

1 Ralph E. Ellinwood  
2 Ralph E. Ellinwood,  
3 Attorney at Law, PLLC  
4 SBA: 3890  
5 PO Box 40158  
6 Tucson, AZ 85717  
7 Phone: (520) 413-2323  
8 Fax: (855) 817-6636  
9 [ree@yourbestdefense.com](mailto:ree@yourbestdefense.com)

11 Amy P. Knight  
12 Knight Law Firm, PC  
13 SBA: 31374  
14 3849 E Broadway Blvd, #288  
15 Tucson, AZ 85716-5407  
16 Phone: 520 878-8849  
17 [amy@amyknightlaw.com](mailto:amy@amyknightlaw.com)

18  
19 IN THE UNITED STATES DISTRICT COURT  
20  
21 IN AND FOR THE DISTRICT OF ARIZONA  
22

Terrence Bressi,

Plaintiff,

vs.

(1) Pima County Sheriff Mark  
Napier, in his individual and official  
capacities, *et al.*,

Defendants.

Case No. 4:18-cv-00186 DCB

PLAINTIFF’S RESPONSE  
TO THE COUNTY DEFENDANTS’  
MOTION FOR SUMMARY  
JUDGMENT

23

24

25

26

Plaintiff Terrence Bressi (hereinafter “Mr. Bressi”), pursuant to L.R. Civ. P. 56.1(d), submits his response to the County Defendants’ Motion for Summary Judgment.

1 **I. THE DEPUTIES' APRIL 10, 2017, ARREST OF MR. BRESSI WAS**  
2 **UNLAWFUL.**

3  
4 **A. Facts Surrounding the Arrest.**

5 A.R.S. § 13-2906(A)(1) provides: “A person commits obstructing a highway  
6 or other public thoroughfare if the person, alone or with other persons, does any of  
7 the following: (1) Having no legal privilege to do so, recklessly interferes with the  
8 passage of any highway or public thoroughfare by creating an unreasonable  
9 inconvenience or hazard.” This is a Class Three misdemeanor with a maximum  
10 punishment of 30 days in jail and/or a \$500 fine. Per A.R.S. § 13-105(10)[c], in the  
11 criminal code, “Recklessly” means, with respect to a result or to a circumstance  
12 described by statute defining an offense, that a person is aware of and consciously  
13 disregards a substantial and unjustifiable risk that the result will occur or that the  
14 circumstance exists. The risk must be of such a nature and degree that disregard of  
15 such risk constitutes a gross deviation from the standard of conduct that a reasonable  
16 person would observe in the situation.

17 At page 4, lines 1 and 2 of its motion (Doc. 135), the County invites the court  
18 to review the video of the April 10, 2017, encounter [Exhibit A]. Mr. Bressi also  
19 believes the court should review that exhibit. The portion of the video depicting Mr.  
20 Bressi’s stop and detention at the primary inspection area is at 2:01 through 4:26.  
21 When Mr. Bressi stops in the roadway, it is because the Border Patrol required him  
22 to. At 2:06 the agent requests Mr. Bressi move to secondary prior to asking him any

1 question other than “How you doin.” At 2:32, the agent makes it clear that Mr. Bressi  
2 is being requested to move to secondary<sup>1</sup> not because they are unsure of his  
3 citizenship, and not because they have reasonable suspicion he has committed a  
4 crime, but because he will not answer the citizenship question, and Mr. Bressi clearly  
5 states he is perfectly willing to leave the checkpoint as soon as the agent allows him  
6 to do so. He repeats this willingness at 2:44. At 4:26, Deputy Roher permits Mr.  
7 Bressi to leave the checkpoint, and Mr. Bressi promptly does. All told, Mr. Bressi is  
8 stopped at the checkpoint for just over two minutes.

9 **B. Deputy Roher Lacked Probable Cause for Arrest.**

10 There clearly was no probable cause to arrest Mr. Bressi for violating A.R.S.  
11 § 13-2906(A)(1). He stopped as required at the checkpoint, and declined to answer  
12 the citizenship question as he may lawfully<sup>2</sup> do. This establishes the defense provided  
13

---

<sup>1</sup> To the extent the county defendants are arguing that Mr. Bressi could be detained because he was refusing to comply with a direct order, the record reflects something much more in the nature of a request, which can be declined (*United States v. Benitez*, 899 F.2d 995 (1990)). At the very least, this is a factual issue warranting resolution by the trier of fact that cannot be determined on summary judgment.

<sup>2</sup> Plaintiff’s right to refuse to answer is discussed at length in his response to the federal defendants’ motion for summary judgment (Doc. 151) at pp. 10-14. Briefly, the stop was not legal to begin with because the checkpoint itself was inconsistent with the Fourth Amendment under *United States v. Martinez-Fuerte*, 428 U.S. 543, 566-567 (1976). Moreover, the question was not for legitimate investigatory purposes because the agent already knew who Plaintiff was and that he was a United States citizen. See *United States v. Galindo-Gonzales*, 142 F.3d 1217, 1221 (10<sup>th</sup> Cir. 1998) (“When an officer seeks to expand the investigation of a motorist beyond the reasons stated for the checkpoint, he or she must have ‘a

1 in A.R.S. § 13-2906(A)(1) that Mr. Bressi had a legal privilege, *i.e.*, to demand a valid  
2 assertion of authority before acquiescing to Border Patrol agents' demands. He was  
3 not required to acquiesce to the unlawful request that he move to secondary  
4 inspection, at all times remained explicitly willing to continue down the highway, and  
5 immediately left the checkpoint when given permission to do so by Deputy Roher.  
6 These actions were all within his legal rights.

7       Moreover, Mr. Bressi's continued presence in the checkpoint after he initially  
8 encountered Agent Frye is quite plainly the result not of any recklessness on Mr.  
9 Bressi's part, but rather of the Border Patrol's decision to detain him despite having  
10 already accomplished their sole stated reason for the stop—both the Border Patrol  
11 and Deputy Roher already knew who Mr. Bressi was, and that he was a United States  
12 citizen. (Plaintiff's Fact #28) At one point in the video, Deputy Roher admits he knew  
13 who Mr. Bressi was and even that he had watched some of his videos. Mr. Bressi's  
14 identity and citizenship were clearly common knowledge at the checkpoint. A poster  
15 bearing his photo and the caption "Extremely Uncooperative Motorist" hung inside  
16 the checkpoint specifically to ensure agents would recognize him, for approximately  
17 one year beginning in March 2016, *i.e.*, very close in time to this event. (Plaintiff's

---

particularized and objective basis for suspecting the particular person stopped of  
criminal activity.'").

1 Facts #28-32) There is no evidence that the poster had been removed by April 10,  
2 2017.

3 Because Mr. Bressi has been detained and interrogated so many times, this was  
4 not the first time that the Border Patrol and the attending Pima County Sheriff's  
5 Deputy considered citing him criminally for blocking the roadway. Indeed, Deputy  
6 Roher knew, at the time of these events, of a prior occasion where Mr. Bressi was  
7 detained but purposely not arrested for blocking the highway. (SOCF #4) On March  
8 26, 2016, just short of a year before the instant encounter, Mr. Bressi was detained  
9 for over 30 minutes at the checkpoint. (SOCF #4) At the end of the encounter, Deputy  
10 McMillan explained to Mr. Bressi that he felt he did not have probable cause to cite  
11 him for blocking the roadway. (SOCF #4) An excerpt of this portion is:

12 Deputy McMillan: Hi, Mr. Bressi. You wanna roll that down  
13 a little bit. There's a lot of wind back behind me here.

14  
15 Mr. Bressi: Okay.

16  
17 Deputy McMillan: I'm gonna give this back to you here. All  
18 right. So, I understand you have issues with the federal  
19 checkpoint and--and going to their authority to stop vehicles  
20 without probable cause on an Arizona roadway versus a state  
21 transit authority through Arizona POST like a--like a sheriff or  
22 municipal officer. Okay. So, I--I--I get that. So, as far as the,  
23 you know, stopping back there, they detained you.

24  
25 Mr. Bressi: Okay.

26  
27 Deputy McMillan: They told you you were not free to leave.

28  
29 Mr. Bressi: Yeah.

1 Deputy McMillan: So, therefore, I--I'm not--I--I know that  
2 they didn't like that you blocked back their road. I don't  
3 necessarily like it but because they told you you were not free to  
4 leave, I don't think that would give me any probable cause to  
5 arrest you for obstructing a public thoroughfare because you  
6 were told not to leave.

7  
8 Mr. Bressi: And that's my analysis as well.

9  
10 Deputy McMillan's assessment reflects what was readily apparent to any  
11 observer—there was simply no way that Mr. Bressi was responsible for the  
12 obstruction. It is certainly also germane in the “reasonable officer” probable cause  
13 determination for purposes of qualified immunity (discussed *infra*) that Deputy Roher  
14 was aware of this incident before the April 10, 2017, encounter with Mr. Bressi, and  
15 the fact that Deputy McMillan had declined to cite Mr. Bressi after consulting with  
16 legal counsel. (SOCF #4)

17 **C. Mr. Bressi was Singled Out for Enforcement Because of His**  
18 **Exercise of His First Amendment Rights.**

19  
20 In *Nieves v. Bartlett*, 139 S. Ct. 1715, 1724 (2019) our Supreme Court  
21 reiterated the requirement that a plaintiff asserting a retaliatory arrest claim must  
22 show more than subjective animus of an officer and a subsequent injury; a plaintiff  
23 must also prove as a threshold matter that the decision to arrest was objectively  
24 unreasonable because it was not supported by probable cause. However, that rule is  
25 not absolute. In retaliatory arrest claims, the probable cause defense does not apply  
26 where a plaintiff presents objective evidence that he was arrested when otherwise  
27 similarly situated individuals not engaged in some sort of protected speech had not

1 been arrested for similar conduct. *Nieves* at 1727. Mr. Bressi has made just such a  
2 showing. (SOCF #5) Thus, Mr. Bressi should not be required to show even a lack of  
3 probable cause.

4 Here, in addition to the clear lack of probable cause as discussed above, there  
5 is ample evidence of animus. Deputy Roher's admission that he had frequently  
6 discussed Mr. Bressi with Border Patrol agents and his statement on the video of the  
7 encounter of April 10, 2017, that he knew Mr. Bressi and had watched his videos  
8 [clearly those posted on Mr. Bressi's website] (SOCF #3) coupled with the  
9 "Extremely Uncooperative Motorist" poster (Plaintiff's Fact #30) depicting Mr.  
10 Bressi, are compelling evidence of animus on the part of Agent Frye and Deputy  
11 Roher.

12 **II. NEITHER DEPUTY ROHER NOR DEPUTY KUNZE IS ENTITLED**  
13 **TO THE DEFENSE OF QUALIFIED IMMUNITY.**  
14

15 As discussed above, Deputy Roher admitted that he knew Mr. Bressi and had  
16 reviewed the checkpoint encounter videos that Mr. Bressi has posted to his website,  
17 and had frequently discussed Mr. Bressi with Border Patrol agents. (SOCF #3) He  
18 also admitted that he was aware that a fellow Pima County Sheriff Deputy McMillan  
19 had a previous encounter with Mr. Bressi and had declined to arrest him for violating  
20 A.R.S. § 13-2906, at least in part because he had been advised Mr. Bressi's actions  
21 did not constitute that crime. (SOCF #4). The court cannot ignore the fact that Deputy  
22 Roher had uncommonly specific notice that the particular actions occurring here did

1 not create probable cause or justify arrest. As the County defendants point out,  
2 qualified immunity offers no protection for “those who knowingly violate the law.”  
3 Doc. 135 at 9 (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

4 The County cites *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011), for the  
5 proposition that a motion for summary judgment based on qualified immunity must  
6 be granted unless existing precedent placed the statutory or constitutional question  
7 “beyond debate,” and cites *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) and *Luchetel*  
8 *v. Hageman*, 623 F.3d 975, 979 (9<sup>th</sup> Cir. 2010) for the proposition that a “reasonable  
9 officer” standard applies in determining whether an arrest would be lawful in light of  
10 clearly established law coupled with information the individual officer possessed.

11 The fact that probable cause is required for a warrantless misdemeanor arrest  
12 is certainly “beyond debate.” A.R.S. § 13-3883, which implements this basic  
13 constitutional requirement, had been in effect years before 2017. And the deputies  
14 were well aware not only of what the “obstructing a highway” statute required, but of  
15 how it applied to motorists at a Border Patrol checkpoint. A violation of A.R.S. § 13-  
16 2906 requires that a proposed defendant be acting recklessly in interfering with  
17 passage of traffic on a public thoroughfare, and acting without legal privilege. Both  
18 Deputies were present at the checkpoint and witnessed or could have easily  
19 determined what occurred. As noted above, Deputy McMillan of the same Pima  
20 County Sheriff’s Department determined almost a year earlier that he had no probable  
21 cause to arrest Mr. Bressi under very similar circumstances, and that information was



1 among that possessed by the deputies on April 10, 2017. There was no basis for any  
2 reasonable officer to believe that the requirements were any different this time. No  
3 reasonable officer would have believed he had probable cause based on these facts  
4 and the clearly established law to arrest Mr. Bressi for violating A.R.S. § 13-  
5 2906(A)(1).

6 Deputies Roher and Kunze are not entitled to qualified immunity, and the  
7 County defendants make no attempt to explain why they would be. The only sentence  
8 in their three-page discussion of the doctrine that says anything about its application  
9 to this case is the very first one: “There was no constitutional violation.” [Doc. 135  
10 at 7.] That is the only reason they provide for applying the doctrine to this case. They  
11 never argue (nor can they) that either the probable cause requirement or the  
12 requirements of A.R.S. was unclear at the time, nor do they make any attempt to  
13 explain what would be “reasonable” about a conclusion directly contrary to Deputy  
14 McMillan’s. The party seeking summary judgment has the burden of establishing it  
15 is warranted, and the County has utterly failed to do so here.

16 **III. COUNT I - VIOLATION OF FIRST AND FOURTEENTH**  
17 **AMENDMENT RIGHTS AGAINST COUNTY AND FEDERAL**  
18 **DEFENDANTS.**  
19

20 Deputies Roher and Kunze are not entitled to summary judgment on Count I.  
21 The only basis the County defendants provide is the existence of probable cause. As  
22 discussed above, Mr. Bressi was not blocking traffic for the approximately two  
23 minutes he was at the checkpoint. He drove away as soon as he was given permission

1 to do so. There was no probable cause for his arrest.

2 **IV. COUNT II - VIOLATION OF FOURTH AND FOURTEENTH**  
3 **AMENDMENT RIGHTS WITHIN CHECKPOINT PRIMARY**  
4 **INSPECTION LANE (*CITY OF INDIANAPOLIS V. EDMOND*)**  
5 **AGAINST ALL COUNTY AND FEDERAL DEFENDANTS.**

6  
7 This is the subject of Mr. Bressi's motion for Partial Summary Judgment  
8 against the federal defendants (Doc. 104) and is discussed as well in his Response to  
9 the federal defendants' motion for summary judgment (Doc. 151). All of those  
10 arguments, citations, and discussions are incorporated by reference. Notably, the  
11 County has cited neither law nor evidence for its claim that the checkpoint is lawful,  
12 nor has it provided any evidence about the nature of or limits on its own activities  
13 there. It states only that its state law enforcement operations are "neither complicated  
14 nor unreasonable." That is far from sufficient to justify summary judgment on a  
15 detailed claim that through their participation in Operation Stonegarden, they  
16 contribute to a serious Fourth Amendment violation. Indeed, although they are liable  
17 for their contributions to the Border Patrol's violations, their general law enforcement  
18 activities at the checkpoint are unconstitutional whether or not the Border Patrol's  
19 activities are permissible, but they have made no argument and provided no evidence  
20 supporting summary judgment on this claim.

21 **V. COUNT III - VIOLATION OF FOURTH AND FOURTEENTH**  
22 **AMENDMENT RIGHTS FOR ARREST ABSENT PROBABLE CAUSE**  
23 **AGAINST DEPUTIES ROHER AND KUNZE.**

24  
25 The only basis the County provides for summary judgment on this claim is the

1 alleged probable cause for the arrest. The absence of probable cause to arrest Mr.  
2 Bressi is addressed above and incorporated herein by reference.

3 **VI. COUNT IV - VIOLATION OF CONSTITUTIONAL RIGHTS**  
4 **PURSUANT TO *MONELL V. NEW YORK CITY DEPARTMENT OF***  
5 ***SOCIAL SERVICES*.**  
6

7 This Count does not function as a separate substantive claim for relief. Rather,  
8 it provides the basis on which the County itself is liable on Counts I and II, because  
9 its participation in the unconstitutional checkpoint is a matter of policy or custom  
10 (which is distinct from its liability relating to training and supervising).<sup>3</sup> The County  
11 makes no argument that its participation in the checkpoint pursuant to Operation  
12 Stonegarden does *not* constitute a policy or custom. Rather, it relies solely on its  
13 insistence that no underlying constitutional violation occurred, which is addressed  
14 throughout this response.

15 **VII. COUNT V - FAILURE TO TRAIN, 42 U.S.C. § 1983 AGAINST**  
16 **DEFENDANT NAPIER IN HIS OFFICIAL CAPACITY AND**  
17 **DEFENDANTS NANOS, KUNZE, AND PIMA COUNTY BOARD OF**  
18 **SUPERVISORS.**  
19

20 The County provides no evidence or argument to refute the claim that it was  
21 on notice of the need for training and failed to provide it. It relies solely on the

---

<sup>3</sup> It makes no difference whether “the County” is formally represented by the sheriff in his official capacity or by the Board of Supervisors. Although the order on the motion to dismiss reflects some confusion on this point, it clearly reflects an intention to allow the constitutional claims relating to the operation of the checkpoint to proceed against the county itself (however formally denominated).

1 assertion that the individual defendants had probable cause to arrest Mr. Bressi. The  
2 absence of probable cause to arrest Mr. Bressi is addressed above and incorporated  
3 by reference. The County makes no attempt to explain why it would be entitled to  
4 summary judgment on the aspect of the claim relating to deputies' long-term  
5 participation in a checkpoint that violates the Fourth Amendment. They have done  
6 nothing to establish that their participation in the checkpoint was lawful or to refute  
7 Mr. Bressi's factual and legal assertions (*see* Count II above). Accordingly, they have  
8 provided no basis for summary judgment.

9 **VIII. COUNT VI - FAILURE TO SUPERVISE, 42 U.S.C. § 1983 AGAINST**  
10 **DEFENDANTS NAPIER IN HIS OFFICIAL CAPACITY AND**  
11 **DEFENDANTS NANOS, KUNZE, AND PIMA COUNTY BOARD OF**  
12 **SUPERVISORS.**

13  
14 The County provides no evidence or argument to refute the claim that it was  
15 on notice of the need for supervision and failed to provide it. It relies solely on the  
16 assertion that the individual defendants had probable cause to arrest Mr. Bressi. The  
17 absence of probable cause to arrest Mr. Bressi is addressed above and incorporated  
18 by reference. The County makes no attempt to explain why it would be entitled to  
19 summary judgment on the aspect of the claim relating to deputies' long-term  
20 participation in a checkpoint that violates the Fourth Amendment. They have done  
21 nothing to establish that their participation in the checkpoint was lawful or to refute  
22 Mr. Bressi's factual and legal assertions (*see* Count II above). Accordingly, they have  
23 provided no basis for summary judgment.

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

3  
4 The County defendants do not even make a comprehensible statement that they  
5 are entitled to summary judgment on this claim; their motion states only that there is  
6 no claim for failure to train, but that is not the claim asserted in this count. If the  
7 County seeks to prevent Mr. Bressi from even taking his serious claim to trial, it must  
8 at least manage to actually state the claim it seeks to foreclose. They make no attempt  
9 to address the elements of the state law claim of false imprisonment. To the extent  
10 they are asserting that probable cause defeats such a claim, the absence of probable  
11 cause to arrest Mr. Bressi is addressed above and incorporated by reference.

12 **X. COUNT VIII - FALSE IMPRISONMENT (FTCA) 28 U.S.C. § 1346(B)**  
13 **AGAINST DEFENDANT UNITED STATES OF AMERICA.**

14  
15 It is unclear why the County defendants would seek summary judgment on this  
16 claim, which is clearly and explicitly asserted only against the federal defendants.

17 **XI. CONCLUSION.**

18 For all the foregoing reasons, argument, and legal and factual citations, the  
19 court should deny the County Defendants Motion for Summary Judgment in its  
20 entirety.

21 Dated this 26<sup>th</sup> day of July 2021.

22 Ralph E. Ellinwood, Attorney at Law, LLC  
23 Knight Law Firm, PC  
24 /s/ Ralph E. Ellinwood  
25 Ralph E. Ellinwood/Amy P. Knight  
26 Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on the 26<sup>th</sup> day of July 2021 I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing. Notice of this filing will be sent by operation of the court's electronic filing system or by mail as indicated on the Notice of Electronic Filing.

/s/ Ralph E. Ellinwood  
Attorney for Plaintiff

ECF copy to:

Andrew J. Petersen, Esq.  
[APetersen@humphreyandpetersen.com](mailto:APetersen@humphreyandpetersen.com)

Dennis Bastron, Esq.  
[Dennis.Bastron@usdoj.gov](mailto:Dennis.Bastron@usdoj.gov)