

## Support HB 624-A – Minimize the Burden of Federal Immigration Checkpoints on NH Motorists

HB 624 as amended would, when informed by a federal agency, require state, county, or municipal law enforcement to provide the public with up to 24 hours' notice that a federal agency intends to conduct an immigration checkpoint.<sup>i</sup> The notice shall disclose, if known, the date, municipality, and geographical area in which the checkpoint will occur.

In recent years, CBP has ramped up temporary interior Border Patrol checkpoints in northern New England, staging at least ten temporary checkpoints in the interior of New Hampshire from 2017 to 2019. At least with respect to seven checkpoints in Woodstock, NH, CBP agents inspected each vehicle with a canine that is tasked with searching for drugs.

**Notice helps to minimize the intrusion and negative impact of checkpoints on New Hampshire motorists.** During federal immigration checkpoints, federal agents stop and seize thousands of individuals travelling through New Hampshire's roadways without any probable cause or reasonable suspicion that a crime has been committed. This legislation would bring immigration checkpoints under similar notice requirements to those already required for sobriety checkpoints. Under New Hampshire law, advanced notice is provided for sobriety checkpoints in part to, as the Attorney General indicates in the NH Law Enforcement Manual, "minimize[] motorist surprise, apprehension and inconvenience."<sup>ii</sup> The New Hampshire Supreme Court has looked favorably on advance notice in the context of sobriety checkpoints.<sup>iii</sup> Given the same nature of the intrusion that exists with federal immigration checkpoints, this legislation simply requires advanced notice to the public similar to the notice that is provided with respect to sobriety checkpoints. Indeed, this bill is modeled, in part, after the Department of Justice's 2020 Law Enforcement Manual<sup>iv</sup> addressing sobriety checkpoints and the one-day notice that was provided in *State v. Hunt*, 155 N.H. 465 (2007).

**Immigration checkpoints have been used to circumvent the New Hampshire Constitution.** The NH Supreme Court has found that "[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 in these terms" and law enforcement must "be able to articulate a reasonable suspicion of criminal activity, albeit after the fact, to employ a dog to sniff for contraband."<sup>v</sup> Unfortunately, U.S. Customs and Border Protection (CBP) and NH law enforcement have tried to circumvent this. For example, during the August 2017 and September 2017 checkpoints, if contraband was allegedly found CBP agents seized that contraband and surrendered it to state or local law enforcement who were on the scene of the checkpoint (since the September 2017 checkpoint, the border patrol agents keep any alleged contraband found). During these 2017 checkpoints, state or local law enforcement then charged the individual(s) in state court for violating state drug laws. While CBP have claimed these checkpoints are for the purpose of immigration enforcement, their actions have shown that the primary purpose has been the detection of drugs.<sup>vi</sup>

**This legislation does not require state or local law enforcement to seek out information about federal immigration checkpoints.** This legislation merely requires that state or local law enforcement provide up to 24 hours' notice to the public of such immigration checkpoints when they are informed by a federal agency that such a checkpoint will occur. In addition, this legislation does not require state or local law enforcement to provide the public with the specific location of the checkpoint. It only requires those agencies to "disclose, *if known*, the date, municipality, and geographical area in which the checkpoint will occur." Finally, the legislation provides state and local law enforcement with substantial flexibility regarding the method of public notice. As the bill states, notice methods "may include publishing

this information on the government agency's website and on social media, or the use of press conferences, press releases, radio and television coverage, posters, and flyers.”

## **Support HB 624 – Better protect the thousands of NH motorists detained without reasonable suspicion or probable cause of criminal activity.**

<sup>i</sup> By statute, U.S. Customs and Border Protection (“CBP”) and Border Patrol claim the authority to conduct stops and warrantless searches, including at traffic checkpoints, on vessels, trains, aircraft, or other vehicles anywhere within “a reasonable distance from any external boundary of the United States.” See 8 U.S.C. § 1357(a)(3). A federal regulation defines a “reasonable distance” as “100 air miles from any external boundary of the United States.” See 8 C.F.R. § 287.1(a)(2). An “external boundary” is defined as “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). Approximately two-thirds of the U.S. population live within this so-called 100-mile zone, which encompasses the entirety of the states of Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.

<sup>ii</sup> State of New Hampshire, Law Enforcement Manual, 2020 Edition, Nov. 2020, p. 444, available at <https://www.doj.nh.gov/criminal/documents/law-enforcement-manual.pdf>.

<sup>iii</sup> See *Op. of Justices*, 128 N.H. 14, 16 (1986) (“The bill incorporates a general notice [7-day] requirement, calculated to achieve the maximum deterrent effect while not compromising the effectiveness of the checkpoint through disclosure of the precise location(s). The notice requirement would also have the salutary effect of minimizing apprehension on the part of motorists who are detained at the sobriety checkpoint.”); *State v. Hunt*, 155 N.H. 465, 476 (2007) (noting that “seven days advance notice was constitutionally adequate,” but seven days may not be constitutionally necessary, and shorter notice may be sufficient; holding that law enforcement’s decision to submit notice to press day before the checkpoint was appropriate).

<sup>iv</sup> State of New Hampshire, Law Enforcement Manual, 2020 Edition, Nov. 2020, available at <https://www.doj.nh.gov/criminal/documents/law-enforcement-manual.pdf>.

<sup>v</sup> *State v. Pellici*, 133 N.H. 523 (1990).

<sup>vi</sup> See, *New Hampshire v. McCarthy*, Docket No. 469-2017-CR-01888 (2nd Cir. Dist. Div. Plymouth, Grafton, May 1, 2018) (“while the stated purpose of the checkpoints in this matter was screening for immigration violations the primary purpose of the action was detection and seizure of drugs.” The court went on to state that CBP and the Woodstock Police Department (WPD) were “working in collaboration with each other with the understanding that the WPD would take possession of any drugs seized below the federal guidelines for prosecution in federal court and bring charges in this court based on that evidence. This evidence was seized in violation of the constitutional rights recognized by the New Hampshire Supreme Court in *State v. Pellici*, *supra*. The New Hampshire Constitution governs the prosecution of state laws in state courts.”). In addition:

- During the August 2017 checkpoint, 33 people who were lawfully in the United States were arrested or summonsed for state drug-related offenses by the WPD. Of these 33 individuals, 31 were charged with possessing small amounts of drugs for personal use (mostly marijuana or marijuana derivatives). All 31 were charged with violation-level offenses. According to Border Patrol, only 25 individuals—including three children (two eleventh graders and a seventh grader)—were detained during this checkpoint due to immigration-related issues. A majority of these individuals allegedly overstayed their visas, and none were detected using the drug-sniffing dogs. There is also no evidence that any of these individuals ever crossed the Canadian border.
- During the September 2017 checkpoint, eleven (11) people who were lawfully in the United States were arrested or summonsed for state drug-related offenses by the State Police. One was charged with a violation-level offense and a class B misdemeanor. Another was charged with a class B misdemeanor. The nine (9) other individuals were charged with violation-level offenses under New Hampshire’s marijuana decriminalization law that went into effect on September 16, 2017. See RSA 318-B:2-c. According to Border Patrol, only eight (8) individuals were detained for immigration-related reasons during this checkpoint. None was detected using the drug-sniffing dogs. There is also no evidence that any of these individuals ever crossed the Canadian border.
- During the May 26-28, 2018 Memorial Day Weekend checkpoint, Border Patrol reported arresting 17 allegedly undocumented individuals, six of whom were visa overstays (though, again, it did not report the thousands of other individuals it detained without a warrant or reasonable suspicion). Border Patrol also reported seizing “drugs and drug paraphernalia including a small amount of marijuana, hash oil and THC vape oil.” Two of the 17 immigrants arrested by Border Patrol came to the United States over 19 years ago from South Korea and were in New Hampshire on vacation with their 23-year-old daughter who was a recipient of the Deferred Action for Childhood Arrivals Program (“DACA”).
- During the June 15-17, 2018 Father’s Day Weekend checkpoint, Border Patrol reported arresting five undocumented individuals (though, again, it did not report the thousands of other individuals it detained without a warrant or reasonable suspicion). Border Patrol also reported seizing “drugs including marijuana, marijuana edibles and THC vape oil.”

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