

The Tenth Circuit's Obscured Vision: Losing Sight of the Importance of Requiring Clearly Visible License Plates [*United States v. Edgerton*, 438 F.3d 1043 (10th Cir. 2006)]

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*[License plates] are . . . signposts of history, cultural icons that mirror the evolution of the country.*¹

I. INTRODUCTION

Providing traffic patrol officers with the ability to read the license plates of moving vehicles has become a vital law enforcement tool. Consider the following scenario: during routine traffic patrol, Officer Randy Betson of the Chicago Police Department observed a white late-model Cadillac traveling several car lengths in front of his police cruiser.² The vehicle's out-of-state license plate sparked Officer Betson's curiosity.³ While still following safely behind the Cadillac, Officer Betson entered the license plate number into the computer located on the dash of his patrol car and quickly learned that the car was reported stolen.⁴ After calling for backup, Officer Betson stopped the vehicle and realized that the occupants of the stolen car were suspects who were wanted for aggravated kidnapping, aggravated robbery, and murder.⁵ Upon the arrival of additional officers, the individuals were immediately arrested.⁶

Officer Betson's intuition and quick computer check of this vehi-

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1. Tim Sultan, *Vintage Cars, Vintage Plates*, N.Y. TIMES, May 6, 2005, at F1 (quoting Tim Stentiford, a license plate collector).

2. This example is similar to the fact pattern of *State v. Hunt*, No. 9854, 1981 Ohio App. LEXIS 11266, at *3 (Ohio Ct. App. May 20, 1981). Some minor details have been added, and the officer's name is fictional.

3. The license plate was issued in Ohio. *Id.*

4. *Id.*

5. *Id.* at *1, *3. Two days before the arrest, the passenger and driver of the vehicle stole the Cadillac and shot the owner. *Id.* at *2-3.

6. *Id.* at *2.

cle's license plate led to the apprehension of two highly dangerous felons.⁷ Ensuring visible numbers on license plates allows officers to quickly discover important crime-fighting information, such as whether the vehicle is stolen or whether the owner has any outstanding warrants.⁸ This can all be accomplished without requiring officers to leave the convenience and safety of their patrol cars⁹ or requiring officers to stop and unnecessarily delay lawful drivers.¹⁰ Additionally, a detection of an invalid license plate provides an officer with reasonable suspicion sufficient to stop a vehicle.¹¹ Frequently, these encounters lead to a subsequent discovery of a range of possible unlawful activities occurring within the stopped vehicle, from felons possessing firearms¹² to the transportation of harmful narcotics.¹³

Unfortunately, in *United States v. Edgerton*,¹⁴ the United States Court of Appeals for the Tenth Circuit jeopardized these crucial law enforcement functions by imposing alarming precedent that will handcuff officers' ability to perform routine license plate checks. The court's holding authorizes an individual to place a temporary registration tag in the rear window of a vehicle, even if the tag is not visible at night. An officer's inability to see a tag from his patrol car requires him to approach the vehicle on foot to view the tag, and the instant the officer

7. These individuals were later convicted. *Id.* at *1-2, *10.

8. *See, e.g., In re Raquel M.*, 291 A.D.2d 155, 156 (N.Y. App. Div. 1st Dep't 2002) (license plate check resulted in recovery of stolen van); *State v. Bates*, No. 1576, 1987 Ohio App. LEXIS 8372, at *1-2 (Ohio Ct. App. Aug. 12, 1987) (license plate check revealed active warrant on driver); *People v. Gonzales*, 728 P.2d 384, 385 (Colo. Ct. App. 1986) (license plate information revealed that the vehicle was stolen).

License plate checks also serve to help locate known terrorists. *See* Mike Kelly, *A Tragic Tale of Ones that got Away: Cop Tells of Brush with 9/11 Terrorists*, THE RECORD, May 18, 2004, at A01. Interestingly, shortly before September 11, an officer ran a computer check of a license plate on a vehicle owned by one of the terrorists. *Id.* Tragically, the check did not alert the officer that the owner of the car was wanted by the FBI for his link to Osama bin Laden's al-Qaeda network. *Id.* At this time, the FBI had not provided local law enforcement officials with access to information concerning suspected terrorists. *Id.* If the officer had been aware of the driver's link to bin Laden, he likely would have captured two of the nation's deadliest terrorists and possibly foiled the entire attack on the Pentagon. *Id.* Today, ordinary law enforcement officers can access information regarding suspected terrorists through license plate checks. *Id.*

9. *See, e.g., Darlene Cedres*, Casenote, *Mobile Data Terminals and Random License Plate Checks: The Need for Uniform Guidelines and a Reasonable Suspicion Requirement*, 23 RUTGERS COMPUTER & TECH. L.J. 391, 398 (1997).

10. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 660 (1979) ("[V]ehicles must carry and display current license plates It does not appear, therefore, that a stop . . . is necessary in order to ascertain compliance with the [s]tate's registration requirements").

11. *See, e.g., United States v. Hernandez-Velasco*, No. 2:06-CR-0075 DKW, 2006 U.S. Dist. LEXIS 52220, at *15 (D. Utah July 28, 2006) (where record check revealed no indication of a license plate and was a valid stop); *United States v. White*, No. 1:98CR332-1, 1999 U.S. Dist. LEXIS 3703, at *8 (M.D.N.C. Jan. 14, 1999) (concluding "not on file" indication by officer's computer regarding vehicle registration provided reasonable suspicion of violation of state law), *aff'd* 201 F.3d 439 (4th Cir. 1999). License plate information that is suspicious may also provide an officer with a basis to pull over a vehicle. *See, e.g., United States v. McWeeney*, 454 F.3d 1030, 1032 (9th Cir. 2006). In *McWeeney*, the officer based his suspicions on the fact that the vehicle had been recently reported stolen, even though the records reflected that it had actually been returned to its original owner. *Id.*

12. *See, e.g., McWeeney*, 454 F.3d at 1032.

13. *See, e.g., State v. Myrick*, 659 A.2d 976, 978 (N.J. Super. 1995).

14. 438 F.3d 1043 (10th Cir. 2006).

discerns the license plate numbers, the foundation for the stop evaporates and he must immediately terminate the stop. The officer may briefly explain to the driver that he was mistaken in his basis for initiating the stop and then return to his patrol car.¹⁵ Such a rule fails to promote the purpose of license plate laws by preventing officers from reading license plates without stopping vehicles. Additionally, if more traffic stops occur for the mere purpose of verifying license plate information, innocent drivers will be subjected to the liberty intrusion that such stops create by hampering those drivers' journeys and causing them to face the anxiety involved in such police encounters.

In reaching its conclusion, the court abandoned traditional rules of statutory construction by essentially reading a Colorado regulation into a Kansas license plate statute. Additionally, the court illogically considered nighttime as an "external condition" excusing the driver from the requirement to post license plates in a "clearly visible" manner, even if it was the sole factor obscuring the visibility of the temporary tag. Subsequent courts have faced great difficulty in applying the Tenth Circuit's language to determine other "external conditions" beyond the driver's control, consequently relieving the driver from ensuring that his license plate is visible to outside observers.

II. CASE DESCRIPTION

At approximately 2:30 a.m., during normal nighttime conditions, State Trooper Andrew Dean¹⁶ was patrolling eastbound on I-70 near Junction City, Kansas, when he observed a white Mercedes-Benz traveling in front of his patrol car that did not appear to have a license plate.¹⁷ After trailing the vehicle for approximately one mile, Trooper Dean determined that a piece of paper was tacked on the rear window but could not distinguish any of the writing on the paper.¹⁸ Convinced that the driver of the vehicle had violated a Kansas law¹⁹ requiring that all license plates be readable from a distance of "four to five car lengths,"²⁰

15. *Id.* at 1051.

16. *See id.* at 1045. Trooper Ranieri accompanied Trooper Dean. *Id.*

17. *United States v. Edgerton*, No. 04-40045-01/02-SAC, 2004 U.S. Dist. LEXIS 21642, at *2, *9 (D. Kan. Sept. 9, 2004). No license plate or registration paper existed in the rear tag brackets of the vehicle. *Id.*

18. *Edgerton*, 2004 U.S. Dist. LEXIS 21642, at *2.

19. In relevant portion, section 8-133 of the Kansas Statutes Annotated requires that [e]very license plate shall at all times be securely fastened to the vehicle to which it is assigned so as to prevent the plate from swinging, and at a height not less than 12 inches from the ground, measuring from the bottom of such plate, in a place and position to be clearly visible, and shall be maintained free from foreign materials and in a condition to be clearly legible.

KAN. STAT. ANN. § 8-133 (2001 & Supp. 2006).

20. Four car lengths would represent a distance of about 57 feet. *See* Thomas J. Vesper, *The Domino Theory of Depositions: When Your Ship Is Sinking . . .*, TRIAL, July 1, 1995, at 48. KAN. STAT. ANN. § 8-1706(c) (2001) states, "[e]ither a tail lamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear registration plate and render it clearly legible

Trooper Dean activated his emergency lights and stopped the car.²¹ Approaching the vehicle on foot, Trooper Dean shined his flashlight onto the paper posted in the rear window and discovered for the first time that the paper was actually a Colorado temporary registration tag.²²

Still believing that the positioning of the tag violated Kansas law, Trooper Dean decided to continue with the traffic stop.²³ While asking the driver, Yolanda Edgerton,²⁴ to produce her license and registration, Trooper Dean noticed a strange odor of air freshener wafting from the car's interior and observed that Edgerton appeared uneasy, avoided eye contact, talked incessantly as she fidgeted to produce her documentation, and that energy drink containers littered the vehicle's floor.²⁵ Trooper Dean testified that, based on his training and experience, these circumstances made him suspicious about the possible presence of illegal drug activity.²⁶

With the license and registration in hand, Trooper Dean returned to his patrol car and wrote a warning ticket for failure to properly display a license plate.²⁷ He then reapproached Edgerton's open window and handed her the warning ticket, her license, and her registration.²⁸ Trooper Dean briefly explained the warning to Edgerton²⁹ and told her that she was free to leave.³⁰ Before heading back to his vehicle, Trooper Dean inquired if he could ask a few quick questions and Edgerton agreed.³¹ When asked, Edgerton responded that she was not transporting any illegal drugs and consented to a search of her vehicle.³² During his search, Trooper Dean discovered a secret compartment that con-

from a distance of fifty (50) feet to the rear.”

21. *Edgerton*, 438 F.3d at 1045.

22. *Id.*

23. *Edgerton*, 2004 U.S. Dist. LEXIS 21642, at *3.

24. A passenger was also traveling with Edgerton. *Id.* at *4.

25. *Id.* at *4-5. Trooper Dean also noticed a Christmas tree air freshener hanging from the rear center of the console. *Id.* at *5. Air fresheners are frequently used in drug trafficking as “masking odors” to cover the smell of illegal drugs. *See, e.g.*, *United States v. Ledesma-Dominguez*, 53 F.3d 1159, 1161 (10th Cir. 1995). *But see* *United States v. Salzano*, 158 F.3d 1107, 1114 (10th Cir. 1998) (noting that the presence of evergreen air freshener in a vehicle around Christmas time can suggest completely innocent behavior). Likewise, because drug traffickers often transport drugs over long distances in a short amount of time, these individuals may use energy drinks to keep awake during such trips; therefore, the existence of energy drinks in a car may contribute to an officer's suspicions as to the presence of illegal activity during a traffic stop. *See* *United States v. Chavira*, 467 F.3d 1286, 1292 n.4 (10th Cir. 2006). Finally, courts consider a driver's nervousness a weak factor in determining the presence of illegal activity. *See, e.g.*, *United States v. Wood*, 106 F.3d 942, 948 (10th Cir. 1997).

26. *Edgerton*, 2004 U.S. Dist. LEXIS 21642, at *5.

27. *Edgerton*, 438 F.3d at 1046.

28. *Edgerton*, 2004 U.S. Dist. LEXIS 21642, at *5.

29. *Id.* Despite learning that she had received merely a warning, Edgerton continued to act uncharacteristically nervous as evidenced by “her talking, her smoking and her brushing of her hair.” *Id.* Trooper Dean testified that the nervousness of most drivers subsides at this point in the stop. *Id.*

30. *Id.* at *6. He told Edgerton, “Well, you have a safe trip.” *Id.*

31. *Id.* Trooper Dean stepped to the rear of the vehicle before quickly moving back to Edgerton's window. *Id.*

32. *Id.*

cealed cocaine, and he promptly arrested Edgerton.³³

The district court determined that the stop was justified in its entirety because Trooper Dean reasonably believed that a traffic violation had occurred and because Edgerton subsequently had consented to the search of her vehicle.³⁴ Edgerton appealed, and relying on its prior ruling in *United States v. McSwain*,³⁵ the Tenth Circuit reversed Edgerton's conviction, holding that the basis for the initially valid stop "dissipated" at the moment Trooper Dean confirmed the validity of the temporary tag posted on the vehicle's rear window.³⁶ Thus, Trooper Dean had no basis to continue with the traffic stop, and the subsequent search for drugs was improper.³⁷

III. BACKGROUND

A. *The Importance of License Plate Laws and a State's Ability to Develop and Enforce Them*

Each state has wide latitude to develop and enforce traffic laws that uniquely meet its individual interests and localized needs.³⁸ Under this system, compliance with one state's traffic code does not automatically guarantee conformity with another state's traffic regulations. Often, questions emerge regarding the extent to which a vehicle registered in one state yet traveling through a different state must abide by the requirements of the latter state's traffic laws.³⁹

The Tenth Circuit has specifically addressed this issue in the con-

33. *Id.* at *10. The compartment existed between the back seat and the trunk wall. *Id.* The passenger was also arrested. *Id.* Through the doctrine of probable cause by association, the United States Supreme Court created the presumption that a passenger also possesses any illegal substances found in a vehicle. See Roarke R. Gordon, Comment, *You Ride With 'Em, You Die With 'Em: A Look at Maryland v. Pringle and the United States Supreme Court's Implementation of Probable Cause by Association*, 44 WASHBURN L.J. 189, 189-90 (2004).

34. *United States v. Edgerton*, 438 F.3d 1043, 1046 (10th Cir. 2006). The district court also determined that Trooper Dean established a valid consensual encounter with Edgerton and had probable cause to search the vehicle. *Id.*

35. 29 F.3d 558 (10th Cir. 1994).

36. *Edgerton*, 438 F.3d at 1051. Edgerton marshaled three arguments on appeal. *Id.* at 1046-47. First, she argued that the initial stop was illegal. *Id.* at 1046. Second, she asserted that Trooper Dean exceeded the scope of the traffic stop after he determined that the temporary tag was valid. *Id.* at 1046-47. Finally, Edgerton maintained that her consent to search her vehicle was not sufficiently attenuated to purge the taint of the unlawful traffic stop. *Id.* at 1047 n.3.

37. *Id.* at 1051. The Tenth Circuit determined that Trooper Dean should have explained to Edgerton that he was mistaken in his belief that her temporary tag was invalid and immediately told her that she could freely leave. *Id.* With the stop terminated, Trooper Dean should not have asked further questions, nor should he have asked Edgerton for her license and registration. *Id.*

38. See, e.g., *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 449 (2002).

39. See, e.g., *United States v. DeGasso*, 369 F.3d 1139, 1146 (10th Cir. 2004) (explaining that a state may enforce its laws against a nonresident hailing from a state with different laws); see also *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) ("The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'") (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939)). The Full Faith and Credit Clause provides in relevant part, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1.

text of license plate checks by officers.⁴⁰ *United States v. DeGasso*⁴¹ involved a vehicle that was licensed in Mexico but passing through Oklahoma.⁴² An officer stopped the vehicle because he believed that its license plate was not “clearly visible” as required by Oklahoma law.⁴³ Responding to the dissent’s argument that no violation of Oklahoma law existed because the driver’s license plate fully complied with the laws of Mexico,⁴⁴ the court wrote:

[W]e suspect that a ‘nonresident driving along an Oklahoma highway’ with an obscured license plate would be astonished (if pleasantly so) to find that his out-of-state status exempted him from so universal a requirement as that of mounting the license plate in such a way that police officers can read it without stopping the vehicle.⁴⁵

Thus, the court held that within the context of license plates, a vehicle licensed in one state traveling through another state is subject to the latter state’s laws so long as the vehicle is located in that state.⁴⁶

Notably, *DeGasso* relied heavily on the Kansas Court of Appeals decision in *State v. Hayes*.⁴⁷ *Hayes* upheld a stop where the visibility of the license plate’s state designation was blocked.⁴⁸ Although the license plate plainly indicated it was issued in “The Hoosier State,” the officer did not know what that meant.⁴⁹ Even though it would have been unlikely that the driver would have been stopped in Indiana, the court found it unreasonable to require a Kansas officer to memorize the nickname of every state.⁵⁰ In determining that an obscured license plate “frustrated” the purpose of license plate laws, the court concluded that “[o]ut-of-state cars on Kansas highways are subject to the same police imperative as local vehicles.”⁵¹

Two years later, the Tenth Circuit reaffirmed the *DeGasso* decision in *United States v. Ledesma*.⁵² This case involved a Michigan-registered vehicle stopped in Kansas because the officer could not see the temporary tag—posted in the rear window—due to extremely dark window tinting.⁵³ Although Michigan law specifically authorized the driver to post the temporary tag in this manner, Kansas law did not.⁵⁴ Again rely-

40. See, e.g., *DeGasso*, 369 F.3d at 1146.

41. 369 F.3d 1139 (10th Cir. 2004).

42. *Id.* at 1145.

43. *Id.*

44. *Id.* at 1156 (Baldock, J., dissenting).

45. *Id.* at 1150.

46. *Id.*

47. 660 P.2d 1387 (Kan. Ct. App. 1983).

48. *Id.* at 1388. The facts do not reveal the exact nature in which the license plate was covered.

49. *Id.*

50. *Id.* at 1389.

51. *Id.*

52. 447 F.3d 1307 (10th Cir. 2006).

53. *Id.* at 1310. The officer could not read the tag until he was approximately four or five feet away from the vehicle. *Id.*

54. *Id.* at 1313; Robert Boczkiewicz, *Judge Upholds License Plate Law*, TOPEKA CAPITAL-JOURNAL, May 20, 2006, at 6 (“The 10th U.S. Circuit Court of Appeals ruled that a Michigan motor-

ing on *Hayes*, the court held that the window tinting obstructed the visibility of the license plate, in violation of Kansas law.⁵⁵ Because the license plate was not “clearly visible,” the court held that the subsequent detention was proper.⁵⁶

The ability of officers to check license plates has changed drastically over the years.⁵⁷ Today, officers can check license plates with ease from the comfort and safety of their patrol cars due to the advent of modern computer databases.⁵⁸ Prior to the development of computer technology, officers were forced to call in a license plate number to a dispatcher stationed at police headquarters.⁵⁹ As one might imagine, such a system caused officers much greater delay and effort in verifying the registration of vehicles.⁶⁰

Courts within the Tenth Circuit have firmly recognized the importance of an officer’s ability to check a license plate without stopping the vehicle.⁶¹ This method serves to promote vital governmental interests

ist in Kansas violated Kansas law by displaying a temporary license tag behind a heavily tinted rear window, even though that display comported with Michigan law.”)

55. *Ledesma*, 447 F.3d at 1310, 1313. The Tenth Circuit previously dealt with conflicting state tinted window regulations in *United States v. Ramirez*, No. 03-408486, 86 Fed. App’x. 384 (10th Cir. Jan. 22, 2004). Basing its holding on the Full Faith and Credit Clause, the court wrote, “Utah is not required by the Full Faith and Credit Clause to apply the window tinting of Colorado in lieu of its own statute.” *Id.* at 386. The court further held that even if Utah’s tinted window statute was “repugnant to the Constitution,” the good faith exception applied to legitimize the stop based on the officer’s reasonable reliance on that statute. *Id.* at 386 n.1. *But see* *United States v. Ramstad*, 308 F.3d 1139, 1144-46 (10th Cir. 2002) (applying Kansas reciprocity statute to uphold stop in Kansas of California driver based on officer’s knowledge that California law required its vehicles to have both front and rear license plates); KAN. STAT. ANN. § 8-138a (2001) (Kansas reciprocity statute).

56. *Ledesma*, 447 F.3d at 1313. Drugs were subsequently found. *Id.* at 1311.

57. *See generally* Sultan, *supra* note 1 (discussing history of license plate requirements); Wikipedia, U.S. and Canadian License Plates, http://en.wikipedia.org/wiki/U.S._and_Canadian_license_plates (last visited Dec. 20, 2006) (examining history and significance of license plates).

58. *See* Cedres, *supra* note 9, at 397. Due to the development of more recent high-tech monitoring systems, a police officer need not even be physically present to check if a license plate is valid. *See, e.g.*, Richard Winton, *Spotting Car Thieves in Blink of a Digital Eye: The LAPD is Testing a Camera that can Capture up to 2,000 Images an Hour to Scan License Plates and Compare them to a Database, Giving Instant Results*, L.A. TIMES, Jan. 10, 2005, at B3. Cities around the country have begun to install cameras that detect moving vehicles using infrared technology and photograph the vehicles’ license plates. *Id.* The systems can then enter the license plate information of these vehicles into national crime databases and identify, for example, stolen cars. *See id.* These systems can also spot drivers who have illegally run red traffic lights. *See, e.g.*, Alexis Grant, *City Says No Photo-Foolery; Drivers Warned that Buying Items to Thwart Red-Light Cameras is Illegal*, HOUSTON CHRONICLE, Sept. 1, 2006, at B1. If a driver fails to stop for a red light, based on the information derived from the photograph of the license plate number, the violating driver is then sent a fine in the mail. *Id.* An Internet company has developed a protective spray-on coating that, if applied to a license plate, prevents the new technology from accurately photographing a license plate’s numbers. *See id.* To ensure the visibility of license plates in all situations, Texas, New York, and Illinois have already taken action to outlaw this product. *See id.*

59. Cedres, *supra* note 9, at 397. The dispatcher would then look up the license plate number and call the officer back and report the results of the search. *Id.* For an example of this prior system of conducting license plate checks, see, e.g., *United States v. Matlock*, 558 F.2d 1328, 1330 (8th Cir. 1977), which stated that a radio check on the license plate confirmed the vehicle was stolen.

60. *See* Cedres, *supra* note 9, at 397.

61. *See, e.g.*, *United States v. Arciga-Bustamante*, No.04-7106, 2006 U.S. App. LEXIS 14908, at *19 (10th Cir. 2006) (“Officers should not be required to stop vehicles in order to read their tags.” (quoting *United States v. Granados-Orozco*, No. 03-40035-01/02-SAC, 2003 U.S. Dist. LEXIS 16753, at *7 (D. Kan. Aug. 26, 2003))); *United States v. DeGasso*, 369 F.3d 1139, 1150 (10th Cir. 2004).

such as protecting officer safety⁶² and finding unlawful drivers⁶³ while not intruding on the privacy rights of innocent citizens.⁶⁴ To effectuate these worthy goals, the Tenth Circuit allows officers to conduct random computer checks of license plates.⁶⁵ For officers to be able to read license plates while following safely behind vehicles, the plates must be posted in a manner that makes them “clearly legible” to outside observers.⁶⁶ Consequently, the Tenth Circuit has found that license plates splattered with mud⁶⁷ or incorrectly mounted negate this purpose.⁶⁸ Similarly, because a large percentage of driving occurs at night,⁶⁹ a driver must take steps to ensure that his license plate is illuminated, and thus, visible during nighttime conditions.⁷⁰

B. Individual Liberty Protections in Traffic Stops: From the Fourth Amendment’s Inception to Terry

Although states now have wide authority to develop and enforce traffic regulations, state traffic laws must not unnecessarily impede the protection of individual liberty and privacy.⁷¹ The Fourth Amendment, which protects against unreasonable searches and seizures,⁷² reflects a

62. See *United States v. Rubio-Sanchez*, No. 05-40081-01-SAC, 2006 U.S. Dist. LEXIS 21230, at *9 n.3 (D. Kan. Apr. 17, 2006).

63. For instance, license plate checks are a prime method for discovering stolen vehicles. See *supra* note 8 and accompanying text. Currently, auto theft comprises almost one-fourth of all property crimes. See *Winton*, *supra* note 58. For examples of other ways license plate checks can aid in ferreting out illegal activity, see *supra* notes 7-13 and accompanying text.

64. See *Rubio-Sanchez*, 2006 U.S. Dist. LEXIS 21230, at *9 n.3. The Tenth Circuit has held that under the plain view doctrine, a driver does not have a reasonable expectation of privacy in a license plate. See *United States v. Walraven*, 892 F.2d 972, 974 (10th Cir. 1989); *United States v. Mathews*, 615 F.2d 1279, 1285 (10th Cir. 1980).

65. See, e.g., *Walraven*, 892 F.2d at 974.

66. See, e.g., *DeGasso*, 369 F.3d at 1145, 1150.

67. See *People v. Altman*, 938 P.2d 142, 143 (Colo. 1997).

68. See *DeGasso*, 369 F.3d at 1141, 1149 (license plate was “mounted too low” and obscured by rear bumper).

69. Approximately one-third of all traffic stops occur at night. See MATHEW R. DUROSE, U.S. DEP’T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp02.pdf>.

70. See KAN. STAT. ANN. § 8-1706(c) (2001) (“lamp shall . . . illuminate . . . the rear registration plate and render it clearly legible from a distance of fifty (50) feet to the rear”); *United States v. Rubio-Sanchez*, No. 05-40081-01-SAC, 2006 U.S. Dist. LEXIS 21230, at *13 n.4 (D. Kan. Apr. 17, 2006); *United States v. Flowers*, No. 02-40108-01-SAC, 2003 U.S. Dist. LEXIS 2132, at *12 (D. Kan. Jan. 13, 2003) (initial stop and officer’s subsequent request for driver’s license and registration justified where “rear license tag was not illuminated by a white lamp so as to [make] visible from a distance of fifty feet”); see also *United States v. Dycus*, No. 04-5975, 151 Fed. App’x 457, 460-61 (6th Cir. Oct. 25, 2005) (Under Tennessee law, license plate must be illuminated to be visible at all times.); *United States v. Foster*, No. 01-5755, 65 Fed. App’x 41, 44-45 (6th Cir. May 5, 2003) (Illinois temporary tag posted in rear window violated Kentucky traffic code requiring license plate to be visible and illuminated); *City of Wilmington v. Conner*, 761 N.E.2d 663, 667 (Ohio 2001) (it “make[s] little sense to find the illumination requirement inapplicable to temporary tags placed” on rear of vehicle).

71. See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

72. The Fourth Amendment provides:

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

determination by the framers of the Bill of Rights to escape centuries of oppression inflicted by the English Parliament.⁷³ More specifically, the Fourth Amendment serves as a response to the despised writs of assistance, which provided officers of the Crown with an arbitrary and indiscriminate ability to search goods imported in suspected violation of British tax laws.⁷⁴ Despite the Amendment's roots, the First Congress determined that vessels transporting goods should be subject to less Fourth Amendment protection than a person's home.⁷⁵ Similarly, the Supreme Court has formally established that the occupants of an automobile have a much lower expectation of privacy than the occupants of a residence.⁷⁶

Even though vehicles are afforded less Fourth Amendment protection than homes, an occupant of a vehicle has a right to enjoy some privacy expectations.⁷⁷ *Terry v. Ohio*⁷⁸ established a two-prong standard concerning automobile stops.⁷⁹ Under *Terry*, a court must first ask "whether the officer's action was justified at its inception."⁸⁰ This requirement calls for an officer "to point to specific and articulable facts" warranting a basis for the initial stop.⁸¹ This prerequisite, in a traffic stop context, serves to balance the governmental interest in fighting crimes with an individual's privacy and liberty interests.⁸² The court must then ask whether the traffic stop "was reasonably related in scope

U.S. CONST. amend. IV.

73. *Stanford v. Texas*, 379 U.S. 476, 481 (1965).

74. *Id.* In his opinion for the court, Justice Potter Stewart further explained that the writs of assistance

were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.' The historic occasion of that denunciation, in 1761 at Boston, has been characterized as 'perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.'

Id. (quoting *Boyd v. United States*, 116 U.S. 616, 625 (1886)).

75. Daniel T. Gillespie, *Bright-Line Rules: Development of the Law of Search and Seizure During Traffic Stops*, 31 LOY. U. CHI. L.J. 1, 1-2 (1999). Over a century later, the Supreme Court formally applied this rule to an automobile. See *Carroll v. United States*, 267 U.S. 132, 147 (1925). The Court grounded the logic for its distinction between a vehicle and a home in the fact that illegal goods concealed in a moving vehicle could quickly be removed from a location before a search warrant targeting those goods could be executed. *Id.* at 151-53.

76. See, e.g., *California v. Carney*, 471 U.S. 386, 391 (1985) ("[L]ess rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."). The rationale for this lesser degree of protection has changed in subsequent court decisions from hinging solely on an automobile's mobility to the fact that these modes of transportation are subject to extensive governmental regulation. See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

77. See *Prouse*, 440 U.S. at 662 ("An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to governmental regulation.").

78. 392 U.S. 1 (1968).

79. *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)) (considering a traffic stop a "relatively brief encounter" and "more analogous to a so-called 'Terry stop' . . . than to a formal arrest.").

80. *Id.* at 20.

81. *Id.* at 21.

82. See *Prouse*, 440 U.S. at 654.

to the circumstances which justified the interference in the first place.”⁸³ The scope prong ensures that an officer’s investigation does not unreasonably deviate from the original purpose for the stop.

C. Lawful Scope of Traffic Stops

1. Generally

Since *Terry*, several subsequent Supreme Court decisions have attempted to clarify the scope prong, including the addition of both a temporal and an intensity limitation in *Florida v. Royer*.⁸⁴ The Court wrote, “[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.”⁸⁵ Just three months after *Royer*, the Court again considered the scope prong in *United States v. Place*,⁸⁶ stating that the nature and length of the stop must be “minimally intrusive” and that police officers should “diligently pursue their investigation.”⁸⁷

Two years later, the Court officially adopted the diligence test in *United States v. Sharpe*,⁸⁸ which requires a court to evaluate whether the officer reasonably attempted to dispel his suspicion by diligently investigating the source of that suspicion.⁸⁹ The Court wrote, “[W]e consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly”⁹⁰ In *United States v. Sokolow*,⁹¹ the Court limited the least intrusive means component of *Royer* to a restraint only on the temporal aspect of a stop.⁹² The Court’s holding resulted in more deference and leniency in an officer’s ability, for example, to elicit conversation with a suspect during an investigatory stop.⁹³ Finally, the Court formally extended *Sokolow* in *Muehler v. Mena*⁹⁴ by establishing an officer’s ability to question an individual about information unrelated to the purpose of the investigatory detention so long as the officer’s inquiry does not prolong that detention.⁹⁵

83. *Terry*, 392 U.S. at 20.

84. 460 U.S. 491, 500 (1983).

85. *Id.* The court also explained, “The scope of the detention must be carefully tailored to its underlying justification.” *Id.*

86. 462 U.S. 696 (1983).

87. *Id.* at 703, 709.

88. 470 U.S. 675 (1985).

89. *Id.* at 686.

90. *Id.*

91. 490 U.S. 1 (1989).

92. *Id.* at 11.

93. *Id.*

94. 544 U.S. 93 (2005).

95. *Id.* at 101. Although *Muehler* dealt with the search of a person’s home, the Court’s rule that

2. The Tenth Circuit's Application of Dissipation Analysis to License Plate Stops

In *United States v. McSwain*,⁹⁶ the Tenth Circuit greatly limited the scope prong of *Terry*. In *McSwain*, the officer spotted a vehicle that had no license plate but had reflective tape that appeared to obscure the temporary sticker posted in the rear window.⁹⁷ The officer stopped the vehicle to ensure that the temporary sticker was up-to-date.⁹⁸ While approaching the driver, the officer passed the rear of the vehicle and noticed that the sticker was indeed valid.⁹⁹ Nevertheless, the officer continued with the traffic stop, eventually received the driver's consent to search the vehicle, and consequently discovered illegal drugs and a gun.¹⁰⁰ The court held that the officer's objectively reasonable suspicion dispelled the instant he determined that a valid temporary tag existed because this served as his "sole purpose" for conducting the stop.¹⁰¹ Because the officer did not thereafter believe that any traffic violation had occurred, the legitimacy of the stop ceased, and the driver's "subsequent consent to the search of his vehicle was not sufficient to purge the taint of the illegal detention"¹⁰²

In light of *McSwain*, courts have struggled to determine when the scope of a stop terminates after the officer's original justification for the stop dissipates. Many courts following *McSwain* have taken the position that no further intrusion should occur after the original reasons for the stop have been satisfied.¹⁰³ Other courts have challenged the *McSwain* reasoning by asserting that it is not a significant intrusion to continue with the traffic stop after the driver is already detained pursuant to an

an officer's questioning is reasonable so long as it does not delay the investigatory detention has been extended to traffic stops. *See, e.g.*, *United States v. Stewart*, 473 F.3d 1256, 1267 (10th Cir. 2007).

96. 29 F.3d 558 (10th Cir. 1994).

97. *Id.* at 559-60. Unlike *Edgerton*, the stop in *McSwain* occurred during the day. *Id.* at 559.

98. *Id.* at 560.

99. *Id.* The reflective tape was a new device used by the state of Colorado "to prevent alteration of the sticker's expiration date." *Id.*

100. *Id.* The officer immediately learned that the driver did not have a license. *Id.* The driver, however, produced a Colorado registration and other identification. *Id.* Upon running a criminal background check on the driver based on this information, the officer discovered that the driver had a suspended license. *Id.* The officer returned the driver's identification and registration and then established a consensual encounter by inquiring if he could ask a few more questions. *Id.* Based on the ensuing conversation and because the driver did not have a valid license, the officer developed a suspicion as to the presence of illegal activity and decided to request permission to search the vehicle. *Id.* In establishing consent, the officer asked, "Do you mind if I look?" *Id.* The driver responded, "Go ahead." *Id.* The officer's search revealed the illegal items in a duffel bag located in the trunk of the vehicle. *Id.*

101. *Id.* at 561.

102. *Id.* at 564. The court held that the drugs and gun should be suppressed. *Id.* The court stated that the officer could not ask for the driver's license and registration, but merely as "a matter of courtesy," explain the purpose of the stop to the driver and let the driver go. *Id.* at 562.

103. *See, e.g.*, *People v. Redinger*, 906 P.2d 81, 85 (Colo. 1995); *State v. Diaz*, 850 So. 2d 435, 439 (Fla. 2003); *State v. Muller*, 698 N.W.2d 285, 289 (S.D. 2005); *People v. Arteaga*, 655 N.E.2d 290, 292 (Ill. App. 3d 1995).

objectively reasonable initial stop.¹⁰⁴ Courts following this logic conclude that an officer could reasonably ask for a driver's license and registration even if the officer's original basis for conducting the stop was fulfilled.¹⁰⁵ Even the Tenth Circuit has appeared uncertain of how to apply *McSwain*.¹⁰⁶

IV. COURT'S DECISION

In *United States v. Edgerton*, where an officer could not read a temporary tag posted in a driver's rear window due to nighttime conditions, the Tenth Circuit examined how long a traffic stop could proceed after the initial basis for the stop had dissipated.¹⁰⁷ As a framework for its ruling, the court found that the officer had reasonable suspicion to make the initial stop.¹⁰⁸ The court then held that even though the stop was justified at its inception, the purpose for the stop terminated after the officer validated the temporary tag.¹⁰⁹ The subsequent request for consent was therefore unlawful.¹¹⁰

104. This represents the minority view. See, e.g., *Holland v. City of Portland*, 102 F.3d 6, 8 (1st Cir. 1996) (stating that pursuant to Maine law, an officer may "stop a driver and ask his name on the basis of an articulable suspicion that the driver has done something wrong. Indeed, even if it then becomes clear that the suspected violation had not occurred, the officer may still insist on seeing the driver's license and registration.") (internal citations omitted); *State v. Huether*, 748 A.2d 993, 995-96 (Me. 2000); *State v. Hill*, 606 A.2d 793, 795 (Me. 1992); see also *United States v. Dycus*, No. 04-5975, 151 Fed. App'x 457, 461 (6th Cir. Oct. 25, 2005) (upholding the stop even though the officer saw a valid temporary tag in the rear window before proceeding with the stop); *United States v. Clayborn*, 339 F.3d 700, 701 (8th Cir. 2003) (determining that where an officer could not see a temporary tag until after he had stopped the car, the officer's belief that a traffic violation had occurred was objectively reasonable and warranted the continued detention of the driver).

In *Hill*, an officer stopped a vehicle for failing to display a license plate. *Hill*, 606 A.2d at 795. Before reaching the cab of the vehicle, the officer noticed a temporary tag in the rear window. *Id.* Nevertheless, the officer continued with the traffic stop. *Id.* The court held that because the officer had a valid reason to initially detain the driver, the subsequent routine detention was not beyond the scope of the original stop. *Id.* The court wrote,

Hill was validly stopped for a suspected traffic violation. Officer Low then sought to ensure that Hill was neither unlicensed nor operating an unregistered vehicle. Balancing this significant state interest against the minimal further intrusion of asking Hill for the documents, we hold that Officer Low did not unreasonably intrude on Hill's Fourth Amendment rights.

Id. Other courts have reasoned that a license plate should not be placed in the rear window of a vehicle. See, e.g., *United States v. Foster*, No. 01-5755, 65 Fed. App'x 41, 44-45 (6th Cir. May 5, 2003); *Merritt v. State*, 829 N.E.2d 472, 476 (Ind. 2005).

105. See, e.g., *Holland*, 102 F.3d at 8; *Hill*, 606 A.2d at 795.

106. See, e.g., *United States v. Poke*, No. 03-3043, 81 Fed. App'x 712, 715 (10th Cir. Nov. 17, 2003) (because the officer still had an "objectively reasonable suspicion that a traffic violation was occurring" where a temporary license tag posted in a vehicle's rear window was less visible because of the window's tinting, the stop was justified).

107. *United States v. Edgerton*, 438 F.3d 1043, 1045 (10th Cir. 2006).

108. *Id.* at 1048.

109. *Id.* at 1051. The court noted that the officer could provide the courtesy of explaining the initial purpose of the stop without requiring the driver to produce her license and registration. *Id.* The court also suggested in dicta that a situation may arise where independent reasonable suspicion could develop during this brief encounter, warranting a longer traffic stop. *Id.* This issue was not argued by the parties on appeal. *Id.*

110. *Id.* at 1045. The government conceded that "if the detention was illegal, the defendant's consent to search was thereby tainted." *Id.* at 1047 n.3 (quoting *United States v. Lampley*, 127 F.3d 1231, 1240 n.7 (10th Cir. 1997)).

A. Initial Stop

The court first considered whether Trooper Dean had a valid reason for initially stopping Edgerton's vehicle.¹¹¹ Edgerton argued that she posted her Colorado temporary tag in a location on the rear window that was "clearly visible" to anyone observing her vehicle,¹¹² and thus, Trooper Dean lacked reasonable suspicion to stop her car.¹¹³ The government countered that the record adequately supported the fact that Trooper Dean could not read the tag until after he stopped Edgerton's vehicle.¹¹⁴

Agreeing with the government's position, the court found that Trooper Dean's initial stop of Edgerton's car was justified "not only because he could not read its temporary registration tag while following at a safe distance, but also because he could not determine whether the document posted in the rear window was, in fact, a temporary tag"¹¹⁵ The court supported its conclusion by reasoning that an officer's inability to spot a vehicle's license plate may alert that officer to the possible violation of "any one of a multitude of . . . traffic and equipment regulations"¹¹⁶ The court further observed that Trooper Dean could not read the temporary tag until "after he approached . . . [the] vehicle on foot and shined his flashlight on the tag."¹¹⁷

B. Governing State Law

The court next addressed whether Trooper Dean "unlawfully extended the duration of the stop . . . beyond its limited scope" after he identified the temporary tag posted in the rear window as valid.¹¹⁸ Although neither party argued this issue on appeal, the court properly recognized the need to resolve the scope issue by deciding first whether Colorado or Kansas law governed the legality of the extended stop because Edgerton's vehicle was registered in Colorado yet stopped in Kansas.¹¹⁹ Nevertheless, the court side-stepped that issue by merely reasoning that the Kansas and Colorado statutes were "virtually identical" because both required license plates to be secured "in a place and position to be clearly visible."¹²⁰ According to the court's construction, the parallel nature of the statutes permits an equal interchange of both states' nonconflicting interpretations of the "clearly visible" language to

111. *Id.* at 1047.

112. See Brief of Appellant at 19-20, *Edgerton*, 438 F.3d 1048 (No. 05-3167).

113. *Edgerton*, 438 F.3d at 1047.

114. Brief of Appellee at 17, *Edgerton*, 438 F.3d 1048 (No. 05-3167).

115. *Edgerton*, 438 F.3d at 1047.

116. *Id.* at 1048 (quoting *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995)).

117. *Id.* (emphasis in original).

118. *Id.*

119. *Id.* at 1049.

120. *Id.* (quoting KAN. STAT. ANN. § 8-133 (2001 & Supp. 2006)).

define the validity of the extended stop.¹²¹ In other words, Kansas's inaction under the "clearly visible" provision does not preclude applying Colorado's interpretation to Kansas law.

Using this logic, the court invoked a Colorado regulation specifically authorizing this manner of placement because Kansas had not considered whether placing a temporary tag in a vehicle's rear window meets the "clearly visible" mandate.¹²² The court further cited a Colorado Supreme Court opinion¹²³ upholding that regulation as support for its conclusion.¹²⁴ Because no Kansas law existed "so directly on point," the court reasoned that there was "no reason to doubt that the language of [section] 8-133 ha[d] the same meaning as its Colorado counterpart" and found a "contrary interpretation . . . highly improbable."¹²⁵ The court, therefore, saw no error in integrating a Colorado regulation into the Kansas license plate statutes to justify its conclusion that Edgerton's temporary tag had been posted in a lawful manner.¹²⁶ In making this determination, however, the court ignored another license plate statute followed by both states: the need for license plates to be illuminated and legible at a distance of fifty feet.¹²⁷

C. Scope of the Stop

Because Edgerton did not argue for the application of Colorado

121. *Id.*

122. See *id.* at 1050 n.8; 1 COLO. CODE REGS. § 204-2H (2006). The statute states:

Permits may be affixed on the lower lefthand corner of the rear windows [of cars which have rear windows] . . . (Permits are always placed on the inside.) Permits properly mounted and clearly visible, when enclosed in a transparent weatherproof covering, may be attached to the rear of the vehicle in the place and manner provided for attaching a rear license plate. (This is an optional method and the previous method of affixing permits applies in all cases other than outlined above.)

Id. (emphasis added).

123. *United States v. Redinger*, 906 P.2d 81 (Colo. 1995). *Redinger* involved a fact pattern similar to *Edgerton* where the officer stopped a vehicle because he could not see the license plate at night. *Id.* at 82. As the officer approached the driver, he noticed a temporary tag posted in the rear window, yet he continued with the stop and eventually found methamphetamine. *Id.*

124. *Edgerton*, 438 F.3d at 1050.

125. *Id.* The court made no further attempt to predict how a Kansas court would decide this issue by considering other Kansas case law or the intent of the legislature in drafting section 8-133. No Kansas law has authorized the posting of a temporary tag in a vehicle's rear window. Interview with Peggy J. Stalcup, Assistant Manager, Kansas Department of Revenue Division of Motor Vehicles, in Topeka, Kan. (Jan. 8, 2007). In Kansas, two avenues exist for a driver to comply with the temporary registration requirements. *Id.* First, a driver may receive a temporary cardboard tag from the County Treasurer's Office similar in size and relative appearance to that of a permanent license plate. *Id.* This tag is designed to be placed in the rear bracketed license plate slot. *Id.* Like a permanent license plate, an officer can easily read the vehicle identification number (VIN) or license plate number from this tag without stopping the vehicle. *Id.* Second, a driver may receive a temporary registration permit from an authorized dealership. *Id.* Again, a dealer's tag is placed in the rear bracketed location on the vehicle. *Id.* In this situation, no license plate number will exist on the plate which an officer may readily enter into a computer database. *Id.* The officer, however, may still read the VIN off of this tag without stopping the vehicle and call in the information to the National Crime Information Center (NCIC). *Id.*

126. *Edgerton*, 438 F.3d at 1050.

127. See KAN. STAT. ANN. § 8-1706(c) (2001); COL. REV. STAT. § 42-4-206(3) (2006). Both statutes have identical language.

law, she addressed the scope issue by maintaining that her detention paralleled the scenario that occurred in *McSwain* where the officer could not continue with the traffic stop after the “purpose of the stop was satisfied.”¹²⁸ The government distinguished *McSwain* by noting that the officer stopped the driver for the “sole purpose” of determining if the temporary sticker on the license plate had expired.¹²⁹ The government argued that in Edgerton’s situation, however, Trooper Dean believed throughout the entire scope of the stop that Edgerton had violated a Kansas traffic statute because she had failed to properly display her tag in a manner as to make it visible to passing vehicles.¹³⁰

The court did not determine whether an objectively reasonable belief by an officer as to the occurrence of a traffic violation was sufficient to justify an extended stop. Rather, the court wrote that the government’s distinguishing of *McSwain* “hinge[d] on its legal argument that the temporary registration display . . . violated [section] 8-133.”¹³¹ Because Colorado law acted with equal force to confirm that Edgerton had posted her temporary tag in a satisfactory manner, the reasonable suspicion dissipated once the officer saw that a valid Colorado temporary tag existed.¹³²

D. Nighttime as an External Condition Beyond a Driver’s Control

As a final key aspect of its decision, the court determined whether nighttime was a factor altering the ability of a driver to place a temporary tag in her rear window.¹³³ Edgerton argued that Trooper Dean stopped her solely because “it was dark out,” and “something as subjective as lighting conditions” should not justify a basis for a traffic stop.¹³⁴ The government maintained that the defendant was attempting to carve out an exception to the general rule requiring a license plate to be clearly visible and legible regardless of whether day or nighttime conditions exist.¹³⁵ According to the government, the defendant’s tag was impossible to read due to the glare produced by the officer’s headlights

128. *Edgerton*, 438 F.3d at 1048-49 (quoting *United States v. McSwain*, 29 F.3d 558, 561 (10th Cir. 1994)).

129. *Id.* at 1049.

130. *See* Brief of Appellee, *supra* note 114, at 29.

131. *Edgerton*, 438 F.3d at 1049.

132. *Id.* at 1051.

133. *Id.* at 1050.

134. *See* Brief of Appellant, *supra* note 112, at 6, 17.

135. Brief of Appellee, *supra* note 114, at 19-20. In a prior order, the district court also addressed Edgerton’s contention that because nighttime conditions constituted the sole reason Trooper Dean could not read her license plate, she had not violated the Kansas statute’s “clearly visible” requirement. *See* *United States v. Edgerton*, No. 04-40045-01/02-SAC, 2004 U.S. Dist. LEXIS 22226, at *4 (D. Kan. Oct. 14, 2004) (motion to reconsider). Dismissing this argument, the district court determined that Kansas law envisioned a manner of ensuring that a license plate was “clearly visible and legible” at night by requiring that the license plate be positioned in a location as to make it illuminated at a distance of fifty feet. *Id.*; *see also* KAN. STAT. ANN. § 8-1706(c) (2001).

on the vehicle's rear window at night, and the defendant needed to overcome this barrier to visibility by taking action to illuminate her tag as required by Kansas law.¹³⁶

The court resolved this dispute by disregarding the Kansas illumination statute and categorizing nighttime as an "external condition[]" beyond the control of the driver, similar to that of "snow, rain, fog, glare, or even an officer's poor eyesight . . .".¹³⁷ Accordingly, the court reasoned that a license plate's visibility, if obscured solely by such "external conditions," would not violate the statutory requirement of being clearly legible under Kansas law.¹³⁸ If there exists an external condition truly beyond a driver's capacity to manage, an officer's ability to continue with an initially valid stop terminates after the officer has placed himself in a location allowing the officer to overcome the condition that impaired the officer's vision of the license plate in the first place.¹³⁹

V. COMMENTARY

A. The Court Incorrectly Interpreted the Language of Section 8-133 and Should Not Have Integrated a Colorado Regulation into Kansas Law

The court failed in its duty to properly construe the language of section 8-133 and apply Kansas law, which requires that license plates be "clearly visible" on all vehicles traveling in the state.¹⁴⁰ In interpreting the statute's language, the court should have predicted how a Kansas court would have applied the statute to the defendant's situation.¹⁴¹ The court wrongly overlooked the holding of *Hayes*, a prior Kansas appellate court decision, which would have provided a firm framework for the court's analysis and a basis to uphold the entire traffic stop.¹⁴² Although the court in *Edgerton* ruled that the statute's language of "[e]very license plate" included temporary license plates,¹⁴³ the court still refused to follow the plain language¹⁴⁴ of the statute's "clearly legible" and

136. Brief of Appellee, *supra* note 114, at 14; KAN. STAT. ANN. § 8-1706(c) (2001) (illumination statute).

137. United States v. Edgerton, 438 F.3d 1043, 1050 (10th Cir. 2006).

138. *Id.* at 1050-51.

139. *Id.* at 1050.

140. KAN. STAT. ANN. § 8-133 (2001 & Supp. 2006).

141. See United States v. DeGasso, 369 F.3d 1139, 1145 (10th Cir. 2004) ("[S]tate courts are the final arbiters of state law.").

142. State v. Hayes, 660 P.2d 1387, 1389 (Kan. Ct. App. 1983). In *Hayes*, the court found that an officer's inability to read a license plate on a moving vehicle "frustrated" the "routine license plate check." *Id.* As discussed previously, the court also confirmed the need for a driver from another state to comply with Kansas law. *Id.* ("We conclude that the display of an illegible or obscured vehicle tag is a violation of [§] 8-133 even if the vehicle is duly licensed in another state.").

143. See United States v. Edgerton, 438 F.3d 1043, 1046 n.2 (10th Cir. 2006) (quoting KAN. STAT. ANN. § 8-133 (2001 & Supp. 2006)); see also KAN. STAT. ANN. § 8-126a (2001) (defining license plates and tags).

144. Kansas courts first look to the plain language of a statute as a basis for interpreting the statute's intended effect. See, e.g., State v. Walker, 124 P.3d 39, 46 (Kan. 2005). If the plain language is

“clearly visible” requirement.¹⁴⁵ Because Edgerton’s license plate was not maintained in a condition and location viewable and readable “at all times,”¹⁴⁶ a straightforward violation of the Kansas statute existed.¹⁴⁷

The court should have considered section 8-133 in conjunction with other similar Kansas statutes.¹⁴⁸ Under Kansas law, statutes must be “construed together” to provide “workable harmony” to the entire statutory scheme.¹⁴⁹ The court made no reference to the Kansas statute requiring a driver to “illuminate” a license plate at night to make it visible from a “distance of fifty (50) feet.”¹⁵⁰ Addressing this aspect of the broader statutory scheme would have left the court with no practical basis for its reliance on nighttime conditions to excuse compliance with the “clearly legible” requirement. Thus, in its effort to construe section 8-133, had the court looked to the statute’s plain language, applied Kansas case law, and attempted to interpret the holistic purpose of the broader statutory scheme, it would have affirmed the district court’s decision.¹⁵¹

ambiguous, a court may apply the rule of lenity by deferring to a defendant’s interpretation of a statute. *Huddleston v. United States*, 415 U.S. 814, 830-31 (1974). The *Edgerton* court, however, did not find the statute’s language unclear and thus did not invoke the rule of lenity as a justification for its conclusion. Regardless, courts only apply the rule of lenity as a last resort because conceivably, all statutes have some degree of ambiguity. See *Muscarello v. United States*, 524 U.S. 125, 138 (1998); *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994).

145. See KAN. STAT. ANN. § 8-133 (2001 & Supp. 2006). “Clearly legible” and “clearly visible” do not have the same technical meanings. See *United States v. Carter*, No. 02-40134-01/02-RDR, 2003 U.S. Dist. LEXIS 15537, at *6-7 (D. Kan. Aug. 1, 2003). For instance, an officer may spot a license plate (making it visible) before he can read it (making it legible). *Id.* Recognizing this distinction, for the sake of brevity, the following analysis will often refer to the two concepts interchangeably.

146. KAN. STAT. ANN. § 8-133. The officer could not decipher the temporary tag until he approached the vehicle on foot and shined his light on the tag. See *Edgerton*, 438 F.3d at 1048.

147. See *United States v. Rubio-Sanchez*, No. 05-40081-01-SAC, 2006 U.S. Dist. LEXIS 21230, at *11 n.2 (D. Kan. Apr. 17, 2006) (determining that “at all times” does not mean “only during . . . hours of daylight.”).

148. See, e.g., *State v. Lawson*, 933 P.2d 684, 687 (Kan. 1997).

149. *Id.*

150. See KAN. STAT. ANN. § 8-1706(c) (2001). Indeed, the prior version of the Kansas license plate statutes included the illumination requirement and the legibility and visibility provision in one comprehensive section. Registration of Automobiles and Other Motor Vehicles, ch. 69, § 10, 1921 Kan. Sess. Laws 113, 121 (mandating that a license plate “at all times be entirely unobscured” and “lighted as to be plainly visible and readable at a distance of fifty feet”). Further, courts have required a driver to ensure that the rear license plate of the vehicle is lighted. See, e.g., *United States v. Dycus*, No. 04-5975, 151 Fed. App’x 457, 460-61 (6th Cir. Oct. 25, 2005) (applying Tennessee law); *United States v. Flowers*, No. 02-40108-01-SAC, 2003 U.S. Dist. LEXIS 2132, at *12 (D. Kan. Jan. 13, 2003). The government has twice asked Kansas federal district courts for certification to the Kansas Supreme Court to determine whether a license plate must be illuminated and visible at a distance of fifty feet or whether a temporary tag can be validly placed in a rear window under sections 8-133 and 1706(c). See *United States v. Martinez*, No. 06-40080-01-RDR, 2006 U.S. Dist. LEXIS 73181, at *14-15 (D. Kan. Oct. 6, 2006) (asking for certification on only the question of whether license plate must be decipherable at distance of fifty feet); *United States v. Ruiz-Lopez*, No. 05-40060-01-JAR, 2006 U.S. Dist. LEXIS 30543, at *4 (D. Kan. May 9, 2006) (certification of both questions). The certifications have both been denied. See *Martinez*, 2006 U.S. Dist. LEXIS 73181, at *15; *Ruiz-Lopez*, 2006 U.S. Dist. LEXIS 30543, at *7.

151. It has been suggested that *Edgerton* is an example of a court taking a Machiavellian approach by attempting to achieve an end result without carefully considering the means necessary to accomplish that outcome. See *Rubio-Sanchez*, 2006 U.S. Dist. LEXIS 21230, at *20 (“The court, however, does construe the Tenth Circuit’s discussion of external conditions beyond the defendant’s control as not an effort to interpret Kansas law but rather as a general appeal for the perceived reasonableness of its conclusion.”).

The court's decision sets confusing precedent regarding both statutory interpretation and issues of deference to another state's traffic laws. Stating only that the Kansas and Colorado license plate statutes are "virtually identical" because both require license plates to "be clearly visible," the *Edgerton* court purported to avoid its task of determining whether Kansas or Colorado law governed the situation.¹⁵² Nevertheless, the court peculiarly took the opportunity to integrate a Colorado regulation into the Kansas license plate statutes.¹⁵³ Because both states' broader statutes require that license plates be illuminated and legible at a distance of fifty feet, Colorado's specific regulation authorizing a driver to place a temporary tag in a vehicle's rear window serves as a narrow exception to this general rule.¹⁵⁴ The Kansas legislature has not adopted this exception. Instead, Kansas issues temporary tags similar in design to permanent plates and intended for placement on the rear bracketed location of the vehicle.¹⁵⁵ Thus, the court's holding effectually legislated this unique exception into the Kansas license plate laws.¹⁵⁶ The resulting choice to apply Colorado law flies in the face of other well-established Tenth Circuit precedent, which has repeatedly rejected the notion that a nonresident driver need only comply with the laws of the driver's home state.¹⁵⁷

In making this determination, the *Edgerton* court further confused the issue of when to delve deeper and examine more specific conflicting state regulations in the event that two broader state statutes are similar on their face.¹⁵⁸ *Edgerton's* invitation for a court to look beyond com-

152. United States v. Edgerton, 438 F.3d 1043, 1049 (10th Cir. 2006).

153. *Id.*

154. In formulating its opinion in *Redinger*, the case on which *Edgerton* was based, the Colorado Supreme Court cited section 42-4-206(3) of the Colorado Revised Statutes, requiring a license plate to be legible and illuminated from distance of fifty feet, in conjunction with section 42-3-123 of the Colorado Revised Statutes, requiring a license plate to be clearly visible. *Redinger*, 906 P.2d at 82 n.1. The *Redinger* court, however, further invoked section 204-2H of the Colorado Code of Regulations as a foundation for its conclusion. *Id.*; see also 1 COLO. CODE REGS. § 204-2H (2006) (registration permitting temporary license plate to be placed in rear window of vehicle); *Rubio-Sanchez*, 2006 U.S. Dist. LEXIS 21230, at *15 n.6 (determining that the Colorado regulation authorizing temporary tag placement in vehicle's rear window was the only plausible basis for *Redinger's* conclusion). *Edgerton* even acknowledged this Colorado regulation in a footnote to its opinion. See *Edgerton*, 438 F.3d at 1050 n.8. Unlike *Edgerton* where the officer reasonably expected that Kansas law ensures the legibility of a license plate from a distance of approximately 50 feet, see *supra* note 20 and accompanying text, the officer in *Redinger* held the mistaken belief that Colorado law requires the visibility of license plates from a distance of 200 feet. *Redinger*, 906 P.2d at 82 n.1.

155. This design ensures that officers can read temporary tags without stopping vehicles. See *supra* note 61.

156. Curiously, while operating under the guise of not making a conflict of laws determination, the court nonetheless took action to apply a Colorado regulation while simultaneously expressing a need to hinge its legal outcome on Kansas law. See *Edgerton*, 438 F.3d at 1049 ("distinction of *McSwain* . . . hinges on [whether] temporary registration display . . . violated [Kansas law]").

157. See, e.g., United States v. Ledesma, 447 F.3d at 1307, 1313 (10th Cir. 2006); United States v. DeGasso, 369 F.3d 1139, 1050 (10th Cir. 2004).

158. When a state lacks a specific regulation authorizing the posting of a temporary license tag in the rear window of a vehicle, courts have held that this manner of placement violates the clearly visible or "clearly legible" requirement. See, e.g., United States v. Foster, No. 01-5755, 65 Fed. App'x 41, 45 (6th Cir. May 5, 2003) (holding that an Illinois temporary license tag posted in rear window of

parable state statutes and follow a more specialized state regulation of the nonresident driver's home state has not been accepted by other Tenth Circuit courts.¹⁵⁹ By applying a Colorado regulation, the *Edgerton* court overlooked its own jurisprudence regarding the application of differing state laws and overstepped a state's right to develop its own exceptions to broad statutory rules.¹⁶⁰ Consistent with precedent, the court should have strictly applied Kansas law.¹⁶¹ Instead, it ignored *Hayes* and failed to even make an attempt to interpret the Kansas license plate statute.¹⁶²

B. The Court's Decision Will Frustrate the Purpose of License Plate Laws

The Fourth Amendment has long served to promote a crucial balance between a public interest in effective law enforcement tactics and the need to safeguard individual privacy and liberty interests from arbitrary governmental interference.¹⁶³ The court's shortsighted decision in *Edgerton* unnecessarily crippled the law's ability to maintain both aspects of this delicate balance.¹⁶⁴ In light of *Edgerton*, drivers need not make any effort to post a temporary license tag in such a position to make it readily visible at night.¹⁶⁵ If this occurs, the ability of officers to perform routine license plate checks on moving vehicles will be undermined.¹⁶⁶ As explained in *Hayes*, officers frequently must determine

vehicle violated requirement of being "clearly legible" under Kentucky law); *Merritt v. State*, 829 N.E.2d 472, 475 (Ind. 2005) (holding that a temporary tag posted in back window is not displayed on "rear" of vehicle). In specifically addressing the argument that a temporary tag placed in the rear window of a vehicle need not be lighted absent a specific regulation requiring such illumination, the *Foster* court wrote, "[T]he absence of a provision exempting temporary tags from the general applicability of [the broad Kentucky license plate statute] supports the proposition that they are subject to the same illumination requirements as are permanent plates." *Foster*, 65 Fed. App'x at 44; *see also* *People v. Pritchett*, No. 216475, 1999 Mich. App. LEXIS 2509, at *2-3 (Mich. Ct. App. Oct. 19, 1999) (holding that temporary license plate in the rear window is not attached to the "rear" of the vehicle).

159. *See, e.g., Ledesma*, 447 F.3d at 1313. In *Ledesma*, the court applied Kansas law even though the defendant fully complied with Michigan's temporary tag requirements. *Id.* The Michigan license plate statute considered in *Ledesma* was "virtually identical" to its Kansas counterpart. *See* MCLS § 257.225 (2006) (requiring license plate to be "in a place and position which is clearly visible . . . and in a clearly legible condition").

160. *See, e.g., DeGasso*, 369 F.3d at 1150.

161. *See id.*

162. The court did not investigate the legislative intent behind section 8-133 in formulating its conclusion. It is plausible that the Kansas legislature considered the positives and negatives of allowing a temporary license plate to be posted in the rear window of a vehicle and specifically decided against this possibility. *See* *United States v. Rubio Sanchez*, No. 05-40081-01-SAC, 2006 U.S. Dist. LEXIS 21230, at *18 n.9 (D. Kan. Apr. 17, 2006).

163. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 365 (1983).

164. *See Rubio-Sanchez*, 2006 U.S. Dist. LEXIS 21230, at *9 n.3 (stating that *Edgerton's* interpretation of section 8-133 would "cause either less license plate checks or more traffic stops that are inherently more intrusive to the public and increase the risk to officer safety").

165. *See United States v. Edgerton*, 438 F.3d 1043, 1051 (10th Cir. 2006). The foregoing analysis assumes that nighttime is the sole factor obscuring the visibility of the tag.

166. *See State v. Hayes*, 660 P.2d 1387, 1389 (Kan. Ct. App. 1983); *see also United States v. Ar-ciga-Bustamante*, No.04-7106, 2006 U.S. App. LEXIS 14908, at *19 (10th Cir. June 16, 2006) ("Officers should not be required to stop vehicles in order to read their tags." (quoting *United States v.*

from license plates a range of important information such as “whether a vehicle is stolen; whether it is properly registered; or whether its occupant is suspected of a crime, is the subject of a warrant, or is thought to be armed.”¹⁶⁷ Requiring an officer to pull over a vehicle also causes a safety hazard to the officer.¹⁶⁸

Not only will the possibility of drivers failing to place their temporary tags in places “clearly legible” at night undermine effective law enforcement efforts, but also it will ultimately give officers wide latitude in determining which vehicles to pull over and investigate.¹⁶⁹ If an officer sees multiple drivers passing by in a short time span with tags obscured by the dark, he will obviously not be able to stop each vehicle. In this scenario, only an officer’s own judgment will guide which vehicles he chooses to pull over.¹⁷⁰ Such unbridled discretion in the hands of ordinary officers with the potential for arbitrary enforcement of traffic laws is exactly what the framers of the Fourth Amendment wished to prevent.¹⁷¹ A more workable standard to guide officers in determining which vehicles to pull over for license plate infractions must exist to avoid this constitutional threat.¹⁷² Subjecting a driver to a traffic stop constitutes a significant liberty invasion, while no intrusion occurs if an

Granados-Orozco, No. 03-40035-01/02-SAC, 2003 U.S. Dist. LEXIS 16753, at *7 (D. Kan. Aug. 26, 2003)). The court’s authorization of a driver to place a temporary tag in a vehicle’s rear window may also frustrate high-tech attempts to further the purpose of license plate laws—e.g., infrared cameras that photograph the vehicle’s license plate. See *supra* note 58. On another level, providing drivers with the ability to place temporary tags in the rear windows of vehicles may create a tempting avenue for falsification. See Jake Wagman, *Market for Fake Vehicle Tags Thrives: A City Bill Could Help Get Cars with Them Off the Streets*, ST. LOUIS POST-DISPATCH, Apr. 3, 2006, at B1. With little effort, a cunning driver can deceive authorities by tacking a piece of paper representing a fake temporary tag in his rear window. See *id.* Consequently, this potential for abuse creates another reason why allowing drivers to place temporary tags in the rear windows of vehicles is problematic. See *id.* Moreover, *Edgerton’s* result implicates a significant number of license plate checks given the large number of traffic stops that regularly occur at night. See DUROSE, *supra* note 69. Further highlighting the number of potential stops impacted by *Edgerton*, Kansas, a state with a relatively small population, issues approximately 100,000 temporary tags each year. Stalcup, *supra* note 125.

167. See *Hayes*, 660 P.2d at 1389.

168. See *Rubio-Sanchez*, 2006 U.S. Dist. LEXIS 21230, at *9 n.3; see also *Arciga-Bustamante*, 2006 U.S. App. LEXIS 14908, at *6 (noting that an officer should not need to stop a vehicle to perform a license plate check). A vehicle pulled over on the side of the road may pose a danger to both the officer and the driver of the vehicle because of the threat of being hit by oncoming traffic. See *Rubio-Sanchez*, 2006 U.S. Dist. LEXIS 21230, at *9 n.3. Allowing a driver to place a temporary registration tag in the rear window of a vehicle may also cause a safety hazard to the driver by causing a blind spot in the rear window and thus preventing the driver from seeing other vehicles approaching from behind. See *United States v. Ruiz-Lopez*, No. 05-40060-01-JAR, 2006 U.S. Dist. LEXIS 25768, at *18 n.25 (D. Kan. Apr. 26, 2006) (suggesting that a lamp placed in the rear window of a vehicle to illuminate a registration tag may cause safety concerns).

169. See *Rubio-Sanchez*, 2006 U.S. Dist. LEXIS 21230, at *9 n.3.

170. See generally *id.* The prevalence of forged temporary tags has further served as an impetus encouraging officers to stop a substantial number of cars to check the validity of temporary tags. This causes more innocent drivers to face cumbersome stops by police. See *Police Cracking Down on Fake Temporary Tags*, ST. PETERSBURG TIMES, Nov. 2, 1997, at 6B (noting that possibly ten percent of all temporary tags in Dade County are forged).

171. See *Stanford v. Texas*, 379 U.S. 476, 481 (1965). For an example of a driver that was subjected to multiple traffic stops because his license plate was posted in his rear window, see *United States v. Wise*, 418 F. Supp. 2d 1100 (D. Iowa 2006).

172. See *Rubio-Sanchez*, 2006 U.S. Dist. LEXIS 21230, at *19 (questioning workability of standards adopted by court).

officer can simply read a license plate in the first place while a vehicle travels on a public road.¹⁷³

C. The Inability to Define What Constitutes an External Condition

Perhaps one of the most problematic aspects of the court's decision is what constitutes an "external condition[]" existing outside the driver's control.¹⁷⁴ If a court applying *Edgerton* finds a driver is unable to control the circumstance blocking the visibility of the license plate, then an officer's reasonable suspicion dissipates even if he still could not read the license plate without stopping the vehicle.¹⁷⁵ On the other hand, if a court finds that the external condition obscuring the license plate was within the driver's ability to control, then the reasonable suspicion has not dissipated and the officer may continue with the traffic stop.¹⁷⁶ The court provided very little guidance for subsequent interpretations of the "external condition[]" phraseology except for a list of conditions, purportedly fitting "snow, rain, fog, glare, or even an officer's poor eyesight," into this newly-created exception.¹⁷⁷ Distinguishing two decisions where a traffic violation existed on the basis of an obscured license plate, the court found that it was within a driver's control to correct a license plate that was mounted too low or to clean a license plate covered by dirt.¹⁷⁸

In developing subsequent court decisions, the Tenth Circuit has faced great difficulty in interpreting this language and drawing lines regarding factors within and factors outside a driver's control.¹⁷⁹ Cases in which courts found the factor obscuring the license plate within the driver's ability to control can be divided into two broad categories. One category is license plates obscured by an aspect of the vehicle's design¹⁸⁰

173. *Id.* at *9 n.3; *see also* *United States v. Ellison*, 462 F.3d 557, 561 (6th Cir. 2005) (computer check on license plate not a search). The Tenth Circuit has likewise held, under the plain view doctrine, that a driver does not have a reasonable expectation of privacy in a license plate. *See United States v. Matthews*, 615 F.2d 1279, 1285 (10th Cir. 1980); *see also United States v. Walraven*, 892 F.2d 972, 974 (10th Cir. 1989). The majority in *DeGasso* specifically rejected the dissent's notion that an officer should pull over a nonresident driver, *see* that the driver is complying with the laws of his home state, and let the driver go even if the driver is violating the laws of the state where he is traveling. *United States v. DeGasso*, 369 F.3d 1139, 1147 (10th Cir. 2004). In *DeGasso*, forcing the driver to comply with the laws of Oklahoma would have allowed the officer to read the license plate without pulling over the vehicle. *Id.* at 1150.

174. *United States v. Edgerton*, 438 F.3d 1043, 1050 (10th Cir. 2006).

175. *See id.*

176. *See id.*

177. *See id.*

178. *Id.*

179. *See, e.g., United States v. Ledesma*, 447 F.3d 1307, 1313 (10th Cir. 2006); *United States v. Rubio-Sanchez*, No. 05-40081-01-SAC, 2006 U.S. Dist. LEXIS 21230, at *21 (D. Kan. Apr. 17, 2006).

180. Included in this category would be license plates obscured by aspects of the vehicle's design such as tinted windows, *see Ledesma*, 447 F.3d at 1307, 1313, ball hitches, *see Rubio-Sanchez*, 2006 U.S. Dist. LEXIS 21230, at *21, or brake lights, *see United States v. Cano*, No. 05-40116-JAR, 2006 U.S. Dist. LEXIS 69049, at *21 (D. Kan. Aug. 25, 2006). The court in each of these cases made determinations that these factors were within the driver's ability to control. For instance, the driver could simply change the location of the license plate or alter an aspect of the vehicle's design. Inter-

or blocked by an object existing on the vehicle.¹⁸¹ The other category includes cases holding that compliance with the laws of the driver's home state constitutes an external condition within the driver's control.¹⁸² Aside from these established categories is one composed of unusual atmospheric conditions truly occurring beyond a driver's ability to control; a driver could do absolutely nothing, for example, to prevent blinding rain.¹⁸³

The *Edgerton* court's decision to consider nighttime conditions as an external factor outside the control of the driver logically clashes with the reasoning behind both of these broad categories. A driver could easily make a license plate visible by taking simple preventative steps to ensure that the license plate is illuminated at night.¹⁸⁴ With less trouble than it would take to remove a ball hitch¹⁸⁵ or alter the tinting in a window,¹⁸⁶ a driver could overcome the possibility of nighttime obscuring the visibility of a license plate.¹⁸⁷ Accordingly, the court's decision con-

estingly, the officer in *Cano* could read the dealer tag and check to ensure that it was valid while following at a safe driving distance. *Id.* at *16-17. Nevertheless, the court still found the stop justified because the driver should have only posted one tag. *See id.*; *see also* KAN. STAT. ANN. § 8-133 (2001 & Supp. 2006); KAN. STAT. ANN. § 8-136 (2001).

181. An object placed on the vehicle by the driver would fall into this category. *See* United States v. Arciga-Bustamante, No. 04-7106, 2006 U.S. App. LEXIS 14908, at *3 (10th Cir. June 16, 2006) (decorative border surrounding license plate blocked officers ability to read state of issuance). This category would also presumably encompass license plates obscured by mud, *see, e.g.*, People v. Altman, 938 P.2d 142, 143 (Colo. 1997), covered by snow, *see, e.g.*, Hamilton v. State, 59 P.3d 760, 765 (Alaska Ct. App. 2002), or license plates difficult to read because they are "mounted too low," *see* United States v. DeGasso, 369 F.3d 1139, 1141 (10th Cir. 2004). The court in *Edgerton* distinguished these categories. *See* United States v. Edgerton, 438 F.3d 1043, 1050 (10th Cir. 2006). The old version of the Kansas license plate statutes specifically enumerated the need to keep a license plate free from any elements that may obscure a license plate's readability. Registration of Automobiles and Other Motor Vehicles, ch. 69, § 10, 1921 Kan. Sess. Laws 113, 121 (requiring license plates to "at all times be kept free from oil, grease, or dirt, or other substance likely to impair its legibility").

182. *See Ledesma*, 447 F.3d at 1313; United States v. Martinez, No. 06-40080-01-RDR, 2006 U.S. Dist. LEXIS 73181, at *12 (D. Kan. Oct. 9, 2006); *Rubio-Sanchez*, 2006 U.S. Dist. LEXIS 21230, at *21-22. In *Ledesma*, the tinted window fully complied with Michigan law. *Ledesma*, 447 F.3d at 1313. In *Rubio-Sanchez*, the defendant argued that his Arizona license plate was not fully visible solely because Arizona license plates were manufactured too small. *Rubio-Sanchez*, 2006 U.S. Dist. LEXIS 21230, at *21. This design, the defendant contended, under *Edgerton*, was outside his power to change. *Id.* The court rejected this argument by narrowly construing *Edgerton* to apply to the limited context of a temporary license plate placed in a rear window obscured solely by night. *Id.* at *20-23. In *Martinez*, the defendant had a "one-trip permit" posted on the lower corner of his windshield as allowed by California law. *Martinez*, 2006 U.S. Dist. LEXIS 73181, at *1-2. The defendant challenged his stop on the basis that "compliance with California law is an 'external condition.'" *Id.* at *12. Again, the court rejected this argument. *Id.*

183. *See Edgerton*, 438 F.3d at 1050; *see also* United States v. Wright, No. 3:06cr447/MCR, 2006 U.S. Dist. LEXIS 86975, at *19 (D. Fla. Nov. 30, 2006) (condensation caused by "intermittent rain" is an external condition outside the driver's control).

184. *See Rubio-Sanchez*, 2006 U.S. Dist. LEXIS 21230, at *19. Such a requirement could be met by simply placing the license plate in the lighted bracketed location intended by the manufacturers. *Id.* In addition to embracing the *Rubio-Sanchez* reasoning, the Kansas Legislature explicitly envisioned the need for drivers to install separate lighting in vehicles that are not already equipped with an illuminated place to secure a license plate. *See* KAN. STAT. ANN. § 8-1706(c) (2001) (requiring a "separate lamp" if the tail lamp does not already illuminate "rear registration plate and render it clearly legible from a distance of fifty (50) feet").

185. *Cf. Rubio-Sanchez*, 2006 U.S. Dist. LEXIS 21230, at *21.

186. *Cf. Ledesma*, 447 F.3d at 1313.

187. Thus, nighttime is not even remotely analogous to the extreme atmospheric conditions of dense fog or falling snow. Nighttime as a condition is very predictable and approximately one third

flicts with the first broad category of factors that courts have found to be within a driver's control. Looking to the second category, compliance with the laws of a driver's home state does not act as an external factor exempting an out-of-state driver from adhering to the requirements of the state where the driver is traveling.¹⁸⁸ Thus, in *Edgerton*, the Colorado law that allowed a driver to post a temporary tag in the vehicle's rear window should have been irrelevant.¹⁸⁹

D. Unanswered Questions: The Extent of *Edgerton's* Holding

A cloud of uncertainties obscures the *Edgerton* decision. Foremost, it is unclear if *Edgerton* allows a driver to place a *permanent* license plate in the rear window of her vehicle.¹⁹⁰ If so, a lazy driver could effortlessly lean or tape a license plate against a vehicle's rear window rather than take the time to securely bolt the plate into the intended bracketed location. This possibility is alarming given that such an outcome would jeopardize the entire purpose of most license plate laws.¹⁹¹ Next, it is uncertain if an *Edgerton* approach can be applied to contexts beyond that of mere license plate checks.¹⁹² For instance, in the event that an officer stops a vehicle for a cracked windshield that he

of all traffic stops take place at night. See DUROSE, *supra* note 69.

188. See, e.g., *Ledesma*, 447 F.3d at 1313 (stating that a vehicle's Michigan licensing is irrelevant for the sake of interpreting section 8-133).

189. See *Rubio-Sanchez*, 2006 U.S. Dist. LEXIS 21230, at *9; see also, e.g., *Ledesma*, 447 F.3d at 1313.

190. This outcome seems possible given the fact that the court interpreted section 8-133 to apply to all license plates, including temporary tags. See *United States v. Edgerton*, 438 F.3d 1043, 1046 n.2 (10th Cir. 2006). It follows that the court's holding would likewise apply to all license plates.

191. See *supra* notes 163-173 and accompanying text.

192. Although the Tenth Circuit itself has not explicitly applied its *Edgerton* dissipation analysis to an officer's suspicion based on something other than an invalid license plate, a district court within the Tenth Circuit has applied it. See *United States v. Rodriguez-Rodriguez*, No. CR 06-0537 JB, 2006 U.S. Dist. LEXIS 95359 (D. N.M. Dec. 11, 2006). *Rodriguez-Rodriguez* involved two vehicles—a sedan and a truck—with California license plates traveling in close proximity to each other in the middle of the night. *Id.* at *3-4. Because no other cars were present on the particular stretch of New Mexico highway where the vehicles were driving, police officer Michael Marquez decided to follow the truck and the sedan. See *id.* at *4. After tailing the vehicles for approximately one mile, Officer Marquez noticed that the truck's license plate was not illuminated and that the sedan swerved across lanes, both in violation of New Mexico traffic law. See *id.* at *4-5. Officer Marquez chose to stop the truck and radioed for another member of his force to locate the sedan. See *id.* at *5. During the stop of the truck, Officer Marquez discovered evidence of marijuana trafficking, and the truck's driver suddenly fled on foot. See *id.* at *5-8.

When Officer Marquez learned that the sedan had been stopped by Deputy Anthony Bencomo, Officer Marquez relayed his suspicions to Deputy Bencomo that the two drivers were jointly involved in illegal drug trafficking. See *id.* at *26. Deputy Bencomo approached the driver of the sedan and the driver adamantly denied that he had any affiliation with the driver of the truck. See *id.* at *9. Nevertheless, Deputy Bencomo continued with the traffic stop and eventually linked the two drivers in a plot to transport marijuana. See *id.* at *10-15. At his suppression motion, the driver of the sedan argued that Deputy Bencomo improperly exceeded the scope of the stop because his suspicions were dispelled at the moment the defendant had denied any connection to the driver of the truck. See *id.* at *28. Finding this *Edgerton* attack without merit, the court held that Deputy Bencomo had independent, objectively reasonable grounds to continue with the traffic stop based on his awareness that the defendant had previously swerved and that Deputy Bencomo knew that the defendant was traveling directly in front of another driver from California who had been previously linked to illegal drug activity. See *id.* at *26-29.

reasonably suspects obscures the driver's view, the court does not resolve whether the officer must terminate the stop immediately if he determines that his initial suspicions were ill-founded.¹⁹³

On another level, if license plates primarily serve as a tool to allow officers to quickly examine a vehicle's registration, it is unclear under *Edgerton* if, after an officer stops and walks up to a vehicle and verifies that a license plate in fact exists, he can then return to his patrol car and conduct a computer check of the plate while requiring the driver to wait.¹⁹⁴ If not, the officer must write down the license plate number, permit the driver to leave, return to his patrol car, and enter the number into his computer; then, if the check of the license plate results in an independent basis for detaining the vehicle, the officer must stop the driver again several miles down the road.¹⁹⁵ A second stop of the same driver may heighten the hostility directed at the officer not only because the driver's journey has been delayed yet again, but also because that individual is acutely aware that the officer must strongly believe that he has committed a traffic violation.¹⁹⁶ Such a procedure hardly seems an efficient or effective method to accomplish the goals of license plate stops.¹⁹⁷

Finally, the court did not resolve the *McSwain* dicta concerning the possibility that grounds for a valid traffic stop may exist if an officer has an objectively reasonable belief that a traffic violation has occurred or is occurring.¹⁹⁸ The central premise of *Edgerton*—that an officer may not

193. See Motion To Suppress at 14, *United States v. Montero*, No. 06-40016-01-SAC (D. Kan. Feb. 22, 2006). In *Montero*, the defendant argued that once the officer stopped the vehicle and saw that the crack did not obscure the driver's view, the stop should have terminated. See *id.* One can appreciate *Edgerton's* attempt to create a bright-line standard designed to deter officers from benefiting from traffic stops continued in bad faith and to protect the public from such intrusions. Nevertheless, the court's choice to impose its dissipation analysis—through the framework of legalizing temporary tags placed in the rear windows of vehicles—achieves the opposite of the court's desired result. Although the interests of both drivers and officers can best be furthered by simply outlawing this manner of posting temporary tags, ambiguity may exist in other traffic contexts. Again, using the example of a cracked windshield, no clear-cut policy measure exists to evaluate the reasonableness of the initial stop in this instance and to ensure that officers do not further a detention founded on bad faith motives. Thus, *Edgerton's* central holding may have more merit in another traffic violation context.

194. *Edgerton* suggests that such a detention would be outside the scope of the initial stop.

195. Cf. *United States v. DeGasso*, 369 F.3d 1139, 1147 (10th Cir. 2004).

196. For instance, if the driver is a wanted criminal, the driver may be more prone to respond with violence toward the officer during the second stop. Cf. *United States v. Rubio-Sanchez*, No. 05-40081-01-SAC, 2006 U.S. Dist. LEXIS 21230, at *9 n.3 (D. Kan. Apr. 17, 2006).

197. For example, if the driver has drugs, he may dispose of all the evidence in the time existing between the two encounters.

198. See *United States v. McSwain*, 29 F.3d 558, 561 (10th Cir. 1994); see also *United States v. Poke*, No. 03-3043, 81 Fed. App'x. 712, 715 (10th Cir. 2003) (holding that a stop to check a license plate was justified where an officer still had "objectively reasonable suspicion that a traffic violation was occurring"). Although it is unclear whether the Tenth Circuit left open the possibility of deferring to an officer's reasonable judgment regarding license plate stops, if the *Poke* exception applies, any reasonable officer would have conducted a stop in the same manner as the officer in *Edgerton*. Interview with Fred Waller, Retired Captain, Kansas Highway Patrol, in Topeka, Kan. (Mar. 13, 2007). Most officers would expect Kansas law to ensure their ability to read a license plate without stopping the vehicle. See *id.*; see also *supra* note 61 and accompanying text. The court in *Edgerton*

continue with a traffic stop after the initial basis for the stop has dissipated—seems problematic if the officer indeed had an objectively reasonable basis for pulling over the vehicle in the first place.¹⁹⁹ Given that the driver is already detained, some courts have reasoned that it is not a significant further intrusion to merely ask to see the driver's license and registration or to establish a consensual encounter.²⁰⁰ Moreover, if an officer's interaction with a driver does not have any element of a routine traffic stop, such as asking the driver to produce a license and registration, the individual may feel that the officer's sole motive in pulling over her vehicle was simply to harass her and delay her journey.²⁰¹ Either way, *Edgerton* undermines officers' good faith efforts to enforce license plate laws.²⁰²

E. Trends

Courts outside the Tenth Circuit have begun to follow the lead set by *Edgerton* pertaining to the dissipation of reasonable suspicion in the context of license plates that are initially difficult to read.²⁰³ In *United*

did not reach a conclusion regarding the officer's good faith judgment as to the occurrence of a traffic violation nor did it consider whether the Kansas license plate statutes were ambiguous.

As a general rule, most circuits have held that a traffic stop rooted in a mistake of fact may be found objectively reasonable, whereas a stop premised on a mistake of law is never legal. *See, e.g., United States v. Miguel*, 368 F.3d 1150, 1153 (9th Cir. 2004); *United States v. Chanthasouvat*, 342 F.3d 1271, 1279 (11th Cir. 2003). The Tenth Circuit has followed this view. *See, e.g., United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005). On the latter issue, the Eighth Circuit has taken an opposite position by establishing that circumstances may exist that render an officer's mistake of law objectively reasonable. *See United States v. Martin*, 411 F.3d 998, 1002 (8th Cir. 2005) (holding that an officer's mistake of law regarding the need for two working taillights was a reasonable basis for a prolonged stop); *United States v. Geelan*, 509 F.2d 737, 744 n.9 (8th Cir. 1974) (holding that a stop was objectively reasonable where an officer pulled over an out-of-state car with the mistaken belief that vehicles from that state required two license plates). Most significantly, in a fact pattern virtually identical to *Edgerton*, the Eighth Circuit upheld a stop in its entirety where the officer did not see a temporary tag posted in the car's rear window until after he had pulled over the vehicle. *See United States v. Clayborn*, 339 F.3d 700, 701-02 (8th Cir. 2003). Although the officer made a mistake in law regarding his basis for the traffic stop, the court deferred to the officer's good faith judgment that a traffic violation had in fact occurred. *See id.*

199. The *Edgerton* holding assumes that the initial stop was valid. *See United States v. Edgerton*, 438 F.3d 1043, 1048 (10th Cir. 2006).

200. *See, e.g., Holland v. City of Portland*, 102 F.3d 6, 8 (1st Cir. 1996); *State v. Hill*, 606 A.2d 793, 795 (Me. 1992).

201. Because the court's holding risks selective enforcement of traffic laws, some drivers may feel unfairly targeted and resent the officer that pulled them over if they believe that the officer had no basis for stopping them in the first place. For example, if the driver is a racial minority and is not cited for a traffic violation, the driver may feel that she has been profiled solely based on her race. *See William M. Carter, Jr., A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 23-24 (2004). Accordingly, the court's result surely poses the threat of an actual or perceived increase in racially-motivated traffic stops.

202. *See supra* notes 55, 198 and accompanying text.

203. A district court in the Tenth Circuit has also applied *Edgerton* to achieve the same result in a factual scenario similar to *Edgerton*. *See United States v. Ruiz-Lopez*, No. 05-40060-01-JAR, 2006 U.S. Dist. LEXIS 25768 (D. Kan. Apr. 26, 2006). In *Ruiz-Lopez*, during a nighttime stop, the officer could not see the temporary tag until after he stopped the vehicle and shined a spotlight on the vehicle's rear window. *Id.* at *2. The officer could only fully read the tag after he had emerged from his vehicle, walked up to the defendant's truck, and shined his flashlight on the tag. *Id.* at *2-3. After examining the defendant's license and registration, the officer issued a warning ticket to the defendant for the illegal display of a tag. *Id.* at *3-4. Subsequent consent given by the defendant led to the

States v. Wise,²⁰⁴ a district court in the Eighth Circuit considered whether a driver could post a temporary license plate in the rear window of a Winnebago.²⁰⁵ The officer stopping the Winnebago could not see the license plate until he parked his patrol car directly behind the vehicle.²⁰⁶ After examining the driver's license and registration, the officer issued a warning for a tag violation.²⁰⁷ The driver then consented to a search of his vehicle and illegal drugs were found inside.²⁰⁸ Relying solely on *Edgerton*, the court granted the motion to suppress stating that, upon learning that a temporary tag was properly displayed, the officer "should have explained the reason for the stop and allowed defendants to continue on their way."²⁰⁹

In *United States v. Wright*,²¹⁰ a district court in the Eleventh Circuit addressed a temporary registration tag posted in the rear window of a vehicle.²¹¹ Because the stop occurred at night, the officer could not see the tag until the driver had pulled to the side of the road and the tag was illuminated by the officer's spotlight.²¹² The officer could read the tag only after he walked up to the vehicle on foot.²¹³ The detention that ensued resulted in the discovery of cocaine.²¹⁴ Primarily following *Edgerton*,²¹⁵ the court suppressed the evidence because the "initial suspicion and basis for the Terry-stop dissipated" the moment the officer observed what appeared to be a valid temporary tag posted in the rear window of the vehicle.²¹⁶

discovery of methamphetamine. *Id.* at *4-5. As in *Edgerton*, the court concluded that the stop was "unreasonably extended" when the officer learned that a valid temporary tag existed. *Id.* at *12.

204. 418 F. Supp. 2d 1100 (D. Iowa 2006).

205. *Id.* at 1108.

206. *Id.* at 1103.

207. *Id.*

208. *Id.* at 1105. Marijuana and a "substantial amount of cocaine" were found inside the vehicle. *Id.*

209. *Id.* at 1108, 1111. Unlike *Edgerton*, however, the court found the initial stop of the Winnebago invalid, but explicitly stated that even if the initial stop was valid, the officer's reasonable suspicion evaporated the moment he spotted the valid tags. *Id.* at 1106. This conclusion directly contradicts the binding Eighth Circuit precedent of *Clayborn*. See *United States v. Clayborn*, 339 F.3d 700, 701-02 (8th Cir. 2003) (upholding stop where the officer was unaware of a valid temporary tag prior to a conversation with the driver).

210. No. 3:06cr447/MCR, 2006 U.S. Dist. LEXIS 86975 (N.D. Fla. Nov. 30, 2006).

211. *Id.* at *3.

212. *Id.* At this point, the officer's patrol car was approximately twenty feet from the defendant's vehicle. *Id.* at *2.

213. *Id.* at *4. The officer also had to wipe the condensation off the vehicle's window to effectively read the tag. *Id.*

214. *Id.* at *3-4. After the officer asked the defendant to produce his license, the defendant informed the officer that it had been suspended. *Id.* at *3. The officer arrested the defendant and searched the vehicle incident to the arrest. *Id.* at *3-4.

215. As in *Edgerton*, in its interpretation of Florida law, the court followed a Florida regulation, and a Florida Supreme Court case based on that regulation, which specifically authorized the placing of a temporary tag in a vehicle's rear window. See *id.*; see also FLA. STAT. § 320.131(4) (2000); *State v. Diaz*, 850 So.2d 435, 439 (Fla. 2003).

216. *United States v. Wright*, No. 3:06cr447/MCR, 2006 U.S. Dist. LEXIS 86975, at *15 (D. Fla. Nov. 30, 2006).

Even *Edgerton's* dicta has proven influential.²¹⁷ The Second Circuit formally adopted it in *United States v. Jenkins*²¹⁸ by upholding a stop based on independent reasonable suspicion.²¹⁹ In *Jenkins*, the officers stopped an SUV for seemingly having no rear license plate.²²⁰ The officers approached the SUV and noticed a temporary plate that was “extremely difficult to read” while passing the rear of the vehicle.²²¹ Upon approaching the driver’s side door of the car, the officers noticed the odor of marijuana.²²² Continuing with the traffic stop,²²³ the officers asked the occupants of the car to exit the vehicle, and after a quick search, a firearm was found.²²⁴ The defendant argued that upon discovering the temporary license plate, the officers should have allowed him to leave without approaching his SUV.²²⁵ Relying solely on *McSwain*, the court stated, “it is reasonable for officers who have stopped a vehicle on the basis of a reasonable factual mistake to approach the vehicle and apprise the vehicle’s occupants of the situation.”²²⁶ The court followed the *Edgerton* dicta by finding that the officers had *independent* reasonable suspicion to arrest the occupants of the vehicle and search the car upon detecting the smell of illegal marijuana.²²⁷

F. Resolving *Edgerton's* Erosion of License Plate Laws

Because *Edgerton* has caused a wake of troublesome repercussions concerning license plate statutes in Kansas and elsewhere, immediate attention by subsequent courts and the Kansas Legislature is needed to clarify the “clearly visible” requirement. The question must be answered regarding when an officer’s inability to read a license plate places the driver in direct violation of the “clearly visible” rule and justi-

217. *United States v. Edgerton*, 438 F.3d 1043, 1051 (10th Cir. 2004) (“[T]he brief encounter between an officer and driver authorized by *McSwain* might independently give rise to facts creating reasonable suspicion of criminal activity, thus warranting further investigation.”).

218. 452 F.3d 207 (2d Cir. 2006).

219. *Id.* at 213.

220. *Id.* at 209. The officer also stated that the vehicle’s windows were heavily tinted. *Id.*

221. *Id.* The tag was in the rear window of the vehicle. *Id.*

222. *Id.* The officers also noticed that one of the passengers of the vehicle appeared to be attempting to conceal something. *Id.* at 210. An officer told the passenger to “keep his hands visible.” *Id.*

223. One officer asked the driver to produce his driver’s license. *Id.* at 209. The driver admitted that he did not have one. *Id.* at 209-10.

224. *United States v. Jenkins*, 452 F.3d 207, 210 (2d Cir. 2006). The firearm was found under the front passenger seat. *Id.* at 210. After the occupants were arrested, a second firearm was found in the rear passenger seat. *Id.*

225. *Id.* at 213.

226. *See id.* at 213-14.

227. *See id.* at 214. Because of the independent basis for pursuing the stop, the firearms recovered were not “fruit of the poisonous tree.” *See id.* at 214-15 (quoting *Segura v. United States*, 468 U.S. 796, 804-05 (1984)). The court also suggested that if no independent reasonable suspicion was found at the time the officers approached the driver, as in *Edgerton*, the basis for the stop would dissipate and the officers could not complete the traffic stop. *See id.* at 214 (noting that officers did not violate rights of occupants “merely by approaching the SUV because it would have been reasonable for them to inform the SUV’s occupants of what had happened”).

fies the officer's continued detention of the vehicle for the purpose of conducting a routine traffic stop. Fortunately, several helpful principles can be gleaned from the above analysis to aid in this determination.

First, and perhaps most important, other Tenth Circuit opinions suggest that a license plate must be maintained in a condition and location such that an officer can read it while following a vehicle at a safe driving distance.²²⁸ Even *Edgerton* itself lends some support to this rule.²²⁹ Such a guidepost allows an officer to fulfill the purpose of license plate laws without unnecessarily intruding on the liberty interests of individual drivers by delaying a driver's journey.²³⁰ Second, courts have recognized the need to leave some room for excusing drivers from strict compliance with "clearly visible" requirements when the sole factor preventing clear visibility is an unusual atmospheric condition beyond the driver's ability to control.²³¹ Finally, it is clear from a wealth of Fourth Amendment jurisprudence that an objective standard should govern a determination of an officer's reasonable belief concerning the occurrence of a traffic violation.²³²

Integrating these principles creates the following cohesive rule: under an objective standard, a reasonable officer following at a reasonably²³³ safe driving distance behind a vehicle, during normal atmospheric conditions, must be able to read the vehicle's license plate. While placing a license plate in the appropriately designed and visibly illuminated

228. See, e.g., *United States v. Arciga-Bustamante*, No.04-7106, 2006 U.S. App. LEXIS 14908, at *19 (10th Cir. 2006); *United States v. DeGasso*, 369 F.3d 1139, 1150 (10th Cir. 2004); *United States v. Rubio-Sanchez*, No. 05-40081-01-SAC, 2006 U.S. Dist. LEXIS 21230, at *9 n.3 (D. Kan. Apr. 17, 2006) ("[If] the tag was not clearly legible to a law enforcement officer following a safe distance behind the vehicle, the statute is violated." (quoting *United States v. Granados-Orozco*, No. 03-40035-01/02-SAC, 2003 U.S. Dist. LEXIS 16753, at *7 (D. Kan. Aug. 26, 2003))); see also KAN. STAT. ANN. § 1706(c) (2001) (requiring license plate to be legible from distance of at least fifty feet at all times); *Delaware v. Prouse*, 440 U.S. 648, 659 (1979). This requirement serves to avoid frustrating the purpose of Kansas license plate statutes. See *United States v. Hayes*, 660 P.2d 1387, 1389 (Kan. Ct. App. 1983).

229. See *United States v. Edgerton*, 438 F.3d 1043, 1047 (10th Cir. 2006).

230. See *Rubio-Sanchez*, 2006 U.S. Dist. LEXIS 21230, at *9 n.3.

231. Examples of such conditions may include dense fog or falling snow. See, e.g., *Edgerton*, 438 F.3d at 1050; *United States v. Wright*, No. 3:06cr447/MCR, 2006 U.S. Dist. LEXIS 86975, at *19 (D. Fla. Nov. 30, 2006).

232. Courts have endorsed an objective standard. See, e.g., *Scott v. United States*, 436 U.S. 128, 138 (1978). A reasonable officer requirement is part of the objective standard. See, e.g., *Maryland v. Pringle*, 540 U.S. 366, 372 (2003). This would also overcome the *Edgerton* court's admonition of an "officer's poor eyesight" serving as a basis for justifying a stop. *Edgerton*, 438 F.3d at 1050.

233. Courts have not carefully delineated what constitutes a "safe" driving distance. However, in adopting section 1706(c), the Kansas Legislature likely determined that fifty feet is a workable distance to render a license plate legible. Yet, following a vehicle traveling at seventy mph by only fifty feet would not constitute a recommended safe driving distance at that speed. See generally *Stuart Tomlinson, Following Too Closely? Cops may be on Your Tail*, SUN. OREGONIAN, Oct. 8, 2006, at B1 (endorsing following distance of seven car lengths at seventy mph). Nevertheless, an officer following a car closely for the sole purpose of reading a license plate would only have to tailgate the car briefly, and on an interstate could even pull into a lane beside the vehicle to minimize the safety hazard posed to the officer in the event that the driver suddenly attempted to stop. An officer tailgating a vehicle for the specific purpose of examining a license plate would also likely be more alert to the possibility of quickly needing to slam on the brakes. Regardless, courts should recognize that it may be feasible to make a license plate readable at only a *reasonably* safe driving distance.

rear bracketed location will likely suffice to render the license plate “clearly legible” at a safe driving distance, it may not serve as the only sufficient condition existing to satisfy this requirement.²³⁴ Rather, whether a reasonable officer should have been able to read the license plate before initiating the stop is a factual determination that courts should make on a case-by-case basis.

Although the Kansas Legislature has seemingly adopted a variation of this rule, subsequent steps should be taken by the legislature to rewrite the visibility requirements to assure that the Kansas license plate statutes serve to enforce this standard.²³⁵ Such a rule would reduce much of the guesswork imposed by *Edgerton* on both drivers and officers regarding compliance with “clearly visible” requirements. If adopted by other states, it would afford parity to drivers traveling from one state to the next.²³⁶ It would also be a workable standard for an officer to follow and apply.²³⁷

VI. CONCLUSION

United States v. Edgerton created a whirlwind of problematic case law in the area of routine license plate checks. The court held that where nighttime serves as the factor preventing an officer from reading a temporary registration tag during a traffic stop, his basis for continuing with the stop dissipates as soon as the officer learns that the tag is valid. In making this determination, the court failed in its duty to properly interpret the Kansas license plate statutes. The court set precedent that will have troubling consequences for officers wishing to uphold license

234. The possibility exists that properly designed temporary tags placed in the rear window of vehicles may be legible from a safe driving distance during, for example, sunny daytime conditions. Thus, even if Kansas takes appropriate steps to clearly outlaw this method of posting a temporary license plate, a court may still afford leniency to a nonresident driver who places his temporary tag in the rear window of his car, as long as the officer could read the tag while following safely behind the vehicle.

235. Most drivers rarely consider whether their license plates are positioned in a “clearly visible” manner. Similarly, drivers would likely not realize that by merely placing their temporary tag in the rear window of their vehicle, they may face the inconvenience of being repeatedly stopped by police officers during nighttime conditions. Consequently, as representatives of the people, it is the legislature’s role to address the problems posed by temporary tags positioned in the rear window of vehicles and, as a prophylactic measure, outlaw this manner of posting license plates.

236. See *United States v. DeGasso*, 369 F.3d 1139, 1145 (10th Cir. 2004). This would provide a driver traveling across state lines with fair warning in how to comply with each state’s license plate visibility provisions. See *United States v. Lanier*, 520 U.S. 259, 266 (1997). Out-of-state drivers would not be surprised if an officer stopped them because the driver’s license plate was not “clearly visible” from a safe driving distance. See *DeGasso*, 369 F.3d at 1150.

237. An officer applying this standard would not have to make an on-the-spot determination of whether the license plate was obscured by a factor outside the driver’s ability to control. See *Edgerton*, 438 F.3d at 1050. Nor would it require the officer to speculate if a driver was complying with another state’s laws. See *United States v. Ledesma*, 447 F.3d 1307, 1313 (10th Cir. 2006) (“state troopers cannot be expected to possess encyclopedic knowledge of the traffic regulations of other states”). Rather, an officer would only have the burden of showing that he could not read the license plate while following a vehicle during normal weather conditions. This could be demonstrated through the officer’s testimony or other credible evidence (i.e., a police video recording).

plate laws and for citizens valuing their civil liberties. In arbitrarily considering nighttime as an external condition outside a driver's control, the court's holding could subject officers to the impossibility of reading license plates at night. As a result, officers attempting to conduct their duties may be forced to wield unbridled discretion in choosing which vehicles to stop, thus sacrificing the individual privacy and autonomy interests of innocent drivers.

In light of the difficulties posed by *Edgerton*, the best test for judging if a license plate is "clearly visible" is as follows: is a license plate objectively legible to a reasonable officer following a vehicle at a reasonably safe driving distance absent extreme atmospheric conditions? Such a rule is rooted in sound judicial interpretations and common sense. A new framework in this area would not only ensure a stable yardstick by which to measure compliance with laws promoting visible license plates, but also advance both law enforcement and individual privacy interests in the process.