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11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF ARIZONA**

13 Terrence Bressi,
14 Plaintiff,
15 vs.
16 Pima County Board of Supervisors, et. al.,
17 Defendants.

No. 18-CV-00186-DCB

**PARTIAL MOTION TO DISMISS BY
DEFENDANTS NAPIER, PIMA
COUNTY BOARD OF
SUPERVISORS, NANOS, ROHER,
AND KUNZE**

18 Defendants Pima County Sheriff Mark Napier, the Pima County Board of
19 Supervisors (“PCBOS”), former Pima County Sheriff Christopher Nanos, Deputy Pima
20 County Sheriff Ryan Roher, and Deputy Pima County Sheriff Brian Kunze (collectively
21 referred to as the “County defendants”), move to dismiss a portion of Plaintiff Terrence
22 Bressi’s (“Bressi’s”) Second Amended Complaint under Fed. R. Civ. P. 12(b)(1) and (6).

23 Pursuant to LR Civ. 12.1, undersigned counsel certifies that she communicated
24 with Bressi’s counsel in writing about the substance and grounds for this motion and
25 inquired whether Bressi would seek to file an amended complaint as to those parts that
26 might be curable and dismiss those claims that could not be cured by amendment.
Bressi’s counsel disagreed with defense counsel’s analysis and felt an amended
complaint was not needed.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Factual Introduction.**

3 Mr. Bressi has sued the County defendants under 42 U.S.C. § 1983, alleging First
4 and Fourth Amendment violations, and related state-law claims. Bressi's claims stem
5 from Deputy Roher's decision to cite and arrest Bressi on charges of blocking a public
6 thoroughfare in violation of A.R.S. § 13-2906 in April of 2017. *Doc. # 44 at pp.1-47*. The
7 citation and arrest occurred at an area away from the checkpoint. *Doc. # 44 at p.30, ¶*
8 *170*. The "public thoroughfare" at issue is the primary inspection lane at the Border
9 Patrol immigration checkpoint located on State Route 86 in Pima County, Arizona. *Doc.*
10 *# 44 at p.27, ¶ 150*.

11 The gist of Bressi's legal argument is that: a) Bressi has a First Amendment right
12 not to declare his citizenship status at an immigration checkpoint; and b) that because
13 Bressi was exercising that First Amendment right not to speak, Deputy Roher (and all or
14 some of the other County defendants) violated Bressi's First and Fourth Amendment
15 rights when Deputy Roher stepped cited and arrested Bressi on misdemeanor traffic
16 charges at an area away from the primary inspection lane. Essentially, Bressi argues that
17 immigration checkpoints are traffic-enforcement free zones. Consequently, Bressi alleges
18 that his citation and arrest were unlawful, that his citation and arrest were done pursuant
19 to an unconstitutional policy, practice, or custom, that the individual defendants are liable
20 in their official capacities for this conduct, and that he is in danger of being subject to
21 said alleged unlawful behavior in the future and requires declaratory and injunctive relief.

22 **II. Bressi's legal claims subject to this partial dismissal motion.**

23 Bressi's claims against the County defendants that are subject to this partial
24 motion to dismiss are as follows:¹

25 _____
26 ¹ Bressi also alleged a state-law false imprisonment claim against Deputies Roher and
Kunze in Count 7. Count 8 is alleged against the federal defendants only.

- 1 Count 1: First and Fourteenth claims of retaliatory arrest against *all* Pima
2 County defendants (Sheriff Napier, the PCBOS, former Sheriff
3 Nanos, and Deputies Roher and Kunze). *Doc. # 44 at p.33*. Bressi
4 seeks compensatory damages plus declaratory and injunctive relief
5 under this count. *Doc. # 44 at p.35, ¶ 195*.
- 6 Count 2: Fourth and Fourteenth Amendment claims of unlawful seizure at the
7 primary inspection lane at the SR-86 immigration checkpoint against
8 *all* Pima County defendants (Sheriff Napier, the PCBOS, former
9 Sheriff Nanos, and Deputies Roher and Kunze). *Doc. # 44 at p.35*.
10 Bressi seeks compensatory damages plus declaratory and injunctive
11 relief on this count. *Doc. # 44 at p.37, ¶ 207*.
- 12 Count 4: Official capacity *Monell* claim against Sheriff Napier for unlawful
13 policy, practice, or custom for the alleged Fourth Amendment
14 violations at SR-86 checkpoint *Doc. # 44 at p.39*. Bressi seeks
15 compensatory damages only on this count. *Doc. # 44 at p.40, ¶ 221*.
- 16 Count 5: Individual capacity *Monell* claim of failure to train against Sheriff
17 Napier, former Sheriff Nanos, Deputy Kunze, and the PCBOS.
18 *Doc. # 44 at p.41*. Bressi seeks compensatory damages only on this
19 count. *Doc. # 44 at p.42, ¶ 229*.
- 20 Count 6: Individual capacity *Monell* claim of failure to supervise against
21 Sheriff Napier, former Sheriff Nanos, Deputy Kunze, and the
22 PCBOS. *Doc. # 44 at p.41*. Bressi seeks compensatory damages
23 only. *Doc. # 44 at p.42, ¶ 229*.

24 **III. This Court lacks subject matter jurisdiction over the declaratory and
25 injunctive relief claims contained in Counts 1 and 2. Thus, they must be
26 dismissed.**

 The declarative and injunctive claims contained in Counts 1 and 2 (First and
Fourth Amendment claims) must be dismissed because subject-matter jurisdiction is
lacking under Fed. R. Civ. P. 12(b)(1). *See City of Los Angeles v. Lyons*, 461 U.S. 95
(1983) (finding a federal court’s jurisdiction requires the plaintiff to make a threshold
showing of an actual case or controversy). Bressi, as the plaintiff, bears the burden of
proof to show jurisdiction is proper. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61
(1992) (discussing the three elements required for constitutional standing—a
particularized, concrete and actual or imminent injury, a causal connection between the

1 injury and conduct at issue, and a likelihood that a favorable decision will redress the
2 issue).

3 In *Lyons*, the plaintiff sought injunctive relief aimed at preventing the City of Los
4 Angeles from using chokeholds during an arrest. *Lyons*, 461 U.S. at 98. There, the Court
5 required the plaintiff to show for standing purposes that he was likely to be subjected to a
6 chokehold in a future arrest by other officers. *Id.* at 105. Moreover, Mr. Lyons would also
7 have to show that such an encounter was not only likely to reoccur, but that all police
8 officers subjected all citizens to unlawful chokeholds or that the City told all of their
9 officers to engage in such conduct. *Id.* at 105-06. In other words, Lyons would have had
10 to show that he “‘sustained or is immediately in danger of sustaining some direct injury’
11 as the result of the challenged official conduct and the injury or threat of injury must be
12 both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’” *City of Los Angeles v.*
13 *Lyons*, 461 U.S. 95, 101–02 (1983). “Past exposure to illegal conduct does not in itself
14 show a present case or controversy . . . if unaccompanied by any continuing, present
15 adverse effects.” *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974).

16 Bressi has not, and cannot, make this showing. As an initial matter, Bressi has not
17 alleged a sufficient constitutional violation. There is no case that establishes that a
18 plaintiff like Bressi has a constitutional right to decline to answer Border Patrol’s
19 question about his citizenship at an immigration checkpoint. *Martinez-Fuerte v. United*
20 *States*, 428 U.S. 543, 566 (1976) (holding that “[immigration checkpoint] stops for brief
21 questioning routinely conducted at permanent checkpoints are consistent with the Fourth
22 Amendment”), does not making this holding. Nor does *City of Indianapolis v. Edmond*,
23 531 U.S. 32 (2000) (finding internal drug interdiction checkpoints were unlawful).
24 Indeed, the Supreme Court has upheld sobriety checkpoints, *Michigan Dept. of State*
25 *Police v. Sitz*, 496 U.S. 444 (1990), and roadblocks to verify driver’s licenses and
26 registrations are permissible, *Deleware v. Prouse*, 440 U.S. 648, 663 (1979). Moreover,

1 the County defendants been able to locate any case which indicate that deputies are not
2 allowed to enforce traffic laws at immigration checkpoints located on public roadways.
3 Unless Bressi can establish that the conduct complained of amounts to a constitutional
4 violation, there can be no claim for equitable relief.

5 Moreover, Bressi has not alleged that all deputies are likely to unlawfully cite and
6 arrest him every time he cross the immigration checkpoint—even assuming he had a
7 constitutional right to decline to answer such a question. Indeed, the factual allegations of
8 Bressi’s complaint establish the opposite. *See Doc. # 44 at ¶ 70*—wherein Bressi
9 specifically alleges that he has passed through it approximately 419 times since 2005; *see*
10 *also Doc. # 44 at ¶ 84*—wherein Bressi alleges that he has passed through the checkpoint
11 on multiple occasions. Yet, the only incident complained of in this lawsuit is the one
12 interaction with Deputy Roher on April 10, 2017. Admittedly, Bressi states that deputies
13 were called to checkpoint by Border Patrol on two other occasions, but he does not claim
14 he was unlawfully cited or arrest at those times. *Doc. # 44 at p. 21, ¶ 111*. Though he
15 does claim Border Patrol agents—as opposed to the County defendants—have unlawfully
16 seized him. *Doc. # 44 at p. 16, ¶ 85*.

17 Bressi has not alleged that Deputies Roher or Kunze have seized him more than
18 the one time. Instead, Bressi alleges that other motorists have been cited by Deputy Roher
19 and other deputies for a variety of traffic offenses (*Doc. # 44 at ¶¶ 100-109*). But Bressi
20 lacks standing to raise claims for nonparties. Thus, for purposes of his declarative and
21 injunctive relief claims, Bressi cannot establish the requisite standing, even assuming the
22 conduct complained of is unconstitutional.

23 Further, As in Lyons, Bressi has also failed to allege sufficient facts of an unlawful
24 County policy. There, “[t]he Court also held that plaintiffs’ showing at trial of a relatively
25 few instances of violations by individual police officers, without any showing of a
26 deliberate policy on behalf of the named defendants, did not provide a basis for equitable

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1 relief.” *Lyons*, 461 U.S. at 104. Even assuming that Bressi is correct that he had a First
2 Amendment right not provide his citizenship status to Border Patrol agents at the
3 immigration checkpoint on April 10, 2017 (and remain silent indefinitely while traffic
4 backs up behind him), the only policy complained of is that Sheriff Napier, former
5 Sheriff Nanos, and the PCBOS allowed sheriff’s deputies to work shifts at or in the
6 vicinity of the immigration checkpoints. Bressi has insufficient allegations that there was
7 a policy to violate constitutional rights or to cite Bressi in the manner and on the charges
8 he was cited with in April of 2017. Bressi has not alleged that there was a County policy
9 authorizing deputies to arrest all persons who refuse to answer citizenship questions at
10 the SR 86 Border Patrol checkpoint. Rather, Bressi alleges that sheriff’s deputies
11 routinely issues state-law traffic citations to persons who possess lawful immigration
12 status. *Doc. # 44 at p.19, ¶ 101*. And he labels it a “zero tolerance” traffic saturation
13 zone. *Doc. # 44 at p. 16, ¶ 87*. Yet, as set forth above, there is no case law which
14 provides that immigration checkpoints are traffic enforcement free zones.

15 And even though Bressi alleges he has travelled through the checkpoint 419 times
16 (*Doc. # 44 at p.14, ¶ 70*), he alleges that he only had two other interactions on two
17 occasions since 2013 with other sheriff’s deputies—not interactions with Deputies Roher
18 or Kunze. He does not allege that he was arrested on those occasions, nor does he allege
19 that he was cited on the same charges Deputy Roher cited him on. *See e.g., Lyons*, 461
20 U.S. at 108 (“We note that five months elapsed between October 6, 1976, and the filing
21 of the complaint, yet there was no allegation of further unfortunate encounters between
22 Lyons and the police.”). Absent a plaintiff’s ability to show that he is “realistically
23 threatened by a repetition of his experience, then he has not met the requirements for
24 seeking an injunction in federal court, whether the injunction contemplates instructive
25 structural relief or the cessation of a discrete practice.” *Id.* at 109. Further, “[t]he
26

1 speculative nature of [plaintiff’s] claim of future injury requires a finding that this
2 prerequisite of equitable relief has not been fulfilled. *Id.* at 110.

3 Here, Bressi only alleges that the federal defendant seize him every time he
4 crosses the checkpoint. He does not allege the County defendants seize him every time.
5 Indeed, with respect to the April 2017 incident, Bressi alleges a federal defendant
6 detained and seized him and that Deputy Roher then took over the seizure and later cited
7 him.

8 The Ninth Circuit applied the *Lyons*’ equitable remedy analysis in the context of
9 “roving patrol operations” by the border patrol in *Hodgers-Durgin v. de la Vina*. 199 F.3d
10 1037, 1039 (9th Cir. 1999). In that case there were two plaintiffs, Lopez and Hodgers-
11 Durgin. *Id.* Lopez lived in Tucson and travelled regularly on the I-19 to Nogales. *Id.* He
12 described himself as “typically Hispanic.” *Id.* Despite seeing border patrol regularly, he
13 had only ever been stopped once in a ten-year period. *Id.* Hodgers-Durgin drove between
14 Rio Rico and Nogales and had only ever been stopped once in a ten-year period. *Id.* Both
15 plaintiffs had been stopped by border patrol, questioned, and consented to a search of
16 their trunks. *Id.* at 1039–40. Although they were hoping to certify a class, the court did
17 not have to reach the certification issue because it found that the plaintiffs could not meet
18 the perquisites of equitable relief. *Id.* The court noted that “[t]he Supreme Court has
19 repeatedly cautioned that, absent a threat of immediate and irreparable harm, the federal
20 courts should not enjoin a state to conduct its business in a particular way.” *Id.* at 1042.
21 The Ninth Circuit reiterated the *Lyons*’ analysis of federalism, comity, and equity when
22 overseeing state law enforcement. *Id.* The court found that because both plaintiffs had
23 been driving in the area for ten years and only stopped once, it was not sufficiently likely
24 that they would be stopped again. *Id.* at 1044. Thus, equitable relief was not available.

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1 Finally, Bressi's requested relief is vague and only asks for an order prohibiting
2 defendants from "engaging in any of the unconstitutional behaviors." (*Doc. # 44 at p.46,*
3 *lines 14-18*). Such a vague request for relief falls short of establishing the requisite
4 standard for injunctive and declaratory relief under *Lyons*. Bressi has not, and indeed
5 cannot, allege that the County or Sheriff have policies of requiring every person who
6 crosses the Border Patrol checkpoint and declines to answer the citizenship question—
7 even assuming a constitutional right exists not to answer that question. Accordingly, this
8 Court should dismiss Bressi's claims for declarative and injunctive relief requested in
9 Counts 1 and 2.

10 **IV. Dismissal of the compensatory damages in Count 1 (First and Fourteenth**
11 **Amendment Retaliatory arrest claim) is required as to as to all individual**
12 **defendants and the PCBOS for failure to state a claim.**

13 Bressi cannot show that he has a constitutional right to remain silent at a Border
14 Patrol immigration checkpoint and not move his vehicle out of the primary inspection
15 lane. Thus, Bressi cannot show that Deputies Roher and Kunze alleged conduct in April
16 of 2017 constituted a constitutional violation, much less that the alleged conduct violated
17 clearly-established law. *See Nieves v. Bartlett*, ___ U.S. ___, 139 S.Ct. 1715 (2019)
18 (holding that probable cause for an arrest defeats a retaliatory arrest claim). Without a
19 showing of a constitutional injury or that the conduct violates clearly established law,
20 qualified immunity applies and operates as a bar to the compensatory damages claim
21 against each individual defendant, including Sheriff Napier, former Sheriff Nanos, and
22 Deputies Roher and Kunze. *Id.*

23 Moreover, nowhere in his 47 page Second Amended Complaint does Mr. Bressi
24 allege sufficient personal participation to impose liability on Sheriff Napier, former
25 Sheriff Nanos, or the PCBOS. Thus, at a minimum, dismissal of those defendants as to
26 Count 1 is required.

1 **V. Count 4’s official-capacity claim against Sheriff Napier should be dismissed**
 2 **because the PBCOS is a defendant to this action. Thus, the inclusion of**
 3 **Sheriff Napier is redundant.**

4 Dismissal of Sheriff Napier as to Count 4’s official-capacity claim is proper
 5 because an official-capacity claim is just another way of pleading a *Monell* claim against
 6 a governmental entity. Thus, Mr. Bressi’s decision to name the PCBOS as a defendant in
 7 this lawsuit makes the official-capacity claim against Sheriff Napier redundant. *See Ctr.*
 8 *for Bio-Ethical Reform, Inc. v. Los Angeles Cty. Sheriff Dep’t*, 533 F.3d 780, 799 (9th
 9 Cir. 2008).

10 **VI. Dismissal of Counts 5 and 6 is proper as to all Defendants because they fail to**
 11 **state a claim under Rule 12(b)(6).**

12 Dismissal of Counts 5 and 6—the individual-capacity failure to train and failure to
 13 supervise *Monell* claims against Sheriff Napier, former Sheriff Nanos, Deputy Kunze,
 14 and the PCBOS—is required for failure to state a claim. Such claims requiring a showing
 15 of personal participation, plus “[a] pattern of similar constitutional violations by
 16 untrained employees” as to all the defendants. *See e.g. Starr v. Baca*, 652 F.3d 1202,
 17 1208 (9th Cir. 2011) (requiring personal involvement in the constitutional violation or a
 18 “sufficient causal connection between the supervisor’s wrongful conduct and the
 19 constitutional violation”); *see also Connick v. Thompson*, 563 U.S. 51, 62 (2011)
 20 (discussing the standard of failure to train and supervise claims). Other than his own
 21 incident with Deputies Roher and Kunze, Bressi has not alleged the required pattern of
 22 constitutional violations. Nor has he shown a constitutional violation or a violation of
 23 clearly-established law. Thus, qualified immunity applies.

24 Further, § 1983 failure to train and supervise claims are typically alleged as
 25 official capacity liability claims against the municipality. Such claims, when so alleged,
 26 seek to impose liability on the governmental entity and generally require proof of
 deliberate indifference. Here, however, Bressi has alleged failure to train and supervise as

1 individual capacity claims (though it is unclear how the PCBOS collectively could be
2 liable on an individual capacity claim).

3 To the extent Bressi meant to allege Counts 5 and 6 as *Monell*, official-capacity
4 claims of failure to train and supervise, Bressi only makes conclusory allegations about a
5 pattern of similar constitutional violations. He has failed to allege the facts necessary for
6 the Court to infer that any other constitutional violations occurred even if one assumes
7 that his arrest and citation on August 10, 2017 amounted to a constitutional violation. A
8 single constitutional violation will not suffice to impose § 1983 *Monell* liability for
9 failure to train or supervise. *See e.g. Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24
10 (finding that more than one incident is required to impose municipal liability in order for
11 the plaintiff to establish “both the requisite fault . . . and causal connection between the
12 ‘policy’ and the constitutional deprivation”); *see also Davis v. City of Ellensburg*, 869
13 F.2d 1230, 1233-34 (9th Cir. 1989) (stating that “[a] single incident of unconstitutional
14 action by a non-policymaking employee is insufficient to prove a municipal policy or
15 custom”). Accordingly, this is an independent basis on which to dismiss Counts 5 and 6
16 as to Sheriff Napier, former Sheriff Nanos, Deputy Kunze, and the PCBOS.

17 **VII. Dismissal of Former Sheriff Nanos is required because the complaint fails to**
18 **state a claim under Rule 12(b)(6) given that Nanos stopped being the Sheriff**
19 **as of December 31, 2016.**

20 In Counts 5 and 6, Bressi has alleged individual-capacity claims against former
21 Sheriff Nanos. In addition to the grounds set forth in Section V, *supra*, these counts fail to
22 state a claim against former Sheriff Nanos for other reasons.

23 First, Bressi has not established that he has a constitutional right to be free from
24 arrest at immigration checkpoints. Thus, qualified immunity applies.

25 Second, as set forth in his complaint, the conduct complained of occurred on April
26 10, 2017. As Bressi alleged, Nanos stopped being the Pima County Sheriff on December
31 2016. *Doc. # 44 at p.4, ¶ 16*. Accordingly, none of the factual allegations tie the

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1 alleged constitutional violation by Deputy Roher that occurred on April 10, 2017 to any
2 personal participation by former Sheriff Nanos prior to December 2016 for purposes of
3 this individual capacity claim. Thus, Bressi's Counts 5 and 6 fail to state a claim against
4 former Sheriff Nanos. Indeed, Nanos cannot be said to have failed to supervise Deputies
5 Roher and Kunze on April 10, 2017, because Nanos was not the sheriff at that time. Thus,
6 this is an independent basis on which to dismiss Count 6 as to former Sheriff Nanos.

7 Third, Bressi has failed to sufficiently allege facts from which the Court could
8 infer the requisite personal participation and a causal connection between former Sheriff
9 Nanos' acts as sheriff and the alleged constitutional violation suffered by Bressi on April
10 10, 2017. *See Starr*, 652 F.3d at 1208. Accordingly, this is yet another reason to dismiss
11 former Sheriff Nanos from Counts 5 and 6.

12 CONCLUSION

13 For all the foregoing reasons, the County defendants respectfully request that the
14 Court issue an Order granting their partial motion to dismiss as to the injunctive and
15 declaratory relief set forth in Counts 1 and 2, the compensatory damages claim set forth
16 in Count 1, the *Monell* claim against Sheriff Napier in Count 4 because the PCBOS is a
17 defendant in this action, and the individual-capacity claims alleging failure to train and
18 supervise claims set forth in Counts 5 and 6. The County defendants further request that
19 the dismissal be given without leave to amend based on Bressi's unwillingness to file an
20 amended complaint prior to the filing of this motion.

21
22 RESPECTFULLY SUBMITTED/ DATED June 25, 2019.

23 BARBARA LAWALL
24 PIMA COUNTY ATTORNEY

25 By Nancy J. Davis
26 Nancy J. Davis
Deputy County Attorney

LR CIV 12.1 CERTIFICATION OF COUNSEL

1
2 I, Nancy J. Davis, do hereby certify and avow under penalty of perjury that I
3 contacted counsel for Plaintiff Bressi about the issues I felt existed with his current
4 complaint and that Plaintiff's counsel stated he disagreed with my analysis and would not
5 be filing an amended complaint.

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7 By Nancy J. Davis
Nancy J. Davis

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CERTIFICATE OF SERVICE

I hereby certify that on Tuesday, June 25, 2019, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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