

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Leesa Jacobson and Peter Ragan,

Plaintiffs,

v.

United States Department of Homeland
Security, et al.,

Defendants.

No. CV-14-02485-TUC-BGM

ORDER

Currently pending before the Court is Defendant’s Motion to Dismiss, or in the Alternative, Motion for Summary Judgment (Doc. 61). Plaintiffs have filed their opposition (Doc. 72), including an assertion that relief pursuant to Rule 56(d), Federal Rules of Civil Procedure, is appropriate. Defendant filed its reply (Doc. 78) and Plaintiff replied in support of their Rule 56(d) declaration (Doc. 83). On September 22, 2016, oral argument was held before the Honorable Bruce G. Macdonald. Minute Entry 9/22/2016 (Doc. 92). The matter is ripe for review.

...
...
...

1 **I. FACTUAL BACKGROUND**

2 **A. *The Arivaca Border Patrol Checkpoint***

3
4 The eastbound approach to the Arivaca checkpoint is marked as follows: at about
5 0.4 mile out, “Border Patrol Checkpoint Ahead;” at 1,350 feet, “Speed Limit 35” mph,
6 reduced from 45 mph; at 900 feet, “Speed Limit 25” mph; at 600 feet, “All Vehicles Must
7 Stop Ahead;” at 320 feet, “No Passing Zone;” at 300 feet, “K-9 on Duty, Please Restrain
8 Your Pets;” at 250 feet, “Use Low Beams;” and at 180 feet, “Speed Limit 15” mph and a
9 digital speed board, with traffic cones and pylons along the center stripe beginning at 200
10 feet out, a series of three rumble strips beginning at 110 feet out, and a stop sign at the
11 primary inspection area, in the center of the checkpoint. *See* Pls.’ Mot. Prelim. Inj.,
12 McLain Decl., Exh. “2” (Doc. 29-3) (map from satellite image); Defs.’ Response to
13 Prelim. Inj., San Martin Decl. (Exh. “C”) (Docs. 38-4, 38-5, & 38-6) at ¶ 8 & Attach. 1–
14 18 (photographs). Plaintiffs dispute this statement, arguing with Defendants’ “overbroad
15 use of the term ‘Arivaca checkpoint.’” Pls.’ CSOF (Doc. 73) at ¶ 1. Plaintiffs further
16 argue that “characterizing the disputed area as a ‘checkpoint,’ or argument about the
17 significance of the disputed area more generally,” Defendants are asserting legal
18 argument.¹ Pls.’ CSOF (Doc. 73) at ¶ 1. Plaintiffs also assert that they are entitled “to
19 take discovery into Defendants’ operations along Arivaca Road[.]” *Id.* Plaintiffs do not
20 dispute, however, the foundation for the photographs and the accuracy of where the
21 signage is placed. Furthermore, Defendants’ statement relies, at least in part, on an image

22
23
24
25
26
27
28

¹ Black’s Law Dictionary defines a “checkpoint” as “[a] roadblock or barrier used to check people and vehicles passing through, as for authorization to enter, security breaches, law enforcement.” Black’s Law Dictionary (10th ed. 2014).

1 submitted by Plaintiffs in their Motion for Preliminary Injunction (Doc. 29) and
2 resubmitted in their Controverting Statement of Facts (Doc. 73) at ¶ 36 opposing to
3 Defendants' currently pending motion.²
4

5 At the primary inspection area, there are two plastic barricades along the center
6 stripe, in between which a Border Patrol agent stands. See Pls.' Mot. Prelim. Inj.,
7 McLain Decl., Exh. "2" (Doc. 29-3) (map from satellite image); Defs.' Response to
8 Prelim. Inj., San Martin Decl. (Exh. "C") (Docs. 38-4, 38-5, & 38-6) at ¶ 8 & Attach. 1–
9 18 (photographs). Plaintiffs dispute this fact, because they "have not been afforded the
10 opportunity to take discovery into Defendants' operations along Arivaca Road, and
11 accordingly have been prevented from providing a more detailed response[.]" Pls.'
12 CSOF (Doc. 73) at ¶ 2. The plastic barricades are clearly visible and identified in the
13 satellite image provided by Plaintiffs' expert and resubmitted in their Controverting
14 Statement of Facts (Doc. 73) at ¶ 36. Moreover, the plastic mat is also visible. See Pls.'
15 CSOF (Doc. 73) at ¶ 36. Furthermore, Plaintiffs do not dispute the foundation or
16 accuracy of the photographs submitted with Agent San Martin's declaration, which
17 clearly show the mat with an agent standing on it. Defs.' Response to Prelim. Inj., San
18 Martin Decl. (Exh. "C") (Doc. 38-5) at Attach. "12."

19
20
21
22
23 On the northern roadside are a portable lighting unit and often several Border
24

25 ² The Court "retain[s] discretion to take judicial notice of documents 'not subject to
26 reasonable dispute.'" *Trigueros v. Adams*, 658 F.3d 983, 987 (9th Cir. 2011) (quoting Fed. R.
27 Evid. 201(b)). As such, "judicial notice of a Google map and satellite image as a 'source[]
28 whose accuracy cannot reasonably be questioned,'" for the placement of rumble strips and
signage is appropriate. *McCormack v. Hiedeman*, 694 F.3d 1004, 1008 n. 1 (9th Cir. 2012)
(citations omitted) (alterations in original) (relying on Google maps and satellite image to
establish distance from Idaho to Utah).

1 Patrol vehicles. *See* Pls.’ Mot. Prelim. Inj., McLain Decl., Exh. “2” (Doc. 29-3) (map
2 from satellite image); Defs.’ Response to Prelim. Inj., San Martin Decl. (Exh. “C”)
3 (Docs. 38-4, 38-5, & 38-6) at ¶ 8 & Attach. 1–18 (photographs). On the southern
4 roadside is an 8-by-40 foot storage container used for administration, processing, and
5 detention, beside which are a canopy and a portable kennel. *See* Pls.’ Mot. Prelim. Inj.,
6 McLain Decl., Exh. “2” (Doc. 29-3) (map from satellite image); Defs.’ Response to
7 Prelim. Inj., San Martin Decl. (Exh. “C”) (Docs. 38-4, 38-5, & 38-6) at ¶ 8 & Attach. 1–
8 18 (photographs). As an initial matter Plaintiffs dispute “that there are ‘often’ ‘several’
9 Border Patrol vehicles parked on the northern side of the road.” Pls.’ CSOF (Doc. 73) at
10 ¶ 3. In support of this opposition, Plaintiffs cite to “Ragan Decl. ¶ 17.” Pls.’ CSOF
11 (Doc. 73) at ¶ 3. Peter Ragan’s declaration submitted in support of their opposition to the
12 currently pending motion does not contain a ¶ 17, and that paragraph in his declaration
13 submitted in support of Plaintiffs’ motion for preliminary injunction relates to Pima
14 County Sheriff’s Deputies moving “monitors” to the northern roadside and states “no
15 Border Patrol activities [were] being conducted on that side of the road.” Diagram “A”
16 of the same paragraph is another satellite image of the checkpoint. The satellite image
17 shows one vehicle parked on the northern shoulder next to the lights. *See* Pls.’ Mot.
18 Prelim. Inj., McLain Decl., Exh. “2” (Doc. 29-3) (map from satellite image); Pls.’ CSOF
19 (Doc. 73) at ¶ 36. Plaintiffs further “object that they cannot provide evidence regarding
20 the actual use of the equipment and structures along Arivaca Road, as they have not been
21 afforded the opportunity to take discovery into Defendants’ operations[.]”³ Pls.’ CSOF
22
23
24
25
26
27
28

³ Irrespective of the equipment and structures actual use, they are present within the

1 (Doc. 73) at ¶ 4.

2 East of the primary inspection area on the southern roadside is an approximately
3 100-foot-long secondary inspection area, at the eastern end of which is a Border Patrol
4 sedan used to give chase. *See* Pls.’ Mot. Prelim. Inj., McLain Decl., Exh. “2” (Doc. 29-3)
5 (map from satellite image); Defs.’ Response to Prelim. Inj., San Martin Decl. (Exh. “C”)
6 (Docs. 38-4, 38-5, & 38-6) at ¶ 8 & Attach. 1–18 (photographs); Pls.’ Mot. Prelim. Inj.,
7 Raglan Decl. (Doc. 29-2) at ¶ 15, Diagram “A.” As motorists exit the checkpoint, traffic
8 pylons extend approximately 160 feet east of its center. *Id.* Plaintiffs object to
9 Defendants’ “legal argument characterizing a particular portion of Arivaca Road as a
10 ‘secondary inspection area[.]’” Pls.’ CSOF (Doc. 73) at ¶ 5. This objection is without
11 merit, however, as “secondary inspection area” is a well-established term of art. *See*
12 *United States v. Martinez-Fuerte*, 428 U.S. 543, 546 & 559, 96 S.Ct. 3074, 3078 & 3083,
13 49 L.Ed.2d 1116 (1976) (describing operation of Border Patrol checkpoint located away
14 from the international border including agents directing vehicles “to a secondary
15 inspection area” and noting the “regularized manner in which established checkpoints are
16 operated”). Plaintiffs “further object that they have not been afforded the opportunity to
17 take discovery into Defendants’ operations along Arivaca Road, and accordingly have
18 been prevented from providing a more detailed response. Pls.’ CSOF (Doc. 73) at ¶ 5.
19 Again, the satellite picture is one submitted by Plaintiffs and the sedan visible, as well as
20 the area referred to as “secondary” (although it is not labeled as such on the satellite
21 image). *See* Pls.’ Mot. Prelim. Inj., McLain Decl., Exh. “2” (Doc. 29-3) (map from
22 footprint of the Arivaca checkpoint.
23
24
25
26
27
28

1 satellite image); Pls.’ Mot. Prelim. Inj., Raglan Decl. (Doc. 29-2) at ¶ 15, Diagram “A.”
2 As such, the Court takes judicial notice of this fact.

3
4 Also on the southern roadside are two portable lighting units, restroom, a sink, a
5 water tank, and a variety of other equipment. *See* Pls.’ Mot. Prelim. Inj., McLain Decl.,
6 Exh. “2” (Doc. 29-3) (map from satellite image); Defs.’ Response to Prelim. Inj., San
7 Martin Decl. (Exh. “C”) (Docs. 38-4, 38-5, & 38-6) at ¶ 8 & Attach. 1–18 (photographs).
8 Again, Plaintiffs object “that they cannot provide evidence regarding the actual use of the
9 equipment and structures along Arivaca Road, as they have not been afforded the
10 opportunity to take discovery into Defendants’ operations along Arivaca Road.” Pls.’
11 CSOF (Doc. 73) at ¶ 6. This contention is similarly without merit. The structures are
12 clearly visible and labeled in McLain’s satellite image. *See* Pls.’ Mot. Prelim. Inj.,
13 McLain Decl., Exh. “2” (Doc. 29-3) (map from satellite image). What their use is
14 (restrooms and lighting) is irrelevant to the fact that they are there. Moreover, Plaintiffs
15 do not dispute the existence of the structures, they simply complain that their use is
16 unknown.

17
18 To encourage westbound motorists to slow to the posted speed limit of 15 mph,
19 and to prevent them from driving off the road to avoid the rumble strips, agents often
20 park Border Patrol vehicles on the northern roadside beside the primary inspection area.
21 *See* Pls.’ Mot. Prelim. Inj., McLain Decl., Exh. “2” (Doc. 29-3) (map from satellite
22 image); Defs.’ Response to Prelim. Inj., San Martin Decl. (Exh. “C”) (Docs. 38-4, 38-5,
23 & 38-6) at ¶ 8–9 & Attach. 1–18 (photographs); Defs.’ Response to Prelim. Inj., Spencer
24 Decl. (Exh. “D”) (Doc. 38-7) at ¶ 6 & Attach. 6–7 (photographs); Defs.’ Response to
25
26
27
28

1 Prelim. Inj., Huey Decl. (Exh. “E”) (Doc. 38-8) at ¶4 & Attach. 1–2 (photographs).
2 “Plaintiffs dispute that ‘agents often park Border Patrol vehicles on the northern roadside
3 beside the primary inspection area.’” Pls.’ CSOF (Doc. 73) at ¶ 7 (citing Pls.’ Mot.
4 Prelim. Inj., McLain Decl., Exh. “2” (Doc. 29-3) (map from satellite image); Pls.’ Mot.
5 Prelim. Inj., Raglan Decl. (Doc. 29-2) at ¶ 15, Diagram “A”). There is a single Border
6 Patrol vehicle parked on the northern roadside in the satellite images cited by Plaintiffs.
7 Plaintiffs’ objection misses the point that Defendants use the northern edge of the road
8 way across from where the checkpoint buildings and other equipment are located on the
9 southern edge.
10
11

12
13 Plaintiffs further object to San Martin’s declaration because it contains hearsay
14 and “presents lay opinions beyond the scope of Federal Rule of Evidence 701, and Mr.
15 San Martin has not been qualified as an expert under Federal Rule of Evidence 702.”
16 Pls.’ CSOF (Doc. 73) at ¶ 7. “Plaintiffs further object to Paragraphs 8 and 9 of the San
17 Martin Declaration because to the extent they purport to present information from any
18 documents, they are not the best evidence under Federal Rule of Evidence 1002.” *Id.*
19 Paragraph 8 of San Martin’s declaration provides “[t]he signage around checkpoints is
20 designed in accordance with the Border Patrol’s traffic control plan, adopted after a pair
21 of fatal accidents at a checkpoint in upstate New York in 2004.” Defs.’ Response to
22 Prelim. Inj., San Martin Decl. (Exh. “C”) (Doc. 38-4) at ¶ 8. Paragraph 8 goes onto
23 address the attached pictures of the Arivaca checkpoint, for which Agent San Martin is
24 providing foundation. As the Patrol Agent in Charge of the United States Border Patrol’s
25
26
27
28

1 Tucson Station, Agent San Martin is qualified as an expert.⁴ See Defs.’ Response to
2 Prelim. Inj., San Martin Decl. (Exh. “C”) (Doc. 38-4) at ¶ 1. Moreover, as mentioned
3 previously, the Supreme Court of the United States has recognized that “checkpoint
4 operations both appear to and actually involve less discretionary enforcement activity.”
5 *United States v. Martinez-Fuerte*, 428 U.S. 543, 559, 96 S.Ct. 3074, 3083, 49 L.Ed.2d
6 1116 (1976). “The location of a fixed checkpoint is not chosen by officers in the field,
7 but by officials responsible for making overall decisions as to the most effective
8 allocation of limited enforcement resources.” *Id.* at 559, 96 S.Ct. at 3083; *see also*
9 United States Government Accountability Office Report to Congressional Requesters,
10 Border Patrol Checkpoints Contribute to Border Patrol’s Mission, but More Consistent
11 Data Collection and Performance Measurement Could Improve Effectiveness, No. 09-
12 824 (August 2009) (“GAO Report”) at 9–10 (describing tactical checkpoints, including a
13 photograph of the Arivaca checkpoint). Additionally, the information that Plaintiffs
14 object to as hearsay is not relevant to the accuracy of Defendants’ SOF ¶ 7.

15
16
17
18
19 Motorists sometimes fail to yield at checkpoints or will flee when referred to the
20 secondary inspection area. Defs.’ Response to Prelim. Inj., San Martin Decl. (Exh. “C”)
21 (Doc. 38-4) at ¶ 10–11. The pursuit vehicle located at the eastern end of the secondary
22 inspection area at the Arivaca checkpoint may swerve, fish tail, and kick up rocks when
23 leaving the unpaved, dirt roadside at the start of a high-speed chase. Defs.’ Response to
24 Prelim. Inj., San Martin Decl. (Exh. “C”) (Doc. 38-4) at ¶ 11. Plaintiffs dispute these
25
26

27
28 ⁴ There can be no serious argument against Agent San Martin’s “specialized knowledge will help the trier of fact to understand the evidence.” Fed. R. Evid. 702(a).

1 facts asserting that only a small percentage of vehicles passing through the checkpoint
2 ever get referred to secondary. Pls.’ CSOF (Doc. 73) at ¶ 8; *see also* Pls.’ Mot. Prelim.
3 Inj., Raglan Decl. (Doc. 29-2) at ¶¶ 7, 9. While this is probably true, it is irrelevant
4 whether it happens or not at the Arivaca checkpoint, because the checkpoints are
5 consistently designed to be “visible evidence, reassuring to law-abiding motorists, that
6 the stops are duly authorized and believed to serve the public interest.” *Martinez-Fuerte*,
7 428 U.S. at 559, 96 S.Ct. at 3083. Plaintiffs further argue that “[l]ikewise, none of the
8 material cited by Defendants establishes that the pursuit vehicle located at or near the
9 Arivaca Road checkpoint has ever ‘swerve[d], fish tail[ed], [or] kick[ed] up rocks when
10 leaving the unpaved, dirt roadside at the start of a high-speed chase.’” Pls.’ CSOF (Doc.
11 73) at ¶ 8. Again, Plaintiffs seek 56(d) relief regarding this assertion. Plaintiffs miss the
12 point, however, that it is not whether the chase vehicle has ever had to chase, but rather
13 that is part of the layout of the checkpoint and ultimately goes to the reasonableness of
14 Defendants’ restriction.

15
16
17
18
19 Defendants assert that in the past 5 years, there have been at least 28 significant
20 safety incidents at the three checkpoints within Tucson Station. Nine of those incidents
21 involved either a failure to yield at the primary inspection area or a flight from the
22 secondary inspection area. Five others involved driving under the influence or reckless
23 driving, two of which resulted in accidents. In March 2014, a drunk motorist traveling
24 westbound through the Arivaca checkpoint drove off the roadway and crashed into
25 license plate readers located on the northern roadside near the primary inspection area.
26
27 Defs.’ Response to Prelim. Inj., San Martin Decl. (Exh. “C”) (Doc. 38-4) at ¶ 10.
28

1 Moreover, “[i]t is a standard weapon-retention technique for law enforcement officers to
2 keep other persons in their line of sight when in close proximity to avoid being snuck up
3 on from behind and assaulted or disarmed.” Defs.’ SOF (Doc. 59-2) at ¶ 10; *see also*
4 Defs.’ Response to Prelim. Inj., San Martin Decl. (Exh. “C”) (Doc. 38-4) at ¶ 20.
5 Additionally, “[c]anines used in the primary and secondary inspection areas of Border
6 Patrol checkpoints can be distracted by unfamiliar surroundings and people, and have
7 bitten handlers, agents, and civilians.” Defs.’ SOF (Doc. 59-2) at ¶ 11; *see also* Defs.’
8 Response to Prelim. Inj., San Martin Decl. (Exh. “C”) (Doc. 38-4) at ¶ 11. Plaintiffs
9 object to these statements for a variety of reasons, including a need for 56(d) relief.
10 Additionally, they object to San Martin’s qualifications as an expert and to the relevance
11 of the canine facts. As noted previously, Plaintiffs’ argument regarding Agent San
12 Martin’s lack of qualification as an expert are meritless. Furthermore, these facts are not
13 relevant to the footprint of the checkpoint, but illustrate Border Patrol’s concern for the
14 safety of their officers, canines, and the public.

15
16
17
18
19 ***B. December 8, 2013 Event***

20 On December 8, 2013, the organization People Helping People staged a rally at
21 the Arivaca checkpoint with more than 100 participants, who carried signs and banners
22 and gave speeches. Defs.’ Response to Prelim. Inj., San Martin Decl. (Exh. “C”) (Doc.
23 38-4) at ¶ 12; Defs.’ Response to Prelim. Inj., Spencer Decl. (Exh. “D”) (Doc. 38-7) at ¶
24 3; Press Release, People Helping People (“PHP”), Community Members Shut Down
25 Border Patrol Checkpoint (Dec. 9, 2013), *available at* <http://phparivaca.org/?p=262> (last
26 visited September 15, 2016). Plaintiffs “disagree with Defendants’ overbroad use of the
27
28

1 term ‘Arivaca checkpoint’ to include anything other than actual structures and areas used
2 for law enforcement activities, such as the small temporary shelter on the south side of
3 the road, from which agents conduct checkpoint inspections of eastbound traffic, and the
4 actual area used to perform secondary inspections of vehicles, also on the south side of
5 the road, running east from and immediately adjacent to the shelter.” Pls.’ CSOF (Doc.
6 73 at ¶ 12 (citing Compl. (Doc. 1); Pls.’ Mot. Prelim. Inj., Raglan Decl. (Doc. 29-2) at ¶
7 9. Plaintiffs seek 56(d) relief. During the rally, protesters entered the roadway within
8 and around the checkpoint. Defs.’ Response to Prelim. Inj., Spencer Decl. (Exh. “D”)
9 (Doc. 38-7) at ¶ 4 & Attach. 1–5 (photographs). Plaintiffs again “disagree with
10 Defendants’ overbroad use of the term ‘Arivaca checkpoint[.]’”⁵ Again, Plaintiffs seek
11 56(d) relief. Due to safety concerns, the Border Patrol suspended checkpoint operations
12 from approximately 12:30 p.m. to 4:50 p.m., during which time traffic was permitted to
13 pass uninspected. *See* Defs.’ Response to Prelim. Inj., San Martin Decl. (Exh. “C”) (Doc.
14 38-4) at ¶ 12; Defs.’ Response to Prelim. Inj., Spencer Decl. (Exh. “D”) (Doc. 38-7) at ¶
15 3–4 & Attach. “4” (photograph); Press Release, People Helping People (“PHP”),
16 Community Members Shut Down Border Patrol Checkpoint (Dec. 9, 2013), *available at*
17 <http://phparivaca.org/?p=262> (last visited September 15, 2016). Plaintiffs again “disagree
18 with Defendants’ overbroad use of the term ‘Arivaca checkpoint’” and seek 56(d) relief.
19
20
21
22
23

24 **C. February 26, 2014 Event**

25 On February 26, 2014, Plaintiff Ragan, five (5) other “monitors,” and
26
27

28 ⁵ The Court notes that Defendant referred generically to the “checkpoint” in this paragraph.

1 approximately two dozen protesters visited the checkpoint. Defs.’ Response to Prelim.
2 Inj., San Martin Decl. (Exh. “C”) (Doc. 38-4) at ¶ 13; Defs.’ Response to Prelim. Inj.,
3 Spencer Decl. (Exh. “D”) (Doc. 38-7) at ¶ 5; Pls.’ Mot. Prelim. Inj., Raglan Decl. (Doc.
4 29-2) at ¶ 13. The group approached the Arivaca checkpoint from the east and stopped
5 approximately 100 feet from the center of the checkpoint, past the checkpoint’s
6 easternmost traffic pylon. When asked by Border Patrol agents to move back to a spot
7 about 150 feet east of the center of the checkpoint, the group repeatedly refused. Defs.’
8 Response to Prelim. Inj., San Martin Decl. (Exh. “C”) (Doc. 38-4) at ¶ 13; Defs.’
9 Response to Prelim. Inj., Spencer Decl. (Exh. “D”) (Doc. 38-7) at ¶ 5–6 & Attach. 6–7
10 (photographs); Pls.’ Mot. Prelim. Inj., Raglan Decl. (Doc. 29-2) at ¶¶ 13–19. Plaintiffs
11 continue to object to Defendants’ use of “Arivaca checkpoint” to refer to anything more
12 than the primary and secondary inspection areas on the south side of the road and seek
13 56(d) relief.

14
15
16
17
18 ***D. March 1, 2014 Event***

19 On March 1, 2014, a group of at least five (5) individuals visited the checkpoint.
20 At that time rope barriers had been strung across the northern and southern roadsides
21 approximately 150 feet east of the center of the checkpoint. Defs.’ Response to Prelim.
22 Inj., San Martin Decl. (Exh. “C”) (Doc. 38-4) at ¶ 13–14; Defs.’ Response to Prelim. Inj.,
23 Huey Decl. (Exh. “E”) (Doc. 38-8) at ¶ 3. The group approached the checkpoint form the
24 east, continued past the rope barriers, and stopped approximately twenty (20) to thirty
25 (30) feet west of the barriers. When asked by Border Patrol agents to move back behind
26 the rope barriers, the group repeatedly refused. *See* Defs.’ Response to Prelim. Inj., Huey
27
28

1 Decl. (Exh. “E”) (Doc. 38-8) at ¶ 3–4 & Attach 1–2 (photographs). Plaintiffs assert that
2 Border Patrol did not put the incident tape up until after they arrived. Pls.’ CSOF (Doc.
3 73) at ¶ 17. During this incident, agents parked Border Patrol vehicles on the northern
4 and southern roadsides, just inside the barriers, as directed by agent San Martin. *See*
5 Defs.’ Response to Prelim. Inj., San Martin Decl. (Exh. “C”) (Doc. 38-4) at ¶ 14. On
6 March 7, 2014 Agent San Martin stated in an e-mail that, during the incident, “[t]he
7 vehicles were parked there to provide an additional barrier because some monitors
8 refused to move. If the monitors had moved when agents asked them to the vehicles
9 would have never been placed there.” *See* Compl. (Doc. 1), San Martin E-mail to PHP
10 3/7/2014 (Exh. “C”) at 2. In the same e-mail, Agent San Martin stated that “agents do
11 not have the desire or intention to challenge or stop PHP from monitoring as long as it’s
12 done from outside the marked perimeter of the checkpoint.” *See id.* at 3. On March 11,
13 2014, during a community meeting, PHP members complained that Border Patrol
14 vehicles parked beside the cordons interfered with their view of the checkpoint. In
15 response, Agent San Martin stated that, as a show of good faith, if the PHP members
16 would agree to respect the cordons, he would direct the agents not to park vehicles beside
17 the cordons (unless that space was needed for parking or other operational needs). The
18 next day, on March 12, 2014, he relaxed his previous order accordingly. Defs.’ Response
19 to Prelim. Inj., San Martin Decl. (Exh. “C”) (Doc. 38-4) at ¶ 14–15, 21. Plaintiffs
20 continuing objection to these statements (aside from the direct dispute regarding when the
21 tape was placed) is Defendants’ use of the term “Arivaca Checkpoint.” Plaintiffs
22 continue to seek 56(d) relief. Regarding the disputed issue of the tape, whether there was
23
24
25
26
27
28

1 tape there or not, there was an incident between the parties.

2 ***E. Additional Activities***

3
4 During a twenty-four (24) hour rally at the checkpoint on December 7, 2014, after
5 PHP members complained that fumes, light, and noise from a generator that powered
6 portable light units were interfering with their sleep, Border Patrol agents moved the
7 generator to the opposite side of the road, away from the PHP members' tents. Defs.'
8 Response to Prelim. Inj., San Martin Decl. (Exh. "C") (Doc. 38-4) at ¶ 21. From the
9 western cordons, PHP members have handed out "know your rights" fliers to motorists
10 entering the checkpoint to advise them of their legal rights. From the eastern cordons,
11 they have flagged down motorists leaving the checkpoint to discuss their views. *Id.* at ¶
12 22. Other citizen groups have erected large signs on private land adjacent to the
13 checkpoint reading "Keep Our BP Checkpoint Open" and "Citizens of Arivaca, Moyza,
14 and Amado Support Our BP Checkpoint." *Id.* at ¶ 8 & Attach. 19–21. Primarily
15 Plaintiffs object to the use of the term "Arivaca Checkpoint" and seek 56(d) relief.
16 Regarding the signs on private land, Plaintiffs object based on relevancy. The signs on
17 private lands are only relevant insofar as Plaintiffs have asserted that others are
18 exercising their First Amendment rights within the Border Patrol checkpoint area (so they
19 should be able to as well). The point being, these signs are on private land, so Border
20 Patrol has no control over their placement.
21
22
23
24
25
26

27 **II. DEFENDANTS' MOTION TO DISMISS**

28 Defendants seek dismissal of Plaintiffs' Complaint (Doc. 1) pursuant to Rule

1 12(b)(6), Federal Rules of Civil Procedure. In making the argument for dismissal,
2 Defendants rely on the Court's September 14, 2015 Order (Doc. 54) denying Plaintiff's
3 motion for preliminary injunction.
4

5 ***A. Standard of Review***

6 A complaint is to contain a "short and plain statement of the claim showing that
7 the pleader is entitled to relief[.]" Rule 8(a), Fed. R. Civ. P. While Rule 8 does not
8 demand detailed factual allegations, "it demands more than an unadorned, the-defendant-
9 unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct.
10 1937, 1949, 173 L.Ed.2d 868 (2009). "Threadbare recitals of the elements of a cause of
11 action, supported by mere conclusory statements, do not suffice." *Id.*; *Pareto v. Fed.*
12 *Deposit Ins. Corp.*, 139 F.3d 696, 699 (9th Cir. 1998) ("conclusory allegations of law and
13 unwarranted inferences are not sufficient to defeat a motion to dismiss.").
14
15

16
17 Dismissal is appropriate where a plaintiff has failed to "state a claim upon which
18 relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a
19 complaint must contain sufficient factual matter, accepted as true, to 'state a claim to
20 relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949 (quoting
21 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974, 167 L.Ed.2d
22 929 (2007)). Further, "[a] claim has facial plausibility when the plaintiff pleads factual
23 content that allows the court to draw the reasonable inference that the defendant is liable
24 for the misconduct alleged. The plausibility standard is not akin to a 'probability
25 requirement,' but it asks for more than a sheer possibility that a defendant has acted
26 unlawfully." *Id.* (citations omitted).
27
28

1 “When ruling on a motion to dismiss, [the Court must] accept all factual
2 allegations in the complaint as true and construe the pleadings in the light most favorable
3 to the nonmoving party.” *Association for Los Angeles Deputy Sheriffs v. County of Los*
4 *Angeles*, 648 F.3d 986, 991 (9th Cir. 2011) (quoting *Knievel v. ESPN*, 393 F.3d 1068,
5 1072 (9th Cir. 2005)). “The court draws all reasonable inferences in favor of the
6 plaintiff.” *Id.* (citing *Newcal Industries, Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1043
7 n.2 (9th Cir. 2008)). This Court is not required, however, to accept conclusory
8 statements as a factual basis. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127
9 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007); *Mann v. City of Tucson*, 782 F.2d 790, 793
10 (9th Cir. 1986) (“Although we must, in general, accept the facts alleged in the complaint
11 as true, wholly vague and conclusory allegations are not sufficient to withstand a motion
12 to dismiss.”); *see also Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir.
13 2007) (“Conclusory, speculative testimony in affidavits and moving papers is insufficient
14 to raise genuine issues of fact and defeat summary judgment”).

15
16
17
18
19 ***B. Plaintiffs’ Complaint***

20 In Count One, Plaintiffs allege that the Government’s policy and practices
21 regarding “public access to public areas adjacent to interior vehicle checkpoints . . .
22 continues to be an impermissible prior restraint on speech and . . . chill[s], deter[s], and
23 infringe[s] upon Plaintiffs’ First Amendment rights.” Compl. (Doc. 1) at 20. Plaintiffs
24 further allege that the Government’s “definition of the ‘enforcement zone’ and
25 inconsistent regulation of Plaintiffs’ proximity to Defendants’ public activities in and
26 near the checkpoints are both broader than needed to further Defendants’ objectives.” *Id.*

1 Count Two alleges that “Defendants have violated Plaintiffs’ First Amendment
2 rights by improperly infringing upon and restricting Plaintiffs[’] First Amendment rights
3 and by harassing, intimidating, retaliating against and threatening Plaintiffs with arrest
4 for engaging in constitutionally protected speech” and that this threat is ongoing. *Id.* at
5 21. Additionally, Plaintiffs have provided an extensive factual background, which if true,
6 is sufficient to sustain a plausible claim on its face. *See Iqbal*, 556 U.S. at 678, 129 S.Ct.
7 at 1949. Plaintiffs seek to engage in conduct including protesting the checkpoint, as well
8 as monitoring the actions of Border Patrol agents. *See Compl.* (Doc. 1). Assuming,
9 without deciding that monitoring is protected conduct, “the First Amendment protects a
10 significant amount of verbal criticism and challenge directed at police officers.” *City of*
11 *Houston, Tex. v. Hill*, 482 U.S. 451, 461, 107 S.Ct. 2502, 2509, 96 L.Ed.2d 398 (1987).
12
13
14

15 In relying on the Court’s previous denial of Plaintiff’s motion for preliminary
16 injunction, Defendants rely on the legal conclusions therein, many of which were
17 presumed, but not decided, and only for the purpose of determining whether Plaintiffs
18 were entitled to immediate injunctive relief. For purposes of a motion to dismiss,
19 however, Plaintiffs have sufficiently stated a claim for an alleged violation of their First
20 Amendment rights.
21
22
23

24 **III. MOTION FOR SUMMARY JUDGMENT**

25 **A. *Rule 56(d) Declaration***

26 Rule 56(d), Federal Rules of Civil Procedure, provides an avenue for relief to a
27 party opposing a motion for summary judgment that has not yet had the opportunity to
28

1 obtain facts necessary to its opposition of the motion. Fed. R. Civ. P. 56(d). Rule 56(d)
2 provides:

3
4 If a nonmovant shows by affidavit or declaration that, for specified reasons,
5 it cannot present facts essential to justify its opposition, the court may:

6 (1) defer considering the motion or deny it;

7 (2) allow time to obtain affidavits or declarations or to take discovery;
8 or

9 (3) issue any other appropriate order.

10 Fed. R. Civ. P. 56(d). “The requesting party must show: (1) it has set forth in affidavit
11 form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist;
12 and (3) the sought-after facts are essential to oppose summary judgment.” *Family and*
13 *Home Finance Center, Inc. v. Federal Home Loan Mortgage, Corp.*, 525 F.3d 822, 827
14 (9th Cir. 2008) (citations omitted) (delineating requirements for relief under Rule 56(f),
15 current Rule 56(d)’s predecessor). The Ninth Circuit Court of Appeals has observed that
16 “[w]here . . . a summary judgment motion is filed so early in the litigation, before a party
17 has had any realistic opportunity to pursue discovery relating to its theory of the case,
18 district courts should grant any Rule 56(f) motion fairly freely.” *Burlington Northern*
19 *Santa Fe R. Co. v. Assiniboine and Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767,
20 773 (9th Cir. 2003) (citations omitted). “The burden is on the party seeking additional
21 discovery[, however,] to proffer sufficient facts to show that the evidence sought exists,
22 and that it would prevent summary judgment.” *Employers Teamsters Local nos. 175 and*
23 *505 Pension Trust Fund v. Clorox*, 353 F.3d 1125, 1129–30 (9th Cir. 2004) (citations
24 omitted).

1 Here, the facts sought by Plaintiffs are not related to the physical footprint of the
2 checkpoint, but rather to the policies surrounding the “Enforcement Zone.” See Taub
3 Decl. (Doc. 69-2). Plaintiffs’ argument is rooted on the *legal* finding that the checkpoint
4 is a public forum—something the Court assumed, without deciding, for purposes of the
5 preliminary injunction motion. See Order 9/14/2015 (Doc. 54). At oral argument the
6 Court inquired into what information Plaintiffs needed to oppose summary judgment if
7 the checkpoint is a non-public forum. In response, counsel directed the Court to
8 paragraphs five (5), six (6), and seven (7) of his declaration. Paragraph five seeks
9 additional discovery “to determine who has been permitted to enter the ‘enforcement
10 zone,’ their views regarding PHP and the Arivaca Road checkpoint, how frequently they
11 have been permitted to enter the zone, and for what purposes. Taub Decl. (Doc. 72-1) at
12 ¶ 5. Paragraph six seeks discovery relevant to determining “whether the ‘enforcement
13 zone’ is necessary to serve a compelling or significant government interest.” *Id.* at ¶ 6.
14 Paragraph seven seeks discovery to “determine the extent to which the ‘enforcement
15 zone’ is narrowly tailored to serving any government interest.” *Id.* at ¶ 7. This includes
16 “written regulations, policies, and other documents pertinent to the restrictions on
17 pedestrians in or near interior checkpoints and pertinent to the size of the area needed to
18 carry out border patrol duties, vehicle parking, equipment storage, temporary building
19 situation, cordons, or other physical features of the interior checkpoints.” *Id.* The
20 information sought, however, would not assist Plaintiffs in opposing summary judgment
21 regarding whether the checkpoint is a non-public forum. As such, and for the reasons
22 discussed, *infra*, Plaintiffs’ motion for Rule 56(d) relief is denied.
23
24
25
26
27
28

1 **B. Standard of Review**

2 Summary judgment is appropriate when, viewing the facts in the light most
3 favorable to the nonmoving party, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255,
4 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986), “there is no genuine issue as to any
5 material fact and [] the moving party is entitled to a judgment as a matter of law.” Fed.
6 R. Civ. P. 56(c). A fact is “material” if it “might affect the outcome of the suit under the
7 governing law,” and a dispute is “genuine” if “the evidence is such that a reasonable jury
8 could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248, 106 S.Ct. at
9 2510. Thus, factual disputes that have no bearing on the outcome of a suit are irrelevant
10 to the consideration of a motion for summary judgment. *Id.* In order to withstand a
11 motion for summary judgment, the nonmoving party must show “specific facts showing
12 that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106
13 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Moreover, a “mere scintilla of evidence” does
14 not preclude the entry of summary judgment. *Anderson*, 477 U.S. at 252, 106 S.Ct. at
15 2512. The United States Supreme Court also recognized that “[w]hen opposing parties
16 tell two different stories, one of which is blatantly contradicted by the record, so that no
17 reasonable jury could believe it, a court should not adopt that version of the facts for
18 purposes of ruling on a motion for summary judgment.” *Scott v. Harris*, 550 U.S. 372,
19 380, 127 S.Ct. 1769, 1776, 167 L.Ed.2d 686 (2007). The determination of what type of
20 forum an area represents for First Amendment purposes is a legal question which may be
21 resolved on summary judgment. *See ACLU of Nevada v. City of Las Vegas*, 333 F.3d
22 1092 (9th Cir. 2003) (reviewing district court’s determination that the Fremont Street
23
24
25
26
27
28

1 Experience was a nonpublic forum and granting summary judgment in favor of
2 Defendants).

3
4 **C. Analysis**

5 **1. First Amendment—In General**

6 In its First Amendment jurisprudence, the Supreme Court of the United States has
7 recognized “three types of fora: the traditional public forum, the public forum created by
8 government designation, and the nonpublic forum.” *Cornelius v. NAACP Legal Defense*
9 *and Educational Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 3449, 87 L.Ed.2d 567
10 (1985). “Traditional public fora are those places which ‘by long tradition or by
11 government fiat have been devoted to assembly and debate.’” *Id.* (quoting *Perry*
12 *Education Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74
13 L.Ed.2d 794 (1983)). “Public streets and parks fall into this category.” *Cornelius*, 473
14 U.S. at 802, 105 S.Ct. at 3449. “The government can exclude a speaker from a traditional
15 public forum ‘only when the exclusion is necessary to serve a compelling state interest
16 and the exclusion is narrowly drawn to achieve that interest.’” *Arkansas Educ. Television*
17 *Comm’n v. Forbes*, 523 U.S. 666, 677, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998) (quoting
18 *Cornelius*, 473 U.S. at 800, 105 S.Ct. 3439)). This “strict scrutiny” analysis applies to
19 content based regulations on speech. *See Madsen v. Women’s Health Ctr., Inc.*, 512 U.S.
20 753, 791, 114 S.Ct. 2516, 2537, 129 L.Ed.2d 593 (1994) (Scalia, J. concurring).

21
22
23
24
25
26 “[E]ven in a public forum[,] [however,] the government may impose reasonable
27 restrictions on the time, place, or manner of protected speech, provided the restrictions
28 ‘are justified without reference to the content of the regulated speech, that they are

1 narrowly tailored to serve a significant governmental interest, and that they leave open
2 ample alternative channels for communication of the information.” *Ward v. Rock*
3 *Against Racism*, 491 U.S. 781, 791, 109, S.Ct. 2746, 105 L.Ed.2d 661 (1989) (quoting
4 *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069,
5 82 L.Ed.2d 221 (1984)); *see also United States v. Griefen*, 200 F.3d 1256, 1260 (9th Cir.
6 2000). Such time, manner, place regulations represent an intermediate level of scrutiny.
7
8 *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642, 114 S.Ct. 2445, 2459,
9 129 L.Ed.2d 497 (1994). Furthermore, “the government always retains authority to close
10 a public forum, by selling the property, changing its physical character, or changing its
11 principal use.” *Internat’l Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672,
12 699, 112 S.Ct. 2711, 2718, 120 L.Ed.2d 541 (1992) (Kennedy, J., concurring).

13
14
15 Designated public fora “may be created by government designation of a place or
16 channel of communication for use by the public at large for assembly and speech, for use
17 by certain speakers, or for the discussion of certain subjects.” *Cornelius*, 473 U.S. at 802,
18 105 S.Ct. at 3449. “The government does not create a [designated] public forum by
19 inaction or by permitting limited discourse, but only by intentionally opening a
20 nontraditional forum for public discourse.” *Id.* “If the government excludes a speaker
21 who falls within the class to which a designated public forum is made generally available,
22 its action is subject to strict scrutiny.” *Arkansas Educ. Television Comm’n*, 523 U.S. at
23 677, 118 S.Ct. at 1641 (citations omitted).

24
25
26
27 The First Amendment, however “does not guarantee access to property simply
28 because it is owned or controlled by the government.” *Cornelius*, 473 U.S. at 803, 105

1 S.Ct. at 3449 (quoting *United States Postal Service v. Council of Greenburgh Civic*
2 *Assns.*, 453 U.S. 114, 129, 101 S.Ct. 2676, 2685, 69 L.Ed.2d 517 (1981)). “Nothing in
3 the Constitution requires the Government freely to grant access to all who wish to
4 exercise their right to free speech on every type of Government property without regard
5 to the nature of the property or to the disruption that might be caused by the speaker’s
6 activities.” *Cornelius*, 473 U.S. 799–800, 105 S.Ct. at 3447. The Government, “no less
7 than a private owner of property, has power to preserve the property under its control for
8 the use to which it is lawfully dedicated.” *Greer v. Spock*, 424 U.S. 828, 836, 96 S.Ct.
9 1211, 1217, 47 L.Ed.2d 505 (1976). “Access to a nonpublic forum . . . can be restricted
10 as long as the restrictions are ‘reasonable and [are] not an effort to suppress expression
11 merely because public officials oppose the speaker’s view.’” *Cornelius*, 473 U.S. at 800,
12 105 S.Ct. at 3448 (citations omitted) (alterations in original).

13
14
15
16
17 “[I]n assessing a First Amendment claim for speech on government property, ‘we
18 must identify the nature of the forum, because the extent to which the Government may
19 limit access depends on whether the forum is public or nonpublic.’” *Hopper v. City of*
20 *Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (quoting *Cornelius*, 473 U.S. at 797, 105
21 S.Ct. at 3446).

22 23 **2. The Arivaca Checkpoint**

24
25 Plaintiffs argue that the “Arivaca checkpoint” does not “include anything other
26 than actual structures and areas used for law enforcement activities, such as the small
27 temporary shelter on the south side of the road, from which agents conduct checkpoint
28 inspections of eastbound traffic, and the actual area used to perform secondary

1 inspections of vehicles also on the south side of the road, running east from and
2 immediately adjacent to the shelter.” *See, e.g.*, Pls.’ CSOF (Doc. 73) at ¶ 12; Compl.
3 (Doc. 1) at ¶ 29; Pls.’ Mot. Prelim. Inj., Raglan Decl. (Doc. 29-2) at ¶ 9.

4
5 The satellite photographs relied on by Plaintiffs for their Motion for Preliminary
6 Injunction, and submitted again in their controverting statement of facts, are clearly
7 marked to show that where Defendants have placed the “enforcement zone” signage on
8 both the east and west ends of the checkpoint corresponds to the “check point sign” with
9 a digital speed board on the west and the 15 mph speed limit sign on the east. *See* Pls.’
10 Mot. Prelim. Inj., McLain Decl. (Doc. 27-3), Exh. “2.” Furthermore, in the center of the
11 roadway from the digital speed board to the 15 mph speed limit sign are orange and white
12 road markers and plastic barricades. *See id.* Additionally, there are plastic speed bumps
13 in the roadway on both the north and south lanes of travel. *See id.* On the north side of
14 the street is portable lighting equipment. *See id.* There is also equipment and vehicles on
15 the south side of the roadway, to the west of the primary inspection area. *See id.* To the
16 east, past the secondary inspection area is a Border Patrol vehicle, which is used in the
17 event someone purposely tries to avoid secondary. *See* Pls.’ Mot. Prelim. Inj., McLain
18 Decl. (Doc. 27-3), Exh. “2;” Defs.’ Response to Prelim. Inj., San Martin Decl. (Exh. “C”)
19 (Doc. 38-4) at ¶ 11. Defendants further assert that Border Patrol vehicles are also parked
20 on the north side of the street. *See* Pls.’ Mot. Prelim. Inj., McLain Decl. (Doc. 27-3),
21 Exh. “2;” Defs.’ Response to Prelim. Inj., San Martin Decl. (Exh. “C”) (Docs. 38-4, 38-5,
22 & 38-6) at ¶ 8–9 & Attach. 1–18 (photographs).

23
24
25
26
27
28 The orange and white lane dividers and barricades were placed there by Border

1 Patrol, and but for the checkpoint, they would not be there. Additionally, the area on
2 either side of the roadway is utilized by Border Patrol equipment and vehicles. *See* Pls.’
3 Mot. Prelim. Inj., McLain Decl. (Doc. 27-3), Exh. “2;” Defs.’ Response to Prelim. Inj.,
4 San Martin Decl. (Exh. “C”) (Docs. 38-4, 38-5, & 38-6) at ¶ 8–9 & Attach. 1–18
5 (photographs). No reasonable jury could believe that the checkpoint is limited solely to
6 the primary enforcement shelter and secondary inspection area. As such, the Court finds
7 that the Arivaca checkpoint consists of the area between the checkpoint/speed limit signs
8 placed on its east and west boundaries.

11 **3. First Amendment—Forum Analysis**

12 Plaintiffs assert that the Arivaca Road checkpoint is a public forum, and that as
13 such they are entitled to protest and record the activities of Border Patrol agents, *inter*
14 *alia*, without limitation. Conversely, Defendants argue that the checkpoint is a nonpublic
15 forum, and therefore, a reasonableness inquiry is required.

16
17
18 “Traditional public fora are those places which ‘by long tradition or by
19 government fiat have been devoted to assembly and debate.’” *Cornelius v. NAACP Legal*
20 *Defense and Educational Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 3449, 87
21 L.Ed.2d 567 (1985) (quoting *Perry Education Assn. v. Perry Local Educators’ Assn.*, 460
22 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983)). “Nothing in the Constitution[,
23 however] requires the Government freely to grant access to all who wish to exercise their
24 right to free speech on every type of Government property without regard to the nature of
25 the property or to the disruption that might be caused by the speaker’s activities.”
26 *Cornellius*, 473 U.S. 799-800, 105 S.Ct. at 3447. “Access to a nonpublic forum . . . can
27
28

1 be restricted as long as the restrictions are ‘reasonable and [are] not an effort to suppress
2 expression merely because public officials oppose the speaker’s view.’” *Cornelius*, 473
3 U.S. at 800, 105 S.Ct. at 3448 (citations omitted) (alterations in original).
4

5 The Ninth Circuit Court of Appeals “has emphasized the following three factors in
6 considering whether an area constitutes a traditional public forum: 1) the actual use and
7 purposes of the property, particularly status as a public thoroughfare and availability of
8 free public access to the area . . . 2) the area’s physical characteristics, including its
9 location and the existence of clear boundaries delimiting the area . . . and 3) traditional or
10 historic use of both the property in question and other similar properties. *ACLU of*
11 *Nevada v. City of Las Vegas*, 333 F.3d 1092 (9th Cir. 2003).
12
13

14 Plaintiffs urge that this is simply a public thoroughfare and free public access to
15 the area demands a determination that the checkpoint is a public forum. Plaintiffs’
16 argument dismisses the law enforcement operation that is occurring on this stretch of
17 road. As the Supreme Court of the United States has noted, the “maintenance of a traffic
18 checking program in the interior is necessary because the flow of illegal aliens cannot be
19 controlled effectively at the border.” *United States v. Martinez-Fuerte*, 428 U.S. 543,
20 556, 96 S.Ct. 3074, 3082, 49 L.Ed.2d 1116 (1976). Moreover, “[t]hese checkpoints are
21 located on important highways; in their absence such highways would offer illegal aliens
22 a quick and safe route into the interior.” *Id.* at 556–57, 96 S.Ct. at 6082. The Ninth
23 Circuit Court of Appeals has upheld a district court’s finding that a “roadway is not a
24 public forum because it is not open to unrestricted public use.” *Hale v. Dept. of Energy*,
25 806 F.2d 910, 915 (1986). In *Hale*, the court of appeals found that the roadway leading
26
27
28

1 from the main highway to the main guard gate of a nuclear testing facility “ha[d] been
2 withdrawn from public use for the purpose of conducting nuclear testing[,] [and] [i]ts use
3 for expressive, as well as nonexpressive, activity by the public is limited.” *Id.* at 915–16.
4 Similarly, the stretch of Arivaca Road where Border Patrol has clearly delineated the
5 checkpoint has been withdrawn from unrestricted public use. As discussed in Section
6 III.C.2., *supra*, the checkpoint consists of signs, road markers, speed bumps, lighting,
7 buildings, equipment, and vehicles. Furthermore, the checkpoint is used 24 hours per
8 day. It is distinctly different from the open highway surrounding it. Additionally, Border
9 Patrol checkpoints do not have a long history of being open to the public, and access on
10 Arivaca Road is not unrestricted in light of the legitimate law enforcement activity taking
11 place. As such, the Court finds that the Arivaca checkpoint is a nonpublic forum.
12
13
14

15 **4. First Amendment—Reasonableness**

16
17 “With respect to a nonpublic forum, the government may enforce restrictions on
18 First Amendment conduct as long as they are neutral with respect to viewpoint and are
19 reasonable.” *Hale v. DOE*, 806 F.2d 910, 916 (9th Cir. 1986) (citing *Cornelius*, 105 S.Ct.
20 at 3451. Further, “[r]easonableness ‘must be assessed in the light of the purpose of the
21 forum and all the surrounding circumstances.’” *Hale*, 806 F.2d at 916–17 (citing
22 *Cornelius*, 105 S.Ct. at 3453).
23

24
25 “The principal inquiry in determining content neutrality, in speech cases generally
26 and in time, place, or manner cases in particular, is whether the government has adopted a
27 regulation of speech because of disagreement with the message it conveys.” *Ward v.*
28 *Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661 (1989)

1 (citations omitted). “[A] facially neutral law does not become content based simply
2 because it may disproportionately affect speech on certain topics.” *McCullen v. Coakley*,
3 — U.S. —, 134 S.Ct. 2518, 2531, 189 L.Ed.2d 502 (2014). “A regulation that serves
4 purposes unrelated to the content of expression is deemed neutral, even if it has an
5 incidental effect on some speakers or messages but not others.” *Ward*, 491 U.S. at 791,
6 109 S.Ct. at 2754. “The question in such a case is whether the law is ‘justified without
7 reference to the content of the regulated speech.’” *McCullen*, — U.S. —, 134 S.Ct. at
8 2531 (quoting *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 89
9 L.Ed.2d 29 (1986)).

10
11
12
13 Here, Defendants primary interest is in protecting the safety and security of Border
14 Patrol agents, canines, and the public. San Martin Decl. 1/30/2015 (Doc. 38-4) ¶¶ 10–11.
15 Furthermore, “[C]heckpoint stops are ‘seizures’ within the meaning of the Fourth
16 Amendment.” *Martinez-Fuerte v. United States*, 428 U.S. 543, 556, 96 S.Ct. 3074, 3082,
17 49 L.Ed.2d 1116 (1976). The Supreme Court of the United States has “upheld brief,
18 suspicionless seizures of motorists at a fixed Border Patrol checkpoint designed to
19 intercept illegal aliens, . . . and at a sobriety checkpoint aimed at removing drunk drivers
20 from the road[.]” *City of Indianapolis v. Edmond*, 531 U.S. 32, 37, 121 S.Ct. 447, 452,
21 148 L.Ed.2d 333 (2000) (internal citations omitted). Such programs were “designed to
22 serve ‘special needs, beyond the normal need for law enforcement.’” *Id.* (citations
23 omitted). As such, checkpoint stops are criminal investigations, which if frustrated may
24 “jeopardize the integrity of the search for truth that is so critical to the fair administration
25 of justice.” *Times Mirror Co. v. U.S.*, 873 F.2d 1210, 1213 (9th Cir. 1989) (discussing
26
27
28

1 the public right of access to judicial proceedings, and the negative impact that openness
2 may have on criminal fact-finding).

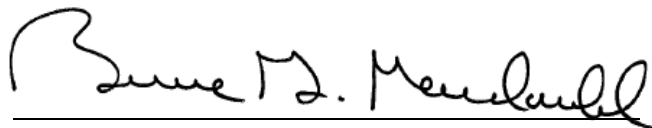
3
4 Defendants' restrictions are content neutral and reasonable in light of the ongoing
5 law enforcement activity at the checkpoint. There are obvious safety and security
6 concerns with such an operation both to the agents and public. To limit monitoring to
7 areas 150 feet from the midpoint of the checkpoint, is not unreasonable. "The First
8 Amendment does not demand unrestricted access to a nonpublic forum merely because of
9 that forum may be the most efficient means of delivering the speaker's message."
10 *Cornelius*, 105 S.Ct. at 3453.
11
12
13

14 **IV. CONCLUSION**

15 Based on the foregoing, the Court finds the Arivaca Checkpoint is a nonpublic
16 forum, and Defendants' restrictions on speech are reasonable. In light of this
17 determination, Plaintiffs' retaliation claim cannot stand.
18

19 Accordingly, IT IS HEREBY ORDERED that Defendant's Motion to Dismiss, or
20 in the Alternative, Motion for Summary Judgment (Doc. 61) is GRANTED. IT IS
21 FURTHER ORDERED that the Clerk of the Court shall enter judgment and close its file
22 in this matter.
23

24 Dated this 30th day of September, 2016.

25
26 

27 Honorable Bruce G. Macdonald
28 United States Magistrate Judge