# APPENDIX

## TABLE OF CONTENTS

**APPENDIX A**

[FILED: FEBRUARY 20, 2024]

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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| JOSEPH M. HOSKINS,<br>Plaintiff-Appellant,<br>v.<br>JARED WITHERS;<br>JESS L. ANDERSON,<br>Defendants-Appellees. | No. 22-4081<br>(D.C. No. 2:20-CV-00749-HCN)<br>(D. Utah) |

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Before **BACHARACH**, **PHILLIPS**, and **EID**, Circuit Judges.

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**BACHARACH**, Circuit Judge.

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This appeal grew out of a traffic stop during Mr. Joseph Hoskins's drive through Utah in November 2018. Mr. Hoskins's car had an Illinois license plate, but the lettering was partially obstructed. Though the stop began uneventfully, it quickly escalated when the trooper (Jared Withers) directed a trained narcotics dog to sniff the car. Tempers flared; and Trooper Withers took Mr. Hoskins's

cell phone, pointed a gun at him, applied handcuffs, patted him down, and searched his car. The trooper found a large amount of cash and arrested Mr. Hoskins.

The traffic stop, dog sniff, search, and arrest led Mr. Hoskins to sue Trooper Withers for violating the First and Fourth Amendments.[1] These claims trigger seven issues:

1. **The traffic stop.** The trooper could conduct a traffic stop only if he had reasonable suspicion to believe that Mr. Hoskins had violated Utah law. A Utah law required maintenance of license plates to keep the lettering legible. But did the Utah law apply to license plates issued in other states? We answer *yes*.

2. **Prolonging of the traffic stop.** After stopping the car, the trooper could ask the driver for proof of insurance. But the trooper couldn't prolong the traffic stop to investigate the possibility of a crime. But what happens if the driver couldn't find the proof of insurance? The trooper could ask the driver to look. While the driver was looking could the trooper conduct a dog sniff outside the car? We answer *yes*.

3. **Reasonableness of protective measures during an investigative detention.** After the stop became confrontational, the trooper decided to search the car and detain the driver. At some point, the restraint could elevate the detention into an arrest. But when the driver reacted angrily and positioned his hands in or near his pockets, could the trooper reasonably believe that he wasn't elevating the stop into an arrest when he pointed a gun, handcuffed the driver,

[1] Mr. Hoskins also claimed violation of the state constitution, but these claims aren't at issue.

conducted a patdown, and put the driver in the patrol car? We answer *yes*.

4. **Arguable probable cause to search the car**. A trained narcotics dog's reaction to the presence of drugs can establish probable cause to justify a search of a car. When a trained dog tries to leap into a car, does that reaction create at least arguable probable cause to conduct a search? We answer *yes*.

5. **Arguable probable cause to arrest the driver.** The search led to the discovery of a large amount of cash hidden in the car. Did the trooper obtain arguable probable cause to arrest the driver based on the dog's reaction and the presence of the cash? We answer *yes*.

6. **Lack of a clearly established violation for retaliatory use of force.** We've never held that the Constitution prohibits an officer from pointing a gun at suspects when there's probable cause to believe that they're committing a felony. Given the absence of such a holding, did the trooper violate a clearly established constitutional right by pointing a gun at the driver to retaliate for protected speech? We answer *no*.

7. **Lack of a clearly established violation involving excessive force.** When a serious crime is suspected, we've held that the Fourth Amendment doesn't prohibit a law-enforcement officer from pointing a gun at the suspect. Given that holding, did the trooper violate a clearly established constitutional right by pointing a gun at the driver when he reacted angrily and positioned his hands in or near his pockets? We answer *no*.

Mr. Hoskins also sued Mr. Jess Anderson, Commissioner of the Utah Department of Public Safety, claiming a violation of the Fourteenth Amendment's due process clause. This claim arose after the confrontation between Mr. Hoskins and Trooper Withers. That confrontation resulted in the arrest of Mr. Hoskins, which in turn led to the taking of a DNA sample. Despite the arrest, authorities never charged Mr. Hoskins; so Utah law required destruction of the DNA sample. But Mr. Hoskins allegedly had no way to learn whether authorities had destroyed the DNA sample. Would the alleged inability to verify compliance with state law constitute a denial of due process? We answer *no*.

## Background

### 1. Mr. Hoskins is stopped with a large amount of cash hidden inside his car.

When Trooper Withers conducted the traffic stop, he and Mr. Hoskins looked at the license plate. As they looked, Trooper Withers requested Mr. Hoskins's proof of insurance. Mr. Hoskins said that his insurance information "should be in an email" on his phone, and Trooper Withers asked Mr. Hoskins to sit in the patrol vehicle to answer questions while he looked for the proof of insurance.

In the patrol vehicle, Trooper Withers put Mr. Hoskins's information into a computer. While Mr. Hoskins continued looking for his proof of insurance, Trooper Withers called dispatch and asked for someone to check on the status of the driver's license and the existence of outstanding warrants.

While waiting for dispatch to respond, Trooper Withers took a trained narcotics dog to sniff the outside of Mr. Hoskins's car. During the sniff, the dog leaped and

clawed at the front passenger door and tried twice to enter Mr. Hoskins's car through an open window. Trooper Withers commented that the dog was trying to follow the smell of drugs.

Based on the dog's reaction, Trooper Withers decided to search Mr. Hoskins's car. At Trooper Withers's instructions, Mr. Hoskins got out of the patrol vehicle and put his cell phone on the vehicle's hood.

Trooper Withers said that he was going to search the car and told Mr. Hoskins where to stand. After Mr. Hoskins went to the designated spot, Trooper Withers learned that the driver's license was valid and no outstanding warrants existed.

Trooper Withers walked toward the designated spot. As he approached, he noticed that Mr. Hoskins was holding a second cell phone. Trooper Withers took the cell phone from Mr. Hoskins and turned away. In response, Mr. Hoskins repeatedly cursed at Trooper Withers and positioned his hands in or near his pockets. Trooper Withers quickly turned around, pointed his gun at Mr. Hoskins, and ordered him to keep his hands out of his pockets. The trooper kept the gun pointed for roughly eight seconds as Mr. Hoskins raised his arms.

Trooper Withers then put his gun away, handcuffed Mr. Hoskins, conducted a patdown, and returned him to the patrol vehicle. Trooper Withers and another officer then searched Mr. Hoskins's car. The officers found roughly $89,000 in cash, which was doubled-wrapped in plastic, vacuum sealed, and hidden in the lining between the trunk and a rear seat.

Trooper Withers arrested Mr. Hoskins, and jail personnel collected Mr. Hoskins's DNA. But no one pressed charges, and authorities released Mr. Hoskins.

**2. Mr. Hoskins sues, and the district court dismisses the action.**

Mr. Hoskins sued under 42 U.S.C. § 1983, and the defendants successfully moved to dismiss. The court ruled that

- Trooper Withers hadn't violated the Constitution by making the traffic stop, conducting a dog sniff, pointing a gun, conducting a patdown, applying handcuffs, searching Mr. Hoskins's car, or arresting Mr. Hoskins, and
- Mr. Anderson hadn't violated the Constitution by failing to provide a way to ensure destruction of the DNA sample.

**3. Our de novo review includes consideration of the video.**

We conduct de novo review over the dismissal. *SEC v. Shields*, 744 F.3d 633, 640 (10th Cir. 2014). In conducting this review, we credit "all well-pleaded factual allegations in the . . . complaint" and view the allegations in a light favorable to Mr. Hoskins. *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006) (quoting *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999)). The parties agree, however, that we can also consider the video from Trooper Withers's body camera.

**Issues Involving Trooper Withers**

**1. We decide whether Trooper Withers is entitled to qualified immunity based on a two-part test.**

Because Trooper Withers had asserted qualified immunity, Mr. Hoskins needed to show that (1) the trooper violated a federal statutory or constitutional right and (2) the unlawfulness of the conduct was "clearly

established at the time." *Reichle v. Howards*, 566 U.S. 658, 664 (2012).

When we consider qualified immunity through a motion to dismiss, we apply the plausibility standard set out in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Brown v. Montoya*, 662 F.3d 1152, 1162–63 (10th Cir. 2011). Under *Iqbal* and *Twombly*, the complaint must contain enough allegations of fact to state a facially plausible claim. *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011).

**2. The Fourth Amendment wasn't violated by the traffic stop or dog sniff.**

For the claims involving the traffic stop and dog sniff, the district court reasoned that

- the video from Trooper Withers's body camera had shown reasonable suspicion for the traffic stop and
- the dog sniff had not prolonged the traffic stop.

We agree with these rulings.

**A. The initial traffic stop was justified.**

Mr. Hoskins challenges the traffic stop, arguing that he didn't violate Utah law. But Utah law requires individuals to maintain their license plates in a legible manner, and Mr. Hoskins's license plate was partially obstructed.[2] That obstruction led Trooper Withers to suspect a violation of Utah law. Trooper Withers could conduct a traffic stop if his suspicion had been reasonable. *Swanson v. Town of Mountain View, Colo.*, 577 F.3d 1196,

[2] In the complaint, Mr. Hoskins admitted that the lettering on the license plate was partially obscured. Appellant's App'x at 70.

1201 (10th Cir. 2009). The reasonableness of the suspicion entails an objective inquiry. *Id.*

In conducting that objective inquiry, we regard Trooper Withers's suspicion as reasonable. Utah law requires maintenance of license plates to keep the lettering legible. *See* Utah Code Ann. § 41-1a-404(3)(b)(ii) ("[Every] license plate shall at all times be . . . maintained . . . in a condition to be clearly legible."). A trooper could reasonably suspect a violation because the frame of the license plate was covering part of the lettering of the state (Illinois). Because the state's lettering was partially covered, Trooper Withers had a reasonable basis to suspect a violation of Utah's legibility requirements.

Mr. Hoskins argues that Utah's legibility requirement applies only to license plates issued in Utah. We rejected this argument in *United States v. Echkart*, concluding that a driver had violated Utah law when his California license plate wasn't "clearly visible or legible." 569 F.3d 1263, 1271–72 (10th Cir. 2009).

In *Eckhart*, the defendant hadn't questioned the applicability of the Utah law on drivers from other states. But the Court decided the issue anyway, and we're bound by that decision. *See Wankier v. Crown Equip. Corp.*, 353 F.3d 862, 866 (10th Cir. 2003) (stating that we're bound by a panel's interpretation of state law unless the state's highest court later resolved the issue). Mr. Hoskins's arguments do not allow us to skirt *Eckhart*'s interpretation of Utah law. *Thompson v. Weyeshaeuser Co.*, 582 F.3d 1125, 1130 (10th Cir. 2009); *see also United States v. Baker*, 49 F.4th 1348, 1358 (10th Cir. 2022)

(concluding that the presentation of a new argument doesn't allow us to deviate from a prior panel opinion).[3]

We would follow *Eckhart* even if we were free to consider Mr. Hoskins's argument for limiting the scope of the Utah law. The Utah law does not say anything to restrict the legibility requirement to license plates issued in Utah. To the contrary, the law uses the passive voice, requiring license plates to "be maintained" in a legible condition. Utah Code Ann. § 41-1a-404(3)(b)(ii). The passive voice reflects a statutory focus on how the license plate is maintained—not where it had been issued. *See Dean v. United States*, 556 U.S. 568, 572 (2009) (stating that a use of passive voice reflects a focus on the existence of an event rather than a specific actor's culpability).

We addressed similar statutory language in *United States v. DeGasso*, 369 F.3d 1139 (10th Cir. 2004). There we considered whether Oklahoma's legibility requirement applies when the driver's license plate had been issued in another state. *Id.* at 1145. We concluded that

> • the first paragraph of the Oklahoma statute (directed to the Oklahoma Tax Commission) applied only to vehicles registered in Oklahoma and

[3] Some other circuits also consider panel precedents as binding even when a party presents arguments not made to the prior panel. *See Tippitt v. Reliance Standard Life Ins.*, 457 F.3d 1227, 1234 (11th Cir. 2006) (stating that the court of appeals was bound by panel precedent even when the appellant makes arguments not considered by the prior panel); *Harris v. Epoch Grp.*, 357 F.3d 822, 826 (8th Cir. 2004) (stating that "precedents do not cease to be authoritative merely because counsel in a later case advance a new argument" (quoting *United States v. Hill*, 48 F.3d 228, 232 (7th Cir. 1995))); *In re Penn Central Transp. Co.*, 553 F.2d 12, 15 (3d Cir. 1977) (stating that a precedent controls even when an appellant makes an argument not considered by the prior panel).

> • the second paragraph (mandating that the license plate be "clearly visible at all times") applied regardless of where the license plate had been issued.

*Id.* at 1147. For the second conclusion, we reasoned in part that police officers must identify vehicles regardless of where the license plate had been issued. *Id.*; *accord United States v. Ledesma*, 447 F.3d 1307, 1313 (10th Cir. 2006) (holding that a similar Kansas statute requires legibility of license plates for vehicles driven in Kansas even when licensed in another state); *cf. United States v. Simpson*, 520 F.3d 531, 536 (6th Cir. 2008) (concluding that Tennessee's statutory requirement on legibility applies to out-of-state license plates, in part because the legislative purpose "would surely be frustrated" if drivers from other states could avoid ready identification when driving on Tennessee highways).

Our reasoning in *DeGasso* applies here. Like the Oklahoma statute in *DeGasso*, some subsections of the Utah statute arguably apply only when the license plate is displayed where it was issued. *See, e.g.*, Utah Code Ann. § 41-1a-401(3) (governing the physical characteristics of license plates, such as the reflective material on the plate face, issued to Utah registrants); Utah Code Ann. § 41-1a-402 (regulating the design of Utah-issued license plates). But the provision here bears no such limitation. This provision expressly applies to the maintenance of all license plates on vehicles using Utah roads. Utah Code Ann. § 41-1a-404(3).

Mr. Hoskins argues that even if the license plate had violated Utah law, authorities rarely stopped anyone for a violation. But if Mr. Hoskins had been violating Utah law, it wouldn't matter whether a law-enforcement officer would generally stop someone for a violation. *United*

*States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995) (en banc).[4]

Mr. Hoskins bases his argument on case law involving retaliatory arrests. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019). Under this case law, officers don't incur liability for retaliatory arrest if they had probable cause for the arrest. *Id.* at 1722, 1724. An exception exists when officers wouldn't typically make an arrest even with probable cause. *Id.* at 1727. But Mr. Hoskins doesn't claim retaliatory arrest.

Granted, Mr. Hoskins elsewhere alleges protected speech and denies the existence of probable cause. But these allegations don't bear on a trooper's right to stop a driver for violating Utah's equipment law. *See United States v. Bustillos-Munoz*, 235 F.3d 505, 512 (10th Cir. 2000) (stating that an officer can stop a driver for reasonable suspicion involving violation of a state's equipment law). So Trooper Withers could stop Mr. Hoskins even if Utah drivers had frequently driven with obstructed license plates.

**B. The dog sniff didn't prolong the traffic stop.**

Reasonable suspicion would thus allow Trooper Withers to stop Mr. Hoskins. To carry out the stop, the trooper could check Mr. Hoskins's driver's license, determine whether outstanding warrants existed, and inspect the proof of insurance. *Rodriguez v. United States*, 575 U.S. 348, 355 (2015). But Trooper Withers

[4] There we said that "[i]t is irrelevant, for purposes of Fourth Amendment review, 'whether the stop in question is sufficiently ordinary or routine according to the general practice of the police department or the particular officer making the stop.'" *Botero-Ospina*, 71 F.3d at 787 (quoting *United States v. Ferguson*, 8 F.3d 385, 391 (6th Cir. 1993)).

couldn't prolong the traffic stop to investigate the possibility of a crime. *Id.* at 353–55.

Mr. Hoskins argues that Trooper Withers prolonged the traffic stop by conducting the dog sniff. We disagree. Trooper Withers didn't begin the dog sniff until he had already asked dispatch to check on warrants for Mr. Hoskins and the status of his driver's license. And when Trooper Withers finished the dog sniff, Mr. Hoskins was still looking for his proof of insurance and dispatch had not yet reported on the existence of outstanding warrants or the status of the driver's license.[5] So the dog sniff did not extend the time of the traffic stop.

We addressed similar circumstances in *United States v. Cates*, 73 F.4th 795 (10th Cir. 2023), *cert. pet. filed*, No. 23-5903 (U.S. Oct. 27, 2023). There a state trooper had stopped a motorist for speeding in a rental car. *Id.* at 799–800. The trooper asked for the rental contract, and the driver looked for it. While he looked, the trooper told another officer to conduct a dog sniff. The second officer finished the dog sniff before the driver could find his rental contract. *Id.* at 807. We thus concluded that the dog sniff hadn't prolonged the traffic stop. *Id.* at 804.

Under *Cates*, Trooper Withers's dog sniff did not prolong Mr. Hoskins's traffic stop. In *Cates*, the driver was still looking for the rental contract when the dog sniff ended. And here, the trooper finished the dog sniff while Mr. Hoskins was still looking for his proof of insurance. In both *Cates* and our case, the traffic stop would have taken the same amount of time with or without the dog sniff. *See United States v. Mayville*, 955 F.3d 825, 833 (10th Cir. 2020) ("Because the dog sniff and alert were

[5] In the complaint, Mr. Hoskins alleged that the dog sniff had taken about a minute. Appellant's App'x at 83 ¶ 51.

contemporaneous with the troopers' reasonably diligent pursuit of the stop's mission, the subsequent search . . . did not violate [the defendant's] Fourth Amendment rights.").

Mr. Hoskins questions the applicability of *Cates*, arguing that Trooper Withers waited too long to contact dispatch. But even if Trooper Withers had contacted dispatch earlier, the traffic stop would have taken just as long because Mr. Hoskins would still have been looking for his proof of insurance. So even if the trooper had contacted dispatch earlier, the dog sniff wouldn't have prolonged the traffic stop.[6]

**3. Asking Mr. Hoskins to sit in the patrol car did not turn the detention into an arrest.**

Mr. Hoskins argues that when he was forced to sit in the patrol car, the stop escalated into an arrest. We disagree. A stop doesn't escalate into an arrest if the detention is reasonably related to the circumstances justifying the stop. *United States v. Muldrow*, 19 F.3d 1332, 1335–36 (10th Cir. 1994).

The video shows that

- Mr. Hoskins needed to look on his cell phone for his proof of insurance and
- Trooper Withers ultimately called dispatch from the patrol car.

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[6] Mr. Hoskins also alleges that the trooper delayed the stop by asking questions unrelated to the equipment violation. "But an officer's mission during a traffic stop is not limited to determining whether to issue a ticket." *United States v. Cone*, 868 F.3d 1150, 1153 (10th Cir. 2017). And Mr. Hoskins doesn't say which questions were problematic or why those questions exceeded the scope of the trooper's mission. We thus lack a meaningful argument to consider.

In these circumstances, Trooper Withers could reasonably maintain safety by asking Mr. Hoskins to sit in the patrol car.

Many other circuits have concluded that an order to sit in a police car doesn't automatically turn a detention into an arrest. *See United States v. Bradshaw*, 102 F.3d 204, 211 (6th Cir. 1996) ("Detention in a police car does not automatically constitute an arrest."); *United States v. Rodriguez*, 831 F.2d 162, 166 (7th Cir. 1987) (concluding that detention in a patrol car did not turn the seizure into an arrest); *United States v. Martinez*, 462 F.3d 903, 908 (8th Cir. 2006) (concluding that placement of the driver in a patrol car did not turn a traffic stop into an arrest); *United States v. Parr*, 843 F.2d 1228, 1230 (9th Cir. 1988) ("Certainly, there is no per se rule that detention in a patrol car constitutes an arrest."). These cases make sense here. Trooper Withers asked Mr. Hoskins to sit in the patrol car, and Mr. Hoskins complied with the request. By asking Mr. Hoskins to join him in the patrol car, Trooper Withers was continuing to carry out the mission of the traffic stop. We thus conclude that the trooper didn't turn the traffic stop into an arrest by asking Mr. Hoskins to sit in the patrol car.

**4. The dog's reaction created arguable probable cause to search the car.**

Trooper Withers and another officer searched Mr. Hoskins's car. For that search, the officers needed probable cause to believe that the car contained contraband. *United States v. Benard*, 680 F.3d 1206, 1210 (10th Cir. 2012). But even if the officers had lacked probable cause, they would incur personal liability only if they had violated a clearly established right. *Camreta v. Greene*, 563 U.S. 692, 705 (2011); *see* p. 7, above.

Though the district court didn't rely on the absence of a clearly established right, we can affirm on any ground adequately supported by the record. *Elkins v. Comfort*, 392 F.3d 1159, 1162 (10th Cir. 2004). In deciding whether to consider affirmance on a different ground, we address

- whether the issue was briefed in district court and on appeal,
- whether the issue is legal or factual, and
- whether the record is adequately developed.

*Id.* at 1162.

The issue was fully briefed in district court and on appeal, and the clearly established nature of a right entails a question of law. *Garrett v. Stratman*, 254 F.3d 946, 951 (10th Cir. 2001). On that legal question, the district court was bound by the allegations in the complaint and the video from Trooper Withers's body camera. *See* p. 6, above. So the record was fully developed. We thus exercise our discretion to consider Trooper Withers's argument that any constitutional violation wouldn't have been clearly established.

We ordinarily consider a right clearly established only "when it's apparent from a precedent or the clear weight of authority from other courts." *Williams v. Hansen*, 5 F.4th 1129, 1132 (10th Cir. 2021). But even without an applicable precedent or consensus of case law, a right can be clearly established when it is obvious. *Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020) (per curiam).

We determine whether Trooper Withers violated a clearly established right by considering whether probable cause was at least arguable. *Stonecipher v. Valles*, 759 F.3d 1134, 1142 (10th Cir. 2014). Probable cause was arguable if Trooper Withers had an objectively

reasonable belief that probable cause existed (even if that belief was mistaken). *Id.* In our view, Trooper Withers could reasonably believe that the dog sniff had created probable cause.

A trained narcotics dog can react to drugs through either an *alert* or an *indication*. An *alert* takes place when the dog reacts to a known odor by changing body posture and increasing respiration. *United States v. Forbes*, 528 F.3d 1273, 1275 n.3 (10th Cir. 2008). An *indication* involves other behavioral changes that show the precise location of the drugs. *Id.* For example, a dog might signal the location of the drugs by staring, sitting, scratching, biting, or barking. *Id.*

A trained narcotics dog's *alert* or an *indication* is enough to create probable cause for a search. *See United States v. Parada*, 577 F.3d 1275, 1281 (10th Cir. 2009). So we must assess the objective reasonableness of Trooper Withers's belief that the dog had alerted or indicated. For that determination, we credit the allegations in the complaint. *See* p. 6, above. But the parties agree that we can supplement those allegations with the video of the dog sniff. *See* p. 6, above.

The video shows that the dog tried twice to leap into an open window. After the first effort, Trooper Withers commented that the dog was "following an odor right into the car." Bodycam 2:37:45, 2:37:55. After the dog tried again to leap into the car, the trooper said that he regarded the dog's behavior as an *indication*. Bodycam 2:38:00. Even if the trooper had been wrong, however, his characterization was at least reasonable because the dog had tried to leap into the car's open window.

When the dog sniff took place, we had characterized similar reactions from trained narcotics dogs as enough for probable cause. *See United States v. Parada*, 577 F.3d

1275, 1281 (10th Cir. 2009) (upholding the district court's finding that a dog had *alerted* when it stiffened, breathed heavily, and tried to jump into the window on the driver's side); *United States v. Woods*, 351 F. App'x 259, 263 (10th Cir. 2009) (unpublished) (stating that a dog had *alerted* when it stopped twice to smell a particular spot and stuck its head into the window on the passenger side); *United States v. Gavilanas-Medrano*, 479 F. App'x 166, 171 (10th Cir. 2012) (unpublished) (upholding the finding of an *alert* when a dog had stood on its hind legs and sniffed along the seam of the windshield and hood).[7]

Mr. Hoskins questions the significance of the dog's second effort to leap into the car, downplaying the significance of the reaction and arguing that Trooper Withers had given an audible command for the dog to react.[8] The video does show that the trooper made a sound before the dog tried to leap into the car for a second time. But before the trooper made this sound, the dog had already tried to leap into the car's open window. So probable cause was at least arguable even if we disregard the dog's second effort to leap into the car.

**5. Trooper Withers didn't violate a clearly-established right by conducting protective measures prior to the search.**

Though Trooper Withers had arguable probable cause to search the car, he doesn't suggest that he had enough information to make an arrest until he searched

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[7] Though two of these cases aren't precedential, they show that a trooper could reasonably infer probable cause from the dog's reaction. *See Grissom v. Roberts*, 902 F.3d 1162, 1168 (10th Cir. 2018) ("[A]n unpublished opinion can be quite relevant in showing that the law was *not* clearly established." (emphasis in original)).

[8] Mr. Hoskins doesn't allege in the complaint that the trooper gave a command for the dog to react.

the car. So the timing of the arrest matters. Mr. Hoskins alleges that he had been arrested prior to the search of his car; Trooper Withers argues that he didn't make the arrest until after he had conducted the search.

The required probable cause differs for search of a car and for an arrest. For an arrest, probable cause exists when reasonably trustworthy sources alert an officer to facts and circumstances that would warrant a person of reasonable caution to believe that an offense has been committed or is being committed. *Romero v. Fay*, 45 F.3d 1472, 1476 (10th Cir. 1995). For a car search, probable cause exists if the totality of the circumstances create a fair probability that the car contains contraband or evidence of a crime. *United States v. Nielsen*, 9 F.3d 1487, 1489–90 (10th Cir. 1993).

We can assume, for the sake of argument, that Mr. Hoskins is correct in alleging an arrest prior to the search of his car. Even with this assumption, Trooper Withers asserts qualified immunity, arguing that the case law wouldn't have clearly established the escalation of his investigative detention into an arrest.

Though the district court didn't address this argument, it was fully briefed here and in district court. And the issue is legal, rather than factual, without the need for any further development of the record. So we can address Trooper Withers's argument to affirm based on the lack of a clearly established right. *See* p. 17, above.

We assess the clarity of the right based on the line between an investigative detention and arrest. Drawing that line is fact-intensive without the benefit of bright-line rules. *See Hemry v. Ross*, 62 F.4th 1248, 1254 (10th Cir. 2023) ("We conduct a fact-intensive inquiry to distinguish between arrests and *Terry* stops."); *United States v. Neff*, 300 F.3d 1217, 1220 (10th Cir. 2002) ("The allowable scope

of an investigative detention cannot be determined by reference to a bright-line rule[.]"). Instead of a bright-line rule, we ask whether a reasonable officer could consider the restraints to fall within the scope of detention. *Manzanares v. Higdon*, 575 F.3d 1135, 1150 (10th Cir. 2009).

On this question, Mr. Hoskins needed to show clear establishment of "an unconstitutional arrest as opposed to a lawful investigative detention." *Soza v. Demsich*, 13 F.4th 1094, 1100–01 (10th Cir. 2021). To satisfy this burden, Mr. Hoskins alleges escalation of the restraint by taking his second cell phone, pointing a gun, applying handcuffs, conducting a patdown, and putting him in the patrol car.[9]

Mr. Hoskins points out that without the cell phone, he couldn't record the encounter. But he doesn't otherwise suggest that confiscation of the cell phone would have elevated the encounter into an arrest. And he didn't suggest in district court that the confiscation of his cell phone would have elevated the detention into an arrest.

After Trooper Withers took the second cell phone, Mr. Hoskins reacted angrily and cursed. Trooper Withers turned around and saw Mr. Hoskins with his hands in or near his pockets. At this point, Trooper Withers could reasonably fear that Mr. Hoskins was going to pull out a handgun.

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[9] Trooper Withers told Mr. Hoskins that he was being detained, not arrested. But the trooper's statement isn't dispositive. *See Cortez v. McCauley*, 478 F.3d 1108, 1117 n.8 (10th Cir. 2007) (en banc) (stating that the law-enforcement officers' subjective beliefs were irrelevant when they told a suspect that he was not being arrested); *accord United States v. Jackson*, 377 F.3d 715, 717 (7th Cir. 2004) (concluding that a similar statement by a police officer doesn't matter because the inquiry under the Fourth Amendment is objective).

Until then, the encounter had proceeded without incident: The two men had looked at the license plate, discussed the legal requirement for unobstructed license plates, and sat together in the patrol car. But the encounter escalated with the dog sniff, as Mr. Hoskins snapped at the trooper. At this point, Mr. Hoskins had not been patted down.[10] Trooper Withers could thus believe that he needed to act quickly, pointing a gun at Mr. Hoskins in case he was reaching for his own gun.

As Trooper Withers pointed his gun, he told Mr. Hoskins to remove his hands from his pockets. Mr. Hoskins complied, raising his hands; Trooper Withers put his gun away and applied handcuffs. Mr. Hoskins alleges that even if pointing the gun hadn't elevated the detention into an arrest, the handcuffing would have done so.

For this allegation, our case law wouldn't have provided clear guidance to Trooper Withers. Many of our opinions stated that handcuffing a suspect hadn't elevated a detention into an arrest. *United States v. Merkley*, 988 F.2d 1062, 1063–64 (10th Cir. 1993); *United States v. Neff*, 300 F.3d 1217, 1218–21 (10th Cir. 2002); *United States v. Albert*, 579 F.3d 1188, 1191, 1193–95 (10th Cir. 2009); *United States v. Salas-Garcia*, 698 F.3d 1242, 1249–52 (10th Cir. 2012). Of course, we had also held the opposite many times. *United States v. Melendez-Garcia*, 28 F.3d 1046, 1051–53 (10th Cir. 1994); *Manzanares v. Higdon*,

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[10] In the complaint, Mr. Hoskins pointed out that he had lifted his shirt to reveal his waistband. Appellant's App'x at 88 ¶ 96(a). Though he didn't have a weapon in his waistband, he could have had a weapon in his pockets or socks. So a reasonable officer could have believed that a patdown was necessary to prevent the possibility that Mr. Hoskins was carrying a weapon in his pockets or socks. *See United States v. Belin*, 868 F.3d 43, 50–51 (1st Cir. 2017) (concluding that a frisk was permissible because the suspect's clothing prevented the officer from visually determining whether the suspect had a firearm).

575 F.3d 1135, 1148–49 (10th Cir. 2009); *Lundstrom v. Romero*, 616 F.3d 1108, 1122–23 (10th Cir. 2010).

From our cases, "any reasonable officer would understand that it [was] unconstitutional to handcuff someone absent probable cause or an articulable basis to suspect a threat to officer safety combined with reasonable suspicion." *Manzanares*, 575 F.3d at 1150. But our case law wouldn't have provided Trooper Withers with an easy benchmark to assess the seriousness of the threat. *See Merkley*, 988 F.2d at 1064 (stating that our case law has "eschewed" "bright-line standards" on when handcuffing would elevate a detention into an arrest). So even if the handcuffing had elevated the detention into an arrest, the violation wouldn't have been clearly established.

After Mr. Hoskins was handcuffed, he was patted down. Trooper Withers could view the patdown as a necessary safeguard during the search of the car. To conduct the patdown, Trooper Withers needed only a "minimum level of objective justification," which could fall below the threshold for probable cause or a preponderance of the evidence. *United States v. Rice*, 483 F.3d 1079, 1083 (10th Cir. 2007) (quoting *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1260 (10th Cir. 2006), and *United States v. Arvizu*, 534 U.S. 266, 274 (2002)). Before Trooper Withers conducted the patdown, he had seen Mr. Hoskins reacting angrily with his hands positioned near or in his pockets. In these circumstances, a trooper could reasonably view the patdown as a necessary safeguard to ensure that Mr. Hoskins wasn't carrying a weapon while the officers searched the car.

After conducting the patdown, Trooper Withers needed to participate in the search, diverting his focus from Mr. Hoskins. So Trooper Withers put Mr. Hoskins

in the patrol car. As noted earlier, courts had often held that placement in a patrol car wouldn't automatically turn a detention into an arrest. See pp. 15–16. So any violation at this step wouldn't have been clearly established.

We may assume for the sake of argument that the combination of measures turned the detention into an arrest. But a reasonable trooper could easily have found such a conclusion far from obvious based on our case law. In analogous circumstances, we upheld qualified immunity for the officer in *Soza v. Demsich*, 13 F.4th 1094, 1099–1104 (10th Cir. 2021). There the officer had pointed a gun at the suspect, patted him down, and applied handcuffs. *Id.* at 1098, 1100 n.2. Though we had elsewhere held that the measures turned the detention into an arrest, we upheld qualified immunity for the officers because the facts cut both ways on the likelihood of a danger to the officers, the plaintiff hadn't identified a "sufficiently on-point case" to render a constitutional violation clearly established, and the district court and prior Tenth Circuit panel had differed on the reasonableness of the protective measures. *Id.* at 1101–1104.

The facts cut both ways here, too, and Mr. Hoskins hasn't identified a prior case recognizing a constitutional violation in similar circumstances. He has cited cases recognizing that unreasonable force ordinarily turns an investigative detention into an arrest. Appellant's Opening Br. at 40 n.191. But he does not suggest that the facts in those cases resemble the facts here. And Trooper Withers pointed a gun, applied handcuffs, and conducted a patdown only after he had seen Mr. Hoskins reacting angrily with his hands positioned in or near his pockets. In these circumstances, a trooper could reasonably regard the protective measures as necessary to ensure

safety. We thus affirm the dismissal of this claim based on the absence of a clearly established right.

**6. In pointing a gun, Trooper Withers didn't violate a clearly established right against retaliation or excessive force.**

Mr. Hoskins claims that the trooper violated the First and Fourth Amendments by pointing the gun. For the First Amendment claim, Mr. Hoskins alleges that the trooper was retaliating for protected speech (cursing at the trooper and complaining that he had allowed the dog to scratch the car). For the Fourth Amendment claim, Mr. Hoskins alleges that pointing the gun constituted excessive force.[11] The district court ruled that the trooper hadn't violated either constitutional amendment by pointing the gun at Mr. Hoskins. Mr. Hoskins challenges these rulings, and Trooper Withers defends the rulings and argues in the alternative that any constitutional violation wouldn't have been clearly established. We address Trooper Wither's alternative argument because it is fully briefed, legal, and adequately developed. *See* p. 17, above.

**A. A violation of the First Amendment wouldn't have been clearly established.**

To determine whether the right was clearly established, we consider the allegations in the complaint and what we can see from the video. *See* p. 6, above. The video shows that Trooper Withers pointed his gun at Mr. Hoskins for roughly eight seconds, and Mr. Hoskins attributes the pointing of the gun to the trooper's anger for the cursing and complaints about the dog sniff. We can assume for the sake of argument that the cursing and

[11] Mr. Hoskins also alleged that he had been shoved. But he doesn't argue on appeal that the shoving constituted excessive force.

complaints constituted protected speech. Even with this assumption, however, we had no precedents finding a First Amendment violation when an officer points a gun at a suspect to retaliate for protected speech.[12]

Even if Trooper Withers had scoured the case law, he might reasonably have concluded that the First Amendment wouldn't prevent him from pointing his gun at Mr. Hoskins in the face of his cursing and complaints. We addressed a similar issue in *Frey v. Town of Jackson, Wyo.*, 41 F.4th 1223 (10th Cir. 2022). There the plaintiff alleged that a law-enforcement officer had unnecessarily applied a wristlock in the Spring of 2018 to retaliate for protected speech. *Id.* at 1230, 1235. We concluded that the officer had qualified immunity based on the absence of any case law that would clearly establish a First Amendment violation from the retaliatory use of force. *Id.* at 1235–36.[13]

We decided *Frey* in 2022, years after the encounter between Trooper Withers and Mr. Hoskins. But *Frey* analyzed the clarity of our case law as of the Spring of 2018, which preceded Trooper Withers's traffic stop by only a few months. Though Trooper Withers didn't have the benefit of *Frey* when he made the traffic stop, our opinion shows that only a few months before Mr. Hoskins was stopped, a retaliatory use of force hadn't been clearly established as a First Amendment violation. We thus affirm the dismissal of this claim based on the absence of

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[12] When the incident took place, one circuit had held that a retaliatory use of force can violate the First Amendment. *See Coady v. Steil*, 187 F.3d 727, 733–34 (7th Cir. 1999).

[13] Trooper Withers doesn't cite *Frey*, but we must consider "all relevant case law." *Williams v. Hansen*, 5 F.4th 1129, 1133 (10th Cir. 2021); *see Elder v. Holloway*, 510 U.S. 510, 516 (1994).

a clearly established protection against a retaliatory use of force.[14]

**B. A violation of the Fourth Amendment wouldn't have been clearly established.**

We also uphold the dismissal of Mr. Hoskins's claim under the Fourth Amendment. This claim involves the use of excessive force when the trooper pointed a gun at Mr. Hoskins for roughly eight seconds. Of course, we've found excessive force when officers shoot unarmed and unthreatening suspects. *E.g.*, *Finch v. Rapp*, 38 F.4th 1234, 1243 (10th Cir. 2022). But not when an officer points a gun at a suspect. To the contrary, we've held that the force isn't excessive under the Fourth Amendment when an officer points a gun at an adult suspected of a serious crime. *Henry v. Storey*, 658 F.3d 1235, 1239–41 (10th Cir. 2011).

If Trooper Withers had scoured the case law, he might reasonably have concluded that pointing the gun wouldn't be excessive. We had no precedents finding excessive force when a law-enforcement officer points a gun at a suspect for a matter of seconds, and a trained dog had already alerted to the odor of illegal drugs in the car.

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[14] Mr. Hoskins relies on a Supreme Court opinion post-dating the traffic stop: *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019). In *Nieves*, the Supreme Court held that a retaliatory arrest doesn't trigger liability when probable cause existed. *Id.* at 1723. Following *Nieves*, two circuits have held that a law-enforcement officer enjoys qualified immunity for retaliatory arrest when probable cause is at least arguable. *Novak v. City of Parma, Ohio*, 33 F.4th 296, 305 (6th Cir. 2022); *Nieters v. Holtan*, 83 F.4th 1099, 1109–10 (8th Cir. 2023). And we conclude below that probable cause was at least arguable. *See* pp. 31–34, below. But we need not determine whether arguable probable cause would trigger qualified immunity on the retaliation claim because there was no clearly established protection against a retaliatory use of force.

And before the trooper drew his gun, the suspect was cursing with his hands near or in his pockets.[15] Given these circumstances, reasonable law-enforcement officers could reasonably believe that the Fourth Amendment would allow them to point a gun at the suspect for roughly eight seconds.

Mr. Hoskins also contends that the situation became volatile only because Trooper Withers had escalated the conflict by shoving Mr. Hoskins and pointing the gun. But in district court and on appeal, Mr. Hoskins doesn't cite any pertinent case law or explain how a reasonable officer should have recognized a constitutional violation from the shove or display of a gun. We thus uphold the dismissal of the Fourth Amendment claim based on the absence of a clearly established violation. *See Cummings v. Dean*, 913 F.3d 1227, 1243 (10th Cir. 2019) (concluding that the plaintiff's failure to identify a factually similar precedent is fatal in qualified immunity).

**7. The search yielded arguable probable cause for an arrest.**

With Mr. Hoskins secured, Trooper Withers and another officer searched the lining between the trunk and back seat and found $89,000 in cash, double-wrapped in plastic and vacuum sealed. Trooper Withers then arrested Mr. Hoskins.

Mr. Hoskins challenges the lawfulness of the arrest. The arrest would have been lawful only if probable cause existed. *United States v. Traxler*, 477 F.3d 1243, 1246 (10th Cir. 2007). Probable cause for an arrest would exist if Trooper Withers had reasonably trustworthy information that would lead a prudent person to believe

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[15] The trooper had seen Mr. Hoskins's waistband, but had not done a patdown. *See* note 10, above.

that Mr. Hoskins was committing a crime or had already committed one. *See* p. 20, above. For the sake of argument, we can assume that probable cause didn't exist when Mr. Hoskins was arrested. Even with this assumption, Trooper Withers urges us to affirm on the ground that any constitutional violation would not have been clearly established. We consider this argument because it's fully briefed, legal, and adequately developed. *See* p. 17, above.

A violation wouldn't be clearly established if probable cause had been at least arguable. *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014). Probable cause would have been arguable if reasonable troopers could have believed that probable cause existed. *Id.*

Based on the video, reasonable troopers could believe that they had probable cause to arrest Mr. Hoskins based on

- the presence of roughly $89,000 in cash that had been double-wrapped, vacuum sealed, and hidden in the car's lining and
- the dog's leaps when sniffing the car.

Mr. Hoskins argues that a large amount of cash wouldn't be enough, in itself, for probable cause. But even if a lot of cash weren't enough in itself, the amount did provide strong evidence of a connection to the drug trade. *See United States v. One Hundred Forty-Nine Thousand Four Hundred Forty-Two & 43/100 Dollars ($149,442.43/100)*, 965 F.2d 868, 876–77 (10th Cir. 1992);[16]

[16] In district court and on appeal, Mr. Hoskins relies solely on this opinion for the point that a large amount of currency isn't alone sufficient for probable cause. The opinion does state that "a large amount of hidden currency in itself is not enough to establish that the

*accord United States v. Thirty-Nine Thousand Eight Hundred Seventy-Three and No/100 Dollars ($39,873.00)*, 80 F.3d 317, 319 (8th Cir. 1996) (recognizing "that possession of a large amount of cash (here, nearly $40,000) is strong evidence that the cash is connected with drug trafficking"); *United States v. Brooks*, 594 F.3d 488, 495 (6th Cir. 2010) ("Courts have readily acknowledged that large sums of cash are indicative of the drug trade[.]"). There wasn't just a lot of money; it was double-wrapped, vacuum sealed, and hidden in the car's lining.

It's possible, of course, that Mr. Hoskins was hiding the cash to protect against theft. But given the way that the cash was packed and hidden, Trooper Withers could doubt an innocent explanation. *See United States v. Orozco*, 41 F.4th 403, 407–09 (4th Cir. 2022) (stating that "innocent explanations seem unlikely" when $111,252 had been wrapped in grocery bags and stashed in a hidden compartment). After all, "[i]t is common for [currency related to illegal drug transactions] to be wrapped in cellophane so as to minimize the ability for a drug-sniffing dog to detect the drug residue often found on such currency, and to secrete it in a hidden area of a vehicle to escape detection." *United States v. Reed*, 443 F.3d 600, 604 (7th Cir. 2006).

A reasonable officer could thus consider the vacuum sealed double-wrapping as an effort to conceal the odor of narcotics. This possibility could appear more likely when the dog jumped while sniffing the car. *See United States*

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money was furnished or was intended to be furnished in return for drugs[.]" 965 F.2d at 877. But the Court went on to conclude that the large amount of hidden currency "is strong evidence of . . . an illicit connection to drug trafficking." *Id.* The Court thus included the "unusually large amount of hidden currency" as a factor contributing to "probable cause." *Id.*

*v. Klinginsmith*, 25 F.3d 1507, 1510 (10th Cir. 1994) (recognizing probable cause for an arrest when a dog alerted to the outside of a car); *United States v. Anchondo*, 156 F.3d 1043, 1045 (10th Cir. 1998) (same).

Mr. Hoskins explains that he hid the money to prevent theft. But an officer wasn't compelled to credit this explanation for concealment of the money in the car's lining. *See United States v. Reed*, 443 F.3d 600, 604 (7th Cir. 2006) (concluding that concealment of a large amount of cash contributed to probable cause for an arrest even though the cash might have been hidden to prevent theft).

Mr. Hoskins also points out that after the dog alerted, there were no drugs found in the car. But a trooper could reasonably infer from the dog's reaction that the currency had been near illegal drugs. *See United States v. Saccoccia*, 58 F.3d 754, 778 (1st Cir. 1995) ("Ordinary experience suggests that currency used to purchase narcotics is more likely than other currency to have come into contact with drugs.").

Based on the large amount of cash, its wrapping and concealment, and the dog's leaps, Trooper Withers had at least arguable probable cause, triggering qualified immunity on the claim of an unlawful arrest.

**Issues Involving the DNA Sample**

After Mr. Hoskins was arrested, he gave a DNA sample. But authorities never charged Mr. Hoskins with a crime. Under Utah law, authorities had an obligation to destroy the DNA sample. Utah Code Ann. § 53-10-406(1)(i) (2011).[17] But Mr. Hoskins allegedly lacks any way of knowing whether authorities destroyed the sample. So he sued for denial of due process.

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[17] This section has been renumbered § 53-10-406(1)(h) (2022).

For this claim, Mr. Hoskins alleges the right to a procedure that ensures the destruction of his DNA sample. Granted, the Fourteenth Amendment's due process clause limits a state's ability to take away entitlements. *Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 67 (2009). These entitlements can come from either the Due Process Clause itself or state law. *Kentucky Dep't of Corrs. v. Thompson*, 490 U.S. 454, 460 (1989). But neither the Due Process Clause nor state law creates such an entitlement.

Mr. Hoskins relies on the constitutional right of privacy. But the Due Process Clause does not provide individuals with a freestanding right to their DNA evidence. *See Dist. Att'y's Off. for Third Jud. Dist.*, 557 U.S. at 72 (concluding that the Fourteenth Amendment's due process clause doesn't entitle defendants to evidence of their own DNA to prove factual innocence); *see also Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1996) (upholding the constitutionality of a statute conditioning discretionary parole on collection of DNA).

In the absence of an underlying substantive right, the Fourteenth Amendment's due process clause doesn't create a protected interest in procedure alone. *Teigen v. Renfrow*, 511 F.3d 1072, 1081 (10th Cir. 2007). We addressed a similar issue in *Stein v. Disciplinary Board of Supreme Court of New Mexico*, 520 F.3d 1183 (10th Cir. 2008). There the plaintiffs claimed "a vested interest and confidence that the rules of procedure would be followed." *Id.* at 1192. We rejected this claim based on the lack of a constitutionally protected liberty or property interest. *Id.* We reasoned that due process protects a substantive interest rather than serve as an end in itself. *Id.* Likewise, Mr. Hoskins's desire for procedural safeguards does not trigger a liberty or property interest.

Mr. Hoskins disagrees, asserting a substantive interest under state law. But he hasn't identified a state law that creates an entitlement. Instead, Mr. Hoskins argues that state law should provide a procedure to ensure the destruction of his DNA. This argument for a change in state law reflects the absence of a protected interest. *See Elliot v. Martinez*, 675 F.3d 1241, 1244 (10th Cir. 2012). The district court thus didn't err in dismissing the due process claim.

**Conclusion**

The district court acted correctly in dismissing the action.

With the gloss of the video, Trooper Withers was entitled to stop Mr. Hoskins and conduct a dog sniff. The dog sniff created at least arguable probable cause to search the car. The car's license plate was partially obstructed, and the video shows that a trooper could reasonably believe that the dog had reacted to the odor of drugs. The resulting search yielded roughly $89,000 that was double-wrapped, vacuum packed, and hidden in the lining of the car. These circumstances created at least arguable probable cause to arrest Mr. Hoskins.

The trooper also pointed a gun at Mr. Hoskins for roughly eight seconds. We don't need to decide whether this action involved retaliation or excessive force. Even if the conduct had been retaliatory or excessive, the violation wouldn't have been clearly established.

After pointing a gun, the trooper applied handcuffs, conducted a patdown, and placed Mr. Hoskins in the patrol car. But Mr. Hoskins had been acting angrily with his hands near or in his pockets. So the trooper didn't violate a clearly established right by taking protective measures before searching the car.

Finally, Mr. Hoskins lacked a protected interest in a procedure that would ensure the destruction of his DNA sample.

**APPENDIX B**

[FILED: AUGUST 18, 2022]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

| | |
|---|---|
| JOSEPH M. HOSKINS,<br>Plaintiff,<br>v.<br>JARED WITHERS, and JESS L. ANDERSON,<br>Defendants. | Case No. 2:20-cv-749<br>Howard C. Nielson, Jr.<br>United States District Judge |

**MEMORANDUM DECISION AND ORDER**

Plaintiff Joseph Hoskins sues Utah Highway Patrol Officer Jared Withers and Jess Anderson, Commissioner of the Utah Department of Public Safety, alleging violations of the First and Fourth Amendments as well as the corresponding provisions in the Utah Constitution. He also asserts a Fourteenth Amendment due process claim on behalf of himself and a putative class of similarly situated individuals. Officer Withers claims qualified immunity and both Defendants move to dismiss all claims. The court grants this motion.

**I.**

On November 13, 2018, Mr. Hoskins was driving westbound on I-80 in Toole County, Utah. *See* Dkt. No. 17 ¶¶ 8–9.[1] After observing Mr. Hoskins' vehicle, Officer Withers initiated a traffic stop. *See id.* ¶¶ 10–13.

[1] These facts are taken from the Amended Complaint, *see* Dkt. No. 17, as well as Officer Withers' body camera footage, *see* Dkt. No. 12, which is cited in the Amended Complaint, *see* Dkt. No. 17 at ¶ 20.

Immediately after pulling Mr. Hoskins over, Officer Withers called the plate number into dispatch, stating "I believe it's AZ39390 Illinois." *Id.* ¶ 16. Officer Withers then exited the vehicle, approached Mr. Hoskins, and informed him that he had been stopped because his license plate frame obscured the name of the issuing state. *See id.* ¶ 19–20. Mr. Hoskins produced his driver's license and exited the vehicle to examine the plate with Officer Withers. *See id.* ¶¶ 20–23. Pictures taken during the stop and later included in the complaint show that "Illinois" is almost completely obscured by the frame with only the very bottom of each letter visible. *See id.* at 8. Mr. Hoskins explained that he had received the car like this from the dealer. *See id.* ¶ 33. Officer Withers commented that it was "[n]ot a huge deal" and asked for Mr. Hoskins' registration and insurance information. *Id.* Mr. Hoskins provided the registration and began looking for his insurance information on his phone. *See id.* ¶¶ 33, 37–38. While Mr. Hoskins was looking for this information, Officer Withers asked Mr. Hoskins where he was headed and what his plans were; Mr. Hoskins responded that he was headed to Reno to gamble. *See id.* ¶¶ 37–38. With Mr. Hoskins still unable to find the insurance information, Officer Withers asked Mr. Hoskins to sit with him in the patrol car while Mr. Hoskins looked for the insurance information. *See id.* ¶ 38.

On their way to the patrol car, Officer Withers asked Mr. Hoskins if he was armed and if he could lift his shirt and show his waist band. *See id.* ¶ 40. Mr. Hoskins stated that he was not armed and complied with this request. *See id.* ¶ 41; Dkt. No. 12 at 2:34:15–21. Before entering the vehicle, Officer Withers commented to his body camera that Mr. Hoskins "was shaking really bad, breathing heavy." Dkt. No. 12 at 2:34:20. The two then sat in the front seats of the patrol car. *See* Dkt. No. 17 ¶ 42.

Officer Withers began entering Mr. Hoskins' information into his computer to prepare a citation and, while he was doing this, asked Mr. Hoskins more questions relating to his employment status and travel plans. *See id.* ¶¶ 43–45. Officer Withers then called Mr. Hoskins' information into dispatch and asked that a driver's license and warrant check be completed. *See id.* ¶ 46. While waiting for dispatch to complete the check, Officer Withers then instructed Mr. Hoskins to "hang tight" and proceeded to retrieve his police canine. *Id.* ¶¶ 47, 49.

Officer Withers took the dog to Mr. Hoskins' car and made "three passes of the driver's side, five passes of the front side, two passes of the rear of the vehicle, and two passes of the passenger side." *Id.* ¶¶ 50–52. The dog sniff lasted fewer than 90 seconds. *See* Dkt. No. 12 at 2:36:45–2:38:10. During the sniff, the dog twice tried to enter the vehicle through the passenger window. *See* Dkt. No. 17 ¶¶ 53–54. After the first attempt, Officer Withers commented to his body camera that "he's just following an odor right into the car." Dkt. No. 12 at 2:37:50. When the dog tried to enter a second time, Officer Withers stated: "OK, I'm going to call that an indication, he keeps trying to jump in the window." *Id.* at 2:37:55. At this point, dispatch had not yet responded with the results of the license and warrant check.

Officer Withers then returned the dog to the car and explained to Mr. Hoskins that the dog was trying to go after a drug odor in the car and that he would now search Mr. Hoskins' vehicle. *See* Dkt. No. 17 ¶¶ 56, 61. Officer Withers directed Mr. Hoskins to exit the vehicle, place his cell phone on the hood of the patrol car, and stand near a delineator post approximately 50 yards from Mr. Hoskins' vehicle while Officer Withers conducted the search. *See id.* ¶¶ 63–68; Dkt. No. 12 at 2:39:26–46. Officer Withers

walked Mr. Hoskins to the post and then returned to the patrol car to retrieve his gloves. *See* Dkt. No. 17 ¶¶ 69–70, 72. At this point, dispatch responded that Mr. Hoskins had no outstanding warrants and possessed a valid driver's license. *See* Dkt. No. 12 at 2:40:05.

Upon returning to Mr. Hoskins' vehicle, Officer Withers observed Mr. Hoskins using a second cell phone with his back turned, hiding it from view. *See* Dkt. No. 17 ¶ 74; Dkt. No. 12 at 2:40:40–2:41:02. He walked up to Mr. Hoskins, grabbed the phone away from him, and pushed Mr. Hoskins with his left hand, causing him to take a step back. *See* Dkt. No. 12 at 2:41:00. The two then engaged in a brief verbal altercation with Mr. Hoskins profanely insulting both Officer Withers and his mother. *See* Dkt. No. 17 ¶ 82. Officer Withers later told another officer "Dude, I don't like him much after he said what—about my mom. You know? I mean, that was like—dude, that was below the belt there." *Id.* ¶ 86.

Mr. Hoskins was still talking as Officer Withers began to walk away. After about six steps, Officer Withers stopped and turned. *See id.* ¶¶ 84–85. Mr. Hoskins was standing with his left hand at his side, partially obscured by the angle and his jacket. *See* Dkt. No. 12 at 2:41:25. Officer Withers immediately drew his firearm and pointed it at Mr. Hoskins, shouting "get your hand out of your pocket." *Id.* at 2:41:26. He ordered Mr. Hoskins to turn around and place his hands on the back of his head. *See* Dkt. No. 17 ¶ 92. Mr. Hoskins immediately complied, and Officer Withers returned his firearm to its holster. *See* Dkt. No. 12 at 2:41:30–35. Officer Withers' weapon was drawn for approximately eight seconds. *See id.* at 2:41:26–33. Officer Withers then called for backup, handcuffed Mr. Hoskins, and escorted Mr. Hoskins back to the patrol car where he stayed for the remainder of the stop. *See* Dkt. No. 17 ¶¶ 93–94, 97–100, 112. Officer Withers

specifically told Mr. Hoskins, "you aren't under arrest, you are being detained." Dkt. No. 12 at 2:41:52.

Officer Withers and a second officer who had now arrived proceeded to search Mr. Hoskins' car. *See* Dkt. No. 17 ¶¶ 110–11. After an extended search, the officers discovered two packages of cash secured in the lining of the rear seats between the trunk compartment and the seat frame. *See id.* ¶¶ 111, 113–14. The officers had to use tools to dissemble the rear seat to retrieve these packages. *See* Dkt. No. 12 at 3:26:30–3:28:30. Each package was vacuumed sealed and then incased in a second layer of plastic wrapping. *See id.* at 3:28:45–3:29:00. The packages contained a total of $89,000. *See* Dkt. No. 17 ¶ 126. Another $1,350 was later found on Mr. Hoskins' person. *See id.*

Officer Withers then informed Mr. Hoskins that he was "being detained for the large amount of money that's in the car."[2] *Id.* ¶ 116. Mr. Hoskins was cited for the equipment violation, money laundering, and criminal conspiracy. *See id.* ¶ 124. Mr. Hoskins was booked into the Toole County jail that night, his car was impounded, and the cash was seized. *See id.* ¶¶ 122–23, 127. Pursuant to Utah Code § 53-10-404.5, Mr. Hoskins' DNA was collected at the jail. *See id.* ¶ 125. He was subsequently released, and no criminal charges were ultimately brought. *See id.* ¶¶ 129, 132. Under Utah law, the Bureau of Forensic Services was accordingly required to destroy his DNA specimen because "criminal charges [had] not been filed

[2] It appears that Officer Withers misspoke and actually meant that Mr. Hoskins was being "arrested" for the money found in the car given that Mr. Hoskins was already detained, and that Officer Withers proceeded to issue the citation and book him after making this statement.

within 90 days after booking for an alleged offense." *Id.* ¶ 133 (quoting Utah Code § 53-10-406(1)(i) (2018)).

Mr. Hoskins filed this suit on October 28, 2020.

**II.**

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). A plaintiff cannot satisfy this standard by offering "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "naked assertions devoid of further factual enhancement." *Id.* (cleaned up). Nor will the court "accept as true a legal conclusion"—even if its "couched as a factual allegation." *Id.* (cleaned up). Rather, a plaintiff must "plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (cleaned up).

Although "[t]he usual rule is that a court should consider no evidence beyond the pleadings on a Rule 12(b)(6) motion to dismiss," *Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1282 (10th Cir. 2019) (cleaned up), a "district court may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity," *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002). This can include videos. *See Montoya v. Vigil*, 898 F.3d 1056, 1060 n.2 (10th Cir. 2018) (considering an interrogation video attached to the complaint in connection with a motion to dismiss). Here, the bodycam video is referred to in the complaint, *see* Dkt No. 17 ¶¶ 52, 109, 111, and central to Mr. Hoskins' claims and the parties do not dispute its authenticity. The court will accordingly consider this video as well as the

allegations set forth in the Amended Complaint in resolving this motion.

**III.**

The court first addresses Mr. Hoskins' claims that Officer Withers violated his Fourth Amendment rights and retaliated against him for his speech in violation of the First Amendment.

**A.**

Officer Withers invokes qualified immunity with respect to Mr. Hoskins' federal claims. Qualified immunity "shields public officials from damages actions unless their conduct was unreasonable in light of clearly established law." *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014) (cleaned up). To overcome qualified immunity, "the plaintiff carries a two-part burden to show: (1) that the defendant's actions violated a federal constitutional or statutory right, and, if so, (2) that the right was clearly established at the time of the defendant's unlawful conduct." *Id.* (quotation omitted). "When, as here, qualified immunity is raised in a motion to dismiss, the court accepts the well-pleaded facts contained in the complaint as true and construes them in the light most favorable to the plaintiff." *Mahdi v. Salt Lake City Police Dep't*, 550 F. Supp. 3d 1193, 1198 (D. Utah 2021). Mr. Hoskins "must accordingly allege facts that support a reasonable inference that [Officer Withers] violated" Mr. Hoskins' constitutional rights, "and he must also establish that" these rights were "clearly established when the alleged unconstitutional conduct occurred." *Id.*

The doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (cleaned up). A Government official's conduct violates clearly established law when, at

the time of the challenged conduct, "[t]he contours of [a] right [are] sufficiently clear" that every "reasonable official would [have understood] that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, (1987). There need not be "a case directly on point," but "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft*, 563 U.S. at 741. "[T]he legal principle [must] clearly prohibit the officer's conduct in the particular circumstances before him." *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018). The plaintiff faces a "heavy burden" to overcome qualified immunity. *Carabajal v. City of Cheyenne*, 847 F.3d 1203, 1208 (10th Cir. 2017).

**B.**

Mr. Hoskins alleges that Officer Withers violated the Fourth Amendment at each step of the encounter. The court evaluates encounters such as the one at issue here "in a step-by-step manner because what may begin as a routine traffic stop will often escalate into probable cause for a search or a search pursuant to a consensual encounter." *United States v. Lee*, 73 F.3d 1034, 1038 (10th Cir. 1996), *overruled on other grounds by United States v. Holt*, 264 F.3d 1215 (10th Cir. 2001). The court must "examine each stage of the encounter to ensure that the government had the required amount of reasonable suspicion, probable cause, or consent to support" the challenged police conduct. *Id.*

**1.**

The court begins with Officer Withers' initial stop of Mr. Hoskins. "A traffic stop is a seizure within the meaning of the Fourth Amendment." *United States v. Botero-Ospina*, 71 F.3d 783, 786 (10th Cir. 1995) (en banc). "[A] traffic stop is valid under the Fourth Amendment 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." *Id.* at 787. The "sole inquiry is whether this particular officer had reasonable suspicion that this particular motorist violated 'any one of the multitude of applicable traffic and equipment regulations' of the jurisdiction." *Id.* (quoting *Delaware v. Prouse*, 440 U.S. 648, 661 (1979)).

After pulling Mr. Hoskins over, Officer Withers explained that Mr. Hoskins had been stopped because the frame of his license plate holder obscured the name of the issuing State. And Officer Withers ultimately issued Mr. Hoskins a citation for violating Utah Code § 41-1a-404(3)(b)(ii). *See* Dkt. No. 17 at 14. That statute requires that a vehicle's "license plate shall at all times be . . . maintained . . . in a condition to be clearly legible." Utah Code § 41-1a-404(3)(b)(ii). A license plate is required to have "(a) the registration number assigned to the vehicle for which it was issued; (b) the name of the state; and (c) . . . a registration decal showing the date of expiration." Utah Code § 41-1a-402(1).

Mr. Hoskins contends the traffic stop was invalid for several reasons. He first argues that the statute for which he was stopped and given a citation does not apply to out-of-state vehicles. But this argument runs headlong into Tenth Circuit precedent. In *United States v. Eckhart*, the defendants argued that "Utah police officers may not enforce Utah license plate statutes on cars licensed in California." 569 F.3d 1263, 1270 (10th Cir. 2009). The court rejected this argument, holding that the traffic stop challenged there was valid because the officer "observed a violation of Utah law before he made the stop." *Id.* at 1271 (citing Utah Code § 41-1a-404(3)(b)(ii)). The court further held that applying this law to an out-of-state driver did not violate the Interstate Commerce Clause

because "Utah does not treat intra-and interstate travelers differently [and] Utah's requirement that license plates be clearly visible and legible does not place a barrier on interstate movement as it is not unique to Utah and does not contradict the laws of other states." *Id.* at 1272. Mr. Hoskins does not acknowledge *Eckhart* or offer any explanation why it does not control.[3]

Next, Mr. Hoskins argues that even if Section 404 does apply to out-of-state vehicles, it only requires that the numbers and letters of the vehicle's license plate number be legible—not the name of the issuing State. This argument cannot be reconciled with the text of the relevant statutes. Section 402 clearly requires that license plates display three things: the license plate number, the name of the State, and a registration decal. Section 404 then requires the license plate to be "clearly legible." Read plainly, this statute mandates that all three required components of the license plate be "clearly legible."

To be sure, Section *403* states that "[l]icense plates and the required letters and numerals on them, except the

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[3] To be sure, the defendants in *Eckhart* did not explicitly argue, as Mr. Hoskins does here, that the language of Section 404 applies by its terms only to Utah license plates. But the court rejects this argument. First, while Section 41-1a-202 expressly exempts out-of-state vehicles from *registration* requirements, *see* Utah Code § 41-1a-202(2)(a) (2018), this statute says nothing about *license plate* requirements. And Section 404 simply states that "License plates issued for a vehicle other than a motorcycle, trailer, or semitrailer shall be attached to the vehicle, one in the front and the other in the rear." Utah Code § 41-1a-404(1). It does not limit application to plates issued "by the State of Utah." This is consistent with the laws of other states. While discussing an analogous Oklahoma law, the Tenth Circuit observed that "every state has some statute prohibiting the obstruction of license plates," but "none has interpreted its statutory scheme to allow out-of-state cars to be driven with obscured license plates." *United States v. DeGasso*, 369 F.3d 1139, 1148 (10th Cir. 2004).

decals and the slogan, shall be of sufficient size to be plainly readable from a distance of 100 feet during daylight." But Section 404 contains no similar limitation. Given that Section 403 demonstrates that the Utah Legislature knew how to limit laws so that they apply to only some of the required elements of a license plate, the fact that the legislature chose not to do so in Section 404 strongly implies that all three things that must be displayed on a license plate must be "clearly legible."

Finally, Hoskins argues that because Section 404(5) exempts license plates from the legibility requirement when the car has a trailer hitch; wheelchair lift; trailer; a bicycle, ski, or luggage rack; or a similar cargo carrying device, it should be read to also exempt license plates with frames.[4] This argument, too, is foreclosed by the statutory text. For although Section 404(5) creates other exemptions, it says nothing about license plate frames. And it is of course an established canon of statutory interpretation that "[t]he expression of one thing implies the exclusion of others." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF

[4] Mr. Hoskins also argues that that the stop was unlawful because Officer Withers "was selectively pursuing enforcement of a law that is not enforced against other drivers with similar license plate frames." Dkt. No. 17 ¶ 32. This argument lacks merit. To be sure, "[s]electivity in the enforcement of criminal laws is subject to constitutional constraints." *Wayte v. United States*, 470 U.S. 598, 608 (1985) (cleaned up). "In particular, the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* (cleaned up). But "[b]road discretion has been vested in executive branch officials to determine when to prosecute, and by analogy, when to conduct a traffic stop or initiate an arrest." *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1167 (10th Cir. 2003) (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996)). Because Mr. Hoskins does not allege that he was impermissibly targeted based on an immutable characteristic or other suspect classification, his argument fails.

LEGAL TEXTS 107 (2012). Officer Withers' initial stop was thus justified because it was based on an "observed traffic violation." *Botero-Ospina*, 71 F.3d at 787. It did not violate the Constitution.

**2.**

The court next addresses the dog sniff. Mr. Hoskins argues that this violated his Fourth Amendment rights because it prolonged the duration of the stop and Officer Withers lacked independent reasonable suspicion to detain Mr. Hoskins solely for purposes of conducting the sniff. Specifically, Mr. Hoskins argues that "[Officer] Withers did not diligently call in [Mr. Hoskins'] information or complete the citation." Dkt. No. 29 at 26.

As a general matter, a "canine sniff" does not constitute a search within the meaning of the Fourth Amendment. *United States v. Place*, 462 U.S. 696, 707 (1983). But "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Rodriguez v. United States*, 575 U.S. 348, 354 (2015). "Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquires'" such as "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 355 (quoting *Caballes*, 543 U.S. at 408). A stop that is prolonged solely for the purpose of conducting a dog sniff may thus violate the Fourth Amendment. *See Caballes*, 543 U.S. at 407.

The body camera footage demonstrates that Officer Withers did not unreasonably prolong the traffic stop to conduct a dog sniff. After showing Mr. Hoskins the reason for the stop, Officer Withers asked him for his registration and insurance. He proceeded to ask Mr. Hoskins several questions while he was waiting for Mr. Hoskins to find his insurance information. *See* Dkt. No. 12 at 2:33:00–2:34:00.[5] When Mr. Hoskins still continued to look for this information, Officer Withers asked Mr. Hoskins to join him in the patrol car and then asked Mr. Hoskins several more questions; he also began simultaneously entering Mr. Hoskins' information into his computer to prepare a citation. *See id.* at 2:34:00–2:36:22. After he finished entering Mr. Hoskins' information, Officer Withers asked dispatch to "run" Mr. Hoskins' driver's license. *See id.* at 2:36:22. Mr. Hoskins still had not provided his insurance information at this time. *See id.* Officer Withers then initiated the dog sniff. *See id.* at 2:36:48.

Officer Withers completed the dog sniff before dispatch completed the driver's license and warrant check and reported the results to Officer Withers. *See id.* at 2:38:10. Indeed, dispatch did not do so until two minutes *after* Officer Withers completed the sniff. *See id.* at 2:40:05. The dog sniff thus did not prolong the stop because Officer Withers was still completing his "mission," which included checking for proof of insurance and "determining whether there are outstanding

[5] To be sure, Mr. Hoskins stated that he had an email with a policy number and asked if that was sufficient. *See* Dkt. No. 12 at 2:35:28–2:35:32. Officer Withers responded that he needed something showing the date of coverage. *See id.* Mr. Hoskins never actually provided the policy number or any information with the date of coverage.

warrants against the driver" at the time the sniff took place. *Rodriguez*, 575 U.S. at 355.

Nor can Officer Withers be faulted for calling in the warrant check instead of performing it on his computer or for entering Mr. Hoskins' information first and then calling it in. In *United States v. Mayville*, the Tenth Circuit explained that an officer's decision to run "the records check through dispatch" instead of relying "exclusively on the information available on the computer in his patrol car" does not violate the Fourth Amendment because "the Fourth Amendment does not require officers to use the least intrusive or most efficient means conceivable to effectuate a traffic stop." 955 F.3d 825, 832 (10th Cir. 2020) (citing *United States v. Sharpe*, 470 U.S. 675, 687 (1985). The dog sniff did not violate the Fourth Amendment.[6]

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[6] This conclusion is consistent with the Tenth Circuit's recent holding in *United States v. Frazier*, 30 F.4th 1165 (10th Cir. 2022). There, the court held that the arresting officer twice violated the Defendant's Fourth Amendment rights by extending the duration of the traffic stop without reasonable suspicion. Specifically, the officer deviated "from the traffic-based mission of the stop" by spending several minutes trying to arrange a dog sniff and by later running the Defendant's license plate through a DEA database to track his past movement. *Id.* at 1171, 1173, 1180. Here, by contrast, Officer Withers did not prolong the stop by deviating from his mission. Though Mr. Hoskins takes issue with the extent of questioning by Officer Withers, those questions were asked while Officer Withers was entering Mr. Hoskins' information to prepare a citation and waiting for Mr. Hoskins to provide his insurance information. To the extent there was any delay, it appears to have been caused by Mr. Hoskins' inability promptly to produce his insurance information. Nor was Officer Hoskins required to accept informal insurance information that did not clearly meet the requirements for establishing proof of insurance under Utah law or even provide the dates of coverage. *See* Utah Code §§ 41-12a-303.2(2), 41-12a-402. And the dog sniff itself occurred only

**3.**

The court next turns to the search of Mr. Hoskins' vehicle. Mr. Hoskins contends that, under the facts alleged in the complaint, Officer Withers' dog never alerted, and he thus lacked probable cause to search Mr. Hoskins' vehicle. See Dkt. No. 29 at 28. Were the court's analysis limited to Mr. Hoskins' allegations, this argument might be well taken. The body camera footage, however, contradicts Mr. Hoskins' allegations and demonstrates that Officer Withers had probable cause to search the vehicle.

The general rule is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote omitted). One such exception relates to cars. A warrantless search of an automobile is reasonable if there is probable cause to believe it contains contraband. *See United States v. Ross*, 456 U.S. 798, 809 (1982). "[A] positive dog alert gives officers probable cause to search." *United States v. Parada*, 577 F.3d 1275, 1281 (10th Cir. 2009). The Tenth Circuit has specifically declined to adopt "the stricter rule" that the dog must "give a final indication before probable cause is established." *Id.* at 1282.

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while Officer Withers was waiting for dispatch to provide the results of the license and warrant check—a check that Officer Wither requested promptly after entering Mr. Hoskins' information into his computer. *Shaw v. Schulte*, 36 F.4th 1006 (10th Cir. 2022), is also inapposite. Unlike here, the officers in *Shaw* had completed all tasks related to the original traffic stop and further prolonged the stop to conduct a dog sniff without reasonable suspicion of additional criminal activity. *See id.* at 1010–12, 1016, 1020.

During the sniff, Officer Withers' dog twice tried to enter the vehicle through the passenger window. After the first attempt, Officer Withers commented to his body camera that "he's just following an odor right into the car." Dkt. No. 12 at 2:37:50. Officer Withers then took the dog away from the door towards the front of the car before allowing it to return to the passenger door. The dog again attempted to jump through the open window into Mr. Hoskins' car and Officer Withers stated to his body camera: "OK, I'm going to call that an indication, he keeps trying to jump in the window." Dkt. No. 12 at 2:37:55.

In *United States v. Forbes*, the Tenth Circuit recognized the difference between a dog "alert" and a dog "indication." 528 F.3d 1273, 1275 n.3 (10th Cir. 2008). "[A] properly trained canine will 'alert' to the *presence* of contraband when it *first* encounters a known odor by changing its body posture and by increasing its respiration. By contrast, the same dog will 'indicate' *the precise location* of that contraband through some other change in behavior, such as by staring, sitting, scratching, biting, or barking." *Id.*

Although Mr. Hoskins seeks to dismiss reliance on the dog's reaction as a "post-hoc attempt[] to justify the search," Dkt. No. 29 at 28, Officer Withers' contemporaneous comments to his body camera make clear that he immediately recognized the change in his dog's behavior. Indeed, he twice noted the dog's effort to enter the vehicle through the open window. The court concludes that this behavior is sufficient for a reasonable officer to believe that the dog had indicated and that he therefore had probable cause to search the vehicle.[7]

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[7] While the Tenth Circuit has held that facilitating a dog's entry into a vehicle without probable cause invalidates a subsequent alert by the

Even if Officer Withers incorrectly determined that his dog alerted or indicated, the court concludes that his mistake was reasonable and did not violate the Fourth Amendment. The Court has long recognized that "the Fourth Amendment allows for some mistakes on the part of government officials," and that "searches and seizures based on mistakes of fact can be reasonable." *Heien v. North Carolina*, 574 U.S. 54, 60–61 (2014). The mistakes, however, "must be those of reasonable men." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). Here, Officer Withers observed a dramatic change in his dog's behavior as the dog repeatedly attempted to enter Mr. Hoskins' vehicle. The court concludes that it was reasonable for Officer Withers, the dog's handler, to interpret these changes in behavior to be the result of the dog's detecting contraband. For all of these reasons, the court concludes that the search did not violate the Fourth Amendment.

**4.**

The court next addresses Mr. Hoskins' arrest. An arrest is reasonable when "there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). Probable cause "is not a high bar." *Kaley v. United States*,

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dog, *see Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 880–81, 884–85 (10th Cir. 2014), it has found no constitutional violation when "(1) the dog's leap into the car was instinctual rather than orchestrated and (2) the officers did not ask the driver to open the point of entry, such as a hatchback or window, used by the dog," *United States v. Vazquez*, 555 F.3d 923, 930 (10th Cir. 2009). Here, Officer Withers' dog did not actually enter the vehicle and alert once inside. Rather, Officer Withers recognized his dog's indication as the repeated *attempts* to enter the vehicle through the window, meaning the alert occurred outside the vehicle. And a "drug dog sniff outside a car during a lawful traffic stop is not a search." *Felders*, 755 F.3d at 880.

571 U.S. 320, 338 (2014). It requires "only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983). Whether probable cause exists "turn[s] on the assessment of probabilities in particular factual contexts," *id.* at 232, and is "incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances," *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

Mr. Hoskins argues that a "large amount of hidden legal tender in itself is not probable cause for an arrest" and "may only be considered evidence of an illicit connection to drug trafficking (and therefore probable cause for an arrest) when the currency is combined with other persuasive evidence, such as drugs, drug paraphernalia, or notebooks containing notations of large drug transactions." Dkt. No. 29 at 29 (citing *United States v. One Hundred Forty-Nine Thousand Four Hundred Forty-Two & 43/100 Dollars ($149,442.43) in U.S. Currency*, 965 F.2d 868, 877 (10th Cir. 1992)). Here, probable cause was not based solely on the discovery of the currency, however. Rather, it was based on the combination of the large amount of hidden cash *and other persuasive evidence*.

At the time of the arrest, Officer Withers had discovered two packages containing a total of nearly $90,000 in cash, vacuum sealed and incased in two layers of plastic wrapping, hidden within the rear seat of Mr. Hoskins' vehicle in a way that required the officers to use tools to extract them. Officer Withers' trained dog had also alerted to drug odor within the vehicle and Officer Withers had noticed that Mr. Hoskins "was shaking really bad, breathing heavy." Dkt. No. 12 at 2:34:20. Finally, Officer Withers observed Mr. Hoskins using a second,

undisclosed cellphone with his back turned, obscuring the phone from view. The court concludes that these facts, *in combination*, are sufficient to give rise to a "substantial chance of criminal activity." *Gates*, 462 U.S. at 243 n.13. Officer Withers had probable cause to make the arrest. Mr. Hoskins also contends that Officer Withers arrested him before the discovery of the cash, and thus lacked probable cause at the time of the arrest. *See* Dkt. No. 29 at 29–30. This argument is contradicted by the body camera footage. Although Mr. Hoskins was handcuffed and placed in Officer Withers' patrol car during the search, Officer Withers specifically told Mr. Hoskins that "you aren't under arrest, you are being detained." Dkt. No. 12 at 2:41:52.

To be sure, an officer must have a "reasonable and articulable suspicion of potential danger" to justify "temporary, protective detention." *United States v. Maddox*, 388 F.3d 1356, 1365, 1367 (10th Cir. 2004). But so long as that standard is met, "[a] law enforcement agent, faced with the possibility of danger, has a right to take reasonable steps to protect himself." *United States v. Merkley*, 988 F.2d 1062, 1064 (10th Cir. 1993) (quotation omitted).

That standard was met here. Prior to detaining Mr. Hoskins, Officer Withers observed him using an undisclosed second cellphone with his back turned towards Officer Withers, hiding its use from view. After Officer Withers took the phone, Mr. Hoskins became verbally combative. Finally, while he was walking away, Officer Withers observed Mr. Hoskins with his left hand at his side, obscured by his jacket. The court concludes that these circumstances are sufficient to establish a "reasonable and articulable suspicion of potential danger." *Maddox*, 388 F.3d at 1367.

For all of these reasons, Mr. Hoskins' arrest did not violate the Fourth Amendment.[8]

**5.**

Finally, the court addresses Mr. Hoskins' claim of excessive force. The Supreme Court has repeatedly held that when such a claim arises from a police encounter, it is governed by the Fourth Amendment's prohibition of "unreasonable seizures." *Tolan v. Cotton*, 572 U.S. 650, 656 (2014). The Court has also long recognized "that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Connor*, 490 U.S. 386, 396 (1989).

"[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness,'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (citation omitted), and the "reasonableness" of a particular use of force is assessed under the balancing test established in *Graham*. Under this test, the court must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (cleaned up). This assessment must consider the totality of the circumstances, including: "the severity of the crime at issue, whether the suspect poses an immediate threat to

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[8] The fact that Mr. Hoskins' physical location and circumstances did not change between his detention during the search and his arrest afterwards is irrelevant. Given the "reasonable and articulable suspicion of potential danger" that a reasonable officer on the scene would have perceived, Mr. Hoskin's detention during the search was permissible. And given that a reasonable officer would have had probable cause to arrest Mr. Hoskins at the conclusion of the search, Mr. Hoskins' arrest and continued confinement in the patrol car after the search was permissible.

the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* The overarching inquiry is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. The Supreme Court has "also emphasized that 'the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" *Hinkley v. Salt Lake City Corp.*, 426 F. Supp. 3d 1207, 1215 (D. Utah) (quoting *Graham*, 490 U.S. at 396) (cleaned up).

Mr. Hoskins' argument that Officer Withers' use of force was unreasonable faces an immediate uphill battle, for the Tenth Circuit has held that merely pointing a "weapon at an adult who was suspected of a serious crime," without more, does not constitute excessive force under the Fourth Amendment. *Henry v. Storey*, 658 F.3d 1235, 1239–41 (10th Cir. 2011). At the time Officer Withers briefly pointed his firearm at Mr. Hoskins, he had probable cause to search Mr. Hoskins' vehicle for drugs; the suspected "crime at issue" was thus serious. *Graham*, 490 U.S. at 396.

Officer Withers also had reason to believe that Mr. Hoskins posed an immediate threat to his safety. Moments before drawing his gun, Officer Withers had observed Mr. Hoskins communicating on a second, undisclosed phone in a manner that appeared intended to hide its use from Officer Withers' view. After Officer Withers took the phone, Mr. Hoskins became verbally hostile. *See* Dkt. No. 17 at ¶ 82. And then while walking away, Officer Withers observed Mr. Hoskins with his left hand at his side, obscured by his jacket. Although Mr. Hoskins emphasizes that Officer Withers had already performed a visual waistband inspection, Officer Withers

had not patted Mr. Hoskins down or otherwise verified that he was unarmed.

These considerations must be balanced against the extent of force used by Officer Withers. Officer Withers drew his gun and pointed it at Mr. Hoskins for approximately eight seconds before holstering it and handcuffing Mr. Hoskins. The court concludes that Officer Withers' brief and relatively minor use of force was reasonable under the Fourth Amendment in light of the serious crime a reasonable officer would have suspected Mr. Hoskins of committing, Mr. Hoskins' evasive behavior, the escalating nature of the encounter, and the danger to his safety that a reasonable officer would have perceived. *See Graham*, 490 U.S. at 396.

**C.**

Mr. Hoskins contends that Officer Withers also violated Mr. Hoskin's First Amendment rights by pointing a gun at him "in retaliation for [Mr. Hoskins'] expression of thoughts and opinions." Dkt. No. 17 ¶ 160. The court concludes that this claim fails as a matter of law.

"'[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions' for engaging in protected speech." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722, (2019) (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). "If an official takes adverse action against someone based on that forbidden motive, and 'non-retaliatory grounds are in fact insufficient to provoke the adverse consequences,' the injured person may generally seek relief by bringing a First Amendment claim." *Id.* (quoting *Hartman*, 547 U.S. at 256). Applying this rule, the Court held that probable cause to execute an arrest forecloses a claim of a retaliatory arrest because the non-retaliatory grounds

are sufficient to "provoke the adverse consequences."[9] *Id.* at 1722, 1724.

Although *Nieves* involved an arrest rather than the use of force, the court concludes that the same rule applies here. Because the court concludes that Officer Withers' briefly pointing a gun at Mr. Hoskins was reasonable under the Fourth Amendment, it follows that Officer Withers had sufficient "non-retaliatory grounds . . . to provoke" the challenged action and that Mr. Hoskins thus cannot prevail on his First Amendment claim.

**IV.**

Finally, the court considers Mr. Hoskins' claim against Mr. Anderson. Mr. Hoskins alleges, on behalf of himself and a putative class, that Mr. Anderson "violated their rights under the Fourteenth Amendment to the U.S. Constitution . . . by depriving them of a protected property interest in their DNA (including any profiles or other data derived therefrom) without due process of law." Dkt. No. 17 ¶ 165. He further contends that the Fourteenth Amendment's Due Process Clause secures a right to "the confirmed destruction of their DNA once Defendants no longer had any valid interest in possessing it under Utah's DNA collection statutes (Utah Code § 53-10-401, *et seq.* [(2018)])." *Id.* ¶ 166.

The Due Process Clause states that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. "An alleged violation of the procedural due process required by this clause prompts a two-step inquiry: (1) whether the

[9] This bright line rule also defeats any First Amendment retaliation claim that Mr. Hoskins might assert based on *his arrest* given that Officer Withers had probable cause to make that arrest, as discussed above.

plaintiff has shown the deprivation of an interest in 'life, liberty, or property' and (2) whether the procedures followed by the government in depriving the plaintiff of that interest comported with 'due process of law.'" *Elliott v. Martinez*, 675 F.3d 1241, 1244 (10th Cir. 2012) (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)). "A protected interest in liberty or property may have its source in either federal or state law." *Id.*

Mr. Hoskins first asserts that he has a protected interest in his DNA generally under the Constitution. This argument is unavailing. Mr. Hoskins alleges a procedural not substantive due process violation—meaning that any protected interest can be deprived pursuant to adequate procedure.[10] Here, Mr. Hoskins' DNA was taken pursuant to a Utah law of general applicability. *See* Utah Code § 53-10-404.5(1)(a) ("When a sheriff books a person for any offense under Subsections 53-10-403(1)(c) and (d), the sheriff shall obtain a DNA specimen from the person upon booking of the person at the county jail."). When, as here, "'the legislature passes a law which affects a general class of persons, those persons have all received procedural due process—the

[10] The court would have no difficulty dismissing any substantive due process claim based on the collection of Mr. Hoskins' DNA. The Supreme Court has squarely held that collecting a DNA sample without a warrant does not violate the Fourth Amendment in "the context of a valid arrest supported by probable cause." *Maryland v. King*, 569 U.S. 435, 465 (2013). It has also held that when "the Fourth Amendment provides an explicit textual source of constitutional protection" against the challenged governmental action, the claim must be analyzed under "that Amendment" and "not the more generalized notion of 'substantive due process.'" *Graham*, 490 U.S. at 395. Even if Mr. Hoskins could assert a substantive due process claim here, moreover, the court believes that the reasoning underlying the Supreme Court's holding in *King* would also foreclose any substantive due process challenge.

legislative process.'" *Oklahoma Educ. Assoc. v. Alcoholic Beverage Laws Enf't Comm'n*, 889 F.2d 929, 936 (10th Cir. 1989) (quoting R. ROTUNDA, J. NOVAK, & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, § 17.8 at 251 (1986)). Thus, even assuming Mr. Hoskins has a protected interest in his DNA that was taken from him, he has received all of the process that was due. Mr. Hoskins next argues that he has a state created interest in the destruction of his DNA. This argument is equally unpersuasive. Utah Code § 53-10-406(1)(i) requires the Bureau of Forensic Services to "destroy a DNA specimen obtained under this part if criminal charges have not been filed within 90 days after booking for an alleged offense under Subsection 53-10-403(2)(c)." While this may be sufficient to create a protected interest in the destruction of his DNA, Mr. Hoskins does not allege that the Bureau failed to destroy his sample. Rather, he argues that "there is no administrative mechanism by which [Mr. Hoskins] may petition the Bureau as an agency of the Department of Public Safety to ensure that his DNA specimen has been destroyed." Dkt. No. 17 ¶ 139. In essence, Mr. Hoskins argues that his procedural due process rights have been violated, not by Bureau's failure to destroy his DNA, but by the Bureau's failure to create procedures that would allow Mr. Hoskins to confirm the destruction of his DNA.

The court concludes that this claim is not cognizable under the Due Process Clause of the Fourteenth Amendment. As the Tenth Circuit has explained, "protected interests are substantive rights, not rights to procedure." *Elliott*, 675 F.3d at 1245. It follows that "an entitlement to nothing but procedure cannot be the basis for a liberty or property interest." *Stein v. Disciplinary Bd. of Sup. Ct. of N.M.*, 520 F.3d 1183, 1192 (10th Cir. 2008) (cleaned up).

**V.**

"When all federal claims have been dismissed, the court may, and usually should, decline to exercise supplemental jurisdiction over any remaining state claims." *Reyes v. N.A.R. Inc.*, 546 F. Supp 3d 1031, 1042 (D. Utah 2021) (cleaned up); *see also* 28 U.S.C § 1367(c)(3). Because the court has determined that all of Mr. Hoskins' federal claims must be dismissed, it will dismiss Mr. Hoskins' state law claims without prejudice.

* * *

For the foregoing reasons, Defendants' motion to dismiss is **GRANTED IN PART**. Plaintiff's federal claims are **DISMISSED WITH PREJUDICE**. Plaintiff's state-law claims are **DISMISSED WITHOUT PREJUDICE**.

**IT IS SO ORDERED.**

Dated: August 18, 2022

/s/ Howard C. Nielson, Jr.
HOWARD C. NIELSON, JR.
UNITED STATES DISTRICT JUDGE

**APPENDIX C**

[FILED: JUNE 3, 2024]

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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| | |
|---|---|
| JOSEPH M. HOSKINS,<br>Plaintiff-Appellant,<br>v.<br>JARED WITHERS, et. al.,<br>Defendants-Appellees. | No. 22-4081<br>(D.C. No. 2:20-CV-00749-HCN)<br>(D. Utah) |

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**ORDER**

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Before **BACHARACH**, **PHILLIPS**, and **EID**, Circuit Judges.

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This matter is before the court on Appellant's petition for rehearing and rehearing en banc and Appellees' response. Upon consideration, the petition for rehearing is denied.

The petition for rehearing en banc was 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, that petition is also denied.

Entered for the Court

*/s/ Christopher M. Wolpert*
CHRISTOPHER M. WOLPERT, Clerk

## APPENDIX D

Section 1983 of Title 42, United States Code, provides:

> Every person who, under color of any statute, ordinance, regulation, custom , or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**APPENDIX E**

[FILED: MARCH 19, 2021]

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*Attorneys for Plaintiff Joseph M. Hoskins*

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, NORTHERN DIVISION

| | |
|---|---|
| JOSEPH M. HOSKINS, an individual, and all others similarly situated,<br>Plaintiffs,<br>v.<br>JARED WITHERS, in his individual capacity; and JESS L. ANDERSON, Utah Department of Public Safety Commissioner, in his official capacity,<br>Defendants. | **PLAINTIFF'S REVISED AMENDED COMPLAINT FOR DAMAGES AND FOR CLASS-WIDE DECLARATORY AND INJUNCTIVE RELIEF**<br>**CLASS ACTION AND JURY DEMAND**<br>Civil No. 2:20-cv-00749-HCN<br>District Judge Howard C. Nielson, Jr.<br>Magistrate Judge Cecilia M. Romero |

Plaintiff Joseph M. Hoskins, by and through undersigned counsel of record, hereby complains against Defendants Jared Withers and Commissioner Jess L. Anderson as alleged below.

## PRELIMINARY STATEMENT AND INTRODUCTION

On November 13, 2018, Joseph Hoskins was peaceably driving his vehicle along I-80 in Tooele County, Utah. Joe was from Peoria, Illinois, and his car was registered in that state.

Joe was obeying all traffic laws as he drove along I-80. Defendant Withers wanted to pull Joe over because he was single male, traveling alone toward Nevada, with an out-of-state license plate; consequently, Withers speculated that Joe might have drugs or cash on him that could be seized. Because Withers had no legitimate traffic offense to use as an excuse for pulling Joe over, he fabricated a basis for a stop.

Withers pulled Joe over on the pretext of an "equipment violation." Citing Utah Code § 41-1a-404(3)(B)(ii), Withers claimed that Joe's Illinois license plate did not comply with a Utah statute governing Utah license plates. The license plate on Joe's vehicle had a frame showing the name of an automobile dealership. The frame (partially) obscured the word "Illinois" at the top of the license plate. As shown below, a high percentage of persons driving automobiles in Utah have similar license plate frames that obscure part of the state name – for example, persons driving vehicles with Ken Garff, Larry Miller Autogroup, Mark Miller, Tim Dahle, BYU, University of Utah, and Utah Jazz frames. (*See* ¶ 31, *infra.*)

Withers knew that Joe's license plate was not issued in Utah and in fact was issued in Illinois, as evidenced by the fact that he radioed in to dispatch that it was an Illinois plate. Withers also knew, or any reasonable officer would know, that Utah's license plate requirements did not apply to a vehicle registered in another state. Knowing that he lacked probable cause, Defendant Withers nonetheless pulled Joe over, questioned him, detained him, let a drug-sniffing dog do significant damage to Joe's car, did significant damage himself in searching Joe's vehicle, arrested Joe, and confiscated money found in Joe's car. No drugs were found, and no criminal charges were ever brought against Joe. The State of Utah's efforts to keep the found money anyway failed. But Withers' actions forced Joe to hire a lawyer and incur other out-of-pocket costs and damages.

Plaintiff is seeking relief for Defendant's violations of his right to be free from unreasonable searches and seizures, as guaranteed by the Fourth Amendment to the United States Constitution as well as Article I, § 14 of the Utah Constitution. Plaintiff also seeks relief for Defendant's violation of his rights under the First Amendment to the U. S. Constitution and Article I, Section 1 of the Utah Constitution, in that Defendant Withers drew a weapon on Joe in response to Plaintiff's speech.

In the course of Joe's booking at the Tooele County jail, Tooele County took possession of a specimen of Joe's DNA pursuant to Utah Code § 53-10-404.5. Joe was never criminally charged. As a result, Utah Code § 53-10-406(1)(i) entitled Joe to have the DNA specimen and any profile generated therefrom destroyed. However, Utah law does not provide any mechanism for enforcing this right.

Utah's DNA collection statutes (Utah Code § 53-10-401, *et seq.*) do not provide a mechanism by which Joe, or others similarly situated, may ensure destruction of their DNA where no criminal charges are filed following an arrest and booking into a county jail. This lack of a remedy or other procedural mechanism to ensure the destruction of a DNA specimen for those who have been booked on alleged suspicion of a felony, but who are never charged with a felony, is a violation of due process. Consequently, Joe and class plaintiffs seek relief for the violation of their right to due process under the Fourteenth Amendment to the U.S. Constitution and Article I, Section 7 of the Utah Constitution.

**PLAINTIFF**

1. Named Plaintiff Joseph M. Hoskins ("Joe" or "Plaintiff") is an adult citizen who, at all times relevant to this complaint, resided in Peoria County, Illinois.

**THE PLAINTIFF CLASS**

2. The named Plaintiff brings this action on his own behalf and as representative of the following class: a. All individuals who have been booked in a county jail on suspicion of a felony and had a specimen of their DNA collected but against whom criminal charges were not filed within 90 days after booking for an alleged offense under Utah Code § 53-10-403(2)(c).

3. Class certification is appropriate under F.R.Civ. P. 23(a) and (b)(2) because the Defendants have acted or refused to act on grounds that apply generally to the class so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole and:

a. The members of the class are so numerous that joinder of all persons is impracticable. Upon

information and belief, there are at more than 100 individuals who are similarly situated to Joe. The number of persons within the class is solely within the possession of DPS or third parties and not available to the public.

b. There are questions of fact or law common to the class:

i. Common questions of fact include the current policies, practices, and customs of the Utah Department of Public Safety with regard to DNA specimen collection, retention, and destruction for individuals who have been arrested and booked but who were (or are) never criminally charged, including whether it is policy, practice, or custom to:

- track the collection and retention of the DNA specimen; and

- destroy a DNA specimen for a given individual if criminal charges have not been filed within 90 days after booking.

ii. Common questions of law include: whether Defendants' current policies, practices, and customs regarding the collection, retention, and destruction of DNA specimens from individuals who were or are never criminally charged comply with the federal and Utah constitutions and whether the polices, practices, and customs create a risk of future harm to the class; and related issues.

c. The representative Plaintiff's claim is typical of the claims of the class.

d. The representative Plaintiff will fairly and adequately represent the interests of the class. The

named Plaintiff has manifested willingness and persistence to assert claims on his own behalf and that of his fellow class members and has retained counsel experienced in class action and other complex litigation.

**DEFENDANTS**

4. Defendant Jared Withers ("Withers") is an individual. At all times relevant to this complaint, Withers was employed as a Trooper with Utah Highway Patrol ("UHP"), an agency of the State of Utah. Defendant Withers is sued in his individual capacity. At all times relevant to this complaint, Defendant Withers was acting within the scope of his employment with UHP.

5. At all times relevant to this complaint, Defendant Jess L. Anderson was Commissioner of the Utah Department of Public Safety, an agency of the State of Utah. Defendant Anderson is sued in his official capacity.

**JURISDICTION AND VENUE**

6. This action raises questions under the Constitution of the United States and 42 U.S.C. § 1983, and thus this Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343. Supplemental jurisdiction of Joe's state law claims is appropriate under 28 U.S.C. § 1367.

7. Venue is proper in this Court under 28 U.S.C. §§ 1391(a) and 1391(b)(2), as the events or omissions alleged occurred in Tooele County, Utah.

**FACTUAL BACKGROUND**

***Initial Stop***

8. On November 13, 2018 at approximately 2:30 p.m., Defendant Withers was driving in the left lane of Interstate 80 ("I-80") westbound near mile post 71, in Toole County.

9. At that same time, Joe was driving his brown Toyota Avalon in the right lane of I-80 westbound near mile post 71.

10. As reflected by Withers' dashcam, Withers proceeded forward in the left lane, gaining on the Avalon as if to pass, and then slowed.

11. Joe was not violating any traffic laws at this time.

12. Withers' dashcam reflects Withers remaining in the left lane for at least 30 seconds before steering his vehicle into the right lane behind Joe.

13. Withers activated his patrol vehicle lights to signal Joe to pull over.

14. Within two seconds, Joe pulled his vehicle over.

15. It was obvious from its face that the license plate on Joe's car was not a Utah plate. Withers knew, and any reasonable Utah law enforcement officer would have known, that Joe's license plate had not been issued by the state of Utah.

16. While still seated in his vehicle and before speaking with Joe, Withers called the plate into dispatch, stating, "I believe it's AZ39390 Illinois." (*See* Withers bodycam at 14:31:26).

17. The sole alleged basis for Withers pulling Joe over, as stated in his subsequent report, was an alleged "equipment violation."

18. At the time Withers read and relayed the Avalon's license plate information, the vehicles were approximately 32-33 feet apart.

19. Withers got out of his vehicle and approached Joe's front passenger window.

20. The following conversation occurred:

Withers Hey, the reason I'm stopping you is your plate frame you've got on your plate is completely covering the state where your plate is from

Joe It is?

Withers Know what I mean? You wanna get out and look at it and I'll show you what I mean?

Joe Yeah, that's fine. I just got this thing in September.

(See Withers bodycam at 14:31:59)

21. Joe handed his driver's license to Withers.

22. Defendant Withers took the license.

23. Joe exited his vehicle and walked with Withers to the rear of the Avalon.

***License Plate Holders***


**Images 1 & 2: License Plate on Joe's Avalon. Photos taken by Withers at time of stop.**

24. The license plate statute to which Withers was referring is Utah Code 41-1a-404. In his citation of Joe, Withers indicated he was specifically relying on Utah Code 41-1a-404(3)(b)(ii).

25. Section 41-1a-404(3)(b)(ii) stated, in relevant part:

(3) Except as provided in Subsection (5), a license plate shall at all times be:

(a) securely fastened:

(i) in a horizontal position to the vehicle for which it is issued to prevent the plate from swinging;

(ii) at a height of not less than 12 inches from the ground, measuring from the bottom of the plate; and

(iii) in a place and position to be clearly visible; and

(b) maintained:

(i) free from foreign materials; and

(ii) in a condition to be clearly legible. . . .

* * *

(6) A violation of this section is an infraction.

26. Utah Code § 41-1a-404 is a Utah statute applicable to Utah license plates. It does not apply to vehicles "registered in another state and owned by a nonresident of the state[.]" *See* Utah Code § 41-1a-202.

27. Even if Utah's license plate laws did not explicitly exempt vehicles registered in other states, it would have been obvious to any law enforcement officer that Utah law could not govern the requirements of license plates issued in other states.

28. Utah Code § 41-1a-403 specifies which portions of a license plate must be legible. The code reads in relevant part:

> License plates and the required letters and numerals on them, except the decals and the slogan, shall be of sufficient size to be plainly readable from a distance of 100 feet during daylight.

29. The Motor Vehicle Act does not define "letters and numerals," but other provisions of the Act use "letters and numbers" to refer to a license plate's registration number, the unique combination of letters and numbers assigned to a vehicle. *See* Utah Code §§ 41-1a-411 and -419(1)(b)(i)(D).

30. The letters and numerals on Joe's plate (AZ 39390) were not obscured in any way.

31. Upon information and belief, Utah Code §§ 41-1a-404 and -403, with respect to license plate frames, are rarely enforced. Facts supporting this belief include: a. From a survey conducted by plaintiff's investigator, approximately one third of Utah vehicles have license plate frames that obscure part or all of the name of the state.

b. License plate frames that obscure part or all of the name of the state are available for purchase from Utah educational institutions, including State institutions. These educational institutions include Brigham Young University, University of Utah, Utah State University, and Weber State University.

c. Many Utah automobile dealerships install license plate frames that partially obscure the name of the state. These dealerships include: Cougar Auto, Curtis Auto, Cutrubus Layton, Ed Kenley, Grimm Auto, Gus Paulos, Hamilton Auto, Henry Day Ford, Jerry Seiner, Ken Garff Auto Group, Larry Miller Auto Group, Mark Miller, Markosian Murdock, Menlove, Mercedes-Benz of Farmington, Millennium Auto, National Auto Plaza Nissan SLC, Prime Auto, PRM Auto, Salt Lake Strong, South Town Mazda, Stephen Wade St. George, Stockton Honda, Tim Dahle, Toole Auto Mall, Tony Divino, Young Chevrolet, Velocity Auto, and West Auto Sales.



**Images 3 & 4: Examples of commonly observed license plate frames in Utah**

d. It is reasonable to infer that, if Sections 41-1a-404 and -403 were enforced, even sporadically, in the manner claimed by Withers then automobile dealers, institutes of higher education, and vehicle owners would not use such plate frames and there would not be such a prevalence of obscuring plate frames in Utah.

32. Even if Utah Code Utah Code §§ 41-1a-404 and -403 do apply to out of state vehicles, the stop was not proper because Defendant was selectively pursuing enforcement of a law that is not enforced against other drivers with similar license plate frames. *Wayte v. United States*, 470 U.S. 598, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985) ("Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints." Enforcement of criminal laws may not be "based upon an unjustifiable standard" or "arbitrary classification."); *Pleasant Grove City v. Orvis*, 2007 UT App 74, ¶¶ 15-16. Selective enforcement occurs when a law is applied against some individuals but not against others similarly situated. *Sanjour v. E.P.A.*, 56 F.3d 85, 92 n.9 (D.C. Cir. 1995); *Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019) (holding that a showing of probable cause may be defeated when a plaintiff presents objective evidence that he was treated differently than others similarly situated).

33. The conversation on scene between Joe and Withers continued:

Withers See what I mean [about the frame]?

Joe Yeah, it came from the dealership like that.

Withers They put that plate frame on there? OK. Yeah, you know a lot of people don't think about that, but the way we look at it is, say this car is involved in

some kind of crime or something and you can't read the plate, that causes a problem for us.

Joe Yeah, I wish I would've noticed it because I would've known that was a problem.

Withers Not a huge deal. Do you got a registration and insurance for this thing?

Joe Oh, yeah.

Withers You can hop back in. I'm not gonna be needing you out here again.

(See Withers bodycam at 14:32:21)

34. Joe returned to sit in the driver's seat of his vehicle.

35. Withers returned to stand at the open passenger window of Joe's vehicle.

36. At this point, Withers' investigation into the alleged equipment violation had concluded. Withers had all the information he needed for an equipment citation.

***Continued detention and dog sniff***

37. While Joe looked for his insurance information, Withers questioned Joe.

38. The following conversation took place between Joe and Withers:

Withers Where you headed to today?

Joe Uh, Reno.

Withers What's in Reno?

Joe Gambling.

Withers Gambling in Reno.

Joe Yeah.

Withers Do ya got insurance on it?

Joe Yeah, I do but it's Esurance. Do you want me to call my girlfriend?

Withers Like, do you have some kind of proof of insurance, like on a phone or a card or—you gotta carry some kind of proof of insurance in the car.

Joe It should be in an email.

Withers You say you have an email with it? You have an electronic copy? Is that what you mean?

Joe Yeah.

Withers Will you turn the car off for me? I'd like you to come back to my car with me. I'm gonna have a few questions for you while you're looking for that.

Joe Yeah, sure.

(See Withers bodycam at 14:33:06)

39. Joe turned off the engine, exited his vehicle, and walked with Withers toward the patrol vehicle.

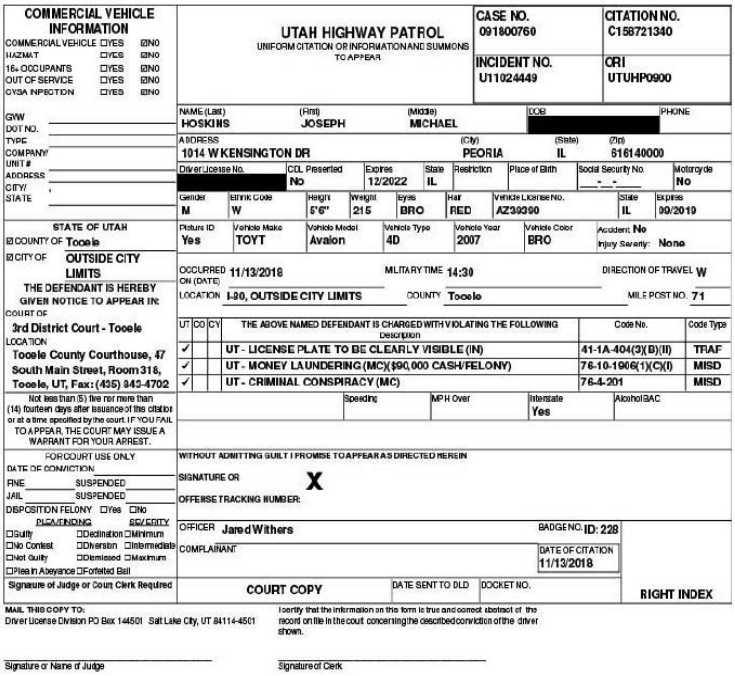
40. Before entering the patrol vehicle, Withers asked Joe to lift his shirt and turn in a circle to show he had no weapons in his waistband.

41. Joe complied with this request, lifting his shirt to expose his bare stomach and turning in a circle to show his bare back.

42. Withers climbed into the driver's seat of the patrol vehicle, and Joe climbed into the front passenger seat.

43. Once inside the patrol vehicle, Withers began plugging Joe's information into his computer.

44. If Withers had been filling out a citation for the alleged equipment violation, the citation would have taken only a few minutes to complete.



COMMERCIAL VEHICLE INFORMATION
COMMERCIAL VEHICLE ☐YES ☑NO
HAZMAT ☐YES ☑NO
16+ OCCUPANTS ☐YES ☑NO
OUT OF SERVICE ☐YES ☑NO
CVSA INSPECTION ☐YES ☑NO
GVW
DOT NO.
TYPE
COMPANY
UNIT #
ADDRESS
CITY
STATE

UTAH HIGHWAY PATROL
UNIFORM CITATION OR INFORMATION AND SUMMONS
TO APPEAR

CASE NO. 091800760
CITATION NO. C158721340
INCIDENT NO. U11024449
ORI UTUHP0900

NAME (Last) HOSKINS (First) JOSEPH (Middle) MICHAEL DOB [redacted] PHONE
ADDRESS 1014 W KENSINGTON DR (City) PEORIA (State) IL (Zip) 616140000
Driver License No. [redacted] CDL Presented No Expires 12/2022 State IL Restriction Place of Birth Social Security No. Motorcycle No
Gender M Ethnic Code W Height 5'6" Weight 215 Eyes BRO Hair RED Vehicle License No. AZ39390 State IL Expires 09/2019
Picture ID Yes Vehicle Make TOYT Vehicle Model Avalon Vehicle Type 4D Vehicle Year 2007 Vehicle Color BRO Accident: No Injury Severity: None

STATE OF UTAH
☑ COUNTY OF Tooele
☑ CITY OF OUTSIDE CITY LIMITS
THE DEFENDANT IS HEREBY GIVEN NOTICE TO APPEAR IN:
COURT OF 3rd District Court - Tooele
LOCATION Tooele County Courthouse, 47 South Main Street, Room 318, Tooele, UT, Fax: (435) 843-4702
Not less than (5) five nor more than (14) fourteen days after issuance of this citation or at a time specified by the court. IF YOU FAIL TO APPEAR, THE COURT MAY ISSUE A WARRANT FOR YOUR ARREST.

OCCURRED ON (DATE) 11/13/2018 MILITARY TIME 14:39 DIRECTION OF TRAVEL W
LOCATION I-80, OUTSIDE CITY LIMITS COUNTY Tooele MILE POST NO. 71

| UT | CO | CY | THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING THE FOLLOWING Description | Code No. | Code Type |
|---|---|---|---|---|---|
| ✓ | | | UT - LICENSE PLATE TO BE CLEARLY VISIBLE (IN) | 41-1A-404(3)(B)(II) | TRAF |
| ✓ | | | UT - MONEY LAUNDERING (MC)($90,000 CASH/FELONY) | 76-10-1906(1)(C)(I) | MISD |
| ✓ | | | UT - CRIMINAL CONSPIRACY (MC) | 76-4-201 | MISD |

Speeding | MPH Over | Interstate Yes | Alcohol/BAC

FOR COURT USE ONLY
DATE OF CONVICTION
FINE SUSPENDED
JAIL SUSPENDED
DISPOSITION FELONY ☐Yes ☐No
PLEA/FINDING: ☐Guilty ☐No Contest ☐Not Guilty ☐Plea in Abeyance
SENTENCE: ☐Declination ☐Diversion ☐Dismissed ☐Minimum ☐Intermediate ☐Maximum ☐Forfeited Bail
Signature of Judge or Court Clerk Required

WITHOUT ADMITTING GUILT I PROMISE TO APPEAR AS DIRECTED HEREIN
SIGNATURE OR X
OFFENSE TRACKING NUMBER:

OFFICER Jared Withers BADGE NO. ID: 228
COMPLAINANT
DATE OF CITATION 11/13/2018
COURT COPY
DATE SENT TO DLD
DOCKET NO.
RIGHT INDEX

MAIL THIS COPY TO: Driver License Division PO Box 144501 Salt Lake City, UT 84114-4501
I certify that the information on this form is true and correct abstract of the record on file in the court concerning the described conviction of the driver shown.
Signature or Name of Judge
Signature of Clerk

Figure 1: Copy of Joe's Citation

(Driver's license number and date of birth redacted for privacy)

45. Instead of completing the citation, Withers began interrogating Joe about his travel plans and employment status.

46. Withers then called Tooele County dispatch and had it run a driver's license and warrants check on Joe. (*See* Jared Withers Utah Highway Patrol Crime Report, Incident: U11024449, Report R14072685).

47. Withers told Joe to "hang tight" for a minute and exited the patrol vehicle.

48. Joe did not believe he was free to leave. Nor would it have been possible having been ordered to stay in the patrol vehicle and Withers between Joe and his car.

49. Withers opened the rear driver's side door and got out his K9, "Gus."

50. Withers walked his dog up to Joe's Avalon.

51. Withers had his dog conduct a purported sniff search around the exterior of the Avalon for approximately one minute.

52. Bodycam footage shows that, in total, the dog made three passes of the driver's side, five passes of the front side, two passes of the rear of the vehicle, and two passes of the passenger side, all without exhibiting conduct consistent with a K9's trained final response. Among other things, the dog never exhibited a "sit," the trained response.

53. Although not exhibiting a trained final response, the dog jumped and clawed at the outside of the vehicle's front passenger windshield and the passenger side rearview mirror.

54. The dog also jumped up, clawing the front passenger door, and attempted twice to enter the Avalon through the open front passenger side window.

55. The dog caused significant damage to Joe's Avalon ("raked the crap out of" the car and "destroy[ing] the door," as Withers later described it).

56. Withers returned to the patrol vehicle and placed the dog back in a kennel in the rear driver's side area.

57. Later on during the stop, Withers took a cell phone call from someone he identified as "Jimmy." Withers stated the following to Jimmy:

> Basically, the dog tried to jump—I mean the dog raked the crap out of the car twice trying to get through the passenger's window. He never gave a 'sit,' but there's no doubt in my mind he's trying to go

> after odor. And so after raking the hell out of the guy's paint twice, I was like, you know what? I'm just pulling it off of it. I mean, he's destroyed the door with his back feet trying to get into the car. He did kind of a half-ass indication after the first time when I yanked him out of the window, and then—I could see him hook odor, drop right back to the passenger window and try to bail through again. I'm like, 'ok, I'm calling that." (See Withers bodycam at 15:46:37)

58. Withers later wrote an incident report on his stop and search of Joe's vehicle.

59. Withers' incident report does not state that Gus alerted. Instead his report about the dog's free-air sniff stated:

> His body tensed, his tail began wagging faster and his sniffing became more intense. He quickly worked back to the open window and truck jumping through it. I pulled him out of the vehicle, and I watched him work odor back to the open window again trying to jump into the open window. It was obvious to me as his handler that he was following drug odor and was trying to get to the source of the odor as he is trained. In my experience with training and handling Gus, he will never try to jump through an open window of a vehicle unless he is trying to get to the source of drug odor. (See Jared Withers Utah Highway Patrol Crime Report, Incident: U11024449, Report R14072685).

60. Joe was still sitting in the patrol vehicle.

61. Withers returned to the car, where he and Joe had the following conversation:

> Joe Did you have to let him jump all over my car like that?
>
> Withers What that is, is he's trying to go after a drug odor, is what he's doing.
>
> Joe There are no drugs.
>
> Withers Well, if there are no drugs, there's something in there with drug odor on it because twice he tried to go into the car and I had to physically keep him out.
>
> Joe He's probably doing false hits. He's probably doing false hits like all you K9 cops do, cause there ain't been nothing smoked in that car and there ain't been nothing done in that car.
>
> Withers Well, I don't know that and he can't talk. All I know is he's a trained and certified narcotic detector dog and he's trying to go into your vehicle to get the drug odor, so. I'm gonna be searching your vehicle, ok. So I'm gonna have you go stand up in front of the car.
>
> (See Withers bodycam at 14:38:14)

62. At this point, Joe continued to believe he was not free to leave.

***Withers' drawing of his weapon***

63. At Withers' instruction, Joe exited the patrol vehicle.

64. Withers ordered Joe to place his cell phone on the hood of the patrol vehicle. Withers did not tell Joe that he could not make or receive a call on his cell phone. There was no legal basis for preventing Joe from making or receiving a call.

65. Withers did not ask Joe about any other phones or other property on his person. Withers had already inspected Joe's person for any weapons.

66. Joe put the cell phone on the hood of the patrol vehicle as requested.

67. Withers pointed out a delineator post farther down the road.

68. Withers directed Joe to stand by the post while Withers searched Joe's Avalon.

69. Withers walked Joe to the post.

70. Withers then left Joe at the post and walked alone, past the Avalon, back to his patrol vehicle.

71. Joe did not believe he was free to leave. Nor would it have been possible with Withers between Joe and his vehicle, and where Withers had taken possession of Joe's cell phone.

72. While Withers was retrieving gloves from the patrol vehicle, dispatch reported to Withers that Joe had no warrants and that Joe's driver's license was valid. At that point, Joe should have been permitted to leave. The citation for an alleged equipment violation should have been completed, and Withers had no probable cause to continue detaining Joe or to search Joe's car.

73. Withers walked back toward the Avalon but continued walking past the Avalon to Joe.

74. As Withers approached Joe, he noticed that Joe had another cell phone. Withers recognized and knew that it was a phone in Joe's hand.

75. Withers later told other UHP troopers that Joe could not hear him coming due to the noise of traffic. (*See* Withers bodycam at 16:02:31).

76. Withers approached Joe on Joe's left side and demanded, "Let me see that!"

77. Withers grabbed the phone from Joe's hand without giving Joe time to react or voluntarily comply with Withers' demand.

78. Joe turned approximately ninety degrees to face Defendant Withers.

79. With his left hand, Withers shoved Joe on the right side of Joe's chest causing Joe to take a step back. The shove was wholly unnecessary and not prompted by any legitimate law enforcement purpose or concern.

80. Up to this point, Joe had been compliant and cooperative with every request and command Withers had made of him.

81. After having his phone taken and being shoved for no reason, Joe began to feel increasingly frustrated and disrespected by Withers' orders and actions, the increasing delay in his trip, and the damage Gus had done to his car that Joe had bought only two months prior.

82. Joe expressed these frustrations verbally.

Joe Fuck yourself, cock smoker!

Withers Hey, you want that dog [Gus] to come out?

Joe Oh, go ahead. I'd love to sue you.

Withers How many more phones you have?

Joe I'd love to sue you.

Withers How many more phones you have?

Joe Let the dog out. Let him bite me.

Withers How many more phones do you have?

Joe Fuck your mom!

Withers Do you have more phones?

Joe No, I don't. I don't have time for your fucking bullshit.

Withers OK. Stay there.

(See Withers bodycam at 14:41:06)

83. Withers started walking back to the Avalon with his back turned to Joe, looking over his shoulder at Joe.

84. Withers had taken approximately six steps away from Joe toward the Avalon when Joe shouted, "Fucking suck a dick!"

85. Withers stopped walking.

86. In response to Joe's declaration, Withers lost his temper. He was already irritated by Joe's comment about Withers' mother. In fact, Withers was so bothered that he brought up the comment later to another officer, stating "Dude, I don't like him much after he said what—about my mom. You know? I mean, that was like—dude, that was below the belt there." (See Withers bodycam at 15:37:50).

87. Withers drew his gun and aimed the gun at Joe's upper body.

88. Joe was startled to see Withers pointing a gun at him.

89. Withers shouted at Joe, "Get your hand out of your pocket!"

90. Joe's hand was not in his pocket. He immediately put his hands in the air.

91. Joe shouted, "I don't have anything. My hands are out of my pockets."

92. Withers ordered Joe to turn around and put his hands on the back of his head. Joe complied.

93. Withers called dispatch for another unit.

94. Withers handcuffed Joe with his hands behind his back. He told Joe, "You're not under arrest; you're being detained." This was a false statement.

95. Joe believed he was not free to leave, nor was it physically possible for him to leave.

96. Withers' use of force through drawing and pointing his gun at Joe was excessive and unreasonable for reasons that include:

a. Withers had earlier performed a visual weapons inspection of Joe's person, having Joe lift his shirt to reveal the waistband of his pants and bare torso. Withers was satisfied with the results of this search such that Withers had seated Joe with him in the front passenger seat of the police vehicle, and had turned away from Joe on other occasions.

b. Joe had been fully compliant and cooperative with every command Withers had given.

c. Withers escalated the interaction by approaching Joe in a manner in which Joe could not hear him, startling Joe, and snatching Joe's phone without warning.

d. Withers further escalated the interaction by unnecessarily shoving Joe, without warning or provocation, causing him to take a step backward.

e. Though Withers knew Joe was not armed and Joe had been fully compliant, Withers drew his gun without giving sufficient verbal warning to allow Joe the opportunity to place his hands wherever Withers wanted them.

f. When Withers drew his gun, rather than aim in the low-and-ready position, he aimed his gun directly at Joe's body.

97. After placing Joe in handcuffs, Withers walked Joe back to the patrol vehicle.

98. Withers patted Joe down. Joe had no property or weapons on him.

99. Withers placed Joe in the front passenger seat of the patrol vehicle.

100. A short while later, Withers moved Joe to the rear passenger-side seat.

101. The rear door had no interior door handles with which to exit the vehicle.

102. Joe continued to believe that he was not free to leave. Nor would it have been physically possible for him to leave, with his hands cuffed behind his back and in the back of a car with no interior door handles.

103. Withers had arrested Joe without a warrant and without probable cause. *United States v. Serna*, 406 F. Supp 3d 1084, 1104 (D.N.M. 2019), aff'd, 806 F. App'x 654 (10th Cir. 2020) ("An arrest is a seizure that is characterized by highly intrusive or lengthy search or detention . . . The general rule is that the use of firearms, handcuffs, and other forceful techniques is sufficiently intrusive to signal that a person has been placed under arrest.") (cleaned up); *Martin v. Duffie*, 463 F.2d 464, 468–69 (10th Cir. 1972) (noting after a plaintiff establishes an invasion of his rights, a warrantless arrest is presumed unconstitutional and the defendant officer bears the burden of proving probable cause for the arrest).

***Withers' search of Joe's vehicle***

104. Withers left Joe in the patrol vehicle.

105. Withers positioned Joe's cell phones on the hood of the patrol vehicle.

106. Withers walked to the front passenger door of Joe's Avalon, opened the door, and began to search Joe's vehicle.

107. UHP Trooper Jesse Williams ("Williams") arrived at the scene.

108. When Williams arrived, Withers relayed his version of events to Williams. Withers falsely stated to Williams that he drew his gun because Joe had attacked him:

> Deploy—deploy dog on it. Dog tries to go through the window twice; twice I have to yank him back out of the car. I tell him (Joe) to go up there. Starts giving me a little bit of attitude. I think he'll be fine; he's way up there. So I go get some gloves and I notice he's up there with his back turned and he's doing this (demonstrates shielding) and I'm like, oh crap, he's got another phone. So I walk up there and he's got a burner phone, but he's hurried and texting on it. So I go 'yoink' (demonstrates), I yank it out of his hand, and the fight was on. I actually drew down on him; I took the phone from him, he gets in my face, lunges at me, and then he reaches in his pocket. I went to gun, boom, and yeah.

(*See* Withers bodycam at 14:45:56) (parentheticals added for clarity).

109. As reflected in Withers' bodycam footage, Withers' statements about the confrontation with Joe were false. Among other things: a. After Wither took the phone, Joe did not step closer to Withers' face; neither did Joe lunge at Withers.

b. After Withers took Joe's phone, Withers pushed Joe, causing Joe to step backward.

c. It was Withers who had approached Joe. Joe turned to face Withers but remained approximately an arm's length from Withers' person.

d. There was no "fight."

e. Withers had taken approximately six steps away from Joe when Withers turned around and drew his gun, and he did so only after Joe yelled another taunt at Withers.

f. When Withers drew his weapon on Joe, Withers remained approximately six steps from Joe. Joe remained in place and had not moved any closer to Withers.

110. Williams joined Withers in searching Joe's Avalon.

111. According to Withers' bodycam footage, Withers' and Williams' search of the Avalon took 1 hour and 15 minutes, from 2:45 p.m. until approximately 4:00 p.m.

112. Throughout the search, Joe was left with his hands cuffed behind his back in the back seat of Withers' vehicle.

113. During the search of the Avalon, Withers took apart the rear seats as well as the lining between the rear passenger compartment and the trunk.

114. The Troopers located money that Joe had secured in his vehicle.

115. The money was United States legal tender.

116. Withers advised Joe, "Ok, Joe. At this point you're being detained for the large amount of money that's in the car."

117. There is no law prohibiting the carrying of legal tender.

118. Withers and Williams found no drugs or drug paraphernalia in Joe's vehicle.

119. The Troopers took the cash.

120. Withers transported Joe to the UHP office in Tooele County.

121. The Avalon was towed to the UHP office in Tooele County.

122. Withers seized a total of $90,350.00 of Joe's money.

123. Joe was booked into the Tooele County jail at 8:28 p.m. on November 13, 2018.

124. On the citation, Withers wrote equipment violation, money laundering, and criminal conspiracy. (*See* Jared Withers Utah Highway Patrol Crime Report, Incident: U11024449, Report R14072685).

125. Because of Withers' reference to alleged felonies on the citation, for which Withers had no probable cause, a specimen of Joe's DNA was collected by Tooele County jail personnel.

126. UHP handed Joe an "Asset Seizure Notification Form" stating that the following property had been "seized for forfeiture and will be held pending further order of the court or a final determination of forfeiture": "an unknow[n] amount of US currency. (subject said 89,000.) And $1350 in US currency from subjects' pocket."

127. Joe's Avalon was towed from the Tooele UHP office to an impound lot.

128. The next day, on November 14, 2018, at 10:42 a.m., UHP deposited $90,350.00 of Joe's money into Wells Fargo Bank.

129. Joe was released from jail on November 14, 2018, at approximately 3:09 p.m.

130. Because his car had been impounded, Joe had to hire a taxi to take him to the impound lot where he could retrieve his vehicle. Joe also had to pay to retrieve his vehicle from impound.

***Anderson's failure to destroy Joe's DNA***

131. Under Utah Code § 53-10-404.5, because of Withers' representations on the citation, Tooele County ordered Joe to provide a specimen of his DNA upon booking Joe into jail.

132. Following his release from jail, no criminal charges were ever brought against Joe.

133. Pursuant to Utah Code § 53-10-406(1)(i), the Bureau of Forensic Services (as an agency within the Department of Public Safety) "shall … destroy a DNA specimen obtained under this part if criminal charges have not been filed within 90 days after booking for an alleged offense under Subsection 53-10-403(2)(c)."

134. Furthermore, under Utah Code § 53-10-406(1)(j), the Bureau of Forensic Services shall "make rules in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, establishing procedures for obtaining, transmitting, and analyzing DNA specimens and for storing and destroying DNA specimens and other physical evidence and criminal identification information obtained from the analysis."

135. Although obligated to destroy Joe's DNA specimen and otherwise make rules "establishing procedures for obtaining, transmitting, and analyzing DNA specimens and for storing and destroying DNA specimens and other physical evidence and criminal identification information obtained from the analysis," the Bureau of Forensic Services has failed to track or destroy Joe's DNA specimen or promulgate administrative rules as required by the Legislature.

136. Upon information and belief, the Bureau of Forensic Services has no system in place to track cases where it is required to automatically destroy DNA specimens pursuant to the statute.

137. Utah Code § 53-10-406(6) provides that:

> A person whose DNA specimen has been obtained under this part may, personally or through a legal representative, submit to the court a motion for a court order requiring the destruction of the person's DNA specimen and any criminal identification record created in connection with that specimen if: (a) (i) a final judgment reverses the conviction, judgment, or order that created an obligation to provide a DNA specimen; or (ii) all charges arising from the same criminal episode for which the DNA specimen was obtained under Subsection 53-10-404.5(1)(a) have been resolved by a final judgment of dismissal or acquittal; and (b) the department determines that the person has not otherwise become obligated to submit a DNA specimen as a result of any separate conviction or juvenile adjudication for any offense listed in Subsection 53-10-403(2).

138. Despite the ability of an individual that has been charged with and/or convicted of a felony to secure the destruction of his or her DNA following a dismissal,

acquittal, or reversal of conviction, Utah's DNA collection statutes do not provide a mechanism by which Joe, and others similarly situated, may ensure the destruction of their DNA where criminal charges are never filed.

139. Additionally, because the Bureau of Forensic Services has not promulgated rules as required by Utah Code § 53-10-406(1)(j), there is no administrative mechanism by which Joe may petition the Bureau as an agency of the Department of Public Safety to ensure that his DNA specimen has been destroyed.

***Civil forfeiture proceeding instituted against Joe***

140. Despite the absence of any criminal charges, on January 24, 2019, the State of Utah filed a civil action against Joe asking that Joe's money be "forfeited."

141. Joe had to hire an attorney to defend against the State's attempt to keep his money.

142. On March 7, 2019, Joe's attorney filed a motion to exclude all evidence. The motion was based on the grounds that, among other things, Withers had no lawful basis to stop Joe.

143. The State did not file any response attempting to justify Withers' stop of Joe. Instead, on March 25, 2019, the State voluntarily dropped its forfeiture lawsuit and agreed to return Joe's money to him.

144. Joe paid $18,070.00 to the forfeiture attorney, equaling 20 percent of the amount of his money that had been seized.

145. Joe also incurred other out-of-pocket expenses and damages as a result of Withers' unlawful actions, including:

a. $55.00 to obtain records from Utah Highway Patrol through a GRAMA request;

b. $250.00 jury demand fee to the Third District Court;

c. $25.00 wire transfer fee from Wells Fargo Bank;

d. Taxi fare to impound lot;

e. Money paid to impound lot;

f. Compensation to an attorney to confirm that Joe's DNA sample has been handled in the manner required by statute when charges were not brought within 90 days of booking, and to enforce all other statutory requirements governing the collection of Joe's DNA upon booking;

g. The cost of a new paint job for his vehicle.

146. Joe has been required to hire seasoned civil rights counsel in order to vindicate his constitutional rights.

**FIRST CLAIM FOR RELIEF**

*(Fourth Amendment and Utah Constitution Art. I, § 14, Defendant Withers)*

147. Plaintiff incorporates by reference all other paragraphs of this Complaint as if fully set forth herein.

148. At all times relevant hereto, Plaintiff had a right to be free of unreasonable stops, searches, seizures, detentions, and excessive force under the Fourth Amendment to the U.S. Constitution, and Article I, § 14 of the Utah Constitution.

149. At all times relevant hereto, and in performance of the acts set forth herein, Defendant Withers acted under color of state law.

150. At all times relevant hereto, and in performance of the acts set forth herein, Defendant Withers actively

and personally caused the violations of constitutional rights alleged herein.

151. Defendant Withers' conduct alleged herein—including, an unreasonable stop, unlawful detainment, unreasonable and excessive force, unlawful search, and unlawful seizure—violated Plaintiff's rights under the Fourth Amendment to the U.S. Constitution as well as Article I, § 14 of the Utah Constitution.

152. The unlawful misconduct of Defendant was objectively unreasonable and undertaken intentionally with willful indifference to Plaintiff's constitutional rights.

153. Defendant Withers' actions violated Plaintiff's clearly established constitutional rights of which reasonable police officers are or should be aware.

154. Defendant's unlawful actions caused Plaintiff to incur damages and out of pocket expenses, which Plaintiff is entitled to recover herein.

155. Plaintiff is further entitled to attorney fees and expenses pursuant to 42 U.S.C. § 1988, pre-judgment interest, and costs as allowable by federal law.

**SECOND CLAIM FOR RELIEF**

*(First Amendment and Utah Constitution Art. I, §§ 1, 15, Defendant Withers)*

156. Plaintiff incorporates by reference all other paragraphs of this Complaint as if fully set forth herein.

157. At all times relevant hereto, Plaintiff had a right to freely express his thoughts and opinions under the First Amendment to the U.S. Constitution and Article I, §§ 1 and 15 of the Utah Constitution.

158. At all times relevant hereto, and in performance of the acts set forth herein, Defendant Withers acted under color of state law.

159. At all times relevant hereto, and in performance of the acts set forth herein, Defendant Withers actively and personally caused the violations of constitutional rights alleged herein.

160. Defendant Withers' conduct alleged herein—including the use of unreasonable force in the form of drawing his gun on Plaintiff in retaliation for Plaintiff's expression of thoughts and opinions—violated Plaintiff's rights under the First Amendment to the U.S. Constitution and Article I, §§ 1 and 15 of the Utah Constitution.

161. The unlawful misconduct of Defendant was objectively unreasonable, based on pretext, and undertaken intentionally with willful indifference to Plaintiff's constitutional rights.

162. Defendant Withers' actions violated Plaintiff's clearly established constitutional rights of which reasonable police officers are or should be aware.

163. Plaintiff is entitled to attorney fees and expenses pursuant to 42 U.S.C. § 1988, pre-judgment interest, and costs as allowable by federal law.

**THIRD CLAIM FOR RELIEF**

*(Fourteenth Amendment and Utah Constitution Art. I, § 7, Commissioner Anderson)*

164. All other paragraphs of this Complaint are re-alleged as if fully set forth herein.

165. Based on the facts set forth above, the named Plaintiff and the class he represents assert that Defendants violated their rights under the Fourteenth

Amendment to the U.S. Constitution and Article I, § 7 of the Utah Constitution by depriving them of a protected property interest in their DNA (including any profiles or other data derived therefrom) without due process of law.

166. At all times relevant hereto, Plaintiff and the class he represents had a protected property interest in their DNA under the Fourteenth Amendment to the U.S. Constitution and Article I, § 7 of the Utah Constitution. Plaintiffs further had a due process right in the confirmed destruction of their DNA once Defendants no longer had any valid interest in possessing it under Utah's DNA collection statutes (Utah Code § 53-10-401, *et seq.*).

167. Existing state law and/or administrative remedies are inadequate to redress the deprivation of Plaintiffs' due process rights because there is no procedural mechanism under Utah law for persons who are booked into jail but not subsequently criminally charged to ensure the destruction of their DNA.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully pray for the following relief:

1. Certify the proposed class;

2. Declare that the events described above are a violation of the United States Constitution and Utah Constitution;

3. Enter an injunction directing Defendant Commissioner Anderson to promulgate rules pursuant to Utah Code § 53-10-406(1)(j) for establishing procedures for obtaining, transmitting, and analyzing DNA specimens and for storing and destroying DNA specimens and other physical evidence and criminal identification information obtained from the analysis and

to comply with the statutory requirements under Utah Code § 53-10-406(1)(i) regarding the destruction of DNA specimens obtained from individuals who are booked following an arrest but against whom criminal charges have not been filed within 90 days for an alleged offense under Utah Code § 53-10-403(2)(c);

4. Enter an injunction directing Defendant Commissioner Anderson to destroy, and to confirm the destruction of, all DNA specimens and profiles that were required to be destroyed pursuant to Utah Code § 53-10-406(1)(i) since the statute's enactment;

5. A judgment awarding Plaintiff interest on economic losses to the extent permitted by law, including those set forth in paragraphs 144-146;

6. A judgment awarding compensation to Plaintiff for his noneconomic loss, emotional distress and other personal injury resulting from the violation of his Constitutional rights;

7. A judgment awarding Plaintiff nominal damages resulting from the violation of his Constitutional rights;

8. A judgment awarding Plaintiff his costs of suit, including reasonable attorney fees and litigation expenses, under 42 U.S.C. § 1988; and

9. A judgment awarding such other and further relief, including equitable, declaratory, and injunctive relief, to which Plaintiffs may be entitled.

DATED this 19th day of March, 2020.

CHRISTENSEN & JENSEN, P.C.

/s/ Karra J. Porter
Karra J. Porter
J.D. Lauritzen
*Attorneys for Plaintiff Joseph M. Hoskins*

JURY TRIAL DEMANDED
Plaintiffs request a jury trial on all issues under the Seventh Amendment of the United States Constitution