



First Amendment Case Brought by Immigration Checkpoint Protesters/Monitors Can Go Forward

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Yesterday, the Ninth Circuit handed down *Jacobson v. U.S. Dep't of Homeland Security*; my students Alexandra Gianelli, Emily Michael, and Tracy Yao and I filed an amicus brief in the case on behalf of the Cato Institute, and I'm pleased to say that the Ninth Circuit's decision was largely consistent with what we asked for. First, the facts:

Leesa Jacobson and Peter Ragan -- as part of a group called People Helping People -- want to protest near a near-border immigration checkpoint, and to monitor what happens at the checkpoint (including by videorecording it). But the Border Patrol has set up an enforcement zone around the checkpoint -- including some neighboring sidewalks -- that would require them to move 150 feet or more away. Jacobson and Ragan sued, claiming that the enforcement zone improperly intruded into a traditional public forum, and was enforced in a viewpoint-based way:

Several incidents led Appellants to believe that the enforcement zone policy was selectively enforced against them. The agents in charge stated in an email to Appellants and at a public presentation that agents on the scene are the ones who determine "who can enter into the perimeter" and "where [Appellants] can and can't be." On April 3, 2014, one of the Appellants saw a local resident arrive at the checkpoint area, park inside the enforcement zone, and remain inside the barrier for approximately 40 minutes. The local resident's wife also arrived and parked inside the barrier.

The local resident, who was known to be a supporter of the BP and an opponent of PHP, questioned and harassed the PHP protesters. BP agents did not ask the local resident to leave the enforcement area. As he departed, he shouted "Well, we had our fun today" to the BP agents on duty, who smiled and laughed. When the Appellants asked an agent at the checkpoint area if they had given the local residents permission to be in the enforcement zone, the agent replied, "It's a free country." When the agent in charge learned of this incident from Appellants' counsel on April 16, 2014, he directed watch commanders to discuss the incident with checkpoint agents and make clear that what had been done was unacceptable.

Subsequently, a surveyor hired by Appellants was allowed inside the enforcement zone. The agents on duty explained to the surveyor that "the barriers were in place only to exclude people who might interfere with Border Patrol activities, such as protestors." One agent invited the

surveyor to share a meal with the agents on duty. On another occasion, BP agents allowed reporters and pedestrians to walk along the north side of the road through the enforcement zone during a PHP rally; but, on the same day, agents parked their vehicles so as to impede the PHP monitors from even viewing, much less entering, the enforcement zone....

The District Court concluded that DHS should win as a matter of law, but the Ninth Circuit remanded for further discovery:

Appellants identified several areas in which they sought discovery relevant to critical matters at issue in the summary judgment motion.

First, Appellants sought discovery regarding the law enforcement uses of the checkpoint area encompassed within the enforcement zone, including rules and regulations governing the use of the checkpoint area. These uses are relevant to the determination of whether the enforcement zone is a public or a nonpublic forum. Moreover, regardless of which level of scrutiny applies, they may be relevant to the ultimate constitutional question of whether the enforcement zone policy violates the First Amendment. The limited information in the record regarding the layout and use of the checkpoint area leaves many questions unanswered about the specific uses of areas outside the primary and secondary inspection zones. For example, evidence that large portions of the enforcement zone are unused for checkpoint activities would tend to create genuine issues of material fact as to whether the government has transformed the enforcement zone along Arivaca Road into a nonpublic forum and, if the area is still a public forum, whether the enforcement zone is narrowly tailored to the government's interest in operating a BP checkpoint.

Second, Appellants sought discovery about who has been allowed into the enforcement zone and why. This information could reveal whether the enforcement zone has been applied selectively based on viewpoint. The government's stated policy is that "pedestrians are allowed inside the checkpoint only for official purposes," but without the benefit of discovery Appellants have already adduced evidence that calls that policy into question. While BP has consistently excluded Appellants and other protesters from the enforcement zone, the record shows that other visitors who were not protesting have been allowed inside. Whether the enforcement zone is a public or a nonpublic forum, evidence that civilians friendly or neutral to BP have been permitted into the enforcement zone while other civilians with a hostile message have been excluded—beyond the incidents already in the record—would tend to create a genuine issue of material fact as to the viewpoint neutrality of the government's policy.

Finally, Appellants sought discovery of data regarding traffic stops at the checkpoint, in order to determine the accuracy of the data gathered by Appellants from their positions outside the enforcement zone. This information is relevant to whether Appellants have ample alternative opportunities for observation, as would be required to justify their exclusion from a public forum.

The limited record before the district court does not permit us to conclude, as a matter of law, that the enforcement zone is a nonpublic forum, or, if it is, that the government has satisfied the requirements for excluding Appellants from that nonpublic forum. On remand, and after

appropriate discovery, the district court will need to determine if there remain genuine issues of material fact regarding whether, and what part of, the enforcement zone is a public forum, and whether the government's exclusion policy is permissible under the principles of forum analysis.