Case No. 21-3130 & 21-3131

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BLAINE FRANKLIN SHAW, SAMUEL SHAW, and JOSHUA BOSIRE, *Plaintiffs-Appellees,* v. HERMAN JONES in his official capacity as the Superintendent of the Kansas Highway Patrol, MASTER TROOPER DOUG SCHULTE in his individual capacity, and TECHNICAL TROOPER BRANDON MCMILLAN in his individual capacity, *Defendants-Appellants.*	

On Appeal from the United States District Court
for the District of Kansas

The Honorable Kathryn H. Vratil, United States District Court Judge
Case No. 6:19-CV-01343-KHV-GEB (D. Kan.)

RESPONSE BRIEF OF PLAINTIFFS-APPELLEES

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KHP……..	Kansas Highway Patrol

STATEMENT OF RELATED CASES

There are no related cases or appeals.

JURSIDICTIONAL STATEMENT

The Court lacks jurisdiction to entertain this interlocutory appeal, as the District Court denied qualified immunity to the Defendant Troopers due to genuine issues of material fact. Denials of qualified immunity due to factual disputes and inconsistencies are not "final orders" capable of review on interlocutory appeal under 28 U.S.C. § 1291. *Johnson v. Jones*, 515 U.S. 304 (1995).

STATEMENT OF THE ISSUES

There are three issues for this Court to consider in this appeal:

1. A district court's determination that the summary judgment record raised genuine issues of fact concerning the applicability of qualified immunity is not an appealable "final decision" within this Court's jurisdiction under 28 U.S.C. § 1291. Here, the District Court denied summary judgment because there were genuine issues of material fact that prevented summary judgment based on qualified immunity. Are these orders appealable?

2. Qualified immunity is appropriate where there is no constitutional violation, or the constitutional violation was not clearly established. When considering qualified immunity at the summary judgment stage, a court can only find qualified immunity applicable if there are no disputed questions of material, historical fact. Here, there are disputed questions of material, historical facts. Do these material factual disputes preclude summary judgment based on qualified immunity?

3. Troopers cannot use out-of-state travel plans or license plates as a basis upon which to justify prolonged detentions and searches. Doing so would preclude qualified immunity. Trooper McMillan relied on Mr. Bosire's suspected travel plans in deciding to prolong his traffic stop for a canine search. Trooper Schulte relied on the Shaws' travel destination in deciding to prolong their traffic stop for a canine

search. Are Defendant Troopers entitled to qualified immunity where they relied on travel plans when deciding to prolong traffic stops for a canine search?

STATEMENT OF THE CASE

This is an action for damages pursuant to 42 U.S.C. § 1983 against two Kansas Highway Patrol (KHP) troopers, Trooper McMillan and Trooper Schulte (Defendant Troopers). There is also a claim against the KHP's Superintendent, Colonel Herman Jones, for injunctive and declaratory relief. The claims stem from two traffic stops: one involving Plaintiff Joshua Bosire and the other involving Plaintiffs Blaine and Samuel Shaw (the Shaws). Mr. Bosire and the Shaws allege that Defendant Troopers subjected them to a prolonged detention following a traffic stop without adequate reasonable suspicion in violation of the Fourth Amendment. *Rodriguez v. United States,* 135 S. Ct. 1609, 1614-15 (2015); *Illinois v. Caballes*, 543 U.S. 405, 406-09 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.").

Mr. Bosire and the Shaws also allege that Defendant Troopers impermissibly relied on the Plaintiffs' Colorado travel plans in justifying reasonable suspicion. Doing so violates clearly established Tenth Circuit and Kansas Supreme Court precedent. *Vasquez v. Lewis*, 834 F.3d 1132, 1138 (10th Cir. 2016) ("Absent a demonstrated extraordinary circumstance, the continued use of state residency as a justification for the fact of or continuation of a stop is impermissible."); *United States v. Guerrero*, 472 F.3d 784, 787-788 (10th Cir. 2007) ("The fact that the

defendants were traveling from a drug source city—or . . . a drug source state—does little to add to the overall calculus of suspicion."); *State v. Jimenez*, 308 Kan. 315, 326-330 (2018) (travel plan questioning only acceptable if they do not prolong detentions or related to the mission of the stop); *State v. Lowery*, 308 Kan. 359, 369 (2018) (finding a Colorado travel destination did not support officer's reasonable suspicion). Defendant Troopers knew or reasonably should have known that their conduct was unlawful.

Mr. Bosire's Stop

Mr. Bosire regularly travels to visit his daughter who lives in Denver, Colorado. Aplt. App., 3, 156. When he drives to Colorado in the winter, he rents a car because his personal car does not have good snow traction. *Id.* He was returning home from visiting his daughter when Trooper McMillian stopped him on February 10, 2019. *Id.* at 156-157.[1] He was driving a rental car with Missouri license plates. *Id.* at 148.

Shortly before Trooper McMillan pulled him over, Mr. Bosire had been at a Love's Travel Stops and Country Store (Love's) in Ellis, Kansas. *Id*. at 157. While there, Mr. Bosire had problems with his pump and spoke to an attendant for

[1] Mr. Bosire asserted additional material facts in his summary judgment response brief. Aplt. App., 3, 156-160. Defendant Troopers did not timely respond and have no response in the record. Mr. Bosire's additional material facts can be considered undisputed for purposes of summary judgment. Fed. R. Civ. P. 56(e).

assistance. *Id.* In Trooper McMillan's written account of the stop, he described his observations at Love's while on a break with Trooper Schulte: "[a]s we were walking towards the doors, there was a group of several people walking inside the shop. . . . We waited by the doors until we could exit. As the individuals entered the store, I smelled the odor of marijuana emitting from one or more of them as they walked by Master Trooper Schulte and I." *Id*. at 157.

Trooper McMillian later testified there was no group of people walking past the Defendant Troopers as they exited. *Id*. at 158. Nonetheless, in his affidavit, Trooper McMillan claims that after exiting the Love's gas station, he "noticed two men (one black and the other white) standing and talking" by a blue Altima. "[N]ot knowing if either man was one of the people [he] associated with the marijuana smell," he "believed that one or both could have been." Aplt. App., 2, 171. He further claimed he thought the Altima might have been a rental car with a speed detector on the front windshield. *Id*.

As Trooper McMillan left Love's, he decided to run the license plate of the Altima and learned it was registered to EAN Holdings. *Id*. Also, while leaving Love's, Trooper McMillan claims, he "saw a silver Dodge Charger, which appeared to be a rental vehicle, driving west on a street just north of the [Love's] parking lot, apparently toward" Interstate 70 (I-70)'s entrance ramps. *Id.* at 171-172. Trooper McMillan claims he suspected the Altima and Dodge Charger may be caravanning

in the delivery or acquisition of drugs. *Id.* at 172. Hoping to pull Mr. Bosire over for a traffic infraction, Trooper McMillian drove down the interstate and parked on the median. Aplt. App., 3, 221, 231.

Trooper McMillan then stopped Mr. Bosire for going 7 miles per hour over the speed limit while traveling eastbound on I-70. Aplt. App. 2, 142. He placed a license plate inquiry which confirmed that the Altima stopped was the one that he had seen at Love's. Aplt. App. 3, 143. Correctly, Mr. Bosire was skeptical of Trooper McMillan because he felt Trooper McMillan had identified him at Love's and was targeting him. *Id*. at 156.

About a minute and a half into the stop, Trooper McMillan approached the Altima and had a first interaction with Mr. Bosire. Trooper McMillan asked where Mr. Bosire was coming from, explicitly asking if he was coming from Colorado, and Mr. Bosire asked if he had to answer the trooper's questions. *Id.* at 145-146.

Trooper McMillian did not smell marijuana in the vehicle. Aplt. App. 3, 146. Nonetheless, he called in an inquiry about Bosire's license and possible warrants and radioed Trooper Schulte for back up. *Id.* at 150.

When Trooper Schulte arrived, Trooper McMillan told Trooper Schulte he could not smell marijuana in the vehicle; he saw a notebook[2] in the back of the car, partly under a blanket; there were several cameras in Bosire's car; and Bosire was

[2] Mr. Bosire had a bible in his back seat, not a notebook. Aplt. 3, 160.

refusing to answer questions. Aplt. App. 3, 151. Trooper Schulte responded, "he is playing the game[.]"

Trooper Schulte asked Trooper McMillan if he had requested consent to search the Altima. Aplt. App. 3, 151. Trooper McMillan said he had not. Trooper McMillan then told Trooper Schulte if Mr. Bosire would not consent, "I don't think I can hold him for a dog." *Id*. Nonetheless, Trooper McMillan asked Trooper Schulte to locate the nearest, available drug-detection dog. *Id*.

Trooper McMillan then completed the paperwork to give Mr. Bosire a warning for speeding. Aplt. App. 3, 152. Then, about twelve minutes into the stop, Trooper McMillan returned to the Altima and spoke to Mr. Bosire for a second time. *Id*. In the second exchange Trooper McMillan asked where Mr. Bosire's "buddy" went—mistakenly assuming the gas station attendant was connected to Mr. Bosire. *Id.* Trooper McMillan also admitted he was suspicious because Mr. Bosire did not want to answer questions. *Id.* at 152-154. Then, after Mr. Bosire refused a search, Trooper McMillan detained him and called a canine unit. *Id.*

The canine sniff did not result in an alert. Trooper McMillan then returned Mr. Bosire's paperwork and gave him a written warning for speeding. Aplt. App. 3, 156. Forty minutes after the targeted stop, Trooper McMillan finally told Mr. Bosire he could leave. *Id*.

Mr. Bosire filed a complaint with the KHP asserting that the search and detention was unjustified. *Id*. at 157. KHP's Professional Standards Unit investigated the complaint and determined, "there was not reason to detain Mr. Bosire . . . for a K-9. . . ." *Id*. at 158. They also concluded Trooper McMillan held "Mr. Bosire for a longer duration than is legally acceptable." *Id*. at 158.

The KHP wrote to Mr. Bosire: "we have determined some of your concerns had merit[;] . . . This contact with you was not what we would consider standard under the confines of investigative reasonable suspicion regarding criminal interdiction[;] . . . we feel the length of time you were detained roadside was unnecessary given the suspicions articulated." *Id*. at 158.

Shaws' Stop

On December 20, 2017, the Shaws were traveling on I-70 through Kansas to Colorado. Aplt. App. 3, 37, 51.[3] They were traveling to see friends and family and go camping. *Id*. They were driving their father's minivan with Osage Nation license plates. *Id.* at 38.

Trooper Schulte was driving on the interstate, in front of the Shaws, when he activated his patrol car lights to pull the Shaws over for speeding. *Id.* at 51-52. B.

[3] The Shaws asserted additional material facts in response to the Trooper Schulte's motion for summary judgment. Aplt. App., 3, 51-56. Trooper Schulte did not timely respond and has no response in the record. The Shaw's additional material facts can be considered undisputed for purposes of summary judgment. Fed. R. Civ. P. 56(e).

Shaw had never been pulled over by a police car in front of him and did not know he was to pull over immediately when a patrol car activates lights ahead of him. *Id.* at 52. Therefore, he slowed but did not immediately pull over. *Id*.

Once stopped, Trooper Schulte received a response to his license plate inquiry and approached the minivan. Aplt. App. 3, 40. He claims that while approaching the minivan he observed a lived-in appearance. *Id*. The Shaws controverted that description, and B. Shaw stated the van was clean and did not have a "lived in look." *Id.* at 95.

After approaching the driver's side window, Trooper Schulte had a conversation with B. Shaw that lasted about 50 seconds. Aplt. App. 3, 52. Trooper Schulte told B. Shaw he was going 91 miles per hour, chided him for not pulling over fast enough, took his license and insurance, and asked about the car's owner and B. Shaw's address. *Id.* at 53. B. Shaw relayed that the car belonged to his father but that he was listed on the insurance and drove the car for his work with Uber. *Id*. Trooper Schulte then left, telling B. Shaw to wait in the vehicle. *Id*.

Once back to his patrol vehicle, Trooper Schulte requested information and learned that B. Shaw's license was valid, there were no outstanding warrants, and that B. Shaw had a record of a 2009 felony intent to distribute narcotics. Aplt. App. 3, 42. Schulte then requested backup and completed paperwork. *Id.* at 43.

About ten minutes passed before Trooper Schulte returned to the minivan. Aplt. App. 3, 53. When he did, he told B. Shaw the court date and how to resolve the ticket without appearing. *Id.* They briefly discussed B. Shaw's concerns about insurance, and then Trooper Schulte said, "[S]low down a little bit . . . have a safe trip and drive safely." *Id.* B. Shaw responded, "All right. Thank you." *Id*.

Three seconds after Trooper Schulte said "have a safe trip and drive safely," Schulte asked if he could inquire further. Aplt. App. 3, 54. When he did, B. Shaw did not think he could leave and could not have pulled away without endangering Trooper Schulte. *Id.* at 54, 56. The Shaws did not consent to the extend stop or detention after receiving the speeding ticket. *Id.* at 54.

During the additional questioning, Schulte learned that the Shaws were heading to Colorado and that B. Shaw would not consent to a search:

> [Schulte] You are coming from Oklahoma; where are you headed to today?
>
> [B. Shaw] Denver. Headed to see family.
>
> [Schulte] Ok, alright. . . . [Y]ou don't have anything in the vehicle that you are not supposed to have with you? [B. Shaw, denials] – no guns, no knives, no contraband, no illegal narcotics, marijuana, cocaine, opioid, no meth, no large sums of cash, anything like that? [B. Shaw, denials] [Schulte] Can we search your vehicle for such items?
>
> [B. Shaw] I don't consent to searches. I am criminology major. It is like the number one golden rule.
>
> [Schulte] OK. Well wait right here, I will be right back with you. OK?

Aplt. App. 3, 43. "The Denver destination was relevant to [Trooper] Schulte because, based upon his experience and knowledge, I-70 was a corridor to Colorado (i.e., a source state for marijuana)." *Id.* at 45.

Trooper Schulte then extended the stop to call for a drug dog which arrived approximately twenty minutes later, Aplt. App. 3, 54, 55, but does not remember the basis for his reasonable suspicion, *id.* at 46.

The canine sniff took place and the dog alerted. Aplt. App. 3, 49. The troopers then searched the Shaws' van. *Id.* at 55. During the search, one of the troopers intentionally ripped B. Shaw's bag open. *Id.* at 49-50. The only additional information the troopers learned during their search, for which they claim a basis to extend the stop, was the differing addresses on B. Shaw's marijuana registration cards and Colorado ID card. *Id.* at 55. Trooper Schulte did not ask B. Shaw why there were differences, but if he had, he would have learned B. Shaw formerly lived at the address on his cards. *Id*.

The troopers did not cite the Shaws for possession of anything unlawful but still required the Shaws to drive to Troop D headquarters because of the differing addresses on B. Shaw's cards. Aplt. App. 3, 55-56. Forcing the Shaws to follow them to Troop D headquarters extended the length of the detention. *Id*.

Summary Judgment

Although discovery does not close until December 31, Defendant Troopers each sought summary judgment, claiming that qualified immunity shielded them from liability. Aplt. App., 1, 234-235; 2, 118-119. Mr. Bosire and the Shaws opposed those motions, arguing there were genuine issues of material fact, that discovery was ongoing, and that Defendant Troopers failed to establish they are entitled to qualified immunity. Aplt. App., 3, 36-91; 139-189. Defendant Troopers failed to timely file a reply brief.

The Court denied both motions for summary judgment for "substantially the reasons stated" in the opposition briefs. Aplt. App., 3, 262-263. Defendant Troopers then filed a Motion to Alter or Amend the Judgment and a Motion for Leave to File a Reply Brief Out of Time. *Id.* at 264-271. Shortly thereafter, Defendant Troopers appealed. Aplt. App., 6, 34-37. This Court held the appeal in abeyance until after the District Court decided the Motion to Alter or Amend the Judgment.

On September 4, 2021, the District Court held oral argument on the pending motions. Aplt. App., 6, 40; Aplee. Supp. App., 29-76. During this argument, the District Court ruled from the bench, making various findings, and ultimately concluding that "genuine issues of material fact on the record prevented [the Court] from finding that [Defendant Troopers] were entitled to judgment as a matter of law on the issue of qualified immunity." Aplee. Supp. App., 44. The District Court also

clarified its earlier summary judgment ruling, providing the legal basis and specific reasoning for the denial of summary judgment. The District Court then denied the Defendant Troopers' pending motions to amend and to file the reply brief out of time, making clear nothing in the proposed reply briefs would have altered its decision.

SUMMARY OF THE ARGUMENT

This appeal should be dismissed because (1) this Court lacks jurisdiction, (2) issues of historical fact preclude application of qualified immunity, and (3) Defendant Troopers impermissibly relied on travel plans to justify their detention of Mr. Bosire and the Shaws.

First, the District Court's order denying summary judgment was based on genuine issues of material fact. Under *Johnson v. Jones*, 515 U.S. 304 (1995), this Court lacks jurisdiction to entertain such interlocutory appeals. They are not "final decisions" under 28 U.S.C. § 1291. Second, there are genuine issues of material fact, including disputes about the facts Defendant Troopers claimed justified their suspicions and whether Defendant Troopers are credible. Finally, Defendant Troopers are not entitled to qualified immunity. The bases for their suspicions are closely analogous to other cases where this Court has found reasonable suspicion lacking. Most fatally, a reasonable jury could conclude that Defendant Troopers

directly violated this Court's precedent by relying on travel plans to or from Colorado in forming reasonable suspicion.

KHP targets drivers with out-of-state plates and stops them for minor traffic infractions to investigate potential drug trafficking. Troopers are trained to then use travel to or from Colorado as a factor in forming reasonable suspicion, describing Colorado as a "drug source state."

This practice contravenes this Circuit's prior admonishments to troopers of the KHP. This Court has told KHP troopers, "[e]ven under the totality of the circumstances, it is anachronistic to use state residence as a justification for the Officers' reasonable suspicion." *Vasquez,* 834 F.3d at 1138. And "[a]s we have said previously, 'that the defendant[] [was] traveling from a drug source city—or . . . a drug source state—does little to add to the overall calculus of suspicion.' Such a factor is 'so broad as to be indicative of almost nothing.'" *Id.* at 1137 (citing *Guerrero*, 472 F.3d at 787-99).

Yet that is precisely what happened in both stops here, and discovery has shown these stops are not anomalies. Trooper McMillan targeted Mr. Bosire and pulled him over for a minor traffic infraction. He then detained Mr. Bosire for an extended period to conduct a canine sniff without reasonable suspicion. Although Trooper McMillan proffers several reasons why he found Mr. Bosire suspicious—as the District Court found—these reasons are inherently contradictory,

unreasonable, and implausible. Notably, Trooper McMillan relied on the fact that he suspected Mr. Bosire was traveling to or from Colorado as part of his reasonable suspicion analysis.

Likewise, Trooper Schulte, in stopping the Shaws and detaining them for a canine sniff—again, as the District Court found—relied on confounding, contradictory, and impermissible criteria. He, too, relied on the Shaws' travel plans to Colorado.

Defendant Troopers now argue Mr. Bosire or the Shaws' travel to Colorado played no part in the detentions, but these arguments ignore the record. Both troopers considered the Plaintiffs' travel plans—despite this Court's strict admonition to do otherwise.

For these reasons, the Court should dismiss for lack of jurisdiction, or alternatively, the District Court's order should be upheld.

STANDARD OF REVIEW

Summary judgment is only appropriate "if the movant shows that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). When a law enforcement official moves for summary judgment based on qualified immunity, courts shall "view the facts in the light most favorable to the non-moving party and resolve all factual disputes and reasonable inferences in its favor," as it would on any other summary judgment motion. *Est. of Booker v. Gomez*, 745 F.3d 405, 411

(10th Cir. 2014). Importantly, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge [ruling on summary judgment]. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [their] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1164 (10th Cir. 2021).

Although jurisdictional review is *de novo*, *Dixon v. Kirkpatrick*, 553 F.3d 1294, 1301 (10th Cir. 2009), "if a district court concludes a reasonable jury could find certain specified facts in favor of the plaintiff . . . [the appellate court] must usually take them as true—and do so even if [its] own *de novo* review of the record might suggest otherwise as a matter of law." *Lynch v. Barrett*, 703 F.3d 1153, 1159 (10th Cir. 2013); *see also Vette*, 989 F.3d at 1162; *Amundsen v. Jones*, 533 F.3d 1192, 1196 (10th Cir. 2008) ("Because we may review only legal issues, we must accept any facts that the district court assumed in denying summary judgment.").

ARGUMENT

I. The Court lacks jurisdiction to entertain this appeal.

The Court lacks jurisdiction to entertain this interlocutory appeal because the District Court denied qualified immunity to Defendant Troopers due to genuine issues of material fact. Denials of qualified immunity on summary judgment due to factual disputes are not "final orders" capable of interlocutory review under 28

U.S.C. § 1291. *See Est. of Valverde ex rel. Padilla v. Dodge*, 967 F.3d 1049, 1058 (10th Cir. 2020) (appellate courts "have jurisdiction [over interlocutory appeals of the denial of qualified immunity] only to the extent that the appeal turns on abstract legal conclusions."); *Fancher v. Barrientos*, 723 F.3d 1191, 1194 (10th Cir. 2013) ("[W]hen reviewing the denial of a summary judgment motion asserting qualified immunity, [appellate courts] lack jurisdiction to review the district court's conclusions as to what facts the plaintiffs may be able to prove at trial."). Therefore, this appeal must be dismissed.

A. Summary judgment orders denying qualified immunity are only immediately appealable if they turn on questions of law, not fact.

This interlocutory appeal is not from a final decision, and so, the Court is without jurisdiction.

Defendant Troopers incorrectly assert this Court has jurisdiction through the collateral order doctrine which provides that certain collateral orders are, in effect, "final decisions" that are immediately appealable under 28 U.S.C. § 1291. Although some orders denying qualified immunity are immediately appealable under 28 U.S.C. § 1291, others are not. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) ("a district court's denial of a claim of qualified immunity, *to the extent that it turns on an issue of law*, is an appealable 'final decision.'" (emphasis added)). As dispositive here, only a denial that turns on an issue of law is an appealable "final decision" within the meaning of § 1291.

In *Johnson v. Jones*, the Supreme Court held that a district court's "determination that the summary judgment record . . . raised a genuine issue of fact concerning" the applicability of qualified immunity was not a "final decision" within the meaning of § 1291 and therefore precluded appellate jurisdiction. 515 U.S. 304, 313 (1995). The Tenth Circuit has also recognized this jurisdictional bar. *Roosevelt-Hennix v. Prickett*, 717 F.3d 751, 753 (10th Cir. 2013) (citing *Johnson*, 515 U.S. at 320) (the appellate court "has no interlocutory jurisdiction to review 'whether or not the pretrial record sets forth a 'genuine' issue of fact for trial.'").

A district court's determination that issues of fact preclude summary judgment on qualified immunity is not an abstract legal question. *Allstate Sweeping, LLC v. Black*, 706 F.3d 1261, 1267 (10th Cir. 2013). Although "determining whether there is a genuine issue of material fact at summary judgment is [itself] a question of law, one [appellate courts] routinely review *de novo* in appeals from the grant of summary judgment," under *Johnson*, "this practice doesn't normally pertain to appeals from the denial of qualified immunity." *Lewis v. Tripp*, 604 F.3d 1221, 1225 (10th Cir. 2010) (internal citations and quotations omitted). "[F]or example, if a district court concludes that a reasonable jury could find certain specified facts in favor of the plaintiff, the Supreme Court has indicated [appellate courts] usually must take them as true and do so even if [an appellate court's] *de novo* review of the record might suggest otherwise as a matter of law." *Id.* at 1225 (discussing *Johnson*

v. Jones). "In other words, '[this Court] must scrupulously avoid second-guessing the district court's determinations regarding whether [the appellee] has presented *evidence* sufficient to survive summary judgment.'" *Tiffany Simpson v. Little*, No. 20-5109, 2021 U.S. App. LEXIS 32040, at *8 (10th Cir. Oct. 26, 2021) (citing *Fancher*, 723 F.3d at 1199.).

Where, as here, a district court determines that summary judgment on the basis of qualified immunity is improper because of genuine factual disputes, there is no "final decision" under 28 U.S.C. § 1291 and no appellate jurisdiction.

B. The District Court's orders are not appealable because the court found issues of fact precluded summary judgment.

The District Court overruled Defendant Troopers' motions "because the genuine issues of material fact on the record prevented [the Court] from finding that [Defendant Troopers] were entitled to judgment as a matter of law on the issue of qualified immunity." Aplee. Supp. App., 44; *see also id.* at 74 ("[T]he only succinct way to reiterate the reason for both [summary judgment] rulings was strictly on the basis that genuine issues of material fact precluded the court from concluding as a matter of law that the individual officers were entitled to qualified immunity."); and Aplt. App., 3, 2626-263 (docket entry order). Because the District Court denied summary judgment as to qualified immunity due to issues of fact, the denials are not immediately appealable. Thus, this Court lacks jurisdiction. *See* Section I.A., *supra*; *Johnson,* 515 U.S. 304 (1995).

1. There were genuine issues of material fact regarding Mr. Bosire's stop.

The District Court found there were significant material facts in dispute on nearly all of Trooper McMillan's proffered reasons for finding Mr. Bosire suspicious. The Court determined that the facts Trooper McMillan relied on were implausible, unsupported, or otherwise in dispute, thereby precluding summary judgment.

a. There were genuine issues of material fact regarding whether the evidence linked the smell of marijuana with Mr. Bosire.

The first suspicion factor Trooper McMillan offered was that he smelled marijuana in the vicinity of Mr. Bosire at the gas station. As the District Court found, this factor was based on inconsistent and insufficient evidence.

Trooper McMillan says he first suspected Mr. Bosire of criminal activity when smelling the odor of marijuana at Love's gas station. Defendants' summary judgment brief explained, "the smell of marijuana at the Love's and [Mr.] Bosire's conversation with another man at the gas pump suggested possible drug trafficking. The [Defendant Troopers] claim they thought that the smell could have been from [Mr.] Bosire or another man observed talking to [Mr.] Bosire at the gas pump." Aplt. App., 2, 147-148.

But Trooper McMillan does not explain why he believed the smell was coming from the two men. There is virtually no evidence to show Defendant

Troopers were ever near Mr. Bosire, and there was no evidence upon which they could have reasonably suspected that the smell came from him. As the District Court noted, "[T]here's nothing in here that would connect the plaintiff to any marijuana at all except that he happened to be at a convenience store where there was the smell of marijuana." Aplee. Supp. App., 52-53. The District Court found that "nothing in [Trooper McMillan's] affidavit even places [Mr. Bosire] within the Love's [gas station] ever. And his name doesn't come up until he and Trooper Schulte leave the store." *Id.* at 44.

Addressing Trooper McMillan's claim that the smell of marijuana may have come from a group of people entering the store as Defendant Troopers exited (Aplt. App., 2, 128, ¶20), the District Court asked, "[W]hy are we talking about this quote-unquote group of people inside the convenience store and the fact that they smelled marijuana when there's no connection to plaintiff?" Aplee. Supp. App., 45.

Even defense counsel admitted, "[I]t is clear that [Defendant Troopers] do not provide testimony that they smelled it on Mr. Bosire. Rather, [Defendant Troopers] felt that he might've been the source of the marijuana." Aplee. Supp. App., 47. The District Court then questioned, "[W]hy would he maybe be the source? It doesn't say in the affidavit that [Mr. Bosire] was near the convenience store entrance or inside. The only thing we know is that he's a black man talking to a white man in a

hoodie, and they look at him and go, 'I believe that one or both could've been the people associated with the marijuana.'" *Id*.

Thus, the District Court found that there was "a genuine issue of material fact" as to "whether a reasonable officer would have associated plaintiff with the marijuana odor based on that encounter and/or based on his observations at the pump."[4] *Id.* at 59.

b. There are several material inconsistencies and disputed facts regarding Trooper McMillan's purported belief that Mr. Bosire was "caravanning" with another car.

The District Court also made clear that Trooper McMillan's purported belief that Mr. Bosire was "caravanning" with another car was inconsistent with the evidence available to Trooper McMillan at the time, the facts as alleged, and Trooper McMillan's own statement.

i. There are disputed facts regarding the existence of a second rental car.

Trooper McMillan claimed to believe Mr. Bosire was "caravanning" to transport drugs because he speculated there were two rental cars at Love's. Aplt.

[4] The Court's finding is consistent with Fourth Amendment case law on reasonable suspicion. "An officer's 'inchoate and unparticularized suspicion or "hunch"' is insufficient to give rise to reasonable suspicion." *United States v. Fernandez*, 18 F.3d 874, 878 (10th Cir. 1994) (citing *United States v. Sokolow*, 490 U.S. 1, 7 (1989) and *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). More puzzling still, Trooper McMillan had reason to affirmatively believe the smell had nothing to do with Mr. Bosire. After pulling over Mr. Bosire, Trooper McMillan smelled no odor of marijuana at all. Aplt. App., 3, 151 (¶ 30).

App., 2, 129. According to Trooper McMillan, the presence of the second car at the gas station, which he believed to be a rental car, contributed to his suspicion of Mr. Bosire. Importantly, Trooper McMillan's suspicions about a drug caravan rested on the fact that there were two *short-term* rental cars: "[P]ersons transporting drugs frequently use short-term rented vehicles for the transport." *Id*.

But, as the District Court noted, Trooper McMillan offered little to no evidence from which a fact finder could infer there ever was a second, rented vehicle, much less a short-term rental. Aplee. Supp. App., 48. In his affidavit, Trooper McMillan merely asserts: "When leaving the convenience store's parking lot, I saw a silver Dodge Charger, which appeared to be a rental vehicle . . . ." Aplt. App., 2, 170. Trooper McMillan does not say why he believed it was associated with Mr. Bosire's car or how he concluded the silver car was rented, and he offers no evidence whatsoever for his belief that the rental was short term. As the District Court noted, "[W]e don't even know why it might appear to be a rental car." Aplee. Supp. App., 49.

ii. There are disputed facts regarding the plausibility of the man at the gas pump driving the silver Dodge Charger.

Next, the District Court made clear that it did not believe the record supported Defendant Troopers' assertion that the second car—the silver Dodge Charger—was driven by the man Defendant Troopers observed Mr. Bosire speaking with at Love's.

Aplee. Supp. App., 50-51. The identity of the man driving the second car is crucial to Trooper McMillan's suspicion because, according to Trooper McMillan's affidavit, he "felt that the silver Dodge Charger, which [he] had seen leaving the convenience store, could be associated with the white man at the gas pump seen talking with Mr. Bosire and, therefore, caravanning with Mr. Bosire." Aplt. App., 2, 172.

But, as the District Court noted, Trooper McMillan's hunch is unsupported by the evidence.

> "So in Paragraph 21 [of McMillan's affidavit] he says he felt quote-unquote that the Dodge Charger could be associated with the white man at the gas pump and therefore caravanning. Again, I don't even know how that would be possible if the Dodge Charger is never placed in the same vicinity as the white man, and I don't know how he would have gotten into the Dodge Charger or what his quote-unquote association with that car would be."

Aplee. Supp. App., 54-55. As with his beliefs about the source of the marijuana smell, and the length of a suspected rental car, Trooper McMillan offers nothing to substantiate his hunch that the man he observed speaking with Mr. Bosire drove away in the silver Dodge Charger.

iii. Trooper McMillan's belief about who drove the Dodge Charger is inconsistent with comments he made the night of the stop.

The Court next observed that Trooper McMillan's hunch about caravanning is inconsistent with his remarks to Trooper Schulte the night of the stop. Trooper

McMillan first claimed to believe Mr. Bosire was "caravanning" with the white man in the hoodie driving the silver Dodge Charger. As Trooper McMillan averred, "I felt that the silver Dodge Charger, which I had seen leaving the convenience store, could be associated with the white man at the gas pump seen talking with Mr. Bosire and, therefore, caravanning with Mr. Bosire." Aplt. App., 2, 172.

But Trooper McMillan's claim is at odds with what he told Trooper Schulte. After pulling Mr. Bosire over, Trooper McMillan radioed to Trooper Schulte, "the white man seen at the convenience store is 'no longer in the car.'" Aplt. App. 2, 130. If Trooper McMillan truly believed the white man was caravanning with Mr. Bosire and driving the silver Dodge Charger, and this assumption contributed to Trooper McMillan's reasonable suspicion, then Trooper McMillan should not have found it remarkable that the white man was not in Mr. Bosire's vehicle. The District Court recognized this inconsistency, describing Trooper McMillan's claim of caravanning as "complete nonsense, because Paragraph 21 [of Trooper McMillan's affidavit] seems to suggest that the white man was in the Dodge Charger and was caravanning, but now he's saying that the white man was in plaintiff's car." Aplee. Supp. App., 55.

As the District Court pointed out, Trooper McMillian's story regarding the suspicious man at the gas pump and Mr. Bosire's "caravanning" with another short-term rental car, consisted of unsubstantiated hunches, material inconsistencies, and

disputed facts. This makes summary judgment inappropriate and prevents jurisdiction over this interlocutory appeal.

iv. A jury could believe that Trooper McMillan found Mr. Bosire was involved in a "caravan" because he is Black.

The District Court made clear that it believed a jury could find that Defendant Troopers targeted Mr. Bosire not because of a reasonable suspicion of criminal activity, but because of his race. "[T]he only thing I see [Defendant Troopers] reacting to is the fact that you have a black man in his 30s driving a new vehicle in good condition, which they think is suspicious enough to run a record check on the license plate . . . [and] there's nothing here that would connect the plaintiff to any marijuana smell at all[.]" Aplee. Supp. App., 52-53.

As the District Court found, Trooper McMillian's story regarding Mr. Bosire's drug "caravanning" consisted of unsubstantiated hunches, material inconsistencies, and disputed facts. Summary judgment was therefore improper, and this type of factual finding precludes interlocutory appellate review.

c. A jury could believe that Trooper McMillan detained Mr. Bosire because Mr. Bosire asserted his rights.

The District Court also found that a reasonable jury could infer that Trooper McMillan found Mr. Bosire suspicious because he declined to consent to a search. "[I]t should go without saying that consideration of such a refusal would violate the Fourth Amendment." *United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997).

After initially talking with Mr. Bosire, Trooper McMillan told Trooper Schulte, "if [Mr. Bosire] does not let me [search], I don't think I can hold him for a dog." Aplt. App. 2, 173. According to Defendant Troopers' own brief:

> McMillan then walked to the passenger side window of the Altima and spoke to Bosire for a second time. By this time, while McMillan had stated to Schulte that **he did not believe that he had sufficient reasonable suspicion to extend the stop to conduct a dog sniff**, McMillan felt that he had reasonable suspicion to detain Bosire for additional questions. He believed additional questions would either abate suspicion that Bosire was involved in criminal activity or establish that it was reasonable to detain Bosire ten or more minutes more for a dog sniff.

Id. at 131-132 (emphasis added).

At this point, Trooper McMillan was in violation of clearly established Supreme Court precedent. *Caballes* held that a traffic stop "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing the warning ticket. 543 U.S. at 407. *Rodriguez* affirmed this reasoning, holding that an officer violates the Fourth Amendment if they prolong a roadside detention for a canine sniff without reasonable suspicion. 575 U.S. at 357.

When Trooper McMillan realized he did not have enough reasonable suspicion to hold Mr. Bosire further, yet did so anyway, he violated this clearly established precedent. Trooper McMillan was not entitled to go get another bite at the apple by asking more questions. There is no separate and lower reasonable suspicion standard for calling a K-9 than for any other prolonged detention, and

Trooper McMillan lacked the authority to further detain Mr. Bosire to ask additional questions so as to "either abate suspicion" or "establish that it was reasonable to detain" him longer.[5]

Not only did Trooper McMillan lack reasonable suspicion to detain Mr. Bosire for additional questions, what the trooper learned from those questions could not have contributed to his reasonable suspicion. During that encounter, Trooper McMillan stated to Mr. Bosire, "[Y]ou are making me highly suspicious that you are transporting something illegal. Is that the case? Is that why you don't want to answer any questions?" Aplt. App., 2, 14. In response, Mr. Bosire told Trooper McMillan, "No cause, according the Constitution [*sic*] you have the right to remain silent." *Id.*

The District Court found it "telling" that Trooper McMillan only called for the K-9 once Mr. Bosire refused to answer any more questions. Aplee. Supp. App., 60 **(**"it's also pretty telling that [Trooper McMillan] doesn't decide to do a K-9 search until he's confronted with a man who seems to understand his constitutional rights and refuses to consent to a search."). This is another factual dispute inherent

[5] "The investigative detention usually must 'last no longer than is necessary to effectuate the purpose of the stop,' and 'the scope of the detention must be carefully tailored to its underlying justification.'" *United States v. Hunnicutt*, 135 F.3d 1345, 1349 (10th Cir. 1998) (citing *Florida v. Royer*, 460 U.S. 491, 500 (1983). "An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop. But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Rodriguez*, 575 U.S. at 355.

in Trooper McMillan's story that precluded summary judgment on the basis of qualified immunity and precludes this Court's jurisdiction over this interlocutory appeal.

d. There are credibility issues with Defendant Troopers' stories about why they found Mr. Bosire to be suspicious.

Overall, the District Court made clear it denied summary judgment because there are significant holes in Defendant Troopers' stories. Aspects of their alleged reasonable suspicion strain credulity.

For example, referring to the connection Defendant Troopers claimed to make between Mr. Bosire's car and the silver Dodge Charger, the District Court made clear that there was not "an inference of truth-telling that can arise from that because it makes no sense." Aplee. Supp. App., 51-52.

Importantly, "[c]redibility determinations. . . and the drawing of legitimate inferences from the facts are jury functions . . . The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Whether Trooper McMillan was telling the truth about why he found Mr. Bosire suspicious is a question of fact. Aplee. Supp. App., 45-47. The question of Trooper McMillan's credibility precluded the District Court from granting qualified immunity on summary judgment. Under

Johnson, the District Court's decision is not ripe for an interlocutory appeal. It is precisely the type of question for which this Court lacks jurisdiction.

In sum, the District Court made clear that it had serious reservations about the evidence supporting Defendants' arguments in Mr. Bosire's case; set out a number of facts the Court believed a reasonable jury could find in Mr. Bosire's favor;[6] and was explicit about denying Defendants' motion because there were multiple issues of material fact which should be resolved by a jury.

As a result, there is no "final decision" under 28 U.S.C. § 1291 and no jurisdiction for an interlocutory appeal in Mr. Bosire's case. *Johnson*, 515 U.S. at 319-320.

2. There were genuine issues of material fact regarding the Shaws' stop.

As with Mr. Bosire's stop, the District Court explicitly denied summary judgment for Trooper Schulte regarding the Shaws' stop because of disputed issues of material fact. Thus, there is no "final decision" under 28 U.S.C. § 1291 and no jurisdiction for an interlocutory appeal in the Shaws' case. *Johnson*, 515 U.S. at 319-320. Broadly speaking, the District Court found that the reasons proffered by

[6] "[I]f a district court concludes that a reasonable jury could find specified facts in favor of the plaintiff, the Supreme Court has indicated [the appellate court] usually must take them as true—and do so even if [the appellate court's] own *de novo* review of the record might suggest otherwise as a matter of law." *Lewis*, 604 F.3d at 1225.

Trooper Schulte for why he found the Shaws to be suspicious were unsupported by the facts, implausible, or unreasonable.

a. The time it took the Shaws to pull over is not suspicious in context.

Trooper Schulte claims the Shaws' failure to immediately pull over after he activated his patrol car lights contributed to his reasonable suspicion. Aplt. App., 2, 56-57. But this was not a typical traffic stop. The Shaws did not speed past Trooper Schulte's patrol car on the side of the road and then fail to pull over after seeing the lights. Trooper Schulte activated his lights *while in front of the Shaws* and then expected them to immediately pull over. *See* Aplt. App., 3, 69-71.

As the District Court observed, "I really question the claim that it is suspicious that the minivan didn't immediately pull over when the officer is driving in front of you and not behind you. I don't know one person in a thousand that would think they're supposed to stop." Aplee. Supp. App., 62. The District Court found credibility issues with this purported reasonable suspicion factor and cited this reason as one, of many, to deny summary judgment.

b. Whether the Shaws' van had a "lived in" appearance is a question of fact for the jury.

Next, Trooper Schulte's portrayals of the Shaws' minivan as "crammed full of stuff" and having a "lived in" appearance, Aplt. App., 23, 60, are characterizations, not statements of fact. Asking the Court to accept the descriptions

seeks an inference in Trooper Schulte's favor and is inappropriate on summary judgment. *Jiron v. City of Lakewood*, 392 F.3d 410, 414 (10th Cir. 2004) ("We construe the record in the light most favorable to the non-moving party.").

The characterizations are also at odds with B. Shaw's testimony. While Trooper Schulte claims the van was "crammed full of stuff," Aplt. App., 3, 46-47 at ¶ 26, Mr. Shaw made clear that they "were travelling with camping gear and [their] luggage but the van was clean" and did not have a lived-in look. Aplt. App., 3, 95 at ¶ 6.

Agreeing that others could come to a different conclusion than Trooper Schulte, the District Court made clear it believed that the condition of the van—and the underlying facts supporting Trooper Schulte's characterization—were matters for the jury. As Judge Vratil said: "[l]uggage, coolers, a cot, blankets and other items. That's exactly what I had in my car when I drove to Montana this summer with my grandchildren." Aplee. Supp. App., 66.

In addition, the District Court noted that the KHP teaches its troopers to label such cars as suspicious in order to justify detaining virtually any car they wish for a canine search. *See generally* Aplee. Supp. App., 65-66. This is not simply a "quarrel" over semantics, as Trooper Schulte argues. Aplt. Br. at 37. There is a genuine issue of fact regarding whether the van had a lived-in appearance and whether it was objectively reasonable for Trooper Schulte to find the Shaws' camping equipment

suspicious. A jury could agree with the Court and find that the Shaws' van did not appear "lived-in," and that this proffered reason for finding them suspicious was unreasonable. *McWilliams v. Jefferson Cnty.*, 463 F.3d 1113, 1116 (10th Cir. 2006) ("evidence is to be liberally construed in favor of the party opposing the motion for summary judgment.").

c. Trooper Schulte lacked credibility in claiming that the Shaws were suspicious because they were driving their father's minivan.

Trooper Schulte also argued the fact that the Shaws were driving their father's minivan supported his reasonable suspicion. *See* Aplt. Br. at 33-34; Aplt. App. 2, 83 (finding suspicious that the "minivan's driver was not the vehicle's owner" because "non-owned vehicles are frequently used by drug transporters"). The District Court found the argument lacked credibility. Aplee. Supp. App., 68-69 (the District Court finds it "laughable" for Trooper Schulte to claim that "it shows reasonable suspicion to think somebody is using drugs if they get the family minivan.").

Indeed, the District Court noted that Blaine Shaw confirmed the minivan was his father's, Aplee. Supp. App., 69, and he was also listed on the insurance for the vehicle. Aplt. App. 3, 53 (¶ 49)**.** Judge Vratil stated: "I'm surprised that you can stand here with a straight face and tell me that taking the family minivan to Colorado . . . supports a reasonable suspicion that you're involved in drugs." Aplee. Supp. App., 69.

Trooper Schulte's credibility is an issue of fact for the jury. It precludes both summary judgment and interlocutory appellate jurisdiction. *Johnson*, 515 U.S. at 319-320.

d. It appears Trooper Schulte called for the canine unit because Mr. Shaw refused to consent to a search.

As with Mr. Bosire's stop, the District Court noted that it appeared Trooper Schulte detained the Shaws because B. Shaw refused to consent to a search. Doing so violates the Fourth Amendment. "[I]t should go without saying that consideration of such a refusal would violate the Fourth Amendment," because "[t]he failure to consent to a search cannot form any part of the basis for reasonable suspicion." *Wood*, 106 F.3d at 946.

Thus, when observing that "here again… it looks like the reason why he called the drug dog is basically because the plaintiff refused to consent to a search," the District Court identified an issue of fact which both defeats summary judgment and precludes appellate jurisdiction. Aplee. Supp. App., 68.

e. Trooper Schulte was not credible when claiming to be suspicious because Blaine Shaw was criminal justice major.

The District Court was also troubled by Trooper Schulte's claim that he was suspicious because Blaine Shaw stated he was a criminal justice major. Aplee. Supp. App., 69-71. Trooper Schulte now claims that he did not rely on that factor to justify his reasonable suspicion. *Id.* But Trooper Schulte listed it in his affidavit as a factor

contributing to his reasonable suspicion. *See* Aplt. App. 2, 84. Trooper Schulte should not be allowed to disregard his own affidavit and the factor that he swore he relied on because he later realized the law does not support him.

As the District Court pointed out, Trooper Schulte's backtracking and cherry-picking his reasonable suspicion criteria after the fact "discredits the other bases for the alleged reasonable suspicion" Trooper Schulte proffered in that affidavit and his other briefing. Aplee. Supp. App., 72. "When you've got your client saying what he thinks is suspicious, I don't think you get to pick and choose which ones you think the court should consider." *Id.* at 70. Again, the issue precludes summary judgment and appellate jurisdiction

f. Trooper Schulte's affidavit is not objectively reasonable.

Given all the concerns with Trooper Schulte's version of events that the Court identified, the Court determined that Trooper Schulte's declaration "doesn't really in my opinion have a coherent, objectively reasonable narrative that defeats the inferences in favor of plaintiff on the issue of qualified immunity." Aplee. Supp. App., 72.

The District Court thus concluded that a reasonable jury could find certain specified facts in favor of the Shaws, and even if "*de novo* review of the record might suggest otherwise," those facts should be taken as true. *Lewis*, 604 F.3d at 1225. The Court "lack[s] jurisdiction to consider [Defendants'] clearly-established-law

arguments that are 'an intertwining of disputed issues of fact and cherry-picked inferences, on the one hand, with principles of law, on the other hand.'" *Tiffany Simpson v. Little*, No. 20-5109, 2021 U.S. App. LEXIS 32040, at *8 (10th Cir. Oct. 26, 2021) (citing *Duda v. Elder*, 7 F.4th 899, 916 (10th Cir. 2021)).

Because the District Court found genuine issues of fact precluded a qualified immunity finding on summary judgment as to both Mr. Bosire and the Shaws' stops, appellate jurisdiction is lacking. There is no "final decision" under 28 U.S.C. § 1291 from which Defendants can appeal. *Johnson*, 515 U.S. at 319-320.

II. There are genuine issues of material fact that preclude summary judgment on qualified immunity.

Even if this Court finds it has jurisdiction and "look[s] behind the order denying summary judgment and review[s] the entire record *de novo*," there are substantial issues of material fact which, when viewed in the light most favorable to the Plaintiffs, prevent summary judgment. *Lewis*, 604 F.3d at 1225. And though Defendant Troopers assert qualified immunity, the material facts must still be undisputed for the Court to enter summary judgment.

Determining whether a defendant is entitled to qualified immunity "involves answering two questions: (1) whether a plaintiff has asserted that the defendant violated a constitutional or statutory right, and if she has, (2) whether that right was clearly established," such that "a reasonable person in the defendant's position would have known that his conduct violated that right." *Keylon v. City of Albuquerque*, 535

F.3d 1210, 1218 (10th Cir. 2008) (citing *Maestas v. Lujan*, 351 F.3d 1001, 1007 (10th Cir. 2003). "Only where there are no disputed questions of historical fact does the court make the [Fourth Amendment reasonableness] determination on its own, such as on summary judgment." *Cavanaugh v. Woods Cross City*, 718 F.3d 1244, 1254 (10th Cir. 2013).[7] Because there are a number of material, "historical facts" in dispute, the District Court did not err in denying summary judgment.

A. There are additional issues of material fact, beyond those identified by the District Court, that preclude summary judgment.

In addition to the numerous factual disputes and material inconsistencies the District Court identified, *see supra,* there are even more factual disputes that prevent summary judgment.

Although not explicitly addressed, the District Court alluded to Trooper McMillan's changing testimony with respect to Mr. Bosire's stop. Trooper McMillan first claimed to smell marijuana as a group of individuals entered the convenience store while he and Trooper Schulte waited to leave. Aplt. App., 3, 181. In Trooper McMillan's written statement to the Highway Patrol's investigator, he wrote:

> Master Trooper Doug Schulte and I were exiting the Love's . . . As we were walking towards the doors, there was a group of several people walking inside the shop, as

[7] Although *Cavanaugh* was an excessive force case, the Court reached this conclusion based on probable cause cases, finding "[t]hese principles from probable cause cases are equally applicable to our excessive force cases[.]"). 718 F.3d at 1254.

> we were still inside. We waited by the doors until we could exit. As the individuals entered the store, I smelled the odor of marijuana emitting from one or more of them as they walked by Master Trooper Schulte and I. We exited the store when we were clear to do so.

Id. at 231.

In contrast, when presented with the video from the store during his deposition, Trooper McMillan testified that no group of people walked in while he and Trooper Schulte exited. Aplt. App., 3, 222-223. The inconsistency should be fatal to the motion for summary judgment and appeal. Where and how Trooper McMillan first smelled marijuana, which he claimed to associate with Mr. Bosire, is an integral fact to his justification for reasonable suspicion.

There are similar deficiencies with Trooper Schulte's version of events surrounding the Shaws' stop. Trooper Schulte claims that Sam Shaw was behaving suspiciously. According to Trooper Schulte, "he felt that the passenger sitting in the front passenger seat, S. Shaw, was acting suspiciously during both his conversations with B. Shaw at minivan [*sic*]. The passenger did not say anything, never looked over at Schulte, never made eye contact with him, had his hands in his lap and looked straightforward, while not moving his head." Aplt. App. 3, 44. Whether Sam Shaw was behaving suspiciously is disputed, *id.* at 75-77; 96, and asking the Court to infer that Sam Shaw's behavior was suspicious impermissibly seeks an inference in Trooper Schulte's favor on summary judgment. *McWilliams*, 463 F.3d at 1116.

Moreover, Sam Shaw was not behaving suspiciously at all. Instead, his behavior was perfectly reasonable, and he behaved exactly as the KHP instructs motorists to behave when pulled over. Aplt. App., 3, 41. In the Highway Patrol's online guidance, "What to Do If You Are Stopped," the agency tells motorists to "Keep your hands in plain view, and do not make any sudden movements." *Id.* at 127. The Highway Patrol also tells drivers to "[a]sk any passengers in your vehicle to remain calm and comply with the officer's instructions. Instruct them to keep their hands in plain view and do not make any sudden movements." *Id*. Trooper Schulte thus not only asks for an inference in his favor, but also asks the Court to deem Sam Shaw's behavior suspicious when a jury could find he behaved exactly as the Highway Patrol itself instructed.

B. Whether Defendant Troopers' suspicions were reasonable is a jury question.

While juries are to decide disputed "historical facts," they should also decide whether an officer's suspicion was reasonable in the first place. "Although on a motion to suppress the ultimate question of the reasonableness of a search or seizure is regarded as a question of law subject to *de novo* review by the appellate court, in a damages action based on an alleged Fourth Amendment violation the reasonableness of a search or seizure is a question for the jury." *Sherouse v. Ratchner*, 573 F.3d 1055, 1059 (10th Cir. 2009) (citing *Bruner v. Baker*, 506 F.3d

1021, 1028 (10th Cir. 2007), and *Keylon v. City of Albuquerque*, 535 F.3d 1210, 1215 (10th Cir. 2008)).

In both stops, juries could differ about whether the Defendant Troopers' suspicion was, in fact, objectively reasonable. And, in the case of Mr. Bosire, Trooper McMillan admitted he lacked reasonable suspicion to hold Mr. Bosire for a canine search. Aplt. App. 2, 173. Beyond Trooper McMillan's admission, KHP's internal investigators and the KHP Superintendent agreed that Trooper McMillan's conduct ran afoul of the Fourth Amendment. In the subsequent internal affairs investigation, the KHP determined that Trooper McMillan's prolonging of the detention of Mr. Bosire "was not . . . standard under the confines of investigative reasonable suspicion." Aplt. App., 3, 158; 251-252.

A jury could reach the same conclusion, and summary judgment was therefore inappropriate.

III. Qualified immunity is inappropriate.

Qualified immunity protects public officials who perform their duties in a constitutional manner or unintentionally violate a constitutional right that was not clearly established—not those who choose to unashamedly ignore instruction from Courts in an overzealous and obsessional search for drugs. During the stops at issue in this case, Defendant Troopers knew, or at the very least should have known, they

were violating Mr. Bosire and the Shaws' clearly established constitutional rights. Thus, they are not entitled to qualified immunity.

The Fourth Amendment prohibits unreasonable searches and seizures, and the Amendment's protections apply to brief investigative stops that are not traditional arrests. *United States v. Arvizu*, 534 U.S. 266, 273 (2002). "To determine whether a traffic stop constituted an unreasonable seizure, [courts] consider: (1) whether the stop was justified at its inception; and (2) whether 'the officer's actions during the detention were reasonably related in scope to the circumstances which justified the interference in the first place." *Vasquez*, 834 F.3d at 1136 (citing *Wood*, 106 F.3d at 945). "Absent the detainee's valid consent, the scope or duration of an investigative detention may be expanded beyond its initial purpose only if the detaining officer, at the time of the detention, has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Vasquez*, 834 F.3d at 1136 (citing *United States v. Lambert*, 46 F.3d 1064, 1069 (10th Cir. 1995)). "The existence of reasonable suspicion of illegal activity does not depend upon any one factor, but on the totality of the circumstances." *Id.*

Qualified immunity is only appropriate if either there is no constitutional violation or the constitutional right was not clearly established. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Vette,* 989 F.3d at 1164. Here, Tenth Circuit precedent makes clear that KHP troopers are not allowed to rely on a person's state of origin or travel

plans in determining reasonable suspicion even when that factor is cited as part of the totality of the circumstances, absent extraordinary circumstances. *See Vasquez*, 834 F.3d at 1137-1138; *Guerrero*, 472 F.3d at 787-88. Defendant Troopers ignored that decision in Mr. Bosire and the Shaws' stops. Instead, Defendant Troopers did precisely what this Court has instructed them not to do—without apology, they relied on travel plans. Qualified immunity is therefore inappropriate.

A. *Vasquez* and *Wood* prohibit relying on state of origin or destination in the reasonable suspicion calculus.

In *Vasquez*—a case also concerning the KHP—this Court put to rest the idea that KHP troopers may rely on a driver's state of origin or destination in forming reasonable suspicion, particularly when the origin or destination state is Colorado. In *Vasquez*, the officers relied "heavily" on Vasquez's state of origin—Colorado—because it is a state that legalized drug use. *Vasquez*, 834 F.3d at 1137. But the Tenth Circuit "found this justification, in **isolation or in tandem with other considerations**, unconvincing." *Id.* (emphasis added). Relying on past Tenth Circuit precedent, the Court noted "that the defendant[] [was] traveling from a drug source city—or . . . a drug source state—does little to add to the overall calculus of suspicion." *Id.* at 1137-1138 (citing *Guerrero*, 472 F.3d at 787-88). The Court went on to say that a driver's travel originating or concluding in Colorado is a factor "so broad as to be indicative of almost nothing." *Id.* (citing *Guerrero*, 472 F.3d at 787).

Vasquez and *Guerrero* therefore stand for the proposition that it is "wholly improper" for KHP troopers to rely on a motorist's origination in or destination of Colorado in determining that the motorist is suspicious, because this criteria is too broad. *Vasquez*, 834 F.3d at 1137-1138 (noting that reliance on "any fact that would inculpate every resident of a state cannot support reasonable suspicion").

Although *Vasquez* addressed motorists' connections to Colorado, the holding and admonition applies to those with any out-of-state plate traveling to or from Colorado. The Court wrote that it is "time to abandon the pretense" that detentions of motorists are permissible based on their travel plans to or from a "drug source state." *Id.* at 1138. Defendant Troopers cling to the belief that they can rely on this factor as part of the "totality of the circumstances." Aptl. App., 2, 83; Aptl. App., 3, 231. *Vasquez* clearly says otherwise. *Id.* ("Even under the totality of the circumstances, it is anachronistic to use state residence as a justification for the Officers' reasonable suspicion."). Thus, the law is, and was at the time of Mr. Bosire and the Shaws' stops, clearly established.

B. Defendant Troopers impermissibly relied on Mr. Bosire and the Shaws' Colorado travel plans as part of their reasonable suspicion.

The evidence demonstrates that Defendant Troopers did, in fact, rely on Plaintiffs' travel plans despite this Court's admonition.

Defendant Troopers' briefing conveniently focuses on other factors that they allegedly found suspicious—factors for which numerous material factual disputes

exist. But Defendant Troopers considered Mr. Bosire's travel plans and the Shaws' travel destination when conducting their individual reasonable suspicion analysis.

According to Trooper Schulte's affidavit, the Shaws' "Denver destination was relevant because, based upon [his] experience and knowledge, I-70 is a corridor to Colorado, a source state for marijuana." Aplt. App., 2, 83. Although Trooper Schulte does not highlight this in his brief, he averred that the Denver destination was relevant in prolonging the Shaws' detention.[8] This was in violation of clearly established law. At a minimum, the extent of his reliance on this impermissible factor is a question of fact that makes summary judgment inappropriate. *Vasquez*, 843 F.3d at 1137-1138; *Guerrero*, 472 F.3d at 787-88.

Likewise, Trooper McMillan makes no mention in his brief of Mr. Bosire's travel plans as contributing to the Trooper's reasonable suspicion. But when the KHP investigated the stop, Trooper McMillan admitted to relying on Mr. Bosire's presumed Colorado travel plans when forming reasonable suspicion: "Along with the other suspicious factors, I thought Bosire possibly made a quick trip to Colorado, which is where numerous marijuana purchases are made in large amounts and brought east through Kansas." Aplt. App., 3, 232.[9]

[8] Notably, as of the time he filed his motion for summary judgment, Trooper Schulte does not remember the basis for his reasonable suspicion that justified the extended detention and canine search. Aplt. App. 3, 46.

[9] Even putting aside the problem with his reliance on this factor after *Vasquez*, Trooper McMillan admits his belief about Mr. Bosire's travel plans were wholesale speculation—

Defendant Troopers' reliance on travel to and from Colorado or any other "drug source state," is impermissible, as it would indict countless drivers on the state's highways. *See, e.g. Guerrero*, 472 F.3d at 787-88. As this Court has noted, that the Shaws and Mr. Bosire were "driving on I-70 does not make [their] otherwise innocent conduct suspicious. I-70 is a major corridor between Colorado and the East Coast. It could equally be said that it is suspicious to not drive" on it. *Vasquez*, 834 F.3d at 1138. Defendant Troopers violated clearly established law when they relied on this fact in forming reasonable suspicion—even if they conveniently ignored this in their briefing.

Moreover, Defendant Troopers cannot get around the mandates of this Court's prior rulings simply by adding other, allowable criteria to the reasonable suspicion calculus in a *post hoc* attempt to avoid liability. To permit the tactic would be to grant license to law enforcement agencies to fabricate any reason for prolonging detentions, once they can get their stories together, even if evidence strongly suggests the troopers relied on impermissible criteria when deciding to prolong the stop.

"it was never confirmed at the time of the traffic stop that he was actually in Colorado." Aplt. App., 3, 232.

Because Defendant Troopers admitted to relying on criteria that this Court has held to be unconstitutional in forming reasonable suspicion, qualified immunity is inappropriate.

C. The other factors Defendant Troopers cite in support of their motions for summary judgment demonstrate that the stops are factually similar to stops previously found unconstitutional.

Setting aside the Defendant Troopers' impermissible reliance on the Shaws and Mr. Bosire's travel to or from Colorado, the other reasonable suspicion criteria Defendant Troopers offered are markedly similar to circumstances where this Court held reasonable suspicion did not exist.

For example, in *Vasquez v. Lewis*, the Court described the factors which the trooper claimed led to reasonable suspicions. They were:

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

Vasquez, 834 F.3d at 1136-1137. According to the Court, "Such conduct, taken together, is hardly suspicious, nor is it particularly unusual." *Id.* at 1137.

Trooper Schulte identifies a remarkably similar list for his detention of the Shaws: the vehicle was suspicious (in the Shaws case, because it was registered to

their father), Aplt. App., 3, 11; there was stuff in the car;[10] Aplt. App. 3, 95; and an occupant of the car did not display the trooper's expected behavior (in *Vasquez* the driver was too nervous, 834 F.3d at 1137, and in this stop, Sam Shaw was too calm), Aplt. App. 2, 83.

The decision in *United States v. Wood* is also on point, despite the Defendant Troopers' protestations otherwise. There, the Court found that a KHP trooper detained a motorist for the following reasons: "unusual travel plans" because he was unemployed and taking a two-week trip to California; failure to correctly identify where he rented his car; fast-food wrappers within the car (which perhaps could be described as a "lived-in look"); nervousness; and a previous narcotics conviction. *Wood*, 106 F.3d at 946-948.

According to the trooper, these factors combined to establish reasonable suspicion. Yet the court in *Wood* held the factors were "insufficient to support a finding that reasonable suspicion existed on the facts of this case." *Id.* at 948.

> Reliance on the mantra "the totality of the circumstances" cannot metamorphose these facts into reasonable suspicion. Although the nature of the totality of the circumstances test makes it possible for individually innocuous factors to add up to reasonable suspicion, it is impossible for a combination of wholly innocent factors to combine

[10] In *Vasquez*, the car was suspicious because the trooper expected to see *more* in the car. 834 F.3d art 1136-1137. Here, Trooper Schulte apparently saw *too much* in the car. Aplt. 3, 95. If too few items *and* too many items are both deemed equally suspicious, literally every driver currently crossing the state on I-70 could be deemed suspicious and detained.

> into a suspicious conglomeration unless there are concrete reasons for such an interpretation.

Id. (quotations omitted).

Here too, the factors are remarkably similar for the prolonged detention of the Shaws: unusual travel plans, a lived-in look, the demeanor of a passenger, the fact they were traveling to a "source state" for drugs, and Blaine's prior narcotics arrest. Trooper Schulte's detention of the Shaws is not materially different from the trooper's detention in *Wood*.[11]

As the Tenth Circuit has stated:

> To sanction a finding that the Fourth Amendment permits a seizure based on such a weak foundation would be tantamount to subjecting the traveling public to virtually random seizures, inquisitions to obtain information which could then be used to suggest reasonable suspicion, and arbitrary exercises of police power.

Wood, 106 F.3d at 948. And while there are some differences between *Wood*, *Vasquez*, and the stops at issue here, satisfying qualified immunity's clearly established law requirement "does not mean that there must be a published case involving identical facts; otherwise we would be required to 'find qualified immunity wherever we have a new fact pattern.'" *York v. City of Las Cruces*, 523

[11] The only additional factor Trooper Schulte points to is that the Shaws "did not timely pull over," Aplt. App., 2, 82, but as the District Court found, "I really question the claim that it is suspicious that the minivan didn't immediately pull over when the officer is driving in front of you and not behind you. I don't know one person in a thousand that would think they're supposed to stop." Aplee. Supp. App., 62.

F.3d 1205, 1212 (10th Cir. 2008) (citing *Casey v. City of Federal Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007)); *see Weigel v. Broad*, 544 F.3d 1143, 1154 (10th Cir. 2008) ("We do not think [qualified immunity] requires a court decision with identical facts to establish clearly that it is unreasonable to use deadly force when the force is totally unnecessary to restrain a suspect or to protect officers, the public, or the suspect himself.").[12]

Trooper McMillan's explanation of his suspicion to detain Mr. Bosire is even weaker. According to Trooper McMillan, Mr. Bosire was suspicious because: he drove a short-term rental car; Trooper McMillan mistakenly believed Mr. Bosire was "caravanning;" Mr. Bosire had mounted cameras in the car; Mr. Bosire did not answer Trooper McMillan's questions; Mr. Bosire did not initially roll his window down all the way; and, Mr. Bosire had a "partially covered notebook in the back." Trooper McMillan also allegedly smelled marijuana at Love's. Aplt. App., 2, 172.

Putting aside the "caravanning" claim and the smell of marijuana—both lacking evidentiary support—leaves Mr. Bosire driving a rental car with cameras, exercising his Constitutional right not to answer questions, initially keeping his

[12] This is especially true in the reasonable suspicion context, as opposed to the deadly force context: if qualified immunity barred all but the exact same facts and reasonable suspicion factors, then under a totality of the circumstances test, troopers could always avoid liability by simply adding more criteria to the pile, no matter how little it actually factored into their calculus. Closely analogous facts—such as the close similarities between the facts here and those in *Vasquez* and *Wood*—is sufficient under the law of this Circuit.

window only partially rolled down, and having a partially covered notebook in the car. Aplt. App., 3, 234-236. When Trooper McMillan elected to prolong the detention for a canine unit, he did not smell marijuana and knew that Mr. Bosire had no criminal history. Aplt. App., 2, 173; Aplt. App., 3, 174; Aplt. App., 3, 231-232**.**

Even the reliance on Mr. Bosire's "partially rolled down window" should be discarded. The behavior is apparently suspicious because "people with marijuana in their vehicles will try to confine the odor of marijuana inside the vehicle," but Trooper McMillan "asked Bosire to roll his window down, which he did," and Trooper McMillan "did not smell marijuana." Aplt. App., 3, 232. It makes no sense for the trooper to continue to insist that the behavior is suspicious once his assumption was dispelled.

The factors Trooper McMillan attempts to rely on are factually analogous to those considered and rejected by the Court in *Vasquez* and *Wood*. Qualified immunity is therefore inappropriate, and the District Court appropriately denied Defendant Troopers' motions.[13]

[13] Other factors allegedly relied on by Trooper McMillan—that Mr. Bosire had a notebook in his back seat, and that he had cameras in the car—are additional red herrings. Mr. Bosire does not dispute the fact that these items were in his car. Case law regarding the unlawfulness of relying on these criteria, absent other significant indicia of criminal activity, was set forth in Mr. Bosire's response to Trooper McMillan's Motion. Aplt. App., 3, 167-169 (cameras); 170 (bible). However, the reasonableness of Trooper McMillan's suspicion of these items is a question for the jury, further demonstrating the inappropriateness of summary judgment.

IV. Qualified immunity should not shield Trooper Schulte from liability for Mr. Bosire's stop.

When Trooper Schulte arrived to assist Trooper McMillan during Mr. Bosire's stop, he had a constitutional obligation to intervene to prevent Trooper McMillan from violating Mr. Bosire's constitutional rights. Trooper McMillan stated that he was going to further detain Mr. Bosire despite lacking the constitutionally required reasonable suspicion. Aplt. App. 2, 173 (Trooper McMillan "told Schulte, 'if [Mr. Bosire] does not let me [search], I don't think I can hold him for a dog."). Trooper McMillan detained Mr. Bosire anyway, despite having no constitutional basis to do so. *Rodriguez*, 135 S.Ct. at 1616 (citing *Caballes*, 543 U.S. at 407) ("If an officer can complete traffic-based inquiries expeditiously, then that is the amount of 'time reasonably required to complete [the stop's] mission.' As we said in *Caballes* and reiterate today, a traffic stop 'prolonged beyond' that point is 'unlawful.'"). Yet Trooper Schulte did nothing.

"All law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence." *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1210 (10th Cir. 2008) (citing *Anderson v. Branen*, 17 F.3d 552, 557 (2nd Cir. 1994)).

The Tenth Circuit has found this duty applicable in claims of excessive force as well as unlawful entry. *See Anderson v. Campbell*, No. 95-6459, 1996 WL 731244, *4 (10th Cir. Dec. 20, 1996).

> [A]ll law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers . . . . [A]n officer who is present but fails to intervene to prevent another law enforcement official from infringing a person's constitutional rights is liable if the "officer had reason to know . . . that any constitutional violation has been committed by a law enforcement official[ ] and the officer had a realistic opportunity to intervene to prevent the harm from occurring." . . .

Reid v. Wren, Nos. 94-7122, 94-7123, 94-7124, 1995 WL 339401, *2 (10th Cir. June 8, 1995) (internal citations and quotation marks omitted) (unpublished); *but see Harris v. Mahr*, 838 Fed.Appx. 339, 343 (10th Cir. 2020) (holding these cases insufficient to establish a clearly defined constitutional violation for an officer's failure to intervene in unlawful entry cases.).

Here, despite Trooper McMillan all but admitting he was going to violate Mr. Bosire's Fourth Amendment rights, Trooper Schulte stood by and did nothing. Qualified immunity should not shield this misconduct.

CONCLUSION AND RELIEF SOUGHT

The District Court denied summary judgment because the record raised genuine issues of fact. There is thus no jurisdiction because there is no "final decision" under 28 U.S.C. § 1291. In addition, summary judgment on qualified immunity is inappropriate here because there are disputed questions of material, historical fact which a jury should resolve. Finally, Defendant Troopers relied on Mr. Bosire's and the Shaws' travel plans and states of origin to justify their

prolonged detentions. Doing so violated clearly established law, precluding qualified immunity.

Plaintiffs therefore ask the Court to dismiss the appeal for lack of jurisdiction or, alternatively, to affirm the District Court's denial of summary judgment.

Respectfully submitted by,

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The undersigned hereby certifies that on the 12th day of November, 2021, a true and accurate copy of this brief and appendix was electronically filed with the Court using the Court's CM/ECF system, which will send a notice of electronic filing to Arthur S. Chalmers, attorney for Defendants-Appellants.

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