No. 16-17199

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEESA JACOBSON and PETER RAGAN,
Plaintiffs-Appellants,

v.

DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
The Honorable Bruce G. MacDonald
Case No. 4:14-CV-02485-BGM

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF *AMICUS CURIAE*[1]

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Cato believes that it is important for the public to monitor the actions of public servants, especially those involved in law enforcement. And because most of the public cannot practically engage in such monitoring, it is important that people be able to record those actions and convey them to others.

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[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief.

SUMMARY OF ARGUMENT

Filming law enforcement officers who are performing their duties is protected under the First Amendment. And when constitutionally protected activity takes place in a traditional public forum, such as on a public street, the government's power to restrict such activity is sharply limited.

Because of community concerns about alleged civil rights violations, People Helping People (PHP) began monitoring and video-recording the Arivaca checkpoint—from about 100 feet away from the primary shelter—to gather comprehensive information on checkpoint interactions. Shortly after PHP (including plaintiffs) began this, the Border Patrol implemented an "enforcement zone," which effectively bans all First Amendment activity along a major public thoroughfare within 150 feet of the checkpoint.

Because the plaintiffs are now required to stand 150 feet away from the checkpoint shelter, they find it much harder to gather details about Border Patrol agents' interactions with motorists—and thus to speak about those details to the public. The Border Patrol claims that the "enforcement zone" is necessary to maintain safety.

But the risk to safety seems to be the everyday risk that anyone near a road might get injured by a speeding car, perhaps one that is trying to evade the police. That risk cannot justify the restrictions on the plaintiffs' First Amendment rights.

The public right-of-way from which the plaintiffs have been excluded is a traditional public forum. The area had been freely accessible; it is virtually indistinguishable from a public sidewalk; and it is within a category of property that is traditionally public and historically used for expressive activity. The government cannot close such a forum to restrict speech with which it disagrees.

But even if this Court considers the right-of-way to be nonpublic, the Border Patrol's policy is viewpoint-discriminatory and unreasonable, and thus unconstitutional. First, plaintiffs allege that Border Patrol agents have allowed other people into the checkpoint and have acted with hostility towards the plaintiffs, suggesting that the agents only exclude people with critical views. Second, the policy is unreasonable because the plaintiffs' passive filming does not materially interfere with checkpoint operations. The Court should hold that the Border Patrol's policy violates the First Amendment.

ARGUMENT

I. Filming Law Enforcement Officers Is a Protected First Amendment Activity

There is a "First Amendment right to film matters of public interest," especially when citizens are monitoring the behavior of public servants. *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). "Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (citation omitted); *see also ACLU of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000). "Filming the police contributes to the public's ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy." *Turner v. Driver*, 848 F.3d 678, 689 (5th Cir. 2017).

Moreover, "speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991). In particular, "the publication of information relating to alleged governmental misconduct" is core

protected speech, *Butterworth v. Smith*, 494 U.S. 624, 632 (1990), because "contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of . . . power." *Gentile,* 501 U.S. at 1035 (citation omitted).

The plaintiffs' purpose in filming at the Arivaca Road checkpoint was to document alleged abuses by Border Patrol agents, in response to growing concerns about alleged harassment and civil rights violations. Complaint ¶ 2.[2] The plaintiffs stood on a public right-of-way 100 feet from the checkpoint and sought to record how agents were interacting with the public that they were examining (and serving). *Id.* at ¶¶ 41, 46. Thus, the plaintiffs' filming of Border Patrol agents performing their checkpoint duties falls squarely within the First Amendment right to film matters of public concern.

II. The Border Patrol's Policy Unconstitutionally Prohibits Protected First Amendment Activity in a Traditional Public Forum

"The ability to restrict speech in [traditional] public forums . . . is 'sharply circumscribed.'" *ACLU of Nevada v. City of Las Vegas*,

[2] We assume, as is proper on a motion to dismiss, that the plaintiffs' factual claims are accurate. *See Daniels-Hall v. National Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

333 F.3d 1092, 1098 (9th Cir. 2003) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). Because "[t]he act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech . . . as a corollary of the right to disseminate the resulting recording," the plaintiffs' activities are as protected as speech. *Alvarez*, 679 F.3d at 595 (emphasis in the original).

A. The Public Right-of-Way Next to the Arivaca Checkpoint Is a Traditional Public Forum

"The quintessential traditional public forums are sidewalks, streets, and parks." *ACLU of Nevada,* 333 F.3d 1092, 1099. The right-of-way alongside Arivaca Road, though unpaved, is still a sidewalk—a pedestrian walkway next to a public street. *See Sidewalk*, Merriam-Webster Dictionary Online (accessed March 21, 2017) (defining "sidewalk" as "a *usually* paved walk for pedestrians at the side of a street") (emphasis added); *Houston Chronicle Pub. Co. v. City of League City*, 488 F.3d 613, 616 (5th Cir. 2007) (recognizing "sidewalks and unpaved shoulders" as traditional public forums). "'[P]ublic places' . . . such as streets, sidewalks, and parks

are considered, without more, to be 'public forums.'" *United States v. Grace*, 461 U.S. 171, 177 (1983).

When determining whether an area constitutes a traditional public forum, this Court has considered three factors:

> 1) the actual use and purposes of the property, particularly status as a public thoroughfare and availability of free public access to the area;
>
> 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.

ACLU of Nevada, 333 F.3d at 1100-01 (citations omitted). All three factors show that the public right-of-way next to the checkpoint is a traditional public forum.

First, Arivaca Road is used as a public thoroughfare, and "use of a property as a public thoroughfare is frequently dispositive" in determining public forum status. *Id.* at 1101. Arivaca Road is a two-lane county road that connects Arivaca with the neighboring town of Amado. Complaint ¶ 27. Many residents of Arivaca regularly take Arivaca Road and pass through the checkpoint to go to school or work, and to perform routine errands. *Id.* at ¶ 31.

The unpaved roadside of Arivaca Road has historically been a public right-of-way. On February 26, 2004, the Border Patrol received a "Permit to Use County Right of Way" from Pima County to establish the Arivaca checkpoint on the public right-of-way. *Id.* at ¶ 48, n.2. The "Nonexclusive Use" provision of the Pima County Code, which governs facilities near a public right-of-way, such as the checkpoint, states that "[a]ny user's facilities shall be . . . maintained in a manner that will not interfere with the reasonable use of the public right-of-way . . . by the public, by county, or by any other user." Pima County Code of Ordinances Title X, ch. 10.50.050. Therefore, the operation of the checkpoint does not strip the entirety of the roadside of its public forum status.

The fact that the right-of-way has long been freely accessible to the public, like the street it parallels, weighs in favor of its being a traditional public forum. *ACLU of Nevada,* 333 F.3d at 1101 ("when a property is used for open public access or as a public thoroughfare, we need not expressly consider the compatibility of expressive activity because these uses are inherently compatible with such activity").

Second, the right-of-way's physical characteristics similarly suggest that the area is a traditional public forum. As this Court explained in *ACLU of Nevada,*

> Similarity to other traditional public forums not only indicates suitability for the conduct of expressive activity, but additionally, areas that are centrally located and integrated into the surrounding locale provide no alteration of expectations that would justify nonpublic forum status.

333 F.3d at 1102. Arivaca Road is "centrally located and integrated into the surrounding locale," as it is one of the primary passageways that residents take in and out of town. *Compare id. with United States v. Kokinda*, 497 U.S. 720, 727 (1990) (plurality op.) (holding that a postal sidewalk was not a traditional public forum because it "was constructed solely to provide for the passage of individuals engaged in postal business," not as a public passageway).

There have also historically been no clear boundaries demarcating the end of the public right-of-way and the start of the Arivaca checkpoint. This case is thus like *United States v. Grace*, where the Supreme Court held that a statute limiting First Amendment activities on Supreme Court grounds could not be applied to the public sidewalks outside the Court building—which the Court held were

traditional public forums—because "[t]here is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalk[ ] . . . that they have entered some special type of enclave." 461 U.S. at 180; *see also Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd. of Las Vegas*, 257 F.3d 937, 947 (9th Cir. 2001) (holding that a sidewalk located on private property was a traditional public forum because "the sidewalk is connected to and virtually indistinguishable from the public sidewalks to its north and south").

The area of the Arivaca Road right-of-way that the plaintiffs seek to access is outside the checkpoint. The checkpoint consists of a small temporary shelter on the south side of the road and a 100-foot-long secondary inspection area immediately to the east. Complaint ¶ 29. Before Border Patrol agents erected yellow tape barriers in response to the plaintiffs' activities, the public could freely access the right-of-way. Plaintiffs' Controverting Statement of Facts ¶ 50, 2 ER 66. As in *Grace*, there were no signs or boundaries

indicating that the unpaved roadside where the plaintiffs were located was part of the checkpoint, rather than part of the existing public right-of-way.

Third, Arivaca Road, as a public street, is "part of the class of property which, by history and tradition, has been treated as a public forum." *ACLU of Nevada,* 333 F.3d at 1103. The sides of traditional roads have historically been treated as public forums, just like roads. *Compare Schneider v. State*, 308 U.S. 147, 151 (1939) ("[S]treets are natural and proper places for the dissemination of information and opinion"), *with Jacobsen v. Bonine*, 123 F.3d 1272, 1274 (9th Cir. 1997) (holding that a walkway at a highway rest stop was not a traditional public forum because "rest stop areas are relatively modern creations" with no history of expressive activity, unlike streets and sidewalks).

Like other roadsides, the Arivaca Road right-of-way has also historically been used for expressive activity: signs relating to elections, events, and local businesses such as restaurants are often displayed on the side of the road, including signs in support of the Border Patrol. Plaintiffs' Controverting Statement of Facts ¶¶ 73, 74, 2 ER 70.

All three *ACLU of Nevada* factors thus show that the Arivaca Road right-of-way is a traditional public forum.

B. Even If It Is No Longer Open to the Public, the Right-of-Way Was a Traditional Public Forum That Border Patrol Deliberately Closed in Retaliation Against the Plaintiffs' First Amendment Activity

The government "may not by its own *ipse dixit* destroy the 'public forum' status of [areas] which have historically been public forums." *Grace*, 461 U.S. at 180 (citation omitted). "[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.*

In *ACLU of Nevada,* this Court held that a downtown street retained its status as a traditional public forum despite the "transformation" of several blocks of the street into a publicly owned pedestrian mall. 333 F.3d at 1094, 1106. "The principal uses" of the downtown street, the Court said, remained unchanged—the street remained a "public thoroughfare." *Id.* at 1105. This Court distinguished *Hale v. Department of Energy*, 806 F.2d 910 (9th Cir. 1986), which held that a roadway was no longer a public forum because

the roadway had been withdrawn from public use for the purpose of conducting nuclear testing. *Id.*

The principal uses of Arivaca Road, much like uses of the downtown street in *ACLU of Nevada,* have not changed after the Border Patrol blocked access to the right-of-way: Arivaca Road remains a primary thoroughfare for Arivaca residents. The Border Patrol cannot strip the roadside of its public forum status by merely saying so.

The Border Patrol contends that the right-of-way is a nonpublic forum because it is within the boundaries of the checkpoint. But those boundaries did not stretch that far before the plaintiffs attempted to monitor the checkpoint.

In *Gerritsen v. City of Los Angeles*, this Court considered a city policy that was "prompted solely by [the plaintiff's] political activity." 994 F.2d 570, 573 (9th Cir. 1993). The policy prohibited handbilling in certain areas of a public park near the Mexican consulate. *Id.* at 573. The Court noted that before the plaintiff's activities, the city had no formal policy on handbilling. *Id.* Despite the city's arguments that "the area around the Mexican Consulate is semi-private in nature and that it has particular functions to carry out which

necessitate separation from activities in other areas of the park," the Court held that the areas in which handbilling had been forbidden were still traditional public fora. *Id.* at 576. The Court reasoned that "sections of public forums [are] one and the same with the larger, undisputed public forum in which they exist." *Id.*

As in *Gerritsen*, the Border Patrol's "enforcement zone" did not exist before the plaintiffs started their monitoring activities. The right-of-way was entirely accessible to the public, and, like the park in *Gerritsen*, was a traditional public forum. Border Patrol agents' taping off part of the right-of-way does not change its status, because the area remains part of a "larger, undisputed public forum." *Id.*

There is also evidence to suggest that the Border Patrol closed the forum to retaliate against the plaintiffs' monitoring activities. In *United States v. Griefen*, this Court upheld a temporary closure of a road for "repair and construction," but noted,

> Our holding does not imply that an order that closes a public forum is sacrosanct. Should it appear that the true purpose of such an order was to silence disfavored speech or speakers, or that the order was not narrowly tailored to the realities of the situation, or that it did not leave open alternative avenues for

> communication, the federal courts are capable of taking prompt and measurably appropriate action.

200 F.3d 1256, 1262, 1265 (9th Cir. 2000). The plaintiffs' allegations suggest the true purpose of the newly invented "enforcement zone" was exactly what this Court warned against in *Griefen*—silencing disfavored speech (or, what is the same thing from a First Amendment perspective, *see* Part I, disfavored videorecording). No "enforcement zone" existed before PHP's monitoring campaign. Plaintiffs' Controverting Statement of Facts ¶ 50, 2 ER 66. In fact, PHP staged a rally at the Arivaca checkpoint in December 2013, and checkpoint operations were suspended for a few hours, but the Border Patrol did not implement an "enforcement zone" after this protest. Defendants' Statement of Facts ¶¶ 12-14, 17.

It was not until the first day of PHP's monitoring campaign that Border Patrol agents created the "enforcement zone." When the monitors arrived at the area 100 feet outside of the checkpoint, Border Patrol agents asked the monitors to move back roughly 100 feet, so that the monitors would be 200 feet away from the checkpoint. Complaint ¶ 46. The monitors remained where they were standing, and just a few hours later, Border Patrol agents put up yellow tape

barriers approximately 150 feet away from the checkpoint. *Id*. at ¶¶ 42, 51, 53. The agents' ad hoc and inconsistent determination of the "enforcement zone," and the timing of the zone's implementation, create at least a factual dispute about whether the barrier was set up specifically to keep the PHP monitors at a distance from which they would find it harder to film.

Border Patrol agents' actions after the zone was implemented also indicate that the agents closed off the public forum to suppress the plaintiffs' First-Amendment-protected activity. Border Patrol agents shouted profanities at the plaintiffs and mocked them in front of motorists who support the checkpoint. Complaint ¶ 72; Plaintiffs' Controverting Statement of Facts ¶ 72, 2 ER 70. In one instance, an agent allegedly advised a motorist to tell the plaintiffs, "Bitch, don't film me!" Complaint ¶ 72. The complaint also alleges that an agent told a surveyor that the barriers were only there to exclude protestors. Plaintiffs' Controverting Statement of Facts ¶¶ 61, 62, 2 ER 68.

The facts that the plaintiffs have alleged suggest that the Border Patrol impermissibly closed a traditional public forum in retaliation

against their First Amendment activities. That is unconstitutional. *See Griefen*, 200 F.3d at 1265.

C. The Border Patrol's Policy Is Not a Valid Time, Place, or Manner Restriction

In a traditional public forum, the government may enact "time, place, and manner" regulations only when they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

1. The Border Patrol's Policy Is Not Narrowly Tailored

Narrow tailoring requires that a policy "not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). The policy "need not be minimally restrictive, [but] the availability of several obvious less-restrictive alternatives is pertinent in deciding whether the regulation burdens substantially more speech than necessary to achieve its purposes." *Galvin v. Hay*, 374 F.3d 739, 753 (9th Cir. 2004); *see also Project*

80's, Inc. v. City of Pocatello, 942 F.2d 635, 638 (9th Cir. 1991) (noting that restrictions that "disregard far less restrictive and more precise means are not narrowly tailored").

In *McCullen v. Coakley*, a state statute prohibited standing on a public way within 35 feet of an abortion clinic entrance. 134 S. Ct. 2518, 2525 (2014). The statute was intended to advance the government interests in "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways." *Id.* at 2531. But the Supreme Court reasoned that the government had "not shown that it seriously undertook to address these . . . problems with the less intrusive tools readily available." *Id.* at 2539. For example, the government could use existing traffic ordinances to punish obstruction of driveways, and criminal statutes forbidding assault and breach of peace to punish people who actually interfered with patients. *Id.* at 2538. Because the exclusion zones "carve[d] out a significant portion of the adjacent public sidewalks," they burdened more speech than necessary to address the government interest; thus, the statute was not narrowly tailored. *Id.* at 2535.

Like the 35-foot buffer zone in *McCullen*, the recently invented 150-foot "enforcement zone" surrounding the Arivaca checkpoint burdens more speech than necessary to serve its interests in border control and public safety. Instead of using less intrusive means, the Border Patrol blocked off a large portion of roadside—extending far enough to interfere with filming agents' activities. By eliminating public access to this area, the Border Patrol has effectively banned any First Amendment activity there. *Cf. Gerritsen*, 994 F.2d at 577 (holding that a "total ban on handbill distribution" in a traditional public forum was "substantially broader than necessary").

The Border Patrol could easily implement alternatives less restrictive than what amounts to a total ban. It could limit the number of people who can gather so as not to block traffic; prevent loud noise so as not to distract agents or drivers; or enforce existing laws against physically obstructing Border Patrol vehicles, to enable quick responses to emergency situations.

Most obviously, the policy could block access to the actual area reasonably needed to secure the checkpoint rather than excluding

all First Amendment activity in an arbitrarily delineated "enforcement zone." *See Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227-28 (9th Cir. 1990) (holding that even a 75-yard exclusion-zone for moving boats in the water around a pier—a physical environment where some buffer space is necessary for safety—"burden[ed] substantially more speech than is necessary," given that the Coast Guard had previously "demonstrated ample ability to operate safely without a 75-yard security zone"). The existence of such alternatives that would not suppress nearly as much First Amendment activity indicates that the Border Patrol's policy is not narrowly tailored. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 948-50 (9th Cir. 2011) (holding that a ban on curbside speech was not narrowly tailored where the city could enforce existing laws to prevent interference with traffic); *Ward*, 491 U.S. at 799 n.7 ("A ban on handbilling, of course, would suppress a great quantity of speech that does not cause the evils that it seeks to eliminate . . . [and thus] would be substantially broader than necessary to achieve the interests justifying it.").

The Border Patrol argues that its policy is narrowly tailored to its interests because it reduces the danger of pedestrians being injured by fleeing smugglers, drunk drivers, or distracted drivers. But any time people walk on a public sidewalk, there is a risk that they will interfere with officers or get injured by a car. This omnipresent risk cannot justify restricting speech, or else any traditional public forum would be subject to increased restrictions on the same basis.

The government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 664 (1994). If the Border Patrol's policy were considered sufficiently narrowly tailored, other traditional public forums would be at risk of losing their First Amendment protection.

2. The Border Patrol's Policy Does Not Leave Open Ample Alternative Channels

If a "regulation so alters the content of a message in a public forum as to hamper speakers from conveying what they mean to convey," it does not leave open ample alternative channels of communication. *Galvin*, 374 F.3d at 756. And "[i]f the location of the

expressive activity is part of the expressive message, alternative locations may not be adequate." *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1025 (9th Cir. 2008). Where the "expression depends in whole or part on the chosen location" "the question must be whether the [policy] prevents the speakers from expressing their views." *Galvin,* 374 F.3d at 756.

Here, because gathering information is necessary to disseminate that information, the plaintiffs' filming of the checkpoint is protected under the First Amendment. The Border Patrol policy effectively bans all filming and other First Amendment activity in the area now marked as the "enforcement zone." PHP alleges that its monitors cannot gather important information from the 150-foot distance prescribed by the policy.

One of the main goals of the monitoring campaign is to gather comprehensive data on checkpoint encounters. This includes Border Patrol agents' identities, so that observers could see if the same agents are repeatedly acting too aggressively or otherwise improperly. It includes vehicle and motorist descriptions, so that observers

could gather information on possible improper profiling. And it includes the nature of the agents' interactions with motorists at the checkpoint. But when monitors are pushed too far away to observe that information, they cannot communicate that information with the public; thus, the policy has prevented PHP from "conveying what they mean to convey," *Galvin*, 374 F.3d at 756. There is no way to document potential abuses at the checkpoint other than to observe the checkpoint.

Finally, when it comes to the First Amendment, proximity matters. It mattered in *McCullen*, where the Court noted that a 35-foot buffer made it harder for speakers to have personal conversations with those they sought to persuade (even though the buffer did not make speech impossible). 134 S. Ct. at 2535-37. It mattered in *Bay Area Peace Navy*, where this Court noted that a 225-foot exclusion zone made it too hard to reach the intended audience. 914 F.2d at 1229. And it matters here, where the 150-foot zone makes it substantially harder for the plaintiffs to see what is going on (and thus to decide what to record), as well as to record the behavior in a way that viewers can make out.

Moreover, the same arguments that the Border Patrol is using to justify its 150-foot exclusion zone could equally be deployed to justify a 250-foot zone or a 350-foot zone. Protecting the plaintiffs' First Amendment activities requires nipping such tactics in the bud.

III. Even If the Disputed Land Is a Nonpublic Forum, the Border Patrol's Policy Is Unconstitutional Because It Is Viewpoint Discriminatory and Unreasonable

Even in nonpublic fora, the government "does not enjoy absolute freedom from First Amendment constraints." *ISKCON v. Lee*, 505 U.S. 672, 687 (1992) (O'Connor, J., concurring). "To be consistent with the First Amendment, the exclusion of a speaker from a non-public forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property." *Ark. Educ. Tel. Comm'n v. Forbes*, 523 U.S. 666, 682 (1998).

A. Border Patrol's Policy Is Viewpoint-Discriminatory

Even if there are reasonable grounds for limiting access to a non-public forum, a regulation is unconstitutional if it is "in reality a facade for viewpoint-based discrimination." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985).

> [A] . . . policy permitting communication in a certain manner for some but not for others raises the specter of content and

> viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official . . . . [S]uch . . . policies impose censorship . . ., and hence are unconstitutional.

City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 763 (1988).

Here, Border Patrol agents have complete discretion over who is allowed within the enforcement zone, and what activities anyone inside can engage in. 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." Plaintiffs' Controverting Statement of Facts ¶ 68, 2 ER 69.

The evidence suggests that Border Patrol agents have used their discretion to restrict the activities of plaintiffs, who are critical of Border Patrol practices, but permit the activities of others. For example, the agents allowed two people, who were outwardly critical of the plaintiffs, to park their cars and to film within the enforcement zone. *Id.* at ¶¶ 63-67, 2 ER 69. The agents also permitted reporters and a surveyor to enter the zone, explaining to the surveyor that the barriers were in place to exclude protesters, not the public in general. *Id.* at ¶ 62. The policy thus gives agents total discretion,

which enables viewpoint discrimination and renders the policy unconstitutional. *See Kaahumanu*, 682 F.3d at 807 (striking down a permitting regulation that allowed government officials to revoke a permit at any time for any reason, because "this discretionary power is inconsistent with the First Amendment").

B. Border Patrol's Policy Is Unreasonable

A speech restriction in a nonpublic forum is reasonable if it is "consistent with the [government's] legitimate interest in preserv[ing] the property . . . for the use to which it is lawfully dedicated." *Perry Education Association*, 460 U.S. at 50 (internal quotation omitted). Border Patrol's policy is unreasonable because the restricted speech does not materially interfere with Patrol activities.

In *ISKCON v. Lee*, the Court concluded that even in an airport, a nonpublic forum, the government could not ban leafleting because it did not disrupt the normal functioning of the airport. 505 U.S. at 690 (O'Connor, J., concurring in the judgment). Unlike solicitation, which the Court noted might impede the flow of traffic and cause particularly harmful delays, leafleting did not lead to increased

traffic or any of the same concerns. *Id*. Because there was no evidence in the record that peaceful leafleting was incompatible with the multipurpose environment of airports, the Court found that a total ban on leafleting was unreasonable. *Id.* at 692.

Just like leafleting in airports, recording Border Patrol agents from a public-right-of-way 100 feet away from a checkpoint does not disrupt the checkpoint's normal operation. Indeed, it causes less disruption than leafleting, which can lead to littering, or to mild pedestrian traffic congestion. Recording presents neither of these concerns, but instead requires the plaintiffs to remain in one place, relatively quiet, still, and thus undisruptive. *See Glik*, 655 F.3d at 84 (noting that "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").

Moreover, even if the government had to exclude people from a few feet away from the checkpoint, setting the boundary of the enforcement zone at 150 feet away is improper. Closing off this large area, which is lawfully dedicated for public access, is unreasonable, especially considering the limited activity at the checkpoint.

On average, only one vehicle arrives at the checkpoint every two and a half minutes. Plaintiffs' Controverting Statement of Facts ¶ 39, 2 ER 65. Motorists are rarely required to stop for secondary inspection. *Id.* at ¶ 32, 2 ER 63. The defendants have admitted that arrests are rare and that the checkpoint's main purpose is deterrence. *Id.* at ¶ 40, 2 ER 65. A total ban on First Amendment activity for 150 feet of roadside is thus an unreasonable speech restriction even if the area is a nonpublic forum. *See Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75 (1987) (unanimously striking down regulation prohibiting "all First Amendment activities" at airport because it was "obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech").

CONCLUSION

Monitoring and filming of Border Patrol agents at the public right-of-way by the Arivaca checkpoint is fully protected by the First Amendment. The Border Patrol cannot close a traditional

public forum to restrict such protected activity. Moreover, the Border Patrol's policy is not valid time, place, or manner restriction.

Even if this Court concludes that the unpaved roadside of Arivaca Road is a nonpublic forum, the policy is both unreasonable and viewpoint discriminatory, and thus unconstitutional. For these reasons, the Court should reverse the district court's decision.

Respectfully Submitted,

s/ Eugene Volokh

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,438 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14-point Century Schoolbook.

Dated: April 14, 2017

s/ Eugene Volokh
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief *Amicus Curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 14, 2017.

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Dated: April 14, 2017

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