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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

NORA PHILLIPS; ERIKA PINHEIRO; and NATHANIEL DENNISON,

Plaintiffs,

v.

U.S. CUSTOMS AND BORDER PROTECTION; MARK MORGAN, in his official capacity as acting commissioner of the U.S. Customs and Border Protection; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; MATTHEW ALBENCE, in his official capacity as acting director of the U.S. Immigration and Customs Enforcement; FEDERAL BUREAU OF INVESTIGATION; and CHRISTOPHER WRAY, in his official capacity as director of the Federal Bureau of Investigation,

Defendants.

CASE NO. 2:19-CV-6338-SVW-JEM

REPLY IN SUPPORT OF DEFENDANTS' PARTIAL MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Honorable Stephen V. Wilson
United States District Judge

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INTRODUCTION

Plaintiff Nathaniel Dennison lacks standing to bring his Fourth Amendment claim, and fails to state a claim on which relief can be granted. To receive an injunction of future non-routine border searches, Mr. Dennison must establish standing, showing that he is likely to undergo these types of searches in the future. But he makes no such showing in either his Amended Complaint or briefing. To the extent Mr. Dennison seeks expungement of records arising out of his January 2019 border inspection, due to a purported Fourth Amendment violation, that claim fails as a matter of law. Mr. Dennison does not allege any of the hallmarks of a non-routine border search, such as an invasive search of his person or property. Indeed, where Plaintiff was merely delayed for some hours before a period of questioning, such a border inspection falls comfortably within the authority of officials to conduct a routine border inspection. For these reasons, Mr. Dennison's Fourth Amendment claim should be dismissed with prejudice.[1]

ARGUMENT

I. Plaintiff Dennison Lacks Standing to Seek An Injunction Against Future Border Searches.

A court's standing inquiry must be "especially rigorous when reaching the merits of the dispute" would compel it "to decide whether an action taken by one of

[1] As to their First Amendment claim, Plaintiffs appear to disclaim any retaliation argument, instead contending that the Government may not create and maintain records which "concern[]" expressive activities, and that the Government may not investigate Plaintiffs "based on" their First Amendment-protected activities. Pls.' Opp'n to Defs.' Partial Mot. to Dismiss ("Pls.' Opp.") at 6, ECF No. 19. Even with the attempted clarification, this claim is unduly vague. For instance, it is unclear what Plaintiffs mean when they say that certain investigations were "based on" expressive activities. Accordingly, this Court should order Plaintiffs to clarify and restate this claim pursuant to Federal Rule of Civil Procedure 12(e), or in the alternative, permit further briefing specifically on the viability of this claim.

the other two branches of the Federal Government was unconstitutional." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citation omitted). Where, as here, a plaintiff seeks to establish Article III standing based on a future injury, the plaintiff must show that the threatened injury is "imminent" —that is, the injury is "certainly impending," or "there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). "[A]llegations of possible future injury are not sufficient." *Clapper*, 568 U.S. at 409. Thus, a controversy exists in this circumstance only when a plaintiff establishes the existence of a "real and immediate threat" that he will be injured in the future. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

Here, Mr. Dennison cannot show a likelihood that he will be subject to future non-routine border searches. A single, allegedly delayed border crossing over a year ago does not provide Mr. Dennison with standing to seek prospective injunctive and declaratory relief against future border searches. *Accord Adams v. CCA*, No. 1:11-CV-00204-BLW, 2011 WL 2909877, at *4 (D. Idaho July 18, 2011) ("Injunctive relief is 'designed to deter future misdeeds, not to punish past misconduct.'"). Indeed, Mr. Dennison concedes that the Amended Complaint alleges "only one . . . [border search] prior to filing." Pls.' Opp. at 21. As a consequence, he cannot rely on a pattern of past conduct to establish that a future injury is certainly impending.[2]

[2] It is immaterial for standing purposes whether a future border inspection could occur despite Plaintiff engaging in only "innocent conduct." Pls.' Opp. at 22 (citation omitted). It is well-established that, to establish standing on the basis of a future injury, Mr. Dennison must show that such injury is "certainly impending," or "there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List*, 573 U.S. at 158; *see also King v. Baca*, No. CV 00-11178 FMC CWX, 2001 WL 682793, at *5 (C.D. Cal. June 12, 2001) ("Plaintiff cannot escape the requirement that he has standing only when the possibility of future injury to him is particular and concrete.").

Rather, to establish a likelihood of future injury, Mr. Dennison relies solely on the fact that he was included on a purported CBP list of individuals, and that this list is used to "target Mr. Dennison and others on the secret database for *non-routine* seizures." Pls.' Opp. at 23 (emphasis in original). But Plaintiffs' brief provides no support for the assertion that this list is used to target individuals specifically for non-routine border searches, and more critically, the Amended Complaint contains no such allegation; therefore this argument cannot be credited by the Court.

Moreover, such a claim – that placement on this alleged list necessarily results in non-routine searches – is undermined by Plaintiffs' Amended Complaint. That is, Plaintiffs aver that Mr. Dennison, Erika Pinheiro, and Nora Phillips "all appear on the secret surveillance list." First Amended Complaint ("FAC") ¶ 46, ECF No. 16. Yet, Plaintiffs do not contend that either Ms. Pinheiro or Ms. Phillips were subjected to a non-routine border inspection by Defendants. This, despite the fact that Plaintiffs declare that "Ms. Pinheiro has crossed the land border between San Diego and Tijuana," FAC ¶ 120, apparently without incident, following the disclosure of the purported surveillance list.[3] Thus, Plaintiffs' own allegations preclude any inference that inclusion on the claimed surveillance list itself creates a likelihood of future, non-routine border searches.[4]

But even if he had shown some likelihood of future border searches, Mr. Dennison does not seek an injunction of all border searches, but only those "intrusive" searches that are not supported by "reasonable . . . suspicion." FAC ¶ 158.

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[3] While Plaintiffs aver that Ms. Phillips "ceased traveling to Mexico for months," they do not claim that she has ceased traveling altogether, nor do they claim that she has been the subject of any non-routine border searches. FAC ¶ 100.

[4] For the same reason, Plaintiffs fail to demonstrate that the existence of the purported surveillance list constitutes a "written policy" to "target" certain individuals for non-routine border searches. *See* Pls.' Opp. at 21.

To establish his standing to enjoin future, unlawful, non-routine searches, Mr. Dennison must show not only that he is likely to be subject to border searches in the future, but that those searches will be non-routine, and that those searches will be unsupported by the requisite level of suspicion, and therefore run afoul of the Fourth Amendment. Yet Plaintiffs provide no facts establishing that future border searches of Mr. Dennison will be either non-routine or unlawful, let alone both. *Accord Baldwin v. Cate*, No. C-08-03516 RMW, 2009 WL 482283, at *4 (N.D. Cal. Feb. 25, 2009) ("[P]laintiffs must show that they are likely again to be the subject of defendants' challenged action.").

As even Plaintiffs must concede, the Government may "lawfully identif[y] millions of . . . travelers for *routine* stops and seizures[.]" Pls.' Opp. at 23. But again, Plaintiffs allege no facts setting forth specifically why non-routine inspections are likely to occur with respect to Mr. Dennison, or why those inspections will necessarily be unlawful. Indeed, Plaintiffs properly recognize that "[w]hat constitutes a non-routine border search requires assessing the totality of the circumstances surrounding it[.]" *Id.* at 9. Thus, under their own analysis, to establish a likelihood of future non-routine searches, Plaintiffs must show that not only will Mr. Dennison be subject to future border searches, but also that specific circumstances, such as the intrusiveness of these future searches, will transform these encounters into a non-routine searches. Yet Plaintiffs fail to allege any of the "circumstances" that will "surround" any future border search of Mr. Dennison. Nor do Plaintiffs make any allegation as to whether or why these hypothetical non-routine searches would lack the requisite level of suspicion to support them.

Absent any showing that Mr. Dennison is likely to undergo unsupported, non-routine border searches in the future, he lacks standing to seek an injunction against such searches. *See Nelsen v. King Cty.*, 895 F.2d 1248, 1252 (9th Cir. 1990) ("Both the

Supreme Court and our circuit have repeatedly found a lack of standing where the litigant's claim relies upon a chain of speculative contingencies.").

II. The January 2019 Border Inspection of Plaintiff Dennison Was Routine and Lawful

To the extent Mr. Dennison seeks expungement of records arising out of his January 2019 border inspection, on the basis of a purported Fourth Amendment violation, that claim fails as a matter of law, because that border inspection was conducted consistent with the Fourth Amendment.

The gravamen of Mr. Dennison's claim is that his border inspection took too long to complete, such that it was transformed into a non-routine border search, requiring reasonable suspicion, which was allegedly not present here. But this argument fails at the outset because a simple delay in the border inspection process does not give rise to a non-routine border search. As an appropriate, routine border search, Mr. Dennison's inspection in January 2019 was lawful and his Fourth Amendment claim fails.

As Defendants previously explained, the Supreme Court has stated "[t]ime and again" that "searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004) (quoting *United States v. Ramsey*, 431 U.S. 606, 616 (1977)). Indeed, the Supreme Court has only ever found one narrow exception to Customs officials' broad authority to conduct suspicionless searches at the border, whereby reasonable suspicion was required in the context of an sixteen-hour detention to determine whether a traveler was smuggling drugs in her "alimentary canal." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). The Ninth Circuit has accordingly required reasonable suspicion in border searches for "highly intrusive searches of the person" or for searches of property that

are "destructive, 'particularly offensive' or overly intrusive." *United States v. Cotterman*, 709 F.3d 952, 963 (9th Cir. 2013) (en banc). Indeed, the Supreme Court has "consistently rejected hard-and-fast time limits" concerning detention in the border context. *Montoya de Hernandez*, 473 U.S. at 543. "Instead, common sense and ordinary human experience must govern over rigid criteria." *Id.* (citation omitted).

Here, Mr. Dennison alleges only that he was made to wait at a busy port of entry, without the use of any restraints, prior to a brief period of questioning. In this circumstance, detention of Mr. Dennison until the necessary inspection could be performed constituted a border search well within the broad constitutional authority of customs officials. It is common sense that delays in processing international travelers occur frequently, and such a delay, of a length found permissible by other courts, does not render a border inspection non-routine, such that even reasonable suspicion was required. *See Tabbaa v. Chertoff*, 509 F.3d 89, 100–01 (2d Cir. 2007) (upholding detention of six hours where "common sense and ordinary human experience" suggested that delay was reasonable); *see also Arjmand v. Dep't of Homeland Sec.*, No. LACV1407960JAKMANX, 2018 WL 1755428, at *6 (C.D. Cal. Feb. 9, 2018) (citing *Tabbaa* and finding no Fourth Amendment violation where CBP officials "held Plaintiff and his spouse in Secondary review for several hours while they were returning from Canada, Mexico and Iran"). To hold otherwise would require CBP officers to forego inspection of travelers simply because circumstances might lengthen the time required for questioning, a clearly untenable proposition. Because Mr. Dennison's border inspection constituted a routine border search, no heightened suspicion was required, and Mr. Dennison fails to state a Fourth Amendment violation.

In opposing this common-sense conclusion, Plaintiffs raise three arguments, but none have merit. Plaintiffs contend first that Mr. Dennison's border inspection was unlawful because it was not supported by law enforcement interests related to

border enforcement. Second, Plaintiffs argue that Mr. Dennison's detention was unduly long. Third and finally, Plaintiffs claim that CBP asked impermissible questions of Mr. Dennison. Not one of these arguments has support in fact or law.

First, while conceding that officials may conduct "suspicionless border searches," Plaintiffs nonetheless argue that all border searches and seizures must be "tethered" solely to an assessment of an individual's identity and preventing the entry of contraband. Pls.' Opp. at 8. Thus, Plaintiffs contend, the border search at issue was not routine because it may have sought, in part, to investigate potential criminal activity.

Yet while Plaintiffs rely largely on a concurrence in *United States v. Tsai*, 282 F.3d 690 (9th Cir. 2002) to support this argument, that is not what the binding, majority opinion held. There, the criminal defendant made an argument almost identical to that of Mr. Dennison here, that a border search was not routine because it was "conducted for purposes of criminal investigation[.]" *Id.* at 694. The Ninth Circuit roundly rejected this contention, holding that "this would turn customary Fourth Amendment reasoning on its head!" *Id.* at 695. Whether a border search is proper, the court held, "turns more on examination of the search's scope than on an inquiry into the searcher's motivation." *Id.* at 695–96. Accordingly, the Ninth Circuit held that the border search of luggage in that case "clearly placed it within our cases' definition of a routine border search . . . notwithstanding [an official's] alleged investigative purpose." *Id.* at 696.

So too here, simply questioning Mr. Dennison on re-entry to the United States falls clearly within the bounds of a routine border search, regardless of whether the questioning may have had an investigative purpose. *See United States v. Gurr*, 471 F.3d 144, 149 (D.C. Cir. 2006) ("[T]he important factor for a court to consider is whether the search was conducted under proper authority, not the 'underlying intent or motivation of the officers involved.'"); *see also United States v. Schoor,* 597 F.2d 1303,

1305 (9th Cir. 1979) (rejecting Fourth Amendment claim that border search was "not limited to a search for contraband[,]" and holding "that the search was made at the request of the DEA officers does not detract from its legitimacy") (Kennedy, J.). Nor do Plaintiffs' other cited cases support their argument. *United States v. Cano*, 934 F.3d 1002 (9th Cir. 2019), for instance, concerned border searches of cell phones, not whether or for what purposes a traveler may be questioned at the border. In short, Plaintiffs' contention – that questions about potential criminal conduct constitute a non-routine border search – is rejected by governing case law.

Plaintiffs' second argument tries another approach to show a non-routine search here, but fares no better. That is, Plaintiffs contend that any border inspection lasting over two hours in length "require[s] at least reasonable suspicion." Pls.' Opp. at 11. But the Supreme Court has held otherwise, "consistently reject[ing] hard-and-fast time limits" concerning detention in the border context. *Montoya de Hernandez*, 473 U.S. at 543. In fact, Plaintiffs' cited case law on border searches bears out the point that delays at the border alone do not give rise to a non-routine search, as the cited cases involved significant factors, such as restraints or invasive bodily searches, not present here.[5] *See, e.g., Montoya de Hernandez*, 473 U.S. at 543 (holding that reasonable suspicion was required for sixteen-hour detention for purposes of searching traveler's "alimentary canal"); *United States v. Juvenile* (RRA-A), 229 F.3d 737, 743 (9th Cir. 2000) (juvenile was "handcuffed . . . in a locked security office after a narcotics search").

[5] Plaintiffs are similarly incorrect to suggest that extended border searches, not at issue here, have only been permitted "when they occur within two hours from the time of a border crossing." Pls.' Opp. at 13; *see United States v. Caicedo-Guarnizo*, 723 F.2d 1420, 1422 (9th Cir. 1984) ("This circuit has upheld an extended border search of an automobile seven hours and 105 miles from the border. It has also upheld a search fifteen hours and twenty miles from the border.").

As a consequence, courts in this circuit to have addressed this unusual claim, that delay alone requires heightened suspicion in a border search, have rejected it. *See Arjmand*, 2018 WL 1755428 at *6 (finding no Fourth Amendment violation where CBP officials "held Plaintiff and his spouse in Secondary review for several hours"); *see also Garcia v. United States*, No. SACV091169DOCRNBX, 2011 WL 13224877, at *8 n. 5 (C.D. Cal. Sept. 19, 2011) (rejecting claim of false imprisonment on basis of four-hour border detention at airport, even when officials conceded the detention was a "mistake," given that "[p]ersons entering the United States from abroad are routinely subjected to prolonged delay periods").

If more were needed, the Supreme Court itself has rejected the contention "that the Fourth Amendment shields entrants from inconvenience or delay at the international border." *Flores-Montano*, 541 U.S. at 155 n.3. It is for this reason that the Ninth Circuit has required reasonable suspicion in border searches for "highly intrusive searches of the person" or for searches of property that are "destructive, 'particularly offensive' or overly intrusive." *Cotterman*, 709 F.3d at 963. Plaintiffs' claimed 6-hour delay, while potentially "inconvenient . . . cannot be considered an unexpected 'level of intrusion into a person's privacy,' that by itself would render the [border inspection] non-routine." *See Tabbaa*, 509 F.3d at 100–01.

Plaintiffs' third and final argument is equally meritless. That is, Plaintiffs contend that the environment in which Mr. Dennison was questioned, and the particular subjects of the questions posed, gave rise to a non-routine border inspection. But Defendants are aware of no cases, and Plaintiffs cite to none, to support the notion that being questioned in the "environment" alleged here, "a walled-off area that featured desks and chairs[,]" could render a border inspection non-routine. FAC ¶ 131. The few cases referenced by Plaintiffs on this point in fact concern whether a traveler had been arrested and placed into custody at the border, an allegation not even raised here, and for good reason. Indeed, *United States v. Butler*, 249

F.3d 1094, 1099 (9th Cir. 2001), discussing arrest at the border and relied upon by Plaintiffs, took pains to emphasize that travelers may be permissibly detained for searches at the border, where they are "not free to leave, but . . . not restrained in any way." *Id.* (citing *United States v. Estrada–Lucas*, 651 F.2d 1261 (9th Cir. 1980)).

Plaintiffs also do not provide a single case citation in support of their claim that the Government cannot seek "answers to questions" about certain political or expressive subjects during a border inspection "absent suspicion." Pls.' Opp. at 15. It is unsurprising that such a vague restriction on even the types of questions that may be posed at a border inspection finds no support in the law, as "the Government's interest in preventing the entry of unwanted persons and effects is at its zenith" at the border. *Flores-Montano*, 541 U.S. at 149. Absent even a single factor that may have given rise to a non-routine border search, Mr. Dennison fails to state a violation of the Fourth Amendment.

Even if reasonable suspicion was required to conduct the border inspection at issue here, and it was not, it was present under the facts pled in the Amended Complaint. That is, Mr. Dennison concedes that he was present at a "conflict" that "erupted" at the U.S.-Mexico border on December 31, 2018. FAC ¶ 128. In fact, it was widely reported that during this incident, 150 migrants attempted to breach a border fence at the border in Tijuana, while individuals apparently threw rocks at U.S. Government employees, ultimately resulting in the detention of 25 migrants.[6] Plaintiffs' conceded attendance at this violent disturbance supports at least reasonable suspicion sufficient to justify a border inspection just ten days afterwards. *See Lyall v.*

[6] *See* PBS News Hour, "U.S. fires tear gas across Mexico border to stop migrants" (Jan. 2, 2019), https://www.pbs.org/newshour/nation/u-s-fires-tear-gas-across-mexico-border-to-stop-migrants (last visited February 10, 2020). This article is cited and relied upon in the First Amended Complaint. FAC ¶ 59 n.25.

City of Los Angeles, 807 F.3d 1178, 1195 (9th Cir. 2015) ("[T]he police can have reasonable suspicion as to the members of the group" that engaged in unlawful, violent activity); *Carr v. District of Columbia*, 587 F.3d 401 (D.C. Cir. 2009) (officials, in a riot situation, may properly rely on a "reasonable belief that the entire crowd is acting as a unit and therefore all members of the crowd violated the law").

In sum, Mr. Dennison fails to state a claim for a violation of the Fourth Amendment arising out of his border inspection. Absent any showing that Defendants acted in an unlawful fashion, Mr. Dennison cannot properly seek the expungement of Government records relating to his inspection, and his Fourth Amendment claim should therefore be dismissed. *See Fazaga v. Fed. Bureau of Investigation*, 916 F.3d 1202, 1240 (9th Cir. 2019) ("[A] determination that records were obtained and retained *in violation of the Constitution* supports a claim for expungement") (emphasis added); *United States v. Sumner*, 226 F.3d 1005, 1014 (9th Cir. 2000) (rejecting contention "that a district court has the power to expunge a record of a valid arrest and conviction solely for equitable considerations").[7]

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' Motion and dismiss the second claim in the First Amended Complaint.

[7] Even assuming Mr. Dennison alleged a possible violation of the Fourth Amendment, and he has not, the alleged acts are not so extraordinary to form a proper basis for expungement of Defendants' law enforcement records. Expungement is a "narrow" equitable remedy that courts may use only in "extreme circumstances," where a plaintiff sets forth harms that outweigh the Government's interest in maintaining accurate records. *See United States v. Smith*, 940 F.2d 395 (9th Cir. 1991). Plaintiff does not set forth facts establishing that this case qualifies for this remedy, the "narrow, extraordinary exception" of expungement. *Id.*

Dated: February 10, 2020

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CERTIFICATE OF SERVICE

I hereby certify that February 10, 2020, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: February 10, 2020 /s/ Michael Drezner