UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 16-55719

RAY ASKINS and CHRISTIAN RAMIREZ,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY; et al.,

Defendants-Appellees.

OPENING BRIEF FOR THE APPELLANTS

Appeal from the Judgment of the United States District Court
For the Southern District of California
D.C. No. 3:12-cv-02600-W-BLM
(Honorable Thomas J. Whelan)

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INTRODUCTION

The First Amendment guarantees an individual's right to collect and disseminate information about matters of public interest, including but not limited to government conduct. This right is crucial to ensuring the transparency and accountability that are the life's blood of participatory government. It protects citizens who document governmental conduct carried out in plain view—whether they use their eyes, a pen, or a camera. Furthermore, it applies with equal force along our nation's borders. To hold otherwise would exempt the border regions—a large part of the United States—from this fundamental First Amendment right. The border is not a Constitution-free zone.

Plaintiffs are U.S. citizens who attempted to exercise their First Amendment rights at two California ports of entry. Ray Askins, a long-time environmental advocate, sought to photograph idling vehicles at the Calexico port of entry. Christian Ramirez, a nationally-recognized expert on border-related human and civil rights, tried to photograph male U.S. Customs and Border Protection ("CBP") officers inappropriately frisking female travelers at the San Ysidro port of entry. In both cases, Plaintiffs sought to document matters of public interest exposed to public view, outdoors and while standing in the United States.

CBP, however, has official policies that prohibit such photography without the agency's advance permission. Pursuant to these policies, CBP officers

detained each Plaintiff, searched his person and devices, and deleted his photographs without consent. Since these incidents, Plaintiffs have refrained from exercising their First Amendment rights to document matters of public concern in public view at ports of entry. CBP's policies, and enforcement thereof against Plaintiffs, have harmed the Plaintiffs and chilled and prevented them from exercising their First Amendment rights.

The district court dismissed Plaintiffs' amended complaint, ignoring Plaintiffs' plausible allegations and inserting its own facts in their stead. This was clear legal error. Additionally, or in the alternative, the district court abused its discretion in holding that the law of the case doctrine barred Plaintiffs' amended complaint. For these reasons, this Court should reverse and remand.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. Plaintiffs appeal from a final judgment, entered on March 23, 2016, granting Defendants' motion to dismiss Plaintiffs' amended complaint without leave to amend. ER 4. Plaintiffs timely filed a notice of appeal on May 17, 2016. ER 1–3. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. With limited exceptions, the First Amendment protects the right to photograph matters of public interest exposed to public view from outdoor and

otherwise unrestricted areas. In their amended complaint, Plaintiffs allege plausible facts that Defendants have adopted and enforced unconstitutional policies that interfere with this right. Did the district court err when, in deciding Defendants' motion to dismiss, it ignored Plaintiffs' allegations and instead relied upon its own facts to conclude that Defendants' policies are constitutional?

2. The Ninth Circuit has held that the law of the case doctrine never bars a district court from reconsidering its own pretrial rulings. Ignoring this precedent, the district court concluded Plaintiffs' amended complaint was barred by the law of the case doctrine, and granted Defendants' motion to dismiss with prejudice. In doing so, did the district court abuse its discretion?

STATEMENT OF THE CASE

I. THE COMPLAINT'S ALLEGATIONS

A. Plaintiffs Are Advocates Committed to Collecting and Disseminating Information Regarding Pressing Matters of Public Concern.

Plaintiffs are U.S. citizens who are deeply committed to monitoring the environmental and human rights issues that affect U.S. border communities.

Ray Askins has engaged in border-related environmental monitoring and advocacy work for many years, and has published his research and analyses since at least 2008. ER 70–71 ¶¶ 32–33 (First Am. Compl.); ER 72–73 ¶¶ 39–44. He is

particularly concerned about environmental health problems in Imperial County, California. ER 71 ¶ 33.

Imperial County and its constituent communities, including the City of Calexico, suffer from high rates of poverty and pollution. ER 71 ¶¶ 34–35. The State of California has designated much of Imperial County a medically underserved area; the county's poor air quality, combined with many residents' lack of access to primary health care, have contributed to very high asthma rates throughout the region. ER 71–72 ¶ 36. Significantly, researchers have found that idling vehicles at the U.S.-Mexico border crossing are the primary source of harmful particulate matter degrading air quality in Calexico. ER 71–72 ¶ 36. Asthma-related hospitalization rates in Imperial County, especially for children, are among the highest in California. ER 72 ¶ 38. These pressing public health and environmental problems are the focus of Askins' research and advocacy.

Christian Ramirez is a nationally-recognized border policy advocate and a leading expert on border-related civil and human rights abuses. ER 79 ¶ 72. He regularly travels along the U.S.-Mexico border, both to visit family members living in Mexico and to observe law enforcement activity and monitor human rights issues. ER 79 ¶ 75.

In recent years, advocates and journalists have tried to publicize U.S. government officials' rampant physical abuse of persons near our borders. For

example, CBP officers' excessive use of force has resulted in a record number of deaths, including of U.S. citizens and lawful permanent residents; many of these deaths have occurred at or near the U.S.-Mexico border. ER 65 ¶ 6. Perhaps the most well-known incident occurred in May 2010, when CBP officers lethally beat and Tasered Anastasio Hernandez Rojas at the San Ysidro port of entry. ER 68 ¶ 18. At that time, CBP officers confronted eyewitnesses who had captured video footage of the beating and demanded that the recordings be deleted. ER 68 ¶ 18 (citing R. Stickney, *Judge Clears Way for Family's Civil Suit in Border Beating Death*, NBC SAN DIEGO, Oct. 7, 2014). Despite this attempted censorship, however, some footage survived; only after it surfaced did it become clear that CBP's justifications for the beating were false. The publication of these crucial video recordings led sixteen members of Congress to send a letter to CBP seeking information about the agency's use-of-force policies and internal investigation protocols, and subsequent public pressure led to an agency-wide review of use-of-force policies and the publication of those policies to the public. ER 68 ¶ 19.

Such deadly incidents, coupled with CBP's routine and consistent refusal to provide the public with basic information regarding officer misconduct and discipline, have heightened the public's interest in monitoring CBP officers engaged in the public discharge of their official duties. ER 65 ¶¶ 5–6. Ramirez is

dedicated to trying to improve government accountability to border communities by recording and publicizing incidents of official abuse.

An unfettered ability to exercise the fundamental First Amendment rights to gather and disseminate information is crucial to each Plaintiff's social and political advocacy efforts. Plaintiffs thus seek to protect their right to photograph matters already exposed to public view from outdoor and otherwise unrestricted areas at or near ports of entry. For clarity and convenience, Plaintiffs use the terms "photograph" and "photography" throughout to encompass all forms of recording matters or events, including but not limited to still photography and video recording. ER 64 ¶ 3.

Along the U.S.-Mexico border, the U.S. Department of Homeland Security ("DHS") either owns or leases from other federal government agencies large swaths of property, including ports of entry and surrounding areas. ER 66 ¶ 7. The exact boundaries of the two ports of entry at issue here have never been established and remain disputed at this stage of the proceedings. Without conceding any particular definition of "port of entry" or "port of entry property," Plaintiffs use these terms herein to encompass all such property, whether owned or leased by DHS and/or CBP, to which Defendants assert their photography policies apply. Likewise, Plaintiffs use the term "Prohibited Areas" for those areas at or

near ports of entry in which Defendants have applied and enforced their policies to prohibit Plaintiffs from exercising their First Amendment rights.

Significantly, Plaintiffs do not allege an unlimited right to engage in unrestricted photography everywhere on ports of entry. Neither Plaintiff, for example, has attempted (or asserted a right) to enter into port of entry buildings and photograph CBP computer screens or other sensitive documents.

B. The Challenged Policies.

CBP has a national policy that prohibits photography on any port of entry property without advance official permission (hereinafter, "Policy"). ER 66 ¶ 8; ER 90–101 (First Am. Compl. Ex. A (CBP Directive No. 5410-001B)). This Policy applies both inside and outside port of entry buildings and does not limit CBP officials' discretion to grant or deny permission to take photographs. ER 66 ¶ 9. The Policy reserves to CBP an unbridled right to prohibit photography it believes may "compromis[e] the DHS/CBP mission." ER 91 ¶ 3.1.

CBP also has media "ground rules" for Southern California ports of entry (hereinafter, "Ground Rules"). ER 66 ¶ 10; ER 102–104 (First Am. Compl. Ex. B). The Ground Rules—which CBP applies to all persons—require advance authorization from CBP officials to take photographs on any port of entry property. ER 66 ¶ 10. Like the Policy, the Ground Rules apply both inside and outside port

of entry buildings, and do not meaningfully limit CBP officials' discretion. ER 66 ¶ 10; ER 103 ¶ 1.

Plaintiffs allege that the Policy and Ground Rules (collectively, "the Challenged Policies") violate the First Amendment. ER 87–89 ¶¶ 118–25.

C. Interference with Askins' First Amendment Rights.

In 2012, Askins was preparing a presentation for a conference entitled "Health Impacts of Border Crossings," funded by the Southwest Consortium on Environmental Research and Policy in cooperation with the U.S. Environmental Protection Agency. ER 73–74 ¶¶ 45–46. For this purpose, Askins planned to visit the Calexico West port of entry and photograph the secondary vehicle inspection area to demonstrate that CBP did not make full and proper use of that area, resulting in excessive vehicle idling and increased emissions pollution. ER 74 ¶ 47.

The day before his planned visit, Askins telephoned CBP Officer John Campos and requested permission to take a few photographs inside the secondary inspection area. ER 74 ¶ 48. Officer Campos replied that this would be "inconvenient," but otherwise did not object. ER 74 ¶ 48. Askins followed up the next day, and, when Officer Campos did not answer his phone, Askins left a voicemail clarifying that he would stand on the street outside the port of entry building to photograph the exit of the secondary inspection area. ER 74 ¶ 49.

That same afternoon, Askins stood near the shoulder at the intersection of two public streets in Calexico, California. ER 74–75 ¶ 50. In this location, Askins was approximately fifty to 100 feet from the secondary inspection area's exit. ER 74–75 ¶ 50. Immediately behind Askins was the Genaro Teco Monroy Memorial International Border Friendship Park, a small public park also overlooking the secondary inspection area. ER 75 ¶ 51. Both the intersection and the park are public forums open to speech and expressive activity by tradition and past usage. ER 75 ¶ 52. Defendants apply the Challenged Policies to some or all of these areas. ER 75 ¶ 52.

From this vantage point, outdoors and outside of any port of entry building or structure, Askins took three or four photographs of the exit of the secondary inspection area. ER 75 ¶ 53. The building exterior Askins photographed was exposed to public view from both outdoor areas of port of entry property and adjacent public property (including the park). ER 76 ¶ 55. Additionally, when taking these photographs, Askins was not engaged in the act of crossing the border; rather, he was standing entirely within the United States. ER 76 ¶ 56.

Shortly after Askins took the photographs, a number of CBP officers approached and demanded that he delete the pictures. When Askins refused and explained that the photographs were his property, one or more of the CBP officers threatened to smash his camera. ER 76 ¶¶ 57–58. Askins was handcuffed and his

camera, passport, car keys, and hat were confiscated; he was then detained and searched. ER 76–77 ¶¶ 59, 61–62. Upon his release, Askins discovered that the CBP officers had deleted all but one of the photographs he had just taken. ER 75 ¶ 53; ER 77 ¶ 64.

Immediately after this incident, Askins sent a complaint to Calexico Port Director Billy Whitford. ER 77 ¶ 65. In a written reply, Director Whitford stated:

> In response to the issues raised in your complaint, the area in question is currently under the jurisdiction of [General Services Administration] and CBP. CBP security policies prohibit visitors at CBP-controlled facilities from using cameras and video recording devices without the prior approval from the senior CBP official (Port Director or designee).

ER 77 ¶ 65; ER 105–106 (First Am. Compl. Ex. D (Email from Billy B. Whitford to Ray Askins (Apr. 20, 2012))).

Askins wants to continue photographing matters and events exposed to public view from outdoor areas of the Calexico port of entry, over which CBP asserts authority to prohibit photography. ER 78 ¶ 66. Specifically, he wishes to photograph vehicular traffic and CBP officers engaged in the public discharge of their official duties to document environmental pollution and human rights abuses, including from the Prohibited Areas. ER 78 ¶ 67. Because of the Challenged Policies and their enforcement against him, however, Askins has refrained, and continues to refrain, from taking such photographs. ER 78 ¶¶ 66, 68, 69.

D. Interference with Ramirez's First Amendment Rights.

In June 2010, Ramirez and his wife visited Ramirez's father in Mexico. ER 80 ¶ 79. Later the same afternoon, Mr. and Mrs. Ramirez reentered the United States without incident. ER 80 ¶ 80. The pair then crossed a pedestrian bridge that passed over the southbound lanes of Interstate 5. ER 80 ¶ 80. While doing so, Ramirez noticed that male CBP officers at a security checkpoint below the bridge were inspecting and patting down female travelers, and in fact that the officers appeared to be pulling aside only women for such inspection. ER 80 ¶ 81. Concerned that these officers were acting inappropriately, Ramirez observed them for ten to fifteen minutes. ER 80 ¶ 82. From this vantage point, outdoors and outside of any port of entry building or structure, Ramirez took approximately ten photographs of the CBP officers using his cell phone camera. ER 80 ¶ 82. The events and individuals Ramirez photographed were exposed to public view in the outdoor areas of the San Ysidro port of entry. ER 81 ¶ 85. Additionally, while observing the officers and taking the photographs, Ramirez was not engaged in the act of crossing the border; rather, he was standing entirely within the United States. ER 80–81 ¶ 84.

Ramirez and his wife were approached on the pedestrian bridge by two men who appeared to be private security officers. ER 81 ¶ 86. One asked for Ramirez's identification documents; he declined to hand these over, explaining that

he had already passed inspection and entered the United States. ER 81 ¶ 87. Ramirez was then ordered to stop taking photographs and one of the officers attempted to grab him. ER 81 ¶ 88. As Ramirez and his wife tried to leave the bridge, these officers followed them, and Ramirez overheard them call for backup. ER 81 ¶ 89.

When Ramirez and his wife reached the bottom of the bridge, five to seven CBP officers were waiting. ER 81 ¶ 90. The officers asked whether and why Ramirez had taken any photographs; he replied that he had done so because he had witnessed what he believed to be inappropriate CBP activity. ER 81 ¶ 90. The officers demanded that Ramirez turn over his cell phone; he refused, although he offered to show the officers the photographs he had taken. ER 81 ¶ 91. A CBP officer then confiscated Ramirez's cell phone and deleted the photographs, without Ramirez's consent, before returning the phone. ER 82 ¶¶ 94–95. In so doing, the officer destroyed contemporaneous evidence of possible CBP misconduct.

In recent years, the San Ysidro port of entry has undergone significant reconstruction. ER 83–84 ¶¶ 101–106. For example, a new pedestrian bridge replaced the bridge where Ramirez and his wife encountered CBP officers in 2010. ER 83 ¶¶ 102–104. Notwithstanding these changes, Ramirez continues to wish to exercise his First Amendment rights at the current San Ysidro port of entry. ER 84–85 ¶ 107; ER 85–86 ¶¶ 109–113. Specifically, Ramirez wants to exercise his

First Amendment rights to photograph and record matters exposed to public view from one or more of the following outdoor areas, over which CBP asserts authority to prohibit photography: (1) the transit plaza on San Ysidro Boulevard and the adjacent sidewalk; (2) the new pedestrian bridge connecting San Ysidro Boulevard to the east and Camiones Way to the west, which lies entirely within the United States and does not connect to the border crossing or to any port of entry building or edifice; and (3) the footpath leading from the transit plaza and adjacent sidewalk to Mexico. ER 84–85 ¶¶ 105, 107. In or near these areas, there are several official U.S. government signs posted that appear to prohibit any form of photography. ER 85 ¶ 108.

Ramirez remains deeply committed to documenting civil and human rights violations at San Ysidro and throughout the border region, especially excessive force and racial or religious profiling. ER 86 ¶ 110. He wants to continue photographing matters and events exposed to public view from outdoor areas of the San Ysidro port of entry, including the Prohibited Areas, as soon as he is able to do so without CBP interference; because of the Challenged Policies and their enforcement against him, however, he has refrained and continues to refrain from doing so. ER 84–85 ¶ 107; ER 86–87 ¶¶ 111–115.

II. PROCEDURAL HISTORY

A. Plaintiffs' Original Complaint.

Plaintiffs commenced this action in October 2012, challenging "an expressly adopted official CBP policy and/or a longstanding CBP practice of prohibiting the use of cameras and video recording devices at CBP-controlled facilities, including U.S. ports of entry, without CBP's prior approval." Dkt. No. 1 (Compl.) ¶¶ 55, 61.[1]

Defendants moved to dismiss, and, in support of their motion, filed copies of the Challenged Policies. Dkt. Nos. 22-2, 22-3. Defendants also sought judicial notice of a variety of matters, including several government websites containing "agency directives and guidelines." ER 155 n.1 (Mot. to Dismiss); *id.* at 155–157 nn.1–12; *id.* at 161 n.15. In opposing Defendants' motion, Plaintiffs objected to Defendants' request for judicial notice of disputed facts. ER 142 (Opp'n to Mot. to Dismiss).

The district court granted the motion in part, holding (as relevant here) that the Challenged Policies were content-based restrictions on speech in a public forum that triggered strict scrutiny. ER 121–124 (Order on Mot. to Dismiss). The court further held that the Challenged Policies survived strict scrutiny,

[1] The original complaint also included Fourth Amendment claims on behalf of both Plaintiffs. As the operative, amended complaint omits Fourth Amendment claims, neither those claims nor the district court's rulings thereupon are discussed here.

notwithstanding the fact that, in light of the procedural posture of the case, the Defendants had produced no evidence yet to satisfy their burden of meeting this exacting constitutional standard. ER 124–125. The court granted Plaintiffs leave to amend their policy-based First Amendment claims. ER 125.

Defendants moved for reconsideration and/or clarification, urging the district court to also dismiss Plaintiffs' First Amendment "pattern or practice" claims and to reconsider its grant of leave to Plaintiffs to amend their policy-based claims. Dkt. No. 46-1 at 2–5. As to these requests, the district court denied Defendants' motion. ER 110–111 (Order on Mot. Recons.). Further briefing was completed with respect to Plaintiffs' Fourth Amendment claims, followed by a third and final order from the Court on Defendants' motion to dismiss in early 2015. Dkt. Nos. 50, 51, 56.

B. Plaintiffs' Amended Complaint.

Plaintiffs subsequently filed an amended complaint alleging only First Amendment claims and clarifying both the factual and legal bases for this action. ER 63–106. First, Plaintiffs claim that the Challenged Policies are prior restraints that violate the First Amendment because they require advance permission to photograph matters of public interest exposed to public view in outdoor areas of port of entry property and provide unlimited discretion for CBP officials to grant or deny permission to take such photographs. ER 87 ¶ 119. Second, Plaintiffs claim

that, as enforced by CBP, the Challenged Policies violate the First Amendment by unreasonably restricting Plaintiffs' right to take photographs of matters of public interest exposed to public view from outdoor areas of port of entry property, regardless of the nature of the forum. ER 88–89 ¶¶ 121–22, 124–25. The amended complaint thus includes facial and as applied challenges to Defendants' policies.

Defendants moved to dismiss once more, arguing that Plaintiffs' amended claims were barred by the "law of the case" doctrine and Plaintiffs lacked standing. ER 56–57, 60–61 (Mot. to Dismiss Am. Compl.). The district court granted the motion. Though it held Plaintiffs had standing, the court concluded that the law of the case doctrine barred Plaintiffs' amended claims. ER 9, 11 (Order on Mot. to Dismiss Am. Compl.). The court also summarily concluded that the Challenged Policies survived strict scrutiny, without addressing the adequacy of Plaintiffs' amended allegations. ER 10. Accordingly, the district court dismissed the complaint with prejudice and entered final judgment in favor of Defendants. ER 4 (Judgment).

STANDARD OF REVIEW

The Ninth Circuit reviews de novo a district court's dismissal of a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). *Lacey v. Maricopa Cty.*, 693 F.3d 896, 911 (9th Cir. 2012) (citations omitted). In doing so, this Court

"inquire[s] whether the complaint's factual allegations, together with all reasonable inferences, state a plausible claim for relief." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 (9th Cir. 2011). The Court's review is limited to the facts pleaded, documents attached to or incorporated by reference in the complaint, and matters properly subject to judicial notice, with inferences drawn in the light most favorable to the plaintiff. *OSU Student All. v. Ray*, 699 F.3d 1053, 1058 (9th Cir. 2012); *Barker v. Riverside Cty. Off. of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009); *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

The plausibility standard is not a "probability requirement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). If a complaint is dismissed, leave to amend must be granted unless amendment is futile. *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015).

As the law of the case doctrine is discretionary, the Ninth Circuit reviews the district court's application of that doctrine for abuse of discretion. *Stacy v. Colvin*, 825 F.3d 563, 567 (9th Cir. 2016). Whether a legal doctrine properly applies is a question of law reviewed de novo, and if "a district court makes an error of law, it

is an abuse of discretion." *Int'l Bhd. of Teamsters, Airlines Div. v. Allegiant Air, LLC*, 788 F.3d 1080, 1090 (9th Cir. 2015) (citation and quotation marks omitted).

SUMMARY OF ARGUMENT

In dismissing Plaintiffs' amended complaint with prejudice, the district court erred both substantively and procedurally.

Substantively, the district court erred in dismissing Plaintiffs' amended complaint for failure to state First Amendment claims. Rather than address Plaintiffs' amended pleading, the district court reiterated its analysis of Plaintiffs' original complaint. Yet "[i]t is well-established in our circuit that an amended complaint supersedes the original, the latter being treated thereafter as non-existent." *Ramirez v. Cty. of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015) (quotation marks and citation omitted). Reviewing de novo, this Court should hold the Plaintiffs state a claim that the Challenged Policies violate the First Amendment right to document matters of public interest exposed to public view in outdoor areas at or near a port of entry, regardless of the nature of the forum from which Plaintiffs seek to exercise that right.

Procedurally, the district court also erred in holding that the law of the case doctrine barred Plaintiffs' amended claims. The law of the case doctrine never bars a district court from reconsidering pretrial rulings before final judgment or appeal. *See, e.g.*, *Peralta v. Dillard*, 744 F.3d 1076, 1088 (9th Cir. 2014) (en

banc), *cert. denied*, 135 S. Ct. 946 (2015); *City of L.A., Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 889 (9th Cir. 2001). The district court abused its discretion by misunderstanding this settled law.

Alternatively, even if the law of the case doctrine were applicable here, the district court's application of that doctrine was illogical and thus an abuse of discretion. In deciding Defendants' motion to dismiss Plaintiffs' original complaint, the district court twice granted Plaintiffs leave to amend their policy-related First Amendment claims. Plaintiffs filed an amended complaint as soon as the district court finally resolved Defendants' first motion to dismiss. In doing so, Plaintiffs clarified both the factual and legal underpinnings of this lawsuit. Yet the district court never addressed any of Plaintiffs' amended factual allegations—much less evaluated their legal sufficiency as pleadings as required in deciding a Rule 12(b)(6) motion.

For these reasons, this Court should reverse the district court's dismissal of Plaintiffs' amended complaint.

ARGUMENT

I. PLAINTIFFS' AMENDED COMPLAINT STATES COGNIZABLE CLAIMS UNDER THE FIRST AMENDMENT.

Plaintiffs seek to exercise their First Amendment right to photograph matters of public interest exposed to public view. On the facts pleaded in the amended

complaint, Defendants are violating that First Amendment right in outdoor areas at or near port of entry property.

A. The First Amendment Protects the Right to Document Matters of Public Interest, Outdoors and in Public View, at Ports of Entry and Elsewhere.

The First Amendment right to freedom of speech includes the "right to film matters of public interest." *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *see also ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) [hereinafter *Alvarez*] ("Audio and audiovisual recording are media of expression commonly used for the preservation and dissemination of information and ideas and thus are included within" the First Amendment (quotation marks and citations omitted)); *id.* ("The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.").

The right to record covers any matter of public interest in public view. *Fordyce*, 55 F.3d at 438–39 (Plaintiff was "exercising his First Amendment right to film matters of public interest" when videotaping "a public protest march"); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) ("The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.").[2]

[2] *See also, e.g.*, *Demarest v. Athol/Orange Cmty. Television, Inc.*, 188 F. Supp. 2d 82, 94 (D. Mass. 2002) (recognizing "constitutionally protected right to record

The right to record matters of public interest includes photography of law enforcement officers engaged in their public duties. *Adkins v. Limtiaco*, 537 F. App'x 721, 722 (9th Cir. 2013) (right to photograph law enforcement is "clearly established"); *see also, e.g.*, *Alvarez*, 679 F.3d at 595; *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (First Amendment protects filming of "government officials engaged in their duties in a public place, including police officers performing their responsibilities"); *Smith*, 212 F.3d at 1333 (First Amendment protects right "to photograph or videotape police conduct"); *see also, e.g.*, *Arnett v. Myers*, 281 F.3d 552, 560 (6th Cir. 2002) ("It is well-settled that the freedom to criticize public officials and expose their wrongdoing is a fundamental First Amendment value, indeed, 'criticism of the government is at the very center of the constitutionally protected area of free discussion.'" (alterations and citation omitted)).

The right to record law enforcement is critical because officers have "substantial discretion that may be misused to deprive individuals of their

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matters of public interest"); *Cirelli v. Town of Johnston Sch. Dist.*, 897 F. Supp. 663, 665–68 (D.R.I. 1995) (First Amendment protected teacher's use of videocamera to record school environmental conditions and document possible health and safety violations; health and safety of public school staff and students "matter of public concern"); *Connell v. Town of Hudson*, 733 F. Supp. 465, 471, 473 (D.N.H. 1990) (upholding freelance reporter's First Amendment right to photograph vehicle accident scene "from positions that did not interfere with police activity"); *Lambert v. Polk Cty.*, 723 F. Supp. 128, 130, 133 (S.D. Iowa 1989) (noting "First Amendment rights to make and display videotapes of events" such as "street fight").

liberties." *Glik*, 655 F.3d at 82. Protecting "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"—especially when "many of our images of current events come from bystanders with a ready cell phone or digital camera." *Id.* at 82–84.

Recognizing that the public's efforts to hold law enforcement officials accountable may generate friction, the Supreme Court has reaffirmed that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *City of Houston v. Hill*, 482 U.S. 451, 461 (1987). The Constitution thus ensures that expressive activity that may be critical of the government continues, even if such activity involves certain impositions on public officials. *See, e.g.*, *Glik*, 655 F.3d at 84 ("In our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights.").

These basic constitutional principles apply in full force to U.S. Customs and Border Protection, a federal law enforcement agency that employs more than 60,000 individuals. ER 69 ¶ 24. Numerous reports over a period of years have implicated CBP officials in significant civil and human rights abuses and various other forms of misconduct. ER 65–66 ¶ 6 (citing Brian Bennett, *Border Patrol Absolves Itself In Dozens of Cases of Lethal Force*, L.A. TIMES, June 15, 2015;

Charles Davis, *U.S. Customs and Border Protection Has Killed Nearly 50 People in 10 Years. Most Were Unarmed.* NEW REPUBLIC, Jan. 4, 2015). Yet, CBP's routine and consistent refusal to provide the public with basic information regarding officer misconduct has shielded both the agency and individual officials from meaningful accountability.

The opportunity to monitor CBP officials independently, therefore, is of paramount importance. Plaintiffs' efforts to do so, as described in their amended complaint, thus lie at the very heart of the First Amendment. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values" (quotation marks and citation omitted)); *Garrison v. State of La.*, 379 U.S. 64, 74–75 (1964) ("For speech concerning public affairs is more than self-expression; it is the essence of self-government."); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (remarking upon the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"). The First Amendment remains in full effect in the border regions of the United States.

B. On the Facts Pleaded, the Challenged Policies Violate the First Amendment Both Facially and As Applied.

As pleaded in the operative complaint, the Challenged Policies violate the First Amendment by preventing photography of matters and events of public interest exposed to public view from exterior or outdoor areas of the ports of entry, irrespective of whether such photography occurs from a public or nonpublic forum. ER 88–89 ¶¶ 121–22, 124–25.

The Challenged Policies require individuals to obtain advance permission from the government before taking photographs in the Prohibited Areas. ER 66 ¶¶ 8, 10. As such, these policies are prior restraints on speech. *See, e.g.*, *Alexander v. United States*, 509 U.S. 544, 550 (1993) (defining prior restraints as "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur" (quotation marks and citation omitted)); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (noting that all prior restraints "had this in common: they gave public officials the power to deny use of a forum in advance of actual expression").

"Prior restraints on speech are disfavored and carry a heavy presumption of invalidity," as prior restraints are "the most serious and the least tolerable infringement on First Amendment rights." *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1023 (9th Cir. 2009) [hereinafter *Peace Network*] (quotation marks and citation omitted). A "prior restraint need not

actually result in suppression of speech in order to be constitutionally invalid." *Id.* As this Court has explained, prior restraints place a "significant burden" on free speech, imposing both a "procedural hurdle" (submission of an application) and a "temporal hurdle" (awaiting the review and approval of that application) in the way of First Amendment rights. *Berger v. City of Seattle*, 569 F.3d 1029, 1037–38 (9th Cir. 2009) (quotation marks and citations omitted). In this way, prior restraints eliminate both "anonymous speech" and "spontaneous speech," each of which are essential to the First Amendment. *Id.* at 1038 (collecting cases).

The government's ability to limit protected speech on public property—via prior restraint or otherwise—depends on the nature of the forum in which that speech occurs. *See, e.g.*, *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985). The Supreme Court has identified three types of forums: the traditional public forum, the designated public forum, and the nonpublic forum. *See, e.g.*, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–47 (1983) [hereinafter *Perry*]. On the facts pleaded, however, Plaintiffs state claims that the Challenged Policies violate the First Amendment regardless of the nature of the forum.

1. The Challenged Policies Improperly Prohibit Photography in Traditional Public Forums and Are Thus Unconstitutional.

Plaintiffs plausibly allege that at least some of the Prohibited Areas qualify as traditional public forums. *See, e.g.*, *Stewart v. D.C. Armory Bd.*, 863 F.2d 1013, 1018 (D.C. Cir. 1988) ("[T]he decision as to whether a forum is public usually invokes a factual inquiry. . . . The only question before the district court on the motion to dismiss for failure to state a claim was whether it was plausible, based on the allegations made in the complaint, that [plaintiffs] could prove [the area] is a public forum."); *Searcey v. Crim*, 815 F.2d 1389, 1392–93 (11th Cir. 1987) ("Determining what type of public forum exists requires development of the relevant facts that bear upon the character of the property at issue."). Askins, for example, wishes to monitor CBP from the same or similar location as where he stood in 2012: the shoulder of a public street in Calexico, California, adjacent to a public park. ER 74–75 ¶¶ 50–53; ER 78 ¶¶ 66–67. At the San Ysidro port, Ramirez wishes to exercise his First Amendment rights from various locations, including the transit plaza on San Ysidro Boulevard and the adjacent sidewalk. ER 84 ¶ 107(a). Defendants have enforced and will continue to enforce the Challenged Policies against Plaintiffs in these areas. ER 76–77 ¶¶ 57–65; ER 81–82 ¶¶ 90–96.

The Calexico street corner and the adjacent public park, and the San Ysidro transit plaza and adjacent sidewalk, are traditional public forums open to speech and expressive activity by history and past usage. *See, e.g.*, *Perry*, 460 U.S. at 45 (streets and parks "quintessential public forums" that "have immemorially been held in trust for the use of the public"); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 945 (9th Cir. 2011) (public streets and sidewalks are "the archetype of a traditional public forum" (quotation marks and citation omitted)).

As traditional public forums, these areas remain "open for expressive activity regardless of the government's intent." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998). Because each is "used for open public access or as a public thoroughfare," each is "inherently compatible" with expressive activity regardless of any assertions about their "primary purpose." *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1101–02 (9th Cir. 2003).[3]

In a traditional public forum, "the government's ability to permissibly restrict expressive conduct is very limited." *United States v. Grace*, 461 U.S. 171,

[3] Defendants' assertion of authority to require a permit in these areas does not convert them into nonpublic forums. *See United States v. Marcavage*, 609 F.3d 264, 278 n.9 (3d Cir. 2010) (sidewalk was not "a nonpublic forum simply because the [government] had jurisdiction over it and the authority and discretion to issue permits"). The government "may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums." *United States v. Grace*, 461 U.S. 171, 180 (1983).

177 (1983). "In such locations, First Amendment protections are strongest and regulation is most suspect." *Peace Network*, 574 F.3d at 1022 (citing *Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994)). Thus, to survive First Amendment scrutiny, restrictions on speech in public forums (prior restraints or otherwise) must be content neutral, narrowly tailored to a significant governmental interest, and leave open ample alternative channels for communications. *Peace Network*, 574 F.3d at 1023–24. Furthermore, to pass constitutional muster, a permit requirement for speech may not delegate overly broad licensing discretion to a government official, nor allow unlimited time to grant or deny the permit. *See, e.g.*, *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *FW/PBS, Inc. v. City of Dall.*, 493 U.S. 215, 227 (1990).

The Challenged Policies fail every element of this test, both as written and as enforced against each Plaintiff.

a. The Challenged Policies Are Content-Based Restrictions.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed," or if it "cannot be justified without reference to the content of the regulated speech" or was "adopted by the government because of disagreement with the message." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (quotation marks and citations omitted); *see also Berger*, 569 F.3d at 1051 (restriction "is content-

based if either the underlying purpose of the regulation is to suppress particular ideas, or if the regulation, by its very terms, singles out particular content for differential treatment"). Under these definitions, the Challenged Policies are content-based restrictions on speech.

As explained, CBP's Policy specifies that the agency's dissemination of information must not "compromis[e] the DHS/CBP mission." ER 91 ¶ 3.1. This directive, coupled with the Ground Rules' requirement that individuals "clear their visit in advance with appropriate CBP officials," ER 103 ¶ 1, censors any ideas that CBP deems in conflict with "the DHS/CBP mission." Likewise, by tolerating only expression that does not "compromis[e] the DHS/CBP mission," the Policy singles out all other expressive activity for differential treatment. In the Prohibited Areas, therefore, CBP's decision to permit photography "depend[s] entirely on the communicative content" of the photographs. *Reed*, 135 S. Ct. at 2227. The Challenged Policies are "content based on [their] face." *Id.*; *see also Peace Network*, 574 F.3d at 1024 (a restriction is content-based if it "distinguishes favored speech from disfavored speech on the basis of the ideas or views expressed" (alterations, quotation marks, and citation omitted)).

b. The Challenged Policies Are Not Narrowly Tailored to Serve a Compelling Governmental Interest.

A content-based restriction on speech is constitutional only if it can survive "strict scrutiny, which requires the Government to prove that the restriction

furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231 (emphasis added; quotation marks and citations omitted). Taking the facts as pleaded as true—as is required at this stage of proceedings—Plaintiffs have set forth plausible claims that the Challenged Policies cannot satisfy this high standard.

Ultimately, Defendants bear the burden to justify the Challenged Policies. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). At this early stage of litigation, however, Defendants have not proved anything. Instead, Defendants have improperly attempted to supplant Plaintiffs' factual allegations with their own unsubstantiated assertions. As noted, in their initial motion to dismiss, Defendants requested judicial notice of disputed factual matters, including the boundaries of the ports of entry at issue in this case. ER 155 n.1; *id.* at 155–157 nn.1–12; *id.* at 161 n.15. These requests for judicial notice were improper.[4] Fed. R. Evid. 201(b) (judicially-noticeable facts must not be subject to reasonable dispute); *see also, e.g., Intri-Plex Tech., Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (court may take judicial notice of "matters of public record" without converting a motion to dismiss into a motion for summary judgment as long as the facts noticed are not subject to

[4] It is unclear whether the district court granted Defendants' request for judicial notice or instead sustained Plaintiffs' objections. ER 123 n.2.

reasonable dispute); *Sears, Roebuck & Co. v. Metro. Engravers, Ltd.*, 245 F.2d 67, 70 (9th Cir. 1957) ("It was error to sustain a motion to dismiss when the clear allegation of the complaint was to the contrary. . . . [J]udicial notice may be taken of a fact to show that a complaint does not state a cause of action. But here there was a question of fact . . . which could not be thu[s] decided without evidence." (emphasis added)).

Defendants also have enumerated various governmental interests purportedly served by the Challenged Policies. ER 163, 169–171. Yet, even if these interests were sufficiently compelling in a vacuum, neither the facts pleaded nor matters subject to judicial notice establish as a matter of law that the Challenged Policies actually further these interests.[5] Plaintiffs allege facts which, if taken as true with inferences drawn in Plaintiffs' favor, state a claim that the Challenged Policies violate the First Amendment. Without a fully developed record, it is impossible to determine whether those Policies in fact further the Defendants' alleged interests.

The district court nevertheless held that the Challenged Policies "serve the compelling interest of protecting United States territorial sovereignty," and

[5] In moving to dismiss Plaintiffs' amended complaint, Defendants did not even offer speculative rationales. ER 55–61. Rather, Defendants implicitly relied on the improper arguments and unsubstantiated facts raised in their motion to dismiss Plaintiffs' original complaint. *Cf. Ramirez*, 806 F.3d at 1008 (amended complaints supersede originals).

"shield[] sensitive CBP operations that would lose efficacy if made known to those who would smuggle aliens or contraband across the border." ER 10. In so opining, the district court presumed the existence of facts outside the complaint not properly subject to judicial notice.[6] The court thus committed reversible legal error, especially given that Defendants bear the ultimate burden to justify restrictions on speech. *See, e.g.*, *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001) ("As a general rule, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." (quotation marks and citation omitted)); *see also, e.g.*, *Hyland v. Wonder*, 972 F.2d 1129, 1140 (9th Cir. 1992) (on appeal from order dismissing First Amendment claim, factual issues "cannot be resolved by this court at such an early stage of the proceedings"); *Perry v. McGinnis*, 209 F.3d 597, 607 (6th Cir. 2000) (in First Amendment case, where "facts were not well enough developed in the pleadings," court erred "by going beyond the pleadings and engaging in fact finding, which is impermissible at the FRCP 12(b)(6) stage"); *Stewart*, 863 F.2d at 1018 (First Amendment forum case

[6] Had Defendants submitted evidence extrinsic to the amended complaint, and had the district court relied thereupon in deciding the motion to dismiss, it should have converted that motion into a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. Fed. R. Civ. P. 12(d).

"raise[d] inherently factual issues that cannot be resolved on a Rule 12(b)(6) motion").[7]

Furthermore, even if Defendants had established a compelling governmental interest, the facts before the Court at this point do not show that the Challenged Policies are narrowly tailored to achieve that interest. Plaintiffs specifically and plausibly allege that the Challenged Policies sweep far too broadly and effectively ban an entire medium of speech, preventing them from photographing matters of public interest that are in public view from outdoor and otherwise unrestricted areas at or near ports of entry. ER 66–68 ¶¶ 8–17; ER 87–89 ¶¶ 118–25.

"A complete ban can be narrowly tailored . . . only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). CBP's blanket prohibition on all photography by all people from all outdoor parts of every port of entry fails this test: Askins' environmental advocacy, and Ramirez's concern for human rights abuses, are not "appropriately targeted evils" undermining, e.g., "territorial sovereignty" as a matter of law. *See, e.g.*, *Berger*, 569 F.3d at 1041 (holding that permitting rule was not narrowly tailored, in part, because it "applies, on its face, to an extraordinarily broad group

[7] *See also, e.g.*, *Adair v. England*, 183 F. Supp. 2d 31, 56 (D.D.C. 2002) (observing "a fundamental procedural mantra" district court must follow "in ruling on a motion to dismiss," namely, that "the court must accept the plaintiffs' well-pled factual allegations as true and draw all reasonable inferences in the plaintiffs' favor" (citation omitted)).

of individuals, the vast majority of whom are not responsible for the 'evil' the [government] seeks to remedy"); *Peace Network*, 574 F.3d at 1025 ("Expansive language can signal the absence of a close fit with the governmental interests underlying the permitting requirement." (quotation marks and citation omitted)).

Once more, the district court improperly inserted its own factual narrative to conclude that the Challenged Policies were narrowly tailored to (the court's asserted) compelling governmental interests of "protecting U.S. territorial sovereignty" and "shield[ing] sensitive CBP operations." ER 10. But it makes little sense to declare that the Challenged Policies are properly tailored to these government interests when at least some of the matters Plaintiffs wish to record are also visible from outside the Prohibited Areas.[8] In any event, the mere possibility that Plaintiffs' exercise of their First Amendment rights might implicate allegedly "sensitive CBP operations" is certainly not dispositive. Any law enforcement operation—whether at our borders or elsewhere—may be potentially "sensitive." As noted, however, courts throughout this country have held time and again that the First Amendment protects the public's right to monitor and record matters of public interest in public view, including but not limited to the conduct of law

[8] Askins, for example, could have taken photographs identical to the ones CBP deleted in 2012 if he had stood just a few feet further back from the Calexico port's secondary inspection area exit, inside the Genaro Teco Monroy Memorial International Border Friendship Park. ER 75 ¶ 51. If there are factual disputes about what is visible from outside port property, such disputes cannot be resolved on a motion to dismiss. *See, e.g.*, *Stewart*, 863 F.3d at 1018.

enforcement officials. *E.g.*, *Glik*, 655 F.3d at 84 ("Such peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation."). Plaintiffs' exercise of these First Amendment rights is not "an appropriately targeted evil." *Frisby*, 487 U.S. at 485.

Furthermore, to have any real meaning, concepts such as "territorial sovereignty" or "border security" must be defined with specificity and precision, and limited to a narrow category of particular interests (e.g., the governmental interest in preserving the integrity of sensitive search techniques) based on facts properly established in a fully developed record. Without such specificity, these concepts may serve as a perpetually-overriding asterisk to our nation's most treasured and fundamental constitutional protections. *Cf. United States v. Cotterman*, 709 F.3d 952, 957 (9th Cir. 2013) (en banc) ("Even at the border, we have rejected an 'anything goes' approach" to evaluating constitutional claims (citation omitted)); *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973) ("The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards."). Taken to its logical conclusion, the district court's rationale would destroy the First Amendment right to photograph matters of public

interest, because the government can almost always concoct a "security" rationale against such photography. *Cf. United States v. Stevens*, 559 U.S. 460, 480 (2010) ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*.").

The district court also opined that "exhaustive recording of CBP activities over time" and "comprehensive, long-term documentation of port procedures"—types of recording activity that neither Plaintiff asserts a right to undertake in the amended complaint—would provide "intimate familiarity with CBP patterns" and be "invaluable to drug cartels and smugglers seeking to violate the borders of the United States." ER 10 (emphases added).

The court's opinion was improper at this stage of the case. No facts supporting that opinion are alleged in the complaint. It is error to "foreclose expressive activity in public areas on mere speculation about danger," and the facts pleaded or properly subject to judicial notice do not allow findings about any "safety or security threat" posed by third parties. *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1228 & n.2 (9th Cir. 1990). Rather, Plaintiffs allege that Askins "seeks to photograph and record matters and events exposed to public view in the area immediately surrounding the Calexico port of entry building, including vehicular traffic and CBP officers engaged in the public discharge of their duties, in order to document air and other environmental pollution as well as human rights

abuses." ER 78 ¶ 67. Likewise, the complaint alleges that Ramirez wishes "to document CBP activity at or near the San Ysidro port of entry to safeguard against civil and human rights abuses, including excessive use of force and racial profiling," and more specifically that he wants "to photograph and otherwise record matters exposed to public view, including CBP officers engaged in the public discharge of their duties." ER 80 ¶ 78; ER 84–85 ¶ 107.

Plaintiffs' allegations, therefore, establish that they "are not responsible for the 'evil[s]'" the district court conjured. *Berger*, 569 F.3d at 1041. And unless and until the parties have the opportunity to further develop the factual record through discovery, the plausible allegations contained in Plaintiffs' complaint comprise the operative factual universe. It was improper for the district court to uphold the Challenged Policies as a matter of law based on an entirely separate factual narrative that the Defendants have not proven and Plaintiffs have had no opportunity to dispute.

To the extent that the Challenged Policies are content-based restrictions on speech in a public forum, therefore, Plaintiffs have alleged a violation of their First Amendment rights.

c. The Challenged Policies, Even if Deemed Content Neutral, Are Unconstitutional.

Plaintiffs' amended complaint states plausible First Amendment claims even

if the Challenged Policies are deemed content-neutral.

In a public forum, the government may "enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry*, 460 U.S. at 45 (collecting cases). Plaintiffs plausibly allege that the Challenged Policies sweep far too broadly to survive the "time, place, or manner" narrow tailoring analysis.

Two questions are relevant here. First, a court should inquire whether the challenged regulation achieves its ends without restricting substantially more speech than necessary. *Peace Network*, 574 F.3d at 1024. This is difficult to assess at this stage of the proceedings. Even assuming Defendants had articulated specific significant government interests furthered by the Challenged Policies, Defendants' interference with the types of free speech activities in which Plaintiffs wish to engage indicates these policies do restrict substantially more speech than necessary. It is unclear, for example, how prohibiting a U.S. citizen from documenting border traffic and environmental pollution furthers U.S. "territorial sovereignty," or threatens "sensitive CBP operations." Likewise, there is no reason to believe that another U.S. citizen's efforts to document male CBP officers' apparent sexual harassment of female pedestrians interferes with legitimate port of entry business; indeed, if anything, such a record arguably would

improve CBP accountability, ensure federal officers correctly execute their port-of-entry duties, and thereby promote U.S. "territorial sovereignty."

Second, a court should inquire as to whether "there are obvious alternatives that would achieve the same objectives while restricting less speech." *Id.* at 1025 (emphasis added). Although the government's chosen mechanism "need not be the least restrictive or least intrusive means available," the existence of "obvious, less burdensome alternatives is a relevant consideration in determining whether the fit between ends and means is reasonable." *Berger*, 569 F.3d at 1041(quotation marks and citations omitted; emphases added). Here, again, Plaintiffs have stated a plausible claim for relief under the First Amendment.

Plaintiffs clearly allege that they wish to engage in First Amendment-protected monitoring activities only from unrestricted, outdoor areas. ER 66–68 ¶¶ 8–17; ER 87–89 ¶¶ 118–25. On the facts as pleaded, there is no reason CBP could not promote "border security" (or any other significant governmental interest) by limiting photography or other recording in certain specific, restricted areas where sensitive materials are present (e.g., inside port of entry buildings or in other secure areas not exposed to public view). CBP could also enforce "an appropriately worded prohibition on aggressive behavior" or other specific interference with official activities at ports of entry to promote the orderly administration of port business. *Berger*, 569 F.3d at 1053; *cf. Glik*, 655 F.3d at 80,

84 (upholding right to film arrest in progress from "comfortable remove" of "roughly ten feet away"). CBP's current approach disregards obvious alternatives, and is thus not narrowly tailored.

To hold otherwise would eviscerate the First Amendment right to record matters of public interest in public view, at the border and elsewhere. The "label of 'national security' may cover a multitude of sins," and courts must guard against the danger that "federal officials will disregard constitutional rights in their zeal to protect the national security." *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985); *cf. United States v. U.S. Dist. Ct. for E. Dist. of Mich.*, 407 U.S. 297, 314 (1972) ("*Keith*") ("The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'").

Additionally, CBP's blanket prohibition on all photography in traditional public forums at or near ports of entry does not leave open any (much less ample) alternative channels for Plaintiffs' expressive activities. "Several considerations are relevant to [the ample alternatives] analysis." *Peace Network*, 574 F.3d at 1025 (quotation marks and citations omitted). For one, "if the location of the expressive activity is part of the expressive message, alternative locations may not be adequate." *Id.* (quotation marks and citation omitted). As alleged in the amended complaint, each Plaintiff's expressive message is specific to border-related rights abuses and other matters of public concern at or near ports of entry.

ER 69 ¶¶ 21–22; ER 70–71 ¶¶ 32–33; ER 73–74 ¶¶ 40–47; ER 79 ¶¶ 72–75; ER 84–85 ¶ 107; ER 86 ¶ 110. For another, "[courts] consider the opportunity for spontaneity in determining whether alternatives are ample, particularly for political speech." *Peace Network*, 574 F.3d at 1025. Here, even if CBP made clear when and how it would exercise its discretion to grant or deny approval for photography, the public would have no way to make spontaneous recordings of events, losing a crucial mechanism for documenting official misconduct.

For all of these reasons, even if the Challenged Policies were deemed content-neutral, Plaintiffs have stated a claim that they nevertheless violate the First Amendment in traditional public forum areas at or near ports of entry. At this stage in the proceedings, this is sufficient. *Starr*, 652 F.3d at 1216.

d. The Challenged Policies Unconstitutionally Give CBP Unbridled Discretion.

The Challenged Policies also violate the First Amendment by granting CBP unbridled discretion in determining whether to grant or deny permission to take photographs in traditional public forum areas at or near port of entry property, with no time limits on the exercise of that discretion. ER 66 ¶¶ 9–10.

A regulation may not "confer unbridled discretion on a permitting or licensing official." *Peace Network*, 574 F.3d at 1025; *see also Forsyth Cty.*, 505 U.S. at 130 ("A government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because

such discretion has the potential for becoming a means of suppressing a particular point of view." (quotation marks and citation omitted)). To avoid this risk, a permit requirement "must contain narrow, objective, and definite standards to guide the licensing authority." *Id.* at 131 (quotation marks and citation omitted). These standards, moreover, must "be sufficient to render the official's decision subject to effective judicial review." *Peace Network*, 574 F.3d at 1025 (alterations, quotation marks, and citation omitted). "The reasoning is simple: If the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted." *Forsyth Cty.*, 505 U.S. at 131 (quotation marks and citations omitted).

As alleged, however, neither the Policy nor the Ground Rules specify any objective or definite standards or criteria limiting CBP officials' discretion to grant or deny permission to take photographs at or near port of entry property. ER 66 ¶¶ 9–10. On the contrary: the Challenged Policies prohibit any activities that may "compromis[e] the DHS/CBP mission" without (a) defining that mission, (b) specifying what may "compromise" it, or (c) limiting official discretion in any manner. ER 91 ¶ 3.1; ER 92 ¶ 3.8 ("CBP media and public affairs policy must be executed with discretion and the use of sound judgment, as every possibility cannot be predicted and covered by a written policy statement."). Nor do the Challenged

Policies require any CBP official to explain any decision regarding photography, if one is ever reached (or if one is never reached).

Indeed, an additional infirmity is that the Challenged Policies do not impose any time limits for CBP officials to make a determination regarding whether to allow photography. The Supreme Court has explained that a "scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech," and is therefore unconstitutional. *FW/PBS*, 493 U.S. at 227; *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 802 (1988) (holding licensing scheme allowing unlimited delays unconstitutional, as "delay compels the speaker's silence"). As alleged, the Challenged Policies can thus suppress speech simply by providing CBP officials unlimited time to respond to a person's request for permission to take photographs. If an official never responds, or does not respond in a timely fashion, the individual seeking permission cannot exercise his or her First Amendment rights at all.

On every metric, therefore, the Challenged Policies fail to satisfy basic First Amendment requirements.

2. The Challenged Policies Are Neither Viewpoint-Neutral Nor Reasonable, and So Are Unconstitutional in Nonpublic Forums.

On the facts pleaded, the Challenged Policies also violate the First Amendment in nonpublic forums at ports of entry. Prior restraints or otherwise,

government restrictions on protected speech in nonpublic forums "must be (1) reasonable in light of the purpose served by the forum and (2) viewpoint neutral." *Kaahumanu v. Haw.*, 582 F.3d 789, 800 (9th Cir. 2012) (quotation marks and citation omitted). The Challenged Policies are neither.

a. The Challenged Policies Are Not Viewpoint-Neutral.

As alleged in the amended complaint, the Challenged Policies are unconstitutional viewpoint-based restrictions on Plaintiffs' First Amendment rights, because the text of the policies invites viewpoint discrimination and the policies afford CBP officials unbridled discretion.

First, the text of the Challenged Policies invites CBP officials to engage in viewpoint discrimination. Although CBP purports to permit photography "without favoritism," the agency expressly reserves the right to prohibit any photography that "compromis[e] the DHS/CBP mission." ER 91 ¶ 3.1. To allow CBP the unfettered right to prohibit speech it deems inconsistent with its "mission" would give the agency "a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed," which "strikes at the very heart of the First Amendment." *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring).

The danger of viewpoint discrimination is highlighted by the fact that, by definition, the Challenged Policies prohibit any spontaneous "unauthorized"

photography (including of abuses committed by CBP officers), while allowing "authorized" photography of matters deemed acceptable by CBP. ER 103 ¶ 1 ("CBP requires that members of the press who desire to film, conduct interviews, or engage in any other media activity must clear their visit in advance with appropriate CBP officials."). It would have been impossible for Ramirez, for example, to seek out and receive prior permission to photograph CBP misconduct exposed to public view in real time. Yet the Challenged Policies give CBP the right to allow "authorized" photography that is consistent with "the DHS/CBP mission," and which, presumably, depicts the agency in a favorable light. This kind of viewpoint discrimination, actual or latent, cannot survive First Amendment scrutiny, even in a nonpublic forum, especially given the fundamental First Amendment interest in holding government accountable for its conduct. *See Alvarez*, 679 F.3d at 597; *Glik*, 655 F.3d at 82.

Second, the Challenged Policies are unconstitutional in view of the principle that viewpoint neutrality "includes the prohibition on a licensing authority's unbridled discretion." *Kaahumanu*, 682 F.3d at 806; *see also Child Evangelism Fellowship of Md., Inc. v. Montgomery Cty. Pub. Schs.*, 457 F.3d 376, 384 (4th Cir. 2006) ("viewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to protect against the improper exclusion of viewpoints"); *Southworth v. Bd. of*

Regents of Univ. of Wis. Sys., 307 F.3d 566, 579 (7th Cir. 2002). As the Supreme Court has explained, "a law or policy permitting communication in a certain manner for some but not for others raises the specter of . . . viewpoint censorship," a danger that is "at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988) [hereinafter *Lakewood*].

As noted, the Challenged Policies nowhere explain how CBP officials are to evaluate whether a certain expression is consistent with "the DHS/CBP mission." Indeed, the fact that each Plaintiff was harassed by CBP after trying to record matters of public interest indicates that the agency takes an excessively broad view of its "mission," and perhaps believes that any expressive activity that might trigger public debate or criticism of CBP port operations is inconsistent with that "mission." ER 66–68 ¶¶ 8–17. In the absence of clear standards governing the exercise of discretion, CBP officials "may decide who may speak and who may not based upon the content of the speech or the viewpoint of the speaker," and in so doing "impose censorship on the public or the press." *Lakewood*, 486 U.S. at 763–64 (citations omitted). This is unconstitutional.

Furthermore, the "Supreme Court has made clear that conferring an unbridled discretion on a licensing official creates the danger of self-censorship, as

well as government censorship." *Kaahumanu*, 682 F.3d at 807. Specifically, "a citizen may hesitate to express, or refrain from expressing, his or her viewpoint for fear of adverse government action such as the denial of a permit." *Id.* (citing *Lakewood*, 486 U.S. at 759). This is precisely what Plaintiffs allege has occurred to each of them in view of the Challenged Policies. ER 78 ¶¶ 66–71; ER 86–87 ¶¶ 111–117. The facts pleaded exemplify this Court's warning that a "standardless discretion also makes it difficult to detect, and protect the public from, unconstitutional viewpoint discrimination by the licensing official." *Kaahumanu*, 682 F.3d at 807 (citations omitted). The very "potential for [CBP's] exercise of [the discretionary] power" the Challenged Policies afford the agency is, itself, enough to render those policies "inconsistent with the First Amendment" on the facts pleaded. *Id.*

b. The Challenged Policies Are Unreasonable.

Finally, and as relevant to the extent Plaintiffs wish to exercise their First Amendment rights from nonpublic forums at the ports of entry, Plaintiffs have alleged plausible grounds that the Challenged Policies are unreasonable.

In nonpublic forums, a restriction on speech is valid only if it is "reasonable in light of the purpose served by the forum." *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 966 (9th Cir. 2002), *abrogated on other grounds by Winter v. NRDC*, 555 U.S. 7 (2008). "The 'reasonableness' requirement for restrictions on

speech in a nonpublic forum requires more of a showing than does the traditional rational basis test." *Id.* at 966–67 (citation omitted). Specifically, "[t]here must be evidence in the record to support a determination that the restriction is reasonable. That is, there must be evidence that the restriction reasonably fulfills a legitimate need." *Id.* (citation omitted).

Neither the facts pleaded nor matters subject to judicial notice properly establish that the Challenged Policies further a "legitimate need." The district court improperly assumed that the policies furthered "territorial sovereignty." ER 10. Even if territorial sovereignty had been established as a legitimate need, however, the Challenged Policies are unreasonable insofar as they prohibit photography of matters exposed to public view that could also be photographed from off port of entry property. For example, Askins could have taken identical photos to the ones CBP deleted in 2012 from just a few feet further back from the Calexico port of entry, standing inside, as opposed to adjacent to, the (public) Genaro Teco Monroy Memorial International Border Friendship Park. CBP's policies do not prohibit such off-port photography.[9] As to such matters exposed to public view, therefore, the Challenged Policies do not "reasonably fulfill[] a

[9] Defendants conceded as much in moving to dismiss Plaintiffs' original complaint. ER 164 ("CBP explicitly permits photography or video from off of ports of entry, and the agency prohibits only unauthorized photography by individuals on port of entry property." (citation omitted)).

legitimate need" because they do not prevent photography of anything that cannot be otherwise recorded. *Sammartano*, 303 F.3d at 967.[10]

To the extent the Challenged Policies purport to further "border security" or general port of entry operations, Plaintiffs state a claim that they are unreasonable because they restrict all photography, not just photography by persons who are disruptive or impede CBP officers. *See, e.g.*, *Cornelius*, 473 U.S. at 811 (the First Amendment allows "exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." (emphases added)). On the facts pleaded, neither Plaintiff posed a threat to safety, interfered with CBP officers, or otherwise hindered port-of-entry operations in any way. ER 76 ¶ 60; ER 82–83 ¶ 98.

For all of these reasons, the district court erred in dismissing Plaintiffs' First Amendment claims with prejudice.

II. THE LAW OF THE CASE DOCTRINE DOES NOT BAR PLAINTIFFS' AMENDED CLAIMS.

In addition to the substantive legal errors detailed above, the district court abused its discretion in relying on the law of the case doctrine to dismiss Plaintiffs' amended complaint.

[10] Nor can Defendants prevail by arguing that Plaintiffs can just as easily, and therefore should, photograph matters exposed to public view from outside port of entry property. It is bedrock law that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. N.J.*, 308 U.S. 147, 163 (1939).

As explained, application of the law of the case doctrine is discretionary. *Stacy*, 825 F.3d at 567. This Circuit applies a two-step test in assessing whether a district court abused its discretion. First, the Court must "determine de novo whether the trial court identified the correct legal rule to apply to the relief requested." *United States v. Hinkson*, 585 F.3d 1247, 1261–62 (9th Cir. 2009) (en banc). Failure to apply the correct legal rule is an abuse of discretion. *Id.* at 1262.

Here, the district court applied the wrong legal rule and thus abused its discretion. Rather than assess the legal sufficiency of Plaintiffs' amended pleadings—which it ought to have done pursuant to Federal Rule of Civil Procedure 12(b)(6)—the district court simply reiterated its previous decision on Defendants' motion to dismiss Plaintiffs' original complaint. ER 10–11. The district court then concluded "[t]he law of the case bars Plaintiffs' claims." ER 11.

The district court was wrong. The law of the case doctrine never bars district courts from reconsidering pretrial rulings. *Peralta v. Dillard*, 744 F.3d 1076, 1088 (9th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 946 (2015) ("Pretrial rulings, often based on incomplete information, don't bind district judges for the remainder of the case. Given the nature of such motions, it could not be otherwise.").

Accordingly, before judgment or appeal, courts can and do reconsider issues decided on a previous motion to dismiss. *See, e.g.*, *Rocky Mountain Farmers*

Union v. Goldstene, 843 F. Supp. 2d 1042, 1060 (E.D. Cal. 2011), *aff'd*, 730 F.3d 1070 (9th Cir. 2013) (rejecting argument that court "cannot reconsider the legal conclusions set forth in its Motion to Dismiss Order because those legal conclusions are the law of the case"); *In re Sony Grand Wega KDF-E A10/A20 Series Rear Proj. HDTV Television Litig.*, 758 F. Supp. 2d 1077, 1098 (S.D. Cal. 2010) (although court had previously ruled on claim, "the law of the case doctrine does not bar the [c]ourt from considering . . . motion to dismiss" similar claim from amended complaint).

The district court ignored *Peralta* and related cases and incorrectly relied on *United States v. Cuddy*, 147 F.3d 1111 (9th Cir. 1998), which arose on a fundamentally different procedural posture from that of this case. In *Cuddy*, this Court discussed whether the district court properly applied the law of the case doctrine in resentencing defendants on remand from an earlier decision of this Court that had vacated the original sentences. *Id.* at 1110–14. Here, by contrast, the district court was not deciding the motion to dismiss on remand from the court of appeals. Therefore, *Cuddy* does not apply. "The legal effect of the doctrine of the law of the case depends upon whether the earlier ruling was made by a trial court or an appellate court. All rulings of a trial court are subject to revision at any time before the entry of judgment." *United States v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986) (emphasis added; citation omitted); *see also, e.g.*, *City of L.A.*,

Harbor Div. v. Santa Monica Baykeeper, 254 F.3d 882, 888 (9th Cir. 2001) (the law of the case doctrine "simply does not impinge upon a district court's power to reconsider its own interlocutory order provided that the district court has not been divested of jurisdiction over the order.").

The district court thus applied the wrong legal rule: one in which the law of the case doctrine barred Plaintiffs' amended claims. This alone is sufficient for a finding that the court abused its discretion.

Even if the law of the case doctrine were applicable, it would be an abuse of discretion for the district court to rely on that doctrine to dismiss Plaintiffs' amended complaint with prejudice. Under *Hinkson*, the second step of the abuse-of-discretion test requires the Ninth Circuit to "determine whether the trial court's application of the correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" 585 F.3d at 1262 (citations omitted). "If any of these three apply," then the appeals court is "able to have a definite and firm conviction that the district court reached a conclusion that was a mistake or was not among its permissible options, and thus that it abused its discretion." *Id.* (quotation marks omitted).

The district court's dismissal of Plaintiffs' amended complaint was illogical. In deciding Defendants' motion to dismiss Plaintiffs' original complaint, the district court expressly granted Plaintiffs leave to amend their policy-related First

Amendment claims. ER 120–125. Defendants moved for reconsideration, arguing that this was error; in response, the district court again explicitly invited Plaintiffs to amend their claims. Dkt. No. 46-1 at 2–5; ER 111. *See also, e.g.*, *Cafasso*, 637 F.3d at 1058 ("Normally, when a viable case may be pled, a district court should freely grant leave to amend." (citations omitted)); *Lacey*, 693 F.3d at 939 (same, collecting cases); Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when justice so requires.").

As soon as the district court had finally resolved Defendants' first motion to dismiss (which involved three separate orders over a period of almost two years), Plaintiffs filed an amended complaint. In doing so, Plaintiffs clarified both the factual and legal underpinnings of their lawsuit. The district court, however, entirely ignored Plaintiffs' amended pleadings in dismissing this action with prejudice. In fact, the district court criticized Plaintiffs for accepting the court's own invitation to file an amended complaint. ER 10 ("Now, more than two years later, Plaintiffs bring claims that hinge on the identical issue—whether CBP's policy of prohibiting photography at CBP-controlled facilities is inconsistent with the First Amendment."). This was illogical, and an abuse of discretion.

CONCLUSION

For the foregoing reasons, this Court should hold that Plaintiffs have stated claims for relief under the First Amendment and reverse the district court's contrary conclusion. This matter should be remanded for further proceedings.

September 26, 2016

Respectfully submitted,

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Certificate of Compliance

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 12,536 words.

2. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C)(i), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: September 26, 2016

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Statement of Related Cases

Plaintiffs-Appellants are not aware of any related cases pending before this Court, as defined by Ninth Circuit Rule 28-2.6.

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Certificate of Service

I hereby certify that on September 26, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

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