No. _____

In The
Supreme Court of the United States

STEPHEN A. TANNER,

Petitioner,

v.

IDAHO DEPARTMENT OF FISH AND GAME DIRECTOR ED SCHRIEVER, VIRGIL MOORE; LUCAS SWANSON; JOSH STANLEY; BRIAN JOHNSON; and WILLIE COWELL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Idaho Department of Fish and Game (IFG) is part of the executive branch of the State of Idaho and is tasked with the duty to manage the wildlife of Idaho. (Idaho Code (I.C.) § 36-103) The Idaho Legislature authorized the use of game check stations stopping fishermen, hunters and trappers to aid in wildlife management. (I.C. § 36-1201) From this the Director of the IFG has established policies expanding the law by authorizing the stopping of All traffic, i.e., roadblocks and "rules for compliance for the public."

The Questions Presented are:

1. Whether the Director and Officers of the State of Idaho Department of Fish and Game violate the Separation of Powers doctrine when implementing roadblocks for game check station purposes.

2. Whether game check station roadblocks implemented by the Director and Officers of the Idaho Department of Fish and Game violate the Fourth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS

Petitioner Steve Tanner was the Plaintiff in the U.S. District Court and the Appellant in the Ninth Circuit Court of Appeals.

Respondents Idaho Department of Fish and Game Director Ed Schriever, Virgil Moore (IFG Director retried); Lucas Swanson, Josh Stanley, Brian Johnson, (are Idaho Department of Fish and Game officers); and Willie Cowell. (City of Bonners Ferry, Idaho Police officer) were Defendants in the District Court and Appellees in the Ninth Circuit.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

Tanner v. Idaho Department of Fish and Game, et al.; No. 20-35886. June 14, 2022 Ninth Circuit Order Denying petition for panel rehearing and rehearing en banc. Doc. 56.

Tanner v. Idaho Department of Fish and Game, et al.; No. 20-35886. April 26, 2022 Ninth Circuit Memorandum affirming the District Court. Doc. 52-1.

Tanner v. Idaho Department of Fish and Game, et al.; U.S. Idaho District Court No. 18-cv-00456. September 10, 2020 the District Court entered Judgment in favor of the Defendants closing the case. Doc. 104.

STATEMENT OF RELATED PROCEEDINGS – Continued

Tanner v. Idaho Department of Fish and Game, et al.; U.S. Idaho District Court No. 18-cv-00456. September 9, 2020 Summary Judgment was entered in favor of the Idaho fish and game, et al.; dismissing this case. Doc. 103.

Tanner v. Idaho Department of Fish and Game, et al.; No. 2:18-cv-00456 U.S. District Court June 17, 2019 ordered the title of the suit changed from *Tanner v. Cowell, et al.*; to reflect the original title filed by the Plaintiff. Doc. 37.

Tanner v. Cowell, et al.; No. 19-35854. May 12, 2020 the Ninth Circuit Court denied Tanners Petition for panel rehearing closing case 19-35854. Doc. 23.

Tanner v. Cowell, et al.; No. 19-35854. February 7, 2020 the Ninth Circuit affirmed the District Court and denied Tanner's requested injunction. Doc. 21-1.

Tanner v. Cowell, et al.; No. 2:18-cv-00456 DCN United States Federal Court for the District of Idaho: October 17, 2018 this case was removed from State of Idaho Court by defendant Cowell. Doc. 1.

Tanner v. Idaho Department of Fish and Game, et al.; First Judicial District of the State of Idaho, In and For the County of Boundary, No. CV11-18-455. Filed September 24, 2018 and is found U.S. District Court 2:18-CV-00456 Doc. 1-3.

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INTRODUCTION

This case addresses the Separation of Powers doctrine and the Fourth and Fourteenth Amendments' rights related to the use of roadblocks for wildlife game check stations.

The Petitioner challenges the constitutionality of the Executive Branch of the State of Idaho, specifically the Idaho Department of Fish and Game (IFG) Director and Officers to implement roadblocks beyond the legislative authority, violating the Separation of Powers doctrine of the United States Constitution and the State of Idaho Constitution.

Secondly the Director and Officers of the IFG utilize roadblocks primarily for enforcing fish and game laws and regulations.

In *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000), the Supreme Court set limits on the permissible purposes of roadblocks on open highways, holding that outside of border patrol and purposes directly related to roadway safety, roadblocks generally violate the Fourth Amendment. It held that if the primary purpose of a roadblock is crime control, beyond roadway safety or border patrols, it is unconstitutional.

The IFG check station Roadblocks are not for the purpose of border patrol enforcement or roadway safety.

> The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants

> constitute a "seizure" within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-558 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); cf. *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

Roadblocks have long been a tool of oppressive government regimes and their misuse is not lite and transient. This Court has not directly addressed the constitutionality of fish and game check station roadblocks. The constitutionality of the Idaho Department of Fish and Game use of roadblocks is questioned.

The facts related to the operation of these roadblocks is documented and not disputed and this case is appropriate for a WRIT OF CERTIORARI.

OPINIONS BELOW

Ninth Circuit Order Denying Petition for panel rehearing and rehearing en banc, is in App. 52 and found on Pacer, Case: 20-35886, 06/14/2022, ID: 12470543, DktEntry: 56.

Ninth Circuit Order not for publication, Granting Motion to extend time to file petition for Panel Rehearing and Rehearing En Banc, is in App. 51 and found on Pacer, Case: 20-35886, 05/04/2022, ID: 12438459, DktEntry: 54.

Ninth Circuit Memorandum, not for publication Memorandum Affirming the District Court Decision

and Order is in App. 1-3 and found on Pacer, Case: 20-35886, 04/26/2022, ID: 12431243, DktEntry: 52-1.

U.S. District Court, District of Idaho, Judgment entered in favor of the Defendants and the case closed is found in App. 50 and is found on Pacer, Case: 2:18-cv-00456-DCN Doc. 104 Filed 09/10/20.

U.S. District Court, District of Idaho, Memorandum Decision and Order Granting the Defendants Motion for Summary Judgment and Dismissing the case in favor of the Idaho Fish and Game, et al.; is in App. 4-49 and is found on Pacer, Case: 2:18-cv-00456-DCN Doc. 103 Filed 09/09/20.

Ninth Circuit Order Denying Petition for panel rehearing, is found on Pacer, Case: 19-35854, 05/12/2020, ID: 11687893, DktEntry: 23.

U.S. District Court, District of Idaho, Memorandum Decision and Order Granting Plaintiffs Motion for Second Amended Complaint, adding Ed Schiever as the new IFG Director and correcting clerical errors, is found on Pacer, Case: 2:18-cv-00456-DCN Doc. 81 Filed 02/14/20. (1-ER-42-49).

Plaintiff's Second Amended Complaint is in App. 62-67 and is found on Pacer, Case: 2:18-cv-00456-DCN Doc. 66 Filed 11/29/19.

Ninth Circuit Court denied Tanner's Petition for panel rehearing closing case 19-35854 and is found on Pacer, Case: 19-35854, 05/12/2020, ID: 11687893, DktEntry: 23.

Ninth Circuit Memorandum, not for publication, Affirmed the District court and denied Tanner's request for an injunction, is found on Pacer, Case: 19-35854, 02/07/2020, ID: 11589466, DktEntry: 21-1.

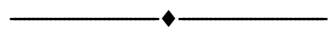
Ninth Circuit Order extending time to file opening brief for a preliminary injunction appeal, is found on Pacer, Case: 19-35854, 11/18/2019, ID: 11502060, DktEntry: 9.

U.S. District Court, District of Idaho Order Denying a Preliminary Injunction is found on Pacer, Case: 2:18-cv-00456-DCN Doc. 50 Filed 10/03/2019.

U.S. District Court, District of Idaho, Order Granting Plaintiffs Motion to clerical change of heading of the case, *Tanner v. Idaho Department of Fish and Game, et al.*; and is found on Pacer, Case: 2:18-cv-00456-DCN Doc. 37 Filed 06/17/19.

U.S. District Court, *Tanner v. Cowell, et al.*; No. 2:18-cv-00456 DCN. October 17, 2018 the case was removed from the State of Idaho District Court to the U.S. District Court for the District of Idaho by defendant Cowell; and is found on Pacer, Case: 2:18-cv-000456 DCN Doc. 1 Filed 10/17/18.

First Judicial District of the State of Idaho, In and For the County of Boundary, *Tanner v. Idaho Department of Fish and Game, et al.*; No. CV11-18-455. Filed September 24, 2018; and is found on Pacer, Case: 2:18-cv-00456-DCN Doc. 1-3 Filed 10/17/18.



JURISDICTION

The Ninth Circuit filed its Memorandum April 26, 2022, Case No. 20-35886. June 14, 2022 the Court denied Tanner's timely rehearing petition and petition en banc. This Court has jurisdiction under 28 U.S.C. § 1254(1).

The Ninth Circuit had jurisdiction as the District Court's Order Granting Defendants Motion for Summary Judgment in favor of the Defendants (District Court Doc. 103, 104; Ninth Cir. Case No: 20-35886, 1-ER-1-41) and closing this case is an appealable decision under 28 U.S.C. § 1291.

The U.S. District Court case No. 2:18-cv-00456 had jurisdiction as the violations arose under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. Supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are included in the Appendix.

STATEMENT OF THE CASE

A. Factual Background.

The Idaho Department of Fish and Game (IFG) is part of the Executive Branch of the State of Idaho and is tasked with the duty to manage the wildlife of Idaho. (Idaho Code (I.C.) § 36-103) The Idaho Legislature authorized the use of game check stations stopping fishermen, hunters and trappers to aid in wildlife management. (I.C. § 36-1201) From this the Director of the IFG has established policies authorizing the stopping of All traffic, i.e., roadblocks and "rules for compliance for the public." (4-ER-795 ¶ 42; 785 ¶ 42; App. 44) (3-ER-459-514) (2-ER-503 ¶ B, 490 ¶ B, 475 ¶ C, 468, 461).

The IFG operates the two types of check stations, Wildlife Management Check Stations and Enforcement Check Stations. Management stations stop only sportsman and are staffed by biologists, primarily gathering data aiding in wildlife management. Impromptu enforcement check stations stop all vehicles and may divert sportsman aside to answer additional questions. These enforcement check stations may be operated at any time of day or night and are intended to enforce Idaho wildlife laws and orders.[1] (3-ER-346 ¶ 24-347 ¶ 25).

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[1] https://idfg.idaho.gov/press/all-hunters-and-anglers-must-stop-check-stations.

https://idfg.idaho.gov/press/all-stop-check-stations.

https://idfg.idaho.gov/blog/2017/10/what-expect-check-station.

Three times since 2010, Tanner has encountered these check points, and each time, he has been either stopped or attempted to be stopped by the IFG. Each time Tanner has reported the conduct of Idaho fish and game at these check points to the Boundary County Sherriff, the IFG, Idaho Governor, Idaho state representatives, and others. (2-ER-171-174 ¶ 142-158) (2-ER-236-268; ER-132-133 ¶ 21-29) (2-ER-121 ¶ 13a-i) (4-ER-630 ¶ 23) (App. 62-77; Document is found on Pacer, Case: 2:18-cv-00456-DCN Doc. 66 Filed 11/29/19) (App. 68 ¶ 45-48) (4-ER-795 ¶ 43-46).

November 18, 2017, about 4:20 p.m. Tanner, a non-sportsman driving south on Meadow Creek Road, Boundary County, Idaho encountered what he knew was an IFG game check station stopping all southbound traffic. (4-ER-792 ¶ 8-15; 782-783 ¶ 8-15) (App. 64 ¶ 10-17) (2-ER-209-210 ¶ 75-77; p. 162 ¶ 34, 35, 39, 40) (4-ER-749-751).

The check station was located on a curved section of the roadway approximately 2 miles from Tanner's residence. (2-ER-217 ¶ 13; 4-ER-456) The stop point was in the roadway and had reflective signs (24" X 30") at 300 and 600 feet prior to the check point stating: "SLOW Idaho Dept Fish and Game CHECK STATION." (3-ER-452-456) Tanner rounded the corner approaching the check point and a flashing blue light was activated for about 3 seconds and then turned off**.** (2-ER-218, 219 ¶ 15-22) A reflective (24" X 30") ground mounted stop sign was on the roadway edge with no one directing traffic. (3-ER-414 ¶ 18-415 ¶ 1) As a vehicle was stopped in the south bound side of the

roadway, Tanner saw no stop sign and proceeded, at about 15 miles per hour, around the vehicle in his lane and continued south. (3-ER-376-384 ¶ 11) (2-ER-138-139 ¶ 66-80) (3-ER-321 ¶ 25).

The check point was staffed by IFG officers Stanley, Swanson, and Johnson, "dressed in full uniform" and "operated from 2:41 p.m. to 6:00 p.m. (4:01 sunset) – a time when we (officers) believed hunters would be returning from their hunts." "The Check station was operated in the same manner that I [District Officer Stanley] conducted every "all stop" check station." Vehicles were stopped and the occupants questioned concerning hunting and the non-hunters were allowed to proceed. (about 15 seconds delay) The hunters were stopped only long enough to verify licenses and "the harvested game was inspected for proper tagging." "The check station resulted in the detection of a violation of Idaho's fish and game laws-a hunter killed a deer without the required tag." (App. 89-91, also found at 4-ER-745-747).

With Tanner not stopping, Officers Swanson and Stanley followed in a patrol vehicle pulling up behind him about 1½ miles down the road where the posted speed limit was 25 MPH. Tanner drove under the speed limit as the officers followed for about 2½ miles with activated overhead lights, intermittent siren and no headlights on. (2-ER-139 ¶ 80-145) (3-ER-416-418) Tanner stopped at the Three Mile Gas Station. Swanson driving, started audio recording the incident as they approached the gas station. (4-ER-626-627 ¶ 2,3).

> DISPATCH: returning on a white F-350 to a Steve Tanner, 489 Meadow Creek Road. . . .
>
> SWANSON: Background, constitutionalist. He doesn't think we're legally allowed to stop him at a check station.
>
> STANLEY: Okay. What – so, I mean, we're on high alert here.
>
> SWANSON: Yeah. Absolutely. (4-ER-586 ¶ 8-24).

Stopping under the gas station's well-lighted area, Tanner got out in clear view. Swanson called Tanner by his first name "Steve" and never questioned him about hunting. (2-ER-224 ¶ 48,49) (2-ER-231 ¶ 98-100) (4-ER-587-588) Stanley, stood ready with a chambered AR-15 and ordered Tanner's arrest. Tanner was arrested for failing to stop at check station and turned over to the Bonners Ferry Police Officer Cowell who had just arrived. Cowell frisked Tanner (4-ER-589 ¶ 17 p. 597) (2-ER-142 ¶ 106) and belted him into the patrol vehicle. Cowell then conferred with Stanley and Swanson, leaving Tanner belted in for about 10 minutes. (2-ER-142-143 ¶ 107-110) (2-ER-151 ¶ 52,53) (4-ER-626-627 ¶ 2,3,4,5,6) [Police Video (PV); Police Audio (PA) Thumb Drive].

Cowell returned with camera on, released and uncuffed Tanner who was in pain from his shoulder and wrists. Tanner showed the officers the marks in his wrists, Cowell confirmed. Cowell started interrogation: "All right. Do you understand why you were stopped?" "Why they pulled you over?" "Why they were behind

you with lights and sirens on?" Tanner exercised his right to remain silent and claimed his right to an attorney. (4-ER-613 ¶ 9 p. 615) Cowell then altered his line of questioning and started a DUI investigation. Cowell threatened to arrest Tanner for failing to answer DUI questions, "if it does not go though as a DUI, it will be an obstructing" declaring he [Tanner] was "obstructing my duties as a law enforcement officer as a – as a law enforcement officer by not conducting a DUI investigation." (4-ER-614).

Tanner answered no more questions; Cowell handcuffed and again placed Tanner in his vehicle. (2-ER-144-145 ¶ 112-121) (2-ER-111 p. 114) Although Cowell threatened a DWI and informed Tanner, he had obstructed his duty, Cowell brought no formal charges.

Tanner was arrested for about 45 minutes, cited for violating I.C. § 36-1201 failing to stop at a check station, and I.C. § 49-1401 attempting to elude a police officer, and released. (4-ER-749-751) (4-ER-794-795 ¶ 36-40; 784-785 ¶ 36-40; App. 67-68 ¶ 38-42) These changes were bought in First Judicial District Court of the State of Idaho. The Pretrial Conference of January 11, 2018 the Magistrate found no probable cause for Idaho Code § 36-1201 and the charges and case were dismissed. (App. 79-88 also found at 4-ER-618-624) (4-ER-628 ¶ 7).

B. Procedural History.

9/24/2018 Tanner filed a verified compliant against the Idaho Department of Fish and Game, et al.; in the

First Judicial District of the State of Idaho for Declaratory Judgment, Injunctive Relief and Request for Damages. Case No. CV11-18-455. (U.S. District Court 2:18-CV-00456 Doc. 1-3).

10/17/ 2018 the case was removed from the State of Idaho District Court to the U.S. District Court for the District of Idaho by defendant Cowell and titled *Tanner v. Cowell, et al*.; Case no: 2:18-CV-00456 DCN. (U.S. District Court 2:18-CV-00456 Dkt. 01).

11/20/2018 Tanner in an effort to meet federal standards filed an Amended Verified Complaint for Declaratory Judgment, injunctive Relief and Request for Damages against Defendants; Idaho Department of Fish and Game Director Virgil Moore, Josh Stanley, Lucas Swanson, Brian Johnson; and Willie Cowell. (4-ER-790-803; U.S. District Court 2:18-CV-00456 Dkt. 4).

12/18/2018 Tanner Motioned for a more Definite Statement. Doc. 11.

1/24/2019 Tanner filed a Motion for Declaratory Judgment and injunctive relief.

1/30/2019 the District Court denied Tanner's Motioned for a more Definite Statement. Doc. 17.

3/26/2019 The District Court denied without prejudice Tanner's Motion for Declaratory Judgment and injunctive relief. Doc. 27.

4/29/2019 Tanner filed a Motion for Declaratory Judgment and injunctive relief. Doc. 30.

6/17/2019 The District Court Granted Plaintiff's Motion to clerical change of heading of the case to the original heading: *Tanner v. Idaho Department of Fish and Game, et al.*; and is found on Pacer, Case: 2:18-cv-00456-DCN Doc. 37 Filed 06/17/19.

10/3/2019 the District Court denied Tanner's request for a preliminary injunction to restrain the IFG use of roadblocks and is found on Pacer, Case: 2:18-cv-00456-DCN Doc. 50 Filed 10/03/2019.

10/9/2019 Tanner filed a timely appeal to this interlocutory decision under 28 U.S.C. § 1292(a)(1). Case No.: 19-35854, *Tanner v. Cowell, et al.*

11/18/2019 the Ninth Circuit Order extend time to file opening brief for a preliminary injunction appeal, is found on Pacer, Case: 19-35854, 11/18/2019, ID: 11502060, DktEntry: 9.

2/7/2020 the Ninth Circuit denied Tanner's request to issue an injunction and is found on Pacer, Case: 19-35854, 02/07/2020, ID: 11589466, DktEntry: 21-1.

2/14/20 the U.S. District Court, District of Idaho, Memorandum Decision and Order Granting Plaintiff's Motion for Second Amended Complaint to add Ed Schriever as the new IFG Director, as Director Moore retired, and correcting clerical errors. Doc. is found on Pacer, Case: 2:18-cv-00456-DCN Doc. 81 Filed 02/14/20. (1-ER-42-49).

Plaintiff's Second Amended Complaint is found in App. 62-67 and on Pacer, Case: 2:18-cv-00456-DCN Doc. 66 Filed 11/29/19.

5/12/2020 the Ninth Circuit Court denied Tanners Petition for panel rehearing closing case 19-35854 and is found on Pacer, Case: 19-35854, 05/12/2020, ID: 11687893, DktEntry: 23.

9/9/2020 the U.S. District Court Memorandum Decision and Order Granted the Defendants Motion for Summary Judgment and Dismissing the case in favor of the Idaho Fish and Game, et al.; is in the App. 4-49 and is found on Pacer, Case: 2:18-cv-00456-DCN Doc. 103 Filed 09/09/20.

9/10/2020 the District Court entered Judgment in favor of the Defendants closing the District Court case No. 18-cv-00456-DCN is in the App. 4-50 and found on Pacer, Case: 2:18-cv-00456-DCN Doc. 103 Filed 09/09/20.

4/26/2022 the Ninth Circuit issued a Memorandum Affirming that the "District Court properly granted summary judgment for defendants" stating in part that "Tanner failed to raise a genuine dispute of material facts as to whether defendants violated his rights under the federal Constitution or Idaho Constitution." App. 1-3 and is found is found on Pacer, Case: 20-35886, 04/26/2022, ID: 12431243, DktEntry: 52-1.

5/4/2022 the Ninth Circuit Court granted Appellant extended time to file a Petition for Rehearing. App. 51 and is found on Pacer, Case: 20-35886, 05/04/2022, ID: 12438459, DktEntry: 54.

6/14/2022 the Ninth Circuit Ordered the petition for panel rehearing and rehearing en banc was

DENIED. App. 52 and is found on Pacer, Case: 20-35886, 06/14/2022, ID: 12470543, DktEntry: 56.

REASONS FOR GRANTING THIS PETITION

I. Whether the Director and Officers of the State of Idaho Department of Fish and Game violate the Separation of Powers doctrine when implementing roadblocks for game check station purposes.

A. The Rule of Law.

The Ninth Circuit errs in affirming the District Court's grant of summary judgment determining:

> "The district court's properly granted summary judgment for defendants because Tanner failed to raise a genuine dispute of material fact as to whether defendants violated his rights under the federal Constitution or Idaho Constitution. See *Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019) (reasoned that plaintiff fails to establish a First Amendment retaliation claim based on arrest when probable cause exists and others similarly situated were also arrested.) . . . *United States v. Patayan Soriano*, 361 F.3d 494, 505 (9th Cir. 2004) (reasoning that arrests are valid when probable cause of a crime exists); . . . " (App. 2).

The facts and law demonstrate Tanner, a non-sportsman, was stopped and arrested for bypassing a game Check station in which no law compelled him to stop nor law authorized law enforcement to stop him.

Tanner was stopped and arrested without probable cause. (4-ER-795; 4-ER-784; App. 68) (4-ER-749-751) (4-ER-793 ¶ 25; App. 66 ¶ 27) (2-ER-145 ¶ 125).

Idaho Code § 36-1201

> PRODUCTION OF WILDLIFE FOR INSPECTION – STOP AT CHECKING STATIONS – LICENSE MUST BE ON PERSON. **No fisherman, hunter or trapper shall refuse or fail to:**
>
> (a) Inspection of Wildlife. Upon request of the director, produce for inspection any wildlife in his possession.
>
> (b) Check Stations. Stop and report at a wildlife check station encountered on his route of travel when directed to do so by personnel on duty. Such direction may be accomplished by signs prominently displayed along the route of travel indicating those persons required to stop.
>
> (c) License to be Carried and Exhibited on Request . . . (App. 57).

I.C. § 36-1201 authorizes the stopping of sportsmen, not the stopping of the general public (roadblocks). This statute neither gives law enforcement authority to stop Tanner a non-fisherman, hunter or trapper (non-sportsman), nor does it direct the non-sportsman to do anything.

> The words "**should be given the same meaning in a statute as they have among the people who rely on and uphold the statute**." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004).

No option to amend or enlarge the statute exists outside of the Legislative branch of government.

> **"When construing a statute, its words must be given their plain, usual and ordinary meaning."** *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004).

The facts and law demonstrate no probable case excised to stop Tanner, a non sportsman nor was any evidence of hunting on or in Tanner's vehicle. (2-ER-231 ¶ 98-100) Tanner broke no law and is with clean hands.

B. Idaho First Judicial District Judge Found No Probable Cause.

Tanner as a non-sportsman was not of that class of persons that is required to stop at game check stations nor is the IFG authorized to stop the general public.

Idaho's First Judicial District Magistrate, case no: 2017-1192 in the pretrial hearing addressing the criminal charges brought against Tanner, accurately adjudicated from the bench, in part:

"COURT: . . . because it was a fish and game check stop, says no fisherman, hunter or trapper shall refuse or fail to stop at the check station. We've got evidence in the record, that's uncontroverted, that the Defendant [Tanner] is not and was not at the time, a fisherman, hunter or trapper, so the check station regulation doesn't apply . . . how do we get around the fact that the traffic control direction has to be, quote, lawful, if under 1201 it's not lawful with respect to Mr. Tanner, because he's not a fisherman, hunter or trapper? It seems that the legislature chose to limit fish and game's authority to stop the general public, to that class of people, not to everybody." (App. 81) (4-ER-619 ¶ 24 p. 620 ¶ 10).

COURT: Well, here's . . . the annotation from *State v. Thurman*, which is directly on point from this particular statute, it says, the check station set up by the wildlife officer was narrowly focused to advance the public's interest in wildlife preservation, protection, perpetuation and management, and was statutorily authorized in compliance with 36-103 of this section. So . . . even where they're upholding it, they're saying it's got to meet the statute, and the statute only applies to fishermen, hunters, and trappers. So how do we get from that to some general authority to stop everybody if they're not within that category of citizens? (App. 82) (4-ER-620 ¶ 24 p. 621 ¶ 6).

COURT: Well *Thurman* specifically says that's . . . the stop has to be statutorily authorized and in compliance with the statute.

> That's what the case law says and if you don't . . . have a fisherman, hunter or trapper, you've not in compliance with the statute. There's not authority for a general . . . general road block." (App. 84-85) (4-ER-622 ¶ 20-25).

The State of Idaho First Judicial District Magistrate's ruling that no probable cause existed to stop Tanner, represents Idaho Courts. The U.S. District Court with the Ninth Circuit affirming erred in determining the State Magistrate erred:

> The U.S. District Court reasoned:
>
> "In the District Court of the First Judicial District of the State of Idaho, in and for the county of Boundary Magistrate Division, CR-2017-1192, the magistrate judge found the officers lacked probable cause to stop Tanner. Dkt. 85-14, . . . the magistrate judge reviewed the plain text of the Idaho Code § 36-1201. Given that the statute only stated that fishermen, hunters, and trappers may be stopped at wildlife checkpoints, the magistrate judge held the officers exceeded their statutory authority in attempting to stop everyone, even for a few seconds. Dkt. 85-14 transcript of January 11, 2018 pretrial Conference, at 45." (App. 28-29).
>
> The U.S. District Judge Continued:
>
> "Regardless of what the magistrate judge held in the criminal case; this Court has the responsibly to independently review whether there was probable cause in deciding Tanner's

> civil claim that the officers violated his constitutional rights." (App. 29 ¶ 2).
>
> "Thus, the Court respectfully disagrees with the magistrate judge's interpretation of § 36-1201; the officers had the statutory authority under § 36-1201 to stop all vehicles in order to quickly determine if they had been fishing or hunting, though it could not unnecessarily delay non-sportsmen.
>
> The Court finds Defendants Swanson, Stanley, and Johnson had probable cause, based on the totality of the circumstances, to believe Tanner may have violated § 36-1201. The court dismisses Tanner's claim for unlawful arrest under § 1983 as his seizure was not a result of a violation of the Fourth Amendment." (App. 30).

The U.S. District Court with the Ninth Circuit Affirming explains its reasoning concluding in error that the arrest of Tanner was valid as the statute authorizes roadblocks, the general public is compelled to stop, probable cause did exist, and that in fact Tanner "failed to raise a genuine dispute of material fact as to whether defendants violated his rights under the federal Constitution or Idaho Constitution."

The District Court's determination that there was probable cause when the State Court determined there was no probable cause to stop Tanner is unprecedented and in error.

> Supervision over either the legislative or the judicial action of the States is in no case

> permissible except as [58 S. Ct. 823] to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence. *Id. Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

C. Violation of the Separation of Powers.

1. Idaho Code § 36-1201 is lawfully enacted by the legislature of the State of Idaho and it is the duty of the executive (IFG) branch to faithfully enforce it.

The wording of this statute is clear, concise and unambiguous. The Idaho Supreme Court clarifies interpreting statute law:

> We interpret the words of a statute according to their plain, usual, and ordinary meaning, and do not use any other tools of construction if the meaning of the statute is unambiguous from its words alone. . . . "When interpreting a statute, the primary function of the Court is to determine and give effect to the legislative intent." . . .

Kaseburg v. State, Board of Land Comm'rs, 154 Idaho 570, 300 P.3d 1058 (Idaho 2013).

It is the power and duty of the Director of the IFG to: (a) Supervise, direct, account for, organize, plan, administer and execute the functions vested within the

department as provided by law. (b) Establish policy to be followed by the department and its employees. (I.C. § 67-2405).

The IFG policies claiming authority from I.C. § 36-1201 is claimed authority beyond the law. (4-ER-459-514; also found in District Court Dkt. 85-12) The duty of the Executive Branch is to "see that the laws are faithfully executed." (Art. IV Section 5 Idaho State Constitution).

The Director and Officers of IFG have exceeded their lawful authority in stopping the general public, thus violating the Separation of Powers of the United States Constitution and Article II Section 1 of the Constitution of the State of Idaho.

2. Idaho Code § 19-621 is the only lawful standard for roadblocks in Idaho, and the IFG is not exempt from law, i.e., I.C. §§ 19-620, 19-621, 19-622.

The U.S. District Court in error determining "Idaho Code § 19-621 is not relevant in this case." (App. 11).

"Idaho has a dim view of roadblocks and has authorized them only for very limited law enforcement purposes." . . .

> "Idaho Code § 19-621, which grants authority to establish roadblocks, does so only where it is reasonably believed that persons have broken the law."

> " . . . The legislature has determined that suspicion of criminal wrongdoing is a condition precedent for authority to establish a roadblock. In the instant case, contrary to I.C. § 19-621, neither Henderson nor any other person was "reasonably believed by such officers to be wanted for violation of the law."

State v. Henderson, 114 Idaho 293, 756 P.2d 1057 (Idaho 1988).

The IFG has long established policies implementing roadblocks. The Check Station policies stated "Legal Authority" "I.C. § 36-1201 supports the Department's use of wildlife check stations and sets forth requirements for public compliance." The policies, spanning years 2002 until September 2017, also reference I.C. § 19-622 and wording from I.C. § 19-621 as legal standards for their Check Stations. (3-ER 461 ¶ C, p. 468 ¶ C, p. 475-473 ¶ C) (4-ER 632 ¶ 31).

3. Concluded: IFG Violates the Separation of Powers.

The IFG is part of the Executive Branch of Idaho (I.C. § 36-101) which lacks authority to enlarge their powers beyond the legislature's enactments by implementing roadblocks and compelling the non-sportsman to stop.

Idaho Code 19 is Idaho's criminal code and I.C. §§ 19-620, 19-621, 19-622 are the statutes for roadblocks in Idaho. The IFG more recent policies (2017 and newer) no longer claim authorly from Idaho's criminal code 19, yet the Department authorizes "all stop"

enforcement check stations to enforce fish and game laws and regulations. State Laws with criminal sanctions are derived from the same legislative process and are general law enforcement. Whether the purpose of the roadblock is to interdict illegal drugs, interdiction illegal game or almost any crime, these are general law enforcement.

The IFG officer additionally claim "all stop" check points are somehow not roadblocks; they do not need judicial approval for roadblocks nor do the laws directing signage and minimum safety standards apply to them. (2-ER-198-200) (4-ER-792 ¶ 15; 783 ¶ 15; App. 65 ¶ 17).

> The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure. The power here sought to be exercised is the lawmaking power, which the Constitution vests in the Congress alone, in both good and bad times. Pp. 587-589. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863 (1952).

Idaho Code § 36-103 requires the IFG Commission to "administer policies in accordance with the . . . Idaho Fish and Game Code."

The Executive Branch's duty "shall see that the laws are faithfully executed." [Idaho Const. Art. IV § 5] The three branches of our Republican form of government are to be separate and a check on the others. Idaho Constitution Article II § 1 secures that the "powers of the government of this state are divided into three distinct departments the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, . . . " The Separation of Powers doctrine is fundamental to our form of government.

> The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power, and the hopes for freedom that lay behind their choice.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863 (1952).

The IFG expansion of powers though written and applied policies that implement roadblocks for game check stations is a violation of our Republican form of Government and is an unconstitutional act. The check station policies demonstrate a history of ongoing unlawfully sanctioned actions, potentially any time of day or night, any time of year, on almost any public roadway within the state of Idaho. The IFG policies established though use, also demonstrate the Department to be acting outside the laws and the

Constitution. (3-ER-515-550, 551-575) (ER-631 ¶ 27) This issue was raised in the District Court and in the Ninth Circuit. (2-ER-89-92) (Ninth Cir. DktEntry: 14 pp. 34-36).

Montesquieu accurately described the result of an unchecked government in 1 Montesquieu, *The Spirit of Laws* 174 at pp. 151-52 (T. Nugent transl. 1886).

> "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."

The IFG have become their own lawmakers, a law unto themselves, violating the Separation of Powers. The Ninth Circuit erred in confirming the District Court determination that "[T]he officers had the statutory authority under 36-1201 to stop all vehicles in order to quickly determine if they had been fishing or hunting, . . . " and the IFG "had probable cause . . . " (App. 30).

For whatever reasons for this corrupted conclusion, be it an error of the Ninth Circuit, the U.S. District Court or of the Appellant/Plaintiff's failure to properly bring the issue forward, the adjudication of this issue is not only in error but is at odds with the rule of law and justice and should not be allowed to stand.

The IFG operates "all stop" check stations throughout the State of Idaho stopping hundreds if not thousands of citizens under the color of law violating both the United States Constitution and the State of Idaho Constitution.

Without this Court's exercising it supervisory authority over the Ninth Circuits affirmation of the U.S. District Court opinion the widespread violations of both the U.S. Constitution and the State of Idaho Constitution will continue unabated.

II. Whether game check station roadblocks implemented by the Director and officers of the IFG violate the Fourth Amendment to the United States Constitution.

A. The Ninth Circuit Erred in Confirming *U.S. v. Fraire* is Appropriate Herein.

> "The district court's properly granted summary judgment for defendants because Tanner failed to raise a genuine dispute of material fact as to whether defendants violated his rights under the federal Constitution or Idaho Constitution. . . ." *United States v. Fraire*, 575 F.3d 929, 932 (9th Cir. 2009) (holding checkpoint stops are constitutional if they are not used as crime control devices and are employed reasonably)." (App. 2).

The District Court reasoned:

> "[T]here is compelling authority that the primary purpose for wildlife check stations is not

> for general law enforcement. In *Fraire*, the Ninth Circuit held that a wildlife checkpoint stationed at an entrance to a national park was not per se invalid because its primary goal was prevention of illegal hunting activity, not conducting arrests, and that there was a "close connection between the checkpoint and the harm it was seeking to prevent." *Fraire*, 575 F.3d 933." (App. 15 ¶ 2).

There is little semblance of this case with *Fraire.* The check point on Meadow Creek Road was intended to contact returning hunters. The stopping point was in the public roadway, not at the entrance to anything. The IFG was not informing or educating the general public. Hunting is not prohibited in the area, nor is there evidence of a poaching problem, nor is the IFG preventing the destruction of a precious natural resource. A hunter failed to properly tag a harvested deer. (App. 89-91).

The Ninth Circuit in *U.S. v. Fraire* determined:

> "We hold today that a momentary checkpoint stop of all vehicles at the entrance of a national park, aimed at preventing illegal hunting-which is minimally intrusive, justified by a legitimate concern for the preservation of park wildlife and the prevention of irreparable harm, directly related to the operation of the park, and confined to the park gate where visitors would expect to briefly stop-is reasonable under the Fourth Amendment." *United States v. Fraire*, 575 F.3d 929 (9th Cir. 2009).

The IFG check point on Meadow Creek Road may have gathered some data that would aid in wildlife management but the primary purpose is enforcement. "Impromptu enforcement check stations stop all vehicles and may divert sportsman aside to answer additional questions. (3-ER-437 ¶ 2) These enforcement check stations are operated at any time of day or night and are intended to enforce Idaho wildlife laws and orders." (See fn. 1, p. 6).

This case the check point officers were stopping all traffic, checking for "legality." (3-ER-382 ¶ 5-13, p. 384 ¶ 1-11, p. 425 ¶ 5-25-426) (4-ER-745-747).

In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the Supreme Court set limits on the permissible purposes of roadblocks on open highways. The court held that outside of border patrol and purposes directly related to roadway safety, roadblocks generally violate the Fourth Amendment. It held that if the primary purpose of a roadblock is crime control, beyond roadway safety or border patrols, it is unconstitutional. The IFG check station Roadblocks are not for the purpose of border patrol enforcement or roadway safety but primary to enforce Idaho's game laws and regulations. The IFG use of roadblocks for game check stations are unconstitutional violating the Fourth Amendment to the U.S. Constitution and Article I Section 17 of the State of Idaho Constitution.

The District Court erred finding that " . . . the IDFG wildlife check stations' primary justification is narrowly focused to advance the public's interest in

wildlife reservation and management and not to advance general law enforcement. Thus, the Court finds that the IDFG wildlife check stations are not general crime control devices and Idaho Code 36-1201 is not per se invalid." (App. 16).

> The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-558 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); cf. *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

Roadblocks must fit the "few specifically established and well delineated exceptions." *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993).

> The burden is on the government to persuade the District Court that a seizure comes "under one of a few specifically established exceptions to the warrant requirement." *United States v. Huguez-Ibarra*, 954 F.2d 546, 551 (9th Cir. 1992).

Roadblocks have long been a tool of oppressive government regimes and their misuse is not lite and transient. No evidence in this case demonstrates a check point exception to the Fourth Amendment requirement for lawful seizure. The Ninth Circuit errs in affirming that the:

> "The district court's properly granted summary judgment for defendants because Tanner failed to raise a genuine dispute of material fact as to whether defendants violated his rights under the federal Constitution or Idaho Constitution. . . ." *United States v. Fraire*, 575 F.3d 929, 932 (9th Cir. 2009) (holding checkpoint stops are constitutional if they are not used as crime control devices and are employed reasonably)" (App. 2).

B. "Employed Reasonably" (Safety and subjective intrusion).

The Ninth Circuit Court erred in affirming the District Court ruling that:

> **The District Court detailing facts reasoned:**
>
> "[T]his Court finds that although the check station was operated after sunset, in the dark, without lighting, and by officers without reflective attire, these are not facts that are material to the outcome of this case." (App. 23 ¶ 3).

Combining the facts[2] listed by the District Court with additional facts of the check point operation that: no one directed traffic; signage did not warn of a stop

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[2] The Courts listing "without lights" it is not disputed that the officers had no generator powered lights illuminating the check point but as vehicles approached headlights and flashlights were activated when they considered it necessary and they activated a flashing blue light, but not continuously. (2-ER-217, 218 ¶ 14-19).

ahead nor was the flashing blue light on continuously, (it was off when Tanner drove past the check point); the officers "attired in full uniform" consisted of dark clothing and stocking caps (2-ER-200, 201; 3-ER-455); and the check point location was on a double curved section of roadway; demonstrate facts material to the outcome of the case. (2-ER-216-219) (2-ER-138-139 ¶ 66-80) (2-ER-197-199) (2-ER-202, 204) (App. 89-91).

I.C. § 36-1201 and § 19-622 require proper signage and lighting for warning and directing traffic that the IFG Officers claim no obligation to follow. (3-ER-380 ¶ 16 p. 381; p. 414 ¶ 18 p. 415 ¶ 1) (2-ER-157, 158; p. 216, 217; p. 218).

The District Court in error reasoning continues:

> "[T]hat no reasonable juror, considering these facts, could conclude that the location of this check station would cause fear and surprise in law-abiding motorist sufficient to interfere with individual liberty to any significant degree." . . . (App. 24 ¶ 1).

"Thus the Court finds that the subjective intrusion of the IDFG wildlife check station in this case was minimal." (App. 24 ¶ 2).

"The fact that the officials may use law enforcement techniques at these check stations does not transform the check station's primary goal of effective wildlife management into crime control." (App. 16 ¶ 1).

Just one of these facts standing alone of the check station operation demonstrates hazardous conditions

for both the officers and the public. The totality of the circumstances demonstrates extreme hazards and gross disregard for rights and safety. Additionally, the check point in this case "was operated in the same manner that I [District Officer Stanley] conduct every "all stop" check station." (4-ER-745-747 ¶ 7; 3-ER-516-550). These "techniques" employed at the check points are in widespread use and not only unreasonable but are at odds with our form of government and far more akin to a Police state than a constitutional republic.

The Ninth Circuit erred when affirming:

> "The district court's properly granted summary judgment for defendants because Tanner failed to raise a genuine dispute of material fact as to whether defendants violated his rights under the federal Constitution or Idaho Constitution. . . ."
>
> "*United States v. Fraire*, 575 F.3d 929, 932 (9th Cir. 2009) (holding checkpoint stops are constitutional if they are not used as crime control devices and are employed reasonably); . . . ."

The general non-sportsman public were stopped questioned and inspected for evidence of hunting and no evidence demonstrates that their roadblocks fit the "few specifically established and well delineated exceptions" to a warren requirement. *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993); *United States v. Huguez-Ibarra*, 954 F.2d 546, 551 (9th Cir. 1992).

Additionally, no evidence supports interrogation and search of the non-sportsman advances the public's interest in wildlife management**.** (3-ER-378 ¶ 3-9; p. 383 ¶ 5; p. 393 ¶ 11; p. 425 ¶ 5; p. 426 ¶ 25) "Unlike most other state agencies, Idaho fish and game does not receive any general tax dollars."[3] The IFG's main revenue is license and tag sales.[4]

> "The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief." *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-558 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); cf. *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

Roadblocks have long been a tool of oppressive government regimes and their misuse is not lite and transient. The Ninth Circuit erred in affirming the District Court determining "[T]hus the IDFG wildlife check stations are not general crime control devices . . . (App. 16 ¶ 1) and when it determined "the check station was reasonable under the Fourth Amendment." (App. 25 ¶ 1).

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[3] https://idfg.idaho.gov/sites/default/files/directors-report-commission-2018.pdf (p. 3 Finance).

[4] https://idfg.idaho.gov/sites/default/files/directors-report-commission-ccr-fy2021.pdf (p. 3 Revenue & Expenditures).

CONCLUSION

The Director and Officers of the Idaho Department of fish and game have become their own lawmakers "set[ting] forth the rules of compliance for the public" while disregarding the law. The IFG have authorized themselves to implement roadblocks for enforcement purposes, at any time of day or night, any time of year, on almost any public roadway within the state of Idaho.

For reasons unclear to him the ruling thus far have reflected little or no consideration of the facts, law, and arguments presented by the Petitioner. Without consideration of the these, due process is by-passed and justice falls.

> This Court "has instructed the federal courts to liberally construe the inartful pleading of pro se litigants. It is settled that the allegations of [a pro se litigant's complaint] however inartfully pleaded are held to less stringent standards than formal pleadings drafted by lawyers." *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987).
>
> and
>
> "[w]hile the standard is higher [under Iqbal], our obligation remains, where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt." (Internal citation omitted); *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010).

If the petitioner has neglected or violated rules of the U.S. District Court, the Ninth Circuit Court of Appeals or this Court he herein moves this honorable Court to suspend any provision of the rules and order the proceedings as directed to facilitate just and proper adjudication and the upholding of the United States Constitution and the rule of law.

Additionally, the Ninth Circuit Court of Appeals, not for publication, opinion in this case has sanctioned the U.S. District Court rulings that have far departed from the accepted and usual course of judicial proceedings and this Court is also herein called to exercise its supervisory power. (Rule 10(a)).

Without this Court's exercising its supervisory authority, these violations of both the U.S. Constitution and the State of Idaho Constitution will continue unabated at the peril of the officers, the people, and our form of government.

For the reasons set forth above, the Petitioner moves this Honorable Court to Grant this PETITION FOR A WRIT OF CERTIORARI.

Respectfully submitted,

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September 12, 2022 A.D.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEPHEN A. TANNER I, Plaintiff-Appellant, v. IDAHO DEPARTMENT OF FISH AND GAME; et al., Defendants-Appellees.	No. 20-35886 D.C. No. 2:18-cv-00456-DCN MEMORANDUM*

Appeal from the United States District Court
for the District of Idaho
David C. Nye, Chief District Judge, Presiding

Submitted April 26, 2022**

Before: D.W. NELSON, FERNANDEZ, and SILVERMAN, Circuit Judges.

Stephen ("Steve") Tanner appeals pro se the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging violations of his First, Fourth, and Fifth Amendment rights and his rights under the Idaho Constitution. We review de novo the district court's grant of summary judgment. *Thomas v. Ponder*,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

611 F.3d 1144, 1149 (9th Cir. 2010) (citation omitted). We affirm.

The district court properly granted summary judgment for defendants because Tanner failed to raise a genuine dispute of material fact as to whether defendants violated his rights under the federal Constitution or Idaho Constitution. *See Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019) (reasoned that the plaintiff fails to establish a First Amendment retaliation claim based on arrest when probable cause exists and others similarly situated were also arrested.); *United States v. Williams*, 846 F.3d 303, 312 (9th Cir. 2016) (reasoning that searches incident to an arrest are lawful); *United States v. Fraire*, 575 F.3d 929, 932 (9th Cir. 2009) (holding checkpoint stops are constitutional if they are not used as crime control devices and are employed reasonably); *Stoot v. City of Everett*, 582 F.3d 910, 925 n.15 (9th Cir. 2009) (holding plaintiff must demonstrate a statement they made was used in a criminal case to establish a Fifth Amendment violation of their right to remain silent.); *United States v. Patayan Soriano*, 361 F.3d 494, 505 (9th Cir. 2004) (reasoning that arrests are valid when probable cause of a crime exists); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001) (reasoning allegations of excessive force on the basis of handcuffing must be supported by evidence); *State v. Thurman*, 996 P.2d 309, 314-15 (Idaho Ct. App. 1999) (holding Article I, § 17 of the Idaho Constitution provides no greater protection in these situations than does the Fourth Amendment to the United States Constitution).

The district court did not abuse its discretion in denying Tanner's motion to strike. *See Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 963 (9th Cir. 2018).

The district court did not abuse its discretion in denying Tanner's motion for reconsideration of his motion to compel because Tanner set forth no valid grounds for reconsideration. *See Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (setting forth standard of review and grounds for reconsideration).

The district court did not abuse its discretion in denying Tanner electronic filing privileges. *See Preminger v. Peake*, 552 F.3d 757, 757, 769 & n.1 1 (9th Cir. 2008) (setting forth standard of review for a district court's decisions regarding management of its docket).

Tanner's motions to correct the caption (Docket Entry No. 23) and to withdraw his motion at Docket Entry No. 36 (Docket Entry No. 43) are granted. Tanner's motion to strike Docket Entry Nos. 36 and 37 (Docket Entry No. 44) is denied. Tanner's motion to expedite the case (Docket Entry No. 46) is denied as moot. Tanner's motion to certify questions to the Idaho Supreme Court, as set out in his opening brief, is denied.

AFFIRMED.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

STEVE TANNER, Plaintiff, v. IDAHO DEPARTMENT OF FISH AND GAME DIRECTOR ED SCHRIEVER; VIRGIL MOORE; LUCAS SWANSON; JOSH STANLEY; BRIAN JOHNSON; and WILLIE COWELL, Defendants.	Case No. 2:18-cv-00456-DCN **MEMORANDUM DECISION AND ORDER** (Filed Sep. 9, 2020)

I. INTRODUCTION

Pending before the Court is Defendant Willie Cowell's Motion for Summary Judgment (Dkt. 72) and Defendants Idaho Department of Fish and Game Director Ed Schriever, Virgil Moore, Lucas Swanson, Josh Stanley, and Brian Johnson's ("IDFG Defendants") Motion for Summary Judgment (Dkt. 73). On July 15, 2020, the Court held oral argument and took the motions under advisement. Upon review, and for the reasons set forth below, the Court GRANTS both Motions.

II. BACKGROUND

The Idaho Department of Fish & Game ("IDFG"), a government agency, utilizes wildlife check stations to

manage Idaho's wildlife resources. At these check stations, IDFG officers stop all vehicles passing through and inquire if the driver and/or passengers have been hunting, fishing, or trapping. If the answer is no, the officers ask no further questions and the vehicle proceeds on its way. These stops rarely last longer than a few seconds. If the answer is yes, the officers spend a few minutes collecting data, receiving public input, and, if necessary, enforcing state laws that pertain to the management and conservation of wildlife resources.

During the daylight hours on November 18, 2017, Plaintiff Steve Tanner was working at his residence when he saw multiple IDFG vehicles drive north past his house. Tanner drove north, up Meadow Creek Road, and saw that IDFG had set up the Meadow Creek game check station. Dkt. 72-2, ¶ 4. Tanner parked his vehicle north of the check station and hiked the area trying to "investigate" and take photographs of the check station. Dkt. 72-2, ¶ 5. Tanner returned to his vehicle and headed home. It was now early evening and Tanner was travelling southbound on Meadow Creek Road in Boundary County, Idaho. At that time, Defendants Swanson, Stanley, and Johnson—employees of IDFG—were operating a wildlife check station on Meadow Creek Road in the southbound lane. As Tanner approached the station, he bypassed it without stopping.

Swanson and Stanley pursued Tanner in their patrol vehicle for several miles with their overhead lights activated. Tanner eventually pulled into a gas station.

Subsequently, Swanson placed Tanner in handcuffs and informed him that he was being placed under arrest. Swanson then turned Tanner over to Defendant Cowell of the Bonner's Ferry Police Department. Cowell placed Tanner in a different set of handcuffs, frisked him, and loaded him into his patrol vehicle. Swanson ultimately cited Tanner for failing to stop at the check station and for eluding a law enforcement officer. Charges were brought against Tanner in Idaho First Judicial Court, Magistrate Division, CR-2017-0001192, and were subsequently dismissed. No other charges were brought against Tanner. Specifically, Cowell did not charge Tanner with any crime.

On September 24, 2018, Tanner filed a civil suit in Idaho state court. Tanner alleged that the IDFG violated his constitutional rights when its police officers pulled him over and arrested him after he failed to stop at a wildlife check station. On October 17, 2018, Defendant Cowell removed the case to this Court pursuant to 28 U.S.C. §§ 1331, 1441(b), and 1446(b). On November 20, 2018, Tanner filed his Amended Complaint. Dkt. 4.

On December 27, 2019, Cowell and IDFG Defendants filed motions for summary judgment. Dkts. 72, 73. The day before, Tanner filed a motion to stay proceedings pending his appeal of this Court's denial of Tanner's Motion for a Preliminary Injunction. Dkt. 71. Before the Court could rule on Tanner's Motion to Stay Proceedings, the Ninth Circuit denied Tanner's interlocutory appeal, *Tanner v. Cowell*, 792 F. App'x 545, 545–46 (9th Cir. 2020), and the Court held Tanner's

Motion to Stay moot, (Dkt. 81). The Court then ordered that summary judgment briefings resume. Dkt. 81.

On March 11, 2020, Tanner filed his opposition to both Cowell's and IDFG Defendants' motions for summary judgment (Dkt. 85); IDFG Defendants filed their reply on March 24, 2020 (Dkt. 88), as did Cowell (Dkt. 89).

III. LEGAL STANDARD

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). This Court's role at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Zetwick v. Cty. of Yolo*, 850 F.3d 436, 441 (9th Cir. 2017) (citation omitted). In considering a motion for summary judgment, this Court must "view[] the facts in the non-moving party's favor. . . ." *Id.* To defeat a motion for summary judgment, the respondent need only present evidence upon which "a reasonable juror drawing all inferences in favor of the respondent could return a verdict in [his or her] favor." *Id.* (citation omitted).

Accordingly, this Court must enter summary judgment if a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The respondent cannot simply rely on

an unsworn affidavit or the pleadings to defeat a motion for summary judgment; rather the respondent must set forth the "specific facts," supported by evidence, with "reasonable particularity" that preclude summary judgment. *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001).

IV. DISCUSSION

Tanner asserts four causes of action in his Amended Complaint. Dkt. 4. Tanner's first cause of action is a 42 U.S.C. § 1983 claim against Defendants Swanson, Stanley, and Johnson for constitutional violations relating to his arrest after failing to stop at the IDFG wildlife check station. Tanner's second cause of action is a § 1983 claim against Defendant Moore for establishing a policy that allows for the use of roadblocks for wildlife check stations. Tanner's third cause of action is a § 1983 claim against Defendant Cowell, also relating to his arrest. Tanner's fourth cause of action is for declaratory judgment and injunctive relief; he seeks to enjoin Defendants from operating wildlife check roadblocks and to mandate that Defendants only stop fishermen, hunters, and trappers at wildlife check stations, rather than the public at large.

All the causes of action concern, to at least some degree, whether IDFG's wildlife checkpoints violated the Fourth Amendment and/or Article 1 § 17 of the Idaho Constitution. Much of the IDFG Defendants' summary judgment arguments turn on whether the use of check station roadblocks under Idaho Code

§ 36-1201 violates the Fourth Amendment, the Idaho Constitution, or Idaho Code § 19-621. *See generally* Dkts. 72, 73. Thus, the Court will first evaluate whether the wildlife check stations violate federal or state law before turning in detail to each of Tanner's individual causes of actions.

A. Legality of IDFG Wildlife Checkpoints

1. Applicable State Law

First, the parties dispute which statute is applicable in reviewing the legality of IDFG's checkpoints. Tanner alleges that IDFG's use of roadblocks at its wildlife checkpoints violates state law. He contends that Idaho Code § 19-621 grants appropriate executive branch officials the authority to establish roadblocks "only where it is reasonably believed that persons have broken the law," and roadblocks at routine wildlife checkpoint violate this statute. Dkt. 85, at 18. The IDFG Defendants move to dismiss on the grounds that that the wildlife checkpoints are "authorized by I.C. §§ 36-103(b), 36-1201(b), and regulations established thereunder," not § 19-621. Dkt. 73-1, at 6. The IDFG Defendants assert that state courts have affirmed the legislature's right to use routine check stations in *State v. Thurman*, 134 Idaho 90, 996 P.2d 309, 314 (Idaho Ct. App. 1999), and *State v. Medley*, 127 Idaho 182, 898 P.2d 1093, 1097 (Idaho 1994).

In *Medley*, the court determined the wildlife checkpoint stop at issue violated the Fourth Amendment of the U.S. Constitution. *Medley*, 898 P.2d at 1099

(holding unconstitutional a *non*-routine IDFG fish and game check station in which the IDFG officer in charge of the station issued a "blanket invitation" to any additional law enforcement agency that wished to participate so that violations of laws not pertaining to fish and game (and in no way related to advancing the public's interest in wildlife management) could be detected). In its ruling, the Idaho Supreme Court noted, "[i]n *State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (Idaho 1988), we expressed no view as to whether fish and game roadblocks complied with state constitutional requirements." *Medley*, 898 P.2d at 1099. Thus, the *Medley* court determined it, too, would express no view on whether the wildlife checkpoint stop complied with *state* constitutional requirements, as it had already held it did not comply with federal constitutional requirements. However, the *Medley* court did state that "the legislature has provided statutory authority supporting the use of check stations maintained by the Department for the purpose of checking fish and game licenses and lawful possession of wildlife. I.C. § 36-1201" *Id.* at 1097. It cited to § 36-1201, not § 19-621, to support its statement that IDFG was statutorily authorized to use wildlife check stations.

In *Thurman*, the Idaho Court of Appeals upheld the use of a wildlife checkpoint station as constitutional under state and federal law. 134 Idaho 90, 996 P.2d 309. The *Thurman* court began its analysis by definitively stating "[t]he Idaho legislature has provided statutory authority to the Idaho Department of Fish and Game to conduct routine check stations. I.C.

§ 36–103(b); I.C. § 36–1201(b).” *Thurman*, 996 P.2d at 313. In that case, the IDFG check station was set up “on a straight stretch of roadway” and the IDFG officer “parked his truck perpendicular to the roadway[.]” *Id.* at 314. While the *Thurman* court never used the term “roadblock” in referring to the impromptu checkpoint, it positively cited to an Oregon case upholding the use “where a fish and game roadblock was conducted to check hunters’ compliance with game laws.” *Id.* at 316 (citing *State v. Tourtillott*, 618 P.2d 423, 430 (Or. 1980)).

Idaho Code § 19-621 was enacted in 1957. S.L. 1957, ch. 31, § 2. Both *Thurman* and *Medley* were issued decades after § 19-621’s enactment. Neither case offer any indication that § 19-621 applies to IDFG check stations—roadblocks or otherwise. Rather, they both assert that § 36-1201 is the controlling statutory authority governing the implementation and use of such checkpoints. Therefore, the Court abides by Idaho Supreme Court precedent and finds that wildlife checkpoints, whether “roadblocks” or otherwise, maintained by IDFG are authorized by § 36-1201 for the purpose of checking fish and game licenses and lawful possession of wildlife. Idaho Code § 19-621 is not relevant in this case.

Finding § 36-1201 is the applicable law, the Court turns next to whether the way IDFG operates the wildlife checkpoints under § 36-1201 is constitutional.

2. Constitutionality of the Wildlife Checkpoints Under the Fourth Amendment of the U.S. Constitution

Idaho Code § 36-1201 states that "[n]o fisherman, hunter or trapper shall refuse or fail to . . . [s]top and report at a wildlife check station encountered on his route of travel when directed to do so by personnel on duty." Tanner challenges the constitutionality of IDFG's use of check stations, arguing that utilizing roadblocks primarily for law enforcement purposes violates the Fourth Amendment and its state counterpart—Article I, Section 17 of the Idaho Constitution. Tanner claims that the plain language of § 36-1201 does not give IDFG authority to stop citizens, such as himself, who are not fishermen, hunters, or trappers. Dkt. 85. As such, he believes that an unreasonable seizure occurs whenever IDFG stops one of these "non-sportsmen" citizens at wildlife check stations. Dkt. 85, at 2.

"The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). "[S]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth] Amendment[], even though the purpose of the stop is limited and the resulting detention is quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). Thus, checkpoint station stops, such as the wildlife check station here, constitute a seizure under the Fourth Amendment.

Not every seizure, however, violates the Fourth Amendment—only unreasonable seizures do. The Ninth Circuit applies the following two-step analysis to determine reasonableness applicable to Fourth Amendment checkpoint cases:

> First, the court must determine whether the primary purpose of the checkpoint was to advance the general interest in crime control. If so, then the stop is per se invalid under the Fourth Amendment.
>
> If the checkpoint is not per se invalid as a crime control device, then the court must judge the checkpoint's reasonableness, hence, its constitutionality, on the basis of the individual circumstances. This requires consideration of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.

U.S. v. Fraire, 575 F.3d 929, 932 (9th Cir. 2009) (internal quotation marks and citations omitted).

a. Primary Purpose of Wildlife Check Stations

First, the Court must determine whether the IDFG wildlife check stations are general crime control devices. According to a policy statement issued by the IDFG, the purpose of wildlife check stations is "[t]o effectively manage the state's wildlife resources" by making field contacts with sportsmen, collecting biological and harvest data to support wildlife

management plans, receiving public input, and enforcing state laws and rules. Dkt. 30-2, at 1.

Tanner argues that the primary purpose of wildlife check stations "is indistinguishable from the general interest in crime control. . . ." Dkt. 85, at 9. To support his position, Tanner cites *Indianapolis v. Edmond*, 531 U.S. 32 (2000), in which the Supreme Court held that the narcotics checkpoints at issue were per se unconstitutional because the checkpoints' primary purpose was crime control. "We cannot sanction stops justified *only* by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." *Edmond*, 531 U.S. at 44 (emphasis added); *see also Henderson*, 756 P.2d at 1063–64 (stating that absent individualized suspicion of wrongdoing or prior legislative or judicial approval to establish such roadblocks, "roadblocks established to apprehend drunk drivers cannot withstand constitutional scrutiny").

Tanner asserts that because (1) the wildlife check station on Meadow Creek Road was staffed by IDFG officers and not biologists;[1] (Dkt. 85) (2) the officers detected a hunter who killed a deer without the proper tag (Dkt. 31-2, ¶ 8); (3) Tanner was arrested for failing to stop at the checkpoint, investigated for a DUI, and

[1] Tanner claims IDFG operates two types of check stations: management check stations staffed by biologists, and impromptu enforcement check stations staffed by conservation officers. Dkt. 85. The former, he argues, primarily gather biological data to help manage wildlife, while the latter primarily enforces Idaho wildlife laws. *Id.*

subsequently arrested for a DUI and obstructing an officer in the line of duty (Dkt. 85); and (4) all of these "ordinary law enforcement violations spring from the IDFGs [sic] enforcement game check stations designed primarily for the interdiction of illegal hunting," its primary purpose is for general law enforcement purposes (Dkt. 85, at 10–11).

To the contrary, there is compelling authority that the primary purpose for wildlife check stations is not for general law enforcement. In *Fraire*, the Ninth Circuit held that a wildlife checkpoint stationed at the entrance to a national park was not per se invalid because its primary goal was prevention of illegal hunting activity, not conducting arrests, and that there was a "close connection between the checkpoint and the harm it was seeking to prevent." *Fraire*, 575 F.3d at 933. Though wildlife check stations may certainly lead to the enforcement of criminal statutes, "the use of law enforcement techniques does not automatically transform [them] into a crime control device for Fourth Amendment purposes." *Id.* Idaho courts have also held that routine IDFG wildlife check stations primarily serve compelling state interests other than crime control. *See Medley*, 898 P.2d at 1097 (holding the state of Idaho "has a compelling interest in the management and conservation of its natural resources, including wildlife"); *Thurman*, 996 P.2d at 314 (stating that wildlife is "a resource to be preserved, protected, perpetuated and managed . . . ").

Like the wildlife checkpoints in *Fraire* that were closely connected to the goal of preventing illegal

hunting, the IDFG check stations here are closely connected to the goal of effectively managing the state's wildlife resources. Even if biologists do not collect biological data at these check stations, the check stations still advance the IDFG's primary purpose to "[m]ake field contact with anglers, hunters, and trappers to collect . . . harvest data to support evaluation and development of wildlife management plans and programs." Dkt. 30-2, at 1. The fact that officials may use law enforcement techniques at these check stations does not transform the check station's primary goal of effective wildlife management into crime control. Unlike the narcotics checkpoints in *Edmond* (or the drunk driving checkpoints in *Henderson*) that were justified only by the possibility that an inspection might reveal any given motorist has committed a crime, the IDFG wildlife check stations' primary justification is narrowly focused to advance the public's interest in wildlife preservation and management and not to advance general law enforcement. Thus, the Court finds that the IDFG wildlife check stations are not general crime control devices and that Idaho Code § 36-1201 is not per se invalid.

b. Reasonableness of Utilizing Wildlife Check Stations to Manage the State's Wildlife Resources

Next, the Court must determine the check station's "reasonableness, hence, its constitutionality, on the basis of the individual circumstances." *Fraire*, 575 F.3d at 932 (citation omitted). This considers "the

gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Id.* (quoting *Illinois v. Lidster*, 540 U.S. 419, 427 (2004)).

The first consideration is the gravity of public concerns served by wildlife check stations. The Court finds that Idaho has a compelling interest in the management and conservation of its natural resources, including wildlife. This interest is not only codified in Idaho Code § 36-103, but has also been acknowledged by the Idaho Supreme Court. *See Medley*, 898 P.2d at 1097 ("[F]ish and game violations are matters of grave public concern which justify minimal intrusion into the public's right of privacy.").

The second consideration is the degree to which wildlife check stations advance the public interest. The Idaho Supreme Court has stated, "*Routine* fish and game check stations are indeed an effective method for advancing [public] interest. . . . Requiring conservation officers, under these circumstances, to have probable cause before stopping suspected violators would be an enormous burden." *Medley*, 898 P.2d at 1097–98.

The Court agrees with both this conclusion and its reasoning. IDFG has operated a check station at the same place on Meadow Creek Road on multiple occasions and when hunters were often present. Dkt. 72-2, ¶ 1; Dkt. 73-3, ¶¶ 1, 4. These routine check stations are designed to quickly and efficiently gather the necessary information to assist in maintaining, protecting,

and conserving Idaho's wildlife. Dkt. 72, ¶ 3; Dkt. 73-3, ¶¶ 9–10. The Court finds that the IDFG wildlife check stations advance the public interest to a significant degree.[2]

The third and final consideration is the degree to which the severity of the wildlife check station interferes with individual liberty. This factor is broken into two subparts: an objective part and a subjective part. *Fraire*, 575 F.3d at 934. The objective part focuses on the "duration of the seizure and the intensity of the investigation." *Id.* Here, the duration of the stops at IDFG check stations vary from a few seconds if the passengers have not engaged in hunting, fishing, or trapping (Dkt. 72-2, ¶ 3; Dkt. 73-3, ¶ 8), to a few minutes if the passengers have engaged in such activities (Dkt. 73-3, ¶ 9).

Tanner does not dispute the duration of the stops were reasonable. Instead, he argues that it is an invasion of privacy to stop *non-sportsmen* in order to "question hunters, check their licenses, inquire about game taken, inspect game in hunters' possession, and collect

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[2] Tanner does not dispute the effectiveness of the IDFG check stations at maintaining and protecting Idaho's wildlife but argues that the check stations "do not educate or take public input" and that they "do not [disseminate] educational material" as was done at the wildlife checkpoint in *Fraire*. Dkt. 85, at 12. Even if educating the public and receiving public input were required elements for advancing public interest, the Court disagrees with Tanner's assertion. At a minimum, these brief stops at IDFG check stations educate both sportsmen and non-sportsmen about Idaho's values and efforts to maintain and preserve wildlife in the state.

biological data." Dkt. 85, at 22. However, the IDFG check stations do not subject non-sportsmen to license checks, game inspections, or collecting biological data. The only inquiry that occurs for non-sportsmen is whether the passengers have been hunting or fishing. If the answer is no, "no further questions would be asked and the vehicle would be sent on its way. . . ." Dkt. 73-3, ¶ 8. Without such questioning, it is unclear how IDFG officials would be able to determine who are sportsmen subject to Idaho Code § 36-1201 and who are not; IDFG distinguishes between the two categories quickly through a brief, concise inquiry.

In this case, there technically was no seizure because Tanner bypassed the wildlife check station.[3] Had he stopped, the duration of the seizure likely would have been only a few seconds because Tanner is not a hunter, fisher, or trapper, and was not engaged in such activities that day. Tanner would only have needed to answer the officer's first question in the negative and he would have been sent on his way. Tanner has submitted no evidence that non-sportsmen are delayed more than a few seconds to confirm they are not a "hunter, fisher, or trapper" subject to the additional search and seizure procedures authorized under Idaho Code § 36-1201. Therefore, the Court finds that the duration of the seizure and intensity of the IDFG wildlife

[3] Tanner asserts in his response to the Motions for Summary Judgment that he had been stopped at similar IDFG checkpoints on November 20, 2010, and November 8, 2014. Dkt. 85, at 2–3.

checkpoint investigation of non-sportsmen is minimal and reasonable.

The second part of this factor—the subjective part—focuses on "the fear and surprise engendered in law-abiding motorists by the nature of the stop." *Fraire*, 575 F.3d at 934. Tanner asserts that the manner in which the wildlife check station was operated was unsafe, being located on a sharp curve, after sunset,[4] and operated by officers who were not wearing proper reflective safety apparel.[5] Dkt. 85. According to Tanner:

> [Tanner], driving south, approached the [check station] area, passing two signs warning of a check station ahead. The signage did not warn of a *stop* ahead, nor did the signage inform those persons who were required to stop at the check station, as required by [Idaho Code] 19-622, and 36-1201. (Photo Exhibit CC)[6] [Tanner] continued slowing as he

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[4] According to Tanner's Second Amended Complaint, sunset occurred at 4:01 PM on the day in question, and that Tanner drove around the IDFG check station at approximately 4:20 PM. Dkt. 66, ¶¶ 14-15.

[5] Based on these assertions, it appears Tanner is making a separate "as-applied" challenge to § 36-1201 due to the unsafe manner in which this particular wildlife check station was operated. Accordingly, the Court does not consider these assertions as a separate constitutional attack, but only as evidence of the severity of this wildlife check station's subjective intrusion.

[6] Exhibit CC as provided by Tanner is an undated photograph of an IDFG sign that reads, "STOP IDAHO DEPT OF FISH & GAME CHECK STATION." Dkt. 85-10, at 2. No affidavit

> rounded the first corner when a flashing blue light, located about 30 feet north of the roadway, was activated for about 2-3 seconds. The curved section of the road precluded the oncoming traffic from seeing the check station roadblock until they rounded the corner about 300 feet away. [Tanner] continued to slow his vehicle, and when he was about 150 feet from the sharp corner, the flashing blue light was turned off. [Tanner] proceeded, at a safe speed . . . , around a stopped vehicle in his lane and continued south. There was no lighting to light the area, no one was directing traffic at this [check station], and no sign directed [Tanner] to stop.

Dkt. 85, at 4.

As a general matter, "[t]he subjective intrusion from a checkpoint stop is significantly less than other types of seizures, such as random stops." *Fraire*, 575 F.3d at 934. In *Fraire*, the court held the subjective intrusion of the national park checkpoint was minimal because "[t]he checkpoint was accompanied by signs announcing it, the rangers operating it were uniformed, and all approaching vehicles were stopped." *Id.* Similarly, in *Thurman*, the Idaho Court of Appeals found that although some of the wildlife checkpoint stops occurred in the dark, the reflective warning signs and blue flashing light alerted travelers to the check station's presence, and that "the subjective potential for causing fear at checkpoints was low because

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accompanies the photograph attesting to where or when the photograph of the sign was taken or who took it.

motorists can see *visible signs of authority*, including uniformed officers." *Thurman*, 996 P.2d at 315 (emphasis added) (citing *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 452–53 (1990)).

In the present case, Tanner stated in his affidavit that while driving south on Meadow Creek Road, he "passed two ground-mounted signs stating, 'SLOW, IDAHO DEPT OF FISH & GAME, CHECK STATION.'" Dkt. 85-3, ("Plaintiff's Affidavit"), at 9. As he neared the check station, Tanner saw "a flashing blue light . . . activate[] for about two to three seconds." Plaintiff's Affidavit, at 10. In response to these signs and the flashing blue light, "[Tanner] continued to slow his vehicle, and when about 150 feet from a vehicle stopped in the southbound lane, the flashing blue light was turned off." Plaintiff's Affidavit, at 10.

Tanner states that after seeing the warning and flashing blue lights, he proceeded "at a safe speed of about 15 miles per hour." Plaintiff's Affidavit, at 10. Upon approaching the check station, Tanner testified there was "a vehicle blocking the southbound lane," and he drove around it, into the northbound lane, continuing south as he bypassed the check station. Dkt. 73-2, Tanner Depo., at 25–26; *see also* Plaintiff's Affidavit, at 10 ("Tanner pulled to the left of a vehicle stopped in the southbound lane and proceeded around the sharp curve, passing the [check station] area at a safe speed of about 15 miles per hour."). As he drove by the check station, Tanner stated that "it was obvious to [him] that it was an Idaho Fish & Game check station." Dkt. 85-7, Tanner Depo., at 45. Additionally, he asserts

that "[t]he curved section of road precluded the oncoming traffic from seeing the check station roadblock until they rounded the corner about 300 feet away." Dkt. 85, at 4

Like the wildlife checkpoint in *Fraire*, the IDFG check station was accompanied by multiple reflective signs announcing the check station ahead, the officers operating it were uniformed, and another vehicle that had approached the check station was stopped.[7] The question, then, is whether the fact that the check station was operated after sunset, in the dark, without proper lighting, and by officers without reflective attire is material such that a reasonable juror could return a verdict in Tanner's favor.

Like the court in *Thurman*, this Court finds that although the check station was operated after sunset, in the dark, without lighting, and by officers without reflective attire, these are not facts that are material to the outcome of this case. The visible signs of

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[7] Tanner attempts to distinguish this case by emphasizing that the checkpoint in *Fraire* was located at a national park entrance where visitors would expect to briefly stop, while the IDFG check station was located along a curved road. However, the *Fraire* court noted that the checkpoint's location at the national park entrance was "not a dispositive point." *Fraire*, 575 F.3d at 934. Likewise, this Court notes, as a non-dispositive factor, that the IDFG check station was located along a road frequented by hunters near potential hunting areas. *See* Dkt. 73-3, ¶ 4. Non-sportsman travelers on Meadow Creek Road, although perhaps not expecting to be stopped at that very place, would not be afraid or surprised by the nature of the stop because, as Tanner stated, the stops occurred "at a time and location when hunters would be returning from their hunts." Dkt. 85, at 13.

authority that Tanner saw within the IDFG check station area—including the reflective warning signs, a blue flashing light, and uniformed officers—decreases the subjective potential for causing fear in unsuspecting motorists because it would also be "obvious" to them, as it was to Tanner (Dkt. 85-7, Tanner Depo., at 45), that it was an IDFG check station.

The Court finds that no reasonable juror, considering these facts, could conclude that the location of this check station would cause fear and surprise in law-abiding motorists sufficient to interfere with individual liberty to any significant degree. The location of the check station was announced by two reflective signs with the words, "SLOW, IDAHO DEPT OF FISH & GAME, CHECK STATION," and a blue flashing light was visible to southbound traffic from over 150 feet from the check station. Oncoming traffic could also see the check station from 300 feet away, giving plenty of time for drivers to react in a safe manner to the unexpected check station, even though it was operated along a "sharp" curve. Tanner himself felt the section of road where the check station was located was safe enough for him to drive slowly around the stopped vehicle in the oncoming traffic's lane. Although Tanner could not see a visible "stop" sign as he drove by the check station, the multiple "slow" signs, blue flashing lights, uniformed officers, and stopped vehicles in his lane would not reasonably cause anxiety or alarm in unsuspecting motorists to any significant degree. Thus, the Court finds that the subjective intrusion of the IDFG wildlife check station in this case was minimal.

c. Conclusion

The Court finds that no reasonable juror, drawing all inferences in favor of Tanner, could return a verdict in his favor. In this case, the public concern for wildlife management was high, the check station significantly advanced this public interest, and the objective and subjective interference with individual liberty was minimal and reasonable. It follows that the check station was reasonable under the Fourth Amendment. Even if the check station were operated under the conditions Tanner described, he has not met his burden to respond with specific facts, supported by evidence, with reasonable particularity, to establish a dispute of fact exists that precludes the Court from issuing summary judgment on this claim.

Tanner has not offered any evidence that would allow a reasonable juror, drawing all inferences in Tanner's favor, to conclude that IDFG wildlife check stations violate the Fourth Amendment.

3. Constitutionality of the Wildlife Checkpoints Under Article I, Section 17 of the Idaho Constitution

"Article I, § 17 of the Idaho Constitution provides no greater protection in these situations than does the Fourth Amendment to the United States Constitution." *State v. Thurman*, 996 P.2d 309, 315 (Idaho Ct. App. 1999) (declining to hold that Idaho's Constitution provides greater protection to the hunting public in

wildlife checkpoint stops than does the Fourth Amendment of the U.S. Constitution).

As routine IDFG wildlife checkpoint stops such as the one before the Court are constitutional under the Fourth Amendment of the U.S. Constitution, they are likewise constitutional under Article I, section 17 of the Idaho Constitution.

B. Tanner's First Cause of Action

Tanner's first cause of action against Defendants Swanson, Stanley, and Johnson is brought pursuant to 42 U.S.C. § 1983. In general, "[t]o establish § 1983 liability, a plaintiff must show both: (1) deprivation of a right secured by the Constitution and laws of the United States; and (2) that the deprivation was committed by a person acting under color of state law." *Chudacoff v. Univ. Med. Ctr. of S. Nev.*, 649 F.3d 1143, 1149 (9th Cir. 2011) (citing *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003)). "Dismissal of a § 1983 claim is proper if the complaint is devoid of factual allegations that give rise to a plausible inference of either element." *Naffe v. Frey*, 789 F.3d 1030, 1036 (9th Cir. 2015).

Courts treat the "under color of law" requirement of § 1983 cases as identical to the "state action" requirement of the Fourteenth Amendment. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982). No party disputes the individual Defendants in this case were acting under color of state law. Thus, the only question is

whether they deprived Tanner of his Constitutional rights.

Tanner essentially alleges two constitutional violations. He asserts that his arrest by Defendants Swanson and Stanley for failing to stop at the checkpoint was unconstitutional as they lacked probable cause. He also contends that Defendants Swanson, Stanley, and Johnson violated his First Amendment rights by specifically targeting his car in retaliation to his complaints to state representatives (as well as other public officials and entities) about the IDFG checkpoints. He alleges Defendants Swanson, Stanley, and Johnson knew that Tanner was not a hunter, fisherman, or trapper, and the stop was pretextual.

In his Complaint, it appears that Tanner also takes issue with the officers' failure to follow procedure during the night of the incident. It is unclear if Tanner is alleging that Defendants Swanson and Stanley violated his Fifth Amendment rights by failing to read him his *Miranda* rights upon arrest and/or if he is alleging Defendants Swanson, Stanley, and Johnson's operation of the wildlife checkpoint station at Meadow Creek Road violated state law and federal regulation. Reading his *pro se* Complaint liberally, the Court will construe his complaint as alleging two additional constitutional claims against Defendants.

1. Fourth Amendment: False Arrest

Tanner asserts Defendants Swanson, Stanley, and Johnson are liable for false arrest. "A claim for

unlawful arrest is cognizable under § 1983 as a violation of the Fourth Amendment, provided the arrest was without probable cause or other justification." *Dubner v. City & Cnty. of S.F.*, 266 F.3d 959, 964 (9th Cir. 2001). "Probable cause exists when there is a fair probability or substantial chance of criminal activity." *United States v. Patayan Soriano*, 361 F.3d 494, 505 (9th Cir. 2004) (quoting *United States v. Bishop*, 264 F.3d 919, 924 (9th Cir. 2001)) (internal quotation marks omitted). "It is well-settled that 'the determination of probable cause is based upon the totality of the circumstances known to the officers at the time of the search.'" *Id.* (quoting *Bishop*, 264 F.3d at 924).

To maintain an action for false arrest against Defendants Swanson, Stanley, and Johnson, Tanner must plead facts that would show they ordered or otherwise participated in the arrest and the arrest was without probable cause. There is no relevant dispute of fact here; Tanner does not deny that he failed to stop at the wildlife check station. Defendants Swanson, Stanley, and Johnson knew, at the time they pursued and arrested him, that Tanner had failed to stop at the station as required.

In the District Court of the First Judicial District of the State of Idaho, in and for the County of Boundary Magistrate Division, CR-2017-1192, the magistrate judge found the officers lacked probable cause to stop Tanner. Dkt 85-14, Transcript of January 11, 2018 Pretrial Conference, at 48. In so ruling, the magistrate judge reviewed the plain text of Idaho Code § 36–1201. Given that the statute only stated that fishermen,

hunters, and trappers may be stopped at wildlife checkpoints, the magistrate judge held the officers exceeded their statutory authority in attempting to stop everyone, even for a few seconds. Dkt 85-14, Transcript of January 11, 2018 Pretrial Conference, at 45. In response to the prosecutor's point that interpretation of the statute would essentially allow all fishermen, hunters, and trappers to drive past wildlife checkpoint stations unless they had a deer hanging up in plain sight, the magistrate judge said the officers should "profile[motorists] and it happens all the time." *Id.* at 47.[8]

Regardless of what the magistrate judge held in the criminal case, this Court has the responsibility to independently review whether there was probable cause in deciding Tanner's civil claim that the officers violated his constitutional rights. Setting aside the fact

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[8] As a general note, the Ninth Circuit rejects broad profiling as a way of establishing reasonable suspicion. *United States v. Wrobel*, 295 F. Supp. 3d 1127, 1136 (D. Idaho 2018) ("The Ninth Circuit explicitly rejected officers' reliance on such broad profiles to create reasonable suspicion, because they sweep in innocents along with criminals, and lack any 'particular, individualized, and objectively observable factors which indicate that [a] person is engaged in criminal activity.' ") (quoting *United States v. Rodriguez*, 976 F.2d 592, 596 (9th Cir. 1992)) (rejecting "profile[s] of specific behavior very likely to sweep many ordinary citizens into a generality of suspicious appearance merely on a hunch."); *see also Sialoi v. City of San Diego*, 823 F.3d 1223, 1235 (9th Cir. 2016) ("[R]easonable suspicion may not be 'based on broad profiles which cast suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped.' ") (quoting *United States v. Sigmond-Ballesteros*, 285 F.3d 1117, 1121 (9th Cir. 2001)) (alterations in original).

that a pickup truck bypassing the check station when all other vehicles stop might be sufficient to raise reasonable suspicion, the magistrate judge's interpretation is not consistent with Idaho Court of Appeals' interpretation of § 36-1201(b) in *Thurman.* In *Thurman*, the court acknowledged that IDFG's "impromptu check station guidelines additionally provide that 'no check stations will be established and operated in a manner that will detain non-hunters or non-fishermen *unnecessarily.*' Generally, anything other than quickly determining whether the vehicle occupants have been hunting or fishing could be considered unnecessary delay." 996 P.2d at 314 (emphasis added). After acknowledging those guidelines, the *Thurman* court went on to hold that when the officer "quickly determine[d] if vehicle occupants had been fishing or hunting. . . . [he] acted reasonably pursuant to *statutory authority* and in substantial conformance with IDFG policy guidelines." *Id.* (emphasis added). Thus, the Court respectfully disagrees with the magistrate judge's interpretation of § 36-1201; the officers had the statutory authority under § 36-1201 to stop all vehicles in order to quickly determine if they had been fishing or hunting, though it could not unnecessarily delay non-sportsmen.

The Court finds Defendants Swanson, Stanley, and Johnson had probable cause, based on the totality of the circumstances, to believe Tanner may have violated § 36-1201. The Court dismisses Tanner's claim for unlawful arrest under § 1983 as his seizure was not a result of a violation of the Fourth Amendment.

2. First Amendment Retaliation

Tanner alleges he had previously complained about the constitutionality of the IDFG fish and game checkpoints to his representatives; that Defendants Swanson, Stanley, and Johnson knew that he had complained; and that said Defendants pursued him for his failure to stop at the IDFG checkpoint in order to retaliate against his prior complaints. In essence, Tanner alleges Defendants Cowell, Stanley, and Swanson arrested him for exercising his First Amendment rights.

"Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right[';] . . . the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Lacey v. Maricopa Cty.*, 693 F.3d 896, 916–19 (9th Cir. 2012) (alterations in original) (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)).

In *Nieves v. Bartlett*, the Supreme Court held that a plaintiff pursuing a First Amendment retaliatory arrest claim must generally plead and prove the absence of probable cause for the arrest. ___ U.S. ___, 139 S. Ct. 1715 (2019) (abrogating *Ford v. Yakima*, 706 F.3d 1188 (9th Cir. 2013) (per curiam)). The *Nieves* Court noted, however, "[a]lthough probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* at 1727. Thus,

"the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.*

During oral argument, Tanner stated he had no record of IDFG letting other people bypass the check station without stopping them; nor did he believe that such an event had ever occurred. He does not know of any other individual that went past the wildlife checkpoint station without stopping. Thus, *Nieves*'s no-probable-cause requirement applies. Tanner has not presented objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been. In other words, Tanner has not presented sufficient facts that individuals who had *not* critiqued IDFG for their wildlife checkpoint stations were allowed to bypass the IDFG roadblock without being stopped.

Here, there was probable cause to arrest Tanner. He bypassed the IDFG wildlife checkpoint. He was pursued, arrested, and cited based on his failure to stop at the check station. As there was probable cause, the Court grants IDFG Defendants motion for summary judgment on Tanner's First Amendment retaliation claim.

3. Fifth Amendment: Failure to Read Miranda Rights

Tanner suggests that Stanley, Swanson, and Cowell's failure to read him his *Miranda* rights prior to arresting him gives rise to a viable § 1983 claim. Dkt. 4, ¶¶ 27, 31. Stanley and Swanson both admit they did not read Tanner his *Miranda* rights, asserting it was because they did not question Tanner. Dkt. 85-4, at 58, 78.

In *Chavez v. Martinez*, a plurality of the Supreme Court said "an officer's failure to read *Miranda* warnings to a plaintiff does "not violate [plaintiff's] constitutional rights and cannot be grounds for a § 1983 action." 538 U.S. 760, 772 (2003) (citing *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987)) (*Miranda*'s warning requirement is "not itself required by the Fifth Amendmen[t] . . . but is instead justified only by reference to its prophylactic purpose"); *see also Michigan v. Tucker*, 417 U.S. 433, 445 (1974) (*Miranda's* safeguards "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected"). Thus, "an officer's failure to read *Miranda* warnings to a defendant before interrogation . . . [is] not actionable under § 1983." *Soo Park v. Thompson*, 851 F.3d 910, 926 (9th Cir. 2017).

To the extent that Tanner is alleging a § 1983 action against Stanley and Swanson (or Cowell) due to their failure to read him *Miranda* warnings, the Court dismisses the claim.

4. State Law or Federal Regulation

It is unclear if Tanner seeks to assert a § 1983 claim against any of the IDFG Defendants for violating state law or federal regulation.[9] "[Section] 1983 does not provide a cause of action for alleged violations of state law." *Pototsky v. Napolitano*, 210 F. App'x 637, 637 (9th Cir. 2006). Additionally, § 1983 claim may only be asserted for violating a right secured by the Constitution and laws of the United States; it does not allow a cause of action simply for failure to abide by federal policy manuals.[10]

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[9] IDFG Defendants posit Tanner may be doing so given the following allegation in his Amended Complaint:

> Defendants Swanson, Stanley and Johnson, under the color of law, operated the roadblocks on a sharp comer of Meadow Creak Road in an unsafe and dangerous way that violated the state and federal laws as to proper signage, and signage placement, and without a continuous flashing blue light at the roadblock *as required by Idaho Code 19-622 (2)-(4).* In addition, these Defendants operated the roadblocks without proper illumination of the area at night and without wearing high visibility safety apparel *as required by the Federal Transportation Manual on Uniform Traffic Control Devices.* (as required by MUTCD § 6G.19 paragraph 10 and 6D.03 paragraph 06 and 6E.02 paragraph 03.)

Dkt. 4, at ¶ 61 (emphasis added).

[10] Policy setting and/or following may be an aspect that bolsters a § 1983 claim (*Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658 (1978)) but must be tied to an overarching claim of a deprivation of a right secured by the Constitution and laws of the United States; it cannot independently give rise to a § 1983 claim.

Ultimately, Tanner may not assert a § 1983 claim against any of the Defendants for violating state law or federal regulation generally. To the extent he is trying to do so, such claim is dismissed.

5. Conclusion

The Court need not address Defendants Swanson, Stanley and Johnson's qualified immunity defenses. The Court dismisses Tanner's claims pursuant to § 1983 against them because the Court finds they did not deprive Tanner of a Constitutional right.

C. Tanner's Second Cause of Action

Tanner's second cause of action is a § 1983 claim against Defendant Moore for establishing IDFG Policy No. E-7 Section H and J that allows for the use of roadblocks for wildlife check stations. Tanner alleges the policy is unconstitutional in that it violates the Fourth Amendment and Article 1, section 17 of the Idaho Constitution.

Tanner has not provided evidence that any of the particular checkpoints he encountered, or any other check stations operated by IDFG pursuant to this policy, have been operated in an unconstitutional or unlawful manner. *See supra.* Thus, the Court does not find Defendant Moore's establishment of such a policy unconstitutional. The Court grants IDFG Defendants summary judgment on Tanner's Second Cause of Action.

D. Tanner's Third Cause of Action

Tanner's third cause of action is a § 1983 claim against Defendant Cowell. He argues Cowell's frisk of Tanner was unreasonable and Cowell's subsequent placement of him in the patrol vehicle caused pain and suffering, violating his Fourth Amendment rights. Further, he alleges that Cowell punished him by conducting a "false arrest" when Tanner "exercise[d] his right to be remain silent." Dkt. 4, ¶¶ 74, 76. Cowell argues that he did not violate Tanner's Fourth, Fifth, or Fourteenth Amendment rights.[11]

1. Fourth Amendment: Frisk

Tanner was under arrest when Cowell arrived at the scene but had not yet been frisked (or searched). Upon transfer, Cowell placed Tanner in a different set of handcuffs, frisked him, and loaded him into his patrol vehicle. Cowell later removed Tanner from the patrol vehicle and investigated him for any signs of DUI. Cowell found none and declined to issue a citation. Dkt. 87, ¶¶ 33–34 (citing Dkt. 73-2, Tanner Depo., at 43).

Defendants assert such a frisk was warranted because Tanner may have been armed and dangerous. Tanner responds that this argument is a farce as

[11] Cowell also argues that any state law claims against him should be dismissed due to failure to comply with Idaho Code § 6-908, which mandates plaintiffs must file a notice of tort claims. Tanner only alleged that Cowell violated his Fourth and Fifth Amendment rights. *See generally* Dkt. 4. As he did not allege any tort against Cowell, the Court cannot dismiss such a cause of action.

Defendants had no probable cause to believe he was armed and dangerous. The Court takes no position on this issue, however, as its resolution is inapplicable to the Court's analysis today.

Tanner was under arrest when frisked. "The Supreme Court and [the Ninth Circuit] have already held that a search incident to a lawful arrest is not limited to simple pat-down of the suspect and can 'involve a relatively extensive exploration' of the areas within the arrestee's immediate control." *United States v. Williams*, 846 F.3d 303, 312 (9th Cir. 2016) (quoting *United States v. Robinson*, 414 U.S. 218, 227 (1973)); *see also United States v. Maddox*, 614 F.3d 1046, 1048 (9th Cir. 2010). "Those areas include the arrestee's person and the inside pockets of the arrestee's clothing." *Williams*, 846 F.3d at 312. Here, the officers had probable cause to arrest Tanner; Cowell performed a valid search incident to arrest upon transfer of custody after Tanner was lawfully apprehended for failing to stop at the check station. The frisk, therefore, was constitutional.

2. Excessive Force

Tanner alleges in his Complaint the way Cowell handcuffed him and belted him in the patrol vehicle caused him "severe pain." Dkt. 4 at ¶ 30. *See also id.* at ¶ 73. He provides no further detail on how he was injured.

"The Fourth Amendment's requirement that a seizure be reasonable prohibits more than the unnecessary strike of a nightstick, sting of a bullet, and thud

of a boot." *Fontana v. Haskin*, 262 F.3d 871, 878 (9th Cir. 2001). Under the Fourth Amendment, police may use only such force as is objectively reasonable under the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989); *White v. Pierce County*, 797 F.2d 812, 815 (9th Cir. 1986). Determining whether force used in making an arrest is excessive or reasonable "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396.

"It is well-established that overly tight handcuffing can constitute excessive force." *Wall v. Cty. of Orange*, 364 F.3d 1107, 1112 (9th Cir. 2004) (citing *Meredith v. Erath*, 342 F.3d 1057, 1061, 1063–64 (9th Cir. 2003)) (holding that "to place and keep [a person] in handcuffs that were so tight that they caused her unnecessary pain violated her Fourth Amendment right to be free from an unreasonable seizure"); *LaLonde v. County of Riverside*, 204 F.3d 947, 960 (9th Cir. 2000) ("A series of Ninth Circuit cases has held that tight handcuffing can constitute excessive force.").

The Ninth Circuit has held, however, that "conclusory allegations" of injury from handcuffing which are "unsupported by factual data are insufficient to defeat" a motion for summary judgment. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001). In *Arpin*, the plaintiff alleged that she suffered injury as a result of being handcuffed by an officer. The

Ninth Circuit held that the plaintiff's failure to provide medical records or other evidence to support her claim of injury was insufficient to support a claim that the force used was unreasonable and excessive. *Id.* Similarly, in an unpublished Ninth Circuit opinion, the court held that it had previously found handcuffing to be an unreasonable application of force where "the plaintiffs either suffered damage to their wrists as a consequence of the handcuffs or the plaintiffs complained to the officers about the handcuffs being too tight." *Liiv v. City of Coeur D'Alene*, 130 F. App'x 848, 852 (9th Cir. 2005). In *Liiv*, because there was no "evidence of a physical manifestation of injury and notification to the police that the handcuffs were too tight," the Ninth Circuit held that the plaintiff could not establish that the officer had unreasonably tightened the handcuffs. *Id.*

Yet in a more recent unpublished Ninth Circuit decision, the court held that a plaintiff need not support a claim of excessive force due to tight handcuffs with proof of visible physical injury. An allegation that the handcuffs caused "unnecessary pain," is sufficient. *See Thompson v. Lake*, 607 F. App'x 624, 625–26 (9th Cir. 2015) (first citing *Meredith v. Erath*, 342 F.3d 1057, 1060, 1062–63 (9th Cir. 2003); then citing *LaLonde v. County of Riverside*, 204 F.3d 947, 952, 960 (9th Cir. 2000)). In *LaLonde*, the Ninth Circuit held that a plaintiff's allegations that officers tightly handcuffed him and refused to loosen the handcuffs when he complained, was sufficient to defeat summary judgment for the defendant. 204 F.3d at 960.

At least two courts in this circuit have noted that the decisions in *Arpin* and *Thompson* appear to conflict. *See Smith v. Sergent*, No. 215CV0979GEBDBP, 2017 WL 4284659, at *6 (E.D. Cal. Sept. 27, 2017); *Chambers v. Steiger*, No. C14–1678–JCC–MAT, 2015 WL 9872531, at *8 (W.D. Wash. Oct. 29, 2015), *rep. and reco. adopted*, 2016 WL 235764 (W.D. Wash. Jan. 20, 2016). In *Arpin*, the Ninth Circuit required medical or other evidence of injury beyond the plaintiff's own claims. 261 F.3d at 922. In *Thompson*, the Ninth Circuit held that a plaintiff's claims of unnecessary pain were enough. 607 F. App'x at 625. Both *Smith* and *Chambers* found *Arpin* controlling and declined to follow the unpublished decision in *Thompson*. *See Smith*, No. 215CV0979GEBDBP, 2017 WL 4284659, at *6 ("It appears that most courts in this circuit have held that a plaintiff attempting to prove excessive force must show either a demonstrable injury or that he complained about the handcuffs being too tight and was ignored.") (first citing *Candler*, 2015 WL 2235674, at *8; then citing *Dillman v. Tuolumne County*, No. 1:13–CV–0404 LJO SKO, 2013 WL 1907379, at *8 (E.D. Cal. 2013)); *Weldon v. Conlee*, No. 1:13–cv–0540–LJO–SAB, 2015 WL 1811882, at *14 (E.D. Cal. Apr. 21, 2015), *aff'd*, 684 F. App'x 612 (9th Cir. 2017); *Gause v. Mullen*, No. CV 12–1439–PHX–RCB(MEA), 2013 WL 5163245, at *9 (D. Ariz. Sept. 12, 2013); *Nguyen v. San Diego Police Dept.*, No. 11cv2594–WQH–NLS, 2013 WL 12114518, at *9 (S.D. Cal. Aug. 15, 2013); *Bashkin v. San Diego County*, No. 08cv1450–WQH–WVG, 2010 WL 2010853, at *7 (S.D. Cal. May 20, 2010); *cf.*

LaLonde, 204 F.3d at 952; *Palmer v. Sanderson*, 9 F.3d 1433, 1434–36 (9th Cir. 1993).

As noted above, Tanner's allegation that the way Cowell handcuffed him and belted him in the patrol vehicle caused him severe pain is sparse. In his response to Defendants' Motion for Summary Judgment, Tanner provides more information on what he is alleging:

> Cowell then belted Tanner in a position that caused pain and suffering, making deep marks on his wrists. Tanner has a right not to be subjected to pain and suffering at the hands of the Defendants. Cowell, Swanson, and Stanley's actions to arrest, handcuff and place in a confined area caused the Plaintiff "a lot of grief." Plaintiff was in severe pain due to the handcuffs and the position in which he was belted into the patrol vehicle.

Dkt. 85, at 30. In support of his allegations, he provided a copy of Officer's Cowell's body camera recording of that night, which he titles "PV--olice Video Recording" (Dkt. 85, at iv) on a USB drive.[12] The body camera video starts when Tanner was already handcuffed and placed in the back seat of Officer Cowell's vehicle. Cowell is assisting Tanner in getting out of the vehicle.

Around twenty-eight seconds into the body camera video, Tanner—still in the process of exiting the vehicle—can be heard saying, "Oh, it's killing my hands."

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[12] The file name for the recording is PICT0004-2017.11.18_16-36.08.

PV, at 00:28. Cowell promptly responds, "I'm gonna, I'm gonna adjust those handcuffs when you get out. In fact, I'm gonna take them off of you here for a – there we go." *Id.* A few seconds later, when Tanner is out of the vehicle, Cowell can be heard asking Swanson on the scene, "Do you mind if I pull him out of handcuffs?" to which Swanson responds "sure." PV, at 00:54; Dkt. 85-14, at 15. Cowell proceeds to remove the handcuffs from Tanner. In sum, within one minute of Tanner voicing his complaint that the handcuffs were painful, Cowell had removed them. Cowell did not ignore Tanner's complaints of pain.

As Cowell was removing the handcuffs, Tanner asks, "You see that?" PV, at 01:33. Cowell responded, "I do." Tanner then seemingly asks someone else "Do you see it?" *Id.* It is not clear from the video what the parties are referring to. However, Tanner affirms that he was showing Cowell marks on his wrists from the handcuffs. Dkt. 85-1, at 8 (citing Plaintiff Affidavit, ¶ 101). Officer Swanson also remembers Tanner mentioning marks on his wrists and thinking Tanner was in some kind of pain. Dkt. 85-7, at 108. Cowell does not dispute that he was shown marks on Tanner's wrists from the handcuffs.

After being asked if Cowell "[saw that]," Cowell allowed Tanner to hold his hands "up here," in front of his body rather than be in handcuffs. PV, at 01:43. Tanner mentioned it was difficult for him to do that as he had a bad shoulder, and so Cowell allowed Tanner to hold his hands against his chest instead while Cowell asked Tanner if he understood why he was stopped.

Tanner then stated he had the right to remain silent and he had a right to attorney. Cowell acknowledged both before proceeding to ask about whether Tanner was impaired or driving under the influence. Tanner objected to the additional questioning, stating he had already invoked his Fifth Amendment rights. Cowell continued to question Tanner. At the end of Cowell's questioning, he placed Tanner back in handcuffs, but handcuffed him with his arms in front, rather than behind his back. PV, at 03:36.

Tanner has not provided evidence of demonstrable injury from the way he was handcuffed or belted. In his deposition, Tanner said he was claiming no medical expenses due to the November 18, 2017 incident. Dkt. 73-2, at 62:10–13.

Upon Tanner informing Cowell the handcuffs pained him, Cowell promptly removed them. As Tanner does not show a demonstrable injury or allege that he complained about the handcuffs causing him pain and was ignored, the Court dismisses his claim of excessive force. *See also Thomas v. Cassia Cty., Idaho*, No. 4:17-CV-00256-DCN, 2019 WL 938385, at *8 n.6 (D. Idaho Feb. 26, 2019), *adhered to on reconsideration*, No. 4:17-CV-00256-DCN, 2019 WL 5270200 (D. Idaho Oct. 17, 2019) ("The Court's decision to grant summary judgment is further supported by [plaintiff's] failure to produce any medical documentation that proves his claimed injuries."); *Law v. City of Post Falls*, 772 F. Supp. 2d 1283, 1300 (D. Idaho 2011) ("Furthermore, like the plaintiff in *Arpin*, in this case Plaintiff has not produced any medical evidence in response to

Defendants' motion for summary judgment that the handcuffing resulting in damage to his wrists or hands.").

3. False Arrest

Tanner alleges in his Amended Complaint that Defendant Cowell "false[ly] arrest[ed]" him. Dkt. 4, at ¶ 76.

IDFG officers had already arrested Tanner prior to Cowell arriving on the scene. Cowell assisted the IDFG officers but never independently arrested Tanner. Cowell reiterated during oral arguments that he never issued any citation to Tanner, whether relating to DUI, obstruction, or otherwise. Tanner has not provided any evidence that Cowell arrested him or cited him for any offense.

As Tanner was only arrested once on November 17, 2017—and the arrest occurred prior to Cowell arriving on the scene—the Court finds that Cowell did not participate in a "false arrest" of Tanner.

4. Fifth Amendment: Right to Remain Silent

Cowell asserts that "the Fifth Amendment applies only to the acts of the federal government and therefore [Tanner's claim in this respect] must be dismissed against" him. Dkt. 72-1, at 12; Dkt. 89, at 7 (citing *Spies v. People of the State of Illinois*, 123 U.S. 131, (1887)).

While technically correct, the Court emphatically disagrees with Cowell's argument. The Fifth Amendment privilege of the right to remain silent is secured against state officers through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) ("The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in Twining, for such silence."). Tanner, as a *pro se* plaintiff, may have unartfully articulated that he was bringing his Fifth Amendment claim against state officers through the Fourteenth Amendment, but his intent was clear. The Court will construe his claim as such.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. "Where the initial request to stop the questioning is clear, 'the police may not create ambiguity in a defendant's desire by continuing to question him or her about it.'" *Anderson v. Terhune*, 516 F.3d 781, 790 (9th Cir. 2008) (quoting *Barrett*, 479 U.S. at 535 n. 5, 107 (Brennan, J., concurring)).

Where the police "parse[an arrestee's] invocation into specific subjects, 'the police fail[ ] to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind.'" *Id.*

(quoting *Mosley*, 423 U.S. 96, 105–06 (1975)). The net result is that "such follow-up questions allow the officer to avoid honoring the Fifth Amendment and, as in a right to counsel situation, enable[ ] 'the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—[to] wear down the accused and persuade him to incriminate himself.'" *Id.* (quoting *Smith v. Illinois*, 469 U.S. 91, 98 (1984)).

However, the Supreme Court held, in a fractured opinion, that coercive police questioning does not violate a suspect's Fifth Amendment right against compelled self-incrimination unless and until the compelled statement is "used" against the suspect in a "criminal case." *Chavez v. Martinez*, 538 U.S. 760, 766 (2003) (Thomas, J., joined by Rehnquist, C.J., O'Connor, J., and Scalia, J.); *id.* at 777–78 (Souter, J., joined by Breyer, J.). Applying *Chavez*, the Ninth Circuit has held that a statement has been "used in a criminal case" if government officials relied on the incriminating statement "to initiate or prove a criminal charge." *Stoot v. City of Everett*, 582 F.3d 910, 925 n.15 (recognizing that plaintiff's Fifth Amendment rights were not violated until the prosecutor used his coerced statements in an affidavit and at arraignment).

Here, Tanner fails to allege which, if any, of his statements were used to initiate or prove a criminal charge. He alleges that Cowell arrested him for drunk driving and obstructing an officer as punishment for asserting his right to remain silent. As stated previously, Tanner has provided no evidence that he was arrested by Cowell at all, let alone for those two charges.

Additionally, there is no record illustrating that any statements Tanner made to Cowell, or other officers, that night were used against him in any criminal proceeding.[13] Absent such evidence, the Court holds Tanner's Fifth Amendment right against compelled self-incrimination was not violated—despite Cowell's failure to honor a decision of a person in custody to cut off questioning. As there is no constitutional violation, the Court dismisses Tanner's Fifth Amendment claim under § 1983 against Cowell.

5. Conclusion

The Court finds Cowell did not violate Tanner's constitutional rights. Thus, it does not review Cowell's qualified immunity claims prior to dismissing Tanner's § 1983 against Cowell.

6. Tanner's Fourth Cause of Action

Tanner's fourth cause of action is for declaratory judgment and injunctive relief. He seeks to enjoin Defendants from operating wildlife checkpoint roadblocks and to mandate that Defendants only stop fishermen, hunters, and trappers at wildlife check stations, rather than the public at large. As the Court has already held that the routine IDFG wildlife checkpoint

[13] The prosecutor dismissed the two counts (failing to stop and report at a check station and eluding a police office) brought by the State of Idaho against Tanner at his pre-trial conference. Dkt 85-14, Transcript of January 11, 2018, Pretrial Conference, at 48.

roadblocks which briefly stop the public for the purpose to effectively manage the state's wildlife resources are both constitutional and statutorily authorized, such relief would be inappropriate. The Court dismisses Tanner's Fourth Cause of Action.

7. Tanner's Motion to Strike

During oral arguments, Tanner moved to strike Cowell's affidavit on the grounds that Cowell lacked personal knowledge of events that occurred prior to his arrival at the gas station. Specifically, Tanner argues that Cowell cannot testify to the events that occurred at the wildlife check point.

The Court has reviewed Cowell's affidavit. Dkt. 72-4. In it, Cowell testifies that he overheard a radio call from the Boundary County Communication Police Dispatch ("dispatch") that a driver had failed to yield. *Id.* ¶ 6. He further testifies that Officer Swanson was the individual who advised dispatch that the driver refused to pull over, despite the fact that the pursuing officer's vehicle had its lights and sirens activated. Based on the information from dispatch, he determined it was a "high risk" situation. *Id.* ¶ 7.

Cowell is not testifying as to the truth of what dispatch or Officer Swanson asserted. Rather, he is providing foundation for his own opinion. In other words, what Tanner alleges are *facts* asserted are actually part of Cowell's *opinion.* The Court will give

Cowell's opinion the weight it deems appropriate. The Court denies Tanner's motion to strike.[14]

V. ORDER

The Court HEREBY ORDERS:

1. Defendant Cowell's Motion for Summary Judgment (Dkt. 72) is **GRANTED**.
2. IDFG Defendants' Motion for Summary Judgment (Dkt. 73) is **GRANTED**.
3. This case is dismissed in its entirety and closed.
4. The Court will enter a separate judgment in accordance with Federal Rule of Civil Procedure 58.

[SEAL]

DATED: September 9, 2020

/s/ David C. Nye
David C. Nye
Chief U.S. District Court Judge

[14] The Court notes that it did not rely on Cowell's affidavit concerning the events that occurred prior to his arrival on the scene in determining whether to grant Defendants' Motions for Summary Judgment.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

STEVE TANNER, Plaintiff, v. IDAHO DEPARTMENT OF FISH AND GAME DIRECTOR ED SCHRIEVER; VIRGIL MOORE; LUCAS SWANSON; JOSH STANLEY; BRIAN JOHNSON; and WILLIE COWELL, Defendants.	Case No. 2:18-cv-00456-DCN **JUDGMENT** (Filed Sep. 10, 2020)

In accordance with the Court's Memorandum Decision and Order entered concurrently herewith,

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment be entered in favor of Defendants, and this case closed.

[SEAL]

DATED: September 10, 2020

/s/ David C. Nye
David C. Nye
Chief U.S. District Court Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEPHEN A. TANNER I, Plaintiff-Appellant, v. IDAHO DEPARTMENT OF FISH AND GAME; et al., Defendants-Appellees.	No. 20-35886 D.C. No. 2:18-cv-00456-DCN ORDER (Filed May 4, 2022)

Before: D.W. NELSON, FERNANDEZ, and SILVERMAN, Circuit Judges.

Appellant's Motion to Extend Time to File Petition for Panel Rehearing and Rehearing En Banc (Dkt. 53) is **GRANTED**. The petition for panel rehearing and rehearing en banc shall be filed on or before May 20, 2022.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEPHEN A. TANNER I, Plaintiff-Appellant, v. IDAHO DEPARTMENT OF FISH AND GAME; et al., Defendants-Appellees.	No. 20-35886 D.C. No. 2:18-cv-00456-DCN ORDER (Filed Jun. 14, 2022)

Before: D.W. NELSON, FERNANDEZ, and SILVERMAN, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing and recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is **DENIED**.

TITLE 19
CRIMINAL PROCEDURE
CHAPTER 6
ARREST, BY WHOM AND HOW MADE

19-620. DEFINITION. For the purpose of this act, a "temporary road block" means any structure, device or means used by duly authorized law enforcement officers of the state of Idaho and of its political subdivisions for the purpose of controlling all traffic through a point on a highway whereby all vehicles may be slowed or stopped.

History:

[19-620, added 1957, ch. 31, sec. 1, p. 49.]

TITLE 19
CRIMINAL PROCEDURE
CHAPTER 6
ARREST, BY WHOM AND HOW MADE

19-621. AUTHORITY TO ESTABLISH ROAD BLOCKS. The duly elected or appointed sheriffs, state policemen or policemen of cities of the first or second class of the state of Idaho are hereby authorized to establish, in their respective or adjacent jurisdictions, temporary road blocks upon the highways of this state or city streets for the purpose of apprehending persons reasonably believed by such officers to be wanted for violation of the laws of this state, of any other state, or of the United States, and using such highways or streets.

History:

[19-621, added 1957, ch. 31, sec. 2, p. 49.]

TITLE 19
CRIMINAL PROCEDURE
CHAPTER 6
ARREST, BY WHOM AND HOW MADE

19-622. MINIMUM REQUIREMENTS. For the purpose of warning and protecting the traveling public, the minimum requirements to be met by such officers establishing temporary road blocks, if time and circumstances allow, are:

1. The temporary road block must be established at a point on the highway or street clearly visible at a distance of not less than 100 yards in either direction.

2. At the point of the temporary road block, a sign shall be placed on the center line of the highway or street displaying the word "stop" in letters of sufficient size and luminosity to be readable at a distance of not less than 50 yards, in both directions, either in daytime or darkness.

3. At the same point of the temporary road block, at least one (1) blue light, on and burning, must be placed at the side of the highway or street which shall be a flashing or intermittent beam of light, clearly visible to the oncoming traffic, at a distance of not less than 100 yards.

4. At a distance of not less than 200 yards from the point of the temporary road block, warning signs must be placed at the side of the highway or street, containing any wording of sufficient size and luminosity, to warn the oncoming traffic that a "police stop" lies

ahead. A burning beam light, flare or reflector must be placed near such signs for the purpose of attracting the attention of the traffic to the sign.

History:

[19-622, added 1957, ch. 31, sec. 3, p. 49; am. 1972, ch. 285, sec. 1, p. 717.]

TITLE 36
FISH AND GAME
CHAPTER 1
FISH AND GAME COMMISSION

36-101. FISH AND GAME DEPARTMENT. A department of fish and game is hereby established. Said department shall, for the purposes of section 20, article IV of the constitution of the state of Idaho, be an executive department of the state government. The department shall have its principal office in Ada county.

History:

[36-101, added 1976, ch. 95, sec. 2, p. 316; am. 2001, ch. 183, sec. 10, p. 619.]

TITLE 36
FISH AND GAME
CHAPTER 1
FISH AND GAME COMMISSION

36-103. WILDLIFE PROPERTY OF STATE — PRESERVATION. (a) Wildlife Policy. All wildlife, including all wild animals, wild birds, and fish, within the state of Idaho, is hereby declared to be the property of the state of Idaho. It shall be preserved, protected, perpetuated, and managed. It shall be only captured or taken at such times or places, under such conditions, or by such means, or in such manner, as will preserve, protect, and perpetuate such wildlife, and provide for the citizens of this state and, as by law permitted to others, continued supplies of such wildlife for hunting, fishing and trapping.

(b) Commission to Administer Policy. Because conditions are changing and in changing affect the preservation, protection, and perpetuation of Idaho wildlife, the methods and means of administering and carrying out the state's policy must be flexible and dependent on the ascertainment of facts which from time to time exist and fix the needs for regulation and control of fishing, hunting, trapping, and other activity relating to wildlife, and because it is inconvenient and impractical for the legislature of the state of Idaho to administer such policy, it shall be the authority, power and duty of the fish and game commission to administer and carry out the policy of the state in accordance with the provisions of the Idaho fish and game code.

The commission is not authorized to change such policy but only to administer it.

History:

[36-103, added 1976, ch. 95, sec. 2, p. 317.]

TITLE 36
FISH AND GAME
CHAPTER 12
CHECK STATIONS — WASTE OF WILDLIFE

36-1201. PRODUCTION OF WILDLIFE FOR INSPECTION — STOP AT CHECKING STATIONS — LICENSE MUST BE ON PERSON. No fisherman, hunter or trapper shall refuse or fail to:

(a) Inspection of Wildlife. Upon request of the director, produce for inspection any wildlife in his possession.

(b) Check Stations. Stop and report at a wildlife check station encountered on his route of travel when directed to do so by personnel on duty. Such direction may be accomplished by signs prominently displayed along the route of travel indicating those persons required to stop.

(c) License to be Carried and Exhibited on Request. Have the proper required license, temporary license, authorization number or other information required by rule, on his person at all times when hunting, fishing or trapping and produce the same for inspection upon request of a conservation officer or any other

person authorized to enforce fish and game laws. However, no person charged with violating this subsection shall be convicted if he produces in court a license, theretofore issued to him and valid at the time of his arrest.

History:

[36-1201, added 1976, ch. 95, sec. 2, p. 359; am. 1979, ch. 96, sec. 1, p. 235; am. 1992, ch. 81, sec. 31, p. 244; am. 1997, ch. 220, sec. 2, p. 651.]

42 U.S. Code § 1983 -
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CONSTITUTION OF THE STATE OF IDAHO
ARTICLE I DECLARATION OF RIGHTS

Section 17. UNREASONABLE SEARCHES AND SEIZURES PROHIBITED. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized.

CONSTITUTION OF THE STATE OF IDAHO
ARTICLE II DISTRIBUTION OF POWERS

Section 1. DEPARTMENTS OF GOVERNMENT. The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

CONSTITUTION OF THE STATE OF IDAHO
ARTICLE IV EXECUTIVE DEPARTMENT

Section 5. SUPREME EXECUTIVE POWER VESTED IN GOVERNOR. The supreme executive power of the state is vested in the governor, who shall see that the laws are faithfully executed.

Section 20. DEPARTMENTS LIMITED. All executive and administrative officers, agencies, and

instrumentalities of the executive department of the state and their respective functions, powers, and duties, except for the office of governor, lieutenant governor, secretary of state, state controller, state treasurer, attorney general and superintendent of public instruction, shall be allocated by law among and within not more than twenty departments by no later than January 1, 1975. Subsequently, all new powers or functions shall be assigned to departments, divisions, sections or units in such a manner as will tend to provide an orderly arrangement in the administrative organization of state government. Temporary agencies may be established by law and need not be allocated within a department; however, such temporary agencies may not exist for longer than two years.

AMENDMENTS TO THE UNITED STATES CONSTITUTION

Amendment I (1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV (1791)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V (1791)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STEVE TANNER (propria persona)
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

STEVE TANNER Plaintiff V. IDAHO DEPARTMENT OF FISH AND GAME DIRECTOR ED SCHRIEVER, VIRGIL MOORE, LUCAS SWANSON, JOSH STANLEY, BRIAN JOHNSON; and WILLIE COWELL Defendants.	Case No: 2:18-CV-00456 DCN SECOND AMENDED COMPLAINT FOR: DECLARTORY JUDGDMENT, INJUCTIVE RELIEF and REQUEST FOR DAMAGES. DEMAND FOR JURY TRIAL FOR ALL TRIALABLE ISSUES

PREAMBLE

(Filed Nov. 29, 2019)

This case was initially filed September 24, 2018, in the Idaho state court, and was removed to this Court October 17, 2018, by Defendant Willie Cowell. The case arises out of the actions of the Idaho Department of Fish and Game (hereafter IDF&G) establishing a game check station, stopping all southbound traffic

close to the Plaintiff's residence. Plaintiff is seeking Declaratory Judgement and Injunctive Relief as to the IDF&G Director exceeding statutory authority to establish policy for the implementation of game check stations utilizing roadblocks. Further, the Plaintiff is seeking these roadblocks, authorized by the IDF&G Ed Schriever, declared unconstitutional as to the State of Idaho Constitution and the Constitution of the United States. Plaintiff also seeks money damages for actions of the Defendants in their individual capacity for civil rights violations.

JURISDICTION AND VENUE

1. This Court has jurisdiction over the Defendant IDF&G Director in his official capacity as to the Declaratory Judgement and Injunctive relief being sought.

2. JURISDICTION. This court has jurisdiction over this complaint because the violations arise under 28 U.S.C. Section 1331 and 42 U.S.C. 1983.

3. This Court has supplemental jurisdiction over the state law claims alleged pursuant to 28 U.S.C. 1367.

4. This court has appropriate venue for this cause of action because Defendants are located in Idaho Judicial District and all incidents, events and occurrences giving rise to this action took place in Idaho Judicial District.

PARTIES

5. Defendant IDF&G Director Ed Schriever is a resident of the State of Idaho. He is sued in his official capacity for Declaratory Judgment and Injunctive Relief.

6. Defendant Virgil Moore is a resident of the State of Idaho and was the Director of the Idaho Department of Fish and Game at the time of these incidents. He is sued in his individual capacity.

7. Defendants Lucas Swanson, Josh Stanley, and Brian Johnson are residents of the State of Idaho, and IDF&G Officers. They are sued in their individual capacity.

8. Defendant Willie Cowell is a resident of the State of Idaho and a Bonners Ferry Police Officer. He is being sued in his individual capacity.

9. Plaintiff Steve Tanner is a resident of the State of Idaho.

GENERAL ALLIGATIONS

10. On November 18, 2017, the Defendants Lucas Swanson, Josh Stanley, and Brian Johnson operated a game check station, stopping all southbound traffic on Meadow Creek Road, Boundary County, Idaho. (hereafter referred to as "game check roadblock")

11. The location of the game check roadblock on Meadow Creek Road is approximately 2 '/2 miles north of U.S. Highway #2, which is Meadow Creek Road's southernmost point.

12. That the events herein described, in the general allegations, transpired on November 18, 2017, unless otherwise noted.

13. The location of the game check roadblock on Meadow Creek Road is approximately 2 miles from the Plaintiff's residence.

14. Sunset, on November 18, 2017, on Meadow Creek Road, was at or about 4:01 P.M. Pacific Standard Time.

15. At about 4:20 P.M., Plaintiff was driving south on Meadow Creek Road and proceeded around the IDF&G game check roadblock area without stopping.

16. Defendants Swanson and Stanley pursued Plaintiff in their patrol vehicle.

17. Defendants Swanson, Stanley, and Johnson had no judicial warrant to operate this game check roadblock.

18. Defendants Swanson, Stanley, and Johnson had no express legislative authority to establish this game check roadblock.

19. Defendants Swanson, Stanley, and Johnson had no individualized suspicion of criminal wrongdoing of the Plaintiff prior to attempting to stop him at the game check roadblock.

20. Defendants Swanson and Stanley pursued Plaintiff in their patrol vehicle without their headlights on.

21. Defendants Swanson and Stanley, in their patrol vehicle, pulled up behind Plaintiff about ¼ mile from his residence.

22. Plaintiff continued driving cautiously, with the IDF&G vehicle following, to the first well-lighted public place, (local gas station) before stopping.

23. Defendant Stanley exited the patrol vehicle and stood ready with a round chambered in an AR-15 style rifle.

24. Defendant Stanley instructed Swanson to arrest Plaintiff.

25. Defendant Swanson arrested Plaintiff at about 4:30 P.M. and informed Plaintiff he was being arrested, "for failing to yield at a check station and stop."

26. Idaho Code 36-1201 requires all fisherman, hunters, and trappers to stop at game check stations.

27. Plaintiff is not, and has not been at any of the times covered by this Complaint, a fisherman, hunter, or trapper.

28. Defendant Swanson turned over the Plaintiff to Defendant Cowell of the Bonners Ferry Police Department.

29. Neither Defendant Swanson nor Stanley informed the Plaintiff of his rights.

30. Defendant Cowell "frisked" Plaintiff and put him in the back seat of his patrol vehicle and belted him in.

31. Defendant Cowell, after holding him for several minutes, released Plaintiff from the vehicle.

32. Plaintiff was in severe pain due to the handcuffs and the position in which he was belted into the patrol vehicle.

33. Defendant Cowell did not inform the Plaintiff of his rights.

34. Defendant Cowell uncuffed Plaintiff and proceeded to question Plaintiff as to; "Do you understand why you were stopped?" "Why they pulled you over?" "Why they were behind you with lights and sirens on?"

35. Plaintiff informed Defendant Cowell that he was exercising his right to remain silent.

36. Defendant Cowell altered his line of interrogation and continued to question Plaintiff.

37. Defendant Cowell arrested Plaintiff for drunk driving and obstructing & delaying an officer in the line of duty.

38. Defendant Cowell handcuffed Plaintiff and put him back into the Patrol vehicle.

39. Defendant Cowell released Plaintiff at about 5:13 P.M. to the Defendant Swanson.

40. At about 5:22 P.M. Defendant Swanson issued citations to Plaintiff for I.C. 36-1201(b), and I.C. 49-1404, and then released Plaintiff.

41. Charges were subsequently brought against the Plaintiff in Idaho First Judicial District, Magistrate Division, CR-2017-0001192.

42. The First Judicial District Magistrate Court dismissed the charges on Jan 11, 2018. No probable cause was found for Idaho Code 36-1201(b) and the subsequent charge I.C. 49-1404 was dismissed.

43. Defendant Moore had, and Defendant Schriever has the duty under Idaho Code 67-2405, that requires him to establish policy to be followed by the IDF&G and its employees.

44. Defendant Moore has established IDF&G Policy NO: E-7.0 that authorizes roadblocks, Section H. "MAJOR CHECK STATIONS-ALL traffic stop", and Section "J. SECONDARY CHECK STATIONS- ALL traffic stop."

45. Defendant Johnson and other unknown or unnamed officers have operated game check roadblocks in a similar manner on Meadow Creek Road since at least November 20th of 2010.

46. Since at least November 20th of 2010, Defendant IDF&G has conducted periodic game check stations that utilize roadblocks, throughout the State of Idaho.

47. Defendant Johnson was operating a game check roadblock, on Meadow Creek Road, stopping all southbound traffic on November 20th, 2010, and stopped Plaintiff who was traveling south.

48. Defendant Johnson was operating a Game Check Roadblock on Meadow Creek Road, on November 8, 2014, and encountered Plaintiff who was traveling south.

49. Upon information and belief, Defendants Swanson, Stanley, Johnson and other unnamed Officers will again establish game check stations stopping all traffic in one or both directions on Meadow Creek Road, and throughout the State of Idaho.

50. Defendants Swanson, Stanley and Johnson were operating this game check roadblock without a sign being placed on the centerline of the roadway displaying the word "STOP" in letters of sufficient size and illumination to be readable at a distance of not less than 50 yards.

51. Defendants Swanson, Stanley, and Johnson operated this game check roadblock without a continuous flashing blue light on and burning, placed at the side of the roadway.

52. Defendants Swanson, Stanley and Johnson operated this game check roadblock without warning signs at the side of the roadway, containing wording of sufficient size and illumination, to warn oncoming traffic that a "police stop" is ahead.

53. Defendants Swanson, Stanley, and Johnson operated this game check roadblock without wearing High-Visibility safety apparel.

54. Defendants Swanson, Stanley, Brian Johnson operated this game check roadblock on a sharply curved section of Meadow Creek Road.

55. Defendants Swanson, Stanley, and Johnson, operated this game check roadblock at night without lighting to illuminate the area.

FIRST CAUSE OF ACTION

(4th and 1st Amendment Violations Against Defendants Swanson, Stanley and Johnson)

56. Wherefore, the Plaintiff realleges, and restates the forgoing jurisdictional allegations and general factual allegations:

57. That on November 18, 2017, under the color of law, the Defendants Swanson, Stanley and Johnson established a game check station, stopping all southbound traffic, on Meadow Creek Road, Boundary County, Idaho.

58. Defendants Swanson and Stanley arrested Plaintiff without probable cause.

59. Defendant Swanson, Stanley, and Johnson, recognized Plaintiffs vehicle and knew the Plaintiff was not a hunter, fisherman or trapper,

60. Plaintiff was targeted by the Defendants because Plaintiff had exercised his rights to redress government through free speech, though his state representatives, through the legislative process, and through written complaints and claims to the IDF&G. This violated the Plaintiff's 1st Amendment Rights.

61. Plaintiff's rights to be secure in his person against unreasonable search and seizure, as guaranteed by Article 1 Section 17 of the Idaho Constitution and the 4th Amendment to the U. S. Constitution were violated by the Defendants.

62. Plaintiff suffered severe pain to his wrists and shoulders, false arrest, and further loss of his

civil rights, which include plaintiff's right to: liberty, property, freedom, freedom of travel, safety, personal privacy.

63. Defendants Swanson, Stanley and Johnson, under the color of law, operated the roadblocks on a sharp corner of Meadow Creek Road in an unsafe and dangerous way that violated the state and federal laws as to proper signage, and signage placement, and without a continuous flashing blue light at the roadblock as required by Idaho Code19-622(2)-(4). In addition, these Defendants operated the roadblocks without proper illumination of the area at night and without wearing high visibility safety apparel as required by the Federal Transportation Manual on Uniform Traffic Control Devices. (as required by MUTCD section 6G.19 paragraph 10 and 6D.03 paragraph 06 and 6E.02 paragraph 03.)

64. These actions of the Defendants, as to the way the roadblock was conducted, violated the Plaintiff's 4th Amendment right to be secure in his person and affects.

65. Wherefore, pursuant to 42 U.S.C. 1983, Plaintiff demands judgment for money damages against Defendants Swanson, Stanley, and Johnson, together with such other relief, as this honorable court deems reasonable and just under the circumstances.

SECOND CAUSE OF ACTION

(Illegal Seizures Due to Unconstitutional Policies Created by Defendant Moore.)

66. Wherefore, the Plaintiff realleges and restates the forgoing jurisdictional allegations and general factual allegations:

67. Defendant Moore. under the color of law, has established IDF&G Policy No: E-7.0 Section H. and J. that allows for the use of roadblocks for game check stations, without legislative authority, which violates Article 1 Section 17 of the State of Idaho Constitution.

68. Defendant Moore, under the color of law, has established IDF&G policy that allows for the operation of roadblocks for game check station purposes, which violates the 4th Amendment to the U.S. Constitution.

69. Defendant Moore failed in his duty to establish constitutional policy.

70. Due to Moore's direct action, under the color of law to established unconstitutional policy that authorizes and establishes unlawful roadblocks, Plaintiff was injured.

71. Plaintiff's rights to be secure in his person against unreasonable search and seizure, as guaranteed by Article 1 Section 17 of the Idaho Constitution and the 4th Amendment to the U. S. Constitution, were violated by the Defendant's direct action.

72. Plaintiff suffered subjection to unlawful and dangerous roadblock, false arrest and loss of his

civil rights which include plaintiff's right to liberty, property, freedom, freedom of travel, personal privacy.

73. Wherefore, pursuant to 42 U.S.C. 1983, Plaintiff demands judgment for money damages against Defendant Moore, together with such other relief as this honorable court deems reasonable and just under the circumstances.

THIRD CAUSE OF ACTION

(Unlawful Seizure and Punishing the Plaintiff for Remaining Silent, Against Defendant Cowell)

74. Wherefore, the Plaintiff realleges and restates the forgoing jurisdictional allegations and general factual allegations:

75. November 18, 2017, under the color of law, Defendant Cowell, a BFPD Officer, "frisked" Plaintiff and placed him in the patrol vehicle and belted him in, causing pain and suffering.

76. Subsequently, after Plaintiff clearly exercised his right to remain silent, Defendant Cowell, under the color of law, altered his line of questioning Plaintiff, and then arrested him for Drunk Driving and Obstructing and Delaying an Officer in the line of duty, thus punishing Plaintiff for exercising his right to remain silent.

77. Plaintiff's rights to be secure in his person against unreasonable search and seizure, were violated as well as his liberty, personal privacy, and property, without probable cause as guaranteed by 4th Amendment to the U. S. Constitution.

78. Plaintiff further suffered false arrest by the Defendant Cowell and was deprived of his rights to liberty, freedom, personal privacy, freedom of speech and the right to remain silent in violation of the 4th, and 5th Amendments to the U.S. Constitution.

79. Wherefore, pursuant to 42 U.S.C. 1983, Plaintiff demands judgment for money damages against Defendant Cowell, together with such other relief as this honorable court deems reasonable and just under the circumstances.

FOURTH CAUSE OF ACTION

DECLARATORY JUDGEMENT
AND INJUNCTIVE RELIEF

80. Wherefore, the Plaintiff realleges and restates the forgoing jurisdictional allegations and general factual allegations:

81. That there is a real and present practical need to adjudicate the issue of the lawfulness of check station roadblocks that have been, and are very likely to be conducted in close proximity to the Plaintiffs residence; without which Plaintiff is in danger of irreparable harm.

82. The relief sought is paramount to clarifying the rights of the Plaintiff, as well as the traveling public that are not fishing, hunting or trapping, in the relationship to the Defendant's actions to establish roadblock for game check stations on Meadow Creek road and in the State of Idaho.

83. There is no harm to the Defendants to enjoin them from operating roadblocks utilized for game check stations.

84. Idaho law requires the Defendants to operate within the clearly defined law for Game Check Stations, I.C. 36-1201 which requires all fisherman, hunters, and trappers to stop at game check stations, not the public at large.

85. The threatened harm to the Plaintiff and the non-hunting traveling public outweighs any possible harm to the Defendants.

86. There is no harm to Defendants from enjoining them from operating game check roadblocks because they can continue to operate lawful check stations by stopping only fisherman, hunters, and trappers as provided in IDF&G Policy NO: E-7.0, sections G and I.

87. The granting of an injunction will not contravene any public interest.

88. Money damages are not enough to restore the Plaintiff if he is subjected to these unlawful actions of the Defendants.

89. The public interest will be served by an injunction by stopping the current abridgment the rights of the Plaintiff as well as the rights of the traveling public not fishing, hunting or trapping.

90. If an injunction is not issued, the Plaintiff's rights to freely travel, and his right to be free from unreasonable search and seizure as listed in Article 1 Section 17 of the State of Idaho

Constitution, and the 4th amendment to the U.S. Constitution are extremely likely to be violated.

91. The ultimate facts alleged in this petition, presented by the Plaintiff, demonstrates through evidence and law, that the Plaintiff is entitled to this Injunction as a matter of law.

92. Therefore, Plaintiff moves this Honorable Court to grant an injunction to stop the Defendants from establishing and operating roadblocks for the purposes of game check stations.

REQUEST FOR RELIEF

DECLARATORY JUDGEMENT
AND INJUNCTIVE RELIEF

93. That the actions of Defendant, IDF&G Director Ed Schriever, to establish and operate roadblocks for game check stations, without express legislative authority constitutes unreasonable search and seizure violating Article 1 Section 17 of the State of Idaho Constitution, and are hereby enjoined.

94. That the IDF&G Policy NO: E-7.0 that authorizes roadblocks, Section "H. MAJOR CHECK STATIONS-ALL traffic stop", and Section "J. SECONDARY CHECK STATIONS- ALL traffic stop", be declared to be Unconstitutional in violation of Article 1 section 17 of the State of Idaho Constitution.

95. That the actions of the Defendant, IDF&G Director Schriever, to establish and operate

roadblocks for game check stations, be declared to be unconstitutional, violating the 4th Amendment to the U.S. Constitution; unreasonable searches and seizures, and further enjoin Defendants from operating such roadblocks in the State of Idaho.

96. DEMAND FOR JURY TRIAL

97. GENERAL DAMAGES for violations of the rights of the plaintiff pursuant to 42 U.S.C. 1983 in the amount of 30,000 dollars.

98. PUNITIVE DAMAGES in the amount of 100,000 dollars.

99. FOR COSTS OF SUIT, including but not limited to, filing fees, attorney fees, printing costs, time and costs spent on pro se litigation etc.

100. TOGETHER with such other relief as this Honorable Court deems reasonable and just under the circumstances.

Dated this 27th day of November 2019 A.D.

Under the penalties of perjury, I affirm that the facts in the forging are correct to the best of my knowledge.

/s/ Steve Tanner
Steve Tanner, Plaintiff

State of Idaho, County of Boundary On this 27 day of November, in the year of 2019, before me, Tracie Isaac a notary public, personally appeared Steve Tanner, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same. My Commission Expires on 11-16-2023.

[SEAL]

I HEREBY CERTIFY that: on the 29th Day of November 2019, that a true and correct copy of the foregoing; Plaintiff's SECOND AMENDED COMPLAINT.

Dated this 27th day of November 2019

Was mailed to:

Bentley G. Stromberg
Clements, Brown & McNicholes, P.A.
321 13th Street
P.O. Box 1510
Lewiston, Idaho 83501

Peter C. Erbland
Jennifer Fegert
Lake City Law Group PPLC
435 W. Hanley Avenue, Suite 101
Coeur d'Alene, Idaho 83815

/s/ Steve Tanner
Steve Tanner

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO,

IN AND FOR THE COUNTY OF BOUNDARY

MAGISTRATE DIVISION

STATE OF IDAHO,	)	
	)	
PLAINTIFF,	)	CR-2017-1192
vs.	)	CLERK'S TRANSCRIPT
	)	OF PRETRIAL
STEVE A. TANNER	)	CONFERENCE OF
	)	
DEFENDANT.	)	JANUARY 11, 2018

BEFORE THE
HON. JUSTIN W. JULIAN, MAGISTRATE JUDGE

APPEARANCES

John R. Douglas	Prosecuting Attorney
	(full address)
Steve A. Tanner	Pro Se Litigant

BE IT REMEMBERED, this matter came regularly on for hearing on the 11th day of January, 2018, at the hour of 2:18 p.m., before the Hon. Justin W. Julian, Magistrate Judge, with appearances as above set forth.

[2] Hearing electronically recorded on January 11, 2018. Whereupon the following proceedings were had and testimony taken:

COURT: The remaining case on the docket is State versus Steve Tanner, case number 17-1192. The charges in this case are failing to stop and report at a check station and eluding a police officer. Do we have any resolution here, Mr. Douglas?

MR. DOUGLAS: Well, Judge, we've answered the discovery. And then I had mentioned to Mr. Tanner that we want to amend count one to be failure to comply with a traffic direction under Idaho Code Section 49-1419, which we believe is the proper charge not the one that was originally charged. So it'd be 49-1419.

COURT: So, 49-1419 says no person shall willfully fail or refuse to comply with any lawful order or direction of any peace officer, fireman, or uniformed adult school crossing guard, invested by law with authority to direct, control, or regulate traffic. So that's what you wish to change the charge to?

MR. DOUGLAS: Yes, Judge.

COURT: Okay. How does that change the complexion of count one, in any significant way?

MR. DOUGLAS: Well, the Court did not find probable cause on count one. We believe that probable cause would be found on this one. We're not gonna proceed on something without probable cause. If the Court tell – if the Court tells us there's not probable cause, we are not going to trial on that, I'll dismiss it, so. Just like every other case. But we believe this charge is valid and we're asking the Court to find probable

cause. The Court's already heard the probable cause from before, so, we'd ask you to take judicial notice and find that this – there is probable cause for this.

COURT: Okay. So here's – here's – and you're right, I've taken judicial notice of the facts from the police report on file. So 36-1201, which talks about what was going on here, this is [3] the more specific law to address the specific situation, because it was a Fish and Game check stop, says no fisherman, hunter or trapper shall refuse or fail to stop at the check station. We've got evidence in the record, that's uncontroverted, that the Defendant is not, and was not at the time, a fisherman, hunter, or trapper, so the check station regulation doesn't apply. So, to take it from the specific statute, which covers the specific circumstances in existence, and go to the more generalized one, how – how do we get around the fact that the traffic control direction has to be, quote, lawful, if under 1201 it's not lawful with respect to Mr. Tanner, because he's not a fisherman, hunter, or trapper? It seems that the legislature chose to limit Fish and Game's authority to stop the general public, to that class of people, not to everybody.

MR. DOUGLAS: I'm not sure that's true, Judge, because I think there's a case, State versus Thurman, which I have in here, I have to get the cite on it, that talks about people having to stop. I think it does.

COURT: State versus Thurman and State versus Medley, but the issue presented there was

whether it was con – whether the statute was constitutional. And they had no problem with the constitutionality of this particular statute, but the sta – we – I – how do we get around the point the statute is limited by the legislature to fishermen, hunters, and trappers, it's not authority to stop the general public. I mean. . . .

MR. DOUGLAS: Okay. Well my – I'm sorry.

COURT: I didn't say anything.

MR. DOUGLAS: Okay. I, uh, I wou – I guess I'm not reading the case the same way. I have to find where I have it now, but I understood it to mean what I had said, and not that they could. In other words, they have regulations that say you can pull over everybody.

COURT: Well, here's the – here's the annotation from State versus Thurman, which is directly on point from this particular statute, it says, the check station set up by the wildlife [4] officer was narrowly focused to advance the public's interest in wildlife preservation, protection, perpetuation, and management, and was statutorily authorized in compliance with 36-103 of this section. So even – even where they're upholding it, they're saying it's got to meet the statute, and the statute only applies to fishermen, hunters, and trappers. So how do we get from that to some general authority to stop everybody if they're not within that category of citizens?

MR. DOUGLAS: Well, if Thurman isn't enough authority by itself I'd say that they – they on – the only way I can do it, Judge, that I'm aware of, is

under the regulations that they have, I assume the regulations to be valid, that they can stop everybody. They have different ways of, you know, its limited stops, stops of everybody. And I've talked with the Fish and Game people the other day and this was a stop everybody. It's a brief – very brief detention, just to are you fishing and hunting, basically. When you deny that you were fishing and hunting that they don't have any indication to the contrary, you're on your way. So it's a very limited intrusion, which I thought was lawful under Medley and Thurman.

COURT: Well, I – I must read it differently.

MR. DOUGLAS: Yeah.

COURT: I think the – the issue is, could it be lawful, and the Supreme Court would probably say it could, but the legislature chose to cut it back and limit it to this class of people of fishermen, hunters, and trappers. And I don't believe an agency can go beyond the authority granted by the legislature, in an extremely explicit statute.

MR. DOUGLAS: Okay.

COURT: If they attempt to it's an unconstitutional regulation because it's – it's an executive branch overruling the – all the other branches. They can't do that and there's case law on that point.

MR. DOUGLAS: That's all I can do, Judge, you know, I mean, I've been through it too, [5] Judge, considerably, over the last few weeks, and I do realize that it does talk about hunters, fishermen, and trappers. I

mean, that's clear as glass, I'm not going to deny that, but I think, you know – I mean, I'm not an expert on all aspects on constitutional law, by any means, but I just thought they had ability to make rules and regulations. They've done that and I thought that Thurman and Medley gave them enough authority to make a brief, very limited, detention, and I could be wrong, but that's what I thought it stood for, is that they could make that brief limited detention as long as it wasn't, like, a subterfuge or for something else, or they're – they're delaying them for a long period of time. Just – just to see whether or not they're hunting. Just because they have a – what they called in their, uh, I forget the exact term, but it was a big interest, I forget the exact term though.

COURT: Compelling interest or whatever?

MR. DOUGLAS: Yeah, but – but it was – it was either that or a word like that. And the State has a compelling interest to protect its wildlife and really, we can't do it very effectively if people can just blow by and say, well I'm not gonna stop at all, because we don't know who the hunter, fisherman, or trapper is to – at all, unless the deer is hangin in the back of the vehicle of somethin. And so there's no way to do it if people can just blow us off completely and say, well I didn't have to stop, so take my word for it, and I'm not gonna even stop for even twenty seconds, long enough to say I wasn't fishing, hunting, or trapping. And, so. . . .

COURT: Well Thurman specifically says that's – that the stop has to be statutorily authorized

and in compliance with the statute. That's what the case law says and if you don't. . . .

MR DOUGLAS: I don't know how we. . . .

COURT: . . . . have a fisherman, hunter, or trapper, you're not in compliance with the statute. There's not authority for a general – a general road block.

[6] MR. DOUGLAS: I don't know how – well, it's not a road block, it's a check station.

COURT: That's – it's – it has the same legal effect. It's just like putting up a road block.

MR. DOUGLAS: I – I don't know how we could stop anybody. I guess the whole public could just – unless they've got a deer hanging up in plain sight or something like that.

COURT: Well, there's probably ways. In terms of how people are dressed you could establish some sort of reasonable suspicion if they're hunters.

MR. DOUGLAS: Well not if they're just driving – with all due respect, not if they're just driving down the road, I mean, how. . . .

COURT: Well they. . . .

MR. DOUGLAS: . . . . are we gonna know?

COURT: . . . . pretty much do it all the time, yeah.

MR. TANNER: Sir?

COURT: It's called profiling and it happens all the time.

MR. TANNER: Is it. . . .

COURT: But you get some little old lady in a sedan and she's on her way to church on Sunday, this does not give the department authority to require her to stop. I mean, if it did it did, but it doesn't. That's all there is to it. Yes, Mr. Tanner?

MR. TANNER: Well, um, this late in the game, I have no trouble defending 36-1201 or the other charge, I don't know how they can amend it, but, the other thing is you – he didn't supply the – the discovery that we talked about the other day. So. . . .

COURT: Alright. Well, that's a different issue, we'll get to that when we can. Based on what I'm seeing I'm denying the motion to amend the charge. I don't think it's a valid amendment. We have a specific statute governing what was specifically going on here, which was a Fish and Game check station, and to make an end run around those requirements by going to some very generalized law, which even itself requires it be a [7] lawful order, I think is lacking in merit. So the motion is denied.

MR. DOUGLAS: Judge, then because you did not find probable cause on count one, I believe it's count one, and. . . .

COURT: You're dismissing count one?

MR. DOUGLAS: Well yeah. Because I'm not gonna. . . .

COURT: Alright.

MR. DOUGLAS: . . . . proceed in the face of no probable cause from the Court. So based on that, and based on the fact that the eluding is because he didn't stop at a place where the Court says we can't prove he had to stop, I – I don't see we have a valid charge on count number two or that we would have a realistic chance of expecting a reasonable jury to agree with us, because he – we can't prove he had to stop. And without that I think that he can go about his me – his way. The public can, with all due respect, they can blow us off. I mean, unless we've got some reason right there to stop 'em, I don't know what we can do when they blow by, because we're never gonna know. And so we can't go on count two cause we're not gonna be able to prove it. And I'm not gonna impanel a jury just so we can get a not guilty in twenty minutes.

COURT: Alright. So you're dismissing count two as well?

MR. DOUGLAS: Yeah.

COURT: Moving to dismiss it.

MR. TANNER: Would that be with prejudice?

COURT: Yes. Misdemeanors can't be refiled. Alright then, in a few seconds copies of the judgments showing dismissals on both will be distributed and

then Mr. Tanner will be free to go and court will be in recess.

IN DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO,

IN AND FOR THE COUNTY OF BOUNDARY

MAGISTRATE DIVISION

STATE OF IDAHO)	) SS	CLERK'S CERTIFICATE
COUNTY OF BOUNDARY)		

I, Jamie Wilson, do hereby certify that I am the individual who transcribed the foregoing proceedings from an electronic record, and that the foregoing pages constitute a true record of the original electronic recording taken at said time and place.

DATED this 16th day of August, 2018.

GLENDA POSTON

CLERK OF THE COURT

By: /s/ Jamie Wilson
Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

STEVE TANNER, Plaintiff, vs. IDAHO DEPARTMENT OF FISH AND GAME DIRECTOR VIRGIL MOORE, LUCAS SWANSON, JOSH STANLEY, BRIAN JOHNSON; and WILLIE COWELL, Defendants.	Case No: 2:18-cv-00456-DCN DECLARATION OF JOSH STANLEY

JOSH STANLEY hereby makes the following declaration:

1. I am an adult citizen of the United States, competent to testify as a witness and I make this declaration on personal knowledge.

2. I am a defendant in the above-entitled matter.

3. At all times relevant to the allegations set forth in plaintiff s Amended Complaint, I was a District Conservation Officer for the Idaho Department of Fish and Game ("IFG").

4. On November 18, 2017, I conducted a wildlife check station on Meadow Creek Road in Boundary County, Idaho. The wildlife check station was an "all stop" check station that required all vehicles travelling south on Meadow Creek Road in the direction towards Bonner's Ferry to stop.

5. The wildlife check station was operated by me, IFG officer Lucas Swanson, and IFG officer Brian Johnson. All three of us were dressed in full uniform and there were three, marked IFG patrol vehicles present. A blue light on one of the patrol vehicles was activated as vehicles approached the check station.

6. The check station was operated from 4:41 p.m. to 8:00 p.m. – a time when we believed hunters would be returning from their hunts. The check station was set up on Meadow Creek Road because that road provides access to several popular hunting areas.

7. The check station was operated in the same manner that I conduct every "all stop" check station. When a vehicle stopped, the passengers were asked if they had been hunting. If the answer was no, the

passengers were thanked for stopping and allowed to proceed down the road. The entire encounter lasted only approximately 15 seconds. If the vehicle passengers indicated they had been hunting, they were asked for their hunting licenses and whether they had taken any game. If game had been taken, the harvested animal was inspected for proper tagging. Vehicles containing hunters were only detained for the time necessary to verify the passengers' hunting licenses and inspect any harvested animals on board. When necessary to prevent a backup of traffic, drivers of vehicles containing harvested animals were asked to pull over to the side of the road so the harvested animal could be inspected.

8. The check station resulted in the detection of a violation of Idaho's fish and game laws – a hunter killed a deer without the required tag.

I certify (or declare) under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 20th day of May 2019.

/s/ Josh Stanley
JOSH STANLEY

TITLE 67
STATE GOVERNMENT AND STATE AFFAIRS
CHAPTER 24
CIVIL STATE DEPARTMENTS – ORGANIZATION

67-2405. POWERS AND DUTIES OF DEPARTMENT HEADS. (1) Unless specifically provided otherwise, each department head shall:

(a) Supervise, direct, account for, organize, plan, administer and execute the functions vested within the department as provided by law.

(b) Establish policy to be followed by the department and its employees.

(c) Compile and submit reports and budgets for the department as required by law.

(d) Provide the governor with any information that he requests at any time on the operation of the department.

(e) Represent the department in communications to the legislature and the governor.

(f) Establish the internal organizational structure of the department and assign the functions of the department to subunits to promote economic and efficient administration and operation of the department. The internal structure of a department shall be established in accordance with section 67-2402(3), Idaho Code.

(g) Subject to law, and the provisions of the state's merit system, establish and make appointments to necessary subordinate positions, remove incompetent,

ineffectual or unfit employees and abolish unnecessary positions.

(2) Each department head has authority to:

(a) Prescribe rules consistent with law for the administration of the department, the conduct of employees, the distribution and performance of business, and the custody, use and preservation of records, documents and property pertaining to the operation of the department. The constitutional officers shall prescribe their own rules.

(b) Subject to law, and the state merit system where applicable, transfer employees between positions, remove persons appointed to positions, and change the duties, titles, and compensation of employees within the department.

(c) Delegate any of the functions vested within the department head to subordinate employees, except the power to fix their compensation.

(d) Require that any officer or employee of the department give an official bond, if the officer or employee of the department is not required to do so by law, in the amount to be determined by the director of the department of administration.