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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MILA VORKOSIGAN, Plaintiff,	:	
v.	:	**No. 17-cv-3352 SPL**
COLE SHOCKLEY, Chief of Police, City of Goodyear Police Department, in his official and individual capacities; CHARLES VILLANUEVA, Officer, City of Goodyear Police Department, in his official and individual capacities; and CITY OF GOODYEAR, Defendants.	:	**JURY TRIAL DEMANDED**

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Where law enforcement goes unchecked, liberty and democracy suffer. Liberty, because law enforcement tends naturally to respond to perceived threats with force, surveillance, and an illusion of safety, at the expense of individual rights. Democracy, because accountability vanishes where nobody investigates the investigator.

When a tragic accident shook the Goodyear community, residents demanded "aggressive action." Goodyear Police Department (GPD) Chief Shockley, an anti-marijuana crusader in an increasingly pro-marijuana world, seized the chance to justify the anti-trafficking and anti-possession war he wished to wage. The GPD instituted dragnet checkpoints along I-10, stopping travelers indiscriminately in hopes of catching a few miscreants carrying marijuana from California, where it was recently legalized.

Thousands of law-abiding citizens like Mila Vorkosigan—a grandmother driving to her midnight shift at the hospital where she has worked for nine years—were subjected to aggressive, unjustified questioning. The GPD generated a marijuana-impaired driving epidemic that did not exist, ensuring it wouldn't be held to account by a trusting and shaken public.

Now, for the sake of liberty and democracy, Ms. Vorkosigan seeks compensation and injunction. She seeks to hold the GPD accountable for what it did: institute an unreasonable program of indiscriminate stops to address an imaginary problem—and then lie about its intentions to escape consequence. This is precisely the sort of "subterfuge" the Fourth Amendment forbids. *United States v. Huguenin*, 154 F.3d 547, 555 (6th Cir. 1998).

STATEMENT OF MATERIAL FACTS

In 2016, California joined a growing number of states in legalizing recreational marijuana. In neighboring Arizona, a campaign to follow California's lead failed, due in part to

the anti-marijuana advocacy of Goodyear Police Department (GPD) Chief Cole Shockley. (Ex. 2, Shockley Dep. 4:23-26). Though marijuana remained illegal in Arizona, Goodyear's proximity to California's legal marijuana market posed challenges to law enforcement's attempts to keep Goodyear marijuana-free. (Shockley Dep. 4:24-26). Goodyear is about a two hour straight-shot drive along Route I-10 from Blythe, California, home to a marijuana dispensary. (Shockley Dep. 4:30-5:4). According to Chief Shockley, the GPD "suspected that Arizona residents were traveling back and forth from Blythe to buy marijuana for both personal use and resale in Arizona." (Shockley Dep. at 5:9-11). This concern persists: Chief Shockley testified that "[a]s a department we were and are concerned about I-10 becoming like I-80—a potential major trafficking route for California marijuana." (Shockley Dep. 8:14-17).

In January 2017, a car crash occurred on I-10 involving a car traveling into Arizona from California. (Article.) A local mother and child died in the crash, as did the car's driver, Anthony Ignatius. (Shockley Dep. at 6:4-5, 6:28-29.) The GPD suspected that marijuana impairment contributed to the accident. (Shockley Dep. at 6:24-28; Article.) Despite its own admission that the GPD was "not able to definitively say that the driver, Anthony Ignatius, was intoxicated at the time of the crash" (Shockley Dep. at 6:21-23), the GPD communicated its unsubstantiated suspicion of marijuana intoxication to the public. (Ex. 3, Howard Fischer, "Police Chief Pledges Crackdown on Marijuana Trafficking," *Arizona Capitol Times* (February 1, 2017)).

Chief Shockley led a town hall regarding the crash at which Goodyear residents demanded that the GPD take "aggressive action." (Shockley Dep. 7:3-8:31). In an interview with a local reporter shortly after the town hall, Chief Shockley declared, "law-abiding citizens of Goodyear are not going to sit back as drug-hauling miscreants drive marijuana into the state from California." (Ex. 3). He continued: "No marijuana. No trafficking. No more." (Ex. 3).

The GPD formed the "Marijuana Impairment Task Force" (MITF), consisting of Chief Shockley, Deputy Police Chief Hannah Pearl, senior narcotics and patrol officers, and a representative each from the prosecutor's office, mayor's office, and city council. (Shockley Dep. 11:1-7; Ex. 4, City of Goodyear, *Marijuana Impairment Task Force Report* (April 1, 2017), at 4). The resulting Report begins: "Recent events confirm what Goodyear law enforcement officials have long understood—that the use and possession of recreational marijuana is a serious threat to the health and safety of the Goodyear community." (Ex. 4 at 1). The "Background" section of the Report mentions marijuana-impaired driving exactly once: when it recites Arizona law prohibiting driving under the influence. (Ex. 4 at 2). Otherwise, it lacks any mention of marijuana-impaired driving, focusing instead on the effects of marijuana usage. (Ex. 4 at 2).

To the extent the GPD harbored genuine concern about marijuana-impaired driving, it was hypothetical. Defendants have stipulated that there exists no reliable method of testing for marijuana impairment (Dkt. No. 128 at ¶ 6) and that any evidence of a recurring problem is purely "anecdotal." (Shockley Dep. 8:3). Indeed, the GPD was not even able to determine that Anthony Ignatius had consumed marijuana prior to the crash. (Shockley Dep. 6:21-24).

The MITF proposed a program of highway checkpoints ostensibly aimed primarily at marijuana-impaired driving, and secondarily at "the strong community interest in… marijuana interdiction." (Ex. 4 at 4). The checkpoints were to focus on I-10 eastbound from California. (Ex. 5, City of Goodyear, *MITF Checkpoint Policy* (April 19, 2017), at 2). Though officers had to stop cars in a systematic fashion, they retained discretion over the checkpoints' time and location, which were not announced to the public in advance. (Ex. 5 at 2). They also retained discretion over placement of the warning signs, which were to be 1-1.5 miles in advance unless the checkpoint was on an exit ramp, in which case "the sign may be located in a reasonable

advance location at the Police Department's discretion." (Ex. 5 at 2). Officers were instructed to ask three questions. "First, officers may inquire if the driver is/was traveling from California. Second, officers may inquire if the driver used marijuana that day. Third, if the answer to either of the first two questions is yes, or if the driver refuses to answer either of the first two questions, or if the car or driver is registered and/or licensed in California, the officer may ask whether the driver currently possesses any marijuana obtained in California." (Ex. 5 at 2-3). Officers were to look for signs of impairment and to "walk around the driver's stopped vehicle to look inside the windows for plain view evidence of contraband." (Ex. 5 at 3). If, in their judgment, the interaction created reasonable suspicion of criminal activity, officers were to address the situation accordingly, including detaining motorists for further questioning. (Ex. 5 at 3).

MITF architects sent mixed messages about the checkpoint program's primary purpose. The Report purported to address the "related issues of marijuana-impaired driving and marijuana possession and trafficking." (Ex. 5 at 1). Then, on May 1, 2017, the day the pilot program began, the MITF, the Narcotics Department, and patrol officers received a memorandum from Deputy Police Chief Pearl—herself a member of the MITF, a coauthor of the report, and one of the trainers for the program. (Shockley Dep. 14:17). The memo explained that the checkpoint program "offers an effective and highly visible interdiction tool." (Ex. 6, Memo Re: Forfeitures at MITF Checkpoints (May 1, 2017)). Deputy Chief Pearl emphasized the "important check on the proliferation of marijuana entering the City of Goodyear," and instructed that "[t]he benefits of the I-10 checkpoints extend beyond curbing marijuana trafficking" to "the opportunity to generate much-needed revenue" via civil asset forfeiture. (Ex. 6).

Around 11:15 p.m. on the night of May 7, 2017, after a long day spent hosting a family birthday party for her five-year-old granddaughter, Plaintiff Mila Vorkosigan left her home in

Goodyear. (Vorkosigan Dep. 4:16-17). In her son's black pickup truck with California plates, she headed eastbound on I-10 to her midnight shift as a technician at the Arizona General urgent care center, a job she had held for nine years. (Vorkosigan Dep. 3:21; 4:19-29; 5:8; 7:11). She exited I-10 at Exit 126 and, once in the exit lane, saw a sign announcing a police checkpoint. (Vorkosigan Dep. 16:17). The sign and the checkpoint were invisible from the highway. (Villanueva Dep. 15:7-10). Ms. Vorkosigan encountered a traffic backup leading to a cluster of police cars with flashing lights, orange cones, flares, and police officers "swarming" in neon yellow vests. (Vorkosigan Dep. 5:20-22; 16:28; 6:1-14). Ms. Vorkosigan waited approximately ten minutes in the line, during which time she became increasingly concerned about reaching work on time. (Vorkosigan Dep. 17:5-4, 6:20-22; Villanueva Dep. 15:20). Ms. Vorkosigan had no forewarning of the checkpoint. (Vorkosigan Dep. 16:10-11).

After the ten-minute wait, Officer Villanueva approached Ms. Vorkosigan's vehicle and shined his flashlight in the car. (Vorkosigan Dep. 7:1-2). He asked Ms. Vorkosigan if she was travelling from California; she answered in the negative and explained that the car belonged to her son, a California resident. (Vorkosigan Dep. 7:2-7). Officer Villanueva next asked if she had been smoking marijuana. (Vorkosigan Dep. 7:17). Ms. Vorkosigan, who has never smoked marijuana in her life, refused to answer on principle. (Vorkosigan Dep. 7:21-28). Officer Villanueva then asked if Ms. Vorkosigan bought marijuana in California; again, Ms. Vorkosigan remained silent. (Vorkosigan Dep. 8:4-13). The questioning lasted approximately one minute. (Villanueva Dep. 13:24). It was around 11:40 p.m. and Ms. Vorkosigan grew increasingly nervous that she would miss her shift. (Vorkosigan Dep. 8:20-25). Officer Villanueva appeared upset with Ms. Vorkosigan's refusal to answer, which exacerbated her anxiety. (Vorkosigan Dep. 8:4-13). Officer Villanueva shined his flashlight on the passenger seat, the cup holders, the car

floor, and, finally, directly in Ms. Vorkosigan's eyes. (Vorkosigan Dep. 8:17-32). At this point, Ms. Vorkosigan testified, her "heart started racing 100 miles an hour." (Vorkosigan Dep. 9:4-5).

Officer Villanueva turned his full attention to the contents of Ms. Vorkosigan's car. He walked towards the trunk, shining the flashlight on the back seat, passenger seat, and floor. (Vorkosigan Dep. 9:19-22; Villanueva Dep. 13:14-19). Ms. Vorkosigan began to have difficulty breathing, her right arm tingled, and her chest began to hurt. (Vorkosigan Dep. 9:26-28). Ms. Vorkosigan informed Officer Villanueva that she was having chest pains and she suspected a heart attack; Officer Villanueva continued his inspection of the vehicle for approximately thirty seconds, then radioed for a paramedic. (Villanueva Dep. 13:28-14:22).

An ambulance transported Ms. Vorkosigan to an emergency room, where she was diagnosed with a panic attack and treated for three hours. (Vorkosigan Dep. 11:1-27). She missed her shift at the hospital and required a few subsequent days of rest. (Vorkosigan Dep. 11:26-30). As a result, Ms. Vorkosigan lost a job making $44,000 per year plus overtime and family health insurance. (Vorkosigan Dep. 13:1-4; 12:7-23). She remains unemployed. (Vorkosigan Dep. 13:9-10).

Over the course of the four-week pilot program, the checkpoints intercepted 2,875 cars, resulting in ten arrests for marijuana impairment and thirty-three for marijuana possession. (Shockley Dep. 17:16-26). The GPD discontinued the program after the pilot expired at the end of May 2017. (Shockley Dep. 17:4).

LEGAL STANDARD

Summary judgment is appropriate only where the "movant shows that there is no genuine dispute as to any material fact," Fed. R. Civ. P. 56(a), and where the evidence is "so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

251 (1986). The moving party bears the burden of identifying the evidence in the record precluding a reasonable jury from finding in the nonmoving party's favor. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [their] favor." *Anderson*, 477 U.S. at 255.

Summary judgment is particularly inappropriate regarding questions of intent or purpose, as those questions are best reserved for a jury. *See Provenz v. Miller*, 102 F.3d 1478, 1489 (9th Cir. 1996) ("Cases where intent is a primary issue generally are inappropriate for summary judgment unless *all* reasonable inferences that could be drawn from the evidence defeat the plaintiff's claim"); *Gulden v. Crown Zellerbach Corp.*, 890 F.2d 195, 197 (9th Cir. 1989) ("Summary judgment is particularly inappropriate where the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions").

ARGUMENT

The Fourth Amendment prohibits search and seizure absent individualized suspicion. *City of Indianapolis v. Edmond,* 531 U.S. 32, 37 (2000). "It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment." *Id.* at 40. Police roadblock checkpoints are therefore presumptively unconstitutional. In "exceptional circumstances," *Ferguson v. City of Charleston,* 532 U.S. 67, 74 (2001), a "special need, beyond the normal need for law enforcement" may compel an exception. *Edmond*, 531 U.S. at 37. *See United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (upholding brief checkpoint stops for immigration enforcement near the border); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (2000) (upholding highway checkpoints aimed at the immediate hazard of drunk driving).

If a checkpoint program's "primary programmatic purpose" is impermissible, the checkpoint is per se unconstitutional. *United States v. Fraire*, 575 F.3d 929, 932-933 (9th Cir.

2009). Because it is "indistinguishable from the general interest in crime control," *Edmond*, 531 U.S. at 44, drug interdiction is not a "special need" and therefore fails to enter the "closely guarded category of constitutionally permissible suspicionless searches." *Chandler v. Miller*, 520 U.S. 305, 309 (1997); *Ferguson*, 532 U.S. at 84. A checkpoint with the primary purpose of drug interdiction is therefore unconstitutional.

If instead the primary purpose is "distinguishable from the general interest in crime control," its constitutionality depends on its "reasonableness… on the basis of the individual circumstances." *Fraire*, 575 F.3d at 933. The reasonableness test balances "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Id.* at 932.

Summary judgment should be denied because a reasonable jury could conclude that the checkpoint program had an impermissible primary programmatic purpose of drug interdiction. In the alternative, the minor public interest in employing an ineffective method of curbing marijuana-impaired driving fails to justify the interference with individual liberty the checkpoint program entailed. The checkpoint program was therefore unreasonable and unconstitutional.

I. SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE A REASONABLE JURY COULD CONCLUDE THAT THE CHECKPOINT PROGRAM HAD AN IMPERMISSIBLE PRIMARY PROGRAMMATIC PURPOSE OF DRUG INTERDICTION.

An impermissible primary programmatic purpose, such as drug interdiction, renders a checkpoint program unconstitutional under *Edmond*, regardless of a legitimate secondary purpose. *Edmond*, 531 U.S. at 46 (noting that otherwise "law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check"). The possibility that law enforcement may employ a legitimate purpose as a pretext to achieve unconstitutional ends requires courts to "determine the actual purpose of the…

checkpoint, because… it does not necessarily pass constitutional muster simply because one of its alleged purposes was" legitimate. *Huguenin*, 154 F.3d at 555. In fact, an improper purpose invalidates activity the Fourth Amendment otherwise permits: "[A] program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar." *Edmond*, 531 U.S. at 47.

The primary purpose inquiry demands consideration of "all the available evidence." *Ferguson*, 532 U.S. at 81. In *Ferguson*, the Supreme Court invalidated a suspicionless search program that subjected pregnant women to drug tests to deter cocaine use. *Id.* at 70. The Court "did not simply accept the State's invocation of a 'special need'" and instead conducted a "close review" of the program. *Id.* at 81; *see also United States v. Johnson*, 889 F.3d 1120, 1125-1126 (9th Cir. 2018) (conducting inquiry "into an officer's purpose in conducting a stop or search without reasonable suspicion or probable cause" in light of the "Supreme Court's express concern that programmatic searches not be used as a pretext"). Ultimately, it rejected the hospital's claim that the program had a "beneficent" purpose devoted to women's health, instead finding that the program's "focus… on… arrest and prosecution," its "incorporat[ion of] the police's operational guidelines," and the day-to-day involvement of prosecutors and police indicated an impermissible law enforcement purpose. *Ferguson*, 532 U.S. at 82.

In the dual purpose checkpoint context, the primary purpose inquiry entails examination of officer behavior. In *United States v. Huguenin* the Sixth Circuit granted a motion to suppress evidence gathered via a checkpoint scheme with a disputed primary purpose. *Huguenin*, 154 F.3d at 552. The Government contended the scheme aimed primarily to discourage drunken driving; defendants believed it was a drug interdiction effort masquerading as a highway safety one. *Id*.

The court refused to accept the Government's word: "[T]he Fourth Amendment requires that police deception and subterfuge must be carefully scrutinized in regard to pretextual checkpoints," so "we must determine the actual purpose of the… checkpoint." *Id.* at 555. The court concluded that detection of intoxicated drivers was a pretext for drug interdiction in part because the officers' behavior indicated a focus on drug interdiction. Checkpoint officers asked questions, such as the drivers' plans, destination, and reasons for exiting, unrelated to the checkpoint's "purported legitimate purpose" of intoxication detection. *Id.* at 558. "If the county had truly established the checkpoint for the purpose of detecting intoxicated drivers, defendants should have been released as soon as the first officer to approach them was satisfied that they were not intoxicated after approximately fifteen to twenty seconds." *Id. See also United States v. Soto-Camacho*, 58 F.3d 408, 412 (9th Cir. 1995) (upholding a checkpoint in part because "its scope did not exceed what was proper under [the permissible] purpose.") The court also noted that "[i]nstead of asking a sufficient number of standard questions for a period long enough to determine sobriety, [the officer] testified that he varied his questioning based on whether the approaching vehicle displayed out-of-state or in-state license tags." *Huguenin*, 154 F.3d at 562. Treatment based on state of origin, rather than on apparent intoxication, betrayed the checkpoint program's real primary purpose. Finally, the supervision by and presence of the Narcotics Officer; the lack of a tool, such as a breathalyzer, able to detect alcohol consumption; and the 128 drug-related arrests contrasted with seven intoxicated driving arrests (of 2,342 stops), all suggested an improper purpose. *Id.* at 555-556.

Documents suggesting an improper primary purpose can also defeat summary judgment on their own. *Bressi v. Ford* concerned a checkpoint ostensibly aimed at sobriety, license, and registration checks. *Bressi v. Ford,* 2012 WL 13114802 (D. Ariz. Jan. 23, 2012) at *4. Two

documents dictated the denial of summary judgment: an arrest report authored by an officer describing the checkpoint as aiming to "locate intoxicated drivers, stolen vehicles, undocumented alien smuggling, and drug contraband"; and a police department memorandum "which indicated that the primary purpose of that roadblock was to control stolen vehicle, drug and smuggling activity, and which directed officers to question drivers about drugs and illegal immigrants." *Id.* at *3. These documents did not go unchallenged: defendants pointed out that neither was authored by the chief of police, that the same officer had referred to the same checkpoint as a "sobriety checkpoint" in another report, and that the lieutenant overseeing the program did not consider the memorandum policy. *Id*. Still, summary judgment was inappropriate: "Inasmuch as the statements… contradict Plaintiff's evidence, a material factual dispute as to the primary purpose of the checkpoint remains." *Id.*

Like the pretextual checkpoint in *Huguenin*, the MITF policy prescribes a scope of action beyond what intoxication detection demands. The policy instructs officers to ask about drug possession if they receive an affirmative or no answer to either of the first two questions, or if the vehicle bears California license plates—an extension of the stop unwarranted by the alleged primary purpose of detecting marijuana impairment. (Ex. 5 at 3). That purpose also does not warrant "walk[ing] around the driver's stopped vehicle to look inside the windows for plain view evidence of contraband" (Ex. 5 at 3) or shining a flashlight on the passenger seat, cup holders, and car floor. (Vorkosigan Dep. 8:17-32). Furthermore, *Huguenin* viewed with suspicion the officer's decision to vary questions based on license plates rather than apparent intoxication. The MITF policy instructs officers to do just that. (Ex. 5 at 3.)

The checkpoint program's structure also indicates its interdiction goals. The record reveals heavy involvement in the MITF by narcotics officers, including the chief of the narcotics

division, who coauthored the MITF report. A similar fact was highly probative in *Huguenin*. Furthermore, the lack of a breathalyzer in *Huguenin* informed the court's conclusion that checkpoints did not aim primarily at curbing drunk driving; here, no reliable tool for marijuana detection exists. (Dkt. No. 128 at ¶ 6). The absence of a reliable tool casts doubt on the GPD's confidence in its ability to detect marijuana impairment—and therefore the plausibility that it established a checkpoint program for that purpose. Furthermore, the National Highway Traffic Safety Administration has developed two programs to train law enforcement to assess marijuana impairment. (Ex. 7, Congressional Research Service, *Marijuana Use and Highway Safety* (May 14, 2019), at 6). They require sixteen and 112 hours of training, respectively. (Ex. 7 at 6-7). By contrast, GPD officers "had to watch a video" and were told "to be alert to smell, glassy or bloodshot eyes, that sort of thing." (Villanueva Dep. 6:18-7:6).

If indeed "actions speak louder than… words," *Huguenin*, 154 F.3d at 555, the Goodyear Police Department's actions speak volumes. Of 2,875 stops, ten resulted in arrests for marijuana-impaired driving alone,[1] for a 0.35% hit rate. (Shockley Dep. 17:26.) By contrast, thirty-three of the stops resulted in arrests for marijuana possession, a 1.15% hit rate. (Shockley Dep. 17:17). Neither enforcement campaign met much success, but the results indicate prioritization of drug possession enforcement over impaired driving.

Words speak loudly too, though. In *Bressi*, the court relied on two pieces of evidence to deny summary judgment: an arrest report authored by a beat cop, and a memorandum not considered policy. Here, statements by much higher officials indicate an improper primary purpose. Deputy Chief Pearl—who coauthored the MITF report (Ex. 4 at 4), trained GPD

[1] Twenty-six arrests were for driving under the influence. Of those, eighteen involved marijuana impairment; of those, eight involved alcohol and marijuana impairment combined. That leaves ten arrests for marijuana impairment only. (Shockley Dep. 17:26.)

officers to conduct the checkpoints (Shockley Dep. 14:17), and is supervised directly by Chief Shockley (Shockley Dep. 21:6)—sent a memorandum on the program's first day reminding the department that the checkpoint program "offers an effective and highly visible interdiction tool," mentioning revenue generation as a secondary purpose, and omitting any reference to impaired driving. (Ex. 6). And although he insists that the program aimed chiefly at impaired driving, Chief Shockley's public rhetoric confirms the focus on drug interdiction. Immediately after the town hall meeting that motivated the MITF, he told a reporter, "law-abiding citizens of Goodyear are not going to sit back as drug-hauling miscreants drive marijuana into the state from California." (Ex. 3). He continued: "No marijuana. No trafficking. No more." (Ex. 3). At his deposition, Chief Shockley cited arrests of Goodyear residents in possession of California marijuana and a suspicion that "Arizona residents were traveling back and forth from Blythe [California] to buy marijuana for both personal use and resale in Arizona." (Shockley Dep. 5:8-27). The probative value of statements, testimony, and documents by the GPD's two top officers well exceeds that of the two documents the *Bressi* court considered sufficient to create a material factual dispute as to the checkpoint's primary purpose.

II. IN THE ALTERNATIVE, SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE A REASONABLE JURY COULD CONCLUDE THE CHECKPOINT ADDRESSED A MINOR PUBLIC CONCERN BY EMPLOYING AN INEFFECTIVE METHOD ENTAILING SIGNIFICANT INTRUSION OF PERSONAL LIBERTY AND WAS THEREFORE UNREASONABLE.

"To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." *Chandler*, 520 U.S. at 313. Rare exceptions exist: "When a roadblock's primary purpose is something other than mere crime control, suspicionless stops at the roadblock may be—but are not 'automatically, or even presumptively'—constitutional." *United States v. Hudson*, 2007 WL 1656282 (D.D.C. June 5, 2007), at *5 (quoting *Illinois v. Lidster*, 540 U.S. 419, 426 (2004)). The Supreme Court has upheld

suspicionless highway checkpoints in two contexts: immigration enforcement near the border, in *Martinez-Fuerte*, and drunk driving, in *Sitz*. This is a "closely guarded category" of stops. *Chandler*, 520 U.S. at 309.

Extending the exception to new contexts requires "examining closely the competing private and public interests advanced by the parties," *Id.* at 314, to determine whether the stop is "reasonable" under the circumstances. *Fraire*, 575 F.3d at 933. The examination balances "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Id.* at 932. Satisfaction of one or even two factors does not render a checkpoint reasonable. Instead, the checkpoint must be reasonable on balance. *See Chandler*, 520 U.S. at 323 (requiring a showing of public danger because "where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged"); *Edmond*, 531 U.S. at 42 ("[T]he gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose").

This court should decline to add the GPD checkpoint to the "closely guarded category." The stop to which Ms. Vorkosigan was subjected entailed significant intrusion of individual liberty in the execution of an ineffective method to achieve a purely hypothetical state interest. It is unreasonable and unconstitutional.

a. Marijuana-impaired driving poses little to no concrete danger.

"The Supreme Court has criticized assertions of special needs based on 'hypothetical' hazards that are unsupported by 'any indication of a concrete danger demanding departure from the Fourth Amendment's main rule.'" *United States v. Scott*, 450 F.3d 863, 870 (9th Cir. 2006) (quoting *Chandler*, 520 U.S. at 319). Highway safety is an important public interest, but

Defendants have failed to provide evidence indicating that marijuana impairs driving to any significant degree, or that Goodyear faces a "grave" public danger, *Hudson*, 2007 WL 1656282, at *8, such that an exception to the normal suspicion requirement is "vital." *Chandler*, 520 U.S. at 318. "Hypothetical" dangers cannot justify a *Sitz*-type exception. *Id.* at 319.

Courts often look for statistical evidence indicating a serious public danger. In upholding drunk driving checkpoints in *Sitz*, the Court noted the "legion" of media reports of "alcohol-related death and mutilation on the Nation's roads" and then emphasized that "[t]he anecdotal is confirmed by the statistical." *Sitz*, 496 U.S. at 451. Indeed, the *Sitz* court included this quote in its introduction, from a 1957 case: "The increasing slaughter on our highways ... now reaches the astounding figures only heard of on the battlefield." *Id.* (quoting *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957)). *See also Edmond*, 531 U.S. at 39 ("The gravity of the drunk driving problem and the magnitude of the State's interest in getting drunk drivers off the road weighed heavily in our determination that the program [in *Sitz*] was constitutional").

No "grave and legitimate" problem, *Sitz*, 496 U.S. at 449, exists here. Chief Shockley admits that his suspicion of a marijuana-impaired driving problem is "anecdotal" (Shockley Dep. 8:3). The anecdotal is also speculative: because no reliable method of testing for marijuana impairment exists, the GPD does not know if Anthony Ignatius was impaired at the time of the crash. (Shockley Dep. 6:21-24). Furthermore, 2,875 stops led to only ten arrests for marijuana-impaired driving—so even a dragnet ostensibly aimed at identifying this behavior failed to uncover any widespread problem. (Shockley Dep. 17:26). To the extent that nationwide statistics are relevant, *see United States v. Faulkner*, 450 F.3d 466, 472 (9th Cir. 2006) (measuring the gravity of the public concern over litter in federal parkland by "nationwide impact"), it is unclear

whether many people drive under marijuana's influence: a Congressional Research Service report called for "better data on the prevalence of marijuana use by drivers." (Ex. 7 at 10).

Even if Defendants had presented evidence that marijuana-impaired driving is a common practice, no research indicates that it presents a serious danger. A Congressional Research Service report indicates that the few relevant studies "have generally found low or no increased risk of crashes from marijuana use." (Ex. 7 at 5). Studies that do suggest a link have found that, at maximum, marijuana-impaired drivers present a risk of crashing three times greater than sober drivers. (Ex. 7 at 5). That is the equivalent of drivers with a blood alcohol content (BAC) of 0.05%—well below the legal limit of 0.08%, which creates a five-to-twenty times greater risk of crashing. (Ex. 7 at 5). In fact, the National Highway Traffic Safety Administration's literature survey found that drivers under the influence of marijuana tend to drive slower, leave more space behind the car in front of them, and take fewer risks than sober drivers. (Ex. 7 at 5). The opposite went for alcohol-impaired drivers. (Ex. 7 at 5). The danger marijuana-impaired drivers pose does not compare to the danger drunk drivers pose. *Sitz* does not apply.

b. The checkpoint program was an ineffective method of curbing marijuana-impaired driving.

The government must also prove that its chosen method sufficiently advances public safety to justify the intrusion. "[S]tops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime" cannot stand. *Edmond*, 531 U.S. at 44. Instead, the method must be closely tailored to the threat. Here, there is no evidence that the checkpoint program effectively furthered the public interest against impaired driving—and common sense indicates that it did not.

Hard data is the most convincing evidence of effectiveness. In *U.S. v. Scott*, the Ninth Circuit invalidated suspicionless drug tests of pretrial releasees. *Scott*, 450 F.3d at 869.

Conceding that Nevada provided "conceivable justifications" like ensuring court appearance, the court nonetheless demanded evidentiary support of the connection between the asserted public interest and the method chosen: "Whether [effectiveness] is plausible depends on whether drug use is a good predictor of [failure to appear]—a case that must be established empirically by the government when it seeks to impose the drug testing condition. But Nevada never attempted such an empirical demonstration in this case." *Id.* at 870. The search was unreasonable.

Defendants have offered no data to indicate effectiveness. The program enjoyed 0.35% hit rate, and the GPD discontinued it after a month of operation. (Shockley Dep. 17:4-26).

The program's ineffectiveness is not fatal. *Sitz* upheld a checkpoint program with a 1.6% hit rate, and *Martinez-Fuerte* a 0.5% rate. *Sitz*, 496 U.S. at 455. But empirical data can overcome a presumption of invalidity where common sense suggests ineffectiveness. *Fraire*, 575 F.3d at 933 (In *Prouse*, the "lack of empirical data of effectiveness meant there was nothing to overcome the presumption of ineffectiveness derived from 'common sense.'") Sometimes, where the checkpoint is closely "targeted" at a "significant… problem," *Id.* at 932, such that common sense suggests effectiveness, the relationship between the ends and the means can suffice. For instance, *Faulkner* upheld an information station employing suspicionless stops at the entrance to a federal park because it was closely tailored to reach park visitors. *Faulkner*, 450 F.3d at 472. But where both common sense and empirics fail to establish effectiveness, a program must fail.

Here, common sense predicts the program's failure. Without a reliable method of testing marijuana impairment, untrained officers were left to look for "smell, glassy or bloodshot eyes, that sort of thing." (Villanueva Dep. 6:18-7:6). And the checkpoints cast a broad net, stopping every car on Exit 126 with no reason to believe that exit attracted impaired drivers. GPD's program thus aimed at the "generalized and ever-present possibility that interrogation and

inspection may reveal that any given motorist has committed some crime," *Edmond*, 531 U.S. at 44, rather than a specific threat as in *Faulkner*. With no empirics demonstrating effectiveness, the presumption of ineffectiveness derived from common sense is unchallenged.

Finally, suspicionless searches are permissible only where the suspicion requirement is "impracticable." *Scott*, 450 F.3d at 868. If the desired ends could be accomplished without its suspension, courts are much more hostile to suspicionless searches. For example, *Prouse* invalidated suspicionless license verification stops because "finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers." *Delaware v. Prouse*, 440 U.S. 648, 659 (1979). The suspicion requirement applied because it did not significantly burden the public interest. *See also Chandler*, 520 U.S. at 314 (suspicionless searches are acceptable "where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion"); *Hudson*, 2007 WL 1656282, at *8 (invalidating a roadblock aimed at speeding because even if speeding presented a "grave" public danger, it "is a readily observable problem that can be effectively controlled by means other than a roadblock").

The same goes here. Defendants insist that marijuana impairs driving ability. In that case, as in *Prouse*, Goodyear police officers should be able to identify impaired drivers without suspension of the suspicion requirement. If, instead, marijuana does not significantly impair driving ability, the state concern in curbing marijuana-impaired driving disappears.

c. The checkpoint entailed significant objective and subjective liberty intrusion.

The liberty intrusion has "objective" components—the duration of the stop and the intensity of the questioning and visual inspection—and "subjective" components—the "fear and surprise" it generates among law-abiding citizens. *Sitz*, 496 U.S. at 451. Here, each is significant.

A short duration and non-intrusive questions help a stop be objectively unintrusive. *Fraire* upheld a stop program where "[c]ontact between drivers and rangers often lasted only about 15 to 25 seconds, drivers would wait in line at most about one minute, and the rangers merely asked the drivers whether they had been hunting but did not search the vehicles." *Fraire*, 575 F.3d at 934. Similarly, the stops in *Lidster* entailed "a brief wait in line—a very few minutes at most," and police contact for "only a few seconds" involving only a "request for information and the distribution of a flyer." *Lidster*, 540 U.S. at 427.

By contrast, Ms. Vorkosigan waited ten minutes in line—all the while growing worried about missing her shift and losing her job. (Vorkosigan Dep. 17:5-4; 6:20-22; Villanueva Dep. 15:20). The questioning lasted approximately one minute, and the visual inspection another minute. (Villanueva Dep. 13:24-14:11). The questions investigated criminal activity, rendering them much more intrusive than a "request for information and the distribution of a flyer."

"Surprise" checkpoints that grant their victims little warning are particularly subjectively intrusive. So are checkpoints that vest discretion in the hands of individual officers. *Huguenin* involved a checkpoint that was invisible until motorists exited, and that invited "discretionary enforcement activity depending on… whether a motorist has in-state or out-of-state license plate tags." *Huguenin*, 154 F.3d at 556. Both factors exacerbated the subjective fear and surprise the checkpoint engendered. *Id.*

The checkpoint here is nearly identical. Officer Villanueva testified that the officers intentionally placed the warning sign such that it was invisible until motorists exited. (Villanueva Dep. at 15:7-10). This decision caused Ms. Vorkosigan to encounter suddenly a cluster of police cars with flashing lights, flares, and "swarming" officers, which triggered her anxiety. (Vorkosigan Dep. 5:20-22; 16:28). It also exemplifies the discretion left in the hands of

individual officers: the policy dictates that warnings shall be placed 1 to 1.5 miles in advance of the checkpoint—except on exit ramps, where the sign "may be located in a reasonable advance location at the Police Department's discretion." (Ex. 5 at 2). And, just as in *Huguenin*, officers here exercise discretion to determine whom they have "reasonable suspicion" to detain and question further (Ex. 5 at 3), a fact significant in *Huguenin*'s determination of unreasonableness. *Huguenin*, 154 F.3d at 563 (explaining that discretion as to "which individuals would be detained" causes checkpoints to more closely resemble an unconstitutional "roving patrol.")

Ultimately, Officer Villanueva and the GPD's actions caused Ms. Vorkosigan—a law-abiding grandmother who had never smoked marijuana in her life—to suffer a panic attack. (Vorkosigan Dep. at 11:19-27). That, more than any objective measure, illustrates the "concern or even fright on the part of lawful travelers," *Prouse*, 440 U.S. at 656, the checkpoint created.

CONCLUSION

"What is left, after close review of Georgia's scheme," the *Chandler* court concluded, "is the image the State seeks to project. By requiring candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse…. The need revealed, in short, is symbolic, not 'special.'" *Chandler*, 520 U.S. at 321. Just so here. Chief Shockley faced a distressed public demanding "aggressive action." (Shockley Dep. at 8:31). But the Fourth Amendment does not tolerate interference with "personal privacy for a symbol's sake." *Id.* at 322. Because factual dispute remains as to the checkpoint's primary programmatic purpose, and because the checkpoint was unreasonable regardless, summary judgment should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum of Law Opposing Defendants' Motion for Summary Judgment was served this day via email to counsel for Defendants at the following address:

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