

No. 16-17199

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEESA JACOBSON, et al.,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLEES

CHAD A. READLER
Acting Assistant Attorney General

ELIZABETH A. STRANGE
Acting United States Attorney

SCOTT McINTOSH
PATRICK G. NEMEROFF
(202) 305-8727
Attorneys, Appellate Staff
Civil Division, Room 7217
Department of Justice
950 Pennsylvania Ave., NW
Washington DC 20530

TABLE OF CONTENTS

	<u>Page(s)</u>
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUE.....	1
STATEMENT.....	2
A. Regulatory and Factual Background.....	2
B. Procedural Background	11
SUMMARY OF ARGUMENT.....	12
STANDARD OF REVIEW	15
ARGUMENT	15
I. The Government’s Security and Safety Restriction on Pedestrian Access Within the Arivaca Road Checkpoint Complies with the First Amendment.	15
A. The Restriction Serves Important Government Interests by Preserving the Checkpoint for Law Enforcement Purposes.	15
B. The Restriction Is a Reasonable and Viewpoint- Neutral Regulation of Access to a Nonpublic Forum.	19
C. The Border Patrol Permissibly Imposed a Reasonable Time, Place, and Manner Restriction on Access to the Checkpoint.	30
II. The District Court Properly Exercised Its Discretion in Denying Plaintiffs’ Request for Discovery.....	40
CONCLUSION	44

STATEMENT OF RELATED CASES

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases:	<u>Page(s)</u>
<i>ACLU v. Alvarez</i> , 679 F.3d 583 (7th Cir. 2012)	38
<i>ACLU v. City of Las Vegas</i> , 333 F.3d 1092 (9th Cir. 2003)	24, 25
<i>Adderley v. Florida</i> , 385 U.S. 39 (1966)	20, 27, 29
<i>Almeida-Sanchez v. United States</i> , 413 U.S. 266 (1973)	40
<i>Bay Area Peace Navy v. United States</i> , 914 F.2d 1224 (9th Cir. 1990)	34, 35
<i>Brown v. California Dep't of Transp.</i> , 321 F.3d 1217 (9th Cir. 2003)	30
<i>Burson v. Freeman</i> , 504 U.S. 191 (1992)	29, 33
<i>Center for Bio-Ethical Reform, Inc. v. City & Cty. of Honolulu</i> , 455 F.3d 910 (9th Cir. 2006)	20
<i>Colten v. Kentucky</i> , 407 U.S. 104 (1972)	39
<i>Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.</i> , 473 U.S. 788 (1985)	20, 26, 30
<i>Employers Teamsters Local Nos. 175 & 505 Pension Tr. Fund v. Clorox Co.</i> , 353 F.3d 1125 (9th Cir. 2004)	14, 41, 43
<i>Family Home & Fin. Ctr., Inc. v. Federal Home Loan Mortg. Corp.</i> , 525 F.3d 822 (9th Cir. 2008)	15, 40, 43
<i>First Unitarian Church of Salt Lake City v. Salt Lake City Corp.</i> , 308 F.3d 1114 (10th Cir. 2002)	25
<i>Flint v. Dennison</i> , 488 F.3d 816 (9th Cir. 2007)	13, 20, 21

<i>Fordyce v. City of Seattle</i> , 55 F.3d 436 (9th Cir. 1995)	38
<i>Galvin v. Hay</i> , 374 F.3d 739 (9th Cir. 2004)	37
<i>Gericke v. Begin</i> , 753 F.3d 1 (1st Cir. 2014)	38
<i>Glik v. Cunniffe</i> , 655 F.3d 78 (1st Cir. 2011)	38
<i>Greer v. Spock</i> , 424 U.S. 828 (1976)	20, 21, 23, 24, 25, 29
<i>Hague v. Committee for Indus. Org.</i> , 307 U.S. 496 (1939)	21
<i>Hale v. Department of Energy</i> , 806 F.2d 910 (9th Cir. 1986)	23, 25
<i>Heffron v. International Soc’y for Krishna Consciousness, Inc.</i> , 452 U.S. 640 (1981)	27
<i>Hodge v. Talkin</i> , 799 F.3d 1145 (D.C. Cir. 2015)	23
<i>Hodgers-Durgin v. de la Vina</i> , 199 F.3d 1037 (9th Cir. 1999)	28
<i>Houchins v. KQED, Inc.</i> , 438 U.S. 1 (1978)	14, 37
<i>International Soc’y for Krishna Consciousness of Cal., Inc. v. City of Los Angeles</i> , 764 F.3d 1044 (9th Cir. 2014)	26, 31
<i>International Soc’y for Krishna Consciousness, Inc. v. Lee</i> , 505 U.S. 672 (1992)	21, 22, 36
<i>Jacobsen v. Bonine</i> , 123 F.3d 1272 (9th Cir. 1997)	21, 24
<i>Jacobsen v. U.S. Postal Serv.</i> , 993 F.2d 649 (9th Cir. 1992)	27
<i>Kaahumanu v. Hawaii</i> , 682 F.3d 789 (9th Cir. 2012)	27, 28

<i>Madsen v. Women’s Health Ctr., Inc.</i> , 512 U.S. 753 (1994)	16
<i>McCullen v. Coakley</i> , 134 S. Ct. 2518 (2014)	31, 32
<i>Menotti v. City of Seattle</i> , 409 F.3d 1113 (9th Cir. 2005)	34, 36
<i>Perry Educ. Ass’n v. Perry Local Educators’ Ass’n</i> , 460 U.S. 37 (1983)	21, 26
<i>Pottenger v. Potlatch Corp.</i> , 329 F.3d 740 (9th Cir. 2003)	15
<i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555 (1980)	39
<i>Smith v. City of Cumming</i> , 212 F.3d 1332 (11th Cir. 2000)	38
<i>Times Mirror Co. v. United States</i> , 873 F.2d 1210 (9th Cir. 1989)	19, 39
<i>United States v. Albertini</i> , 472 U.S. 675 (1985)	34
<i>United States v. Flores-Montano</i> , 541 U.S. 149 (2004)	15
<i>United States v. Grace</i> , 461 U.S. 171 (1983)	22
<i>United States v. Griefen</i> , 200 F.3d 1256 (9th Cir. 2000)	23, 35, 37
<i>United States v. Hernandez</i> , 739 F.2d 484 (9th Cir. 1984)	3
<i>United States v. Kokinda</i> , 497 U.S. 720 (1990)	24
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543 (1976)	3, 15, 33
<i>United States v. Vasquez-Guerrero</i> , 554 F.2d 917 (9th Cir. 1977)	15

Ward v. Rock Against Racism,
491 U.S. 781 (1989)31, 32, 36

Wright v. Incline Vill. Gen. Improvement Dist.,
665 F.3d 1128 (9th Cir. 2011) 23, 25

Statutes:

6 U.S.C. § 202.....2

8 U.S.C. § 1357.....3

28 U.S.C. § 12911

28 U.S.C. § 13311

Regulation:

8 C.F.R. § 287.5.....3

Rule:

Fed. R. App. P. 4(a)(1)(B) 1

Other Authority:

U.S. Gov’t Accountability Office, GAO-09-824,
*Border Patrol: Checkpoints Contribute to Border Patrol’s
Mission* (Aug. 2009), <http://www.gao.gov/assets/300/294548.pdf>2

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BRIEF FOR APPELLEES

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court granted the government's motion for summary judgment on September 30, 2016. Plaintiffs filed a timely notice of appeal on November 29, 2016. Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

U.S. Border Patrol operates traffic checkpoints on interior roads and highways to intercept illegal immigrants who evade detection at the border. Since 2007, the

Border Patrol has operated one such checkpoint at a fixed location on Arivaca Road in southern Arizona. After protesters repeatedly disrupted government operations by congregating inside the Arivaca Road checkpoint, the Border Patrol established a perimeter approximately 150 feet from the center of the checkpoint, within which it prohibits unauthorized pedestrian access.

The issues presented are:

- (1) Whether requiring unauthorized pedestrians to stay 150 feet from the center of the checkpoint violates the First Amendment; and
- (2) Whether the district court abused its discretion in denying plaintiffs' request for discovery under Federal Rule of Civil Procedure 56(d).

STATEMENT

A. Regulatory and Factual Background

1. U.S. Customs and Border Protection (CBP) is a division of the Department of Homeland Security responsible for securing the nation's borders. 6 U.S.C. § 202. CBP controls entry into and exit from the United States at air, land, and sea ports of entry. SER 9; *see* SER 1-87 (U.S. Gov't Accountability Office, GAO-09-824, *Border Patrol: Checkpoints Contribute to Border Patrol's Mission* (Aug. 2009)).¹ To further ensure border security, U.S. Border Patrol, a component of CBP, operates traffic checkpoints

¹ Available at <http://www.gao.gov/assets/300/294548.pdf>.

on United States roads and highways near the border. SER 9. Checkpoints are generally located 25 to 100 miles inland from the border, at locations deemed likely to result in the apprehension of illegal immigrants who evade detection at the border. SER 10, 14-15.

Recognizing that the Border Patrol's "traffic-checking program in the interior is necessary" to border security, *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976), Congress has authorized Border Patrol agents to conduct searches and execute arrests at checkpoints based on their specialized training in law enforcement, 8 U.S.C. § 1357; 8 C.F.R. § 287.5. The Supreme Court has held that Border Patrol agents may stop a vehicle at a checkpoint for brief questioning "even though there is no reason to believe the particular vehicle contains illegal aliens." *Martinez-Fuerte*, 428 U.S. at 545.

The Border Patrol operates approximately 70 traffic checkpoints along the nation's southwest border. SER 16, 18. Checkpoints are designated as permanent or tactical. Permanent checkpoints include brick-and-mortar structures and are often located on major highways, while tactical checkpoints do not have permanent structures and are often located on secondary roads. SER 15-17; ER 138. Both types of Border Patrol checkpoints operate from fixed locations, and there is no "meaningful legal distinction between" them. ER 138; *see United States v. Hernandez*, 739 F.2d 484, 488 (9th Cir. 1984) ("[T]he distinctions . . . between a [tactical]

checkpoint and a permanent checkpoint are not material.”). But tactical checkpoints offer fewer safety protections to Border Patrol agents and the public, because they often lack safety features such as concrete barriers separating agents from traffic.

SER 16.

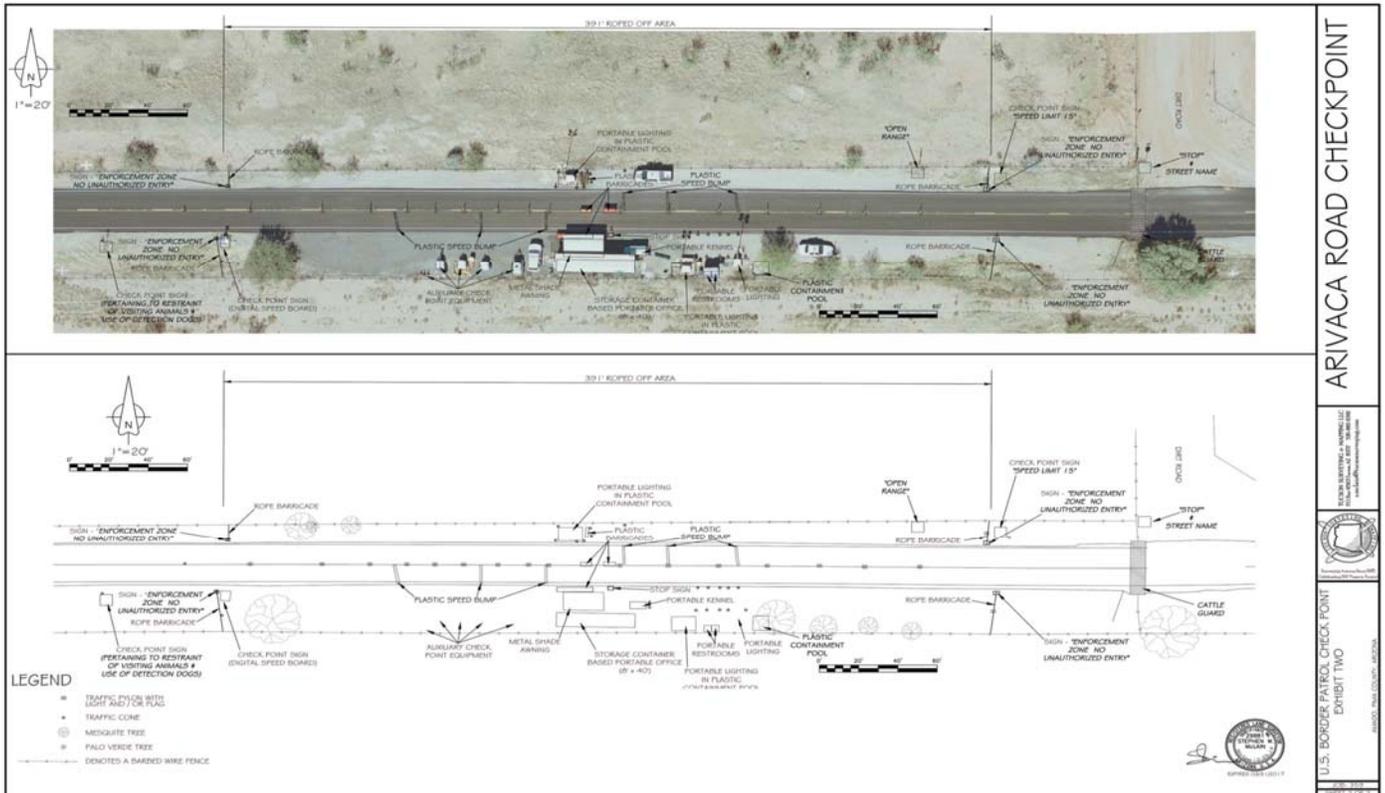
All Border Patrol checkpoints include a primary inspection area, where motorists are initially stopped, and a secondary inspection area, where motorists may be referred for further questioning. ER 140-42. Secondary inspection areas must “provide ample parking space for buses, trucks, and other vehicles pulled off for further questioning.” ER 141. Border Patrol checkpoints must contain administrative and detention facilities, whether in the form of brick-and-mortar buildings, mobile trailers, or other facilities. ER 140. An adequate number of Border Patrol vehicles must be present at checkpoints at all times, so that agents can pursue motorists who fail to yield or who flee, ER 140, and checkpoints must include parking for agents staffing the checkpoint and for agents conducting roving patrols in the area. Checkpoints may house a variety of inspection equipment, such as vehicle lifts, x-ray and gamma-ray machines, and canine units. SER 33, 38.

In the wake of a pair of fatal checkpoint crashes in 2004, a federal-state task force devised a traffic control plan for all Border Patrol checkpoints, pursuant to which signs must be placed in each direction warning approaching traffic well in

advance of checkpoints. ER 127-34. All checkpoints must be arranged to minimize the risk of accident or injury to agents and the public, and operations may be suspended if conditions become unsafe. ER 142-43.

2. The Arivaca Road checkpoint is a tactical traffic checkpoint located on a rural, two-lane road in southern Arizona. ER 115. The checkpoint was created to prevent circumvention of a permanent traffic checkpoint at Interstate 19, a major route inland that is intersected by Arivaca Road. SER 17, 51 n.63. The Border Patrol has operated the checkpoint at the same location since 2007, after receiving a permit from the Pima County Department of Transportation granting it use of the county right-of-way. ER 115, 230-32. The checkpoint operates twenty-four hours a day and seven days a week. ER 115. It is staffed with a minimum of three agents per shift, but generally has two additional agents to conduct roving patrols for persons attempting to circumvent the checkpoint. ER 115-16. Continuous operation “is key to effective and efficient checkpoint performance . . . because smugglers and illegal aliens closely monitor potential transit routes” to cross “[a]s soon as a checkpoint is closed.” SER 28-29.

The below survey of the checkpoint was prepared by plaintiffs for purposes of this litigation:



ER 203.

Like other checkpoints, the Arivaca Road checkpoint includes a primary and secondary inspection area, as well as inspection and safety equipment. *See* ER 203 (depiction of checkpoint by plaintiffs’ surveyor). The primary inspection area is located on the roadway itself, which is divided by plastic barricades and traffic cones, and marked by plastic speed bumps. *Id.*; *see* ER 165-73, 181 (photographs of checkpoint). Barbwire fence stretches along either side of the road, approximately 15

feet from the northern roadside and approximately 30 feet from the southern roadside. ER 203. On the southern roadside, between the road and the fence, there are two portable lighting units, a large storage container-based portable office, portable restrooms, a dog kennel, space for parking, and other equipment. *Id.*; ER 185 (photograph). On the northern roadside, between the road and the fence, there is a portable lighting unit and space for parking. *See* ER 203 (survey); ER 183 (photograph). The side of the road is used as a secondary inspection area, which must be sufficiently large to allow space for buses, trucks, and other vehicles that may be referred for further questioning. ER 121, 141. Border Patrol vehicles generally are parked throughout the vicinity of the checkpoint to direct traffic or give chase to motorists that flee inspection. ER 116-17, 121.

Consistent with the Board Patrol's traffic control plan, ER 129, Arivaca Road is marked with signs to warn drivers about the upcoming checkpoint. The eastbound approach to the checkpoint includes the following signs: at about 0.4 mile out, "Border Patrol Checkpoint Ahead"; at 1,350 feet, "Speed Limit 35"; at 900 feet, "Speed Limit 25"; at 600 feet, "All Vehicles Must Stop Ahead"; at 320 feet, "No Passing Zone"; at 300 feet, "K-9 on Duty, Please Restrain Your Pets"; at 250 feet, "Use Low Beams"; and at 180 feet, "Speed Limit 15". ER 203; *see* ER 151-65

(photographs of signs). Traffic cones and pylons further demarcate the checkpoint. ER 2 (district court order); ER 203; ER 165, 169, 170 (photographs).

3. Plaintiffs Leesa Jacobson and Peter Ragan are members of an Arizona-based organization, People Helping People (PHP), which began a campaign to protest the Arivaca Road checkpoint and call for its removal. ER 251-52. On December 8, 2013, PHP held a rally at the checkpoint with more than 100 protesters. ER 252. Due to safety concerns raised by the large crowd and oncoming traffic, Border Patrol agents were forced to suspend checkpoint operations for over four hours, thus permitting traffic to pass uninspected. ER 117; SER 100-01.

A group of about 30 protesters returned to the checkpoint on February 26, 2014. ER 117; SER 101. After the protesters repeatedly ignored Border Patrol agents' requests to move out of the interior of the checkpoint, the Board Patrol used yellow incident tape to establish a perimeter on the northern and southern roadsides, approximately 150 feet from the center of the checkpoint. ER 117-18, 256. The tape was later replaced with rope cordons and signs reading "Border Patrol Enforcement Zone—No Pedestrians Beyond this Point." ER 118, 256-57. The signs were then replaced with new signs that read "No Unauthorized Entry Beyond This Point." ER 261; *see* ER 165-67 (photographs).

The Border Patrol has since restricted pedestrian access inside of the 150-foot perimeter of the checkpoint. After a group of PHP members disregarded the checkpoint perimeter in early March 2014, SER 104, Border Patrol agents parked vehicles inside the rope cordons to further demarcate the enforcement zone, ER 118-19. When PHP members complained that the location of the vehicles obstructed their view, the Border Patrol ceased parking cars in those locations on the condition that PHP members remain outside the checkpoint perimeter. *Id.*

Plaintiffs identify three incidents in which pedestrians were allowed inside the checkpoint perimeter. They claim that, in early April 2014, a man was permitted to park and remain inside the checkpoint for approximately 40 minutes, during which time he allegedly harassed PHP members. ER 69, 119. In response to these allegations, Border Patrol officials “immediately took corrective action,” including by “reinforc[ing] the policy to permit only authorized persons within the checkpoint for official purposes.” ER 119. Plaintiffs also observe that members of the media were allowed to walk across the checkpoint on one occasion, ER 216, and that their own surveyor was permitted within the checkpoint for purposes of a survey related to this litigation, ER 68, 198.

In response to complaints, Border Patrol officials described the reasons for restricting pedestrian access inside the Arivaca Road checkpoint. SER 88-89 (letter

from Chief Patrol Agent Manuel Padilla, Jr.); ER 234-36 (e-mail from Agent in Charge Roger San Martin). Chief Patrol Agent Padilla explained that “no individuals, regardless of their political beliefs, including whether or not they support the agency’s mission, are granted access to the Checkpoint unless they are accompanied by Border Patrol Agents for official purposes.” SER 88. He observed that this restriction “protect[s] the safety of [Border Patrol] agents and the safety of the traveling public,” noting that agents “work in dangerous environments under arduous conditions” and “are required to stand in the middle of traffic where the slightest distraction can lead to serious injury or even death.” *Id.* He also explained that “sensitive law enforcement techniques and technologies are often employed at the Checkpoint,” and that “[c]onstant surveillance and filming of such operations by protesters from within the Checkpoint could be used by third parties to assist alien smugglers and human traffickers to elude detection.” SER 88-89. The Border Patrol “must also be mindful of the privacy interests of the individuals who are questioned by Border Patrol Agents at the Checkpoint.” SER 89. Finally, Chief Patrol Agent Padilla noted that “any protesters wishing to monitor Checkpoint operations ha[ve] unlimited viewing space from either side of the Checkpoint.” *Id.*

B. Procedural Background

Plaintiffs filed a complaint in November 2014, asserting that the Border Patrol violated the First Amendment by restricting their access to the interior of the Arivaca Road checkpoint. ER 245-69. In January 2015, plaintiffs moved for a preliminary injunction that would have required the government to allow PHP members unrestricted access to any portion of the checkpoint more than twenty feet from its inspection areas. ER 92. The district court denied plaintiffs' motion, concluding that the Border Patrol had enacted a valid time, place, and manner restriction that "applies equally to Plaintiffs, cartel members who wish to obtain information regarding the transport of their load, or members of the public who wish to cheer in support of the checkpoint." ER 103. The court reasoned that the restriction on pedestrian access is appropriately tailored to serve "the Government's concern for agent and public safety." ER 105-06.

The government moved to dismiss plaintiffs' complaint or, in the alternative, for summary judgment. Dkt. 61. Plaintiffs opposed the government's motion and requested discovery, pursuant to Federal Rule of Civil Procedure 56(d). Dkt. 72.

On September 30, 2016, the district court granted the government's motion for summary judgment. ER 1-29. The court concluded that the Arivaca Road checkpoint is a nonpublic forum, because it is "clearly delineated" and "has been

withdrawn from unrestricted public use.” ER 27. Moreover, “Border Patrol checkpoints do not have a long history of being open to the public” and instead are devoted to “legitimate law enforcement activity.” *Id.* Having held that the checkpoint is a nonpublic forum, the district court explained that the Border Patrol’s restriction on pedestrian access complies with the First Amendment as long as it is viewpoint neutral and reasonable. ER 27-29. The district court held that the restriction satisfies that standard, because it serves “obvious safety and security concerns.” ER 29. And the court denied plaintiffs’ request for discovery, explaining that “the facts sought by Plaintiffs are not related to the physical footprint of the checkpoint” and “would not assist Plaintiffs in opposing summary judgment regarding whether the checkpoint is a non-public forum.” ER 19.

SUMMARY OF ARGUMENT

To ensure the nation’s border security, the Border Patrol operates checkpoints on roads and highways near the southwest border. The Border Patrol has operated one such checkpoint at a fixed location on Arivaca Road since 2007. After protesters repeatedly disrupted the checkpoint, including forcing the checkpoint to suspend operations on one occasion, the Border Patrol used ropes and signs to demarcate a 150-foot perimeter, within which it prohibits unauthorized pedestrians.

The Border Patrol's exclusion of unauthorized pedestrians from within the checkpoint is consistent with the First Amendment. Border Patrol checkpoints are established to secure the nation's borders, not to provide a forum for expressive activity. "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property." *Flint v. Dennison*, 488 F.3d 816, 830 (9th Cir. 2007). The pedestrian restriction serves legitimate government interests, by preserving the interior of the checkpoint for its proper law enforcement purpose and protecting the safety of Border Patrol agents and pedestrians themselves. At the same time, it leaves protesters free to express their views in the immediate vicinity of the checkpoint, and it applies equally to all persons without respect to viewpoint. The district court therefore correctly concluded that the restriction constitutes a reasonable and viewpoint-neutral restriction on access to a nonpublic forum.

Even if the Arivaca Road checkpoint were not properly treated as a nonpublic forum, the pedestrian restriction would comply with the First Amendment as a reasonable time, place, and manner restriction. The restriction is content neutral because it depends not on what (if anything) an individual says, but on where he is. It is narrowly tailored to significant government interests, because it serves the

government's vital interest in border security by ensuring that checkpoint operations are uninterrupted, protecting the safety of agents and the public, preserving the efficacy of checkpoint inspections, and securing the privacy of the traveling public. And the restriction leaves open ample alternatives for communication, because it does not limit the public's ability to protest, leaflet, or engage in other expressive activity from the perimeter of the checkpoint. While plaintiffs assert a right to enter the checkpoint to monitor Border Patrol activities, there is no "First Amendment guarantee of a right of access to all sources of information within government control." *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978).

The district court correctly granted summary judgment to the government, and it did not abuse its discretion in denying plaintiffs' request for additional discovery. The record at the time of summary judgment had been developed over more than a year of litigation, and it was more than adequate to demonstrate that the restriction complies with the First Amendment. The district court reasonably concluded that plaintiffs had not satisfied their burden of establishing that discovery could be expected to lead to evidence that "would prevent summary judgment." *Employers Teamsters Local Nos. 175 & 505 Pension Tr. Fund v. Clorox Co.*, 353 F.3d 1125, 1129-30 (9th Cir. 2004).

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo. *Pottenger v. Potlatch Corp.*, 329 F.3d 740, 745 (9th Cir. 2003). This Court reviews for abuse of discretion the denial of a motion for more discovery. *Family Home & Fin. Ctr., Inc. v. Federal Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008).

ARGUMENT

I. The Government’s Security and Safety Restriction on Pedestrian Access Within the Arivaca Road Checkpoint Complies with the First Amendment.

A. The Restriction Serves Important Government Interests by Preserving the Checkpoint for Law Enforcement Purposes.

The government has a “paramount interest in protecting the border,” *United States v. Flores-Montano*, 541 U.S. 149, 155 (2004), and there is a “substantial public interest in controlling illegal alien traffic by maintaining . . . checkpoint[s],” *United States v. Vasquez-Guerrero*, 554 F.2d 917, 920 (9th Cir. 1977) (per curiam). The Supreme Court has recognized that Border Patrol checkpoints are “necessary” to preserving border security, observing that “checkpoint inquiries apprehend many smugglers and illegal aliens.” *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 (1976). Indeed, in 2008 alone, Border Patrol agents at checkpoints along the southwest border apprehended nearly 17,000 illegal immigrants. SER 24-26.

The restriction on pedestrian access to the interior of the Arivaca Road checkpoint ensures the uninterrupted operation of the checkpoint, while allowing Border Patrol agents to focus on their law enforcement duties. The Border Patrol demarcated the perimeter around the Arivaca Road checkpoint after more than 100 protesters entered the checkpoint in December 2013, forcing the Border Patrol to suspend checkpoint operations for over four hours and resulting in traffic passing uninspected. ER 117, 252; SER 100-01. Such interruptions in checkpoint operations undermine “effective and efficient checkpoint performance . . . because smugglers and illegal aliens closely monitor potential transit routes” to cross “[a]s soon as a checkpoint is closed.” SER 28-29. And even smaller and less disruptive groups of protesters can distract agents from their law enforcement duties, thereby interfering with the Border Patrol’s efforts to secure the border. *See* ER 117-18, 211 (approximately thirty protesters repeatedly ignored Border Patrol agent directions in February 2014); SER 101 (same); ER 118 (a group of protesters again defied agent instructions in March 2014); SER 104 (same).

The restriction protects the safety of Border Patrol agents and the public, which is a prerequisite for continuous checkpoint operations and a significant government interest in itself. *See Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 768 (1994) (recognizing that a buffer zone around health clinics that perform abortions

served the government’s “strong interest in ensuring the public safety and order” and “in promoting the free flow of traffic on public streets”). The Border Patrol Checkpoint Operations and Guidelines provide that “[t]he physical arrangement of any checkpoint must minimize the risk of an accident or an injury to any agent or member of the public,” ER 141, and “[t]he safe operation of traffic checkpoints is of the utmost importance,” ER 142. Checkpoint “[o]perations should be suspended if conditions become such that either the Border Patrol Agents or the traveling public are in danger of being injured through an accident.” ER 143.

Allowing pedestrians unrestricted access to the interior of the checkpoint would present real safety concerns. “[T]raffic stops are inherently dangerous, and at the Arivaca checkpoint, agents are working directly in the roadway, with westbound traffic passing by just inches away.” ER 121. The presence of crowds inside the interior of the checkpoint could distract agents or motorists, leading to accidents. *Id.* Similarly, “canines used in checkpoints’ primary and secondary inspection areas can be easily distracted by unfamiliar surroundings and people, and have bitten handlers, agents, and civilians.” ER 117. Individuals congregating inside the checkpoint also would be exposed to possible harm by unsafe motorists. “Failures to yield and high-speed flights can be particularly dangerous,” because agents’ “vehicles swerve, fish tail, and kick up rocks when leaving the unpaved, dirt roadside to begin a high-speed

chase.” *Id.* “More generally, motorists referred to secondary [inspection] for further questioning are often unhappy and drive carelessly, creating safety risks even in more routine circumstances.” *Id.*

While plaintiffs dispute the legitimacy of these concerns, the record confirms the commonsense conclusion that Border Patrol checkpoints present a heightened risk for traffic accidents. Over a five-year span, there were “at least 28 significant safety incidents at the three checkpoints within Tucson Station,” including nine “incidents involv[ing] either a failure to yield at primary or a flight from secondary,” and five incidents “involv[ing] driving under the influence or reckless driving.” ER 116. In March 2014, for example, “a drunk motorist traveling westbound through the Arivaca checkpoint drove off the roadway and crashed into license plate readers located on the northern roadside near the primary inspection area, which Plaintiffs wish to access.” ER 116-17. More generally, a federal-state task force devised a comprehensive traffic control plan for all Border Patrol checkpoints in the wake of a pair of fatal traffic accidents at checkpoints. ER 127-34.

Restricting pedestrians from accessing the interior of the checkpoint also preserves the integrity of Border Patrol inspections and protects the privacy of the traveling public. “[S]ensitive law enforcement techniques and technologies are often employed at the Checkpoint,” and “[c]onstant surveillance and filming of such

operations by protesters from within the Checkpoint could be used by third parties to assist alien smugglers and human traffickers to elude detection.” SER 88-89.

Moreover, the Border Patrol has “an obligation to prevent the unauthorized disclosure of certain information that [it] collect[s] from the traveling public,” and monitoring by protesters inside the checkpoint would intrude on “the privacy interests of the individuals who are questioned by Border Patrol Agents at the Checkpoint.” SER 89. Unrestricted pedestrian access to checkpoint operations therefore would undermine significant government interests by “frustrat[ing] criminal investigations” and resulting in “possible injury to privacy interests.” *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213, 1216 (9th Cir. 1989) (rejecting First Amendment claim seeking access to search warrants and supporting affidavits during ongoing criminal investigation).

B. The Restriction Is a Reasonable and Viewpoint-Neutral Regulation of Access to a Nonpublic Forum.

1. For these reasons, requiring pedestrians to remain 150 feet from the center of the Arivaca Road checkpoint serves important and legitimate interests relating to the operation of the checkpoint. That limited restriction on pedestrians is fully consistent with the First Amendment.

The government, “no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”

Adderley v. Florida, 385 U.S. 39, 47 (1966); *see id.* at 46-47 (holding that sheriff did not violate the First Amendment by prohibiting protesters from jail grounds). “Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property.” *Flint v. Dennison*, 488 F.3d 816, 830 (9th Cir. 2007) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985)). That is especially true with respect to government property dedicated to sensitive law enforcement operations that are necessary to protecting the nation’s security. *Cf. Greer v. Spock*, 424 U.S. 828, 837-38 (1976) (upholding restriction of free speech activity on a military base).

“[T]he extent to which the Government may limit access [to government property] depends on whether the forum is public or nonpublic.” *Center for Bio-Ethical Reform, Inc. v. City & Cty. of Honolulu*, 455 F.3d 910, 919-20 (9th Cir. 2006) (quotation marks omitted). While public fora are “places that have traditionally been devoted to expressive activity,” nonpublic fora are places “not traditionally or explicitly opened to expressive activity,” such as “airport terminals, highway overpass fences, and interstate rest stop areas.” *Id.* at 919 (quotation marks and citations omitted). A restriction on access to a nonpublic forum complies with the First Amendment as long as it “is reasonable and not an effort to suppress expression merely because

public officials oppose the speaker's view.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983). The district court correctly concluded that the checkpoint perimeter is a reasonable and viewpoint-neutral restriction on use of a nonpublic forum. ER 25-29.

Border Patrol checkpoints are nonpublic fora because they are “not by tradition or designation a forum for public communication,” *Flint*, 488 F.3d at 830, and do not have “as a principal purpose . . . the free exchange of ideas,” *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992) (quotation marks omitted; alteration in original). Like military bases, checkpoints are established to serve a particular function, securing national borders. *See Greer*, 424 U.S. at 838 (holding that military installations are nonpublic fora, because “the business of a military installation like Fort Dix [is] to train soldiers, not to provide a public forum”). And, like airports and interstate rest areas, checkpoints are “relatively modern creations,” *Jacobsen v. Bonine*, 123 F.3d 1272, 1274 (9th Cir. 1997), that have not “‘immemorially . . . time out of mind’ been held in the public trust and used for purposes of expressive activity,” *Lee*, 505 U.S. at 680 (alteration in original) (quoting *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939)).

Border Patrol checkpoints’ physical characteristics also “serve to indicate that the separated property is a special enclave, subject to greater restriction.” *Lee*, 505

U.S. at 680. Consistent with the Border Patrol's traffic control plan, the Arivaca Road checkpoint is announced by at least eight warning signs beginning about a half mile away, including "Border Patrol Checkpoint Ahead," "No Passing Zone," and "K-9 on Duty, Please Restrain All Pets." ER 203; *see* ER 151-65 (photographs of signs).

Traffic cones and pylons demarcate the checkpoint, beginning about 200 feet from the center of the checkpoint, and the checkpoint contains structures, inspection equipment, lighting units, and parking for Border Patrol vehicles. ER 203. And, because protesters refused to comply with agents' directives, the checkpoint's perimeter is now delineated with ropes and signs indicating that unauthorized pedestrians are prohibited. ER 117-18, 261; *see* ER 167, 185 (photographs).

2. In arguing that the Arivaca Road checkpoint should be considered a public forum devoted to expressive activity, plaintiffs ignore the checkpoint's physical characteristics and law enforcement purpose. Plaintiffs rely on *United States v. Grace*, 461 U.S. 171, 183 (1983), which held that the sidewalks around the Supreme Court are a public forum because there is "nothing to indicate to the public that these sidewalks are part of the Supreme Court grounds" or that they "are in any way different from other public sidewalks in the city." By contrast, the Arivaca Road checkpoint is separated by signs, pylons, and other markers from the rest of the road, and the checkpoint's appearance and design "clearly indicate to the public that" it is "not

intended for the exercise of First Amendment rights.” *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1136 (9th Cir. 2011) (holding that beaches were sufficiently separated from public beaches to qualify as nonpublic fora). In *Hodge v. Talkin*, 799 F.3d 1145, 1158-59 (D.C. Cir. 2015), the D.C. Circuit held that the Supreme Court plaza is a nonpublic forum, distinguishing it from the sidewalks at issue in *Grace* because its “appearance and design” demonstrate “its separation from the perimeter sidewalks and surrounding area.” The same factors are present here, and *Grace* is inapposite for the same reasons.

The checkpoint does not qualify as a public forum merely by virtue of the fact that it is located on a road. In *Greer*, 424 U.S. at 837, the Court held that the entire Fort Dix Military Reservation was a nonpublic forum, including “the state and country roads that pass through it,” *id.* at 830. Consistent with that decision, this Court held that a road to a nuclear testing facility constituted a nonpublic forum, despite the public’s access to the road, because “the government has not abandoned its right to exclude unauthorized traffic.” *Hale v. Department of Energy*, 806 F.2d 910, 915-16 (9th Cir. 1986). And, in *United States v. Griefen*, 200 F.3d 1256, 1261 (9th Cir. 2000), this Court upheld a restriction on protesters’ access to a road construction site, observing that “[t]he immediate area of a construction zone is not an area that has the

attributes of a public forum, or even a limited public forum, where people are entitled to exercise their rights of free speech.”

This Court has explained that “it is the ‘location and purpose’ of the property and the government’s subjective intent in having the property built and maintained, that is crucial to determining the nature of the property for forum analysis.” *Jacobsen*, 123 F.3d at 1274 (citing *United States v. Kokinda*, 497 U.S. 720, 727-30 (1990)). The Border Patrol established the Arivaca Road checkpoint at a fixed location to intercept illegal immigrants who evade detection at the border. SER 10, 15. The checkpoint operates twenty-four hours a day and seven days a week. ER 115. And, while the checkpoint is necessarily open to the traveling public, the government retains control over the area pursuant to its legitimate law enforcement activities. *See Greer*, 424 U.S. at 838 n.10 (permitting some public access to a location does not “leave the authorities powerless thereafter to prevent any civilian from entering” for any purpose).

It is irrelevant that the Border Patrol first established the checkpoint in 2007, on an otherwise unoccupied portion of Arivaca Road. Even assuming that the portion of the rural road on which the checkpoint is located previously constituted a public forum, the government may change a property’s forum status by “alter[ing] the objective physical character or uses of the property.” *ACLU v. City of Las Vegas*, 333

F.3d 1092, 1105 (9th Cir. 2003). Contrary to plaintiffs' assertion, the government has not "simply declare[d] the First Amendment status of [the checkpoint] regardless of its nature and its public use." Appellants' Br. 21 (quoting *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1124 (10th Cir. 2002)). Rather, the Border Patrol genuinely altered the nature of the property and has operated the checkpoint exclusively for law enforcement purposes throughout the decade since its establishment. *Cf. Wright*, 665 F.3d at 1135–38 (beach became nonpublic forum when property owners installed kiosks and limited public access).

Plaintiffs also err in suggesting that this Court should inspect every location within the Arivaca Road checkpoint to determine if it is "involved in or needed for law enforcement operations." Appellant's Br. 22. The Supreme Court did not undertake such a searching examination before holding in *Greer* that the entire military base constituted a nonpublic forum. 424 U.S. at 839-40. And, in *Hale*, 806 F.2d at 915-16, this Court held that the entire 3-mile road was a nonpublic forum without questioning whether any portion of the road could be opened to the public. Here, the Arivaca Road checkpoint occupies less than 400 feet of a rural road, and it is designed according to Border Patrol policies that dictate checkpoint construction. Plaintiffs identify no basis for concluding that the any portion of the Arivaca Road checkpoint is properly dedicated to expressive purposes.

3. Because the Arivaca Road checkpoint is a nonpublic forum, the prohibition on unauthorized pedestrians complies with the First Amendment as long as it is reasonable and viewpoint neutral. *See Perry Educ. Ass'n*, 460 U.S. at 46. The district court correctly concluded that the restriction easily satisfies that standard, because it applies without respect to viewpoint and serves a variety of important interests, including protecting the safety of Border Patrol agents and the public, preventing disruptions to checkpoint operations, and preserving the integrity of the Border Patrol's law enforcement activities. ER 27-29.

In asserting that a factual dispute exists regarding whether the pedestrian restriction adequately serves a government interest, plaintiffs misunderstand the standard applicable to a nonpublic forum. A restriction on access to a nonpublic forum “need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.” *Cornelius*, 473 U.S. at 808. And “[a] restriction is reasonable . . . where it is wholly consistent with the government’s legitimate interest in preserving the property . . . for the use to which it is lawfully dedicated.” *International Soc’y for Krishna Consciousness of Cal., Inc. v. City of Los Angeles*, 764 F.3d 1044, 1049 (9th Cir. 2014). The record in this case demonstrates that the Border Patrol’s restriction on pedestrian access would satisfy an even more demanding standard, because it furthers the government’s significant interest in border security while ensuring the

safety of Border Patrol agents and the public. *See supra* pt. I.A. At a minimum, however, the restriction is “reasonable in its furtherance of a legitimate government interest.” *Jacobsen v. U.S. Postal Serv.*, 993 F.2d 649, 660 (9th Cir. 1992).

Plaintiffs also mistakenly claim that upholding the restriction here “would authorize the government to exclude anyone from speaking on any sidewalk or right of way which might be threatened by a reckless driver.” Appellants’ Br. 33. A Border Patrol checkpoint is easily distinguishable from other roads, sidewalks, or rights of way. *Cf. Heffron v. International Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981) (rejecting comparison of fairground to city streets, because “[t]he flow of the crowd and demands of safety are more pressing in the context of the Fair”). And the Supreme Court has “vigorously and forthrightly rejected” the claim that protesters have a right to access a nonpublic forum, when such access would interfere with the government’s “power to preserve the property under its control for the use to which it is lawfully dedicated.” *Adderley*, 385 U.S. at 47-48.

While plaintiffs argue that the pedestrian restriction is viewpoint discriminatory, the record demonstrates that the Border Patrol “permit[s] only authorized persons within the checkpoint for official purposes.” ER 119. That policy is viewpoint neutral on its face, and it appropriately constrains the discretion of officials in granting access to the checkpoint. *See Kaabumanu v. Hawaii*, 682 F.3d 789, 805-07 (9th Cir.

2012) (noting that “[i]n some contexts, the phrase ‘necessary and appropriate’ may sufficiently constrain the authority of a permitting official”). Plaintiffs claim that an individual was permitted to linger within the checkpoint and allegedly heckle protesters in April 2014, but that isolated episode was not in conformity with the governing policy, and Border Patrol officials promptly took corrective actions to reinforce the neutrality of the policy. ER 119. A single alleged instance of individual officers misapplying the Border Patrol’s policy cannot justify declaring the entire restriction unconstitutional on a prospective basis. *See Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1042-44 (9th Cir. 1999) (en banc) (holding that two instances of allegedly unconstitutional traffic stops would not “warrant an equitable judicial remedy, including declaratory relief, that would require, or provide a basis for requiring, that the Border Patrol change its practices”).

Plaintiffs’ other examples of pedestrians being allowed within the checkpoint are consistent with the Border Patrol’s policy. On one occasion, plaintiffs claim that the Border Patrol allowed a group of media members to cross from one side of the checkpoint to another. ER 216. And, on another occasion, plaintiffs note that the Border Patrol allowed plaintiffs’ own surveyor to enter the checkpoint in order to conduct a survey for purposes of this very litigation. ER 198. That pedestrians are sometimes allowed on checkpoint property for limited official purposes does not

“leave the authorities powerless thereafter to prevent any civilian from entering” for any purpose. *Greer*, 424 U.S. at 838 n.10.

Plaintiffs also err in arguing that the restriction on pedestrian access to the checkpoint is viewpoint discriminatory because the Border Patrol first used ropes and signs to delineate the 150-foot perimeter after protests disrupted checkpoint operations. Government officials “adopt laws to address the problems that confront them,” and “[t]he First Amendment does not require [the government] to regulate for problems that do not exist.” *Burson v. Freeman*, 504 U.S. 191, 207 (1992). The Arivaca Road checkpoint is located on a rural road, with limited pedestrian access. The Border Patrol had no reason to use ropes and signs to indicate that unauthorized pedestrians were prohibited, until plaintiffs and other protesters repeatedly refused to comply with officers’ instructions to move out of the checkpoint interior. ER 117-18. While plaintiffs assert that other Border Patrol checkpoints were not similarly marked at the time the record was compiled in this case, Appellants’ Br. 30, there also is no evidence in the record that other checkpoints had been confronted with crowds of people assembling for any expressive or non-expressive purpose, *cf. Adderley*, 385 U.S. at 47 (upholding prohibition on protesters on jail property, and noting that “[t]here is no evidence at all that on any other occasion had similarly large groups of the public been permitted to gather on this portion of the jail grounds for any purpose”).

Plaintiffs' reliance on *Brown v. California Department of Transportation*, 321 F.3d 1217 (9th Cir. 2003), is misplaced. There, this Court held that CalTrans could not prohibit expressive banners from being hung on highway overpasses, but permit American flags on the same overpasses. *Id.* at 1222-24. The Court observed that, because CalTrans' "safety concerns apply equally to both flags and expressive banners, the policy is not reasonable." *Id.* at 1223. By contrast, here, the Border Patrol prohibits pedestrians within the Arivaca Road checkpoint for any nonofficial purpose, without regard to their intended expression (if any). The equivalent in *Brown* would have been if CalTrans had prohibited all expressive material, including flags, while reserving highway overpasses only for official traffic signs. There can be little doubt that such a policy would be reasonable, or that it would comport with the government's authority to "preserve the property under its control for the use to which it is lawfully dedicated." *Cornelius*, 473 U.S. at 800.

C. The Border Patrol Permissibly Imposed a Reasonable Time, Place, and Manner Restriction on Access to the Checkpoint.

1. The Border Patrol's restriction on pedestrian access to the Arivaca Road checkpoint would comply with the First Amendment even if the checkpoint were not considered a nonpublic forum. Regardless of the forum, "the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated

speech,” “are narrowly tailored to serve a significant government interest,” and “leave open ample alternative channels for communications of the information.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quotation marks omitted). The pedestrian restriction satisfies this “intermediate level of scrutiny.” *City of Los Angeles*, 764 F.3d at 1049.

The exclusion of all unauthorized pedestrians from the checkpoint interior is content neutral, because the policy does not distinguish among pedestrians based on their speech; the public’s compliance with the policy “depends not on what they say but simply on where they say it.” *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (quotation marks and citation omitted). In *McCullen*, the Supreme Court found to be content neutral a state statute that made “it a crime to knowingly stand on a ‘public way or sidewalk’ within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed.” *Id.* at 2525, 2531-32. Similarly, here, pedestrians are not allowed within the 150-foot perimeter of the Arivaca Road checkpoint, unless for an official purpose. As the district court explained in rejecting plaintiffs’ motion for a preliminary injunction, the restriction “applies equally to Plaintiffs, cartel members who wish to obtain information regarding the transport of their load, or members of the public who wish to cheer in support of the checkpoint.” ER 103.

The government did not “adopt[] a regulation of speech because of disagreement with the message it conveys,” *Ward*, 491 U.S. at 791; it imposed a restriction on conduct that is incompatible with the purpose of the checkpoint regardless of any message associated with the conduct. After crowds of pedestrians repeatedly disrupted the checkpoint, the Border Patrol established a perimeter to ensure it could effectively inspect travelers in a safe and secure manner. Whether similar perimeters also had been formally established at other checkpoints is irrelevant, because the government did so at the Arivaca Road checkpoint in response to an obvious problem. *Cf. McCullen*, 134 S. Ct. at 2532 (holding that “there are no grounds for inferring content-based discrimination here simply because the legislature acted with respect to abortion facilities generally rather than proceeding on a facility-by-facility basis”). The restriction is “justified without reference to the content of the regulated speech.” *Id.* at 2531. And a “facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics.” *Id.*; *see Ward*, 491 U.S. at 791 (“A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”).

2. The prohibition on unauthorized pedestrians within the Arivaca Road checkpoint also is narrowly tailored to serve significant government interests. The

government established the perimeter after protesters repeatedly disrupted the checkpoint, on one occasion forcing checkpoint operations to be suspended, thereby allowing traffic to pass uninspected. The perimeter therefore serves to ensure the uninterrupted operation of the checkpoint, which is part of “a traffic-checking program in the interior [that] is necessary” to border security. *Martinez-Fuerte*, 428 U.S. at 545. It preserves the integrity of the Border Patrol’s investigative and search techniques, as well as the privacy of members of the public being questioned. And it protects the safety of Border Patrol agents, protesters, and the traveling public. *See supra* pt. I.A.

Plaintiffs argue that the Border Patrol could protect these same interests with a smaller perimeter, but the Supreme Court has observed that the “question whether the . . . boundary line could be somewhat tighter” is not “a question of constitutional dimension.” *Burson*, 504 U.S. at 209-10; *see id.* (“Reducing the boundary to 25 feet . . . is a difference only in degree, not a less restrictive alternative in kind.”). Similarly, in upholding an emergency order temporarily prohibiting World Trade Organization protesters from entering downtown Seattle, this Court explained that “[o]ur role here is not to inject ourselves into the methods of policing,” because “the validity of a regulation ‘does not turn on a judge’s agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government

interests.” *Menotti v. City of Seattle*, 409 F.3d 1113, 1137 (9th Cir. 2005) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

In any event, Border Patrol officials gave sound reasons for deciding that the perimeter should be 150 feet from the center of the checkpoint, explaining that it places protesters “just outside the checkpoint’s easternmost traffic pylons—a safe distance away from agents, motorists, vehicles, and other equipment in the checkpoint, and at a spot where the roadside widens significantly, allowing more room for protesters to congregate without crowding the roadway.” ER 118. Permitting protesters on the northern side of the road within 20 feet of the center of the checkpoint, as they requested, “would undermine the effectiveness of the checkpoint and would place agents, motorists, and the public—as well as Plaintiffs themselves—in greater danger.” ER 121. It also would position protesters “directly behind the agent manning the primary inspection area, out of his or her line of sight,” which “would be contrary to standard weapon-retention techniques.” ER 120.

This case therefore is easily distinguished from *Bay Area Peace Navy v. United States*, 914 F.2d 1224 (9th Cir. 1990), in which the Court held unconstitutional a 75-yard exclusion zone because “[t]here was no evidence presented that a [smaller] zone was insufficient,” and the only justification offered for the larger zone “was the existence of terrorism in the world.” *Id.* at 1227-28. Regardless, the Court in *Bay Area*

Peace Navy cast no doubt on a smaller 25-yard (or 75-foot) zone. *Id.* And, in *United States v. Griefen*, this Court rejected a First Amendment challenge to an exclusion zone that extended 150 feet along a road from either end of a construction site. 200 F.3d at 1260-62. The Court explained that “not only was the zone more narrow than in *Bay Area Peace*, but an actual threat posed by the protestors and the appellants clearly existed.” *Id.* at 1261. Here, an actual threat likewise exists, and the perimeter is approximately 150-feet from the center of the checkpoint and much closer to other portions of the checkpoint, such as the secondary inspection area. ER 203; *see* ER 105 (noting that the “the secondary inspection area extends approximately 100-feet from the center of the checkpoint”).

Plaintiffs are equally mistaken in suggesting that the Border Patrol could serve the same interests without any perimeter, by “enforc[ing] existing laws against physical obstruction or endangerment.” Appellants’ Br. 45. The Border Patrol used ropes and signs to demarcate the perimeter only after protestors repeatedly ignored agents’ directions, and officials reasonably concluded that further efforts to manage crowds within the checkpoint would distract agents from their law enforcement responsibilities and pose a threat to the safety of agents and the public. Similarly, plaintiffs’ amicus suggests that the Border Patrol could “limit the number of people who can gather so as not to block traffic,” Cato Inst. Br. 19, but even a small number

of pedestrians congregating within the checkpoint would pose legitimate safety concerns and threaten law enforcement and privacy interests. In any event, the Supreme Court has made clear that the reasonableness of a regulation “should not be measured by the disorder that would result from granting an exemption solely to” a particular plaintiff. *Lee*, 505 U.S. at 685; *see id.* (“Obviously there would be a much larger threat to the State’s interest in crowd control if all other . . . organizations could likewise move freely.”).

3. The Border Patrol’s restriction on pedestrian access to the interior of the Arivaca Road checkpoint “leave[s] open ample alternative channels of communication.” *Ward*, 491 U.S. at 802. The policy does not affect the public’s ability to protest, leaflet, or engage in other expressive activity from the perimeter of the checkpoint. And members of plaintiffs’ organization have continued to express their views at the checkpoint, handing out “know your rights” fliers to motorists entering the checkpoint, ER 120, and “often flag[ging] down motorists leaving the checkpoint to discuss their views,” ER 121.

Given their ability to congregate immediately adjacent to the Arivaca Road checkpoint, plaintiffs can “reasonably expect their protest to be visible and audible to” their intended audience, “even if not as proximate as [they] might have liked.” *Menotti*, 409 F.3d at 1138; *see id.* (noting that protesters had adequate alternative

channels of communication where they could “communicate directly across the street from most WTO venues”). Contrary to plaintiffs’ argument (Br. 46), limiting protests to the perimeter of the checkpoint also does not “so alter[] the content of [plaintiffs] message . . . as to hamper [them] from conveying what they mean to convey.” *Galvin v. Hay*, 374 F.3d 739, 756 (9th Cir. 2004); *see id.* (observing that the building that was “critical” to the protesters’ message was visible from the site of protest only “faintly, obliquely, and with partial obstruction”). A protest just outside a checkpoint in a remote location on a rural road will be understood as being related to that checkpoint. *Cf. Griefen*, 200 F.3d at 1261 (explaining that “it is clear that protestors could continue their protest, but at a distance of 150 feet from the construction site,” thus leaving “them with ample opportunities . . . to express their views”).

Plaintiffs primarily argue that the pedestrian restriction impedes their ability to “observe agents’ interactions with motorists,” and “record information about agents’ actions at the checkpoint,” including “the identities of the agents conducting stops, the vehicle occupants’ characteristics, the behavior of service canines, or the nature of communications between agents and motorists.” Appellants’ Br. 46. But there is no “First Amendment guarantee of a right of access to all sources of information within government control.” *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978). The Border

Patrol is not required to allow members of the public into the Arivaca Road checkpoint for the sole purpose of monitoring checkpoint operations.

While this Court has assumed that some First Amendment protection extends to the filming of police officers in public, *see Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995), it has never recognized a right to enter controlled law enforcement areas, such as a checkpoint, in order to record sensitive government operations.

Other courts have recognized only a right to film officials in the public exercise of their duties from a location at which an individual is already lawfully present. *See Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011); *ACLU v. Alvarez*, 679 F.3d 583, 605 (7th Cir. 2012); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

Even in public locations, courts have cautioned that filming “may be subject to reasonable time, place, and manner restrictions,” *Glik*, 655 F.3d at 84 (citing *Smith*, 212 F.3d at 1333), including through “a preexisting statute, ordinance, regulation, or other published restriction with a legitimate governmental purpose,” *Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014). “It goes without saying that the police may take all reasonable steps to maintain safety and control, secure crime scenes and accidents sites, and protect the integrity and confidentiality of investigations.” *Alvarez*, 679 F.3d at 607. Indeed, in upholding the disorderly-conduct conviction of a man who refused to leave a roadside where his friend was being ticketed, the Supreme Court explained

that “the police had cause for apprehension that a roadside strip, crowded with persons and automobiles, might expose the entourage, passing motorists, and police to the risk of accident.” *Colten v. Kentucky*, 407 U.S. 104, 109-10 (1972). Under those circumstances, the defendant “had no constitutional right to observe the issuance of a traffic ticket,” and the police officers “were entitled to enforce [traffic laws] free from possible interference or interruption from bystanders, even those claiming a third-party interest in the transaction.” *Id.* at 109.

Although the Supreme Court has recognized a right to observe certain criminal judicial proceedings, *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), this Court has declined to extend that right to ongoing criminal investigations, *Times Mirror Co.*, 873 F.2d at 1213 (rejecting First Amendment right of access to search warrants and supporting affidavits during ongoing criminal investigation). Continuous monitoring of checkpoint inspections would likely “frustrate criminal investigations” and result in “injury to privacy interests.” *Id.* at 1213, 1216. Moreover, there is “no historical tradition of public access” to checkpoint operations. *Id.* at 1213-14.

Neither plaintiffs nor their amici cite a single instance of members of the public being allowed inside checkpoints for the purposes of monitoring government operations, despite the fact that the government has long maintained such checkpoints near the

southwest border. *See, e.g., Almeida-Sanchez v. United States*, 413 U.S. 266, 268 (1973) (describing checkpoints dating back to the early 1970s).

The Border Patrol does not prohibit plaintiffs from observing or filming checkpoint operations from outside the perimeter of the checkpoint, or from communicating with travelers as they exit the checkpoint in order to ask about their experiences. Plaintiffs have in fact engaged in these activities and have been able to collect detailed data on individuals who have passed through the checkpoint. ER 105-06 (observing that “the sample ‘Checkpoint Vehicle Stop Report[s]’ Plaintiffs have submitted do not reflect Plaintiffs’ inability to monitor the checkpoint”); *see* ER 220-25 (Checkpoint Monitoring Data); ER 108-09 (monitoring notes); Dkt. 40-2 (573 pages of monitoring notes); Dkt. No. 40-3 (690 pages of monitoring notes). The First Amendment does not entitle plaintiffs to anything more.

II. The District Court Properly Exercised Its Discretion in Denying Plaintiffs’ Request for Discovery.

A party requesting discovery pursuant to Federal Rule of Civil Procedure 56(d) “must show: (1) it has set forth in affidavit form the specific facts it hopes to elicit from discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment.” *Family Home & Fin. Ctr., Inc. v. Federal Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008). “The burden is on the party seeking additional discovery to proffer sufficient facts to show that the evidence sought exists,

and that it would prevent summary judgment.” *Employers Teamsters Local Nos. 175 & 505 Pension Tr. Fund v. Clorox Co.*, 353 F.3d 1125, 1129-30 (9th Cir. 2004). “The district court does not abuse its discretion by denying further discovery if the movant has failed diligently to pursue discovery in the past, or if the movant fails to show how the information sought would preclude summary judgment.” *Id.*

The record before the district court at the time of its summary judgment order had been developed over the course of more than a year of litigation, and it thoroughly described the nature of the Arivaca Road checkpoint, as well as the purpose and operation of the restriction on pedestrian access. As part of this litigation, plaintiffs prepared and submitted a detailed survey of the checkpoint, ER 203, and submitted multiple declarations describing their observations of checkpoint operations, ER 32-37, 72-75, 76-78, 110-13. The record also included photographs of the checkpoint, ER 150-91, declarations from Border Patrol officials, ER 114-22; SER 100-02, 103-04, documents describing checkpoint policies, ER 127-34, 135-49, and communications between plaintiffs and the Border Patrol, ER 234-36; SER 88-99. Those documents provided a more than adequate basis for the court to hold that the restriction on pedestrian access complies with the First Amendment.

See supra pt. I.

As the district court reasonably concluded, plaintiffs failed to satisfy their burden of demonstrating that additional discovery could be expected to preclude summary judgment. ER 19. Plaintiffs requested “[d]iscovery of whether the area in the ‘enforcement zone’ has been used for actual law enforcement activities,” Appellants’ Br. 48, but the record already details the layout and use of the checkpoint. They sought discovery regarding who has been allowed into the checkpoint, but Border Patrol officials have made clear that pedestrians are allowed inside the checkpoint only for official purposes.² Plaintiffs claimed to need discovery into “public safety concerns,” Appellants’ Br. 48, but the record already establishes the dangers inherent in checkpoint operations. Finally, plaintiffs asserted that they need “data about traffic stops” at the Arivaca Road checkpoint to compare against their own observations, Appellants’ Br. 48, but any inaccuracies in plaintiffs’ monitoring data are irrelevant to their First Amendment claim.

Plaintiffs’ assertion that they needed further discovery is particularly unpersuasive because plaintiffs had ample opportunity to gather information regarding the Arivaca Road checkpoint, and they availed themselves of that

² While plaintiffs identify one instance in early 2014 in which an individual allegedly lingered inside the checkpoint, the Border Patrol immediately took corrective action, and plaintiffs offer no facts suggesting that others have been allowed inside the checkpoint for expressive purposes. *See supra* pt. I.B.3.

opportunity. At the time of summary judgment, plaintiffs had been monitoring the checkpoint for more than two years. During that time, plaintiffs commissioned a professional survey of the checkpoint area, observed the checkpoint for hundreds of hours, and issued a public report detailing the findings of their monitoring campaign. *See* ER 192-203 (survey); ER 108-09 (monitoring notes); Dkt. 40-2 (573 pages of monitoring notes); Dkt. No. 40-3 (690 pages of monitoring notes); ER 220-25 (report on monitoring data). The government provided plaintiffs with official checkpoint and traffic control policies as part of this litigation and, in response to a request under the Freedom of Information Act, provided to plaintiffs' counsel thousands of pages of documents related to Border Patrol's checkpoint and roving patrol operations in Arizona. *See* Def's Statement of Facts at ¶ 19, *ACLU Found. of Ariz. v. U.S. Dep't of Homeland Security*, No. 14-cv-2052 (D. Ariz. July 1, 2016), Dkt 40-2.

Because the discovery sought by plaintiffs "is only 'generically relevant'" to the case, *Family Home & Fin. Ctr.*, 525 F.3d at 827, and plaintiffs "fail[ed] to show how the information sought would preclude summary judgment," *Clorox Co.*, 353 F.3d at 1130, the district court did not abuse its discretion in denying plaintiffs' request for discovery and granting summary judgment to the government.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ELIZABETH A. STRANGE
Acting United States Attorney

SCOTT McINTOSH
PATRICK G. NEMEROFF
(202) 305-8727
Attorneys, Appellate Staff
Civil Division, Room 7217
Department of Justice
950 Pennsylvania Ave., NW
Washington D.C. 20530

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STATEMENT OF RELATED CASES

Counsel for the United States are aware of no related cases in this Court as defined in Circuit Rule 28-2.6.

/s/ Patrick G. Nemeroff
PATRICK G. NEMEROFF

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), I hereby certify that the foregoing Brief for Appellees contains 9,517 words, according to the count of this office's word processing system.

/s/ Patrick G. Nemeroff
PATRICK G. NEMEROFF

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Brief for Appellees 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 June 9, 2017. Participants in the case are registered CM/ECF users and service will be accomplished through that system.

/s/ Patrick G. Nemeroff
PATRICK G. NEMEROFF