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IN THE SUPREME COURT OF THE UNITED STATES

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CITY OF INDIANAPOLIS, INDIANA, AND :
BART PETERSON, IN HIS OFFICIAL :
CAPACITY AS MAYOR OF THE CITY OF :
INDIANAPOLIS, :
Petitioners, :

v. : No. 99-1030

JAMES EDMOND AND JOELL PALMER, ON :
THEIR OWN BEHALF AND ON BEHALF OF A :
CLASS OF THOSE SIMILARLY SITUATED, :
Respondent. :

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Washington, D.C.

Tuesday, October 3, 2000

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:00 a.m.

APPEARANCES:

A. SCOTT CHINN, ESQ., Indianapolis, Indiana; on behalf
of the Petitioners.

PATRICIA MILLETT, ESQ., Washington, D.C.; on behalf
of the Petitioners.

KENNETH FALK, ESQ., Indianapolis, Indiana; on behalf
of the Respondent.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument on No. 99-1030, the City of Indianapolis versus James Edmond.

Mr. Chinn.

ORAL ARGUMENT OF A. SCOTT CHINN

ON BEHALF OF THE PETITIONER

MR. CHINN: Mr. Chief Justice, and may it please the Court:

The City of Indianapolis operates roadway checkpoints comprised of conduct that in other relevant contexts this Court has approved.

The Court of Appeals declined to apply this Court's Brown versus Texas balancing test to evaluate that conduct because the checkpoints primarily investigate crimes, but the city's checkpoints are constitutional for two independent reasons. First, this Court used the balancing test in upholding other roadway checkpoints where the government's interests was to investigate crimes. Second, the city's checkpoints serve sobriety checking and driving regulation interests that this Court has approved and the city's drug checking conduct adds no additional intrusion to these procedures. The roadway checkpoints

1 this Court has previously upheld --

2 QUESTION: I have just one question about
3 that. I guess on the checkpoints to check for drunk
4 drivers, that's at least related to the condition of
5 the driver of the car, and the Court applied a
6 balancing test and upheld it.

7 Now, is this search more to find drugs being
8 transported in vehicles or is it looking for drivers
9 who are impaired by drug use?

10 MR. CHINN: It's to do both, Your Honor, but
11 primarily to look for drug possession and trafficking
12 in cars.

13 QUESTION: What do the statistics show or do
14 they show about the percentage of people that were
15 arrested that were using drugs and were therefore
16 driving under the influence of drugs? Do the
17 statistics show us that?

18 MR. CHINN: Not in this case. On this
19 record there is no evidence that any driver was
20 arrested because he or she was under the influence of
21 drugs or alcohol. Our statistics show that 4.7 percent
22 of the drivers stopped possessed some sort of
23 narcotics.

24 QUESTION: But does that make this akin to a
25 checkpoint, for instance, to catch burglars in an area

1 or a murderer or something of that kind? Is this more
2 for typical law enforcement purposes? And does that
3 affect the balance in some way?

4 MR. CHINN: No, Your Honor, I think it's
5 different than the hypotheticals that you described for
6 this important reason. The relationship between
7 smuggling drugs in cars, of course, and the roadway
8 itself is close. We have found that, obviously, with
9 our high hit rate in Indianapolis. Carrying drugs in
10 cars is important to foster the drug trade in our
11 neighborhoods, both in terms of possession amounts and
12 smuggling amounts, traffic amounts. The ease with
13 which the drugs can be concealed and moved about very
14 easily and enter our neighborhoods is a problem.

15 QUESTION: Well, if there were a high crime
16 area with lots of thefts and burglaries and it was
17 believed that the burglars typically made their getaway
18 in cars, is it appropriate to have roadblocks and check
19 people for that purpose?

20 MR. CHINN: It might be, Your Honor, if that
21 connection was shown. If there was a significant
22 connection shown by the government in that case between
23 that rash of burglaries or whatever the crime may be
24 and the use of the roadway, that would be perhaps
25 available.

1 QUESTION: Well, there's always such a
2 connection. I know very few burglars that go on foot.
3 I mean, you're saying yes, then. You're answering the
4 question yes.

5 MR. CHINN: Well, certainly if you have a
6 lot of crime in the neighborhood --

7 QUESTION: You can stop all cars to see if
8 they have burglary tools?

9 MR. CHINN: Probably not, Your Honor.
10 Certainly a substantial connection can be shown in this
11 case and was shown in Martinez-Fuerte, for example.
12 The Court can easily set the bar at that substantial
13 connection or significant connection that would
14 differentiate between stopping cars for general
15 criminal violations.

16 QUESTION: Why is the connection between
17 burglars, who usually get where they're going by car,
18 not as close as the connection with drug traffickers,
19 who usually engage in their business by car? I mean,
20 everybody almost usually does everything by car. It
21 seems to me I don't see anything special about this.

22 MR. CHINN: It's special, Your Honor,
23 because here the car is used as an instrumentality to
24 secret away the drugs that are then either -- have been
25 just purchased in a neighborhood or may be on their way

1 to a neighborhood for sale.

2 QUESTION: Does the record -- does the
3 record tell us how many of these drug arrests involved
4 persons who were selling drugs as opposed to those who
5 might have just been using them themselves?

6 MR. CHINN: It doesn't tell us specifically,
7 Your Honor. What the record does tell us is that in
8 the very first checkpoint that Indianapolis set up
9 there was a sizable distribution amount that was seized
10 in the checkpoint, but our checkpoints are designed to
11 both attack the supply and demand. We think it's
12 important to attack possession amounts as well.

13 QUESTION: Would your case be as strong if
14 the record showed that every one of the persons stopped
15 just happened to be a casual user or something and then
16 had some drugs left in the car?

17 MR. CHINN: Our case would be as strong for
18 two reasons.

19 QUESTION: You don't really -- you don't
20 really have to rely on the fact that some of them may
21 be selling drugs?

22 MR. CHINN: That's correct. It tells you
23 something about our program, but it -- but it need --
24 we need not have --

25 QUESTION: Mr. Chinn, I think you answered

1 to an earlier question that the dominant reason for
2 this program is to catch people who distribute, unlike
3 the alcohol stops, the sobriety checks, that the
4 dominant purpose is not to catch dangerous drivers, and
5 you have no record of distinguishing between those two,
6 so we have to assume -- well, you have been candid
7 about it. Your purpose is to catch people who are
8 distributing drugs. Is that not so?

9 MR. CHINN: Distributing -- to smuggle
10 drugs. People who smuggle drugs, either for
11 distribution or possession.

12 QUESTION: Well, I don't --

13 QUESTION: Is that the only purpose?

14 MR. CHINN: For these checkpoints?

15 QUESTION: Yeah.

16 MR. CHINN: Our -- our -- no. We have three
17 interests that are being served here. The drug
18 distribution interest is primary, and we conceded that,
19 but we also, and the record shows this indisputably,
20 check for signs of impairment. So we are interested in
21 catching drivers who are under the influence of drugs
22 or alcohol. And thirdly, we check drivers' license and
23 registrations at each checkpoint. In fact, that's the
24 first thing that the officers do at the checkpoints,
25 and we had a measurable, a sizable hit rate for driving

1 violations as well. It was essentially equal to our
2 narcotics hit rate, and both were higher than this
3 Court sustained in Sitz.

4 QUESTION: I suppose given the fact that you
5 don't have a record with respect to finding actual
6 impairment among the people that you stop, I suppose
7 that if we sustain the search here, we would be
8 required to do the same thing if you made a facial
9 showing that in a given neighborhood drug distribution
10 was done on foot. I suppose you would be able to stop
11 pedestrians again on a sort of a random basis according
12 to some set of criteria like this and question every
13 pedestrian.

14 MR. CHINN: Pedestrian stops present a
15 different case, Your Honor, for several reasons. One,
16 this Court certainly hasn't applied, for example, the
17 Brown balancing test to --

18 QUESTION: Why not?

19 MR. CHINN: Well, I believe because the
20 degree of intrusion and one's expectation of privacy in
21 the pedestrian context is simply higher or different
22 than in the motorist context.

23 QUESTION: Well, the reason that it is is
24 that -- that we -- we have, if not a history, at least
25 some experience with -- with motorist checkpoints, but

1 there was a day when we didn't. It had to start
2 somewhere, and I don't know why the same reasoning
3 couldn't be applied to pedestrians and start somewhere
4 there, and after a while we'd have a tradition of
5 stopping pedestrians on the street, too.

6 MR. CHINN: Well, the Court certainly has
7 recognized for some time, for 75 years perhaps since
8 Carroll, that motorists enjoy a diminished expectation
9 of privacy.

10 QUESTION: Yeah, but the original rationale
11 for that was that because the person was in a car, the
12 person could get away easily, and yet that rationale
13 has nothing to do with the rationale that -- that
14 you're advancing here to justify this stop. Your --
15 your rationale for stopping cars is that people use
16 cars to distribute drugs, and my suggestion is that in
17 a given area if people distribute drugs on foot, the
18 same rationale that would justify what you're doing
19 here would justify pedestrian stops, and the original
20 Carroll justification for an automobile exception
21 so-called doesn't have anything to do with either case.

22 MR. CHINN: Again, I think there are some
23 differences, Your Honor, between the pedestrian context
24 and the motorist context. Certainly there is that
25 expectation of freedom of movement, of liberty interest

1 that is different between cars and pedestrians.
2 Pedestrians are much less regulated certainly than
3 cars, much less used to the government telling them
4 that they have to stop. Pedestrians can stop at their
5 own will and proceed down the street and window shop in
6 a way that cars cannot certainly. Cars have to be
7 traveling at speeds dictated by the government in a
8 direction that's dictated by the government, cannot
9 change lanes unless they do it in a way that the
10 government has told them they can. So --

11 QUESTION: I thought the rationale with the
12 car was a lesser expectation of privacy in a car, say,
13 as opposed to a home, but if you're going to do
14 expectation of privacy, one can't be seen, I suppose
15 the street would be lowest because the car, at least
16 you are sheltered by the car itself. On the street
17 there you are. Everybody can see you, so the rationale
18 that you're offering, I think, would apply at least as
19 much. A high crime area, you have reason to suspect
20 that people are going to get away so that the police
21 are there to check them, and is there a distinction
22 based on the expectation of privacy? I don't see it,
23 but perhaps you can explain it to me.

24 MR. CHINN: I think in this case the
25 expectation is a freedom of movement because here no

1 searches are undertaken without probable cause, so
2 really what we're talking about in this case and all
3 respondents have ever challenged about this case is the
4 initial stop of the car. So the point is merely that
5 because people in cars, motorists are used to being
6 stopped, even at the behest of the government for any
7 number of different reasons. It's that expectation
8 that makes these checkpoints in this case the same as
9 the checkpoints that the Court has upheld in Martinez
10 Fuerte and Sitz reasonable under the circumstances.
11 That's simply different than the pedestrian context.

12 QUESTION: I've never heard the concept of
13 expectation of privacy which has been applied to -- to
14 searches applied to seizures, which is what you're now
15 saying. You're saying there's no reasonable
16 expectation of not being seized, right?

17 MR. CHINN: I think that's right, Your
18 Honor.

19 QUESTION: Do you know of any of our cases
20 that ever applied that reasoning to seizures? I mean,
21 after all, you have to stop for a traffic light. You
22 have to stop for, you know, bridges that are up and all
23 sorts of things, so you say, you expect to be stopped
24 or seized by government order frequently while you're
25 in a car, and therefore you have no right not to be.

1 MR. CHINN: I think it's inherently part of
2 the Brown balancing test, as this Court applied it in
3 Sitz, for example, it measures in the third element of
4 the Brown test the degree of intrusion on motorists.

5 QUESTION: Yeah, but it doesn't say anything
6 about expectation of being stopped. I mean, this is
7 just a novel, a novel approach to me, to use the
8 expectation rationale with respect to seizures as
9 opposed to searches.

10 MR. CHINN: I think the point remains that
11 cars are stopped in any number of different contexts,
12 even at the government's direction, and so it's
13 reasonable for the Court to conclude that that is a --
14 presents a lesser degree of intrusion than the
15 pedestrian context.

16 QUESTION: Well, even so, it's somewhat
17 circular. I mean, if we say there is no expectation,
18 then there is going to be no expectation.

19 QUESTION: You're using the expectation.
20 You're using the expectation. It's just -- it's much
21 more -- it's reasonable to stop cars very often, very
22 often for checks, you know, all the things that people
23 have said in prior cases. But the difficulty with your
24 case is it doesn't seem any more reasonable to stop a
25 car just to look for evidence of a crime in general

1 than it does to stop a pedestrian to look for evidence
2 of a crime in general. And what you haven't done, at
3 least I haven't heard you do, is to say why there's
4 something special about this that would really justify
5 stopping the car any more than it would justify
6 stopping a pedestrian. So what is it?

7 MR. CHINN: It is reasonable to stop a car
8 because of, again, the connection between the activity
9 that's sought to be regulated here and the roadway.

10 QUESTION: So that's when we go back to
11 Justice Ginsburg who made the point very well, look,
12 people sometimes rob banks on foot. Bank robbers
13 perhaps are poor, they can't afford cars. They walk
14 around. And that happens a certain number of times.
15 So do we stop all the pedestrians? I mean, you heard
16 her question.

17 My problem is, I can't find anything special
18 about being in a car in respect to a general search
19 without suspicion that there's any special crime but
20 just a general effort to stop crime, and I haven't
21 heard you present one.

22 MR. CHINN: Again, we think that the Court
23 could look to the substantial connection between drugs
24 and their trafficking and possession on the roadways.
25 If the Court is not convinced that that presents a

1 significantly different context than the pedestrian
2 situation, then of course you could apply Brown in that
3 context.

4 QUESTION: What was the reasoning of the
5 Court in Martinez-Fuerte? There you had a -- a -- a --
6 a -- a stop with -- without a search, and unless there
7 was probable cause.

8 MR. CHINN: Yes, the Court found on balance
9 the degree of intrusion was not -- did not outweigh the
10 government's interests in that case, and that since
11 Martinez Fuerte, like the case here, is a smuggling
12 case. There the fear was that persons or motorists
13 were smuggling illegal aliens in their cars, and the
14 Court thought it sufficient that a program of the
15 neutral seizures at a checkpoint guarded against
16 arbitrariness and did not outweigh the intrusion caused
17 by --

18 QUESTION: Mr. Chinn, wasn't there the
19 factor, the locational factor there that the stop,
20 although distant from the border, was on the main --
21 the road, the highway that you would take if you were
22 going from the Mexican border into the interior because
23 that's where all the traffic flowed. But here you
24 don't have that. It could be any -- anyplace.

25 MR. CHINN: Let me say a few things about

1 that if I can, Your Honor. First, that was not part of
2 the Court's decision in Martinez Fuerte. These were
3 stops of persons that there was no reasonable suspicion
4 to believe had just crossed the border.

5 QUESTION: But it was a fact in the case.
6 There wasn't any question it was a main highway that
7 people used, traveling from Mexico.

8 MR. CHINN: Yes, it was a factor in the
9 case, Your Honor, but it didn't appear critical to the
10 Court's holding, nor did the United States argue that
11 that case is sufficiently different from our case.

12 QUESTION: So you think you could stop --
13 police can stop cars anywhere in the United States just
14 to look for smuggled immigrants? Just stop the car and
15 say, you know, can I see your papers, please? That's
16 sort of scary.

17 MR. CHINN: If a particular government
18 program was not successful, certainly, that is one
19 check against that sort of checkpoint as well. The
20 second element of the Brown balancing test requires
21 essentially that the programs serve the governmental
22 interests at stake, and so a program that didn't do
23 very well certainly wouldn't survive this Court's
24 Fourth Amendment scrutiny.

25 QUESTION: What seems to be your argument,

1 the strength of your case depends on the success, your
2 success rate. In other words, you prove it was
3 reasonable by what you find rather than by what you
4 knew before you started.

5 MR. CHINN: I think it's -- I think it's
6 both, Your Honor. We clearly have articulated in this
7 case a substantial interest in interdicting drugs.
8 Respondents haven't really challenged that as an
9 important interest, and it's an interest that this
10 Court has upheld on many occasions.

11 QUESTION: If I read your brief, it's
12 important to your case that 5 percent of the people in
13 Indianapolis apparently don't have their driver's
14 license with them and another 5 percent have some
15 marijuana in the car. If there was only 1 percent,
16 your case would be much weaker.

17 MR. CHINN: It would be weaker, Your Honor.

18 QUESTION: Yeah.

19 MR. CHINN: Although probably --

20 QUESTION: But you didn't know that until
21 you conducted the searches.

22 MR. CHINN: Well, we knew that we had a
23 problem.

24 QUESTION: Sort of like -- sort of like you
25 found something there, ergo, it was reasonable to look

1 for it.

2 MR. CHINN: Well, we certainly knew we had a
3 problem, and our program actually proved that we were
4 correct.

5 QUESTION: The case that everybody begins
6 with in automobile searches is Carroll, the prohibition
7 case, and the Chief Justice in that case writing it
8 said it would be intolerable and unreasonable if a
9 prohibition agent were authorized to stop every
10 automobile on the chance of finding liquor and thus
11 subject all persons lawfully using the highway to the
12 inconvenience and indignity of such a search. That's
13 this case, isn't it?

14 MR. CHINN: It's not for a couple reasons.
15 First, that case was for that quote, and that case was
16 talking about searches, and of course we don't search
17 anyone here. We engage in a pattern of brief roadway
18 seizures. And secondly, this Court's decisions in
19 Martinez Fuerte and Sitz and its suggestion in Delaware
20 versus Prouse shows there are any number of things that
21 a court -- that a government can -- interests that can
22 be served by a checkpoint program.

23 Mr. Chief Justice, I'll reserve my remaining
24 time. Thank you.

25 QUESTION: Very well, Mr. Chinn.

1 Ms. Millett, we'll hear from you.

2 ORAL ARGUMENT OF PATRICIA MILLETT

3 ON BEHALF OF THE PETITIONERS

4 MS. MILLETT: Mr. Chief Justice, and may it
5 please the Court:

6 Our position is first the petitioner's
7 checkpoints, including their drug detection component,
8 are constitutional under this Court's decisions in
9 Martinez-Fuerte, which upheld a checkpoint designed to
10 intercept alien smuggling, and Sitz, which upheld a
11 sobriety check-in -- checkpoint.

12 Second, petitioner's checkpoints are also
13 constitutional because they advance the government's
14 legitimate interests in assuring that only properly
15 licensed and sober drivers --

16 QUESTION: On your first point about
17 Martinez, how would you respond to Justice Scalia's
18 question? Would that checkpoint have been legal in
19 Indianapolis?

20 MS. MILLETT: As a constitutional matter,
21 yes. As a statutory matter, no. The Border Patrol --

22 QUESTION: As a constitutional matter.

23 MS. MILLETT: -- does not have authority to
24 go beyond a hundred miles.

25 As a constitutional matter, if the government,

1 Border Patrol was able to show that, for example, in
2 Indianapolis or Kansas or between -- somewhere in
3 Colorado there was a thoroughfare that had a strong
4 nexus to alien smuggling, for example, seasonal workers
5 moving back and forth, then it would be.

6 QUESTION: With what we now know about
7 Indianapolis, just right as of today, do you think it
8 would be legal to have the Martinez-Fuerte's checkpoint
9 in Indianapolis today?

10 MS. MILLETT: I think we would have to show
11 an alien smuggling nexus to the roadways on which we
12 established our checkpoints.

13 QUESTION: Well, then did they have to show
14 them before they conducted these checkpoints here, did
15 the city have to show that 5 percent of the people were
16 driving without licenses or did they find that out
17 after they did it?

18 MS. MILLETT: I think they have to
19 establish -- they have to have a reasonable basis for
20 believing that there will be a problem. Obviously, we
21 have that with the alien checkpoints that the Border
22 Patrol operates, and here the City of Indianapolis
23 focused on crime statistics and was able to determine
24 that particular areas --

25 QUESTION: The high crime statistics they

1 got as a result of the program they instituted.

2 MS. MILLETT: No, no, no, general crime,
3 drug crime statistics, which you obviously will know in
4 advance as a law enforcement agency, just as we know
5 where the primary problems of alien transportation are
6 in the country.

7 QUESTION: Let me follow up on the
8 Indianapolis hypothetical. Why would it have to be
9 alien smuggling? I mean, why couldn't you simply
10 identify an area that has a large -- you know that
11 there are a large number of illegal aliens in this
12 section of Indianapolis that is largely Hispanic, so
13 you simply set up roadblocks, and I'll bet you you'll
14 get a pretty good catch if you stop every car that
15 drives down the street in that section to see if there
16 are illegal aliens in the car.

17 MS. MILLETT: I think as a constitutional
18 matter, if the government were able to show the
19 appropriate nexus and the effect that its checkpoints
20 again were actually effective that it would -- and the
21 intrusion was no more than it was in Martinez-Fuerte,
22 but, yes, the Fourth Amendment applies the same in
23 Indianapolis as it does in Arizona.

24 QUESTION: Then the same result then would
25 be for pedestrian checkpoints?

1 MS. MILLETT: No, not at all.

2 QUESTION: Why not?

3 MS. MILLETT: There's a bright line in this
4 Court's decisions between cars and pedestrians.

5 QUESTION: Why should there be? In other
6 words, the rationale that you're advancing and that
7 your brother has been advancing doesn't seem to me to
8 make any particular sense of that distinction.

9 MS. MILLETT: First, it's beneficial. I
10 don't think there's anything about this case that puts
11 us closer to pedestrian checkpoints than
12 Martinez-Fuerte and Sitz, but the rationale has been --

13 QUESTION: Well, if -- if Martinez-Fuerte
14 can be applied as you have said to Justice Scalia that
15 it may be applied in Indianapolis or the middle of
16 Nebraska somewhere because there is -- there is a --
17 a -- a general basis in the evidence prior to the
18 search operation, that there is a high incidence of
19 illegal aliens, then to begin with Judge Posner's
20 rationale has nothing, I guess, to do -- much to do
21 with the case, and it doesn't seem to have anything --
22 it doesn't seem to be key to the use of automobiles,
23 and therefore I don't see why, if we accept your answer
24 to Justice Scalia, we are not well down the road toward
25 pedestrian checkpoints.

1 MS. MILLETT: Because cars are different
2 than pedestrians. Cars are highly regulated. This
3 Court has recognized this they are subject to a web of
4 regulation by government, and I think it was Justice
5 Breyer earlier said one has no reasonable expectation
6 within the meaning of the Fourth Amendment that you
7 will not be briefly stopped and asked to show a
8 driver's license, your authority to operate the car,
9 and under Martinez-Fuerte that you are not using the
10 car to smuggle illegal aliens, we see no difference
11 between that and smuggling drugs.

12 And in this case the drug component isn't
13 necessary to explain the seizure. The entire scope of
14 the seizure is independently justifiable. In fact,
15 most of the time is expended on the driver's license
16 checkpoints.

17 The only role of the drug detection component
18 is that they're in a justifiable stop under this
19 Court's precedence for driver's license checkpoint and
20 sobriety checkpoint. They add a canine sniff for dogs.
21 That does not independently cause the seizure, although
22 we do think a drug checkpoint in its own right is
23 constitutional, but it does --

24 QUESTION: Well, then, on -- excuse me -- on
25 that theory could the police station drug detection

1 dogs at every street crossing where the traffic lights
2 require pedestrians to wait until the yellow light
3 comes along? The pedestrians are being stopped in the
4 normal manner in which pedestrian traffic is regulated.
5 The dog is no more intrusive than the dog is when it
6 goes around the car. Could the police do that and have
7 a good search?

8 MS. MILLETT: Yes. I think the police have
9 a right to be on street corners with their dogs or
10 without their dogs, and smell -- the sniff the dog
11 alerts to is odors emanating from --

12 QUESTION: So if somebody says to the dog,
13 you know, get away from me, the police can say, no,
14 you've got to let the dog search you?

15 MS. MILLETT: No, that then I think would be
16 a seizure of a pedestrian if they won't -- can't get
17 away, but the pedestrian can walk away. It's a big
18 difference.

19 QUESTION: Then why isn't it a seizure of
20 the car for something other than the purposes of
21 checking license plates when the dog goes around the
22 car? Are you telling -- or maybe your answer would be
23 that the driver of the car can say to the police, get
24 the dog away from the car. And the police would have
25 to do it. Would they?

1 MS. MILLETT: No, I don't think so. Because
2 the difference between the pedestrian example and this
3 one is that you have a legitimate basis for the seizure
4 independent of the dog. That's the driver's license
5 checkpoint.

6 QUESTION: You have a legitimate basis for
7 stopping the pedestrian until the light turns yellow.
8 The pedestrian is just as validly stopped as the car is
9 for the driver's license check.

10 MS. MILLETT: That -- that -- well, I think
11 it's a separate question whether --

12 QUESTION: If the pedestrian can tell the
13 police to get the dog away, why can't the car owner?

14 MS. MILLETT: I'm not sure that a traffic
15 light, in fact, effectuates a seizure within the
16 meaning of the Fourth Amendment.

17 QUESTION: Well --

18 MS. MILLETT: Because pedestrians can turn
19 around and walk away, they can do a U-turn. I'm sorry.

20 QUESTION: Do we know in the facts of this
21 case whether the dog sniffing occurs while the license
22 check is going on or whether the policeman first checks
23 the license and then says, okay, now stay here, I'm
24 done checking your license, but I want to walk around
25 the car with a police dog?

1 MS. MILLETT: My understanding is that it's
2 done while the driver's license check is going on. And
3 that's what takes the two to three to five minutes.
4 Dog sniffs take a minute, 90 seconds at the most for a
5 very large vehicle.

6 QUESTION: Suppose the city council
7 authorized this search and had a preamble and said, in
8 order to interdict drug distributors, we are setting up
9 the following checkpoint, and then the case is just
10 like it is, and you have a license, they say that the
11 sole -- the purpose is to interdict drug smuggling.
12 Does that change the case at all?

13 MS. MILLETT: It doesn't -- we have two
14 rationales. Our position is that drug interdiction,
15 drug smuggling checkpoints in their own right are
16 constitutional, so obviously under that theory it would
17 not. But if the Court disagrees with that and says
18 that that is not a legitimate basis for having a
19 checkpoint, then the case would be different if they
20 did the stop and they did not actually effectuate the
21 interests that are served by a driver's license
22 checkpoint, they didn't ask for the licenses, and they
23 didn't act upon license violations.

24 If they, in fact, act upon license violations
25 and serve that interest within the meaning of this

1 Court's prior recognition of that as a legitimate
2 interest, then the fact that they also serve another
3 legitimate interest that does not in any way change the
4 nature of the intrusion on the individual, does not
5 enhance the length or duration or intensity of the
6 seizure, then it would not make a difference, and then
7 what the government says or doesn't say in the preamble
8 I don't think would change the Fourth Amendment
9 analysis.

10 QUESTION: In other words, in order to do
11 it, the city has candidly told us it wants it to
12 apprehend drug distributors, it has this pretense of
13 stopping people to check their licenses an also
14 purpose, but it's using that as a gateway to get to
15 what it's really interested in, which is the drug
16 distribution.

17 MS. MILLETT: You mean pretense by the fact
18 that they ask for licenses but don't do anything about
19 it? And I profess to do something --

20 QUESTION: No, you said that they would have
21 to do that. Mr. Chinn told us -- candidly, I thought,
22 to his credit -- that the primary purpose of doing this
23 is to apprehend drug distributors. So you're saying,
24 yeah, but they couldn't just do that openly or overtly,
25 they need some kind of cover for it. So we do the

1 license check.

2 MS. MILLETT: That's not what I mean to say.
3 Our position is that a drug checkpoint in its own right
4 would be constitutional. Border patrols, the drug
5 smuggling, aliens --

6 QUESTION: So let's take -- then let's take
7 away that. You are saying without the license and
8 registration check this would still be okay, we just
9 stop people because we want to have the dog go around
10 the car.

11 MS. MILLETT: I'm saying two things. We're
12 saying that's our first -- that's our first argument.
13 Our second argument is if the drug interdiction purpose
14 is not in itself a basis for the stop, then as long as
15 the driver's license stop or the sobriety stop is
16 actually being accomplished by the government, those
17 interests are being served, and the drug detection
18 component does not add anything to the length or
19 duration of the seizure, then it would still be
20 constitutional under both of them. And that if both of
21 them are legitimate interests, if the Court doesn't --
22 as long as -- as long as one legitimate interest is
23 served by the checkpoints and explains the entire --
24 and justifies the entire scope and duration and
25 intensity of the seizure, the fact that the government

1 has other interests, primary or secondary, doesn't
2 matter.

3 QUESTION: Thank you, Ms. Millett.

4 Mr. Falk, we'll hear from you.

5 ORAL ARGUMENT OF KENNETH FALK

6 ON BEHALF OF THE RESPONDENT

7 MR. FALK: Mr. Chief Justice, and may it
8 please the Court:

9 This case is not Martinez-Fuerte. This case
10 is not Sitz. The Indianapolis roadblocks are criminal
11 investigatory seizures of primarily innocent persons
12 without cause. In Martinez-Fuerte --

13 QUESTION: Certainly the seizures in
14 Martinez-Fuerte and Sitz were also seizures of
15 primarily entered in. No one claims they had a 51
16 percent harvest there.

17 MR. FALK: That's correct, but this Court
18 recognized, Your Honor, for instance, in Montoya
19 de Hernandez that Martinez-Fuerte was one of a number
20 of cases reflecting the long-standing concern for the
21 protection of the integrity of the border, which has
22 been characterized as a noncriminal investigatory
23 concern.

24 QUESTION: But in Martinez-Fuerte they
25 arrested these people. That's how the case came to

1 this Court.

2 MR. FALK: Well, of course, Your Honor, but
3 in Camara back in 1967, violation of the housing codes
4 in issue there were criminal. In New York v. Burger,
5 violation of the regulatory statute turned out to be
6 criminal. This Court in all those cases looked back to
7 see what the programmatic purpose was, and recognized
8 that the programmatic purpose was not for criminal
9 investigation.

10 If, in fact a --

11 QUESTION: What did the Court say, then in
12 Martinez-Fuerte? What did it say the main purpose, the
13 programmatic purpose, as you call it, was?

14 MR. FALK: Protection, integrity of the
15 borders, Your Honor, have been recognized by this Court
16 since I believe the 1880s in the United States v. Boyd,
17 that the United States has an inherent regulatory right
18 to ensure that people and things that enter this
19 country do so lawfully. That is a regulatory purpose.
20 Similarly, lower courts have recognized through
21 inspection and checking licenses, registrations, and
22 inspection status has recognized a safety-related
23 purpose for traffic stops.

24 QUESTION: And drunk driving.

25 MR. FALK: And drunk driving, Your Honor.

1 QUESTION: How about driving while impaired
2 by drug use? If that were the purpose, okay?

3 MR. FALK: If the -- if the City of
4 Indianapolis could show here that there was, indeed, a
5 problem of drugged driving, like there was in Sitz of
6 drunk driving, then of course there could be a
7 regulatory purpose.

8 QUESTION: How could the city show that
9 without having done some investigation?

10 MR. FALK: Well, I think if you looked at
11 Sitz there were reams of statistics introduced there to
12 show what the national and local problem of drunk
13 driving was. Sitz recognized -- I'm sorry?

14 QUESTION: Please, finish your answer.

15 MR. FALK: Sitz recognizes that there is a
16 regulatory right of a state to get an immediately
17 unsafe vehicle off the road. In the same way that a
18 car without brakes is imminently unsafe to innocent
19 persons, so is a car driven by a drunk driver.

20 QUESTION: What about a driver without a
21 driver's license, is that a safety concern? Do you
22 acknowledge that it's okay to make the stops to see
23 that the person behind the wheel has a driver's
24 license?

25 MR. FALK: Arguably, Your Honor, but even

1 those stops, even those noncriminal investigatory
2 seizures have to be justified under Brown, there has to
3 be a showing there actually is --

4 QUESTION: That's fine. Let's assume that
5 that is so justified here.

6 MR. FALK: Yes.

7 QUESTION: What difference does it make that
8 in the course of that search, in the course of that
9 stop the police also send a dog around the car? I
10 mean, in the case of individualized traffic stops, we
11 have innumerable cases where the person who was caught
12 with drugs in his car after a stop for a broken
13 taillight and in the course of interrogating the driver
14 about the broken taillight, the policeman sees
15 something suspicious, and then conducts a full search.

16 And it is often alleged and may well be true
17 that the reason the policeman stopped the car with the
18 broken taillight was that this car looked suspicious
19 and he thought it might have drugs in it, and we have
20 simply rejected that argument. We've said we're not
21 going to go into the subjective motivation of the
22 individual policeman. So long as he had a valid basis
23 for stopping the car, that's enough.

24 MR. FALK: That's correct.

25 QUESTION: Now, why shouldn't that apply in

1 gross, just as it applies with respect to individual
2 traffic stops?

3 MR. FALK: Subjective intent is irrelevant
4 provided there is otherwise probable cause.

5 QUESTION: Right, so --

6 MR. FALK: But there is no cause here, Your
7 Honor, and this Court has insisted --

8 QUESTION: But there is cause. You've
9 acknowledged that it is okay to stop to check for
10 driver's licenses.

11 MR. FALK: Well, there's not a criminal
12 investigatory cause. And I would add, Your Honor, that
13 this Court has made it clear in, for instance, in
14 Terry, you cannot go beyond the scope of what is
15 allowed by the narrow exception to the cause
16 requirement of the Fourth Amendment. Michigan v.
17 Clifford, same example.

18 QUESTION: I'm assuming they're not going
19 beyond what's allowed. They're only stopping to
20 check -- now their real purpose is to find drugs, but
21 they're only stopping the cars as long as it takes to
22 check for driver's licenses.

23 MR. FALK: Well, Your Honor --

24 QUESTION: While they do that the dog sniffs
25 around the car.

1 MR. FALK: Obviously adding the dog goes
2 beyond the scope of a license checkpoint. A dog is not
3 necessary to check licenses. Under the roadblocks --

4 QUESTION: The dog -- the dog is not a
5 search under our place.

6 MR. FALK: Well, arguably that's correct,
7 Your Honor.

8 QUESTION: Or it's a stop. Not just
9 arguably. The Court has said it's correct.

10 MR. FALK: The Court has said that a search
11 of unattended luggage is not -- by a dog, a sniff,
12 excuse me, is not a search, but I'm assuming it's not a
13 search for this purpose, Your Honor, but still it is
14 clearly beyond the scope. It is something
15 unnecessary --

16 QUESTION: Beyond the scope of what?

17 MR. FALK: Beyond the scope of what is
18 allowed for the regulatory intrusion to check someone's
19 license, Your Honor.

20 QUESTION: I guess a policeman could walk a
21 dog, a sniffing dog down the street, couldn't he? I
22 mean, suppose he did that. There are people stopped, I
23 mean, so it doesn't bother anybody, but he sniffs the
24 dog. I thought probably that was lawful.

25 MR. FALK: Well, but Your Honor, this is a

1 seizure.

2 QUESTION: But I would like you to address
3 that particular point. I'm confused. My
4 characterization, not theirs. But from what Mr. Chinn
5 said, I thought that this was a stop the basic purpose
6 of which was to look for drugs; i.e., if the police had
7 known they weren't going to get -- be able to look for
8 drugs, there would have been no stop.

9 From what the Solicitor General said, I
10 thought that my characterization, not hers, that this
11 was a different kind of stop. This was a stop to
12 search for drunk drivers or a stop to search for
13 licenses -- unlicensed drivers, and the police would
14 have done it if drugs had had nothing to do with it,
15 and their having done this is like somebody stopping at
16 a red light, and people walk a dog around.

17 Well, there seems to be quite different
18 considerations. So what is this case?

19 MR. FALK: This is not like stopping at a
20 red light. This is being pulled over by a sign saying,
21 warning, drug interdiction checkpoint ahead.

22 QUESTION: But that isn't my point. My
23 point is, have the police set this up to look for drugs
24 and in the absence of their ability to do that, they
25 wouldn't have set it up, wouldn't have stopped people?

1 Or is it a search that the police set up to look for no
2 licenses and alcohol? And if you had told them you
3 can't look for drugs, they would have done it anyway?

4 MR. FALK: This is a search to look for
5 drugs, Your Honor. No matter how quickly one shows a
6 valid license or registration, one cannot leave the
7 checkpoint until the dog sniffs the car.

8 QUESTION: Now, when you say it's a search
9 to look for drugs, and the Solicitor General says it
10 isn't, it's a search for -- how am I going to find out
11 who is right?

12 MR. FALK: The City of Indianapolis concedes
13 that the primary purpose of this search, excuse me, of
14 this seizure is to look for drugs.

15 QUESTION: Where did they concede that?

16 MR. FALK: They have conceded that, I
17 believe, in their briefs. They conceded that today
18 before this Court.

19 QUESTION: And does primary purpose mean in
20 the absence of their ability to do that, they wouldn't
21 have done it; i.e., it was a necessary condition for
22 the stop?

23 MR. FALK: I'm sorry, Your Honor, I cannot
24 answer that. All I can answer is that everything that
25 an individual is told when they are stopped, they are

1 told, you are now at a drug roadblock. They are told,
2 this is a drug interdiction checkpoint coming ahead
3 with canines to check for drugs. You cannot --

4 QUESTION: Did the courts below find there
5 were these other purposes in addition?

6 MR. FALK: The trial court found that from
7 the fact that the licenses were checked, that there's a
8 secondary purpose to look for licenses. The Seventh
9 Circuit, Judge Posner found that the primary, not sole
10 purpose was to look for evidence of drugs, and in fact
11 as I've indicated, everyone is told when they're
12 pulling up there is no pretense, there is no one saying
13 this is a license roadblock, you are at a drug
14 checkpoint. And even if as I indicated this was a
15 checking of licenses, there is no valid reason to go
16 beyond that and introduce the drug-detecting dog unless
17 you are now converting this seizure which arguably
18 might be a regulatory seizure into one for purposes of
19 criminal investigation.

20 QUESTION: Why can't the city or the state
21 have a multipurpose stop?

22 MR. FALK: Arguably they could. They don't
23 in this case, but arguably they could. But you still
24 have to look --

25 QUESTION: I thought counsel here said that

1 there were three purposes for the thing.

2 MR. FALK: The city has never attempted,
3 never attempted below to justify even under Brown
4 having a license checkpoint. There never was a showing
5 that there was a public need for this. There was never
6 a showing that the means used were not overly
7 intrusive, and in fact advanced that effort.

8 QUESTION: What service -- at what point do
9 you think the city would have to make that showing?

10 MR. FALK: I think at some level they would
11 have to show that they believe this is a problem in
12 Indianapolis and this is --

13 QUESTION: You mean the city council would
14 have to pass a resolution?

15 MR. FALK: No, I mean in the course of
16 justifying their search to the Court.

17 QUESTION: Justifying it at what point? I
18 mean, when it's brought to court, as it was here?

19 MR. FALK: Yes.

20 QUESTION: But you're not saying they would
21 have to justify it beforehand?

22 MR. FALK: No.

23 QUESTION: It seems to me in court, the
24 lower court, the District Court they found that there
25 were additional purposes.

1 MR. FALK: The lower court found only that
2 licenses and registrations were taken, and from that
3 she surmised this secondary purpose.

4 QUESTION: Surmised?

5 MR. FALK: Well, there is no other evidence,
6 Your Honor.

7 QUESTION: But if that was satisfactory for
8 the District Court, are you saying it's clearly
9 erroneous to have found that?

10 MR. FALK: No, Your Honor. I think it's
11 clear from the way the roadblock is set up that
12 licenses and registration are taken to hold the people
13 there so that the dog can sniff the car.

14 QUESTION: Take an easy case in which there
15 is simply a history in Indianapolis or any other
16 jurisdiction of license roadblock checks, and after 25
17 years of doing this, suddenly one day a drug sniffing
18 dog appears at the license check. Would you find
19 anything constitutionally suspect in the use of the dog
20 there?

21 MR. FALK: Yes, Your Honor, that would be
22 unconstitutional because you have now gone beyond the
23 scope of what is arguably a valid, noncriminal
24 investigatory seizure under Brown. Arguably --

25 QUESTION: Well, but let's -- you're talking

1 about seizure. Let's assume that the dog simply
2 sniffs, if it sniffs at all, during the time in which
3 it takes to look at the license so that there is no --
4 there is no greater imposition upon the driver by the
5 use of the dog. Would that raise a constitutional
6 suspicion?

7 MR. FALK: Yes, Your Honor. This Court has
8 never said you can take a noncriminal investigatory
9 seizure and incrementally add things to it and still be
10 constitutional. The opposite is true.

11 Let's go back to Opperman, inventory case.
12 You can have one officer searching a car and another
13 officer searching the exact same car, I mean another
14 car in the exact same way, two different searches
15 exactly the same. One can be constitutional because
16 the programmatic purpose is not criminal investigation,
17 an inventory search. The other could be
18 unconstitutional if the officer is looking for evidence
19 of a crime.

20 QUESTION: But in the example that I gave
21 you, the assumption that I was making or implying by
22 the hypo was that the license check remained, in fact,
23 a bona fide license check. It had been so before dogs
24 arrived, it continued to be so after the dog arrived.
25 If you make that assumption, that in fact there is a

1 bona fide license check being made for the ostensible
2 purpose, that of checking licenses, does the addition
3 of the dog raise a constitutional suspicion?

4 MR. FALK: Yes, it does, and for the reason
5 I indicated.

6 QUESTION: Does it raise it for any other
7 reason than it raises a question as to whether they are
8 still really looking for licenses?

9 MR. FALK: Your Honor --

10 QUESTION: I can understand -- I guess I can
11 understand your argument. You say, hey, look, when the
12 dog appears, we all know that they are no longer
13 interested in licenses, they are interested in
14 something else. They are doing just what they are
15 doing here. That argument I can understand. But if
16 you assume, if it were proved, if it were found as a
17 fact by a reviewing court that the license check was
18 still a bona fide purpose, that's where I have trouble
19 with your position.

20 MR. FALK: Your Honor, we're not asking this
21 Court or any court to go inside the head of people to
22 see what their real purpose is. When you add the dog,
23 there is only one purpose. A dog cannot check licenses
24 or registrations.

25 QUESTION: But the reality of police work is

1 that the police enforce all of the laws. Suppose there
2 were a driver's license checkpoint as stipulated by
3 Justice -- hypothesized by Justice Souter, and the
4 police said now we want to add the people, the officers
5 manning this license checkpoint who are experts in drug
6 detection. Would there be something constitutionally
7 suspicious about that?

8 MR. FALK: No, provided they use that
9 expertise in a way that does not require dogs or
10 equipment or anything that is beyond the scope --

11 QUESTION: No, but they're trained
12 especially to look at people's eyes and to smell and to
13 look at the kinds of containers they can see in plain
14 view, this is to normal police work.

15 MR. FALK: Sure. Of course. And that's
16 analogous to doing an inventory inspection of a car and
17 seeing evidence of a crime in plain view.

18 QUESTION: So then if that's permissible,
19 what's not permissible about adding the dog? Because
20 the dog's more efficient?

21 MR. FALK: Because -- but you've added the
22 dog. You've added something which is beyond the scope.
23 It's not in plain view. You've added something
24 completely different and --

25 QUESTION: Officers with really sharp noses

1 would be okay?

2 (Laughter.)

3 QUESTION: How about bringing a witness,
4 just bringing a witness to look at somebody stopped at
5 a stoplight? I mean, people do things like this all
6 the time. You stop them for one purpose, but what the
7 policeman does doesn't hurt them in any way whatsoever.
8 It's just a way of getting a witness or somebody to --
9 you're pursuing this line of I guess assuming that this
10 was a stop that was done for a legitimate other
11 purpose, and I'm having trouble following that
12 assumption.

13 MR. FALK: Your Honor, we are arguing this
14 because we -- the question has been asked, what if
15 there was a legitimate secondary purpose. We have
16 contended all along in both the lower courts and our
17 briefs that --

18 QUESTION: What does secondary mean? To me
19 secondary meant that they never would have done this
20 thing if it weren't for the primary purpose. That's
21 what I thought it was and now I'm a little mixed up
22 about it.

23 MR. FALK: Your Honor, I cannot tell you
24 what the city would and would not have done but for the
25 drug search seizing.

1 QUESTION: Do they have any other places in
2 the city where they stop people for checking for
3 licenses?

4 MR. FALK: Not that I'm aware of, Your
5 Honor.

6 QUESTION: Do they have any other places in
7 the city in the same way where they stop people for
8 drunk driving with these same kinds of checks?

9 MR. FALK: Not that I'm aware of, Your
10 Honor.

11 QUESTION: Mr. Falk, I don't understand why
12 it makes any difference whether the city would have
13 done this otherwise. Why does it make any difference
14 in this case? It surely makes no difference when a
15 defendant who has been convicted of a drug offense
16 comes in and says, the policeman who stopped my car,
17 oh, yes, he stopped it because of a defective brake
18 light, but that's not really what he was after. And we
19 don't inquire as to whether that's really what he was
20 after, and I frankly personally believe that very often
21 that isn't what he was really after, that he stopped
22 this suspicious looking car which happened to have a
23 defective brake light.

24 Now, we just don't listen to that argument.
25 We don't care what the primary subjective purpose was.

1 Why should we care here so long as they have authority
2 to stop for the driver's licenses and one of the
3 purposes of the stop is driver's licenses, what
4 difference does it make that they have another motive?

5 MR. FALK: Programmatic purpose has always
6 been extremely important in searches or seizures which
7 are designed for things other than criminal
8 investigation.

9 QUESTION: Mr. Falk, I want to get into this
10 same area with you because as I read Sitz and
11 Martinez-Fuerte, this Court didn't look at purpose at
12 all. We have spent most of the morning here talking
13 about purpose, what was the purpose. That wasn't the
14 analysis. The Court just went to balancing. What does
15 the government need and how closely does the checkpoint
16 serve that need? And we totally obviated the need to
17 look for purpose, so I'm not sure that these
18 discussions have helped the analysis that much.

19 MR. FALK: The problem, Your Honor, is if we
20 lose the purpose inquiry procedures which are not
21 inherently regulatory like Martinez-Fuerte, which are
22 not immediately concerning safety, like Sitz, then we
23 are going to end up with pedestrian roadblocks
24 because --

25 QUESTION: You have no bright line. I read

1 over Martinez-Fuerte twice in the last, and I simply
2 don't find any statement in there that the seizure was
3 primarily regulatory. Can you refer me to language in
4 the case that says that? They ended up arresting the
5 people.

6 MR. FALK: That's correct, Your Honor. And
7 as I said, they arrested people in Burger and arguably
8 could have arrested in Camara.

9 QUESTION: But where does it say in
10 Martinez-Fuerte that the seizure is primarily
11 regulatory?

12 MR. FALK: Martinez-Fuerte does talk about
13 the immigration problems, and other cases I cited this
14 Court back --

15 QUESTION: I asked you about
16 Martinez-Fuerte.

17 MR. FALK: No, there is nothing in
18 Martinez-Fuerte, Your Honor, that specifically says
19 it's regulatory.

20 QUESTION: That says it's regulatory?

21 MR. FALK: That's correct.

22 QUESTION: But you're trying to reconcile
23 that decision as a piece of a tapestry with the ones
24 that had to do, for example, with the fire
25 investigation when this Court did make something of a

1 purpose line. They said if you want to find out how
2 this fire got started, that's regulatory and it's okay.

3 MR. FALK: That's correct. That's correct.

4 QUESTION: But if you're trying to find the
5 arsonist, it's not okay.

6 MR. FALK: Of course. And in Opperman this
7 Court found it extremely important that the seizures
8 there and the searches were pursuant to a noncriminal
9 inventory purpose.

10 QUESTION: But I want to go back to the
11 rationale that I think you started to add up right
12 there for the reason for the purpose inquiry. If I
13 understood what you were saying is, I think you were
14 implying that in cases like Martinez-Fuerte and the
15 regular driver's checks, the question of purpose was
16 not in the case; that where purpose has come into the
17 case, as Justice Ginsburg suggested, we have -- we have
18 said that in fact purpose is a crucial inquiry. And I
19 understood you to be starting to say that if you don't
20 make it a crucial inquiry, your categories simply
21 collapse and there is no way, in effect, to stop, as
22 you said in your -- there is no way to stop short of
23 pedestrian search. Can you elaborate on that?

24 MR. FALK: Well, if the category collapses
25 in multiple dimensions, the first collapse, as this

1 Court noted in questionings of Mr. Chinn is what about
2 things that are serious concerns to the city other than
3 drugs? So we will have an expansion to what other
4 problems, people not paying parking tickets, people not
5 paying child support, other things of stopping
6 motorists. It also collapses, however, as far as who
7 can be seized. If the argument is that somehow getting
8 into your car is a surrender of your privacy interests,
9 that same argument, as you noted, applies to a
10 pedestrian in a high crime neighborhood. Why not stop
11 that person? That person has by going out in public
12 surrendered a significant amount of privacy, arguably
13 more than I surrender when I drive down the street in
14 my car.

15 Ultimately what the city is arguing, I
16 believe, is that if we subject everyone to the same
17 degree of intrusion pursuant to this plan, that that
18 somehow makes everything constitutional, but this Court
19 has never viewed the Fourth Amendment as somehow being
20 something that allows everyone to be treated in an
21 even-handed manner. As long as everyone's
22 constitutional rights are violated in the same way,
23 that's appropriate.

24 QUESTION: But we have recognized special
25 needs as an exception to the individualized suspicion,

1 and we've recognized those special needs in the
2 automobile context. And it is certainly arguable, I
3 guess, that because the state licen -- or the --
4 because the state licenses the driver and because motor
5 vehicles are deadly weapons potentially that the state
6 has a special need of assuring that the people who are
7 driving are licensed and are not impaired by drugs or
8 alcohol. And maybe there's a special need there that
9 can be met by occasional checkpoints. Is that
10 unreasonable?

11 QUESTION: And if I may add, this is exactly
12 what the Court said, this is what Justice O'Connor's
13 point is. This is exactly what the Court said in Sitz.
14 We don't need Martinez-Fuerte, not because there is a
15 difference between a regulatory stop and a stop for
16 probable cause, but because it's a car involved.
17 That's the way I read Sitz.

18 MR. FALK: It's an unsafe car involved, as
19 Justice O'Connor noted. It's an immediately unsafe car
20 that is going to cause imminent harm to innocent
21 persons because it is a deadly weapon when driven by
22 someone who is drunk or drugged.

23 QUESTION: That doesn't translate to
24 pedestrians at all. We are dealing with licensing
25 somebody to use this potentially lethal vehicle.

1 MR. FALK: But it doesn't -- that's correct,
2 but it doesn't translate to searching the trunks of
3 cars to search for drug smugglers, it doesn't translate
4 to that at all. It translates to checking to see if
5 someone is drunk or someone is impaired.

6 QUESTION: Right. Then it boils down to
7 whether there is any increase in intrusion by having
8 the dog sniff.

9 MR. FALK: There is an increase in intrusion
10 when the state turns a criminal investigatory eye on
11 presumably innocent persons, yes.

12 QUESTION: I know you say yes, but until I
13 heard the Solicitor General, frankly, I thought that
14 just like the first of the cases you're talking about
15 was an immigration case and the second case was a drunk
16 search. This was a drug search.

17 MR. FALK: Yes.

18 QUESTION: The lower courts have treated it
19 this way.

20 MR. FALK: Yes.

21 QUESTION: Indianapolis had said any other
22 purpose was secondary.

23 MR. FALK: Yes.

24 QUESTION: Now suddenly since the Solicitor
25 General argued, I think there is a new premise reaching

1 in -- reaching in. This is not a drug search case.
2 This is a drunk search plus a dog. Now, that's quite a
3 different thing.

4 MR. FALK: That's correct.

5 QUESTION: And because of that issue, I
6 think it's important to get clear on what it is, and if
7 we're treating it as a drug case, it's one thing.
8 Drunk case plus a dog, it's another. So in your last
9 answer, you accepted the characterization. The second
10 characterization. And I want to be sure what you think
11 about that and why I take it you think it should be the
12 first characterization, not the second.

13 MR. FALK: This is most definitely a drug
14 case. The city has always indicated its primary
15 purpose is to interdict drugs, not to find drugged
16 drivers. The city has always said that's not the
17 purpose. The purpose is, as the city conceded this
18 morning, to stop bad guys carrying drugs, from carrying
19 them through the streets of Indianapolis, and that is
20 why it's no different than a pedestrian search, because
21 there are bad guys carrying drugs who are walking
22 through the streets of Indianapolis.

23 QUESTION: So what is wrong about the city
24 saying, look, we have a right to stop people, to look
25 at their licenses? Police forces do this all the time

1 in Fairfax County. They stop to make sure you paid
2 your vehicle tax. Why don't we do that, and in the
3 course of doing it have a dog sniff around the car? In
4 fact, their primary purpose may be to have the dog
5 sniff around the car, but they are conducting a stop
6 that is a perfectly legitimate stop, and we don't look
7 into purpose.

8 MR. FALK: And, again, assuming that was the
9 case here, which I do not believe it is, because I
10 think we are dealing with a primarily if not sole drug
11 issue, but even assuming that sort of mixed motive
12 which you're hypothesizing --

13 QUESTION: No, I'm not -- I'm not assuming a
14 mixed motive. I'm hypothesizing that they wanted to
15 get people carrying drugs, and the means of doing it,
16 they said we have a perfect right to stop cars in order
17 to look at licenses, and why don't we do that, and
18 while the cars are stopped, send a dog around the car.
19 What's wrong with that?

20 MR. FALK: Then what we have is a criminal
21 investigatory seizure done without any individual --

22 QUESTION: No, it isn't a criminal
23 investigatory seizure. It's a seizure to look at their
24 licenses.

25 MR. FALK: No, it's not. It's a seizure.

1 When you have a dog there, it's a seizure to look for
2 drug activity.

3 QUESTION: No, but this comes back to your
4 purpose argument. You're basically saying that Justice
5 Scalia's premise cannot be accepted in those
6 circumstances.

7 MR. FALK: That's correct.

8 QUESTION: And you're saying that because
9 purpose is crucial, we characterize it this way as the
10 drug search.

11 MR. FALK: There has been --

12 QUESTION: But the tough question, and I
13 think this is consistent with his question, what if we
14 assume, it is found as a fact by the reviewing court
15 that the license check or the registration check is, in
16 fact, a genuine, bona fide purchase -- purpose, and
17 they simply add the dog? They're saying, look, if
18 we're stopping them for this legitimate purpose anyway,
19 why not check for this, too? Why not let the dog go
20 around?

21 MR. FALK: Because --

22 QUESTION: Why does the dog taint the search
23 in that case?

24 MR. FALK: Because then you're going back to
25 having a seizure which is for criminal purposes which

1 is beyond the scope of what might otherwise be allowed
2 in a noncriminal investigation.

3 QUESTION: And is the reason of the beyond
4 the scope criterion essentially a slippery slope
5 reason? Are you, in effect, saying that my premise is
6 really an unsupportable premise? Because if you accept
7 that premise, everybody's going to wink and say, we're
8 just checking for licenses, and we happen to have this
9 dog here, and -- and that the -- that the premise, in
10 fact, will never -- or will -- the threat that the
11 premise will not be true, that it will not be a bona
12 fide purpose is just too great, and that's why you
13 don't let the dog --

14 MR. FALK: Yes, although I think in defense
15 of Indianapolis, they're not winking. They're coming
16 out --

17 QUESTION: Oh, I realize that. I'm
18 pursuing -- I'm just pursuing the limits of your
19 argument as Justice Scalia --

20 MR. FALK: If you break the distinction down
21 between criminal investigatory purpose and a
22 noncriminal investigatory purpose --

23 QUESTION: Would you say stopping for
24 driver's license, a man who doesn't have a driver's
25 license is not a criminal investigatory purpose?

1 MR. FALK: I believe, Your Honor, that
2 that's been deemed to be regulatory because --

3 QUESTION: Deemed by whom?

4 MR. FALK: Well, I think in lower courts, in
5 approaching the problem, have deemed that to be -- the
6 desire is to remove immediately unsafe people off the
7 roads. There's a presumption if you have no license
8 you're unsafe.

9 QUESTION: Well, there's also a presumption
10 you've committed a crime.

11 MR. FALK: Well, yes, Your Honor, but again
12 this Court has recognized, as I said, in *Camara* and
13 *Burger* and other cases that you can have a regulatory
14 purpose and a criminal investigatory purpose.

15 QUESTION: Do you want us to use the
16 *Von Raab* analysis and in *Sitz* we said when you have
17 automobiles you don't, you use the *Martinez-Fuerte*
18 analysis.

19 MR. FALK: And that's why *Sitz* said that,
20 because *Martinez-Fuerte*, I believe, was there,
21 indicating that for that seizure which was not a
22 criminal investigatory seizure, which was part of the
23 inherent regulatory right of the United States to
24 regulate people and things coming into the United
25 States, in that you use a balance, but if we abandon

1 the cause requirement when it's a pure criminal
2 investigation, then we will have seizures which are
3 based on a perceived governmental need.

4 QUESTION: Would you allow a dog in a
5 Martinez-Fuerte stop?

6 MR. FALK: A dog searching -- if, in fact --
7 if, in fact, this Court's case law allowed regulatory
8 seizures at that point for purposes of contraband, yes.

9 QUESTION: It seems to me that you're really
10 arguing that there's a difference between pretext when
11 it's an individual officer acting and pretext when it's
12 a regulatory program. That's the heart of your case.

13 MR. FALK: It is, and I don't like using the
14 word pretext because, again, I think the City of
15 Indianapolis isn't being --

16 QUESTION: It's a word motive instead of
17 pretext.

18 MR. FALK: It's a primary, what is the
19 purpose, and this Court itself in Opperman said here
20 the primary purpose is noncriminal investigatory. In
21 Burger the primary purpose is noncriminal
22 investigatory, and the reason for that was because if
23 it was a criminal investigatory purpose, there would
24 have to be specific cause.

25 QUESTION: And what's the danger that you

1 perceive in making the distinction between the
2 individual and the programmatic? Why do you make that
3 distinction? Why do you say there can't be a
4 programmatic rem?

5 MR. FALK: Because the danger, then, I
6 believe is that a sufficient government interest, the
7 drug crisis, will be sufficient to overcome the privacy
8 interests which this Court has always recognized as
9 something held by individuals under the Fourth
10 Amendment.

11 QUESTION: Mr. Falk, I asked Miss Millett
12 earlier whether the dogs ever took longer than the
13 license check, and she said no, that the license check
14 takes three to five minutes, and the dog's done by the
15 time the license check -- do you agree with that?

16 MR. FALK: The record is not clear, Your
17 Honor. The only thing the record indicates is that
18 there's an affidavit from an officer which says it's
19 usually done at the same time, but it's also clear from
20 the record that no one can leave the checkpoint until
21 they're sniffed by a dog. So it's clear that there are
22 times when the last thing being done is being sniffed
23 by a dog, and that makes sense. If you're just
24 checking licenses and registrations, it won't take five
25 minutes, and given the size -- there are 30 police

1 officers there. Given the number of cars, the dogs
2 have to do multiple cars, and inevitably I believe
3 there's going to be a wait for the dog.

4 But obviously, Your Honor, the risk here is
5 that if we break down the barrier here and allow this
6 seizure which is clearly for criminal investigatory
7 purposes to occur without cause, then we will be faced
8 with ever-increasing incursions which will be balanced
9 away because if the problem is deemed serious enough,
10 if the intrusion is deemed minimal enough, we will have
11 seizures of persons on streets.

12 QUESTION: Thank you, Mr. Falk.

13 Mr. Chinn, you have two minutes remaining.

14 REBUTTAL ARGUMENT OF A. SCOTT CHINN

15 ON BEHALF OF THE PETITIONER

16 MR. CHINN: Thank you, Mr. Chief Justice.

17 I'd like to first clear up from our perspective one of
18 Justice Breyer's concerns about what is the primary
19 purpose or what are the purposes in this case. It's
20 clearly true that Indianapolis has wanted to primarily
21 emphasize drug detection in these checkpoints, but it's
22 also clear that we had three interests being served.
23 It's clear in the record. We were so interested, in
24 fact, in driver's license and registration checks being
25 performed in this very set of checkpoints that 4.2

1 percent of the motorists stopped in these checkpoints
2 were arrested for traffic violations.

3 QUESTION: And do you ever do other similar
4 traffic, any registration checks without the drugs?

5 MR. CHINN: It's not clear from the record
6 whether we do, Your Honor. I know certainly that we do
7 in Indianapolis sobriety checkpoints quite all the
8 time. I'm not sure about driver's license and
9 registration checkpoints apart from sobriety or drug
10 checkpoints, but we're clearly interested in all three
11 of these interests being served.

12 QUESTION: How was it advertised to the
13 public? I forgot what those signs were. I know there
14 was a sign that said canine, but what was the other
15 sign? Wasn't it drug checkpoint ahead?

16 MR. CHINN: Yes, the signs -- the signs
17 display what our area of emphasis is for those
18 checkpoints, which is narcotics detection checkpoint
19 ahead so many miles, one mile, half a mile, canine in
20 use. Be prepared to stop. That's what the sign said.

21 QUESTION: What is your -- what is your take
22 on whether -- whether you have to wait after your
23 driver's license has been checked for the dog to
24 complete sniffing? Do we know about that?

25 MR. CHINN: Well, Mr. Falk is certainly

1 correct, the record isn't absolutely clear on that. My
2 understanding is that the dogs do their work very
3 quickly. We're only talking about five to ten cars in
4 a sequence, and the dog is led around each car really
5 in a matter of seconds. So it's my understanding in
6 almost all situations the dog will be done with its
7 work.

8 CHIEF JUSTICE REHNQUIST: Thank you all.
9 Thank you, Mr. Chinn. The case is submitted.

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