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United States District Court, S.D. California.

Ray ASKINS and Christian Ramirez, Plaintiffs,
v.
U.S. DEPARTMENT OF HOMELAND SECURITY, et al., Defendants.

CASE NO. 12-CV-2600 W (BLM)
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Signed 01/29/2015

Attorneys and Law Firms

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ORDER GRANTING-IN-PART DEFENDANTS' MOTION FOR RECONSIDERATION [DOC. 46]

Hon. Thomas J. Whelan, United States District Judge

***1** Pending before the Court is Defendants' motion for reconsideration of the Court's September 30, 2013 Order, (*Defs.' Mot. Recons.* [Doc. 46]), wherein the Court granted-in-part and denied-in-part Defendants' motion to dismiss Plaintiffs' Complaint for failure to state a claim, (*see Sept. 30, 2013 Order* [Doc. 42]). Thereafter, the Court granted-in-part and denied-in-part Defendants' motion, and ordered further briefing. (*Apr. 17, 2014 Order* [Doc. 49].) The parties have submitted their supplemental briefs. (*See Pls.' Suppl. Br.* [Doc. 50]; *Defs.' Suppl. Reply* [Doc. 51].) Defendants continue to seek the dismissal of Plaintiffs' Fourth Amendment claims. Plaintiffs oppose.

The Court decides the matter on the parties' briefs and the record. See S.D. Cal. Civ. L.R. 7.1(d.1). For the following reasons, the Court **GRANTS-IN-PART** Defendants' motion for reconsideration, and **DISMISSES-IN-PART** Plaintiffs' Fourth Amendment claims.

I. BACKGROUND

The facts of this case are well known to the parties and the Court. Nevertheless, given the tenor of the relevant issues, the Court finds it appropriate to restate the facts below.[1] As the Court has previously noted, Plaintiffs allege that in two separate but similar incidents, their First Amendment and Fourth Amendment rights were infringed.[2] The first incident involved Mr. Ramirez and occurred on June 20, 2010 at the San Ysidro Port of Entry. The second involved Mr. Askins and occurred on April 19, 2012 at the Calexico Port of Entry.

A. Incident Involving Mr. Ramirez

According to the Complaint, Mr. Ramirez is a U.S. citizen living in San Diego, California who crosses the border three or four times every month. (*Compl.* ¶ 33.) He works as the Human Rights Director for Alliance San Diego, a nonprofit organization dedicated to a number of causes, including issues related to immigrant rights at the U.S.–Mexico Border. (*Id.* ¶ 34.) As part of his job, and as a concerned member of the "border community," Mr. Ramirez often visits the U.S.–Mexico border "to observe law enforcement activity and monitor human rights issues." (*Id.* ¶ 35.)

On or around June 20, 2010, Mr. Ramirez and his wife were returning to the United States after visiting a family member in Mexico. (*Compl.* ¶¶ 36–37.) After being admitted into the United States, Mr. Ramirez and his wife crossed a pedestrian bridge that passes over Interstate 5 on the U.S. side of the border. (*Id.* ¶ 37.) While crossing

the bridge, Mr. Ramirez noticed that male Customs and Border Protections ("CBP") officers were inspecting and patting down female pedestrians at a southbound pedestrian checkpoint below the bridge. (*Id.* ¶ 38.) Mr. Ramirez claims that his wife said that the officers were only inspecting female pedestrians. (*Id.*) Mr. Ramirez "observed the checkpoint for approximately ten to [fifteen] minutes," taking approximately ten pictures using his cell phone camera out of concern that the officers were acting inappropriately. (*Id.* ¶ 39.) Mr. Ramirez does not allege that he had or attempted to obtain permission from CBP prior to photographing the port of entry. (*See id.*)

***2** While Mr. Ramirez was observing and photographing the checkpoint from the pedestrian bridge, a uniformed officer asked him to present his personal identification documents and to stop taking pictures. (*Compl.* ¶¶ 42–43.) After explaining that he had already passed through inspection, refusing to hand over his documents, and taking another picture of the officer, Mr. Ramirez and his wife began to descend the pedestrian bridge. (*Id.* ¶¶ 42–44.)

At the bottom of the bridge, CBP officers stopped Mr. Ramirez and his wife and asked whether and why he had taken photographs. (*Compl.* ¶ 44.) Mr. Ramirez told the officers that he had taken photographs of "what he believed to be inappropriate activity by CBP officers at the checkpoint—namely, the patting down of women by male officers." (*Id.*) After Mr. Ramirez refused the officer's request to turn over his phone, he offered to show them the pictures. (*Id.* ¶ 45.)

At that point, a U.S Immigration and Customs Enforcement ("ICE") agent confronted Mr. Ramirez and asked him for his personal identification documents. (*Compl.* ¶ 46.) Mr. Ramirez again refused and explained that he and his wife had already been inspected. (*Id.*) The ICE agent took Mr. Ramirez's and Mr. Ramirez's wife's passports and brought them to a nearby office. (*Id.*) While in the office, a CBP officer scrolled through the photos on Mr. Ramirez's phone and deleted all the photos Mr. Ramirez had taken of the CBP checkpoint. (*Id.*) The ICE agent returned the passports and allowed Mr. Ramirez and his wife to continue on their way. (*Id.* ¶ 49.)

B. Incident Involving Mr. Askins

According to the Complaint, Mr. Askins is a U.S. citizen living primarily in Mexicali, Mexico who frequently crosses the border into the United States. (*Compl.* ¶ 17.) He maintains and contributes to a blog that addresses environmental issues and human rights abuses in the U.S.–Mexico border region. (*Id.*) Mr. Askins's work "involves extensive research, investigation, and analysis of CBP border activities." (*Id.*)

On April 18, 2012, Mr. Askins contacted CBP Officer John Campos by phone and "requested permission to take three or four photographs inside the secondary inspection area at the Calexico port of entry" on April 19, 2012. (*Compl.* ¶ 20.) Officer Campos did not object to the request, nor did he grant it. (*Id.*) On April 19, 2012, Mr. Askins called Officer Campos to follow up on their previous conversation, but Campos did not answer. (*Id.* ¶ 21.) Mr. Askins left Officer Campos a voicemail stating that he was going to stand on the street in Calexico and take photographs of the exit of the secondary inspection area. (*Id.*)

On or about April 19, 2012, Mr. Askins took "three or four photographs of the exit of the secondary inspection area" while standing approximately "50–100 feet from the exit from the secondary inspection area." (*Compl.* ¶ 22.) When he took the pictures, he was in the United States and "not engaged in the act of crossing the border." (*Id.* ¶ 24.) After Mr. Askins took the pictures, CBP officers demanded he delete the photos. (*Id.* ¶ 25.) Mr. Askins refused, and the officers stated they would "smash the camera if Mr. Askins did not delete the photos." (*Id.*) He again declined, explaining that the photos were his property. (*Id.*) At that point, the officers handcuffed Mr. Askins and took his camera, passport, car keys, and hat. (*Id.*)

Mr. Askins was forcefully led into a small room inside the secondary inspection area and told to sit down. (*Compl.* ¶ 27.) He was not free to leave. (*Id.*) He was later taken to a separate room where he was "subjected ... to an invasive and embarrassing physical search." (*Id.* ¶ 28.) Then, the officers told Mr. Askins he was free to go and returned his belongings. (*Id.* ¶ 29.) Upon inspection of his phone, he realized that three of the four pictures he had taken of the port of entry had been deleted. (*Id.* ¶ 30.)

C. The Current Litigation

***3** On October 24, 2012, Plaintiffs filed this action alleging multiple violations of their First and Fourth Amendment rights. (*Compl.* ¶¶ 52–73.) On February 13, 2013, Defendants filed a motion to dismiss Plaintiffs' Complaint for failure to state a claim. (*MTD* [Doc. 22]; *Defs.' Reply* [Doc. 33].). Plaintiffs opposed. (*Pls.' Opp'n* [Doc. 32].) Thereafter, on September 30, 2013, the Court granted-in-part and denied-in-part Defendants' motion to dismiss. (*See Sept. 30, 2013 Order.*) The Court's Order prompted Defendants to file a motion for reconsideration, which the Court granted-in-part and denied-in-part on April 17, 2014. (*See Defs.' Mot. Recons.*; *Apr. 17, 2014 Order.*) The Court also ordered the parties to submit further briefing on Defendants' probable cause argument—an argument contained within the portion of Defendants' motion to dismiss that addressed Plaintiffs' Fourth Amendment claims. (*Apr. 17, 2014 Order* 6:17–18.) Specifically, the Court ordered briefing "on the issue of the statutory authority for the federal property regulations that Defendants argue form the grounds for the officers' probable cause." (*Id.* at 7:19–21.) The parties have submitted their supplemental briefs, which are now before the Court. (*See Pls.' Suppl. Br.*; *Defs.' Suppl. Reply.*)

II. LEGAL STANDARD

Once judgment has been entered, reconsideration may be sought by filing a motion under either Federal Rule of Civil Procedure 59(e) (motion to alter or amend a judgment) or Federal Rule of Civil Procedure 60(b) (motion for relief from judgment). See Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th Cir. 1993).

"Although Rule 59(e) permits a district court to reconsider and amend a previous order, the rule offers an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000) (citation and internal quotation marks omitted). "Indeed, 'a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.' " Id. (quoting 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999)). Further, a motion for reconsideration "may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." Id. It does not give parties a "second bite at the apple." See id. Finally, "after thoughts" or "shifting of ground" do not constitute an appropriate basis for reconsideration. Ausmus v. Lexington Ins. Co., 2009 WL 2058549, at *2 (S.D. Cal. July 15, 2009) (citations and internal quotation marks omitted).

Similarly, Rule 60(b) provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances. Engleson v. Burlington N.R. Co., 972 F.2d 1038, 1044 (9th Cir. 1992) (citing Ben Sager Chem. Int'l v. E. Targosz & Co., 560 F.2d 805, 809 (7th Cir. 1977)). Under Rule 60(b), the court may grant reconsideration based on: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered before the court's decision; (3) fraud by the adverse party; (4) the judgment being void; (5) the judgment having been satisfied; or (6) any other reason justifying relief. Fed. R. Civ. P. 60(b). The ground for relief under (6) is "used sparingly as an equitable remedy to prevent manifest injustice" and "is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." U.S. v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir. 1993).

However, the relief available under Federal Rule of Civil Procedure 60(a) differs from the aforementioned rules. Rule 60(a) states, in pertinent part, that "[t]he court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record," and "[t]he court may do so on motion or on its own, with or without notice." Fed. R. Civ. P. 60(a). Though "[s]ubstantive changes of mind by a court cannot be effected through Rule 60(a)," it is said that "[a] court's failure to memorialize part of its decision [constitutes] a clerical error." Buchanan v. United States, 755 F. Supp. 319, 324 (D. Or. 1990) (citing Miller v. Transamerican Press, Inc., 709 F.2d 524, 527 (9th Cir. 1983)); see also Blanton v. Anzalone, 813 F.2d 1574, 1577 n.2 (9th Cir. 1987). "Rule 60(a) can be used to conform a judgment to a prior ruling." Buchanan, 755 F. Supp. at 324 (citation omitted).

III. DISCUSSION

***4** In its September 30, 2013 Order, the Court found CBP's photography policy to comport with the First Amendment. (*See Sept. 30, 2013 Order* 11:20–25.) Next, in setting out its Fourth Amendment analysis, the Court restated Defendants' contention that "[b]ecause the restriction of unauthorized photography on land ports of entry is constitutional, the seizure and search of individuals who violate that restriction is also constitutional." (*Id.* at 12:4–10 (citing *MTD* 21:2–4) (internal quotation marks omitted).) However, despite the Court's initial finding that CBP's policy does not violate the First Amendment, the Court then relied on the erroneous premise that CBP's photography policy *does* violate the First Amendment, and therefore rejected Defendants' contention. (*Id.*) As a result, the Court—with one exception—denied Defendants' motion to dismiss Plaintiffs' Fourth Amendment claims.[3] (*Id.* at 11:28–13:17, 14:7–13.)

In light of the above, the Court has not yet had an opportunity to reach the merits of Defendants' probable cause argument. (*See Apr. 17, 2014 Order* at 6:17–18.) The Court will now analyze that argument. And, for the reasons stated below, the Court **GRANTS-IN-PART** Defendants' motion for reconsideration and **DISMISSES-IN-PART** Plaintiffs' Fourth Amendment claims, but only to the extent that Plaintiffs claim that CBP's photography *policy* violates the Fourth Amendment.

A. CBP's Policy Comports with the Fourth Amendment

In its motion to dismiss, Defendants argued that "CBP's written policy complies with the Fourth Amendment by permitting the arrest of individuals who take unauthorized photographs on ports of entry." (*MTD* 20:14–15.) Defendants then explained that "GSA regulations authorize[ ] the arrest and search of an individual on port of entry property if an officer has probable cause to believe that the individual has violated federal law." (*Id.* at 20:18–20.) Thus, according to Defendants' probable cause argument, (1) taking photographs at a port of entry is a crime; (2) an officer who observes photographs being taken at a port of entry has probable cause to believe that a crime is being committed; and (3) the officer may thus constitutionally detain that individual and seize his camera. (*Id.*)

In support of their argument, Defendants pointed to various provisions of the code of federal regulations as well as a CBP agency directive. (*See, e.g.*, MTD 20:17–24.) Under 41 C.F.R. § 102-74.420—the federal regulation pertaining to "the policy concerning photographs for news, advertising or commercial purposes"—photography on federal property is explicitly limited. The text of the regulation states as follows:

> Except where security regulations, rules, orders, or directives apply or a Federal court order or rule prohibits it, persons entering in or on Federal property may take photographs of—
>
> (a) Space occupied by a tenant agency for non-commercial purposes only with the permission of the occupying agency concerned;
>
> (b) Space occupied by a tenant agency for commercial purposes only with written permission of an authorized official of the occupying agency concerned; and
>
> (c) Building entrances, lobbies, foyers, corridors, or auditoriums for news purposes.

41 C.F.R. § 102-74.420. Section 102-74.370 of the same subpart of the C.F.R.— subpart "C," which deals with "Conduct on Federal Property"—details the items subject to inspection on federal property by federal agencies.[4] Section 102-74.450 is the subpart's criminal penalties provision.[5]

***5** In addition to § 102-74.420, the CBP's Office of Public Affairs has circulated a Directive that appears to elucidate CBP's photography policy.[6] According to that Directive, "CBP personnel should not prevent the *lawful* efforts of the news media to photograph, tape, record, or televise an enforcement action from *outside* a designated perimeter as long as the CBP-controlled area has not been breached." CBP Directive No. 5410–001B, 6.2.2 (emphasis added). The Directive further explains that "[d]etention of persons or media and/or the detention of recording equipment, film or notes are prohibited unless the owner or operator of such materials has *violated federal law.*" Id. at 6.2.4 (emphasis added).

Thus, the first issue that the Court must resolve is whether a violation of the provisions at § 102-74.420, specifically

§ 102-74.420(a), constitutes a crime. The Court will then decide whether an officer who observes photographs being taken at a port of entry has probable cause to believe that a crime is being committed, and, if so, whether the officer may detain that individual and seize his camera.

1. The relevant statutory history indicates that taking photographs on a port of entry in contravention of 41 C.F.R. § 102-74.420(a)constitutes a crime

Plaintiffs' principal point of contention is that a violation of the regulation codified at 41 C.F.R. § 102-74.420(a) is not a crime. (*Pls.' Suppl. Br.* 1:7–12 ("Simply put, taking photos of matters exposed to public view on federal property is not a crime.").) In setting the foundation for that argument, Plaintiffs cite to United States v. Alghazouli, wherein the Ninth Circuit recognized that according to the Supreme Court, "a criminal conviction for violating a regulation is permissible only if a statute explicitly provides that violation of that regulation is a crime." 517 F.3d 1179, 1184 (2008). Plaintiffs proceed to argue that §§ 102-74.420(a) and 102-74.450—the criminal sanctions provision—are not based on a statutory source of authority authorizing criminal sanctions, "and therefore the regulations cannot criminalize Plaintiffs' conduct." (*Pls.' Suppl. Br.* 1:5–8.) As Plaintiffs point out, §§ 102-74.420(a) and 102.74.450 appear to cite only to 40 U.S.C. § 121(c) as their statutory source of authority. (*Id.* at 1:22–2:11.) Plaintiffs believe this to mean that § 121(c) constitutes "the *sole* statute that expressly authorizes the regulations at issue here." (*Id.* at 3:4–5 (emphasis added).)

Section 121(c) falls under Subtitle I of Title 40 of the United States Code. Title 40 pertains to "Public Buildings, Property, and Works," and Subtitle I pertains to "Federal Property and Administrative Services." The text of § 121(c), which deals with functions of the Administrator of the General Services Administration ("GSA"), states:

> (c) Regulations by Administrator.—
>
> (1) General Authority.— The Administrator may prescribe regulations to carry out this subtitle.
>
> (2) Required regulations and order.— The Administrator shall prescribe regulations that the Administrator considers necessary to carry out the Administrator's functions under this subtitle and the head of each executive agency shall issue orders and directives that the agency head considers necessary to carry out the regulations.

40 U.S.C. § 121(c). Plaintiffs note that "[b]y its plain language, [§ 121(c)] does not authorize criminal penalties for violation of any regulation it authorizes." (*Pls.' Suppl. Br.* 1:24–25.) And, after applying the decision in Alghazouli to the instant case, Plaintiffs conclude that violators of 41 C.F.R. § 102-74.420 are not subject to criminal penalties because "there is no statutory authorization for the imposition of criminal penalties for alleged violation[s] of § 102-74.420." (*Pls.' Suppl. Br.* 2:10–11.)

***6** Defendants, on the other hand, contend that the government indeed has "the ability to criminally sanction violators of federal property regulations such as the regulations specified under 41 C.F.R. § 102-74.420. (*See Defs.' Suppl. Reply* 1:2–3.) To support their contention, Defendants assert that § 102-74.420's citation to 40 U.S.C. § 121(c) is not fully determinative of the issue. Rather, Defendants argue it is actually 40 U.S.C. § 1315(c) that serves as the statutory authority providing for criminal sanctions of violations of federal property regulations. (*See, e.g.*, *id.* at 8:3–8.) And, as Defendants point out, "Plaintiffs cite to no authority suggesting that a Federal Register notice"—such as the one in question that purportedly modified the Federal Management Regulations ("FMR") in 2005—"must contain a citation to all relevant statutory authorities or risk becoming ineffective." (*Id.* at 4:19–5:5.) Therefore, according to Defendant, the fact that §§ 102-74.420 and 102-74.450 cite only to 40 U.S.C. § 121(c) as their "general regulatory authority" does not lead to the conclusion that there can be no *other* extant statutory authority for criminalizing violations of § 102-74.420. (*Id.* at 4:19–5:5; 8:3–8.) The Court agrees with Defendants.

Congress enacted 40 U.S.C. § 318a in 1948, thereby authorizing the GSA to promulgate rules and regulations to govern property falling within its control. Act of June 1, 1948, ch. 359, § 2, 62 Stat. 281 (1948). In addition, § 318a provided for the *enforcement* of such rules and regulations, and, in conjunction with § 318c, it authorized penalties for violations of those rules and regulations. 40 U.S.C. §§ 318a, 318c (1948). In 2002, in an effort to "revise, codify, and enact without substantive change certain general and permanent laws, related to public

buildings, property, and works," Congress modified Title 40. Pub. L. No. 107-217, 116 Stat. 1062 (2002). Through that modification, Congress moved the substance of the statutory provisions previously codified at 40 U.S.C. § 318 to 40 U.S.C. § 1315. See id.; see also U.S. v. Bichsel, 395 F.3d 1053, 1055 (9th Cir. 2005).

In addition to the 2002 modifications of Title 40, Congress also passed the Homeland Security Act ("HSA") in 2002 in the wake of the events of September 11, 2001. Pub. L. No. 107-96, 116 Stat. 2135 (2002). One effect of the HSA was the transfer of the functions of the Administrator of the GSA—previously codified at 40 U.S.C. § 318—to the Secretary of the newly-formed Department of Homeland Security ("DHS"). See id.; 40 U.S.C. § 1315. The HSA contained a number of savings provisions, one of which explained that "[c]ompleted administrative actions of an agency shall not be affected by the enactment of [the HSA] or the transfer of such agency to the Department [of Homeland Security], but shall continue in effect according to their terms until amended, modified, superseded, terminated, set aside, or revoked." Pub. L. No. 107-296, § 1512(a)(1), 116 Stat. 2135 (codified at 6 U.S.C. § 552(a)(1)). The Act noted that the phrase "completed administrative action" included "orders, determinations, *rules*, *regulations*, [and] personnel actions." Id. at § 1512(a)(2) (emphasis added) (codified at 6 U.S.C. § 552(a)(2)). Defendants point out—and the Court has found no indication to the contrary—that the Secretary of DHS has yet to revoke or otherwise amend the GSA's previously promulgated rules. (*See Defs.' Reply Br.* 2:1–3.)

Therefore, in light of the above, it appears that the aforementioned congressional actions in 2002 relocated the former 40 U.S.C. § 318 to its current position at 40 U.S.C. § 1315, and transferred from the GSA to the Secretary of the DHS the authority to revise or otherwise promulgate regulations such as the those under which the instant dispute arises.[7] See § 1315(c).

***7** Nonetheless, Plaintiffs further argue that the 2005 publication in the Federal Register of the regulations at issue—41 C.F.R. §§ 102-74.420 and 102-74.450—relies on a statute "that does not authorize criminal penalties." (*Pls.' Suppl. Br.* 3:12–14, 1:22–25.) Plaintiffs again identify that statute as 40 U.S.C. § 121(c). (*See id.* at 1:22–25, 3:3–6.) And, as previously noted, Plaintiffs point out that this "sole statute that expressly authorizes the regulations at issue here ... does not establish ... criminal liability." (*Id.* at 3:2–6.) In other words, Plaintiffs contend that "statutory authorization for regulatory criminal liability must be located, if it exists at all, by reference to the statutes that the regulation itself recognizes as its source of authority." (*Id.* at 3:6–8.)

Defendants, on the other hand, claim that the "2005 GSA update to and reorganization of certain federal property regulations"—which affected 102-74.420 and 102-74.450—merely constituted one of several instances of the GSA's attempts to "streamline regulations governing federal property." (*Defs.' Reply Br.* 3:17–20.) Thus, Defendants assert that the 2005 GSA actions were merely "technical in nature" and did not dispense with the government's ability to prescribe criminal penalties for regulatory violations. (*Id.* at 5:11–13.) The Court again agrees with Defendants.

Before Congress passed the HSA in 2002, the Administrator of the GSA was authorized to impose criminal penalties for violations of regulations governing federal property. Prior to 2002, those regulations were located at 41 C.F.R. Pt. 101. The specific regulation authorizing criminal penalties for violations of federal property regulations was located at 41 C.F.R. § 101-20.315. Management of Buildings and Grounds, 53 Fed. Reg. 129-01 (Jan. 5, 1988). In 2002, the regulations previously contained at § 101-20 were moved to § 102-74. See Real Property Policies, 67 Fed. Reg. 76882-01 (Dec. 13, 2002); see also 41 C.F.R. § 101-20.0.[8] According to the Federal Register, these GSA changes moved the criminal penalties provision—located at 41 C.F.R. § 101-20.315—to its current location at 41 C.F.R. § 102-74.450. 67 Fed. Reg. 76882-01; Real Property Policies Update, 67 Fed. Reg. 76820-01 (Dec. 13, 2002). The subsequent 2005 changes that Plaintiffs refer to were made for the purposes of "amending the Federal Management Regulation (FMR) to update the legal citations to conform [to law] and to incorporate additional policy guidance." Federal Management Regulation; Real Property Policies Update, 70 Fed. Reg. 67786-01 (Nov. 8, 2005). Thus, the 2005 changes did not alter the location or substance of 41 C.F.R. § 102-74.450.

As Defendants point out, the fact that the 2005 updates to the regulations in question here only cite to 40 U.S.C. § 121(c) is unavailing to Plaintiffs position for several reasons. First, Plaintiffs do not cite any authority that would require a Federal Register notice to include citations to all relevant statutory authorities or risk becoming ineffective. (*Defs.' Suppl. Reply* 5:2–5.) Second, Defendants note that in 2002 and 2005, the GSA

"no longer had the authority to prescribe, revoke, or amend property regulations with criminal penalties" because such authority had been transferred to DHS under the HSA and 40 U.S.C. § 1315(c). (*Id.* at 5:5–8.) Therefore, in light of the fact that neither the 2002 or 2005 action substantively modified the federal property regulations that fall within the purview of the DHS's authority, it appears that those GSA actions were in fact merely "technical in nature." (*Id.* at 5:11–12.)

***8** For the reasons discussed above, the Court finds that the relevant statutory history establishes that a violation of 41 C.F.R. § 102-74.420(a) in fact constitutes a crime and subjects violators to criminal penalties.

2. Extant case law also indicates that a violation of 41 C.F.R. § 102-74.420(a) constitutes a crime

In addition to the foregoing, extant case law appears to indicate that individuals who violate § 102-74.420(a) are indeed subject to criminal penalties. According to Defendants, numerous circuit courts—including the Ninth Circuit—have affirmed criminal convictions for regulatory violations comparable to the regulation at issue in the instant case. (*See, e.g., Defs.' Suppl. Reply* 1:11–13.) In support of this contention, Defendants cite, *inter alia*, United States v. Baldwin, 745 F.3d 1027 (10th Cir. 2014), United States v. Strong, 724 F.3d 51 (1st Cir. 2013), and Bichsel, 395 F.3d at 1053. Plaintiffs, on the other hand, contend that Defendants' citations are inapposite. Plaintiffs, for their part, cite to the Eleventh Circuit's decision in United States v. Izurieta, 710 F.3d 1176 (11th Cir. 2013), which they aver supports "the principle that statutory authorization for regulatory criminal liability must be located, if it exists at all, by reference to the statutes that the regulation itself recognizes as its source of authority." (*Pls.' Suppl. Br.* 3:6–8.) For the following reasons, the Court finds that Defendants have the better of the argument.

In Baldwin, an attorney was convicted of three offenses after a bench trial before a federal magistrate judge, two of which were based on federal property regulations located at 41 C.F.R. Pt. 102-74.[9] 745 F.3d at 1029–30. The attorney challenged his federal property regulation convictions, arguing that the regulations existed merely to "articulate[ ] no more than administrative rules or policies, not crimes." Id. at 1030. The Tenth Circuit disagreed.

In affirming the attorney's convictions, the court explained that "[t]he regulations certainly do delineate policy, but that isn't all they do." Baldwin, 745 F.3d at 1030. The court continued: "Another section of the same regulatory 'subpart' expressly provides that the very sections Mr. Baldwin violated *can* be enforced through *criminal* sanctions ...." Id. The court then quoted 41 C.F.R. § 102-74.450—the criminal sanctions provision discussed above. Id. And, in identifying the statutory authority for the criminalization of the conduct for which the appellant had been convicted, the court explained:

> [W]ith some scratching around we see that Congress did *expressly* authorize first the General Services Administration and then the Department of Homeland Security to establish regulations "for the protection and administration of property owned or occupied by the Federal Government" and to prescribe "reasonable" penalties of "not more than 30 days" in prison and fines in the amounts allowed by title 18.

***9** Id. (emphasis added). In support of this, the court cited both 40 U.S.C. § 1315(c) and 6 U.S.C. § 552. Id. The court's citations noted that 40 U.S.C. § 1315(c) was "formerly found at 40 U.S.C. 318a, 318c," and that 6 U.S.C. § 552 "facilitat[ed] transfer of authority from GSA to DHS." Id. Furthermore, the Baldwin court concluded that the criminal provision regulation in question "can claim at least some legislative pedigree, some measure of congressional authorization." Id. Thus, it appears that the Tenth Circuit's "scratching around" in Baldwin is tantamount to the examination of statutory authority that this Court conducted above.

Another case to which Defendants cite in support of their position is Strong. 724 F.3d at 51. In Strong, an individual defendant soiled the first floor men's restroom at a federal courthouse in Portland, Maine. Id. at 54. As a result of his actions, the defendant was charged with violating 41 C.F.R. § 102-74.380(b) and (d), which prohibit "[a]ll persons entering in or on Federal property" from "[w]illfully destroying or damaging property," and from "[c]reating any hazard on property to persons or things." Id. at 52. The defendant was also charged with violating 41 C.F.R. § 102-74.390(a), which prohibits "[a]ll persons entering in or on Federal property ... from loitering, exhibiting disorderly conduct or exhibiting other conduct on property that ... [c]reates loud or unusual noise or a nuisance." Id. After a bench trial before a magistrate

judge, the defendant was convicted of violating all three regulations and sentenced to seven days in jail. Id. at 52, 55. The district court affirmed the convictions on appeal—a decision that the defendant later appealed to the Court of Appeals for the First Circuit. Id. at 52.

In reviewing the defendant's convictions, the First Circuit acknowledged 40 U.S.C. § 1315(c)(1) as being "the enabling statute" for regulations falling within subpart "C" of § 102-74. See Strong, 724 F.3d at 55. Specifically, the court quoted the language of § 1315(c)(1) and explained that "[t]he statute ... authorizes the Secretary [of Homeland Security] to come up with substantive rules needed for the protection and administration of the property." Id. at 56. Based in part on that finding, the Court ultimately upheld the defendant's convictions. Id. at 60. Thus, although the specific legal arguments proffered by the defendant in Strong differ from that of the Plaintiffs in the instant case,[10] Strong—consistent with Defendants' averments here—appears to supply additional support for the proposition that 40 U.S.C. § 1315 provides a statutory basis for criminalization of acts prohibited under subpart "C" of § 102-74.

A third case to which Defendants cite for support is Bichsel. 395 F.3d at 1053. Bichsel involved a defendant who, after chaining himself to the doors of a United States courthouse in Tacoma, Washington, and subsequently refusing to comply with a Federal Protective Service officer's command to remove the chains, was charged with violating 41 C.F.R. § 102-74.385—a federal regulation requiring "[p]ersons in and on [Federal] property" to comply "with the lawful direction of Federal police officers and other authorized individuals." Id. at 1054–55. After a bench trial before a magistrate judge, the defendant was found guilty of violating § 102-74.385. Id. at 1055. The district court then affirmed the conviction on appeal, and the defendant sought review of that decision before the Ninth Circuit. Id.

***10** In upholding the defendant's conviction, the Ninth Circuit explained that § 102-74.385—another regulation falling within the purview of the same statutory subpart of the regulations in question in the instant case—"is promulgated under 40 U.S.C. § 1315." Bichsel, 395 F.3d at 1055. The court then went one step further to note that "[s]ection 1315 was enacted in August 2002, and is derived from former 40 U.S.C. § 318"—the original statute that Congress enacted in 1948, which, as discussed above and by the Sixth Circuit in Baldwin, (1) authorized the GSA to promulgate rules and regulations to govern property falling within its control, and (2) provided for the *enforcement* of such rules and regulations through the penalties it authorized. Id. Thus, as Defendants point out, the Ninth Circuit's decision in Bichsel provides yet another example of an appellate court recognizing 40 U.S.C. § 1315 as providing a statutory basis for criminalization of acts prohibited under subpart "C" of § 102-74.[11] (*See Defs.' Suppl. Reply* 5:20–6:4 (citing Bichsel, 395 F.3d at 1055).)

Plaintiffs, on the other hand, rely on Izurieta, 710 F.3d at 1184, in support of their assertion that "statutory authorization for regulatory criminal liability must be located, if it exists at all, by reference to the statutes that the regulation itself recognizes as its source of authority." (*Pls.' Suppl. Br.* 2:21–3:8.) The defendants in Izurieta were charged with and subsequently convicted, under 18 U.S.C. § 545, of conspiracy to unlawfully import goods into the United States based on their purported violation of 19 C.F.R. § 141.113(c)(3). 710 F.3d at 1178–79. On appeal, the Eleventh Circuit addressed the "key question as to what 'law' must be violated for importation to be 'contrary to law' under the charged statute, 18 U.S.C. § 545." Id. at 1179 (citing United States v. Place, 693 F.3d 219, 228–29 n.12 (1st Cir. 2012)). After conducting a thorough analysis, the Eleventh Circuit explained that 18 U.S.C. § 545 was "grievously ambiguous, at least with respect to its effect of criminalizing conduct in violation of 19 C.F.R. § 141.113(c)." Id. at 1184 (citing United States v. Mitchell, 39 F.3d 465, 470 (4th Cir. 1994)). That is, the court found "great doubt" as to whether § 141.113(c) defined criminal activity or merely provided for civil remedies. Id. In light of that ambiguity, the court applied the rule of lenity, and ultimately vacated the defendants' convictions. Id.

Plaintiffs' reliance on Izurieta is unavailing for several reasons. First, that case involved the Eleventh Circuit's interpretation of a statutory scheme and correspondent regulation wholly unrelated to those in question in the instant case. Second, the defendants' convictions in Izurieta were vacated based on the rule of lenity, the application of which would be improper here considering the absence of the requisite " 'grievous ambiguity or uncertainty' " that must precede the application of the rule to a given regulation. 710 F.3d at 1181–82 (quoting Chapman v. United States, 500 U.S. 453, 456 (1991)). Third, Plaintiffs do not cite to any specific portion of Izurieta to support their assertion that "statutory authorization for regulatory criminal liability must be located, if it exists at all, by reference to the statutes that

the regulation itself recognizes as its source of authority."[12] (*See Pls.' Suppl. Br.* 3:6–8.) Fourth, although the Eleventh Circuit examined the statutes to which 19 C.F.R. 141.113(c) cites, it also recognized that whether a regulation constitutes a "law" for the purposes of criminal prosecutions depends on the structure of the particular statute in question. See Izurieta, 710 F.3d at 1180–81 (citing United States v. Howard, 352 U.S. 212, 216 (1957)); see also Alghazouli, 517 F.3d at 1184 ("As the Supreme Court has stated, there is no 'fixed principle that a regulation can never be a "law" for purposes of criminal prosecutions. It may or may not be, depending on the structure of the particular statute.' " (quoting Singer v. United States, 323 U.S. 338, 345 (1945))).

***11** Plaintiffs' citation to Aghazouli is also unavailing. That case, like Izurieta, dealt with a defendant charged with violating 18 U.S.C. § 545 based on violations of a federal regulation. Aghazouli, 517 F.3d at 1183. However, the decision in Aghazouli pertained to a particular question of law not before the Court in the instant case. Id. Specifically, the Ninth Circuit held that "Congress intended the term 'law' in § 545 to include a regulation when, but only when, a statute ... specifies that a violation of that regulation constitutes a crime." Id. Thus, Aghazouli appears to be limited to the Ninth Circuit's interpretation of § 545. See, e.g., Izurieta, 710 F.3d at 1180 (noting that the Ninth Circuit's decision Alghazouli reflected its narrow interpretation of § 545).

Still, Plaintiffs contend that the Ninth Circuit's decision in Alghazouli stands for the proposition that "a regulation may not impose criminal sanctions unless that regulation's authorizing statute explicitly authorized it to do so." (*Pls.' Suppl. Br.* 3:15–17 (citing Alghazouli, 517 F.3d at 1184).) That contention, however, mischaracterizes Alghazaouli, wherein the Ninth Circuit also recognized that "the Supreme Court made clear ... that a criminal conviction for violating a regulation is permissible only if *a* statute"—not the regulation's authorizing statute—"explicitly provides that violation of that regulation is a crime." Furthermore, and rather tellingly, the Ninth Circuit has previously upheld a conviction for a violation of 102-74.385—a similarly situated regulation falling under the same regulatory scheme as § 102-74.420(a). See Bichsel, 395 F.3d at 1053.

In light of the above, the Court finds that persons who violate § 102-74.420(a) are in fact subject to criminal penalties. Indeed, adopting the adverse position would lead to an untenable result—specifically, that violations of other regulations falling within the same subpart of the C.F.R., such as regulations regarding explosives on federal property (41 C.F.R. § 102–74.435), weapons on federal property (41 C.F.R. § 102–74.440), and vehicular and pedestrian traffic on federal property (41 C.F.R. § 102-74.430), could not be punishable as "crimes." Furthermore, Plaintiffs' contentions beg the question: by what statutory authority were the Defendants subject to criminal sanctions in Baldwin, Strong, and Bicshel? Those cases, however, furnish a sufficient answer to that question: § 1351(c) provides the requisite statutory source of authority to criminalize the acts in question in those cases as well as in this case.

3. Probable cause to detain and to seize cameras

According to the remainder of Defendants' probable cause argument, an officer who observes photographs being taken on a port of entry has probable cause to believe that a crime is being committed, and, as a result, may lawfully detain that individual and seize his camera. (*MTD* 20:18–20, 21:5–7.) Plaintiffs do not appear to refute these assertions. Plaintiffs' only apparent argument revolves around the threshold issue of the government's capacity to criminally sanction violators of § 102-74.420(a). (*See generally Pls.' Opp'n*; *Pls.' Suppl. Br.*)

According to well-established precedent, "[t]here is probable cause for a warrantless arrest and a search incident to that arrest if, under the totality of the facts and circumstances known to the arresting officer, a prudent person would have concluded that there was a fair probability that the suspect had committed a crime." United States v. Gonzales, 749 F.2d 1329, 1337 (9th Cir. 1984) (citing United States v. Woods, 720 F.2d 1022, 1028 (9th Cir. 1983); United States v. Bernard, 623 F.2d 551, 559 (9th Cir. 1979)). Moreover, the Supreme Court has explained that although "warrantless searches are presumptively unreasonable," there exist "a few limited exceptions to this general rule," such as automobiles, consent, and exigent circumstances. United States v. Karo, 468 U.S. 705, 717 (1984) (citations omitted). Another such exception is the "plain view" exception, which "requires: (1) that the initial intrusion must be lawful; and (2) that the incriminatory nature of the evidence must be immediately apparent to the officer."

United States v. Garcia, 205 F.3d 1182, 1187 (9th Cir. 2000) (citing United States v. Hudson, 100 F.3d 1409, 1420 (9th Cir. 1996)).

***12** In light of the Court's finding that a violation of § 102-74.420(a) constitutes a crime, and given the relevant Fourth Amendment case law, it follows that a CBP officer's observation of an act prohibited under § 102-74.420(a) would provide such officer with the requisite probable cause to conclude that a crime had been committed. See Gonzales, 749 F.2d at 1337. As a result, the Court agrees with Defendants' assertion that—notwithstanding the prohibitions of the Fourth Amendment— the observing CBP officer would be lawfully permitted to detain the suspect and seize his camera. See Garcia, 205 F.3d at 1187.

B. Plaintiffs' Remaining Fourth Amendment Claims

In their motion for reconsideration, Defendants requested "that the Court reconsider its denial of the government's [m]otion to [d]ismiss [P]laintiffs' Fourth Amendment challenge to CBP's search and seizure *policy.*" (*Defs.' Mot. Recons.* 7:7–9 (emphasis added).) In their supplemental reply brief, Defendants reiterated that request verbatim. (*Defs.' Suppl. Br.* 8:12–14.) However, Defendants' supplemental reply also attempts to expand the scope of the instant motion beyond Plaintiffs' Fourth Amendment challenge to CBP's policy to encompass all of Plaintiffs' remaining Fourth Amendment claims. (*Id.* at 2:8–10 (contending that "Plaintiffs' Fourth Amendment claims should be dismissed *in their entirety*" (emphasis added)).) Despite Defendants' attempt, the Court declines to dismiss the remainder of Plaintiffs' Fourth Amendment claims for two reasons.

First, in partially granting Defendants' reconsideration motion, this Court's April 17, 2014 Order explicitly stated that it would reconsider "only ... the portion of its previous order that addressed Defendants' Fourth Amendment probable-cause analysis." (*Apr. 17, 2014 Order* 6:11–13.) Defendants' probable-cause analysis was provided in the context of their argument that "CBP's *written policy* complies with the Fourth Amendment by permitting the arrest of individuals who take unauthorized photographs on ports of entry." (*MTD* 20:13–15 (emphasis added).) Specifically, Defendants' motion to dismiss argued that "GSA regulations authorize[ ] the arrest and search of an individual on port of entry property if an officer has probable cause to believe that the individual has violated federal law." (*Id.* at 20:17–20.) Thus, in the Court's view, the only issue on which Defendants sought reconsideration was the validity of CBP's policy under the Fourth Amendment. Above, the Court found CBP's written photography policy to comport with the Fourth Amendment. The remainder of Plaintiffs' claims, therefore, remain intact.

Second, it does not follow from the Court's dismissal of Plaintiffs' Fourth Amendment claim as to CBP's *policy* that the Court must also dismiss Plaintiffs' remaining Fourth Amendment claims. As an initial matter, neither Plaintiffs or Defendants contend that the CBP officers were unable to discern the nature of Plaintiffs' actions. Indeed, Plaintiffs do not argue—nor could they, based on the extant record—that they were not taking photographs at the relevant times. Furthermore, there is no dispute as to whether Plaintiffs obtained permission to take photographs. Thus, for the purposes of Plaintiffs' remaining Fourth Amendment claims, the unresolved point of contention is whether or not Plaintiffs were on ports of entry when they were seized. (*See, e.g.*, *Pls.' Opp'n* 25:13–18.)

Defendants' motion to dismiss contended that Plaintiffs were in fact on port of entry property while they took the photographs. (*See, e.g.*, *MTD* 7:22–8:2.) However, according to Plaintiffs, an unresolved factual issue exists as to ownership of or authority over the properties in question. (*Pls.' Opp'n* 13:9–28, 14:16–22, 25:11–13.) In ruling on Defendants' motion to dismiss, the Court recognized that Defendants had proffered argument and evidence in an effort to establish such facts. (*September 30, 2013 Order* 9:1–2.) Yet, because the Court must construe Plaintiffs' allegations of material fact in the light most favorable to Plaintiffs as the nonmoving parties for the purposes of Defendants' 12(b)(6) motion, Cedars-Sanai Med. Ctr. v. Nat'l League of Postmasters of U.S., 497 F.3d 972, 975 (9th Cir. 2007), the Court accepts Plaintiffs' allegations of material fact as true.[13] That is, at this stage of the litigation, Plaintiffs' allegations as to the ownership of the property on which they stood at all relevant times, even if doubtful in fact—and the Court has its doubts that the property in question is not CBP-administered, port of entry property—are assumed to be true. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

***13** For these reasons, the Court declines to alter its

previous decision not to dismiss the remainder of Plaintiffs' Fourth Amendment claims, and, accordingly, **DENIES** Defendants' reconsideration motion insofar as it seeks the dismissal of those claims.

IV. CONCLUSION

In light of the forgoing, the Court finds that there is sufficient statutory authority for violations of 41 C.F.R. § 102-74.420(a) to be punishable as a criminal offense. Given the criminal nature of the offense, the Court finds that CBP's photography policy comports with the Fourth Amendment. For this reason, and after careful reconsideration of the Court's September 30, 2013 Order, the Court **GRANTS-IN-PART** Defendants' motion for reconsideration and **DISMISSES-IN-PART** Plaintiffs' Fourth Amendment claims, but only to the extent that Plaintiffs claim Defendants' photography *policy* to be violative of the Fourth Amendment. Moreover, given that the Court's finding is one of law, leave to amend would be futile, and thus the dismissal is **WITH PREJUDICE**.

IT IS SO ORDERED.

DATED: January 29, 2015.

All Citations

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Footnotes

[1] The facts herein discussed are the same as those appearing in the Court's September 30, 2013 Order. (*See Sept. 30, 2013 Order.*)

[2] The Court's September 30, 2013 Order granted-in-part and denied-in-part Defendants' motion to dismiss Plaintiffs' First Amendment claims. (*See Sept. 30, 2013 Order* 6:7–11:25, 13:24–14:6.) The Court subsequently denied Defendants' motion to reconsider the Court's Order as to those claims. (*Apr. 17, 2014 Order* 4:1–5:27.) Thus, issues pertaining to Plaintiffs' First Amendment claims are not presently before the Court.

[3] The Court partially granted Defendants' motion to dismiss Plaintiffs' Fourth Amendment claims, but only "to the extent that Plaintiffs claim that Defendants['] photography policy explicitly condones deletion of photographs." (*September 30, 2013 Order* 14:7–9.) Because the Court determined that Plaintiffs would be unable to demonstrate that Defendants' written policy condones deletion of pictures, the partial dismissal was with prejudice. (*Id.* at 14:9–12.)

[4] Section 102-74.370 is entitled "What items are subject to inspection by Federal agencies?" and states: "Federal agencies may, at their discretion, inspect packages, briefcases and other containers in the immediate possession of visitors, employees or other persons arriving on, working at, visiting, or departing from Federal property. Federal agencies may conduct a full search of a person ... upon his or her arrest." 41 C.F.R. § 102-74.370.

[5] Section 102-74.450 is entitled "What are the penalties for violating any rule or regulation in this subpart?" and states: "A person found guilty of violating any rule or regulation in this subpart while on any property under the charge and control of GSA shall be fined under title 18 of the United States Code, imprisoned for not more than 30 days, or both." 41 C.F.R. § 102-74.450.

[6] See CBP Directive No. 5410–001B, U.S. Customs and Border Protection Office of Public Affairs, Roles, Functions and Responsibilities (March 18, 2009), http://foiarr.cbp.gov/streamingWord.asp?i=1245 (superceding a 2005 directive).

[7] Section 1315(c) is entitled "Regulations," and § 1315(c)(1) states in part: "The Secretary, in consultation with the Administrator of General Services, may prescribe regulations necessary for the protection and administration of property owned or occupied by the Federal Government and persons on the property. The regulations may include reasonable penalties, within the limits prescribed in paragraph (2), for violations of the regulations." Section 1315(c)(2) states: "A person violating a regulation prescribed under this subsection shall be fined under title 18, United States Code, imprisoned for not more than 30 days, or both."

[8] Notably, 41 C.F.R. § 101-20.0 is now titled "Cross-reference to the Federal Management Regulation (FMR) (41 CFR chapter 102 parts 1 through 220)." The specific text of § 101-20.0 now reads: "[F]or information on management of buildings and grounds, see FMR part 102-74 (41 CFR part 102–74)." 41 C.F.R. § 101-20.0 It is also important to note that § 101-20.315 originally cited to 40 U.S.C. 318c as one of its sources of statutory authority. See 53 Fed. Reg. 129-01.

[9] The first of those two offenses was 41 C.F.R. § 102-74.385, which requires persons in and on federal property to "at all times comply with official signs of a prohibitory, regulatory or directory nature and with the lawful direction of Federal police officers and other authorized individuals." Baldwin, 745 F.3d at 1030. The second was 41 C.F.R. § 102-74.390(c), which states that "persons entering in or on Federal property are prohibited from loitering, exhibiting disorderly conduct or exhibiting other conduct on property that ... impedes or disrupts the performance of official duties by Government employees." Id.

[10] Unlike Plaintiffs' argument here, the defendant's principal argument in Strong involved whether or not the government had satisfied the notice requirement under § 102-74.365. See generally Strong, 724 F.3d at 51.

[11] Plaintiffs argue that because the decision in Bichsel pre-dates the 2005 publication in the Federal Register of the regulations at issue, Bichsel is not controlling or persuasive in this instance. (*Pls.' Suppl. Br.* 3:9–17.) However, as discussed above, the Court has found the relevant events in 2005 to be merely technical in nature, and, therefore, not preclusive of Bichsel's application to the instant case.

[12] Instead, Plaintiffs point to the Eleventh Circuit's observation that none of the provisions under which 19 C.F.R. § 141.113(c) was authorized "establish criminal liability for failure to comply with the provision itself." (*See Pls.' Suppl. Br.* 3:2–4 (quoting Izurieta, 710 F.3d at 1183) (internal quotation marks omitted).) However, as this Court already explained above, 40 U.S.C. § 1315(c) provides the requisite "express authorization" for § 102-74.420 and its coordinate penalty provision at § 102-74.450.

[13] In their motion to dismiss, Defendants contended that "judicially noticeable facts establish that Mr. Askins was in fact on port of entry property" when he took photographs at the Calixico port of entry. (*MTD* 7:22–1.) Then, in a footnote, Defendants cited to various pieces of evidence in support of that contention. (*MTD* 8 n.15.) The evidence included a picture attached to the Complaint that Plaintiffs purport to be one of the pictures Mr. Askins took on April 19, 2012 (*see Compl.* ¶ 22); the Complaint's allegation as to Mr. Askins's location when he took the photographs (*see id.*); and a series of documents related to certain Calexico border-area property, including information about various parcels of land and a somewhat obscure map depicting the property, (*see MTD, Ex. D* [Doc. 22-5]; *MTD, Ex. E* [Doc. 22-6]]). (*MTD* 8 n.15.)
Defendants' motion to dismiss also averred that Plaintiffs had conceded in the Complaint that Mr. Ramirez was on the San Ysidro port of entry at the time that he took the photographs. (*MTD* 8:1–2.) Then, in their Reply, Defendants cited a GSA website in support of their contention that "the San Ysidro pedestrian bridge is indisputably part of the San Ysidro port of entry." (*Defs.' Reply* 4 n.2 (citing San Ysidro Pedestrian Bridge Fact Sheet, GSA, http://www.gsa.gov/graphics/regions/%20SYLPOE_Ped_Bridge_Fact_Sheet.pdf (last visited Jan. 6, 2015) (broken link)).)

With respect to Mr. Askins, the Court agrees with Plaintiffs that Defendants' exhibits, even in conjunction with the photograph included in the Complaint, do not *conclusively* demonstrate his exact location on April 19, 2012. (*See, e.g.*, *Pls.' Opp'n* 13:9–14:15.) Defendants' argument on this point occurred in a footnote, and it was not fully developed. Without more, the Court declines at this juncture to find that Mr. Askins was indisputably standing on port of entry property when he took the photographs. Whether he was is a fact that Defendants will have an opportunity to prove at a later stage. As to Mr. Ramirez, the only piece of evidence that Defendants provided was a broken link to GSA's website. Although the Court has its doubts that the pedestrian bridge is not port of entry property under the administration of CBP, the Court cannot, based on that piece of evidence alone, find that Mr. Ramirez was on port of entry property at the time he took photographs in San Ysidro.