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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Terrence Bressi, Plaintiff, vs. Pima County Board of Supervisors, et. al., Defendants.	No. 18-CV-00186-DCB **REPLY IN SUPPORT OF PARTIAL MOTION TO DISMISS BY THE PIMA COUNTY DEFENDANTS**

Plaintiff Terrence Bressi's ("Bressi's") opposition is not well-taken. Accordingly, the Court should grant the Pima County Defendants' partial motion to dismiss.

I. Bressi's Background section does not contain a sufficient legal or factual basis for the Court to deny the Pima County Defendants' partial motion.

Bressi's assertion that *United States v. Martinez-Fuerte*, 428 U.S. 543, 546 (1976), support his claims—and a denial of the Pima County Defendants' partial motion to dismiss—is misplaced. Under *Martinez-Fuerte*, Border Patrol may conduct immigration checkpoints and briefly detain motorists without securing a warrant. *Id.* at 566. Further, "Border Patrol officers have wide discretion in selecting the motorists to be diverted . . . ." *Id.* at 563-64. This means Bressi was legally required to stop and lawfully referred to secondary after he declined to provide his citizenship.

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The question then becomes what effect *Martinez-Fuerte* has on Bressi's complaint that a deputy sheriff cited Bressi on charges of blocking a public thoroughfare after Bressi refused to move his vehicle to secondary. To this end, Bressi has not cited any case law that holds that immigration checkpoints are traffic-free enforcement zones. Instead, Bressi makes a lot of conclusory statements about Border Patrol that have no bearing on this issue. For example, Bressi asserts that Border Patrol's "overriding purpose" at the checkpoint is to detect general criminal activity based on a highway permit Bressi did not provide. Bressi then misquotes his own complaint about what the permit allegedly says. *See Doc. 44 at ¶ 66* (alleging one purpose was "to include the deterrence of narcotics smuggling" as opposed to it being an "overriding purpose" as claimed in his motion). While reasonable inferences of factual allegations may be accepted as true on a motion to dismiss, blatant contradictions of a complaint do not. Further, Bressi did not allege that he was searched or cited for narcotics. Thus, Bressi's allegations about what Border Patrol can lawfully do at its checkpoint is not relevant to the issue of this Court's subject matter jurisdiction over Bressi's claims for injunctive and declaratory relief against the Pima County Defendants.

The facts that are significant are Bressi's admissions that: 1) he has driven through the checkpoint 419 times between 2005 and 2017; 2) only had three interactions with deputy sheriffs between 2013 and 2017; and 3) two of the interactions resulted in two different traffic citations being issued, but one did not. Bressi's only interaction with Roher and Kunze was in April of 2017.

Bressi then opines that because "he continues to drive the same route on a regular basis and will continue to do so for the foreseeable future . . . *it is likely* that [the Pima County] Defendants will continue to have direct involvement at the checkpoint." *Doc. 50 at p.3, lines 17-21* (emphasis added). Significantly, Bressi acknowledges the April 2017 conditions *do not* currently exist: "To the extent that certain conditions existing on April 10, 2017, at the SR-86 checkpoint are no longer present, both County and Federal

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Defendants are capable of resuming such conditions at a moment's notice . . . ." *Doc. 44 at ¶ 206.* Bressi's admissions about 2 different citations and his speculative belief of possible future harm are fatal to his claims for injunctive and declaratory relief. *See e.g. City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983).

II. Subject Matter Jurisdiction is lacking over Bressi's claims for equitable relief.

A court should consider well-pled allegations, not conclusory statements of law and facts, when deciding whether a plaintiff has standing. *See e.g. Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1163 (9th Cir. 2017) ("We do not . . . assume the truth of legal conclusions merely because they are cast in the form of factual allegations," and, most especially, where our jurisdiction is at stake, "[w]e cannot construe the complaint so liberally as to extend our jurisdiction beyond its constitutional limits."). The Ninth Circuit rejected the Nation's attempt to "shore up its allegations by invoking the 'presumption that general allegations embrace those specific facts that are necessary to support the claim' at the pleading stage." *Id.* The Court found that "[a]bsent more concrete allegations, the Nation cannot show . . . it has suffered the injury needed for standing." *Id.* at 1164.

And contrary to Bressi's assertion, the Pima County Defendants' motion referred to all three *Lujan* standing requirements. *Doc. # 46 at pp.3-4. See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (a plaintiff must show a particularized, concrete and actual or imminent injury, a causal connection between the injury and conduct at issue, and a likelihood that a favorable decision will redress the harm). The motion focused on injury-in-fact because that element is most applicable to Bressi's claims.

A. Bressi has not alleged sufficient facts to show that he has standing.

"To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) (finding plaintiffs' claims were too speculative because they rested on a "highly attenuated chain of possibilities"

because it was based on speculation about what communications the government might target under the Foreign Intelligence Surveillance Act) (internal citation omitted). And "[t]he injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

In *Lyons*, the Ninth Circuit initially concluded that Lyons had presented a more immediate threat of injury because Lyons would only need to be stopped for a minor traffic violation to be subject to a chokehold. *Lyons*, 461 U.S. at 107–08. The Supreme Court rejected that position, stating that just because Lyons might be "stopped for a traffic or other violation in the reasonably near future, it is untenable to assert, and the complaint made no such allegation, that strangleholds are applied by the Los Angeles police to every citizen who is stopped or arrested regardless of the conduct of the person stopped." *Id.* at 108. The Court further found that in the five months between the incident and the filing of the complaint, Lyons had not alleged that he was subjected to another chokehold, which was the behavior to be enjoined. *Id.* at 109. Thus, the Court concluded that Lyons failed to meet 'the requirements for seeking an injunction in a federal court" because he could not show that he was realistically threatened to suffer the same injury. *Id.* "The speculative nature of Lyons' claim of future injury require[d] a finding that this prerequisite of equitable relief has not been fulfilled." *Id.* at 111.

As the Ninth Circuit clarified in a later case, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of a court ordering preliminary relief, and that the balance of equities tips in his favor, and that an injunction is in the public interest." *See Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012) (finding plaintiffs had standing in light of an admitted and express policy of the Maricopa County Sheriff's Department to enforce criminal immigration laws outside of a federal immigration checkpoint) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). A plaintiff can show the likelihood of an injury recurring by: 1) pointing

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to the existence of a written policy at the time of the injury and that the injury flowed from the policy; or 2) that a pattern of officially sanctioned unconstitutional conduct or behavior caused the injury. *See Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001).

In *Melendres*, irreparable harm was found because the defendants had an existing unlawful policy directing deputies to continue to violate the plaintiffs' rights. *Melendres*, 695 F.3d at 1002. In contrast, as noted in *Lyons*, the "plaintiffs' showing . . . of a relatively few instances of violations by individual police officers, without any showing of a deliberate policy on behalf of the named defendants, did not provide a basis for equitable relief." 461 U.S. at 104 (citing to *Rizzo v.* Goode, 423 U.S. 362, 372 (1976) (finding a few violations by individual officers in the absence of a deliberate policy was insufficient to obtain equitable relief).

Bressi has not alleged the existence of a written policy, nor has he alleged that a written policy caused his harm. Nor has Bressi sufficiently pled a pattern of officially sanctioned unconstitutional conduct. Bressi's failure to make this showing is fatal to his standing argument because he cannot tie his injury—or any perceived future injury—to an unconstitutional written policy or an officially sanctioned pattern of unlawful behavior. Indeed, Bressi has not pointed to any harm by deputies since April of 2017 and, in fact, acknowledges a change in conditions, even if this Court were to assume that the April 2017 conduct was unlawful. *See Doc. 44 at ¶ 206.* Further, Bressi does not even allege that the April 2017 citation was for the same charge as the one other citation he says he received.

Bressi incorrectly argues that the merits of his claims have no bearing on standing. He is incorrect. The constitutionally of the conduct at issue and the likelihood of future harm bear on the issue of the court's jurisdiction to award equitable relief. *See e.g. Hodgers-Durgin v. de la Vina*. 199 F.3d 1037, 1042 (9th Cir. 1999) (requiring plaintiff to show a real and immediate threat of irreparable injury). In *Hodgers-Durgin*, plaintiffs lacked standing because they were cited once in a ten year period by Border Patrol. Further,

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Bressi has an availability remedy at law via his Fourth Amendment claim for money damages. This fact makes it less likely that equitable relief is needed since such relief is about preventing future harm. *See e.g. Lyons*, 461 U.S. at 111-13 (discussing plaintiff's claims for equitable relief and money damages in holding that plaintiff lacked standing).

B. The cases relied on by Bressi do not advance his cause.

Bressi cites to *Wooley v. Maynard*, 430 U.S. 705, 717 (1977), and *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1082 (9th Cir. 2004), for the proposition that his alleged injury is more real because he travels through the checkpoint to return to his home. But neither of these cases are controlling. In *Wooley*, the Court concluded that "New Hampshire may not require appellees to display the state motto ["Live Free or Die"] upon their vehicle license plates." Also of concern was that the State had undertaken "three successive prosecutions" against plaintiffs over a five week period. *Id*. at 712. On appeal, the State did not challenge standing, only that the District Court erred in not refraining from exercising jurisdiction under *Younger v. Harris*, 401 U.S. 37 (1971) (holding that federal courts should refrain from exercising equitable jurisdiction to enjoin ongoing state court criminal prosecutions). Thus, *Wooley* has no application here. *Fortyune*, in turn, arose under the Americans with Disability Act ("ADA"). Thus, it is not instructive because noncompliance with ADA requirements has been found to threaten a plaintiff with "imminent harm." *See Pickern v. Holiday Quality Foods*, 293 F.3d 1133, 1138 (9th Cir. 2002). Bressi's claims do not arise under the ADA.

Likewise, Bressi's reliance on *Nicacio v. U.S. I.N.S.*, 797 F.2d 700, 702 (9th Cir. 1985), is misplaced. There, the government had not challenged plaintiff's standing on appeal and the District Court had already "found that several of the plaintiff class members had actually experienced repeated stops which the court found to violate their rights." That is not the posture of Bressi's case.

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Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 558 (9th Cir. 1990), was also an appeal following a finding that constitutional violations had occurred. But *Orantes-Hernandez* affirmed the *O'Shea* standards of "'the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law[,]'" stating that "[t]o satisfy this standard, plaintiffs must establish actual success on the merits, and that the balance of equities favors injunctive relief." *Id.* at 558. Bressi has not made this showing.

Thomas v. Cty. of Los Angeles, 978 F.2d 504, 508 (9th Cir. 1992), as amended (Feb. 12, 1993), was a class action of 75 plaintiffs who alleged they were repeated victims of police brutality and misconduct. The Ninth Circuit vacated the injunction because it found insufficient evidence that the alleged abuses "were the product of a departmental policy" and because the injunction was too broad and failed to "specify the act or acts sought to be restrained." *Id.* at 508-09. While Bressi's complaint does allege Roher has issued other people citations, Bressi does not allege those citations were unlawful, done pursuant to written policy, or that he has standing to assert claims for nonparties. Thus, *Thomas* does not advance his cause.

Nor is *Bressi v. Ford* instructive. 575 F.3d 891, 900 (9th Cir. 2009) ("affirming the dismissal of Bressi's claims relating to his arrest and citations[,] affirm[ing] the grants of summary judgment on the *Bivens* action, the right to privacy under the Arizona Constitution, and the malicious prosecution claim[,]" but remanding the roadblock claim for further proceedings). *Bressi* discussed tribal jurisdiction over non-tribal members on a state road that crossed a reservation. *Bressi* is completely inapplicable to this case.

Bressi also argues that the Defendants' citation to "checkpoint" cases are not helpful because those cases do not discuss the First Amendment. While those cases do not discuss the First Amendment, the cases *do* address the lawfulness of immigration checkpoints, referrals to secondary, and the validity of checkpoints related to driving behavior. *See e.g. Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding roadblocks to verify

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driver's licenses and registrations are permissible); *Martinez-Fuerte*, 428 U.S. at 566 ("stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment").

III. Qualified immunity bars Count 1's First Amendment damages claim.

Bressi cannot show that he has a constitutional right to: a) not declare his citizenship at an immigration checkpoint; b) refuse to move his vehicle to a secondary inspection lane upon the request of a Border Patrol agent; or c) use his claimed right to not speak to block the flow of traffic on a county road where an immigration checkpoint is located. Accordingly, Bressi cannot show that the individual Pima County Defendants' conduct violated clearly-established law. *See City of Escondido. v. Emmons*, ___ U.S. ___, 139 S.Ct. 500, 503 (2019) ("Under our cases the clearly established right must be defined with specificity."); *Kisela v. Hughes*, 584 U.S. ___, 138 S.Ct. 1148, 1152 (2018) ("Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."); *Plumhoff v. Rickard*, 572 U.S. 765, 778-79 (2014) ("defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it").

Notably, Bressi does not discuss *Nieves v. Bartlett*, ___ U.S. ___, 139 S.Ct. 1715 (2019) (holding probable cause defeats a retaliatory arrest claim) at all. Instead, Bressi cites to a number of First Amendment cases that do not involve traffic stops and that do not involve interactions with law-enforcement officers at or near a checkpoint. None of those cases establish that Bressi suffered a constitutional injury. Nor do they establish that any Pima County Defendants' conduct violated clearly-established law.

For example, *Spence v. State of Wash.*, 418 U.S. 405, 410 (1974), involved the displaying of an American flag with a peace symbol on it. In *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943), the Supreme Court enjoined a policy that required

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students to salute the American flag at school. *Id.* In *Texas v. Johnson*, 491 U.S. 397, 405 (1989), the expressive conduct at issue was a flag burning at a rally. *Id.* Bressi's reference to these cases are unavailing because they do not deal with interactions with law enforcement at an immigration checkpoint, nor do they address deputies issuing citations for state-law traffic violations, such as blocking a public thoroughfare *Id.* Nor do these cases hold that Bressi has a constitutional right to not declare his citizenship, much less that he had a constitutional right to refuse to move his vehicle to secondary and block traffic on a public roadway.

Immigration checkpoints and referrals to secondary inspection lanes are lawful. *See Martinez-Fuerte*, 428 U.S. at 566-67. And it is clearly established that drivers must identify themselves to the police. *See e.g. Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 189 (2004) (officer's request for identification did not violate the Fourth or Fifth Amendment); *see also In re Moises L.*, 18 P.3d 1231, 1232 (Ariz. Ct. App. 2000) (drivers stopped by police must show they have a driver's license under A.R.S. § 28-1595(B)). Further, under A.R.S. § 13-2906, motorists are prohibited from blocking public roadways. Accordingly, Bressi cannot show that the April 2017 conduct at issue constituted a constitutional violation, much less that the conduct violated clearly-established law. Further, Bressi failed to show the requisite personal participation by Kunze, Napier, or Nanos in his citation and arrest. Therefore, qualified immunity applies and bars Count 1.

IV. Count 4's official-capacity claim against Sheriff Napier should be dismissed.

Bressi's opposition confuses the argument regarding dismissal of the official-capacity claim against Napier. Dismissal is proper because an official-capacity claim is just another way of pleading a *Monell* claim against a governmental entity. Bressi's decision to name the PCBOS as a defendant makes this official-capacity claim redundant. *See Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cty. Sheriff Dep't*, 533 F.3d 780, 799 (9th Cir.

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2008). If the PCBOS is dismissed, then it would be proper for Napier to remain a defendant as to Count 4's official capacity claim. *See Section V*, supra.

V. Counts 5 and 6 must be dismissed.

Counts 5 and 6 allege individual-capacity failure to train and supervise claims against Napier, Nanos, Kunze, and the PCBOS. Consequently, in addition to showing that he suffered a constitutional injury, Bressi must also show personal participation, plus "[a] pattern of similar constitutional violations by untrained employees" as to all the defendants. *See e.g. Starr v. Baca*, 652 F.3d 1202, 1208 (9th Cir. 2011) (requiring personal involvement or a "sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation). Contrary to Bressi's assertions, deliberate indifference *does* apply to an individual capacity claim for failure to train and supervise. *See Flores v. County of Los Angeles*, 758 F.3d 1154, 1158–59 (9th Cir. 2014) ("As to an official in his individual capacity, the same standard applies—Flores must show that Baca was deliberately indifferent to the need to train subordinates, and the lack of training actually caused the constitutional harm or deprivation of rights.")

As an initial matter, qualified immunity bars all of the individual capacity claims in Counts 5 and 6 because Bressi cannot establish that it is unconstitutional for deputies to issue state-law traffic citations at or near immigration checkpoints when a motorist declines to declare his citizenship and refuses to move his vehicle to secondary. Bressi does not allege the deputies were untrained about the issuance of traffic citations or arrests. Rather, Bressi limits his complaints to a lack of Stonegarden specific policies. But Stonegarden is a funding source. *Doc. # 44 at ¶ 90.* Stonegarden does not broaden a deputies law enforcement powers, nor does Bressi allege that it does. *Id.* Bressi cites no case requiring Napier to implement "funding" aka Stonegarden policies. And it is undisputed that Bressi was not cited or arrested on immigration charges. *Id. at ¶ 211.* Thus, these are independent grounds for dismissing Counts 5 and 6 as to Napier, Nanos, Kunze, and the PCBOS.

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An independent basis exists to dismiss Kunze from Count 5. The only allegations against Kunze are as follows: ¶ 8—Kunze is as an employee of PCSD; ¶ 103—Kunze was aware traffic citations were routinely issued at the checkpoint; ¶ 110—Kunze was earning overtime under Operation Stonegarden; and ¶ 183—Kunze arrived after Roher had arrested Bressi and allegedly ratified Roher's arrest. *Doc. # 42.* Bressi did not allege that Kunze was responsible for training Roher. Thus, Kunze should be dismissed from Count 5.

Counts 5 and 6 also fail to allege viable "failure to train or supervise" individual capacity claims against the PCBOS. While Bressi claims he sued PCBOS in an individual capacity, he did not name any individual board members as defendants, nor did he allege personal involvement. Accordingly, the PCBOS should be dismissed from Counts 5 and 6.

Finally, additional grounds exist to dismiss Counts 5 and 6 as to Nanos. Bressi admits that Nanos' tenure as Sheriff ended on December 31, 2016. *Doc. # 44 at p. 4,* ¶ 16. After that date, Nanos had no control or responsibility over the training or supervision of deputies, departmental policies or procedures, or the April 2017 conduct of Roher and Kunze. Accordingly, there is no basis to impose liability on Nanos. Bressi's citation to *Schweiker v. Chilicky*, 487 U.S. 412, 418 (1988) for the proposition that an employee can be sued "for actions they took when still employed" is misplaced. There, the only question was "[w]hether a *Bivens* remedy should be implied for alleged due process violations in the denial of social security disability benefits." *Schweiker*, 487 U.S. at 420. The Court found that relief was unavailable as a matter of law because Congress had not included such a right in enacting the Social Security program. *Id*. *Schweiker* has no application here. Thus, Nanos should be dismissed from Counts 5 and 6.

CONCLUSION

For all the foregoing reasons, the Pima County Defendants respectfully request that the Court issue an Order granting their partial motion to dismiss.

RESPECTFULLY SUBMITTED August 16, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on Friday, August 16, 2019, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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