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
State v. Travis Dustin, 469-2017-cr-1940

DEFENDANTS' REPLY TO THE STATE'S OBJECTIONS TO DEFENDANTS' MOTION TO SUPPRESS

NOW COME the above-captioned 17 Defendants, by and through their attorneys, and hereby file this Reply to the State's Objections to their Motion to Suppress.[1]

[1] Note that the case *State v. Brett W. Pokines*, 469-2017-cr-1941, which was previously consolidated with these cases, has been resolved. Accordingly, there are now 17 consolidated cases at issue in Defendants' Motion to Suppress. In addition, for the sake of the record's completeness, Defendants have attached the I-44 Report of Apprehension or Seizure form completed by CBP concerning Defendant Travis Dustin. This document is attached as *Ex. 19*.

ARGUMENT

I. The New Hampshire Constitution Applies to the Searches and Seizures Conducted in These Cases. As a Result, Because the State Does Not Meaningfully Dispute that the Warrantless and Suspicionless Dog-sniff Searches Conducted by CBP Violated *State v. Pellicci*, 133 N.H. 523 (1990), the Evidence Must Be Suppressed.

A. The New Hampshire Constitution Applies in New Hampshire State Court

These cases are about the importance of the New Hampshire Constitution. Significantly, the State's Objections do not seriously contest the fact that the searches conducted by United States Customs and Border Protection ("CBP") during the August and September 2017 checkpoints violated Part I, Article 19 of the New Hampshire Constitution. Under Part I, Article 19 of the New Hampshire Constitution, 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). The State does not dispute the fact that CBP did not have a warrant or reasonable suspicion to conduct dog-sniff searches at these checkpoints. It also appears that the Woodstock Police Department ("WPD") may have been involved in some of these searches conducted by CBP during the August 2017 checkpoint. *See* 16 August 2017 Checkpoint Police Reports, attached as *Ex. 3*.[2]

[2] According to I-44 Report or Apprehension forms created by CBP arising out of the August 2017 checkpoint, WPD involvement was as follows:

- Kyle Goodell: "In secondary I (CBP Agent) assisted the Woodstock Police Sgt. K. Millar where Milo altered. Sgt. Millar subsequently located approximately 20 grams of marijuana in the front seat of the vehicle. Sgt. Seized the 20 grams of marijuana…"
- Taylor O'Neill: "All items were recovered by Woodstock Police SGT K Millar."
- Richard Robinson: "All items were recovered by Woodstock Police SGT K Millar."
- Daniel McCarthy: "All items were recovered by Woodstock Police SGT K Millar."
- Timothy Lucier: "All items were recovered by Woodstock Police SGT K Millar."
- Michael Benoit: "All items were recovered by Woodstock Police SGT K Millar."
- Adam Clark: "All items were recovered by Woodstock Police Chief R. Oleson"
- Jacob Rushing: "All items were recovered by Woodstock Police Chief R. Oleson"
- Jesse Drewniak: "The illicit drugs and paraphernalia were seized by Officer K. Millar"
- Jeffery Goodwin: "The illicit drugs and paraphernalia were seized by Officer K. Millar"

See 16 August 2017 Checkpoint Police Reports, attached as *Ex. 3*.

The State attempts to avoid this unconstitutionality under Article 19 by arguing that the New Hampshire Constitution does not apply in these cases. According to the State, this is so because CBP agents—not state agents—conducted the initial seizures and dog-sniff searches. *See* State's Br. at 12. Based on the State's position, it appears that whether the New Hampshire Constitution applies to these consolidated cases is dispositive as to Defendants' suppression claim under *Pellicci*.

The State cites no New Hampshire case law in support of its position that the New Hampshire Constitution does not apply in state court criminal prosecutions where non-New Hampshire actors—here, CBP agents—conducted the seizure or search. To the contrary, the New Hampshire Supreme Court, in the seminal case *State v. Ball*, explained that *state courts must apply the independent protections of the New Hampshire Constitution first in state court prosecutions*. *See State v. Ball*, 124 N.H. 226, 231 (1983) ("When a defendant, as in this case, has invoked the protections of the New Hampshire Constitution, we will first address these claims."). As *Ball* noted, applying the New Hampshire Constitution is critical because "[w]e live under a unique concept of federalism and divided sovereignty between the nation and fifty States." *Id.* The *Ball* Court went on:

> The sovereign people gave limited powers to the State government, and the Bill of Rights in part I of the New Hampshire Constitution protects the people from governmental excesses and potential abuses. 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. If we ignore this duty, we fail to live up to our oath to defend our constitution and we help to destroy the federalism that must be so carefully safeguarded by our people …. Even if it appears that the Federal Constitution is more protective than the State Constitution, the right of our citizens to the full protection of the New Hampshire Constitution requires that we consider State constitutional guarantees.

Id. at 231, 232. The holding in *Ball* recognizes that, in state court prosecutions, the New Hampshire Constitution often provides greater protections to defendants than the federal

constitution. Yet, the State in these cases asks this Court to create an exception to *Ball* that would render the New Hampshire Constitution inapplicable where the search or seizure is conducted by a federal law enforcement agency. No such exception exists under *Ball* or any other New Hampshire precedent. Rather, as *Ball* explains, the applicability of the New Hampshire Constitution is dependent on the state court prosecutorial forum, not on who conducted the search or seizure. This is consistent with the finding of the United States Supreme Court in *Elkins v. United States*, 364 U.S. 206 (1960), that "[t]o the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.* at 215. As the *Elkins* Court explained, "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." *Id.*

The New Hampshire Supreme Court has repeatedly found—consistent with *Ball*—that the New Hampshire Constitution applies in state court criminal prosecutions, regardless of who collects the evidence in question. *See State v. Turmelle*, 132 N.H. 148, 152 (1989) (analyzing federal agent's search in Hawaii under Part 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). In both *Turmelle* and *McDermott*, the New Hampshire Supreme Court summarily applied the New Hampshire Constitution to non-New Hampshire law enforcement actors where such actors secured evidence for use in a New Hampshire prosecution. The State has not cited a New Hampshire case to the contrary. Nor is the State able to materially distinguish these cases or limit them to their facts. Nothing in these two cases—or in *Ball* for that matter—suggests that this

rule would (or should) be any different in the context of an interior federal border patrol checkpoint conducted 90 driving miles from the international border.

These cases are about a simple proposition: If the State chooses to prosecute a person in state court under our state's laws, then it must comply with the rules of that forum—here, the New Hampshire Constitution, which is "the fundamental charter of our State." *See Ball*, 124 N.H. at 231. Put another way, according to a common adage, the State has, in choosing state court as the forum to bring criminal charges, "made its bed, and now it must lie in it."

B. Federal Law Does Not Trump State Law with Respect to These Interior Checkpoints

The State further argues that, under the Supremacy Clause, the Fourth Amendment trumps the New Hampshire Constitution with respect to the interior border patrol checkpoints conducted in these cases. This is wrong for two reasons. First, the State's argument, once again, runs contrary to the federalism principle in *Ball* that, in New Hampshire state courts, the New Hampshire Constitution may provide greater protections than the Fourth Amendment and therefore must be applied in state criminal prosecutions. If the New Hampshire Constitution is not applied, then New Hampshire courts "fail to live up to [their] oath[s] to defend our constitution" and "help to destroy the federalism that must be so carefully safeguarded by our people." *Ball*, 124 N.H. at 231.

Second, the State's Supremacy Clause argument relies on cases that have no bearing on this case. Unlike in *State v. Coburn*, 683 A.2d 1343 (Vt. 1996) and the other cases cited by the State, the searches in these 17 cases were not "federal border searches," as they occurred over 90 driving miles from the border in the interior of New Hampshire in the context of temporary immigration checkpoints. The State has cited no case in any state court rejecting the applicability of a state constitution in this context where the searches were conducted as part of an interior

checkpoint miles from the border. For example, in *Coburn*, the Vermont Supreme Court held that the Vermont Constitution did not apply to a "federal border search" conducted by customs officials at J.F.K. International Airport, which is the functional equivalent of an international border. This decision was explicitly premised upon (and limited to) the federal government's exclusive interest in safeguarding the international border. The same is true of the other cases cites by the State, which focus exclusively on searches conducted at the border. *See People v. Mitchell*, 275 Cal. App. 2d 351, 79 Cal. Rptr. 764, 767 (Ct. App. 1969) ("A border search by a United States Customs Officer is lawful; does not depend upon probable cause; and is not governed by state laws."; search conducted at U.S./Mexico border); *Morales v. State*, 407 So. 2d 321, 329 (Fla. Dist. Ct. App. 1981) (evidence seized by Customs officers pursuant to reasonable border search is clearly admissible in either federal or state courts; involved search and seizure of sea vessel crossing from the high seas into the United States territorial seas); *State v. Allard*, 313 A.2d 439, 451 (Me. 1973) (no state constitutional violation where Customs officer turned over evidence to state police; involving Calais, Maine/Canadian border); *State v. Bradley*, 719 P.2d 546, 548 (Wash. 1986) (applying only federal Constitution arising out of a search/seizure at the Washington/Canadian border).

The justification in *Coburn* and the other cases the State cites for not applying their respective state constitutions is inapplicable here. In these cases, the courts are concerned with intruding on the federal government's exclusive function of controlling activities *at the nation's international borders*. *See Coburn*, 683 A.2d at 1347 ("Control of commerce with foreign nations is an exclusively federal function under the United States Constitution …."); *Bradley*, 719 P.2d at 548 ("[I]t is Congress to whom the federal constitution allocates the responsibility for policing international borders …."). But that federal jurisdiction no longer becomes exclusive within the interior of the United States. For example, in Woodstock 90 driving miles from the Canadian

border, New Hampshire law enforcement carries primary responsibility for enforcing the State's drug laws. And, relatedly, those individuals traveling through Woodstock miles away from the border have an expectation that their independent rights under the New Hampshire Constitution will be respected if confronted with a state court prosecution.

These 17 checkpoint cases are nearly identical to *State v. Cardenas-Alvarez*, 25 P.3d 225 (N.M. 2001), where the New Mexico Supreme Court applied its State Constitution to evidence seized by federal officials at a permanent border patrol checkpoint 60 miles from the Mexican border. *Id.* at 227; *id.* at 247 (Baca, J., concurring) (noting checkpoint authority within 100 miles of a border). The State's Objections ignore this decision. This New Mexico search, like the 17 cases here (and unlike the searches in cases cited by the State), *did not* take place at the border. In *Cardenas-Alvarez*, the Court explicitly rejected the State's argument that "federal agents are not subject to state constitutions, and that their alleged non-compliance with the New Mexico Constitution … does not affect the admissibility of evidence in a New Mexico court." *Id.* at 232. The 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, "when a federal agent effectuates such an intrusion and the State proffers the evidence thereby seized in state court, we will subject it to New Mexico's exclusionary rule." *Id.*

The result in *Cardenas-Alvarez* is required here in New Hampshire. It is irrelevant that the dog-sniff searches in these 17 cases were conducted by CPB. Because evidence derived therefrom is sought to be used in a New Hampshire court, the New Hampshire Constitution applies. *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)[3]; *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")[4]; *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").

It is critical to note that the State's position, if adopted by this Court, would neuter the New Hampshire Constitution and its independent protections throughout *all of New Hampshire*. This is the case because all of New Hampshire is within 100 miles of an "external boundary." *See*

[3] The State attempts to distinguish *Moran*, but to no avail. The fact that an Indiana officer was directly involved in the execution of the search warrant played no role in that Court's ultimate conclusion that "Indiana judges serve as judicial officers of a sovereign power, the State of Indiana. They must respect and adjudicate state constitutional claims when made. This is a separate and distinct dimension of their offices." *Id.* at 538. The *Moran* Court concluded that the Indiana Constitution applied because the criminal case was pending in an Indiana Court. And the fact that the *Moran* Court did not invalidate the warrant under the Indiana Constitution is immaterial. What is material is that the Indiana Supreme Court applied the Indiana Constitution to this Indiana prosecution, just as the New Hampshire Constitution must apply to these New Hampshire prosecutions. It is true that *Moran* was overruled by *Litchfield v. State*, 808 N.E. 2d 713 (Ind. App. 2004), but it was on other grounds. *See State v. Shipman*, No. 59A01-0704-CR-189, 2007 Ind. App. Unpub. LEXIS 743, at *12 (Ct. App. Aug. 30, 2007) ("*Litchfield*, requiring reasonable suspicion to conduct a warrantless trash search, had not been decided at the time Shipman's trash had been searched. *Litchfield* invalidated the prior analysis originally announced in *Moran v. State*, 644 N.E.2d 536 (Ind. 1994). Prior to *Litchfield*, trash pulls were evaluated under our Supreme Court's decision in *Moran v. State*, which held that the constitutionality of a trash search should be based upon the reasonableness of the search looking at the totality of the circumstances. *Moran*, 644 N.E.2d 536. The focus of the review of the constitutionality of the trash search in Moran was the manner in which the trash was seized.").

[4] The State attempts to distinguish *Griminger*, but this too is no avail. The fact that the search was conducted and evidence seized by New York officers was irrelevant to the Court's holding that, because the "defendant has been tried for crimes defined by the State's penal law," he should "be afforded the benefit of our State's search and seizure protection." In *Griminger*, the Court applied the New York Constitution to an affidavit prepared by federal Secret Service agents and approved by a federal magistrate judge—an affidavit that ultimately formed the basis of a search by state officials. The Court held that, under New York law, the affidavit was lacking and therefore the search warrant been improperly issued. As a result, the fruits of that illegal search were suppressed. *Id*. at 410.

ACLU, "The Constitution in the 100-Mile Border Zone," attached as *Ex. 17*. This is worth repeating: Under the State's theory, CBP would have *carte blanche* to use dog-sniff searches that violate the New Hampshire Constitution throughout all of New Hampshire and then hand over evidence seized from these searches to state officials for prosecution in state court. This is of particular concern here where, as demonstrated by the facts of this case, federal border patrol officials and state officials actively collaborated to avoid New Hampshire's constitutional protections against suspicionless dog-sniff searches in a popular tourist area during the last summer weekend in August 2017. *See* Mark Hayward, "U.S. Border Patrol arrest 25 illegals at I-93 roadblock, seizes pounds of pot," *Union Leader* (Aug. 28, 2017) (WPD police chief noting that CBP was conducting searches that he was barred from conducting), attached as *Ex. 1*.

Finally, the State is incorrect in its claim that a ruling in Defendants' favor "would result in CBP's inability to utilize canine sniffs in furtherance of their critical immigration and other Federal enforcement duties" and would "invade the province of the federal jurisdiction." *See* State's Memo. at 11. Granting Defendants' Motion on *Pellicci* grounds would do nothing to limit CBP's authority to create temporary immigration checkpoints in the interior of New Hampshire or use suspicionless dog-sniff searches for the primary purpose of immigration enforcement during these interior checkpoints. Of course, if a CBP canine uncovers a person who is in the United States unlawfully during these checkpoints, nothing would bar CBP from detaining that person and pursuing removal proceedings in federal immigration court (though it is unclear to Defendants how a canine would actually be able to smell whether a person is in the United States unlawfully or is being concealed). CBP also need not turn, as the State suggests, "a blind eye" to illegal drugs. CBP would, of course, be free to use any contraband derived from these warrantless and suspicionless dog-sniff searches—even to the extent that its collection violated the New

Hampshire Constitution—as evidence in federal prosecutions where the New Hampshire Constitution does not apply. *See Cardenas-Alvarez*, 25 P.3d at 232 ("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."). But what the State cannot do—which it is what it is doing here—is circumvent the independent protections of the New Hampshire Constitution in a state court proceeding. While this Court does not have "the authority to constrain the activities of federal agents," this Court does "possess the authority—and indeed the duty—to insulate our courts from evidence seized in contravention of our state's constitution." *See Cardenas*, 25 P.3d at 394.[5]

C. Though Not Necessary to Apply the New Hampshire Constitution, Federal Officials Here Collaborated with State Officials to Collect Evidence for These State Criminal Proceedings.

The New Hampshire Constitution and *Pellicci* apply in these state court prosecutions even if CBP did not act in concert with, and thus as agents for, the WPD or the State Police. As explained above, the New Hampshire Constitution applies because these prosecutions are in state court.

However, the search and seizure protections of Article 19 independently apply in these cases because CBP and local law enforcement did actively collaborate to investigate and prosecute these state drug cases. *See State v. Knight*, 661 A.2d 298, 308 (N.J. 1995) ("in order to avoid the

[5] The State claims that "it is well settled in New Hampshire law for over 50 years that police officers of one jurisdiction can lawfully transfer probable cause to police officers of other jurisdiction for crimes allegedly committed in the first jurisdiction." *See* State's Br. at 8; *see also State v. Merriam*, 150 N.H. 548, 550 (2004) ("It is well settled that police officers of a town can transfer probable cause to police officers of another town for crimes allegedly committed in the first town."). Defendants do not contest this legal proposition but it does little to support the State's argument. Of course, if a law enforcement officer secures evidence in violation of the New Hampshire Constitution—which occurred here—and then transfers that evidence to another officer, that transfer does not inoculate the evidence from the constitutional violation.

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.").

With respect to the August 2017 checkpoint, the collaboration between the CBP and the WPD does not appear to be seriously in dispute. 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 Lt. Gary Prince in a July 24, 2017 email: "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*. The WPD was present at the August 2017 checkpoint at CBP's request. The WPD observed everything that was occurring. And CBP immediately turned over to the WPD all alleged drugs for prosecution. It also appears that WPD may have been involved in some of these searches conducted by CBP during the August 2017 checkpoint. *See* 16 August 2017 Checkpoint Police Reports, attached as *Ex. 3*.[6] 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.

[6] *See supra* note 2.

> 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), attached as *Ex. 1*. With respect to the September 2017 checkpoint, the State has similarly conceded that the State Police "had general knowledge that U.S. Border Control was going to conduct a checkpoint operation" and that there was a "general agreement [to] lend assistance if needed." *See* State Police Dec. 18, 2017 Obj. to Mot. to Suppress.[7]

II. 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 State's brief does little, if anything, to undermine the facts establishing that the primary purpose of these checkpoints was drug-related, as opposed to immigration related. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 44, 41 (2000) ("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"). First, the State does not dispute that CBP engaged local law enforcement to collaborate in order to arrange the

[7] The Vermont Supreme Court decision in *State v. Coburn*, 683 A.2d 1343 (Vt. 1996) is inapplicable here as well because it concerned a border search conducted by federal agents where there was no collaboration with state law enforcement officials during the search at the border. There, the challenged search was conducted by federal officials at JFK International Airport without any state involvement.

arrest of individuals who were caught with drugs arising out of these checkpoints. This collaboration was necessary because the U.S. Attorney would not prosecute these individuals for possession-amount drug offenses. *See* July 24, 2017 Email Chain, at SP002, attached as ***Ex. 11***. After the August 2017 checkpoint, CBP agent Paul Kuhn also 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, attached as ***Ex. 2***.

Second, the State does not dispute that CBP and local law enforcement's public statements all indicate drug interdiction as a primary purpose of the checkpoints. *See* WPD Sept. 1, 2017 Press Release, at WPD008 ("US Border Patrol's primary function is to look for immigration violations and large quantities of illegal narcotics at these checkpoints."), attached as ***Ex. 2***.

Third, the State does not dispute that CBP used drug-sniffing dogs. *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"). However, the State claims that these dogs also had the purpose of "detecting concealed humans." *See* State's Br. at 7. This assertion is conclusory and cannot be credited by this Court. In fact, through a pending Motion to Compel filed on December 20, 2017, Defendants have sought information from CBP concerning these dogs' ability to "detect concealed humans." This request seeks, among other things:

> **Request No. 9**: Documents sufficient to identify, of the 25 individuals detained for immigration-related reasons during the August 25-27, 2017 checkpoint in Woodstock, how many of these 25 individuals were detected through the use of a dog sniff during the checkpoint.
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> **Request No. 11**: Documents sufficient to identify, of the 8 individuals detained for immigration-related reasons during the September 26-28, 2017 checkpoint in Woodstock, how many of these 8 individuals were detected through the use of a dog sniff during the checkpoint.

> **Request No. 15**: From 2001 to the present, for each border patrol checkpoint in the interior of the Unites States conducted by the Swanton Sector pursuant to CBP's authority to set up a checkpoint 100 miles from an external boundary, documents sufficient to identify how many individuals were cited for possession of a controlled substance after the use of a dog sniff during each checkpoint.
>
> **Request No. 18**: From 2001 to the present, for each border patrol checkpoint in the interior of the Unites States conducted by the Swanton Sector pursuant to CBP's authority to set up a checkpoint 100 miles from an external boundary, documents sufficient to identify how many individuals detained due to their immigration status were detected through the use of a dog sniff during each checkpoint.

The State, in objecting to Defendants' Motion to Compel, has refused to attempt to collect this information from CBP. In addition, CBP has failed to produce documents concerning these checkpoints in response to the ACLU-NH's Freedom of Information Act request. *See* CBP FOIA Response, attached as *Ex. 20*. Given this unwillingness to produce any evidence from CBP on these important questions, the State has not met its burden of establishing by a preponderance of the evidence that the dogs employed by CBP have a dual purpose of "detecting concealed humans." *See Ball*, 124 N.H. at 234 (holding that the State has the burden of proving, by a preponderance of the evidence, that a warrantless search and seizure was constitutionally permissible). Thus, the dogs' only real purpose, as derived from the available evidence, is drug-related.

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 State has produced no evidence establishing that the August/September 2017 checkpoints had a 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; *see also* Hannah Robbins, Note, "Holding the Line: Customs and Border Protection's Expansion of the Border Search Exception and the Ensuing Destruction of Interior Fourth Amendment Rights," 36 Cardozo L. Rev. 2247, 2266-67

(2015) ("Of the 2743 people arrested during CBP transportation raids in Rochester in that four-year span [2006-2009], only seven were arrested at entry and fifteen were arrested within seventy-two hours of crossing the border."; "Of the 41,912 passengers who were stopped [during February and November 2008 checkpoints in Washington State], eighty-one undocumented immigrants were taken into custody, nineteen people were turned over to other agencies, and zero terrorists were apprehended."). The State has produced nothing showing that any of the 33 individuals detained during these checkpoints by CBP because of immigration status crossed the U.S. Canadian border. Defendants have requested information on this question in their December 20, 2017 Motion to Compel, where they sought, among other things:

> **Request No. 8**: Documents sufficient to identify, of the 25 individuals detained for immigration-related reasons during the August 25-27, 2017 checkpoint in Woodstock, how many of these 25 individuals entered the United States from the U.S./Canadian border. This request includes documents sufficient to identify where and when each of these 25 persons crossed the border.
>
> **Request No. 10**: Documents sufficient to identify, of the 8 individuals detained for immigration-related reasons during the September 26-28, 2017 checkpoint in Woodstock, how many of these 8 individuals entered the United States from the U.S./Canadian border. This request includes documents sufficient to identify where and when each of these 8 persons crossed the border.
>
> **Request No. 17**: From 2001 to the present, for each border patrol checkpoint in the interior of the Unites States conducted by the Swanton Sector pursuant to CBP's authority to set up a checkpoint 100 miles from an external boundary, documents sufficient to identify how many individuals detained due to their immigration status had entered the United States from the U.S./Canadian border. This request includes documents sufficient to identify where and when each detained person crossed the border.

Once again, the State has refused to attempt to obtain this information from CBP. Since it has not been produced, the State has not met its burden, and this Court must assume that none of these 33 individuals had any nexus to the U.S./Canadian border.

Fifth, no evidence has been produced indicating that there exists any specific immigration "problem" that these checkpoints might reasonably be expected to address. For example, CBP

scheduled the September 2017 checkpoint not because of any specific immigration concern, but because the funds for the checkpoint had to be used before October 1, 2017. *See* Sept. 19, 2017 Email, at SP030, attached as *Ex. 1*.

Sixth, and significantly, the State does not dispute that 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. However, CBP detained approximately 33 individuals for immigration-related offenses during the August/September 2017 checkpoints.

III. The "Border Search" Exception to the Fourth Amendment Does Not Apply Because the August/September 2017 Checkpoints Were Not "Border Searches."

The State also invokes the "border search" exception to the Fourth Amendment. However, as explained above, even if this Court finds that the "border search" exception applies under a Fourth Amendment analysis to these interior checkpoints, the greater protections of the New Hampshire Constitution nonetheless apply because these cases are in state court. *See Cardenas-Alvarez*, 25 P.3d at 232. In any event, the "border search" exception to the Fourth Amendment is inapplicable here.

Under the "border search" exception, border searches and seizures are permitted without a warrant or probable cause. *See United States v. Ramsey*, 431 U.S. 606, 616 (1977). But, as the United States Supreme Court in *Ramsey* explained, this exception only applies to searches and seizures made at the international border or its functional equivalent. *See id.* ("searches *made at the border* … are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration") (emphasis added). The "functional equivalent" of a border is generally the first practical detention point after a border crossing or the final port-of-entry. Places such as international airports within the country and ports within the country's

territorial waters or stations at the intersection of two or more roads extending from the border exemplify such functional equivalents. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973). For example, in *Almeida-Sanchez*, the United States border patrol, as part of a roving patrol, conducted a search without a warrant or probable cause on a vehicle 25-miles from the Mexican border. The Supreme Court held that the border-search exception did not apply because the roving patrol occurred miles away from the border and was therefore not a search at the "functional equivalent" of the border. As a result, the defendant was entitled to the full protections of the Fourth Amendment. As the Court explained: "But the search of the petitioner's automobile by a roving patrol, on a California road that lies at all points at least 20 miles north of the Mexican border, was of a wholly different sort. In the absence of probable cause or consent, that search violated the petitioner's Fourth Amendment right to be free of 'unreasonable searches and seizures.'" *Id*. at 273.

The August and September 2017 checkpoints, like the search in *Almeida-Sanchez*, were not "border searches" conducted at the "functional equivalent" of the border; rather, they were "temporary immigration checkpoints" set up in the interior of New Hampshire 90 driving miles from the Canadian border. Significantly, they were not in permanent locations. Moreover, given their significant distance from the border, these checkpoints had a profound impact on domestic traffic. Indeed, though CBP has not produced requested data on the August/September 2017 checkpoints (and therefore the State has failed to meet its burden), there is not a reasonable certainty that a significant portion of the individuals ensnared in these checkpoints actually crossed the northern border. *See Almeida-Sanchez*, 413 U.S. at 273 ("searches at *an established station near the border*, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches") (emphasis added); *United States v.*

Jackson, 825 F.2d 853, 859-60 (5th Cir. 1987) ("Whether a checkpoint merits functional equivalency status, therefore, depends entirely on the nature of the traffic passing through it. To justify searches at checkpoints labeled the functional equivalent of the border the government must demonstrate with 'reasonable certainty' that the traffic passing through the checkpoint is 'international' in character."; holding that checkpoint 14 miles from Mexican border was not a border equivalent for Fourth Amendment purposes); *United States v. Heinrich*, 499 F.2d 95, 95 (9th Cir. 1974) (checkpoint 72 miles north of the international boundary was not the functional equivalent of a border).

The temporary interior checkpoints at issue here conducted miles away from the border have a different set of rules than those that apply at an international border under *Ramsey*. Under *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), these interior immigration checkpoints are 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." *Id.* at 558. Unlike the rules that exist at the actual border under *Ramsey*, neither vehicles nor occupants should be searched, and referrals to secondary inspection areas should involve "routine and limited inquiry into residence status" only. *Id.* at 560. As *Martinez-Fuerte* explains, the primary purpose of the checkpoint must be immigration related. Here, as explained in Section II *supra*, the primary purpose of the August/September 2017 checkpoints was not immigration related.

IV. 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).

The State argues that the *Koppel* test does not apply because that case concerned sobriety checkpoints. *See* State's Br. at 13. The State is incorrect. In *Koppel*, the New Hampshire Supreme

Court created a standard for warrantless automobile searches and seizures as a whole. It did so because "[w]here the search or seizure of a motor vehicle is involved, N.H. Const. pt. 1, art. 19, provides significantly greater protection than the Fourth Amendment against intrusion by the State." *Id.* at 291. As the *Koppel* Court explained, "[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." The Court then applied this test to sobriety checkpoints. But, by its plain terms, this *Koppel* test is not limited to sobriety checkpoints; rather, it applies any search or seizure of a motor vehicle done without probable cause or reasonable suspicion given the robust protections afforded automobiles under the New Hampshire Constitution. As CBP's search and seizure of Defendants' automobiles were warrantless and suspicionless, the State must present evidence establishing that the conduct of law enforcement "significantly advances the public interest in a manner that outweighs the accompanying intrusion on individual rights." As explained in Defendants' Motion to Suppress, the State has failed to adequately do so.

V. The State Has Failed to Meet Its Burden Because It Has Declined to Produce Material Witnesses and Critical Documents.

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. Again, the core of the State's argument is that the New Hampshire Constitution does not apply because the initial searches and seizures were conducted by CBP, not State actors. However, notwithstanding the State's reliance on CBP, the State has refused to obtain documents in CBP's possession related to the checkpoints' efficacy which is relevant under *Edmond* and *Koppel*, including documents

concerning (i) the number of people (hundreds, perhaps thousands) of individuals detained as a result of these checkpoints, (ii) how dogs were used during the checkpoints, how many people were the victim of these unconstitutional dog-sniff searches, and whether dogs detected anyone who was in the United States unlawfully, and (iii) how many individuals who were detained due to their immigration status during the checkpoints came across the northern U.S./Canadian border. Defendants have sought this information through a pending Motion to Compel filed on December 20, 2017, but the State has objected to attempting to identify these documents. Defendants have also sought these documents from CBP through a Freedom of Information Act (FOIA) request, but CBP has produced no documents to date. *See* CBP FOIA Response, attached as *Ex. 20*. These documents are critical to these cases and to cross examine CBP's potential testimony at the January 11, 2018 hearing, yet no law enforcement agency has been willing to collect this information.

State Trooper Goulet and Lt. Prince have also been subpoenaed to testify and produce documents in this case. *See* Dec. 26, 2017 Goulet/State Police Subpoena, attached as *Ex. 21*; Dec. 26, 2017 Prince/State Police Subpoena, attached as *Ex. 22*. However, the State has moved to quash these subpoenas and, in so doing, has not agreed to (i) produce Trooper Andrew Goulet and Lt. Gary Prince for the January 11, 2018 hearing or (ii) produce two attachments to emails sent by CBP to the State Police concerning the constitutionality of these checkpoints. The State Police has also not provided assurances that (excluding these two withheld attachments) it produced all responsive documents concerning the checkpoints. This testimony and this information is critical. First, the State has designated Trooper Goulet as a trial witness in the case of Defendant Travis Dustin. *See Ex. 23*, at p. 034 (designating Trooper Goulet as a witness). Given this designation, obviously Trooper Goulet has relevant and necessary testimony in this case. In light of this disclosure, there is no justification for the State's decision to not produce this witness for the

January 11, 2018 hearing. Second, Lt. Prince—who is the State Police's Troop F commander—is necessary to provide testimony as a supervisor concerning the State Police's "general knowledge that U.S. Border Control was going to conduct a checkpoint operation" and "general agreement [to] lend assistance if needed." *See* State Police Dec. 18, 2017 Obj. to Mot. to Suppress. Third, as evidenced in the attached subpoena to Trooper Goulet, Lt. Prince, and the State Police, the State Police is withholding important attachments to emails in this case. *See* Dec. 26, 2017 Goulet/State Police Subpoena (Doc. Request No. 5, Ex. A), attached as ***Ex. 21***. These attachments were sent from CBP Agent Paul Kuhn to the Colonel Christopher Wagner—the head of the State Police—in September 2017 with the hope of justifying the checkpoints' constitutionality. Notwithstanding this clear relevance, the State is refusing to produce this information on the ground that it contains "sensitive law enforcement information." There is no such privilege warranting this withholding, and the State cites no case supporting its position. And even if this information is truly "sensitive"—which is doubtful—then Defendants' counsel would consider a stipulated protective order in which Defendants' counsel would be barred from sharing this information.

Finally, the State in its Motion to Quash Defendants' subpoenas to the Division of the State Police argues that the withheld email attachments "should be requested of the State." This assertion is surprising because, when Defendants sought this information from the Division of the State Police on December 19, 2017, the Division of the State Police in Concord and the Attorney General's Office refused to accept service of subpoenas; instead, the Division of the State Police referred Defendants' counsel to the State Police prosecutor in these cases. *See* Dec. 19, 2017 ACLU-NH Email to State Police, attached as ***Ex. 24***; Dec. 20, 2017 Email from State Police Refusing to Accept Service, attached as ***Ex. 25***. As a result, on December 26, 2017, Defendants' counsel served a subpoena on Trooper Goulet and Lt. Prince seeking their presence at the January

11, 2018 hearing and the necessary documents in the State Police's possession. Defendants' counsel also sent copies of these subpoenas to the State Police prosecutor by email. Now, the State's Police prosecutor states that Defendants should not seek this information from the prosecutor, but must go back to the Division of State Police leadership (which Defendants attempted to do on December 19, 2017). This "passing of the buck" is inappropriate. Here, the State is the State is the State. The documents are not only relevant, but critical to Defendants' due process rights. Defendants have requested this information, and the State is obligated to produce this information.

In short, because the State has not produced these documents or these witnesses, then it cannot meet its burden of demonstrating the checkpoints' constitutionality. Accordingly, Defendants' Motion to Suppress should be summarily granted.

WHEREORE, Defendants respectfully request that this Court (i) grant their 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; and (ii) grant any other relief that is just or equitable.

Respectfully submitted,

Defendants,

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

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January 10, 2018

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, January 10, 2018.

Gilles Bissonnette