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UNITED STATES DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

NORA PHILLIPS; ERIKA PINHEIRO; and NATHANIEL DENNISON;

Plaintiffs,

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION; MARK MORGAN; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; MATTHEW ALBENCE; FEDERAL BUREAU OF INVESTIGATION; and CHRISTOPHER WRAY,

Defendants.

CASE NO. 2:19-cv-06338

PLAINTIFFS' OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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INTRODUCTION

When Nathaniel Dennison, a United States citizen, attempted to return to the country from Tijuana on January 10, 2019, border officers detained him for more than six hours before interrogating him for forty-five minutes about his ideological beliefs, domestic political activities, and his associations. In their Partial Motion to Dismiss, Defendants United States Customs and Border Protection ("CBP"), Immigration and Customs Enforcement ("ICE"), the Federal Bureau of Investigation ("FBI"), and their three directors (collectively referred to as the "Government") claim this was a routine and lawful exercise of their authority at the border. On the Government's theory, border officers can detain anyone at the border without suspicion of wrongdoing in circumstances far beyond what any reasonable traveler would be prepared to endure. This position flatly contradicts established law and threatens to eviscerate the Constitution's protection against unreasonable searches and seizures at the border.

The Fourth Amendment authorizes suspicionless border searches for two narrow purposes: to assess an individual's admissibility into the country, and to regulate the entry of physical property and prevent smuggling of contraband. Mr. Dennison's detention and interrogation did neither. To the contrary, the Government held Mr. Dennison pursuant to a covert surveillance and detention program designed to target migrant rights activists and lawyers under the auspices of investigating alleged criminal activity. This alone rendered the detention illegal.

The Government's alternative argument that Plaintiffs' allegations establish the existence of reasonable suspicion likewise fails. Intrusive detentions at the border must be justified by reasonable suspicion tailored to the purposes of the border search doctrine, not suspicion of ordinary criminal activity. In any event, the plausible inferences drawn from the allegations do not establish reasonable suspicion.

The Government lastly attacks Mr. Dennison's standing to seek injunctive relief to prevent future intrusive seizures. This argument fails to account for the likelihood that the ongoing surveillance program will inevitably injure Mr. Dennison unless remedied here. Article III confers standing to seek injunctions against future unconstitutional actions taken pursuant to a written policy or an established pattern and practice, even if only one such unconstitutional act occurred prior to suit. The plausible allegations, borne of both Plaintiffs' own experiences as well as the Government's own records, require denial of the Motion.

BACKGROUND

I. SUMMARY OF RELEVANT ALLEGATIONS

A. Defendants operate a covert program to unlawfully surveil Plaintiffs, seize them at the border, and inhibit their travel.

Plaintiffs Nora Phillips, Erika Da Cruz Pinheiro, and Nathaniel Dennison are United States citizens who work for non-profits providing services or humanitarian support to migrants in Mexico. Dkt. 16, First Amended Complaint ("FAC") ¶¶ 1, 4–6, 13–23, 30, 61–65, 101, 122–125. Plaintiffs allege that the defendant agencies collaborated in the creation and maintenance of a secret surveillance and seizure program called "Operation Secure Line" that targets humanitarian workers like Plaintiffs on account of their activities supporting asylum-seekers and migrants. FAC ¶¶ 24–29, 30–33, 40–41.

As part of Operation Secure Line, the Government created a secret database of fifty-nine individuals, including Plaintiffs, who provided legal advice to, supported, associated with, or reported on asylum seekers. FAC ¶¶ FAC ¶¶ 30–33, 36, 38–44. The database included the individuals' names, along with their photographs, dates of birth, and their "roles" within the larger migrant support network. FAC ¶¶ 45–46. The Government also created separate dossiers for at least

twenty-five of them, also including Plaintiffs, containing private and First Amendment-protected information about them. FAC ¶¶ 47–48.

In addition to the surveillance and investigations, the Government conducted intrusive seizures—defined in FAC ¶ 32 as a detention, physical placement in custody, and interrogations—on some of the individuals on the list, including Mr. Dennison, when they crossed the border into the United States. FAC ¶¶ 39, 43–44, 49–50. For others like Ms. Pinheiro and Ms. Phillips, the Government frustrated their ability to travel internationally, placed alerts on their passports, and frustrated their ability to secure Mexican travel visas. FAC ¶¶ 4–5, 39.

B. The Government's unconstitutional treatment of Plaintiffs resulted in First and Fourth Amendment violations.

1. *Nathaniel Dennison*

Plaintiff Nathaniel Dennison, a filmmaker, photographer, and journalist by training, founded Through My Eyes Foundation to provide young people the tools and expertise to tell stories about their experiences through the medium of documentary photography and filmmaking. FAC ¶¶ 22, 121. Mr. Dennison traveled to Mexico in December 2018 as part of his non-profit's project to provide filmmaking equipment and expertise to migrant youth seeking asylum in the United States. FAC ¶¶ 122–125.

On January 10, 2019, Mr. Dennison attempted to travel to San Diego from Tijuana on foot at the San Ysidro Port of Entry. FAC ¶ 129. When he arrived at the port, CBP officers pulled him out of a line and escorted him into a holding area for detained travelers. FAC ¶ 130. CBP held him in that pen for more than six hours. *Id.*

Following the lengthy wait, officers escorted Mr. Dennison to another confined area containing individual desks and chairs. FAC ¶ 131. They sat him down facing a non-uniformed ICE officer who proceeded to interrogate him. *Id*.

During the examination, Mr. Dennison felt as though he was under arrest, unable to leave the room, and unable to refuse to answer questions. FAC ¶ 132.

The officer began by asking Mr. Dennison why he was in Mexico, then forced Mr. Dennison to describe the volunteer work he did there, with whom he did that work, and with whom he associated while there. FAC ¶ 133. The officer also demanded to know Mr. Dennison's political views on the migrant caravan, about migration, and about those seeking asylum in the United States. FAC ¶ 136. Throughout, the interrogator forcefully and falsely accused Mr. Dennison of being an organizer of the migrant caravan. FAC ¶ 134.

As the interrogation continued, the officer changed topics and began asking Mr. Dennison about his domestic political activities. He asked Mr. Dennison, "So, what did you have to do with Charlottesville?", referring to a well-covered political rally that took place in Charlottesville, Virginia in August 2017. FAC ¶ 137. The officer asked Mr. Dennison if he knew people or worked with anyone present at the protest, and his personal political views about it. FAC ¶¶ 138–39. The officer also asked about demonstrations at Standing Rock Indian Reservation in the Dakotas, and demanded to know if Mr. Dennison ever attended them. FAC ¶¶ 140–41. The entire interrogation lasted approximately forty-five minutes. FAC ¶ 132. Upon its conclusion, CBP officers walked Mr. Dennison to the United States side of the border after confiscating his Mexican visa. FAC ¶¶ 142–43.

Three days later, various officers from the defendant agencies participating in Operation Secure Line circulated an email identifying Mr. Dennison as a "top target" interviewed because of his status as a surveillance focus, not because of any need to identify contraband or secure the border. FAC ¶ 145.

2. *Nora Phillips*

Plaintiff Nora Phillips lives and works in Los Angeles managing the work of the non-profit organization she co-founded, Al Otro Lado, which provides legal services to indigent deportees, migrants, refugees, and their families. FAC ¶¶ 61–

64. On January 31, 2019, Ms. Phillips attempted to travel with her family to Mexico on a personal trip. FAC ¶ 72. Upon her arrival in Guadalajara, Mexican officials detained and subsequently deported her due to the Government's placement of an alert on her passport occasioned by its secret surveillance and seizure program. FAC ¶¶ 73–91. The continued placement of this alert has frustrated her ability to travel abroad, as well as indefinitely delayed renewal of her expedited international travel benefits. FAC ¶¶ 65–67, 95.

3. *Erika Pinheiro*

Plaintiff Erika Pinheiro works in Tijuana for Al Otro Lado as its Director of Policy & Litigation providing legal services for deportees, migrants, and refugees. FAC ¶ 101. As with Ms. Phillips, the Government's surveillance operation against her also resulted in her deportation from Mexico and the frustration of her ability to travel expeditiously internationally. On January 29, 2019, Mexican immigration officials detained and deported her at the behest of the United States government. FAC ¶¶ 103–06, 111–113. The next month, Mexican officials once again detained her at the border and informed her that the Government placed the alert on her passport, an act typically reserved for individuals with pending criminal matters or suspected of posing national security risks. FAC ¶¶ 111–113. Ms. Pinheiro later learned that the alert remains and will impair her ability to travel internationally outside of Mexico. FAC ¶ 115.

C. The Government justified its covert program on a need to gather information from witnesses for ordinary criminal investigations.

CBP initially described its surveillance program by stating that "CBP and our law enforcement partners [including Defendants ICE and FBI] . . . follow all leads garnered from information collected, conduct interviews and investigations, in preparation for, and often to prevent future incidents that could cause further harm to the public, our agents, and our economy." FAC ¶ 52. However, the former ICE officer who leaked details of the program stated that he did not see any

evidence that the list targeted those suspected of illegal smuggling. FAC ¶ 55. CBP also falsely claimed that the names in the database "are all people who were present during violence that broke out at the border in November." FAC ¶¶ 56–59. CBP stated that it needed "various sources of information" to "assess[] the intentions of the caravan" and to "identify a number of people involved in assisting migrants in crossing the border illegally or having witnessed the violent actions taken against law enforcement at the border," conceding that its covert program "may inconvenience law-abiding persons in [its] efforts to detect, deter, and mitigate threats to our homeland." FAC ¶ 60.

II. PROCEDURAL HISTORY

Plaintiffs filed this action on July 23, 2019 alleging the Government's covert program violated the First Amendment and the Privacy Act. Dkt. 1. Their subsequently filed FAC added a Fourth Amendment claim on behalf of Mr. Dennison and withdrew the Privacy Act claim without prejudice to repleading it after administrative exhaustion. Dkt. 15 (Parties' stipulation); Dkt. 17 (Court's Order on stipulation).

The FAC seeks declaratory and injunctive relief for violations of the First and Fourth Amendments. The First Amendment claim alleges two theories of liability: that the creation and maintenance of records concerning their protected activities violates the First Amendment, *see* FAC ¶¶ 9, 151, and that the surveillance and investigation of them based on their First Amendment-protected activity constitutes an infringement of their rights to free association and expression, *see* FAC ¶¶ 9, 150.[1] Separately, the Fourth Amendment claim challenges Mr. Dennison's intrusive seizure. FAC ¶¶ 9, 155–157.

[1] In a footnote, the Government claims that Plaintiffs vaguely drafted the second theory of First Amendment, despite the FAC clearly alleging that the Government impermissibly based its investigation on their First Amendment-protective activity. *See, e.g.*, FAC ¶¶ 9, 39, 44, 50, 150; *see Woods v. Reno Commodities, Inc.*, 600 F. Supp. 574, 580 (D. Nev. 1984) ("Rule 12(e) is designed (cont'd)

The Government filed the instant Partial Motion to Dismiss seeking dismissal only of Mr. Dennison's Fourth Amendment claim and his standing to seek injunctive relief. Dkt. 18 (hereinafter "Mot.").[2]

ARGUMENT

I. MR. DENNISON PLAUSIBLY ALLEGES THAT HIS INTRUSIVE SEIZURE AT THE BORDER VIOLATED THE FOURTH AMENDMENT.

The Government asks this Court to hold that the Fourth Amendment allows border officers to conduct lengthy, suspicionless detentions of United States citizens to interrogate them about their associations, intimate political activities, and their private lives. For three reasons, established Ninth Circuit precedent rejects the sweeping rule the Government advances here and demands that a non-routine seizure like Mr. Dennison's be supported by at least reasonable suspicion. First, Mr. Dennison plausibly alleges that the Government surveilled and intrusively seized him not for border-related purposes, but pursuant to a wide-ranging retaliatory criminal investigation. Second, the duration of Mr. Dennison's suspicionless seizure exceeded what is routine at the border. Third, the Government conducted the seizure to interrogate Mr. Dennison on deeply intrusive matters far outside what border officers may permissibly ask without suspicion or consent.

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to strike at unintelligibility, rather than want of detail."). The Motion's failure to address this clearly alleged theory is a problem of the Government's making, and does not warrant any additional briefing.

[2] While the Government makes offhand reference to all three Plaintiffs' standing to assert injunction relief, it does not in fact move to dismiss Plaintiffs' request for injunctive relief on their First Amendment claim. The Motion opens by declaring the Government's intent to answer the First Amendment claim, Mot. at 1, then requests that the Court only "dismiss the second claim" of the FAC, Mot. at 6. The Motion also appears to concede First Amendment standing on Plaintiffs' expungement theory. Mot. at 11 n. 3. In an abundance of caution, Plaintiffs address Article III standing for both claims in Part III, *infra*.

A. The Government requires at least reasonable suspicion to perform non-routine searches and seizures at the border.

While border searches form "a narrow exception to the Fourth Amendment prohibition against warrantless searches without probable cause," *United States v. Cotterman*, 709 F.3d 952, 960 (9th Cir. 2013) (quoting *United States v. Seljan*, 547 F.3d 993, 999 (9th Cir. 2008)), the Government's powers at the border are not limitless. "The authority to search at the border has always been justified as necessary to prevent smuggling and to prevent prohibited articles from entry, and to determine whether the individual presenting himself at the border is entitled to come in." *United States v. Tsai*, 282 F.3d 690, 699 (9th Cir. 2002) (Berzon, J., concurring) (internal quotations and citations omitted).

These two dual purposes for suspicionless border searches—determining an individual's identity to assess their admissibility, and searching belongings to prevent the entry of smuggled or contraband goods—trace their roots back to the Founding. Statutes passed by the First, Second, and Fourth Congresses permitted warrantless border searches that asked a traveler to "identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Carroll v. United States*, 267 U.S. 132, 154 (1925). Border searches tethered to these two purposes are considered "routine" and do not require the Government establish any suspicion of wrongdoing. *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) ("Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant."); *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004) (Congress "granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.").

Conversely, "[a] search which happens to be at the border but is not motivated by either of these two national self protection interests may not be 'routine' in the sense that term is used in the border search cases, as it is not within the rationale for declaring such searches reasonable without a warrant or probable cause." *Tsai*, 282 F.3d at 699 (Berzon, J., concurring) (internal quotations and citation omitted). To perform non-routine searches and seizures at the border, the Fourth Amendment requires at least reasonable suspicion. *Montoya de Hernandez*, 473 U.S. at 541.

What constitutes a non-routine border search requires assessing the totality of the circumstances surrounding it, "including the scope and duration of the deprivation," *Cotterman*, 709 F.3d at 960, as well as whether the search was psychologically intrusive, *United States v. Bravo*, 295 F.3d 1002, 1006–07 (9th Cir. 2002). In some instances, a prolonged border detention morphs into an arrest requiring probable cause when "a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave." *United States v. Price*, 921 F.3d 777, 790 (9th Cir. 2019) (quoting *Bravo*, 295 F.3d at 1009) (italics in original).

B. Mr. Dennison plausibly alleges that ordinary border control purposes did not motivate his intrusive seizure.

The Government's intrusive seizure of Mr. Dennison required probable cause or reasonable suspicion because a retaliatory (or, at best, a criminal) investigatory purpose motivated it. Mr. Dennison alleges that the Government held him for over six hours for the purpose of interrogating him about matters unrelated to his identity, his admissibility into the United States, or customs or goods regulations. FAC ¶¶ 130, 132–41, 145. This detention occurred pursuant to a Government program designed to gather intelligence, investigate alleged criminal activity, and retaliate against members of the migrant support network. FAC ¶¶ 39, 41–45, 52–56, 60, 133, 136–40, 145.

In its statements justifying its suspicionless surveillance and seizure program, CBP claimed it conducted the intrusive seizure program "to collect evidence," "follow all leads garnered from information collected . . . to prevent future incidents," and to investigate "criminal events." FAC ¶¶ 52, 56, 60. Setting aside Plaintiffs' allegations of improper retaliatory purpose, CBP conceded that its secret border detention program does precisely what the Ninth Circuit prohibits: investigates *criminal events* by collecting *evidence* of suspected illegality, not contraband itself. *United States v. Cano*, 934 F.3d 1002, 1013 (9th Cir. 2019) ("A border search must be conducted to enforce importation laws, and not for general law enforcement purposes.") (internal quotations omitted); *id* at 1017 ("[I]f U.S. officials reasonably suspect that a person who has presented himself at the border may be engaged in price fixing, *see* 15 U.S.C. § 1, they may not conduct a forensic search of his phone or laptop. Evidence of price fixing—texts or emails, for example—is not itself contraband whose importation is prohibited by law.").

Contrary to the Government's assertion, determining the constitutionality of Mr. Dennison's intrusive seizure requires appraising the Government's investigatory purpose. *See* Mot. at 8. Its authority to conduct suspicionless searches at the border derives from a constellation of related Fourth Amendment rules concerning administrative, special needs, and "exempted" location searches. *United States v. Kincade*, 379 F.3d 813, 822 (9th Cir. 2004); *see Almeida-Sanchez v. United States*, 413 U.S. 266, 278 (1973) (Powell, J., concurring) (traditional probable cause not required in border automobile searches because they are "undertaken primarily for administrative rather than prosecutorial purposes"). "Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion" may be invalid if the scheme as a whole "pursue[s] primarily general crime control purposes." *City of Indianapolis v. Edmond*, 531 U.S. 32, 45–46, 47 (2000); *see Whren v. United States*, 517 U.S. 806, 811–12 (1996) ("[T]he exemption from the need for probable cause (and warrant), which is

accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes."); *United States v. Johnson*, 889 F.3d 1120, 1125 (9th Cir. 2018) (recognizing administrative searches as exception to general rule that subjective motivations are irrelevant to validity of searches under the Fourth Amendment); *see, e.g.*, *id.* at 1127–28 (suppressing evidence gathered from a search of an individual's car during an inventory search because the police officers who conducted the search admitted that they searched the vehicle to find evidence of a crime, rather than to safeguard the arrestee's property).

The allegations in the First Amended Complaint overwhelmingly support the plausible inference that the Government detained Mr. Dennison not to investigate his admissibility or whether he carried contraband with him, but for reasons unrelated to border enforcement. Accordingly, Mr. Dennison's intrusive seizure must have been supported by reasonable suspicion or probable cause.

C. Border detentions lasting longer than two hours ordinarily require at least reasonable suspicion.

Beyond the improper programmatic purpose of Mr. Dennison's detention, the Fourth Amendment did not permit the Government to detain him for more than six hours prior to a forty-five-minute interrogation without at least reasonable suspicion. The "duration of detention is critically important" in both evaluating the reasonableness of a detention within the border, *United States v. Patterson*, 648 F.2d 625, 632 (9th Cir. 1981), as well as one that occurs at the border, *United States v. Espericueta Reyes*, 631 F.2d 616, 622 (9th Cir. 1980). "[S]o long as the [border] searches are conducted with reasonable dispatch and the detention involved is reasonably related in duration to the search, the detention is permissible under the Fourteenth Amendment." *Id.*

The Government cites to no case—and Plaintiffs could find none—where a court within the Ninth Circuit both addressed and permitted a suspicionless border

detention lasting longer than six hours. Every Ninth Circuit case to address duration required either reasonable suspicion or probable cause, or permitted a routine suspicionless detention only if completed within two hours.

In cases challenging border detentions longer than three hours, courts within the Circuit required either probable cause or reasonable suspicion. *See United States v. Juvenile (RRA-A)*, 229 F.3d 737, 743 (9th Cir. 2000) (border detention of individual handcuffed in a locked security office for four hours constituted arrest that required probable cause); *Alvarado v. United States*, No. CV 14-2066-TUC-LAB, 2015 WL 1279262, at *5 (D. Ariz. Mar. 20, 2015) (border detention for eight hours conducted after a fruitless search for drugs states a Fourth Amendment claim because probable cause dissipated after the search found no contraband); *see Montoya de Hernandez*, 473 U.S. at 540–41 (requiring reasonable suspicion for non-routine alimentary canal search at the border during eighteen-hour detention).

Even when addressing border detentions shorter than three hours, the Ninth Circuit has at times required either suspicion or probable cause, depending on the circumstances of the detention. *See Price*, 921 F.3d at 790 (officers initiated arrest requiring probable cause when they handcuffed individual for two hours and twenty-two minutes upon deplaning at the border). When it has not required *any* suspicion, the detention lasted no longer than two hours. *United States v. Nava*, 363 F.3d 942 (9th Cir. 2004) (permitting two hour suspicionless detention until contraband found in vehicle); *see Arjmand v. Dep't of Homeland Security*, No. 14-07960 JAK (MANx), 2018 WL 1755428, at *6 (C.D. Cal. Feb. 9, 2018) (suspicionless border stops of one to two hours in length not unreasonable). The Government's claim that six-hour detentions are routine therefore finds no support in the Circuit.

In addition, the Government's position also contradicts established precedent in analogous contexts. Border officers can perform "extended" border searches and seizures some distance away from the physical border, but only when they are

reasonably certain that an individual recently crossed the border. *United States v. Guzman-Padilla*, 573 F.3d 865, 878–79 (9th Cir. 2009). The Fourth Amendment allows such searches when they occur within two hours from the time of a border crossing and, critically here, if justified by reasonable suspicion. *See Espericueta-Reyes*, 631 F.2d at 620–21 (reasonable suspicion justified extended border search of vehicle one and one half hours after border crossing); *Guzman-Padilla*, 573 F.3d at 875, 881–82 (reasonable suspicion justified use of tire deflation device that resulted in stop of vehicle and immediate arrest of individual upon encountering smell of marijuana emanating from vehicle); *United States v. Nelson*, No. CR 11-01364-TUC-JGZ, 2012 WL 827582, at *4–5 (D. Ariz. Mar. 12, 2012) (approximately one hour extended border search).

When considering Fifth and Sixth Amendment challenges to a failure to apply *Miranda* warnings at the border, no Ninth Circuit court has admitted statements made after a six hour or longer detention without *Miranda* warnings. *See United States v. Butler*, 249 F.3d 1094, 1098–98 (9th Cir. 2001) (distinguishing "brief detention at the border" from "custody" required to trigger *Miranda* requirement). To the contrary, even a very brief detention followed by a single question may constitute a custodial interrogation. *See United States v. Hernandez*, 476 F.3d 791, 796 (9th Cir. 2007) (question about a package found during a frisk constituted a custodial interrogation when it occurred at a border inspection station immediately after CBP officers ordered the individual out of a car to pat him down); *United States v. Pineda*, No. 09-2542-TUC-FRZ, 2010 WL 3034514, at *4 (D. Ariz. July 19, 2010), *report and rec. adopted by* 2010 WL 3038723 (D. Ariz. Aug. 3, 2010) (one to two hour detention followed by an interrogation of individuals locked in a truck constituted custodial detention). In one case involving a lengthy detention close to this one, a district court found that a five- and one-half hour detention at a public airport terminal was not a custodial detention that triggered *Miranda*. *United States v. Salinas*, No. CR 18-00108 JMS,

2019 WL 4935596, at *5 (D. Haw. Oct. 7, 2019). However, the case involved the discovery of weapon parts and undeclared cash on an airplane two hours after it had been flagged as suspicious, demonstrating at least reasonable suspicion that contraband was aboard. *Id.* at *1. Accordingly, the allegations concerning Mr. Dennison's lengthy intrusive seizure establish that it was non-routine and required at least reasonable suspicion. *See* FAC ¶¶ 132, 144.

D. The intrusive and coercive nature of Mr. Dennison's interrogation is further basis for requiring at least reasonable suspicion.

Finally, the Government's insistence that it properly detained and interrogated Mr. Dennison ignores the extraordinary scope and coercive nature of his suspicionless interrogation. Together with a six-hour detention occasioned by a non-border related purpose, such an invasive search far exceeds the scope of a permissible suspicionless search.

Absent consent, invasive questioning of an individual in a circumstance in which the person is not free to leave ordinarily constitutes a Fourth Amendment search that requires reasonableness. *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975) (brief border-area seizure of individual in a car for questioning about citizenship and immigration status is a search that requires reasonable suspicion). *Cf. I.N.S. v. Delgado*, 466 U.S. 210, 216–17 (1984) (police questioning under circumstances that "demonstrate that a reasonable person would have believed he was not free to leave if he had not responded" requires "some minimal level of objective justification" under the Fourth Amendment).

So too must invasive and coercive interrogations that extend beyond the scope of a routine border inquiry require at least reasonable suspicion or probable cause. Here, Mr. Dennison's questioning exceeded anything that might be considered routine. First, border officers interrogated him in an intimidating environment in which he did not feel free to refuse to answer, particularly since the questioning followed a six-hour detention. FAC ¶¶ 130–133, 137, 139–140. *Cf.*

Butler, 249 F.3d at 1099 (coercive nature of environment a factor in determining whether an individual is in custody at border). That the interrogating officer repeatedly accused him of being "an organizer of the caravan," FAC ¶ 134, which the Government regards as possibly criminal behavior, FAC ¶ 60, further exacerbated the coerciveness of the interrogation. *See Butler*, 249 F.3d at 1099 (considering accusatory questioning as factor in holding that a detention at the border transformed to arrest); *see, e.g.*, *United States v. Chavira*, 614 F.3d 127, 133–34 (5th Cir. 2010) (detention at the border transformed to arrest in part because of accusatory questioning).

Second, the questions themselves concerned "uniquely sensitive" information about Mr. Dennison's intimate political views, domestic political activity, and personal associations. FAC ¶¶ 133 (questions about associations in Mexico), 136, 139 (political views); 137–40 (domestic political activities); *see Cotterman*, 709 F.3d at 966 (reasonable suspicion is required when gathering "uniquely sensitive" information at the border). Just as the Government may not search an individual's living quarters at the border without reasonable suspicion, *United States v. Alfonso*, 759 F.2d 728, 737–38 (9th Cir. 1985), and may not conduct a forensic examination of the contents of a cell phone containing intimate personal information without reasonable suspicion, *Cano*, 934 F.3d at 1016, so too can it not demand answers to questions about intimate—and Constitutionally protected—political, expressive, and associational activity absent suspicion.

Third, any residual questioning of Mr. Dennison did not concern the interdiction of contraband or his admissibility into the country. Even if discovery reveals that some of the Government's questioning of Mr. Dennison sought evidence of *past* criminal activity in Mexico, which Mr. Dennison does not allege here, the Government could not detain him to ask such questions on a suspicionless basis absent consent. "[B]order officials have no general authority to search for crime." *Cano*, 934 F.3d at 1017. When the Government forcibly seized and

interrogated Mr. Dennison on matters unrelated to contraband or his admissibility, even if it sought "evidence of border-related crimes," it could only have done so with at least reasonable suspicion. *Id.* at 1017–18 ("[C]an border agents conduct a warrantless search for evidence of past or future border-related crimes? We think that the answer must be 'no.'"); *see United States v. Aigbekaen*, 943 F.3d 713, 724 (4th Cir. 2019) ("If the border search exception is to retain any distinction from the Government's generalized interest in law enforcement and combatting crime, it cannot be invoked to sanction invasive and nonroutine warrantless searches of all suspected domestic 'criminals,' nor the suspected 'instrumentalities' of their domestic crimes.") (internal quotation and citation omitted).

The only case the Government advances to support its position, *Tabbaa v. Chertoff*, 509 F.3d 89 (2d Cir. 2007), does not bind this Court. Besides being out-of-circuit authority not cited by any Ninth Circuit majority opinion, *Tabbaa* relied on the ordinary nature of the interrogations of those detained, which the Second Circuit described as "the types of questions border officers typically ask prospective entrants in an effort to determine the places they have visited and the purpose and duration of their trip." *Id.* at 99. Here, on the other hand, Mr. Dennison's interrogator demanded answers to questions entirely unlike the routine inquiry of the *Tabbaa* plaintiffs. The questions concerned deeply personal matters like his personal political views, associations, and domestic political activities. FAC ¶¶ 133, 136–140. And unlike *Tabbaa*, the Government interrogated Mr. Dennison pursuant to a secret criminal investigatory program unconnected to the purposes of the border search exception. In any event, *Tabbaa* left "open the possibility that in some circumstances the cumulative effect of several routine search methods could render an overall search non-routine," 509 F.3d at 99, which presents an alternative basis to distinguish the case.

In sum, given Plaintiffs' plausible allegations concerning the Government's non-border control purposes for surveilling and seizing them, given the

Government's lengthy detention of Mr. Dennison, and given the coercive and intrusive nature of Mr. Dennison's interrogation, the totality of the circumstances weigh sharply in favor of characterizing his intrusive seizure a non-routine one that required at least reasonable suspicion.

II. THE GOVERNMENT'S INTRUSIVE SEIZURE OF MR. DENNISON WAS UNSUPPORTED BY REASONABLE SUSPICION.

The Government alternatively contends that Plaintiffs' allegations establish the reasonable suspicion necessary to detain Mr. Dennison for six hours and forcibly interrogate him at the border. But this argument misapprehends established precedent defining the reasonable suspicion standard at the border, misunderstands the plausible facts Mr. Dennison alleged in support of his claim, and fails to "construe the complaint in the light most favorable to the plaintiff." *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005).

A. The Government did not have reasonable suspicion that Mr. Dennison possessed contraband, which it required to detain him.

The Government claims that Mr. Dennison's presence at the border disturbance on New Year's Eve constituted reasonable suspicion of his involvement in a border-related crime, which it argues is all that it required to forcibly detain and interrogate him. Mot. at 10. Yet border detentions of the type suffered by Mr. Dennison must be supported not by reasonable suspicion of *border-related crime*, but suspicion tied to the contraband detection purposes of the border search and seizure doctrine.

In *Cano*, the Ninth Circuit rejected a reasonable suspicion and probable cause standard that focused on "border-related crime" to support a border search. After concluding "that border searches are limited in scope to searches for contraband and do not encompass searches for evidence of past or future border-related crimes," the panel made clear that, for a "highly intrusive search" like a forensic cell phone search, "border officials must reasonably suspect that the cell

phone to be searched itself contains contraband." *Cano*, 934 F.3d at 1020; *see Alfonso*, 759 F.2d at 737–38 (requiring reasonable suspicion of the existence of contraband to support "intrusive" search of private living quarters at the border); *Aigbekaen*, 943 F.3d at 721 ("[T]o conduct such an intrusive and nonroutine search under the border search exception (that is, without a warrant), the Government must have individualized suspicion of an offense that bears some nexus to the border search exception's purposes of protecting national security, collecting duties, blocking the entry of unwanted persons, or disrupting efforts to export or import contraband.").

Here, the Government does not argue, and no allegations support an inference that, the border officials searching and interrogating Mr. Dennison suspected him of carrying contraband, or asked him questions to elicit whether he possessed contraband. That fact alone is fatal to the Government's reasonable suspicion theory.

Even were this not true, and even if the Fourth Amendment permits a prolonged and intrusive seizure on suspicion of border-related crime, Plaintiffs' allegations cannot be read to provide such suspicion. When making a reasonable suspicion determination, a reviewing court "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a '*particularized* and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (emphasis added). The Government alleges that mere physical presence at the border where a tear gas incident occurred constitutes reasonable suspicion, even though Mr. Dennison does not allege that any criminal activity occurred there—either by him, his associates, or anyone else. *See* FAC ¶ 128; *Entler v. Gregoire*, 872 F.3d 1031, 1043 (9th Cir. 2017) (allegations in a complaint must be taken as true when deciding motion to dismiss).

If the Court improperly reads into the FAC an allegation that the Government had a reasonable basis for suspecting *some* criminality occurred on

New Year's Eve, it must nevertheless demand particularity in any assessment of that suspicion. Put differently, border officers must have suspected Mr. Dennison *himself* of perpetrating criminality. *Bravo*, 295 F.3d at 1008 (the particularity requirement demands that an officer "not base reasonable suspicion on broad profiles which cast suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped.") (internal quotation and citation omitted). Indeed, "mere propinquity to others independently suspected of [unlawful] activity" cannot support reasonable suspicion. *Perez Cruz v. Barr*, 926 F.3d 1128, 1138 (9th Cir. 2019) (quoting *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)). Here, the Government can only point to Mr. Dennison's arrival *after* a disturbance broke out in which he does not allege any criminality occurred. This is insufficient to support a determination of reasonable suspicion, particularly since a motion to dismiss requires a court "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Ass'n for Los Angeles Deputy Sheriffs v. Cnty. of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011).

In any event, *Terry* and its progeny make clear that the reasonable suspicion standard relates to *ongoing or imminent* crime, not *past* crime. *United States v. Cortez*, 449 U.S. 411, 417 (1981) (*Terry* stops require "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity."); *United States v. Hensley*, 469 U.S. 221, 228 (1985) ("A stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly as a stop to investigate suspected ongoing criminal activity."); *see Cano*, 934 F.3d at 1015, 1019 (relying on *Terry* by analogy in border search context). Whatever Mr. Dennison did *prior* to his detention could not provide border officials reasonable suspicion of ongoing or imminent crime.

B. The factual nature of a reasonable suspicion and probable cause determination counsels against premature dismissal.

The necessarily factual inquiry into reasonable suspicion independently counsels against dismissal at the motion to dismiss stage. "[A] determination of reasonable suspicion or probable cause requires an inquiry as to the facts and circumstances within an officer's knowledge." *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993); *Harper v. City of Los Angeles*, 533 F.3d 1010, 1022 n. 11 (9th Cir. 2008) (noting that "in a section 1983 action the factual matters underlying the judgment of reasonableness generally mean that probable cause is a question for the jury"). The proper posture for the Government to test Plaintiffs' plausible allegations about reasonable suspicion is after discovery. *See, e.g.*, *Alston v. Tassone*, No. S-11-2078 JAM, 2012 WL 2377015, at *11 (E.D. Cal. June 22, 2012), *report and rec. adopted by* 2012 WL 3070689 (E.D. Cal. July 27, 2012) (reasonable suspicion determination raises "factual issues inappropriate for resolution on a motion to dismiss, in the context of which the plaintiff's factual allegations must be taken as true.").

III. MR. DENNISON HAS STANDING TO SEEK INJUNCTIVE RELIEF TO END AN ONGOING GOVERNMENT PROGRAM.

Plaintiffs allege the Government surveilled them and seized Mr. Dennison pursuant to a pattern and practice of targeted surveillance and seizure, reduced to writing in part by the secret database and accompanying dossiers. Nevertheless, the Government claims that Plaintiffs cannot "show a future injury with respect to unconstitutional surveillance and screenings at the border." Mot. at 11.

A. Plaintiff Nathaniel Dennison's request for an injunction preventing the Government from intrusively seizing him at the border satisfies Article III's standing requirements.

The Government attacks in one sentence Mr. Dennison's standing to seek injunctive relief, claiming that his appeal for injunctive relief is "mere speculation"

due to "the close temporal proximity between Dennison's examination and the disturbance at the border."[3]

Mr. Dennison alleges that the Government continues to target him individually by its covert surveillance program, and that the program singles out others that volunteer with migrants abroad. *See, e.g.*, ¶ 60 (alleging the Government's intent to conduct future surveillance and seizures "may inconvenience law-abiding persons"); ¶ 147 (alleging that Mr. Dennison's ongoing placement on secret database evidences intent to conduct further intrusive seizures). The Government incorrectly cites *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) in support of its position that Mr. Dennison's fear of future stops and seizures is speculative. First, the Ninth Circuit has held that *Lyons* is inapplicable where the government caused the challenged injuries pursuant to a written policy or a pattern and practice of conduct. *Melendres v. Arpaio*, 695 F.3d 990, 997–98 (9th Cir. 2012); *LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th Cir. 1985). Because his intrusive seizure resulted from a specific and ongoing Government program that lists his name in a database of individuals to target for such treatment, *see* FAC ¶¶ 39, 145, Mr. Dennison's claim to Article III standing categorically differs from that made in *Lyons*. This is true even though he alleges only one such intrusive seizure occurred prior to filing. *Melendres*, 695 F.3d at 998 (defendants' express policy of stopping people based on suspected unlawful presence established a likelihood that plaintiffs—who had been stopped only once in the past—would be stopped again in the future); *see also Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010) ("past" actions alone are "strong evidence" of a "credible threat of adverse state action," even in pre-enforcement cases challenging prospective government action).

[3] Plaintiffs Nora Phillips and Erika Pinheiro do not assert a Fourth Amendment claim against the Government.

The Government's reliance on *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) is misplaced. That case hinged on the fact that plaintiffs had been stopped only once to hold they failed to show a "substantial and immediate" likelihood of future injury. *Id.* at 1042-44. But as a district judge subsequently explained, the *Hodgers-Durgin* plaintiffs "lacked standing not because they had only been stopped once in ten years, but more precisely because a single stop provided no evidence that INS had a policy of racial profiling" and plaintiffs had produced no other evidence of such a policy. *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 987 (D. Ariz. 2011). In contrast, one prior stop suffices to establish standing where, like here, the stop stems from a written policy or pattern and practice of behavior. *Id*. Mr. Dennison's stated need to travel across the border to continue the work of his non-profit further illustrates the non-speculative nature of his anticipated injuries. FAC ¶¶ 146–48.

Second, *Lyons* does not govern when the "plaintiffs engaged in entirely innocent conduct" and "there is no string of contingencies necessary to produce an injury." *Hodgers-Durgin*, 199 F.3d at 1041–42. So too here, since Mr. Dennison alleges that the Government's intrusive seizure of him occurred on a suspicionless basis, and that he engaged in no criminal conduct that foisted this mistreatment upon him. *Bayaa v. United Airlines, Inc.*, 249 F. Supp. 2d 1198, 1205 (C.D. Cal. 2002) ("Where a plaintiff has engaged in entirely innocent conduct, resulting in an alleged injury, allegations of a likelihood of future contact with the defendant are sufficient to satisfy the pleading requirements for standing.").

The Government also claims that Mr. Dennison is unlikely to face future *constitutional* injury because Congress authorizes border officials to conduct stops and seizures at the border. Mot. at 12 (citing 19 U.S.C. § 1582). This uncontested fact misses his principal contention here: that the Government specifically identified fifty-nine individuals, including Mr. Dennison, for surveillance and intrusive seizures at the border. That the Government lawfully identifies millions

of other travelers for *routine* stops and searches is irrelevant to whether it intends, as part of a now-revealed secret program, to target Mr. Dennison and others on the secret database for *non-routine* seizures.

Nor is it clear why the ten-day proximity between Mr. Dennison's seizure at the border and the New Year's Eve tear gassing incident undermines his claim for injunctive relief. Mot. at 12–13. Mr. Dennison alleges that the Government's surveillance operation identified him as a target before New Year's Eve. FAC ¶ 57. Mr. Dennison satisfies Article III so long as he plausibly alleges that the Government has and continues to unlawfully target him pursuant to a still active secret surveillance and detention program, causing him concrete harm and instilling credible fear of future detention resulting in avoidance of future travel. *See* FAC ¶¶ 146–148; *cf. Cherri v. Mueller*, 951 F. Supp. 2d 918, 931–33 (E.D. Mich. 2013) (forgoing travel to avoid secondary inspection and questioning about one's religious beliefs is a cognizable injury for standing).

B. All three Plaintiffs have standing to challenge the Government's unlawful maintenance of records and unlawful surveillance.

The Government does not move to dismiss Plaintiffs' First Amendment claim, nor does it challenge standing to seek injunctive relief to remedy the claim. *See* Mot. at 11 n.3 (noting that the Government moves to dismiss only the request for injunction concerning "future searches of Plaintiffs at the border").

Even assuming it does, Plaintiffs have standing to redress their claim that the Government's maintenance of records concerning their protected activity violates the First Amendment. "[A] determination that records were obtained and retained in violation of the Constitution supports a claim for expungement relief of existing records so obtained." *Fazaga v. Fed. Bureau of Investigation*, 916 F.3d 1202, 1240 (9th Cir. 2019); *see id.* at 1239 ("We have repeatedly and consistently recognized that federal courts can order expungement of records, criminal and otherwise, to vindicate constitutional rights."). Because Plaintiffs allege that the Government

continues to maintain information about them unlawfully, the ongoing retention of such records "constitutes[s] a continuing 'irreparable injury' for purposes of equitable relief." *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1275 (9th Cir. 1998); *see* FAC ¶ 41 (noting that information gathered is being collected and routed through to Washington D.C.), ¶ 48 (alleging ongoing maintenance of records). The Government's citation to Congressional authorization to maintain certain FBI records is inapposite if Plaintiffs demonstrate that the Government created and maintained those records in violation of the Constitution. Nor is its citation to *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357, 363 (1998) relevant, as that decision concerned the expansion of the Fourth Amendment's exclusionary rule, not a court's equitable power to order destruction of records created in violation of the Constitution.

Plaintiffs also have standing to challenge the Government's ongoing surveillance operation of them, which they allege is based on a written policy and practice that targets them on account of their First Amendment-protected activity. To establish Article III standing, a plaintiff must show: (1) they suffered a concrete, particularized injury (2) that is fairly traceable to the defendant's action and (3) likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "Constitutional challenges based on the First Amendment present unique standing considerations," which, in most cases, "tilt[] dramatically toward a finding of standing." *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003). Here, Plaintiffs have standing for injunctive relief because they allege that the Government "had, at the time of the injury, a written policy, and [Plaintiffs'] injury stems from that policy" or "the harm is part of a pattern of officially sanctioned behavior, violative of the plaintiffs' federal rights." *Melendres*, 695 F.3d at 997–98 (internal quotation and citation omitted); *LaDuke*, 762 F.2d at 1324 (distinguishing *Lyons* where "defendants engaged in a standard pattern of officially sanctioned officer

behavior"); *see* FAC ¶¶ 33–45 (explaining how Plaintiffs' injuries arise from a sanctioned and coordinated secret surveillance program).

As a result of the improper surveillance and seizure operation, Plaintiffs' injuries included improper placement of international alerts by the Government, FAC ¶ 45 (describing notation for alerts in secret database), FAC ¶¶ 76, 78, 94 (Government placed alert on Ms. Phillips), FAC ¶¶ 111–13, 116 (Government placed alert on Ms. Pinheiro), frustration of their ability to travel internationally, FAC ¶ 95 (delay of Ms. Phillips' SENTRI pass renewal), ¶ 116 (frustration of Ms. Pinheiro's ability internationally), ¶¶ 142–43 (confiscation of Mr. Dennison's Mexican visa), and detention and deportation by or at the behest of the Government, FAC ¶¶ 74–91 (Ms. Phillips' detention and deportation caused by the Government's alert), FAC ¶¶ 103–06 (Ms. Pinheiro's inability to travel to Mexico caused by the alert), FAC ¶¶ 129–142 (Mr. Dennison's intrusive seizure by Government officers). Plaintiffs consequently suffer and continue to suffer irreparable injuries that confer standing. FAC ¶¶ 147–48 (limiting Mr. Dennison's travel, adversely impacting his foundation's fundraising, and preventing him from performing his work); FAC ¶ 120 (limiting Ms. Pinheiro's international travel and causing adverse personal and professional consequences resulting from same); ¶ 100 (same for Ms. Phillips).

CONCLUSION

For the reasons set forth above, Plaintiffs request the Court deny the Government's Motion.

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Respectfully submitted,

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