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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Leesa Jacobson, *et al.*,

Plaintiffs,

v.

U.S. Department of Homeland Security, *et al.*,

Defendants.

No. CV-14-02485-TUC-BGM

DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM

For the reasons set forth in the accompanying memorandum of law, the United States of America, through undersigned counsel, respectfully moves the Court to dismiss this action in its entirety or, in the alternative, to grant summary judgment to Defendants on all claims. See Fed. R. Civ. P. 12(b)(1), (6), 56.

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INTRODUCTION

At issue in this case is the authority of the U.S. Border Patrol to exclude unauthorized persons from the interior of traffic checkpoints—checkpoints that the Supreme Court has described as "necessary" to border security. United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976). Plaintiffs ask the Court to grant them virtually unfettered access to the Border Patrol checkpoint outside of Amado, Arizona, to protest its existence and to monitor the activities of agents working there. But the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." Wright v. Incline Vill. Gen. Improvement Dist., 665 F.3d 1128, 1134 (9th Cir. 2011) (citation omitted). On the contrary, it is well established that the "government may limit the uses of properties under its control to the uses to which [they] are lawfully dedicated." Id. (citation omitted).

The Border Patrol's policy—to restrict access to the checkpoint to authorized persons for official purposes—is fully consistent with the First Amendment. Border Patrol checkpoints are nonpublic fora, much like airport security checkpoints, police stations, and highway rest stops, where restrictions on expressive activity are subject to a lenient degree of scrutiny. The purpose of Border Patrol checkpoints is to secure the border, not to facilitate expression, and free public access would be incompatible with their purpose. That is particularly true given the significant law enforcement and public safety concerns at stake: Not only is the government's interest in border security paramount, but traffic stops are inherently dangerous, and agents must be prepared to confront smugglers who have every incentive to flee. Moreover, checkpoints are clearly marked with signs—"Border Patrol Checkpoint Ahead," "All Vehicles Must Stop," "K-9 on Duty"—that inform reasonable observers that they are entering a zone where free passage is limited and expression may be restricted.

But the Court need not conclude that the Arivaca checkpoint is a nonpublic forum to reject Plaintiffs' claims. As the Court has already determined, even if the checkpoint were a public forum, the Border Patrol's "policy restricting pedestrian access to the

checkpoint . . . is a valid time, place, and manner restriction." Slip op. at 20 (Doc. No. 54). That policy regulates only conduct, not speech, and it does not limit the public's ability to speak, picket, leaflet, or engage in any other expressive activity from outside the checkpoint. Indeed, despite their assertions to the contrary, Plaintiffs have had considerable success in reaching their target audience from outside the checkpoint, flagging down motorists, handing out fliers, publishing reports on alleged misconduct, and attracting significant media attention.

In short, the Court's determination that the Border Patrol's policy is a "valid time, place, and manner restriction" effectively resolves this case. It directly resolves the portion of Count One alleging an infringement of the right to monitor, to which Plaintiffs purported to limit their preliminary injunction motion. It likewise resolves the remainder of Count One, alleging an infringement of the right to protest, which, under forum analysis, should be resolved no differently. If anything, to allow protesters within the checkpoint—along with picket signs and banners—would be even more dangerous to public safety and disruptive to law enforcement than to allow monitoring. Finally, because the Border Patrol's policy is valid under the First Amendment, it does not infringe on protected speech, so Plaintiffs' retaliation claim in Count Two cannot stand. In any event, there is no support for Plaintiffs' conclusory assertion that the Border Patrol's actions were intended to punish Plaintiffs for expressing their views, rather than simply to prevent unauthorized persons from entering the checkpoint.

The Court can reach these conclusions based on the deficiencies in the complaint, the documents incorporated into the complaint by reference, and judicially noticeable materials, and it should therefore dismiss the case. In the alternative, should the Court deny Defendants' motion to dismiss or rely on other materials, it should grant summary judgment to Defendants.

BACKGROUND

The Department of Homeland Security ("DHS") is responsible for securing the nation's borders and enforcing its immigration laws. Those duties are divided among

several DHS components, including U.S. Customs and Border Protection ("CBP"). Within CBP, the Office of Field Operations enforces immigration laws at ports of entry, such as international airports, some seaports, and official land crossings. Another CBP division, the U.S. Border Patrol—the principal Defendant here—secures the border against unlawful entry between ports of entry.

A. The U.S. Border Patrol

To accomplish its mission, the Border Patrol has established three main lines of defense. See GAO, Report 09-824, at 6 (2009), available at http://www.gao.gov/assets/300/294548.pdf (hereinafter "GAO"). First, most agents are assigned to "line watch" operations at the border, where they turn back or arrest persons attempting to cross the border unlawfully. Id. Second, agents at traffic checkpoints, usually located on major highways and secondary roads up to 100 miles inland, see 8 C.F.R. § 287.1(a), intercept individuals who evade detection at the border and prevent them from reaching major population centers. GAO at 6. Third, "roving patrols" apprehend persons who attempt to circumvent these border defenses. See id. The Supreme Court has specifically endorsed the role that checkpoints play in the Border Patrol's enforcement strategy, explaining that "a traffic-checking program in the interior is necessary because the flow of illegal aliens cannot be controlled effectively at the border." Martinez-Fuerte, 428 U.S. at 555.

B. Border Patrol Checkpoints

As of 2009, there were 71 Border Patrol checkpoints operating along the nation's southwest border. GAO at 8, 10. Checkpoints fall into two categories, "permanent" and "tactical," with permanent checkpoints tending to be brick-and-mortar structures on major highways, and tactical checkpoints being temporary facilities on secondary roads. Id. at 7. However, both types now operate from fixed locations, and there is no legal distinction between the two. See United States v. Hernandez, 739 F.2d 484, 488 (9th Cir. 1984) (the "distinctions . . . between a temporary checkpoint and a permanent checkpoint are not material"); United States v. Soto-Camacho, 58 F.3d 408, 411 (9th Cir. 1995) (applying Hernandez to Border Patrol checkpoints). Even so, tactical checkpoints offer

fewer safety protections to Border Patrol agents and the public, particularly given their lack of concrete barriers separating agents from traffic. GAO at 8.

Although checkpoints vary in terms of size, infrastructure, and staffing, they share many common features. To begin, the approach to a checkpoint is marked with warning signs in accordance with the Border Patrol's traffic control plan, devised by a federal-state task force in the wake of a pair of fatal checkpoint crashes in 2004. Under that plan, the recommended signage on a rural, two-lane road is: at 1 mile out, "Border Patrol Checkpoint 1 Mile"; at ½ mile, "Be Prepared to Stop" and "No Passing Zone"; at 1,800 feet, "All Vehicles Must Stop Ahead"; at 1,200 feet, "Use Low Beams"; and at 550 feet, "Stop Ahead," with traffic cones or pylons along the center stripe and a stop sign at the primary inspection area. See Traffic Control Plan at A-1, 2 (Defs.' Ex. A). These "distances . . . may be adjusted based on field conditions" and "changeable message signs . . . or other devices" including "rumble strips" may also be used. Id.

Within a checkpoint, Border Patrol guidelines call for a primary inspection area, where motorists are initially stopped, see Traffic Checkpoint Policy ("TCP") § 6.13.3 (Defs.' Ex. B); a secondary inspection area, to which motorists may be referred for further questioning, and which must be large enough to accommodate buses, trucks hauling trailers, and other large vehicles, id. § 6.9.2; administrative and detention facilities, whether brick-and-mortar buildings, mobile trailers, or other vehicles, id. § 6.2.1-6.2.2; and access to water and electricity, either portable or permanent, id. § 6.2.3. Checkpoints must also have a number of Border Patrol vehicles on hand—for example, to chase motorists who fail to yield or who flee, id. § 6.3—and sufficient parking for agents staffing the checkpoint and for agents conducting roving patrols nearby. Checkpoints may also house a variety of inspection equipment, such as vehicle lifts, x-ray and gamma-ray machines, and canine units. GAO at 25, 50. Checkpoints must be arranged to minimize the risk of accident or injury to agents and the public, and operations may be suspended if conditions become unsafe. TCP § 6.13.8.

When operating checkpoints, Border Patrol agents act under unique legal

authority. Congress has empowered agents "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States," 8 U.S.C. § 1357(a)(1), and the Supreme Court has held that "a vehicle may be stopped at a fixed checkpoint for brief questioning of its occupants even though there is no reason to believe the particular vehicle contains illegal aliens." Martinez-Fuerte, 428 U.S. at 545. Likewise, agents need not have "individualized suspicion" to selectively refer motorists to secondary inspection for further questioning about immigration matters. Id. However, referral to secondary for a non-immigration purpose, such as a suspected drug or customs violation, requires reasonable suspicion, see United States v. Preciado-Robles, 964 F.2d 882, 884 (9th Cir. 1992), and a vehicle search requires probable cause or consent, regardless of the purpose, Martinez-Fuerte, 428 U.S. at 567 (citation omitted).

C. The Arivaca Road Checkpoint

The Arivaca Road checkpoint is located on a rural, two-lane county road, about twenty-two miles east of Arivaca (population 700) and one mile west of Amado (population 300), where the road meets Interstate 19, a major route inland. Compl. ¶¶ 27-28. It has operated in the same location since 2007. Id. ¶ 31. The county transportation department has authorized the Border Patrol to use the county right-of-way to establish checkpoints at "various locations" on the road, and the permit does not limit the boundaries of any such checkpoint. Compl. Ex. B. The Arivaca checkpoint operates primarily in the eastbound direction, and serves to prevent circumvention of the I-19 checkpoint just south of Amado. GAO at 43 n.63. It generally operates 24 hours a day, 7 days a week, which "is key to effective and efficient checkpoint performance . . . because smugglers and illegal aliens closely monitor potential transit routes" using "sophisticated surveillance and communication technology" that "allow[s] for immediate notification of security vulnerabilities, such as a checkpoint closure." GAO at 20-21.

Consistent with the Border Patrol's traffic control plan, the eastbound approach to the Arivaca checkpoint is marked as follows: at about 0.4 mile out, "Border Patrol Checkpoint Ahead"; at 1,350 feet, "Speed Limit 35" mph, reduced from 45 mph; at 900

feet, "Speed Limit 25" mph; at 600 feet, "All Vehicles Must Stop Ahead"; at 320 feet, "No Passing Zone"; at 300 feet, "K-9 on Duty, Please Restrain Your Pets"; at 250 feet, "Use Low Beams"; and at 180 feet, "Speed Limit 15" mph and a digital speed board, with traffic cones and pylons along the center stripe beginning at 200 feet out, a series of three rumble strips beginning at 110 feet out, and a stop sign at the primary inspection area, in the center of the checkpoint. See McLain Decl. Ex. 2 (Pls.' Mot. Prelim. Inj., Doc. No. 29-3) (map from satellite image). Photographs of these signs, and similar ones marking the westbound approach to the checkpoint, accompany the declaration of Roger San Martin, the Patrol Agent in Charge of the Border Patrol's Tucson Station. See Defs.' Ex. C Attach. 1-18; see also Defs.' Statement of Facts ("SOF") ¶ 1.

At the primary inspection area, there are two plastic barricades along the center stripe, where a Border Patrol agent stands. See McLain Decl. Ex. 2. On the southern roadside is an 8-by-40-foot storage container used for administration, processing, and detention, beside which are a canopy and a portable kennel. Id. On the northern roadside are a portable lighting unit and often several Border Patrol vehicles, id., placed there to encourage westbound traffic to slow to the posted speed limit in that direction (15 mph) and to prevent westbound traffic from driving off the roadway to avoid the rumble strips, San Martin Decl. ¶ 9. East of the primary inspection area on the southern roadside is an "approximately 100-foot-long" secondary inspection area, Compl. ¶ 29, at the eastern end of which is a Border Patrol sedan used to give chase, see McLain Decl. Ex. 2. Also on the southern roadside are two portable lighting units, restrooms, a sink, a water tank, and a variety of other equipment. See id. Additional Border Patrol vehicles, including detainee transport units, are also commonly parked at the checkpoint. See San Martin Decl. ¶ 23. As motorists exit the checkpoint, traffic pylons extend about 160 feet east of its center. See McLain Decl. Ex. 2; see generally Defs.' SOF ¶¶ 2-7.

D. Plaintiffs' Protesting and Monitoring "Campaign"

Plaintiffs are two members of People Helping People ("PHP"), an advocacy group that seeks to shut down the Arivaca checkpoint because of alleged civil rights abuses and

perceived negative effects on the surrounding community. Compl. ¶¶ 9-10, 34. To accomplish that goal, PHP has conducted a "campaign" to protest the checkpoint and to monitor the behavior of Border Patrol agents working there. Id. ¶ 32. On December 8, 2013, the group staged a rally at the checkpoint with more than 100 supporters, who carried signs and banners, gave speeches, and delivered a petition calling on the Border Patrol to remove the checkpoint. Id. ¶ 36. Because the presence of a large number of protesters raised safety concerns, the Border Patrol closed the checkpoint for much of the day—a result that PHP advertised in a press release. See Press Release, PHP, Community Members Shut Down Border Patrol Checkpoint (Dec. 20, 2013), at http://phparivaca.org/?p=262. Photographs of the rally accompany the declaration of Watch Commander Stephen Spencer. See Defs.' Ex. D Attach. 1-5.

The campaign continued on February 26, 2014, when PHP "initiated checkpoint monitoring activities." Compl. ¶ 42. About 30 individuals—six "monitors" with video cameras and note pads, including Mr. Ragan, and two dozen "additional protesters" carrying signs and banners, including Ms. Jacobson—entered the checkpoint on foot, approaching from the east on the southern shoulder. Id. ¶¶ 43-45. When they were "approximately 100 feet" from the center of the checkpoint, "at the eastern terminus of the secondary inspection area," id. ¶ 46—that is, about 60 feet within the checkpoint's easternmost traffic pylons, see McLain Decl. Ex. 2—they were stopped by two Border Patrol agents, who asked them to move back, Compl. ¶ 46. The PHP members refused. Id. ¶ 47. Twenty minutes later, Border Patrol agents again asked them to move back; they again refused. Id. ¶ 48. The PHP members later agreed to cross to the northern shoulder, but then attempted to move even farther inside the checkpoint and were turned back. Id. ¶¶ 49-50. At that point, Border Patrol agents asked the PHP members for a third time to move back; once again, they refused. Id. ¶¶ 51-52. Border Patrol agents then strung yellow incident tape across the northern and southern roadside about "150 feet east" of the center of the checkpoint, and informed the PHP members that they would be arrested if they did not move behind it. Id. ¶¶ 53-54. The PHP members then

relented, about two and a half hours after first entering the checkpoint. Id. ¶¶ 51, 55; see also Spencer Decl. Attach. 6-7 (photos of the incident).

Three days later, on March 1, 2014, six unnamed PHP members (none Plaintiffs here) returned to monitor the checkpoint. Compl. ¶ 59. The yellow incident tape had been replaced with rope cordons and signs reading "Border Patrol Enforcement Zone—No Pedestrians Beyond This Point." Id. ¶¶ 56, 57. The PHP members disregarded the cordons and entered the checkpoint, stopping "approximately 100 feet" from the center of the checkpoint. Id. ¶¶ 58-60. Border Patrol agents asked them to move behind the cordons, but they refused. Id. ¶ 61. About an hour later, Border Patrol agents informed the PHP members that they would be arrested if they did not move behind the cordons, and they relented. Id. ¶ 62. Border Patrol agents parked vehicles on the northern and southern shoulders, just inside the cordons, to reinforce the barriers. Compl. ¶¶ 64, 77; Compl. Ex. C at 2. Photographs of this incident accompany the declaration of Supervisory Border Patrol Agent Rosalinda Huey. See Defs.' Ex. E Attach. 1-2.

The next month, on April 17, 2014, Plaintiffs' counsel wrote to the head of the Border Patrol's Tucson sector, Chief Patrol Agent Manuel Padilla Jr., demanding that the cordons be removed and that PHP members be given greater access to the checkpoint. Compl. Ex. E. Agent Padilla responded within a week, declining to remove the cordons. Compl. Ex. F. He explained that Border Patrol's policy—to restrict access to the checkpoint to authorized persons for official purposes, regardless of their political beliefs—was reasonable in light of law enforcement and public safety concerns. Id.

Three months later, on July 11, 2014, PHP members staged a "Know Your Rights" rally at the checkpoint. Compl. ¶ 87. At that time, the cordons remained in place, but the accompanying signs read "No Unauthorized Entry Beyond This Point," as they do today. Id. ¶ 83. A group of protesters, including Mr. Ragan, assembled on the west side of the checkpoint, while a group of "monitors," including Ms. Jacobson, assembled on the east side. Plaintiffs allege that, during the rally, Border Patrol agents allowed pedestrians and members of the media to traverse the checkpoint on foot, by walking along the north

roadside from one side of the checkpoint to the other. Id. ¶ 87.

Since they began monitoring the checkpoint more than 18 months ago, Plaintiffs have identified three instances in which other individuals were allegedly permitted access to the checkpoint. First, on April 3, 2014, a local resident allegedly parked his truck inside the cordons, where he remained for about 40 minutes. Id. ¶ 27. Second, on an unspecified date, another man allegedly passed through the primary inspection area, parked his car in the secondary inspection area, and walked back toward the primary inspection area, where he spoke with Border Patrol agents for about 20 minutes. Id. ¶ 82. Third, on November 11 and 23, 2014, the surveyor that Plaintiffs hired for this case was allowed to enter the checkpoint.

Plaintiffs do not allege that they have ever been prevented from using cameras or recording devices. Nor do they allege that any Border Patrol vehicles have entirely blocked their view of the checkpoint, and the photographs attached to their complaint show otherwise. See Compl. Ex. D. In fact, contrary to Plaintiffs' assertions that the Border Patrol's policy has stymied their monitoring efforts, PHP published a report in October 2014 documenting the perceived race of individuals who (a) passed through the checkpoint; (b) showed agents some form of identification; (c) were referred to secondary; or (d) were the subject of canine alerts. See Compl. ¶ 90 (quoting from PHP, Community Report, at http://phparivaca.org/?p=567). PHP also claims to have achieved many of its goals. See PHP, Checkpoint Monitoring—a Challenge and a Triumph (Mar. 31, 2014) ("[O]ur presence at the checkpoint is absolutely deterring abuse, which is a primary goal of this effort. . . . Other goals, to engage other border communities and to send a clear message that Arivacans are not afraid to resist border militarization, are being accomplished."), at http://phparivaca.org/ ?p=536.

E. This Action

Plaintiffs' complaint raises two claims. In Count One, they allege that the Border Patrol's policy is an "unlawful regulation" of their First Amendment rights to protest the checkpoint and to monitor the activities of Border Patrol agents working there. Compl.

¶¶ 106-09. In Count Two, they allege that the Border Patrol's actions amount to "retaliation" in response to "constitutionally protected speech." Id. ¶¶ 110-13. As relief, Plaintiffs seek a declaration that the First Amendment entitles them "to protest and record . . . from a reasonable distance outside the primary inspection area" at the checkpoint. Id. ¶ B.2. They also seek a permanent injunction preventing the Border Patrol from "interfering with [their] First Amendment rights to protest and record the [Arivaca] checkpoint . . . from the public right-of-way" and "from areas where other members of the public are allowed to congregate." Id. ¶ A.1-2.

Plaintiffs sought a preliminary injunction granting them access to all portions of the checkpoint more than "twenty feet outside of the primary and secondary inspection areas," Pls.' Mot. Prelim. Inj. 1, asserting at oral argument that their motion sought access only for purposes of monitoring, not protesting, see slip op. at 7. In denying preliminary relief, the Court found it unnecessary to address the government's argument that the checkpoint was a nonpublic forum. See id. at 14. Instead, the Court held that, even assuming the checkpoint were a public forum, the Border Patrol's "policy . . . is a valid time, place, and manner restriction on speech." Id. at 20; see also id. at 19 (the "180-foot enforcement zone is . . . valid").

In reaching this result, the Court addressed four main issues. First, it held that the Border Patrol's policy is "content-neutral." Id. at 16. Because the policy "applies equally to Plaintiffs, cartel members who wish to obtain information regarding the transport of their load, or members of the public who wish to cheer in support of the checkpoint," the "message of the speaker is irrelevant." Id. Second, it found the government's significant interests in border security and public safety to be "undisputed." Id. at 15-17. Third, it found that the Border Patrol's policy is narrowly tailored to serve those interests. The policy creates "a safety zone for the protection of all involved": it provides a "buffer" between pedestrians and vehicle traffic; prevents pedestrians from occupying the northern roadside behind armed agents, consistent with "standard weapon retention techniques"; and provides parking for Border Patrol vehicles for "legitimate law

enforcement purposes." Id. at 18. Moreover, because "the secondary inspection area extends approximately 100 feet from the center of the checkpoint," the eastern end of the "180-foot enforcement zone" is actually only 80 feet away from the secondary inspection area—much closer than the "150-foot" safety zones that the Ninth Circuit has affirmed in other cases. Id. (citing United States v. Griefen, 200 F.3d 1256, 1262 (9th Cir. 2000)). Fourth, the Court noted that Plaintiffs' own submissions established that, contrary to their assertions, they remain able to successfully monitor the checkpoint. Id. at 18-19.[1]

LEGAL STANDARDS

A motion to dismiss under Rule 12(b)(1) challenges the Court's subject matter jurisdiction. In reviewing a facial challenge to subject matter jurisdiction, the Court accepts the well-pleaded allegations of the complaint as true, and determines whether those allegations are sufficient to establish jurisdiction. Leite v. Crane Co., 749 F.3d 1117, 1121-22 (9th Cir. 2014). However, in assessing its jurisdiction, the Court may consider extra-pleading facts, such as those set forth in declarations, and if necessary may resolve disputed jurisdictional facts, without converting the motion to one for summary judgment. See id.

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff's complaint must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). This "plausibility" standard "asks for more than a sheer possibility that a defendant has acted unlawfully." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" Id. (quoting Twombly, 550 U.S. at 557). While the Court

[1] The Court rejected the government's argument that Plaintiffs' monitoring claims should be evaluated under the "right of access" test set forth in Leigh v. Salazar, 677 F.3d 892, 898 (9th Cir. 2012). See slip op. at 15 n.2; Defs.' Opp'n to Pls.' Mot. Prelim. Inj. 23-25. While the government does not concede that this was correct, it does not seek to relitigate the issue here.

accepts well-pleaded factual allegations as true, "mere conclusory statements" and "'legal conclusion[s] couched as . . . factual allegation[s]'" are "disentitled to this presumption of truth." Id. (citation omitted). Although under Rule 12(b)(6) the Court generally may not rely on material outside the pleadings, it may consider materials incorporated into the complaint by reference, as well as judicially noticeable materials, without converting the motion into one for summary judgment. Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d 1005, 1016 n.9 (9th Cir. 2012).

Under Rule 56, the Court "shall grant summary judgment 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). The moving party may do so simply "by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). To defeat summary judgment, a plaintiff must do more than establish the "mere existence of a scintilla of evidence" in his favor. Anderson v. Liberty Lobby, 477 U.S. 242, 252 (1986). Rather, "plaintiffs must produce sufficient evidence to establish the existence of every essential element of their case on which they will bear the burden of proof at trial." River City Markets, Inc. v. Fleming Foods West, Inc., 960 F.2d 1458, 1462 (9th Cir. 1992) (citation omitted).

ARGUMENT

I. THE BORDER PATROL'S POLICY IS CONSISTENT WITH THE FIRST AMENDMENT.

The Court's "determination that [the Border Patrol's] policy is a valid time, place, and manner restriction on speech," slip op. at 19, fully resolves Plaintiffs' "unlawful regulation" claim in Count One. It directly resolves the portion of Count One alleging an infringement of the right to monitor, to which Plaintiffs purported to limit their preliminary injunction motion. It likewise resolves the remainder of Count One, alleging an infringement of the right to protest—which, under forum analysis, should be treated no differently. Indeed, to allow "more than 100" protesters within the checkpoint—not to mention their picket signs, banners, and speeches, Compl. ¶ 36—would be even more

dangerous to public safety and disruptive to law enforcement than to allow monitoring. Moreover, it would be untenable to allow protesting but disallow monitoring, which would effectively replace the current policy, which the Court has found to be "content neutral," slip op. at 16, with one that is explicitly content-based.[2]

Thus, Count One should be dismissed for failure to state a claim, based on the deficiencies in the complaint, the documents incorporated into the complaint by reference, and judicially noticeable materials.[3] In the alternative, should the Court deny Defendants' motion to dismiss or rely on other materials, it should grant summary judgment to Defendants on Count One.[4]

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[2] Plaintiffs also assert a First Amendment right to record law enforcement officers discharging their duties. Although some courts have recognized such a right, the Ninth Circuit has not directly addressed whether recording for that purpose is an expressive activity, with any restrictions subject to forum analysis, or a monitoring activity, with restrictions subject to right-of-access analysis. See Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3rd Cir. 2010) (noting uncertainty); Leigh v. Salazar, 677 F.3d 892, 894, 898 & n.3 (9th Cir. 2012) (applying right-of-access analysis, rather than forum analysis, to photojournalist's request for access to horse gather to improve government oversight and accountability); cf. Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011) (acknowledging First Amendment right to film matters of public interest "subject to reasonable time, place, and manner restrictions"). Regardless, Plaintiffs cannot prevail under either test.

[3] The Court "may take judicial notice of 'records and reports of administrative bodies'" such as CBP, the GAO, and the NTSB, Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986), as well as press releases, Arce v. Douglas, 793 F.3d 968, 975 (9th Cir. 2015), newspaper articles, Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1153 (9th Cir. 1986), and "map[s] and satellite image[s] . . . whose accuracy cannot reasonably be questioned,'" McCormack v. Hiedeman, 694 F.3d 1004, 1008 (9th Cir. 2012).

[4] In opposing Plaintiffs' preliminary injunction motion, the government submitted, and the Court considered, material outside of the pleadings. But the Court could have reached the same legal conclusions by relying only on the complaint, the documents incorporated into the complaint by reference, and judicially noticeable materials. Indeed, for the most part, it did so. While the Court's description of the factual background referred to the declarations of several Border Patrol agents, see slip op. at 1-4 & n.1, those declarations tell the same story as Plaintiffs' allegations, which are taken as true here, see supra at 2-9. And although the Court's legal analysis cited agent San Martin's

A. Border Patrol Checkpoints Are Nonpublic Fora

In resolving Plaintiffs' preliminary injunction motion, the Court concluded that it need not resolve the status of the forum to deny relief. Slip op. at 14. The same is true here. Nevertheless, should the Court find it necessary to address the issue, it should conclude that Border Patrol checkpoints—like airport security checkpoints, police stations, and highway rest stops—are nonpublic fora, where restrictions on expressive activity are subject to a lenient degree of scrutiny.

When assessing the constitutionality of a restriction on expressive activity, the degree of judicial scrutiny depends on the type of forum at issue. "[P]ublic property fits into one of three main categories: (1) a public forum, (2) a designated public forum, or (3) a nonpublic forum." Ctr. for Bio-Ethical Reform v. City & Cnty. of Honolulu, 455 F.3d at 910, 919 (9th Cir. 2006) (citation omitted). "On one end of the fora spectrum lies the traditional public forum, 'places which by long tradition . . . have been devoted to assembly and debate,'" Flint v. Dennison, 488 F.3d 816, 830 (9th Cir. 2007) (citation omitted), such as parks and sidewalks, where content-neutral restrictions on speech are subject to "'an intermediate level of scrutiny,'" Int'l Soc'y for Krishna Consciousness of Cal. ("ISKCON") v. City of Los Angeles, 764 F.3d 1044, 1049 (9th Cir. 2014) (citation omitted). "Next on the spectrum is the so-called designated public forum, 'which exists when the government intentionally dedicates its property to expressive conduct.'" Flint, 488 F.3d at 830 (citation and brackets omitted).

"At the opposite end of the fora spectrum is the non-public forum," which is "'any public property that is not by tradition or designation a forum for public communication.'" Id. (citation and brackets omitted). "Examples of nonpublic fora

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declaration in support of its conclusion that the Border Patrol's public safety concerns were not speculative, slip op. at 15, 18, the same conclusion could have been drawn as a matter of law. See infra at 15-20 (citing, e.g., Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3rd Cir. 2010) (traffic stops are "inherently dangerous"); Brown v. Cal. Dep't of Transp., 321 F.3d 1217, 1222 (9th Cir. 2003) (signs along highways "invariably . . . pos[e] safety risks")).

include airport terminals, highway overpass fences, and interstate rest stop areas (including perimeter walkways)," Ctr. for Bio-Ethical Reform, 455 F.3d at 919 (citations omitted), as well as military installations, Greer v. Spock, 424 U.S. 828, 838 (1976), police stations, First Def. Legal Aid v. City of Chicago, 319 F.3d 967, 968 (7th Cir. 2003), judicial and municipal complexes, Sammartano v. 1st Judicial Dist. Ct., 303 F.3d 959, 966 (9th Cir. 2002), and Transportation and Security Administration ("TSA") screening checkpoints, Mocek v. City of Albuquerque, 3 F. Supp. 3d 1002, 1070-71 (D.N.M. 2014). In nonpublic fora, "restrictions on speech need 'survive only a much more limited review.'" ISKCON, 764 F.3d at 1049 (citation omitted).

In determining a property's forum status, the Ninth Circuit looks to three factors: (1) "the actual use and purposes of the property"; (2) "the area's physical characteristics, including its location and the existence of clear boundaries delimiting the area"; and (3) "traditional or historic use of both the property in question and other similar properties." Wright, 665 F.3d at 1135 (citation omitted). Each factor indicates that Border Patrol checkpoints are nonpublic fora.

First, the "actual use and purpose" of a Border Patrol checkpoint is to secure the nation's borders and to enforce its immigration laws, not to facilitate expressive activity. The Supreme Court has explicitly recognized that checkpoints are a "necessary" component of the Border Patrol's enforcement strategy, and that the need for them is "great." Martinez-Fuerte, 428 U.S. at 556-57. The "crucial question," then, "is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). There can be little doubt that staging protests inside Border Patrol checkpoints, just 20 feet away from agents performing their duties, is incompatible with their purpose.

The "federal workplace, like any place of employment, exists to accomplish the business of the employer." Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 805 (1985). "It follows that the Government has the right to exercise control over access to the federal workplace in order to avoid interruptions to the performance of the

duties of its employees." Id. at 805-06. While Plaintiffs assert that their activities have never disrupted Border Patrol operations, see Compl. ¶ 73, their own allegations show otherwise. PHP's first rally at the checkpoint, with more than 100 protesters, was so large that the checkpoint was shut down for safety reasons. On the first day of monitoring, PHP members thrice refused Border Patrol agents' orders to leave the interior of the checkpoint, diverting agents from their duties for two and a half hours. And on the second day of monitoring, PHP members simply ignored the cordons and entered the checkpoint, again diverting agents from their duties. Much like "the business of a military installation . . . [is] to train soldiers, not to provide a public forum," Greer, 424 U.S. at 838, the purpose of a checkpoint is to ensure the Border Patrol's ability to enforce border security, not to facilitate expressive activities—particularly when those activities distract government employees from their mission. See also Preminger v. Principi, 422 F.3d 815, 824 (9th Cir. 2005) ("purpose of [Veterans Affairs facility] is not to facilitate public discourse"); Sammartano, 303 F.3d at 966 (municipal complex "built . . . for the purpose of conducting the business of the county"); Mocek, 3 F. Supp. 3d at 1071 ("purpose of [TSA] screening checkpoint is the facilitation of passenger safety"); cf. Adderley v. Florida, 385 U.S. 39, 41 (1966) ("Jails, built for security purposes, are not" generally "open to the public.").

Moreover, allowing protesters—and their signs and banners—inside Border Patrol checkpoints would endanger agents, motorists, and the protesters themselves. For one thing, they would distract drivers, increasing the risk of accidents. Highway "overpass fences are not 'compatible' with expressive activity because messages displayed invariably distract drivers, thereby posing safety risks." Brown v. Cal. Dep't of Transp., 321 F.3d 1217, 1222 (9th Cir. 2003); see also City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994) ("signs take up space and may obstruct views[and] distract motorists"). The same is true of Border Patrol checkpoints, where the existing signage is calibrated to provide clear warnings without overloading drivers with information. These traffic controls were implemented in response to the National Transportation Safety Board's

("NTSB") admonition, following a pair of fatal checkpoint crashes in 2004, that "many safety signs are not noticed in situations of high visible clutter." NTSB, Urgent Safety Recommendation, H-04-34, at 7 (Oct. 21, 2004), available at http://www.ntsb.gov/safety/safety-recs/recletters/H04_34.pdf.

These safety concerns are magnified at tactical checkpoints, like the one on Arivaca Road, where Border Patrol agents are working directly in the roadway, without concrete barriers to protect them from traffic. See GAO at 8. Westbound motorists often fail to slow to the speed limit in that direction and, when Border Patrol vehicles are not parked on the northern shoulder, attempt to avoid the rumble strips by driving onto the roadside, where Plaintiffs wish to stand. In addition, anyone on the northern roadside would be directly behind the agent manning the primary inspection area, out of his line of sight, which is at odds with standard weapon-retention techniques. San Martin Decl. ¶ 20 (Defs.' SOF ¶ 10).

"[T]raffic stops" are "inherently dangerous situations," Kelly, 622 F.3d at 262, where the "'risk of harm . . . is minimized . . . if the officers routinely exercise unquestioned command of the situation,'" Arizona v. Johnson, 555 U.S. 323, 330 (2009) (citation omitted). Motorists sometimes fail to yield at checkpoints, or will flee when referred to secondary. San Martin Decl. ¶ 11 (Defs.' SOF ¶ 8). Some of those motorists are smuggling people or drugs, and will stop at nothing to escape. Allowing protesters within 20 feet of inspection areas would place them directly in the path of both fleeing suspects and agents giving chase, endangering themselves, the agents, other motorists, and interfering with the effective operation of the checkpoint.

Second, the "physical characteristics" of Border Patrol checkpoints alert the public that they are entering a "special enclave" that is "not intended for the exercise of First Amendment rights." Wright, 665 F.3d at 1136. Unlike sidewalks that have been deemed public fora where "indistinguishable" from other parts of an urban pedestrian grid, see United States v. Grace, 461 U.S. 171, 179 (1983), checkpoints are clearly marked with signs and traffic control devices distinguishing them from surrounding areas. Such

signs—"Border Patrol Checkpoint Ahead," "All Vehicles Must Stop," "K-9 on Duty"—indicate to reasonable observers that they are entering a zone where free passage is limited and expressive activities may be "'subject to greater restrictions.'" Wright, 665 F.3d at 1136 (citation omitted).

Third, Border Patrol checkpoints have not "traditionally" or "historically" been open to expressive activity, and Plaintiffs do not allege otherwise. Like highway rest stops, which are nonpublic fora, checkpoints are "relatively modern creations," akin to "appendages" to the highway system, and are "hardly the kind of public property that has 'by long tradition . . . been devoted to assembly and debate.'" Jacobsen v. Bonine, 123 F.3d 1272, 1274 (9th Cir. 1997) (citation omitted). Moreover, it is not dispositive that the Arivaca checkpoint is located on a county road, as Plaintiffs appear to assume. Although "public streets and sidewalks" have been described as the "archetype" of a traditional public forum, Frisby v. Schultz, 487 U.S. 474, 480 (1988), not every public street or sidewalk is a public forum, see, e.g., Greer, 424 U.S. at 1214 (public streets and sidewalks within military installation are nonpublic fora); Monterey Cnty. Democratic Party Cent. Comm. v. USPS, 812 F.2d 1194, 1197 (9th Cir. 1987) (public sidewalk at post office is nonpublic forum). On the contrary, where a roadway is "not open to unrestricted public use," it is not the sort of "open thoroughfare" traditionally considered a public forum. Hale v. U.S. Dep't of Energy, 806 F.2d 910, 915-16 (9th Cir. 1986) (public road patrolled to restrict access to nuclear facility is nonpublic forum).

Moreover, Plaintiffs do not allege that the area around the Arivaca checkpoint, in particular, has ever previously been used for expressive activity, so "[t]his is . . . not a case in which the government has attempted to destroy or convert a public forum . . . into a nonpublic forum." Wright, 665 F.3d at 1137. Regardless, even if the Arivaca checkpoint area were once a public forum, it no longer is. The government may change a property's forum status by "'alter[ing] the objective physical character or uses of the property,'" ACLU v. City of Las Vegas, 333 F.3d 1092, 1105 (9th Cir. 2003) (citation omitted)—for example, where the "'land containing the roadway has been withdrawn

from public use,'" id. (quoting Hale, 806 F.2d at 915). Here, the Border Patrol has done just that by establishing a checkpoint along the roadside, with government facilities and clear signage, that has restricted passage along the road for 7 years, with the endorsement of the county government. Plaintiffs' contention that all roads are created equal in forum analysis is inconsistent with the case law and ignores the function, history, and purpose of the Arivaca checkpoint.

B. The Exclusion of Unauthorized Persons from the Interior of Border Patrol Checkpoints is Reasonable and Viewpoint Neutral.

Because Border Patrol checkpoints are nonpublic fora, the exclusion of unauthorized persons from their interior "does not violate the First Amendment as long as it is '(1) reasonable in light of the purpose served by the forum and (2) viewpoint neutral.'" Ctr. for Bio-Ethical Reform, 455 F.3d at 920 (citation omitted). The Border Patrol's policy easily satisfies this forgiving standard.

1. Border Patrol's policy is reasonable given the vital interest in securing the nation's borders.

In a nonpublic forum, a restriction on expressive activity "'must fulfill a legitimate need,'" but it "'need not constitute the least restrictive alternative available.'" Id. at 922 (citation omitted). In other words, it "'need only be reasonable; it need not be the most reasonable or the only reasonable limitation.'" ISKCON v. Lee, 505 U.S. 672, 683 (1992) (citation omitted). It cannot reasonably be disputed that the government interests at stake here are legitimate—indeed, strong.

The federal government has a "paramount interest in protecting the border," United States v. Flores-Montano, 541 U.S. 149, 155 (2004), and there is a "substantial public interest in controlling illegal alien traffic by maintaining . . . checkpoint[s]," United States v. Vasquez-Guerrero, 554 F.2d 917, 920 (9th Cir. 1977). Checkpoints are "necessary" to border security, Martinez-Fuerte, 428 U.S. at 556-57, and the government has "wide discretion" to control them "to avoid interruptions to the performance of the duties of its employees," Cornelius, 473 U.S. at 805-06. In addition, the government has

a "strong interest" in ensuring public safety and order, including by regulating traffic and pedestrian safety. Madsen v. Women's Health Ctr., 512 U.S. 753, 768-69 (1994) (sustaining buffer zone to "ensur[e] that petitioners do not block traffic" and to reduce risk of accident); see also Schenck v. Pro-Choice Network, 519 U.S. 357, 375-76 (sustaining buffer zone because of "interaction between cars and protesters"); cf. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984) (clutter caused by "accumulation of signs . . . constitutes a significant substantive evil").

The Border Patrol's policy reasonably regulates these legitimate interests. To meet this test, the government "need not provide detailed proof that the regulation advances its purported interests." Ctr. for Bio-Ethical Reform, 455 F.3d at 922. But there is proof aplenty. Indeed, the Border Patrol's policy is not only reasonable, it is narrowly tailored, as shown below in Part I.C.2.

2. Border Patrol's policy is viewpoint neutral.

The Border Patrol's policy—to restrict access to the checkpoint to authorized persons for official purposes, regardless of their political beliefs, Compl. ¶ 85 & Ex. F—is also viewpoint neutral. To begin, nothing in the policy "on its face . . . prohibits speech by particular speakers, thereby suppressing a particular view about a subject," Menotti v. City of Seattle, 409 F.3d 1113, 1130 n.30 (9th Cir. 2005); on the contrary, the policy is explicitly viewpoint neutral. Moreover, Plaintiffs' allegations of selective enforcement fail to state a plausible viewpoint discrimination claim. "[W]hen someone challenges a law as viewpoint discriminatory but it is not clear from the face of the law which speakers will be allowed to speak, he must show that he was prevented from speaking while someone espousing another viewpoint was permitted to do so." McCullen v. Coakley, 134 S. Ct. 2518, 2534 n.4 (2014). Here, while Plaintiffs allege that, on a handful of occasions, others were permitted inside the cordons for various reasons—to traverse the checkpoint on foot, to speak with Border Patrol agents, to conduct a geographical survey for purposes of this litigation—there is no allegation that those individuals were permitted to protest in support of the checkpoints, in opposition to

Plaintiffs' viewpoint. Thus, even if the Border Patrol imperfectly enforced its policy to exclude those without an official reason to be at the checkpoint,[5] it certainly has not endorsed speech advancing only one side of a divisive issue—the hallmark of viewpoint discrimination. See slip op. at 16 (the "message of the speaker is irrelevant" here).

C. Even if Checkpoints Were Public Fora, Border Patrol's Policy Is a Permissible Time, Place, and Manner Restriction.

Even in a public forum, "the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions '[1] are justified without reference to the content of the regulated speech, [2] that they are narrowly tailored to serve a significant governmental interest, and [3] that they leave open ample alternative channels for communication of the information.'" Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citation omitted). Even if Border Patrol checkpoints were public fora, they would still satisfy this "'intermediate level of scrutiny,'" ISKCON, 764 F.3d at 1049, as the Court has already found. Slip op. at 15-19.

1. Border Patrol's policy is content neutral.

Border Patrol's policy to exclude unauthorized persons from checkpoints is "content neutral." Slip op. at 15; see Ward, 491 U.S. at 791 ("The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."). First, the policy regulates conduct, not speech. It does not even refer to speech, let alone directly regulate it. See McCullen, 134 S. Ct. at 2531 (policy is content neutral where it "does not draw

[5] Plaintiffs' complaint identifies only a handful of such occasions (one of which, involving their own surveyor, operated manifestly to their benefit). Such a small number of allegedly improper actions over the course of 18 months is an inadequate basis for prospective injunctive relief. See Ortega Melendres v. Arpaio, 695 F.3d 990, 998 (9th Cir. 2012) (no standing for prospective injunctive relief absent "'pattern of officially sanctioned . . . behavior, violative of the plaintiffs' . . . rights'") (citation omitted); Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1042-44 (9th Cir. 1999) (two incidents insufficient to establish pattern of wrongdoing); see also San Martin Decl. ¶¶ 16-19 (describing immediate corrective action taken after one incident).

content-based distinctions on its face"). Rather, the policy simply bars entry into the interior of the checkpoint. Whether a person violates the policy "'depends' not 'on what they say' but simply on where they say it." Id. (citation omitted).

Second, that the policy may have the incidental effect of restricting immigration-related speech more than speech on other subjects is immaterial. A "facially neutral law does not become content-based simply because it may disproportionately affect speech on certain topics." Id. On the contrary, such regulations are considered content neutral when they are "justified without reference to the content of the regulated speech." Id. (citation omitted). As noted above, Border Patrol's policy is justified by significant law enforcement and public safety interests—interests that have long been recognized as content neutral. See, e.g., id. (public safety is a content-neutral purpose). Thus, this is not a case where "'[e]very objective indication shows that the [policy's] primary purpose is to restrict speech that opposes'" immigration enforcement. Id. (citation omitted).

Plaintiffs are also mistaken to suggest that the policy is content based because the Border Patrol erected cordons around the interior of the checkpoint only after Plaintiffs entered it. Governments "'adopt laws to address the problems that confront them,'" and the "'First Amendment does not require [them] to regulate for problems that do not exist.'" Id. at 2532 (citation omitted). The Arivaca checkpoint is located on a rural road, between two small towns, with rare pedestrian traffic, and there is nothing to suggest that the area has ever previously been used for expressive activity. The Border Patrol was not required to already have cordons in place for a problem that had not yet presented itself.

2. Border Patrol's policy is narrowly tailored to serve significant governmental interests.

As shown above, the government interests at stake are no doubt significant, see supra Part I.B.1—a point that the Court found "undisputed." Slip op. at 17. The Border Patrol's policy is narrowly tailored to serve those interests, because it advances an "interest that would be achieved less effectively absent the regulation" and is "not substantially broader than necessary" to achieve that interest. Ward, 491 U.S. at 797-800.

Plaintiffs are mistaken to paint the Border Patrol's policy as arbitrary. Compl. ¶ 93. On the contrary, that policy is grounded in experience, both at the Arivaca checkpoint and elsewhere. Although Plaintiffs assert that their campaign against the checkpoint has never disrupted enforcement activities, in reality they have refused agents' orders to leave the checkpoint, ignored the cordons, and on one occasion staged a rally so large that the checkpoint was closed for safety reasons—a result they advertised in a press release—giving an opening to smugglers who might wish to circumvent the nearby I-19 checkpoint. In addition, the NTSB expressed concern that confusing signage may have contributed to fatal checkpoint crashes in 2004, and advised that "visible clutter" around checkpoint signage be avoided—a recommendation that the Border Patrol followed in adopting its traffic control plan. Further, while Plaintiffs describe the Arivaca checkpoint as relatively tranquil, they have observed it for only a slice of a single year. In fact, since 2009 there have been at least 28 significant safety incidents at the three checkpoints within the Tucson station, including intoxicated motorists, accidents, failures to yield, and flights from secondary. San Martin Decl. ¶ 10 (Defs.' SOF ¶ 9). Indeed, in March 2014, a drunk motorist traveling westbound through the Arivaca checkpoint drove off the roadway and crashed into license plate readers located on the northern roadside near the primary inspection area, which Plaintiffs wish to access. Id. Had civilians been permitted inside the checkpoint during such an incident, they would have been directly in harm's way.

It was with such experiences in mind that the Border Patrol set the cordons about 150 feet from the center of the checkpoint, Compl. ¶ 53, roughly where the checkpoint's easternmost and westernmost traffic pylons are fixed. That spot is, by Plaintiffs' own estimation, just 80 feet away from the secondary inspection area. Cf. Bay Area Peace Navy v. United States, 914 F.2d 1224, 1226 (9th Cir. 1990) (permitting 75-foot (25-yard) "safety and security zone" even "in the absence of . . . a tangible threat to security"); United States v. Griefen, 200 F.3d 1256, 1260 (9th Cir. 2000) (150-foot safety zone around road construction is "[e]minently reasonable"). The Border Patrol's policy does

not affect the ability of Plaintiffs or anyone else outside the checkpoint to speak, picket, leaflet, or engage in any other expressive activity protected by the First Amendment. Plaintiffs' signs and banners can still be seen from within the checkpoint, prompting motorists to stop and speak with them after passing through the checkpoint. Thus, Plaintiffs remain close enough to deliver their message, but not so close as to interfere with immigration enforcement or public safety. Accordingly, the Border Patrol's policy is narrowly tailored. It addresses a significant threat to immigration enforcement and public safety while respecting the public's right to freedom of expression, and arrives at a workable solution—tied to the preexisting footprint of the checkpoint—that is not "substantially broader than necessary to achieve the government's interest." Ward, 491 U.S. at 800.

Plaintiffs insist that Border Patrol could have regulated in a less restrictive fashion. But a content-neutral time, place, or manner restriction—in contrast to a regulation subject to strict scrutiny, see Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988)—is not "invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.'" Ward, 491 U.S. at 797-98 (citation omitted). Plaintiffs fail to demonstrate that the Border Patrol's policy sweeps in substantially more speech than necessary to achieve the government's goals. They suggest, for example, that either the western cordons be moved eastward, to a spot 20 feet west of the center of the checkpoint, or that they be given essentially unrestricted access to the northern roadway. While that might satisfy Plaintiffs, it would be at the sacrifice of the government's interests. Whether or not any difficulties would arise if Plaintiffs alone were permitted greater access to protest or monitor is beside the point, because the Border Patrol must account for everyone who might crowd the checkpoint if access were not restricted. See Heffron v. ISKCON, 452 U.S. 640, 653-55 (1981) (criticizing the lower court's failure to "take into account the fact that any . . . exemption cannot be meaningfully limited to [plaintiff], and as applied to similarly situated groups would prevent the State from furthering its important concern"); Lee, 505 U.S. at 685. Recently, citizen groups

supportive of the Border Patrol's mission erected large signs on private land adjacent to the checkpoint reading "Keep Our BP Checkpoint Open" and "Citizens of Arivaca, Moyza, and Amado Support Our BP Checkpoint." San Martin Decl. ¶ 8 & Attach. 19-21 (Defs.' SOF ¶ 25). Imagine that these groups were to stage a counter-protest in support of the Arivaca checkpoint. Unless the checkpoint could function safely and effectively while hosting both protests, not to mention other demonstrations on other topics—and it could not—it must function without hosting any.

3. Border Patrol's policy leaves open ample alternative channels of communication.

The Border Patrol's policy also "leave[s] open ample alternative channels of communication." Ward, 491 U.S. at 802. As noted above, the policy does not affect the public's ability to protest, picket, leaflet or engage in other expressive activity from outside the cordons. And PHP members have done just that, with considerable success in reaching their intended audience. From the western cordons, they have handed out "know your rights" fliers to motorists entering the checkpoint. San Martin Decl. ¶ 22 (Defs.' SOF ¶ 24). From the eastern cordons, they often flag down motorists leaving the checkpoint to discuss their views. Id. They have collected data on the perceived race of individuals who (a) passed through the checkpoint; (b) showed agents some form of identification; (c) were referred to secondary; or (d) were the subject of canine alerts, as their own report demonstrates. See PHP, Community Report, at http://phparivaca.org/?p=567. They have attracted significant media attention to their cause. See http://phparivaca.org/?page_ id=252 (listing more than 50 articles); Fernanda Santos, Border Patrol Scrutiny Stirs Anger in Arizona Town, N.Y. Times, June 27, 2014, at A13. And they have announced that their campaign is "absolutely deterring abuse, a primary goal," among other accomplishments. See http://phparivaca.org/?p=536.

Thus, contrary to Plaintiffs' contention, this is not a case in which "[t]he alternatives . . . are far from satisfactory." Linmark Assocs., Inc. v. Willingboro Tp., 431 U.S. 85, 93-94 (1977). Rather, the alternatives available here reach precisely the same

"audience," and provide a good "opportunity" to "win the[] attention" of that audience, Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949) (plurality opinion)—without forcing Plaintiffs to convey "a message quite distinct from" the one that they would deliver if they could enter the interior of the checkpoint, Gilleo, 512 U.S. at 56-57. Indeed, those alternatives are in every meaningful way a "practical substitute" for the narrow channel that the Border Patrol's policy has foreclosed. Id. at 57.

Plaintiffs nevertheless argue that no possible alternatives can substitute for the ability to access the heart of the checkpoint and to stand just 20 feet away from Border Patrol agents performing their duties. But it is well established that a time, place, or manner restriction will not be invalidated simply because it denies a speaker his or her preferred or even the most effective means of communication. Adderley, 385 U.S. at 47-48. It could hardly be otherwise. If an alternative channel of communication were required to be a perfect substitute for the restricted one, then no time, place, or manner restriction would ever be upheld. See Clark v. Cmty. Creative Non-Violence, 468 U.S. 288, 291-97 (1984) ("reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression"); Kovacs, 336 U.S. at 88 (plurality opinion) (upholding restriction on amplification though "more people may be more easily and cheaply reached by sound trucks"). No doubt protesters outside schools, funerals, political conventions, courthouses, and meetings of international leaders could often convey their messages most effectively unhampered by any time, place, or manner restrictions. Yet courts have deemed such restrictions constitutional, on the ground that ample communicative alternatives remain. See, e.g., Bl(a)ck Tea Soc'y v. City Of Boston, 378 F.3d 8, 14-15 (1st Cir. 2004). The same result is appropriate here.

II. PLAINTIFFS' RETALIATION CLAIM IS MERITLESS.

In Count Two, Plaintiffs assert that the Border Patrol has "retaliated" against them in response to "constitutionally protected speech." Id. ¶¶ 110-13. They allege that, on "multiple" occasions, Border Patrol agents parked vehicles beside the cordons "for the purpose of obstructing the monitors' view," id. ¶ 70, and that, on two such occasions,

agents left the vehicles running, "with exhaust fumes directed at the monitors," id. ¶ 71. The complaint does not specify when these alleged incidents took place, other than sometime "following the initiation" of PHP's monitoring campaign, id. ¶ 70. But the first appears to have been on March 1, 2014, after several PHP members ignored the cordons, entered the checkpoint, and refused to leave for more than an hour. Id. ¶¶ 59-64.

These allegations fail to state a retaliation claim. To begin, because the Border Patrol's policy is valid under the First Amendment, it infringes on no protected speech, so no retaliation claim can lie. The complaint itself shows that Plaintiffs' view was not materially obstructed, see Compl. Ex. D, a fact confirmed by their success in collecting data. Regardless, there is no support for the notion that the Border Patrol's actions were intended to punish Plaintiffs for expressing their views, rather than simply to keep the checkpoint clear after PHP members repeatedly entered it and refused to leave. But the Court need not reach the merits of this claim, because it also fails for an independent, threshold reason: Plaintiffs lack standing to seek prospective injunctive relief.

A. Plaintiffs Lack Standing to Seek Prospective Injunctive Relief.

Because Plaintiffs cannot demonstrate that any alleged retaliation is likely to recur in the future, they lack standing to seek prospective injunctive relief. To establish Article III standing, Plaintiffs must demonstrate the familiar elements of: (1) an injury in fact; (2) causation; and (3) redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Moreover, to obtain prospective injunctive relief—the only type of relief sought for their retaliation claim—it is not enough to allege a past injury. City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983); O'Shea v. Littleton, 414 U.S. 488, 495-96 (1973) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."). Rather, Plaintiffs must demonstrate that they face a "real and immediate threat" of future harm, Lyons, 461 U.S. at 102, that is "certainly impending," Whitmore v. Arkansas, 495 U.S. 149, 158 (1990); Daimler Chrysler Corp. v. Cuno, 547 U.S. 332, 345 (2006). The necessary facts "must affirmatively appear in the record" and

"cannot be inferred argumentatively from averments in the pleadings." FW/PBS Inc. v. Dallas, 493 U.S. 215, 231 (1990).

Here, Plaintiffs cannot establish—and do not even allege—that any supposed retaliation is likely to recur in the future. Instead, they offer only the vague allegation that Border Patrol agents parked vehicles beside the cordons on "multiple" occasions, without specifying any dates. Compl. ¶¶ 70-71. As agent San Martin has explained, he ordered agents to reinforce the cordons with vehicles as a standard crowd-control measure, but relaxed that order on March 12, 2014, after PHP members agreed to respect the cordons. San Martin Decl. ¶ 14-15. Plaintiffs filed their complaint some 9 months later, and although they allegedly "continue[d]" to monitor the checkpoint, see, e.g., Compl. ¶ 9, they fail to allege any later instances of supposed retaliation.

Accordingly, Plaintiffs fail to show any future threat—let alone an "immediate" or "certain" one—that the Border Patrol will retaliate against Plaintiffs in response to their monitoring or protesting activities. See Lyons, 461 U.S. at 102; Whitmore, 495 U.S. at 158. Thus, Plaintiffs lack standing to seek injunctive relief for this claim.[6]

[6] Moreover, the vague injunction that Plaintiffs propose would not redress any concrete injury. Plaintiffs seek an injunction that would prevent the Border Patrol from "restricting, impeding, or otherwise interfering with [their] First Amendment rights to protest and record the [Arivaca] checkpoint." Compl. ¶ A.1-2. In other words, Plaintiffs ask the Court to issue an injunction requiring the Border Patrol not to retaliate against Plaintiffs for exercising their First Amendment rights. But it is well established that such generic "obey the law" injunctions are inappropriate. Keyes v. Sch. Dist. No. 1, 895 F.2d 659, 668-69 (10th Cir. 1990). Here, the proposed injunction would redress nothing, for Defendants are, of course, already obligated to comply with the Constitution. See SEC v. Warren, 583 F.2d 115, 121 (3d Cir. 1978) (affirming dissolution of injunction requiring defendants to merely "obey the law" in the future, "a requirement with which they must comply regardless of the injunction"). Moreover, such an injunction could not be squared with Rule 65(d), which requires that every injunction must "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(B)-(C); see Keyes, 895 F.2d at 668 & n.5 (striking an injunction requiring defendants "to use their expertise and resources to comply with the constitutional requirement of equal education opportunity for all").

B. Plaintiffs Fail to State a Retaliation Claim.

Even if the Court had jurisdiction over Plaintiffs' retaliation claim, it should be dismissed for failure to state a claim. Plaintiffs suggest that the Border Patrol parked vehicles beside the cordons not as a crowd control measure but, instead, to punish Plaintiffs for monitoring and protesting in the first place. But their speculation about the Border Patrol's motives is insufficient to make out a retaliation claim.

To state a First Amendment retaliation claim, a plaintiff must demonstrate (1) that he was engaged in protected First Amendment activity; (2) that the defendant's conduct would deter a person of ordinary firmness from continuing to engage in the protected activity; and (3) that deterring the plaintiff was a substantial or motivating factor in the defendant's conduct. See Mendocino Envtl. Ctr. v. Mendocino Cnty., 192 F.3d 1283, 1300 (9th Cir. 1999). Plaintiffs' claim falls short at each step.

1. Plaintiffs' attempts to monitor or protest from within the checkpoint are not protected First Amendment activity.

Plaintiffs' contention that the Border Patrol retaliated against them for attempting to monitor or protest from within the checkpoint fails at the outset because, as the Court has found, those efforts were not protected under the First Amendment. The Ninth Circuit's decision in Blomquist v. Town of Marana, 501 F. App'x 657 (9th Cir. 2012), is instructive. In rejecting a similar retaliation claim, the court explained that, "[b]ecause Plaintiffs lacked a First Amendment right to picket or otherwise occupy the site of the abandoned easement, they cannot establish that the individual defendants questioned, cited, or arrested them in retaliation for the exercise of their federal constitutional rights." Id. at 659. So too here. Because the Border Patrol's policy is a valid time, place, and manner restriction, Plaintiffs lacked a First Amendment right to protest or monitor from within the checkpoint. Thus, they cannot establish that the Border Patrol retaliated against them for attempting to do so. See id.; see also, e.g., Carreon v. Ill. Dep't of Human Servs., 395 F.3d 786, 797 (7th Cir. 2005) (rejecting retaliation claim where "defendants were free to exclude [the plaintiff's] attorney" from the forum and, therefore,

the plaintiff had "not established that he engaged in conduct protected by his rights of speech or association"); Watkins v. U.S. Postal Emple., 611 F. App'x 549 & n.2 (11th Cir. 2015) (where policy was "a reasonable restriction on expression" the court "need not address the additional requirements of a First Amendment retaliation claim").[7]

2. Border Patrol's supposedly retaliatory actions would not deter a person of reasonable firmness—and did not, in fact, deter Plaintiffs.

Even assuming that Plaintiffs were engaged in protected First Amendment activity, they cannot show that the Border Patrol's supposedly retaliatory actions—parking vehicles beside the cordons—would deter a person of reasonable firmness from exercising his First Amendment rights. For "retaliatory actions to offend the First Amendment, they must be of a nature that would stifle someone from speaking out." Blair v. Bethel Sch. Dist., 608 F.3d 540, 544 (9th Cir. 2010). The "most familiar" such actions are "'exercises of government power' that are 'regulatory, proscriptive, or compulsory in nature' and have the effect of punishing someone for his or her speech." Id. (citation omitted). Here, however, it is difficult to fathom how the Border Patrol's use of such a routine crowd-control technique would deter any reasonable person from engaging in protected activity. Certainly, it did not deter Plaintiffs.

Although Plaintiffs allege that their view of the checkpoint was obstructed, Compl. ¶¶ 70, 87, the photographs attached to their complaint show otherwise. See id. Ex. D (primary and secondary inspection areas visible despite Border Patrol vehicle beside cordons). Moreover, while Plaintiffs allege that the Border Patrol twice left

[7] For the same reason, Plaintiffs' allegation that they were threatened with arrest after refusing to leave the interior of the checkpoint, Compl. ¶¶ 54-55, 62-63, fails to state a retaliation claim. Because Plaintiffs were not engaged in protected First Amendment activity inside the checkpoint, any threats of arrest could not have been retaliatory. See Blomquist, 501 F. App'x at 659; see also Corales v. Bennett, 567 F.3d 554, 565 (9th Cir. 2009) ("Under Ninth Circuit law, Plaintiffs do not have a retaliation claim based on threats of discipline for First Amendment activity if that threat is itself based upon lawful consequences and is not actually administered.").

vehicles running beside the cordons, allegedly exposing monitors to exhaust fumes, id. ¶ 71, nowhere do they allege any physical harm resulting from such exposure, and it is difficult to imagine how exposure to an incidental level of vehicle exhaust could be anything other than the sort of "de minimis" inconvenience that simply "do[es] not give rise to a First Amendment claim." Blair, 608 F.3d at 544. The Arivaca checkpoint is "in a rural area surrounded by farmland and private residences" "where traffic is minimal," Compl. ¶¶ 28, 30, and there is unlimited room behind the cordons for Plaintiffs to gather. In such a wide open space, the effect of exhaust fumes from a single vehicle—left running on only two occasions—would be negligible.

It is therefore unsurprising that Plaintiffs do not allege that the presence of Border Patrol vehicles has, in fact, deterred them from protesting or monitoring the checkpoint. To be sure, a plaintiff need not show that his own speech was actually inhibited, but only that the speech of a "person of ordinary firmness" would have been. Lacey v. Maricopa Cty., 693 F.3d 896, 917 (9th Cir. 2012) (citations omitted). Yet courts will still consider whether there was any actual deterrence, even if it is not determinative. See, e.g., Blair, 608 F.3d at 544 ("The district court found [that the allegedly retaliatory act] didn't chill [the plaintiff's] speech, and the record supports that finding."). Here, Plaintiffs concede that, despite the occasional presence of Border Patrol vehicles, they "have continued" to protest and monitor the checkpoint. Compl. ¶¶ 67. And although they claim to be unable to view "the full range of actions" of Border Patrol agents from behind the cordons, Plaintiffs themselves explain that this is "because they are restricted to observing from approximately 150 feet away," id. ¶ 68—a restriction that the Court has found valid. Nowhere do Plaintiffs allege that the presence of Border Patrol vehicles, in particular, has interfered with their ability to monitor the checkpoint, and any such allegation would be contradicted by Plaintiffs' success in collecting data.

Thus, Plaintiffs fail to show that the presence of Border Patrol vehicles actually deterred their own protesting or monitoring activities, and allege no facts from which the Court could conclude that a hypothetical "person of ordinary firmness" would have been

affected differently.[8]

3. Plaintiffs fail to demonstrate retaliatory intent.

In any event, Plaintiffs fail to show that, in parking vehicles beside the cordons, the Border Patrol intended to punish Plaintiffs for exercising their First Amendment rights, rather than simply to block access to the interior of the checkpoint. Their "mere speculation that defendants acted out of retaliation is not sufficient" to state a claim. Wood v. Yordy, 753 F.3d 899, 905 (9th Cir. 2014). To establish retaliatory motive, a plaintiff must show that deterring him from engaging in protected First Amendment activity "was a substantial or motivating factor in [the defendant's] conduct." Lacey, 693 F.3d at 917. While "retaliatory motive may be shown by circumstantial evidence, such as the timing of the allegedly retaliatory act," evidence of timing "is not, by itself, sufficient to plausibly suggest retaliatory animus" where "there is an 'obvious alternative explanation' for the conduct." Eberhard v. California Highway Patrol, 73 F. Supp. 3d 1122, 1127-28 (N.D. Cal. 2014) (quoting Twombly, 550 U.S. at 567).

Here, Plaintiffs' conclusory insinuations about the Border Patrol's motives for parking vehicles beside the cordons deserve no deference. Plaintiffs baldly allege that the Border Patrol "retaliated against [them] in direct response to their checkpoint monitoring campaign." Compl. ¶ 70. But they offer no evidence to support that assertion, which is precisely the sort of "'legal conclusion couched as a factual allegation'" that is "disentitled to th[e] presumption of truth" on a motion to dismiss. Iqbal, 556 U.S. at 678.

Moreover, in this case, chronology alone is insufficient to plausibly show

[8] Plaintiffs also allege that, on a single occasion, monitors overheard a Border Patrol agent, during a conversation with a passing motorist, use a profanity in reference to one of the monitors. Id. ¶ 72. While such language is not to be condoned, its use—particularly in isolation, as here—would not deter a person of ordinary firmness from exercising his First Amendment rights. See, e.g., Oltarzewski v. Ruggiero, 830 F.2d 136, 137-39 (9th Cir. 1987) (use of "excessively vulgar language" insufficient to state First Amendment retaliation claim"); Nunez v. City of Los Angeles, 147 F.3d 867, 875 (9th Cir. 1998) ("bad-mouth[ing] and verbal threat[s]" insufficient to state First Amendment retaliation claim).

retaliatory motive. True enough, the Border Patrol parked vehicles beside the cordons after Plaintiffs entered—and declined to leave—the checkpoint. Compl. ¶¶ 59-64. Yet, as the Supreme Court has explained, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability," but there is a "more likely" or "'obvious alternative explanation'" for the defendant's conduct, then liability is not "plausibly establish[ed]" and the claim must be dismissed. Iqbal, 556 U.S. at 678. Here, the complaint itself reveals an "obvious alternative explanation" for the Border Patrol's actions: to help keep unauthorized persons out of the checkpoint, after they repeatedly refused to respect its boundaries. Compl. ¶¶ 46-52, 59-61. Plaintiffs acknowledge that this was the precisely the explanation that agent San Martin gave at the time. Id. ¶ 77 (agent "San Martin acknowledged that Border Patrol vehicles had parked adjacent to the barriers to block ingress"). And the same contemporaneous explanation is reflected in documents attached to the complaint. Id. Ex. C at 2 (email from agent San Martin) ("The vehicles were parked there to provide an additional barrier because some monitors refused to move. If the monitors had moved when the agents asked them to, the vehicles would never have been placed there."). Thus, both Plaintiffs' own complaint and common sense point to an obvious, nonretaliatory motive for the Border Patrol's actions. Plaintiffs' conclusory assertions to the contrary are insufficient to nudge this claim "across the line from conceivable to plausible." Iqbal, 556 U.S. at 680.

C. Alternatively, the Court Should Grant Summary Judgment to Defendants on Plaintiffs' Retaliation Claim.

The Court should dismiss Plaintiffs' retaliation claim based on the complaint, the materials incorporated by reference into the complaint, and the judicially noticeable facts discussed above. Should the Court deny Defendants' motion to dismiss or rely on other materials, however, it should grant summary judgment to Defendants. To prevail on their retaliation claim, Plaintiffs need not only prove each of the elements set forth above—none of which they can do, for the reasons already discussed. In addition, Plaintiffs must ultimately "'prove . . . retaliatory animus as the cause of injury,' with causation being

'understood to be but-for causation.'" Lacey, 693 F.3d at 917 (emphasis added); see also Hartman v. Moore, 547 U.S. 250, 260 (2006) ("action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway"). They cannot meet this burden.

As explained above, Plaintiffs allege no facts to suggest any intent to punish them for their viewpoint, and Border Patrol's contemporaneous explanations consistently show that the agency was merely trying to prevent unauthorized persons from entering the checkpoint, after they repeatedly refused to respect its boundaries. In his declaration, agent San Martin confirms these explanations, stating that "because the protesters had ignored the cordons and signs," he ordered agents to park vehicles beside the barriers "to reinforce" them as a crowd-control measure. San Martin Decl. ¶ 14 (Defs.' SOF ¶¶ 19-22). He also explains that he has made several attempts to accommodate PHP members—for example, by relaxing his order to use vehicles to reinforce the cordons, and by relocating a generator-powered lighting unit when PHP members complained about its brightness and fumes, id. ¶ 21 (Defs.' SOF ¶¶ 22-23)—further undermining the notion that the Border Patrol acted with retaliatory intent.

Thus, there is overwhelming evidence that the Border Patrol's motive in parking vehicles beside the cordons was merely to reinforce those barriers, after they had repeatedly been breached, and not to punish Plaintiffs on the basis of their viewpoint. No reasonable jury could conclude otherwise. If this claim is not dismissed, summary judgment should be granted to Defendants.

CONCLUSION

For the foregoing reasons, the Court should dismiss this case in its entirety or, in the alternative, grant summary judgment to Defendants on all claims.

DATED this 23rd day of October, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2015, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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