UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-15931

TERRENCE HARRY BRESSI,

Plaintiff-Appellant,

v.

MICHAEL FORD, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Case No. CV-04-264-JMR
Honorable John M. Roll, United States District Court Judge

APPELLANT TERRENCE BRESSI'S OPENING BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Mr. Bressi respectfully requests that the Court hear oral argument in this case, because oral argument would aid the Court in understanding and deciding the issues presented by this case.

I. STATEMENT OF JURISDICTION

The District Court has federal question jurisdiction over Mr. Bressi's Constitutional claims pursuant to 28 U.S.C. §1331.

This is an appeal from a final judgment of the District Court disposing of all claims with respect to all parties, and falls within this Court's appellate jurisdiction under 28 U.S.C. §1291. The District Court entered final judgment on May 17, 2007. Appellant filed a notice of appeal on May 2, 2007 as to claims dismissed by the District Court on April 2, 2007, and amended the notice of appeal on June 1, 2007 upon dismissal of all claims. The notice of appeal was timely filed under Fed. R. App. P. 6.3, governing appeals of cases where the United States is a party.

II. ISSUES PRESENTED

1. Was Appellees' roadblock, that checks not only for sobriety but also for licenses, wants and warrants, and other general crime control tasks, a violation of Mr. Bressi's and all drivers' constitutional rights?

2. Did the District Court abuse its discretion by resolving genuine issues of material fact in favor of Appellees and by ignoring material facts favorable to the Appellant?

3. May tribal police officers, acting concurrently in their capacities as officers of the State of Arizona as well as tribal officers, and in conjunction with

federal officers, operate a roadblock on a public highway that disregards the mandates of the United States Supreme Court as well as state and federal law?

4. Do tribal police officers maintain sovereign immunity for their actions in their capacities as tribal officers and officers of the State of Arizona?

5. Did the officers in this case have probable cause to believe that Mr. Bressi violated the statutes for which he was cited?

6. Did the officers have probable cause to re-file the dismissed criminal claims against Mr. Bressi?

III. STATEMENT OF THE CASE

On December 19, 2003, Mr. Bressi filed a Complaint in the Superior Court of Arizona in and for Pima County for Damages, Injunctive and Declaratory Relief against the individually-named Appellees, Tohono O'odham Police Department ("TOPD") officers who are also certified with Arizona Peace Officers Standards and Training ("AZ-POST"). The Complaint sought relief from actions by the Defendants at a December 20, 2002 roadblock at which Mr. Bressi was arrested, as well as for malicious prosecution when the charges (which had been dropped) were re-filed on June 20, 2003, immediately after the officers received a Notice of Claim from Mr. Bressi. The criminal matter was dismissed with prejudice by the Pima County Justice Court in Ajo, Arizona on December 9, 2003.

On May 19, 2004, the United States of America substituted itself as a party on the malicious prosecution claim under the Federal Tort Claims Act, 28 U.S.C. §2679, and also removed this action to the United States District Court for the District of Arizona, Tucson Division. On May 26, 2004, the United States of

America and the individual defendants then filed a Joint Motion to Dismiss all claims based on Defendants' sovereign immunity from suit as agents of a tribal nation, as well as police officers' qualified immunity from suit. The Motion to Dismiss the malicious prosecution claim cited Plaintiff's failure to follow federal statutory procedure.

On June 15, 2004, Mr. Bressi filed an opposition to this Joint Motion to Dismiss. Mr. Bressi also filed a Motion to Remand to the Superior Court on May 24, 2004.

Oral argument was conducted on all pending motions December 9, 2004. On December 10, 2004, the District Court granted the motion to dismiss the malicious prosecution claim, without prejudice. Mr. Bressi promptly filed an administrative claim, which was denied, and this claim was subsequently joined again with the other claims when the Court granted Mr. Bressi's motion to file the Third Amended Complaint on September 26, 2005.

On January 7, 2005, the District Court denied the motion to dismiss the Constitutional claims against the individual Defendants because of the peculiar interweaving of tribal and state authority possessed by the Defendants at the time they arrested and charged Mr. Bressi.

On January 24, 2005, the individual Defendants filed a Motion for Reconsideration. This motion was granted by the Court on January 31, 2005. The Court ordered the parties to engage in limited discovery related to the issue of jurisdiction and set a new briefing schedule.

Mr. Bressi filed Motion for Leave to File a Second Amended Complaint,

which was granted on March 28, 2005. The Second Amended Complaint federalized the legal theories for the cause of action, citing 42 U.S.C. §1983 and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

Mr. Bressi filed a Response to the Motion to Reconsideration on March 14, 2005, and the individual Defendants filed a Reply on March 28, 2005. On March 29, 2005 the Court ordered that no hearing will take place and allowed the parties to file an amended response and reply. Mr. Bressi filed an Amended Response to the Motion for Reconsideration on May 6, 2005, and the individual Defendants filed an Amended Reply on May 27, 2005. In his Amended Response, Mr. Bressi noted for the District Court that the Defendants failed to provide complete discovery and that certain critical documents related to the roadblock at which Mr. Bressi was arrested were claimed to be "lost."

On July 7, 2005, Mr. Bressi received documents from the Department of Homeland Security pursuant to a Freedom of Information Act request that had been made years earlier. The documents provided by U.S. Customs and Border Protection pertained to involvement of federal agencies at the December 20, 2002 roadblock. The information in these documents confirmed Mr. Bressi's statements of facts and contradicted the affidavits of the Defendants. On July 11, 2005, Mr. Bressi promptly filed a Response to the Defendants' Reply with these documents attached, asking the Court to consider this evidence.

On September 27, 2005, the Court dismissed all Constitutional claims against the individual Defendants pertaining to the stop, questioning and detention of Mr. Bressi at the roadblock, as well as the *Bivens* claim, leaving only the §1983

claims pertaining to the arrest and charging of Mr. Bressi.

On November 7, 2005, Mr. Bressi filed a Motion for Reconsideration on the basis that the Court's ruling did not take into account many of the material facts in the record and that the Court's legal analysis, applied to the facts provided by Mr. Bressi, supported a denial of the motion to dismiss. On May 23, 2006, the Court summarily denied the Motion for Reconsideration.

On August 22, 2006, the individual Defendants filed a Motion for Summary Judgment. Mr. Bressi filed his Response to the Motion on November 24, 2006, and the individual Defendants filed a Reply on December 14, 2006.

On March 27, 2007, the Court granted the individual Defendants' motion for summary judgment without a hearing. Mr. Bressi timely filed his notice of appeal.

On February 2, 2007, the United States filed a Motion for Summary Judgment. Mr. Bressi filed a Response on March 5, 2007. The United States filed a reply on April 3, 2007.

On May 16, 2007, the Court granted the United States of America's motion for summary judgment without a hearing. Mr. Bressi amended his notice of appeal on June 1, 2007 to include this claim in the appeal.

IV. STATEMENT OF FACTS

On December 20, 2002, Terrence Bressi was driving home to Tucson from work at the Kitt Peak National Observatory, which is located on the Tohono O'odham Nation reservation. (ER 1, ¶2). As he was driving on State Route 86 eastbound toward Tucson, he came upon a roadblock patrolled by the officers of the Tohono O'odham Police Department ("TOPD"). (ER 1, ¶2). No notice to the

public was provided of this roadblock. Drivers had no warning of the presence of the roadblock until seeing portable signs and orange cones on the highway about a quarter-mile in advance of the stopping point. (ER 89, 28:10 – 29:4). At the location of the roadblock, mile marker 145, SR-86 is a two-lane highway, twenty-four feet wide, divided by a broken yellow line, with no shoulders or turn-offs where a U-Turn could be safely made. (ER 88-89, 23:11 – 26:13). There is no other road that leads from Kitt Peak to Tucson. (ER 1, ¶4). Drivers who approach the roadblock and attempt to turn around and avoid it are actively pursued by police officers. (ER 126).

Mr. Bressi approached the front of the eastbound line at the roadblock at approximately 5:00 p.m. (ER 1, ¶2). Shortly after his arrival at the front of the line, a rear-end collision occurred involving two other cars near the back of the line. (ER 91, 34:21 – 36:10-24; ER 106, 82:13-17; ER 107, 94:7-23).

At the front of the line, Mr. Bressi immediately noticed several United States Border Patrol and United States Customs Service vehicles as well as a United States Customs Service officer wearing a black vest marked CUSTOMS. (ER 1, ¶6-7; ER 116, 26:1-4). At this time, Mr. Bressi used his cell phone to call a co-worker, Andrew Tubbiolo, to witness by telephone the interaction that was to take place. (ER 1, ¶3; ER 7, ¶2).

When Mr. Bressi reached the front of the line, he was met by Lieutenant Michael Ford of the TOPD, who identified himself to Mr. Bressi as the on-scene commander of the roadblock operation. (ER 1, ¶8; ER 90, 33:18-22). Lt. Ford immediately noticed a State of Arizona logo on the truck Mr. Bressi was driving.

(ER 90, 32:14-24). Lt. Ford indicated to Mr. Bressi that the purpose of the roadblock was to check for sobriety and driver's licenses. (ER 1, ¶9; ER 90-91, 33:24 – 34:2). However, the presence and active participation of Customs and Border Patrol agents seemed to indicate that this was not the sole purpose of the roadblock. (ER 1, ¶9).

Then, Lt. Ford asked to see Mr. Bressi's driver's license; he told Mr. Bressi that all drivers were being asked to ensure they were in compliance with the traffic laws. (ER 2, ¶10-14; ER 91, 34:3-20). Other officers, including a Customs Agent later identified as Bill Dreeland, began to gather around Mr. Bressi's vehicle. (ER 2, ¶12). Mr. Bressi asked if Lt. Ford suspected any wrongdoing on Mr. Bressi's part, to which Lt. Ford answered in the negative; but Lt. Ford asked again for the driver's license. (ER 2, ¶13-14). In lieu of providing the driver's license, Mr. Bressi provided his name and the telephone number for his employer so that the officers could verify that Mr. Bressi had lawful possession of the state vehicle he was driving. (ER 2, ¶15). A TOPD Officer spoke with Mr. Bressi's employer at the University of Arizona and verified this information. (ER 7, ¶4).

Again, Lt. Ford pressed for Mr. Bressi's driver's license. Mr. Bressi asked the officers to provide a citation of law that allowed officers to demand a driver's license at a suspicionless sobriety checkpoint, but the officers did not answer this question. (ER 2, ¶16).

TOPD Officer George Traviolia stated that he could tell Mr. Bressi had not been drinking based on his appearance and his ability to communicate. (ER 2, ¶17). Ofc. Traviolia then said that Mr. Bressi had to provide a driver's license, for

this area was known for smuggling of drugs and illegal immigrants and people traveling through needed to be identified. (ER 2, ¶17).

At this time, Agent Dreeland entered into the conversation and forcefully told Mr. Bressi to comply with the officers' demands. (ER 2, ¶18; ER 115, 16:11-23). Mr. Bressi responded that a Customs Agent has no jurisdiction at a roadblock allegedly checking for sobriety. (ER 2, ¶19). Then Lt. Ford informed Mr. Bressi that the roadblock was a joint task force operation. (ER 2, ¶19). Mr. Bressi stated that the Supreme Court distinguishes between roadblocks set up for public safety protection versus those set up to detect criminal conduct and that general law enforcement roadblocks were not constitutional. (ER 2, ¶20). Mr. Bressi also stated that this roadblock was clearly designed for general law enforcement based on the presence of Customs and Border Patrol agents as well as the continued detention of Mr. Bressi after acknowledging that he was not impaired. (ER 2-3, ¶20).

The officers became agitated with Mr. Bressi. (ER 3, ¶21). At one point Ofc. Traviolia walked away and left Mr. Bressi alone with Customs Agent Dreeland. (ER 102-103, 60:19 – 64:25). Ofc. O'Dell yelled "Don't give me that Fourth Amendment crap!" and then ordered Mr. Bressi to turn off the engine and exit the car. (ER 7, ¶5). Several officers put their hands on their guns. (ER 3, ¶23). Mr. Bressi followed the direction to take the keys out of the ignition and placed them on the dashboard, and stayed in the vehicle motionless. (ER 3, ¶24). Mr. Bressi was removed from the vehicle, cuffed, and carried to the side of the road. (ER 3, ¶25). Ofc. Traviolia removed Mr. Bressi's wallet and found his driver's license. (ER 3, ¶27).

While on the side of the road, Officer O'Dell came up to Mr. Bressi on a few occasions and belligerently berated him for being uncooperative. (ER 3, ¶28). At one point Ofc. O'Dell referred to Mr. Bressi as a "green freak." (ER 3, ¶28). Also, Agent Dreeland made a comment to another officer, within earshot of Mr. Bressi, that Mr. Bressi was conducting himself like a "peace protestor." (ER 4, ¶29). Agent Dreeland confirmed that he did make this comment. (ER 117, 33:9-21).

While on the side of the road, Mr. Bressi observed the operation of the roadblock. Vehicles were not stopped according to any particular order or pattern. (ER 4, ¶30). Sometimes several vehicles would be stopped followed by several vehicles waved through without being stopped, and sometimes the officers stopped every other vehicle while waving the others through. (ER 4, ¶30). Not all drivers were treated the same. (ER 4, ¶30). Mr. Bressi observed officers searching trunks, obviously searching for contraband. (ER 4, ¶31). Ofc. Traviolia stated that he routinely asks for consent to search vehicles (including the trunk) even after determining that there is no further basis for detaining the vehicle. (ER 57). At one point, TOPD officers gestured to Agent Dreeland about a car that passed through the roadblock, and Agent Dreeland got in his vehicle and pursued that car. (ER 4, ¶31).

Ofc. Traviolia presented Mr. Bressi with an Arizona Traffic Ticket and Complaint charging him with violating two state laws: A.R.S. §28-1595(B), failure to produce a driver's license, and A.R.S. §28-622(A), refusal to comply with a lawful order of a police officer while directing traffic. (ER 100, 51:11-14). At first, Mr. Bressi did not sign the complaint, so the officers contacted Mr. Bressi's

supervisor to allow them to come speak with Mr. Bressi and pick up the University-owned vehicle. (ER 4, ¶33-34). Marcus Perry and Andrew Tubbiolo arrived on the scene at about 8:00 p.m. (ER 8, ¶8).

Mr. Tubbiolo made notes of his observations of the roadblock. He noticed that there was a generator powering several kilowatt lights that would cause drivers to lose their night vision temporarily. (ER 8, ¶8). The vast majority of the vehicles on the scene belonged to Border Patrol, and there were many Border Patrol agents on the sides of the road. (ER 8, ¶8). To the South of the checkpoint was a staging area where approximately 40 vehicles were being searched, shut down, or towed. (ER 8, ¶9). There were a few large trucks, of the type used to haul cars to dealerships, that were being loaded with civilian vehicles to be towed from the scene. (ER 8, ¶9).

Mr. Tubbiolo also observed Border Patrol agents investigating on the line alongside TOPD officers. (ER 9, ¶11). He observed one officer using a dog to sniff cars, but he could not tell with what agency that officer worked. (ER 9, ¶11). Mr. Tubbiolo also observed the lack of any pattern as to how officers were stopping vehicles; some were waved through without showing identification while others were not only stopped for identification but also had their trunks searched. (ER 9, ¶11).

Mr. Tubbiolo also had an opportunity to speak with Lt. Ford, who told Mr. Tubbiolo that the operation's purpose was not only to stop drunk driving but also to detect smugglers of people and drugs. (ER 9, ¶13). Mr. Tubbiolo and Mr. Perry were then given an opportunity to speak with Mr. Bressi, who then signed the

citation and was released from custody. (ER 4, ¶35; ER 10, ¶14).

The criminal complaint against Mr. Bressi was dismissed without prejudice on January 3, 2003. (ER 104, 68:24 – 69:1).

On June 16, 2003, Mr. Bressi served upon the four individual Defendants Notices of Claim as required by A.R.S. §12-821.01. (ER 104, 69:2-13). Ofc. Traviolia reacted by immediately re-filing the criminal complaint against Mr. Bressi. (ER 104, 69:14-25). Mr. Bressi retained attorney Marc Victor to defend him in the criminal case. (ER 48).

Mr. Victor conducted interviews with Lt. Ford and Ofc. Traviolia on December 5, 2003. (ER 48). In his interview, Lt. Ford told Mr. Victor that he knew by sight whether a driver was a tribal member based on his knowledge of the community. (ER 50). Lt. Ford stated that he was checking for seatbelts, which he acknowledged is required under Arizona law but not required under tribal law. (ER 51). Lt. Ford also stated that insurance is not required for tribal members but that officers do request non-tribal members produce proof of insurance. (ER 50). Lt. Ford also told Mr. Victor that part of the driver's license check was checking for outstanding warrants. (ER 53). Lt. Ford told Mr. Victor that he noticed Mr. Bressi was driving a state vehicle with government plates, and he "wasn't sure if he was authorized operate of the vehicle [sic]." (ER 52). Lt. Ford was aware that Mr. Victor filed a subpoena for the briefing memorandum that was sent out prior to the roadblock and a summary report was created after the roadblock that included the statistics for the operation, and he also received this information from the Deputy Pima County Attorney assigned to the case, Philip Perkins. (ER 65).

At an evidentiary hearing in Justice Court, Deputy Pima County Attorney Perkins assigned to prosecute the case averred to the Court, in the presence of Lt. Ford and Ofc. Traviolia, that the TOPD officers would not comply with a subpoena to produce documents, claiming sovereign immunity. (ER 36). Lt. Ford later claimed that he never reported these things to the prosecutor, though he admits that he did nothing to correct the record that was being made in his presence. (ER 95-96, 64:8 – 66:12). This testimony by Lt. Ford contradicts his affidavit in which he affirms that he was told not to produce the documents in question. (ER 65, ¶11).

During the discovery process in this case, the TOPD officers were required to produce documents related to the December 20, 2002 roadblock, as well as similar roadblocks conducted during that general time period. (ER 43). Documentation of the December 20 roadblock was reported as "lost" by Lt. Ford and his superior, Captain Joseph Delgado. (ER 44; ER 65, ¶12; ER 71-72). The pre-roadblock memorandum was two pages; only the first page was supplied to Mr. Bressi during discovery, while the other page that contained the objectives of the roadblock was "lost." (ER 44). Other evidence that should have been preserved as part of normal police business record keeping were destroyed, especially since the TOPD was on notice of Mr. Bressi's legal claims within six months of the incident. (ER 44-45). Lt. Ford denies ever making the statement that the December 20, 2002 roadblock was any kind of a multi-jurisdictional joint task force. (ER 56, ¶5).

Documentation related to other roadblocks that was provided through discovery showed that TOPD routinely invited other policing agencies to work

jointly on their roadblocks. (ER 136). A memorandum published by Lt. Kevin Shonk dated May 4, 2000 has been official policy of the TOPD during Chief Saunders administration. (ER 78-79, 40:12 – 43:13). The Lt. Shonk memorandum shows that it is the policy of the TOPD to check for violations of state and federal law in addition to tribal law, and to check not only for licenses and sobriety but also for illegal drugs. (ER 132-133).

Appellees' affidavits state that federal officers were not on scene until violations of federal law were discovered. (ER 55-56; ER 62; ER 66-68). This contradicts Agent Dreeland's testimony that he was invited to the roadblock in advance, and he showed up prior to any Customs violations being detected. (ER 116, 29:18-25). The Customs reports sent to Mr. Bressi pursuant to his Freedom of Information Act request confirm that Customs agents were on the scene already prior to any violations being discovered. And TOPD Det. Nick Romero, the only officer on the scene who uncovered a Customs violation (which occurred one hour after Mr. Bressi was arrested), wrote in his report that Customs was already on scene. (ER 11-13).

Briefings of the officers who participated in roadblocks consisted of nothing more than officers showing up and being told where to stand. (ER 129-130). No notice would be given to the community of the roadblock. (ER 119). Chief Saunders stated that no published guidelines for operating roadblocks existed prior to August 17, 2005 and that those guidelines are not available to the public except upon an individual providing identification and stating a purpose for viewing the documents. (ER 77, 34:22 – 35:22). Chief Saunders has testified that roadblocks

will continue to be operated and that wants and warrants checks will continue to be performed on motorists who are stopped. (ER 82, 54:1-9). Warrant checks take a long time to run because they involve calling the information into dispatch and having staff at headquarters checking paper files in the file drawer. (ER 53).

Chief Saunders has offered no guidance to his officers to ensure that they treat all motorists uniformly, rather, he allows individual officers to decide their own policies as to how to treat motorists. (ER 80, 48:12-16). Chief Saunders has vested the ultimate authority for roadblock operational plans with patrol commanders (who hold the rank of Lieutenant). (ER 76, 22:15 – 23:24). As a direct result, officers under his command plan in advance to enforce Arizona state law against United States citizens, such as Lt. Ford checking for seatbelt violations. Also, Det. Romero wrote in his arrest report on December 20, 2002 that the roadblock was to check not only for intoxicated drivers but also for smugglers and stolen vehicles. (ER 12).

Pursuant to A.R.S. §41-1822, Chief Saunders, Lt. Ford, Ofc. Traviolia and Ofc.O'Dell (as well as all other TOPD officers) are certified by Arizona Peace Officer Standards and Training Board ("AZ-POST"). This certification, along with further statutory authority from A.R.S. §13-3874, allows these officers to enforce Arizona law anywhere within the State of Arizona. (ER 61).

V. SUMMARY OF THE ARGUMENT

This is a case about the freedom of law-abiding motorists to travel unmolested. Specifically, here the issue is whether the roadblock operated by

Appellees that checks for wants and warrants and other general crime control tasks was a violation of Mr. Bressi's constitutional rights. The United States Supreme Court has repeatedly required police forces that choose to conduct suspicionless roadblocks to be extremely cautious in protecting the Fourth Amendment right against unreasonable searches and seizures by ensuring that the inconvenience to motorists is as short in duration as possible and minimizes the intrusion to the driver. Most recently in *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447 (2000), the Court has distinguished public safety checkpoints from general law enforcement checkpoints, finding the former constitutional under limited circumstances while the latter is unconstitutional. The TOPD officers in this case were cloaked not only with the jurisdiction of the Tohono O'odham Nation but also that of the State of Arizona, and they used their authority as state police officers to stop and detain motorists, and sometimes arrest and charge them as well.

The evidence that was provided to the District Court demonstrates that the Defendants-Appellees used their various jurisdictional authorities concurrently so that they could enforce the laws of the State of Arizona against United States citizens who travel on SR-86. While the Defendants-Appellees are legally permitted to do this, as a result of this use of authority they are also required to uphold the Constitutions of the United States and the State of Arizona. The Defendants-Appellees exercised the same kind of "peculiar" jurisdictional authority that this Court held qualifies as "under color of state law" when it allowed a suit under 42 U.S.C. §1983 to proceed in *Evans v. McKay*, 869 F.2d

1341 (9th Cir. 1989). Because the TOPD officers' activities formed a "symbiotic relationship" with federal agencies, they also acted under color of federal law and therefore Appellant can bring a claim against the Defendants-Appellees under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

Appellant does not dispute the legal standards applied by the District Court in this case. The District Court acknowledged that it was required to review the facts submitted to it in the light most favorable to the Plaintiff-Appellant. In this case, the Defendants-Appellees moved for dismissal and summary judgment by relying on their sworn affidavits and deposition testimonies that were contradicted by their own official documents. However, the District Court chose instead to cite to facts submitted by the Defendants-Appellees at the expense of facts submitted by the Plaintiff-Appellant. The District Court made other findings of fact that were in direct contradiction not only to affidavits submitted by the Plaintiff-Appellant but also by the documents provided by the Defendants-Appellees through discovery. This legal error by the District Court led to the entry of dismissal and summary judgment on the Constitutional claims. Then the District Court relied on its findings and orders related to the Constitutional claims when granting summary judgment on the Appellant's malicious prosecution claim against Defendant United States of America.

Mr. Bressi asks this Court to declare that the District Court has subject matter jurisdiction to decide all the claims in this case.

Mr. Bressi asks this Court to find that he has alleged sufficient facts to defeat the motion for summary judgment on the Constitutional claims, and to reverse and

vacate the order of the District Court granting summary judgment to the individual Appellees.

Mr. Bressi asks this Court to find that he has alleged sufficient facts to defeat the motion for summary judgment on the malicious prosecution claim, and to reverse and vacate the order of the District Court granting summary judgment to Appellee United States of America.

Mr. Bressi asks this Court for a finding that the roadblock in this case was operated in violation of Supreme Court case law.

Mr. Bressi asks this Court to find that his initial causes of action have been stated adequately and to remand the case for further proceedings.

For these reasons, Mr. Bressi asks this Court to reverse and vacate the District Court's orders of summary judgment for all the Defendants-Appellees and remand this case to the District Court for further proceedings.

VI. STANDARD OF REVIEW

An order granting a motion for summary judgment pursuant to Fed. R. Civ. P. 56 is reviewed *de novo*. *McNamara-Blad v. Ass'n of Prof'l Flight Attendants*, 275 F.3d 1165, 1169 (9th Cir. 2002). An order granting a motion for dismissal pursuant to Fed. R. Civ. P. 12(b)(1) is reviewed *de novo*. *FDIC v. Nichols*, 885 F.2d 633, 635 (9th Cir. 1989).

In resolving a factual attack under Rule 12(b)(1), the Court is not limited to the allegations in the pleadings if the "jurisdictional issue is separable from the merits [of the] case." *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987); see also *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Yet

the Court may not resolve factual disputes "when the jurisdictional issue and the substantive issues are so intermeshed that the question of jurisdiction is dependent on decision of the merits." *Metro Industries, Inc. v. Sammi Corp*., 82 F.3d 839, 846 (9th Cir. 1996). This is the case here because the "color of state law" issue "provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief." *Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc.*, 711 F.2d 138, 139-40 (9th Cir. 1983). Therefore, disputed facts must be treated in the posture of Rule 56 summary judgment, where the Court must view the evidence in the light most favorable to Plaintiff and must leave genuine issues of material fact for determination at trial. *Metro Industries*, 82 F.3d at 846.

VII. ARGUMENT

A. The District Court Erred as a Matter of Law by Not Relying on the Appellant's Statements of Facts as True, by Resolving Disputed Facts in Favor of the Moving Party, and by Ignoring Material Facts that were Beneficial to the Appellant

The District Court may only grant summary judgment if, when viewing the pleadings and the supporting documents in the light most favorable to the nonmoving party, the court determines that "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552 (1986). Substantive law determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will

properly preclude the entry of summary judgment." *Id*. In considering the evidence, the District Court is not to weigh the evidence and determine the truth of the matter, but it is to determine whether there is a genuine issue of material fact. *Anderson*, 477 U.S. at 249, 106 S.Ct. at 2511. The moving party need not disprove matters on which the opponent has the burden of proof at trial. *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2552.

The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but … must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Matsushita Elec. Industries Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87, 106 S.Ct. 1348, 1355-56 (1986). However, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his [or her] favor." *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513. In its Opinion and Order granting the Appellees' motion for reconsideration and motion to dismiss Appellant's claims as to the stop, detention, and questioning of Appellant, the District Court correctly cited the standard for resolving factual issues, i.e., that the Court must give all reasonable deference to the non-moving party's facts and resolve disputed facts in favor of the non-moving party. However, the District Court then proceeded to ignore several material facts that were beneficial to the Appellant and resolve all disputed facts in favor of the Appellees. (ER 152-166).

First, the District Court found it compelling that no state police officers were present at the roadblock. (ER 159). However, the District Court looked past the fact that the Appellees had no need for state police officers because they

themselves possessed the authority of Arizona state police officers through their AZ-POST certification. The presence of other state police officers would have been redundant.

Second, the District Court stated that "a Customs Agent at one point helped direct traffic," (ER 162) suggesting that this was the sum of the Appellant's facts regarding Customs Agent Dreeland's involvement at the roadblock. The evidence, including the testimony of Agent Dreeland himself, shows that Customs was invited in advance to participate in this roadblock, and that Customs Agents, including but not limited to Agent Dreeland, were active participants to the point of "substantial coordination" with federal authorities. The Appellees' sworn statements that Customs Agents were not on the scene until violations of federal law were discovered are clearly false given the overwhelming documentary evidence, as well as the testimony of Agent Dreeland, to the contrary.

Third, the District Court stated that "Border Patrol Agents looked inside vehicles in line at the checkpoint," (ER 162) but then dismissed this activity by stating that "Plaintiff's friend … had no knowledge of the particular circumstances in which such searches were taking place, including whether certain drivers had already failed to produce identification." (ER 163). Here, the District Court is creating facts by claiming that the witness Mr. Tubbiolo had no such knowledge; however, Mr. Tubbiolo does have such knowledge, for he witnessed the activity by Border Patrol agents occurring prior to any contact with other police officers such as the Appellees.

Fourth, the District Court stated that "Plaintiff relies heavily upon the

apparently continual presence of federal officers, but the record explains their presence by the frequent, regular discoveries of federal violations." (ER 163). The only items of evidence in the record that support this statement at all are the bald assertions of the Appellees in their affidavits. But the police reports that were produced through discovery prove conclusively that Appellees' statements were false and that Border Patrol and Customs Agents were already on the scene well before any federal violations were discovered.

Finally, the District Court stated that Lt. Ford's single comment about a multi-jurisdictional task force "is insufficient to overcome the overwhelming evidence of tribal purposes behind the roadblock." (ER 163). This factual assertion by the Court ignores the exhibits provided through discovery of other operational plans for roadblocks by the TOPD that, by their clear language, are multi-jurisdictional task forces. Of course, since Appellees "lost" the operational plan for the roadblock in this case, it cannot be conclusively proven through Appellees' own documents that this roadblock had a similar operational plan. This operational plan was within the control of the Appellees on December 9, 2003 when Lt. Ford refused to produce the document in discovery for the criminal case against Mr. Bressi, but shortly thereafter it disappeared. The District Court had a legal obligation to infer that the document contained information harmful to the Appellees and to resolve this factual dispute in favor of the Appellant; failure to do so is an abuse of discretion.

Other facts ignored by the District include that Lt. Ford checks for seatbelts, that all TOPD officers are instructed to ask for insurance if the driver is not a tribal

member. And drivers may be detained further even after disclosing their identity as a non-tribal member, for the purpose of asking if they have anything illegal and if they will consent to a search of the vehicle.

All of these ignored facts support Mr. Bressi's claims, and at the least raise genuine issues of material fact that can only be resolved by a jury.

B. The District Court Has Subject Matter Jurisdiction Over the Constitutional Claims Because the Officers Were Acting Under Color of State and Federal Law

After the District Court ordered that removal of this case to federal court was proper, the District Court granted leave to Mr. Bressi to amend his Complaint and ordered the Clerk to file the Second Amended Complaint on March 28, 2005. In the Second Amended Complaint, Mr. Bressi recited the same facts that gave rise to the cause of action, but relied on 42 U.S.C. §1983 and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), as the legal theory upon which the claim for relief would be based that the Appellees acted both under color of state law and under color of federal law. Defendants-Appellees moved to dismiss the Constitutional claims on the ground that they were acting purely under color of tribal law.

1. Sovereign Immunity of Tribal Nations and their Agents

Generally, Indian tribes enjoy sovereign immunity, as do agents of tribes when they act on behalf of the tribe. *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002). However, federal law and the United States Constitution do apply to Indian tribes and their agents, who can be sued unless a particular statute creates an exception for Indian tribes and tribal agents.

In *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116, 80 S.Ct. 543 (1960), the Supreme Court stated that "a general statute in terms applying to all persons includes Indians and their property interests." This Court, in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir.1985), held that the Occupational Health and Safety Act applied to a farm operated by a tribe and located on the tribal reservation. The *Coeur d'Alene* Court identified only three exceptions to the statement in *Tuscarora* that federal statutes apply to tribes: when "(1) the law touches 'exclusive rights of self-governance in purely intramural matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'; or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations." *Coeur d'Alene*, 751 F.2d at 1116 (quoting *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir.1980)).

Relying on this test, the Court of Appeals for the District of Columbia Circuit recently found that the National Labor Relations Act applies to Indian tribes. *San Manuel Indian Bingo and Casino v. N.L.R.B.*, 475 F.3d 1306 (D.C. Cir. 2007). (This decision was published subsequent to the District Court's ruling on the jurisdictional issues in September 2005.) The NLRB decided that the location of the tribal government activity is not determinative, rather it focused on the nature of the activity, and held that the exercise of jurisdiction over the tribe was appropriate because "the casino is a typical commercial enterprise [that] employs non-Indians [ ] and … caters to non-Indian customers [citations omitted]." The Court upheld the NLRB's decision on *de novo* review on the basis that non-Indians

were substantially affected, even if the enterprise itself was within the boundaries of the tribal reservation.

In this case, Mr. Bressi sues under the Fourth Amendment to the United States Constitution and Article 2, Section 8 of the Arizona Constitution, and as constitutional provisions they are extended to tribal agents as well. And 42 U.S.C. §1983 does not specifically exclude Indian government actors from liability for violating constitutional privileges, immunities and rights granted to citizens of the United States. Also, the activity conducted by the Appellees that is at issue here is not purely intramural; rather, tribal officers, cloaked with AZ-POST authority from the State of Arizona, working in close concert with officers from the United States Border Patrol and Customs Service, stopped many non-tribal members who were traveling on an Arizona state highway. Finally, extending §1983 protection to Mr. Bressi for actions taken against him by the Appellees in no way abrogates tribal sovereignty. Therefore, applying *Coeur d'Alene*, the federal courts have subject matter jurisdiction over claims brought against tribal officers for violations of constitutional rights under §1983 and *Bivens*.

2. "Symbiotic Relationship" Test

When tribal police officers are cloaked in multiple jurisdictions and their actions are not clearly delineated as tribal, the use of state authority by tribal officers allows the Court to exercise jurisdiction over the subject matter. In *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989), this Court analyzed the use of state authority by tribal police in Browning, Montana, and held that individual tribal defendants had acted in concert with city/tribal officers in the same conduct.

"Given this explicit allegation of official state authority, coupled with the 'peculiar' law enforcement situation as it exists on the reservation, we conclude that the appellants have sufficiently pleaded action under color of state law to withstand a Rule 12(b)(6) motion." 869 F.2d at 1348. *Evans* concluded that dismissal of §1983 claims was not proper because: (1) the officers carried out their activities pursuant to both a tribal court order and a city ordinance; (2) the complaint explicitly alleged official state authority; and (3) a "peculiar law enforcement situation" existed in which the officers were contracted as both City and tribal officers. *Id*. This Court also determined that those tribal officers were alleged to have acted "in concert" with the city/tribal officers and found that to be another basis for finding §1983 liability. *Id*. at 1348 n.9.

In *Brunette v. Humane Society of Ventury Cty*., 294 F.3d 1205 (9th Cir. 2002), this Court found that exercise of subject matter jurisdiction was proper where private actors who were Defendants to the suit were working closely in concert with state actors. The "joint action" test requires evidence that the Defendants are "willful participant[s] with the state or its agents in an activity which deprives others of constitutional rights, and its particular actions must be inextricably intertwined with those of the government." *Brunette*, 294 F.3d at 1211. The "symbiotic relationship" test asks "whether the government has so far insinuated itself into a position of interdependence with a private entity that the private entity must be recognized as a joint participant in the challenged activity." *Id*. at 1210.

Brunette is parallel to this case in that there would be no subject matter

jurisdiction over the tribal police Appellees but for the fact that they worked so closely in concert with the State of Arizona in the exercise of their state police powers. And the multiple jurisdictional authorities possessed and employed by the TOPD officers in this case is no less "peculiar" than what this Court found in *Evans* to be actions "under color of state law" over which the District Court could exercise subject matter jurisdiction.

Furthermore, the TOPD officers were also working in close concert with federal authorities at this roadblock. On July 7, 2005, through a Freedom of Information Act request, Mr. Bressi obtained third-party evidence from the United States Department of Homeland Security. These DHS documents, obtained two and a half years after Plaintiff filed requests and appeals to the federal government under FOIA, demonstrate conclusively that the Appellees were in fact operating a joint task force with federal agents and that said federal agents were substantial players in the December 20, 2002 roadblock which is the subject of this case.

Appellees Michael Ford and Richard Saunders provided affidavits that no joint task force occurred, and Lt. Ford maintains that he never told Plaintiff on the scene anything about the roadblock being operated by a joint task force. This testimony contradicts all the available evidence, such as the affidavits of Mr. Bressi and Mr. Tubbiolo, the memorandum of TOPD Lt. Kevin Shonk explaining to officers that they should be looking for violations of state law, and operational plans from other TOPD roadblocks that were operated by multijurisdictional task forces. This is sufficient to show that the Appellees were acting under color of federal law, and therefore the District Court has subject matter jurisdiction under *Bivens*.

Appellees disclosed information pertaining to the organization and planning of other roadblocks, but they gave nothing pertaining to the December 20, 2002 roadblock. The Appellees have also in the past willfully failed to provide disclosure to the Justice Court in the criminal case against Mr. Bressi, and they have also failed to disclose in this case without adequate or plausible justification.

Appellees believe they deserve the protection of sovereign immunity because they have the authority under tribal law to conduct roadblocks without resorting to their AZ-POST authority as state police officers. The District Court agreed with this reasoning. However, this reasoning misses the point; it is not relevant what Appellees *could have done*, but rather it is only relevant what they actually *did*. In this case, Appellees could have operated a roadblock that checked only for sobriety and not for driver's licenses, registrations, insurance, seatbelts, stolen vehicles, drugs, and wants and warrants – but they did not do that. Appellees could have operated a roadblock that recognized the restrictions of their authority as tribal officers without dipping into the authority vested in them by AZ-POST – but they did not do that. When Appellees have to invoke their Arizona state police authority potentially for each and every stop, it is impossible to separate their state authority from their tribal authority, and *Evans* must apply.

C. The Government's Requiring Motorists to Provide ID Violates the First Amendment By Restricting Citizens' Right to Travel.

1. The Right to Travel is Fundamental

"[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *United States v. Guest*, 383 U.S. 745, 758 (1966). "[O]ur constitutional concepts of personal liberty unite to require that all

citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969). *See also Waters v. Barry*, 711 F. Supp. 1125, 1134 (curfew tramples upon associational liberty interests); *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 (same). Freedom to physically travel and the free exercise of First Amendment rights are inextricably intertwined. "Freedom of movement is kin to the right of assembly and to the right of association." *Aptheker v. Sec'y of State*, 378 U.S. at 520. "[T]he right to migrate is firmly established and has been repeatedly recognized by our cases." *Att'y Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986). "That citizens can walk the streets, without explanations or formal papers, is surely among the cherished liberties that distinguish this nation from so many others." *Gomez v. Turner*, 672 F.2d 134, 143 n.18 (D.C. Cir. 1982).

The Supreme Court has located [the travel right] at times in the Privileges and Immunities Clause of Article IV, the Commerce Clause, the Privileges and Immunities Clause of the Fourteenth Amendment and the "federal structure of government adopted by our Constitution." *Soto-Lopez*, 476 U.S. at 902.

The right of anonymity – the right to not to be subjected to compulsory identification – has been upheld in many First Amendment contexts, including press (*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960)), association (*NAACP v. Alabama*, 357 U.S. 449 (1958)), and speech (*Watchtower Bible, et al. v. Village of Stratton*, 436 U.S. 150 (2002)).

Even a recent Supreme Court case granting the government some power to compel identification does not grant the police the power to demand identification from a person, such as Mr. Bressi, who is not suspected of any crime. *See Hiibel v. Sixth Judicial District of Nevada, Humboldt County*, 542 U.S. 177, 124 S.Ct. 2451 (2004). If the courts were to state that innocent citizens may not have their identity papers demanded "except when they are moving," the exception would swallow the rule. "If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order." *Thomas v. Collins*, 323 U.S. 516, 540 (1945).

Travelers are routinely required to show ID today. The issue is whether the above practices "unreasonably burden or restrict this movement." *Saenz v. Roe*, 526 U.S. 489, 499, 119 S.Ct. 1518, 1524-25 (1999). A demand for identification implicates the Fourth Amendment, among other constitutional rights. *Brown v. Texas*, 443 U.S. 47, 52, 99 S.Ct. 2637, 2640 (1979); *Lawson v. Kolender*, 658 F.2d 1362 (9th Cir. 1981).

The Appellees' practice of requiring motorists to produce a driver's license and be subjected to a delayed detention while checking for warrants violates Mr. Bressi's Fourth Amendment right to be free from unreasonable searches and seizures. According to the Appellees, police officers may circumvent the Fourth Amendment by conducting suspicionless and warrantless general searches for

identification at a "sobriety checkpoint" that includes checks for identification, wants and warrants, and other general law enforcement.

2. Mr. Bressi's Right to Travel Was Violated

Mr. Bressi was prevented from traveling along the nation's highways because he would not show ID when stopped at a suspicionless checkpoint. He was prevented from traveling due to an arbitrary condition placed upon that right by the Appellees.

This Court has held that "governmental restrictions upon freedom to travel are to be weighed against the necessity advanced to justify them, and a restriction that burdens the right to travel 'too broadly and indiscriminately' cannot be sustained." *United States v. Davis*, 482 F.2d 893, 912 (1973) (quoting *Aptheker v. Sec'y of State*, 378 U.S. at 505). "Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252 (1961). And "exercise of the constitutional right to travel may not be conditioned upon the relinquishment of another constitutional right (here, the Fourth Amendment right to be free of unreasonable search), absent a compelling state interest." *Davis*, 482 F.2d at 913.

Mr. Bressi correctly stated in his complaint, in his responses to the motion for reconsideration, and in his response to the motions for summary judgment that the Appellees were using their authority as granted by the State of Arizona when they stopped him under color of state law to enforce state laws such as vehicle theft

and seatbelt violations against him. Furthermore, they were acting under color of federal law when they inextricably commingled their authority with federal agencies for the purpose of enforcing federal laws such as smuggling of drugs and aliens. While the Appellees denied these facts in affidavits and deposition testimony, their own documentation and the documentation of the Department of Homeland Security verifies Mr. Bressi's claims.

The District Court ignored these facts and decided, as a mistake of law, to not take Mr. Bressi's factual allegations as true in granting Appellees' motion to dismiss certain claims and motions for summary judgment on the remaining claims.

The Appellees have made no attempt to argue that their actions and policies meet constitutional muster, rather they have relied simply on the claim that they need not follow the constitution. Because the Appellees are not protected by sovereign immunity, and because their actions and policies violate the United States and Arizona Constitutions, Mr. Bressi has stated a colorable claim for relief that should be remanded for trial before the District Court.

3. Strict Scrutiny Applies to Violations of the Right to Travel

The right to travel is so fundamental that laws that burden the right to travel must satisfy strict scrutiny. *Soto-Lopez*, 476 U.S. at 906. The prevention of drunken driving is a compelling state interest. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 455, 110 S.Ct. 2481, 2488 (1990); *City of Indianapolis v. Edmond*, 531 U.S. 32, 39, 121 S.Ct. 447, 453 (2000). But "[if] there are other, reasonable ways to achieve [a compelling state purpose] with a lesser burden on

constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Soto-Lopez*, 476 U.S. at 909-10 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). Even with a compelling state interest, government may not employ wide-ranging policies to achieve a narrow end. *Shelton*, 364 U.S. at 488. In *Waters v. Barry*, the D.C. District Court struck down a curfew – a restriction of free movement – explaining that "when government undertakes to limit these rights in some manner, it must act gingerly … narrowly focused on the harm at hand, as well as sensitive to needless intrusions upon the constitutional interests of the innocent." 711 F. Supp. 1125, 1135 (D.D.C. 1989).

Restrictions on the right to travel are required to meet strict scrutiny, and should also be required to be effective. The government has not met its burden of proof that identification at roadblocks meets either of these tests, so the District Court's opinions and orders dismissing some claims and granting summary judgment on the others should be reversed.

D. Police Roadblocks that Check for Driver's Licenses and Warrants Impermissibly Burden Citizens' Constitutional Right to Travel and Fourth Amendment Right to be Free from Unreasonable Searches and Seizures.

1. Law Related to Sobriety Checkpoints is Clearly Established

Stopping a vehicle from its self-directed motion, for however short duration of time, is a seizure that implicates the Fourth Amendment. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450, 110 S.Ct. 2481, 2485 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556, 96 S.Ct. 3074, 3082 (1976); *Brown v.*

Texas, 443 U.S. 47, 99 S.Ct. 2637 (1979). In order for a seizure of an individual to be constitutional, it must be based on specific, objective facts that give rise to reasonable suspicion of criminal wrongdoing; stopping an individual without such individualized suspicion and demanding identification of that individual is unconstitutional. *Brown*, 443 U.S. at 51, 99 S.Ct. at 2640. One who is suspected of criminal wrongdoing may be compelled to identify himself. *Hiibel v. Sixth Judicial District of Nevada, Humboldt County*, 542 U.S. 177, 124 S.Ct. 2451 (2004) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968)). The Court has differentiated these two kinds of stop, stating that a "stop and identify" rule that does not require individualized suspicion of criminal wrongdoing runs "the risk of 'arbitrary and abusive police practices'" that is "too great and the stop [is] impermissible." *Hiibel*, 542 U.S. at 184, 124 S.Ct. at 2457 (quoting *Brown*, 443 U.S. at 52, 99 S.Ct. at 2640).

Plaintiff has a clearly established right to be free of unwanted governmental intrusions while traveling on a public highway such as SR-86. "Both the Fourth Amendment to the Constitution of the United States and Article 2, §8 of the Arizona Constitution, providing that 'No person shall be disturbed in his private affairs … without authority of law' protect travelers upon the public highways from harassment by government agents if there is no basis to support a founded suspicion of criminal activity." *State v. Ochoa*, 112 Ariz. 582, 584, 544 P.2d 1097, 1099 (1976). Roving patrols that stop individual vehicles without any suspicion of wrongdoing or criminal activity are unconstitutional. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979). Roadblocks that stop all traffic may be constitutional if

the primary purpose is to check for drivers who are intoxicated, but a roadblock for which there are no operational guidelines and where individual officers operating the roadblock have a substantial amount of discretion violates both the United States and Arizona Constitutions. *State ex rel. Ekstrom v. Justice Court of State of Arizona in and for Kingman Precinct 1*, 136 Ariz. 1, 5, 663 P.2d 992, 996 (1983).

With regard to roadblocks conducted by police officers, Appellant's rights were clearly established by the United States Supreme Court in *Sitz* as well as *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447 (2000). In *Sitz*, the Supreme Court held that sobriety checkpoints do not per se violate the Fourth and Fourteenth Amendments, provided that the checkpoint be designed primarily to prevent drunken driving and take measures to limit the intrusion upon motorists who are stopped. *Sitz*, 496 U.S. at 455, 110 S.Ct. at 2488.

The Supreme Court has never held that police may conduct arbitrary roadblocks to check for ordinary criminal wrongdoing. In *Edmond* the Court ruled that, because the primary purpose of the Indianapolis narcotics checkpoint program was to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment. "We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." 531 U.S. at 44, 121 S.Ct. at 455.

The Indian Civil Rights Act, 25 U.S.C. §1302, states that "no Indian tribe in

exercising powers of self-government shall … violate the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." Essentially, this is a selective incorporation of the Fourth Amendment to federally-recognized Indian tribes, not unlike the function of the Fourteenth Amendment with regard to the States. The ICRA imposes an "identical limitation" on tribal government conduct as the Fourth Amendment. *United States v. Strong*, 778 F.2d 1393, 1397 (9th Cir. 1985). Therefore, Supreme Court decisions related to roadblocks apply to the tribal police.

Furthermore, in *Tohono O'odham Nation v. Ahill, et al.*, Case No. CR12-1762-88 (1989) (ER 142-151), the Nation's tribal court also states that sobriety checkpoints must be narrowly tailored to serve the purpose of protecting public safety, and TOPD roadblocks must be operated in such a manner that drivers are treated uniformly by all officers and that guidelines are necessary to ensure that drivers' rights are left unmolested. However, as *Ahill* was decided prior to *Sitz* and *Edmond*, the TOPD is bound to modify its interpretation of *Ahill* to the extent that *Sitz* and *Edmond* hold differently.

Appellant has alleged that the purpose of the roadblock at which he was arrested was general crime control. Appellant provided the District Court with sufficient evidence to support his claim, not only through his own observations but also through the testimony of all the witnesses, including the Appellees themselves.

Furthermore, *Sitz* makes it abundantly clear that published guidelines for conducting sobriety checkpoints are a requirement to meet constitutional muster:

"Here, checkpoints are selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle." 496 U.S. at 453. In this case, no such guidelines existed at all until August 17, 2005 (and those guidelines are still insufficient), and the Appellees themselves have testified that drivers received disparate treatment and officers at roadblocks are vested with extraordinary individual discretion.

2. The Facts Support Mr. Bressi's Claim that the Roadblock was Conducted for General Law Enforcement Purposes

There are many disputed material facts in this case that the District Court was legally obligated to resolve in favor of the Appellant. *See* Section VII-A, *supra*. These facts support Mr. Bressi's claim that the purpose of the roadblock at which he was arrested on December 20, 2002 was to uncover criminal wrongdoing and general crime control. Primarily, the Appellees, who clearly are aware that roadblocks are only constitutional if operated for public safety purposes, use the term "sobriety checkpoint" as a cover for the underlying purposes of the roadblock. The Appellees operate these roadblocks to detect alien and drug smuggling, find stolen cars, and run wants and warrants checks on drivers who pass through.

Some of these facts are undisputed. All of the Appellees, including Chief Saunders, have admitted that they do not merely check for driver's licenses but run all licenses through the state and national databases for wants and warrants. (ER 80, 49:2-4). Chief Saunders has acknowledged that he is mostly hands-off with the creation and approval of operational plans for roadblocks and that no guidelines existed for nearly two decades after the tribal court and the U.S. Supreme Court

affirmed the need for published guidelines as a prerequisite to roadblocks meeting constitutional muster. (ER 76, 22:15 – 23:24). Furthermore, considerable discretion was vested in individual officers such that Ofc. Traviolia used his authority as an opportunity to conduct warrantless and suspicionless trunk searches. (ER 57, ¶8). Chief Saunders has abdicated his responsibility to make policy and to supervise the officers under him. Delegating authority may be a wise management style, but ultimately the Chief of Police bears the responsibility for poor training and supervision of his officers.

But ultimately, the proof that this roadblock was conducted for general crime control purposes is the Lt. Shonk memorandum. (ER 132-133). That memorandum, which Chief Saunders acknowledges as official policy of the TOPD, urges all officers who work at roadblocks to ask not only about sobriety and licenses but also to ask about drugs and ask motorists for consent to search the vehicle. Vehicle and trunk searches have no constitutional place at a sobriety checkpoint.

3. Appellees are Not Entitled to Qualified Immunity Because They Knew or Should Have Known that their Actions Caused the Violation of Mr. Bressi's Rights

Appellees argue that they are entitled to the protection of qualified immunity. Qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982). Qualified immunity protects "all but the plainly incompetent or those who knowingly violated the law." *Malley*

v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092 (1986).

Police officers may raise the defense of qualified immunity from suit. However, individual police officers will be held liable for their actions when their conduct violates some constitutional or statutory right, and that such right was clearly established at the time of the alleged violation. *Siegert v. Gilley*, 500 U.S. 226, 231-34 (1991) (citing *Harlow*, 457 U.S. at 818). "To be clearly established, the law must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996) (citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987)). "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). The party asserting the constitutional injury bears the burden of showing that the right at issue was clearly established. *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002). Finally, the plaintiff must show that the right allegedly violated was clearly established at the time of the incident. *Elder v. Holloway*, 510 U.S. 510, 114 S.Ct. 1019 (1994) (citing *Davis v. Scherer*, 468 U.S. 183, 197, 104 S.Ct. 3012, 3020-21 (1984)).

Mr. Bressi contends, and his evidence supports, that the Appellees violated clearly-established law, and if they were not aware of such law then they reasonably should have been aware of it. Either way, they are not entitled to qualified immunity.

The Appellees demonstrated their lack of concern for Mr. Bressi's rights in their response to receiving statutory notices of claim in June 2003 in which Mr.

Bressi informed the Appellees that *Sitz* and *Edmond* are the controlling Supreme Court cases in this area of law. Even after receiving a notice that shows that Mr. Bressi's right was "clearly established," the Appellees still re-filed the criminal charges that they had allowed to be dismissed without prejudice. A few minutes worth of legal research would have shown the Appellees that their seizure and continued detention of Mr. Bressi, and therefore the entire basis for Mr. Bressi's arrest, was unconstitutional, and they had no probable cause to re-file the charges. As the re-filing of the charges is a separate event from the original arrest, any claim to qualified immunity the Appellees might have had on December 20, 2002 totally disappeared in June 2003.

4. Appellees are Not Entitled to Qualified Immunity Against Mr. Bressi's Claims for Injunctive Relief

This Court has repeatedly held that "[q]ualified immunity is an affirmative defense to damage liability; it does not bar actions for declaratory or injunctive relief." *Presbyterian Church (U.S.) v. United States of America*, 870 F.2d 518, 527 (9th Cir. 1989) (citing *Harlow*, 457 U.S. at 806, 102 S.Ct. at 2732); *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1472 (9th Cir. 1993). The rationale for not extending the qualified immunity defense to equitable claims is explained in *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir. 1983), overruled in part on other grounds, *DaimlerChrysler Corp. v. Cuno*, 126 S.Ct. 1854, 1864 n.4 (2006). Relying on *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992 (1975) and *Scheuer v. Rhodes*, 416 U.S. 232, 239-40, 94 S.Ct. 1683, 1688 (1974), *Hoohuli* recognized that the doctrine of qualified immunity is justified in suits seeking

damages because (1) the threat of personal financial liability would deter executive officers from taking the kind of quick, decisive and responsive action that society needs, and (2) that in the absence of such immunity, "all but the most fearless, or foolish, would be reluctant to participate in public service." *Hoohuli*, 741 F.2d at 1176. In the context of equitable relief, however, the Court held that these concerns do not apply. *Id*. Here, even if the Appellees are granted qualified immunity against claims for monetary damages, Mr. Bressi's claim against the Appellees for injunctive relief must remain intact.

In the case of complaints for injunctive relief, the "injury in fact" element of standing requires a showing that Mr. Bressi faces a threat of ongoing or future harm. *See Park v. Forest Service of the United States*, 205 F.3d 1034, 1037 (8th Cir. 2000), *citing City of Los Angeles v. Lyons*, 461 U.S. 95, 101-05, 103 S.Ct. 1660 (1983). Similarly, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief … if unaccompanied by any continuing, present adverse effects." *Park*, 205 F.3d at 1037, *citing O'Shea v. Littleton*, 414 U.S. 488, 495-96, 94 S.Ct. 669, 676 (1974).

In *Park*, the checkpoint at issue was no longer being used, and the Defendant did not deny that the checkpoint was impermissible, so that Court was not presented with a case in which the unlawful conduct was ongoing. The Court therefore found that Park did not have standing to seek injunctive relief as she failed to demonstrate a real and immediate threat that she would again suffer similar injury in the future. *Park*, 205 F.3d at 1037 (citations omitted).

That is not the case here. The Appellees continue to operate their roadblocks

largely in the same manner as they did when Mr. Bressi was arrested in 2002. Mr. Bressi continues to drive on SR-86 between Kitt Peak and Tucson for work. Lt. Ford disclosed during his deposition that roadblock were currently being planned for the near future:

Q Are there any roadblocks that are presently being planned for the future to your knowledge?
A Yes.
Q For the immediate future or for distant future?
A Immediate future, from my understanding.
Q Like holidays, for example?
A Yes.
Q Okay. Are you aware of this because you have been asked to plan it or because you have just heard talk?
A I am aware of it through department email.

(ER 87, 19:14-25).

As stated above, Plaintiff asserts that Defendants are conducting their roadblocks primarily for general law enforcement, as opposed to vehicle operation safety concerns. Along with the fact that the roadblocks are conducted in concert with federal law enforcement agencies and the other evidence presented, Defendants' ongoing practice of running wants and warrants checks on those stopped at their roadblocks is evidence of its general law enforcement purpose. This matter was addressed in Chief Saunders deposition:

THE WITNESS: We would, we would, we would check through our via communication or police radio, with our dispatcher, and they would, they would make the inquiry. If it's a local wants and warrants check, it would be within Arizona; if it's a national -- actually they automatically do a national check there, so it's NCIC, which is the National Crime Information Center, by way of our communications system and through Arizona DPS there that the inquiry is made.

(ER 81, 52:7-16).

And unlike in *Park*, Defendants have neither conceded their roadblocks were unconstitutional, nor have they taken measures to change their procedures. What changes they have made have not corrected their error:

BY MR. EUCHNER:
Q With regard to the guidelines that are in place right now that were adopted or in effect as of August 17th, 2005, does the license check that includes a wants and warrants check, is that still part of the procedure within those guidelines?
A I don't recall if it's, it's specifically in the guidelines. I do believe and would hope that it is still practiced when time permits there, yes.

(ER 82, 54:1-9).

Whether someone is "wanted" has little relevance to a person's ability to safety operate a motor vehicle. Here, unlike in *Park*, Defendants stand by their conviction that what they are doing is constitutional:

BY MR. EUCHNER:
Q In your opinion is it legal under state law to run a wants and warrants of driver's licenses at checkpoints?
MR. FRAZIER: Form.
THE WITNESS: In my opinion is it legal?
BY MR. EUCHNER:
Q To ask for a driver's license upon stopping somebody and then run a wants and warrants check on that.
MR. FRAZIER: Form.
THE WITNESS: Yes, in my opinion it is legal.
MR. HARRISON: At checkpoints, is what --
THE WITNESS: At checkpoints, yes.
BY MR. EUCHNER:
Q Is it also legal under federal law, in your opinion?
A I am not certain.
Q Is it also legal under tribal law, in your

opinion?
MR. FRAZIER: Again, form.
But go ahead and answer.
THE WITNESS: Yes, in my opinion under tribal law, yes.
MR. EUCHNER: I don't think I have any further questions.

(ER 84, 110:18 – 111:19). Because the Appellees have stated they are continuing to conduct the roadblocks in the same manner, and because Mr. Bressi will regularly continue to be at risk of being stopped by the Appellees at their roadblocks as he drives to and from work, Plaintiff has standing to seek injunctive relief.

Mr. Bressi has shown that his constitutional rights have been violated sufficient to survive the motion for summary judgment. The Court has the power to enjoin the Appellees should Plaintiff prevail on the merits. "[T]his Court has approved of the issuance of injunctions by federal courts against state or municipal police departments where necessary to prevent the continued enforcement of unconstitutional official policies. See, e.g., *Allee v. Medrano*, 416 U.S. 802 (1974); *Hague v. CIO*, 307 U.S. 496 (1939); *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966) (en banc), cited with approval in *Allee, supra*, at 816." *City of Los Angeles v. Lyons*, 461 U.S. at 133 n.23 (Marshall, J., dissenting). Given Appellees' disregard for clear constitutional limitations for operating roadblocks, this Court can find that a permanent injunction against the Appellees, including a Chief of Police and a patrol commander, is appropriate. As injunctive relief is not avoidable with the

defense of qualified immunity, Mr. Bressi's claim must go forward.

VIII. CONCLUSION

The District Court abused its discretion and erred as a matter of law when granting Appellees' motions by resolving genuine issues of material fact in favor of the Appellees instead of the Appellant. Doing so required ignoring a large number of critical facts while taking the affidavits of Appellees at face value, even when those affidavits contradict their own documents provided through discovery.

Mr. Bressi asks this Court to declare that the District Court has subject matter jurisdiction to decide all the claims in this case and to reverse the order of the District Court dismissing some of the Constitutional claims.

Mr. Bressi asks this Court to find that he has alleged sufficient facts to defeat the motion for summary judgment on the remainder of the Constitutional claims, and to reverse and vacate the order of the District Court granting summary judgment to the individual Appellees.

Mr. Bressi asks this Court to find that he has alleged sufficient facts to defeat the motion for summary judgment on the malicious prosecution claim, and to reverse and vacate the order of the District Court granting summary judgment to Appellee United States of America.

Mr. Bressi asks this Court for a finding that Mr. Bressi has stated a claim for relief that the roadblock in this case was operated in violation of Supreme Court case law.

For these reasons, Mr. Bressi asks this Court to reverse and vacate the District Court's orders of dismissal and summary judgment for all the Defendants-Appellees and remand this case to the District Court for further proceedings.

DATED: September 4, 2007

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,935 words and 1,031 lines, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 SP2 in Times New Roman, 14-point font.

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I certify that on September 4, 2007, an original and fifteen (15) copies of Appellant Terrence Bressi's Opening Brief were sent, via hand delivery, to the Clerk of the United States Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, California 94110-3939, and two (2) copies were sent, via United States mail, postage prepaid to:

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