty or non-existent, little has been done to improve the situation.

Two examples provide clear evidence of Defendant Jones’ deliberate indifference to constitutional violations occurring within his department and his failure to properly supervise KHP troopers and command staff. First, when the PSU determined that Trooper McMillan violated Mr. Bosire’s constitutional rights, Defendant Jones signed off on the “discipline” imposed, which included a remedial class (in which Trooper McMillan admittedly learned nothing that changed his policing practices) and a single “ride along” with a Field Training Officer. Pl. SOF ¶¶ 55, 56, 204, 207-208. According to the KHP policy, this was not even “discipline,” but rather, “corrective action,” despite a finding that Trooper McMillian violated a motorist’s constitutional rights. As Chief Aden noted, this was an “insufficient consequence” and demonstrates Defendant Jones’ overall failure to take the holdings of *Vasquez* seriously. Pl. SOF ¶¶ 57-58, 206.

Similarly, testimony from Lieutenant Rohr—who was promoted post-*Vasquez* and now oversees a troop of highway interdiction troopers—demonstrates that supervisors under Jones’ leadership do not feel it is necessary to take corrective action against troopers who violate the constitution. When asked what Lieutenant Rohr does to supervise his troopers and whether he reviews canine reports, Trooper Rohr noted that he generally reviews such reports for grammar and spelling mistakes. Pl. SOF ¶ 116. To Chief Aden, this demonstrated a clear failure in Jones’ system of supervision that allows constitutional violations to go unchecked. Pl. SOF ¶ 79.¹²

¹² Indeed, as the U.S. Department of Justice has repeatedly noted, the failure of supervisors to review reports and ensure that policing activities are compliant with the constitution can be indicative of a broader pattern or practice of constitutional violations. *See generally* U.S. Dep’t. of Just. C.R. Div. & U.S. Atty’s Off. Dist. of N.M., *Findings Letter on Investigation of the Albuquerque Police Department* (Apr. 10, 2014) at 4, https://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf (“We found only a few instances in the incidents we reviewed where supervisors scrutinized officers’” reports, and “In nearly all cases, supervisors endorsed officers’ version of events, even when officers’ accounts were incomplete, were inconsistent with other evidence, or were based on canned or repetitive language.”); U.S. Dep’t. of Just. C.R. Div. & U.S. Atty’s Off. N. Dist. of Ill., *Findings Letter on Investigation of the Chicago Police Department* (Jan 13, 2017) at 41, <https://www.justice.gov/opa/file/925846/download> (“The failure to ensure the accurate reporting, review, and investigation of officers’ use of force has helped create a culture in which officers expect to use force and never be carefully scrutinized about the propriety of that use.”); U.S. Dep’t. of Just. C.R. Div. & U.S. Atty’s Off. N. Dist. Ohio, *Findings Letter on Investigation of the Cleveland Division of Police* (Dec. 4, 2014) at 29-30, <https://www.justice.gov/sites/default/files/opa/>

Taken together, even resolving all inferences and disputes in the light most favorable to Defendants, Plaintiffs have clearly met their burden of demonstrating that oversight and supervision failures at the top—by Defendant Jones—results in deliberate indifference and a practice, policy, or custom of unconstitutional detentions. The *Vasquez* decision put Jones on notice about the constitutional implications of the Two-Step and detaining drivers without adequate reasonable suspicion. Rather than step up and ensure his agency changed their ways to comply with the constitution, Jones maintained his hands-off approach. This is enough to demonstrate his liability in this action for prospective relief.

6. The practice, policy, or custom of detaining vehicles without adequate reasonable suspicion is likely much more widespread than revealed in discovery.

While Plaintiffs have more than sufficiently shown KHP’s unconstitutional practice, policy, or custom of violating motorists Fourth Amendment rights to be free from prolonged roadside detentions absent reasonable suspicion, KHP’s own data systems and report policies prevent this Court from knowing just how widespread the practice truly is. KHP’s antiquated technology systems, combined with their practice of sweeping unconstitutional detentions under the rug by not documenting reasonable suspicion in the vast majority of detentions, has hindered Plaintiffs’ ability to discovery the depth and breadth of KHP’s unconstitutional actions.

Throughout discovery in this case, the KHP took the position that its record management system was not searchable. *See e.g.*, Docs. 104, 135. From there, the KHP argued that, while it had documents, the documents were not reasonably accessible because they were not searchable. *Id.* Specifically, Plaintiffs requested documents recording any stop initiated by a KHP trooper where

press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf (“Officers . . . [do] not describe with sufficient particularity the type of force they used. [...] This language does not adequately describe the level and type of force used for a supervisor to review and ensure that the force was within constitutional limits. [...] These shortcomings in CDP’s policies inhibit supervisors’ ability to review force and ensure that it is within constitutional limits.”).

the driver was detained for a drug dog search; documents recording any detention where a driver's license plate was used as a factor to justify reasonable suspicion; documents recording any detention where a driver's travel origin or destination was used as a factor to justify reasonable suspicion; and documents entered into Kansas Law Enforcement Reports and all reports in the record management system that reference a drug dog sniff search. *Id.* Defendants consistently argued that collection would be time consuming and that identification of factors showing reasonable suspicion is too case specific to locate documents regarding the same. *Id.* As a result, Plaintiffs maintain that there are likely many more documentary records that support their claims in this case. *See Floyd*, 959 F. Supp. 2d at 583 (granting injunction against NYPD's stop and frisk policies, and noting that "[t]he problems with [the expert's] Fourth Amendment analysis of [NYPD's stop and frisk reports] result not from analytical failures but from the inadequacy of the NYPD's systems for identifying unjustified stops when they occur. As a result, the magnitude of Fourth Amendment violations that have taken place in this case — beyond the rough minimum indicated by [the expert's] statistics — will almost certainly never be known.").

Moreover, KHP's documentation policies further suggest that the practice may be more widespread than we know. Per current, long-standing policy, troopers are not required to fill out any documentation of their reasons for detaining a motorist—including the factors that contributed to reasonable suspicion—unless the detention results in a seizure or an arrest. Pl. SOF ¶ 119.¹³ Canine handlers must fill out a canine report for each canine sniff, but those reports frequently do

¹³ Since this lawsuit has been pending, KHP approved a new policy: FOR-44, form HP 141. Pl. SOF ¶¶ 122-124. While it was "approved" in January of 2022, it has yet to be implemented, and troopers do not have access to it. Pl. SOF ¶¶ 122-124. However, even if it is eventually implemented, it is insufficient. *See generally* U.S. Dep't. of Just. C.R. Div. & U.S. Atty's Off. Dist. of N.M., *Findings Letter on Investigation of the Albuquerque Police Department* (Apr. 10, 2014) at 4, https://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf ("In nearly all cases, supervisors endorsed officers' version of events, even when officers' accounts were incomplete, were inconsistent with other evidence, *or were based on canned or repetitive language.*") (emphasis added).

not contain any explanation of the reasons the trooper called out the canine unit. Pl. SOF ¶ 120. In fact, in the stops at issue in this case, the trooper who initiated the stop and prolonged the detention for a canine sniff did not document their reasons for doing so until a Plaintiff filed a complaint with the Professional Standards Unit, or filed the instant lawsuit. The fact that there is no contemporaneous account of the factors justifying a detention indicates two significant problems. First, it prevents KHP supervisors from doing any internal review or oversight to ensure detentions made by troopers are constitutional. *See supra*, IV.B.5, Pl. SOF ¶ 79. Second, it prevents Plaintiffs from demonstrating just how pervasive KHP’s unconstitutional conduct may be. *See Floyd*, 959 F. Supp. 2d at 559 (describing how NYPD’s stop and frisk reports “skew toward underestimating the number of unconstitutional stops that occur” because officers did not need to prepare reports for every stop they make, and the form includes only a series of check boxes rather than “requiring the officer to explain the basis for her suspicion,” indicating that “the actual number of stops lacking reasonable suspicion was likely far higher.”).

C. KHP’s practice of subjecting out-of-state drivers to prolonged roadside detentions, without adequate reasonable suspicion, interferes with Plaintiffs’ constitutional right to interstate travel.

For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

Smith v. Turner, 48 U.S. 283, 492 (1849).

[Both] the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.

Shapiro v. Thompson, 394 U.S. 618, 629 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974).

“The ‘right to travel’ . . . embraces at least three different components. It protects [1] the right of a citizen of one State to enter and to leave another State, [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, [3] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.” *Saenz v. Roe*, 526 U.S. 489, 500 (1999); accord *Peterson v. Martinez*, 707 F.3d 1197, 1212–13 (10th Cir. 2013). Here, the undisputed facts show that KHP has a practice of targeting drivers with out-of-state license plates and other innocent travel indicia for prolonged roadside detentions that are not supported by reasonable suspicion, violating the first and second components of the right to travel.

1. KHP’s practice of targeting out-of-state drivers for prolonged roadside detentions impairs the right to enter and leave a state.

The first component protects the “right of a citizen of one State to enter and to leave another State.” *Saenz*, 526 U.S. at 500. The right to free interstate movement was “conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created” and is “inferred from the federal structure of government adopted by our Constitution. *Id.* at 501. *See also United States v. Guest*, 383 U.S. 745, 757 (1966) (“The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.”) (emphasis added).

A “law implicates the right to travel when,” among other things, “it actually deters such travel.” *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986). For instance, in *Crandall v. Nevada*, 73 U.S. 35 (1867), the Supreme Court struck down a Nevada law that imposed a head tax on each passenger of any commercial vehicle leaving or passing through the state, holding that the tax unjustifiably burdened interstate travel. *See id.* at 44-47. Here, KHP’s practice of targeting out-of-state drivers for prolonged roadside detentions violates this component of the

right to travel because it “directly and substantially impair[s] the exercise of the right to free interstate movement.” *Abdi v. Wray*, 942 F.3d 1019, 1030 (10th Cir. 2019) (citing *Saenz*, 526 U.S. at 501) (internal quotations omitted).

First, the undisputed facts establish that the KHP disproportionately subjects out-of-state drivers to prolonged roadside detentions. As discussed above, Dr. Mummolo’s expert report analyzing KHP’s traffic stop data and canine sniff reports demonstrates that KHP has a pattern of targeting out-of-state drivers for traffic enforcement, and then subjecting them to prolonged detentions at a rate far higher than that of in-state drivers. *See supra*, IV.B.2; Pl. SOF ¶¶ 102, 108. Dr. Mummolo’s review of KHP traffic stops and canine searches in certain locations along interstate highways shows that out-of-state drivers made up 65.9% of overall KHP stops at those locations, but only 22% of interstate traffic volume in the same areas. *Id.*, Pl. SOF ¶ 105. Dr. Mummolo found that the “overrepresentation of out-of-state drivers in KHP stops cannot be explained even after using available data to adjust for differential driver behavior in different places and times.” *Id.*, Pl. SOF ¶¶ 106-109 .

Even if KHP treated in- and out-of-state drivers the same once a stop has occurred, KHP’s targeting of out-of-state drivers for stops leads to a dramatic overrepresentation of out-of-state drivers in prolonged detentions. In fact, Dr. Mummolo’s analysis shows that KHP disproportionately subjects stopped out-of-state drivers to canine sniff relative to stopped in-state drivers. Pl. SOF ¶ 108. On interstates where Dr. Mummolo could measure the prevalence of out-of-state drivers, 92.9% of the canine sniffs involved out-of-state drivers. Pl. SOF ¶ 108 (Mummolo found a statistically significant disparity between the number of out-of-state drivers subjected to detentions for canine sniffs, as compared to in-state drivers; where out-of-state drivers make up 76.6% of stops over the covered time period but 93% of canine searches). Dr. Mummolo found that “a canine-search policy that is blind to origin state after the initial decision to stop—cannot

fully explain the disparities in canine searches.” Pl. SOF ¶ 109. Furthermore, as noted above, many of the narratives contained in the canine reports expressly identified travel to/from a drug source state among the reasons a driver was suspicious enough to detain for a canine sniff. Pl. SOF ¶ 120.

This evidence provides strong, un rebutted support for the conclusion that KHP has a practice of targeting out-of-state drivers for prolonged detention in violation of the constitutional right to interstate travel. As Plaintiffs’ own experiences demonstrate, many of these prolonged detentions are not supported by reasonable suspicion and some of them last for well over an hour, even in winter. Pl. SOF ¶¶ 129, 155, 160, 214, 228 (in the Shaws stop, over an hour elapsed between when they were pulled over on December 20, 2017, and the completion of the search of the vehicle; Erich and Maloney forced to stand outside their vehicle for long period of time; Bosire stood on side of the highway at night in the winter during the canine sniff).

The prolonged detention—rather than the traffic stop itself—is the crux of Plaintiffs’ constitutional right to travel claim. Although other courts have held that traffic stops alone cannot support a right to travel claim, the nature of his case is different than that of mere traffic stops. Here, KHP systematically targets out-of-state motorists for stops *and prolongs those stops* to conduct unconstitutional canine sniffs. Pl. SOF ¶¶ 102-114. In many instances, out-of-state drivers must wait long periods for the canine unit to arrive, thereby delaying their travel and subjecting them to differently treatment from their in-state counterparts. The claims in this case are therefore distinguishable from cases where the right to travel claim was predicated on a traffic stop alone. *Cf. State v. Chettero*, 297 P.3d 582, 586 n.2 (Utah 2013) (noting that case law “limits the reach” of the first component of the right to travel to “impediments beyond the mere threat of a traffic stop for a violation of the traffic laws”) (citing *Maryland State Conference of NAACP Branches v. Maryland Dep’t of State Police*, 72 F.Supp.2d 560, 568–69 (D.Md.1999)); *United States v. Lindsey*, 2004 WL 1846123, at *5 (D. Kan. May 6, 2004) (“Even if an officer focuses on out-of-

state plates, the existence of a traffic violation justifies a traffic stop without violating the driver's right to travel.") (quoting *United States v. Hare*, 2004 WL 609289 at * 37 (D.Neb.2004)).

In addition to directly impeding interstate travel, KHP's practice of targeting out-of-state drivers for arbitrary—and often unjustified—prolonged roadside detentions causes significant fear and anxiety that substantially impairs the right to travel through Kansas. For example, after Blaine Shaw was stopped by KHP during his trip to Denver, he avoided driving through Kansas on his way home to Oklahoma City. Pl. SOF ¶ 157. In fact, he disliked driving altogether because he felt that “police were going to play by their own rules and that my stuff [is] just fair game any time.” *Id.* (“[W]hile driving, any time I would see police, get a knot in my stomach. Just feel anxious. Even though I am not doing anything wrong because I feel like I get forced to endure what I endured in the traffic stop of 2017.”). Similarly, Mr. Bosire has altered his travel plans because of KHP's targeting of out-of-state motorists. Mr. Bosire often uses rental cars, which may have out-of-state-plates, when drives to visit his daughter in Denver each month. Pl. SOF ¶ 209. He now stays overnight in hotels rather than travel at night through Kansas, because he is “scared of what law enforcement people can do to me.” *Id.* Every time he travels to Denver, he feels the need to inform others about his whereabouts in case something happens to him. *Id.* In addition, while Erich and Maloney have traveled to Colorado a few times since the March 2018 incident, if time permits, they will travel around Kansas because they do not feel safe driving through Kansas anymore. Pl. SOF ¶ 237-238. These are not unusual responses to prolonged and unjustified roadside detentions by law enforcement, and they impair motorists' right to travel freely through the state, in violation of the Constitution.¹⁴

¹⁴ Indeed, as Americans have become increasingly aware about instances where law enforcement officers have deployed excessive, sometimes lethal, force against civilians, a policy or custom of targeting out-of-state motorists for prolonged roadside detentions will undoubtedly deter many motorists from traveling through our state—especially motorists from communities of color, like the Shaws and Mr. Bosire.

KHP's practice of subjecting out-of-state drivers to prolonged roadside detentions is unreasonable, and therefore unjustified. *See Abdi*, 942 F.3d at 1029. As the Tenth Circuit held in *Vasquez*, "[i]t is time to abandon the pretense that state citizenship is a permissible basis upon which to justify the detention and search of out-of-state motorists." 834 F.3d at 1138. The Tenth Circuit reaffirmed that holding in this case when it concluded that destination and state of origin are of "minimal value" in establishing reasonable suspicion to justify a prolonged detention. *Shaw*, 36 F.4th at 1014. Defendant Jones has not identified any other rationale that could justify the discriminatory targeting of out-of-state drivers for prolonged roadside detentions.

2. KHP's practice of targeting out-of-state drivers for prolonged roadside detentions violates the right to be treated as a welcome visitor.

Defendant Jones' practice of targeting out-of-state drivers for prolonged roadside detentions also violates the second component of the right to travel, which protects "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State." *Saenz*, 526 U.S. at 500. The right to be treated as welcome visitor is expressly protected by the Privileges and Immunities Clause of Article IV, § 2 of the Constitution. *Id.* The Supreme Court has established a two-part test for determining whether a state's discrimination against out-of-state residents violates the Privileges and Immunities Clause. First, the reviewing court must determine whether the regulated activity is "sufficiently basic to the livelihood of the Nation . . . as to fall within the purview of the Privileges and Immunities Clause." *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64 (1988); *Baldwin v. Fish & Game Commission*, 436 U.S. 371, 388 (1978) (central question in a claim under the privileges and immunities clause is whether the right at issue is "basic to the maintenance or well-being of the Union."). If so, the state must demonstrate that its discrimination against out-of-state residents is "closely related to the advancement of a substantial state interest." *Friedman*, 487 U.S. at 65.

The right to move about without fear of being subjected to arbitrary or unjustified prolonged detentions by law enforcement is essential to the maintenance or well-being of the Union, and is therefore protected under the Privileges and Immunities Clause. “Freedom of movement is basic in our scheme of values,” *Kent v. Dulles*, 357 U.S. 116, 126 (1958), and deeply etched in our law. Blackstone wrote that “[p]ersonal liberty consists in the power of locomotion, of changing situation, or removing one’s person to whatever place one’s own inclination may direct, without restraint, unless by due course of law.” 1 W. Blackstone, *Commentaries on the Laws of England* 130 (1765). “As early as the Articles of Confederation, state citizens “possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom.” *Johnson v. City of Cincinnati*, 310 F.3d 484, 497 (6th Cir. 2002) (quoting *United States v. Wheeler*, 254 U.S. 281, 293 (1920)). And the Supreme Court has long recognized that “the right to remove from one place to another according to inclination, is an attribute of . . . liberty . . . secured by the Fourteenth Amendment and by other provisions of the Constitution.” *William v. Fears*, 179 U.S. 270, 274 (1900); accord *City of Chicago v. Morales*, 572 U.S. 41, 54 (1999) (plurality opinion). See also *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

Freedom of movement is also essential to everyday life. “The right to travel locally through public spaces and roadways—perhaps more than any other right secured by substantive due process—is an everyday right, a right we depend on to carry out our daily life activities. It is, at its core, a right of function.” *Johnson*, 310 F.3d at 498. It “is important for job and business opportunities—for cultural, political, and social activities—for all the commingling which gregarious man enjoys.” *Aptheker v. Sec’y of State*, 378 U.S. 500, 519–20 (1964) (Douglas, J., concurring).

In addition to directly infringing the right to move about freely, KHP’s practice of targeting out-of-state drivers for prolonged detentions causes significant fear and anxiety that further impair this fundamental freedom. Pl. SOF ¶¶ 157, 209, 237. Plaintiffs and those similarly situated are restricted in their right to move from one place to another in Kansas—doing so currently subjects them to a risk of experiencing violations of their constitutional rights, due to Defendant Jones’ practice, policy, or custom of targeting out-of-state motorists for prolonged detentions without reasonable suspicion.

As a matter of law, Defendant Jones cannot show that KHP’s practice of targeting out-of-state drivers is “closely related to the advancement of a substantial government interest.” *Friedman*, 487 U.S. at 65. *Vasquez* already concluded that out-of-state residency is an “impermissible” basis for justifying a prolonged detention in almost all circumstances. 834 F.3d at 1138; *accord Shaw*, 36 F.4th at 1014. Although the Tenth Circuit reached that decision in a Fourth Amendment case, its holding applies with equal force to Plaintiffs’ claims under the first and second components of the right to travel.

V. CONCLUSION

The undisputed facts show that Defendant Jones engages in a practice, policy, or custom of detaining drivers without adequate reasonable suspicion in violation of their Fourth and Fourteenth Amendment rights. For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for summary judgment on their claims for injunctive and declaratory relief against Defendant Jones.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of September, 2022, a copy of the foregoing was filed and served via the Court's electronic filing system on all counsel of record. Exhibits to the statement of facts were all served electronically to counsel for Defendant Jones at Art.Chalmers@ag.ks.gov.

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