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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

RAY ASKINS and  
CHRISTIAN RAMIREZ,  
Plaintiffs,  
v.  
UNITED STATES DEPARTMENT  
OF HOMELAND SECURITY;  
GENERAL SERVICES  
ADMINISTRATION;  
FEDERAL PROTECTIVE SERVICE;  
JOHN P. SANDERS, Acting  
Commissioner of United States  
Customs and Border Protection;  
EMILY W. MURPHY, Administrator  
of the General Services Administration;  
L. ERIC PATTERSON, Director of the  
Federal Protective Service; DAVID A.  
SALAZAR, Director, Calexico Port of  
Entry; SIDNEY K. AKI, Director, San  
Ysidro & Otay Mesa Ports of Entry,  
Defendants.

Case No. 3:12-cv-02600-W-BLM

**PLAINTIFFS' MEMORANDUM OF  
POINTS & AUTHORITIES IN SUPPORT  
OF MOTION TO COMPEL**

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## I. INTRODUCTION

This is a First Amendment case in which two individual Plaintiffs challenge Defendants’ policies purportedly prohibiting photography at or near two Southern California ports of entry: San Ysidro and Calexico West. As the Ninth Circuit confirmed in reversing the dismissal of this case and remanding, the First Amendment guarantees an individual’s right to collect and disseminate information about matters of public interest, including government conduct. *See Askins v. U.S. Dep’t of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018). And “[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.” *Id.* at 1045 (citation omitted).

In remanding this case, the Ninth Circuit emphasized that “further factual development is required before the district court can determine what restrictions, if any, the government may impose [on photography] in the[] public, outdoor areas” described in Plaintiffs’ complaint. *Id.* at 1047. Heeding the Ninth Circuit’s decision, Plaintiffs developed and served written discovery requests regarding (1) the actual use and purposes of the properties at issue here and (2) the traditional or historic uses of these and similar properties. *See id.* at 1045.

The relevant evidence is within the government’s control, yet Defendants have avoided responding to these requests for the past four months. Despite Plaintiffs’ good faith efforts to resolve these disputes—including by narrowing and clarifying these requests and (at Defendants’ invitation) developing proposed search terms for Defendants’ use—the parties have reached impasse. Accordingly, Plaintiffs respectfully seek an order compelling Defendants CBP and GSA to search for and produce documents responsive to Plaintiffs’ requests related to the actual use and purposes and historic uses of relevant port property, and to provide sufficiently detailed responses to Plaintiffs’ interrogatories seeking that information.

The Ninth Circuit also explained that Defendants’ tailoring of the challenged

1 policies—if any—is centrally relevant to Plaintiffs’ First Amendment claims. *Id.* at  
 2 1044–45. Accordingly, Plaintiffs have propounded discovery to assess whether and  
 3 how Defendants tailor these policies to avoid infringing on expressive activities. CBP  
 4 has asserted that certain government officials are authorized to grant exceptions to the  
 5 challenged policies, but refuses to provide Plaintiffs with these officials’ names—or  
 6 indeed any information about them that would allow Plaintiffs to establish the extent  
 7 of Defendants’ efforts at tailoring. Plaintiffs therefore also seek an order compelling  
 8 CBP to produce the names of officials authorized to grant exceptions to the challenged  
 9 policies.

## 10 **II. LEGAL STANDARDS**

11 Plaintiffs may obtain discovery regarding any non-privileged, relevant matter  
 12 that is proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1). Defendants must  
 13 make a reasonable inquiry into the factual and legal bases for any discovery response,  
 14 including into the existence and location of the requested material. Fed. R. Civ. P.  
 15 26(g); *see also, e.g., In re Rivera*, No. CV 16-4676 JAK (SSx), 2017 WL 5163695, at  
 16 \*3 (C.D. Cal. Apr. 14, 2017).

## 17 **III. ARGUMENT**

### 18 **A. Defendants Must Respond to Discovery Requests Regarding the 19 Actual Use and Purposes and Historical Use of the Ports of Entry.**

#### 20 **1. The Forum Analysis Central to this Case Is A Fact-Intensive 21 Undertaking.**

22 Plaintiffs are U.S. citizens attempting to exercise their First Amendment rights  
 23 to collect and disseminate information about matters of public interest, including  
 24 government conduct. Dkt. 108 (“SAC”) ¶¶ 58–59, 85–86. Specifically, each Plaintiff  
 25 seeks to document matters of public interest exposed to public view, while standing in  
 26  
 27  
 28

1 a publicly accessible, outdoor location at or near the ports of entry. SAC ¶¶ 14–16.<sup>1</sup>

2 A central factual question in this litigation is thus the “forum status” of the  
3 various areas where Plaintiffs seek to exercise their First Amendment rights.<sup>2</sup> “The  
4 Supreme Court has constructed an analytical framework known as ‘forum analysis’ for  
5 evaluating First Amendment claims relating to speech on government property.” *ACLU*  
6 *of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003) (citations omitted).  
7 This approach requires courts to “first determine whether the property is a traditional  
8 public forum, a designated public forum, or a nonpublic forum in order to ascertain  
9 what level of scrutiny to apply to restrictions on speech.” *Id.* at 1097–98 (citation  
10 omitted). “Following this determination, [courts] apply the indicated standard of  
11 scrutiny to decide whether the restrictions in question pass constitutional muster.” *Id.*  
12 at 1098. “Thus, the scope of permissible governmental interference with expressive  
13 activity varies depending upon the nature of the location in which speech is to take  
14 place.” *Id.* (citation omitted).

15 As the Ninth Circuit held in remanding this case, “determining whether a  
16 location is properly categorized as a public forum involves largely factual questions.”  
17 *Askins*, 899 F.3d at 1045; *see also, e.g., Jacobson v. U.S. Dep’t of Homeland Sec.*, 882  
18 F.3d 878, 883 (9th Cir. 2018). The following evidence is relevant to that analysis: “1)  
19 the actual use and purposes of the property, particularly [its] status as a public  
20 thoroughfare and availability of free public access to the area; 2) the area’s physical  
21 characteristics, including its location and the existence of clear boundaries delimiting  
22 the area; and 3) traditional or historic use of both the property in question and other

23 <sup>1</sup> Plaintiffs do not, and have never, asserted an unlimited right to engage in unrestricted  
24 photography everywhere on ports of entry (*e.g.*, within official buildings or other  
restricted-access areas). SAC ¶¶ 13–15.

25 <sup>2</sup> Plaintiff Ray Askins, for example, wishes to photograph while standing in public  
26 places, such as the shoulder of a public street in Calexico, California, adjacent to a  
27 public park. SAC ¶ 72. Plaintiff Christian Ramirez wishes to photograph from various  
28 locations at or near San Ysidro’s port, including the transit plaza on San Ysidro  
Boulevard and the adjacent sidewalk. SAC ¶ 110.

1 similar properties.” *Askins*, 899 F.3d at 1045.

2 The public-forum factors “consistently reflect two underlying considerations.”  
3 *ACLU of Nev.*, 333 F.3d at 1100. “First, and most significantly, there is a common  
4 concern for the compatibility of the uses of the forum with expressive activity.” *Id.* In  
5 this regard, “[t]he crucial question is whether the manner of expression is basically  
6 incompatible with the normal activity of a particular place at a particular time.”  
7 *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). “Secondly, the case law  
8 demonstrates a commitment by the courts to guarding speakers’ reasonable  
9 expectations that their speech will be protected.” *ACLU of Nev.*, 333 F.3d at 1100.

10 At least some of the areas from which Plaintiffs have sought to document matters  
11 of public interest exposed to public view qualify as traditional public forums. *See id.* at  
12 1099 (“The quintessential traditional public forums are sidewalks, streets, and parks.”)  
13 (citing *United States v. Grace*, 461 U.S. 171, 177 (1983)). And, key here, the Ninth  
14 Circuit has emphasized the necessity of a *granular* analysis of *specific* areas within and  
15 adjacent to each port. *See Askins*, 899 F.3d at 1045–46 (discussing, with particularity,  
16 specific areas within and around the Calexico West Port of Entry); *id.* at 1046 (same,  
17 for San Ysidro). For example, as the Court noted, even if certain San Ysidro “port of  
18 entry facilities are a nonpublic forum, the public’s *access to and use of* the transit plaza,  
19 sidewalks, and other outdoor areas [at the port] is critical to determining whether they  
20 retain their public fora status.” *Id.* (emphasis added).

21 Plaintiffs thus propounded several discovery requests designed to develop the  
22 factual record necessary for forum analysis in this case. Plaintiffs served their original  
23 requests in April. *See* Declaration of Mitra Ebadolahi in Support of Plaintiffs’ Motion  
24 to Compel (“Decl.”), ¶¶ 2 & 13, Exs. A & G. In an effort to accommodate Defendants’  
25 objections and following several rounds of correspondence and conferences, Plaintiffs  
26 narrowed the requests for production (“RFPs”) at issue here on June 5, *see id.* ¶¶ 8–9  
27 & Ex. E, and clarified and limited the interrogatories at issue on June 25, *see id.* ¶¶ 16–



17 & Ex. I.

2. **Neither CBP nor GSA Has Provided Specific Information Regarding Actual Use and Purposes of Relevant Areas Within the Ports.**

Plaintiffs seek information related to the first prong of public forum analysis, *i.e.*, the actual use and purposes of publicly accessible places at the two ports of entry at issue in this case. As narrowed, RFPs 4 and 5 ask for “documents referring or relating to the Government’s current use of land circumscribed by the [Calexico West/San Ysidro] Port of Entry boundaries that is not occupied by a building today, provided that such land is generally accessible to the public (*i.e.*, that typically the public has access to the land, regardless of whether the Government could limit access if it so wished).” Decl. ¶ 9(a)–(b) & Ex. E at 3. And, as narrowed, Interrogatories 8 and 9 ask Defendants to describe “the government’s current use of land circumscribed by the [Calexico West/San Ysidro] Port of Entry boundaries that is not occupied by a building today, provided that such land is generally accessible to the public (*i.e.*, that typically the public has access to the land, regardless of whether the Government could limit access if it so wished).” Decl. ¶ 17(a)–(b) & Ex. I at 3–4.

To date, neither CBP nor GSA has provided adequate responses to these discovery requests. All Defendants have refused to conduct searches for documents responsive to RFPs 4 and 5, as narrowed. As to Plaintiffs’ Interrogatories 8 and 9, CBP’s initial responses simply mentioned, at a high level, port reconfiguration and modernization projects. Decl. ¶ 15 & Ex. H at 11–12. Regarding port uses, CBP simply claimed that, at all relevant times, the ports *as a whole* “have been used to inspect persons and goods entering and exiting the United States.” *Id.* CBP provided no specific information about the actual uses or purposes of publicly accessible areas within the boundaries of either port. Nor did CBP provide any information about actual use of publicly accessible areas within port boundaries that do *not* involve crossing the



border (*e.g.*, the transit plaza and adjacent sidewalk in San Ysidro).<sup>3</sup>

Instead of responding to RFPs 4 and 5, CBP claimed that “a written description of the historic and current use would be more efficient” than conducting document searches, and it committed to providing additional written information by August 2. Decl. ¶¶ 19–21 & Ex. J. But CBP did not supply additional information by that date; instead, CBP told Plaintiffs to wait for GSA’s forthcoming discovery responses, which purportedly would provide the requested information. Decl. ¶¶ 23–24 & Ex. K.

When GSA responded to RFPs 4 and 5 on August 2, it objected to the requests in their entirety. Decl. ¶¶ 25–26 & Ex. L at 13–15. And, in its responses to Interrogatories 8 and 9, GSA failed to address the actual use or purposes of any specific areas of either port. Decl. ¶¶ 27–28 & Ex. M. Rather, GSA’s responses consisted of a series of high-level generalizations about each port, focusing on property ownership and boundaries rather than necessary information about *uses* (such as, for example, whether people regularly engage in expressive activities in the relevant areas). Decl. Ex. M at 13–14.

In an effort to avoid Court intervention, Plaintiffs explained why, given the “actual use and purposes” prong of the public-forum test, CBP and GSA’s interrogatory responses were insufficient. Decl. ¶ 29 & Ex. N at 3. Plaintiffs likewise renewed their request that Defendants respond to RFPs 4 through 8, as narrowed. Decl. Ex. N at 4–5. In reply, Defendants again promised supplemental responses to Interrogatories 8 and 9. Decl. ¶¶ 30–31 & Ex. O. During a telephonic conference of counsel, Defendants also invited Plaintiffs to give examples of document types that might be responsive to RFPs

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<sup>3</sup> Plaintiffs’ original formulation of these interrogatories expressly asked for such information, asking Defendants to “[d]escribe the Government’s current use...of the property at or near the [Calexico West/San Ysidro] port of entry ... including but not limited to [for Calexico: the area at or near the exit of the secondary inspection area at the Calexico port of entry, including at the intersection of First Street and Paulin Avenue] [for San Ysidro: the old and new pedestrian bridges, the transit plaza and adjacent sidewalk, and the “PedWest” pedestrian segment at or near the San Ysidro port of entry].” Decl. Ex. G at 7.

1 4 through 8, and to suggest search terms for these requests. Decl. ¶¶ 32–33. Plaintiffs  
 2 did so. Decl. ¶ 37 & Ex. Q.

3 CBP supplemented its responses to Interrogatories 8 and 9 on September 6. Decl.  
 4 ¶ 38 & Ex. R. Again, CBP’s responses focused on construction history and the  
 5 configuration of the ports *as a whole*, without any discussion of the actual use or  
 6 purposes of the key areas within port boundaries at issue in this lawsuit. *Id.*<sup>4</sup> Finally—  
 7 although CBP had invited Plaintiffs to suggest search terms for RFPs 4 through 8, the  
 8 agency declined to run any of the suggested searches. Decl. ¶¶ 39–40 & Ex. S at 3.  
 9 While GSA made a limited offer to search for certain additional maps, Decl. ¶ 40 &  
 10 Ex. S at 2, Plaintiffs explained that these discovery responses remained deficient, Decl.  
 11 ¶ 41 & Ex. T at 4–5, and Defendants confirmed impasse, Decl. ¶ 42 & Ex. U.

12 Taken together, CBP and GSA’s responses to Plaintiffs’ RFPs 4 and 5 and  
 13 Interrogatories 8 and 9 fail to supply the granular, specific information that binding  
 14 precedent holds is necessary for the fact-intensive inquiry of forum analysis. *See, e.g.,*  
 15 *Vegan Outreach, Inc. v. Los Angeles Cmty. Coll. Dist.*, No. CV 10-6525-GW (JCGx),  
 16 2013 WL 12233618, at \*8, \*10 (C.D. Cal. Feb. 7, 2013) (denying summary judgment  
 17 on forum status of college campus, explaining that “Defendants cannot take a satellite’s  
 18 perspective . . . they must, instead, proceed more in the manner of a microscope,” and  
 19 address “the constituent parts of a campus, not the campus as a whole”). Courts  
 20 “consider the [actual] uses and purpose of a property because, by informing us of the  
 21 compatibility of expressive activity with other uses of the property, [these facts] enable  
 22 us to evaluate the societal costs of allowing versus restricting speech.” *ACLU of Nev.*,  
 23 333 F.3d at 1101. For this Court to be able to undertake that necessary evaluation,

24 <sup>4</sup> CBP’s supplemental responses include four aerial photographs: one showing  
 25 Callexico West’s current infrastructure; one showing Callexico West’s infrastructure  
 26 prior to construction that began in 2015; one showing “the use of land and  
 27 infrastructure” at San Ysidro in 2011; and one showing the “current infrastructure” at  
 28 San Ysidro. Decl. Ex. R at 2–3 (and exhibits thereto). None of these photographs  
 provide information about the actual use and purposes of specific areas in either port.

1 discovery must establish such facts as whether certain areas within the port boundaries  
 2 are routinely publicly accessible; whether such areas are used or compatible with  
 3 expressive activities (such as photography, rallies, or demonstrations); and whether and  
 4 how often the government restricts public access to specific port areas (and, if so, on  
 5 what basis).<sup>5</sup> *See id.* at 1101–02 (“The fact that the *primary* use of the property is not  
 6 as a park or public thoroughfare is *irrelevant* as long as there is no concrete evidence  
 7 that use for expressive activity would significantly disrupt the principal uses.”).

8 And while GSA has produced site plans, topographical maps, and construction  
 9 blueprints, those documents chiefly address a different prong of forum analysis—that  
 10 of physical characteristics, including boundaries. These documents do *not* show which  
 11 areas *not* occupied by buildings are publicly accessible, or describe whether and how  
 12 Defendants are using those spaces. Likewise, photographs showing a bird’s-eye view  
 13 of building footprints at each port do not establish current uses of (and public access  
 14 to) the relevant areas within port boundaries. And even as to the buildings themselves,  
 15 not all buildings within port boundaries are necessarily restricted access or off limits  
 16 for First Amendment activity. (For example, there is a small convenience store just  
 17 south of the transit plaza cul-de-sac at the San Ysidro Port of Entry which, although  
 18 apparently within port boundaries, cannot seriously be a place from which photography  
 19 is restricted by the federal government.)

20 \* \* \*

21 Plaintiffs seek information about areas *not* occupied by buildings so that they  
 22 can assess the actual use and purposes of such areas within each port. Plaintiffs have  
 23 demonstrated a willingness to refine their discovery requests and to cooperate with  
 24 Defendants to facilitate efficient resolution of these disputes. In the end, however,  
 25 Defendants must respond to Plaintiffs’ relevant and proportional discovery requests,

26 <sup>5</sup> Several of Plaintiffs’ suggested searches were designed to address these very  
 27 inquiries. *See* Decl. ¶ 37 & Ex. Q at 2.

1 and cannot avoid doing so with conclusory claims that searching for responsive  
 2 materials is unduly burdensome. *See Pellerin v. Wagner*, No. 2:14-cv-02318 JWS,  
 3 2016 WL 950792, at \*5 & n.40 (D. Ariz. Mar. 14, 2016) (party claiming undue burden  
 4 or expense “must provide some evidence regarding the time or expense required,”  
 5 citing Fed. R. Civ. P. 26(b) advisory committee’s notes).<sup>6</sup> In remanding this case, the  
 6 Ninth Circuit held that evidence regarding the actual use and purposes of these port  
 7 properties is essential to the proper resolution of this case. Both CBP and GSA should  
 8 be compelled to provide the evidence required by the Ninth Circuit’s decision.

### 9 **3. CBP and GSA Have Inadequately Addressed Historic Uses of** 10 **Specific Port Areas.**

11 Plaintiffs have also propounded discovery requests for information related to the  
 12 third prong of public forum analysis, *i.e.*, the traditional or historic use of the properties  
 13 in question and other similar properties. This factor probes whether a particular area  
 14 “is part of the class of property which, by history and tradition, has been treated as a  
 15 public forum,” and it is “invariably mentioned” in forum analysis cases. *ACLU of Nev.*,  
 16 333 F.3d at 1103.

17 As narrowed, RFPs 6 and 7 seek “documents referring or relating to the  
 18 Government’s historical use, prior to [2012 for Calexico West/2010 for San Ysidro],  
 19 of land circumscribed by the [Calexico West/San Ysidro] Port of Entry boundaries that  
 20 was not occupied by a building.” Decl. ¶ 9(c)–(d) & Ex. E at 3. Narrowed RFP 8,  
 21 meanwhile, seeks “documents referring or relating to the Government’s historical use,  
 22 prior to 2010, of land circumscribed by port of entry boundaries that was not occupied

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23 <sup>6</sup> CBP has provided some evidence that searching through employee emails is  
 24 burdensome for the agency. *See* Dkt. 116-1 ¶¶ 4–6 (Declaration of Elaine Dismuke in  
 25 Support of Defendants’ Opposition to Plaintiffs’ [First] Motion to Compel); Dkt. 116-  
 26 2 ¶¶ 14–16 (Declaration of Peggy DeBeliso in Support of Defendants’ Opposition to  
 27 Plaintiffs’ [First] Motion to Compel). It is not clear that the discovery requests here at  
 28 issue require any email searches, however, and CBP has proffered *no* evidence of  
 burdens associated with non-email searches. GSA has not submitted any record  
 evidence of undue burden whatsoever.

1 by a building (a) for one land port that processes a similar daily volume of pedestrian  
 2 and vehicular traffic to the San Ysidro Port of Entry, and (b) for one land port of entry  
 3 that processes a similar daily volume of pedestrian and vehicular traffic to the Calexico  
 4 West Port[] of Entry.”<sup>7</sup> Decl. ¶ 9(e) & Ex. E at 4. Finally, the relevant portions of  
 5 Interrogatories 8 and 9 ask Defendants to describe “the government’s historical use,  
 6 prior to [2012 for Calexico West/2010 for San Ysidro], of land circumscribed by the  
 7 [Calexico West/San Ysidro] Port of Entry boundaries that was not occupied by a  
 8 building, so long as Defendants’ response addresses (i) when those locations became  
 9 owned or operated by the Government, (ii) when any restriction on public access and  
 10 photography (as defined in Definition 5) was imposed, (iii) when Defendants began  
 11 enforcing any such restrictions, and (iv) whether, how long, and to what extent those  
 12 areas have been generally accessible to the public.” Decl. ¶ 17(a)–(b) & Ex. I at 3–4.

13 CBP has refused to search for documents responsive to RFPs 6, 7, and 8. In  
 14 discussions with Plaintiffs, CBP has professed an inability to craft searches to capture  
 15 information responsive to these RFPs; when Plaintiffs proffered suggested searches at  
 16 CBP’s invitation, however, the agency categorically refused to pursue any of Plaintiffs’  
 17 suggestions. Decl. ¶¶ 32, 37, 40 & Exs. Q & S.

18 GSA has also generally refused to search for documents responsive to RFPs 6  
 19 and 7, excepting only searches for certain maps.<sup>8</sup> Such maps, if found, may answer part  
 20 of Plaintiffs’ RFPs; alone, however, maps are unlikely to address the historical *uses* of

21 <sup>7</sup> Plaintiffs have propounded and served RFP 8 on CBP but not GSA.

22 <sup>8</sup> GSA has agreed to “search for maps that show changes in the use of the land  
 23 circumscribed by [the two ports] over the last 20 years, including (1) maps that show  
 24 which areas are not now occupied by buildings; (2) maps that show which San Ysidro  
 25 port areas were not occupied by buildings prior to 2010, and (3) maps that show which  
 26 Calexico West port areas were not occupied by buildings prior to 2012, as requested  
 27 by Plaintiffs.” Decl. ¶ 39 & Ex. S at 2.

28 GSA has also claimed that it is “willing to entertain more specific proposals,”  
 Decl. Ex. S at 2. When Plaintiffs, citing to CBP’s similar invitation and subsequent  
 refusal to conduct any suggested searches, questioned GSA’s assertion, Defendants  
 confirmed impasse. Decl. ¶ 42 & Ex. U.

1 the relevant areas. Decl. Ex. T at 5–6.<sup>9</sup>

2 In response to Interrogatories 8 and 9, each agency has provided some—though  
3 not most, much less all—of the information Plaintiffs have requested. Specifically,  
4 CBP’s supplemental interrogatory responses indicate that Defendants began restricting  
5 photography at the ports of entry in 1999. Decl. Ex. R at 3. GSA’s interrogatory  
6 responses explain when the government acquired certain property in Calexico, *see*  
7 Decl. Ex. M at 13, and the government’s status as owner of certain property in San  
8 Ysidro, *see id.* at 14. Defendants’ other discovery responses (not here at issue) also  
9 establish the boundaries of each port.

10 Yet Plaintiffs still do not have enough information to understand the historical  
11 *uses* of specific areas within each port’s boundaries, including whether, how long, and  
12 to what extent those areas have been generally accessible to the public. Nor do  
13 Plaintiffs know when Defendants began *enforcing* photography restrictions at each  
14 port. These facts are essential to the third prong of the public forum analysis. *See, e.g.,*  
15 *Venetian Casino Resort, LLC v. Local Joint Exec. Bd. of Las Vegas*, 257 F.3d 937, 944  
16 (9th Cir. 2001) (examining historic *use* of specific segment of sidewalk to assess forum  
17 status of replacement sidewalk).

18 \* \* \*

19 Again, the Ninth Circuit has made clear that each aspect of the three-part public  
20 forum analysis must be developed in the factual record before this lawsuit can be  
21 resolved on the merits. *Askins*, 899 F.3d at 1045–46. The present record, however,  
22 includes many unresolved questions, such as: details of the public’s historic access to  
23

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24 <sup>9</sup> As already noted, in response to other requests for production, GSA has produced  
25 topographical maps, site plans, and similar property documents for both Calexico West  
26 and San Ysidro Ports of Entry. Although these documents, taken together, establish the  
27 changing physical manifestations of these port properties over time, they do not,  
28 themselves, explain either which areas within each port were historically publicly  
accessible, or how Defendants historically used such areas.



1 certain areas within port boundaries; whether certain areas have been used for  
 2 expressive activities (such as photography, rallies, or demonstrations); and when the  
 3 government has enforced restrictions on expressive activities in these areas in the past.  
 4 For these reasons, CBP and GSA should be compelled to respond to RFPs 6, 7, and 8,  
 5 and Interrogatories 8 and 9, as narrowed.<sup>10</sup>

6 **B. CBP Must Identify Port Officials Authorized to Grant Exceptions to**  
 7 **the Challenged Policies.**

8 As explained, after determining the forum status of the areas in question, this  
 9 Court must apply the appropriate standard of scrutiny to determine whether  
 10 Defendants' policies pass constitutional muster. *ACLU of Nev.*, 333 F.3d at 1098. If  
 11 some or all of the relevant areas are deemed public forums, the government may impose  
 12 content-based restrictions on speech only if such restrictions are "the *least restrictive*  
 13 *means available* to further a compelling government interest." *Askins*, 899 F.3d at 1044  
 14 (emphasis added; quotation marks and citation omitted). Alternatively, content-neutral  
 15 restrictions in public forums are permissible only if they are "*narrowly tailored* to serve  
 16 a significant governmental interest, leave open ample alternative channels for  
 17 communication of the information, and do not delegate overly broad licensing  
 18 discretion to a government official." *Id.* (emphasis added; quotation marks and citations  
 19 omitted). Finally, if any of the relevant areas are deemed non-public forums, the  
 20 government may impose only *viewpoint neutral* restrictions on speech that are  
 21 "reasonable in light of the purpose served by the forum." *Id.* (quotation marks and  
 22 citation omitted). Thus, it is essential to develop a factual record as to *whether* the  
 23 government has tried to tailor the challenged policies to avoid infringing on expressive

24 <sup>10</sup> As to RFP 8, Defendants have stated their view that San Ysidro and Calexico West  
 25 are sufficiently "similar properties" to obviate the need for additional searches related  
 26 to other ports. Decl. ¶¶ 30–31 & Ex. O at 2. Given Defendants' position, Plaintiffs  
 27 would be willing to forgo RFP 8, but only if they receive sufficient responses to RFPs  
 28 6 and 7 and Interrogatories 8 and 9. Since Plaintiffs have not, to date, received adequate  
 responses to these other discovery requests, this motion includes a request that CBP be  
 compelled to respond to RFP 8 (as narrowed).



1 activities at the ports of entry—and, if so, *how* the government has done so. This is the  
 2 information Plaintiffs seek through Interrogatory 5. Decl. Ex. G at 6.

3 In its response to this interrogatory, CBP explained that “the CBP official on  
 4 site[,] in coordination with the site Security Officer” were authorized to grant  
 5 exceptions for photography at the ports of entry “on a case-by-case basis.” Decl. Ex. H  
 6 at 9–10. This assertion raises questions including:

- 7 1. Who are the officials authorized to grant such exceptions?
- 8 2. What factors do these officials consider in their “case-by-case” evaluations?
- 9 3. How often are exceptions granted, and for what reasons?

10 The answers to these questions may elucidate whether Defendants’ policies are, in fact,  
 11 appropriately tailored or viewpoint neutral to withstand constitutional scrutiny.

12 Accordingly, Plaintiffs asked CBP to identify, for each of the two ports here in  
 13 question, the “Site Security Officer[s]” and “CBP official[s] on site” authorized to grant  
 14 exceptions to the challenged policies. Decl. ¶¶ 16, 29 & Ex. I at 1–2; Ex. N at 1. CBP  
 15 has not done so. Instead, CBP claims that, as these and “other individuals who may  
 16 have authority to grant an exception[] vary according to the operational needs of CBP  
 17 at any given time,” the agency “cannot provide a designated individual for each of these  
 18 categories.” Decl. ¶ 30 & Ex. O at 1.<sup>11</sup> Although Plaintiffs have asked CBP to provide  
 19 more specific information about the number of officials who have had such authority  
 20 (to assess whether a sampling of these officials’ names would be appropriate), *see* Decl.  
 21 ¶ 34, CBP claims to have no “additional information ... with respect to Interrogatory 5  
 22 at this time.” Decl. ¶ 43 & Ex. V.

23 Plaintiffs are entitled to know the positions and names of the government  
 24 officials authorized to grant exceptions to the policies challenged in this lawsuit, so that

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25 <sup>11</sup> Plaintiffs do not seek a “designated” individual. Rather, they have asked for a list of  
 26 such individuals, or, alternatively, enough information regarding the number of such  
 27 individuals to permit the parties to derive a thoughtful sampling of such individuals’  
 28 names.

1 Plaintiffs can depose such individuals about how they exercise such authority. CBP's  
2 responses establish that government officials authorized to grant such exceptions *do*  
3 *exist*. There is no reason why CBP cannot provide this information—which is clearly  
4 relevant and “proportional to the needs of the case”—immediately. *See* Fed. R. Civ. P.  
5 26(b)(1). Only Defendants have access to this information. *Id.* And Defendants have  
6 made no showing that providing this information imposes any burden, much less an  
7 undue burden. *See Rogers v. Giurbino*, 288 F.R.D. 469, 488 (S.D. Cal. 2012)  
8 (compelling response in which defendant had not clearly “establish[ed] how [certain]  
9 interrogatories were “burdensome or overbroad”). Although Plaintiffs have asked for  
10 more information regarding the number of names at issue (to assess whether sampling  
11 might be warranted), CBP has refused outright to provide such information.

12 Given the relevance of the information to the claims and defenses in this lawsuit,  
13 and the factual record the Ninth Circuit has instructed the parties to develop, CBP  
14 should be compelled to identify the officials at each port who are authorized to grant  
15 exceptions to policies restricting photography.

#### 16 **IV. CONCLUSION**

17 Plaintiffs' discovery requests are consistent with the decision remanding this  
18 case and relevant and proportional to the central fact issues the Ninth Circuit identified.  
19 Accordingly, Plaintiffs respectfully request that the Court grant this motion to compel,  
20 order Defendants to respond to Plaintiffs' requests seeking information about the actual  
21 use and purposes and historic use of the relevant port properties, and order CBP to  
22 provide information about officials authorized to grant exceptions from any applicable  
23 photography restrictions.

Dated: September 23, 2019

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