

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' PETITION FOR PANEL REHEARING
OR REHEARING EN BANC**

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INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure 35 and 40, Plaintiffs respectfully petition this Court for panel rehearing or, alternatively, rehearing en banc.

The Panel's decision puts Plaintiffs in a remarkable position: they have shown that the Government is keeping records about them that it allegedly obtained in violation of the Constitution, but they nevertheless lack standing even to ask that the records be destroyed. The Panel's holding conflicts with an unbroken line of Circuit precedent establishing that the ongoing retention of records obtained *in violation of the Constitution* is a concrete harm that confers standing. *See Sanchez v. Los Angeles Dep't of Transp.*, 39 F.4th 548 (9th Cir. 2022); *Fazaga v. FBI*, 965 F.3d 1015 (9th Cir. 2020), *rev'd on other grounds*, 595 U.S. 344 (2022); *Mayfield v. United States*, 599 F.3d 964 (9th Cir. 2010); *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260 (9th Cir. 1998). Plaintiffs are aware of no other decision by this Court, or the Supreme Court, rejecting standing to expunge records obtained in violation of the Constitution when the existence of those records is undisputed.

The Panel reached this unprecedented conclusion by applying the test for determining standing for *statutory* violations to this *constitutional* challenge. *Cf. TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021); *Campbell v. Facebook, Inc.*,

951 F.3d 1106 (9th Cir. 2020). In so doing, the Panel asked whether Plaintiffs demonstrated that the records invade a common law privacy right by containing particularly sensitive information, a showing that this Court has never demanded litigants make. And, as to whether Plaintiffs made that showing, the Panel's decision contravenes long-standing precedent by grossly undervaluing the First Amendment's vigorous protection of information about individuals' expressive and associational activities.

All told, the Panel decision makes impossible the task of determining what Article III requires to remedy a constitutional violation via expungement. The Panel's misguided treatment of this Court's precedent leaves Plaintiffs without any judicial review of a sprawling government surveillance program that no party denies resulted in the creation of records that will live in government databases in perpetuity—even if the Constitution prohibited the investigation that created the records. Rehearing is required.

BACKGROUND

Plaintiffs are United States citizens who challenge a wide-ranging federal government surveillance and intelligence gathering program that targeted public interest lawyers, humanitarian leaders, and migrant rights activists.¹ They allege

¹ This is one of four cases brought on behalf of individuals targeted by the Government in this surveillance program, one of which resulted in a retaliation judgment against the Government. *See Dousa v. DHS, No. 19-cv-1255-TWR*

that as a result of their work with migrants and asylum seekers, Defendants U.S. Customs and Border Protection, Immigration and Customs Enforcement, and the Federal Bureau of Investigation (collectively “the Government”) selected them for unlawful scrutiny, surveillance, and seizures. The Government created troves of records about Plaintiffs and other humanitarian activists and leaders, including records containing information about their political expressions, *see, e.g.*, 5-ER-801, associations with other activists and humanitarians, *see, e.g.*, 7-ER-1353, organizational financial transactions, *see, e.g.*, 9-ER-1926–27, occupational histories, *see, e.g.*, 7-ER-1315, social media accounts, *see, e.g.*, 6-ER-965, and other detailed biographical data, *see, e.g.*, 5-ER-810–25, 6-ER-830–1116, 10-ER-1978–83.

Plaintiffs allege the Government violated (1) all Plaintiffs’ First Amendment rights by surveilling and detaining them in retaliation for their associations and political expressions, (2) Plaintiff Nathaniel Dennison’s Fourth Amendment rights during a 2019 arrest at the border, and (3) the federal Privacy Act, 5 U.S.C. 552a. 2-ER-62–67. They sought, *inter alia*, an order expunging “all records unlawfully collected and maintained about Plaintiffs.” 2-ER-65–66.

(KSC), 2023 WL 2586301 (S.D. Cal. Mar. 21, 2023) (finding government retaliated against pastor targeted by the surveillance program); *Adlerstein v. U.S. Customs and Border Protection*, No. 4:19-cv-00500-CKJ (D. Ariz., filed Oct. 16, 2019); *Guan v. Mayorkas*, No. 1:19-cv-06570-PKC-JO (E.D.N.Y. filed Nov. 20, 2019).

The district court granted summary judgment for the Government on Plaintiffs' constitutional claims on standing grounds. 1-ER-14–17. Plaintiffs argued that the Government's retention of the records collected in violation of the Constitution was itself sufficient to confer standing. But the district court held that Plaintiffs could not show that retention alone “constitutes an ongoing injury or poses any likelihood of future injury.” 1-ER-17.

As relevant here, the Panel affirmed the district court's standing ruling. Relying on *TransUnion*, it held that “retention of records alone does not constitute a concrete injury,” and that “something beyond retention” must be alleged to support standing to redress a constitutional violation. Op. 11, 13. But the Panel also held that in certain circumstances, retention alone *does* suffice to establish standing, including when the retention “amounted to an invasion of [the plaintiff's] privacy interests.” Op. 14–15. The Panel then rejected Plaintiffs' arguments that the Government's records collection creates a concrete and ongoing injury, relying on a common law analysis to find that the information was not “so sensitive” that the Government's access to that information is “offensive to a reasonable person” or “gives rise to reputational harm or injury to privacy interests.” Op. 19.

ARGUMENT

I. THE PANEL’S DECISION CONFLICTS WITH THIS COURT’S PRECEDENT ON ARTICLE III’S REQUIREMENTS TO SEEK EXPUNGEMENT FOR VIOLATIONS OF THE CONSTITUTION.

A. **This Court has repeatedly held that retention alone of unconstitutionally obtained records causes an ongoing harm that confers standing to expunge them.**

Sanchez foreclosed the Panel’s decision that Plaintiffs must allege some additional injury beyond retention to establish standing to seek expungement. There, this Court ruled that a shared scooter rider had standing to seek an injunction—including expungement—to end collection of anonymous vehicle location data by the City of Los Angeles allegedly in violation of the Constitution, even when that data did not name him or contain any identifying or private information. Because “[t]he harm [he] alleged is one ‘specified by the Constitution itself,’” he had standing to pursue his Fourth Amendment claim. 39 F.4th at 554 (quoting *TransUnion*, 141 S. Ct. at 2204). This Court plainly stated that “the collection of the [vehicle] location data itself—without more—violates his constitutional rights today.” *Id.*

The Panel decision reached precisely the opposite conclusion. It held that “[u]nder Supreme Court precedent, the retention of records alone does not constitute a concrete injury” Op. 11; *see also* Op. 13 (“Where we have held that the retention of illegally obtained records resulted in a concrete injury, we have always identified something beyond retention alone that resulted in an injury

of the sort recognized by the Supreme Court”). That conclusion directly conflicts with the holding of *Sanchez* and a line of precedent predating *TransUnion* establishing that ongoing retention of records collected in violation of the Constitution suffices to confer standing to seek their destruction.

Before *Sanchez*, this Court applied the same rule in *Fazaga*. *Fazaga* concerned an allegedly unconstitutional law enforcement investigation that captured “hundreds of phone numbers; thousands of email addresses; background information on hundreds of individuals,” and audio and video surveillance. 965 F.3d at 1027. In addressing the *Fazaga* plaintiffs’ expungement request, this Court issued two holdings. First, it recognized “federal courts can order expungement of records, criminal and otherwise, to vindicate constitutional rights.” *Id.* at 1053. Second, it rejected the government’s contention that the plaintiffs failed to advance a “plausible claim of an ongoing constitutional violation” because the “mere retention of the records does not violate the Constitution.” Gov’t Opp’n Br. 29–30, *Fazaga*, No. 13-55017 (9th Cir. June 25, 2015), ECF 73; *Fazaga*, 965 F.3d at 1054 (quoting government brief). Relying on its standing discussion in *Norman-Bloodsaw*, this Court held that the plaintiffs *themselves* could seek expungement because records “obtained and retained in violation of the Constitution” worked an “ongoing constitutional violation.” *Fazaga*, 965 F.3d at 1054–55.

The Panel’s decision conflicts with this second holding. The Panel erroneously stated that “*Fazaga* did not address whether the plaintiffs had standing” to seek expungement relief, Op. 15, perhaps because *Fazaga* did not use the word “standing.” But if *Fazaga*’s discussion was not about standing, what was it about? The Panel does not explain why *Fazaga* relied solely on cases about Article III standing and mootness to reject precisely the same argument that the Panel adopted. *Fazaga*, 965 F.3d at 1054–55 (quoting *Norman-Bloodsaw*, 135 F.3d at 1275, and citing *Wilson v. Webster*, 467 F.2d 1282, 1283–84 (9th Cir. 1972)).² The Panel offers no other explanation for what *Fazaga* analyzed when holding that the *Fazaga* plaintiffs alleged an ongoing constitutional violation, and Plaintiffs can think of none.

The Panel’s treatment of *Norman-Bloodsaw* further highlights the conflict created by its decision. In *Norman-Bloodsaw*, this Court held that the storage alone of plaintiffs’ information allegedly obtained in violation of the Constitution constituted “an ongoing ‘effect’” of the original violation that authorized plaintiffs to seek expungement. 135 F.3d at 1275 (quoting *Lindquist v. Idaho State Bd. of Corr.*, 776 F.2d 851, 854 (9th Cir. 1985)). Put differently, the retention of this

² The *Fazaga* parties’ briefs confirm that standing was at the heart of the dispute. In addition to the government’s arguments quoted above, the *Fazaga* plaintiffs cited similar standing authority as Plaintiffs did below to support their argument for the availability of expungement and their own standing to secure that remedy. See Pls.’ Br. 80, *Fazaga*, No. 13-55017 (9th Cir. Nov. 17, 2014), ECF 32-2.

information “would constitute a continuing ‘irreparable injury’” that justifies injunctive relief because the information was “obtained in an unconstitutional and discriminatory manner.” *Id.*

Yet the Panel once again disagreed, erroneously claiming that this Court limited the *Norman-Bloodsaw* ruling only to records “that involved an invasion of privacy.” Op. 14. To the contrary, the private nature of the information was relevant in *Norman-Bloodsaw* only because the plaintiffs alleged that *obtaining* the information violated their constitutional rights to privacy—even if the *storage* of the information does not “*itself* constitute a violation of law.” *Norman-Bloodsaw*, 135 F.3d at 1275; *see also Quillar v. Cal. Dep’t of Corr.*, 393 F. App’x 429, 431 (9th Cir. 2010) (relying on *Norman-Bloodsaw* to hold that ongoing retention, without more, of non-sensitive prison disciplinary records confers standing). Just as in *Fazaga* and *Sanchez*, the retention alone created the concrete injury.

This Court made the same ruling in *Mayfield v. United States*, 599 F.3d 964 (9th Cir. 2010), another case in conflict with the Panel’s decision. Just as in the rulings discussed above, “the very fact of the government’s retention of derivative FISA materials” conferred standing to destroy the records in *Mayfield* under the Constitution. *Id.* at 970 (adopting the district court’s reasoning). The Panel claimed that this Court reached this holding only because Mayfield “alleged an ongoing injury that involved an invasion of privacy, an injury identified by the Supreme

Court ass concrete.” Op. 14. But *Mayfield* gave no such justification for its ruling. While *Mayfield* quoted the trial court’s description of the records in an early footnote, its analysis did not rely on, discuss, or even mention the privacy of the information contained in those records. *See Mayfield*, 599 F.3d at 970–71; *see also Scott v. Rosenberg*, 702 F.2d 1263, 1267–68 (9th Cir. 1983) (plaintiff suffered an injury-in-fact to pursue expungement merely because the government either collected information in violation of the Constitution or because it threatened to do so).

Taking this pre- and post-*TransUnion* case law together, when Plaintiffs here alleged that the Government’s violations of their First and Fourth Amendment rights cause them persistent harm, and pointed to records that indisputably exist, they demonstrated harms that the Constitution itself recognizes as a concrete injury. The Panel decision holding otherwise is in irreconcilable tension with this Court’s precedent.

B. The Panel’s conflicting decision is based on an erroneous application of the Supreme Court’s decision in *TransUnion*.

The source of the conflict created by the Panel is its erroneous application of the *statutory* standing framework set out in *TransUnion* and *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016) to *constitutional* violations. In addressing what type of harm beyond retention alone satisfies standing, the Panel held that “plaintiffs must assert that such retention gives rise to a tangible harm or material risk of future tangible

harm, or bears ‘a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts,’ like ‘reputational harms, disclosure of private information, and intrusion upon seclusion’ or those ‘specified by the Constitution itself.’” Op. 11 (quoting *TransUnion*, 141 S. Ct. at 2204). But rather than following *Sanchez*’s application of *TransUnion* to hold that retention alone causes harm “specified by the Constitution itself,” *Sanchez*, 39 F.4th at 554, the Panel required some other “injury that had a ‘historical or common-law analog,’” Op. 13. Contrary to *Sanchez* and its predecessors, the Panel incorrectly assumed this requirement “does not change if the information at issue was collected in violation of a plaintiff’s constitutional rights rather than a statutory violation as in *TransUnion*.” Op. 13.

This application of the *TransUnion* common-law injury analysis to constitutional claims also creates a conflict with every other circuit to consider the question. *See Green-Cooper v. Brinker Int’l, Inc.*, 73 F.4th 883, 890 n. 9 (11th Cir. 2023) (recognizing the “common-law analogue analysis” in *TransUnion* as “*sui generis* to legislature-made statutory violations because the Supreme Court has not applied it to any other kind of intangible harm”); *O’Leary v. TrustedID, Inc.*, 60 F.4th 240, 243 & n.1 (4th Cir. 2023) (“The intangible harm of enduring a statutory violation, standing alone, typically won’t suffice under Article III—unless there’s separate harm (or a materially increased risk of another harm) associated with the

violation,” and noting that “*TransUnion, Spokeo*, and the other key standing cases dealt with federal statutes”); *Helbachs Cafe LLC v. City of Madison*, 46 F.4th 525, 529 (7th Cir. 2022) (*TransUnion* “made clear that when asserting a *statutory* violation, a concrete injury must be more than the bare claim that a violation occurred,” but the “Court has not addressed whether, if the asserted violation is the act of retaliation, that act alone would be sufficiently concrete injury-in-fact”) (emphasis added)); *Perez v. McCreary, Veselka, Bragg & Allen, P.C.*, 45 F.4th 816, 822 (5th Cir. 2022) (applying *TransUnion* and noting that constitutional harms “plainly” have the necessary “close relationship” to traditional harms, and applying its common-law analysis for statutory causes of action); *see also Garey v. James S. Farrin, P.C.*, 35 F.4th 917, 921 (4th Cir. 2022); *Maddox v. Bank of New York Mellon Tr. Co., N.A.*, 19 F.4th 58, 64 & n.2 (2d Cir. 2021); *Associated Builders & Contractors W. Penn. v. Cmty. Coll. of Allegheny Cnty.*, No. 22-2030, 2023 WL 5539276, at *4–5 (3d Cir. Aug. 29, 2023); *Ward v. Nat’l Patient Acct. Servs. Sols., Inc.*, 9 F.4th 357, 361 (6th Cir. 2021); *Baysal v. Midvale Indem. Co.*, 78 F.4th 976, 979 (7th Cir. 2023).

Until the Panel’s decision, “no one dispute[d] that the violation of a person’s constitutional rights also is an injury sufficient for standing.” Erwin Chemerinsky, *What’s Standing After Transunion LLC v. Ramirez*, 96 NYU L. Rev. Online 269, 273 (2021) (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123,

152 (1951) (Frankfurter, J., concurring) (“A litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts. Or standing may be based on an interest created by the Constitution or a statute.”) (internal citation omitted)). The Panel’s conclusion otherwise is therefore not only inconsistent with this Court’s precedent, but is an outlier among the Courts of Appeals nationally.

C. The panel’s refusal to consider expungement a form of retrospective relief conflicts with this Court’s precedent.

The Panel opinion’s denial of standing conflicts not only with Circuit precedent treating expungement as a form of prospective relief, but also with related precedent treating expungement as a retrospective injunctive remedy. *See Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001); *Bell v. City of Boise*, 709 F.3d 890 (9th Cir. 2013).

This Court has sometimes held that expungement operates as retrospective relief when asserted to remedy past violations of law. *See Gomez*, 255 F.3d at 1130 (holding that expungement was “retrospective relief” because it was intended to “remedy[] the prison’s [past] retaliatory acts”); *Bell*, 709 F.3d at 895–97 (considering expungement of criminal records as retrospective relief in case challenging past citations); *Elsharkawi v. United States*, 830 Fed. App’x 509 (9th Cir. 2020) (characterizing request to destroy data collected during border

inspection as “retrospective [] relief”); *see also Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007) (expungement is also prospective, and “cannot be characterized solely as retroactive injunctive relief”). If expungement is retrospective in nature, then no ongoing injury is required to seek relief for *past* harm. *Bank of Lake Tahoe v. Bank of Am.*, 318 F.3d 914, 918 n.4 (9th Cir. 2003).

Ultimately, whichever way this Court understands expungement under the Constitution, the result has always been that a plaintiff seeking destruction of records allegedly obtained in violation of the Constitution has standing to seek their destruction—until this case.

II. THE PANEL’S IMPOSITION OF A PRIVACY REQUIREMENT FOR CONSTITUTIONAL VIOLATIONS ALSO CONFLICTS WITH THIS COURT’S PRECEDENT.

After announcing that Article III requires a plaintiff to allege some independent injury beyond retention of unconstitutionally obtained records, the Panel imported a privacy requirement into the concreteness analysis for constitutional claims that also conflicts directly with *Sanchez*, *Fazaga*, *Mayfield*, and *Norman-Bloodsaw*.

Under the Panel decision, a plaintiff can show a concrete injury if the records they seek to expunge “would be highly offensive to a reasonable person . . . or otherwise give[] rise to reputational harm or injury to privacy interests.” Op. 19. But this Court has demanded no such privacy infringements to

expunge records allegedly created in violation of the Constitution. To the contrary, *Sanchez* held that retaining non-sensitive, non-identifying vehicle location data causes a concrete injury, even though the Court ultimately decided that the plaintiff had no expectation of privacy in the anonymous data. *Sanchez*, 39 F.4th at 554–61. *Sanchez* foreclosed the result the Panel reached here, which “confuses the jurisdictional inquiry . . . with the merits inquiry.” *Id.* at 554 (quoting *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000)).

Nor can the Panel’s privacy requirement be reconciled with the decision in *Fazaga*. The records at issue in *Fazaga* included “background information” that this Panel would certainly not consider private, like pamphlets distributed by charities, public announcements made by mosques, and license plate numbers of cars parked in mosque parking lots. *Fazaga*, 965 F.3d at 1027; First Am. Compl. 211–12, 219–19, *Fazaga*, No. 13-55017 (9th Cir. Sep. 13, 2011), ECF 33-2. Under the Panel’s decision here, none of those would be amenable to expungement. But this Court held otherwise in *Fazaga*.

Finally, as explained above, *Mayfield* found that retention alone conferred standing, without addressing the privacy of information in the challenged records at all. *Mayfield*, 599 F.3d at 970–71. And *Norman-Bloodsaw*’s same conclusion did not depend on the records’ privacy. The Panel’s suggestion to the contrary is flatly inconsistent with both cases.

III. THE PANEL’S TREATMENT OF FIRST AMENDMENT-PROTECTED INFORMATION FURTHER CONFLICTS WITH THIS COURT’S PRECEDENT.

Even if the privacy of the challenged records is otherwise relevant to Article III’s standard for constitutional violations, the Panel’s appraisal of the sensitivity of the records conflicts with this Court’s recognition of the special nature of the First Amendment-protected activities at issue here.

The Panel decided that information about Plaintiffs’ protected activities is not “so sensitive that another’s access to that information would be highly offensive to a reasonable person, or otherwise gives rise to reputational harm or injury to privacy interests.” Op. 19 (cleaned up). But in addition to more routine information, the Government also collected financial transaction information, social security numbers, and highly personal information that goes to the core of the First Amendment’s protections, like Plaintiffs’ associations with other organizations and individuals, their personal political views, and their domestic political activities. By discounting the sensitivity of this information, the Panel contradicted the Supreme Court’s historical recognition of the “vital relationship between freedom to associate and privacy in one’s associations.” *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958).

When it comes to “a person’s beliefs and associations,” “[b]road and sweeping state inquiries into these protected areas . . . discourage citizens from

exercising rights protected by the Constitution.” *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (plurality opinion). This may include retaliatory government investigations, which the First Amendment prohibits regardless of the nature of the associational or expressive activity. *See Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (reiterating that to vindicate associational or expressive rights, “it is immaterial ... whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters.”) (quoting *NAACP*, 357 U.S., at 460–461) (cleaned up)); *Mendocino Env’t Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999) (retaliation occurs if a government “official’s acts would chill or silence a person of ordinary firmness from future First Amendment activities”) (internal quotation and citation omitted). The Constitution protects against their compelled disclosure, unwarranted intrusion, and unjustified retention all the same. *See, e.g., Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir. 2010) (“Compelled disclosures concerning protected First Amendment political associations have a profound chilling effect on the exercise of political rights.”); *Ctr. for Competitive Pol. v. Harris*, 784 F.3d 1307, 1313 (9th Cir. 2015) (recognizing that “compelled disclosure can also infringe First Amendment rights when the disclosure requirement is itself a form of harassment intended to chill protected expression”), *rev’d on other grounds by Americans for Prosperity Found.* And where, as here, the Government assembled the protected

information with other data about Plaintiffs, the privacy harms greatly multiply. *See C.I.A. v. Sims*, 471 U.S. 159, 178 (1985) (“[T]he very nature of the intelligence apparatus of any country is to try to find out the concerns of others; bits and pieces of data ‘may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself.’”) (quoting *Halperin v. CIA*, 629 F.2d 144, 150 (D.C. Cir. 1980)).

The harm suffered by Plaintiffs is particularly acute because Plaintiffs’ challenge “involves the First Amendment, under which a chilling effect on speech can itself be the harm.” *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1178 (9th Cir. 2022); *see also TransUnion*, 141 S. Ct. at 2204 (reiterating abridgment of free speech as an example of concrete constitutional injury). Unlike the cases cited in the Panel’s decision where the plaintiffs could not demonstrate they were specifically targeted or that the government *in fact* retained records about them, Op. 20 (citing *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 418 (2013) and *Laird v. Tatum*, 408 U.S. 1, 10–11 (1972)), no party disputes that the Government targeted Plaintiffs and retains records about their protected activities.

The Panel’s decision therefore devalues the protection the Constitution affords to these rights in favor of lesser privacy interests governed by common law. In the process, it imposes a heightened standing burden for plaintiffs bringing First Amendment challenges that finds no basis in this Court’s decisions. This

Circuit has recognized that otherwise lawful conduct may violate the First Amendment if undertaken in retaliation for exercising protected freedoms. *See, e.g., O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016); *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 869 (9th Cir. 2016). On the Panel's logic, the Constitution authorizes standing to expunge only those sufficiently sensitive records collected during retaliatory law enforcement investigations. The Government would be free to retain any other unconstitutionally obtained records with impunity, even though the Constitution indisputably authorizes such a remedy for *all* of them. *See Fazaga*, 965 F.3d at 1054; *accord* Op. 16. Rehearing is required to prevent this inversion of constitutional design.

Correcting the Panel's erroneous application of Article III's requirements to seek expungement for claims under the Constitution is also a matter of "exceptional importance." *See* Fed. R. App. P. 35(a)(2). Because of "the foundational role that Article III standing plays in our separation of powers," *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 135 (2011), cases concerning standing to review Executive branch misconduct have previously been declared of "exceptional importance" justifying en banc review. *See, e.g., Comm. on Judiciary of U.S. House of Representatives v. McGahn*, 968 F.3d 755, 760 (D.C. Cir. 2020) (en banc). *Cf. Thomas v. Anchorage Equal Rts. Com'n*, 220

F.3d 1134, 1143 (9th Cir. 2000) (en banc) (O’Scannlain, J., concurring) (noting “it is useful to refine the rules governing who can challenge what when in this circuit”). Correcting the law in this Circuit is more pressing given the necessity of oversight over government surveillance, which has proliferated with the advancement of contemporary technology. *United States v. Moalin*, 973 F.3d 977, 990 (9th Cir. 2020) (“Advances in technology since 1979 have enabled the government to collect and analyze information about its citizens on an unprecedented scale.”).

CONCLUSION

Plaintiffs respectfully request this Court grant Plaintiffs’ Petition and rehear this matter.

Date: October 2, 2023

ACLU OF SOUTHERN CALIFORNIA

s/ Mohammad Tajsar
Mohammad Tajsar
Diana Sánchez
Counsel for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), and Circuit Rule 40-1(a), I certify that the foregoing brief, APPELLANTS' PETITION FOR PANEL REHEARING OR REHEARING EN BANC, is proportionately spaced, has a typeface of 14 points or more, and contains 4,198 words.

Dated: October 2, 2023

s/ Mohammad Tajsar
Mohammad Tajsar
Counsel for Appellants

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NORA PHILLIPS; ERIKA
PINHEIRO; NATHANIEL
DENNISON,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

No. 21-55768

D.C. No.
2:19-cv-06338-
SVW-JEM

OPINION

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted February 9, 2023
Pasadena, California

Filed July 21, 2023

Before: Mary M. Schroeder, Richard C. Tallman, and
Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Ikuta;
Concurrence by Judge Schroeder

SUMMARY*

Standing

The panel affirmed the district court's summary judgment in favor of the government in an action seeking to expunge plaintiffs' records that were created by several federal agencies as part of a surveillance program.

The surveillance program gathered information on individuals that the agencies believed were associated with a migrant caravan approaching the southern border of the United States. The panel held that the retention of the allegedly illegally obtained records at issue, without more, did not give rise to a concrete injury necessary for standing, and plaintiffs had not shown that the retention gave rise to any other sort of harm that constituted a concrete injury.

The panel rejected plaintiffs' central argument that the government's retention of illegally obtained information about them was per se an injury-in-fact. Under Supreme Court precedent, the retention of records alone does not constitute a concrete injury, and plaintiffs must assert that

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

such retention gives rise to a tangible harm or material risk of future tangible harm or bears a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts.

The panel rejected plaintiffs' alternative argument that the government's retention of records allegedly obtained in violation of their First and Fourth Amendment rights constituted a concrete and ongoing injury under that framework. The evidence did not show that the government was using or will use the records to investigate plaintiffs or prevent them from crossing the border or that a third party will obtain the records and use them to plaintiffs' detriment. Plaintiffs had not shown that retention of the type of information contained in the records could give rise to a common law tort claim. Finally, plaintiffs failed to explain (or identify supporting authority) why retention of the records was an ongoing violation of their constitutional rights.

Concurring, Judge Schroeder observed that plaintiffs did not challenge any governmental conduct in obtaining the underlying information. Nor could they, because the information came from publicly available sources or existing law enforcement databases.

COUNSEL

Mohammad Tajsar (argued), ACLU Foundation of Southern California, Los Angeles, California; R. Alexander Pilmer, Kirkland and Ellis LLP, Los Angeles, California; for Plaintiffs-Appellants.

Thomas G. Pulham (argued), Michael S. Raab, and Joshua M. Salzman, Appellate Staff Attorneys, Civil Division; Lisa Olson; Stephanie S. Christensen, Acting United States Attorney; Brian M. Boynton, Principal Deputy Assistant Attorney General; United States Department of Justice; Washington, D.C.; for Defendants-Appellees.

OPINION

IKUTA, Circuit Judge:

Nora Phillips, Erika Pinheiro, and Nathaniel Dennison (collectively, plaintiffs) seek to expunge records that were created by several federal agencies as part of a surveillance program in 2018–2019, arguing that the collection and retention of these records violated their constitutional rights. The district court granted summary judgment to the government, holding that plaintiffs lacked Article III standing to seek expungement.¹ Because the retention of the allegedly illegally obtained records at issue, without more,

¹ Plaintiffs also challenge the district court’s denial of their requests for additional discovery. We affirm the district court’s denial in the memorandum disposition filed contemporaneously with this opinion. -- F. App’x-- (9th Cir. 2023).

does not give rise to a concrete injury necessary for standing, and plaintiffs have not shown that the retention gives rise to any other sort of harm that constitutes a concrete injury, we affirm.

I

The following background facts are undisputed. From 2018 through 2019, a migrant caravan comprised of tens of thousands of people approached the southern border of the United States. In response, Customs and Border Protection (CBP) organized a surveillance program, called Operation Secure Line, in coordination with Immigration and Customs Enforcement (ICE) and the Federal Bureau of Investigation (FBI), as well as with “state and local law enforcement partners, non-law enforcement governmental organizations, and Mexican law enforcement officials.”

As part of Operation Secure Line, CBP gathered information on individuals it believed were associated with the migrant caravan. CBP used both open source information available to the public, such as media reports and social media pages, as well as preexisting law enforcement databases, which were not publicly available.

In connection with its effort to provide border security officers with information about the caravan, CBP used the information it gathered to prepare a PowerPoint presentation with the names, photographs, date of birth, and citizenship status of 67 individuals. The presentation also indicated each person’s alleged role in the caravan and whether the person had been interviewed by government officials. A CBP official presented the PowerPoint document at a weekly command staff meeting in January 2019. Subsequently, an ICE agent who was not involved in the caravan response

discovered the presentation on a government computer system and leaked it to the media.

The three plaintiffs here are three of the 67 individuals named in the PowerPoint document. Each of these individuals was stopped by border officials in 2019 when attempting to cross the United States-Mexico border. There is no evidence linking their encounters to their inclusion in the PowerPoint document or other records maintained by the government. Phillips and Pinheiro are attorneys employed by *Al Otro Lado*, an organization that “provide[s] services to immigrants.” In January 2019, Phillips attempted to take a family trip to Mexico. Upon her arrival at the airport in Guadalajara, Mexico, Mexican immigration officials informed her that there was an alert on her passport. Two hours later, she was informed that Mexican immigration would not permit her to enter Mexico, and she returned to the United States the following morning. Phillips did not identify any evidence that the United States government was responsible for the alert. After this incident, Phillips stated that she did not travel to Mexico for several months for health reasons. Then in August 2019, Phillips attempted to travel to Mexico at the San Ysidro port of entry and was turned away by Mexican immigration officials due to an alert on her passport. She was permitted to enter Mexico the next day, and was approved for one-year temporary residency by the Mexican government. CBP subsequently approved her application for a SENTRI pass.² Other than

² SENTRI (Secure Electronic Network for Travelers Rapid Inspection) “allows expedited clearance for pre-approved, low-risk travelers upon arrival in the United States.” U.S. Customs and Border Protection, *Secure Electronic Network for Travelers Rapid Inspection* (Jan. 4, 2022), <https://www.cbp.gov/travel/trusted-traveler-programs/sentri>.

the January and August 2019 incidents, Phillips has never been detained, questioned, or searched while crossing the United States-Mexico border.

Erika Pinheiro's experience was similar. In January 2019, Pinheiro was stopped by Mexican border officials and denied entry to Mexico because there was an alert on her passport. Ten minutes after the encounter, she entered Mexico through the car lane without incident. In April 2019, Pinheiro was granted temporary residence status in Mexico. In February 2020, Mexican border officials "directed her to secondary inspection, where her vehicle was sent through a large scanning device," and asked her "a few questions before admitting her to [Mexico]." And in March 2020, she was granted permanent resident status in Mexico, where she currently lives. She crossed the border without incident nearly 70 times from 2018 through 2020.

The third plaintiff, Dennison, was present during an incident extending from the evening of December 31, 2018 to the morning of January 1, 2019. During that period, migrants attempted to climb over the border wall and assaulted border patrol agents by throwing rocks at them. Dennison took photographs and video footage of the incident and spoke to some of the migrants. The government suspected that Dennison had been involved in organizing or providing assistance to the migrants during this incident. Later in January, when Dennison crossed the border into the United States, he was detained for about six hours and interviewed "about his work with the migrant caravan." He was then permitted to enter the United States. From September 2019 to September 2020, Dennison crossed the United States-Mexico border over 100 times. He was stopped and questioned only once, in January 2020, when he crossed the border from the United States to Mexico, stopped

less than 50 yards from the border, asked for directions, and immediately drove back to reenter the United States. Upon Dennison's reentry, a CBP officer asked him a few questions and searched Dennison's vehicle. The whole interaction took approximately 25 minutes.

Plaintiffs filed suit against the federal agencies involved in Operation Secure Line (CBP, FBI, and ICE) and several officials in their official capacity (collectively, "the government"). The operative Second Amended Complaint (SAC) first alleged that the government violated all three plaintiffs' First Amendment rights of free speech and free association because the government "collected and maintain[s] records describing Plaintiffs' First Amendment-protected activity," namely their conduct relating to "charitably supporting migrants traveling through Mexico to seek asylum in the United States." Second, the SAC alleged that the government violated Dennison's Fourth Amendment right to be free from unreasonable searches and seizures because the government "unlawfully and without legal justification intrusively seized . . . Dennison while he attempted to cross into the United States on January 10, 2019," and, as a result, the creation and maintenance of "all records which contain information gathered about him as a result of [the] unlawful seizure and interrogation" likewise violated the Fourth Amendment. Finally the SAC alleged that the government violated all three plaintiffs' rights under the federal Privacy Act, 5 U.S.C. § 552a, a claim that is not raised in this appeal. The SAC sought an injunction ordering the government "to expunge all records unlawfully collected and maintained about [p]laintiffs, and any information

derived from that unlawfully obtained information,” as well as other injunctive and declaratory relief.³

The district court granted the government’s motion for summary judgment, on the grounds that plaintiffs lacked standing to seek prospective injunctive relief and expungement of the records with respect to both their First and Fourth Amendment claims. Plaintiffs timely appealed this holding. We have jurisdiction under 28 U.S.C. § 1291, and we review the district court’s grant of summary judgment de novo, *see Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1007 (9th Cir. 2021).

II

“[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). To do so, plaintiffs bear the burden to establish standing by showing that an injury-in-fact was caused by the challenged conduct and can be redressed by a favorable judicial decision. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

To establish an injury-in-fact, plaintiffs must establish “an invasion of a legally protected interest which is . . . concrete and particularized” and “actual or imminent,

³ Dennison also sought damages with respect to his claims under the Privacy Act for income allegedly lost from inability to travel “without fear of reprisal” and his inability to return to Mexico to collect his camera and footage. Because the Privacy Act claim is not on appeal, we do not consider his damages claim.

not ‘conjectural’ or ‘hypothetical.’” *Id.* at 560 (citation omitted). An injury is “concrete” if it “actually exist[s].” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). Tangible injuries, like physical harms or monetary losses, are concrete. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). But “[a] concrete injury need not be tangible.” *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1270 (9th Cir. 2019). As explained by the Supreme Court, an *intangible* injury may be concrete if it presents a material risk of *tangible* harm or “has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts,” like common law torts or certain constitutional violations. *Spokeo*, 578 U.S. at 340–41; *see also TransUnion*, 141 S. Ct. at 2204.

“[A] plaintiff must demonstrate standing separately for each form of relief sought.” *Friends of the Earth, Inc. v. Laidlaw Env’t Serv. (TOC), Inc.*, 528 U.S. 167, 185 (2000). A past harm may “confer standing to seek injunctive relief if the plaintiff . . . continue[s] to suffer adverse effects.” *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010). However, “a plaintiff who has standing to seek damages for a past injury . . . does not necessarily have standing to seek prospective relief.” *Id.* at 969. To the extent a plaintiff seeks relief for a possible future injury, that injury must be “certainly impending,” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (emphasis omitted) (citation omitted), or there must be a “‘substantial risk’ that the harm will occur,” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citation omitted).

III

Plaintiffs’ central argument is that the government’s retention of illegally obtained information about them is per

se an injury-in-fact.⁴ Plaintiffs first contend that the government unlawfully obtained the records. They argue that the creation of the records violated their “First Amendment right to be free of unlawful government scrutiny based on their associations and political expressions.” They also claim that at least one record was created using information collected during Dennison’s January 11, 2019 allegedly unlawful detention, which plaintiffs assert violated the Fourth Amendment.

Second, according to plaintiffs, the government’s retention of records collected in violation of plaintiffs’ constitutional rights constitutes an ongoing injury that satisfies standing. Therefore, plaintiffs contend they need not demonstrate ongoing or future risk of an additional injury attributable to the retention of the illegally obtained records. In their reply brief, however, plaintiffs argue that they have also established a likelihood of a future injury from the retention of the records.

A

Under Supreme Court precedent, the retention of records alone does not constitute a concrete injury, and plaintiffs must assert that such retention gives rise to a tangible harm or material risk of future tangible harm, or bears “a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts,” like “reputational harms, disclosure of private information, and intrusion upon seclusion” or those “specified by the Constitution itself.” *TransUnion*, 141 S. Ct. at 2204; *see also Spokeo*, 578 U.S.

⁴ Because plaintiffs claim they have standing due to the government’s retention of records alone, they do not argue that the nature of the alleged underlying constitutional violation affects our analysis.

at 340–41. In *TransUnion*, plaintiffs claimed that a credit reporting agency violated federal law by failing to follow “reasonable procedures to ensure the accuracy of [information in] their credit files,” 141 S. Ct. at 2200, and wrongly identified them “as potential terrorists, drug traffickers, or serious criminals,” *id.* at 2209. The plaintiffs attempted to certify a class that included members whose inaccurate information had been disseminated to potential creditors and members whose information had merely been retained by the credit reporting agency. *Id.* at 2200. The Supreme Court held that class members whose information had not been disseminated failed to establish Article III standing to challenge the credit reporting agency’s retention of their inaccurate credit reports.⁵ *See id.* at 2200, 2209. First, the plaintiffs did not demonstrate that the inaccurate credit information allegedly created in violation of federal law posed a tangible harm to the plaintiffs’ finances in the future. *See id.* at 2212. Specifically, they “did not demonstrate a sufficient likelihood that their individual credit information would be requested by a third-party business and provided by TransUnion” or that “TransUnion would otherwise intentionally or accidentally release their information to third parties.” *Id.* Second, the credit reporting agency’s mere retention of the plaintiffs’ inaccurate credit reports was not itself an injury that had a

⁵ Plaintiffs attempt to distinguish *TransUnion* from their case by arguing that the plaintiffs in that suit sought damages rather than expungement. But the Court explained that regardless whether plaintiffs seek retrospective relief (in the form of damages) or prospective relief (like an injunction or expungement), the injury must be concrete, and mere retention of inaccurate credit reports is not a concrete injury. 141 S. Ct. at 2210.

“historical or common-law analog” and therefore did not itself qualify as an injury-in-fact. *Id.* at 2209.

This standing analysis is applicable here. “Article III standing requires a concrete injury even in the context of a statutory violation.” *Spokeo*, 578 U.S. at 341. Thus, “deprivation of a procedural right” in violation of a statute “is insufficient to create Article III standing” “without some concrete interest that is affected by the deprivation.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). Put differently, “for Article III purposes, it is not enough for a plaintiff to allege that a defendant has violated a right created by a statute; we must still ascertain whether the plaintiff suffered a concrete injury-in-fact due to the violation.” *Patel*, 932 F.3d at 1270. This analysis does not change if the information at issue was collected in violation of a plaintiff’s constitutional rights rather than a statutory violation as in *TransUnion*. Unless the retention of unlawfully obtained or created information amounts to the type of concrete injury recognized by the Supreme Court, it is insufficient to establish standing. *See infra* Section III.B.

In arguing against this conclusion, plaintiffs assert that we have previously held that the retention of illegally obtained records, without more, constitutes a concrete injury, citing *Norman-Bloodsaw v. Lawrence Berkely Laboratory*, 135 F.3d 1260, 1274–75 (9th Cir. 1998), *Mayfield*, 599 F.3d at 969–72, and *Fazaga v. FBI*, 965 F.3d 1015, 1027, 1030, 1054–55 (9th Cir. 2020), *rev’d and remanded on other grounds*, 142 S. Ct. 1051 (2022). This contention does not withstand scrutiny. Where we have held that the retention of illegally obtained records resulted in a concrete injury, we have always identified something beyond retention alone that resulted in an injury of the sort recognized by the Supreme Court, such as a material risk of

future tangible harm, a violation of the common law right to privacy, or a cognizable constitutional violation. See *Spokeo*, 578 U.S. at 340–41; *TransUnion*, 141 S. Ct. at 2204.

In *Norman-Bloodsaw* and *Mayfield*, the plaintiffs alleged an ongoing injury that involved an invasion of privacy, an injury identified by the Supreme Court as concrete. See *Spokeo*, 578 U.S. at 341. In *Norman-Bloodsaw*, plaintiffs alleged that their employer, a public university laboratory, took their blood and urine to test for conditions such as syphilis, sickle cell anemia, and pregnancy, without their knowledge or consent, in violation of Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and their constitutional right to privacy. 135 F.3d at 1264–65. The university laboratory’s retention of this “undisputedly intimate medical information,” *id.* at 1275, implicated information in which the plaintiffs enjoyed “the highest expectations of privacy,” *id.* at 1270. Under these circumstances, we held that the plaintiffs suffered “a continuing ‘irreparable injury’ for purposes of equitable relief.” *Id.* at 1275. In *Mayfield*, the government unlawfully searched and seized documents from the plaintiff’s home, including confidential client files, bank records, and “summaries of confidential conversations between husband and wife, parents and children.” 599 F.3d at 969 n.6. The plaintiff argued that “the retention by government agencies of materials derived from the seizures in his home and office constitute[d] an ongoing violation of [the plaintiff’s] constitutional right to privacy.” *Id.* at 970. We agreed that the plaintiff “suffer[ed] a present, on-going injury due to the government’s continued retention of derivative material from [this] seizure.” *Id.* at 971 (citation omitted).

Norman-Bloodsaw and *Mayfield* are consistent with many other cases in which we held that the plaintiffs had

standing to challenge the retention of illegally obtained records because the retention amounted to an invasion of their privacy interests. In *Campbell v. Facebook, Inc.*, we held that parties had standing to sue a social media company that captured, read, and used information in their private messages in violation of various state and federal statutes, because there was “a straightforward analogue between” the protections codified in those statutes against viewing or using private communications and the common law privacy tort of “unreasonable intrusion upon the seclusion of another.” 951 F.3d 1106, 1112, 1117–18 (9th Cir. 2020). Therefore, a violation of those statutes gave rise to a concrete injury. *Id.*; see also *Nayab v. Cap. One Bank (USA), N.A.*, 942 F.3d 480, 491–92 (9th Cir. 2019) (holding that “[w]hen a third party obtains [a] consumer’s credit report in violation of 15 U.S.C. § 1681b(f),” the consumer suffers a concrete injury because the violation is analogous to a “harm that has traditionally been regarded as providing a basis for a lawsuit: intrusion upon seclusion (one form of the tort of invasion of privacy)”); *Patel*, 932 F.3d at 1268, 1273 (holding that a violation of a state law prohibiting the collection, use, and storage of a person’s biometric identifiers from photographs constituted a concrete injury because it was analogous to violations of the right to privacy “actionable at common law”). In none of these cases did we hold that the plaintiffs had standing due to the retention of records alone.

Plaintiffs’ reliance on *Fazaga* is also misplaced. *Fazaga* did not address whether the plaintiffs had standing. In that case, the government collected and retained documents that included the contents of surreptitiously recorded conversations held in prayer halls of mosques, an Imam’s chambers, and “other parts of the mosque not open to the public” as well as the inside of individuals’ homes, in

violation of multiple constitutional and statutory provisions. 965 F.3d at 1027, 1030, 1054–55. *Fazaga* held that federal courts could order expungement of records to vindicate constitutional rights, and therefore the injunctive remedy of expungement was available to vindicate the plaintiffs’ Fourth Amendment rights in that case. *Id.* at 1055 & n.36. But *Fazaga* did not address the question whether the retention of records collected in violation of the plaintiffs’ constitutional rights in that case gave the plaintiffs standing.⁶

By contrast, when considering a plaintiff’s standing to challenge the retention of records collected in violation of constitutional rights, we have carefully identified a concrete and ongoing injury. In *Scott v. Rosenberg*, for instance, a plaintiff claimed that the government’s request for a record of the plaintiff’s donations to his church violated his free exercise rights under the First Amendment. 702 F.2d 1263, 1267–68 (9th Cir. 1983). We held that the government’s request constituted an injury-in-fact because an undisputed tenet of the plaintiff’s faith was that his giving had to be secret in order to be efficacious. *Id.* We explained that if the government had “already procured the requested records, the alleged injury may be actual,” and if the government had “not yet received the documents, but continue[d] to threaten

⁶ *MacPherson v. IRS*, another decision relied on by plaintiffs, is not on point because it did not discuss standing, 803 F.2d 479, 484 (9th Cir. 1986), but rather addressed whether the collection of certain records violated the Privacy Act, 5 U.S.C. § 552a(e)(7), which precludes an agency that maintains a system of records from maintaining records “describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity,” *MacPherson*, 803 F.2d at 480–81 (citing § 552a(e)(7)).

the church with a loss of its license for failure to produce them, the alleged injury [was] at least threatened.” *Id.* In light of the burden placed by the government on the plaintiff’s sincerely held religious belief, the plaintiff “properly allege[d] injury from disclosure of his donations.” *Id.* “Therefore, the injury aspect of Article III standing [was] met.” *Id.*

In sum, there is no support for plaintiffs’ claim that the government’s unlawful collection and retention of records alone gives rise to a concrete injury for purposes of standing. In every case where we (or the Supreme Court) held that the plaintiffs had standing, the collection or retention caused a concrete harm of the sort the Supreme Court has recognized.

B

In light of this conclusion, we turn to plaintiffs’ alternative argument that the government’s retention of the records allegedly obtained in violation of their First and Fourth Amendment rights constitutes a concrete and ongoing injury under the framework discussed above.

First, plaintiffs argue that the government’s retention of the records constitutes a concrete, ongoing injury because it “subject[s] them to an unnecessary risk of future detention and unwarranted government scrutiny.” We disagree. The evidence in this case does not show that the government is using or will use the records in the future to investigate plaintiffs or prevent them from crossing the border or that a third party will obtain the records and use them to plaintiffs’ detriment.

Acknowledging the lack of support in the record, plaintiffs argue that they need not predict how the records maintained by the government are likely to injure plaintiffs

in the future. Rather, relying on *Flint v. Dennison*, 488 F.3d 816, 823–24 (9th Cir. 2007), they contend, it is enough if the records “may” have some effect in the future. This argument is contrary to Supreme Court precedent, which requires a plaintiff to show that a “risk of harm is sufficiently imminent and substantial.” *TransUnion*, 141 S. Ct. at 2210.

Nor does *Flint* support plaintiffs’ claim. *Flint* addressed whether a student’s suit against a state university for violation of his First Amendment free speech rights was moot after the student graduated. 488 F.3d at 823. We held that the case was not moot because the student was seeking both declaratory relief and injunctive relief to remove disciplinary records from his file. *Id.* at 824. Because the student’s record contained evidence of disciplinary sanctions, which “may jeopardize the student’s future employment or college career,” we concluded that we retained the ability to “grant relief in a legally significant way,” by ordering their expungement, and therefore the case was not moot. *Id.*

Flint is not on point here. First, *Flint* acknowledged that we apply different standards to a mootness inquiry than we do to a standing inquiry, because “mootness, unlike standing, is a flexible justiciability doctrine.” *Id.* Therefore, *Flint* did not consider whether the retention of disciplinary records constituted a concrete harm or an ongoing injury or gave rise to an imminent risk of injury. Even had we considered that issue, we may well have determined that the retention of the disciplinary records at issue in *Flint* is analogous to a “reputational harm[,]” which has been “traditionally recognized as providing a basis for lawsuits in American courts,” and therefore constituted a concrete and ongoing injury as discussed above. *TransUnion*, 141 S. Ct. at 2204; see also *Kennedy v. Warren*, 66 F.4th 1199, 1206

(9th Cir. 2023) (“Reputational harm stemming from an unretracted government action is a sufficiently concrete injury for standing purposes.”).

Next, plaintiffs do not show that the type of information contained in the records—names, birthdays, social security numbers, occupations, addresses, social media profiles, and political views and associations—is so sensitive that another’s access to that information “would be highly offensive to a reasonable person,” Restatement (Second) of Torts § 652B, or otherwise gives rise to reputational harm or injury to privacy interests. A person’s “name, address, date and place of birth, place of employment, . . . and social security number” are not “generally considered ‘private.’” *Russell v. Gregoire*, 124 F.3d 1079, 1082, 1094 (9th Cir. 1997) (citation omitted). This identifying information is also a far cry from the types of information that we have held are so sensitive that another’s retention of the information is analogous to tortious conduct. *See Nayab*, 942 F.3d at 487–88, 492 (holding that obtaining another’s consumer credit report is analogous to intrusion upon seclusion because “a credit report can contain highly personal information” including “information ‘bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living’” (citation omitted)); *Patel*, 932 F.3d at 1273 (explaining that scanning a person’s face to create a face template that can be used to identify that individual in other images, “determine when the individual was present at a specific location,” and “used to unlock the face recognition lock on that individual’s cell phone” “invades an individual’s private affairs”). Indeed, the record shows that many of the records were created with “open source information available to the public,” like media reports and

social media pages, as well as information already collected and retained in other law enforcement databases (which plaintiffs do not challenge).

Finally, plaintiffs do not explain (or identify supporting authority) why retention of the records here is an ongoing violation of their constitutional rights. *See Scott*, 702 F.2d at 1268; *see also TransUnion*, 141 S. Ct. at 2204 (noting that concrete harms include those “specified by the Constitution itself”). To the extent that plaintiffs argue that the government’s retention of the records will chill their First Amendment rights of free speech and free association, “[a]llegations of a subjective ‘chill’ are not an adequate substitution for a claim of specific present objective harm or a threat of specific future harm.” *Clapper*, 568 U.S. at 418 (citation omitted); *see also Laird v. Tatum*, 408 U.S. 1, 10–11 (1972). Thus, plaintiffs fail to show a “risk of real harm” from the government’s retention of the records. *Spokeo*, 578 U.S. at 341.

Because plaintiffs fail to establish that the government’s retention of the records constitutes a concrete harm, we hold that they lack standing to seek expungement of the records.

AFFIRMED.

SCHROEDER, Circuit Judge, concurring:

Appellants contend in this appeal that the government's retention of records concerning their border crossings may cause them harm in the future and they seek expungement of the records. They do not challenge any governmental conduct in obtaining the underlying information. Nor could they, because the information came from publicly available sources or existing law enforcement databases.

This case is thus unlike *Fazaga v. Federal Bureau of Investigation*, 965 F.3d 1015, 1054 (9th Cir. 2020), where the Plaintiffs claimed the government obtained the information by means of warrantless surveillance that violated Plaintiffs' constitutional rights, and where standing was not even questioned. Nor is there anything of a medical or other sensitive, personal nature about the information that would make this case resemble the situation in *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260 (9th Cir. 1998).

As the district court correctly recognized, there is no ongoing injury here, or any likelihood of future injury attributable to the government's conduct. With these observations, I join the majority opinion.



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