Docket No. 22-15123

In the

United States Court of Appeals

For the

Ninth Circuit

TERRENCE BRESSI,

Plaintiff-Appellant,

v.

PIMA COUNTY SHERIFF CHRIS NANOS, in his official capacity, MARK NAPIER, Former Pima County Sheriff, in his individual capacity, PIMA COUNTY BOARD OF SUPERVISORS, RYAN ROHER, Pima County Deputy Sheriff, in his individual capacity, BRIAN KUNZE, Pima County Deputy Sheriff, in his individual capacity, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CUSTOMS & BORDER PROTECTION, UNITED STATES BORDER PATROL, ALEJANDRO MAYORKAS, Secretary, U.S. Department of Homeland Security, in his official capacity, CHRIS MAGNUS, Secretary, U.S. Customs & Border Protection, in his official capacity, RAUL ORTIZ, Chief, U.S. Border Patrol, in his official capacity, JOHN MARTIN, Chief Patrol Agent-Tucson Sector, in his official capacity and UNITED STATES OF AMERICA,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the District of Arizona, No. 4:18-cv-00186-DCB · Honorable David C. Bury

APPELLANT'S OPENING BRIEF

RALPH E. ELLINWOOD, ESQ.
RALPH E. ELLINWOOD,
ATTORNEY AT LAW, PLLC
Post Office Box 40158
Tucson, Arizona 85717
(520) 413-2323 Telephone
ree@yourbestdefense.com

AMY P. KNIGHT, ESQ.
KNIGHT LAW FIRM, PC
3849 East Broadway Boulevard, Suite 288
Tucson, Arizona 85716
(520) 878-8859 Telephone
amy@amyknightlaw.com

Attorneys for Appellant Terrence Bressi

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

COURT RULES

STATUTES

INTRODUCTION

Plaintiff Terrence Bressi seeks to maintain his Fourth Amendment right to be free from unreasonable searches and seizures during his commute. He has been unable to do that for over a decade, because the Border Patrol has placed a permanent checkpoint between his workplace and his home. They routinely stop him and demand that he state his citizenship, even when they recognize him as a known U.S. citizen, often refusing to let him leave the checkpoint when he declines to speak. Although the checkpoint is nominally for immigration purposes, in reality, it is used for general law enforcement. The Border Patrol openly uses it to find and seize narcotics, even touting that goal on its website, and has periodically stationed sheriff's deputies, working overtime on the federal payroll, at the checkpoint, where they run warrants checks, detain people for things like a missing lug nut, and "handle" other things federal agents do not deal with, such as personal-use quantities of marijuana.

Mr. Bressi objects, and exercises his First Amendment rights to express those objections. He is well known to agents as an anti-checkpoint activist who posts videos of his encounters on his website with commentary. He chooses not to speak when agents demand he speak aloud his—already known—citizenship. Agents regularly refer to him by name at the checkpoint and give him a hard time, not only insisting on answers, but doing things like placing spike strips in front of

his vehicle or demanding that he move to a secondary inspection area for no valid reason.

On April 10, 2017, checkpoint agents refused to allow Mr. Bressi through without verbally stating his citizenship, and ultimately summoned a sheriff's deputy to the primary stop location. The deputy released Mr. Bressi from the checkpoint, but proceeded to pursue him, stop him, handcuff him while Border Patrol agents looked on approvingly, and place him under arrest with a citation for blocking the roadway.

On these facts, the district court granted summary judgment, without even holding a hearing, in favor of the Border Patrol, Pima County, and the two deputies involved in the arrest, on Mr. Bressi's First and Fourth Amendment claims and related state law claims. The district court erred by ignoring disputes of material fact and construing evidence in the defendants' favor regarding (1) the primary purpose of the checkpoint; (2) the reasonableness of its operation; (3) the nature of Mr. Bressi's actions in protest; (4) the reasons for Border Patrol Agents' and deputies' actions toward Mr. Bressi; and (5) the knowledge and understanding of the arresting officers. This Court should reverse and remand to permit the case to proceed to trial.

JURISDICTIONAL STATEMENT

The district court had original jurisdiction over the civil rights and Federal Tort Claims Act claims in Counts I, II, III, IV, V, VI, and VIII of the Second Amended Complaint pursuant to 28 U.S.C. § 1331. The district court had supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over the pendent state law claim in Count VII. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because it arises from a final decision of a United States District Court. Judgment was entered in the district court on January 10, 2022. Mr. Bressi filed his notice of appeal on January 20, 2022, which was within 60 days of the judgment, pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B). This appeal is from a final judgment that disposes of all parties' claims.

ISSUES PRESENTED FOR REVIEW

1. Whether the materials in the record, construed in the light most favorable to Mr. Bressi, raise a genuine issue of material fact regarding the constitutionality of the SR-86 checkpoint, either through its primary purpose or through the reasonableness of its operation?

2. Whether the materials in the record, construed in the light most favorable to Mr. Bressi, raise a genuine issue of material fact regarding local and federal government actors retaliating against Mr. Bressi for exercising his First Amendment rights?

3. Whether the materials in the record, construed in the light most favorable to Mr. Bressi, raise a genuine issue of material fact regarding the constitutionality and state-law legality of Mr. Bressi's arrest on April 10, 2017?

STATEMENT OF THE CASE

The Border Patrol has operated a checkpoint at milepost 146.5 on SR-86 in Pima County, Arizona at least since 2010 (the "SR-86 checkpoint"). 4-ER-411. The SR-86 checkpoint is approximately 52 miles from the nearest point along the U.S.-Mexico Border and operates only in the eastbound lane. 4-ER-437. SR-86 is an east-west road connecting the north-south roads SR-85, which is to the west in Why, and I-19, where it intersects I-10 in Tucson to the east. One other north-south road runs from the border to SR-86, between these endpoints: SR-286. All three of these north-south roads intersecting SR-86 have permanent Border Patrol checkpoints between the border and SR-86. 4-ER-434. Plaintiff Terrence Bressi lives in Tucson and works at Kitt Peak National Observatory, located along SR-86 to the west of the checkpoint. To get home from work, he must pass through the checkpoint. 4-ER-420.

Operation of the Checkpoint

The Border Patrol's policy is to stop each vehicle, without suspicion, to ask occupants if they are United States citizens (the "citizenship question"), and to look for signs of any federal criminal activity. 5-ER-724; 756. In this "primary

inspection lane," agents at times use dogs trained to detect both concealed humans and narcotics, 4-ER-428, and have at times used license plate readers that capture data about the passing vehicles, which is transmitted to other arms of the Border Patrol and other federal agencies for use in ongoing investigations. 3-ER-372-73. It is Border Patrol policy to ask the citizenship question of every person, even those recognized as local residents and commuters. 2-ER-74. If agents have reasonable suspicion of either an immigration violation or a federal criminal violation, they may direct the vehicle to a secondary inspection area; if not, they are supposed to allow the vehicle to pass. 5-ER-724; 683. If they develop probable cause for either an immigration or criminal violation, they may search the vehicle. 5-ER-725; 757.

All Border Patrol agents are cross-designated with Title 21 authority to enforce federal drug laws, 5-ER-687-709, and they do so prodigiously at this checkpoint. They report their arrests for both narcotics violations and for immigration violations, which average out to about equal, 3-ER-383, and internally report their success in terms of quantities of narcotics seized. 5-ER-788. The Border Patrol publicly advertises the purpose of its checkpoint program on its website as intended both to "detect and apprehend illegal aliens" and "to detect illegal narcotics." 3-ER-370-71.

At least as early as 2012, continuing through 2019, Pima County participated in a federal grant program called Operation Stonegarden, whereby the federal

government paid county deputies overtime to work shifts at the direction of the Border Patrol. 3-ER-221-250. Those deputies were sometimes stationed at the SR-86 checkpoint, where they wrote tickets, ran warrants checks and made arrests, sometimes requesting that Border Patrol agents detain a vehicle the agents had no grounds to detain so deputies could conduct further state law enforcement activities. 3-ER-289-369.

Plaintiff Terrence Bressi

Mr. Bressi has long been known to the agency, and to agents who regularly staff the checkpoint, by name and specifically as a U.S. citizen. 4-ER-419. Indeed, for approximately a year, a poster with his photo and the words "EXTREMELY UNCOOPERATIVE MOTORIST," identifying him as a U.S. citizen, hung inside the checkpoint:

****Extremely uncooperative motorist****

Terrence Howard Bressi
U. S. Citizen

Vehicle: Silver 2013 Ford F-150 w/metal racks sticking up out of bed of truck.

License plate: Arizona BEW7629

Travels to Kitt Peak as an employee with

Has video and audio recorders stationed throughout vehicle, and records ALL encounters w/law enforcement, esp. Border Patrol.

Will post videos, photos, and recordings on his website: CheckpointUSA.org and other websites.

Often honks horn continuously if kept at primary longer than a few seconds.

Will attempt to incite Agents into confrontations.

This information does not convey any authority to Agents to indiscriminately wave these individuals through the checkpoint without inspection by Agents and/or K-9s. This information is provided solely to assist Agents in recognizing the uncooperative U. S. Citizens who are frequently encountered at 86C and/or on State Route 86.

March 29, 2016

3-ER-288; 389.

Mr. Bressi regularly declines to answer when agents nonetheless ask him, sometimes addressing him by name, if he is a U.S. citizen. He records each interaction at the checkpoint with cameras mounted on his truck and posts these videos online. 2-ER-210-212. A compilation of 18 selected video clips of his encounters was presented to the district court by the federal defendants. *See*

Exhibit N Videos.[1] While agents sometimes allow him to pass, other times, upon his failure to answer their citizenship question, they detain him, insisting that he answer their question and/or directing him to secondary inspection, without claiming reasonable suspicion of any immigration or criminal violation. Mr. Bressi generally does not move into secondary, because the agents have no valid basis for detaining him. At times, this leads to an impasse where the agents refuse to allow him to leave without a verbal answer to the citizenship question, and Mr. Bressi refuses to move into the secondary inspection area without a legal basis for the detention. Agents often treat him harshly, for example placing spike strips in front of his vehicle, taunting him, and detaining him at the checkpoint for no valid reason.

Arrest of Mr. Bressi

On April 10, 2017, one of these confrontations occurred when Border Patrol agent Taylor Frye refused to allow Mr. Bressi to pass through the checkpoint, even after being explicitly told the driver was Mr. Bressi. The video of the incident (Exhibit N, BRE0383_10APR2017) shows Frye summoning a deputy who was

[1] The set of 18 video clips was filed by the federal defendants as Exhibit N to the Statement of Facts Re: Federal Defendants' Motion for Summary Judgment, 2-ER-141-153. A motion for leave to file the 18 Exhibit N videos with this court is concurrently filed herewith. Each video file within the exhibit is named with its Bates number and the date; in this brief, individual videos will be identified by these file names. The parties also provided competing descriptions of each of these video clips to the district court. 2-ER-123-133.

inside the checkpoint, Ryan Roher, who briefly discussed the situation with Mr. Bressi before allowing him to pass without answering the citizenship question. Immediately after he left the checkpoint, Mr. Bressi pulled over as he saw Deputy Roher in pursuit. Deputy Roher issued him a citation for obstructing the roadway, 2-ER-60, and informed him he either had to sign the citation or be arrested and taken to jail. Mr. Bressi asked Roher to summon his supervisor (Defendant Brian Kunze), which he did, but in the meantime he placed Mr. Bressi in handcuffs, and two Border Patrol agents arrived, claiming to assist with the arrest. Eventually, Kunze arrived, Mr. Bressi signed the citation, and was released. After Mr. Bressi's lawyer conducted pre-trial discovery, the county dropped the criminal charge. *See also* 2-ER-185-204 (unofficial transcript of encounter).

Mr. Bressi then filed this lawsuit in the District of Arizona, alleging (1) the checkpoint is unconstitutional under the Fourth and Fourteenth Amendments because its primary purpose is general law enforcement; (2) Pima County had a custom, practice, or policy of participating in illegal checkpoint operations, and failed to train and supervise deputies working at the checkpoint; (3) agents and deputies retaliated against him for exercising his First Amendment rights to criticize the checkpoint and not to speak when asked a question with no valid investigatory purpose, both through general harassment and through the arrest on April 10, 2017; (4) the deputies violated his Fourth and Fourteenth Amendment

rights by arresting him without probable cause on April 10, 2017; and (5) both deputies and Border Patrol agents committed state law false imprisonment in arresting him on April 10, 2017. 4-ER-546-592.

The County filed a partial motion to dismiss, which the district court mostly denied.[2] After discovery, Mr. Bressi filed a motion for partial summary judgment on the constitutionality of the checkpoint itself, and both defendants filed cross-motions, seeking summary judgment on all claims. In a January 10, 2022 order, the district court denied Mr. Bressi's motion and granted both defendants' motions. 1-ER-3-41. This timely appeal followed.

SUMMARY OF THE ARGUMENT

The district court resolved the merits of the claims, rather than performing a summary judgment inquiry of whether the record, taken in the light most favorable to the plaintiff, could support Mr. Bressi's claims. A suspicionless checkpoint violates the Fourth Amendment unless it has a valid primary purpose distinct from general law enforcement sufficient to justify the intrusion, and this record is replete with evidence to support a conclusion that the SR-86 checkpoint's primary purpose is general law enforcement. The evidence at the very least supports a finding of coequal dual purposes of immigration and general law enforcement, and a

[2] It did dismiss one of the defendants and a portion of the First Amendment claim against the County.

checkpoint with an impermissible purpose as one of two coequal primary purposes also violates the Fourth Amendment. Even if it were primarily an immigration checkpoint, its operation is not reasonable for that purpose, because it is not reasonably located and it includes measures useful mainly for general law enforcement that do not assist with immigration enforcement.

Mr. Bressi engages in First Amendment-protected expression about the checkpoint in three ways: by filming encounters, through online critical commentary, and by engaging in intentional silence when agents attempt to force him to speak for no valid purpose. In retaliation, agents continually harass and detain him, and on April 10, 2017, a deputy, along with Border Patrol agents, arrested him. Drivers who are not known activists are not arrested or cited for comparable conduct. Moreover, there was no probable cause for the arrest, because it was obvious that Mr. Bressi was only remaining stopped in the roadway because agents, with no valid basis for detaining him, would not permit him to leave. Accordingly, in addition to being retaliatory under the First Amendment, the arrest constituted a Fourth Amendment violation and state-law false imprisonment.

ARGUMENT

In 1993, Judge Kozinski, dissenting in a case challenging a California checkpoint, found "reason to suspect the agents working these checkpoints are looking for more than illegal aliens. If this is true, it subverts the rationale of

Martinez-Fuerte [the 1976 Supreme Court case allowing an immigration checkpoint] and turns a legitimate administrative search into a massive violation of the Fourth Amendment." *United States v. Soyland,* 3 F.3d 1312, 1316 (9th Cir. 1993) (Kozinski, J., dissenting in part). In 2016, a panel of this Court credited these concerns, granting a criminal defendant discovery to probe whether these fears were founded. *United States v. Soto-Zuniga,* 837 F.3d 992, 999 (9th Cir. 2016). As *Soto-Zuniga* settled, the fruits of the ordered discovery never materialized, and this Court was not asked to consider whether a modern checkpoint had actually subverted *Martinez-Fuerte*. Mr. Bressi asserts here that the SR-86 checkpoint in Southern Arizona does just that.

The district court erred in granting summary judgment because the record presents numerous disputed issues of fact. This Court reviews a district court's order granting summary judgment de novo. *Porter v. California Dep't of Corr.*, 419 F.3d 885, 891 (9th Cir. 2005). In "reviewing a grant of summary judgment, we draw all inferences of fact in favor of the party opposing the motion." *Sankovich v. Life Ins. Co. of N. Am.*, 638 F.2d 136, 138 (9th Cir. 1981). "Furthermore, the trial court should resolve all reasonable doubts touching the existence of a genuine issue as to a material fact against the moving party." *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976).

These standards apply especially stringently when a party's intent is at issue, where the court is "very wary of allowing summary judgment." *Sankovich*, 638 F.2d at 140. The Court must be attentive to findings that "represent a choice of inferences to be drawn from the subsidiary facts contained in the affidavits, attached exhibits, and depositions submitted below," and must always choose the inference favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Defendants have not shown they are entitled to judgment as a matter of law that the checkpoint as operated is constitutional, that defendants' actions toward Mr. Bressi were legitimate rather than retaliatory, or that his arrest on April 10, 2017 was legal.

I. THE DISTRICT COURT IGNORED MULTIPLE DISPUTES OF MATERIAL FACT IN RULING THE CHECKPOINT IS CONSTITUTIONAL UNDER THE FOURTH AND FOURTEENTH AMENDMENTS (COUNT II) (all defendants).

The district court appears to have lost sight of its role at summary judgment. After reviewing relevant case law, it announced it was now "positioned to assess and decide the merits of Plaintiff's Fourth Amendment claim that the SR-86 Border Patrol checkpoint stops are constitutional." 1-ER-16. It went on to explain the purpose of the checkpoint by quoting a Border Patrol memorandum—inherently crediting defendants' assertion in the face of significant contrary evidence it ignored, such as the Border Patrol's website stating checkpoints also had the purpose of narcotics enforcement, or the fact that when it publicly reports checkpoint

enforcement statistics, the agency reports narcotics seizures, not immigration arrests. 1-ER-18. It later confirmed it was "assessing the purpose of the checkpoints." 1-ER-21. Elsewhere, it construed facts against the plaintiff, sometimes while claiming to do the opposite. *E.g.,* 1-ER-21. The court concluded aspects of the checkpoint the plaintiff identified as reflecting a general law enforcement purpose "reflect nothing more than the dual role played by Border Patrol . . . that police officers have the ability to act appropriately upon information that they properly learn during a stop which is justified by a lawful primary purpose." 1-ER-22. The district court said nothing about whether the evidence could support the plaintiff's claims if it were all construed in his favor—only that this district judge thought on balance it did not. That was error.

The Fourth Amendment prohibits "unreasonable searches and seizures," and reasonableness generally requires individualized suspicion to permit a seizure. Traffic checkpoints effect a seizure of all vehicles without individualized suspicion[3] and have been tightly limited in a series of Supreme Court cases establishing that "exceptions to the general rule of individualized suspicion" are limited to checkpoints that serve particular compelling government needs where the intrusion

[3] *See, e.g., United States v. Martinez-Fuerte,* 428 U.S. 543, 556 (1976) ("It is agreed that checkpoint stops are 'seizures' within the meaning of the Fourth Amendment."); *Michigan Dept. of State Police v. Sitz,* 496 U.S. 444, 450 (1990) ("Petitioners concede, correctly in our view, that a Fourth Amendment 'seizure' occurs when a vehicle is stopped at a checkpoint.").

is minimal and the scope is targeted to advance the permissible purpose. *City of Indianapolis v. Edmond,* 531 U.S. 32, 43 (2000)). The Court allowed early, limited immigration checkpoints (*United States v. Martinez-Fuerte,* 428 U.S. 543 (1976)), stops for license and registration checks (*Delaware v. Prouse,* 440 U.S.648 (1979)), sobriety checkpoints (*Michigan Dept. of State Police v. Sitz,* 495 U.S. 444 (1990)), and a checkpoint for police to enlist the public's help in solving a nearby hit-and-run (*Illinois v. Lidster,* 540 U.S. 419 (2004). It roundly rejected a narcotics checkpoint "whose primary purpose was to detect evidence of ordinary criminal wrongdoing" (*Edmond,* 531 U.S. at 41).

This Court uses "a two-step analysis applicable to Fourth Amendment checkpoint cases." *United States v. Fraire,* 575 F.3d 929, 932 (2009). The first step is to determine whether "the primary purpose of the checkpoint was to advance the general interest in crime control." *Id.* (cleaned up). If so, the checkpoint is impermissible, and the inquiry ends. If it does not have an impermissible primary purpose, "then the court must judge the checkpoint's reasonableness, hence, its constitutionality, on the basis of the individual circumstances." *Id.* (cleaned up).

A. Taken in the light most favorable to the plaintiff, the evidence permits an inference that the SR-86 checkpoint's primary purpose is general law enforcement, including narcotics.

As this Court recognized in *Soto-Zuniga,* 837 F.3d at 1002, the primary purpose of the very checkpoint upheld in *Martinez-Fuerte,* given the passage of 40

years, was "a question subject to discovery under Rule 16"—to be decided based on present evidence, not prior decisions, and not resolved by the government's assertions about purpose alone. Evidence in this record that the checkpoint's primary purpose is general law enforcement includes:

- The Border Patrol's website explicitly advertises two purposes for its checkpoints, one of which is "to detect illegal narcotics." 3-ER-370-71.
- In the Border Patrol's published enforcement data, the section on checkpoints reports nothing about immigration enforcement; its only discussion of checkpoints is data on drug seizures at checkpoints. 3-ER-383-386.
- Pursuant to a Memorandum of Understanding with the Drug Enforcement Agency (DEA), all border patrol agents are specifically empowered to enforce federal criminal laws relating to narcotics. 3-ER-389; 5-ER-687-709.
- The Border Patrol's internal reporting on the success of its own checkpoints includes drug seizures measured in pounds for all three checkpoints in the Tucson sector. 5-ER-788.
- On its encroachment permits submitted to the Arizona Department of Transportation, the Border Patrol represented that the SR-86 checkpoint would be "used to deter human and narcotics smuggling activities," and that

it included installation of "an LPR camera system," i.e., license plate readers (discussed further below). 3-ER-372-73.

- The Border Patrol's training materials direct agents to "identify the primary purpose of checkpoint operations" as including detection and deterrence of five things, including "drugs and contraband" and "border crime." 5ER-779.
- Agents working at checkpoints are trained to look not only for immigration violations, but for federal criminal activity of any kind; they explicitly tie this direction to "Title 21 authority" (authority to enforce drug laws). 5-ER-756; 779.
- Arrest statistics for the SR-86 checkpoint reveal that narcotics-related events are at least as common, if not more common, than immigration-related ones. 3-ER-379-82.
- Pima County for years participated in a federal grant program, Operation Stonegarden, during which sheriff's deputies worked overtime shifts on assignments designated by the Border Patrol at federal expense. 3-ER-222-251. The Border Patrol at times assigned deputies, who have no authority to enforce immigration laws, to work at the checkpoint, as reflected in at least 44 incident reports filed by deputies who had been so assigned. 3-ER-289-

369.[4] Deputy Roher confirmed he personally had done this on multiple occasions. 3-ER-252; 255-256.

- On multiple occasions, agents detained individuals passing through the checkpoint when they had no immigration or federal criminal concerns because deputies asked them to do so to permit general law enforcement activities. 3-ER-322, 3-ER-327, 3-ER-334, 3-ER-344, 3-ER-355, 3-ER-367, 3-ER-368, 3-ER-300, 3-ER-310.
- The checkpoint includes or has included enforcement tools and capabilities irrelevant to immigration enforcement, but useful for general law enforcement. These include license plate readers, both owned and operated by the Border Patrol, 4-ER-435, and owned and operated by the DEA. 4-ER 425-426; 3-ER-388. They also include access to databases containing criminal history information, without specific rules or criteria governing how that information may be used specifically at checkpoints. 4-ER-468-69, 4-ER-474, 4-ER-476. Neither of these tools is used for intercepting undocumented people at the checkpoint. 4-ER-427, 4-ER-436, 4-ER-475-476.

[4] The compilation of reports in the record also includes two that do not reflect checkpoint activities (3-ER-299 and 3-ER-304), as well as one incident for which there are two separate types of report included 3-(ER-296 and 3-ER-318).

- Checkpoint agents use dogs trained to detect both concealed humans and narcotics, deployed before a car even reaches primary inspection, 4-ER-438-439 (where it would be impossible to know if any "human" odor pertained to a concealed vs. visible, human but quite possible to identify illegal narcotics). The Border Patrol was unable to identify how many times, if ever, dogs had led to the discovery of concealed humans at the checkpoint. 4-ER-435.

While any of these items individually might seem insufficient, and some could support multiple inferences, taken together in the light most favorable to the plaintiff, they could easily convince a reasonable factfinder that the checkpoint's primary purpose is general law enforcement, including narcotics enforcement. While Border Patrol documents and testimony facially state the primary purpose is immigration enforcement, the agency making those statements is seeking to defend its own actions. The objective evidence is sufficient to raise a genuine question of material fact about the true primary purpose.

B. Even if the general law enforcement purpose does not predominate over the immigration purpose, the evidence supports the conclusion that it is a coequal motivating purpose, and therefore impermissible.

The above evidence indisputably shows that even if it does not predominate over immigration, general law enforcement, including narcotics, is an equally important goal of the SR-86 checkpoint, as evidenced by the manner in which the

checkpoint is operated, the data about what it actually accomplishes, and in the way the agency talks about its checkpoint activities internally (in memos and trainings) and externally (on its website and in its published enforcement data). The evidence depicts a checkpoint for which the agency repeatedly emphasizes the general law enforcement purpose alongside or over immigration. Although the Court need not reach this question, as a matter of first impression, the checkpoint is impermissible and violates the Fourth Amendment if it has dual coequal motivating purposes, one of which is an impermissible general law enforcement purpose. The district court failed to address this question, ruling only that a clearly *secondary* purpose of general law enforcement was likely acceptable.[5] That ruling is incorrect and also fails to address the assertion here that the two purposes are, at a minimum, coequal. This Court should rule that a checkpoint is impermissible if it has dual coequal motivating purposes, one of which is general law enforcement.

Purpose—or motivation—is often not a simple question with a single answer. The *Edmond* Court explained, in insisting a purpose inquiry be conducted in checkpoint cases, that "courts routinely engage in [a purpose inquiry] in many

[5] The district court cited *U.S. v. Moreno-Vargas,* 315 F.3d 489 (5th Cir. 2002) to support its conclusion that a secondary purpose of narcotics enforcement did not run afoul of *Edmond.* 1-ER-19. But in that case, the motorist (a criminal defendant) did not dispute that immigration enforcement was the primary purpose; the court was deciding only whether a concededly secondary purpose could defeat the constitutionality of the checkpoint.

areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful." 531 U.S. at 46-47; *see also City of Arlington Heights v. Metropolitan Housing Development Corp,* 429 U.S. 252, 265 (1977) ("Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."). Given *Edmond*'s invocation of other constitutional settings, the purpose analysis used in other types of claims is instructive. For instance, in assessing First Amendment employment retaliation claims, this Court asks "whether the plaintiff's protected speech was a *substantial or motivating factor* in the adverse employment action." *Ellins v. City of Sierra Madre,* 710 F.3d 1049, 1056 (9th Cir. 2013) (emphasis added). The same "motivating factor" analysis is used in claims of racially discriminatory action. *See, e.g., Arlington Heights,* 429 U.S. at 265-66. The reason this "mixed motives" test has been so widely adopted is that requiring the impermissible motivation to stand alone would permit agencies to get away with a wide swath of otherwise impermissible behavior if it also included a valid purpose. The *Edmond* Court recognized exactly this problem, explaining that without a true purpose analysis, officials could "establish checkpoints for virtually any purpose so long as they also included a license or sobriety check." 531 U.S. at 36.

Accordingly, this Court should recognize that even a checkpoint with a valid purpose violates the Fourth Amendment if an invalid purpose is an equally important motivation. The evidence cited above, viewed in the light most favorable to the plaintiff, is more than sufficient to raise a genuine fact issue about whether general law enforcement is an important motivating purpose of the SR-86 checkpoint alongside immigration.

To be sure, the Supreme Court has recognized officers may act upon information learned incidentally while pursuing a permissible purpose. *See Edmond,* 531 U.S. at 457. But that does not permit a dual-purpose checkpoint, for two reasons. First, it assumes the checkpoint is operated *primarily* for a valid purpose to begin with, and the claim here is that it is being operated just as much for an impermissible purpose. Second, no matter what the primary purpose(s), a critical difference exists between taking advantage of information that happens to become available while pursuing a lawful goal, and operating the checkpoint intentionally to generate and act upon that information. To approve a checkpoint intentionally operated to enforce general criminal laws merely because one core purpose is immigration enforcement would quickly lead this limited exception to the individualized suspicion requirement to swallow the rule. Police would have *carte blanche* to run veritable dragnets for criminal activity of any sort any time they operated, for instance, a sobriety checkpoint—exactly the situation the

Edmond Court warned against. What is the difference, really, between a "sobriety checkpoint" where officers also run warrants checks and run a drug-sniffing dog around each car, and the unconstitutional checkpoint in *Edmond*? The Court must look at what the government is actually trying to accomplish, and limit them to lawful conduct.

C. Even if the primary purpose were immigration enforcement, the SR-86 checkpoint's operation would not be reasonable in light of that purpose.

If this Court determines the evidence, taken in the light most favorable to the plaintiff, is insufficient to raise a genuine fact issue about the primary purpose of the checkpoint, it must determine whether the evidence raises such an issue about the reasonableness of the checkpoint as operated. *Fraire,* 575 F.3d at 932. In approving a particular immigration checkpoint in *Martinez-Fuerte,* the Supreme Court explained, "[t]he principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop." 428 U.S. at 566-67. The checkpoint here exceeds the permissible scope for two distinct reasons.

First, in *Edmond,* the Court explicitly left open the question of whether, assuming a permissible purpose, agents could take additional investigatory steps unrelated to that permissible purpose to advance other, less central purposes. 531 U.S. at 47 n.2. If this Court reaches this question, it should hold that they may not. Although related to the mixed-motives question discussed *supra,* this is a distinct

question, in that it asks, assuming the primary purpose (whether sole or dual) is valid, if the agency may then expand the scope of the stop and undertake investigatory actions not related to the valid purpose to further a purpose for which they could not legally operate a checkpoint.

In *Edmond,* while formally leaving the question undecided, the Court correctly recognized that unwarranted investigatory actions did not become permissible by virtue of the presence of a permissible purpose. 531 U.S. at 46. It further recognized the ability of officers to act on "information that they *properly* learn during a checkpoint stop justified by a lawful primary purpose," *id.* at 48 (emphasis added), confirming that officers could also learn information during a checkpoint stop in ways that are improper, even if the stop itself is for a valid primary purpose. Indeed, for the limits recognized in *Edmond* and other cases to have any meaning, officers' suspicionless investigatory actions must be restricted to those serving the permissible purpose. Otherwise, officers operating a legitimate immigration or sobriety checkpoint could do anything they wanted to discover criminal activity, once they had the vehicles validly stopped. Allowing investigatory steps to be taken without suspicion based only on the presence of a permissible primary purpose would turn any valid checkpoint into a Fourth Amendment-free zone. Rather, this Court should recognize that while agents may pursue information they happen across while pursuing a permissible primary

purpose, such as illegal drugs in plain view, they may not take investigatory steps unrelated to the permissible purpose in the absence of reasonable suspicion or probable cause. If they could not conduct the stops based on a purpose, they cannot subject drivers to suspicionless investigations for that purpose.

The evidence here indisputably shows that agents take steps at the checkpoint that cannot be justified by an immigration enforcement purpose. These actions include stationing local law enforcement personnel at the checkpoint and detaining drivers for their benefit, 3-ER-322, 3-ER-327, 3-ER-334, 3-ER-344, 3-ER-355, 3-ER-367, 3-ER-368, 3-ER-300, 3-ER-310; actively looking for violations of federal criminal laws rather than only for immigration violations, 5-ER-724; 683; continuing to detain and question motorists whose citizenship is already known in the absence of any evidence of criminal activity, Exhibit N; using dogs who, while capable of detecting concealed humans, are used to detect narcotics, 4-ER-428-429; and installing license plate readers used to gather information for unrelated investigations.[6] 4-ER-435-436.

[6] While neither dogs nor license plate readers themselves violate the Fourth Amendment, neither can be effectively used on unrestricted traffic. Thus, in using them, agents are exploiting the checkpoint for purposes outside of their permissible primary purpose. If the mere fact that the techniques are on their own essentially constitutional meant they could be deployed freely at unrelated checkpoints, then there would be nothing to stop agents from forcing traffic to slow and stop so they could run a dog around and write down the license plate number of each passing car, anywhere, any time.

Second, even if adding steps unrelated to the primary purpose were not *per se* impermissible, the evidence viewed in the light most favorable to the plaintiff shows a genuine issue of fact as to whether the SR-86 checkpoint as operated is reasonable as an immigration checkpoint, as the concept was understood in *Martinez-Fuerte.* This Court at summary judgment does not assess the reasonableness; it inquires whether the evidence, with all inferences drawn in the plaintiff's favor, could support a determination that the checkpoint is not reasonable.

The *Martinez-Fuerte* Court relied on a long list of attributes of the checkpoint at issue there in finding it reasonable. The evidence shows many of those features are lacking here, rendering the SR-86 checkpoint unreasonable.

The "reasonable" checkpoints in *Martinez-Fuerte*:

- Were placed according to the Border Patrol's explicit criteria. 428 U.S. at 563 n.15 ("The location meets the criteria prescribed by the Border Patrol to assure effectiveness . . ."). Those criteria included being "close to the confluence of two or more significant roads leading away from the border." 428 U.S. at 552. The Border Patrol still uses those criteria. 5-ER-656. The SR-86 checkpoint is not close to the confluence of any two roads, let alone two significant roads leading away from the border, nor is it itself situated

on a road leading away from the border, and the only north-south roads that intersect it all have their own checkpoints.

- Had an "absolute number of apprehensions at the checkpoint" that was "high . . . confirming Border Patrol judgment that significant numbers of illegal aliens regularly use Interstate 5 at this point." 428 U.S. at 563 n.15. That road, Interstate 5, is the primary route from the border up through southern California. Here, in contrast, the numbers provided by the Border Patrol indicate that in 2017, they arrested just 8 people at the SR-86 checkpoint for immigration violations; the highest number in the years provided was 117 immigration arrests for an entire year (about one every three days), on just 35 distinct occasions (only about three times each month). 3-ER-379-382. Construed in the light most favorable to the plaintiff, these statistics show that SR-86 is *not* heavily used by undocumented people seeking to enter the country without detection.[7] Indeed, the agency explicitly recognizes the traffic on SR-86 is mostly "employees returning from work in Sells, Arizona or the Kitt Peak Observatory." 5-ER-785.

[7] Defendants, and the district court, suggest this is evidence not that the checkpoint is unnecessary, but that it is working as a deterrent. That is a possible inference, but the inference that it is unnecessary is also reasonable, and in this posture, the court must accept the inference favorable to the plaintiff.

- "Motorists whom officers recognize as local inhabitants, however, are waved through the checkpoint *without inquiry*." 428 U.S. at 550 (emphasis added). Although agents do sometimes allow Mr. Bressi to pass through the checkpoint, the Border Patrol's policy is *not* to exempt any vehicle, including those recognized as local inhabitants, from inspection at the SR-86 checkpoint. 4-ER-482. Indeed, on a number of occasions, agents have initiated an immigration inspection on Mr. Bressi, and even after recognizing him and sometimes even addressing him by name, continued to detain him. Particularly striking examples include the following Exhibit N videos: BRE0020_20DEC2008; BRE0097_14AUG2010; BRE0164_25SEP2011; BRE0222_29MAR2013; BRE0263_30APR2014; BRE0330_26MAR2016; BRE0399_14JUL2017; BRE3995_01AUG2018. Even when they do not address him by name, the evidence taken in the light most favorable to the plaintiff shows Mr. Bressi's identity was common knowledge among agents at that checkpoint, as, for instance, they had hung a poster with his photo and identifying details, along with the designation "Extremely Uncooperative Motorist" and "U.S. Citizen" inside the checkpoint. 3-ER-288.

Finally, the Border Patrol's attitude toward its checkpoint indicates a disregard for the privacy rights that must be observed at an interior checkpoint.

The government is permitted significantly greater intrusiveness at the actual border, and also at locations that are considered the "functional equivalent of the border," such as airports. *Almeida-Sanchez v. United States,* 413 U.S. 266, 272-73 (1973). Although the defendants have not, in this litigation, taken the position that they have this expanded border-search authority at the SR-86 checkpoint (and indeed could not), the Border Patrol does believe that it has such authority at this checkpoint. The agency's 30(b)(6) designee's testimony included the following exchange:

> Q: . . . My question to you is, does the United States Border Patrol consider the Highway 86 checkpoint a functional equivalent of the border?
>
> A: At this location, yes, sir, due to the traffic flow from the Tohono O'odham Nation. And it's within 100 miles of the border.

4-ER-422-423. This same witness was unable to explain why this checkpoint was located at this site. 4-ER-412-414. One reasonable inference from this evidence is that the Border Patrol is not attempting to confine itself to activities permissible at an interior checkpoint, which renders its operation of the SR-86 checkpoint unreasonable. At this stage, the Court is required to credit this inference favorable to the plaintiff.

II. THE RECORD SUPPORTS THE CONCLUSION THAT PIMA COUNTY IS LIABLE FOR THE FOURTH AMENDMENT VIOLATIONS AT THE SR-86 CHECKPOINT (COUNTS IV, V, and VI) (county defendants only).

Pima County has not claimed it has no responsibility for law enforcement activities conducted at the SR-86 checkpoint. Rather, it presented a four-sentence argument with no citation to any facts or record materials:

> "The Border Patrol is conducting a lawful immigration checkpoint. The Border Patrol focuses on citizenship and related information. The checkpoint is on a State Highway, and Pima County Deputies can ensure roadway safety and enforce State law if necessary. This is neither complicated nor unreasonable."

The first two sentences are refuted by the evidence presented above about the purpose and reasonableness of the checkpoint, which is more than sufficient to raise a fact question precluding summary judgment. As to the remaining allegations, plaintiff does not dispute these things, but they are not the actions he has alleged are unlawful. Rather, in addition to enforcing state laws and ensuring safety along SR-86, which they likely have done and can legally do, deputies were stationed directly at the SR-86 checkpoint pursuant to an agreement between Pima County and the Border Patrol, where they conducted general law enforcement activities. The evidence strongly supports these allegations: Mr. Bressi has presented 44 incident reports authored by deputies who were stationed at the SR-86 checkpoint, 3-ER-289-369, along with the interview of Deputy Roher, who confirmed he was often specifically stationed there 3-ER-255. Roher stated, "I'll

go – I, I go out to the particular checkpoint in question a lot . . . there would be a lot of Stone Gardens that I would actually go there. At one point, we were actually assigned to that checkpoint for the day." 4-ER-255. When asked, "so sometimes you're, you're asked to do patrol duties on the highway, and I guess on other occasions you're asked to position yourself at the checkpoint?" he agreed. 3-ER-258. He also explained that when stationed at a checkpoint, they might act on information Border Patrol agents came across that was something that "they don't handle," like a small amount of marijuana. 3-ER-259.

The 44 deputies' reports consistently indicate specifically being stationed at the checkpoint (rather than the vicinity of SR-86 generally), and running not only equipment and license checks, but warrants checks on both drivers and passengers, as well as assorted other investigation of criminal activity not within the purview of the Border Patrol. Highlights include:

- I was working a Stonegarden assignment at the Border Patrol checkpoint located at Arizona 86 Milepost #145 . . .. When the vehicle reached the checkpoint, came to a stop, and the driver spoke with the United States Border Patrol agents, I advised them to have the vehicle pull into secondary . . . . A warrants check on Mr. [redacted] returned as having a warrant out of Tucson Police Department (TPD) for Failure to Appear on an original charge of Theft. At that time, I placed Mr. [redacted] in handcuffs behind his back . . .. I then transported Mr. [redacted] to the Pima County Adult Detention Center where he was booked in . . .." 3-ER-327-328.

- I was participating in Operation Stone Garden at this time and was assigned to work at the checkpoint. At approximately 1440 hours I observed a silver in color Dodge Durango pull into the checkpoint travelling eastbound. I observed that a lug nut was missing on one of the wheels. At that point

Border Patrol Agent Speriando . . . who is a K-9 Unit with her canine partner, Henry, advised that she wanted the vehicle to be pulled into the secondary search area. Agent Speriando conducted her investigation and ultimately advised that she had located a grinder consistent with utilization for marijuana along with a pipe, a second pipe and a small glass jar with a very small amount of what appeared to be marijuana residue . . .. Mr. [redacted] indicated that he had a medical marijuana card . . .. Communications advised that the medical marijuana card had, in fact, expired. . .. Based on the fact that his medical marijuana card was expired, I advised Mr. [redacted] that I was going to be citing him for possession of drug paraphernalia, as no usable amount of marijuana was found in the vehicle . . .. 3-ER-346.

- "Border Patrol Agents directed a black Chevy Suburban into a secondary search area after a canine alert was received . . .. After Agent Lopez advised his search was complete, he advised there was some indications of some potential personal use in the vehicle. He later located rolling papers; however, no associated drugs were actually found. . . . It was determined Mr. [redacted] [the passenger] had a warrant for his arrest out of the Tucson Police Department (TPD) . . .. I placed Mr. [redacted] into handcuffs, double-locking them . . .. Mr. [redacted] was placed into the rear of my patrol vehicle and ultimately transported to the Pima County Adult Detention Center . . .." 3-ER-353-354.

- "At approximately 1800 hours, on 3/20/14 . . . I was assigned to the Border Patrol checkpoint at Arizona State highway #86, Milepost #146. I was advised by Agent Stubbs . . . that his K-9 partner . . . had alerted on a vehicle . . . for the presence of narcotics. . . Upon a wants and warrants check on the other individuals [passengers], there was an outstanding warrant for [redacted] out of the Pima County Sheriff's Department . . . as well as a warrant out of Maricopa County Sheriff's Department . . .. After discovering the outstanding warrants for [redacted], I then approached her and advised her to place her hands behind her back . . .. I then transported Ms. [redacted] to the Pima County Adult Detention Center and booked her in on the above-stated warrants . . .. 3-ER-359-360.

- "[Border Patrol agents] advised me that the occupants in the vehicle possibly had drugs. Border Patrol Agent Haley *T293 was a canine unit . . . and his dog had alerted to the vehicle. Apparently, one of the occupants . . . indicated he had smoked marijuana. Agent Haley indicated that the dog

> would still alert to the vehicle even if an occupant had smoked marijuana . . . . I was advised that several plastic baggies had been located in Ms. [redacted] possession. The baggies were consistent with being used for illegal drugs, although all the baggies that I observed were clear and unused . . .. I learned from Border Patrol agents that they had run a check on Mr. [redacted] as well as Mr. [redacted] and determined there were warrants for their arrest . . .. After the warrants were confirmed, the subjects were placed in handcuffs." 3-ER-296-297.

- "I was facing eastbound on the west side of the checkpoint when I ran the license plate of a black GMC Sierra truck . . . The registration returned as current. At that time, I also ran the registered owner of the vehicle, [redacted]. I received a return that Mr. [redacted] had an active warrant out of the Pima County Sheriff's Department. The original charge was a marijuana violation. The vehicle pulled up and was interviewed briefly by Border Patrol agents at the checkpoint . . .. The vehicle was then told it could proceed. At that time, I pulled up to the Border Patrol agent and asked him to look at my Mobile Data Computer (MDC) and asked if that was the driver of the vehicle. He confirmed it was; therefore, I pulled a traffic stop on the vehicle, just east of the Border Patrol checkpoint." 3-ER-307-308.

These examples, along with the full collection of reports and Deputy Roher's testimony, at a minimum raise a fact issue as to whether deputies were conducting unlawful general law enforcement activities at the checkpoint, rather than conducting routine traffic enforcement operations along SR-86. The reports show drivers time and again coming through the checkpoint and being investigated, with zero indication of concern about immigration status. That is precisely what the Fourth Amendment forbids.

Regarding liability for this violation under *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978), the County has not denied its deputies' activities at the checkpoint were part of a policy or custom, asserting instead

simply that there was no constitutional violation. It is the moving party's burden to show an absence of genuine factual dispute, and the country defendants have made no attempt to do that.

A *Monell* claim requires a custom, practice or policy, attributable to the municipal defendant, that causes a constitutional deprivation. *Canton v. Harris,* 489 U.S. 378, 386-92 (1989). As the 44 reports discussed above demonstrate, their participation in the unlawful general law enforcement checkpoint was part of the County's customs and policies, as it was part of the formal Operation Stonegarden program that required the Border Patrol to assign the deputies. Even if it were not the County's formal policy to station its deputies there to conduct general law enforcement activities, taken in the light most favorable to the plaintiff, the reports spanning approximately five years show that the practice was regular, documented, and known to the sheriff's department leadership. Moreover, it is eminently reasonable to infer that the checkpoint activities of the deputies, who lack immigration enforcement authority, were an important cause of the asserted constitutional deprivation. The County similarly moved for summary judgment on the failure to supervise and failure to train claims based solely on the purported lack of constitutional violation. But the County's training on Operation Stonegarden failed to include any discussion of appropriate limitations on checkpoint activities, 3-ER-260-287, and the fact that the activities were repeatedly

documented in departmental reports supports the conclusion that the departmental leadership was fully aware of the unconstitutional practice and did nothing to stop it. This evidence—which is unrefuted—is more than sufficient to establish failure to supervise and failure to train.

III. THE RECORD RAISES MULTIPLE FACT QUESTIONS REGARDING AGENTS' AND DEPUTIES' RETALIATION AGAINST MR. BRESSI FOR HIS POLITICAL EXPRESSION AT AND ABOUT THE CHECKPOINT (COUNT I) (federal defendants for declaratory/injunctive relief; defendants Roher and Kunze for damages).

Count I of the Amended Complaint asserts violation of Mr. Bressi's First Amendment rights, in that the defendants have engaged—and continue to engage—in official acts of retaliation against him for his filming, his anti-checkpoint public speech, and his exercise of his protected right *not* to speak at the checkpoint itself, and this retaliation has chilled his First Amendment rights. The claim has both a damages component stemming from the arrest on April 10, 2017 (against defendants Roher and Kunze), and a declaratory/injunctive component concerning ongoing retaliation (against the federal defendants).

By protesting the SR-86 checkpoint, Mr. Bressi engages in political speech, for which First Amendment protection is "at its zenith." *Buckley v. Am. Const. Law Found.,* 525 U.S. 182, 186-87 (1999). A First Amendment retaliation claim requires that the plaintiff was "engaged in a constitutionally protected activity," that the "defendant's actions would chill a person of ordinary firmness from

continuing to engage in the protected activity," and that "the protected activity was a substantial or motivating factor in the defendant's conduct." *Bello-Reyes v. Gaynor,* 985 F.3d 696, 700 (9th Cir. 2021). In a damages claim for a retaliatory arrest, the court must find a lack of probable cause for the arrest before proceeding to the motivation question, or find that "officers have probable cause to make arrests, but typically exercise their discretion not to do so," and there is "objective evidence that [the plaintiff] was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves v. Bartlett,* 139 S. Ct. 1715, 1727 (2019). Here, the alleged retaliatory acts include both an arrest and other acts of ongoing official retaliation.

The district court never squarely determined whether Mr. Bressi had engaged in protected acts—the necessary first step—and never fully addressed the claim for declaratory and injunctive relief for ongoing retaliation.[8] Rather, it stated that in its view, Deputy Roher had probable cause to arrest Mr. Bressi on April 10, then made the conclusory assertion that "Plaintiff's claim that under the First Amendment he had a right to not answer the citizenship question fails for another

[8] The district court did include a footnote stating it "rejects Plaintiff's retaliation claim because one or two instances out of approximately 555 encounters do not establish a constitutional violation which requires injunctive relief," citing the federal defendants' brief. 1-ER-34. To the extent this constituted a ruling, it was not based on an interpretation of the facts most favorable to the plaintiff because, as detailed below, there were significantly more than one or two incidents that could be understood as acts of retaliation.

reason. This is simply not a free speech case." 1-ER-24-25. This refusal to consider whether the defendants have shown the absence of a genuine issue for trial on the asserted constitutional claim was error. The determination of probable cause was also error, as addressed below.

A. Protected Speech and Expression

It is indisputable that Mr. Bressi is openly critical of the checkpoint and films his encounters, posting them on the internet, and that deputies and Border Patrol agents were aware of this. 2-ER-162, 4-ER-419, 2-ER-50-52. Mr. Bressi has a "First Amendment right to film matters of public interest," *Fordyce v. City of Seattle,* 55 F.3d 436, 439 (9th Cir. 1995), including monitoring "government officials engaged in their duties in a public place, including police officers performing their responsibilities." *Glik v. Cunniffe,* 655 F.3d 78, 82-83 (1st Cir. 2011). Indeed, "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill,* 482 U.S. 451, 462-63 (1987). The defendants have not acknowledged, and the district court did not address, Mr. Bressi's known anti-checkpoint public expression beyond his actions at the checkpoint itself, including his online speech and posting of videos. 2-ER-159-162, 164. There is ample evidence in the record of Mr. Bressi's explicit political speech.

Mr. Bressi also regularly engages in protected expressive activity by his silence at the checkpoints.[9] There is no dispute that Mr. Bressi regularly engages in intentional silence when asked the citizenship question. *See, e.g.,* 2-ER-163. The First Amendment unquestionably includes "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard,* 430 U.S. 705, 714 (1977). Moreover, individuals may not be punished for refusing to answer questions, such as providing their name, when there is no independent basis for seizing or detaining them. *See, e.g., Brown v. Texas,* 443 U.S. 47, 49 (1979). This Court has explicitly recognized that refusal to answer an officer's question cannot contribute to probable cause. *Graves v. City of Coeur D'Alene,* 339 F.3d 828 (9th Cir. 2003) (individual's refusal to give an officer his name could not contribute to probable cause for his arrest).

This Court need not resolve the potentially thorny question of the precise constitutional contours of individuals' rights to silence in the context of bona fide

[9] The district court never decided whether those acts of intentional silence constitute protected expression, because it wrongly conflated the question of whether Mr. Bressi had a right to refuse to go to secondary with the question of whether he has a First Amendment right to engage in pointed silence when asked an insincere, inappropriate question at an unlawful checkpoint. 1-ER-25. This Court must first determine if Mr. Bressi's undisputed refusal to speak an answer is protected First Amendment activity. If so, it must ask if there is a genuine fact question about whether the agents' treatment of Mr. Bressi was done in retaliation for this protected activity.

investigation,[10] because the agents are generally not sincerely trying to determine Mr. Bressi's citizenship; they already know he is a United States citizen. Thus, their citizenship question is not an investigatory measure, but an attempt to force a person to make statements—statements he has a political objection to making—for their own sake. It is not the information they are seeking; it is the actual act of speaking.

The record strongly supports this conclusion. The videos show repeated occasions on which agents explicitly recognize and identify Mr. Bressi, but continue to seek to force him to state his citizenship aloud. *See* Exhibit N: BRE0020_20DEC2008; BRE0097_14AUG2010; BRE0164_25SEP2011; BRE0222_29MAR2013; BRE0263_30APR2014; BRE0330_26MAR2016; BRE0399_14JUL2017; BRE3995_01AUG2018. The Border Patrol's poster from inside its checkpoint also explicitly states Mr. Bressi is a U.S. citizen. 3-ER-288, 2-ER-45. And the agency admitted they have "known Mr. Bressi for multiple years traveling through the . . . 86 checkpoint." 4-ER-419. Whatever the law requires in terms of response to actual investigative questioning, it clearly does not require an individual to state already known facts upon agents' demand.

[10] Citizens have no obligation to speak to police officers as a general matter, need not consent to any sort of search per the Fourth Amendment, and of course, when they are being detained, the Fifth Amendment is implicated. Parsing exactly when along the way the protections switch among Amendments is not a necessary exercise here.

Mr. Bressi's objection to the checkpoint is inherently political. Thus, forcing him to speak at all in this context for no valid law enforcement purpose is a quintessential instance of compelled speech prohibited by the First Amendment. To the extent the analysis depends on the sincerity of agents' questioning, that is a factual issue, and the record provides more than enough evidence for that to go to trial.

B. General ongoing retaliation (federal defendants only)

To demonstrate a First Amendment violation, a plaintiff must show the "official's acts would chill or silence a person of ordinary firmness from future First Amendment activities." *Mendocino Environmental Center v. Mendocino County,* 192 F.3d 1283, 1300 (9th Cir. 1999). A plaintiff need not be actually deterred, as "it would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity." *Id.*

Videos of Mr. Bressi's checkpoint encounters between 2008 and 2019 confirm that agents repeatedly treat him with unwarranted harshness. For example, multiple times, agents placed a spike strip in front of Mr. Bressi's vehicle after identifying him—even though in recognizing him, they are also recognizing that he is a U.S. citizen. Exhibit N, BRE0097_14AUG2010; BRE0263_30APR2014; BRE0330_26MAR2016; BRE0399_14JUL2017. Following an encounter on April

30, 2014, one of the agents incredibly attempted to pursue assault charges against Mr. Bressi, claiming the honking of the factory-issue horn on his truck damaged his hearing. 5-ER-618-624. As detailed above, agents have many times detained Mr. Bressi in the checkpoint, having already established his citizenship and identity, without suspicion of commission of any federal crime, sometimes for considerable periods of time. The question for the factfinder is whether these actions would chill a person of ordinary firmness from exercising his rights—for instance, by just giving up and speaking aloud his citizenship, or ceasing to post videos and commentary online, just to avoid the hassle. The defendants have done nothing to show absence of a genuine issue about that.

A plaintiff must then show that the retaliatory motive was a substantial motivating factor in the agents' actions. *Bello-Reyes*, 985 F.3d at 700. The district court made its own merits judgment, unsupported by any reference to evidence, that the agents' reason for detaining Mr. Bressi was that "he was asked to and refused to pull over and stop in the secondary area." 1-ER-36. The district court was instead obligated to determine whether, construing all the facts in Mr. Bressi's favor, a factfinder *could* conclude that a substantial motivating reason for the detentions—and other actions such as antagonizing comments and the use of spike strips—was retaliatory. The evidence of retaliatory motive here, ignored by the district court, is strong.

Perhaps the most damning evidence is the "EXTREMELY UNCOOPERATIVE MOTORIST" poster that hung inside the checkpoint for at least a year with Mr. Bressi's photo, name, and citizenship. 3-ER-288. Similar information was presented on a slide used in an agents' meeting, which emphasized Mr. Bressi's practice of videotaping the agents. 2-ER-45. Agents' internal e-mails also document their incredible plan to have Mr. Bressi criminally charged with assault for blowing the horn on his truck. 5-ER-618-625. This evidence can support a conclusion that the agents' actions are retaliatory.

Moreover, the record shows no evidence of any other reason for refusing to let him go. There is no evidence they suspected him of any immigration violation or federal crime; why else force him to remain there, if not to punish him for refusing to speak? The district court bent over backwards to give Border Patrol agents the benefit of the doubt, explaining "reasonable suspicion existed to refer the Plaintiff to the secondary area for blocking traffic by obstructing the roadway in the primary area." 1-ER-27. There was no evidence that was ever the reason agents detained Mr. Bressi, and indeed, they could not have; agents detain motorists only on reasonable suspicion of a *federal* crime—laws the agents have authority to enforce. 5-ER-724. Traffic laws are beyond their purview. What's more, at no point has there ever been a claim that he was unlawfully blocking the

roadway in the primary lane *before* any request or order to move to secondary was given; it thus cannot serve as the basis for those requests or orders to begin with.

Videos of the encounters also contain evidence of the agents' motives. Agents have repeatedly referred to Mr. Bressi's videos and vocally objected to his perfectly legal filming. In one video (Exhibit N, BRE0007_03MAR2008), an agent chastises Mr. Bressi for filming him. In another (Exhibit N, BRE0016_26NOV2008), agents repeatedly demand that Mr. Bressi state his citizenship, telling him at one point, "You can put this on YouTube, I know who you are." Even after this admission, they continue to detain him based on his refusal to answer. In another incident (Exhibit N, BRE0020_20DEC2008), an agent tells him, "I know who you are, and I've seen your videos," while refusing to identify himself to Mr. Bressi. On September 25, 2011, the first agent Mr. Bressi encounters covers Mr. Bressi's camera with his hat (Exhibit N, BRE0164_25SEP2011). After an agent asks Mr. Bressi to move to secondary, Mr. Bressi inquires whether he is being detained, but rather than answering, the agent says, "Please don't film me." The agent then receives a phone call, and can be heard stating "Who? Bressi?" before proceeding to detain Mr. Bressi for approximately 15 more minutes. *Id.* This is more than sufficient to create a fact question about the agents' reasons for their treatment of Mr. Bressi.

The evidence also shows agents explicitly linking their treatment of Mr. Bressi to his exercise of his right not to speak. In several videos (Exhibit N, BRE0020_20DEC2008; BRE0164_25SEP2011; BRE0263_30APR2014; BRE0330_26MAR2016; BRE0399_14JUL2017), agents demonstrate awareness of Mr. Bressi's identity, but refuse to allow him to leave the checkpoint specifically until he gives them a verbal answer to the citizenship question—strongly suggesting they are detaining him in retaliation for his exercise of his right not to speak, rather than because they have a valid need to investigate him . In earlier incidents, agents also sometimes explicitly tied their refusal to let him leave to his refusal to answer without saying his name, but also without any indication of concern about his immigration status (Exhibit N, BRE0007_03MAR2008; BRE0010;22APR2008; BRE0016_26NOV2008).

Because the factual question here is one of intent, this Court should be especially hesitant to grant summary judgment. *Sankovich*, 638 F.2d at 140. Taken in the light most favorable to the plaintiff, this evidence could easily support a conclusion that the agents at the checkpoint are intentionally harassing Mr. Bressi in retaliation for his critical speech and his exercise of his right not to speak.

C. April 10, 2017 Arrest (defendants Roher and Kunze)

To establish an arrest was retaliatory, a plaintiff must prove either lack of probable cause, or that similarly situated individuals who did not engage in the protected activity were not arrested. *Nieves,* 139 S. Ct. at 1734-35.

The record creates a fact question about whether the officers had probable cause to arrest Mr. Bressi. Because that question is central to the resolution of Counts III, VII, and VIII, it is discussed separately below. If the Court finds, based on the discussion below, that there is a fact issue about whether the officers lacked probable cause, this element is satisfied.

Even if the Court finds there was probable cause, the claim still must go forward if a jury could find similarly situated individuals *not* engaging in protected speech were not arrested. *Nieves,* 139 S. Ct. at 1715. It is the defendants' burden to demonstrate the absence of material fact on that issue, and they have not, and cannot, do so.

Regarding sheriff's deputies' treatment of drivers detained in the primary lane because they do not answer questions or submit to secondary inspection, the record contains an incident report with a driver *not* identified as a known anti-checkpoint activist who engaged in comparable conduct "being uncooperative in answering questions and holding up traffic," which "was backing up to about 30 vehicles deep," while Border Patrol agents "believed he was a United States

citizen." 2-ER-47. The deputy in that incident correctly explained to the agents that "without reasonable suspicion of a criminal violation, [he] would be unable to assist them with this." He informed the driver that there is a statute, A.R.S. § 28-622, prohibiting failing to obey an officer directing traffic, and "then departed." *Id.* No citation. No arrest.

Border Patrol policy confirms that arrest by local law enforcement is not the preferred response to what they term a "noncompliant motorist." 5-ER-683-684. Their formal written policy directs agents to "advise the driver that he will not be permitted to proceed until he answers the agent's questions,"—but only "[i]f the agent has concerns about whether the motorist or his passengers are legally present in the United States." 5-ER-683. The policy confirms, "Once an agent establishes a motorist's lawful U.S. presence and no reasonable suspicion of criminal wrongdoing exists, secondary detention is unwarranted and immediate release is appropriate." 5-ER-683. Concerning refusal to move to secondary, the agency advises pressing the issue, for example by seeking assistance from local law enforcement, only if "the agent either remains unconvinced of any of the vehicle occupants' legal presence in the United States or possesses reasonable suspicion of criminal wrongdoing." 5-ER-684. This policy applies specifically to motorists engaging in conduct comparable to Mr. Bressi's, and directs they should be released. That is strong evidence that similarly situated drivers who are not known

anti-checkpoint activists are not cited and arrested. In contrast, known activist Mr. Bressi, in addition to the April 10, 2017 arrest, had been cited three times at the checkpoint—and all of them were later dismissed. 2-ER-165. This is objective evidence that similarly situated motorists who are not vocal checkpoint opponents are not arrested for doing exactly the same thing.

Turning to the substantial motivating factor analysis, Deputy Roher recalled that on seeing Mr. Bressi get cited, Border Patrol Agent Fuentes "was pleased . . .. Given their previous interactions with this guy and the difficulties they've had . . .", and that Agent Lopez "was kind of telling Fuentes to tone, tone it down a little bit. Like, 'Hey, we're being recorded.'" 2-ER-58-59. On the question of whether the agents' conduct was inappropriate, Roher stated "Obviously, it might be perceived that way." 2-ER-59. He confirmed he'd "heard BP agents talking about him in the past," 2-ER-50, and had discussed Mr. Bressi with agents "frequently." 2-ER-52. Roher confirmed that on the day he arrested Mr. Bressi, he already "knew he had a checkpoint U.S.A. website or something like that. I knew what he'd had an issue with . . . Deputy Wren (ph.), and had put up a video of interaction with her." 2-ER-48-49. This evidence raises a genuine fact issue about what motivated the arrest.

IV. TAKEN IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF, THE EVIDENCE DEMONSTRATES A LACK OF PROBABLE CAUSE FOR THE APRIL 10, 2017 ARREST (COUNTS III (defendants Roher and Kunze), VII (defendants Roher and Kunze), and VIII (federal defendants)).

Whether Deputy Roher, assisted by Border Patrol agents and Deputy Kunze, had probable cause to arrest Mr. Bressi on April 10, 2017, is relevant to several claims in this lawsuit. First, lack of probable cause is one way to meet the requirements for the § 1983 First Amendment claim against Deputies Roher and Kunze that the April 10, 2017 arrest was retaliatory, as argued above. Second, it forms the core of Count 3, a § 1983 claim for damages against Deputies Roher and Kunze for violating the Fourth Amendment. Finally, it is the basis for the Arizona state law claim of false imprisonment asserted against Deputies Roher and Kunze in Count 7, and against the United States via the Federal Tort Claims Act in Count 8. While the § 1983 claims against the deputies are subject to a qualified immunity analysis (discussed below), the state law claims are not.

The statute Mr. Bressi was accused of violating—A.R.S. § 13-2906(A)(1)—provides, as relevant here: "A person commits obstructing a highway or other public thoroughfare if the person . . . [h]aving no legal privilege to do so, recklessly interferes with the passage of any highway or public thoroughfare by creating an unreasonable inconvenience or hazard." "Recklessly" means "consciously disregards a substantial and unjustifiable risk that the result will occur

or that the circumstance exists" and the disregard must constitute a "gross deviation from the standard of conduct that a reasonable person would observe in the situation." *See* A.R.S. § 13–105(10)(c).

Probable cause requires "reasonably trustworthy information . . . sufficient to warrant a prudent man in believing that the [person] had committed or was committing an offense." *Beck v. Ohio,* 379 U.S. 89, 91 (1964). The analysis "turn[s] on the assessment of probabilities in particular factual contexts." *Illinois v. Gates,* 462 U.S. 213, 232 (1983). Further, "[p]robable cause also requires consideration of the totality of facts known at the time a probable cause determination is made." *Lacy v. County of Maricopa,* 631 F. Supp.2d 1197, 1210 (D. Ariz. 2008). While probable cause is ultimately a legal question, "the factual matters underlying the judgment of reasonableness generally mean that probable cause is a question for the jury; and summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have probable cause." *McKenzie v. Lamb,* 738 F.2d 1005, 1008 (9th Cir. 1984); *see also Hopkins v. City of Sierra Vista, Ariz.,* 931 F.2d 524, 527 (9th Cir. 1991); *Wallis v. Spencer,* 202 F.3d 1126, 1138 (9th Cir. 2000).[11]

[11] The analysis is different where qualified immunity applies, *see, e.g., Hunter v. Bryant,* 502 U.S. 224, 228 (1991). The qualified immunity analysis is addressed separately below.

Whether it would be reasonable to conclude that Mr. Bressi was committing a crime depends on what the arresting officer knew. It is undisputed that Mr. Bressi's continued presence in the primary inspection lane was holding up traffic. Whether the statute is implicated turns on who was responsible for the obstruction, and why. Video evidence confirms Mr. Bressi stopped because the agents required him to and continually offered to leave the checkpoint. Rather than allowing Mr. Bressi to pass, Agent Frye asked him to move to the secondary inspection area, refusing to allow him to leave without verbally answering the citizenship question. Exhibit N, BRE0383_10APR2017 at 2:36; 2:55. There is no indication Agent Frye suspected Mr. Bressi of an immigration or criminal violation, and there is evidence his identity and citizenship were known if not immediately, shortly into the encounter. Mr. Bressi did not move into the secondary area, although he remained willing to leave the checkpoint entirely. In total, Mr. Bressi was in the primary inspection lane for just under two and a half minutes.

Whether a reasonable officer could conclude Mr. Bressi was violating A.R.S. § 13-2906 depends on facts concerning what the deputy knew. While Roher clearly knew that Mr. Bressi had stopped at Agent Frye's behest, that Agent Frye had asked him to move to secondary, and that he was still in the primary lane, there

are fact issues about whether Roher knew (1) whether Agent Frye suspected Mr. Bressi was committing any immigration or federal criminal violation, (2) whether and when Agent Frye realized Mr. Bressi was a known U.S. citizen, and (3) that Border Patrol policy directs agents encountering "noncompliant" motorists to release them immediately absent reasonable suspicion of an immigration or criminal violation, 5-ER-683, among others. If Roher knew some or all of these things when he made the arrest, then probable cause was lacking, as the delay was obviously being caused by Border Patrol agents violating their own policy and refusing to release the known U.S. Citizen driver, whom they had no basis to detain anywhere, including in the primary lane.

Indeed, there is evidence Roher did know the agents lacked any valid reason to detain Mr. Bressi at the time he made the arrest. As reflected in the video, Roher asked Mr. Bressi if he understood he was blocking the roadway, and Mr. Bressi pointed out it was the agent who was blocking the roadway. Exhibit N, BRE0383_10APR2017 at 4:19. Roher appeared to consider this for a minute, then permitted Mr. Bressi to leave the checkpoint, which he immediately did. If Roher had thought Agent Frye had a valid reason to detain Mr. Bressi—in the primary or

secondary area—surely he would not have permitted him to leave the checkpoint.[12] Roher also explained he was aware of a previous incident where a colleague had considered making a similar arrest of Mr. Bressi, and been explicitly advised that he would not have probable cause to do so. He explained that his colleague, during a contact with Mr. Bressi, had "contact[ed] the Legal Advisor, and the Legal Advisor, based on their conversation, he did not issue a citation to him." 2-ER-54. Video evidence confirms this story. Exhibit N, BRE0330_26MAR2016 at 17:30.[13] While Roher's subjective intent for the arrest is not directly relevant, this background makes it more likely that he knew the cause of the obstruction in the

[12] As these facts demonstrate, a statute that primarily punishes either inherently dangerous road conditions (e.g., *Herrera v. Western Express Inc.,* 2021 WL 2105573 at *3 (D. Ariz. May 25, 2021)) (large trailer parked in lane of traffic on West Jefferson street in Phoenix, causing fatal traffic accident), or protest demonstration activities that shut down city streets without permission (e.g., *Mack v. Dellas,* 235 Ariz. 64 (App. 2014)), is a poor fit. There *is* an Arizona statute that covers situations like this—A.R.S. § 28-622, which punishes refusing to comply with a lawful order by an officer "invested by law with authority to direct, control or regulate traffic"—but that was not the law being invoked, nor could it be. Border Patrol agents don't have authority to regulate traffic on Arizona highways, and Roher released Mr. Bressi when questioned, before he could reasonably be said to have refused any direction Roher had given. In any event, Roher explicitly stated he was *not* arresting Mr. Bressi for his refusal to drive into the secondary area. 2-ER-55.

[13] An informal transcript, 2-ER-46, shows Deputy McMillan telling Mr. Bressi, "They told you you were not free to leave . . .. So therefore I'm not, I know that they didn't like that you blocked back their road. I don't necessarily like it but because they told you were not free to leave I don't think that would give me any probable cause to arrest you for obstructing a public thoroughfare because you were told not to leave . . .."

roadway was in fact the Border Patrol, not Mr. Bressi, and because that goes to what the arresting officer knew at the time, it is a core fact question for the jury on the probable cause issue. Finally, although not definitive in the probable cause analysis, the fact that the charge was dropped is evidence there was never a valid reason for the arrest to begin with. Of course, it is possible for an arrest to be valid when the charges ultimately don't hold up, but the fact that the state did not pursue the charge, in a case where the conduct was captured completely on video and the facts are largely undisputed, lends support to the lack of probable cause.

The district court ruled it was "for the Court to determine whether a reasonable police officer knowing what officer Roher knew would have believed probable cause existed to detain the Plaintiff for blocking the roadway because he refused to comply with the directive to move to the secondary area." 1-ER-25. Leaving aside the fact that Roher explicitly disclaimed that as the basis for the arrest, 2-ER-55, the district court ignored the factual question of what, in fact, Roher knew and understood at the time. This was error.

V. DEPUTIES ROHER AND KUNZE ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

Deputies Roher and Kunze are sued solely for their roles in the April 10, 2017, arrest. Officers are shielded by qualified immunity for wrongful arrests if "a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." *Hunter v.*

Bryant, 502 U.S. 224, 228 (1991) (quoting *Anderson v. Creighton,* 483 U.S. 635, 641 (1987).

It is quite plain, and clearly established, that the Fourth Amendment would not permit arrest of an individual for blocking the roadway when he was legally required to stop and remain stopped. No reasonable officer would believe, for instance, that he could constitutionally arrest a driver for blocking the roadway when he was stopped at a red light, nor when he had been pulled over by another officer, even if, where pulled over, he was blocking traffic. Here, the arresting officer knew Mr. Bressi had stopped only because the Border Patrol had forced him to, and remained willing to leave but was not permitted to. No reasonable officer could conclude that it was criminal to stop where required, and wait to leave until permission was granted. If that permission was wrongly withheld, no reasonable officer could blame Mr. Bressi for that.

CONCLUSION

At the SR-86 checkpoint, Border Patrol agents detain motorists until they are "satisfied" they have established their citizenship, although they have never articulated a standard by which this determination is made. *See, e.g.,*4-ER-480 (motorist sent to secondary if "the agent is not satisfied with the motorist's answer"); 4-ER-485 ("Once we're satisfied with our requirements, they are on

their way.")[14] This practice is strikingly similar to the California statute struck down decades ago in *Kolender v. Lawson,* 461 U.S. 352 (1983)—after *Martinez-Fuerte*. That statute allowed police to require individuals to "provide 'credible and reliable' identification when requested by a police officer" who has conducted a valid *Terry* stop. *Id.* at 356. The state confirmed the statute is violated "unless 'the officer [is] satisfied that the identification is reliable,'" entrusting that determination entirely to the direction of the officer. *Id.* at 360. The Supreme Court recognized this discretion as "a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Id.* at 360. The Court struck down the statute "because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do" to satisfy it. *Id.* at 361. Here, although the checkpoint agents are not charging motorists with crimes for failing to adequately identify themselves (because there is no such law), they are indefinitely detaining them, and that is arguably just as bad, especially when objecting does lead to arrest and criminal charges.

The record here is replete with evidence raising factual questions not only about the checkpoint's purpose and operation, but about the nature and purpose of

[14] Indeed, when asked via interrogatory whether this could include insisting on a verbal answer, the Border Patrol repeatedly objected and refused to give a straight answer. 2-ER-75.

the agents' treatment of Mr. Bressi and the legality of his April 10, 2017, arrest. The district court wrongly made merits determinations on the central questions, rather than examining the record for questions that needed to go to trial. That was error, and this Court, reviewing *de novo*, should hold it was error to grant summary judgment for the defendants on all counts, and should remand to the district court for further proceedings.

Dated: March 28, 2022

Respectfully submitted,

/s/ Amy P. Knight
Amy P. Knight
Attorney for Appellant,
Terrence Bressi

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 22-15123

I am the attorney or self-represented party.

This brief contains 13,128 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[XX] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature: /s/ Amy P. Knight Dated: March 28, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

9th Cir. Case Number(s) 22-15123

The undersigned attorney or self-represented party states the following:

[XX] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[ ] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature: /s/ Amy P. Knight Dated: March 28, 2022

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Kirstin E. Largent