

C.A. No. 22-15123

D. Ct. No. CV-18-186-TUC-DCB

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

TERRENCE BRESSI

Plaintiff-Appellant,

v.

PIMA COUNTY BOARD OF SUPERVISORS, et al.,

Defendant-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF FEDERAL APPELLEES

**(U.S. Dept. of Homeland Security; U.S. Customs and Border Protection; U.S.
Border Patrol; Alejandro N. Mayorkas, Secretary, Dept. of Homeland
Security; Chris Magnus, Commissioner, Customs and Border Protection;
Raul L. Ortiz, Chief, Border Patrol; John R. Modlin, Interim Chief Border
Patrol Agent, Tucson Sector; and the United States)**

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III. STATEMENT OF JURISDICTION

A. District Court Jurisdiction

The district court had subject matter jurisdiction as to the federal defendants (U.S. Dept. of Homeland Security; U.S. Customs and Border Protection; U.S. Border Patrol; Alejandro Mayorkas, Secretary, Department of Homeland Security; Chris Magnus, Commissioner, Customs and Border Protection; Raul L. Ortiz, Chief, Border Patrol; John R. Modlin, Interim Chief Border Patrol Agent, Tucson Sector; and the United States) pursuant to 28 U.S.C. §§ 1331 and 1346(b)(1) based on the allegations in plaintiff's second amended complaint. (4-ER-546.)¹

B. Appellate Court Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 based on the entry of the final judgment by the district court on January 10, 2022. (1-ER-2.)

C. Timeliness of Appeal

Following the entry of the final judgment, the plaintiff filed a notice of appeal on January 20, 2022. (4-ER-593.) The notice was timely pursuant to Fed. R. App. P. 4(a)(1).

¹ “CR” refers to the Clerk’s Record, followed by the document number(s). “ER” refers to the Excerpts of Record, followed by the page number(s). “SER” refers to the Supplemental Excerpts of Record, followed by the relevant page number(s).

IV. ISSUES PRESENTED

- A. Whether the district court erred by finding a Border Patrol immigration checkpoint did not violate the Fourth Amendment and granting summary judgment on that claim.
- B. Whether the district court erred by granting summary judgment to the federal defendants on Bressi's First Amendment claim.
- C. Whether the district court erred by granting the United States' motion for summary judgment on the Federal Tort Claims Act count.

V. STATEMENT OF THE CASE

A. Introduction

Plaintiff Terrence Bressi misunderstood the law relating to immigration checkpoints. As a result of his misunderstanding, he believed he did not have to comply with agents' directives at a lawfully-established checkpoint. His failure to follow the directives resulted in him blocking State Route 86. Blocking the highway was a violation of Arizona law, which resulted in his arrest (and release after about 20 minutes) by a Pima County Sheriff's deputy. The district court properly granted summary judgment on Bressi's challenges to the checkpoint and his detention,

B. Nature of the Case; Course of Proceedings

Plaintiff Bressi filed a second amended complaint alleging several claims involving the operation of a Border Patrol checkpoint. (4-ER-546.) As to the federal defendants, Bressi alleged a violation of his First Amendment right to free speech (Count 1); a violation of his Fourth Amendment rights (Count 2); and a claim of false imprisonment against the United States under the Federal Tort Claims Act (Count 8). (4-ER-578-591.) As to the federal defendants in Counts 1 and 2, Bressi sought only declaratory and injunctive relief. (4-ER-580-583.) The complaint also alleged violations by individuals and an entity associated with Pima County, Arizona ("county defendants"). (4-ER-578-589.) On January 10, 2022, the district court

granted the defendants' motions for summary judgment. (1-ER-3.) This appeal ensued.

C. Statement of Facts

1. The Border Patrol Checkpoint on State Route 86

The Border Patrol operates an immigration checkpoint on State Route 86, about 1,100 feet west of milepost 146, near Robles Junction, Arizona. (2-ER-141.) State Route 86 is an east/west road that runs from State Route 85 to Tucson. (1-ER-5.) State Route 85 runs from the border with Mexico to Interstate 8. (1-ER-5.) Two other roads from the border area, Federal Routes 19 and 21, run through the Tohono O'odham Reservation to State Route 86. (4-ER-434.) The State Route 86 checkpoint is strategically located to capture traffic crossing the approximately 63 miles of international border between Mexico and the Tohono O'odham Reservation. It is the only checkpoint between the Tohono O'odham Nation and Tucson. (SER-18.)

Border Patrol command staff in Tucson decided to attempt to target routes from the border area to Tucson. They established the State Route 86 checkpoint, as well as checkpoints on State Route 286 and Arivaca East Road. (2-ER-143.) The State Route 86 checkpoint was opened in 2008. The other two checkpoints were opened in 2009. (5-ER-784.) These three locations make it difficult to avoid a checkpoint when traveling to Tucson from the border area west of Tucson. (2-ER-

143.) If any of these three checkpoints were removed, smugglers would have an unobstructed route from the border area to Tucson. (2-ER-144.)

Pursuant to Border Patrol policy, the primary purpose of immigration checkpoints is “to apprehend illegal aliens and smugglers who have managed to evade apprehension at the border and are attempting to travel to interior locations.” (2-ER-142.) Border Patrol agents are trained that the primary purpose of a checkpoint “is to apprehend illegal aliens and smugglers who have managed to evade apprehension at the border and are attempting to travel to interior locations.” (5-ER-715; 5-ER-748.) The Acting Agent in Charge of the Tucson Border Patrol Station testified that immigration is the primary purpose of the State Route 86 checkpoint. (4-ER-409; 4-ER-425.) Specifically, the purpose of the State Route 86 checkpoint is to detect and deter illegal traffic coming through the Tohono O’odham Reservation. (4-ER-434-435.) The Border Patrol has publicly stated that checkpoints also are used to detect illegal narcotics. (3-ER-392.)

The checkpoint on State Route 86 is permanent and staffed at all times. (3-ER-391.) The checkpoint is operational the vast majority of the time, although it occasionally is closed for weather or traffic reasons. (4-ER-432.) The checkpoint only covers eastbound (towards Tucson) traffic. (2-ER-141.)

As eastbound drivers approach the checkpoint, a series of speed limit signs gradually reduce the speed of traffic. (3-ER-375.) As vehicles get nearer to the

checkpoint, rumble strips and speed limit signs alert them to slow down to 15 miles an hour. Signs advise travelers that they are approaching a Border Patrol immigration checkpoint and that federal officers are present. (2-ER-141-142.) At the checkpoint itself, drivers come to a complete stop. (2-ER-141.) In this primary inspection area, a Border Patrol agent asks the occupants of the vehicle if they are United States citizens and conducts an “open view” inspection of the interior of the vehicle. (3-ER-396.)

Agents are trained to look for signs of immigration violations as well as indications of other federal crimes. (3-ER-396.) Border Patrol agents are trained that they may refer a vehicle to secondary inspection on “some or mere suspicion” of an immigration offense or “reasonable suspicion” of a non-immigration federal crime. (2-ER-144.) The Border Patrol’s policy is to detain individuals passing through the checkpoint until they have determined their citizenship. (3-ER-397.)

By statute, Border Patrol agents have the authority to make probable cause arrests of individuals for immigration violations, as well as for other federal offenses they encounter during the performance of their immigration duties if there is a likelihood the person could escape before a warrant could be obtained. 8 U.S.C. § 1357(a)(4) and (5); 8 C.F.R. § 287.5(c). All Border Patrol agents are cross-designated by the Drug Enforcement Administration (“DEA”) with “Title 21 authority,” which allows them to enforce federal drug laws. (3-ER-388-389.)

The Border Patrol does not exempt any vehicle, including those of known local commuters or residents, from inspection at the checkpoint. They do not “wave through” individuals they know to be U.S. citizens. (3-ER-395-396.) The Acting Patrol Agent in Charge of the Tucson station explained that there had been numerous instances in his career where a person who regularly traveled through a checkpoint had been apprehended later for smuggling through a checkpoint. (4-ER-419.) In fact, at times the regular travel was used as a ruse to get Border Patrol to know the traveler in an attempt to have Border Patrol wave them through the checkpoint. (4-ER-419.)

Canines that are trained to detect concealed humans and narcotics are at the checkpoint. They are used in the “pre-primary” area, before the driver has contact with the agent at primary inspection. (3-ER-395.)

The checkpoint has an x-ray machine that can be used to detect anomalies within the compartments of a vehicle. It is used in the secondary inspection area if there is probable cause to believe a human or contraband is hidden in the vehicle or the driver of the vehicle consents. (4-ER-467.) Agents also have personal radiation devices that alert them to radiation. (4-ER-482.)

Agents at the checkpoint have access to computers that are capable of accessing law enforcement databases regarding immigration and criminal records (National Crime Information Center (“NCIC”)). (4-ER-474-475.) The databases

are accessed when there is particular need related to a specific incident, such as identifying a driver. (4-ER-475.)

Between January and July 2018, Border Patrol used a license plate reader at the State Route 86 checkpoint as a pilot program. The program was not successful. (4-ER-435-436.) DEA has a license plate reader near the checkpoint but outside the checkpoint's "footprint." (4-ER-426-427.) Border Patrol agents at the checkpoint do not have access to information from DEA's license plate reader. (4-ER-427-428.)

Border Patrol arrest statistics for the State Route 86 checkpoint reflect the following:

	12/1/2016 to 11/30/2017	12/1/2017 to 11/30/2018	12/1/2018 to 11/30/2019	12/1/2019 to 11/30/2020
Immigration Related Arrests	8	81	51	117
Narcotic Related Arrests	26	55	36	36
Narcotic Related, Non-Immigration Related Arrests	26	43	35	23
Total Arrests	74	174	121	172

(3-ER-379-382.) An arrest is immigration related if it involves alien smuggling or a deportable alien. (3-ER-379-382; 4-ER-459-460.) The Border Patrol continues to see a steady flow of traffic attempting to circumvent the checkpoint, as well as an increase in traffic entering the United States illegally. (4-ER-421-422.)

Operation Stonegarden was a federal grant program that provided funds to local law enforcement agencies to compensate officers for overtime work during

which they were assigned to assist the Border Patrol. The Pima County Sheriff's Department participated in Operation Stonegarden at least between 2008 and 2018. (3-ER-398.)² The training for Operation Stonegarden specifically stated that Pima County Sheriff's Department members shall not participate at immigration checkpoints except when requested to respond to enforce a specific state or local statute. (3-ER-270.)

Operation Stonegarden's purpose was to have state and local law enforcement assist in combatting transnational criminal organizations. (3-ER-223.) For example, the Pima County Sheriff's Department objective in connection with Operation Stonegarden was to deter, detect, and investigate state crimes associated with transnational criminal activity and to increase law enforcement presence in targeted areas. (3-ER-264.)

According to the Acting Patrol Agent-in-Charge of Tucson, despite this cooperation, local law enforcement are not allowed in the "enforcement zone" at the checkpoint to perform any type of state regulation. (4-ER-440.) The enforcement zone is delineated with signage and rope 180 feet from the primary inspection area (stop sign). The signage states "Border Patrol Enforcement Zone, no unauthorized entry beyond this point." (3-ER-375.) Local law enforcement officers perform

² Bressi acknowledged that the Pima County Sheriff's Department stopped participating in Operation Stonegarden in 2020. (2-ER-165.)

duties outside the enforcement zone and respond to requests from Border Patrol relating to some type of infraction within the enforcement zone. (4-ER-440-444.)

Bressi presented information, which consisted of 56 police reports over a four-year period relating to law enforcement actions by Pima County Sheriff's deputies in the checkpoint area. (3-ER-399; 3-ER-289-369.) These reports reflect activity by sheriff's deputies at the checkpoint on 29 days over that four year period. (SER-5.) The vast majority of these reports related to vehicle or driving issues. (3-ER-289-369.) The reports reflect that in some of the incidents, the deputies were observing traffic approaching the checkpoint and developed reasonable suspicion to stop a vehicle. (3-ER-289; 3-ER-292; 3-ER-294; 3-ER-300; 3-ER-307; 3-ER-323; 3-ER-327; 3-ER-331; 3-ER-333; 3-ER-337; 3-ER-339; 3-ER-349; 3-ER-357; 3-ER-368.) Other incidents involved deputies responding to state law issues observed by Border Patrol agents. (3-ER-305; 3-ER-312; 3-ER-329; 3-ER-345; 3-ER-359; 3-ER-361; 3-ER-366.) Other incidents are unclear exactly where the deputy was located when he made his observations. (3-ER-296; 3-ER-311; 3-ER-313-319; 3-ER-320; 3-ER-341; 3-ER-343; 3-ER-355; 3-ER-358; 3-ER-363.)

2. Plaintiff Bressi

Plaintiff Bressi is a United States citizen. (3-ER-397.) He works at the University of Arizona. His job duties require him to travel to Kitt Peak National Observatory 50 to 60 times a year, although there was a disruption of this routine

during the pandemic. (2-ER-145-146.) State Route 86, with the checkpoint, is the main route from Kitt Peak to Tucson. (3-ER-392.)

Since 2008, Bressi attempted to record every encounter he had at the checkpoint, using four or five cameras in his truck for the last few years. (2-ER-159-160.) He posted some of the videos publicly on You Tube or Vimeo, and also on his own website. (2-ER-161.) Bressi stated that at the checkpoint, he rolls his window down an inch or two and does not respond when asked his citizenship. (2-ER-163.) Bressi explained that he thinks it is very important that “individuals, when they’re being seized, especially absent any reasonable suspicion of wrongdoing, that they exercise their right not to – not to be a witness against themselves.” (2-ER-163.) Bressi admitted that he frequently honks his horn whenever there is an agent, or particularly a dog, nearby. (2-ER-163.) He claimed that he honks his horn because he is concerned for his safety. (2-ER-163.) Bressi also admitted that if an agent directed him to secondary inspection, he refused to move his truck. (2-ER-164.) He stated he was concerned about his safety. (2-ER-164.) Sometimes, when he was told he is free to go, he continued to question the agent. (2-ER-164.)

Prior to 2017, Bressi had received three civil citations for his conduct at the checkpoint: (1) for impeding traffic in 2013, (2) for a horn honking incident in 2014, and (3) for stopping unnecessarily in the lane of traffic on an unspecified date. The citations ultimately were dismissed. (2-ER-165.)

A supervisory Border Patrol agent created an “Extremely Uncooperative Motorist” poster that contained Bressi’s name, pictures, and description of his truck. (3-ER-288; 3-ER-389.) The poster was placed in a canopied area at the checkpoint that was not visible to the public and accessible only by Border Patrol agents. It was there for about a year from March 29, 2016. (3-ER-389.) The poster identified Bressi as a United States citizen and advised that he makes video and audio recordings of his encounters with Border Patrol and posts the recording on websites. (3-ER-288.) The poster also stated that Bressi often honks his horn continuously if kept at the primary inspection area longer than a few seconds and attempts to incite agents into confrontations. (3-ER-288.) The poster noted that it did not provide authorization to wave Bressi through the checkpoint. (3-ER-288.)

3. The Issuance of a Citation to Bressi on April 10, 2017

On April 10, 2017, Border Patrol Agent Taylor Frye identified the purpose of the checkpoint and greeted Bressi. (Exh. N, Apr. 10, 2017 video at 17:13:12.)³ Bressi did not roll down his window or otherwise respond. Agent Frye asked and

³ Exhibit N was part of the federal defendants’ statement of facts in support of their motion for summary judgement. It consists of videos made by Bressi of 18 encounters at the checkpoint. Bressi has moved, pursuant to Ninth Circuit Rule 27-14, to transmit a copy of Exhibit N to the Court. The April 10, 2017 video is on disc 2 of Exhibit N.

then directed Bressi to “pull over there [secondary inspection] for a second” (Exh. N, Apr. 10, 2017 video at 17:13:21.)

Agent Frye then asked Bressi if he was a United States citizen. (Exh. N, Apr. 10, 2017 video at 17:13:32.) When Bressi did not respond, Agent Frye again directed him to “pull over there.” He also advised Bressi that he was blocking traffic. (Exh. N, Apr. 10, 2017 video at 17:13:36.) Bressi asked if he was free to go. Agent Frye responded that he was free to go after he answered the question. (Exh. N, Apr. 10, 2017 video at 17:13:42.) Agent Frye again directed Bressi to “pull over there.” (Exh. N, Apr. 10, 2017 video at 17:13:53.)

Agent Frye asked another agent where the supervisor was. (Exh. N, Apr. 10, 2017 video at 17:14:11.) While waiting for the supervisor, Pima County Deputy Sheriff Ryan Roher approached Bressi’s truck. (Exh. N, Apr. 10, 2017 video at 17:14:28.) (Deputy Roher was at the checkpoint because he had earlier been involved with an impounded vehicle and was waiting for a tow truck. (2-ER-177; *see* Exh. N, Apr. 10, 2017 video at 17:23:20.))

Deputy Roher directed Bressi to pull into secondary or answer Agent Frye’s questions. (Exh. N, Apr. 10, 2017 video at 17:14:52.) Deputy Roher told Bressi to “pull over there” or he would be subject to arrest. (Exh. N, Apr. 10, 2017 video at 17:15:01.)

Deputy Roher asked Bressi if he understood he was blocking the roadway. (Exh. N, Apr. 10, 2017 video at 17:15:27.) Agent Roher subsequently told Bressi he could go. (Exh. N, Apr. 10, 2017 video at 17:15:35.)

After leaving the checkpoint, Bressi pulled over to the side of the road. (Exh. N, Apr. 10, 2017 video at 17:15:52.) Shortly thereafter, Deputy Roher pulled up behind him. (Exh. N, Apr. 10, 2017 video at 17:16:06.) A Border Patrol vehicle arrived a short time later. (Exh. N, Apr. 10, 2017 video at 17:16:30.)

After obtaining Bressi's license, Deputy Roher asked him whether he would sign a citation if he was given one. (Exh. N, Apr. 10, 2017 video at 17:17:20.)⁴ When Bressi did not respond, Deputy Roher asked "or do you need to go to jail?" (Exh. N, Apr. 10, 2017 video at 17:17:26.) When Bressi did not respond, Deputy Roher asked "would you like to go in handcuffs?" (Exh. N, Apr. 10, 2017 video at 17:17:30.) When Bressi did not respond, Deputy Roher placed Bressi in handcuffs. (Exh. N, Apr. 10, 2017 video at 17:17:35.) The video reflects that there was no communication between Deputy Roher and the Border Patrol agents who had arrived on the scene prior to Bressi being handcuffed.

Deputy Roher advised Bressi that he was under arrest for blocking a roadway. (Exh. N, Apr. 10, 2017 video at 17:21:25.) Bressi ultimately agreed to sign the

⁴ By signing a citation, an individual states, "Without admitting guilt or responsibility, I promise to appear as directed in this complaint." (2-ER-179.)

citation and was released. (Exh. N, Apr. 10, 2017 video at 17:40:22.) The citation was for obstructing a highway or public thoroughfare (Ariz. Rev. Stat. § 13-2906(A)). (2-ER-178.)

4. The District Court Granted the Defendants' Motion for Summary Judgment.

Bressi filed a motion for partial summary judgment, and both the federal and county defendants filed motions for summary judgment. (*See* 1-ER-3.) The district court granted the defendants' motions, finding that Bressi's Fourth and First Amendment rights were not violated by the checkpoint operations on State Route 86 or his detention and citation for blocking traffic on April 10, 2017. (1-ER-3.) The district court concluded that the operation of the State Route 86 checkpoint did not violate the Fourth Amendment. (1-ER-38.) The court further found that the First Amendment did not apply to the limited questioning at the checkpoint. (1-ER-26-27.) Finally, the court concluded that there was probable cause to detain Bressi for blocking the roadway. (1-ER-26.)

VI. SUMMARY OF ARGUMENTS

A. The district court did not err by granting the federal defendants' motion for summary judgment on the claim that the State Route 86 checkpoint violated the Fourth Amendment. The Supreme Court has held that motorists may be stopped at immigration checkpoints and asked about their citizenship or immigration status without either a search warrant or articulable individualized reasons for the stop. The immigration checkpoint at issue in this case was operated in a manner authorized by both the Supreme Court and this Court. As the district court found, the evidence, viewed in the light most favorable to Bressi, demonstrates that at a programmatic level, the primary purpose for the Border Patrol checkpoint is immigration control, not general law enforcement. The checkpoint also is operated in a reasonable manner. The interference with individual liberty is slight. The checkpoint also serves the important public interest of hindering the movement of undocumented individuals from the border area to the interior of the country.

B. The district court did not err by granting the federal defendants' motion for summary judgment on Bressi's First Amendment claim that his detention at the checkpoint was lengthened in retaliation for his speech. The reasonableness of the detention is properly addressed under the Fourth Amendment. Even if considered under the First Amendment, Bressi would have to establish that there was no legal basis for the agents' actions at the checkpoint. Bressi cannot make this showing.

The evidence demonstrates that any lengthening of the detention at the checkpoint was a result of Bressi's actions, not retaliation for his speech.

C. The district court did not err by granting summary judgment on Bressi's claim, pursuant to the Federal Tort Claims Act (FTCA), that his arrest on April 10, 2017 was not supported by probable cause. First, the FTCA only applies to actions of federal employees. The evidence does not establish that any federal employee caused the arrest of Bressi by a Pima County Sheriff's deputy. In any event, there was probable cause to arrest Bressi for obstructing State Route 86. The undisputed facts show that Bressi repeatedly was directed to go to the secondary inspection area off the roadway, but he refused. After being told he was blocking the highway and subject to arrest, he still refused to move his truck. His failure to move his truck blocked State Route 86, causing unreasonable inconvenience to the motorists behind him.

VII. ARGUMENTS

A. The District Court Did Not Err By Granting Summary Judgement on Bressi's Fourth Amendment Claim.

1. Standard of Review

The Court reviews de novo a district court's decision on summary judgment.

Hughes v. Rodriguez, 31 F.4th 1211, 1218 (9th Cir. 2022).

2. Argument

a. Summary Judgment Standard

A party is entitled to summary judgment if the party shows “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those facts that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a ‘genuine’ dispute as to those facts.” *Scott v. Harris*, 550 U.S. 372, 380 (2007). “[W]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is ‘no genuine issue for trial.’” *Id.* (internal citation omitted).

Bressi argues that the district court erred in granting summary judgment because there are disputed facts regarding whether the Border Patrol checkpoint

violates the Fourth Amendment. (Op. Br. at 13-29.) Bressi’s argument fails. The undisputed material facts, when viewed in light of established caselaw, demonstrate that the checkpoint complies with the Fourth Amendment.

b. Courts Have Long Recognized that Immigration Checkpoints Are Legal.

There is no dispute that checkpoint stops are “seizures” within the meaning of the Fourth Amendment. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976). The Supreme Court has held, however, that motorists may be stopped at immigration checkpoints and asked about their citizenship or immigration status without either a search warrant or articulable individualized reasons for the stop. *Id.* at 562-67 (1976). “Such a stop is constitutional so long as the scope of the detention is limited to a few brief questions about immigration, the production of immigration documents, and a ‘visual inspection of the vehicle . . . limited to what can be seen without a search.’” *United States v. Preciado-Robles*, 964 F.2d 882, 884 (9th Cir. 1992) (quoting *Martinez-Fuerte*, 428 U.S. at 558).

Moreover, the motorist may be referred to a secondary inspection area for further questioning “in the absence of any individualized suspicion.” *United States v. Wilson*, 7 F.3d 828, 833 (9th Cir. 1993) (quoting *Martinez-Fuerte*, 428 U.S. at 562). Any further detention or search must be based on probable cause or consent. *Martinez-Fuerte*, 428 U.S. at 567.

The Supreme Court has stated that the “principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop.” *Martinez-Fuerte*, 428 U.S. at 566–67. Thus, this Court has held that a stop at a permanent Border Patrol checkpoint “is reasonable per se, so long as the scope of detention remains confined to a few brief questions, the possible production of a document indicating the detainee’s lawful presence in the United States, and a ‘visual inspection of the vehicle . . . limited to what can be seen without a search.’” *United States v. Taylor*, 934 F.2d 218, 220 (9th Cir. 1991) (quoting *Martinez–Fuerte*, 428 U.S. at 558); *United States v. Segundo-Orellana*, 541 F. App’x 751, 754 (9th Cir. 2013).

The Supreme Court’s decision in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) did not explicitly or implicitly overrule any of these cases. In *Edmond*, 531 U.S. at 40-44, the Court concluded that a checkpoint with a “primary purpose” of interdicting illegal narcotics violated the Fourth Amendment. In reaching this conclusion, the Court noted that it had never approved a checkpoint “whose primary purpose was to detect evidence of ordinary criminal wrongdoing.” *Id.* at 41. That is, each of the checkpoint programs that the Court had approved were “designed primarily to serve purposes closely related to the problems of policing the border or the necessity of insuring roadway safety.” *Id.* The Court noted that it was not

deciding whether a state could establish a checkpoint with a valid primary purpose and a “secondary purpose of interdicting narcotics.” *Id.* at 47 n.2.

In *Edmond*, the Supreme Court emphasized the limited nature of its holding. The Court stated that “[i]t goes without saying” that its holding did not “alter the constitutional status” of the border checkpoints approved in *Martinez-Fuerte*. *Edmond*, 531 U.S. at 47. The Court explained that the holding in *Edmond* “does not impair the ability of police officers to act appropriately upon information that they properly learn during a checkpoint stop justified by a lawful primary purpose, even where such action may result in the arrest of a motorist for an offense unrelated to that purpose.” *Id.* at 48. Indeed, the majority opinion in *Edmond* explicitly rejected the dissent’s claim that it was holding that the use of a “drug sniffing dog” annuls the constitutionality of a checkpoint. *Id.* at 44 n.1.

Subsequent to *Edmond*, this court has used a two-step analysis to evaluate the legality of checkpoints. *United States v. Fraire*, 575 F.3d 929, 932 (9th Cir. 2009). “First, the court must determine whether the primary purpose of the checkpoint was to advance the general interest in crime control.” *Id.* (cleaned up). If the primary purpose is general crime control, the stop is per se invalid. *Id.* Second, if the primary purpose is not general crime control, the court judges the checkpoint’s reasonableness on the basis of the individual circumstances – such as “the gravity of the public concerns served by the seizure, the degree to which the seizure advances

the public interest, and the severity of the interference with individual liberty.”
Fraire, 575 F.3d at 932 (quoting *Illinois v. Lidster*, 540 U.S. 419, 427 (2004)).

c. Primary Purpose Analysis

The Supreme Court emphasized that the determination of the primary purpose “is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene.” *Edmond*, 531 U.S. at 48.

If the primary purpose of the checkpoint is legitimate, it does not matter if the checkpoint also has a secondary purpose. For example, in *United States v. Soto-Camacho*, 58 F.3d 408, 411 (9th Cir. 1995), the defendant argued that the decision to operate an immigration checkpoint based in part on drug intelligence violated the Fourth Amendment. This Court rejected that argument and specifically rejected the claim that once an agent conducting an immigration checkpoint starts looking for drugs the search becomes improper. *Id.* at 411-12. As the Court explained:

we cannot say that the stop was improper solely because general intelligence having to do with the movement of drugs was one of the reasons for the timing of the Border Patrol’s decision to activate the checkpoint. As in [*United States v. Watson*, 678 F.2d 765 (9th Cir. 1982)], the stop and search had an “independent administrative justification,” and “did not exceed in scope what was permissible under that administrative justification.” *Watson*, 678 F.2d at 771; see *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-60, 96 S. Ct. 3074, 3082-84, 49 L.Ed.2d 1116 (1976). . . .

Soto-Camacho, 58 F.3d at 412; see *United States v. Bulacan*, 156 F.3d 963, 972 (9th Cir. 1998) (in “*Watson* and *Soto–Camacho*, the Ninth Circuit approved

administrative searches that, as designed, had a secondary purpose of searching for drugs”); *United States v. Orozco*, 858 F.3d 1204, 1213 (9th Cir. 2017) (neither the presence of a criminal investigatory motive, nor a dual motive (one valid and one impermissible), renders an administrative stop pretextual).

Thus, “a lawful immigration checkpoint is not made unlawful by the addition of a secondary purpose of drug interdiction.” *United States v. Wilson*, 650 F. App’x 538, 539 (9th Cir. 2016). In *United States v. Carrasco*, 813 F. App’x 275, 277 (9th Cir. 2020), the district court determined that the primary purpose of a checkpoint was immigration control, based on evidence that consistently emphasized that the primary purpose was “to restrict the routes of egress from the border area and thereby create deterrence to the initial illegal entry.” This Court found no clear error, even though the agency “may have had other goals in addition to its central mission of interdicting undocumented immigrants.” *Id.*

Subsequent to *Edmond*, the Fifth Circuit concluded that a checkpoint which had a primary immigration purpose was constitutional, “regardless of whether or not it could also be said to have a secondary programmatic purpose of drug interdiction.” *United States v. Moreno-Vargas*, 315 F.3d 489, 491 (5th Cir. 2002). Like this Court in *Soto-Camacho*, 58 F.3d at 412, the Fifth Circuit stated that the focus is on whether the checkpoint stop was “sufficiently limited in duration to pass constitutional

muster.” *Moreno-Vargas*, 315 F.3d at 490 (quoting *United States v. Machuca-Barrera*, 261 F.3d 425, 435 (5th Cir. 2001)).

The District of Columbia Circuit reached the same conclusion, noting that the fact that a checkpoint would not have been established at that specific location “but for” evidence of drug dealing in area did not mean that discovery and interdiction of illegal narcotics was the primary purpose of checkpoint. *United States v. Davis*, 270 F.3d 977 (D.C. Cir. 2001).

d. The Primary Purpose of the State Route 86 Border Patrol Checkpoint Is Immigration Control.

As the district court found, the evidence demonstrates that at the programmatic level, the primary purpose of the State Route 86 checkpoint is immigration control. (1-ER-16-23.) The Acting Chief of the Tucson Border Patrol station testified that the primary purpose of the State Route 86 checkpoint was immigration. (4-ER-409; 4-ER-425.) The Border Patrol Handbook states:

The primary purpose of a traffic checkpoint operation is to apprehend illegal aliens and smugglers who have managed to evade apprehension at the border and are attempting to travel to interior locations. Checkpoints greatly enhance the Border Patrol’s ability to carryout the mission of securing the Nation’s borders against terrorist, smugglers of weapons of terrorism, other contraband and illegal aliens. Border Patrol Agents assigned to this operation often encounter violators of state and other Federal laws. Any assistance rendered to other agencies is incidental to their duties as immigration officers.

(5-ER-655.) Similarly, Border Patrol agents are trained that immigration is the primary purpose for their checkpoints and that any assistance to agencies enforcing other laws is incidental to their immigration duties. (5-ER-715; 5-ER-748.)

Consistent with this primary purpose, the manner in which the checkpoint is operated demonstrated the primacy of immigration control. That is, Border Patrol agents in the primary inspection area ask the occupants of the vehicle if they are United States citizens and conduct an “open view” inspection of the interior. (3-ER-396.) Bressi has presented no evidence that the questioning at the primary inspection area exceeds immigration related inquiries that are expressly permitted at an immigration checkpoint. *E.g.*, *Preciado-Robles*, 964 F.2d at 884; *Martinez-Fuerte*, 428 U.S. at 558. Moreover, agents are instructed not to refer an individual to secondary inspection for a non-immigration offense unless they have reasonable suspicion. (2-ER-144.)⁵

Despite this uncontroverted evidence regarding what happens at the checkpoint, Bressi argues that other evidence creates an issue regarding whether the primary purpose of the checkpoint is general law enforcement. (Op. Br. at 16-19.) These other facts, when viewed in context, do not create any issue regarding the primary purpose of the checkpoint.

⁵ Reasonable suspicion is the standard required for brief investigatory stops of vehicles. *E.g.*, *United States v. Valdes-Vega*, 738 F.3d 1074, 1078 (9th Cir. 2013) (en banc).

- The facts that Border Patrol agents are authorized to enforce federal narcotics laws, are trained to be alert for other offenses at the checkpoint, and use dogs trained to detect both concealed humans and drugs does not alter the primary purpose of the checkpoint. *United States v. Soyland*, 3 F.3d 1312, 1314 (9th Cir. 1993) (nothing in the record “suggests that narcotics training of Border Patrol agents has resulted in anything other than agents who, during the course of a lawful immigration search, have the ability to discern the presence of illegal drugs”); *Wilson*, 7 F.3d at 833 (9th Cir. 1993) (the use of a dog at a checkpoint is not evidence of a pretext for a narcotics search because the dog “is trained to detect hidden persons as well as drugs”); *Wilson*, 650 F. App’x at 539 (the fact that a dog at an immigration checkpoint “was trained to detect both drugs and concealed people does not raise an inference of illegality”).

- Contrary to Bressi suggestion, the arrest statistics for the checkpoint support the conclusion that the primary purpose is immigration control. That is, for the four years covered by the statistics in this case, the State Route 86 checkpoint resulted 541 total arrests, including 257 immigration related arrests and 127 narcotics related arrests that were non-immigration related. (3-ER-379-382.) Thus, there were twice as many immigration related arrests as non-immigration drug related arrests. Immigration offenses represented about 47.5 percent of all arrests.

Moreover, these arrest statistics do not take into account the deterrent effect of the checkpoint or the fact that the checkpoint causes smugglers to take less traveled back roads to avoid the checkpoint. Both the Supreme Court and this Court have recognized that traveling on back roads that avoid a checkpoint can contribute to a finding of reasonable suspicion supporting the stop of a vehicle. *E.g.*, *United States v. Arvizu*, 534 U.S. 266, 277 (2002); *United States v. Garcia-Barron*, 116 F.3d 1305, 1308 (9th Cir. 1997).

- Also contrary to Bressi’s claim, the presence of a DEA license plate reader in the area, whose information is inaccessible to agents at the checkpoint, is irrelevant to the purpose of the checkpoint. Moreover, Bressi’s argument assumes that a license plate reader can only operate if a vehicle is not moving fast. (Op. Br at 25 n.6.) Nothing in the record supports this assumption. *See* Stephen Rushin, *The Judicial Response to Mass Police Surveillance*, U. Ill. J.L. Tech. & Pol’y, Fall 2011, at 281, 285 (“The most advanced license plate readers photograph up to 1,800 plates per minute at a speed of up to 140 miles per hour”).

- Similarly, agents’ access to NCIC, a law enforcement database, does not make the checkpoint a general crime control checkpoint. Indeed, the presence of law enforcement tools at the checkpoint is consistent with the Supreme Court’s holding that officers may “act appropriately upon information that they properly learn during a checkpoint stop justified by a lawful primary purpose, even where

such action may result in the arrest of a motorist for an offense unrelated to that purpose.” *Edmond*, 531 U.S. at 48.

- Bressi also contends that the presence of local law enforcement in the area of the checkpoint makes it a general crimes checkpoint. The district court found, viewing the facts in the light most favorable to Bressi, that Pima County Sherriff’s deputies “are readily available at the checkpoint and assist Border Patrol agents by assuming authority over nonimmigration incidents.” (1-ER-21.)

Bressi’s anecdotal evidence, however, does not establish that the presence of these local officers altered the Border Patrol agents’ conduct at primary inspection, which was focused solely on immigration issues. To the extent that the involvement of local law enforcement was based on something observed during the immigration-focused primary stop, such involvement is consistent with the Supreme Court’s holding that officers can act on other matters observed during a justified checkpoint stop. *Edmond*, 531 U.S. at 48. To the extent that local officers operating near the checkpoint developed their own reasonable suspicion for a vehicle stop prior to or independent of the primary inspection stop, the checkpoint is irrelevant to the local officers’ actions. *United States v. Slayden*, 800 F. App’x 468, 471 (9th Cir. 2020) (the constitutionality of a Border Patrol checkpoint was irrelevant to the stop of a vehicle at the checkpoint, when the agents had developed reasonable suspicion prior

to the checkpoint).⁶ Moreover, Bressi’s anecdotal evidence demonstrates that the vast majority of the deputy sheriffs’ activity related to vehicle or driving issues. (3-ER-289-369.) Any suggestion that Border Patrol is operating a checkpoint with a primary purpose of enforcing state vehicle and driving laws simply is not supported by the evidence.

- Bressi takes issue with a statement on the Border Patrol website that “Traffic checks are conducted on major highways leading away from the border to (1) detect and apprehend individuals attempting to travel further into the interior of the United States after evading detection at the border and (2) to detect illegal narcotics.” (3-ER-370.) Bressi also notes that the Highway Encroachment Permit Application for the checkpoint stated that it was for a Border Patrol checkpoint “used to deter human and narcotics smuggling activities.” (3-ER-373.) These statements do not refute the evidence that the primary purpose of the checkpoint is immigration control.

⁶ The simple presence at or near the checkpoint of local law enforcement officers, who have general authority to enforce laws, does not convert the checkpoint into a general crime control checkpoint. Indeed, local law enforcement officers can operate checkpoints, as long as the primary purpose is valid. *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoint operated by state and local police did not violate the Fourth Amendment); *Lidster*, 540 U.S. 419 (2004) (checkpoint established by local police seeking information regarding a recent crime did not violate the Fourth Amendment); see *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (suggesting that “roadblock-type stops” are a permissible method for police to check driver’s licenses and vehicle registrations).

- The fact that Border Patrol publishes data on drug seizures and has an internal report that reflects only drug seizures at checkpoints also does not alter the primary purpose or immigration control. Moreover, there can be no dispute that the Border Patrol also tracks immigration matters at the checkpoint, as evidenced by the statistics produced in this case. (3-ER-379-382.)

In sum, when the undisputed evidence is viewed in the light most favorable to Bressi, he cannot meet his burden of establishing that the primary purpose of the Border Patrol checkpoint was general crime control rather than immigration control. The district court did not err in reaching that conclusion. (1-ER-16-23.)

e. The Checkpoint Is Operated in a Reasonable Manner

Courts judge the checkpoint's reasonableness on the basis of the individual circumstances – such as “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.” *Frquire*, 575 F.3d at 932 (quoting *Lidster*, 540 U.S. at 427).

The gravity of the concern addressed by the checkpoint is high. As the district court concluded, “[i]t is not disputed that illegal immigration remains a serious public interest that has not lessened since the Supreme Court considered the question in *Martinez-Fuerte*.” (1-ER-30.)

The State Route 86 checkpoint also advances that public interest. That checkpoint, along with two other checkpoints, make it difficult to avoid a checkpoint when traveling to Tucson from the border area west of Tucson. (2-ER-143.) Although some checkpoints are located 45 linear miles north of the border, Border Patrol selected the checkpoints locations to maximize effectiveness in light of a variety of logistical concerns. (5-ER-784.) If any of these three checkpoints were removed, smugglers would have an unobstructed route from the border area to Tucson. (2-ER-144.) Specifically, as the district court found, the State Route 86 checkpoint is strategically located to capture traffic crossing the approximately 63 miles of international border between Mexico and the Tohono O’odham Nation. It is the only checkpoint between the Tohono O’odham Nation and Tucson. (SER-18.)

Bressi argues that the number of immigration arrests indicates that the checkpoint does not advance the public interest. This argument overlooks that fact that the checkpoint is designed, in coordination with other checkpoints, to make it difficult to travel from the border area west of Tucson to Tucson without encountering a checkpoint. It also ignores the deterrent value of the checkpoints.

The severity of the interference with individual liberty at the checkpoint is slight. As the Supreme Court stated, “principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop.” *Martinez-Fuerte*, 428 U.S. at 566–67. The primary stop at the State Route 86

checkpoint is limited to questions regarding citizenship or immigration status and an “open view” inspection of the interior. (3-ER-396.) The nature of the stop is exactly the type of stop approved by the Supreme Court. *Id.* at 558.

Bressi argues that the checkpoint was unreasonable because he was not always waved through the checkpoint without having to stop. (Op. Br. at 28.) He emphasizes that in *Martinez-Fuerte*, 428 U.S. at 550, the Court stated that motorists recognized as local inhabitants “are waved through the checkpoint without inquiry.”

His reliance on that language is misplaced. First, that fact did not appear to factor into the Supreme Court’s reasoning explaining why the checkpoint was constitutional. *Id.* at 557-64. Second, in other cases, the Supreme Court indicated that stopping all vehicles at a checkpoint contributed to a finding of reasonableness:

For Fourth Amendment purposes, we also see insufficient resemblance between sporadic and random stops of individual vehicles making their way through city traffic and those stops occasioned by roadblocks where all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community.

Prouse, 440 U.S. at 657; *Lidster*, 540 U.S. at 428 (“Viewed subjectively, the contact provided little reason for anxiety or alarm. The police stopped all vehicles systematically”).

Third, the acting chief of the Tucson Sector of the Border Patrol explained that the reason they do not exempt any vehicles is because there have been numerous

occasions when people who regularly travel through a checkpoint are caught smuggling. (4-ER-419.)

Finally, Bressi argues that the acting chief's reference to the checkpoint as the functional equivalent of the border implies that they operated the checkpoint like a port of entry. (Op. Br. at 29.) At the functional equivalent of the border, vehicles and persons are subject to search without probable cause or reasonable suspicion. *United States v. Cotterman*, 709 F.3d 952, 961 (9th Cir. 2013) (en banc). There is no evidence that the checkpoint is operated like a port of entry.

In sum, the undisputed evidence, viewed in the light most favorable to Bressi, demonstrates that Bressi cannot meet his burden of establishing that the State Route 86 checkpoint violates the Fourth Amendment. As the district court found, the checkpoint's primary purpose is immigration control, and it is operated in a reasonable manner. (1-ER-28-34.)

B. The District Court Did Not Err By Granting Summary Judgement to the Federal Defendants on Bressi's First Amendment Claim.

1. Standard of Review

The Court reviews de novo a district court's decision on summary judgment. *Hughes*, 31 F.4th at 1218.

2. Argument

Bressi claims that he exercises his First Amendment rights by recording interactions at the checkpoint and refusing to respond to agents' inquiries. He argues

that the federal defendants retaliated against him in violation of the First Amendment by occasionally detaining him longer than necessary at the checkpoint. (Op. Br. at 41-42.) Stated another way, Bressi's argument is that he has a special entitlement to be waved through the checkpoint without questioning. The district court did not err by granting summary judgment on this claim.

The extent of Bressi's First Amendment claim against the federal defendants is narrow. By Bressi's own acknowledgment, he encountered what he perceived to be a First Amendment violation at the checkpoint less than four percent of the time. That is, during discovery in this case, Bressi produced 555 videos of his encounters at the checkpoint. He identified only 18 of these encounters as showing an alleged First Amendment violation. (2-ER-147.)

The district court found that it was "undisputed that in in every instance, the Plaintiff refused to comply with directives to move to the secondary area when he refused to answer the citizenship question during the primary stop." (1-ER-27.) The court further found that "in every instance, 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 (footnote omitted).) Bressi's failure to move to secondary at the direction of the agents is not "speech." *Yount v. County of Los Angeles*, 655 F.3d 1156, 1170 (9th Cir. 2011) (plaintiff's refusal to follow an officer's direction to reenter this vehicle "was not an act of speech protected by the First Amendment").

There is no evidence to support Bressi’s claim that the length of his detention at the checkpoint was affected by the fact that he was recording the encounters. There is no evidence that any detention at the checkpoint was extended because of the recording, rather than because of Bressi’s failure to answer a citizenship question or to move to secondary inspection as directed. For example, there is no instance where Bressi was recording, answered the citizenship question, but still was detained.

Regarding Bressi’s claim based on his failure to respond to the agents’ questions, the district court correctly recognized that the case “is simply not a free speech case.” (1-ER-27.) The Fourth Amendment — not the First — is the relevant amendment governing the type of questions an officer may ask during a legal seizure and whether an officer may prolong a seizure based on a person’s answer or non-answer. *E.g.*, *Brown v. Texas*, 443 U.S. 47, 53 (1979) (the application of a state statute to detain appellant and require him to identify himself violated the Fourth Amendment because the officers lacked any reasonable suspicion to believe that appellant was engaged or had engaged in criminal conduct); *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 188 (2004) (a state law requiring a suspect to disclose his name in the course of a valid stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968) is consistent with Fourth Amendment); *see Koch v. City of Del City*, 660 F.3d 1228, 1244 (10th Cir. 2011) (“we again have found no

authority recognizing a First Amendment right to refuse to answer questions during a *Terry* stop”).

Even if considered as a First Amendment claim, Bressi cannot prevail. The most analogous framework for Bressi’s checkpoint claim is the framework established by the Supreme Court in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019) for retaliatory arrest claims. Under *Nieves*, 139 S. Ct. at 1722, a plaintiff must establish that a retaliatory motive was a “but-for” cause, “meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.” Thus, in the context of a retaliatory arrest claim, the plaintiff must plead and prove the absence of probable cause for the arrest. *Id.* at 1724.

Applying this framework to the checkpoint context, Bressi would need to demonstrate that the agents at the checkpoint did not have a legal basis to ask his citizenship or refer him for secondary inspection. Considering the legal standards pertaining to checkpoints, Bressi cannot make this showing.

In short, an agent can ask an individual their citizenship at an immigration checkpoint. *Martinez-Fuerte*, 428 U.S. at 566. Similarly, the legal standard for referring vehicles to secondary inspection at a checkpoint is extraordinarily minimal. No “particularized reason” is needed to justify such a referral. *Id.* at 563. Border Patrol officers have “wide discretion in selecting the motorists to be diverted for the brief questioning involved.” *Id.* at 563-64. As this Court has recognized, the

“government may refer any vehicle to a secondary area for further immigration questioning ‘in the absence of any individualized suspicion. . . .’” *Preciado-Robles*, 964 F.2d at 884 (quoting *Martinez-Fuerte*, 428 U.S. at 562); *United States v. Barnett*, 935 F.2d 178, 181 (9th Cir. 1991) (agents do not need articulable suspicion of an immigration-related offenses to refer vehicle to secondary inspection). In light of these standards, Bressi cannot show that the agents’ actions lacked a legal basis.

In holding that the lack of probable cause was necessary for a retaliatory arrest claim, the Supreme Court recognized a “narrow” exception for “circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so.” *Nieves*, 139 S. Ct. at 1727. For that exception to apply, the plaintiff must present “objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.” *Id.* Bressi has not made any showing that similarly situated people were treated differently at the checkpoint by federal agents.

Bressi’s First Amendment claim also fails for an additional reason. It is premised on his assumption that all Border Patrol agents know who he is and know he is a United States citizen. The facts do not support such an assumption.

First, prior to the COVID-19 pandemic, Bressi passed through the checkpoint only about once a week. (2-ER-145-146.) Second, the “Uncooperative Motorist” poster at the checkpoint that Bressi relies on does not establish that all Border Patrol

agents knew his citizenship. Although the poster identifies Bressi as a United States citizen, it was at the checkpoint for about one year from March 29, 2016. (3-ER-288; 3-ER-389.) As noted above, Bressi identified only 18 encounters where he alleges his First Amendment rights were violated. (2-ER-147.) None of those 18 encounters occurred during the time that the poster was in place. (*See* 2-ER-147-152.) These facts demonstrate that Bressi's assumption that all Border Patrol agents know his citizenship is unwarranted.

Bressi's claim that this poster reflects retaliatory intent also fails. All the poster does is advise agents of a potential problem. It does not direct any action other than notifying agents that Bressi is not exempt from inspection. (3-ER-288.)

Similarly, Bressi's claim that an agent's exploration of possible charges against him demonstrates retaliatory intent also lacks merit. In fact, that incident demonstrates the care Border Patrol took in insuring its actions have a legal basis. In that incident, a Border Patrol agent was diagnosed with some hearing loss after Bressi continuously blared his truck's horn at a checkpoint encounter. (5-ER-619.) The internal e-mail exchange demonstrates that agents sought advice from others, including legal counsel, before attempting to take action. (5-ER-620-624.) Based on this careful review, no action was taken.

Finally, Bressi's claims against the federal defendants are premised on an accumulation of 18 decisions by various Border Patrol agents over a 14-year period.

The evidence certainly does not established a widespread Border Patrol practice or policy, in light of the fact that Bressi has identified only 18 incidents out of 555 encounters.

In sum, the district court did not err by granting summary judgment as to the federal defendants on Bressi’s First Amendment claim. The evidence demonstrates that any lengthening of the detention at the checkpoint was a result of Bressi’s actions, not retaliation for his speech.

C. The District Court Did Not Err By Granting Summary Judgment to the United States on the Count Pursuant to the Federal Tort Claims Act.

1. Standard of Review

The Court reviews de novo a district court’s decision on summary judgment. *Hughes*, 31 F.4th at 1218.

2. Argument

In Count VIII of the Second Amended complaint, Bressi brought a claim against the United States under the Federal Tort Claims Act (FTCA). (4-ER-590.) This claim was based on allegations that employees of the federal government “intentionally confined Plaintiff within the boundaries of the checkpoint” and “induced and/or encouraged Defendant [Sheriff’s Deputy] Roher to confine Plaintiff in handcuffs after leaving the boundaries of the SR-86 checkpoint” on April 10,

2017. (4-ER-590.) On appeal, Bressi focuses solely on whether his arrest by Deputy Roher was supported by probable cause. (Op. Br. at 48-53.)⁷

a. Bressi Cannot Establish that Federal Employees Caused His Arrest.

As a preliminary matter, a claim against the United States under the Federal Tort Claims Act only is available for injuries caused by employees of the federal government. 28 U.S.C. § 1346(b)(1). An “employee of the Government” is an officer or employee “of any federal agency . . . and persons acting on behalf of a federal agency in an official capacity, . . . in the service of the United States.” 28 U.S.C. § 2671.

Bressi cannot establish that a federal employee induced or encouraged Deputy Roher to arrest Bressi and place him in handcuffs. The United States cannot be sued for Deputy Roher’s decisions because Deputy Roher is not a United States employee, and he was not acting in the service of the United States.

b. There Was Probable Cause to Arrest Bressi.

Even if the United States could be sued for Deputy Roher’s decisions, however, the district court properly granted summary judgment because the undisputed evidence demonstrates that there was probable cause for the Bressi’s arrest.

⁷ In any event, the brief detention by a Border Patrol agent at the checkpoint was lawful. (See Argument A, *supra*.)

“A warrantless arrest is reasonable if the officer has probable cause to believe that the suspect committed a crime in the officer’s presence.” *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018). Probable cause exists if there is “a probability or substantial chance of criminal activity, not an actual showing of such activity.” *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 243-44 n.13 (1983)). Probable cause “is not a high bar.” *Id.* (quoting *Kaley v. United States*, 571 U.S. 320, 338 (2014)).

To determine whether probable cause exists, the Court considers the facts leading up to the arrest, and decides whether those facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. *Id.*

On April 10, 2017, Bressi was arrested (and ultimately cited, after he agreed to sign the citation promising to appear in court) for obstructing a highway in violation of Ariz. Rev. Stat. § 13-2906(A)(1). That statute provides: “A person commits obstructing a highway or other public thoroughfare if the person . . . Having no legal privilege to do so, recklessly interferes with the passage of any highway or public thoroughfare by creating an unreasonable inconvenience or hazard.” Ariz. Rev. Stat. § 13-2906(A)(1).

Given what Deputy Roher witnessed, which is all recorded on video, the facts available to him established probable cause. That is, the undisputed facts show that Bressi repeatedly was directed to go to the secondary inspection area off the roadway, but he refused. After being told he was blocking the highway and subject

to arrest, he still refused to move his truck. His failure to move his truck to the secondary inspection area blocked State Route 86, causing unreasonable inconvenience to the motorists behind him.

As the district court found, and as explained above, Bressi “did not have any constitutional right to pass through the primary lane of the checkpoint because he is a United States citizen. He did not have a constitutional right to not move to the secondary area when asked to do so by Agent Frye or Deputy Roher.” (1-ER-26.)

Bressi suggests that Ariz. Rev. Stat. 28-622 more aptly applies to his conduct on April 10, 2017. (Op. Br. at 52 n.12.) That statute provides: “A person shall not wilfully fail or refuse to comply with any lawful order or direction of a police officer invested by law with authority to direct, control or regulate traffic.” Ariz. Rev. Stat. § 28-622. That statute also applies here. Bressi refused to comply with Deputy Roher’s directive to “pull over there” to secondary inspection. (Exh. N, Apr. 10, 2017 video at 17:15:01.) Bressi argues that because Deputy Roher did not invoke that law, it does not matter. (Op. Br. at 52 n.12.) Bressi is wrong. “Because probable cause is an objective standard, an arrest is lawful if the officer had probable cause to arrest for any offense, not just the offense cited at the time of arrest or booking.” *Wesby*, 138 S. Ct. at 585 n. 2.

Thus, the undisputed evidence demonstrates that there was probable cause to arrest Bressi on April 10, 2017. The district court did not err in reaching that conclusion and granting the motion for summary judgment on that issue.

VIII. CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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IX. STATEMENT OF RELATED CASES

To the knowledge of counsel, there are no related cases currently pending in this Court.

X. CERTIFICATE OF COMPLIANCE FOR BRIEFS (Form 8)

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

I am the attorney or self-represented party.

This brief contains 9,620 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).

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