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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Leesa Jacobson, *et al.*,

Plaintiffs,

v.

U.S. Department of Homeland Security, *et al.*,

Defendants.

No. CV-14-02485-TUC-BGM

PLAINTIFFS' MOTION FOR SANCTIONS

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NOTICE OF MOTION AND MOTION FOR SANCTIONS

Under Federal Rule of Civil Procedure 37 and the Court's inherent powers, Plaintiffs Leesa Jacobson and Peter Ragan respectfully seek an order of sanctions against Defendants based on (1) Defendants' destruction of key documents and (2) Defendants' submission to the Court of a declaration, on which the Court relied on multiple occasions, which lacked foundation for critical statements.

This motion is supported by the following Memorandum of Points and Authorities and all attached materials; all papers, pleadings, records, and files in this case as cited in the Memorandum; all matters of which judicial notice may be taken; and any other argument or evidence that may be presented to this Court at a hearing on this motion.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SANCTIONS

INTRODUCTION

Throughout this case—now in its sixth year before the Court—former Border Patrol Agent in Charge Roger San Martin has served as Defendants' principal declarant and central fact witness. Yet during San Martin's deposition in February 2020, Plaintiffs learned that San Martin (1) routinely destroyed relevant documents during the pendency of this litigation, (2) destroyed his remaining electronic and hard copy records when he retired from Border Patrol nearly five years ago (the same month Defendants filed a premature dispositive motion), and (3) lacked any foundation for key assertions included in his declaration, which were central both to Defendants' opposition to Plaintiffs' motion for a preliminary injunction (Dkt. 38) and to Defendants' dispositive motion (Dkt. 61). These three actions are interconnected, and each reinforces the others' egregiousness: San Martin admitted at his deposition that although he may have reviewed notes of conversations or documents prepared for litigation purposes in making certain statements in his declaration, he subsequently destroyed all these documents, rendering it impossible for Plaintiffs to investigate or challenge those statements.

Further, at his deposition, San Martin claimed he had never been subject to a litigation hold and admitted that he had in fact not taken any steps to retain his documents—despite the

fact that he was a named Defendant in this matter and had been served with process in November 2014 (Dkt. 22). Defendants also failed to ensure that San Martin collected and preserved relevant records in his possession before he retired. Instead, San Martin was apparently allowed to provide certain documents to support Defendants' case—and destroy all of his remaining records.

Defendants relied almost exclusively on San Martin's documents and testimony in successfully opposing Plaintiffs' motion for a preliminary injunction (Dkt. 54) and in prevailing at summary judgment (Dkt. 93). Indeed, San Martin was the *sole* witness on several central issues for which Defendants bear the burden in this First Amendment litigation: (1) the forum status of the checkpoint on Arivaca Road; (2) whether Defendants' exclusion of Plaintiffs from key areas near that checkpoint is content- or viewpoint-neutral; and (3) whether Defendants' restrictions on Plaintiffs' access to those key areas are reasonable. San Martin has also served as Defendants' chief witness regarding the alleged level of law enforcement activity at the Arivaca Checkpoint. Now—nearly two years after the Ninth Circuit's reversal of summary judgment and remand for discovery, and after multiple (and ongoing) discovery disputes—it is clear that Defendants' litigation misconduct irrevocably impedes Plaintiffs' right, and this Court's duty, to interrogate Defendants' purported factual bases for their actions against Plaintiffs.

Plaintiffs hereby seek sanctions for Defendants' egregious misconduct, *i.e.*, (1) Defendants' failure to preserve vital documents relevant to this litigation, and (2) their submission of a sworn declaration that violates the requirements of the Federal Rules, a violation exacerbated by San Martin's destruction of documents purportedly referenced or relied upon in preparing that declaration. *See* Fed. R. Evid. 602 (personal knowledge required); Fed. R. Civ. P. 56(c)(4) (same).

Defendants' misconduct has delayed and disrupted this case significantly and gravely prejudiced Plaintiffs. Dispositive sanctions in Plaintiffs' favor are warranted, as are monetary sanctions, to deter further discovery abuse by the government and provide recompense for the years of unnecessary litigation resulting from Defendants' misconduct.

BACKGROUND

I. San Martin has been Defendants' main fact witness concerning the Arivaca Road checkpoint since the inception of this case.

Plaintiffs commenced this action in November 2014, alleging that Defendants violated Plaintiffs' First Amendment rights by preventing them from observing and recording government activity at an internal Border Patrol checkpoint on Arivaca Road. Dkt. 1.

In opposing Plaintiffs' motion for a preliminary injunction (Dkt. 29), Defendants submitted a declaration from the Border Patrol's Tucson Station Patrol Agent in Charge, Roger San Martin (Dkt. 38-4, the "RSM Decl."). San Martin claimed that his declaration was "based on personal knowledge and information provided to [him] in the course of [his] official duties." RSM Decl.¶ 4. San Martin affirmed that he had been the "Patrol Agent in Charge of the U.S. Border Patrol's Tucson Station" since 2007, *id.* ¶ 1, and that the Arivaca Road checkpoint was within his purview. *Id.* ¶¶ 3, 6. He explained Defendants' views on why the Arivaca Road checkpoint exists, how it operates, and why the U.S. Border Patrol opposed the relief Plaintiffs sought. *Id.* ¶¶ 6–24.

Defendants' opposition relied substantially on San Martin's statements, including assertions as to (1) why the Arivaca Road checkpoint is allegedly a non-public forum, (2) why Defendants' restrictions on checkpoint access are purportedly viewpoint-neutral, (3) why Defendants' restrictions are allegedly narrowly tailored, and (4) how Defendants' restrictions purportedly leave open ample alternatives for Plaintiffs' speech activities. *See* Dkt. 38 at 5–6, 8–9, 14, 17, 20–22. Indeed, San Martin's declaration was often Defendants' *sole* basis for claiming that Defendants' exclusion of Plaintiffs from the disputed area comported with the U.S. Constitution. *See id.* In declining to issue a preliminary injunction, the Court cited extensively to San Martin's declaration. Dkt. 54.

Just over a month after the preliminary injunction order, Defendants filed a motion to dismiss or for summary judgment, again relying on San Martin's declaration. *See* Dkt. 59; Dkt. 61-2 (Defs.' Statement of Facts, citing San Martin's declaration throughout); Dkt. 61 at 17–34

(relying mainly on San Martin's declaration to contend that Plaintiffs' claims lacked merit). Around that same time—in October 2015—San Martin retired from the Border Patrol.

The Court granted Defendants' motion, again relying substantially on San Martin's declaration. Dkt. 93 at 2–14. The Ninth Circuit reversed and remanded for discovery, underscoring key factual disputes about (1) whether the area at issue is a public forum, and (2) whether Defendants—who bear the burden of proof on key elements in this First Amendment action—could satisfy the legal requirements for excluding Plaintiffs from that area. Dkt. 102-1 at 13–14. Although Defendants resisted full discovery on remand, *see* Dkt. 110, this Court ultimately issued an order declining to limit the scope of discovery and affirming that discovery would be commensurate with "the Federal Rules of Civil Procedure, the claims alleged in Plaintiffs' Complaint, and the affirmative defenses contained in Defendants' Answer." Dkt. 115.

In May 2019, Plaintiffs requested San Martin's current contact information for purposes of serving a deposition subpoena. Taub Decl. Ex. 1 (E-mail from E. Forrest to E. Beckenhauer (May 7, 2019, 15:17 PT)). Defendants responded that "CBP believes that Mr. San Martin is currently living in Africa but does not have contact information for him." *Id.* at Ex. 2(a) (E-mail from E. Beckenhauer to E. Forrest (May 15, 2019, 19:48 PT)); *see also id.* at Ex. 2(b) (E-mail from E. Beckenhauer to E. Forrest (May 20, 2019, 15:28 PT)) (stating CBP had no contact information for San Martin). Plaintiffs then hired a process server and investigator, who learned by visiting to San Martin's home in Arizona that—contrary to Defendants' representations—San Martin continued to reside in this state (with occasional travel abroad). Taub Decl. ¶ 4. Plaintiffs successfully served San Martin with a deposition subpoena in September 2019. Taub Decl. ¶ 5.

Plaintiffs then spent months trying to ensure that San Martin and Defendants would timely produce the documents subpoenaed in advance of San Martin's deposition. On October 31, 2019, Plaintiffs sent an initial request for confirmation "that Defendants have produced all of Mr. San Martin's custodial documents and other documents that relate to Mr. San Martin." Taub Decl. Ex. 4 (E-mail from N. Jaganathan to R. Patton (Oct. 31, 2019, 16:29 PT)). Thereafter, Plaintiffs were forced to reiterate this request multiple times over the ensuing weeks, during

which defense counsel stated that they were having difficulty locating certain files from San Martin's personal folder, but that they would continue searching. Taub Decl. Ex. 5 and ¶ [CITE]. After Defendants finally promised to produce all relevant documents by January 31, Taub Decl. Ex. 5(g), the parties set San Martin's deposition for February 20, 2020.

Nine days before the deposition, defense counsel told Plaintiffs—for the first time—that "Mr. San Martin's personal drive on CBP's computer system was unfortunately destroyed after his retirement." Taub Decl. Ex. 6.[1] Defense counsel stated:

> [W]e have been unable to confirm whether any responsive information on that drive was otherwise captured and produced in this case. We are still investigating to determine why the drive was destroyed and what might have been on the drive. When our investigation is complete, we will send a comprehensive letter explaining what happened.[2]

Id. Notably, even then, defense counsel did not admit the truth: that San Martin *himself* had intentionally and affirmatively destroyed his files. When Plaintiffs finally deposed San Martin, the full extent of Defendants' litigation misconduct came to light. Taub Decl. Ex. 7 ("Dep. Tr.") at 23:2–5.

II. San Martin routinely destroyed relevant documents during this litigation, claimed to have never received a litigation hold, and destroyed substantially all of his remaining files nearly a year after this litigation commenced.

Despite San Martin's central involvement in the facts underlying this litigation, San Martin testified in his deposition that he had never been subject to a litigation hold and admitted that he had not taken any steps to retain or preserve his documents: "Q: At some point while you were still working as a Border Patrol agent, were your documents subject to a litigation hold? A: No. Q: So you've never seen a litigation hold notice? A: Not personally." Dep. Tr. 22:20–25. San Martin also testified that it was his typical practice to destroy paper notes almost

[1] Previously, during a December 2019 teleconference, defense counsel had stated that San Martin's "personal file" "no longer exists," but represented that an investigation was ongoing as to whether copies of documents that had been saved in that file were nonetheless available. Taub Decl. ¶ 8.

[2] To date, defense counsel has not provided the "comprehensive letter" promised more than four months ago.

immediately after taking them, and that he continued this practice while employed with the Border Patrol and during the pendency of this lawsuit. *Id.* at 128:20–129:4.

When San Martin retired, Defendants failed to ensure he had preserved or produced all documents in his possession related to this case: "Q: When you retired, did you sign anything verifying that your documents were preserved or that you had turned over— A: No. Q: Okay. Did you verify that you had turned over all the documents you might have related to this case? A: No." *Id.* at 24:1–16. To the contrary, San Martin ***erased*** all of his electronic files and shredded "most of" his remaining hard-copy notes when he retired. *Id.* 26:12–16; 27:24–28:2. When asked if he knew what happened to his personal computer drive upon his retirement, San Martin said, "I believe they clear it out once somebody retires. . . . Pretty much all the information is taken out of—zapped out. I don't know how to exactly word it." *Id.* 24:1–16. He clarified that all the documents would have been deleted or erased. *Id.* 24:14–22.

San Martin then admitted that he was, in fact, the person who deleted all of his electronic files: "Q: So—well, did you delete everything on your personal drive? A: To the best of my ability, yes. I cleared out my computer." *Id.* at 27:18–28:2.

Although San Martin initially claimed to have deleted only personal documents unrelated to the case, he admitted after being pressed that he deleted official documents, including "policies or notes on some meetings that I had with the chief . . . and items like that." *Id.* at 25:6–26:3. San Martin explained "personal documents" included notes from "meetings that I may have with the supervisors, emails, a lot of emails, and particular [*sic*] having to do with the operation of the [Tucson Border Patrol S]tation." *Id.* He also included among these "personal documents" "other documents having to do with operations plans." *Id.* at 21:13–16.

Most significantly, San Martin also admitted to deleting documents regarding the Arivaca Road checkpoint, including emails and photographs related to People Helping People ("PHP"), the organization with which Plaintiffs engaged in the monitoring activity that is at the heart of this case: "Q: But did you have pictures… of events at the checkpoint emailed to you? A: Yes. Q: And you saved those emails in your personal drive? A: Correct. Q: And did you save them

anywhere else? A: Not that I'm aware of, no. Q: And did you delete those emails when you retired? A: Yes." *Id.* at 146:7–17.

San Martin confirmed that he also deleted documents about his meetings with his supervisor, *id.* at 25:6–26:3, and confessed to deleting key reports prepared for his supervisor, including reports that detailed Border Patrol enforcement activities at or near the Arivaca Road checkpoint: "Q: How did you send these yearly after action reports to [your supervisor] Tim York? A: Through email. Q: Did you keep a copy yourself? A: Not after I retired. Q: Were these reports on your personal drive before you retired? A: In the computer, yes, but it was in a filed drive. Q: Okay. And did you delete that file when you retired? A: Yes." *Id.* at 185:17–186:2.[3]

San Martin further confessed to disposing of emails or notes about PHP monitors purportedly attempting to enter a roped-off area at the Arivaca Road checkpoint: "Q: And did you receive email—those emails or notes stating in writing that monitors attempted to… cross the rope area? A: Yes. Q: And where did you keep those emails or notes? A: In my computer drive. Q: And were those destroyed when you retired? A: Yes." *Id.* at 200:9–17.

As to his hard copy documents, San Martin admitted that he shredded and destroyed documents that may have concerned PHP. *Id.* at 26:14–16, 27:4–6. Among hard copy documents that San Martin destroyed were notes he took about his conversation with another Border Patrol agent about PHP and public monitoring activities at the Arivaca Checkpoint:

> Q: Did you take notes of the conversation?
> A: Yes.
> Q: Were those some of the documents that were destroyed when you retired?
> A: They were on a pad like that, just notes, my notes, probably got rid of them there. So they were notes so I could complete my report.
> Q: And did you shred the notes when you retired?

[3] According to San Martin, "after action reports" were key compilations of law enforcement activities and issues related to checkpoint operations, shared with his supervisor and the Tucson Sector Chief. Depo Tr. 184:8–13, 23–25; 185:6–10. To date, Defendants have not produced these documents to Plaintiffs.

> A: I probably shredded them that day after I used it, after I wrote the report.

Id. at 128:20–129:4.[4]

III. San Martin and defense counsel misrepresented San Martin's personal knowledge of key facts in his declaration.

In his declaration, San Martin attested, under penalty of perjury, to certain facts. During his deposition, however, San Martin admitted that he did not have personal knowledge of those facts, and stated further that he had not reviewed any official records establishing those facts. His declaration thus violated the requirements of Federal Rule of Civil Procedure 56(c)(4) and Federal Rule of Evidence 602.

For example, San Martin declared there had been at least twenty-eight significant safety incidents at the three checkpoints within Tucson Station in the five preceding years. RSM Decl. ¶ 10. San Martin also declared that nine of those twenty-eight incidents involved either a motorist's failure to yield at the checkpoint or a "flight from secondary." *Id.* Additionally, San Martin recounted safety hazards allegedly created at Border Patrol checkpoints generally when motorists failed to yield or drove carelessly, *id.* ¶ 11, and offered his "view" that permitting Plaintiffs to exercise their First Amendment rights near the Arivaca Checkpoint would "endanger" agents, motorists, and the public. *Id.* ¶ 24.

When Plaintiffs raised hearsay objections to San Martin's declaration, counsel for Defendants represented that San Martin had direct knowledge of the facts in his declaration, claiming that San Martin's statements were "based on personal knowledge and information provided to him in the course of his official duties." Dkt. 78 at 18 n.10.

But when San Martin was asked at deposition how he had determined there had been twenty-eight "significant" safety incidents at Tucson Station checkpoints, he testified that he had not personally reviewed ***any*** of the corresponding "significant incident reports" documenting those alleged incidents and had not personally observed any of the incidents; he only testified as

[4] Disturbingly, San Martin may not have been unique among Border Patrol agents in improperly destroying his records and other materials relevant to pending litigation. As he testified at his deposition, "[A] lot of agents when they retire get rid of everything." Dep. Tr. 26:19–20.

to personal knowledge that vehicles occasionally do not slow adequately while passing through the Arivaca Checkpoint. Dep. Tr. 159:24–160:10. Critically, San Martin could not say how many (***if any***) of the twenty-eight alleged "significant" safety incidents even occurred at the Arivaca Checkpoint—the only location at issue in this litigation. *Id.* at 167:20–23. He testified that he could not remember the Border Patrol agent who had reviewed the reports "for" him, *id.* at 162:17–163:7, and that he had not preserved any notes from his conversation with that agent. *Id.* at 167:15–168:1.

San Martin also testified that he could not remember any of the alleged incidents involving motorists' failure to yield at the Arivaca Checkpoint. He admitted that he had ***never*** witnessed ***any*** of these alleged events because he did not work at the Arivaca Checkpoint. *Id.* at 173:24–174:20. San Martin stated that when he visited the Arivaca Checkpoint, he would typically stay for only ten or fifteen minutes. *Id.* at 174:11–18. He further admitted that some of the statements about the Arivaca Checkpoint in his declaration were based on "word of mouth." *Id.* at 176:8–177:7. San Martin claimed that he had been speaking in "general terms" in his declaration. *Id.* at 170:2–12. No such caveat appears in San Martin's sworn declaration, and this Court, in declining to issue a preliminary injunction, expressly relied on Paragraphs 10 and 11 of the San Martin declaration to conclude that Defendants' purported "concern for agent and public safety is not speculative." Dkt. 54 at 18.

LEGAL STANDARD

The Court has inherent power to levy sanctions in response to abusive litigation practices, including misrepresentations and spoliation of evidence. *E.g.*, *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006).

A party seeking sanctions for spoliation of evidence under the Court's inherent powers has the burden of establishing the following elements by a preponderance of the evidence: "(1) the party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a 'culpable state of mind;' and (3) the evidence that was destroyed or altered was 'relevant' to the claims or defenses of the

party that sought the discovery of the spoliated evidence." *Surowiec v. Capital Title Agency, Inc.*, 790 F. Supp. 2d 997, 1005 (D. Ariz. 2011).

Dispositive sanctions are appropriate if a discovery violation is due to "willfulness, bad faith, or fault." *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002).[5]

ARGUMENT

I. Defendants willfully despoiled evidence in the custody of their key fact witness.

A. San Martin destroyed documents in his custody that Defendants had an absolute duty to preserve.

Defendants had an absolute duty to preserve San Martin's documents.[6] The "duty to preserve arises when a party knows or should know that certain evidence is relevant to pending or future litigation." *Surowiec*, 790 F. Supp. 2d at 1005.

Defendants knew as early as November 2014—when San Martin was served—that his documents would be relevant to this litigation. Dkts. 6-9 & 22. They certainly knew by January 2015, when they lodged San Martin's declaration and supporting evidence opposing Plaintiffs' motion for a preliminary injunction (Dkts. 34-4 – 34-6). The continuing relevance of San Martin's documents was clear when he retired less than a year later, in October 2015. Dep. Tr. 23:2–5. At nearly the same time, Defendants submitted their dispositive motion, again relying on San Martin's testimony and evidence. Dkt. 59-2. Defendants cannot genuinely dispute that

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[5] Further, when a litigant "fails to obey an order to provide or permit discovery," Rule 37 permits a district court to order that "designated facts be taken as established for purposes of the action" *and* to "render[] a default judgment against the disobedient party[.]" Fed. R. Civ. P. 37(b)(2)(A)(i) & (vi), 37(c)(1); *see also, e.g.*, *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006).

Under Ninth Circuit law, the standards for imposing terminating sanctions under Rule 37 and under a court's inherent powers are substantially the same. "We also note that dismissal sanctions under Rule 37 are 'subject to much the same considerations' as those under a court's inherent powers and therefore use both types of cases interchangeably." *U.S. for Use & Ben. of Wiltec Guam, Inc. v. Kahaluu Const. Co.*, 857 F.2d 600, 603 n.5 (9th Cir. 1988) (quoting *Halaco Engineering Co. v. Costle*, 843 F.2d 376, 379 (9th Cir. 1988)).

[6] As noted, San Martin was a named defendant in this lawsuit served with process on December 18, 2014. Dkt. 22. At all relevant times—*i.e.*, when San Martin destroyed his documents and prepared his declaration in support of Defendants' dispositive motion in late autumn 2015—he remained in the employ of the Border Patrol and a defendant in this matter.

they had a duty to preserve San Martin's documents relevant to this case—including emails, notes, and photos concerning Plaintiffs, PHP, and San Martin's work pertaining to the Arivaca Road checkpoint—as soon as Defendants were served in November 2014, and certainly by the time San Martin retired and destroyed his remaining records in October 2015.

B. Defendants despoiled San Martin's documents "willfully," and with a "culpable state of mind."

San Martin's destruction of documents was done with a "culpable state of mind" as required for sanctions under the Court's inherent powers.[7] "A party's destruction of evidence qualifies as willful spoliation if the party has '*some notice* that the documents were potentially relevant to the litigation before they were destroyed.'" *Leon*, 464 F.3d at 958 (quoting *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir. 2002)) (emphasis added, internal quotation marks and citation omitted). When a party is on notice of a duty to preserve evidence and fails to even check whether relevant witnesses have preserved evidence, such facts establish the requisite culpable state of mind. *Apple Inc. v. Samsung Elecs. Co.*, 881 F. Supp. 2d 1132, 1147 (N.D. Cal. 2012) ("conscious disregard" of preservation duties sufficient to establish willful spoliation).

There is no reasonable dispute that San Martin and counsel for Defendants had notice that San Martin's documents were "potentially relevant to the litigation before they were destroyed," as the documents in question were destroyed *after* the lawsuit had commenced, and *after* San Martin was put forward as a key witness. Defense counsel failed to check or confirm that San Martin was preserving evidence; San Martin testified that he had not seen or been placed under a litigation hold; and neither he nor defense counsel made any attempt to preserve his documents when he retired (an event that coincided with active motion practice in this case). Dep. Tr. 22:20–25, 24:1–16; *cf. Leon*, 464 F.3d at 959 (holding that even unintentional deletion of records, after party was on notice of potential litigation, was willful).

[7] It was also "willful" within the meaning required for dispositive sanctions under Rule 37. As noted *supra*, note 5, the standards for willful and culpable destruction are substantially identical for purposes of issuing terminating sanctions.

But San Martin's and counsel for Defendants' conduct in this case far exceeds the misconduct threshold required for dispositive sanctions under Ninth Circuit law.

First, Defendants themselves *selected* San Martin as their central fact witness in opposing Plaintiffs' preliminary injunction motion and in moving for summary judgment. The documents destroyed bear directly on the credibility of San Martin's testimony. As San Martin admitted, he destroyed notes and reports about the events at issue in this lawsuit—events about which he has little personal knowledge. It is axiomatic that Plaintiffs were entitled to examine San Martin using those materials, or to offer those materials to rebut San Martin's statements, as modern civil discovery "is less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *U.S. v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (internal citations omitted).[8]

Second, wholly apart from any duty owed to this Court, applicable ethics rules and governmental regulations required Defendants, including San Martin, to preserve San Martin's documents. The Federal Records Act and associated regulations obligated San Martin to preserve his records as documentation of the "policies, decisions, procedures, [and] operations" of CBP (including the U.S. Border Patrol).[9] 44 U.S.C. §§ 3301–02; *see generally* Office of the Chief Records Officer, National Archives and Records Administration, DHS U.S. Customs and Border Protection Records Management Program, Records Management Inspection Report (July 16, 2018) [hereinafter "National Archives Report"], https://bit.ly/3eJJbEv. As to San Martin's counsel at the Department of Justice, applicable Arizona and Washington, D.C., ethics rules

[8] While San Martin testified that he gave defense counsel at least some of his records so they could prepare his declaration and submit evidence to the Court, this admission only makes the problem worse: because San Martin destroyed all his other records, all that remains are those materials Defendants cherry-picked as favorable to their case. Dep. Tr. 24:1–16; 27:18–28:2. This is severely prejudicial to Plaintiffs.

[9] The Federal Records Act tasks the National Archives with promulgating regulations regarding agency record retention and disposal. 44 U.S.C. § 3302. Records are defined broadly to include "all recorded information, regardless of form or characteristics, made or received by a Federal agency . . . and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government." *Id.* § 3301. The regulations state that federal agencies are responsible for establishing and maintaining a records management program. 36 CFR § 1220.10(b).

very clearly prohibit allowing clients to destroy evidence. Ariz. Rule of Prof'l Conduct 3.4(a); D.C. Rule of Prof'l Conduct 3.4(a). Defendants' and counsel for Defendants' failure to abide by these rules and regulations further highlight Defendants' culpability. *E.g.*, *Harmon v. United States ex rel. Bureau of Indian Affairs*, No. 4:15-CV-00173-BLW, 2017 WL 1115158, at *5–6 (D. Idaho Mar. 24, 2017) (holding that failure to comply with Federal Records Act obligations supported a finding of spoliation and that imposing sanctions was consistent with goals of the Federal Records Act).

Third, CBP—San Martin's employer during the relevant time and itself a named defendant in this lawsuit—has been admonished for its failure to preserve relevant materials. The National Archives and Records Administration—the government body tasked with issuing records preservation guidelines for federal agencies—audited CBP's record-keeping practices in 2018 and concluded that the agency was substantially ***not*** compliant with its record preservation obligations. National Archives Report at 3 ("In its current state, the records management program at CBP is substantially non-compliant with Federal statutes and regulations, [National Archives and Records Administration] policies [and other government regulations]."); *see generally id.* at 1–10 (articulating fourteen separate findings).

Fourth, throughout this litigation, Defendants have attempted to evade any serious examination of the factual basis for their exclusion of Plaintiffs from the disputed area at the Arivaca Checkpoint. This is, of course, at the very heart of this First Amendment litigation—and *Defendants* bear the burden of establishing the constitutionality of their actions. Defendants' persistent resistance to routine discovery has delayed this litigation significantly and extended their unconstitutional interference with Plaintiffs' peaceful monitoring activities for years.

In moving for summary judgment, Defendants opposed Plaintiffs' Rule 56(d) requests for any discovery whatsoever, arguing that "the current record"—which at that stage consisted largely of San Martin's declaration and its attachments—"contains all of the evidence necessary to resolve Plaintiffs' claims." Dkt. 79-1 at 5. During the summary judgment hearing, counsel for Defendants went so far as to suggest that the Court should presume San Martin's credibility and veracity:

> Plaintiffs essentially, they complain that — or they suggest, rather, that perhaps the Court shouldn't trust some of the government's declarations, that perhaps some of those, some of the letters that the government submitted are self-serving. I would suggest, Your Honor, that the government's letters should be accorded a presumption of good faith.

Taub Decl., Ex. 8 (Sept. 22, 2016 Hearing Tr. at 50:15–21.) On remand, Defendants argued for extremely limited discovery into only those "matters identified in Plaintiffs' Rule 56(d) request." Dkt. 110 at 5. And counsel for Defendants represented that San Martin was "living" in Africa, and therefore unavailable for deposition, where a single visit to his Arizona home revealed that statement to be false. Taub Decl., ¶ 4; *id.* Ex. 2(a).

When finally deposed, however, San Martin admitted that he lacked ***any*** personal knowledge of most of the key facts included in his declaration, and that he intentionally had destroyed ***all*** of his electronic and hard copy records, including emails, notes, and photographs about the Arivaca Road checkpoint, PHP, and potentially Plaintiffs, in violation of Defendants' discovery obligations, counsel's ethical obligations, and federal laws and regulations. This, from the witness whose testimony Defendants offered as presumptively credible and "dispositive."

For all the foregoing reasons, Defendants' litigation misconduct far exceeds the standards for "willful" or "culpable" destruction of documents under Ninth Circuit law.

C. Defendants destroyed documents that were not only relevant, but crucial to this case.

The next question is whether the documents San Martin destroyed were relevant or potentially relevant to this case. As already indicated, and explained here, they absolutely were.

Courts in this district have held that if "the evidence in the case as a whole would allow a reasonable fact finder to conclude that the missing evidence would have helped the requesting party support its claims or defenses, that may be a sufficient showing of both relevance and prejudice to make [sanctions] appropriate." *Surowiec*, 790 F. Supp. 2d at 1007–08 (quoting *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 617 (S.D. Tex. 2010)). In *Surowiec*, the court held that it "ha[d] no doubt that this standard [was] satisfied" where the

documents destroyed were emails and electronic files belonging to a witness with a "role at the center of the problem" addressed in the lawsuit. *Id.* at 1007–08.

San Martin provided sworn testimony directly addressing the alleged reasons for excluding Plaintiffs from the disputed area, including testimony regarding alleged law enforcement activity at the Arivaca Road checkpoint and Plaintiffs' alleged interference with that activity. *See* Dkt. 38 at 5–6, 8–9, 14, 17, 20–22 (MPI Opp.); Dkt. 61-2; Dkt. 61 at 17–34 (MSJ). These contentions form the core of Defendants' litigation position—namely, that their restrictions on Plaintiffs' First Amendment activities at Arivaca Checkpoint are constitutional. The Court explicitly relied on Defendants' proffer of allegedly admissible testimony to rule against Plaintiffs twice. *See generally* Dkt. 54; Dkt. 93 at 2–14.

The evidence destroyed includes the notes and other documents alleged to have provided the basis for San Martin's statements in his declaration. Because, as San Martin testified, he lacked knowledge other than as provided to him in the destroyed documents, Plaintiffs have been unable to explore the truth of those statements.

Moreover, there is significant reason to believe that San Martin's assertions are inaccurate or exaggerated. San Martin's declaration mentions a single safety incident relevant to the Arivaca Checkpoint, in which a drunk driver apparently "crashed into license plate readers located on the northern roadside near the primary inspection area, which Plaintiffs wish to access" in March 2014. RSM Decl. ¶ 10. San Martin testified that a Significant Incident Report would have been created to document the alleged drunk driver crashing into license plate readers at the Arivaca Checkpoint, Dep. Tr. 138:3-24, but Defendants have not produced any Significant Incident Reports documenting this incident.[10]

Defendants have produced just one other report of a traffic safety incident at the checkpoint during San Martin's employment, suggesting that San Martin's statements about safety and law enforcement concerns are, at a minimum, greatly exaggerated. It is therefore

[10] The only document Plaintiffs have identified in Defendants' production that references a traffic safety incident at the Arivaca Checkpoint during 2014 involves equipment other than a license plate reader.

reasonable to assume that the documents San Martin reviewed did not support his assertions that the exclusion of Plaintiffs from the area near the Arivaca Road checkpoint furthers any safety or law enforcement interests. Having access to those documents would thus help Plaintiffs support their claims, and the destruction of that evidence has prejudiced Plaintiffs, making sanctions appropriate. *E.g.*, *Leon*, 464 F.3d at 959. In any case, "because the relevance of destroyed documents cannot be clearly ascertained because the documents no longer exist, a party can hardly assert any presumption of irrelevance as to the destroyed documents." *Id.* (alterations, quotation marks, and citation omitted).

There can be no genuine dispute over whether San Martin destroyed relevant or potentially relevant documents. By his own admission, he did.

II. Defendants knowingly submitted a declaration filled with inadmissible statements.

San Martin's spoliation compounds the seriousness of Defendants' second sanctionable offense: submitting a declaration replete with inadmissible statements about central issues, the factual bases for which can no longer be investigated because San Martin destroyed the records on which he purportedly relied to make those statements, and because San Martin could not identify the agent who prepared those documents for his review.

As explained, Defendants submitted a declaration from San Martin setting forth the "safety" and "law enforcement" concerns allegedly implicated by Plaintiffs' attempts to monitor the Arivaca Road checkpoint. Dkt. 34-4 ¶¶ 10–11 & 24. San Martin described a variety of dangerous circumstances at Border Patrol checkpoints, including motorists' alleged "driving under the influence or reckless driving," *id.* ¶ 10, and "smugglers" that are "desperate to escape," causing "agents" to "hurriedly jump into a pursuit vehicle . . . to give chase . . . as vehicles swerve, fish tail, and kick up rocks when leaving the unpaved, dirt roadside to begin a high-speed chase." *Id.* ¶ 11. Defendants relied heavily on these statements in opposing a preliminary injunction, Dkt. 34, and moving for summary judgment. Dkt. 61 at 17, 23.

Despite Plaintiffs' objections that Paragraphs 10 and 11 were hearsay and / or improper opinion, Dkt. 69-1 ¶¶ 8–9, the Court credited San Martin's assertions in granting Defendants' motion, either as supporting "the reasonableness of Defendants' restriction" on Plaintiffs' First

Amendment activity, Dkt. 93 at 9:14–18, or as "illustrat[ing] Border Patrol's concern for the safety of their officers, canines, and the public." *Id.* at 10:14–18.

But as San Martin admitted in his deposition, he had ***no basis*** for these assertions, as he neither witnessed the specific safety incidents described, nor reviewed any of the official "significant incident reports" regarding the same. Dep. Tr. 159:24–160:10. Instead, San Martin relied on a summary prepared by another (unspecified) Border Patrol agent specifically to facilitate his declaration and "word of mouth," and claimed to have offered statements in "general terms." *Id.* at 176:8–177:7, 170:2–12. Plaintiffs were unable to explore how San Martin arrived at the statements in his declaration because, as discussed above, he *destroyed everything that he actually reviewed* in drafting those statements. *Id.* at 167:15–168:1.

The Federal Rules of Civil Procedure require that any affidavit filed in support of a motion for summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c). San Martin confessed to lacking any "personal knowledge" as to his testimony in paragraphs 10 and 11. He further admitted that his testimony was not based on his own review of any official records—rather, he relied on unspecified conversations with an unidentified agent, who supplied him with some kind of summary materials specifically prepared for this litigation, none of which San Martin kept.

In sum, San Martin is not at all "competent to testify on the matters stated" in his declaration. Counsel for Defendants appear not to have taken even the most basic steps to verify the foundation for San Martin's statements before submitting them to this Court, and as discussed above made no efforts to preserve the documents actually reviewed by San Martin, all of which have been destroyed.

As a result, Plaintiffs continue to litigate this case nearly six years after it was filed, following an unnecessary appeal, with no way to determine if San Martin's critical testimony was truthful, an exaggeration, or an outright lie.

III. The Court should impose dispositive sanctions—or, in the alternative, issue and evidentiary sanctions—on Defendants.

The only remaining question for the Court is what kind of sanctions to impose, under its inherent authority, for Defendants' litigation misconduct. The gravity of Defendants' misconduct warrants imposing dispositive sanctions and entry of judgment in Plaintiffs' favor. Dispositive sanctions would redress the harm to Plaintiffs, permit Plaintiffs to resume their First Amendment-protected activities, and dissuade Defendants from engaging in similar misbehavior in other cases. As set out below, possible alternative sanctions—including issue or evidentiary sanctions as well as adverse inferences—are insufficient to punish or rectify the underlying prejudice Defendants created in this case.

Courts consider five factors when deciding whether to impose dispositive sanctions: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.'" *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 348 (9th Cir. 1995).[11] These factors are not applied mechanically and are not "conditions precedent" to sanctions, but rather give the Court "a way . . . to think about what to do." *Valley Engineers*, 158 F.3d at 1057.

Applying these rules, the Ninth Circuit repeatedly has affirmed dispositive sanctions for violations of discovery orders, including spoliation,[12] and district courts have imposed

[11] "Although [the] five-factor test [above] is usually used to review the propriety of Rule 37 sanctions, this same test was applied in *Anheuser-Busch* to review sanctions granted under a court's 'inherent power.'" *Leon*, 464 F.3d at 958 n.4 (quotation omitted).

[12] *See, e.g.*, *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1094 (9th Cir. 2007) (affirming order of dispositive sanctions for party's evasion of discovery obligations and deliberate misrepresentations); *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (affirming order of dispositive sanctions for failure to produce documents and misrepresentations to counsel and the court regarding whether documents existed at all, even where documents were eventually produced); *Valley Engineers Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1053–58 (9th Cir. 1998) (affirming order of dispositive sanctions for willful failure to produce single key document after court ordered production, even where thousands of other documents produced); *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997) (affirming order of dispositive sanctions where party ignored court's order to produce); *Anheuser-Busch, Inc.*, 69 F.3d at 348–55 (affirming order of dispositive sanctions after party "concealed"

dispositive sanctions to punish discovery abuses.[13] In *Leon*, for example, the Ninth Circuit affirmed the district court's decision to dismiss the case after the plaintiff deleted files from his laptop. *See* 464 F.3d at 958–61.

The Ninth Circuit has also made clear that "[t]he effectiveness of and need for harsh measures is particularly evident when," as here, "the disobedient party is the government." *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1370 (9th Cir. 1980). Because the government tends to be a repeat litigant, stern sanctions protect not only the directly harmed litigant, but also have a "prophylactic effect" against abuses affecting "other litigants as well." *Lewis v. Ryan*, 261 F.R.D. 513, 522 (S.D. Cal. 2009).

The Ninth Circuit's five-factor test for imposing dispositive sanctions favors entering judgment in Plaintiffs' favor.

A. The public has a strong interest in the expeditious resolution of this litigation.

The public has an overriding interest in securing "the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. As the Ninth Circuit has observed, "[o]rderly and expeditious resolution of disputes is of great importance to the rule of law. By the same token, delay in reaching the merits, whether by way of settlement or adjudication, is costly in money, memory, manageability, and confidence in the process." *In re PPA Prods. Liab. Litig.*, 460 F.3d 1217, 1227 (9th Cir. 2006). Litigation misconduct that causes delay favors judgment against Defendants. *See, e.g.*, *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 131 (9th Cir. 1987).

Had Defendants complied with their discovery obligations and the requirements of Federal Rule of Civil Procedure 56(c) and Federal Rule of Evidence 602, this case could have reached final judgment years ago, following a timely trial with a complete factual record without an unnecessary appeal. Given that this case involves alleged interference with Plaintiffs' First Amendment rights, delay itself is prejudicial to Plaintiffs. *See, e.g.*, *Klein v. City of San*

documents for three years and "continuously lie[d] about their existence and conditions under penalty of perjury").

[13] *See, e.g.*, *Sanchez v. Rodriguez*, 298 F.R.D. 460, 466 (C.D. Cal. 2014) (ordering dispositive sanctions where plaintiff ignored court-ordered discovery obligations without excuse).

Clemente, 584 F.3d 1196, 1207–08 (9th Cir. 2009) ("Both this court and the Supreme Court have repeatedly held that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Also, the passage of time has severely impacted Plaintiffs' ability to probe Defendants' claimed justifications for limiting First Amendment activity near the Arivaca Checkpoint. Plaintiffs did not discover Defendants' spoliation until late February 2020—years after this case commenced in November 2014 and San Martin destroyed his records in October 2015. Had San Martin's records been properly preserved and produced, Plaintiffs would not now be forced to accept whatever testimony San Martin and other Defendants choose to offer. Because Defendants' misconduct has in fact delayed the case for multiple years, and because Plaintiffs are suffering the consequences of that delay, this factor favors judgment against Defendants.

B. The Court's need to manage its docket favors judgment against Defendants.

"District courts have inherent power to control their dockets. In the exercise of that power they may impose sanctions including, where appropriate, default or dismissal." *Thompson v. Housing Auth. of City of L.A.*, 782 F.2d 829, 831 (9th Cir. 1986) (citing *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1961)).

This factor is typically reviewed alongside the first factor because the interests served are identical: courts may impose sanctions as part of controlling their dockets to encourage prompt resolution of cases on their merits, and to punish or dissuade parties from impeding that goal by not following the discovery rules. *In re PPA*, 460 F.3d at 1227 (citing *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976)). These goals are particularly apposite here because, again, the Ninth Circuit has made clear that "harsh measures" are effective and necessary when "the disobedient party is the government," a repeat litigant. *Sumitomo Marine & Fire Ins. Co.*, 617 F.2d at 1370; *see also Lewis*, 261 F.R.D. at 522.

Defendants' submission of testimony that lacks foundation (improperly sworn under penalty of perjury and affirmed by counsel to be competent) has prejudiced this Court.

Furthermore, Defendants' spoliation of evidence interferes with the Court's fact-finding role and thereby also prejudices the Court. This factor also favors dismissal.

C. Defendants' conduct has prejudiced Plaintiffs.

"The prejudice inquiry 'looks to whether the [despoiling party's] actions impaired [the non-despoiling party's] ability to go to trial or threatened to interfere with the rightful decision of the case.'" *Leon*, 464 F.3d at 959 (citing *United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co.*, 857 F.2d 600, 604 (9th Cir. 1988)).

The movant's burden on this factor is only to "come forward with plausible, concrete suggestions about what the despoiled evidence might have been." *Mizzoni v. Allison*, No. 3:15-cv-00313-MMD-VPC, 2018 WL 3203623, at *6 (D. Nev. Apr. 4, 2018), *report and recommendation adopted*, 2018 WL 2197957 (D. Nev. May 14, 2018) (quoting *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1328 (Fed. Cir. 2011)). "Whether or not the documents would have changed the outcome of the trial is not the issue in determining prejudice. It is sufficient that [the litigant's] concealment of the documents clearly impaired [its opponent's] ability to go to trial and threatened to interfere with the rightful decision of the case." *Anheuser-Busch*, 69 F.3d at 354.

For example, the Ninth Circuit held that this factor favored dismissal in *Leon*, where the litigant's spoliation "threatened to distort the resolution" of the case because any of the deleted records *could* have been relevant to the movant's claims or defenses, "although it is impossible to identify which files and how they might have been used." 464 F.3d at 960 (quoting *Kahaluu Constr. Co.*, 857 F.2d at 604)). The Ninth Circuit has also held "it is appropriate to presume that where documents relevant to the merits of the litigation have been concealed the deception casts doubt on the concealing party's case." *Anheuser-Busch*, 69 F.3d at 354.

Here, Plaintiffs do not even need to make "suggestions" about what the despoiled evidence might have been. *See Mizoni*, 2018 WL 3203623 at *6. San Martin testified that he destroyed records concerning the operation of the Arivaca Road checkpoint, pictures of events at that checkpoint (potentially including PHP or Plaintiffs' monitoring activities), communications with his supervisor regarding the monitoring and law enforcement activity at the checkpoint,

documents that he reviewed in preparing his declaration, and possibly more. *Supra* Background Section II. The facts in the destroyed documents, whether helpful or unhelpful to either party, are of central relevance to the merits of this litigation. As such, Ninth Circuit precedent supports a conclusion that San Martin's spoliation "threaten[s] to distort the resolution" of this case, and also that Defendants' failure to preserve San Martin's records rightly casts doubt on the entirety of their case. *Leon*, 464 F.3d at 960; *Kahaluu Constr. Co.*, 857 F.2d at 604; *Anheuser-Busch*, 69 F.3d at 354. This factor favors dismissal.

D. Public policy favoring resolution on the merits does not outweigh imposing sanctions.

As the Ninth Circuit has held, "'[T]he public policy favoring disposition of cases on their merits,' . . . standing alone, 'is not sufficient to outweigh the other four factors.'" *Leon*, 464 F.3d at 960–61 (quoting *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 133 n.2 (9th Cir. 1987)). Further, "[the Ninth Circuit has] also recognized that this factor 'lends little support' to a party whose responsibility it is to move a case toward disposition on the merits but whose conduct impedes progress in that direction," as is the case here. *In re PPA*, 460 F.3d at 1228 (quoting *In re Exxon Valdez*, 102 F.3d 429, 433 (9th Cir. 1996)). As such, this factor lends little if any support to Defendants' case, and does not undermine the case for imposing dispositive sanctions based on Defendants' litigation misconduct.

E. Terminating sanctions are fully justified.

Given Defendants' extreme misconduct, Plaintiffs submit that dispositive sanctions are the appropriate remedy. In reviewing an order for dispositive sanctions, the Court of Appeals considers "(1) whether the district court explicitly discussed the feasibility of less drastic sanctions and explained why such alternate sanctions would be inappropriate; (2) whether the district court implemented alternative sanctions before ordering dismissal; and (3) whether the district court warned the party of the possibility of dismissal before ordering dismissal." *Anheuser–Busch*, 69 F.3d at 352. But as the Ninth Circuit held in *Anheuser-Busch*, the second and third factors are irrelevant if records were destroyed before a court has had an opportunity to compel discovery or warn a party of the consequences of destroying evidence during litigation,

id.—not that the Department of Justice or a senior Border Patrol agent should need such a warning. So the only consideration for the Court in this case is whether sanctions short of judgment for Plaintiffs are appropriate.

The most critical factor to be considered in case-dispositive sanctions is whether 'a party's discovery violations make it impossible for a court to be confident that the parties will ever have access to the true facts.'" *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1097 (9th Cir. 2007) (quoting *Valley Eng'rs v. Electric Eng'g Co.*, 158 F.3d 1051, 1058 (9th Cir. 1998)).

The Court cannot be confident that Plaintiffs will ever have "access to the true facts" pertaining to the documents San Martin destroyed. Defendants have caused irreversible damage: they selectively marshalled evidence from San Martin to prevail at the preliminary injunction and summary judgment stages (notwithstanding the latter's reversal on appeal), wasting years of Plaintiffs' and the Court's time. On remand, Defendants have failed to timely produce discovery or adhere to a reasonable case management schedule. Dkt. 163 at 3–5 (outlining Defendants' numerous inexcusable discovery delays on remand). Defendants represented to Plaintiffs that San Martin—their central witness—was unavailable for deposition "in Africa," when in fact he remained a resident of Tucson. Taub Decl. ¶ 4 & Ex. 2(a). San Martin's deposition was delayed for months while Plaintiffs awaited Defendants' confirmation that they had produced all subpoenaed records. Taub Decl. Ex. 5(a)–(g). Just nine days before the scheduled deposition date, Defense counsel admitted for the first time that San Martin's hard drive "was unfortunately destroyed"—and, even then, they did not admit to San Martin's culpability in the spoliation of this evidence. Taub Decl. ¶ 8 & Ex. 6. Only when Plaintiffs finally deposed San Martin did the truth come to light: that San Martin had destroyed key records ***himself*** almost five years ago, and lacked foundation for key statements made in his declaration. *Supra* Background Section III. In light of this sustained and egregious misconduct, it is virtually impossible for Plaintiffs to investigate the bases for the statements in San Martin's declaration, or to fully examine the truth

of Defendants' claimed justifications for their interference with Plaintiffs' First Amendment rights at the Arivaca Checkpoint.[14]

There are at least three conceivable alternative sanctions in this case, but each is insufficient to address Defendants' behavior.

First, the Court could hold the issue conclusively established that Plaintiffs were excluded from the checkpoint because of their viewpoints, *not* for safety reasons, in violation of the First Amendment. *E.g.*, *Guifu Li v. A Perfect Day Franchise, Inc.*, 281 F.R.D. 373, 393 (N.D. Cal. 2010) (holding certain facts alleged in the complaint established for trial, as sanction) (citing *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982)); *see also Shepherd v. Am. Broad. Cos. Inc.*, 62 F.3d 1469, 1478 (D.C. Cir. 1995) (holding issue established where "a preponderance of the evidence establishes that a party's misconduct has tainted the evidentiary resolution of the issue"). But for the reasons explained above, this sanction is insufficient to address the prejudices that Defendants have wrought on the expeditious resolution of the case, the Court's ability to manage its docket, and the Court and Plaintiffs' ability to examine the truth underlying San Martin's destroyed documents and foundationless declaration.

Second, the Court could enter evidentiary sanctions precluding Defendants from introducing any evidence on the subjects of (1) Defendants' reasons for erecting rope barriers alongside Arivaca Road and (2) Defendants' exclusion of Plaintiffs from the Arivaca Checkpoint—two evidentiary issues for which San Martin's declaration and evidence were key. *See Von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 844 (9th Cir. 1976) (upholding trial court's exclusion of documents as appropriate discovery sanction). But again, this sanction does not address the fundamental prejudices Defendants have caused Plaintiffs and the Court.

[14] Troublingly, there is reason to believe that other defense witnesses may likewise have destroyed key evidence. San Martin testified that other Border Patrol agents destroyed documents upon retirement. *See supra* note 4 (quoting Dep. Tr. 26:19–20). And, as the National Archives found, Border Patrol's recordkeeping practices were out of compliance with federal regulations as recently as July 2018. *See generally* National Archives Report.

Third, the Court could "draw an adverse inference from the destruction of evidence relevant to a case." *Akiona v. United States*, 938 F.2d 158, 161 (9th Cir. 1991). Specifically, San Martin served as a key witness for Defendants' rebuttals to Plaintiffs' arguments that (1) the roadside from which Plaintiffs seek to observe government agents at work is a public forum, (2) the measures Defendants took to exclude Plaintiffs from that roadside are not content-neutral, and (3) those measures are also not reasonable time, place, and manner restrictions. *See* Dkt. 38 at 5–6, 8–9, 14, 17, 20–22; Dkt. 61-2; Dkt. 61 at 17–34 (in each case relying on San Martin to oppose those arguments). Based on Defendants' misconduct, the Court could properly draw adverse inferences against Defendants on at least these three points (i.e., concluding that the area at issue is a traditional public forum and that Defendants' restrictions are neither content-neutral nor reasonable time, place, or manner restrictions). But such adverse inferences would not even go as far as issue or evidentiary sanctions to address the far-reaching prejudices that Defendants have created through the destruction of San Martin's documents and submission of his foundationless declaration.

For all the foregoing reasons, lesser sanctions would not punish Defendants, deter similar litigation misconduct in the future, or rectify the prejudice to Plaintiffs and the Court. *In re PPA*, 460 F.3d at 1227 (discussing purposes of terminating sanctions). The inadequacy of these lesser sanctions is underscored by the fact that the disobedient party is the government, which the Ninth Circuit has held should be subject to harsher discovery sanctions for disobedience because of law enforcement's obligation to set an example for other litigants by following the rules. *See Sumitomo Marine & Fire Ins. Co.*, 617 F.2d at 1370. As such, it is insufficient for the Court to resort solely to these lesser sanctions, and entirely appropriate for the Court to enter terminating sanctions.

IV. The Court should also impose monetary sanctions.

In addition to entering dispositive (or other) sanctions, and irrespective of any other sanction, the Court should award Plaintiffs fees and costs for pursuing these sanctions.

"Under its 'inherent powers,' a district court may award sanctions in the form of attorneys' fees against a party or counsel who acts 'in bad faith, vexatiously, wantonly, or for

oppressive reasons.'" *Leon*, 464 F.3d at 961 (quoting *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997)). "Before awarding such sanctions, the court must make an express finding that the sanctioned party's behavior 'constituted or was tantamount to bad faith.'" *Id.* "A party 'demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of a court order.'" *Id.*[15] The Court also has discretion to impose monetary sanctions under Federal Rule of Civil Procedure 37(b) and (c), so long as the sanction is just and directed to the violation at issue. *E.g.*, *United States v. Nat'l Med. Enters., Inc.*, 792 F.2d 906, 910 (9th Cir. 1986); *Sumitomo Marine & Fire Ins. Co.*, 617 F.2d at 1370–71.

As described at length above, Defendants' destruction of evidence—compounded by their failure to prevent that destruction, disclose it truthfully, or try to remedy it—has delayed and disrupted this litigation. *Supra* Argument Section III.C (discussing how San Martin's actions prejudiced Plaintiffs); Background Sections II and III (discussing San Martin's foundationless declaration and spoliation of key relevant evidence). This conduct merits imposing monetary sanctions on Defendants by awarding fees and costs to Plaintiffs.

CONCLUSION

Defendants have held out Roger San Martin as a central witness in this case. San Martin, however, lacked the requisite personal knowledge for key facts to which he attested in his declaration, and willfully despoiled key relevant evidence almost a year after this litigation commenced, at which time both he and defense counsel were on notice of their obligations to preserve evidence under the Federal Rules. This egregious litigation misconduct has significantly delayed this case, and perpetuated ongoing irreparable harms borne by Plaintiffs. Dispositive sanctions—dismissing the case and entering judgment for Plaintiffs—and monetary sanctions are warranted. And although issue sanctions, evidentiary sanctions, and adverse inference sanctions are also available to the Court, they do not go far enough in addressing the delay and prejudice Defendants' inexcusable actions have caused.

[15] Rule 37 also allows the Court to award Plaintiffs fees where Defendants disobey court orders and discovery rules. Fed. R. Civ. P. 37(b)(2)(C).

Dated: June 30, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2020, the foregoing Motion for Sanctions was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Winslow Taub

Winslow Taub