No. _____

In the Supreme Court of the United States

DAX K. LEWIS and RICHARD JIMERSON,
Petitioners,

v.

PETER L. VASQUEZ,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
STEPHEN R. McALLISTER
Solicitor General of Kansas
(*Counsel of Record*)
DWIGHT R. CARSWELL
Assistant Solicitor General
BRYAN C. CLARK
Assistant Solicitor General
M.J. WILLOUGHBY
Assistant Attorney General
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

I. Whether the Tenth Circuit, in a divided 2-1 decision, yet again incorrectly narrowed qualified immunity and failed to faithfully apply this Court's precedents when it held that officers clearly lacked reasonable suspicion for the brief detention of a driver after a valid traffic stop until a drug detection dog arrived and alerted to the driver's car.

II. Whether the Tenth Circuit erred by doing precisely what this Court instructed lower courts not to do in *United States v. Arvizu*, 534 U.S. 266 (2002), which was to use a divide-and-conquer approach to reasonable suspicion and proceed to dismiss individual factors as innocuous in isolation rather than consider all factors collectively, *i.e.*, the totality of the circumstances.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

PETITION FOR WRIT OF CERTIORARI

Kansas Highway Patrol Trooper Dax Lewis and Lieutenant Richard Jimerson respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's decision is reported at 834 F.3d 1132 and is reproduced in the Petition for Writ of Certiorari as Appendix A.

The district court's decision is not reported but is available at 2014 WL 6685481 and is reproduced in the Petition for Writ of Certiorari as Appendix B.

JURISDICTION

The Tenth Circuit decided this case on August 23, 2016, and denied the Petitioners' timely motion for rehearing and rehearing en banc on September 19, 2016. Appendix C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any

> citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

1. At approximately 2:43 a.m. on December 16, 2011, Kansas Highway Patrol Lieutenant Richard Jimerson and Trooper Dax Lewis observed a 1992 BMW traveling eastbound on Interstate 70 that did not appear to have a license plate. App. 21. The Officers stopped the car, which was being driven by Respondent Peter Vasquez. App. 21. The Officers then noticed a temporary tag taped in the back window of the car behind tinted glass, in violation of K.S.A. 8-133, which requires tags to be "in a place and position to be clearly visible." App. 21.

Lieutenant Jimerson approached the car and noticed there were items covered on the front floorboard and in the back seat. App. 21. He also noticed a pillow in the back seat. App. 21. At first, based on how the items were arranged, it appeared someone was sleeping in the back, but Lieutenant Jimerson confirmed Vasquez was the sole occupant of the car. App. 21.

Lieutenant Jimerson asked Vasquez where he was headed, and Vasquez (after asking Lieutenant Jimerson to repeat the question) replied, "Uh, Elkton,

Maryland." App. 21, 35.[1] Lieutenant Jimerson asked Vasquez whether he was from Maryland originally, and Vasquez replied, "No, I'm from Colorado I just moved out there." App. 21, 36. However, the dash cam recording demonstrates that Lieutenant Jimerson cut in with, "Oh, Okay," immediately after Vasquez said "Colorado" and therefore did not hear Vasquez mention that he had moved to Maryland.[2] Lieutenant Jimerson asked whether Vasquez had family in Maryland, and Vasquez replied, "Just my daughter," leaving Lieutenant Jimerson with the impression Vasquez was traveling to Maryland to see his daughter. App. 21, 36. Lieutenant Jimerson then took Vasquez's driver's license and proof of insurance and returned to the patrol vehicle. App. 21-22.

Back in the patrol vehicle, Lieutenant Jimerson told Trooper Lewis that Vasquez was trying to "keep his nervousness in check" and had items covered up in his car. App. 22. Lieutenant Jimerson asked Trooper Lewis to go check the VIN number and to "see how nervous he is" and "get a feel for him." App. 22.

---

[1] Vasquez used his cell phone to record his interactions with the Officers. Transcripts of his cell phone recordings were filed with the district court as documents 36 and 37 and are included as Appendices D and E.

[2] The dash cam recording is in Volume III of the record on appeal. Vasquez's statement about the move is not audible on the dash cam recording, and so Trooper Lewis, who was listening back in the patrol vehicle, also did not hear Vasquez mention his move.

While checking the VIN number, Trooper Lewis noticed that one of the car's headlights was out. App. 39. He mentioned this to Vasquez, who said a guy at his store had just replaced the headlight. App. 39. Trooper Lewis asked Vasquez where he worked, and Vasquez replied: "We own a store called Boutiques at Brighton." App. 22, 40. Trooper Lewis then walked back to the patrol vehicle.

On returning to the patrol vehicle, Trooper Lewis told Lieutenant Jimerson that Vasquez "looks all scared to death." App. 22.

Meanwhile, Lieutenant Jimerson checked Vasquez's proof of insurance, which indicated that Vasquez also owned a 2011 Chevy Malibu and a 1998 Ford Mustang in addition to the 1992 BMW. App. 22. The Officers found it suspicious that Vasquez would drive a 1992 model vehicle across the country when he owned newer cars. App. 22.

Trooper Lewis returned to Vasquez's car and asked Vasquez why he was driving the older car when he owned a 2011 Chevy Malibu. App. 22, 40. After asking Trooper Lewis to repeat the question, Vasquez replied that he bought the older car for his girlfriend in Maryland.[3] App. 40. Trooper Lewis found it implausible that Vasquez would buy an almost 20-year-old car in

---

[3] Both the district court and the Tenth Circuit panel majority stated that Vasquez claimed he bought the 2011 Chevy Malibu for his girlfriend. But the transcript of Vasquez's cell phone recording indicates he actually told the Officers he bought the 1992 BMW for his girlfriend, as Chief Judge Tymkovich pointed out in his dissent. App. 19 n.2.

Colorado and drive it to Maryland for his girlfriend rather than just purchasing a car in Maryland for her.

Trooper Lewis then inquired how Vasquez was planning to get back to Colorado if he was leaving the car with his girlfriend, and Vasquez replied that he was going to stay in Maryland. App. 22, 40. This struck Trooper Lewis as suspicious both because Vasquez earlier stated that he owned a store in Colorado and also because the car did not contain items consistent with a move. App. 27. So Trooper Lewis asked Vasquez, "Where's all the stuff if you're moving?" App. 22, 41. Vasquez (after once again asking Trooper Lewis to repeat his question) claimed that he had moved most of his belongings to Maryland already. App. 22, 41. Trooper Lewis then returned Vasquez's paperwork, gave Vasquez a warning for the non-working headlight and the obscured temporary tag, and began to walk away. App. 23.

After taking a step or two, Trooper Lewis turned around and asked Vasquez if he could ask him a couple more questions. App. 23, 42. Vasquez answered yes. App. 23, 42. Trooper Lewis asked whether Vasquez had any drugs in the car, which Vasquez denied. App. 23, 42. Trooper Lewis then asked Vasquez for consent either to search his car or to bring a drug detection dog to walk around the car. App. 23, 42. Vasquez refused both requests. App. 23, 42. Trooper Lewis then informed Vasquez that he was being detained until a drug dog arrived because Trooper Lewis suspected Vasquez was "probably involved in a little criminal activity here." App. 23, 43.

The drug dog arrived approximately 15 minutes later and alerted to the presence of drugs in Vasquez's car, but a search of the car did not discover illegal drugs. App. 23.

2. Following the encounter, Vasquez brought a § 1983 action against the Officers, claiming they detained him without reasonable suspicion in violation of the Fourth Amendment. The district court granted summary judgment to the Officers based on qualified immunity. App. 31. The court did not address whether reasonable suspicion existed for the detention but instead resolved the case on the clearly established prong of the qualified immunity analysis, holding that the alleged lack of reasonable suspicion was not clearly established. App. 30.

The district court noted that Vasquez cited only one case, *United States v. Wood*, 106 F.3d 942 (10th Cir. 1997), in his attempt to demonstrate clearly established law. App. 28. The court concluded that "[w]hile there are some similarities between *Wood* and this case—odd travel plans and defendants' subjective determination that plaintiff was nervous—it is not so similar that a reasonable officer would have known that the circumstances in this case could not give rise to reasonable suspicion." App. 29. The court noted that there were a number of factors here, not present in *Wood*, which arguably supplied reasonable suspicion:

> For instance, defendants here noted that plaintiff was driving a 1992 vehicle with temporary tags instead of a 2011 Chevy Malibu that he owned, plaintiff had items covered in the front and back seat, and plaintiff was making his trip across the country in the middle of the

> night coming from a known drug-source area. Plaintiff told Lewis that he was moving to Maryland, but his car was not loaded with items indicating a permanent move. Furthermore, Lewis found it strange that plaintiff would relocate when he claimed to own a business in Colorado.

App. 29. Because the facts here were "sufficiently different from the facts of *Wood*," the district court granted the Officers qualified immunity. App. 30.

3. Vasquez appealed, and the Tenth Circuit reversed 2-1. The panel majority began by identifying several factors that "have less weight in our analysis." App. 8. In particular, the majority focused on Vasquez's status as a resident of Colorado, App. 8, despite the fact that the Officers neither claimed nor argued Vasquez's Colorado residency formed a basis for reasonable suspicion. Instead, along with numerous other factors, the Officers relied on the fact that Vasquez was traveling from a significant drug source area along a known drug corridor (I-70) toward the East Coast. App. 26. But the panel majority fixated on Vasquez's Colorado residency, proclaiming that it is "time to stop the practice of detention of motorists for nothing more than an out-of-state license plate." App. 9.

The majority then proceeded to dismiss other factors one by one, such as Vasquez's nervousness, that his car was unusually empty for a person allegedly moving across country, and that he had items covered up in his back seat. App. 10. Observing that each factor alone could have had an innocent explanation, the majority concluded that the Officers lacked reasonable

suspicion to detain Vasquez after the traffic stop. App. 10-11.

The majority then held that the lack of reasonable suspicion was clearly established, relying exclusively on *Wood*. App. 11-13. The majority concluded that *Wood* was "almost indistinguishable from this case." App. 12.

Chief Judge Tymkovich dissented. He opined that "[t]his case presents a close call on reasonable suspicion," but he noted that "the essence of qualified immunity is to give government officials protection in resolving close calls in reasonable ways." App. 14.

The Chief Judge criticized the majority for using the "divide-and-conquer" approach to reasonable suspicion that this Court specifically rejected in *United States v. Arvizu*, 534 U.S. 266 (2002). App. 15. He explained that "[t]he majority, in effect, takes the district court finding and concludes that 0 + 0 + 0 cannot = reasonable suspicion." App. 14. But he recognized that, rather than discounting factors individually, *Arvizu* requires courts to consider the "totality of the circumstances." App. 15. "[E]ven if each factor is consistent with innocent travel, factors when taken together can warrant further investigation." App. 15. Here, "Vasquez's story struck the officers as unusual, and when a police officer encounters a series of unusual facts, each factor no longer carries a weight of zero; together they may provide a 'particularized and objective basis' to suspect illegal activity." App. 15-16.

Even had there been a lack of reasonable suspicion, Chief Judge Tymkovich would have affirmed the district court's grant of qualified immunity because

Vasquez did not identify any clearly established law. App. 16. He noted the Tenth Circuit repeatedly had distinguished *Wood* in similar circumstances. App. 17-18. Given these cases, the Officers acted against a "hazy legal backdrop." App. 18 (citing *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015)).

The Chief Judge noted the Officers here "encountered a sufficiently different factual scenario than in *Wood*, especially in light of almost twenty years of cases distinguishing it." App. 18. While there was an allegation of unusual travel plans in *Wood* (driving a rental car from Sacramento to Topeka), Vasquez's travel plans were "sufficiently distinct as to allow a reasonable officer to be more suspicious." App. 18. In particular, Vasquez claimed he was moving cross-country but had no items in his car consistent with his story, he was traveling in the middle of the night, apparently sleeping in his car, and he was driving a newly-purchased 20-year-old car, despite owning a much newer one, and had a "flimsy, even implausible, explanation as to why." App. 18-19.

Accordingly, Chief Judge Tymkovich would have affirmed the district court's finding of qualified immunity. App. 19.

4. The Officers petitioned for rehearing and rehearing en banc. The petition for rehearing en banc was denied without a poll. App. 32-33. The Chief Judge would have granted panel rehearing. App. 32.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit Yet Again Has Failed to Faithfully Apply this Court's Qualified Immunity Precedents.

Review by this Court is necessary because the panel majority's decision here veered off the road established by this Court's qualified immunity precedents and crashed into the ditch of reversed lower court decisions that incorrectly denied qualified immunity.

As this Court has explained time and again, qualified immunity is designed to protect government officials from damage lawsuits unless the officials are "plainly incompetent" or "knowingly violate the law," *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011), neither of which can be said here. To overcome an officer's qualified immunity, a plaintiff must demonstrate that the law was "clearly established" at the time of the challenged conduct such that "every reasonable official" would have understood he was violating the law. *Id.* at 741. "In other words, 'existing precedent must have placed the statutory or constitutional question *beyond debate*.'" *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (emphasis added) (quoting *al-Kidd*, 563 U.S. at 741). (*Reichle* is itself a Tenth Circuit case that incorrectly denied qualified immunity before this Court reversed.)

The Tenth Circuit panel majority refused to yield to this Court's repeated qualified immunity holdings, and instead relied exclusively on *United States v. Wood*, 106 F.3d 942 (10th Cir. 1997), to conclude that the alleged lack of reasonable suspicion here was clearly established. As both the district court and Chief Judge

Tymkovich correctly concluded, however, *Wood* is readily distinguishable from this case and did not put the question whether reasonable suspicion existed "beyond debate."

As an initial matter, the continued validity of *Wood* is questionable in light of *United States v. Arvizu*, 534 U.S. 266 (2002), because *Wood* "stripp[ed] away" and completely "disregarded" factors the court found "innocuous" in isolation, 106 F.3d at 948—which is precisely what this Court forbade in *Arvizu*. 534 U.S. at 274; *see State v. Fornof*, 179 P.3d 954, 956 (Ariz. Ct. App. 2008) (observing that *Wood* "invites the type of piecemeal evaluation of the innocence of each individual factor rejected by the United States Supreme Court").

But even if *Wood* remains good law despite *Arvizu*, "it is not so similar that a reasonable officer would have known that the circumstances in this case could not give rise to reasonable suspicion," as the district court's careful opinion recognized. After stripping away factors the court deemed innocuous, *Wood* found only two supported reasonable suspicion: "Wood's [1] nervousness and [2] his prior narcotics history." 106 F.3d at 948. Thus, the *only* overlap between this case and *Wood* is the driver's nervousness, but there are numerous *additional* factors present here that support reasonable suspicion:

(1) Vasquez was traveling alone, at approximately 2:43 a.m., and his statements suggested he was traveling from the Denver area to Elktown, Maryland, apparently having left at sunset for a roughly 25 hour drive. The Officers knew that most travelers, particularly on a long cross-country trip and

particularly when they are driving alone, do not choose to drive overnight. But there are reasons drug traffickers might choose to travel at night. For example, there are generally fewer police officers on the roads, it is more difficult to notice certain traffic violations, and officers may be less likely to observe suspicious behavior. The Tenth Circuit and other circuits have considered unusual times for traveling as contributing to reasonable suspicion. *See United States v. Pollack*, 895 F.2d 686, 690 (10th Cir. 1990); *United States v. Diaz-Juarez*, 299 F.3d 1138, 1142 (9th Cir. 2002); *United States v. Guerrero-Barajas*, 240 F.3d 428, 433 (5th Cir. 2001); *see also United States v. Vazquez*, 555 F.3d 923, 930-31 (10th Cir. 2009) (discussing an officer's testimony on this issue).

(2) Items in the back seat of Vasquez's car were covered in a manner the Officers found highly unusual, particularly given that the car already had darkly tinted windows and that Vasquez appeared to intend to sleep in the car, thus never leaving the items unattended overnight. Lieutenant Jimerson had previously seen drug traffickers cover items in their vehicles, including in a Tenth Circuit case where he found duffel bags full of drugs covered with a sleeping bag. *See United States v. Hindhaugh*, 166 F.3d 1222, 1999 WL 2506 at *2 (10th Cir. 1999) (unpublished) (agreeing with the district court that items covered up in the back seat contributed to reasonable suspicion); *see also United States v. Compton*, 830 F.3d 55, 65 (2d Cir. 2016) (concluding that an officer reasonably extended a stop after observing a blanket concealing objects in the car); *United States v. Aldaco*, 168 F.3d 148, 151 (5th Cir. 1999) (an officer's observation of

bulky items covered by blankets in the back of a vehicle contributed to reasonable suspicion).

(3) Vasquez was driving an old, but recently purchased car. The Officers knew that drug traffickers sometimes use older cars because the loss is less if the car is seized, and a recently registered car is also consistent with drug trafficking. *See United States v. Moore*, 795 F.3d 1224, 1231 (10th Cir. 2015); *United States v. Berrelleza*, 90 F. App'x 361, 364 (10th Cir. 2004) (unpublished) ("it is common for drug cartels to supply a courier with a high mileage vehicle that has only recently been registered and insured"); *United States v. De Jesús-Viera*, 655 F.3d 52, 58 (1st Cir. 2011) (driving a recently purchased vehicle is one of the recognized indicia of drug trafficking); *United States v. Bernal*, 638 F. App'x 379, 379 (5th Cir. 2016) (unpublished) (same).

(4) Vasquez claimed that, although he owned a much newer vehicle (a 2011 Chevy Malibu), he was driving the 1992 BMW because he bought it for his girlfriend in Maryland. The Officers found it implausible that Vasquez would buy an almost 20-year-old car in Colorado and drive it to Maryland for his girlfriend rather than just purchasing a car in Maryland. *Cf. United States v. Kopp*, 45 F.3d 1450, 1453-54 (10th Cir. 1995) ("[The officer] did not find it plausible that Defendant would drive from California to North Carolina merely to take a very dilapidated sofa to some friends.").

(5) Vasquez told Trooper Lewis he was moving to Maryland, but this seemed implausible for two reasons. First, when Trooper Lewis asked Vasquez where he worked, Vasquez replied: "We own a store called

Boutiques at Brighton." The Officers questioned whether Vasquez was actually moving to Maryland when he owned a store in Brighton, Colorado. Second, Vasquez's statement that he was moving to Maryland seemed implausible because the Officers did not observe any of the items they typically see during the course of a cross-country move. *See United States v. Powell*, 277 F. App'x 782, 787 (10th Cir. 2008) (unpublished) ("transporting a relatively small amount of luggage seemingly inconsistent with his stated purpose of moving to Kentucky" contributed to reasonable suspicion); *United States v. DeJesus*, 435 F. App'x 895, 901 (11th Cir. 2011) (unpublished) (reasonable suspicion based on four factors, including that "the items in [the driver's] vehicle were inconsistent with someone making a permanent move to a new location."); *cf. United States v. Ledesma*, 447 F.3d 1307, 1318 (10th Cir. 2006) (small amount of luggage not consistent with two-week trip).

(6) Vasquez seemed to give the Officers different explanations for his trip to Maryland. Vasquez left Lieutenant Jimerson with the impression that he was traveling to Maryland to see his daughter. But Vasquez told Trooper Lewis that his girlfriend lived in Maryland and he was moving there. Vasquez's apparently different explanations for traveling to Maryland could have led reasonable officers to suspect that Vasquez was actually traveling for another purpose, such as transporting drugs. *See, e.g.*, *United States v. Kitchell*, 653 F.3d 1206, 1219 (10th Cir. 2011) (inconsistent statements about travel plans can give rise to reasonable suspicion).

(7) Vasquez was traveling from a significant source area for high-grade marijuana (the Denver, Colorado area), along a high volume drug corridor (I-70), to a drug market area (an urban area on the East Coast). While traveling from a known drug source area may not be entitled to significant weight, it is something that can and should be considered as part of the totality of the circumstances in determining whether the low standard of reasonable suspicion has been met. *Wood* certainly does not clearly establish otherwise. In fact, this Court has previously considered travel to and from a drug source city in finding reasonable suspicion. *See United States v. Sokolow*, 490 U.S. 1, 9 (1989) (holding that travel to a drug source city, while not suspicious standing alone, may become suspicious when combined with other factors). Notably, the Officers' suspicion here was not based merely on the fact that Colorado had been labeled as one among numerous other drug source areas or on the fact that Colorado had legalized medical marijuana at the time of this stop. Rather, the Officers knew, based on their training and professional experience, that Colorado *in particular* was a "huge" source of marijuana trafficking. *See* Deposition of Trooper Lewis at 34:19-21, 36:3-4, and 51:11-12, Exhibit 6 to *Memorandum in Support of Motion for Summary Judgment*, R. Vol. 1, Doc. #70-6.

(8) Vasquez asked the Officers to repeat several questions before answering them, such as where he was headed, why he was driving the older car, and where his belongings were if he was moving. The Officers knew, based on their training and professional experience, that asking officers to repeat questions can be a sign of deception because it gives the person more

time to make up an answer. *Cf. United States v. Gonzalez*, 328 F.3d 755, 758 (5th Cir. 2003) (a driver's hesitant answers to questions about his travel plans contributed to reasonable suspicion).

(9) The Officers observed pillows and blankets in Vasquez's car, and he was the only occupant of the car, a fact that suggested he intended to sleep in the car. Based on their training and professional experience, the Officers knew that drug traffickers tend not to go to motels; instead, they sleep in their cars so they do not leave the drug cargo unattended during the trip. *Cf. United States v. Lebrun*, 261 F.3d 731, 733 (8th Cir. 2001) (traveling without making stops is a common practice among drug traffickers).

* * *

To overcome an officer's qualified immunity, existing precedent must have clearly established "the violative nature of [the] *particular* conduct" at issue. *See Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). "Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.'" *Id.*; *see Arvizu*, 534 U.S. at 274 ("the concept of reasonable suspicion is somewhat abstract"). Given the numerous factors here (none present in *Wood*), *Wood* did not clearly establish a lack of reasonable suspicion in this case.

The panel majority, however, attempted to draw analogies between *Wood* and this case. The majority compared the fact that Vasquez was driving an old,

recently purchased car to the rental car in *Wood* and compared the fact that Vasquez had items covered in the backseat to the trash wrappers and maps in *Wood*. App. 12.

These analogies simply do not withstand scrutiny and certainly did not place any legal questions here beyond debate. Ironically, the allegedly analogous factors in this case are ones the Tenth Circuit itself previously has considered as *contributing* to reasonable suspicion. *See, e.g.*, *Berrelleza*, 90 F. App'x at 364 (recently registered, high mileage car); *Hindhaugh*, 166 F.3d 1222 (items covered up in backseat). While there was an allegation of implausible travel plans in *Wood*, *Wood* dismissed that allegation after finding that Wood's travel plans were not actually suspicious. 106 F.3d at 947. Here, a reasonable officer could have found several of Vasquez's statements implausible, such as his claim that he was moving to Maryland when he owned a store in Colorado, and his claim that he had purchased an almost 20-year-old car in Colorado to drive to Maryland as a gift for his girlfriend. At the very least, there are plausible, arguable distinctions between this case and *Wood*, meaning the reasonable suspicion question was not "beyond debate," and thus the Officers are entitled to qualified immunity here.

Furthermore, as Chief Judge Tymkovich noted, *Wood* has been distinguished by numerous subsequent Tenth Circuit decisions that, contrary to *Wood*, find reasonable suspicion in similar circumstances. App. 17-18 (citing *United States v. $49,000.00 in U.S. Currency, More or Less*, 208 F. App'x 651 (10th Cir. 2006) (unpublished); *United States v. Toledo*, 139 F.3d 913, 1998 WL 58117 (10th Cir. 1998) (unpublished); and

United States v. Williams, 271 F.3d 1262 (10th Cir. 2001)). If different Tenth Circuit panels cannot agree on reasonable suspicion in these circumstances, how can the question be "beyond debate?"

Indeed, consider two more examples of Tenth Circuit cases distinguishing *Wood*. In *United States v. Duenas*, 331 F. App'x 576 (10th Cir. 2009) (unpublished), the Court found reasonable suspicion based on the following facts: (1) a rental agreement prohibited the driver, who was stopped in Kansas, from operating the vehicle outside of California and Nevada, (2) the driver's travel plans were implausible, and (3) the driver appeared nervous throughout the encounter. *Id.* at 579-80. The Court distinguished *Wood*, noting that *Wood* involved only two factors (nervousness and criminal history) and did not consider the issue of implausible travel plans because Wood's travel plans were not implausible. *Id.* at 580 n.2. Two of the three factors in *Duenas* (nervousness and implausible travel plans) are equally present here, plus several others.

In *United States v. Karam*, 496 F.3d 1157 (10th Cir. 2007), the government relied on the fact that the driver flew on a one-way ticket from Akron to Los Angeles and then rented a vehicle one-way to drive back to Akron. *Id.* at 1165. The court observed that a similar travel plan was present in *Wood*, which completely dismissed it as not unusual. *Id.* But the court noted that a more recent Tenth Circuit decision conflicted with *Wood* and found that this type of travel plan contributed to reasonable suspicion. *Id.* While *Karam* gave little weight to traveling one way by air and back by rental car, it concluded that this factor must be considered as

part of the totality of the circumstances and could not be discounted entirely, as in *Wood*. *Id.* Thus, even assuming (implausibly) that Vasquez's implausible statements regarding his travel plans were comparable to the travel plans in *Wood*, *Karam* demonstrates that *Wood* does not constitute clearly established law.

Given the substantial differences between this case and *Wood*, as well as the existence of numerous cases distinguishing *Wood*, the law in the Tenth Circuit at the time of the stop here was "hazy" at best, not clearly settled "beyond debate." *See Mullenix*, 136 S. Ct. at 309. Yet, two Tenth Circuit judges once again thumbed their noses at this Court's instructions on qualified immunity and instead improperly narrowed the important protection that doctrine provides to law enforcement officers who are doing their best in often fluid and uncertain circumstances. *See Howards v. Reichle*, 634 F.3d 1131 (10th Cir. 2011), *rev'd and remanded* 132 S. Ct. 2088 (2012); *Pauly v. White*, 814 F.3d 1060 (10th Cir. 2016), *petition for cert. filed and pending* (No. 16-67).

The Tenth Circuit should have affirmed the district court's careful conclusion that qualified immunity protected the Officers here. But it did not, and now only this Court can correct the Tenth Circuit's blatant error.

II. The Tenth Circuit's Reasonable Suspicion Analysis Is Deeply Flawed.

If this Court agrees that the law was not clearly established and reverses the Tenth Circuit's decision on that basis, the Court should vacate the Tenth Circuit's holding on the constitutional question whether reasonable suspicion existed. *See Pearson v. Callahan*, 555 U.S. 223, 237-41 (2009).

But if the Tenth Circuit's reasonable suspicion holding is not vacated, that holding also would warrant this Court's review and reversal on the merits for two reasons. First, as Chief Judge Tymkovich explained, the panel majority used the "divide-and-conquer" approach to reasonable suspicion that this Court specifically rejected in *Arvizu*. Second, the panel majority's decision deepens an intra-circuit split regarding reasonable suspicion, a split the *en banc* Tenth Circuit has refused to address.

A. The Tenth Circuit's divide-and-conquer approach to reasonable suspicion is inconsistent with *United States v. Arvizu*, 534 U.S. 266 (2002).

In *United States v. Arvizu*, this Court held that in determining whether reasonable suspicion existed, courts should not consider each fact in isolation and dismiss those facts capable of innocent explanation; instead, courts must consider the "totality of the circumstances." 534 U.S. at 274. "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *Id.* at 273. But,

in conflict with *Arvizu*, in this case the panel majority held that several of the individual factors the Officers relied on—based on their extensive training and professional experience—were entitled to little or no weight and therefore could not add up to reasonable suspicion. The panel majority's conclusion that the detention rested on "nothing more than an out-of-state license plate," App. 9, which was contrary to the record, flowed from its erroneous analysis.

This sort of "divide-and-conquer analysis" flies in the face of *Arvizu*. As Chief Judge Tymkovich's dissent explained, "Vasquez's story struck the officers as unusual, and when a police officer encounters a series of unusual facts, each factor no longer carries a weight of zero; together they may provide a 'particularized and objective basis' to suspect illegal activity." App. 15-16.

B. The panel majority's decision deepens an intra-circuit split that the *en banc* Tenth Circuit has declined to address.

The panel majority's decision also collides with recent Tenth Circuit decisions that found reasonable suspicion in equally or less suspicious circumstances, including *United States v. Moore*, 795 F.3d 1224 (10th Cir. 2015) and *United States v. Pettit*, 785 F.3d 1374 (10th Cir. 2015). Both *Moore* and *Pettit* cast considerable doubt on the continuing correctness of *Wood*. But the decision here relies solely on *Wood* and deepens an intra-circuit split.

A comparison demonstrates that these cases cannot be reconciled. In *Moore*, the Tenth Circuit found reasonable suspicion based on: (1) a driver's extreme nervousness, (2) the fact that the car had recently been

registered, and (3) the driver's statement that he had been in trouble before but did not wish to talk about it. 795 F.3d at 1230-31. *But cf. Wood*, 106 F.3d at 948 (no reasonable suspicion based on extreme nervousness and prior narcotics history). The first two factors in *Moore* are also present in this case, plus a number of others.

Similarly, *Pettit* found reasonable suspicion based on: (1) a driver's abnormal nervousness, (2) unusual travel plans, and (3) the driver's multiple suspended driver's licenses. 785 F.3d at 1380-83. Again, the first two factors are equally present here, plus several others (including a recently registered car, as in *Moore*).

It is impossible to reconcile the panel majority's decision in this case with *Moore*, *Pettit*, and other decisions upholding reasonable suspicion on circumstances similar to or less suspicious than the situation here. Ideally, the *en banc* Tenth Circuit would resolve this intra-circuit split. But when the Officers requested that the Tenth Circuit do so, that court declined the opportunity. Therefore, the exercise of this Court's supervisory authority is necessary to resolve this conflict, either by vacating the Tenth Circuit's reasonable suspicion analysis here after reversing the denial of qualified immunity to the Officers, or by addressing the Tenth Circuit's flawed reasonable suspicion analysis on the merits.

Without action by this Court, the Tenth Circuit's conflicting reasonable suspicion decisions perpetuate legal uncertainty that hampers the ability of law enforcement officers to carry out their critical duties in the six states that make up the Tenth Circuit. This

uncertainty is compounded by the panel majority's incorrect qualified immunity analysis, a restrictive approach that threatens to hold officers liable—despite the legal uncertainty the Tenth Circuit *itself* has created—if officers make reasonable but ultimately mistaken decisions during traffic stops.

CONCLUSION

The Petition for Writ of Certiorari should be granted, and the decision of the Tenth Circuit summarily reversed. In the alternative, the Court should set this case for plenary review.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
STEPHEN R. McALLISTER
Solicitor General of Kansas
(*Counsel of Record*)
DWIGHT R. CARSWELL
Assistant Solicitor General
BRYAN C. CLARK
Assistant Solicitor General
M.J. WILLOUGHBY
Assistant Attorney General
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com

Counsel for Petitioners

December 2016

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 14-3278

[Filed August 23, 2016]

PETER L. VASQUEZ,
Plaintiff - Appellant,

v.

DAX K. LEWIS; RICHARD JIMERSON,
Defendants - Appellees.

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 5:12-CV-04021-DDC-JPO)

Johnny Lombardi, Lomardi Law, LLC, Denver, Colorado, for Plaintiff-Appellant.

Dwight R. Carswell, Assistant Solicitor General (M. J. Willoughby, Assistant Attorney General, with him on the brief), Office of the Attorney General Derek Schmidt, Topeka, Kansas, for Defendants-Appellees.

Before **TYMKOVICH**, Chief Judge, **LUCERO** and **BACHARACH**, Circuit Judges.

LUCERO, Circuit Judge.

This case asks us to determine whether, under the totality of circumstances, Kansas Highway Patrol Officers Richard Jimerson and Dax Lewis (the "Officers") had reasonable suspicion to detain and search the vehicle of Peter Vasquez. In particular, this case presents the question of what weight to afford the state citizenship of a motorist in determining the validity of a search. Vasquez alleges that after stopping him for a traffic violation, the Officers detained him and searched his car without reasonable suspicion. As justification, the Officers assert, among other indicators detailed herein, Vasquez was a citizen of Colorado, driving alone on Interstate 70 from Colorado through Kansas, in the middle of the night, in a recently purchased, older-model car.

The district court concluded the Officers were entitled to qualified immunity because Vasquez's asserted right was not clearly established. We disagree. We conclude that the Officers acted without reasonable suspicion and violated clearly established precedent. In particular, we conclude that the Officers impermissibly relied on Vasquez's status as a resident of Colorado to justify the search of his vehicle. Exercising jurisdiction under 28 U.S.C. § 1291, we reverse and remand to the district court for further proceedings.

I

On December 16, 2011, the Officers saw Vasquez's 1992 BMW sedan driving eastbound on I-70 in Wabaunsee County, Kansas. Jimerson could not read

Vasquez's temporary tag, which was taped to the inside of the car's tinted rear window. Because of this, Jimerson turned on his emergency lights and Vasquez pulled to the side of the road. Jimerson approached the car, noted that Vasquez was its sole occupant, and observed blankets and a pillow in the front passenger seat and back seat of the car. Based on the arrangement of the back seat, Jimerson thought something large was obscured under the blankets, and he asked Vasquez if anyone else was in the car. Vasquez told him no. Jimerson then asked Vasquez where he was heading and Vasquez responded, "Elkton, Maryland." Vasquez also told Jimerson that he was from Colorado originally, but had just moved to Maryland. Jimerson asked whether Vasquez had any family in Maryland to which Vasquez responded, "Just my daughter." Jimerson then took Vasquez's driver's license and proof of insurance and returned to the patrol car.

In the car, Jimerson told Lewis that Vasquez was notably nervous and that there were items covered in the front and back seat of the car. Jimerson sent Lewis to check on Vasquez, to "see how nervous he [was]" and to "get a feel for him." Upon returning, Lewis told Jimerson that Vasquez "look[ed] all scared to death." Jimerson then checked Vasquez's proof of insurance which indicated Vasquez also had insurance for two newer cars. Jimerson, suspecting Vasquez was transporting illegal drugs, called Trooper Jason Edie to bring a trained drug dog.

Lewis returned to Vasquez and asked where he worked. Vasquez responded "We own a store called Boutiques at Brighton." Lewis also asked why Vasquez

was not driving one of the newer cars listed on his proof of insurance. Vasquez stated that he bought the newest car for his girlfriend. Further, Vasquez told Lewis that he was moving to Maryland, which prompted Lewis to ask "Where's all the stuff if you're moving?" Vasquez replied that he already had moved most of his belongings.

After issuing a warning and walking away, but before getting back into his patrol car, Lewis returned and inquired if he could ask a couple more questions, to which Vasquez consented. Lewis asked if there were any drugs in the vehicle, which Vasquez denied. Lewis then asked if he could search the car and Vasquez refused. After the refusal, Lewis said that he suspected Vasquez was "probably involved in a little criminal activity here" and detained him. Trooper Edie arrived with the drug dog about fifteen minutes later. The Officers' subsequent search of the vehicle did not reveal anything illegal.

On February 28, 2012, Vasquez filed this lawsuit against the Officers under 42 U.S.C. § 1983, arguing that they violated his Fourth Amendment rights by detaining him and searching his car without reasonable suspicion. The district court initially denied the Officers' motion to dismiss, concluding that Vasquez had stated sufficient facts in his complaint to properly allege a violation of his Fourth Amendment rights. However, after discovery, the district court granted the Officers' motion for summary judgment on the basis of qualified immunity. It held that Vasquez failed to show that the Officers' conduct violated clearly established law, and as such, he could not overcome their immunity from suit. Vasquez timely appealed.

II

We review the grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party. Yousuf v. Cohlmia, 741 F.3d 31, 37 (10th Cir. 2014). To overcome qualified immunity, a plaintiff must show: (1) a defendant violated his constitutional rights; and (2) it was clearly established at the time of the violation that such actions violated that right. Foote v. Spiegel, 118 F.3d 1416, 1424 (10th Cir. 1997).

A

"The Fourth Amendment prohibits unreasonable searches and seizures by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." United States v. Arvizu, 534 U.S. 266, 273 (2002) (quotation omitted). To determine whether a traffic stop constituted an unreasonable seizure, we consider: (1) whether the stop was justified at its inception; and (2) whether "the officer's actions during the detention were reasonably related in scope to the circumstances which justified the interference in the first place." United States v. Wood, 106 F.3d 942, 945 (10th Cir. 1997).

An investigative detention must be temporary, lasting no longer than necessary to effectuate the purpose of the stop, and the scope must be carefully tailored to its underlying justification. Id. Absent the detainee's valid consent, the scope or duration of an investigative detention may be expanded beyond its initial purpose only if the detaining officer, at the time of the detention, has "a particularized and objective

basis for suspecting the particular person stopped of criminal activity." United States v. Lambert, 46 F.3d 1064, 1069 (10th Cir. 1995) (quotation omitted). The existence of reasonable suspicion of illegal activity does not depend upon any one factor, but on the totality of the circumstances. Id. Officers may rely on common sense and ordinary human experience, and we avoid second-guessing a law enforcement officer's judgment. United States v. Melendez–Garcia, 28 F.3d 1046, 1052 (10th Cir. 1994).

1

This Court has repeatedly admonished law enforcement that once an officer has been assured that a temporary tag is valid, he "should . . . explain[] to Defendant the reason for the initial stop and then allow[] her to continue on her way without requiring her to produce her license and registration." United States v. Edgerton, 438 F.3d 1043, 1051 (10th Cir. 2006); see also United States v. Pena-Montes, 589 F.3d 1048, 1055 (10th Cir. 2009) (the discovery of facts resolving the initial purpose of a stop "wholly dispel[s] . . . reasonable suspicion"); United States v. McSwain, 29 F.3d 558, 561-62 (10th Cir. 1994) (officers improperly detained a driver and searched a vehicle long after the initial purpose of a stop was completed).

The Officers argue their observations other than the car's license plate justified extending the length of the seizure. See United States v. Clarkson, 554 F.3d 1196, 1201 (10th Cir. 2009) ("The traffic stop may be expanded beyond its original purpose if during the initial stop the detaining officer acquires reasonable suspicion of criminal activity." (quotation omitted)). But Vasquez challenges only the drug dog sniff and

subsequent search of his car. Therefore, we consider only whether Vasquez's continued detention after he refused the search and the subsequent search of his car violated his constitutional rights.

2

We now turn to whether the Officers had reasonable suspicion to justify the search of Vasquez's car. They argue the following factors created reasonable suspicion: (1) Vasquez was driving alone late at night; (2) he was travelling on I-70, "a known drug corridor"; (3) he was from Colorado and was driving from Aurora, Colorado, "a drug source area"; (4) the back seat did not contain items the Officers expected to see in the car of someone moving across the country; (5) the items in his back seat were covered and obscured from view; (6) he had a blanket and pillow in his car; (7) he was driving an older car, despite having insurance for a newer one; (8) there were fresh fingerprints on his trunk; and (9) he seemed nervous.[1] Such conduct, taken together, is hardly suspicious, nor is it particularly unusual.[2]

---

[1] The Officers also argue that Vasquez gave vague or inconsistent answers to questions about his travel plans. However, the Officers do not explain what these answers were or why they were contradictory. On reviewing the record, which contains a video recording of the interactions between the Officers and Vasquez, we cannot find anything even arguably inconsistent in Vasquez's answers.

[2] Neither the dissent nor the Officers explain how these factors, taken together, indicate suspicious behavior. The Officers instead recite them as a list of unrelated facts. But officers must explain why the factors, together, create "a particularized and objective basis for suspecting the particular person stopped of criminal activity." Lambert, 46 F.3d at 1069 (quotation omitted). As the

Though we analyze these facts under the totality of the circumstances, Arvizu, 534 U.S. at 273, we first note which factors have less weight in our analysis. We start with the most troubling justification: Vasquez's status as a resident of Colorado. The Officers rely heavily on Vasquez's residency because Colorado is "known to be home to medical marijuana dispensaries." But we find this justification, in isolation or in tandem with other considerations, unconvincing. As we have said previously, "that the defendant[] [was] traveling from a drug source city—or . . . a drug source state—does little to add to the overall calculus of suspicion." United States v. Guerrero, 472 F.3d 784, 787-88 (10th Cir. 2007). Such a factor is "so broad as to be indicative of almost nothing." Id. at 787. Moreover, our fellow circuits have concluded the state of residence of a detained motorist is an "extremely weak factor, at best" in the reasonable suspicion calculus because "interstate motorists have a better than equal chance of traveling from a source state to a demand state." United States v. Beck, 140 F.3d 1129, 1138 & n.3 (8th Cir. 1998) (collecting cases and noting that the government has argued that almost every major city in the United States is a drug source area). Currently, twenty-five states permit marijuana use for medical purposes, with Colorado, Alaska, Oregon, Washington, and Washington, D.C. permitting some recreational use

---

Supreme Court has reminded the circuit courts, we should not and cannot review these factors in isolation. Arvizu, 534 U.S. at 273. Thus, officers must explain why the factors considered together are suspicious, and not simply recite isolated factors, leaving it to the courts to glean how they create reasonable suspicion.

under state law.[3] Thus, the Officer's reasoning would justify the search and seizure of the citizens of more than half of the states in our country. It is wholly improper to assume that an individual is more likely to be engaged in criminal conduct because of his state of residence, and thus any fact that would inculpate every resident of a state cannot support reasonable suspicion. Accordingly, it is time to abandon the pretense that state citizenship is a permissible basis upon which to justify the detention and search of out-of-state motorists, and time to stop the practice of detention of motorists for nothing more than an out-of-state license plate.

And we cannot think of a scenario in which a combination of otherwise innocent factors becomes suspicious because the individual is from one of the aforementioned twenty-five states or the District of Columbia. Even under the totality of the circumstances, it is anachronistic to use state residence

---

[3] See Alaska Stat. §§ 17.37 et seq., 17.38 et seq.; Ariz. Rev. Stat. §§ 36-2801 et seq.; Cal. Health & Safety Code § 11362.5; Colo. Rev. Stat. §§ 12-43.3-101 et seq., 18-18-406.3, 25-1.5-106; Colo. Const. art. XVIII, § 16(3); Conn. Gen. Stat. §§ 21a-408 et seq.; Del. Code. tit. 16 §§ 4901a et seq.; D.C. Code §§ 7-1671.01 et seq., 48-9043.01; Haw. Rev. Stat. §§329-121 et seq.; 410 Ill. Comp. Stat. 130/1 et seq.; Me. Stat. 22 § 2383-B; Md. Code, Health-Gen. §§ 13-3301 et seq.; Mass. Gen. Laws. ch. 94C, §§ 1-2 et seq.; Mich. Comp. Laws §§ 333.26421 et seq.; Minn. Stat. §§ 152.21 et seq.; Mont. Code §§ 50-46.301 et seq.; Nev. Rev. Stat. §§ 40.453A et seq.; N.H. Rev. Stat. §§ 126-X et seq.; N.J. Stat. §§ 24:6I et seq., 45:1-45.1; N.M. Stat. §§ 26-2b et seq.; N.Y. Pub. Health Law §§ 3360 et seq.; Ohio Rev. Code §§ 3796.19 et seq. (effective Sept. 8, 2016); Or. Rev. Stat. §§ 475.300 et seq., 475.864; 21 R.I. Gen. Laws §§ 28.6 et seq.; 35 Pa. Stat. §§ 10231.101 et seq.; Vt. Stat. tit. 18, §§ 4472 et seq.; Wash. Rev. Code. §§ 69.51A et seq., 69.50.4013.

as a justification for the Officers' reasonable suspicion. Absent a demonstrated extraordinary circumstance, the continued use of state residency as a justification for the fact of or continuation of a stop is impermissible.

Some other factors also weigh little in our totality of the circumstances analysis. "[W]e have repeatedly held that nervousness is of limited significance in determining reasonable suspicion and that the government's repetitive reliance on . . . nervousness . . . as a basis for reasonable suspicion . . . must be treated with caution." Wood, 106 F.3d at 948 (quotation omitted). Moreover, the Officers' reasoning is contradictory at points. Officer Jimerson claimed that Vasquez's car contained items that were covered by blankets, but Officer Lewis found suspicious that the car was uncharacteristically empty and lacking in sundries common for someone moving cross-country. We do not give much weight to these seemingly contradictory facts. And that Vasquez was driving on I-70 does not make his otherwise innocent conduct suspicious. I-70 is a major corridor between Colorado and the East Coast. It could equally be said that it is suspicious to not drive from Colorado to Maryland along I- 70.

In sum, Vasquez's conduct does not create reasonable suspicion. What we have here is a driver traveling from Colorado to Maryland, on a major interstate; in an older car despite owning a newer car; with blankets and a pillow obscuring items in the back seat; who did not have items visible that an officer expected to see; and who was and continued to be nervous when pulled over by officers late at night. Such

conduct does not raise an inference of reasonable suspicion. Thus, we conclude that the Officers violated Vasquez's Fourth Amendment rights in searching his car.

B

We next turn to whether it was clearly established, at the time of the incident, that the Officers' actions violated Vasquez's constitutional rights. "A right is clearly established if it would be clear to a reasonable officer that his conduct was unlawful in the situation." Maresca v. Bernalillo Cty., 804 F.3d 1301, 1308 (10th Cir. 2015) (quotation omitted). Generally, "this means that there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." Id. (quotation omitted).

We have previously held, under strikingly similar circumstances, that an officer—in fact, one of the officers before us now—did not have reasonable suspicion to further detain a defendant after issuing a speeding warning. Wood, 106 F.3d at 944, 948. In Wood, Officer Jimerson stopped Wood for a routine traffic violation. Id. at 944. After issuing a warning, Jimerson told Wood he was free to leave, but then quickly inquired if he could ask Wood a few questions, to which Wood agreed. Id. Jimerson asked if Wood had any narcotics or weapons, and was told no. Id. Despite this, Jimerson asked for Wood's consent to search the car, and after it was denied, Jimerson "detain[ed] the car and its contents in order to subject it to a canine search." Id. Jimerson justified his detention of Wood based on his observation that the he was "extremely nervous," that the car had "trash on the floor, including

sacks from fast-food restaurants" and "open maps in the passenger compartment," that the car was rented, and that Wood previously had been arrested for drug possession. Id. at 944, 946-48. Jimerson also found Wood's travel plans suspicious because the car was rented in a different city than the one Wood indicated, and because, even though Wood was unemployed, he stated he was returning from a vacation in California. Id. at 946-47. Jimerson additionally raised some concern about California being a drug source state. Id. at 947. We held that Jimerson's stated reasons did not rise to the level of reasonable suspicion, and thus detaining Wood after issuing the warning violated his Fourth Amendment rights. Id. at 948.

In both cases, Jimerson detained an individual because: he thought the car was unusual (Vasquez's older car and Wood's rented car); the car had "unusual" but typical items in it (Vasquez's items covered by blankets and Wood's trash wrappers and maps); and the driver was nervous, leaving a drug source state, and passing through Kansas. The facts of these cases are almost indistinguishable.

The district court erred in concluding that the differences between Wood and this case were significant.[4] Wood "place[s] the statutory or

[4] In the alternative, the Officers argue Wood was overruled by the Supreme Court in Arvizu, 534 U.S. 266. Specifically, they cite an unpublished opinion of this court, United States v. $49,000.00 in U.S. Currency, More or Less, 208 F. App'x 651 (10th Cir. 2006) (unpublished), to claim we recognized this change in the law. But this is incorrect. As we said in $49,000 in U.S. Currency, "the Supreme Court in [Arvizu] reemphasized that reviewing courts must look at the totality of the circumstances of each case to see

constitutional question beyond debate" and provides "contours [that] are sufficiently clear that a reasonable offic[er] would understand that what he is doing violates that right." Carroll v. Carman, 135 S. Ct. 348, 350 (2014). Thus, at the time of the detention, it was clearly established that the Officers did not have reasonable suspicion based upon the articulated circumstances.

III

For the foregoing reasons, we **REVERSE** the judgement of the district court and **REMAND** for further proceedings not inconsistent with this opinion.[5]

---

whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." Id. at 656 (quotation omitted) (emphasis added). Arvizu did not change our Fourth Amendment analysis. Further, the panel in $49,000 in U.S. Currency did not conclude that Wood had been overruled, but distinguished it on specific relevant facts. Compare id. at 655 ("[T]he facts in the instant case are quite similar to the facts in Wood. However, . . . there are additional facts . . . which justified . . . denial of appellant's motion to suppress."), with id. ("Because I find this case indistinguishable from [Wood], I respectfully dissent." (Lucero, J., dissenting)). Arvizu did not alter our analysis, and we continue to abide by the totality of the circumstances test, as we did in Wood. See 106 F.3d at 946.

[5] The Officers also argue Vasquez's appeal is frivolous, and he made a false declaration of poverty. As we reverse the district court, this appeal clearly is not frivolous. And the Officers admit they do not have access to Vasquez's application to proceed in forma pauperis. Thus, the Officers cannot know whether Vasquez's declaration of poverty was truthful, and we reject their assertion that Vasquez's declaration was false.

TYMKOVICH, C.J., dissenting.

This case presents a close call on reasonable suspicion. But the essence of qualified immunity is to give government officials protection in resolving close calls in reasonable ways. Because the majority employs a divide-and-conquer analysis specifically rejected by the Supreme Court and because Vasquez cannot identify clearly established law necessary to overcome qualified immunity, I respectfully dissent.

When the defense of qualified immunity is raised, we require the plaintiff to demonstrate (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct. Vasquez challenges that his detention beyond the original traffic stop violated the Fourth Amendment. But such detention is permissible where the officer has an "objectively reasonable and articulable suspicion that illegal activity has occurred or is occurring . . . ." *United States v. Gonzalez-Lerma*, 14 F.3d 1479, 1483 (10th Cir. 1994).

"[R]easonable suspicion is not, and is not meant to be, an onerous standard." *United States v. Pettit*, 785 F.3d 1374, 1379 (10th Cir. 2015) (quoting *United States v. Kitchell*, 653 F.3d 1206, 1219 (10th Cir. 2011)). An officer need only have "a 'particularized and objective basis for suspecting' criminal conduct under a totality of the circumstances." *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 417–18 (1981)).

The majority, in effect, takes the district court finding and concludes that 0 + 0 + 0 cannot = reasonable suspicion. Of course, a series of completely innocent conduct does not create reasonable suspicion.

But the Supreme Court instructs us not to employ a "divide-and-conquer analysis" and requires us to consider the "totality of the circumstances." *See United States v. Arvizu*, 534 U.S. 266 (2002).

In *Arvizu*, a particularly instructive case, the Court reversed the Ninth Circuit's determination that a border patrol agent had no reasonable suspicion to detain a minivan. The Ninth Circuit had independently examined ten factors supporting reasonable suspicion and determined that seven of them should not be given much weight because those factors were each readily susceptible to innocent explanation. *Id.* at 274. In rejecting this approach, the Court held that even if each factor is consistent with innocent travel, factors when taken together can warrant further investigation. Our cases agree. *See, e.g.*, *Pettit*, 785 F.3d at 1380 ("We evaluate each of the factors supporting reasonable suspicion separately and in aggregate."); *United States v. Padilla-Esparza*, 798 F.3d 993, 999 (10th Cir. 2015); *United States v. Santos*, 403 F.3d 1120, 1133–34 (10th Cir. 2005); *United States v. Quintana-Garcia*, 343 F.3d 1266, 1270–71 (10th Cir. 2003).

Under this analysis, no factor can be given a constant weight of zero in a reasonable suspicion equation. *See, e.g.*, *Arvizu*, 534 U.S. at 275–76 ("We think it quite reasonable that a driver's slowing down, stiffening of posture, and failure to acknowledge a sighted law enforcement officer might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona)."). Vasquez's story struck the officers as unusual, and when a police officer encounters a series

of unusual facts, each factor no longer carries a weight of zero; together they may provide a "particularized and objective basis" to suspect illegal activity. *Id.* at 273 (quoting *Cortez*, 449 U.S. at 417–18 (1981)).[1]

But even assuming a lack of reasonable suspicion, I would still affirm the district court because Vasquez has not pointed to clearly established law. While the precise conduct in question need not have been previously held unlawful, "'the contours of the right' must be 'sufficiently clear that a reasonable official' would understand that what he is doing violates that right." *Romero v. Story*, 672 F.3d 880, 889 (10th Cir. 2012) (quoting *Dodds v. Richardson*, 614 F.3d 1185, 1206 (10th Cir. 2012)). The Supreme Court has recently emphasized that the

> dispositive question is whether the violative nature of *particular* conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition. Such specificity is especially important in the Fourth Amendment

[1] The majority particularly objects to giving weight to a driver's route from a drug-source area to a drug-market area, especially in the aftermath of legalized marijuana. I appreciate this concern. Standing alone, traveling from a drug-source area is simply insufficient to establish reasonable suspicion and we have held it is "at best, a weak factor" in contributing to reasonable suspicion. *United States v. Williams*, 271 F.3d 1262, 1270 (10th Cir. 2001). Although here I would not find travel from a state that had legalized marijuana suspicious, we should recognize, especially near borders where smuggling is common, law enforcement can discern patterns in drug trafficking. *See Arvizu*, 534 U.S. at 275–76 (reasoning that driver and passenger behavior near the Mexican border may be assessed with regard to location).

> context, where . . . it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confront[ed].

Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (internal brackets, citations, and quotations omitted).

Vasquez points to no Supreme Court or Tenth Circuit case with sufficiently analogous facts. He and the majority rely on a case where we held the police lacked reasonable suspicion where the driver "had fast food wrappers and other trash in his car, he had open maps out, he misidentified the place where he picked up his rental car, and he described somewhat expensive travel plans despite being temporarily employed." *United States v. Toledo*, 139 F.3d 913 (10th Cir. 1998) (unpublished table opinion) (describing the holding of *United States v. Wood*, 106 F.3d 942 (10th Cir. 1997)).

I disagree that *Wood* clearly defines the absence of reasonable suspicion here, especially given the multiple times we have affirmed district court decisions finding reasonable suspicion while citing and distinguishing *Wood*. Consider three examples:

(1) *United States v. $49,000.00 in U.S. Currency, More or Less*, 208 F. App'x 651 (10th Cir. 2006). Officers pulled over an afternoon driver on Interstate 70 in Kansas. The driver lived in Los Angeles but rented a car from Detroit, was nervous, and had a prior arrest for possession of marijuana with intent to distribute.

(2) *Toledo*, 139 F.3d 913. Officers also pulled over an afternoon driver on Interstate 70 in Kansas. The driver gave inconsistent accounts of his travel plans to explain

why he was headed to North Carolina but the rental car needed to be returned in California. The car smelled of air freshener, the defendant had a prior drug conviction, and acted nervously.

(3) *United States v. Williams*, 271 F.3d 1262 (10th Cir. 2001). Again, this case involved an afternoon driver on Interstate 70 in Kansas. The driver was nervous, had a two-way, short-range radio despite attesting to be traveling alone, was not named in the rental agreement, and was traveling from a drug-source area.

Our treatment of *Wood* in this line of cases "reveal[s] the hazy legal backdrop," against which Officers Jimerson and Lewis acted. *Mullenix*, 136 S. Ct. at 309. The officers encountered a sufficiently different factual scenario than in *Wood*, especially in light of almost twenty years of cases distinguishing it.

Most notably, the two cases differ in the degree of unusual travel plans. The court in *Wood* declined to give any weight to Wood's "unusual" travel plans – driving a rental car from Sacramento to Topeka. 106 F.3d at 946–47. As a preliminary matter, this reasoning puts *Wood* on shaky ground. In *Wood*, we "stripp[ed] away the factors which must be disregarded because they are innocuous," 106 F.3d at 948, which is precisely what the Supreme Court warned against in *Arvizu*. Regardless, Vasquez's travel plans are sufficiently distinct as to allow a reasonable officer to be more suspicious. Vasquez asserted he was moving, but no items in his car aligned with his story. Vasquez was driving in the middle of the night, apparently sleeping in his car. Vasquez was driving a newly-purchased twenty-year-old car, despite owning a new

car, and had a flimsy, even implausible, explanation as to why.[2]

Because reasonable officers may differ regarding whether Vasquez's detention violated the Fourth Amendment, I would affirm the district court's finding of qualified immunity.

---

[2] The majority characterizes that Vasquez told Trooper Lewis he bought the newer car for his girlfriend, which explains why he was driving the older one. But the transcript shows that Vasquez told Trooper Lewis he bought the older car for his girlfriend, which raised Trooper Lewis's suspicions.

> [Trooper Lewis]: So, you have a 2011 Chevy Malibu too?
> [Vasquez]: Yeah.
> [Trooper Lewis]: Okay. And how come you're driving the older car across the country?
> [Vasquez]: What's that?
> [Trooper Lewis]: How come you're driving the older one across the country?
> [Vasquez]: Because I bought it for my girlfriend.
> [Trooper Lewis]: This? Oh, okay.

R., Vol. I at 25–26.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 12-CV-4021-DDC-JPO

[Filed November 26, 2014]

PETER L. VASQUEZ,
Plaintiff,

v.

DAX K. LEWIS and
RICHARD JIMERSON,
Defendants.

MEMORANDUM AND ORDER

Kansas Highway Patrol Officers Dax Lewis and Richard Jimerson detained plaintiff after a routine traffic stop to search plaintiff's car for illegal drugs. The search revealed no drugs. Plaintiff argues that defendants violated his Fourth Amendment rights by detaining him when they lacked reasonable suspicion that he was doing anything illegal. Defendants filed this motion for summary judgment (Doc. 69), asserting the defense of qualified immunity. The Court concludes that qualified immunity protects defendants from liability and therefore grants their motion for summary judgment.

I. Uncontroverted Facts

The first step in assessing whether qualified immunity protects defendants is to determine the relevant facts. *Scott v. Harris*, 550 U.S. 372, 378 (2007). The following facts are uncontroverted. On December 16, 2011, at 2:43 a.m., defendants saw plaintiff's 1992 BMW sedan with a temporary registration tag driving eastbound on I-70 in Wabaunsee County, Kansas. Defendants could not read the temporary tag because it was taped to the inside of the car's tinted rear window, so they decided to stop the car. Defendants turned on the emergency lights on their patrol car, and plaintiff pulled to the side of the road. Plaintiff concedes that this initial stop did not violate his constitutional rights.

Jimerson stepped out of the patrol car and approached the BMW. Jimerson noted that plaintiff was the sole occupant of the vehicle and observed there were items covered by blankets in the front passenger seat and back seat of the car. He also noticed a pillow in the back seat of the car. Based on the arrangement of the back seat, Jimerson thought there might be someone in the back and asked plaintiff if anybody else was in the car. Plaintiff told him no. Jimerson then asked plaintiff where he was heading and plaintiff responded "Uh, Elkton, Maryland." Jimerson asked where Elkton was located, and plaintiff said, "Right on the border of Delaware." Plaintiff told Jimerson that he was from Colorado originally, but he had just moved to Maryland. Jimerson asked whether plaintiff had any family in Maryland, and plaintiff responded, "Just my daughter." Jimerson then took plaintiff's driver's

license and proof of insurance and returned to the patrol car.

Back in the car, Jimerson told Lewis, sitting in the passenger seat, that plaintiff was trying to "keep his nervousness in check" and that he had items covered in the front and back seat of the car. Jimerson then told Lewis to go check the VIN number on plaintiff's BMW and to "see how nervous he is" and to "get a feel for him." Lewis did so and, upon returning to the patrol car, told Jimerson that he thought plaintiff "looks all scared to death." While Lewis was with plaintiff, Jimerson checked plaintiff's proof of insurance; it indicated that plaintiff also owned a 2011 Chevy Malibu and a 1998 Ford Mustang. Defendants found it suspicious that plaintiff would drive a 1992 model vehicle across the country when he owned newer cars. Based on the information known at that point, Jimerson suspected that plaintiff was transporting illegal drugs and said "I'll call Edie," a reference to Trooper Jason Edie, who could bring a police dog to sniff plaintiff's car for drugs.

Lewis then went back to talk to plaintiff. Lewis asked where plaintiff worked, and plaintiff said, "We own a store called Boutiques at Brighton." Lewis asked plaintiff why he was driving an older 1992 model year vehicle instead of the 2011 Chevy Malibu on such a long trip. Plaintiff responded that he bought the Malibu for his girlfriend, who already was in Maryland. Plaintiff told Lewis that he was moving to Maryland, which prompted Lewis to ask "Where's all the stuff if you're moving?" Plaintiff told him that he had moved most of his belongings to Maryland already. After that,

Lewis handed plaintiff a written warning and began to walk away from the car.

After a step or two, Lewis turned around and asked plaintiff if he could ask a couple more questions. Plaintiff said yes. Lewis asked plaintiff if he had any drugs in the vehicle, which plaintiff denied. Lewis then asked if he could search the car and plaintiff refused. After that, Lewis informed plaintiff that he was detaining plaintiff because he suspected that plaintiff was "probably involved in a little criminal activity here." Trooper Edie showed up with the police dog about 15 minutes later. Although the dog signaled that there were drugs in the car, defendants' subsequent search revealed nothing illegal.

On February 28, 2012, plaintiff filed this lawsuit against defendants under 42 U.S.C. § 1983. Plaintiff seeks to recover damages, arguing that defendants violated his Fourth Amendment rights by detaining him without reasonable suspicion that he was committing a crime.

II. Qualified Immunity

Defendants argue they are entitled to summary judgment because qualified immunity shields them from any liability. Qualified immunity is a defense that protects government officials sued in their personal capacity for violating constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). Recognizing that constitutional law is constantly evolving and that public officials cannot be "expected to predict the future course of constitutional law," the Supreme Court has decided to shield government officials performing discretionary functions from liability for civil damages

as long as their conduct does not violate clearly established constitutional rights. *Procunier v. Navarette*, 434 U.S. 555, 562 (1978); *Harlow*, 457 U.S. at 818.

In the normal case, a party moving for summary judgment bears the burden of showing that no genuine issues of material fact exist and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Clark v. Edmunds*, 513 F.2d 1219, 1222 (10th Cir. 2008). However, because qualified immunity is "designed to protect public officials from spending inordinate time and money defending erroneous suits at trial," courts analyze summary judgment involving qualified immunity differently. *Id.* Specifically, when a defendant asserts a qualified immunity defense, the burden shifts to the plaintiff to satisfy a two-part test: (1) the plaintiff must show that the defendants' actions violated a constitutional or statutory right; and (2) the plaintiff must show that this right was "clearly established at the time of the conduct at issue." *Rojas v. Anderson*, 727 F.3d 1000, 1003 (10th Cir. 2013). "If, and only if, the plaintiff meets this two-part test does a defendant then bear the traditional burden of the movant for summary judgment . . . ." *Clark*, 513 F.2d at 1222.

When determining whether a plaintiff has satisfied the initial two-part burden, courts must "view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion," which, in qualified immunity cases, usually means adopting the plaintiff's version of the facts. *Rojas*, 727 F.3d at 1004 n.5.

III. Discussion

In this case, defendants lawfully stopped plaintiff because the temporary registration tag on his vehicle was obscured by tinted windows. "After an initial traffic stop by an officer, further detention of the driver for purposes of questioning unrelated to the initial traffic stop is impermissible *unless*: (1) the officer has an objectively reasonable and articulable suspicion that illegal activity has occurred or is occurring, *or* (2) the initial detention has become a consensual encounter." *Arencibia v. Barta*, 498 F. App'x 773, 777 (10th Cir. 2012) (emphasis in original). Plaintiff did not consent to defendants detaining him, so defendants' only permissible basis for the stop was reasonable suspicion of wrongdoing. *Id.*

Reasonable suspicion is based on the "totality of the circumstances." *United States v. Arvizu*, 534 U.S. 266, 273 (2002). Courts look at the facts of each case as a whole, combined with the officers' experience and training, to determine if the officers had a "particularized and objective basis" for suspecting illegal activity. *Arencibia*, 498 F. App'x at 778. To overcome defendants' qualified immunity defense, however, plaintiff must show that defendants lacked reasonable suspicion *and* that the absence of reasonable suspicion, under the circumstances, was "clearly established." *Id.*

"A right is clearly established only if its contours are sufficiently clear that 'a reasonable official would understand that what he is doing violates that right.'" *Carroll v. Carman*, __U.S.__, No. 14-212, 2014 WL 5798628, at *2 (Nov. 10, 2014). In other words, "existing precedent must have placed that statutory or

constitutional question beyond debate." *Id.* (citing *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011). In our Circuit, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Martinez v. Carr*, 479 F.3d 1292, 1295 (10th Cir. 2007). This standard protects the balance between vindicating constitutional rights and allowing government officials to perform their jobs effectively by ensuring that officials can anticipate when their conduct may give rise to liability for damages. *Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012). Courts may grant qualified immunity because a purported right was not "clearly established" by prior case law, without resolving the often more difficult question whether the purported right exists at all. *Id.* This approach comports with the general reluctance among federal courts to decide constitutional questions unnecessarily. *Id.*

Here, plaintiff has not met his burden to prove that defendants violated his "clearly established" Fourth Amendment rights. Defendants identified several reasons for their suspicion that plaintiff was transporting illegal drugs. Plaintiff was traveling alone, in the middle of the night, on a long trip from a drug source area (Aurora, Colorado) to a drug market area (Maryland), along a known drug corridor (I-70), in a recently purchased 1992 BMW with temporary registration tags. Defendants found it unusual that plaintiff would make such a long trip in the middle of the night. Defendants also questioned why plaintiff would drive an older car across the country when he apparently owned newer cars—a 2011 Chevy Malibu and a 1998 Ford Mustang. While plaintiff has a

reasonable explanation—his parents owned the Mustang and the Malibu already was in Maryland—defendants did not know those facts when they decided to detain plaintiff. Furthermore, based on their experience, defendants knew that drug traffickers often transport drugs in older, less expensive vehicles because the risk is high that the police will confiscate the car if they apprehend a trafficker. Defendants also believed, based on their experience, that driving a newly-purchased car was consistent with drug trafficking activity. Plaintiff told Lewis that he was moving to Maryland. Lewis found this strange for two reasons: (1) plaintiff told Lewis that he owned a business in Colorado and (2) the car was not packed full with items that would suggest plaintiff was moving permanently to a different state.

At separate times, defendants approached the vehicle and noticed that both the front passenger seat and the back seat of the BMW were covered with blankets in a manner defendants found to be unusual. They also noticed a pillow in the back seat. This indicated to defendants that plaintiff was sleeping in the car, something they believe drug traffickers frequently do.

The Court need not decide whether defendants had reasonable suspicion to detain plaintiff because plaintiff has not met his burden to show defendants violated his "clearly established" rights. A "plaintiff must do more than identify in the abstract a clearly established right and allege that the defendant has violated it." *Swanson v. Town of Mountain View, Colo.*, 577 F.3d 1196, 1200 (10th Cir. 2009). Although a plaintiff need not "find a case with an identical factual

situation, he still must show legal authority which makes it apparent that in the light of pre-existing law a reasonable official would have known that the conduct in question violated the constitutional right at issue." *Id.* For district courts in the Tenth Circuit, this means "Supreme Court or Tenth Circuit precedent" or clearly established authority from other courts that "found the law to be as the plaintiff maintains." *Cordova v. Aragon*, 569 F.3d 1183, 1192 (10th Cir. 2009).

Plaintiff concedes that "[t]here is no case law directly on point," but argues this "presumably [is] because no Court would be asked to decide, much less publish a decision, on such an obvious issue." (Doc. 71 at 24) Plaintiff asserts that "[c]ase law defining the bounds of objectively reasonable suspicion to detain is abundant in the Tenth Circuit and District of Kansas. Even a cursory review of that law makes it obvious that a detention based on the uncontroverted facts in this case alone would violate a motorist[']s Fourth Amendment rights." (Doc. 71 at 25) The Court finds it significant, however, that plaintiff cites only one case, *United States v. Wood*, 106 F.3d 942 (10th Cir. 1997), to support his argument that defendants violated his "clearly established" Fourth Amendment rights by detaining him.

In *Wood*, the Tenth Circuit suppressed drug evidence because it determined the police officer who conducted the search—coincidentally Officer Richard Jimerson, one of the defendants here—lacked reasonable suspicion to conduct a search. *Id.* at 948. In that criminal case, Jimerson based his finding of reasonable suspicion on five factors. *Id.* at 946. First,

he thought the defendant's response to his question about why he was traveling implausible. *Id.* The defendant told him that he was an unemployed painter who was taking a two-week vacation in California and driving a rental car back to Kansas. *Id.* Second, the defendant misidentified the city where he rented the car, confusing Sacramento with San Francisco. *Id.* at 947. Third, Jimerson noted fast food wrappers and open maps on the passenger seat. *Id.* at 947. Fourth, Jimerson found the defendant to be extremely nervous during the traffic stop. *Id.* at 948. Finally, Jimerson found that the defendant had a prior felony drug conviction. *Id.* The Tenth Circuit concluded that, even taking into account the totality of the circumstances, those "innocent" factors together could not amount to reasonable suspicion. *Id.*

While there are some similarities between *Wood* and this case—odd travel plans and defendants' subjective determination that plaintiff was nervous—it is not so similar that a reasonable officer would have known that the circumstances in this case could not give rise to reasonable suspicion. For instance, defendants here noted that plaintiff was driving a 1992 vehicle with temporary tags instead of a 2011 Chevy Malibu that he owned, plaintiff had items covered in the front and back seat, and plaintiff was making his trip across the country in the middle of the night coming from a known drug-source area. Plaintiff told Lewis that he was moving to Maryland, but his car was not loaded with items indicating a permanent move. Furthermore, Lewis found it strange that plaintiff would relocate when he claimed to own a business in Colorado.

The Court wants to emphasize that it does not hold, and need not hold, that the facts of this case establish reasonable suspicion to detain plaintiff under the Fourth Amendment. Rather, the Court concludes only that this case's facts are sufficiently different from the facts of *Wood* that *Wood* does not show defendants violated "clearly established" constitutional rights.

Finally, plaintiff has filed a Notice of Supplemental Authority (Doc. 77), citing Judge Belot's Order in *United States v. $39,440 in U.S. Currency*, No. 13-1325-MLB, 2014 WL 3881054 (D. Kan. Aug. 7, 2014). Plaintiff argues that "the order supports [plaintiff's] argument that reasonable officers standing in the place of the Defendants would know that the factors on which they relied in detaining [plaintiff] did not amount to reasonable suspicion." (Doc. 77 at 1) But this argument misses the dispositive point: plaintiff still must prove that defendants violated a right that was clearly established on the date defendants detained plaintiff. *Swanson*, 577 F.3d at 1200. As a result, only those cases decided *before* the incident here govern the Court's analysis. *Id.* An August 7, 2014 district court opinion does not show what law was "clearly established" on December 16, 2011, nor does it provide any Tenth Circuit or Supreme Court precedent on that point.

Qualified immunity is a high bar meant to protect public officials from civil liability. Plaintiff has identified no legal authority demonstrating "beyond debate" that defendants violated plaintiff's constitutional rights. *Carroll*, 2014 WL 5798628, at *2. Plaintiff has failed to meet his summary judgment burden.

IV. Conclusion

Because precedent does not clearly establish that defendants lacked reasonable suspicion to detain plaintiff, the Court grants defendants' motion for summary judgment based on qualified immunity.

IT IS THEREFORE ORDERED BY THE COURT THAT the defendants' Motion for Summary Judgment (Doc. 69) is granted.

IT IS SO ORDERED.

Dated this 26th day of November, 2014, at Topeka, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 14-3278

[Filed September 19, 2016]

PETER L. VASQUEZ,	)
Plaintiff - Appellant,	)
	)
v.	)
	)
DAX K. LEWIS, et al.,	)
Defendants - Appellees.	)
	)

ORDER

Before **TYMKOVICH**, Chief Judge, **LUCERO**, and **BACHARACH**, Circuit Judges.

This matter is before the court on appellees' Petition for Rehearing and Rehearing En Banc. Upon consideration, the request for panel rehearing is denied by a majority of the original panel members. Judge Tymkovich would grant panel rehearing.

The petition for rehearing en banc was also transmitted to all of the judges of the court who are in regular active service. As no member of the original panel and no judge in regular active service on the

court requested that the court be polled, the en banc request is likewise denied.

Entered for the Court
/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX D

ORIGINAL TRANSCRIPT

TRANSCRIPT OF A RECORDING
[Transcript of Vasquez's Cell Phone Recording]
277

[Filed July 6, 2012]

Appino & Biggs Reporting Service, Inc.
Technology Specialists in Complex Litigation

(Main Office)
511 SW 21st Street
Topeka, KS 66604
785.273.3063

Toll Free 888.273.3063
Fax 785.273.0762

6420 W. 95th Street, Suite 200
Overland Park, KS 66212
913.383.1131

[p.2]

(WHEREUPON, voices start at 1:04.)

OFFICER ONE: Hey the reason I stopped you, that dark tinted windows, I can't even see your temporary.

DRIVER: Oh, the Colorado one?

OFFICER ONE: Yeah, yeah. You got your receipt with you for it?

DRIVER: Yeah.

OFFICER ONE: You got somebody sleeping there (inaudible)?

DRIVER: What's that?

OFFICER ONE: You got somebody asleep in the back or --

DRIVER: No.

OFFICER ONE: Oh, okay. Is it your car then?

DRIVER: Yeah.

OFFICER ONE: You just recently buy it?

DRIVER: Yeah.

OFFICER ONE: Okay. How long ago has it -- or how long you got until it expires?

DRIVER: December 30th.

OFFICER ONE: Oh, okay, you got a while then.

DRIVER: Yeah.

[p.3]

OFFICER ONE: Where you headed to tonight?

DRIVER: Huh?

OFFICER ONE: Where are you headed to tonight?

DRIVER: Uh, Elkton, Maryland.

OFFICER ONE: Where?

DRIVER: Elkton, Maryland.

OFFICER ONE: Where is that at?

DRIVER: Right on the border of Delaware.

OFFICER ONE: Is that where you're originally from?

DRIVER: No, I'm from Colorado I just moved out there.

OFFICER ONE: Oh, okay. I mean you got family back there originally?

DRIVER: Just my daughter.

OFFICER ONE: Okay. Well let me check on this real quick and I'll be right back with you, okay?

DRIVER: All right. All right.

OFFICER ONE: How did your daughter end up over there, with the ex-wife, moved back that way?

DRIVER: She married someone in the Air

[p.4]

Force and he got stationed out in Dover.

OFFICER ONE: I gotcha. I'll be right back then.

DRIVER: All right.

(WHEREUPON, the recording was concluded.)

[p.5]

CERTIFICATE

STATE OF KANSAS
ss:
COUNTY OF SHAWNEE

I, Annette S. Droste, a Certified Shorthand Reporter, commissioned as such by the Supreme Court of the State of Kansas, and authorized to take depositions and administer oaths within said State pursuant to K.S.A. 60-228, certify that the foregoing was transcribed from audio CD, and that the foregoing constitutes a true and accurate transcript of the same

I further certify that I am not related to any of the parties, nor am I an employee of or related to any of the attorneys representing the parties, and I have no financial interest in the outcome of this matter.

Given under my hand and seal this 6th day of July, 2012

/s/ Annette S. Droste
Annette S. Droste
C.S.R. – No. 1301

APPENDIX E

ORIGINAL TRANSCRIPT

TRANSCRIPT OF A RECORDING
[Transcript of Vasquez's Cell Phone Recording]
281

[Filed July 6, 2012]

Appino & Biggs Reporting Service, Inc.
Technology Specialists in Complex Litigation

(Main Office)
511 SW 21st Street
Topeka, KS 66604
785.273.3063

Toll Free 888.273.3063
Fax 785.273.0762

6420 W. 95th Street, Suite 200
Overland Park, KS 66212
913.383.1131

[p.2]

(WHEREUPON, voices start at 0:47.)

OFFICER TWO: Hey guy. I want to come over here and just check your VIN number real quick.

DRIVER: Okay.

OFFICER TWO: Just to match it up.

DRIVER: All right.

OFFICER TWO: Just want to let you know before I come over there around your car what I was doing.

DRIVER: All right.

OFFICER TWO: You got a headlight out too, did you know that?

DRIVER: On the front one?

OFFICER TWO: Yeah.

DRIVER: I just replaced them.

OFFICER TWO: Yep.

DRIVER: Really?

OFFICER TWO: Yeah.

DRIVER: Well I just replaced them. I just bought them at Auto -- I just bought the parts at Auto Zone.

OFFICER TWO: Really? Well, I don't know. You replaced both headlights or just that one?

[p.3]

DRIVER: Both.

OFFICER TWO: Hmm.

DRIVER: Well actually I didn't, the guy at my -- our -- our store did, but same difference. They were working when I left.

OFFICER TWO: Where do you work at?

DRIVER: We own a -- we own a Boutiques at Brighton.

OFFICER TWO: I didn't hear you.

DRIVER: We own a store called Boutiques at Brighton. It's where vendors rent spaces and sell stuff.

OFFICER TWO: Oh, okay. All right. I'll go back there and let him finish up.

DRIVER: All right.

OFFICER TWO: All right. There's your license. So you have a 2011 Chevy Malibu too?

DRIVER: Yeah.

OFFICER TWO: Okay. How come you're driving the older car across the country?

DRIVER: What's that?

OFFICER TWO: How come you're driving the older one across the country?

DRIVER: Because I bought it for my girlfriend.

[p.4]

OFFICER TWO: This? Oh, okay. And she lives out in Maryland? So how are you going to get back to Colorado?

DRIVER: I'm not going back to Colorado.

OFFICER TWO: You're going to stay in Maryland?

DRIVER: Uh-huh.

OFFICER TWO: Okay. Where's all your -- where's all stuff if you're moving?

DRIVER: What's that?

OFFICER TWO: Where's all the stuff if you're moving?

DRIVER: Well we've already moved a lot of our stuff out there.

OFFICER TWO: Oh, okay.

DRIVER: That's how the 2011 Malibu got out there.

OFFICER TWO: Oh, it's out there already? Okay. Here's all your paperwork, sir.

DRIVER: Well where is there a 24 hour Walmart so I can get a bulb?

OFFICER TWO: In Topeka just up the road about 30 miles.

DRIVER: Okay. Well then I'll just -- I'll just do that. Oh, yeah, yeah, yeah, I know

[p.5]

that one.

OFFICER TWO: Okay. That's just -- it's just a warning for the headlight and the registration, all right, guy?

DRIVER: All right.

OFFICER TWO: All right. Be careful.

DRIVER: All right, man, see you later.

OFFICER TWO: Yeah. Hey sir.

DRIVER: Yeah.

OFFICER TWO: Do you got a second I can ask you a couple questions here?

DRIVER: Yeah.

OFFICER TWO: Okay. You're not hauling anything in here that you are not supposed to, are you?

DRIVER: Well even if I did I wouldn't answer, but no.

OFFICER TWO: Oh, okay. You don't have any marijuana in here?

DRIVER: No.

OFFICER TWO: No cocaine?

DRIVER: No.

OFFICER TWO: None of that stuff in here. Would it be okay if we searched real quick to make sure you don't have any of that in here?

[p.6]

DRIVER: No, I can't -- I'm not going to let you search because I didn't do anything wrong and I don't have anything so --

OFFICER TWO: Would it be okay if we had a canine come up here and run around your car?

DRIVER: I'd have to say no because I haven't done anything.

OFFICER TWO: Well I guess at this point in time we're just going to detain you here until we get a dog up here. We got one that's going to come up here, so --

DRIVER: What for? I mean -- I mean I haven't --

OFFICER TWO: Well I'm not going to set here and debate it with you.

DRIVER: No, I'm just asking. I just wanted to know like what --

OFFICER TWO: Just -- I just think that you're probably involved in a little criminal activity here maybe, suspect that, so that's what we're going to -- have a dog come up here. Here – here's what I would tell you, if you have something in here that's a little bit of personal use that you are worried about, don't waste your time and the canine guy's time. If you got a

[p.7]

dimebag or a pipe, we're not looking for that. So we're --

DRIVER: No, I just -- I just kind of --

OFFICER TWO: We're looking for --

DRIVER: I almost -- I almost -- I just find it offensive.

OFFICER TWO: Okay.

DRIVER: I mean -- I mean I -- I mean you asked me questions and I tell you and then you want to accuse me of that. I'm just like -- I'm just trying to get home, you know, I mean --

OFFICER TWO: Sure. Okay. Well we got a job to do and I wouldn't be a good police officer if I wasn't investigating stuff and looking -- looking a little farther. So what we're going to do is you can just sit

here and keep warm and we'll wait until the dog gets here and we'll go from there, okay?

DRIVER: Okay. That's fine.

OFFICER TWO: All right.

7:11 (silence).

9:04 (inaudible voice).

9:16 (laughing or chuckling).

11:58 (laughing or chuckling).

12:00 - 12:58 (silence).

[p.8]

OFFICER TWO: Hey guy, just going to let you know the dog will be here in about ten minutes so --

DRIVER: Okay.

OFFICER TWO: That's kind of the time frame we're looking at.

DRIVER: All right.

OFFICER TWO: All right?

13:08 (clearing throat).

14:36 (deep sigh).

15:58 (deep sigh).

16:05 (breathing).

16:19 (breathing).

16:39 (inaudible whispering).

16:48 (deep sigh).

16:52 (inaudible whispering).

17:49 (inaudible whispering).

20:59 (noise).

21:14 (inaudible whispering).

21:40 (inaudible whispering).

OFFICER TWO: Grab a jacket or whatever you need, come on out here. Pat you down real quick. Do you have any weapons on you?

DRIVER: Nope.

OFFICER TWO: Turn around for me.

[p.9]

(Inaudible) wallet and phone (inaudible). All right, just stand right over there for me. (Inaudible) little farther. Dog's on a big leash, don't want you to get bit.

23:12 (groan).

24:00 (deep sigh).

24:17 (heavier breathing).

25:40 (deep sigh).

26:23 - 26:25 (deep breathing).

26:36 (yawn).

26:44 - 26:45 (deep breathing).

OFFICER TWO: Hey, guy, let me see your keys.

DRIVER: Huh?

OFFICER TWO: Let me see your keys. We're going to search your car.

DRIVER: Why?

OFFICER TWO: Because of the dog.

OFFICER THREE: Is there any reason a dog would indicate to drug odor on your vehicle?

DRIVER: I have no idea why.

OFFICER TWO: Who were you talking to on the phone?

DRIVER: I'm filming actually.

OFFICER TWO: Filming?

[p.10]

DRIVER: Yeah.

27:47 (deep sigh).

28:02 (inaudible whispering).

OFFICER THREE: (Inaudible).

(WHEREUPON, the recording ended.)

[p.11]

CERTIFICATE

STATE OF KANSAS
ss:
COUNTY OF SHAWNEE

I, Annette S. Droste, a Certified Shorthand Reporter, commissioned as such by the Supreme Court of the State of Kansas, and authorized to take depositions and administer oaths within said State pursuant to K.S.A. 60-228, certify that the foregoing was transcribed from audio CD, and that the foregoing constitutes a true and accurate transcript of the same

I further certify that I am not related to any of the parties, nor am I an employee of or related to any of the attorneys representing the parties, and I have no financial interest in the outcome of this matter.

Given under my hand and seal this 6th day of July, 2012

/s/ Annette S. Droste
Annette S. Droste
C.S.R. – No. 1301