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## Freedom to Float: Requiring Reasonable Suspicion for Boating Stops on Idaho Waterways

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# FREEDOM TO FLOAT: REQUIRING REASONABLE SUSPICION FOR BOATING STOPS ON IDAHO WATERWAYS

*Perhaps the most important attribute of our way of life in Idaho is individual liberty. A citizen is free to stroll the streets, hike the mountains, and float the rivers of this state without interference from the government. That is, police treat you as a criminal only if your actions correspond.<sup>1</sup>*

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1. State v. Henderson, 756 P.2d 1057, 1062, 114 Idaho 293, 298 (1988). In *Henderson*, the Idaho Supreme Court invalidated a DUI roadblock where law enforcement officers lacked individualized suspicion of criminal wrongdoing and legislative authority to establish a roadblock. *Id.* at 1064, 114 Idaho at 300.

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## I. INTRODUCTION

Just after sunset on June 5, 2009, Ty Newsom was operating his motorboat on the north end of Lake Coeur d'Alene.<sup>2</sup> Upon observing Mr. Newsom's boat, two deputy sheriffs mistakenly believed that he was speeding.<sup>3</sup> The deputies turned on their overhead lights and stopped the boat.<sup>4</sup> Because the deputies were mistaken in their belief that Mr. Newsom was speeding, the stop was suspicionless.<sup>5</sup>

One of the deputies approached Mr. Newsom's boat and asked for his identification and boat registration, which he provided.<sup>6</sup> The deputies also conducted a safety inspection, checking for personal flotation devices and fire extinguishers, among other things.<sup>7</sup> During the safety inspection, one of the deputies noticed that Mr. Newsom displayed signs of intoxication.<sup>8</sup> After Mr. Newsom failed several field sobriety tests, the deputy decided that he was under the influence of alcohol and arrested him.<sup>9</sup> Mr. Newsom refused to submit to an evidentiary test and was later charged with boating under the influence of alcohol.<sup>10</sup>

Mr. Newsom's facts might prompt some forgiveness of the officers' misjudgment. Despite their suspicionless stop, the deputies were able to identify and arrest an individual who displayed signs of intoxication, preventing potentially harmful future events from occurring. However, what if the scenario changed slightly?

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2. Memorandum Opinion and Order Regarding Defendant's Motion to Suppress, Motion in Limine, and Motion to Dismiss at 1, *State v. Newsom*, No. CR-2009-11898 (Idaho 1st Dist. 2009) [hereinafter *Newsom Memorandum Opinion and Order*].

3. *Id.* at 2–3. A Kootenai County ordinance established a daytime speed limit of fifty miles per hour and a nighttime speed limit of twenty miles per hour. *Id.* However, the nighttime speed limit did not take effect until one hour after sunset. *Id.* at 3. The magistrate judge found that the stop occurred less than one hour after sunset and, therefore, that the defendant's speed of thirty-six miles per hour did not exceed the daytime speed limit. *Id.* at 2–3.

4. *Id.* at 2.

5. *Id.* at 10–11. Although the Fourth Amendment reasonableness standard allows room for some mistakes, it requires that “the mistakes must be those of reasonable men.” *Brinegar v. United States*, 338 U.S. 160, 176 (1949). Here, the officers' mistake was unreasonable because they could have easily verified the time of sunset. *Newsom Memorandum Opinion and Order*, *supra* note 2, at 10.

6. *Newsom Memorandum Opinion and Order*, *supra* note 2, at 2.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

Suppose Tom takes the day off work and decides to go boating at a lake with his family.<sup>11</sup> Tom and his family are having a great time wakeboarding and tubing. They are eating sandwiches and drinking bottled root beer. Suddenly, they hear a siren and see blue overhead lights. A patrol boat approaches and pulls alongside their boat. One officer boards their boat and asks to see Tom's identification and boat registration, which he provides. The officer then notices several empty root beer bottles in cup holders throughout the boat. Believing the bottles are empty beer bottles, the officer asks Tom whether he and his family have been drinking. Before Tom can respond, the officer looks at Tom's eyes and believes they look red and watery. In reality, Tom's eyes are red and watery because his allergies tend to flare up this time of year.

Before Tom can explain, the officer explains that he will transport Tom to the shore to perform field sobriety tests. Tom contends that he has not had anything to drink all day and begins to move away from the officer. Believing Tom is resisting, the officer pulls out his handcuffs and tells Tom to turn around because he is under arrest for boating while intoxicated. When Tom begins to protest further, the officer slams him onto the floor of the boat and handcuffs him face down in front of his family. Another officer attaches Tom's boat to the patrol boat with a rope and tows it to the nearby marina while Tom remains face down. Onshore, the officers have Tom perform three standard field sobriety tests. However, Tom does not meet decision points for arrest. Further, the officers administer a Breathalyzer test, which reveals that Tom has not been drinking alcohol. The officers remove the handcuffs and release Tom.

While Mr. Newsom's facts might prompt some forgiveness of the officers' misjudgment, the same is probably not true in Tom's case. Mr. Newsom's arrest led to a charge of boating under the influence. However, Tom's arrest led to a severe limitation on individual liberty and a fruitless evidentiary search. Idaho's special interest in protecting individual freedom requires more.

Although Idaho statutory and appellate case law do not currently address the issue, Idaho should require law enforcement officers to have reasonable suspicion of criminal activity before stopping boats operating on its waters. This would ensure the protection of Fourth Amendment rights, while allowing law enforcement officers to enforce boating safety laws effectively. Part II of this comment discusses the history of boating

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11. This scenario is loosely based on an actual boating stop that occurred in Ohio. See D'Arcy Egan, *Gov. Kasich goes Lake Erie walleye fishing, signs Boater Freedom Act*, CLEVELAND.COM (July 10, 2013), [http://www.cleveland.com/outdoors/index.ssf/2013/07/gov\\_kasich\\_goes\\_lake\\_erie\\_wall.html](http://www.cleveland.com/outdoors/index.ssf/2013/07/gov_kasich_goes_lake_erie_wall.html).

stops in the United States, focusing on the landmark Supreme Court decision *United States v. Villamonte-Marquez*.<sup>12</sup> Part III discusses the modern trend among the states of requiring some level of suspicion for boating stops.<sup>13</sup> Part IV discusses Idaho's boating enforcement statute and case law.<sup>14</sup> Part V argues that Idaho should follow the lead of states like Ohio, Kentucky, Virginia, and Florida and require law enforcement officers to have reasonable suspicion of criminal activity before stopping boats on its waters.<sup>15</sup> Finally, Part VI concludes with an invitation to act.<sup>16</sup>

## II. HISTORY OF BOATING STOPS IN THE UNITED STATES

The Fourth Amendment to the United States Constitution provides 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 . . . .”<sup>17</sup> The United States Supreme Court has stated that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”<sup>18</sup>

Congress first addressed the subject of boating stops in 1789, when it enacted what became an exception to the Fourth Amendment applying to customs officers.<sup>19</sup> Congress later included the Coast Guard in this exception.<sup>20</sup> The Supreme Court addressed the subject of boating stops under the customs statute in 1983 when it decided *United States v. Villamonte-Marquez*.<sup>21</sup> *Villamonte-Marquez* and the Supreme Court's line of automobile cases provide the backdrop for an analysis of inland boating stops on the state level.

### A. Customs and Coast Guard Statutes

In 1789, the First Congress enacted the Act of July 31, 1789, which authorized customs officers to stop and board boats.<sup>22</sup> Congress enacted the statute to provide “for the due collection of duties imposed by law on

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12. See *infra* Part II.

13. See *infra* Part III.

14. See *infra* Part IV.

15. See *infra* Part V.

16. See *infra* Part VI.

17. U.S. CONST. amend. IV.

18. *Katz v. United States*, 389 U.S. 347, 357 (1967).

19. See Act of July 31, 1789, ch. 5, § 24, 1 Stat. 43.

20. 14 U.S.C. § 89(a) (2015).

21. See *generally* *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983).

22. Act of July 31, 1789, ch. 5, § 24, 1 Stat. 43.

the tonnage of ships and vessels, and on goods, wares and merchandises imported into the United States . . . .”<sup>23</sup> The Act authorized “every collector, naval officer and surveyor” to enter and to search “any ship or vessel, in which they [had] *reason to suspect* any goods, wares or merchandise subject to duty [were] concealed.”<sup>24</sup> Just one year later, in 1790, Congress repealed the Act.<sup>25</sup> The revised version authorized customs officers “to go on board of ships or vessels in any part of the United States . . . for the purposes of demanding the manifests aforesaid, and of examining and searching the said ships or vessels.”<sup>26</sup>

It is interesting to note that the First Congress grappled with the question of whether customs officials were required to have “reason to suspect” that boats were engaged in criminal activity before making a stop. The 1789 and 1790 versions of the customs Act evidence this struggle. The Act of July 31, 1789 suggests that Congress’s original intent was to require some level of suspicion.<sup>27</sup>

The 1790 version of the Act is considered the lineal ancestor of 19 U.S.C. § 1581(a), the present-day statute granting customs officers authority to stop boats.<sup>28</sup> Section 1581(a) authorizes customs officers to board a boat, inspect its manifest and other documents and papers, and search the entire boat.<sup>29</sup> The Coast Guard counterpart to § 1581(a) is 14 U.S.C. § 89(a), enacted in 1950.<sup>30</sup> Like § 1581(a), § 89(a) authorizes the Coast Guard to board a boat, examine its documents and papers, and search the boat.<sup>31</sup>

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23. *Id.* at ch. 5, § 1, 1 Stat. 29.

24. *Id.* at ch. 5, § 24, 1 Stat. 43 (emphasis added).

25. Act of August 4, 1790, ch. 35, § 31, 1 Stat. 164.

26. *Id.*

27. Act of July 31, 1789, ch. 5, § 24, 1 Stat. 43.

28. *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 (1983).

29. 19 U.S.C. § 1581(a) (2015). The statute provides in its entirety:

Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance. *Id.*

30. 14 U.S.C. § 89(a) (2015).

31. *Id.* The statute provides in its entirety:

The Coast Guard may make inquires, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquires of those on board, examine the ship’s documents and papers, and examine, inspect,

At first glance, § 1581(a) and § 89(a) grant customs officials and the Coast Guard seemingly unlimited discretion in determining which particular boat to stop. The language of each statute is extremely broad. Fortunately, federal courts of appeals provide direction.<sup>32</sup>

For example, in *United States v. Serrano*, the United States Court of Appeals for the Fifth Circuit held that customs officers acting under § 1581(a) were required to have reasonable suspicion of criminal activity in order to stop a boat on inland waters.<sup>33</sup> In reaching its decision, the court noted that “[s]earches and seizures made pursuant to [§ 1581(a)] must, of course, meet the general standard of reasonableness imposed by the Fourth Amendment.”<sup>34</sup> The court made a clear distinction between “inland waters” and “customs waters,” concluding that reasonable suspicion was required on inland waters, as opposed to customs waters, where reasonable suspicion was not required.<sup>35</sup> The *Serrano* rule took hold, and many federal courts followed its precedent, requiring customs officers and the Coast Guard to have reasonable suspicion of criminal activity when stopping boats on inland—and sometimes even coastal—waters.<sup>36</sup>

#### B. The Narrow Holding of *Villamonte-Marquez*

On the heels of these decisions, the Supreme Court took up the issue of suspicionless stops on inland waters when it decided *United States v. Villamonte-Marquez* in 1983.<sup>37</sup> In *Villamonte-Marquez*, customs officers patrolling a Louisiana channel located eighteen miles in-

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and search the vessel and use all necessary force to compel compliance. When from such inquires, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized. *Id.*

32. *United States v. Serrano*, 607 F.2d 1145, 1148–49 (5th Cir. 1979).

33. *Id.*

34. *Id.* at 1147.

35. *Id.* at 1147–1148.

36. *United States v. Gollwitzer*, 697 F.2d 1357, 1361 (11th Cir. 1983) (holding that customs officers acting under 19 U.S.C. § 1581(a) were required to have reasonable suspicion of criminal activity in order to stop a boat on inland waters); *United States v. Streifel*, 665 F.2d 414, 422–23 (2d Cir. 1981) (holding that Coast Guard officers acting under 14 U.S.C. § 89(a) were required to have reasonable suspicion of criminal activity in order to stop a boat on coastal waters); *United States v. D'Antignac*, 628 F.2d 428, 433–34 (5th Cir. 1980) (holding that customs officers acting under 19 U.S.C. § 1581(a) were required to have reasonable suspicion of criminal activity in order to stop a boat on inland waters).

37. *United States v. Villamonte-Marquez*, 462 U.S. 579, 582–83 (1983).

land from the Gulf of Mexico approached a sailboat after a freighter created a large wake in the channel.<sup>38</sup> The officers spotted one man on deck, who shrugged his shoulders and failed to respond when the officers asked him whether the sailboat and crew were all right.<sup>39</sup> The officers then boarded the sailboat to inspect the boat's documentation.<sup>40</sup> After boarding the sailboat, one of the officers thought he smelled burning marijuana and saw marijuana bales through an open hatch.<sup>41</sup> The officers subsequently found marijuana "in almost every conceivable place" onboard.<sup>42</sup> The officers arrested the crew, which consisted of two men.<sup>43</sup>

The Court found that the officers' stop and subsequent boarding of the defendants' sailboat was not accompanied by reasonable suspicion of criminal activity.<sup>44</sup> However, the Court concluded that the officers were not required to have reasonable suspicion of criminal activity because the suspicionless stop and subsequent boarding was authorized by 19 U.S.C. § 1581(a).<sup>45</sup> The Court reviewed the statute's history and noted that it had "an impressive historical pedigree" because the statute's "lineal ancestor," the Act August 4, 1790, authorized suspicionless stops.<sup>46</sup> Notably, the Court did not mention the original version of the Act, the Act of July 31, 1789, which required customs officers to have "reason to suspect" criminal activity before making a stop.<sup>47</sup> As stated in Part II.A, the Act of July 31, 1789 is important because it evidences original Congressional intent.<sup>48</sup>

The Court next balanced the governmental interests of public safety and crime prevention against the level of intrusion on individual liberty.<sup>49</sup> In doing so, the Court highlighted differences between automobiles and boats.<sup>50</sup> First, the Court made a clear distinction between boating stops that occur on inland waters with "ready access to the open sea" and stops that occur on inland waters without such access.<sup>51</sup> The Court noted that waters with ready access to the open sea lack narrow

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38. *Id.*

39. *Id.* at 583.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Villamonte-Marquez*, 462 U.S. at 583.

44. *Id.* at 583–84.

45. *Id.* at 592–93.

46. *Id.* at 584–85; *see also supra* note 25.

47. Act of July 31, 1789, ch. 5, § 24, 1 Stat. 43.

48. *Id.*

49. *Villamonte-Marquez*, 462 U.S. at 588–93.

50. *Id.*

51. *Id.* at 589.



straights, where roadblock or checkpoint stops are viable alternatives.<sup>52</sup> It stated that inland waters without ready access “may funnel into rivers, canals, and the like, which are more analogous to roads and made a ‘roadblock’ approach more feasible.”<sup>53</sup> The Court also distinguished waters with ready access to the open sea because the threats of smuggling and the illegal importation of aliens are primary concerns on those waters, which is not the case on inland waters lacking ready access.<sup>54</sup>

Second, the Court contrasted documentation requirements for boats with the automobile licensing system.<sup>55</sup> The Court stated that, while law enforcement officers can readily determine whether an automobile is in compliance with the law by observing a vehicle’s license plate and stickers, the same is not true for boats, since comparable license plate and sticker requirements do not currently exist.<sup>56</sup>

Finally, the Court found that the intrusion on individual liberty was limited because the stop involved only a brief detention.<sup>57</sup> The Court stated that the intrusion on individual liberty did not outweigh governmental interests because “the need to make document checks [in waters with ready access to the open sea] is great.”<sup>58</sup> While it is true that the Court spent a substantial portion of its opinion highlighting differences between automobiles and vessels, it is important to note that the Court repeatedly limited its holding to vessels operating in waters with ready access to the open sea.<sup>59</sup> This narrowing language suggests that the Court only considered differences between automobiles and vessels significant in waters with ready access to the open sea.<sup>60</sup>

The dissent argued that the majority’s reliance on perceived differences between automobiles and boats was flawed.<sup>61</sup> It argued that the Court was ignoring binding precedent from a long line of Supreme Court cases involving automobiles that prohibited roving, suspicionless stops.<sup>62</sup> The dissent also emphasized that every automobile case required a “discretion-limiting feature,” such as probable cause, reasonable suspicion, or the use of fixed checkpoints.<sup>63</sup> It expressed fear that the majority’s

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52. *Id.*

53. *Id.*

54. *Id.*

55. *Villamonte-Marquez*, 462 U.S. at 589–90.

56. *Id.* at 590.

57. *Id.* at 592.

58. *Id.*

59. *Id.* at 593. The majority used the narrowing term “ready access to the open sea” four separate times in its opinion. *Id.* at 581, 588–89, 593.

60. *Villamonte-Marquez*, 462 U.S. at 593.

61. *Id.* at 593, 600–01 (Brennan, J., dissenting). Justices Marshall and Stevens, in part, joined Justice Brennan in dissent. *Id.* at 593.

62. *Id.* at 601–05; *see, e.g.*, *Delaware v. Prouse*, 440 U.S. 648, 663 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

63. *Villamonte-Marquez*, 462 U.S. at 599 (Brennan, J., dissenting).

decision granted “unlimited police discretion”<sup>64</sup> because it failed to place “any limitations whatever on officers’ discretion.”<sup>65</sup>

The dissent also took issue with the majority’s reliance on the differences between vessel documentation requirements and the automobile licensing system.<sup>66</sup> It stated that it would be easy and inexpensive to create a boating licensing system similar to the automobile licensing system, and that the absence of such a system did not excuse random boating stops.<sup>67</sup>

### C. The Supreme Court’s Line of Automobile Cases

As the dissent underlined, the majority in *Villamonte-Marquez* spent a considerable amount of time reviewing its long line of automobile cases.<sup>68</sup> The Court distinguished *Villamonte-Marquez* from those cases, highlighting differences between automobiles and boats in waters with ready access to the open sea.<sup>69</sup> However, the Supreme Court’s line of automobile cases is much more applicable in the context of inland waters lacking ready access to the open sea.

The standard for automobile stops has its roots in *Terry v. Ohio*.<sup>70</sup> In *Terry*, a Cleveland police detective developed a suspicion that two men were about to commit a robbery when he observed the men making a dozen trips from one position to a store window.<sup>71</sup> The officer approached the men, identified himself as a police officer, and asked for their names.<sup>72</sup> When one of the men mumbled in response to his inquires, the officer patted down the men and found weapons.<sup>73</sup> The men were convicted of carrying concealed weapons and appealed.<sup>74</sup>

The Supreme Court held that the officer’s investigatory search was reasonable under the Fourth Amendment, both because the officer was checking for weapons to protect his own safety and because the officer limited the scope of his search.<sup>75</sup> The Court in *Terry* announced a new

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64. *Id.* at 598, n. 6.

65. *Id.* at 598.

66. *Id.* at 609.

67. *Id.*

68. *Id.* at 587–93.

69. *Villamonte-Marquez*, 462 U.S. at 587–93.

70. *Terry v. Ohio*, 392 U.S. 1, 37 (1968).

71. *Id.* at 5–6.

72. *Id.* at 6–7.

73. *Id.* at 7–8.

74. *Id.*

75. *Id.* at 30.

standard for evaluating investigatory stops: a law enforcement officer must have reasonable suspicion "that criminal activity may be afoot."<sup>76</sup>

Seven years after *Terry*, the Supreme Court applied *Terry* in the context of an automobile stop near the border in *United States v. Brignoni-Ponce*.<sup>77</sup> In *Brignoni-Ponce*, two Border Patrol officers stopped an automobile on a stretch of highway adjacent to a closed checkpoint near the United States-Mexico border.<sup>78</sup> The officers later stated that their only reason for stopping the automobile was that the three occupants appeared to be of Mexican descent.<sup>79</sup> The Court found that the stop was a roving stop because the stop did not occur at a permanent or temporary checkpoint.<sup>80</sup> The Court also found that the officers' belief that the occupants were of Mexican descent did not provide them with reasonable suspicion of criminal activity.<sup>81</sup> The Court weighed the level of intrusion on individual liberty with the governmental interests of the stop.<sup>82</sup> Despite its finding that the level of intrusion on individual liberty was modest, and that the governmental interest in protecting its borders was substantial, the Court invalidated the stop because "the reasonableness requirement of the Fourth Amendment [demanded] something more than the broad and unlimited discretion sought by the Government."<sup>83</sup> The Court emphasized that roads near the border carry a large volume of legitimate traffic, not just aliens seeking to enter the country illegally.<sup>84</sup>

The Court in *Brignoni-Ponce* assured law enforcement officials that they would still have power to ensure safety at the border under a reasonable suspicion standard.<sup>85</sup> The Court expressly authorized law enforcement officers to consider information such as proximity to the border, recent border crossings in the area, the driver's behavior, and aspects of the vehicle itself when determining whether there is reasonable suspicion to make an automobile stop in a border area.<sup>86</sup>

One year later, *United States v. Martinez-Fuerte* presented the Supreme Court with a slightly different set of facts.<sup>87</sup> In *Martinez-Fuerte*, Border Patrol officers briefly stopped all automobiles passing through permanent checkpoints near the United States-Mexico border.<sup>88</sup> The of-

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76. *Terry*, 392 U.S. at 30.

77. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

78. *Id.* at 874-75.

79. *Id.* at 875.

80. *Id.* at 876.

81. *Id.* at 876, 886.

82. *Id.* at 878-79.

83. *Brignoni-Ponce*, 422 U.S. at 882.

84. *Id.*

85. *See id.* at 884-85.

86. *Id.*

87. *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976).

88. *Id.*

ficers did not have any suspicion of criminal activity.<sup>89</sup> The Court upheld the constitutionality of the stops, holding that governmental interests outweigh individual liberty and security where stops are conducted at permanent checkpoints.<sup>90</sup> The court reasoned that checkpoint stops place sufficient limitations on the discretion of law enforcement officials.<sup>91</sup>

As illustrated by *Brignoni-Ponce*, roving automobile stops near the border are unconstitutional.<sup>92</sup> The Supreme Court applied these principles to an inland roving stop in *Delaware v. Prouse*.<sup>93</sup> In *Prouse*, a patrolman in a police cruiser stopped an automobile in Delaware.<sup>94</sup> As he approached the automobile, the patrolman smelled marijuana smoke, and later seized a marijuana plant in plain view on the car floor.<sup>95</sup> The patrolman testified that “prior to stopping the vehicle he had [not] observed . . . traffic or equipment violations nor any suspicious activity, and that he made the stop only in order to check the driver’s license and registration.”<sup>96</sup>

The Supreme Court invalidated the stop, finding that the patrolman’s discretion was “standardless and unconstrained.”<sup>97</sup> The Court stated that, in order to make a roving automobile stop, an officer must have “at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law.”<sup>98</sup>

Reading these cases together, it is clear that roving, suspicionless automobile stops are unconstitutional. On the other hand, the Supreme Court favors checkpoint stops because they place sufficient limits on officer discretion. These same principles should apply in the boating context. In fact, several of the most recent state court decisions distinguish *Villamonte-Marquez*, highlighting parallels between automobiles and boats on inland waters lacking ready access to the open sea.<sup>99</sup>

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89. *Id.* at 547.

90. *Id.* at 566–67.

91. *Id.*

92. *Brignoni-Ponce*, 422 U.S. at 884.

93. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

94. *Id.* at 650.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 663.

99. *See infra* Part III.

### III. THE MODERN TREND: STATES ARE REQUIRING SOME LEVEL OF SUSPICION

The modern trend among many states is to require law enforcement officers to have some level of suspicion before making a boating stop.<sup>100</sup> Authority to enforce state boating law is typically conferred to law enforcement officers in a state's boating enforcement provision.<sup>101</sup> Although statutory language—and the cases and regulations interpreting it—differs widely, states fall into three categories in their approaches to boating stops. First, some states do not address whether some level of suspicion is required.<sup>102</sup> Second, some states grant law enforcement officers authority to make stops without any suspicion of criminal activity.<sup>103</sup> Third, some states require law enforcement officers to have some level of suspicion.<sup>104</sup>

#### A. States that Do Not Address Whether Some Level of Suspicion is Required

Some states have not addressed whether law enforcement officers must have some level of suspicion before making a boating stop.<sup>105</sup> These states include (1) states with very general enforcement provisions,<sup>106</sup> and (2) states with more specific enforcement provisions that grant authority to stop and—in some cases—board boats, but do not address whether some level of suspicion is required.<sup>107</sup> States in the first group

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100. See *infra* Part III.C.

101. See, e.g., IDAHO CODE § 67-7028 (2015).

102. See *infra* Part III.A.

103. See *infra* Part III.B.

104. See *infra* Part III.C.

105. See *infra* notes 106 & 107. Although these states do not address whether some level of suspicion is required to stop boats, some expressly require reasonable suspicion or probable cause to board boats. See, e.g., ALASKA STAT. § 05.25.080(b) (2015) (requiring probable cause to board boats).

106. These seven states are: Alabama, Delaware, Indiana, Montana, Oklahoma, South Carolina, and Vermont. ALA. CODE §§33-5-6 (2015); DEL. CODE ANN. tit. 23, § 2215(b) (2015); IND. CODE § 14-15-10-1 (2015); MONT. CODE ANN. § 23-2-506(2) (2015); OKLA. STAT. tit. 63, § 4202 (2015); S.C. CODE ANN. § 50-21-80 (2015); VT. STAT. ANN. tit. 23, § 3318(c) (2015).

107. These seventeen states are: Alaska, Arizona, Colorado, Connecticut, Idaho, Kansas, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Rhode Island, South Dakota, Tennessee, Utah, Washington, and Wyoming. ALASKA STAT. § 05.25.080(b) (2015) (authorizing peace officers to stop and, with probable cause, board watercraft); ARIZ. REV. STAT. ANN. § 5-391(c) (2015) (authorizing peace officers to “stop” watercraft); COLO. REV. STAT. § 33-13-112(1) (2015) (authorizing to peace officers to “stop and board” vessels); CONN. GEN. STAT. § 15-154(b) (2015) (authorizing officers to “stop and board” vessels); IDAHO CODE § 67-7028 (2015) (authorizing sheriffs to “stop and board” vessels); KAN. STAT. ANN. § 32-1179 (2015) (authorizing peace officers to “stop and board” vessels); NEB. REV. STAT. § 37-1269 (2015) (authorizing peace officers to “stop and board” vessels); NEV. REV. STAT. § 488.900(1) (2015) (authorizing peace officers to “stop and board” vessels); N.J. STAT. ANN. §

have general enforcement provisions that vaguely grant law enforcement officers authority to enforce state boating laws.<sup>108</sup> For example, the Indiana enforcement statute generally authorizes Indiana law enforcement officers to enforce the “article” and “rules adopted by the department under [the] article.”<sup>109</sup> Since there are no cases, administrative regulations, or attorney general opinions interpreting this broad statutory language in these states, it remains unclear whether these states require law enforcement officers to have some level of suspicion before making a stop.

States in the second group contain greater specificity in their statutory language, but still fail to address whether law enforcement officials must have some level of suspicion before stopping boats.<sup>110</sup> These statutes authorize law enforcement officers to “stop and board,” or a slight variation of this language.<sup>111</sup> The Idaho Safe Boating Act is an example.<sup>112</sup> The enforcement provision of the Act authorizes sheriffs and deputy sheriffs to “stop and board any vessel subject to law.”<sup>113</sup> This “stop and board” language, without more, does not authorize a suspicionless stop. In fact, many states have interpreted almost identical statutory language to require some level of suspicion.<sup>114</sup>

#### B. States that Authorize Suspicionless Stops

Seven states authorize suspicionless boating stops.<sup>115</sup> In most of these states, appellate courts have interpreted broad enforcement provi-

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12:6-6(a) (West 2015) (authorizing harbor masters to “stop” vessels); N.M. STAT. ANN. § 66-12-22 (2015) (authorizing peace officers to “stop and board” vessels); N.D. CENT. CODE § 20.1-13-14 (2015) (authorizing to officers “stop and board” vessels); 46 R.I. GEN. LAWS § 22-17 (2015) (authorizing officers to “stop and board” vessels); S.D. CODIFIED LAWS § 42-8-66 (2015) (authorizing officers to “stop and board” boats); TENN. CODE ANN. § 69-9-220(a) (2015) (authorizing officers to “stop and board” vessels); UTAH CODE ANN. § 73-18-20(2) (West 2015) (authorizing officers to “stop and board” vessels); WASH. REV. CODE § 79A.60.100(1) (2015) (authorizing officers to stop, board, and direct vessels to a suitable pier); WYO. STAT. ANN. § 41-13-215(b)(i) (2015) (authorizing peace officers to “stop, halt, inspect or board” watercraft).

108. *Supra* note 106.

109. IND. CODE § 14-15-10-1 (2015).

110. *Supra* note 107.

111. *Id.*

112. IDAHO CODE § 67-7028 (2015).

113. *Id.*

114. *See infra* Part III.C.1.

115. These seven states are: Georgia, Illinois, Louisiana, Mississippi, Missouri, North Carolina, and Texas. GA. CODE ANN. § 52-7-25(a) (2015) (interpreted to authorize a suspicionless stop in *Peruzzi v. State*, 567 S.E.2d 15, 16 (Ga. 2002)); 625 ILL. COMP. STAT. 45/2-2(a) (2015) (interpreted to authorize a suspicionless stop in *People v. Butorac*, 3 N.E.3d 438, 455 (Ill. App. Ct. 2013)); LA. STAT. ANN. § 34:851.29 (2015) (interpreted to authorize a suspicionless stop in *State v. Eppinette*, 838 So. 2d 189, 192 (La. Ct. App. 2003)); MISS. CODE

sions to authorize suspicionless stops, even though these provisions do not expressly authorize suspicionless stops.<sup>116</sup> Most of these courts follow the limited holding in *Villamonte-Marquez* and distinguish *Prouse*.<sup>117</sup> Texas and Illinois are representative of this approach.

### 1. Texas

Texas illustrates a relatively recent example. The Texas boating enforcement provision provides, “In order to enforce the provisions of [the] chapter, an enforcement officer may stop and board any vessel subject to [the] chapter and may inspect the boat to determine compliance with applicable provisions.”<sup>118</sup> In 2000, the Texas Court of Criminal Appeals upheld a suspicionless stop under this provision in *Schenekl v. State*.<sup>119</sup> In *Schenekl*, a game warden observed a man leaving a marina on a Texas lake and decided to stop the man’s boat to conduct a safety inspection.<sup>120</sup> After conducting the inspection, the warden noticed that the man had trouble answering questions, fumbled with his fingers, and smelled of alcohol.<sup>121</sup> The warden arrested the man for boating while intoxicated.<sup>122</sup>

Balancing the state’s interest in recreational water safety with individual liberty, the court first expressed concern over the “unsettling and inconvenient” showing of authority that accompanies a random stop.<sup>123</sup> However, the court found that the balance favored the state since, in its view, the state’s interest could “be realistically promoted only through . . . random water safety checks.”<sup>124</sup> The court distinguished *Prouse*, finding that boats and automobiles are different because, since automobiles are a “necessary means of transportation,” there is a heightened expectation of privacy in an automobile.<sup>125</sup> Citing *Villamonte-Marquez*, the court found that checkpoint stops were not a

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ANN. § 59-21-127 (2015) (authorizing officers to board and examine vessels without a warrant); MO. REV. STAT. § 306.165 (2015) (interpreted by the Missouri Attorney General to permit suspicionless stops in Mo. Att’y. Gen. Op. No. 141-85 (Dec. 27, 1985)); N.C. GEN. STAT. § 75A-17(a) (2015) (interpreted to authorize a suspicionless stop in *State v. Pike*, 532 S.E.2d 543, 546 (N.C. Ct. App. 2000)); TEX. PARKS & WILD. CODE ANN. § 31.124(a) (West 2015) (interpreted to authorize a suspicionless stop in *Schenekl v. State*, 30 S.W.3d 412, 416 (Tex. Crim. App. 2000)).

116. See, e.g., *Peruzzi v. State*, 567 S.E.2d 15, 16 (Ga. 2002) (interpreting the Georgia enforcement provision to authorize a suspicionless stop, although the provision only generally authorized officers to “stop and board any vessel”).

117. See, e.g., *Schenekl v. State*, 30 S.W.3d 412, 415 (Tex. Crim. App. 2000).

118. TEX. PARKS & WILD. CODE ANN. § 31.124 (West 2015).

119. *Schenekl v. State*, 30 S.W.3d 412, 416 (Tex. Crim. App. 2000).

120. *Id.* at 413.

121. *Id.*

122. *Id.*

123. *Id.* at 415–16.

124. *Id.*

125. *Schenekl*, 30 S.W.3d at 415–16.

practical alternative to random stops because they would be easy to avoid.<sup>126</sup> Accordingly, the court held that the stop was reasonable under the Fourth Amendment and upheld the constitutionality of the enforcement provision.<sup>127</sup>

## 2. Illinois

Illinois took a similar approach. The Illinois enforcement provision provides, “Agents of the Department or other duly authorized police officers may board and inspect any boat at any time for the purpose of determining if this Act is being complied with.”<sup>128</sup> In 2013, the Appellate Court of Illinois upheld a suspicionless stop under this provision in *People v. Butorac*.<sup>129</sup> In *Butorac*, two conservation police officers were patrolling a 200-yard wide stretch of river when they decided to stop every boat they saw to check for registration and safety equipment.<sup>130</sup> When the officers stopped the defendant’s boat, they checked for safety equipment and noticed empty alcoholic beverage bottles in the boat.<sup>131</sup> The officers also noticed that the defendant showed signs of intoxication and arrested him.<sup>132</sup>

The court concluded that the stop was reasonable under the Fourth Amendment.<sup>133</sup> Weighing state and individual interests, the court emphasized that the brief and non-intrusive nature of the stop weighed in the state’s favor.<sup>134</sup> Citing *Villamonte-Marquez*, the court found that checkpoint stops were an impractical alternative to roving stops because the river in *Butorac* did not involve “a roadway-like waterway that [was] amenable to fixed checkpoints or roadblocks.”<sup>135</sup> Further, the court found that the safety inspection stops at issue were “part of a regular and systematic boat safety enforcement operation.”<sup>136</sup> Therefore, the court concluded that the officers were not acting with unbridled discretion.<sup>137</sup> After *Butorac*, law enforcement officers in Illinois continue to make suspicionless stops, despite significant backlash from Illinoisans.<sup>138</sup>

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126. *Id.* at 415.

127. *Id.* at 415–16.

128. 625 ILL. COMP. STAT. 45/2-2 (West 2015).

129. *People v. Butorac*, 3 N.E.3d 438, 455 (Ill. App. Ct. 2013).

130. *Id.* at 442.

131. *Id.*

132. *Id.*

133. *Id.* at 455.

134. *Id.*

135. *Butorac*, 3 N.E.3d at 450.

136. *Id.* at 455.

137. *Id.*

138. Robert McCoppin, *Backers of new watercraft laws aim to change boating culture*, CHICAGO TRIBUNE (May 23, 2015, 7:32 AM),



The courts in *Schenekl* and *Butorac* both suffer from the same flaw: an overbroad reading of *Villamonte-Marquez*.<sup>139</sup> The Court in *Villamonte-Marquez* limited its holding to waters with ready access to the open sea.<sup>140</sup> However, the stop in *Schenekl* occurred on a lake in the middle of Texas,<sup>141</sup> while the stop in *Butorac* occurred on a 200-yard wide river in Illinois.<sup>142</sup> Those bodies of water are substantially different from a channel located eighteen miles from the Gulf of Mexico. A number of other states have recognized this distinction.

### C. States that Require Some Level of Suspicion

Nineteen states require law enforcement officials to have some level of suspicion before stopping boats.<sup>143</sup> These states fall into two categories: (1) states with relatively broad enforcement provisions that do not expressly require some level of suspicion,<sup>144</sup> and (2) states with explicit statutory language requiring some level of suspicion.<sup>145</sup>

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<http://www.chicagotribune.com/suburbs/lake-county-news-sun/news/ct-illinois-watercraft-laws-20150521-story.html>. Illinois boaters report that law enforcement officers performing safety inspections often harass them, sometimes after they have already passed previous inspections. *Id.* Some have unsuccessfully pushed for the enactment of a Boater's Bill of Rights, which "would forbid police from boarding a boat to search it unless there is reasonable suspicion of wrongdoing." *Id.*

139. *Schenekl*, 30 S.W.3d at 415; *Butorac*, 3 N.E.3d at 450.

140. *United States v. Villamonte-Marquez*, 462 U.S. 579, 589 (1983).

141. *Schenekl*, 30 S.W.3d at 413.

142. *Butorac*, 3 N.E.3d at 442.

143. *See infra* nn. 144 & 145.

144. These six states are: Arkansas, Iowa, Maryland, Massachusetts, New Hampshire and Oregon. ARK. CODE ANN. § 27-101-105(a)(2) (2015) (interpreted to require reasonable suspicion by *State v. Allen*, 425 S.W.3d 753 (Ark. 2013)); IOWA CODE § 462A.20 (2015) (interpreted to require either reasonable suspicion or a particularized checkpoint procedure by Iowa Att'y. Gen. Op. WL 42718 (Jan. 27, 1982)); MD. CODE ANN., NAT. RES. § 8-727(b) (West 2015) (interpreted to require reasonable suspicion by *Blair v. U.S.*, 665 F.2d 500 (1981)); MASS. GEN. LAWS ch. 90B, § 12 (2015) (interpreted to require reasonable suspicion by Memorandum of Decision and Order on the Defendant's Motion to Suppress Evidence at 1, *Commonwealth v. Brunet*, (Mass. Super. Ct. May 25, 2005) (No. 04-0542), 2005 WL 6066655); OR. REV. STAT. § 830.035(1) (2015) (interpreted to require reasonable suspicion by *State v. Lecarros*, 66 P.3d 543 (Or. Ct. App. 2003)).

145. These thirteen states are: California, Florida, Hawaii, Kentucky, Maine, Michigan, Minnesota, New York, Ohio, Pennsylvania, Virginia, West Virginia, and Wisconsin. CAL. HARB. & NAV. CODE § 663 (West 2015); 2016 Fla. Sess. Law Serv. ch. 2016-134 (West); HAW. REV. STAT. § 199-7(a) (2015); KY. REV. STAT. ANN. § 235.310(1) (West 2015); ME. STAT. tit. 38, § 285 (2015); MICH. COMP. LAWS § 324.80166(2) (2015); MINN. STAT. § 86B.801(a) (2015); N.Y. NAV. LAW § 49(4) (McKinney 2015); OHIO REV. CODE ANN. § 1547.521(B) (West 2015); 30 PA. CONS. STAT. § 901(a)(5) (2015); VA. CODE ANN. § 29.1-745(B) (2015); W. VA. CODE § 20-7-4(b)(3) (2015); WIS. STAT. § 30.79(3) (2015).

1. States that Interpret Relatively Broad Statutes to Require Some  
Level of Suspicion

Some states with relatively broad enforcement provisions require law enforcement officers to have some level of suspicion before stopping boats.<sup>146</sup> Generally, these states read “stop and board” language in light of the Fourth Amendment reasonableness requirement, which requires warrantless searches and seizures to be reasonable in order to pass constitutional muster.<sup>147</sup> Oregon, Arkansas, and New Hampshire illustrate this group of states.

a. Oregon

The Oregon boating enforcement provision states, “[A] peace officer may stop any boat and direct it to a suitable pier or anchorage for boarding.”<sup>148</sup> In 2003, the Oregon Court of Appeals invalidated a suspicionless stop under this provision.<sup>149</sup> In *State v. Lecarros*, three deputy sheriffs were patrolling a channel in Oregon when they decided to stop a cabin cruiser for the purpose of conducting a random safety inspection.<sup>150</sup> When the defendant could not find his registration onboard, the officers ordered him to move his boat to a dock in order to retrieve the documents.<sup>151</sup> As the defendant operated his boat, the officers began to suspect that he was under the influence of alcohol.<sup>152</sup> After the defendant failed sobriety tests, the officers arrested him.<sup>153</sup>

The court found that the stop was unreasonable under the Fourth Amendment.<sup>154</sup> The court first distinguished *Lecarros* from *Villamonte-Marquez*, finding the Supreme Court’s holding was limited to customs officials when stopping boats with ready access to the open sea.<sup>155</sup> Second, the court noted that the enforcement provision authorized the State Marine Board to promulgate regulations.<sup>156</sup> “However, neither

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146. See *supra* note 144.

147. U.S. CONST. amend. IV.

148. OR REV. STAT. § 830.035(1) (2015). The statute provides, in its entirety:

(1) The sheriff of each county and all other peace officers shall be responsible for the enforcement of this chapter and any regulations made by the State Marine Board pursuant thereto. In the exercise of this responsibility, a peace officer may stop any boat and direct it to a suitable pier or anchorage for boarding. *Id.*

149. *State v. Lecarros*, 66 P.3d 543, 543 (Or. Ct. App. 2003).

150. *Id.* at 545.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Lecarros*, 66 P.3d at 547.

156. *Id.*

that agency nor any other governmental entity [had] created rules to limit the discretion of . . . officers in carrying out boat searches and seizures, nor could the officers articulate any such rules.”<sup>157</sup> The court concluded that the decision whether to stop the defendant’s boat was “entirely within [the officers’] discretion.”<sup>158</sup>

b. Arkansas

Similarly, the Arkansas boating enforcement provision authorizes Game and Fish officers to “stop and board any vessel subject to [the] chapter and to investigate any accident or violation involving vessels subject to [the] chapter.”<sup>159</sup> The provision does not expressly require law enforcement officers to have either probable cause or reasonable suspicion of criminal activity to conduct a boating stop.<sup>160</sup> However, in 2013, the Arkansas Supreme Court invalidated a suspicionless boating stop under the provision.<sup>161</sup> In *State v. Allen*, an Arkansas Game and Fish officer stopped a pontoon boat being operated in an “unremarkable fashion” for the purpose of conducting a safety inspection.<sup>162</sup> After boarding the boat, the officer concluded that the defendant was under the influence of alcohol and arrested him.<sup>163</sup> The officer later testified that his intention was to stop and perform a safety check on as many vessels as he could in that day.<sup>164</sup> The officer also testified that he had no plan to determine which boats he stopped.<sup>165</sup>

The court held that the stop was unreasonable under the Fourth Amendment.<sup>166</sup> In reaching its decision, the court balanced the state’s interest in public safety with individual liberty.<sup>167</sup> While acknowledging that the stop at issue was brief and did not entail a high level of intrusion, the court expressed concern that there were no limits on officer discretion.<sup>168</sup> The court stated, “Regardless of how brief or slight the in-

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157. *Id.*

158. *Id.*

159. ARK. CODE ANN. § 27-101-105(a)(1)–(3) (2015). The statute provides, in its entirety:

(a)(1)(A) It shall be the duty of every sheriff, deputy sheriff, state police officer, and enforcement officer of the Arkansas State Game and Fish Commission to enforce the provisions of this chapter . . .

(2) In the exercise of their duty to enforce the provisions of this chapter, they shall have the authority to stop and board any vessel subject to this chapter and to investigate any accident or violation involving vessels subject to this chapter. *Id.*

160. *Id.*

161. *State v. Allen*, 425 S.W.3d 753, 757 (Ark. 2013).

162. *Id.* at 755, 757.

163. *Id.* at 755.

164. *Id.* at 757.

165. *Id.*

166. *Id.*

167. *Allen*, 425 S.W.3d at 757.

168. *Id.*

trusion, or how weighty the public interest, an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field."<sup>169</sup> The court emphasized that, since the officer's actions were not confined by a plan, he exercised unfettered discretion when he decided to stop the defendant's pontoon boat.<sup>170</sup>

The principle coming out of *Lecarros* and *Allen* suggests that a stop will pass constitutional muster if there is a discretion-limiting mechanism, such as a checkpoint procedure or administrative regulation. The courts in *Lecarros* and *Allen* each expressed concern with the potential dangers associated with unfettered officer discretion on inland bodies of water. Other courts have expressed similar concerns when interpreting even more general statutes.

### c. New Hampshire

New Hampshire's boating enforcement provision is extremely broad.<sup>171</sup> At first glance, it does not give any indication as to whether officers may conduct suspicionless stops.<sup>172</sup> Like the enforcement provisions in seven other states, the provision generally authorizes the commissioner of safety to "enforce the provisions of [the] chapter and the rules adopted under [the] section."<sup>173</sup> In 2004, the New Hampshire Supreme Court invalidated a suspicionless stop under the provision in *State v. McKeown*.<sup>174</sup> In *McKeown*, a New Hampshire Marine Patrol Officer stopped the defendant's kayak while conducting random personal flotation device checks on a lake.<sup>175</sup> When the defendant did not produce his personal flotation device upon request, the officer issued him a summons and escorted him back to a dock.<sup>176</sup> The court held that the stop was unreasonable under the Fourth Amendment because the officer did not have an articulable suspicion of criminal activity.<sup>177</sup> Therefore, despite a vague grant of authority, the New Hampshire Supreme Court concluded that the statute should be read in light of the Fourth Amendment's reasonableness requirement.

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169. *Id.* (citing *Brown v. Texas*, 443 U.S. 47, 51 (1979)).

170. *Id.*

171. N.H. REV. STAT. ANN. § 270:11(II) (2015).

172. *Id.*

173. *Id.*; see *supra* note 106.

174. See *State v. McKeown*, 849 A.2d 127 (N.H. 2004).

175. *Id.* at 129.

176. *Id.*

177. *Id.* at 130.

## 2. States with Statutory Language Requiring Some Level of Suspicion

An increasing number of states have boating enforcement provisions that explicitly require law enforcement officers to have either reasonable suspicion of criminal activity or probable cause to make a boating stop.<sup>178</sup> Illustrating the modern trend, Ohio, Kentucky, Virginia, and Florida have recently amended their enforcement provisions to require reasonable suspicion.

### a. Ohio: The Model Statute

Ohio provides the ideal statutory scheme. However, Ohio's sweeping legislative response came only after a court decision invalidated a suspicionless boating stop.<sup>179</sup> *State v. Carr* triggered a complete reworking of the Ohio boating enforcement provision.<sup>180</sup>

In 2007, the Ohio Court of Appeals decided *State v. Carr*.<sup>181</sup> At the time, the Ohio boating enforcement provision authorized state watercraft officers to "stop, board, and conduct a safety inspection of any vessel."<sup>182</sup> In *Carr*, an Ohio Department of Natural Resources park officer was patrolling an inland lake when he decided to stop a pontoon boat to conduct a safety inspection, despite the fact that he did not observe any law violation.<sup>183</sup> After conducting the safety inspection, the officer observed alcoholic beverages on the floor of the boat and noted that the defendant appeared intoxicated.<sup>184</sup> The officer arrested the defendant.<sup>185</sup>

The court held that the stop violated the Fourth Amendment.<sup>186</sup> In reaching its decision, the court distinguished *Carr* from *Villamonte-Marquez*, finding that the lake did not have ready access to the open sea.<sup>187</sup> Therefore, a checkpoint stop was a practical alternative.<sup>188</sup> Additionally, the court stated that Ohio law did "not define or describe the scope of a 'safety inspection' and there [were] no limitations on the discretion of state officers in conducting [such safety] inspections."<sup>189</sup> The court was particularly concerned that officers had complete discretion

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178. See *supra* note 145.

179. See generally *State v. Carr*, 878 N.E.2d 1077, 1082 (Ohio Ct. App. 2007).

180. *Id.*

181. *Carr*, 878 N.E.2d at 1082.

182. 1998 Ohio Laws, File 200, at § 1547.521. The statute provided, in its entirety, "For the purpose of enforcing the laws and rules that they have the authority to enforce, [state watercraft officers] may stop, board, and conduct a safety inspection of any vessel." *Id.*

183. *Carr*, 878 N.E.2d at 1079, 1081.

184. *Id.* at 1079.

185. *Id.*

186. *Id.* at 1082.

187. *Id.* at 1081.

188. *Id.*

189. *Carr*, 878 N.E.2d at 1077, 1081 (internal quotations added).

over whether to stop a particular boat.<sup>190</sup> Based on this reasoning, the court concluded that officers were only permitted to stop boats in two circumstances: (1) “with articulable[,] reasonable suspicion of a watercraft violation or other violation of law which they [were] authorized to enforce” or (2) if there was “a particularized checkpoint procedure designed and systematically administered to limit the discretion of officers.”<sup>191</sup>

After *Carr*, Ohio law enforcement officers continued to conduct suspicionless stops.<sup>192</sup> There was “one instance of a local boater being brought to shore while face down and in handcuffs, even though a breathalyzer test showed no evidence of alcohol use.”<sup>193</sup> Boaters complained about “constant safety inspections by local and state agencies.”<sup>194</sup> Some boaters even complained they had been stopped “multiple times during the same day.”<sup>195</sup>

In response to these pervasive concerns, the Ohio legislature took action in 2013.<sup>196</sup> On July 10, 2013, Ohio Governor John Kasich signed House Bill 29, the “Boater Freedom Act.”<sup>197</sup> The Act codified the *Carr* holding, amending Ohio’s boating enforcement provision to authorize a state watercraft officer to stop, board, and conduct a safety inspection only (1) with a reasonable suspicion of a law violation or (2) at an authorized checkpoint.<sup>198</sup> The Ohio Legislature passed the Act “as an

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190. *Id.*

191. *Id.* at 1082.

192. Egan, *supra* note 11.

193. Egan, *supra* note 11.

194. Egan, *supra* note 11.

195. Egan, *supra* note 11.

196. *Governor John Kasich Signs Boater Freedom Act*, OHIO DEP’T OF NAT. RES. (July 10, 2013), <http://www.ohiodnr.gov/news/post/governor-john-kasich-signs-boater-freedom-act>.

197. *Id.*

198. OHIO REV. CODE ANN. § 1547.521(B) (West 2015). The amended statute provides, in its entirety:

(B)(1) Except as authorized by division (B)(2) of this section, no state watercraft officer or other law enforcement officer as described in *section 1547.63 of the Revised Code* shall stop or board any vessel solely for the purpose of conducting a safety inspection of the vessel unless the owner or operator voluntarily requests the watercraft officer or other law enforcement officer to conduct a safety inspection of the vessel.

(2) A state watercraft officer or other law enforcement officer as described in *section 1547.63 of the Revised Code* may stop, board, and conduct a safety inspection of any vessel for the purpose of enforcing the laws and rules that the officer has the authority to enforce under this chapter, if either of the following applies:

(a) The watercraft officer or law enforcement officer authorized under *section 1547.63 of the Revised Code* has a reasonable suspicion that the vessel, the vessel’s equipment, or the vessel’s operator is in violation of this chapter or rules adopted under it or is otherwise engaged in a violation of a law of this state or a local ordinance, resolution, rule, or regulation

emergency measure necessary for the immediate preservation of the public peace, health, and safety.”<sup>199</sup> This is not surprising, considering the widespread problems at the time. These problems were not confined solely to Ohio, as illustrated by the Kentucky, Virginia, and Florida legislatures over the next three years.

#### b. Kentucky, Virginia, & Florida: The Model Timeline

Kentucky, Virginia, and Florida represent the ideal timeline model. Each state enacted a similar statute to Ohio, but on a much shorter timeline.

In 2014, the Kentucky legislature followed Ohio’s lead, enacting its own “Boater Freedom Act.”<sup>200</sup> Prior to 2014, Kentucky’s boating enforcement provision was very broad.<sup>201</sup> The provision authorized law enforcement officers “to enter upon all boats [on Kentucky waters] for the purpose of examining their registration documents and inspect their marine sanitation device . . . .”<sup>202</sup> The amended version authorizes a law enforcement officer to stop a boat only “if the officer has a reasonable and articulable suspicion based upon specific and articulable facts which, taken together with rational inferences from those facts, demonstrate that a violation of the Kentucky Revised Statutes or an administrative regulation promulgated under this chapter has occurred.”<sup>203</sup>

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adopted in compliance with the provisions of this chapter within the territorial jurisdiction of the officer;

(b) The watercraft officer or law enforcement officer authorized under *section 1547.63 of the Revised Code* is conducting a vessel safety inspection in the course of an authorized checkpoint operation in accordance with rules adopted by the chief of the division of watercraft under *section 1547.52 of the Revised Code. Id.*

199. 2013 Ohio Laws, File 26, at § 3.

200. 2014 Ky. Acts, ch. 109.

201. 2007 Ky. Acts, ch. 85.

202. *Id.*

203. KY. REV. STAT. ANN. § 235.310(1) (West 2015). The amended statute provides, in its entirety:

The commissioner of the Department of Fish and Wildlife Resources shall designate officers and employees of the department to enforce the provisions of this chapter, and these officers when duly authorized by the commissioner shall have the general powers of a peace officer for the enforcement of other offenses against the Commonwealth. In enforcing the provisions of this chapter, these officers and all other peace officers of the Commonwealth and its subdivisions shall have the right to enter upon all waters of this state, either private or public, for the purpose of inspecting certificate of registration and boat numbering, but shall only have the right to stop or enter upon boats on such waters if the officer has a reasonable and articulable suspicion based upon specific and articulable facts which, taken together with rational inferences from those facts, demonstrate that a violation of the Kentucky Revised Statutes or an administrative regulation promulgated under this chapter has occurred, with any subsequent search of the boat or persons on it being authorized only if supported by probable cause. The provisions of this section shall not apply to license inspections under KRS 150.090(5), but only as to those licenses and items specified in that section. They may arrest on sight, without warrant, any person detected by them in the act of violat-

In 2015, Virginia amended its boating enforcement provision to require reasonable suspicion.<sup>204</sup> Prior to 2015, the provision authorized a law enforcement officer to “stop, board and inspect any vessel . . . after having identified himself in his official capacity.”<sup>205</sup> The amended version states that a law enforcement officer cannot “stop, board, or inspect any noncommercial vessel . . . unless such officer has reasonable suspicion that a violation of law or regulation exists.”<sup>206</sup>

Finally, on March 25, 2016, Florida Governor Rick Scott signed a bill that amended Florida’s boating enforcement provision to require reasonable suspicion.<sup>207</sup> Prior to 2016, Florida’s boating enforcement provision broadly authorized law enforcement officers to “cause any inspections to be made of all vessels.”<sup>208</sup> In fact, one year before the U.S. Supreme Court decided *Villamonte-Marquez*—in 1982—the Florida Supreme Court upheld a suspicionless boating stop that occurred on the Atlantic side of the Florida Keys in *State v. Casal*.<sup>209</sup>

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ing any of the provisions of this chapter. They shall have the same rights as sheriffs to require aid in arresting, with or without process, any person found by them violating any of the provisions of this chapter or other offenses against the Commonwealth. *Id.*

204. VA. CODE ANN. § 29.1-745(B) (2015).

205. 2007 Va. Legis. Serv., ch. 87 (West).

206. VA. CODE ANN. § 29.1-745(B) (2015). The amended statute provides, in its entirety:

Notwithstanding the provisions of subsection A, no conservation police officer, officer of the Virginia Marine Police, or other law enforcement officer shall, without the consent of the owner, stop, board, or inspect any noncommercial vessel subject to this chapter unless such officer has reasonable suspicion that a violation of law or regulation exists, except that conservation police officers and officers of the Virginia Marine Police may conduct lawful stops or boardings to inspect hunting, fishing, and trapping licenses pursuant to §§ 28.2-231 and 29.1-337 or to inspect creel and bag limits pursuant to § 29.1-209 and may conduct lawful boating safety checkpoints in accordance with established agency policy. *Id.*

207. Conrad Defiebre, *New boating decal ends repeated safety checks*, TREASURE COAST PALM (April 13, 2016), <http://www.tcpalm.com/news/indian-river-lagoon/recreation/new-boating-decal-ends-repeated-safety-checks-2f321b01-f30e-2d96-e053-0100007f5fa5-375555461.html>.

208. 2009 Fla. Sess. Law Serv. ch. 2009-86 (West).

209. *State v. Casal*, 410 So. 2d 152, 155 (Fla. 1982), *cert. dismissed* 462 U.S. 637 (1983). In *Casal*, two Florida Marine Patrol officers were patrolling the Atlantic side of the Florida Keys at night when they stopped a fishing vessel to inspect the registration certificate. *Id.* at 153. The officers initially had no suspicion of illegal activity. *Id.* When the defendants failed to produce the vessel’s registration certificate, the officers asked for permission to board, which the defendants gave. *Id.* The officers discovered several marijuana bales onboard and arrested the defendants. *Id.* The court held that the initial stop was lawful because the officers were not required to have any level of suspicion to make the stop. *Id.* at 155. The court reasoned that the state’s interest in boating safety outweighed individual liberty because there was no practical alternative to roving stops. *Id.* The court observed differences between automobile and boat travel, stating that checkpoint stops were an impractical alternative to roving stops because a “boat at sea can travel in any direction” and “is not limited by fixed roadways.” *Id.* Apart from reading *Casal* in light of Florida’s newly-



Florida's new boating enforcement provision adopts a hybrid approach that sets itself apart from the statutes enacted in Kentucky and Virginia.<sup>210</sup> Once a law enforcement officer has performed a safety inspection on a boat, the boat displays a safety inspection decal alongside its registration decal.<sup>211</sup> The statute requires law enforcement officers to have "reasonable suspicion that a violation of a safety equipment carriage or use requirement has occurred or is occurring" in order to stop a boat when a valid safety inspection decal is visible.<sup>212</sup>

Although Florida's new statute still authorizes suspicionless stops, it places limits on officer discretion after the boat has passed a safety inspection, thus preventing repeated, intrusive stops at the officers' unbridled discretion.<sup>213</sup>

In the ideal scenario, a state would adopt Ohio's statute on the accelerated timeline exemplified by Kentucky, Virginia, and Florida to hasten the protection of individual liberty. In Ohio, six years passed between *Carr* and the enactment of the Boater Freedom Act. In the meantime, law enforcement officers had unlimited discretion to stop boats without any suspicion of wrongdoing. By contrast, the Kentucky, Virginia, and Florida legislatures ensured the immediate protection of Fourth Amendment rights by amending their respective boating enforcement provisions without waiting for an appellate decision. Therefore, the accelerated timeline model is preferable because it gets ahead of the problem.

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enacted legislation, its holding is unreliable for two reasons. First, *Casal* pre-dated *Villamonte-Marquez* by one year. Because of this, the *Casal* court did not operate under the same precedent as post-*Villamonte-Marquez* decisions. Second, the stop at issue in *Casal* occurred on the Atlantic side of the Florida Keys, an area not only with "ready access to the open sea," but literally in the open sea. *United States v. Villamonte-Marquez*, 462 U.S. 579, 593 (1983); *Casal*, 410 So. 2d at 153.

210. 2016 Fla. Sess. Law Serv. ch. 2016-134 (West). The statute provides in its entirety:

(2)(a) Upon demonstrated compliance with the safety equipment carriage and use requirements of this chapter during a safety inspection initiated by a law enforcement officer, the operator of a vessel shall be issued a safety inspection decal signifying that the vessel is deemed to have met the safety equipment carriage and use requirements of this chapter at the time and location of such inspection. The safety inspection decal, if displayed, must be located within 6 inches of the inspected vessel's properly displayed vessel registration decal. For nonmotorized vessels that are not required to be registered, the safety inspection decal, if displayed, must be located above the waterline on the forward half of the port side of the vessel.

(b) If a vessel properly displays a valid safety inspection decal created or approved by the division, a law enforcement officer may not stop the vessel for the sole purpose of inspecting the vessel for compliance with the safety equipment carriage and use requirements of this chapter unless there is reasonable suspicion that a violation of a safety equipment carriage or use requirement has occurred or is occurring. This subsection does not restrict a law enforcement officer from stopping a vessel for any other lawful purpose.

211. *Id.*

212. *Id.*

213. *Id.*

The Ohio, Kentucky, Virginia, and Florida statutes all achieve a favorable outcome: requiring law enforcement officers to have reasonable suspicion of criminal activity before stopping a boat. However, Florida's new statute is less favorable because it authorizes law enforcement officers to conduct suspicionless stops where a boat lacks a safety inspection decal.<sup>214</sup> The statute moves in the right direction, but does not go far enough because it still allows officers to conduct some stops in their unbridled discretion.<sup>215</sup> The Kentucky and Virginia statutes move a step closer by making reasonable suspicion a prerequisite for all stops.

Ohio's statute is superior. By providing for checkpoint stops, it protects individual liberty and promotes governmental safety interests, thus achieving the best outcome for both individuals and the government. Checkpoint stops favor individual liberty because they place significant limits on officer discretion. At the same time, checkpoint stops favor governmental interests because they allow law enforcement officers to ensure boating safety by checking for personal floatation devices, fire extinguishers, and other required items.

Ohio's statute strikes a reasonable balance between competing individual and governmental interests; Kentucky, Virginia, and Florida represent the ideal timeline. If the Ohio Legislature had enacted its statute on an accelerated timeline, it would represent the perfect model. Idaho has the opportunity to become the perfect model.

#### IV. IDAHO'S STANCE: A VAGUE STATUTE AND CHOPPY WATERS

##### A. The Idaho Safe Boating Act and § 67-7028

In 1986, the Idaho Legislature enacted the Idaho Safe Boating Act.<sup>216</sup> In doing so, the Legislature intended "to improve boating safety, to foster the greater development, use and enjoyment of the waters of this state by watercraft."<sup>217</sup> The Act authorizes the Idaho Department of Parks and Recreation to "promulgate rules and regulations in compliance with [the Act]."<sup>218</sup> The enforcement provision of the Act is found in § 67-7028.<sup>219</sup> That provision provides that "[t]he sheriffs and deputy sheriffs of the respective counties shall be primarily responsible for the

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214. 2016 Fla. Sess. Law Serv. ch. 2016-134 (West).

215. *Id.*

216. IDAHO CODE §§ 67-7001–7078 (2015).

217. *Id.* § 67-7001.

218. *Id.* § 67-7002. *See generally* IDAHO ADMIN. CODE r. 26.01.30 (2015).

219. IDAHO CODE § 67-7028 (2015).

enforcement of this chapter and in the exercise of their authority may stop and board any vessel subject to law.”<sup>220</sup>

Section 67-7028 is remarkably similar to the enforcement provisions found in other states, like the one in Arkansas, which authorizes Fish and Game officers to “stop and board any vessel.”<sup>221</sup> Like the Arkansas statute, the scope of § 67-7028 is very broad: it authorizes officers to “stop and board any vessel subject to law,” but it does not specify whether officers must have some level of suspicion in order to do so.<sup>222</sup>

An Idaho appellate court has never interpreted § 67-7028, nor addressed whether § 67-7028 requires law enforcement officers to have some level of suspicion before stopping a boat. Therefore, an appellate case interpreting § 67-7028 would be a case of first impression. The only Idaho appellate court decision addressing § 67-7028 is *State v. Simpson*, decided in 1987.<sup>223</sup> However, the court in *Simpson* declined to interpret the statute.<sup>224</sup> In *Simpson*, a sheriff’s deputy responded to an eyewitness complaint that a vessel was being operated improperly.<sup>225</sup> When the deputy arrived, however, the vessel was already being pulled out of the water and loaded onto a trailer.<sup>226</sup> As the van towing the trailer left the premises, the deputy followed and, after some distance, made a traffic stop.<sup>227</sup> The deputy noticed that the man driving the van showed signs of intoxication and arrested him.<sup>228</sup>

The Idaho Court of Appeals held that the stop was constitutional because the tip the deputy received prior to his arrival at the scene provided him with probable cause to believe that the man was engaged in illegal activity.<sup>229</sup> Based on this conclusion, the court found that it was unnecessary to determine whether § 67-7028 authorized suspicionless boating stops on Idaho waterways.<sup>230</sup> Although *Simpson* does not provide much guidance in the boating context, its reliance on automobile principles to reach its decision is prescient. Idaho case law addressing suspicionless automobile stops is very robust, and provides substantial guidance in the boating context.

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220. *Id.*

221. ARK. CODE ANN. § 27-101-105(a)(1)–(3) (2015).

222. IDAHO CODE § 67-7028 (2015).

223. *State v. Simpson*, 734 P.2d 669, 671, 112 Idaho 644, 646 (1987).

224. *Id.*

225. *Id.* at 645.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Simpson*, 734 P.2d at 671, 112 Idaho at 646 (1987).

230. *Id.* at 672, 647.

B. Idaho's Line of Automobile Cases

Parallels between automobiles and boats are particularly significant on inland waterways. As *Villamonte-Marquez* explained, inland waterways lacking ready access to the open sea are more analogous to roadways.<sup>231</sup> Much can be gleaned from Idaho appellate cases addressing automobile stops under the Fourth Amendment and the equivalent provision of the Idaho Constitution, Article I, § 17.<sup>232</sup> These cases highlight Idaho's special interest in protecting individual liberty.

In several instances, the Idaho Supreme Court has held that Article I, § 17 of the Idaho Constitution provides even greater protection than the Fourth Amendment.<sup>233</sup> This is "based on the uniqueness of [its] state, [its] Constitution, and [its] long-standing jurisprudence."<sup>234</sup> More specifically, in the context of checkpoint stops, Idaho appellate courts have sometimes diverged from U.S. Supreme Court precedent to provide Idaho drivers with increased protection.<sup>235</sup>

For example, in *Michigan Department of State Police v. Sitz*, the U.S. Supreme Court upheld a DUI checkpoint stop under the Fourth Amendment, finding that Michigan had a strong state interest in preventing drunk driving.<sup>236</sup> However, in *State v. Henderson*, the Idaho Supreme Court invalidated a DUI checkpoint stop under article I, § 17.<sup>237</sup> In *Henderson*, the Boise City Police Department established a roadblock in downtown Boise for the purpose of detecting drunk drivers.<sup>238</sup> The police stopped every vehicle that passed through the checkpoint and diverted drivers who appeared to be intoxicated to a secondary evaluation point.<sup>239</sup> The Idaho Supreme Court held that the roadblock was unconstitutional under Article I, § 17, reasoning that the officers lacked indi-

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231. *United States v. Villamonte-Marquez*, 462 U.S. 579, 589 (1983).

232. IDAHO CONST. art. I, § 17. Section 17 provides 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 warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized." *Id.*

233. *See, e.g., State v. Fees*, 90 P.3d 306, 313–14, 140 Idaho 81, 88–89 (2004).

234. *Id.*

235. *See, e.g., Henderson*, 756 P.2d at 1063–64, 114 Idaho at 299–300 (1988) ("The Idaho Constitution can, where appropriate, grant more protection than its federal counterpart.").

236. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

237. *Henderson*, 756 P.2d at 1063–64, 114 Idaho at 299–300 (1988).

238. *Id.* at 1057.

239. *Id.* at 1058. The officers gave each driver a pamphlet detailing the purpose of the roadblock. *Id.* This caused the motorists to open their windows so the officers could observe more closely. *Id.*

vidualized suspicion and legislative authority to establish a roadblock.<sup>240</sup> The Court stated:

Perhaps the most important attribute of our way of life in Idaho is individual liberty. A citizen is free to stroll the streets, hike the mountains, and float the rivers of this state without interference from the government. That is, police treat you as a criminal only if your actions correspond.<sup>241</sup>

*Henderson* illustrates that, perhaps more than anything else, Idaho values individual liberty.

Just seven years after *Henderson*, the Idaho Supreme Court reached a similar result in *State v. Medley*.<sup>242</sup> In *Medley*, the Idaho Department of Fish and Game set up a highway check station on U.S. Highway 95 during hunting season.<sup>243</sup> The Department also invited a myriad of other departments to participate at the checkpoint, including the Kootenai County Sheriff's Office and the United States Border Patrol.<sup>244</sup> The checkpoint itself involved a brief stop of each vehicle in which a Department flagperson asked the drivers about their hunting and fishing activities.<sup>245</sup> If a driver indicated that he had been fishing or hunting, or that he possessed any fish or game, the flagperson directed him to another officer for further inquiry.<sup>246</sup> In addition to this, the flagperson also directed vehicles to one of the other departments if he suspected, for example, that the driver was under the influence of alcohol or had expired vehicle registration.<sup>247</sup>

After weighing the corresponding individual and state interests, the Idaho Supreme Court once again invalidated the checkpoint.<sup>248</sup> Although the Court found that the State had a strong interest in the management and conservation of its natural resources, and that the level of intrusion to drivers was minimal, it stressed that the checkpoint was not "confined to the advancement of the State's interest in the conservation of wildlife" because of the blanket invitation to multiple departments.<sup>249</sup> The Court also found that, since there was no Department policy or criteria limiting the officers, they had "unfettered discretion."<sup>250</sup> This was a problem, the Court found, since law enforcement officers

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240. *Id.* at 1063.

241. *Id.* at 1062.

242. *State v. Medley*, 898 P.2d 1093, 1098, 127 Idaho 182, 187 (1995).

243. *Id.* at 1095.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Medley*, 898 P.2d at 1098, 127 Idaho at 187 (1995).

249. *Id.*

250. *Id.*

sometimes act unreasonably when provided with complete discretion.<sup>251</sup> In light of the Fourth Amendment reasonableness requirement, the Court concluded, this sort of activity was unconstitutional.<sup>252</sup>

*Henderson* and *Medley* illustrate Idaho's special interest in protecting individual liberty. Although the U.S. Supreme Court generally approves of checkpoint stops,<sup>253</sup> Idaho appellate courts generally do not. Idaho courts, in fact, uphold such stops under very limited circumstances.<sup>254</sup> For a stop to pass constitutional muster in Idaho, extensive limits must be placed on officer discretion.<sup>255</sup>

For example, in *State v. Thurman*, an Idaho Fish and Game officer set up a checkpoint along a stretch of gravel road during hunting season in order to ask drivers about their hunting activities in the area.<sup>256</sup> The officer asked each driver the same two questions: (1) whether the driver had been hunting that day and (2) whether the driver was transporting any fish or game.<sup>257</sup>

The Idaho Court of Appeals concluded that the checkpoint stop was reasonable under the Fourth Amendment because Idaho statutes and regulations placed substantial limits on the officer's discretion.<sup>258</sup> Two Idaho statutes expressly authorized Fish and Game officers to conduct routine check stations.<sup>259</sup> In addition to this, the Department of Fish and Game had adopted internal policy guidelines, which required officers to comply with a host of discretion-limiting requirements when conducting a checkpoint.<sup>260</sup> These requirements included: prior checkpoint authorization, one-hundred-yard visibility in both directions, signs displaying the word "stop" with sufficient visibility, and a flashing blue light on the side of the roadway.<sup>261</sup> Since the officer complied with all of these requirements, the court concluded that his discretion was sufficiently limited and upheld the constitutionality of the stop.<sup>262</sup>

Read together, *Henderson*, *Medley*, and *Thurman* make one statement eminently clear: Idaho's policy choice favors individual liberty.

251. *Id.*

252. *Id.*

253. *See* *United States v. Martinez-Fuerte*, 428 U.S. 543, 566–67 (1976) (holding "that stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant").

254. *State v. Thurman*, 996 P.2d 309, 316, 134 Idaho 90, 97 (Ct. App. 1999).

255. *Id.* at 313.

256. *Id.* at 311–12.

257. *Id.* at 312.

258. *Id.* at 313–14, 316.

259. *Id.* at 313.

260. *Thurman*, 996 P.2d at 313, 134 Idaho at 94 (Ct. App. 1999).

261. *Id.*

262. *Id.*

While the U.S. Supreme Court and other states approve of automobile checkpoint stops liberally, Idaho does not follow this trend.<sup>263</sup> *Thurman* illustrates this point.<sup>264</sup> Idaho appellate courts uphold checkpoint stops under the narrowest of circumstances.<sup>265</sup> In *Thurman*, it is difficult to imagine that the officer's discretion could have been more limited. While automobile checkpoint stops are permitted in Idaho where officer discretion is limited, roving, suspicionless automobile stops are clearly unconstitutional.<sup>266</sup> Similarities between automobiles and boats require Idaho courts to adhere closely to automobile precedent when evaluating suspicionless boating stops, such as the one involving Mr. Newsom discussed in the introduction.<sup>267</sup>

### C. The Trial Court Level: *State v. Newsom*

While there have been no appellate court decisions interpreting § 67-7028 since the Idaho Legislature enacted the Idaho Safe Boating Act in 1986, there has been at least one trial court case: *State v. Newsom*.<sup>268</sup> As described in the introduction, the law enforcement officers who stopped Mr. Newsom's boat on Lake Coeur d'Alene lacked reasonable suspicion of criminal activity.<sup>269</sup> Notwithstanding this fact, the trial court upheld the constitutionality of the stop under § 67-7028.<sup>270</sup>

In reaching its decision, the court relied on four cases.<sup>271</sup> First, the court relied heavily on *Villamonte-Marquez* to highlight differences between automobiles and boats.<sup>272</sup> Second, the court relied on an Ohio case called *State v. Deters*<sup>273</sup> to support its finding that "[i]n Ohio, state watercraft officers [were authorized to] constitutionally board, without a warrant, any vessel to conduct a routine safety inspection."<sup>274</sup> Third, the court relied on *State v. Casal*, discussed in Part III.C.2.b, to show that Florida authorized suspicionless stops because the stops were brief.<sup>275</sup> Finally, the court relied on *Schenkl v. State*, discussed in Part III.B.2, to show that Texas authorized suspicionless stops because there was no practical alternative.<sup>276</sup>

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263. See, e.g., *Medley*, 898 P.2d at 1098, 127 Idaho at 187.

264. See *Thurman*, 996 P.2d at 313-15, 134 Idaho at 94-96.

265. *Id.*

266. See *Henderson*, 756 P.2d at 1062, 114 Idaho at 198 (1988).

267. *Newsom Memorandum Opinion and Order*, *supra* note 2, at 1.

268. *Id.*

269. *Id.* at 10-11.

270. *Id.* at 15-16.

271. *Id.* at 11-15.

272. *Id.* at 11-13.

273. See generally *State v. Deters*, 714 N.E.2d 972 (Ohio Ct. App. 1998).

274. *Newsom Memorandum Opinion and Order*, *supra* note 2, at 13.

275. *Id.*

276. *Id.* at 13, 15.

Next, the court weighed Idaho's interest in regulating public waters with individual liberty.<sup>277</sup> The court concluded that Idaho's "especially strong interest in promoting recreational water safety" outweighed individual liberty because the stop at issue was brief.<sup>278</sup>

*Newsom* is unhelpful for a number of reasons. First, it relied on inconsistent precedent. The court suffered from an overbroad reading *Villamonte-Marquez*. Although the court recognized that the holding in *Villamonte-Marquez* was limited to waters "providing ready access to the sea," the court failed to take the next step by distinguishing that holding.<sup>279</sup> Lake Coeur d'Alene—and every other body of water in Idaho, for that matter—lacks ready access to the open sea. The court's reliance on Ohio boating law was also misplaced because, as discussed in Part III.C.2.a, state watercraft officers in Ohio may no longer stop and board Ohio boats without reasonable suspicion.<sup>280</sup> Ohio has now codified that law enforcement officers are required to have reasonable suspicion of criminal activity before stopping a boat.<sup>281</sup> Likewise, the court's reliance on *Casal* was misplaced. As noted in Part III.C.2.b, *Casal* is unreliable when dealing with recent boating stops because it pre-dated *Villamonte-Marquez* and involved a stop on the Atlantic side of the Florida Keys, which is literally in the open sea.<sup>282</sup> Moreover, Florida legislation enacted in 2016 now requires law enforcement officers to have reasonable suspicion to stop a boat, unless the boat lacks a safety inspection decal.<sup>283</sup> Finally, the court's reliance on *Schenekl* was misplaced. As noted in Part III.B.2, *Schenekl* suffered from an overbroad reading of *Villamonte-Marquez* and ignored the Supreme Court's distinction between waters with ready access to the open sea and inland waters.<sup>284</sup>

Second, *Newsom* is unhelpful because it failed to afford adequate weight to Idaho's special interest in protecting individual liberty. Noticeably absent from the court's opinion was an analysis of binding Idaho precedent.<sup>285</sup> In balancing state and individual interests, the court failed to discuss Idaho's line of automobile cases, which demonstrate what Idaho appellate courts have articulated on multiple occasions: Idaho's policy choice favors individual liberty.<sup>286</sup>

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277. *Id.* at 15–16.

278. *Id.* at 15.

279. *Id.* at 11–13.

280. *See supra* Part III.C.2.a.

281. OHIO REV. CODE ANN. § 1547.521(B) (West 2015).

282. *See supra* Part III.B.1.

283. *See supra* Part III.C.2.b.

284. *See supra* Part III.B.2.

285. *See generally Newsom Memorandum Opinion and Order, supra* note 2.

286. *See, e.g., Henderson*, 756 P.2d at 1062, 114 Idaho at 298.



Based on its reliance on inconsistent precedent and its failure to give adequate weight to Idaho's special interest in protecting individual liberty, *Newsom* is unhelpful. Therefore, Idaho should look to states like Ohio, Kentucky, Virginia, and Florida as models for its boating enforcement framework.

#### V. SMOOTHER SAILING: IDAHO SHOULD REQUIRE REASONABLE SUSPICION

When states choose to allow suspicionless boating stops, that choice often reflects a very specific policy goal: to promote health and safety, for example, or to protect an area's wildlife. While the Safe Boating Act does contain a broad policy goal of improving boating safety, Idaho has yet to make explicit how that goal relates to boating stops—at least through the normal and expected channels of judicial precedent or comprehensive legislation.<sup>287</sup> But while Idaho case law in the boating stop arena is certainly scant, indicia of its policy goals in the area are not. Idaho police can treat citizens as criminals only if their actions correspond.<sup>288</sup>

Those words, from the Idaho Supreme Court's own pen, are a strong statement of what Idaho values most in the constitutional context: individual freedom. The State's preference for personal liberty is clearest in the separate but similar automobile setting, where the Idaho Supreme Court has repeatedly refused to allow checkpoints that do not sufficiently limit officer discretion, despite the U.S. Supreme Court's unequivocal approval of those investigative tools.<sup>289</sup>

Idaho's willingness to favor individual liberty over other legitimate state policy goals—and to disagree with the U.S. Supreme Court to do so—is a bold choice. But the audacity is, at the moment at least, being wasted. The ambiguity in Idaho's current Safe Boating Act leaves open the possibility that other courts, like the court in *Newsom*, will interpret its words to elevate safety over freedom. And although that would be a valid state purpose, it is not the one Idaho so confidently embraces in the analogous automobile context.

From a constitutional perspective, the most significant problem with a suspicionless stop—in the automobile or boating context—is that law enforcement officers may exercise unbridled discretion. But, in its current state, the Idaho Safe Boating Act allows just that. There are presently no limitations placed on the discretion of Idaho law enforcement officers when deciding whether to stop a particular boat.<sup>290</sup> Section

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287. IDAHO CODE § 67-7001 (2015).

288. *Henderson*, 756 P.2d at 1062, 114 Idaho at 298.

289. *See, e.g., Medley*, 898 P.2d at 1098, 127 Idaho at 187.

290. IDAHO CODE § 67-7028 (2015).

67-7028 grants broad, ambiguous authority to “stop and board” boats.<sup>291</sup> Section 67-7002 authorizes the Department of Parks and Recreation to promulgate regulations.<sup>292</sup> However, the Department has not promulgated any regulations designed to place limits on officer discretion when stopping boats.<sup>293</sup> In its existing state, the Idaho Safe Boating Act suffers from severe constitutional deficiencies. The time has come to act.

Idaho and Ohio should share more than just similar-sounding names. Idaho should amend § 67-7028 to mirror Ohio’s boating enforcement statute. If Idaho were to adopt Ohio’s statute, the new statute would support Idaho’s policy goal of elevating individual freedom over safety by placing substantial limits on officer discretion. But the new statute would not leave the government powerless. It would provide Idaho law enforcement officers with two primary paths to enforce boating safety laws. They could stop boats based on reasonable suspicion or at authorized checkpoints.

The first section of the new Idaho statute would authorize a law enforcement officer to conduct stops based on reasonable suspicion.<sup>294</sup> It would authorize an officer to stop a boat if

the . . . law enforcement officer . . . has a reasonable suspicion that the vessel, the vessel’s equipment, or the vessel’s operator is in violation of this chapter or rules adopted under it or is otherwise engaged in a violation of a law of this state or a local ordinance, resolution, rule, or regulation adopted in compliance with the provisions of this chapter within the territorial jurisdiction of the officer[.]<sup>295</sup>

The second section would authorize a law enforcement officer to conduct an authorized checkpoint.<sup>296</sup> It would authorize an officer to stop a boat if

the . . . law enforcement officer . . . is conducting a vessel safety inspection in the course of an authorized checkpoint operation in accordance with rules adopted by the [Idaho Department of Parks and Recreation].<sup>297</sup>

An important feature of the new statute is that it would authorize the Idaho Department of Parks and Recreation to promulgate discre-

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291. *Id.*

292. *Id.* § 67-7002.

293. *See generally* IDAHO ADMIN. CODE r. 26.01.30 (2015).

294. OHIO REV. CODE ANN. § 1547.521(B)(2)(a) (West 2015).

295. *Id.*

296. *Id.* § 1547.521(B)(2)(b).

297. *Id.*

tion-limiting regulations.<sup>298</sup> Because of these regulations, checkpoint boating stops would be administered much like checkpoint automobile stops, and would therefore safeguard individual freedom. The two sections would also provide law enforcement officers with some discretion to determine which enforcement method to utilize, thus allowing them to effectively enforce boating safety laws, which would advance Idaho's stated policy of improving boating safety.

While Ohio's statute provides the best language for Idaho's new statute, Kentucky, Virginia, and Florida offer the better timeline. As discussed in Part III.C.2.b, Kentucky, Virginia, and Florida did not wait for an appellate court decision before amending their respective boating enforcement provisions.<sup>299</sup> Idaho shouldn't either. Idahoans deserve this kind of statutory protection as soon as possible. By enacting a statute like Ohio's on an accelerated timeline, Idaho will best balance its strong interest in protecting individual freedom with its stated goal of boating safety.

## VI. CONCLUSION

This comment began with the image of Tom—face down and bound in the bottom of a boat. Tom represents the model, law-abiding citizen. Tom is not a criminal. Yet, under the current version of Idaho Code section 67-7028, he was treated like one when his actions did not correspond. Section 67-7028 is inconsistent with Idaho's preference for individual liberty.

Under a new statutory framework requiring reasonable suspicion, it is clear that this would not have occurred. The law enforcement officers who stopped and boarded Tom's boat lacked reasonable suspicion. Therefore, they never would have been able to board Tom's boat in the first place, much less slam him face down in front of his family.

In the constitutional context, as illustrated by the Idaho Supreme Court in its line of automobile cases, Idaho values individual freedom above granting law enforcement officers unbridled discretion to ensure safety. If the Idaho Supreme Court has sanctioned officers to stop automobiles at checkpoints only under the narrowest of circumstances, why should officers be permitted to randomly stop boats at their complete discretion?

Idaho's special interest in protecting individual liberty requires more. Idaho should act to ensure the protection of individual freedoms by adopting Ohio's boating enforcement statute, which requires law enforcement officers to have reasonable suspicion of criminal activity—or conduct an authorized checkpoint—when stopping a boat. This solution

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298. *Id.*

299. *See supra* Part III.C.2.b.

adequately balances individual freedom and the stated policy goal of improving boating safety. And Idaho should do this on an accelerated timeline, thus ensuring the immediate implementation of these protections.

In 1986, the Idaho Supreme Court summarized Idaho's approach to interactions between law enforcement officers and individuals: "police [may] treat you as a criminal only if your actions correspond."<sup>300</sup> The Court has spoken clearly—now it is Idaho's turn to act.

*Kyle Bastian\**

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300. *Henderson*, 756 P.2d at 1062, 114 Idaho at 298.

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