

No. 22-244

Supreme Court, U.S.
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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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SUPREME COURT, U.S.

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 re-tried); 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).

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 Sheriff, 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 south-bound 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 charges 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 (road-blocks). 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 cause 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 responsibility 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 authority 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 law-making 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 its supervisory authority over the Ninth Circuit’s 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 check-point 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 check-point 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 facts² 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

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. Dicker-son*, 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).

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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