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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Leesa Jacobson, *et al.*,

Plaintiffs,

v.

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

Defendants.

No. CV-14-02485-TUC-BGM

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

At issue in this case is the authority of the U.S. Border Patrol to exclude unauthorized persons from the interior of traffic checkpoints — checkpoints that the Supreme Court has described as "necessary" to border security. United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976). Plaintiffs ask the Court to grant them virtually unfettered access to the Border Patrol checkpoint outside of Amado, Arizona, to protest its existence and to monitor the activities of agents working there. But the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." Wright v. Incline Vill. Gen. Improvement Dist., 665 F.3d 1128, 1134 (9th Cir. 2011) (citation omitted). On the contrary, it is well established that the "government may limit the uses of properties under its control to the uses to which [they] are lawfully dedicated." Id. (citation omitted).

The Border Patrol's policy — to restrict access to the checkpoint to authorized persons for official purposes — is fully consistent with the First Amendment. Border Patrol checkpoints are nonpublic fora, much like airport security checkpoints, police stations, and highway rest stops, where restrictions on expressive activity are subject to a lenient degree of scrutiny. The purpose of Border Patrol checkpoints is to secure the border, not to facilitate expression, and free public access would be incompatible with their purpose. That is particularly true given the significant law enforcement and public safety concerns at stake: Not only is the government's interest in border security paramount, but traffic stops are inherently dangerous, and agents must be prepared to confront smugglers who have every incentive to flee. Moreover, checkpoints are clearly marked with signs — "Border Patrol Checkpoint Ahead," "All Vehicles Must Stop," "K-9 on Duty" — that inform reasonable observers that they are entering a zone where free passage is limited and expression may be restricted.

Even if checkpoints were public fora, the Border Patrol's policy would be a permissible time, place, and manner restriction. The policy regulates only conduct, not speech, and it does not limit the public's ability to speak, picket, leaflet, or engage in any

other expressive activity from outside the checkpoint. Indeed, despite their assertions to the contrary, Plaintiffs have had considerable success in reaching their target audience from outside the checkpoint, flagging down motorists, handing out leaflets, publishing reports on alleged misconduct, and attracting significant media attention. Thus, whether checkpoints are nonpublic or public fora, Plaintiffs are unlikely to prevail on their First Amendment claims.

In any event, Plaintiffs' lengthy delay in seeking preliminary relief undermines their contention that the Court should exercise its equitable powers to enter an injunction immediately, rather than proceeding in the ordinary course. Plaintiffs waited until two days before Christmas to lodge their request for preliminary relief — 10 months after they allege their rights were first infringed, 8 months after the Border Patrol informed them in writing that it would not modify its policy, and 5 months after they allege they last visited the checkpoint. That delay is reason enough to deny preliminary relief.

BACKGROUND

The Department of Homeland Security ("DHS") is responsible for securing the nation's borders and enforcing its immigration laws. Those duties are divided among several DHS components, including U.S. Customs and Border Protection ("CBP"). Within CBP, the Office of Field Operations enforces immigration laws at ports of entry, such as international airports, some seaports, and official land crossings. Another CBP division, the U.S. Border Patrol — the principal Defendant here — secures the border against unlawful entry between ports of entry. (A separate DHS component, U.S. Immigration and Customs Enforcement, not named in this lawsuit, enforces immigration laws in the interior of the country.)

A. The U.S. Border Patrol

To accomplish its mission, the Border Patrol has established three main lines of defense. See GAO, Report 09-824, at 6 (2009), available at http://www.gao.gov/assets/300/294548.pdf (hereinafter "GAO"). First, most agents are assigned to "line watch" operations at the border, where they turn back or arrest persons attempting to cross the

border unlawfully. Id. Second, agents at traffic checkpoints, usually located on major highways and secondary roads up to 100 miles inland, see 8 C.F.R. § 287.1(a), intercept individuals who evade detection at the border and prevent them from reaching major population centers. GAO at 6. Third, "roving patrols" apprehend persons who attempt to circumvent these border defenses. See id. The Supreme Court has specifically endorsed the role that checkpoints play in the Border Patrol's enforcement strategy, explaining that "a traffic-checking program in the interior is necessary because the flow of illegal aliens cannot be controlled effectively at the border." Martinez-Fuerte, 428 U.S. at 555.

B. Border Patrol Checkpoints

As of 2009, there were 71 Border Patrol checkpoints operating along the nation's southwest border. GAO at 8, 10. Checkpoints fall into two categories, "permanent" and "tactical," with permanent checkpoints tending to be brick-and-mortar structures on major highways, and tactical checkpoints being temporary facilities on secondary roads. Id. at 7. However, both types now operate from fixed locations, and there is no legal distinction between the two. See United States v. Hernandez, 739 F.2d 484, 488 (9th Cir. 1984) (the "distinctions . . . between a temporary checkpoint and a permanent checkpoint are not material"); United States v. Soto-Camacho, 58 F.3d 408, 411 (9th Cir. 1995) (applying Hernandez to Border Patrol checkpoints). Even so, tactical checkpoints offer fewer safety protections to Border Patrol agents and the public, particularly given their lack of concrete barriers separating agents from traffic. GAO at 8.

Although checkpoints vary in terms of size, infrastructure, and staffing, they share many common features. To begin, the approach to a checkpoint is marked with warning signs in accordance with the Border Patrol's traffic control plan, devised by a federal-state task force in the wake of a pair of fatal checkpoint crashes in 2004. Under that plan, the recommended signage on a rural, two-lane road is: at 1 mile out, "Border Patrol Checkpoint 1 Mile"; at ½ mile, "Be Prepared to Stop" and "No Passing Zone"; at 1,800 feet, "All Vehicles Must Stop Ahead"; at 1,200 feet, "Use Low Beams"; and at 550 feet, "Stop Ahead," with traffic cones or pylons along the center stripe and a stop sign at the

primary inspection area. See Traffic Control Plan at A-1, 2 (Ex. A). These "distances . . . may be adjusted based on field conditions" and "changeable message signs . . . or other devices" including "rumble strips" may also be used. Id.

Within a checkpoint, Border Patrol guidelines call for a primary inspection area, where motorists are initially stopped, see Traffic Checkpoint Policy ("TCP") § 6.13.3 (Ex. B); a secondary inspection area, to which motorists may be referred for further questioning, and which must be large enough to accommodate buses, trucks hauling trailers, and other large vehicles, id. § 6.9.2; administrative and detention facilities, whether brick-and-mortar buildings, mobile trailers, or other vehicles, id. § 6.2.1-6.2.2; and access to water and electricity, either portable or permanent, id. § 6.2.3. Checkpoints must also have a number of Border Patrol vehicles on hand — for example, to chase motorists who fail to yield or who flee, id. § 6.3 — and sufficient parking for agents staffing the checkpoint and for agents conducting roving patrols nearby. Checkpoints may also house a variety of inspection equipment, such as vehicle lifts, x-ray and gamma-ray machines, and canine units. GAO at 25, 50. Checkpoints must be arranged to minimize the risk of accident or injury to agents and the public, and operations may be suspended if conditions become unsafe. TCP § 6.13.8.

When operating checkpoints, Border Patrol agents act under unique legal authority. Congress has empowered agents "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States," 8 U.S.C. § 1357(a)(1), and the Supreme Court has held that "a vehicle may be stopped at a fixed checkpoint for brief questioning of its occupants even though there is no reason to believe the particular vehicle contains illegal aliens." Martinez-Fuerte, 428 U.S. at 545. Likewise, agents need not have "individualized suspicion" to selectively refer motorists to secondary inspection for further questioning about immigration matters. Id. However, referral to secondary for a non-immigration purpose, such as suspected drug or customs violations, requires reasonable suspicion, see United States v. Preciado-Robles, 964 F.2d 882, 884 (9th Cir. 1992), and a vehicle search requires probable cause or consent, regardless of the purpose,

Martinez-Fuerte, 428 U.S. at 567 (citation omitted).

C. The Arivaca Road Checkpoint

The Arivaca Road checkpoint is located on a rural, two-lane county road, about twenty-two miles east of Arivaca (population 700) and one mile west of Amado (population 300), where the road meets Interstate 19, a major route inland. Compl. ¶¶ 27-28. It has operated in the same location since 2007. Id. ¶ 31. The county transportation department has authorized the Border Patrol to use the county right-of-way to establish checkpoints at "various locations" on the road, and the permit does not limit the boundaries of any such checkpoint. Compl. Ex. B. The Arivaca checkpoint operates primarily in the eastbound direction, and serves to prevent circumvention of the I-19 checkpoint just south of Amado. GAO at 43 n.63. It generally operates 24 hours a day, 7 days a week, which "is key to effective and efficient checkpoint performance . . . because smugglers and illegal aliens closely monitor potential transit routes" using "sophisticated surveillance and communication technology" that "allow[s] for immediate notification of security vulnerabilities, such as a checkpoint closure." GAO at 20-21.

Consistent with the Border Patrol's traffic control plan, the eastbound approach to the Arivaca checkpoint is marked as follows: at about 0.4 mile out, "Border Patrol Checkpoint Ahead"; at 1,350 feet, "Speed Limit 35" mph, reduced from 45 mph; at 900 feet, "Speed Limit 25" mph; at 600 feet, "All Vehicles Must Stop Ahead"; at 320 feet, "No Passing Zone"; at 300 feet, "K-9 on Duty, Please Restrain Your Pets"; at 250 feet, "Use Low Beams"; and at 180 feet, "Speed Limit 15" mph and a digital speed board, with traffic cones and pylons along the center stripe beginning at 200 feet out, a series of three rumble strips beginning at 110 feet out, and a stop sign at the primary inspection area, in the center of the checkpoint. See McLain Decl. Ex. 2. Photographs of these signs, and similar ones marking the westbound approach to the checkpoint, accompany the attached declaration of Roger San Martin, the Patrol Agent in Charge of the Border Patrol's Tucson Station. See Ex. C Attach. 1-18.

At the primary inspection area, there are two plastic barricades along the center stripe, where a Border Patrol agent stands. See McLain Decl. Ex. 2. On the southern roadside is an 8-by-40-foot storage container used for administration, processing, and detention, beside which are a canopy and a portable kennel. Id. On the northern roadside is a portable lighting unit and often several Border Patrol vehicles, id., placed there to encourage westbound traffic to slow to the posted speed limit in that direction (15 mph) and to prevent westbound traffic from driving off the roadway to avoid the rumble strips, San Martin Decl. ¶ 9. East of the primary inspection area on the southern roadside is an "approximately 100-foot-long" secondary inspection area, Compl. ¶ 29, at the eastern end of which is a Border Patrol sedan used to give chase, see McLain Decl. Ex. 2. Also on the southern roadside are two portable lighting units, restrooms, a sink, a water tank, and a variety of other equipment. See McLain Decl. Ex. 2. Additional Border Patrol vehicles, including detainee transport units, are also commonly parked at the checkpoint. See San Martin Decl. ¶ 23. As motorists exit the checkpoint, traffic pylons extend about 160 feet east of its center. See McLain Decl. Ex. 2.

D. This Action

Plaintiffs are two members of People Helping People ("PHP"), an advocacy group that seeks to shut down the Arivaca checkpoint because of alleged civil rights abuses and perceived negative effects on the surrounding community. Compl. ¶¶ 9-10, 34. To accomplish that goal, PHP has conducted a "campaign" to protest the checkpoint and to monitor the behavior of Border Patrol agents working there. Id. ¶ 32. On December 8, 2013, the group staged a rally at the checkpoint with more than 100 unnamed supporters, who carried signs and banners, gave speeches, and delivered a petition calling on the Border Patrol to remove the checkpoint. Id. ¶ 36. Because the presence of a large number of protesters raised safety concerns, the Border Patrol closed the checkpoint for much of the day — a result that PHP advertised in a press release. See Press Release, PHP, Community Members Shut Down Border Patrol Checkpoint (Dec. 20, 2013), at http://phparivaca.org/?p=262. Photographs of the rally accompany the attached

declaration of Watch Commander Stephen Spencer. See Ex. D Attach. 1-5.

The campaign continued on February 26, 2014, when PHP "initiated checkpoint monitoring activities." Compl. ¶ 42. About 30 individuals — six "monitors" with video cameras and note pads, including Mr. Ragan, and two dozen "additional protesters" carrying signs and banners, including Ms. Jacobson — entered the checkpoint on foot, approaching from the east on the southern shoulder. Id. ¶¶ 43-45. When they were "approximately 100 feet" from the center of the checkpoint, "at the eastern terminus of the secondary inspection area," id. 46 — that is, about 60 feet within the checkpoint's easternmost traffic pylons, see Ragan Decl. ¶ 15 & Diagram A — they were stopped by two Border Patrol agents, who asked them to move back, Compl. ¶ 46. The PHP members refused. Id. ¶ 47. Twenty minutes later, Border Patrol agents again asked them to move back; they again refused. Id. ¶ 48. The PHP members later agreed to cross to the northern shoulder, but then attempted to move even farther inside the checkpoint and were turned back. Id. ¶¶ 49-50. At that point, Border Patrol agents asked the PHP members for a third time to move back; once again, they refused. Id. ¶¶ 51-52. Border Patrol agents then strung yellow incident tape across the northern and southern roadside about "150 feet east" of the center of the checkpoint, and informed the PHP members that they would be arrested if they did not move behind it. Id. ¶¶ 53-54. The PHP members then relented, about two and a half hours after first entering the checkpoint. Id. ¶¶ 51, 55; see also Spencer Decl. Attach. 6-7 (photos of the incident).

Three days later, on March 1, 2014, six unnamed PHP members returned to monitor the checkpoint. Compl. ¶ 59. The yellow incident tape had been replaced with rope cordons and signs reading "Border Patrol Enforcement Zone — No Pedestrians Beyond This Point." Id. ¶¶ 56, 57. The PHP members disregarded the cordons and entered the checkpoint, stopping "approximately 100 feet" from the center of the checkpoint. Id. ¶¶ 58-60. Border Patrol agents asked them to move behind the cordons, but they refused. Id. ¶ 61. About an hour later, Border Patrol agents informed the PHP members that they would be arrested if they did not move behind the cordons, and they

relented. Id. ¶ 62. Border Patrol agents then parked vehicles on the northern and southern shoulders, just inside the cordons, to reinforce the barriers. San Martin Decl. ¶ 14. Photographs of this incident accompany the attached declaration of Supervisory Border Patrol Agent Rosalinda Huey. See Ex. E Attach. 1-2.

The next month, on April 17, 2014, Plaintiffs' counsel wrote to the head of the Border Patrol's Tucson sector, Chief Patrol Agent Manuel Padilla Jr., demanding that the cordons be removed and that PHP members be given greater access to the checkpoint. Compl. Ex. E. Agent Padilla responded within a week, declining to remove the cordons. Compl. Ex. F. He explained that Border Patrol's policy — to restrict access to the checkpoint to authorized persons for official purposes, regardless of their political beliefs — was reasonable in light of law enforcement and public safety concerns. Id.

Three months later, on July 11, 2014, PHP members staged a "Know Your Rights" rally at the checkpoint. Compl. ¶ 87. At that time, the cordons remained in place, but the accompanying signs read "No Unauthorized Entry Beyond This Point," as they do today. Id. ¶ 83. A group of protesters, including Mr. Ragan, assembled on the west side of the checkpoint, while a group of "monitors," including Ms. Jacobson, assembled on the east side. Plaintiffs allege that, during the rally, Border Patrol agents allowed pedestrians and members of the media to traverse the checkpoint on foot, by walking along the north roadside from one side of the checkpoint to the other. Id. ¶ 87.

Since they began monitoring the checkpoint nearly a year ago, Plaintiffs have identified three instances in which other individuals were allegedly permitted access to the checkpoint. First, on April 3, 2014, a local resident allegedly parked his truck inside the cordons, where he remained for about 40 minutes, at one point "question[ing]" and "harass[ing]" the PHP members, including Mr. Ragan. Ragan Decl. ¶ 27. Second, on an unspecified date, another man allegedly passed through the primary inspection area, parked his car in the secondary inspection area, and walked back toward the primary inspection area, where he spoke with Border Patrol agents for about 20 minutes. Compl. ¶ 82. Third, on November 11 and 23, 2014, the surveyor that Plaintiffs retained for

purposes of this case was allowed to enter the checkpoint.

Plaintiffs do not allege that they have ever been prevented from using cameras or recording devices. Nor do they allege that any vehicles have entirely blocked their view of the checkpoint, and the photographs attached to their complaint suggest otherwise. See Compl. Ex. D. Indeed, contrary to Plaintiffs' assertions that they have been unable to collect information regarding "characteristics of the vehicle occupants," "the nature of agents' interactions with motorists," and "the behavior of Border Patrol's service canines," Ragan Decl. ¶ 20, PHP released a report documenting precisely that information — namely, the perceived race of individuals who (a) passed through the checkpoint; (b) showed agents some form of identification; (c) were referred to secondary; or (d) were the subject of canine alerts, id. Ex. 1. PHP also claims to have achieved many of its goals. See PHP, Checkpoint Monitoring — a Challenge and a Triumph (Mar. 31, 2014) ("[O]ur presence at the checkpoint is absolutely deterring abuse, which is a primary goal of this effort. . . . Other goals, to engage other border communities and to send a clear message that Arivacans are not afraid to resist border militarization, are being accomplished."), at http://phparivaca.org/?p=536.

Plaintiffs filed this action on November 20, 2014, alleging that their exclusion from the interior of the Arivaca checkpoint violates their First Amendment rights to protest the checkpoint and to monitor the behavior of Border Patrol agents working there. Compl. ¶¶ 106-08. On December 23, 2014, they requested a preliminary injunction permitting them to protest and monitor inside the checkpoint, just "twenty feet outside of the primary and secondary inspection areas." Pls.' Mot. for Prelim. Inj. 1.[1]

[1] Plaintiffs also allege that Border Patrol agents "retaliated" against them by parking vehicles inside the cordons and leaving the engines running. Compl. ¶¶ 69-71, 110-13. The exhibits attached to their preliminary injunction motion offer only hearsay to support this claim, and nothing to suggest a retaliatory motive. See Ragan Decl. ¶ 30 (stating that he "understand[s]" this to have happened on one unspecified date, for an unspecified period, to unnamed PHP members). In fact, using vehicles to reinforce barriers is a standard law enforcement technique to assist with crowd control. San Martin Decl. ¶ 14.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right." Munaf v. Geren, 128 S. Ct. 2207, 2219 (2008) (citations and internal quotation marks omitted). A party seeking such relief "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." Winter v. NRDC, 555 U.S. 7, 20 (2008). In a case such as this, where the injunction sought would alter, rather than preserve, the status quo, the plaintiff must meet an even higher standard: a request for "[s]uch 'mandatory preliminary relief' is subject to heightened scrutiny and should not be issued unless the facts and law clearly favor the moving party." Dahl v. Herm Pharms. Corp., 7 F.3d 1399, 1403 (9th Cir. 1993); see also Stanley v. Univ. of S. Calif., 13 F.3d 1313, 1320 (9th Cir. 1994) (mandatory preliminary relief is "particularly disfavored").

ARGUMENT

I. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS

Plaintiffs assert two distinct First Amendment rights — to protest the checkpoint and to monitor the activity of Border Patrol agents working there — each of which is analyzed under a different test. Plaintiffs cannot prevail under either.[2]

Regardless, because Plaintiffs do not rely on their retaliation claim to support their request for preliminary relief, it is not further addressed in this brief.

[2] Plaintiffs also assert a First Amendment right to record law enforcement officers discharging their duties. Although some courts have recognized such a right, the Ninth Circuit has not directly addressed whether recording for that purpose is an expressive activity, with any restrictions subject to forum analysis, or a monitoring activity, with restrictions subject to right-of-access analysis. See Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3rd Cir. 2010) (noting uncertainty); Leigh v. Salazar, 677 F.3d 892, 894, 898 & n.3 (9th Cir. 2012) (applying right-of-access analysis, rather than forum analysis, to photojournalist's request for access to horse gather to improve government oversight and accountability); cf. Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011) (acknowledging First Amendment right to film matters of public interest "subject to reasonable time, place, and manner restrictions"). Regardless, Plaintiffs cannot prevail under either test.

A. Plaintiffs' First Amendment Right to Protest the Checkpoint Has Not Been Infringed

When assessing the constitutionality of a restriction on expressive activity, such as protesting, the degree of judicial scrutiny depends on the type of forum at issue. "[P]ublic property fits into one of three main categories: (1) a public forum, (2) a designated public forum, or (3) a nonpublic forum." Ctr. for Bio-Ethical Reform v, City & Cnty. of Honolulu, 455 F.3d at 910, 919 (9th Cir. 2006) (citation omitted). "On one end of the fora spectrum lies the traditional public forum, 'places which by long tradition . . . have been devoted to assembly and debate,'" Flint v. Dennison, 488 F.3d 816, 830 (9th Cir. 2007) (citation omitted), such as parks and sidewalks, where content-neutral restrictions on speech are subject to "'an intermediate level of scrutiny,'" Int'l Soc'y for Krishna Consciousness of Cal. ("ISKCON") v. City of Los Angeles, 764 F.3d 1044, 1049 (9th Cir. 2014) (citation omitted). "Next on the spectrum is the so-called designated public forum, 'which exists when the government intentionally dedicates its property to expressive conduct.'" Flint, 488 F.3d at 830 (citation and brackets omitted).

"At the opposite end of the fora spectrum is the non-public forum," which is "'any public property that is not by tradition or designation a forum for public communication.'" Id. (citation and brackets omitted). "Examples of nonpublic fora include airport terminals, highway overpass fences, and interstate rest stop areas (including perimeter walkways)," Ctr. for Bio-Ethical Reform, 455 F.3d at 919 (citations omitted), as well as military installations, Greer v. Spock, 424 U.S. 828, 838 (1976), police stations, First Def. Legal Aid v. City of Chicago, 319 F.3d 967, 968 (7th Cir. 2003), judicial and municipal complexes, Sammartano v. 1st Judicial Dist. Ct., 303 F.3d 959, 966 (9th Cir. 2002), and Transportation and Security Administration ("TSA") screening checkpoints, Mocek v. City of Albuquerque, 3 F. Supp. 3d 1002, 1070-71 (D.N.M. 2014). In nonpublic fora, "restrictions on speech need 'survive only a much more limited review.'" ISKCON, 764 F.3d at 1049 (citation omitted).

1. Border Patrol checkpoints are nonpublic fora.

In determining a property's forum status, the Ninth Circuit has looked to three factors: (1) "the actual use and purposes of the property"; (2) "the area's physical characteristics, including its location and the existence of clear boundaries delimiting the area"; and (3) "traditional or historic use of both the property in question and other similar properties." Wright, 665 F.3d at 1135 (citation omitted). Each factor indicates that Border Patrol checkpoints are nonpublic fora.

First, the "actual use and purpose" of a Border Patrol checkpoint is to secure the nation's borders and to enforce its immigration laws, not to facilitate expressive activity. The Supreme Court has explicitly recognized that checkpoints are a "necessary" component of the Border Patrol's enforcement strategy, and that the need for them is "great." Martinez-Fuerte, 428 U.S. at 556-57. Thus, the "crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). There can be little question that staging protests inside Border Patrol checkpoints, just 20 feet away from agents performing their duties, is incompatible with their purpose.

The "federal workplace, like any place of employment, exists to accomplish the business of the employer." Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 805 (1985). "It follows that the Government has the right to exercise control over access to the federal workplace in order to avoid interruptions to the performance of the duties of its employees." Id. at 805-06. While Plaintiffs assert that their activities have never disrupted Border Patrol operations, see Compl. ¶ 73, their own allegations demonstrate otherwise. PHP's first rally at the checkpoint, with more than 100 protesters, was so large that the checkpoint was shut down for safety reasons. On the first day of monitoring, PHP members thrice refused Border Patrol agents' orders to leave the interior of the checkpoint, diverting agents from their duties for two and a half hours. And on the second day of monitoring, PHP members simply ignored the cordons and entered the checkpoint, again diverting agents from their duties. Much like "the business

of a military installation . . . [is] to train soldiers, not to provide a public forum," Greer, 424 U.S. at 838, the purpose of a checkpoint is to ensure the Border Patrol's ability to control entry to the country, not to facilitate expressive activities — particularly when those activities distract government employees from their mission. See also Preminger v. Principi, 422 F.3d 815, 824 (9th Cir. 2005) ("purpose of [Veterans Affairs facility] is not to facilitate public discourse"); Sammartano, 303 F.3d at 966 (municipal complex "built . . . for the purpose of conducting the business of the county"); Mocek, 3 F. Supp. 3d at 1071 ("purpose of [TSA] screening checkpoint is the facilitation of passenger safety"); cf. Adderley v. Florida, 385 U.S. 39, 41 (1966) ("Jails, built for security purposes, are not" generally "open to the public.").

Moreover, allowing protesters — and their signs and banners — inside Border Patrol checkpoints would endanger agents, motorists, and the protesters themselves. For one thing, they would distract drivers, increasing the risk of accidents. Highway "overpass fences are not 'compatible' with expressive activity because messages displayed invariably distract drivers, thereby posing safety risks." Brown v. Cal. Dep't of Transp., 321 F.3d 1217, 1222 (9th Cir. 2003); see also City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994) ("signs take up space and may obstruct views[and] distract motorists"). The same is true of Border Patrol checkpoints, where the existing signage is calibrated to provide clear warnings without overloading drivers with information. These traffic controls were implemented in response to the National Transportation Safety Board's ("NTSB") admonition, following a pair of fatal checkpoint crashes in 2004, that "many safety signs are not noticed in situations of high visible clutter." NTSB, Urgent Safety Recommendation, H-04-34, at 7 (Oct. 21, 2004), available at http://www.ntsb.gov/safety/safety-recs/recletters/H04_34.pdf.

These safety concerns are magnified at tactical checkpoints, like the one on Arivaca Road, where Border Patrol agents are working directly in the roadway, without concrete barriers to protect them from traffic. See GAO at 8. Westbound motorists often fail to slow to the speed limit in that direction and, when Border Patrol vehicles are not

parked on the northern shoulder, attempt to avoid the rumble strips by driving onto the roadside, where Plaintiffs wish to stand. In addition, anyone on the northern roadside would be directly behind the agent manning the primary inspection area, out of his line of sight, which is at odds with standard weapon-retention training. San Martin Decl. ¶ 20.

"[T]raffic stops" are "inherently dangerous situations," Kelly, 622 F.3d at 262, where the "'risk of harm . . . is minimized . . . if the officers routinely exercise unquestioned command of the situation,'" Arizona v. Johnson, 555 U.S. 323, 330 (2009) (citation omitted). Motorists sometimes fail to yield at checkpoints, or will flee when referred to secondary. Some of those motorists are smuggling people or drugs, and will stop at nothing to escape. San Martin Decl. ¶ 24. Allowing protesters within 20 feet of inspection areas would place them directly in the path of both fleeing suspects and agents giving chase, endangering themselves, the agents, other motorists, and interfering with the effective operation of the checkpoint.

Second, the "physical characteristics" of Border Patrol checkpoints alert the public that they are entering a "special enclave" that is "not intended for the exercise of First Amendment rights." Wright, 665 F.3d at 1136. Unlike sidewalks that have been deemed public fora where "indistinguishable" from other parts of an urban pedestrian grid, see United States v. Grace, 461 U.S. 171, 179 (1983), checkpoints are clearly marked with signs and traffic control devices distinguishing them from surrounding areas. Such signs — "Border Patrol Checkpoint Ahead," "All Vehicles Must Stop," "K-9 on Duty" — indicate to reasonable observers that they are entering a zone where free passage is limited and expressive activities may be "'subject to greater restrictions.'" Wright, 665 F.3d at 1136 (citation omitted).

Third, Border Patrol checkpoints have not "traditionally" or "historically" been open to expressive activity, and Plaintiffs do not allege otherwise. Like highway rest stops, which are nonpublic fora, checkpoints are "relatively modern creations," akin to "appendages" to the highway system, and are "hardly the kind of public property that has 'by long tradition . . . been devoted to assembly and debate.'" Jacobsen v. Bonine, 123

F.3d 1272, 1274 (9th Cir. 1997) (citation omitted). Moreover, it is not dispositive that the Arivaca checkpoint is located on a county road, as Plaintiffs appear to assume. Although "public streets and sidewalks" have been described as the "archetype" of a traditional public forum, Frisby v. Schultz, 487 U.S. 474, 480 (1988), not every public street or sidewalk is a public forum, see, e.g., Greer, 424 U.S. at 1214 (public streets and sidewalks within military installation are nonpublic fora); Monterey Cnty. Democratic Party Cent. Comm. v. USPS, 812 F.2d 1194, 1197 (9th Cir. 1987) (public sidewalk at post office is nonpublic forum). On the contrary, where a roadway is "not open to unrestricted public use," it is not the sort of "open thoroughfare" traditionally considered a public forum. Hale v. U.S. Dep't of Energy, 806 F.2d 910, 915-16 (9th Cir. 1986) (public road patrolled to restrict access to nuclear facility is nonpublic forum).

Moreover, Plaintiffs do not allege that the area around the Arivaca checkpoint, in particular, has ever previously been used for expressive activity, so "[t]his is . . . not a case in which the government has attempted to destroy or convert a public forum . . . into a nonpublic forum." Wright, 665 F.3d at 1137. Regardless, even if the Arivaca checkpoint area were once a public forum, it no longer is. The government may change a property's forum status by "'alter[ing] the objective physical character or uses of the property,'" ACLU v. City of Las Vegas, 333 F.3d 1092, 1105 (9th Cir. 2003) (citation omitted) — for example, where the "'land containing the roadway has been withdrawn from public use,'" id. (quoting Hale, 806 F.2d at 915). Here, the Border Patrol has done just that by establishing a checkpoint along the roadside, with government facilities and clear signage, that has restricted passage along the road for 7 years, with the endorsement of the county government. Plaintiffs' contention that all roads are created equal in forum analysis is inconsistent with the case law and ignores the function, history, and purpose of the Arivaca checkpoint.

2. The exclusion of unauthorized persons from the interior of Border Patrol checkpoints is reasonable and viewpoint neutral.

Because Border Patrol checkpoints are nonpublic fora, the exclusion of

unauthorized persons from their interior "does not violate the First Amendment as long as it is '(1) reasonable in light of the purpose served by the forum and (2) viewpoint neutral.'" Ctr. for Bio-Ethical Reform, 455 F.3d at 920 (citation omitted). The Border Patrol's policy easily satisfies this forgiving standard.

a. Border Patrol's policy is reasonable given the vital interest in securing the nation's borders.

In a nonpublic forum, a restriction on expressive activity "'must fulfill a legitimate need,'" but it "'need not constitute the least restrictive alternative available.'" Id. at 922 (citation omitted). In other words, it "'need only be reasonable; it need not be the most reasonable or the only reasonable limitation.'" ISKCON v. Lee, 505 U.S. 672, 683 (1992) (citation omitted). It cannot reasonably be disputed that the government interests at stake here are legitimate — indeed, strong.

The federal government has a "paramount interest in protecting the border," United States v. Flores-Montano, 541 U.S. 149, 155 (2004), and there is a "substantial public interest in controlling illegal alien traffic by maintaining . . . checkpoint[s]," United States v. Vasquez-Guerrero, 554 F.2d 917, 920 (9th Cir. 1977). Checkpoints are "necessary" to border security, Martinez-Fuerte, 428 U.S. at 556-57, and the government has "wide discretion" to control them "to avoid interruptions to the performance of the duties of its employees," Cornelius, 473 U.S. at 805-06. In addition, the government has a "strong interest" in ensuring public safety and order, including by regulating traffic and pedestrian safety. Madsen v. Women's Health Ctr., 512 U.S. 753, 768-69 (1994) (sustaining buffer zone to "ensur[e] that petitioners do not block traffic" and to reduce risk of accident); see also Schenck v. Pro-Choice Network, 519 U.S. 357, 375-76 (sustaining buffer zone because of "interaction between cars and protesters"); cf. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984) (clutter caused by "accumulation of signs . . . constitutes a significant substantive evil").

The Border Patrol's policy reasonably regulates these legitimate interests. To meet this test, the government "need not provide detailed proof that the regulation

advances its purported interests." Ctr. for Bio-Ethical Reform, 455 F.3d at 922. But there is proof aplenty. Indeed, the Border Patrol's policy is not only reasonable, it is narrowly tailored, as shown below in Part I.A.3.

b. Border Patrol's policy is viewpoint neutral.

The Border Patrol's policy — to restrict access to the checkpoint to authorized persons for official purposes, regardless of their political beliefs, Compl. ¶ 85 & Ex. F — is also viewpoint neutral. To begin, nothing in the policy "on its face . . . prohibits speech by particular speakers, thereby suppressing a particular view about a subject," Menotti v. City of Seattle, 409 F.3d 1113, 1130 n.30 (9th Cir. 2005); on the contrary, the policy is explicitly viewpoint neutral. Moreover, Plaintiffs' allegations of selective enforcement fail to state a plausible viewpoint discrimination claim. "[W]hen someone challenges a law as viewpoint discriminatory but it is not clear from the face of the law which speakers will be allowed to speak, he must show that he was prevented from speaking while someone espousing another viewpoint was permitted to do so." McCullen v. Coakley, 134 S. Ct. 2518, 2534 n.4 (2014). Here, while Plaintiffs allege that, on a handful of occasions, others were permitted inside the cordons for various reasons — to traverse the checkpoint on foot, to speak with Border Patrol agents, to conduct a geographical survey for purposes of this litigation — there is no allegation that those individuals were permitted to protest in support of the checkpoints, in opposition to Plaintiffs' viewpoint. Thus, even if the Border Patrol has imperfectly enforced its policy to exclude those without an official reason to be at the checkpoint,[3] it

[3] Plaintiffs' complaint identifies only a handful of such occasions (one of which, involving their own surveyor, operated manifestly to their benefit). Such a small number of allegedly improper actions over the course of a year are an inadequate basis for prospective injunctive relief. See Ortega Melendres v. Arpaio, 695 F.3d 990, 998 (9th Cir. 2012) (no standing for prospective injunctive relief absent "'pattern of officially sanctioned . . . behavior, violative of the plaintiffs' . . . rights'") (citation omitted); Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1042-44 (9th Cir. 1999) (two incidents insufficient to establish pattern of wrongdoing); see also San Martin Decl. ¶¶ 16-19 (describing immediate corrective action taken after one incident).

certainly has not endorsed speech advancing only one side of a divisive issue — the hallmark of viewpoint discrimination.

3. Even if checkpoints were public fora, Border Patrol's policy is a permissible time, place, and manner restriction.

Even in a public forum, "the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions '[1] are justified without reference to the content of the regulated speech, [2] that they are narrowly tailored to serve a significant governmental interest, and [3] that they leave open ample alternative channels for communication of the information.'" Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citation omitted). If Border Patrol checkpoints were public fora, they would still satisfy this "'intermediate level of scrutiny.'" ISKCON, 764 F.3d at 1049.

a. Border Patrol's policy is content neutral.

Border Patrol's policy to exclude unauthorized persons from checkpoints is content neutral. See Ward, 491 U.S. at 791 ("The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."). First, the policy regulates conduct, not speech. It does not even refer to speech, let alone directly regulate it. See McCullen, 134 S. Ct. at 2531 (policy is content neutral where it "does not draw content-based distinctions on its face"). Rather, the policy simply bars entry into the interior of the checkpoint. Whether a person violates the policy "'depends' not 'on what they say' but simply on where they say it." Id. (citation omitted).

Second, that the policy may have the incidental effect of restricting immigration-related speech more than speech on other subjects is immaterial. A "facially neutral law does not become content-based simply because it may disproportionately affect speech on certain topics." Id. On the contrary, such regulations are considered content neutral when they are "justified without reference to the content of the regulated speech." Id. (citation omitted). As noted above, Border Patrol's policy is justified by significant law

enforcement and public safety interests — interests that have long been recognized as content neutral. See, e.g., id. (public safety is a content-neutral purpose). Thus, this is not a case where "'[e]very objective indication shows that the [policy's] primary purpose is to restrict speech that opposes'" immigration enforcement. Id. (citation omitted).

Plaintiffs are also mistaken to suggest that the policy is content based because the Border Patrol erected cordons around the interior of the checkpoint only after Plaintiffs entered it. Governments "'adopt laws to address the problems that confront them,'" and the "'First Amendment does not require [them] to regulate for problems that do not exist.'" Id. at 2532 (citation omitted). The Arivaca checkpoint is located on a rural road, between two small towns, with rare pedestrian traffic, and there is nothing to suggest that the area has ever previously been used for expressive activity. The Border Patrol was not required to already have cordons in place for a problem that had not yet presented itself.

b. Border Patrol's policy is narrowly tailored to serve significant governmental interests.

As already shown, the government interests at stake are no doubt significant. See supra Part I.A.2.a. The Border Patrol's policy is narrowly tailored to serve those interests. That requirement is satisfied here because the policy advances an "interest that would be achieved less effectively absent the regulation" and is "not substantially broader than necessary" to achieve that interest. Ward, 491 U.S. at 797-800.

Plaintiffs are mistaken to paint the Border Patrol's asserted interests as "specious" and its policy as "arbitrary." Pls.' Mot. for Prelim. Inj. 17, 19. On the contrary, that policy is grounded in experience, both at the Arivaca checkpoint and elsewhere. Although Plaintiffs assert that their campaign against the checkpoint has never disrupted enforcement activities, in reality they have refused agents' orders to leave the checkpoint, ignored the cordons, and on one occasion staged a rally so large that the checkpoint was closed for safety reasons — a result they advertised in a press release — giving an opening to smugglers who might wish to circumvent the I-19 checkpoint. In addition, the NTSB expressed concern that confusing signage may have contributed to fatal

checkpoint crashes in 2004, and advised that "visible clutter" around checkpoint signage be avoided — a recommendation that the Border Patrol followed in adopting its traffic control plan. Further, while Plaintiffs describe the Arivaca checkpoint as relatively tranquil, they have observed it for only a slice of a single year. In fact, since 2009 there have been at least 28 significant safety incidents at the three checkpoints within Tucson station, including intoxicated motorists, accidents, failures to yield, and flights from secondary. San Martin Decl. ¶ 10. Indeed, in March 2014, a drunk motorist traveling westbound through the Arivaca checkpoint drove off the roadway and crashed into license plate readers located on the northern roadside near the primary inspection area, which Plaintiffs wish to access. Id. Had civilians been permitted inside the checkpoint during such an incident, they would have been directly in harm's way.

It was with such experiences in mind that the Border Patrol set the cordons about 150 feet from the center of the checkpoint, Compl. ¶ 53, roughly where the checkpoint's easternmost and westernmost traffic pylons are fixed. That spot is, by Plaintiffs' own estimation, just 80 feet away from the secondary inspection area. Cf. Bay Area Peace Navy v. United States, 914 F.2d 1224, 1226 (9th Cir. 1990) (permitting 75-foot (25-yard) "safety and security zone" "in the absence of . . . a tangible threat to security"); United States v. Griefen, 200 F.3d 1256, 1260 (9th Cir. 2000) (150-foot safety zone around road construction is "[e]minently reasonable"). The Border Patrol's policy does not affect the ability of Plaintiffs or anyone else outside the checkpoint to speak, picket, leaflet, or engage in any other expressive activity protected by the First Amendment. Plaintiffs' signs and banners can still be seen from within the checkpoint, prompting motorists to stop and speak with them after passing through the checkpoint. Thus, Plaintiffs remain close enough to deliver their message, but not so close as to interfere with immigration enforcement or public safety. Accordingly, the Border Patrol's policy is narrowly tailored. It addresses a significant threat to immigration enforcement and public safety while respecting the public's right to freedom of expression, and arrives at a workable solution — tied to the preexisting footprint of the checkpoint — that is not "substantially

broader than necessary to achieve the government's interest." Ward, 491 U.S. at 800.

Plaintiffs argue that Border Patrol could have regulated in a less restrictive fashion. But a content-neutral time, place, or manner restriction — in contrast to a regulation subject to strict scrutiny, see Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988) — is not "invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.'" Ward, 491 U.S. at 797-98 (citation omitted). Plaintiffs fail to demonstrate that the Border Patrol's policy sweeps in substantially more speech than necessary to achieve the government's goals. They suggest that either the western cordons be moved eastward, to a spot 20 feet west of the center of the checkpoint, or that they be given essentially unrestricted access to the northern roadway. While that might satisfy Plaintiffs, it would be at the sacrifice of the government's interests. Whether or not any difficulties would arise if Plaintiffs alone were permitted to protest and picket without any "place" restriction is beside the point, because the Border Patrol must account for everyone who might crowd the checkpoint if access were not restricted. See Heffron v. ISKCON, 452 U.S. 640, 653-55 (1981) (criticizing the lower court's failure to "take into account the fact that any . . . exemption cannot be meaningfully limited to [plaintiff], and as applied to similarly situated groups would prevent the State from furthering its important concern"); Lee, 505 U.S. at 685. Recently, citizen groups supportive of the Border Patrol's mission erected large signs on private land adjacent to the checkpoint reading "Keep Our BP Checkpoint Open" and "Citizens of Arivaca, Moyza, and Amado Support Our BP Checkpoint." San Martin Decl. ¶ 8 & Attach. 19-21. Imagine that these groups were to stage a counter-protest in support of the Arivaca checkpoint. Unless the checkpoint could function safely and effectively while hosting both protests, not to mention other demonstrations on other topics — and it could not — it must function without hosting any.

c. Border Patrol's policy leaves open ample alternative channels of communication.

Border Patrol's policy also "leave[s] open ample alternative channels of

communication." Ward, 491 U.S. at 802. As noted above, the policy does not affect the public's ability to protest, picket, leaflet or engage in other expressive activity from outside the cordons. And PHP members have done just that, with considerable success in reaching their intended audience. From the western cordons, they have handed out "know your rights" fliers to motorists entering the checkpoint. San Martin Decl. ¶ 22. From the eastern cordons, they often flag down motorists leaving the checkpoint to discuss their views. Id. They have collected data on the perceived race of individuals who (a) passed through the checkpoint; (b) showed agents some form of identification; (c) were referred to secondary; or (d) were the subject of canine alerts, as their own report demonstrates. Ragan Decl. Ex. 1.[4] They have attracted significant media attention to their cause. See http://phparivaca.org/?page_id=252 (listing more than 50 articles); Fernanda Santos, Border Patrol Scrutiny Stirs Anger in Arizona Town, N.Y. Times, June 27, 2014, at A13. And they have announced that their campaign is "absolutely deterring abuse, a primary goal," among other accomplishments. See http://phparivaca.org/?p=536.

Thus, contrary to Plaintiffs' contention, this is not a case in which "[t]he alternatives . . . are far from satisfactory." Linmark Assocs., Inc. v. Willingboro Tp., 431 U.S. 85, 93-94 (1977). Rather, the alternatives available here reach precisely the same "audience," and provide a good "opportunity" to "win the[] attention" of that audience, Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949) (plurality opinion) — without forcing Plaintiffs to convey "a message quite distinct from" the one that they would deliver if they could enter the interior of the checkpoint, Gilleo, 512 U.S. at 56-57. Indeed, those alternatives are in every meaningful way a "practical substitute" for the narrow channel that the Border Patrol's policy has foreclosed. Id. at 57.

[4] The government objects to Plaintiffs' attempt to introduce the contents of this report under Fed. R. Evid. 401-02 (relevance), 602 (lack of personal knowledge), 701-02 (improper expert testimony), 801-802 (hearsay), 1002 (best evidence rule), 1006 (absence of underlying data), and 403 (confusion of issues, unfair prejudice). In addition, to the extent that Plaintiffs rely on alleged complaints of individuals who are not Plaintiffs here, e.g., Compl. Ex. A; Ragan Decl., the government raises the same objections.

Petitioners nevertheless argue that no possible alternatives can substitute for the ability to access the heart of the checkpoint and to stand just 20 feet away from Border Patrol agents performing their duties. But it is well established that a time, place, or manner restriction will not be invalidated simply because it denies a speaker his or her preferred or even the most effective means of communication. Adderley, 385 U.S. at 47-48. It could hardly be otherwise. If an alternative channel of communication were required to be a perfect substitute for the restricted one, then no time, place, or manner restriction would ever be upheld. See Clark, 468 U.S. at 291-97 ("reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression"); Kovacs, 336 U.S. at 88 (plurality opinion) (upholding restriction on amplification though "more people may be more easily and cheaply reached by sound trucks"). No doubt protesters outside schools, funerals, political conventions, courthouses, and meetings of international leaders could often convey their messages most effectively unhampered by any time, place, or manner restrictions. Yet courts have deemed such restrictions constitutional, on the ground that ample communicative alternatives remain. See, e.g., Bl(a)ck Tea Soc'y v. City Of Boston, 378 F.3d 8, 14-15 (1st Cir. 2004). The same result is appropriate here.

B. Plaintiffs Have No First Amendment Right to Access Border Patrol Checkpoints in Order to Monitor Them

Plaintiffs' assertion of a First Amendment right to access Border Patrol checkpoints in order to monitor them is analyzed under a different test, but the result is the same. There is no "'per se right of access to government . . . activities simply because such access might lead to more thorough or better reporting.'" Flynt v. Rumsfeld, 355 F.3d 697, 703 (D.C. Cir. 2004) (citation omitted). While the Ninth Circuit has recognized a "qualified right of access for the press and public to observe government activities," that right attaches only where both (1) "'the place and the process have historically been open to the press and the general public'" and (2) "'public access plays a significant positive role in the functioning of the particular process in question.'" Leigh

v. Salazar, 677 F.3d 892, 898 (9th Cir. 2012) (citation omitted). Even then, the government may restrict access where there is "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Id. (citation omitted). Plaintiffs do not even address this test, and they cannot satisfy it.

1. Border Patrol checkpoints have not historically been open to the public.

Plaintiffs' monitoring claim fails at the outset, for Border Patrol checkpoints have not historically been open to the public, and Plaintiffs do not allege otherwise. This historical inquiry is important because "a tradition of accessibility implies the favorable judgment of experience." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980). Thus, the Supreme Court has found a qualified right of access to criminal trials where the "unbroken, uncontradicted history" indicated that free public access had been "'the rule in England since time immemorial.'" Id. at 567, 573 (citation omitted). But absent such a tradition of openness, the Ninth Circuit has rejected claims of access. See, e.g., Times Mirror Co. v. United States, 873 F.2d 1210, 1213 (1989) (no right of access to search warrants related to ongoing investigations). Here, Plaintiffs make no attempt to establish that Border Patrol checkpoints in general, or the Arivaca checkpoint in particular, have historically been open to the public. Their failure to pass this "test[] of experience" is fatal to their monitoring claims. Press-Enterprise Co. v. Super. Ct. of Cal., 478 U.S. 1, 9 (1986).

2. Greater public access would not significantly improve the functioning of Border Patrol checkpoints.

"[E]very governmental process arguably benefits from public scrutiny to some degree, in that openness leads to a better-informed citizenry and tends to deter government officials from abusing the powers of government." Times Mirror, 873 F.3d at 1213. But "claims of 'improved self-governance' and 'the promotion of fairness' cannot be used as an incantation to open [government] proceedings to the public." Id. Thus, in Times Mirror, while the Ninth Circuit found that public access to warrants

would "doubtless have some positive effect" — for example, by "increasing the flow of information to the public" and by "deterring . . . law enforcement officers from abusing the warrant process" — it considered the "incremental value in public access" to be "slight compared to the government's interest." Id. at 1218. So too here, for all the reasons already explained.

Moreover, as in Times Mirror, here "other mechanisms . . . are already in place to deter governmental abuses" at checkpoints. Id. For example, motorists who believe their constitutional rights have been violated may file a civil rights lawsuit. See id. And a criminal defendant may file a suppression motion challenging the constitutionality of a stop or search, see id., and the reasonableness of a checkpoint's location, Martinez-Fuerte, 428 U.S. at 559 & n.13, 562 n.15; Vasquez-Guerrero, 554 F.2d at 920. Thus, any benefit of greater public access would not significantly improve the functioning of checkpoints, and no right of access attaches here.

3. The access restriction here is narrowly tailored to serve essential government interests.

Even if Plaintiffs could establish a qualified right of access, the Border Patrol's policy restricting access to the Arivaca checkpoint is narrowly tailored to serve the government's "paramount" interest in border security, for reasons already explained. See supra Part I.A.3.b. Thus, the policy infringes no First Amendment access right.

II. PLAINTIFFS FAIL TO ESTABLISH STANDING, LET ALONE IRREPARABLE HARM

Plaintiffs' preliminary injunction motion should be denied for an independent reason: they fail to establish standing, let alone irreparable harm. Because Plaintiffs allege that they last visited the Arivaca checkpoint more than six months ago and allege no concrete plans to return, they fail to establish a likely threat of future harm to support prospective injunctive relief. Moreover, Plaintiffs' lengthy delay in seeking relief, coupled with their ability to still reach their desired audience and collect the information they seek, undermines their contention that any harm is irreparable.

A. Plaintiffs Lack Standing to Seek Prospective Injunctive Relief

To establish Article III standing, Plaintiffs must demonstrate the familiar elements of: (1) an injury in fact; (2) causation; and (3) redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Moreover, to obtain prospective injunctive relief, it is not enough to allege a past injury. City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983); O'Shea v. Littleton, 414 U.S. 488, 495-96 (1973) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."). Rather, Plaintiffs must demonstrate that they face a "real and immediate threat" of future harm, Lyons, 461 U.S. at 102, that is "certainly impending," Whitmore v. Arkansas, 495 U.S. 149, 158 (1990); Daimler Chrysler Corp. v. Cuno, 547 U.S. 332, 345 (2006). The necessary facts "must affirmatively appear in the record" and "cannot be inferred argumentatively from averments in the pleadings." FW/PBS Inc. v. Dallas, 493 U.S. 215, 231 (1990). A complaint that is nothing "more than labels and conclusions . . . will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

Under this standard, a plaintiff's mere "profession of an 'intent' to return to the places [she] had visited before . . . is simply not enough. Such 'some day' intentions — without any description of concrete plans, or indeed even any specification of when the some day will be — do not support a finding of the 'actual or imminent' injury that our cases require" for Article III standing. Lujan, 504 U.S. at 564. Here, Plaintiffs allege that they last visited the Arivaca checkpoint on July 11, 2014, Compl. ¶ 87, and they fail to offer even the sort of "some day" allegations of an intent to return that were found insufficient in Lujan. Thus, they fall well short of establishing the "real and immediate threat" of future injury necessary to obtain prospective injunctive relief, and therefore lack standing to seek it.

B. Plaintiffs Fail to Establish Irreparable Harm

Even if Plaintiffs could establish standing, they fail to demonstrate irreparable harm. To begin, a mere incantation of the First Amendment is not enough. While "a

party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim," Sammartano, 303 F.3d at 973 (citation omitted), here Plaintiffs have not alleged a colorable First Amendment claim, as already shown. See Hale, 806 F.2d at 918 ("Absent a First Amendment claim, the appellants have failed to establish that irreparable harm will flow from a failure to preliminarily enjoin defendants' actions."). In any event, "the assertion of First Amendment rights does not automatically require a finding of irreparable injury, thus entitling a plaintiff to a preliminary injunction if he shows a likelihood of success on the merits." Hohe v. Casey, 868 F.2d 69, 72-73 (3rd Cir. 1989) (citing Rushia v. Town of Ashburnham, 701 F.2d 7, 10 (1st Cir. 1983)); see also Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 301 (D.C. Cir. 2006) ("[I]n this court, as in several others, there is no per se rule that a violation of freedom of expression automatically constitutes irreparable harm."). "Constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction." Hohe, 868 F.2d at 73 (quoting Lyons, 461 U.S. at 112-13). Contrary to Plaintiffs' assertion of per se irreparable injury, the Ninth Circuit has rejected claims of irreparable injury in cases involving restrictions of free expression in nonpublic fora. See Preminger, 422 F.3d at 826 (restriction on voter registration at VA facility); Hale, 805 F.2d at 918 (restriction on protests on public road leading to nuclear testing site). Similarly, Plaintiffs here cannot establish irreparable injury because they remain able to express their views at an appropriate distance from the checkpoint, and have ample alternative channels of communication.

Moreover, Plaintiffs' lengthy delay in seeking preliminary relief undermines their contention that the Court should exercise its equitable powers to enter an injunction immediately, instead of proceeding in the normal course. Plaintiffs waited until two days before Christmas to move for preliminary relief — 10 months after they allege that their rights were first infringed, 8 months after the Border Patrol informed them in writing that it would not modify its policy, and 5 months after they allege they last visited the

checkpoint. Their "'long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.'" Miller v. Cal. Pac. Med. Ctr., 991 F.2d 536, 544 (9th Cir. 1993) (quoting Oakland Tribune Inc. v. Chronicle Pub. Co., 762 F.2d 1374, 1377 (9th Cir. 1985)). In the meantime, other PHP members have remained able to reach their intended audience while outside the cordons, and PHP's own reports show that they have been able to collect much of the data they seek. See supra at 21-22. Thus, Plaintiffs fail to establish irreparably injury warranting preliminary injunctive relief.

III. THE EQUITIES AND THE PUBLIC INTEREST TILT AGAINST PRELIMINARY INJUNCTIVE RELIEF

Plaintiffs also cannot rely on the mere allegation of a First Amendment violation to establish that the equities and the public interest favor entry of preliminary relief. "The public interest in maintaining a free exchange of ideas, though great, has in some cases been found to be overcome by a strong showing of other competing public interests, especially where the First Amendment activities of the public are only limited, rather than entirely eliminated." Sammartano, 303 F.3d at 974 (citing Hale, 806 F.2d at 918). Thus, the Ninth Circuit has found that the equities and the public interest weigh against preliminary relief in other cases involving restrictions on expression. For example, in Preminger, it held that the "inability to register residents [to vote] . . . until the outcome of a trial on the merits does not, on this record, outweigh the VA's legitimate interest in providing the best possible care for veterans . . . and in maintaining political neutrality." 422 F.3d at 826; see also Rosebrock v. Beiter, 788 F. Supp. 2d 1127, 1148-49 (C.D. Cal. 2011) (relying on Preminger in denying permanent injunction against restriction on hanging flags and banners on fence at VA facility). Similarly, in Hale, the Ninth Circuit held that the equities did not favor a preliminary injunction barring the government from restricting protests on a public road near a nuclear testing site. 806 F.2d at 918 (the "inability to demonstrate freely . . . is not a hardship" where plaintiffs could "demonstrate in a designated area adjacent to [the road] in full view of any motorist").

Here, whatever First Amendment interest Plaintiffs have in protesting and

monitoring the Arivaca checkpoint, that interest does not outweigh the vital border security and public safety interests served by Border Patrol's policy. See Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1138 (9th Cir. 2011) (preliminary injunction inappropriate unless public interests served by that relief "outweigh other public interests that cut in favor of not issuing the injunction") (emphasis in original). As noted above, the government's interest in securing the border is paramount, and the Supreme Court has specifically endorsed traffic checkpoints as a "necessary" part of the Border Patrol's enforcement strategy. At the same time, Plaintiffs' own allegations show that their activities have interfered with enforcement activity on several occasions, and that they remain able to protest and monitor immediately outside the checkpoint interior, where they have had great success in reaching their target audience. Under these circumstances, the equities and public interest tilt against preliminary relief.

CONCLUSION

Plaintiffs fail to meet their heavy burden to show that they are clearly entitled to a mandatory injunction that would upend the status quo. See Dahl, 7 F.3d at 1403. The Court should deny their motion for preliminary relief.

DATED this 30th day of January, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2015, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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