No. 22-15123

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TERRENCE BRESSI,

Plaintiff-Appellant,

vs

PIMA COUNTY SHERIFF CHRIS NANOS, MARK NAPIER, PIMA COUNTY BOARD OF SUPERVISORS, RYAN ROHER, BRIAN KUNZE, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CUSTOMS & BORDER PROTECTION, UNITED STATES BORDER PATROL, ALEJANDRO MAYORKAS, CHRIS MAGNUS, RAUL ORTIZ, JOHN MARTIN, and UNITED STATES OF AMERICA,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona

The Honorable David C. Bury, District Judge
Case No. 4:18-cv-00186-DCB

ANSWERING BRIEF OF PIMA COUNTY DEFENDANTS'/APPELLEES'

filed May 31, 2022

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INTRODUCTION

United States Customs and Border Protection (Border Patrol) operates a checkpoint on Arizona State Route 86 (SR86), an east-west highway approximately 50 miles north of the U.S.-Mexico border between Tucson and the intersection with State Route 85 in Why. *See* 8 U.S.C. § 1357 (authorizing checkpoint operations); 8 C.F.R. § 287.1(a)(2) (interpreting reasonable distance as within 100 miles of border). As discussed by the District Court, the checkpoint is one of three located in Southwestern Arizona. 1-ER-5-6, 31-32. The checkpoint intercepts access to freeways connecting through Tucson and potential illegal border travelers and contraband that cross illegally from Mexico at Lukeville/SR85 and through the approximately 63 miles of international border on Tohono O'odham Nation. 1-ER-5-6, 31-32.

Mr. Bressi uses SR86 going to and from work several times a week, and he protests the checkpoint. He refuses to respond when asked his citizenship. He blocks traffic at the checkpoint, and honks his horn. He films these encounters and posts them on his website. On April 10, 2017, Mr. Bressi was cited and released by Pima County Sheriff's Deputy Ryan Roher for obstructing traffic at the Border Patrol checkpoint after he remained in the through lane and refused to comply a total of ten times with directives from Border Patrol Agent Frye (seven

times) and Deputy Roher (three times) to move out of the travel lane into the secondary area of the checkpoint. (See Exhibit N, BRE0330_10APR2017 at 00:05-04:30.) After refusing to move, Deputy Roher told Mr. Bressi to proceed in order to clear the through travel lane. Deputy Roher then initiated a traffic stop and cited Mr. Bressi for obstructing the highway pursuant to A.R.S. § 13-2906(A)(1). (See Exhibit N, BRE0330_10APR2017 at 04:30-30:35.)

Mr. Bressi filed suit against multiple federal agencies and individuals ("the Federal Appellees"), as well as Pima County Sheriffs Chris Nanos and Mark Napier, the Pima County Board of Supervisors, and Pima County Deputy Ryan Roher and Sgt. Brian Kunze ("the County Appellees"), claiming as to the County Appellees: (1) the SR86 checkpoint is unconstitutional, as is the Pima County Sheriff's Department's participation in it (Count II); (2) his arrest was without probable cause in violation of the Fourth Amendment and in retaliation for the exercise of his First Amendment right to free speech (Counts I and III); (3) the Sheriff/Board of Supervisors are liable under *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978), for its policies, training and supervision related to the Sheriff's Department's participation at the checkpoint (Counts IV, V, and VI); and (4) the County Appellees are liable for false imprisonment under Arizona law (Count VII.)

The trial court correctly granted summary judgment in favor of Appellees. Specifically, the trial court determined the SR 86 checkpoint is constitutional under *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). 1-ER-16-22, 28-38. Further, Border Patrol Agent Frye had a right to direct Mr. Bressi to move his vehicle into the secondary area of the checkpoint and respond to the question about his citizenship. 1-ER-26, 36. Finally, Deputy Roher had probable cause to arrest Mr. Bressi for obstructing traffic at the checkpoint. 1-ER-26, 27.

ISSUES

Appellant's Opening Brief raises two issues, which the County Appellees essentially agree with, though the County Appellees would recast the issues as follows:

(1) whether the SR86 checkpoint had a primary purpose of border enforcement, was operated in a reasonable manner and was therefore constitutional; and

(2) whether Appellant's arrest for blocking travel on SR86 was supported by probable cause.

In addition to these two issues, two other issues are before this Court: (1) whether Pima County Deputy Sheriff Ryan Roher and Sgt. Brian Kunze are entitled to qualified immunity under federal and state law for the arrest of Mr.

Bressi, and whether Mr. Bressi has stated a claim against Pima County Sheriff Napier/The Pima County Board of Supervisors pursuant to *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978).

STATEMENT OF THE CASE

As noted several times by the trial court, the material facts are undisputed. 1-ER-9, 18, 27, 28, 31, 33, 34, 36, 40. The Federal Appellees set forth the facts relevant to the constitutionality of the SR86 checkpoint and the procedural history of the action. The Pima County Appellees focus on the facts specifically relevant to them.

Mr. Bressi has encountered Pima County Deputies at the SR86 checkpoint on a total of five occasions. 2-ER-206-216. He was issued a total of four citations by the Pima County Sheriff's Department: one criminal citation and three civil citations. 2-ER-206-216. The criminal citation occurred on April 10, 2017, after Mr Bressi refused seven separate directives from Border Patrol Agent Frye, and three directives from Pima County Deputy Ryan Roher, to move his vehicle from the primary traffic lane into the secondary area of the checkpoint. 2-ER-185-187; Exhibit N, BRE0330_10APR2017 at 00:05-04:30. As traffic backed up behind Mr. Bressi, he continued to refuse to move to secondary. Deputy Roher decided to let Mr. Bressi proceed out of the checkpoint to allow traffic to flow freely before

initiating a traffic stop of Mr. Bressi to cite Mr. Bressi for violating A.R.S. § 13-2906(A)(1), Obstructing a highway or other public thoroughfare. 2-ER-187-189, 192-194; Exhibit N, BRE0330_10APR2017 at 04:30-06:30, 09:15-11:48.

During the traffic stop, Mr. Bressi remained uncooperative, continuing to interrupt the Deputy, challenge his authority, and not respond to his requests for information. 2-ER-187-189, 192-194; Exhibit N, BRE0330_10APR2017 at 04:30-30:35. Eventually Deputy Roher informed Mr. Bressi he would be cited for violation of the statute. 2-ER-187-189, 192-194; Exhibit N, BRE0330_10APR2017 at 04:30-30:35. Mr. Bressi demanded to speak to a supervisor, and Pima County Sheriff's Department Sgt. Brian Kunze was called to the scene. 2-ER-189, 190; Exhibit N, BRE0330_10APR2017 at 6:06-6:10, 11:25-11:35. Sgt. Kunze informed Mr. Bressi Deputy Roher was correct in citing him for obstructing traffic at the checkpoint, Mr. Bressi ultimately signed the citation, and was allowed to proceed. 2-ER-199-204. This was Deputy Roher's first time interacting with Mr. Bressi. 2-ER-193, 217-218.

STANDARD OF REVIEW

The standard of review of the grant of summary judgment is de novo. *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983). A probable cause determination is reviewed *de novo*. *Picray v. Sealock*, 138 F.3d 767, 770-71 (9th Cir. 1998).

SUMMARY OF ARGUMENT

Over forty-five years ago, the Supreme Court upheld the use of interior checkpoints because illegal crossings cannot be controlled effectively at the international border. "Interdicting the flow of illegal entrants from Mexico poses formidable law enforcement problems." *United States v. Martinez-Fuerte*, 428 U.S. 543, 552 (1976). No less today than forty-five years ago, there remains a compelling government and public interest in securing the border. Interior checkpoints impose a minimal intrusion on an individual's privacy. *Id.* at 563. SR 86 checkpoint is constitutional in its purpose and is reasonably operated. Border Patrol agents have the right to ask simple questions regarding citizenship, and they can refer individuals to the secondary area of the checkpoint for immigration purposes without needing any reasonable suspicion of wrongdoing. *Id.* at 563-64.

Mr. Bressi had no right under the First Amendment or otherwise to obstruct the travel lane of SR 86 at the checkpoint. He refused multiple requests from Border Patrol Agent Frye and Pima County Deputy Roher to move his vehicle out of the travel lane. Mr. Bressi violated A.R.S. § 13-2906(A)(1) by obstructing the travel lane. While Mr. Bressi claims fact issues exist as to probable cause, the alleged facts disputed by Mr. Bressi are either not disputed, not material, inadmissible, irrelevant or a combination of these factors.

As discussed below, Mr. Bressi cannot establish Deputy Roher or Sgt. Kunze violated any constitutional right, much less one that is clearly established. Individually, they are entitled to qualified immunity under both state and federal law. Because there is no underlying constitutional violation, Mr. Bressi also cannot establish a *Monell* claim against Pima County or the Pima County Sheriff.

ARGUMENT

A. Mr. Bressi had no constitutional right to obstruct traffic by refusing to move into the secondary area.

Mr. Bressi's claims depend on his allegation the SR86 checkpoint is unconstitutional at the programmatic level, that is to say its primary purpose is not border/immigration enforcement but general law enforcement activities, and it is operated in an unreasonable fashion. *See, e.g., City of Indianapolis v. Edmond*, 531 U.S. 32, 44-45 (2000) ("While we do not limit the purposes that may justify a checkpoint program to any rigid set of categories, we decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control.");*United States v. Fraire*, 575 F.3d 929, 932 (9th Cir. 2009) *quoting Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (where checkpoint is not *per se* invalid as a crime control device, the court must assess the reasonableness of its operation under *Martinez-Fuerte*). The County Appellees join in the arguments and authorities presented by the Federal Appellees on this

issue. Because the checkpoint itself is constitutional, Border Patrol agents operating the checkpoint had a right to stop Mr. Bressi at the checkpoint, require him to confirm his citizenship status, and refer Mr. Bressi to the secondary area of the checkpoint for a brief immigration related investigation, all without reasonable suspicion that he was otherwise committing any unlawful activity. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 545, 562 (1976) (holding "a vehicle may be stopped at a fixed checkpoint for brief questioning of its occupants even though there is no reason to believe the particular vehicle contains illegal aliens."); *United States v. Barnett*, 935 F.2d 178, 180-82 (9th Cir. 1991) (holding referral to secondary inspection was proper even in the absence of articulable suspicion); *United States v. Wilson*, 7 F.3d 828, 833 (9th Cir. 1993) (holding vehicles may be stopped by Border Patrol at "permanent immigration checkpoints for brief initial questioning and referred to a secondary inspection area for further questioning 'in the absence of any individualized suspicion.'")[1].

[1] Some courts recognize an exception to the rule no reasonable suspicion is required to refer a vehicle to secondary where the referral is pretext to conduct a search for illegal narcotics. *United States v. Koshnevis*, 979 F.2d 691, 694 (9th Cir. 1992) ("[i]n the absence of affirmative evidence that [an agent] harbored a subjective purpose in referring [a defendant] to secondary inspection for drug-related offenses, we will not require an agent to demonstrate articulable suspicion for an otherwise legitimate immigration stop."); *see also United States v. Wilson*, 7 F.3d 828, 833 (9th Cir. 1993). Mr. Bressi makes no claim that he was being referred to secondary as a pretext to conduct a narcotics investigation, only that the agents had no right to make the request at all.

Because the checkpoint itself is constitutional, Mr Bressi was required to obey their directives to move his vehicle into the secondary area. He has no right to refuse based on the First Amendment or any other law. The Border Patrol agents' activities at the checkpoint are lawful, as are those of the Pima County Sheriff's Department and its Deputies, both in general and with respect to Mr. Bressi's actions on April 10, 2017.

Mr. Bressi's argument is essentially that where the measured effect of the checkpoint, based on number of arrests, is greater for narcotics offenses then for immigration offenses, the primary purpose of the checkpoint shifts to general law enforcement instead of immigration enforcement. This mathematical equivalency approach was properly rejected by the trial court. 1-ER-17. A purely statistical analysis based on the number of arrests in a particular category misleadingly equates purpose with effect. The primary purpose of the checkpoint could be to interdict illegal aliens and alien smuggling. The checkpoint could be so successful at this purpose that not a single illegal alien or alien smuggler seeks to traverse the checkpoint. That the same methods used to detect human smuggling, such as backscatter x-rays and detection dogs, are equally effective at discovering smuggled narcotics as smuggled humans, resulting in far more narcotics arrests than immigration arrests, would not alter the primary purpose of the checkpoint or

its effectiveness in limiting immigration violations on SR86.

In any event, as noted by the trial court, Mr. Bressi's evidence of the number of immigration vs. narcotics arrests shows only an approximately equivalent number of each at the checkpoint for the years 2016 through 2020. 1-ER-18. Mr. Bressi cites no case where an immigration checkpoint was found unconstitutional based on an equivalent number of immigration vs. non-immigration arrests, and his citation of mixed-motive cases from other contexts is unavailing. The Federal Appellees have demonstrated the primary purpose of the SR86 checkpoint is immigration enforcement, and it is otherwise operated within constitutional constraints. Mr. Bressi fails to prove a lynchpin element of his claims.

B. Mr. Bressi's arrest for blocking traffic at the checkpoint was supported by probable cause.

Mr. Bressi's claims against the County Appellees also fail because his arrest was supported by probable cause. Probable cause is an absolute defense to Mr. Bressi's claims against the County Appellees for violation of his Fourth Amendment rights (Counts II and III), as well as his *Monell* claims for failure to train and supervise (Counts IV, V, and VI), and for state law false imprisonment (Count VII). Probable cause to arrest or detain is an absolute defense to any claim under § 1983 against police officers for wrongful arrest, as the lack of probable

cause is a necessary element of that claim. *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998) ("To prevail on his section 1983 claim for false arrest . . . [the plaintiff] would have to demonstrate that there was no probable cause to arrest him."); *Cullison v. City of Peoria*, 120 Ariz. 165, 169 (1978) (lack of probable cause is a complete defense to a state law false imprisonment claim).

In addition, probable cause forecloses Mr. Bressi's claim for violation of his First Amendment rights (Count I) in the circumstances presented. *See Nieves v. Bartlett*, 139 S.Ct. 1715, 1723-24 (2019) (in order to bring a First Amendment claim for retaliatory arrest a plaintiff generally must first show the absence of probable cause for the arrest, and the existence of probable cause will "provide weighty evidence" the officer's animus did not cause the arrest). "Probable cause exists when the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the plaintiff had committed or was committing an offense." *Hart v. Parks*, 450 F.3d 1059, 1065-66 (9th Cir. 2006) (citations and quotations omitted).

Because the probable cause standard is objective, probable cause supports an arrest so long as the arresting officers had probable cause to arrest a suspect for any criminal offense regardless of their stated reason or subjective intent for the

arrest. *Devenpeck v. Alford*, 543 U.S. 146, 153-155 (2004); *Edgerly v. City and County of San Francisco*, 599 F.3d 946, 954 (9th Cir. 2010) (finding that although the officers lacked probable cause to arrest for violating the statute they cited him under, there was probable cause to arrest the plaintiff under another statute). Contrary to Mr. Bressi's claim that probable cause is a fact question to be determined by a jury, whether a reasonable officer could have believed probable cause existed to justify a search or an arrest is "an essentially legal question" that should be determined by the Court. *Act Up!Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993). Here, the underlying facts and circumstances of Mr. Bressi's interactions with the agents and deputies were recorded and are not disputed. *Id*. ("Where the underlying facts are undisputed, a district court must determine the issue on motion for summary judgment.").

1. Probable cause existed to arrest Mr. Bressi for blocking traffic at the checkpoint in violation of A.R.S. § 13-2906(A)(1).

After Mr. Bressi refused ten direct orders from Border Patrol Agent Frye and Pima County Deputy Sheriff Roher to move his vehicle from the traffic lane into the secondary area because he was blocking traffic, Mr. Bressi was told to go so Deputy Roher could get him out of the travel lane and then initiate a traffic stop for Mr. Bressi's violation of A.R.S. § 13-2906(A)(1), Obstructing a Highway or

Public Thoroughfare. 2-ER-185-204 (Transcription of April 10, 2017 incident); Exhibit N, BRE0330_10APR2017 at 00:05-04:30. A.R.S. § 13-2906(A)(1) provides in relevant part:

> A. A person commits obstructing a highway or other public thoroughfare if the person . . . does any of the following:
>
> 1. 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.

Here, it is undisputed that Mr. Bressi interfered with the passage of traffic at the SR86 checkpoint when he refused multiple times to move his vehicle to the secondary area. See Opening Brief, p. 50 ("It is undisputed that Mr. Bressi's continued presence in the primary inspection lane was holding up traffic.") Mr. Bressi cites the statutory definition of "recklessly," but does not dispute Mr. Bressi's conduct meets this definition. *See* A.R.S. § 13-105(10)(c).

Mr. Bressi argues instead there is an issue of disputed fact as to whether Deputy Roher had probable cause to arrest him for blocking the roadway. In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine dispute as to a material fact for trial. *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005). When the underlying facts claimed to support probable cause are not in dispute, whether those facts constitute probable cause is an issue of law. *See*

Ornelas v. United States, 517 U.S. 690, 696-97 (1996) (holding that the inquiry is whether the rule of law as applied to the established, historical facts is or is not violated); *Peng v. Mei Chin Penghu*, 335 F.3d 970, 979-80 (9th Cir. 2003) ("[W]here the material historical facts are not in dispute, and the only disputes involve what inferences properly may be drawn from those historical facts, it is appropriate for the court to decide whether probable cause existed[.]"). Further, not every disputed fact is a material one. *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1053 (9th Cir. 2009) (acknowledging the existence of factual disputes in the record but holding there were sufficient undisputed material facts to support the officers had probable cause to arrest).

Mr. Bressi concedes his "continued presence in the primary inspection lane was holding up traffic," but claims the following material disputed fact issues must be determined by a jury: (1) whether Border Patrol Agent Frye suspected Mr. Bressi was committing a violation of immigration or federal law; (2) whether and when Agent Frye recognized 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 . . ." (Opening Brief, p. 50-51.) Bressi asserts: "If [Deputy] Roher knew some or all of these things when he made the arrest, then probable

cause was lacking, . . .” (Opening Brief, p. 51.)

Mr. Bressi’s claims fail because the established, historical facts are undisputed, the facts he claims to be disputed are not material, and the claimed disputed facts are not relevant or admissible. First, the facts necessary to establish probable cause are admitted. Mr. Bressi himself admits he was obstructing traffic in the primary lane and refused ten times to move to the secondary area when instructed to do so by both Agent Frye and Deputy Roher. These undisputed facts establish probable cause as a matter of law that Mr. Bressi violated A.R.S. § 13-2906(A)(1). The only element Mr. Bressi appears to dispute is whether he enjoyed some privilege to remain in the primary lane, obstructing traffic. As established above and in the Federal Appellees’ Answering Brief, Agent Frye had the authority to require Mr, Bressi to move to the secondary area and answer questions related to his citizenship regardless of whether he had any reasonable suspicion that Mr. Bressi was committing a violation of immigration or other federal criminal law.

Mr. Bressi has also submitted no evidence to show Deputy Roher knew of the alleged Border Patrol policy to allow non-cooperative motorists to proceed through the checkpoint. In fact, the evidence demonstrates the opposite. The April 10, 2017 incident was Deputy Roher’s first encounter with Mr. Bressi. 2-ER-

193, 217-218. Mr. Bressi had interactions with Pima County Sheriff's Deputies at the checkpoint on four occasions prior to April 10, 2017. 2-ER-206-216. On three of those occasions he was cited for various traffic violations for his actions at the checkpoint. 2-ER-206-216. If anything, the evidence establishes a pattern of citing Mr. Bressi for similar incidents at the checkpoint, and no support that Deputy Roher was aware of a policy not to impede uncooperative motorists. The undisputed evidence establishes Mr. Bressi had no legal grounds to refuse Agent Frye and Deputy Roher's directives to move to the secondary area, and his continued refusal to do so was a clear violation of A.R.S. § 13-2906(A)(1).

In addition, the facts Mr. Bressi claims to be disputed are not material, relevant or even admissible to show a lack of probable cause. The supposedly disputed facts asserted by Mr. Bressi, including whether Deputy Roher arrested him while knowing Agent Frye did not suspect him of violating any federal law, knew he was a citizen, and was aware of the policy against impeding uncooperative motorists, what Deputy Roher knew about Mr. Bressi and his website (see Opening Brief, p. 47), all go to Deputy Roher's subjective intent in making the arrest. A law enforcement officer's subjective intent is immaterial, irrelevant and inadmissible on the probable cause determination in both Fourth Amendment false arrest and First Amendment retaliation claims. *See Devenpeck v.*

Alford, 543 U.S. 146, 153, 155 (2004) (A particular officer's state of mind is simply "irrelevant," and it provides "no basis for invalidating an arrest" in the Fourth Amendment false arrest context); *Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019) ("when reviewing an arrest, we ask 'whether the circumstances, viewed objectively, justify [the challenged] action,' and if so, conclude 'that action was reasonable *whatever* the subjective intent motivating the relevant officials.'" (alteration and emphasis in original) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011)).

Deputy Roher knew Mr. Bressi was refusing Agent Frye's and his own directives to proceed to the secondary area. Regardless of whether Mr. Bressi had a right to refuse Agent Frye's directives (he did not), Mr. Bressi had no right to refuse those of Deputy Roher. Mr. Bressi admits his continued presence in the primary lane was obstructing traffic. Probable cause existed for the arrest.

Mr. Bressi concedes Deputy Roher's subjective intent is not relevant, then proceeds to argue it proves Deputy Roher knew Agent Frye was detaining Mr. Bressi without any reasonable suspicion, and that he permitted Mr. Bressi to move out of the primary lane before making the arrest[2]. (Opening Brief, pp. 51-52.) As

[2] Mr. Bressi also argues Deputy Roher knew Mr. Bressi had not been cited for obstructing traffic the year before by Deputy McMillan. (Opening Brief, p. 52 & n.13.) The facts of that incident, where Border Patrol Agents placed a spike

demonstrated above, Agent Frye needed no reasonable suspicion to direct Mr. Bressi to the secondary area and ask him for proof of citizenship. Why Deputy Roher chose to allow Mr. Bressi to clear the primary travel lane before initiating the arrest goes to his subjective intent. Again, Mr. Bressi's alleged disputed facts are immaterial, irrelevant, and inadmissible on the issue of Deputy Roher's subjective intent in making the arrest. *See Baker v. Clearwater County*, 2:20-CV-00376-CWD (D.Idaho Jan. 3, 2022) (evidence of plaintiff's claim he was exercising his property rights and that deputy who placed him in handcuffs was friends with the victim held inadmissible in claim plaintiff was arrested in property dispute in violation of his First and Fourth Amendment rights); *Thomas v. Cassia County*, 491 F.Supp.3d 805, 811 (D.Idaho 2020) (finding evidence of officers comments that he did not like plaintiff, recognizing the odds of obtaining a conviction for the arrest were slim, but that he would like to get a felony conviction against the plaintiff in order to take his guns away irrelevant to probable cause determination in First Amendment retaliation claim because they

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strip in front of Mr. Bressi's vehicle and told him he was not free to leave, are distinguishable from those present here, where the only commands issued by Agent Frye and Deputy Roher were for Mr. Bressi to move to the secondary area. *Compare* Exhibit N, BRE0330_26MAR2016 at 00:05-01:20, 03:40-03:50, 12:30-13:24 *with* Exhibit N, BRE0330_10APR2017 at 00:05-04:30. This incident is examined in further detail below in Argument Section (B)(2) addressing the *Nieves* exception.

were nothing more than subjective evidence of officer's intent in making arrest) *upheld* at No. 20-35862, at *4-5 (9th Cir. Apr. 26, 2022).

Mr. Bressi claims the fact the prosecutor chose to drop the charge rather than pursue it to trial "is evidence there was never a valid reason for the arrest to begin with." (Opening Brief, p. 53.) This claim is contrary to established law that dismissal of a case is irrelevant to the existence of probable cause at the time of arrest. *Heath v. Cast*, 813 F.2d 254, 260 (9th Cir. 1987) (that prosecution did not oppose criminal defendant's motion to dismiss held not probative as to whether officers had probable cause to make arrest); *Anda v. City of Long Beach*, 7 F.3d 1418, 1422 (9th Cir. 1993) (dismissal of criminal charge held irrelevant to whether officers had probable cause to arrest).

Mr. Bressi also claims A.R.S. § 28-622, which punishes a person for refusing to comply with a lawful order issued by an officer invested with authority to direct traffic, "covers situations like this," then argues it does not apply because Deputy Roher released Mr. Bressi before he could refuse to comply with Deputy Roher's directive to move to the secondary. (Opening Brief, p. 52 n.12.) Mr. Bressi's argument here supports Appellees. Mr. Bressi refused three times to comply with Deputy Roher's lawful directives to move to the secondary area before Deputy Roher allowed him to clear the primary traffic lane for other

travelers then initiating a traffic stop. 2-ER-185-187; Exhibit N, BRE0330_10APR2017 at 00:05-04:30.

As Mr. Bressi points out, probable cause existed for a violation of A.R.S. § 28-611 as well as § 13-2906. The law is well settled that probable cause need exist for any legal violation, not just the violation charged by the officer, to render an arrest constitutional. *Devenpeck v. Alford*, 543 U.S. 146, 153-155 (2004) (because the probable cause standard is objective, probable cause supports an arrest so long as the arresting officers had probable cause to arrest a suspect for any criminal offense regardless of their stated reason for the arrest). Likewise, whether "[Deputy] Roher explicitly stated he was *not* arresting Mr. Bressi for his refusal to drive into the secondary area" (Opening Brief, p. 52 n.12) (emphasis in original) is irrelevant for the same reason - Deputy Roher's subjective reasoning for making the arrest is irrelevant.

The undisputed evidence establishes probable cause existed for Deputy Roher's arrest of Mr. Bressi for blocking the primary lane of travel at the SR 86 checkpoint on April 10, 2017.

2. Mr. Bressi has not presented evidence of otherwise similarly situated individuals not engaged in the same sort of allegedly protected speech who were not arrested to meet the narrow exception set forth in *Nieves v. Bartlett*.

In order to pursue a First Amendment retaliation claim, Mr. Bressi must

present evidence establishing: (1) he engaged in a constitutionally protected activity; (2) as a result, he was subjected to adverse action that would chill a person of ordinary firmness from continuing to engage in the activity; and (3) there was a substantial causal relationship between the protected activity and the adverse action. *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010). Mr. Bressi's claim fails because he cannot establish elements one and three of a retaliation claim. He fails to show he engaged in constitutionally protected conduct for the reasons stated above. As to the causal relationship element, the protected activity must be a "but-for" cause, meaning the adverse action would not have been taken but for the retaliatory motive. *Nieves*, 139 S.Ct. at 1722 (quoting *Hartman v. Moore*, 547 U.S. 250, 259 (2006).

Generally, the existence of probable cause "should defeat" the but for causation element, as it demonstrates an objectively reasonable basis for the arrest, and the officer's subjective intent is irrelevant. *Id.* at 1724-25, 1725. A very narrow exception exists, however, "where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* at 1727. Stated differently, probable cause does not necessarily defeat a First Amendment retaliation claim "when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of

protected speech had not been." *Id.* The example provided by the court was jaywalking, where jaywalking at a particular intersection may occur often, but rarely result in arrests. *Id.* If a person who speaks out against police were to be arrested at such an intersection, the fact probable cause existed would do "little to prove or disprove the causal connection between animus and injury . . ." *Id.*

Another example where the *Nieves* exception was applied is *Ballentine v. Tucker*, No. 20-16805 (9th Cir. March 8, 2022). In *Ballentine*, the plaintiffs were arrested for chalking anti-police statements on public sidewalks in violation of Nevada's anti-graffiti statute. *Id.* at *4 -*6. The plaintiffs "presented objective evidence that they were arrested while others who chalked and did not engage in anti-police speech were not arrested." *Id.* at *10. Specifically, they presented evidence that others who were chalking sidewalks at the same time, but were not chalking anti-police messages were not arrested, and that of only two other instances were people had been suspected of violating the anti-graffiti statute only one citation, not an arrest, had been issued. *Id.*

Mr. Bressi cites the *Nieves* exception in his Opening Brief, claiming Appellees bear "the burden to demonstrate the absence of material fact" as to whether "similarly situated individuals *not* engaging in protected speech were not arrested," and that the record contains "an incident report with a driver *not*

identified as a known anti-checkpoint activist who engaged in comparable conduct" who was not arrested. (Opening Brief, p. 45-46) (emphasis in original.) Mr. Bressi's argument is misleading and not supported by evidence. While Appellees bear the burden of demonstrating the absence of a material issue of disputed fact under the general summary judgment standard, Mr. Bressi bears the ultimate burden of presenting evidence from which a trier of fact could find in his favor. Appellees do not bear the burden of proof at trial and in moving for summary judgment; they need only prove an absence of evidence to support Mr. Bressi's case. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once Appellees have met their initial burden, the burden then shifts to Mr. Bressi "to designate specific facts demonstrating the existence of genuine issues for trial." *Id.*

The single incident identified by Mr. Bressi, which occurred on June 30, 2014, is completely distinguishable from the April 10, 2017 incident involving Mr. Bressi. First, the motorist identified by Mr. Bressi was allegedly engaging in the same conduct he was – "refusing to answer any questions," and "holding up traffic." 2-ER-47. How the deputy chose to handle this situation provides no insight into whether persons not engaged in the same allegedly protected conduct were treated differently. Second, the deputy was not at the scene when the

motorist was refusing to answer questions and obstructing traffic. 2-ER-47. By the time the deputy arrived, the motorist had moved off the road and was no longer obstructing traffic. 2-ER-47. The motorist never refused the deputy's directive to move off the road, and there is no indication he ever refused a request by the Border Patrol agents to move out of the way of traffic in the primary travel lane. 2-ER-47.

The evidence shows the motorist did comply with the agents' request to move his vehicle out of the way, and that the motorist never refused to comply with any directive of the deputy, a completely different situation from that occurring with Mr. Bressi on April 10, 2017. No reasonable finder of fact could conclude based on the single factually dissimilar incident occurring on June 30, 2016, that similarly situated individuals not engaged in the same allegedly protected conduct were treated differently from how Mr. Bressi was treated on April 10, 2017.

While not cited in support of the *Nieves* exception, Mr. Bressi also argues he was not cited approximately a year prior to his arrest on April 10, 2017 when he refused to answer whether he was a citizen and border patrol agents put a stop strip in front of his truck, preventing him from moving, and told him to remain where he was in the primary travel lane. (Opening Brief, p. 52); Exhibit N,

BRE0330_26MAR2016 at 00:05-01:20, 03:40-03:50, 12:30-13:24. In that incident, when Mr. Bressi refused to move to the secondary area, Border Patrol agents ordered him to remain where he was and physically prevented him from moving at all by placing a spike strip in front of his tires. Exhibit N, BRE0330_26MAR2016 at 00:05-01:20, 03:40-03:50, 12:30-13:24. As with the June 30, 2014 incident, no deputy was present to witness when Mr. Bressi refused to move to the secondary area, and the only thing the Deputy witnessed was Mr. Bressi's truck being prevented from moving by the Border Patrol agents with a spike strip. Exhibit N, BRE0330_26MAR2016 at 00:05-01:20, 03:40-03:50, 12:30-13:24. Again, this incident is completely different from what occurred on April 10, 2017, where Deputy Roher observed Agent Frye issue seven separate directives for Mr. Bressi to move his vehicle from the primary lane to the secondary area, and himself issued three directives to Mr. Bressi to move, all of which were ignored. 2-ER-185-187; Exhibit N, BRE0330_10APR2017 at 00:05-04:30.

Further, that Mr. Bressi has been cited for various civil and criminal violations four of the five times he has interacted with Pima County Sheriff's Department personnel at the checkpoint is further evidence his allegedly protected activities are treated consistently by the Sheriff's Department and its deputies. 2-

ER-206-216. Mr. Bressi has not presented evidence from which a reasonable fact finder could conclude similarly situated people who do not engage in the allegedly protected activities Mr. Bressi does are not arrested.

C. The individual officers are protected by qualified immunity under federal and state law.

Inquiry into whether a constitutional right is clearly established, for the purpose of qualified immunity, must be undertaken in light of the specific context of the case, not as a broad general proposition. In *Pearson v. Callahan* the Supreme Court stated: "The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" 129 S.Ct. at 815 (2004) (quoting *Grow v. Romero*, 540 U.S. 551, 567 (2004)). Even when there are disputed and not fully developed issues of fact regarding whether any constitutional rights were violated, the court can still make the determination as to whether the defendants' alleged conduct violated clearly established law. *Id.* at 820-23.

The conduct of Deputy Roher and Sgt. Kunze was clearly shielded by qualified immunity. First, Mr. Bressi's actions in refusing to move to the secondary area or identify himself as a citizen is not protected by the Constitution, and no constitutional violation occurred. Second, Mr. Bressi points to no case law

where it has ever been held a person has a First Amendment right to refuse a directive to move to the secondary area of a border checkpoint or to identify himself or herself as a citizen. Instead, Mr. Bressi claims he was unlawfully detained at the checkpoint by Border Patrol agents, who were responsible for his inability to proceed. (Opening Brief, p. 53-54.) This claim is contrary to the undisputed evidence. 2-ER-185-187; Exhibit N, BRE0330_10APR2017 at 00:05-04:30. Deputy Roher observed Mr. Bressi knowingly blocking traffic by refusing to move into the secondary area. Sgt. Kunze was called to the scene, explained what had occurred, and supported that the arrest was proper. 2-ER-189, 190, 199-204; Exhibit N, BRE0330_10APR2017 at 6:06-6:10, 11:25-11:35, 25:00-26:30.

Mr. Bressi also claims Deputy Roher and Sgt. Kunze are not entitled to qualified immunity for his state law false imprisonment/false arrest claim. This is incorrect. As expressly stated in A.R.S. § 12-820.05(A), Arizona's immunity statutes do "not affect, alter or otherwise modify any other rules of tort immunity regarding public entities and public officers as developed at common law . . ." cases such as *Chamberlain v. Mathis*, 151 Ariz. 551, 555 (1986), and *Spooner v. City of Phoenix*, 246 Ariz. 119, 124, ¶ 11 (App. 2018), establish Arizona law enforcement officers are entitled to qualified immunity under common law for discretionary functions that involve exercise of professional judgment. Deputy

Roher and Sgt. Kunze are entitled to qualified immunity.

D. Mr. Bressi's *Monell* claims against the Pima County Sheriff fail due to the lack of an underlying constitutional violation.

Absent a constitutional deprivation, there can be no liability against the entity for maintaining an unconstitutional policy, or for failing to train or supervise employees. *See, e.g., Simmons v. Navajo County Ariz.*, 609 F.3d 1011, 1021 (9th Cir. 2010) ("Because we hold that there was no underlying constitutional violation, the [plaintiffs] cannot maintain a claim for municipal liability."); *Patel v. Maricopa County*, 585 Fed.Appx. 452, 452 (9th Cir. 2014) (The plaintiff's "*Monell* and supervisory liability claims fail as there was no underlying constitutional violation."). Here, the SR86 checkpoint is constitutional, and Mr. Bressi's arrest for obstructing traffic was supported by probable cause. There is no underlying constitutional violation, and Counts IV, V, and VI of Mr. Bressi's Complaint for *Monell* liability are subject to judgment as a matter of law.

CONCLUSION

For the above reasons, Appellees request that the Court affirm the district court's order granting summary judgment in their favor.

Respectfully submitted this 31st day of May, 2022.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the County Appellees states that he is unaware of any related case pending in this court.

s/ Andrew J. Petersen
ANDREW J. PETERSEN

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(5)(6)(7), I certify that the attached Response Brief uses proportionally spaced type of 14 points, is double-spaced text using a Roman font, and contains 6472 words, excluding the items exempted by Fed. R. App. P. 32(f).

Dated this 31st day of May, 2022.

s/ Andrew J. Petersen
ANDREW J. PETERSEN

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2022, I caused the foregoing document to be filed electronically with the Clerk of Court through ECF and placed a copy in the U.S. Mail to:

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