

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GILBERT CARRASCO,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TODD W. BURNS
Counsel of Record
Burns & Cohan, Attorneys at Law
1350 Columbia Street, Suite 600
San Diego, California 92101
619-236-0244
todd@burnsandcohan.com

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), this Court held that the special need of immigration enforcement made it constitutionally permissible for Border Patrol agents to make suspicion-less stops of vehicles at internal checkpoints, for the limited purpose of conducting brief immigration inspections. In recent testimony by top-level officials, the Border Patrol acknowledged that it is now using its checkpoints to carry out its broad mission of searching for contraband, weapons, and undocumented immigrants. That is more than the Court approved in *Martinez-Fuerte*, and akin to the general law enforcement checkpoints the Court found unconstitutional in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). Nonetheless, the circuit courts where these internal checkpoints are used – the Fifth, Ninth, and Tenth – continue to uphold their constitutionality.

The question presented is whether the Border Patrol’s admitted use of internal immigration checkpoints to carry out its broad mission of intercepting contraband, weapons, and undocumented immigrants violates the Fourth Amendment’s command that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

STATEMENT OF RELATED CASES

United States v. Gilbert Carrasco, 3:17-cr-3938-JLS, United States District Court for the Southern District of California. District court proceeding in which the issue that is the subject of this petition was litigated. Judgment was entered on November 20, 2018.

United States v. Gilbert Carrasco, No. 18-50417, United States Court of Appeals for the Ninth Circuit. Direct appeal deciding issue raised in this petition. Judgment was entered on May 13, 2020.

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INTRODUCTION

Forty-four years ago, in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), this Court held that the special need of immigration enforcement made it constitutionally permissible for Border Patrol agents to make suspicion-less stops of vehicles at internal checkpoints, for the limited purpose of conducting brief immigration inspections. In recent testimony by top-level officials, the Border Patrol acknowledged that it is now using its checkpoints to carry out its broad mission of searching for contraband, weapons, and undocumented immigrants. That is more than the Court approved in *Martinez-Fuerte*, and akin to the general law enforcement checkpoints the Court found unconstitutional in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). Nonetheless, the circuit courts where these internal checkpoints are used – the Fifth, Ninth, and Tenth – continue to uphold their constitutionality. Because this is an entrenched issue of exceptional importance, the Court should grant review and either hold that the checkpoints are being operated in an unconstitutional manner, or provide a reasoned opinion explaining the bases for, and limits on, its conclusion to the contrary.

ORDER AND OPINION BELOW

On May 21, 2018, the district court denied Gilbert Carrasco’s motion to suppress the fruits of his seizure at an interior Border Patrol checkpoint. *See* 5/21/18 Reporter’s Transcript (RT) in *United States v. Carrasco*, S.D. Cal. Case No. 3:17-cr-3938-JLS, at 82 (attached in appendix). Following a jury trial, Carrasco was convicted of one count of possessing methamphetamine with intent to distribute, *see* 21 U.S.C. §841(a)(1), and he was subsequently sentenced to 120 months custody.

On May 13, 2020, the Ninth Circuit filed an unpublished opinion affirming the district court's denial of Carrasco's suppression motion. *See United States v. Carrasco*, __ Fed. App'x __, 2020 WL 2466378, *1 (9th Cir. 2020) (attached in appendix).

JURISDICTION

The Ninth Circuit's opinion was filed on May 13, 2020, and Carrasco did not seek rehearing. This Petition is timely and the Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

I. District Court Proceedings

On October 24, 2017, Border Patrol Agent Luis Lozano was working with his drug and human detecting dog at the California Highway 111 Border Patrol checkpoint, which is 52 miles north of the U.S.-Mexico border. *See* ER 48, 179.¹ At 3:40 p.m., Agent Lozano's dog, Amon, was sniffing cars that were in line at the checkpoint, and he alerted to the driver's side of a Saturn Ion. *See* ER 183-84. Amon continued to sniff the car when it got to the "primary [inspection] officer," and again alerted to the driver's side. *See* ER 185. Agent Lozano had the primary officer send the

¹ The ER cites in this petition are to the Excerpts of Record submitted in the Ninth Circuit, at docket #15 in case number 18-50417.

car to the checkpoint's secondary inspection area, and Agent Lozano followed the car there. *See* ER 185.

In secondary inspection, the driver consented to a search of the interior of the car, and he and the two male passengers – one of whom was Petitioner Gilbert Carrasco – were told to get out of the car and sit on a bench nearby. *See* ER 186. Amon then jumped into the car and alerted repeatedly to the front passenger's seat. *See* ER 187. Agent Lozano immediately walked over to Carrasco, who had been sitting in that seat, and asked if he had narcotics on him or had used narcotics recently. *See* ER 187-88. Carrasco responded yes, and, in response to additional questions said he had methamphetamine taped to his legs. *See* ER 188. Agent Lozano patted down Carrasco, felt packages under his pants, and then had another agent escort Carrasco inside the checkpoint trailer. *See* ER 188. There agents uncovered two packages containing approximately two pounds of methamphetamine. *See* ER 189-90, 196, 269D-E.

Carrasco moved to suppress the fruits of his initial seizure at the checkpoint because the Border Patrol is unconstitutionally using that checkpoint, and all of its internal checkpoints, for general law enforcement purposes. *See* ER 10-24. Specifically, contrary to *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000), the Border Patrol is using the checkpoints to carry out its overall mission of interdicting contraband, weapons, and undocumented immigrants, rather than for the limited special need of immigration enforcement approved in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

In *Martinez-Fuerte*, the Court addressed the constitutionality of a Border Patrol checkpoint and held that immigration enforcement is a permissible purpose for stopping vehicles and posing questions without individualized suspicion. 428 U.S. at 556-64. The Court rejected the defendant's Fourth Amendment challenge to the checkpoint, concluding that "a traffic-checking program in the

interior is necessary because the flow of illegal aliens cannot be controlled effectively at the border.” *Id.* at 556. The Court also “stressed the impracticality of the particularized study of a given car to discern whether it was transporting illegal aliens, as well as the relatively modest degree of intrusion entailed by the stops.” *Edmond*, 531 U.S. at 38 (citing *Martinez–Fuerte*, 428 U.S. at 556-64).

The Court reached the opposite conclusion in *Edmond*, which “involved a checkpoint at which police stopped vehicles to look for evidence of drug crimes committed by occupants of those vehicles. After stopping a vehicle at the checkpoint, police would examine (from outside of the vehicle) the vehicle’s interior; they would walk a drug-sniffing dog around the exterior; and, if they found sufficient evidence of drug (or other) crimes, they would arrest the vehicle’s occupants.” *Illinois v. Lidster*, 540 U.S. 419, 423 (2004) (citing *Edmond*, 531 U.S. at 35). The Court “found that police had set up this checkpoint primarily for general ‘crime control’ purposes, *i.e.*, ‘to detect evidence of ordinary criminal wrongdoing,’” and held that was unconstitutional. *Id.* at 41; *see also id.* at 34, 38 (stating that checkpoint aimed at “discovery and interdiction of illegal narcotics” has the “primary purpose [of] detect[ing] evidence of ordinary criminal wrongdoing”).

In Carrasco’s case, to support its argument that the primary purpose of the Border Patrol’s internal checkpoints is limited to immigration enforcement, the government relied on: (1) written testimony by Border Patrol Chief Mark Morgan at a September 13, 2016 hearing before the House Subcommittee on Border and Maritime Security, titled, “Moving the Line of Scrimmage: Re-examining the Defense in Depth Strategy,” ER 51-57; and (2) the November 27, 2017 testimony of Assistant Chief Border Patrol Agent Ryan Yamasaki at a hearing held in *United States v. Becerra-Perez*, S.D. Cal. Case No. 17-cr-0478-JLS (found at docket #58) (hereafter “11/27/17 Yamasaki

Testimony”).² That testimony actually shows that the internal checkpoints are an integral part of the Border Patrol’s strategy for achieving its broad mission of interdicting contraband, weapons, and undocumented immigrants, which is akin to the general law enforcement purpose that is prohibited by this Court’s holding in *Edmond*.

Chief Morgan and Agent Yamasaki are, of course, well aware of *Martinez-Fuerte* and the limited authority it gives the Border Patrol to use checkpoints for immigration enforcement. Indeed, Agent Yamasaki acknowledged that members of the Border Patrol – from the highest echelon to field agents – are trained about that limited authority, informed to stay on script when discussing the purpose of the checkpoints in public, and given laminated reference cards setting out that script. *See* 11/27/17 Yamasaki Testimony at 22, 24, 30, 32, 67, 69-70. And at points in their testimony, Chief Morgan and Agent Yamasaki *briefly* parroted the claim that the “primary purpose” of the Border Patrol checkpoints is to conduct immigration inspections. *See* ER 44, 54, 56-57; 11/27/17 Yamasaki Testimony at 20.

The substance of Chief Morgan’s and Agent Yamasaki’s testimony, however, tells a different story. Their testimony shows the checkpoints are an integral part of the Border Patrol’s overall strategy for interdicting contraband, weapons, and undocumented immigrants. To begin with, both men testified that the Border Patrol’s “mission” – per its own mission statement – “is to secure the United States’ borders between the ports of entry. That includes preventing the illegal entry of persons and contraband” ER 43; *see also* ER 27, 51; 11/27/17 Yamasaki Testimony at 10, 65, 123. They also testified that in seeking to accomplish that mission, the Border Patrol uses a “layered enforcement strategy,” which “has been referred to as ‘defense in-depth.’” ER 51-52; 11/27/17

² In *Becerra-Lopez*, the same district court judge addressed the same issue presented here two months prior, and in that case heard the testimony of Agent Yamasaki.

Yamasaki Testimony at 10, 123. The first of those layers is made up of agents and resources deployed at the borderline to prevent the illegal entry of contraband, weapons, and undocumented immigrants. *See* ER 52; 11/27/17 Yamasaki Testimony at 10. But, as Chief Morgan testified, the Border Patrol has concluded “that the security of the border cannot be achieved by only enforcement activities located at the physical border For that reason, some of USBP’s enforcement operations take place away from the physical border, at interior checkpoints, and in ancillary areas.” ER 52. Or, as Chief Morgan stated in his related oral testimony to Congress, “things are still getting across the border,” thus the Border Patrol has implemented its “defense in-depth” strategy to prevent a “single point of failure,” that “single point” being the entire borderline. *See* 9/13/16 Morgan Oral Testimony at 15:15, 16:45, 32:40, 53:30;³ *see also* 11/27/17 Yamasaki Testimony at 10-11, 65, 123.

Thus, the second layer of the Border Patrol’s defense in-depth strategy is comprised of interior checkpoints and roving patrols many miles from the border. As Agent Yamasaki testified, checkpoints “maximize” the Border Patrol’s ability to secure the border against contraband, weapons, and undocumented migrants.⁴ *See* 11/27/17 Yamasaki Testimony at 14, 80. Similarly, throughout his testimony Chief Morgan emphasized that interior checkpoints are used to carry out the Border Patrol’s overall mission, not just for immigration enforcement. For example, he stated:

As part of the USBP’s layered security strategy, checkpoints greatly enhance our ability to carry out the mission of securing the Nation’s borders against terrorists and smugglers of weapons, contraband, and unauthorized entrants. *Checkpoint*

³ The oral testimony was given by Chief Morgan on September 13, 2016, in addition to the written testimony at ER 51-57. The oral testimony can be found at www.c-span.org/video/?415164-1/hearing-examines-border-security-effectiveness. The Ninth Circuit took judicial notice of Chief Morgan’s oral testimony. *See Carrasco*, 2020 WL 2466378, *1 n.1.

⁴ Indeed, when checkpoints are not operating the Border Patrol relies more heavily on its roving patrols. *See* 11/27/17 Yamasaki Testimony at 14.

operations are critical security measures that ensure that the border is not our only line of defense, but rather one of many.

ER 52 (emphasis added). Moments later, Chief Morgan discussed the use of dogs at the interior checkpoints:

USBP also uses canine teams to detect undocumented individuals and illegal drugs by conducting a quick exterior canine sniff at an immigration checkpoint while the roadblock inspection is ongoing. An alert by a Border Patrol canine constitutes probable cause to search. USBP canine teams are specially trained to detect the odors of controlled substances and concealed humans at checkpoints and other Border Patrol operations. As part of CBP's layered enforcement strategy, canine teams provide an unmatched level of security and detection capability.

ER 54. In the same vein, Chief Morgan said checkpoints are "an efficient and effective security mechanism used to interdict criminal activity" of all sorts, explaining:

The presence of USBP agents along strategic routes reduces the ability of criminals and potential terrorists to easily travel away from the border. Given that fewer resources (law enforcement personnel, equipment, and technology) are required to operate a checkpoint, checkpoint operations are an efficient and effective security mechanism used to interdict criminal activity and restrict the ability of criminal organizations to exploit roadways and routes of egress away from the border. In FY 2015, at checkpoints alone, USBP apprehended 8,503 individuals and seized over 75,000 pounds of drugs, while intercepting thousands of dangerous attempts at human and drug smuggling. Many of the drugs seizures at checkpoints are a reflection of the effectiveness of USBP's multi-layered strategy. The shipments seized at checkpoints are often referred to as 'consolidation loads,' meaning that they are not shipments being moved directly from the border into the interior, but rather they are a combination of several small cross-border shipments that had previously entered the United States, and are now being moved to major distribution points in the interior of the country.

ER 54-55.

Chief Morgan's and Agent Yamasaki's testimony makes clear that the purpose of the checkpoints is not merely to conduct immigration inspections, it is to carry out the Border Patrol's broad law enforcement mission of interdicting contraband, weapons, and undocumented immigrants. This is further supported by the fact that the checkpoints are equipped with narcotic detecting dogs

and scales for weighing drug seizures, as well as radiation detecting devices for detecting weapons. *See* 11/27/17 Yamasaki Testimony at 26, 98, 128-29, 137-38. At the very least, it is indisputable that the checkpoints have the dual primary purposes of interdicting drugs and undocumented immigrants, because the Border Patrol’s website says so. Specifically, under the heading “Traffic Checkpoints” – not “Immigration Checkpoints” – the Border Patrol website says, “Traffic checks are conducted on major highways leading away from the border to (1) detect and apprehend illegal aliens attempting to travel further into the interior of the United States after evading detection at the border and (2) to detect illegal narcotics.” *See* www.cbp.gov/border-security/along-us-borders/overview.⁵

Furthermore, statistics show that the checkpoints are achieving the Border Patrol’s purpose of interdicting drugs. Over half the arrests made at the Highway 94 checkpoint involved in *Becerra-Perez* are for drugs, and a third of the arrests made at the Highway 111 checkpoint involved in this case are for drugs.⁶ *See* ER 19, 23-24; 3/9/18 RT at 3 (found at docket #69 in S.D. Cal. Case No. 17-cr-0478-JLS) (attached in appendix). And when asked during his Congressional testimony whether there was a distinction between the checkpoints’ effectiveness in interdicting undocumented immigrants versus drugs, Chief Morgan said there was not, that the checkpoints were “very successful” for interdicting drugs, and that the checkpoints were also effective for catching criminals with outstanding warrants. *See* 9/13/16 Morgan Oral Testimony at 25:12, 26:03, 27:05.

⁵ The Ninth Circuit took judicial notice of the quoted statement from the Border Patrol’s website. *See Carrasco*, 2020 WL 2466378, *1 n.1.

⁶ Consistent with these numbers, in 2009 checkpoints accounted for over one-third of Border Patrol drug seizures. *See* 11/27/17 Yamasaki Testimony at 121. Notably, the Border Patrol touts its drug seizure statistics on signs posted at the checkpoints, which is evidently intended to deter drug smuggling, and thus further demonstrates the checkpoints’ general law enforcement purpose. *See* ER 13; 11/27/17 Yamasaki Testimony at 155-56.

Finally, the facts in Carrasco’s case are consistent with the conclusion that the Border Patrol is using the checkpoints to interdict drugs. On October 24, 2017, Agent Lozano and his dog, Amon, were stationed in the “preprimary” area, where he spends the majority of his time at the checkpoint. *See* ER 72. There they scanned cars for drug odors before the cars even got to the agent who posed immigration questions. *See id.* When Amon alerted to the Saturn Ion in preprimary and primary, Agent Lozano told the primary officer to send the car to secondary inspection. *See* ER 74-75. At that point, Agent Lozano had no basis to believe his dog had alerted to anything other than drugs, because there was no indication that Amon was aware how many people were in the car, thus he could not possibly indicate that there was a concealed human inside.⁷ *See United States v. Summer*, 153 F. Supp. 3d 1261, 1269 (S.D. Cal. 2015) (citing undisputed expert testimony that “it is not possible to train a dog to alert to concealed human smell but ignore or differentiate other human smell in the same vehicle”). And after the car’s occupants were removed and Amon homed-in on the passenger’s seat, Agent Lozano immediately went to Carrasco and asked if he was holding or had used drugs, again evidencing a focus on drug interdiction, not immigration enforcement. Indeed, at that point Agent Lozano had not made any inquiry about Carrasco’s immigration status. *See* ER 80-81, 103.

Despite the wealth of evidence discussed above, the district court denied the motion to suppress. The court adopted its ruling in *United States v. Becerra-Perez*, S.D. Cal. Case No. 17-cr-0478-JLS, in which the same judge addressed the same issue two months prior. *See* ER 58-59, 62-63, 139. Specifically, the court in Carrasco’s case said, “[t]here’s really no reason for this court to change its ruling,” and “the [Highway] 111 checkpoint,” like the Highway 94 checkpoint at issue in

⁷ Consistent with this common sense observation, Agent Lozano testified that Amon had never found concealed humans in a vehicle while working in the preprimary area. *See* ER 99.

Becerra-Perez, is “constitutional as set up.” 5/21/18 RT at 82, in *United States v. Carrasco*, S.D. Cal. Case No. 3:17-cr-3938-JLS (attached in appendix). In light of this, it is appropriate to consider what the district court said about the checkpoint challenge in *Becerra-Perez*, when it provided more reasoning for its holding.

At a March 9, 2018 hearing in that case, the court said its analysis focused on “whether the primary purpose of the checkpoint was to advance the general interest in crime control.” *See* 3/9/18 RT at 3, in S.D. Cal. Case No. 17-cr-0478-JLS (attached in appendix).⁸ The court noted that the defendants in that case had “pointed to the fact that the number of immigration-related arrests at the [Highway 94] checkpoint over the last four years [was] less than half of the total arrests. Defendants also point[ed] to various Border Patrol agency documents indicating that, after the events of September 11, 2011, the priority mission of the Border Patrol became the prevention of terrorist and terrorist weapons from entering the United States.” *Id.* With respect to the fact that immigration arrests make up less than half of the arrests at the Highway 94 checkpoint, the court found that was irrelevant because “a checkpoint must be analyzed at the level of its design, and not the relative numbers of arrests, in evaluating its primary purpose.” *Id.* at 4. The court also stated that “[a]lthough the broader mission of the U.S. Border Patrol may include the detection and apprehension of terrorists and their weapons, in addition to the traditional mission of preventing illegal aliens and contraband smugglers from entering the United States, all of the evidence before the court suggests that the internal checkpoint component of the overall Border Patrol mission is focused upon deterrence of illegal immigration.” *Id.* The court then denied the motion, concluding

⁸ The government filed a notice of lodging for this transcript in Carrasco’s case, but failed to attach the transcript to its notice. Because of that lapse, Carrasco moved for the Ninth Circuit to take judicial notice of the transcript, and it did. *See Carrasco*, 2020 WL 2466378, *1 n.1.

by stating that the “primary purpose of the 94 checkpoint is the deterrence of illegal immigration, and not to advance the general interest in crime control.” *Id.* at 6. That conclusion was erroneous in *Becerra-Lopez* and in Carrasco’s case, as the evidence the government submitted to the district court shows that the Border Patrol uses the interior checkpoints to carry out its overall mission of interdicting drugs, weapons, and undocumented immigrants.

II. Ninth Circuit Opinion

On appeal, the Ninth Circuit affirmed the district court, and in doing so applied a clear error standard of review. The entirety of that court’s reasoning is as follows:

Here, the district court reviewed extensive testimony and agency documents that consistently emphasized that the primary purpose of the Highway 111 Border Patrol checkpoint was “to restrict the routes of egress from the border area and thereby create deterrence to the initial illegal entry.” Although the agency may have had other goals in addition to its central mission of interdicting undocumented immigrants, we cannot conclude that the district court *clearly erred* in determining that the primary purpose of the Highway 111 checkpoint was to intercept undocumented immigrants, rather than to advance a general interest in crime control.

United States v. Carrasco, __ Fed. App’x __, 2020 WL 2466378, *1 (9th Cir. 2020)(emphasis added). Use of the clear error standard was unsupported, because all of the evidence was undisputed, indeed it all came from Border Patrol sources. The district court was therefore presented with the purely legal question of whether the checkpoints are being operated in an unconstitutional manner.

REASONS FOR GRANTING THE PETITION

As discussed above, the evidence shows the Border Patrol is using checkpoints to carry out its overall mission of interdicting contraband, weapons, and undocumented immigrants. That is not the limited immigration enforcement purpose approved by this Court in *Martinez-Fuerte*. And, in light of the evidence, it makes no sense to say that the checkpoints are being used to meet a limited, “special need[], beyond the normal need for law enforcement,” *Edmond*, 531 U.S. at 37, unless the

Border Patrol's broad law enforcement mission is defined as a limited "special need." That conclusion would stretch the meaning of the quoted words beyond their breaking point, and thus would be contrary to this Court's case law.

Nonetheless, the district court found that "all of the evidence before the court suggests that the internal checkpoint component of the overall Border Patrol mission is focused upon deterrence of illegal immigration." 3/9/18 RT at 4 (found at docket #68 in S.D. Cal. Case No. 17-cr-0478-JLS) (attached in appendix). That conclusion is contrary to the admissions of Chief Morgan and Agent Yamasaki that the checkpoints are being used as a second line of defense after the border, to interdict contraband, weapons, and undocumented immigrants. It seems the district court relied on the Border Patrol's rehearsed mantra as to the checkpoints' primary purpose, rather than considering the substance of Chief Morgan's and Agent Yamasaki's testimony. That, of course, was error. *See Edmond*, 531 U.S. at 46 (stating that a court must "examine the available evidence to determine the primary purpose of the checkpoint program").

With respect to the telling fact that there are more drug than immigration arrests at the Highway 94 checkpoint, the district court found that was irrelevant because "a checkpoint must be analyzed at the level of its design, and not the relative numbers of arrests, in evaluating its primary purpose." 3/9/18 RT at 4 (found at docket #68 in S.D. Cal. Case No. 17-cr-0478-JLS) (in appendix). But the statistics strongly support the conclusion that at least *a* primary purpose of the checkpoints is to interdict drugs, which, of course, Chief Morgan and Agent Yamasaki repeatedly stated in their testimony. And in *United States v. Soto-Camacho*, 58 F.3d 408, 412 (9th Cir. 1995), the Ninth Circuit recognized that an important fact supporting its conclusion that a Border Patrol checkpoint was not being used in an unconstitutionally pretextual manner was the "statistics which show[ed] that illegal alien seizures are substantially greater than those related to drugs." Here, Border Patrol

leadership admits that drug interdiction is a key goal of the checkpoints, and the statistics bear that out.

Notably, the alarm was sounded on this issue in the Ninth Circuit almost thirty years ago, in *United States v. Soyland*, 3 F.3d 1312 (9th Cir. 1993). There, the defendants and their car were searched at a Border Patrol checkpoint and agents found drugs. *See id.* at 1314. The majority in that case declined to address “the issue of whether checkpoint officers routinely overstep their authority by conducting pretextual narcotics searches,” because it had not been argued in the district court or on appeal. *See id.* Judge Kozinski dissented, however, expressing concern that Border Patrol checkpoints were being used to violate restrictions on suspicionless searches. *See id.* at 1315-20 (Kozinski, J., dissenting). While recognizing that *Martinez-Fuerte* approved checkpoints for immigration control purposes, Judge Kozinski warned that “[t]here’s reason to suspect the agents working these checkpoints *are looking for more than illegal aliens*. If this is true, it subverts the rationale of *Martinez-Fuerte* and turns a legitimate administrative search into a massive violation of the Fourth Amendment.” *Id.* at 1316 (emphasis added). He recommended remanding the case for a factual inquiry into “whether the policies, programs, directives and incentives put in place by the government, or any customs and practices that have developed with the government’s tacit approval, have turned . . . [the Border Patrol checkpoints] into general law enforcement checkpoints.” *Id.* at 1319 (emphasis added).

Here, the testimony of Chief Morgan and Agent Yamasaki makes clear that the Border Patrol “agents working these checkpoints are looking for more than illegal aliens.” Per the Border Patrol’s defense in-depth strategy, they are looking for contraband, weapons, and undocumented immigrants. And in that effort, drugs are a particular focus. Indeed, as discussed above, the Border Patrol website states that the purpose of its checkpoints is “to (1) detect and apprehend illegal aliens attempting to

travel further into the interior of the United States after evading detection at the border and (2) to detect illegal narcotics.” See www.cbp.gov/border-security/along-us-borders/overview. Thus, the Border Patrol admits that drug interdiction is at least one of two primary purposes for the checkpoints.⁹ And *Edmond* makes clear that checkpoints may not be used for a primary purpose of drug interdiction. 531 U.S. at 41.

It is evident that the Border Patrol is using checkpoints in a manner, and for a purpose, far beyond what this Court approved in *Martinez-Fuerte*, and contrary to its holding in *Edmond*. Despite this, and Judge Kozinski’s statement of the obvious in *Soyland*, the Ninth Circuit, and the other two circuits where Border Patrol checkpoints are predominantly used, have allowed this massive constitutional violation to continue unabated for years. See, e.g., *United States v. Tello*, 924 F.3d 782, 787 (5th Cir. 2019) (stating that Border Patrol agents may use checkpoints to search for drugs and weapons); *United States v. Forbes*, 528 F.3d 1273, 1277-78 (10th Cir. 2008) (stating that “border patrol agents [at checkpoints] have virtually unlimited discretion to refer cars to the secondary inspections area” and to use dogs to search for drugs) (citation and quotation omitted). Furthermore, the Ninth Circuit’s use of “clear error” review in this case gave unwarranted deference to the district court’s ruling. The relevant facts were undisputed – indeed, all of the evidence was submitted by the government, and came from Border Patrol sources. It was thus a dodge of the constitutional issue for the Ninth Circuit to apply clear error review. It instead should have

⁹ See, e.g., *United States v. Adair*, 732 F.2d 1394, 1409 (9th Cir. 1983) (holding that “convert[ing Native Americans] to an agricultural way of life” and “guarant[eeing their] hunting and gathering lifestyle” both “qualified as primary purposes of” a treaty, even though those are conflicting purposes); see also *United States v. Messer*, 655 Fed. App’x 956, 959 (4th Cir. 2016) (holding that a “premises can have more than one primary purpose”) (unpublished opinion); *United States v. Sanchez*, 710 F.3d 724, 729 (7th Cir. 2013) (holding that “a premises can have more than one principal use,” and “the proper inquiry is whether the drug transactions were a second primary use of the premises”).

examined, *de novo*, whether the undisputed evidence established that the Border Patrol is operating the internal checkpoints in an unconstitutional manner. That is exactly the approach this Court took in *Edmond*, 531 U.S. at 40-47, and *Martinez-Fuerte*, 428 U.S. at 60-64. And here, if the Court applies *de novo* review to the undisputed facts, it is apparent that the Border Patrol checkpoints run afoul of the holdings in *Martinez-Fuerte* and *Edmond*.

Because of this conflict, and because this is an issue of exceptional importance, review should be granted. *See* S. Ct. R. 10(c). Furthermore, the issue presented is mature and entrenched, because the circuits where the Border Patrol checkpoints are located have repeatedly upheld their constitutionality, and shown no penchant for revisiting the issue. A reckoning on this issue is, therefore, long overdue. Accordingly, the Court should grant this petition and either (1) hold that the checkpoints are being operated in an unconstitutional manner, or (2) provide a reasoned opinion explaining the bases for, and limits on, its conclusion to the contrary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Todd W. Burns

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TODD W. BURNS
Counsel of Record
Burns & Cohan, Attorneys at Law
1350 Columbia Street, Suite 600
San Diego, California 92101-5008
(619) 236-0244
todd@burnsandcohan.com

Counsel for Petitioner