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8 * *Pro hac vice* motions forthcoming
9 **Admitted pursuant to Ariz. Sup. Ct. R.
38(f)

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13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF ARIZONA**

15 LEESA JACOBSON; PETER RAGAN,

16 *Plaintiffs*

17 v.

18 UNITED STATES DEPARTMENT OF
19 HOMELAND SECURITY; UNITED STATES
20 CUSTOMS & BORDER PROTECTION; UNITED
21 STATES OFFICE OF BORDER PATROL; JEH
22 JOHNSON, Secretary, United States Department of
23 Homeland Security, in his official capacity; R. GIL
24 KERLIKOWSKE, Commissioner, United States
25 Customs & Border Protection, in his official
26 capacity; MICHAEL J. FISHER, Chief of the
27 United States Border Patrol, in his official capacity;
28 JEFFREY SELF, Commander, Arizona Joint Field
Command, in his official capacity; MANUEL
PADILLA, JR., Chief Patrol Agent-Tucson Sector,
in his official capacity; ROGER SAN-MARTIN,
Agent in Charge-Tucson Border Patrol Station, in
his official capacity; LLOYD EASTERLING,
Assistant Agent in Charge-Tucson Border Patrol
Station, in his official capacity; BORDER PATROL
AGENT J. JOYNER, in his official capacity;
BORDER PATROL AGENT ROSALINDA
HUEY, in her official capacity; BORDER

) CASE NO.:

)
) **COMPLAINT FOR**
) **DECLARATORY AND**
) **INJUNCTIVE RELIEF FOR**
) **VIOLATION OF**
) **PLAINTIFFS' FIRST**
) **AMENDMENT RIGHTS**

1 PATROL AGENT N. BALLISTREA, in her)
official capacity; BORDER PATROL AGENT S.)
2 SPENCER, in his official capacity; BORDER)
PATROL AGENT K. RIDEN, in her official)
3 capacity)

4 *Defendants.*)
5)
6)
7)

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18 * *Pro hac vice motions forthcoming*
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1. This action is brought to vindicate Plaintiffs’ First Amendment right to engage in political speech in a public forum—specifically, to protest, observe, and record law enforcement activity in their community.

2. In February 2014, Plaintiffs, along with other members of the Arivaca community organization People Helping People, initiated a “checkpoint monitoring campaign” to protest the U.S. Border Patrol checkpoint on Arivaca Road in Amado, Arizona, and to observe, photograph, and video record the actions of Border Patrol agents at the checkpoint from a public right-of-way adjacent to the checkpoint. The campaign is the culmination of local residents’ growing concern about Border Patrol activities in their community, including harassment and civil rights violations by federal agents at the checkpoint.

3. In response to the Arivaca residents' campaign, Border Patrol agents unconstitutionally interfered with Plaintiffs' speech and retaliated against them by: barring Plaintiffs from the public right-of-way adjacent to the checkpoint; requiring them and others monitoring the checkpoint with them to remain at an unreasonably great distance from the checkpoint; obstructing Plaintiffs' view by parking vehicles directly in the way; leaving parked vehicles running next to the checkpoint monitors for hours at a time so that the monitors would suffer from noxious fumes emissions; and threatening Plaintiffs with arrest, while allowing individuals who supported Defendants the same access to the public right-of-way that Defendants denied to Plaintiffs and other PHP monitors.

4. In continuing these actions, Defendants are violating Plaintiffs' First Amendment rights and chilling their present and future exercise of these rights. Judicial intervention is required to end the Defendants' ongoing interference with Plaintiffs' freedom of speech and retaliation against Plaintiffs for exercising their First Amendment rights, and to prevent the ongoing irreparable harms to Plaintiffs resulting from these First Amendment violations.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

6. The Court may grant declaratory and injunctive relief for the constitutional violations alleged here under 5 U.S.C. § 702, 28 U.S.C. §§ 2201(a) and 2202, and/or Federal Rules of Civil Procedure 57 and 65.

7. The United States and/or its officers or employees acting in their official capacities have waived sovereign immunity against actions seeking relief other than money damages. 5 U.S.C. § 702.

8. Venue is proper in the District of Arizona under 28 U.S.C. §§1391(b) and (e), because the events that give rise to this action occurred within this district, and because one or more plaintiffs reside in this district.

PARTIES

9. Plaintiff Leesa Jacobson is a resident of Arivaca, Arizona and a member of People Helping People (“PHP”). Ms. Jacobson has volunteered as a PHP checkpoint monitor on multiple occasions since the initiation of PHP’s checkpoint monitoring campaign, and continues to volunteer in that capacity.

10. Plaintiff Peter Ragan is a resident of Arivaca, Arizona and a member of PHP. Mr. Ragan has volunteered as a PHP checkpoint monitor on multiple occasions since the initiation of PHP's checkpoint monitoring campaign, and continues to volunteer in that capacity.

11. Defendant Department of Homeland Security (“DHS”) is a Cabinet-level department that is responsible for the coordination and unification of national security efforts. Defendant DHS has authority over policies, procedures, and practices relating to the operation of U.S. Border Patrol interior vehicle checkpoints.

12. Defendant United States Customs & Border Protection (“CBP”) is an agency within DHS. Defendant CBP has authority over policies, procedures, and practices relating to the operation of Border Patrol interior vehicle checkpoints.

13. Defendant Office of Border Patrol (“Border Patrol”) is a sub-agency within CBP. Border Patrol is a federal law enforcement agency responsible for the enforcement of the laws and regulations governing the admission of foreign-born persons to the United

1 States. Border Patrol has responsibility for and oversight over policies, procedures, and
2 practices relating to the operation of Border Patrol interior vehicle checkpoints.

3 14. Defendant Jeh Johnson is the Secretary of Homeland Security, vested with
4 all functions of all officers, employees, and organizational units of DHS. Defendant
5 Johnson has authority over all DHS policies, procedures, and practices relating to Border
6 Patrol interior checkpoint operations. Defendant Johnson is sued in his official capacity.

7 15. Defendant R. Gil Kerlikowske is Commissioner of CBP. In that capacity,
8 Defendant Kerlikowske has authority over all CBP policies, procedures, and practices
9 relating to Border Patrol interior checkpoint operations. Defendant Kerlikowske is sued in
10 his official capacity.

11 16. Defendant Michael J. Fisher is Chief of the Border Patrol. In that capacity,
12 Defendant Fisher has direct responsibility for and oversight over Border Patrol policies,
13 procedures, and practices relating to Border Patrol interior checkpoint operations.
14 Defendant Fisher is sued in his official capacity.

15 17. Defendant Jeffrey Self is Commander of the Arizona Joint Field Command.
16 In that capacity, Defendant Self has direct responsibility for and oversight over Tucson
17 Sector Border Patrol policies, procedures, and practices relating to Border Patrol interior
18 checkpoint operations in Tucson Sector. Defendant Self is sued in his official capacity

19 18. Defendant Manuel Padilla, Jr. is the Chief Patrol Agent for the Tucson
20 Sector of the Border Patrol. In that capacity, Defendant Padilla has direct responsibility
21 for and oversight over Tucson Sector Border Patrol policies, procedures, and practices
22 relating to Border Patrol interior checkpoint operations in Tucson Sector. Defendant
23 Padilla is sued in his official capacity.

24 19. Defendant Roger San-Martin is Agent in Charge of Tucson Border Patrol
25 Station. In that capacity, Defendant San-Martin has direct responsibility for and oversight
26 over Border Patrol policies, procedures, and practices relating to Border Patrol interior
27 checkpoint operations in Tucson Sector. Defendant San-Martin is sued in his official
28 capacity.

20. Defendant Lloyd Easterling is Assistant Agent in Charge of Tucson Border Patrol Station. In that capacity, Defendant Easterling has direct responsibility for and oversight over Border Patrol policies, procedures, and practices relating to Border Patrol interior checkpoint operations in Tucson Sector. Defendant Easterling is sued in his official capacity.

21. Defendant Border Patrol Agent J. Joyner is a Border Patrol Agent stationed in Tucson Sector. Defendant Joyner is sued in his official capacity.

22. Defendant Border Patrol Agent Rosalinda Huey is a Border Patrol Agent stationed in Tucson Sector. Defendant Huey is sued in her official capacity.

23. Defendant Border Patrol Agent N. Ballistrea is a Border Patrol Agent stationed in Tucson Sector. Defendant Ballistrea is sued in her official capacity.

24. Defendant Border Patrol Agent S. Spencer is a Border Patrol Agent stationed in Tucson Sector. Defendant Spencer is sued in his official capacity.

25. Defendant Border Patrol Agent K. Riden is a Border Patrol Agent stationed in Tucson Sector. Defendant Riden is sued in her official capacity.

FACTS

26. Border Patrol operates an interior checkpoint on Arivaca Road in Amado, Arizona (“Arivaca Road checkpoint”).

27. Arivaca Road is a paved two-lane county road that runs from Arivaca, Arizona, a town of 700 people, approximately twenty miles east to Amado, Arizona, a town of 300 people.

28. The Arivaca Road checkpoint is located in a rural area surrounded by farmland and private residences, approximately one mile west of Amado and twenty-five miles north of the U.S.-Mexico border. The roadside of Arivaca Road is unpaved and designated as a public right-of-way.

29. The Arivaca Road checkpoint consists of a small temporary shelter on the south side of the road, from which agents conduct checkpoint inspections, as well as an approximately 100-foot-long “secondary inspection” area, also on the south side of the

1 road, running east from and immediately adjacent to the shelter. Beginning several
2 thousand feet to the east and west of the checkpoint, a series of road signs direct motorists
3 to slow to a stop at the checkpoint, where they are questioned by the Border Patrol agent
4 or agents on duty. Motorists may be directed to the secondary inspection area for further
5 questioning.

6 30. Arivaca Road is located in a rural area where traffic is minimal. Generally,
7 no more than one or two vehicles arrive at the Arivaca Road checkpoint at any given time,
8 and of all vehicles arriving at the checkpoint, only a small fraction are referred for
9 secondary inspections.

10 31. Despite being designated a temporary or “tactical” checkpoint, the Arivaca
11 Road checkpoint has been in operation for approximately seven years, and is one of four
12 interior Border Patrol checkpoints located within thirty miles of Arivaca. Arivaca
13 residents must drive through a checkpoint in order to leave the area by automobile in any
14 east, west, or northbound direction. Many residents must pass through the Arivaca Road
15 checkpoint regularly, to go to school, to go to work, and to perform routine errands.

16 **People Helping People Campaign Protesting the Arivaca Road Checkpoint**

17 32. In or around July 2013, the community organization People Helping People
18 (“PHP”) launched a campaign to protest the Arivaca Road checkpoint.

19 33. PHP is an all-volunteer organization, founded by residents of Arivaca,
20 Arizona to provide humanitarian aid along the U.S.-Mexico border. The organization
21 sponsors an Abuse Documentation Clinic; co-sponsors the Arivaca Humanitarian Aid
22 Office, in Arivaca, Arizona; and hosts public events such as community forums and
23 educational workshops, including “Know Your Rights” and medical trainings, and
24 presentations on border-related topics.

25 34. Beginning in or around October 2013, PHP drafted and circulated a petition
26 calling on Border Patrol to remove the Arivaca Road checkpoint, citing civil rights
27 violations by agents at the checkpoint, along with harm to property values, tourism, and
28 quality of life resulting from checkpoint operations. The petition also stated residents’

1 objection to the checkpoint for its role in contributing to migrant deaths and the
2 militarization of the border region. More than 230 Arivaca residents and ten local business
3 owners have signed the petition calling for the removal of the Arivaca Road checkpoint.

4 35. PHP's petition drive followed the launch, in September 2013, of PHP's
5 "Abuse Documentation Clinic," through which PHP invited local residents to document
6 their experiences with Border Patrol in the community. PHP subsequently published a
7 selection of residents' accounts to its website (<http://phparivaca.org/>). Several of those
8 accounts described abuses by Border Patrol agents at the checkpoint, including prolonged
9 interrogation and detention, invasive searches, false canine alerts, racial profiling, verbal
10 harassment, and physical assault.

11 36. On December 8, 2013, members of PHP and a group of more than 100
12 supporters delivered a copy of the petition to Border Patrol at the Arivaca Road
13 checkpoint. There, PHP and its supporters staged a rally, with local residents carrying
14 banners and signs and speaking out in opposition to the checkpoint.

15 37. On January 15, 2014, the ACLU submitted an administrative complaint to
16 DHS as well as Defendants Johnson and Padilla, on behalf of fifteen individuals alleging
17 rights abuses at Border Patrol checkpoints in southern Arizona, almost half of which
18 involved local residents at the Arivaca Road checkpoint.¹ To date, Defendants have not
19 provided any information regarding whether any of those complaints have been
20 investigated or resolved. Neither have Defendants responded to the alleged abuses of
21 Arivaca residents documented on PHP's website, which are also incorporated into the
22 ACLU's January 15 complaint.

23 38. On or around January 16, 2014, Defendant Padilla sent a letter to PHP,
24 stating that Border Patrol would not remove the checkpoint. Defendant Padilla noted,
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26
27 ¹ See ACLU OF ARIZ., COMPLAINT AND REQUEST FOR INVESTIGATION OF ABUSES AT U.S.
28 BORDER PATROL INTERIOR CHECKPOINTS IN SOUTHERN ARIZONA, INCLUDING UNLAWFUL
SEARCH AND SEIZURE, EXCESSIVE FORCE, AND RACIAL PROFILING (Jan. 15, 2014), attached
as Exhibit A.

1 “You are welcome to bring to our attention specific incidents or issues regarding local
2 residents at the checkpoint.”

3 39. On or around January 23, 2014, Congressman Raul Grijalva sent a letter to
4 Border Patrol in support of the Arivaca residents’ petition.

5 **Monitoring the Arivaca Road Checkpoint and Border Patrol Response**

6 40. On January 22, 2014, PHP and its supporters staged a rally and press
7 conference outside of Border Patrol’s Tucson Sector headquarters to announce the start of
8 a “community based effort” to monitor the Arivaca Road checkpoint and called for public
9 hearings on the negative impacts of Border Patrol checkpoints.

10 41. Before initiating these monitoring activities, Plaintiffs and other members of
11 PHP drafted protocol and data collection materials for observing agents’ interactions with
12 motorists at the Arivaca Road checkpoint and for recording those observations. These
13 materials included a “Checkpoint Vehicle Stop Report” and a “Checkpoint Monitoring
14 Shift Report,” which direct monitors to record checkpoint-related information based on
15 their observations, including the names and agent numbers of any agents or other law
16 enforcement present at the checkpoint; the duration of any checkpoint interrogations; the
17 number of motorists searched, required to show identification, or referred for secondary
18 inspection; the number of apprehensions and seizures; the incidence of canine searches
19 and alerts; descriptions of every vehicle stopped at the checkpoint; the gender, apparent
20 ethnicity, and approximate age of each vehicle’s occupant(s); and other observations.

21 42. PHP members initiated checkpoint monitoring activities on February 26,
22 2014 when, at approximately 11:00 a.m., a group of six designated PHP checkpoint
23 monitors, including Plaintiff Ragan, arrived in the vicinity of the Arivaca Road
24 checkpoint.

25 43. The monitors wore fluorescent yellow traffic vests marked “Checkpoint
26 Monitor” and carried a sign reading “Monitoring to Deter Abuse + Collect Data.”
27 Monitors were supplied with video cameras, notepads, and PHP materials, including the
28 “Checkpoint Vehicle Stop Report” and a “Checkpoint Monitoring Shift Report.” Using

1 these materials, Plaintiff Ragan and the other PHP monitors sought to observe all
2 interactions between agents and motorists during the period monitoring occurred, and to
3 record relevant information based on those observations.

4 44. The monitors were accompanied by roughly two dozen additional protesters
5 and PHP members, including Plaintiff Jacobson, several of whom carried signs and
6 banners protesting the checkpoint with slogans such as, “Checkpoints Can’t Divide Us!,”
7 “Arivaca Is Not At War! Demilitarize Now!,” “Revitalize Not Militarize Border
8 Communities,” and “We R Watching.”

9 45. The group approached the checkpoint area from the east, walking on the
10 public right-of-way on the south shoulder of the county road and remaining out of the path
11 of traffic.

12 46. When Plaintiff Ragan and the other PHP monitors were approximately 100
13 feet east of the checkpoint at the eastern terminus of the secondary inspection area, they
14 were approached by Defendants Joyner and Riden. Defendant Joyner informed the
15 monitors that they would have to “move back” past a cattle guard in the roadway, which
16 was approximately 100 feet behind them and roughly 200 feet east of the checkpoint.
17 Defendant Joyner also stated that the Border Patrol had a permit demarcating the
18 boundaries of the checkpoint and promised to retrieve it.

19 47. Plaintiff Ragan and the other PHP monitors remained in place and began to
20 monitor and record interactions between agents and passing motorists, using a video
21 camera and taking notes.

22 48. Approximately twenty minutes later, Defendants Joyner and Riden returned.
23 They told Plaintiff Ragan and the other PHP monitors that Border Patrol had a permit on
24 site; Border Patrol would not provide a copy of the permit to the monitors; and that the
25 monitors could instead “look it up.”² Defendants Joyner and Riden repeated that Plaintiff
26

27 ² Plaintiffs are aware of one “Permit to Use County Right of Way” obtained by the U.S.
28 Border Patrol for the Arivaca Road checkpoint on February 26, 2004. That permit, a copy
of which is attached as Exhibit B, however, does not demarcate the boundaries of the
checkpoint, nor does it limit public access to the public-right-of-way. Upon information

1 Ragan and the other monitors needed to move and directed them to “back up to the cattle
2 guard” and out of the Border Patrol’s “enforcement area.” Defendants Joyner and Riden
3 then returned to the checkpoint.

4 49. A short time later, Pima County Sherriff’s Deputies arrived on the scene.
5 After conferring with Border Patrol for approximately fifteen minutes, Deputy Judd,
6 accompanied by Agents Joyner and Spencer, approached Plaintiff Ragan and the other
7 monitors. Deputy Judd asked Plaintiff Ragan and the other monitors to cross the street to
8 the north side of Arivaca Road. Deputy Judd pointed to an area directly across from where
9 the monitors were stationed, at the end of a line of Border Patrol vehicles. Plaintiff Ragan
10 and the other monitors agreed to go to the area indicated by Deputy Judd.

11 50. In that area, however, the monitors’ line of vision to the checkpoint
12 and the activities they sought to observe and record were obstructed by several Border
13 Patrol vehicles that were parked along the north side of the road. When some of the
14 monitors attempted to move closer to better observe the checkpoint, they were turned back
15 by agents, including Defendants Spencer, Ballistrea, Joyner, and Riden. Defendants
16 claimed the monitors were intruding on Border Patrol’s “enforcement area.” Those
17 monitors retreated to the area indicated by Deputy Judd, where Plaintiff Ragan had
18 remained.

19 51. At approximately 1:30 p.m., Defendant Easterling approached and asked
20 Plaintiff Ragan and the other monitors to “move back” again, this time to an area
21 approximately fifty feet from where they were stationed and 150 feet east of the
22 checkpoint. Defendant Easterling said that he had seen a permit granting Border Patrol an
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24 and belief, U.S. Border Patrol has no other permits related to its Arivaca Road checkpoint.
25 Additionally, Pima County Code of Ordinances Title X, Chapter 10.50.050,
26 “Nonexclusive Use,” which governs public right-of-ways, provides, “Nothing in this
27 chapter shall be construed to grant any user an exclusive right to use the public right-of-
28 way. Any user’s facilities shall be erected, adjusted, installed, replaced, removed,
relocated and maintained in a manner that will not interfere with the reasonable use of the
public right-of-way, drainage ways, alleys, or easements by the public, by county, or by
any other user, or the rights and conveniences of adjacent property owners.”

1 “enforcement zone” that extended 800 feet to the west of the checkpoint. Defendant
2 Easterling said that he did not remember how far to the east the enforcement zone
3 extended, but said that he was demarcating it as running to “the end of the pylons” and
4 that the monitors had to move beyond that limit.

5 52. Plaintiff Ragan and the other monitors communicated to Defendant
6 Easterling that Pima County Sheriff’s Deputies had directed them to stand in their present
7 location. Defendant Easterling then summoned a different Pima County Sheriff, Sergeant
8 Lapelini. Sergeant Lapelini did not say that the monitors were required to move. The
9 monitors remained in place.

10 53. Defendant Spencer and a second Border Patrol agent then proceeded to
11 string yellow tape marked “U.S. Border Patrol Incident Scene” across the north and south
12 shoulders of the road, approximately 150 feet east of the checkpoint. On both sides of the
13 road, Border Patrol agents strung the tape from a private fence adjacent to the public right-
14 of-way to a traffic barrier by the roadside, blocking off pedestrian access to the public
15 right-of-way on both the north and south sides of Arivaca Road.

16 54. Shortly after the Sheriff’s Deputies left the scene, Defendant Easterling
17 approached Plaintiff Ragan and the other monitors. Agent Easterling stated that if the
18 monitors did not move, the agents would move them forcibly. Agent Easterling stated that
19 this was “an order,” and that if monitors resisted, they would be arrested.

20 55. Under threat of arrest, Plaintiff Ragan and the other monitors relocated by
21 moving east to an area behind the newly-installed boundary. From that distance, Plaintiff
22 Ragan and the other monitors were unable to observe and record much of the checkpoint-
23 related information they sought, including information regarding agents’ identities,
24 vehicle and motorist descriptions, and the nature and description of agents’ interactions
25 with motorists at the checkpoint.

26 **Additional Border Patrol Restrictions on Public Access to the Public Right-of-Way**

27 56. At some point prior to March 1, 2014, Border Patrol modified the barriers
28 on both sides of Arivaca Road, replacing the yellow incident tape with rope cordons

1 running from the private fence adjacent to the public right-of-way to a traffic barrier in the
2 middle of the public right-of-way, and from there to another traffic barrier by the roadside.

3 57. On each side of the road, Border Patrol also posted a sign: “Border Patrol
4 Enforcement Zone — No Pedestrians Beyond This Point.”

5 58. Pedestrians passing by the checkpoint from either direction on the north or
6 south right-of-ways could not pass without stepping under the rope cordons or into the
7 roadway. The barriers have since been modified but remain in place and prevent observers
8 from coming within about 150 feet of the checkpoint.

9 59. On March 1, 2014, at approximately 10:30 a.m., a group of six PHP
10 monitors returned to the north side of the Arivaca Road checkpoint. The monitors again
11 carried video cameras, notepads, and PHP materials, including the “Checkpoint Vehicle
12 Stop Report” and a “Checkpoint Monitoring Shift Report” in order to observe agents’
13 interactions with motorists and record relevant information.

14 60. The monitors stopped approximately 100 feet from the checkpoint, in
15 roughly the same location they had agreed to use at the request of Deputy Judd on
16 February 26.

17 61. The monitors were approached by Defendant Huey and several unidentified
18 agents. Defendant Huey informed the monitors that they were within Border Patrol’s
19 “zone of operation” and needed to stand behind the boundary. The monitors responded
20 that they had returned to the same location to which they had been directed by Pima
21 County Sheriff’s Deputies on February 26. Defendant Huey stated that if the monitors did
22 not move, Border Patrol would call the Pima County Sheriff’s Office. The monitors
23 objected and remained in place.

24 62. After approximately one hour, Defendant Huey returned, again
25 accompanied by several unidentified agents. Defendant Huey then stated, “There is
26 nothing to discuss, there is nothing to decide. Either you move or we will arrest you.”
27 Another agent stated to Defendant Huey, “Just arrest them.” Defendant Huey and another
28

1 agent produced handcuffs and began advancing on the monitors. Under threat of arrest,
2 the monitors moved.

3 63. One of the monitors asked the agents for their names. In response,
4 Defendant Huey stated, “You have to move or we will place you under arrest. If you want
5 our names you will have to move behind the barrier.” Agents followed the monitors to the
6 barrier, approximately 150 feet from the checkpoint. The agents then walked away
7 without allowing the monitors to obtain the agents’ names or agent numbers.

8 64. An unidentified Border Patrol agent parked a vehicle directly in front of the
9 monitors, on the west side of the barrier, blocking their line of vision. Another vehicle was
10 parked in the same location on the south side of the road, just west of the barrier. At that
11 time, there was ample space inside the “enforcement zone” for the Border Patrol vehicles
12 to park without obstructing the monitors’ view, including most of the north side of
13 Arivaca Road adjacent to the checkpoint.

14 65. Despite the existence of ample alternative parking locations, Border Patrol
15 parked its vehicles immediately adjacent to the barriers and knowingly impeded the
16 monitors’ line of sight to the checkpoint.

17 66. As before, agents denied monitors access to the vacant, unused space in the
18 public right-of-way within 150 feet of the checkpoint. As a result, monitors were again
19 unable to observe and record much of the checkpoint-related information they sought.

20 **Border Patrol Interference With, and Retaliation Against, Plaintiffs and Other**
21 **Checkpoint Monitors**

22 67. Members of PHP, including Plaintiffs Jacobson and Ragan, have continued
23 to attempt to protest and observe Arivaca Road checkpoint operations to the best of their
24 ability from behind Defendant Border Patrol’s barriers. PHP monitors, including
25 Plaintiffs, seek to observe interactions between agents and motorists, and to record
26 relevant information based on those observations. These activities, however, continue to
27 be greatly restricted by the barriers and the conduct of agents.
28

1 68. For example, because they are restricted to observing from approximately
2 150 feet away, Plaintiffs and other PHP monitors have been unable to observe or record
3 the identity of agents operating the checkpoint, and have had difficulty observing and
4 recording descriptions of vehicles and vehicle occupants. Plaintiffs also have been unable
5 to discern the nature of agents' interactions with motorists, whether conversational or
6 inquisitional in nature, from behind the barriers. Plaintiffs are further impeded in their
7 ability to observe and record the full range of actions taken by agents and by Border Patrol
8 service canines, including canine "alerts" and agent inspections. As a result of the
9 obstacles imposed by Border Patrol, Plaintiff and other PHP monitors' ability to gather
10 basic information about public law enforcement practices has been severely limited.

11 69. Additionally, as-yet unidentified Border Patrol agents have harassed,
12 intimidated, and retaliated against the PHP monitors, including Plaintiffs, in direct
13 response to their checkpoint monitoring campaign. Plaintiffs have themselves been
14 subject to harassment, intimidation, and retaliation by agents at the checkpoint, and are
15 aware of all incidents alleged herein in which other members of PHP were treated
16 similarly.

17 70. On multiple occasions following the initiation of the checkpoint monitoring
18 campaign, Border Patrol agents parked vehicles next to the barriers for the purpose of
19 obstructing the monitors' view, despite the ample availability of alternative parking
20 locations. When Plaintiffs and other PHP monitors arrived at the checkpoint in the
21 morning, Border Patrol agents moved their vehicles and parked them next to the barriers;
22 after the monitors left, agents removed the vehicles.

23 71. On more than one occasion, agents have parked a Border Patrol vehicle next
24 to the barrier and left the engine running, with exhaust fumes directed at the monitors. In
25 one instance, in an attempt to avoid the exhaust fumes blowing in their direction, the
26 monitors moved to the opposite side of the road. The agent responded by parking a
27 vehicle next to the barrier on that side of the road, again leaving the engine running. Both
28 vehicles were left idling for approximately three hours while the monitors were present.

1 On another occasion, Plaintiff Jacobson was forced to breathe exhaust fumes directed at
2 the monitors from a Border Patrol vehicle that was left running next to the barrier.

3 72. On another occasion, the monitors could overhear agents shouting
4 profanities that were directed at the monitors; one agent yelled to a passing motorist, "You
5 should drive up and tell her, 'Bitch, don't film me!'"

6 73. At no point since the onset of PHP's checkpoint monitoring activities have
7 Plaintiffs or any other checkpoint monitors interfered or attempted to interfere with
8 Border Patrol operations in any way.

9 74. On March 7, 2014, Defendant San-Martin sent an e-mail to People Helping
10 People, a copy of which is attached as Exhibit C, which read in part:

11 The inside perimeter of the checkpoint is not a public place where anyone
12 can just show up and establish ground. It is a "controlled area" for agents
13 conducting their duties. By controlled I mean agents have the authority and
14 are within their right to determine who can enter into the perimeter where
15 they are conducting law enforcement actions. Agents have the right to
16 perform their duties without impediment by individuals who are on scene.
17 The decision on where monitors can stand/sit without interfering with agents
18 and traffic is that of the agents and not the monitors.

19 75. On March 11, 2014, Defendant San-Martin and Defendant Easterling spoke
20 at the Arivaca Community Center. Members of PHP, including Plaintiff Ragan, were
21 present.

22 76. Defendants San-Martin and Easterling both asserted that Border Patrol had
23 the authority to restrict access to the public area adjacent to the Arivaca Road checkpoint.
24 Defendant Easterling stated that "the people who are going to dictate where they can and
25 can't be are the agents on the scene." Defendant Easterling also noted that agents required
26 the monitors to move "under threat of arrest." Defendant Easterling went on to say,
27 "We're well aware that we have some agents out there that lose their minds. Well aware.
28 And when we get the reports on that . . . we take care of it." Defendant Easterling stated
that all agents should have their name tags visible.

1 77. Defendant San-Martin acknowledged that Border Patrol vehicles had parked
2 adjacent to the barriers to block ingress, but claimed there was no intention to obstruct the
3 monitors' view of the checkpoint.

4 78. Defendants Easterling and San-Martin also acknowledged that arrests at the
5 Arivaca Road checkpoint are rare, but that the checkpoint serves as a "deterrent."

6 79. Border Patrol agents at the Arivaca Road checkpoint have repeatedly
7 allowed individuals not affiliated with PHP to access the area surrounding the checkpoint
8 while denying that access to Plaintiffs and other PHP monitors. On April 3, 2014, PHP
9 monitors, including Plaintiff Ragan, observed a local resident arrive and park his vehicle
10 next to the barrier, directly inside the new "enforcement zone." That individual had
11 previously directed obscene comments and gestures at the monitors, and on this occasion
12 began to harass and video record the monitors stationed on the other side of the barrier.

13 80. The man remained inside the barrier for approximately forty minutes, at one
14 point parking his truck with one end protruding into the roadway. The man's wife also
15 arrived and parked her car inside the barrier. As the man left the checkpoint area, he
16 stopped in the westbound lane where monitors overheard him shout to the agents on duty,
17 "Well, we had our fun today." The agents at the checkpoint smiled and laughed.

18 81. Later, as Plaintiff Ragan was departing from the Arivaca Road checkpoint,
19 he asked the agents at the checkpoint if they had given the man permission to remain
20 inside the "enforcement zone." An agent replied, "It's a free country."

21 82. On another occasion, monitors observed another man dressed in plain
22 clothes go through the checkpoint, park his truck in the secondary inspection area, and
23 approach the checkpoint on foot, where he conversed with agents for approximately
24 twenty minutes.

25 83. At some point subsequent to this encounter, Border Patrol replaced the "No
26 Pedestrian" signs with new signs that read, "No Unauthorized Entry Beyond This Point."
27 Those signs and the Border Patrol's barriers remain in place. Photographs of the signs are
28 attached as Exhibit D.

1 84. On April 17, 2014, the ACLU sent a letter to Defendants Padilla, Johnson,
2 and Kerlikowske, a copy of which is attached as Exhibit E, demanding that Border Patrol
3 cease harassing and discriminating against the checkpoint monitors, remove the barriers
4 on Arivaca Road, and allow peaceful protest and monitoring activity from a short distance
5 outside the primary inspection area.

6 85. On April 24, 2014, Defendant Padilla sent a letter to the ACLU, a copy of
7 which is attached as Exhibit F, asserting that Border Patrol would continue to restrict
8 access to the public area adjacent to the Arivaca Road checkpoint.

9 86. On July 3, 2014, the ACLU sent a second letter to Defendants Padilla,
10 Johnson, and Kerlikowske, a copy of which is attached as Exhibit G, seeking a resolution
11 of the dispute. To date, Defendants have not responded to that letter.

12 87. On July 11, 2014, Plaintiff Ragan and other members of PHP participated in
13 a checkpoint “Know Your Rights” rally at the Arivaca Road checkpoint. The rally took
14 place on the west side of the checkpoint, while Plaintiff Jacobson and other PHP monitors
15 set up to record checkpoint operations from the east. Members of the media were present
16 and agents permitted reporters and pedestrians only to walk along the north side of the
17 road from one end of the “enforcement zone” to the other. Agents again parked Border
18 Patrol vehicles immediately adjacent to the barriers on both sides of the road, impeding
19 Plaintiff Jacobson and other monitors’ view of the checkpoint. As the monitors were
20 departing, the Border Patrol vehicles were removed.

21 88. Border Patrol agents at the Arivaca Road checkpoint and at other Border
22 Patrol checkpoints repeatedly have asserted that motorists do not have the right to record
23 checkpoint interactions. For example, the ACLU’s January 15, 2014 administrative
24 complaint describes an August 19, 2013 encounter in which a family of four was accosted
25 by Defendant Riden for attempting to video record their checkpoint stop.³

27 ³ See ACLU COMPLAINT, *supra* n.1, at 8–9 (“When Mrs. Garcia exited the vehicle with
28 the phone, Agent Riden yelled at her to turn it off, and tried unsuccessfully to grab the
 phone from Mrs. Garcia’s hand, poking her chest. Mrs. Garcia handed the phone to her
 husband. Agent Riden continued to yell and demanded that Mr. Garcia turn the phone off.

1 89. More recently, on August 1, 2014, a California resident filed a complaint
2 with Pima County Sheriff's Department, alleging that a Border Patrol agent at the Arivaca
3 Road checkpoint prevented her from videotaping a search of her vehicle.⁴

4 90. On October 19, 2014, after analyzing monitoring data collected from
5 February 26 to April 28, 2014, members of PHP presented initial findings of the
6 checkpoint monitoring campaign at a community forum in Arivaca. Among other
7 findings, PHP reported that Border Patrol agents at the Arivaca Road checkpoint were
8 engaged in "systemic" discrimination, subjecting Latino motorists to far greater scrutiny
9 and delay than Caucasian motorists. The monitors' report noted that the data was collected
10 from an area "beyond monitors' ability to adequately see or hear Border Patrol
11 operations" and that limitations imposed by Border Patrol "restricted [monitors'] ability to
12 observe and record important information."

13 91. After more than eight months and thousands of observed checkpoint stops,
14 PHP monitors have not witnessed a single arrest at the Arivaca Road checkpoint.

15 92. To the best of their ability, given the restrictions imposed upon them by
16 Defendants, Plaintiffs and other PHP members have continued monitoring, recording, and
17 collecting data concerning agents' interactions with motorists at the Arivaca Road
18 checkpoint, and intend to continue analyzing the recorded data and reporting their
19 findings. Their ability to do so remains significantly impeded by Defendants' actions,
20 however, and PHP recently decided to narrow the scope of the data monitors will seek to
21

23 Agent Riden stated that Mr. Garcia could not use her phone to record because Border
24 Patrol was searching the vehicle 'based on probable cause.' Agent Riden continued
25 yelling at Mr. Garcia to turn off the phone . . . Mr. Garcia could see that Agent Riden's
26 behavior was upsetting his children, so he turned the phone off, but not before Agent
Riden attempted, again unsuccessfully, to grab the phone out of his hands.").

27 ⁴ See *Woman Claims Assault at Border Patrol Checkpoint*, GREEN VALLEY NEWS, Aug.
28 22, 2014, available at <http://bit.ly/1rIWgRY> ("A short video clip of the incident provided
to the Green Valley News shows the agent grabbing the phone from the woman's hand.
The woman also said the agent went through her phone and purse without permission.").

1 record. For example, monitors no longer attempt to record the identity of agents at the
2 checkpoint because that information is impossible to discern from so far away.

3 **Border Patrol's Arbitrary "Enforcement Zone" and Harassment of Plaintiffs Violate**
4 **the First Amendment**

5 93. On information and belief, prior to February 26, 2014, Defendants never
6 created or enforced a restricted checkpoint "enforcement area" or "zone," or any similar
7 restriction on public access to the public right-of-way adjacent to the Arivaca Road
8 checkpoint, or adjacent to any other Arizona interior vehicle checkpoint.

9 94. On information and belief, prior to February 26, 2014, Defendants never
10 erected "No Pedestrian" signs or other signage indicating restricted public access to the
11 public right-of-way adjacent to the Arivaca Road checkpoint, or adjacent to any other
12 Arizona interior vehicle checkpoint.

13 95. On information and belief, subsequent to February 26, 2014, Defendants
14 have not created or enforced any other checkpoint "enforcement zone" and have not
15 installed "No Pedestrian" signage restricting access to the public right-of-way adjacent to
16 any other interior vehicle checkpoint in Arizona other than the Arivaca Road checkpoint.

17 96. On information and belief, prior to February 26, 2014, Defendants were
18 aware that Plaintiffs and others working with them were critical of the practices of Border
19 Patrol, including their criticism of arbitrary and unconstitutional actions by Border Patrol
20 agents at the Arivaca Road checkpoint.

21 97. On information and belief, Defendants established the "enforcement zone"
22 and accompanying signage at the Arivaca Road checkpoint in direct response to the PHP
23 monitoring campaign and to prevent protesters and monitors from accessing the public
24 right-of-way adjacent to the checkpoint.

25 98. On information and belief, Defendants DHS, CBP and Border Patrol have
26 not promulgated regulations governing the boundaries of interior checkpoint
27 "enforcement zones" or any similar exclusive zones of authority adjacent to interior
28 vehicle checkpoints.

1 99. On information and belief, Defendants DHS, CBP, Border Patrol, Johnson,
2 Kerlikowske, Self, Fisher, Padilla, San-Martin, and Easterling have a policy and practice
3 of delegating decisions regarding any restrictions on public access to public areas adjacent
4 to Border Patrol interior checkpoints to the discretion of local sector chiefs, supervisors,
5 and/or agents in the field. These delegations of authority do not include specific criteria or
6 conditions for persons seeking to observe and/or record the activities of agents at Border
7 Patrol interior checkpoints, nor instructions concerning the First Amendment rights of
8 persons to engage in such observations.

9 100. On information and belief, Defendants DHS, CBP, Border Patrol, Johnson,
10 Kerlikowske, Self, Fisher, Padilla, San-Martin, and Easterling are aware of and condone
11 the actions Border Patrol has taken to restrict public access to public areas adjacent to the
12 Arivaca Road checkpoint, including the harassment, intimidation, and retaliatory acts
13 Border Patrol agents have directed at Plaintiffs, and have taken no action to lift those
14 restrictions or to prevent future harassment, intimidation, and retaliatory acts from being
15 directed at Plaintiffs.

16 101. By preventing and impeding Plaintiffs' checkpoint monitoring and
17 protesting activities, and by threatening Plaintiffs with arrest, Defendants' actions have
18 chilled, deterred, and infringed upon Plaintiffs' right to engage in protected speech,
19 resulting in harm to Plaintiffs.

20 102. Defendants' policies, customs, and/or practices concerning Plaintiffs'
21 checkpoint monitoring and protesting activities have caused Border Patrol agents to chill,
22 deter, and infringe upon Plaintiffs' right to engage in protected speech, resulting in harm
23 to Plaintiffs and entitling them to declaratory and injunctive relief.

24 103. Through harassment, intimidation, willful obstruction, and selective
25 enforcement of the "enforcement area" at the Arivaca Road checkpoint, Defendants have
26 discriminated and retaliated against Plaintiffs for exercising their First Amendment rights.

27 104. The acts, omissions, policies, customs, and/or practices of all Defendants are
28 causing irreparable harm to Plaintiffs due to interference with and chilling of their First

1 Amendment rights to protest and/or record checkpoints from a public right-of-way, for
2 which they have no adequate remedy at law.

3 105. An actual and immediate controversy has arisen and now exists between
4 Plaintiffs and Defendants regarding Plaintiffs' ability to exercise First Amendment rights
5 to protest, observe, and/or record the Arivaca Road checkpoint from a public right-of-way
6 adjacent to the checkpoint. Plaintiffs are entitled to a declaration of rights with respect to
7 this controversy. Without such a declaration, Plaintiffs will be uncertain of their rights and
8 responsibilities under the law.

9 **CLAIMS**

10 **COUNT ONE**

11 **Unlawful Regulation of Plaintiffs' First Amendment Rights in a Public Forum** 12 **(All Defendants)**

13 106. Plaintiffs reallege and incorporate by reference the allegations in all
14 preceding paragraphs.

15 107. The First Amendment to the United States Constitution prohibits
16 infringement on and chilling of protected First Amendment activity.

17 108. Defendants Easterling, San-Martin, Joyner, Huey, Ballistrea,
18 Spencer, and Riden acted pursuant to Defendants DHS, CBP, Border Patrol, Johnson,
19 Kerlikowske, Self, Fisher, and Padilla's expressly adopted official policy and/or
20 longstanding practice of delegating authority regarding public access to public areas
21 adjacent to interior vehicle checkpoints to the discretion of supervisors and/or agents in
22 the field. This policy and/or practice affords an impermissible degree of discretion to
23 agents and continues to be an impermissible prior restraint on speech and to chill, deter,
24 and infringe upon Plaintiffs' First Amendment rights. Further, Defendants' definition of
25 the "enforcement zone" and inconsistent regulation of Plaintiffs' proximity to Defendants'
26 public activities in and near the checkpoints are both broader than needed to further
27 Defendants' objectives.
28

109. Defendants continue to infringe upon, restrict, and violate Plaintiffs' First Amendment rights because Plaintiffs' speech has been chilled by Defendants' policies, customs, and/or practices.

COUNT TWO

Retaliation Based on Rights Protected Under the First Amendment of the United States Constitution

(All Defendants)

110. Plaintiffs reallege and incorporate by reference the allegations in all preceding paragraphs.

111. The First Amendment protects the rights of Plaintiffs to protest and to observe, take photographs, and make video recordings of public officials engaged in the public discharge of their duties.

112. Defendants have violated Plaintiffs' First Amendment rights by improperly infringing upon and restricting Plaintiffs First Amendment rights and by harassing, intimidating, retaliating against and threatening Plaintiffs with arrest for engaging in constitutionally protected speech.

113. Defendants continue to infringe upon, restrict, and violate Plaintiffs' First Amendment rights. Plaintiffs continue to face an imminent threat from Defendants of being harassed, intimidated, retaliated against or arrested if they engage in constitutionally protected activity.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Issue a preliminary and permanent injunction restraining Defendants, their employees, agents, and successors from

1. Preventing, restricting, impeding, or otherwise interfering with Plaintiffs' First Amendment rights to protest and record the Border Patrol checkpoint on Arivaca Road, or any other Border Patrol

1 checkpoint situated similarly to the one on Arivaca Road, from the
2 public right-of-way; and

- 3 2. Preventing, restricting, impeding, or otherwise interfering with
4 Plaintiffs' First Amendment rights to protest and record the Border
5 Patrol checkpoint on Arivaca Road, or any other Border Patrol
6 checkpoint situated similarly to the one on Arivaca Road, from areas
7 where other members of the public are allowed to congregate.

8 B. Enter a judgment declaring that

- 9 1. Defendants have violated Plaintiffs' rights under the First
10 Amendment; and
11 2. Plaintiffs are entitled under the First Amendment to protest and
12 record Border Patrol interior vehicle checkpoint operations from a
13 reasonable distance outside the primary inspection area.

14 C. Award Plaintiffs costs, including reasonable attorneys' fees, and

15 D. Grant such other and further relief as the Court deems just and proper.
16

17 DATED this 20th day of November, 2014.

18 ACLU FOUNDATION OF ARIZONA

19 By /s/ James Lyall

20 Daniel J. Pochoda

21 James Lyall

22 Victoria Lopez

23 Joel Edman

24 3707 North 7th Street, Suite 235

25 Phoenix, AZ 85014

26 ACLU FOUNDATION OF SAN DIEGO &
27 IMPERIAL COUNTIES

28 /s/ Mitra Ebadolahi

David Loy

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EXHIBIT A



January 15, 2014

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Tamara Kessler
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Re: Complaint and request for investigation of abuses at U.S. Border Patrol interior checkpoints in southern Arizona, including unlawful search and seizure, excessive force, and racial profiling.

Dear Mr. Edwards and Ms. Kessler:

We write with serious concerns regarding U.S. Border Patrol interior vehicle checkpoints in southern Arizona. This complaint is submitted on behalf of 15 U.S. citizens, aged 6 to 69 years old, whose rights were violated in the course of more than 12 separate incidents over the past 15 months at 6 different Arizona checkpoints, as described in detail below.¹ The ACLU receives frequent reports from Arizona residents regarding unconstitutional searches and seizures, excessive use of force, racial profiling, and other agent misconduct at checkpoints. Residents describe similar patterns of abuse at various checkpoints throughout the state—including searches based on service canines “alerting” to nonexistent contraband² and prolonged, unjustified detentions—indicating that these incidents are not anomalous or perpetrated by a few “bad apples,” but rather are the result of systemic deficiencies in Border Patrol policies and practices, which are leading to widespread rights violations.

The ACLU is a non-partisan, non-profit, nation-wide organization that works daily in courts, communities, and legislatures across the country to protect and preserve the rights and liberties established by the Bill of Rights and state and federal law. The ACLU has a particular commitment to ensuring that fundamental constitutional protections of due process and equal protection are extended to every person, regardless of citizenship or immigration status, and that government respects the civil and human rights of all people. The ACLU of Arizona is an ACLU state affiliate organization with over 7,000 supporters. The ACLU’s Border Litigation Project investigates, documents, and litigates civil and human rights violations in the U.S.-Mexico border region.

¹ Five of these incidents occurred in the same week in late November-early December 2013, at three different checkpoints. Though several of the individuals described below have experienced checkpoint-related abuses on multiple occasions, this letter focuses on the most recent incidents.

² In at least eight of the incidents documented herein, Border Patrol service canines “alerted” in the absence of contraband. The ACLU recently filed a lawsuit on behalf of a U.S. citizen subjected to a strip search, multiple genital and cavity searches, a forced bowel movement, an X-ray, and a CT scan following a similar false alert by a U.S. Customs and Border Protection service canine. *See Jane Doe v. El Paso County Hospital District, et al.*, No. 3:13-CV-00406-DB (W.D.Tex. filed Dec. 18, 2013); Complaint available at <http://www.aclu-nm.org/wp-content/uploads/2013/12/Complaint-Jane-Doe-v-Variou-Defendants-12-18-13.pdf>

Residents of southern Arizona are increasingly outraged by Border Patrol checkpoints, and for good reason. Forty years ago, the U.S. Supreme Court condoned immigration checkpoints under the assumption that the stops are “brief,” and involve, at most, a “limited inquiry into residence status” and a “visual inspection” of the exterior of the vehicle.³ In practice, border residents regularly experience extended interrogation and detention not related to establishing citizenship, invasive searches, verbal harassment, and physical assault, among other abuses. As discussed below, Border Patrol checkpoints often appear to be operated as drug interdiction checkpoints, which are unconstitutional,⁴ and not for the limited purpose of verifying residence status. Indeed, most of the individuals described herein were never asked about their citizenship, and Border Patrol’s own figures show that the vast majority of drug-related arrests at checkpoints do not involve unauthorized immigrants at all, but rather, U.S. citizens.⁵

According to a 2009 U.S. Government Accountability Office (GAO) Report, Border Patrol operates 71 permanent and tactical checkpoints across the southwest.⁶ These operations stem from Border Patrol’s authority to conduct warrantless seizures within “a reasonable distance”⁷ of the border. That distance is defined by outdated regulations to be “100 air miles”⁸ from any external boundary, including coastal boundaries, and thus encompasses roughly two-thirds of the U.S. population and the entirety of several states.⁹ In practice, Border Patrol ignores that limitation, roaming still further into the interior of the country.¹⁰ In Arizona, most checkpoints are located on rural state highways between 25 and 50 miles north of the border, many of them in the vicinity of southern Arizona towns and cities.

³ See *United States v. Martinez-Fuerte*, 428 U.S. 543, 558–60 (1976), discussed *infra*.

⁴ See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), discussed *infra*.

⁵ The vast majority of these arrests are for marijuana-related offenses, and the number of arrests in 2011 was triple that in 2005. See Andrew Becker, *Four of Five Border Patrol Drug Busts Involve US Citizens, Records Show*, CENTER FOR INVESTIGATIVE REPORTING, Mar. 26, 2013, available at <http://cironline.org/reports/four-five-border-patrol-drug-busts-involve-us-citizens-records-show-4312>. Meanwhile, CBP’s data shows that apprehensions of undocumented immigrants are at 40-year lows while deaths of border crossers are at historic highs. See Bob Ortega, *Border Apprehensions Up, But Still Near Historic Lows*, ARIZONA REPUBLIC, Jun. 3, 2013 available at <http://www.azcentral.com/news/politics/articles/20130531mexico-border-apprehensions-up.html>

⁶ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, BORDER PATROL: CHECKPOINTS CONTRIBUTE TO BORDER PATROL’S MISSION, BUT MORE CONSISTENT DATA COLLECTION AND PERFORMANCE MEASUREMENT COULD IMPROVE EFFECTIVENESS, GAO-09-824, (Aug. 2009) available at <http://www.gao.gov/products/GAO-09-824>.

⁷ See 8 U.S.C. § 1357(a)(3).

⁸ See 8 C.F.R. § 287.1(b). The Justice Department published regulations defining “reasonable distance” as 100 miles in 1957. See *Field Officers: Powers and Duties*, 22 Fed. Reg., 236, 9808–09 (Dec. 6, 1957) (to be codified at C.F.R. § 287). There is no public history to indicate *why* the Justice Department chose 100 miles as the “reasonable distance” from the border. It may have been that 100 miles had historically been considered a “reasonable” distance regarding availability of witnesses for examination, responses to subpoenas, and other discovery issues under federal law. See, e.g., 10 U.S.C. § 849; FED. R. CRIM. P. 7; FED. R. CIV. P. 45.

⁹ Though immigration checkpoints are mostly confined to the southwest, Border Patrol has operated temporary checkpoints in northern states as well. A recent Freedom of Information Act (FOIA) request uncovered design plans for permanent checkpoints on southbound New England highways. See ACLU OF VERMONT, *SURVEILLANCE ON THE NORTHERN BORDER*, (Sept. 17, 2013), available at http://www.acluvt.org/surveillance/northern_border_report.pdf.

¹⁰ See, e.g., Todd Miller, *War on the Border*, NY TIMES, Aug. 18, 2013, available at http://www.nytimes.com/2013/08/18/opinion/sunday/war-on-the-border.html?pagewanted=all&_r=0 (describing checkpoint stop of Senator Patrick Leahy 125 miles from the border in New York state: “When Mr. Leahy asked what authority the agent had to detain him, the agent pointed to his gun and said, ‘That’s all the authority I need.’”); Michelle Garcia, *Securing the Border Imposes a Toll on Life in Texas*, AL JAZEERA AMERICA, Sept. 25, 2013, available at http://america.aljazeera.com/articles/2013/9/25/living-under-the-law-of-border-security.html#mainpar_adaptiveimage_0 (“[W]hen it was pointed out that [Alice, Texas] sits more than 100 miles from the border, [a Border Patrol spokesman] explained that ‘the law does not say that we cannot patrol. Our jurisdiction kinda changes.’”); see also *United States v. Venzor-Castillo*, 991 F.2d 634 (10th Cir. 1993) (finding Border Patrol lacked

Border Patrol checkpoints have profoundly negative impacts on border communities. Recently, residents of Arivaca, Arizona¹¹ began petitioning for the removal of one of three local checkpoints that surround their town, citing ongoing rights violations and harassment as well as harm to property values,¹² tourism, and quality of life resulting from checkpoint operations. Community members have also been documenting examples of checkpoint abuses. One former local business owner (her small business suffered from the decline in tourism caused by the checkpoint and was forced to close its doors at the end of 2013) described being detained on her way to a doctor's appointment following a heart attack, held for over an hour in the hot sun, not permitted to sit down, and denied water. Other Arivacans report that agents at the checkpoint have told them, "You have no rights here," or that all community members are considered suspect simply by virtue of living in Arivaca.¹³ The Arivaca petition, recently presented to Border Patrol's Tucson Sector Chief Manuel Padilla Jr., reads in part:

Residents are intimidated by armed federal agents and subjected to improper questioning and warrantless searches in violation of their 4th, 5th and 14th Amendment rights. It is not possible for Arivaca residents to leave northbound without passing through one of three area checkpoints. Thus, locals must pass through the checkpoint with regularity, sometimes daily, such that these constitutional rights violations are not merely occasional or minor inconveniences but rather frequent and substantial infringements. People of color experience greater scrutiny and longer detentions at the checkpoint; such racial profiling violates the law as well as the federal government's own guidelines prohibiting any consideration of race or ethnicity in such encounters.¹⁴

The experiences described by the residents of Arivaca—and those listed below—are not unique; rather, they are consistent with numerous reports of rights violations across the state and throughout the southwest, and have become more common as Border Patrol has expanded at an unprecedented rate.¹⁵ The GAO has found numerous problems with checkpoint oversight, including "information gaps and reporting issues [that] have hindered public accountability, and inconsistent data collection and entry [that] have hindered management's ability to monitor the need for program improvement."¹⁶

reasonable suspicion to stop and search vehicle 235 miles from the border where agent had no knowledge regarding the origin of the vehicle).

¹¹ A town of approximately 700 people, Arivaca is located 11 miles north of the U.S.-Mexico border and within 30 miles of three different Border Patrol checkpoints—one on Arivaca Road in Amado, Arizona, another on State Route 286, south of Three Points, Arizona, and a third on Interstate 19 outside of Tubac, Arizona. Residents must pass through the checkpoints daily to go to work, purchase groceries, or run basic errands.

¹² See, e.g., Judith Gans, THE BORDER PATROL CHECKPOINT ON INTERSTATE 19 IN SOUTHERN ARIZONA: A CASE STUDY OF IMPACTS ON RESIDENTIAL REAL ESTATE PRICES, UNIVERSITY OF ARIZONA, (Dec. 2012), available at http://udallcenter.arizona.edu/ucpubs/gans_2012b.pdf

¹³ Additional narratives of Arivaca community members, three of which are described in greater detail in this complaint, are available at http://phparivaca.org/?page_id=210

¹⁴ Arivaca Checkpoint Petition, available at <https://www.change.org/petitions/u-s-border-patrol-remove-the-checkpoint-on-arivaca-rd-in-amado-az-quite-el-ret%C3%A9n-de-la-carretera-de-arivaca-en-amado-az>

¹⁵ From 2004 to 2011, as the ranks of agents doubled to more than 21,000, complaints involving CBP received by the DHS Office of Civil Liberties and Civil Rights nearly tripled. See DEP'T OF HOMELAND SEC., OFFICE OF CIVIL RIGHTS AND CIVIL LIBERTIES, "DEPARTMENT-WIDE DATA ON COMPLAINTS RECEIVED," available at <http://www.dhs.gov/departement-wide-data-complaints-received>. Given the many problems with the DHS complaint system, discussed *infra*, it is likely that incidents of abuse are substantially under-reported.

¹⁶ See GAO-09-824, *supra* at *28. Those findings were made in 2009, the last time the federal government conducted a thorough review of Border Patrol checkpoint operations and their impact on border residents and local communities. GAO's "community impact" analysis omitted Tucson sector checkpoints on the grounds that, at the time, they were considered "tactical" and not permanent checkpoints. *Id.* at *89.

We request that you promptly investigate and respond appropriately to each of the individual incidents detailed herein, and conduct a comprehensive review of *all* complaints regarding Border Patrol checkpoints over the past five years. Furthermore, a thorough review of Border Patrol checkpoint policies and practices is needed to ensure that operations are in fact limited to briefly verifying citizenship. This review should determine whether agents are receiving direction and instructions regarding the limits of their authority and if they adhere to those guidelines in practice. It should include all policies and procedures related to service canines, in light of widespread reports of “false alerts,” a problem that federal courts have long recognized.¹⁷ We believe significant changes in Border Patrol training, oversight, and accountability mechanisms are needed to prevent ongoing and systematic violations of state and federal law, as well as Border Patrol’s own guidelines, and to protect the rights of border communities. We urge you to make recommendations for such changes consistent with your mission to prevent further abuses.

Section I of this complaint describes 12 recent examples of unlawful practices at Border Patrol checkpoints in southern Arizona. Section II presents the applicable legal framework.

I. Individual Complaints of Border Patrol Abuses at Checkpoints

1. Samaritans of Green Valley (Kathy Zweig, Lyn Nowakowski, & Fawn Brown) - Arivaca Road Checkpoint, Amado, AZ, Dec. 18, 2013.

At approximately 1:45 p.m. on December 18, 2013, Kathy Zweig, 69, Lyn Nowakowski, 68, and Fawn Brown, 59, arrived at the Arivaca Road checkpoint. All three are volunteers with Samaritans of Green Valley (“Samaritans”). The group has been providing humanitarian aid in southern Arizona for the past decade and passes through the Arivaca Road checkpoint daily. On this occasion, the volunteers pulled into the checkpoint in a clearly marked Samaritans vehicle and were met by a Border Patrol agent later identified as John Howard. Agent Howard did not ask any of the women about their citizenship; instead, he asked a series of questions about the contents of their vehicle, which they answered truthfully. Agent Howard was particularly interested in the volunteers’ backpacks in the rear of the vehicle, which the volunteers explained were used to carry food, water, and medical supplies for their humanitarian aid work. Agent Howard stated that the backpacks could also be used to carry narcotics and asked the volunteers to open the trunk. When they asked why, Agent Howard stated, “Because I have mere suspicion you could be carrying drugs.” Agent Howard then directed them to “pull into secondary.”

The volunteers pulled into the secondary inspection area and exited the vehicle. They again asked for an explanation. Agent Howard said, “I pulled you over for due diligence and mere suspicion.” When the women asked Agent Howard to articulate what his suspicion was based upon, Agent Howard explained that there could be narcotics in the backpacks “because that’s what backpacks are used for. When we see backpacks, we become suspicious.” Agent Howard then repeated, “Just pop your trunk.” The women again refused and continued to ask for an explanation. Agent Howard replied, “The backpacks.” Agent Howard handed the volunteers a small, laminated card bearing U.S. Customs and Border Protection (“CBP”) and Border Patrol insignia and titled “Authority as an Agent.”¹⁸

¹⁷ *See infra*.

¹⁸ Attached herein as Exhibit A, the card reads in part: “Border Patrol agents may stop and question motorist [sic] at reasonably located checkpoints, even in the absence of individualized or reasonable suspicion.” Among other omissions, the card does not specify that questioning must be “brief” and the stop confined to a “limited inquiry into residence status.” *United States v. Martinez-Fuerte*, 428 U.S. 543, 558–60 (1976). Neither does it specify that “reasonable suspicion” is required for non-immigration inquiries (the standard is not “mere suspicion,” as the agent claimed), or that searches must be based on “probable cause” that a crime has *likely* been committed. *See infra*.

Ms. Zweig, Ms. Nowakowski, and Ms. Brown proceeded to record the names of Agent Howard and the two other agents present, Agent Miguel San Quentin and Agent Alexis Barrios. As they were doing so, Agent Barrios became visibly angry and agitated, and ripped his name tag off his chest and thrust it in Ms. Nowakowski's face in an aggressive and intimidating manner. Agent Howard continued to ask for consent to search the vehicle, and the volunteers continued to refuse. After approximately ten minutes, Agent Howard told them, "We called the dog and it will be here in a few minutes." After another ten minutes had elapsed, a service canine and its handler arrived. Ms. Nowakowski recognized the handler, Agent Ewing, from several prior interactions. Agent Ewing said, "Just let me walk around the car with the dog." Ms. Nowakowski again objected, and asked if she and the others were free to go. Agent Ewing said that they were. As Ms. Nowakowski was returning to the vehicle, Agent Howard asked Agent Ewing, "Are you releasing them?" Agent Ewing responded that he was.

Ms. Zweig, Ms. Nowakowski, and Ms. Brown were detained for approximately thirty minutes. They were never asked about their citizenship.

2. John Forrey – Tombstone Checkpoint, Route 80, Dec. 6, 2013.

On December 6, 2013, John Forrey arrived at the Tombstone checkpoint located on Arizona State Route 80. Mr. Forrey is a professional photographer and native of Bisbee, Arizona. An agent peered through the back window of his vehicle and asked him to open his trunk. Mr. Forrey did not consent to a search of his trunk. The agent asked Mr. Forrey where he was coming from. Mr. Forrey responded that this was personal information. The agent asked Mr. Forrey if he had a driver's license, and Mr. Forrey said that he did. The agent then directed Mr. Forrey into a secondary inspection area. Mr. Forrey asked why he was being detained. The agent called over another agent, identified as Agent Torres, who asked Mr. Forrey if he was refusing to go to secondary. Mr. Forrey replied that he was not refusing but was asking why he was being detained. Mr. Forrey then pulled into secondary and left the motor running and his foot on the brake.

Agent Torres approached and asked if Mr. Forrey had a weapon. Mr. Forrey did not have a weapon, but because the question was not related to his citizenship, he paused to consider whether or not he was required to answer. Before Mr. Forrey could respond, however, Agent Torres unholstered his gun, and holding it a foot away, pointed it at Mr. Forrey's face, screaming at him not to reach for anything. Other agents approached, pulled Mr. Forrey's left arm through the open window, and began twisting it. The agents opened the door as Agent Torres directed them to pull Mr. Forrey out. Mr. Forrey tried to put the automatic transmission in park so the car would not roll. Agent Torres, still pointing his gun at Mr. Forrey's head, started screaming, "He's reaching for the console!" Mr. Forrey stopped reaching for the transmission. The agents started dragged Mr. Forrey out of the car, causing his foot to come off the brake and the car to roll forward. Agent Torres yelled, "Put it in park, asshole!" Mr. Forrey put the car in park. Agent Torres then holstered his pistol, pulled out his Taser and yelled, "Let's just Taser him!" Instead, the agents handcuffed Mr. Forrey and left him on a bench nearby while they searched his car.

A supervisor approached and accused Mr. Forrey of intentionally trying to harm the agents by allowing his car to roll forward. Mr. Forrey noted that, with a gun pointed at his head, he had been instructed not to reach for anything while being forcibly removed from his vehicle. Mr. Forrey objected strongly to his detention and to the conduct of Agent Torres. The supervisor did not release Mr. Forrey from the handcuffs, but said that he would "talk to Torres."

Agents continued to search the interior of the vehicle over Mr. Forrey's repeated objections. To open the passenger door, which was locked, one of the agents broke the door latch mechanism; as a result, the door now does not open or close securely. The agents called for an Arizona Department of Public

Safety officer, but an officer never arrived. Mr. Forrey was detained for approximately 40 minutes before he was finally taken out of handcuffs and released. He suffered a bruise on his upper left arm and cuts on his left hand. Mr. Forrey was not asked about his citizenship status.

This was not the first time Mr. Forrey has been detained by the Border Patrol. About three months earlier, Mr. Forrey was pulled over while driving approximately 30 miles north of the border. An agent approached him and immediately asked to look in his trunk. The agent did not say why he pulled Mr. Forrey over and did not ask him about his residence status. Mr. Forrey was detained for 30 minutes before being released. The next day, Mr. Forrey arrived at the Tombstone checkpoint. Again an agent asked to look in Mr. Forrey's trunk. Mr. Forrey refused and had to wait while a service canine inspected his car. Mr. Forrey is a professional photographer who travels extensively in southern Arizona. He has been pulled over by Border Patrol dozens of times, sometimes as far as 60 miles from the border.

3. Dale Polen – Arivaca Road Checkpoint, Amado, AZ, Dec. 2, 2013.

Dale Polen is a six-year resident of Arivaca, Arizona and a local mechanic. On December 2, 2013, Mr. Polen was on his way to get supplies for work when he arrived at the Arivaca Road checkpoint at approximately 8:45 a.m. An agent slapped the side of his vehicle and told him to "pull into secondary." Mr. Polen asked why, to which the agent responded, "You're driving like an idiot." Mr. Polen objected to the agent's characterization of his driving. The agent then stated that a service canine had "alerted."

Mr. Polen pulled into the secondary inspection area and the agent directed him to exit his vehicle. The agent again stated, "The only reason we pulled you over is because you were driving like an idiot." Mr. Polen objected that traffic enforcement was outside Border Patrol's authority. The agent then claimed that a service canine had "tagged" the vehicle. The agent proceeded to remove Mr. Polen's two dogs from the car and search the interior of Mr. Polen's vehicle. When Mr. Polen objected to the search, one agent said, "You won't be laughing when we find stuff." Another agent remarked, "Arivaca is just a bunch of smugglers." One of the agents kept his right hand on his firearm during his interaction with Mr. Polen. Mr. Polen was detained for approximately 30 minutes before he was released. He was never asked about his citizenship.

Like all Arivaca residents, Mr. Polen must pass through a checkpoint anytime he wishes to leave town, and has had similar encounters with Border Patrol at the Arivaca Road checkpoint in the past. Last year, agents detained Mr. Polen for 30 minutes and searched the interior of his vehicle after claiming that a service canine had alerted. On another occasion, Mr. Polen arrived at the checkpoint on his motorcycle. A service canine alerted, jumping up on Mr. Polen's motorcycle. Agents told Mr. Polen to get off his motorcycle and began to question him about drugs. When Mr. Polen objected to being detained, an agent reached out and grabbed Mr. Polen's arm. The other agents assisted in throwing Mr. Polen to the ground. Agents held Mr. Polen down while his motorcycle was searched. After more than 20 minutes, he was released. Mr. Polen tried to make a complaint to local law enforcement, but officials dismissed his concerns. As a result of these experiences, Mr. Polen feels extremely apprehensive every time he approaches the checkpoint, which he tries as much as possible to avoid.

4. Tim Buchanan – Arivaca Road Checkpoint, Amado, AZ, Dec. 2, 2013.

On December 2, 2013, Tim Buchanan arrived at the Arivaca Road checkpoint at approximately 9:30 a.m. Mr. Buchanan is a 61-year-old retiree and 12-year resident of Arivaca. He drives through the checkpoint several times a week, usually on his way to play golf. On this occasion, an agent asked Mr. Buchanan if he was a U.S. citizen, and he confirmed that he is. The agent then directed him to the secondary inspection area. Mr. Buchanan pulled into the secondary inspection area and exited his vehicle.

An agent who later identified himself as Agent Taylor approached with a service canine, opened the driver's side door, and directed the dog to enter Mr. Buchanan's vehicle. Mr. Buchanan immediately objected that he did not consent to allowing the dog inside his vehicle. Agent Taylor responded by yelling, "Shut your fucking mouth!" Mr. Buchanan repeated his objection to the search. Agent Taylor yelled, "Shut your fucking mouth you fucking asshole and let me do my job!" Mr. Buchanan turned to another agent standing by and asked for an explanation. Agent Taylor interjected, "Shut your fucking mouth!" The other agent directed Mr. Buchanan to sit on a bench. Mr. Buchanan repeated his request for an explanation. Agent Taylor again interrupted him, screaming, "I said shut the fuck up," and placed his right hand on his firearm. Agent Taylor then continued searching Mr. Buchanan's vehicle, muttering loudly to himself, "These fuckers...the fucking cunts." Mr. Buchanan was deeply shaken by Agent Taylor's actions, but he persisted in asking the other agent why his vehicle was being searched. Agent Taylor again interrupted and said, "Because I didn't recognize you."

Mr. Buchanan was detained for approximately 30 minutes before he was released. When he asked Agent Taylor for his name, the agent concealed his badge from view but responded, "Taylor." Mr. Buchanan was deeply traumatized by the encounter; nonetheless, he called a Border Patrol supervisor to report the incident. Approximately one week later, a Border Patrol "community liaison" called Mr. Buchanan. The liaison informed Mr. Buchanan that agents had confirmed his account, and clarified that the abusive agent's name was not "Taylor," but "Haley." The liaison said, "I don't know why he lied to you." The liaison would not say whether Agent Haley faced any consequences for his actions, but tried to reassure Mr. Buchanan that "it won't happen again." Mr. Buchanan later learned that a Border Patrol agent in Arivaca had asked Mr. Polen (whose checkpoint encounter, described above, occurred minutes ahead of Mr. Buchanan's) for information about Mr. Buchanan; Mr. Buchanan does not know why a Border Patrol agent would be asking other Arivaca residents about him.

5. Shirley Stepp – Arivaca Road Checkpoint, Amado, AZ, Dec. 1, 2013.

On the morning of December 1, 2013, Shirley Stepp pulled into the Arivaca Road checkpoint following a run-in with a dead skunk. An agent asked if she was a U.S. citizen, and she confirmed that she is. The agent asked her about the smell of her car, and she explained that she had been at the home of a neighbor who recently killed a skunk. The agent said, "No, that's not what it smells like," and directed Ms. Stepp to the secondary inspection area.

Ms. Stepp pulled into the secondary inspection area and exited the vehicle. The agent indicated that he had called for a service canine. No service canine arrived, however, and after waiting nearly 45 minutes, the agent told Ms. Stepp, "It will save time if we can search your car." In order to be released, Ms. Stepp consented to a search. The agent conducted an extended, invasive search of her vehicle. Ms. Stepp keeps a gas treatment additive in the rear of her vehicle; later, she discovered the container had been opened and flammable liquid was leaking all over the rear of the vehicle. After searching the interior of her car, the agent directed Ms. Stepp to empty her pockets. The agent questioned her at length about drugs and her prescribed medication, refusing to believe that the smell was due to a skunk, even when Ms. Stepp offered to call her neighbor to confirm her story. At one point, the agent claimed that by carrying her prescribed medication, Ms. Stepp had committed "an arrestable offense." The service canine never arrived. Finally, after detaining Ms. Stepp for over an hour, the agents released her.

Ms. Stepp was outraged by this encounter. She felt humiliated watching her friends and neighbors drive by while she was detained. Some people tried to stop to check on her but were waved away by Border Patrol agents who claimed that she was "under investigation." Though she has lived in Arivaca for the past 25 years, Ms. Stepp fears interacting with Border Patrol agents at the checkpoint, which she must drive through several times every week. She hears frequent reports from friends and neighbors about Border Patrol agents harassing and abusing Arivaca residents at the checkpoint.

6. Don Tran & Chad Ivey – I-8 Checkpoint, California-Arizona State Line, Nov. 29, 2013.

On November 29, 2013, Don Tran and Chad Ivey were driving from San Diego to Phoenix on I-8. Mr. Tran, 49, is a law school graduate and Mr. Ivey, 41, is a Marine veteran; both are IT professionals. They arrived at the I-8 Border Patrol checkpoint around 10:30 p.m. An agent asked if they were U.S. citizens, and they confirmed that they are. The agent directed Mr. Tran to pull into the secondary inspection area. Mr. Tran complied. In the secondary inspection area, agents again asked if Mr. Tran and Mr. Ivey were U.S. citizens, and again they stated that they are. An agent then asked Mr. Tran and Mr. Ivey to step out of the vehicle, without explanation. They both complied. As he was exiting, Mr. Tran locked his car.

Mr. Tran spoke with a supervising agent and made clear that he did not consent to a search of his vehicle. Mr. Tran and Mr. Ivey sat on a bench and watched as an agent arrived with a service canine. Mr. Tran and Mr. Ivey observed the dog and its handler, later identified as Agent Danny Ruiz circled their vehicle. The dog did not react to Mr. Tran's vehicle in any way. After passing Mr. Tran's vehicle, the dog alerted to a hand bag in an adjacent vehicle, pulling the bag out of the open trunk. The Border Patrol supervisor then notified Mr. Tran and Mr. Ivey, "We need to search your car. The dog got a hit on your car." Mr. Tran objected that the dog had not alerted on his vehicle but rather on an item in an adjacent vehicle. Nonetheless, both the supervisor and Agent Ruiz asserted that they dog had "hit a positive scent" in Mr. Tran's vehicle, giving Border Patrol probable cause for a search.

An agent tried to open Mr. Tran's vehicle but it was locked. Mr. Tran repeated his objection to any search of his vehicle and suggested they call a judge to obtain a warrant. A group of agents conferred together before notifying Mr. Tran, "It's going to be a while, we need to pat you down and put you in a holding cage while we wait for the magistrate." Mr. Tran was directed to leave his car keys with the agents. Mr. Tran and Mr. Ivey each asked if they were being detained. Both of them were told, "You are being detained." Mr. Tran and Mr. Ivey were taken to a holding area of small, wire cages and placed in separate cells. After approximately 45 minutes, agents returned and released them. After returning to their vehicle, it was apparent from the disarray that agents had searched the interior, including the glove compartment, center console, and trunk.

7. The Garcia Family – Route 86 Checkpoint, east of Tohono O'odham Indian Reservation, Aug. 19, 2013.

On August 19, 2013, Jason and Charlotte Garcia were driving east on State Route 86 from Sells, Arizona with their twin six-year-old foster children. Mrs. Garcia was driving when the family arrived at the checkpoint. Without inquiring about the family's residence status, the agent directed Mrs. Garcia to pull into the secondary inspection area. Mrs. Garcia asked why they were being detained and the agent responded angrily, "Because I told you so." The Garcias again asked for an explanation. A female agent, later identified as K. Riden, approached and directed Mrs. Garcia to pull into secondary. Agent Riden stated that she would forcefully remove the Garcias from their vehicle and drive the car into secondary if they did not comply. The Garcias repeated their request for an explanation. Agent Riden claimed that a service canine had "alerted" to the vehicle. The Garcias stated that they did not have anything in the vehicle that would cause a dog to alert, and no dog was nearby.

Agent Riden then directed another agent to "put it down," shorthand for deploying a tire deflation device to prevent the vehicle from driving away. Mrs. Garcia told the agent that she would go to the secondary inspection area, and Agent Riden instructed her to "hold on." The tire deflation device was removed and Mrs. Garcia drove into secondary, where Agent Riden demanded that the Garcias exit the vehicle. The Garcias had begun recording the incident on a cell phone. When Mrs. Garcia exited the

vehicle with the phone, Agent Riden yelled at her to turn it off, and tried unsuccessfully to grab the phone from Mrs. Garcia's hand, poking her chest. Mrs. Garcia handed the phone to her husband. Agent Riden continued to yell and demanded that Mr. Garcia turn the phone off. Agent Riden stated that Mr. Garcia could not use her phone to record because Border Patrol was searching the vehicle "based on probable cause." Agent Riden continued yelling at Mr. Garcia to turn off the phone.

The Garcia family was escorted to a nearby bench. Several agents stood over them in a threatening manner as the Garcia parents tried to comfort their sons, who were terrified by what was happening. From where they were sitting the Garcias could not see whether or not agents were searching their vehicle. Agent Riden continued yelling at Mr. Garcia to turn off his phone. Another agent told the Garcias they were "setting terrible role models" for their children. Mr. Garcia could see that Agent Riden's behavior was upsetting his children, so he turned the phone off, but not before Agent Riden attempted, again unsuccessfully, to grab the phone out of his hands. Another agent pulled Mr. and Mrs. Garcia aside and told them not to "argue" with Agent Riden which would "just make matters worse" for them. The Garcia parents continued to try to comfort their children, who were visibly upset. Finally, the Garcia family was released. They were never asked about their citizenship.

This incident was extremely traumatic for the Garcia children, who continued to refer to the experience for several weeks. One of the children stated that he was afraid that Border Patrol agents were going to "throw Mom down." The other child said he did not want to visit his cousin in Sells anymore because he did not want to cross the checkpoint again. Several days after the incident, the Garcia children spotted some Border Patrol agents in a local diner and were instantly afraid; the boys clung to their parents and asked if the agents were going to harm them. Both Mr. and Mrs. Garcia work in Sells. It is not possible for them to return from work without passing through one of the four Border Patrol checkpoints surrounding the Tohono O'odham Indian Reservation. Mrs. Garcia often returns from work late at night, sometimes arriving at the checkpoint around midnight, with no other cars around. Agents have repeatedly demanded that she open her trunk for inspection, questioned her about matters unrelated to her immigration status, and refused to provide names and badge numbers when requested.

Mr. Garcia says, "The Reservation has become a police state. It seems like no one can go out in public without being questioned by Border Patrol agents." He says Border Patrol agents do not respect tribal customs or the law, and that abuses of tribal members¹⁹ have become more common because agents "are never held accountable for their actions."

¹⁹ See Stanley Throssell, *77-year-old woman says Border Patrol agent abused her at AZ 86 checkpoint*, THE RUNNER, Oct. 18, 2013, available at, <http://oodhamrunner.com/community/77-year-old-woman-says-border-patrol-agent-abused-her-at-az-86-checkpoint/> ("A 77-year-old woman from San Pedro Village says a Border Patrol agent left her with bruises when he grabbed her arm as she went to open the trunk of her car at the checkpoint on Arizona Highway 86 east of the reservation boundary. Mildred Antone said the incident took place Oct. 12, between 5 and 6 p.m. as she was on her way to San Xavier for the celebration of Saint Kateri Tekakwitha...Antone said when she drove up to the checkpoint, an older Border Patrol agent asked her to open her car trunk. She noted that it's not easy for her to get in and out of her car, so she told the agent that there was nothing in her trunk. She said he continued to insist that she open the trunk, and an argument ensued. Antone admitted to letting loose an expletive, and the agent responded by implying that tribal members lie to the agents all the time. Antone said she then pushed her car door open and the agent walked into it. She walked to open up the trunk, and that is when the agent grabbed her by the arm, she said. The incident escalated from there, she said, as the agent accused her of assaulting a federal officer. She was told to pull her car to a secondary checkpoint area, and she said she complied, giving the agent her driver's license. Several agents huddled together, then the agent with whom she had the confrontation came over to her, saying her age was of no consequence, he would throw her in jail and tow away her car, she recalled. He then tossed her driver's license into the front window of her car and told her to leave, she said. Antone said she is now fearful of going to the checkpoint. 'I'm afraid to go down there to the checkpoint. I haven't gone because I'm afraid he might still be there,' she said.")

8. Julia Turner – Tombstone Checkpoint, Route 80, Jan. 1, 2013.

9. Julia Turner – Tombstone Checkpoint, Route 80, Nov. 8, 2012.

On the evening of January 1, 2013, Julia Turner, then 19-years-old, was on her way home from work. Ms. Turner is Hispanic and describes her appearance as Hispanic. At the Tombstone checkpoint, Ms. Turner was questioned about her citizenship and asked to hand over her driver's license. An Agent Cooper walked around her vehicle with a service canine. Ms. Turner saw that the dog did not react to her vehicle and had begun to move to the car behind hers when Agent Cooper pulled on the dog and started tapping on the trunk of Ms. Turner's vehicle. Agent Cooper then told Ms. Turner the dog had "hit" on something in the car and directed her to pull into the secondary inspection area.

Ms. Turner pulled into the secondary inspection area, turned off her vehicle, and exited with her purse and phone. Agent Cooper told her to leave her purse and phone in the car. Ms. Turner objected, and Agent Cooper tried to grab her phone out of her hands. She again objected, but Agent Cooper told her it was "part of procedure." Ms. Turner retained her phone and called her father, a retired Sheriff's Deputy with extensive experience with police dogs.²⁰ Two other agents approached and an Agent Nabity told Ms. Turner that if she did not hang up the phone she would have to "sit there a long time and not be able to leave." Meanwhile, Agent Cooper and another agent searched Ms. Turner's car. Agents removed Ms. Turner's registration as well as her prescription medication. Agent Cooper and Agent Nabity began to question her about the medication at length, even after they were presented with a valid prescription. Ms. Turner was detained approximately 35 minutes before she was released.

Two months earlier, on the evening of November 8, 2012, Ms. Turner was driving home from work when an agent asked her for her driver's license, proof of insurance, and information related to her commute. An agent then notified Ms. Turner that a dog had "alerted," giving Border Patrol probable cause to search her car, and directed her to the secondary inspection area. An agent told Ms. Turner to hand over her cell phone, but she refused and was able to call her father. Agents detained Ms. Turner for approximately 45 minutes while they searched her vehicle before releasing her.

In addition, Ms. Turner faced additional scrutiny on at least three prior occasions at the same checkpoint. In each instance, agents asked Ms. Turner to turn off her engine and open her trunk for inspection. Each time she was asked about her work, where she was going and why, and about her vehicle. Each time, agents asked her to show identification, registration, and proof of insurance. On several occasions, Ms. Turner witnessed other cars being waved through while she was detained. Ms. Turner believes she was subject to additional scrutiny and harassment on account of her ethnicity.

10. David Chapman – Huachuca City Checkpoint, Route 90, December 28, 2012.

11. David Chapman – Sunsites Checkpoint, Route 191, Dec. 21, 2012.

12. David Chapman – Sunsites Checkpoint, Route 191, Oct. 24, 2012.

David Chapman, 45, is a small business owner and 15-year resident of Pearce, Arizona. On December 28, 2012 at approximately 11:45 a.m., Mr. Chapman arrived at the Border Patrol checkpoint located on Route 90 north of Sierra Vista, Arizona. Mr. Chapman was informed that a service canine had alerted to his car, and he was directed to pull into the secondary inspection area. A supervisor named Agent Caspar approached Mr. Chapman's vehicle with an Agent Debusk. Agent Debusk proceeded to

²⁰ Brian Turner has driven through the Tombstone checkpoint and observed the dogs being improperly handled. He believes agents arbitrarily decide whom to question, only subjecting some persons to stops and searches, and that his daughter was repeatedly detained on account of her Hispanic appearance. Mr. Turner, who is Caucasian, has driven his daughter's vehicle through Border Patrol checkpoints without facing similar detention or harassment.

search the interior of the vehicle and Mr. Chapman's personal effects. Mr. Chapman repeatedly objected to the search, which greatly amused Agent Caspar. Agent Caspar laughed and said, "Go tell Congress, it won't get you anywhere." Mr. Chapman was detained for over ten minutes while his car was searched before he was released. He was not questioned about his residence status.

On December 21, 2012, at approximately 1:30 p.m., Mr. Chapman arrived at the Sunsites checkpoint on Route 191. He was not asked about his citizenship; instead, he was immediately directed to pull into the secondary inspection area. An Officer C. Swanson told him that a service canine had alerted and directed the dog into Mr. Chapman's vehicle. Mr. Chapman objected to the search. Mr. Chapman later discovered the dog had destroyed some business-related paperwork in the front seat. Mr. Chapman was eventually released.

On October 24, 2012 at approximately 9:30 a.m., Mr. Chapman arrived at the Sunsites checkpoints. A service canine jumped onto Mr. Chapman's vehicle. Mr. Chapman objected that the dog was scratching his truck. An Agent M. Torres informed him that his dog had "hit," and directed Mr. Chapman to pull into the secondary inspection area. Agent Torres then told Mr. Chapman that he had probable cause to search the vehicle. Another agent asked Mr. Chapman for identification and asked him to exit his vehicle. Agent Torres proceeded to lead the dog around the vehicle, saying, "Get it boy, get it boy." The dog continued to jump onto the vehicle. Agent Torres returned the dog to its kennel and continued to search Mr. Chapman's truck bed, pausing to confer with an Agent J. Caporale. Agent Torres questioned Mr. Chapman about his use of the vehicle and about drugs. After being detained for approximately fifteen minutes, Mr. Chapman was released. He was not asked about his residence status.²¹

II. Constitutional Limitations on Immigration Checkpoints

The Fourth Amendment imposes limits on the government's search-and-seizure powers to prevent "arbitrary and oppressive" interference with the privacy and personal security of individuals. *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976). Accordingly, courts have imposed strict limitations on Border Patrol checkpoint operations; indeed, the legal legitimacy of immigration checkpoints is premised upon those limitations. *Id.* at 556–57. ("The principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop.")

In *Martinez-Fuerte*, the Supreme Court found immigration checkpoints to be permissible only insofar as they involve a "brief detention of travelers during which (a)ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States." *Id.* at 558 (citation omitted). The Court specified, "Neither the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search." *Id.* The Court condoned referrals to secondary inspection areas "made for the sole purpose of conducting a routine and *limited inquiry into residence status* that cannot feasibly be made of every motorist *where the traffic is heavy*." *Id.* at 560 (emphasis added). "The objective intrusion of the stop and inquiry thus remains minimal [and] should not be frightening or offensive because of their public and relatively routine nature," the Court observed. *Id.*; see also *United States v. Ortiz*, 422 U.S. 891, 894–95 (1975) ("At traffic checkpoints the motorist can see that other vehicles are being stopped...and he is much

²¹ This was not Mr. Chapman's last encounter with Agent Torres. On December 16, 2012 at around 11:30 a.m., Mr. Chapman again arrived at the Sunsites checkpoint. The checkpoint was not in operation, but as Mr. Chapman drove through, he made eye contact with Agent Torres before continuing westbound on Route 191. Approximately one quarter mile down the road, a Border Patrol vehicle approached Mr. Chapman from the rear until it was a car's length from his rear bumper. The Border Patrol vehicle tailgated Mr. Chapman at a speed of 65 miles per hour for about half a mile before pulling off the road. Mr. Chapman subsequently called the Wilcox Border Patrol station to submit a verbal complaint, but did not receive a response.

less likely to be frightened or annoyed by the intrusion.”) As for local residents subject to frequent stops, the Court noted, “Motorists whom the officers recognize as local inhabitants...are waved through the checkpoint without inquiry.” *Id.* at 550.

That case was decided almost 40 years ago, in 1976.²² Today, Border Patrol checkpoints diverge in significant respects from those described in *Martinez-Fuerte*. In Arizona, most checkpoints are located in rural areas where local residents are often forced to undergo searches and detentions ranging far beyond “limited” citizenship inquiries and not justified by “heavy traffic.”²³ Border residents—including the many individuals who must pass through checkpoints daily to go to work, run errands, or take children to school—describe feelings of anxiety, fear, and anger after being interrogated, harassed, searched, and/or assaulted by federal agents. These individuals are not “waved through the checkpoint without inquiry,” as the Supreme Court envisioned. *Id.* Each of the motorists described herein was referred for non-routine, unjustified detentions in a secondary inspection area on at least one occasion. Two of the above complainants were threatened with firearms.²⁴ Mr. Forrey and Mrs. Garcia were physically assaulted. Ms. Stepp was threatened with imprisonment. Mr. Ivey and Mr. Chan were detained in wire cages for approximately 45 minutes while their car was searched on a pretext and without their consent. The Garcia children fear passing through the checkpoints that surround the Tohono O’odham Indian Reservation where their parents work. While the Supreme Court in *Martinez-Fuerte* condoned immigration checkpoints because they were thought to impose a “minimal,” non-offensive intrusion on the rights of motorists, the daily experiences of border residents profoundly undermine that premise, and by extension, the legitimacy of the checkpoints themselves. *Id.*²⁵

In many cases, agents appear to be dispensing with any pretext of immigration enforcement, instead conducting generalized criminal investigations, which the Supreme Court has found to be unconstitutional. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (“We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.”); *Delaware v. Prouse*, 440 U.S. 648 (1979); *see also United States v. Ellis*, 330 F.3d 677, 680 (5th Cir. 2003) (allowing Border Patrol to routinely tack on otherwise impermissible drug interdiction questioning was “essentially an attempt to circumvent the [Supreme] Court’s holding in *Edmond*...” (quotations omitted)). In *Edmond*, the Supreme Court invalidated a checkpoint established for general crime control purposes: “Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.” *Id.* at 42.

²² There were roughly 1,800 Border Patrol agents nationwide in 1976. Today, there are over 21,000.

²³ One of the checkpoints at issue in *Martinez-Fuerte* was located on I-5 in California, and referrals to secondary inspection areas were justified in part by the necessity of managing heavy traffic on “important highways.” *Martinez-Fuerte*, 428 U.S. at 556–57. By contrast, the majority of Border Patrol checkpoints are located on rural state highways and county roads where traffic is light and motorists often interact with agents in isolation.

²⁴ Both of those incidents occurred shortly before The Arizona Republic reported on the absence of known consequences for agents who use deadly force. *See* Rob O’Dell and Bob Ortega, *Deadly Border Agents Incidents Cloaked in Silence*, ARIZONA REPUBLIC, Dec. 16, 2013, available at

<http://www.azcentral.com/news/politics/articles/20131212arizona-border-patrol-deadly-force-investigation.html>

(noting that 42 individuals have been killed by Border Patrol agents since 2005 and, “In none of the 42 deaths is any agent or officer publicly known to have faced consequences — not from the Border Patrol, not from Customs and Border Protection or Homeland Security, not from the Department of Justice, and not, ultimately, from criminal or civil courts.”)

²⁵ *See also Martinez-Fuerte*, 428 U.S. at 572–73 (Brennan, J., dissenting) (“One wonders what actual experience supports my Brethren’s conclusion that referrals ‘should not be frightening or offensive because of their public and relatively routine nature.’ ...[F]or the arbitrarily selected motorists who must suffer the delay and humiliation of detention and interrogation, the experience can obviously be upsetting.” (citations omitted))

For many border residents, invasive stops have long since become a “routine part of life.” *Id.* In the above cases, three humanitarian aid workers were detained for thirty minutes solely because an agent claimed that backpacks are *per se* suspicious; one motorist was detained over an hour because her car smelled like a skunk; another because he was “driving like an idiot”; and yet another was detained and threatened with a firearm because an agent “didn’t recognize” him. Ms. Stepp and Ms. Turner were harassed and questioned about their legitimate prescription medications. The residents of Arivaca have documented similar experiences.²⁶ Most tellingly, in each of the stops described herein, Border Patrol had either completed or never initiated any immigration-related inquiry when it detained these motorists; ten of the fifteen individuals described above were never asked about residence status at all. Also revealing is the common sight of local law enforcement with no immigration enforcement authority accompanying Border Patrol agents at checkpoints. With so many agents going far beyond—or simply ignoring—the permissible “limited inquiry into residence status,” it is difficult to discern what differentiates Border Patrol checkpoints from the general crime control checkpoints held to be unconstitutional more than a decade ago in *Edmond*. See also *United States v. Soyland*, 3 F.3d 1312, 1316 (9th Cir. 1993) (Kozinski, J., dissenting) (“There’s reason to suspect the agents working these checkpoints are looking for more than illegal aliens. If this is true, it subverts the rationale of *Martinez–Fuerte* and turns a legitimate administrative search into a massive violation of the Fourth Amendment.”)²⁷

Additionally, it is clear that Border Patrol agents regularly exceed the lawful limits of their authority in the course of individual stops, resulting in widespread rights abuses. There is no question that agents cannot extend checkpoint stops for *any* length of time for non-immigration purposes, absent “reasonable suspicion” that a crime has been committed. See *United States v. Preciado-Robles*, 964 F.2d 882, 884–85 (9th Cir. 1992) (articulable suspicion is required for detention following immigration questioning and “there *must* be a valid basis for any additional intrusion, and it must be of a brief duration.”); *Ellis*, 330 F.3d 677, 680 (“[A]n agent at an immigration stop may investigate non-immigration matters beyond the permissible length of the immigration stop if and only if the initial lawful stop creates reasonable suspicion warranting further investigation.”); *United States v. Machuca-Barrera*, 261 F.3d 425, 433 (5th Cir. 2001) (“[T]he scope of an immigration checkpoint is limited to the justifying, programmatic purpose of the stop: determining the citizenship status of persons passing through the checkpoint.”).

²⁶ In one case, “[a]n Arivaca resident and a friend arrived at the checkpoint and identified themselves as U.S. citizens. An agent asked to search their vehicle and they declined. As a result, the agent directed them to the secondary inspection area. When they asked for an explanation, the agent replied that if they would not consent to a search, they would have to wait for a service canine to inspect the vehicle. They waited 20 minutes for the dog to arrive, at which point agents demanded that they exit the vehicle, without explanation, and then opened the door of their car and let the dog in. When they objected, agents yelled at them to remain still and keep their hands visible. They were not allowed to use their phones. One of the agents then claimed that the dog had ‘alerted’ because it had ‘changed its breathing pattern.’ After 45 minutes, they were finally released. Agents told them the search was, ‘for [their] own protection.’” In another case, an Arivaca resident, “arrived at the checkpoint and notified the agent she was a U.S. citizen. The agent asked if the vehicle she was driving belonged to her. She responded that she was a U.S. citizen. The agent said, ‘You can answer a simple question or we can do it the hard way,’ and directed her to the secondary inspection area. More agents arrived with a service canine, and claimed that the dog had ‘alerted’ to the presence of contraband. The agents demanded that the woman exit the vehicle, over her objections, then questioned her about drugs, firearms, and the vehicle’s history. The service canine found no drugs or contraband, but agents continued to search her trunk, then rifled through her purse and opened and smelled her water bottle. Before letting her go, the agents told her she had not been ‘respectful.’” See http://phparivaca.org/?page_id=210

²⁷ See also *Soyland*, 3 F.3d 1312 at 1320 (Kozinski, J., dissenting) (“Given the strong hints that the Constitution is being routinely violated at these checkpoints, we owe it to ourselves and the public we serve to look into the matter. Even without an order of this court or the district court, the Department of Justice would be well-advised to establish the bona fides of these checkpoints.”)

The government itself acknowledges this limitation on its authority. See Legal Opinion of INS General Counsel, *Other Agencies Working at Border Patrol Checkpoints*, at 2 (May 9, 1994) (“Referrals to the secondary inspection area that do not involve an immigration based violation must be supported by *at least* reasonable suspicion.”) (emphasis added); UNITED STATES BORDER PATROL, SAN DIEGO SECTOR, LEGAL ANALYSIS OF BORDER PATROL CHECKPOINTS 14 (June 1, 2003) (“Where Border Patrol agents seek to detain a vehicle for secondary inspection solely for some non-immigration purpose, the law generally requires the agents to have a ‘reasonable suspicion’ of criminal wrongdoing.”); see also *CBP Inspector’s Field Manual*, Section 18.7(b) (“Before an inspector may constitutionally detain a person...the inspector must have reasonable suspicion that the person is an alien and is illegally in the United States.”)

By contrast, southern Arizona residents are regularly detained and questioned regarding weapons and drug trafficking, as well as medical history, work and family, their comings and goings, and other subjects in no way related to verifying immigration or residence status or based on reasonable suspicion of a crime. The stops described herein ranged from 15 minutes to over an hour, not the “brief” three to five minute stops and “limited” inquiries contemplated by the Supreme Court—though, as noted, absent reasonable suspicion of criminal wrongdoing, each of these stops would have been unlawful for *any* period of time. See *Martinez-Fuerte*, 428 U.S. at 547, 558-59; *Ellis*, 330 F. 3d at 680 (“[W]hen the purpose of a stop switches from enforcement of immigration laws to drug interdiction, a *Fourth Amendment* violation occurs unless the Border Patrol agent has individualized suspicion of wrongdoing.”) (emphasis added).²⁸

It is also well-established that Border Patrol agents at permanent checkpoints may not search the interior of any vehicle without consent or probable cause. *Ortiz*, 422 U.S. 891; see also *Almedia-Sanchez v. United States*, 413 U.S. 266 (1973). Consent to a search must be knowingly and voluntarily given, and must not be the product of coercion. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). Agents routinely ignore this limitation as well. As described above, Mr. Buchanan’s vehicle was searched without any lawful basis and over his repeated objections. Ms. Stepp only consented to a search of her vehicle and her person after being forcibly detained and humiliated for 45 minutes. Mr. Forrey’s vehicle was searched after he was threatened at gunpoint. Mr. Tran’s vehicle was searched on a pretext. Mr. Forrey, Mr. Polen, Mrs. Garcia, Ms. Turner, and Mr. Chapman were all subjected to vehicle searches on multiple occasions. These searches, lacking consent and probable cause, were unlawful. *Id.*

Equally troubling is agents’ common practice of asserting that service canines have “alerted” to contraband as a basis for probable cause to conduct a search. A canine alert can provide agents with probable cause for a search only if the reliability of the dog and the handler are established. *United States v. Lingenfelter*, 997 F. 2d 632, 639 (9th Cir. 1994). There are ample grounds, however, to doubt the reliability of Border Patrol’s use of service canines, including numerous studies and court decisions questioning the ability of canines to detect contraband accurately. See, e.g., *United States v. Thomas*, 726 F.3d 1086, 1093 (9th Cir. 2013) (Border Patrol canine certification records showed marginal performance but were too heavily redacted to afford adequate opportunity to challenge basis for search); *Merrett v. Moore*, 58 F.3d 1547, 1549 (11th Cir. 1995) (noting that narcotics were not found in twenty-seven out of twenty-eight alerts at a temporary checkpoint); *Doe v. Renfrow*, 631 F.2d 91, 95 (7th Cir. 1980) (Fairchild, C.J., dissenting) (noting false alerts in thirty-five out of fifty encounters); see generally Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 427, 430 (1997) (noting that “even a very high accuracy rate can produce an unreasonable amount of false positives” and that service canines are “least effective when they survey a random population.”)

²⁸ See also *Edmond*, 531 U.S. at 56. (Thomas, J., dissenting) (“I rather doubt that the Framers would have considered ‘reasonable’ a program of indiscriminate stops of individuals not suspected of wrongdoing.”)

The experiences of Arizona motorists raise similar concerns. In the eight examples of false canine alerts documented herein, none resulted in the discovery of contraband. In some instances, agents appeared to be using the service canines as excuses to conduct a search. In the case of Mr. Tran and Mr. Ivey, a canine's alert to *another* motorist's bag was used as a basis for searching their vehicle. Ms. Turner described a similar experience, with agents striking her vehicle to encourage the dog to alert.²⁹ In the case of Mr. Polen, agents were unclear about the basis for his detention before settling on an alleged canine alert, even though there was no dog nearby. Several of the cases documented by Arivaca residents involved Border Patrol calling for service canines only *after* motorists legitimately declined to consent to a search or answer questions not related to citizenship; in several instances, agents then claimed a service canine "alerted," giving them probable cause for a search. In none of those cases was any contraband discovered. The frequency of false canine alerts at Border Patrol checkpoints indicates either that canines are frequently unreliable, or that agents are using canines fraudulently in order to obtain probable cause where it does not otherwise exist, or both. Whichever the case may be, the result is that border residents are regularly subject to unconstitutional searches and detentions.

Additionally, as we have seen in the context of "roving patrol" stops,³⁰ Border Patrol continues to rely on race and ethnicity as factors in subjecting certain motorists to additional scrutiny and detention at checkpoints. In addition to Ms. Turner's account of multiple racially-motivated detentions, the ACLU receives reports from Latino and Native American residents who experience additional scrutiny and delay at checkpoints, for no apparent reason other than their perceived race or ethnicity.³¹ Such practices are unlawful as well. *See Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000); *Melendres v. Arpaio*, Civ. No. PHX-CV-07-02513-GMS, 2013 WL 2297173, at *69 (D. Ariz. May 24, 2013) ("[T]here is no legitimate basis for considering a person's race in forming a belief that he or she is more likely to engage in a criminal violation, and the requisite 'exact connection between justification and classification,' in focusing on Hispanic persons in immigration enforcement is lacking.") (citation omitted).³²

Border Patrol checkpoints today bear little resemblance to those authorized by the Supreme Court in *Martinez-Fuerte*. Many Border Patrol officials do not understand—or simply ignore—the legal limits of their authority at checkpoints. One of the agents described above resorted to reading legalese from a tiny script that he did not understand, misstating the applicable legal standard, to try to justify the stop. Others claimed, falsely, that motorists could not make phone calls or videotape agents searching vehicles. Multiple citizens have reported being told by agents, "You have no rights here," or that refusal to consent to a search gives agents probable cause for a search. In many cases, agents responded to citizens who legitimately asserted their rights with additional abuses. The Office of Inspector General recently

²⁹ The agent's contact with the vehicle may have in and of itself been unlawful. *See Thomas*, 726 F.3d at 1093 ("[I]t is conceivable that by directing the drug dog to touch the truck and toolbox in order to gather sensory information about what was inside, the border patrol agent committed an unconstitutional trespass or physical intrusion.")

³⁰ The ACLU submitted a complaint on October 9, 2013, on behalf of five Arizona residents subjected to unlawful roving patrols, at least one of whom appeared to have been racially profiled by Border Patrol. *See* <http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Roving%20Patrols%20Oct%209%202013.pdf>

³¹ One Arivaca resident, a naturalized U.S. citizen, has "repeatedly faced extended questioning and demands for identification at the Arivaca Road checkpoint. Although she is a citizen, agents have demanded that she show proof of naturalization, which she is not required to carry. She believes this scrutiny is based solely on her Hispanic appearance and her accent." *See* http://phparivaca.org/?page_id=210

³² *See also* U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES, (June 2003), available at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf

concluded that Border Patrol agents do not understand agency use of force policies.³³ This profound lack of understanding evidently extends to checkpoint procedures as well. These problems are compounded by the fact that agents at checkpoints do not appear to document their interactions with motorists—including agents’ use of force, false alerts by service canines, and prolonged detentions—*not* resulting in arrest. The lack of documentation and oversight makes it impossible to know when Border Patrol agents are exceeding their authority or straying from agency guidelines. This is a recipe for further abuse.

Finally, as we have noted before, the complaint process by which individuals report abuses to Border Patrol and other DHS entities is lacking in consistency and transparency and fails to provide meaningful redress to those whose rights have been violated. Border Patrol and DHS officials often fail to provide accurate information to complainants about the investigatory process or the status of their complaint, and are not responsive to reasonable requests for information. The ACLU is still awaiting response to a complaint filed on April 26, 2012 on behalf of eleven individuals abused by agents at Ports of Entry,³⁴ and another filed on October 9, 2013 on behalf of five Arizona residents subjected to unlawful roving patrol stops.³⁵ Unfortunately, the lack of attention by DHS and its agencies to these complaints—involving civil rights abuses by the largest federal law enforcement agency in the nation—is not atypical. As should by now be clear, the entire DHS complaint process is in dire need of reform, and a broader commitment to Border Patrol oversight, accountability, and transparency is long overdue.

III. Conclusion

We request that you conduct a prompt investigation of these individual allegations of abuse, along with any known checkpoint-related complaints from the past five years. We also urge a comprehensive review of checkpoint policies and practices to determine whether Border Patrol is complying with its obligations under the U.S. Constitution and agency guidelines—with **particular attention to** the extent to which agents at checkpoints are:

- 1) conducting investigations unrelated to verifying immigration status and without reasonable suspicion of criminal activity;
- 2) searching vehicles without consent or probable cause;
- 3) using service canines to obtain probable cause, either by claiming falsely that a dog has “alerted,” or by relying on inadequately trained or unqualified canines, resulting in significant rates of false alerts;
- 4) racially profiling motorists at checkpoints; and
- 5) using excessive force, making false claims, and/or improperly interrogating, intimidating, and harassing motorists at checkpoints.

³³ See Brian Bennett, *Many Border Agents Don’t Understand Use-Of-Force Rules, Report Says*, LA TIMES, Sept. 18, 2013, available at <http://articles.latimes.com/2013/sep/18/nation/la-na-nn-border-patrol-use-of-force-20130918> (An audit showed that many agents “do not understand use of force and the extent to which they may or may not use force.”) This is in part due to the fact that training and hiring standards were lowered to accomplish the rapid expansion of the Border Patrol from roughly 12,000 agents in 2006 to over 21,000 today. See Greg Morgan, *Hiring Practices Questioned after Border Agent’s Arrest*, SAN DIEGO UNION TRIBUNE, Apr. 1, 2011, available at <http://www.utsandiego.com/news/2011/Apr/01/hiring-practices-questioned-after-border-agents-ar/> (quoting a Border Patrol representative, “Pretty much everyone was being pushed through because they needed the bodies.”)

³⁴ Available at https://www.aclu.org/files/assets/aclu_2012_cbp_abuse_complaint_2.pdf. DHS sent form responses regarding three of the eleven cases of abuse documented in the ACLU’s April 2012 complaint, without commenting on the many allegations of abuse by CBP officials or conducting interviews with any of the complainants.

³⁵ Available at <http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Roving%20Patrols%20Oct%209%202013.pdf>. To date, DHS has contacted only one of the five individuals whose abuses were documented in the ACLU’s October 2013 complaint.

In cases of unlawful conduct, we urge that the agents responsible be appropriately disciplined and that the results of your investigation be made public. Finally, significant changes in Border Patrol training, oversight, and accountability mechanisms are needed, and we again urge you to make substantive recommendations for such changes consistent with your institutional mission in order to prevent further abuses.

Please contact us with any questions or concerns at (602) 650-1854.

Sincerely,



James Lyall
Staff Attorney
ACLU of Arizona

Cc: Jeh Johnson
Acting Secretary of Homeland Security
U.S. Department of Homeland Security
245 Murray Lane SW
Washington, D.C. 20528

Thomas Winkowski
Acting Commissioner
U.S. Customs and Border Protection
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United States Attorney
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Tucson, AZ 85701

Senator John McCain
U.S. Senator for Arizona
241 Russell Senate Office Building
Washington, DC 20510

Senator Jeff Flake
U.S. Senator for Arizona
B85 Russell Senate Office Building
Washington, DC 20510

Congressman Raúl Grijalva
U.S. House of Representatives
1511 Longworth HOB
Washington, DC 20515

Congressman Ron Barber
U.S. House of Representatives
1029 Longworth HOB
Washington, DC 20515

EXHIBIT A

Authority As An Agent U.S. Border Patrol

Statutory Authority:

INA 274(b): Seize alien and smuggling conveyance (for forfeiture)

INA 287(a)(1): Interrogate aliens

INA 287(a)(2): Arrest unlawfully present aliens (likely to escape at a checkpoint)

INA 287(a)(3): Board conveyances (within 100 air miles)

INA 287(h): Administer oaths

19 USC 1589(a)(3): Arrest for federal misdemeanors committed in the presence and for any federal felonies.

19 USC 1959(a): Seize anything used for smuggling merchandise.

Frequently asked questions:

Am I being detained? Yes.

What authority do you have to stop me?

The United States Supreme court has stated in *U.S. v. Martinez-Fuerte* that the U.S. Border Patrol has authority to conduct an immigration inspection at a checkpoint without individualized suspicion. This is an immigration checkpoint and I am conducting an immigration inspection. Of what country are you a citizen?



U.S. Customs and
Border Protection



Checkpoint Authority U.S. Border Patrol

U.S. v. Martinez-Fuerte – 428 U.S. 543 (1976):

Holding: Border Patrol agents may stop and question motorist at reasonably located checkpoints, even in the absence of individualized or reasonable suspicion.

What section of the INA did the Supreme Court use to justify their opinion? INA 287 (a)(3)

- Within a reasonable distance from any external boundary of the United States, to board and search for aliens in any vessel within territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle.

What section of the INA gives us the authority to question motorist? INA 287 (a)(1)

- Court surmised that there was only a minimal intrusion to motorist when stopped at immigration checkpoints.

CBP Publication No. 0415-0511; May 2011



U.S. Customs and
Border Protection



EXHIBIT B

PIMA COUNTY DEPARTMENT OF TRANSPORTATION
1313 S MISSION ROAD TUCSON, AZ 85713
201 N. STONE AVENUE, 1ST FLOOR TUCSON, AZ 85701

PERMIT TO USE COUNTY RIGHT-OF-WAY
PERMIT NO. P04RW00558

NO PAVEMENT CUTS ON NEW PAVEMENT (SEE CONDITION#6)

THE UNDERSIGNED MAKES APPLICATION FOR A PERMIT TO ENTER UPON A PORTION OF THE PUBLIC HIGHWAY, STREET, ALLEY OR DRAINAGEWAY FOR CONSTRUCTION IMPROVEMENT PURPOSES.

LOCATION: ARIVACA RD - VARIOUS LOCATIONS

NEAREST CROSS STREET (S):

TAX CODE:

INSPECTION DISTRICT: _____

TOWNSHIP-RANGE-SECTION: 0S- 0E - 0

TYPE OF WORK: COUNTY PROJECT

DESCRIPTION OF PROPOSED WORK: ROW/PERMIT TO ESTABLISH CHECKPOINTS ON ARIVACA RD TO HELP US BORDER PATROL

FOR AND IN CONSIDERATION OF THE GRANTING OF THE PERMIT, THE APPLICANT AGREES TO COMPLY WITH ALL CONDITIONS AS SPECIFIED ON THE BACK OF THIS PERMIT AND ANY AND ALL SPECIAL CONDITIONS THAT THE COUNTY ENGINEER MAY REQUIRE.

THE WORK SHALL BE COMPLETED WITHIN FORTY-FIVE (45) DAYS FOR UTILITY AND MISCELLANEOUS WORK AND ONE HUNDRED EIGHTY (180) DAYS FOR SUBDIVISION WORK, FROM THE DATE OF THIS PERMIT. PERMIT RENEWALS ARE TO BE OBTAINED AT THE PIMA COUNTY DEPARTMENT OF TRANSPORTATION PRIOR TO EXPIRATION DATE. AN ADDITIONAL PERMIT FEE WILL BE CHARGED. PIMA COUNTY ACCEPTS NO RESPONSIBILITY FOR THE ENGINEERING DESIGN FOR WORK COVERED BY THIS PERMIT. THE APPLICANT ACCEPTS ALL FINANCIAL AND/OR LEGAL LIABILITIES OR OBLIGATIONS WHICH MAY RESULT FROM WORK PERFORMED UNDER THIS PERMIT.

THE CONTRACTOR, PERSON OR FIRM DOING THE WORK MUST CALL PIMA COUNTY INSPECTION AT 740-2650 AT LEAST FORTY-EIGHT (48) HOURS PRIOR TO STARTING WORK.

APPLICANT: US BORDER PATROL
1500 W LA QUINTA
NOGALES, AZ
85621
520-377-6285

CONTRACTOR:

APPLICANT'S SIGNATURE: _____

MILLER AGENT AL

DATE: 02/26/2004

1/7/08

SPECIAL CONDITIONS

- 1: TRAFFIC CONTROL PLANS MUST BE IMPLEMENTED FOR EACH SET UP AND FOR EACH NEW LOCATION OF THE CHECKPOINTS.
- 2: PERMIT APPROVAL BY TRAFFIC ENGINEERING
- 3: PERMIT IS TO REMAIN VALID UNTIL SUCH TIME THAT IT IS NO LONGER APPLICABLE

SEE CONDITION #13

PERMIT ISSUED: 02/26/2004
PERMIT EXPIRATION:

PIMA COUNTY ENGINEER

BY: _____

MELISSA POULIN

PIMA COUNTY DEVELOPMENT SERVICES DEPARTMENT
201 N STONE AVENUE, 1ST FLOOR PHONE: 740-6508

CONDITIONS

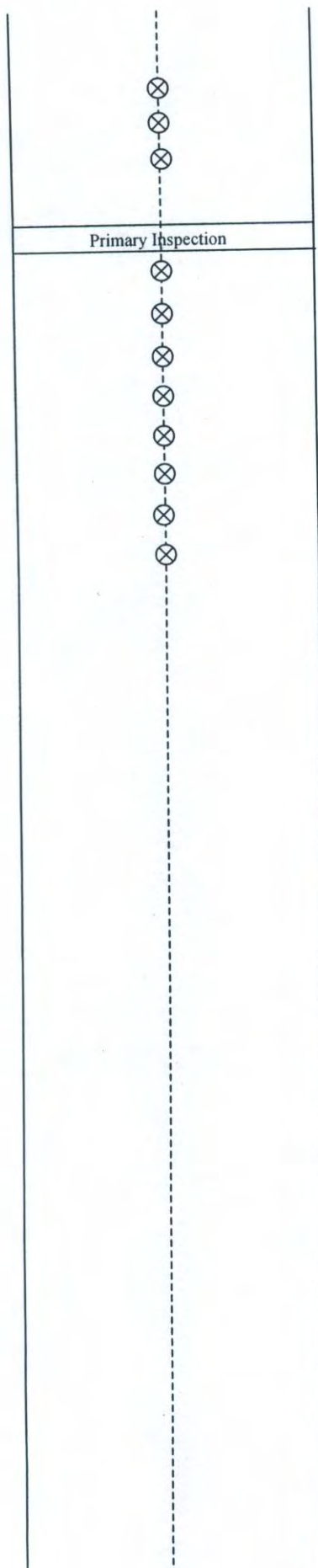
1. The applicant shall indemnify, defend and hold Pima County harmless from any and all claims, demands and suits arising out of the applicant's use and occupancy of the County right-of-way, both during the course of construction by the applicant of any improvements in the County right-of-way, and during the existence of any such improvements in the County right-of-way.
2. All work done shall be at the sole cost and expense of the applicant and shall be done at such time and in such a manner as to be least inconvenient to the traveling public, as directed by the County Engineer, or his authorized Representative.
3. If the work performed under this Permit fails to pass final inspection, the applicant will remove or replace the same within such time as specified by written notice from the County Engineer or his authorized Representative or if any material used by the applicant in replacing or reconstructing any part of the work, material or workmanship performed under this Permit proves defective, the applicant will replace the same as specified by the County Engineer or his authorized Representative.
4. If the work requires cutting of existing pavement, temporary pavement repair must be completed prior to leaving the work site. Temporary pavement repair shall be maintained in a manner acceptable to the County Engineer or his authorized Representative, by the applicant until a permanent pavement repair.
5. Permanent pavement repairs shall be performed within fifteen (15) days of the initial work or sooner if requested, in writing, to do so by the County Engineer or his authorized Representative.
6. No pavement cuts on a new pavement. Utility boring shall only be required under new construction which is five (5) years or less old. On overlays, slurry seals, etc., construction which is five (5) years old or less and STILL in excellent condition, a TYPE II or III concrete patch shall be required per standard detail #216. All other pavement cuts shall require a TYPE I patch per standard detail #216.
7. Permanent pavement repair must be completed by a duly licensed Contractor in the State of Arizona, qualified to make such repairs.
8. The applicant will not allow any condition to exist which would be a hazard or a source of danger to the traveling public. If the work presents or becomes a hazard to the traveling public, Pima County may take immediate corrective action and bill the the applicant for the full cost incurred for such corrective action.
9. The applicant shall provide, install and maintain traffic control devices as prescribed by the Traffic Control Manual for Highway Construction and Maintenance, Arizona Department of Transportation, August, 1981 and including all subsequent revisions thereof, and shall and will take measures of precaution as the the County Engineer or his authorized Representative shall direct.
10. The applicant shall be responsible for verifying the location of all underground utilities prior to the commencement of excavation and shall protect said utilities from damage.
11. All work shall be accomplished in accordance with applicable engineering details, standards or specifications of Pima County on file in the office of the County Engineer.
12. If at any time hereafter the right-of-way or any portion thereof, occupied and used by this Permit is needed or required by the County, upon sufficient written notice, the applicant, at their expense, shall remove all property belonging to the applicant or placed in the right-of-way by the applicant.
13. The PCDOT will perform testing of all materials used in any roadway construction or reconstruction within Pima County right-of-way when an Inspection Fee is charged. When no Inspection Fee is charged, the permit applicant is responsible to obtain a certified testing laboratory to perform compaction tests. COPIES OF TEST RESULTS ARE TO BE SUBMITTED TO PIMA COUNTY DEPARTMENT OF TRANSPORTATION PERMIT SECTION.

Inspector's
Remarks:

Inspector's
Signature:

Date:

Arivaca Checkpoint
Mile post 22



Checkpoint Trailer

STOP

500'

STOP AHEAD

500'

25 MPH

500'

35 MPH

500'

45 MPH

500'

REDUCED SPEED AHEAD

500'

DO NOT PASS

500'

CHECKPOINT AHEAD

EXHIBIT C

From: **SAN-MARTIN, ROGER** <ROGER.SAN-MARTIN@cbp.dhs.gov>

Date: Fri, Mar 7, 2014 at 9:43 AM

Subject:

To: "phparivaca@gmail.com" <phparivaca@gmail.com>

Dear PHP,

I was browsing through your website and came across a briefing you give regarding the recent protests at the Arivaca BP Checkpoint. There were a couple of statements in the brief that I would like to address and clarify. I think it's important to avoid putting out misinformation that can cause confusion and misunderstandings between those monitoring the checkpoint and agents working there.

In the brief you state that Border Patrol Agents do not have the authority to make arrests. That is an incorrect statement. In fact, the arrest authority for Border Patrol Agents is greater than most other Federal Law Enforcement Agencies and a result of enforcing laws under three different U.S. Titles. They are Titles 18 , 19, and 21. These titles relate to Immigration, U.S. Customs, and Federal Drug Laws. U.S. Border Patrol Agents make more arrests per year than any other law enforcement agency within the United States. Arrests are not limited to illegal immigrants and include U.S. Citizens and members of vast criminal organizations who violate the U.S. Laws that Border Patrol Agents enforce. Agents can also make arrests for any felony that takes place in their presence. What agents do not have is the authority to enforce traffic laws and that is why the Pima County Sheriff's Office was asked to come to the checkpoint that day. Agents wanted to make sure that no state laws were being violated as a result of protesters standing on the shoulder of the highway and the highway itself.

I also noted where the brief stated that Border Patrol's intention to intimidate monitors was abundantly clear that day. It further states that under threat of arrest, Border Patrol agents ordered the monitors to move to a distance that severely impaired their ability to observe checkpoint operations. Let me be clear, agents have no intention of trying to keep your group from monitoring or protesting the checkpoint. As far as agents are concerned, you are within your right to monitor and protest but you are not within your right to do it inside the operational perimeter of the checkpoint where agents are working and conducting law enforcement activities. The inside perimeter of the checkpoint is not a public place where anyone can just show up and

establish ground. It is a “controlled area” for agents conducting their duties. By controlled I mean agents have the authority and are within their right to determine who can enter into the perimeter where they are conducting law enforcement actions. Agents have the right to perform their duties without impediment by individuals who are on scene. The decision on where monitors can stand/sit without interfering with agents and traffic is that of the agents and not the monitors.

There are numerous reasons for this. Foremost is the safety of the agents, travelers, and protesters. We cannot have a crowd of people impeding, standing, or sitting in close proximity to agents doing their job. Agents need to be focused on arriving traffic and the passengers they are speaking with, not distracted by people who have entered their work area without authorization and who are moving around, yelling, talking, singing, getting in their way, waving signs, etc. That is absolutely not going to be allowed. . There is also an expectation of privacy by the people we encounter driving into the checkpoint. Not everyone supports your cause and we are liable for protecting the privacy of those who do not wish have monitors listening to the answers they give during our questioning. Furthermore, agents cannot and will not allow the monitors to establish ground in areas where the agents feel the monitors may be at risk should a confrontation arise between agents and those they may be trying to arrest (wanted criminals, smugglers, UDAs, drug traffickers, etc.). The protestors and monitors will be instructed to remain in a marked area that has been established for them at the edge of the checkpoint’s eastern perimeter. You state that this distance severely impairs your ability to observe checkpoint operations. I disagree, there is a close clear view of the agents and inspection areas while at the same time allowing agents to do their job without impediment and respecting the privacy of vehicle occupants during questioning.

Your brief alleges that Border Patrol’s intention on the day of the protest was to intimidate monitors by pushing them back and threatening arrest. Fact is that agents politely asked the monitors numerous times to move back to a designated area we had set up for them and the monitors refused. The agents explained why this needed to be done to include advising that the public was not allowed to set up ground where agents were conducting law enforcement duties as it impeded the agent’s ability to safely do their job. This was explained numerous times yet the monitors still refused to move. It was then that agents began to advise the monitors that they were subject to arrest if they continued to ignore commands to move away from the agent’s work area.

Eventually the majority of protester/monitors moved to the area we had designated yet there were still some who continued to challenge the agents by remaining a few feet inside the perimeter. At this point agents were forced to park vehicles up against the barrier in order to get these persons to move to the other side. Some of the monitors claimed agents placed the vehicles there to block the view of the inspection areas. That is incorrect. The vehicles were parked there to provide an additional barrier because some monitors refused to move. If the monitors had moved when agents asked them to the vehicles would have never been placed there. We really have to commend the agents at the checkpoint that day for their patience and professionalism. Agents would have been within their authority to forcibly remove and/or arrest those who continued to impede and interfere after commands were given to move behind the barrier. Agents instead chose to give the protestors ample time

(approximately 1 ½ hours) to move. I doubt there is any other law enforcement agency that would have patiently waited 1 ½ hours for someone to move after they were asked and ultimately told to do so.

There is a law which addresses impeding a Federal Officer while in the performance of his or her duties. The law also addresses assault and resisting. Contrary to your beliefs that agents cannot make arrests, 18 USC 111 gives agents the authority to arrest any persons, including citizens, who violate the section as it reads below.

18 USCS § 111. Assaulting, resisting, or impeding certain U.S. officers or employees

(a) In general. Whoever--

(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person deemed an officer or employee of the U.S. as designated in section 1114 of this title [18 USCS § 1114] while officer or employee is engaged in or on account of the performance of official duties; or

(2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 [18 USCS § 1114] on account of the performance of official duties during such person's term of service,

shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.

In the end I think it is important that both groups respect each other's mission. As previously stated, agents do not have the desire or intention to challenge or stop PHP from monitoring as long as it's done from outside the marked perimeter of the checkpoint. Monitoring and protesting must be done in a manner that does not impede or interfere with the agent's ability to do their job or put anyone in danger of getting hurt. Please feel free to post my message on your website for PHP members to see.

You can contact me by phone or e mail should you have any questions, complaints, or issues.

Thank You

Roger San Martin

Agent in Charge

Tucson Border Patrol Station

Roger.Sanmartin@dhs.gov

(520) 514-4701 (desk).

--

People Helping People

Arivacans providing hospitality and community support in the borderlands.

Arivaca Humanitarian Aid Office Hours and Contact Info

Tuesday, Thursday 12-4pm

Friday and Saturday 9am-1pm

Closed - Sunday, Monday, Wednesday

520-398-3093

www.phparivaca.org

EXHIBIT D



**BORDER PATROL
ENFORCEMENT ZONE**
**NO PEDESTRIANS
BEYOND THIS POINT**





NO UNAUTHORIZED ENTRY
BEYOND THIS POINT

EXHIBIT E

ALESSANDRA SOLER
EXECUTIVE DIRECTOR

ZENAIDO QUINTANA
PRESIDENT



*The ACLU's Border Litigation Project
investigates, documents, and litigates
civil and human rights violations
in the U.S.-Mexico border region.*

April 17, 2014

VIA CERTIFIED U.S. MAIL:

Manuel Padilla, Jr.
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***Re: First Amendment Rights of Protesters and Photographers at Arivaca
Road Checkpoint***

Dear Mr. Padilla:

We write on behalf of residents of Arivaca, Arizona who are calling for the removal of the Border Patrol checkpoint on Arivaca Road in Amado, Arizona. As you know, community members working with the organization People Helping People have initiated a “checkpoint monitoring campaign” to protest the Arivaca Road checkpoint and to document and record agents’ interactions with motorists at the checkpoint. This campaign is the culmination of Arivaca residents’ growing concern with the overwhelming Border Patrol presence in their community as well as numerous rights violations of residents at the checkpoint.

We at the ACLU have already shared our concerns with you regarding civil rights abuses at Border Patrol checkpoints throughout southern Arizona, including the Arivaca Road checkpoint.¹ Now it has come to our attention that the Border Patrol is restricting the ability of the Arivaca checkpoint monitors to protest and record checkpoint operations in their community, and in some cases appear to be harassing and retaliating against the monitors. These actions violate the First Amendment. “The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.” *City of*

¹ See ACLU OF ARIZONA, COMPLAINT AND REQUEST FOR INVESTIGATION, JAN. 15, 2014, available at <http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Checkpoints%20%202014%2001%2015.pdf>

Houston v. Hill, 482 U.S. 451, 462-63 (1987). We write to demand that Border Patrol immediately cease interfering with lawful protest and monitoring of the Arivaca Road checkpoint and respect the civil rights of all residents and motorists at Border Patrol checkpoints.

I. Factual Background

Beginning in 2013, Arivaca residents and members of People Helping People launched a campaign protesting the Arivaca Road checkpoint, one of the three local immigration checkpoints that surround their town.² Community members are petitioning the Border Patrol to remove the Arivaca Road checkpoint, citing ongoing rights violations along with harm to property values,³ tourism, and quality of life resulting from checkpoint operations, as well as the role of the checkpoint in contributing to migrant deaths and the militarization of the border region.⁴ More than 200 community members and 10 business owners signed the petition, which was delivered to the Border Patrol at the Arivaca Road checkpoint on December 8, 2013. On January 23, 2014, Congressman Raul Grijalva sent a letter to Border Patrol in support of the campaign.

Arivaca residents have documented numerous instances of rights violations by Border Patrol agents at the checkpoint, including extended detention and interrogation not related to establishing citizenship, invasive and unlawful searches, racial profiling, verbal harassment, and physical assault, among other abuses.⁵ Agents have repeatedly relied on false alerts from service canines to justify prolonged searches and detentions.⁶ Some agents have stated that all community members are considered suspect simply by virtue of living in Arivaca, while others have told residents, “You have no rights here.”

Border Patrol refuses to remove the checkpoint, has not investigated any of the residents’ complaints of harassment and abuse, and says it will not share stop data or other checkpoint-related information that would allow Arivaca residents to assess the need for a checkpoint they say is causing severe harm to the community. For all of these reasons, in February, community members

² See Paul Ingram, *Border Residents Demand End to Arivaca Checkpoint*, TUCSON SENTINEL, Jan. 23, 2014, available at http://www.tucsonsentinel.com/local/report/012214_arivaca_checkpoint_protest/border-residents-demand-end-arivaca-checkpoint/.

³ See, e.g., Judith Gans, *THE BORDER PATROL CHECKPOINT ON INTERSTATE 19 IN SOUTHERN ARIZONA: A CASE STUDY OF IMPACTS ON RESIDENTIAL REAL ESTATE PRICES*, UNIVERSITY OF ARIZONA, (Dec. 2012), available at http://udallcenter.arizona.edu/ucpubs/gans_2012b.pdf

⁴ The Arivaca Checkpoint Petition is available at <https://www.change.org/petitions/u-s-border-patrol-remove-the-check-point-on-arivaca-rd-in-amado-az-quite-el-ret%C3%A9n-de-la-carretera-de-arivaca-en-amado-az>

⁵ Narratives of Arivaca community members are available at http://phparivaca.org/?page_id=210

⁶ *Id.*

initiated a “checkpoint monitoring campaign.”⁷ The purpose of this campaign is to peacefully protest the checkpoint and to observe and document Border Patrol interactions with local residents and motorists.

A. February 26, 2014

On February 26, 2014 at approximately 11:00 a.m., a group of 6 checkpoint monitors, accompanied by roughly 25 additional protesters, arrived in the vicinity of the Arivaca Road checkpoint. The group approached from the east, walking on the south shoulder of the county road. The group held signs and banners protesting the checkpoint, and remained on the public right of way, out of the path of traffic. When monitors were approximately 100 feet east of the checkpoint at the eastern terminus of the secondary inspection area, they were approached by Border Patrol Agent Joyner. Agent Joyner informed the monitors that they would have to “move back,” past a cattle guard in the roadway, which was approximately 100 feet behind them and roughly 200 feet east of the checkpoint. Agent Joyner stated that the public right of way on which the monitors were standing was used for “overflow secondary inspection,” and that for safety reasons the monitors would have to move. Agent Joyner stated that the Border Patrol had a permit and promised to retrieve it.

After approximately 45 minutes, Pima County Sheriff’s Deputies arrived on the scene. After conferring with Border Patrol, Sheriff’s Deputy Judd asked the monitors to cross the street to the north side of Arivaca Road, directly across from where the monitors were stationed, at the end of a line of Border Patrol vehicles. Deputy Judd did not say that the monitors were required to move, but the monitors agreed to go to the north side of the road. Because the vehicles obstructed the monitors’ line of vision, some of the monitors attempted to move closer to better observe and record the checkpoint, but were turned back by Border Patrol agents who claimed monitors were intruding on Border Patrol’s “enforcement area” and were “impeding operations.”

At approximately 1:30 p.m., Agent Lloyd Easterling approached and asked the monitors to “move back,” this time to an area approximately 50 feet from where they were stationed and 150 feet east of the checkpoint. Agent Easterling said that he had seen a permit granting Border Patrol an “enforcement zone” that extended 800 feet to the west of the checkpoint. Agent Easterling said that he did not remember how far to the east the enforcement zone extended, but said that he was demarcating it as running to “the end of the pylons” and that the monitors had to move beyond that limit. Agent Easterling refused to show the permit to the monitors. When the monitors noted that Sheriff’s Deputies had already directed them to stand in their present location, Agent Easterling summoned a Pima County Sheriff’s Sergeant Lapelini. Sergeant Lapelini said that

⁷ See Cindy Carcamo, *Arizona Residents Begin Monitoring Immigration Checkpoint*, LA TIMES, Feb. 26, 2014, available at <http://www.latimes.com/nation/la-na-ff-border-crossing-20140227,0,7296370.story#axzz2v81cbwn5>

he had not seen a permit but that he believed Border Patrol's request was "reasonable." Sergeant Lapelini did not say that the monitors were required to move. The monitors remained in place and the Sheriff's Deputies left the scene.

Border Patrol agents then proceeded to string yellow tape marked "U.S. Border Patrol Incident Scene" across the north and south shoulders of the road, approximately 150 feet east of the checkpoint, blocking pedestrian traffic. On each side of the street, incident tape was strung from a private fence adjacent to the public right of way to a traffic barrier by the roadside, obstructing pedestrian traffic. At approximately 2:15 p.m., Agent Easterling approached the monitors and notified them that if they did not move, agents would forcibly remove them. Agent Easterling said this was an "order," and that if the monitors resisted, they would be arrested. Under threat of arrest, the monitors relocated by moving east to an area behind the newly-installed boundary.

B. March 1, 2014

On March 1, 2014 at approximately 10:30 a.m., a group of 6 monitors returned to the north side of the Arivaca Road checkpoint; two additional monitors arrived a short time later. The monitors stopped approximately 100 feet from the checkpoint, in roughly the same location they had agreed to use at the request of Deputy Judd on February 26. The monitors found that Border Patrol had erected new barriers on each side of the road, approximately 150 feet from the checkpoint. These barriers now consisted of rope running from the private fence adjacent to the public right of way to a traffic barrier in the middle of the public right of way, and another traffic barrier by the roadside. On each side of the road, Border Patrol had posted a sign: "Border Patrol Enforcement Zone - No Pedestrians Beyond This Point."

The monitors were approached by Supervising Agent Rosalinda Huey who informed them they were within Border Patrol's "zone of operation" and needed to stand behind the boundary. The monitors responded that they had returned to the same location to which they had been directed by Pima County Sheriffs on February 26. Agent Huey stated that if monitors did not move, Border Patrol would call Pima County Sheriff. The monitors objected and remained in place.

After approximately one hour, Agent Huey and four other agents returned. Agent Huey stated, "There is nothing to discuss, there is nothing to decide. Either you move or we will arrest you". Another agent stated to Agent Huey, "Just arrest them." Agent Huey and another agent produced handcuffs and began advancing on the monitors. Under threat of arrest, the monitors agreed to move. One of the monitors asked the agents for their names. In response, Agent Huey stated, "You have to move or we will place you under arrest. If you want our names you will have to move behind the barrier." Agents followed the monitors to the barrier, approximately 150 feet from the checkpoint. The agents then walked away

without allowing the monitors to obtain the agents' names or badge numbers. Border Patrol parked a vehicle directly in front of the monitors, on the west side of the barrier, blocking their line of vision; another vehicle was parked in the same location on the south side of the road, just west of the barrier.

C. March – April 2014

In the intervening weeks, checkpoint monitors have continued to protest and record the checkpoint to the best of their ability from behind the makeshift barriers, and have documented instances of motorists being detained and searched without consent. The monitors' activities, however, continue to be greatly restricted by Border Patrol's barriers. At no point have any checkpoint monitors interfered or attempted to interfere with Border Patrol operations.

Meanwhile, Border Patrol has continued to harass and intimidate the checkpoint monitors. For several weeks following the initiation of the campaign, Border Patrol parked vehicles next to the barriers, obstructing the monitors' view: when monitors arrived in the morning, Border Patrol agents parked their vehicles next to the barriers; after the monitors left, the Border Patrol vehicles were removed. On one occasion, an agent parked a Border Patrol vehicle next to the barrier and left the engine running, with exhaust fumes directed at the monitors. The monitors moved to the opposite side of the road where another vehicle was parked with its engine running. Both vehicles were left idling for approximately four hours while the monitors were present. On another occasion, the monitors could overhear agents shouting profanities that were directed at the monitors; one agent yelled to a passing motorist, "You should drive up and tell her, 'Bitch, don't film me!'"

On March 7, Border Patrol Agent Roger San-Martin sent an e-mail to People Helping People, which read in part:

"The inside perimeter of the checkpoint is not a public place where anyone can just show up and establish ground. It is a 'controlled area' for agents conducting their duties. By controlled I mean agents have the authority and are within their right to determine who can enter into the perimeter where they are conducting law enforcement actions. Agents have the right to perform their duties without impediment by individuals who are on scene. The decision on where monitors can stand/sit without interfering with agents and traffic is that of the agents and not the monitors.

There are numerous reasons for this. Foremost is the safety of the agents, travelers, and protesters...Agents need to be focused on arriving traffic and the passengers they are speaking with, not distracted by people who have entered their work area without authorization and who are moving around, yelling, talking, singing, getting in their way, waving

signs, etc. That is absolutely not going to be allowed...There is also an expectation of privacy by the people we encounter driving into the checkpoint. Not everyone supports your cause and we are liable for protecting the privacy of those who do not wish have monitors listening to the answers they give during our questioning. Furthermore, agents cannot and will not allow the monitors to establish ground in areas where the agents feel the monitors may be at risk should a confrontation arise between agents and those they may be trying to arrest (wanted criminals, smugglers, UDAs, drug traffickers, etc.). The protestors and monitors will be instructed to remain in a marked area that has been established for them at the edge of the checkpoint's eastern perimeter."

On Thursday, April 3, monitors observed a local resident arrive and park his vehicle next to the barrier, directly *inside* the "enforcement zone." The resident in question had directed obscene comments and gestures at the monitors in the past, and on this occasion began to question and video record the monitors. He remained inside the barrier for approximately 40 minutes, at one point parking his truck with the rear end protruding into the roadway. As the man left, he stopped in the westbound lane where monitors overheard him shout, "Well, we had our fun today." The agents at the checkpoint smiled and laughed. At the end of the day, one of the monitors asked the agents at the checkpoint if they had given the man permission to remain inside the "enforcement zone." An agent replied, "It's a free country."

II. Legal Analysis

Arivaca community members have a First Amendment right to protest the Arivaca Road checkpoint and to record agents' interactions with motorists. It is well established that peaceful picketing and parading are forms of expressive communication protected by the First Amendment, and have "always rested on the highest rung of the hierarchy of First Amendment values." *Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 861 (9th Cir. 2001). The Arivaca checkpoint monitors are engaged in political speech, which is guaranteed the highest level of protection under the First Amendment. *Buckley v. American Const. Law Found.*, 525 U.S. 182, 186-87 (1999); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (to protest with political signs is to exercise First Amendment rights "in their most pristine and classic form.").

The First Amendment also protects the checkpoint monitors' right to photograph and video record law enforcement. *See American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (act of making audiovisual recording "is necessarily included within the First Amendment's guarantee of speech and press rights"), *cert. denied*, 133 S. Ct. 651 (2012); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing First Amendment right to film matters of public interest); *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.”).

In *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2012), a bystander who was arrested for filming the arrest of another from 10 feet away sued officials for First and Fourth Amendment violations. The First Circuit held that the “filming of government officials engaged in their duties in a public place...fits comfortably within First Amendment principles. Gathering information about government officials in a form that can be readily disseminated to others serves a cardinal First Amendment interest in protecting and promoting “the free discussion of governmental affairs.” *Id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Furthermore, “freedom of expression has particular significance with respect to government because it is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.” *Id.* (quoting *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 n.11 (1978)). This is especially true as to “law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties.” *Id.* (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035–36 (1991)). “Ensuring the public’s right to gather information about their officials not only aids in the uncovering of abuses . . . but also may have a salutary effect on the functioning of government more generally.” *Id.* at 82–83 (citing *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986)).

More recently, in *Bologna v. City of Escondido*, No. 12-CV-1243-JAH-WVG (S.D. Cal.), the ACLU sued on behalf of a group of protesters after law enforcement officials, relying on an inapplicable section of the California Vehicle Code and an asserted “operational area” extending more than 500 feet from the checkpoint, disrupted the peaceful protest and recording of traffic checkpoints. The plaintiffs settled with the City of Escondido, which agreed to respect the First Amendment right to protest, film, or record traffic checkpoints and to ensure the operational area of a checkpoint creates “a distance of no more than 15 feet between observers and officers,” subject only to narrowly drawn exceptions. Joint Motion to Dismiss, *Bologna v. City of Escondido*, No. 12-CV-1243-JAH-WVG, Dkt. 27-1 (S.D. Cal. Oct. 24, 2012). The settlement upheld free access to public sidewalks, with limited exceptions, to record checkpoint operations in the interest of holding police accountable for their conduct.⁸ The District Court subsequently enjoined the California Highway Patrol from “infringing or interfering with plaintiffs’ First Amendment rights to videotape or otherwise record the operation of traffic checkpoints from public sidewalks in the City of Escondido as long as the protestors do not create a traffic or public safety hazard to others or themselves.” Amended Order Granting Plaintiffs’ Motion for Preliminary Injunction at 4, *Bologna v. City of Escondido*, No. 12-CV-1243-JAH-WVG, Dkt. 40 (S.D. Cal. May 20, 2013). These cases demonstrate that Border Patrol is

⁸ See ACLU Press Release, *Freedom of Speech Upheld in Escondido*, Oct. 25, 2012, available at <https://www.aclu.org/free-speech/freedom-speech-upheld-escondido>

unconstitutionally restricting the First Amendment rights of protesters and observers at the Arivaca Road checkpoint.

In addition, Border Patrol is engaging in unconstitutional retaliation and harassment of the protesters and observers. Border Patrol agents installed previously non-existent barriers at the Arivaca Road checkpoint specifically in response to the monitoring campaign. Agents have provided vague and shifting justifications for restricting the checkpoint monitors' activity and harassed and intimidated monitors to discourage them from engaging in constitutionally protected conduct. Agents have also enforced the restrictions selectively against the monitors but not against other members of the community. These actions amount to viewpoint discrimination, "an egregious form of content discrimination" prohibited by the First Amendment. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995); *see also Giebel v. Sylvester*, 244 F.3d 1182, 1188 (9th Cir. 2001).

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Even if Border Patrol's ad hoc restrictions were "content-neutral," Border Patrol's claim of unbridled discretion to restrict speech creates an unacceptable risk of viewpoint discrimination, and such "discretionary power is inconsistent with the First Amendment." *Kaahumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012); *see also California Teachers Ass'n v. State Bd. Of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001) (vague rules "impermissibly delegate basic policy matters to lower level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application"). Heightened scrutiny is necessary to avoid the danger that a law enforcement official "might resort to enforcing the [law] only against...signs whose messages the officer or the public dislikes." *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998). Furthermore, Border Patrol's restrictions are not narrowly tailored to any substantial interest in safety—to the contrary, by forcing pedestrian traffic into the roadway, the barriers make the area substantially *less* safe. Nor do they leave open ample alternative channels for effectively protesting, monitoring, and recording the operation of checkpoints. *See Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) ("75-yard security zone" was not narrowly tailored to asserted safety interests).

Although the rights of the checkpoint monitors "may be subject to reasonable time, place, and manner restrictions," the monitors' exercise of First Amendment rights fall "well within the bounds of the Constitution's protections," especially since the checkpoint monitors are filming agents from a public right of way along a public roadway, "the apotheosis of a public forum," where "the rights of the state to limit the exercise of First Amendment activity are 'sharply circumscribed.'" *Glik*, 655 F.3d at 84 (citation omitted); *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011); *see also ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1099 (9th Cir. 2003) (sidewalk is "quintessential traditional public forum"). "Public fora have achieved a special status in our law; the government must bear an extraordinarily heavy burden to regulate speech in such locales," especially

“core First Amendment speech.” *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1022 (9th Cir. 2009).

Border Patrol agents at the Arivaca Road checkpoint cannot evade the First Amendment by decreeing that an arbitrary 150- foot area within a public right of way is an “operations zone” or a “controlled area” from which individuals must be excluded for “safety reasons.” The agency “is not free to foreclose expressive activity in public areas on mere speculation about danger.” *Bay Area Peace Navy*, 914 F.2d at 1228; *cf. Turner v. Plafond*, No. C 09-00683 MHP, 2011 WL 62220, *11 (N.D. Cal. Jan. 7, 2011) (generalized “danger of driver distraction” does not justify restrictions on political signs). Even if Border Patrol had legitimate fears that protesters or observers might violate the law, which is not conceded, the proper response would be “to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.” *Collins v. Jordan*, 110 F.3d 1363, 1372 (9th Cir. 1996). Law enforcement officials are “expected to endure significant burdens caused by citizens’ exercise of their First Amendment rights,” and the “same restraint demanded of law enforcement officers in the face of ‘provocative and challenging’ speech must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces.” *Glik*, 655 F.3d at 84 (citations omitted).

III. Conclusion

Arivaca residents have the First Amendment right to peacefully protest, photograph, and videotape a checkpoint that continues to have a profound impact on their daily lives. The Border Patrol has ignored these residents’ reports of civil and human rights abuses committed by federal agents in their community for years, compelling residents to take action. The recording of law enforcement in a public space “that does not interfere with the police officers’ performance of their duties is not reasonably subject to limitation.” *Glik*, 655 F.3d at 84. By restricting the ability of the residents of Arivaca to protest and record checkpoint operations in their community, and by doing so in a manner that openly discriminates against the monitors on the basis of their constitutionally protected activity, the Border Patrol is violating the First Amendment.

For the foregoing reasons, we demand that Border Patrol immediately remove the “No Pedestrians” barriers on Arivaca Road and allow residents to peacefully protest, photograph, and videotape from the public right of way across the street from the checkpoint and/or from a short distance outside the primary inspection area. If Border Patrol refuses, we will be forced to pursue litigation to vindicate these individuals’ Constitutional rights.

Please contact us if you have any questions at (602) 650-1854 or
jlyall@acluaz.org.

Sincerely,



James Lyall
Staff Attorney
ACLU of Arizona

Cc: Jeh Johnson
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R. Gill Kerlikowske
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OF ARIZONA

EXHIBIT F

APR 24 2014



**U.S. Customs and
Border Protection**

Staff Attorney James Lyall
American Civil
Liberties Union Foundation of Arizona
P.O. Box 17148
Phoenix, Arizona 85011

Dear Mr. Lyall:

We recently received your letter, dated April 16, 2014, requesting that the U.S. Border Patrol remove what you believe are barriers on Arivaca Road that allegedly prevent area residents from protesting, photographing, and videotaping the Arivaca Checkpoint ("Checkpoint"). First, I want to thank you for raising your concerns to us directly. Our mission requires that we not only protect our nation's borders, but that we do so with vigilance, integrity, and professionalism. Because our agency serves the public, it is important for us to receive feedback from the public, both positive and negative, so that we can continue to serve in the most effective and professional manner possible.

I also want to assure you that I have read and understand your concerns about the protesters and their ability to exercise their First Amendment rights at the Checkpoint. Please note that the agency has the utmost respect for those wishing to engage in a fundamental right guaranteed to them by the U.S. Constitution. We recognize that the filming of government officials who are engaged in their official duties in a public place may be protected by the First Amendment. However, the "government may impose reasonable time, place, and manner restrictions on speech in public forums provided the restrictions are (1) content neutral, (2) that are 'narrowly tailored to serve a significant governmental interest,' and (3) that they 'leave open ample alternative channels for communication.'" Citizens for Peace in Space v. City of Colorado Springs, 477 F.3d 1212, 1219-1220 (10th Cir. 2007) (quoting Ward Rock Against Racism, 491 U.S. 781, 791 (1989)). We believe that limiting access to the Checkpoint to unauthorized persons, by cordoning off such areas, is reasonable and falls squarely within the courts' time, place, and manner restrictions.

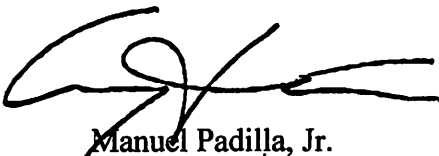
We note that no individuals, regardless of their political beliefs, including whether or not they support the agency's mission, are granted access to the Checkpoint unless they are accompanied by Border Patrol Agents for official purposes. Hence, any barriers that are put in place are entirely content-neutral. The U.S. Border Patrol restricts access to authorized persons at the Checkpoint to protect the safety of its agents and the safety of the traveling public. Border Patrol Agents work in dangerous environments under arduous conditions. The Checkpoint presents additional threats, as Agents are required to stand in the middle of traffic where the slightest distraction can lead to serious injury or even death. If protesters were allowed to wander through the Checkpoint unescorted, they too would be at risk. Officer safety and protecting third parties from harm certainly qualify as significant governmental interests. Moreover, sensitive law enforcement techniques and technologies are often employed at the Checkpoint. Constant surveillance and filming of such operations by protestors from within the Checkpoint could be

used by third parties to assist alien smugglers and human traffickers to elude detection. The Agency must also be mindful of the privacy interests of the individuals who are questioned by Border Patrol Agents at the Checkpoint. We have an obligation to prevent the unauthorized disclosure of certain information that we collect from the traveling public. Finally, there is often sensitive government equipment at the Checkpoint that we are required to maintain and safeguard that could easily be damaged or destroyed if the agency allowed unrestricted access.

We have also provided alternative channels of communication. Specifically, any protesters wishing to monitor Checkpoint operations has unlimited viewing space from either side of the Checkpoint, which is only ten feet from the end of the secondary inspections area. Accordingly, area residents are not being prohibited from engaging in any protected First Amendment activities. Instead, the U.S. Border Patrol has merely exercised its right to impose reasonable time, place, and manner restrictions on access to its Checkpoint facility. Therefore, we will continue to restrict access to the Checkpoint to only authorized persons.

You are welcome to bring to our attention any specific incidents or issues regarding protests at the Checkpoint. While we will not allow unfettered access to unauthorized persons at the Checkpoint, we do want to work with local residents to address their concerns. Please remember that in the end, our checkpoints are a vital part of our efforts to safeguard the nation's borders.

Sincerely,

A handwritten signature in black ink, appearing to read 'Manuel Padilla, Jr.', with a stylized flourish at the end.

Manuel Padilla, Jr.
Chief Patrol Agent

Attachment

ALESSANDRA SOLER
EXECUTIVE DIRECTOR

ZENAIDO QUINTANA
PRESIDENT



The ACLU's Border Litigation Project
investigates, documents, and litigates
civil and human rights violations
in the U.S.-Mexico border region

April 16, 2014

VIA CERTIFIED U.S. MAIL:

Manuel Padilla, Jr.
Chief Patrol Agent – Tucson Sector
U.S. Customs and Border Protection
2430 South Swan Road
Tucson, AZ 85711

RECEIVED

APR 16 2014

CHIEF PATROL AGENT
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*Re: First Amendment Rights of Protesters and Photographers at Arivaca
Road Checkpoint*

Dear Mr. Padilla:

We write on behalf of residents of Arivaca, Arizona who are calling for the removal of the Border Patrol checkpoint on Arivaca Road in Amado, Arizona. As you know, community members working with the organization People Helping People have initiated a "checkpoint monitoring campaign" to protest the Arivaca Road checkpoint and to document and record agents' interactions with motorists at the checkpoint. This campaign is the culmination of Arivaca residents' growing concern with the overwhelming Border Patrol presence in their community as well as numerous rights violations of residents at the checkpoint.

We at the ACLU have already shared our concerns with you regarding civil rights abuses at Border Patrol checkpoints throughout southern Arizona, including the Arivaca Road checkpoint.¹ Now it has come to our attention that the Border Patrol is restricting the ability of the Arivaca checkpoint monitors to protest and record checkpoint operations in their community, and in some cases appear to be harassing and retaliating against the monitors. These actions violate the First Amendment. "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of*

¹ See ACLU OF ARIZONA, COMPLAINT AND REQUEST FOR INVESTIGATION, JAN. 15, 2014, available at <http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Checkpoints%20%202014%2001%2015.pdf>

Houston v. Hill, 482 U.S. 451, 462-63 (1987). We write to demand that Border Patrol immediately cease interfering with lawful protest and monitoring of the Arivaca Road checkpoint and respect the civil rights of all residents and motorists at Border Patrol checkpoints.

I. Factual Background

Beginning in 2013, Arivaca residents and members of People Helping People launched a campaign protesting the Arivaca Road checkpoint, one of the three local immigration checkpoints that surround their town.² Community members are petitioning the Border Patrol to remove the Arivaca Road checkpoint, citing ongoing rights violations along with harm to property values,³ tourism, and quality of life resulting from checkpoint operations, as well as the role of the checkpoint in contributing to migrant deaths and the militarization of the border region.⁴ More than 200 community members and 10 business owners signed the petition, which was delivered to the Border Patrol at the Arivaca Road checkpoint on December 8, 2013. On January 23, 2014, Congressman Raul Grijalva sent a letter to Border Patrol in support of the campaign.

Arivaca residents have documented numerous instances of rights violations by Border Patrol agents at the checkpoint, including extended detention and interrogation not related to establishing citizenship, invasive and unlawful searches, racial profiling, verbal harassment, and physical assault, among other abuses.⁵ Agents have repeatedly relied on false alerts from service canines to justify prolonged searches and detentions.⁶ Some agents have stated that all community members are considered suspect simply by virtue of living in Arivaca, while others have told residents, “You have no rights here.”

Border Patrol refuses to remove the checkpoint, has not investigated any of the residents’ complaints of harassment and abuse, and says it will not share stop data or other checkpoint-related information that would allow Arivaca residents to assess the need for a checkpoint they say is causing severe harm to the community. For all of these reasons, in February, community members

² See Paul Ingram, *Border Residents Demand End to Arivaca Checkpoint*, TUCSON SENTINEL, Jan. 23, 2014, available at http://www.tucsonsentinel.com/local/report/012214_arivaca_checkpoint_protest/border-residents-demand-end-arivaca-checkpoint/.

³ See, e.g., Judith Gans, *THE BORDER PATROL CHECKPOINT ON INTERSTATE 19 IN SOUTHERN ARIZONA: A CASE STUDY OF IMPACTS ON RESIDENTIAL REAL ESTATE PRICES*, UNIVERSITY OF ARIZONA, (Dec. 2012), available at http://udallcenter.arizona.edu/ucpubs/gans_2012b.pdf

⁴ The Arivaca Checkpoint Petition is available at <https://www.change.org/petitions/u-s-border-patrol-remove-the-check-point-on-arivaca-rd-in-amado-az-quitte-el-ret%C3%A9n-de-la-carretera-de-arivaca-en-amado-az>

⁵ Narratives of Arivaca community members are available at http://phparivaca.org/?page_id=210

⁶ *Id.*

initiated a “checkpoint monitoring campaign.”⁷ The purpose of this campaign is to peacefully protest the checkpoint and to observe and document Border Patrol interactions with local residents and motorists.

A. February 26, 2014

On February 26, 2014 at approximately 11:00 a.m., a group of 6 checkpoint monitors, accompanied by roughly 25 additional protesters, arrived in the vicinity of the Arivaca Road checkpoint. The group approached from the east, walking on the south shoulder of the county road. The group held signs and banners protesting the checkpoint, and remained on the public right of way, out of the path of traffic. When monitors were approximately 100 feet east of the checkpoint at the eastern terminus of the secondary inspection area, they were approached by Border Patrol Agent Joyner. Agent Joyner informed the monitors that they would have to “move back,” past a cattle guard in the roadway, which was approximately 100 feet behind them and roughly 200 feet east of the checkpoint. Agent Joyner stated that the public right of way on which the monitors were standing was used for “overflow secondary inspection,” and that for safety reasons the monitors would have to move. Agent Joyner stated that the Border Patrol had a permit and promised to retrieve it.

After approximately 45 minutes, Pima County Sheriff’s Deputies arrived on the scene. After conferring with Border Patrol, Sheriff’s Deputy Judd asked the monitors to cross the street to the north side of Arivaca Road, directly across from where the monitors were stationed, at the end of a line of Border Patrol vehicles. Deputy Judd did not say that the monitors were required to move, but the monitors agreed to go to the north side of the road. Because the vehicles obstructed the monitors’ line of vision, some of the monitors attempted to move closer to better observe and record the checkpoint, but were turned back by Border Patrol agents who claimed monitors were intruding on Border Patrol’s “enforcement area” and were “impeding operations.”

At approximately 1:30 p.m., Agent Lloyd Easterling approached and asked the monitors to “move back,” this time to an area approximately 50 feet from where they were stationed and 150 feet east of the checkpoint. Agent Easterling said that he had seen a permit granting Border Patrol an “enforcement zone” that extended 800 feet to the west of the checkpoint. Agent Easterling said that he did not remember how far to the east the enforcement zone extended, but said that he was demarcating it as running to “the end of the pylons” and that the monitors had to move beyond that limit. Agent Easterling refused to show the permit to the monitors. When the monitors noted that Sheriff’s Deputies had already directed them to stand in their present location, Agent Easterling summoned a Pima County Sheriff’s Sergeant Lapelini. Sergeant Lapelini said that

⁷ See Cindy Carcamo, *Arizona Residents Begin Monitoring Immigration Checkpoint*, LA TIMES, Feb. 26, 2014, available at <http://www.latimes.com/nation/la-na-ft-border-crossing-20140227.0.7296370.story#axzz2v81cbwn5>

he had not seen a permit but that he believed Border Patrol's request was "reasonable." Sergeant Lapelini did not say that the monitors were required to move. The monitors remained in place and the Sheriff's Deputies left the scene.

Border Patrol agents then proceeded to string yellow tape marked "U.S. Border Patrol Incident Scene" across the north and south shoulders of the road, approximately 150 feet east of the checkpoint, blocking pedestrian traffic. On each side of the street, incident tape was strung from a private fence adjacent to the public right of way to a traffic barrier by the roadside, obstructing pedestrian traffic. At approximately 2:15 p.m., Agent Easterling approached the monitors and notified them that if they did not move, agents would forcibly remove them. Agent Easterling said this was an "order," and that if the monitors resisted, they would be arrested. Under threat of arrest, the monitors relocated by moving east to an area behind the newly-installed boundary.

B. March 1, 2014

On March 1, 2014 at approximately 10:30 a.m., a group of 6 monitors returned to the north side of the Arivaca Road checkpoint; two additional monitors arrived a short time later. The monitors stopped approximately 100 feet from the checkpoint, in roughly the same location they had agreed to use at the request of Deputy Judd on February 26. The monitors found that Border Patrol had erected new barriers on each side of the road, approximately 150 feet from the checkpoint. These barriers now consisted of rope running from the private fence adjacent to the public right of way to a traffic barrier in the middle of the public right of way, and another traffic barrier by the roadside. On each side of the road, Border Patrol had posted a sign: "Border Patrol Enforcement Zone - No Pedestrians Beyond This Point."

The monitors were approached by Supervising Agent Rosalinda Huey who informed them they were within Border Patrol's "zone of operation" and needed to stand behind the boundary. The monitors responded that they had returned to the same location to which they had been directed by Pima County Sheriffs on February 26. Agent Huey stated that if monitors did not move, Border Patrol would call Pima County Sheriff. The monitors objected and remained in place.

After approximately one hour, Agent Huey and four other agents returned. Agent Huey stated, "There is nothing to discuss, there is nothing to decide. Either you move or we will arrest you". Another agent stated to Agent Huey, "Just arrest them." Agent Huey and another agent produced handcuffs and began advancing on the monitors. Under threat of arrest, the monitors agreed to move. One of the monitors asked the agents for their names. In response, Agent Huey stated, "You have to move or we will place you under arrest. If you want our names you will have to move behind the barrier." Agents followed the monitors to the barrier, approximately 150 feet from the checkpoint. The agents then walked away

without allowing the monitors to obtain the agents' names or badge numbers. Border Patrol parked a vehicle directly in front of the monitors, on the west side of the barrier, blocking their line of vision; another vehicle was parked in the same location on the south side of the road, just west of the barrier.

C. March – April 2014

In the intervening weeks, checkpoint monitors have continued to protest and record the checkpoint to the best of their ability from behind the makeshift barriers, and have documented instances of motorists being detained and searched without consent. The monitors' activities, however, continue to be greatly restricted by Border Patrol's barriers. At no point have any checkpoint monitors interfered or attempted to interfere with Border Patrol operations.

Meanwhile, Border Patrol has continued to harass and intimidate the checkpoint monitors. For several weeks following the initiation of the campaign, Border Patrol parked vehicles next to the barriers, obstructing the monitors' view: when monitors arrived in the morning, Border Patrol agents parked their vehicles next to the barriers; after the monitors left, the Border Patrol vehicles were removed. On one occasion, an agent parked a Border Patrol vehicle next to the barrier and left the engine running, with exhaust fumes directed at the monitors. The monitors moved to the opposite side of the road where another vehicle was parked with its engine running. Both vehicles were left idling for approximately four hours while the monitors were present. On another occasion, the monitors could overhear agents shouting profanities that were directed at the monitors; one agent yelled to a passing motorist, "You should drive up and tell her, 'Bitch, don't film me!'"

On March 7, Border Patrol Agent Roger San-Martin sent an e-mail to People Helping People, which read in part:

"The inside perimeter of the checkpoint is not a public place where anyone can just show up and establish ground. It is a 'controlled area' for agents conducting their duties. By controlled I mean agents have the authority and are within their right to determine who can enter into the perimeter where they are conducting law enforcement actions. Agents have the right to perform their duties without impediment by individuals who are on scene. The decision on where monitors can stand/sit without interfering with agents and traffic is that of the agents and not the monitors.

There are numerous reasons for this. Foremost is the safety of the agents, travelers, and protesters... Agents need to be focused on arriving traffic and the passengers they are speaking with, not distracted by people who have entered their work area without authorization and who are moving around, yelling, talking, singing, getting in their way, waving

signs, etc. That is absolutely not going to be allowed... There is also an expectation of privacy by the people we encounter driving into the checkpoint. Not everyone supports your cause and we are liable for protecting the privacy of those who do not wish have monitors listening to the answers they give during our questioning. Furthermore, agents cannot and will not allow the monitors to establish ground in areas where the agents feel the monitors may be at risk should a confrontation arise between agents and those they may be trying to arrest (wanted criminals, smugglers, UDAs, drug traffickers, etc.). The protestors and monitors will be instructed to remain in a marked area that has been established for them at the edge of the checkpoint's eastern perimeter."

On Thursday, April 3, monitors observed a local resident arrive and park his vehicle next to the barrier, directly *inside* the "enforcement zone." The resident in question had directed obscene comments and gestures at the monitors in the past, and on this occasion began to question and video record the monitors. He remained inside the barrier for approximately 40 minutes, at one point parking his truck with the rear end protruding into the roadway. As the man left, he stopped in the westbound lane where monitors overheard him shout, "Well, we had our fun today." The agents at the checkpoint smiled and laughed. At the end of the day, one of the monitors asked the agents at the checkpoint if they had given the man permission to remain inside the "enforcement zone." An agent replied, "It's a free country."

II. Legal Analysis

Arivaca community members have a First Amendment right to protest the Arivaca Road checkpoint and to record agents' interactions with motorists. It is well established that peaceful picketing and parading are forms of expressive communication protected by the First Amendment, and have "always rested on the highest rung of the hierarchy of First Amendment values." *Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 861 (9th Cir. 2001). The Arivaca checkpoint monitors are engaged in political speech, which is guaranteed the highest level of protection under the First Amendment. *Buckley v. American Const. Law Found.*, 525 U.S. 182, 186-87 (1999); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (to protest with political signs is to exercise First Amendment rights "in their most pristine and classic form.").

The First Amendment also protects the checkpoint monitors' right to photograph and video record law enforcement. *See American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (act of making audiovisual recording "is necessarily included within the First Amendment's guarantee of speech and press rights"), *cert. denied*, 133 S. Ct. 651 (2012); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing First Amendment right to film matters of public interest); *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.”).

In *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2012), a bystander who was arrested for filming the arrest of another from 10 feet away sued officials for First and Fourth Amendment violations. The First Circuit held that the “filming of government officials engaged in their duties in a public place...fits comfortably within First Amendment principles. Gathering information about government officials in a form that can be readily disseminated to others serves a cardinal First Amendment interest in protecting and promoting “the free discussion of governmental affairs.” *Id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Furthermore, “freedom of expression has particular significance with respect to government because it is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.” *Id.* (quoting *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 n.11 (1978)). This is especially true as to “law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties.” *Id.* (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035–36 (1991)). “Ensuring the public’s right to gather information about their officials not only aids in the uncovering of abuses . . . but also may have a salutary effect on the functioning of government more generally.” *Id.* at 82–83 (citing *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986)).

More recently, in *Bologna v. City of Escondido*, No. 12-CV-1243-JAH-WVG (S.D. Cal.), the ACLU sued on behalf of a group of protesters after law enforcement officials, relying on an inapplicable section of the California Vehicle Code and an asserted “operational area” extending more than 500 feet from the checkpoint, disrupted the peaceful protest and recording of traffic checkpoints. The plaintiffs settled with the City of Escondido, which agreed to respect the First Amendment right to protest, film, or record traffic checkpoints and to ensure the operational area of a checkpoint creates “a distance of no more than 15 feet between observers and officers,” subject only to narrowly drawn exceptions. Joint Motion to Dismiss, *Bologna v. City of Escondido*, No. 12-CV-1243-JAH-WVG, Dkt. 27-1 (S.D. Cal. Oct. 24, 2012). The settlement upheld free access to public sidewalks, with limited exceptions, to record checkpoint operations in the interest of holding police accountable for their conduct.⁸ The District Court subsequently enjoined the California Highway Patrol from “infringing or interfering with plaintiffs’ First Amendment rights to videotape or otherwise record the operation of traffic checkpoints from public sidewalks in the City of Escondido as long as the protestors do not create a traffic or public safety hazard to others or themselves.” Amended Order Granting Plaintiffs’ Motion for Preliminary Injunction at 4, *Bologna v. City of Escondido*, No. 12-CV-1243-JAH-WVG, Dkt. 40 (S.D. Cal. May 20, 2013). These cases demonstrate that Border Patrol is

⁸ See ACLU Press Release, *Freedom of Speech Upheld in Escondido*, Oct. 25, 2012, available at <https://www.aclu.org/free-speech/freedom-speech-upheld-escondido>

unconstitutionally restricting the First Amendment rights of protesters and observers at the Arivaca Road checkpoint.

In addition, Border Patrol is engaging in unconstitutional retaliation and harassment of the protesters and observers. Border Patrol agents installed previously non-existent barriers at the Arivaca Road checkpoint specifically in response to the monitoring campaign. Agents have provided vague and shifting justifications for restricting the checkpoint monitors' activity and harassed and intimidated monitors to discourage them from engaging in constitutionally protected conduct. Agents have also enforced the restrictions selectively against the monitors but not against other members of the community. These actions amount to viewpoint discrimination, "an egregious form of content discrimination" prohibited by the First Amendment. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995); see also *Giebel v. Sylvester*, 244 F.3d 1182, 1188 (9th Cir. 2001).

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Even if Border Patrol's ad hoc restrictions were "content-neutral," Border Patrol's claim of unbridled discretion to restrict speech creates an unacceptable risk of viewpoint discrimination, and such "discretionary power is inconsistent with the First Amendment." *Kaahumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012); see also *California Teachers Ass'n v. State Bd. Of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001) (vague rules "impermissibly delegate basic policy matters to lower level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application"). Heightened scrutiny is necessary to avoid the danger that a law enforcement official "might resort to enforcing the [law] only against... signs whose messages the officer or the public dislikes." *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998). Furthermore, Border Patrol's restrictions are not narrowly tailored to any substantial interest in safety—to the contrary, by forcing pedestrian traffic into the roadway, the barriers make the area substantially less safe. Nor do they leave open ample alternative channels for effectively protesting, monitoring, and recording the operation of checkpoints. See *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) ("75-yard security zone" was not narrowly tailored to asserted safety interests).

Although the rights of the checkpoint monitors "may be subject to reasonable time, place, and manner restrictions," the monitors' exercise of First Amendment rights fall "well within the bounds of the Constitution's protections," especially since the checkpoint monitors are filming agents from a public right of way along a public roadway, "the apotheosis of a public forum," where "the rights of the state to limit the exercise of First Amendment activity are 'sharply circumscribed.'" *Glik*, 655 F.3d at 84 (citation omitted); *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011); see also *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1099 (9th Cir. 2003) (sidewalk is "quintessential traditional public forum"). "Public fora have achieved a special status in our law; the government must bear an extraordinarily heavy burden to regulate speech in such locales," especially

“core First Amendment speech.” *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1022 (9th Cir. 2009).

Border Patrol agents at the Arivaca Road checkpoint cannot evade the First Amendment by decreeing that an arbitrary 150- foot area within a public right of way is an “operations zone” or a “controlled area” from which individuals must be excluded for “safety reasons.” The agency “is not free to foreclose expressive activity in public areas on mere speculation about danger.” *Bay Area Peace Navy*, 914 F.2d at 1228; cf. *Turner v. Plafond*, No. C 09-00683 MHP, 2011 WL 62220, *11 (N.D. Cal. Jan. 7, 2011) (generalized “danger of driver distraction” does not justify restrictions on political signs). Even if Border Patrol had legitimate fears that protesters or observers might violate the law, which is not conceded, the proper response would be “to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.” *Collins v. Jordan*, 110 F.3d 1363, 1372 (9th Cir. 1996). Law enforcement officials are “expected to endure significant burdens caused by citizens’ exercise of their First Amendment rights,” and the “same restraint demanded of law enforcement officers in the face of ‘provocative and challenging’ speech must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces.” *Glik*, 655 F.3d at 84 (citations omitted).

III. Conclusion

Arivaca residents have the First Amendment right to peacefully protest, photograph, and videotape a checkpoint that continues to have a profound impact on their daily lives. The Border Patrol has ignored these residents’ reports of civil and human rights abuses committed by federal agents in their community for years, compelling residents to take action. The recording of law enforcement in a public space “that does not interfere with the police officers’ performance of their duties is not reasonably subject to limitation.” *Glik*, 655 F.3d at 84. By restricting the ability of the residents of Arivaca to protest and record checkpoint operations in their community, and by doing so in a manner that openly discriminates against the monitors on the basis of their constitutionally protected activity, the Border Patrol is violating the First Amendment.

For the foregoing reasons, we demand that Border Patrol immediately remove the “No Pedestrians” barriers on Arivaca Road and allow residents to peacefully protest, photograph, and videotape from the public right of way across the street from the checkpoint and/or from a short distance outside the primary inspection area. If Border Patrol refuses, we will be forced to pursue litigation to vindicate these individuals’ Constitutional rights.

Please contact us if you have any questions at (602) 650-1854 or
jlyall@acluaz.org.

Sincerely,



James Lyall
Staff Attorney
ACLU of Arizona

Cc: Jeh Johnson
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OF ARIZONA

EXHIBIT G



*The ACLU's Border Litigation Project
investigates, documents, and litigates
civil and human rights violations
in the U.S.-Mexico border region.*

July 3, 2014

VIA EMAIL AND CERTIFIED U.S. MAIL:

Manuel Padilla, Jr.
Chief Patrol Agent – Tucson Sector
U.S. Customs and Border Protection
2430 South Swan Road
Tucson, AZ 85711

***Re: First Amendment Rights of Protesters and Photographers at Arivaca
Road Checkpoint***

Dear Chief Padilla,

We write to again seek resolution of this matter. A recent decision by the U.S. Supreme Court, as well as consistent findings by the Ninth Circuit Court of Appeals, make clear that the arbitrary interference with the ability of Arivaca residents to observe and record public activities at the Arivaca Road checkpoint, including restriction to a designated area 150 feet from the checkpoint, violate established constitutional rights. Further your April 24, 2014 response letter on this matter includes inaccurate representations, which we write to correct; that letter is attached, for your reference.

In a decision handed down just last week, *McCullen v. Coakley*, No. 12-1168 (U.S. June 26, 2014), the Supreme Court made clear that the restriction imposed by the Border Patrol in Arivaca cannot stand. *McCullen* involved a buffer zone restricting access to public areas within 35 feet of abortion clinic entrances. *Id.* The Supreme Court held that this restriction violated the First Amendment of persons seeking to be closer, notwithstanding the legitimate interests asserted by the state, including that of maintaining public safety, because the statute burdened “substantially more speech than necessary.” *Id.* at 16. The Court observed there were ample, less restrictive alternatives available, and the fact that those alternatives might be more difficult to implement than a simple buffer zone was not enough to satisfy the First Amendment: “To meet the

requirements of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier. A painted line on the sidewalk is easier to enforce, but the prime objective of the First Amendment is not efficiency." *Id.* at 20. By resorting to "the extreme step of closing a substantial portion of a traditional public forum to all speakers...without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes," the statute violated the First Amendment. *Id.*

The same rationale applies to the checkpoint monitors engaged in First Amendment activity at the Arivaca Road checkpoint. As stated in our previous letter, Border Patrol's checkpoint restrictions are not narrowly tailored to any substantial interest in safety and do not provide alternative channels for effectively protesting, monitoring, and recording the operation of checkpoints. *See Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) ("75-yard security zone" was not narrowly tailored to asserted safety interests

Notwithstanding your April 24 response letter, the Border Patrol has not provided "alternative channels of communication." It is not the case, as your letter claims, that residents have "unlimited viewing space from either side of the Checkpoint, which is only ten feet from the end of the secondary inspections area." In fact, Border Patrol has erected barriers on the public right of way approximately 150 feet from the checkpoint on both the east and west sides of the checkpoint. As you know, the secondary inspection area extends east from the checkpoint on the south side of Arivaca Road. There is no secondary inspection area to the west of the checkpoint or on the north side of the road directly across from the checkpoint. Nonetheless, checkpoint monitors are prohibited from entering the newly created "enforcement zone," and must remain approximately 150 feet from the checkpoint at all times.

The response letter also inaccurately claims that filming government officials in public "may" be protected by the First Amendment. There is no "may" about this protection. As set out in our previous letter of April 17, 2014, the Ninth Circuit and other federal appellate courts have been unequivocal on this point. *See e.g., Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing First Amendment right to film matters of public interest). Further, your letter does not address our concerns that agents have harassed and retaliated against checkpoint monitors, have parked vehicles in a manner to obstruct observations, and subjected checkpoint supporters and opponents to disparate treatment. Nor does it address our concerns regarding the undue discretion afforded to agents in restricting access to public areas adjacent to checkpoints.

Accordingly, we renew our demand that Border Patrol remove the barriers on Arivaca Road and allow residents to peacefully protest, photograph, and videotape from the public right of way across the street from the checkpoint and/or from a short distance outside the primary inspection area. We are available

to discuss this matter further; if however, we cannot resolve this matter promptly, we will pursue legal action to vindicate the rights of the Arivaca checkpoint monitors.

Please contact us if you have any questions at (602) 650-1854 or jlyall@acluaz.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'James Lyall', with a stylized, looping flourish at the end.

James Lyall
Staff Attorney
ACLU of Arizona

Enclosure as indicated:

Cc: Jeh Johnson
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U.S. Department of Homeland Security
245 Murray Lane SW
Washington, D.C. 20528

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Commissioner
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APR 24 2014



**U.S. Customs and
Border Protection**

Staff Attorney James Lyall
American Civil
Liberties Union Foundation of Arizona
P.O. Box 17148
Phoenix, Arizona 85011

Dear Mr. Lyall:

We recently received your letter, dated April 16, 2014, requesting that the U.S. Border Patrol remove what you believe are barriers on Arivaca Road that allegedly prevent area residents from protesting, photographing, and videotaping the Arivaca Checkpoint ("Checkpoint"). First, I want to thank you for raising your concerns to us directly. Our mission requires that we not only protect our nation's borders, but that we do so with vigilance, integrity, and professionalism. Because our agency serves the public, it is important for us to receive feedback from the public, both positive and negative, so that we can continue to serve in the most effective and professional manner possible.

I also want to assure you that I have read and understand your concerns about the protesters and their ability to exercise their First Amendment rights at the Checkpoint. Please note that the agency has the utmost respect for those wishing to engage in a fundamental right guaranteed to them by the U.S. Constitution. We recognize that the filming of government officials who are engaged in their official duties in a public place may be protected by the First Amendment. However, the "government may impose reasonable time, place, and manner restrictions on speech in public forums provided the restrictions are (1) content neutral, (2) that are 'narrowly tailored to serve a significant governmental interest,' and (3) that they 'leave open ample alternative channels for communication.'" Citizens for Peace in Space v. City of Colorado Springs, 477 F.3d 1212, 1219-1220 (10th Cir. 2007) (quoting Ward Rock Against Racism, 491 U.S. 781, 791 (1989)). We believe that limiting access to the Checkpoint to unauthorized persons, by cordoning off such areas, is reasonable and falls squarely within the courts' time, place, and manner restrictions.

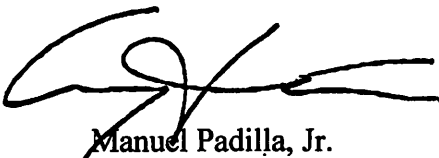
We note that no individuals, regardless of their political beliefs, including whether or not they support the agency's mission, are granted access to the Checkpoint unless they are accompanied by Border Patrol Agents for official purposes. Hence, any barriers that are put in place are entirely content-neutral. The U.S. Border Patrol restricts access to authorized persons at the Checkpoint to protect the safety of its agents and the safety of the traveling public. Border Patrol Agents work in dangerous environments under arduous conditions. The Checkpoint presents additional threats, as Agents are required to stand in the middle of traffic where the slightest distraction can lead to serious injury or even death. If protesters were allowed to wander through the Checkpoint unescorted, they too would be at risk. Officer safety and protecting third parties from harm certainly qualify as significant governmental interests. Moreover, sensitive law enforcement techniques and technologies are often employed at the Checkpoint. Constant surveillance and filming of such operations by protestors from within the Checkpoint could be

used by third parties to assist alien smugglers and human traffickers to elude detection. The Agency must also be mindful of the privacy interests of the individuals who are questioned by Border Patrol Agents at the Checkpoint. We have an obligation to prevent the unauthorized disclosure of certain information that we collect from the traveling public. Finally, there is often sensitive government equipment at the Checkpoint that we are required to maintain and safeguard that could easily be damaged or destroyed if the agency allowed unrestricted access.

We have also provided alternative channels of communication. Specifically, any protesters wishing to monitor Checkpoint operations has unlimited viewing space from either side of the Checkpoint, which is only ten feet from the end of the secondary inspections area. Accordingly, area residents are not being prohibited from engaging in any protected First Amendment activities. Instead, the U.S. Border Patrol has merely exercised its right to impose reasonable time, place, and manner restrictions on access to its Checkpoint facility. Therefore, we will continue to restrict access to the Checkpoint to only authorized persons.

You are welcome to bring to our attention any specific incidents or issues regarding protests at the Checkpoint. While we will not allow unfettered access to unauthorized persons at the Checkpoint, we do want to work with local residents to address their concerns. Please remember that in the end, our checkpoints are a vital part of our efforts to safeguard the nation's borders.

Sincerely,

A handwritten signature in black ink, appearing to read 'Manuel Padilla, Jr.', with a stylized flourish at the end.

Manuel Padilla, Jr.
Chief Patrol Agent

Attachment

ALESSANDRA SOLER
EXECUTIVE DIRECTOR

ZENAIDO QUINTANA
PRESIDENT



The ACLU's Border Litigation Project
investigates, documents, and litigates
civil and human rights violations
in the U.S.-Mexico border region

April 16, 2014

VIA CERTIFIED U.S. MAIL:

Manuel Padilla, Jr.
Chief Patrol Agent – Tucson Sector
U.S. Customs and Border Protection
2430 South Swan Road
Tucson, AZ 85711

RECEIVED

APR 16 2014

CHIEF PATROL AGENT
TUCSON, ARIZONA

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*Re: First Amendment Rights of Protesters and Photographers at Arivaca
Road Checkpoint*

Dear Mr. Padilla:

We write on behalf of residents of Arivaca, Arizona who are calling for the removal of the Border Patrol checkpoint on Arivaca Road in Amado, Arizona. As you know, community members working with the organization People Helping People have initiated a "checkpoint monitoring campaign" to protest the Arivaca Road checkpoint and to document and record agents' interactions with motorists at the checkpoint. This campaign is the culmination of Arivaca residents' growing concern with the overwhelming Border Patrol presence in their community as well as numerous rights violations of residents at the checkpoint.

We at the ACLU have already shared our concerns with you regarding civil rights abuses at Border Patrol checkpoints throughout southern Arizona, including the Arivaca Road checkpoint.¹ Now it has come to our attention that the Border Patrol is restricting the ability of the Arivaca checkpoint monitors to protest and record checkpoint operations in their community, and in some cases appear to be harassing and retaliating against the monitors. These actions violate the First Amendment. "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of*

¹ See ACLU OF ARIZONA, COMPLAINT AND REQUEST FOR INVESTIGATION, JAN. 15, 2014, available at <http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Checkpoints%20%202014%2001%2015.pdf>

Houston v. Hill, 482 U.S. 451, 462-63 (1987). We write to demand that Border Patrol immediately cease interfering with lawful protest and monitoring of the Arivaca Road checkpoint and respect the civil rights of all residents and motorists at Border Patrol checkpoints.

I. Factual Background

Beginning in 2013, Arivaca residents and members of People Helping People launched a campaign protesting the Arivaca Road checkpoint, one of the three local immigration checkpoints that surround their town.² Community members are petitioning the Border Patrol to remove the Arivaca Road checkpoint, citing ongoing rights violations along with harm to property values,³ tourism, and quality of life resulting from checkpoint operations, as well as the role of the checkpoint in contributing to migrant deaths and the militarization of the border region.⁴ More than 200 community members and 10 business owners signed the petition, which was delivered to the Border Patrol at the Arivaca Road checkpoint on December 8, 2013. On January 23, 2014, Congressman Raul Grijalva sent a letter to Border Patrol in support of the campaign.

Arivaca residents have documented numerous instances of rights violations by Border Patrol agents at the checkpoint, including extended detention and interrogation not related to establishing citizenship, invasive and unlawful searches, racial profiling, verbal harassment, and physical assault, among other abuses.⁵ Agents have repeatedly relied on false alerts from service canines to justify prolonged searches and detentions.⁶ Some agents have stated that all community members are considered suspect simply by virtue of living in Arivaca, while others have told residents, “You have no rights here.”

Border Patrol refuses to remove the checkpoint, has not investigated any of the residents’ complaints of harassment and abuse, and says it will not share stop data or other checkpoint-related information that would allow Arivaca residents to assess the need for a checkpoint they say is causing severe harm to the community. For all of these reasons, in February, community members

² See Paul Ingram, *Border Residents Demand End to Arivaca Checkpoint*, TUCSON SENTINEL, Jan. 23, 2014, available at http://www.tucsonsentinel.com/local/report/012214_arivaca_checkpoint_protest/border-residents-demand-end-arivaca-checkpoint/.

³ See, e.g., Judith Gans, *THE BORDER PATROL CHECKPOINT ON INTERSTATE 19 IN SOUTHERN ARIZONA: A CASE STUDY OF IMPACTS ON RESIDENTIAL REAL ESTATE PRICES*, UNIVERSITY OF ARIZONA, (Dec. 2012), available at http://udallcenter.arizona.edu/ucpubs/gans_2012b.pdf

⁴ The Arivaca Checkpoint Petition is available at <https://www.change.org/petitions/u-s-border-patrol-remove-the-check-point-on-arivaca-rd-in-amado-az-quitte-el-ret%C3%A9n-de-la-carretera-de-arivaca-en-amado-az>

⁵ Narratives of Arivaca community members are available at http://phparivaca.org/?page_id=210

⁶ *Id.*

initiated a “checkpoint monitoring campaign.”⁷ The purpose of this campaign is to peacefully protest the checkpoint and to observe and document Border Patrol interactions with local residents and motorists.

A. February 26, 2014

On February 26, 2014 at approximately 11:00 a.m., a group of 6 checkpoint monitors, accompanied by roughly 25 additional protesters, arrived in the vicinity of the Arivaca Road checkpoint. The group approached from the east, walking on the south shoulder of the county road. The group held signs and banners protesting the checkpoint, and remained on the public right of way, out of the path of traffic. When monitors were approximately 100 feet east of the checkpoint at the eastern terminus of the secondary inspection area, they were approached by Border Patrol Agent Joyner. Agent Joyner informed the monitors that they would have to “move back,” past a cattle guard in the roadway, which was approximately 100 feet behind them and roughly 200 feet east of the checkpoint. Agent Joyner stated that the public right of way on which the monitors were standing was used for “overflow secondary inspection,” and that for safety reasons the monitors would have to move. Agent Joyner stated that the Border Patrol had a permit and promised to retrieve it.

After approximately 45 minutes, Pima County Sheriff’s Deputies arrived on the scene. After conferring with Border Patrol, Sheriff’s Deputy Judd asked the monitors to cross the street to the north side of Arivaca Road, directly across from where the monitors were stationed, at the end of a line of Border Patrol vehicles. Deputy Judd did not say that the monitors were required to move, but the monitors agreed to go to the north side of the road. Because the vehicles obstructed the monitors’ line of vision, some of the monitors attempted to move closer to better observe and record the checkpoint, but were turned back by Border Patrol agents who claimed monitors were intruding on Border Patrol’s “enforcement area” and were “impeding operations.”

At approximately 1:30 p.m., Agent Lloyd Easterling approached and asked the monitors to “move back,” this time to an area approximately 50 feet from where they were stationed and 150 feet east of the checkpoint. Agent Easterling said that he had seen a permit granting Border Patrol an “enforcement zone” that extended 800 feet to the west of the checkpoint. Agent Easterling said that he did not remember how far to the east the enforcement zone extended, but said that he was demarcating it as running to “the end of the pylons” and that the monitors had to move beyond that limit. Agent Easterling refused to show the permit to the monitors. When the monitors noted that Sheriff’s Deputies had already directed them to stand in their present location, Agent Easterling summoned a Pima County Sheriff’s Sergeant Lapelini. Sergeant Lapelini said that

⁷ See Cindy Carcamo, *Arizona Residents Begin Monitoring Immigration Checkpoint*, LA TIMES, Feb. 26, 2014, available at <http://www.latimes.com/nation/la-na-ft-border-crossing-20140227.0.7296370.story#axzz2v81cbwn5>

he had not seen a permit but that he believed Border Patrol's request was "reasonable." Sergeant Lapelini did not say that the monitors were required to move. The monitors remained in place and the Sheriff's Deputies left the scene.

Border Patrol agents then proceeded to string yellow tape marked "U.S. Border Patrol Incident Scene" across the north and south shoulders of the road, approximately 150 feet east of the checkpoint, blocking pedestrian traffic. On each side of the street, incident tape was strung from a private fence adjacent to the public right of way to a traffic barrier by the roadside, obstructing pedestrian traffic. At approximately 2:15 p.m., Agent Easterling approached the monitors and notified them that if they did not move, agents would forcibly remove them. Agent Easterling said this was an "order," and that if the monitors resisted, they would be arrested. Under threat of arrest, the monitors relocated by moving east to an area behind the newly-installed boundary.

B. March 1, 2014

On March 1, 2014 at approximately 10:30 a.m., a group of 6 monitors returned to the north side of the Arivaca Road checkpoint; two additional monitors arrived a short time later. The monitors stopped approximately 100 feet from the checkpoint, in roughly the same location they had agreed to use at the request of Deputy Judd on February 26. The monitors found that Border Patrol had erected new barriers on each side of the road, approximately 150 feet from the checkpoint. These barriers now consisted of rope running from the private fence adjacent to the public right of way to a traffic barrier in the middle of the public right of way, and another traffic barrier by the roadside. On each side of the road, Border Patrol had posted a sign: "Border Patrol Enforcement Zone - No Pedestrians Beyond This Point."

The monitors were approached by Supervising Agent Rosalinda Huey who informed them they were within Border Patrol's "zone of operation" and needed to stand behind the boundary. The monitors responded that they had returned to the same location to which they had been directed by Pima County Sheriffs on February 26. Agent Huey stated that if monitors did not move, Border Patrol would call Pima County Sheriff. The monitors objected and remained in place.

After approximately one hour, Agent Huey and four other agents returned. Agent Huey stated, "There is nothing to discuss, there is nothing to decide. Either you move or we will arrest you". Another agent stated to Agent Huey, "Just arrest them." Agent Huey and another agent produced handcuffs and began advancing on the monitors. Under threat of arrest, the monitors agreed to move. One of the monitors asked the agents for their names. In response, Agent Huey stated, "You have to move or we will place you under arrest. If you want our names you will have to move behind the barrier." Agents followed the monitors to the barrier, approximately 150 feet from the checkpoint. The agents then walked away

without allowing the monitors to obtain the agents' names or badge numbers. Border Patrol parked a vehicle directly in front of the monitors, on the west side of the barrier, blocking their line of vision; another vehicle was parked in the same location on the south side of the road, just west of the barrier.

C. March – April 2014

In the intervening weeks, checkpoint monitors have continued to protest and record the checkpoint to the best of their ability from behind the makeshift barriers, and have documented instances of motorists being detained and searched without consent. The monitors' activities, however, continue to be greatly restricted by Border Patrol's barriers. At no point have any checkpoint monitors interfered or attempted to interfere with Border Patrol operations.

Meanwhile, Border Patrol has continued to harass and intimidate the checkpoint monitors. For several weeks following the initiation of the campaign, Border Patrol parked vehicles next to the barriers, obstructing the monitors' view: when monitors arrived in the morning, Border Patrol agents parked their vehicles next to the barriers; after the monitors left, the Border Patrol vehicles were removed. On one occasion, an agent parked a Border Patrol vehicle next to the barrier and left the engine running, with exhaust fumes directed at the monitors. The monitors moved to the opposite side of the road where another vehicle was parked with its engine running. Both vehicles were left idling for approximately four hours while the monitors were present. On another occasion, the monitors could overhear agents shouting profanities that were directed at the monitors; one agent yelled to a passing motorist, "You should drive up and tell her, 'Bitch, don't film me!'"

On March 7, Border Patrol Agent Roger San-Martin sent an e-mail to People Helping People, which read in part:

"The inside perimeter of the checkpoint is not a public place where anyone can just show up and establish ground. It is a 'controlled area' for agents conducting their duties. By controlled I mean agents have the authority and are within their right to determine who can enter into the perimeter where they are conducting law enforcement actions. Agents have the right to perform their duties without impediment by individuals who are on scene. The decision on where monitors can stand/sit without interfering with agents and traffic is that of the agents and not the monitors.

There are numerous reasons for this. Foremost is the safety of the agents, travelers, and protesters... Agents need to be focused on arriving traffic and the passengers they are speaking with, not distracted by people who have entered their work area without authorization and who are moving around, yelling, talking, singing, getting in their way, waving

signs, etc. That is absolutely not going to be allowed... There is also an expectation of privacy by the people we encounter driving into the checkpoint. Not everyone supports your cause and we are liable for protecting the privacy of those who do not wish have monitors listening to the answers they give during our questioning. Furthermore, agents cannot and will not allow the monitors to establish ground in areas where the agents feel the monitors may be at risk should a confrontation arise between agents and those they may be trying to arrest (wanted criminals, smugglers, UDAs, drug traffickers, etc.). The protestors and monitors will be instructed to remain in a marked area that has been established for them at the edge of the checkpoint's eastern perimeter."

On Thursday, April 3, monitors observed a local resident arrive and park his vehicle next to the barrier, directly *inside* the "enforcement zone." The resident in question had directed obscene comments and gestures at the monitors in the past, and on this occasion began to question and video record the monitors. He remained inside the barrier for approximately 40 minutes, at one point parking his truck with the rear end protruding into the roadway. As the man left, he stopped in the westbound lane where monitors overheard him shout, "Well, we had our fun today." The agents at the checkpoint smiled and laughed. At the end of the day, one of the monitors asked the agents at the checkpoint if they had given the man permission to remain inside the "enforcement zone." An agent replied, "It's a free country."

II. Legal Analysis

Arivaca community members have a First Amendment right to protest the Arivaca Road checkpoint and to record agents' interactions with motorists. It is well established that peaceful picketing and parading are forms of expressive communication protected by the First Amendment, and have "always rested on the highest rung of the hierarchy of First Amendment values." *Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 861 (9th Cir. 2001). The Arivaca checkpoint monitors are engaged in political speech, which is guaranteed the highest level of protection under the First Amendment. *Buckley v. American Const. Law Found.*, 525 U.S. 182, 186-87 (1999); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (to protest with political signs is to exercise First Amendment rights "in their most pristine and classic form.>").

The First Amendment also protects the checkpoint monitors' right to photograph and video record law enforcement. *See American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (act of making audiovisual recording "is necessarily included within the First Amendment's guarantee of speech and press rights"), *cert. denied*, 133 S. Ct. 651 (2012); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing First Amendment right to film matters of public interest); *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.”).

In *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2012), a bystander who was arrested for filming the arrest of another from 10 feet away sued officials for First and Fourth Amendment violations. The First Circuit held that the “filming of government officials engaged in their duties in a public place...fits comfortably within First Amendment principles. Gathering information about government officials in a form that can be readily disseminated to others serves a cardinal First Amendment interest in protecting and promoting “the free discussion of governmental affairs.” *Id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Furthermore, “freedom of expression has particular significance with respect to government because it is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.” *Id.* (quoting *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 n.11 (1978)). This is especially true as to “law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties.” *Id.* (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035–36 (1991)). “Ensuring the public’s right to gather information about their officials not only aids in the uncovering of abuses . . . but also may have a salutary effect on the functioning of government more generally.” *Id.* at 82–83 (citing *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986)).

More recently, in *Bologna v. City of Escondido*, No. 12-CV-1243-JAH-WVG (S.D. Cal.), the ACLU sued on behalf of a group of protesters after law enforcement officials, relying on an inapplicable section of the California Vehicle Code and an asserted “operational area” extending more than 500 feet from the checkpoint, disrupted the peaceful protest and recording of traffic checkpoints. The plaintiffs settled with the City of Escondido, which agreed to respect the First Amendment right to protest, film, or record traffic checkpoints and to ensure the operational area of a checkpoint creates “a distance of no more than 15 feet between observers and officers,” subject only to narrowly drawn exceptions. Joint Motion to Dismiss, *Bologna v. City of Escondido*, No. 12-CV-1243-JAH-WVG, Dkt. 27-1 (S.D. Cal. Oct. 24, 2012). The settlement upheld free access to public sidewalks, with limited exceptions, to record checkpoint operations in the interest of holding police accountable for their conduct.⁸ The District Court subsequently enjoined the California Highway Patrol from “infringing or interfering with plaintiffs’ First Amendment rights to videotape or otherwise record the operation of traffic checkpoints from public sidewalks in the City of Escondido as long as the protestors do not create a traffic or public safety hazard to others or themselves.” Amended Order Granting Plaintiffs’ Motion for Preliminary Injunction at 4, *Bologna v. City of Escondido*, No. 12-CV-1243-JAH-WVG, Dkt. 40 (S.D. Cal. May 20, 2013). These cases demonstrate that Border Patrol is

⁸ See ACLU Press Release, *Freedom of Speech Upheld in Escondido*, Oct. 25, 2012, available at <https://www.aclu.org/free-speech/freedom-speech-upheld-escondido>

unconstitutionally restricting the First Amendment rights of protesters and observers at the Arivaca Road checkpoint.

In addition, Border Patrol is engaging in unconstitutional retaliation and harassment of the protesters and observers. Border Patrol agents installed previously non-existent barriers at the Arivaca Road checkpoint specifically in response to the monitoring campaign. Agents have provided vague and shifting justifications for restricting the checkpoint monitors' activity and harassed and intimidated monitors to discourage them from engaging in constitutionally protected conduct. Agents have also enforced the restrictions selectively against the monitors but not against other members of the community. These actions amount to viewpoint discrimination, "an egregious form of content discrimination" prohibited by the First Amendment. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995); see also *Giebel v. Sylvester*, 244 F.3d 1182, 1188 (9th Cir. 2001).

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Even if Border Patrol's ad hoc restrictions were "content-neutral," Border Patrol's claim of unbridled discretion to restrict speech creates an unacceptable risk of viewpoint discrimination, and such "discretionary power is inconsistent with the First Amendment." *Kachumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012); see also *California Teachers Ass'n v. State Bd. Of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001) (vague rules "impermissibly delegate basic policy matters to lower level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application"). Heightened scrutiny is necessary to avoid the danger that a law enforcement official "might resort to enforcing the [law] only against... signs whose messages the officer or the public dislikes." *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998). Furthermore, Border Patrol's restrictions are not narrowly tailored to any substantial interest in safety—to the contrary, by forcing pedestrian traffic into the roadway, the barriers make the area substantially less safe. Nor do they leave open ample alternative channels for effectively protesting, monitoring, and recording the operation of checkpoints. See *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) ("75-yard security zone" was not narrowly tailored to asserted safety interests).

Although the rights of the checkpoint monitors "may be subject to reasonable time, place, and manner restrictions," the monitors' exercise of First Amendment rights fall "well within the bounds of the Constitution's protections," especially since the checkpoint monitors are filming agents from a public right of way along a public roadway, "the apotheosis of a public forum," where "the rights of the state to limit the exercise of First Amendment activity are 'sharply circumscribed.'" *Glik*, 655 F.3d at 84 (citation omitted); *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011); see also *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1099 (9th Cir. 2003) (sidewalk is "quintessential traditional public forum"). "Public fora have achieved a special status in our law; the government must bear an extraordinarily heavy burden to regulate speech in such locales," especially

“core First Amendment speech.” *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1022 (9th Cir. 2009).

Border Patrol agents at the Arivaca Road checkpoint cannot evade the First Amendment by decreeing that an arbitrary 150- foot area within a public right of way is an “operations zone” or a “controlled area” from which individuals must be excluded for “safety reasons.” The agency “is not free to foreclose expressive activity in public areas on mere speculation about danger.” *Bay Area Peace Navy*, 914 F.2d at 1228; *cf. Turner v. Plafond*, No. C 09-00683 MHP, 2011 WL 62220, *11 (N.D. Cal. Jan. 7, 2011) (generalized “danger of driver distraction” does not justify restrictions on political signs). Even if Border Patrol had legitimate fears that protesters or observers might violate the law, which is not conceded, the proper response would be “to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.” *Collins v. Jordan*, 110 F.3d 1363, 1372 (9th Cir. 1996). Law enforcement officials are “expected to endure significant burdens caused by citizens’ exercise of their First Amendment rights,” and the “same restraint demanded of law enforcement officers in the face of ‘provocative and challenging’ speech must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces.” *Glik*, 655 F.3d at 84 (citations omitted).

III. Conclusion

Arivaca residents have the First Amendment right to peacefully protest, photograph, and videotape a checkpoint that continues to have a profound impact on their daily lives. The Border Patrol has ignored these residents’ reports of civil and human rights abuses committed by federal agents in their community for years, compelling residents to take action. The recording of law enforcement in a public space “that does not interfere with the police officers’ performance of their duties is not reasonably subject to limitation.” *Glik*, 655 F.3d at 84. By restricting the ability of the residents of Arivaca to protest and record checkpoint operations in their community, and by doing so in a manner that openly discriminates against the monitors on the basis of their constitutionally protected activity, the Border Patrol is violating the First Amendment.

For the foregoing reasons, we demand that Border Patrol immediately remove the “No Pedestrians” barriers on Arivaca Road and allow residents to peacefully protest, photograph, and videotape from the public right of way across the street from the checkpoint and/or from a short distance outside the primary inspection area. If Border Patrol refuses, we will be forced to pursue litigation to vindicate these individuals’ Constitutional rights.

Please contact us if you have any questions at (602) 650-1854 or
jlyall@acluaz.org.

Sincerely,



James Lyall
Staff Attorney
ACLU of Arizona

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