No. 16-17199

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEESA JACOBSON, *et al.*,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendant-Appellee.

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

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

Plaintiffs are members of People Helping People, a group critical of the Border Patrol. They and other group members initiated a campaign to observe and record Border Patrol agents working at a checkpoint on Arivaca Road, a public roadway between two southern Arizona towns. Using the threat of arrest, Defendants pushed Plaintiffs too far away for them to effectively observe or record the agents. Then Defendants set up a roped-off area called an "enforcement zone," excluding Plaintiffs from the area altogether.

The record fails to establish that, as a matter of law, Border Patrol has a constitutionally permissible basis to declare the disputed football-field-size section of Arivaca Road nonpublic and to bar Plaintiffs from entering any part of it. Defendants offer almost nothing beyond generic reasons, conceivably applicable to any law enforcement activity, for why their actions are justified. The District Court erred by accepting these blanket assertions without considering competing inferences. It compounded its error by denying Plaintiffs the opportunity to develop a balanced record through discovery and cross-examination.

Viewed in the light most favorable to Plaintiffs, the record below raises multiple triable issues of fact about the nature of the forum—public or nonpublic—and about the constitutionality of Defendants' actions in either type of forum.

ARGUMENT

This Court, applying *de novo* review, should reverse and remand the summary judgment order. *Posey v. Lake Pend Oreille School Dist. No. 84*, 546 F.3d 1121, 1126 (9th Cir. 2008). The Court should also grant Plaintiffs discovery.

The Court must evaluate the parties' dispute in the special context of First Amendment law. Plaintiffs' monitoring and protesting the checkpoint was political speech, for which First Amendment protection is "at its zenith." *Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 186–87 (1999). "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987).

In particular, Plaintiffs have the "First Amendment right to film matters of public interest," including government law enforcement officials working in public. *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *Glik v. Cunniffe*, 655 F.3d 78, 82–83 (1st Cir. 2011). As this Court recently confirmed, a "public street" is "a quintessential public forum," and "observing a government operation" is protected by the First Amendment. *Reed v. Lieurance*, 863 F.3d 1196, 1211 (9th Cir. 2017).

I. Defendants' Characterization of the Forum, Which the District Court Accepted, Ignores Substantial Conflicting Evidence in the Existing Record.

The opposition does no more than restate Defendants' characterization of the record below regarding the nature of the disputed forum, which was accepted by the District Court.

The first and most important inference in Defendants' favor accepted by the District Court is Defendants' characterization of a particular 300-foot section of Arivaca Road as a nonpublic "checkpoint."

Public rights of way such as Arivaca Road are archetypal public forums, for which no particularized inquiry into forum status is necessary because "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). Inquiry into forum status is fact-intensive, 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). A reasonable factfinder could have found the area in question is a public forum.

The record contains substantial evidence supporting an inference that all or part of the disputed area remains a traditional public forum. The roadway has scattered buildings and equipment on the south side, with the north side largely open:

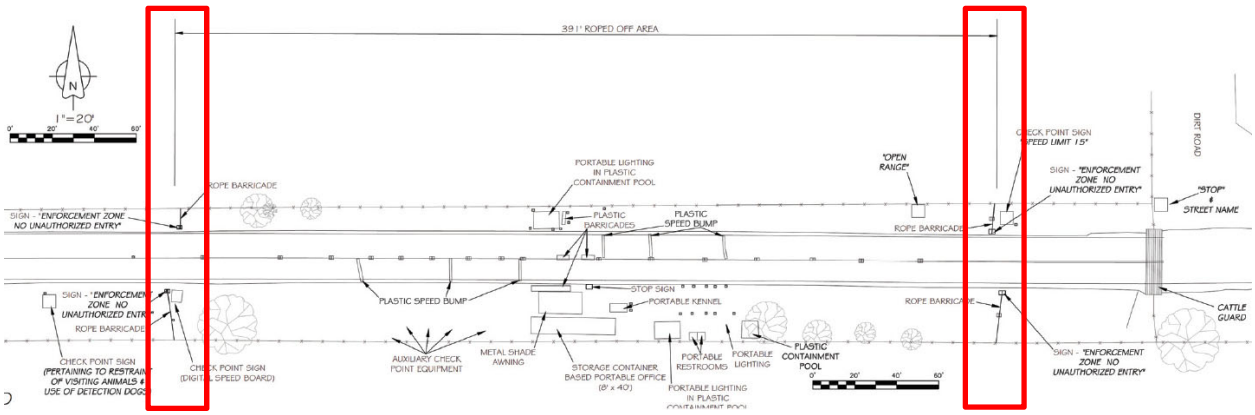

Figure 1 (ER202, Ex. 2). As to the empty areas on the northern roadside, Plaintiffs submitted declarations stating that those empty areas do not appear to be used for law enforcement purposes. ER051, 052, 064–65 ¶¶ 1, 3–4, 36–40. Defendants themselves note that vehicles are stopped only in limited primary and secondary inspection areas. Dkt. 30 (Opposition ("Opp.")) at 4.

More broadly, nothing but the rope barriers—added in response to Plaintiffs—visibly marks the boundary of a "checkpoint." Defendants and the District Court note other roadside signs and equipment. ER025–027; Opp. at 24–25. But none indicates a restriction on pedestrian access or is located at the rope barriers. ER024. The same is true for the road's other features—plastic pylons and speed bumps. ER080 ¶ 1; ER116 ¶ 8; ER150–185. Even Defendants' selectively produced and redacted "regulations" only refer to traffic, not pedestrian access. *Id.* No other checkpoint in the surrounding area has such an "enforcement zone." ER066-67 ¶ 50.

The fact that there are large vacant areas on the north side of Arivaca Road, inside the enforcement zone, permits an inference that the roadside adjacent to where law enforcement takes place remains public—even assuming other areas may be nonpublic. ER051 ¶ 1; ER202 Ex. 2; *supra* Figure 1; *see, e.g.*, *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.").

Further casting doubt on Defendants' claim that the entire enforcement zone is nonpublic, Defendants have allowed other members of the public inside the enforcement zone—including individuals who have expressed opposition to Plaintiffs' viewpoint—while excluding Plaintiffs. Defendants have let the media, a surveyor, and pro-Border-Patrol hecklers into the enforcement zone. ER198 ¶ 15; ER215 ¶¶ 26–30; ER068–070 ¶¶ 61–72. Border Patrol agents also told the surveyor that any barriers were meant to exclude protestors or others the agents believed "disruptive"—not the general public. ER068-69 ¶ 62. The record contains no evidence that Defendants have excluded from the roped-off area anyone other than Plaintiffs and their colleagues at People Helping People.

Policies that purportedly restrict speech are worthless if they lack definite standards and are not consistently enforced. *Hopper v. City of Pasco*, 241 F.3d 1067, 1075-76 (9th Cir. 2001). In response to facts suggesting Defendants enforce

their policy selectively, Defendants offer their own witness's declarations, attempting to explain those instances as violations of a general policy of allowing only "official" business. Opp. at 27–28. The District Court erred by not resolving those credibility determinations in Plaintiffs' favor. *See Frisby*, 487 U.S. at 481; *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092,1100–01 (9th Cir. 2003).

Defendants cite *Wright v. Incline Village General Improvement District* for their claim that the signs, pylons, and other features "clearly indicate to the public" that the enforcement zone is nonpublic. Opp. at 22–23 (citing 665 F.3d 1128, 1136 (9th Cir. 2011)). But the land at issue in *Wright* comprised several lakeside beaches in a district specially created by statute, subject to covenants limiting public access. *See* 665 F.3d at 1132–33. The "kiosks and gates" limiting access to the beaches simply confirmed what was always true—the beaches were never "public thoroughfares" open to unlimited expression as a traditional public forum. *Id.* at 1135–36. Arivaca Road has long been public and continues to be used as a venue for political speech, including election and event signs. ER070 ¶¶ 73–74.

More apposite than *Wright* is *ACLU v. Las Vegas*, which held that barriers, a canopy over a street, and a lightshow did not change the forum status of a public street with pedestrian access. 333 F.3d at 1102–03. For pedestrians, Arivaca Road's roadside functions as it always has, but for Border Patrol's ad hoc

"enforcement zone," which a reasonable factfinder could conclude is an unjustified response to Plaintiffs' protected speech.

Hodge v. Talkin is also inapposite. 799 F.3d 1145 (D.C. Cir. 2015). *Hodge* did not concern the government's ad hoc attempt to block part of a public street and exclude speakers from a traditional public forum. It concerned the plaza of the U.S. Supreme Court building: a terrace set off from a public sidewalk by a marble staircase leading to the plaza and then the Court's doors. *Id.* at 1150. That plaza's appearance and design showed it was integrated with the Supreme Court building and separated from the nearby sidewalks. *Id.* at 1158. By contrast, those sidewalks—like the roadside of Arivaca Road—remained a traditional public forum. *Id.* at 1149. Indeed, *Hodge* supports Plaintiffs' position, confirming through long-held Supreme Court precedent that the government cannot change a public forum's status through an *ipse dixit* restriction on expression, such as the erection of rope barriers. *Id.* at 1160.

Defendants also cite three cases to claim the Court need not probe the facts about Arivaca Road to decide its status. Opp. 23–25. Each case is distinguishable, involving areas clearly withdrawn from the public. In *Greer v. Spock*, a state statute ceded jurisdiction and control over public roads within military bases to the United States. 424 U.S. 828, 830 n.1 (1976). In *Hale v. Department of Energy*, a side road off of a highway was "removed from the public domain by various land

withdrawals and [was] reserved as an outdoor laboratory for nuclear weapons testing." 806 F.2d 910, 911, 915–16 (9th Cir. 1986). In *United States v. Griefen*, the government closed a public road through a national forest by obtaining a special closure order through a Forest Service regulation. 200 F.3d 1256, 1259, 1261 (9th Cir. 2000).

No such statutes, withdrawals, or orders exist here. Rather, Arivaca Road remains a standard thoroughfare—presumptively a public forum. The District Court erred by failing to make the distinction this Court required in *Hale*: to distinguish such thoroughfares from places that are geographically set off, like a "long driveway," or those areas formally withdrawn from public use. *Cf.* 806 F.2d at 916.

II. Assuming the Enforcement Zone Is Nonpublic, the District Court Ignored Disputes About the Existence of an Exclusion Policy, Its Reasonableness, and Its Viewpoint Neutrality.

Even assuming the enforcement zone is nonpublic, the District Court and Defendants ignore material fact disputes about (1) the existence of a policy restricting speech, (2) its reasonableness, assuming its existence, and (3) whether it is viewpoint-neutral. *Sammartano v. First Judicial Distr. Ct.*, 303 F.3d 959, 965 (9th Cir. 2002), *abrogated on other grounds by Winter v. NRDC, Inc.*, 555 U.S. 7 (2008).

The policy's existence. The record fails to establish as a matter of law that Defendants have a policy about whom to exclude from the enforcement zone. Defendants have never offered any document substantiating what they call their "policy to permit only authorized persons within the checkpoint for official purposes." Opp. at 9. It is unclear, for example, whether Defendants have a written policy document or a less formal policy.

Even assuming that some policy exists, a reasonable factfinder could find that the policy permits selective exclusion based on a speaker's viewpoint. Border Patrol agents stated as much when they told Plaintiffs' surveyor that any barriers were only in place to keep out people like protesters, not the general public. ER198 ¶ 15. Another example is Border Patrol agents telling Plaintiffs that two Border Patrol supporters could enter the enforcement zone and harass Plaintiffs and their colleagues because "[i]t's a free country." ER069 ¶¶ 63–67.

The policy's reasonableness. A reasonable factfinder could also decide that Defendants' exclusion of Plaintiffs from the enforcement zone is unreasonable. The District Court adopted Defendants' position that an alleged *generalized* interest in safety lets Defendants restrict the particular disputed area, absent *particularized* facts supporting that restriction. Opp. 16, 26–27. If this were sufficient justification, law enforcement officers could declare areas off-limits to protected speech without any factual showing of a need tied to those areas. But

that is contrary to the law: Defendants must establish that restricting Plaintiffs' speech "reasonably fulfills a legitimate need," and Defendants' "failure to select simple available alternatives suggests that the ban [they have] enacted is not reasonable." *Sammartano*, 303 F.3d at 966–67. Reasonableness must be assessed in light of the forum's purpose and all surrounding circumstances. *Hale*, 806 F.2d at 916–17.

Here, Defendants' generalized interest in "safety" in the roped-off area is based almost entirely on data about other checkpoints. ER028 (citing ER116–117 ¶¶ 10–11); ER114 ¶ 2. At this checkpoint, traffic is minimal, arrests are rare, and there is no indication in the record of any pursuit or other dangerous circumstance arising from checkpoint operations. ER209 ¶¶ 6–7, 9; ER213 ¶ 19. The one safety incident in the record relates to a drunk motorist—a concern for pedestrians along any roadway. *See* ER066. Defendants' claim that Plaintiffs cannot be allowed to stand directly behind armed Border Patrol officers, at most, might justify exclusion from very limited areas. *See* Opp. at 34. Nor do Defendants identify anything in the 2004 "traffic control plan" that restricts pedestrian activity. *See* Opp. at 4.

Defendants also contend that excluding Plaintiffs is necessary for "preserving the integrity" of law enforcement operations, and that allowing Plaintiffs within the roped-off area would help criminals elude detection. Opp. 19, 26. They offer no support for this concern, nor do they explain how the concern

would justify excluding Plaintiffs from the enforcement zone but allowing other members of the public, such as the media, to enter. ER216 ¶ 29.

Defendants' stated integrity and safety concerns do not show that their restrictions were reasonable as a matter of law because a reasonable factfinder could conclude on the existing record that the barriers—erected mere days after Plaintiffs' and their colleagues' first public demonstration at the site—were put in place specifically to exclude Plaintiffs and other opponents of the checkpoint. *See Multimedia Pub. Co. of S. Carolina, Inc. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 162 (4th Cir. 1993) (holding a restriction on speech in a nonpublic forum unconstitutional because "the governmental interests asserted as justification for the ban were *post hoc*, pretextual creations, which were not shown to have been significantly threatened by the conduct banned.").

Defendants also cannot justify the enforcement zone by asserting the supposed privacy interests of motorists. Opp. 18-19. Plaintiffs wish to openly record "officers performing their duties in public places and speaking at a volume audible to bystanders. Communications of this sort lack any reasonable expectation of privacy." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 605–06 (7th Cir. 2012) (citation and quotation marks omitted). Nor is there any "legitimate expectation of privacy shielding that portion of the interior of an automobile which

may be viewed from outside the vehicle." *Texas v. Brown*, 460 U.S. 730, 740 (1983) (citations omitted).

Defendants also fail to distinguish *Brown v. California Department of Transportation*, 321 F.3d 1217 (9th Cir. 2003). In *Brown*, this Court held unconstitutional Caltrans's policy of letting American flags be hung from overpasses, but banning all other objects for "safety reasons," because Caltrans offered no credible evidence showing that flags and other objects did not raise the same safety concerns. *Id.* at 1223. Defendants argue that their purported policy is unlike the bar from *Brown* because theirs distinguishes between "official" and "nonofficial" purposes. Opp. at 30. As an example, Defendants say the *Brown* court would have allowed banning all signs except official traffic signs. *Id.*

But nothing in the record supports finding as a matter of law that Defendants only let pedestrians into the enforcement zone for "official purposes." Rather, it shows pedestrians entered the enforcement zone for several purposes, none related to Defendants' "official" work. ER198 ¶ 15; ER215–216 ¶¶ 26–30; ER068–070 ¶¶ 61–72. And as a Border Patrol agent told Plaintiffs' surveyor, agents only exclude protesters and others they deemed disruptive. ER068 ¶ 62. If safety and integrity were Defendants' real concerns, then Defendants should have offered credible evidence showing that those allowed inside the enforcement zone did not raise the same concerns as Plaintiffs. *See Brown*, 321 F.3d at 1223. They did not.

The policy's viewpoint-neutrality. The District Court and Defendants ignore both disputed material facts and inferences that Defendants restricted speech on the basis of viewpoint. If speech was restricted because of the speaker's viewpoint, not the forum's limitations or a specific risk in the forum, the restriction is an unconstitutional viewpoint regulation. *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 972 (9th Cir 2008).[1]

Defendants created the enforcement zone in direct response to Plaintiffs' activities on Arivaca Road. ER066 ¶¶ 49–50. As noted, Defendants let Plaintiffs' surveyor inside the enforcement zone and told him barriers were only in place to exclude people like protestors. ER198 ¶ 15. That fact alone supports a reasonable inference that Defendants' exclusion of Plaintiffs was viewpoint-based. Other examples support a finding of viewpoint discrimination, as when Border Patrol has allowed into the enforcement zone the media, other pedestrians, and even Border Patrol supporters who criticized Plaintiffs' group. ER216 ¶ 29; ER069 ¶¶ 63–67.

These examples also rebut Defendants' claim that Plaintiffs raised only a "single alleged instance of individual officers misapplying the Border Patrol's policy." Opp. 28. Plaintiffs raised at least three examples, any one of which is

[1] Again, the District Court applied the wrong standard in its analysis: it applied content neutrality, not viewpoint neutrality. ER027–28. But Plaintiffs argued that Defendants' restrictions on their speech were motivated by Plaintiffs' viewpoint—not that those restrictions were content-neutral regulations that incidentally affected Plaintiffs but no one else. *Id.*

enough to rule for Plaintiffs, as this Court has held. In *Truth v. Kent School District*, this Court reversed summary judgment for a government defendant because the plaintiff—a student group that was denied recognition on the basis that it violated the district's nondiscrimination policy—alleged that a school recognized at least two other student groups who also violated the district's nondiscrimination policy. 542 F.3d 634, 650 (9th Cir. 2008), *overruled on other grounds by L.A. Cty. v. Humphries*, 562 U.S. 29 (2010). Similarly, in *Alpha Delta Chi-Delta Chapter v. Reed*, this Court reversed summary judgment in the government's favor when there was evidence that a public university made "some" exceptions to its non-discrimination policy but provided no evidence explaining why this was constitutional. 648 F.3d 790, 803 (9th Cir. 2011). This raised a triable issue of fact as to whether the university applied its policy selectively and violated the plaintiffs' First Amendment rights. *Id.* at 795.

Border Patrol's discretion in choosing whose presence is "official" also raises constitutional problems, which the District Court ignored—a reversible error. Defendants maintain, without evidence, that the surveyor, media, or random pedestrians were in the enforcement zone for "official purposes" but Plaintiffs were not. Opp. at 28. This irregularity highlights the danger of viewpoint discrimination, which 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). The mere potential for such abuse merits finding First Amendment violations. *E.g.*, *Kaahumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012).

Overall, this case resembles this Court's recently decided *Reed v. Lieurance*, 863 F.3d 1196 (9th Cir. 2017). In *Reed*, a usefully analogous public forum case, this Court reversed a lower court's decision that the government constitutionally excluded two animal rights activists from an area near where the government was herding buffalo. *See id.* at 1209–12. As in *Reed*, the District Court improperly credited evidence and found facts in the government's favor about safety risks when analyzing the restriction's reasonableness—including by ignoring Plaintiffs' evidence that no genuine safety or operational reasons merited exclusion. *Id.* at 1211–12. And as in *Reed*, the District Court improperly disregarded the fact that others were treated differently from Plaintiffs with regard to their ability to be in what the government said was a restricted area—which could support a finding that the government's justifications were pretextual. *Id.* at 1212. As in *Reed*, the Court should reverse the District Court. *See id.*

III. Even Under Traditional Public Forum Analysis, There Are Material Disputes of Fact About the Appropriateness of Purported Time-Place-Manner Restrictions.

The Court need not address Defendants' alternative arguments under the traditional public forum standard. Opp. 30–31. The District Court did not address

those arguments in the order on appeal, and this Court is "a court of review, not first view." *Haskell v. Harris*, 745 F.3d 1269, 1271 (9th Cir. 2014). Even so, material fact disputes about these issues preclude holding in the government's favor: (1) whether the government excluded Plaintiffs because of their speech's content or viewpoint, (2) what the government's interest is and whether any restrictions are narrowly tailored, and (3) whether Plaintiffs have ample alternatives for speech. *United States v. Grace*, 461 U.S. 171, 177 (1983). Defendants face an "extraordinarily heavy burden" to regulate Plaintiffs' core political speech in a traditional public forum. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1022 (9th Cir. 2009); *see also Reed*, 863 F.3d at 1209–13 (reversing judgment as a matter of law for government defendant in similar circumstances).

Content- or viewpoint-neutrality. The record supports a finding that Defendants excluded Plaintiffs from the enforcement zone because of their speech's content or viewpoint. *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 person is "prevented from speaking . . . while someone espousing another viewpoint was permitted to do so."). Defendants contend their restriction is applied without reference to

speech's content or viewpoint. Opp. at 32. But as explained in Sections I and II, Defendants established the enforcement zone in direct response to Plaintiffs' First Amendment activity—then excluded only Plaintiffs from the enforcement zone while allowing others to enter.

Government interests and narrow tailoring. The record also allows a reasonable trier of fact to find that Defendants' restrictions on Plaintiffs' speech are not narrowly tailored to advance a significant government interest. *Grace*, 461 U.S. at 177. As to the government's interest, Defendants' claim of generalized interest in safety, integrity, or privacy does not prove, as a matter of law, that the enforcement zone will advance those interests in "a direct and material way" at the Arivaca Checkpoint. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).

Defendants argue that excluding Plaintiffs from the entirety of the roped-off area furthers a "paramount interest in protecting the border" by allowing for the "uninterrupted operation of the checkpoint." Opp. at 15–19. But this general interest is at odds with the facts. As explained in Sections I and II, the record evidence about Arivaca Road does not map to Defendants' more generalized, sweeping concerns—instead it could lead a reasonable factfinder to conclude many empty areas in the enforcement zone are not tied to Defendants' law enforcement interests. Plaintiffs also submitted affirmative evidence that no monitor has observed any arrests or detentions at the checkpoint. ER065 ¶ 40. Defendants

admit that arrests are extremely rare and the main checkpoint purpose is "deterrence." *Id.* The District Court erred by not resolving these disputes in Plaintiffs' favor.

Defendants misstate Plaintiffs' interests in claiming they seek "[u]nrestricted pedestrian access to checkpoint operations" in a manner that would "distract agents from their law enforcement duties." Opp. at 16, 19. Rather, Plaintiffs have consistently asserted that they wish to monitor in a way that will not interfere with Border Patrol's operations. *E.g.*, ER214 ¶ 25. Plaintiffs have already submitted undisputed evidence that large sections of the roped-off area are free of agents and equipment. A reasonable finder of fact could conclude that Plaintiffs may exercise their First Amendment rights from within the disputed area with no effect on checkpoint operations, further demonstrating that the District Court erred.

Even if Defendants could tie their treatment of Plaintiffs to a specific government interest, they cannot show narrow tailoring. Given Plaintiffs' right to observe and record government officials at work, Defendants' actions burden "substantially more speech than is necessary." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,* 657 F.3d 936 949 (9th Cir. 2011). The record supports a reasonable inference that Plaintiffs can stand within the enforcement zone and monitor Border Patrol agents without interfering in their work.

Narrow tailoring does not require the least restrictive alternative. *Long Beach Area Peace Network*, 574 F.3d at 1025. But regulations are not narrowly tailored if there are "obvious alternatives that would achieve the same objectives with less restriction of speech." *Id.* A reasonable factfinder could evaluate the record and conclude that Plaintiffs could be closer to the Border Patrol agents at work without interfering. *E.g.*, *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227 (9th Cir. 1990) (holding 75-yard enforcement zone burdened too much speech because government had previously demonstrated ability to work safely without such a zone). This would lessen the restrictions on Plaintiffs' speech while achieving government objectives. The District Court erred by not making these inferences for Plaintiffs.

Defendants contend that assessing the enforcement zone's size is not a constitutional question for the court, so the Court should defer to Defendants' discretion in setting the enforcement zone's bounds. Opp. at 33–34 (citing *Burson v. Freeman*, 504 U.S. 191 (1992); *Menotti v. City of Seattle*, 409 F.3d 1113, 1137 (9th Cir. 2005)). Their cases do not support that claim.

Burson concerned the constitutionality of a ban on all types of political campaigning within 100 feet of Tennessee polling places. 504 U.S. at 194. The Supreme Court ruled this constitutional, based on the case's unique facts. The state could not present proof of narrow tailoring partly because the laws had been

in place for over a century, leaving no witnesses to testify about what happens without those laws. *Id.* at 208. Also, the law's targets—voter intimidation and election fraud—were hard to detect, making it hard for the government to gather evidence. *Id.* Last, the *Burson* court cited settled law that states have no empirical burden to prove the effects of many voting regulations. *Id.* at 208–09 (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)). In contrast, no such precedent exists here, and this Court has ruled on fairly specific boundaries where speech can be restricted. *E.g.*, *Bay Area Peace Navy*, 914 F.3d at 1227 (assessing appropriateness in terms of specific distances). Also, Defendants do not maintain that evidence is impossible to gather in this case, due to time or other factors.

Defendants also cite *Burson* to contend that changing the enforcement zone's bounds would be "a difference only in degree, not a less restrictive alternative in kind." Opp. at 33 (quoting *Burson v. Freeman*, 504 U.S. 191, 209-210 (1992)). But the speech interests here are different. Unlike what *Burson* held to be a fairly minimal restriction on speech—speakers could go a few feet away from a polling place and still get their message out—the enforcement zone impedes Plaintiffs' ability to effectively observe agents at work. ER213 ¶ 20. This distinct First Amendment interest—observation versus dissemination—suggests that changing the boundary here would be a less restrictive alternative in kind,

casting doubt on whether the restriction is narrowly tailored. *See Burson*, 504 U.S. at 210. The District Court should have resolved that doubt in Plaintiffs' favor.

As for *Menotti*, Defendants misstate the case in suggesting that the Court would be second-guessing the government by evaluating the enforcement zone's size. Opp. at 33. *Menotti* involved Seattle's decision to restrict access to its downtown in response to large, violent protests throughout the area. 409 F.3d at 1120–28. Rejecting the argument that the lower court should have taken the most granular possible approach as a matter of law, *Menotti* held that a boundary's appropriateness must be based on a case's specific circumstances. *See id.* at 1130–31. Under that case's facts—random violence and a breakdown of social order across many blocks of a city—creating a broad restricted zone was appropriate. *Id.*at 1137. *Menotti* did not hold that courts can never investigate tailoring on a fairly precise basis: it said tailoring depends on the facts. The facts here do not warrant a broad restricted zone like the one in *Menotti*—the Arivaca Road checkpoint area is discrete, not diffuse like a city's downtown, and there is no violence or social breakdown here.

Bay Area Peace Navy remains instructive. The decision states that although the government has limited leeway in picking boundaries of speech-restrictive zones, it must submit evidence that its restriction burdens no more speech than is necessary to serve the government's interest—including evidence about the

appropriateness of a boundary's size. 914 F.3d at 1227–28. This Court ruled the government had not submitted sufficient evidence to show that creating a general 75-yard "security zone" restricted no more speech than necessary to protect people on their pier from a speculative attack, or to promote marine safety generally—especially when there was no evidence safety was a concern before the government created the security zone. *Id.*

The same lack of evidence to support Defendants' generalized and speculative concerns exists here, meriting reversal. And as in *Peace Navy*, Defendants fail to explain why they suddenly restricted speech when their concerns presumably existed for years prior. *See* 914 F.3d at 1227–78. Yet Defendants cite *United States v. Griefen* to claim that Plaintiffs pose "an actual threat," meriting a broad enforcement zone. Opp. at 35 (citing 200 F.3d at 1258). The case is not comparable: the *Griefen* protestors damaged property and blocked a road, while Plaintiffs had some peaceful gatherings and monitored Border Patrol agents at work. ER065-66 ¶¶ 41, 43–44; *Griefen*, 200 F.3d at 1258.

Ample alternative channels. Assuming content-neutrality and narrow tailoring, the record still presents material disputes of fact concerning ample alternatives for speech. From outside the enforcement zone, Plaintiffs have not been able to observe agents' interactions with motorists. ER067. Contrary to Defendants' position, a reasonable factfinder could rule that this is not an adequate

alternative to collecting data from somewhere inside the enforcement zone. Opp. at 40; *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").

Defendants are also wrong that Plaintiffs have no right to directly monitor activities at the checkpoint because such information is "within government control." Opp. 37. Unlike Defendants' case *Houchins v. KQED, Inc.*, where the government "controll[ed] all access to the Alameda County Jail," the Arivaca Checkpoint has no walls, gates, or security guards, and is located on a public road. 438 U.S. 1, 3 (1978). Also, as explained in Section I, a fundamental factual dispute in this case is what area is at issue for First Amendment analysis—and whether Defendants can unilaterally restrict speech on a public roadway by calling part of it an enforcement zone. A reasonable factfinder could conclude that the Arivaca Road roadside is not generally within government control, as far as speech or pedestrian traffic is concerned. These disputes preclude summary judgment.

Defendants also argue that filming government activities must yield to a "preexisting statute, ordinance, regulation, or other published restriction with a legitimate government purpose." Opp. 38 (quoting *Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014)). But Plaintiffs were never expelled from the enforcement zone per any published restriction. ER117-19 ¶ 12-14; ER067 ¶ 51. The Border Patrol

Checkpoint Operations and Guidelines produced by Defendants are from an internal DHS memorandum, not a public notice. ER141–42. And they include no specific provisions applicable to Plaintiffs. *Id.* So this case is distinguishable from Defendants' case *Colten v. Kentucky*, 407 U.S. 104, 107, 109 (1972), in which a plaintiff was arrested for violating a disorderly conduct statute and was not engaged in constitutionally protected speech.

Also, even if there were some applicable published restriction, Defendants have not produced it and Plaintiffs were denied the opportunity to investigate it or its purpose. In any event, any restriction on speech must still comply with the First Amendment. And the record presents numerous disputes of fact going to the question whether the restrictions here violate the First Amendment.

Unlike private parole hearings or grand jury proceedings, which Defendants contend are comparable to this situation, Arivaca Road is a public place where concerns about public scrutiny in sensitive contexts do not apply. *See* Opp. at 19, 39 (citing *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213, 1216 (9th Cir. 1989) (discussing public's qualified interest in some non-public proceedings)). The Court in *Times Mirror* was concerned that public scrutiny of search warrants and supporting affidavits during a pre-indictment investigation, which by definition is not public, would compromise the "integrity and independence" of the "criminal fact-finding process." *Id.* That case has nothing to do with law

enforcement operations conducted in public. When law enforcement operates in public by conducting traffic stops, at checkpoints or otherwise, there is no confidential "criminal investigation" that "requires secrecy." *Id.* at 1214. By definition, public law enforcement operations are open to public observation and therefore subject to the First Amendment right to record those operations, as recognized by this Court. *E.g.*, *Reed*, 863 F.3d at 1211 (citing *Fordyce*, 55 F.3d at 439).

Defendants' stated reasons for restricting Plaintiffs' speech are inadequate in light of the "particular significance" courts ascribe to monitoring of government conduct. *See Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *Fields v. City of Phil.*, 862 F.3d 353, 359 (3rd Cir. 2017) ("Access to information regarding public police activity is particularly important because it leads to citizen discourse on public issues, 'the highest rung of the hierarchy of First Amendment values, and is entitled to special protection'"). Defendants cannot carry their burden under public forum analysis on this record.

IV. The District Court Abused its Discretion by Denying Plaintiffs' Request for Discovery.

This Court has recognized that "summary judgment in the face of requests for additional discovery is appropriate only where such discovery would be 'fruitless' with respect to the proof of a viable claim." *Jones v. Blanas*, 393 F.3d 918, 930 (9th Cir. 2004). Far from fruitless, the discovery Plaintiffs seek bears on

fact issues that are critical to Plaintiffs' case. Defendants and the District Court have misstated Plaintiffs' interests and the scope of Plaintiffs' requests, for example:

- Plaintiffs have not been able to take discovery about the current and historical uses of property in the Checkpoint—Defendants have selectively produced some evidence. *Contra* Opp. at 42.
- The record suggests pedestrians are not only allowed inside the enforcement zone for "official purposes," as several have apparently gone inside without having government business there—but Plaintiffs have not been able to investigate this. *Contra id.*
- The record lacks evidence about safety concerns about the Arivaca Road checkpoint in particular. *Contra id.*
- Far from being irrelevant to Plaintiffs' claim, purported inaccuracies in Plaintiffs' monitoring data is a core part of Plaintiffs' claim. If their data has become less accurate since being forced away from the Border Patrol agents at work, that evidence would be relevant to Plaintiffs' claimed harm. *Contra id.*

Such requested facts are sufficiently specific, given this early stage of litigation, and are likely known by Defendants or exist in Defendants' records. *See Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck*

Reservation, 323 F.3d 767, 774 (9th Cir. 2003). Also, Plaintiffs' independent investigation of the checkpoint does not replace formal discovery—rather, this Court has made clear that the point of discovery is to reveal what evidence an opposing party has, which Plaintiffs have been unable to investigate. *Contra* Opp. 42–43; *Computer Task Grp., Inc. v. Brotby*, 364 F.3d 1112, 1117 (9th Cir. 2004). Because "denial [of a Rule 56(d) request] is disfavored when a plaintiff specifically identifies relevant information and points to 'some basis' for its existence," the Court should reverse the District Court's ruling. *Pride v. Correa*, 533 F. App'x 745, 748 (9th Cir. 2013).

CONCLUSION

The District Court and Defendants ignore the disputed facts and the heavy burden on restricting Plaintiffs' speech. The Court should reverse the District Court's order granting summary judgment and denying Plaintiffs' Rule 56(d) motion. Plaintiffs should have their case heard.

August 23, 2017

Respectfully submitted,

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