

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE**

JESSE DREWNIAK, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 U.S. CUSTOMS AND BORDER PROTECTION, )  
 )  
 U.S. BORDER PATROL, )  
 )  
 MARK A. QUALTER, )  
 U.S. Border Patrol Agent, )  
 )  
 JEREMY FORKEY, )  
 Supervising U.S. Border Patrol Agent, and )  
 )  
 ROBERT N. GARCIA, )  
 Chief Patrol Agent of Swanton Sector of U.S. )  
 Border Patrol, )

Civil No. \_\_\_\_\_

**COMPLAINT FOR DAMAGES  
AND INJUNCTIVE RELIEF**

**JURY TRIAL DEMANDED**

Defendants.

**INTRODUCTION**

1. This is a civil rights action seeking injunctive relief and damages as a result of the illegal search and seizure of Plaintiff Jesse Drewniak on August 26, 2017 at a temporary interior checkpoint in Woodstock, New Hampshire by Defendants United States Customs and Border Protection (“CBP”), United States Border Patrol (“Border Patrol”), Border Patrol Agent Mark A. Qualter, Supervising Border Patrol Agent Jeremy Forkey, and Chief Patrol Agent of the Swanton Sector Robert N. Garcia (collectively, “Defendants”).

2. It is clearly established law that traffic checkpoints are unconstitutional when used for the primary purpose of general crime control. *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000). In violation of this principle, Border Patrol agents have routinely erected a temporary interior checkpoint in Woodstock—approximately 90 driving miles from the Canadian border—

for the primary purpose of general crime control and drug interdiction.

3. From August 25-27, 2017, Border Patrol agents, in collaboration with the Woodstock Police Department (“WPD”), stopped every single vehicle traveling southbound on I-93 and used drug-sniffing dogs to inspect each vehicle. During this three-day checkpoint that caused lengthy traffic jams, Border Patrol stopped countless people without a warrant or reasonable suspicion of criminal activity. Because of the checkpoint, 33 people who were lawfully in the United States were arrested or summonsed for state drug-related offenses. Of these 33 individuals, 31 were charged in state court with violation-level offenses for allegedly possessing small amounts of drugs for personal use (mostly marijuana or marijuana derivatives). No individual was summonsed or charged with unlawfully crossing the Canadian border.

4. Mr. Drewniak is a United States citizen, a resident of New Hampshire, and one of the persons Defendants’ unconstitutionally seized during this temporary interior checkpoint. On August 26, 2017, Mr. Drewniak was a passenger in a vehicle driving southbound on I-93 in Woodstock on his way home to Hudson from a fishing trip in the White Mountains. During this journey home, Border Patrol stopped and searched him as part of this checkpoint. Border Patrol agents illegally detained and searched Mr. Drewniak for almost an hour, searching inside the entirety of the vehicle, with Defendant Agent Mark Qualter, on information and belief, shouting in his face “WHERE’S THE FUCKING DOPE?” After detecting a small quantity of hashish oil for a vaping device, Border Patrol agents turned Mr. Drewniak over to a WPD Sergeant who was assisting with the unconstitutional checkpoint. The Sergeant then charged Mr. Drewniak with the state law violation-level offense of unlawful possession of a prohibited substance. Border Patrol records indicate that the agents directly involved in this search and seizure were Defendants Mark

A. Qualter and Jeremy Forkey. There were at least two additional Border Patrol agents involved in this search and seizure that Plaintiff has not yet identified.

5. The direct collaboration between Border Patrol and the WPD demonstrates how the primary purpose of this August 2017 checkpoint was drug interdiction in clear violation of *Edmond*. For example, in a *Union Leader* interview, WPD Chief Ryan Oleson acknowledged that Border Patrol has “a lot more leeway” to conduct a drug-sniffing-dog examination, whereas “he could not use a dog to search a car unless he has a suspicion of drug possession that he can articulate.”<sup>1</sup>

6. The 2nd Circuit (District Division) in Plymouth reviewed the charges against Mr. Drewniak and 15 others arising out of the August 2017 checkpoint, and suppressed all the evidence seized. See *McCarthy* Order *Ex. A*, *New Hampshire v. McCarthy*, Docket No. 469-2017-CR-01888 (2nd Cir. Dist. Div. Plymouth, Grafton, May 1, 2018). After hearing testimony from three Border Patrol agents, including Defendant Mark Qualter, Judge Thomas Rappa, Jr. found that Border Patrol used the checkpoint for the impermissible purpose of general crime control, not immigration enforcement. As Judge Rappa concluded, “while the stated purpose of the checkpoints ... was screening for immigration violations[,] the primary purpose of the action was detection and seizure of drugs.” *Id.* at \*11-12. In other words, the August 2017 checkpoint was pretextual where Border Patrol used the ruse of immigration enforcement to engage in general crime control in violation of *Edmond*. Following this suppression, the State voluntarily dismissed all charges against Mr. Drewniak and the 15 other individuals.

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<sup>1</sup> See Mark Hayward, *Border Patrol arrests 25 illegals at I-93 roadblock, seizes pounds of pot*, *Union Leader* (Aug. 29, 2017), [https://www.unionleader.com/news/crime/us-border-patrol-arrests-25-illegals-at-i-93-roadblock-seizes-pounds-of-pot/article\\_b33260da-4ea6-59ad-a44d-6a9f0ba3ce4f.html](https://www.unionleader.com/news/crime/us-border-patrol-arrests-25-illegals-at-i-93-roadblock-seizes-pounds-of-pot/article_b33260da-4ea6-59ad-a44d-6a9f0ba3ce4f.html).

7. Because of the August 2017 checkpoint, Mr. Drewniak suffered harm from the invasion of his constitutional rights during this lengthy warrantless seizure, as well as economic harm during the period that a charge remained pending against him. He seeks compensatory and punitive damages against the Border Patrol agents involved in this seizure under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

8. Additionally, there is a substantial risk that harm from the unconstitutional checkpoint will recur. Mr. Drewniak frequently travels to the White Mountains each summer—the time that Border Patrol has historically been the most active at the Woodstock checkpoint, stopping countless people each time. Mr. Drewniak seeks declaratory and injunctive relief against CBP, Border Patrol, and the Chief Patrol Agent for the Swanton Sector to prevent them from further invasions of his rights in the future.

#### **JURISDICTION AND VENUE**

9. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3).

10. This complaint is for damages based upon civil rights violations committed by federal officials contrary to the Fourth Amendment to the United States Constitution. This case is brought against Border Patrol agents and supervisors pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and the Fourth Amendment to the United States Constitution. This case is also brought under the Declaratory Judgment Act, 28 U.S.C. § 2201, and seeks injunctive relief under Fed. R. Civ. P. 65.

11. This Court has authority to award reasonable costs and attorney's fees pursuant to 28 U.S.C. § 2412.

12. Venue is proper in the District of New Hampshire because a substantial part of the events complained of and giving rise to Plaintiff's claims occurred in this District. *See* 28 U.S.C. §§ 1391(b), 1391(e), 1402(b).

### **PARTIES**

13. Plaintiff Jesse Drewniak is a United States citizen currently residing in Hudson, New Hampshire.

14. Defendant CBP is the sub-agency of the U.S. Department of Homeland Security ("DHS"), and the parent agency of Defendant United States Border Patrol. CBP is responsible for the initial processing and detention of noncitizens who are apprehended near the United States border, including at ports of entry.

15. Defendant United States Border Patrol operates within CBP. While CBP officers are stationed at ports of entry, Border Patrol agents are present along United States borders (between ports of entry) and in the interior of the United States.

16. Defendant Mark A. Qualter, at all times relevant to this complaint, was a Border Patrol agent. He is sued in his personal capacity. At all times relevant to this complaint, Defendant Qualter acted under color of law. Agent Qualter searched and seized Plaintiff during the August 2017 checkpoint without a warrant or any reasonable suspicion of criminal activity.

17. Defendant Jeremy Forkey, at all times relevant to this complaint, was a supervisory Border Patrol agent. He is sued in his personal capacity. At all times relevant to this complaint, Defendant Forkey acted under color of law. Agent Forkey searched and seized Plaintiff during the August 2017 checkpoint without a warrant or any reasonable suspicion of criminal activity.

18. Defendant Robert N. Garcia is currently the Chief Border Patrol Agent for the Swanton Sector. He was the former Deputy Chief Border Patrol Agent of the Swanton Sector,

serving in that role during the August 2017 checkpoint. The Swanton Sector covers (i) the entire State of Vermont, (ii) Clinton, Essex, Franklin, St. Lawrence, and Herkimer counties of New York, and (iii) Coos, Grafton, and Carroll counties of New Hampshire. Mr. Garcia is sued in his official capacity. At all times relevant to this complaint, Mr. Garcia acted under color of law.

## **FACTS**

### **I. Border Patrol Checkpoints for the Primary Purpose of Drug Interdictions Violate Federal Law and the Fourth Amendment**

19. By statute, CBP and Border Patrol claim the authority to conduct stops and warrantless searches, including at traffic checkpoints, on vessels, trains, aircraft, or other vehicles anywhere within “a reasonable distance from any external boundary of the United States.” *See* 8 U.S.C. § 1357(a)(3). A federal regulation defines a “reasonable distance” as “100 air miles from any external boundary of the United States.” *See* 8 C.F.R. § 287.1(a)(2). An “external boundary” is defined as “the land boundaries and the territorial sea of the United States extending 12 nautical miles from the baselines of the United States determined in accordance with international law.” 8 C.F.R. § 287.1(a)(1).

20. Approximately two-thirds of the U.S. population live within this so-called 100-mile zone, which encompasses the entirety of the states of Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.

21. Although CBP and Border Patrol often assert sweeping authority, their actual power is circumscribed not only by the express terms of the statute, *see* 8 U.S.C. § 1357(a)(3), but also by the limitations of the Fourth Amendment to the United States Constitution. Both prohibit warrantless searches for the purpose of general crime control in the interior of the United States.

22. Under 8 U.S.C. § 1357(a)(3), a Border Patrol agent is authorized to conduct a search only “for the purpose of patrolling the border to prevent the illegal entry of aliens into the United

States[.]” (emphasis added). This statute does not authorize Border Patrol agents to stop or search vehicles in the interior of the United States for the purposes of general crime control. Nor does the statute authorize dragnet searches for other types of immigration violations. Instead, the statutory authority is limited to “patrolling the border to prevent the illegal entry” of individuals into the United States. 8 U.S.C. § 1357(a)(3).

23. Echoing established constitutional principles, federal regulations emphasize that immigration enforcement officials—including Border Patrol agents—must have a “reasonable suspicion, based upon specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an [individual] illegally in the United States” before a vehicle stop may be initiated. *See* 8 C.F.R. § 287.8(b)(2).

24. Fundamentally, warrantless and suspicionless stops at checkpoints for the general purpose of crime control violate the Fourth Amendment to the United States Constitution. No act of Congress or agency regulation “can authorize a violation of the Constitution.” *United States v. Brignoni-Ponce*, 422 U.S. 873, 877 (1975) (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973)).

25. These suspicionless interior checkpoints are unconstitutional under the Fourth Amendment when used for the “general interest in crime control.” *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000). Drug enforcement is the perfect example of general crime control, and checkpoints for the purpose of drug interdiction violate the Fourth Amendment. *Id.* As the Court explained in *Edmond*, “We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.” *Id.* at 44.

26. The Supreme Court has also held that interior Border Patrol checkpoints are consistent with the Fourth Amendment only if (i) they are limited to a “brief detention of travelers” during which the vehicle’s occupants are subjected to a “brief question or two” about their citizenship status, and (ii) Border Patrol can show that their effectiveness at minimizing illegal entry from the border outweighs the degree of intrusion on individual rights. *See, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 558 (1976). In other words, a checkpoint’s reasonableness “still depends on a balancing of the competing interests at stake and the effectiveness of the program.” *Edmond*, 531 U.S. at 47; *see also Jasinski v. Adams*, 781 F.2d 843, 849 (11th Cir. 1986) (per curiam) (“Plaintiff alleges that the checkpoint was merely a ‘dragnet’ to catch illegal aliens travelling in south Florida, regardless of their point of entry. If true, these allegations could constitute an abuse of administrative discretion and might establish defendant Mongiello’s liability.”) (internal citations omitted).

27. In determining the purpose of an interior Border Patrol checkpoint, courts consider record evidence regarding the effectiveness of the checkpoint with respect to its stated goal. For example, one of the permanent checkpoints at issue in *Martinez-Fuerte* led to the apprehension of some 17,000 undocumented individuals in 1973. The same checkpoint yielded “725 deportable [individuals] in 171 vehicles” over an eight-day period. *Martinez-Fuerte*, 428 U.S. at 554. When evaluating the constitutionality of that permanent checkpoint, the Court credited these statistics as support for the effectiveness of that checkpoint in furthering its stated purpose of minimizing unlawful immigration from the border. *See id.* Indeed, in *Martinez-Fuerte*, the Court focused on evidence that highways at issue there would provide undocumented individuals who snuck across the U.S./Mexico border “a quick and safe route into the interior.” *Id.* at 557. The “reasonableness” analysis in *Martinez-Fuerte* also includes consideration of the location, method

of operation, and other logistics about the interior checkpoints, to assess the degree of intrusion on individuals. *See United States v. Soto-Zuniga*, 837 F.3d 992 (9th Cir. 2016).

28. Significantly, *Martinez-Fuerte* did not hold that all interior Border Patrol checkpoints are *per se* constitutional. Rather, the Court expressly emphasized that its holding as to the permanent checkpoints at issue there was “limited to the type of stops described in this opinion.” 428 U.S. at 567. Indeed, as explained below, the specific circumstances of the temporary interior Border Patrol checkpoint in Woodstock render it unconstitutional. Its effectiveness (if any) at minimizing illegal entry from the Canadian border has been (and is) outweighed by the degree of intrusion on the rights of people detained at the checkpoint without a warrant or any reasonable suspicion of criminal activity.

## **II. Border Patrol Traffic Checkpoints and the Enforcement of Domestic Drug Laws**

29. CBP is the largest and best-funded law enforcement agency in the country. In 2017, CBP’s budget was more than \$13 billion, and the President’s budget for 2020 would increase that amount to \$18.2 billion. For comparison, the operating budget for the largest police department in the country, the New York City Police Department, is slightly more than \$5 billion, totaling almost \$11 billion once expenses like pensions and fringe benefits are included.

30. Over the years, Border Patrol has assumed an increasing role in drug law enforcement. (As recent events have demonstrated, CBP’s activities have even exceeded drug and immigration enforcement.<sup>2</sup>)

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<sup>2</sup> In May 2020, CBP flew military-grade drones over protests in Minneapolis following the police murder of George Floyd. *See Geneva Sands, Customs and Border Protection Drone Flew Over Minneapolis to Provide Live Video to Law Enforcement*, CNN (May 29, 2020), <https://www.cnn.com/2020/05/29/politics/cbp-drone-minneapolis/index.html>. The Department of Homeland Security also has deployed helicopters, airplanes, and drones over 15 cities where demonstrators gathered to protest the murder of George Floyd, logging at least 270 hours of surveillance according to CBP data. *See Zolan Kanno-Youngs, U.S. Watched George Floyd Protests in 15 Cities Using Aerial Surveillance*, N.Y. Times (June 19, 2020), <https://www.nytimes.com/2020/06/19/us/politics/george-floyd-protests-surveillance.html?smid=tw-share>. CBP also deployed agents to Washington D.C. amid the protests of the murder of George Floyd.<sup>2</sup> Most recently, CBP agents have been stationed as federal paramilitary forces in

31. Border Patrol seizes a substantial amount of drugs at interior traffic checkpoints. In 2009, the Government Accounting Office (“GAO”) found that “[c]heckpoints have contributed to the Border Patrol’s ability to ... seize illegal drugs,” with drugs seized from checkpoints amounting to “over one-third of the Border Patrol’s total drug seizures” at that time.

32. Over the past eleven years, Border Patrol has continued to seize a large volume of drugs following encounters at interior checkpoints. For example, from October 2019 to May 2020, the Border Patrol made the following drug seizures at checkpoints:

Monthly U.S. Border Patrol Nationwide Checkpoint Drug Seizures						
Numbers below reflect FY20 To Date (TD) May.						
<i>Fiscal Year 2020 runs October 01, 2019 - September 30, 2020.</i>						
	Marijuana	Cocaine	Heroin	Methamphetamine	Fentanyl	Other
October	2,431	462	22	2,313	35	109
November	3,662	292	69	493	36	100
December	3,066	177	21	383	6	4
January	925	126	87	963	9	63
February	3,351	156	11	815	14	2
March	2,296	229	9	367	35	9
April	2,057	119	3	756	32	264
May	2,780	193	10	759	18	32
June						
July						
August						
September						

\*weights are in pounds (lb)

33. Although CBP claims that interior checkpoints across the country are also for the purpose of detecting and apprehending undocumented individuals attempting to travel further into the interior of the United States after evading detection at the border, the agency does not publish

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Portland, Oregon to crack down on protestors, using “force and unmarked vehicles to transport arrested protestors.” See Mark Hosenball, *U.S. Homeland Security Confirms Three Units Sent Paramilitary Officers to Portland*, Reuters (July 21, 2021), <https://www.reuters.com/article/us-global-race-protests-agents/us-homeland-security-confirms-three-units-sent-paramilitary-officers-to-portland-idUSKCN24M2RL>.

any data on the number of such individuals detected at checkpoints across the country, including whether any of the individuals apprehended actually had crossed the border unlawfully.

34. According to Border Patrol data nationwide (not limited to checkpoints), apprehensions in fiscal year 2019 in Border Patrol's "northern border sectors," including the Swanton sector, formed a small fraction of total apprehensions across the country.<sup>3</sup> Specifically, there were 4,408 apprehensions in the northern border sectors, approximately 0.5% of the total 859,501 apprehensions across the country. CBP provides no publicly available data on how many of those apprehensions arose from checkpoints, nor how many people apprehended at checkpoints had recently crossed the border.

35. Border Patrol's northern border sectors, including the Swanton sector, are responsible for a much larger percentage of Border Patrol's drug seizures. In fiscal year 2019, for example, Border Patrol's northern border sectors were responsible for approximately 7% to 30% of drug apprehensions. Specifically, Border Patrol's northern border sectors made up approximately 7.5% of total marijuana seizures, 7% of cocaine seizures, 9% of heroin seizures, 30% of methamphetamine seizures, 4% of ecstasy seizures, and 12% of other seizures of drugs.

36. Additionally, in at least some sectors along the northern border, there has been more outbound migration into Canada than there is inbound traffic in recent years, including in 2017. For example, public information shows that most of the traffic in the Houlton Sector (in Maine, neighboring the Swanton Sector) has "more outbound traffic occurrences" going into Canada "than illegal entries from Canada" during FY17—a trend that CBP projects will "likely increase" in the future.

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<sup>3</sup> The "northern border sectors" includes the Blaine, Buffalo, Detroit, Grand Forks, Havre, Houlton, Spokane, and Swanton Sectors.

### **III. Border Patrol Checkpoints in New Hampshire and Northern New England**

37. CBP and Border Patrol have a practice and custom of conducting unconstitutional Border Patrol checkpoints in northern New England.

38. Indeed, in recent years, CBP has ramped up temporary interior Border Patrol checkpoints in northern New England, staging at least eight temporary checkpoints in the interior of New Hampshire from 2017 to the present. Unsurprisingly, these checkpoints have predominantly resulted in drug seizures, as well as intimidating and harassing drivers and passengers.

39. For example, on two separate occasions from August 25-27, 2017 and September 26-28, 2017, Border Patrol instituted temporary interior checkpoints southbound on I-93 in Woodstock, New Hampshire. Woodstock is a small town (population 1,374) located in the White Mountains—a popular tourist attraction—that is approximately 90 driving miles from the Canadian border.

40. During these August and September 2017 checkpoints, Border Patrol stopped vehicles and directed them to a primary checkpoint location where Border Patrol agents asked about passengers' citizenship. While these vehicles were stationary, Border Patrol agents—without any reasonable suspicion of criminal activity—used drug-detection dogs to perform “pre-primary free air sniffs” of the vehicles waiting to go through the primary checkpoint. This tactic is unconstitutional under the New Hampshire Constitution. *See State v. Pellicci*, 580 A.2d 710, 716 (N.H. 1990) (holding that a canine sniff is a search under the New Hampshire Constitution that requires a reasonable suspicion of criminal activity). If a dog alerted to an odor that it is trained to detect, the K9-agent alerted the primary agent who then sent the vehicle to a secondary

checkpoint for further investigation. Once in the secondary checkpoint, Border Patrol agents searched the vehicles.

41. During the August 2017 checkpoint, if alleged contraband was found, Border Patrol surrendered it to the Woodstock Police Department, which was at the scene of the checkpoint. The WPD then charged these individuals in state court for violating state drug laws.

42. Similarly, during the September 2017 checkpoint, if alleged contraband was found, Border Patrol surrendered it to the New Hampshire State Police, which was at the scene of the checkpoint. The State Police then charged these individuals in state court for violating state drug laws.

43. Border Patrol knew from the outset that its primary purpose would be to catch people for drug offenses during these August and September 2017 checkpoints. This is why Border Patrol engaged the WPD and the State Police about the possibility of collaborating well before these checkpoints began. This is why Border Patrol asked the State Police via email as early as July 24, 2017 whether individuals caught with marijuana could be charged with a crime.<sup>4</sup> This is why, during the August and September 2017 checkpoints, the WPD and State Police responded to calls from Border Patrol to charge individuals allegedly caught with drugs. This is why, during the August 2017 checkpoint, the WPD was on the scene to observe Border Patrol's use of dog-sniff searches (which, according to the WPD chief in an interview with the *Union Leader*, was "impressive to watch"<sup>5</sup>). This is why one Border Patrol official told the WPD police chief via email on August 28, 2017 that, "[w]ithout you folks [the WPD,] we [Border Patrol] would have

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<sup>4</sup> Border Patrol specifically asked in this email in part: "When we do the checkpoint we will probably have some personal use seizures. Our federal attorney will not prosecute that amount of marijuana. Do your guys or local police in general still ticket for this type of thing?"

<sup>5</sup> See Mark Hayward, *Border Patrol arrests 25 illegals at I-93 roadblock, seizes pounds of pot*, *Union Leader* (Aug. 29, 2017), [https://www.unionleader.com/news/crime/us-border-patrol-arrests-25-illegals-at-i-93-roadblock-seizes-pounds-of-pot/article\\_b33260da-4ea6-59ad-a44d-6a9f0ba3ce4f.html](https://www.unionleader.com/news/crime/us-border-patrol-arrests-25-illegals-at-i-93-roadblock-seizes-pounds-of-pot/article_b33260da-4ea6-59ad-a44d-6a9f0ba3ce4f.html).

been hamstrung.” And this is why, after the August 2017 checkpoint had come to a close, Border Patrol officials drafted I-44 forms (Reports of Apprehension or Seizure) for those allegedly caught with contraband and sent these forms to the WPD so the WPD could prosecute these individuals in state court. This collaboration was for no other purpose than to engage in drug interdiction.

44. Further evidencing this collaboration, the WPD acknowledged in a press release issued after the August 2017 checkpoint “that for those traveling through our area over this past weekend traffic slowing and then having to stop to answer these questions might create a small delay,” but insisted that “it is a necessary function to ensure the security of our Nation *and an opportunity to remove illegal narcotics from our communities.*” (emphasis added).

45. Because of the August 2017 checkpoint, 33 people who were lawfully in the United States were arrested or summonsed for state drug-related offenses by the WPD. Of these 33 individuals, 31 were charged with possessing small amounts of drugs for personal use (mostly marijuana or marijuana derivatives). All 31 were charged with violation-level offenses.<sup>6</sup> According to Border Patrol, only 25 individuals—including three children (two eleventh graders and a seventh grader)<sup>7</sup>—were detained during this checkpoint due to immigration-related issues. A majority of these individuals allegedly overstayed their visas, and none were detected using the drug-sniffing dogs. There is also no evidence that any of these individuals ever crossed the Canadian border. Indeed, in discussing the August 2017 checkpoint, Defendant Qualter and two other Border Patrol agents testified in court that they were unaware whether anyone stopped at the checkpoint had crossed the Canadian border. Border Patrol’s press release publicizing the

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<sup>6</sup> A 32nd person was charged with felony drug possession, but the State dismissed his case. The 33rd person was charged with running the checkpoint along with other drug charges.

<sup>7</sup> NHPR Staff, *Three Children Among 25 Undocumented Immigrants Detained at N.H. Highway Checkpoint*, NHPR (Aug. 30, 2017), <https://www.nhpr.org/post/three-children-among-25-undocumented-immigrants-detained-nh-highway-checkpoint#stream/0>.

apprehensions from the August 2017 checkpoint says nothing about the likely thousands of individuals who were needlessly detained because of the checkpoint.

46. The September 2017 checkpoint was conducted in a fashion identical to the August 2017 checkpoint, but with the State Police at the scene to charge individuals with state drug offenses. Eleven (11) people who were lawfully in the United States were arrested or summonsed for state drug-related offenses by the State Police. One was charged with a violation-level offense and a class B misdemeanor. Another was charged with a class B misdemeanor. The nine (9) other individuals were charged with violation-level offenses under New Hampshire's marijuana decriminalization law that went into effect on September 16, 2017. *See* RSA 318-B:2-c. According to Border Patrol, only eight (8) individuals were detained for immigration-related reasons during this checkpoint. None was detected using the drug-sniffing dogs. There is also no evidence that any of these individuals ever crossed the Canadian border. Once again, Border Patrol's press release publicizing these apprehensions says nothing about the likely thousands of individuals who were needlessly detained because of the checkpoint.

47. In total, during the August and September 2017 checkpoints, 44 individuals who were in the United States lawfully were charged in state court with drug possession. Of these 44 individuals, 42—including the Plaintiff—were charged with possessing small amounts of drugs for personal use (mostly marijuana or marijuana derivatives). None of these 42 individuals was charged with an offense greater than a class B misdemeanor, and none was alleged to possess drugs with the intent to sell.

48. Subsequently, Border Patrol conducted checkpoints at this Woodstock location on five separate occasions in 2018 (May 26-28 Memorial Day Weekend, June 15-17 Father's Day Weekend, August 21-23, and September 27) and 2019 (June 9 during Laconia Motorcycle Week).

Border Patrol conducted these five checkpoints using canines in the same manner as they conducted the August and September 2017 checkpoints.<sup>8</sup>

49. During the May 26-28, 2018 Memorial Day Weekend checkpoint, Border Patrol reported arresting 17 allegedly undocumented individuals, six of whom were visa overstays (though, again, it did not report the thousands of other individuals it detained without a warrant or reasonable suspicion). Border Patrol also reported seizing “drugs and drug paraphernalia including a small amount of marijuana, hash oil and THC vape oil.” Two of the 17 immigrants arrested by Border Patrol came to the United States over 19 years ago from South Korea and were in New Hampshire on vacation with their 23-year-old daughter who was a recipient of the Deferred Action for Childhood Arrivals Program (“DACA”).<sup>9</sup>

50. During the June 15-17, 2018 Father’s Day Weekend checkpoint, Border Patrol reported arresting five undocumented individuals (though, again, it did not report the thousands of other individuals it detained without a warrant or reasonable suspicion). Border Patrol also reported seizing “drugs including marijuana, marijuana edibles and THC vape oil.”

51. As to the August 21-23, 2018, September 27, 2018, and June 9, 2019 checkpoints in Woodstock, Border Patrol did not issue a press release concerning the results, which suggests that it apprehended no undocumented persons, while needlessly detaining likely hundreds of individuals. Indeed, at least one media outlet reported that the June 9, 2019 checkpoint—which Border Patrol conducted during Laconia Motorcycle Week—yielded no immigration arrests.<sup>10</sup>

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<sup>8</sup> On September 5, 2019, Border Patrol also set up a checkpoint on Interstate 89 in Lebanon, near Dartmouth College—a location nearly 100 miles from the Canadian border.

<sup>9</sup> Robert Garrova, *Family Vacationing In N.H. Reeling After Arrest At Checkpoint 90 Miles From The Border*, NHPR (Jul. 6, 2018), <https://www.nhpr.org/post/family-vacationing-nh-reeling-after-arrest-checkpoint-90-miles-border#stream/0>.

<sup>10</sup> Alyssa Dandrea, *Immigration checkpoint on I-93 nets no arrests but draws concern*, Concord Monitor (June 11, 2019, 2:16 PM), <https://www.concordmonitor.com/Border-patrol-checkpoint-immigration-Woodstock-NH-26181887>.

52. Similarly, a recent checkpoint in Maine led to only one immigration arrest for a Haitian man who had been living in the United States for more than a decade—as well as “10 drug seizures.”<sup>11</sup> Likewise, a recent checkpoint in Vermont yielded “two narcotics seizures, but no arrests,” leading some to believe that the searches were intended in part to “assist local law enforcement in efforts to curb drug trafficking.”<sup>12</sup>

53. Indeed, members of Congress from Vermont, New Hampshire, and Maine sent a letter to CBP on November 13, 2019 noting “the lack of arrests from the random stops” in those states, and questioning whether those results justify “the harmful economic impact” from border checkpoints.<sup>13</sup>

54. The November 13, 2019 letter shows that unnecessary checkpoints continue in New Hampshire and other New England states. For example, the lawmakers mentioned the June 2019 checkpoint “along I-93 near Woodstock, NH that news reports indicate resulted in no arrests but caused severe traffic problems during the beginning of Laconia Motorcycle Week in New Hampshire.”<sup>14</sup> As another example in Vermont, “Border Patrol conducted four checkpoints since

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<sup>11</sup> Callie Ferguson & Alex Acquisto, *Border patrol agents arrest 1 at I-95 checkpoint about citizenship*, Bangor Daily News, (June 21, 2018), <https://bangordailynews.com/2018/06/21/news/border-patrol-agents-question-drivers-at-i-95-checkpoint-about-citizenship/>; see also *Border Patrol Agents Arrest 2 at Immigration Checkpoint on Interstate 95*, Bangor Daily News (Aug. 16, 2019), <https://bangordailynews.com/2019/08/16/news/aroostook/border-patrol-agents-arrest-2-at-immigration-checkpoint/> (arresting two Mexican nationals, one who “entered . . . illegally, more than 20 years ago” and the other who violated his work visa by leaving a prior job).

<sup>12</sup> Xander Landen, *Vermonters Question Ramped Up Border Security*, VTDigger (Sept. 15, 2019), <https://vtdigger.org/2019/09/15/ramped-up-border-patrol-checkpoints-divide-vermonters/>.

<sup>13</sup> Associated Press, *New England Lawmakers Question Border Patrol Checkpoints Far from the Border*, Portland Press Herald (Nov. 15, 2019), <https://www.pressherald.com/2019/11/15/new-england-lawmakers-question-border-patrol-checkpoints-far-from-the-border/>; see also Associated Press, *Politicians Seek Info on Interior New England Border Checks*, U.S. News & World Rep. (Nov. 14, 2019), <https://www.usnews.com/news/best-states/main/articles/2019-11-14/politicians-seek-info-on-interior-new-england-border-checks>; Letter from Jeanne Shaheen et al., U.S. Sen., to Mark Morgan, Acting Comm’r U.S. Customs & Border Prot. (Nov. 13, 2019), [https://www.shaheen.senate.gov/imo/media/doc/2019-11-13%20Letter%20to%20CBP%20-%20Border%20Patrol%20in%20Northern%20New%20England%20\(002\).pdf](https://www.shaheen.senate.gov/imo/media/doc/2019-11-13%20Letter%20to%20CBP%20-%20Border%20Patrol%20in%20Northern%20New%20England%20(002).pdf).

<sup>14</sup> Letter from Jeanne Shaheen, *supra* note 13, at 1.

[summer 2018] . . . which resulted in approximately 4,200 stopped cars but only one [immigration-related] arrest – for a visa overstay.”<sup>15</sup>

55. Border Patrol has continued interior checkpoints in New England states despite the ongoing dangers of the COVID-19 pandemic. On information belief, on July 23, 2020, Border Patrol officers performed a checkpoint in Maine, almost 50 miles from the Canadian border, stopping hundreds of cars on the highway without providing any legitimate justification for doing so.

56. In contrast to the minimal numbers of apprehensions at checkpoints in New England, CBP’s records show a significant interest in drug interdiction in the New England states. CBP’s training records regarding border checkpoints suggest a focus on drug offenses, including training regarding fentanyl, oxycodone, and marijuana.

57. As with operations elsewhere in the country, CBP’s operations along the northern border are plagued with concerns of racial profiling and unfair and excessive enforcement practices. For example, CBP arrested two citizens in Montana just for speaking Spanish. Complaints about Border Patrol checkpoints, including in New Hampshire, “range from allegations of ‘unnecessary delays, harassment and sometimes abuse’ to allegations of ‘unconstitutional searches and seizures, excessive use of force, racial profiling, and other agent misconduct.’”<sup>16</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> Jesus A. Osete, *The Praetorians: An Analysis of U.S. Border Patrol Checkpoints following Martinez-Fuerte*, 93 Wash. U. L. Rev. 803, 806 (2016) (internal citations omitted); see also Fernanda Santos, *Border Patrol Accused of Profiling and Abuse*, N.Y. Times, (Oct. 14, 2015), <https://www.nytimes.com/2015/10/15/us/aclu-accuses-border-patrol-of-underreporting-civil-rights-complaints.html>; Kathleen Masterson, *Broad Jurisdiction of U.S. Border Patrol Raises Concerns about Racial Profiling*, WBUR (Oct. 11, 2017), <https://www.wbur.org/news/2017/10/11/border-patrol-stops-profiling>.

**IV. Border Patrol Subjected Mr. Drewniak to an Unconstitutional Checkpoint for the Primary Purpose of Drug Interdiction**

58. Mr. Drewniak is currently 40 years old, and lives with his wife and youngest stepson in Hudson, New Hampshire. He is a citizen of the United States and has never left the country (with the exception of going to the Bahamas once when he was 8-years-old).

59. At around noon on August 26, 2017, after a fly-fishing trip with friends in the White Mountains on Profile Lake (near the former Old Man of the Mountain on Cannon Mountain), Mr. Drewniak was a passenger in a vehicle driving southbound on I-93 in the Town of Woodstock, New Hampshire. During his journey home, he approached a temporary interior checkpoint set up by Border Patrol. He was accompanied by two friends, who had joined him on the fishing trip.

60. This specific Border Patrol checkpoint was located approximately 90 driving miles from the U.S./Canadian border.

61. Mr. Drewniak had no advanced notice of the checkpoint and had no opportunity to exit the highway to avoid the checkpoint.

62. As Mr. Drewniak's vehicle drove down I-93, he saw a sign notifying motorists of "federal agents" ahead and a snarl of traffic ahead on the highway. Mr. Drewniak's vehicle was among many vehicles that Border Patrol stopped at the checkpoint, causing traffic to slow.

63. After several minutes of inching forward in heavy traffic, Mr. Drewniak's vehicle approached Border Patrol agents wearing green. Two of the agents had machine guns. As Mr. Drewniak's vehicle entered the checkpoint—and as traffic was backed up—one of the Border Patrol agents said "immigration checkpoint, have your license ready."

64. The Border Patrol agents at the checkpoint—which included Defendant Agents Qualter and Forkey—had no individualized suspicion to stop Mr. Drewniak at this interior checkpoint.

65. The agents were accompanied by drug-sniffing dogs for the purpose of enforcing federal and state drug laws.

66. At the checkpoint, Border Patrol Agents Qualter and Forkey used trained search dogs to conduct “pre-primary canine free air sniffs” of the vehicles waiting at the checkpoint. The dogs have training to alert to odors of some controlled substances.

67. If the dog alerted on a vehicle in this preliminary inspection, the vehicle would be diverted to a secondary inspection area.

68. As Mr. Drewniak’s vehicle approached the checkpoint, the Border Patrol agents asked the driver of the vehicle in which Mr. Drewniak was a passenger, through the driver’s window, whether the driver was a United States citizen. The driver said “yes.” Mr. Drewniak and the other passenger answered “yes” as well, as they believed that the agents were asking all the individuals in the vehicle for citizenship information. Consistent with what they were previously told, all three occupants of the vehicle showed their driver’s licenses, which an agent looked at through the window. Despite the occupants’ prompt confirmation of their citizenship—thus dispelling any notion that Mr. Drewniak and the other occupants were undocumented—the Border Patrol agents continued to prolong their detention.

69. At or around the time of this interaction, one Border Patrol agent was circling the car with a dog.

70. As the dog circled the car, the agent with the dog gave a signal to the agent near the driver’s window. The agent near the driver’s window then pointed to the secondary inspection area and told the driver of Mr. Drewniak’s vehicle to go there. As a result, Mr. Drewniak’s vehicle was diverted to a secondary inspection area in the highway median for further investigation.

71. Once parked at the median, agents opened the doors of the vehicle. On information and belief, Defendant Agent Qualter opened the driver's side door. One of the agents told the other passenger to exit the vehicle. Because Border Patrol agents opened both doors, Mr. Drewniak took this to mean that all occupants of the vehicle should exit. Mr. Drewniak and his friends complied and exited the vehicle.

72. For approximately 15 minutes, Mr. Drewniak and his friends stood outside their vehicle while Agent Qualter conducted a secondary inspection with his dog "Marian."

73. During this inspection, Agent Qualter circled the vehicle numerous times with his dog, and opened the trunk and passenger doors of the vehicle to allow the dog to sniff both in and around the car more thoroughly. Agent Qualter also had a machine gun in his hand while this inspection occurred.

74. After the dog jumped in the trunk but failed to alert to any odor it was trained to detect, Agent Qualter had his dog enter the vehicle (the doors had already been opened) to sniff the front seat and back seats to perform a lengthy and invasive search of the entire vehicle. The dog jumped into the vehicle, including on the center console.

75. Despite this invasive search, and on information and belief, the dog did not provide another alert to any odor. This process took approximately 15 minutes, and Agent Qualter and his dog circled the vehicle again at least six or seven times.

76. Without an alert from the dog, Border Patrol Agent Qualter, on information and belief, yelled at Mr. Drewniak "WHERE'S THE FUCKING DOPE?"

77. After Agent Qualter shouted in his face in a threatening manner, Mr. Drewniak said that there was a small amount of marijuana in the center console of the vehicle. Agent Qualter yelled at Mr. Drewniak, "GET IT FOR ME!" Mr. Drewniak then went into his vehicle and

removed a small quantity of hash oil in a tupperware container from the center console. He then gave it to Agent Qualter.

78. Agent Qualter seized the oil and went into a mobile trailer at the scene for approximately five minutes, presumably to test the substance. Agent Qualter then exited the trailer. Presumably because the test concluded that this was hashish oil, and not a more serious substance, Agent Qualter then immediately provided the substance to Sergeant Millar of the Woodstock Police Department who was standing nearby.

79. Sergeant Millar issued Mr. Drewniak a citation for Acts Prohibited, *see* RSA 318-B:2, requiring him to attend court on October 23, 2017.

80. When Sergeant Millar was writing out the citation to Mr. Drewniak, Sergeant Millar asked Mr. Drewniak to “write out” the citation and complete the “Uniform Statement Form” because Sergeant Millar’s hand hurt from writing so many citations.

81. Mr. Drewniak was subsequently released, and then waited approximately 20 minutes more to get back to the highway due to Border Patrol agents blocking their way.

82. From the moment Mr. Drewniak was first stuck in checkpoint traffic, to the moment when he was able to continue on his drive home, approximately one hour had elapsed during which Mr. Drewniak was unlawfully detained at the Border Patrol checkpoint.

83. Forty-two (42) individuals, including Mr. Drewniak, were charged in state court with possession of small amounts of controlled substances—mostly marijuana or marijuana derivatives—during the August 2017 and September 2017 Border Patrol checkpoints.

84. Sixteen (16) people, including Mr. Drewniak, challenged the charges arising out of the August 2017 checkpoint and moved to suppress all evidence seized because the checkpoint

violated the Fourth Amendment to the United States Constitution and Part I, Article 19 of the New Hampshire Constitution.<sup>17</sup>

85. Judge Thomas A. Rappa of the 2nd Circuit (District Division) in Plymouth held a suppression hearing on January 11, 2018. At the hearing—in an effort to show that the purpose of the immigration checkpoints was not drug interdiction—Border Patrol agents testified that the purpose of the dogs used at the checkpoints was “to detect concealed humans within vehicles.” Border Patrol’s argument was a ruse designed to conceal that the obvious purpose of the dogs was to detect for drugs. This was made clear at the suppression hearing where Defendant Agent Qualter admitted that Border Patrol found no concealed humans during the August 2017 checkpoint and that his dog had *never* detected a concealed human throughout his years of service as a Border Patrol agent. Out of desperation, the State of New Hampshire also attempted to argue at the suppression hearing that the WPD was at the scene, not for the purpose of drugs, but because other functions may need to be performed, like, for example, treating someone “who has a heart attack” at the checkpoint or “if there’s a child that needs to be delivered.”

#### **V. The New Hampshire Circuit Court Finds the August 2017 Checkpoint Unconstitutional**

86. On May 1, 2018, Judge Rappa found that the evidence seized during this August 2017 checkpoint was in violation of the United States and New Hampshire Constitutions and therefore granted a Consolidated Motion to Suppress any evidence seized during this checkpoint. *See McCarthy* Order Ex. A.

87. The Court evaluated the results and logistics of this purported “immigration” checkpoint in New Hampshire, finding that its primary purpose was, instead, detection and seizure

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<sup>17</sup> Two additional defendants were slated to challenge the September 2017 checkpoint in a suppression motion, but the State nolle prossed these charges. *See McCarthy* Order Ex. A, at \*1 n.2.

of drugs. *Id.* at 11-12. Specifically, “the number of arrests for drug charges” arising from the checkpoint “far outnumbered the arrests for immigration violations,” and “there was no evidence that any of the individuals arrested for immigration violations had crossed the Canadian border.” *Id.* at 11. These facts, plus Border Patrol’s overtures “to the State and local agencies for assistance,” supported the conclusion that “the primary purpose of the action was detection and seizure of drugs”—making the checkpoints “unconstitutional under both State and federal law.” *Id.* at 12.

88. The Court also held that the search was unconstitutional for the independent reason that the New Hampshire Constitution prohibits the use of suspicionless dog sniffs. *See id.* at 5. Specifically, the New Hampshire Supreme Court has previously held that “[e]mploying a trained canine to sniff a person’s private vehicle in order to determine whether controlled substances are concealed inside is certainly a search in these terms.” *Id.* at 6 (quoting *State v. Pellicci*, 580 A.2d 710 (N.H. 1990)). Under this rule, the checkpoint’s use of dog sniffs without any individualized suspicion violated the New Hampshire Constitution, thereby preventing this evidence from being used in a New Hampshire criminal proceeding. *See id.* at 5-10.

89. Notably, added to this concern with dog sniffs is that abuses at Border Patrol checkpoints involving service canines are both common and rarely investigated. These include dozens of troubling accounts of service canines falsely alerting at vehicle checkpoints, resulting in prolonged detention and searches of innocent travelers.<sup>18</sup> *See also id.* at 12 (noting that CBP testimony “revealed that there were numerous, ‘non-productive alerts,’ by the dogs at the checkpoints which extended the duration of the stops for those individuals but resulted in no evidence of a crime being found”).

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<sup>18</sup> *See* ACLU Nat’l Pol. Advocacy Dep’t, *From the Border to Disasters and Beyond: Critical Canine Contributions to the DHS Mission*, ACLU 3 (May 18, 2017), [https://www.aclu.org/sites/default/files/field\\_document/2017-05-18\\_aclu\\_statement\\_house\\_homeland\\_security\\_hearing\\_critical\\_canine\\_contributions\\_to\\_the\\_dhs\\_mission.pdf](https://www.aclu.org/sites/default/files/field_document/2017-05-18_aclu_statement_house_homeland_security_hearing_critical_canine_contributions_to_the_dhs_mission.pdf).

90. Accordingly, in light of the violations of both the United States and New Hampshire Constitutions, the Court granted the Defendants' motion to suppress any drugs or drug paraphernalia seized as part of the August 2017 checkpoint.

91. The Circuit Court denied the State's Motion for Reconsideration on August 21, 2018. *See McCarthy Order Ex. B, New Hampshire v. McCarthy*, Docket No. 469-2017-CR-01888 (2nd Cir. Dist. Div. Plymouth, Grafton, Aug. 21, 2018).

92. In September 2018, the State voluntarily dismissed the charges against Mr. Drewniak and the 15 other defendants after the Attorney General's Office declined to appeal the decision to the New Hampshire Supreme Court.

#### **VI. Harms to Mr. Drewniak from the Checkpoint**

93. The August 2017 checkpoint harmed Mr. Drewniak by invading his right to privacy and right to freedom of movement.

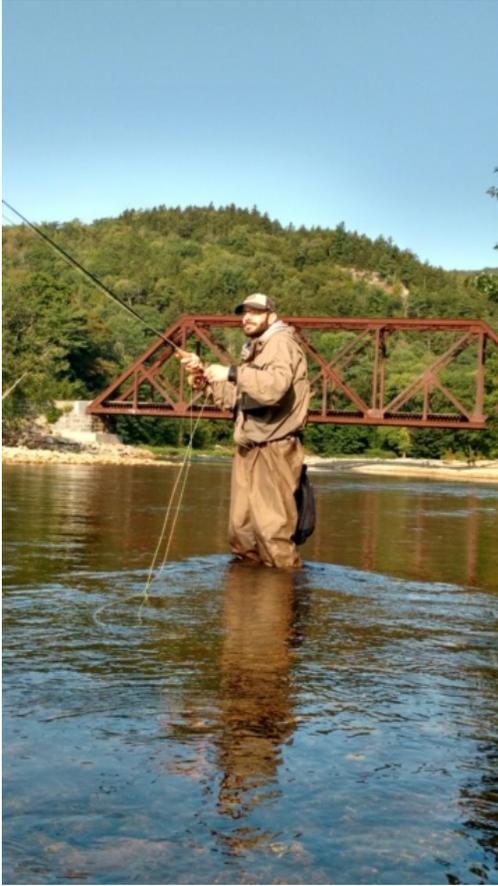
94. The unconstitutional search and seizure by federal agents also caused Mr. Drewniak emotional and financial harm. Mr. Drewniak has a close family member who has taught him to respect law enforcement. However, this experience has caused Mr. Drewniak to experience anxiety and fear when dealing with law enforcement and when thinking about this incident (which he thinks about every day).

95. The entire experience of the August 2017 checkpoint, including having an armed Border Patrol agent shout in his face, was traumatizing and caused stress and emotional distress, making it difficult for him to even sleep.

96. The stress from the checkpoint and the pending charge also put a toll on Mr. Drewniak's family life, his health, and his work.

97. Mr. Drewniak also suffered financial harm. In August 2017, Mr. Drewniak was working in food services and aspired to start his own restaurant. However, the pending charge delayed Mr. Drewniak's efforts to start his new business because he was worried that the charge may affect his ability to get necessary loans and other approvals (including licensing) to start the restaurant.

98. There is a substantial risk that Mr. Drewniak will be harmed in a similar way in the future. Mr. Drewniak regularly travels through Woodstock to the White Mountains. He is not just an occasional visitor to the White Mountains. As an avid fly fisherman, Mr. Drewniak will travel to the White Mountains at least 50 times to fish, forage, hike, and swim during fishing season (from approximately March to November). During ice fishing season (approximately December to February), he will also travel to the White Mountains and Lake Winnepesaukee approximately 10 times to enjoy outdoor recreation. Below are several photographs documenting Mr. Drewniak's trip on the day he was ensnared in the checkpoint on August 26, 2017:



99. The most efficient route by far between the White Mountains and Mr. Drewniak’s home in Hudson is southbound on I-93, where Border Patrol checkpoints regularly occur. Avoiding I-93 South adds approximately 45 minutes to the trip. Because of his experience with the Border Patrol checkpoint and resulting trauma, Mr. Drewniak often avoids I-93 South when driving home. However, there are several occasions each year when it is not feasible for Mr. Drewniak to take the additional 45-minutes on his drive home, and, on these occasions, Drewniak drives home on I-93 South, where Border Patrol checkpoints regularly occur, placing him at imminent risk of encountering another unconstitutional Border Patrol checkpoint.

100. Border Patrol checkpoints are particularly common in the summer, the same time that Mr. Drewniak most frequently travels to the White Mountains. Consistent with the numerous checkpoint procedures described above, Border Patrol has stated that “it plans on using more

checkpoints in northern New England in the future.”<sup>19</sup> CBP has provided no guarantee that it will cease these unconstitutional operations, undertaken primarily to enforce state and federal drug laws. Indeed, even after the New Hampshire court ruled the August 2017 checkpoint unconstitutional, Border Patrol has continued to use the Woodstock temporary checkpoint for the purpose of drug interdiction. *See supra* ¶¶ 48-51.

101. In other words, Mr. Drewniak will continue trips through Woodstock on I-93 in the future during popular travel summer weekends, and Border Patrol likely will continue to conduct temporary checkpoints in this area in the future during these times. Accordingly, there is an imminent threat that Mr. Drewniak will be subjected to such checkpoints again in the future.

## CAUSES OF ACTION

### **COUNT ONE – FOURTH AMENDMENT**

***Defendants Border Patrol Agent Mark A. Qualter and Border Patrol Agent Jeremy Forkey  
(individual capacities)  
(BIVENS)***

102. The foregoing allegations in the preceding paragraphs are re-alleged and incorporated herein by reference.

103. The Fourth Amendment to the U.S. Constitution prohibits “unreasonable searches and seizures.”

104. It is clearly established law that a warrantless checkpoint for the primary purpose of drug interdiction violates the Fourth Amendment. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000); *see also* 8 U.S.C. § 1357(a)(3) (limiting authority to conduct stops and warrantless searches, including at traffic checkpoints, on vessels, trains, aircraft, or other vehicles anywhere within “a reasonable distance from any external boundary of the United States” only

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<sup>19</sup> Masterson, *supra* note 16.

“for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States”) (emphasis added).

105. In violation of this clearly established law, Defendants Border Patrol Agents Mark A. Qualter and Jeremy Forkey erected a warrantless checkpoint in August 2017 for the primary purpose of drug interdiction, and searched and seized Mr. Drewniak as part of this unconstitutional checkpoint, causing him harm.

106. Defendants Qualter and Forkey acted with a malicious intention to deprive Mr. Drewniak of his rights or to do him injury. *See Carlson v. Green*, 446 U.S. 14, 22 (1980) (“punitive damages may be awarded in a *Bivens* suit”).

**COUNT TWO – INJUNCTIVE AND DECLARATORY RELIEF (28 U.S.C. § 2201)**  
***Defendant United States Customs and Border Protection, United States Border Patrol, and Chief Robert N. Garcia (official capacity)***

107. The foregoing allegations in the preceding paragraphs are re-alleged and incorporated herein by reference.

108. Plaintiff is entitled to declaratory and injunctive relief. CBP and Border Patrol have a practice and/or custom of conducting unconstitutional Border Patrol checkpoints in northern New England, including in Woodstock, New Hampshire approximately 90 driving miles from the Canadian border.

109. A ripe and justiciable controversy exists with regard to the circumstances and legality of Plaintiff’s detention.

110. As a result, Plaintiff is entitled to a declaration in his favor pursuant to 28 U.S.C. § 2201 that the August 2017 Border Patrol checkpoint violated the Fourth Amendment for two independent reasons—namely, the checkpoint (i) was for the purpose of drug interdiction, and (ii) unreasonably seized Plaintiff without a warrant or reasonable suspicion because the checkpoint’s

effectiveness (if any) at minimizing illegal entry from the border was outweighed by the degree of intrusion on his individual rights.

111. Plaintiff is also entitled to two separate injunctions that reflect the two independent Fourth Amendment violations presented by these checkpoints.

112. First, this Court must preliminarily and permanently enjoin CBP, Border Patrol, and Chief Border Patrol Agent Robert N. Garcia from operating additional unconstitutional Border Patrol checkpoints in New Hampshire for the purpose of drug interdiction. *See Edmond*, 531 U.S. at 41-42; 8 U.S.C. § 1357(a)(3) (limiting authority to conduct stops and warrantless searches, including at traffic checkpoints, on vessels, trains, aircraft, or other vehicles anywhere within “a reasonable distance from any external boundary of the United States” only “*for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States*”) (emphasis added).

113. Second, this Court must preliminarily and permanently enjoin CBP, Border Patrol, and Chief Garcia from operating additional unconstitutional Border Patrol checkpoints on I-93 in Woodstock, New Hampshire that seize individuals without a warrant or reasonable suspicion. The facts of this individual checkpoint indicate that its purported effectiveness (if any) at minimizing illegal entries from the Canadian border is outweighed by the degree of intrusion on individual rights. *See, e.g., Martinez-Fuerte*, 428 U.S. at 554, 558. For example, during the course of the Woodstock checkpoint from 2017 to 2019, Border Patrol has uncovered only a relatively small number of undocumented individuals (none of whom have been identified as crossing the Canadian border), while it has detained thousands of individuals without a warrant or reasonable suspicion of criminal activity.

114. Because of this practice and/or custom, Mr. Drewniak has suffered and will continue to suffer irreparable harm—namely being deprived of his Fourth Amendment rights.

115. Unless restrained from doing so, CBP and Border Patrol will continue to violate the Fourth Amendment by enforcing this practice and/or custom of conducting Border Patrol checkpoints in New Hampshire that seize individuals without a warrant or reasonable suspicion. There is a substantial risk that harm from the unconstitutional checkpoint will recur.

116. The harm to Plaintiff would outweigh the harm CBP and Border Patrol would suffer from the imposition of an injunction.

117. The public interest would not be adversely affected by an injunction.

#### **JURY DEMAND**

118. Plaintiff demands a trial by jury in this action on each of his claims triable by a jury.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests relief as follows:

A. Per Count I, grant compensatory and punitive damages against Defendants Mark A. Qualter and Jeremy Forkey in an amount to be proven at trial;

B. Per Count II, declare that the August 2017 Border Patrol checkpoint violated the Fourth Amendment to the United States Constitution because it (i) was for the purpose of drug interdiction, and (ii) unreasonably seized Plaintiff without a warrant or reasonable suspicion because its effectiveness (if any) at minimizing illegal entry from the Canadian border was outweighed by the degree of intrusion on his individual rights;

C. Per Count II, preliminarily and permanently enjoin CBP, Border Patrol, and Chief Border Patrol Agent Robert N. Garcia from operating unconstitutional Border Patrol checkpoints in New Hampshire for the purpose of drug interdiction;

D. Per Count II, preliminarily and permanently enjoin CBP, Border Patrol, and Chief Border Patrol Agent Robert N. Garcia from operating unconstitutional Border Patrol checkpoints on I-93 in Woodstock, New Hampshire that seize individuals without a warrant or reasonable suspicion because their purported effectiveness (if any) at minimizing illegal entry from the Canadian border is outweighed by the degree of intrusion on individual rights;

E. Award reasonable costs and attorneys' fees; and

F. Award such other relief as the Court deems just and equitable.

Respectfully submitted,

Jesse Drewniak,

By and through his attorneys affiliated with the American Civil Liberties Union of New Hampshire Foundation, the American Civil Liberties Union of Maine Foundation, and the ACLU Foundation of Vermont,

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\*Certifications for admission *pro hac vice* to follow.

August 11, 2020

**EXHIBIT A**

# The State of New Hampshire

GRAFTON, SS.

2<sup>ND</sup> CIRCUIT – DISTRICT DIVISION - PLYMOUTH

STATE OF NEW HAMPSHIRE

v.

DANIEL MCCARTHY, ET. AL.

DOCKET # 469-2017-CR-01888, ET. AL.

## ORDER

A hearing was held in these consolidated matters on January 11, 2018 to address the Defendants' Motion to Suppress, filed December 8, 2017, and the State's Objection thereto, filed December 27, 2017. Both sides also filed memoranda of law on the issues raised. The defendants also filed a Defendants' Reply to State's Objection on January 10, 2018.<sup>1</sup>

The State was represented by Gabriel Nizetic, Esquire and Cayla Kevlik, Esquire. The defendants were represented by Gilles R. Bissonette, Esquire; Mark Sisti, Esquire and Albert E. Scherr, Esquire. Of the sixteen defendants involved in these cases all were present with the exception of Kyle Goodell.<sup>2</sup>

Most of the material facts in these cases are not in dispute. For a brief period in both August and September, 2017 the United States Customs and Border Protection (CBP) set up a temporary checkpoint on Interstate 93 southbound approximately ninety (90) miles from the border between the United States and Canada in the Town of Woodstock, NH.<sup>3</sup> Law enforcement officers of the Woodstock Police Department (WPD) were also present at the checkpoints in August. The CBP used search dogs to monitor the vehicles passing through the checkpoints. If the dog alerted on a vehicle it would be diverted to a secondary processing area.

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<sup>1</sup> Also pending at the time of the hearing were Defendants' Emergency Motion for Discovery and to Compel Witnesses, filed December 22, 2017; State's Objection to Defendants' Motion to Compel, filed December 27, 2018; and State's Motion to Strike Exhibits, filed December 27, 2017. None of these pleadings were noticed for the hearing on January 11, 2018, but they were briefly addressed at the commencement of the hearing.

<sup>2</sup> There were originally eighteen defendants, but the charges against two of the defendants, were *not proessed* prior to the hearing.

<sup>3</sup> All of the charges pending in these matters stem from the checkpoint conducted in August. All the charges pending against the defendants were filed by the Woodstock Police Department.

The defendants' vehicles were searched by the CBP at the secondary processing area resulting in discovery of illegal controlled substances. That contraband was then turned over to the WPD, which resulted in these prosecutions. None of these searches or seizures was sanctioned by a warrant. As a result of these searches, forty-four individuals, including the defendants in these cases, were charged with possession of small amounts of controlled substances – mostly marijuana.

The State argued that the primary purpose of the checkpoints was border enforcement, searching for individuals who were in this country illegally. Federal law authorizes border checkpoints to be conducted within one hundred (100) miles of an international border. There is no dispute that the checkpoints in these matters were within that zone. The State argued that the checkpoints were a legitimate exercise of the authority of the CBP, as officers of the federal government, to maintain the integrity of the borders of the United States. Conversely, the State argued that the State of New Hampshire has no such authority. The State argued that the Supremacy Clause in Article 4 of the United States Constitution precludes the application of the protections of the New Hampshire Constitution to actions by federal officials acting under federal authority. The State argued that there is no legal bar to federal law enforcement officials cooperating with state law enforcement officials in the enforcement of the law. *Abel v. United States*, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960)<sup>4</sup> The State argued that a brief stop by border patrol agents at such checkpoints without a reasonable articulable suspicion is constitutional. *United States v. Martinez-Fuentes*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1975) The State argued that the use of the trained search dogs by federal officers at the checkpoints was a valid tool for detection of illegal drugs and does not require a reasonable suspicion of criminal activity prior to the use of the dogs. *United States v. Place*, 462 U.S. 696; 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983)

The State argued that there was no state action involved in these cases because the WPD did not actually conduct any of the searches in these matters and did not seize any evidence from the defendants. The State argued that the CBP agents were working independently from the State law enforcement officials and were enforcing federal law.

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<sup>4</sup> In *U.S. v. Clarke*, 110 F.3d 612 (1997) the continued viability of *Able* was questioned based on the U.S. Supreme Court's decision in *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89(1996).

The State argued that based on the “border search exception” the searches by the CBP do not require probable cause and are not governed by state law. *U.S. v. Ramsey*, 431 U.S. 606, 97 S.Ct. 1972 (1977) *People v. Mitchell*, 79 Cal. Rptr. 764, 275 Cal. App. 2<sup>nd</sup> 351, 355 (1969) The State maintained that the CBP is not required to get permission or approval for border enforcement operations from the state when conducting border enforcement operations. The State argued that the protections of Part 1, Article 19 of the New Hampshire Constitution only apply to New Hampshire law enforcement officers and not to federal officers.

The State argued that the legal authority relied upon by the defendants does not support the positions they are asserting. The State argued that the defendants’ argument that the primary purpose of the checkpoints was drug interdiction ignores the fact that approximately twenty-five people were arrested at these checkpoints based on their immigration status. The State also argued that the *Koppel* case has been superseded by RSA 256:1-a and the decision in *State v. Hunt*, 155 N.H. 465 (2007)

The defendants argued that these warrantless searches of their vehicles violated Part I, Article 19 of the New Hampshire Constitution. The defendants argued that the court must consider the admissibility of the evidence pursuant to the protections afforded the defendants by the New Hampshire Constitution regardless of the fact that the evidence was seized by federal law enforcement officers in the first instance. Citing, *State v. Turmelle*, 132 N.H. 148, 152 (1989) and *State v. McDermott*, 131 N.H. 495, 900 (1989) The defendants argued that pursuant to *State v. Pellici*, 133 N.H. 523 (1990) the State must be able to articulate a reasonable suspicion of criminal activity before using a trained search dog to conduct the search of their motor vehicle. The defendants argued that the State had no reasonable and articulable suspicion of criminal activity prior to conducting the searches in these cases. The defendants also argued that the checkpoints violated the Fourth Amendment of the United States Constitution and Part I, Article 19 of the New Hampshire Constitution because their primary purpose was for drug interdiction, citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 40-42 (2000) and *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976). Finally the defendants argued that the searches violated Part I, Article 19 of the New Hampshire Constitution because the degree of intrusion on the individuals’ rights by the searches outweighed the value to the public interest. Citing, *State v. Koppel*, 127 N.H. 286 (1985)

As with any search and seizure issue in the State of New Hampshire the analysis starts with Part I, Article 19 of the New Hampshire Constitution, which provides in relevant part that, “Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions.” The New Hampshire Supreme Court (N.H. Sup. Ct.) has consistently held that, “a warrantless search is *per se* unreasonable and evidence derived from such a search is inadmissible unless the State proves that the search comes within one of the recognized exceptions to the warrant requirement.” *Turmelle*, at 152, citing *State v. Beede*, 119 N.H. 620 (1979)(string cites omitted); *also see, State v. Ball*, 124 N.H. 226, 234 (1983) In order for the results of a search to be admissible the State must prove by a preponderance of the evidence that the search was either reasonable or subject to one of the recognized exceptions to the warrant requirement. *Id.*

The N.H. Sup. Ct. has recognized that the act of stopping a motor vehicle by a law enforcement officer is a seizure that ordinarily must be prefaced by “an articulable suspicion that the person detained has committed or is about to commit a crime” in order to be constitutional under both the state and federal constitutions. *State v. Joshua Mckinnon–Andrews*, 151 N.H. 19, 22 -23 (2004) The N.H. Sup. Ct. has also recognized that the New Hampshire Constitution may afford more protection of individual rights than the United States Constitution. The N.H. Sup. Ct. has declared:

“This court has historically viewed the rights of people in light of both the United States Constitution and the Constitution of the State of New Hampshire.” *State v. Settle*, 122 N.H. 214, 217, 447 A.2d 1284, 1285 (1982). While the role of the Federal Constitution is to provide the *minimum* level of national protection of fundamental rights, our court has stated that it has the power to interpret the New Hampshire Constitution as more protective of individual rights than the parallel provisions of the United States Constitution. *State v. Settle*, 122 N.H. 214, 217, 447 A.2d 1284, 1285 (1982); *State v. Osborne*, 119 N.H. 427, 433, 402 A.2d 493, 497 (1979); *State v. Hogg*, 118 N.H. 262, 264, 385 A.2d 844, 845 (1978). The Supreme Court has recognized this authority and has stated that its holdings “[do] not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.” *Cooper v. California*, 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730 (1967).

*Ball*, at 231-232

In its analysis of the propriety of sobriety checkpoints the N.H. Sup. Court explained:

... where the search or seizure of a motor vehicle is involved, article 19 provides significantly greater protection than the fourth amendment against intrusion by the State. Accordingly, in evaluating the constitutionality of a warrantless search or seizure, we will apply a more stringent test in cases like this one than we applied in *Landry*.<sup>5</sup> To justify the search or seizure of a motor vehicle, absent probable cause or even a reasonable suspicion that a criminal offense is being committed, the State must prove that its conduct significantly advances the public interest in a manner that outweighs the accompanying intrusion on individual rights. It must further prove that no less intrusive means are available to accomplish the State's goal.

*State v. Koppel*, 127 N.H. 286, 291-292 (1985)

The State argued that in today's world of mobile terrorists the protection of our nation's borders by way of border checkpoints searching for people entering the country illegally is a public interest that justifies the minimal intrusion involved in the initial stop at the checkpoint. This Court agrees. The analysis then turns to the use of the drug sniffing dogs to search the vehicles that are stopped at the checkpoints. It is here that the protections under the federal constitution and those under the New Hampshire Constitution, as well as those of other states, would seem to diverge. *See, State v. Pellici*, 133 N.H. 523 (1990)(canine sniff implicates protections of Part I, Article 19); *Accord, State v. Carter*, 697 N.W.2d 199, 202 (Minn.2005) (canine sniff of storage unit is a search under state constitution); *State v. Tackett*, 67 P.3d 295 (Mont. 2003) (canine sniff of trunk a search under state constitution); *Com. v. Rogers*, 849 A.2d 1185 (Pa. 2004)(canine sniff a search under state constitution); *People v. Dunn*, 564 N.E.2d 1054 (N.Y. 1990)(canine sniff a search under New York Constitution)

Ignoring for the moment the issue of the primary purpose of the checkpoints, this Court recognizes that if the defendants in these cases were tried in federal court for federal charges based on the current state of the law the evidence seized by the CBP officers would be admissible.<sup>6</sup>

<sup>5</sup> *State v. Landry*, 116 N.H. 288 (1976)

<sup>6</sup> This assumes that the government is able to prove that the dogs were trained and certified. Federal cases on this issue have recognized that the government must prove by a preponderance of the evidence that the dogs are properly trained and certified. *U.S. v. One Million, Thirty-Two Thousand, Nine Hundred Eighty Dollars in U.S. Currency (\$1,032,980.00)*, 855 F.Supp.2d, 678, 697-698 (D.Ct. – N.D. Ohio)(2012); *Florida v. Harris*, 568 U.S. 237, 133 S.Ct. 1050, 185 L.Ed.2d 61 (2013) (drug-sniffing dog's satisfactory performance in a certification or training program is a sufficient basis to trust his alert and thus establish probable cause.), excepts as noted in paragraph 2 on page 13 of this Order.

In *United States v. Place*, 462 U.S. 696; 103 S.Ct. 2637 (1983) the United States Supreme Court held that a canine sniff of the defendant's luggage at an airport was not a search and hence was not subject to Fourth Amendment requirements of probable cause or even an articulable suspicion that a crime was being committed to justify the intrusion.

In *Illinois v. Caballes*, 543 U.S. 405; 125 S.Ct. 834 (2005) the United States Supreme Court held that the use of a well-trained narcotics detection dog during a lawful traffic stop generally does not implicate legitimate privacy interests protected by the 4<sup>th</sup> Amendment.<sup>7</sup> The holding in that case was premised on the fact that the implementation of the detection dog did not extend the length of the traffic stop.

However, the holdings in *Place* and *Caballes* are inconsistent and irreconcilable with the holding in *State v. Pellici*, 133 N.H. 523 (1990) in which the N.H. Sup. Ct. held that, "Employing a trained canine to sniff a person's private vehicle in order to determine whether controlled substances are concealed inside is certainly a search in these terms."<sup>8</sup> *Id.*, at 533 Writing for the majority in *Pellici*, Justice Johnson also held that the State must be able to articulate a reasonable suspicion of criminal activity before using a search dog to conduct the search. *Id.* at 536 In his opinion, Justice Johnson expressly distinguished the holding in *Pellici* from that of the United States Supreme Court in *Place*. *Id.*, at 531 -534

Based on *Pellici*, this Court finds that had the State Police or a local law enforcement agency employed search dogs in the manner employed in the instant cases the evidence would be inadmissible because there was no articulable reasonable suspicion that any of these defendants was involved in criminal activity prior to the initial dog search. The issue thus becomes whether the inadmissibility of the evidence changes given the fact that the searches were conducted by CBP officers rather than State law enforcement officers.

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<sup>7</sup> It is interesting to note that New Hampshire's most prominent jurist, the Honorable David Souter, issued a dissent in that case indicating that he would find the use of the drug detection dog to be a search which would not be justified in a traffic stop without a reasonable articulable suspicion. He chided the majority opinion because it relied very heavily in the reliability of the search dog's performance stating, "The infallible dog, however, is a creature of legal fiction."

<sup>8</sup> The phrase "in these terms" refers back to the Court's definition of a search in the prior paragraph as, "a quest by an officer of the law, a prying into hidden places for that which is concealed." *Pellici*, at 533. (citations omitted)

The State cited several cases across the country that have held that evidence obtained by CBP agents operating pursuant to their federal authority is admissible in prosecutions of state criminal charges.<sup>9</sup> None of the cases cited were from New Hampshire. However, the State did cite cases from our neighboring states of Vermont and Maine.

In *State v. Coburn*, 165 Vt. 318 (VT 1996) the defendant's luggage was searched by a customs agent in New York after a drug sniffing dog alerted on the luggage. The bags were searched and marijuana was detected.

The federal authorities had no interest in prosecuting the drug charges but did alert the local customs agent in Vermont as well as the Vermont State Police. The evidence was repackaged and sent to Vermont with the luggage. The Vermont State Police eventually took possession of the items and delivered them to the defendant, which led to his arrest and prosecution. In addressing the defendant's motion to suppress the evidence the Vermont Supreme Court held:

[T]he Vermont Constitution does not apply to the conduct of federal government officials acting under the exclusive federal authority to safeguard the borders of the United States. We are not alone in holding that the state constitution does not apply to federal border searches. See, e.g., *People v. Mitchell*, 275 Cal.App.2d 351, 79 Cal.Rptr. 764, 767 (1969) ("A border search by a United States Customs Officer is lawful; does not depend upon probable cause; and is not governed by state laws."); *Morales v. State*, 407 So.2d 321, 329 (Fla.Dist.Ct.App.1981) (evidence seized by Customs officers pursuant to reasonable border search is clearly admissible in either federal or state courts); *State v. Allard*, 313 A.2d 439, 451 (Me.1973) (no state constitutional violation where Customs officer turned over evidence to state police); *State v. Bradley*, 105 Wash.2d 898, 719 P.2d 546, 549 (1986) ("Neither state law nor the state constitution can control federal officers' conduct.").

*Id.*, at 325

Similarly, in *State v. Allard*, 313 A.2d 439 (1973) the defendant was asked to empty his pockets by a customs officer at the border crossing in Calais, ME. The officer discovered that the defendant was in possession of LSD. He notified his superior who advised him to call the Maine State Police who then took possession of the contraband and prosecuted the defendant. In addressing the denial of the defendant's motion to suppress the Maine court held,

"[W]e see no constitutional violation occasioned by this turning over of evidence to the local police. The seizure by the Customs officials was reasonable and proper as based on mere suspicion at a border crossing. See, e. g., *Alexander v. United States*, 362 F.2d 379 (9th Cir.), cert. denied, 385 U.S. 977, 87 S.Ct. 519, 17 L.Ed.2d 439 (1966). There was no seizure by the Calais policeman who received the evidence from the Customs officer.

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<sup>9</sup> State's Memo of Law, Section I, pp. 4-5

We do not perceive any policy similar to that directed toward police officers in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) which would lead us to forbid this cooperation between federal and state officials. The turning over of evidence does not promote improper conduct by either local police or Customs agents.

*Id.*, at 451

Ordinarily secondary authority from neighboring New England states is afforded slightly more deference than opinions from other parts of the country due to the shared experience of heritage and origins. However, these cases are case both distinguishable from the instant cases. Maine appears to follow the federal law on the issue of dog sniffs and does not require articulable suspicion prior to using the dog. *See, State v. Jeremy Soucy*, 2006 WL 2002396 (2006) Vermont has still not addressed the issue of whether a so-called “dog sniff” with the purpose of locating drugs is a search under Article 11 of the Vermont Constitution. *State v. Cunningham*, 183 VT 401 (2008)(Dooley dissent)

The State argued that New Hampshire has long recognized the validity of police officers from one jurisdiction transferring information establishing probable cause to another jurisdiction. *State v. Hutton*, 108 N.H. 279 (1967); *State v. Merriam*, 150 N.H. 548 (2004)

The defendants argued evidence used to prosecute state criminal charges in New Hampshire must be governed by the protections of the New Hampshire Constitution. They argued that allowing the State to prosecute state criminal charges using evidence collected in violation of the State constitution by federal CBP officers would eviscerate the protections of Article 19 of the New Hampshire Constitution. The defendants’ invoked the principle articulated in *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437; 4 L.Ed.2d 1969 (1960) in which the U.S. Supreme Court declared:

To the victim<sup>10</sup> it matters not whether his constitutional right has been invaded by a federal agent or by a state officer. It would be a curiously ambivalent rule that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis. Such a distinction indeed would appear to reflect an indefensibly selective evaluation of the provisions of the Constitution. Moreover, it would seem logically impossible to justify a policy that would bar from a federal trial what state officers had obtained in violation of a federal statute, yet would admit that which they had seized in violation of the Constitution itself. (footnotes and citations omitted)

*Id.*, at 215

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<sup>10</sup> “Victim” in the context of the opinion was referring to a defendant in case where evidence illegally procured by state law enforcement officials was used against him/her in a federal prosecution.

The defendants also argued that the so-called “reverse silver platter doctrine” does not apply in New Hampshire. The “reverse silver platter doctrine” has been described as follows:

Evidence that is obtained by federal agents acting lawfully and in conformity with federal authority is admissible in state proceedings. *Gutierrez*, 22 S.W.3d at 84. This has been referred to as the “reverse silver-platter” doctrine. *Id.* The underlying concept of the “reverse silver-platter” doctrine is that “protections afforded by the constitution of a sovereign entity control the actions only of the agents of that sovereign entity.” *State v. Toone*, 823 S.W.2d 744, 748 (Tex.App.—Dallas 1992), *aff’d on other grounds*, 872 S.W.2d 750 (Tex.Crim.App.1994). Thus a state constitution will not be applied to control the conduct of officers of a foreign jurisdiction. *State v. Mollica*, 114 N.J. 329, 554 A.2d 1315, 1325 (1989). Simply put, “state constitutions do not control federal action.” *Id.* at 1327.

*Pena v. Texas*, 61 S.W.3d 745, 754 (2001)(Texas Court of Appeals)

The defendants correctly point out that the United States Supreme Court rejected the “silver platter doctrine” which allowed federal officers to use evidence obtained by state officers acting in violation of state law in federal prosecutions. *Elkins v. United States*, 364 U.S. 206 (1960); See also, *Mapp v. Ohio*, 367 U.S. 643 (1961)

The defendants also argued that the N.H. Sup. Ct.’s decision in *Turmelle* is a rejection of the “reverse silver platter doctrine.” In *Turmelle*, a federal officer working for the U.S. Department of Agriculture (U.S.D.A.) in Hawaii conducted a search of packages addressed to the defendant to ascertain whether they contained agricultural articles or pests and detected the presence of marijuana. The DEA was contacted and subsequently forwarded the packages to the police in Dover, New Hampshire. The Dover police obtained a search warrant and had the packages delivered to the defendant’s residence. The defendant was then arrested and charged with possession of a controlled substance with the intent to sell.

At trial Ms. Turmelle moved to suppress the evidence based on an allegation that the warrantless search by the U.S.D.A. officer violated her rights under the New Hampshire Constitution. In upholding the validity of the search, the N.H. Sup. Ct. adopted the administrative search exception to the warrant requirement articulated in *New York v. Burger*, 107 S. Ct. 2634 (1987) and thereby found that the search by the U.S.D.A. officer was reasonable. Given that N.H. Sup. Ct. ruled that the evidence would be admissible under the New Hampshire Constitution based on the “administrative search exception” which was adopted by New Hampshire for the first time in that decision, this Court fails to see how that decision stands for a rejection of the “reverse silver platter doctrine” as argued by the defendants.

In other words, the evidence was admissible under both the State and Federal constitutions. Therefore there was no silver platter.

The defendants next argued that *State v. McDermott*, 131 N.H. 495 (1989) also signifies a rejection of the “reverse silver platter doctrine.” In *McDermott* the defendant, who was acting as a confidential informant for the federal Drug Enforcement Administration, confessed to a murder after being told by a DEA agent that anything he said would not leave the office. The New Hampshire Supreme Court ruled that, “A confession made in reliance upon a promise of confidentiality or a promise of immunity is involuntary and coerced under the State Constitution,” and was therefore inadmissible. *Id.*, p. 501 However, the decision never addressed the issue of whether the confession would be admissible under the Federal Constitution. If, as this Court suspects, the confession would not have been admissible in a federal prosecution either, this case does represent a clear rejection of the “reverse silver platter doctrine.” This Court finds that the New Hampshire Supreme Court has never directly addressed the issue of the “reverse silver platter doctrine.”

The defendants then cite numerous cases from various state courts in which evidence seized by federal officials has been deemed inadmissible based on the protections in the state constitutions.<sup>11</sup> There is no need to analyze each of those cases here, but the cases are incorporated herein by reference.

This Court finds that given that the defendants in this matter are facing prosecution in the State court for violations of State laws the constitutional protections of the New Hampshire Constitution should apply. As noted in *Elkins*, “To the [defendant] it matters not whether his constitutional right has been invaded by a federal agent or by a state officer.” *Supra*, p. 215 As such, based on the Court’s finding above that the evidence would be inadmissible if seized by State law enforcement officials because there was no articulable reasonable suspicion that any of these defendants was involved in criminal activity prior to the initial dog search, the Court also finds that the inadmissibility of the evidence does not change based on the fact that it was seized by federal officers and then handed over to the State.

Ordinarily the Court would stop there, but given that this order is likely to be subjected to further review the Court will address the balance of the arguments presented.

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<sup>11</sup> See, Defendants’ Memorandum of Law, pp. 10 – 12

The defendants argued that the CBP and the WPD worked in collaboration with each other to facilitate the prosecution of these drug charges. This Court agrees.

The CBP agents testified that the primary purpose of the searches at the checkpoints was to discover human beings that had entered or remained in the United States illegally. They were aware of the fact that the United States Attorney would not prosecute individuals for small amounts of drugs even before they set up the checkpoints. They then reached out to State law enforcement to ascertain whether they would prosecute the drug charges. *Exhibit 11* From the facts of the instant cases it is patently clear that the primary purpose of WPD being present at the checkpoint in August to accept the illegal drugs confiscated by the CBP searches in order to prosecute the defendants on state drug charges. CPB Officer Labaff testified that the WPD, “was there to take the marijuana that was seized.”<sup>12</sup> It also appears that there were times when the WPD actually seized the contraband from the defendant’s vehicle.<sup>13</sup> Officer Labaff testified that if a local law enforcement officer was not able to take possession of the confiscated illegal drugs that evidence would have been transported to a federal processing center with no criminal charges filed.<sup>14</sup> In addition to taking possession of the evidence the WPD performed other functions such as traffic control or supervision of the detainees. The Court finds that the State and federal authorities were absolutely working in collaboration with each other. The CBP agent in charge of the checkpoint operations, Paul F. Kuhn, wrote to the Woodstock Chief of Police, Ryan Oleson, “Without you folks we would have been hamstrung.” *Exhibit 2*

The State argued that the primary purpose of the CBP checkpoints was to maintain the integrity of the international borders of the United States. The defendants argued that the primary purpose of the checkpoints was drug interdiction, citing *Edmund v. Goldsmith*, 183 F.3d 659 (7<sup>th</sup> Cir. 1999) They noted that the number of arrests for drug charges far outnumbered the arrests for immigration violations.<sup>15</sup> They argued that there was no evidence that any of the individuals arrested for immigration violations had crossed the Canadian border. In fact, most of the individuals arrested for immigration violations had entered the United States legally but overstayed their visas.

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<sup>12</sup> Hearing Transcript, p.37, line 9.

<sup>13</sup> *Id.*, line 16

<sup>14</sup> *Id.*, p. 38, line 8

<sup>15</sup> There were approximately forty-four (44) arrests for drug charges compared to approximately twenty-five (25) people that were arrested for immigration violations.

This Court finds that while the stated purpose of the checkpoints in this matter was screening for immigration violations the primary purpose of the action was detection and seizure of drugs.

The CBP was aware of that prior to setting up the checkpoints which is precisely why they felt the need to reach out to the State and local agencies for assistance. In *City of Indianapolis v. Edmund*, 532 U.S. 32, 121 S.Ct. 447 (2000) the United States Supreme Court argued that the primary purpose of a motor vehicle checkpoint cannot be the random detection of criminal activity such as drug detection. As such, the checkpoints were unconstitutional under both State and federal law.

Finally, the defendants argued that the checkpoint searches were illegal in light of the holding in *State v. Koppel*, 127 N.H. 286 (1985) which was a case involving DWI checkpoints. In that case the N.H. Sup. Ct. held that to justify a search or seizure of a motor vehicle without probable cause or a reasonable suspicion that the occupants are engaged in criminal activity, the State must prove that the “conduct significantly advances the public interest in a manner that outweighs the intrusion on individual rights” and “must further prove that no less intrusive means are available to accomplish the State’s goal.” *Id.*, pp. 291-292. The State argued that the criteria set forth in *Koppel* has been superseded by RSA 265:1-a and *State v. Hunt*. However, that argument is misplaced. In *Hunt* the N.H. Sup. Ct. expressly reaffirmed that the *Koppel* analysis is still the law in this State. *Hunt*, p. 475 Moreover, the procedure for approval of the sobriety checkpoints set forth in RSA 265:1-a was not utilized in the instance case, making a *Koppel* analysis appropriate.

The State’s stated purpose for conducting the checkpoints was to discover illegal aliens. As previously held, that is a significant public interest that outweighs a minor intrusion on an individual’s rights occasioned by the initial stop. However, the State failed to prove the necessity of subjecting each of the motor vehicles stopped at the checkpoints to searches by trained search dogs. The testimony of the CBP officers revealed that there were numerous, “non-productive alerts,” by the dogs at the checkpoints which extended the duration of the stops for those individuals but resulted in no evidence of a crime being found. The primary purpose of detecting illegal aliens could have, in most cases, been accomplished by a mere visual inspection of the interior of the vehicle and a brief interrogation of its occupant(s). If those measures then resulted in a reasonable articulable suspicion of criminal activity then the dog searches would have been warranted.

In fact, the testimony of the CBP officers revealed that no “concealed humans” were found.<sup>16</sup> CBP Officer Qualter testified that he has never located a “concealed human” in a motor vehicle in his seventeen years of service.<sup>17</sup>

CBP Officer Labaff testified correctly, that an alert by his trained canine constitutes probable cause for a search.<sup>18</sup> However, none of the CBP officers took steps to procure a search warrant based on that alleged probable cause prior to continuing the search.

Based on the foregoing the Court orders the following:

1. The Defendants’ Consolidated Motion to Suppress, filed December 8, 2017, is GRANTED for the reasons stated above. The CBP and the WPD were working in collaboration with each other with the understanding that the WPD would take possession of any drugs seized below the federal guidelines for prosecution in federal court and bring charges in this court based on that evidence. The evidence was seized in violation of constitutional rights recognized by the New Hampshire Supreme Court in *State v. Pellici*, *supra*. The New Hampshire Constitution governs prosecution of state laws in state courts.
2. The Defendants’ Consolidated Motion to Suppress is granted on a separate and independent basis for the individuals listed below based on the fact that the State failed to present any evidence that the canine, Sam, working with CBP Officer John Marquise, was properly trained and certified.<sup>19</sup>
  - a. Daniel McCarthy, #469-2017-CR-01888
  - b. Richard Robinson, #469-2017-CR-01887
  - c. Adam Clark, #469-2017-CR-01872
  - d. Jacob Rushing, #469-2017-CR-01871
  - e. Michael Benoit, #469-2017-CR-01878
  - f. Timothy Lucier, #469-2017-CR-01911
  - g. Taylor O’Neill, #469-2017-CR-01982
3. The Defendants’ Emergency Motion for Discovery and to Compel Witnesses, filed December 22, 2017, is moot and therefore DENIED.

<sup>16</sup> Hearing Transcript, p. 54, line 19

<sup>17</sup> *Id.*, p. 64, line 14

<sup>18</sup> This is a correct statement of federal law. *Florida v. Harris*, *supra*

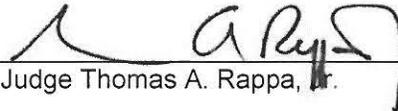
<sup>19</sup> See, *U.S. v. One Million, Thirty-Two Thousand, Nine Hundred Eighty Dollars in U.S. Currency*, *supra*.

4. The State's Motion to Strike Exhibits, filed December 27, 2017, is GRANTED with respect to defendants' *Exhibit 17* (ID) and *Exhibit 18* (ID) only and DENIED with respect to defendants' *Exhibit 1* through *Exhibit 16*, inclusive.<sup>20</sup>

**IT IS SO ORDERED:**

May 1, 2018

Date

  
Judge Thomas A. Rappa, Jr.

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<sup>20</sup> The State stipulated to the admission of Defendants' *Exhibits 1, 2, 3, 9* and *Exhibit 11*.

**EXHIBIT B**

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
NH CIRCUIT COURT**

2nd Circuit - District Division - Plymouth  
26 Green St.  
Plymouth NH 03264

Telephone: 1-855-212-1234  
TTY/TDD Relay: (800) 735-2964  
<http://www.courts.state.nh.us>

**NOTICE OF DECISION**

**GILLES R. BISSONNETTE, ESQ  
AMERICAN CIVIL LIBERTIES UNION OF NH  
18 LOW AVENUE #12  
CONCORD NH 03301**

Case Name: **State v. Daniel McCarthy, ET. AL.**  
Case Number: **469-2017-CR-01888, ET. AL.**

Enclosed please find a copy of the Court's Order dated August 21, 2018 relative to:  
**Order on Motion for Reconsideration**

August 22, 2018

Deborah A. Nichols  
Clerk of Court

(668)

C: Daniel McCarthy, ET. AL.; Woodstock Police Department; Plymouth Area Prosecutor

# The State of New Hampshire

GRAFTON, SS.

2<sup>ND</sup> CIRCUIT – DISTRICT DIVISION - PLYMOUTH

STATE OF NEW HAMPSHIRE

v.

DANIEL MCCARTHY, ET. AL.

DOCKET # 469-2017-CR-01888, ET. AL.

## **ORDER ON MOTION FOR RECONSIDERATION**

The State filed a Motion for Reconsideration of the Court's Order dated May 1, 2018 in a timely manner. The Defendants filed an objection to the motion. Having finally had the time to review the pleadings and the relevant law related thereto the Court finds that it can rule on these pleadings without further hearing.

The State first argues that the Court's rulings in the Order dated May 1, 2018 failed to consider the expectation of privacy analysis of *State v. Goss*, 150 N.H. 46 (2003) which the State raised in its oral argument during the hearings on these motions. The State argued that the Court improperly relied on the holding in *State v. Pellici*, 133 N.H. 523 (1990), which predated the expectation of privacy analysis adopted for the first time in *Goss*. Indeed in *Pellici* the N.H. Supreme Court noted that at the time, "Unlike the United States Supreme Court, we have neither adopted nor rejected the reasonable expectation of privacy analysis for purposes of determining what constitutes an invasion of protected interests under part I, article 19. *See State v. Valenzuela*, 130 N.H. 175, 180–81, 536 A.2d 1252, 1256–57 (1987), *cert. denied*, 485 U.S. 1008, 108 S.Ct. 1474, 99 L.Ed.2d 703 (1988)." *Id.* at 532-533 The fact that the *Goss* decision did recognize the reasonable expectation of privacy in the New Hampshire Constitution for the first time did not over-rule *Pellici*, which this Court believes is still good law. Furthermore, people who are lawfully operating a motor vehicle on ways in New Hampshire do have a reasonable expectation that their vehicle will not be subject to a warrantless search without probable cause. Finally, the *Goss* decision clearly reaffirms the fact that the New Hampshire Constitution affords the people of New Hampshire more protection than that provided by the 4<sup>th</sup> Amendment.

The State next argues that the Court Order ignored the well settled principal in New Hampshire that law enforcement officers in one jurisdiction can transfer information constituting probable cause to law enforcement officers in another jurisdiction. As noted by the Defendants, the State's argument ignores the fact that the probable cause being transferred from one agency to another must have been lawfully obtained in order for it to be relied upon by the receiving agency. That requirement was not present in the instant case because the Court found that the canine searches violated the New Hampshire Constitution and therefore any evidence produced from those searches would be inadmissible regardless of it being transferred to the new agency. The Court further found that the primary purpose of the checkpoints was generalized crime prevention and therefore in violation of the 4<sup>th</sup> Amendment. The evidence was not tainted, "based solely on the transfer from one agency to another,"<sup>1</sup> as alleged by the State, but rather was tainted by the unconstitutional search that led to its discovery in the first instance.

Finally, the State faults the Court for finding that the State failed to produce evidence necessary to overcome a motion to suppress with respect to one dog and its handler because the issue was not pled. This was a hearing on a motion to suppress. The State had the burden to prove that the evidence in question was admissible. With respect to canine searches the relevant law requires the State to show that the dog involved in the search was properly trained and certified.<sup>2</sup> The State was obviously aware of that requirement because it addressed that issue with the other dog and handler teams involved in these cases. For reasons that are unknown to the Court the State neglected to address that issue with respect to the canine, Sam. The State's failure to present sufficient facts to allow the Court to determine that the evidence was admissible was the State's error, not the Court's.

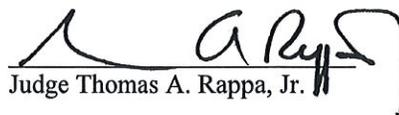
The Court orders the following:

1. The State's Motion for Reconsideration dated May 8, 2018 is DENIED.

**IT IS SO ORDERED:**

August 21, 2018

Date

  
Judge Thomas A. Rappa, Jr.

<sup>1</sup> State's Motion for Reconsideration, p. 2, par. 9.

<sup>2</sup> See, *U.S. v. One Million, Thirty-Two Thousand, Nine Hundred Eighty Dollars in U.S. Currency*, 855 F.Supp.2d, 678, 697-698 (D.Ct. – N.D. Ohio)(2012)