In the District Court
of
Geary County, Kansas

State of Kansas, ex rel. Geary County Sheriff's Department, Plaintiff, v. **One 2007 Chevrolet Tahoe,** VIN: 1GNFK13067R375829 Defendant.	Case No. GE-2023-CV-000129 GESO 23-8840 Motion to Suppress; Memorandum in Support; Exhibit A; Certificate of Service. Hearing: To Be Set. Hon. Benjamin Sexton (D01)

Motion to Suppress

Dewonna Goodridge moves this Court for an Order suppressing all illegally obtained evidence following—and flowing from—Geary County Law Enforcement Officer Cayla J. Da Giau activation of her police lights.

This motion is made pursuant to Kansas Constitution Bill of Rights Sections 1, 15, and 18, the separation of powers doctrine, the Fourth and Fourteenth Amendments to the United States Constitution, and KSA § 22-3216; and it's based on the memorandum in support—incorporated here as if set for fully—and the evidence and arguments at the hearing. Because the government still hasn't disclosed certain evidence despite requests, counsel reserves the right to supplement or amend this motion and the accompanying memorandum.

Dated: Feb. 1, 2024.

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State of Kansas, ex rel. Geary County Sheriff's Department, Plaintiff, v. **One 2007 Chevrolet Tahoe,** VIN: 1GNFK13067R375829 Defendant.	Case No. GE-2023-CV-000129 GESO 23-8840 Memorandum in Support

Memorandum in Support

Summary of the Factual Background[1]

On June 29, 2023, Geary County Law Enforcement Officer Cayla J. Da Giau initiated a traffic stop of the 2007 Chevrolet Tahoe at issue in this forfeiture case. Officer Da Giau initiated the stop after she allegedly "observed the Tahoe fail to signal when exiting the roundabout and continue driving westbound on Goldenbelt Blvd." Exhibit A, page 2.[2] The driver of the 2007 Chevrolet Tahoe failed to immediately stop, but eventually did so in a parking lot at 2031 S. Spring Valley Road in Junction City.

At the lot, Officer Da Giau instructed the driver—Antwaan Dwayne Williams—back to Officer Da Giau's car where another officer, Deputy Huizard, placed Mr. Williams in custody. Ex. A, page 2. Nobody else was in the 2007 Chevrolet Tahoe. Ex. A, page 2.

Officer Da Giau then "deployed" Enzo, her police service dog. Ex. A, page 3. After walking the dog around the 2007 Chevrolet Tahoe, Enzo eventually "jumped up onto the front passenger side door and was sniffing and continued around the vehicle to the front driver side door." Ex. A, page 3. Enzo then "returned to the front Driver side door on his own fruition and began sniffing higher up the seam of the door placing his front paws on the

[1] Ms. Goodridge doesn't admit these alleged facts are true. Instead, she recites them as a basis for the filing of the instant motion. The facts will be adduced at the hearing. The affidavit is attached as an exhibit.

[2] Exhibit A is the affidavit that was attached to the government's Notice of Pending Forfeiture filed on August 16, 2023.

front driver side door." Ex. A, page 3. After walking Enzo around the 2007 Chevrolet Tahoe, Enzo "indicated with a sit to the front driver side door." Enzo "indicated to the same location upon initial indication." Ex. A, page 3.

Officers Da Giau and Huizar then searched the 2007 Chevrolet Tahoe. Officer Da Giau claims she found "small amounts of marijuana (Commonly referred to as 'shake')" in the "center console underneath the plastic covering." Ex. A, pages 3-4. Nobody recovered the alleged marijuana shake or any other evidence. Ex. A, page 4.

The government claims the 2007 Chevrolet Tahoe represented the proceeds of illegal drug transactions, or was used, or intended to be used, to facilitate drug transactions. Notice of Pending Forfeiture at 1.

Summary of the Argument.

First, Officer Da Giau didn't have probable cause to initiate the seizure of the 2007 Chevrolet Tahoe. Failing to signal when exiting the Goldenbelt Roundabout isn't a traffic violation. Ms. Goodridge presents a good faith argument for an extension, modification, or reversal of existing law—that the seizure occurred when Officer Da Giau activated her lights, not when the 2007 Chevrolet Tahoe eventually stopped.

Second, Enzo conducted a warrantless physical intrusion *onto* the 2007 Chevrolet Tahoe for which no warrant exception applies.

Third, law enforcement conducted a warrantless physical intrusion *into* the 2007 Chevrolet Tahoe for which no warrant exception applies.

Fourth, under a privacy-based analysis, law enforcement's warrantless search of the 2007 Chevrolet Tahoe shouldn't be justified by the automobile exception. In this section, Ms. Goodridge presents a good faith argument for an extension, modification, or reversal of existing law—that the automobile exception doesn't establish a *per se* exigent circumstance.

Argument

1. Officer Da Giau didn't have probable cause to initiate the seizure of the 2007 Chevrolet Tahoe: failing to signal when exiting the Goldenbelt Roundabout isn't a traffic violation.

The Kansas Constitution protects the "right of the people to be secure in their persons and property against unreasonable searches and seizures[.]" Kan. Const. Bill of Rts. Sec. 15.

Because a traffic stop is at least a Section 15 seizure, the government can't conduct one without probable cause that a traffic violation has been committed. *Whren v. United States*, 517 U.S. 806, 810 (1996) (stop based on alleged "traffic violation" requires "probable cause"); *State v. Greever*, 286 Kan. 124, 140 (2008) (same); *but see Swanson v. Town of Mountain View, Colo.*, 577 F.3d 1196, 1201 (10th Cir. 2009); *State v. Jones*, 300 Kan. 630, 637, (2014).

In this case, Officer Da Giau initiated the traffic stop when she "observed the Tahoe fail to signal when exiting the roundabout and continue driving westbound on Goldenbelt Blvd." Ex. A, page 2.

Although not stated in the officer's report, Officer Da Giau appears to rely on KSA § 8-1548, "[t]urning movements and required signals," for initiating the traffic stop. It says, "[n]o person shall turn a vehicle or move right or left upon a roadway" "without giving an appropriate signal in the manner hereinafter provided," KSA § 8-1548(a), and "[a] signal of intention to turn or move right or left *when required* shall be given continuously during not less than the last one hundred (100) feet traveled by the vehicle before turning," KSA § 8-1548(b) (emphasis added).

Failing to signal when driving through a roundabout doesn't amount to either probable cause or reasonable suspicion though—it's neither a violation of the law, nor a crime.[3]

A statute directly governing roundabouts, KSA § 8-1521(c), says "[a] vehicle passing around a rotary traffic island shall be driven only to the right of such island." It doesn't mention, let alone require, a turn signal, unlike in other states. *See* O.R.S. § 811.400.

Further, the signaling statute at KSA § 8-1548 only requires a turn signal if the person intends to make a complete 90 degree turn or if the person changes lanes. *State v. Greever*, 286 Kan. 124, 137 (2008) (signaling statute applies to 90-degree right or left-hand turns); *State v. DeMarco*, 263 Kan. 727, 733 (1998) (signaling statute applies to a "lane change").

A person driving through a roundabout—like here—isn't turning or changing lanes as contemplated by the signaling statute. Rather, the person simply travels the *same* road in the *same* direction. Therefore, a signal isn't required at all.

Separately—as a practical matter—the 100-foot signaling distance can't apply to the Goldenbelt roundabout: each entrance-exit is less than 100 feet from the next. By the time a person enters a roundabout, there isn't enough distance to use their signal. Besides, the signaling statute doesn't specify whether the person should use their right-hand or left-hand signal when circling the roundabout either.

Based upon a fair reading of the affidavit, the driver of the 2007 Chevrolet Tahoe never left Goldenbelt road—he kept traveling on the same road in the same direction; he

[3] Ms. Goodridge wasn't driving the 2007 Chevrolet Tahoe, of course. Nonetheless, because it's *her car*, she has a sufficient and cognizable property interest and/or privacy interest to challenge its seizure, under Section 15. *See also Carpenter v. United States*, 138 S. Ct. 2206, 2267–68 (2018) (Under the "traditional" property-based approach, "if a house, paper or effect was *yours* under law," "no more was needed to trigger the Fourth Amendment.") (Gorsuch, J., dissenting) (emphasis in original); *id.* at 2269 (entrusting property to another "may not mean you lose any Fourth Amendment interest"); *id*. (doubtful that "complete ownership or exclusive control of property" is "a necessary condition to the assertion of a Fourth Amendment right"); *Williamson v. Bernalillo Cnty. Sheriff's Dep't*, 125 F.3d 864 (10th Cir. 1997) (unpublished) (possessory interest can be enough to establish standing). And, as will be shown below and throughout, because Section 15 *and* Section 1 are *fundamental rights* designed to protect against arbitrary invasions of one's property, Ms. Goodridge has an independent, sufficient interest to challenge the government's seizure and search.

didn't make any turn or lane change, as contemplated by the statute; the entrance-exit points were less than 100 feet from the next; and a signal wasn't required. At least three cases establish that probable cause doesn't exist when a driver fails to signal when entering or exiting a roundabout.

In *Noble v. State*, the police stopped Mr. Noble "for failing to use his turn signal when he entered and left a roundabout." 357 P.3d 1201, 1201 (Alaska Ct. App. 2015). The Alaska Court of Appeals agreed with Mr. Nobel that "Alaska's existing regulations regarding a motorist's use of turn signals do not apply to roundabouts," *id.*; and "[t]herefore, Noble did not commit a traffic violation by failing to signal when he entered and left the roundabout," *id.*

Like here, the Alaska statute required a continuous use of a signal for the last hundred feet before turning. *Id.* at 1202-1303. The *Noble* Court correctly explained that requiring a signaling distance of 100 feet or more can't apply to roundabouts where the entrances and exits are less than 100 feet apart. *Id.* at 1206.

In *State v. Davis*, the Indiana Court of Appeals analyzed a statute that said a "signal of intention to turn right or left shall be given continuously during not less than the last two hundred (200) feet traveled by a vehicle before turning or changing lanes." 143 N.E.3d 343, 346–47 (Ind. Ct. App. 2020).

The *Davis* Court held that traveling through a roundabout and exiting a roundabout without signaling a turn was not a sufficient justification for stopping the defendant's vehicle. *Id.* at 347-48. When "motorists are entering a roundabout, they are simply following the roadway and continuing along the natural flow of the road, similar to when coming upon a curve in the road. Accordingly, it would be nonsensical to read the current turn signal statute as requiring motorists to activate their right-turn signals when entering a roundabout, especially if they simply mean to travel in a continuous lane and move through the roundabout. In that circumstance, the driver is not making a choice between alternatives that

other motorists need to be alerted to for safety purposes; the driver is neither turning nor changing lanes, so there is nothing to signal." *Id*. at 347.

"Moreover," the *Davis* Court explained, when exiting a roundabout, "it would only make sense from a safety standpoint for a motorist to signal a turn, whether it be right or left, immediately upon passing the exit just prior to the desired exit. However, our current law requires motorists to signal continuously during not less than the last 200 feet traveled before turning or changing lanes." *Id*. at 348. Because a turn signal isn't required before *entering* a roundabout, it can't apply to *exiting* a roundabout, the court concluded. Therefore, failing to signal didn't establish reasonable suspicion for the seizure.

In *People v. McBride*, the Colorado Court of Appeals held the state's signaling statute didn't apply to roundabouts either, and adopted the reasoning of *Noble* and *Davis*. 490 P.3d 810, 818 (Colo. App. 2020), *reversed in part on other grounds*, 511 P.3d 613 (Colo. 2022).

The Kansas Legislature didn't criminalize failing to signal when entering or exiting a roundabout like Oregon has, *see* O.R.S. § 811.400, Officer Da Giau didn't have probable cause or reasonable suspicion to initiate the traffic stop, and all evidence flowing from the illegal stop should be suppressed.

1.1 Alternatively, the State's signaling statute is unconstitutionally vague.

To the extent the government or this Court takes the position the signaling statute does require a turn signal when exiting a roundabout, the statute is unconstitutionally vague. It doesn't provide fair notice as to the conduct proscribed—a violation of Kansas Constitution Bill of Rights Section 18, Kansas' due process clause—and because it doesn't provide explicit standards for enforcement to protect against arbitrary enforcement—a violation of the separation of powers doctrine under the Kansas Constitution

Vague statutes are unconstitutional under either the due process clause or the separation of powers doctrines. *State v. Harris*, 311 Kan. 816, 821 (2020). A statute that uses "terms so vague" that it forces ordinarily intelligent people to "necessarily guess at its meaning and differ as to its application" violates due process. *Harris*, 311 Kan. at 821

(cleaned up). On the other hand, under the federal and state separation of powers doctrines, laws that do not provide explicit standards for those who apply them amounts to an "impermissible delegation of basic policy matters by the legislative branch to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis." *Id.* (cleaned up).

"The primary problem with a law that fails to provide explicit standards for enforcement is that such laws invite arbitrary power. That is, these laws threaten to transfer legislative power to police, prosecutors, judges, and juries, which leaves them the job of shaping a vague statute's contours through their enforcement decisions." *Harris*, 311 Kan. at 822 (cleaned up).

"Because an impermissible delegation of legislative power will often lead to arbitrary enforcement based on subjective or even prejudicial criteria, the United States Supreme Court has indicated that the more important prong of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement. Without these, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections. It is the very overbreadth of such laws that renders them impermissibly vague. It is not necessarily because they are ambiguous on their face—an overbroad law can be very clear. The problem, in fact, may be amplified by clarity. If a law makes everyone a violator, then prosecutors and the police will both define the law on the street and decide who has violated it." *Harris*, 311 Kan. at 822-823 (cleaned up).

The statute fails to provide any standard—let alone an "explicit" one—for those who apply it. The statute is so vague it can be interpreted in any manner the government sees fit—the very definition of unconstitutionally vague. *Harris*, 311 Kan. at 822 (legislature must establish guidelines so police, prosecutors, judges, and juries do not impermissibly shape the statute's contours through their enforcement decisions).

1.2 Kansas Constitution Bill of Rights Section 15 should be interpreted so that the seizure occurred when Officer Da Giau activated her emergency lights, not when the 2007 Chevrolet Tahoe stopped.

At the moment Officer Da Giau activated her emergency lights, she didn't have probable cause to believe the driver of the 2007 Chevrolet Tahoe had committed a crime. It's therefore necessary to determine *when* the unreasonable seizure occurred.

Although the two clauses are different, the Kansas Supreme Court currently interprets Section 15 *generally* the same as the Fourth Amendment to the United States Constitution. *E.g.*, *State v. Thompson*, 284 Kan. 763, 779–80 (2007), as modified (Oct. 17, 2007); *State v. Cleverly*, 305 Kan. 598, 604 (2016) (Section 15 offers "at least the same protections" as the Fourth Amendment).

As such, the Kansas Supreme Court generally follows the seizure rule announced in *California v. Hodari D.*, a United States Supreme Court case interpreting the Fourth Amendment: that a seizure doesn't occur unless there's physical force; or where there's a show of authority that communicates to a reasonable person that they aren't free to leave, and the person submits to that show of authority. 499 U.S. 621, 624, 628-29; *State v. Morris*, 276 Kan. 11, 18–19, 21-24 (2003).

The Kansas Supreme Court should depart from its lockstep approach when analyzing Section 15, reject *Hodari D.* as a matter of state constitutional law—as at least sixteen other states have done[4]—and hold that Officer Da Giau seized the 2007 Chevrolet Tahoe when she activated her emergency lights, for the reasons below.

1.2.1 Section 15 provides greater protection from warrantless searches and seizures than the Fourth Amendment does.

Kansas' search and seizure clause provides greater protection than the Fourth Amendment does. First, it's textually *different*. "Persons and property"—a *Madisonian* phrase—is broader than "persons, houses, papers, and effects." Second, because the Kansas

[4] LaKeith Faulkner, et al., *State-Constitutional Departures from the Supreme Court: The Fourth Amendment*, 89 Miss. L. Jour. 197, 203 (2020).

Constitution is grounded in Lockean principles and contains provisions not found in the United States Constitution, Section 15's meaning, purpose, and protections are far more expansive than its federal counterpart. Third, the right to be free from unreasonable searches and seizures is *itself* a fundamental right; *and* it's the mechanism to protect those fundamental rights from government interference.

1.2.1.1 Section 15's textual differences: broader and more protective than the Fourth Amendment.

At the Wyandotte Convention, Kansas' original search and seizure proposal—then numbered Section 16—stated "[t]he right of the people to be secure in their persons, houses, papers, estates, &c, against unreasonable searches and seizures, shall be inviolate, and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." Kansas Constitutional Convention: A Reprint of the Proceedings and Debates of the Convention Which Framed the Constitution of Kansas at Wyandotte in July, 1859. (Kansas State Printing Plant, Topeka 1920) at 188.

On July 18, 1859, the newly numbered search and seizure clause—now Section 15—"was read and passed." *Id.* at 289. One week later, on July 25, 1859, the Committee on Phraseology and Arrangement proposed the following changes: "Section 15, for 'houses, papers, estates,' &c. read 'property'; in line five, for 'one' read 'on'; in last line, for 'things' read 'property.'" *Id.* at 461.

On July 29, 1859, the Wyandotte Convention closed, with the Kansas Founders adopting the current iteration of Section 15: "The right of the people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or property to be seized."[5]

[5] Original handwritten version available here: https://www.kansasmemory.org/item/90272/page/2

Given its meaning at or near the time of the Wyandotte Convention, the phrase "persons and property" is broader in its scope, meaning, and its protections, than the Fourth Amendment.

James Madison, one of the principal architects of the Fourth Amendment, originally proposed that the Fourth Amendment include the term "property," rather than "effects." Neil C. McCabe, *State Constitutions and the "Open Fields" Doctrine: A Historical Definitional Analysis of the Scope of Protection against Warrantless Searches of "Possessions,"* 13 Vt. L. Rev. 179, 182 (1988). The Kansas Founders—by deliberately choosing to include "property" in Section 15—brought "itself in line with Madison's proposal." *Id*. at 191.

As a textual matter, the term "property" is broader than the Fourth Amendment's use of the word "effects." *See Oliver v. United States*, 466 U.S. 170, 177 (1984) ("The term 'effects' is less inclusive than 'property'") (cleaned up); McCabe at 209 ("state constitutional provisions employing either 'possessions' or 'property' should be considered wider in scope than the fourth amendment"). As a conceptual matter, the Madison concept of property is far broader as well. Morgan Cloud, *Property is Privacy: Locke and Brandeis in the Twenty-First Century*, 55 Am. Crim. L. Rev. 37, 38, 48 (2018).

In the end, Kansas' search and seizure clause—by its very terms—is broader than the Fourth Amendment.

1.2.1.2 The Kansas Constitution is structurally and fundamentally different than the United States Constitution

The Kansas Constitution is grounded in the Lockean principles of natural rights, and contains provisions not found in its counterpart, the United States Constitution. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 639 (2019) (holding that Section 1 is a Lockean natural rights guarantee).

As a historical matter, the interconnectedness between Lockean principles and protections from government searches and seizures is unequivocal.

The Lockean concept of property formed the basis for one of history's most seminal search and seizure cases, *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765).

In *Entick,* Chief Justice Charles Pratt—later becoming Lord Camden—assumed "John Locke's philosophy of natural rights," "reasoned that the protection of private property underpinned the formation of society as a sacred right," William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 602-1791, 454 (2009), and issued a devasting rebuke of the Crown's searches and seizures under the General Warrant, comparing it to the Star Chamber. He explained that "every invasion of private property, be it ever so minute, is a trespass," 19 How. St. Tr. 1001, 1066, and therefore, was an "invasion of the indefeasible rights of personal security, [and] liberty," Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1198 (2016).

In fact, the "Lockean theory of property was embedded in the Fourth Amendment's" "text and history." Cloud, *supra* at 37; *Carpenter v. United States*, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting) ("The concept of security in property recognized by Locke and the English legal tradition appeared throughout the materials that inspired the Fourth Amendment.")

Under Lockean principles, "property" doesn't just include physical and tangible property—it includes property in *all of its* "manifestations," Cloud, *supra* at 50, like a person's "liberty," "his labor," the "products of that labor," *id*. at 45, the "expressions of a person's ideas," *id*. at 60, one's "beliefs," *id*. at 48, and a person's privacy, *see id*. at 73.

According to Locke *and* Madison, the term "property" even includes a person's rights. *Id*. at 44, 48; Frederic Jesup Stimson, LL.D., The American Constitution as it protects private rights (New York 1923), 154 ("Personal liberty" includes the "right of the people to be secure in their houses, free of molestation, and to keep their private affairs to themselves," and is "even more important than freedom of speech.").

As shown above, because the Kansas Constitution both expresses and protects Lockean principles of natural rights; and because the United States constitution doesn't

contain a Section 1 equivalent; the "principles applied by the United States Supreme Court" "under the Fourth Amendment are not the same." *See Commonwealth v. Alexander*, 664 Pa. 145, 193 (2020).

When warrantless seizures and searches implicate the natural rights protected by Section 1 then, the two constitutional provisions must be "read together." *See State v. Hill*, 322 Mont. 165, 171 (2004); *cf State v. Ryce*, 303 Kan. 899, 912–13 (2016), adhered to on reh'g, 306 Kan. 682, 396 P.3d 711 (2017) (reading federal due process clause and Fourth Amendment together); Clint Bolick, *Principles of State Constitutional Interpretation*, 53 Ariz. St. L.J. 771, 789 (2021) (state constitutions "should be interpreted in their overall context").

Put slightly differently, Section 1's protections "*augment*" Section 15's, and vice versa. *See State v. $129,970.00 One Hundred Twenty Nine Thousand Nine Hundred Seventy Dollars in U.S. Currency*, 337 Mont. 475, 481 (2019) (emphasis added).

Therefore, based upon the historical record, the writings and philosophies of John Locke, James Madison, and others, at the time of the Wyandotte Convention, Section 15—properly understood—both expresses *and* protects "property" in a much different way than the current Supreme Court does when analyzing the Fourth Amendment.

1.2.1.3 In Kansas, there's a fundamental right to be free from unreasonable seizures and searches.

Two years before the Supreme Court decided its first significant Fourth Amendment case, *Boyd v. United States*, 116 U.S. 616 (1886), the Kansas Supreme Court independently analyzed Section 15 of the Kansas Constitution and declared it a fundamental right.

In *State v. Gleason,* the Kansas Supreme Court held that "Section 15 is declaratory of the fundamental rights of the citizen, and was intended to protect him in his liberty and property against the arbitrary action of those in authority." 32 Kan. 245, 4 P. 363, 365 (1884). "So long as [Section 15] is in force, the principles therein declared are to remain absolute and unchangeable rules of action and decision. The legislature cannot infringe thereon, and the courts must yield implicit obedience thereto." *Id.*

Even though Section 15 is "almost identical" to the Fourth Amendment, the Court went on, it would be impermissible to allow warrants to issue on "mere hearsay or belief;" otherwise, "all the guards of the common law *and of the bill of rights of our own constitution* to protect the liberty and property of the citizen against arbitrary power are swept away." *Id.* at 366 (emphasis added).

That Section 15 *is itself* a fundamental right—as *Gleason* held—was re-affirmed in *State v. Ryce*, 303 Kan. 899, 909, 953 (2016), and confirmed in *Hodes*, 309 Kan. 610, 689 (Biles, J. concurrence) (describing *Ryce* as involving a "fundamental right to be free from an unreasonable search"). It's also consistent with Locke's and Madison's natural rights philosophy of property rights.

1.2.1.4 The Kansas Supreme Court is the final arbiter of its Constitution—not the United States Supreme Court.

The Kansas Supreme Court—not the United States Supreme Court—is the final arbiter of its constitution. *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (state is "free *as a matter of its own law"* to afford greater constitutional protections) (emphasis in original); Clint Bolick, *Principles of State Constitutional Interpretation*, 53 Ariz. St. L.J. 771, 771 (2021) ("Our system of dual sovereignty ensures the capacity of state courts to interpret their own constitutions to provide greater protections for individual rights than the federal constitution"); Jack L. Landau, *Should State Courts Depart from the Fourth Amendment? Search and Seizure, State Constitutions, and the Oregon Experience*, 77 Miss. L.J. 369, 384–85 (2007); *see generally* Daniel E. Monnat & Paige Nichols, *The Loneliness of the Kansas Constitution*, 34 J. Kan. Assoc. Just. 1, 10 (2010); *Hodes*, 309 Kan. 610.

That's true even where the state's constitutional text mirrors the federal's text. Loretta H. Rush & Marie Forney Miller, *A Constellation of Constitutions: Discovering & Embracing State Constitutions As Guardians of Civil Liberties*, 82 Alb. L. Rev. 1353, 1380 (2019), Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U.

Kan. L.Rev. 687, 707 (2011); William J. Brennan Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L.Rev. 489, 503 (1977).

Deferring to the United States Supreme Court on matters involving the Kansas Constitution "deprives residents of our state of rights our constitution's framers intended to protect. It also places" Kansas residents "on the often unpredictable path of U.S. Supreme Court jurisprudence." *See* Bolick, supra at 785. Deferring to the Untied States Supreme Court on questions of searches and seizures also undermines the notion that "Kansans," "[b]y nature," "value their privacy and solitude." J. Lyn Entrikin, *The Right to Be Let Alone: the Kansas Right of Privacy*, 53 Washburn L.J. 207, 207 (2014).

That the Kansas Supreme Court considers itself "bound by United States Supreme Court precedent" "regardless of whether the statute is challenged under the federal or the state Constitution" is therefore incorrect. *State v. Henning*, 289 Kan. 136, 145 (2009). As Arizona Supreme Court Justice Clint Bolick says, "state judges have an obligation to enforce two constitutions, not one." Bolick, *supra* at 779.

For all of the reasons stated above, the Kansas Supreme Court should decouple Section 15 from the Fourth Amendment. It should also reject *Hodari D.*'s rule. "Unless limits" are "placed on law enforcement's authority to conduct investigatory stops"—like the one here, where *no law was broken*—the "doctrine of investigative stops" will "become a vehicle for serious and unintended erosion of the constitutional protections against unlawful searches and seizures." *Joseph v. State*, 145 P.3d 595, 599 (Alaska Ct. App. 2006) (cleaned up).

"Were the rule otherwise," that a police officer could interfere with one's liberty and freedom of movement—also a fundamental right, *Manzanares v. Bell*, 214 Kan. 589, 600 (1974)—"the police could turn a hunch into" something more "by inducing" "flight" "justifying the suspicion." *Com. v. Stoute*, 422 Mass. 782, 789 (1996) (cleaned up); *cf* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L. Rev. 221, 223 (1989) ("wide-

ranging searches conducted on the basis" of "ubiquitous events as traffic violations are subject to abuse").

It would further undermine the very purposes of Section 15 and Section 1, and "all the guards of the common law and of the bill of rights of our own constitution to protect the liberty and property of the citizen against arbitrary power are swept away." *Gleason*, supra at 366 (emphasis added).

In the end, just as other states have done, the Kansas Supreme Court should reject "*Hodari D.*" *State v. Quino*, 74 Haw. 161, 179–80 (1992) (Levinson, J., concurring). It is, after all, an "anathema to our constitutional freedoms." *Id.*

1.2.1.5 Conclusion

For the reasons above, the Kansas Constitution affords greater protections against improper seizures than does the Fourth Amendment. When Officer De Giau activated her lights, she effected a seizure within the meaning of Section 15. Because there wasn't probable cause for the seizure, everything flowing from the illegal seizure should be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963); *State v. Poulton*, 286 Kan. 1, 5–6 (2008).

2. Enzo the drug dog warrantlessly trespassed onto the 2007 Chevrolet Tahoe—no Section 15 or Fourth Amendment exception applies.

Searches conducted without criminal warrants are presumptively unreasonable, and it's the government's heavy burden to prove a Section 15 or Fourth Amendment exception applies. *E.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455 (1971); *California v. Acevedo*, 500 U.S. 565, 589 n.5 (1991); *Pike v. Gallagher*, 829 F. Supp. 1254, 1262 (D.N.M. 1993); *Jones v. United States*, 357 U.S. 493, 499 (1958); *State v. Cleverly*, 305 Kan. 598, 605 (2016).

The United States Supreme Court recognizes two approaches to analyzing Fourth Amendment claims: one based on expectations of privacy, *e.g.*, *Katz v. United States*, 389 U.S. 347 (1967), the other on property, *e.g., United States v. Jones*, 565 U.S. 400 (2012), *Fla. v. Jardines*, 569 U.S. 1 (2013).

The Fourth Amendment's text "reflects its close connection to property," *Jones*, 565 U.S. at 405, and until 1967 was "tied to common-law trespass," *id*. at 405, 409. That's when *Katz v. United States* introduced the now well-known *privacy*-based framework. 389 U.S. 347 (1967). The *Katz* reasonable-expectation-of-privacy test *supplemented* the Fourth Amendment's original property-based framework—it did not displace it. *Jones*, 565 U.S. at 400; *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018); *United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016) (Gorsuch, J.). *Katz* was supposed to provide protection in situations without a physical intrusion. For the four-plus decades since *Katz* through, the United States Supreme Court mostly decided Fourth Amendment questions based upon the reasonableness of the person's privacy expectations. But *Katz*'s privacy-based framework proved challenging. *Carpenter v. United States*, 138 S. Ct. 2206, 2266 (2018) (Gorsuch, J, dissenting) ("*Katz* has yielded an often unpredictable—and sometimes unbelievable—jurisprudence.")

The Supreme Court *reintroduced* the property-based approach in *Jones*, 565 U.S. 400, 411, and affirmed the framework one year later in *Jardines*, 569 U.S. 1.

Under the *Jones-Jardines* property-based framework, Fourth Amendment protections do not "rise or fall on the *Katz* formulation," *Jones*, 565 U.S. at 406, and one's expectation of privacy *is irrelevant, Jardines*, 569 U.S. at 11. One's Fourth Amendment protections could be "extinguish[ed]" under *Katz* but could nonetheless be protected under the property-based rubric. *See Carpenter v. United States*, 138 S. Ct. 2206, 2269 (2018) (Gorsuch, J., dissenting).

In short, under the property-based approach, if the government trespasses or conducts a physical intrusion in order to obtain information, a property-based "search" occurs.

For example, in *Jones*, the government's installation of a GPS device onto a car was considered a trespassory search. 565 U.S. at 404. In *Jardines*, law enforcement used a trained police dog to physically "explore the area around the home in hopes of discovering incriminating evidence." 569 U.S. at 9. The physical intrusion onto the curtilage was a

trespassory search. *Id*. at 12. Property-based searches are analyzed differently from privacy-based ones. *E.g., Collins v. Virginia*, 138 S.Ct. 1663, 1671 (2018) (physical intrusion onto curtilage a trespassory search); *Taylor v. City of Saginaw*, 922 F.3d 328, 332 (6th Cir. 2019) (tire chalking a trespassory search); *Johnson v. VanderKooi*, 509 Mich. 524, 537 (2022) (fingerprinting a trespassory search); *United States v. Gregory*, 497 F. Supp. 3d 243, 271 (E.D. Ky. 2020) (trash pull a trespassory search); *Matter of United States*, No. 5:22-MJ-02005-RN, 2022 WL 16757941 (E.D.N.C. Oct. 26, 2022).

The Kansas Supreme Court recognized and adopted the *Jones-Jardines* property-based framework in *State v. Talkington*, 301 Kan. 453 (2015).

Just like the trespassory searches in *Jones*, *Jardines*, *Collins*, *Gregory*, and *VanderKooi*, when Enzo "jumped up onto the front passenger side door and was sniffing and continued around the vehicle to the front driver side door," and then "returned to the front Driver side door on his own fruition and began sniffing higher up the seam of the door placing his front paws on the front driver side door," Ex A, page 3, the government conducted a trespassory search under Section 15 and the Fourth Amendment. *State v. Dorff*, 171 Idaho 818, 526 P.3d 988, 998, cert. denied, 144 S. Ct. 249 (2023) (It "cannot be overemphasized that a 'search' occurred here because Nero [the drug dog] trespassed against Dorff's vehicle *for the purpose of* obtaining information about, or related to, *the vehicle*.") (emphasis in original).

Once there is a trespassory search under the *Jones-Jardines* framework, reasonableness turns on a property-based analysis, not on a privacy-based one. *Jardines*, 569 U.S. at 11; *Jones*, 565 U.S. at 414 (Sotomayor, J., concurring); *see Carpenter v. United States*, 138 S. Ct. 2206, 2269 (2018) (Gorsuch, J., dissenting).

For instance, in *Collins,* 138 S. Ct. 1663, the government argued that the "automobile exception"—premised on its "pervasive regulation," *id*. at 1669, a theory deriving from *Katz*—justified a warrantless physical intrusion by the government. The United States Supreme Court flatly rejected that notion. *Id*. at 1670-1675.

Keeping in mind it's the government's heavy burden to prove a Fourth Amendment and Section 15 exception applies; and not Ms. Goodridge's burden to prove it doesn't, *State v. Cleverly*, 305 Kan. 598, 605 (2016), the government can't establish a property-based exception justifying its trespassory search. That's especially so under Section 15, because as shown above, it affords greater protections than the Fourth Amendment does, and explicitly protects "property."

In sum, because Enzo's actions were an unlicensed, nonconsensual trespassory search—without a warrant and without probable cause to boot—all evidence flowing from the warrantless search must be suppressed under Section 15 and the Fourth Amendment.[6]

3. The Warrantless Search Inside the 2007 Chevrolet Tahoe Violated Section 15 and/or the Fourth Amendment.

3.1 Reaching into the 2007 Chevrolet Tahoe was a trespassory search for which no Section 15 or Fourth Amendment exception applies.

For the reasons stated in the immediately preceding section—incorporated as if set forth fully here—when Officer Da Giau *entered* the 2007 Chevrolet Tahoe, she conducted a trespassory search as well. Just as above, it's the government's heavy burden to prove an exception applies. It cannot establish a property-based exception justifying the trespassory search.

3.2 Reaching into the 2007 Chevrolet Tahoe was also a privacy-based search.

Under the reasonable-expectation-of-privacy test, there is no reasonable dispute that a Section 15 and Fourth Amendment search also occurred when the officers went into the car's interior.

[6] Ms. Goodridge also has a sufficient and cognizable property interest and/or privacy interest to challenge the search of her car under the Fourth Amendment and Section 15. *See, e.g., United States v. Gordon*, No. 11-cr-20752, 2013 WL 791622, at *5-6 (E.D. Mich. Mar 4, 2013) (owner of vehicle could challenge trespassory search); *see also State v. Bartlett*, 27 Kan. App. 2d 143, 149 (2000).

3.2.1 Under Section 15, the "automobile exception" shouldn't apply.

For privacy-based claims, the Kansas Supreme Court generally follows the "automobile exception" as re-framed in *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996), a United States Supreme Court case interpreting the Fourth Amendment: so long as an automobile has been lawfully stopped, and there's probable cause to search, the government doesn't need to establish exigent circumstances before conducting a warrantless search. *State v. Sanchez-Loredo*, 294 Kan. 50, 57 (2012); *State v. Crudo*, No. 123,559, 2024 WL 132880, at *2 (Kan. Jan. 12, 2024). The "mobility of the vehicle itself" provides the exigency, even if the driver of the car is no longer in it. *State v. Knight*, 55 Kan. App. 2d 642, 646 (2018).

As shown above and throughout, the 2007 Chevrolet Tahoe wasn't lawfully stopped and Ms. Goodridge doesn't concede probable cause for the search existed. But if the court holds otherwise, the automobile exception still shouldn't apply. As discussed above, Section 15's use of the word "property" rather than "houses, papers, and effects" reflects a broader protection for all types of property than exists under the Fourth Amendment. Put differently, the Kansas Supreme Court should depart from its lockstep approach when analyzing Section 15, reject *Labron* as a matter of state constitutional law—as at least 12 other states have done[7]—and hold that Officer Da Giau violated Section 15 by warrantlessly searching the 2007 Chevrolet Tahoe.

[7] *State v. Smart*, 289 A.3d 469, 474 (N.J. 2023) (quoting *State v. Carter*, 255 A.3d 1139, 1148 (N.J. 2021)); *State v. McCarthy*, 501 P.3d 478 (Or. 2021); *Commonwealth v. Alexander*, 243 A.3d 177 (Pa. 2020); *State v. Cora*, 167 A.3d 633 (N.H. 2017); *State v. Tibbles*, 236 P.3d 885 (Wash. 2010); *State v. Bauder*, 924 A.2d 38 (Vt. 2007); *State v. Cooke*, 163 N.J. 657, 670, (2000) (declining to apply the holding of *Labron* to evaluate cases under the New Jersey Constitution); *State v. Elison*, 302 Mont. 228, 244 (2000) (requiring police officers to show exigent circumstances under the automobile exception); *State v. Harnisch*, 114 Nev. 225, 228–29 (1998) ("[T]he Nevada Constitution requires both probable cause and exigent circumstances in order to justify a warrantless search of a parked, immobile, unoccupied vehicle."); *State v. Gomez*, 122 N.M. 777, 788 (1997) (holding that "[w]arrantless searches of automobiles require a showing of exigent circumstances"); *State v. Sterndale*, 139 N.H. 445, 449–50 (1995) (declining to adopt the automobile exception because the New Hampshire Constitution provides greater privacy protections than the Fourth Amendment); *State v. Ritte*, 68 Haw. 253, 257 (1985) ("To establish exigent circumstances, however, the government must show it had reason to believe that because of the vehicle's mobility or exposure, there was a foreseeable risk that it might be moved or that the evidence which it contained might be lost before a warrant could be obtained.")

3.2.2 Section 15 should require actual exigency.

For the reasons stated above—incorporated as if set forth fully here—Kansas' search and seizure clause provides greater protections than the Fourth Amendment.

The Kansas Supreme Court should overrule the categorial, *per se* exigency rule, and hold that, in order to justify a warrantless search of a vehicle, the government must prove exigent circumstances actually existed, as determined case by case.

The modern categorial rule doesn't comport with modern technological advances.

"Law enforcement officers and magistrates have computers and smartphones. Not only can officers call and speak to magistrates from the field, but they can also make and send audio and video recordings; they can prepare, sign, and send documents; and they can have recorded videoconferences with multiple other people. Advances in technology have enabled officers and district attorneys to more quickly and easily prepare, exchange, and record information necessary to apply for warrants and enabled magistrates to more quickly and easily review that information and issue and record warrants." *State v. McCarthy*, 369 Or. 129, 174 (2021).

In fact, Kansas law enforcement officers are authorized to secure search warrants based on oral statements, including those received by telephone. *See* KSA § 22-2502; KSA § 22-2504; *see also, Missouri v. McNeely*, 569 U.S. 141, 173, (2013) ("in one county in Kansas, police officers can e-mail warrant requests to judges' iPads; judges have signed such warrants and e-mailed them back to officers in less than 15 minutes. Benefiel, DUI Search Warrants: Prosecuting DUI Refusals, 9 Kansas Prosecutor 17, 18 (Spring 2012).").

"Indeed, in the age of computers in police vehicles, tablets, and smartphones, obtaining a warrant for a vehicle search, even from the side of the road, is easier than ever before." Thomas J. Snyder, *My Car Is My Castle: The Failed Historical Roots of the Vehicle Exception to the Fourth Amendment*, 93 S. Cal. L. Rev. 987, 1024 (2020).

Nor does the per se exception comport with the text of Section 15. *See id.* at 1035 ("The automobile exception is clearly at odds with the text of the Fourth Amendment");

Kendra Hillman Chilcoat, *The Automobile Exception Swallows the Rule: Florida v. White*, 90 J. Crim. L. & Criminology 917, 917 (2000) (automobile exception has "become divorced from the Fourth Amendment's purpose"); *see, e.g.*, Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L. Rev. 221, 223 (1989) ("wide-ranging searches conducted on the basis" of "ubiquitous events as traffic violations are subject to abuse").

The automobile exception "was not well founded or clearly reasoned; it was not intended to be permanent; it has not provided stability or clarity; it is inconsistent with other, more recent cases; [and] given technological changes, it is no longer justified." *McCarthy*, 369 Or. at 177.

In sum, to hold otherwise—that the government gets to automatically discharge its heavy constitutional burden of proving each and every factor of a warrant exception—undermines the very purposes of Section 15 *and* Section 1; and "all the guards of the common law *and of the bill of rights of our own constitution* to protect the liberty and property of the citizen against arbitrary power are swept away." *Gleason*, *supra* at 366 (emphasis added).

4. Conclusion

For the reasons stated above, this Court should issue an Order suppressing all illegally obtained evidence following—and flowing from—Geary County Law Enforcement Officer Cayla J. Da Giau activation of her police lights.

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