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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

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| JANE DOE, et al., | | |
| | Plaintiffs, | |
| v. | | |
| JOHN F. KELLY, et al., | | |
| | Defendants. | |

Case No.: 16-cv-00750 W (BLM)
[Related: 16-cv-0374, 16-cv-0725,
16-cv-0797]

**ORDER DENYING FEDERAL
DEFENDANTS’ MOTION TO
DISMISS [DOC. 30]**

Pending before the Court is a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) filed by Defendants United States of America and John F. Kelly, Secretary of the Department of Homeland Security (collectively “Federal Defendants”). Plaintiffs oppose.

The Court decides the matter on the papers submitted and without oral argument. See Civ. L.R. 7.1(d.1). For the reasons that follow, the Court **DENIES** Federal Defendants’ motion to dismiss [Doc. 30].

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1 **I. BACKGROUND**

2 Plaintiffs Jane Doe and Jane Roe are female Border Patrol Agents, and members of
3 the Critical Incident Investigative Team (“CIIT”) at the Chula Vista Border Patrol Station
4 in California. (*Second Am. Comp.* (“SAC”) [Doc. 33] ¶ 20.) Defendant Armando
5 Gonzalez was one of Plaintiffs two supervisors on the CIIT and, as such, had the
6 authority to undertake or make recommendations regarding employment decisions
7 affecting Plaintiffs. (*Id.* ¶ 21.)

8 The CIIT office in Chula Vista had one women’s restroom that doubled as a
9 changing room for the female agents. (*SAC*. ¶ 24.) Plaintiffs used the restroom every
10 work day both as a toilet and/or a changing room to change from their civilian clothing
11 into their work uniforms. (*Id.*)

12 On January 9, 2015, Plaintiff Doe was in the women’s restroom at the CIIT office
13 when she observed what appeared to be a hidden camera in the drain. (*SAC* ¶ 25.) She
14 removed the drain cover and discovered a security camera hidden in a black sock. (*Id.*)
15 Doe reported the incident to Rebecca Phenicie at the Customs and Border Patrol Office of
16 Internal Affairs, which initiated an investigation. (*Id.* ¶ 27.) Gonzalez later stated that he
17 placed the camera in the drain in order to detect possible on-the-job drug use among his
18 female subordinates. (*Id.* ¶ 27.) An examination of the camera’s micro SD card revealed
19 images of “a female’s undergarment-clad breast as she changed her shirt in the restroom,
20 and images of part of a female’s naked buttock as she prepared to sit on the toilet and
21 again as she stood.” (*Id.* ¶ 29.) Another micro SD card recovered from Gonzalez’s office
22 contained approximately 169 video files taken from July 20, 2013 to December 23, 2014.
23 (*Id.* ¶ 30.) The images were of private areas of multiple female victims, including both
24 Plaintiffs’ naked and/or undergarment-clad genitalia, pubic areas, buttocks, and/or breasts
25 as the victims changed and/or used the toilet. (*Id.*)

26 On March 30, 2016, Plaintiffs filed this lawsuit. On April 16, 2016, Plaintiffs filed
27 the First Amended Complaint alleging a variety of state claims under the Federal Tort
28 Claims Act, 28 U.S.C. §§ 1346(b)(1) & 2671, *et seq.* (“FTCA”), and employment

1 discrimination under federal law. (*See FAC.*) On December 14, 2016, this Court denied
2 in part and granted in part Federal Defendants’ motion to dismiss. (*See Dismissal Order*
3 [Doc. 28].)

4 On December 28, 2016, Plaintiffs filed the Second Amended Complaint. Federal
5 Defendants now seek to dismiss Plaintiffs’ tenth cause of action for violation of
6 California Penal Code §§ 632 & 637.2, and Plaintiffs’ request for punitive damages under
7 the sixth, seventh and eight causes of action. (*P&A* [Doc. 30-1] 1:2–11.) Plaintiffs
8 oppose the motion. (*See Opp’n* [Doc. 32].)

9
10 **II. LEGAL STANDARD**

11 Federal Rule of Civil Procedure 12(b)(1) provides a procedural mechanism for a
12 defendant to challenge subject-matter jurisdiction. “A jurisdictional challenge under
13 Rule 12(b)(1) may be made either on the face of the pleadings or by presenting extrinsic
14 evidence. Where jurisdiction is intertwined with the merits, we must assume the truth of
15 the allegations in a complaint unless controverted by undisputed facts in the record.”
16 Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003) (internal
17 quotation marks, brackets, ellipsis and citations omitted).

18 A facial attack challenges the complaint on its face. Safe Air for Everyone v.
19 Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). But when the moving party raises a factual
20 challenge to jurisdiction, the court may look beyond the complaint and consider extrinsic
21 evidence, and “need not presume the truthfulness of the plaintiff’s allegations.” See id.
22 Once the defendant has presented a factual challenge under Rule 12(b)(1), the burden of
23 proof shifts to the plaintiff to “furnish affidavits or other evidence necessary to satisfy its
24 burden of establishing subject matter jurisdiction.” Id.

1 **III. DISCUSSION**

2 **A. The FTCA constitutes a waiver of sovereign immunity for Plaintiffs’**
3 **California Penal Code §§ 632 & 637.2 cause of action.**

4 Federal Defendants seek to dismiss Plaintiffs’ tenth causes of action for violation
5 of California Penal Code §§ 632 & 637.2, arguing that “Plaintiffs have failed to set forth
6 any allegations establishing an express waiver of the United States’ sovereign immunity
7 that would permit” the claim to be brought. (*P&A* 3:6–12.) Plaintiffs respond that the
8 United States’ waiver in the FTCA applies to the claim for violation of sections 632 and
9 637.2. (*Opp’n* 4:13–5:15.) The Court agrees with Plaintiffs.

10 The FTCA waives sovereign immunity for suits against the United States sounding
11 in tort. Gottschalk v. City and County of San Francisco, 964 F. Supp. 2d 1147, 1161
12 (N.D. Cal. 2013). In F.D.I.C. v Meyer, 510 U.S. 471, 477 (1994), the Supreme Court
13 explained that in order to fall within the scope of the FTCA, plaintiff’s claim must satisfy
14 six conditions. The claim must be,

15 [1] against the United States, [2] for money damages, . . . [3] for injury or
16 loss of property, or personal injury or death [4] caused by the negligent or
17 wrongful act or omission of any employee of the Government [5] while
18 acting within the scope of his office or employment, [6] under circumstances
19 where the United States, if a private person, would be liable to the claimant
in accordance with the law of the place where the act or omission occurred.

20 Id. (citing 28 U.S.C. 1346(b)) (brackets in original). Courts have interpreted the
21 “negligent or wrongful act or omission” language to “encompass both negligent and
22 intentional torts.” Waters v. United States, 812 F.Supp. 166, 169 (N.D. Cal. 1993) (citing
23 Hatahley v. United States, 351 U.S. 173, 181 (1956)). The “FTCA has also been
24 interpreted to encompass both statutory and common law torts.” Id. (citing Jones v.
25 United States 773 F.2d 1002, 1003 (9th Cir. 1985)).

26 California Penal Code § 632 prohibits the intentional recording of another’s
27 “confidential communication” without that person’s consent. Section 637.2 “provides a
28 private right of action, through which plaintiffs may recover damages for violations of the

1 law, including section 632(a).” See Cuviello v. Feld Entertainment, Inc., 304 F.R.D. 585,
2 590 (N.D. Cal. 2015) (citing Cal. Penal Code § 637.2(a)). Thus, sections 632 and 637.2
3 create private liability for conduct deemed wrongful under California law. Because the
4 FTCA applies to claims for “wrongful acts” asserted against the United States, “under
5 circumstances where the United States, if a private person, would be liable to the
6 claimant in accordance with the law of the place where the act ... occurred,” Plaintiffs’
7 Penal Code cause of action appears to fall within the scope of the FTCA.

8 Significantly, Federal Defendants fail to provide any meaningful analysis
9 regarding why conduct deemed wrongful under state law is not encompassed by the
10 FTCA. Instead, Federal Defendants simply assert that the FTCA does not apply to
11 Plaintiffs’ tenth cause of action because the California Penal Code is “not a tort statute.”
12 (*Reply* [Doc. 33] 2:8.) But California does not have a so-called “tort statute,” and Federal
13 Defendants offer no authority suggesting that a statute’s title determines whether the
14 FTCA applies.

15 Moreover, the United States’ argument is not consistent with cases that have found
16 the FTCA applies to claims based on state statutes that are not titled “tort statutes.” For
17 example, in Lu v. Powell, 621 F.3d 944 (9th Cir. 2010), the Ninth Circuit found that a
18 claim under California Civil Code § 52.1 (the Bane Act) constituted a statutory “tort” and
19 allowed plaintiff to pursue the violation under the FTCA. *Id.* at 950. Waters found
20 claims for violations of California Civil Code § 51.7 and California Government Code §
21 12940 were wrongful acts under the FTCA. *Id.*, 812 F.Supp. 166; see also Santillo v.
22 United States, 2011 WL 2729243 (S.D. Cal. 2011) (finding California Bane Act claim
23 falls within the scope of the FTCA); Lincoln v. Tusso, 1996 W 708592 (N.D. Cal. 1996)
24 (dismissing claim for violation of California Civil Code §§ 51.7, 52 & 52.1 for failure to
25 comply with FTCA’s administrative claim requirement); O’Donnell v. U.S., 891 F.2d
26 1079, 1083–1086 (3rd Cir. 1989) (holding plaintiff may pursue FTCA claim for violation
27 of Pennsylvania’s Mental health Procedures Act of 1976). *Id.* at 1083–1086.

1 For these reasons, the Court finds the United States’ sovereign immunity waiver in
2 the FTCA encompasses Plaintiffs’ tenth cause of action for violation of California Penal
3 Code §§ 632 & 637.2.

4
5 **B. Federal Defendants have failed to establish that Plaintiffs’ Penal Code**
6 **cause of action is duplicative of Plaintiffs’ tort claims.**

7 Despite Federal Defendants’ contention that Plaintiffs’ Penal Code cause of action
8 does not sound in tort, they next argue the cause of action should be dismissed because it
9 is duplicative of two of Plaintiffs’ tort causes of action. The Court is not persuaded.

10 Notably, Federal Defendants’ moving papers failed to cite any authority supporting
11 the proposition that Plaintiffs’ cause of action should be dismissed as duplicative. (*See*
12 *P&A* 3:14–17.) After Plaintiffs’ opposition remarked about the lack of supporting
13 authority, Federal Defendants cited White v. Social Security Administration, 111 F.
14 Supp. 3d 1041 (N.D. Cal. 2015) and McAuliffe v. U.S. Dept. of Veterans Affairs, 2007
15 WL 2123690 (N.D. Cal. 2007), in their reply. (*Reply* 2:28–38.) Neither case, however,
16 appears helpful to Federal Defendants.

17 Although White dismissed plaintiff’s negligent infliction of emotional distress
18 cause of action as duplicative of her negligence cause of action, the basis for the decision
19 was that California law does not recognize negligent infliction of emotional distress as an
20 independent tort:

21 In California, “there is no independent tort of negligent infliction of
22 emotional distress.” Potter v. Firestone Tire & Rubber Co., 6 Cal.4th 965,
23 984 (1993). “The tort is negligence.” Id. Accordingly, this claim is dismissed
with prejudice as duplicative of Plaintiffs’ negligence claim.

24 Id. at 1054. The Court fails to see how White applies to this case given that California
25 law clearly recognizes an independent civil cause of action for violation of Penal Code §
26 632.

1 As for McAuliffe, there, the pro per plaintiff repeated the same legal theory in
2 different causes of action. Id. at *3. The court, therefore, struck certain causes of action
3 as “redundant.” Id. Here, Plaintiffs have not repeated the same legal theory.
4 Accordingly, Federal Defendants’ reliance on McAuliffe is also misplaced.

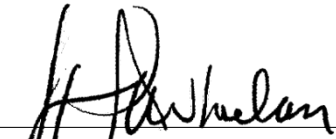
5 For these reasons, the Court is not persuaded that Plaintiffs’ Penal Code claims
6 should be dismissed as duplicative.

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8 **IV. SUMMARY & CONCLUSION**

9 For the foregoing reasons, the Court **DENIES** the United States’ motion to
10 dismiss.¹

11 **IT IS SO ORDERED.**

12 Dated: April 25, 2017

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14 
15 Hon. Thomas J. Whelan
United States District Judge

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27 ¹ The United States’ motion is denied with respect to Plaintiffs’ claims for punitive damages because of
28 Plaintiffs’ representation that they are asserting those claims against Defendant Gonzalez, who the
United States contends was not acting within the scope of employment. (*P&A* n. 1.) Plaintiffs may not
assert the punitive damage claims against the United States. See 28 U.S.C. § 2674.