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 IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** **1:16-cv-553 (AKH)**

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INTRODUCTION

Flying in the face of decades of checkpoint case law, Defendant City puts untrained officers like Defendant Jugraj and Delacruz into the field without written guidelines, who then make arbitrary decisions adversely affecting innocent people like the plaintiffs in this case. Defendants' motion for summary judgment should be denied because they failed to meet their burden.

Knowing that the central issue in the case is the constitutionality of NYPD checkpoint policy, practices, and the conduct of this particular checkpoint, their memorandum of law on that issue is less than one page long. They fail to offer any evidence or reasoning that the city's checkpoint policy meets constitutional standards. They failed to demonstrate that the checkpoint practices of the 33rd Precinct, or NYPD as a whole, meet constitutional standards. And they failed to demonstrate that the checkpoint at issue in this case complied with either NYPD checkpoint policy or constitutional standards.

The 33rd precinct practices did not follow NYPD policy. And the checkpoint as conducted by Defendants Jugraj and Delacruz did not comply with NYPD policy or with the precinct's practices.

Regarding the other issues raised in Defendants' summary judgment motion, Defendants did not have probable cause to arrest Plaintiff Schramm. Regarding Plaintiff Saenz's arrest, there is at least a question of fact as to whether Defendants had probable

cause as the testimony varies about what happened. The officers themselves do not agree as to why she was arrested, or even who arrested her.

Defendants Delacruz and Schramm are not protected by qualified immunity because they violated clearly established constitutional law and NYPD policy regarding checkpoints, state law regarding the use of portable breath screens, and clearly established constitutional standards for making drunk driving arrests.

Please note that Exhibits 1-18 referenced in this memorandum are from Plaintiffs' motion for summary judgment.

FACTS

At an unknown date on or 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 and worked at the direction of Patrol Borough Manhattan North, testified that commanding officers do not prepare checkpoint forms and are generally not involved in checkpoints. Exhibit 17 at 38-40.

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. On further review of the evidence it is unclear if the checkpoint even had a single designated supervisor. Sergeant Lewis testified that he and Jugraj both supervised. Exhibit 17 at 13:20 to 15:4.

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 33rd 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. No checkpoint records were produced from 2015 or 2014. So it's at least two and a half years. More likely the 33rd precinct never kept checkpoint records until after this lawsuit began, and even with that they're still sloppy about it.

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 commanding officer even knowing about them, much less fulfilling his supposed 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 Vehicle & Traffic Law § 1193(1)(d) (enhanced DWI penalties for taxicab drivers). Sergeant Lewis testified that the decision to exempt TLC plates 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 any procedure. Jugraj laughably 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). Captain Natale testified that he doesn't know if portable breath tests are supposed to be used in checkpoints. Exhibit 6 at 33:2 to 33:9.

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 under VTL 1194) 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. Exhibit 2 at ¶12; Exhibit 9 at 99:18 to 100:1. 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 such section.

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.

Delacruz denies that he arrested Saenz. Exhibit 10 at 92:9 to 92:11. He claimed that Saenz stepped in between him and Schramm while he was trying to administer the portable breath test. Exhibit 10 at 85:6 to 92:20. Defendant Jugraj tells a completely different story. Exhibit 4 at 65:11 to 68:9. He said that Saenz started interfering after the decision to arrest Schramm had already been made. Exhibit 4 at 65:17 to 65:25. He

further claimed that Saenz interfered when Schramm was being put into a police car. Id at 66:21 to 67:8.

According to Saenz, Delacruz ordered her to leave the scene and she asserted her right to remain on a public sidewalk. Saenz Deposition, Exhibit 19 at 49:3 to 49:25. Farrell testified that he and Saenz were initially standing behind the car in the street while Schramm was at the middle of the sidewalk near the front of the car when an officer ordered her to move. She moved onto the sidewalk and then an officer grabbed her arm and forced her backward. Farrell Deposition, Exhibit 20 at 50:23 to 55:2. Farrell did not think she was interfering. Exhibit 20 at 54:18 to 54:19. By Farrell's testimony Saenz was arrested long before any attempt to put Schramm into a police car.

Schramm did not notice Saenz or Farrell until after he was in handcuffs, said she was not in his vision, never got close, and he never heard anything she said. Exhibit 9 at 66:2 to 67:22.

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 in DWI investigation, 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 13.

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, according to Officer Pina. 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 release 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.

There was no public notice of the checkpoint in this case. Jugraj Deposition, 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 will be 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. Schramm Deposition, Exhibit 9 at 32-33.

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.

ARGUMENT

I. Defendants Failed to Show Checkpoint Was Constitutional

Defendants claim at Point III in their memo that the checkpoint was constitutional. They offer no facts as to how NYPD checkpoint policy was established, how checkpoint locations are determined, or what post-stop procedures are to be followed. Compare *Michigan Department of State Police v. Sitz*, 496 U.S. 444 at 447 (1990):

> The Director appointed a Sobriety Checkpoint Advisory Committee …. [which] 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.

Rather than checkpoint locations being determined by an advisory committee or other policy-making officials, NYPD checkpoint policy directs precinct commanding officers to determine the location, and procedures, and prepare the paperwork for it. In the 33rd and 28th precincts and Patrol Borough Manhattan North generally, sergeants disregard this policy and choose locations on their own without even informing the commanding

officer that they're doing a checkpoint.

NYPD policy does not specify any post-stop procedures. Unlike *Sitz*, NYPD policy does not specify the use of field sobriety tests, and does not even require that checkpoint officers, supervisors, or precinct command staff have any training or experience in field sobriety tests or the making of DWI arrests. In this particular checkpoint none of the officers at the checkpoint were trained in field sobriety tests. They do not even know what field sobriety tests are. Sergeant Jugraj, who planned and supervised the checkpoint, was never trained in field sobriety tests and had never made a DWI arrest in his career as a police officer.

Unlike in *Sitz*, vehicles in this checkpoint were directed out of the traffic flow before any officer had made any determination regarding signs of intoxication. Again this is a post-stop procedure that is not spelled out by NYPD checkpoint policy and for which there is no space in the vehicle checkpoint form to specify how officers are to handle vehicles after they have been stopped.

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" … 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 (citation omitted). 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); *Ingersoll v. Palmer*, 43 Cal.3d 1321, 743 P.2d 1299 (Cal. Sup. Ct. 1987); and *Commonwealth V. Cox*, 491 S.W.3D 167 (Ky. Sup. Ct. 2015).

The comparison between NYPD policy and *Muhammad F.* is striking. NYPD does not require a written record of stops or a log of vehicles. The 33rd precinct has no written record of any checkpoints for a period of at least 18 months and probably much longer. NYPD policy has no "particularized" guidelines, no established procedures for site selection, lighting and signs, or determining the location of screening areas. While NYPD's vehicle checkpoint form allows for stopping all vehicles or every second or third, the vehicle checkpoint form also offers an "Other" with no guidance as to what would be appropriate for that. That "Other" option was selected by Defendant Jugraj in this case, stopping all vehicles but with an arbitrary exemption for vehicles with TLC plates. In the words of Sergeant Lewis, it was "a random decision" made by officers in the field. Lewis Deposition, Exhibit 17 at 17:8 to 17:21.

Defendants offer no facts as to how locations are chosen for checkpoints in the city as a whole, in New York County, or in the 33rd Precinct. Consider the language of

United States v. Martinez-Fuerte, 428 U.S. 543 (1976):

> Routine checkpoint stops do not intrude similarly on the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise, as they know, or may obtain knowledge of, the location of the checkpoints, and will not be stopped elsewhere. Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. **The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class.**

Id at 559 (emphasis added).

Here NYPD policy says that checkpoint locations are to be set by the precinct commanding officer. Plaintiffs respectfully submit this is not high enough in the chain of command to meet the goals of *Martinez-Fuerte*. Note that on the Monell claim discussed below Defendants contend that Plaintiffs have not shown misconduct by policymaking officials. This appears to concede that precinct commanding officers like Aramboles are not policymakers, and the checkpoint policy itself is defective in assigning these decisions to officers who do not make policy decisions.

In any event it is not done that way in the 33rd precinct, nor in the 28th, nor apparently in Patrol Borough Manhattan North. Sergeant Lewis, from the 28th precinct, testified that he was working that day "at the direction of the patrol borough." Lewis Deposition, Exhibit 17 at 11:22 to 11:25. That direction did not specify where the checkpoint would be located. Rather, Defendant Jugraj, an officer in the field, chose the location. Id at 36:22 to 37:7. According to Lewis commanding officers do not prepare checkpoint forms and are generally not involved in checkpoints at all. Id at 38:16 to 40:23. No one instructed him to do a checkpoint. Id at 36:11 to 36:18.

II. No Probable Cause for Arrest

A. No Probable Cause for Arrest of Plaintiff Schramm

Defendant Delacruz did not have probable cause to arrest Plaintiff Schramm. The only signs of intoxication Defendant Delacruz observed were "bloodshot eye and the odor of alcohol." Delacruz Deposition, Exhibit 10 at 89:2 to 89:22. Defendants assert that an arrest for the lesser offense of DWAI was supported by the evidence, but Delacruz testified he arrested Schramm for DWI, not DWAI. Id at 89:18 to 89:22: "I place him under arrest for suspicion of DWI."

Contrary to the claims made in Defendants' memorandum of law, Delacruz did not testify he relied on Schramm"acting in an evasive manner."

The Second Circuit has spoken on what is sufficient probable cause for arrest in a drunk driving case. *Kent v. Katz*, 312 F.3d 568 (2002):

Katz contends that he had qualified immunity as a matter of law because it was

> objectively reasonable for him to believe Kent was intoxicated based on two facts that are undisputed: that Kent was "red-eyed," and that when asked if he had been drinking alcohol Kent said "[n]ot very much," which "amounted to an admission of alcohol consumption." … We reject this contention for several reasons.

Id at 576.

Both there and here, there was an explanation for the eye redness separate from alcohol. There the driver had been burning brush on his property. Here Plaintiff Schramm had recent eye surgery and Delacruz knew that. Pina Deposition at 31:23 to 32:22. Kent admitted alcohol consumption. Schramm did not. Kent refused to take a sobriety test. 312 F.3d at 571. Schramm arguably refused to take a portable breath test. The arresting officer in *Katz* claimed that Kent was walking unsteadily, swayed as he stood, and had slurred speech. Id at 570-571. Defendants here make no such assertions regarding Schramm.

Delacruz purportedly relied on “the strong odor of alcohol.” The claim of a strong odor of alcohol is unverifiable and dubious. Officer Pina did not notice any odor, or any other signs of intoxication besides eye redness, when he dealt with Schramm. He was asked about a list of possible things he’s trained to look for in examining a DWI suspect and acknowledged he didn't take note of any of those things. Pina Deposition at 32:23 to 34:25. Officer Pina is the only police officer involved in this case who is trained in DWI investigation and he noticed nothing but the eye redness.

Defendants offer no cases with fact patterns anywhere near similar to the case in front of this Court. They rely, *inter alia*, on *Hoyos*, a case where police found the driver sleeping in the driver’s seat after his SUV swerved suddenly and nearly hit the police

officers' van. *Hoyos v. City of New York*, 999 F.Supp.2d 375 at 382-383 (EDNY 2013).

> First, defendants were entitled, under the fellow officer doctrine, to rely on Officer Lynch's report that Hoyos had swerved across several lanes of the Grand Central Parkway, almost striking a police van, at an unsafely slow speed shortly before three o'clock in the morning; he was slumped behind the wheel of his SUV just minutes after this erratic driving maneuver; and, in Officer Lynch's opinion, was intoxicated. …
>
> Second, it is undisputed that Officers Harrison and Avron themselves observed Hoyos behind the wheel of an SUV in a "groggy" state with bloodshot eyes, which are typical indicia of inebriation. **Coupled with the report of plaintiff's erratic driving**, these facts are sufficient to give defendants probable cause for the arrest.

Id at 387-388 (emphasis added).

Here there is no allegation that Plaintiff Schramm drove erratically, was groggy, or was sleeping in the driver's seat. Rather Schramm was wide awake and drove in a completely normal manner obeying police instructions to pull over in the checkpoint.

Defendants also rely on *People v. Reding*, 167 AD2d 716 (3rd Dept 1990). That case had nothing to do with the issue of probable cause for arrest, but rather whether a DWAI verdict could be sustained when the jury acquitted on DWI. The driver in *Reding* had crossed the center line several times before swaying into the opposite lane, admitted drinking, was administered field sobriety tests which he failed to complete, had alcohol on his breath, exhibited a psychomotor coordination problem, and registered a positive

result on the Alco-sensor portable breath test. Ultimately he registered a 0.17 BAC on the Sheriff's admissible breath test device. Id at 716-717.

Here Plaintiff Schramm showed no erratic driving, did not admit drinking, was not offered field sobriety tests before Delacruz arrested him, did not exhibit any coordination problems, and did not take the portable breath test.

Defendants contend that Delacruz relied on Plaintiff's "physical appearance and behavior" when Delacruz himself said no such thing. They contend that Plaintiff asserting his rights constitutes "acting in an evasive manner." By contrast Sergeant Lewis acknowledged that Plaintiff had the right to remain silent (Lewis Deposition at 34:15 to 34:22), that a driver does not have to open his door in a checkpoint (Id at 33:8 to 33:20), and was at best unclear on whether a driver has to roll down the window in a checkpoint (Id at 33:21 to 34:22).

There is a dearth of case law on the required behavior of drivers in a checkpoint. Consider the dissent in *Commonwealth v. Cox*: 491 S.W.3d 167 (Ky. Sup. Ct. 2015). "Must everyone stop at one of these roadblocks? Can one blow off the officer and speed right past? Can a motorist be cited for not stopping? That question is yet to be decided." 491 S.W.3d at 179. That's from the judge who wanted to uphold the checkpoint.

It is not even clear if drivers are required to obey police instructions to stop at a checkpoint. Defendants contend that Schramm's hesitation to roll down his window and open his door on officer requests, and his accurate questioning of the legal requirement to perform a portable breath test somehow gives probable cause for arrest. A driver's assertion of his rights cannot support probable cause. Moreover there is nothing in NYPD

policy indicating what is expected of drivers in checkpoints.

Here it's not clear that NYPD checkpoint officers are even supposed to ask drivers to roll down their windows because NYPD policy and the vehicle checkpoint forms provide nothing on post-stop procedures. NYPD policy is silent on post-stop procedures so plaintiffs were confronted with untrained officers in the field acting arbitrarily without written guidelines. To suggest that a driver's "evasive" behavior supports probable cause for arrest is nonsense.

The closest case on point is *Kent v. Katz*, 312 F.3d 568 (2002) where there was more evidence supporting the arrest than here and the Second Circuit still found no probable cause and rejected qualified immunity.

No Probable Cause to Arrest for Refusing Portable Breath Test

Defendants contend that this statute applies to Schramm even though the plain language of the statute makes it inapplicable to a checkpoint stop. VTL 1194(1)(b) provides:

> 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.

Id (emphasis added). Plaintiffs' vehicle had not been involved in an accident and there is no allegation it was operated in violation of any provisions of any law. Unlike routine traffic stops, a checkpoint stop is by its nature one where the vehicle is pulled over

without any traffic violation.

Defendants rely on non-checkpoint cases to support their position: *People v. Leontiev*, 38 Misc.3d 716 (Nassau County 1st Dist. 2012) (officer observed defendant's SUV hit a sedan and commit multiple traffic violations); *People v. Graziano*, 19 Misc.3d 133(A) (App. Term 2nd Jud. Dist. 2008) (stop for speeding); and *People v. Cunningham III*, 95 NY2d 909 (2000) (reason for stop not mentioned here nor in the County Court appellate decision at 182 Misc. 2d 597 (Dutchess County Court, 1999)). These cases are not pertinent. The language of the statute is clear that it applies only where there has been an accident or traffic violation.

No Probable Cause to Arrest Saenz

Defendants falsely assert it is undisputed that Saenz was arrested for refusing to move away from the scene. The reason for her arrest is far from clear. Officer Hassel testified that he filed the charge against Saenz because Defendant 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. Delacruz denies that he arrested her. Delacruz at 92:9 to 92:11. He claimed that Saenz stepped in between him and Schramm while he was trying to administer the portable breath test. Delacruz at 85:6 to 92:20. Defendant Jugraj tells a different story. Jugraj at 65:11 to 68:9. He said that Saenz started interfering after the decision to arrest Schramm had already been made. Id at 65:17 to 65:25. That is after the portable breath test discussion was over. Jugraj further claimed that Saenz interfered when Schramm was being put into a police car. Id at 66:21

to 67:8.

The descriptions from Plaintiff Saenz and passenger Farrell contrast sharply with the officers' testimony. There is no indication from either of them that Saenz interfered with the breath test or interfered with placing Schramm in the car. According to Saenz, Delacruz ordered her to leave the scene and she asserted her right to remain on a public sidewalk. Exhibit 19 at 49:3 to 49:25. Farrell testified that he and Saenz were initially standing behind the car in the street while Schramm was at the middle of the sidewalk near the front of the car when an officer ordered her to move. She moved onto the sidewalk and the officer grabbed her arm and forced her backward. Exhibit 20 at 50:23 to 55:2. Farrell did not think she was interfering. Id at 54:18 to 54:19. By Farrell's testimony Saenz was arrested long before any attempt to put Schramm into a police car.

According to Saenz and Farrell, she was not obstructing governmental administration at all. Schramm did not notice Saenz or Farrell until after he was in handcuffs, said she was not in his vision, never got close, and he never heard anything she said. Exhibit 9 at 66:2 to 67:22. And as noted the officers' inconsistent testimony does not support the defense theory that Saenz was arrested for refusing to move.

Defendants again rely on cases that present very different fact patterns. In *Marcavage v. City of New York*, 689 F.3d 98, 100-101 (2012) the plaintiffs were protesting at the Republican National Convention and refused to move from an area where demonstrating was prohibited to an area designated for protesting. In *Wilder v. Village of Amityville*, 288 F.Supp.2d 341 (EDNY 2003) the plaintiff was protesting removal of a tree and refused to move from an area where she might have been harmed

by a falling branch.

Even on the stronger facts for the defense it does not look good for them. A charge of obstructing government administration cannot survive if the government action involved was not authorized or lawful. E.g. *People v. Vogel*, 116 Misc. 2d 332, 332-333 (App. Term, 2d Dept. 1982). As argued above, the checkpoint itself was unlawful, the attempt to force a portable breath test in a checkpoint stop was unlawful, and the DWI arrest was unlawful as it lacked probable cause.

The defense has not explained why they wanted Saenz to move at all. By Farrell's description she was not near Schramm at the time of the confrontation. By Jugraj's testimony Schramm was already under arrest so she could not have interfered with the portable breath test. And by Delacruz' testimony she did not interfere with the arrest. There is so much conflicting testimony that there is at least be a question of fact.

Qualified Immunity Does Not Apply

Regarding the arrest of Schramm for DWI the aforementioned case of Kent v. Katz makes clear that summary judgment for the defense on qualified immunity grounds is improper. Kent v. Katz, 312 F.3d 568 (2nd Circuit 2002). The Second Circuit rejected qualified immunity under very similar circumstances as described above. Id at 576-577. Regarding the purported arrest for refusing a portable breath screen, the statute itself clearly establishes that it doesn't apply when there was no accident and no traffic violation involved. For a claim of qualified immunity regarding Saenz there is too much uncertainty as to what the basis was for her arrest. The testimony of the defendant

officers doesn't even agree with the prosecution theory.

Regarding the checkpoint as a whole there is ample case law indicating that checkpoints are unlawful unless conducted properly. The New York Court of Appeals clearly established the need for particularized guidelines, procedures for site selection, lighting and signs, avoidance of arbitrary discrimination, and a written record of stops. *In the Matter of Muhammad F.*, 94 NY2d 136, 148 (1999); see also *People v. Abad*, 98 NY2d 12, 18 (2002).

Excessive Detention Claim

Defendants argue in Point II of their memorandum of law against Plaintiffs' "purported excessive detention claim." The paragraph they reference in the amended complaint simply relates to the false arrest and wrongful imprisonment cause of action. The overly long detention, particularly of Schramm, was alleged to further demonstrate malice on the part of Delacruz. It was not intended to create a separate claim.

Procedural Due Process Claim

Plaintiffs consent to dismissal of the procedural due process claim.

Monell Claim

Defendant City contends it is not liable on the Monell claim, asserting that Plaintiffs have not identified NYPD's formal policy. While this is incorrect - Plaintiffs have identified the policy as discussed above and below. But on this motion by

Defendants asserting that there is no viable Monell claim, it was their burden to establish what their checkpoint policies and practices are, to demonstrate that their policy and practices are constitutional and did not contribute to the deprivations suffered by Plaintiffs.

In many prominent cases like *Michigan v. Sitz* and *Indianapolis v. Edmond* the government defendants proudly explained their policies and practices in detail so that they could show what they were doing was right and honorable. *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990); *Indianapolis v. Edmond*, 531 U.S. 32 (2000). Here Defendant City, by contrast, has done everything it can to stymie and delay discovery, lose documents, and prevent testimony by witnesses involved with the policy. Rather than set forth what their policy and practices are to show they are constitutional, they assert on their own motion for summary judgment that Plaintiffs have not met a burden we do not have. Defendants did not meet their burden.

Defendant City is liable on the Monell claim because its NYPD checkpoint policy is unconstitutional, as discussed above and below. The defense bizarrely asserts that plaintiffs have failed to articulate any formal, officially promulgated policy that led to this incident. They have known this is about NYPD's checkpoint policy since at least October 20, 2016 when plaintiffs deposed Defendant Jugraj and asked him about that specific policy, Patrol Guide 212-64. Jugraj Deposition at 89:15 to 91:14; Exhibit 7. Captain Natale testified that the policy document is part of how he sets up a checkpoint and he directs sergeants to follow that procedure. Natale Deposition at 21:11 to 22:10. Captain McDermott also referenced the policy in her testimony. McDermott Deposition

at 11:3 to 12:12.

Further, the City made a policy decision through NYPD to staff DWI checkpoints with officers untrained in the basics of DWI investigations and arrests. It is city policy and practice to use officers who are untrained in DWI procedures and have never made a DWI arrest and put them in position to plan and supervise checkpoints. Captains Natale and McDermott both testified it would be better policy to staff checkpoints with officers trained in DWI investigation and field sobriety tests. McDermott Deposition at 21:3 to 22:12; Natale at 34:3 to 36:6. Natale and McDermott have Master's degrees in public administration. Natale at 35:3 to 35:7; McDermott at 6:24 to 7:8.

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).

If one believes in field sobriety testing, as many courts do, officers trained in their use can differentiate between drivers who have a high BAC and a low BAC. See, e.g. *United States v. Horn*, 185 F.Supp.2d 530, 535-538 (D. Md. 2002) (with the combined use of horizontal gaze nystagmus and walk-and-turn field testing, "an officer can 'achieve 80% accuracy' in differentiating suspects"). Since Schramm had a BAC below the legal limit, the use of field sobriety tests by a non-malicious trained officer at the scene would have likely exonerated him on the spot and prevented his arrest. Even though his ankle

was injured, he would have been able to perform the eye test (horizontal gaze nystagmus) which is considered the most reliable of the tests. *Horn* supra 185 F.Supp.2d at 537.

Similarly an officer trained in NY DWI investigation would have known that portable breath screens cannot be compelled in a checkpoint because the statute does not authorize it. A trained officer would have known that Schramm blowing a 0.03 in the station meant he was innocent and would have released him (assuming that Delacruz made a mistake, rather than acted with deliberate malice).

An officer trained in DWI investigation would have known that a recent eye surgery means the finding of bloodshot eyes is not a reliable clue of intoxication. If NYPD had a policy of training officers in DWI investigation, or using such trained officers in DWI checkpoints, Plaintiffs' arrests would likely have been avoided.

Defendants contend that on a Monell claim:

> To meet this stringent standard of fault, a plaintiff must show that: "(1) policymaker knows to a moral certainty that its employees will confront a given situation; (2) either situation presents employees with difficult choice that will be made less so by training or supervision, or there is a record of employees mishandling situation; and (3) wrong choice by employees will frequently cause deprivation of constitutional rights."

This is precisely why Defendant City's failure to train is part of the Monell claim. NYPD policymakers know that in their DWI checkpoints its employee officers will confront the situation of encounters with potentially drunk drivers. This situation presents these officers with the difficult choice of whether or not to arrest someone for drunk driving.

That choice would be made less difficult with training in how to investigate potential DWI cases by, for example, using field sobriety tests, the training to know that recent eye surgery negates bloodshot eyes as an indicator of intoxication, and the training to know that a 0.03 BAC means the driver is innocent and should be released. The decision to arrest, as here, means that Plaintiff Schramm suffered the wrongful deprivation of his rights and spent 22 or so hours in police custody when he was innocent and should not have been arrested at all.

It is disturbing that defendants claim "plaintiffs have failed to identify a practice so widespread as to have the effect of a formal policy" and that plaintiffs "cannot establish the existence of a policy practice based on the alleged improprieties of actors below the policymaking level." Plaintiffs moved (Docket #55) to depose actors at the policymaking level, Chief of Patrol Borough Manhattan North Kathleen O'Reilly and Deputy Commissioner Ann Prunty. At a conference with the Court on May 3rd Plaintiffs argued that such discovery was needed for the very purpose Defendants now claim Plaintiffs lack proof. Defendants asserted such discovery was unnecessary and irrelevant. The Court denied the motion (Docket #58) relying on Defendants' misleading assertion.

This is the second time Defendants misled the Court about discovery. Earlier in the case they claimed producing checkpoint records from 2014 and 2016 was unduly burdensome and assured the Court they would produce records from 2015. Then they admitted they had no records from 2015, and produced an untruly burdensome 16 pages of checkpoint records from 2016, with none from 2014. Defendants faced no consequences then. Will there be any consequences now?

Plaintiffs respectfully submit that if the Court takes this defense argument seriously it should hold off on deciding the summary judgment motions, revisit Plaintiffs' discovery motion and compel Defendant City to produce O'Reilly and Prunty for depositions with all due haste. Plaintiffs should be allowed to climb the ladder until we find someone in NYPD who can explain the checkpoint policy, what practices are supposed to be followed, and what process was used to establish all of this.

In the alternative Plaintiffs respectfully submit that Defendants should be estopped from making this argument precisely because they obstructed such discovery.

Oddly if Defendants' argument is to be credited, it further shows that the NYPD checkpoint policy itself is constitutionally defective because it acknowledges that precinct commanding officers are not policymakers. Decisions about the location and guidelines for checkpoints should be made at a higher level. *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976); see also *Ingersoll v. Palmer*, 43 Cal.3d 1321, 1342-1343 (Cal. Sup. Ct. 1987).

Respectfully Submitted,

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