SCHEDULED FOR ORAL ARGUMENT ON MAY 8, 2009

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7127

Caneisha Mills, et al.

Appellants

v.

District of Columbia

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
C.A. No. 08-1061

REPLY BRIEF FOR APPELLANTS

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CASES

*** Authorities upon which appellants chiefly rely are marked with asterisks.

I. SUMMARY OF ARGUMENT

With respect to standing, the District urges the wrong analysis. Standing is measured as of commencement of the suit. Lyons is distinguishable. Upon the proper analysis in light of the record, standing is established.

With respect to the Fourth Amendment, the District continues to misrepresent the holding of Lidster and misinterprets Edmond. It does not undermine plaintiffs' presentation that the interest in crime deterrence falls within "the general interest in crime control." The checkpoints have an impermissible purpose. No reasonability analysis is necessary, but were one undertaken, the District has failed to overcome plaintiffs' demonstration that the checkpoints are ineffectiveness and intrusive.

ARGUMENT

II. The District Fails to Apply the Proper Evaluation for Standing

This case presents a challenge to the D.C. Metropolitan Police Department's Special Order SO-08-06 "Neighborhood Safety Zone" (NSZ) program which implements an extraordinary program of seizure, interrogation and restraint of travel on public roads without probable cause or reasonable suspicion of those affected. The program has been deployed multiple times, the Chief of Police has stated it will be deployed again, and to date, the program and Special Order have never been rescinded.

In an effort to avoid a determination on the unconstitutionality of the program, the District seeks to employ a moving target campaign. It asserts that, since the program is deployed periodically and not on any scheduled calendar, equitable relief is barred. This argument misses the fact that challenge is to this official policy, which remains in full force, and also misstates the proper evaluation of standing.

A. Standing Is Evaluated as of Suit Commencement

The District argues that it is unknown "whether the NSZ will ever be implemented again, let alone soon enough that a preliminary injunction would be warranted." DC's Opp at 22. The District argues that there is no evidence from which the Court can, as measured by circumstances existing now and "in the near future," find "that conditions in the District will lead the Chief to establish an NSZ again." Id.

Today's circumstances, the District argues, are different from those at the commencement of the suit because "[w]ithout a threat of vehicle-borne crime[1] such as the threats that led [Chief of Police Cathy Lanier] to establish NSZs in June and July, 2008 [i.e., the commencement of the lawsuit], she would have no reason" to implement neighborhood checkpoints. Id.

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[1] Notwithstanding frequent references to drive by shootings, the NSZ Checkpoints are authorized in response to almost any general crime. See Pls' Br. at 4 – 5.

The District misplaces the relevant moment of time in which the analysis must be made. In Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (plurality opinion), the plurality of the Supreme Court found that "standing is to be determined *as of the commencement of the suit*." Id. at 571-72 n.5 (emphasis added).

Two pleadings commenced this suit. The Class Action Complaint was filed on June 20, 2008. The Supplemental Pleading was filed on August 14, 2008 at the request of the Court to accommodate events that had occurred since the initial complaint during ongoing and repeated implementations of checkpoint operations.

When focus is adjusted from the period of time that is today and into the near future to the period at the commencement of the suit, the District's argument defeats itself. The District itself is arguing and conceding that at the commencement of the suit the predicate for the finding of standing, or at least of ongoing implementation of the NSZs, was in existence.

The period of the commencement of the suit was dominated by the recurring checkpoint implementations and repeated statements of intent by policymakers that checkpoints would continue recurring as officials deemed appropriate.

The following is not in dispute:

- On June 4, 2008, MPD issued Special Order SO-08-06, "Neighborhood Safety Zones." R. 8, 41.

- On June 4, 2008, the Mayor and Police Chief announced that "[t]he NSZ will be launched next week in the Trinidad area." R. 12, 44-45; R. 135.[2]

- On June 7, 9, 10, 11 and 12, 2008, NSZ checkpoints were implemented in Trinidad. R. 143 – 149.

- Plaintiffs' counsel represented during lower court proceedings that plaintiffs refrained from filing suit until confirmation that checkpoints were ongoing, after a June 16, 2008 hearing where Chief Lanier and Attorney General Peter Nickles testified before the D.C. Council that checkpoints would continue to be deployed as they saw fit. Plaintiffs' Supplemental Filing Regarding Issues Raised at the July 9, 2008 Hearing, Record Doc. ("Doc.") 12. See also R. 5 – 6 (relating same in Complaint).

- On June 20, 2008 the Class Action Complaint was filed. R. 20.

- On July 9, 2008 at the motions hearing, the District asserted it "reserves the right to redeploy the safety zone" (R. 221:15-16) and conceded the program was authorized in anticipation of recurring circumstances justifying recurring use. R. 225:7 – 16.

- On July 18, 2008, the District represented to the Court that future checkpoint implementation was "conjecture." Doc. 11 at 1, 2.

- On July 19, 2008, the very next day, the District established an NSZ for a period of five days in Trinidad. R. 274.

- On July 19, 2008, "MPD Chief Cathy Lanier and other District of Columbia officials held a press conference . . . at which Chief Lanier stated that she would continue to utilize NSZ's 'until a judge orders me to stop.'" R. 50.

- On July 24, 2008 Chief Lanier attested that "the threat of continued and future violence in the [Trinidad] NSZ remains high" and justified ongoing

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[2] This Chief's media announcement preceded by two days the actual request for an NSZ in Trinidad as well as the determination that there was a basis for such. R. 137.

checkpoint implementations. R. 279.

- On July 24, 2008 Chief Lanier extended the NSZ in Trinidad for an additional five day period through July 29, 2008. R. at 276.

- On July 30, 3008, the Honorable Richard J. Leon recalled the parties. Judge Leon observed "we have had a number of events occur" (R. 299) since the filing of the complaint. He referenced both revisions to Special Order SO-08-06 (R. 299) and "the second and/or third iterations [of the Neighborhood Safety Zones]" (R. 311). The Court set an August 14, 2008 deadline for amending or supplementing the pleadings.

- On August 14, 2008, plaintiffs filed Plaintiffs' Supplemental Pleading. R. 13 – 39.

The District concedes and the record establishes that at the commencement of the suit NSZ checkpoint implementations were ongoing in Trinidad. By operation of SO-08-06, checkpoints are authorized potentially in any quadrant with general crime.

Plaintiff William Robinson resided in Trinidad. Plaintiff Linda Leaks had property-related interests in Trinidad. Plaintiff Caneisha Mills was a Howard University student, a hotel worker and a driver in D.C. who was stopped at a Trinidad checkpoint and prohibited from entry. Plaintiff Sarah Sloan was drawn to Trinidad for the purposes of community organizing and education on the subject of civil rights. There was one plaintiff from each of the four District quadrants. Each intended to continue driving throughout the District. Each asserted past and continuing and/or future adverse effects based on the ongoing iterations of the NSZs.

B. Lyons Distinguished

The District's references to City of Los Angeles v. Lyons, 461 U.S. 95 (1983) are unavailing. Lyons did not allege that the challenged chokehold was authorized by the City. Id. at 105. Nor could he show reason to believe he would again have another random encounter with police in which, acting against instructions, they would render him unconscious without provocation. Id. at 106. There was no persistence of the challenged conduct in Lyons, as there is to the municipality's NSZ program and Special Order. Unlike Lyons, which was random and unauthorized and non-systematic misconduct, the formal NSZ program consists of coordinated and systematic police action, including to "disrupt[] traffic access so that the traffic is funneled to the NSZ Entry Checkpoints." See Pls' Br. at 5; SO 7/18/08 rev'n (R.260); SO 7/24/08 rev'n (R.288); Doc. 4-2 at 8.

If persons intend or need to drive within a targeted neighborhood they have no choice but to encounter the checkpoints.

C. Plaintiffs Suffered Continuing Adverse Effects

The District, citing O'Shea v. Littleton, 414 U.S. 488 (1974), concedes that standing would be established by a demonstration of "continuing, adverse effects" upon a plaintiff. DC's Opp. at 22, citing, Id. at 495-96.

The District disregards the verified (R. 36) Supplemental Pleading, in which plaintiff Linda Leaks swore to continuing, adverse effects. R. 9 – 29, ¶¶54 – 61.

Ms. Leaks is a board member of a cooperative building in Trinidad. R. 27 – 28, ¶56 - 57. As a District resident and community activist, Ms. Leaks works to preserve affordable housing and bring local residents into home ownership. R. 27. Leaks attested to regularly driving into Trinidad in furtherance of her duties as a board member and her purposes in the preservation and expansion of affordable housing in Trinidad. She attested that she often required her vehicle to bring supplies for renovation and property rehabilitation, to give seminars on the responsibilities of home ownership and to remove items in order to clear out premises for renovation. R. 27 – 28, ¶57. She was not a Trinidad resident. Her activities did not fall within the scope of the six "legitimate" purposes for driving into Trinidad. R. 28, ¶58. Her liberty to move about the local roadways in Trinidad during checkpoint periods was actually, and likely to be, impaired with repeated Trinidad checkpoints. R. 28, ¶58. She asserted "an ongoing frustration of purpose" and "diversion/consumption of resources" in her work to bring new homeowners to purchase affordable housing in Trinidad. She must "expend more efforts, time and resources to overcome (where at all possible) a newly-manifest unwillingness to associate with or move into Trinidad caused by the checkpoints." R. 28 – 29, ¶60. She was expending more time and resources because of the stigma caused by the Trinidad checkpoints and potential homebuyers' expressed aversion and refusal to

moving into a neighborhood perceived to be in a state of police siege. R. 28 – 29, ¶¶60 – 61.

The District dismisses the injuries of community organizer Sarah Sloan as being self-inflicted and wrongly states that she "intends to seek out a checkpoint." DC's Opp at 23 n3. Sloan is a community activist who meets with people in neighborhoods where there are crises or matters of political or social import including those targeted by checkpoints. In her work supporting civil rights, she must drive into the area of NSZs including with boxes of literature and materials. R. 33. When bringing materials or going to the homes or apartments of residents to discuss checkpoints and other community issues including community-based responses to crime, she has no intention to disclose to police her intended activities or with whom she is meeting. Id. Her injuries, however, are not self-inflicted. Ms. Sloan does not encounter the NSZs as a "tester." See Fair Empl. Council v. BMC Mktg. Corp., 28 F.3d 1268 (D.C. Cir. 1994), cited by National Family Planning & Reproductive Health Ass'n v. Gonzales, 468 F.3d 826, 831 (D.C. Cir. 2006). She does not enter the neighborhood to create injury. She seeks to enter neighborhoods to engage in lawful organizing and educational activities. She encounters the NSZs because they are a comprehensive imposition, because they are not avoidable when seeking to enter a targeted zone. She is harmed, not abstractly, but concretely. She

is disallowed from driving into the zone to her destination unless she pays the "price" of disclosure of her activities, destination and contact(s).

The District does not address the injury-in-fact asserted by William Robinson. At the commencement of the action, Robinson lived in Trinidad at the location of the checkpoint implementations. R. 1. He asserted his movement and privacy was restricted by the checkpoints, that the sense of "living in a police state" and having to pass through checkpoints impaired the aesthetic and functional qualities, his enjoyment and use, of his home. R. 14 – 15, ¶14 – 15. The checkpoints dissuaded or prevented people from associating with him. R. 15, ¶70.

At the commencement of the suit, the relevant point in time, plaintiffs properly evidenced standing.

The District argues that plaintiffs should have filed for a temporary restraining order on top of filing for a preliminary injunction, and that "failure" to do so evidences lack of irreparable harm.[3] This is not persuasive given the posture and context of this case at that time. The motion for preliminary injunction had been filed and submitted. Oral argument had been completed on July 9, 2008. Plaintiffs were awaiting an adjudication.

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[3] The District incorrectly states that the lower court "explicitly informed plaintiffs' counsel of its willingness to entertain a motion for a temporary restraining order while the motion for a preliminary injunction was pending." DC's Opp at 23 n3. During oral argument, the Court inquired whether a preliminary injunction would be rendered unnecessary if plaintiffs could seek a TRO while a request for a permanent injunction was pending. R.192, 194.

Forty-five minutes before the checkpoints were re-implemented on Saturday, July 19, 2008, the District filed a notice with the Court advising of the checkpoint implementation. Doc. 13. The Court *was* fully apprised of the ongoing implementation, a fact centrally relevant to discrediting the District's defense, reiterated 24 hours earlier, that ongoing implementation was "speculative" and "conjectural." To the extent that disbelief of ongoing implementation was the obstacle to ruling in plaintiffs' favor, the Court was given the relevant new information to take that into consideration. The evidence of ongoing implementation did not create new legal arguments regarding the constitutionality of the program. The request for an immediate injunction was fully briefed and submitted.

III. Plaintiffs Have Demonstrated Likelihood of Success on the Merits

The District of Columbia agrees that the substantive analysis of the constitutionality of the checkpoints must proceed in two stages, the first stage being an evaluation of primary purpose, and the second stage being a reasonability analysis that is reached only if the primary purpose is permissible. See DC's Opp at 16. The District addressed each of these two stages in sections II(A) and (B) of its opposition, DC's Opp at 28 – 50, to which plaintiffs respectfully reply.

A. The District Fails to Demonstrate that the Interest in Crime Deterrence is Outside the General Interest in Crime Control

The District concurs that in City of Indianapolis v. Edmond, 531 U.S. 32 (2000), "the Supreme Court held that checkpoints with the 'primary purpose' of serving the 'general interest in crime control' violate the Fourth Amendment." DC's Opp at 17.

Judge Leon identified "the novel question presented in this case is whether this primary purpose to deter violent crime of a specific type is a purpose sufficiently distinct from the District's general interest in crime control to pass muster under the Supreme Court's analysis in Edmond." R. 81.[4]

The District's primary argument is, as plaintiffs accurately described in their opening brief, that the Edmond ruling pertaining to checkpoints that advance "the general interest in crime control" was strictly limited to checkpoints that are used to uncover evidence of criminal wrongdoing of those stopped. See DC's Opp at 30 (arguing "'the general interest in crime control' is one that 'employ[s] a checkpoint primarily for the ordinary enterprise of investigating crimes' that the driver of the stopped vehicle may have committed."); Id. at 31 (arguing category of checkpoints

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[4] The District contends that Plaintiffs do not challenge the Court's factual finding of programmatic purpose. Plaintiffs' argument is that crime deterrence *is* a proscribed purpose and the additional verbiage that the deterrence is focused on "crime of a specific type," were it true, would not render the checkpoints beyond the general interest in crime control. See Pls' Br. at 24 – 25. As reflected by the record, the Special Order authorizes checkpoints in response to general crime. See Pls' Br. at 4 – 5.

advancing "the general interest in crime control" excludes checkpoints which "have primary purposes other than detecting evidence of ordinary criminal wrongdoing by the drivers of stopped vehicles"); Id. at 32.

This is not accurate, for the reasons addressed in plaintiffs' opening brief. Pls' Br. at 26 – 32.

B. The District's Illogical Argument Interpreting Edmond

It is a false argument to contend that because in Edmond the Supreme Court found a crime detection narcotics checkpoint to be within "the general interest in crime control," that "the general interest in crime control" can be only a checkpoint for the purpose of crime detection. DC's Opp at 30. This is fanciful and defective reasoning. See e.g. Lewis Carroll, Alice's Adventures in Wonderland, Chapter 7: A Mad Tea-Party (1865) ("You might just as well say that 'I see what I eat' is the same thing as 'I eat what I see'!").

The fact that all criminal investigation/prosecution checkpoints are a subset of checkpoints advancing "the general interest in crime control," does not compel or even suggest the conclusion that the scope of "the general interest in crime control" is limited exclusively to checkpoints for criminal investigation of those stopped.

The District presses this misapplied reasoning repeatedly. It has no greater persuasion regardless of the number of iterations.

The District observes that in Delaware v. Prouse, 440 U.S. 648 (1979), the Court found apprehension of stolen motor vehicles to fall within "the general interest in crime control." DC's Opp at 31 (citing Littleton, 414 U.S. at 658 n.18). That does not lead to the conclusion that the "general interest in crime control" is limited to apprehension of stolen cars, specifically, or to criminal investigation, generally.

The District observes that in Ferguson v. City of Charleston, 532 U.S. 67 (2001), the Court found suspicionless seizures (consisting of the non-consensual drawing of blood from pregnant women to prosecute those testing positive for drugs) to be unconstitutional where "immediate objective of the searches was to generate evidence for law enforcement purposes." DC's Opp at 31 (quoting, Id. at 83). This does not limit the scope of the "general interest in crime control" to seizures to generate evidence for prosecution.

What these cases do illustrate is that suspicionless seizures for criminal prosecution purposes are impermissible.

The District misstates plaintiffs' position, claiming plaintiffs assert that every roadblock "having any connection with crime control" is unconstitutional, DC's Opp at 30 - 31, apparently including sobriety checkpoints, border checkpoints, checkpoints to thwart an imminent terrorist attack, license-and-registration checkpoints, and checkpoints at airports and government buildings.

The District then argues this *purported* (and misstated[5]) position of plaintiffs' demonstrates a failure of plaintiffs' reasoning in this case since Edmond distinguished each of these types of checkpoints based on the particular circumstances present. Making an unconnected leap of logic, the District then argues this proves the Edmond Court restricted the scope of checkpoints advancing "the general interest in crime control" to those with the purpose of detecting ordinary criminal wrongdoing of those stopped. DC's Opp at 31 – 32.

C. The District's Unreasonable Claim as to the "Holding" of Lidster

The District, in opposition, then moves to a treatment of Illinois v. Lidster, 540 U.S. 419 (2004). It does not deny or explain its misleading presentation of that

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[5] Each of these checkpoints is exceptional and/or constitutionally permissible based on the particularity of the circumstances each presents. Plaintiffs do not contend otherwise. See Doc. 4-2 at 16 - 17 (distinguishing Sitz sobriety checkpoints which focus specifically on roadway and driving bound safety, and imminent threat to life and limb posed by drunk driving), R. 21 (same); R. 219 (same). Plaintiffs represented below that neither Edmond nor plaintiffs' position affects the validity of border searches, which relate uniquely to national security and integrity, or to places like airports or government buildings which constitute acute special needs in well-defined and discrete physical locations that do not risk being replicated on every street or roadway in the nation. See R. 209 – 210, 212 – 213.

Plaintiffs distinguished checkpoints to seize a fleeing felon or thwart an imminent terrorist threat. These types of exigent circumstances do not fall even within the rubric of *general* crime control but instead advance a particular, if not individualized, need to stop a criminal or criminal act. See R. 216 – 219; Doc.12 at 7.

case to the Court below, see Pls' Br. at 27 – 28, but instead tries to establish the same conclusion through a different approach.

The District argues the Lidster case issued the "holding that the 'general interest in crime control' subject to Edmond is nothing more than 'detect[ing] evidence of ordinary criminal wrongdoing.'" DC's Opp at 33; Id. at 18.

The District's "proof" of this holding is no longer the misleading presentation to the Court below, but now rests upon the Lidster Court's description of the fact pattern present in Edmond.

The District argues there is significance that the Lidster Court uses "i.e." in the following description of the Edmond fact pattern: "We found that the police had set up this checkpoint primarily for 'crime control' purposes, *i.e.*, 'to detect evidence of ordinary criminal wrongdoing.' [Lidster at 423] (quoting [Edmond] 531 U.S. at 41)." DC's Opp at 33.

The "i.e." merely reaches back to give further explanation to "*this checkpoint*['s]" "purpose" in order to convey that the nature of *this* checkpoint, the Edmond checkpoint, was to detect evidence of ordinary criminal wrongdoing. Lest there be any ambiguity, one need only review the actual text that is referenced as the basis for this sentence, i.e., to page 41 of the Edmond case. The reference is to a paragraph in the fact pattern description finding that the purpose of that checkpoint, the Edmond checkpoint, was to detect evidence of criminal

wrongdoing, specifically "to interdict narcotics traffic" and "to catch drug offenders." See Edmond, 531 U.S. at 41.

Neither the referenced text at page 41 of the Edmond case nor the referencing text at page 423 of Lidster constitute a Supreme Court holding that the "general interest in crime control" is "nothing more than 'detect[ing] evidence of criminal wrongdoing.'" DC's Opp at 33.

What can be fairly said about Edmond, including the references to it in Lidster, is that the principles of law applied in Edmond had occasion to be applied in the context of a challenge to a narcotics roadblock which had as its primary purpose the detection of criminal conduct of those stopped. What cannot be fairly said is that either Edmond or Lidster held that the operative principle of law, that checkpoints are impermissible where the primary purpose is to advance "the general interest in crime control," has been limited to checkpoints which detect evidence of criminal wrongdoing of those stopped.

The District points to the general statement in Lidster that "general interest in crime control" does not refer to *every* law enforcement purpose. This general statement suggests *without answering* the general question: What law enforcement

purposes do fall within the proscribed category of advancing "the general interest in crime control?"[6]

The District attempts the argument that Lidster holds the general interest in crime control is limited to crime detection. As discussed in plaintiffs' opening brief, that is neither the holding in that case nor can the rather particular facts in Lidster be stretched to encompass the case at hand.

It is unreasonable to argue that Lidster so held when the Supreme Court declined the invitation to so rule. In its opposition, the District does not respond to plaintiffs' observation that while adopting the opinion of the dissenting Circuit Court Judge as to the constitutionality of the checkpoint, in issuing its reversal the U.S. Supreme Court did not adopt the dissent's proposition that the general interest in crime control is limited to detecting criminal activity of those stopped.

D. The District's Cursory Dismissal of the Cases Articulating that Crime Deterrence is Within the "General Interest in Crime Control"

The plaintiffs presented a number of cases in which courts have specifically addressed whether crime deterrence is within or beyond the "general interest in crime control," each time finding it within the scope of that impermissible category

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[6] The District's argument that plaintiffs have waived their interest in adjudicating whether "this Court should extend" Edmond to the case at hand is ridiculous and, at best, one of meaningless semantics. The plaintiffs have at all times argued that the principle articulated in Edmond, that the checkpoints that advance the general interest in crime control, governs the outcome of this case as a matter of law because the purpose of the NSZ checkpoints is crime deterrence.

of checkpoints. The District summarily and cursorily dismisses these cases. See Pls' Br. at 20 – 24 (citing Galberth v. United States, 590 A.2d 990 (D.C. 1991), U.S. v. Gabriel, 405 F. Supp. 2d 50 (D. Me. 2005), Park v. Forest Serv. of U.S., 69 F. Supp. 2d 1165 (W.D. Mo. 1999), and Shankle v. Tex. City, 885 F. Supp. 996 (S.D. Tex. 1995)).

In a footnote, without any substantive treatment, the District dispenses the Galberth case, the Park case, and the Shankle case as having "predated" the Edmond case, which issued in 2000. DC's Opp at 34 – 35 n.7.

Yet, in their opening brief, plaintiffs identify that the term of art, "general interest in crime control," originated not in the Edmond case but in the 1979 opinion in Delaware v. Prouse. Pls' Brief at 18 n.8 (citing Prouse, 440 U.S. at 648).

The Galberth, Park, and Shankle cases are all post-Prouse cases in which courts expressly focused on the issue of whether crime deterrence, *per se*, falls within the scope of the "general interest in crime control," the very same term of art as is applied in Edmond. Each concluded that crime deterrence *does* fall within the proscribed category of "the general interest in crime control." These cases each issued in the context of roadway checkpoints. They were extant and provided vitality and definition to that term when the Supreme Court issued the Edmond ruling. While none of these rulings are binding on this appellate Court, they are

persuasive precedent addressing the same issue as is present in this case in similar factual contexts.

The District argues that the Galberth ruling "does not as plaintiffs imply, hold that checkpoints motivated by crime deterrence are proscribed. Instead, the court held that a particular checkpoint was not reasonable assuming that it was motivated by deterrence." DC's Opp at 34 n.7. Again, the District, unable to counter plaintiffs' argument as made, misstates and fails to represent with precision what plaintiffs' argument was. Plaintiffs represented "[t]he Galberth Court expressly found that the crime deterrence rationale fell squarely within the scope of the 'general interest in crime control' and was, therefore, unconstitutional." Pls' Br. at 21 (citing, Galberth, 590 A.2d at 998-99 (citing Prouse, 440 U.S. at 659 n.18)). Plaintiffs quoted from Galberth, in which the Court found the crime deterrence purpose to be a "justification [that] is antithetical to the Fourth Amendment" because it fell within the proscribed category of checkpoints advancing "the general interest in crime control" as that term was used in Prouse. Ultimately, the Galberth Court applied that principle within the then-applicable and sole standard of Brown v. Texas, 443 U.S. 47 (1979), to find the checkpoint unconstitutional. Galberth supports plaintiffs' position in this case.

The District argues that the judicial language in U.S. v. Gabriel is irrelevant dicta. DC's Opp at 34 – 35 n.7. Yet, the U.S. District Court's reasoning in that case

is sound and focused on the particular nuanced inquiry regarding criminal deterrence that is at hand, finding in light of Edmond and Lidster, that "if this checkpoint had been operated by the state police for purposes of general criminal deterrence, it would not have passed constitutional muster." Gabriel, 405 F. Supp. 2d at 58. This is not a stray or thoughtless judicial remark.

E. Waiver of Argument that the NSZ Checkpoints Have Same Purpose as Sobriety Checkpoints

In lower court proceedings, the District expressly disclaimed that the NSZ checkpoints were justified as special needs checkpoints or Sitz sobriety checkpoints. Doc. 6 at 17 – 18.

On appeal, it now contends that the checkpoints have a purpose similar to sobriety checkpoints. DC's Opp at 36 – 37. Sobriety checkpoints apprehend persons who are at that very moment driving under the influence, actually violating criminal law, and posing an immediate threat to safe use of the roads. NSZ checkpoints do none of that. The restriction on driving privileges imposed at NSZ checkpoints does not require the finding of *any* criminal offense let alone one which establishes the driver poses an immediate threat to roadway safety.

The opposition also argues that NSZ checkpoints are justified because they advance "public safety." As the Supreme Court observed, "[i]f we were to rest the case at this high level of generality, there would be little check on the ability of the

authorities to constrict roadblocks for almost any conceivable law enforcement purpose." Edmond, 531 U.S. at 42.

F. The District's Inadmissible Reliance on a "Petition"

The District asserts that no reason has been presented "to doubt that those stopped at these checkpoints will often react positively" and references a "petition" that it organized that it claims was signed by 75 Trinidad residents in support of the NSZ program, out of 300,000 persons licensed to drive in the District. DC's Opp at 36, 9. The "petition" was drafted and signed by a politician who is herself not a Trinidad resident, and the addresses of all signatories are redacted.

A survey taken at a community meeting held as a "healing" opportunity directly after the initial checkpoint deployment in Trinidad found overwhelming opposition to the police checkpoints. Doc. 17 at 8-9. In any case, constitutional rights cannot be petitioned away. They are inalienable.

Lastly in this section, the District argues that plaintiffs have constructed a "lengthy straw-man analysis attacking the argument that any checkpoint is automatically constitutional provided that its primary purpose is not to detect evidence of ordinary criminal wrongdoing by the drivers of stopped vehicles (Br. 28 – 32), but the District makes no such argument." DC's Opp at 38.

Plaintiffs make no straw man characterization of the District's position. Plaintiffs accurately stated the District argument as being "that the automatic

unconstitutionality found in the Edmond ruling was limited strictly to suspicionless checkpoints that 'are used to uncover evidence of ordinary criminal wrongdoing' of those stopped." Pls' Br. at 26, citing, Doc. 6 at 17 (misquoting the Lidster case).

Plaintiffs accurately conveyed that it was not the District's position that any checkpoint is automatically constitutional provided that its primary purpose is not to detect evidence of ordinary criminal wrongdoing. According to the District's argument, checkpoints with a primary purpose other than detection of criminal conduct remain subject to a second stage reasonability analysis. Pl's Br. at 27.

Plaintiffs' argument was not that some unmade straw man argument was meritless. It was that the District's position, as accurately represented by plaintiffs, urged an erroneous statement, and application, of the law and that the lower Court erred by adopting the District's erroneous representations and argument.

G. The District Fails to Establish Checkpoints as Reasonable

1. Gravity

Plaintiffs do not dispute the gravity of the need for crime control or deterrence. In Edmond, the Supreme Court found that the existence of a compelling interest in prevention of narcotics-related violent crime did not alter the constitutional requirement of individualized suspicion. Edmond, 531 U.S. at 42.

2. *Effectiveness*

The District argues on appeal that this Court should discredit the statistical evidence presented by the District in the Court below "given the limited nature of the statistics." Yet, this is the data presented by the District precisely to evidence the effectiveness of the checkpoint. The problem the District has is that according to MPD's own data, the NSZ checkpoints led to an increase in crime during their operation. See Pls' Br. at 12 – 14, 38 – 39.

They argue that the routine suspicionless seizure and questioning of citizens "obviously further[s] the goal" of crime deterrence. DC's Opp at 42. The second implementation of the checkpoints had to be discontinued abruptly after nine persons were shot elsewhere in a night of violence while large numbers of officers were immobilized to staff these checkpoints. The alleged perpetrator of the triple homicide that preceded, and provided a referenced rationale for, the first implementation turned out to be a resident of Trinidad and therefore allowed passage. See R. 29, ¶62, R. 56, ¶62 (admitting arrest); R. 30, ¶64, R. 56, ¶64 (admitting McCorckle's residency within Trinidad). The District conceded an increase in violent crime in Trinidad during the days of the checkpoint, but now argues that is within an acceptable margin of error.

The District argues that imposing suspicionless seizures and subjecting citizens to questioning "obviously" has a deterrent effect on crime. This begs the

question, which is whether mass suspicionless seizures, citizen interrogation, and exclusion from roadway use is constitutional. As the Eleventh Circuit held, reversing a ruling allowing mass, suspicionless magnetometer inspections at protests,

> The City's position would effectively eviscerate the Fourth Amendment. 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, 1311-12 (11th Cir. 2004).

The stark reality is, the District provides no evidence of effectiveness. Their position boils down to the contention that during the actual hours of checkpoint operation there was not a drive-by shooting at the corner on which police were posted.

On any given day, there is likely not a drive-by shooting at that location or within Trinidad generally. It is no "proof" of effectiveness to point to the absence of something that is ordinarily not there. One may just as well say that, today, the

absence of checkpoints is effective at deterring crime if there is no checkpoint and no drive-by shooting in Trinidad on this day.

3. Intrusiveness

The District in its opposition argues that plaintiffs never claimed and have waived that the exclusion of entry into the NSZ was an intrusive element of seizure. DC's Opp at 49. Yet, at oral argument, plaintiffs argued:

> [P]art of the seizure, they seize people and then people are not allowed to proceed any further without providing a legitimate, in the view of the police, a legitimate reason for continuing on a public roadway . . .
>
> The fact is, that makes it even more significantly different than entering this courthouse, which is that people have to prove to the satisfaction of the police that they have a quote "legitimate reason" and provide detailed information and the police then make a determination as to whether or not a driver in the District of Columbia may travel by car on a public roadway in the District of Columbia. . .
>
> And, indeed, it is not a [courthouse or building entrance] security screening because they say that they are not doing an investigation nor are they looking to see what people have in their cars. They are stopping persons without particularized suspicion in violation of the Fourth Amendment to then stop people from going any further. And that for the purpose of general crime control is completely unconstitutional under Edmond.
>
> [Court: Go ahead.]
>
> The third element in Brown v. Texas would be the intrusiveness element, and based on what I was just discussing and referencing, without reiterating all that, I don't think anyone can suggest for a moment that this is a minimally intrusive program.

R. 212:10 – 213:18.

This is addressed in the Memorandum in Support of Motion for Preliminary Injunction. Doc. 4-2 at 6 ("[a] 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."); Id. at 7 – 8 ("The MPD 'Neighborhood Safety Zone' program goes even farther than the prior use of roadway checkpoints. The NSZ program establishes exclusion zones. . ."); Id. at 1 (checkpoints restrict "the privilege of vehicular entry or movement within the designated areas"); See also R. 2 (Complaint) ("allowing the privilege of vehicular entry or movement within the designated area" based on police evaluation); R. 10, ¶16 (checkpoint purpose is "to stop every vehicle and to exclude from entry any vehicle" except where acceptable "legitimate reason" is provided); R. 6 (Mills "prohibited from entry by car"); R. 7 (Robinson "told he could not proceed to his house without providing identity information"); Id. (Leaks "prohibited from continuing further in her vehicle"); R. 8 (Sloan "could not proceed past NSZ Checkpoint unless she provided the requested information"); R. 10 (officers "[d]eny a stopped vehicle access to the NSZ"); R. 27 – 28, ¶¶56 – 58 (particularizing the denial of vehicular entry as injury); R. 304 (case not mooted by amendments to special order where "[t]he denial of the privilege of roadway access and usage of the neighborhood based on the failure to provide the legitimate reason all remains unchanged."); R. 26, ¶51 ("function of

the checkpoints" is "the exclusion of selected drivers from such use [of roadways]"); R. 26, ¶54 ("ability to lawfully use the roadways within Trinidad is impaired and restricted").

The lower court acknowledged the arguments about exclusion to be a component of the intrusiveness evaluation, albeit ruling contrary to plaintiffs' presentation. R. 24 (citing, Maxwell v. City of N.Y., 102 F.3d 664, 667 (2d Cir. 1996) (checkpoints "only allow[ed] individuals with a legitimate reason to enter").

It is impossible to deconstruct the exclusion apart from the checkpoint operation or the questioning where "[p]ersons who wish to drive into the zone must, as a condition of potential passage, disclose their identity" and disclose personal information in response to questioning. Doc. 4-2 at 8 – 9; R. 24 – 25, ¶24 ("a driver will be denied entry unless he or she both possess a reason deemed 'legitimate' to police and is willing to forego and lose informational and personal privacy and disclose the details of such purpose in order to secure entry.").

It is true, as observed by the District, that the profiling and exclusion from roadway use may constitute an independent Due Process violation or Equal Protection violation or violate the right to local travel. Where, however, the exclusion is a constituent element of and, indeed, a stated purpose of a system of suspicionless checkpoints, the Fourth Amendment is an appropriate vehicle for challenge and evaluation.

The District argues that plaintiffs did not argue below, and have waived, "that the list of legitimate reasons for entry is arbitrary and underinclusive." DC's Opp at 49. But see Doc. 4-2 at 7 ("The list of acceptable 'legitimate reasons' is not coextensive with the scope of all lawful purposes."); R. 1, ¶24 ("six specific circumstances do not include or encompass 'visiting a friend.'"); R. 24 (same); R. 11, ¶25 ("do not include or encompass 'going to pick up groceries'"); R. 24 (same); R. 11, ¶26 ("do not include or encompass a wide range of lawful activities that are a part of ordinary life"); R. 11, ¶27 ("exigent circumstances" and approval of ranking officer required for any exceptional entries into NSZ); R. 24 (does not include "visiting a family member"); R. 24 (does not include "driving a vehicle into the neighborhood to help a friend move"); R. 44 ("driving a vehicle into the neighborhood to engage in a broad array of lawful activities is prohibited"); R. 28, ¶58 (although Leak's intended activities are lawful they do not fall within the scope of the six legitimate reasons and consequently she may not drive in).

The District argues that plaintiffs have not before argued that the checkpoint criteria constitute the profiling of criminal intent. But see Doc. 4-2 at 9 ("The absence of a police approved 'legitimate reason' . . . is considered a sufficient nexus to 'criminal incidents including homicides, shootings, robberies and other [unspecified general criminal offenses]" for exclusion).

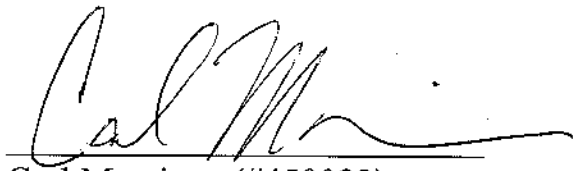
In the next to the final paragraph of its brief, the District argues for the very first time that the exclusion function or loss of driving privileges to enter the neighborhood - - again, a *stated* purpose of the checkpoints - - should be segmented out from the checkpoint reasonableness evaluation. The District argues, for the first time and without case citation, that "plaintiffs present no reason why the consequence of a stop should be relevant to the Fourth Amendment inquiry." Plaintiffs have argued that the exclusion was a constituent part and component of the seizure. R. 212 ("[P]art of the seizure, they seize people and then people are not allowed to proceed any further. . ."). The District did not dispute plaintiffs' position below or argue that the exclusion function was not a constituent element of seizure. Had the District argued below that the use or show of police force to restrain movement into the exclusion zone or the neighborhood was not a component of the seizure, it would not have been on solid legal ground. See United States v. Mendenhall, 446 U.S. 544, 553 (1980) ("a person is `seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained.").

Conclusion

The Court should reverse the denial of the preliminary injunction.

March 30, 2009

Respectfully submitted,



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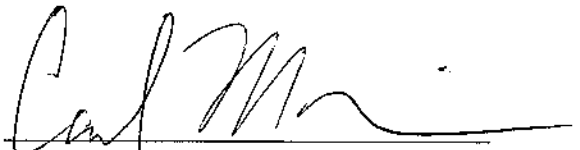

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CERTIFICATE OF SERVICE

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