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
No. 2:19-cv-06338-SVW-JEM
Hon. Steven V. Wilson

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The district court erred when it rejected Plaintiffs' requests for additional discovery, and further erred when it concluded they lack standing to expunge the surveillance records the Government unlawfully created about them. The former was an abuse of discretion, while the latter a grievous error of law with far-reaching consequences for judicial review of government misconduct.

In defending the discovery rulings, the Government upends the standards ordinarily used to resolve discovery disputes, underplays the importance of the information Plaintiffs sought, and improperly substitutes the Government's own litigation judgment in place of Plaintiffs' in the guise of complaining about their purported lack of diligence. In fact, Plaintiffs' sought-after discovery will be critically important to prosecuting their claims, including by contradicting testimony from the Government's witnesses about its role in the Mexican detentions of Plaintiffs Nora Phillips and Erika da Cruz Pinheiro—events central to their retaliation cause of action. The district court's refusal to entertain Plaintiffs' motion was therefore improper and an abuse of discretion.

The Government's defense of the flawed Article III ruling is even more egregious. Rather than meaningfully engage with the well-established rule in this Circuit that makes clear Plaintiffs' standing to seek expungement, the Government buries this Court's precedent amidst discussions of inapplicable and

distinguishable out-of-circuit authorities. In the process, the Government asserts a position that will have the consequence of immunizing from judicial scrutiny illegal law enforcement activity merely because a defendant promises not to use the fruits of its unconstitutionally obtained records. But the rule in this and other circuits awards the victims of such malfeasance standing to challenge the violations and expunge records without the often-impossible task of proving the existence of separate, independent injuries. This Court should reverse.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING PLAINTIFFS' REQUESTS FOR ADDITIONAL WRITTEN AND ORAL DISCOVERY.

A. This Court may properly reverse the district court's discovery rulings.

As a threshold matter, this Court has the authority to decide whether the district court properly denied Plaintiffs' request for additional oral and written discovery. The Government argues that because Plaintiffs challenge only the Article III determination of the summary judgment ruling, their requested discovery must concern information directly relevant to that issue. Gov't Br. 36–37. It is true that if the Court holds that Plaintiffs must establish additional harm flowing from the Government's continued retention of the disputed records, it is entirely possible that reversal of the district court's discovery rulings results in the revelation of information relevant to showing exactly those harms. *See* Part I.C.

But if this Court reverses the standing ruling, the new discovery will also become critical to the merits of the case. *Id*. Either way, this Court must decide the issue.

B. The district court abused its discretion when it did not decide Plaintiffs' discovery motions.

The district court's refusal to meaningfully address Plaintiffs' ripe motions seeking discovery into the Department of Homeland Security Office of Inspector General's (OIG) investigation and additional depositions was reversible error.

The Government argues that the court in fact considered the OIG motion by "deferring" it, then ruling that "the requested discovery was not essential to oppose the motion." Gov't Br. 42. But the district never "considered" the motion at all. It merely deferred decision on the fully briefed OIG motion until summary judgment briefing, 1-ER-26, only to summarily overrule Plaintiffs' Rule 56(d) objections in a one-sentence ruling that did not "give specific reasons" for the decision. 1-ER-24[1]; *Patty Precision v. Brown & Sharpe Mfg. Co.*, 742 F.2d 1260, 1265 (10th Cir. 1984). This conclusory denial was therefore not the reasoned decision the Government suggests it was. Gov't Br. 42. Plaintiffs do not demand a "lengthy explanation" for the denial of further discovery. Gov't Br. 43. They challenge the

[1] Plaintiffs' opening brief incorrectly cited the location of the text order at 1-ER-72.

lack of *any* explanation for the district court's order. *See Stevens v. CoreLogic, Inc.*, 899 F.3d 666, 677 (9th Cir. 2018).

More fundamentally, the district court's treatment of Plaintiffs' ripe discovery motions conflicts with the standards governing motions to compel. It permits a trial court to hold in abeyance fully-briefed discovery disputes, only to demand the requesting party meet a higher burden to justify granting them at the summary judgment stage. This has the effect of improperly morphing garden-variety discovery motions (which do not require a showing of necessity) into summary judgment proceedings (which do). *See Fam. Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008). Doing so prevents parties from resolving motions mid-discovery, the resolutions of which likely alter how they prosecute the remainder of discovery. While district courts are entitled to manage their civil dockets as they see fit, they enjoy no such discretion to fundamentally alter the legal standards that govern discovery.

In this way, the district court violated the principles set forth in *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). *See* Opening Br. 41–43. The Government erroneously argues that both decisions hinged on the *necessity* of the sought-after records to the claims. Gov't Br. 42. But *Clark* only concerned discovery that "could" be relevant, while specifically

declining to "pass on the merits of the motion." *Id.* at 1178; *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 10 (2d Cir. 1983) ("possibility" of unearthing probative evidence from pending discovery disputes sufficient to justify denial of summary judgment). And while the requested discovery in *Garrett* was "crucial" to the litigation, *Garrett* applied a general rule—that courts lack discretion to not decide pending discovery motions—that depends on the information's relevance, not its absolute necessity. *Garrett*, 818 F.2d at 1519.

C. The disputed discovery sought information critical to Plaintiffs' standing and merits arguments.

The Government's alternative defense of the district court's erroneous discovery decisions are its own *post hoc* judgments about the relevance of the material Plaintiffs sought below. The Government argues that discovery into the OIG's investigation and factual conclusions is irrelevant to the claims below, even though it is now clear they would have unearthed critical information about Plaintiffs' causes of action—including information that contradicts the Governments' own testimony. And the Government claims Plaintiffs did not adequately justify their need for the few additional depositions they sought below. Both contentions are wrong.

The Government erroneously argues that discovery into the OIG's investigation and ultimate findings was unlikely to yield any essential or relevant information about Plaintiffs' claims. Gov't Br. 39. But the Government did not

object below to the OIG discovery on pure relevance grounds, resting instead solely on its deliberative process objection. *See Phillips v. U.S. Customs and Border Protection*, No. 2:19-cv-6338-SVW-JEM (C.D. Cal. filed July 23, 2019), ECF 69 at 12–13 (arguing relevance only in the context of the balancing test necessary to appraise deliberative process objection). It has therefore waived this argument. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("As a general rule, we will not consider arguments that are raised for the first time on appeal.").

In any event, the OIG's findings about the Government's secret surveillance operation—published after Plaintiffs filed the notice of appeal here—revealed critical new information about Plaintiffs' claims that they would have unearthed during discovery. According to the OIG's report, the Government shared "names and sensitive…[i]nformation" with Mexican officials from the secret database that included Plaintiffs' names and requested Mexican authorities detain and deport them. Office of Inspector General, Department of Homeland Security, *CBP Targeted Americans Associated with the 2018-2019 Migrant Caravan*, (Sept. 20, 2021), http://bit.ly/OIGOSLReport ("OIG Report"), at 21–22. Plaintiffs Nora Phillips and Erika Phillips alleged that the Government did this in retaliation for their protected activities. 2-ER-48–50, 2-ER-53–56. But the Government denied any role in their Mexican detentions, its witnesses testifying that the targeting list was used for no other purpose other than internal situational briefings. FER-7-14

(Rule 30(b)(6) deposition transcript),[2] 9-ER-1766–72 (Juan Rodriguez deposition transcript).

The OIG report also found that Mexican officials successfully deported four U.S. citizens named in the secret database, likely because of CBP's requests. OIG Report at 23. Plaintiffs Ms. Phillips and Ms. Pinheiro were among those individuals. The Government should not be heard to question the necessity of this further discovery, Gov't Br. 38–39,[3] particularly when it refused to make available two individuals directly involved in the creation of the secret database, Roberto Del-Villar and Leonardo Ayala.[4]

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[2] Plaintiffs concurrently file further excerpts of record that contain portions of Plaintiffs' Rule 30(b)(6) deposition transcript of Defendant U.S. Customs and Border Protection. Plaintiffs did not include these excerpts in their summary judgment papers before the district court. The OIG issued its report on September 20, 2021 containing this new evidence, three months after the award of judgment and two months after Plaintiffs filed their Notice of Appeal. 3-ER-407. Since the appeal divested jurisdiction from the district court, Plaintiffs could not enter this new evidence in the record below. The post-judgment discovery of contradictory information that undermines the Government's arguments on appeal is therefore an "extraordinary circumstance" that authorizes this Court's exercise of inherent authority to supplement the record on appeal. *Hornish v. King Cnty.*, 899 F.3d 680, 702 (9th Cir. 2018).

[3] Plaintiffs continue to dispute the Government's deliberative process objection to the OIG discovery even after the publication of the report, a dispute which this Court need not hear in the first instance. *See* Gov't Br. 39.

[4] Plaintiffs provided the district court with facts necessary to justify the deposition of Leonardo Ayala, 3-ER-291–92, and summarized them in their opening brief, Opening Br. 31. They therefore did not forfeit their right to seek his deposition on remand, as the Government urges. Gov't Br. 39 n.12.

The OIG report also revealed numerous other important facts that Plaintiffs could have investigated below, including:

- CBP violated policy when it destroyed important records memorializing requests to the Mexican government to detain and deport United States citizens. OIG Report at 21–22, 25–29.
- Border officers violated CBP policy by placing "lookouts" on individuals resulting in stops and detentions at the border, often irrespective of whether those individuals were suspected of committing a border-related crime. OIG Report at 10–12.
- Border officers often did not remove lookouts of individuals once they were no longer necessary, as happened to Mr. Dennison when lookouts persisted even after litigation commenced. 4-ER-489. The continued existence of these lookouts (and the records memorializing them) could result in unnecessary and repeated detentions and stops at the border. OIG Report at 12–16.

These additional facts demonstrate the risks to Plaintiffs associated with the continued retention of these surveillance records.

The six additional depositions Plaintiffs requested were also likely to reveal critical information, both about standing and the merits of Plaintiffs' claims. Mr. Dennison's Fourth Amendment claim (and his standing to expunge records derived

from it[5]) relies in part on deposing his two border interrogators. The constitutionality of his suspicionless border detention depends on why his interrogators detained and questioned him. "A border search must be conducted to enforce importation laws, and not for general law enforcement purposes." *United States v. Cano*, 934 F.3d 1002, 1013 (9th Cir. 2019) (internal citations omitted). If the government conducts an administrative search for a criminal investigatory purpose, it must be justified by some suspicion of criminal wrongdoing. *Perez Cruz v. Barr*, 926 F.3d 1128, 1143 (9th Cir. 2019); *see Cano*, 934 F.3d at 1017 ("[B]order officials have no general authority to search for crime."). By being withheld from deposing his interrogators, the district court limited Mr. Dennison's ability to determine what his interrogators' tasking order was, what they understood the purpose of the interrogation was, whether they believed they had reasonable suspicion or probable cause to detain him, what notations they took of his interrogation, and the likelihood that they would be called again to detain or interrogate him given CBP's continued maintenance of his "lookouts" and other records. *See* 10-ER-2005–07, 9-ER-1640–41.

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[5] Plaintiffs identified one such record created by Mr. Dennison's detention in their briefing below, an "incident report" which detailed his responses to his interrogators' invasive questions designed to elicit his associations and political beliefs. *See* 7-ER-1304–07.

The requested additional depositions also were critical to Plaintiffs' First Amendment claims. Plaintiffs satisfied the factual showing required for deposing Jazmin Castillo and Terri Cochran, Gov't Br. 39, both by stating the lines of questioning they intended to pursue, and by attaching an example of the intelligence record created by Ms. Castillo and Ms. Cochran that stores a tranche of protected information. *See* 10-ER-2000–02. And Plaintiffs' request to depose Mr. Del-Villar and Mr. Ayala were likely to reveal contradictory information concerning the Government's arguably retaliatory request for Mexican officials to detain and deport Ms. Phillips and Ms. Pinheiro, among other information about how the secret watchlist was (and may continue to be) used. 10-ER-2002.

For these reasons, Plaintiffs more than satisfied the required showing of relevance and necessity for taking these modest additional depositions. The Government misstates Plaintiffs' position as urging courts to authorize depositions of *all* witnesses identified in Rule 26(a)(1) disclosures. Gov't Br. 43. But Plaintiffs ask for no such categorical rule. "A party seeking to exceed the presumptive limit bears the burden of making a 'particularized showing' of the need for additional depositions." *Thykkuttathil v. Keese*, 294 F.R.D. 597, 600 (W.D. Wash. 2013). Here, Plaintiffs did not seek to depose all the Government's identified witnesses. And Plaintiffs' decision to also depose two other individuals not similarly identified by the Government is not evidence of their lack of diligence, as the

Government suggests. Gov't Br. 43. To the contrary, deposing the individual responsible for disclosing the Government's sprawling intelligence operation was eminently reasonable, and Plaintiffs could not have known about his lack of involvement in the surveillance operation without deposing him first.

D. Plaintiffs diligently pursued discovery.

The Government also questions the wisdom of Plaintiffs' discovery decisions under the pretense of complaining about Plaintiffs' diligence. Gov't Br. 41. It does not argue that Plaintiffs' request for additional discovery would have prejudiced it, or would have unnecessarily delayed proceedings. Instead, its diligence argument amounts merely to second-guessing Plaintiffs' litigation strategy.

In the context of Rule 56(d) motions and requests for additional discovery, diligence generally refers to the timely prosecution of discovery reasonably available to a litigant. *See Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1026 (9th Cir. 2006); *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1005 (9th Cir. 2002). Here, however, the Government does not argue that Plaintiffs were dilatory or untimely in conducting discovery. Instead, the Government claims in hindsight that Plaintiffs should have funneled depositions of important witnesses through existing Rule 30(b)(6) testimony or depositions of their superior officers. Gov't Br. 41. But these are poor alternatives to deposing percipient witnesses about their

conduct, tasking, and motivations—particularly given what Plaintiffs now know was a culture of superior officers disclaiming knowledge of their subordinates' activities, or simply not authorizing their activities at all. *See* OIG Report at 20 (supervisors of CBP official "did not admit involvement" in the request to Mexican officials and "denied directing, approving, or being involved" in it), at 24–25 (noting that other CBP officials who requested U.S. citizens be detained by Mexican officials "were not properly authorized to provide information about U.S. citizens to Mexico").

The Government also argues that Plaintiffs lacked diligence because they should have repackaged their planned oral discovery into written form, Gov't Br. 41, again refusing to credit Plaintiffs as masters of their own discovery strategy. Tactical decisions about how to prosecute discovery are irrelevant to Rule 56(d)'s diligence inquiry.

Finally, the Government demands that Plaintiffs be satisfied with the documents produced by the Government, in lieu of the discovery Plaintiffs sought below. Gov't Br. 41. In context, the Government would have this Court rule that its production of a relatively modest 6,000 pages of records precluded Plaintiffs from seeking additional oral discovery. But this case concerns three separate plaintiffs, with distinct injuries, occurring on distinct days, suffered at the hands of three distinct law enforcement agencies, all during a sprawling, multi-year, interagency

surveillance operation that spawned four separate federal lawsuits. *See Adlerstein v. U.S. Customs and Border* Protection, No. 4:19-cv-00500-CKJ (D. Ariz., filed Oct. 16, 2019); *Dousa v. Dep't of Homeland Sec.*, No. 19-cv-1255-TWR (KSC) (S.D. Cal. filed July 8, 2019); *Guan v.* Mayorkas, No. 1:19-cv-06570-PKC-JO (E.D.N.Y. filed Nov. 20, 2019). Put in context, the relatively little additional material Plaintiffs requested was wholly proportional to the needs of this otherwise complex case.

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Should this Court reverse the discovery rulings below, Plaintiffs are entitled to re-submit their dispute over the OIG report to the district court. *See* Gov't Br. 39 n.13. On remand, the Government cannot hamstring Plaintiffs' ability to seek information relevant to any of the other issues presented to the district court during summary judgment briefings. Gov't Br. 44. Plaintiffs do not, therefore, forfeit their ability to utilize new information gleaned through this additional discovery, either to support their claims for other forms of injunctive relief or any of their arguments on the merits.

II. PLAINTIFFS HAVE STANDING TO SEEK EXPUNGEMENT OF SENSITIVE RECORDS THE GOVERNMENT ILLEGALLY COLLECTED ABOUT THEM.

The district court erred when it ruled that Plaintiffs do not enjoy standing to challenge the unconstitutional retention of secret intelligence files the Government

created about them. While the Government's brief correctly recites Article III's general rule that plaintiffs must show that the remedy they seek will redress a "concrete and particularized" and "actual or imminent" injury, Gov't Br. 16–17, that injury is presumed to flow from the ongoing retention of unconstitutionally derived information about them.[6] This is settled law of this Circuit, articulated in *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1275 (9th Cir. 1998), *Mayfield v. United States*, 599 F.3d 964 (9th Cir. 2010), and most recently *Fazaga v. FBI*, 965 F.3d 1015 (9th Cir. 2020), *rev'd on other grounds*, 142 S. Ct. 1051.[7] But the Government relegates these precedents to afterthoughts in its brief,

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[6] There is some disagreement in this Circuit about whether expungement is a form of prospective or retrospective relief. At times, this Court has characterized it as retrospective injunctive relief, the consequence of which may be that past injury alone would suffice to establish standing. *See Gomez v. Vernon*, 255 F.3d 1118, 1130 (9th Cir. 2001) (expungement of disciplinary reports of prisoners considered retrospective relief); *Bell v. City of Boise*, 709 F.3d 890, 895 (9th Cir. 2013) (summarizing district court's conclusion that expungement of criminal records is retrospective relief); *Elsharkawi v. United States*, 830 Fed. App'x 509 (9th Cir. 2020) (expungement request of allegedly searched cell phone constitutes retrospective injunctive relief); *see also Ellis v. Dyson*, 421 U.S. 426, 439 (1975) (Powell, J., dissenting) (characterizing expungement as retrospective relief). In another instance, this Court has stated the opposite. *Flint v. Dennison*, 488 F.3d 816, 824–25 (9th Cir. 2007) (expungement "cannot be characterized solely as retroactive injunctive relief"). Even if *Flint* is correct, present and future injury against Plaintiffs is presumed under the law of the Circuit.

[7] Plaintiffs' brief included a clerical error citing *Fazaga* as having been decided en banc. Opening Br. 49. The amended *Fazaga* opinion followed a denial of the government's petition for rehearing en banc.

relying heavily on out-of-circuit decisions that are either irrelevant, inapplicable, or simply wrong. And even if the Government's position were correct, Plaintiffs presented enough facts below to support a likelihood of concrete injury flowing from the Government's retention of these records.

A. Expungement does not require an additional showing of harm caused by the retention of illegally obtained records.

This Circuit's contemporary treatment of Article III's expungement doctrine began in *Norman-Bloodsaw*. There, this Court held that the maintenance of allegedly illegally-collected health records was presumptively injurious and confers standing to seek their destruction. 135 F.3d at 1275. But the Government overstates the importance of the type of information collected there, and understates the sensitivity of the information it retains about Plaintiffs here. *See* Gov't Br. 34. *Norman-Bloodsaw* rejected conditioning standing on the records' sensitivity, noting that even if the continued storage "of intimate medical information" does not "itself constitute a violation of law," the existence of records themselves constitutes the "ongoing effect" of the "unconstitutional and discriminatory testing." 135 F.3d at 1275; *see also Burnsworth v. Gunderson*, 179 F.3d 771, 775 (9th Cir. 1999) (affirming expungement order of disciplinary record that violated procedural due process without requiring showing of harm associated

with its continued retention); *Maurer v. Individually & as Members of Los Angeles Cnty. Sheriff's Dep't*, 691 F.2d 434, 437 (9th Cir. 1982) (same).

Critically, *what* the records contain does not determine whether they are an "effect" of the allegedly unconstitutional actions, as the Government urges. Gov't Br. 27, 34. Nowhere does this Court suggest that retaining only particularly sensitive information collected "in an unconstitutional and discriminatory manner" would "constitute a continuing 'irreparable injury.'" *Norman-Bloodsaw*, 135 F.3d at 1275. And when this Court does find standing, it bases that finding on whether the retained records flowed from the challenged conduct—not on the information's sensitivity. *Scott v. Rosenberg*, 702 F.2d 1263, 1268 (9th Cir. 1983) (finding standing to challenge retention of information about church donors compelled from plaintiff); *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1117–19 (9th Cir. 2020) (finding standing to challenge retention of private Facebook messages after their surreptitious review). Otherwise, *Flint v. Dennison*, 488 F.3d 816 (9th Cir. 2007) and *Hatter v. Los Angeles City High School District*, 452 F.2d 673 (9th Cir. 1971) would be wrongly decided, as neither concerned particularly sensitive information contained in the disciplinary records the student-plaintiffs sought to expunge.

On the other hand, the Government's insistence that the volumes of records it collected on Plaintiffs "concern basic biographical facts or public activities" flatly misstates the record. Gov't Br. 34. The extensive material the Government

continues to illegally possess about Plaintiffs includes (1) spreadsheets containing personal information, birthdays, social security numbers, occupations, addresses, and social media information, *see, e.g.*, 5-ER-813, 5-ER-965–67 & 7-ER-1359, (2) documents containing their personal political viewpoints, *see, e.g.*, 5-ER-801, 7-ER-1304–07, (3) information about Plaintiffs' employment activities, 7-ER-1258–59, 7-ER-1315, and (4) a detailed chart drawing relationships between Plaintiffs and other likeminded individuals and organizations, 7-ER-1353, among others. *See* Opening Br. 12–13. Certainly social security numbers, addresses, and political viewpoints are neither "basic biographical facts" nor "public activities." Gov't Br. 34. Neither are Government's characterizations of Plaintiffs as "anarchists," 6-ER-830, caravan supporters, or "suspected antifa/organizers," 7-ER-1137.[8] Even if they were, the district court's proposed rule—that only records containing uniquely

[8] That addresses and certain other information may be located in a public forum does not vitiate Plaintiffs' interest in protecting them from prying Government eyes and indefinite Government storage. *Russell v. Gregoire*, 124 F.3d 1079, 1094 (9th Cir. 1997), upon which the Government relies, is inapplicable insofar as it held that certain biographical information published in a state sex offender registry does not violate a generic constitutional right to privacy. The question there concerned a "carefully designed and narrowly limited" statutory data collection and notification scheme that did not reveal people's exact addresses or employer information. *Id.* Whatever the appropriate balance for sex offender registries is between disclosure of information about individuals and individuals' privacy, that balance is not implicated for Plaintiffs who have committed no crimes and on whom the Government collected far more intrusive information.

sensitive information can establish ongoing injuries-in-fact—threatens to saddle judges with the difficult task of deciding, for instance, whether the results of a medical examination are more or less sensitive than the identities of political organizations an individual privately belongs to. *See* Opening Br. 60.

This Court also addressed expungement in detail in *Mayfield v. United States*, 599 F.3d 964 (9th Cir. 2010), a decision the Government likewise does not meaningfully engage. In a case with similar echoes to this one, the government subjected Brandon Mayfield to "surveillance, searches, and seizures" on suspicion that he committed the 2004 Madrid bombings, then retained the derivative fruits of its surveillance operation after it cleared him of any wrongdoing—all under circumstances "highly unlikely to recur." *Id.* at 970. Although the government contended that he lacked standing to destroy the retained materials because the possibility of their future use would be "wholly speculative," *id.*, the Court agreed with Mayfield that "the retention by government agencies of materials derived from the seizures in his home and office constitutes an ongoing violation of his constitutional right to privacy." *Id.*; *id.* at 971 (Mayfield "continue[s] to suffer a present, on-going injury due to the government's continued retention of derivative material from the FISA seizure."). Importantly, this Court did not demand from

Mayfield either any evidence that he would be harmed by the records again, or evidence that the records were particularly invasive. *Id.*[9]

Lastly, this Court's most recent treatment of Article III's expungement rule came in *Fazaga*, another case the Government dramatically downplays in its brief. Gov't Br. 33. *Fazaga* addressed the FBI's attempts to dismiss a Fourth Amendment claim seeking expungement of intelligence records. Relying on the discussion of standing in *Norman-Bloodsaw*, the *Fazaga* panel concluded that the ongoing retention of records allegedly collected in violation of the Fourth Amendment entitled the plaintiffs to seek expungement as a remedy, without demanding any additional allegation of harm flowing from those records. *Fazaga*, 965 F.3d at 1055. Nevertheless, the Government asserts that *Fazaga* never discussed Article III standing at all, even though the Government appears to concede that the very section of *Norman-Bloodsaw* that *Fazaga* quotes discusses standing. Gov't Br. 33.

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[9] Mayfield bargained away in a prior settlement agreement the right to pursue expungement or other forms of injunctive relief or damages. As a result, his expungement request was not redressable with the limited form of declaratory relief available to him, even though he alleged an injury-in-fact. *Mayfield*, 599 F.3d at 971–73 ("Mayfield unquestionably had standing to seek damages and injunctive relief when he filed the original complaint."). Plaintiffs are under no such limitation.

The Government's alternative attack on *Fazaga* is to ask that it be limited only to Fourth Amendment claims, a manufactured narrowing that appears nowhere in the opinion's text. To the contrary, *Fazaga* based its Article III holding on the availability of expungement as a remedy for *all* constitutional violations. *Fazaga*, 965 F.3d at 1053, 1053 n.32. It makes little doctrinal sense for the demands of Article III to shift so dramatically based on which constitutional amendment a defendant violates.

Understanding the harms the First and Fourth Amendments protect against provides additional insight into the wisdom of this Court's expungement rule. It is a substantive violation of the First Amendment for the government to illegally collect (whether through a retaliatory motive, compelled disclosure, or other verboten surreptitious tactics) information about individuals' protected activities, then retain that information in perpetuity. *See* Opening Br. 52–54. *MacPherson v. I.R.S.*, 803 F.2d 479, 484 (9th Cir. 1986) articulates this principle via a federal Privacy Act suit that incorporates the First Amendment's substantive protections. While not an Article III case, Gov't Br. 32, *MacPherson* does describe one of the underlying harms the First Amendment remedies: the "compilation by the government of records describing the exercise of First Amendment freedoms," which this Court presumed "creates the possibility that those records will be used to the speaker's detriment, and hence has a chilling effect on such exercise."

MacPherson, 803 F.2d at 484. So too is the forced disclosure and continued retention of religious information by the government an injury-in-fact sufficient to establish standing. *Scott*, 702 F.2d at 1268.

In the Fourth Amendment context, when a plaintiff alleges the existence of records generated because of a false search or arrest, "the very presence of these records carries the strong implication that the underlying arrest and detention were somehow justified." *Sullivan v. Murphy*, 478 F.2d 938, 969 (D.C. Cir. 1973); *cf. Campbell*, 951 F.3d at 1118–19 (every privacy violation of Electronic Communications Privacy Act and California Invasion of Privacy Act constitutes injury that confers standing).

Nevertheless, the Government's theory requires Plaintiffs predict, with evidentiary support, precisely how the voluminous intelligence records the Government maintains today are likely to injure Plaintiffs in some new and different way in the future. Gov't Br. 22. But the very Ninth Circuit cases the Government relies upon make no such demands. In *Flint*, this Court held that a public university student's challenge to a campaign finance regulation resulting in his discipline was not moot simply because he graduated, since his disciplinary records "*may* jeopardize the student's future employment or college career." 488 F.3d at 824 (emphasis added). He was not required to prove such jeopardy was imminent or even likely. The same was true in *Hatter*: the existence of high school

disciplinary records was enough not to moot a challenge to the discipline, since those records "threaten prejudice with respect to college admission and future employment." 452 F.2d at 674. The threat alone—without evidence that such a threat in fact came to pass, or was likely—sufficed to make the dispute justiciable.

Importantly, the evidentiary posture of both *Flint* and *Hatter* did not dramatically alter Article III's standing requirement. *Flint* was an appeal from an adverse grant of summary judgment, and *Hatter* a denial of a motion for a preliminary injunction. Contrary to the Government's position, the posture of both cases did not present a "fundamental problem" to either plaintiff's ability to establish ripeness of their constitutional challenge. Gov't Br. 22. All that was required was evidence that those records *in fact existed* and were in the possession of the defendant—rather than merely alleged to exist in a complaint. *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 147 (2d Cir. 2011) ("To establish an injury in fact—and thus, a personal stake in this litigation—[a plaintiff] need only establish that its information was obtained by the government.").

For that reason, this case is wholly distinguishable from *Clapper v. Amnesty International USA*, 568 U.S. 398, 408 (2013) (cited at Gov't Br. 23). *Clapper* relied on the plaintiffs' failure to establish that they had been directly surveilled at all (let alone that the government maintained records about them). *See Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1118 (9th Cir. 2017) (distinguishing *Clapper* when

"both the challenged conduct and the attendant injury have already occurred"); *ACLU v. Clapper*, 785 F.3d 787, 801 (2d Cir. 2015) (the fact that the government did in fact collect records about plaintiffs was unlike the "speculative chain of possibilities" that made the existence of standing in *Clapper* speculative). No such factual deficit exists here. For that reason, *Clapper* does not disturb the holding of *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 522 (9th Cir. 1989), as the Government suggests, Gov't Br. 25 n.6, since the plaintiff church demonstrated its members were *in fact* targets of the government's surveillance operation.

B. This Court's expungement rule is consistent with that followed by other circuits.

Sister circuits across the country also reject the Government's position. In *Tabbaa v. Chertoff*, 509 F.3d 89 (2d Cir. 2007), the defendants "properly [did] not contest that plaintiffs possess Article III standing based on their demand for expungement" when they sought removal of CBP records. *Id.* at 96 n.2. The court used the word "properly" to signal approval of the CBP's admission that it could not challenge as moot the plaintiffs' expungement demand, since "[b]rief narratives memorializing the fact that plaintiffs had been subjected to heightened inspection exist in one CBP database," and that "CBP continues to maintain this information, as it does for all records documenting heightened border inspections."

Appellees Br. *28–29, 2006 WL 6222134, *id.* (No. 06-0119-CV). Having conceded standing on similar facts in *Tabbaa*, CBP and the other Defendants-Appellees now take the opposite, and incorrect, position. *See also ACLU*, 785 F.3d at 801 (even though the plaintiffs could not show "anything more than a speculative prospect" of injury flowing from retained data, plaintiffs "surely have standing to allege injury from the collection, and maintenance in a government database, of records relating to them."); *Guan v. Mayorkas*, 530 F. Supp. 3d 237, 262 (E.D.N.Y. 2021) ("The CBP's retention of records from the searches itself also constitutes an independent harm.").

Both the D.C. and Fifth Circuits similarly apply the Ninth Circuit's expungement rule. *See Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1152 (D.C. Cir. 2004) (teenager enjoyed standing to expunge arrest records, even though the arrest resulted from a now-terminated government policy); *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 787 F.3d 524, 534–35 (D.C. Cir. 2015) (existence of allegedly unconstitutionally acquired investigatory records defeats mootness objection); *United States v. McLeod*, 385 F.2d 734, 753 (5th Cir. 1967) (conviction records); *Malik v. U.S. Dep't of Homeland Sec.*, No. 4:21-CV-0088-P, 2022 WL 3104840, at *4 (N.D. Tex. Aug. 4, 2022) (border records).

Instead of directly challenging this Circuit's longstanding expungement precedent, the Government relies on a bevy of inapplicable out-of-circuit

authorities. Although *J. Roderick MacArthur Found. v. F.B.I.*, 102 F.3d 600, 606 (D.C. Cir. 1996) conflicted with this Court's expungement rule, *Hedgepeth* and *Abdelfattah* have since cast its holding into doubt. Even were it good law in the D.C. Circuit, this Court has already declined to follow its Privacy Act expungement holding, *see Garris v. FBI*, 937 F.3d 1284, 1296–97 (9th Cir. 2019). And because its separate standing holding contradicts sharply with the law of this Circuit, it does not govern here. The Government also cites the D.C. Circuit's non-precedential order in *Klayman v. Obama*, 759 Fed. App'x 1 (D.C. Cir. 2019), even though there was no evidence to suggest that the records there would have remained in the government's possession but for the litigation. *Id.* at *3–4.

The Government alternatively relies on recent decisions in the Seventh Circuit that also appear to depart from the Ninth Circuit's rule on expungement. *Swanigan v. City of Chicago*, 881 F.3d 577, 584 (7th Cir. 2018); *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909 (7th Cir. 2017). Since the Ninth Circuit's precedent conflicts with *Swanigan* and *Gubala* on this question, this Court should decline the Government's invitation to follow them as well.

The Government's other cited authorities are equally unpersuasive. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) did not involve a request for expungement at all. The plaintiffs there sought damages for anticipated violations of a statutory right, and the holding only applied the straightforward rule that one

cannot claim damages for an injury that has not yet occurred. *Id.* at 2210–11. And in any event, the case concerned inaccurate, not illegally or unconstitutionally obtained, information. The same was true of *Gordon v. Warren Consolidated Board of Education*, 706 F.2d 778 (6th Cir. 1983), which also did not involve a request to destroy records.

Finally, Plaintiffs identified before the district court and now on appeal many of the specific records and categories of records warranting expungement. Opening Br. 12–13; *see, e.g.*, MSJ Exhibits 6–31, *available at* 5-ER-722 to 7-ER-1370. Some of the records are themselves compilations created from many other intelligence documents (including the Al Otro Lado report the Government cites, Gov't Br. 22), a fact immaterial to Plaintiffs' standing to destroy them. But by demanding Plaintiffs identify *every* document they want expunged as a condition of demonstrating standing, the Government asks this Court to transform *their* motion for summary judgment into *Plaintiffs'* motion for a permanent injunction. Gov't Br. 21–22. But Plaintiffs do not have to provide a line-by-line account of the entire remedy they seek here. *ACLU v. Clapper*, 959 F. Supp. 2d 724, 738 (S.D.N.Y. 2013), *aff'd in part, vacated in part*, 785 F.3d 787 (2d Cir. 2015) (a plaintiff "is not obligated at the standing stage to prove the merits of its case"; since "there is no dispute the Government collected" records through the challenged government program, "the standing requirement is satisfied.") (internal

quotations omitted). It is sufficient that Plaintiffs offered "specific facts" to establish standing, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (cited in Gov't Br. 31), particularly in the context of a sprawling surveillance operation the fruits of which are too voluminous to recount.

C. Plaintiffs submitted evidence of the likelihood of future injury from the illegal record retention.

Even if the Government's standing argument prevails, Plaintiffs provided evidence to support the likelihood of independent future harm from the documents' retention. The Government's continued retention of the subject records is likely to harm Plaintiffs by subjecting them to an unnecessary risk of future detention and unwarranted government scrutiny.[10] For instance, the Government created the secret database that included Plaintiffs by searching the very intelligence records Plaintiffs want destroyed. 4-ER-472–73, 4-ER-486–88. The database in turn resulted in Plaintiffs' detentions, either at the hands of CBP in the case of Mr. Dennison, Opening Br. 15, or at the hands of Mexican officials at CBP's urging,

[10] It may in fact be the Government's "heavy burden" to establish that it will not utilize the existing records to injure Plaintiffs in the future. *Cf. Norman-Bloodsaw*, 135 F.3d at 1274. Given that the records at issue continue to this day to be accessible by CBP officers, including those maintained in TECS databases that line CBP agents at ports of entry can access, the Government has not established that Plaintiffs' concern about subsequent detentions and seizure is unreasonable.

see Part I.C. The Government also disseminated the database and other secret intelligence records widely among the Defendant agencies, 4-ER-485, without any policies limiting their sharing or ensuring their accuracy or investigative relevance, 4-ER-490. Indeed, one of the intergovernmental agencies responsible for collecting and retaining the records is still operational today. 4-ER-485. Some of these records were the basis of lookouts used to initiate border stops and detentions, including of Mr. Dennison, who continued to be monitored and tracked well after he filed this case. 4-ER-489–90. Given widespread access to these records within CBP and other agencies, it is eminently reasonable to assume that Plaintiffs are at serious risk of being subjected to further unjustified scrutiny at the border, even if their recent cross-border travels have been unencumbered. So long as the records remain stored and accessible, that risk remains, and Plaintiffs are entitled to seek their destruction.

The Government's invocation of *Laird v. Tatum*, 408 U.S. 1 (1972) is therefore misplaced. In *Laird*, there appeared to be no plausible allegation that the intelligence collection was unlawful in the first instance, *id.* at 8, no allegation that the unlawful collection ever harmed the plaintiffs in the past, *id.* at 9, and some question as to whether the records continued to be in the government's possession, *id.* at 7–8. In both *Fifth Ave. Peace Parade Comm. v. Gray*, 480 F.2d 326, 332 (2d Cir. 1973) and *Donohoe v. Duling*, 465 F.2d 196, 198–99, 202 (4th Cir. 1972),

there was similarly a strong likelihood that the collection in the first instance was lawful, and no allegation of past harm flowing from the collection.

Here, on the other hand, Plaintiffs raised triable issues as to the illegality of the initial data collection, and revealed in discovery (backed by the OIG's own subsequent investigation) that the document collection caused Plaintiffs past harm. *Cf. Melendres v. Arpaio*, 695 F.3d 990, 997–98 (9th Cir. 2012) (plaintiffs enjoy standing when they plausibly 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") (internal citations omitted); *LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th Cir. 1985) (distinguishing *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) when "defendants engaged in a standard pattern of officially sanctioned officer behavior"). Unlike cases that challenge the incidental effects of otherwise lawful surveillance activity, Gov't Br. 23–24, Plaintiffs brought into sharp focus the unlawful arrests and retaliatory deployment of government resources to stifle lawful and protected expressive activity, injuries far more severe than mere "subjective chills" on their rights. *The Presbyterian Church (U.S.A.)*, 870 F.2d at 522 (*Laird* was not about a challenge to "any specific action of the Army directed against the plaintiffs," unlike the government directly targeting the church's members).

***

Far beyond its legal error, the decision below has the consequence of eliminating a key mechanism for judicial review when authorities violate the Constitution. On the Government's theory, victims of even flagrantly unconstitutional police action cannot destroy the fruits of such illegality so long as the Government assures them that nothing more will be done with the ill-gotten records. In such circumstances, the Government claims the right to indefinitely retain illegally seized information, with no role for courts to play to remedy serious constitutional injuries. But at least where records memorialize the Government's wrongdoing, this Court's precedent prevents such a calamity of unchecked executive authority.

CONCLUSION

For the reasons set forth above, the district court's award of judgment should be reversed and the case remanded for further proceedings.

Date: December 16, 2022

ACLU FOUNDATION OF SOUTHERN CALIFORNIA

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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