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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

Terrence Bressi, Plaintiff, vs. (1) Pima County Sheriff Mark Napier, in his individual capacity, *et al.*, Defendants.	Case No. 4:18-cv-00186 DCB PLAINTIFF'S RESPONSE TO FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

FACTUAL BACKGROUND

Pages 2-11 of the federal defendants' motion (Doc. 140) consist mostly of a nearly verbatim repetition of their Statement of Facts. Plaintiff has filed, concurrent with this response, the required Statement of Controverting Facts, and will not repeat them here. In short, the parties agree on some basic facts about the location and dates

of operation of the checkpoint, Mr. Bressi's history of traveling through it, and the objective facts shown in videos disclosed of 18 encounters. The parties disagree about the purpose of and need for the checkpoint and federal defendants' characterization of various encounters.

Among the Border Patrol checkpoints in Southern Arizona is, in addition to several operated on major interstates and north-south highways leading away from the border, a checkpoint on SR-86, a small east-west road connecting the town of Ajo with the City of Tucson. Over the last four years—the only years for which the Border Patrol has provided data—agents have made more arrests for narcotics at this checkpoint than for immigration. (Plaintiff's Fact #10).[1] The agency openly admits its checkpoint program is operated for both purposes, and in its publicly reported statistics, it reports its checkpoint seizures of narcotics, but not of undocumented people. (Plaintiff's Facts #8, 12) The SR-86 checkpoint is equipped with K-9s trained to detect narcotics, as well as access to databases containing criminal histories (Plaintiff's Fact #15) and has frequently been staffed not only by Border Patrol agents but by local law enforcement personnel with no immigration enforcement authority.

[1] As explained in the concurrently filed Statement of Controverting Facts, some of the facts Plaintiff relies on in this response were asserted, with accompanying exhibits, in Plaintiff's Statement of Undisputed Facts in Support of Partial Motion for Summary Judgment (Doc. 105), and are incorporated here by reference. Such facts are identified in this pleading as "Plaintiff's Fact #," where facts asserted in response to federal defendants' facts or for the first time with this filing are identified as "SOCF #." Where facts as asserted by the federal defendants in their Statement of Facts (Doc. 141) are relied upon, they are identified as "Fed SOF #."

(Plaintiff's Fact #41). The Border Patrol insists on stopping and questioning even individuals well known to them as U.S. citizen local commuters. (Fed SOF #37).

The Border Patrol opened this checkpoint in 2008. (Fed SOF #8). It has no documentation of its decision to place a checkpoint there, and does not know who made that decision. (SOCF #6). The only document it has with any information about the need for a checkpoint at that location is a single 9-page memo prepared in 2016 discussing the three checkpoints operated by the Tucson Station (SOCF #6). That memo notes the SR-86 checkpoint is "in close proximity to the Tohono O'odham Nation boundary," Fed. Exh. J at 2, but does not otherwise discuss the reservation.

Nonetheless, the federal defendants now claim the checkpoint is necessary to "control[] illegal immigration coming from Mexico into the Tohono O'odham Nation." [Doc. 140 at 3.] Although the SR-86 checkpoint was the first of the three in the area to open, and thus the other two have never operated without it, the federal defendants claim the other two checkpoints would be ineffective without it because it would leave some unspecified "unobstructed route to the Tucson metro area," which it thinks, for unclear reasons, would allow a significant amount of smuggling traffic to escape their detection. [Doc. 140 at 3.] They also claim to have established the checkpoints in response to a significant increase in traffic, and to have seen a significant reduction since their institution, although they have provided no data to support these assertions.

The federal defendants then give a description of what occurs at the checkpoint that consists of agents asking drivers about their citizenship and performing an "open

view" inspection of vehicles. [Doc. 140 at 4.] They acknowledge they may also "access law-enforcement databases" or "run[] a K9." [Doc. 140 at 4.] They neglect to mention that they routinely run these K9s on all vehicles approaching the checkpoint before they reach the primary inspection area (Plaintiff's Fact #17), that the Drug Enforcement Administration has erected license plate readers just outside of the checkpoint that the Border Patrol includes in its yearly encroachment permit applications to the Arizona Department of Transportation (Plaintiff's Fact #20),[2] and that vehicles are sometimes subject to inspection by X-ray (Plaintiff's Fact #14). They also fail to mention their long history of allowing local law enforcement agencies to station themselves inside the checkpoint to investigate the traffic coming through, run license plate and warrants checks, inspect vehicle equipment for violations of state law, and similar activities. (Plaintiff's Fact #41). Finally, they neglect to mention that in stark contrast to a recognized practice at the checkpoints in *Martinez-Fuerte v. United States*, 428 U.S. 543 (1976), agents at the SR-86 checkpoint do not wave recognized local residents or commuters through, but rather insist that they stop and be inspected each time. (Fed. SOF #36).

[2] The Border Patrol has also admitted it attempted to install its own license plate readers at the SR-86 checkpoint, but the program ultimately failed. Consistent with this evidence, the Border Patrol's Traffic Checkpoint Policy (Fed. Exh. I) lists license plate readers among the optimal equipment for a checkpoint. *Id.* at 14.

I. The checkpoint is unlawful under *Martinez-Fuerte* because it is operated largely for the purpose of general crime control and narcotics enforcement.

The problem with the federal defendants' claim arises in the very first sentence of their argument that the checkpoint is legal: it asserts the checkpoints in *Martinez-Fuerte* were "like the one on State Route 86." [Doc. 140 at 14.] But the SR-86 checkpoint is not at all like those in *Martinez-Fuerte* because of where it is located, what the agents do there, and what it does and does not actually accomplish.

As detailed in Plaintiff's Motion for Partial Summary Judgment (Doc. 104 at 19-20), *Martinez-Fuerte* dealt with checkpoints on major interstates leading directly away from the border, which would force smugglers "onto less efficient roads that are less heavily traveled, slowing their movement and making them more vulnerable to detection by roving patrols." 554 U.S. at 557. The SR-86 checkpoint is indisputably one of these smaller, less efficient roads, and the *Martinez-Fuerte* Court explicitly distinguished the roads where it was allowing checkpoints from roads like this one.

The federal defendants' description of what occurs at the checkpoint per policy and training—a brief stop and question about citizenship (Fed. SOF # 22-29)—is not inaccurate per se, but it is badly incomplete. They do note, obliquely, that they use K9s at the checkpoint (Fed. SOF #36) and that agents can access drivers' criminal histories via database (Fed. SOF #35). But they fail to present the complete picture, that in addition to the stop and brief questioning approved in *Martinez-Fuerte*, a motorist traveling SR-86 will pass by DEA license plate readers installed in conjunction with the Border Patrol's encroachment permits for its checkpoint

(Plaintiff's Fact #20), that at one point the Border Patrol sought to install license plate readers of its own (Plaintiff's Fact #19), that K9s are used before the car even enters the primary inspection area and are trained not only to look for smuggled humans but also narcotics (Plaintiff's Facts #16-17), that the agency lacks limiting criteria for when database searches may be run on drivers passing through the checkpoint (Plaintiff's Fact #15), that the checkpoint also sometimes includes backscatter X-ray and radiation detectors (Plaintiff's Fact #14), that agents are trained to look not only for immigration violations but for anything that might create reasonable suspicion of any criminal activity (Plaintiff's Facts #23, 25), and that Pima County Sheriff's deputies were repeatedly stationed at the checkpoint to check passing vehicles for state law violations, warrants, and other general law enforcement tasks (Plaintiff's Fact #41). What is more, the agents at the SR-86 checkpoint actively collect intelligence to feed into ongoing investigations outside of the scope of what they can intercept at the checkpoint. (SOCF #86). All of this is outside the scope of the limited checkpoints approved in *Martinez-Fuerte*. Moreover, the limited data available on arrests at the SR-86 checkpoint set it worlds apart from the two approved in *Martinez-Fuerte*. *See* Plaintiff's Motion for Partial Summary Judgment (Doc. 104) at 13 (checkpoint in *Martinez-Fuerte* led to the arrest of 17,000 illegal aliens in the year at issue; SR-86 checkpoint has in recent years yielded between 8 and 145 per year).

The federal defendants insist the primary purpose of the SR-86 checkpoint must be immigration enforcement because (1) the Border Patrol says it is; (2) agents are supposed to ask an immigration question; and (3) the "evidence" allegedly shows

that the checkpoint is a necessary part of an intricate scheme to "restrict the major routes of egress from the U.S.-Mexico border to the Tucson metro area." [Doc. 140 at 17.] But the evidence presented on these points consists only of a single 2016 memo in which an agent simply asserts these facts with no supporting data or other information and the agency's 30(b)(6) designee making similar conclusory comments. *See* SOCF #9-13, 19-21. Of course, the agency, aware of the *Martinez-Fuerte* standard, will assert that its checkpoints meet that standard, but that is not enough; they must *demonstrate* as much with facts, data, or other evidence. The record is devoid of evidence on these issues aside from Border Patrol agents' say-so.

Moreover, the fact that the agents ask an immigration question says little about the checkpoint's purpose. The agents in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), could have added that question to their routine at their narcotics checkpoint, and that would not make it an immigration checkpoint. And the proffered "evidence" of the need for the checkpoint and the alleged problem with illegal aliens entering through the Tohono O'odham Nation consists of an agent's say-so unsupported by any data or even specific anecdotal evidence.

But leaving aside purpose, the federal defendants ignore the entire second part of the inquiry: even if immigration is the primary purpose, is the scope of the seizure reasonable to further that purpose? A checkpoint is not automatically permissible because it is run by the Border Patrol, or because the Border Patrol uses it to some degree for immigration purposes. That is the crux of *Martinez-Fuerte*: that for any particular checkpoint and indeed any particular stop, the intrusion must be reasonable

for the purpose asserted. *See, e.g.*, *United States v. Galindo-Gonzales*, 142 F.3d 1217, 1221 (10th 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 particularized and objective basis for suspecting the particular person stopped of criminal activity.'") In addition to all of the detection methods and intelligence collection deployed and the failure to allow known local commuters to pass unmolested (Fed SOF #36-37), the checkpoint agents are trained not only to look for immigration violations, but to refer for further inspection any vehicle where they have reasonable suspicion of any sort of federal criminal activity. In other words, they are taking vehicles where they have no indication of an immigration problem and, with broad discretion, detaining them to look for evidence of crimes. They are intentionally using dogs trained to locate narcotics. These are not incidental discoveries; they are systematically exploiting the alleged immigration stops for narcotics enforcement purposes, and even if the initial stop and immigration question were supportable, all these additional active steps looking for separate criminal violations are not.

As for the federal defendants' reliance on this Court's prior consideration of Arizona checkpoints, each checkpoint must be considered individually, and cases discussing other checkpoints say little about the SR-86 checkpoint, which is uniquely situated on an east-west road between two egress roads equipped with checkpoints. They have identified only one case—*United States v. Brown*, 2017 WL 6403069—involving the SR-86 checkpoint. *Brown* is a criminal case, and the cited opinion is the denial of a motion to suppress. The evidence before the court was apparently more

limited than that available here, perhaps in part because criminal defendants are not entitled to the type of discovery available to a civil plaintiff. The record here is very different, and indeed, the important arrest and event statistics provided by the Border Patrol in this case mostly concern events *after* the June 2017 hearing in *Brown.* Nor did the record in *Brown* include the Border Patrol's public statements about its use of the checkpoint for narcotics enforcement or the evidence about the presence nearby of DEA license plate readers or the database-search capability. And, although Sheriff's Deputies were called to the scene after a confrontation began between the defendant and the agents, there was no evidence before the Court of local law enforcement officers being assigned to the checkpoint generally. The other cited case concerns a different checkpoint (on SR 80, which is on the north-south road that leads from the border town of Douglas to Interstate 10, just past where it intersects with SR 82, which leads from the border town of Nogales).

If the Court is to consider prior opinions discussing the operation of Arizona checkpoints, it should look at the Ninth Circuit's published opinion discussing a roadblock operated in 2002 on the Tohono O'odham Nation near where the SR-86 checkpoint is located today, *Bressi v. Ford*, 575 F.3d. 891 (9th Cir. 2009). In that case, the Ninth Circuit reversed the District Court's grant of summary judgment for the officers. The authority for the stop was tribal jurisdiction, which extended only over tribal members; thus, the officers were permitted to determine tribal status, but not to prolong the stop or make further inquiries (*id.* ¶ 5). The officers "did not confine themselves to inquiring whether [Mr. Bressi] was or was not an Indian," and any

further inquiries rendered the roadblock "an instrument for the enforcement of state law," (*id.* ¶ 6). Substitute immigration status for tribal status, and we have the same situation here. The Court also noted that in the analogous context of determining whether the roadblock was operated "under color of state law," it would give significant consideration to the roadblock's actual function, rather than trying only to assess law enforcement's intent, "because function is a more readily ascertainable guide to conduct and furnishes a more practical rule for determining whether a road block is operated (at least in part) under color of state law." *Id.*

Finally, the allegation that the checkpoint deters illegal activity—even if it were factually supported—does not render it constitutional. The narcotics checkpoint in *Edmond* would surely have deterred some criminal activity too. As would giving officers the unfettered right to search vehicles' trunks. But those things violate the Fourth Amendment. We have struck a societal balance wherein not all methods that would increase the effectiveness of law enforcement are permissible. Setting up a dragnet for immigration and criminal activity on every road near the southern border may improve border security, but it falls far outside the level of reasonableness our society supports.

II. The Agents' Actions at the SR-86 Checkpoint Violate Mr. Bressi's First Amendment Rights.

A. <u>The federal defendants' suggestion that the right not to respond is a Fourth Amendment issue only is wrong; these questions implicate the First Amendment, especially when asked without valid investigatory purpose</u>.

A review of the videos contained in the federal defendants' Exhibit N makes abundantly clear that these agents are, for the most part, not sincerely attempting to determine whether Mr. Bressi is lawfully present in the United States, but rather are attempting to force him to submit to their authority by requiring him to respond to a question to which, in many of the instances, they already know the answer. In light of this fact, the federal defendants' motion claiming there is no genuine issue of material fact on a First Amendment violation here fails for multiple reasons.

First, the federal defendants' argument depends on the premise that the checkpoint seizures are legal. For the reasons described above and in Plaintiff's Motion for Partial Summary Judgment (Doc. 104), the Border Patrol's suspicionless seizures of Mr. Bressi at the SR-86 checkpoint are not legal to begin with. They thus cannot justify further investigative steps, including questioning.

Even if the stops were lawful, the federal defendants have cited no law requiring that the general First Amendment right not to speak is wiped out when agents conduct a valid limited seizure. The question of whether an individual may be punished for refusing to answer limited questions (such as identifying oneself) during a lawful seizure is unsettled. The First Amendment unquestionably includes "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Moreover, individuals may not be punished for refusing to answer questions, such as providing their name, when there is no valid basis for seizing or detaining them. *See, e.g., Brown v. Texas*, 443 U.S. 47, 49 (1979). Nor may a refusal to answer contribute to a probable cause analysis. *Graves v. City of Coeur*

D'Alene, 339 F.3d 828 (9th Cir. 2003) (refusal to give an officer his name could not contribute to probable cause for individual's arrest). This concern unquestionably implicates the First Amendment. *See Kolender v. Lawson,* 461 U.S. 352, 358 (1983) (recognizing statute requiring individuals to identify themselves when asked by officers jeopardizes "First Amendment liberties . . ."). What the cases do *not* say is that this background right not to speak evaporates in the face of a valid seizure. The government cites two out-of-circuit cases for its claim that the "First Amendment is not implicated" in an individual's refusal to answer an officer's questions during a lawful seizure: *Alexander v. City of Round Rock,* 854 F.3d 298 (5th Cir. 2017) and *Koch v. City of Del City,* 660 F.3d 1228 (10th Cir. 2011). However, neither case so held; both determined, in damages actions against individual local government actors, that the issue was not sufficiently clearly determined in existing cases to overcome qualified immunity. Because this is a claim for declaratory and injunctive relief against official-capacity actors, qualified immunity does not come into play.

Mr. Bressi's First Amendment right not to speak endures regardless of whether he has been seized, validly or otherwise. To hold otherwise would raise serious concerns about compelled speech, and would implicate not only the First Amendment but also the Fifth Amendment. If a limited investigatory detention strips a person of his core constitutional rights, including the right not to speak, it begins to look a lot less limited. It would be absurd to suggest that officers conducting a mere limited investigatory stop can force individuals to do things that officers carrying out a full-blown arrest cannot. And it would be grossly inconsistent to conclude that although

a choice not to respond to officers cannot elevate reasonable suspicion to probable cause, it can create reasonable suspicion out of thin air.

In any event, the Court need not decide whether individuals properly detained may be required to answer limited legitimate questions such as identifying themselves for one simple reason: in a significant number of these incidents, the agents are not asking Mr. Bressi his citizenship and demanding an answer for legitimate investigatory purposes or to obtain information needed to enforce immigration law. By and large, they already know the answer. Not only did the Border Patrol's 30(b)(6) designee admit the Border Patrol has "known Mr. Bressi for multiple years traveling . . . through the 86 checkpoint," (Fed. Exh. B at 16, ll. 2-18), but multiple documents produced by the Border Patrol reflect their long-time knowledge that Mr. Bressi is a U.S. Citizen, whom they identified with posters and training slides as an "extremely uncooperative motorist." SOCF #84. And although their descriptions largely omit this fact, the encounters documented in the videos in the federal defendants' Exhibit N show agents time and again recognizing Mr. Bressi, and then continuing to insist that he tell them his citizenship, even though they already know it. (SOCF #55-82.)

Given that agents are demanding that Mr. Bressi respond to them (*i.e.*, speak) when they are not asking a sincere investigative question for true law enforcement purposes, they are indisputably attempting to compel speech, *not* taking steps they must take to enforce immigration, or even criminal, laws. Whatever the law requires in terms of response to actual investigative questioning in a valid seizure, it clearly does not require an individual to state already known facts upon agents' demand.

Moreover, Mr. Bressi's position—that the checkpoint and agents' questioning is an unwarranted expansion of government power—is an inherently political one. Thus, forcing him to speak at all in this context for no valid law enforcement purpose is a quintessential instance of compelled speech prohibited by the First Amendment. His position is that these agents should not be permitted to detain and question him, and forcing him to answer their questions is tantamount to forcing him to agree out loud that they have this power, when that is entirely unnecessary for them to do their valid law enforcement jobs. *See Alexander*, 854 F.3d at 308 (First Amendment analysis considers whether the potentially compelled speech had some "particular political or ideological message." (Quoting *McFayden v. Duke Univ.*, 786 F. Supp. 2d 887, 949 (M.D.N.C. 2011)).

B. The federal defendants make no attempt to address the retaliation aspects of the First Amendment claim.

The federal defendants seek summary judgment on Plaintiff's claim of violation of his First Amendment rights, but their argument addresses only one aspect of the alleged violation—that attempting to force him to speak violates his First Amendment right not to speak. That is indeed one way in which the defendants' checkpoint activities violate Mr. Bressi's First Amendment rights, and as demonstrated above, that is a serious violation. But it is not the only way. The claim also encompasses agents' targeting and retaliating against Mr. Bressi for his public expressions of his point of view on the issue of the legality of checkpoints.

The allegations in Count 1 specify that the actions of the defendants described throughout the complaint "violated Plaintiff's right to freedom of speech guaranteed by the First Amendment to the Constitution . . . Defendants, through the acts described above, acted to eliminate and chill Plaintiff's exercise of his right to speak and, by extension, his right not to speak." [Doc. 42, ¶ 187.] The complaint further alleges that Plaintiff's injuries include "having his right to engage in the constitutionally protected activity of ideological speech truncated, extinguished, and/or deprived him," and that he has suffered a "First Amendment retaliatory arrest" and fears "all Defendants are likely to continue to chill Plaintiff's First Amendment rights at the SR-86 checkpoint. In fact, the Federal Defendants have truncated and attempted to chill Plaintiff's First Amendment rights since April 10, 2017, at the SR-86 checkpoint." [Doc. 42, ¶¶ 191, 193.] The allegations include seizing Mr. Bressi at the checkpoint despite knowing his identity and citizenship and lacking reasonable suspicion (Doc. 42, ¶ 77) and placing dogs in the bed of his pickup truck (Doc. 42, ¶ 82), which he contends "have chilled [his] First Amendment speech while traveling through the SR-86 checkpoint." [Doc. 42, ¶ 85.] The federal defendants' motion fails entirely to address this retaliation-and-chilling-based aspect of the First Amendment claim, and summary judgment must be denied on that basis alone.

Indeed, the record contains ample evidence that Border Patrol agents have repeatedly targeted Mr. Bressi because of his speech, detaining him, inspecting him, and even filming him not because they have any valid investigative purpose, but to punish him. This retaliation for protected expression violates the First Amendment

every bit as much as attempting to force him to speak. For example, the document the federal defendants rely on so heavily to justify their checkpoint, Exhibit J, includes a section specifically discussing Plaintiff: "Mr. Bressi has been the most outspoken individual against the HWY 86 Checkpoint since it was opened. Mr. Bressi is an employee at the University of Arizona who works at the Kitt Peak Observatory. Mr. Bressi has consistently challenged agents on their authority to stop him and has posted numerous videos on internet websites such as www.youtube.com." (p. 7). At the time this memo was written in 2016, agents had already hung a poster inside the checkpoint identifying Mr. Bressi as a U.S. citizen. (SOCF #84.) They included the same information in a May 10, 2017, "Tucson Station Checkpoints Protest Response Plan," where they added that "Mr. Bressi is known to videotape all checkpoint encounters and will often challenge agents in regards to their authority and attempt to incite them to action." (SOCF #87). This addition is especially notable because it focuses not only on Mr. Bressi's actions, but on his documentation of the encounters, which he was known to publicize. Finally, Agent Eduardo Fuentes, who was the supervisor on scene the day Plaintiff was arrested, was observed to be "expressing some kind of pleasure at the fact that Mr. Bressi was getting charged with a crime" and was laughing at him. (SOCF #88). This type of singling out of an individual who disagrees with the agency's policy is exactly what the First Amendment is designed to prevent.

C. <u>These violations are no less real because they occur in only some encounters or because Mr. Bressi could shorten the encounters by acceding to the agents' unconstitutional demands.</u>

The federal defendants suggest Mr. Bressi cannot claim to be injured by these violations because: (1) they are mostly brief; (2) "Bressi himself deliberately prolongs the encounter by remaining at the checkpoint after he has been waved through" (Doc. 140 at 19); and (3) it has only happened 18 times. None of these points compels denial of relief.

Regarding duration, the violation is not in the length of time for which Mr. Bressi is detained; it is in the *reason* for which he is detained. While the extent of the intrusion may be a relevant factor in a Fourth Amendment analysis, it does not reduce the harm done to his First Amendment rights by retaliation or attempts at compelled speech. Relatedly, whether or not Mr. Bressi immediately departs upon release has no bearing on whether it was legal to detain him to begin with. And in any event, the federal defendants' factual assertion here—that Mr. Bressi remains "to continue yelling at the agents"—is incorrect. In the vast majority of these encounters, if Mr. Bressi remains behind, it is to make sure he has recorded the identities of the individuals violating his rights and/or to obtain from the agents a very clear and explicit statement that he is free to leave, which serves an obvious self-protective function. (*See* SOCF #55-82 (describing video encounters).) And, of course, the fact that Mr. Bressi could likely be released from the checkpoint more quickly if he waived his rights cannot serve as a basis for denying those rights to begin with. In many instances it would be easier to accede to government assertions of authority, but our government permits citizens to challenge violations of constitutional rights, and that is an essential part of our fair and free society.

Finally, the federal defendants suggest no relief is needed because there are only 18 documented violations. Perhaps if it had happened once, or even twice, there would be an argument to be made there. But how many free violations does the government get? The percentage of encounters including this particular type of violation, is not the point. This behavior began in 2005 and has continued through 2019. And even aside from these incidents of specific detention for refusal to speak, Mr. Bressi has continued to be recognized and fear retaliation each time he passes through the checkpoint on his way home from work (which is likely to resume in the relatively near future, Fed. SOF #41).

D. The undisputed facts do not foreclose FTCA relief for false imprisonment.

1. Discretionary function exception.

The federal defendants now suggest their agents cannot be liable because no "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." [Doc. 140 at 21.] Yet for the rest of their motion, they rely heavily on agents' following "official policy and training" to defend their checkpoint actions. [*See, e.g.*, Doc. 140 pp. 15, 16, 19.] They cannot simultaneously claim that the agents' actions are constitutional because they are Border Patrol policy, and then turn around and argue that they are not subject to tort liability because their actions are not controlled by a federal policy. Indeed, the federal defendants specifically defend their agents' arrest-related conduct by arguing "both Border Patrol's policy on checkpoint operations and its guidance on non-compliant motorists authorize

Border Patrol agents to request assistance from local law-enforcement agencies." (Doc. 140 at 22). If, as they claim, the agents were simply carrying out this policy, then they are subject to FTCA liability.

Next, they argue, essentially, that any decisions made by law enforcement agents during an investigation are presumptively immune from FTCA scrutiny. In so doing, they ignore the most directly relevant part of the statute. True, 28 U.S.C. § 2680(a) exempts the performance of discretionary functions, but § 2680(h) includes a crucial proviso: "with regards to acts or omissions of investigative or law enforcement officers of the United States Government, the [FTCA] shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, ***false imprisonment,*** abuse of process, or malicious prosecution," specifically including any federal officer "who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law" (emphasis added). Thus, federal officers absolutely can be liable under the FTCA for a false imprisonment claim. *See, e.g.*, *Nurse v. United States*, 226 F.3d 996, 1002-03 (9th Cir. 2000). Although the actions of law enforcement officers may still be exempt if they are true discretionary functions under *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994), there is no background assumption in the statute that they are discretionary, as the federal defendants suggest. The opposite is true.

Finally, they argue the agents' actions involve judgments of social, economic, or political policy. But that is exactly what they have continually insisted the agents are *not* doing. They have repeatedly insisted they are just enacting Border Patrol

policy. If they wish to concede that in interacting with Mr. Bressi, they are taking social and political stances rather than merely following their own rules, they should explicitly so state. Otherwise, at the very least, there is a genuine factual dispute about that, and summary judgment is unwarranted.

2. The Border Patrol agents are liable for the false imprisonment.

There are two components to the Border Patrol's false imprisonment of Mr. Bressi: their own confinement of Mr. Bressi in the checkpoint when they had no valid authority for doing so, and their participation in the deputies' detention and handcuffing of Mr. Bressi. (*See* Second Amended Complaint [Doc. 42, ¶¶ 252-256].)

Regarding the Border Patrol's right to detain Mr. Bressi, the stop was not lawful because the checkpoint itself is impermissible under the Fourth Amendment and *Martinez-Fuerte,* as explained *supra* and in Plaintiff's Motion for Partial Summary Judgment (Doc. 104). But even if it were legal for them to stop him for long enough to ascertain his citizenship, it was not legal for them to detain him any further once they had identified him as a known U.S. citizen, especially when they had no reasonable suspicion that he was violating any federal criminal law. *See supra,* Part II.A. Mr. Bressi was known to agents at the checkpoint. (SOCF #83-84.) The agents, however, told Mr. Bressi several times he was not free to go until he answered their questions. (SOCF #68-78.) This continued detention, which was not necessary for them to accomplish the stated justification for their suspicionless stop, was not lawful. It accordingly constituted a detention without consent and without lawful authority.

Moreover, the federal defendants assert that upon Mr. Bressi's refusal to move to secondary, "Agent Frye had reasonable suspicion to prolong the seizure because Bressi was blocking a public roadway." Deputy Roher, for his part, flatly denied that his arrest of Mr. Bressi was for refusing to drive into the secondary area. (SOCF #89.) In any event, the Border Patrol has always been clear in its policy that they are permitted to hold someone based on reasonable suspicion only of a federal, not a state offense (Fed. SOF #29), so any alleged "blocking" was not a valid basis for them to detain him. They had no authority to enforce an Arizona statute. At that point, they had no authority to detain him at all. That was false imprisonment.

Regarding the Border Patrol's responsibility for the arrest ultimately committed by Deputy Roher, the on-scene agents' reports confirm they were active participants: Eduardo Fuentes, Jr., the supervising agent, explained he walked over to where Roher had stopped Mr. Bressi and Roher "briefed [him] on the situation." Fuentes also stated he "commanded Mr. Bressi to sit down, [he] stated that it was a lawful order and that he must comply." Another agent, Edmundo Lopez Sr., explained he left the checkpoint "to provide back-up for Deputy Roher." Lopez reported that when Roher returned to his vehicle, *Lopez* "was guarding Mr. Bressi." Lopez then "placed [his] hands on the arms of Bressi's sweat shirt and guided him to the hood of Deputy Roher's vehicle." (*See* SOCF # 90 and exhibits.) To suggest these agents bear no liability for the false imprisonment is thus flatly contrary to the record.

Moreover, the record reflects that deputies, when working under Operation Stonegarden, were subject to the direction of the Border Patrol. (Plaintiff's Fact #38.)

Roher was there because the Border Patrol had assigned him there, and he interacted with Mr. Bressi because the Border Patrol asked him to do so. They cannot then wash their hands of his actions during his assignment.

3. Roher had no probable cause to arrest Mr. Bressi.

Mr. Bressi explains at length why Deputy Roher lacked probable cause for arrest in his opposition to the County Defendants' Motion for Summary Judgment (Doc. 135). That explanation is hereby incorporated by reference.

Briefly, there clearly was no probable cause to arrest Mr. Bressi for violating A.R.S. § 13-2906(A)(1).[3] First, the statute requires that the individual's behavior be reckless, and that it create an "unreasonable inconvenience or hazard." Mr. Bressi stopped at the checkpoint because Border Patrol agents required him to, and left immediately when permitted to do so. All told, he was stopped at the checkpoint for just over two minutes. He repeatedly sought to leave the area entirely, but the Border Patrol, whose asserted authority was merely to conduct an immigration inspection, forbade it, despite being aware of his identity and citizenship. (*See*, *e.g.*, SOCF #84.) To suggest that *Mr. Bressi* was being reckless and unreasonable when in fact the agents were holding him at the checkpoint and forbidding him from continuing along

[3] "A person commits obstructing a highway or other public thoroughfare if the person, alone or with other persons, 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." This is a Class Three misdemeanor with a maximum punishment of 30 days in jail and/or a $500.00 fine.

the highway with no valid basis is beyond reason, and certainly could not create probable cause for arrest. Indeed, it appears Deputy Roher may have recognized it was the Border Patrol agents, not Mr. Bressi, who were creating the obstruction, as when he took over the interaction and was asked his authority for continued detention, he released Mr. Bressi right away.

Moreover, A.R.S. § 13-2906(A)(1) explicitly does not apply when the person stopping has "legal privilege to do so." Mr. Bressi remained in the checkpoint at the agents' insistence after he declined to answer the citizenship question, which, as detailed *supra,* was an entirely lawful action on his part, especially considering the Border Patrol's knowledge of his identity and citizenship. Mr. Bressi had a Fourth Amendment right not to be seized or detained in this manner, as well as a First Amendment right not to be forced to speak when there was no valid investigatory purpose, and he was simply asserting those rights. He continued to ask if he was free to go, and the agent continued to unlawfully refuse to allow him to leave (which would have immediately cleared any obstruction). This meets the defense provided in A.R.S. § 13-2906(A)(1) that Mr. Bressi had a legal privilege.

III. CONCLUSION

Summary judgment is appropriate only when the facts not subject to legitimate dispute compel the requested result. Here, the facts reveal that the Border Patrol is operating a checkpoint that is more effective at seizing drugs than catching undocumented people, on a road that does not lead to or from the border, and that at that checkpoint, they have repeatedly detained Mr. Bressi when already aware of his

identity and citizenship and attempted to compel him to answer questions, not because they had a legitimate law enforcement need for the answers, but simply to assert authority over a known "highly uncooperative motorist" whom they disliked. They then participated actively in a deputy's arrest of Mr. Bressi without probable cause. Because a reasonable jury hearing all this evidence could absolutely find in favor of Mr. Bressi on all counts, the federal defendants' motion for summary judgment must be denied.

Dated this 26th day of July 2021.

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/s/ Amy P. Knight
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Amy P. Knight
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 26th 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/ Amy P. Knight
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