Docket No. 22-15123

In the

United States Court of Appeals

For the

Ninth Circuit

TERRENCE BRESSI,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

APPELLANT'S REPLY BRIEF

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

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

Attorneys for Appellant Terrence Bressi

COUNSEL PRESS · (213) 680-2300 PRINTED ON RECYCLED PAPER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

REPLY OF PLAINTIFF/APPELLANT TERRENCE BRESSI

Appellees argue that because immigration checkpoints as a general proposition are legal under *Martinez-Fuerte,* 428 U.S. 543 (1976), this particular Border Patrol checkpoint must be constitutional. But *Martinez-Fuerte* did not bless all checkpoints so long as they have some immigration purpose; it agreed that immigration checkpoints could be permissible where they were reasonably located and operated for that purpose, with appropriate limitations on scope. The checkpoint here is dramatically different from the *Martinez-Fuerte* checkpoints even on paper, but far more so when its actual on-the-ground operation is examined. Appellees treat their formal policies, obviously written specifically to demonstrate purported compliance with *Martinez-Fuerte,* as dispositive, ignoring, distorting, or arguing for self-serving interpretations of all evidence suggesting the actual operation of the checkpoint strays from those boundaries. A position that requires that kind of interpretation cannot support summary judgment.

I. Like the District Court, Appellees Continually Refuse to Interpret the Evidence in Mr. Bressi's Favor.

The overarching theme of both response briefs is largely factual: local agents did *not* operate at the checkpoint, the purpose of the checkpoint was *not* to detect narcotics or other criminal wrongdoing, and agents were *not* detaining Mr. Bressi just to punish him for his views, Deputy Roher *could* reasonably believe Mr. Bressi was committing a crime. Those arguments reflect a fundamental misunderstanding

of the summary judgment standard. The undisputed facts viewed in Mr. Bressi's favor permit a determination that it *was* a general crime-control checkpoint sometimes staffed with sheriff's deputies, where agents repeatedly detained Mr. Bressi not to determine his citizenship, and Deputy Roher arrested him not because he was committing a crime, but to punish him. For summary judgment, rather than arguing that the facts in the record should not be interpreted that way, appellees would have had to argue that even if they were, Mr. Bressi could not prevail. They have made no attempt to do that.

One key disputed area is the participation of local law enforcement. *See* USA Brief (Doc. 25) at 28-29. The nature and extent of county deputies' involvement, which bears on multiple claims, is heavily disputed. While the federal appellees point to testimony of a Border Patrol agent and a line on a training slide stating what the formal policy is, Mr. Bressi points to 44 deputies' reports documenting being stationed specifically at the checkpoint conducting activities such as warrant checks, as well as the testimony of Deputy Roher that he was stationed at that checkpoint frequently. 3-ER-255-56; 3-ER-289-369. Appellees claim this evidence does not reflect that the deputies were participating in the checkpoint, and because the official policy is no local law enforcement inside the formal "enforcement zone" unless specifically summoned, they cannot have been operating as part of the checkpoint. USA Brief (Doc. 25) at 28-29. But

that is just one interpretation of the evidence—and a self-serving one at that. It is more likely (and this Court must assume) the reports reflect what they say they do: deputies stationed at the checkpoint conducting general law enforcement activities, whether permitted by formal policy or not. Indeed, the federal appellees presented the District Court with evidence of another local agency—the Arizona Department of Public Safety—operating firmly within the checkpoint. SER-12 (summarizing video federal defendants submitted below from May 24, 2019, in which Mr. Bressi "noticed Arizona DPS officers standing inside the checkpoint using a radar device to detect speeding."). In other words, even assuming a formal policy that local officers must stay outside an arbitrary area (which would not necessarily mean they were not participating anyway), they are not doing so even in the federal defendants' own evidence. Appellees are urging this Court to weigh competing evidence to determine what actually occurred and to interpret the evidence in their favor. That alone demonstrates summary judgment should have been denied.

The federal appellees do the same thing when discussing the "Extremely Uncooperative Motorist" poster of Mr. Bressi that hung inside the checkpoint (3-ER-288) and agents' attempt to bring assault charges against him for honking his horn (5-ER-618-25). USA Brief (Doc. 25) at 38. The poster and the emails are in the record, and their contents are undisputed; what they mean, in terms of agents' intentions and motivations, is both disputed and material. Appellees urge this Court

to interpret the poster as simply providing the agents with information because it does not explicitly direct specific action, and to read emails about potential prosecution as careful reflection rather than a wish to punish. But this evidence unquestionably *could* be interpreted to reflect animus toward Mr. Bressi. Appellees are simply urging an interpretation favorable to them.

The same thing happens yet again with enforcement statistics. Mr. Bressi explained his interpretation of the numbers: the high proportion of narcotics arrests, in addition to the Border Patrol's reporting of its checkpoint success in terms of pounds of narcotics seized, reflects a driving purpose of narcotics enforcement. Opening Brief (Doc. 9) at 16. The evidence can be interpreted this way. Appellees argue for a different interpretation, USA Brief (Doc. 25) at 26-27, but their need to urge their interpretation again confirms summary judgment was unwarranted. The same goes for what statistics the agency chooses to report and how it explains checkpoints to the general public on its website.

The county appellees attempt to shape the facts in their favor in sometimes less transparent but no less impermissible ways. For instance, they claim 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," and later that he "admits he . . . refused ten times to move to the secondary area." County Brief (Doc. 27) at 13, 15. But that is their self-serving interpretation.

The fact to which Mr. Bressi agreed is only that it was his presence in the lane that held up traffic, not that Mr. Bressi was responsible for it, nor that he "refused" instructions, let alone ten times. Opening Brief (Doc. 9) at 50. Construing the facts in Mr. Bressi's favor, it was the Border Patrol agents who were responsible for Mr. Bressi's continued presence, and thus interfered with the traffic, and Mr. Bressi was not refusing to move to secondary, but was attempting to identify a valid basis for the request before determining whether he needed to comply. Yet the county appellees depend on their interpretation (that Mr. Bressi was obstructing traffic) when claiming Deputy Roher had probable cause for the arrest. County Brief (Doc. 27) at 15. Because their position depends on their interpretation, rather than an available one more favorable to Mr. Bressi, summary judgment cannot stand.

The county appellees also make unwarranted leaps, claiming certain facts conclusively establish propositions that in fact remain disputed. For instance, they insist "[b]ecause the checkpoint itself is constitutional, Mr. Bressi was required to obey their directives to move his vehicle into the secondary area." County Brief (Doc. 27) at 9. But that does not follow. Even assuming, *arguendo,* that the checkpoint itself is constitutional, agents working there could still make requests or give orders that exceed their constitutional authority. A motorist would not, for instance, be required to allow agents to search his vehicle without probable cause if they so directed. Likewise, they lack authority to detain a motorist whose

citizenship they have already established and who is committing no crime, even if they have the authority to stop each car initially to make a citizenship determination.

The county appellees also attempt to obscure questions about Deputy Roher's knowledge and intent in making the arrest. While Mr. Bressi acknowledges that an officer's subjective *intent* is not generally a factor in assessing the legality of arrest, what *information* an officer had at the time is crucial to an assessment of whether he had probable cause (and whether any reasonable officer with that information could have thought he had probable cause). *See, e.g., United States v. Lopez,* 482 F.3d 1067, 1072 (9th Cir. 2007) ("Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested."). County appellees try to explain away Deputy Roher's knowledge of a previous incident where a colleague was explicitly instructed he would not have probable cause to arrest Mr. Bressi when agents were preventing him from leaving by claiming the facts are distinguishable. County Brief (Doc. 27) at 17-18 & n.2. But that, again, is an act of interpretation in their favor. They urge the Court to view the prior incident as different enough so as not to render a conclusion that probable cause existed unreasonable. But whether that information, along with all of the

other information Deputy Roher had at the time, would lead a person of "reasonable caution to believe that an offense has been. . . committed" is disputed, and a reasonable jury certainly could find that this information rendered any such conclusion unreasonable.

Appellees offer interpretations favorable to them throughout both briefs, and their claims to victory depend heavily on those characterizations, rather than on what the law would require when drawing all inferences in Mr. Bressi's favor. Accordingly, summary judgment was unwarranted.

II. Appellees' Position Rests on the Faulty Premise that Agents Are Entitled Not Only to Determine Immigration Status, but Also to a Verbal Answer to the Citizenship Question in All Cases.

Several of the disputes in this lawsuit stem from agents' refusing to let Mr. Bressi pass through the checkpoint after they have identified him when he refuses to give a verbal answer to the citizenship question. The question of whether the agency may require a verbal answer to that question, knowledge notwithstanding, is crucial; if agents are entitled to a verbal answer regardless of their existing knowledge, they are justified in detaining Mr. Bressi until he provides one. If they are entitled only to determine citizenship, they have no right to detain him and attempt to force him to answer—meaning once they have identified him, they are unlawfully detaining him and he is doing nothing wrong in insisting he be allowed to leave. Moreover, if this added detention is *not* legally justified, it is clearly the

agents, and not Mr. Bressi, prolonging the stops, as they are supposed to let him pass but are refusing to do so. Additionally, if the detention is not a legitimate performance of agents' legal duties, it constitutes a form of retaliation.

A. The Federal Appellees Have Refused to State Their Position.

Throughout this litigation, the federal appellees have repeatedly dodged and obscured this question. The reason is apparent: ultimately, they must realize that once agents have determined citizenship (however that is done), absent any indication of wrongdoing, they must allow the motorist to proceed, yet have been captured on video many times refusing to do so.

Mr. Bressi sought an explicit answer to this straightforward question during discovery, asking, in an interrogatory:

> Is it the position of the United States Border Patrol ("USBP") that agents may insist all individuals passing through a USBP traffic checkpoint in the interior of the United States (*i.e.,* not at the border) answer the question of whether they are United States citizens even when the agents are already aware of the individual's citizenship?

2-ER-75. The Border Patrol initially refused to answer, claiming, inexplicably, that the question, which asks simply what the policy is in a particular situation, was argumentative. Ultimately, it responded not with an answer, but with:

> In general, agents at the primary inspection area should stop every vehicle, identify themselves as Border Patrol agents, inquire as to the citizenship of the occupants, and look at areas of the vehicle within plain view. They should do that even if they are familiar with the driver of the vehicle.

2-ER-75. That, of course, is not an answer to the inquiry about what may happen after the citizenship question is asked. The agency also never provided any response to the related question of whether it was their position that "agents may detain an individual passing through a USBP traffic checkpoint . . . until he explicitly answers agents' question as to whether or not the individual is a United States citizen, even if the agents are already aware of the individual's citizenship?" *Id.* The agency's steadfast refusal to simply state whether or not agents are permitted to insist on a verbal answer is revealing—and renders summary judgment in its favor inappropriate, as a disputed issue of material fact obviously remains.

An entitlement only to determine citizenship and not to insist on a verbal answer is consistent with law and policy on checkpoints. For instance, the Border Patrol's guidance on noncompliant motorists specifies "[o]nce an agent establishes a motorist's lawful U.S. presence and no reasonable suspicion of criminal wrongdoing exists, secondary detention is unwarranted and immediate release is appropriate." 5-ER-683. And Border Patrol training materials provide that referral to secondary is appropriate either in the event of mere suspicion of immigration violation or reasonable suspicion of a federal criminal offense, 5-ER-724; a known citizen's refusal to state his citizenship is neither of these. Indeed, the training materials specifically acknowledge that "[t]he public is not mandated or required to

answer any of [an agent]'s questions at a checkpoint. It is your job to determine alienage, it is not a requirement for the public to prove they are a U.S. citizen," and direct agents to release motorists when they are satisfied everyone in the vehicle is legally present and there are no other criminal violations. 5-ER-732-33. Appellees have never alleged they cannot determine citizenship without a verbal answer. They insist the purpose of the checkpoints is immigration enforcement (and that is the purpose for which the Supreme Court has agreed a reasonable checkpoint may operate), but insisting on specific actions by known U.S. citizens does nothing to further that goal.

Accordingly, appellees are wrong to claim Mr. Bressi is asserting "special entitlement." USA Brief (Doc. 25) at 34. He is entitled under the Fourth Amendment not to be detained when his citizenship is known in the absence of any indication he is committing any crime, as is every citizen. He has *not* asserted that stopping him at all is a violation simply because he is a local resident (although he does assert that refusal to allow him through when recognized is a factor in determining overall reasonableness, as discussed *infra*).

Recognizing that agents are entitled to determine citizenship and, in the absence of any indication of criminal activity, no more, the violations of both the First and Fourth Amendments come into clear focus.

B. Detaining Mr. Bressi When His Citizenship is Known Because He Has Not Given a Verbal Answer Violates the Fourth Amendment.

The Fourth Amendment angle is simple: detention to determine citizenship is justified. Detention beyond that, such as to insist on a verbal answer when citizenship is already known, is not. If agents are detaining Mr. Bressi without a valid reason, they are violating the Fourth Amendment. The only remaining question is whether that is occurring. In other words, are there instances where agents know the person they are detaining, Mr. Bressi, is a citizen, yet continue to detain him based on his refusal to answer?

Appellees argue such a conclusion would require assuming that "all Border Patrol agents know who he is and know he is a United States citizen." USA Brief (Doc. 25) at 37. While the evidence may well support such a finding (4-ER-419 (deposition testimony reflecting the agency has "known Mr. Bressi for multiple years"); 3-ER-288 (poster with Mr. Bressi's photo stating he is a citizen that hung inside the checkpoint for a year); 2-ER-73 (agent report reflecting recognition of Mr. Bressi), it is not necessary. To defeat summary judgment, Mr. Bressi need not prove every single agent who ever insisted on a verbal answer knew he was a citizen. He must only provide evidence from which a reasonable jury could conclude that it had happened, even if it were not all 18 times he has alleged. And of course, evidence that agents knew or recognized Mr. Bressi *is* evidence that they knew his citizenship; if he was known to them and they had doubts about his

citizenship, he would have been processed into immigration proceedings long ago. To reach the conclusion appellees propose—that agents did *not* know Mr. Bressi was a citizen—requires an unlikely interpretation favorable to them, something that cannot occur in this summary judgment analysis.

C. Agents Violated Mr. Bressi's First Amendment Rights in Multiple Ways.

Appellees treat Mr. Bressi's First Amendment claim as limited to agents' post-citizenship-determination detention as retaliation only for refusal to answer and for filming agents. While there is more than enough evidence of such retaliation to defeat summary judgment, the true claim is broader.

As an initial matter, although retaliation is central to this claim, agents also violate the First Amendment directly by attempting to force Mr. Bressi to speak. Appellees have not disputed that the First Amendment protects a right not to speak, and they have not disputed the notion that one could exercise that right in a situation where agents were nominally asking a question but not sincerely seeking information for investigatory purposes. They have not denied that the evidence shows agents repeatedly asking Mr. Bressi a question to which they plainly already know the answer. Whatever a person's obligations might be in response to sincere investigatory steps, he simply has no obligation to make a statement upon an agent's demand for its own sake. Attempting to detain Mr. Bressi until he says the

magic words they wish him to say plainly violates the First Amendment, retaliation aside.

Moreover, it is undisputed that in addition to his actions at the checkpoint itself, Mr. Bressi is well known as an anti-checkpoint activist who posts his views on the internet, along with videos of his encounters, and that at least some of the agents know this and make reference to it when detaining him. Appellees' only answer to that is that the prolonged detention is legally justified by Mr. Bressi's refusal to answer their question, and therefore cannot be retaliatory. There is no such legal justification, as explained *supra.*[1] In addition, in at least one instance, the initial retaliatory acts occurred before there was any request of Mr. Bressi—and thus cannot be justified by his response to agents' requests. *See* video of August 14, 2010[2] (agents place a spike strip in front of Mr. Bressi's car before they've asked him anything, then greet him by name). The collapse of the asserted

[1] The notion, which appears to have its genesis in the District Court's order rather than a position taken by either party, that agents have a valid reason to refer Mr. Bressi to secondary based on reasonable suspicion that he is committing the crime of blocking the roadway (USA Brief (Doc. 25) at 34) is absurd on its face. For one thing, a subsequent refusal cannot justify the making of the request to begin with, as the refusal has not occurred yet at the time of the request. Moreover, Border Patrol's policy is to make such referrals only for reasonable suspicion of a *federal crime*, which blocking traffic is not. And of course, as explained *supra,* Mr. Bressi is perfectly correct that once they know he is a citizen, agents have no authority to detain him, in secondary or anywhere else; his so stating cannot justify any further detention. Appellees have never asserted he was obligated to submit to secondary inspection solely because agents asked him to, regardless of their legal authority.

[2] All video clips referred to are contained on the disc filed at Doc. No. 36.

justification in this instance serves as evidence reasonable jurors could interpret to mean the asserted justification is never true.

Even if there were a possible legal justification for the detention, there is evidence from which a jury could conclude a retaliatory motive was nonetheless substantially driving agents' actions. The federal appellees argue this Court must apply to this claim of harassment and improperly prolonged detention the standard for retaliatory arrests from *Nieves v. Bartlet*, 139 S. Ct. 1715, 1727 (2019),[3] rather than the analysis from *Mt. Healthy City Bd. Of Educ. v. Doyle,* 429 U.S. 274 (1977) requiring only that retaliation be a substantial motivating factor. *See* USA Brief (Doc. 25) at 36. There is no support for that proposition, and the argument is foreclosed by *Bello-Reyes v. Gaynor,* 985 F.3d 696, 700 (9th Cir. 2021) (ICE's discretionary revocation of bond and re-arrest following public speech critical of immigration policies must be evaluated under *Mt. Healthy* standard, not *Nieves* standard). Mr. Bressi cited *Bello*, but appellees failed to address it. Indeed, appellees' argument itself illustrates the inapplicability of *Nieves*, which holds that generally, an arrest cannot be considered retaliatory where there was probable cause (although even this rule has exceptions). To apply that test to a situation where no particular standard (like probable cause) is required—such as the

[3] *Nieves* does properly apply to the claim regarding Mr. Bressi's formal arrest on April 10, 2017, but that is only one piece of the retaliation claim.

decision to refer to secondary—would be to say no action by a checkpoint agent could ever be considered retaliatory. But just because the agents have discretion does not mean they cannot unlawfully abuse it, and retaliating against citizens for their protected expression is plainly abuse.

To the extent this case is analogous to any existing case, it is not *Nieves* but *United States v. Barnett,* 935 F.2d 178 (9th Cir. 1991), a checkpoint case in which this Court recognized that although no articulable suspicion is required, a referral to secondary that is plainly pretextual may still be impermissible. *Id.* at 181; *see also United States v. Koshnevis,* 989 F.2d 691, 694 (9th Cir. 1992). In other words, although agents do not need an articulable reason to refer someone to secondary, they cannot do it for a retaliatory reason. This Court in *Barnett* noted some objective evidence that the referral was pretextual would be necessary, and such evidence is present here: several of the videos depict agents identifying Mr. Bressi personally and expressing hostility toward his video recording. Examples include the videos from March 3, 2008 (agent advising Mr. Bressi he has not given permission to film); November 26, 2008 ("You can put this on YouTube, I know who you are."); December 20, 2008 ("I know who you are and I've seen your videos."); September 25, 2011 ("Please don't film me."); March 29, 2013 (agents filming Mr. Bressi with their own phones).

III. The Purpose of the Checkpoint Is Heavily Disputed.

A core issue in determining whether the SR-86 checkpoint violates the Fourth Amendment is the primary purpose for which it is operated. Federal appellees claim the sole primary purpose is immigration enforcement, citing an agent's deposition testimony and the Border Patrol Handbook and training documents. They go on to explain, point by point, how each item of evidence Mr. Bressi presented that the checkpoint's true purpose is general law enforcement can instead be interpreted in appellees' favor. *See* USA Brief (Doc. 25) at 26-30. But that is their task before a jury, not at summary judgment. Mr. Bressi explained how each of these items demonstrates the checkpoint's true purpose involving narcotics and general law enforcement. *See* Opening Brief (Doc. 9) at 16-19 (examining agency's website; published checkpoint enforcement data; agreement with DEA; internal reporting; representations on a highway encroachment permit application; training materials; numbers and proportions of immigration vs. narcotics arrests; participation in Operation Stonegarden; actions of local law enforcement at the checkpoint; enforcement tools not useful for immigration enforcement). Appellees dispute very few of the facts, and simply argue for favorable interpretations of each one individually. If they must advocate their interpretation, they are not entitled to summary judgment. Additionally, their attempt to dispute Mr. Bressi's case point by point ignores the requirement of examining the evidence "as a whole."

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Considering all the evidence, it really adds up.

In any event, appellees failed to respond to all the evidence Mr. Bressi presented. While they argued the license plate readers belonging to the DEA should not be interpreted as evidence of a narcotics-enforcement purpose, they ignored the fact that the Border Patrol at one point placed its own license plate readers there—a choice difficult to explain for any immigration purpose. *See* Opening Brief (Doc. 9) at 18. Although the agency removed them, the fact that they installed them at all is reflective of a certain purpose or intent—a reasonable interpretation favorable to Mr. Bressi that this Court is bound to credit at this stage of proceedings.

Additionally, appellees ignore the question of what "primary purpose" really means. Mr. Bressi explained it must encompass dual coequal purposes, consistent with courts' approaches in other contexts examining purpose or motivation. Opening Brief (Doc. 9) at 19-23. That important legal assertion was met with silence, as appellees argued only that a *secondary* purpose was permissible. This Court should treat that as a concession that a coequal impermissible purpose renders the checkpoint unlawful, and find any argument to the contrary waived.

IV. The Reasonableness of the Checkpoint Depends on Disputed Facts.

Regarding reasonableness of this checkpoint's operation, some facts are undisputed, such as the checkpoint's location on an east-west road with relatively little traffic primarily composed of commuters; agents asking a citizenship question and the use of dogs, radiation detectors and, in secondary, x-rays; that agents have access to criminal database information; and that agents are directed never to "wave through" recognized local residents. If those were the only relevant facts, this Court could compare this checkpoint to those okayed in *Martinez-Fuerte* and make a determination.

But these are not the only relevant facts—a wide range of crucial facts that *are* disputed bear on the reasonableness of this checkpoint's operation and scope. For instance, it is disputed whether the Border Patrol has regularly allowed or encouraged local law enforcement personnel to conduct general law enforcement operations at the checkpoint. That disputed fact is hugely consequential for the reasonableness analysis. It is disputed whether there is a plausible justification for refusing to allow Mr. Bressi to pass when he is recognized. Although Agent Teran testified he was aware of occasions where smugglers had purposely built up familiarity at checkpoints so they could later pass through without suspicion, the application of that reasoning (if it is even true) to Mr. Bressi and those like him is heavily disputed; agents' knowledge that he is in fact an employee at Kitt Peak

who lives in Tucson suggests the stated justification is pretextual in his case, but that is a fact question. And in describing agents' behavior toward Mr. Bressi, the federal appellees depend upon the assertion that some agents do not know or recognize him. That, too, is a heavily disputed factual question. Neither the District Court nor this Court can resolve the reasonableness of the operation of this checkpoint as an immigration checkpoint while these facts remain disputed. Not to mention the elephant in the room: that the checkpoint is not being operated reasonably if agents are detaining drivers for longer than they have the authority to detain them, an inquiry which itself turns on disputed facts as detailed *supra*.

Finally, the federal appellees seem to be advocating for a kind of rational basis review, rather than the balancing that has long been the heart of Fourth Amendment analysis. In attempting to justify the reasonableness of the checkpoint, they assert that without it, some undocumented people or smugglers might escape through the Tohono O'odham Nation. USA Brief (Doc. 25) at 31. But the Fourth Amendment does not allow law enforcement to take any step simply because it might capture more wrongdoers. Police would surely catch more criminals if we did away with the Fourth Amendment all together. As a country we have agreed to strike a balance, and whatever marginal benefit this checkpoint may produce is not worth the cost it is placing on ordinary citizens. On a major highway with a large amount of cross-border traffic where recognized local residents are waved through

(as in *Martinez-Fuerte*), the yield is greater and the cost is lower. Where the traffic is sparse and no one is permitted to pass uninspected, the checkpoint, even if it does work to some extent, simply is not worth the heightened intrusion. This is especially true considering agents have other ways to look for smugglers on lesser-traveled roads, such as roving patrols that can target likely smugglers while leaving locals undisturbed.

V. FTCA Liability (federal appellees only)

The federal appellees declare, without elaboration, that the arrest by Deputy Roher cannot create liability for federal employees because "Bressi cannot establish that a federal employee induced or encouraged Deputy Roher to arrest Bressi and place him in handcuffs." USA Brief (Doc. 25) at 40.[4] But there is significant evidence of federal agents' participation in the initiation of, and throughout the duration of, the unlawful arrest. The video of the April 10, 2017, encounter shows it was Border Patrol agents that initially sent Deputy Roher to speak to Mr. Bressi. While what exchange(s) may occur between the deputy and the agents after Mr. Bressi leaves the checkpoint and before Deputy Roher pulls him over is not on video, the video does show, especially from the camera on the

[4] They also claim that the confinement of Mr. Bressi within the boundaries of the checkpoint (the other basis for the claim) was legal, *id.*, but Mr. Bressi has thoroughly discussed this point above.

back of the truck, that as Mr. Bressi left, Deputy Roher walked from Agent Frye to a second Border Patrol agent who had been observing the interaction. After Mr. Bressi is pulled over, the video shows a Border Patrol truck pulling up behind Deputy Roher and an agent getting out and approaching significantly before Mr. Bressi has been arrested and handcuffed (he is still in his vehicle with both hands free). At least one agent can be seen present throughout the arrest, and it is not possible to hear everything that is said. Border Patrol agents' reports of the incident also note the presence of multiple agents during the arrest, one of whom, Eduardo Fuentes, wrote "Deputy Roher approached me and briefed me on the situation," and that another agent, Lopez, "sternly told Mr. Bressi to 'sit down' as Mr. Bressi stood up" while Deputy Roher was in his vehicle (an interaction also visible on the video). 2-ER-69. Agent Fuentes also reports himself "command[ing]" Mr. Bressi to sit down. *Id.* Agent Lopez, for his part, wrote he went to "provide back-up for Deputy Roher," and was then "guarding Mr. Bressi." 2-ER-71. This is more than enough evidence to go to a jury on the question of whether the federal agents were active participants in the unlawful arrest.

Finally, although the federal appellees have not so urged in this Court, the actions are not immune as a discretionary function.[5] The discretionary function

[5] The United States bears the ultimate burden of proving the applicability of the discretionary function exception. *Prescott v. United States,* 973 F.2d 696, 702 (9th Cir. 1992).

exception applies *only* if the challenged actions involve "an element of judgment or choice" and if that "judgment is of the kind that the discretionary function was designed to shield," *Sabow v. United States,* 93 F.3d 1445, 1451 (9th Cir. 1996) (quoting *United States v. Gaubert,* 499 U.S. 315, 322 (1991)), specifically, "governmental actions and decisions based on considerations of public policy." *Berkovitz v. United States,* 486 U.S. 531, 537 (1988). It does not apply when federal employees act inconsistently with mandatory rules governing their conduct, nor if they make choices for reasons unrelated to policy. *Id.* at 542-43. In other words, it protects the actions of officials who are carrying out agency policy reflecting considered judgment on how to accomplish the agency's duties—not actions they take for reasons unrelated to accomplishing the agency's mission.

The allegation here is that Border Patrol policy requires a specific course of action—releasing uncooperative motorists if agents lack concern about whether the motorist is legally present in the United States and have no reason to believe they are committing any federal crime, 5-ER-683—and that agents at the SR-86 checkpoint have repeatedly failed to take this mandatory action. While agents have considerable discretion in sincere, legitimate enforcement and investigative activities, they do not have discretion to detain known citizens with no indication of criminal activity, i.e., when there is nothing to investigate. Accordingly, what the agents did here is not protected. To the extent agents are exercising discretion,

they are doing so for a reason entirely unrelated to immigration or enforcement policy: animus and retaliation against a person whose actions and views they disagree with. That is not what the exception was designed to shield. *See Sabow,* 93 F.3d at 1454 (exception inapplicable where defendant "had no legitimate policy rationale for resorting to verbal abuse and an investigation of Dr. Sabow's medical license as a response to the possibility that complaints . . . might be publicly aired.").

On summary judgment, appellees cannot prevail by arguing they would be protected under their version of the facts; they can only prevail if they would be protected drawing all reasonable inferences and resolving all ambiguities in favor of Mr. Bressi. The facts construed in Mr. Bressi's favor show agents detaining him when policy required them to release him, not because they needed to investigate further to ensure he was legally present, but because they did not care for his views and expression. There is no reasonable argument that *that* is protected, and because the evidence can support that interpretation, summary judgment must be denied.

VI. State Law Liability and Qualified Immunity (county appellees only)

The question of whether a constitutional violation has occurred is discussed at length *supra*. The remaining question is whether it was clearly established that the deputies' conduct was unlawful. The County appellees go about this all wrong, arguing that the conduct in *their* version of the facts was not prohibited by any

clearly established law. County Brief (Doc. 27) at 27. But that is essentially the same thing as re-arguing there was no violation. The required analysis is whether the violation that occurred in Mr. Bressi's interpretation of the facts—if a factfinder ultimately determines that is what occurred—would have been clearly established. *See David v. Kaulukukui,* __ F.4th __, 2022 WL 2299036 (9th Cir. June 27, 2022) at *2.

As discussed at length above, Mr. Bressi has presented evidence that Deputy Roher (condoned by Deputy Kunze) arrested him for obstructing the roadway when the Border Patrol agents were the ones that caused the traffic obstruction by refusing without justification to allow him to proceed, despite his repeated requests to do so, and thus no reasonable officer would have believed he had probable cause to arrest Mr. Bressi.[6] The question for the Court is thus whether "there was enough evidence for a reasonable jury to conclude that reasonable officers would not have acted as [defendant officers] did in arresting [plaintiff]". *Grant v. City of Long Beach,* 315 F.3d 1081, 1090 (9th Cir. 2002); *see also Torres v. City of Los Angeles,*

[6] Whether Mr. Bressi could have remedied this agent-caused obstruction in some other way is irrelevant to the question of whether the agents caused the obstruction through unlawful actions to begin with. The fact that Mr. Bressi could have but did not acquiesce to an unlawful command does not make the obstruction his fault. Again, none of the defendants has asserted that Mr. Bressi had an obligation to obey a command the agents lacked authority to give—only that the command was valid. Accordingly, the question of Mr. Bressi's obligations in the event of an invalid order is not before the Court.

548 F.3d 1197, 1212 (9th Cir. 2008) (denying qualified immunity for wrongful arrest where "there was enough evidence for a jury to conclude that reasonable officers would not have acted" as defendants did "in arresting [the plaintiff]"); *Johnson v. Bay Area Rapid Transit Dist.,* 724 F.3d 1159, 1173 (9th Cir. 2013) (qualified immunity for unlawful arrest properly denied because "whether [the officer's] mistake was reasonable is a question for the jury.").

Appellees have never claimed an officer acting reasonably could find probable cause to make an arrest for obstructing the roadway faced with knowledge that Border Patrol agents, although required by law to allow Mr. Bressi to continue on, refused to allow him to pass—only that that is not what the deputies did. As the officers are the ones seeking this protection, they are required to explain why they are entitled to it, and they have not.

Even if they had made that claim, it would necessarily fail. Any jury could reasonably conclude: (1) Deputy Roher knew Mr. Bressi was trying to continue on but was being prevented from doing so by agents who had no authority for that action (indeed, Mr. Bressi explicitly told him as much, captured on the video of the incident, and Deputy Roher reported having previously been told the same thing by another deputy, 2-ER-54); and (2) no reasonable officer would have believed he had probable cause to arrest Mr. Bressi for blocking the roadway under those

circumstances. Accordingly, summary judgment on qualified immunity was inappropriate.

As for immunity on state-law claims, the county appellees never asserted such an immunity below. Now they cite two Arizona cases claiming they establish Arizona common-law qualified immunity for law enforcement officers under state law. County Brief (Doc. 27) at 27. This ignores the fact that Arizona has enacted specific immunity statutes spelling out *when* law enforcement officers enjoy qualified immunity. *See* A.R.S. § 12-820.02(A); *see also Glazer v. State,* 237 Ariz. 160, 163 (2015) (nothing the "Act leaves intact the common-law rule that the government is liable for its tortious conduct unless immunity applies."); *Clouse v. State,* 199 Ariz. 196, 203 ¶ 26 (2001) (in prior cases, court "applied common law immunity principles in the absence of any statutory direction. After *Ryan,* however, the legislature provided the missing direction, as the constitution permits."); *Doe v. State,* 200 Ariz. 174, 175 ¶ 3 (2001) (statute "defined the boundaries of governmental absolute and qualified immunity"); *Walls v. Arizona Dept. of Public Safety,* 170 Ariz. 591, 594 (App. 1991) ("[I]t is clear . . . that the legislature intended to limit sovereign immunity to certain specific, enumerated circumstances . . ."). The statute's list of actions by law enforcement officers subject to qualified immunity does not include a wrongful arrest in a non-

emergency situation.[7] But even if qualified immunity did apply, it would not exist here for the same reasons as in the federal claims.

In addressing the retaliatory arrest, Mr. Bressi identified a motorist who was not a known activist but did the same things, who was not arrested for his nearly identical actions. The county appellees argue that case is "completely distinguishable," but they fail to explain how they believe the motorist was not an example of a person who is not a known anti-checkpoint activist doing the same thing Mr. Bressi did without getting arrested. They do not deny the record reflects the other motorist "refusing to answer any questions," and "holding up traffic," County Brief (Doc. 27) at 23 (citing 2-ER-47), nor do they claim that motorist was in fact also a known activist. They merely claim, without explanation, that "[h]ow the deputy chose to handle this situation provides no insight into whether persons not engaged in the same allegedly protected conduct were treated differently." But that is the whole point—when the motorist was not a known activist, deputies

[7] County appellees also cite *Spooner v. City of Phoenix,* 435 P.3d 462, 466-67 (Ariz. Ct. App. 2018) in support of state-law qualified immunity—something they did not assert below. But the District of Arizona has found that case inapplicable to state-law claims other than simple negligence arising from actions of police. *Hamberlin v. Arizona,* No. CV-18-3624-PHX-DLR, 2021 WL 2805828 at *5 (July 6, 2021).

"chose to handle this situation" differently, without arrest. That is precisely what the *Nieves* exception calls for. While they attempt to identify factual differences between the two encounters, they never explain how any differences are meaningful when the record is interpreted in Mr. Bressi's favor, and there is more than enough evidence here to go to a jury on whether similarly situated motorists were treated differently.

As for claims that the County itself is liable, the only argument presented was that there was no violation; it has not argued it would not be liable for any violation that did occur, nor did the District Court so find.

CONCLUSION

The attitudes of appellees and the District Court are troubling: they suggest Mr. Bressi should just answer the question, which would be easier for everyone. *See* USA Brief (Doc. 25) at 35; 1-ER-34-35. They also argue that 18 incidents are nothing to worry about because there were plenty of uneventful trips through the checkpoint. USA Brief (Doc. 25) at 38. But that is a dangerous road to go down. The First Amendment protects the right to express unpopular opinions in inconvenient ways, and the Fourth Amendment places outer limits on the authority

of officers and agents in a given encounter. Mr. Bressi is fully entitled to insist on his rights even when it is inconvenient, and appellees are required to respect them not just most of the time, but all the time.

Dated: July 22, 2022

Respectfully submitted,

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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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

I am the attorney or self-represented party.

This brief contains 6.969 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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

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

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

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

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

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

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

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

Signature: /s/ Amy P. Knight Dated: July 22, 2022

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

/s/ Kirstin E. Largent