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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

RAY ASKINS, *et al.*

Plaintiffs,

v.

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

Defendants.

Case No. 12-cv-2600-W (BLM)

**ORDER:**

**(1) GRANTING IN PART AND  
DENYING IN PART  
DEFENDANTS' MOTION FOR  
RECONSIDERATION [DOC. 46];  
AND**

**(2) REQUIRING FURTHER  
BRIEFING**

On October 24, 2012, Plaintiffs commenced this action against Defendants, alleging violations of their First and Fourth Amendments by Customs and Border Protection ("CBP") officers. On September 30, 2013, the Court granted in part and denied in part Defendants' motion to dismiss for failure to state a claim. Defendants now move for reconsideration of that order. Plaintiffs oppose.

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1 The Court decides the matter on the papers submitted and without oral  
2 argument. See Civ. L.R. 7.1(d.1). For the following reasons, the Court **GRANTS IN**  
3 **PART** and **DENIES IN PART** Defendants’ motion for reconsideration, and  
4 **ORDERS** further briefing.

5  
6 **I. LEGAL STANDARD**

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

11 “Although Rule 59(e) permits a district court to reconsider and amend a previous  
12 order, the rule offers an extraordinary remedy, to be used sparingly in the interests of  
13 finality and conservation of judicial resources.” Kona Enters., Inc. v. Estate of Bishop,  
14 229 F.3d 877, 890 (9th Cir. 2000) (internal quotation marks omitted). “Indeed, a  
15 motion for reconsideration should not be granted, absent highly unusual circumstances,  
16 unless the district court is presented with newly discovered evidence, committed clear  
17 error, or if there is an intervening change in the controlling law.” Id. (quoting 389  
18 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999)) (internal quotation  
19 marks omitted). Further, a motion for reconsideration may not be used to raise  
20 arguments or present evidence for the first time when they could reasonably have been  
21 raised earlier in the litigation. Id. It does not give parties a “second bite at the apple.”  
22 See id. Finally, “after thoughts” or “shifting of ground” do not constitute an appropriate  
23 basis for reconsideration. Ausmus v. Lexington Ins. Co., No. 08-CV-2342-L, 2009 WL  
24 2058549, at \*2 (S.D. Cal. July 15, 2009).

25 Similarly, Rule 60(b) provides for extraordinary relief and may be invoked only  
26 upon a showing of exceptional circumstances. Engleson v. Burlington N.R. Co., 972  
27 F.2d 1038, 1044 (9th Cir.1994) (citing Ben Sager Chem. Int’l v. E. Targosz & Co., 560  
28 F.2d 805, 809 (7th Cir. 1977)). Under Rule 60(b), the court may grant reconsideration

1 based on: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered  
2 evidence which by due diligence could not have been discovered before the court's  
3 decision; (3) fraud by the adverse party; (4) the judgment is void; (5) the judgment has  
4 been satisfied; or (6) any other reason justifying relief. Fed. R. Civ. P. 60(b). That last  
5 prong is "used sparingly as an equitable remedy to prevent manifest injustice and is to  
6 be utilized only where extraordinary circumstances prevented a party from taking timely  
7 action to prevent or correct an erroneous judgment." Delay v. Gordon, 475 F.3d 1039,  
8 1044 (9th Cir. 2007).

9       However, the relief available under Federal Rule of Civil Procedure 60(a) differs  
10 from the aforementioned rules. Rule 60(a) states, in pertinent part, that "[c]lerical  
11 mistakes in judgments, orders or other parts of the record and errors therein arising  
12 from oversight or omission may be corrected by the court at any time of its own  
13 initiative or on the motion of any party and after such notice, if any, as the court  
14 orders." Fed. R. Civ. P. 60(a). Though "[s]ubstantive changes of mind by a court  
15 cannot be effected through Rule 60(a) . . . [a] court's failure to memorialize part of its  
16 decision . . . is a clerical error." Buchanan v. United States, 755 F. Supp. 319, 324 (D.  
17 Or. 1990); see also Blanton v. Anzalone, 813 F.2d 1574, 1577 n.2 (9th Cir. 1987).  
18 "Rule 60(a) can be used to conform a judgment to a prior ruling." Buchanan, 755 F.  
19 Supp. at 324.

## 21 **II. ANALYSIS**

22       Defendants move for reconsideration of three parts of the previous order. First,  
23 they contend that the Court made an error in partially denying their motion to dismiss  
24 Plaintiffs' First Amendment claims. (Defs.' Mot. 2:14–5:10.) Second, they contend  
25 that the Court should not have granted Plaintiffs leave to amend the First Amendment  
26 claims that were dismissed. And third, they argue that the Court erred by partially  
27 denying their motion to dismiss Plaintiffs' Fourth Amendment claims. (Id. at 5:11–7:9.)

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1           **A. Partial Denial of Defendants’ Motion to Dismiss Plaintiffs’ First**  
2           **Amendment Claims Was Proper.**

3           Defendants contend that “[t]he ‘pattern or practice’ claims identified by the  
4 Court are not distinguished as independent claims in the complaint and, to the extent  
5 they exist, they are inextricably intertwined with the First Amendment ‘policy’ claims  
6 that the Court rejected.” (Defs.’ Mot. 3:3–6.) Defendants are incorrect.

7           Plaintiffs allege in the complaint that “an expressly adopted official CBP policy  
8 *and/or* a longstanding CBP practice of prohibiting the use of cameras and video  
9 recording devices at CBP-controlled facilities[.]” (Compl. 11:25–28, 12:22–25  
10 (emphasis added).) The use of the disjunctive in the second and third claims allows  
11 Plaintiffs to pursue alternative theories. See Fed. R. Civ. P. 8(d)(2) (“A party may set  
12 out 2 or more statements of a claim or defense alternatively or hypothetically, either in  
13 a single count or defense or in separate ones. If a party makes alternative statements,  
14 the pleading is sufficient if any one of them is sufficient.”).

15           Defendants moved to dismiss one of Plaintiffs’ theories relating to an official CBP  
16 policy, but their motion failed to adequately address allegations of a pattern or practice.  
17 (See Defs.’ Mot. to Dismiss 16:21–17:19; Compl. 11:25–28, 12:22–25.) Defendants  
18 only grounded their arguments for the constitutionality of policies restricting  
19 photography on those specific, official policies. (See Defs.’ Mot. to Dismiss 16:21–17:19  
20 (“[T]he ground rules issued by CBP’s San Diego Office of Field Operations highlight  
21 “concerns for . . . the integrity of law enforcement and investigative activities’ . . . .  
22 CBP’s photography policy also addresses ‘concerns for the privacy of the traveling  
23 public.” (citations omitted)).) One of these arguments formed a basis for the Court’s  
24 order. (See Sept. 30, 2013 Order 10:8–10 (noting Defendants’ contention that their  
25 policy protected an interest in preserving sensitive law enforcement techniques).)

26           Having successfully argued that CBP’s explicit and official policies regarding  
27 photography were constitutional, Defendants may not now move to dismiss the  
28 alternative theory of an unconstitutional pattern or practice by urging reconsideration

1 of the previous order on the ground that “whether the alleged CBP activity occurred  
2 pursuant to a policy or pursuant to a practice is immaterial.” (See Defs.’ Mot. 4:10–13.)  
3 Defendants state that “[t]he fundamental premise of [Plaintiffs’ First Amendment  
4 claims] is that CBP’s restriction of plaintiffs’ photographic activity—*whether done*  
5 *pursuant to a policy or pursuant to a pattern or practice*—violated of [sic] the First  
6 Amendment.” (Id. at 4:7–10 (emphasis added).) The basis for the Court’s previous  
7 order was Defendants’ motion to dismiss, and Defendants grounded that motion’s  
8 reasoning in official CBP policies. Reconsideration is not the appropriate vehicle for  
9 Defendants to raise this new argument that was not raised in the previous motion. See,  
10 e.g., Kona Enters., 229 F.3d at 890 (citing Orange St. Partners, 179 F.3d at 665).

11 Accordingly, the Court **DENIES** Defendants’ motion for reconsideration insofar  
12 as it requests reconsideration of the Court’s order partially denying their previous  
13 motion to dismiss Plaintiffs’ First Amendment pattern-or-practice claims.

14  
15 **B. Leave to Amend Plaintiffs’ First Amendment Claims Was Properly**  
16 **Granted.**

17 Defendants also “respectfully [request] that the Court reconsider its decision to  
18 grant plaintiffs leave to amend the First Amendment claims[.]” (Defs.’ Mot. 5:3–4.)  
19 They provide only the following reasoning: “Because ‘CBP’s photography policy survives  
20 the strict scrutiny analysis,’ any attempt to amend the constitutional challenges to that  
21 policy would be futile.” (Defs.’ Mot. 5:8–10.)

22 “The court should freely give leave when justice so requires,” and apply this  
23 policy with “extreme liberality.” DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186  
24 (9th Cir. 1987) (applying Fed. R. Civ. P. 15(a)). Defendants fail to demonstrate why  
25 amendment would be futile. Therefore, the Court **DENIES** Defendants’ motion for  
26 reconsideration of the Court’s order granting leave to amend the First Amendment  
27 claims.

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1           **C. The Court’s Fourth Amendment Probable Cause Analysis Requires**  
2           **Reconsideration and Further Briefing.**

3           The Court began its previous Fourth Amendment analysis with Defendants’  
4 contention that “[b]ecause the restriction of unauthorized photography on land ports  
5 of entry is constitutional, the seizure and search of individuals who violate that  
6 restriction is also constitutional.” (Sept. 30, 2013 Order 12:4–10; see also Defs.’ Mot.  
7 to Dismiss 21:2–4.) In rejecting this line of reasoning, the Court relied on the  
8 erroneous premise that the CBP photography policy violated the First Amendment.  
9 (Sept. 30, 2013 Order 12:4–10.)

10           Because the Court had previously found the CBP policy to be permissible under  
11 the First Amendment, the Court **GRANTS** Defendants’ motion for reconsideration  
12 only of the portion of its previous order that addressed Defendants’ Fourth Amendment  
13 probable-cause analysis, and that subsumed the premise that the policy was  
14 unconstitutional under the First Amendment. However, the Court emphasizes that a  
15 finding that the enforcement of the CBP policy comports with the Fourth Amendment  
16 does not necessarily follow from the policy itself comporting with the First Amendment.

17           In its previous order, the Court did not reach the merits of Defendants’ probable  
18 cause argument. Defendants contend that: (1) taking photographs at a port of entry  
19 is a crime; (2) an officer who observes photographs being taken at a port has probable  
20 cause to believe that a crime is being committed; and (3) the officer may thus  
21 constitutionally detain that individual and seize his camera. (Defs.’ Mot. 20:18–20.)  
22 They proceed to direct the Court’s attention to 42 C.F.R. §§ 102-74.370, 102-74.420,  
23 102-74.450 as providing the basis for the crime in question. (Id.) However, as Plaintiffs  
24 point out in their opposition brief, “a criminal conviction for violating a regulation is  
25 permissible only if a statute explicitly provides that violation of that regulation is a  
26 crime.” (Pls.’ Opp’n 3:24–27 (citing United States v. Alghazouli, 517 F.3d 1179, 1184  
27 (9th Cir. 2008)).) Plaintiffs cite 40 U.S.C. § 121(c) as the authorizing statute for the  
28 regulation providing for criminal penalties in their argument that the statute in question

1 does not explicitly permit such penalties. (Pls.' Opp'n 3:17–4:7.) Defendants do not  
2 identify any authorizing statutes either in their motion to dismiss or in their motion for  
3 reconsideration. Defendants do, however, identify such statutes in their reply briefs to  
4 both motions. (Defs.' Reply to Mot. to Dismiss 33 12:1–16; Defs.' Reply 7:3–20  
5 (arguing, among other sources of statutory authorization, that “the Ninth Circuit has  
6 recognized 40 U.S.C. § 1315 as delegating authority to impose criminal penalties for  
7 violations of GSA's federal property regulations”).) Consequently, Plaintiffs have not  
8 yet had the opportunity to respond to this line of reasoning. Therefore, further briefing  
9 is required before the Court can resolve this issue.

### 11 III. CONCLUSION & ORDER

12 In light of the foregoing, the Court **GRANTS IN PART** and **DENIES IN**  
13 **PART** Defendants' motion for reconsideration. (Doc. 46.) Specifically, the Court  
14 **DENIES** Defendants' motion insofar as Plaintiffs' First Amendment claims as to a  
15 pattern or practice, and Plaintiffs being given leave to amend. And the Court  
16 **GRANTS** Defendants' motion insofar as Defendants' Fourth Amendment probable-  
17 cause analysis and the incorporation of the premise that the CBP policy violated the  
18 First Amendment.

19 In light of the unresolved issue reconsidered, the Court **ORDERS** further briefing  
20 on the issue of the statutory authority for the federal property regulations that  
21 Defendants argue form the grounds for the officers' probable cause. The briefing  
22 schedule shall be as follows:

- 23 (1) Plaintiffs shall file and serve a response, if any, to this order by **April 24,**  
24 **2014**, which shall not exceed ten pages in length; and
- 25 (2) Defendants shall file and serve a reply, if any, to Plaintiffs' response by  
26 **May 1, 2014**, which also shall also not exceed ten pages in length.

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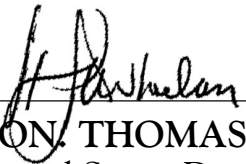
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The parties are warned that the Court will not consider arguments straying outside the scope of the specific question presented.

**IT IS SO ORDERED.**

**DATE: April 17, 2014**

  
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**HON. THOMAS J. WHELAN**  
United States District Court  
Southern District of California