UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CANEISHA MILLS, ET AL.	)	
	)	
Plaintiffs,	)	
v.	)	Civil Action No.: 08-1061 (RJL)
	)	
DISTRICT OF COLUMBIA	)	
441 4th Street, N.W.	)	
Washington DC 20001	)	
	)	
Defendant	)	
	)	

MEMORANDUM IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION

I. Introduction

Police checkpoints used to stop and inspect drivers without suspicion of any crime. Armed police officers posted outside of neighborhoods to pull over all vehicles and question those who seek to enter as to their purpose in driving upon the city streets, to interrogate citizens to disclose the names, phone numbers and contact information of their friends, family and associates (information which will first be "verified" to the officer's satisfaction and then be permanently catalogued and cross-referenced in a law enforcement data base). Checkpoint officers questioning residents about their associations, meetings, intentions, where they are traveling to, the purpose of their travel; demanding drivers disclose the nature of their political activities and name their political associates if their stated intention is political; and allowing the privilege of vehicular entry or movement within the designated area based on police determination that the purposes of travel provided by residents seems sufficiently "legitimate." Large posters announce to those entering the checkpoint that "failure to comply with such a request may result in arrest for 'Failure to Obey.'"

None of the above is a projection of a dark but hypothetical future.

It is all set out and authorized by the District of Columbia Metropolitan Police Department (MPD) Special Police Order SO-08-06, "Neighborhood Safety Zones," (NSZs) issued on June 4, 2008. While the use of roadblock seizure checkpoints to surround a neighborhood is a new policy, the MPD has maintained a long-standing practice of using roadway seizure checkpoints, also known as roadblocks, for the purposes of general crime control and also data collection on law abiding citizens. See, e.g., Allan Lengel, *The Washington Post*, "Safety Stops Draw Doubts: D.C. Police Gather Nonviolator's Data," May 2, 2005 at B1 (data collected on law abiding citizens secured through suspicionless "safety" checkpoints entered into master law enforcement database).

It is fundamental to the Fourth Amendment to the Bill of Rights that, absent strictly limited special circumstances not present herein, police may not stop and seize an individual, no matter how brief such seizure may be, in the absence of individualized suspicion of wrongdoing. The requirement of individual suspicion is a bedrock principle of Fourth Amendment jurisprudence. It is a critical bulwark against abusive and arbitrary exercise of the limited authority allowed to police.

The stopping of a car at the NSZ roadblocks established by the District of Columbia is a seizure under the Fourth Amendment. "It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment." City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000). The Supreme Court has stressed that the exceptions to the general prohibition on suspicionless roadway seizures are strictly limited and that going beyond those strict limitations especially when the purpose is to effect general crime control is unconstitutional.

In City of Indianapolis v. Edmond, the Supreme Court established a clear standard: A roadway seizure checkpoint is unconstitutional if the primary purpose of the checkpoint program is for "general crime control purposes." Edmond at 47. The purpose analysis is undertaken at the programmatic level. Id. at 47 – 48.

According to MPD programmatic documents, including the Special Order establishing the checkpoint program, the purpose of the challenged "Neighborhood Safety Zone" checkpoints is general crime control.

The checkpoint program is plainly unconstitutional as a matter of law. The intelligence gathering component, whereby the MPD uses the unlawful checkpoints to collect data on the identities and activities of law abiding residents and visitors, is equally unconstitutional.

The protections of the Fourth Amendment were not stumbled upon by the Framers arbitrarily. It is a bulwark establishing minimal, but fundamental and essential, limitations on the encroachment of the state into private lives and movements. The Fourth Amendment was not enacted with a disregard for the compelling needs of government, it was established because in the name of such pressing asserted needs the government can and will inevitably seek to intrude upon and restrict individual freedoms. It will take little to morph the so-called Neighborhood Safety Zone checkpoint program from planning documents to trial implementations in Northeast Washington, DC, to the creation of ever-larger zones where the citizens are subject to a pass and identity system, their movements recorded and approved by police power.

A grave situation does indeed exist today in the District of Columbia when it comes to street crime and personal security. Although the situation is far less acute than it was in the 1980's and early 1990's, it is real and the people want action, a remedy that matters.

The population of the District requires a solution and response to the very real problems arising from street crime and violence, which are neither inevitable nor a necessary component of summertime as some have suggested. People want their children to be able to walk the streets in their neighborhoods in a safe and secure environment. The District's military-style roadblock system was deployed, in part, to give the appearance that the government is addressing this deeply felt need. But it is neither constitutional, nor effective. There is an urgent need to tackle the problems of violence, street crime, unemployment and education. This roadblock does not address any of them.[1]

Plaintiffs have filed the instant lawsuit on behalf of the class of all District of Columbia residents who are licensed motor vehicle operators to enjoin the District of Columbia from executing Neighborhood Safety Zone checkpoints and, more generally, to enjoin the District of Columbia from executing roadway seizure checkpoints for purposes of general crime control purposes.

The instant lawsuit seeks, on behalf of the class of all persons seized at the Neighborhood Safety Zone checkpoints, to expunge and prohibit from dissemination all records relating to the identities of persons or vehicle operators/owners who were, or whose vehicles were, stopped at such unconstitutional checkpoints.

Plaintiffs present a constitutional challenge to the NSZ checkpoint program and policy as well as to the practice of using checkpoint roadblocks for general crime control purposes in the absence of individualized suspicion. See generally, Plaintiffs' Verified Complaint.

[1] The Trinidad checkpoint was suspended after a night in which eight people were shot at six other locations throughout the District, See, Allison Klein and Clarence Williams, "Trinidad Driver Checks Halted, 8 People Shot Across District," *Washington Post*, June 13, 2008.

II. Background on the Neighborhood Safety Zones Program and the MPD's Use of Suspicionless Roadway Seizure Checkpoints for General Crime Control Purposes

A. The Primary Programmatic Purpose of the Challenged Roadway Seizure Checkpoint Program is General Crime Control

The programmatic purpose of the "Neighborhood Safety Zone" checkpoint program is general crime control, as is conclusively established by the Special Order authorizing the program, the MPD training plan for the checkpoint program, the MPD brochure for citizens entitled "Neighborhood Safety Zones: For Your Safety," as well as Mayor Fenty and Chief Lanier's June 4, 2008 news release announcing the checkpoint system. See Edmond, 531 U.S. at 41 (relying on initiating Order of the Chief of Police and other descriptive police documents to establish programmatic purpose).

The programmatic purpose is admitted and asserted by the MPD itself to be general crime control. The opening sentence of the Special Order authorizing the NSZs identifies the purpose to be crime control. "The establishment of Neighborhood Safety Zones is **an effective law enforcement tool for addressing violent crime**. Vehicles are common instrumentalities of crime, particularly armed violent crime. . . ." Ex. 1, Special Order at 1 (emphasis added); Ex. 2, Lesson Plan at 3 (same).

The general crime control purpose is restated in all MPD documents describing the programmatic purpose of the checkpoint program. The MPD Special Order defines Neighborhood Safety Zones to be "delineated geographic areas designated by the Chief of Police in response to documented crimes of violence **the purpose of which is to** provide high police visibility, **prevent and deter crime**, safeguard officers and community members, and create safer District of Columbia neighborhoods." Ex. 1, Special Order at 1 (emphasis added); Ex. 2, Lesson Plan at 3 (checkpoints to "**prevent and deter crime**") (emphasis added); Id. at 4

(checkpoints to "**prevent and deter crime**") (emphasis added); Id. at 3 ("officers must ensure they follow the [Special Order] to keep these zones available for use as a **tool to prevent and deter crime**") (emphasis added); Id. at 7 ("An NSZ location shall be selected **for the purpose of addressing a neighborhood violent crime problem**.") (emphasis added); Ex. 3, MPD brochure for citizens ("the purpose of which is to provide high police visibility, **prevent and deter crime, and create safer District of Columbia neighborhoods**") (emphasis added); Ex. 4, Fenty and Lanier news release (a "**targeted initiative[] aimed at reducing criminal activity** and increasing quality of life in at-risk communities.") (emphasis added); Id. ("The program will authorize Metropolitan Police Department to set up public safety checks to help safeguard community members and create safer neighborhoods in the District by increasing police presence **aimed at deterring crime**.") (emphasis added); Id. (According to Police Chief Cathy Lanier, "The Neighborhood Safety Zones is just **another tool MPD will employ to stop crime before it happens**. . . .") (emphasis added).

"An NSZ **may be established solely in response to documented crimes of violence** occurring in a designated location." Ex. 1, Special Order at 2, 3 (emphasis added); Ex. 2, Lesson Plan at 5 (same); Ex. 4, Fenty and Lanier news release (same); Ex. 2, Lesson Plan at 7 ("Evidence of **crime problem** is a necessity") (emphasis added). The nature of severity of the triggering "crime problem" is broad and unrestricted. See Ex. 1, Special Order at 2 (defining the underlying program as "e.g., recently reported criminal incident(s) including homicides, shootings, robberies, and other offenses as approved by the Chief of Police.").

A related stated purpose of the checkpoints is to exclude from entry any vehicle except those where the motor vehicle operator presents and is able to prove to an officer's satisfaction "a legitimate reason" for entry into the neighborhood. Ex. 1, Special Order at 2 (defining

"Neighborhood Safety Zone Checkpoint" to be "A location at the perimeter of the NSZ where vehicles are stopped **for the purpose of determining whether the operator has a legitimate reason for entering the NSZ.**") (emphasis added); Ex 2, Lesson Plan at 4 (same); Ex. 1, Special Order at 4 (police to allow vehicle to enter only if police believe "the operator of the stopped vehicle has a legitimate reason for entering the NSZ") (emphasis in original).

The list of acceptable "legitimate reasons" is not coextensive with the scope of all lawful purposes. The six "legitimate" reasons are: "a. The person resides in the NSZ; b. The person is employed in the NSZ or is on a commercial delivery; c. The person attends school or a day-care facility, or is taking a child to, or picking up a child from, a school or day-care facility in the NSZ; d. The person is a relative of a person who resides in the NSZ; e. The person is seeking medical attention, is elderly, or is disabled; and/or f. The person is attempting to attend a verified organized civil, community or religious event within the NSZ." Ex. 1, Special Order at 4. Any reasons outside of these six, including "to visit a friend" or 'to go grocery shopping" or any other within a range of ordinary lawful activities is strictly prohibited except where there exists "exigent circumstances" and "[a]n official the rank of Sergeant or above assigned to the NSZ approved the entry." Id.

Stated intentions are not accepted at face value but officers are to "[r]equire proof of the reason for entry." Id. at 5.

To this end the police engage in an extraordinary additional element: the invasive questioning of persons about their associations, destinations and other privileged information.

B. The Neighborhood Safety Zone Checkpoint Program

The MPD "Neighborhood Safety Zone" program goes even farther than the prior use of roadway checkpoints. The NSZ program establishes exclusion zones ("Neighborhood Safety

Zones") around or within D.C. neighborhoods and establishes an armed presence at checkpoints at perimeter entrances into the neighborhood. See Ex. 1, Special Order at 2 (checkpoints located "at the perimeter of" the neighborhood zone).

There are no programmatic limitations on the size of the exclusion zones, they are limited only by the resources of the police and their ability to cordon off neighborhoods. See Ex. 2, Lesson Plan at 4 ("Number of checkpoints will be determined by resources, size of zone, etc."). The MPD has sufficient resources to cordon off massive neighborhood areas of the District, as reflected by the MPD's cordoning of large swaths of the District in the context of International Monetary Fund / World Bank meetings and protests.

Upon approach into an NSZ neighborhood, all vehicles will be stopped. By closing other entry options, utilizing one way streets, and by redirecting traffic from other roadways to the checkpoint, the police funnel traffic to the checkpoint including vehicles the drivers of which hold no intention to enter the "safety zone." This creates a vortex or drain-like effect whereby vehicles moving outside of the zone are swept into the checkpoint. See, Allison Klein, Elissa Silverman, "Police Close Streets to Steer Drivers to Checkpoint," *Washington Post*, June 10, 2008.

Persons who wish to drive into the zone must, as a condition of potential passage, disclose their identity and provide their driver's license information, as well as car registration (which reveals their friends or family members were they to have borrowed the vehicle), for entry into MPD data records. The police also record vehicle tag information. In addition, as a condition of potential passage, persons must provide the government an explanation as to their purpose and destination, provide telephone, contact and any other information related to their friends, family, or associates deemed necessary to "verify" the "legitimacy" of their purpose for

entering the neighborhood. See Ex. 1, Special Order at 4 (A checkpoint officer is to "Inquire whether the operator of the stopped vehicle has a legitimate reason for entering.") (emphasis in original); Id. at 5 (The checkpoint officer is to "Request operator identification when attempting to determine the legitimacy of the reason for entering.").

The absence of a police approved "legitimate reason" for entry into the neighborhood is considered a sufficient nexus to "criminal incidents including homicides, shootings, robberies, and other [unspecified general criminal] offenses" that exclusion of the vehicle is asserted by police to be justified. See Ex. 2, Lesson Plan at 5; see also Ex. 1, Special Order at 2.

The officer is not to accept the stated reason at face value, but is to "[r]equire proof of the reason." See Ex. 1, Special Order at 5.

The officer is to then question the individual further in order to elicit "information sufficient for the [officer] to verify the accuracy of the reason." See Id. at 5.

As part of the stop and verification process, the officer may contact by phone or visit the address of any person or organization related to the NSZ visit to "verify" the stated intention. See, Id. ("the operator must provide information sufficient for the member to verify the accuracy of the reason. This may include, but is not limited to, a telephone number of the address to which the person seeks entry (which the member may use to verify that the resident/occupant expects the *person(s)*) and/or an invitation to a verified organized civil, community, or religious event located within the NSZ.") (emphasis added). The reference here to "persons" in the plural reflects that the scope of the verification process extends beyond even the motor vehicle operator to include the friends, family or associates and purposes of passengers.

In other words, the stop and "verification" process is so extensive and intrusive that it ordinarily may go beyond the scope of simple and swift questions to the driver and encompass an

unannounced visit or telephone call by the police to friends, family or associates of the driver and of the passengers.

For those vehicles that are denied entry, the police are required to place into MPD records on a PD 76 the identity of the operator, the vehicle description, vehicle tag number and the reason for the denial.

For vehicles that are allowed entry or where the operator elects to leave the checkpoint without providing information, the police are required to record on a PD 76 the vehicle tag number and, where applicable, the reason for entry. Id. at 6. These referenced items of information are just what is minimally required.

Each PD Form 76, the Stop or Contact Report, contains standard fields for recordation of the name, home address, phone number, gender, race, date of birth, height and weight, eye color, hair color, complexion, driver's license number and other identifying characteristics. It also has a place to record whether the individual was a passenger in a vehicle. See Id. at 11.

C. MPD Has a Long-Standing Practice of Roadway Checkpoints for Purposes of Crime Control, Including Most Recently As a Component of the Neighborhood Safety Zone Program

The District of Columbia Metropolitan Police Department has an established practice of using roadway checkpoints for the purposes of general crime prevention. Defendant's practice has been repeatedly rejected by the Courts as unconstitutional. See, e.g., United States v. Hudson, Criminal Action No. 07-00082 (ESH), June 5, 2007 Memorandum Opinion at 11 (excluding evidence seized at unconstitutional checkpoint executed by an MPD "Street Crime / Power Shift Unit," observing that "evidence points to crime control as the roadblock's primary purpose and finding no evidence that checkpoint effectively advanced its claimed purpose of stopping speeding); Galberth v. United States, 590 A.2d 990 (D.C. 1991) (declaring

unconstitutional a Montello Avenue checkpoint which was placed in the Trinidad neighborhood for the purpose of deterring violent crime, including violent crime and drug traffic, on the basis that this was an unconstitutional purpose on which to make suspicionless seizures).

According to police statements to the *Washington Post*, since the year 2002 the MPD has also used such checkpoints for intelligence gathering and data collection of information related to law-abiding citizens. Allan Lengel, *The Washington Post*, "Safety Stops Draw Doubts: D.C. Police Gather Nonviolator's Data," May 2, 2005 at B1. The information collected on those seized is "fed into the database, which is linked to a computer that includes arrest records and mug shots of criminals." Id.; See also Ex. 5, Yellow House Associates, LLC Project Summary, available at www.yellowhouseassociates.net (MPD's Columbo Intelligence data system combines over twenty databases and enables free text or "Google-like" searching of information).

III. ANALYSIS

A. The NSZ Roadway Checkpoints Effect Fourth Amendment Seizures

It is well established that a Fourth Amendment seizure occurs when a vehicle is stopped at a checkpoint. Michigan State v. Sitz, 496 U.S. 444, 450 (1990) ("[A] Fourth Amendment 'seizure' occurs when a vehicle is stopped at a checkpoint."); City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000) ("It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment."); United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976) ("checkpoint stops are 'seizures' within the meaning of the Fourth Amendment"); United States v. Bowman, 496 F.3d 685 (D.C. Cir. 2007) (applying Fourth Amendment seizure analysis to MPD license-and-registration roadway checkpoint); United States v. Davis, 270 F.3d 977, 979 (D.C. Cir. 2001) (Fourth Amendment seizure effected

by MPD checkpoint that stopped vehicle as part of "Summer Mobile Force" anti-crime initiative); United States v. Montgomery, 561 F.2d 875, 878 (D.C. Cir. 1977) ("The stop of a moving vehicle - - even if the period of detention is brief - - involves a 'seizure' within the meaning of the fourth amendment."); United States v. Hudson, 07-CR-00082 (ESH), June 5, 2007 Memorandum Opinion at 7 ("It is well settled that stopping a vehicle at a roadblock constitutes a Fourth Amendment 'seizure.'), citing Edmond 496 U.S. at 450.

"The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975), citing Davis v. Mississippi, 394 U.S. 721 (1969) & Terry v. Ohio, 391 U.S. 1, 16 – 19 (1968). A checkpoint stop does intrude, even if only in a limited way, on motorists' right to 'free passage without interruption' and arguably on their right to personal security." " United States v. Martinez-Fuerte, 428 U.S. 543, 557 - 558 (1976), citing, Carroll v. United States, 267 U.S. 132, 154 (1925).

The *sine qua non* of a roadway seizure is the stopping of a vehicle.

It is immaterial for the purpose of determining whether a seizure has occurred whether, after the vehicle stop, the detention may be brief[2] or the motorist may not be arrested and may be free to travel elsewhere as he or she pleases. While such circumstances may be relevant to a determination of whether such seizure was "reasonable," they cannot be used to change the fact that checkpoint stops constitute "seizures."

[2] The intrusiveness of a stop or roadway seizure is reached in the constitutional analysis only if the stop is for a permissible purpose, in this case, for a purpose other than general crime control. A vehicle stop or roadway seizure is unconstitutional - - no matter how brief or unintrusive - - if the stop is made as a component of a law enforcement program the primary purpose of which is general crime control.

MPD materials establish that at NSZ checkpoints, all vehicles "are stopped" by police. Ex. 1, Special Order at 1 ("A location at the perimiter of the NSZ where **vehicles are stopped** . . .") (emphasis added).

Motorists are warned that the failure to stop or to provide identification subjects that motorist to potential arrest:

> "**NOTICE This area has been declared a NEIGHBORHOOD SAFETY ZONE BY ORDER OF THE CHIEF OF POLICE. VEHICLES ENTERING THIS AREA ARE SUBJECT TO STOP. OPERATORS MUST PROVIDE IDENTIFICATION. . . .**Failure to comply with such a request may result in arrest for 'Failure to Obey' per Title 18 DCMR §2000.2."

Ex. 6, Official Neighborhood Safety Zone poster (emphasis in original).

The MPD Special Order authorizing the checkpoints requires, as is required for all seizures that do not result in arrest, that a PD Form 76 (Stop or Contact Report) be completed for each seizure. See Ex. 1, Special Order at 6.

B. Roadway Checkpoints - - Including the NSZ Checkpoints - - Are Unconstitutional Where the Primary Purpose of the Checkpoint Program is General Crime Control

As discussed above, the primary purpose of the NSZ Checkpoint Program is crime control.

The U.S. Supreme Court addressed the issue of programmatic purpose squarely in the seminal case of City of Indianapolis v. Edmond, 531 U.S. 32, 41 (2000) (emphasis added). "We have *never* approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing."

The D.C. Circuit has applied the Edmond case and insodoing has articulated the applicable legal standards to be the same as stated above.

> "The Supreme Court has derived a principle from the Fourth Amendment: a search or seizure of a person must be based on individualized suspicion of

> wrongdoing. E.g., Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); Delaware v. Prouse, 440 U.S. 648, 654 – 55, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); but see Brown v. Texas, 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). As exceptions to this principle, the Court has upheld the constitutionality of vehicle checkpoints near the border to intercept illegal aliens (United States v. Martinez-Fuerte, 428 U.S. 543, 556, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)), and roadblocks aimed at apprehending drunk drivers (Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 450, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990)). The Court has indicated that roadside truck weigh-stations and roadblocks to check drivers' licenses and vehicle registrations would also qualify as exceptions to the general principle. Delaware v. Prouse, 440 U.S. at 663 & n. 26, 99 S.Ct. 1391; Edmond, 531 U.S. at 39, 121 S.Ct. 447. *Concerned that its exceptions would swallow the principle of individualized suspicion, 531 U.S. at 46-47, 121 S.Ct. 447, the Court in Edmond laid down a line: 'When law enforcement authorities pursue primarily general crime control purposes at checkpoints . . . stops can only be justified by some quantum of individualized suspicion.' Id. At 47, 121 S.Ct. 447. Even if the police check licenses at the roadblock, their stopping of vehicles would violate the Fourth Amendment when the 'primary purpose of the checkpoint program' is the discovery and interdiction of illegal narcotics.' Id. At 46, 34, 121 S.Ct. 447. . . . Throughout the text the Court states again and again that when the 'primary purpose' of a roadblock is general crime control it is unconstitutional. Id. At 38, 41, 42, 44, 46, 47, 48, 121 S.Ct.447."*

United States v. Davis, 270 F.3d 977, 979 (D.C. Cir. 2001) (emphasis added).

The Supreme Court warned against roadblock seizures for general crime control as being deleterious to American life and constitutional protections.

> "If we were to rest the case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose. Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life."

City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000).

Stopping a vehicle at a checkpoint constitutes a seizure, no matter how brief the stop may be. See Id. at 40.

The exceptions to the requirement of individual and particularized suspicion are strictly limited to "special circumstances," and for purposes of roadway checkpoints include being at or near international border crossings in light of the unique and imperative need to preserve the

integrity of national borders, or strictly limited roadway stops that preserve the immediate safety of roadway use, for example, through a sobriety checkpoint or a license/registration/inspection verification checkpoint. See Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (sobriety checkpoint where all vehicles are stopped for a few seconds for signs of intoxication); See also Delaware v. Prouse, 440 U.S. 648, 663 (1979) (suggesting it is constitutional to establish vehicular checkpoints for purposes of roadway safety to confirm operator licensure, vehicular registration and inspection); See also United States v. Bowman, 496 F.3d 685 (D.C. Cir. 2007) (even a license-and-registration checkpoint may be unconstitutional if operated for primary purpose of general crime control); United States v. Davis, 270 F.3d 977 (D.C. Cir. 2000) (same); cf. United States v. McFayden, 865 F.2d 1306 (D.C. Cir. 1989) (pre-Edmond case authorizing license and registration checkpoint).

The Supreme Court has been clear on the matter of checkpoint seizures. These limited and exceptional "special circumstances" do not and cannot encompass general crime control or else the exceptions would swallow the rule and render the Fourth Amendment an empty measure. See Id. at 37 (2000) (prohibiting suspicionless seizures at roadway checkpoints the primary purpose of which is "to serve the general interest in crime control"); Chandler v. Miller, 520 U.S. 305, 314 (1997) (defining "special needs" to be "concerns other than crime detection"); Skinner v. Railway Labor Executives Association, 489 U.S. 602, 619 (1989) (exceptions warranted based on "special needs, beyond the normal need for law enforcement").

When presented with a challenge to the constitutionality of a checkpoint, the Court is to first determine the primary purpose of the checkpoint program and determine whether it is permissible. If there is a permissible primary purpose, then the Court is to proceed with two further inquiries. The second inquiry is whether the checkpoint system is an effective means of

furthering the identified constitutionally legitimate purpose. Third, the Court must evaluate whether the checkpoint is "minimally intrusive." U.S. v. Bowman, 496 F.3d 685, 692 (D.C. Cir. 2007) (citing United States v. McFayden, 865 F.2d 1306, 1311-12 (D.C. Cir. 1989) (citing in turn Delaware v. Prouse, 440 U.S. 648, 659, 662 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 558-59 (1976); Brown v. Texas, 443 U.S. 47, 51 (1979)).

For the NSZ checkpoints and, more generally, for roadway checkpoints the primary purpose of which is determined to be general crime control, the analysis is complete with the first factor. Such checkpoints are the very type of checkpoints that are unconstitutional, as their primary purpose of suspicionless seizures for the purpose of general crime control is impermissible.

C. The NSZ Checkpoint Program Is Distinguishable From the Sobriety Checkpoint Program Allowed Under Sitz

The NSZ checkpoints are not similar or comparable to the sobriety checkpoint deemed permissible by the U.S. Supreme Court Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990), which had as its primary purpose the immediate protection of roadway safety. Edmond, 531 U.S. at 39.

The Sitz sobriety checkpoint was deemed constitutional because the checkpoint was "designed to eliminate" the type of "*immediate, vehicle-bound* threat to life and limb" posed by drunk driving. Edmond, 531 U.S. at 43 (emphasis added); Id. at 39 (Sitz sobriety checks were "clearly aimed at reducing the *immediate hazard* posed by the presence of drunk drivers on the highways and there was an obvious connection between the imperative of highway safety and the law enforcement practice at issue.") (emphasis added).

There is a constitutionally significant distinction that is drawn by the Supreme Court between checkpoints designed to eliminate an "immediate, vehicle-bound threat to life and limb"

from roadway checkpoints that focus on reducing a specific crime threat that is perceived to be facilitated by vehicle operation.

In Sitz, checkpoint stops averaged twenty-five seconds and the police did not check identity papers (which can be used for general crime control purposes to run data through general crime or law enforcement databases), and specifically did not review the driver's license and car registration unless the officer detected signs of intoxication and directed the vehicle for further testing. Sitz, 496 U.S., at 447.

This is in sharp contrast to the questioning and verification process in the instant roadblock, where police require disclosure of the acquaintances, friends or family that the vehicle operator wishes to visit as well as proof or verification which may be satisfied by having the police place a call or contact that person.

Unlike the NSZ checkpoint program, both the programmatic purpose of the actual functioning of the Sitz sobriety checkpoints are narrowly tailored to the immediate protection of roadway safety and specifically to the detection and removal of vehicles being driven by persons under the influence of alcohol.

D. The NSZ Suspicionless Checkpoints Cannot Be Justified as a Deterrent to Crime

One basis publicly advanced by the MPD for the NSZ checkpoints is the contention that it is necessary to utilize suspicionless roadway checkpoints in response to a documented and specific law enforcement need evidenced by crime statistics. The NSZ checkpoints are justified by police - - as they were also in Edmond - - as an urgent response to specific "recently reported criminal incident(s) including homicides, shootings, robberies, and other offenses as approved by the Chief of Police." Ex. 2, Lesson Plan at 5.

This is plainly a justification based on the need to deter crime. This is exactly where the constitutional requirements of reasonable suspicion are at their apex. If police could use the existence of crime to justify suspension of constitutional protections, there would be no Constitution left to speak of.

In Edmond, the government argued that the primary purpose of the checkpoints was to interdict and deter the specific threat of vehicles being used to facilitate violent crime, specifically drug trafficking. Edmond, 531 U.S. at 41. The government submitted a police affidavit attesting that the location of the checkpoints was determined in advance based on evidence of prior criminal activity and crime statistics and traffic data, Id. at 35, which indicated a specific and compelling need to combat drug trafficking in that location.

Still, the Supreme Court rejected the reasoning that presentation of a specific area's need somehow moved the purpose of the program outside of the parameters of general crime control. The fact that there was a strong and compelling interest in prevention of such violent crime within the area did not alter the constitutional requirement of individualized suspicion. Id. at 42 (acknowledging the "severe and intractable nature of the drug problem"); Id. ("There is no doubt that traffic in illegal narcotics creates social harms of the first magnitude."), citing, Treasury Employees v. Von Raab, 489 U.S. 656, 668 (1989); See also Von Raab, 489 U.S. at 660 (1989) (identifying that drug trafficking "may be effected by violence or its threat.").

A specific area's problems with violent street crime within the District are no less urgent of an interest. Such specific needs do not here provide a basis to dispense with the constitutional requirement of individualized suspicion any more than they did in Edmond.[3]

[3] Nor, as discussed below, is the District's roadblock program even an effective response to the very real problems that District residents face. However, as below, the effectiveness of the program need not be assessed where the programmatic nature renders the checkpoint system unconstitutional.

That a stated goal of the program is deterrence or interdiction of vehicles to be used as implements of a crime, as distinct from a stated goal of arrest, does not remove the purpose of the checkpoints from the scope of "general crime control."

The Eleventh Circuit soundly rejected the strategy of such a justification for suspicionless searches and seizures of attendees at a protest which, each year, resulted in violation of federal law when protestors marched and trespassed upon a military base as a recurring act of unlawful civil disobedience.

> "It is quite possible that both protestors and passersby would be safer if the City were permitted to engage in mass, warrantless, suspicionless searches. Indeed, it is quite possible that our nation would be safer if police were permitted to stop and search anyone they wanted, at any time, for no reason at all. Cf. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (requiring that police demonstrate individualized suspicion that a suspect is armed before frisking him). Nevertheless, the Fourth Amendment embodies a value judgment by the Framers that prevents us from gradually trading ever-increasing amounts of freedom and privacy for additional security. It establishes searches based on evidence — rather than potentially effective, broad, prophylactic dragnets — as the constitutional norm."

Bourgeois v. Peters, 387 F.3d 1303, 1311 - 1312 (11th Cir. 2004).

Likewise, in Edmond, the Supreme Court - - while acknowledging the importance of the interdiction or detection of criminal conduct - - refused to allow that to justify the constitutional violations inherent in that checkpoint system. Edmond, 531 U.S. at 43 (Acknowledging that "The detection and punishment of almost any criminal offense serves broadly the safety of the community, and our streets would no doubt be safer but for the scourge of illegal drugs" and declaring the suspicionless checkpoints to be unconstitutional).

E. The NSZ Suspicionless Seizure Checkpoints Cannot Be Justified on the Claim That Motor Vehicles Are Facilitative of Violent Crime

The District has also publicly argued that the NSZ checkpoints are justified because motor vehicle operation is facilitative of violent crime. The Supreme Court entertained and

rejected a similar government argument in Edmond, that the Edmond checkpoints were justified by the fact that vehicles are facilitative of drug trafficking and are potential instruments of violent crime because they are used to conceal and transport contraband.

In rejecting this argument, the Court explained that "The problem with this argument is that the same logic prevails any time a vehicle is employed to conceal contraband or other evidence of crime. This type of connection to the roadway is very different from the close connection to roadway safety that was present in Sitz and Prouse." Edmond, 531 U.S. at 43. The argument that vehicles are facilitative of violent crime is no different than the interest in general crime control, a purpose for which individualized suspicion is constitutionally required. To provide otherwise would undermine the Fourth Amendment.

F. The NSZ Suspicionless Seizure Checkpoints Cannot Be Justified as License-and-Registration Checkpoints

Applying the immediate roadway safety framework of Sitz, the D.C. Circuit has upheld license-and-registration checkpoints, roadblocks in which all vehicles are stopped to confirm operator licensure and vehicle registration and inspection. See also Delaware v. Prouse, 440 U.S. 648, 661 (1979) (suggesting that roadway checkpoints would be constitutional if established for the purposes of ensuring immediate roadway safety by confirming operator licensure, vehicle registration and inspection); United States v. McFayden, 865 F.2d 1306 (D.C. Cir. 1989) (pre-Edmond case permitting registration-and-licensure checkpoint).

The NSZ checkpoints are not justified as licensure-and-registration checkpoints. Nor do they function as licensure-and-registration checkpoints for purposes of securing immediate roadway safety.

The request of identification at the NSZ checkpoint is asserted to be ancillary to, and for informing, the determination of the legitimacy of the reason provided for entry. See Ex. 1,

Special Order at 5 ("Request operator identification when attempting to determine the legitimacy of the reason for entering an NSZ."); Ex. 2, Lesson Plan at 9 (same).

MPD policy materials indicate that drivers may elect to depart the checkpoint without providing such information to police, with the consequence being that the drivers cannot enter the zone by vehicle. Id. at 12 (allowing operator to "elect[] to leave the checkpoint without providing information"); Ex. 3, citizens' brochure ("Vehicle operators entering an NSZ will need to provide personal identification (i.e., driver's license) and information sufficient for determining the accuracy of the reason for entering the area."). The significance of this allowance, under policy, to elect to not provide such information reinforces that the programmatic purpose of the NSZ checkpoints is not to implement licensure-and-registration checkpoints for the purposes of roadway safety.

Even were such present, a requirement that all drivers produce license and registration at the checkpoint cannot "save" or legitimize a checkpoint the primary purpose of which is to control crime. See gen'ly Edmond, 531 U.S. 32 (declaring checkpoint unconstitutional where primary purpose was crime control, even though police required production of license and registration); See also Meeks v. State, 692 S.W.2d 504, 508 (Tex.Crim.App. 1985) ("The mere asking for a driver's license will not validate the stopping of an automobile if it is clear that the driver's license check was not the reason for detention."), cited in Galberth v. U.S., 590 A.2d 990, 998 (D.C. 1991) (declaring Trinidad neighborhood checkpoint unconstitutional where primary purpose was general deterrence of drug transactions).

In the pre-Edmond case of United States v. McFayden, 865 F.2d 1306 (D.C. Cir. 1989), the D.C. Circuit upheld the constitutionality of a license-and-registration roadblock. "If a driver's license and registration were in order, the car would be permitted to continue within a matter of

seconds." Only if the documents were not in order would a computer check be run on the individual. McFayden, 865 F.2d, at 1308. Although the roadblock at issue was put in place as an element of an anti-narcotics initiative, Operation Cleansweep, the U.S. District Court found that the facts as related above established that the roadblock was operated for the purpose of traffic enforcement. The McFayden Court stressed, citing the Supreme Court case of Delaware v. Prouse, that the constitutionality of the checkpoint turned in part on the fact that "they must detain drivers no longer than is reasonably necessary to accomplish the purpose of checking a license and registration, unless other facts come to light creating a reasonable suspicion of criminal activity." McFayden. 865 F.2d at 1312, citing Prouse, 440 U.S. at 662.

The D.C. Circuit has since expressly held that the reasoning and analysis of McFayden has been refined or modified by the superceding Edmond case which established the necessary inquiry into programmatic purpose underlying the roadblock. See United States v. Davis, 270 F.3d 977, 981 (D.C. Cir. 2000).

The D.C. Circuit has entertained two post-Edmond cases related to such roadblocks, United States v. Davis, 270 F.3d 977 (D.C. Cir. 2000) and United States v. Bowman, 496 F.3d 685 (D.C. Cir. 2007).

In both Davis and Bowman, the MPD operated checkpoints at which they demanded license and registration from all vehicles. In both cases the checkpoints were a part of a larger crime prevention program. In each of these cases the D.C. Circuit held that even if the checkpoints functioned to uniformly require production of license and registration from all

vehicles, such suspicionless routine roadway seizures would be unconstitutional were they implemented for the primary purpose of general crime control.[4]

G. The Fatal Flaw in the NSZ Program is That it Imposes Suspicionless Roadway Seizures for the Purpose of Crime Control; The Pre-Edmond Second Circuit Case of Maxwell v. City of New York Is Inapplicable

All analyses lead back to the same simple and fatal obstacle to the District's NSZ plan: the NSZ roadway seizure checkpoints are for crime control, which is precisely where the need for individually particularized suspicion or cause is unavoidable.

Given the District's previous failures in establishing constitutionally sound roadblocks, it is unclear how the District can assert that the NSZ roadblock and neighborhood exclusion system - - which goes even farther afield than prior efforts by surrounding targeted neighborhoods and by subjecting drivers and residents to routine invasive interrogation about activities and associations - - can be constitutional.

The District of Columbia and its Office of the Attorney General has, however, articulated the "basis" on which it seeks to circumvent the plain terms and clear holding of the Edmond case which was decided in 2000.

Mayor Adrian Fenty and Chief of Police Cathy Lanier have published a brochure titled "Neighborhood Safety Zones," that poses the question, "Are such zones Constitutional?" and answer the question as follows: "Yes. The U.S. Courts have found that such zones are Constitutional when limited in scope, and when conducted for a legitimate law enforcement

[4] In Davis, the D.C. Circuit observed that the challenged checkpoint was part of the MPD's Summer Mobile Force initiative, the stated objective of which was "to restore the public's confidence in the Metropolitan Police Department through the reduction and prevention of crime and violence by utilizing short-term, pro-active, high visibility enforcement techniques." Davis, 270 F.3d at 981. In Bowman, the checkpoint was part of a larger program. The testifying officer was a part of the "Seventh District High Impact Tactical Team," which had the acknowledged responsibility or purpose of "combating crime in the Seventh District [,] . . . [p]rimarily the retrieval of narcotic[s] and guns from the streets." Bowman, 496 F.3d 685, 693-94 (D.C. Cir. 2007).

purpose."[5] This remarkably legally deficient and inaccurate explanation provided to the residents of the District, and approved by the Mayor's Attorney General, Peter Nickles, is then immediately followed by a quote from the pre-Edmond case of Maxwell v. City of New York, 102 F.3d 664 (2d Cir. 1996). The NSZ checkpoint program shares many overlapping characteristics with the checkpoint zone set up in Maxwell. However, the Maxwell checkpoint could not stand under Edmond. Its asserted purpose was for generalized crime control, that of deterring drive-by shootings that were perceived to be connected with the drug trade. The Second Circuit evaluated the constitutionality of the Maxwell checkpoint using a scheme squarely rejected by the Supreme Court's holding in Edmond four years later. As such the Maxwell opinion was rendered to a truncated and relatively short life-span.

The Maxwell case is not controlling. It was issued by a Court outside of this jurisdiction that is subordinate to the U.S. Supreme Court and its ruling in Edmond, was issued prior to Edmond, and is in direct contravention to the Edmond holding. The fact that the District feels unencumbered by controlling Supreme Court case law evidences that it has established its sweeping checkpoint program using a model in complete disregard for its obligations under the Fourth Amendment to the Constitution.

The District's utter failure to meet, and apparent contempt for, the well-established guidelines for constitutional checkpoints, renders any evaluation of the second and third prong of the analysis unnecessary. As the checkpoints were established for general crime control purposes, and as such violate the Fourth Amendment, there is no additional inquiry to be had. Even were there to be, the District would fail.

With respect to the second factor, effectiveness to achieve a permissible purpose, *there is no permissible purpose present*. Further, the District will be unable to establish that the NSZ

[5] This is the same language that is used in the MPD SO – 08 – 06, June 4, 2008.

checkpoints are effective at lowering crime in the District of Columbia overall (as opposed to squeezing shootings out of one area and into another) or, within the confines of the targeted zone, [6] more effective than an enhanced police presence which deters crime without imposing unconstitutional suspicionless seizures and roadblocks.

The population of the District requires a solution and response to the very real problems arising from street crime and violence. People want their children to be able to walk the streets in their neighborhoods in a safe and secure environment. The District's roadblock system was deployed, in part, to give the appearance that the government is addressing this deep felt need. But it is neither effective, nor constitutional.

No doubt crime is temporarily and locally depressed when the police direct massive resources from the remainder of the District or a particular police district into a highly targeted neighborhood, but it is impossible to establish that the suspicionless seizure, questioning and data collection system is responsible as distinguished from the massive police presence.

A unanimous panel of the D.C. Court of Appeals wrote with respect to such unconstitutional checkpoints, as used (ultimately to arrest over 50,000 persons) in the anti-violence and anti-drug initiative Operation Cleansweep:

> "The purported deterrence rationale for the Galberth roadblock [located at Montello Avenue and Queen Street, N.E. in Trinidad]. . . was addressed to problems of general law enforcement, namely deterring drug traffic and violence and preventing 'violence, drugs and guns,' not to problems predictably associated with persons who are stopped at the roadblock. Such a justification is antithetical

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[6] During the existence, and after the close, of its recent Trinidad neighborhood roadblock, the District proclaimed success because it stated that there had been no shootings or violent crime reported in the NSZ it established. Keith L. Alexander and V. Dion Haynes, *in Face of Protests, Police Call Area Checkpoints A Success*, Washington Post, June 8, 2008 at C06 (Assistant Police Chief Diane Groomes expressed her belief that the program had satisfied one of its main goals, stating "We did not hear gunfire."); Brian Westley, *DC Police Chief Defends Checkpoints Before Council*, The Associated Press Monday, June 16, 2008 (Police Chief Lanier testified that roadblock was a success, noting that there were no shootings while the checkpoints were in place).

The District's approach to the terrible series of mostly unrelated shootings the weekend of May 29 – June 2, 2008 was to announce the establishment of the NSZ program and its first checkpoint in Trinidad.

> to the Fourth Amendment. See Delaware v. Prouse, supra, 440 U.S. at 659 n. 18, 99 S.Ct. at 1399 n.18 ('the general interest in crime control' is insufficient to justify suspicionless stops).
>
> Moreover, there is no empirical evidence that the roadblock technique itself effectively promoted the government's interest in deterring drug crimes. Indeed, common sense (see Sitz, supra, 110 S.Ct. at 2487), as well as the police use of 'saturation' patrols, suggests that any disruption resulted from the highly visible police presence during the roadblock, and that any law enforcement technique involving a substantial police presence would have had a similar effect."

Galberth v. United States, 590 A.2d 990, 999 (D.C. 1991).

With respect to the third factor, the District's checkpoint and questioning system cannot even approach a burden of being "minimally intrusive." The District's unprecedented level of intrusiveness does not pass constitutional muster. Requiring law-abiding people to provide an explanation of where they are going to law enforcement to be followed with proof and "verification" of "legitimacy" including the demand for invitations, flyers, phone numbers, contacts, addresses and associates names is extraordinary. Requiring people to open up their address books, turn over names and phone numbers, and further for those associates to then be called by the police out of the blue is far from "minimally intrusive." Having the police then place an unannounced call or visit to friends or family or associates to "verify" the stated intentions to the satisfaction of the police goes far beyond any measure that could be considered "minimally intrusive." It is extraordinary to suggest that, for residents within a neighborhood zone who plan to have a relative visit by car, the "price" they must be willing to pay is the likelihood of a police visit or telephone call.

H. Police Questioning Mandating Disclosure of Attendance at Political or Other Constitutionally Protected Events Also Violates the First Amendment.

Persons who prefer or need (for physical, health or practical reasons including delivery of materials) to travel by car to engage in political First Amendment protected activity within an

area surrounded by the police, are required to identify to the police information that is soundly protected and constitutionally privileged.

The very manifestation of the program itself provokes neighborhood and political meetings within the NSZ in response and opposition to the checkpoint imposition. Persons driving to such meetings should be allowed to attend without having to have the fact of their intention and attendance recorded in police records, particularly where there may be a fear of police harassment stemming from such oppositional political activities.

The case law is clear. "Where, however, 'the primary purpose' of a roadblock is general crime control' or the 'interdiction of illegal narcotics' - - as in Edmond – 'it is unconstitutional.'" U.S. v. Bowman, 496 F.3d 685, 692 (D.C. Cir.).

"Concerned that its exceptions would swallow the principle of individualized suspicion, the Court in Edmond laid down a line: 'When law enforcement authorities pursue primarily general crime control purposes at checkpoints . . . stops can only be justified by some quantum of individualized suspicion.'" United States v. Davis, 270 F.3d 977, 979 (D.C. Cir. 2001). "Throughout the text the [Edmond] Court states again and again that when the 'primary purpose' of a roadblock is general crime control, it is unconstitutional." Id., citing, Edmond at 38, 41, 42, 44, 46, 47, 48.

The same principles apply here.

IV. All Data on Law Abiding Citizens Secured Through the Unconstitutional Roadway Seizures Should be Expunged

The intelligence data that has been collected on citizens through the unconstitutional NSZ checkpoint system is fruit of the poisonous tree, ill gotten data collection secured solely by a mass violation of civil rights. The collected data revealed personal associations, movements, and stated intentions for activity.

Each PD Form 76, the Stop or Contact Report, requires recordation of the name, home address, phone number, gender, race, date of birth, height and weight, eye color, hair color, complexion, driver's license number and other identifying characteristics. It also has a place to record whether the individual was a passenger in a vehicle. This information was all secured through civil rights violations and abuse of police authority and therefore should be disgorged, expunged and recovered/deleted from any data or record keeping systems into which it has been entered.

It is well established that courts possess within their equitable powers, as well as pursuant to the U.S. Constitution where appropriate to remedy constitutional violations, the authority to order expungement of records. U.S. v. Johnson, 714 F. Supp. 522, 523-24 (S.D.Fla. 1989) ("Expungement lies within the equitable discretion of the district court"), citing, United States v. Schnitzer, 567 F.2d 536, 539 (2d Cir. 1977) (same); Diamond v. United States, 649 F.2d 496 (7th Cir. 1981); Patton v. La Prade, 524 F.2d 862 (3rd Cir. 1975) (expungement of administrative law enforcement records maintained by the FBI); Sullivan v. Murphy, 487 F.2d 938, 963-64 ("The principle is well established that a court may order the expungement of records, including arrest records, when that remedy is necessary and appropriate in order to preserve basic legal rights" including "as an appropriate remedy in the wake of police action in violation of constitutional rights."); Sullivan v. Murphy, 380 F. Supp. 867, 868 (D.D.C. 1974) (in the context of mass false arrests, ordering defendants to convey to plaintiffs' counsel "all records, including recordings, reports, memoranda, index cards, notations and writings of any kind" related to false arrests).

V. Conclusion

The relief sought by the instant lawsuit is focused on eradication of the persistent circumstance of unlawful police misconduct that is manifest in suspicionless seizures and roadblocks that broadly subject law abiding citizens, residents and visitors to routine police intervention, to demands under threat of arrest for disclosures of a personal and protected nature, to data collection on movement and activity and association - - all conducted by police without *any* individualized suspicion or basis whatsoever. Whether police goals are agreeable or disagreeable, effective or ineffective, is not the issue presented by this motion. The tactics are plainly unconstitutional.

June 20, 2008

Respectfully submitted,

__/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 2008, copies of Plaintiff's Motion for A Preliminary Injunction and Memorandum in Support of Plaintiff's Motion for A Preliminary Injunction were e-filed and hand delivered along with copies of the Summons and Complaint in this case to the following:

Adrian M. Fenty, Mayor
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Peter Nickles, Interim D.C. Attorney General
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__/s/_____
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