No. _____

IN THE

Supreme Court of the United States

MARK BERG,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MELODY BRANNON
Federal Public Defender
DANIEL T. HANSMEIER
Appellate Chief
Counsel of Record
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue, Suite 201
Kansas City, Kansas 66101
Phone: (913) 551-6712
Email: daniel_hansmeier@fd.org
Counsel for Petitioner

QUESTION PRESENTED

I. When reviewing a suppression ruling on appeal, should the appellate court view the evidence in the light most favorable to the prevailing party (as the Tenth Circuit did below and as five other Circuits do), or (consistent with the other six Circuits) should it not employ a most-favorable-light standard and simply review factual findings for clear error and the ultimate legal determination de novo?

RELATED PROCEEDINGS

United States v. Berg, Case No. 5:18-cr-40004-DDC-1 (D. Kan. Dec. 5, 2018).

United States v. Berg, Case No. 18-3250 (10th Cir. Apr. 15, 2020).

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PETITION FOR WRIT OF CERTIORARI

Mark Berg respectfully petitions 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Tenth Circuit's published decision is available at 956 F.3d 1213, and is included as Appendix A. The Tenth Circuit's unpublished order granting in part panel rehearing and denying rehearing en banc is included as Appendix C. The district court's unpublished order denying Mr. Berg's motion to suppress is available at 2018 WL 3647133, and is included as Appendix B.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction under 28 U.S.C. § 1291. The Tenth Circuit granted in part the petition for panel rehearing, denied the petition for rehearing en banc, and affirmed the denial of Mr. Berg's motion to suppress on April 15, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The federal courts of appeals are deeply divided over whether to view evidence in a most-favorable light when reviewing rulings on motions to suppress. Below, the

Tenth Circuit, in holding an extended traffic stop reasonable under the Fourth Amendment, viewed the evidence in a light most favorable to the government (the prevailing party). Five other Circuits take similar approaches. In contrast, consistent with this Court's precedent, the other six Circuits do not view the evidence in any light, but instead accept the district court's factual findings unless clearly erroneous and review the ultimate issue of reasonableness de novo. This Court should grant this petition to resolve this conflict.

The resolution of this conflict is critically important. The manner in which suppression rulings are reviewed should not turn on the location of the reviewing court. Moreover, the Tenth Circuit's rule, in practice, improperly defers to the district court's legal determination. Rather than accept the district court's factual findings and review the legal issue de novo, under the Tenth Circuit's rule, the appellate court, by viewing the evidence most favorably to the prevailing party, finds its own facts that inevitably favor the district court's ruling. The rule thus effectively turns appellate courts into factfinders – finding any facts necessary to affirm the district court's legal determination. The rule stands the review process on its head by making the appellate court the arbiter of facts and the district court the arbiter of law.

On the merits, the Tenth Circuit's rule is wrong. It is not supported by this Court's precedent or any rule of practice or procedure. And this case is an excellent vehicle to resolve the conflict. The Tenth Circuit held an extended traffic stop reasonable even though there was no objective basis to suspect criminal activity. The Tenth Circuit reached this erroneous result only by viewing the evidence in a light most favorable to the government. Review is necessary.

1. Because this case involves whether to weigh evidence in a certain light, we include an extensive recitation of that evidence. The underlying historical facts are largely undisputed. Pet. App. 2. On the night of December 9, 2017, Kansas State Trooper Kyle Seiler positioned his squad car in a crossover area on interstate 70 in rural Kansas. Pet. App. 1a, 13-14a. This crossover area is just before an off ramp to a state highway (K-156), and roughly one mile after a rest area. Pet. App. 8a; R3.13, 57-58, 101-102.[1] So Trooper Seiler was positioned in an area "where some cars might be slowing down traffic because they're entering [from the rest area] and some cars might be slowing down because they're exiting" the interstate via the off ramp. R3.58.

Trooper Seiler observed three vehicles pass by – the first (a pickup truck) and the third (a smaller dark-colored car) both with California license plates, and the middle (a red minivan driven by Mr. Berg) with an Arizona license plate – all traveling in the right lane and below the posted speed limit (65 mph in a 75 mph zone). Pet. App. 3a, 9a, 16a; R3.14-17, 103. According to Trooper Seiler, although it is common to see out-of-state plates on interstate 70, it is not common to see three vehicles with out-of-state plates traveling in close proximity on interstate 70. Pet. App. 3a, 9a, 30a; R3.15.

Trooper Seiler pulled out into the left lane of the interstate, caught up with the "trailing vehicle" (the smaller car), confirmed that it was traveling 65 miles per hour, and checked its registration. Pet. App. 3a, 16a, R3.18-19. This vehicle was a rental

[1] With respect to facts not referenced by the district court or the court of appeals, we cite to the record on appeal in the Tenth Circuit. A dash cam recording of the traffic stop is included in the record on appeal in the Tenth Circuit.

car. Pet. App. 5a, 16a. At no point did this vehicle commit a traffic infraction. Pet. App. 16a. At this point, the other two vehicles had sped up to the speed limit. Pet. App. 3a, 9a, 30a, R3.19, 22, 64, 105-106.

As this smaller car maintained its speed (at 65 mph), Trooper Seiler left this vehicle and caught up to the other two vehicles. Pet. App. 30a. At this point, Trooper Seiler began to pace Mr. Berg's minivan. Pet App. 3a, 16a. He learned that the minivan was also a rental car. Pet. App. 3a, 16a. As Trooper Seiler paced the minivan, the minivan committed a traffic violation (it crossed the white fog line for approximately two to three seconds before returning to the road). Pet. App. 3a, 16a-17a, 31a. Trooper Seiler also believed that the minivan was traveling too closely to the pickup truck. Pet. App. 16a, 31a.

But Trooper Seiler did not then stop the minivan. Instead, Trooper Seiler noticed that the pickup truck in front of the minivan increased its speed "almost immediately after the minivan veered off the road." Pet. App. 55a, 17a, 31a. The dash cam recording shows that it was some 37 seconds before the pickup truck pulled away from the minivan. Exh. 1:54-2:45. Trooper Seiler left the minivan, caught up to the truck, and paced the truck at 84 miles per hour. Pet. App. 3a, 17a, 31a. Trooper Seiler ran the truck's license plate. Pet. App. 3a, 17a. The truck was not a rental vehicle (it registered to a California resident). Pet. App. 3a, 17a.

Trooper Seiler drew a number of inferences from these historical facts. First, he inferred that the three vehicles were traveling together. Pet. App. 3a, 8a, 16a-17a. Second, he inferred that the trailing vehicle, by not speeding up, was trying to draw his attention away from the other two vehicles. Pet. App. 9a, 17a, 30a. Third, he

inferred that the pickup truck increased its speed "to divert his attention from the minivan." Pet. App. 4a, 7a, 17a, 31a. Fourth, based on these inferences, he further inferred that the three vehicles were trafficking drugs, that two of the three vehicles were "escort vehicles," and that the third vehicle (Mr. Berg's minivan) contained contraband "because of its larger capacity." Pet. App. 4a, 10a, 17a, 30a. Trooper Seiler thought that the trailing vehicle was too small to carry contraband, and he eliminated the pickup truck as the load vehicle because it was not a rental. Pet. App. 10a, 31a.

Neither the district court nor the Tenth Circuit discussed other vehicles on the interstate that night. But the dash cam recording shows two other vehicles. Specifically, when Trooper Seiler accelerated from the trailing vehicle to catch the other two vehicles, there were actually three vehicles on the road (Mr. Berg's minivan, the truck, and a smaller, seemingly dark-colored vehicle in the passing lane next to or just in front of the truck). Exh. 1:41. Apparently, Trooper Seiler did not notice this other vehicle that night. R3.65. But he admitted that this other vehicle could have been one of the three that he saw "traveling at the same speed" when they passed the crossover area. R3.65.

Moreover, when the truck increased its speed (after the minivan crossed the fog line), this other "unknown" vehicle had actually just passed the truck, and both of these vehicles (the unknown vehicle and the truck) increased their speed. Exh. 1:54-2:45. And just before Trooper Seiler caught up to the truck, the truck had passed the other vehicle, and Trooper Seiler in turn passed that vehicle as well. Exh. 2:48-3:06; R3.68. As Trooper Seiler then slowed down to allow the minivan to catch up to him, this unknown vehicle (as well as a different truck) passed him in the right lane. Exh.

4:05; R3.70. Trooper Seiler did not know where the other two vehicles came from. R3.70-72. For unknown reasons, he also did not believe that the vehicles were traveling with the other vehicles. R3.71.

In any event, Trooper Seiler stopped Mr. Berg's minivan. Pet. App 4a. Trooper Seiler approached the minivan on the passenger's side and obtained Mr. Berg's (Minnesota) driver's license and his rental agreement. Pet. App. 4a, 17a. Mr. Berg explained to Trooper Seiler that he left the roadway on accident when he was trying to set his cruise control. Pet. App. 18a. Trooper Seiler told Mr. Berg that he intended to give him a warning ticket. Pet. App. 18a. He ordered Mr. Berg to exit the vehicle, patted him down, and put him in the front passenger seat of his patrol vehicle. Pet. App. 18a; R3.36.

According to the (one-way) rental agreement, Mr. Berg rented the vehicle three days earlier (December 6, 2017) in Las Vegas. Pet. App. 18a. Mr. Berg indicated that he was moving back home from Las Vegas to Minnesota. Pet. App. 4a, 17a-18a. He stated that he had lived in Las Vegas for a few months. R3.38, 76; Pet. App. 4a, 18a. He stated that he left Las Vegas the morning of December 7. Pet. App. 18a. Mr. Berg indicated that he was not driving the entire trip "straight through," but that he had stopped at hotels and rest areas. Pet. App. 19a. In particular, he stayed at a hotel in Denver the previous night (December 8). R3.43; Pet. App. 5a, 19a. He intended to drive through the night and arrive home in Minnesota early the next morning (December 10), as he had to work the next day (he also had to return the minivan). R3.34, 44; Pet. App. 18a-19a.

Trooper Seiler found Mr. Berg's travel plans suspicious because Mr. Berg was traveling at night on interstate 70, which was not the most direct route from Las Vegas to Minnesota. Pet. App. 5a 13a. Trooper Seiler also thought that it was suspicious that Mr. Berg stopped in Denver even though he was "in a hurry" to get to Minnesota. Pet. App. 5a. But Trooper Seiler admitted that not driving straight through (i.e., breaking up a trip) is common and inconsistent with drug trafficking. Pet. App. 5a. He also conceded that many people prefer to travel at night rather than the day. Pet. App. 13a. And there were no "lies or inconsistencies" with respect to Mr. Berg's trial plans. Pet. App. 33a.

The minivan (a passenger van, but with the back seats removed) was "carefully and neatly packed" ("so that no space was wasted") with cardboard boxes and large black bags or suitcases. Pet. App. 4a-5a, 17a, 31a-32a. The boxes and bags were all the same size. Pet. App. 31a. There was nothing else in the van (no "household items"). Pet. App. 31a-32a. When asked what the boxes/bags contained, Mr. Berg stated, "[j]ust stuff I had at the house," and "[j]ust a bunch of clothes, a TV, shit like that." Pet. App. 18a. Mr. Berg stated that he did not have any furniture in the van. R3.40. Trooper Seiler did not ask Mr. Berg any other follow-up questions about the cargo. He did not ask, for instance, whether Mr. Berg lived in a furnished or unfurnished apartment or house, a hotel, or a rented room in Las Vegas. R3.81-82.

Trooper Seiler doubted Mr. Berg's explanation "because, in his experience, the way Berg's items were packed was inconsistent with what he typically sees when interacting with motorists who are moving." Pet. App. 4a, 31a. The minivan "was packed completely full, top to bottom, front to back, up into the front seats." Pet. App.

11a. He thought that Mr. Berg should have had other "household items that can't be packed into a box," like "lamps, appliances, bedding, furniture, anything of that nature." Pet. App. 5a, 32a; R3.79-80, 112. "I might see that in the back of a moving truck but not in a minivan." Pet. App. 5a. He noted his "own personal experience" moving to college, as his clothes and a TV "filled up a Grand Am, not an entire minivan with the seats removed." Pet. App. 11a n.6; R3.40.

About eight minutes into the traffic stop, while Mr. Berg was seated in the squad car, Trooper Seiler issued Mr. Berg a warning ticket and returned all of his documentation. Pet. App. 19a. Mr. Berg attempted to exit the squad car, but Trooper Seiler stopped him and asked if he could ask a few questions. Pet. App. 19a. Mr. Berg sat back down in the squad car and jokingly asked if he could get an escort to Minnesota. Pet. App. 19a. Mr. Berg never expressly consented to answer any questions, but he answered them anyway. Pet. App. 5a. Trooper Seiler asked Mr. Berg if the minivan contained anything illegal, including methamphetamine, cocaine, heroin, large amounts of U.S. currency, guns, marijuana, or large amounts of marijuana. Pet. App. 19a. Mr. Berg denied that there was any drugs or guns in the minivan. Pet. App. 19a. Trooper Seiler than asked Mr. Berg seven times for consent to search the vehicle, but Mr. Berg repeatedly refused to give consent to search. Pet. App. 19a-20a, 28a.

Trooper Seiler testified that he would not have relied on Mr. Berg's consent (if given after his first refusal) to search the minivan. Pet. App. 28a. Instead, he continued to ask for consent as an investigative tactic – to try to determine "what's in the vehicle." R3.119. The more "somebody is adamant about you not searching,"

the more likely a search will uncover contraband. R3.119. The trooper further stated that his questioning will almost always cause an "innocent" motorist to consent to the search. R3.85 ("the innocent motoring public will realize that they have nothing to hide and for whatever reason that I have reasonable articulable suspicion they generally consent to that").

Trooper Seiler also wanted to know why Mr. Berg would not consent, noting that Mr. Berg did not refuse to consent because it was his right to do so or because there was nothing illegal in the minivan, but rather that he wanted to get back on the road. R3.120. According to Trooper Seiler, this explanation "confirmed the inconsistencies that [he] had already seen in his timeline." R3.120. Trooper Seiler further admitted that Mr. Berg's refusal to consent was one reason that he seized him, but that other factors also contributed ("everything from the escort vehicles up into his behavior when asking about illegal substances in the vehicle"). R3.55, 86-87.

Without consent to search, Trooper Seiler detained Mr. Berg to await the arrival of a drug dog. Pet. App. 20a. The dog alerted, and the subsequent search unearthed 471 pounds of marijuana. Pet. App. 21a.

We mention six additional points about this stop. First, Trooper Seiler did not smell drugs or a masking agent (i.e., an air freshener) during the stop. R3.75. Second, Mr. Berg was cooperative during the stop. Pet. App. 18a. Third, during the stop, Trooper Seiler ran Mr. Berg's paperwork and learned that he had no prior criminal history. R3.37, 73. Fourth, Mr. Berg was not nervous during the stop. Pet. App. 33a. Fifth, at no point before detaining Mr. Berg did Trooper Seiler ask Mr. Berg about the "escort vehicles."

And sixth, another trooper (Sneath) was actually in the crossover area with Trooper Seiler when the three vehicles passed by. Pet. App. 20a. Around two minutes after Trooper Seiler detained Mr. Berg, Trooper Sneath arrived on the scene. Pet. App. 20a. Trooper Sneath informed Trooper Seiler that he had seen three California-plated cars together at the rest stop (he did not mention a vehicle with Arizona plates). Pet. App. 20a. Despite the fact that Mr. Berg's minivan did not have California license plates, Trooper Seiler testified that he understood Trooper Sneath to be talking about the same three vehicles that he found suspicious, and that Trooper Sneath also believed that the vehicles were traveling together. Pet. App. 20a.

Finally, at the time of the stop, Trooper Seiler had been a state trooper for only two and a half years (the first six months training; two years as a patrol officer). R3.11, 56. As a state trooper, he patrolled the highways, enforced traffic laws, and "focus[ed] largely on criminal interdiction on those roadways." R3.11. He testified that he had attended three training courses related to (or partly related to) criminal interdiction. R3.10-11; Pet. App. 30a.

2. In January 2018, a federal grand jury in Kansas returned a one-count indictment, charging Mr. Berg with possession with intent to distribute over 100 kilograms of marijuana, 21 U.S.C. §§ 841(a), (b)(1)(B). Pet. App. 4a. Mr. Berg moved to suppress the marijuana. Pet. App. 15a. He argued that Trooper Seiler did not have reasonable suspicion to detain him following the completion of the traffic stop. Pet. App. 15a.

The district court held an evidentiary hearing and denied the motion in a written order. Pet. App 15a-36a. The district court relied on the escort-vehicle testimony, in

combination with the way in which the minivan was packed, to find that Trooper Seiler had reasonable suspicion to detain Mr. Berg to await the drug dog. Pet. App. 29a-32a.. The district court found that Trooper Seiler "provided articulable reasons for suspecting these vehicles were traveling together," and that the other two vehicles were "escort vehicles for the load vehicle—the minivan." Pet. App. 30a.

The district court relied on Trooper Seiler's testimony: (1) that it was uncommon to see three cars with out-of-state plates in such close proximity to one another on interstate 70; (2) that, when the truck and minivan separated from the smaller car, and the smaller car travelled ten miles per hour below the speed limit, this "was a deliberate tactic utilized to draw his attention away from the minivan"; and (3) that, when the truck accelerated "almost immediately after the minivan veered off the road, it did so "as another purposeful tactic designed to draw [Trooper Seiler's] attention away from the minivan," Pet. App. 30a-31a. The district court further credited Trooper Seiler's testimony that the minivan, and not the other two vehicles, contained contraband, as the smaller car was too small and the truck was owned by a private individual (i.e., it was not a rental car). Pet. App. 31a.

The district court also credited Trooper Seiler's testimony "about his observations of the cargo in the minivan" because the trooper "regularly encounters individuals who are moving." Pet. App. 31a. The district court cited as "unusual": (1) "there was no variety among the boxes and bags, as Trooper Seiler normally sees when a driver is using a passenger vehicle to move"; (2) the van had three rows of seats, but the trooper could not observe the seats (the district court expressly found that Trooper Seiler found this fact "suspicious"); (3) "quite importantly," there were "no personal

belongings visible," such as "pillows, blankets, and other items [not typically] paced in boxes"; (4) most passenger vehicles have "only a few household items" or "a lot of items 'crammed in,'" but Mr. Berg's van was "carefully and neatly packed" and "packed so that no space was wasted"; and (5) Trooper Seiler could not "see any household items—everything was concealed." Pet App. 31a-32a. "In sum, the combination of the vehicles' behavior and the unusual nature of the minivan's cargo provided Trooper Seiler reasonable suspicion to detain Mr. Berg long enough for a drug detection canine to arrive." Pet. App. 32a.

The district court affirmatively found that other facts did not contribute to a reasonable-suspicion finding. Pet. App. 32a-34a. The fact that the minivan was a rental car was not suspicious, as this coincided with Mr. Berg's explanation that he was moving. Pet. App. 32a. Mr. Berg's statements about living and working in Las Vegas were not inconsistent. Pet. App. 33a. Mr. Berg was not nervous during the traffic stop. Pet. App. 33a. And the government failed to show "any lies or inconsistencies in Mr. Berg's explanation" of his travel plans. Pet. App. 33a. "Spending a few extra hours in a city along the route and then driving straight to the destination are not the type of unusual or inconsistent travel plans that support reasonable suspicion." Pet. App. 33a-34a.

Although one of Mr. Berg's arguments focused on his refusal to consent and the fact that Trooper Seiler admitted that this refusal was a reason to seize Mr. Berg, the district court did not discuss this fact in its reasonable-suspicion analysis. Pet. App. 29a-34a. But in addressing the "consensual encounter" prior to Mr. Berg's detention, the district court noted that it had "substantial reservations about the way Trooper

Seiler solicited [Mr. Berg's] consent." Pet. App. 27a. The district court noted that Trooper Seiler asked for consent seven times, and that this "bordered on badgering." Pet. App. 27a-28a. "Repeated requests for consent are unlikely to produce genuine consent. It concerns the court when law enforcement persists as Trooper Seiler did here." Pet. App. 28a. Despite noting these "substantial reservations," the district court did not otherwise address Mr. Berg's argument that Trooper Seiler seized Mr. Berg because he refused to consent. Pet. App. 26a-34a. In the end, although the district court found that this was "a close call," it nonetheless found that Trooper Seiler had reasonable suspicion to detain Mr. Berg because of "the vehicles' unusual behavior, the unusual content of the minivan's cargo, and the odd way it was packed." Pet. App. 34a.

Mr. Berg entered a conditional guilty plea, reserving the right to appeal the denial of the motion to suppress, Pet. App. 4a. In December 2018, the district court imposed a 21-month term of imprisonment, to be followed by a 3-year term of supervised release. R1.137-138. Mr. Berg timely appealed. R1.142.

3. The Tenth Circuit affirmed. Pet. App. 1a-14a. In doing so, the Tenth Circuit applied this standard of review:

> When this court reviews the denial of a motion to suppress, *we view the evidence in the light most favorable to the government* and accept the district court's factual findings unless clearly erroneous. The ultimate determination of the reasonableness of a search or seizure under the Fourth Amendment is subject to de novo review.

Pet. App. 6a (citation and footnote omitted; emphasis added). In a footnote, the Tenth Circuit acknowledged our argument that light-most-favorable review is improper in

this context, but declined, on stare decisis grounds, to engage the argument. Pet. App. 6a n.3.

Like the district court, the Tenth Circuit found reasonable suspicion based on the existence of just two circumstances: "(1) Berg was traveling in tandem with two escort vehicles; and (2) Berg's claim he was moving personal possessions with his rental car was likely untrue." Pet. App. 13a-14a. On the first circumstance, based on the same reasoning employed by the district court, the Tenth Circuit held that it "was objectively reasonable for Trooper Seiler to infer that the three vehicles were somehow connected" and "engaged in criminal activity." Pet. App. 9a-10a. The Tenth Circuit dismissed the fact that the vehicles had just passed a rest area and that it was Mr. Berg's minivan, and not the other two vehicles, that committed a traffic violation. Pet. App. 10a. The Tenth Circuit simply "defer[red]" to Trooper Seiler's "ability to distinguish between innocent and suspicious actions." Pet. App. 10a. (citation omitted).

With respect to the contents of the minivan, the Tenth Circuit again employed the district court's reasoning and held that Trooper Seiler had "an objective basis" to believe that "the nature of Berg's cargo was inconsistent with Berg's story that he was moving his possessions from Las Vegas to Minnesota." Pet. App. 12a. This "objective basis" was rooted in Trooper Seiler's "experiences interacting with members of the public who are using vehicles to move their possessions." Pet. App. 12a. Based on that experience, the Tenth Circuit deferred to Trooper Seiler's testimony that Mr. Berg packed his minivan in a "materially" different way than the average moving motorist packs a minivan. Pet. App. 11a.

In coming to its ultimate conclusion, the Tenth Circuit purported to apply a totality-of-the-circumstances test. Pet. App. 2a, 7a, 13a. But the Tenth Circuit only considered the circumstances relied on by the government. Pet. App. 8a-13a. The Tenth Circuit did not consider a number of other unsuspicious circumstances, including that: (1) Mr. Berg had no criminal history, R3.37, 73; (2) Mr. Berg was properly licensed and had properly rented the minivan, R3.31-33; (3) Mr. Berg promptly pulled over, R3.29; (4) the trooper did not observe or smell any drugs or masking agents, R3.75; and (5) the trooper did not observe any cell phones, pagers, or anything else indicative of drug trafficking.

The panel also ignored unsuspicious circumstances surrounding the escort vehicles testimony: (1) the trooper knew that the three vehicles had just left the rest area (thus explaining their close proximity and speed), Pet. App. 20a.; (2) only two of the three vehicles had California plates, Pet. App. 20a; (3) there was at least one other vehicle traveling with the three cars, but the trooper simply ignored its existence, R3.65-67; (4) the "lead" vehicle did not "immediately" speed up when Mr. Berg committed a traffic infraction (the video shows that it took around 37 seconds before the lead vehicle sped up, and it did so while passing the fourth vehicle), Exh. 1:54-2:45; and (5) the trooper never asked Mr. Berg if, or otherwise investigate whether, he was traveling with the other cars. The Tenth Circuit also ignored the trooper's failure to ask questions or otherwise investigate the way in which Mr. Berg packed the minivan.

In a footnote, the Tenth Circuit identified two additional unsuspicious factors: (1) Mr. Berg was not nervous; and (2) Mr. Berg did not give a confused answer to

questions about his stay in Las Vegas. Pet. App. 9a n.5. But the Tenth Circuit did not give any weight to these unsuspicious factors because "the government d[id] not rely on" these factors on appeal. *Id.* Similarly, in footnote 2, the Tenth Circuit stated that Mr. Berg's eight refusals to consent to a search "does not contribute to the reasonable suspicion analysis." Pet. App. 5a n.2. But the Tenth Circuit did not thereafter give any weight to the trooper's testimony that he, in fact, considered Mr. Berg's eight refusals to consent in his reasonable-suspicion calculus. R3.55, 85-87, 94, 119, 120. Nor did the Tenth Circuit note that it was not suspicious for Mr. Berg to invoke his constitutional right to refuse to consent eight times. In viewing the evidence in the light most favorable to the government, the court gave this evidence no weight at all.

4. Mr. Berg petitioned for rehearing en banc. The Tenth Circuit granted the petition for panel rehearing in part to delete one sentence of its decision referring to photographs that were not in evidence or included as part of the record on appeal (and to remove those photographs, which the Court had attached to the initial panel opinion). *See* Pet. App. 37a-38a. The partial grant implicitly acknowledged that the court erred in considering those photographs. But the Tenth Circuit declined to rehear the appeal en banc. This timely petition follows.

REASONS FOR GRANTING THE WRIT

The federal courts of appeals are evenly split six to six over whether to view evidence in a most-favorable light when reviewing Fourth Amendment suppression rulings. The state courts of last resort are also conflicted on this question. This Court should use this case – where the Tenth Circuit affirmed the district court only by viewing the evidence in a light most favorable to the government – to resolve the

conflict on this vitally important question. This Court should reaffirm that an appellate court's task is to review a district court's factual findings for clear error and its legal conclusions de novo, and not to view the entirety of the evidence in a most-favorable light.

I. The Courts Of Appeals Are Deeply Divided Over Whether To View Evidence In A Light Most Favorable To The Prevailing Party When Reviewing Suppression Rulings.

When a district court rules on a Fourth Amendment issue, it is typically tasked with determining whether an officer had reasonable suspicion or probable cause to conduct the search or seizure at issue.

> The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact: "[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated."

Ornelas v. United States, 517 U.S. 690, 694 n.3, 699 (1996). In making this ultimate determination, the district court will draw its own inferences from the facts. *Id.* at 699. It may also find credible any reasonable inferences drawn by law enforcement officers. *Id.* at 699-700. Importantly, Rule 12(d) requires the district court to "state its essential findings on the record." Fed.R.Crim.P. 12(d). In other words, a district court cannot summarily deny (or grant) a suppression ruling. *Id.*

If a suppression ruling is appealed, the appellate court employs a two-pronged

standard of review. The appellate court reviews the district court's findings of historical fact for clear error. *Ornelas v. United States*, 517 U.S. 690, 694 n.3, 699 (1996). The appellate court then reviews the ultimate legal issue – i.e., whether reasonable suspicion or probable cause exists – de novo. *Id.* at 696-697, 699. In doing so, the appellate court gives "due weight" to inferences drawn from the historical facts by the district court. *Id.* at 699. The appellate court also gives due weight to a district court's "finding that an officer was credible," and any findings made by the district court that an officer's "inference was reasonable." *Id.* at 700.

Six federal courts of appeals, like the Tenth Circuit in this case, have crafted an additional requirement onto this dual-pronged standard of review – one requiring the appellate court to view the evidence in a light most favorable to the prevailing party (or the district court's ruling). These courts of appeal have done so despite the absence of such a rule in this Court's precedent.

1a. According to the **Tenth Circuit** in this case, when reviewing a suppression issue, the court "view[s] the evidence in the light most favorable to the government and accept[s] the district court's factual findings unless clearly erroneous." Pet. App. 6a. The "ultimate determination" – whether reasonable suspicion exists – is reviewed de novo. Pet. App. 6a. Four other courts of appeals – the **Fourth Circuit**, **Fifth Circuit**, **Sixth Circuit**, and **Eleventh Circuit** – also generally view the evidence in the light most favorable to the prevailing party. *See*, *e.g.*, *United States v. Jordan*, 952 F.3d 160, 165-166 (4th Cir. 2020); *United States v. Smith*, 952 F.3d 642, 646 (5th Cir. 2017); *United States v. Lott*, 954 F.3d 919, 922 (6th Cir. 2020); *United States v. Johnson*, 921 F.3d 991, 997 (11th Cir. 2019) (en banc).

b. The First Circuit employs a similar standard; it views the evidence in the light most favorable to the district court's ruling, rather than the prevailing party. *See*, *e.g.*, *United States v. Camacho*, 661 F.3d 718, 723-724 (1st Cir. 2011) ("When reviewing a challenge to the district court's denial of a motion to suppress, '[w]e view the facts in the light most favorable to the district court's ruling' on the motion, and we review the district court's findings of fact and credibility determinations for clear error.") (citation omitted).[2]

c. Of these six Circuits who view the evidence in a most-favorable light, at least three, the Fifth Circuit, the Sixth Circuit, and Tenth Circuit, interchange the two most-favorable-light standards of review (favoring either the district court's ruling or the prevailing party's position). *See, e.g.*, *United States v. Rideau*, 969 F.2d 1572, 1576 (5th Cir. 1992) (en banc) ("It is settled that in reviewing this denial of a motion to suppress, we view the evidence taken both at the suppression hearing and at trial in the light most favorable to the ruling."); *United States v. Shamaeizadeh*, 80 F.3d 1131, 1135 (6th Cir. 1996) (viewing the evidence in a light most favorable to the district court's decision); *see also United States v. Price*, 841 F.3d 703, 706 (6th Cir. 2016) ("we review its factual findings for clear error and consider the evidence in the light most favorable to affirmance"); *United States v. Ruiz*, 664 F.3d 833, 838 (10th Cir. 2012)

[2] As far as we can tell, the First Circuit's rule traces to *United States v. Mosciatello*, 771 F.2d 589, 596 (1st Cir. 1985), but that case relies on two cases for the rule – *United States v. Patterson*, 644 F.2d 890, 894 (1st Cir. 1981), and *United States v. Jobin*, 535 F.2d 154 (1st Cir. 1976) – neither of which included any language about viewing evidence in a most-favorable light. Moreover, in some cases the First Circuit has qualified the rule, viewing evidence in a most-favorable light only to the extent that the evidence derives "support from the record." *United States v. Sealey*, 30 F.3d 7, 8 (1st Cir. 1994). At other times, the First Circuit has stated that it will affirm the denial of a motion to suppress "[i]f any reasonable view of the evidence supports the denial." *United States v. De La Cruz*, 835 F.3d 1, 5 (1st Cir. 2016).

(viewing the evidence in the light most favorable to the prevailing party). Thus, although these three Circuits view the evidence in a most-favorable light, there appears to be an intra-circuit conflict in each Circuit on how, exactly, to employ this most-favorable-light analysis.[3]

2. In contrast to these six Circuits, there are six Circuits – the **Second Circuit**, **Third Circuit**, **Seventh Circuit**, **Eighth Circuit**, **Ninth Circuit**, and **DC Circuit** – who do not view evidence in a most-favorable light in the Fourth Amendment context. Instead, consistent with this Court's decision in *Ornelas*, 517 U.S. at 699, these six Circuits simply review the district court's factual findings for clear error, without also viewing the entirety of the evidence in a most-favorable light. *See, e.g.*, *United States v. Pabon*, 871 F.3d 164, 173-174 (2d Cir. 2017); *United States v. Foster*, 891 F.3d 93, 104 n.9 (3d Cir. 2018); *United States v. Givan*, 320 F.3d 452, 458 (3d Cir. 2014); *United States v. Stewart*, 902 F.3d 664, 672 (7th Cir. 2018); *United States v. Williams*, 955 F.3d 734, 737 (8th Cir. 2020); *United States v. Gorman*, 859 F.3d 706, 714 (9th Cir. 2017); *United States v. Hutchinson*, 408 F.3d 796, 798 (D.C. Cir. 2005) (citing *Ornelas*).

[3] Moreover, there are a handful of Fourth Amendment cases from the Fourth, Fifth, and Tenth Circuits that do not include most-favorable-light language. *See, e.g.*, *United States v. White*, 836 F.3d 437, 440 (4th Cir. 2016) ("we review the district court's factual findings for clear error and its legal conclusions de novo"); *United States v. Vargas*, 643 F.2d 296, 297 (5th Cir. 1981) (same); *United States v. Gurule*, 935 F.3d 878, 882 (10th Cir. 2019) (same); *United States v. Hammond*, 890 F.3d 901, 905 (10th Cir. 2018) (same).

As far as we can tell, the Fifth Circuit began to employ a most-favorable-light standard in *United States v. Ehlebracht*, 693 F.2d 333, 337 (5th Cir. 1982), but it did so by citing a sufficiency-of-the-evidence case, not a case involving a suppression issue. *See Glasser v. United States*, 315 U.S. 60, 80 (1942) (noting that evidence is viewed in the light most favorable to the government on sufficiency-of-the-evidence review.)

The Second Circuit has addressed the issue extensively. In *United States v. Bershchansky*, 788 F.3d 102, 110 (2d Cir. 2015), the Second Circuit acknowledged that it had "sometimes posited that on a suppression motion we review facts both for clear error and in the light most favorable to the prevailing party." *Id.* But "the better approach is to review the district court's findings of fact for clear error without viewing the evidence in favor of either party, and to review its conclusions of law and mixed questions of law and fact de novo," as it had in some of its prior decisions. *Id.* at 109. The Court explained that evidence is viewed in a most-favorable light only when "the trial court has not made factual findings and the decision is based on one side's factual assertions or evidence," or when reviewing a jury's general guilty verdict. *Id.* at 110. "A requirement that the evidence be viewed in favor of one side or the other would be at odds with the notion that deference must be given to the factfinder's view of the evidence, and, for example, where there are two permissible views of the evidence, the less favorable of the two would not be clearly erroneous." *Id. Bershchansky* did not ultimately decide the issue, however, noting that the defendant would prevail under either standard of review. *Id.*

The Second Circuit revisited this issue in *Pabon*, 871 F.3d at 173-174. Citing *Bershchansky*, the Second Circuit held that, "in reviewing the district court's decision, we apply familiar standards governing clear error review, without viewing the evidence in either party's favor. In addition to carrying with it the advantage of invoking already-familiar standards of review, this approach is also the one most

consistent with precedent." *Id.* at 173.[4] The Tenth Circuit's decision below is in direct conflict with *Pabon*.

Similarly, the DC Circuit has also expressly rejected a standard that defers to the lower court's determination. *United States v. Castle*, 825 F.3d 625, 632 (D.C. Cir. 2016). "[W]hen, as here, the District Court has made factual findings, we may not search the record for any reasonable view of the evidence that will support the trial judge's conclusions." *Id.* The Tenth Circuit's decision cannot be reconciled with *Castle* either.[5]

3. Considering the depth of the conflict between the Circuits, as well as the various intra-Circuit conflicts on this issue, there is no reason to think that the lower courts can resolve the conflict on their own. It would take six Circuits to switch sides, and the other Circuits to remain firm in their positions, to eliminate this conflict without this Court's review. There is no reason to think that this could happen.

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[4] We found two post-*Pabon* Second Circuit decisions that, without mentioning *Pabon*, still invoked light-most-favorable review. *See*, *e.g.*, *United States v. O'Brien*, 926 F.3d 57, 73 (2d Cir. 2020); *United States v. Iverson*, 897 F.3d 450, 459 (2d Cir. 2018). Both decisions were authored by the same Judge. These subsequent decisions do not overrule *Pabon*. *See Shipping Corp. of India v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 (2d Cir.2009) (noting that a panel generally may not "reverse an existing Circuit precedent").

[5] The Third Circuit has some outlier cases. For instance, the Third Circuit recently viewed "the facts in the light most favorable to the government" in *United States v. Garner*, 961 F.3d 264, 269 (3d Cir. 2020). *Garner* cited *United States v. Myers*, 308 F.3d 251, 255 (3d Cir. 2002). In *Myers*, the Third Circuit construed "the record in the light most favorable to the government." *Myers* cited *United States v. Riddick*, 156 F.3d 505 (3d Cir. 1998), for this proposition. But, when reviewing the suppression ruling in *Riddick*, the Third Circuit did not view the evidence in the light most favorable to the government. *Id.* at 509. Instead, *Riddick* reviewed the "denial of the motion to suppress for 'clear error as to the underlying facts, but exercise[d] plenary review as to its legality in light of the court's properly found facts.'" Thus, *Myers*'s citation to *Riddick* for the most-favorable-light standard was incorrect. *See also United States v. Harrison*, 689 F.3d 301, 306 (3d Cir. 2012) (citing *Myers* for the light-most-favorable standard).

The Third Circuit also recently viewed "the evidence presented in the light most favorable to the District Court's ruling" in *United States v. Clark*, 902 F.3d 404, 409 (3d Cir. 2018). But *Clark* cited nothing other than a First Circuit decision for this proposition.

We discuss Seventh and Ninth Circuit outliers in footnote 6 below.

Indeed, the Second Circuit has expressly rejected the light-most-favorable standard employed by the Tenth Circuit below. *Pabon*, 871 F.3d at 173-174. And the DC Circuit has expressly rejected the light-most-favorable-to-the district-courts'-ruling standard used exclusively by the First Circuit (and sometimes by other Circuits). *Castle*, 825 F.3d at 632. Moreover, when asked to address this issue en banc below, the Tenth Circuit declined without comment. Pet. App. 37a-38a. The conflict will persist until this Court resolves it.

4. Additionally, the state courts of last resort are also conflicted over whether to view evidence in a most-favorable light when reviewing suppression rulings. Some state courts of last resort view the evidence in the light most favorable to the district court's ruling. *See*, *e.g.*, ***Alaska*** *v. Wagar*, 79 P.3d 644, 650 (Alaska 2003) ("A denial of a motion to suppress is reviewed in the light most favorable to upholding the trial court's ruling."); *Ferch v.* ***Wyoming***, 459 P.3d 1105 (Wyo. 2020) ("this Court views 'the evidence in the light most favorable to the district court's determination and defer[s] to the district court's factual findings unless they are clearly erroneous'"); ***South Dakota*** *v. Bonacker*, 825 N.W.2d 916, 919 (S.D. 2013) (same); *White v.* ***Georgia***, 837 S.E.2d 838, 842 (Ga. 2020) ("an appellate court must construe the evidentiary record in the light most favorable to the trial court's factual findings and judgment"); *Smith v.* ***Florida***, 998 So. 2d 516, 524 (Fla. 2008) ("The evidence is considered in the light most favorable to the ruling, and mixed questions of fact and law are reviewed de novo.")

Other state courts of last resort view the evidence in the light most favorable to the prevailing party. *See*, *e.g.*, ***Maryland*** *v. State*, 214 A.3d 505, 509 (2019) ("We

assess the record 'in the light most favorable to the party who prevails on the issue'"); ***Pennsylvania*** *v. Mathis*, 173 A.3d 699, 706 (Pa. 2017) (same); ***Vermont*** *v. Koenig*, 148 A.3d 977, 981 (Vt. 2016) ("taking the evidence in the light most favorable to the prevailing party"); ***West Virginia*** *v. Farley*, 737 S.E.2d 90, 93 (W. Va. 2012) ("When we review the denial of a motion to suppress, we consider the evidence in the light most favorable to the prosecution."); *Smith v.* ***Oklahoma***, 419 P.3d 257, 259 (Okla. Crim. App. 2018) (same).

Other state courts of last resort do not view the evidence in the light most favorable to the prevailing party or to the district court's ruling. *See*, *e.g.*, ***Wisconsin*** *v. Wright*, 926 N.W.2d 157, 162 (Wis. 2019) ("this court engages in a two-step inquiry. 'First, we review the circuit court's findings of historical fact under the clearly erroneous standard. Second, we independently apply constitutional principles to these historical facts.'"); ***Idaho*** *v. Blythe*, 462 P.3d 1177, 1180 (Idaho 2020) (same); ***Massachusetts*** *v. McCarthy*, 142 N.E.3d 1090, 1097 (Mass. 2020) (same); ***Montana*** *v. Vegas*, 463 P.3d 455, 457 (Mont. 2020) (same); ***Nebraska*** *v. Krannawitter*, 939 N.W.2d 335, 340 (Neb. 2020) (same); ***Michigan*** *v. Hammerlund*, 939 N.W.2d 129, 134 (Mich. 2019) (same); ***Minnesota*** *v. Leonard*, 943 N.W.2d 149, 155 (Minn. 2020) (same); ***Nevada*** *v. Sample*, 414 P.3d 814, 816 (Nev. 2018) (same); *Welch v.* ***Kentucky***, 149 S.W.3d 407, 409 (Ky. 2004) (same); ***Hawaii*** *v. Iona*, 416, 443 P.3d 104, 108 (Haw. 2019) (same); ***Kansas*** *v. Schooler*, 419 P.3d 1164, 1173 (Kan. 2018) ("an appellate court reviews the factual underpinnings of the decision under a substantial competent evidence standard. The ultimate legal conclusion drawn from those facts is reviewed de novo."); ***North Carolina*** *v. Parisi*, 831 S.E.2d 236, 243 (N.C. 2019)

(same); ***New Jersey*** *v. Manning*, 222 A.3d 662, 679 (N.J. 2020) ("We defer to the trial court's factfindings, provided they are 'supported by sufficient credible evidence in the record.' In contrast, clearly mistaken factfindings are not entitled to deference. We review issues of law de novo and are not bound to follow the trial court's or Appellate Division's interpretive legal conclusions, unless persuaded that those conclusions are correct.") (citations omitted); ***Colorado*** *v. Coates*, 266 P.3d 397, 400 (Colo. 2011) ("while the findings of historical fact upon which probable cause depend are entitled to deference by a reviewing court, the ultimate determination of probable cause is a mixed question of fact and law, to be resolved de novo by the reviewing court"); ***Iowa*** *v. Haas*, 930 N.W.2d 699, 701–02 (Iowa 2019) ("When a defendant challenges a district court's denial of a motion to suppress based upon the deprivation of a state or federal constitutional right, our standard of review is de novo.").

If an even six-to-six split among the federal courts of appeals is not enough to garner this Court's review, then this further dissention among the state courts should tip the scale.

II. The Question Presented Is Critically Important To The Procedures That Govern Appeals Of Suppression Rulings.

The question presented merits this Court's attention. Standards of review are important to the administration of justice. Not only do they frame the issues for appeal, and oftentimes determine the result of the appeal, but they also provide context for practitioners litigating issues in the lower courts (as well as inform the lower courts how their rulings will be reviewed). Standards of review should not differ depending on the geographic location of the court of appeals. A party should not have

a better opportunity at a reversal in one court over another. *See, e.g.*, *Concrete Pipe v. Construction Laborers Pension*, 508 U.S. 602, 625-626 (1993) (explaining that the case turned on the proper standard of review); *United States v. Gallegos*, 314 F.3d 456, 463 (10th Cir. 2002) (explaining that the standard of review can have a "substantial impact on the resolution of a particular case").

This Court has often granted certiorari to resolve conflicts in the Circuits on standard-of-review issues. *See, e.g.*, *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1067 (2020) ("The question that these two consolidated cases present is whether the phrase 'questions of law' in the Provision includes the application of a legal standard to undisputed or established facts."); *Monasky v. Taglieri*, 140 S. Ct. 719, 723 (2020) ("Should the Court of Appeals have reviewed the District Court's habitual-residence determination independently rather than deferentially?"); *U.S. Bank v. Vill. at Lakeridge, LLC*, 138 S.Ct. 960, 963 (2018) ("In this case, we address how an appellate court should review that kind of determination: de novo or for clear error?"); *McLane v. EEOC*, 137 S.Ct. 1159, 1164 (2017) (resolving "whether a court of appeals should review a district court's decision to enforce or quash an EEOC subpoena de novo or for abuse of discretion"); *Johnson v. California*, 543 U.S. 499, 502 (2005) ("We consider whether strict scrutiny is the proper standard of review for an equal protection challenge to that policy."); *Adarand Constructors v. Pena*, 515 U.S. 200, 204 (1995) (holding that "courts should analyze cases of this kind under a different standard of review than the one the Court of Appeals applied").

In *Ornelas*, this Court granted certiorari to resolve a similar Fourth Amendment standard-of-review conflict. 517 U.S. at 695 (granting "certiorari to resolve the

conflict among the Circuits over the applicable standard of appellate review"). The same need for this Court's guidance exists here. This Court agrees to resolve so many standard-of-review issues because those issues infect virtually every aspect of any given case. Standards of review are the equivalent of rules to a game. If those standards differ in the appellate courts, then those courts will necessarily resolve legal issues under different rules. Considering the prevalence and importance of Fourth Amendment issues, it is imperative that the appellate courts play by the same rules when reviewing suppression rulings.[6] Because they currently do not, the conflict presented in this petition is in need of prompt resolution. Moreover, in light of the grab bag of lower court rulings, it is not possible that the lower courts could resolve the conflict on their own. As it stands now, only this Court can resolve this entrenched conflict.

III. The Tenth Circuit Erred When It Viewed The Evidence In A Light Most Favorable To The Prevailing Party.

For at least five reasons, the Tenth Circuit erred when it viewed the evidence in a light most favorable to the government.

1. The Tenth Circuit's standard is not supported by this Court's precedent. Instead, this Court ordinarily reviews factual findings for clear error and legal determinations de novo. *First Options v. Kaplan*, 514 U.S. 938, 947-948 (1995). This Court has applied this ordinary standard in the Fourth Amendment context. *Ornelas*, 517 U.S. at 696-698. *Ornelas* holds that findings of fact are reviewed for clear error,

[6] A Westlaw search of federal circuit courts for the phrase "motion to suppress" in the case synopsis yields over 2,500 cases just in the past ten years.

whereas ultimate legal determinations, such as whether reasonable suspicion or probable cause exists, are reviewed de novo. *Id.* *Ornelas* does not further hold that reviewing courts should view the evidence in a light most favorable to the district court's ruling or the prevailing party. This Court has never so much as hinted that an appellate court should view evidence in a most-favorable light when reviewing a suppression ruling. *Pabon*, 871 F.3d at 174 ("*Ornelas* nowhere suggested that the clear error standard should be slanted in favor of one party or another, moreover, but instead suggested that it intended for us to apply the familiar version of that standard."). Thus, it is implausible to think that this Court would employ a light-most-favorable standard when reviewing a Fourth Amendment reasonable-suspicion issue (like the one at issue here).

2. The Tenth Circuit's standard "makes littles sense" in light of *Ornelas*'s admonition to "give 'due weight' to the inferences drawn by local law enforcement officers and by trial judges, who are resident in the communities they serve." *Pabon*, 871 F.3d at 174. "[I]t is far from clear how one might go about appropriately layering the inferences required by [the most-favorable light] approach on top of the 'due weight' afforded by *Ornelas* to locally-drawn inferences." *Id.*

3. The Tenth Circuit's standard is also unworkable. According to the Tenth Circuit, not only is the evidence viewed in a light most favorable to the prevailing party, but the district court's factual findings are also reviewed for clear error. Pet. App. 6a. As a practical matter, however, if the evidence must be viewed in a light most favorable to the prevailing party, then a factual finding would be clearly erroneous only when it does not support the prevailing party's position. As long as a

factual finding supports the prevailing party, the appellate court could not hold the fact clearly erroneous (even if it is clearly erroneous). The rule thus effectively turns appellate courts into factfinders – finding any facts necessary to affirm the district court's legal determination.

4. The Tenth Circuit's standard also effectively turns what should be de novo review into review for an abuse of discretion. In *Ornelas*, this Court confirmed the importance of independent appellate review of ultimate Fourth Amendment determinations. 517 U.S. at 697. In doing so, *Ornelas* rejected "[a] policy of sweeping deference" to the lower courts, noting that such deference would permit, in the absence of any significant factual differences, the Fourth Amendment's application to turn on different conclusions drawn by district court judges. *Id.* "Such varied results would be inconsistent with the idea of a unitary system of law. This, if a matter-of-course, would be unacceptable." *Id.* "Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Id.* This Court further noted that "de novo review tends to unify precedent and will come closer to providing law enforcement officers with a defined set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." *Id.* at 697-698.

The Tenth Circuit's standard is inconsistent with these principles. By viewing the evidence in a light most favorable to the prevailing party, the Tenth Circuit gives improper deference to the lower court's ultimate legal determination (which undoubtedly will be consistent with the prevailing party's position). The decision in

this case proves the point. Pet. App. 1a-12a. Below, the Tenth Circuit affirmed the lower court not by conducting an independent legal review and determining, for itself, whether Trooper Seiler had reasonable suspicion to continue to detain Mr. Berg, but instead by adopting the district court's reasoning. Pet. App. 6a-12a. Rather than conduct de novo review, as this Court did in *Ornelas*, the Tenth Circuit effectively reviewed the suppression ruling for an abuse of discretion.

5. Finally, a most-favorable light standard is a poor fit for reviewing suppression rulings. There are only three contexts in which this Court views evidence in a most-favorable light: (1) a motion to dismiss, where a party has asked the court to dismiss a case before sending it to the factfinder, *see, e.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); (2) a motion for summary judgment, where one party has asked the court to decide the case instead of sending it to the factfinder, *see, e.g.*, *San Francisco v. Sheehan*, 135 S.Ct. 1765, 1769 (2015); and (3) a motion for judgment of acquittal, where a defendant has asked the court to override a general jury verdict, *see, e.g.*, *Jackson v. Virginia*, 443 U.S. 307, 324 (1979); *cf. Tibbs v. Florida*, 457 U.S. 31, 38 n.11 (1982) (explaining that this rule does not apply when a party only asks for a new trial). In each instance, the district court and the appellate court respectively view the evidence in a most-favorable light. And each court does so in order to establish the universe of facts necessary to resolve the legal issue. *See Bershchansky*, 788 F.3d at 110 ("In the first two scenarios, the trial court has not made factual findings and the decision is based on one side's factual assertions or evidence, and in the third scenario, the jury likewise has not made specific factual findings but has rendered only a general verdict.").

But here, Rule 12(d) requires the district court to find the facts essential to its holding. Because the district court (unlike a jury, for instance) is required to make factual findings, and thus identify the universe of facts in play, there is no reason to view the entirety of the evidence in a certain light. *See Bershchansky*, 788 F.3d at 110. Instead, the proper role of an appellate court is first to review the lower court's factual findings to ensure that those findings are not clearly erroneous, and second to review the lower court's legal determination de novo. *Ornelas*, 517 U.S. at 696-698.

The Tenth Circuit's most-favorable-light standard can be traced back to a 1971 case, *United States v. Miles*, 449 F.2d 1272, 1274 (10th Cir. 1971). But the sole citation for it is a state habeas case, *Sinclair v. Turner*, 447 F.2d 1158 (10th Cir. 1971). *Miles* did not include a pinpoint citation to *Sinclair*, but a review of *Sinclair* reveals that its only mention of viewing evidence in the light most favorable to the government was in reviewing a jury's general guilty verdict. *Sinclair*, 447 F.2d at 1160. Indeed, *Sinclair* did not even involve a Fourth Amendment claim.

Moreover, when the Tenth Circuit decided *Miles* in 1971, Federal Rule of Criminal Procedure 12 did not require district courts to make express factual findings when ruling on motions to suppress. Because summary denials of motions to suppress were possible at this time, the standard adopted in *Miles* was at least a plausible, workable standard in certain cases (i.e., summary denials). But in 1975, four years after the decision in *Miles*, Rule 12 was amended to require district courts to make express factual findings and conclusions of law when ruling on pretrial motions, such as motions to suppress. Fed.R.Crim.P. 12(e) (1975) ("Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.").

This amendment should have effectively done away with *Miles*'s earlier rule requiring appellate courts to view evidence in a "most favorable" light. With express factual findings, there is no need to view evidence in a certain light. Either the factual findings are clearly erroneous, or they are not clearly erroneous, and if they are not clearly erroneous, then the appellate court accepts the findings and reviews the ultimate legal issue de novo.[7] Because the Tenth Circuit erroneously viewed the evidence in a most-favorable light, review is necessary.

IV. This Case Is An Excellent Vehicle For Resolving The Conflict In The Circuits.

For two reasons, this case is an ideal vehicle to resolve the conflict.

1. The question presented arises on direct review from a published decision of a federal court of appeals. Mr. Berg asked the Tenth Circuit not to view the evidence in a light most favorable to the government, but the Tenth Circuit rejected the request under stare decisis principles. Pet. App. 6a n.3. Mr. Berg then asked the Tenth

[7] As mentioned above, the Fifth Circuit's most-favorable-light standard also comes from a sufficiency-of-the-evidence case. *Ehlebracht*, 693 F.2d at 337 (citing *Glasser*, 315 U.S. at 80). That precedent is as deficient as the Tenth Circuit's precedent.

Similarly, the Fourth Circuit's most-favorable-light standard traces to a pre-Rule 12 decision – *United States v. Vickers*, 387 F.2d 703, 706 (4th Cir.1967). *Vickers* held that, "when a district court denies a motion to suppress without findings of fact," the evidence would be "looked at in the light most favorable to the government." *Id.* Again, Rule 12(d) now requires district courts to find facts (it did not when *Vickers* was decided). The Fourth Circuit should have abandoned this precedent after Rule 12(d)'s adoption.

Like the Fourth Circuit, the Ninth Circuit initially viewed evidence in a most-favorable light "[w]here no findings of fact were made or requested." *See, e.g.*, *United States v. Rabe*, 848 F.2d 994, 997 (9th Cir. 1988); *United States v. Gomez*, 846 F.2d 557, 560 (9th Cir.1988). The handful of cases that have since employed this standard have done so with no acknowledgment that Rule 12(d) now requires a district court to make factual findings. *United States v. Garcia-Barron*, 116 F.3d 1305, 1307-1308 (9th Cir. 1997); *United States v. Childs*, 944 F.2d 491, 492 (9th Cir. 1991). But the great majority of Ninth Circuit cases do not employ a most-favorable-light standard. *See* Section I(2), *supra*.

The Seventh Circuit used a light-most-favorable standard prior to the adoption of Rule 12. *See*, *e.g.*, *United States v. Griffith*, 537 F.2d 900, 901 (7th Cir. 1976). The Seventh Circuit properly abandoned that standard after Rule 12(d)'s adoption. *See* Section I(2), *supra*.

Circuit, sitting en banc, to reconsider this standard, but the Tenth Circuit denied the petition for rehearing en banc without comment. Pet. App. 36a-37a. The conflict is ripe for review. There are no procedural hurdles to overcome for this Court to address the merits of this critically important question.

2. If this Court grants certiorari and holds that an appellate court should not view the entirety of the evidence in a light most favorable to the government, Mr. Berg would be entitled to relief on remand. The record is clear that the Tenth Circuit affirmed the denial of the motion to suppress only because it viewed the evidence in a light most favorable to the government. Pet. App. 8a-12a.

By viewing the evidence in the light most favorable to the government, the Tenth Circuit conducted an improper circumstances-relied-on-by-the-government test, rather than a totality-of-the-circumstances test. The Tenth Circuit only considered the "factors upon which the government relied." Pet. App. 8a; *see also* Pet. App. 12a ("[a]s to the other factors upon which the government relies . . . ."). The Tenth Circuit did not consider a number of other unsuspicious circumstances, including that: (1) Mr. Berg had no criminal history, R3.37, 73; (2) Mr. Berg was properly licensed and had properly rented the minivan, R3.31-33; (3) Mr. Berg promptly pulled over, R3.29; (4) the trooper did not observe or smell any drugs or masking agents, R3.75; and (5) the trooper did not observe any cell phones, pagers, or anything else indicative of drug trafficking.

The Tenth Circuit also ignored unsuspicious circumstances surrounding the escort vehicles testimony: (1) the trooper knew that the three vehicles had just left the rest area (thus explaining their close proximity and speed), Pet. App. 20a.; (2) only two of

the three vehicles had California plates, Pet. App. 20a; (3) there was a fourth vehicle traveling with the three cars, but the trooper simply ignored its existence, R3.65-67; (4) the "lead" vehicle did not "immediately" speed up when Mr. Berg committed a traffic infraction (the video shows that it took around 37 seconds before the lead vehicle sped up, and it did so while passing the fourth vehicle), Exh. 1:54-2:45; and (5) the trooper never asked Mr. Berg if, or otherwise investigate whether, he was traveling with the other cars. The Tenth Circuit also ignored the trooper's failure to ask questions or otherwise investigate the way in which Mr. Berg packed the minivan.

In a footnote, the Tenth Circuit identified two additional unsuspicious factors: (1) Mr. Berg was not nervous; and (2) Mr. Berg did not give a confused answer to questions about his stay in Las Vegas. Pet. App. 9a n.5. But the Tenth Circuit did not give any weight to these unsuspicious factors because "the government d[id] not rely on" these factors on appeal. *Id.* Similarly, in footnote 2, the Tenth Circuit stated that Mr. Berg's eight refusals to consent to a search "does not contribute to the reasonable suspicion analysis." Pet. App. 5a n.2. But the Tenth Circuit did not thereafter give any weight to the trooper's testimony that he, in fact, considered Mr. Berg's eight refusals to consent in his reasonable-suspicion calculus. R3.55, 85-87, 94, 119, 120. Nor did the Tenth Circuit note that it was not suspicious for Mr. Berg to invoke his constitutional right to refuse to consent eight times. In viewing the evidence in the light most favorable to the government, the court gave this evidence no weight at all.

This Court just reaffirmed that, under a totality-of-the-circumstances test, "the presence of additional facts might dispel reasonable suspicion." *Kansas v. Glover*, 140

S.Ct. 1183, 1191 (2020). Yet the Tenth Circuit below gave no weight whatsoever to a litany of facts that dispelled suspicion in this case. The most-favorable-light standard of review improperly blinkered the Tenth Circuit, resulting in a decision that considered only the circumstances relied on by the government rather than the totality of circumstances (whether those circumstances were favorable to the government or not). Under the totality of the evidence, when not viewed in a light most favorable to the government, Trooper Seiler did not have an objectively reasonable suspicion to detain Mr. Berg following the completion of the traffic stop. Because the Tenth Circuit reached the wrong conclusion under the wrong standard of review, review is necessary.

CONCLUSION

For the foregoing reasons, this Court should grant this petition.

Respectfully submitted,

MELODY BRANNON
Federal Public Defender

DANIEL T. HANSMEIER
Appellate Chief
Counsel of Record
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue, Suite 201
Kansas City, Kansas 66101
Phone: (913) 551-6712
Email: daniel_hansmeier@fd.org
Counsel for Petitioner

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Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. MARK BERG, Defendant - Appellant.	No. 18-3250

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 5:18-CR-40004-DDC-1)

Daniel T. Hansmeier, Appellate Chief (Melody Brannon, Federal Public Defender, and Carl Folsom, III, Assistant Federal Public Defender, with him on the briefs), Kansas City, Kansas, for Defendant-Appellant.

James A. Brown, Assistant United States Attorney (Stephen R. McAllister, United States Attorney, with him on the brief), Topeka, Kansas, for Plaintiff-Appellee.

Before **LUCERO**, **MURPHY**, and **EID**, Circuit Judges.

MURPHY, Circuit Judge.

I. INTRODUCTION

Defendant-Appellant Mark Berg entered a conditional guilty plea to one count of possession of 100 kilograms or more of marijuana with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). Berg appeals his conviction, asserting the district court erred by refusing to suppress evidence seized after a traffic stop. *See* Fed. R. Crim. P. 11(a)(2) (providing that a defendant may, with the consent of the district court and the government, enter a conditional guilty plea but reserve the right to appeal an adverse determination of a pretrial motion). Specifically, Berg asserts law enforcement lacked the reasonable suspicion of criminal activity necessary to detain him after the initial stop ended.

Exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court **affirms** the denial of Berg's motion to suppress. The totality of the circumstances, including facts indicating Berg was traveling in tandem with two escort vehicles and Berg's rental car was packed in a manner inconsistent with his assertion he was moving his possessions from one state to another, provided law enforcement with reasonable suspicion.

II. BACKGROUND

The following facts are either undisputed or were found by the district court and not challenged on appeal. On December 9, 2017, Trooper Kyle Seiler

of the Kansas Highway Patrol was patrolling a section of Interstate 70 ("I-70") when he observed three vehicles traveling east. Trooper Seiler noticed two things about the vehicles that caught his attention: all three were traveling approximately ten miles per hour below the speed limit and none had a Kansas license plate. He testified it was uncommon to see three vehicles with out-of-state plates traveling in close proximity on I-70. His observations led Trooper Seiler to believe the vehicles were traveling together. He pulled onto the roadway and caught up with the trailing vehicle, a compact car with a California license plate. Trooper Seiler checked the vehicle's registration with his in-car computer and determined it was registered to a rental company in California.

As Trooper Seiler investigated the trailing vehicle, he noticed the two other vehicles, a red minivan and a light-colored pickup truck, speed up and began to travel at approximately the speed limit. He passed the compact car and began following the minivan. He determined the minivan was registered to a rental company in Arizona. While Trooper Seiler was following the minivan and running its registration, he observed it commit a traffic violation. Almost immediately after the minivan committed the infraction, Seiler saw the pickup truck accelerate to approximately ten miles per hour over the speed limit. Seiler ran the truck's license plates and learned the truck was registered to a private individual in California.

Trooper Seiler believed the compact car and the pickup truck were escort vehicles which, based on his training and experience, he knew are used as a tactic to divert attention from a vehicle transporting illegal drugs. He believed the pickup truck had tried to divert his attention from the minivan by speeding up when it noticed he was following the minivan.[1] He decided to stop the minivan based on his belief it was more likely the load vehicle because of its larger capacity. Seiler activated his lights and stopped the minivan.

As Trooper Seiler approached the minivan from the passenger side, he looked inside and noticed a large amount of cargo. He asked the driver, defendant Berg, if he was moving and Berg responded that he was moving from Las Vegas to Minnesota. While Trooper Seiler checked Berg's license and the rental agreement, he questioned Berg about his travel plans. Berg told Seiler he had been living in Las Vegas temporarily and was moving his possessions back to his home in Minnesota. Berg said his minivan was loaded with clothes and a television. Trooper Seiler testified he doubted the veracity of Berg's explanation for the contents of the minivan because, in his experience, the way Berg's items were packed was inconsistent with what he typically sees when interacting with motorists who are moving. Specifically, he stated:

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[1]Trooper Seiler testified he believed the driver of the pickup truck was attempting to be pulled over for speeding.

> Generally . . . when somebody's moving, you see household items that can't be packed into a box, appliances. You see boxes, suitcases, sure. It was the missing items. It was the fact that all of that cargo was consistent where it was—if it was a box, it was the same type of box. If it was a bag, you know, they were the large duffels that almost—you know, large suitcase-sized bags that I could see from my vantage. And they were just piled, stacked floor to ceiling, front to back, and they were crammed in there. That's not normally what I see when somebody's moving. I might see that in the back of a moving truck but not in a minivan.

As to Berg's route of travel, Trooper Seiler testified it was inconsistent with what he typically sees "with the normal motoring public" because Berg said he was in a hurry but he had spent time in Denver when he could have been on the road. Trooper Seiler admitted, however, that Berg's decision to break up his twenty-four-hour trip into four days was inconsistent with drug trafficking because most traffickers drive directly to their destination without stopping.

Based on his observations, Trooper Seiler believed Berg was engaged in drug trafficking. He returned Berg's documents but asked Berg if he would answer a few more questions. Berg did not expressly agree but he continued speaking to Trooper Seiler. During this additional questioning, Seiler asked Berg for consent to search his vehicle. When Berg refused,[2] Trooper Seiler told Berg he was being detained while a drug dog was called. The dog alerted to Berg's

[2]The fact Berg refused to give consent does not contribute to the reasonable suspicion analysis. *See United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997) (stating, "it should go without saying that consideration of" a motorist's refusal to consent "would violate the Fourth Amendment").

vehicle and it was searched by law enforcement. Officers found approximately 471 pounds of marijuana in Berg's minivan.

Berg moved to suppress all evidence obtained during the search of his minivan. The district court denied his motion. Berg then entered a conditional guilty plea permitting him to bring an appeal challenging "Whether Trooper Seiler had reasonable suspicion to detain [him] for a dog sniff."

III. DISCUSSION

When this court reviews the denial of a motion to suppress, we view the evidence in the light most favorable to the government and accept the district court's factual findings unless clearly erroneous.[3] *United States v. Karam*, 496 F.3d 1157, 1161 (10th Cir. 2007). The ultimate determination of the reasonableness of a search or seizure under the Fourth Amendment is subject to de novo review. *Id*. A traffic stop is constitutional if justified at its inception and if "the resulting detention was reasonably related in scope to the circumstances that justified the stop in the first place." *United States v. Valenzuela*, 494 F.3d

[3]Although Berg argues that viewing the evidence in the light most favorable to the government is inconsistent with the clearly erroneous standard applicable to a district court's factual findings, our precedent is clear on this point and "[w]e are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993); *see also United States v. Gaines*, 918 F.3d 793, 796 n.3 (10th Cir. 2019) (addressing the identical argument Berg makes here and similarly concluding "one panel of this court can't overrule another panel").

886, 888 (10th Cir. 2007). Berg does not challenge the validity of the initial stop, which Trooper Seiler testified was based on two traffic violations committed by Berg: following too closely and failing to maintain a lane. Berg, instead, argues Trooper Seiler unlawfully detained him from the time he refused to consent to the search until the drug dog alerted.[4]

An officer may detain a driver without consent once the initial purpose of a routine traffic stop has ended if, during the stop, "the officer develops an objectively reasonable and articulable suspicion that the driver is engaged in some illegal activity." *United States v. Rosborough*, 366 F.3d 1145, 1148 (10th Cir. 2004) (quotation omitted). To determine whether an officer has a reasonable suspicion to continue the detention, we "look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quotations omitted). "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*. (quotation omitted). Reasonable suspicion cannot be based on a "mere hunch," but it "need not rise to the level required for

[4]Once the canine alerted to Berg's vehicle, officers had probable cause to search it. *United States v. Rosborough*, 366 F.3d 1145, 1153 (10th Cir. 2004).

probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *Id*. at 274. Although facts consistent with innocent travel may support reasonable suspicion, some such facts provide no support for a particular driver's continued detention because they are "so innocent or susceptible to varying interpretations as to be innocuous." *United States v. White*, 584 F.3d 935, 950 (10th Cir. 2009) (quotation omitted). The government bears the burden of proving the reasonableness of the officer's suspicion. *United States v. Nichols*, 374 F.3d 959, 965 (10th Cir. 2004).

Here, the district court based its conclusion that Trooper Seiler had reasonable suspicion to detain Berg on (1) Seiler's belief the three vehicles were traveling together and were acting in concert in a manner consistent with drug trafficking and (2) Seiler's testimony that Berg's cargo was not consistent with his assertion he was moving from Las Vegas to Minnesota. The court concluded the other factors upon which the government relied were either not supported by the record or were too innocuous to contribute to reasonable suspicion. The district court identified those factors as: (1) Berg was traveling in a rental car; (2) Berg had trouble expressing whether he lived in Las Vegas and what he did there; (3) Berg was nervous because his breathing was shallow and quick throughout the encounter; (4) Berg took an indirect route of travel; and (5) Berg said he was in a rush to get home, but his statements about his travel timeline, rental agreement,

and travel route made that assertion implausible.[5] We agree that Trooper Seiler had reasonable suspicion to prolong the stop while he waited for the drug dog.

Trooper Seiler's suspicion that the three vehicles he observed on I-70 were traveling in tandem is supported by specific and articulable facts. Seiler testified it is uncommon to see three vehicles with out-of-state plates traveling in close proximity to each other on I-70. He also testified the three vehicles were all traveling at approximately the same speed: ten miles under the posted speed limit. From these facts, it was objectively reasonable for Trooper Seiler to infer that the three vehicles were somehow connected. Further, Seiler explained in detail why he suspected the vehicles were engaged in criminal activity. Specifically, he described how the compact car continued to drive ten miles per hour below the speed limit while the minivan and the pickup truck pulled ahead. Relying on his training and experience, Trooper Seiler interpreted this activity as an attempt by the compact car to draw his attention to the compact car and away from the other two vehicles. Trooper Seiler also observed the pickup truck accelerate to approximately ten miles per hour over the speed limit almost immediately after the minivan committed a traffic violation. From this, he inferred the pickup truck was intentionally diverting his attention from the minivan, which he had been

[5]Because of the district court's unchallenged factual findings, the government does not rely on Berg's alleged nervousness or his alleged confusion about his activities in Las Vegas.

following while he ran its registration. Trooper Seiler also explained he believed the minivan was the load vehicle because the other two vehicles did not have the necessary capacity. He testified he ruled the truck out as the load vehicle because it was registered to a private individual and, in his professional experience, he "rarely" saw large amounts of narcotics in privately owned vehicles.

Berg asserts all of the activity observed by Trooper Seiler is either consistent with innocent conduct or inconsistent with drug trafficking. For example, he argues Seiler first sighted the three vehicles close to a rest area and it is unremarkable that multiple vehicles with out-of-state plates would be traveling close together on the freeway immediately after a rest area. He also argues it was implausible for Trooper Seiler to believe that the compact car and the pickup truck were attempting to divert his attention by traveling under or over the speed limit. Instead, he asserts, if they were the escort vehicles, it would have been more rational for them, not the minivan, to commit the traffic infraction.

Even though Berg is correct that "common sense and ordinary experience are to be employed" in the reasonable suspicion analysis, this court defers "to a law enforcement officer's ability to distinguish between innocent and suspicious actions." *United States v. Hernandez*, 847 F.3d 1257, 1269 (10th Cir. 2017) (quotation omitted). And, here, Trooper Seiler fully detailed all the reasons why his training and experience caused him to suspect (1) the three vehicles were

traveling in tandem, (2) the behavior of the compact car and the truck were consistent with escort vehicles used in drug trafficking, and (3) the minivan was likely the load vehicle.

Trooper Seiler's reasonable suspicion of illegal activity was also supported by his observations about the cargo in Berg's minivan and how it was stacked. Seiler testified the minivan "was packed completely full, top to bottom, front to back, up into the front seats." On cross-examination, Trooper Seiler further explained that the uniformity in the size and type of boxes and the fact they were "crammed" into the minivan was inconsistent with what he "see[s] when people are moving."[6] Seiler's testimony that "the nature of the cargo [and] how it was packed" differed materially from what he typically observes in the vehicles of movers was unwavering. In its written order, the district court discussed Trooper Seiler's testimony in great detail concluding it was "credible evidence." Berg argues this court's holding in *United States v. Karam* precludes reliance on his cargo and the manner in which it was packed into the vehicle. *Karam*, however, involved a different situation than the one presented here.

[6]Trooper Seiler also testified, based on his personal experience, that a person who had lived in Las Vegas for only two months would have fewer possessions than Berg had in his minivan. The district court did not rely on Seiler's subjective opinion in its reasonable-suspicion analysis and neither does this court.

In *Karam*, the government attempted to support an investigative detention with a trooper's testimony that neatly packaged boxes in the defendant's vehicle were consistent with drug trafficking. 496 F.3d at 1163. This court, however, noted that the government failed to provide "any objective basis for associating [the] boxes or [the] style of packaging with criminal activity." *Id*. The trooper's suspicion that the boxes contained illegal drugs was based only on "a single anecdote" he heard from another trooper. *Id*. Accordingly, we held that, considered in context, "the presence of new, neatly taped boxes in a vehicle contribute[d] nothing to the reasonable suspicion analysis." *Id*. Here, Trooper Seiler's suspicion was not based on anecdotal evidence or a belief that drugs are typically transported in the type of boxes and bags Berg had in his vehicle. Instead, he testified the nature of Berg's cargo was inconsistent with Berg's story that he was moving his possessions from Las Vegas to Minnesota. Trooper Seiler further testified that his suspicion was based on his experiences interacting with members of the public who are using vehicles to move their possessions. Thus, it had an objective basis and we conclude it contributed to Trooper Seiler's reasonable suspicion of criminal activity.

As to the other factors upon which the government relies, we agree with the district court that, in this case, they are too innocuous to support reasonable suspicion of criminal activity. The government has failed to provide any

objective basis to show why the facts Berg was traveling at night along a known drug corridor, using a slightly indirect route are significant in this case. Trooper Seiler admitted there was nothing about Berg's night-time travel "in and of itself" that raised his suspicions. He also testified that Berg could have reached his destination faster by traveling along I-80 instead of I-70, but he did not testify that the difference between the two routes was significant or that Berg's choice was highly unusual. As to the rental car, a trooper's knowledge that drug couriers frequently use rental cars may contribute to reasonable suspicion for extending a traffic stop. *See United States v. Williams*, 271 F.3d 1262, 1270 (10th Cir. 2001). But, Berg's use of a rental vehicle was not inconsistent with his description of his travel plans and Trooper Seiler did not identify anything about the rental car that was unusual in this matter. *See id*. (noting the defendant rented his vehicle in a city known to be a "staging area for marijuana" distribution and attempted to conceal that fact from law enforcement).

IV. CONCLUSION

Under the totality of the circumstances and based on the district court's findings, we conclude specific and articulable facts existed to provide Trooper Seiler with reasonable suspicion that Berg was engaged in criminal activity. From these facts, Trooper Seiler rationally inferred that (1) Berg was traveling in tandem with two escort vehicles; and (2) Berg's claim he was moving personal

possessions with his rental car was likely untrue. Thus, Berg's continued detention was not unconstitutional.

Because the district court did not err when it denied Berg's motion to suppress, the court's order is **affirmed**.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **MARK BERG (01),** **Defendant.**	**Case No. 18-40004-01-DDC**

MEMORANDUM AND ORDER

On December 9, 2017, Trooper Kyle Seiler of the Kansas Highway Patrol ("KHP") stopped defendant Mark Berg on Interstate 70. After he completed the traffic stop, Trooper Seiler continued the encounter in a consensual manner. Trooper Seiler asked Mr. Berg a series of questions that culminated with him asking for consent to search Mr. Berg's vehicle. When Mr. Berg declined, Trooper Seiler detained him and requested a drug detection canine to come to the scene. After the canine indicated that Mr. Berg's vehicle contained a controlled substance, Trooper Seiler searched the vehicle. He discovered 471 pounds of marijuana in it.

Now, Mr. Berg asks the court to suppress all evidence and any statements he made after Trooper Seiler detained him for the dog sniff because, he says, Trooper Seiler lacked reasonable suspicion to detain him. For reasons explained by this Order, the court denies Mr. Berg's Motion to Suppress (Doc. 15).

I. Background

The following facts are taken from the evidence presented at the July 11, 2018 motion hearing.

A. Vehicle Behavior

Around 10:30 p.m. on Saturday, December 9, 2017, Trooper Seiler was stationed in the median near milepost 225 on Interstate 70 in Ellsworth County, Kansas. He was monitoring traffic traveling on the eastbound-half of the interstate. While stationed there, Trooper Seiler noticed three vehicles traveling in close succession to one another. The vehicles were traveling in this order: a light-colored pickup truck; a red minivan; and a dark-colored compact car. He noted the three vehicles were following each other closely, all at about the same speed in the right, or travel lane. The vehicles' proximity to one another and their speed—they were traveling at about 65 mph in a 75-mph zone—caught Trooper Seiler's attention. That combination of facts led him to suspect the three vehicles might be traveling together. He decided to investigate further and pulled out onto the highway.

About one-half to three-quarters of a mile from Trooper Seiler's original position, he caught the last of the three vehicles—the compact car. At this point, the pickup and the minivan had moved farther ahead of the compact car. Trooper Seiler began pacing the compact car to check its speed while simultaneously checking the compact car's registration. The car was registered in California to a rental car company. And it still was traveling about 65 mph. Trooper Seiler did not see the compact car commit any traffic infractions so he decided to break off contact and catch the minivan.

When Trooper Seiler caught the minivan, he began to pace it. While doing so, he began running its registration. He learned that it was registered in Arizona to a rental car company. Trooper Seiler also noted that the minivan was following the pickup closely—less than 100 feet separated the two—and he intended to time their separation. Before he could do so, he watched the minivan leave the roadway to the right. Both right tires completely crossed the right fog line

onto the rumble strips for about two or three seconds. Trooper Seiler heard the tires on the rumble strips and could see pavement between the van's right tires and the white fog line. At this point, Trooper Seiler activated his dash-mounted camera.[1]

When the minivan left the roadway, the pickup began to accelerate away from the minivan. Trooper Seiler began to follow the pickup as it accelerated, and he clocked its speed at 85 mph. The pickup stopped accelerating and maintained a speed around 84 mph. Trooper Seiler checked the pickup's registration and learned that it was registered in California to a private individual.

Based on his training and experience and the way the three vehicles behaved, Trooper Seiler now believed that the pickup, minivan, and compact car were traveling together. Specifically, based on their actions, Trooper Seiler believed the pickup and compact car were serving as escort vehicles and that their drivers were trying to draw his attention away from the minivan. Trooper Seiler, based on his observations to date, believed the van was the load or courier vehicle. So Trooper Seiler slowed until the minivan caught his patrol vehicle. He pulled behind the minivan and initiated a traffic stop of it.

B. Traffic Stop

When he approached the minivan, Trooper Seiler noticed the minivan was packed with cardboard boxes and large black bags. Trooper Seiler learned the van's driver was Mark Berg—the defendant in this case. Trooper Seiler asked Mr. Berg if he had his license with him. While Mr. Berg searched for his license, Trooper Seiler asked him if he was moving, and Mr. Berg replied he was. Trooper Seiler then asked where he was headed, and Mr. Berg replied he was

[1] When a KHP trooper activates his dash-mounted camera, the recording system preserves the last two minutes of video before the camera was activated. But it captures no audio for those two minutes. Accordingly, Government's Exhibit 1—the video recording taken from Trooper Seiler's dash camera—starts as he catches the compact car. But the audio starts as the minivan leaves the roadway.

headed home to Coon Rapids, Minnesota. Trooper Seiler then asked him where he was coming from, and after a pause, Mr. Berg replied, "Uh . . . Las Vegas." Gov. Ex. 1 at 5:52–55. Eventually, Mr. Berg produced a Minnesota driver's license that Trooper Seiler later confirmed was valid.

When Trooper Seiler was telling Mr. Berg that his vehicle had left the roadway onto the rumble strips and re-entered the roadway, Mr. Berg interrupted him and said, "Yea, I was trying to set my cruise control." *Id.* at 5:57–6:05. Trooper Seiler asked for the rental agreement and noticed the minivan was rented in Las Vegas on December 6, 2017, and due back to the rental car company the next day, December 10, 2017. After inspecting Mr. Berg's documents, Trooper Seiler said that he was not going to write a ticket. Instead, Trooper Seiler asked Mr. Berg to come back with him and sit in the patrol car. Mr. Berg obliged.

As Mr. Berg exited the minivan, Trooper Seiler looked into the back of the minivan a second time. Trooper Seiler then told Mr. Berg that he needed to pat him down for officer-safety reasons. Mr. Berg responded that he always had respect for law enforcement and complied.

Once they got into the patrol car, Trooper Seiler questioned Mr. Berg about his travel plans while the trooper prepared the warning ticket on his computer. From his questions, Trooper Seiler learned Mr. Berg did not work in Las Vegas and he was there "just packing up some stuff." *Id.* at 7:27. Trooper Seiler asked Mr. Berg if he lived in Las Vegas. At first, he replied no, but then corrected himself and said he had lived there a couple months. When Mr. Berg was asked specifically what he had packed, he replied, "Just the stuff I had at the house." *Id.* at 8:02. Trooper Seiler then asked about any furniture he may have and Mr. Berg explained, "Just a bunch of clothes, a TV, s*** like that." *Id.* at 8:11. Mr. Berg later explained he only had lived in Las Vegas for about two months and that "gambling" had taken him there.

During this interaction, Trooper Seiler ran Mr. Berg's name for warrants and prior drug arrests. Dispatch informed the trooper that Mr. Berg's record included neither. Through further questioning, Trooper Seiler learned Mr. Berg's past and future travel plans. Mr. Berg said he'd left Las Vegas on December 7, 2017, had stopped at hotels and rest areas, and now planned to drive straight through to arrive home by 5:00 a.m. or so the following morning. Mr. Berg specifically mentioned he had stayed in Denver the night before, December 8, 2017. He also said he needed to be home for work on Monday morning, December 11, 2017.

C. Consensual Encounter

About eight minutes into the traffic stop, Trooper Seiler gave Mr. Berg the warning ticket and told him to pay more attention to the roadway. As Mr. Berg started to leave the vehicle, Trooper Seiler asked, "Can I ask you a couple more questions?" *Id.* at 12:44. Mr. Berg sat back down and jokingly asked whether he could get "an escort all the way back to Minnesota?" *Id.* at 12:46.

Trooper Seiler asked if Mr. Berg knew that I-70 was a "pretty major drug-trafficking corridor?" *Id.* at 12:57–13:00. Mr. Berg responded that he had never been on I-70 before. Trooper Seiler then asked if Mr. Berg had anything illegal in his car—specifying methamphetamine, cocaine, heroin, large amounts of U.S. currency, guns, or large amounts of marijuana. Mr. Berg shook his head, smiled, chuckled, and answered, "Nope." Then, Trooper Seiler asked Mr. Berg again if he had any large amounts of marijuana. Again, he replied he did not. *Id.* at 13:14–13:30. Trooper Seiler then asked permission to search Mr. Berg's van. Mr. Berg declined, and said, "I thought you were giving me a warning?" *Id.* at 13:30–13:35. Trooper Seiler then asked three more times for permission to search. Each time, Mr. Berg declined. *Id.* at 13:35–14:00.

At that point, Trooper Seiler asked Mr. Berg, "Is there a reason you don't want me to search your car?" *Id.* at 14:05. Mr. Berg responded, "No. I'm trying to get back on the road." *Id.* at 14:08. Trooper Seiler said, "I understand. But I'm just asking you for consent to search it, so we can get you back on your way." *Id.* at 14:09–14:14. Mr. Berg said no two more times. Trooper Seiler then gave Mr. Berg a "final opportunity" to consent. Mr. Berg still said no. *Id.* at 14:14–14:26.

D. Detention for Dog Sniff

Trooper Seiler told Mr. Berg that he was detaining him to see if he could get a drug dog to come out to the location. Trooper Seiler called his dispatcher and asked, "Can you contact the K-9 for a refusal, please?" *Id.* at 14:40–14:44. This request was made at 10:40 p.m. About two minutes later, a second trooper—Master Trooper Steve Sneath—arrived. Master Trooper Sneath had been stationed in the median with Trooper Seiler before he initiated the stop.

While they waited for the canine, Master Trooper Sneath mentioned that he had seen three California cars together at the rest stop. Trooper Seiler responded, "They all left." *Id.* at 17:00–17:03. Master Trooper Sneath then repeated that he had seen the California cars "all at the rest stop together." *Id.* at 17:25–17:30. Trooper Seiler testified that he understood Master Trooper Sneath to be talking about the same three vehicles he found suspicious. And he also understood Master Trooper Sneath's statements to indicate that he, too believed, the vehicles were traveling together.

Technical Trooper Rohr and his canine, Nico, arrived on the scene at 11:10 p.m.—40 minutes after the traffic stop had begun and 30 minutes after Trooper Seiler had detained Mr. Berg. When Trooper Rohr arrived, Trooper Seiler said this was the "moment of truth." *Id.* at 50:20–50:25. He explained to Master Trooper Sneath that "he"—referring to Mr. Berg—is "not

very nervous. But he didn't ever—you know—usually when someone doesn't want to take the time, they'll say 'oh you can search it.' Or 'I don't have anything.' I mean, nothing. None of that. I mean—it's bizarre, whatever it is." Trooper Seiler then referenced the increased cost of a one-way rental—the arrangement that applied to Mr. Berg's rented minivan. He said, "None of it is making sense." *Id.* at 50:25–50:48.

When Trooper Rohr gave Nico the command to sniff, he directed him around the minivan in a counter clockwise direction. As Trooper Rohr directed Nico around the car and passed the driver's door, he observed an alert. Nico suddenly changed directions and began to sniff intensely low and high around the driver's door. The driver's door window was opened; Nico moved up to the window and began to sniff more intensely. Trooper Rohr called Nico back to him and began to direct Nico a second time. Nico changed direction suddenly and went back to the driver's door; putting his front paws on the open window, acting like he wanted to jump into the minivan. Trooper Rohr called Nico to him again and started to direct Nico down low on the car. Nico turned once more and went back to the driver's door.

Nico did this a total of four times and, each time, he focused on the area between the driver's door and the sliding door. Trooper Rohr gave Nico the command to sniff near the door seam on the driver's door. After Trooper Rohr gave this command, Nico sat and stared at the door. Nico is trained to sit and stare after locating the source of a drug odor. Trooper Rohr then advised Trooper Seiler that Nico had indicated on the vehicle, and Trooper Seiler could search the vehicle. A search of Mr. Berg's minivan led law enforcement to find contraband, which it claims consists of 471 pounds of marijuana.

After they discovered the suspected marijuana, the troopers read Mr. Berg the *Miranda*[2] warning. Mr. Berg then gave an incriminating statement to police, explaining that he had been hired to make a one-time delivery of marijuana from California to Minnesota.

Mr. Berg now asks the court to suppress all evidence secured from his detention, law enforcement's search of the vehicle, and any other evidence acquired from his arrest, including his statement to police.

II. Fourth Amendment Standard

The Fourth Amendment[3] to our Constitution forbids unreasonable searches and seizures. *California v. Carney*, 471 U.S. 386, 390 (1985). When a defendant challenges the reasonableness of a search or seizure, the government bears the burden to prove by a preponderance of the evidence that the challenged search or seizure was reasonable. *United States v. Matlock*, 415 U.S. 164, 177 (1974); *United States v. Zubia-Melendez*, 263 F.3d 1155, 1160 (10th Cir. 2001). If the court determines that a search or seizure violated the Constitution, the exclusionary rule prohibits admission of the fruits of all evidence seized illegally. *See Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963).

III. Analysis

Mr. Berg's motion challenges just one issue: Whether Trooper Seiler had reasonable suspicion to detain him for a dog sniff. Nonetheless, the court addresses all the relevant issues in this traffic stop—albeit more briefly than it would had Mr. Berg challenged all aspects of the

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[2] *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

[3] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

stop. The court's analysis focuses on reasonable suspicion. Ultimately, the court concludes that Trooper Seiler possessed reasonable suspicion that Mr. Berg was engaged in drug trafficking.

A. Traffic Stop

"[S]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth Amendment]." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). A traffic stop can pass Fourth Amendment muster "if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring." *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995). Reasonable suspicion is "a particularized and objective basis for suspecting the person stopped of criminal activity." *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (internal quotation and citation omitted).

During the July 11, 2018 hearing on defendant's motion, the government argued that Trooper Seiler possessed reasonable suspicion to stop Mr. Berg for drug trafficking beginning when he observed the three vehicles' behavior on I-70. So beginning with that observation the government asserts, Trooper Seiler possessed reasonable suspicion to detain Mr. Berg for a dog sniff. The evidence does not persuade the court that Trooper Seiler's suspicions rose to the requisite level to detain based solely on watching the three cars. But Trooper Seiler did observe Mr. Berg commit two traffic violations and thus the court concludes that those violations validated the traffic stop.

Kansas law prohibits a driver from following another vehicle "more closely than is reasonable and prudent." Kan. Stat. Ann. § 8-1523(a). The Tenth Circuit and Kansas courts have applied the "car-length" and "two-second" rules to determine reasonable and prudent behavior. The "car-length" rule suggests that depending on road and weather conditions, a driver

should maintain one car length—ten to fifteen feet—for every ten miles per hour. *United States v. Vercher*, 358 F.3d 1257, 1261–62 (10th Cir. 2004). In *Vercher*, the Circuit found 100 to 150 feet was a reasonable and prudent distance when traveling at 70 mph. *Id.* Under the "two-second" rule, a driver should maintain a distance of at least two seconds between his car and the car ahead. *United States v. Hunter*, 663 F.3d 1136, 1142–43 (10th Cir. 2011).

Here, Trooper Seiler saw Mr. Berg following the pickup at a distance that Trooper Seiler estimated as less than 100 feet. According to the "car-length" rule and *Vercher*'s reasoning, at a speed around 65 mph, 100 feet likely is the closest distance that is reasonable and prudent. Also, although Trooper Seiler was not able to count the interval between Mr. Berg and the pickup in front of him, the video from the dash camera in Trooper Seiler's vehicle showed an interval of about one second. Based on the "car-length" and "two-second" rules, the court finds that Trooper Seiler had reasonable suspicion to believe Mr. Berg was following the pickup in front of him too closely.

Kansas law also requires drivers to keep their vehicles within a single lane. Specifically, Kan. Stat. Ann. § 8-1522(a) requires a vehicle to be driven "as nearly as practicable entirely within a single lane" and it prohibits a driver from leaving that lane "until the driver has first ascertained that such movement can be made with safety." A driver violates § 8-1522(a) when: (1) he intentionally makes a lane change, and that lane change was unsafe; and (2) it is practicable to maintain a single lane, but he fails to do so. *State v. Marx*, 215 P.3d 601, 611 (Kan. 2009). In *Marx*, a police officer stopped a motorhome after it crossed the fog line, overcorrected, and then crossed the center line. *Id.* at 604. The Kansas Supreme Court held that the officer lacked reasonable suspicion to stop the motorhome because it never violated § 8-1522(a). *Id.* at 613. In reaching this conclusion, *Marx* considered the following factors: (1)

there was only one lane breach; (2) there was no testimony about how far over the line the motorhome had moved; (3) there was no testimony about traffic conditions; and (4) there was no evidence permitting the court to infer anything about the practicability of maintaining a single lane. *Id.*

Here, the evidence is different. It established sufficient reasonable suspicion that Mr. Berg violated § 8-1522(a). Although Mr. Berg's minivan left the lane just once, the vehicle crossed the fog line for about two to three seconds. Trooper Seiler heard Mr. Berg's tires on the rumble strips and could see pavement between the tire and the fog line. This is different from *Marx* where the court lacked evidence about how far over the line the motorhome had moved. Mr. Berg told Trooper Seiler that he had swerved trying to set the cruise control, indicating that the movement was unintentional—and not a movement to avoid a hazard. Also, unlike *Marx*, the dash camera video shows no obstacles or hazards that would have made it impracticable for Mr. Berg to maintain his lane. So the court can infer it was practical for Mr. Berg to maintain his lane. But for two to three seconds, his van left its lane and traveled with his right tires on the shoulder. Accordingly, Trooper Seiler had reasonable suspicion to believe Mr. Berg had violated Kan. Stat. Ann. § 8-1522(a).

In sum, Trooper Seiler had reasonable suspicion to believe Mr. Berg had committed two traffic violations: violating §§ 8-1523(a) (following too closely) and 8-1522(a) (failing to maintain a lane). The traffic stop was valid.

B. Trooper Seiler's Actions During the Initial Stop

Trooper Seiler's actions during the initial stages of the traffic stop were appropriately limited to the mission of the stop. The Supreme Court has held:

> A seizure for a traffic violation justifies a police investigation of that violation. A relatively brief encounter, a routine traffic stop is more analogous to a so-called

> *Terry* stop than to a formal arrest. Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's mission—to address the traffic violation that warranted the stop and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose.

Rodriguez v. United States, 135 S. Ct. 1609, 1614 (2015) (internal quotations, citations, and corrections omitted). The Supreme Court has explained the permissible mission of a traffic stop: "Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to the traffic stop. Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* at 1615 (internal quotation, citations, and corrections omitted). The Tenth Circuit also has allowed an officer to "generally inquire about the driver's travel plans and ask questions, whether or not related to the purpose of the stop, so long as they do not prolong the stop." *United States v. Moore*, 795 F.3d 1224, 1229 (10th Cir. 2015) (citations omitted).

Here, Trooper Seiler checked Mr. Berg's name for warrants and prior arrests and questioned him about his travel plans while he completed the warning. So Trooper Seiler properly confined his actions to the traffic stop's mission.

C. Consensual Encounter

After Trooper Seiler completed the stop, his interaction with Mr. Berg continued in a consensual encounter. "Once an officer returns the driver's license and registration, the traffic stop has ended and questioning must cease; at that point, the driver must be free to leave." *United States v. Villa*, 589 F.3d 1334, 1339 (10th Cir. 2009). But, "[a]dditional questioning unrelated to the traffic stop is permissible if the detention becomes a consensual encounter. Whether the driver has consented to additional questions and detention turns on whether a

reasonable person would believe he was free to leave or disregard the officer's request for information." *Id.* at 1339–40 (internal quotations and citations omitted).

The court thus must decide if the encounter between Trooper Seiler and Mr. Berg became a consensual one or, alternatively, if Trooper Seiler had reasonable suspicion to prolong the detention. *See United States v. Hunnicutt*, 135 F.3d 1345, 1349 (10th Cir. 1998) ("Lengthening the detention for further questioning beyond that related to the initial stop is permissible in two circumstances. First, the officer may detain the driver for questioning unrelated to the initial stop if he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring. Second, further questioning unrelated to the initial stop is permissible if the initial detention has become a consensual encounter." (citations omitted)).

Mr. Berg does not challenge that he consented to the questions after Trooper Seiler told him he was free to leave. *See United States v. Ledesma*, 447 F.3d 1307, 1315 (10th Cir. 2006) ("[A trooper's] words of farewell suggest[ ] that any subsequent discussion was consensual."). Trooper Seiler asked Mr. Berg whether he had contraband in the minivan. Mr. Berg responded. And then, Trooper Seiler asked Mr. Berg for consent to search his van. While it is well-settled that law enforcement may search without a warrant when consent is given, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973), that consent must be voluntary, *United States v. Dewitt*, 946 F.2d 1497, 1500 (10th Cir. 1991). So the government must "prove consent was given without duress or coercion, express or implied." *Id.* (internal quotation marks and citation omitted).

The court addresses consent here because, although Mr. Berg never consented, the court has substantial reservations about the way Trooper Seiler solicited his consent. Specifically, Trooper Seiler asked Mr. Berg for consent to search his vehicle seven different times. This

bordered on badgering. And with his multiple requests, Trooper Seiler included two phrases of particular concern. After Mr. Berg refused several times, Trooper Seiler said that he wanted "consent to search so [he] could get [Mr. Berg] back on his way." Gov. Ex. 1 at 14:09–14:14. Then, when Mr. Berg continued to refuse consent, Trooper Seiler gave him a "final opportunity" to consent. *Id.* at 14:14–14:26.

Trooper Seiler tried to explain his multiple requests for consent at the July 11, 2018 hearing. He testified that even if Mr. Berg had given his consent in response to any of Trooper Seiler's requests after had had declined the first request, Trooper Seiler would not have relied on that response as putative consent. This concession says it all. Repeated requests for consent are unlikely to produce genuine consent. It concerns the court when law enforcement persists as Trooper Seiler did here.

But in the end, the court's reservations do not matter to the conclusion here because Trooper Seiler proceeded in another fashion. After Mr. Berg refused, Trooper Seiler explained that he was detaining Mr. Berg until a drug detection canine arrived. Trooper Seiler asserts that he had reasonable suspicion to extend the detention. Naturally, Mr. Berg disagrees.

D. Reasonable Suspicion to Detain

"[A] dog sniff is not fairly characterized as part of the officer's traffic mission"—rather it is "aimed at detecting evidence of ordinary wrongdoing"—so the officer must reasonably suspect criminal wrongdoing to detain the defendant while the drug detection canine arrives and is deployed. *Rodriguez v. United States*, —U.S.—, 135 S. Ct. 1609, 1615 (2015) (internal quotation marks, corrections, and citations omitted). When determining whether an officer had acquired reasonable suspicion of other criminal activity during a traffic stop, the court considers the totality of the circumstances. *United States v. White*, 584 F.3d 935, 950 (10th Cir. 2009). "A

factor may raise objectively reasonable suspicions even if it is not by itself proof of any illegal conduct and is quite consistent with innocent travel." *Id.* (quoting *United States v. Valles*, 292 F.3d 678, 680 (10th Cir. 2002) (internal quotation marks omitted). "But unparticularized hunches based on indicators so innocent or susceptible to varying interpretations as to be innocuous cannot justify a prolonged traffic stop or vehicle search." *Id.* (quoting *United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997) (internal quotation marks omitted)).

The government contends that Trooper Seiler had reasonable suspicion based on seven articulable facts:

1. The three vehicles exhibited behavior consistent with drug trafficking;
2. Mr. Berg's cargo was unusual because it consisted of luggage and same-sized boxes that did not appear consistent with the things Mr. Berg said he had packed in Las Vegas to move—a TV and some clothing;
3. Mr. Berg was traveling in a rental car;
4. Mr. Berg had trouble expressing whether he lived in Las Vegas and what his business there was;
5. Mr. Berg's breathing was shallow and quick throughout the whole encounter;
6. Mr. Berg took an indirect route of travel; and
7. Mr. Berg said he was in a rush to get home, but his statements about his travel timeline, rental agreement, and travel route made that implausible.

While the court concludes that Trooper Seiler possessed reasonable suspicion to detain Mr. Berg, the court finds several facts identified by the government are innocuous and, at least here, not persuasive. Specifically, the court finds that the credible evidence supports the first two facts

and, together, they provided reasonable suspicion. But the others are "so innocent or susceptible to varying interpretations as to be innocuous." *See id.*

First, Trooper Seiler explained at length why he believed the pickup, the minivan, and the compact car were traveling together. Although his suspicions did not rise to the requisite level to justify a traffic stop, he provided articulable reasons for suspecting these vehicles were traveling together. So ultimately, this fact contributed to the totality of the circumstances supporting Trooper Seiler's assessment of reasonable suspicion.

Trooper Seiler testified that he had attended two conferences in 2017 on criminal interdiction where he received specialized training in drug trafficking detection. Specifically, he learned how to identify vehicles operating together as part of a drug trafficking scheme. This training acquainted him with techniques where traffickers use escort vehicles to monitor a load's progress and, if necessary, to distract law enforcement officers from the load vehicle. Applying his training to his observations that night, Trooper Seiler identified the pickup and compact as escort vehicles for the load vehicle—the minivan.

Trooper Seiler explained that it was uncommon to see three cars with out-of-state plates in such close proximity to one another on I-70. So he decided to investigate. During this investigation, he formed suspicions based in reason, experience, and fact. First, when he pulled out of his position to catch up to the compact car, he noticed the pickup and minivan had increased their distance from the compact car. Trooper Seiler explained that he did not know whether the pickup and minivan had accelerated or the compact car had decelerated, but he perceived the increased distance as a deliberate tactic utilized to draw his attention away from the minivan. Importantly, the compact car was traveling 10 mph below the posted speed limit. After checking registration and speed on the car, Trooper Seiler moved on to the minivan.

Trooper Seiler noticed the minivan was following the pickup too closely and then saw the minivan leave the roadway. Trooper Seiler testified—and video from his dash camera verifies—that almost immediately after the minivan veered off the road, the pickup accelerated to about 10 mph over the speed limit. Trooper Seiler perceived this acceleration as another purposeful tactic designed to draw his attention away from the minivan. So, after he checked the pickup's speed and registration, he stopped the minivan.

Trooper Seiler was able to articulate other reasons he believed the minivan was the courier and the other vehicles were escorts. He eliminated the pickup as the courier because, he explained, vehicles owned by private individuals are not usually used as courier vehicles. Also, he said the pickup did not have the capacity to hold a large load. He eliminated the compact car because of its limited capacity as well. In short, Trooper Seiler's articulated reasons support reasonable suspicion for his belief that the three vehicles were operating in concert and why this was unusual.

Second, Trooper Seiler testified in detail about his observations of the cargo in the minivan. The court recognizes that Trooper Seiler regularly encounters individuals who are moving and so, the court finds his observations on this subject credible. Trooper Seiler testified that the rear cargo area was packed with boxes and suitcases. Although this is not unusual for someone who is moving, Trooper Seiler saw several unusual things. He noted that the boxes were all the same shape and size. And there were several large black bags of similar make and construction. In short, there was no variety among the boxes and bags, as Trooper Seiler normally sees when a driver is using a passenger vehicle to move. Trooper Seiler also found it suspicious that the minivan was the type that has three rows of seats. But he could not observe the seats (as if they had been removed). Finally, and quite importantly, Trooper Seiler noted that

there were no personal belongings visible. He testified that, in his experience, when someone uses a passenger vehicle to move, he typically sees pillows, blankets, and other items not packed in boxes. He saw none of that here.

The three vehicles' behavior already had caused Trooper Seiler to form suspicions, but the unusual nature of the cargo increased his level of suspicion. He usually sees passenger vehicles with only a few household items or with a lot of items "crammed in." But here, he saw a van carefully and neatly packed. The minivan was packed so that no space was wasted and he couldn't see the back seats. Finally, he couldn't see any household items—everything was concealed. Independently, a neatly packed vehicle would not reasonably support suspicions. But when viewed in the totality of the circumstances, this unusual occurrence provided another articulable reason for suspicion. In sum, the combination of the vehicles' behavior and the unusual nature of the minivan's cargo provided Trooper Seiler reasonable suspicion to detain Mr. Berg long enough for a drug detection canine to arrive.

The government's remaining facts do not contribute anything to the reasonable suspicion analysis. The government tries to rely on Mr. Berg traveling in a rental car. The Tenth Circuit has viewed rental cars differently. *Compare United States v. Davis*, 636 F.3d 1281, 1291 (10th Cir. 2011) ("Finally, our cases note drug traffickers often use rental vehicles to transport narcotics.") *with United States v. Karam*, 496 F.3d 1157, 1165 (10th Cir. 2007) ("[A] one-way flight in one direction and a one-way rental vehicle in the other direction is not the type of unusual itinerary that gives rise to reasonable suspicion."). In this circumstance, Mr. Berg's rental car coincided with his explanation that he was moving. So a rental vehicle does not support reasonable suspicion.

The government also relies on perceived inconsistencies in Mr. Berg's statements about living and working in Las Vegas. But nothing in the facts suggest Mr. Berg was inconsistent. Indeed, at one point, Trooper Seiler said Mr. Berg was traveling from Los Angeles and Mr. Berg corrected him, interjecting, "Las Vegas." Likewise, Mr. Berg consistently reiterated that he was traveling home—to Minnesota—after spending a couple of months in Las Vegas to gamble.

Next, the government says, Mr. Berg's breathing was shallow and quick, suggesting he was extremely nervous throughout the encounter. But this directly contradicts Trooper Seiler's comment to Master Trooper Sneath that Mr. Berg did not seem nervous. Trooper Seiler also contradicted this fact during the July 11, 2018 hearing, saying that Mr. Berg's voice wavered, but no more than usual for a traffic stop.

Finally, the government tries to use Mr. Berg's travel plans for support. The government conducts an in-depth analysis of distance and time between Las Vegas and Coon Rapids, Minnesota. The government questions Mr. Berg's route and the amount of time he spent in Colorado. In short, the government does not agree with Mr. Berg's explanation of his travel plans.

The Tenth Circuit "ha[s] generally been reluctant to give weight in the reasonable-suspicion analysis to unusual travel purposes, at least absent lies, inconsistencies, or the like." *United States v. Lopez*, 849 F.3d 921, 927 (10th Cir. 2017). The government has not directed the court to any lies or inconsistencies in Mr. Berg's explanation. Simply put, the government suggests only that Mr. Berg was traveling on a route that added a bit of time to his travel and that he stayed in Denver for part of a day. Spending a few extra hours in a city along the route and then driving straight to the destination are not the type of unusual or inconsistent travel plans that

support reasonable suspicion. *See id.*; *see also United States v. Wood*, 106 F.3d 942, 947 (10th Cir. 1997).

In sum, these facts have varying interpretations and thus lend no support to the court's reasonable suspicion finding. But though it is a close call, the vehicles' unusual behavior, the unusual content of the minivan's cargo, and the odd way it was packed provided Trooper Seiler reasonable suspicion to detain Mr. Berg for a dog sniff.

E. Probable Cause for Car Search

After a 30-minute period, a drug detection canine with the KHP arrived on scene and indicated that the minivan contained contraband. Based on this trained canine's alert, Trooper Seiler searched Mr. Berg's minivan and found evidence of marijuana. Mr. Berg does not challenge whether the canine's alert and subsequent indication provided Trooper Seiler probable cause to search the minivan, so the court addresses the issue only briefly.

As a preliminary matter, law enforcement generally must have a warrant to search a person or his house, papers, or effects. U.S. Const. amend. IV. But there are exceptions to this rule, and the "vehicle exception" is one of them. Under this exception, law enforcement may search an automobile during a traffic stop without a warrant "if probable cause exists to believe that contraband or evidence of criminal activity is located inside." *United States v. Baylor*, No. 06-40099-01-RDR, 2006 WL 3146348, at *2 (D. Kan. Oct. 31, 2006) (first citing *Chambers v. Maroney*, 399 U.S. 42 (1970); *then citing Carroll v. United States*, 267 U.S. 132 (1925)).

A drug detection canine can provide the requisite probable cause if it indicates contraband is located in the car. *See Florida v. Harris*, 568 U.S. 237, 246–47 (2013) ("If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable

cause to search."). Here, Nico was a trained and certified drug dog. He alerted to Mr. Berg's minivan and then indicated at a specific point along the van. This indication provided probable cause to search the vehicle. And so, the vehicle search was valid.

In sum, Trooper Seiler possessed reasonable suspicion to stop Mr. Berg for following too closely and failing to maintain his lane. From there, Trooper Seiler's actions were appropriately limited to the mission of the stop. Once the stop was complete, Trooper Seiler and Mr. Berg continued with a consensual encounter. During this encounter, Mr. Berg refused consent to search his minivan and then, Trooper Seiler detained him. Facts learned by Trooper Seiler before and during the traffic stop provided him reasonable suspicion to believe that Mr. Berg was engaging in criminal activity. This permitted him to detain Mr. Berg while the drug detection canine arrived. Once the canine arrived, he alerted on the minivan, providing probable cause to search it for contraband. Accordingly, the court denies Mr. Berg's Motion to Suppress (Doc. 15).

IV. Objection to TFO Shawn Herrman's Testimony

At the July 11, 2018 motion hearing, during the direct examination of Task Force Officer ("TFO") Shawn Herrman, Mr. Berg's defense counsel objected to a question by the prosecutor. This question was: "Based on your training and experience and your review of the facts in this case, do you have an opinion as to whether or not Mr. Berg was engaged in drug trafficking with the assistance of escort vehicles?" Doc. 20 (July 11, 2018 Hr'g Tr.) at 10. The court allowed the parties seven days to file briefs about the validity of the objection. They have done so.

The government filed a comprehensive brief arguing why the court should overrule the objection under Fed. R. Civ. P. 403, 608, and 702. *See* Doc. 21. In his brief, Mr. Berg withdrew

his objection. Doc. 22 at 2. Mr. Berg conceded that the testimony likely was admissible because defense counsel failed to object under Rules 403 or 702. *Id.*

In light of Mr. Berg's decision to withdraw his objection, the court overrules the objection and finds that it could—and did—consider the following question and response:

> [Prosecutor:] What I'm asking you, Agent Herrman, is whether or not based on your review of the evidence in this case, in your training and experience, what is your opinion as to whether or not Mr. Berg was couriering drugs with the assistance of an escort vehicle.
>
> [TFO Herrman:] He was. Doc. 20 at 13.

But this testimony, though admitted, adds little to the government's case. It substantiates Trooper Seiler's testimony that drug traffickers sometimes use escort vehicles to avert attention from a load vehicle. But it does nothing else.

IT IS THEREFORE ORDERED BY THE COURT THAT defendant Mark Berg's Motion to Suppress (Doc. 15) is denied.

IT IS FURTHER ORDERED THAT defendant Mark Berg's objection during the July 11, 2018 hearing is overruled.

IT IS SO ORDERED.

Dated this 1st day of August, 2018, at Topeka, Kansas.

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

FILED
United States Court of Appeals
Tenth Circuit

April 15, 2020

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARK BERG,

Defendant - Appellant.

No. 18-3250
(D.C. No. 5:18-CR-40004-DDC-1)
(D. Kan.)

ORDER

Before **TYMKOVICH**, Chief Judge, **BRISCOE**, **LUCERO**, **MURPHY, HARTZ**, **HOLMES**, **MATHESON**, **BACHARACH**, **PHILLIPS**, **McHUGH**, **MORITZ**, **EID**, and **CARSON**, Circuit Judges.

This matter is before the court on the Petition for Panel Rehearing and Rehearing En Banc filed by Appellant. Pursuant to Fed. R. App. P. 40, the petition for panel rehearing is granted in part to the extent of the modifications in the attached revised opinion. The court's January 23, 2020, opinion is withdrawn and replaced by the attached revised opinion which shall be filed as of today's date.

The petition for rehearing en banc and the attached revised opinion were transmitted to all of the judges of the court who are in regular active service. As no

member of the panel and no judge in regular active service on the court requested that the court be polled, the petition for rehearing en banc is denied. *See* Fed. R. App. P. 35(f).

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk