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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

LEESA JACOBSON, PETER RAGAN,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CUSTOMS & BORDER PROTECTION, UNITED STATES OFFICE OF BORDER PATROL, ET. AL.,

Defendants.

Case No.: 4:14-cv-02485-BGM

LODGED: PROPOSED REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

In opposing Plaintiffs' motion for a preliminary injunction, Defendants mischaracterize the First Amendment violation described in Plaintiffs' motion, fail to address binding precedent establishing the right to observe and record law enforcement activity from roads and other public forums, and offer only general and unsupported justifications for excluding Plaintiffs from public locations on Arivaca Road.

Defendants' response does not rebut Plaintiffs' First Amendment claims. "[I]n the First Amendment context," a party seeking a preliminary injunction "bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011). At that point, "the burden shifts to the government to justify the restriction." *Id.* (citation omitted).

Defendants have failed to satisfy their burden. They describe in vague and shifting terms an alleged nonpublic "checkpoint" within the public right-of-way along Arivaca Road, but admit that the barriers around that area were erected *in response to* Plaintiffs' exercise of their First Amendment rights, more than seven years after law enforcement operations commenced. Defendants then point to the very signs and barriers that they erected as evidence that the restrictions on Plaintiffs' rights are proper. Accepting Defendants' circular arguments would effectively license Border Patrol to suppress speech in its unfettered discretion, simply by posting signs and erecting barriers along public roadways—precisely the type of public forum that the First Amendment was designed to protect. *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1099 (9th Cir. 2003).

Defendants' justifications for the restrictions placed on Plaintiffs' First Amendment rights are internally inconsistent and inadequate as a matter of law. In view of Defendants' failure to rebut Plaintiffs' *prima facie* case, and given Plaintiffs' satisfaction of the *Winter* factors, *see Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), this Court should enjoin Defendants from interfering with

Plaintiffs' observation of law enforcement activities from the public right-of-way along Arivaca Road.

II. ARGUMENT

A. Defendants Ignore Plaintiffs' Well-Established First Amendment Right to Observe, Photograph and Record Government Officials in the Public Performance of Their Duties at the Checkpoint

The First Amendment right to observe and photograph or otherwise record law enforcement activities from a public forum is clearly established in this and other circuits.[1] *See, e.g.*, *Fordyce v. City of Seattle*, 55 F.3d 436, 438–39 (9th Cir. 1995) (affirming plaintiff's "First Amendment right to film matters of public interest," including "the activities of the police officers assigned to work the event" during a "public protest march" on the streets of Seattle); *Gericke v. Begin*, 753 F.3d 1, 7–9 (1st Cir. 2014) (holding that "the right of individuals to videotape police officers performing their duties in public" is "clearly established"); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595, 601 (7th Cir. 2012) (creation of audiovisual recordings of police "necessarily included within the First Amendment's guarantee of speech and press rights"); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (upholding First Amendment rights of third parties filming traffic stops "to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."). Where, as here, individuals seek to monitor, observe, and record law enforcement officers' public activities, such individuals are unequivocally protected by the First Amendment.

Defendants never once acknowledge this long line of precedent. Instead, they rely on an irrelevant Ninth Circuit opinion, *Leigh v. Salazar*, 677 F.3d 892 (9th Cir. 2012), and on a Third Circuit decision considering materially different facts in the context of assessing qualified immunity rather than the underlying constitutional right, *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010). Opp. at 10 n.2. Neither case supports the government's position.

[1] *See also, e.g.*, *Adkins v. Limtiaco*, 537 F. App'x 721, 722 (9th Cir. 2013) (right to photograph law enforcement activities "clearly established").

Leigh involved a photojournalist who alleged that viewing restrictions in place at a Bureau of Land Management ("BLM") "horse roundup" violated her First Amendment right to observe government activities. 677 F.3d at 893. The "horse gather" occurred at the BLM's "Silver King Herd Management Area" in Lincoln County, Nevada. *Id.* at 894. The plaintiff did not allege that the area is a public forum; nor could she plausibly have done so. *See Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 515 (D.C. Cir. 2010) (noting that "vast" wilderness areas in national parks "would . . . be classified as nonpublic forums."). Because *Leigh* did not concern the right to engage in speech by monitoring and recording official conduct from a public forum, the Ninth Circuit did not discuss *Fordyce* or other binding precedent establishing that right. Instead, the Court applied the "right of access" test set forth in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"), which applies to "judicial proceedings" and other "government activities" that cannot be observed or recorded from a public forum. *Leigh*, 677 F.3d at 898.

By contrast, Plaintiffs here seek to observe law enforcement activity from a roadside, which is a quintessential public forum. "[T]he government's ability to permissibly restrict expressive conduct" in a public forum "is very limited." *United States v. Grace*, 461 U.S. 171, 177 (1983). The "government must bear an extraordinarily heavy burden to regulate speech" in a public forum, especially "core First Amendment speech" such as monitoring and recording official conduct. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1022 (9th Cir. 2009). That burden requires the government to prove its "restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication," which it cannot do through conclusory assertions. *Grace*, 461 U.S. at 177. Indeed, even in *Leigh*, the court noted that it is improper to "rubber-stamp an access restriction simply because the government says it is necessary." 677 F.3d at 900. That principle applies even more strongly in the context of a public forum.

In *Kelly*, the Third Circuit considered whether an officer had qualified immunity from damages in a suit alleging that the officer had improperly prevented a vehicle's passenger from videotaping the conduct of an officer who stopped the vehicle. The court held that as of the date of the incident in May 2007 "there was insufficient case law establishing a right to videotape police officers during a traffic stop to put a reasonably competent officer on 'fair notice' that seizing a camera or arresting an individual for videotaping police during the stop would violate the First Amendment." *Kelly*, 622 F.3d at 262. *Kelly* is irrelevant to this case for at least two reasons.

First, the plaintiff in *Kelly* was a participant in the traffic stop, and the Third Circuit did not consider whether individuals such as Plaintiffs in this case have the right to record police conduct as observers. In distinguishing *Fordyce* and similar cases upholding the right of observers to record the police, the Third Circuit found them "insufficiently analogous to the facts of this case," noting the inherent risks of interactions between police and vehicle occupants during a traffic stop. *Kelly*, 622 F.3d at 262–63. *Kelly* is not relevant to this case, which involves observers, as in *Fordyce*.

Second, *Kelly* decided only that any right of a vehicle occupant to record a traffic stop was not clearly established in the Third Circuit, for purposes of overcoming qualified immunity, in 2007. *Kelly*, 622 F.3d at 262. This case, brought in the Ninth Circuit, involves a request for an injunction, to which qualified immunity does not even apply. *L.A. Protective League v. Gates*, 995 F.2d 1469, 1472 (9th Cir. 1993).

In sum, there is a clear First Amendment right under Ninth Circuit law to observe and photograph or otherwise record law enforcement activities from a public forum.

B. Plaintiffs Have Shown a Likelihood of Success on the Merits of Their First Amendment Claim

Having misapprehended the relevant legal standard, Defendants engage in a lengthy discussion premised on the erroneous supposition that the public road and right-of-way surrounding the Arivaca Road checkpoint, where Plaintiffs wish to stand, is a nonpublic forum. Opp. at 11–18. In the alternative, Defendants assert that their restrictions are content neutral and justified by "safety" considerations, Opp. at 18–23,

ignoring the factual record to the contrary. Defendants throughout mischaracterize the right Plaintiffs seek to exercise, focusing on the effect of their restrictions on Plaintiffs' right to "protest." Each of Defendants' arguments is unavailing.

1. Defendants Have Failed to Rebut Plaintiffs' Showing That the Portion of Arivaca Road Where Plaintiffs Seek to Stand is a Public Forum

Defendants argue that the entire disputed portion of Arivaca Road is a nonpublic forum by assuming the very thing they need to prove in order to rebut Plaintiffs' *prima facie* case: that there is a broad and vaguely defined "Border Patrol checkpoint" from which Plaintiffs may properly be excluded. But Defendants' position is flawed as a matter of law and incompatible with the factual record.

The law is very clear that public streets, such as Arivaca Road and the adjacent public right-of-way, are "quintessential traditional public forums." *ACLU of Nev.*, 333 F.3d at 1099 (citing *Grace*, 461 U.S. at 177). Sidewalks, streets, and parks "have immemorially been held in trust for the use of the public . . . . As a result, [they] generally are considered, without more, to be public forums." *Id*. (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939) (internal citations and quotation marks omitted)); *see also, e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) ("No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora").[2] Defendants have the burden of proving otherwise, and have failed to do so.

The mere presence of law enforcement activity on a public street does not render a broad area adjacent to that activity nonpublic. "Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its

[2] Arivaca Road, as a public street, is not a "relatively modern creation" like a highway rest stop. *Cf. Jacobsen v. Bonine*, 123 F.3d 1272, 1274 (9th Cir. 1997) (holding perimeter walkways of interstate rest areas were not public fora for purposes of First Amendment free speech protections). Nor is the public right-of-way adjacent to the Arivaca Road checkpoint an area that the parties agree has been withdrawn from public use, *cf. Hale v. U.S. Dep't of Energy*, 806 F.2d 910, 915–16 (9th Cir. 1986), or a federally-regulated area within a military establishment, *cf. Greer v. Spock*, 424 U.S. 828, 838–40 (1976).

historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression." *Grace*, 461 U.S. at 180. Accordingly, Border Patrol "may not by its own *ipse dixit* destroy the 'public forum' status of streets" and rights-of-way adjacent to the Arivaca Road checkpoint. *See id.*

Defendants' own guidelines make clear that a checkpoint consists of areas provisioned for specific law enforcement functions: "Within a checkpoint, Border Patrol guidelines call for a primary inspection area . . . a secondary inspection area . . . administrative and detention facilities . . . and access to water and electricity." Opp. at 4. According to Defendants, checkpoints must also have sufficient parking for agents, and may house "a variety of equipment." *Id.* Plaintiffs, however, do not seek to occupy those areas, but rather seek to observe law enforcement functions from adjacent public areas such as the unoccupied space across Arivaca Road—*i.e.*, *outside* of the "checkpoint." Defendants' framing of the question—whether a "Border Patrol checkpoint" is a public forum—is therefore misleading.

Defendants argue that a broader "checkpoint" area is nonpublic because it is "clearly marked with signs and traffic control devices distinguishing [it] from surrounding areas." Opp. at 5, 14. Yet Defendants cite no authority, and Plaintiffs are aware of none, stating that such signage alone is sufficient to deprive a public street or public right-of-way of its status as a public forum. *See Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F. 3d 1128, 1136-37 (9th. Cir. 2011) (noting the presence of "[k]iosks and gates" surrounding beaches, but also finding that the general public was long excluded from those beaches as a result of other factors, including a "restrictive covenant" forbidding property owners from granting access to the public).

Defendants also cannot plausibly argue that the lack of any geographic limitation in their permit, issued by the local county, provides them with an affirmative right to abrogate First Amendment protections along whatever portion of Arivaca Road that Defendants choose. Opp. at 5. This argument is particularly baseless because Defendants

at the same time claim that they do not need the permit at all. *See* Defs.' Ex. B (checkpoint policy) § 2.4 ("local operating permits need not be sought.").

Defendants cannot characterize the entire roped-off area as a "federal workplace" simply because law enforcement activity takes place within discrete portions of it. Opp. at 12–13. The limited set of structures and equipment along Arivaca Road is quite different from the various nonpublic fora cited by Defendants as examples of "workplaces," such as office buildings and hospitals. *Cf. Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 805–06 (1985) (discussing forum status of a charitable fund-drive conducted in federal offices); *Preminger v. Principi*, 422 F.3d 815, 823–24 (9th Cir. 2005) (same for Veterans Affairs hospital).[3] Indeed, the basic right to observe law enforcement activities described in *Fordyce* and its progeny is incompatible with Defendants' position that government officials may simply declare a large public area to be an "enforcement zone" in order to prevent the exercise of that right.

Defendants' remaining arguments about the nonpublic nature of the disputed area relate to alleged "safety concerns" in the area surrounding the checkpoint. Opp. at 13–14. The principal case cited by Defendants does not actually rely on safety considerations in determining the nonpublic nature of the forum at all. *See Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1222 (9th Cir. 2003) (nonpublic nature of forum was undisputed). To the extent that safety considerations bear on the reasonableness of any restriction on Plaintiffs' location, they are discussed below.

Defendants have failed to carry their burden to rebut Plaintiffs' showing that the Arivaca Road right-of-way—a "quintessential" example of an area in which speech is most strongly protected—is a public forum. *See ACLU of Nev.*, 333 F.3d at 1099.

2. Defendants Have Failed to Establish That Their Exclusion of Plaintiffs From the Entirety of the Roped-off Area Is Narrowly

[3] Defendants' reliance on *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213 (9th Cir. 1989), Opp. at 24–25, is curious. There, the Ninth Circuit held that there was no First Amendment right of access to search warrants related to ongoing investigations. The relevance of *Times Mirror* to this case, which implicates entirely different First Amendment rights, is unclear.

Tailored to Serve a Significant Government Interest

Because the Arivaca Road right-of-way adjacent to Defendants' actual law enforcement activity is a public forum, Defendants must show that their exclusion of Plaintiffs from the entirety of the roped-off area surrounding the Arivaca Road checkpoint is a restriction that is narrowly tailored to serve a significant government interest. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Defendants have failed to do so, for multiple reasons. Defendants' description of the "checkpoint" area shifts throughout their papers, undercutting any argument that there is a well-defined, broad region from which Plaintiffs should be excluded. Defendants' alleged safety and operational concerns are precisely the sort of *ipse dixit* justification that courts in this circuit have rejected in other cases. *See Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1228 (9th Cir. 1990); *Turner v. Plafond*, No. C 09-00683 MHP, 2011 WL 62220, *11 (N.D. Cal. Jan. 7, 2011). And the fact that Plaintiffs were excluded only after attempting to exercise their First Amendment rights, while other members of the public have continued to be allowed within the rope barriers, shows that Defendants' justifications are specious.

Defendants' shifting description of the "checkpoint" or "enforcement zone" from which Plaintiffs should be excluded demonstrates that the placement of the rope barriers is arbitrary. For example, in places, Defendants indicate that the signs leading up to a checkpoint are *not* part of the checkpoint, but rather are part of the "approach to the checkpoint." Opp. at 3, 5. But elsewhere Defendants suggest that those very same signs are "physical characteristics of Border Patrol checkpoints" that "alert the public that they are entering a special enclave" where "free passage is limited and expressive activities may be subject to greater restrictions." Opp. at 14. Defendants then describe in certain places the checkpoint as being defined by the location of certain features and equipment, which are either "[w]ithin a checkpoint," or "on hand." Opp. at 4. But in others, Defendants appear to argue that the "checkpoint" is the entire area enclosed by the "cordons," which are "about 150 feet from the center of the checkpoint." Opp. at 20. These conflicting characterizations illustrate what is apparent from Plaintiffs' aerial survey: the roped-off area is chosen arbitrarily, and the actual law enforcement activity

along Arivaca Road takes place in relatively discrete locations where Border Patrol maintains facilities, equipment, and vehicles.

Defendants' alleged safety concerns are also speculative, and Defendants do not tie them to the particular roped-off area they created. Opp. at 13–14. Defendants offer aggregate safety-related statistics from other Border Patrol checkpoints in Tucson sector, but supply no data specific to the Arivaca Road checkpoint. They cite a single safety-related incident at Arivaca Road, Opp. at 20, but offer no explanation as to why motorists are more likely to injure observers located closer to the inspection area—where, by Defendants' own admission, speed limits are *lower*—than observers located outside of the roped-off area. Arivaca Road is a rural, two-lane country road, with limited traffic and ample signage informing drivers to slow down. It is not a busy highway where the presence of a small number of observers could distract drivers. *Cf. id.* at 13.

In both of the cases cited by Defendants for the proposition that the current rope barriers are not overly restrictive, the restrictions were closely linked to particular safety concerns. In *Peace Navy*, the Court found that the government could reasonably prevent boats from approaching within 75 feet of a pier during a Navy boat parade, because there was testimony that 25 yards was sufficient to provide "a channel of access to the land by military vessels[, which] was useful for handling law enforcement and medical emergencies," despite the Navy's complaint that "it is more difficult to maneuver in a 25-yard zone than in a larger zone." 914 F.2d at 1228. In *United States v. Griefen*, 200 F.3d 1256, 1258 (9th Cir. 2000), the court allowed a "closure order" of an area extending 150 feet from the center of a road bed damaged by the Plaintiffs in a national forest, because the closure order only covered the actual area in which construction activities to repair the road bed were going to take place. Here, in contrast, Defendants offer no explanation of why 180 feet of clearance on both sides of Arivaca Road, to the east and to the west of the checkpoint, is required. And, as in *Peace Navy*, prior to Plaintiffs' First Amendment activity, Defendants operated the checkpoint safely and effectively for seven years without utilizing an enforcement zone hundreds of feet long. *See* 914 F.2d at 1228.

Indeed, the only alleged traffic safety incident at the Arivaca Road checkpoint took place *after* Defendants erected the unconstitutional barriers.

The history of interactions on Arivaca Road further underscores that Defendants' justifications are specious. Defendants did not create the purported safety zone until after Plaintiffs had initiated their monitoring activities, at which point Defendants strung up yellow tape "about '150 feet east'" of the primary inspection area. Opp. at 7 (quoting Compl. ¶¶ 53–54). Defendants did not label that area as a no-pedestrian "enforcement zone" until three days after they set up the boundary. *Id.* In addition, Defendants' selective enforcement of the restriction against Plaintiffs, while allowing other members of the public to remain within the roped-off area, belies the stated safety rationale. Ragan Decl. ¶¶ 27–29.

Defendants' speculative arguments about traffic safety are particularly misplaced because they rely on characterizing Plaintiffs as "protesters" who will create "visible clutter" along Arivaca Road by displaying "signs and banners," Opp. at 13, or by suggesting that Plaintiffs seek to "stag[e] a rally so large that the checkpoint" would need to be "closed for safety reasons." Opp. at 19. The government "is not free to foreclose expressive activity in public areas on mere speculation about danger." *Peace Navy*, 914 F.2d at 1228; *see also Turner*, 2011 WL 62220 at *11 (generalized "danger of driver distraction" did not justify restrictions on political signs on Golden Gate Bridge). And to "enjoi[n] or preven[t] First Amendment activities . . . before the demonstration poses a clear and present danger is presumptively a First Amendment violation." *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996). Plaintiffs are not seeking through this motion an order to stage mass protests, and Defendants make no allegation that Plaintiffs' presence observing the checkpoint within the roped-off area would pose a "clear and present danger" to passing traffic or to officer safety.

Plaintiffs seek to monitor law enforcement operations, in small groups, from the nearest area that will not interfere with the checkpoint. This is nothing more than what the First Amendment requires: "[A] police order that is specifically directed at the First

Amendment right to film the police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties." *Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014). "Such peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation." *Glik v. Cunnife*, 655 F.3d 78, 84 (1st Cir. 2011).

In sum, Defendants have not established that there are legitimate safety or operational concerns with Plaintiffs performing closer observation, and have done nothing to tie any concern to the specific roped-off area from which Plaintiffs have been excluded.

3. Defendants Have Failed to Establish That Their Exclusion of Plaintiffs Is Content Neutral

Defendants have failed to rebut the evidence that they have specifically targeted Plaintiffs for exclusion. Defendants concede that they first erected the rope barriers in response to Plaintiffs' monitoring activities, but argue that before Plaintiffs began their monitoring, safety at the checkpoint was a problem that "d[id] not exist." Opp. at 19. Defendants cannot have it both ways: if, as Defendants contend, a large nonpublic "checkpoint" area has existed along Arivaca Road for seven years, in part because "[t]raffic stops are inherently dangerous situations" (Opp. at 14), then they cannot maintain that safety was "a problem that had not yet presented itself" until 2014.

Defendants also cannot dispute that they have allowed other members of the public into the roped-off area while continuing to exclude Plaintiffs.[4] Ragan Decl. ISO Pl.'s Mot. ¶¶ 27–29; McClain Decl. ISO Pl.'s' Mot. ¶¶ 15. Contrary to Defendants' suggestion, these other individuals were manifestly "espousing another viewpoint" than the one shown by Plaintiffs because none was attempting to monitor the checkpoint. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2534 n.4 (2014).

[4] Defendants misstate the record when they claim, "there is no allegation that those individuals were permitted to protest in support of the checkpoints, in opposition to Plaintiffs' viewpoint." Opp. at 17. *See* Compl. at ¶¶ 79–80, Ragan Decl. ISO Pl.'s Mot. at ¶¶ 27–28.

Thus Plaintiffs' motion is supported by unrebutted evidence that the exclusion of Plaintiffs is a "regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791.

4. Defendants Have Failed to Establish That Their Restrictions Leave Open Ample Alternative Channels for the Exercise of First Amendment Rights

Defendants have failed to show that Plaintiffs have ample alternate channels for conducting their monitoring activities. In arguing that Plaintiffs are not unduly burdened, Defendants again conflate the distinct First Amendment rights to protest or disseminate expressive materials with the right to observe government employees in their public capacities. *See Gericke*, 753 F.3d at 3–8. Even if they are free to "protest" elsewhere,[5] Plaintiffs are now forced to stand too far away from Border Patrol agents to observe reasonable details about what happens at the stops. Pl.'s Mot. at 20–21; *see Peace Navy*, 914 F.2d at 1229–30 (citing *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 808–10 (1984)).

Nor is it a proper response that Plaintiffs have been able to perform *some* monitoring even from the remote vantage point behind the rope barriers. Opp. at 22. The efficacy of Plaintiffs' monitoring is closely tied to the proximity of that monitoring to the checkpoint. In *McCullen* the Supreme Court held that it was error to "downplay" the burden placed on the plaintiff, where the challenged "buffer zone" caused her to need to "rais[e] her voice at patients from outside the zone," because communicating in that fashion is "sharply at odds with the compassionate message she wishes to convey." 134 S. Ct. at 2535-36. Here, similarly, requiring Plaintiffs to monitor from a significant

[5] The Supreme Court long ago rejected any contention that "liberty of expression" in a public forum may necessarily be "abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). Except in rare circumstances where the government can prove otherwise, the First Amendment protects the right of speakers—not the government—to decide where and how to speak in a public forum. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 790-91 (1988); *Galvin v. Hay*, 374 F.3d 739, 751 (9th Cir. 2004). Indeed, in *Grace* itself, the Supreme Court struck down a rule against protesting on a sidewalk even though the plaintiffs could have protested "across the street." 461 U.S. at 174.

distance imposes real burdens, which Defendants cannot argue away simply by saying that some monitoring is already possible.[6] Defendants have not rebutted Plaintiffs' arguments that the rope barriers fail to leave open ample alternative channels for monitoring of the checkpoint.

5. Defendants' Arguments Also Fail Under the Inapplicable "Right to Access" Standard

Defendants fare no better under the *Press-Enterprise II* standard articulated in cases such as *Leigh*. 677 F.3d 892. As articulated in *Leigh*, the right to public access to government activity in a location other than a public forum attaches where (1) "the place and process have historically been open to the press and general public" and (2) "public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 898. In *Leigh*, the plaintiff sought "unrestricted access" to the roundup of horses in a federal herd management area. *Id.* at 894–95. The government argued in response that the plaintiff could properly be confined to a specific "viewing locatio[n]," in order to "protect the public from wild horses, helicopters, and vehicles." *Id.* at 894. This restriction was content-neutral, as the plaintiff "was not denied access that others received." *Id.* at 895.

The court held that certain arguments—such as whether the plaintiff was "treated differently than other members of the public" and whether plaintiff had been "prohibited . . . from observing the horse gather altogether" were "not part of the . . . balancing test," and "not relevant." *Id.* at 900. Instead, the court required "rigorous scrutiny" of restrictions, including more than a mere "rubber-stamp" of government arguments that the restriction is necessary. *Id.* Among other inquiries, the court required a determination of "whether public access plays a positive role in the functioning" of the government activity. *Id.* at 901.

[6] In response to Defendants' objection to portions of the Ragan Declaration and Exhibit 1 thereto, Plaintiffs provide with this brief the contemporaneously created records of the data underlying PHP's report, along with a declaration establishing their admissibility.

Under that rigorous standard, Defendants' attempted justifications fail. There is no question that the checkpoint on Arivaca Road has always been "open to the general public"; indeed, the goal of the checkpoint is to channel all members of the public traveling on Arivaca Road through a point of possible interrogation by Border Patrol officers. The challenged restriction seeks to exclude only a certain subset of the public—pedestrians—from a broad area surrounding the point where drivers may be required to stop. But allowing that segment of the public, including Plaintiffs, to observe the law enforcement activities indisputably "plays a positive role in the functioning" of the checkpoint by subjecting those activities to critical scrutiny by observers not under interrogation. *See id.*; *cf. Fordyce*, 55 F.3d at 438–39. And as discussed in detail above, Defendants' justifications have no clear relationship to the restriction. This court should not provide Defendants with the "rubber-stamp" they seek. *See Leigh*, 677 F.3d at 900.

6. Plaintiffs Seek a Classic "Negative" Injunction

Defendants incorrectly characterize the injunction sought by Plaintiffs as a "mandatory preliminary injunction" subject to heightened scrutiny. Opp. at 10. Plaintiffs seek a return to the *status quo ante*, prior to Defendants' implementation of their policy of excluding Plaintiffs from the roped-off area surrounding the Arivaca Road checkpoint. To bring that about Defendants need only cease excluding Plaintiffs from the area inside the rope barriers and adjacent to the checkpoint. This is a very typical negative injunction. *See Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1061 (9th Cir. 2014) (finding that the injunction in question was not mandatory, but rather prohibitory "like other injunctions that prohibit enforcement of a new . . . policy").

C. Plaintiffs Have Shown Irreparable Harm That Is Properly Remediated by a Preliminary Injunction

1. Plaintiffs Have Established Irreparable Harm

Defendants make two cursory attempts to argue that Plaintiffs have failed to show irreparable harm, neither of which has merit.

First, Defendants argue in circular fashion that there is no irreparable harm because Plaintiffs have failed to show any First Amendment violation at all. As discussed in detail

above, Plaintiffs have presented unrebutted evidence of ongoing violations of their First Amendment rights.

Second, Defendants argue that showing a First Amendment violation does not establish irreparable harm *per se*. This is not an accurate statement of the law: in the Ninth Circuit, deprivation of First Amendment rights "unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). *Hale*, 806 F.3d at 918, is not to the contrary, as the court there found no First Amendment violation, and therefore did not reach the question of whether a violation, had it been shown, would be sufficient to establish irreparable harm. Similarly, in *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005), the court found "that Plaintiffs did not show a probability of success on the merits" at all.[7]

But even if an additional showing were required, Plaintiffs have alleged concrete and significant harm as a result of their inability to conduct closer observations of the checkpoint. *See* Motion at 21–22. As the Supreme Court recently stressed in *McCullen*, it is improper to "downplay" the burden placed on Plaintiffs from being forced to observe from a distance—particularly where being kept at a distance is "sharply at odds" with the right to observe. *See* 134 S. Ct. at 2535-36. Plaintiffs need not show that their speech has been completely silenced to establish injury; the fact that Plaintiffs have been able to perform some monitoring does not defeat a claim of irreparable harm. It "would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity." *Mendocino Envtl. Center v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

Plaintiffs have clearly shown irreparable harm under the proper legal standard.

[7] Defendants' citation of *Hale* and *Preminger* in support of their contention that the balance of equities and public interest tip in Defendants' favor is similarly misplaced. Here, where Plaintiffs have established a First Amendment violation, the balance tips "sharply in favor" of an injunction for all of the reasons cited in Plaintiffs' Motion at 22–25.

2. Plaintiffs Have Standing to Seek an Injunction

Defendants challenge Plaintiffs' standing by arguing, erroneously, that Plaintiffs "alleged that they last visited the Arivaca checkpoint on July 11, 2014." Opp. at 26. To the contrary, the complaint and the declarations accompanying this motion establish that Plaintiffs have continued monitoring and attempting to monitor the Arivaca checkpoint from February 2014 to the present. Compl. ¶¶ 9–10, 67, 91–92; Ragan Decl. ISO Pl.'s Mot. ¶¶ 32–33. The rope barriers, which keep Plaintiffs at a distance from the law enforcement activities, are an ongoing irreparable harm, establishing Plaintiffs' standing to seek an injunction.

Defendants also fail to acknowledge that Plaintiffs' reduced monitoring is itself an independent and ongoing injury: namely, the chilling of Plaintiffs' efforts to exercise their First Amendment rights. Defendants did not, and cannot, dispute that Plaintiffs and persons acting with them have reduced their attempts to observe and record because of the improper, arbitrary, and disruptive tactics used by Defendants. Ragan Decl. ¶¶ 31–34. Chilling of the exercise of First Amendment rights, whether partial or complete, constitutes irreparable harm. *Rhodes v. Robinson*, 408 F.3d 559, 567 n.11, 568 (9th Cir. 2005) ("harm that is more than minimal will almost always have a chilling effect . . . . Speech can be chilled even when not completely silenced.").

Finally, Defendants ignore applicable First Amendment doctrine, and the corresponding argument in Plaintiffs' Motion (at 19), that Plaintiffs can establish standing to challenge government action by showing that it inhibits the First Amendment rights of others. *See Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 999 (9th Cir. 2004). A plaintiff may sue on behalf of third parties on the grounds that "the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 129 (1992).

Plaintiffs continue to suffer harm as a result of being kept at an unreasonable distance, and have reduced their monitoring activity, due to Defendants' actions. Ragan Decl. ¶¶ 31–34. It is deeply ironic for Defendants to rely on the efficacy of their own deterrence as evidence that Plaintiffs have allegedly suffered no harm.

3. There Is No Undue Delay in Making This Filing, Any Such Delay Would Only Be a Single Factor in the Analysis of Harm, and There Is No Prejudice to Defendants Flowing From Any Delay

Contrary to Defendants' assertions, there has been no undue delay in seeking this preliminary injunction. Plaintiffs began monitoring the checkpoint in late February, and have continued to do so until the present. As a result of Defendants' actions, Plaintiffs have been unable to observe and record the information they seek and have consequently monitored the Arivaca Road checkpoint less frequently. Plaintiffs nonetheless prepared a report based on their limited observations, and published the report in October 2014. After Plaintiffs' attempts to resolve the dispute were unsuccessful (Compl. ¶¶ 84-86; Ragan Decl. ISO Pl.'s Mot. ¶ 12), Plaintiffs filed this lawsuit in November. Within a month of that filing, Plaintiffs moved for a preliminary injunction. Plaintiffs have pursued this action diligently and without undue delay. *See Gilder v. PGA Tour*, 936 F.2d 417, 423 (9th Cir. 1991). They should not be penalized for exercising their constitutional right to petition officials and seeking to resolve the matter without litigation.

The alleged delay in this case is less significant than delays found acceptable in other First Amendment cases. *See Legal Aid Soc'y of Haw. v. Legal Servs. Corp.*, 961 F. Supp. 1402, 1417–18 (D. Haw. 1997) (finding a nine-month delay did not undermine plaintiffs' showing of irreparable harm, noting that the First Amendment is the "most sacred of all rights"); *see also Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1214 (9th Cir. 1984) (indicating that a delay of five years may not have undermined a showing of irreparable harm had the plaintiff also made a showing that First Amendment violations likely occurred).[8]

Even where a plaintiff alleges a non-constitutional violation, delay, on its own, is never a proper ground for denying a preliminary injunction. *See Arc of Cal.v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014) (delay is "but a single factor" in evaluating irreparable injury; courts are "loath to withhold relief" solely on that ground); *McDermott v.*

[8] Defendants' reliance on *Miller v. California Pacific Medical Center*, 991 F.2d 536 (9th Cir. 1993), Opp. at 28, is misplaced because *Miller* considers injunctive relief in a non-First Amendment context. *Id*. at 539.

Ampersand, 593 F.3d 950, 965 (9th Cir. 2010) ("delay by itself is not a determinative factor"). Delay is "not particularly probative in the context of ongoing, worsening injuries," and where delay is explained by other factors, its "significance . . . in determining irreparable harm may become so small as to disappear." *Arc of Cal.*, 757 F.3d at 991–92. As explained above, harm to Plaintiffs is ongoing, and Plaintiffs have diligently pursued non-legal and legal avenues of resolution.

Moreover, Defendants "identif[y] no prejudice that [they] ha[ve] suffered as a result of this delay." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 n.12 (9th Cir. 2013). Defendants have had more than sufficient time to respond to Plaintiffs' motion for preliminary injunction, and do not identify any prejudice they have suffered as a result of the alleged delay. Because the timing of Plaintiffs' motion for a preliminary injunction was not due to a lack of urgency, it is not probative of the harm they are suffering and will continue to suffer absent a preliminary injunction.

III. CONCLUSION

Plaintiffs, through this motion, seek an order vindicating their clearly established First Amendment right to observe and record law enforcement activities from public locations on Arivaca Road. Defendants have failed to carry their burden of rebutting Plaintiffs' claims. And, importantly, the order sought "ensure[s] the public's right to gather information about their officials" which "not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally." *Glik*, 655 F.3d at 82-83. (internal citations omitted). The Court should therefore enjoin Defendants from excluding Plaintiffs from these public areas, including unoccupied spaces on the north side of Arivaca Road and to the east of the areas actually used by Defendants for inspections.

DATED this 9th day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of March 2015, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail as indicated on the Notice of Electronic Filing.

Dated: March 9, 2015
San Francisco, California

/s/ Rohna Houston
Paralegal