IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

BLAINE FRANKLIN SHAW, *et al.*, *Plaintiffs,* v. HERMAN JONES in his official capacity as the Superintendent of the Kansas Highway Patrol, *et al.*, *Defendants.*	**Case No. 19-1343-KHV-GEB**
MARK ERICH, *et al.*, *Plaintiffs,* v. HERMAN JONES, *KHP Superintendent,* *Defendant.*	**Case No. 20-1067-KHV-GEB**

PLAINTIFFS' REPLY BRIEF IN FURTHER SUPPORT OF THEIR PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND IN RESPONSE TO DEFENDANT JONES'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 20, 2023, Plaintiffs' submitted their Proposed Findings of Fact and Conclusions of Law for the Court's consideration.[1] Defendant submitted his Proposed Findings of Fact and Conclusions of Law on May 26, 2023.[2] In accordance with the Court's Order,[3] Plaintiffs hereby

[1] Pls.' Proposed Findings of Fact & Conclusions of Law, Doc. #529.

[2] Def. Proposed Findings of Fact and Conclusions of Law, Doc. #531.

[3] Order, Doc. #520.

submit the following Reply Brief in Further Support of Their Proposed Findings of Fact and Conclusions of Law, and in Response to Defendant Jones's Proposed Findings of Fact and Conclusions of Law.

In general, Defendant's pleading ignores and misconstrues the overwhelming evidence in the record and rehashes identical arguments from prior pleadings that have already been considered and overruled. Put simply, Defendant has not grappled with the *actual* evidence and claims in this case, choosing instead to argue against strawmen and suggest that his law enforcement agency's misconduct is beyond the reach of this Court. But however valuable drug interdiction work might be, it is not without its constitutional limits. For the reasons set forth below, Plaintiffs respectfully request that the Court reject Defendant's proposed findings of fact and conclusions of law and find in favor of the Plaintiffs.

I. DEFENDANT'S PROPOSED FINDINGS OF FACT DO NOT ACCURATELY REPRESENT TESTIMONY AND EVIDENCE PRESENTED AT TRIAL.

As an initial matter, the Court should not rely on Defendant's Proposed Findings of Fact as they contain material omissions and inaccuracies, and in part, rely on evidence not in the record and inferences to which the Defendant—who put on only a single witness in his defense—is not entitled.

Notably, Defendant's Proposed Findings of Fact contain no citations to any evidence in the record from the two-week long bench trial save for KHP policies and a few cherry-picked slides from PowerPoint presentations that the Kansas Highway Patrol (KHP)'s former legal counsel allegedly presented to troopers at some point in the past.[4] Although Plaintiffs' Motion for Leave

[4] *See, e.g.* Def. Proposed Findings of Facts (hereinafter Def. PFOF) ¶¶ 21-22 (citing to KHP policies, Exs. 903 ¶ 905) and ¶¶ 24-28 (citing to KHP trainings, Exs. 900 & 901). Defendant provides no Finding of Fact regarding how many troopers took these trainings, and when, or any evidence that the troopers walked away from the trainings with an understanding of the law on the key issues in this case.

to Utilize Unofficial Transcripts[5] was still pending at the time of filing, Defendant's Proposed Findings of Fact do not rely on *any* other evidence, including transcripts of depositions in the record, for support.

Plaintiffs' Proposed Findings of Fact included in their submission to the Court[6] provide a much more comprehensive—and accurate—overview of the evidence that was *actually* produced at trial. Defendant's proposal, on the other hand, ignores the vast majority of the evidence presented at all three trials, as described in detail in Plaintiffs' pleading.

Perhaps because of this, Defendant's proposed "facts" contain several significant inaccuracies. For example, in ¶ 49, Defendant insists that there was evidence presented demonstrating that the alleged "paint" on the back of the Erich/Maloney RV was "fresh" and that Lt. Rohr's partner saw a "white substance" on his hand after touching the rear of the RV.[7] Yet no evidence was produced at trial to this effect beyond an unsupported, fleeting statement made by the trooper that was captured on Lt. Rohr's dashcam video which Plaintiffs objected to on hearsay grounds. Nor did Defendant call Lt. Rohr's partner as a witness to testify about what was on his hand, if anything. This alleged fact also makes no sense—there was never any "fresh paint" on the back of the van, and the testimony at trial confirmed this. Defendant's factual statement in this regard is therefore unsupported and contradicted by the remainder of the record—much like the alleged "marijuana smell" at the Love's gas station in Mr. Bosire's stop and detention. Paragraph 80 is also wholly inaccurate. Dr. Mummolo *never* testified that his inability to determine a disparate hit rate with a reasonable degree of statistical certainty—i.e., a statistically significant

[5] Doc. #524.

[6] Doc. #529 at 6-107.

[7] *See* Def. PFOF ¶ 49.

disparity—"disputed" Plaintiffs' claim that troopers "apply a lower standard for reasonable suspicion to out-of-state drivers."[8] His conclusion in this regard was only that "there was no evidence that out-of-state drivers are more likely than Kansas drivers to be found hiding illegal drugs or contraband at the conclusion of a canine sniff," but that this finding was not "statistically significant."[9] Finally, Defendant asserts that the pretextual stop of the Erich/Maloney RV was an "exception" and that KHP's interdiction work is not really about pretextual traffic stops at all.[10] Yet ample evidence in the record refutes that assertion. Ms. Dunn's traffic stop was clearly pretextual, as was Mr. Kelly's—both were driving rental cars with out of state plates and followed for a period of time until a minor traffic violation occurred (lingering too long in the left lane, and following too closely, respectively).[11] Minor traffic infractions like these occur on Kansas highways *every single day* without KHP troopers taking any action; they have discretion in deciding whom to stop.[12] And Lt. Rohr testified that he uses that discretion to target particular vehicles, including newer vehicles and rental vehicles,[13] and by inference based on the totality of the evidence: vehicles with out-of-state plates.

Defendant's proposed findings of fact also rely on evidence that was *never presented through testimony at trial*. For example, in ¶ 67, Defendant (without citation) states that once Lt.

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[8] Def. PFOF ¶ 80.

[9] *See* Pls.' Proposed Findings of Facts (hereinafter Pls. PFOF) ¶ 203. *See also* Jones Tr. Vol. 3, 42:4-10 (when asked to summarize his opinions about whether KHP is more likely to find drugs when they search out-of-state drivers, Dr. Mummolo answered that his analysis shows "there's no statistical evidence that out of stated [sic] drivers are more likely to be found holding illegal drugs or contraband at the conclusion of a canine sniff" than in-state drivers).

[10] Def. PFOF ¶ 31.

[11] *See* Pls. PFOF, Doc. #529, ¶¶ 102-104, 123-126, 147.

[12] Pls. PFOF ¶ 175.

[13] Pls. PFOF ¶ 254.

Proffitt ran Mr. Martinez's license with KHP dispatch, he found out that there was "no new registration," and therefore that "Mr. Martinez had not been truthful" about having previously renewed the vehicle's registration.[14] Lt. Proffitt did not testify to this "fact" at trial—this accusation is simply not a part of the trial record. And Defendant's assertion that "Lieutenant front-line field supervisors *frequently* review the work of the troopers under their supervision,"[15] has no support at all. Defendant put on no evidence to describe the type or frequency of supervision that field supervisors provide. At best, Defendant presented disjointed testimony on cross examination from Captain Brent Hogelin about how *he* supervises within the interdiction unit—which makes up a small portion of the total number of KHP troopers patrolling Kansas highways.[16] And the remainder of the fact paragraph, which discusses the troopers' 15-day reports that outline their "daily activities,"[17] conveniently ignores that these reports do not track the number of roadside detentions and canine sniffs conducted by the trooper.[18]

Defendant's Statement of Facts also includes material omissions. Most notably, Trooper Schulte testified at trial that he relied on Mr. Shaw's state of residency, Oklahoma, in finding Mr. Shaw suspicious, because Oklahoma is a "drug source" state.[19] Yet that fact is conveniently missing from Defendant's articulation of Trooper Schulte's reasonable suspicion for the Shaw

[14] *See* Def. PFOF ¶ 67. Perhaps Defendant is referring to Lt. Proffitt's testimony at Jones Tr. Vol. 2, 63:23-64:5, where he stated that he asked dispatch for the expiration date on the tag of Mr. Martinez's car and learned it had expired. But that testimony did not confirm that there was "no new registration" on the tag or that Mr. Martinez had been untruthful when he said that he recently renewed the tag.

[15] Def. PFOF ¶ 18.

[16] *See* Pls. PFOF ¶¶ 365.

[17] Def. PFOF ¶ 18.

[18] *See* Pls. PFOF ¶¶ 388.

[19] *See* Schulte Tr., Vol. 2, 27:14-28:1.

detention.[20] Defendant also states that "about 1000 canine sniffs were conducted in post-traffic stop detention" in the time period that Dr. Mummolo reviewed, and uses this "fact" to imply that the risk of being subjected to a canine sniff is low.[21] But Defendant omits the evidence that during this period there were many canine sniffs conducted by non-KHP canine units *at the behest of a KHP trooper*, many of which were never documented by KHP or provided to Dr. Mummolo for analysis. Each time a third-party law enforcement agency, like a county sheriff, conducted the canine sniff, KHP maintained no record of the sniff at all.[22] Defendant's "fact" in this regard is therefore wholly inaccurate because it omits a key part of the evidence that affects the total number of canine sniffs conducted stemming from *KHP trooper-initiated* traffic stops and detentions.

Finally, in numerous instances, Defendant continues to misconstrue and mischaracterize Plaintiff's claims to avoid addressing the ample evidence that Plaintiffs presented in support thereof. Defendant continues to think he is defending against a lawsuit that is materially different from the one Plaintiffs have pursued for the last four years, relying heavily on assertions that the KHP does not *solely* rely on out-of-state residence, origin or destination in forming reasonable suspicion,[23] and that KHP does not *physically block* cars during the Two-Step.[24] These assertions continue to miss the point. Plaintiffs have demonstrated that KHP continues to train officers that out-of-state license plates can be *a* meaningful factor in forming reasonable suspicion, in

[20] Def. PFOF ¶ 41.

[21] Def. PFOF ¶ 34.

[22] *See* Pls. PFOF ¶ 187; Jones Tr. Vol. 3, 17:6-15.

[23] Def. PFOF ¶¶ 23, 25, 75-75.

[24] Def. PFOF ¶ 28.

conjunction with the "totality of the circumstances,"[25] and there was testimony from numerous troopers that they do in fact rely on a person's state of origin, destination, or residency in forming reasonable suspicion.[26] Defendant cites to nothing in support of his factual assertions otherwise.

Overall, there are no facts offered by Defendant that contradict the ample facts presented by Plaintiffs: that KHP troopers, by and through Defendant's oversight and sanctioned practices, (1) routinely rely on out-of-state citizenship, destination, or origin in deciding to detain drivers for canine sniffs, and (2) routinely perform the "Two Step" in a way that an objectively reasonable person would not find the subsequent encounter to be truly "consensual,"[27] and (3) will continue to do so into the future.[28]

For the foregoing reasons, Plaintiffs respectfully request that the Court reject Defendant's proposed findings of fact and adopt Plaintiffs' proposed findings of fact instead.

II. PLAINTIFFS HAVE STANDING.

Defendant argues that Plaintiffs lack standing because "there is no evidence of a prevailing and persistent pattern that troopers systematically detain people without reasonable suspicion or voluntary consent because of a policy or custom attributable to Jones."[29] He is doubly mistaken. Plaintiffs have put forth dispositive evidence demonstrating KHP's practice of targeting out-of-state drivers for prolonged roadside detentions without reasonable suspicion, and this practice is

[25] Pls. PFOF ¶ 313.

[26] *See, e.g.*, Pls. PFOF ¶¶ 251-252, 319.

[27] *See* Pls. PFOF ¶¶ 175-274.

[28] *See* Pls. PFOF ¶¶ 205-212, 233-255, 318-325.

[29] Doc. #531 at 21, ¶ 4.

attributable to Defendant in his official capacity as the head of the agency. Plaintiffs have therefore established standing for the prospective relief they seek.

First, Plaintiffs have established that they face a non-speculative risk of being again subjected to suspicionless, prolonged roadside detentions, in violation of their Fourth Amendment rights, because of KHP's practice of targeting out-of-state drivers.[30] Contrary to Defendant's assertions, Plaintiffs have shown at trial—by at least a preponderance of the evidence—that KHP is engaged in a widespread, ongoing practice of targeting out-of-state drivers for pretextual traffic stops, and then detaining those drivers without adequate reasonable suspicion at least partly on the basis of those drivers' out-of-state travel origin or destination.[31] In particular, Plaintiffs have shown that: (1) KHP's unconstitutional practice contributed to the Fourth Amendment violations in their individual stops, as well as the stops of other motorists;[32] (2) these unconstitutional detentions have not been limited to individual officers, a particular subset of KHP, a particular geographic area, or a particular time period, but are instead widespread throughout the agency and the state;[33] (3) KHP has persistently disregarded the Tenth Circuit's admonition to the agency that "[i]t is time to

[30] Doc. #529 at 116-17. Defendant also asserts, without supporting authority, that Plaintiffs can establish standing only by demonstrating that it is *likely* KHP will again violate their constitutional rights pursuant to this practice. Doc. #531 at 21, ¶ 3. Not so. Plaintiffs need only establish a "realistic threat" of future constitutional deprivation in order to establish standing. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 106 n.7, 109 (1983). *See also, e.g.*, *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 979 (D. Ariz. 2011) (finding standing to challenge a stop policy where the "likelihood that any particular named Plaintiff will again be stopped in the same way may not be high"); Doc. #529 at 115 & nn. 739-741 (collecting cases).

[31] Doc. #529 at 117-19.

[32] Doc. #529 at 119-132. Because Defendant is being sued in his official capacity as KHP Superintendent for prospective relief only, his lack of personal involvement in Plaintiffs' prior detentions, Def. PFOF ¶39, is irrelevant. *See, e.g.*, *Gonzalez v. Feinerman*, 663 F.3d 311, 315 (7th Cir. 2011) ("If Gonzalez was seeking only damages, the warden's lack of personal involvement would be conclusive, but since Gonzalez also seeks injunctive relief it is irrelevant whether the warden participated in the alleged violations." (citations omitted)); *Spiess v. Fricke*, 386 F. Supp. 2d 1178, 1191 (D. Kan. 2005) ("Goossen's lack of personal involvement in any retaliation is irrelevant because this is an official capacity claim essentially against the State.").

[33] Doc. #529 at 132-34.

abandon the pretense that state citizenship is a permissible basis upon which to justify the detention and search of out-of-state motorists,"[34] and that the agency did not even require troopers to document the reasons for their roadside detentions until the middle of summary judgment briefing this case;[35] (4) troopers testified they will continue to violate the law, because they either do not understand it or they do not feel they are required to follow it;[36] (5) even despite the near total absence of agency documentation regarding KHP troopers' reasonable suspicion for canine detentions, statistical analysis demonstrates KHP's strongly disproportionate targeting of out-of-state drivers for traffic enforcement *and* canine detentions;[37] and (6) KHP uses the Two Step maneuver to subject drivers to invasive questioning under circumstances where a driver would not reasonably feel free to leave, thus initiating an unconstitutional roadside detention even before a canine sniff is ordered.[38] This showing is sufficient to establish Plaintiffs' injury-in-fact.

Second, Plaintiffs have shown causation and redressability because KHP's ongoing unconstitutional practice is attributable to Defendant in his official capacity as KHP Superintendent. As this Court previously recognized, "plaintiffs only need to show that a causal nexus exists between Jones' conduct—specifically his failure, as the head of the agency, to ensure his troopers are complying with the Constitution—and the continual constitutional violations occurring in the field under his watch."[39] Plaintiffs' evidence at trial demonstrates the requisite

[34] *Vasquez v. Lewis*, 834 F.3d 1132, 1138 (10th Cir. 2016)

[35] Doc. #529 at 134-38.

[36] Doc. #529 at 135-136.

[37] Doc. #529 at 138-141.

[38] Doc. #529 at 141-145.

[39] Order, Doc. #466 at 3. *See also Turner v. Nat'l Council of State Bds. of Nursing, Inc.*, No. 11-2059-KHV, 2012 WL 1435295, at *15 (D. Kan. Apr. 24, 2012), *aff'd*, 561 F. App'x 661 (10th Cir. 2014). As Plaintiffs have previously argued, this is a lawsuit against a state official rather than a municipality, so the standard for *municipal* liability under *Monell v. Dep't of Soc. Servs*., 436 U.S. 658, 694-95 (1978), "has no applicability." *See Rounds v. Clements*, 495 F.

causal nexus between Jones' conduct as the head of the agency and the ongoing constitutional violations described above. Plaintiffs have further demonstrated that Defendant actively encourages the unconstitutional conduct of which they complain. Plaintiffs showed that: (1) Defendant improperly trains KHP troopers on the *Vasquez* decision and Fourth Amendment guardrails on interdiction, including by encouraging troopers to consider out-of-state license plates as a factor in the reasonable suspicion calculus;[40] (2) Defendant's "head in the sand" approach to supervision has led to agency-wide failures to detect, deter, and address Fourth Amendment violations;[41] (3) until very recently, Defendant did not even require KHP troopers to document their grounds for detaining an individual unless that detention would need to be defended in criminal court, demonstrating complete apathy to whether those detentions were justified;[42] and (4) KHP's Professional Standards Unit is totally ineffective at addressing violations of drivers' Fourth Amendment rights and deterring future violations.[43]

In arguing that Plaintiffs' evidence is insufficient to establish standing, Defendant largely relies on the Supreme Court's decision in *Rizzo v. Goode*.[44] However, that reliance is misplaced. In *Rizzo*, the plaintiffs brought two class action lawsuits against the Mayor of Philadelphia, the City Managing Director, the Police Commissioner, and others alleging a pervasive pattern of assorted illegal and unconstitutional police misconduct against minority citizens in particular and

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App'x 938, 941 (10th. Cir. 2012) (citing *Monell*, 436 U.S. at 694); *see also Spann v. Hannah*, No. 20-3027, 2020 WL 8020457, at *3 (6th Cir. Sept. 10, 2020) (citing *Rounds*, 495 F. App'x at 941); *Cain v. City of New Orleans*, No. CV 15-4479, 2017 WL 467685, at *17 (E.D. La. Feb. 3, 2017) (same).

[40] Doc. #529 at 147-48.

[41] Doc. #529 at148-150.

[42] Doc. #529 at 150.

[43] Doc. #529 at 150-52.

[44] 433 U.S. 362.

Philadelphia residents in general.[45] After extensive trial proceedings, the district court arguably identified a total of nineteen unrelated instances of unconstitutional police misconduct over the span of a year.[46] The court "found that the evidence did not establish the existence of any policy on the part of the named petitioners to violate the legal and constitutional rights of the plaintiff classes, but it did find that evidence of departmental procedure indicated a tendency to discourage the filing of civilian complaints and to minimize the consequences of police misconduct." *Id.* at 368-69. Although "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners express or otherwise showing their authorization or approval of such misconduct," the district court found "that in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur."[47] The district court directed petitioners to draft a comprehensive program for dealing with civilian complaints, in accordance with guidelines laid out by the court.[48] Although it did not resolve the case on justiciability grounds, the Supreme Court expressed strong reservations about the justiciability of the named plaintiffs' claims, which rested "upon what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures."[49]

In stark contrast to *Rizzo*—where the plaintiffs' fears of future injury rested on variegated instances of individual misconduct by police officers, without any apparent connection to each

[45] *Id.* at 366-67.

[46] *Id.* at 367-68.

[47] *Id.* at 371.

[48] *Id.* at 369-70.

[49] *Id.* at 372.

other or to department policy or practice—Plaintiffs have demonstrated that KHP, with Defendant's overt and tacit encouragement, has a widespread and persistent practice of targeting out-of-state drivers for suspicionless detentions in violation of the Fourth Amendment. *Lyons* is similarly inapposite because "[t]he *Lyons* complaint . . . did not assert that there was a pattern and practice of applying chokeholds without provocation or, if it did state such a claim, the Court found it was not supported by the record."[50] By contrast, as Jones himself acknowledges, the Supreme Court upheld a permanent injunction against the Texas Rangers in *Allee v. Medrano* because "the constitutional violations 'were not a series of isolated incidents but a prevailing pattern' of police misconduct."[51] And, as set forth in Plaintiffs' Proposed Conclusions of Law, courts have consistently held that plaintiffs have standing to seek prospective relief against unconstitutional profiling practices by law enforcement, even where the plaintiff's individual likelihood of being stopped was relatively low.[52] In short, Plaintiffs have demonstrated that KHP has a widespread and persistent practice of targeting out-of-state drivers for suspicionless roadside detentions, and that Jones' failure to meaningfully implement *Vasquez* within the agency has causally contributed to the ongoing constitutional violations occurring under his supervision. That is sufficient to establish Plaintiffs' standing.

III. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF.

Plaintiffs extensively briefed why they are entitled to a permanent injunction in their submitted Proposed Conclusions of Law.[53] Defendant's pleading primarily focuses on the second

[50] *Md. State Conf. of NAACP Branches v. Md. Dep't of State Police*, 72 F. Supp. 2d 560, 564-65 (D. Md. 1999) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 106 n.7 (1983)).

[51] Doc. #531 at 22, ¶ 5 (quoting *Allee v. Medrano*, 416 U.S. 802, 809 (1974)).

[52] Doc. #529 at 115 & n.741 (collecting cases).

[53] Doc. #529 at 117 *et seq.*

prong of the test for determining entitlement to an injunction: irreparable harm.[54] Defendant apparently concedes that if the Court finds success on the merits, then the balancing of the harms merits an injunction, and an injunction would be in the public interest. Because Defendant's arguments regarding irreparable harm are unavailing, and because there is precedent supporting the issuance of an injunction in this case, Defendant's conclusions of law in this regard should be dismissed.

1. Plaintiffs have demonstrated irreparable harm.

Plaintiffs have carried their burden of demonstrating irreparable harm sufficient to justify an injunction.

As the Tenth Circuit recognized in *Awad v. Ziriax*, "[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."[55] "The law is well-settled that plaintiffs establish irreparable harm through the allegation of Fourth Amendment violations."[56] Although Defendant cites *Floyd v. United States* for the proposition that the Tenth Circuit does not consider Fourth Amendment violations categorically irreparable, the court in that case addressed the meaning of irreparable injury in the context of former Federal Rule

[54] *See* Doc. #531 at 25-30.

[55] 670 F.3d 1111, 1131 (10th Cir. 2012) (quoting *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001)); *see also Kikumura*, 242 F.3d at 963, *abrogated on other grounds by Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797 (10th Cir. 2019). *But cf. Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016) ("[W]hile we must nonetheless engage in our traditional equitable inquiry as to the presence of irreparable harm in such a context, we remain cognizant that the violation of a constitutional right must weigh heavily in that analysis.").

[56] *Doe v. Bridgeport Police Dep't*, 198 F.R.D. 325, 335 (D. Conn. 2001) (quotations omitted). *E.g., Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021) ("Because there is a likely constitutional violation, the irreparable harm factor is satisfied."); *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009); *Herrera v. Santa Fe Pub. Sch.*, 792 F. Supp. 2d 1174, 1182 (D.N.M. 2011). *See also Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992); *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983); *Bannister v. Bd of Cnty. Comm'rs*, 829 F. Supp. 1249, 1252 (D. Kan. 1993) (Van Bebber, J.). *See generally* Doc. #529 at 154-55 & nn. 919, 920 (collecting cases).

of Criminal Procedure 41(e), now Rule 41(g), which governs the return of property.[57] The court held that irreparable harm in that context "refers to circumstances in which a Rule 41(e) movant cannot wait for a legal remedy," such as when an indictment based on illegally seized evidence appears imminent.[58] *Floyd* is therefore inapposite.

In any event, Plaintiffs have shown that KHP's practice of targeting out-of-state drivers for unconstitutional detentions is causing them individual irreparable harm,[59] and that neither money damages nor suppression motions are adequate alternatives to injunctive relief where a state law enforcement agency is engaged in widespread and ongoing constitutional violations.[60] Defendant argues that *O'Shea v. Littleton* found that the plaintiffs in that case had an adequate remedy at law, despite allegations of First, Sixth, Eighth, Thirteenth, and Fourteenth Amendment violations.[61] But the full context from this passage in *O'Shea* reveals that the Court was merely quoting "the 'basic doctrine of equity jurisprudence that courts of equity should not act, *and particularly should not act to restrain a criminal prosecution*, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.'"[62]

2. The Court can and should enter an injunction.

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[57] Doc. #531 at 28-29 (quoting *Floyd v. United States*, 860 F.2d 999, 1005 (10th Cir. 1988)).

[58] *Floyd*, 860 F.2d at 1006 (citing *inter alia Pieper v. United States*, 604 F.2d 1131, 1134 (8th Cir.1979)).

[59] Doc. #529 at 155-56.

[60] Doc. #529 at 156-160. *See also Lankford v. Gelsteon*, 364 F.2d 197, 202 (4th Cir. 1966) (approvingly cited in *Allee v. Medrano*, 416 U.S. 802, 816 n.9 (1974)); *Easyriders*, 92 F.3d at 1501.

[61] Doc. #531 at 29-30 (citing *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974)).

[62] *O'Shea*, 414 U.S. at 499 (quoting *Younger v. Harris*, 401 U.S. 37, 43-44 (1971)). Plaintiffs further briefed the inapplicability of *O'Shea* in their response to order to Show Cause. *See* Doc. #358 at 10.

As Plaintiffs have previously noted, should the Court find Defendant liable, then it has broad, flexible powers to enter appropriate injunctive relief.[63] Defendant does not meaningfully argue otherwise. Nevertheless, to the extent that Defendant attempts to argue that the Court is without power to enjoin KHP's unlawful conduct, or that the provisions proposed by Plaintiffs are insufficient, Plaintiffs respond as follows.

a. Injunctive relief is an appropriate and vital remedy in institutional reform litigation.

It should be beyond dispute that this Court has the power to fashion equitable relief that fits the needs of this case. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[64] Indeed, the Tenth Circuit "has directly applied to institutional reform litigation the vital principle that a federal court's equitable powers are inherently sufficiently broad to allow federal courts to fashion effective injunctive relief to cure federal constitutional violations."[65] The Tenth Circuit has further recognized the importance of institutional reform litigation, and judicial intervention in such cases, stating that "the courts intervene, not simply to prevent isolated instances of misconduct, but rather to remove a threat to constitutional values posed by the manner of operation of the institution."[66] Based on these overarching principles, "[o]nce a constitutional violation is established, remedial decrees may require actions not

[63] *See e.g.*, Pls.' Response to Order to Show Cause, Doc. #358 at 8.

[64] *Cole v. City of Memphis*, 108 F. Supp. 3d 593, 608 (W.D. Tenn. 2015) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971)).

[65] *Duran v. Carruthers*, 678 F. Supp. 839, 846-47 (D.N.M. 1988), *aff'd,* 885 F.2d 1492 (10th Cir. 1989), *citing with approval Battle v. Anderson*, 708 F.2d 1523 (10th Cir. 1983).

[66] *Battle*, 708 F.2d at 1538 (discussing ability to enjoin state defendants' conduct in operating unconstitutional conditions of confinement).

independently required by the Constitution if those actions are, in the judgment of the court, necessary to correct the constitutional deficiencies."[67]

Plaintiffs recognize that fashioning an appropriate injunction to address a widespread practice of Fourth Amendment violations is not simple. There are competing concerns for the Court: on the one hand, ensuring individuals' foundational constitutional rights have meaning, and therefore a remedy; and on the other hand, respecting federalism and comity as much as possible. But although courts "must be sensitive to the State's interest[s]," they "nevertheless must not shrink from their obligation to 'enforce the constitutional rights of all persons . . . [.]'"[68]

As a sister court from the Tenth Circuit previously noted in another *Ex parte Young* civil rights case:

> The principles of equitable breadth and flexibility are at some tension with the doctrine of comity. *This tension, however, is superficial; ultimately the doctrines are consistent*. The preservation of the supremacy of federal law that animated *Ex Parte Young* serves as well to reconcile the facial inconsistency of these doctrines. First, *Ex Parte Young* makes clear that federal courts are authorized to vindicate federal rights, the principle of sovereign immunity notwithstanding. Second, where federal constitutional rights have been traduced, principles of restraint, including comity, separation of powers and pragmatic caution, dissolve; federal courts are empowered and required to design equitable remedies that are effective to cure constitutional violations. In this tailoring of remedies, of course, the preferred course is to preserve as much discretion for state administrators as possible. Yet, where constitutional rights have been violated, comity does not require, or even permit, a federal court to countenance those violations.[69]

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[67] *Duran*, 678 F. Supp. at 847, *citing Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 438 (1968); *Milliken v. Bradley*, 433 U.S. 267 (1977); *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974).

[68] *Brown v. Plata*, 563 U.S. 493, 511 (2011) (upholding structural reform injunction of California's administration of its prisons) (quoting *Cruz v. Beto*, 405 U.S. 319, 321 (1972)); *see also Swann*, 402 U.S. at 15 (if state "authorities fail in their affirmative obligations [to uphold federal law] . . . judicial authority may be invoked"); *Todaro v. Ward*, 565 F.2d 48, 53 (2d Cir. 1977) ("[A] policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution." (quoting *Procunier v. Martinez*, 416 U.S. 396, 405 (1974))).

[69] *Duran*, 678 F. Supp. at 847 (emphasis added).

This is why courts have consistently held that when a law enforcement agency suffers from a "persistent pattern of police misconduct, injunctive relief is appropriate."[70]

Defendant argues that the Supreme Court's decision in *Rizzo* prohibits this Court from issuing injunctive relief that interferes with KHP's law enforcement practices.[71] But *Rizzo* addressed an "unprecedented theory of [Section] 1983 liability," in which the plaintiff classes' claims "for equitable relief against [municipal officials] were made out on a showing of an 'unacceptably high' number of those incidents of constitutional dimension some 20 in all occurring at large in a city of three million inhabitants, with 7,500 policemen."[72] Although the district court found that the constitutional violations it identified were "fairly typical of (those) afflicting police departments in major urban areas,"[73] and that the named defendants were not responsible for any of the individual violations,[74] the court nonetheless took it upon itself to fashion "prophylactic procedures for a state agency designed to minimize this kind of misconduct on the part of a handful

[70] *Allee v. Medrano*, 416 U.S. 802, 815 (1974); *see also Ligon v. City of New York*, 925 F. Supp. 2d 478, 541–43 (S.D.N.Y. 2013) (enjoining NYPD from performing trespass stops outside certain buildings without reasonable suspicion and from using "furtive movement"—without more—as the basis for reasonable suspicion); *Alsaada v. City of Columbus*, 536 F.Supp. 3d 216, 275 (S.D. Ohio 2021) (granting preliminary injunction against the Columbus Police Department which restrained their use of non-lethal force against nonviolent protestors); *Index Newspapers LLC v. City of Portland*, 480 F. Supp. 3d 1120, 1155–56 (D. Or. 2020); *Lankford v. Gelston*, 364 F.2d 197, 201 (4th Cir. 1966) (reversing and remanding the district court's denial of an injunction in plaintiffs' favor because plaintiffs were entitled to their requested injunctive relief where the police department practice permitted unlawful searches); *Barajas v. City of Rohnert Park*, No. 14-CV-05157-SK, 2019 WL 13020803, at *8 (N.D. Cal. Jan. 16, 2019) (partially granting plaintiffs' permanent injunction that sought to improve police officer training in a separate proceeding, after a jury found in plaintiffs' favor); *Cole*, 108 F. Supp. 3d at 611; *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 517-18 (1939); *Build of Buffalo, Inc. v. Sedita*, 441 F.2d 284, 289 (2d Cir. 1971); *Spring Garden United Neighbors, Inc. v. City of Philadelphia*, 614 F.Supp. 1350, 1352-55 (E.D. Pa. 1985).

[71] Doc. #531 at 31. Defendant also cites *O'Shea*, but the plaintiffs in that case asked the federal court to monitor the day-to-day functions of state criminal courts—not a police agency. Plaintiffs' requested injunction here would not require the Court to participate, in any way, in state court proceedings.

[72] *Rizzo*, 423 U.S. at 373

[73] *Id.* at 375 (citation and internal quotation marks omitted).

[74] *Id.* at 377.

of its employees."[75] The Supreme Court concluded that the district court's imposition of a structural injunction in response to an assortment of unrelated constitutional violations by individual officers was "quite at odds with the settled rule that in federal equity cases the nature of the violation determines the scope of the remedy," as well as "important considerations of federalism."[76]

This case is entirely different. Whereas *Rizzo* concerned a prophylactic injunction untethered to any particular unconstitutional policy or practice by Philadelphia law enforcement, or even any particular constitutional right, Plaintiffs here have shown that KHP has a widespread and persistent practice of targeting out-of-state drivers for prolonged roadside detentions in violation of their Fourth Amendment rights, and that this unconstitutional practice is attributable to Defendant's conduct as the head of the agency.[77] In particular, Plaintiffs have shown that the Defendant *encourages* and *actively trains* his troopers to engage in pretextual traffic stops of out-of-state motorists and then use the manipulative Two Step maneuver to trick those individuals into giving up additional information, which the troopers then use to justify prolonged detentions for canine sniffs.[78] Plaintiffs have also shown that Defendant allows troopers to violate *Vasquez* with impunity, and until very recently did not even implement a policy requiring his troopers to document their detention decisions. And defendant offered no evidence at trial of compliance with the new policy.[79] This case more closely resembles *Allee*, where the Supreme Court identified a

[75] *Id.* at 378.

[76] *Id.*

[77] Doc. #529 at 117-152.

[78] Doc. #529 at 142-145.

[79] Doc. #529 at 146-152.

"persistent pattern" of unconstitutional law enforcement intimidation that "flowed from an intentional, concerted, and indeed conspiratorial effort to deprive the [plaintiff] organizers of their First Amendment rights."[80] Synthesizing *Allee* and *Rizzo*, lower courts have held that "[s]pecific findings of a persistent pattern of misconduct supported by a fully defined record can support broad injunctive relief" against a state law enforcement agency.[81] Plaintiffs have established just such a persistent pattern of constitutional violations here.[82]

b. Injunctive relief against the KHP can be narrowly tailored yet still effective.

Following a finding that a law enforcement agency is engaging in a widespread practice resulting in constitutional violations, injunctive relief typically includes several elements.[83] First,

[80] *Allee*, 416 U.S. at 814-15. The fact that KHP has persistently refused to implement the Tenth Circuit's decision in *Vasquez* also brings this case within the ambit of *Swann*, which recognized that courts have broad remedial powers to address state officials' intransigent refusal to implement constitutional requirements. *See* 402 U.S. at 15. *See also Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (upholding injunctive relief where "the police chief has expressed her intent to continue to use the program until a judge stops her").

[81] *Easyriders*, 92 F.3d at 1501 (quoting *Thomas v. County of Los Angeles*, 978 F.2d 504, 508 (9th Cir.1993)); *Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2016 WL 3996453, at *6 (D. Ariz. July 26, 2016) (distinguishing *Rizzo* and upholding the court's authority to fashion broad injunctive relief to remedy pervasive law enforcement policies and practices related to the unconstitutional detention of individuals without adequate reasonable suspicion), *aff'd sub nom*. *Melendres v. Maricopa County*, 897 F.3d 1217 (9th Cir. 2018).

[82] For this reason, Defendant's attempt to distinguish the injunctive relief granted against the NYPD's stop-and-frisk practices in *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) is unavailing. Doc. #531 at 32 n.16. As in *Floyd*, and unlike in *Rizzo*, Plaintiffs have demonstrated that the constitutional violations at issue here are part of a discrete, ongoing, and widespread agency practice, rather than unrelated instances of misconduct by individual officers.

[83] Given the Court's concerns as expressed at closing argument, Plaintiffs outline more specifics regarding the type of relief that would help curb the constitutional violations identified in this case. In this section, Plaintiffs point to reforms ordered by the District Court for the District of Arizona as part of the injunction issued in *Melendres v. Arpaio* as evidence of one example of how these orders can be structured. The *Melendres* injunction is but one of many examples of how relief can and should be structured in an institutional reform case involving a law enforcement agency accused of detaining drivers without adequate reasonable suspicion. It was also upheld in large part by the Ninth Circuit. Because of the overlapping legal issues between that case and this one, Plaintiffs point to *Melendres* as one approach that has been adopted, and affirmed, in the past.

Plaintiffs further point the Court's attention to the U.S. Department of Justice, Civil Rights Division's interactive tool that tabulates provisions from court-ordered police reform litigation handled by the federal government. Although those cases are brought under 42 U.S.C. § 14141 (re-codified at 34 U.S.C. § 12601), rather than 42 U.S.C. § 1983, the underlying legal claims are the same, and based on violations of the Fourth Amendment. Both statutes require that the plaintiff prove an ongoing pattern or practice of unconstitutional policing. Using this tool, the Court can sort by cases

the Court can order the defendant to implement changes to policies, procedures, and training to prevent future violations.[84] Here, such provisions could include the following, among others:

- Require Defendant to explicitly revise his policies to instruct troopers that they are not allowed to rely on a driver's state of citizenship, origin, or destination in forming reasonable suspicion to detain a driver, and that the fact that a driver is coming from a "drug source" city or state, or going to a "drug destination," carries no weight.[85]

- Direct KHP to end the "Two Step" practice, and mandate that if troopers reapproach for additional questioning that they must inform drivers they do not have to answer the questions and they are free to leave.[86]

- Require Defendant to develop new mandatory training for all troopers consistent with the Court's order that includes pre- and post-testing, scenarios, and other adult learning

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where there was a pattern or practice of Fourth Amendment violations related to unconstitutional stops, searches, and arrests, and view a list of provisions in court orders that were intended to address those violations, including in areas such as policy reform, training, data collection, and oversight. *See* U.S. Dep't of Justice, Police Reform Finder, https://www.justice.gov/crt/page/file/922456/download. All of the court-ordered reforms in cases handled by the DOJ are available at https://www.justice.gov/crt/special-litigation-section-cases-and-matters#police.

To be clear, Plaintiffs do not argue that an order from this Court needs *all* of the provisions included in these examples. Rather, Plaintiffs point to them only as exemplars from which the Court can draw its own relief. Certainly, should the Court feel other provisions are more applicable or appropriate here, the Court can order the relief it determines will best address the specific conduct at issue in this case.

[84] *See, e.g.*, *Melendres v. Arpaio*, 2013 WL 5498218, at *9-12 (D. Ariz. Oct. 2, 2013) (ordering the Maricopa County Sheriff's Office (MCSO) to revise policies to be consistent with the injunction, and adopt a small number of new policies with specific provisions as outlined in the injunction), *aff'd in relevant part Melendres v. Arpaio*, 784 F.3d 1254, 1266 (9th Cir. 2015); *see also United States v. Town of Colorado City*, 2017 WL 1384353, at *13 (D. Ariz. 2017) (in response to finding of liability by cities for pattern of Fourth Amendment violations, ordering injunctive relief that includes reviewing and revising policies and adopting new policies to address the violations found by the court).

[85] Although prior caselaw provides that destination and origin may be considered in extreme circumstances, testimony of troopers in this trial has shown that (1) in many instances, they equate "origin" with state of "residency" which is prohibited as a consideration; and moreover, (2) they consider *every* origin and destination to be a drug source or destination city or state. Therefore, any reliance on a driver's state of origin or destination is meaningless, and could be properly enjoined.

[86] It does not matter that under current Supreme Court precedent troopers are not required to say "you are free to leave." *See Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996). The Court has the power to order changes to policy and practice that go beyond current constitutional mandates if those changes are necessary to abate an ongoing practice that results in ongoing constitutional violations. As noted above, "[o]nce a constitutional violation is established, remedial decrees may require actions not independently required by the Constitution if those actions are, in the judgment of the court, necessary to correct the constitutional deficiencies." *Duran*, 678 F. Supp. at 847 (citing *Green v. County School Board*, 391 U.S. 430, 438, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716 (1968)).

techniques and that will ensure the troopers understand how these policies and legal rulings should impact their practices in the field.[87]

Second, court orders often include data collection and analysis provisions that will allow for the defendant and/or a court-appointed neutral to determine if the practices are continuing, despite the aforementioned changes to policies and trainings.[88] For example, in the *Melendres* injunction, which was upheld by the Ninth Circuit, the district court mandated that sheriff deputies document their reasons for stopping cars *and* any reasonable suspicion factors *prior* to first approaching the driver, and significant other details pertaining to the stop.[89] The injunction further ordered that MCSO collect and analyze data to "look for warning signs" of profiling or "other improper conduct under this order."[90] Here, the Court could order the Defendant to:

- Collect, analyze, and report data regarding their traffic stop and detention practices along the same lines as the analysis Dr. Mummolo conducted for his testimony in this case.[91]

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[87] *See, e.g.*, *Melendres*, 2013 WL 5498218, at * 14 (mandating that MCSO implement revised training on new policies within a certain period of the effective date of the Order, and that such training include at least 60% live training with an interactive component, testing to indicate learning of the material taught, and the incorporation of adult learning methods), *aff'd in relevant part Melendres v. Arpaio*, 784 F.3d 1254, 1266 (9th Cir. 2015) (upholding training requirements in the injunction because "[t]here is evidence that some MCSO deputies and supervisors lacked basic knowledge of constitutional requirements, and that MCSO took no steps to evaluate personnel for racial profiling or to discipline personnel who engaged in racial profiling. The district court did not abuse its discretion in ordering these corrective training and supervision procedures in order to redress the constitutional violations it found here."); *see also Colorado City*, 2017 WL 1384353, at *14 (requiring the enjoined law enforcement agency to provide yearly training on relevant Fourth Amendment topics by a "qualified third person or organization" for "at least three hours" per year, and that defendants must obtain approval from the plaintiff on the content of that training).

[88] *See, e.g.*, *Melendres*, 784 F.3d at 1266 (upholding data collection and analysis provisions of injunction against county sheriff, as the measures "directly address and relate to the constitutional violations found by the district court" (internal quotations omitted)); *Nicacio v. INS*, 797 F.2d 700, 706 (9th Cir.1985) (upholding injunction requiring INS to record particularized grounds for motorist stops in order to prevent future racial profiling), *overruled in part on other grounds by Hodgers–Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir.1999) (en banc).

[89] *See Melendres*, 2013 WL 5498218, at *17-18.

[90] *Id.* at *20.

[91] It would not be sufficient to merely require that Defendant track how many in-state versus out-of-state cars are stopped and/or detained. For the reasons provided by Dr. Mummolo during his direct examination, such a metric tells us little about KHP's disparate enforcement and detention practices, because it does not include a benchmark that signifies whether that metric is disproportionate to each group's total share of the population on Kansas highways at the same dates and times. *See* Pls. PFOF ¶¶ 190-191.

- Implement a revised version of the new reasonable suspicion detention policy and form that: eliminates the use of check boxes; requires troopers to articulate in the narrative section their reasonable suspicion in their own words; provides for regular and meaningful review of dashcam footage of roadside detentions to determine if reasonable suspicion existed; and mandates analysis of department trends regarding who is being detained and for what reason, similar to the provisions included in the *Melendres* injunction.[92]

- Devise and implement a series for periodic randomized audits of individual detention decisions, to ensure that similar standards are applied to in-state versus out-of-state drivers, and follow up with troopers regarding their detention decisions when there is an indication of strong disparities within troops or by individual troopers.

- Incorporate into KHP training and continuing education the findings from the data collection and analysis of detention forms, and any analysis conducted to reflect and respond to the level of compliance with the Court's orders.

Finally, court orders in police reform litigation generally include provisions that improve the agency's ability to detect continued violations of the Court's orders and appropriately respond to those violations if and when they occur.[93] These provisions include reforms to an agency's

[92] For more in-depth analysis of the problems with Defendant's newly enacted reasonable suspicion detention reporting form, *see* Doc. #529 at 137. Importantly, a court order requiring troopers to document their reasonable suspicion in narrative form, in their own words, for each detention they conduct—which they know will be *meaningfully* reviewed by command—could dramatically reduce the overall number of detentions that occur *and* significantly increase the number of detentions that are actually supported by reasonable suspicion. *See* Jonathan Mummolo, *Modern Police Tactics, Police-Citizen Interactions, and the Prospects for Reform*, 80 J. Pol. 1 (2018) (finding that implementation of a new policy requiring NYPD officers document their reasonable suspicion for detaining individuals led to a significant increase in justified detentions, as the new documentation requirement signaled increased "managerial scrutiny, leading them to adopt more conservative tactics"—i.e., only detain individuals when they actually had legal grounds to do so.).

[93] *See, e.g. Melendres*, 2013 WL 5498218 at *28 (requiring development of a plan for regular "audits" or "integrity [] checks" conducted by agency personnel to identify and investigate instances of officers engaging in improper conduct). Importantly, a district court is permitted to order "relief that the Constitution would not of its own force initially require if such relief is necessary to remedy a constitutional violation." *Sharp v. Weston*, 233 F.3d 1166, 1173 (9th Cir. 2000) (quotations omitted). And internal and external accountability provisions are a routine part of court-ordered police reforms, as they are the mechanism for ensuring officers are following the Court's orders.

internal accountability mechanisms—here, KHP's supervision[94] and disciplinary systems[95]—as well as provisions that allow for independent oversight of the implementation of the court's order. The Court could, for example, order that the KHP:

- Improve its supervision practices by requiring more frequent and regular review of dash cam videos of traffic detentions, or mandating review of dash cam footage by a supervisor for *every* detention for a canine sniff, to determine if it matches the information provided on the trooper's detention paperwork.

- Develop a system to track complaints related to violations of this order, and suppression motions that are granted against the KHP on issues that relate to this order.

- Revise its PSU policies such that if other troopers witness a colleague violating terms of the Court's injunction, and fail to report those violations, the witnessing trooper will be subjected to discipline.

- Appoint a neutral that would be tasked with spot checking both troopers' detentions *and* supervisors' review of those detentions on a regular basis and reporting progress to the Court.[96]

The above are examples of the type of relief that may be appropriate in this case, depending on the Court's ultimate finding on liability, that would comply with Rule 65. In the first instance, however, the Court can enter a finding of liability and basic injunction terms, as set forth in the Plaintiff's proposed initial terms of declaratory and injunctive relief, attached hereto as Exhibit A, followed by a meet and confer process between Plaintiffs and the state wherein the parties would have the opportunity to agree on specific terms to effectuate the Court's initial order.

[94] *Melendres*, 2013 WL 5498218, at *25 (ordering the following: "First-line field Supervisors shall be required to discuss individually the stops made by each Deputy they supervise with the respective Deputies no less than one time per month in order to ensure compliance with this Order. This discussion should include, at a minimum, whether the Deputy detained any individuals stopped during the preceding month, the reason for any such detention, and a discussion of any stops that at any point involved any immigration issues.").

[95] *Id.* at *28 (ordering changes to MCSO's complaint tracking system).

[96] *See* Section III.2.c.

The Plaintiffs made this proposal for two reasons. First, Plaintiffs believe that good faith negotiations following a finding of liability would secure the KHP's buy-in to the reform process. These negotiations should include necessary and constructive input from the State as to the contours of the relief ultimately ordered by the Court, which may ultimately positively impact the agency's willingness to implement the agreed-to reforms. Second, without a finding of liability and an order from the Court regarding its findings of fact and conclusions of law, Plaintiffs felt that it would be impossible to articulate the necessary reforms with precision and tailor their proposed terms to the specific violations found, as is required by Rule 65.[97]

For these reasons, Plaintiffs propose entering an order that includes the terms listed in Exhibit A. This includes initial terms sufficient to satisfy Rule 65, and can be followed by a supplemental order after the parties have the opportunity to meet and confer. However, should the Court find Defendant liable and that Plaintiffs are entitled to injunctive relief, but that Plaintiffs should propose more specific terms at the outset, Plaintiffs respectfully request the opportunity to draft and submit their proposed terms that are in line with the above discussion *and* narrowly tailored to the Court's order on liability.

c. Given the KHP's failure to understand and abide by prior court orders and decisions, oversight by a Court-ordered neutral is both precedented and appropriate.

The authority of the Court to appoint a monitor is well established.[98] Following a finding of liability, "it is common in institutional reform litigation for courts to appoint parajudicial

[97] *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) ("The scope of the remedy is determined by the nature and extent of the constitutional violation.").

[98] *See Ex Parte Peterson*, 253 U.S. 300, 312-13 (1920) (courts have the inherent power to "appoint persons unconnected with the court to aid judges in the performance of specific judicial duties," and courts have long exercised this power "when sitting in equity by appointing, either with or without the consent of the parties, special masters, auditors, examiners, and commissioners"). Federal Rule of Civil Procedure 53 also explicitly provides that the Court

officers to assist in conducting and overseeing actual implementation of the remedies."[99] "Such parajudicial officers are particularly necessary when the Court lacks expertise in the field and lacks time to devote to oversight of a remedial action."[100] Unlike special masters under Rule 53, whose "role is broad[ ]: to report to the court and, if required, make findings of facts and conclusions of law," a court monitor or compliance administrator's role "is limited to ensuring or monitoring compliance with a court's orders."[101]

An independent, court-ordered neutral that can oversee implementation of the changes called for by the Court serves two purposes. First, it allows the Court to remove itself from day-to-day oversight of KHP's policy and practice changes and routine evaluation of their efficacy. Second, it ensures that the KHP actually makes the changes it is compelled to make and that the Court's orders are meaningfully implemented and followed by the rank-and-file. Defendant's argument that the issuance of an injunction in this case would insert the Court into every suppression hearing or criminal trial[102] is a red herring. It ignores decades of examples of monitors or special masters serving in precisely this role, in a variety of settings—including most notably, in injunctions against the police—without issue. The monitor will not sit as arbiter of each

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may appoint a "special master" to "address. . . posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." Fed. R. Civ. P. 53(a)(1)(C).

[99] *Reed v. Rhodes*, 500 F. Supp. 363, 397 (N.D. Ohio 1980), *decision clarified in* 642 F.2d 186 (6th Cir. 1981) (citations omitted) (cited with approval in *Jackson v. Los Lunas Ctr. for Persons with Developmental Disabilities*, No. CV 87-0839 JP/KBM, 2012 WL 13076262, at *89–91 (D.N.M. Oct. 12, 2012)).

[100] *Jackson*, 2012 WL 13076262, at *89.

[101] *United States v. Tennessee*, 2010 WL 1212076, *12-*13 (W.D. Tenn. Feb. 16, 2010) (quoting *Cobell v. Norton*, 392 F.3d 461, 476 (D.C. Cir. 2004) (internal quotations and brackets omitted) and *Jackson*, 2012 WL 13076262, at *91; *see also United States v. City of Albuquerque*, No. 1:14-CV-1025 RB-SMV, 2017 WL 5508519, at *3–4 (D.N.M. Nov. 16, 2017) (describing monitor's duties as essentially investigatory, to assess and report on compliance with the court's orders).

[102] Doc. #531 at 30-31.

individual roadside detention. Rather, the monitor will evaluate compliance with the Court's order as a whole.

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To be clear, no remedial order is ever perfect. In institutional reform litigation like this, the ultimate remedy is unlikely to be a complete panacea—there may still be constitutional violations that occur. The aim is to reduce the frequency of such violations *and* put appropriate measures in place to ensure that if they do occur, they are detected and met with an appropriate response—both on the individual level, and with an eye towards further refining the agency's processes to reduce the risk even more. And, importantly, requiring changes like the above through a court-ordered process *does* improve outcomes, even in unexpected ways. As the U.S. Department of Justice has noted,

> There is significant evidence that unlawfully aggressive police tactics are not only unnecessary for effective policing, but are in fact detrimental to the mission of crime reduction. Officers can only police safely and effectively if they maintain the trust and cooperation of the communities within which they work, but the public's trust and willingness to cooperate with the police are damaged when officers routinely fail to respect the rule of law.[103]

And perhaps most importantly, where there is a right, there must be a remedy.[104]

For all the foregoing reasons, and the reasons set forth in Plaintiffs' Proposed Conclusions of Law, the Court can and should find that Plaintiffs are entitled to injunctive relief.

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[103] Statement of Interest, U.S. Dep't of Justice, Civil Rights Division, Doc. #365, *Floyd v. City of New York*, No. 08-cv-1034 (S.D.N.Y.), *citing with approval* Stephen Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 346-74 (2011); Tom Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 233-67 (2008); Jason Sunshine & Tom Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 534-36 (2003); *see also* INSTITUTE ON RACE AND JUSTICE, NORTHEASTERN UNIVERSITY, COPS EVALUATION BRIEF NO. 1: PROMOTING COOPERATIVE STRATEGIES TO REDUCE RACIAL PROFILING 2021 (U.S. Dep't of Justice, Office of Community Oriented Policing Services), 2008 ("Being viewed as fair and just is critical to successful policing in a democracy. When the police are perceived as unfair in their enforcement, it will undermine their effectiveness.").

[104] *Marbury v. Madison*, 5 U.S. 137 (1803).

IV. PLAINTIFFS DO NOT NEED TO SHOW IRREPARABLE HARM TO OBTAIN A DECLARATORY JUDGMENT.

In *Steffel v. Thompson*, the Supreme Court squarely held that a plaintiff raising Section 1983 claims need not demonstrate irreparable harm in order to obtain prospective declaratory relief. There, the plaintiff raised Section 1983 claims for declaratory and injunctive relief, alleging that he had been threatened with prosecution under a state trespass statute for distributing handbills, in violation of his First and Fourteenth Amendment rights.[105] The court of appeals ruled that "since [plaintiff] failed to demonstrate irreparable injury—a traditional prerequisite to injunctive relief—it followed that declaratory relief was also inappropriate."[106] The Supreme Court reversed. Recognizing that a declaratory judgment is "less intrusive" than an injunction,[107] and that "engrafting upon the Declaratory Judgment Act a requirement that all of the traditional equitable prerequisites to the issuance of an injunction be satisfied before the issuance of a declaratory judgment is considered would defy Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate,"[108] the Court decisively rejected the court of appeals' conclusion "that a failure to demonstrate irreparable injury . . . precluded the granting of declaratory relief."[109] Following *Steffel*, lower courts have allowed declaratory relief

[105] 415 U.S. 452, 454-55 (1974)

[106] *Id.* at 462-63.

[107] *Id.* at 469.

[108] *Id.* at 471. *See also Green v. Mansour*, 474 U.S. 64, 72 (1985) ("The Declaratory Judgment Act of 1934 permits a federal court to declare the rights of a party whether or not further relief is or could be sought, and we have held that under this Act declaratory relief may be available even though an injunction is not.") (citation omitted).

[109] *Steffel*, 415 U.S. at 471-72. "The only occasions where this Court has disregarded these 'different considerations' and found that a preclusion of injunctive relief inevitably led to a denial of declaratory relief have been cases, in which principles of federalism militated altogether against federal intervention in a class of adjudications," such as interference with enforcement of state tax laws or ongoing state criminal prosecution. *Id.* at 472 (citing *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943); *Samuels v. Mackell*, 401 U.S. 66 (1971)). As discussed above,

on Section 1983 claims even when adequate alternative remedies were available or plaintiffs otherwise failed to show irreparable harm sufficient to justify injunctive relief.[110]

Turning *Steffel* on its head, Defendant argues that "the Eleventh Amendment bars federal court from ordering notice or declaratory relief in a suit against the state 'unless it is ancillary to a judgment awarding prospective injunctive relief.'"[111] But the authority he quotes for that proposition goes on to explain that "[t]he Eleventh Amendment 'does not permit judgments against state officers declaring that they violated federal law *in the past*.'"[112] While the Eleventh Amendment bars retrospective declaratory relief against state officials for past violations of federal law, prospective declaratory relief is available to remedy ongoing or future violations.[113] Because Plaintiffs' request for declaratory relief is addressed to KHP's ongoing practice of targeting out-of-state drivers for unconstitutional detentions, declaratory relief is warranted here even if the Court declines to grant an injunction.

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supra n.70, federal courts have consistently stood ready to ensure that state law enforcement agencies' detention practices comply with the Fourth Amendment.

[110] *See Tierney v. Schweiker*, 718 F.2d 449, 457 (D.C. Cir. 1983) ("Although a party must demonstrate irreparable injury before obtaining injunctive relief, such a showing is not necessary for the issuance of a declaratory judgment.") (citing *Steffel*, 415 U.S. at 471-72); *see also Woodruff v. Herrera*, No. CV 09-449 JH/KBM, 2014 WL 12727581, at *6 (D.N.M. Sept. 30, 2014) ("The Court left open the declaratory relief that Plaintiffs sought, but declined to award injunctive relief because Plaintiffs had failed to demonstrate irreparable harm.").

[111] Doc. #531 at 34 (quoting *Johns v. Stewart*, 57 F.3d 1544, 1553 (10th Cir.1995)).

[112] *Johns*, 57 F.3d at 1553 (emphasis added) (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc*., 506 U.S. 139, 146 (1993)). *Accord Buchwald v. Univ. of N.M. Sch. of Med*., 159 F.3d 487, 495 (10th Cir. 1998) (stating that "'[*Ex parte Young*] applies only to prospective relief' and may not be used to obtain a declaration that a state officer has violated a plaintiff's federal rights in the past." (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc*., 506 U.S. at 146)).

[113] *Green*, 474 U.S. at 73 (citing *Steffel*, 415 U.S. at 454). *See also, e.g., MCI Telecomms. Corp. v. Pub. Serv. Comm'n of Utah*, 216 F.3d 929, 935 (10th Cir. 2000) (*"*[A] private party may sue a state officer for prospective injunctive *or declaratory* relief from an ongoing violation of the Constitution or federal laws.") (emphasis added) (citing *Ex parte Young*, 209 U.S. 123, 159-160 (1908)).

V. PLAINTIFFS HAVE MET THEIR BURDEN.

Contrary to Defendant's assertions otherwise, Plaintiffs have met their burden of demonstrating that there is an ongoing practice within the KHP of detaining drivers without adequate reasonable suspicion based in part on the driver's state of residency, origin, or destination, *and* using the Two Step to unconstitutionally trick drivers into giving up additional information that the troopers then use to justify the driver's detention for a canine sniff. Defendant's arguments otherwise are unavailing.

First, Defendant principally rests on his continued argument that Plaintiffs must demonstrate liability under *Monell v. Dep't of Soc. Servs. of New York*[114] and show "deliberate indifference" in order to prevail. It is worth noting that in arguing for a municipal liability standard to apply in this case, Defendant misconstrues that body of law and mistakenly collapses *all* municipal liability claims under the same standard.[115] Nevertheless, the Court has already

[114] 436 U.S. 658 (1978)

[115] The Tenth Circuit recognizes various forms of municipal liability claims: "a formal regulation or policy statement, an informal custom that amounts to a widespread practice, decisions of municipal employees with final policymaking authority, ratification by final policymakers of the decisions of subordinates to whom authority was delegated, and the deliberately indifferent failure to adequately train or supervise employees." *Hinkle v. Beckham Cnty. Bd. of Comm'rs.*, 962 F.3d 1204, 1239-40 (10th Cir. 2020) (citing *Pyle v. Woods*, 874 F.3d 1257, 1266 (10th Cir. 2017) and *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1189 (10th Cir. 2010)). Plaintiffs do not need to prove "deliberate indifference" where their theory of liability is based on an agency having a widespread practice or custom resulting in ongoing constitutional violations. In such cases, the widespread practice—even among subordinates—can constitute a "custom" for purposes of *Monell*, without requiring a specific finding of deliberate indifference. *See Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 404 (1997) (where the acts themselves are unlawful, culpability is straightforward); *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998) ("[W]hen an official municipal policy itself violates federal law, issues of culpability and causation are straightforward; simply proving the existence of the unlawful policy puts an end to the question." (citation omitted)). Although "a plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences," *Brown*, 520 U.S. at 407, this is not a case challenging a facially *lawful* municipal action. Moreover, *Brown* was a case that proceeding on a theory of negligent hiring and inadequate training only. *Brown*, 520 U.S. at 415. The claims there were fundamentally different than the claims present in this case. This is a case challenging pervasive *unlawful* actions within a state agency.

considered and overruled this argument.[116] Plaintiffs hereby incorporate prior briefing in this regard.

But even if *Monell* standards and "deliberate indifference" were appliable here, Plaintiffs more than met that burden.[117] They have clearly demonstrated that (1) there is a pervasive pattern of misconduct, directly attributable to Defendant's policy choices and desire to aggressively pursue his interdiction goals, regardless of the Fourth Amendment violations that he knows are occurring under his watch; and (2) this pattern will continue unabated absent intervention from this Court.[118]

The remainder of Defendant's arguments are equally unpersuasive. He continues to cite numerous pre-*Vasquez* or readily distinguishable cases regarding the propriety of considering a driver's travel plans *in general*.[119] But this case is not about general reliance on *implausible* travel plans in forming reasonable suspicion. Defendant continues to ignore Plaintiffs' prior briefing on

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[116] *See* Mem. and Order, Doc. #466. The fact that the Court articulated the proper standard for liability in the context of a ruling on a motion *in limine* has no special significance as Defendant seems to suggest. *See* Doc. #531 at 36. The Court correctly ruled that Plaintiffs do not need to meet the same liability standard as in municipal liability cases, and that is the law of the case.

[117] "The deliberate indifference standard may be satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm." *Waller v. City & County of Denver*, 932 F.3d 1277, 1284 (10th Cir. 2019) (internal quotation marks omitted) (quoting *Barney*, 143 F.3d at 1307). Here, Defendant was on notice of the problems inherent with relying on out-of-state plates as part of the reasonable suspicion calculus by virtue of the Tenth Circuit's decision in *Vasquez* and the strong admonitions contained in that opinion. Yet ample testimony at trial made clear that Defendant did *nothing* to ensure troopers understood *Vasquez* and properly applied it. *See* Pls. PFOF ¶¶ 205-212. And it wasn't until well after this litigation was filed that Defendant even bothered to include *Vasquez* in training. Pls. PFOF ¶¶ 310-312.

Although Defendant avers that *Vasquez* was not new law, and that troopers were never doing anything inconsistent with the *Vasquez* holding, the plain language of the Tenth Circuit's opinion indicates otherwise. After all, if KHP was *not* detaining motorists based on their state of residency, origin, or destination, then why would the Tenth Circuit have felt the need to instruct them that it is "time to abandon the pretense" that such information is indicative of criminal activity? Moreover, Defendant's staff's inability to properly articulate and apply the central holding from that case indicates that Defendant is, in fact, *deliberately indifferent* to whether or not troopers under his command are actually following the law as stated in that decision.

[118] *See* Doc. #529 at 117-152.

[119] Doc. #531 at 41-43.

this point, which points out the inapplicability of Defendant's cited cases to the facts and circumstances present in this case.[120]

Defendant also continues to place heavy emphasis on a series of individual fact-specific rulings on motions to suppress where district courts declined to strike down the Two-Step practice altogether.[121] As Plaintiffs noted in their Proposed Conclusions of Law, this case is the first opportunity a federal district court has had to look at the Two Step as an institutional practice in the context of a prospective civil rights action. Unlike criminal courts considering the use of the maneuver in a single individual incident, the Court here can consider the Two Step's constitutionality in the context of all the evidence demonstrating how and why it is used, and the fact that Defendant actively endorses it through KHP training. Moreover, the Court need not find the Two Step unconstitutional *per se* to find that it is a tactic that undoubtedly results in constitutional violations and enjoin its use by the KHP as a result. Plaintiffs presented significant evidence that it directly results in unconstitutional detentions, and that objectively reasonable individuals would not feel free to leave or decline to respond when reapproached by an armed officer demanding more information mere seconds after a traffic stop was allegedly complete.[122] Yet, even if the Court disagrees on this singular point, that does not preclude the Court from fashioning a remedy for the constitutional violations that Plaintiffs have clearly proven that will reduce the harm the Two Step maneuver inevitably creates.

[120] *See* Pls. Opp. to Def. Jones's Mot. for Summ. J., Doc. #315 at 119-120, n. 24.

[121] *See* Doc. #531 at 45.

[122] *See* Doc. #529 at 143-145.

CONCLUSION

For the foregoing reasons, Defendant's Proposed Findings of Fact and Conclusions of Law should be overruled.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of May 2023, a copy of the foregoing was filed and served via the Court's electronic filing system on all counsel of record.

s/ Madison A. Perry
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Exhibit A

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, *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 PROPOSED INITIAL TERMS OF DECLARATORY AND INJUNCTIVE RELIEF

Following a two-week bench trial and post-trial briefing submitted by both parties, the Court entered a Memorandum Opinion and Order finding Defendant Col. Herman Jones, Superintendent of the Kansas Highway Patrol (KHP), liable in his official capacity for engaging in an ongoing practice of violating Plaintiffs' Fourth Amendment rights to be free from

unreasonable searches and seizures under the Fourth Amendment to the U.S. Constitution. (Doc. # _____). The Court further found that Plaintiffs are entitled to declaratory and injunctive relief.

In conjunction with that Order, the Court now enters the following initial terms of declaratory and injunctive relief:

1. Defendant and his officers, agents, employees, and attorneys are engaged in a practice of detaining drivers without adequate suspicion based in part on the driver's state of residence, origin, or destination, in violation of the Fourth Amendment of the U.S. Constitution.

2. Defendant and his officers, agents, employees, and attorneys use the Two Step and other similar maneuvers in a manner that detains individuals without their consent, in violation of the Fourth Amendment, for the purposes of asking additional questions and potentially calling a police canine to conduct a sniff of the exterior of the driver's car.

3. Defendant and his officers, agents, employees, and attorneys, and all other persons who are in active concert or participation with the Defendant in his official capacity, are hereby enjoined from allowing KHP troopers to rely on out of state residency in forming reasonable suspicion, even as part of the totality of the circumstances.

4. Defendant and his officers, agents, employees, and attorneys, and all other persons who are in active concert or participation with the Defendant in his official capacity, are hereby enjoined from allowing Kansas Highway Patrol troopers to rely on origin or destination of so-called "drug source" cities or states in forming reasonable suspicion, even as part of the totality of the circumstances.

5. Defendant and his officers, agents, employees, and attorneys, and all other persons who are in active concert or participation with the Defendant in his official capacity, are further enjoined from allowing KHP troopers to use the Two Step or any similar maneuver to make any

real or perceived "break in contact" with a driver following a traffic stop and subsequently "reapproach" the driver to ask additional questions, unless the trooper directly informs the driver that they are not required to answer any additional questions and they are free to go at any time.

6. To effectuate these orders, the Defendant and whichever other officers, agents, employees, and attorneys the Defendant designates to assist, but not replace him or her, is hereby ordered to meet and confer with Plaintiffs to develop a remedial plan for any necessary changes to KHP policy, practices, training, documentation, data collection, and supervision. At a minimum, the remedial plan will include requirements to do the following:

a. Revise current policies to reflect this injunction.

b. Revise training to reflect this injunction.

c. Adopt documentation, data collection, and supervisory review policies and/or procedures that will ensure this Court's orders are complied with in the field, including but not limited to, ensuring that documentation of all roadside detentions and searches is contained in a single, searchable, up-to-date computerized database; and

d. Adopt any other such reforms that are necessary to ensure that this injunction is adhered to by all KHP personnel, to include any provisions related to monitoring or oversight of implementation of the remedial plan, such as the appointment of a special master or monitor.

7. The parties are ordered to meet and confer no later than two weeks after the entry of this order, and to submit a joint remedial plan to the Court for adoption as a Court Order by _____. If the parties are unable to reach agreement on key terms within the remedial plan, the parties shall brief their dispute as follows: Plaintiffs shall submit their proposed remedial plan and

any briefing in support thereof by _____; Defendant shall respond by _____; and Plaintiffs shall reply by September _____.

8. This Order applies to the Defendant and any successors and assigns who are appointed in an interim or permanent capacity to the position of Superintendent of the KHP.

SO ORDERED.

Dated: _____

_____
HON. KATHRYN H. VRATIL
UNITED STATES DISTRICT COURT JUDGE