No. 21-55768

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORA PHILLIPS, *et al.*,

Plaintiffs-Appellants,

v.

U.S. CUSTOMS AND BORDER PROTECTION, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California

BRIEF FOR APPELLEES

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

STEPHANIE S. CHRISTENSEN
Acting United States Attorney

MICHAEL S. RAAB
THOMAS PULHAM
Attorneys, Appellate Staff
Civil Division, Room 7323
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-4332

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STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. 1-ER-31. The district court granted the government's motion for summary judgment on June 22, 2021. 1-ER-2. Plaintiffs filed a notice of appeal on July 20, 2021. 3-ER-407. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The issues presented in this appeal are:

1. Whether plaintiffs lack standing to seek expungement of records containing information about them that were created and maintained by federal agencies as part of their efforts to gather and analyze information regarding large groups of migrants approaching the southern border of the United States in late 2018 and early 2019 to monitor potential threats to border security.

2. Whether the district court abused its discretion in denying plaintiffs' request to conduct additional discovery before granting summary judgment on the basis of their lack of standing.

STATEMENT OF THE CASE

A. Background

1. In late 2018 and early 2019, a "migrant caravan" involving tens of thousands of people approached the southern border of the United States from Mexico. 1-ER-2. The federal government's response to this unprecedented event was led by United States Customs and Border Protection (CBP)—the federal agency responsible for securing the nation's borders—acting in coordination with multiple federal agencies, state and local law enforcement partners, and counterparts in the Mexican government. *Id.*; 4-ER-432, 459. As part of these efforts, CBP gathered information on people associated with the migrant caravan, "looking for individuals who may have been organizing the caravan and encouraging [migrants] to try and enter the United States illegally." 1-ER-3; 4-ER-460. The agency drew upon open-source information and information already in the possession of various law enforcement partners to obtain a "general awareness" of the parties involved. 1-ER-3; 4-ER-460.

For example, Juan Rodriguez, an acting special operations supervisor with CBP's Foreign Operations Branch in San Diego, was tasked by his supervisor in January 2019 to prepare a "visual picture or representation" of

information on persons believed to be associated with the caravan. 1-ER-3. To do so, Rodriguez searched an internal CBP database and transcribed information concerning individuals identified in pre-existing documents as being associated in any way with the migrant caravan. *Id.*; 4-ER-473-74. The resulting PowerPoint document dated January 9, 2019, contains 67 entries, each of which provides a person's name, photograph, date of birth, citizenship status, and role in the caravan; each entry also indicates whether the person had been the subject of certain investigatory or immigration enforcement actions in connection with the caravan. 13-ER-2805; *see also* 1-ER-3; 4-ER-474, 477.[1]

The PowerPoint document was presented by Rodriguez at a weekly command staff meeting. 4-ER-467. Sometime later, an Immigrations and Customs Enforcement (ICE) agent with no official responsibilities related to the caravan response discovered the presentation on a government computer system and provided a copy to the media. 1-ER-3, 4-ER-470. "That

[1] According to a legend on the PowerPoint document, the presence of a colored X over a person's photograph indicated whether the person had been interviewed, arrested, or had a visa or SENTRI enrollment canceled. 4-ER-477. SENTRI is a CBP "trusted traveler" program that "allows expedited clearance for pre-approved, low-risk travelers upon arrival in the United States." CBP, *Secure Electronic Network for Travelers Rapid Inspection*, https://perma.cc/7N4Z-888K (last modified Jan. 4, 2022).

document," the district court observed, was "the subject of this lawsuit" as litigated below. 1-ER-3.

2. The three plaintiffs are individuals with entries in the 2019 PowerPoint document who claim to have been the subjects of unlawful surveillance by federal agencies.

Nathaniel Dennison is a documentary filmmaker and the founder and executive director of a nonprofit organization "dedicated to providing young people tools and camera equipment to document stories mainstream audiences do not often hear." 1-ER-4, 30. He states that he traveled to Mexico in December 2018 to perform this work with members of the migrant caravan, which included teaching young migrants how to use cameras, helping to process donations, and bringing migrants to medical attention. 4-ER-434.

On the night of December 31, 2018, and into the morning of January 1, 2019, Dennison was present at an incident at the U.S.-Mexico border during which migrants attempted to climb over the border wall and assaulted border patrol agents by throwing rocks at them. 1-ER-4; 4-ER-434, 462. "The government received information suggesting Dennison was involved in organizing or providing assistance to migrants during this incident." 1-ER-4.

The PowerPoint document, created approximately a week later, described Dennison's role in the caravan as "Suspected Antifa/Organizer." 13-ER-2809.

While Dennison had not been interviewed in relation to the caravan at the time the PowerPoint document was created, 4-ER-475, he was subsequently interviewed at his next border crossing following the border wall incident. After presenting his passport, Dennison was escorted to a waiting room and told to sit. 4-ER-438.[2] From the waiting room, Dennison was taken to some nearby cubicles and questioned for approximately 45 minutes. 4-ER-439. The officer asked about Dennison's presence and role at the border wall disturbance, his work with the migrant caravan, and a variety of other topics. 4-ER-440. At the conclusion of the interview, Dennison collected his passport and entered the United States. 1-ER-4.

After this interview, Dennison crossed the U.S.-Mexico border over a hundred times without incident. On one occasion he was asked by a CBP

[2] In a Facebook post created within a day or two of the event (and deleted some time afterward), Dennison said that he was "detained at the border for a bit" and sat "waiting for a while," falling asleep "for a few minutes." 4-ER-444; 11-ER-2323; 13-ER-2779. In a deposition for this case taken some 20 months later, Dennison estimated the wait to be around six hours, based on his "internal clock." 4-ER-653.

officer why he had crossed the border into Mexico, stopped less than 50 yards into that country to speak with someone, and then immediately returned to the United States. But "[t]here is no evidence in the record" connecting that event to Dennison's "appearance on the caravan document or to his journalistic or philanthropic activities." 1-ER-4-5; *see also* 4-ER-446 (reflecting no dispute that the stated basis for the questioning was Dennison's conduct at the border and frequent crossings on his passport).

The other two plaintiffs, Nora Phillips and Erika Da Cruz Pinheiro, are attorneys for Al Otro Lado, an organization that provides services to immigrants. 1-ER-5, 7. Phillips is the legal director and co-founder of Al Otro Lado, and Pinheiro is the litigation and policy director. 4-ER-432. CBP became interested in the organization after receiving "intelligence connecting an individual associated with Al Otro Lado to the migrant caravan, to suspected fraudulent activity relating to immigration, and to improper presentments at ports of entry." 1-ER-5; *see also* 4-ER-468-69. The PowerPoint document describes Phillips and Pinheiro as having an "unknown" role with respect to the caravan and not being the subject of any alert. 13-ER-2814.

Both Phillips and Pinheiro have been stopped and denied entry into Mexico by Mexican immigration officials. *See* 1-ER-6-7 (summarizing events). For example, Phillips was denied entry by Mexican officials at the Guadalajara airport in January 2019 after being informed that there was an alert on her passport. Phillips "thought it was implied that the U.S. was responsible for the alert," but "the Mexican officers did not say this directly," and Phillips has identified "no evidence that the U.S. Government, much less the Defendants in this case, were responsible for the Mexican government's decision to deny Phillips entry." *Id.* Pinheiro was also denied entry into Mexico in January 2019 after crossing the border on foot at San Ysidro, while attempting to renew her business visa there. She was told that there was an alert on her passport, placed by a foreign country, but was not told which foreign government had done so. 4-ER-456. Mexican officials removed Pinheiro to the U.S. side of the border, but she was able to re-cross into Mexico through the car lane 10 minutes later. 1-ER-7. Subsequent to these events, both Phillips and Pinheiro received adjustments to their residency status in Mexico that they had requested—temporary residence for Phillips, permanent residence for Pinheiro. 1-ER-7-6.

Neither Phillips nor Pinheiro claims to have been detained by U.S. officials during this time period. *See* Br. 6-17. Phillips has never been searched or detained by any U.S. government officer when entering the country from a foreign nation. 4-ER-455. And Pinheiro recalls only one brief secondary inspection of her automobile by CBP in over one hundred border crossings, which is not alleged to be related to the subject of this lawsuit. 1-ER-7-8; *see also id.* (noting the lack of evidence connecting the inspection to her inclusion on the PowerPoint document or her work for Al Otro Lado).

B. Prior Proceedings

1. Plaintiffs filed this action in July 2019. The second amended complaint includes three claims. First, all three plaintiffs claim that the "investigation of and collection of information about Plaintiffs based on their First Amendment-protected activity," as well as the "collect[ion] and maint[enance] [of] records describing" such activity, violated the First Amendment. 1-ER-62. Second, Dennison claims that he was "intrusively seized" while crossing the border on January 10, 2019, in violation of the Fourth Amendment. 1-ER-63. And third, all plaintiffs claim various violations of the Privacy Act, 5 U.S.C. § 552a. 1-ER-64. They seek declaratory and injunctive relief for the alleged constitutional violations,

including an order "to expunge all records unlawfully collected and maintained about Plaintiffs, and any information derived from that unlawfully obtained information," and various forms of relief for the alleged Privacy Act violations. 1-ER-66-67.

2. The government moved for summary judgment on February 26, 2021, after more than a year of discovery, during which time plaintiffs took all 10 of the depositions authorized by Federal Rule of Civil Procedure 30, submitted dozens of document requests, and received thousands of pages in response. Nevertheless, plaintiffs opposed the government's motion under Rule 56(d) on the ground that they needed more time to take additional discovery. Specifically, plaintiffs "renew[ed] and slightly modif[ied]" two applications they had previously submitted to the district court: one to take six additional depositions, and another to obtain discovery related to a then-ongoing investigation by the U.S. Department of Homeland Security Office of Inspector General. 10-ER-1996.

3. The district court denied discretionary relief under Rule 56(d), explaining that plaintiffs had "fail[ed] to identify specific facts to be elicited through further discovery or describe how further discovery will yield facts

essential to opposing summary judgment." 1-ER-24. The court ordered plaintiffs to respond to the government's summary judgment motion. *Id.*

After the motion was fully briefed, the district court granted summary judgment in favor of the government. The court first held that plaintiffs lack standing to seek an injunction prohibiting defendants from engaging in the alleged surveillance and detention activities at the border because they had not "put forth evidence supporting a likelihood of future injury, or ongoing injury, that is fairly traceable to the governmental conduct at issue." 1-ER-11. The court explained that "Plaintiffs have no evidence that any government policies or intelligence collection practices adopted in response to the migrant caravan remain in effect" or that, even if such practices were applied to them in the future, plaintiffs would experience "any limitation" on their abilities to cross the border or engage in their work. 1-ER-12-13. Phillips and Pinheiro faced the additional obstacle that the interference with their activities involved "conduct by Mexican, rather than U.S., immigration officers" that was not "fairly traceable to any activities of Defendants." 1-ER-13-14. Plaintiffs have not challenged the district court's grant of summary judgment on this issue.

The court next held that plaintiffs had failed to establish standing to seek expungement of records, another "form of prospective relief." 1-ER-15. The court noted that "[c]ases concluding that a plaintiff has standing to seek expungement have specifically found that the continued existence of a record could adversely affect the plaintiff in the future." *Id.* In other words, the plaintiffs in those cases "had standing because the expungement order would remedy a likely future injury." *Id.* Here, however, "Plaintiffs have pointed to no evidence" suggesting that their inclusion in any record "constitutes an ongoing injury or poses any likelihood of future injury," including invasion of privacy or adverse "effect on their First Amendment-protected activity." 1-ER-17. Nor, the district court found, had plaintiffs "shown that any of their injuries are redressable by expungement." *Id.*

Finally, the district court held that all of plaintiffs' claims under the Privacy Act failed—some because an agency had no records or any records were properly exempted; others because the claims were unexhausted; and still others because the requested relief was unavailable (by law or on this particular record). 1-ER-17-23. Plaintiffs have also declined to challenge the grant of summary judgment on this issue.

SUMMARY OF ARGUMENT

In late 2018 and early 2019, as tens of thousands of people approached the southern border with Mexico as part of a "migrant caravan," federal agencies used public and law-enforcement sources of information to gain a general awareness of the caravan and its organizers. Some of the records created during that operation reference the three plaintiffs in this action and their professional associations related to the caravan. Plaintiffs contend that the agencies' operation violated their First and Fourth Amendment rights, and they seek expungement of records containing information about them.

I. The district court correctly held that plaintiffs lack standing to seek expungement of agency records, and plaintiffs have abandoned all other requests for relief. Because expungement is a form of prospective injunctive relief, plaintiffs must demonstrate that the existence of the records they seek to have expunged causes them current, ongoing injury, or threatens to injure them in the future. But plaintiffs have offered no evidence of such injury. The Supreme Court and federal courts of appeals have repeatedly held that the collection of information by government organizations, including information about associational activities, does not establish injury in fact absent evidence of concrete harm to the individuals whose information is

recorded. And in a variety of contexts, the mere retention of records, including records alleged to have been maintained in violation of law, is generally insufficient to establish standing. This Court has held that some types of information collection and retention can cause harm to cognizable privacy interests, but plaintiffs have not established that any of the information in the records at issue is so private in nature. Absent evidence that the government's retention of records causes them a concrete injury, plaintiffs cannot establish that they seek to litigate "a real controversy with real impact on real persons." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

Plaintiffs are not relieved of this burden simply because they claim that the government violated their rights when it initially gathered information about them. Standing remains an independent inquiry in cases of constitutional violations; indeed, it is especially rigorous in such cases. And past exposure to alleged illegal conduct does not, without more, confer standing to seek prospective injunctive relief in any type of case. Plaintiffs identify no authorities that find jurisdiction to seek such relief in the absence of a concrete injury.

II. The district court did not abuse its discretion when it denied plaintiffs' request to conduct additional discovery before that court decided the government's motion for summary judgment. When a district court denies relief under Rule 56(d), "[a]buse of discretion is found only 'if the movant diligently pursued its previous discovery opportunities, and if the movant can show how allowing additional discovery would have precluded summary judgment.'" *U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 934 (9th Cir. 2002) (quoting *Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 844 (9th Cir. 1994)). Plaintiffs have not even attempted to argue that the additional discovery they sought would preclude summary judgment on the only part of the district court's order that they have appealed—standing to seek expungement. And to the extent any merits issues are relevant, plaintiffs fail to establish that the additional discovery they sought would have yielded specific facts essential to resist the government's motion. Quite apart from their failure to satisfy the minimum requirements of Rule 56(d), plaintiffs' appeal on this issue is undermined by their lack of diligence with respect to previous opportunities for discovery. They cannot leverage their own prior failures into cause for further delay and additional burdens on the government and district court.

STANDARD OF REVIEW

The district court's grant of summary judgment and its determination on the issue of standing are reviewed de novo. *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1007 (9th Cir. 2021). The district court's denial of relief under Rule 56(d) is reviewed for abuse of discretion. *SEC v. Stein*, 906 F.3d 823, 833 (9th Cir. 2018).

ARGUMENT

I. Plaintiffs Lack Standing To Seek Expungement of Records

Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. "[N]o principle is more fundamental to the judiciary's proper role in our system of government" than this jurisdictional limitation. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

"One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Clapper*, 568 U.S. at 408. "The doctrine of standing gives meaning to" this requirement "by identify[ing] those disputes which are appropriately resolved through the judicial process." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (alteration in original). Every plaintiff "must have (1) suffered an

injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). "The party invoking federal jurisdiction bears the burden of establishing these elements," and must do so "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The Court's "standing inquiry" is "especially rigorous" when "reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper*, 568 U.S. at 408.

A. Plaintiffs Failed To Demonstrate that the Existence of Records Causes Them a Cognizable Injury in Fact

1. Injury in fact is the "foremost of standing's three elements." *Spokeo*, 578 U.S. at 338 (quotation marks omitted). This requirement "helps to ensure that the plaintiff has a personal stake in the outcome of the controversy." *Driehaus*, 573 U.S. at 158 (quotation marks omitted). The alleged injury must represent an "'invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural

or hypothetical.'" *Spokeo*, 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560). A "'concrete' injury must be '*de facto*'; that is, it must actually exist." *Id.* at 340. A "particularized" injury is one that "affect[s] the plaintiff in a personal and individual way." *Id.* at 339. And to show an "actual or imminent" injury, "allegations of possible future injury are not sufficient." *Clapper*, 568 U.S. at 409 (cleaned up). Rather, a plaintiff relying on an injury that has not yet occurred must demonstrate that "the risk of harm is sufficiently imminent and substantial." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021).

"[P]laintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion*, 141 S. Ct. at 2208. A past injury may provide sufficient injury in fact to seek damages. But where a plaintiff seeks prospective relief, past injuries alone are insufficient to establish standing—the plaintiff must demonstrate either an ongoing injury or an immediate threat of injury. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974); *see also Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010).

As this Court has recognized, the expungement of government records is a form of prospective injunctive relief. *See, e.g.*, *Flint v. Dennison*, 488

F.3d 816, 825 (9th Cir. 2007) (holding that expungement is prospective injunctive relief for purposes of the Eleventh Amendment); *Shipp v. Todd*, 568 F.2d 133, 134 (9th Cir. 1978) (per curiam) (same for quasi-judicial immunity). It is prospective because it "serve[s] the purpose of preventing present and future harm." *Flint*, 488 F.3d at 825; *see Hedgepeth ex rel. Hedgepeth v. Washington Metro. Area Transit Auth.*, 386 F.3d 1148, 1152 (D.C. Cir. 2004) (explaining that a complaint praying for the expungement of an arrest record, among other things, "seeks only prospective relief"); *Elliott v. Hinds*, 786 F.2d 298, 302 (7th Cir. 1986) (explaining that injunctive relief in the form of "expungement of personnel records[] is clearly prospective in effect"). And it is injunctive because it "tells someone what to do or not to do." *Nken v. Holder*, 556 U.S. 418, 428 (2009); *see also Injunction*, Black's Law Dictionary (11th ed. 2019) (defining an "injunction" as a "court order commanding or preventing an action"). It follows, as the district court recognized, that the "ordinary standing doctrine evolved to address injunctive relief" must also "apply to a request for expungement." 1-ER-15.[3]

[3] This court has described expungement as "retrospective" relief in dicta in two cases. In one, the Court considered whether injunctive relief ordered by the district court was properly tailored to the established violation, and the Court's reasoning applied equally to expungement and to

Continued on next page.

Indeed, where courts have held that they have jurisdiction to entertain a request for expungement, they have relied on a determination that "the continued existence of a record could adversely affect the plaintiff in the future." 1-ER-15. For example, this Court held in *Flint* that a student's request for expungement of a disciplinary record containing "negative information derived from allegedly unconstitutional school regulations" presented a live case or controversy because "that information may jeopardize the student's future employment or college career." 488 F.3d at 823-24; *see also Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1275 (9th Cir. 1998) (finding the request for expungement of medical records containing information allegedly collected in violation of constitutional right to privacy not moot because "the continued storage, against plaintiffs' wishes, of intimate medical information" constituted "an ongoing 'effect'" of the challenged conduct). The D.C. Circuit similarly held in *Hedgepeth*, 386 F.3d at 1152, that a plaintiff "ha[d] Article III standing" to

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the relief it characterized as prospective. *See Gomez v. Vernon*, 255 F.3d 1118, 1130-31 (9th Cir 2001). In the other case, the Court held in a non-precedential disposition that a request for expungement was not moot in light of a factual dispute over whether the defendant agency possessed the data at issue. *Elsharkawi v. United States*, 830 Fed. App'x 509, 511-12 (9th Cir. 2020) (per curiam). In neither case did the Court address the showing required to establish standing to seek such relief.

seek expungement of an arrest record because it "would relieve [her] of the burden of having to respond affirmatively to the familiar question, 'Ever been arrested?' on application, employment, and security forms."[4]

By contrast, where a plaintiff is unable to establish that the continued existence of records causes ongoing or sufficiently imminent harm, courts have held that there is no standing to seek expungement. For example, in *J. Roderick MacArthur Foundation v. FBI*, 102 F.3d 600, 601, 606 (D.C. Cir. 1996), a foundation and its former president sought the expungement of records "relating to their associational activities," claiming that Federal Bureau of Investigation's (FBI) "maintenance of records on [them] inhibited [their] pursuit of activities protected by the first amendment." The D.C. Circuit held that the plaintiffs had failed to provide evidence of a concrete, imminent injury. *Id.* at 606. "The standing doctrine requires a greater degree of certainty that the party seeking relief from the court has a real interest at stake." *Id.* Similarly, the Seventh Circuit held in *Swanigan v.*

[4] In *Tabbaa v. Chertoff*, 509 F.3d 89, 96 n.2 (2d Cir. 2007), the Second Circuit suggested in a footnote, without elaboration, that the plaintiffs in that case "possess Article III standing based on their demand for expungement." It is unclear how a request for relief could provide standing, and the court did not cite any support for this proposition other than *Hedgepeth*, which provides none. As the district court observed, "*Tabbaa* therefore has little persuasive value on this point." 1-ER-15-16 n.8.

City of Chicago, 881 F.3d 577, 584 (7th Cir. 2018), that a plaintiff who had been misidentified as a bank robber (and claimed that the City had violated his due process and Fourth Amendment rights in the process) did not have standing to seek expungement of a "cleared-closed case fil[e]" that continued to label him as the bank robber. The Court found that it was "entirely speculative to suggest that a police officer might use the cleared-closed file to violate [the plaintiff's] rights in some unknown way" in the future. *Id.*

2. Plaintiffs here have failed to carry their burden of demonstrating that the records they seek to have expunged cause them ongoing or future injury. As an initial matter, Plaintiffs do not even identify the specific records they want expunged. Br. 48-63; *see also* 1-ER-17 n.9 (noting similar failure in district court). Plaintiffs' factual recitation provides "examples of the types of records Defendants created and stored about Plaintiffs." Br. 12-13.[5] But they do not make clear whether they seek to have any or all of these particular records expunged, nor do they attempt to connect these records' specific (and differing) content to any ongoing or imminent injury. Indeed,

[5] Plaintiffs submitted discovery requests for "all Documents, including Communications, relating to" each plaintiff. Pltfs' Doc. Request Nos. 8, 13, 16. They have not challenged the completeness of the government's productions.

plaintiffs represented in district court that one of the records they highlight now—"[a] detailed report documenting Al Otro Lado's history, mission, volunteers, and employees," Br. 13—was created "months after the collection of information about them" and was not "related to the Government's investigative interest in them." 4-ER-469.

The fundamental problem with plaintiffs' position is that "[i]n response to a summary judgment motion" raising a question of Article III standing, "a plaintiff can no longer rest on 'mere allegations' but must set forth by affidavit or other admissible evidence 'specific facts' . . . as to the existence of such standing." *Gerlinger v. Amazon.com Inc.*, 526 F.3d 1253, 1255-56 (9th Cir. 2008) (quoting *Lujan*, 504 U.S. at 561). As the district court observed, plaintiffs "pointed to no evidence suggesting that their inclusion on the caravan document, or in any other intelligence product, constitutes an ongoing injury or poses any likelihood of future injury," nor has "Dennison pointed to any evidence regarding how records of his questioning by CBP currently affect or are likely in the future to affect him." 1-ER-17; *see also* 1-ER-11-14 (noting the absence of evidence regarding *any* "future injury, or ongoing injury," including with respect to border crossings, "that is fairly traceable to the governmental conduct at issue in this case"). Plaintiffs

follow the same course on appeal: their standing argument does not contain a single citation to an evidentiary submission offered to establish injury in fact. *See* Br. 48-63. This failure to comply with the procedural rules governing summary judgment dooms plaintiffs' appeal.

It is not surprising that plaintiffs are unable to demonstrate standing to seek expungement of records they claim to have resulted from the unlawful collection of information regarding a potential threat to border security. Courts have "often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs." *Clapper*, 568 U.S. at 409.

This includes situations where, as here, the alleged "surveillance" results in collection of information about individuals' associations. *See* 1-ER-12-14 (noting the lack of evidence that the challenged conduct limited plaintiffs' work or travel activities). For example, in *Laird v. Tatum*, 408 U.S. 1, 2 (1972), the plaintiffs claimed that the Army had conducted "surveillance of [their] lawful and peaceful civilian political activity" in violation of the First Amendment. *See also id.* at 26 (Douglas, J. dissenting) (noting that the challengers were "targets of the Army's surveillance"). "The

information itself was collected by a variety of means," including "publications in general circulation," "field reports" describing "meetings that were open to the public" and attended by intelligence agents, and information "provided to the Army by civilian law enforcement agencies." *Id.* at 6 (majority op.). But the plaintiffs failed to establish that these activities had caused a "specific present objective harm or a threat of specific future harm." *Id.* at 14. The Supreme Court held that "a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose" lacked standing to pursue the claim in federal court. *Id.* at 10.

The courts of appeals have faithfully applied *Laird*'s teaching. Thus, they have found standing absent where plaintiffs are unable to establish any concrete harm resulting from the challenged information-gathering activities. *See, e.g.*, *Gordon v. Warren Consol. Bd. of Educ.*, 706 F.2d 778, 780-81 (6th Cir. 1983) (covert surveillance of classrooms at public school with "not a single allegation that the covert operation in and of itself resulted in tangible consequences"); *Fifth Ave. Peace Parade Comm. v. Gray*, 480 F.2d

326, 333 (2d Cir. 1973) (investigation of antiwar demonstration); *Donohue v. Duling*, 465 F.2d 196, 202 (4th Cir. 1972) (police surveillance of public demonstrations and meetings and retention of photographs of persons participating). By contrast, jurisdiction does exist where a plaintiff can establish that the challenged conduct caused a concrete and cognizable injury. *See, e.g.*, *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 523 (9th Cir. 1989) (explaining that churches would have standing where "the surveillance of religious activity has directly interfered with the churches' ability to carry out their religious mission," for example by causing "a decrease in congregants' participation in worship services").[6]

The mere retention of records, including records alleged to have been maintained in violation of law, is similarly insufficient to establish standing. In *TransUnion*, for example, a class of plaintiffs alleged that a credit company wrongly identified them in credit reports as potential terrorists,

[6] It is unclear whether the specific harm relied on in *Presbyterian Church* would be sufficient following *Clapper*. This Court determined that a church is injured "[w]hen congregants are chilled from participating in worship activities, when they refuse to attend church services because they fear the government is spying on them and taping their every utterance, all as alleged in the complaint." 870 F.2d at 522. In *Clapper*, however, the Supreme Court rejected a similar theory of standing, concluding that such choices "based on third parties' subjective fear of surveillance" are not fairly traceable to the challenged government action. 568 U.S. at 417 n.7.

drug traffickers, or other serious criminals in violation of a law requiring the agency to "follow reasonable procedures to assure maximum possible accuracy" in consumer reports. 141 S. Ct. at 2200-01. The Supreme Court held that the credit agency's unlawful maintenance of the inaccurate records, without more, did not inflict an injury in fact of the class members. *See id.* at 2210. The D.C. Circuit reached a similar conclusion in *J. Roderick MacArthur Foundation*, discussed above. In that case, the plaintiff foundation and its president did not challenge the FBI's initial collection of information about them, but they claimed that the maintenance of records about their associational activities violated the First Amendment. 102 F.3d at 601-02. The court dismissed the claim for lack of standing because the plaintiffs had not identified "a sufficiently concrete and imminent injury." *Id.* at 607.

And in *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909 (7th Cir. 2017), the plaintiff claimed that his former cable provider violated a law requiring cable operators to "destroy personally identifiable information" when no longer needed for its original purpose, 47 U.S.C. § 551(e), and sought injunctive relief requiring the expungement of his information. The court "assume[d] at least tentatively that Time Warner had violated the

statute" but held that "the absence of allegation let alone evidence of any concrete injury inflicted or likely to be inflicted on the plaintiff as a consequence of Time Warner's continued retention of his personal information precludes the relief sought" and compelled dismissal "for want of standing." 846 F.3d at 910, 913.

This Court has held that some types of information collection (and retention) can cause harm to cognizable privacy interests, which in turn could constitute an injury in fact for standing purposes. *See, e.g.*, *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1117-19 (9th Cir. 2020) (interception and use of private communications); *Scott v. Rosenberg*, 702 F.2d 1263, 1268 (9th Cir. 1983) (procurement of records relating to donations required by religion to be kept secret). But as the district court observed, plaintiffs "have not argued, or pointed to evidence, suggesting that Defendants collected records about them that are so sensitive that their retention alone constitutes a continuing injury" to such privacy interests. 1-ER-17. Take, for example, the PowerPoint document, which contains each plaintiff's name, date of birth, country of citizenship, and role with respect to the caravan. 4-ER-477. Such identifying information has not traditionally been recognized as private, and information regarding plaintiffs' association with the caravan relates to

either their professional activities or participation in public events. *See, e.g.*, *Russell v. Gregoire*, 124 F.3d 1079, 1083, 1094 (9th Cir. 1997) (holding that general identifying information is "fully available to the public" and a person's employer is "not generally considered 'private'"; *see also* Restatement (Second) of Torts §§ 652B, 652D, Westlaw (database updated May 2022). Again, at this stage in the litigation—on a motion for summary judgment, after full documentary discovery—plaintiffs must establish standing by offering evidence of specific facts. They cannot rely on generalized allegations, vague references to "private" information, or the possibility that there might be other records beyond the examples that they identify.

Plaintiff Dennison (alone) brings a Fourth Amendment claim, asserting that CBP agents unlawfully detained him at the border and questioned him about his political beliefs and participation in other protest activities. 1-ER-63; 4-ER-440. But plaintiffs have not advanced any specific argument about this claim in their brief or identified any records that contain private information derived from the claimed violation. The PowerPoint document and the "report concerning Mr. Dennison" referenced in plaintiffs' brief (Br. 13), for example, were based on research conducted before the alleged

detention. 7-ER-1313-15; 13-ER-2809. These records therefore could not be viewed as "ongoing effects" of the claimed Fourth Amendment violation, and their expungement would not redress any such injury. *See Norman-Bloodsaw*, 135 F.3d at 1275 (retention of results of medical tests conducted in violation of the Fourth Amendment constituted ongoing privacy injury).

As in *Laird*, what plaintiffs "appear to be seeking is a broad-scale investigation . . . to probe into the [government's] intelligence-gathering activities, with the district court determining at the conclusion of that investigation the extent to which those activities may or may not be appropriate to the [government's] mission" of securing the border. 408 U.S. at 14. But the federal courts "do not exercise general legal oversight of the Legislative and Executive Branches." *TransUnion*, 141 S. Ct. at 2203. Absent evidence that the government's retention of records causes them a concrete injury, plaintiffs cannot establish that they seek to litigate "a real controversy with real impact on real persons." *Id.*

B. Plaintiffs Identify No Error in the District Court's Standing Analysis

Plaintiffs' primary argument on appeal is that they do not need to demonstrate any concrete injury because "the existence of illegally obtained records constitutes an injury-in-fact." Br. 51. In other words, plaintiffs

contend that they have standing because the government violated the law. But the "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Allen v. Wright*, 468 U.S. 737, 754 (1986). Plaintiffs are not relieved of their obligation to satisfy Article III simply because they claim that the government has violated the Constitution. On the contrary, the standing analysis is "especially rigorous" in such cases. *Clapper*, 568 U.S. at 408; *see also Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473-474 (1982).

Further, even if plaintiffs had offered evidence that they were injured when the government "collected information about [them] through allegedly unconstitutional means," Br. 52—a showing they have not made—"[p]ast exposure to harmful or illegal conduct does not necessarily confer standing to seek injunctive relief if the plaintiff does not continue to suffer adverse effects." *Mayfield*, 599 F.3d at 970; *see also Klayman v. Obama*, 759 F. App'x 1, 4 (D.C. Cir. 2019) (per curiam) (holding that plaintiffs lacked

standing to seek expungement of records from past surveillance if the claimed "injury is only the initial collection").[7]

Plaintiffs' contention (Br. 53) that "the district court should have presumed an injury-in-fact" given their allegations of constitutional violations gets things exactly backwards. "Federal courts are courts of limited jurisdiction. . . . It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction[.]" *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). This burden extends to establishing standing, and at the summary judgment phase it is satisfied only by offering evidence of "specific facts" that establish injury in fact, causation, and redressability. *Lujan*, 504 U.S. at 561.

Plaintiffs suggest that evidence of injury is not required because "controlling Ninth Circuit law" establishes that the "chilling effect" caused by "[t]he mere compilation by the government of records describing the

[7] *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 147 (2d Cir. 2011) (per curiam), does not establish that the collection of any information, without more, establishes standing for prospective relief. The plaintiff in that case sought damages in addition to injunctive relief and its allegations concerned confidential financial data quite unlike the information at issue here. *See Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 607 F. Supp. 2d 500, 501, 505 (S.D.N.Y. 2009).

exercise of First Amendment freedoms" is sufficient to establish standing. Br. 52 (quoting *MacPherson v. IRS*, 803 F.2d 479, 484 (9th Cir. 1986)). But the case plaintiffs rely on has nothing to do with standing. *See MacPherson*, 803 F.2d at 484 (discussing the purpose of section (e)(7) of the Privacy Act).[8] And such a rule would run headlong into *Laird*'s holding that a "subjective chill" is "not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." 408 U.S. at 13-14. The Supreme Court specifically rejected an attempt to base standing on a "chilling effect" arising "merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some *other* and additional action detrimental to that individual." *Id.* at 11. Rather, a chilling effect will be a cognizable injury only where "the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging." *Id.*; *see also Clapper*, 568 U.S. at 417-18.

[8] Plaintiffs abandoned their claim under the Privacy Act when they declined to appeal the district court's grant of summary judgment on that claim.

Similarly inapposite is this Court's conclusion in *Fazaga v. FBI*, 965 F.3d 1015 (9th Cir. 2020), *rev'd on other grounds*, 142 S. Ct. 1051 (2022), that the plaintiffs in that case had stated a claim under the Fourth Amendment. *See* Br. 55-57. As the district court noted, *Fazaga* "held that expungement was available as a remedy for a Fourth Amendment violation" but "did not address Article III limitations" on a party's standing to seek the remedy. 1-ER-16. Moreover, the basis for the Court's conclusion was that the plaintiffs there had advanced a "plausible claim of an ongoing constitutional violation" relating to the government's alleged continued possession of records deriving from surreptitious recordings of private conversations without a warrant. *Fazaga*, 965 F.3d at 1032, 1054. Even if *Fazaga* could be read to provide guidance on standing to seek expungement in that context, it would shed no light on standing here, where two of the plaintiffs do not bring Fourth Amendment claims at all and the sole plaintiff who does so fails to identify any records that resulted from the alleged violation. *See TransUnion*, 141 S. Ct. at 2208 ("[P]laintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek . . ."); *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (noting that the standing inquiry "often turns on the nature and source of the claim asserted").

Finally, plaintiffs urge (Br. 53, 59-62) that this Court's decision in *Norman-Bloodsaw* supports their argument that they "were not required to" offer any evidence of injury in fact because the Court held in that case that "the retention of undisputedly intimate medical information obtained in an unconstitutional and discriminatory manner would constitute a continuing 'irreparable injury' for purposes of equitable relief." 135 F.3d at 1275, *quoted at* Br. 59. But as plaintiffs acknowledge (Br. 62), the "content of the information collected" in that case was entirely different. The plaintiffs there sought the expungement of the results of medical tests performed on them without consent in violation of a "constitutionally protected privacy interest." 135 F.3d at 1269. Indeed, the Court observed that "[o]ne can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health or genetic make-up." *Id.* The information in the records at issue here, by contrast—which generally concern basic biographical facts or public activities—implicates no such interest.[9] If it did, *Laird* and its progeny would have come out exactly the other way.

[9] For this reason, cases concerning the compelled disclosure of private associations, Br. 62, have no application here.

The district court's conclusion that plaintiffs lack standing to seek expungement of records about them created as part of the government's efforts "to obtain a general awareness" of the migrant caravan was correct and should be affirmed.

II. The District Court Properly Denied Plaintiffs' Request for Additional Discovery Under Rule 56(d)

Plaintiffs opposed the government's motion under Rule 56(d) on the ground that they needed more time to take an additional six depositions and to obtain discovery related to a then-ongoing investigation by the Department of Homeland Security Office of Inspector General (OIG). "Rule 56(d) provides 'a device for litigants to avoid summary judgment when they have not had sufficient time to develop affirmative evidence.'" *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 678 (9th Cir. 2018) (quoting *United States v. Kitsap Physician Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002)). Thus, relief is generally appropriate "where a party has had no previous opportunity to develop evidence and the evidence is crucial to material issues in the case." *Program Eng'g, Inc. v. Triangle Publ'ns, Inc.*, 634 F.2d 1188, 1193 (9th Cir. 1980); *see also SEC v. Stein*, 906 F.3d 823, 833 (9th Cir. 2018) ("The facts sought must be 'essential' to the party's opposition to summary judgment . . . . (quoting Fed. R. Civ. P. 56(d)). But "[d]istrict courts have

wide latitude in controlling discovery, and their rulings will not be overturned in the absence of a clear abuse of discretion." *Kitsap*, 314 F.3d at 1000. When a district court denies relief under Rule 56(d), this Court will "f[i]nd abuse of discretion only 'if the movant diligently pursued its previous discovery opportunities, and if the movant can show how allowing additional discovery would have precluded summary judgment." *U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 934 (9th Cir. 2002). Plaintiffs fail at both steps.

A. The only part of the district court's summary judgment order that plaintiffs appealed is the ruling that they lack standing to seek expungement of records resulting from alleged violations of the First and Fourth Amendments. But plaintiffs have not even attempted to argue that any "particular evidence not yet discovered was 'essential'" to oppose summary judgment on that issue. *Stein*, 906 F.3d at 833. Indeed, plaintiffs' chief contention on appeal is that no evidence beyond the existence of records (which they already have) is required. *See, e.g.*, Br. 51. That is presumably why they conceded in district court that they did not "requir[e] additional

discovery to support expungement." 10-ER-2008.[10] This Court has repeatedly sustained the denial of relief under Rule 56(d) where "the information sought would *not* illuminate the determinative inquiry." *Stevens*, 899 F.3d at 679; *see Family Home & Fin. Ctr., Inc. v. Federal Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008); *California ex rel. Cal. Dep't of Toxic Substances Control v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998); *Qualls ex rel. Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 844 (9th Cir. 1994). This alone provides adequate basis to affirm the district court.

Even if the Court were inclined to look beyond the determinative issue of standing, plaintiffs have still failed to demonstrate that the material sought was necessary to oppose any portion of the government's motion for summary judgment. For example, plaintiffs' affidavit in district court stated that they needed to depose the CBP officials who allegedly "arrested" Dennison at the border to learn about "the circumstances of his detention and seizure," including "the length of time of his detention" and which "interview questions he was asked," as well as "*why* [they] arrested him." 9-

[10] Plaintiffs did contend that the requested discovery would be relevant to establish their standing to seek "an injunction preventing future surveillance and detention based solely on Plaintiffs' ongoing protected speech and expression," 10-ER-2008, but they abandoned that request for relief on appeal.

ER-1640-41.[11] But Dennison himself can testify about the circumstances of his detention, and he was asked about them in deposition. *See, e.g.*, 4-ER-438-41 (citing deposition testimony). And the subjective intentions of the officers are not relevant to establishing whether the detention was an unlawful arrest. *See Whren v. United States*, 517 U.S. 806, 813 (1996); *United States v. Bravo*, 295 F.3d 1002, 1009 (9th Cir. 2002). Thus, this additional testimony "would have made no difference on summary judgment, because the allegedly omitted material would not have altered the total mix of information available" to plaintiffs. *McCormick v. Fund Am. Cos.*, 26 F.3d 869, 885 (9th Cir. 1994). The same is true for the deposition of Roberto Del-Villar, who directed Juan Rodriguez to create the PowerPoint document. Plaintiffs told the district court that they wanted to learn why Del-Villar did so, what the "purpose" of the document was, and what would be done with it. 9-ER-1641. But plaintiffs deposed both Mr. Rodriguez and CBP's Rule 30(b)(6) witness on these very topics. 8-ER-1633-36; 9-ER-1766-70.

[11] To the extent that plaintiffs' brief on appeal discusses discoverable facts not included in the affidavit, *see, e.g.*, Br. 45 (describing "what, if anything, the interrogators did with the answers" they received as "critical information"), such newly proffered justifications cannot be relied on now. *See Family Home*, 525 F.3d at 827 (explaining that "[t]he requesting party must show" that "it has set forth in affidavit form the specific facts it hopes to elicit from further discovery").

With respect to CBP agents Jazmin Castillo and Terri Cochran, plaintiffs stated that they sought to ask about "the nature of Defendants' investigation," "the breadth and scope of the intelligence gathered," and "why the Government felt 'association with the migrant caravan' justified the intelligence gathering." 9-ER-1643. These are vague, generalized topics of inquiry, not "specific facts" that "would have precluded summary judgment." *Tatum v. City & Cty. of San Francisco*, 441 F.3d 1090, 1100 (9th Cir. 2006).[12]

As for discovery into the OIG investigation, the matter is even more clear-cut. Especially now that OIG's final report has been released, the only incremental information that plaintiffs could conceivably obtain is insight into OIG's own deliberative process. Such insight is not relevant, much less "essential," to opposing any aspect of the motion for summary judgment on plaintiffs' claims, which challenge actions taken by CBP, ICE, and FBI during the migrant caravan crisis and do not concern any subsequent conduct of OIG.[13] Nor is it necessary to go through OIG to obtain

[12] Plaintiffs offer no argument in their brief on appeal that they satisfied the requirements of Rule 56(d) with respect to the deposition of Leonardo Ayala. They have therefore forfeited this portion of the request for relief.

[13] The government argued in district court that this information is also unavailable because it is protected by the deliberative process privilege. *See*

Continued on next page.

information about the challenged conduct. Plaintiffs assert (Br. 43) that they need discovery to find out more about OIG's findings that "CBP officials may have shared information about U.S. citizens with their Mexican counterparts and sought to deny the citizens' entry into Mexico" or "subjected some U.S. citizens to 'repeated and unnecessary inspections.'"[14] But the underlying sources (*e.g.*, agency documents and personnel) that would establish these facts, or any other conclusions reached by OIG, were available to plaintiffs through direct discovery from the defendant agencies. None of the underlying information upon which OIG would have relied in conducting its investigation was withheld from plaintiffs on the ground that it was separately provided to OIG.

Quite apart from their failure to show that the additional discovery they request would have precluded summary judgment, plaintiffs' appeal is separately doomed by their lack of diligence with respect to previous

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Dkt. No. 69, at 6-15 & Ex. A. The district court has not yet had an opportunity to address that argument, and could do so on remand, in the event that this Court reverses its ruling under Rule 56(d).

[14] Plaintiffs do not claim that they personally have been subjected to "repeated and unnecessary inspections" by U.S. officials. Dennison alleges that he was subjected to improper detention on one occasion, and Phillips and Pinheiro do not allege any improper detentions or inspections. *See* 1-ER-11-14.

discovery opportunities. *See U.S. Cellular*, 281 F.3d at 934 (explaining that such diligence is required to establish abuse of discretion in the denial of Rule 56(d) relief). Plaintiffs had ample opportunity to seek discovery on the topics they now claim are essential. The government moved for summary judgment after a lengthy discovery period, during which plaintiffs took 10 depositions, including of three deponents designated by their respective agencies under Rule 30(b)(6), and received over 6,000 pages of records in response to dozens of requests for production. Yet during that time, plaintiffs did not submit a single request for written discovery—not a single interrogatory or request for admission—on the topics they now seek to pursue with their additional depositions. Nor did plaintiffs take advantage of the opportunities to obtain information on these topics from other witnesses, including the witness for CBP designated under Rule 30(b)(6), *see* 8-ER-1627-30 (identifying topics for examination and not mentioning, for example, Dennison's detention), and superiors of officers Castillo and Cochran. Finally, as mentioned above, plaintiffs had full opportunity to seek discovery from the same sources that OIG would rely on in its review. Plaintiffs cannot leverage these failures to conduct discovery in a diligent manner into cause

for further delay and additional burdens on the time and resources of government officials.

B. Plaintiffs' arguments on appeal fall far short of establishing "a clear abuse of discretion" by the district court. *Kitsap*, 314 F.3d at 1000. That court did not "ignore" their request for discovery of OIG's special review "prior to awarding summary judgment to Defendants." Br. 40. On the contrary, the district court "deferred" the matter "until after review" of "any motions for summary judgment" and instructed the parties to seek relief under Rule 56(d) if it turned out that "further discovery is required to oppose" such a motion. 1-ER-26. Then, having reviewed the government's motion for summary judgment and plaintiffs' "Rule 56(d) Opposition" based on their previous discovery motions, 10-ER-1996 n.1, the court determined that the requested discovery was not essential to oppose the motion. This sequence is quite unlike *Garrett v. City & County of San Francisco*, 818 F.2d 1515 (9th Cir. 1987), and *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162 (9th Cir. 2006), upon which plaintiffs rely (Br. 40-43). In those cases, the district court granted summary judgment without addressing a party's plea that it needed additional discovery to oppose the motion, *and* summary judgment was granted on grounds for which the additional

discovery was relevant. *Clark*, 460 F.3d at 1178-79; *Garrett*, 818 F.2d at 1518-19.

Plaintiffs further suggest (Br. 46-47) that the district court had to allow the additional depositions they requested because the government had identified several of the proposed deponents in its initial disclosures as likely having discoverable information. But they cite no authority for the proposition that an opposing party is automatically entitled to depose all such witnesses, particularly in a situation, as here, where plaintiffs failed to submit any written discovery regarding these witnesses and then chose to depose others not similarly identified in initial disclosures (including the former ICE agent who leaked the PowerPoint presentation but had no personal knowledge of its creation and had no official responsibilities related to the migrant caravan). Similarly misguided is plaintiffs' argument (Br. 47) that reversal is required because the district court did not provide a lengthy explanation of its decision to deny relief. The court identified the correct standard and found that it had not been satisfied. As the quotation plaintiffs rely on makes clear, further elaboration might be advisable when the additional discovery sought is "relevant to the basis for the summary judgment ruling," *Stevens*, 899 F.3d at 677. But no more is needed (indeed,

less would suffice) when the information sought "would not have shed light" on the determinative issues. *Qualls*, 22 F.3d at 844.

C. In the event that this Court concludes that the district court abused its discretion in denying plaintiffs' request under Rule 56(d), the Court should make clear in its opinion that any additional discovery would be limited by the narrow scope of further proceedings on remand. By failing to present any argument on the district court's rulings on standing to pursue prohibitory injunctive relief (*i.e.*, relief other than expungement) and the Privacy Act claims, 1-ER-9-14, 17-23, plaintiffs have abandoned these issues on appeal and may not attempt to resurrect them in district court. *See, e.g.*, *United States v. McChesney*, 871 F.3d 801, 809-10 (9th Cir. 2017) (holding that a claim "never mentioned" in the "briefing in the first appeal" was thereafter forfeited); *Facebook, Inc. v. Power Ventures, Inc.*, 252 F. Supp. 3d 765, 775 (N.D. Cal. 2017) (Koh, J.) (explaining that an issue or argument abandoned on appeal "cannot be revived on remand"), *aff'd*, 749 F. App'x 557 (9th Cir. 2019). *See generally* 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4478.3 (3d ed.), Westlaw (database updated Apr. 2022) (explaining that a district court may not "reconsider its own rulings made before appeal and not raised on appeal").

Thus, any future proceedings would be limited to plaintiffs' ability to seek expungement of records that resulted from proven violations of the First or Fourth Amendment, the destruction of which would redress such violations. Any discovery (or other proceeding) that did not further this limited end would be beyond the scope of this Court's remand.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

STEPHANIE S. CHRISTENSEN
Acting United States Attorney

MICHAEL S. RAAB

s/ Thomas Pulham
THOMAS PULHAM
Attorneys, Appellate Staff
Civil Division, Room 7323
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-4332
thomas.pulham@usdoj.gov

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellees state that they know of no related case pending in this Court.

s/ Thomas Pulham
Thomas Pulham

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,372 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in CenturyExpd BT 14-point font, a proportionally spaced typeface.

s/ Thomas Pulham
Thomas Pulham