

**APPENDIX B:
UNRESOLVED ISSUES AND PARTIES' POSITIONS**

This document includes text from Appendix A (the proposed order) to which there remains disagreement, and the parties' positions on that disagreement. This document is meant to be a summary of each party's position to facilitate the Court's consideration and discussion at the upcoming status conference.

I.c., n.1:

Although "the evidence at trial only established constitutional violations on federal highway I-70," Order at 3 (Doc. #550), it is unfeasible to maintain one set of policies and practices for troopers when they police on I-70, and a separate set of policies and practices for troopers policing elsewhere in the state. Accordingly, the terms of the injunction apply generally to KHP policies and practices.

DEFENDANT: The Court specifically stated that the proposed injunction shall be limited to motorists on I-70, absent agreement to the contrary. (Doc. 550 at 3). Although, as a practical matter, KHP may decide to apply these procedures statewide, there is no reason to expand the scope of the injunction beyond what the Court proposed.

PLAINTIFFS: Plaintiffs' counsel discussed this with Defendant's counsel, who agreed that any operational changes made to KHP policies and procedures will not differentiate between policing conducted on I-70 and policing conducted elsewhere in the state. Plaintiffs therefore proposed this language to make clear that the changes contained in the proposed injunction were for policies and procedures generally, since no special policy and procedure book exists just for traffic stops and detentions conducted on I-70.

II.b:

When conducting a traffic stop and investigatory detention, the KHP is hereby enjoined from using the “Kansas Two-Step”¹ to extend traffic stops of motorists without reasonable suspicion or without the motorists’ knowing, intelligent, and voluntary consent.

¹ The “Kansas Two-Step” shall be defined and understood for the purposes of this Injunction to include any attempt to end the purposes of the traffic stop and then reengage with the driver, in an attempt to ask additional questions, without first informing the driver that the traffic stop is concluded and they do not need to answer additional questions.

DEFENDANT: This is not in the Court’s Memorandum and Order and Order to Show Cause or proposed injunction. There is no reason to expand the scope of the injunction beyond what the Court proposed.

PLAINTIFFS: The Court found in its Memorandum and Order (Doc. #539) that the KHP’s use of the Two-Step maneuver, as it was defined and described in the lawsuit and the Court’s Order, led to the pattern of constitutional violations the Court identified. This provision was added for clarity, and to meet the requirements of Federal Rule of Civil Procedure 65(d)(1)(C) which requires that every injunction “describe in reasonable detail—and not by referring to the complaint or other document—the acts or acts restrained or required.”

III.a.i.1:

Troopers shall document **all investigatory stops**² and detentions, any searches (including canine sniffs) resulting from or proximate to the stop or detention, and any consents to search or to engage with troopers after the conclusion of a traffic stop.

² An “investigatory stop” shall be defined and understood for the purposes of this Injunction to include any traffic stop in which a trooper detains a vehicle and its occupants to initiate inquiry into a traffic violation or any other criminal infraction.

DEFENDANT: The requirement to document all traffic stops is overly broad and burdensome. All the issues in this case were related to the activities of KHP following the conclusion of the traffic stop such as whether the trooper had adequate reasonable suspicion to justify further detention or whether the conversion to a voluntary encounter was truly voluntary. There was no evidence regarding the validity of the underlying traffic violation or cases where drivers were released at the conclusion of the traffic stop with no further contact by the trooper. Documenting all traffic violations is beyond the scope of the issues in this case. An alternative would be to limit the definition of an investigatory stop to only those situations where a driver is detained, either voluntarily by consent or through development of reasonable suspicion, beyond the original purpose of the stop.

PLAINTIFFS: Defendant has not put forth any evidence that requiring documentation of all traffic stops would be “burdensome.” Current KHP practices undercut such a claim. Troopers already document traffic stops that result in a citation or a warning by issuing a physical citation or warning ticket. That is already a form of documentation and requires much of the same information that is required under this provision. There is therefore no colorable argument that recording such information in a searchable database is “burdensome.” Moreover, as demonstrated by Dr. Mummolo’s testimony at trial, recording all stops is necessary to identify patterns in whom KHP stops and detains. The evidence at trial focused on not just what happens during the investigatory detentions, but *whom the KHP decides to detain* for such additional questioning. The KHP therefore needs to track the total universe of individuals stopped for traffic violations to establish benchmarks and identify any patterns among the population that KHP decides to approach for additional questioning or a consent search, versus dismiss with only a warning or citation. The alternative offered by Defendant is no alternative at all—it is just redefining “investigatory stop” to include only traffic stops that result in searches or further detentions.

III.a.iii.2:

Supervisors shall report and shall document (1) those investigatory stops and detentions which appear unsupported by reasonable suspicion; (2) those searches which appear to be without legal justification; (3) stops, detentions or searches which appear to violate KHP training or policies; and (4) stops or searches that indicate a need for corrective action or review of KHP policy, strategy, tactics or training. Such documentation shall be submitted up the chain of command.

DEFENDANT: This is not in the Court’s Memorandum and Order and Order to Show Cause or proposed injunction. There is no reason to expand the scope of the injunction beyond what the Court proposed.

PLAINTIFFS: Plaintiffs added this provision because the provision as drafted did not indicate what should happen with the “report” and “document[ation]” called for by this provision. This created a lack of clarity around whether anyone would be required to review the reports and documentation that the Court believed were needed. Plaintiffs added this clause to ensure that the reports and documentation are reviewed by the chain of command, which is the step necessary to ensure that corrective action is taken—both against officers who violate the Court’s order and the Constitution, and against Supervisors who fail to take action when such violations are identified.

III.b.i:

Within 60 days of the effective date of this Injunction, KHP shall update its policies to require that when a trooper seeks consent for a search, the trooper shall affirmatively inform the subject of his or her right to refuse and to revoke consent at any time, and **document the subject's consent on a written form** which explains these rights. The written form shall include separate signature lines for the trooper to certify that the trooper has read and explained these rights to the subject, and for the subject to affirm that he or she understands the right to refuse and to revoke consent to the search.

DEFENDANT: Both the Tenth Circuit Court of Appeals and the United States Supreme Court have held that a law enforcement officer is not required to inform an individual, verbally or in writing, that they have the right to refuse to consent to a search and, if consent is given, they have the right to revoke it at any time. Voluntariness of consent is determined on a case-by-case basis based on an evaluation of the totality of the circumstances. This provision imposes conditions not legally required and will effectively change the applicable legal standard. Voluntariness will now be determined based on the existence or absence of a signed consent form. By imposing a burden that the law does not require, this provision will impair troopers ability to do their job. As an alternative, assuming the goal of the written forms is to provide a method to verify that consent was voluntary, the audio and video recordings required in III.g. will accomplish that by providing a record from which the totality of the circumstances can be evaluated on a case-by-case basis as necessary. This will achieve the same goal, consistent with 10th Circuit and US Supreme Court case law, without imposing additional administrative burdens.

PLAINTIFFS: As Plaintiffs explained in their Reply to Defendant's Response to the Court's Order to Show Cause (Doc. #549 at 11-12), "Once 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 v. Carruthers*, 678 F. Supp. 839, 847 (D.N.M. 1988). Defendant does not offer anything beyond a conclusory statement that requiring a signed consent form will "impair troopers [sic] ability to do their job." Written consent forms remove the subjectivity inherent in these encounters and will greatly reduce the risk of abuse. Audiovisual recordings, on the other hand, cannot establish either that a motorist understands their rights or that their consent is freely, knowingly, and voluntarily given. Moreover, as the evidence at trial demonstrated, the dashcam audio does not capture the entirety of the conversation between the trooper and the motorist, and the motorist's responses to the trooper's questions and comments are often muffled or unclear. Finally, KHP already has a policy and written form that troopers *may* use, in their discretion, to obtain consent. KHP offers no explanation for why it is an

“administrative burden” to make an already existing policy mandatory for all troopers.

III.b.ii.1:

The KHP supervisor who reviews requests for approval to conduct a consensual search shall document, in a searchable, electronic format, the reasons why the request to conduct the consensual search was either granted or denied. As part of this documentation, the supervisor shall document requests that are legally unsupported, are in violation of KHP policy or this injunction, or that indicate a need for corrective action or review of any KHP policy, strategy, tactics or training.

DEFENDANT: This is not in the Court’s Memorandum and Order and Order to Show Cause or proposed injunction. There is no reason to expand the scope of the injunction beyond what the Court proposed.

PLAINTIFF: Plaintiffs added this language for clarity to indicate what the supervisor is required to document as part of this review. Otherwise, this provision could be read as merely requiring a running tally of the total number of unsupported requests, which would prevent the supervisors—or their supervisors—from identifying trends in the requests that might suggest a need to retrain an officer or a trooper under that supervisor’s command.

III.c.i:

Within 60 days of the effective date of this Injunction, KHP shall update its policies to require that when a trooper seeks to re-engage with a driver or occupant of the vehicle to continue conversation after a traffic stop has concluded, the trooper shall affirmatively inform the subject of his or her right to refuse and to revoke consent at any time, and document the subject's consent on a written form which explains these rights.

DEFENDANT: Both the Tenth Circuit Court of Appeals and the United States Supreme Court have held that a law enforcement officer is not required to inform an individual, verbally or in writing, that they have the right to refuse to consent to additional questioning and, if consent is given, they have the right to revoke it at any time. Voluntariness of consent is determined on a case-by-case basis based on an evaluation of the totality of the circumstances. This provision imposes conditions not legally required and will effectively change the applicable legal standard. Voluntariness will now be determined based on the existence or absence of a signed consent form. By imposing a burden that the law does not require, this provision will impair troopers ability to do their job. As an alternative, assuming the goal of the written forms is to provide a method to verify that consent was voluntary, the audio and video recordings required in III.g. will accomplish that by providing a record from which the totality of the circumstances can be evaluated on a case-by-case basis as necessary. This will achieve the same goal, consistent with 10th Circuit and US Supreme Court case law, without imposing additional administrative burdens.

PLAINTIFFS: Plaintiffs' rationale for including the highlighted language is substantially similar to their rationale for including the highlighted language in provision III.b.i, *supra*. The Court can and should order provisions that go beyond mandates from current case law in order to ensure that the pattern of constitutional violations the Court identified is remedied in full.

III.c.iii:

Within 60 days of the effective date of this Injunction, the KHP shall create and maintain a log which lists each request to reengage a driver or occupant of a vehicle for additional questioning following an investigatory stop, the trooper who made the request, the response received, and resulting action taken. The KHP shall submit these logs to the Court for review on a quarterly basis, by the last day of March, June, September, and December.

DEFENDANT: This is not in the Court's Memorandum and Order and Order to Show Cause or proposed injunction. There is no reason to expand the scope of the injunction beyond what the Court proposed.

PLAINTIFF: This requirement was included in the Court's proposed injunction with regards to consent searches of vehicles. (Doc. #539 at 77-78; Doc. #550 at 8.) The Court's draft combined provisions related to consent searches of vehicles and requests to engage in additional questions. For clarity and consistency, Plaintiffs proposed breaking those out into separate sections and including this provision for both types of requests (i.e., requests to search and requests to ask additional questions). This does not substantively expand the scope of the injunction as Defendant claims, but rather ensures the provision written by the Court applies to all activity requested by the trooper at the end of the traffic stop. If the Court (as Defendant presumes) intended to require this log for consent searches but not for additional questioning, the Plaintiffs are willing to discuss revisions.

III.f.

KHP supervisors shall be held accountable for providing close and effective supervision necessary to direct and guide troopers in complying with constitutional requirements. To this end, within 90 days of the effective date of this Injunction, all troopers shall be assigned a single, consistent and clearly-identified supervisor. Supervisors shall work the same days and hours as the troopers they are assigned to supervise.

DEFENDANT: This is not possible with current staff. Troopers are assigned to specific geographical areas. For example, assume six troopers (one of which is a supervisor) are assigned to a four county area. They are responsible to patrol that specific area 24/7. If they all work the same days and hours, there will be no one on the duty for the majority of the time. Assuming three eight hour shifts per day, to have all troopers and their respective supervisors on duty at the same time and on the same days will require the addition of at least two more supervisors, each of which will then only supervise one or two troopers. There are presently 86 supervisory level troopers. To comply with this requirement would require the addition of approximately 172 supervisory level troopers.

Close and effective supervision does not necessarily require the supervisor being on the same shift as those supervised. Close and effective supervision can be accomplished by providing supervisors additional training specific to their supervisory responsibilities.

PLAINTIFFS: Plaintiffs maintain that some reforms are necessary to the KHP's supervision structure in order to ensure that supervisors are actually aware of and responsive to constitutional and policy violations committed by their troopers. The Court rightfully recognizes that one of the best ways to do that is to require supervisors to work the same shifts as the troopers under their command. Defendant continues to object that doing so would require hiring additional staff—the same argument raised in prior briefing.

Plaintiffs reminded Defendant during their meet and confer on September 6, 2023 that the Defendant had an obligation under the Court's August 30, 2023 Order to provide alternatives that would meet the goal of this provision, if this provision was unattainable for the KHP. *See* Order (Doc. #550 at 9, n.7). Specifically, Plaintiffs noted that the aim of this provision is to ensure that supervisors know what their troopers are up to and are adequately engaging in the task of overseeing their troopers' work to ensure compliance with the injunction and the Constitution as a whole.

Plaintiffs offered several examples of potential alternative provisions that would meet that same goal. Plaintiffs urged Defendant to consider and propose some or all of those provisions, if Defendant could not identify an alternative staffing pattern. Plaintiffs' examples included: (1) ride-alongs

with troopers under their command every two weeks to observe their work in the field; (2) weekly in-person check ins with each trooper under their command to go over case updates, best practices, or questions the troopers have in the field; (3) mandatory reviewing of dash cam audio and video from a random sample of stops for each trooper under their chain of command, every two weeks; (4) additional training for supervisors on an annual basis that teaches them best practices in supervision, review of field paperwork, and how to identify constitutional violations in the field; or (5) some combination of the above.

Rather than engage with these options, Defendant simply objects to the provision as written. Defendant's cursory response that "close and effective supervision can be accomplished by providing supervisors additional training" does nothing, because it adds no affirmative obligation for Defendant to *provide such training* under the terms of the injunction, nor does it spell out what that training will look like, when it will occur, who will receive it, or any other information necessary for the Court—or Plaintiffs—to evaluate whether or not it is a proper substitute for the shift-based model proposed by the Court.