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5  
6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

8 Terrence Bressi,

Plaintiff,

9 vs.

No. CV-04-264-TUC-JMR

10 Michael Ford; Eric O'Dell; George Traviolia;  
11 Richard Saunders; and the United States of  
12 America,

Defendants.

**MOTION FOR SUMMARY JUDGMENT**

**Oral Argument Requested**

13  
14 Defendants Michael Ford, Eric O'Dell, George Traviolia, and Richard Saunders, by and  
15 through their attorneys undersigned, hereby move for summary judgment pursuant to Rule 56,  
16 Fed.R.Civ.P. on the following grounds: (1) that these Defendants have qualified immunity for  
17 the Plaintiff's claims against them under 42 U.S.C. § 1983 with regard to the arrest and citation  
18 of the Plaintiff for state law violations; (2) that there is no basis for any § 1983 finding against  
19 Defendant Saunders, because he was neither at the checkpoint nor directed the arrest and  
20 citation on the grounds issued; (3) that Defendants did not violate Plaintiff's right to privacy  
21 under Art. 2, § 8 of the Arizona constitution; (4) and that Plaintiff has no standing to seek a  
22 permanent injunction and that judgment on the other claims will eliminate any possibility that  
23 he could win on the merits, as required for a permanent injunction. Defendants also seek direct  
24 entry of final judgment pursuant to Rule 54(b), Fed.R.Civ.P.

25 This motion is supported by the following Memorandum of Points and Authorities and  
26 the accompanying Statement of Facts ("SOF"), and all exhibits and statements incorporated

1 therein, and which are are incorporated herein by reference.<sup>1</sup>

## 2 MEMORANDUM OF POINTS AND AUTHORITIES

### 3 I. INTRODUCTION

4 Plaintiff Terrence Bressi (“Bressi”) brought suit against these individual defendants, all  
5 police officers of the Tohono O’Odham Police Department (“TOPD”), with regard to a  
6 checkpoint at which he was stopped on State Highway 86 within the boundaries of the Tohono  
7 O’Odham Nation (“Nation”), and subsequent arrest and citation for violations of state law. He  
8 also seeks damages for alleged violation of privacy under the Arizona Constitution, and a  
9 permanent injunction against these Defendants.

10 By orders of September 26, 2005 and May 23, 2006 (“Docket # 64 and 72,  
11 respectively”), this Court ruled that the checkpoint, stop, questioning and detention of Bressi  
12 were conducted pursuant to tribal law, clothing the Defendants with tribal sovereign immunity  
13 for those actions. On the other hand, the Court ruled that Bressi may continue to pursue his §  
14 1983 claims for the citation and arrest, injunctive relief for future roadblocks, and pursue his  
15 Arizona constitutional claim for privacy. It is these continued claims that the current motion  
16 addresses.

17 The Supreme Court, in *Saucier v. Katz*, 533 U.S. 194, 200-01, 121 S.Ct. 2151, 150  
18 L.Ed.2d 272 (2001), explained that qualified immunity should be decided at the earliest  
19 possible stage in litigation, because it is an immunity from suit, rather than a mere defense to  
20 liability. In this case, the Court allowed limited discovery for purposes of the prior motion to  
21

22  
23  
24 <sup>1</sup> The statements of facts are supported by the exhibits previously submitted with the previous  
25 Statement of Facts filed by these Defendants on May 27, 2005 (“5/27/2005 Statement of  
26 Facts”) (at Docket # 51) and Errata to same (Docket # 55) regarding Tubbiolo’s deposition, and  
from these defendants’ sworn Answers to Interrogatories which Plaintiff included as Exhibit 8  
to his Statement of Facts filed May 6, 2005 (Docket #48). Pursuant to LRCiv. 7.1(d)(4), copies  
of those items will be provided separately and informally for the Judge’s and other counsel for  
reference.

1 dismiss for sovereign immunity. The discovery obtained and evidence submitted to the Court  
2 for purposes of that motion, or more specifically, the motion for reconsideration and related  
3 pleadings filed by the Defendants thereafter, along with Bressi's Third Amended Complaint,  
4 supply the allegations, factual background and evidence on which these Defendants move at  
5 this time. Consequently, the Statement of Facts submitted herewith incorporates the designated  
6 evidence from those proceedings. Some of the facts describing the checkpoint, stop,  
7 questioning, and detention of Bressi are likewise provided here for background. To the extent  
8 any facts set forth herein are deemed admitted, they are admitted strictly for purposes of  
9 consideration for this summary judgment motion.

## 10 **II. BRESSI'S ALLEGATIONS AND THE FACTS**

### 11 **A. Bressi's Allegations and Relief Sought Against the Individual Defendants in** 12 **His Third Amended Complaint.**

13 In his Third Amended Complaint, Bressi alleges that after being detained at the  
14 roadblock on December 20, 2002, and after discussions with the officers about the propriety of  
15 the stop and their request for certain documents, the officers "arrested Bressi and removed him  
16 from his vehicle, and cited him with violations of A.R.S. § 28-1595(B) and A.R.S. § 28-  
17 622(A). The complaint [i.e., the citation] included a summons to appear in Pima County  
18 Justice Court in Ajo on January 3, 2003." (*Third Amended Complaint* ¶¶ 2-7; *quotation is*  
19 *from* ¶ 7.) He claims then he was detained for approximately three hours. *Id.* ¶ 8. As a basis  
20 for requested relief, Bressi asserts that he "enjoys a right to privacy under Article 2 § 8 of the  
21 Arizona Constitution and a right to be free from unreasonable searches and seizures under the  
22 Fourth Amendment to the United States Constitution." (*Id.* ¶ 16.) He claims that "his civil  
23 rights were violated when the Defendants seized his person and vehicle without reasonable  
24 suspicion pursuant to a roadblock that did not satisfy Constitutional requirements stated in  
25 [*Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990),  
26 and *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000)]. (*Id.*

1 at ¶ 17.) And he alleged that Defendants continued to act in an unconstitutional manner upon  
2 receiving information from him. (*Id.*) He requests damages in the amount of \$50,000.00 to  
3 compensate him for the alleged violation of his civil rights. (*Id. at* ¶ 21.) And finally, he  
4 requests that the Defendants be permanently enjoined from violating federal and state laws  
5 “when enforcing state law on a state highway in their capacity as state police officers and/or  
6 police officers under contract with the United States of America, in particular from violating  
7 Constitutional requirements regarding roadblocks and sobriety checkpoints.” (*Id.* ¶ 22.)

8 **B. Background Facts of the Checkpoint and Defendants’ Authority.**

9 On December 20, 2002, the Tohono O’odham Police Department (“TOPD”) conducted  
10 a checkpoint for sobriety, registration and driver’s licenses on State Highway 86, within the  
11 boundaries of the Tohono O’odham Nation (“Nation”), a federally recognized Indian tribe.  
12 (SOF 1.) State Highway 86 traverses a right-of-way provided by the Nation to the State of  
13 Arizona for that highway. (SOF 2.)

14 The TOPD was operating at that time under a contract with the Bureau of Indian Affairs  
15 (“BIA”) pursuant to the Indian Self Determination Act, Public Laws 93-638 and 100-472. All  
16 TOPD officers are AZ-POST (Arizona Peace Officers Standards and Training Board) certified  
17 and duly appointed as tribal law enforcement officers. They possess the law enforcement  
18 powers of Arizona peace officers pursuant to A.R.S. § 13-3874. Defendants Michael Ford,  
19 George Traviolia, and Eric O’Dell were so certified and appointed as TOPD officers on  
20 December 20, 2002. (SOF 3.) TOPD officers are certified by AZ-POST because such  
21 certification provides basic law enforcement training meeting BIA standards and because it  
22 enables TOPD officers to protect tribal lands and tribal members from non-tribal violators who  
23 commit crimes, including alcohol-related offenses, within the Nation's boundaries. TOPD  
24 officers are not cross-deputized as county sheriffs. (SOF 4.)

25 Each of the defendants in this case was authorized by tribal authority to patrol and make  
26 any lawful stops on State Highway 86 within the boundaries of the Nation. If a driver is

1 deemed to have violated a state law, the TOPD officers are authorized by virtue of their AZ-  
2 POST certification to enforce Arizona law. However, until such an issue as to state law  
3 becomes known, and which would require officers to act pursuant to state law, the officers  
4 were still fully authorized by tribal authority to stop all drivers within the boundaries of the  
5 Nation, including on State Highway 86. (SOF 5.)

6 The officers were all fully authorized by tribal authority to also conduct checkpoints for  
7 sobriety, drivers licenses, registrations, and other issues related to safety on state highway 86  
8 within the boundaries of the Nation. The basis for this authorization is contained in the  
9 Nation's constitution, ordinances, and precedent from the United States Supreme Court. Also,  
10 the Nation's tribal court has authorized these checkpoints in an opinion dated October 23, 1989,  
11 entitled *Tohono O'odham Nation v. Ahill, et al.*, Case No. CR12-1762-88, et al. (SOF 6.) If  
12 the drivers were tribal members, they would be cited into tribal court for violations of any  
13 traffic or DUI laws. If the drivers were determined to be non-members (or non-Indian, see ¶ 16  
14 below), and were determined to have violated Arizona state law, they would be cited for the  
15 appropriate violation into Pima County Justice Court at Ajo, Arizona. (SOF 7.)

16 There is no way to know whether any particular driver arriving at a checkpoint like the  
17 one on December 20, 2002 is or is not a tribal member until such time as they provide relevant  
18 identification. (SFO 8.) Tribal criminal law applied not only to members of the Tohono  
19 O'odham Nation at this checkpoint, but also to any tribally affiliated Indian, regardless of  
20 whether he or she was a member of this Nation or affiliated or enrolled in another tribe or  
21 enjoys the benefits of tribal affiliation. See 25 U.S.C. § 1301, and Public Law no. 102-137.  
22 Such criminal jurisdiction of the Nation extends to and includes the area of the right-of-way on  
23 State Highway 86 within the Nation's boundaries. See 18 U.S.C. § 1151. (SOF 8.) Tribal  
24 members have Arizona driver's licenses and Arizona vehicle registrations. Persons with  
25 driver's licenses or vehicles bearing plates from other states or countries also drive through the  
26 reservation on State Highway 86 routinely. The requirement for all drivers is that they have a

1 valid driver's license and a proper registration. (SOF 9.)

2 Defendants Ford, Traviolia and O'Dell worked at the checkpoint on State Highway 86  
3 on December 20, 2002; Defendant Saunders, who was the Acting Chief of Police of the TOPD  
4 at that time, was never present at that checkpoint, and was not a witness to the events involving  
5 Bressi at the scene. (SOF 10.)

6 **C. Bressi's Arrest and Citation for State Law Violations.**

7 Bressi came directly from Kitt Peak (within the Nation's boundaries) on December 20,  
8 2002, and was on his way back to Tucson when he reached the checkpoint scene shortly before  
9 5:00 p.m. (SOF 11.) He called his friend and co-worker Andrew Tubbiolo on his cell phone  
10 once he slowed down and realized there was a law enforcement action going on. (SFO 12.)  
11 Tubbiolo grabbed a piece of paper and wrote down everything he could hear; he claimed he  
12 could only hear about 40% of what was being said, but if he did hear anything, he wrote it  
13 down. He stated that if it were not written on his notes (a copy of which is included as an  
14 exhibit with his deposition excerpts), he would not trust his memory. (SOF 13.)

15 Lt. Ford was the first person Bressi spoke to at the scene. Bressi asked the purpose of  
16 the roadblock, and Ford told him that it was a sobriety, driver's license and registration  
17 checkpoint (per Ford), that it was a sobriety and document checkpoint (per Bressi), and driver's  
18 license and sobriety (per Tubbiolo). Bressi is not sure if Ford specifically indicated insurance,  
19 but he is positive Ford never mentioned seatbelts. (SOF 14.) Ford requested Bressi's drivers  
20 license. (SOF 15.) Bressi asked if they had any reason to believe that he as an individual had  
21 done anything wrong, and Ford told him there was not, and then again asked for Bressi's drivers  
22 license, and that said that everyone was being asked the same questions. (SOF 16.)

23 Bressi's response was that he felt in that case that he did not need to comply with the  
24 officers in any way and did not even need to show his driver's license. Lt. Ford and Bressi  
25 discussed whether Bressi had to present his driver's license. They continued to talk but Bressi  
26 refused to identify himself, and refused to cooperate or comply with any of Lt. Ford's

1 instructions. Ford told Bressi that if he presented his drivers license, which was not his own  
2 personal property but the property of the state,<sup>2</sup> it would in no way diminish his appeal as to  
3 whether he thought the checkpoint was valid or not. Ford says that Bressi said flat out that he  
4 was refusing. Bressi testified that he does “not remember actually specifically refusing,” but  
5 instead, that he “was waiting for a response to questions that I asked later on that never – never  
6 came forward.” Ford said that Bressi asked if he was detained or if he could leave, and Lt.  
7 Ford responded that he could not leave until he provided the information they were asking for.  
8 This entire conversation probably lasted less than a minute per Ford, a little longer per Bressi,  
9 but traffic was beginning to back up behind Bressi's vehicle. (SOF 17.)

10 Lt. Ford requested Detective Traviolia to assist him, because traffic was backing up and  
11 Bressi was engaged in a lengthy conversation and Ford had to deal with other issues ongoing.  
12 (SOF 18.) Other officers were beginning to gather around Bressi's vehicle as his conversation  
13 with Lt. Ford progressed. After Lt. Ford called Traviolia over to the vehicle, and explained that  
14 he was having a problem with Bressi and asked Traviolia to help, Traviolia came forward, and  
15 Ford went away for a while after Traviolia engaged Bressi in conversation. (SOF 19.)

16 Traviolia asked Bressi if he could show his license, and Bressi would not. Although it  
17 did not appear to Traviolia that Bressi was intoxicated, Traviolia explained to him that this was  
18 also a license and registration checkpoint and that they needed to see his license and  
19 registration, and thereafter he could be on his way. Bressi had become argumentative about not  
20 showing his license, and Traviolia asked him to leave the vehicle, to step out of the vehicle, and  
21 Bressi refused that order also. Rather, Bressi sat quietly, not even responding verbally any  
22 further. Traviolia says he told Bressi that he was under arrest for failure to show his i.d. and  
23 disobeying the police officer while directing traffic. (SOF 20.) Bressi testified that Traviolia  
24 may have said he was operating under tribal authority, but Bressi does not specifically recall  
25 \_\_\_\_\_

26 <sup>2</sup> Which would be true of any tribal member's license, too.

1 that. However, the phone line to Tubbiolo was open during this time and Tubbiolo, wrote  
2 down that he heard as follows: "claimed tribal police authority." (SOF 21.)

3       Thereafter, someone (Traviolia, Bressi thinks), told him to pull to the side of the road.  
4 Officer O'Dell, who had come over to assist Traviolia, told Bressi to exit the vehicle. Bressi's  
5 truck was blocking traffic. (SOF 22.) According to Bressi's deposition testimony, in response  
6 to being requested to pull off, Bressi asked if he was being detained, the reason being, he  
7 testified, was that in his subjective (but unspoken) view, if he was not being detained, then this  
8 was converted into a consensual stop and therefore he did not have to comply. But he admits  
9 that he knew he was not free to go until he showed his license, and that the officers were still  
10 demanding to see his license before he departed, and that this was all after he had been ordered  
11 to pull over to the side of the road. (SOF 23.) Bressi testified that Officer O'Dell then said  
12 "I've had enough of your crap" [or similar], but does not recall anyone saying: "Don't give me  
13 that Fourth Amendment crap." Tubbiolo said that an officer was complaining about hold-ups  
14 or delays in traffic being caused by Bressi. (SOF 24.)

15       Bressi said he saw officers put their hands on the top of their holsters of their weapons,  
16 so he turned off the engine, put the keys on the dash, his hands on the wheel and said nothing.  
17 (SOF 25.) Defendants O'Dell and Traviolia removed Bressi physically from the vehicle and  
18 handcuffed him. Bressi acted as a passive resister, not doing anything to impede or actively  
19 resist them in removing him, but basically he just went limp. (SOF 26.) Bressi refused to walk  
20 and Officers O'Dell and Traviolia had to carry him; and he was carried to the south side of the  
21 highway and was seated on the ground. (SOF 27.) Someone else moved Bressi's vehicle from  
22 the traffic lane that it had been blocking. (SOF 28.) No one asked to search his vehicle, except  
23 when he was going to be removed from the vehicle, and at that time they asked what was in his  
24 glove compartment. (SOF 29.)

25       After O'Dell and Traviolia removed Bressi from his vehicle and handcuffed him,  
26 Traviolia obtained Bressi's wallet and identification and determined that he would be cited into



1 state court for two state misdemeanor laws, A.R.S. § 28-1595(B) for refusing to provide  
2 identity or a drivers license and A.R.S. § 28-622(A) for purposefully refusing to cooperate with  
3 officers with authority to direct, control or regulate traffic. (SOF 30.) Traviolia gave Bressi the  
4 option to sign the citation, which was not an admission of the charges, but only an agreement to  
5 appear in state justice court at a later date, and that he could then be on his way, but he refused  
6 to sign the ticket, so they placed him in the back of a patrol car. (SOF 31.)

7 In the meantime, an accident had occurred from the line of traffic, which required the  
8 attention of a number of officers. Accordingly, there was some delay in having sufficient  
9 personnel to transport Mr. Bressi to a jail (which was some 60 miles away). (SOF 32.) Also in  
10 the meantime, a person who Traviolia believed to be Bressi's supervisor showed up and  
11 Traviolia told that person that Bressi was under arrest and that they were preparing to take him  
12 to a jail in Ajo, but that it was a cite for a releasable offense and if Bressi signed the ticket and  
13 promised to show up on the court date, he would not have to go to jail. (SOF 33.) That person  
14 requested to speak to Bressi, and after doing so, returned and said that Bressi would sign the  
15 ticket. Thereafter, Bressi signed the citation and was free to go and indeed did leave after  
16 writing down license numbers, which he requested permission to do before leaving. (SOF 34.)

### 17 **III. ARGUMENTS**

#### 18 **A. Defendants are Entitled to Summary Judgment on the Defense of** 19 **Qualified Immunity to Claims Under 42 U.S.C. § 1983.**

20 Summary judgment is appropriate where there is no genuine issue as to any  
21 material fact, after taking the non-moving party's evidence as true, and drawing all justifiable  
22 inferences in his favor, and the moving party is entitled to prevail as a matter of law. *Anderson*  
23 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-253, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

24 To recover damages under 42 U.S.C. § 1983, Bressi must prove by a preponderance of  
25 the evidence that the Defendants deprived him of his constitutional rights while acting under  
26 color of state law. *Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1094 (9th

1 Cir.2006). Because qualified immunity should be decided early in the litigation, the Court, not  
2 a jury, settles the ultimate question of qualified immunity. *Johnson v. County of Los Angeles*,  
3 340 F.3d 787, 791 (9th Cir.2003).

4 The Supreme Court requires that the requisites of a qualified immunity defense be  
5 considered in proper sequence. *Saucier, supra*, 533 U.S. at 200, 121 S.Ct. 2151. The first  
6 question is, in the light taken most favorably to the party asserting the injury, did the facts  
7 alleged show the officer's conduct violated a constitutional right? *Id.* at 201. "If no  
8 constitutional right would have been violated were the allegations established, there is no  
9 necessity for further inquiries concerning qualified immunity." *Id.*; *Johnson, supra*, 340 F.3d  
10 at 793-94. If a violation could be made out on a favorable view on the parties' submissions, the  
11 next sequential step is to ask whether the right was clearly established. *Saucier, supra*, 533  
12 U.S. at 201-02. Furthermore, the right that the officers are alleged to have violated must not  
13 just be a generally stated one, but rather, "must have been 'clearly established' in a more  
14 particularized, and hence more relevant, sense: The contours of the right must be sufficiently  
15 clear that a reasonable official would understand that what he is doing violates that right." *Id.*  
16 at 202, *citing Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523  
17 (1987). Bressi can make no such showing here that meets the foregoing requirements.

18 **B. No Federal Constitutional Right was Violated in this Case.**

19 Bressi claims his rights were violated under the Fourth Amendment for the arrest and  
20 citations under state law. A police officer has probable cause to arrest a person without a  
21 warrant if the available facts suggest a "fair probability" that the person has committed a crime.  
22 *Tatum, supra*, 441 F.3d at 1094. This is true even if the person has committed only a very  
23 minor criminal offense carrying only a minor penalty: "An officer who observes criminal  
24 conduct may arrest the offender without a warrant, even if the pertinent offense carries only a  
25 minor penalty." *Id.*, *citing Atwater v. City of Lago Vista*, 532 U.S. 318, 354, 121 S.Ct. 1536,  
26

1 149 L.Ed.2d 549 (2001)(upholding a warrantless arrest for a misdemeanor seatbelt violation  
2 punishable only by a fine).

3 Authorities may conduct suspicionless checkpoints to check sobriety, driver licenses  
4 and registrations. *Sitz; Ahill, supra*. As determined in this case (Orders of September 26, 2005  
5 and May 23, 2006, Docket ## 64 and 72, respectively), the checkpoint, stop, questioning and  
6 detention of Bressi were conducted pursuant to tribal law, clothing the defendants with tribal  
7 immunity for those actions. The propriety of those actions is governed by 25 U.S.C. § 1302(2),  
8 which must be determined by a tribal court. *See, e.g., National Farmers Union Insurance Co.*  
9 *v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985); *Santa Clara*  
10 *Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); *see also, R.J. Williams*  
11 *Co. v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir.1983).

12 It has also long been established that a state highway right-of-way through an Indian  
13 reservation remains part of the reservation and within the territorial jurisdiction of the tribal  
14 police, and the tribal police may patrol for tribal, state and federal violations, and detain  
15 persons to hand over to the appropriate authority. *Strate v. A-1 Contractors*, 520 U.S. 438, 456,  
16 n.11, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997); *Ortiz-Barraza v. U.S.*, 512 F.2d 1176 (9th  
17 Cir.1975).

18 Probable cause that Bressi was committing crimes under state law arose under two  
19 misdemeanor statutes: A.R.S. § 28-1595(B), refusing to provide identity or drivers license to an  
20 officer, and § 28-622(A), purposeful refusal to cooperate with an officer with authority to  
21 direct, control or regulate traffic. However, until the officers knew that Bressi was not a tribal  
22 member of this or any other tribe, he could have been cited for similar offenses under tribal  
23 law, had he been a tribal member. Upon determining that he was not a tribal member, which  
24 was ultimately determined when they retrieved his wallet after removing his limp body from  
25 the road, it was clear then that he was subject to state law. If the facts known to an arresting  
26

1 officer are sufficient to objectively create probable cause (regardless of the officer's subjective  
2 reasons for it), the arrest is lawful. *Tatum, supra*, 441 F.3d at 1094, *citing Devenpeck v. Alford*,  
3 543 U.S. 146, 153, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004).

4 Based on the undisputed facts, there was probable cause to arrest Bressi for violations  
5 of both A.R.S. § 28-1595(B) and § 28-622(A). Arizona law authorizes officers to arrest  
6 violators of these statutes. A.R.S. § 13-3883(A)(2), (3). Arizona law further allows violators  
7 of criminal statutes such as the foregoing to avoid detention by signing citations without  
8 acknowledging guilt, promising to appear in court at an appointed time. A.R.S. § 13-3903.  
9 Bressi was given an opportunity to depart the scene upon signing the citation, which was not an  
10 admission of the charges, but only an agreement to appear in justice court at a later date, or be  
11 taken to jail. He opted for the latter, but after waiting to be taken to jail, changed his mind and  
12 signed the citation, after which he was immediately permitted to leave.

13 Under all of the foregoing allegations and facts, the Court should find as a matter of law  
14 that there was no constitutional violation, or that if there was, it was not clearly established in a  
15 particularized sense such that a reasonable official or officer would understand that he was  
16 violating that right in the circumstances in this case. Accordingly, the Defendants should be  
17 granted summary judgment on the basis of qualified immunity.

18 **C. Defendant Saunders is Entitled to Summary Judgment on the 1983 Claims,**  
19 **Because He Was Not Present and Did Not Direct the Other Defendants to**  
20 **Cite Bressi for the Two State Law Violations for Which He Was Cited.**

21 Respondeat superior is not a basis to recover under § 1983; there must be personal  
22 involvement. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690,  
23 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Jones v. Williams*, 297 F.3d 930, 934 (9th  
24 Cir.2002). A supervisor is only liable if he participated in or directed the violations or knew of  
25 the violations and failed to act to prevent them. *Taylor v. List*, 880 F.2d 1040, 1045 (9th  
26 Cir.1989).

1 Defendant Richard Saunders was not at the checkpoint on December 20, 2002, and did  
2 not know of, participate in, nor direct the arrest and citations of Bressi for violations of A.R.S.  
3 § 28-622 and § 28-1595(B). Although Defendant Saunders was the acting chief who originally  
4 requested that a checkpoint be conducted, the Court has dismissed Bressi's claims based on the  
5 checkpoint itself. Absent any evidence that Chief Saunders was connected to the arrest and  
6 citation of Bressi there is no material issue of fact regarding Saunders' involvement. This is an  
7 additional ground for summary judgment in favor of Defendant Saunders.

8  
9 **D. Defendants are Entitled to Summary Judgment on Bressi's Claim for**  
10 **Violation of His Right of Privacy Under Art. 2, § 8 of the Arizona**  
11 **Constitution.**

12 Bressi's claim that the Defendants violated his right of privacy under Art. 2, § 8 of the  
13 Arizona Constitution derives from the same factual situation as his claim of a violation under  
14 the federal Fourth Amendment. Art. 2, § 8 of the Arizona Constitution states:

15 No person shall be disturbed in his private affairs, or his home invaded, without  
16 authority of law.

17 Similar to the qualified immunity analysis above which is based on an objective rather than a  
18 subjective mental state, Arizona applies an objective test to alleged violations of Art. 2, § 8.  
19 *State v. Jeney*, 163 Ariz. 293, 295-297, 787 P.2d 1089, 1091-93 (App.1989). In *Jeney*, police  
20 officers were acting on a tip that Jeney was selling drugs from his apartment. Prior to  
21 beginning a surveillance, they discovered there were outstanding traffic warrants for his arrest.  
22 They decided to arrest him on the traffic warrants, and while at his residence noticed various  
23 indicia of drugs, which led to a full search and eventual drug charges. The court held that  
24 despite the officers' subjective reasons for the search, as long as they did no more than they  
25 were objectively authorized and legally permitted to do, their motives were irrelevant. The  
26 traffic warrants for which the defendant was originally arrested were not issued for any purpose  
other than their execution for a traffic offense. Thus, the court held that because the officers  
acted with the authority of law, they did not violate the defendant's right to privacy under Art.

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1 2, § 8 of the Arizona Constitution. *Id.* at 297, 787 P.2d at 1093. The *Jeney* court applied the  
2 very subjective analysis that the United States Supreme Court applies in Fourth Amendment  
3 analysis of “an objective assessment of the officer’s actions in light of the facts and  
4 circumstances confronting him at the time.” *Id.* at 295-96, 787 P.2d at 1091-92 (citations  
5 omitted). The Arizona Supreme Court has adopted and followed this analysis. *See State v.*  
6 *Spreitz*, 190 Ariz. 129, 144, 945 P.2d 1260, 1275 (1997).

7 The same objective analysis that supports qualified immunity on the § 1983 claims, as  
8 set forth in arguments A and B above, applies with equal force to Bressi’s claims under Art. 2,  
9 § 8 of the Arizona Constitution. Under that objective analysis, the Defendants acted with the  
10 authority of law, and thus did not violate Bressi’s right to privacy under Art. 2, § 8 of the  
11 Arizona Constitution. *Jeney, supra*. Accordingly, summary judgment should be granted on  
12 Bressi’s claims under the state constitution.

13 **E. No Permanent Injunction May Issue Because Bressi Lacks Standing to**  
14 **Seek a Permanent Injunction, and His Claims Fail on the Merits.**

15 Bressi seeks a permanent injunction against the defendants ordering the Defendants not  
16 to violate his rights on the state highway and when enforcing state or federal law. (*See Third*  
17 *Amended Complaint, Docket # 66, p. 5 at ¶ 22.*) Injunctive relief sounds in equity, and is  
18 available to only to a party who can demonstrate that his remedy at law is inadequate. *Stanley*  
19 *v. University of Southern California*, 13 F.3d 1313, 1320 (9th Cir.1994) (*citing Beacon*  
20 *Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 & n. 8, 79 S.Ct. 948, 32 Ed.2d 988 (1959)).  
21 Further, injunctive relief looks to the future, and is not designed to punish for the past.  
22 *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 62, 95 S.Ct. 2069, 45 L.Ed.2d 2069 (1975).

23 Since Bressi seeks permanent injunctive relief on both federal and state constitutional  
24 rights and law, both federal and state injunction law may apply to his request for the permanent  
25 injunction. However, the result is the same under both state and federal law, which is that no  
26 permanent injunction may issue where plaintiff has failed on the merits of his case. For federal

1 law, see 11A Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice &*  
2 *Procedure*, Civil.2d § 2941, p. 33 (1995) (“A permanent injunction will issue only after a right  
3 thereto has been established at a trial on the merits.”); see also *Associado dos Industriais de*  
4 *Cordoaria e Redes v. U.S. Court of International Trade*, 17 C.I.T. 754, 763, 828 F.Supp. 978,  
5 987 (1993) (noting grant of permanent injunction requires actual success on the merits, and that  
6 permanent injunctive relief is properly denied where the main claim has been dismissed). For  
7 Arizona law, see e.g., *Smith v. Coronado Foothills Estates Homeowners Association, Inc.*, 117  
8 Ariz. 171, 172, 571 P.2d 668, 669 (1977) (permanent injunctions are issued after a decision on  
9 the merits); *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 280,  
10 860 P.2d 1328, 1333 (App.1993)(distinguishing between preliminary injunction versus burdens  
11 for final judgment). Because the defendants never violated Bressi’s rights in the first place, and  
12 because their actions are not otherwise shown to be in violation of his rights, he cannot prevail  
13 on the merits, and his claim for permanent injunctive relief must be denied.

14 Also, Bressi has no standing to even seek an injunction. Standing for injunctive relief  
15 requires a showing that the plaintiff faces a threat of ongoing or future harm. See e.g., *Park v.*  
16 *Forest Service of the United States*, 205 F.3d 1034, 1037 (8th Cir.2000), citing *City of Los*  
17 *Angeles v. Lions*, 461 U.S. 95, 101-05, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). In *Park*, the  
18 Forest Service conceded that a prior checkpoint was unlawful, but even so, the court held this  
19 was not enough in and of itself to support an injunction:

20 The mere fact that the checkpoint used at the 1996 gathering was  
21 unconstitutional cannot alone give Ms. Park standing: “Past exposure to illegal  
22 conduct does not in itself show a present case or controversy regarding  
23 injunctive relief ... if unaccompanied by any continuing, present adverse  
24 effects.” *O’Shea v. Littleton*, 414 U.S. 488, 495-96, 94 S.Ct. 669, 38 L.Ed.2d  
25 674 (1974).

26 205 F.3d at 1037. In this case, there is no showing of past harm, let alone the absence of a  
significant probability that the Defendants will, in the future, violate state or federal

1 constitutional laws with regard to Bressi at checkpoints on the state highway. He has no  
2 standing to seek a permanent injunction and he cannot win on the merits even if he had  
3 standing, and therefore, summary judgment should be awarded on the claim for injunctive  
4 relief.

#### 5 **IV. CONCLUSION**

6 Summary judgment should be granted on qualified immunity for all four individual  
7 Defendants on Bressi's claims against them under 42 U.S.C. § 1983, because under step one of  
8 the *Saucier* analysis, no constitutional right was violated. Even if Bressi somehow shows that a  
9 constitutional right was violated, it was not a right that was clearly established in a  
10 particularized sense such that a reasonable officer would understand that his actions were  
11 violating that right. And Defendant Saunders' lack of personal involvement is an additional  
12 ground for summary judgment for him.

13 There also was no violation of privacy under the Arizona Constitution, because the  
14 officers were objectively authorized and legally permitted to arrest and issue the citations for  
15 violations of A.R.S. § 28-622 and § 28-1595(B). Therefore, summary judgment should be  
16 entered on Bressi's claim for damages under Art. 2, § 8 of the Arizona Constitution.

17 Finally, because Bressi fails on the merits in his entire case against the Defendants, no  
18 permanent injunction may be issued. Bressi lacks standing to seek a permanent injunction,  
19 because there no evidence of either past illegal conduct or a significant probability of harm in  
20 the future. Accordingly, summary judgment is proper on the injunctive relief also.

21 For all the foregoing reasons, Defendants request that summary judgment be entered in  
22 their favor and against Bressi on his entire Third Amended Complaint. Further, the above  
23 resolves all claims against each of these individual Defendants, and accordingly, these  
24 Defendants request, pursuant to Rule 54(b), Fed.R.Civ.P., that the Court expressly determine  
25  
26



1 that there is no just reason for delay of entry of judgment for them, and to expressly direct that  
2 final judgment be entered as to these Defendants.

3 RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of August, 2006.

4 GUST ROSENFELD P.L.C.

5 By: /s/ Roger W. Frazier

6 Roger W. Frazier  
7 ttorneys for Defendants

8 Original of the foregoing electronically  
9 filed this 22<sup>nd</sup> day of August, 2006, with:

10 Clerk, U.S. District Court  
11 District of Arizona  
12 405 West Congress St.  
13 Tucson, AZ 85701  
14 <https://ecf.azd.uscourts.gov>

15 Courtesy Copy of the foregoing to be mailed  
16 this 22<sup>nd</sup> day of August, 2006, to:

17 Honorable John M. Roll  
18 U.S. District Court  
19 District of Arizona  
20 405 West Congress St., Suite 5190  
21 Tucson, AZ 85701

22 COPY of the foregoing electronically  
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