UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT A. SCHRAMM and GABRIELA SAENZ,

Plaintiffs,

v.

THE CITY OF NEW YORK, POLICE OFFICER ALAN HASSEL (#21029), POLICE OFFICER EMMANUEL DELACRUZ (#15061), SGT. NOEL JUGRAJ and POLICE OFFICERS "JOHN DOE" #1-4,

Defendants.

MEMORANDUM OF LAW ON MOTION FOR SUMMARY JUDGMENT

1:16-cv-553

Plaintiff respectfully submits that summary judgment should be granted as set forth below. Oral argument is requested.

I. Introduction

Plaintiffs Bobby Schramm and Gaby Saenz were wrongly stopped and arrested by Defendants Delacruz and Jugraj and the John Doe officers in an unconstitutional NYPD checkpoint on June 7, 2015. Schramm, at the time a Ph.D. and MBA student at SUNY in Albany, was arrested by Defendant Delacruz for drunk driving. During the encounter Delacruz demonstrated malice, saying: "You want to play games? Now you're going to play my game."

Schramm subsequently registered a legal BAC of 0.03 at the 28th precinct's Intoxilyzer breath machine. Instead of releasing him, Delacruz held him for an additional 19 hours and then improperly and maliciously charged him with refusing a portable

breath test. That charge remained pending against Schramm for 542 days, just short of a year and a half. It was dismissed by the Traffic Violations Bureau on November 30, 2016.

Saenz, Schramm's wife, is a Business Analyst. She was observing the checkpoint process after the car was stopped. Defendant Jugraj, who is twice her size, viciously slammed Gaby into a fence. She was wrongly arrested for no reason on the false charge of obstructing governmental administration. She was held for 16 hours. That charge was resolved quickly with an adjournment in contemplation of dismissal.

While there are other issues in this case, the central focus here is the constitutionality of NYPD checkpoint policy, checkpoint practices in the 33rd precinct, and the checkpoint in which plaintiffs were arrested. Defendants violated almost every basic principle underlying the supposed constitutionality of checkpoints, both at the level of city policy as well as at the operational level. Most notably Defendants failed to maintain written guidelines and records, for this checkpoint and as a practice in the 33rd precinct where the checkpoint took place. Defendant City also has a stunning policy and practice of conducting DWI checkpoints using officers who are not trained in the basics of DWI stops, investigations and arrests.

During the checkpoint stop of the plaintiffs, Defendants Delacruz, Jugraj, and the John Doe officers followed through on the City's lack of non-arbitrary procedures by engaging in arbitrary behavior that led to their mistreatment of the plaintiffs.

Defendant Hassel merely completed paperwork at the direction of defendants Delacruz and/or Jugraj. Hassel was not at the checkpoint. As such plaintiff and defense counsel have agreed that claims against Hassel should be dismissed.

Plaintiffs served Notice of Claim upon Defendant City on or about August 10, 2015. Plaintiffs appeared for and testified at 50-H hearings conducted by the City on or about December 2, 2015.

II. Facts

At an unknown date before June 6, 2015, a decision was made in the 33rd precinct to set up a checkpoint on the night of June 6 into the early morning hours of June 7 on West 158th Street at or near the Henry Hudson Parkway. It remains unclear who made the decision to set up the checkpoint, how the decision was actually made, and why it was so decided. No public notice was provided that the checkpoint would be conducted. Jugraj Deposition, Exhibit 4 at 21-22.

Deputy Inspector Wilson Aramboles was the commanding officer for the 33rd precinct. Exhibit 4 at 10; Aramboles Deposition, Exhibit 5 at 29; Natale Deposition, Exhibit 6 at 11. NYPD policy 212-64 (now renumbered to be 221-16) requires that the commanding officer be in charge of setting up vehicle checkpoints. Exhibit 7. Specific tasks for the commanding officer include:

> 1. Establish vehicle checkpoints for the primary purpose of a DWI check or vehicle safety check. Vehicle checkpoints for all other purposes other than in emergency circumstances cannot be conducted without prior written approval from the Deputy Commissioner, Legal Matters.
>
> 2. Prepare VEHICLE CHECKPOINT FORM.
>
> 3. Ensure the VEHICLE CHECKPOINT FORM is affixed to the interior

right side of a legal size manila file folder.

4. Give the directive and file folder to the supervisor in charge of the checkpoint and discuss tactics and safety concerns.

5. Ensure that safety equipment is utilized when warranted and ordered from the Quartermaster Section, when necessary.

Exhibit 7 at 1.

Aramboles testified he does not remember if he prepared the checkpoint form for the June 6-7 checkpoint. Exhibit 5 at 28. Defense counsel has admitted that the vehicle checkpoint form for this checkpoint cannot be found, if it ever existed. Sergeant Lewis, who supervised the checkpoint along with Jugraj, testified he never saw the vehicle checkpoint form. Lewis Deposition, Exhibit 17 at 16-17. He also testified that Jugraj chose the location. Exhibit 17 at 36-37. Defendant Jugraj testified that Aramboles had no role in setting up the checkpoint. Exhibit 4 at 10. Jugraj testified that he worked with Captain Natale in setting up the checkpoint. Id at 9-14. Defense counsel admits that Natale was not assigned to the 33rd precinct at the time of this checkpoint and that he had nothing to do with it. Natale testified that he started at the 33rd precinct in August of 2015 and was not working in the 33rd precinct when the June checkpoint was prepared and conducted. Exhibit 6 at 6-7. Based on the testimony, the only credible conclusion is that Defendant Jugraj - a sergeant - set up the checkpoint on his own without any participation from officers ranked above him. Sergeant Lewis, who was assigned to the 28th precinct, testified that commanding officers do not prepare checkpoint forms. Exhibit 17 at 39.

The policy requires the supervisor in charge of the checkpoint (Defendant Jugraj in this case) to ensure a record is kept of various documents from the checkpoint, including the vehicle checkpoint form. The checkpoint supervisor is supposed to deliver those records to the commanding officer (Aramboles). Exhibit 7 at page 2.

It is unclear if the documents were ever prepared in the first place. They certainly were not maintained. Jugraj testified that he keeps the forms in his own office rather than delivering them to the commanding officer. Exhibit 4 at 17-19. Aramboles testified instead that the checkpoint supervisor (Jugraj) is supposed to give the checkpoint folder to "the administrative staff" rather than to Aramboles himself. Exhibit 5 at 8, 11. Sergeant Lewis testified that he does not take checkpoint forms to the commanding officer either. Exhibit 17 at 40.

The 2016 Checkpoint Forms

After plaintiff's lengthy efforts at discovery defendants eventually disclosed vehicle checkpoint forms from the 33rd Precinct which begin on June 28, 2016. Exhibit 8. This demonstrates that the checkpoint forms were not prepared or maintained for an unknown number of years in the precinct. There is also an unexplained four month gap in the disclosed checkpoint forms, with no forms dated between July 25, 2016 and November 25, 2016.

Of the sixteen checkpoint forms disclosed by the defense, Aramboles is listed as the commanding officer on only one of them. On eight of the forms the commanding officer line is blank. There is no spot on the form to indicate who actually prepares the

form. There is no signature line. The handwriting on the forms varies widely even on forms that indicate they had the same “commander”.

The forms themselves show an utter disregard for the city policy requirements of such checkpoints. Near the top is a section titled: REASONS FOR CHECKPOINT which provides several lines for a description:

> Indicate nature of condition, factors evidencing existence of condition, how and why a vehicle checkpoint and the specific location chosen will remedy/deter condition in a productive manner.

For the forms produced by the 33rd precinct, this section is usually answered in a few words. Responses include:

- Bicycle and Motorcycle Safety
- DWI Check Point
- Pedestrian hit by motorist at above location
- Safety Check Point
- Accident Prone Location
- Safety
- Bicycle/Vehicle Safety Check Point
- DUI’s
- DWI Checkpoint

The forms, as prepared, do not identify conditions to be remedied, any of the other details related to the existence of the conditions, nor how the checkpoint will remedy such conditions.

Key details were at times left blank such as the name of commanding officer or the number of stops made.

The checkpoint practices of the 33rd precinct were and may still be out of control. The defense disclosed a total of 16 checkpoint forms for 2016. This does not include checkpoints that may have been conducted in the first half of the year, or in the four month gap between late July and late November. Aramboles testified that the precinct does two or three checkpoints per year. Exhibit 5 at 9. Either Aramboles is lying or the precinct conducts the vast majority of its checkpoints without the commander even knowing about them, much less fulfilling his appointed role in setting them up.

The Checkpoint Encounter

Sometime after 1:00 am on June 7, 2015, the defendants stopped plaintiffs' vehicle. The checkpoint personnel applied an unusual and arbitrary procedure as to which vehicles to stop. They stopped all vehicles except those with TLC plates. The blank NYPD checkpoint form offers four options for this: Stop every vehicle; every other vehicle; every third vehicle; and "Other (explain)." From the testimony this checkpoint utilized "Other" but defendants have offered no explanation by a policy-maker for excluding TLC plates. Jugraj testified that he decided not to stop vehicles with TLC plates because "I don't think I ever came across a drunk taxi driver." Exhibit 4 at 15-16. Keep in mind that Jugraj has never made a drunk driving arrest. Id at 39-40. Jugraj's view is contrary to New York State law. NY VTL 1193(1)(d) (enhanced DWI penalties for

taxicab drivers). Sergeant Lewis testified that he and Jugraj decided to exempt TLC plates and that it was "a random decision." Exhibit 17 at 17.

Once the vehicle was stopped the defendants continued to apply arbitrary procedures. The vehicle checkpoint forms provide no space for delineation of post-stop procedures. Exhibit 8. Defendant Jugraj indicates that plaintiff Schramm refused to open his door. Exhibit 4 at 7-9. There is no indication anywhere that requesting or ordering a driver to open his door during a checkpoint is part of the procedure. Jugraj even extrapolated this to a possible hostage situation. Exhibit 4 at 56-58. Defendants eventually forced Schramm out of the car. Defendant Delacruz then demanded that plaintiff Schramm take a portable breath screen. There is no indication anywhere that portable breath screens are part of proper checkpoint procedure or NYPD procedure, and requiring them in a suspicionless checkpoint stop is illegal under Vehicle & Traffic Law § 1194(1)(b).

According to Plaintiff Schramm's deposition testimony, the officers in this checkpoint required all stopped drivers to get out of their cars and perform portable breath tests. Exhibit 9 at 34-35.

After Schramm indicated he did not want to do a portable breath test (which was his legal right in NY at a checkpoint) the officers proceeded to tell him he had to get out of the car (Exhibit 9 at 50), began grabbing at door handles and tapping their hands on the windows of the vehicle (Id at 51), then Delacruz began tapping the windows and windshield with a 2-3 foot long metal stick (Id at 53), and a group of officers began counting down in unison and said they were coming in (Id at 57-58). Then Schramm got

out of the car. Delacruz wrongly threatened Schramm with arrest if he refused to take the portable breath test (Id at 63), and then arrested him (Id at 64). Delacruz also made the malicious statement about playing games. Schramm affidavit, Exhibit 2 at ¶12. Delacruz wrote a ticket to Schramm for refusal of alcosensor/PBT indicating a violation of Section "1193.A" of the Vehicle and Traffic Law. Delacruz Ticket, Exhibit 11. There is no Section 1193.A of the Vehicle and Traffic Law.

According to Aramboles' testimony, a checkpoint officer is first supposed to request the driver's license, registration and insurance. Exhibit 5 at 68-69. If that paperwork checks out the officer is supposed to let the driver continue on his way. Delacruz testified it was his practice not to ask for paperwork until after he made a probable cause determination. Exhibit 10 at 55. Jugraj initially testified that every driver would be required to submit to a "portable breathalyzer test." Exhibit 4 at 34. When asked about that he then provided a much more complicated description of the procedure. Id at 35-36. That procedure still doesn't fit with Aramboles' description. Assuming Aramboles' testimony is accurate, Defendant City's policy failure to provide space on the form for written guidelines to delineate post-stop procedures contributed to the mishandling of the checkpoint by Delacruz and Jugraj. The 33rd precinct's practice of conducting checkpoints without the knowledge of the commanding officer prevented communication of post-stop procedures from the commanding officer to the checkpoint supervisor and officers.

Defendant Jugraj pushed plaintiff Saenz into a fence. Saenz Affidavit, Exhibit 3, at ¶5. She was falsely arrested for interfering and held for 16 hours. The charge against

her was later adjourned in contemplation of dismissal. Defense deposition testimony was inconsistent on the nature of her alleged interference. She denies interfering in any way. Exhibit 3 at ¶8. Officer Hassel testified that he filed the charge against Saenz because Delacruz brought her to the precinct and "told me that she prevented him from administering a portable breathalyzer test on the husband of the Defendant." Exhibit 12 at 5. Hassel noted that specifically in his log book. Exhibit 12 at 25-26.

Plaintiff Schramm was arrested for drunk driving. He was taken for a breath test three hours after his arrest, more than an hour longer than NY regulations require. Unlike many other police agencies NYPD does not set up its checkpoints with an admissible breath testing device on site. Also unlike other police agencies, NYPD does not staff checkpoints with officers trained in field sobriety tests and other aspects of drunk driving investigations.

Plaintiff Schramm registered a legal blood-alcohol content (0.03) on the police station breath test (Pina Deposition, Exhibit 18 at 21). IDTU Officer Pina, who is trained, observed no signs of intoxication. Exhibit 18 at 33-34. Despite that Defendant Delacruz did not release Schramm, and held him for an additional 19 hours. This was contrary to NYPD Patrol Guide Procedure 210-13 - Release of Prisoners:

> When an arrest is made by a uniformed member of the service or a civilian, and there is reasonable cause to believe that the prisoner did not commit the offense in question or any related offense:
>
> 1. Confer with patrol supervisor and obtain consent for release.

Exhibit 12.

Once the breath test result showed a legal BAC, Defendant Delacruz had reasonable cause to believe that Schramm had not committed the DWI for which he had been arrested. Exhibit 18 at 30. A BAC of 0.05 or below is prima facie evidence the person was not impaired under New York Law (VTL 1195(2)(a)). Delacruz did not follow the procedure and seek consent for release from his patrol supervisor. The Patrol Guide procedure goes further:

> If the arresting officer, prior to removal of the prisoner to the stationhouse/ borough court section, has reasonable cause to believe that the prisoner did not commit the offense charged and the patrol supervisor is not available for conferral, the prisoner may be released immediately and the patrol supervisor/ desk officer will be notified as soon as possible.

Exhibit 13.

Sergeant Lewis also testified that if someone blows a BAC less than 0.05: "They are to be let loose." Exhibit 17 at 23.

Instead of following the Patrol Guide, Delacruz kept Schramm in custody for an additional 19 hours, claiming he needed to hear from an Assistant District Attorney. Exhibit 10 at 29. Delacruz followed through on his "play my game" threat.

Defendant Jugraj stated there was no public notice of the checkpoint in this case. Exhibit 4 at 21-22. Earlier this year we learned that NYPD actively opposes any notice of checkpoints, as was revealed in a letter from Ann Prunty, NYPD's Acting Deputy Commissioner for Legal Matters. Exhibit 14. The February 2, 2019 letter threatened Google for providing notice of the location of NYPD checkpoints in Google's Waze

application. There is nothing on the blank vehicle checkpoint form to indicate what public notice was provided. Exhibit 8. Similarly there is nothing in PG 212-64, the written NYPD policy, to indicate that public notice should be provided regarding checkpoints. Exhibit 7.

PG 212-64 states that checkpoints must be set up to include adequate warnings to motorists of their existence. It does not specify how such warnings are to be done. Exhibit 7. The vehicle checkpoint form includes details about whether flares, cones or other equipment are used but does not contain any space to explain how they are to be used. Exhibit 8. In the checkpoint in this case we do not have the form. Drivers coming from the direction the plaintiffs took came up on the checkpoint with no notice at all, having just turned off a ramp onto the road. Exhibit 9 at 32-33.

The National Highway Transportation Safety Administration (NHTSA) promulgates a standard curriculum for police officers to handle traffic stops leading to DWI investigation and arrests. The manuals are too long to burden the Court with as exhibits, but they are available at https://www.nhtsa.gov/standardized-field-sobriety-test-training-downloads

The 2018 edition of the participant manual is 598 pages long, titled "DWI Detection and Standardized Field Sobriety Testing" and is available at: https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/sfst_full_participant_manual_2018.pdf

The 2013 edition, which was the one in common use at the time of the 2015 checkpoint, is much shorter at 353 pages and is available here:

https://www.wsp.wa.gov/breathtest/docs/dre/manuals/SFST/SFST_basic_dwidetect/2013/student_mar_2013_SFSTbasic.pdf

That 2013 edition acknowledges the contribution of Doug Paquette of the New York State Police. Paquette retired in 2018 after years of training Troopers on DUI arrests and was the coordinator of impaired driving programs.

According to the California Highway Patrol:

> In the 1970s, the National Highway Traffic Safety Administration (NHTSA) began sponsoring research studies into the development of standardized tests for law enforcement officers to use to evaluate levels of impairment in drivers suspected of driving under the influence (DUI) of alcohol or drugs or driving while intoxicated (DWI). A number of tests were studied, and some of them were validated by the studies as being accurate indicators of impairment.
>
> The Standardized Field Sobriety Testing (SFST) course, also known as the DUI or DWI Detection course, is a comprehensive course that is designed to increase the student's ability to detect impairment in drivers. The fundamental purpose of this training course is to foster DWI deterrence, i.e., to dissuade people from driving while impaired by increasing the odds that they will be arrested and convicted. SFST training focuses on the three-phases of the DUI/DWI detection investigation, and especially on the battery of three tests that were validated by NHTSA in their studies. Students in this class learn how to recognize and document the presence or lack of clues from each test that indicate impairment in suspected DUI subjects. Successful completion of this class has resulted in

attendees' improved ability to remove impaired drivers from California's roadways.

CHP Website, https://www.chp.ca.gov/programs-services/for-law-enforcement/drug-recognition-evaluator-program/schedule-of-classes/sfst

This curriculum is mandatory for New York State Troopers and is part of their basic training, including 32 hours of the field sobriety training and 40 hours for breath testing. http://www.excelsior.edu/c/document_library/get_file?uuid=dbc61a9a-1639-4b3d-83d1-ee17dd48ed7c

DWI Enforcement (3 credits, lower division)

Program: Basic School

Location: New York State Police Academy, Albany, NY

Length: 72 hours

Objectives: Examine principles, techniques and apparatus for enforcing alcohol and drug related collisions. Review procedures for the strict enforcement of New York State DWI and DWAID laws. Identify the means of increasing deterrence to DWI and DWAID violations, as well as reducing the number of crashes, deaths and injuries caused by impaired drivers. Understand the enforcement role in DWI and DWAID deterrence and the detection phase of enforcement, along with clues and techniques of identifying impaired drivers. List the requirements for conducting field sobriety testing and the Alcotest 711 MKIII. Review the prosecutorial process and the role of a law enforcement officer.

Instruction: Students must complete no fewer than: thirty two hours of

"Standardized Field Sobriety Training Course" and forty hours of "Breath Test Operator Training Course."

Field sobriety testing is mentioned in too many court cases to be listed, but a few examples date back as far as 1985: *Nyflot v. Minnesota Commissioner of Public Safety*, 474 U.S. 1027, 1029, 106 S.Ct. 586 (1985); *Sitz* supra 496 U.S. at 447-448; *Freeman v. Kadien*, 684 F.3d 30, 32 (2d Cir. 2012); *Haussman v. Fergus*, 894 F. Supp. 142, 148 (S.D.N.Y. 1995); *Whitton v. Williams*, 90 F. Supp. 2d 420 (S.D.N.Y. 2000); *People v. Berg*, 92 N.Y.2d 701, 705 (1999).

Defendants Jugraj and Delacruz were not trained in field sobriety testing. Exhibit 4 at 37-39; Exhibit 10 at 7-8. Delacruz' training in DWI arrests was only "out in the field" and not in the police academy. Exhibit 10 at 12. Defendant Jugraj testified that he had never even made a DWI arrest. Exhibit 4 at 39-40.

Captain Natale, an executive officer within the 33rd precinct, testified that he was not trained in field sobriety tests and he was not sure if any officers in NYPD have such training. Exhibit 6 at 34. Natale, who has a Master's degree in Public Administration, admitted that if he was making checkpoint policy he would incorporate officers who had such training. Id at 35.

Captain McDermott, who also has a Master's degree, agreed. Exhibit 15 at 21. She was an executive officer within the precinct at the time of the checkpoint, and was also unfamiliar with the concept of field sobriety testing. She had made only one DWI arrest in her career. Exhibit 15 at 16-17. She did not know what training Defendants

Jugraj and Delacruz had for making DWI arrests. She denied ever planning a checkpoint while working in the precinct. Id at 9-10. She did not recall Aramboles ever planning a checkpoint in her time there. Id at 11.

Aramboles himself is unaware of the two-hour rule for breath testing. Exhibit 5 at 65-66; Vehicle and Traffic Law 1194(2)(a) (breath test required "within two hours after such person has been placed under arrest"). He is also unfamiliar with the legal meaning of a breath test result under 0.05. Exhibit 5 at 61-64. Aramboles was unconcerned or uninterested in the impact of checkpoints on innocent drivers. Id at 66-67.

III. Causes of Action

Plaintiffs seek summary judgment:

- On the First Cause of Action against all defendants for false arrest and wrongful imprisonment
- On the Fourth Cause of Action for stopping and arresting plaintiffs in an unconstitutional checkpoint in violation of their rights under the Fourth and Fourteenth Amendments
- On the Sixth Cause of Action, the Monell claim against Defendant City, for its unconstitutional checkpoint policy, procedures, practices both city wide and within the 33rd precinct

Plaintiffs have agreed with defense counsel that the second cause of action for malicious prosecution must be dismissed as it was a traffic infraction filed in a non-

criminal court. The third cause of action for punitive damages cannot be resolved for the plaintiffs on summary judgment.

IV. Argument

The US Supreme Court first allowed DUI checkpoints in the case of *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990). The Court specifically and repeatedly noted the use of guidelines.

> The Director appointed a Sobriety Checkpoint Advisory Committee comprising representatives of the State Police force, local police forces, state prosecutors, and the University of Michigan Transportation Research Institute. Pursuant to its charge, the Advisory Committee created guidelines setting forth procedures governing checkpoint operations, site selection, and publicity.
>
> Under the guidelines, checkpoints would be set up at selected sites along state roads. All vehicles passing through a checkpoint would be stopped and their drivers briefly examined for signs of intoxication. In cases where a checkpoint officer detected signs of intoxication, the motorist would be directed to a location out of the traffic flow where an officer would check the motorist's driver's license and car registration and, if warranted, conduct further sobriety tests. Should the field tests and the officer's observations suggest that the driver was intoxicated, an arrest would be made. All other drivers would be permitted to resume their journey immediately.

Id. at 447.

The guidelines in *Sitz* were set up by a policy-making body. These policy-makers selected sites to conduct checkpoints, and set forth procedures for checkpoint operations. By contrast in the case of NYPD official procedure, site selection is supposed to be done by precinct commanders. From the testimony of precinct commander Aramboles and the other executive officers of the precinct, they do not appear to have policy-making authority. The actual procedures for checkpoint operations are not delineated in NYPD policy and the Vehicle Checkpoint Form provides no space for such procedures to be detailed for each checkpoint.

The New York Court of Appeals held a checkpoint improper, noting the absence "of particularized guidelines with 'listed criteria' that 'established procedures for site selection, lighting and signs; avoidance of discrimination by stopping all vehicles, or every second, third or fourth vehicle; [and] location of the screening areas.'" *In the Matter of Muhammad F.*, 94 N.Y.2d 136, 148 (1999).

> Since the officers here were not even required to make a written record of stops that had taken place, in conducting our "post-stop judicial review" (*United States v Martinez-Fuerte*, supra, at 559), we are relegated to the self-verifying evidence from the officers whose conduct is being challenged to determine whether they were using uniform and non-discriminatory procedures.

Id. Compare *People v. Abad*, 98 N.Y.2d 12, 18 (2002) (suspicionless stops allowed where program "requires the police to complete a detailed activity log for every stop made, which affords the possibility of 'post-stop judicial review' to the extent questions are raised as to the actual operation of the program" and "police also maintain a registration

log of all vehicles participating in the program"). See also *People v. Scott*, 63 NY 2d 518, 526 (1984) and *Ingersoll v. Palmer*, 43 Cal.3d 1321, 743 P.2d 1299 (1987).

In addition the Court must consider the purpose of a checkpoint. In *Indianapolis v. Edmond*, 531 U.S. 32 (2000), the Supreme Court stated:

> We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the generalized and everpresent possibility that interrogation and inspection may reveal that any given motorist has committed some crime.

Id. at 44.

In the absence of written guidelines for the checkpoint in this case, and in consideration of the vague descriptions offered in the 2016 checkpoint forms we do have from the 33rd precinct, it is at best unclear if the checkpoint that was used to arrest plaintiffs was done for a proper purpose or if it was done for "the general interest in crime control." The latter violates the holding in *Edmond*.

The widely cited *Ingersoll* case in particular sets forth a list of factors for courts to consider in evaluating the constitutionality of checkpoints. *Ingersoll v. Palmer*, 43 Cal.3d 1321, 1338-1348 (1987). *Ingersoll* and the similarly influential case of *State v. Deskins*, 234 Kan. 529 (1983) are referenced in *Michigan v. Sitz*, 496 US at 461, note 3. *Deskins* is also referenced twice in *People v. Scott*, 63 N.Y.2d 518, 526-529 (N.Y. 1984).

Deskins laid out its factors similar to *Ingersoll*:

> Numerous conditions and factors must be considered in determining whether a DUI roadblock meets the balancing test in favor of the state. Among the factors which should be considered are: (1) The degree of discretion, if any, left to the officer in the field; (2) the location designated for the roadblock; (3) the time and duration of the roadblock; (4) standards set by superior officers; (5) advance notice to the public at large; (6) advance warning to the individual approaching motorist; (7) maintenance of safety conditions; (8) degree of fear or anxiety generated by the mode of operation; (9) average length of time each motorist is detained; (10) physical factors surrounding the location, type and method of operation; (11) the availability of less intrusive methods for combating the problem; (12) the degree of effectiveness of the procedure; and (13) any other relevant circumstances which might bear upon the test. Not all of the factors need to be favorable to the State but all which are applicable to a given roadblock should be considered.

Deskins, supra 234 Kan. at 541.

The *Ingersoll* Factors for DWI Checkpoints

— Governmental Interest

The first factor addressed by *Ingersoll* is the "Governmental Interest." *Ingersoll*, 43 Cal.3d at 1338-39. Most cases on this issue describe a serious problem with drunk driving in whatever geographic area is involved.

> "The drunk driver cuts a wide swath of death, pain, grief, and untold physical and emotional injury across the roads of California and the nation. The monstrous proportions of the problem have often been lamented in graphic terms by this court and the United States Supreme Court. … [I]n the years 1976 to 1980 there were many more injuries to California residents in alcohol-related traffic accidents than were suffered by the entire Union Army during the Civil War, and more were killed than in the bloodiest year of the Vietnam War. Given this setting, our observation that '[d]runken drivers are extremely dangerous people' [citation] seems almost to understate the horrific risk posed by those who drink and drive." Stopping the carnage wrought on California highways by drunk drivers is a concern the importance of which is difficult to overestimate.

Id. (citations omitted). See also:

> No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. "Drunk drivers cause an annual death toll of over 25,000 …."

Sitz at 451.

New York City is different. It has the lowest rate of alcohol-related motor vehicle injuries and deaths in the state by far.

Https://Webbi1.Health.Ny.Gov/Sasstoredprocess/Guest?_Program=/Ebi/Phig/Apps/Chir_Dashboard/Chir_Dashboard&P=It&Ind_Id=Og107

The city-wide rate is 18.1 per 100,000, less than half what the data shows for

other parts of the state. The checkpoint in this case was conducted in New York County (Manhattan) where the rate is even lower - 14.3. At the time of the checkpoint the data showed that New York County had by far the lowest rate of alcohol-related injury and death in the entire state. The danger in some other counties was four times as high, including Greene County, Yates County and Delaware County, all with rates over 60. The New York data goes further showing that only 2 percent of alcohol-related crashes involve a serious injury.

Https://Www.Health.Ny.Gov/Statistics/Prevention/Injury_Prevention/Traffic/County/New_York/2014/New_York_Co_Crash_Fs.Pdf

According to the Fatality Analysis Reporting System, there were only 17 "driving deaths with alcohol involvement" over the 5 year period from 2013 to 2017 in New York County. New York County has a population of approximately 1.6 million people. Of course Manhattan has a much larger population than its residents, with an estimated 4 million people there on a typical weekday and 2.9 million on a weekend day. https://wagner.nyu.edu/files/rudincenter/dynamic_pop_manhattan.pdf

By comparison, Queens County had 68 alcohol involved driving deaths in the same period, four times as many as New York County, with triple the per capita death rate. That's within New York City. Nearby Suffolk County had 158 deaths, or nearly 10 times as many, with a smaller population. Greene County had 10 deaths with a far smaller population of just under 50,000. The per capita death rate for Greene County is roughly 20 times as high as New York County. Ulster County had more deaths (18) with a population of only 180,000.

https://www.countyhealthrankings.org/sites/default/files/state/downloads/2019%20County%20Health%20Rankings%20New%20York%20Data%20-%20v1_0.xls

New York County is Row 34 on the above spreadsheet and the alcohol-impaired driving death statistics are in Columns AY-BD. That portion is reproduced in Exhibit 16. Not only does the county have a low number of alcohol-impaired driving deaths for its size, but the share of driving deaths is only 9%, compared to 21% statewide.

Alcohol-involved motor vehicle deaths are not even mentioned in the New York City summary of death statistics for 2016.

https://www1.nyc.gov/assets/doh/downloads/pdf/vs/2016sum.pdf

It is worth noting that the terms "alcohol-involved" and "alcohol-related" bring in more deaths than those involving drunk drivers:

> [A] crash is considered as alcohol-related if either a driver or a nonoccupant (pedestrian or pedalcyclist) had a BAC of 0.01 g/dl or greater

National Institute on Alcohol Abuse and Alcoholism, *Trends in Alcohol-Related Fatal Traffic Crashes, United States, 1982-2004*, August 2006 (available at https://pubs.niaaa.nih.gov/publications/surveillance76/fars04.htm).

Including alcohol from non-occupants increased the numbers by as much as 40% according to the report. Id. It is unclear how much the inclusion of drivers with legal BACs also increases the numbers. Applying that to the New York City numbers suggests that drunk drivers kill fewer than 2 people a year in New York County.

Thus while the governmental interest factor often is found to be in favor of the State, there may be no other place in the United States where there is less of a governmental interest than in New York County.

New York County does not see astounding figures for drunk driving deaths only heard of on the battlefield.

With an average daily population in excess of 3 million people and only 2 drunk driving deaths a year, the odds of dying in a drunk driving accident in New York County are literally less than one in a million.

As a result the magnitude of the drunk driving problem in New York County is insufficient to justify the intrusive use of drunk driving checkpoints. The governmental interest is weak, if it exists at all. This Court should rule that the governmental interest factor weighs against the defendants in this case.

— Effectiveness

It is well documented that checkpoints are less effective at making drunk driving arrests compared to saturation patrols. E.g. Jeffrey W. Greene, *Battling DUI: A Comparative Analysis of Checkpoints and Saturation Patrols*, FBI Law Enforcement Bulletin, page 2, January 2003, Volume 72, No. 1. The only argument advanced for the effectiveness is that public awareness of them deters drunk driving. As the NY Court of Appeals put it:

> [T]he importance of informing the public about DWI checkpoint operations [is] the chief means of deterring driving while intoxicated.

People v. Scott, 63 N.Y.2d 518, 526-27 (1984). See also NHTSA High Visibility Enforcement (HVE) Toolkit at https://www.nhtsa.gov/enforcement-justice-services/high-visibility-enforcement-hve-toolkit

> High Visibility Enforcement (HVE) is a universal traffic safety approach designed to create deterrence and change unlawful traffic behaviors. HVE combines highly visible and proactive law enforcement targeting a specific traffic safety issue. Law enforcement efforts are combined with visibility elements and a publicity strategy to educate the public and promote voluntary compliance with the law. …
>
> The goal of publicizing your HVE is to make the motoring public aware of your enforcement efforts and create deterrence. When the perceived risk of getting caught by law enforcement goes up, the likelihood that people will engage in unsafe driving behaviors goes down.

Even if one believes that checkpoint publicity justifies violating the Fourth Amendment, the problem here is NYPD's secretive approach. Rather than publicize their checkpoints, NYPD offers no public notice that they will be conducted. There was no public notice of the checkpoint in question in this case, nor of the initiative under which it may have been conducted. Recently NYPD showed its opposition to public notice by threatening Google and Waze for notifying the public of checkpoints. Exhibit 14.

NYPD's failure to document the details of this checkpoint, as well as an unknown number of other checkpoints, also counts against any argument of their effectiveness. They're not even trying to measure how effective their checkpoints are.

This Court should find NYPD checkpoints fail to meet the Effectiveness test.

— Intrusion on Individual Liberty

> The third balancing factor is the intrusiveness on individual liberties engendered by the sobriety checkpoints. Upon examination of the record, we conclude that the programs at issue in this case have implemented procedures designed to provide minimal interference with individual liberties. The decisions of courts of other states and the California Attorney General's opinion which originally sanctioned the kind of checkpoints operated here have analyzed the issue of intrusiveness extensively and have identified a number of factors important in assessing intrusiveness. The standards articulated in these cases provide functional guidelines for minimizing the intrusiveness of the sobriety checkpoint stop.

Ingersoll at 1341.

Ingersoll lists eight standards to be considered under this question of whether the checkpoint minimizes intrusion on individual liberty.

1. **Role of Supervisory Personnel**

> "[T]he decision to establish a sobriety roadblock, the selection of a site, and the procedures for its operation must be made and established by supervisory law enforcement personnel, rather than the officer in the field."

Ingersoll supra at 1341-42; see also *People v. Scott*, 63 NY2d at 522-23 (roadblock

established by Sheriff, an elected official).

While NYPD policy indicates these decisions should be made by the precinct commander, this is not true in the 33rd precinct or in this case. Defendant Jugraj, a sergeant, testified he made all the decisions and that Deputy Inspector Aramboles, the precinct commander, had no role. Exhibit 4 at 10. Jugraj asserted that he planned the checkpoint with Captain Bryan Natale. Id at 9-11. Defense counsel concedes that Natale was not assigned to that precinct during the period when the checkpoint was conducted. Both he and Captain McDermott, the executive officer who was assigned at the time, deny participating in such planning. Exhibit 6 at 6-7; Exhibit 15 at 9-10. Aramboles, for his part, said that it was not Jugraj's role to prepare checkpoint forms. Exhibit 5 at 28-29. He asserts that such decisions were made "on his authority" by executive officers such as Natale and McDermott. Id at 29-30.

Even the city policy itself is insufficient in having precinct commanding officers plan checkpoints. They are not policy-makers at the level envisioned in *Sitz* and *Ingersoll*, if at all. Plaintiffs respectfully submit that a review of the Aramboles deposition on the whole demonstrates that he is not a policy-maker. Exhibit 5. He doesn't even remember how many checkpoints they do. Id at 8-9. His explanation for why TLC plates would be exempted from checkpoints demonstrates a complete lack of understanding of the concept of arbitrariness. Id at 40-44. He seems to think that 0.08 is the limit for impaired driving arrests (Id at 58) when in NY arrests for DWAI are often made with BACs of 0.06 and 0.07. He's not aware of the two-hour rule for breath testing. Id at 65-66.

Putting checkpoint planning in the hands of such ignorance cannot be found in favor of the City.

2. Restrictions on discretion of field officers

Ingersoll specifically addressed the process for deciding which vehicles should be stopped in a checkpoint:

"A related concern is that motorists should not be subject to the unbridled discretion of the officer in the field as to who is to be stopped. Instead, a neutral formula such as every driver or every third, fifth or tenth driver should be employed. To permit an officer to determine to stop any particular driver or car when there is no legitimate basis for the determination would be to sanction the kind of unconstrained and standardless discretion which the United States Supreme Court sought to circumscribe in its decisions …. In all the checkpoint programs at issue here, neutral mathematical selection criteria were used. "

Ingersoll at 1342. See also *People v. Scott*, 63 NY2d at 523.

Contrary to that approach, Defendant Jugraj, a field officer, decided against a mathematical formula. Instead they decided to scrutinize regular passenger cars more closely than cars with TLC plates.

As *Ingersoll* put it: "[O]nly if a roadblock is carried out according to a comprehensive plan adopted by supervisory personnel and embodying explicit, neutral limitations on the conduct of individual officers can it begin to satisfy constitutional requirements."

Here instead we are presented with an explicitly non-neutral limitation on the conduct of individual officers. Jugraj's exclusion of TLC plates conflicts with New York State policy. Vehicle & Traffic Law §1193(1)(d) provides enhanced DWI penalties for taxicab and livery drivers.

Beyond the issue of which cars would be stopped, NYPD policy and the practice in this particular checkpoint lacked a comprehensive plan with limits on the conduct of the officers. The checkpoint policy does not specify how officers are to interact with drivers after the stop:

- What are the officers supposed to say, if anything, to drivers?
- What documents, if any, are they supposed to request?
- What questions, if any, are they supposed to ask?
- Do drivers and passengers have the right to remain silent?
- Do drivers and passengers have to roll down their windows?
- Under what circumstances, if any, should drivers be asked or ordered to exit their vehicles?
- Under what circumstances, if any, should drivers be asked or ordered to blow into portable breath screen device (PBT)?
- Should officers even have PBT devices on them?
- Should checkpoints be equipped with admissible breath testing devices such as the Intoxilyzer that exonerated Schramm?

Similarly the vehicle checkpoint form has no place for such an action plan to be specified.

NYPD policy in general, and this checkpoint in particular, lacked a comprehensive plan with neutral limitations on the conduct of individual officers. Instead Defendant Delacruz was free to harass drivers who he saw as playing games, even when they legally refuse to perform a breath screen following Vehicle & Traffic Law § 1194(1)(b). Jugraj testified that drivers do not have the right to remain silent in a checkpoint. Exhibit 4 at 58-59. This does not appear to be NYPD policy, but rather Jugraj applying his own discretionary standards in the field. Sergeant Lewis, who supervised the checkpoint with Jugraj, testified that "Everyone has the right to remain silent 100% of the time. Exhibit 17 at 34.

This Court should find that the checkpoint in question in this case lacked adequate restrictions on the discretion of individual officers. The Court should further find that NYPD's checkpoint policy similarly lacks such restrictions.

PG 212-64 does provide the following in italics at numbered paragraph 12 about what the officers are permitted to do:

After stopping a vehicle, it is permissible to request the driver's license, registration, and insurance card. It is also permissible to conduct a license and VIN check. The VIN check must be conducted from the outside of the car. Reaching inside the car to uncover the VIN plate is not permitted even if the VIN plate is covered or obstructed; however, the member may request that the motorist uncover the VIN plate. Additionally, the driver's failure to produce a license or insurance card does not provide the basis to enter the car and conduct a further search. However, the driver's failure to produce a license or insurance card does allow for the issuance of a

summons or other appropriate enforcement action. If the documentation produced is appropriate, the driver must be allowed to proceed unless reasonable suspicion is developed during the stop.

Exhibit 7.

Nothing in that suggests that officers can order drivers out of their cars. If anything it suggests that drivers are free to refuse police requests although they might be ticketed for it. The policy is vague. Rather than telling officers what they should do, it says certain things are permissible to do. A few things are not permitted - reaching into the car and entering the car to conduct a search - but there's no guidance about the use or non-use of portable breath tests, ordering drivers out of cars, etc.

Paragraph number 13 says officers should "Take summary action, when necessary." Exhibit 7 at ¶13. This is extremely vague and authorizes a wide field of discretionary behavior by the officer. What does "summary action" refer to? What makes such action "necessary" instead of permissible? All of this is left to officer discretion.

The officers in this checkpoint required all stopped drivers to get out of their cars and perform portable breath tests. Schramm EBT, Exhibit 9 at 34-35. After Schramm indicated he did not want to do a portable breath test they told him he had to get out of the car (Id at 50), began grabbing at door handles and tapping their hands on the windows of the vehicle (Id at 51), then Delacruz began tapping the windows and windshield with a 2-3 foot long metal stick (Id at 53), and a group of officers began counting down in unison and said they were coming in (Id at 57-58). After Schramm got out of the car, Delacruz threatened Schramm with arrest if he refused to take the portable breath test (id

at 63), and then arrested him (Id at 64).

None of this behavior by the checkpoint officers matches any direction from NYPD checkpoint policy or any indication from anyone involved in the command of the 33rd precinct as to how checkpoints are supposed to be conducted. Requiring portable breath screens in a checkpoint violates the plain language of Vehicle & Traffic Law § 1194(1)(b):

> Every person operating a motor vehicle which has been involved in an accident or which is operated in violation of any of the provisions of this chapter shall, at the request of a police officer, submit to a breath test to be administered by the police officer.

A checkpoint stop, such as this one, does not involve an accident or traffic violation.

Further, requiring drivers to step out of cars was noted as unjustifiably intrusive in *Matter Of Muhammad F.*, 94 N.Y.2d 136, 147 (1999):

> Moreover, these stops were excessively and, on these records, unjustifiably intrusive, both objectively and subjectively. As for the objective intrusiveness, the safety checks in Muhammad F. were described as routinely involving a request or direction that the passengers step out of the cab ….

This Court should find the city policy along with practices in the 33rd precinct (and 28th) fail to restrict discretion of officers, and that the officers in this checkpoint acted arbitrarily.

3. **Safety**

NYPD policy does not address how to ensure checkpoint safety in any meaningful way. Defendant Jugraj stated stopping a car is one of the most dangerous things he does. Exhibit 4 at 56. City policy fails to specify how to safely choose checkpoint locations, timing, and other arrangements.

The Court should find this factor goes against the defendants.

4. **Reasonable Location**

"The location of checkpoints should be determined by policy-making officials rather than by officers in the field. The sites chosen should be those which will be most effective in achieving the governmental interest; i.e., on roads having a high incidence of alcohol related accidents and/or arrests."

Ingersoll, supra at 1343.

Ingersoll noted that non-permanent locations for "sobriety checkpoints may be used by law enforcement and if the checkpoints are well marked and safely conducted." Here the checkpoint was not well marked, as will be addressed further in Point 6, below.

"With respect to the Burlingame checkpoint, the lighting, signing, substantial uniformed police presence, official vehicles, etc., provided advance notice to the motorist sufficient to ward off surprise and fright. In fact, sufficient advance notice was provided so a motorist could choose to avoid the checkpoint altogether. The objective and subjective intrusion into Fourth Amendment rights was no greater than

that resulting from a permanent checkpoint. ”

Ingersoll at 1344-45.

By contrast the 33rd precinct’s checkpoint was set up with no advance notice to motorists, who could not choose to avoid the checkpoint. Schramm deposition at 32-33. Delacruz at 38-39.

Nor, as previously noted, was the checkpoint location determined by policy-making officials. It was determined by Jugraj based on his own analysis. Compare *People v. Scott*, 63 NY2d at 522 (roadblock established pursuant to directive of Sheriff).

The Court should find this factor goes against the defendants.

5. Time and Duration

> The time of day that a checkpoint is established and how long it lasts also bear on its intrusiveness as well as its effectiveness. For example, a nighttime stop may be more hazardous and possibly more frightening to motorists, but it will also probably prove more effective. …
>
> [N]o hard and fast rules as to timing or duration can be laid down, but law enforcement officials will be expected to exercise good judgment in setting times and durations, with an eye to effectiveness of the operation, and with the safety of motorists a coordinate consideration.

Ingersoll at 1345 (citations omitted).

There is nothing in NYPD policy about how to determine the time or duration of checkpoints. There is no space on the Vehicle Checkpoint Form for an explanation of

how time and duration were determined by whoever set it up. The "Reasons for Checkpoint" section indicates location should be explained but doesn't even suggest any consideration of time or duration. The Court should conclude that NYPD makes no effort at either a policy level or in practice to even consider how time and duration of its checkpoints relate to effectiveness or safety. This factor goes against the defendants.

6. **Indicia of official nature of roadblock**

"Those aspects of a sobriety roadblock which evidence its official nature are also critical in minimizing its intrusiveness. The roadblock should be established with high visibility, including warning signs, flashing lights, flares, police vehicles, and the presence of uniformed officers. … In addition to being important for safety reasons, this advance warning will reassure motorists that the stop is duly authorized. Clearly visible warning lights and other signs of authority have been present in most of the checkpoints upheld by other courts. … In contrast, most of the checkpoints found unconstitutional have not provided adequate warning to motorists."

Ingersoll at 1345 (citations omitted).

Here again NYPD policy offers little guidance about the use of advance warning for checkpoints. PG 212-64 merely states that checkpoints should "include adequate warnings to motorists" without any indication of what is adequate. Exhibit 7.

The checkpoint had no advance warning. Flares and lights may have been used but we don't know how or where.

Plaintiff Schramm testified as follows:

So as I took the right off of the Parkway exit and onto 158th Street, there was an officer immediately underneath the overpass for Riverside Drive. And that officer was standing in the center of the road and stopping vehicles as they passed by.

Schramm deposition, Exhibit 9 at 32.

There were lights, but they were "up ahead":

I saw many lights of police vehicles and many officers up ahead and more stopped vehicles.

Id at 33.

See also *In Re Muhammad F.*, supra 94 NY 2d at 147 (motorists taken by surprise).

Compare *Scott*:

"At that location warning signs were set up on the shoulders facing traffic from both directions some 300 feet in advance of the checkpoint, two police vehicles exhibiting flashing roof lights were placed so that their headlights illuminated the signs, and flares were placed in the center of the road."

People v. Scott, supra at 524.

This Court should find that the the city's policy fails, and the checkpoint in this case failed to meet constitutional standards for providing indicia of its official nature.

7. Length and Nature of Detention

The average time each motorist is detained must be minimized, both to reduce the intrusiveness of the stop on the individual driver and to avoid lengthy traffic tie-ups. As occurred in the Burlingame checkpoint, each motorist who is stopped

> should be detained only long enough for the officer to question the driver briefly and to look for signs of intoxication, such as alcohol on the breath, slurred speech, and glassy or bloodshot eyes. If the driver does not display signs of impairment, he or she should be permitted to drive on without further delay.

Ingersoll at 1346.

In this case all drivers were ordered out of their vehicles to perform portable breath screens. This goes beyond what Ingersoll seems to suggest and increases the length of detention and intensifies the nature of detention.

Furthermore the policy failure to have admissible breath test machines on site greatly increased the length and intensity of Plaintiff Schramm's detention.

8. Advance Publicity

> Advance notice to the public through the media that sobriety checkpoints are planned will simultaneously diminish their intrusiveness and increase their deterrent effect. …
>
> No legitimate purpose is served by surprising motorists at a checkpoint. …
>
> In sum, advance publicity is absolutely essential to the establishment of a constitutionally permissible roadblock. Only when it becomes generally known to the driving public that such checkpoints may be encountered will maximum deterrent effect be achieved. Publicity will also considerably lessen the anxiety of the motorist approaching the checkpoint and will permit motorists to plan for potential delays from sobriety checkpoints.

Ingersoll at 1346.

There was no advance publicity of this checkpoint. Schramm, his passengers and other motorists were surprised at the checkpoint, which appeared suddenly after they came off the ramp. Prunty's letter shows that NYPD policy runs directly contrary to the notion that advance publicity is essential.

Plaintiffs were not permitted to plan for potential delay from sobriety checkpoints as there was no public notice. Instead they were surprised and faced extreme anxiety from the arbitrary behavior of the checkpoint officers.

This last factor should also be found against the defendants, at the city policy level as well as in the practices of the 33rd precinct and in this particular checkpoint.

Ideal Checkpoint Policy

In an ideal world of course plaintiffs believe there would be no checkpoints. But following the line of cases that have allowed them, a sensible checkpoint policy would look more like this:

- Checkpoints would be planned at the state level, as they were in *Sitz*. New York City would be low on the list for checkpoints since it has the statistically lowest rate of drunk driving problems.
- If handled at the city level, locations would be decided by policy makers above the patrol borough level (as in *People v. Scott*), rather than by precinct staff. Checkpoints would be conducted in places (and times) where the problem is worst, like Queens,

rather than in Manhattan where it is nearly non-existent. Safety of the checkpoint location would be explicitly considered.

- Checkpoints would be staffed and supervised by officers trained and experienced in making drunk driving arrests, rather than by officers with no training and little experience.
- Each checkpoint would have a complete plan including advance warning for motorists, specific instructions for personnel in the checkpoint, and thorough records and video kept of the entire event.
- Public notice would be sent out to local media and publicized on City and NYPD websites and social media. Media and groups like MADD would be invited to attend.
- Admissible breath testing devices would be available on-site so that testing would be done within the two-hour window and innocent drivers would be released much more quickly.
- Policy-makers at the city level would review the results of checkpoints regularly to determine which were the most effective and if they are effective at all.

First Cause of Action: False arrest and Wrongful Imprisonment

Plaintiffs were innocent. Plaintiff Schramm was falsely arrested for refusing a breath screen and for drunk driving. Defendant Delacruz made the decision to arrest Schramm based on malice - “now you’re going to play my game” - and not based on anything appropriate in a checkpoint stop. Delacruz’ malice was further demonstrated by his decision to continue holding Schramm after the station breath test proved sobriety.

Saenz was arrested because she allegedly interfered with Delacruz's unlawful efforts to force Schramm to do the breath screen.

Here we have an arrest and imprisonment without a warrant. Under NY law the presumption is that such arrest and imprisonment was unlawful. *Smith v County of Nassau*, 34 NY2d 18, 23 (1974). Plaintiffs must prove that (1) the defendant intended to confine them; (2) the plaintiffs were conscious of the confinement; (3) the plaintiffs did not consent to the confinement; and (4) the confinement was not otherwise privileged. E.g. *Broughton v. State of N.Y.*, 37 N.Y.2d 451, 456; *Smith v. Nassau*, supra 34 NY2d at 22.

The first three elements have obviously been satisfied. This case turns on whether the confinement was privileged. Here the confinement - the arrest and imprisonment of plaintiffs, was flawed in several ways. First, they arose out of an unconstitutional checkpoint, as discussed at length above. Second, the arrests were not based on probable cause of any crime, but rather on Delacruz's malicious "play my game" intent. See also *Sakoc v. Carlson*, No. 15-1793-cv, at *3 (2d Cir. 2016) ("no reasonable officer could have found arguable probable cause to arrest Sakoc for [drunk driving] solely based the video and accompanying audio of the field sobriety tests.").

Third, Delacruz's improper use of a portable breath screen in a checkpoint stop with no accident and no violation is an invalid manner of establishing probable cause for DWI. Fourth, the defendants have failed to set forth any sensible explanation for the arrest of Saenz other than their malice. Fifth, Delacruz held Schramm for an additional 19

hours after the station breath test showed that Schramm was innocent, and in violation of NYPD policy.

This Court should grant summary judgment to the plaintiffs on the first cause of action for false arrest and wrongful imprisonment.

Fourth Cause of Action: Unconstitutional Checkpoint

Stopping plaintiffs in an improper checkpoint implicates the Fourth Amendment rights asserted here. *Indianapolis v. Edmond*, 531 U.S. 32 (2000). Edmond acknowledged that sobriety checkpoints may be lawful but noted: "The constitutionality of such checkpoint programs still depends on a balancing of the competing interests at stake and the effectiveness of the program." Id at 47.

That balance goes against the defendants here as they conducted the checkpoint in a manner violating just about every established principle for how checkpoints should be handled.

This Court should rule that the NYPD checkpoint policy violates the Fourth Amendment; that the practices and customs of the 33rd precinct violate the Fourth Amendment; and that the actions of Defendants Delacruz and Jugraj in stopping and arresting plaintiffs violated the Fourth Amendment. This Court should grant summary judgment to the plaintiffs on the Fourth cause of action.

Sixth Cause of Action: Monell Claim

As detailed at length in this memo, this Court should grant summary judgment against Defendant City for its unconstitutional checkpoint policy, procedures, practices both city wide and within the 33rd precinct.

> Liability under section 1983 is imposed on the municipality when it has promulgated a custom or policy that violates federal law and, pursuant to that policy, a municipal actor has torturously injured the plaintiff. … Establishing the liability of the municipality requires a showing that the plaintiff suffered a tort in violation of federal law committed by the municipal actors and, in addition, that their commission of the tort resulted from a custom or policy of the municipality.

Askins v. Doe, 727 F.3d 248, 253 (2d Cir. 2013)

Plaintiffs respectfully submit that the facts in this case and the argument above easily meet this burden. NYPD's checkpoint policy is absurd in so many ways including using untrained officers. The checkpoint practices and custom of the 33rd precinct are even worse. Plaintiffs were wrongly arrested and imprisoned as a result of those polices, practices and customs. Plaintiff Schramm was forced to defend himself for nearly 18 months from a bogus charge filed by Delacruz as a result of those policies, practices and customs. Plaintiff Saenz was slammed into a fence by Jugraj as a result of those policies, practices and customs.

Checkpoints Always Violate the Fourth Amendment

While plaintiffs do not expect a district court judge to rule this way, plaintiffs must argue this point for the purpose of preserving the argument on appeal. Checkpoints

are always unconstitutional. The litany of cases including *Michigan v. Sitz* and dating back as far as *United States v. Carroll,* 267 U.S. 132, 147 (1925) all spit in the face of the plain language of the Fourth Amendment. All of these cases were wrongly decided. Vehicles should not be stopped by police without a warrant issued by a neutral magistrate based on probable cause stated in an oath or affirmation. The string of exceptions have eviscerated the meaning of the Fourth and that meaning should be restored.

Every time the Fourth is eroded it is done in the name of a foolish policy. For *Carroll* it was alcohol prohibition. For much of the rest it has been the failed war on drugs. It is long past time we stopped destroying the foundational document of our country in pursuit of populist disasters.

Any publicity advantage claimed for checkpoints can also be claimed for saturation patrols, which also benefit from the advantages of not flatly violating the Fourth and being far more effective at making arrests. The notion that the warrant requirement is impracticable is wrongheaded in the first place, and outdated in our world of modern technology.

One thing we see in checkpoints is the inevitable result of "give them an inch and they'll take a mile." *Sitz* allowed checkpoints in limited circumstances with extensive procedures put in place. Following that police departments started doing checkpoints with little regard for such limits and procedures. NYPD is the shining example of that, but we saw the same in *Edmond* as well. *Indianapolis v. Edmond*, 531 U.S. 32 (2000).

Justice Broussard was correct in his dissent in *Ingersoll* (at 1350-1356) as were Justices Brennan, Marshall and Stevens in *Sitz* (at 456-477). The Courts should restore

Fourth Amendment protections, ban suspicionless stops, checkpoints, roadblocks and even warrantless traffic stops.

Qualified Immunity

Qualified immunity at this stage of the case is dubious. First of all it does not protect Defendant City's liability for its unconstitutional checkpoint policy. *Askins v. Doe*, supra 727 F.3d at 254 ("Qualified immunity is a defense available only to individuals sued in their individual capacity.").

Regarding the individual officers the Supreme Court has held that it is an immunity from suit rather than a defense to liability, and as such should be resolved prior to discovery. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). We are well past that point.

Regardless of that it is clearly established law in New York that checkpoints must have written guidelines. *In the Matter of Muhammad F.*, 94 N.Y.2d 136, 148 (1999); *People v. Abad*, 98 N.Y.2d 12, 18 (2002). From their testimony we know that Defendant officers were aware that there was supposed to be a vehicle checkpoint form. Defendant Jugraj should have known that checkpoint stops have to be made based on neutral criteria, not with his ad hoc TLC exemption. It is also clearly established law that drivers can not be required to undergo portable breath tests unless there was an accident or a traffic violation. Delacruz and Jugraj should have known that.

> Every person operating a motor vehicle **which has been involved in an accident or which is operated in violation of any of the provisions of this chapter** shall,

> at the request of a police officer, submit to a breath test to be administered by the police officer.

Vehicle & Traffic Law § 1194(1)(b) (emphasis added).

Drivers subjected to suspicionless checkpoint stops have not been involved in an accident nor operated in violation of any law.

Defendant officers ignored this and attempted to force and/or bully plaintiff Schramm into doing such a test and arrested him when he refused. This action was willful and malicious as evidenced by Defendant Delacruz's statement about playing his game.

There are two key inquiries regarding qualified immunity: Did defendants violate a constitutional right? And was that right clearly established? E.g. *Saucier v. Katz*, 533 U.S. 194 (2001); *Pearson v. Callahan*, 555 U.S. 223 (2009); *Dist. of Columbia v. Wesby*, 583 US ___, 138 S. Ct. 577, 199 L.Ed.2d 453 (2018).

Qualified immunity case law has made this a muddle. The facts and argument above make clear that plaintiffs' Fourth Amendment right to be free from unreasonable seizure was violated. That right is clearly established. Unfortunately the muddle takes the analysis all over the place. *Pearson* and other cases have twisted the notion of a clearly established right (*Harlow v. Fitzgerald*, 457 U.S. 800, 818) to whether the unconstitutionality of the officers' conduct was clearly established.

> "Clearly established" means that, at the time of the officer's conduct, the law was " 'sufficiently clear' that every 'reasonable official would understand that what he is doing' " is unlawful. … In other words, existing law must have placed the constitutionality of the officer's conduct "beyond debate." … This demanding

> standard protects "all but the plainly incompetent or those who knowingly violate the law."

D.C. vs. Wesby, supra 583 US at IV(A) (citations omitted). So we've gone from the right being clearly established to it being clearly established that the government official's conduct was wrongful. Compare this to 1979:

> The officer whose report of refusal triggers a driver's suspension is a trained observer and investigator. He is, by reason of his training and experience, well suited for the role the statute accords him in the pre-suspension process. And, as he is personally subject to civil liability for an unlawful arrest and to criminal penalties for willful misrepresentation of the facts, he has every incentive to ascertain accurately and truthfully report the facts.

Mackey v. Montrym, 443 U.S. 1, 14 (1979)

We have gone from trained and experienced officers subject to civil liability to this case with untrained and inexperienced officers who will argue they are immune from civil liability except in the rarest of circumstances.

Even with that muddle, it was clearly established in New York State and the entire country that checkpoints require written guidelines. *Muhammad F.* supra 94 N.Y.2d at 148; *People v. Abad*, 98 N.Y.2d 12, 18 (2002); *Sitz* at 447 et seq. It is also beyond debate that police can't force a driver to do a portable breath screen in a checkpoint. Vehicle & Traffic Law § 1194(1)(b).

Part of the problem with this muddle is NYPD's policy and practice of running checkpoints with "plainly incompetent officers" untrained in doing checkpoints, DWI

investigations and arrests. An officer with any meaningful training would know that you can't order all drivers out of cars in checkpoints, that you can't order someone to do a portable breath screen if they haven't been in an accident or committed a traffic violation, and that a BAC of 0.03 means you should release the driver. Lewis Deposition, Exhibit 17 at 23.

Defendant Jugraj, who knows he has no training and knows he's never made a DWI arrest, chose to set up this checkpoint. This is in some ways a case of the blind (Jugraj) leading the blind (Delacruz) while Aramboles, the other executive officers and NYPD leadership all turned a blind eye to what the sergeants and officers were doing.

Not only did Jugraj and Delacruz violate the law. They also violated NYPD policy in the way they set up and conducted the checkpoint. Jugraj knew or should have known that the commanding officer is supposed to set up the checkpoint and prepare the vehicle checkpoint form. Delacruz should know that drivers in checkpoints (and all other encounters) should not be forced to play his game.

With all of that in mind, the Court should find qualified immunity does not apply in this case to protect Defendants Delacruz and Jugraj.

Plaintiffs respectfully submit this Court should grant summary judgment to the plaintiffs on the three causes of action for which relief is sought in this motion.

Respectfully Submitted,

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