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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

LEESA JACOBSON, PETER RAGAN,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CUSTOMS & BORDER PROTECTION, UNITED STATES OFFICE OF BORDER PATROL, ET. AL.,

Defendants.

Case No.: 4:14-cv-02485-BGM

LODGED: PROPOSED PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

(ORAL ARGUMENT REQUESTED)

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EXPLANATION OF FACT CITATION FORMS

- "CSOF" refers to Plaintiffs' Controverting Statement of Facts, filed concurrently herewith.
- "SOF" refers to Defendants' Statement of Facts, Docket No. 61-2.
- "Ragan Decl." refers to the Declaration of Peter Ragan in Support of Plaintiffs' Motion for Preliminary Injunction, Docket No. 27-2.
- "McLain Decl." refers to the Declaration of Stephen W. McLain in Support of Plaintiffs' Motion for Preliminary Injunction, Docket No. 27-3.
- "Ragan Reply Decl." refers to the Declaration of Peter Ragan in Support of Plaintiffs' Reply Brief, Docket No. 40-1.
- "Ebanks Decl." refers to the Declaration of Tracy Ebanks in Support of Plaintiffs' Motion for Preliminary Injunction, Docket No. 27-1.
- "Ragan MSJ Decl." refers to the Declaration of Peter Ragan in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, filed concurrently herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case presents multiple questions of fact going to the fundamental question whether Defendants may define First Amendment rights out of existence simply by affixing the label "checkpoint" to a public area and alleging generalized government interests. Taking the facts pleaded as true, as the Court must, the complaint establishes that Plaintiffs lawfully engaged in political speech in a traditional public forum, alongside a public road and *outside* the boundaries of a low-traffic checkpoint in a rural area. In response, Defendants arbitrarily excluded them from areas of the public forum in which they were otherwise entitled to speak and retaliated against them due to the content and viewpoint of their speech. On those facts, Plaintiffs state a claim for violation of their First Amendment rights.

Defendants cannot defeat that claim by rewriting the facts. The motions to dismiss and for summary judgment hinge on the disputed question whether the government improperly expanded the alleged "checkpoint" boundaries to curtail or prevent speech. The government mistakenly contends that Plaintiffs seek to enter the "interior of the checkpoint" or "access the heart of the checkpoint." Dkt. No. 61 ("Motion") at 16, 26. That assertion depends on accepting the government's version of the facts, under which the dimensions of the "checkpoint" are subject to expansion at the sole discretion of Border Patrol agents. However, as pleaded in the complaint, Plaintiffs do not seek to enter the checkpoint as properly defined. Instead, they seek to engage in lawful speech from a public right of way *outside* of the area where actual law enforcement activity takes place. Defendants have stifled Plaintiffs' speech by placing boundaries far beyond what is necessary to serve any legitimate interest.

Of course Defendants dispute that claim, but that dispute cannot be resolved on the pleadings. Nor can it be resolved by a premature motion for summary judgment. Having stated a claim, Plaintiffs are entitled to discovery to test the numerous disputed facts and opinions on which Defendants rely, especially given that Defendants bear the burden to

justify restrictions on speech, and given that the limited evidence they submitted was selected from materials under their exclusive control. Plaintiffs have not had the opportunity to determine all relevant facts through discovery, or to make the record necessary to present their claims to this Court, which must have the benefit of that record before ruling on the merits. The limited facts developed for purposes of the preliminary injunction motion are no substitute for a full record that explores the multiple issues of fact embedded in this case. Further, nothing in the order denying a preliminary injunction binds the Court in deciding the motion to dismiss or for summary judgment.

In any event, even the limited record developed to date reveals numerous material disputes regarding the nature of the forum at issue, the proper dimensions of the Arivaca Road checkpoint, the nature and geographic scope of law enforcement operations along Arivaca Road, the effect of Plaintiffs' speech on those operations, and the legitimacy of Defendants' interests in curtailing Plaintiffs' speech. When viewed in the light most favorable to Plaintiffs, as is required in the context of Defendants' motion, the record to date defeats any claim that Defendants are entitled to judgment as a matter of law. Finally, the complaint and current record amply establish standing to challenge Defendants' restrictions on Plaintiffs' speech. Accordingly, the Court should deny Defendants' motion and allow discovery to proceed.

II. BACKGROUND

A. Facts Relevant to Motion to Dismiss

Plaintiffs have pled the following facts in their complaint, which must be accepted as true in ruling on the motion to dismiss.

1. The Arivaca Road Checkpoint

For more than seven years, residents of the towns of Arivaca and Amado in Arizona have lived with a continuous and pervasive Border Patrol presence in their community. Border Patrol checkpoints are present on virtually every route out of Arivaca, and many local residents must pass through a checkpoint regularly to go to school or work, or to perform routine errands. Dkt. No. 1 ("Compl.") ¶ 31. Since 2014,

residents have sought to monitor one of these checkpoints, on Arivaca Road in Amado ("the Arivaca Road checkpoint"), to document and deter suspected abuses by Border Patrol agents and to measure the efficacy of the checkpoint and its impact on the local community. *Id.* ¶¶ 40–41.

The Arivaca Road checkpoint is located on a two-lane road where traffic is minimal. *Id.* ¶¶ 27, 30. It is located between Arivaca and Amado, rural towns with a combined population of 1,000 and few local businesses. *Id.* ¶ 27. Arivaca Road is not heavily trafficked, and arrests at the Arivaca Road checkpoint are extremely rare. *Id.* ¶ 91. The "checkpoint consists of a small temporary shelter on the south side of the road, from which agents conduct checkpoint inspections" of eastbound traffic, "as well as an approximately 100-foot-long 'secondary inspection' area, also on the south side of the road, running east from and immediately adjacent to the shelter." *Id.* ¶ 29. Although "road signs direct motorists to slow to a stop at the checkpoint," the signs are located outside the checkpoint itself, "several thousand feet to the east and west." *Id.*

Therefore, on the facts pled by Plaintiffs, the Arivaca Road checkpoint extends at most 100 feet east of the shelter on the south side of the road. Beyond that point, the "roadside of Arivaca Road is unpaved and designated as a public right-of-way," which is necessarily open to the public. *Id.* ¶ 28.

After being questioned by the Border Patrol agent(s) on duty, eastbound motorists may be directed to the secondary inspection area for further questioning. *Id.* ¶ 29. Only a small fraction of vehicles arriving at the Arivaca Road checkpoint are referred for secondary inspections. *Id.* ¶ 30.

In July 2013, the community organization People Helping People ("PHP") began a campaign to protest the Arivaca road checkpoint and inform the public about its impact on the community. *Id.* ¶ 32. PHP launched an "Abuse Documentation Clinic" and circulated a petition calling for removal of the Arivaca Road checkpoint. *Id.* ¶¶ 33–34. Complaints documented by PHP describe Border Patrol agents engaging in a variety of civil rights violations at the checkpoint, including racial profiling, false canine alerts, unlawful searches, and excessive use of force. *Id.* ¶¶ 34–35. In support of its campaign, and to

hold Border Patrol agents at the Arivaca Road checkpoint accountable, PHP subsequently began a community effort to monitor the checkpoint. *Id.* ¶ 40.

2. Plaintiffs Have Attempted to Observe and Record the Arivaca Road Checkpoint; Border Patrol Agents Have Unlawfully Erected Barriers in Response

Since the initiation of PHP's monitoring campaign in February 2014, Border Patrol agents at the Arivaca Road checkpoint routinely and deliberately have interfered with Plaintiffs' ability to observe and record checkpoint activities. On February 26, 2014, the first day of monitoring, Plaintiffs were part of a group of approximately thirty PHP monitors and protesters who approached *but did not enter* the secondary inspection area from the east, walking on the south side of Arivaca Road. *Id.* ¶¶ 42–45. The monitors carried signs that read "Monitoring to Deter Abuses + Collect Data." The protesters carried signs and banners protesting the checkpoint with slogans such as, "Checkpoints Can't Divide Us!" and "Revitalize Not Militarize Border Communities." *Id.* ¶ 44.

When Plaintiff Ragan and the other monitors were approximately 100 feet east of the shelter, "at the eastern terminus of the secondary inspection area" but *outside* the Arivaca Road checkpoint, the group was confronted by Defendants Joyner and Riden. *Id.* ¶ 46. Joyner told the monitors "to 'move back' past a cattle guard in the roadway, which was approximately 100 feet behind them" and therefore at least 100 feet away from the eastern boundary of the checkpoint on the southern side of the road. *Id.* ¶ 46.

The monitors initially remained in place and began to observe and record interactions between agents and motorists. *Id.* ¶ 47. Defendants returned and again insisted that Plaintiff Ragan and the other monitors move further away. *Id.* ¶ 48. Defendants Joyner and Riden stated that they had a permit granting Border Patrol use of the area.[1] *Id.* Later, after also being directed to do so by local Sheriff's Deputies, the

[1] Plaintiffs later discovered that Border Patrol apparently obtained a "Permit to Use County Right of Way," Permit No. P04RW00558, for the Arivaca Road checkpoint on February 26, 2004. *Id.* ¶ 48, fn. 2. The description of the "proposed work" for the permit is "to establish checkpoints on Arivaca Rd to help US Border Patrol." *Id.* Ex. B. That permit does not, however, demarcate the boundaries of the checkpoint or limit public access to the public right-of-way. Indeed, the permit provides that: "The applicant [here,

monitors moved to an area on the north side of the road directly across from where they had been stationed, again *outside* the Arivaca Road checkpoint. *Id.* ¶ 49. After the monitors relocated to the north side of the road, some of them attempted to move to the west, though still outside the Arivaca Road checkpoint, but were turned back by several Border Patrol agents. *Id.* ¶ 50.

Later that day, Border Patrol agents erected yellow tape barriers demarcating a newly determined "enforcement zone" outside the Arivaca Road checkpoint, approximately 50 feet east of the secondary inspection area and 150 feet east of the checkpoint shelter. *Id.* ¶¶ 51, 53. The barriers were erected "across the north and south shoulders of the road ... blocking off pedestrian access to the public right-of-way" outside the Arivaca Road checkpoint "on both the north and south sides of Arivaca Road." *Id.* ¶ 53. Border Patrol agents then insisted that Plaintiffs and the monitors move behind the barrier, and threatened them with arrest if they did not comply. *Id.* ¶ 54. Under threat of arrest, Plaintiffs and others in their group relocated to an area behind the barrier. *Id.* ¶ 55.

Before the initiation of PHP's campaign, Defendants never "created or enforced" an "'enforcement area' or 'zone' or any similar restriction on public access to the public right-of-way adjacent to the Arivaca Road checkpoint, or adjacent to any other Arizona interior vehicle checkpoint." *Id.* ¶ 93. Only after PHP began protesting and monitoring the Arivaca Road checkpoint did Border Patrol erect and maintain barriers on the public-right-of-way, replacing "the yellow incident tape with rope cordons" and posting a sign stating "Border Patrol Enforcement Zone – No Pedestrians Beyond this Point." *Id.* ¶¶ 56–57. The barriers continue to "prevent observers from coming within about 150 feet of the

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Border Patrol] will not allow any condition to exist which would be a hazard or a source of danger to the traveling public." *Id.* Ex. B. Further, Pima County Code of Ordinances Title X, Chapter 10.50.050, "Nonexclusive Use," which governs public right-of-ways, provides, "Nothing in this chapter shall be construed to grant any user an exclusive right to use the public right-of-way. Any user's facilities shall be erected, adjusted, installed, replaced, removed, relocated and maintained in a manner that will not interfere with the reasonable use of the public right-of-way, drainage ways, alleys, or easements by the public, by county, or by any other user, or the rights and conveniences of adjacent property owners." *Id.* ¶ 48, fn. 2.

checkpoint" shelter and 50 feet of the secondary inspection area. *Id.* ¶ 58.

As a result, Plaintiffs have not been able to observe and record basic checkpoint activities. From behind the barriers, persons seeking to monitor the Arivaca Road checkpoint cannot observe agents' interactions with motorists, and are thus unable to record information about the checkpoint activity, including the identity of agents conducting the stops, the characteristics of the vehicle occupants, the behavior of any service canines, and the nature of communications between agents and motorists. *Id.* ¶ 68.

Border Patrol agents have continued to threaten monitors with arrest whenever they attempt to stand closer to the Arivaca Road checkpoint. In March 2014, monitors again attempted to move to an empty space across the road from the checkpoint on the north shoulder and approximately 100 feet east of the shelter. *Id.* ¶¶ 59–61. Border Patrol agents again forced the monitors to relocate behind the barriers under threat of arrest. *Id.* ¶¶ 62–63. As a result, monitors were again unable to observe and record much of the checkpoint-related information they sought. *Id.* ¶ 66.

3. Border Patrol Has Excluded Plaintiffs, Yet Allowed Other Individuals to Enter the "Enforcement Zone"

Defendants' actions since the erection of the barriers are inconsistent with the government's assertion that the roped-off area is necessary for "enforcement," as the Border Patrol has allowed other individuals not affiliated with Plaintiffs or PHP to enter this area.

For example, on April 3, 2014, PHP monitors, including Plaintiff Ragan, observed a local resident arrive and park his vehicle next to the barrier, directly inside Border Patrol's newly-designated "enforcement zone." *Id.* ¶ 79. That resident began to heckle the monitors stationed on the other side of the barrier. *Id.* ¶ 80. He remained inside the barrier for approximately forty minutes, at one point parking his truck with one end protruding into the roadway. *Id.* The man's wife also arrived and parked her car inside the barrier. *Id.* As Plaintiff Ragan was departing, he asked the agents at the checkpoint if they had given the man permission to remain inside the "enforcement zone;" an agent replied, "It's a free country." *Id.* ¶ 81.

Defendants have acknowledged that the agents at the Arivaca Road checkpoint are given discretion to choose which members of the public are allowed near the checkpoint. In a March 7, 2014 email, Defendant San-Martin stated that "agents have the authority and are within their right to determine *who can enter into the perimeter* where they are conducting law enforcement actions." *Id.* ¶ 74 and Ex. C (emphasis added). At a March 11, 2014 presentation, Agent Easterling stated that "the people who are going to dictate where [the monitors] can and can't be are the agents on the scene." *Id.* ¶¶ 75–76.

Agents at the Arivaca Road checkpoint have used this discretion to interfere with Plaintiffs' observations by, for example, parking vehicles in Plaintiffs' line of sight. At a July 2014 checkpoint rally, agents parked Border Patrol vehicles immediately adjacent to the barriers on both sides of the road, impeding Plaintiff Jacobson's and other monitors' view of the checkpoint. *Id.* ¶ 87.

On more than one occasion, agents have parked a Border Patrol vehicle next to the barrier and left the engine running, with exhaust fumes directed at the monitors. In one instance, in an attempt to avoid the exhaust fumes blowing in their direction, the monitors moved to the opposite side of the road. *Id.* ¶ 71. An agent responded by parking a vehicle next to the barrier on that side of the road, again leaving the engine running. *Id.* Both vehicles were left idling for three hours while the monitors were present. *Id.*

B. Facts Relevant to Motion for Summary Judgment

The facts pled in the complaint, recited above, and the additional facts recited below have been supported by declarations, as set forth in Plaintiffs' Controverting Statement of Facts ("CSOF"). All of those facts must be viewed in the light most favorable to Plaintiffs in the context of evaluating Defendants' motion.

1. Border Patrol's Restrictions on Monitoring Have Prevented Adequate Documentation of Border Patrol Agents' Public Activities, and Are Not Justified By Defendants' Proffered Rationales

Due to Border Patrol's restrictions, PHP members who have continued to observe the Arivaca Road checkpoint have been forced to do so from a distance that has severely limited their ability to monitor the checkpoint. Further, while Plaintiffs have been able to

collect some data, Defendants' restrictions frustrate the purpose of Plaintiffs' campaign and severely restrict observation of Border Patrol's public activities, and therefore Plaintiffs and other monitors have curtailed monitoring activities and participation in the monitoring campaign has diminished. CSOF ¶ 58.

But even the limited observations that monitors have made suggest that the restrictions on their ability to observe activity at the Arivaca Road checkpoint may conceal inappropriate agent conduct. Specifically, PHP's initial findings, based on monitoring from February to April 2014, suggests that Latino motorists are subjected to discriminatory practices. CSOF ¶ 59. Based on its limited stop data, PHP concluded that Latinos are approximately twenty times more likely than Caucasians to be referred for secondary inspection, and twenty-six times more likely to be asked to show identification. CSOF ¶ 60. But as noted in their findings, Plaintiffs and PHP are severely limited in their ability to confirm, describe, or elaborate upon this apparent discrimination and other activity at the Arivaca Road checkpoint from their distant vantage point. *Id*.

Actual or alleged civil rights violations aside, law enforcement activity at the Arivaca Road checkpoint is minimal. In approximately 100 hours of monitoring from February to March 2014, Plaintiffs and other monitors observed 2,379 vehicles pass eastbound though the Arivaca Road checkpoint, an average of approximately one vehicle every two and half minutes. CSOF ¶ 39. Over the same period, monitors did not observe a single driver or passenger detained by agents at the checkpoint. CSOF ¶ 40. Indeed, Defendants have acknowledged that arrests at the Arivaca Road checkpoint are extremely rare, and that the primary purpose of the checkpoint is "deterrence." *Id*.

2. Law Enforcement Activity Occurs Only Within the Original Checkpoint Boundaries, not in the "Enforcement Zone" Established After Plaintiffs Began Speaking

Border Patrol's activities are largely confined to the south side of the road, east of the Arivaca Road checkpoint shelter. Border Patrol does not conduct inspections on the north side of the road, across from the checkpoint shelter, or in the area west of the checkpoint shelter. CSOF ¶ 36. The barriers arbitrarily demarcating Border Patrol's "enforcement zone" were erected across the public right-of-way on both the north and

south shoulders of the road, even though Border Patrol's activities at the Arivaca Road checkpoint are limited to the south shoulder of the road. CSOF ¶ 37. Indeed, law enforcement activity occurs in only a relatively small portion of the roped-off area, within the boundaries of the checkpoint as originally established. CSOF ¶ 38. Further, as shown in the diagrams submitted by Plaintiffs, there are large areas inside the barriers where no physical structures exist. *See id.*

3. Border Patrol Has Excluded Plaintiffs but Allowed Other Individuals to Enter the "Enforcement Zone"

Defendants never established an "enforcement zone" outside the Arivaca Road checkpoint before Plaintiffs' monitoring campaign, and have offered no evidence that an analogous zone exists outside any other checkpoint in the area. CSOF ¶ 50. Rather, Border Patrol hastily installed the barriers on Arivaca Road, outside the Arivaca Road checkpoint, specifically in response to Plaintiffs' efforts to observe and monitor public law enforcement activities. *See* CSOF ¶ 50, 61.

Since erecting the barriers, Border Patrol has allowed persons other than Plaintiffs and the PHP monitors to enter the "enforcement zone." For example, on November 23, 2014, Steve McLain, a professional surveyor, conducted a survey of the checkpoint. CSOF ¶ 61. When he asked whether he could conduct the survey in the area surrounding the checkpoint, including within the "enforcement zone," the Border Patrol agents on duty informed him that the barriers were only in place to exclude protesters or others whom the Border Patrol agents believe to be disruptive to the checkpoint—not the public in general. CSOF ¶ 62.

Plaintiffs and other monitors have experienced several instances in which motorists passing through the Arivaca Road checkpoint taunted and harassed them as they drove by, after having had conversations with Border Patrol agents. CSOF ¶ 72. These motorists' interactions with Border Patrol agents appeared to be joking and friendly, and sometimes clearly contained negative comments about PHP and monitors. *Id.*

4. Arivaca Road is Used for Expressive Purposes

The public right of way alongside Arivaca Road is routinely used for expressive

purposes. CSOF ¶ 73. Election signs, mounted on stakes, are often displayed on the roadside. *Id*. Signs pertaining to events and local businesses, such as restaurants, are also located on the side of Arivaca Road. CSOF ¶ 74. Signs in support of the Arivaca Road checkpoint and Border Patrol are also clearly visible from Arivaca Road, including from within the "enforcement zone." CSOF ¶ 75.

III. ARGUMENT

On the detailed facts pled in the complaint, which must be taken as true, Plaintiffs state claims that Defendants violated their First Amendment rights by (1) creating and maintaining an ad hoc exclusion zone outside the boundaries of the Arivaca Road checkpoint that infringes on Plaintiffs' right to protest, monitor, and record the checkpoint, and by (2) retaliating against Plaintiffs because of their speech. The complaint plausibly alleges that Defendants have unconstitutionally prohibited Plaintiffs from engaging in political speech within the exclusion zone based on the content or viewpoint of their speech. Even assuming the exclusion zone is content-neutral, it remains unconstitutional because it does not advance any pre-existing significant interest, burdens substantially more speech than necessary to serve any such interest, and does not provide ample alternatives for Plaintiffs' speech. The complaint also alleges Defendants' harassment and hostility toward Plaintiffs sufficiently to state a claim for retaliation. While of course Defendants dispute Plaintiff's claims, that dispute cannot be resolved at the pleading stage, nor can Defendants prevail by rewriting the complaint to suit their convenience. As a result, the Court should deny the motion to dismiss.

The Court should also deny the motion for summary judgment because the limited record developed to date cannot show the absence of any material disputes of fact or support judgment as a matter of law against Plaintiffs' First Amendment claims, especially since Defendants bear the burden to justify restrictions on speech. Indeed, even the current record reveals numerous material disputes that preclude summary judgment. In any event, Plaintiffs are entitled to discovery into material facts and documents in Defendants' sole possession or control before the Court may consider summary judgment. Therefore, the Court should deny the motion for summary judgment.

A. On the Facts Pled, Plaintiffs State First Amendment Claims, Which Defendants Cannot Defeat Using Materials Outside the Complaint

1. Legal Standard for Deciding Motion to Dismiss

In determining whether to dismiss a complaint for failure to state a claim, a court must examine "whether the complaint's factual allegations, together with all reasonable inferences, state a plausible claim for relief." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 (9th Cir. 2011). The Court must accept as true the facts in the complaint and consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice. *See, e.g., OSU Student All. v. Ray*, 699 F.3d 1053, 1058 (9th Cir. 2012); *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012). The plausibility standard is not a "probability requirement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

If the Court finds that Plaintiffs have not stated a claim, it must grant leave to amend unless it is clear amendment is futile. *See, e.g., Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995). The findings "entered in connection with the denial of the preliminary injunction are not binding on the Court in considering a motion to dismiss, or, in the alternative, for summary judgment. Nor are the conclusions of law entered in connection with the injunction considered the law of the case." *Bowers v. Nat'l Collegiate Athletic Ass'n*, 9 F. Supp. 2d 460, 466 n.3 (D.N.J. 1998) (citation omitted); *see also University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.").

2. Plaintiffs State First Amendment Claims for Unconstitutional Exclusion from a Public Forum and Content-Based Retaliation

On the facts pled, Plaintiffs are engaging in speech protected by the First Amendment, which Defendants have unconstitutionally excluded from a traditional public forum, regardless of whether the exclusion is content-based or content-neutral.

Defendants cannot define the relevant forum out of existence by fiat, nor can they justify preventing Plaintiffs from speaking in areas outside the Arivaca Road checkpoint, where their presence does not prevent any legitimate law enforcement activities. Taking the facts in the complaint as true, as the Court must, Plaintiffs state claims for violation of their First Amendment rights to protest and monitor the Arivaca Road checkpoint.

a) The First Amendment Protects Plaintiffs' Political Speech

By protesting and monitoring the Arivaca Road checkpoint, Plaintiffs are engaging in political speech, for which First Amendment protection is "at its zenith." *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186-87 (1999). Political protest and picketing have "always rested on the highest rung of the hierarchy of First Amendment values." *Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 861 (9th Cir. 2001). In particular, "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Hous. v. Hill*, 482 U.S. 451, 462–63 (1987).

Plaintiffs have the "First Amendment right to film matters of public interest," especially law enforcement operations conducted in public.[2] *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *see also Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014) (recognizing "First Amendment right to film police activity carried out in public,

[2] Regardless of whether Plaintiffs' speech is characterized as "monitoring" or "expressive," Motion at 13 n.2, it is equally protected as political speech in a public forum. The government mistakenly relies on *Leigh v. Salazar*, 677 F.3d 892 (9th Cir. 2012) and *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010). Neither is relevant. *Leigh* involved a challenge to restrictions on viewing a horse roundup in a remote Bureau of Land Management preserve. 677 F.3d at 893–94. Unlike the public right-of-way alongside Arivaca Road, the BLM preserve is not a public forum. *See, e.g., Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 515 (D.C. Cir. 2010) ("wilderness preserve" is nonpublic forum). In *Kelly*, the court addressed only the qualified immunity question whether a vehicle passenger had "a clearly established right to videotape police officers during a traffic stop" of the vehicle. 622 F.3d at 262. The court did not address the First Amendment rights of observers more generally, nor did it decide whether the right to record existed, though the Ninth Circuit has done so. Also, "qualified immunity does not bar injunctive relief." *Thornton v. Brown*, 757 F.3d 834, 840 (9th Cir. 2013).

including a traffic stop"); *Adkins v. Limtiaco*, 537 F. App'x 721, 722 (9th Cir. 2013) (right to photograph law enforcement is "clearly established"); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (audiovisual recording of police "is necessarily included within the First Amendment's guarantee of speech and press rights"); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (upholding right "to gather information about what public officials do on public property").

b) Plaintiffs Are Seeking to Speak in a Public Right-of-Way That Is a Traditional Public Forum, Which Defendants Cannot Destroy by Administrative Fiat

As the complaint makes clear, Plaintiffs seek to preserve the right to engage in protected speech in a traditional public forum. Plaintiffs have alleged infringement of their First Amendment right to monitor and protest law enforcement activity from public spaces along Arivaca Road, outside the Arivaca Road checkpoint as properly defined. Specifically, Plaintiffs allege that the area where they seek to stand and speak is a "roadside" that is "unpaved and designated as a public right-of-way," and the actual "checkpoint" is significantly smaller than the area summarily roped off after they began protesting and monitoring. Compl. ¶¶ 28–29.

For pleading purposes, these allegations demonstrate that Plaintiffs seek to protest and monitor the Arivaca Road checkpoint from a public forum. "Public streets and sidewalks" are "the archetype of a traditional public forum." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 945 (9th Cir. 2011). The presence of a sidewalk is not necessary to a traditional public forum. A public right-of-way alongside a rural road is a classic public forum. *See, e.g., Tucker v. City of Fairfield*, 398 F.3d 457, 463 (6th Cir. 2005) ("public right-of-way" between car dealership and road was public forum); *Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1070–71 (3d Cir. 1994) (rejecting argument that "rights of way" adjacent to public roads "are non-public fora" and holding, "[o]nce it is determined that the forum at issue is public roads, it is clear that it is a public forum."). Nothing more is needed to establish that this is a traditional public forum case. To suggest otherwise would deprive numerous rural and suburban residents of the right to speak and protest in public spaces without sidewalks.

The government misrepresents settled law in asserting Plaintiffs must "allege that the area around the Arivaca checkpoint" has "previously been used for expressive activity." Motion at 18. The courts reject any "argument that the historical uses and characteristics of the particular streets need to be considered on a case-by-case basis to determine the nature of the forum." *Rappa*, 18 F.3d at 1071. "No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora," regardless of whether they were previously used "for public communication." *Frisby v. Schultz*, 487 U.S. 474, 480–81 (1988) (rejecting claim that streets were not public forum because of their "physical narrowness" and "residential character").

Therefore, on the facts pled, the public right-of-way alongside Arivaca Road is a traditional public forum in which Plaintiffs may engage in political speech. While perhaps Defendants may exclude the public from the area where actual law enforcement activity is taking place, properly defined, that is not the issue. According to the complaint, Plaintiffs are not attempting to occupy that area.

Defendants rewrite the complaint by asserting Plaintiffs seek to protest "inside Border Patrol checkpoints," refused to "leave the interior of the checkpoint," or "entered the checkpoint." Motion at 15–16. Those assertions require the Court to accept (among other things) Defendants' contention that the area from which Plaintiffs were excluded is, in fact, the "checkpoint" where actual law enforcement activity occurs. The complaint pleads facts to the contrary: Defendants created the "enforcement zone" as an ad-hoc response to Plaintiffs' attempts to protest and monitor the Arivaca Road checkpoint, in a manner inconsistent with past practice along Arivaca Road and at other interior checkpoints, and in doing so closed off areas previously open to the public. Compl. ¶¶ 51–58, 93. On those facts, this is a case in which the government improperly "attempted to destroy or convert a public-forum [right-of-way] into a nonpublic forum." *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1137 (9th Cir. 2011). Defendants' mere wish to close portions of the right-of-way outside the checkpoint cannot convert these areas into a nonpublic forum. A traditional public forum remains "open for

expressive activity regardless of the government's intent." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998). To allow closure of a traditional public forum based only on "the government's intent … would make a mockery of the protections of the First Amendment." *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1105 (9th Cir. 2003).

As a result, government agents cannot close the traditional public forum outside the checkpoint simply by throwing up tape or rope barriers.[3] The government, whether through Congress or Border Patrol, "may not by its own *ipse dixit* destroy the 'public forum' status" of areas "which have historically been public forums." *United States v. Grace*, 461 U.S. 171, 180 (1983). In rejecting an attempt to eliminate the public forum status of a sidewalk "by the expedient of including it within the statutory definition of what might be considered a non-public forum," the Supreme Court held that "[t]raditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression." *Id.*; *see also Henderson v. Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992) ("The mere fact that a sidewalk abuts property dedicated to purposes other than free speech is not enough to strip it of public forum status.").

The same principle applies here. Defendants may not summarily remove public rights-of-way from a public forum adjacent to or across from the Arivaca Road checkpoint by the mere expedient of declaring the area an "enforcement zone." The

[3] Though in some circumstances perhaps the government can "change a property's public forum status" by altering "the objective physical character or uses of the property," *ACLU of Nev.*, 333 F.3d at 1105, it may not "restrict speech by fiat" or "simply declare the First Amendment status of property regardless of its nature and its public use." *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1124 (10th Cir. 2002). Much more is needed to close a traditional public forum. *See, e.g., Hawkins v. City & Cty. of Denver*, 170 F.3d 1281, 1288 (10th Cir. 1999) ("In constructing the Galleria, Denver has altered the physical characteristics and function of the former public street sufficiently to remove its status as a traditional public forum."). At the least, this issue presents fact questions that cannot be resolved on a motion to dismiss.

"government cannot establish the inconsistency" of a particular location with "public assembly and debate … simply by declaring it and by enforcing restrictions on speech," nor can those restrictions "bootstrap themselves into validity by their mere existence." *Henderson*, 964 F.2d at 1182–83.

Defendants also cannot rely on "judicial notice" of facts asserted in various governmental documents, *see* Motion at 2-6, to circumvent the requirement of treating the allegations in the complaint as true. Judicial notice can be used to establish the existence of documents outside the complaint, but "not for the truth of the facts recited therein," which Plaintiffs have had no opportunity to contest and therefore dispute. *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001). "The court cannot take judicial notice of disputed facts" stated in those documents. *Newman v. San Joaquin Delta Cmty. Coll. Dist.*, 272 F.R.D. 505, 516 (E.D. Cal. 2011). As a result, the contents of those documents may not be considered in deciding the motion to dismiss. *See Ramirez v. City of Phoenix*, No. 2:12-CV-00639-JWS, 2012 WL 2900661, at *2 (D. Ariz. July 16, 2012) (excluding document "because its contents do not bear on disposition" of motion to dismiss).

Accordingly, on the facts pled, Plaintiffs have been excluded from an area that is a public forum, and that is outside of any area where actual law enforcement activity takes place. Defendants' assertions to the contrary improperly rewrite the complaint or derive from disputed sources outside the complaint.

c) Defendants Are Violating the First Amendment by Preventing Plaintiffs from Speaking Inside the Ad Hoc Exclusion Zone, Regardless of Whether the Exclusion Is Content-Based or Content-Neutral

The government faces "an extraordinarily heavy burden to regulate speech" in a public forum, especially "core First Amendment speech." *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1022 (9th Cir. 2009). It "may enforce reasonable time, place, and manner regulations as long as the restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Grace*, 461 U.S. at 177. "The failure to satisfy any single prong of this test invalidates" the restriction. *Grossman v. City of*

Portland, 33 F.3d 1200, 1205 (9th Cir. 1994). The government bears the burden to justify restrictions on speech in a public forum. *See, e.g.*, *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009); *Edwards*, 262 F.3d at 863. In its analysis, the Court "must give the benefit of any doubt to protecting rather than stifling speech." *Citizens United v. FEC*, 558 U.S. 310, 327 (2010).

As an initial matter, because it is *Defendants'* burden to show that their restriction on Plaintiffs' speech is justified, it would be unreasonable to expect Plaintiffs to plead facts in their complaint that anticipate and rebut Defendants' arguments. *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004) (noting that plaintiffs "need not anticipate and attempt to plead around all potential defenses"); *Panagacos v. Towery*, 782 F. Supp. 2d 1183, 1192 (W.D. Wash. 2011), *aff'd*, 501 Fed. Appx. 620 (9th Cir. 2012) (refusing to dismiss First Amendment claim because plaintiffs are not "required to anticipate a defendant's affirmative defense and plead around it"). Defendants are premature in asking the Court to reach the reasonableness of the exclusion zone based on Plaintiffs' pleadings. This is particularly true where, as here, Defendants attempt to rely on facts from outside of Plaintiffs' complaint in support of their arguments.

But regardless, Plaintiffs have pled facts supporting a plausible claim that Defendants have excluded Plaintiffs from a public forum based on the content or viewpoint of Plaintiffs' speech. Plaintiffs have also pled facts supporting a plausible claim that the restriction itself is not narrowly tailored to any significant interest and does not leave open ample alternatives for Plaintiffs' speech.

(1) The Complaint States a Plausible Claim That the Exclusion of Plaintiffs Is Content-Based

The facts of the complaint raise at least a plausible inference of content-based or viewpoint-based exclusion from the roped-off area along Arivaca Road. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) (viewpoint discrimination is "an egregious form of content discrimination").

The close connection between Plaintiffs' monitoring and protesting and the creation of the barrier supports this inference. Before Plaintiffs began protesting and

monitoring the Arivaca Road checkpoint, neither that checkpoint nor any other interior checkpoint in Arizona was surrounded or bounded by any additional "enforcement area." Compl. ¶ 93. However, on the very day that "PHP members initiated checkpoint monitoring activities," carrying a sign that said "Monitoring to Deter Abuse + Collect Data" and accompanied by protesters holding signs and banners with anti-Border Patrol slogans, Defendants "proceeded to string yellow tape" outside the checkpoint and compelled Plaintiffs to relocate their speech "behind the newly-installed boundary." Compl. ¶¶ 42–44, 53–55. Just a few days later, Defendants replaced "the yellow incident tape with rope cordons" and posted a sign proclaiming "Border Patrol Enforcement Zone – No Pedestrians Beyond This Point," which was eventually changed to "No Unauthorized Entry Beyond This Point." Compl. ¶¶ 56–57, 83. This sequence of events supports an inference that the ad hoc exclusion zone was motivated by the content or viewpoint of Plaintiffs' speech. *See, e.g., Handy-Clay v. City of Memphis*, 695 F.3d 531, 546 (6th Cir. 2012) (plaintiff stated First Amendment claim where "the chronology of events" pleaded in complaint "supports an inference of causation, particularly because [plaintiff] was terminated the day after she made her own records requests.").

The fact that Defendants have selectively permitted others to stand within the exclusion zone further supports an inference of content-based or viewpoint-based exclusion. *See Hoye v. City of Oakland*, 653 F. 3d 835, 851 (9th Cir. 2011) (noting that the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views"). Defendants have allowed individuals engaging in speech different from or in opposition to that of the Plaintiffs to enter the "enforcement zone." As stated in the complaint, "agents permitted reporters … to walk along the north side of the road from one end of the 'enforcement zone' to the other," and also permitted an individual who "had previously directed obscene comments and gestures at the monitors" to "park his vehicle next to the barrier, directly inside the new 'enforcement zone,'" where he remained "for approximately forty minutes" and "harass[ed] and video record[ed] the monitors," while his "wife also arrived and parked her car inside the barrier." Compl. ¶¶

79–80, 82, 87. Therefore, the Complaint in fact shows that Plaintiffs were "prevented from speaking" inside the ad hoc exclusion zone "while someone espousing another viewpoint was permitted to do so." Motion at 20 (quoting *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 n.4 (2014)).

The fact that Border Patrol agents have at least on some occasions spoken about individuals protesting the Arivaca Road checkpoint with hostility further supports an inference of content-based exclusion. As pled in the complaint, checkpoint monitors have heard "agents shouting profanities that were directed at the monitors," and "one agent yelled to a passing motorist, 'You should drive up and tell her, "Bitch, don't film me!"'" Compl. ¶ 72.

Any one of the preceding facts, if accepted as true, would support a plausible inference of content-based exclusion, and certainly the combination of them provides much stronger circumstantial evidence than what is required at the pleading stage. As has been noted, the pleading burden for claims that require establishing a particular intent, such as content-based discrimination or retaliation, is low. *Cf. Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012) ("Because direct evidence of retaliatory intent rarely can be pleaded in a complaint, allegation of a chronology of events from which retaliation can be inferred is sufficient to survive dismissal.").

Finally, Defendants have not even attempted to demonstrate that the pleadings show that the content-based exclusion of Plaintiffs "serves a compelling government interest in the least restrictive manner possible," and Defendants cannot "survive such strict scrutiny" in these circumstances. *Hoye*, 653 F.3d at 853 (city violated First Amendment by allowing speech within 100 feet of clinics that facilitated access to clinics but not speech that discouraged access). Plaintiffs have stated a claim for content and / or viewpoint discrimination. Defendants may proffer alternative explanations for their behavior, but those contentions cannot defeat Plaintiffs' claim at the pleading stage. *See Starr*, 652 F.3d at 1216.

(2) The Complaint States a Plausible Claim That the Exclusion Is Unconstitutional Even If It Is Content-Neutral

Even assuming the exclusion of Plaintiffs from the alleged "enforcement zone" is content-neutral, Plaintiffs' complaint states a plausible claim that the exclusion is unconstitutional.

Plaintiffs' underlying rights are not the subject of a genuine dispute. Plaintiffs have the First Amendment right to film "government officials engaged in their duties in a public place, including police officers performing their responsibilities." *Glik v. Cunniffe*, 655 F.3d 78, 82–83 (1st Cir. 2011). Defendants do not apparently dispute that Plaintiffs may "protest, picket, leaflet or engage in other expressive activity" from outside the checkpoint. Motion at 25.

Plaintiffs' complaint alleges that they seek to exercise these rights in a public forum. While Defendants assert that they have the right "to restrict access to the checkpoint" itself (Motion at 1), as pled in the complaint the "checkpoint" does not extend to the rope barriers, and Plaintiffs have not sought to stand within areas in which law enforcement activities are taking place. Defendants cannot prevail merely by rewriting the complaint to redefine the "checkpoint" at their convenience.

Therefore, the issue presented in the complaint is whether Defendants' exclusion of Plaintiffs or other speakers from areas outside the Arivaca Road checkpoint violates the First Amendment. Even if Defendants' conduct is content-neutral, Plaintiffs have pled sufficient facts to state a plausible claim that the ad hoc exclusion zone does not materially advance any significant interest, is not narrowly tailored to any such interest, and does not leave open ample alternatives for Plaintiffs' speech.

Though the government's interests in safety, security, and law enforcement may be significant, it is not sufficient merely to assert those interests in a generalized fashion. The claim that "asserted interests are important in the abstract" does not prove the ad hoc exclusion zone "will in fact advance those interests" in "a direct and material way," as necessary to sustain a content-neutral restriction on speech. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). In this case, Defendants operated the Arivaca Road checkpoint for years without asserting that an exclusion zone outside the checkpoint itself was needed to protect agents, drivers, pedestrians, or checkpoint operations. The absence

of any such zone before Plaintiffs began speaking against the checkpoint raises at least a plausible inference that the zone does not in fact materially advance the government's claimed interests. Though Defendants argue otherwise, that dispute cannot be resolved at the pleading stage.

In any event, the exclusion zone "must be narrowly tailored to serve a significant governmental interest," because the government may not "suppress speech" for "mere convenience." *McCullen*, 134 S. Ct. at 2534 (citation and quotation marks omitted). Defendants' ad hoc exclusion zone is not narrowly tailored because it burdens "substantially more speech than is necessary" to protect the government's claimed interests. *Comite de Jornaleros*, 657 F.3d at 949. In this case, the narrow tailoring analysis must be founded on the recognition that law enforcement "officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights," and the "same restraint demanded of law enforcement officers in the face of 'provocative and challenging' speech must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces." *Glik*, 655 F.3d at 84 (citations omitted).

The ad hoc measures adopted by Defendants exclude Plaintiffs from peacefully recording law enforcement activities in an area significantly larger than that held unconstitutional in similar cases. In *Glik*, the court held it violated the First Amendment to prevent plaintiff from recording an arrest in progress in a public forum from only ten feet away. *Id.* at 80. The court found the ten-foot distance to be "a comfortable remove" and held that "[s]uch peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation." *Id.* at 84.

Even accounting for the asserted differences between an arrest and a checkpoint or traffic stop, Plaintiffs state a plausible claim for violation of their First Amendment rights by the ad hoc creation of an excessively large exclusion zone, because the mere act of filming or monitoring does not interfere with Border Patrol duties on the facts pled in the complaint. *Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014) ("[A] police order that is

specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties."). In response, Defendants offer only "mere speculation about danger," which is insufficient to "foreclose expressive activity in public areas" or defeat Plaintiffs' claim. *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1228 (9th Cir. 1990). This insufficiency is particularly acute in light of the rural area in which the Arivaca Road checkpoint is located, the relative lack of traffic in this area and through the checkpoint, and the minimal Border Patrol activity at the actual checkpoint itself. Compl. ¶¶ 27–30, 91.

In any event, the ad hoc exclusion zone is not narrowly tailored to the government's asserted interests, because "a substantial portion of the burden on speech does not serve to advance its goals." *McCullen*, 134 S. Ct. at 2535. Though perhaps narrow tailoring does not require the least restrictive alternative, the existence of "obvious alternatives that would achieve the same objectives with less restriction of speech" shows that a regulation is not narrowly tailored. *Long Beach Area Peace Network*, 574 F.3d at 1025; *see also Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th Cir. 1991) (restrictions that "disregard far less restrictive and more precise means are not narrowly tailored"). Based on the facts pled in the complaint, the government asserts the exclusion zone is justified by the interest in keeping individuals out of "the path of both fleeing suspects and agents giving chase." Motion at 17. However, that interest is easily served, for example, by the obvious alternative of marking off the actual area reasonably needed for exit from the checkpoint, rather than the wholesale exclusion of speech from an area much larger than reasonably necessary for vehicle egress.[4]

In addition, Defendants may enforce existing laws against physically obstructing

[4] To hold that Border Patrol may impose the ad hoc exclusion zone because of hypothetical reckless fleeing drivers would authorize the government to exclude anyone from speaking in any part of a public forum that might be threatened by a reckless driver and thus license suppression of speech on virtually any public sidewalk or right-of-way. In any event, the existence, nature, and frequency of risks posed by "fleeing suspects" present fact questions that cannot be decided on the pleadings.

official vehicles, which is the proper response to such conduct, rather than "to prevent the First Amendment activity from occurring in order to obviate the possible unlawful conduct." *Collins v. Jordan*, 110 F.3d 1363, 1372 (9th Cir. 1996). Because it is plausible that there are "feasible, readily identifiable, and less-restrictive means of addressing" the government's asserted interest "while burdening little or no speech," Plaintiffs state a claim that the ad hoc exclusion zone "is not narrowly tailored" to serve that interest.[5] *Comite de Jornaleros*, 657 F.3d at 948–50 (ban on curbside speech not narrowly tailored where city could enforce existing laws against jaywalking and physically interfering with traffic); *see also McCullen*, 134 S. Ct. at 2537–38 (holding that 35-foot buffer zone around abortion clinics burdened more speech than necessary due to availability of existing laws against obstruction and harassment). To any extent these obvious alternatives are allegedly "less efficient and convenient than [unlimited] bestowal of power on police authorities to decide" where Plaintiffs may speak, such an assertion does "not empower [the government] to abridge freedom of speech." *Comite de Jornaleros*, 657 F.3d at 950 (quoting *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939)).

In addition, because location is essential to Plaintiffs' ability to meaningfully monitor, record, or protest the Arivaca Road checkpoint, the Court "must consider the degree of distortion" of Plaintiffs' speech "that is effected by the regulation in question." *Galvin v. Hay*, 374 F.3d 739, 754 (9th Cir. 2004). On the facts pled, "the relegation" of Plaintiffs' speech to the exclusion zone "burden[s] the plaintiffs' speech to a substantially greater degree than necessary." *Id.* at 755.

At the very least, narrow tailoring presents fact issues that cannot be resolved on the pleadings, especially where Defendants operated the Arivaca Road checkpoint for

[5] The government cannot rely on cases involving judicial injunctions issued on the basis of complete records developed in adversarial proceedings showing "prior unlawful conduct." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 n.2 (1994); *Schenck v. Pro-Choice Network*, 519 U.S. 357, 374 n.6 (1997). Those cases do not justify as a matter of law the restriction of speech by administrative fiat, especially where the complaint does not show that Plaintiffs have engaged in any "unlawful conduct."

years before recently manufacturing the exclusion zone, thus undermining their assertion that the zone is narrowly tailored to serving interests that presumably predated its existence.[6] *See Bay Area Peace Navy*, 914 F.2d at 1227 (holding that 75-yard exclusion zone "burden[ed] substantially more speech than is necessary," where Coast Guard previously "demonstrated ample ability to operate safely without a 75-yard security zone").

The decision in *United States v. Griefen*, 200 F.3d 1256 (9th Cir. 2000), does not defeat Plaintiffs' claim. In *Griefen*, the Forest Service excluded the public only from "the immediate site of the planned new road construction and the repair of the existing roadbed and culverts," and the "closure order was tailored to cover just the area of scheduled construction activities," which "required the use of potentially dangerous heavy construction equipment." *Id.* at 1258, 1260. The Arivaca Road checkpoint involves governmental activities far less intensive than road construction and repair with heavy equipment, and the ad hoc exclusion zone extends significantly beyond the checkpoint itself. *See, e.g.*, Compl. ¶¶ 27–30, 91 (describing limited governmental activities at Arivaca Road checkpoint). As a result, *Griefen* does not resolve this case.

Defendants cannot justify restrictions on Plaintiffs' speech by asserting that this speech "would distract drivers." Motion at 16. That argument proves too much, because it would authorize the government to prohibit any roadside speech anywhere. A generalized "danger of driver distraction" does not justify restrictions on political signs on a major bridge, much less a rural road.[7] *Turner v. Plafond*, No. C 09-00683 MHP,

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[6] Defendants misrepresent the holding of *Bay Area Peace Navy* in suggesting that it approved a "75-foot (25-yard) … 'safety and security zone.'" Motion at 23. The issue before the Ninth Circuit was "whether the 75-yard [225-foot] security zone" was "narrowly tailored" or allowed "ample alternative means of communication." *Bay Area Peace Navy*, 914 F.2d at 1227, 1229. The court affirmed an order "enjoining the Coast Guard from imposing or enforcing a 75-yard security zone." *Id.* at 1231. Plaintiffs did not challenge, and the court did not address, the distinct question whether "25 yards" was an appropriate exclusion zone. *Id.* at 1227.

[7] The Ninth Circuit's reference to messages that can "distract drivers" pertained only to classifying fences on "highway overpasses" as "nonpublic fora." *Brown v. California*

2011 WL 62220, *11 (N.D. Cal. Jan. 7, 2011). To hold otherwise would license law enforcement officers to prohibit all roadside political signs, a result inconsistent with the Supreme Court's "particular concern with laws that foreclose an entire medium of expression." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (striking down blanket ban on yard signs). At a minimum, the issue of driver distraction, again, presents a fact issue that cannot be resolved on the pleadings. Accordingly, Plaintiffs state a claim that the ad hoc exclusion zone is not narrowly tailored to any legitimate interests.

Nor does the exclusion zone provide ample alternatives for Plaintiffs' speech. Although "Plaintiffs and other PHP members have continued monitoring, recording, and collecting data," "[t]heir ability to do so remains significantly impeded by Defendants' actions," and "PHP recently decided to narrow the scope of the data monitors will seek to record," such as "the identity of agents at the checkpoint," which is "impossible to discern from so far away." Compl. ¶ 92. Plaintiffs also have "difficulty observing and recording descriptions of vehicles and vehicle occupants." Compl. ¶ 68. They are "unable to discern the nature of agents' interactions with motorists, whether conversational or inquisitional in nature, from behind the barriers" and are "impeded in their ability to observe and record the full range of actions taken by agents and by Border Patrol service canines, including canine 'alerts' and agent inspections." *Id.*

On these facts, the exclusion zone does not provide ample alternatives for Plaintiffs' monitoring, because it does not permit them to record matters they otherwise have a right to observe. *See Long Beach Area Peace Network*, 574 F.3d at 1025 (noting that an "alternative is not ample if the speaker is not permitted to reach the intended audience"). In addition, alternatives to the exclusion zone are not ample if they have undue "impact on the content of the message itself" through "severance of the speech from a location critical to that content," even "if the intended audience is non-existent or is only the other members of a protesting group," *Galvin*, 374 F.3d at 756. Any factual

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Dep't of Transp., 321 F.3d 1217, 1222 (9th Cir. 2003). It cannot be bootstrapped into a justification for restricting speech in a traditional public forum.

questions about the adequacy or effectiveness of Plaintiffs' speech outside the exclusion zone, *see* Motion at 25, cannot be decided on a motion to dismiss. Plaintiffs therefore state a claim that the exclusion zone fails to provide ample alternatives for their speech.

d) Plaintiffs State a Plausible Claim for Retaliation in Light of Defendants' Pattern of Harassment and Hostility

Plaintiffs state a claim that Defendants retaliated against them because of their speech, in violation of the First Amendment. As stated in the complaint, "Border Patrol agents have harassed, intimidated, and retaliated against the PHP monitors, including Plaintiffs, in direct response to their checkpoint monitoring campaign. Plaintiffs have themselves been subject to harassment, intimidation, and retaliation by agents at the checkpoint." Compl. ¶ 69. On "multiple occasions following the initiation of the checkpoint monitoring campaign, Border Patrol agents parked vehicles next to the barriers for the purpose of obstructing the monitors' view, despite the ample availability of alternative parking locations," and "agents removed the vehicles" after the monitors left. Compl. ¶ 70.

Agents have done more than simply obstruct the monitors' view. They have directly targeted them with offensive and noxious conduct. "On more than one occasion, agents have parked a Border Patrol vehicle next to the barrier and left the engine running, with exhaust fumes directed at the monitors," and in one instance, when "monitors moved to the opposite side of the road" to avoid the fumes, an "agent responded by parking a vehicle next to the barrier on that side of the road, again leaving the engine running. Both vehicles were left idling for approximately three hours while the monitors were present." Compl. ¶ 71. Agents have verbally harassed monitors and encouraged others to do so as well. Compl. ¶¶ 72, 79–80.

These facts state a plausible claim for First Amendment retaliation, which requires that agents "deterred or chilled" Plaintiffs' speech and that "such deterrence was a substantial or motivating factor" in their conduct. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 916 (9th Cir. 2012). Plaintiffs need not show their "speech was actually inhibited or suppressed," only that the actions at issue "would chill or silence a person of ordinary

firmness from future First Amendment activities." *Id.* "Speech can be chilled even when not completely silenced." *Rhodes v. Robinson*, 408 F.3d 559, 568 (9th Cir. 2005). It is therefore irrelevant whether Plaintiffs have continued to protest or monitor the Arivaca Road checkpoint.

It should go without saying that multiple incidents of visual obstruction, verbal harassment, and noxious fumes are sufficient to state a claim for First Amendment retaliation that would chill or silence a person of ordinary firmness. *See Lacey*, 693 F.3d at 916; *see also, e.g.*, *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 536 (9th Cir. 2015) (noting cases where "the risk of 'heat of the moment' harassment" was "chilling speech"). Even a "campaign of petty harassment may achieve the same effect as an explicit punishment" of protected speech. *DeGuiseppe v. Vill. of Bellwood*, 68 F.3d 187, 192 (7th Cir. 1995). Allegedly "minor forms of retaliation can support a First Amendment claim, for they may have just as much of a chilling effect on speech as more drastic measures." *Smith v. Fruin*, 28 F.3d 646, 649 n.3 (7th Cir. 1994). It cannot be said on the facts pleaded that Plaintiffs suffered only "a rather minor indignity" or "de minimis deprivations of benefits and privileges" insufficient to state a claim. *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 544 (9th Cir. 2010) (no "adverse action" arose from school board's "procedurally legitimate vote" to remove plaintiff as vice president, where he continued to serve on board). Defendants' factual assertions to the contrary do not diminish the adequacy of Plaintiffs' pleadings and cannot be properly resolved at this stage.

B. Defendants Cannot Justify Summary Judgment on the Current Limited Record, in Advance of Discovery, Especially Where the Record Reveals Numerous Material Disputes and Defendants Bear the Burden to Justify Their Restrictions on Plaintiffs' Speech

The government cannot carry its heavy burden to justify summary judgment at this extraordinarily early stage of the case, before it has answered the complaint or provided any discovery. The record to date is insufficient to allow the Court to conclude as a matter of law that Defendants did not violate the First Amendment, and in any case, even the limited record reveals numerous material issues of fact. In addition, Plaintiffs are

entitled to discovery into material facts and documents in Defendants' sole possession before the Court can consider summary judgment.

1. Legal Standard for Deciding Summary Judgment Motion

The Court may grant summary judgment only if there is no genuine dispute as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a); *see also, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). As the moving party, the government "initially bears the burden of proving the absence of a genuine issue of material fact." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). Because "summary judgment is a drastic device … the moving party bears a heavy burden" to show "the absence of any material issues of fact." *Nationwide Life Ins. Co. v. Bankers Leasing Ass'n, Inc.*, 182 F.3d 157, 160 (2d Cir. 1999) (internal marks omitted).

Where, as here, the government has restricted speech, it "bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) (citations omitted). As parties "with the burden of persuasion," Defendants "must establish beyond controversy" that the challenged restrictions are constitutional. *S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (internal marks omitted). The Court cannot grant summary judgment unless Defendants demonstrate that "no reasonable trier of fact could find other than" for Defendants on the First Amendment claims.[8] *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986) (emphasis omitted). "If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything" in response to a summary judgment motion, especially where the nonmoving party does not have the burden of persuasion at trial. *Nissan*, 210 F.3d at 1102.

[8] Defendants are therefore mistaken that they may merely point to "an absence of evidence to support" Plaintiffs' case. Motion at 12. That rule only applies where the nonmoving party has the "ultimate burden of persuasion at trial," which is not the case here. *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102–03 (9th Cir. 2000).

On a summary judgment motion, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014). The Court thus "views the evidence in the light most favorable to the non-moving party to determine if there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law." *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014). Indeed, "[s]ummary judgment is improper [even] where divergent ultimate inferences may reasonably be drawn from the *undisputed* facts." *Id*. (emphasis added; citation and quotation marks omitted).

In theory, a summary judgment motion may be filed "at any time until thirty days after the close of all discovery." Fed. R. Civ. P. 56(b). "Where, however, a summary judgment motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue discovery relating to its theory of the case," the Court should freely grant a request under Rule 56(d) to deny or defer the motion. *Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003). Rule 56(d) has been construed as "requiring, rather than merely permitting, discovery 'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition,'" to ensure that "adequate discovery will occur before summary judgment is considered." *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (quoting *Anderson*, 477 U.S. at 250 n.5).

Defendants' current motion for summary judgment relies heavily on the Court's preliminary injunction order, but the "considerations that determine a motion for a preliminary injunction are foreign to those that govern decision on a motion for summary judgment." *Country Floors, Inc. v. P'ship Composed of Gepner and Ford*, 930 F.2d 1056, 1062 (3d Cir. 1991). The standards at the two stages are fundamentally different. In order to obtain a preliminary injunction, a *plaintiff* must establish (1) a likelihood of success on the merits, (2) irreparable harm if the injunction is not granted, and (3) that the balance of equities and public interest support an injunction. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). On a motion for summary judgment by

defendants, by contrast, *defendants* have the initial burden of showing an absence of any material factual issue, which Plaintiffs may then rebut. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 160 (1970). The treatment of evidence in a summary judgment motion is also fundamentally different from the treatment in a motion for a preliminary injunction. In ruling on a summary judgment motion, a court should not make inferences based on facts not established in the record, weigh evidence, evaluate credibility, or speculate as to the ultimate factual conclusions. *See, e.g., Pepper & Tanner, Inc. v. Shamrock Broad., Inc.*, 563 F. 2d 391, 393 (9th Cir. 1977). Any inferences should be construed against the moving party. *Id*. at 395. Therefore, as is also true for the motion to dismiss, any findings or conclusions made in denying the preliminary injunction "are not binding on the district court" at summary judgment. *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007).

2. Defendants Cannot Meet Their Burdens of Production or Persuasion to Obtain Summary Judgment, Especially Where Plaintiffs Have Had No Opportunity to Conduct Discovery into Defendants' Multiple Assertions of Fact and Opinion

Defendants fail to meet their heavy burden to demonstrate that there are no genuine issues of fact or that they are entitled to judgment as a matter of law. As discovery has not begun, Defendants can point only to the declarations on file for the preliminary injunction motion. Those declarations do not meet Defendants' burden, first and foremost, because in significant part they consist of hearsay and improper opinion testimony regarding out-of-court and / or redacted documents that Plaintiffs have had no opportunity to examine or otherwise test through discovery. *See generally* CSOF.

Even to the extent that the declarations reflect admissible evidence, they reveal numerous material issues of fact and competing inferences that defeat the right to judgment as a matter of law on Plaintiffs' First Amendment claims, especially before discovery, including:

- The actual dimensions and configuration of the Arivaca Road checkpoint, *see* CSOF, ¶ 1;
- The dimensions of space and configuration of equipment reasonably necessary

to carry out the Arivaca Road checkpoint's operations, *see* CSOF ¶ 1;

- The number, nature, and location of structures, equipment, and vehicles located at the Arivaca Road checkpoint, *see* CSOF, ¶¶ 3–4;
- The number, nature, and location of structures, equipment, and vehicles reasonably necessary to carry out Arivaca Road checkpoint operations, *see* CSOF ¶¶ 36–40;
- The volume of vehicle traffic passing through the Arivaca Road checkpoint, *see* CSOF ¶ 28;
- The nature, location, intensity, frequency, and duration of vehicle stops, inspections, searches, arrests, accidents, flight attempts, or pursuits at the Arivaca Road checkpoint and other checkpoints, *see* CSOF ¶¶ 32, 40;
- Defendants' motivation for erecting and maintaining the tape barriers and rope cordons around the exclusion zone after Plaintiffs began protesting and monitoring the Arivaca Road checkpoint, *see* CSOF ¶¶ 62–68
- The nature, extent, and motivation of any similar exclusion zones at any other Border Patrol checkpoints, *see* CSOF ¶ 50;
- The nature and extent, if any, of any alleged disruption of the checkpoint by Plaintiffs or others engaged in protest and monitoring, *see* CSOF ¶ 48;
- The reasonableness of prohibiting speech in the ad hoc exclusion zone, *see* CSOF ¶¶ 36–40;
- The proper dimensions, if any, of any reasonable exclusion zone outside the Arivaca Road checkpoint, *see* CSOF ¶¶ 36–40;
- The nature and extent of readily available alternatives to prohibiting speech in the exclusion zone, *see* CSOF ¶ 43;
- The adequacy and effectiveness of Plaintiffs' attempts to continue monitoring Arivaca Road checkpoint operations from outside the exclusion zone, *see* CSOF ¶¶ 57–58;
- The nature, extent, and motivation for actions such as parking Border Patrol vehicles at the barriers, blowing exhaust fumes in monitors' faces, and

encouraging drivers to yell profanities at monitors, *see* CSOF ¶¶ 61–62, 70–72; and

- The extent to which Border Patrol agents selectively allow access to the exclusion zone for individuals engaged in speech different from that of the Plaintiffs or directly opposed to Plaintiffs, *see* CSOF ¶¶ 61–69.

All of these issues go directly to the propriety of the ad hoc exclusion zone and the nature of and motivation for Defendants' conduct, which in turn affect the constitutionality of Defendants' actions. Plaintiffs' "first amendment causes of action necessarily involve complicated questions of motive and intent," and require determining whether the "enforcement zone" meets a significant or compelling interest, whether it is narrowly tailored, and whether it allows for ample alternatives, none of which can be decided on summary judgment given the current limited state of the record. *Peacock v. Duval*, 694 F.2d 644, 646 (9th Cir. 1982).

Defendants also rely on a number of general governmental documents that make assertions unconnected to the facts on the ground of the Arivaca Road checkpoint, such as reports by U.S. Customs and Border Protection, the Government Accounting Office, and the National Transportation Safety Board, about the nature and purpose of Border Patrol operations *generally* and the design of checkpoints and approaches thereto. Motion at 2–6. Plaintiffs have had no opportunity to conduct discovery into the facts and opinions asserted in those documents or to consult experts on the relevance, reliability, and probative value of those opinions as to the particular condition and needs at the Arivaca Road checkpoint. For example, Plaintiffs have not yet been permitted to conduct discovery related to Border Patrol's purported safety concerns, including but not limited to the claim that to allow speakers on the north side of Arivaca Road would be inconsistent with unspecified "standard weapon-retention techniques." Motion at 17. At this stage, therefore, nothing in these documents can justify early summary judgment.

At the least, Plaintiffs are entitled to an order denying or deferring the summary judgment motion until discovery is complete. *Burlington*, 323 F.3d at 773. For example, Plaintiffs have not yet been able to discover the following material information:

- Any regulations, policies, or other evidence pertinent to restrictions on pedestrians in or near interior checkpoints, including the Arivaca Road checkpoint. *See* Rule 56(d) Decl. ¶¶4–6.
- Any regulations, policies, or other evidence pertinent to the size of the area needed to carry out border patrol duties, including "enforcement zones" or other areas outside interior checkpoints. *See* Rule 56(d) Decl. ¶¶ 4–6.
- Any regulations, policies, or other evidence pertinent to vehicle parking, equipment storage, temporary building situation, cordons, or other physical features of interior checkpoints. *See* Rule 56(d) Decl. ¶¶ 4, 6.
- Records of accidents or other public-safety incidents at the Arivaca road checkpoint. *See* Rule 56(d) Decl. ¶¶ 6–7.
- Data regarding the frequency, types, and extent of law enforcement activity at both the Arivaca Road checkpoint and other Arizona interior checkpoints. *See* Rule 56(d) Decl. ¶¶ 6, 8.
- Evidence related to Defendants' arguments that their exclusion of Plaintiffs is content- and viewpoint-neutral. *See* Rule 56(d) Decl. ¶¶ 5–6, 9.

Since those documents and facts "are exclusively in the possession of the defendants, summary judgment should not ordinarily be granted where the facts alleged by the plaintiff would provide a ground for recovery, at least not without allowing discovery." *Schoenbaum v. First Brook*, 405 F.2d 215, 218 (2d Cir. 1968).

Finally, Defendants cannot justify summary judgment by asserting the occurrence of "significant safety incidents" at various checkpoints. Motion at 23. Without allowing Plaintiffs the opportunity to conduct discovery into the nature and significance of those incidents, the Court cannot grant summary judgment. In any event, the asserted actions of third parties beyond Plaintiffs' control do not justify prohibiting Plaintiffs from exercising their free speech rights in the ad hoc exclusion zone. As with their assertions of driver distraction, Defendants' argument proves too much. The claim that intoxicated or reckless drivers might injure roadside protesters or monitors applies anywhere on Arivaca Road or any other road. If accepted by the Court, Defendants' reasoning would license

the government to prohibit all roadside protests—indeed, all sidewalk protests, since reckless drivers can easily jump curbs. To state that position is to refute it. If the government cannot prohibit curbside solicitation of "employment, business, or contributions from an occupant of any motor vehicle," *Comite de Jornaleros*, 657 F.3d at 940, it certainly cannot prohibit roadside or curbside political speech.

On the limited record to date, Defendants cannot demonstrate the absence of genuine issues of material fact, and they are not entitled to judgment as a matter of law that their restrictions do not violate the First Amendment. Plaintiffs are also entitled to conduct discovery. Accordingly, the Court should deny summary judgment.

C. Plaintiffs Have Standing to Challenge the Restrictions on and Retaliation Against Their Speech

Plaintiffs have stated sufficient facts to establish standing to challenge the restrictions on engaging in speech within the ad hoc exclusion zone and Defendants' retaliation against them for their speech. Standing requires actual or imminent injury in fact caused by the Defendants' conduct that is likely to be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). To show standing to seek injunctive relief, Plaintiffs must plead a "real or immediate threat that [they] will be wronged again," for which a pattern of past wrongs is relevant evidence. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). To decide standing on the pleadings, the court "must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011). If "pertinent facts bearing on the question of jurisdiction are in dispute, discovery should be allowed." *America West Airlines, Inc. v. GPA Grp., Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989).

On the facts pled and stated in declarations, Defendants have restricted Plaintiffs' ability to speak by enforcing the ad hoc exclusion zone, selectively or otherwise, threatening them with arrest, and taking other actions sufficient to chill speech. *See supra* Section III A (2)(d). Those facts establish standing to challenge both the constitutionality of the exclusion zone and its selective enforcement. *See, e.g.*, *Maldonado v. Morales*, 556

F.3d 1037, 1044 (9th Cir. 2009) ("chilling effect on speech" creates standing); *Faustin v. City, Cnty of Denver, Co.*, 268 F.3d 942, 950 (10th Cir. 2001) (plaintiff had standing to challenge policy excluding her speech from overpass sidewalk); *cf. Rhodes*, 408 F.3d at 567 n.11 ("[H]arm that is more than minimal will almost always have a chilling effect"). In addition, the Defendants' repeated acts of harassment—spewing profanities and exhaust fumes at checkpoint monitors and obstructing their view—are sufficient to plead standing to challenge "a pattern of officially sanctioned" retaliation that violates Plaintiffs' rights. *Melendres v. Arpaio*, 695 F.3d 990, 998 (9th Cir. 2012) (internal marks omitted). Those incidents are more numerous and much closer in time than the two traffic stops over ten years that did not confer standing to make a Fourth Amendment claim. *See Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999).

Because Plaintiffs intend "to continue to be vocal opponents" and monitors of the Arivaca Road checkpoint and have alleged "continued efforts" by Defendants to "regulate protected speech," they have "established a likelihood of future injury sufficient … to seek declaratory and injunctive relief." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (citation and quotation marks omitted). That injury would be cured by an appropriately tailored injunction. The Court should not now address the terms of that injunction. The evidence developed in discovery will show what terms are "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). At this stage, the Court should find that Plaintiffs have standing and have stated First Amendment claims for which summary judgment is improper.

IV. CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion to Dismiss, or in the alternative, for Summary Judgment. In the alternative, ruling on the motion should be deferred pending completion of the discovery requested by Plaintiffs, and/or Plaintiffs should be provided with the opportunity to file an amended complaint.

DATED this 4th day of January, 2016.

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