Appeal No. 16-17199

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEESA JACOBSON, et al.,
Plaintiffs-Appellants,

v.

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

Appeal from a Judgment of the United States District Court
for the District of Arizona, Case No. 4:14-cv-02485-BGM
Honorable Bruce G. Macdonald

PLAINTIFF-APPELLANTS' LEESA JACOBSON, et al.'s OPENING BRIEF

COVINGTON & BURLING LLP

ACLU

One Front Street, 35th Floor
San Francisco, California 94111
Telephone: (415) 591-6000
Facsimile: (415) 591-6091

Attorneys for Plaintiff-Appellants

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INTRODUCTION

Plaintiffs seek to exercise their well-settled First Amendment rights to monitor and protest Border Patrol operations on Arivaca Road in rural Arizona. For about a decade, Border Patrol has operated the "Arivaca Checkpoint": a "temporary checkpoint" on Arivaca Road, where Border Patrol stops vehicles under its narrow authority to conduct brief questioning of motorists. Plaintiffs are local residents who are concerned about Border Patrol exceeding that narrow authority.

This dispute arose after Plaintiffs exercised their rights to monitor and protest at the Arivaca Checkpoint. In response, Border Patrol roped off a largely empty, football field-sized portion of the public right of way next to Arivaca Road. It forced Plaintiffs and others to stand outside the roped-off area, which Border Patrol named an "enforcement zone." From this vantage, Plaintiffs are kept too far away to effectively monitor Border Patrol agents at work.

Border Patrol tied no specific safety or security concerns to the placement of the roped-off area. Nor has it identified a single checkpoint anywhere else with such a roped-off area. And although Plaintiffs have been excluded from the roped-off area, Border Patrol has repeatedly let other people—whose viewpoints Border Patrol perceives as less hostile to its work than Plaintiffs'—enter and speak within the "enforcement zone." These facts raise inferences that Border Patrol's

exclusion of Plaintiffs serves no purpose but to exclude speech that Border Patrol does not like.

Yet on these facts, the district court granted summary judgment in favor of Border Patrol on Plaintiffs' First Amendment claims. And it denied Plaintiffs the opportunity to take any discovery in support of their claims.

The district court erred by ignoring multiple disputes of material fact related to (1) the nature of the forum where Plaintiffs seek to monitor and protest governmental operations; (2) the government's interest in excluding Plaintiffs from that forum; and (3) the viewpoint and content neutrality of this exclusion. The district court also impermissibly weighed evidence and made credibility determinations favoring Border Patrol regarding the nature of the forum and the reasons for Plaintiffs' exclusion. And it ignored instances of viewpoint discrimination altogether.

The court also ignored the governing First Amendment law in denying Plaintiffs' request to postpone summary judgment and take discovery. Plaintiffs explained the need for discovery on several points, including:

- The government's actual use of the roped-off area.
- Whether all or part of the roadside within the roped-off area is a public forum.
- Whether excluding Plaintiffs from the roped-off area furthers any interest in public safety.

- Whether excluding Plaintiffs from all of the roped-off area is related to Border Patrol's ability to carry out operations at the checkpoint.
- Whether Border Patrol's purported policy of exclusion exists at all, and if it does, whether it is viewpoint and content neutral.

This discovery bears on all the material disputes of fact Plaintiffs raised in this case. Yet the district court did not address the importance of any of the discovery that has so far been denied to Plaintiffs. The district court's conclusion that this evidence was irrelevant reflects its misapprehension of governing First Amendment law. Its denial of discovery was an abuse of discretion.

These errors are particularly serious because Plaintiffs assert that the government has restricted their First Amendment rights. In cases like this, the government "bears the burden of proving the constitutionality of its actions,"[1] and "must establish beyond controversy" that its restrictions are constitutional.[2]

The Court should reverse and remand for discovery and adjudication on the merits. Disputes of material fact exist as to the constitutionality of excluding Plaintiffs from areas surrounding Border Patrol's operations on Arivaca Road. Plaintiffs have also established that they are entitled to discovery, pursuant to Rule 56(d).

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[1] *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) (citations omitted).

[2] *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (internal marks omitted).

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. The notice of appeal was timely filed on November 30, 2016. ER030. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the district court improperly discount genuine issues of material fact about the type of forum at issue and the legality of Defendants' restrictions on Plaintiffs' speech?
2. Did the district court abuse its discretion by denying Plaintiffs' Rule 56(d) request based on the district court's misunderstanding of governing law, where Plaintiffs identified specific information that would have created material factual disputes about the nature of the forum at issue and the legality of Defendants' restrictions on Plaintiffs' speech?

STATEMENT OF THE CASE

For nearly a decade, the residents of two small towns in Arizona—Arivaca and Amado, with combined populations of 1,000—have endured continuous and pervasive Border Patrol enforcement. ER063 ¶¶ 26, 30. Border Patrol checkpoints intercept almost every route into and out of Arivaca, requiring residents to traverse one or more checkpoints to go to school or work, or to run routine errands. *Id.*

The checkpoint at issue in this case is the Arivaca Checkpoint, which the Department of Homeland Security ("DHS") maintains on Arivaca Road between

Arivaca and Amado. *Id*. ¶¶ 27–30. Arivaca Road is a two-lane road with minimal traffic. *Id*. ¶ 28, 31. It is a public thoroughfare between two towns, and its roadside is "designated as a public right of way." ER208–209 ¶ 4–7; ER064, 067, 070 ¶¶ 37, 52, 73 (noting that areas alongside Arivaca Road are public rights of way); *see also* ER200–203, McLain Decl. Exs. 1–2 (providing maps of the area). That roadside is host to a wide range of speech and expression, including election signs and signs for events and local businesses. ER070 ¶¶ 73–74.

In July 2013, Plaintiffs and Arivaca residents who belong to a group called People Helping People began a campaign to protest the Arivaca Checkpoint and inform the public about its impact on the community. ER063–064 ¶¶ 33–34. People Helping People documented complaints about Border Patrol agents engaging in racial profiling, unlawful searches, and excessive use of force at the Arivaca Checkpoint. *Id*. ¶ 34. After hearing about civil rights abuses occurring there, Plaintiffs and others decided to monitor and protest the Arivaca Checkpoint. *Id*. ¶35.

A. In Response to Plaintiffs' First Amendment Activities, Defendants Created an Ad Hoc "Enforcement Zone" to Exclude Plaintiffs.

The Arivaca Checkpoint consists of (1) a shelter on the south side of the road, from which Border Patrol agents conduct checkpoint inspections of eastbound traffic, and (2) a dirt area to the east of the checkpoint shelter on the

south side of the road, which is used for secondary inspections. *Id.* ¶ 29. The figure below shows a 2014 aerial view of the Arivaca Checkpoint:

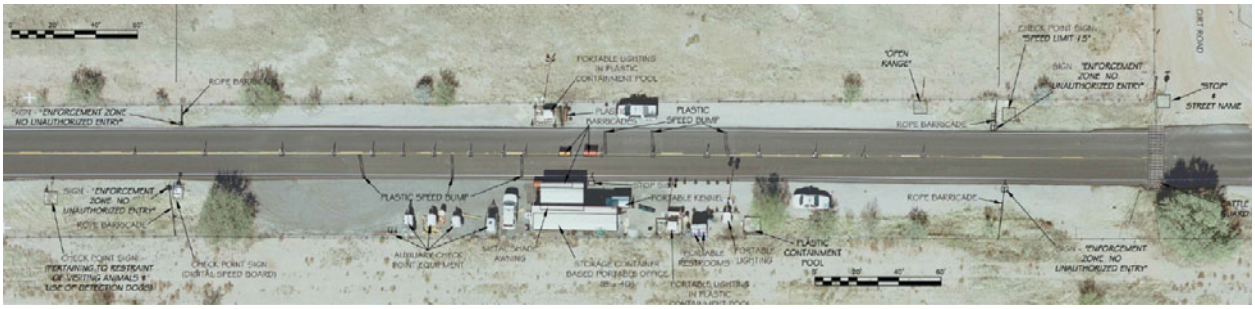


Figure 1 (ER202, Ex. 2).

Before Plaintiffs began monitoring and protesting the Arivaca Checkpoint in February 2014, no barriers blocked any part of the public right of way surrounding the checkpoint. ER066–67 ¶ 50.

On February 26, 2014, in order to monitor and protest the Arivaca Checkpoint, Plaintiffs and others peacefully approached the checkpoint from the east, on the south side of the road. ER065 ¶ 41. They carried signs and banners with slogans like, "Monitoring to Deter Abuses + Collect Data", "Checkpoints Can't Divide Us!", and "Revitalize Not Militarize Border Communities." *Id.* ¶ 42. From the public right of way about 100 feet east of the shelter, they began their protest while observing and recording the actions of Border Patrol agents with video cameras and notepads. ER066 ¶¶ 43–44. They later moved to the north side of the road, still about 100 feet east of the shelter in a public right of way. *Id.* ¶¶ 44, 47. Border Patrol agents prevented them from moving any farther to the west.

Id. ¶ 48. The protesters always remained outside the area where Border Patrol conducted vehicle stops and inspections. *Id.*

Later that day—for the first time ever—Border Patrol agents erected barriers demarcating a so-called "enforcement zone" around the Arivaca Checkpoint.[3] *Id.* ¶¶ 49–50. The barriers went up in the public right of way on the north and south sides of the road, 50 feet east of where Plaintiffs had been protesting and 150 feet east of the shelter. *Id.* ¶ 49. Border Patrol agents threatened Plaintiffs with arrest if they did not move behind the barrier. ER067 ¶ 51. To avoid arrest, Plaintiffs complied. *Id.* Since that time, Border Patrol has maintained barriers in the same location, along with signs prohibiting pedestrian entry to the "enforcement zone." *Id.* ¶¶ 52–53. No other checkpoints in the area surrounding Arivaca and Amado have similar "enforcement zones" from which pedestrians, protestors, or observers are barred. ER066 ¶ 50.

[3] Although there was a protest near the checkpoint in December 2013, which Defendants contend required them to suspend checkpoint operations for about four hours, Border Patrol did not place any barriers on the public right of way surrounding the checkpoint or otherwise demarcate an "enforcement zone" until February 2014. *See* ER066 ¶ 49.

Figure 1 below shows where Plaintiffs initially stood (Position 1), where they were then told to move (Position 2), and finally where they were forced under threat of arrest (Position 3).

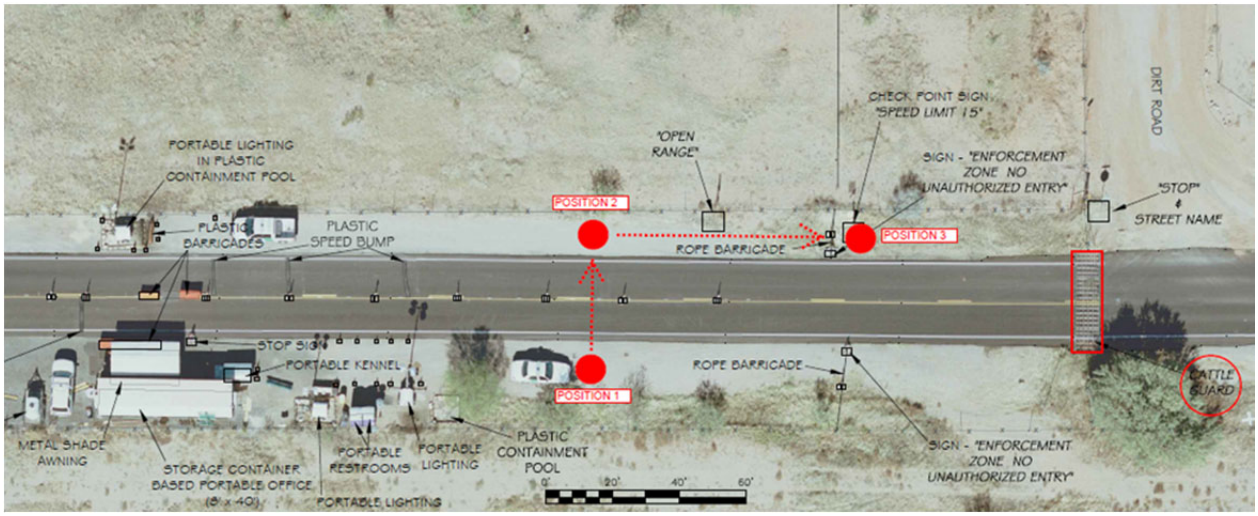


Figure 2 (Excerpt from Dkt. 27-2, ER212, oriented with north at top of image).

Because of the newly-created "enforcement zone," Plaintiffs and other protestors must remain at least 150 feet east of the checkpoint. ER067 ¶ 53. From there, Plaintiffs cannot monitor and record basic checkpoint activities, like agents' interactions with motorists, vehicle occupants' characteristics, service canines' behavior, or the nature of communications between agents and motorists. *Id.* ¶ 54. Agents have continued to deny Plaintiffs and other People Helping People members access to the "enforcement zone" by threat of arrest. *Id.* ¶ 55. This has frustrated Plaintiffs' campaign and curtailed their observations. ER068 ¶ 58.

B. Most Parts of the "Enforcement Zone" Are Vacant and Do Not Appear to Be Used for Law Enforcement Activity—Which Is Minimal at the Arivaca Checkpoint.

Despite creating the "enforcement zone" on both sides of the road, Border Patrol's law enforcement activities at the Arivaca Checkpoint are largely confined to the south side of the road, east of the shelter. Border Patrol conducts no inspections on the north side of the road, across from the checkpoint shelter, or in the area west of the checkpoint shelter. ER064 ¶ 36. No physical structures exist in large areas of the purported checkpoint borders. *See id.*

Law enforcement activity at the Arivaca Checkpoint is also minimal. In about 100 hours of monitoring, between February and March 2014, Plaintiffs and other monitors observed 2,379 vehicles pass though the Arivaca Checkpoint—an average of about one vehicle every 2.5 minutes. ER065 ¶ 39. Yet during this time, monitors observed no one detained by agents at the checkpoint. *Id.* ¶ 40.

C. Defendants Have Let Members of the Public with Different Views from Plaintiffs' Enter the "Enforcement Zone."

Since the creation of the "enforcement zone," Border Patrol has allowed people who are not monitoring or protesting the Arivaca Checkpoint to be inside the zone. For instance, Plaintiff Ragan saw a local resident park his vehicle inside the "enforcement zone" and remain there for about forty minutes. ER069 ¶ 63–65. From inside the zone, the resident harassed the People Helping People monitors on the other side of the enforcement zone. *Id.* This resident's wife later joined him.

Id. ¶ 66. When Plaintiff Ragan asked the agents on duty whether Border Patrol permitted the local resident to stay inside the enforcement zone, an agent replied, "It's a free country." *Id.* ¶ 67.

Also, Border Patrol agents told a surveyor who was permitted inside the "enforcement zone" that the barriers were only in place to exclude protestors or others whom agents believed to be "disruptive," not the general public. ER068 ¶ 62. The Border Patrol agents on duty even invited the surveyor to share a meal with them. ER198 ¶ 15.

D. The District Court Granted Defendants' Summary Judgment Motion Before Discovery Began.

Plaintiffs brought suit in the District of Arizona on November 20, 2014, claiming that Defendants violated their First Amendment rights. *See generally* ER245 (Compl.). They moved for a preliminary injunction on December 23, 2014. The district court denied that motion on September 14, 2015. ER088. On October 23, 2015, Defendants moved to dismiss, or in the alternative for summary judgment. ER082. Their motion was based solely on the pleadings and declarations regarding the preliminary injunction motion. *See* ER081 (index of exhibits to Defendants' motion). None of that evidence had been subjected to adversarial testing through depositions or other discovery.

Almost one year later, on September 30, 2016, the district court denied the motion to dismiss, denied Plaintiffs' request to take discovery, and granted

summary judgment. ER001. The district court found that the entire roped-off area is a nonpublic forum as a matter of law, and that Defendants' restrictions on Plaintiffs' speech were constitutional. *Id.* at 17–29.

SUMMARY OF ARGUMENT

The district court erred in granting summary judgment for Defendants because there are numerous material disputes of fact about the nature of the forum at issue and the legality of Defendants' exclusion of Plaintiffs from the forum.

Before Defendants established the checkpoint, the entire right of way along Arivaca Road was a traditional public forum. On the limited record before it, the district court could not have concluded as a matter of law that the entire roped-off "enforcement zone" is no longer a traditional public forum.

The parties dispute material facts about the proper characterization of the so-called "enforcement zone" from which Plaintiffs are excluded. These facts include (1) "the actual use and purposes of the property" and (2) "traditional or historic use of both the property in question and other similar properties." *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1100–01 (9th Cir. 2003).

Regarding "the actual use and purposes of the property" where Plaintiffs seek to monitor and protest, Plaintiffs submitted evidence that large sections of the roped-off area are vacant and do not appear to be used or required for law enforcement activities. Plaintiffs also submitted evidence that traffic is minimal

along Arivaca Road, and that checkpoint monitors have never observed a single arrest at the checkpoint.

Regarding the "traditional or historic use of both the property in question and other similar properties," Plaintiffs submitted evidence that no other checkpoint in the vicinity includes a similar roped-off area from which pedestrians are excluded.

Viewed in the light most favorable to Plaintiffs—as required at summary judgment—these facts permit a reasonable trier of fact to conclude that all or part of the roped-off area remains a traditional public forum, like the rest of the public right of way alongside Arivaca Road.

But the district court ignored the import of all those facts. Instead, it concluded—based on the "signs, road markers, speed bumps, lighting, buildings, equipment, and vehicles" within portions of the roped-off area—that the entire area "has been withdrawn from unrestricted public use." ER027. This conclusion is legal error, for at least two reasons.

First, in violation of established summary judgment principles, it rests on inferences drawn in Defendants' favor regarding the location, use, and significance of the objects and structures within the roped-off area. The court should have made those inferences in Plaintiffs' favor (for example, drawing the very reasonable inference that signs directed at vehicle traffic provide no support for an

exclusion of pedestrians). Second, the district court's conclusion considers only *one* of the factors for determining the type of forum—the area's physical characteristics. The district court's judgment should therefore be reversed and the case remanded for factfinding to determine whether the roped-off "enforcement zone" remains a traditional public forum.

Even assuming the enforcement zone is a nonpublic forum, material disputes of fact remain about whether the zone is both (1) reasonable and (2) viewpoint neutral. Plaintiffs submitted evidence that the vacant portions of the roped-off area are rarely, if ever, used for law enforcement activities. A reasonable trier of fact could conclude from that evidence that Plaintiffs' presence in those areas would not affect any law enforcement activity. If so, excluding Plaintiffs could not be reasonable.

Plaintiffs also submitted evidence that several people were permitted to enter the "enforcement zone," including a surveyor who said agents told him they were only restricting protesters, and two unidentified Border Patrol supporters who harassed Plaintiffs from within the "enforcement zone." A reasonable trier of fact could conclude from Plaintiffs' evidence that Defendants' restrictions were not viewpoint neutral, but were specifically targeted at Plaintiffs' views on the Arivaca Checkpoint.

The district court's failures to consider this evidence and to weigh inferences in favor of Plaintiffs are errors meriting reversal apart from the district court's initial error in deciding what forum applies here.

Separately, the Court may wish—although it need not—to reach the question whether the enforcement zone is a valid restriction on speech in a traditional public forum. If so, the record presents genuine issues of material fact about whether the exclusion can survive the applicable standard of review for traditional public forums: (1) whether excluding Plaintiffs is a content-neutral rule that is (2) narrowly tailored to serve significant interests and (3) leaves open ample alternatives for communication.

Last, the district court abused its discretion in denying Plaintiffs' Rule 56(d) request for further discovery. Indeed, no formal discovery took place before the Court granted summary judgment for Defendants. The district court's decision was premised on misunderstanding of the governing First Amendment law. Plaintiffs satisfied their burden under Rule 56(d). They identified specific information within the government's control that relates to the actual use and operation of the property in question, as well as that of other similar properties. Under First Amendment law, that information is relevant to whether the "enforcement zone" serves an actual government purpose or is an *ad hoc* measure to exclude speech critical of the government. Plaintiffs also identified specific

information related to whether Defendants have engaged in viewpoint discrimination or content discrimination in their application of the "enforcement zone" policy. The district court erred in finding that discovery would not have assisted Plaintiffs in opposing summary judgment.

STANDARD OF REVIEW

The Court reviews grants of summary judgment de novo. *Posey v. Lake Pend Oreille School Dist. No. 84*, 546 F.3d 1121, 1126 (9th Cir. 2008). The Court must decide, "viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003).

As movants, Defendants had the initial burden of proving the *absence* of a genuine issue of material fact. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). The Court must resolve all inferences—including the weight and credibility of the evidence—in favor of Plaintiffs, the nonmoving party. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991). In doing so, the Court should not "determine the truth of disputed material facts, but determine only whether there is a genuine issue for trial." *Menotti v. City of Seattle*, 409 F.3d 1113, 1119–20 (9th Cir. 2005).

The Court reviews for abuse of discretion the denial of a request to continue summary judgment pending further discovery pursuant to Federal Rule of Civil Procedure 56(d). *Michelman v. Lincoln Nat. Life Ins. Co.*, 685 F.3d 887, 892 (9th Cir. 2012). As this Court recently noted, "it will always be considered an abuse of discretion if the district court materially misstates or misunderstands the applicable law." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1115 (9th Cir. 2017).

ARGUMENT

The district court erred in granting summary judgment because the record presents numerous disputed issues of fact regarding the question whether the forum at issue remains a traditional public forum. Even assuming it is not, the district court still erred, because the record also presents material disputes of fact on the question whether the scope of the entire enforcement zone survives First Amendment review in a nonpublic forum. This Court need not decide whether the enforcement zone is a valid restriction on speech in a traditional public forum, because the district court did not reach that issue. Assuming this Court wishes to address that issue, the record presents material issues of fact defeating summary judgment. The district court also abused its discretion in denying Plaintiffs' request to continue summary judgment in order to take discovery, because its decision was premised on errors of First Amendment law.

The Court must evaluate all these issues in the special context of First Amendment law. By protesting and monitoring the Arivaca Checkpoint, Plaintiffs engaged in political speech, for which First Amendment protection is "at its zenith." *Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 186–87 (1999). Political protest and picketing have "always rested on the highest rung of the hierarchy of First Amendment values." *Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 861 (9th Cir. 2001).

Of particular importance here, Plaintiffs have the "First Amendment right to film matters of public interest." *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). This right applies to Plaintiffs' monitoring "government officials engaged in their duties in a public place, including police officers performing their responsibilities." *Glik v. Cunniffe*, 655 F.3d 78, 82–83 (1st Cir. 2011).[4] Indeed, "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we

[4] *See also Turner v. Driver*, 848 F.3d 678, 687 (5th Cir. 2017) ("First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions."); *Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014) (recognizing "First Amendment right to film police activity carried out in public, including a traffic stop"); *Adkins v. Limtiaco*, 537 F. App'x 721, 722 (9th Cir. 2013) (right to photograph law enforcement is "clearly established"); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (audiovisual recording of police "is necessarily included within the First Amendment's guarantee of speech and press rights"); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (upholding right "to gather information about what public officials do on public property").

distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987).

On this case's limited record, Defendants have not shown that they are entitled to judgment as a matter of law that the restrictions they imposed on Plaintiffs' rights are constitutional. Plaintiffs are also entitled to discovery to develop a full record.

I. The District Court Ignored Several Disputes of Material Fact About the Nature of the Forum at Issue.

The district court improperly resolved material issues of fact in favor of Defendants to conclude that the entire "enforcement zone" is a nonpublic forum as a matter of law. ER027. Its main error was to accept, at face value, Defendants' position that simply labeling a wide area surrounding a checkpoint as an "enforcement zone" is enough to destroy the public forum status of the rights of way within that area—even where there is substantial evidence that large portions are not used for any law enforcement purpose.

To evaluate speech restrictions on public property, the Court must "first determine whether the property is a traditional public forum, a designated public forum, or a nonpublic forum." *ACLU of Nev.*, 333 F.3d at 1097–98. That threshold issue is fact-intensive: "the decision as to whether a forum is public usually invokes a factual inquiry" and "it is virtually impossible in most cases to identify a public forum by legal inquiry alone, confined to the intrinsic nature of

government actions or purposes." *Stewart v. D.C. Armory Bd.*, 863 F.2d 1013, 1018 (D.C. Cir. 1988); *see also Searcey v. Crim*, 815 F.2d 1389, 1392–93 (11th Cir. 1987) ("Determining what type of public forum exists requires development of the relevant facts that bear upon the character of the property at issue."). The record presents material disputes of fact and allows a reasonable trier of fact to draw competing inferences on the question whether the entire roped-off area represents an improper attempt to prohibit Plaintiffs from criticizing Border Patrol. As a result, the district court erred in finding as a matter of law that the entire "enforcement zone" constitutes a nonpublic forum.

Before Defendants established the checkpoint, the entire public right of way along Arivaca Road was unquestionably a traditional public forum. "Public streets and sidewalks" are "the archetype of a traditional public forum." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 945 (9th Cir. 2011). Such areas have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *ACLU of Nev.*, 333 F.3d at 1099 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

It does not matter that Arivaca Road is a rural road without a sidewalk, not a street in a city: with or without a sidewalk, a public right of way along a rural or

suburban road remains a traditional public forum. *Tucker v. City of Fairfield*, 398 F.3d 457, 463 (6th Cir. 2005) ("public right of way" between car dealership and road was public forum); *Rappa v. New Castle Cty.*, 18 F.3d 1043, 1070–71 (3d Cir. 1994) (rejecting argument that "rights of way" adjacent to public roads "are non-public fora" and holding, "[o]nce it is determined that the forum at issue is public roads, it is clear that it is a public forum."). Suggesting otherwise would deprive many rural and suburban residents of the right to speak and protest along public roads without sidewalks.

Indeed, "[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). "Thus, 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." *ACLU of Nev.*, 333 F.3d at 1101. Plaintiffs need not show evidence of previous use of the right of way along Arivaca Road for expression, but even if such a requirement exists, the record satisfies it: election signs often dot the roadside, as do signs for events and local businesses. ER070 ¶¶ 73–74.

Based on this settled First Amendment law, Defendants may not destroy a traditional public forum (like the right of way alongside Arivaca Road) by

unilaterally declaring that the "checkpoint" includes any portion of the public right of way the government chooses. Instead, Defendants' ability to remove portions of the public right of way from a traditional public forum depends on close analysis of the objective characteristics of that particular checkpoint's operations.

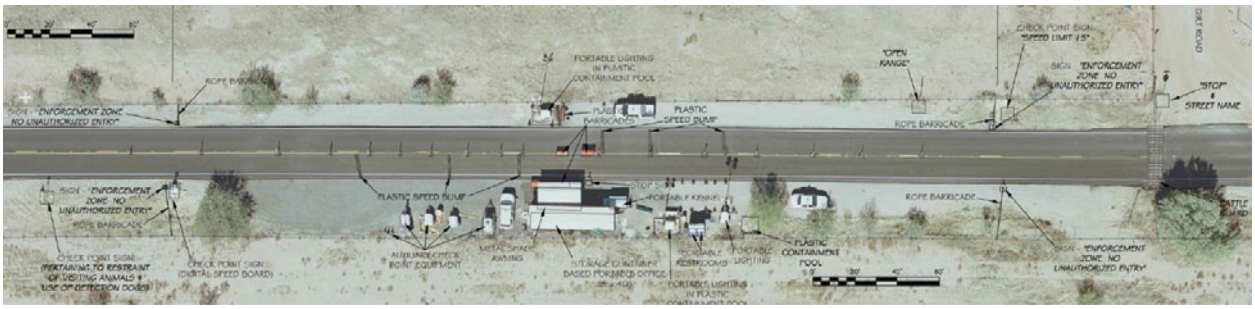
A traditional public forum is "defined by the objective characteristics of the property" and remains "open for expressive activity regardless of the government's intent." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677–78 (1998). The government "may not by its own *ipse dixit* destroy the 'public forum' status" of areas "which have historically been public forums." *United States v. Grace*, 461 U.S. 171, 180 (1983); *see also Henderson v. Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992) ("The mere fact that a sidewalk abuts property dedicated to purposes other than free speech is not enough to strip it of public forum status."). Allowing closure of a traditional public forum based only on "the government's intent . . . would make a mockery of the protections of the First Amendment." *ACLU of Nev.*, 333 F.3d at 1104–05.

Sometimes, the government can "change a property's public forum status" by sufficiently altering "the objective physical character or uses of the property." *Id.* at 1105. But it may not "restrict speech by fiat" or "simply declare the First Amendment status of property regardless of its nature and its public use." *First*

Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114, 1124 (10th Cir. 2002).

Here, the First Amendment analysis turns on disputed issues of fact, precluding summary judgment. The district court erred in finding as a matter of law that the entire "enforcement zone" asserted by Defendants in response to Plaintiffs' speech has been converted to a nonpublic forum. The record presents material disputes of fact about what type of forum is at issue. A reasonable trier of fact could draw competing inferences about whether (1) the entire roped-off area serves genuine law enforcement purposes, or (2) it is instead an *ad hoc* attempt to prohibit Plaintiffs from criticizing Border Patrol within that area.

The evidence allows a reasonable trier of fact to find that large portions of the enforcement zone are functionally identical to the surrounding right of way and are not involved in or needed for law enforcement operations. Inside the zone, there are large vacant areas along the north side of the road, outside where Border Patrol agents perform their duties. ER051 ¶ 1; ER202 (McLain Decl.) Ex. 2. For example, Plaintiffs submitted the aerial photograph below. It shows that the entire north side (top) of the roadway is empty of equipment and vehicles other than in the very center of the photograph. A reasonable trier of fact could conclude that the "enforcement zone" on the north side of the road has no purpose but to prohibit Plaintiffs' speech. ER024.



Plaintiffs submitted declarations attesting that the areas shown as empty in the photograph do not appear to be used for law enforcement purposes. *See* ER051, 052, 064–65 ¶¶ 1, 3–4, 36–40. Of particular relevance to the error in the district court's order, Plaintiffs' submissions regarding the lack of visible activity within the roped-off area raise a genuine issue as to whether the features relied on by the district court—for instance, the "orange and white road markers," "speed bumps," and "speed limit sign" within the roped-off area—bear any relationship to where law enforcement activity actually takes place. *Id.*; *see* ER024. Plaintiffs also submitted a declaration that *no other checkpoint* in the region includes a similar roped-off area from which pedestrians are excluded. ER207 (Ragan Decl.). Finally, Plaintiffs submitted evidence that other members of the public have been allowed within the roped-off area with no objection by Defendants. ER198 ¶ 15; ER215 ¶¶ 26–30; ER068–070 ¶¶ 61–72. These facts further call into question whether the roped-off area is a place where Defendants *might* have some legitimate

interest in restricting speech—versus an *ad hoc* attempt to restrict speech critical of Border Patrol.

Taking the evidence in the light most favorable to Plaintiffs, as the district court should have done, a trier of fact could reasonably find that the entire roped-off area does not serve *any* legitimate government purpose and instead remains part of the surrounding public right of way. If so, the facts support a finding that Defendants improperly "attempted to destroy or convert a public-forum [right of way] into a nonpublic forum." *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1137 (9th Cir. 2011). Therefore, Defendants are not "entitled to judgment as a matter of law" that they have destroyed a traditional public forum by the mere expedient of roping off empty areas in response to Plaintiffs' speech. Fed. R. Civ. P. 56(a).

Even if one improperly discounts the evidence submitted by Plaintiffs, the evidence analyzed by the district court does not support a finding as a matter of law that the roped-off area has been converted to a nonpublic forum. The district court primarily relied on certain physical features in the area of the Arivaca Checkpoint: namely, the speed limit and "checkpoint ahead" signs at the far ends of the relevant area, and the barriers, speed bumps, lights and other objects Defendants placed between those bounds. ER025–027. The district court ignored material disputes about the significance of all these physical features and

improperly failed to draw all inferences in Plaintiffs' favor, even assuming the underlying facts were undisputed. *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 988 (9th Cir. 2006) ("Simply because the facts are undisputed does not make summary judgment appropriate. Instead, where divergent ultimate inferences may reasonably be drawn from the undisputed facts, summary judgment is improper.").

The physical features cited by the district court, alone or viewed in combination, are insufficient to justify concluding, as a matter of law, that Defendants changed the entire roped-off right of way along Arivaca Road from a public forum to a nonpublic one.

Signs. To find the eastern- and westernmost limits of the relevant forum, the district court relied, apparently exclusively, on the fact that "the 'enforcement zone' signage" corresponds "to the 'check point sign' with a digital speed board on the west and the 15 mph speed limit sign on the east." ER024.

The checkpoint signs do not dispose of the forum issue, for several reasons. First, Border Patrol placed the "enforcement zone" signs only *after* Plaintiffs began their monitoring and protest of the Arivaca Checkpoint. Border Patrol submitted no proof that similar signs exist at other, comparable checkpoints. This suggests that the signs are simply an attempt to restrict speech at this checkpoint, not a genuine law enforcement measure.

Second, Border Patrol agents have let people other than Plaintiffs enter the so-called "enforcement zone." ER068–070 ¶¶ 61–72. This further undermines the argument that the signs legitimately mark the checkpoint boundary.

Third, the presence of signs warning vehicles of the approach to a checkpoint does not mean that the signs mark the boundaries of a nonpublic forum. *Cf. United States v. Martinez-Fuerte*, 428 U.S. 543, 545–46 (1976) (treating signs that stated "ALL VEHICLES, STOP AHEAD" and "WATCH FOR BRAKE LIGHTS" as separate from checkpoint itself). None of the signs mentions pedestrians at all (aside from the ad hoc "enforcement zone" sign, added later), and the materials submitted by Defendants to show the regulations governing temporary checkpoints make no mention of restrictions on pedestrian access. ER080 ¶ 1, and ER116 ¶ 8 & ER150–185.

Physical features between the signs. Assessing the characteristics of the area between the signs, the district court also gave improper weight, and made improper inferences, about the other objects around Arivaca Road.

It is irrelevant that the part of Arivaca Road at issue features "orange and white road markers and plastic barricades" or "plastic speed bumps." ER024. Such features do not show as a matter of law that the public right of way alongside the road is closed to pedestrian access for speech. After all, they regulate vehicular travel, not pedestrians.

Also irrelevant is the presence of "portable lighting equipment" or other "equipment and vehicles" in certain locations on the roadside in the "enforcement zone." ER024. Those objects cannot defeat the reasonable inference that the entire empty space around those objects remains a public right of way, not a nonpublic forum. *Id.* One would not assume a city park was closed to free speech because police offers had parked a car and put up a spotlight there.

The district court was required to draw inferences in Plaintiffs' favor based on *all* of the evidence, not just a few of the objects Defendants have put around Arivaca Road. The mere placement of rope barriers cannot destroy a quintessential public forum. Even putting aside Plaintiffs' evidence that empty portions of the roped-off area are functionally identical to other sections of the roadside, a reasonable trier of fact could conclude from the signs and equipment alone—all of which are used to control vehicle traffic, and say nothing about restricting pedestrian access—that all or part of the roped-off area remains part of the public right of way.

The fact that there may be some "law enforcement operation that is occurring on this stretch of road" (ER026) also does not confer on Defendants the power to destroy the public forum along Arivaca Road. For First Amendment purposes, it is irrelevant that "maintenance of a traffic checking program in the interior is necessary." *Id.* (quoting *Martinez-Fuerte*, 428 U.S. at 556). *Martinez-*

Fuerte held that certain checkpoints can be "consistent with the Fourth Amendment." 428 U.S. at 545. But it said nothing about either the First Amendment right to protest a checkpoint, or whether government agents can summarily declare portions of a traditional public forum off limits to such protest.

The district court also incorrectly relied on *Hale v. Department of Energy*, 806 F.2d 910 (9th Cir. 1986). *Hale* did not involve a traditional public forum in a public right of way along a public thoroughfare. Instead, it concerned a side road leading to a gate controlling entrance to a nuclear weapons test site. *Id.* at 911–12. In effect, the side road was "a long driveway" from the highway to the gate, and all land surrounding the driveway was "withdrawn from public use for the purpose of conducting nuclear testing." *Id.* at 915–16. Here, Arivaca Road remains an "open thoroughfare" in that residents are required to pass through the checkpoint area in the course of traveling between Amado and Arivaca. *Cf. id.* at 916. A reasonable trier of fact could conclude from this alone that portions of the roadway not actually used for law enforcement remain a public forum.

Because there are multiple material disputes of fact about what portions of the roped-off area are public, the district court erred in granting summary judgment to Defendants.

II. Assuming the "Enforcement Zone" Is a Nonpublic Forum, the District Court Ignored Fact Disputes About the Existence, Reasonableness, and Viewpoint Neutrality of Restricting Plaintiffs' Speech There.

Even if the "enforcement zone" is a nonpublic forum, the district court still erred in resolving material questions of fact in the government's favor. In a nonpublic forum, the government bears the burden to show that restrictions on speech are reasonable and not "an effort to suppress expression merely because the public officials oppose the speaker's view." *Sammartano v. First Judicial Distr. Ct.*, 303 F.3d 959, 965 (9th Cir. 2002) (quoting *Cornelius*, 473 U.S. at 800)), *abrogated on other grounds by Winter v. NRDC, Inc.*, 555 U.S. 7 (2008).

The district court erred in ignoring factual disputes about (1) whether the exclusion of Plaintiffs is pursuant to a policy for maintaining safety or security at checkpoints, and, if so, (2) whether the policy is reasonable and (3) whether excluding monitors such as Plaintiffs is viewpoint-neutral.

A. The Parties Dispute Whether Defendants Actually Have a Policy About "Enforcement Zones."

Defendants have stated that Plaintiffs were excluded from the roped-off area pursuant to a "policy and practice" of allowing Border Patrol supervisors and agents to create and define "enforcement zones." *See* ER266 ¶ 108. Defendants contended below that the Border Patrol's policy is "to restrict access to the checkpoint to authorized persons for official purposes." *See* ER114 (San Martin Decl.) & ER083 at 1.

The district court implicitly accepted the existence of a policy when it held that "Defendants [*sic*] primary interest is in protecting the safety and security of Border Patrol agents, canines, and the public." ER028.

Yet the record contains substantial evidence that no such policy exists, or if it does, that it was selectively enforced. The record shows that the Border Patrol knowingly allowed at least one person to move freely throughout the Arivaca Checkpoint area, and even invited him to share a meal with the agents on duty. ER198 ¶ 15. The Border Patrol also let two other people into the enforcement zone on the grounds that "[i]t's a free country." ER069 ¶¶ 63–67.

Plaintiffs also submitted unchallenged declarations establishing that there is no similar "enforcement zone" around other local checkpoints. ER213–214 (Ragan Decl.) ¶ 21. And it is not disputed that the rope barriers were erected directly in response to Plaintiffs' attempts to monitor the checkpoint.

A reasonable trier of fact could conclude that the alleged "policy" was created after the fact, as a justification for suppressing Plaintiffs' exercise of their First Amendment rights.

B. The Parties Dispute Whether Defendants' Purported Policy Is Reasonable.

Even assuming that a policy exists, the district court overlooked factual disputes about whether such policy is reasonable. As the district court noted, "Reasonableness 'must be assessed in the light of the purpose of the forum and all

the surrounding circumstances.'" ER027 (citing *Hale*, 806 F.2d at 916–17 (quoting *Cornelius*, 473 U.S. at 806)).

For First Amendment purposes, "[t]he 'reasonableness' requirement for restrictions on speech in a nonpublic forum requires more of a showing than does the traditional rational basis test." *Sammartano*, 303 F.3d at 966–67 (citations and quotation marks omitted). The government must submit evidence proving "that the restriction reasonably fulfills a legitimate need," and "its failure to select simple available alternatives suggests that the ban it has enacted is not reasonable." *Id.* at 967. The record contains material issues of fact defeating summary judgment on the question whether the government carried that burden.

The district court ruled that the exclusion of Plaintiffs from the roped-off area furthers an interest in protecting the safety and security of government agents, canines, and the public. ER028. It based this conclusion on the San Martin Declaration, and on Fourth Amendment cases generally noting the need for stops and seizures at Border Patrol checkpoints. *Id.* (citing ER116–117 ¶¶ 10–11).

The parties dispute the facts in the San Martin Declaration. To support Defendants' argument that restrictions around the Arivaca Checkpoint are necessary for safety reasons, the San Martin Declaration references "28 significant safety incidents at the three checkpoints within Tucson Station," the area within which Arivaca Road is situated. *Id.* ¶¶ 10–11. But that declaration only references

a single event at the Arivaca Checkpoint, in which a drunk driver hit the license plate readers situated on the north side of the road. *Id.* ¶ 11. Other than that, the declaration does not reference Arivaca Road or any safety concerns about it. It refers to the Tucson Station generally—a much larger area, which Agent San Martin attested "runs for 23.8 miles along the Mexican border, extends 68 miles north, and covers the vast majority of Pima County." ER114 ¶ 2.

Plaintiffs dispute the extent of Defendants' safety concerns as applied specifically to the Arivaca Checkpoint. Plaintiffs presented evidence showing that the traffic at this checkpoint is very minimal. ER209 ¶ 7. The Arivaca Checkpoint is located between two rural towns that have a combined population of just 1,000 people. *Id.* ¶ 6. Arrests at the Arivaca Checkpoint are rare. *Id.* ¶ 7. And although the "enforcement zone" barriers are present on both the north and south shoulders of Arivaca Road, Border Patrol's checkpoint activities are limited to the south shoulder. ER209, ER213 ¶¶ 9, 19. It is not clear that Defendants' broad and general references to safety concerns apply equally to all checkpoints in the vast area constituting the U.S. border region. Such references are not enough to show that Defendants' restrictions on Plaintiffs' First Amendment rights are reasonable as a matter of law.

If anything, the rarity of safety incidents on Arivaca Road shows that it is unusually safe, not that there is a special need to keep Plaintiffs away from the

Arivaca Checkpoint. This inference is strengthened by evidence that traffic is low on Arivaca Road, and that (given the speed-limit signs and speed bumps) cars are moving slowly by the time they reach the primary inspection area. It was improper for the district court to make the opposite inference in favor of Defendants at summary judgment.

In any event, it goes too far to assert that the government may exclude speech from a roadside simply because of the potential risk posed by reckless drivers. Holding otherwise would authorize the government to exclude anyone from speaking on any sidewalk or right of way which might be threatened by a reckless driver. This would license suppression of speech virtually anywhere.

The cases on which the district court relied are distinguishable for several reasons. As noted above, *Martinez-Fuerte* is a Fourth Amendment case that says nothing about First Amendment rights to protest a checkpoint. 428 U.S. at 556. The district court also cited *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000), as supporting the safety and security interests behind checkpoints. But the Border Patrol checkpoint referenced in *Edmond* is the same one involved in *Martinez-Fuerte*, 531 U.S. at 37 (citing *Martinez-Fuerte*). *Edmond* is inapposite for the same reasons as *Martinez-Fuerte*.

The sobriety checkpoint case that *Edmond* references, *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), concerns a particular Michigan State

Police checkpoint program. In evaluating the effectiveness of this program, the court had the benefit of "extensive testimony." *Id.* at 448. No such extensive record exists here. And like *Martinez-Fuerte*, *Sitz* concerned only whether a checkpoint was lawful under the Fourth Amendment—not whether the government could impose restrictions on the exercise of First Amendment rights in the area around the checkpoint.

The last case the district court cited, *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213 (9th Cir. 1989), concerns whether reporters could access search warrant materials related to an ongoing, pre-indictment investigation. There, the integrity of the investigation would have been compromised if the materials were made public before an indictment issued or an investigation concluded. *See id.* That case has nothing to do with whether members of the public can observe government officials doing their work in full public view, as here. It also has nothing to do with the extent to which law enforcement has an unbridled right to destroy a traditional public forum by fiat. Indeed, the language of *Times Mirror* supports Plaintiffs in their efforts to monitor law enforcement operations: "Every . . . governmental process[] arguably benefits from public scrutiny to some degree, in that openness leads to a better-informed citizenry and tends to deter government officials from abusing the powers of government." *Id.* at 1213.

A more instructive case than any the district court cited is this Court's decision in *Brown v. California Department of Transportation*, 321 F.3d 1217 (9th Cir. 2003). There, CalTrans let some members of the public hang American flags on overpass fences after 9/11, but forbade others to display other types of messages, like anti-war signs. *Id.* at 1220–21. (These fences were nonpublic forums. *Id.*) CalTrans's reason for doing so, it said, was public safety: signs can fall or distract motorists. *Id.* at 1222. Assessing whether that rationale sufficed to show reasonableness under nonpublic forum analysis, this Court ruled it did not. *Id.* at 1223. As the Court explained, CalTrans offered no credible evidence to show flags did not raise the same safety concerns as other types of signs. *Id.* Its safety rationale was thus "patently unreasonable." *Id.*

A similar principle applies here. Defendants have said, like CalTrans said in *Brown*, that Plaintiffs must be excluded from the "enforcement zone" for public safety reasons. *See* ER028. This record does not permit a finding that excluding Plaintiffs from the zone was reasonable as a matter of law. Just as CalTrans had no reasonable justification for permitting one medium for speech and forbidding another, this record permits the trier of fact to find that Defendants have no reasonable justification for excluding only Plaintiffs but not other members of the public from the entire roped-off area. The district court erred in granting summary judgment even if the entire roped-off area is a nonpublic forum.

C. The Parties Dispute Whether Any Purported Policy Is Viewpoint-Neutral.

The district court erred in addressing "content neutrality" but not viewpoint neutrality. ER027. "[W]here the government is plainly motivated by the nature of the message rather than the limitations of the forum or a specific risk within that forum, it is regulating a viewpoint rather than a subject matter." *Az. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 972 (9th Cir. 2008) (citations omitted). Here, the district court did not address the material dispute of fact about the extent to which Border Patrol agents selectively allow access to the enforcement zone for individuals engaged in speech different from, or directly opposed to, that of Plaintiffs.

At the outset, the district court erred in applying the wrong standard: content-neutrality, not viewpoint-neutrality. *See* ER027–28. Plaintiffs did not argue that a facially neutral law, unrelated to content of expression, incidentally affected them but no one else. *See id.* (citing content-neutrality cases). The disputed facts, discussed above, show instead that Defendants' actions were "plainly motivated by the nature of [Plaintiffs'] message," not by any limitations or risks related to Arivaca Road. *Stanton*, 515 F.3d at 972. Viewed in the light most favorable to Plaintiffs, that evidence establishes viewpoint discrimination, which is unconstitutional.

Plaintiffs presented evidence that at least one member of the public, their surveyor, was allowed to wander freely through the Arivaca Checkpoint areas, and

was even offered a meal by the on-duty Border Patrol agents. ER198 ¶ 15. Those agents told the surveyor that the barriers were only meant to exclude protestors or those the agents felt to be disruptive—not the general public. *Id.* A reasonable factfinder could conclude that the terms "disruptive" is code for viewpoint discrimination.

Another time, Border Patrol let media reporters and pedestrians walk along the north side of the road from one end of the "enforcement zone" to the other. ER216 ¶ 29. But when Plaintiff Jacobson and other monitors tried to record checkpoint operations, Border Patrol agents used their vehicles to block the monitors' views. *Id.* Letting some people go freely through the "enforcement zone," but excluding and blocking the views of others, could suggest viewpoint discrimination to a reasonable factfinder.

Border Patrol agents also let a "well-known supporter of Border Patrol and opponent of PHP" remain inside the "enforcement zone," along with his wife who arrived later, both of whom harassed Plaintiffs. ER069 ¶ 63–66. When Plaintiff-Appellant Ragan asked Border Patrol agents whether they had allowed the other member of the public to stay inside the "enforcement zone," an agent responded, "It's a free country." *Id.* ¶ 67. This evidence suggests that Defendants' actions targeted Plaintiffs specifically, and not the general public.

Further, the parties dispute facts about what kind of, and how much, discretion Border Patrol agents have to decide who gets to approach the checkpoint. *Id.* ¶¶ 68–69. For instance, one Border Patrol agent said, "the people who are going to dictate where [the monitors] can and can't be are the agents on the scene." *Id.* ¶ 69.

As the Supreme Court has explained, "[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." *City of Lakewood v. Plain Dealer Pub'g Co.*, 486 U.S. 750, 763 (1988). Even if the *potential* for such abuse exists, such "discretionary power is inconsistent with the First Amendment." *Kaahumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012) (holding that even where the record showed government's discretionary power "ha[d] never been exercised," the potential for abuse merited a finding that it violated the First Amendment).

The district court ignored Border Patrol's stated discretion in excluding people from around the Arivaca Checkpoint. Its failure to do so is reversible error.

III. Even Under Public Forum Analysis, Material Issues of Fact Preclude a Holding That the "Enforcement Zone" Complies with the Standard for Restricting Speech in a Traditional Public Forum.

Even under public forum analysis, which the district court did not address, material issues of fact preclude judgment for Defendants.

As a threshold point, the Court need not consider this issue at all. This Court is "a court of review, not first view." *Haskell v. Harris*, 745 F.3d 1269, 1271 (9th Cir. 2014). The Court should instead remand this case for discovery and further review under the correct legal standards. *See ACLU of Nev.*, 333 F.3d at 1094 (reversing "the district court's conclusion" that area "is a nonpublic forum" and remanding "to allow the district court" to evaluate speech restrictions "under the proper standard of review"). Yet if the Court decides to address the public forum standard, the Defendants cannot meet this high standard on the record at hand.

The government faces "an extraordinarily heavy burden to regulate speech" in a public forum, especially "core First Amendment speech" such as Plaintiffs' political protest. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1022 (9th Cir. 2009).

It "may enforce reasonable time, place, and manner regulations as long as the restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Grace*, 461 U.S. at 177. "The failure to satisfy any single prong

of this test invalidates" the restriction. *Grossman v. City of Portland*, 33 F.3d 1200, 1205 (9th Cir. 1994).

A. The Parties Dispute Whether Defendants Excluded Plaintiffs from the "Enforcement Zone" Because of the Content of Their Speech, or Their Viewpoints.

The record permits a reasonable factfinder to infer that Defendants engaged in content-based or viewpoint-based exclusion of Plaintiffs' speech. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (stating that viewpoint discrimination is "an egregious form of content discrimination"); *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 n.4 (2014) (explaining that viewpoint discrimination exists when one person is "prevented from speaking" "while someone espousing another viewpoint was permitted to do so").

The close connection between Plaintiffs' speech and the creation of the barrier supports this inference. Before Plaintiffs began to monitor and protest the Arivaca Checkpoint, neither it nor any other interior checkpoint in Arizona included any so-called "enforcement area." ER213 ¶ 21. But as soon as People Helping People began monitoring and protesting at the Arivaca Checkpoint, Defendants strung yellow incident tape at an arbitrary place and pushed Plaintiffs' monitoring and protesting behind it. *Id.* ¶ 19. Just a few days later, Defendants replaced the tape with rope barriers, and posted a sign proclaiming "Border Patrol Enforcement Zone – No Pedestrians Beyond This Point." ER214 ¶ 22; ER067 ¶

53. This wording was eventually changed to "No Unauthorized Entry Beyond This Point."

Defendants' actions in selectively allowing people other than Plaintiffs to engage in speech in the enforcement zone further supports an inference of content-based or viewpoint-based exclusion. *See Hoye v. City of Oakland*, 653 F.3d 835, 851 (9th Cir. 2011) (noting that the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views"). As noted in Section II, Defendants did so on several occasions.

The record thus precludes summary judgment on the question of whether exclusion of Plaintiffs' speech from the roped-off area was motivated by content or viewpoint. There also remain disputed questions whether that exclusion "serves a compelling government interest in the least restrictive manner possible," as necessary to survive strict scrutiny for content or viewpoint discrimination. *Hoye*, 653 F.3d at 853 (city violated First Amendment by prohibiting speech within 100 feet of clinics that discouraged access to clinics while allowing speech that facilitated access to clinics).

B. The Parties Dispute the Government's Interest and Whether Any Restrictions Are Narrowly Tailored.

Even assuming the exclusion of Plaintiffs from protesting inside the entire roped-off area is content-neutral, the record presents material issues of fact

precluding summary judgment. The enforcement zone was only created in response to Plaintiffs' speech, is not replicated at other checkpoints, and contains significant empty areas where no law enforcement equipment or operations are located. So it cannot be said, as a matter of law, that the exclusion (1) materially advances a significant government interest, (2) is narrowly tailored to serve any such interest, and (3) leaves open ample alternative channels of communication, as necessary to sustain a content-neutral restriction of speech in a traditional public forum. *Grace*, 461 U.S. at 177.

Though the government may have significant interests in safety, security, and law enforcement, it is not sufficient merely to assert those interests in a generalized fashion. The claim that "asserted interests are important in the abstract" does not prove as a matter of law that the enforcement zone "will in fact advance those interests" in "a direct and material way," as necessary to sustain a content-neutral restriction on speech. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). Yet as explained in Section II, disputes of fact exist about Defendants' interest in creating the enforcement zone at issue.

In any event, the enforcement zone "must be narrowly tailored to serve a significant governmental interest," because the government may not "suppress speech" for "mere convenience." *McCullen*, 134 S. Ct. at 2534 (citation and quotation marks omitted).

The record permits a reasonable inference that the enforcement zone is not narrowly tailored because it burdens "substantially more speech than is necessary" to protect the government's claimed interests. *Comite de Jornaleros*, 657 F.3d at 949. This analysis must account for the fact that law enforcement "officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights." *Glik*, 655 F.3d at 84 (citations omitted). The "same restraint demanded of law enforcement officers in the face of 'provocative and challenging' speech must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces." *Id.*

In other cases, courts struck down restrictions on plaintiffs' ability to record law enforcement from distances *far closer in proximity* than the area from which Defendants excluded Plaintiffs. For example, in *Glik*, the court ruled it violated the First Amendment to prevent plaintiff from recording an arrest in a public forum from only ten feet away. *Id.* at 80. The court found the ten-foot distance to be "a comfortable remove." *Id.* at 84. It held, "Such peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation." *Id.*

Even accounting for potential differences between an arrest and a checkpoint or traffic stop, the record permits a reasonable inference that the enforcement zone excessively invades a traditional public forum. A trier of fact could find that the

mere act of filming or monitoring from any portion of that zone does not interfere with Border Patrol's operations. *Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014) ("[A] police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties.").

Given that the record supports the reasonable inference that Plaintiffs can stand within the roped-off area and monitor Border Patrol agents from far enough away not to interfere with their work, the enforcement zone is not narrowly tailored to the asserted interests "in protecting the safety and security of Border Patrol agents, canines, and the public." ER028. Here, "a substantial portion of the burden on speech does not serve to advance its goals." *McCullen*, 134 S. Ct. at 2535.

Further, although narrow tailoring does not require the least restrictive alternative, "obvious alternatives that would achieve the same objectives with less restriction of speech" show that a regulation is not narrowly tailored. *Long Beach Area Peace Network*, 574 F.3d at 1025; *see also Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th Cir. 1991) (restrictions that "disregard far less restrictive and more precise means are not narrowly tailored"). A reasonable factfinder could determine that an obvious alternative here is to limit the

enforcement zone to the checkpoint shelter and the primary and secondary inspection areas, allowing speech in the surrounding empty areas of the public right of way, as was the case before Plaintiffs began their protest and monitoring. *See Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227 (9th Cir. 1990) (holding that 75-yard enforcement zone "burden[ed] substantially more speech than is necessary," where Coast Guard previously "demonstrated ample ability to operate safely without a 75-yard security zone").

Also, Defendants may enforce existing laws against physical obstruction or endangerment, to the extent it were relevant to do so. (There are disputes of fact on this point too.) This is the proper response to such conduct in a traditional public forum, instead of "prevent[ing] the First Amendment activity from occurring in order to obviate the possible unlawful conduct." *Collins v. Jordan,* 110 F.3d 1363, 1372 (9th Cir. 1996).

Even if these alternatives are allegedly "less efficient and convenient than [unlimited] bestowal of power on police authorities to decide" where Plaintiffs may speak, that assertion does "not empower [the government] to abridge freedom of speech." *Comite de Jornaleros,* 657 F.3d at 950 (quoting *Schneider v. New Jersey,* 308 U.S. 147, 162 (1939)). As a result, the government is not entitled to summary judgment on narrow tailoring.

C. The Parties Dispute Whether Plaintiffs Have Ample Alternatives for Speech.

Defendants are also not entitled to summary judgment on the question of ample alternatives. Although Plaintiffs and others have continued to monitor the Arivaca Checkpoint, being excluded from the "enforcement zone" has impeded their work. ER067 ¶ 54. For instance, they cannot observe agents' interactions with motorists. *Id.* So they cannot record information about agents' actions at the checkpoint. *Id.* This includes information like 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. *Id.*

On these facts, for which the Court must make all inferences in favor of Plaintiffs, the enforcement zone does not provide ample alternatives for Plaintiffs' speech—*i.e.*, it does not permit them to record matters they otherwise have a right to observe. *See Long Beach Area Peace Network*, 574 F.3d at 1025 (noting that an "alternative is not ample if the speaker is not permitted to reach the intended audience").

Also, alternatives to the enforcement zone are not ample if they have undue "impact on the content of the message itself" through "severance of the speech from a location critical to that content," even "if the intended audience is non-existent or is only the other members of a protesting group," *Galvin v. Hay*, 374 F.3d 739 , 756 (9th Cir. 2004). Any factual questions about the adequacy or

effectiveness of Plaintiffs' speech outside the enforcement zone cannot be decided on summary judgment. So the government is not entitled to judgment as a matter of law on ample alternatives.

IV. The District Court Abused Its Discretion by Denying Plaintiffs' Rule 56(d) Request.

By denying Plaintiffs' Rule 56(d) request, the district court abused its discretion and precluded Plaintiffs from testing Defendants' factual assertions. *See Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003) (noting that "District Courts should grant any Rule 56[d] motion fairly freely" when a summary judgment motion is filed before discovery has taken place).

Rule 56(d) has been construed as "requiring, rather than merely permitting, discovery where the nonmoving party has not had the opportunity to discover information that is essential to its opposition," to ensure that "adequate discovery will occur before summary judgment is considered." *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (citation and quotation marks omitted).

Plaintiffs satisfied the requirements of Rule 56(d). They specifically identified the information sought that would have created further factual disputes, such as information related to the actual uses and purpose of the property at issue.[5]

[5] In addition to filing a request under Rule 56(d), Plaintiffs also filed separate briefing on the need for discovery in light of Defendants' separate response to the (continued…)

See VISA Int'l Serv. Ass'n v. Bankcard Holders of Am. 784 F.2d 1472, 1475 (9th Cir. 1986).

The actual and traditional use of public property and its physical characteristics, along with those of "other similar properties," are directly relevant to whether the property at issue is a traditional public forum or nonpublic forum. *ACLU of Nev.*, 333 F.3d at 1100–01. Under the governing First Amendment law, as explained in Sections I–III, Plaintiffs were denied the opportunity to take discovery into crucial issues:

- Discovery of whether the area in the "enforcement zone" has been used for actual law enforcement activities is relevant to whether that area is public or not, and also whether the restriction was reasonable. *See* ER073 ¶ 4.
- Discovery about who has been allowed into the "enforcement zone"—not to mention why, and how often—is relevant to whether Defendants' actions were content- or viewpoint-based and whether those actions are sufficiently grounded in legitimate law enforcement concerns to justify a content-neutral restriction on speech. *Id.* ¶ 5.
- Discovery into public safety concerns, the extent of law enforcement activity, and any policies about pedestrians and the physical features of checkpoints, is relevant to whether Defendants' restrictions serve a compelling or significant government interest. ER073 ¶ 6. Similar information is relevant to whether those restrictions are narrowly tailored. *Id.* ¶ 7.
- And information about law enforcement activity at the Arivaca Checkpoint, like data about traffic stops (to compare against Plaintiffs' own monitoring data), is relevant to whether Plaintiffs have ample alternative channels of communication. *Id.* ¶ 8.

56(d) request. *See* ER038, (Plaintiffs' Reply to Defendants' Response to Plaintiffs' Rule 56(d) Declaration).

All of this information concerns whether a reasonable factfinder could determine that the entire roped-off area is legitimately nonpublic, or an *ad hoc* exclusion targeting Plaintiffs' speech that is insufficient to remove a public right of way from a traditional public forum.

Thus, the district court abused its discretion in denying the Rule 56(d) request because it misunderstood First Amendment law in finding that the information sought "would not assist Plaintiffs in opposing summary judgment regarding whether the checkpoint is a non-public forum." ER019. *See Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F. 3d 1087, 1091 (9th Cir. 2010) ("[A]n error of law *is* an abuse of discretion."). Also, determining that an area is a nonpublic forum does not end the First Amendment inquiry. Plaintiffs sought information about whether the "enforcement zone" policy is viewpoint or content-neutral, and had a reasonable basis for seeking this information. *See* Supra Sections II–III.

The District Court also deprived Plaintiffs of the chance to present information critical to their opposition. *Metabolife*, 264 F.3d at 846. Indeed, not only has no discovery taken place in this case, but the only record presented to the District Court was made up of redacted documents selected by Defendants to advance their argument. For example, Defendants attached a memorandum titled "Border Patrol Traffic Checkpoint Policy" as an exhibit, but the memorandum redacts several paragraphs from the policy, as well as the names of individuals

involved in approving the policy. Indeed, entire pages of the exhibit are almost fully redacted. That is not discovery. *See In Re Nat'l Western Life Ins. Deferred Annuities Litigation*, No. 05-CV-1018-AJB (WVG), 2011 WL 1304587, at *4 (S.D. Cal. 2011) ("The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case.") (quoting Fed. R. Civ. P. 26 advisory committee notes on 1946 amendments).

By denying Plaintiffs the chance to investigate any of Defendants' factual assertions, and by misapprehending the applicable First Amendment law, the district court abused its discretion and committed reversible error. *Just Film, Inc.*, 847 F.3d at 1115; s*ee Burlington*, 323 F. 3d at 774 (finding that it was an abuse of discretion for district court to deny Rule 56(f), now Rule 56(d), request where plaintiff "showed some basis" for believing information sought existed, and had "no fair opportunity to develop the record" on the issue).

CONCLUSION

The record in this case is limited, yet it provides ample room to infer that Defendants unconstitutionally restricted Plaintiffs' First Amendment rights. Plaintiffs have the right to monitor and record government agents at work in public. But the record allows for the inference that because Defendants do not like Plaintiffs' point of view, they have impeded Plaintiffs' ability to exercise their

constitutional rights. The record also suggests that Defendants unilaterally claimed that unused parts of a public right of way are somehow nonpublic, pushing Plaintiffs too far away to exercise their rights effectively.

The district court's decision to grant Defendants summary judgment on this limited record—when it should have made every inference in Plaintiffs' favor, as described above—should be reversed. So should its decision not to allow Plaintiffs take discovery into whether or how Defendants violated their First Amendment rights. The Court should reverse and remand this case so Plaintiffs can have their case heard.

April 10, 2017

Respectfully submitted,

ACLU FOUNDATION OF ARIZONA

By /s/ Kathleen E. Brody
Kathleen E. Brody
Brenda Muñoz Furnish
3707 North 7th Street, Suite 235
Phoenix, AZ 85014

ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES

/s/ Mitra Ebadolahi
David Loy
Mitra Ebadolahi
P.O. Box 87131
San Diego, CA 92138-7131

COVINGTON & BURLING, LLP

/s/ Winslow Taub
Winslow Taub
Tracy Zinsou
Ethan Forrest
Neha Jaganathan
1 Front Street, 35th Floor
San Francisco, CA 94612

Attorneys for Plaintiffs-Appellants
LEESA JACOBSON, ET AL.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, LEESA JACOBSON ET AL., states that it is not aware of any related cases currently pending in this Court.

April 10, 2017

Respectfully submitted,

COVINGTON & BURLING LLP

By: */s/ Winslow Taub*

Attorney for Plaintiff-Appellants
LEESA JACOBSON ET AL.

9th Circuit Case Number(s) 16-17199

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