

ALESSANDRA SOLER  
EXECUTIVE DIRECTOR

ZENAIDO QUINTANA  
PRESIDENT



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

April 16, 2014

*VIA CERTIFIED U.S. MAIL:*

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

AMERICAN CIVIL  
LIBERTIES UNION  
FOUNDATION  
OF ARIZONA  
P.O. BOX 17148  
PHOENIX, AZ 85011  
P/602.650.1854  
F/602.650.1376  
WWW.ACLUAZ.ORG

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

Dear Mr. Padilla:

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

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

---

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

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

## I. Factual Background

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

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

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

---

<sup>2</sup> See Paul Ingram, *Border Residents Demand End to Arivaca Checkpoint*, TUCSON SENTINEL, Jan. 23, 2014, available at

[http://www.tucson sentinel.com/local/report/012214\\_arivaca\\_checkpoint\\_protest/border-residents-demand-end-arivaca-checkpoint/](http://www.tucson sentinel.com/local/report/012214_arivaca_checkpoint_protest/border-residents-demand-end-arivaca-checkpoint/).

<sup>3</sup> See, e.g., Judith Gans, THE BORDER PATROL CHECKPOINT ON INTERSTATE 19 IN SOUTHERN ARIZONA: A CASE STUDY OF IMPACTS ON RESIDENTIAL REAL ESTATE PRICES, UNIVERSITY OF ARIZONA, (Dec. 2012), available at [http://udallcenter.arizona.edu/ucpubs/gans\\_2012b.pdf](http://udallcenter.arizona.edu/ucpubs/gans_2012b.pdf)

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

<sup>5</sup> Narratives of Arivaca community members are available at [http://phparivaca.org/?page\\_id=210](http://phparivaca.org/?page_id=210)

<sup>6</sup> *Id.*

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

*A. February 26, 2014*

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

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

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

---

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

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

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

#### *B. March 1, 2014*

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

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

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

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

*C. March – April 2014*

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

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

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

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

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

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

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

AMERICAN CIVIL  
LIBERTIES UNION FOUNDATION  
OF ARIZONA

## II. Legal Analysis

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

The First Amendment also protects the checkpoint monitors' right to photograph and video record law enforcement. *See American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (act of making audiovisual recording "is necessarily included within the First Amendment's guarantee of speech and press rights"), *cert. denied*, 133 S. Ct. 651 (2012); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing First Amendment right to film matters of public interest); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (upholding First Amendment rights of third

parties filming traffic stops “to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”).

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

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

---

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

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

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

AMERICAN CIVIL  
LIBERTIES UNION FOUNDATION  
OF ARIZONA

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

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



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

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

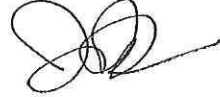
### III. Conclusion

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

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

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

Sincerely,



James Lyall  
Staff Attorney  
ACLU of Arizona

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

Thomas Winkowski  
Acting Commissioner  
U.S. Customs and Border Protection  
1300 Pennsylvania Avenue, N.W.  
Washington, D.C. 20229

Stevan Bunnell  
General Counsel  
Office of the General Counsel  
U.S. Department of Homeland Security  
Mail Stop 3650  
Washington, DC 20528

Scott K. Falk  
Chief Counsel  
Office Of Chief Counsel  
U.S. Customs and Border Protection  
Mail Stop 3650  
Washington, DC 20528

AMERICAN CIVIL  
LIBERTIES UNION FOUNDATION  
OF ARIZONA