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.

APPELLANTS' REPLY BRIEF

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

This case exemplifies a timeless truth: that "First Amendment rights are among the most fragile possessions of a citizen." *Bise v. Int'l Bhd. of Elec. Workers, AFL-CIO Local 1969*, 618 F.2d 1299, 1304 (9th Cir. 1979) (citations omitted). In Defendants' universe, the executive's sweeping assertion of a generalized "border security" interest is sufficient not only to deny these core freedoms to the public, but to insulate that denial from any meaningful judicial review. Fortunately, our system—predicated on rule of law and separation of powers—forecloses Defendants' arguments.

With limited exceptions not relevant here, the First Amendment protects the right to photograph matters of public interest exposed to public view from outdoor and otherwise unrestricted areas. This right is essential to ensuring the transparency and accountability on which democracy depends, and it applies with equal force along our nation's borders. In their amended complaint, Plaintiffs allege facts plausibly stating a claim that Defendants have adopted and enforced unconstitutional policies that interfere with this right. Defendants cannot be allowed to evade judicial review with unsworn testimony of counsel, faulty premises, and irrelevant citations.

The Defendants' argument and the district court's ruling suffer from the same fundamental flaw: both violate the axiom that the court must accept "all factual allegations in the complaint as true" and construe "them in the light most favorable to the nonmoving party." Appellees' Opp'n 16, ECF No. 23 ("Opp.") (quoting *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012)). Properly read and construed, the amended complaint states a claim that Defendants are violating the First Amendment. This Court should decline Defendants' invitation to perpetuate the legal errors committed by the district court in deciding questions of fact on the pleadings, and reverse and remand.

ARGUMENT

I. PLAINTIFFS HAVE STATED COGNIZABLE FIRST AMENDMENT CLAIMS.

In deciding a motion to dismiss for failure to state a claim prior to any discovery, a district court's sole task is to "inquire 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). Instead of doing so, the court below completely ignored Plaintiffs' amended complaint (the operative pleading) and substituted its own factual narrative instead of Plaintiffs' allegations. Appellants' Opening Br. 18, ECF No. 7 ("AOB").

Most notably, the district court decided that the Challenged Policies were "the least restrictive means by which to serve the compelling interest of protecting United States territorial sovereignty," and opined that the Challenged Policies "shield[] sensitive CBP operations that would lose efficacy if made known to those who would smuggle aliens or contraband across the border." ER 10.[1] Yet the amended complaint only discusses Plaintiffs' attempts to photograph matters *already exposed to public view*—and thus known to any of the millions of people who cross either port of entry each day. ER 76 ¶¶ 55–56; ER 80–81 ¶¶ 84–85. Neither Plaintiff has engaged in any effort to photograph "sensitive CBP operations." Rather, each has attempted, and would like to continue, to photograph public officials engaged in the public discharge of their duties to document matters of pressing public concern, including environmental pollution, human rights abuses, and official misconduct. ER 78 ¶¶ 66–67; ER 86 ¶¶ 112–13.

The district court further opined that any policy that allowed "comprehensive, long-term documentation of port procedures" "would be invaluable to drug cartels and smugglers seeking to violate the borders of the United States." ER 10. Again: no such facts appear on the face of

[1] As explained in Plaintiffs' opening brief, the "Challenged Policies" include both CBP's national policy and its media "ground rules" for Southern California ports of entry. AOB at 7–8.

Plaintiffs' amended complaint. Rather, each Plaintiff took only a few photographs over a matter of minutes, and for the sole purpose of documenting matters of legitimate public concern. ER 74–75 ¶¶ 47, 53; ER 80 ¶¶ 81–82.

In supplanting its own factual narrative for Plaintiffs' well-pleaded allegations, the district court committed reversible legal error.

A. Defendants Improperly Attempt to Substitute Their Own Facts In Place of Plaintiffs' Well-Pleaded Allegations.

Defendants now replicate the district court's error, presenting a lengthy (and, at this stage, largely irrelevant) narrative about the regulatory scheme applicable to ports of entry, Opp. 3–10, 16–17, and CBP's *general* interest in border security, Opp. 21–23. None of Defendants' factual assertions, however, are properly before this Court, which must at this stage confine its analysis to Plaintiffs' pleadings and matters properly subject to judicial notice, which do not include the multitude of disputed facts asserted by Defendants. AOB at 30. 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); *Sears, Roebuck & Co. v. Metro. Engravers, Ltd.*, 245 F.2d 67, 70 (9th Cir. 1957).

The following facts control for the purpose of ascertaining whether Plaintiffs have stated cognizable First Amendment claims:

First, CBP has a national policy that prohibits photography on any port of entry property without advance official permission ("Policy"). ER 66 ¶ 8. 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 (First Am. Compl. Ex. A (CBP Directive No. 5410-001B)). CBP also has media "ground rules" for Southern California ports of entry ("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 violate the First Amendment. ER 87–89 ¶¶ 118–125.

Second, two specific ports of entry are at issue in this litigation: the Calexico West port of entry, and the San Ysidro port of entry. ER 73–78, ¶¶ 47–69 (Calexico); ER 79–87, ¶¶ 76–115 (San Ysidro). The exact boundaries of each of these ports of entry have never been established and

remain disputed at this stage of the proceedings.[2] 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. ER 66 ¶ 7.[3]

Third, as noted, Plaintiffs assert a right only to photograph matters and events *exposed to public view* in *outdoor areas* of ports of entry. ER 69 ¶ 20; ER 78 ¶ 67; ER 86 ¶ 113; ER 89 (Prayer for Relief). 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 or information. Defendants' repeated concerns about "unrestricted" photography exposing "sensitive inspection techniques," Opp. at 21–22, 24–25, are, therefore, beyond the scope of

[2] Throughout their brief, Defendants discuss "ports of entry" and "port of entry property" as though these terms have clearly defined meanings. Plaintiffs' well-pleaded factual allegations, however, indicate that these geographical terms are contested.

[3] 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.

Plaintiffs' pleadings and not properly subject to judicial notice, as they involve disputed facts Plaintiffs have not yet tested through discovery.[4]

Likewise, this case does not implicate any right to privacy, Opp. at 2, 14–15, 22, because Plaintiffs assert a First Amendment right to record only that which is exposed to public view. *See, e.g.*, *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 605–06 (7th Cir. 2012) ("The ACLU wants to openly audio record police officers performing their duties in public places and speaking at a volume audible to bystanders. Communications of this sort lack any 'reasonable expectation of privacy' for purposes of the Fourth Amendment. Dissemination of these communications would not be actionable in tort." (citations omitted)); *Barnhart v. Paisano Publ'ns, LLC*, 457 F. Supp. 2d 590, 593 (D. Md. 2006) (dismissing privacy claim for taking of photograph at outdoor public event because "anything visible in a public place can be recorded and given circulation by means of a photograph, to the same extent as by a written description, since this amounts to nothing more than giving

[4] For example, Defendants discuss "filming the questioning of suspects" and "close-up photographs or videos of port computer screens [that] may contain sensitive information[.]" Opp. at 22. These facts are inconsistent with Plaintiffs' pleadings, which assert a First Amendment right to photographs matters and events exposed to public view in outdoor port of entry areas. ER 69 ¶ 20; ER 78 ¶ 67; ER 86 ¶ 113; ER 89 (Prayer for Relief). Defendants have not established that any questioning of suspects or computer screens are even visible from such locations.

publicity to what is already public and what anyone would be free to see." (quotation marks and citation omitted)). Accordingly, this case does not involve sensitive private information "entrusted to the government." *The Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989). Opp. at 27.

Fourth, Plaintiffs have plausibly alleged that the Defendants have applied and enforced (or will apply and enforce) the Challenged Policies in certain traditional public forums within each of the two specific ports of entry at issue here. Specifically, Defendants enforced the Challenged Policies against Plaintiff Ray Askins while he stood near the shoulder of a public street adjacent to a small public park—two areas alleged to be traditional public forums—in Calexico, California. ER 74–75 ¶¶ 50–52. In San Ysidro, Plaintiffs allege that official U.S. government signs appear to prohibit any form of photography from, *inter alia*, the transit plaza on San Ysidro Boulevard and adjacent sidewalk; these areas, too, are alleged to be traditional public forums. ER 84–85 ¶¶ 107–108. At this stage, these plausible allegations are sufficient, and cannot be overridden by Defendants' summary assertions that *all* parts of port of entry property are nonpublic forums. Opp. at 29–32.[5] *See, e.g.*, *Stewart v. D.C. Armory Bd.*, 863 F.2d

[5] Defendants claim that "Plaintiffs do not dispute that ports of entry have no history of being devoted to free expression[.]" Opp. at 30. As noted, however, Plaintiffs *do* dispute the exact boundaries of the ports of entry at

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.").

In sum: Plaintiffs' amended complaint sufficiently alleges 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. Plaintiffs likewise adequately allege 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

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issue in this litigation, and plausibly have alleged that at least some parts of the areas in which Defendants have enforced the Challenged Policies *have* historically been devoted to free expression. ER 75 ¶¶ 51–52; ER 84 ¶ 107(a).

outdoor areas of port of entry property, regardless of the nature of the forum. ER 88–89, ¶¶ 121–22, 124–25. Defendants' motion to dismiss should have been denied.

B. Numerous Factual Questions Remain Unresolved and Disputed At This Early Stage of Litigation.

The fundamental requirement that a court accept a plaintiff's plausible factual allegations in deciding a motion to dismiss is rooted in the Federal Rules of Civil Procedure, which contemplate the development of a full factual record, via adversarial proceedings, prior to any judgment on the merits. This is especially important where, as here, *defendants* bear the burden of proof. *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 stage, however, Defendants have not proved anything, and numerous crucial factual questions remain disputed.

As noted, one key question relates to how each port of entry is delineated. Without clarity on this factual point, Defendants' assertion that the Challenged Policies are reasonable because they "only" apply "on" port of entry property is meaningless. Opp. at 25. If the government can unilaterally and arbitrarily designate an area as "port of entry property," then the limit putatively imposed by the on port/off port distinction dissolves

entirely. Significantly, Plaintiffs' allegations indicate that Defendants take an expansive view of "port of entry property," sweeping in sidewalks that are across a road from any actual port edifice and a transit plaza used each day by thousands of people, *many of whom do not cross any border*. ER 74–75 ¶¶ 50–52; ER 84 ¶ 107(a).[6] Related to this is a second fact question: whether certain areas over which Defendants' port directors assert authority are in actuality traditional public forums. *Searcey*, 815 F.2d at 1392–93.

Throughout their brief, Defendants claim that the Challenged Policies protect "sensitive government operations." Opp. at 1–2, 15, 28. Yet nothing in the limited record before this Court establishes how a right to photograph matters or events exposed to public view from exterior or outdoor areas of ports of entry would in any way compromise any specific "sensitive government operation." Indeed, it is unclear how an operation that is readily observable from off port of entry property—for example, cars exiting the secondary inspection area at Calexico West, which are just as visible from

[6] Defendants argue, for instance, that "roads and walkways are integral to the purpose of ports of entry, permitting the lawful transportation of people, vehicles, and goods across the United States border." Opp. at 31. Yet it is unclear how the public street shoulder on which Askins stood—across the road, approximately 50 to 100 feet from any Calexico West port of entry building, and entirely within the United States—is "integral" to the functioning of that port of entry. ER 74–75 ¶¶ 50–51. In view of Plaintiffs' facts, Defendants' claim that this street shoulder is somehow "analogous" to a road leading to a nuclear testing facility, Opp. at 32, is absurd.

the Genaro Teco Monroy Memorial International Border Friendship Park, ER 75 ¶ 51—can properly be claimed to be "sensitive" at all.[7]

Defendants additionally proclaim that the Challenged Policies "ensure[] the safe and efficient operation of ports of entry," Opp. at 22, and "further[] [CBP's] interest in protecting ports, and the public, from possible terrorist attacks." Opp. at 23. Plaintiffs have alleged, however, that CBP is *failing* to ensure the safe *or* efficient operation of the two ports here at issue—and that the Challenged Policies function to shield these federal officials from much-needed public accountability. ER 64–66 ¶¶ 4–6; ER 67–68 ¶¶ 16–19. Ramirez, for example, witnessed male CBP officers improperly targeting only female travelers for additional inspection. ER 80 ¶ 81–82. Askins, meanwhile, photographed one consequence of Defendants' *inefficient* operation of the Calexico West port of entry: idling vehicles discharging noxious emissions. ER 71–73 ¶¶ 33–39; ER 74–76 ¶¶ 47–53. Likewise, nothing in the record before this Court supports a conclusion that either Plaintiff's photography "could aid in planning" a

[7] Two additional fact questions are: (1) Why, if necessary, CBP could not "erect barriers and position its operations to shield sensitive techniques" from photography in outdoor areas on port of entry property, and (2) Is it, in fact, "impossible for CBP to enforce a policy that permitted individuals on port of entry property to photograph only matters visible from off port of entry property"? Opp. at 25 (quoting ER 125).

terrorist attack. Defendants' insinuations to the contrary, Opp. at 21, 23, are rank speculation, and may not be credited at this stage of litigation. *See Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1228 (9th Cir. 1990) (government "is not free to foreclose expressive activity in public areas on mere speculation about danger").[8]

Defendants baldly assert that the district court could properly look beyond the facts pleaded in Plaintiffs' amended complaint because "[t]he interests served by the restriction on photography are explained in CBP's policy." Opp. at 25. Accepting this circular reasoning would effectively insulate all executive policies restricting speech from judicial review, immunizing censorship without allowing for any independent evaluation of the alleged factual bases for the government's claims. Unsurprisingly, Defendants can cite absolutely no authority for this sweeping—and patently legally erroneous—proposition.

Instead, Defendants rely on three entirely irrelevant cases—ostensibly, to support some ill-defined law enforcement interest not at all relevant to the facts on hand. Opp. at 25–26. In *United States v. Cotterman*, the panel majority discussed a totally different constitutional provision (the

[8] At the least, whether photography of matters already exposed to public view impacts port efficiency or security is a disputed question of fact, which the district court erred in resolving on the pleadings.

Fourth Amendment) and the general scope of the government's *border search power*—doctrinal questions entirely distinct from the First Amendment rights here at issue. 637 F.3d 1068, 1074–75 (9th Cir. 2011), *rev'd en banc*, 709 F.3d 952 (9th Cir. 2013). In *In re The City of New York*, the question was whether a writ of mandamus was available to overturn the district court's order "granting a motion to compel the production of certain sensitive intelligence reports prepared by undercover [NYPD] officers[.]" 607 F.3d 923, 928 (2d Cir. 2010). In that case, therefore, the contested information was in the sole possession of government officials—not publicly visible to thousands of travelers each day. And in *Lavan v. City of Los Angeles*, the Court discussed the protections afforded to homeless people's momentarily unattended personal property under the Fourth and Fourteenth Amendments. 693 F.3d 1022, 1023–24 (9th Cir. 2012). Specifically, in the footnote cited by Defendants, the Court compared the government's interest "in destroying suspicious unattended luggage discovered in transportation hubs" with its interest in destroying homeless people's property. *Id.* at 1029 n.8. While unattended luggage in transportation hubs may pose a threat of explosion, it cannot be said—as a matter of law, without discovery and development of the record—that the act of photographing matters of public interest in public view poses any similar risk.

In short, numerous and critical fact questions remain at this early stage of litigation, and it was reversible error for the district court to answer those questions in favor of Defendants in deciding a Rule 12(b)(6) motion to dismiss. Even if Defendants' alternative factual assertions are plausible, Plaintiffs' facts are at least equally plausible—and, accordingly, reversal is required. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) ("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).").

II. DEFENDANTS IMPROPERLY RELY ON IRRELEVANT CASES, DEMONSTRATING THEIR FUNDAMENTAL MISUNDERSTANDING OF GOVERNING FIRST AMENDMENT DOCTRINE.

In addition to their improper attempts to rewrite Plaintiffs' well-pleaded factual allegations, Defendants commit numerous doctrinal errors.

1. *First*, Defendants rely heavily on a series of cases discussing whether the First Amendment includes a public "right of access" to government-controlled information. Opp. at 15, 17–19, 26–27. These cases are entirely distinguishable for multiple reasons.

Most fundamentally, courts have long differentiated between the First Amendment right to engage in protected speech, on the one hand, and a more limited "right of special access to information not available to the

public generally," *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972), on the other. The First Amendment right at issue in this case relates to the former, not the latter. In other words, Plaintiffs allege that the Challenged Policies violate their First Amendment right of freedom of speech, which includes the "right to film matters of public interest" in public view, *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995), and specifically includes the right to photograph 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"); *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 v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (First Amendment protects right "to photograph or videotape police conduct"); *cf. 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)).[9]

Plaintiffs do not assert a right of access to sources of information *within the government's control and otherwise invisible*; rather, they allege a right to photograph only matters of public interest exposed to outdoor public view. ER 69 ¶ 20; ER 78 ¶ 67; ER 86 ¶ 113; ER 89 (Prayer for Relief). By contrast, each of the cases Defendants cite expressly pertain to whether the public has any constitutional right to access government-controlled information *at all*. *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (the First Amendment does not mandate "a right of access to government information or sources of information *within the government's control*" (emphasis added)); *PG Publ'g Co. v. Aichele*, 705 F.3d 91, 99 (3d Cir. 2013) ("The First Amendment does not guarantee the press a constitutional right of special access to information *not available to the public generally*. Thus, while the First Amendment does protect [a publishing company's] right of

[9] As explained in Plaintiffs' opening brief, the First Amendment right to record law enforcement is critical because officers have "substantial discretion that may be misused to deprive individuals of their liberties." *Glik*, 655 F.3d at 82. Thus, 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.

access to gather news, that right does not extend to *all* information." (quotation marks and citation omitted; first emphasis added)); *Garrett v. Estelle*, 556 F.2d 1274, 1276 (5th Cir. 1977) ("We hold that the protection which the [F]irst [A]mendment provides to the news gathering process does not extend to matters *not accessible to the public generally*, such as filming of executions in Texas state prison[.]" (emphasis added)).

Additionally, Defendants' cases each involve physically restricted, enclosed spaces invisible to outdoor public view, access to which was entirely controlled by the relevant government entity. *See, e.g.*, *Houchins*, 438 U.S. at 8–12 (access to jail); *Mocek v. City of Albuquerque*, 813 F.3d 912, 930–31 (10th Cir. 2015) (access to airport security checkpoint inside airport building); *PG Publ'g Co.*, 705 F.3d at 108–13 (access to polling places); *United States v. Edwards*, 785 F.2d 1293, 1295–96 (5th Cir. 1986) (per curiam) (access to a federal courtroom during a criminal trial); *United States v. Yonkers Bd. of Educ.*, 747 F.2d 111, 112–14 (2d Cir. 1984) (access to a federal courtroom during a civil trial); *Garrett*, 556 F.2d at 1275–76 (access to a state prison during an execution). Defendants' "right of access" cases might be pertinent if Plaintiffs alleged a First Amendment right to access (and photograph) the *interiors* of port of entry buildings and other

restricted port of entry property; Plaintiffs emphatically *do not* assert any such right, however. AOB at 7.

Likewise, whereas Plaintiffs allege that the Challenged Policies prohibit *all* forms of photography at ports of entry, many of Defendants' cases involve a narrower question: whether *certain* forms of recording are permitted in government-controlled spaces once the government has otherwise made those spaces publicly accessible. *See, e.g.*, *Rice v. Kempker*, 374 F.3d 675, 678–79 (8th Cir. 2004) ("Because we hold that neither the public nor the media has a First Amendment right to videotape, photograph, or make audio recordings of government proceedings *that are by law open to the public*, we find it unnecessary to decide whether executions must be open to the public. . . . [C]ourts have universally found that restrictions on videotaping and cameras do not implicate the First Amendment guarantee of public access." (citing cases; emphasis added)); *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 180 (3d Cir. 1999) ("The primary issue on appeal is whether there is a federal constitutional right to videotape public meetings of a township planning commission *when other effective means of recording the proceedings are available*." (emphasis added)); *Garrett*, 556 F.2d at 1278 ("In the present case, similarly, access is provided except for one purpose, to film executions. . . . Despite the unavailability of

film of the actual execution the public can be fully informed; the free flow of ideas and information need not be inhibited."); *Conway v. United States*, 852 F.2d 187, 188 (6th Cir. 1988) (per curiam) (noting that the challenged rules "do not deny professional broadcast journalists and photographers access to the court room where the trial will be conducted," but simply "place restrictions on that right of access"—specifically, by prohibiting "the broadcasting, telecasting, and photographing of judicial proceedings"). For this reason, too, Defendants' cases are inapt.

2. *Second*, Defendants repeatedly fall back on cases addressing the border search doctrine—which, as noted, relates to an entirely different constitutional amendment than that at issue here. Opp. at 20–21, 26. The border search doctrine provides that "searches of closed containers and their contents can be conducted at the border without particularized suspicion under the Fourth Amendment." *United States v. Arnold*, 533 F.3d 1003, 1007 (9th Cir. 2008); *see also United States v. Ickes*, 393 F.3d 501, 503 (4th Cir. 2005) ("However the Constitution limits the government's ability to *search a person's vehicle generally*, our law is clear that *searches at the border* are a different matter altogether." (emphases added)). The border search doctrine is predicated on the government's "interest in preventing the entry of unwanted persons and effects" at our international borders. *Id.* at

505 (quoting *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004); quotation marks omitted). No such interest is implicated by the First Amendment rights Plaintiffs here assert. More fundamentally: the fact that one's Fourth Amendment rights may be somewhat limited in specific circumstances at the borders does not convert the border into an entirely Constitution-free zone to which established First Amendment rights no longer apply.[10]

3. *Third*, Defendants misapprehend their burden of proof in a case of this nature. Defendants proclaim that "[p]orts of entry are nonpublic fora," Opp. at 29, but in doing so they once again ignore Plaintiffs' well-pleaded factual allegations. Plaintiffs allege that 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 Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (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*

[10] Defendants misunderstand the holding in *Ickes*. Opp. at 20–21. There, the Fourth Circuit concluded that there was no "First Amendment exception to the border search doctrine." 393 F.3d at 506. The court did not evaluate, much less decide, any question relating to the First Amendment outside the border search doctrine context at all.

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 use." *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1101–02 (9th Cir. 2003).

Defendants cannot declare all port of entry property a "nonpublic forum" by *ipse dixit*. *United States v. Grace*, 461 U.S. 171, 180 (1983). The forum status of a given area does not depend on the mere formality of legal title (even if it were clear where the boundary lines are), or the mere assertion of authority to restrict speech. *See, e.g.*, *Venetian Casino Resort, LLC v. Local Joint Exec. Bd. of Las Vegas*, 257 F.3d 937, 943–44 (9th Cir. 2001) (in assessing district court's grant of *summary judgment*, enumerating various factors to be considered by a court "faced with the [factual] question whether private property qualifies as a public forum").

Here, Plaintiffs have pleaded facts sufficient to establish (1) that at least some of the Prohibited Areas *are* traditional public fora, and (2) that

Defendants have enforced the Challenged Policies against each Plaintiff from these portions of each port of entry at issue in this case.[11] ER 75 ¶¶ 51–52, 69; ER 84–85 ¶ 107; ER 87 ¶ 115. As explained, "[t]he 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." *Stewart*, 863 F.2d at 1018 (emphasis added).[12]

Defendants erroneously rely on *Leigh v. Salazar*, 677 F.3d 892 (9th Cir. 2012), to argue that it is unnecessary for this Court to engage in a forum analysis at all. Opp. at 28. In *Leigh*, a photojournalist alleged that viewing

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[11] It is therefore misleading to claim, as Defendants do, that "Plaintiffs do not dispute that ports of entry have no history of being devoted to free expression and are established to serve the national interest in border security." Opp. at 30. As clearly stated in Plaintiff's amended complaint, Defendants have enforced the Challenged Policies against each Plaintiff from areas which Plaintiffs argue *are* traditional public forums, even if Defendants maintain that those areas are properly within each "port of entry." ER 75 ¶¶ 51–52, 69; ER 84–85 ¶ 107; ER 87 ¶ 115.

[12] Defendants attempt to redefine the areas Plaintiffs allege to be traditional public forums—a public sidewalk, a transit plaza—by claiming that ports of entry, generally, are "relatively modern creations" more akin to airports and interstate rest areas." Opp. at 29. As noted, *supra* note 2 and accompanying text, the exact geographical boundaries of the term "port of entry" remain disputed at this stage. Nevertheless, Plaintiffs have alleged that Defendants have enforced the Challenged Policies against them from port of entry areas that are properly considered traditional public forums. Put differently, even if "ports of entry" are "relatively modern creations," public sidewalks, transit plazas, and public parks are not.

restrictions in place at a Bureau of Land Management ("BLM") "horse roundup" violated her First Amendment right to observe government activities. 677 F.3d at 893. The "horse gather" occurred at the BLM's remote "Silver King Herd Management Area" in Lincoln County, Nevada. *Id.* at 894. Significantly, the *Leigh* plaintiff *did not allege that the area was a public forum*.[13] Moreover, *Leigh* is distinguishable on its merits, because this case does not arise in a remote wilderness area, but instead in heavily-trafficked areas—at least parts of which, Plaintiffs have alleged, *are* traditional public forums.

Likewise, because ports of entry are not, in fact, "like military bases," Defendants' reliance on *Greer v. Spock*, 424 U.S. 828 (1976) is misplaced. Opp. at 29, 31. Military bases are highly restricted properties with clearly delineated boundaries and are not generally accessible to the public. *Greer*, 424 U.S. at 838 (explaining that "the business of a military installation like Fort Dix [is] to train soldiers, not to provide a public forum"). By contrast, ports of entry are publicly accessible spaces designed to facilitate the flow of people, traffic, and goods across borders. Moreover, as alleged in Plaintiffs'

[13] As explicitly stated in the footnote Defendants cite, only amici curiae argued that the Ninth Circuit should analyze the restrictions in question "as a violation of the First Amendment right to expression in a public forum." *Leigh*, 677 F.3d at 898 n.3.

amended complaint, at least parts of the two ports of entry here at issue are traditional public forums.

4. *Fourth*, Defendants misunderstand why the Challenged Policies are, in fact, content-based restrictions on Plaintiffs' speech. Opp. at 32–33. As Plaintiffs have explained, "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). Under these definitions, the Challenged Policies are content-based restrictions on speech: 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 Rule's 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 thus "content based on [their] face." *Id.*; *see also Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1024 (9th Cir. 2008) (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)).[14]

5. *Fifth*, it cannot be said as a matter of law that the Challenged Policies are narrowly tailored to serve a compelling governmental interest, as is necessary for a content-based restriction to survive strict scrutiny. *Reed*, 135 S. Ct. at 2231 (noting that it is the *Government's* burden to prove that a content-based restriction "furthers a compelling interest and is narrowly tailored to achieve that interest"). As noted, Defendants attempt to rewrite Plaintiffs' well-pleaded factual allegations by citing a number of interests. Opp. at 21–22. Defendants have not, however, *proven* that the Challenged Policies actually further any of these putative interests. AOB at 31. Indeed, Defendants' own arguments indicate that the Challenged

[14] Defendants' reliance on *Virginia v. Black*, 538 U.S. 343, 362 (2003) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393 (1992)), Opp. at 33, is misplaced. In those cases, the Supreme Court discussed content discrimination within very narrow classes of *unprotected* speech (such as true threats and obscenity). By contrast, photography is clearly *protected* speech.

Policies are not narrowly tailored as a matter of law. For example, Defendants argue that photography would "enable individuals to document, study, and evade CBP's sensitive techniques," Opp. at 21, yet they simultaneously concede that Plaintiffs have every right to photograph from, *e.g.*, "'an adjacent public park' that is not on port of entry property." Opp. at 30 n.14. In other words, Defendants claim that photography would undermine some vague governmental interest, yet acknowledge that the matters Plaintiffs wish to photograph are in plain view (both on and off port of entry property). "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 ports of *every* port of entry fails this test: Askins' environmental advocacy, and Ramirez's concern for human rights abuses and government misconduct, are not "appropriately targeted evils" undermining, *e.g.*, "territorial integrity." *See, e.g.*, *Berger v. City of Seattle*, 569 F.3d 1029, 1041 (9th Cir. 2009) (holding that permitting rule was not narrowly tailored, in part, because it "applies, on its face, to an extraordinarily broad group of individuals, the vast majority of whom are not responsible for the 'evil' the [government] seeks to remedy").

In any event, it is a disputed question of fact whether photography of matters already exposed to outdoor public view actually poses any substantial bona fide risk. As with any disputed issue of fact, that question cannot be decided on the pleadings.

6. *Sixth*, Defendants misunderstand the requirement of viewpoint neutrality. 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.*, 682 F.3d 789, 800 (9th Cir. 2012) (quotation marks and citation omitted). As Plaintiffs have explained, the Challenged Policies are neither. AOB at 43–49.

Defendants argue that the Challenged Policies pass constitutional muster to the extent that they are applied in nonpublic forums because the CBP Policy provides for responses "without favoritism." Opp. at 32–35. Yet the Policy expressly allows CBP to prohibit any photography that "compromis[es] the DHS/CBP mission," ER 91 ¶ 3.1, and nowhere defines what that "mission" is. 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."

City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 763–64 (1988) (citation omitted). This is unconstitutional.

7. *Seventh*, on the question whether the Challenged Policies violate the First Amendment to the extent they apply to photography in outdoor areas that may be nonpublic forums, Defendants have simply ignored this Court's rule that "[t]he 'reasonableness' requirement for restrictions on speech in a nonpublic forum requires more of a showing than does the traditional rational basis test" and demands "evidence that the restriction reasonably fulfills a legitimate need." *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 966–67 (9th Cir. 2002), *abrogated on other grounds by Winter v. NRDC*, 555 U.S. 7 (2008). The unsworn assertions of defense counsel are not evidence. Given that Plaintiffs have pleaded facts plausibly showing that the policies unjustifiably prohibit photography of matters exposed to public view, it cannot be said from the face of the pleadings that the Challenged Policies are reasonable as a matter of law. *See* AOB at 48–49. Again, Defendants improperly ask this Court to affirm the district court's erroneous resolution of fact questions on the pleadings. The district court's ruling violated the law of this Court and must therefore be reversed.

CONCLUSION

For the reasons set forth above and in Plaintiffs' opening brief, Plaintiffs have stated claims for relief under the First Amendment. This Court should reverse the district court's erroneous conclusion to the contrary and remand this matter for further proceedings.

February 16, 2017

Respectfully submitted,

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