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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Terrence Bressi,

10 Plaintiff,

11 v.

12 Pima County Board of Supervisors, et al.,

13 Defendants.
14

No. CV-18-00186-TUC-DCB

ORDER

15 The Court considers three related dispositive motions: Plaintiff’s Motion for Partial
16 Summary Judgment (Doc. 104); Federal Defendants’ Motion for Summary Judgment
17 (Doc.146), and Pima County Defendants’ Motion for Summary Judgment (Doc. 135, 136).
18 The Court considers all three motions with the facts construed in favor of the Plaintiff, and
19 grants summary judgment for Defendants. The Court finds that the Plaintiff’s Fourth
20 Amendment and First Amendment rights under the United States Constitution were not
21 violated by Defendants’ border checkpoint operations on SR-86 or his detention and
22 citation for blocking traffic on April 10, 2017.

23 A.

24 Plaintiffs’ Alleged Statement of Facts

25 Plaintiff Bressi alleges that over the past approximately 13 years, he has been
26 stopped at the State Route 86, “traffic checkpoint,” when driving from the Kitt Peak
27 Observatory to Tucson. (P MPSJ, SOF (Doc. 105) ¶ 1.) His work for the University of
28 Arizona requires periodic trips to the Kitt Peak Observatory. *Id.* ¶ 33. It is undisputed that

1 he travels through the checkpoint an average of 50-60 times per year and has been doing
2 so since the inception of the checkpoint on SR-86. *Id.* ¶ 33-34.

3 “Since 2010, the United States Border Patrol has continuously operated a traffic
4 checkpoint on SR-86 at milepost 146.5; it is a permanent check point, staffed at all times,
5 and stops all traffic traveling eastbound towards Tucson. *Id.* ¶ 2. All Border Patrol agents
6 are cross-designated with so-called “Title 21 authority,” which includes the power to
7 enforce federal criminal laws pertaining to narcotics. *Id.* ¶ 13.

8 “The Department of Homeland Security operates a grant program known as
9 Operation Stonegarden which provides funds to local law enforcement agencies to
10 compensate officers for overtime work during which they are assigned to assist the Border
11 Patrol.” *Id.* ¶ 36. Approved by the County Board of Supervisors, *id.* ¶ 43, the Pima County
12 Sheriff’s Department participated in Operation Stonegarden from at least 2008-2018, *id.* ¶
13 37, and Pima County Sheriff’s deputies were regularly stationed at the SR-86 checkpoint
14 to carry out general law enforcement duties, as “reflected in incident reports maintained by
15 the Sheriff’s Department in which deputies report working at the checkpoint and enforcing
16 state laws with no report of having been called there by the Border Patrol for a specific
17 purpose,” *id.* ¶ 41. “Operation Stonegarden deployments were directed and approved by
18 Customs and Border Protection/Border Patrol, . . . [and] required the Pima County Sheriff’s
19 Department to ‘coordinate’ with the relevant Border Patrol stations to ‘conduct joint
20 patrols’ and ‘conduct joint operations.’” *Id.* ¶ 38. Pima County Sheriff’s Deputies have no
21 authority to enforce federal immigration laws. *Id.* ¶ 42. There is no evidence or allegation
22 that County Sheriff deputies enforced any federal immigration laws.

23 In short, “[b]etween 2013 and 2017, it was the official policy of Pima County to
24 allow deputies to be stationed as directed by the Border Patrol during Operation
25 Stonegarden shifts, and those assignments regularly included working at the SR-86
26 checkpoint conducting general law enforcement activities such as enforcing vehicle
27 equipment requirements and checking for outstanding warrants.” *Id.* ¶ 44.

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1 The SR-86 border checkpoint is one of three checkpoints located in the western half
2 of Southern Arizona. The Government’s stated purpose for these permanent checkpoints
3 was border security, including preventing terrorism, and the dual purpose of stopping
4 human and drug smuggling. *See* Arizona Department of Transportation (ADOT) Highway
5 Encroachment Permit Application, dated November 4, 2019 (Fed. DMSJ, SOF (Doc. 141)
6 at Ex. A); Border Patrol Traffic Checkpoint Policy from 2003, *Id.* at Ex. I); 2016 TUC
7 Checkpoint Operations (G’s SOF at J; P MPSJ, SOF, Ex. 20 (Doc. 132¹-8) at 1-9);
8 Checkpoint Procedures, dated November 2017, *Id.* at Ex. K; P MPSJ, SOF, Ex. 20 (Doc.
9 132-8) at 1-16; MOU between DEA and INS, dated April 28, 2011, (P MPSJ, SOF, Ex. 7
10 Prt 1 (132-1) at 1-11.

11 The relevant geographical highway system in western half of Southern Arizona
12 includes an interstate system of I-8, an east-west interstate that comes from Southern
13 California through Southern Arizona at Yuma to I-10 around Casa Grande, a city located
14 between Tucson and Phoenix. I-10 is the east-west interstate that runs between New
15 Mexico and California through Southern Arizona to Tucson, then north-south between
16 Tucson and Phoenix. I-19 is a north-south interstate that runs between the Mexico border
17 at Nogales and Tucson. There are three state routes in the western² half of Southern
18 Arizona. SR 85 runs between Mexico at Lukeville, north-south, to I-8. SR 86 runs east-
19 west from its intersection with SR 85 to Tucson. SR 286 runs from the Mexico border at
20 Sasabee, north-south, to SR 85.

21 “The United States Border Patrol operates checkpoints on all three north-south roads
22 coming from the Mexico border intersected by SR-86: SR 85, SR 286, and I-19.” At 6.
23 “SR-86 is an east-west road that at no point intersects the US-Mexico border. (P MPSJ,
24 SOF (Doc. 105) ¶ 5.) “SR-86 is the main east-west route traveled by individuals, including
25 those coming from the Kitt Peak National Observatory.” *Id.* ¶ 7.

26 The United States Border Patrol conducts traffic checks on these major highways

27 ¹ Doc. 132 (sealed) is comprised of exhibits filed under seal.

28 ² The Court considers the road system west of Tucson to be in the western half of
Southern Arizona.

1 leading away from the border to (1) detect and apprehend illegal aliens attempting to travel
2 further into the interior of the United States after evading detection at the border and (2) to
3 detect illegal narcotics.” *Id.* ¶ 8. In other words, one main purpose of the SR-86 checkpoint
4 is deterring narcotics smuggling. *Id.* ¶ 9.

5 For the four years (2017-2020) that the Border Patrol provided statistics, there were
6 approximately 257 immigration arrests and 83 incidents compared to 153 narcotic related
7 arrests and 128 incidents involving narcotics. *Id.* ¶ 10. Some narcotic arrests were
8 immigration related, and there were “other arrests,” including narcotic arrests, that were
9 not immigration related. Adjusted accordingly, there were 257 immigration related arrests
10 and 284 nonimmigration related arrests. *See* (P MPSJ, SOF, Ex. 4: Stats at 1-4 (Doc. 106-
11 4)).

12 Agents routinely use trained canines at the SR-86 checkpoint that are trained to
13 detect narcotics and concealed humans, (P MPSJ, SOF (Doc. 105) ¶ 16, and are used in the
14 “pre-primary” area of the checkpoint “before a driver has an initial encounter with any
15 agents.” *Id.* ¶ 17. A backscatter (X-ray) device detects hidden compartments that can
16 conceal both humans and narcotics. *Id.* ¶ 14. Agents wear personal radiation detector
17 devises. *Id.*; (Fed. Resp. to P MPSJ (Doc. 172) at 17).

18 Border Patrol operated a pilot program for several months where it installed agency-
19 owned automatic license plate readers at the SR-86 checkpoint, (P MPSJ, SOF (Doc. 105)
20 ¶ 19), and between 2013 and 2017, Pima County Sheriff’s deputies were regularly stationed
21 at the SR-86 checkpoint to carry out general law enforcement duties, *id.* ¶ 41, such as
22 enforcing vehicle equipment requirements and checking for outstanding warrants, *id.* ¶ 44.

23 Border Patrol’s policy does not to exempt any vehicle, including those of known
24 local commuters or residents, from inspection at the SR-86 checkpoint; there is no policy
25 for agents to “wave through” individuals known to them whom they know to be U.S.
26 citizens. *Id.* ¶ 21.

27 Each car passing through the checkpoint enters an area known as “primary
28 inspection,” where it is required to stop, and a Border Patrol agent asks the occupants if

1 they are United States citizens and conducts an “open view” inspection of the vehicle. *Id.*
2 ¶ 22. During this initial encounter, agents are trained to look both for signs that the
3 occupants may not be United States citizens or may be present without authorization, and
4 for indications of federal criminal activity of any kind. *Id.* ¶ 23. “The basis of a primary
5 checkpoint inspection is the decision to allow individuals to proceed or refer them to
6 secondary inspection” based on “immigration purposes,” i.e., for “additional investigation
7 based on some or mere suspicion that there may be an immigration violation,” (PMPSJ
8 SOF: Traffic Check Operations 11/2017 (Doc. 132-5) at 14.) “Title 21 authority in
9 conjunction with reasonable suspicion” or “[r]easonable suspicion for any federal crime
10 and state violations in some jurisdictions.” (P MPSJ, SOF (Doc. 105) ¶ 23 (citing Ex. 9:
11 Academy Student and Instructor Traffic Check Slide 18; Ex. 10: Field Training Instructor
12 Guide, p. 10.1.1-10 (USA-02270)). *Accordingly*, “agents have discretion to direct any
13 vehicle passing through the checkpoint to a secondary inspection area.” *Id.* ¶ 24 (emphasis
14 added).

15 “Agents may refer a vehicle to a secondary inspection area because the agent has
16 reasonable suspicion that the occupant is engaged in non-immigration-related criminal
17 activity.” *Id.* ¶ 25. “Agents sometimes detain individuals passing through the checkpoint,
18 including directing them to the secondary inspection area, not for immigration reasons, but
19 at the request of other law enforcement agencies who do not enforce immigration laws.”
20 *Id.* ¶ 26

21 “It is the policy of the Border Patrol to detain individuals passing through the
22 checkpoint until they have determined their citizenship.” *Id.* ¶ 27. Plaintiff alleges the
23 following: the Border Patrol knows the Plaintiff is a United States citizen, *id.* ¶ 28; many
24 of the agents recognize him and his vehicle; *id.* ¶ 29, there is a poster with Mr. Bressi’s
25 name and photograph, with a statement that he is a United States citizen and an
26 uncooperative motorist, posted at the SR-86 checkpoint, *id.* ¶ 30, and “agents often do not
27 allow him to proceed without stopping him to question him about his citizenship, even
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1 when they recognize him,” *id.* ¶ 31. There is no evidence that agents at the SR-86
2 checkpoint have ever suspected the Plaintiff is involved in human smuggling. *Id.* ¶ 32.

3 On April 10, 2017, Plaintiff was stopped at the primary inspection area and “the
4 agent request[ed] Mr. Bressi move to secondary prior to asking him any question other than
5 ‘How you doin.’” (PResp PC MSJ) (Doc. 161) at 2-3). Plaintiff left the checkpoint as soon
6 as Border Patrol Agent Frye allowed him to do so; in total, Plaintiff was at the primary
7 checkpoint stop for just over two minutes. (PResp PC MSJ) (Doc. 161) at 3.) Deputy Roher
8 knew that Plaintiff was detained at the primary stop at the direction of Border Patrol and,
9 therefore, knew there was no probable cause to arrest the Plaintiff for obstructing traffic at
10 the checkpoint. *Id.* at 5 (relying on prior conduct of Pima County Sherriff, Deputy
11 McMillan, who declined to arrest him for blocking roadway because Border Patrol stopped
12 him, and he was not free to go).

13 On April 10, 2017, Deputy Roher detained the Plaintiff, including handcuffing him,
14 and criminally cited him for obstructing traffic at the SR-86 checkpoint. The Plaintiff has
15 received three civil citations for blocking or impeding the flow of traffic there on December
16 20, 2008, March 29, 2013, and April 30, 2014. (PResp Pima County MSJ (PC MSJ),
17 Controverting SOF (CSOF) ¶ 2.)

18 B.

19 Plaintiff’s claims

20 The Plaintiff alleges that the Border Patrol is violating the Fourth Amendment
21 because Border Patrol agents and Pima County Sheriff’s primarily use the SR-86
22 checkpoint for general law enforcement, not immigration. These stops are made without
23 reasonable suspicion that he has or is committing a state or federal crime and, therefore,
24 violate the Fourth Amendment to the United States Constitution. During these allegedly
25 illegal stops, he is asked his citizenship and required to answer the question in violation of
26 the First Amendment to the Constitution. He alleges he has been repeatedly subjected to
27 these constitutional violations as he regularly traverses SR-86, and on April 10, 2017, he

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1 was detained without probable cause for blocking the roadway in violation of the Fourth
2 Amendment.

3 The seminal Fourth Amendment case relevant here, *United States v. Matrinez-*
4 *Fuerte*, 428 U.S. 543 (1976), involved consolidated conflicting appeals from this circuit
5 and the Fifth Circuit, with the Supreme Court reversing the Ninth Circuit and affirming the
6 Fifth Circuit. Both circuits had considered the merits of convictions where defendants
7 argued to suppress evidence in criminal cases based on arguments that routine Border
8 Patrol checkpoint stops violated the Fourth Amendment. The Ninth Circuit reversed the
9 conviction, the Fifth Circuit did not. The Supreme Court found the convictions were not
10 unconstitutional. Border Patrol agents, after routinely stopping or slowing automobiles at
11 a permanent checkpoint, may refer motorists selectively to a secondary inspection area for
12 questions about citizenship and immigration status based on criteria that would not sustain
13 a roving-patrol stop, and there is no constitutional violation even if such referrals are made
14 largely on the basis of apparent Mexican ancestry.

15 The border patrol checkpoint stops addressed in *Matrinez-Fuerte* were on I-5 near
16 San Clemente, California, approximately 60 miles north of the Mexico border. The
17 checkpoint was well marked. Approximately one mile in advance of the checkpoint, a large
18 black on yellow sign with flashing yellow lights over the highway stated, "ALL
19 VEHICLES, STOP AHEAD, 1 MILE." Three-quarters of a mile, two black on yellow signs
20 suspended over the highway with flashing lights stated, "WATCH FOR BRAKE
21 LIGHTS." At the checkpoint, two large signs with flashing red lights suspended over the
22 highway stated "STOP HERE U. S. OFFICERS." Orange traffic cones funneled traffic into
23 two lanes where a Border Patrol agent in full dress uniform, standing behind a white on red
24 "STOP" sign checked traffic. Border Patrol vehicles with flashing red lights blocked traffic
25 in the unused lanes. There were permanent buildings for housing the Border Patrol office
26 and temporary detention facilities. *Martinez-Fuerte*, 428 U.S. at 545-546. It is undisputed
27 that the SR-86 checkpoint is similarly located, signed, marked, and manned by Border
28 Patrol agents.

1 In *Martinez-Fuerte*, the Supreme Court described the “point” agent as standing
2 between the two lanes of traffic visually screening all northbound vehicles, which the
3 checkpoint virtually brought to a complete stop. Most motorists were allowed to resume
4 their progress without any oral inquiry or close visual examination, but in a relatively small
5 number of cases, the “point” agent would conclude that further inquiry was in order and
6 direct these cars to a secondary inspection area. There, agents asked occupants about their
7 citizenship and immigration status. The average length of the stop in the secondary
8 inspection area was three to five minutes. A direction to stop in the secondary inspection
9 could be based on something suspicious about a particular car passing through the
10 checkpoint, but it could also be without any articulable suspicion. *Id.* at 546-547.

11 The defendants in the criminal cases considered in *Martinez-Fuerte* were stopped at
12 the secondary inspection area for questioning related to citizenship. Here, Plaintiff
13 challenges a stop in the primary area, but like the defendants in *Martinez-Fuerte*, he
14 challenges a suspicionless stop and questioning related to his citizenship.

15 Plaintiff also asserts that the Defendants’ insistence he answer the question of
16 citizenship violated his First Amendment right to speak freely or not speak at all. *Wooley*
17 *v. Maynard*, 430 U.S 705, 714 (1977).

18 Plaintiff seeks injunctions to stop the allegedly unconstitutional activities, and he
19 sues the Pima County Defendants under *Monell*³ for policies and lack of training which
20 allegedly caused Pima County Sheriffs, including Deputy Roher, to violate the Plaintiff’s
21 constitutional rights on an ongoing basis and on April 10, 2017, and Plaintiff sues
22 Defendant Roher, individually, under 42 U.S.C. § 1983.

23 C.

24 Fourth Amendment and Border Checkpoint Stops

25 “The Fourth Amendment imposes limits on search-and-seizure powers in order to
26 prevent arbitrary and oppressive interference by enforcement officials with the privacy and
27 personal security of individuals.” *Martinez-Fuerte*, 428 U.S. at 554-555 (citing *United*

28 _____
³ *Monell v. New York Department of Social Services*, 436 U.S. 658 (1978).

1 *States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *United States v. Ortiz*, 422 U.S. 891,
2 895 (1975); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)). “The Fourth
3 Amendment requires that searches and seizures be reasonable. A search or seizure is
4 ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.” *City of*
5 *Indianapolis v. Edmond*, 531 U.S. 32, 37-38 (2000) (citing *Chandler v. Miller*, 520 U.S.
6 305, 308 (1997)).

7 As explained in *Martinez-Fuerte*, such suspicion is not an “irreducible” component
8 of reasonableness, but only limited circumstances exist in which the usual rule does not
9 apply. *Martinez-Fuerte*, 428 U.S. at 561. For example, suspicionless searches are upheld
10 for certain regimes designed to serve “special needs,” beyond the normal need for law
11 enforcement. *Edmond*, 531 U.S. at 452 (citing *see e.g., Vernonia School Dist. 47J v. Acton*,
12 515 U.S. 646 (1995) (random drug testing of student-athletes); *Treasury Employees v. Von*
13 *Raab*, 489 U.S. 656 (1989) (drug tests for United States Customs Service employees
14 seeking transfer or promotion to certain positions); *Skinner v. Railway Labor Executives’*
15 *Assn.*, 489 U.S. 602 (1989) (drug and alcohol tests for railway employees involved in train
16 accidents or found to be in violation of particular safety regulations)). Searches are also
17 allowed for “administrative purposes” without particularized suspicion of misconduct, if
18 those searches are appropriately limited. *Id.* (citing *see, e.g., New York v. Burger*, 482 U.S.
19 691, 702–704 (1987) (warrantless administrative inspection of premises of “closely
20 regulated” business); *Michigan v. Tyler*, 436 U.S. 499, 507–509, 511–512 (1978)
21 (administrative inspection of fire-damaged premises to determine cause of blaze); *Camara*,
22 387 U.S. at 534–539 (administrative inspection to ensure compliance with city housing
23 code)).

24 A sobriety checkpoint aimed at removing drunk drivers from the road for “roadway
25 safety” does not violate the Constitution. *Michigan Dept. of State Police v. Sitz*, 496 U.S.
26 444 (1990). In *Delaware v. Prouse*, 440 U.S. 648, 663 (1979), the Supreme Court
27 suggested that a similar type of roadblock with the purpose of verifying drivers' licenses
28 and vehicle registrations would be permissible. Under *Martinez-Fuerte*, suspicionless

1 seizures of motorists at a fixed Border Patrol checkpoint, designed to intercept illegal aliens
2 does not violate the Fourth Amendment. *Supra.* at 6-8.

3 As this Court reads *Martinez-Fuerte*, a stop at a permanent Border Patrol checkpoint
4 constitutes a “seizure” within the meaning of the Fourth Amendment. The “principal
5 protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the
6 scope of the stop.” *United States v. Taylor*, 934 F.2d 218, 220 (9th Cir. 1991) (quoting
7 *Martinez-Fuerte*, 428 U.S. at 566-671)).

8 First, given the importance of border security and the difficulty in securing our
9 borders, “[s]uch a stop is reasonable *per se*, so long as the scope of the detention remains
10 confined” to determining immigration status; for instance, a few brief questions, production
11 of an identification document, and “a visual inspection of the vehicle ... limited to what
12 can be seen without a search.” *United States v. Taylor*, 934 F.2d 218, 220 (9th Cir. 1991)
13 (quoting *Martinez-Fuerte*, 428 U.S. at 558, 562).

14 In *Taylor*, the court focused on the discussion in *Martinez-Fuerte* that balanced the
15 critical special need for the stop against the extremely limited scope of the stop to protect
16 Fourth Amendment rights. As understood by the Court in *Edmond*, none of these cases
17 indicated that the suspicionless seizure exception was so broad it could reach “a checkpoint
18 program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.”
19 *Edmond*, 531 U.S. at 38. In *Edmond*, the focus shifted from the limited scope of the stop
20 to ensuring that the primary purpose of the checkpoint was a special need, like border
21 security, and not for general criminal law enforcement. Importantly, *Edmond* was not a
22 border checkpoint case. *Edmond* involved checkpoints in the City of Indianapolis, which
23 had the stated primary purpose of drug interdiction. In *Edmond*, the Court expressly
24 distinguished *Martinez-Fuerte*.

25 “[T]he holding [] does nothing to alter the constitutional status of the sobriety and
26 border checkpoints that we approved in *Sitz* and *Martinez-Fuerte*, or of the type of traffic
27 checkpoint that we suggested would be lawful in *Prouse*.” 531 U.S. at 47. The case should
28 not be read to affect the validity of border searches or searches in airports and government

1 buildings, where the special need for such measures is to ensure public safety is particularly
2 acute. Likewise, the Court reaffirmed police officers' ability to act appropriately upon
3 information that they properly learn during a checkpoint stop which is justified by a lawful
4 primary purpose. *Id.* "Finally, the purpose inquiry is to be conducted only at the
5 programmatic level and not to probe the minds of individual officers acting at the scene.
6 *Id.*

7 In *Edmond*, the Government challenged the law enforcement distinction because the
8 *Sitz* and *Martinez–Fuerte* checkpoints had the same ultimate purpose of arresting those
9 suspected of committing crimes. "Securing the border and apprehending drunken drivers
10 are [] law enforcement activities, and law enforcement authorities employ arrests and
11 criminal prosecutions to pursue these goals." *Id.* at 42. The Court rejected such a sweeping
12 interpretation of Fourth Amendment exceptions because this "high level of generality,"
13 would provide "little check on the ability of the authorities to construct roadblocks for
14 almost any conceivable law enforcement purpose." *Id.* Instead, the Court drew the line at
15 roadblocks designed primarily to serve the general interest in crime control, otherwise the
16 Fourth Amendment would do little to prevent such intrusions from becoming a routine part
17 of American life. *Id.*

18 The Court found no differences between America's intractable drug problem or
19 illegal immigration, preventing drunk driving, or any of the other myriad of "social harms
20 of the first magnitude." *Id.* at 42. The Court rejected the notion that the drug interdiction
21 checkpoint could be justified by legitimate secondary purposes, such as keeping impaired
22 motorists off roadways or immigration, because then authorities would be able to establish
23 checkpoints for virtually any purpose so long as they also included a sobriety check or a
24 question related to citizenship. To limit the overly broad reach of Fourth Amendment
25 exceptions, the Court held that the primary purpose of the checkpoint is determinative of
26 the Fourth Amendment protections. *Id.* at 46-47. If the checkpoint's primary purpose is
27 general law enforcement, the Fourth Amendment's reasonable suspicion standard applies
28 and the suspicionless stop is *per se* unconstitutional. *Id.*

1 1. “Primary Purpose” Constitutional Analysis

2 Plaintiff asks the Court to apply *Edmond* and determine the primary purpose of the
3 SR-86 checkpoint. The Court recognizes that the Ninth Circuit in *United States v. Soto-*
4 *Zuniga*, 837 F.3d 992 (9th Cir. 2016) applied *Edmond* to a border checkpoint stop, but it
5 was a discovery case, not a case addressing the merits of a Fourth Amendment claim. In
6 *Soto-Zuniga*, the defendant argued that the San Clemente border checkpoint was
7 unconstitutional because its immigration purpose was a pretext for general law
8 enforcement. The trial court refused discovery of arrest and search statistics for the
9 checkpoint because this was the checkpoint found to be constitutional in *Martinez-Fuerte*,
10 therefore, the discovery was immaterial and inadmissible at trial. The Ninth Circuit
11 reversed, holding that the requested discovery was material because *Soto-Zuniga* could
12 constitutionally challenge the checkpoint stop; it had been some 40 years since the
13 *Martinez-Fuerte* decision addressing the constitutionality of the San Clement border
14 checkpoint. *Soto-Zuniga* did not, however, answer the merits of the question and relied on
15 rules providing for broad discovery and that documents do not have to be admissible to be
16 discoverable. *Id.*

17 *Soto-Zuniga* stands for the proposition that, even where information is sensitive or
18 ultimately inadmissible, it must be disclosed if the defense makes the requisite showing.
19 *Soto-Zuniga* filed a motion to suppress, placing the constitutionality of the San Clemente
20 checkpoint directly at issue by challenging its primary purpose as pretextual. In the Ninth
21 Circuit, “[w]hether the primary purpose of the checkpoint has evolved from controlling
22 immigration to detecting ‘ordinary criminal wrongdoing,’” is a question that is subject to
23 discovery under Rule 16. *Soto-Zuniga*, 837 F.3d at 1002 (citing *Edmond*, 531 U.S. at 42).
24 Then, with all material evidence on the table, the district court is in a position to assess and
25 decide the motion to suppress. *Id.*

26 The court in *Soto-Zuniga* relied on the dissenting opinion in *United States v.*
27 *Soyland*, 3 F.3d 1312 (9th Cir. 1993). In *Soyland*, the defendants' car was searched at an
28 immigration checkpoint's secondary inspection and agents found drug paraphernalia and

1 small amounts of marijuana. While the majority declined to address “the issue of whether
2 checkpoint officers routinely overstep their authority by conducting pretextual narcotics
3 searches” because it had not been argued below, Judge Kozinski dissented. He voiced the
4 concern that the San Clemente checkpoint, and perhaps others, were violating restrictions
5 on suspicionless searches, *id.* at 1315–20 (Kozinski, J., dissenting), by looking for more
6 than illegal aliens, *id.* at 1316. “If this is true, it subverts the rationale of *Martinez–Fuerte*
7 and turns a legitimate administrative search into a massive violation of the Fourth
8 Amendment.” *Id.*

9 He recommended the majority in *Soyland* remand the case for the trial court to
10 conduct a factual inquiry into “whether the policies, programs, directives and incentives
11 put in place by the government, or any customs and practices that have developed with the
12 government's tacit approval, have turned ... San Clemente into [a] general law enforcement
13 checkpoint[].” *Id.* at 1319 (footnote omitted).

14 Judge Kozinski’s dissenting position in *Soyland*, followed by the majority in *Soto-*
15 *Zuniga*, applies to “the initial seizure—the vehicle stop.” *Soto–Zuniga*, 837 F.3d at 999
16 (relying on *Edmond*, 531 U.S. at 37–38). In the Ninth Circuit, “[t]here is a two-step analysis
17 applicable to Fourth Amendment checkpoint cases.” *United States v. Fraire*, 575 F.3d 929,
18 932–35 (9th Cir. 2009). First, the Court determines whether the primary purpose of the
19 checkpoint was to advance “the general interest in crime control.” *Id.* at 932 (quoting
20 *United States v. Faulkner*, 450 F.3d 466, 470 (9th Cir. 2006) (quoting *Edmond*, 531 U.S. at
21 48)). “If so, then the stop ... is *per se* invalid under the Fourth Amendment.” *Id.* Second, if
22 the checkpoint is not *per se* invalid as a crime control device, then the Court assesses the
23 checkpoints reasonableness under *Martinez–Fuerte* by considering “the gravity of the
24 public concerns served by the seizure, the degree to which the seizure advances the public
25 interest, and the severity of the interference with individual liberty.” *Fraire*, 575 F.3d at
26 933 (quoting *Illinois v. Lidster*, 540 U.S. 419, 427 (2004)).

27 As the Ninth Circuit Court of Appeals has done, this Court looks to *Soyland* and
28 *Fraire*, informed by *Lidster*, to understand the application of the holding in *Edmond* to

1 border checkpoint stops. In *Lidster*, the Supreme Court explained the *Edmond* language as
2 well as its context. The Supreme Court considered a checkpoint stop asking motorists for
3 help in providing information about a crime during which a drunk driver was arrested. The
4 Court explained that, both expressly and in context, the Court in *Edmond* made it clear that
5 the constitutionality of *an information-seeking kind of stop* was not before it. *Lidster*, 540
6 U.S. at 424. Recognizing that *Edmond* describes the law enforcement objective there as a
7 “general interest in crime control,” the Court noted it specified that the phrase “general
8 interest in crime control” does not refer to every “law enforcement” objective. In *Lidster*,
9 the Supreme Court held this language and related general language in *Edmond* is limited
10 to like circumstances and not to quite different circumstances that were not before it in
11 *Edmond*. The Supreme Court held: “*Edmond* refers to the subject matter of its holding as
12 ‘stops justified only by the generalized and ever-present possibility that interrogation and
13 inspection may reveal that any given motorist has committed some crime.’” *Id.* (quoting
14 *Edmond*, at 44 (adding emphasis)). Likewise, the Supreme Court held it would not apply
15 the *Edmond*-type rule of automatic unconstitutionality where the border checkpoint is a
16 brief, information-seeking highway stop. *Id.* at 424-45 427-28 (citing *Martinez-Fuerte*)).

17 Here, with discovery complete, this Court is positioned to assess and decide the
18 merits of Plaintiff’s Fourth Amendment claim that the SR-86 Border Patrol checkpoint
19 stops are unconstitutional.

20 The Court looks first at whether the SR-86 border checkpoint is unconstitutional,
21 *per se*, as a general crime control device. To recap *Edmond*: the City of Indianapolis
22 operated vehicle checkpoints on city streets for the express purpose of discovering and
23 interdicting illegal drugs. *Edmond*, 531 U.S. at 34. The Court held that the checkpoint
24 program violated the Fourth Amendment because the “primary purpose” was to “uncover
25 evidence of ordinary criminal wrongdoing.” *Id.* at 41–42. The Court distinguished two
26 prior cases permitting checkpoints, *Martinez–Fuerte* and *Sitz*, on the grounds that the
27 checkpoints in those cases served purposes other than ordinary crime control. *Id.* at 37–42.
28 The Court explained why the primary purpose of the checkpoints in *Martinez–Fuerte* and

1 *Sitz* were not about detecting ordinary criminal wrongdoing. The Court acknowledged that
2 “[s]ecuring the border and apprehending drunk drivers are, of course, law enforcement
3 activities, and law enforcement officers employ arrests and criminal prosecutions in pursuit
4 of these goals.” *Edmond*, 531 U.S. at 42. However, the checkpoint program in *Sitz* “was
5 clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on
6 the highways, and there was an obvious connection between the imperative of highway
7 safety and the law enforcement practice at issue.” *Id.* at 39. As for *Martinez–Fuerte*, the
8 objective was to “intercept illegal aliens” and “to serve purposes closely related to the
9 problems of policing the border[.]” *Id.* at 37, 41.

10 The Court in *Edmond* recognized that duality of purpose should not trigger a *per se*
11 constitutional violation. Such an overly broad application of the “primary purpose”
12 analysis from *Edmond* would sweep away the recognized *per se* constitutional Fourth
13 Amendment checkpoint exceptions, especially if they prove successful in accomplishing
14 their purposes of reducing illegal immigration or getting drunk drivers to stop driving.
15 Therefore, the Court rejects a “primary purpose” analysis for border checkpoints based on
16 simple mathematical calculations of arrests or events with a tipping point ratio set
17 somewhere between immigration or other general law enforcement, including drug
18 smuggling. It would make no sense to hinge Fourth Amendment protections on swings in
19 criminal activities that shift in response to effective law enforcement strategies.

20 The “primary purpose” analysis for border checkpoints looks at “whether the
21 policies, programs, directives and incentives put in place by the government, or any
22 customs and practices that have developed with the government's tacit approval, have
23 turned the checkpoint into a general law enforcement checkpoint.” *Supra.* at 13 (quoting
24 *Soyland*, 3 F.3d at 1319). The Court defines “general law enforcement purpose” as “stops
25 justified only by the generalized and ever-present possibility that interrogation and
26 inspection may reveal that any given motorist has committed some crime.” *Supra.* at 14
27 (quoting *Lidster*, 540 U.S. at 424). Even *Edmond*, recognized police officers’ ability to act
28

1 appropriately upon information that they properly learn during a stop which is justified by
2 such a lawful primary purpose.

3 2. Border Checkpoints for Crime Control are *per se* Unconstitutional

4 The Court considers the Plaintiff's argument that over a period of four years (2016-
5 2020) arrests related to narcotics have exceeded those related to immigration. (P MPSJ
6 (Doc. 104) at 14.) The Defendant asserts that there were more immigration (257) than
7 narcotic (153) arrests. (Reply (Doc 181) at 2.) These statistics, presented by the Plaintiff,
8 reflect that arrests and events at SR-86 checkpoint were fairly evenly split between
9 immigration and narcotics. The Court basis this conclusion on the arrest data provided by
10 the Plaintiff from 2016 through 2020, which reflects total immigration-related arrests of
11 257 and total narcotic-related arrests of 153, but because some narcotic arrests are also
12 immigration related and there are also other arrests that are not immigration related, the
13 Court considers that these totals reflect 257 immigration related arrests and 284
14 nonimmigration related arrests. *See* (P MPSJ, SOF (Doc. 105) ¶ 10; (P MPSJ, SOF, Ex. 4:
15 Stats at 1-4 (Doc. 106-4)). The statistics construed in favor of the Plaintiff reflect
16 approximately a 50/50 split between 257 immigration related arrests, including those
17 related to narcotics, and 284 other nonimmigration related arrests. *See also* (P MPSJ (Doc.
18 104) at 14 (estimating across four years an average of just 47%).

19 There is no case law suggesting that narcotic smuggling between Mexico and the
20 United States is not a legitimate border security issue. The SR-86 checkpoint was opened
21 in 2008, for the purpose of securing "the Nation's borders against terrorists, smugglers of
22 weapons of terror, other contraband, and illegal aliens." (Fed. DMSJ, SOF (Doc. 141), Ex.
23 I: US BP 2003 Memorandum at 1). "The primary purpose of a checkpoint is to restrict the
24 routes of egress from the border area and thereby create deterrence to the initial illegal
25 entry." *Id.* at 2. In 2003, the Defendant identified its primary objective as being "to inspect
26 vehicular traffic for illegal aliens. *Id.* It is undisputed that the Defendant requires its agents
27 to have reasonable suspicion for any detention that is not related to immigration, including
28 drug smuggling offenses.

1 The Fifth Circuit has determined, post-*Edmund*, that a checkpoint with a primary
2 immigration purpose was constitutional “regardless of whether or not it could also be said
3 to have a secondary programmatic purpose of drug interdiction.” *United States v. Moreno-*
4 *Vargas*, 315 F.3d 489, 491 (5th Cir. 2002). While this case does not provide precedential
5 value, it does constitute persuasive authority. This Fifth Circuit case is not contrary to the
6 law in this Circuit, which has upheld a suspicionless referral to secondary based on
7 *Martinez-Fuerte*, where the primary stop, including a citizenship question, lead to a
8 secondary referral whereat a canine sniff-search provided reasonable suspicion for a
9 narcotic search. In *Barnett*, the court held the defendants failed to offer any affirmative
10 evidence that the first agent’s subjective purpose to refer defendants from primary to
11 secondary inspection was drug-related, and therefore, it was not a pretext case. In the Ninth
12 Circuit, in the absence of evidence of pretext, we need not reflect upon the applicability of
13 *Martinez-Fuerte* to a secondary referral even if it appears that the referral is only (or even
14 partially) drug related. No articulable suspicion was required. *United States v. Barnett*, 935
15 F.2d 178, 181-82 (9th Cir. 1991) (citing *United States v. Watson*, 678 F.2d 765, 771 (9th
16 Cir. 1982) (assuming administrative plan which led to the boarding of the [vessel] was
17 motivated partly by suspicion of drug smuggling and finding stop and search had an
18 independent administrative justification; stop and search did not exceed in scope what was
19 permissible under that administrative justification).

20 The court in *Barnett* expressly noted that “[t]he lack of evidence supporting a
21 referral to secondary inspection is precisely what *Martinez-Fuerte* authorized.⁴ It would
22 set that decision on its head to say that, while agents do not need articulable suspicion to
23 refer for an immigration-related inquiry, they must offer articulable suspicion of
24 immigration-related offenses to demonstrate that they are not referring for another
25 purpose” to avoid a charge of pretext. *Barnett*, 935 F.3d at 181.

26
27 ⁴ In *Martinez-Fuerte*, the “point” agent visually screened the traffic as it was brought
28 to almost a virtual stop, and allowed most motorists to proceed, with a small number of
cases referred to secondary inspection area based on something suspicious about a
particular car or it could also be without any articulable suspicion.” *Martinez-Fuerte*, 428
U.S. at 546-547).

1 In addition to the statistics, which the Plaintiff argues reflects the law enforcement
2 purpose of the checkpoint, the Plaintiff argues Border Patrol now routinely employs law
3 enforcement techniques at the SR-86 checkpoint, such as: dog sniffs, backscatter (X-ray),
4 license-plate readers, active intelligence-gathering, and use of local law enforcement,
5 including programs like Operation Stonegarden. Plaintiff challenges the suspicionless stops
6 at the SR-86 checkpoint because 45 years have passed since the 1976 ruling in *Martinez-*
7 *Fuerte*. During this time, the Immigration and Naturalization Service signed a
8 memorandum of understanding with the Drug Enforcement Administration providing for
9 cross-designation of Border Patrol agents with so-called Title 21 authority to enforce
10 federal drug laws. Plaintiff asserts that after September 11, 2001, Border Patrol underwent
11 significant change, including doubling its workforce and resources and expanding its use
12 of intelligence techniques and investigative activities through collaboration with law
13 enforcement agencies throughout the government. (P MPSJ (Doc. 104) at 6.) Plaintiff
14 argues that the primary purpose of the border checkpoints, including SR-86 checkpoint,
15 has changed too as evinced by the actual law enforcement operations occurring there and
16 it now serves a general law enforcement purpose, not immigration.

17 The Federal Defendant admits to using canine dogs that are trained to detect both
18 narcotics and concealed humans and Border Patrol agents are trained to look both for signs
19 of immigration violations and indications of federal criminal activity of any kind. This
20 duality does not undermine the primary immigration purpose of the SR-86 checkpoint. *See*
21 *Edmond*, 531 U.S. at 45, n. 1 (holding use of a drug-sniffing dog does not annul what is
22 otherwise plainly constitutional), *see also United States v. Place*, 462 U.S. 696, 707 (1983)
23 (the investigative technique of a limited canine sniff by a well-trained narcotics detection
24 dog is less intrusive than other investigative techniques). The Defendant recognizes the law
25 and clarifies that he “has never said dog sniffs themselves violate the Fourth Amendment,
26 [but] rather reflect what the agency is looking for when it stops vehicles, bearing directly
27 on the primary purpose.” (P Reply to MPSJ (Doc. 183) at 8.)

28

1 While there was a time when Border Patrol piloted a program using license-plate
2 readers, it no longer uses them. Currently, the DEA operates a license-plate reader near the
3 checkpoint. The Court assumes it is strategically located to take advantage of slowing
4 traffic passing through the checkpoint. Any license plate readings, either those now being
5 collected by the DEA or those previously collected by Border Patrol during its pilot
6 program, were not and are not used by agents at the checkpoint. Information gleaned from
7 license-plate readers flows to general law enforcement activities, which may include joint
8 task force activities and/or the general sharing of intelligence. *Id.* at 16. “License-plate
9 readers do not implicate the Fourth Amendment because there is no reasonable expectation
10 of privacy in one’s license plate.” *Id.* (citing *United States v. Diaz-Casteneda*, 494 F.3d
11 1146, 1151 (9th Cir. 2007)).

12 The Federal Defendant admits to sharing intelligence and joint task force activities
13 between DEA and Border Patrol, but these activities have nothing to do with the checkpoint
14 operations. There is no allegation that Plaintiff has been subject to any such sharing or
15 taskforce activities. Likewise, the Federal Defendant admits that agents have access to
16 law-enforcement data bases, but agents do not run criminal record checks during a
17 suspicionless checkpoint stop. (Fed. Resp. P MPSJ (Doc. 172) at 6-7, 16-17.) The Plaintiff
18 does not submit legal support for his assertion that using this data “as part of longer-term
19 investigations is in some ways far worse than using it in the moment,” and the Court finds
20 none is needed to consider it as a factor in assessing the purpose of the checkpoints. (P
21 Reply MPSJ (Doc. 183) at 10) (also arguing that search of a criminal data base goes beyond
22 immigration purpose and reflects law enforcement purpose of checkpoint).

23 Finally, the Plaintiff challenges the Stonegarden Operation and other policy and
24 practices by the Pima County Sheriff’s Office and Border Patrol that allows county
25 deputies to be stationed at the checkpoint. Plaintiff alleges that these officers are there
26 solely for law enforcement purposes. The facts construed in Plaintiff’s favor reflect Pima
27 County deputies are readily available at the checkpoint and assist Border Patrol agents by
28 assuming authority over nonimmigration incidents. On April 10, 2017, Deputy Roher, who

1 was already at the checkpoint, came over to the primary inspection area when Plaintiff
2 refused to comply with Agent Frye’s directive to move his car to the secondary area.
3 Deputy Roher instructed the Plaintiff to move to the secondary area because he was
4 blocking the roadway, informed him he was violating state law, and ultimately detained
5 and cited him for the violation.

6 The Plaintiff’s argument is that these operational components at the SR-86
7 checkpoint are law enforcement techniques that are “broadly intrusive.” (P MPSJ (Doc.
8 104) at 9.) “These techniques are much more reflective of a goal of seizing narcotics than
9 of intercepting undocumented people.” *Id.* at 15. The Court does not agree. These
10 operational components reflect nothing more than the dual role played by Border Patrol,
11 approved even in *Edmond*, that police officers have the ability to act appropriately upon
12 information that they properly learn during a stop which is justified by a lawful primary
13 purpose.

14 The Plaintiff’s evidence reflects nothing more because he does not show these law
15 enforcement techniques come into play during the suspicionless stops, either primary or
16 secondary, except for techniques which detect both narcotics and human smuggling
17 simultaneously. The Fourth Amendment does not prevent the use of canine-sniffs or
18 backscatter (X-ray) because the techniques *might* reveal narcotic smuggling instead of
19 human smuggling. A constitutionally legitimate search for one purpose is not corrupted by
20 the potential or actual discovery of contraband which is not within the scope of the purpose
21 of the search. It is the scope of the search which is limited by its purpose. For example, if
22 officers conduct a warrantless search for weapons for the legitimate purpose of officer
23 safety, the Fourth Amendment does not require officers to ignore a bag of cocaine they
24 find during the search as long as the scope of the search which found the cocaine was
25 limited to places where a weapon could be concealed. *See Arizona v. Gant*, 556 U.S. 332,
26 342 (2009) (describing ability to search a vehicle incident to an arrest as a Fourth
27 Amendment exception which is justified by the twin rationales for officer safety or to
28

1 prevent destruction of evidence and search of glove box as being limited by those
2 purposes).

3 3. April 10, 2017: Probable Cause and Arrest for Blocking Traffic

4 On April 10, 2017, Agent Frye referred the Plaintiff straight off to secondary after
5 asking him, “How you doing.” (PC MSJ, SOF, Ex. B: 4/10/17 Arrest TR (Doc. 137-3) at
6 2 ln 17:13:13.) Instead of pulling over to the secondary area, the Plaintiff responded that
7 he “did mind” pulling over. *Id.* at ln 17:13:27. The agent replied that he had not asked if
8 the Plaintiff minded following the directive, he reissued the directive, and added, “Are you
9 a United States citizen?” *Id.* at 17:13:33. The agent asked the Plaintiff, a third time and a
10 fourth time to move to the secondary area, and the fourth time added: “You’re blocking
11 traffic here.” *Id.* at 17:13:39. This back and forth took approximately 26 seconds.

12 Thereafter, an argument ensued. Agent Frye submitted the Plaintiff was blocking
13 the roadway by refusing to move to the secondary area. Plaintiff argued that Agent Frye
14 was blocking the roadway because he, Bressi, was prepared to move through the
15 checkpoint but Agent Frye was not allowing him to do so. For approximately a minute, the
16 Plaintiff argued that he should be allowed to pass through the checkpoint without
17 answering the citizenship question.

18 Eventually, Pima County Sherriff Deputy Roher came over and he too,
19 unsuccessfully, asked the Plaintiff to pull to the secondary area because he was blocking
20 the roadway. Plaintiff refused to either answer the immigration question or to pull to the
21 secondary area. Deputy Roher repeatedly asked the Plaintiff to pull to secondary because
22 he was blocking traffic and warned him that he was subject to arrest for blocking traffic.
23 *Id.* at 17:14:37-17:15:02. Deputy Roher informed the Plaintiff that he was detaining him
24 for blocking the roadway and to pull to secondary. When the Plaintiff continued to argue,
25 Deputy Roher said he could “go” and allowed the Plaintiff to proceed through the
26 checkpoint. *Id.* at 17:15:37. Deputy Roher got in his patrol car, followed the Plaintiff just
27 past the checkpoint, pulled him over, and detained him, including handcuffing him, for
28

1 blocking the roadway. Eventually, after much more argument, the Plaintiff agreed to accept
2 a citation for blocking the roadway rather than be arrested.

3 Plaintiff continues the argument he made to Deputy Roher on April 10, 2017, that
4 he was not obstructing traffic at the checkpoint because he would not be stopped there but
5 for the refusal by Agent Frye to let him go through the checkpoint without answering the
6 citizenship question. Plaintiff argues that Deputy Roher lacked probable cause to arrest him
7 for obstructing traffic at the checkpoint because Deputy Roher knew that the Plaintiff was
8 detained at the primary stop at the direction of Border Patrol. *Id.* at 5 (relying on past
9 detentions and interrogations, including Pima County Deputy McMillan, for blocking
10 roadway, with conclusion being there was no probable cause for arrest because Border
11 Patrol stopped him, and he was not free to go). This argument fails because Deputy Roher
12 knew that the Plaintiff had refused to move to the secondary area when asked to do so by
13 Agent Frye, and more importantly, the Plaintiff also refused to move to the secondary area
14 of the checkpoint after he was told, expressly by Deputy Roher, to move there because he
15 was blocking the roadway.

16 A.R.S. § 13-2906(A)(1) provides: “A person commits obstructing a highway or
17 other public thoroughfare if the person, alone or with other persons, does any of the
18 following: (1) Having no legal privilege to do so, recklessly interferes with the passage of
19 any highway or public thoroughfare by creating an unreasonable inconvenience or hazard.”
20 “Recklessly” means, with respect to a result or to a circumstance described by statute
21 defining an offense, that a person is aware of and consciously disregards a substantial and
22 unjustifiable risk that the result will occur or that the circumstance exists. The risk must be
23 of such a nature and degree that disregard of such risk constitutes a gross deviation from
24 the standard of conduct that a reasonable person would observe in the situation. A.R.S. §
25 13-105(10)(c).

26 Probable cause is defined in terms of facts and circumstances sufficient to warrant
27 a reasonable officer to believe the suspect has been or is committing offense. *Sialoi v. City*
28 *of San Diego*, 823 F.3d 1223, 1232 (9th Cir. 2016). Whether probable cause existed to

1 justify a search or an arrest is “an essentially legal question” that should be determined by
2 the Court. *Actup/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993).

3 The reasonable officer test is an objective assessment, with no inquiry to be made
4 into Deputy Roher’s state of mind; it does not matter if he had any intentions other than
5 enforcing A.R.S. § 13-2906(A)(1). Accordingly, it is for the Court to determine whether a
6 reasonable police officer knowing what officer Roher knew would have believed probable
7 cause existed to detain the Plaintiff for blocking the roadway because he refused to comply
8 with the directive to move to the secondary area.

9 In *Whren v. United States*, 517 U.S. 806 (1996), the Court rejected the argument
10 that something more than probable cause should be considered to establish reasonableness
11 under the Fourth Amendment for traffic code violations. The Plaintiffs suggested the Court
12 should consider whether the officer's conduct deviated materially from usual police
13 practices, so that a reasonable officer in the same circumstances would not have made the
14 stop for the reasons given. Plaintiffs in *Whren* argued for this “objective test” because
15 traffic code violations can be readily found by police and create a “temptation to use traffic
16 stops as a means of investigating other law violations, as to which no probable cause or
17 even articulable suspicion exists.” *Id.* at 810.

18 The Supreme Court found the Plaintiffs’ position was not just unsupported by the
19 law, but contrary to legal precedent. The Supreme Court reported: Outside of the context
20 of inventory or administrative inspection cases, “we have repeatedly held and asserted the
21 contrary.” *Id.* at 812-13 (citing *United States v. Villamonte–Marquez*, 462 U.S. 579, 584,
22 n. 3 (1983) (finding otherwise valid warrantless boarding of a vessel not rendered invalid
23 because U.S. Customs officers accompanied by state policeman and followed informant's
24 tip that marijuana was on vessel; dismissed idea that an ulterior motive might serve to strip
25 the agents of their legal justification); *United States v. Robinson*, 414 U.S. 218, 221, n. 1
26 (1973) (finding traffic-violation arrest not rendered invalid by the fact it was “a mere
27 pretext for a narcotics search”); *Gustafson v. Florida*, 414 U.S. 260, 266 (1973) (valid
28 search incident to arrest for driving automobile without operator’s license, entitled officer

1 to make full search of petitioner's person, and therefore it was ok to open box of cigarettes
2 found in his pocket, which contained unlawful substance, even though officer had no
3 subjective fear of the defendant or that a weapon was inside the cigarette box); *Scott v.*
4 *United States*, 436 U.S. 128, 138 168 (1978) (rejecting contention that wiretap evidence
5 was subject to exclusion because agents failed to comply with statutory requirement that
6 unauthorized acquisitions be minimized because “[s]ubjective intent alone ... does not
7 make otherwise lawful conduct illegal or unconstitutional”). Such precedent “foreclose[d]
8 any argument that the constitutional reasonableness of traffic stops depends on the actual
9 motivations of the individual officers involved.” *Id.* at 813. In other words, a finding of
10 probable cause forecloses any argument of pretext; where there is probable cause, the stop
11 is reasonable under the Fourth Amendment.

12 The District Court in *Whren* found that the officers had probable cause to believe
13 that petitioners had violated the traffic code. That rendered the stop reasonable under the
14 Fourth Amendment, and the evidence thereby discovered admissible. The appellate court
15 had affirmed the convictions. The Supreme Court did the same. *Id.* at 819.

16 This Court does the same and affirms the Pima County Defendants’ assertion that
17 there was probable cause for the Plaintiff’s detention for blocking the roadway. He refused
18 to move his car from the primary area to the secondary area of the checkpoint after being
19 repeatedly directed to move. He did not have any constitutional right to pass through the
20 primary lane of the checkpoint because he is a United States citizen. He did not have a
21 constitutional right to not move to the secondary area when asked to do so by Agent Frye
22 or Deputy Roher. There was probable cause for Deputy Roher to detain the Plaintiff for
23 blocking the roadway.

24 The Court could, but does not need to, rely on this objective standard to conclude
25 that the Plaintiff’s refusal to answer the citizenship question gave Agent Frye reasonable
26 suspicion to believe that an immigration offense was being committed. *See* (FedD Reply
27 (Doc. 4-6) (citing cases finding reasonable suspicion created when a driver refuses to
28 answer questions about his or her citizenship). Plaintiff’s claim that under the First

1 Amendment he had a right to not answer the citizenship question fails for another reason.
2 This is simply not a free speech case. Here, Border Patrol limits the primary stop to a few
3 seconds to ask the citizenship question, and thereafter based on some or mere suspicion
4 related to citizenship, a referral to the secondary area for further investigation. *Supra* at 5
5 (citing P MPSJ SOF: Traffic Check Operations 11/2017 (Doc. 132-5) at 14).

6 It is undisputed that in in every instance, the Plaintiff refused to comply with
7 directives to move to the secondary area when he refused to answer the citizenship question
8 during the primary stop.⁵ “A deliberate decision to disobey a lawful police order is not
9 speech.” (FedD MSJ (Doc. 146) at 19 (citing *Yount v. Los Angeles*, 655 F.3d 1156, 1170
10 (9th Cir. 2011) (refusing officer’s lawful directive is not speech). Additionally, in every
11 instance,⁶ reasonable suspicion existed to refer the Plaintiff to the secondary area for
12 blocking traffic by obstructing the roadway in the primary area. *See* (P MPSJ, Deputy BP
13 Agent in Charge of Tucson Station Operations Terran TR (Doc. 132-1) at 78-84
14 (explaining primary and secondary operations, including need to keep traffic moving).
15 Because the Plaintiff never moved to the secondary area, there is no way to know whether
16 any First Amendment rights would or would not be violated for refusing to answer the
17 citizenship question. The answer to that question depends on the circumstances of whatever
18 transpires, there, which in this case never happened.

19 The Court having concluded that Plaintiff’s detention on April 10, 2017, for
20 blocking the roadway was based on probable cause, the claims against the Pima County
21 Defendants, including Deputy Roher, fail. The related false imprisonment claims brought
22 under the Federal Tort Claims Act (FTCA) against the Federal Defendants, including
23 Agent Frye, fail as well; these claims also involve criminal law enforcement decisions
24

25 _____
26 ⁵ There is no allegation that the Plaintiff has ever been referred to secondary for
27 suspicion of smuggling drugs or humans.

28 ⁶ The Court considers below the reasonableness of the primary stop conducted on
29 April 10, 2017, in the one instance when Agent Frye straight out referred the Plaintiff to
30 the secondary area before the Plaintiff refused to answer the citizenship question and,
31 arguably, without some suspicion regarding his citizenship.

1 which are discretionary in nature and barred by the discretionary-function exception to the
2 waiver of sovereign immunity granted under the FTCA.

3 4. SR-86 Border Patrol Checkpoint's Purpose

4 It remains for the Court to determine whether the presence of Pima County Sheriffs
5 at the checkpoint, as alleged by the Plaintiff, in combination with other law enforcement
6 techniques being used there, have changed the purpose of the checkpoint from immigration
7 to law enforcement.

8 As alleged by the Plaintiff, the Pima County Sheriffs take their direction for any
9 activities at the checkpoint from the federal Border Patrol agents, and Border Patrol agents
10 make the suspicionless stops, which are short, lasting long enough to ask only about
11 citizenship. It is undisputed that all general criminal enforcement undertakings, including
12 drug related actions, are based on reasonable suspicion. As noted above, even *Edmond*,
13 recognized police officers' ability to act appropriately upon information that they properly
14 learn during a stop which is justified by such a lawful primary purpose.

15 The strategic placement of Pima County Sheriffs or DEA agents where traffic is
16 slowing down to pass through the checkpoint may assist officers in discerning whether
17 reasonable suspicion exists related to any criminal conduct, including detention and/or
18 arrest for drug or other nonimmigration offenses, but such observations and the use of
19 license plate readers are less intrusive than a canine search, which has passed the Fourth
20 Amendment sniff test for border checkpoints. *Supra.* at 18.

21 The "purpose" inquiry is made at the programmatic level and does not probe the
22 mind of the individual officers acting at the scene, *Edmond*, at 47, unless there is some
23 affirmative evidence that the point agent, Agent Frye, harbored a subjective purpose to
24 orchestrate referrals to secondary inspection for drug-related offenses, *Barnett*, 935 F.2d at
25 181-82. This is not argued here. There is no evidence that suspicionless secondary referrals
26 are based on the "point" agent's subjective purpose to refer defendants for drug-related law
27 enforcement purposes. This is not a pretext case. Instead, the Plaintiff argues that at the
28

1 programmatic level the immigration purpose is a pretext for effecting law enforcement at
2 these checkpoints.

3 The Court rejects the notion that some mass transformation of purpose related to
4 border checkpoints occurred since 1976 when the Court considered the Fourth Amendment
5 question in *Martinez-Fuerte*. This Court relies on the statements of purpose reflected in
6 government documents from 2003, 2006 and 2016,⁷ which reflect that the purpose of the
7 SR-86 checkpoint at these points in time was border security, including terrorism and both
8 human and narcotic smuggling. In the context of border security, terrorism and smuggling
9 are problems related to immigration to the extent they involve an illegal entry into this
10 country, with the immigration purpose of the border checkpoints being to intercept those
11 who illegally enter the country, including those who smuggle in contraband.

12 The primary stops at SR-86, including the April 10, 2017, stop of the Plaintiff, were
13 within the scope of the checkpoint's immigration purpose. When Plaintiff refused to move
14 to secondary, Agent Frye asked him his citizenship and again asked him to move to
15 secondary because he was blocking the roadway. To the extent the secondary referral of
16 the Plaintiff on April 10, 2017, was related to his refusal to answer the citizenship question,
17 the secondary referral remained within the scope of the stop related to immigration. To the
18 extent the secondary referral was because he was blocking the roadway after being
19 instructed to move to secondary, it was based on reasonable suspicion that Plaintiff was
20 violating a state law.

21 Looking at the facts of this case, as alleged by the Plaintiff, the Court has considered
22 the policies, programs, directives and incentives put in place by the government for SR-86,
23 and the customs and practices, as alleged by the Plaintiff, that have developed there with
24 the government's tacit approval. The Court finds that the SR-86 border checkpoint has not
25 been turned into a general law enforcement checkpoint because the suspicionless stops
26 there are not "justified by a generalized, ever-present, possibility that interrogation and
27

28 ⁷ September 11, 2001, Islamic extremist group al-Qaeda attacked the United States
in New York City and Washington D.C., causing extensive death and destruction and
triggering enormous United States response to combat terrorism.

1 inspection may reveal that any given motorist has committed some crime.” *Supra.* at 14
2 (citing *Lidster*, 540 U.S. at 424). Singularly, and in combination, the alleged law
3 enforcement techniques found at SR-86 do not extend the suspicionless stops at SR-86
4 beyond for the purpose of border security, with the primary purpose being immigration.
5 The checkpoint is not *per se* unconstitutional. Accordingly, the Court turns to *Martinez-*
6 *Fuerte* to determine its reasonableness on the basis of the individual circumstances of this
7 case, and hence its constitutionality. *Lidster*, 540 U.S. at 426.

8 D.

9 Reasonableness of SR-86 Border Patrol Checkpoint

10 If the checkpoint is not *per se* invalid as a crime control device, then the Court
11 assesses the checkpoints reasonableness under *Martinez–Fuerte* by considering ““the
12 gravity of the public concerns served by the seizure, the degree to which the seizure
13 advances the public interest, and the severity of the interference with individual liberty.””
14 *Fraire*, 575 F.3d at 932 (quoting *Illinois v. Lidster*, 540 U.S. 419, 427 (2004)).

15 1. Gravity of the Public Concern

16 “[T]he United States has a substantial interest in controlling the flow of illegal aliens
17 [and] [c]arrying out a program of routine stops for brief questioning at permanent
18 checkpoints that is effective in support of this interest.” *United States v. Vasquez-Guerrero*,
19 554 F.2d 917, 919 (9th Cir. 1977) (citing *Martinez-Fuerte*, 428 U.S. at 556). It is not
20 disputed that illegal immigration remains a serious public interest that has not lessened
21 since the Supreme Court considered the question in *Martinez-Fuerte*. As the events of
22 September 11, 2001, evinced, border security, including immigration, is now more
23 important than ever. In *Edmond*, also a case considering border security checkpoints prior
24 to September 11, the Court noted that it should not be read to affect the validity of border
25 searches or searches in airports and government buildings, where there is a particularly
26 acute special need for such measures to ensure public safety. *Edmond*, 531 U.S. at 47. The
27 Court does not need to determine whether border security is more important now than it
28

1 was in 1976 because it is undisputed that curbing illegal immigration remains a paramount
2 public interest.

3 2. Degree the Checkpoint Advances the Public Interest

4 The Plaintiff challenges the changed degree to which the stops advance the public
5 interest of securing our borders, specifically he argues the checkpoints do not deter illegal
6 immigration.

7 The Court rejects the Plaintiff’s criticism of the location of the SR-86 checkpoint
8 because it is not on a major highway leading away from the border. The Plaintiff argues
9 that *Martinez-Fuerte* only recognized checkpoints located on major highways leading
10 away from the border because such checkpoints would “force smugglers ‘onto less efficient
11 roads that are less heavily travelled, slowing their movement and making them more
12 vulnerable to detection by roving patrols.’” (P MPSJ (Doc. 104) at 19-20 (quoting
13 *Martinez-Fuerte*, at 557)). The Plaintiff argues that SR-86 is not a major highway but is
14 instead a smaller roadway where roving patrols could operate to detect smuggling, and the
15 low number of human smuggling apprehensions on SR-86 does not warrant the
16 intrusiveness of the border checkpoint there. *Id.* at 20.

17 The Court does not agree that *Martinez-Fuerte* is limited by road type, but if such a
18 distinction exists, it does not apply here. The SR-86 border checkpoint is located on the
19 only east-west state route, intersecting with SR 85, approximately, 50 miles north of the
20 Mexico border. (DSOF, Ex. 3: Teran Depo at 34 (Doc. 141-3) at 34). So located, the SR-
21 86 checkpoint intercepts traffic coming north from the border-crossing at Lukeville on SR-
22 85 that turns off to travel east to Tucson. The Plaintiff ignores the fact that the SR-86
23 checkpoint is also strategically located to capture traffic crossing the approximately 63
24 miles of international border between Mexico and the Tohono O’odham Nation. *See* (D
25 Resp. to P MPSJ (Doc. 175) at 4; Controverting SOF (Doc. 162) ¶ 9.) This area is porous
26 and vulnerable to border crime, including illegal immigration crossings involving or not
27 involving smuggled contraband. *Id.* The SR-86 checkpoint is the only checkpoint between
28 the Tohono O’odham reservation and metro Tucson. *Id.* ¶ 10. Geographically, “[w]ithout

1 the checkpoint, anyone who crosses the border illegally within the Tohono O’odham
2 reservation would be able to get into a vehicle close to the border and drive on an
3 unobstructed path to Tucson, and from Tucson, anywhere in the United States.” *Id.*

4 The Plaintiff produces arrest statistics for the SR-86 border checkpoint, which he
5 argues reflect it is more successful at intercepting drug smuggling than human smuggling.
6 The Court in *Fraire*, however, concluded that “the degree to which the seizure advances
7 the public interest” does not need to be supported by empirical data demonstrating
8 effectiveness. *Fraire*, 575 F.3d at 933-34; *see also supra.* at 15 (describing as illogical,
9 hinging Fourth Amendment rights on crime statistics). Instead, the Court in *Fraire* relied
10 on common sense: “We have previously observed that in certain cases effectiveness may
11 be measured ‘by the relationship of the checkpoint to its objective, rather than by any
12 measureable results, or by any results period.’” *Id.* (quoting *Faulkner*, 450 F.3d at 473).
13 Here too, common sense reflects a close relationship between the checkpoint’s border
14 security objective and its location on SR-86. The checkpoints in Southern Arizona force
15 smugglers to walk further north into the United States, giving Border Patrol a better chance
16 to detect them before they get into vehicles. (DMSJ (Doc. 146) at 3); (SOF (Doc. 141) ¶
17 20.) If any of the three checkpoints within the southwestern Tucson region were removed,
18 illegal entrants, including smugglers, would have unobstructed routes to Arizona’s metro
19 areas. Especially, removing the SR-86 checkpoint would leave an unobstructed route from
20 the border to the Tucson metro area. Here, common sense reflects the SR-86 border
21 checkpoint is a reasonably efficient tool to prevent illegal immigration, including
22 intercepting human smuggling.

23 The checkpoint’s location and the primary objective of the stop as reflected by
24 questioning related to citizenship reflects a close connection and rational relationship
25 between the checkpoint and border security, especially immigration.

26 3. Severity of Interference with Individual Liberty

27 The third consideration is “the severity of the interference with individual liberty.”
28 *Faire*, 575 F.3d at 934 (citing *Lidster*, 540 U.S. at 427 (quoting *Brown v. Texas*, 443 U.S.

1 47, 51 (1979)). The Court gauges this factor “by the objective intrusion, measured by the
2 duration of the seizure and the intensity of the investigation, and by the subjective intrusion,
3 measured by the fear and surprise engendered in law-abiding motorists by the nature of the
4 stop.” *Id.* (citing *Faulkner*, 450 F.3d at 472–73).

5 The objective intrusion here is no greater than that approved by the Court in
6 *Martinez-Fuerte*. The contact between drivers and agents is designed to last only a few
7 seconds for the citizenship question(s) to be asked and answered, unless there is a referral
8 to the secondary area. There is no suggestion that drivers wait long periods of time at the
9 checkpoint; the undisputed evidence is that any delay in the short ask and answer agenda
10 being conducted during the primary stop results in a referral to the secondary area of the
11 checkpoint. There is no allegation of delay related to the secondary stops being conducted
12 at the checkpoint. In short, the suspicionless stop at SR-86 border checkpoint falls squarely
13 within the limited time constraints set out in *Martinez-Fuerte*.

14 There is no allegation that the canine sniff prolongs the stop, and the evidence and
15 law is to the contrary. The personal radiation detectors are simply worn by the Border
16 Patrol agent and have no effect on any citizen unless it detects radioactive material. The
17 backscatter (X-ray) device is only used in secondary, if there is reasonable suspicion to
18 believe that a vehicle has a hidden compartment being used to smuggle humans or drugs.
19 The remainder of the alleged intrusive criminal investigative measures, like the license
20 plate readers or criminal record checks, are not related to and have no impact on the
21 suspicionless border-checkpoint stops, which are limited in scope to the stop and brief
22 questioning related to citizenship.

23 There is no evidence related to any secondary-stop conducted by Border Patrol
24 because Plaintiff in every instance refused to comply with secondary referrals. The Plaintiff
25 produced video records for approximately 555 checkpoint incidents. Only one reflected a
26 referral to the secondary area and compliance with the directive to pull over, which was
27 given to him by a Pima County Sheriff’s deputy. In that instance, on March 29, 2013, the
28 Plaintiff pulled through the checkpoint without authorization from agents, who were

1 arguably antagonizing⁸ him by video recording him. It is impossible to hear whether they
2 asked his citizenship because he had his window rolled up and was blaring his horn. Agents
3 had him back-up and asked him to pull over because he was blocking the roadway. He
4 refused until a Pima County Sherriff took over, directed him to pull over, detained him,
5 and cited him for blocking the roadway. (Fed. MSJ (Doc. 146) at 6, 19) (reflecting 18 out
6 of 555 incidents where Plaintiff identified agents as intending to detain him until he
7 answered the citizenship question); Fed. MSJ, SOF (Doc.141) ¶ 63, Ex. N: Video,
8 3/29/2013 (Bates #0222)). It is undisputed that in every instance when the Plaintiff is
9 referred to the secondary area, he refuses and, thereby, blocks the roadway and prevents
10 traffic from moving through the primary area of the checkpoint.

11 Plaintiff argues that it is Border Patrol policy to detain the driver until the citizenship
12 question is answered, which is supported in part by the record that reflects agents will not
13 authorize him to pass through the checkpoint when he refuses to answer the citizenship
14 question, and they instead refer him to the secondary inspection area. There is also evidence
15 that more recently, he is often waived through. (Fed. Reply Re: MSJ (Doc. 181) at 7.)
16 Neither fact is dispositive because it is undisputed that when the Plaintiff refuses to answer
17 the citizenship question “he never moves his car into the secondary inspection area when
18 agents direct him over there.” (Fed. MSJ (Doc. 146) at 6, SOF (Doc. 141) ¶ 49 (citing Ex.
19 D: Bressi Depo at 35:1-5 (Doc. 141-5) at 8.) Plaintiff ignores the fact that when he chooses
20 to not comply with the directive to move over to the secondary area, he blocks the roadway
21 in the primary area.

22 The Court must also consider the reasonableness of the primary stop conducted on
23 April 10, 2017, when Agent Frye straight out referred the Plaintiff to the secondary area
24 before asking a question about citizenship. Arguably,⁹ Agent Frye knew the Plaintiff was

25 ⁸The Court rejects Plaintiff’s retaliation claim because one or two instances out of
26 approximately 555 encounters do not establish a constitutional violation which requires
injunctive relief. *See* (Fed. Reply MSJ (Doc. 181) at 7).

27 ⁹To determine the constitutionality of the suspicionless stops at SR-86, the Court
28 assumes as a matter of fact that Agent Frye and any other agent, who stopped the Plaintiff,
knew the Plaintiff was a United States citizen. The Court makes this assumption, here,
because the facts of this case are limited to determining the constitutionality of the

1 a United States citizen and, therefore, the referral conflicted with Border Patrol procedures
2 that secondary referrals for immigration purposes be based on some or mere suspicion of
3 an immigration violation. *Supra* at 5, 24 (citing PMPSJ SOF: Traffic Check Operations
4 11/2017 (Doc. 132-5) at 14), *see also* (Fed. MSJ, SOF (Doc. 141), Ex. L: Memo 11/8/2012
5 Guidance on Noncompliant Motorists at Checkpoints (explaining referral to secondary
6 lasting approximately five to six minutes is generally reasonable “if agent has concerns
7 about whether motorist or his passengers are legally present in the United States”). The
8 referral on April 10, 2017, to secondary, however, falls squarely under *Martinez-Fuerte* as
9 a constitutional stop for the purpose of conducting the suspicionless immigration stop. The
10 secondary referral also falls squarely within the discretionary-function of a law
11 enforcement officer to exercise his own judgment or choice during an investigation, which
12 this Court finds includes the suspicionless immigration inspection. Accordingly, the
13 discretionary-function exception to liability under the Federal Tort Claims Act applies. *See*
14 (Fed. MSJ (Doc. 140) at 21-23.) This investigatory discretion does not conflict with the
15 nondiscretionary nature of the investigation, i.e., the stop and citizenship question; officer
16 discretion exists over where to stop a driver, primary or secondary, and what questions to
17 ask regarding citizenship. *See* (Fed. Reply MSJ (Doc. 181) at 8).

18 The Court finds minimal objective intrusion at the primary stops, including the April
19 10, 2017, stop, being conducted at the SR-86 border checkpoint, which were all designed
20 to last only the few seconds it takes to ask and answer a citizenship question. Delay beyond
21 these few seconds occurred because the Plaintiff refused to move to the secondary area
22 when he chose to not answer the immigration question in the primary area. Contrary to
23 Plaintiff’s assertion, it is not unconstitutional for agents at a border checkpoint to conduct
24 a suspicionless immigration stop, either in a primary or secondary area, including asking
25 immigration related questions about citizenship. It does not matter whether the checkpoint
26 agent knows the Plaintiff is a United States citizen. As noted above, the Ninth Circuit in

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28 suspicionless stop and brief citizenship question, which the Court finds are constitutional
as a matter of law under *Martinez-Fuerte*. This would, however, be a material question of
fact if the case involved a detention of the Plaintiff beyond the scope of this limited stop.

1 *Barnett*, 935 F.2d at 181-82, concluded that no articulable suspicion is required because a
2 suspicionless referral to secondary inspection is precisely what *Martinez-Fuerte*
3 authorized.

4 The SR-86 checkpoint suspicionless stops were limited to their constitutional scope,
5 which allows for a brief stop for the purpose of determining whether there are any persons
6 in a vehicle, who may not be United States citizens. Under *Martinez-Fuerte*, the stop may
7 be long enough to visually check the vehicle and to ask a citizenship question. *Supra.* at 10
8 (citing *Taylor*, 934 F.2d at 220 (describing border checkpoint stop as reasonable *per se*, so
9 long as the scope remains confined” to determining immigration status; for instance, a few
10 brief questions, production of an identification document, and ““a visual inspection of the
11 vehicle ... limited to what can be seen without a search””) (quoting *Martinez-Fuerte*, 428
12 U.S. at 558, 562). As a matter of law, the suspicionless referral to the secondary area to ask
13 the Plaintiff the citizenship question was constitutional. Based on the undisputed
14 circumstances of the primary stops made in this case, collectively and on April 10, 2017,
15 especially those that included confrontative behavior by the Plaintiff during the primary
16 stop, such as blaring his horn or driving straight through the check point, the referral to the
17 secondary area for immigration purposes was reasonable so that the brief visual inspection
18 and citizenship question could be asked without the primary roadway being blocked.

19 In summary, the Court finds that the Plaintiff was not detained because he refused
20 to answer the citizenship question during the primary stop. He was detained because he
21 was asked to and refused to pull over and stop in the secondary area. The suspicionless
22 referral to secondary was constitutional because it was within the scope of the border
23 checkpoint’s immigration purpose. If the Plaintiff had moved to the secondary area and
24 then refused to answer the citizenship question, there may have been no reasonable
25 suspicion that an immigration crime was being committed to support a detention there. But
26 this is not that case, and there are no circumstances of any such a detention presented to
27 the Court to evaluate. The Plaintiff circumvented the constitutional inquiry by refusing to
28 move to the secondary area where it could be conducted without blocking the primary

1 roadway. The Plaintiff was detained and arrested by Deputy Roher for blocking the
2 roadway based on probable cause because he refused to move to the secondary area and
3 blocked the road in the primary area of the checkpoint.

4 The severity of the subjective intrusion is ““measured by the amount of concern and
5 fright that is generated on the part of lawful travelers.”” *Faire*, 575 F.3d at 934 (quoting
6 *Faulkner*, 450 F.3d at 473). “The subjective intrusion from a checkpoint stop is
7 significantly less than other types of seizures, such as random stops. *Id.* (citing *Martinez–*
8 *Fuerte*, 428 U.S. at 558). The factors for finding the subjective intrusion is minimal set out
9 in *Faire* apply equally here: “the checkpoint was marked in advance announcing it, the
10 agents were uniformed, and all approaching vehicles were stopped.” *Id.* (citing *Lidster*, 540
11 U.S. at 428 (little reason for anxiety or alarm where police stopped all vehicles
12 systematically); *Sitz*, 496 U.S. at 453 (noting the fact that uniformed officers stopped every
13 approaching vehicle as showing a minimal intrusion); *Faulkner*, 450 F.3d at 473–74). The
14 lack of discretion is an important component that limits the subjective intrusion of the stop
15 because it alleviates a driver’s concern that he is being singled out for scrutiny by law
16 enforcement. This factor cuts against the Plaintiff’s constitutional claim that he cannot be
17 stopped and asked about his citizenship because the agents know he is a United States
18 citizen. This raises discretionary concerns that might increase the level of apprehension
19 engendered in law-abiding motorists at the checkpoint. This does not, however, mean that
20 Border Patrol cannot waive him through if the agent is capable of conducting a visual
21 inspection of the interior of the vehicle to determine he is the only person in the vehicle
22 and the agent knows his identity and citizenship.

23 The Court finds that the nondiscretionary nature of the SR-86 border checkpoint
24 stop, combined with the notice given to travelers of the limited nature of the stop, the
25 duration of the primary stop and the limited intensity of the investigation, which included
26 a visual assessment and citizenship question, did not severely interfere with Plaintiff’s
27 individual liberties beyond what is allowed under *Martinez-Fuerte*. The addition of a
28 canine sniff and other less intrusive law enforcement techniques did not increase the

1 intensity of the suspicionless investigation beyond that allowed under *Martinez-Fuerte*. In
2 other words, the severity of the interference with individual liberty resulting from the SR-
3 86 checkpoint stops did not violate the Fourth Amendment.

4 The Court concludes that the gravity of the public interest served by the checkpoint
5 was high, the checkpoint advanced these concerns, and the severity of the interference with
6 individual liberty was minimal.¹⁰ It follows that the SR-86 border checkpoint operations
7 were and are reasonable under the Fourth Amendment.

8 E.

9 Conclusion: Summary Judgment

10 There was no constitutional violation. If there was a constitutional violation, a law
11 enforcement officer is entitled to qualified immunity from liability under 42 U.S.C. §1983,
12 unless his actions violate clearly established law. Law enforcement officers are not required
13 to be perfect. They are only required to act reasonably under the circumstances. Law
14 enforcement officers, “who ‘reasonably but mistakenly concluded that probable cause is
15 present,’” are entitled to qualified immunity. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)
16 (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). Put differently, “cases
17 establish that qualified immunity shields” officers “from suit for damages if ‘a reasonable
18 officer could have believed’” the arrest “‘to be lawful, in light of clearly established law
19 and the information the arresting officers possessed.’” *Hunter*, 502 U.S. at 227 (quoting
20 *Anderson*, 483 U.S. at 641) (brackets omitted). Qualified immunity leaves ample room for
21 mistaken judgments and protects all but the plainly incompetent or those who knowingly
22 violate the law. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

23 Inquiry into whether a constitutional right is clearly established, for the purpose of
24 qualified immunity, must be undertaken in light of the specific context of the case, not as
25 a broad general proposition. *Mueller v. Aufer*, 576 F.3d 979, 994 (9th Cir. 2009). “The
26 protection of qualified immunity applies regardless of whether the government official’s

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28 ¹⁰The constitutional safeguards applicable in particular contexts depend on the
weight of the public interest balanced against the Fourth Amendment interest of the
individual. *Martinez-Fuerte*, 428 U.S. at 555 (citations omitted).

1 error is ‘a mistake of law, a mistake of fact, or a mistake based on mixed questions of law
2 and fact.’” *Pearson v. Callahan*, 555 U.S. 223, 231 (2004) (quoting *Grow v. Romero*, 540
3 U.S. 551, 567 (2004)). Even when there are disputed and not fully developed issues of fact
4 regarding whether any constitutional rights were violated, the Court can still make the
5 determination as to whether the defendants’ alleged conduct violated clearly established
6 law. *Id.* at 239-245.

7 Qualified immunity applies unless every reasonable official would have understood
8 that what he was doing violated a constitutional right. *Ashcroft v. al-Kidd*, 563 U.S. 731,
9 741 (2011). A motion for summary judgment on qualified immunity must be granted
10 unless existing precedent placed the statutory or constitutional question “beyond debate.”
11 *Id.* Accordingly, the Court must grant the Motion for Summary Judgment for Pima County
12 Sheriff Deputy Roher based on qualified immunity because even his arrest of the Plaintiff
13 was without probable cause, it was the type of mistaken judgment covered by qualified
14 immunity.

15 Summary Judgment is appropriate only where there is no genuine issue as to any
16 material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ.
17 P.56(c). It is not for the judge to determine the truth of a matter asserted, weigh the
18 evidence, or determine credibility, but only to determine whether there is a genuine issue
19 for trial. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). The movant carries the
20 burden of showing that there is no genuine issue of material fact, *Celotex Corp. v. Catrett*,
21 477 U.S. 317, 323 (1986); all reasonable doubt as to the existence of a genuine issue of fact
22 should be resolved against the moving party, *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir.
23 1976). Where different inferences can be drawn, summary judgment is inappropriate.
24 *Sankovich v. Life Ins. Co. of North Am.*, 638 F.2d 136, 140 (9th Cir. 1981).

25 Both Defendants seek summary judgment and the Plaintiff seek partial summary
26 judgment. All the parties’ dispositive motions hinge on the constitutionality of the
27 suspicionless stops conducted at the SR-86 border checkpoint, including the stop
28 conducted on April 10, 2017. The parties’ stories do not diverge on the facts. The

1 Defendants admit to using the tactics at SR-86 which the Plaintiff asserts are overly
2 intrusive law enforcement tactics which singularly and together reflect the checkpoint's
3 purpose is general law enforcement, not immigration. The Plaintiff admits he always
4 refuses to move to the secondary area when asked to do so by Border Patrol agents and it
5 is undisputed that he refused to move over for Deputy Roher on April 10, 2017. The inquiry
6 before the Court is a question of law: whether the facts, if construed in favor of the Plaintiff
7 by a trier of fact, could support a finding in favor of the Plaintiff. The standard mirrors that
8 for a directed verdict. *Celotex*, 477 U.S. at 323 (citing *Liberty Lobby*, 477 U.S. at 250). The
9 Court finds that no trier of fact could reasonably find for the Plaintiff because as a matter
10 of law there was no Fourth Amendment violation. Simply put, after thoroughly examining
11 the fully briefed motions and supporting evidence submitted by the parties, the Court finds
12 no material, factual, contentions in dispute which require a taking of evidence, a weighing
13 of evidence and a resolution of a factual dispute by trial. As a matter of law, the Court
14 denies the Plaintiff's Motion for Partial Summary Judgment and grants the Defendants'
15 dispositive motions.

16 **Accordingly,**

17 **IT IS ORDERED** that the Plaintiff's Motion for Partial Summary Judgment (Doc.
18 104) is DENIED.

19 **IT IS FURTHER ORDERED** that the Pima County Defendants' Motion for
20 Summary Judgment (Doc. 135, 136) is GRANTED.

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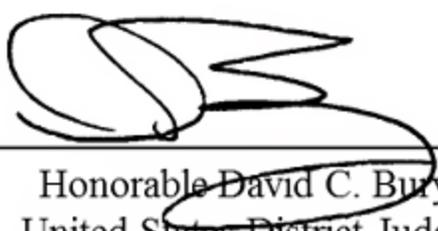
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IT IS FURTHER ORDERED that the Federal Defendants’ Motion for Summary Judgment (Doc. 146) is **GRANTED**.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter Judgment, accordingly.

Dated this 3rd day of January, 2022.



Honorable David C. Bury
United States District Judge