No. 02-1060

In The
# Supreme Court of the United States

ILLINOIS,

*Petitioner,*

v.

ROBERT S. LIDSTER,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of Illinois**

**BRIEF *AMICUS CURIAE* OF NATIONAL COLLEGE FOR DUI DEFENSE IN SUPPORT OF RESPONDENT**

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National College for DUI Defense[1] is a non-profit professional organization founded in 1995. The mission of the College includes assisting its members in the defense of their clients charged with drinking and driving offenses and the advancement of liberty through constitutional advocacy. The College has over 525 members throughout the United States and presents at least two major continuing education programs specializing in issues relating to the defense of persons charged with driving under the influence. The College's Summer Program has been continuously presented at the facilities at Harvard Law School since 1996. Winter Sessions have been given every year since 1997. The College also co-sponsors training and educational seminars with organized Bar Associations including the National Association of Criminal Defense Lawyers.

The National College for DUI Defense believes that *Michigan v. Sitz*, 496 U.S. 444 (1990), should be abandoned, not expanded, because it misapplied the balancing test for determining the reasonableness of criminal investigatory seizures articulated in *Brown v. Texas*, 443 U.S. 47, 50-51 (1979), thereby causing millions of innocent motorists to be subjected to mass suspicionless criminal investigatory seizures. Since an analysis of the instant case must necessarily draw from the authority of *Sitz*,

[1] Consents to file this Brief *Amicus Curiae* have been obtained from counsel of record for both Petitioner and Respondent and filed with the Clerk of this Court. No counsel for any party has authored any part of this brief. No person or entity has made any monetary contribution for the preparation or submission of this brief, nor has its counsel received any compensation from any source for the efforts extended in the preparation of this *Amicus* Brief.

*Amicus* has focused on the infirmities and fallacy of *Sitz*, grounded in an historical perspective, and invites this Honorable Court to consider the constitutional merits counseling against transient law enforcement roadblocks.

## SUMMARY OF THE ARGUMENT

Justice Thomas's dissent in *City of Indianapolis v. Edmond*, 531 U.S. 32, 56 (2002), was a prophetic insight worthy of a new sequel to the hit movie "*Back to the Future*." This Court's roadblock decisions have not included a critical analysis of either the original meaning or intent of the Fourth Amendment in the context of mass suspicionless seizures of law abiding citizens. State courts considering the constitutionality of transient law enforcement roadblocks by the light of history have determined their unconstitutionality. *Pimental v. Department of Transportation*, 561 A.2d 1348, 1352 (R.I. 1989) ("[I]t would shock and offend the framers of the Rhode Island Constitution if we were to hold that the guarantees against unreasonable and warrantless searches and seizures should be subordinated to the interest of efficient law enforcement."); *State v. Henderson*, 756 P.2d 1057, 1058 (Idaho 1988). That same analysis applies in the federal context. The Framers took to heart the "petty indignities" suffered by those in England and colonial America under writs of assistance and general warrants, enacting the Fourth Amendment as an impenetrable barrier between the citizen and unjustified government action threatening the fundamental right of liberty.

*Sitz* has been the source of widespread criticism, originating with the dissents and continuing through

today in law review articles,[2] state court opinions,[3] and legislation barring the use of sobriety roadblocks.[4] The Court misapplied the balancing test enunciated in *Brown* in three significant respects. First, it departed from the fundamental precept in *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967), that public safety cannot justify creation of an exception to the Fourth Amendment's individualized suspicion requirement unless the government can demonstrate that its legitimate ends cannot be met absent an exception. Second, it yielded an inappropriate degree of discretion to law enforcement to determine whether transient roadblocks serve highway safety. This is the fallacy of *Sitz* – the past thirteen years have revealed that transient law enforcement roadblocks bear no nexus with highway safety. Finally, in balancing the intrusion of mass suspicionless criminal investigatory seizures, *Sitz* did not consider the societal intrusion.

As illustrated by the case *sub judice* and *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), *Sitz* has been

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[2] Strossen, *Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 HASTINGS L.J. 285, 370 (1991); Thatcher, *Michigan v. Sitz: A Sobering New Development For Fourth Amendment Rights*, 20 CAP. U.L. REV. 279 (1991); *Drunk Driving Roadblocks*, 104 HARV.L.REV. 266 (1990); O'Loughlin, *Guerillas In The Midst: The Dangers Of Unchecked Police Powers through the Use Of Law Enforcement Checkpoints*, 6 SUFFOLK J. TRIAL & APP. ADVOC. 59.

[3] *E.g., Ascher v. Commissioner*, 519 N.W.2d 193 (Minn. 1994) (characterizing *Sitz* as a "radical departure" from the proper application of *Brown* balancing test). States rejecting roadblocks prior to *Sitz* on independent state grounds have not reversed themselves. *See City of Seattle v. Mesiani*, 755 P.2d 775 (Wash. 1988); *Pimental v. Department of Transportation*, 561 A.2d 1348, 1352 (R.I. 1989); *Michigan v. Sitz*, 506 N.W.2d 209 (Mich. 1993) (rejecting sobriety roadblocks on remand).

[4] *E.g.*, N.H. Rev. Stat. Sec. 265:1-a.

received by law enforcement as creating a "roadblock exception" to the Fourth Amendment where the roadblock serves a worthy interest. For as long as history has documented the duals between government and citizens, the government has argued that its interests justify the sacrifice of certain liberties. *Sitz* indulged the government's argument, loosely applying the constitutional balancing test, thereby giving law enforcement the weapon of mass suspicionless seizures to combat the scourge of drunk driving. In light of our present awareness that it is no more than a blunt instrument, the time has come for a considered analysis of the case sanctioning the proliferation of mass suspicionless criminal investigatory seizures, that the experiment may finally be put to rest.

## ARGUMENT

### I. LAW ENFORCEMENT ROADBLOCKS ARE CONTRARY TO THE FRAMERS' INTENT MANIFESTED IN THE BILL OF RIGHTS.

The Fourth Amendment's provision for the security of the individual is unequivocal in its command and guaranty, not of *creating* a right, but of *securing* a preexisting right, "[t]he right of the people to be secure in their person . . . against unreasonable . . . seizures [which] shall not be violated." The constitutional question presented by warrantless seizures is whether the seizure was reasonable. The focal point of that analysis is an assessment of the perimeter of the rights the Framers intended to safeguard when the Bill of Rights was drafted, for it is through an historical lens that "reasonableness" draws its meaning. *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) ("Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, our effort to give content to this term may be guided by the meaning

ascribed to it by the Framers of the Amendment."). Accordingly, it is necessary to recall the impetus for the Fourth Amendment.

It was during the winter of 1761, when a young John Adams intently listened to arguments on behalf of sixty-three Boston Merchants in the Massachusetts Bay Writs of Assistance Case. *Paxton's Case*, Quincy's Reports 51 (Mass. 1761) (*See also* pgs. 469-82). Writs of assistance were a breed of general warrants and were issued to customhouse officers charged with collecting duties imposed upon the colonies by England as a method of generating revenue. NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51-53 (1937). In *Paxton's Case*, Boston Merchants had petitioned for a hearing on the propriety of writs of assistance issuing after King George II died, since under a statute of Anne, all writs of assistance expired six months after the death of the sovereign. *Id.* at 51-53. The nameless writs, issued by superior court judges, gave customhouse officers unrestrained authority to search and seize any items for which duties had not been paid. *Id.* John Adams recounted the indelible arguments of the merchants' celebrated lawyer, James Otis Jr., to wit:

> I do say in the most solemn manner, that Mr. Otis's oration against the Writs of Assistance breathed into this nation the breath of life. . . . Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against Writs of Assistance. Then and there was the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In 15 years, namely in 1776, he grew to manhood and declared himself free.

WORKS OF JOHN ADAMS, VOL. X, 247-248.

A writ of assistance allowing the indiscriminate investigation and seizure of goods for which duties had not

been paid, however, differed from England's infamous general warrant because it did not, of itself, authorize the arrest of any individual. THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION at 54. Presumably, that is because the general warrant was used by the office of England's Secretary of State to enforce licensing laws forbidding libelous publications by the press, laws which it does not appear were prosecuted by the Crown in the colonies. *See generally Stanford v. State of Texas*, 379 U.S. 476, 482-483 (1965); *Boyd v. United States*, 116 U.S. 616, 626-627 (1886). However, while James Otis Jr. argued against the customhouse officers' writs of assistance in colonial America, the battle against general warrants ensued in England, where charges were levied against Lord Halifax for issuing a general warrant commanding the seizure of persons responsible for, and papers relating to, an alleged libelous publication, No. 45 of the *North Briton*. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 300, fn 1 (1878), quoting MAY'S CONSTITUTIONAL HISTORY OF ENGLAND, c. 11.

Lord Halifax, being without any evidence of the identity of the authors and publishers of No. 45, issued a general warrant, not against any individual, but against the crime. Four messengers, emboldened by their roving commissions, traversed the populace in search of unknown offenders, "[h]olding in their hands the liberty of every man whom they were pleased to suspect." *Id. See also Leach v. Three of the King's Messengers*, 19 How. St. Tr. 1001, 1008 (1765) for text of general warrant commanding the messengers "to make strict and diligent search for the authors, printers, and publishers of . . . The North Briton, No 45." In three days, the ardent messengers arrested forty-nine people, most of whom were innocent. A TREATISE ON CONSTITUTIONAL LIMITATIONS 300, fn 1. Ultimately, the

messengers received information that Wilkes was the author for whom they had been searching, whereupon they set out to arrest him and seize his papers under authority of the general warrant. *See Wilkes v. Wood*, 19 How. St. Tr. 1153, 1161 (1763) (reporting that Lord Halifax admitted on cross-examination that the warrant was issued three days before receiving any information identifying Wilkes). Wilkes, upon being presented with the nameless warrant, declared it "a ridiculous warrant against the whole English nation," and refused to go with the messengers. A TREATISE ON CONSTITUTIONAL LIMITATIONS 301. Not to be deterred, the messengers carried Wilkes away in his chair. *Id.*

Wilkes brought an action against Mr. Wood, the under-secretary of state who personally superintended the warrant, as well as both secretaries of state, Lord Egremont and Lord Halifax, for false imprisonment. *Wilkes v. Wood*, 19 How. St. Tr. 1153 (1763). Lord Chief Justice Pratt declared the warrants illegal, stating that they were "totally subversive of the liberty of the subject," *id.* at 1167, echoing James Otis Jr.'s pronouncement of writs of assistance being "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book, [placing] the liberty of every man in the hands of every petty officer." A TREATISE ON CONSTITUTIONAL LIMITATIONS 303, quoting WORKS OF JOHN ADAMS, VOL. II, pgs. 523-524.

Ultimately, the House of Commons passed resolutions condemning the general warrant. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, VOL. IV, 288 (1765). The demise of the general warrant was applauded both in England and colonial America, as recognized in *Boyd*:

> As every American statesman, during our revolutionary and formative period as a nation, was

> undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.

*Id.* at 626-627. *See also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 648 (1905) (noting that the Fourth Amendment "was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American revolution.").

Back in Colonial America, the flame of indignation ignited by *Paxton's Case* matured to an inferno with the Declaration of Independence in 1776, a ringing indictment of the Crown. Included among the charges was a tacit reference to suspicionless searches and seizures. CARL L. BECKER, THE DECLARATION OF INDEPENDENCE 12 (1922) ("He has sent hither swarms of officers to harass our people and eat out their substance."). One by one, the colonies began enacting their own bills of rights reflecting the concept of natural rights implicit in the Declaration of Independence, *i.e.*, rights which man is entitled to enjoy by virtue of his divine creation, a concept originating with Thomas Aquinas in the Thirteenth Century and carried forward through Montesquieu and Locke to scholars such as Blackstone. THE DECLARATION OF INDEPENDENCE 37; FRANCIS N. THORPE, THE CONSTITUTIONAL HISTORY OF THE AMERICAN PEOPLE 21 (1898). *See, e.g.,* JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT, c. II (1680) ("To understand political power aright, and derive it from its original, we must consider what state all men are naturally in, and that is, a state of perfect freedom to order

their actions . . . as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.").

George Mason drafted the first so-called bill of rights for Virginia in June of 1776. The Virginia Convention adopted Mason's Bill of Rights, but added two additional provisions, one of which was a prohibition against general warrants. HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT 79-80. Pennsylvania's provision securing the right to be free from suspicionless searches and seizures resembles what would become the Fourth Amendment, insofar as it contains every element of the Fourth Amendment, while Massachusetts' Declaration of Rights was the first to use the phrase "unreasonable searches and seizures." *Id.* at 79-82. The Declarations of Rights of Maryland, North Carolina, Vermont, and New Hampshire provided similar safeguards against unreasonable searches and seizures, while Connecticut forbade arrests and seizures unless "clearly warranted" by the laws of the state. *Id.* 81-82.

The Framers, however, did not include a bill of rights with the Constitution it sent to the colonies for ratification. The Convention considered a bill of rights, but rejected the idea, largely because it was believed that the Constitution would not repeal the states' bills of rights and that the rights were so fundamental that it would be dangerous to list them and thereby exclude others by implication. *See id.* at 83-85. Thus in the fall of 1787, the Constitution was presented to the Continental Congress. There, Richard Henry Lee advocated for a declaration of rights providing, *inter alia*, that "the Citizens shall not be exposed to unreasonable searches, seizure of their persons, houses, papers, or property." *Id.* at 87, n.32. Though unsuccessful in his quest for a declaration of rights, the absence of a declaration of rights was significant enough that Congress submitted the Constitution to the States

without an expression of approval. *Id.* at 87-88. Most assuredly, the absence of a bill of rights was the primary impediment to the States' ratification of the Constitution. Fierce debates over ratification ensued; of significant importance was the lack of protection from overzealous government agents, as articulated by Richard Henry Lee (author of *Letters of a Farmer*):

> I feel myself distressed, because the necessity of securing our *personal rights* seems not to have pervaded the minds of men; for many other valuable things are omitted: – for instance, general warrants, by which an officer may search suspected places, without evidence of the commission of a fact, or seize any person without evidence of his crime, ought to be prohibited.

*Id.* at 94, quoting DEBATES ON THE FEDERAL CONSTITUTION, VOL. III 588 (JONATHAN ELLIOT, ED. 1836) (Italics in original.).

Massachusetts, South Carolina, and New Hampshire ratified the Constitution with statements indicating that powers not expressly delegated were reserved, thereby insuring the rights protected by way of their respective state bills of rights. New York ratified but referred a lengthy Declaration of Rights and amendments to a proposed second general convention, the assembling of which was superseded by passage of the Bill of Rights. Significantly, neither North Carolina nor Rhode Island would ratify the Constitution until after the Bill of Rights was passed by the First Congress. HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT 96-97, n.62.

In *Ex Parte Milligan*, 4 Wall. 2 (1866), Justice Davis noted the general view that the Constitution never would have been ratified but for the tacit understanding that it would be amended so as to embody the customary guarantees of personal liberty. *Id.* at 120. And so it was. Washington spoke of the necessity of amendments in his inaugural

address to both houses of Congress. WRITINGS OF GEORGE WASHINGTON, VOL. XI 385-386. James Madison raised the subject of amendments in the First Congress four days later. The significance he gave the issue is reflected in his correspondence to George Eve, written prior to Washington's inaugural address:

> It is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it ought to prepare and recommend to the states for ratification the most satisfactory provisions for all essential rights, particularly the rights of conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants, etc.

WRITINGS OF JAMES MADISON, VOL. V, 320.

Thus, whether original meaning or original intent is considered, it is clear that the Fourth Amendment was fundamental to the colonists' security and peace of mind in its assurance that they would not be subjected to suspicionless searches and seizures. It was essential to the government charter and considered axiomatic that suspicionless searches and seizures exceeded the scope of the "consent of the governed." THE DECLARATION OF INDEPENDENCE 8. This was not a radical concept, but one that had a foundation in centuries of scholarly reasoning.

The genesis of the concept of natural rights has been traced to the writings of Thomas Aquinas in the Thirteenth Century and was elaborated upon by Eighteenth Century philosophers. THE DECLARATION OF INDEPENDENCE 37-40. *See also* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 165-167 (1997). Sir William Blackstone's Commentaries on the Laws of England devoted significant discussion to natural or "absolute rights." He contended, without dispute, that the principal aim of society is to protect individuals in the enjoyment of their absolute rights vested in them by the

immutable laws of nature, and hence, that the "first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals." COMMENTARIES ON THE LAWS OF ENGLAND, VOL. I, 120 (1765) (Emphasis in original). Included among the panoply of man's absolute rights protected by the laws of England was the personal security of individuals, *viz.* "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; *without imprisonment or restraint*; unless by due course of law." *Id.* at 130 (emphasis added). These concepts of liberty resided deep within Thomas Jefferson who echoed Blackstone: "[T]here is a circle around every individual human being, which no government is allowed to overstep, that there is, or ought to be, some space in human existence thus entrenched around and sacred from authoritarian intrusion. . . . "[5] Blackstone further maintained that the right of personal security was a natural right that was not abridged without sufficient cause, not even by a magistrate absent the explicit cession of the law. Blackstone illustrated this principle by citing statutes providing that no freeman could be *detained* or imprisoned without cause shown. *Id.* at 131. So jealously guarded was the right to personal security, that imprisonment was defined to include "*arresting or forcibly detaining [a man] in the street*." *Id.* at 132. Blackstone's treatise reflects the great monument of English freedom that a general warrant to apprehend "all persons guilty of a crime therein specified," without naming or describing any particular person, is illegal and void for its uncertainty, "for it is the duty of the magistrate, and ought not be left to the officer, to judge of

[5] Roark, *State v. Jackson: Warning – Roadblock Ahead! Louisiana Creates Log Jam of Search And Seizure Analysis*, 46 LOY.L.REV. 1341, 1358 (2000).

the ground of suspicion." COMMENTARIES ON THE LAWS OF ENGLAND, VOL. IV 288-289.

Thus the concept of liberty has been consistently woven through the ages, originating in the Thirteenth Century with the principle accepted as fundamentally true by the great philosophers and scholars, that man, by his uniquely divine combination of blood coursing through his veins with the will of his heart and mind, should be ever free to move about society. This is why the Declaration of Independence stated as axiomatic that "*these truths are self-evident, that all men . . . are endowed by their creator with certain unalienable rights*." THE DECLARATION OF INDEPENDENCE 8. The wholesale abridgement of the right of personal liberty entailed by law enforcement roadblocks, however, is inimical not only to the social compact between the American government and its citizens, but to the English common law and centuries upon centuries of reason giving rise to the formation of the United States of America.

Mass suspicionless criminal investigatory seizures of innocent citizens at transient law enforcement roadblocks resuscitates the despised general warrant. If we could "go back" and bring James Otis Jr. into the "future" he would stand before this Court and denounce seizures of innocent citizens without cause as he did in 1761. Jefferson, Adams, and Madison would look at the roadblocks in this case and *Sitz* and remind us that this is not the liberty *they* fought for.

## II. *MICHIGAN v. SITZ* MISAPPLIED THE *BROWN v. TEXAS* BALANCING TEST IN DETERMINING THE CONSTITUTIONALITY OF TRANSIENT LAW ENFORCEMENT ROADBLOCKS.

*Sitz* upheld a Michigan drunk driving roadblock program based on the authority of *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), applying the balancing

test discussed in *Brown*, 443 U.S. at 50-51. *Sitz* is wholly unique in Fourth Amendment jurisprudence because it created an exception to the reasonable suspicion requirement attached to criminal investigatory seizures by allowing law enforcement to conduct mass *suspicionless* criminal investigatory seizures of citizens at interior roadblocks.

The Fourth Amendment standard of reasonableness applies to criminal investigatory seizures. *Davis v. Mississippi*, 394 U.S. 721 (1969).[6] The principle of judging the constitutionality of criminal investigatory seizures by balancing the public interest against the violation of individual liberty originated with *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968).[7] There, the Court carved an exception to the probable cause requirement for seizures, establishing "a narrowly drawn authority" allowing the "stop and frisk" of an apparently armed and dangerous suspect upon reasonable suspicion where the exigencies of officer safety and prevention of impending crime counterbalanced the limited intrusion on the suspect's liberty. *Id.* at 26-27.

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[6] Recognizing the imperative that the Fourth Amendment apply to investigatory seizures, the Court stated:

> Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. *Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions*.'

*Davis*, 394 U.S. at 726-727 (Emphasis added).

[7] *Camara v. Municipal Court*, 387 U.S. 523 (1967), marked the Court's first consideration of balancing in the context of regulatory safety inspections, and was cited by the Court in *Terry*.

In *Sitz*, the Court applied the synthesized jurisprudence resulting from *Terry*'s exception to the predicate of probable cause, discussed in *Brown*, 443 U.S. at 50-51, to consideration of whether the suspicionless criminal investigatory seizures entailed by law enforcement roadblocks were constitutionally permissible. 496 U.S. at 450. However, the Court erred in its application of the balancing test at the inception by not placing the appropriate burden on the government to demonstrate the need for the incredible exception it created. *Camara*, 387 U.S. at 533 (noting that the government's interest in ensuring public safety was not, in and of itself, sufficient to justify exception).

Prior to *Sitz*'s remarkable exception to individualized suspicion for mass criminal investigatory seizures, the Court consistently rejected arguments that a seizure for ordinary criminal law enforcement could be justified on less than individualized suspicion. *Brown*, 443 U.S. at 52 (holding that officer could not detain suspicious looking individual to require production of identification); *Prouse*, 440 U.S. at 648 (holding that officer could not detain individual to check driver's license and registration without cause); *Henry v. United States*, 361 U.S. 98, 103-104 (1959) (invalidating search because seizure of suspects was not reasonable). Despite the significance of the needs in *Terry* – protection of officers' lives and the community from armed robbery – the Court did not elevate the needs above the constitutional requirement for individualized suspicion. *Cf. Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Chandler v. Miller*, 520 U.S. 305 (1997). It is an unwarranted anomaly that the government must demonstrate necessity for the criminal investigative seizure of an individual by articulating reasonable suspicion, but not for mass suspicionless criminal investigatory seizures.

The Court's abolition of the individualized suspicion requirement was marked by its departure from *Camara*'s

precept that public safety cannot justify creation of an exception unless the government can demonstrate that its legitimate ends cannot be met absent the exception. 387 U.S. at 533. However, when the appropriate burden of justification was placed on the states, it is clear that the exception created by *Sitz* is unnecessary to the government's interest.[8] Unlike *Martinez-Fuerte*'s undocumented aliens, drunk driving is outwardly manifested and readily observable[9] to both trained police officers and lay people. *Brignoni-Ponce*, 442 U.S. at 883 (noting that requirement of reasonable suspicion struck the balance between the government's interest and the public's interest in being free from suspicionless seizures since, "the characteristics of smuggling operations tend to generate articulable grounds for identifying violators"); *Camara*, 387 U.S. at 537 ("[T]he public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions . . . are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself."); *Prouse*, 440 U.S. at 659

[8] *Martinez-Fuerte* cannot provide the basis for the *Sitz* exception because of the "qualitatively different balance of reasonableness" inherent in an immigration checkpoint. *United States v. Montoya De Hernandez*, 473 U.S. 531, 538 (1985). Notably, the Court dismissed Justice Brennan's "unwarranted" concern that the checkpoint permitted would be expanded because its holding was "confined to permanent checkpoints." *Martinez-Fuerte*, 428 U.S. at 566, n.19. Moreover, the result in *Martinez-Fuerte* was dictated in part by the presumption of constitutionality accorded relevant federal enactments and the federal government's constitutional authority to regulate immigration and protect our borders.

[9] *See* DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING, NHTSA STUDENT MANUAL, 2000 Session V, Vehicle In Motion, HS178 R2/00 (correlating traffic infractions with likelihood that a driver is impaired).

("Given the alternative mechanisms available . . . we are unconvinced that the incremental contribution to highway safety of the random spot check justifies the practice under the Fourth Amendment.").

> It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of the national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

*United States v. Almeida-Sanchez*, 413 U.S. 266, 273 (1973); *cf. Martinez-Fuerte*, 428 U.S. at 557 (A requirement that stops on major routes inland always be based on reasonable suspicion could 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 aliens.").

The state cannot demonstrate any deficiencies in its ability to stop and detain drivers it reasonably suspects of drunk driving, nor can it demonstrate that roadblocks are necessary to removing drunk drivers from the public roads. The only justification is the amorphous interest in highway safety; there was not, nor could there be, any showing of necessity. In *Florida v. Royer*, 460 U.S. 491, 500 (1983), the Court affirmed *Brignoni-Ponce*'s holding that an officer may stop a driver reasonably suspected of criminal activity on less than probable cause. In *Whren v. United States*, 517 U.S. 806 (1996), the Court held that an officer may constitutionally stop and detain any driver for violating one of hundreds of traffic infractions and further, that the courts need not engage in the balancing of competing interests inherent in such potentially pretext stops. Law enforcement's existing arsenal, coupled with the

outward and observable manifestation of drunk driving, is sufficient to combat the crime of drunk driving – draconian dragnet techniques are not needed to catch drunk drivers.

In *Sitz*, the State did not seek an exception to the requirement of particularized suspicion because it was unable to detect and apprehend drunk drivers, rather, the State sought a "pass" on the requirements of *Terry* and the Fourth Amendment. Thus, the difficult question becomes, can a laudable purpose override the explicit text of the Fourth Amendment, written with the blood of those who believed "that all men . . . are endowed by their creator with certain unalienable rights; that among these are life, liberty, & the pursuit of happiness; [and] that *to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed. . . .* "? THE DECLARATION OF INDEPENDENCE 8 (emphasis added). The answer to this question lies in the balancing of competing interests articulated in *Brown v. Texas*. These factors, as applied to law enforcement roadblocks, will be addressed *seriatim*.

### A. The Gravity of the Government Interest.

While the government's interest in the detection and apprehension of drunk drivers is undisputed, the interest in public safety cannot justify violation of citizens' Fourth Amendment right to be free from suspicionless seizures no more than the government's interest in curbing the staggering numbers of deaths caused by guns may justify infringing citizens' Second Amendment right to own a gun. *See Camara*, 387 U.S. at 533; *Edmond*, 531 U.S. at 42 ("But the gravity of the threat alone cannot be dispositive of questions concerning what *means* law enforcement officers may employ to pursue a given purpose. [Emphasis added.]"). *Cf. Richards v. Wisconsin*, 520 U.S. 385, 392-394 (1997) (rejecting argument that government interest for

officer safety and preservation of evidence justified exception to knock and announce requirement for felony drug cases); *Florida v. J.L.*, 529 U.S. 266, 272-273 (2000) (rejecting argument that inherently dangerous nature of firearms justified firearm exception to *Terry*'s particularized suspicion requirement). Allowing any significant government interest to justify suspicionless criminal investigatory seizures clearly departs from the "original meaning" of Fourth Amendment "reasonableness," since it would mark a return to the nameless general warrant, which found its justification in the severity of the crime. *Entick v. Carrington*, 19 How. St. Tr. 1029, 1063-1064 (K.B. 1765).

Analyzing the constitutionality of mass suspicionless criminal investigatory seizures by simply juxtaposing the government interest against the individual intrusion, as the Court did in *Sitz*, would result in the Fourth Amendment's proscription of unreasonable seizures being swallowed by exceptions, since the government's interest in apprehension of criminals is always significant, while a *Terry* type investigative seizure is, *by definition*, minimally intrusive. Accordingly, the second prong of the balancing test – the degree to which the seizure advances the government's interest – is pivotal to a meaningful analysis.

### B. The Degree to which the Seizure Advances the Government Interest.

The degree to which suspicionless seizures advance the public interest is gauged by the effectiveness of the method at issue and the absence of other alternatives. *Prouse*, 440 U.S. at 661 (noting that "the marginal contribution to roadway safety" did not justify suspicionless seizures); *Brignoni-Ponce*, 422 U.S. at 881 (allowing stops based on reasonable suspicion, the Court considered "the

absence of practical alternatives for policing the border."); *Camara*, 387 U.S. at 537.

The justification for roadblocks in *Sitz* was the "obvious connection between . . . highway safety and [roadblocks]." *Edmond*, 531 U.S. at 39. Notably, *Sitz* cited the death toll caused by drunk drivers in assessing the public interest. 496 U.S. at 451. However, thirteen years after *Sitz*, the benefit of hindsight reveals the absence of any nexus between roadblocks and highway safety. The nine States with the highest alcohol related deaths average 1.01 deaths per 100 million vehicle miles, while the nine States with the lowest alcohol related deaths an average .41 deaths per 100 million vehicle miles.[10] If there was a nexus between highway safety and roadblocks, the states with the lowest rates of alcohol related deaths would be those that allowed roadblocks, while the states with the highest death rates would not; however, in both instances, eight of the nine states in the two categories allow roadblocks.

Statistics from the National Highway Traffic Safety Administration for the period of 1992-2001 disclose that 60% of the states that do not employ roadblocks[11] experienced a *reduction* in alcohol related traffic fatalities in 2001 when compared with 1992. A similar comparison to

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[10] Alcohol Involvement in Fatal Crashes 2001, National Highway Safety Administration, DOT HS 809 579; Table A-24 (April 2001). *States with the lowest alcohol related deaths*: Utah .29, Vermont .36, New York .38, Minnesota .42 (no roadblocks), New Jersey .43, Massachusetts .44, Maine .45, Virginia .46, and Indiana .47. *States with the highest alcohol related deaths:* Alaska .91, New Mexico .92, Wyoming .94 (no roadblocks), Arizona .96, South Dakota .98, Washington D.C. 1.01, Montana 1.04, Louisiana 1.08, South Carolina 1.27.

[11] Idaho, Iowa, Michigan, Minnesota, Oregon, Rhode Island, Texas, Washington, Wisconsin, and Wyoming.

states using roadblocks demonstrates that 62.5% experienced an *increase* in alcohol related fatalities in 2001 when compared to 1992.[12] Clearly, there is no nexus between roadblocks and highway safety.

Empirical data supports the premise that there are effective suspicion based methods of combating drunk driving. For example, Pennsylvania's local police agencies seized 112,617 citizens at roadblocks to make 730 drunk driving arrests in 2002 (arrest rate of 0.6%). During the same year, roving drunk driving patrols made 687 drunk driving arrests as a result of 9,838 stopped vehicles, yielding an arrest rate of 6.98%, over ten times greater than that for roadblocks.[13] Similarly, in 2002, Checkpoint Strikeforce, a regional program in Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and the District of Columbia, roadblocks yielded an arrest rate of 0.46%, while saturation patrols produced an arrest rate of 10.7%, over ten times greater than that for roadblocks.[14]

Considered together, the foregoing data not only reveals that there is not a nexus between highway safety and roadblocks, but also that roadblocks are the least effective method of addressing the interest in highway safety. *Sitz*, however, considered neither the ineffectiveness of the newly minted law enforcement method of roadblocks, nor "the absence of practical alternatives."

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[12] Statistics reported by the NHTSA, available at <http://www.nhtsa.dot.gov/people/injury/alcohol/july4planner-03/July4crash_statistic.html> (accessed August 6, 2003).

[13] Statistics compiled by the Pennsylvania DUI Association, available at <http://www.padui.org/1999data.htm> (accessed August 6, 2003).

[14] Statistics reported by the National Highway and Traffic Safety Association (NHTSA), available at <http://www.nhtsa.dot.gov/nhtsa/whatis/regions/region03/webreport.cfm> (accessed August 6, 2003).

*Brignoni-Ponce*, 422 U.S. at 881. Rather, the Court discounted the Michigan Court of Appeals' analysis of *Brown*'s effectiveness prong, giving unparalleled deference to law enforcement stating that, "this passage from *Brown* was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable law enforcement techniques should be employed . . . for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with [law enforcement]." 496 U.S. at 453-454.

The Court's deference to law enforcement was unjustified. The decision to employ roadblocks is not an "on the spot" decision made by an officer in the heat of the moment (the cases in which the Court has given due deference to law enforcement), but a considered decision by a local police agency to conduct mass suspicionless criminal investigatory seizures. No executive or legislative domestic law enforcement method is immune from judicial review when the choice is challenged as constitutionality flawed. While law enforcement may choose which constitutional methods to employ, the power to choose from alternatives does not render each alternative constitutionally reasonable. *Cf. Kylo v. United States*, 533 U.S. 27 (2001) (invalidating infrared surveillance of homes without deference to law enforcement's decision that it was an effective crime-fighting tool). The very purpose of balancing is to assess the constitutionality of the *method* employed, yet that analysis ceases to be meaningful when the Court abdicates an element of balancing to the unrestrained judgment of law enforcement. The dangers inherent in relegating judicial review to law enforcement were recognized at common law by Lord Chief Justice Pratt, to wit:

> [T]hough their intentions were very pure . . . it often happens that to this ignorance of the law they add a contempt for it, and a disposition to disregard its restraints, and overleap the limits

> it prescribes to their authority, which they are apt to consider as narrow pedantic rules which it is below their dignity to submit to. . . . They are therefore fond of the doctrines of 'reason of state, and state necessity, and the impossibility of providing for great emergencies and extraordinary cases, without a discretionary power in the crown to proceed sometimes by uncommon methods not agreeable to the known forms of law,' and the like dangerous and detestable positions, which have ever been the pretence and foundation for arbitrary power.

*Wilkes v. Wood*, 19 How. St. Tr. 1153, 1169 (1763).

### C. The Degree of Interference with Individual Liberty.

The degree to which investigatory seizures interfere with individual liberty is measured both objectively and subjectively. *Camara*, 387 U.S. at 530-533; *Prouse*, 440 U.S. at 657. This prong of the *Brown* balancing test, as applied by *Sitz*, does not encompass the broad range of considerations unique to mass suspicionless criminal investigatory seizures of the innocent motoring public.

#### 1. The Objective Intrusion Is Constitutionally Significant.

The objective intrusion on individual liberty entailed by a seizure is measured by the duration of the seizure and the intensity of the investigation. *Sitz*, 496 U.S. at 452. *Camara* established that there is an appreciable difference in the objective intrusion of a criminal search, as compared to an administrative or regulatory search, a distinction equally applicable to seizures. The Court noted the heightened "hostility" of the intrusion implicated by "the typical policeman's search for the fruits and

instrumentalities of crime." 387 U.S. at 530. Ultimately, one of the three factors it cited to support its conclusion that area search warrants were a reasonable mode of enforcing state health and sanitation laws, was that the inspections were "neither personal in nature nor aimed at discovery of a crime." 387 U.S. at 537. *Accord National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666-668 (1989). *Sitz*, however, did not consider the distinction, as evidenced by the Court's statement that, "[w]e see virtually no difference between the levels of intrusion on law-abiding motorists from the brief stops necessary [in *Sitz* and *Martinez-Fuerte*], which to the average motorist would seem identical save for the nature of the questions the checkpoint officers might ask." *Sitz*, 496 U.S. at 451-452.

Realistically, the intrusion inherent in sobriety roadblocks' criminal investigatory seizures is much greater than the intrusion of a border checkpoint where the overwhelming majority of vehicles are waved through. The intensity of the seizure is greater because of its criminal investigatory character, as opposed to the border checkpoint where "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 [*e.g.,* a valid driver's license]." *Martinez-Fuerte*, 428 U.S. at 558. Conversely, drivers seized at drunk driving roadblocks are not only required to submit to a brief interrogation regarding their conduct and whereabouts for the evening (in addition to being required to produce a driver's license and registration), but are also questioned at an intimate range, which allows the officer to smell the driver's breath, inspect the driver's clothing, examine the driver's complexion, and shine a flashlight in the driver's face to examine the driver's eyes. *See generally Respondent's Brief* in *Sitz*, 1989 WL 429002, *33. Thus, while an immigration checkpoint stop is neither personal

in nature nor designed to discover evidence of a crime (like the regulatory searches in *Camara*), criminal investigatory drunk driving roadblock seizures have an intensely personal focus.

The objective intrusion is also measured by the duration of the seizure. In gauging this intrusion, *Sitz* considered the duration of an individual seizure, said to last twenty-five seconds. 496 U.S. at 448. While it is true that the initial citizen contact at a roadblock may be brief, the overall detention is often significantly prolonged while innocent citizens wait to be interrogated. Data on overall delays in checkpoint cases is conspicuously absent, though there is some anecdotal evidence. For example, on Memorial Day, 2003, in Jackson County, Missouri, a roadblock "stopped 2,286 cars and created a delay of 40 minutes to an hour. At one point, traffic was backed up two miles." The roadblock resulted in seven drunk driving arrests and significant public outcry.[15]

*Sitz*'s analysis of the objective intrusion was flawed because it pitted the dramatic interest of "mutilation on the Nation's roads" against the intrusion suffered by a singular individual, rather than considering the societal intrusion. In *Maryland v. Wilson*, 519 U.S. 408, 415 (1997), Justices Stevens and Kennedy dissented from the holding that an officer may order passengers out of a vehicle stopped for a traffic infraction, troubled by the "separate and significant question concerning the power of the State to make an initial seizure of persons who are not even suspected of having violated the law." In balancing the interest of officer safety against the individual intrusion,

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[15] Examiner.net, "*Legislature Got An Earful About Sobriety Checkpoint*," <http://www.examiner.net/stories/062403/gov_062403009.shtml> (accessed August 6, 2003).

the dissent recognized that, "the aggregation of thousands upon thousands of petty indignities has an impact on freedom that I would characterize as substantial, and which in my view clearly outweighs the evanescent safety concerns pressed by the majority." *Id.* at 419. *See also City of Seattle v. Mesiani*, 755 P.2d at 778 ("The easiest and most common fallacy in "balancing" is to place on one side the entire, cumulated "interest" represented by the state's policy and compare it with one individual's interest in freedom from the specific intrusion on the other side. A fairer balance would weigh the actual expected alleviation of the social ill against the cumulated interest invaded.").

Innocent citizens have the "right to free passage without interruption" on the public highways. *United States v. Carroll*, 267 U.S. 132, 154 (1925); *see also Dunaway v. New York*, 442 U.S. 200, 213 (1979) ("Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment[.]"). This is a fundamental right deeply engrained in the rubric of American life. Multi-tasking Americans today, more than ever, value their liberty, their "power of loco-motion."[16] This right and the privacy it affords is so highly valued that the overwhelming majority of Americans would rather get up earlier in the morning and return home later at night than take public transportation or participate in a car pool. Yet, the motoring public's right of free passage was not considered as part of its interest in *Sitz*, despite 125 innocent individuals' course of travel being delayed, nor was the intrusion of being subjected to interrogation considered by the Court. *See, e.g., Brignoni-Ponce*, 422 U.S. at 883 ("We are not convinced that the legitimate

[16] COMMENTARIES ON THE LAWS OF ENGLAND, VOL. I, 130.

needs of law enforcement require this degree of interference with lawful traffic.").

The practical effect of *Sitz* is the erosion of society's exercise of its right of free passage and its reasonable expectation of privacy in exercising that right, as evidenced by the proliferation of law enforcement roadblocks.[17] This intrusion cannot honestly be characterized as "slight." *Sitz*, 496 U.S. at 451.

### 2. The Subjective Intrusion Is Constitutionally Significant.

The subjective intrusion on liberty entailed by a seizure is measured by the degree of officer discretion and the fear and surprise the roadblock may generate. *Sitz*, 496 U.S. at 452-453; *Martinez-Fuerte*, 428 U.S. at 558. Officer discretion is limited in the context of permanent immigration checkpoints and in the type of administrative "license and registration" roadblocks alluded to in *Prouse* because of the concrete laws being enforced, that is, a driver is validly licensed or not; an individual has a right to be in the United States or not. *Martinez-Fuerte*, 428 U.S. at 562. However, transient law enforcement roadblocks do not have the same inherent limitations upon officer discretion.

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[17] While it is true that an individual's expectation of privacy in a car is not equivalent to one's expectation of privacy in a home, that principle applies to searches based upon reasonable suspicion, which are justified by the mobile nature of the vehicle, not to suspicionless seizures. *E.g., Cady v. Dombrowski*, 413 U.S. 433, 441-442 (1973); *cf. Prouse*, 440 U.S. 662 (noting individuals' expectation of privacy in an automobile, stating "[w]*ere the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. . . .* ").

It is not illegal to drink and then drive in any state in our country. Accordingly, the officer conducting the initial criminal investigatory seizure of drivers passing through a roadblock *must* exercise a significant degree of discretion. As the record in *Sitz* revealed, officers conducting the initial seizures send drivers to a secondary investigation area based on factors ranging from the smell of alcohol on the driver's breath to the driver's shirt not being properly buttoned.

In *United States v. Ortiz*, 422 U.S. 891, 895 (1975), the Court determined that the low percentage of vehicles singled out for search by border patrol authorities (fewer than 3%) evidenced the "substantial degree of discretion" exercised by the officer determining which cars would be searched. This same level of discretion is exercised in roving roadblocks where, as in *Sitz*, a small percentage of drivers are referred to a secondary area for further interrogation and field sobriety tests. *Sitz*, 496 U.S. at 448 (1.6% of drivers referred to secondary).

Finally, in measuring discretion, the Court considers the potential for abuse. Unlike the permanent checkpoints in *Martinez-Fuerte*, decisions concerning the location of roving roadblocks are not made by distant high-ranking officials, but by officers within local police agencies, who then conduct the transient roadblocks in the neighborhoods they patrol. There is substantial potential for abuse exercised by the "officer in the field" conducting criminal investigatory seizures of the citizens he may know from his daily patrols. He may lawfully order the driver out of the vehicle and proceed to frisk the driver. *Pennsylvania v. Mimms*, 434 U.S. 106, 111-112 (1977). Additionally, he can order the passengers to step out of the vehicle. *Maryland v. Wilson*, 519 U.S. 408 (1997). Drivers referred to the secondary investigation area will feel the stigmatization of

being labeled a drunk driver, rightly or not, as they perform field sobriety tests along the side of the road as their neighbors watch from their cars.

*Sitz* erred in its analysis of the "fear and surprise" generated by transient law enforcement roadblocks in two respects. First, while noting that this inquiry considers the fear and surprise of the law abiding motorist as opposed to the concern about the prospect of being stopped felt by the driver who has been drinking, the Court failed to consider that transient roadblocks generate fear and surprise in the heart of every innocent driver who had a glass of wine with dinner, not because the driver is impaired, not for fear of being "caught," but for fear that of being subjected to an unwarranted criminal investigation for driving under the influence.

Second, *Sitz* rests on the premise that where the Fourth Amendment violation is en masse, the intrusion is minimal since "the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened and annoyed by the intrusion." 496 U.S. at 453. This philosophy is fundamentally flawed and overemphasizes the Fourth Amendment's protection from *discriminatory* seizures while minimizing its assurance against *unjustified* intrusions. The Fourth Amendment guards the "right of the *people* to be secure in their persons," as opposed to the right of a singular individual. It is anomalous to posit that its protections protect the lone citizen, but not society. Colonists took no comfort in knowing that writs of assistance justified the search of *everyone's* home and business. The resentment engendered by general warrants was not assuaged by their character of being warrants against a nation. To the contrary, it was precisely the regularity attendant to writs of assistance and general warrants, executed with the calculated sanction of law, which led colonists to demand that a bill of rights be enacted to

assure the citizenry that such investigatory practices would *not* be sanctioned by the government, that their natural right of liberty would not be abridged. As recognized by Justice Kennedy, "Liberty comes not from officials by grace, but from the Constitution by right." *Maryland v. Wilson*, 519 U.S. at 424.

## CONCLUSION

*Michigan v. Sitz* should be overruled and the judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

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