STATE OF NEW HAMPSHIRE
CIRCUIT COURT
2nd Circuit—District Division—Plymouth

State v. Daniel McCarthy, 469-2017-cr-01888
State v. Richard Robinson, 469-2017-cr-01887
State v. Jeffrey Godwin, 469-2017-cr-01901
State v. Jesse Drewniak, 469-2017-cr-01900
State v. Silas Magee, 469-2017-cr-01897
State v. Taylor O'Neill, 469-2017-cr-01982
State v. Jacob Rushing, 469-2017-cr-01871
State v. Adam Clark, 469-2017-cr-01872
State v. Nicole Palermo, 469-2017-cr-01974
State v. Kyle Goodell, 469-2017-cr-01892
State v. Darcy Gentile, 469-2017-cr-01873
State v. Zachary Burns, 469-2017-cr-01877
State v. Jonathon Tinker, 469-2017-cr-01875
State v. David Warner, 469-2017-cr-01874
State v. Michael Benoit, 469-2017-cr-01878
State v. Timothy Lucier, 469-2017-cr-01911
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DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR CONSOLIDATED MOTION TO SUPRESS

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INTRODUCTION

During August and September 2017 temporary border patrol checkpoints in Woodstock (90 driving miles from the border), the Woodstock Police Department ("WPD") and the New Hampshire State Police separately worked in concert with United States Customs and Border Protection ("CBP") to circumvent the independent protections of the New Hampshire Constitution. In particular, CBP agents used dog-sniff searches during these checkpoints to acquire evidence for use in state court drug prosecutions. These searches violated the principle under Part I, Article 19 of the New Hampshire Constitution that, absent a warrant, "authorities [must] be able to articulate a reasonable suspicion of criminal activity … to employ a dog to sniff for contraband." *State v. Pellicci*, 133 N.H. 523, 536 (1990). Neither CBP nor local law enforcement had a warrant or reasonable suspicion to conduct the dog-sniff searches at these checkpoints. Thus, these searches violated Article 19.

Local law enforcement has been transparent about how CBP's use of dog-sniff searches thwarted the search and seizure protections of Article 19. In a *Union Leader* interview, WPD police chief Ryan Oleson acknowledged that that CBP has "a lot more leeway" to conduct a drug-sniffing-dog examination, and that "he could not use a dog to search a car unless he has a suspicion of drug possession that he can articulate." *See* Mark Hayward, "U.S. Border Patrol arrest 25 illegals at I-93 roadblock, seizes pounds of pot," *Union Leader* (Aug. 28, 2017), attached as *Ex. 1*.

These unlawful searches were with considerable consequence. During the August and September 2017 checkpoints, 44 individuals who were in the United States lawfully were charged with drug possession. Of these 44 individuals, 42—including the 18 Defendants in the above-captioned cases—were charged with possessing small amounts of drugs for personal use (mostly

marijuana). None of these 42 individuals were charged with offenses greater than class B misdemeanors, and none were alleged to possess drugs with the intent to sell.

This Court must suppress all evidence seized by CBP for use in these 18 cases brought in state court seeking to enforce state drug laws. This is for four reasons. First, as a threshold matter, Part I, Article 19 of the New Hampshire Constitution applies to evidence that the State seeks to admit in state court to prosecute a state offense, regardless of whether the evidence was obtained by federal officials. *See State v. Turmelle*, 132 N.H. 148, 152 (1989); *State v. McDermott*, 131 N.H. 495, 500 (1989). Second, the dog-sniff searches conducted by CBP violated the Article 19 rule in *Pellicci*. Third, and independently, the August/September 2017 checkpoints conducted by CBP violated the Fourth Amendment to the United States Constitution and Part I, Article 19 of the New Hampshire Constitution because their primary purpose was drug interdiction. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 40-42 (2000) (a highway checkpoint program violates the Fourth Amendment if its "primary purpose" is the discovery and interdiction of illegal narcotics); *see also United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976) (immigration checkpoints near US/Mexico border were permissible only insofar as they involve a "brief detention of travelers" during which all that is required of the vehicle's occupants is "a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States"). Fourth, and independently, the August/September 2017 checkpoints—and the warrantless dog-sniff searches conducted by CBP—violated Article 19 because they failed to comply with the test in *State v. Koppel*, 127 N.H. 286 (1985). The degree of intrusion on individual rights imposed by these checkpoints and dog-sniff searches far outweighs their value to the public interest.

STATEMENT OF FACTS

I. The August 25-27, 2017 Checkpoint

From August 25, 2017, to August 27, 2017, CBP—with the cooperation of the WPD—set up a temporary checkpoint on Interstate 93 South in Woodstock, New Hampshire. CBP set up this checkpoint pursuant to its authority to do so within 100 miles of any United States "external boundary."[1] Woodstock is approximately 90 driving miles from the Canadian border. *See* WPD Sept. 1, 2017 Press Release, at WPD008, 010, attached as *Ex. 2*.

During the checkpoint (hereinafter, "the August 2017 checkpoint"), CBP stopped vehicles and directed them to a primary checkpoint location where CBP agents asked about passengers' citizenship. While these vehicles were stationary, approximately three CBP agents utilized their drug-detection dogs to perform "pre-primary free air sniffs" of the vehicles waiting to go through the primary checkpoint. *See* Sixteen Police and Border Patrol Reports from Aug. 2017 Checkpoint, attached as *Ex. 3*. If a dog alerted to an odor that it is trained to detect, the K9-agent alerted the primary agent who then sent the vehicle to a secondary checkpoint for further investigation. *See, e.g.*, Godwin Aug. 26, 2017 CBP I-44 form, at DEF050, attached as *Ex. 3*. Once in the secondary checkpoint, CBP searched the vehicles. If contraband was found, CBP surrendered it to the WPD, which was at the scene of the checkpoint. The WPD then charged these individuals in state court for violating state drug laws.

The August 2017 checkpoint resulted in state drug-related charges against 33 individuals who were lawfully in the United States. *See* WPD Sept. 1, 2017 Press Release, at WPD008, 010,

[1] Section 287(a)(3) of the Immigration and Nationality Act of 1952 authorizes Border Patrol agents, without warrant, within a "reasonable distance" from any external boundary of the United States, "to board and search for aliens any … vehicle … for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States." 8 U.S.C. § 1357(a)(3). The term "reasonable distance" has been defined to mean within 100 air miles from any "external boundary" of the United States. 8 C.F.R. § 287.1(a)(2). An "external boundary" means "the land boundaries and the territorial sea of the United States extending 12 nautical miles from the baselines of the United States determined in accordance with international law." 8 C.F.R. § 287.1(a)(1).

attached as *Ex. 3*. Of these 33 individuals, 31—including 16 of the above-captioned Defendants—were charged with possessing small amounts of drugs for personal use (mostly marijuana).[2] All 31 individuals were charged with violation-level offenses. A 32nd person was charged with felony drug possession, but the State nolle prossed his case.[3] The 33rd person was charged with running the checkpoint along with other drug charges.[4] Only 25 individuals were detained during this checkpoint due to immigration-related issues, which included three children (two eleventh graders and a seventh grader). *See* Aug. 28, 2017 CBP Press Release (noting that CBP detained 25 individuals "without valid immigration status"), at WPD004, attached as *Ex. 2*; NHPR Staff, "Three Children Among 25 Undocumented Immigrants Detained at N.H. Highway Checkpoint," *NHPR* (Aug. 30, 2017), attached as *Ex. 9*.

According to CBP, the August 2017 checkpoint was the first it had conducted in New Hampshire since July 2012. *See* Mark Hayward, "U.S. Border Patrol arrest 25 illegals at I-93 roadblock, seizes pounds of pot," *Union Leader* (Aug. 28, 2017), attached as *Ex. 1*. According to CBP, this renewed use of checkpoints was fueled, in part, by increased funding and manpower. *See* Ethan Dewitt, "Interstate 93 Immigration Checkpoint Draws Differing Opinions," *Concord Monitor* (Sept. 28, 2017), attached as *Ex. 10*; *see also* Sept. 19, 2017 Email, at SP030 (CBP agent mentioning in advance of the September 2017 checkpoint that "I have conferred with our financial

[2] Defendants' 16 police reports arising from the August 2017 checkpoint are attached as *Ex. 3*. Of the 31 individuals charged with violation-level drug offenses, 15 are not named-defendants in this Motion. This is for several reasons. Of the 15 remaining violation-level cases:

- The State nolle prossed all drug charges against eight of these individuals on the eve of arraignment: Valnardia Novas; an unnamed juvenile; Noel Hernandez; an unnamed juvenile; Hugo Helmer; Ethan Dull; Dana Pappas; and Taylor Rivard. The police reports for these individuals are attached as *Ex. 4*;
- Four individuals (Brandy Sue Lilly-Bizier, Matthew Taylor, Taylor Kuietauskas, and Joshua Larose) pled guilty likely to have this matter put behind them. The police reports for these individuals are attached as *Ex. 5*; and
- The three remaining individuals (Victor Tosin Olumbambi, Hanna Mia Cowett, and Jinwook Lee) are not represented by the undersigned counsel in this Motion, but the relief sought in this Motion should apply to them as well. The police reports for these individuals are attached as *Ex. 6*.

[3] Brian Bell's police report is attached as *Ex. 7*.

[4] Jason Labrie's police report is attached as *Ex. 8*.

folks at HQ and they are telling me that we have to spend the funding for the checkpoint in this fiscal year (before October 01) …."), attached as *Ex. 11*. As one CBP official explained, "[w]e have recently received new executive orders." NHPR Staff, "Three Children Among 25 Undocumented Immigrants Detained at N.H. Highway Checkpoint," *NHPR* (Aug. 30, 2017), attached as *Ex. 9*. When this I-93 checkpoint was in use prior to 2012 in the Plymouth area, it was historically employed annually around Motorcycle Week, which is held in June. *See* WPD Sept. 1, 2017 Press Release, at WPD008, attached as *Ex. 2*.[5]

II. The September 26-28, 2017 Checkpoint

From September 26, 2017 to September 28, 2017, CBP—with the cooperation of the New Hampshire State Police—set up another temporary checkpoint on Interstate 93 South in Woodstock. This checkpoint (hereinafter, "the September 2017 checkpoint") was conducted in a fashion nearly identical to the August 2017 checkpoint. During this checkpoint, CBP stopped vehicles and directed them to a primary checkpoint location where CBP agents asked about passengers' citizenship. While these vehicles were stationary, CBP agents utilized their drug-detection dogs to perform "free air sniffs" of the vehicles waiting to go through the primary checkpoint. *See* Brett Pokines Oct. 11, 2017 State Police Report (handwritten Page 7), attached as *Ex. 13*.[6] If a dog alerted to an odor that it is trained to detect, the K9-agent alerted the primary agent who then sent the vehicle to a secondary checkpoint for further investigation. Once in the secondary checkpoint, CBP searched the vehicles. If contraband was found, CBP called the State Police, which was aware that the checkpoint was occurring and that it would be called if drugs

[5] In 2005, following criticism from Senator Patrick Leahy, CBP curtailed operations at a traffic checkpoint along Interstate 91 at the Hartford, Vermont rest area, 97 miles from the Canadian border. *See* Associated Press, "Border Patrol scales back I-91 checkpoint," *Union Leader* (May 26, 2005), attached as *Ex. 12*.

[6] Also attached are the police reports for Defendant Travis Dustin. There is no reason to believe that the facts concerning Mr. Dustin are any different than the facts in Mr. Pokines's case. *See* Travis Dustin Oct. 9, 2017 State Police Report, attached as *Ex. 14*. The State Police has not yet produced in discovery CBP's I-44 forms (Report of Apprehension or Seizure) for Mr. Pokines and Mr. Dustin.

were allegedly found in violation of state law. The State Police then arrived, and CBP surrendered the alleged contraband to the State Police. The State Police then charged these individuals in state court for violating state drug laws. *Id.*

The September 2017 checkpoint resulted in state drug-related charges against 11 individuals—including Defendants Brett Pokines and Travis Dustin. Mr. Pokines was charged with a violation-level offense and a class B misdemeanor. *See* Brett Pokines Police Report, attached as *Ex. 13*. Mr. Dustin was charged with a class B misdemeanor. *See* Travis Dustin Police Report, attached as *Ex. 14*. The nine other individuals were charged with violation-level offenses under New Hampshire's new marijuana decriminalization law. *See* RSA 318-B:2-c; *see also* Nine Violation Reports from September 2017 Checkpoint, attached as *Ex. 15*. Only eight individuals were detained for immigration-related reasons during this checkpoint. *See* Oct. 2, 2017 CBP Press Release, attached as *Ex. 16*.

STANDARD

Part I, Article 19 of the New Hampshire Constitution protects against unreasonable searches and seizures. It states, in pertinent part, "[e]very subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions." The New Hampshire Supreme Court has recognized "that article 19 provides greater protection for individual rights than does the fourth amendment." *State v. Koppel*, 127 N.H. 286, 289 (1985). The protections of Article 19 are to be considered first and independent of the Fourth Amendment to the United States Constitution. *State v. Ball*, 124 N.H. 226, 231 (1983) ("When State constitutional issues have been raised, this court has a responsibility to make an independent determination of the protections afforded in the New Hampshire Constitution."); *see also State v. Morrill*, 169 N.H. 709, 715 (2017) ("We first address the defendant's claim under the State

Constitution and rely upon federal law only to aid our analysis."). The State has the burden of proving, by a preponderance of the evidence, that a warrantless search and seizure was constitutionally permissible. *Ball*, 124 N.H. at 234.

ARGUMENT

I. As a Threshold Matter, the Independent Protections of Part I, Article 19 to the New Hampshire Constitution Apply to All Evidence Relied Upon by the State Because these Cases are in the New Hampshire Courts and the State is Seeking to Enforce State Drug Laws.

As a threshold matter, Part I, Article 19 of the New Hampshire Constitution applies to all evidence that the State seeks to admit in state court to prosecute a state offense, regardless of whether it was obtained by federal law enforcement actors. To hold otherwise would permit state law enforcement officers to use federal law enforcement officers to thwart the independent search and seizure protections of Article 19. Put simply, if the State seeks to rely on evidence in a New Hampshire criminal prosecution, that evidence must have been obtained in a manner that comports with the protections given to the defendant by Article 19.

A. The "Reverse Silver Platter" Doctrine Does Not Apply in New Hampshire.

The "reverse silver platter" doctrine does not apply in New Hampshire. Under the reverse silver platter doctrine, evidence obtained by federal officers during a search which, if conducted by state officers, would have violated the defendant's rights under the state constitution is nonetheless admissible in a state criminal prosecution.

The reverse silver platter doctrine is the converse of the "silver platter" doctrine. Until 1960, the silver platter doctrine was often applied by federal courts in federal prosecutions as a way to skirt the Fourth Amendment at a time when the Fourth Amendment did not yet apply to state actors. Under the silver platter doctrine, federal prosecutors could use evidence handed to

them by the local police on a "silver platter" even though the local police obtained the evidence in ways that were inconsistent with the Fourth Amendment. In 1960, in *Elkins v. United States*, 364 U.S. 206 (1960), the United States Supreme Court rejected the silver platter doctrine. *See id.* at 223 (holding that "[e]vidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible"). The United States Supreme Court's subsequent decision *Mapp v. Ohio*, 367 U.S. 643 (1961)—which applied the Fourth Amendment exclusionary rule to state actors—also effectively eliminated the silver platter doctrine. After *Elkins* and *Mapp*, state officials were now subject to the Fourth Amendment and therefore could not be used by the federal government to skirt its protections for the purpose of federal prosecutions.

However, following *Elkins* and *Mapp*, the opposite phenomenon occurred: state officials would attempt to introduce in state criminal proceedings evidence they received on a "silver platter" from federal law enforcement officials where the evidence was obtained in ways that would violate the state constitution. Therein, the "reverse silver platter" doctrine, which suggests that the state-based unconstitutionality of the federal officials' conduct does not merit exclusion in the state court prosecution.

The New Hampshire Supreme Court has never adopted the reverse silver platter doctrine. To the contrary, the Supreme Court has unequivocally—and correctly—applied the New Hampshire Constitution to evidence seized by non-New Hampshire officials. *See State v. Turmelle*, 132 N.H. 148, 152 (1989) (analyzing federal agent's search in Hawaii under Apart I, Article 19 of the New Hampshire Constitution); *State v. McDermott*, 131 N.H. 495, 500 (1989) (applying New Hampshire Constitution principles to a confession given to Drug Enforcement

Agents in Connecticut in determining whether it was voluntary). Further, applying the reverse silver platter doctrine would contravene the New Hampshire Supreme Court's long history of interpreting the New Hampshire Constitution as offering more protection to a criminal defendant than the Fourth Amendment. *See, e.g.*, *State v. Koppel*, 127 N.H. 286, 291 (1985) ("where the search or seizure of a motor vehicle is involved, article 19 provides significantly greater protection than the fourth amendment against intrusion by the State"); *State v. Ball*, 124 N.H. 226, 235 (1983) (departing from Fourth Amendment analysis in *Texas v. Brown*, 460 U.S. 730 (1983)); *State v. Finn*, 146 N.H. 59, 62 (2001) (noting broader protections under Part I, Article 19, and applying these protections in the context of the police opening a closed container in a police inventory search of automobile).

Just as the United States Supreme Court in *Elkins* rejected the silver platter doctrine in federal prosecutions because the doctrine subverts the protections of the Fourth Amendment, so too must this Court reject the reverse silver platter doctrine in state prosecutions because it subverts the independent protections of the New Hampshire Constitution afforded to New Hampshire defendants. As the *Elkins* Court explained:

> To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer. It would be a curiously ambivalent rule that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis. Such a distinction indeed would appear to reflect an indefensibly selective evaluation of the provisions of the Constitution.

Elkins, 364 U.S. at 215.

The same reasoning in *Elkins* applies here in the context of the New Hampshire Constitution. New Hampshire has an interest in providing protection in its state courts to all individuals within its borders. To the 18 Defendants in this case who were the victims of a State Constitutional violation (as explained in Sections II-IV, *infra*), it makes little difference who

conducted the search or seizure. The rights embedded in Article 19 are personal to the individual being searched or seized regardless of who conducts the search or seizure. *See Pellicci,* 133 N.H. at 532 ("There is no question that part I, article 19 gave <u>*Pellicci*</u> a right to be secure from unreasonable searches of his vehicle") (emphasis added); *see also Moran v. State*, 644 N.E.2d 536, 540 (Ind. 1994) ("The right protected is 'personal' in that it arises where there is an individual interest in the subject matter of the search susceptible of transgression …."). To nullify the protections of the New Hampshire Constitution simply because the evidence was seized by federal agents—as opposed to state agents—would be arbitrary. Such a distinction would "reflect an indefensibly selective evaluation of the provisions of" the New Hampshire Constitution. *See Elkins*, 364 U.S. at 215.

For these reasons, multiple state courts throughout the country have similarly rejected the reverse silver platter doctrine. *See, e.g., Moran v. State*, 644 N.E.2d 536, 538 (Ind. 1994) (applying Indiana constitution to Indiana state judge's ruling on question of whether Indiana prosecutor should be permitted to convict upon evidence that was product of federal search warrant); *People v Griminger*, 524 N.E.2d 409, 412 (N.Y. 1988) ("Since defendant has been tried for crimes defined by the State's penal law, we can discern no reason why he should not also be afforded the benefit of our State's search and seizure protection"; rejecting the prosecution's alternative argument that "[f]ederal law should apply . . . since the warrant was issued by a [f]ederal [m]agistrate and executed by [f]ederal agents"); *State v. Williams*, 617 P.2d 1012, 1017-18 (Wash. 1980) (concluding that the Washington Privacy Act "fully applies to evidence proffered in state court, even when that evidence was gathered by federal peace officers"); *State v. Cardenas-Alvarez*, 25 P.3d 227 (N.M. 2001); *State v. Rodriguez*, 854 P.2d 399 (Or. 1993); *State v. Davis*, 834 P.2d 1008 (Or. 1992).

For example, in *State v. Cardenas-Alvarez*, the New Mexico Supreme Court applied the state constitution where the defendant, a non-U.S. citizen, arrived at a permanent checkpoint 60 miles from the Mexican border in a truck bearing Mexican license plates at 7:45pm. 25 P.3d 225, 227 (N.M. 2001). Border Patrol inspected the defendant's paperwork and asked standard questions regarding the defendant's origin and destination. *Id*. The agent found the defendant's responses suspicious and referred him to a secondary checkpoint where the agent obtained consent to search the vehicle. *Id*. Based on the results of this search, the agent conducted a canine search. *Id*. The canine alerted on the tank, which triggered the defendant's arrest. *Id*. The car was subsequently dismantled revealing an inner gas tank containing nearly 85 pounds of marijuana. *Id*. The Court stated that it found "no mandate in the text of [the New Mexico Constitution] nor in [its] jurisprudence interpreting th[e] clause, to selectively protect New Mexico's inhabitants from intrusions committed by state but not federal governmental actors." *Id.* at 232. The *Cardenas-Alvarez* Court explained that, "[u]nlike the private actors[,] … federal agents exercise jurisdiction over New Mexicans and possess the authority to systematically subject [New Mexico] inhabitants to searches, seizures and other interferences." *Id.* According to that Court, "[a] federal agent who wields these powers unreasonably commits precisely the sort of unwarranted governmental intrusion against which the New Mexico Constitution ensures." *Id.* (quotations omitted). Thus, the Court held that New Mexico's exclusionary rule would be applied in the state court "when a federal agent effectuat[ed] such an intrusion[.]" *Id.*

The Oregon Supreme Court reached a similar result in *State v. Davis*, 834 P.2d 1008 (Or. 1992), where evidence gathered by a Mississippi officer was utilized in an Oregon state prosecution. There, the Court held that

> if the government seeks to rely on evidence in an Oregon criminal prosecution, that evidence must have been obtained in a manner that comports with the

> protections given to the individual by Article 1, [§]9 of the Oregon Constitution. It does not matter *where* that evidence was obtained (in-state or out-of-state), or *what* governmental entity (local, state, federal, or out-of-state) obtained it; the constitutionally significant fact is that the Oregon government seeks to use the evidence in an Oregon criminal prosecution. Where that is true, the Oregon constitutional protections apply.

Id. at 1012–13 (emphasis in original). This holding was affirmed in *State v. Rodriguez*, 854 P.2d 399 (Or. 1993) one year later in the context of evidence seized by a federal officer. In *Rodriguez*, the Oregon Supreme Court excluded evidence obtained by an Immigration and Naturalization Service agent legally under federal law because it did not meet Oregon's constitutional standards. Applying *Davis*, the Court opined that it sees "no reason why the factual distinction between a state officer and a federal officer has any legal significance in determining whether certain evidence is admissible in an Oregon criminal prosecution." *Id.* at 403. *Davis* was most recently examined and followed in June 2017 by the Oregon Supreme Court. *See State v. Keller*, 396 P.3d 917, 922 (Or. 2017) ("We made clear in *Davis* that out-of-state governmental conduct implicates Article I, [§] 9").

For these reasons, this Court must categorically reject the reverse silver platter doctrine. Whether CBP has used these checkpoints in other jurisdictions is beside the point. The searches and seizures at these checkpoints occurred in New Hampshire and the New Hampshire Constitution must apply to them in State court prosecutions.

B. Alternatively, Even if this Court Does Not Categorically Reject the "Reverse Silver Platter" Doctrine (Which it Must), the New Hampshire Constitution Must Be Enforced Where Federal Officials Collaborate with State Officials to Collect Evidence for a State Criminal Proceeding.

Even if this Court does not categorically reject the reverse silver platter doctrine (which it must), Article 19 must apply when federal officials collaborate with state actors to secure evidence for a state criminal proceeding.

Many states that have not categorically rejected the reverse silver platter doctrine have still concluded that state law must apply when federal officers' actions effectively qualify as state action. The state action exception examines whether federal and state officers were working so closely together that the federal actors could be viewed as state agents. *See State v. Knight*, 661 A.2d 298, 308 (N.J. 1995) ("in order to avoid the strictures of state constitutional protections, federal agents when obtaining evidence sought to be used in a state action must have 'acted independently and without cooperation or assistance of our own state officer'"); *State v. Minter*, 561 A.2d 570, 577 (N.J. 1989) ("If a purpose of the investigation is for a State prosecution, the federal agents can, in effect, be deemed agents of the State prosecutors …"); *State v. Cauley*, 863 S.W.2d 411, 416 (Tenn. 1993) ("When evidence is used in a Tennessee courtroom that has been obtained at the behest of Tennessee authorities pursuant to their own investigation of a crime occurring within our borders, as in the instant case, Tennessee's constitutional search and seizure principles should apply.").

Here, for the purposes of the 18 Defendants' pending drug charges, the search and seizure protections of Article 19 must apply because CBP and local law enforcement actively and closely collaborated to investigate and prosecute these state drug cases. Indeed, the purpose of CBP's drug investigations *was* for state prosecution. CBP never acted independently. CBP knew from the outset that it needed to collaborate with local law enforcement to ensure that individuals allegedly caught with drugs were charged in state court. As CBP Agent-in-Charge Paul F. Kuhn asked State Police Troop F Commander Gary Prince in a July 24, 2017 email: "Governor Sununu has decriminalized marijuana. When we do the checkpoint, we will probably have some personal use seizures. Our federal attorney will not prosecute that amount of marijuana. Do your guys or local police in general still ticket for this type of thing." *See* July 24, 2017 Email Chain, at SP002,

attached as *Ex. 11*.

During the August 2017 checkpoint, CBP and the WPD worked hand in hand. On August 10, 2017, CBP agents traveled in-person to Woodstock to inform the WPD about the checkpoint. *See* Sept. 1, 2017 Email, at WPD012, attached as *Ex. 2*. During the checkpoint itself, CBP would execute the dog-sniff searches and the WPD—which was, as planned, lying in wait—would swoop in and cite any individuals CBP allegedly caught with drugs. The WPD was present at CBP's request. The WPD observed everything that was occurring. And CBP immediately turned over to the WPD all alleged drugs for prosecution. The WPD was open about this collaboration in comments to the *Union Leader*:

> Oleson said Woodstock police handled arrests for state law violations, nearly all of which involved drug possession or drug transportation.
>
> He said federal agents used three dogs and walked them alongside cars as they waited in the checkpoint. If the dog signaled the possible presence of drugs, the driver was asked to park. Occupants of the car exited the car, and a dog went through the interior.
>
> *"Those dogs were highly trained and impressive to watch," Oleson said. Border patrol agents would locate the drugs, field-test them, weigh them, and then turn them over to Woodstock police.*
>
> *Oleson said border patrol agents have "a lot more leeway," and he could not use a dog to search a car unless he has a suspicion of drug possession that he can articulate. He said no arrests were made for driving under the influence of drugs.*

See Mark Hayward, "U.S. Border Patrol arrest 25 illegals at I-93 roadblock, seizes pounds of pot," *Union Leader* (Aug. 28, 2017) (emphasis added), attached as *Ex. 1*. The WPD's September 1, 2017 press release echoed this collaboration, noting: "Woodstock Police was proud to assist Border Patrol with their federal checkpoint and in preventing these illegal drugs from staying on the streets of our Community." *See* Sept 1, 2017 WPD Press Release, at WPD010, attached as *Ex. 2*; *id.* at WPD008 ("[W]ith the diligence of [CBP's] K9's detection work, over (30) individuals

were arrested by the Woodstock Police Department for being in possession of drugs and/or drug paraphernalia."). The WPD added in the press release that the checkpoint provided "an opportunity to remove illegal narcotics from our communities." *Id.* at WPD010. On August 27, 2017, after the August checkpoint had come to a close, CBP officials also drafted I-44 forms (Reports of Apprehension or Seizure) for those allegedly caught with contraband and sent these forms to the WPD so the WPD could prosecute these individuals in state court. *See* Aug. 27, 2017 Email, at WPD001, attached as *Ex. 2*. In an email sent the next day, CBP agent Paul Kuhn wrote WPD Chief Oleson to thank him, adding: "Without you folks we would have been hamstrung. Chief John Pfiefer, my boss, is going to call you today to thank you personally." *See* Aug. 28, 2017 Email, at WPD003. CBP's August 28, 2017 press release further documents this collaboration with local officials: "The subjects [of drug charges] were turned over to the Woodstock Police Department for further investigation and prosecution." *See* Aug. 28, 2017 CBP Press Release, at WPD004, attached as *Ex. 2*. The State has also disclosed CBP agents as potential trial witnesses in these 18 cases.

The collaboration between CBP and the State Police was similar during the September 2017 checkpoint. Following the August 2017 checkpoint, the State Police and CBP engaged in active discussions about the use of the checkpoints in New Hampshire, including requests for assistance made by CBP to the State Police. *See generally* State Police Emails, attached as *Ex. 11*. The State Police—like the WPD before it—was aware that, if CBP encountered someone allegedly in the possession of drugs as a result of the dog-sniff searches during the September 2017 checkpoint, CBP would contact the State Police for assistance. And CBP knew that the State Police was ready and waiting. When CBP allegedly found contraband, the State Police were called, would swoop in, and would then charge and prosecute the individuals.

CBP's collaboration with local law enforcement during these checkpoints was deep and pervasive. And, as WPD Chief Oleson acknowledged in statements to the *Union Leader*, everyone knew that CBP would be using its expansive federal powers in ways that state law enforcement officials could not under the New Hampshire Constitution. In short, CBP conducted the drug-sniffing-dog searches for the benefit of the local police. Accordingly, the protections of Part I, Article 19 apply in these state court proceedings.

II. The Warrantless and Suspicionless Dog-sniff Searches Conducted by CBP Violated Part I, Article 19 of the New Hampshire Constitution and the Principles of *State v. Pellicci*, 133 N.H. 523 (1990). Thus, the Evidence Derived Therefrom is Inadmissible in State Court Proceedings Seeking to Enforce State Drug Laws.

While warrantless and suspicionless dog-sniff examinations of car exteriors are allowed and admissible in federal prosecutions under the Fourth Amendment,[7] the New Hampshire Constitution is more protective of privacy.

In *State v. Pellicci*, 133 N.H. 523 (1990), the New Hampshire Supreme Court rejected the United States Supreme Court's Fourth Amendment jurisprudence in *United States v. Place*, 462 U.S. 696 (1983) and held that, under Part I, Article 19, "[e]mploying a trained canine to sniff a person's private vehicle in order to determine whether controlled substances are concealed inside is certainly a search." *Id.* at 531-33; *see also State v. Perez*, Nos. 07-S-3385, 08-S-155, 2008 N.H. Super. LEXIS 3, *16 (Apr. 30, 2008) ("The New Hampshire Supreme Court has held that a canine sniff in a vehicle to determine what controlled substances are concealed within is a search.") (Nadeau, T., J.). This is because a dog-sniff search is "a quest by an officer of the law, a prying

[7] *See United States v. Place*, 462 U.S. 696, 707 (1983) (treating a canine sniff by a well-trained narcotics-detection dog as "sui generis" because it "discloses only the presence or absence of narcotics, a contraband item"); *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (holding that a dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess is not a search under the Fourth Amendment). Justice Souter dissented in *Caballes*, arguing that "I would hold that using the dog for the purposes of determining the presence of marijuana in the car's trunk was a search unauthorized as an incident of the speeding stop and unjustified on any other ground." *Id.* at 410 (Souter, J., dissenting).

into hidden places for that which is concealed." *Pellicci*, 133 N.H. at 533. As a result, absent a warrant, "authorities [must] be able to articulate a reasonable suspicion of criminal activity, albeit after the fact, to employ a dog to sniff for contraband." *Id.* at 531-33, 536. Demanding less would "abdicate [the court's] responsibility for judicial scrutiny of searches under our State Constitution." *Id*.

It cannot be reasonably disputed that the dog-sniff searches employed by CBP in these cases violated Article 19. Neither CBP, the WPD, nor the State Police had any information regarding Defendants before the dog-sniff search was deployed. Neither law enforcement entity had talked to Defendants nor observed any suspicious behavior. They did not have any inkling that Defendants allegedly possessed drugs. At most, they knew Defendants were in vehicles travelling south from somewhere north of Woodstock. CBP never would have uncovered any alleged contraband without the use of the dog-sniff search.

The WPD even publicly confirmed that there was no reasonable suspicion to believe that any of the Defendants possessed contraband before the dog-sniff searches were employed—a reality which barred the WPD from using this tactic under Article 19. As the WPD police chief explained in a press interview, CBP has "a lot more leeway" to conduct dog-sniff searches whereas he would need a reasonable suspicion of drug possession to run those same searches. *See* Mark Hayward, "U.S. Border Patrol arrest 25 illegals at I-93 roadblock, seizes pounds of pot," *Union Leader* (Aug. 28, 2017), attached as *Ex. 1*. CBP itself effectively characterized these searches are being suspicionless, calling them "pre-primary free air sniffs." *See* Sixteen Police and Border Patrol Reports from Aug. 2017 Checkpoint, attached as *Ex. 3*; Brett Pokines Oct. 11, 2017 State Police Report (handwritten Page 7), attached as *Ex. 13*.

This arbitrary and indiscriminate use of dog-sniff searches was a fishing expedition expressly rejected by the New Hampshire Supreme Court in *Pellicci*. This search cannot meet the impermissible level of "a hunch," let alone reasonable suspicion. *See State v. Joyce*, 159 N.H. 440, 447 (2009) (holding there was no reasonable suspicion when officers smelled marijuana on defendant after calling for a drug dog); *State v. Pepin*, 155 N.H. 364, 367 (2007) (holding that "a brief squeal of tires, without more, does not support a reasonable suspicion that the road racing statute had been, was or was about to be violated"); *State v. Beauchesene*, 151 N.H. 803, 815 (2005) (holding that seeing two men in an alley exchange something small and unidentifiable in an area where drug transactions are more common did not establish reasonable suspicion).

Exclusion here must apply because, without it, state and federal officials would be incentivized to circumvent the independent protections of Article 19 by prearranging for a federal search, and then using the results of the federal search in state court. *See Elkins*, 364 U.S. at 217 ("[The exclusionary rule's] purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."); *Beauchesne*, 151 N.H. at 817 ("The exclusionary rule acts as a remedy for a violation of a defendant's right to be free from illegal searches and seizures."); *see also State v. De La Cruz*, 158 N.H. 564, 566 (2009) ("A warrantless search or seizure is *per se* unreasonable and evidence derived from such a search or seizure is inadmissible unless the state unless the State proves that it comes within one of the recognized exceptions to the warrant requirement."). If permitted, state and federal officials could—in conjunction with the fact that CBP has the authority to run checkpoints within 100 miles of any United States "external boundary"—collaborate to eviscerate the protections under *Pellicci* virtually *everywhere in New Hampshire*. This is because practically all of New Hampshire is within 100 miles of an "external boundary" (which includes the Canadian border and New

Hampshire's 13-mile Atlantic seacoast). *See* ACLU, "The Constitution in the 100-Mile Border Zone," attached as *Ex. 17*. A picture of this 100-mile border zone is here:

Id. The facts of this case highlight these perverse incentives and the need for exclusion. Based on the WPD police chief's own statements to the *Union Leader*, this collaboration was designed to avoid New Hampshire's constitutional protections against suspicionless dog-sniff searches.

Accordingly, any evidence secured arising out of these dog-sniff searches must be excluded in these state prosecutions seeking to enforce state drug laws.

III. Alternatively, the August/September 2017 Checkpoints Conducted by CBP Violated the Fourth Amendment to the United States Constitution and Part I, Article 19 of the New Hampshire Constitution, as their Primary Purpose was Drug Interdiction.

The August/September 2017 checkpoints violated the Fourth Amendment and Part I, Article 19 of the New Hampshire Constitution for another reason: their primary purpose was drug interdiction.

The Fourth Amendment bans "unreasonable searches and seizures." Under the Fourth Amendment, "a search or seizure is ordinarily unreasonable in the absence of individualized

suspicion or wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). While the United States Supreme Court has "upheld brief, suspicionless seizures of motorists at a fixed Border Patrol checkpoint designed to intercept illegal aliens," it has also held that suspicionless seizures may not be conducted at checkpoints or roadblocks if they are primarily conducted for purposes of generalized crime prevention. *Id* at 37, 47 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)); *id.* at 44, 41 ("We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime."; "We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing"). Thus, whether a suspicionless seizure conducted by the government at a checkpoint is reasonable for purposes of the Fourth Amendment turns on the primary programmatic purpose for which the checkpoint is administered.

In *Martinez-Fuerte*, the United States Supreme Court addressed "whether a vehicle may be stopped at a fixed [immigration] checkpoint for brief questioning of its occupants even though there is no reason to believe the particular vehicle contains illegal aliens." 428 U.S. at 562. There, the Supreme Court found that "the purpose of the stop [was] legitimate and in the public interest" and the need for the stop was demonstrated by the record. *Id*. The facts of that case are worth mentioning. There, the record demonstrated, among other things, that the checkpoints at issue—all of which were near the U.S. border with Mexico—were located on "important highways" that would offer undocumented individuals who snuck across the border "a quick and safe route into the interior." *Id.* The record also reflected that one of the challenged checkpoints was in operation 70% of the time and yielded "725 deportable aliens in 171 vehicles" in an eight-day period. *Id*. at 554. These data and the Court's previous opinions both reflected that the "maintenance of a traffic-checking program in the interior is necessary because the flow of illegal aliens cannot be controlled

effectively at the border." *Id.* at 556. The Court indicated that "the flow of illegal entrants from Mexico poses formidable law enforcement problems." *Id.* at 552. Because of the significance of the problem, the Court found that requiring border patrol agents to investigate immigration violations based on roving traffic stops supported by reasonable suspicion "would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens [and] would largely eliminate any deterrent to the conduct of well-disguised smuggling operations." *Id.* at 557. Given these facts—and a finding that these checkpoints were necessary to control the flow of illegal immigrants—the Court held "that under the circumstances the government interests outweighed those of the private citizen." *Id*. at 556–62.

Given the holdings of *Edmond* and *Martinez-Fuerte*, border patrol checkpoints within 100 miles from the border are not automatically constitutional under the Fourth Amendment in all cases. A checkpoint's reasonableness "still depends on a balancing of the competing interests at stake and the effectiveness of the program." *Edmond*, 531 U.S at 47; *see also Illinois v. Lidster*, 540 U.S. 419, 427 (2004) ("In judging reasonableness, we look to the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.") (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)); *Martinez-Fuerte*, 428 U.S. at 559 ("a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review"). Here, there is a significant difference between CBP's August/September 2017 checkpoints and the checkpoints in *Martinez-Fuerte*—namely, the August/September 2017 checkpoints were established for the primary purpose of drug interdiction in violation of *Edmond*. This is for several reasons.

First, CBP knew from the outset that its purpose would be to catch people for drug offenses. This is why CBP engaged local law enforcement to collaborate well before the checkpoints began. *See* Sept. 1, 2017 Email, at WPD012 (CBP engaged WPD on August 10, 2017), attached as *Ex. 2*. This is why CBP asked the State Police as early as July 24, 2017 whether individuals caught with marijuana could be charged with a crime. *See* July 24, 2017 Email, at SP002, attached as *Ex. 11*. This is why, during the checkpoints, local law enforcement responded to calls from CBP to charge individuals allegedly caught with drugs. This is why, during the August 2017 checkpoint, the WPD was on the scene to watch CBP's use of dog-sniff searches (which, according to the WPD chief, was "impressive to watch"). *See* Mark Hayward, "U.S. Border Patrol arrest 25 illegals at I-93 roadblock, seizes pounds of pot," *Union Leader* (Aug. 28, 2017), attached as *Ex. 1*. And this is why one CBP official told the WPD police chief that "[w]ithout you folks [the WPD] we [CBP] would have been hamstrung." *See* Aug. 28, 2017 Email, at WPD003, attached as *Ex. 2*. This collaboration was for no other purpose than to engage in drug interdiction. *See* Section I.B, *supra* (documenting collaboration between CBP and local law enforcement).

Second, CBP and local law enforcement's public statements all indicate that the primary purpose was drug interdiction. According to the WPD's September 1, 2017 press release, "*US Border Patrol's primary function is to look for* immigration violations and *large quantities of illegal narcotics at these checkpoints*." *See* WPD Sept. 1, 2017 Press Release, at WPD008 (emphasis added), attached as *Ex. 2*. The release also announced that these checkpoints were conducted, in part, "to combat illegal immigration *and drug trafficking issues*" and were "an opportunity to remove illegal narcotics from our communities." *See id.* at WPD008, 010 (emphasis added). Similarly, as CBP stated in an August 28, 2017 press release, "[c]heckpoints are just one

of the tools we utilize to enforce the immigration *and other federal laws of our nation*." *See* Aug. 28, 2017 CBP Press Release, at WPD004 (emphasis added), attached as *Ex. 2*.

Third, CBP's use of dog-sniff searches themselves indicate that the checkpoints' primary purpose was drug interdiction. *See Edmond v. Goldsmith*, 183 F.3d 659, 665 (7th Cir. 1999) ("the dog at the City's roadblocks shows … that the purpose of the roadblocks is to catch drug offenders"). It appears that CBP subjected *all* vehicles ensnared within the checkpoints—hundreds, if not thousands—to "pre-primary free air sniffs." Forty-three (43) individuals—including the 18 Defendants—cited for drug offenses during the August/September 2017 checkpoints were only detained following the use of the dog-sniff searches. Put another way, law enforcement would not have detained these 43 individuals but for CBP's use of the dog-sniff search. There also has been no evidence produced suggesting that the 33 individuals detained by CBP for immigration issues during the August/September 2017 checkpoints were detected through a dog-sniff.

Fourth—unlike the checkpoints in *Martinez-Fuerte* where there was evidence that highways would provide undocumented individuals *who snuck across the U.S./Mexico border* "a quick and safe route into the interior"—the August/September 2017 checkpoints had little nexus to ensuring that undocumented individuals *who snuck across the U.S./Canadian border* do not have "a quick and safe route into the interior" of the United States. *See Martinez-Fuerte*, 428 U.S. at 557. This points to the fact that these checkpoints principally served a non-immigration purpose (in particular, drugs), were substantially intrusive, and were unnecessary. For example, there is no indication that any of the 33 allegedly undocumented individuals detained during the August/September 2017 checkpoints arrived from Canada or even crossed the northern border. Of the 25 individuals detained by CBP during the August 2017 checkpoint for immigration-related

issues, 14 were visa overstays from Columbia. These 14 individuals originally entered the United States *lawfully*. Of the 25, three were children originating from Columbia who attended Excel Academy Charter Schools in the Boston-area. *See* NHPR Staff, "Three Children Among 25 Undocumented Immigrants Detained at N.H. Highway Checkpoint," *NHPR* (Aug. 30, 2017), attached as *Ex. 9*. Others were from Brazil, Ecuador, and Mexico. *See* Aug. 28, 2017 CBP Press Release, at WPD004, attached as *Ex. 2*. Of the eight individuals detained by CBP during the September 2017 checkpoint for immigration-related issues, two overstayed their visas. Individuals were detained from Bulgaria, Ecuador, El Salvador, and Guatemala. *See* Oct. 2, 2017 CBP Press Release, attached as *Ex. 16*. These checkpoints' lack of nexus to the northern border is consistent with earlier New England checkpoints. For example, when addressing a June 2004 I-91 Vermont checkpoint, a CBP agent explained: "'The vast majority of those [detained] were either *entering illegally on the southwest border of the United States, or they came in legally as an immigrant and then didn't depart*.' …. [The agent] said an illegal alien might be working for a construction company elsewhere in the country that bids on a job in Vermont, causing the employee to relocate." *See* Associated Press, "Two illegal aliens arrested on I-91," *Union Leader* (June 12, 2004) (emphasis added), attached as *Ex. 18*.

Fifth, the timing of the checkpoints has no nexus to immigration-related concerns. When these checkpoints were in regular use prior to 2012, it was timed to target drugs. Then, the checkpoint was historically employed around Motorcycle Week, which is held annually in June. *See* Sept 1, 2017 WPD Press Release, at WPD010, attached as *Ex. 2*. Motorcycle Week is known for its participants' raucous behavior. The September 2017 checkpoint also was not specifically timed to target unlawful immigration activity. Rather, it was scheduled because the funds for the checkpoint had to be used before October 1, 2017. *See* Sept. 19, 2017 Email, at SP030, attached

as *Ex. 11*. In short, there is no evidence that there exists any specific immigration "problem" that these checkpoints might reasonably be expected to address.

Sixth, and significantly, the August/September 2017 checkpoints produced more alleged drug violations than alleged immigration violations. Forty-four (44) individuals who were in the United States lawfully were charged with drug possession. Of these 44 individuals, 42—including the 18 Defendants in the above-captioned cases—were charged with possessing small amounts of drugs for personal use (mostly marijuana). None of these 42 individuals were charged with offenses greater than class B misdemeanors, and none were alleged to possess drugs with the intent to sell. A 43rd person was charged with felony drug possession, but the State nolle prossed his case.[8] However, CBP detained approximately 33 individuals for immigration-related offenses during the checkpoints. The United States Supreme Court has explained that the "effectiveness of the program" informs its programmatic purpose. *See Edmond*, 531 U.S. at 47. Here, the numbers alone establish that, when looking at the checkpoints' effectiveness, CBP's primary purpose was drug-related.

In sum, the August/September 2017 checkpoints were a well-organized, meticulously-planned criminal investigation for drugs. If CBP or any other federal police agency had conducted the checkpoints for drug-related purposes, it would have been unconstitutional under *Edmond* and its predecessors. *See also Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (holding that, except in those situations in which there was reasonable suspicion that a motorist was unlicensed or that an automobile was not registered, or that either the vehicle or an occupant was otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile was

[8] Again, the 44th person (Jason Labrie) was charged with running the checkpoint along with other drug charges.

unreasonable under the Fourth Amendment). CBP's pairing of the checkpoints with a secondary immigration-control purpose does not cleanse the checkpoints of that constitutional taint. Indeed, based on CBP's transparent efforts to use these checkpoints for drug interdiction, the natural inference that this Court should draw is that the traveling public ought not be asked to endure checkpoint stops in the middle of the White Mountains—a popular tourist attraction—unless the government can both articulate an appreciable public interest (programmatic purpose) and demonstrate in some fashion that the public interest sought to be advanced is, in fact, advanced to some degree (efficacy). The State cannot meet this burden. Therefore, the searches and seizures of all Defendants were unconstitutional and any evidence derived therefrom must be suppressed.

Finally, even if the checkpoints did not violate the Fourth Amendment (which they did), the Court must conclude that, based on the facts above, the checkpoints violated Part I, Article 19, thereby limiting the use of this evidence acquired from the checkpoints in these state criminal prosecutions. *See State v. Koppel*, 127 N.H. 286, 289 (1985) (Article 19 provides broader protections than the Fourth Amendment in the context of motor vehicle searches). Here, even if the Court concludes that drug interdiction was not *the* primary purpose of the checkpoints (which it was), drug interdiction was undoubtedly *a* primary purpose. Given this reality, the checkpoints cannot withstand Article 19's more robust privacy protections.

IV. Alternatively, the August/September 2017 Checkpoints—and the Warrantless/Suspicionless Dog-sniff Searches Conducted by CBP—Violated Part I, Article 19 of the New Hampshire Constitution Because They Failed to Comply with the Test in *State v. Koppel*, 127 N.H. 286 (1985). Thus, the Evidence Derived Therefrom is Inadmissible in State Court Proceedings Seeking to Enforce State Drug Laws.

The August/September 2017 checkpoints—as well as CBP's use of dog-sniff searches—violated Part I, Article 19 of the New Hampshire Constitution for one final reason: they failed to

comply with the test in *State v. Koppel*, 127 N.H. 286 (1985).

As the New Hampshire Supreme Court in *Koppel* explained, "where the search or seizure of a motor vehicle is involved, article 19 provides significantly greater protection than the fourth amendment against intrusion by the State." *Id.* at 291. Thus, "[t]o justify the search or seizure of a motor vehicle, absent probable cause or even a reasonable suspicion that a criminal offense is being committed, the State must prove that its conduct significantly advances the public interest in a manner that outweighs the accompanying intrusion on individual rights." *Id.* at 291-92. The State "must further prove that no less intrusive means are available to accomplish the State's goal." *Id.* In applying this test, the purpose of the roadblocks becomes critical. *Id.* at 292. Here, as explained above in Section III, *supra*, the primary purpose of the checkpoints was drug related. But even if the checkpoints' purpose was immigration-related, they still fail under *Koppel*.

The degree of intrusion imposed by these checkpoints and dog-sniff searches on individual rights far outweighs any value to the public interest. The intrusion here was significant. An inordinate number of law-abiding citizens must be stopped at these checkpoints in order to make only tens of arrests for immigration and drug-related offenses. During the six days of the August/September 2017 checkpoints, hundreds—if not thousands—of vehicles were stopped, yet only approximately 77 individuals were arrested for violations of any law (33 immigration-related and 44 for non-immigration crimes). These checkpoints are fraught with subjective intrusion. Neither CBP nor local law enforcement officials provided any notice to the public of the August/September 2017 checkpoints. They just happened. The checkpoints were also in a temporary location. As the Court explained in *Koppel*, "[a] roadblock of the latter type [temporary and unpublished] produces a substantially greater amount of subjective intrusion—the generation of concern or even fright on the part of lawful travelers, which both article 19 and the fourth

amendment were intended to prevent." *Id.* at 293 (internal citation and quotations omitted).

The public interest served by the checkpoints was also minimal. As explained in Section III, *supra*, there is no legitimate public interest advanced in conducting these checkpoints for drug-related purposes, as drug checkpoints expressly violate the Fourth Amendment principle in *Edmond*. Moreover, there can be no public interest in setting up a drug checkpoint using a suspicionless dog-sniff search that, under *Pellicci*, is barred under the New Hampshire Constitution. Here, the only reason the State can claim that 43 individuals were allegedly found with drugs (excluding the individual who fled the checkpoint) is because the State impermissibly used dog-sniff searches that violated the State Constitution. Put another way, the intrusion here was great because individuals detained in these CBP checkpoints were both seized *and* subjected to an illegal dog-sniff search. These checkpoints also did not serve the public interest of regulating highways that may provide undocumented individuals who snuck across the U.S./Canadian border "a quick and safe route into the interior." *See Martinez-Fuerte*, 428 U.S. at 557. As explained above in Section III, *supra*, there is no evidence that any of the 33 individuals detained for immigration offenses during the August/September 2017 checkpoints ever crossed the Canadian border. Also, neither CBP nor local law enforcement obtained a warrant from a judge approving the checkpoints. No independent and neutral magistrate ever determined that these checkpoints advanced any public interest, let alone one that outweighed the intrusion on the lives of those waiting in line at the checkpoints (though both notice and a warrant still would not cure the checkpoints' constitutional infirmities under *Pellicci* and *Edmond*).

Thus, the seizure and search of Defendants were unconstitutional under Article 19. These checkpoints "draw dangerously close to what may be referred to as a police state." *Koppel*, 127 N.H. at 296 (quoting *State v. Smith*, 674 P.2d 562, 564-65 (Okla. Crim. App.

1984)). The checkpoints "ignored the presumption of innocence" and "assumed that criminal conduct must be occurring on the roads and highways," thereby taking an "'end justifies the means' approach" that is unacceptable under the New Hampshire Constitution. *Id.*

V. The Relief Requested

As an epilogue, it is important to note that the relief sought here would neither disturb nor enjoin the lawful activities of CBP.

As to Sections I-IV of this Memorandum focusing on the independent protections of the New Hampshire Constitution, the relief Defendants seek would only preclude the use of evidence derived from these checkpoints *in state court prosecutions*. Defendants acknowledge that New Hampshire's broader constitutional protections—including its dog-sniff protections—may have little impact on evidence seized for use in federal court criminal prosecutions. But the 18 cases here are not federal court prosecutions. In these 18 cases, state law enforcement officers used federal agents' power to circumvent the independent protections of the New Hampshire Constitution by acquiring evidence and pursuing *state* prosecutions based upon searches state officials could not have done themselves. The New Hampshire Constitution must apply when this occurs. To hold otherwise "would abdicate [the court's] responsibility for judicial scrutiny of searches under our State Constitution." *Pellicci*, 133 N.H. at 536; *see State v. Cardenas-Alvarez*, 25 P.3d 227, 232 (N.M. 2001) ("Our application of state constitutional standards to determine the admissibility in state court of evidence seized by federal agents will not affect any prosecution that might be brought against Defendant in federal court, or otherwise circumscribe federal activities within our borders."); *State v. Williams*, 617 P.2d 1012, 1017 (Wash. 1980) ("the application of state statutory criteria to all evidence proffered in state court is essential to give effect to the congressional purpose of permitting more rigorous state requirements"); *United States v. Wright*,

16 F.3d 1429, 1434 (6th Cir. 1994) ("The state may exclude evidence in trials that would not be excluded by application of the Fourth Amendment. However, the state rule does not have to be applied in federal court."). And, as to Section III of this Memorandum addressing the federal Constitution, the relief Defendants seek would only affirm the well-established Fourth Amendment principle in *Edmond* that the primary purpose of an immigration checkpoint set up within 100 miles of the border must not be drug interdiction.

CONCLUSION

For these reasons, Defendants respectfully request that this Court grant this Consolidated Motion to Suppress and suppress any and all evidence seized by CBP for use in these cases brought in state court seeking to enforce state drug laws.

Respectfully submitted,

Defendants,

By and through their attorneys in cooperation with the American Civil Liberties Union of New Hampshire Foundation,

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December 8, 2017

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been delivered by mail to the Plymouth Area Prosecutor (pcja1988@gmail.com), State Police Officer Meredith Favreau (meredith.favreau@dos.nh.gov), and State Police Prosecutor Roni Karnis (roni.karnis@dos.nh.gov) on this date, December 8, 2017.

Gilles Bissonnette