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6 UNITED STATES DISTRICT COURT

7 DISTRICT OF ARIZONA

8 Terrence Bressi,

9 Plaintiff,

10 vs.

11 Pima County Board of Supervisors, et al.

12 Defendants,

Case No.: 18-CV-00186-DCB

**MOTION FOR SUMMARY
JUDGMENT**

(Oral Argument Requested)

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14 Pursuant to Fed.R.Civ.P. 56, the Pima County Defendants request summary
15 judgment. As to Mr. Bressi’s arrest for obstructing the highway, the United States Supreme
16 Court has consistently recognized that probable cause depends on the totality of the
17 circumstances and requires only a probability or substantial chance of criminal activity.
18 *See, e.g., District of Columbia v. Westby*, 138 S. Ct. 577, 586 (2014) (“To determine
19 whether an officer had probable cause for an arrest, ‘[courts] examine the events leading
20 up to the arrest, and then decide “whether these historical facts, viewed from the standpoint
21 of an objectively reasonable police officer, amount to” probable cause.’ Because probable
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1 cause ‘deals with probabilities and depends on the totality of the circumstances,’ it is ‘a
2 fluid concept’ that is ‘not readily, or even usefully, reduced to a neat set of legal rules.’ ‘It
3 requires only a probability or substantial chance of criminal activity, not an actual showing
4 of such activity.’ Probable cause ‘is not a high bar.’”) (citations omitted).

5 Probable cause is “not a high bar” and is met here when Deputy Roher witnessed
6 and heard Mr. Bressi’s repeated refusal to pull into the secondary. The border checkpoint
7 is perfectly reasonable and consistent with the Supreme Court’s decision in *United States*
8 *v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976), and the Ninth Circuit case law including
9 *United States v. Soto-Camacho*, 58 F.3d 408 (9th Cir. 1995), *United States v. Summers*, 153
10 F. Supp. 3d 1261, 1267 (S.D. Cal. 2015), and *United States v. Ruiz-Hernandez*, CR 16-
11 511-TUC-CKJ (D. Ariz. Mar. 16, 2017). Finally, individual officers are entitled to
12 immunity “if a reasonable officer could have believed that probable cause existed to
13 arrest.” *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). In a civil lawsuit against individual
14 deputies, when there is arguable probable cause, qualified immunity applies. As explained
15 below, each of the Pima County Defendants are entitled to summary judgment in their
16 favor.

17 **I. Mr. Bressi’s checkpoint protest on Arizona State Route 86 does not allow him**
18 **to obstruct the highway by refusing to pull into secondary when requested to**
do so.

19 Mr. Bressi video recorded this encounter on April 10, 2017. He was told he was
20 blocking traffic, and he was blocking traffic. The Defendants have included the video and
21 a transcript of the video as exhibits to their Statement of Facts. Mr. Bressi refused to pull
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1 into the secondary when asked to do so. His continued purpose at the checkpoint is to
2 argue over the legality of the stop by refusing to pull into the secondary as requested. After
3 arguing back and forth with requests to pull into the secondary as traffic backed up, Mr.
4 Bressi's was told to move ahead to get him out of the way. Deputy Roher then proceeded
5 to stop, arrest, and cite Mr. Bressi for obstructing a highway. A.R.S. § 13-2906 (A)(1).

6 During the many years Mr. Bressi has passed through this checkpoint, he has had
7 five encounters with Pima County Sheriff Deputies. In the past, he has been issued three
8 civil citations. On April 10, 2017, he was cited under a criminal statute. (Bressi deposition
9 p. 53 lines 5-16) This was his only encounter with Deputy Roher. (p. 57 line 24 – p. 61
10 line 9)

11 **II. Argument**

12 The through lane of a Border Patrol Checkpoint on State Highway 86 is not the
13 place for arguing over the constitutionality of a border patrol checkpoint while impeding
14 traffic *Cf., United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976) (routine stops at
15 the border and selective referrals to secondary inspection are inherently reasonable). Mr.
16 Bressi was asked to move to secondary, and he refused. He was told traffic was backing
17 up, and he was impeding traffic. Mr. Bressi understood perfectly what he was asked to do,
18 and he wanted to take this another opportunity to argue with the Border Patrol and law
19 enforcement.

20 If probable cause exists to make an arrest, the arrest is lawful regardless of the
21 arresting officer's subjective intent. Mr. Bressi was arrested after blocking traffic and
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1 refusing to pull into the secondary. This Court can review the video and determine whether
2 there was probable cause for an arrest for impeding traffic. Under *Devenpeck v. Alford*,
3 543 U.S. 146, 153 (2001), the subjective reason that the officer arrests the offender is
4 irrelevant so long as the available facts suggest that the offender was committing a crime.
5 *See also Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019) (a retaliatory arrest claim must
6 plead and prove the absence of probable cause for the arrest; abrogating *Ford v. Yakima*,
7 706 F.3d 1188 (9th Cir. 2013)); *Tatum v. City Council of San Francisco*, 441 F.3d 1090,
8 1094 (9th Cir. 2006); *Blankenhorn v. City of Orange*, 485 F.3d 463, 471 (9th Cir. 2007)
9 (standard is “whether at the moment of arrest the facts and circumstances within the
10 knowledge of the arresting officers and of which they had reasonably trustworthy
11 information were sufficient to warrant a prudent [person] in believing that the [suspect]
12 had committed or was committing an offense.”).

13 Probable cause is defined in terms of facts and circumstances sufficient to warrant
14 a reasonable officer in believing the suspect has been or is being committed an offense.
15 *Sialoi v. City of San Diego*, 823 F.3d 1223, 1232 (9th Cir. 2016). Whether a reasonable
16 officer could have believed probable cause existed to justify a search or an arrest is “an
17 essentially legal question” that should be determined by the Court. *Actup/Portland v.*
18 *Bagley*, 988 F.2d 868, 873 (9th Cir. 1993).

19 This Court has previously ruled on a partial motion to dismiss. (Doc #61) More
20 specifically as to the remaining claims:

21 **COUNT I - VIOLATION OF FIRST AND FOURTEENTH AMENDMENT**
22 **RIGHTS AGAINST COUNTY AND FEDERAL DEFENDANTS:**

1 Dismissed as to Sheriff and Pima County Board of Supervisors, and as to any claim
2 for declaratory or injunctive relief. Claim for damages remains against Deputies Roher and
3 Kunze, and all federal Defendants.

4 The Defendants are entitled to summary judgment on Count I. As Mr. Bressi's
5 video demonstrates, he repeatedly refused to pull into the secondary, he was told he was
6 impeding traffic, and there was probable cause for his arrest.

7 **COUNT II - VIOLATION OF FOURTH AND FOURTEENTH**
8 **AMENDMENT RIGHTS WITHIN CHECKPOINT PRIMARY INSPECTION**
9 **LANE (CITY OF INDIANAPOLIS V. EDMOND) AGAINST ALL COUNTY AND**
10 **FEDERAL DEFENDANTS:**

11 Plaintiff asserts that checkpoint was maintained primarily to detect general criminal
12 wrongdoing instead of detecting and apprehending aliens illegally within the United States.
13 It seeks declaratory and injunctive relief requiring Defendants to cease such operations.

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

18 **COUNT III - VIOLATION OF FOURTH AND FOURTEENTH**
19 **AMENDMENT RIGHTS FOR ARREST ABSENT PROBABLE CAUSE AGAINST**
20 **DEPUTIES ROHER AND KUNZE:**

21 Probable cause bars this claim. A.R.S. § 13-2906 (Obstructing highway or other
22 public thoroughfare).

1 **COUNT IV - VIOLATION OF CONSTITUTIONAL RIGHTS PURSUANT**
2 **TO *MONELL V. NEW YORK CITY DEPT. OF SOCIAL SERVICES*) AGAINST**
3 **DEFENDANT NAPIER IN HIS OFFICIAL CAPACITY:**

4 This claim was dismissed as to Sheriff Napier in his official capacity as redundant
5 of Counts V and VI for Failure to Train and Supervise. This Court's Order mistakenly
6 states this claim is asserted against the Board of Supervisors also and remains against them,
7 but Count IV says that it is asserted only against Sheriff Napier.

8 Generally, to state a *Monell* claim, a plaintiff must show that: 1) a policy or custom
9 existed; 2) it was attributable to the municipal defendant; 3) a constitutional deprivation
10 occurred; and, 4) the policy or custom caused the constitutional deprivation. *Canton v.*
11 *Harris*, 489 U.S. 378, 386-392 (1989). In the absence of any underlying constitutional
12 violation, any *Monell* claim must be dismissed. *City of Los Angeles v. Heller*, 475 U.S.
13 796, 799 (1986).

14 **COUNT V - FAILURE TO TRAIN, 42 U.S.C. § 1983 AGAINST DEFENDANT**
15 **NAPIER IN HIS OFFICIAL CAPACITY, AND DEFENDANTS NANOS, KUNZE,**
16 **AND PIMA COUNTY BOARD OF SUPERVISORS:**

17 Because there was probable cause and no constitutional violation by the individual
18 defendants, there is no failure to train claim.

19 **COUNT VI - FAILURE TO SUPERVISE, 42 U.S.C. § 1983 AGAINST**
20 **DEFENDANT NAPIER IN HIS OFFICIAL CAPACITY, AND DEFENDANTS**
21 **NANOS, KUNZE, AND PIMA COUNTY BOARD OF SUPERVISORS:**

22 Because there was probable cause and no constitutional violation by the individual
defendants, there is no failure to train claim.

1 **COUNT VII - FALSE IMPRISONMENT, ARIZONA STATE LAW**
2 **AGAINST DEFENDANTS ROHER AND KUNZE:**

3 Because there was probable cause and no constitutional violation by the individual
4 defendants, there is no failure to train claim.

5 **COUNT VII - FALSE IMPRISONMENT (FTCA), 28 U.S.C. § 1346(b),**
6 **AGAINST THE UNITED STATES OF AMERICA:**

7 Because there was no constitutional violation by the individual defendants, there is
8 no failure to train claim.

9 **III. The individual deputies are entitled to qualified immunity.**

10 There was no constitutional violation. If there is a constitutional violation a law
11 enforcement officer is entitled to qualified immunity unless his actions violate clearly
12 established law. Law enforcement officers are not required to be perfect. They are only
13 required to act reasonably under the circumstances. Law enforcement officers “who
14 ‘reasonably but mistakenly concluded that probable cause is present’” and justifies an
15 arrest are entitled to qualified immunity. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)
16 (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)); see also *Pierson v. Ray*, 386
17 U.S. 547, 557 (1967). Put differently, “cases establish that qualified immunity shields”
18 officers “from suit for damages if ‘a reasonable officer could have believed’” the arrest
19 ““to be lawful, in light of clearly established law and the information the arresting officers
20 possessed.”” *Hunter*, 502 U.S. at 227 (quoting *Anderson*, 483 U.S. at 641) (brackets
21 omitted).

1 Because arguable probable cause is an objective inquiry, it “will often require
2 examination of the information possessed by the” arresting officers. *Anderson*, 483 U.S. at
3 641. But it “does not reintroduce into qualified immunity analysis the inquiry into officials’
4 subjective intent.” *Id.* The officers’ “subjective beliefs about the” arrest “are irrelevant.”
5 *Id.*; *see also Connor v. Heiman*, 672 F.3d 1126, 1131-32 (9th Cir. 2012) (officers had
6 probable cause and therefore qualified immunity for arrest; when no material dispute
7 existed as to what facts the officers knew, and the only dispute involved what inference
8 properly could be drawn, whether there was probable cause is for the court to decide);
9 *Luchetel v. Hageman*, 623 F.3d 975, 979 (9th Cir. 2010) (even if court concludes that
10 officers did not have probable cause to arrest, if a reasonable officer could have so believed
11 from the undisputed facts, they are entitled to qualified immunity). Qualified immunity
12 protects public officials from liability for damages under § 1983 if their actions did not
13 violate clearly established rights of which a reasonable person would have known. *Pearson*
14 *v. Callahan*, 129 S.Ct. 808, 815 (2009). Qualified immunity shields officials from
15 harassment, distraction, and liability when they perform their duties. *Harlow v. Fitzgerald*,
16 457 U.S. 800, 816 (1982). To overcome qualified immunity, a plaintiff in a § 1983 action
17 has the burden to show that 1) the facts make out a § 1983 violation of the Plaintiff’s federal
18 or constitutional rights and 2) the right at issue is clearly established at the time of the
19 alleged misconduct. A court may address these two requirements in the order it deems most
20 expedient. *Pearson*, 129 S. Ct. at 818. When it is apparent that the alleged right at issue

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1 is not clearly established, a court may decide the issue of qualified immunity on those
2 grounds without first deciding if there was an underlying constitutional violation.

3 Qualified immunity leaves ample room for mistaken judgments, and protects all but
4 the plainly incompetent or those who knowingly violate the law. *Malley v. Briggs*, 475
5 U.S. 335, 341 (1986). Inquiry into whether a constitutional right is clearly established, for
6 the purpose of qualified immunity, must be undertaken in light of the specific context of
7 the case, not as a broad general proposition. *Mueller v. Aufer*, 576 F.3d 979, 994 (9th Cir.
8 2009). In *Pearson v. Callahan* the Supreme Court stated, “The protection of qualified
9 immunity applies regardless of whether the government official’s error is ‘a mistake of
10 law, a mistake of fact, or a mistake based on mixed questions of law and fact.’” 129 S.Ct.
11 at 815 (2004) (quoting *Grow v. Romero*, 540 U.S. 551, 567 (2004)). Even when there are
12 disputed and not fully developed issues of fact regarding whether any constitutional rights
13 were violated, the court can still make the determination as to whether the defendants’
14 alleged conduct violated clearly established law. *Id.* at 820-23.

15 Qualified immunity applies unless every reasonable official would have understood
16 that what he was doing violates a constitutional right. *Ashcroft v. al-Kidd*, 131 S.Ct. 2074,
17 2083 (2011). A motion for summary judgment on qualified immunity must be granted
18 unless existing precedent placed the statutory or constitutional question “beyond debate.”
19 *Id.*

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1 **IV. Conclusion**

2 For these reasons, the Pima County Defendants request this Court to grant summary
3 judgment in their favor.

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5 DATED this 17th day of June, 2021.

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HUMPHREY & PETERSEN, P.C.

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/s/ Andrew Petersen

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ANDREW PETERSEN
Attorney for Defendants

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2021, I electronically transmitted the attached document to the Clerk’s office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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