UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

JESSE DREWNIAK and SEBASTIAN FUENTES Plaintiffs, v. U.S. CUSTOMS AND BORDER PROTECTION, et al., Defendants.	)	No. 1:20-cv-852-LM

PLAINTIFFS' SURREPLY IN SUPPORT OF THEIR OBJECTION TO THE OFFICIAL DEFENDANTS' SECOND MOTION TO DISMISS (DN 73)

One judge has described the government's approach to many civil rights cases as follows: "So no damages for past injury, due to immunity—and no injunction to stop future injury, due to mootness. Heads I win, tails you lose." *Tucker v. Gaddis*, 40 F.4th 289, 293 (5th Cir. 2022) (Ho, J., concurring). As a result, the government often seeks to "avoid being held accountable in the courts." *Id.* Defendants embrace this practice here. Having secured the dismissal of Plaintiff Drewniak's Fourth Amendment *Bivens* claim, the Official Defendants now seek dismissal of Plaintiffs' Fourth Amendment injunctive claim because they assert that "no such [checkpoint] 'policy' now operates." *See* Reply at p. 1. But at this threshold stage, that mere assertion cannot defeat Plaintiffs' well-pleaded claims. Here, the Amended Complaint meets the lenient standard of "establishing sufficient factual matter to plausibly demonstrate . . . standing to bring the action." *See Hochendoner v. Genzyme Corp*., 823 F.3d 724, 731 (1st Cir. 2016). Defendants' arguments fail for the same reasons they previously failed. This second Motion to Dismiss should be denied.

I. Defendants' Standing Arguments Fail (Defs.' Reply, Section A, pp. 5-19).

Little has materially changed since this Court's April 8, 2021 order. As the First Circuit has held, Mr. Drewniak's standing is based on the allegations in his August 11, 2020 Complaint that existed at the commencement of this case.[1] It is hardly a surprise that, as multi-year litigation proceeds, life circumstances can sometimes change for civil rights plaintiffs. But even if this Court believes that Mr. Drewniak no longer has standing, Sebastian Fuentes surely does given that he lives one town away from Woodstock. His standing allegations—both in his December 7, 2021 Amended Complaint and his June 22, 2022 declaration—are even stronger than the standing allegations that Mr. Drewniak presented in his original August 11, 2020 Complaint and that this

[1] *See Becker v. FEC*, 230 F.3d 381, 386 n.3 (1st Cir. 2000) ("[W]hile it is true that a plaintiff must have a personal interest at stake throughout the litigation of a case, such interest is to be assessed under the rubric of standing at the commencement of the case, *and under the rubric of mootness thereafter*.") (emphasis added).

Court previously concluded were sufficient at the pleading stage. *See Drewniak v. U.S. Customs & Border Prot.*, 554 F. Supp. 3d 348, 363 (D.N.H. 2021). As Mr. Fuentes has testified, "I continue to pass this checkpoint area about two times per week, especially when I travel back to my home in Thornton after picking up my daughter from school." *See* Fuentes Decl. ¶ 4 (DN 86-2). And Mr. Fuentes "will continue to document these checkpoints and record Border Patrol activity" when they occur. *Id.* ¶ 5. Thus, when a checkpoint happens, Mr. Fuentes "faces a realistic risk of future exposure to the challenged policy,"[2] and there is a "'substantial risk' that the harm will occur."[3]

Juxtaposed against Plaintiffs' frequency of travel is Defendants' reliance under Rule 12(b)(1) on declarations that refuse to disavow their ability to conduct checkpoints at any time without notice. While Defendants state that they have "no planned checkpoints" in New Hampshire for the fiscal year 2022 (which ended on Sept. 30, 2022), *see* Garcia Decl. ¶ 32, they declare that "[t]he location and operation of any future immigration checkpoint within the Swanton Sector is subject to change based on a variety of factors …." *See id.* ¶ 34. Defendants' Reply acknowledges their refusal to issue an "unambiguous disclaimer." Reply at p. 11-12. And Defendants' Motion to Compel objection resists disclosure of some operations order information because these orders "are heavily relied upon, and instructive, *for future operations*." *See* DN 104, at p. 6 (emphasis added); DN 104-1, ¶ 31. Defendants cannot have their cake and eat it too. They cannot claim that this case should be dismissed because no checkpoints are currently planned while they simultaneously preserve their right to conduct them at any time in the future. If Defendants

[2] *See Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997); *see also Mangual v. Rotger-Sabat*, 317 F.3d 45, 59 (1st Cir. 2003) (quoting *Berner* and stating a "realistic risk of future exposure to [a] challenged policy . . . is sufficient to satisfy" standing); *R.I. Ass'n of Realtors v. Whitehouse*, 199 F.3d 26, 30 (1st Cir. 1999) (citing same standard); *Alasaad v. Nielsen*, No. 17-cv-11730-DJC, 2018 U.S. Dist. LEXIS 78783, at *34 (D. Mass. May 9, 2018) (same); *Davis v. Grimes*, 9 F. Supp. 3d 12, 23 (D. Mass. 2014) (same).

[3] *See Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017) (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013), and noting that it need not be "literally certain that the harms they identify will come about").

are truly not going to conduct these checkpoints for a fixed period (and seek dismissal based on this representation), then they can say so definitively under oath. But they will not. Thus, this case should proceed, as this Court earlier concluded.[4]

If there is any further doubt, it is resolved by the existence of the operations orders. As alleged, Defendants have specifically ordered the challenged checkpoints in New Hampshire and, in doing so, have established a policy of seizing thousands of individuals without probable cause or a warrant. *See* Am. Compl. ¶ 40. Defendants admit that this policy was implemented in the form of operations orders. *See also* Garcia Decl. ¶ 19. This too establishes standing at this early stage.[5] Again, with much of the operations orders' contents being recycled, nothing prevents CBP from setting up a checkpoint tomorrow, even after the Circuit Court's May 1, 2018 decision. *Compare* DN 86-3 (1494-95) with DN 86-4 (1446-47).

Though Defendants' original motion and reply reference Rule 12(b)(6), Defendants clarify that they are bringing an accuracy/factual standing challenge, which allows for the proffering of extrinsic evidence. Reply at p. 5. They then claim that "Plaintiffs have not controverted the [Defendants'] declarations." *Id.* at p. 9. But, as noted above, Defendants' declarations actually support standing. And it cannot be said that Defendants' declarations are undisputed where Plaintiffs have not yet had the opportunity to fully vet them in discovery. Given the pending motion to dismiss, discovery is still in its infancy while the parties await a decision. Depositions have not yet commenced, nor have Plaintiffs received complete copies of all the records upon which Defendants rely to justify their standing arguments and defend their checkpoint practices.

[4] *See Drewniak*, 554 F. Supp. 3d at 365 ("He does not state that the agency has abandoned the use of checkpoints as an enforcement tool."); *see also Davis v. Grimes*, 9 F. Supp. 3d 12, 23 (D. Mass. 2014) ("While defendants have not threatened to penalize plaintiffs, they also have not unequivocally stated that they will not enforce the licensing restrictions.").

[5] *See Drewniak*, 554 F. Supp. 3d at 365 ("The official approval of CBP and Garcia's 'operational plan' to conduct traffic checkpoints in New Hampshire further supports Drewniak's theory of standing.").

Defendants are even resisting discovery of portions of the very operations orders that they are relying on in their Motion to Dismiss despite the existence of an agreed-upon protective order. *See* DN 93 (Plaintiffs' Motion to Compel). This Court should not rely on Defendants' declarations to dismiss this case where Defendants are resisting discovery relevant to these declarations' claims. Here, jurisdictional discovery can be conducted in conjunction with discovery on the merits, and any jurisdictional challenge can be resolved at summary judgment.[6]

II. The Remaining Arguments Likewise Fail (Defs.' Reply, Sections B-E, pp. 19-32).

As to the remaining arguments, this Court can—and should—quickly dispose of them. *First*, third-party standing is not at issue in this case. *See* Defs.' Reply, Section B, pp. 19-24. The Amended Complaint relies solely on the standing of Mr. Fuentes and Mr. Drewniak, and it is therefore their experience that matters for satisfying the "familiar triad" of "injury, causation, and redressability." *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012). They satisfy that test. Mr. Fuentes and Mr. Drewniak plausibly allege that they personally suffered concrete Fourth Amendment injuries in the form of warrantless seizures and are likely to suffer those concrete harms again. The cause of that injury is Defendants' policy and practice—a policy and practice demonstrated by the numerous experiences of other motorists, but one that injured Plaintiffs personally.[7] Dissolution of that policy will redress Plaintiffs' concrete injuries.

Second, Defendants' novel version of "constitutional avoidance" has no basis in law. *See* Defs.' Reply, Section C, pp. 24-28. Nothing requires this Court to rewrite Plaintiffs' well-pleaded Fourth Amendment claim as an APA challenge simply because—in Defendants' own view of the

[6] *See Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363-64 (1st Cir. 2001) ("[T]he court enjoys broad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings in order to determine its own jurisdiction.").
[7] *See FEC v. Akins*, 524 U.S. 11, 24 (1998) ("Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact.'"; finding standing where a voter suffered the same alleged harm as all other voters).

law—Mr. Fuentes and Mr. Drewniak *could have* pleaded an additional, statutory cause of action. Every instance of the so-called "rule" identified by Defendants—including "the First Circuit's recent application of the constitutional avoidance canon in *M & N*," *see* Reply at p. 25—presented standard scenarios where the plaintiff chose to plead both statutory and constitutional claims, and the Court opted to rely on the former.[8] Here, Plaintiffs allege violations of their Fourth Amendment rights alone. They are entitled to invoke the Constitution for relief.

Finally, nothing requires this Court to dismiss the Amended Complaint merely because Defendants object to the scope of the relief requested. *See* Defs.' Reply, Sections D and E, pp. 28-32. Defendants argue that the injunction sought might turn out to be overbroad. But that is not—as Defendants contend—an Article III standing problem; all "[t]he redressability element of constitutional standing requires [is] that the plaintiff show 'that a favorable resolution of [the] claim would likely redress the professed injury.'"[9] The injunction sought would do just that.

To be sure, the ultimate scope of any relief will depend on the full factual record. But that is no reason to dismiss the Amended Complaint at this threshold stage. At present, Mr. Drewniak and Mr. Fuentes need only show their entitlement to declaratory and injunctive relief "with the manner and degree of evidence required" at this "stage[] of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Since they have plausibly alleged their entitlement to declaratory and injunctive measures that would remedy a concrete injury, they have carried that burden. Defendants remain free to reassert their objections over the details of any relief at a proper—and later—phase of proceedings.

---

[8] *See Marasco & Nesselbush, LLP v. Collins*, 6 F.4th 150, 164 (1st Cir. 2021) (identifying the specific counts in that complaint pleading "APA claims" versus "constitutional claims").

[9] *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 995 F.3d 18, 22 (1st Cir. 2021), cert. denied sub nom. *Hermandad de Empleados del Fondo del Seguro del Estado v. United States*, 142 S. Ct. 1112 (2022) (quoting *Katz*, 672 F.3d at 72).

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Deny the Official Defendants' second March 22, 2022 Motion to Dismiss (ECF No. 73); and

B. Grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

JESSE DREWNIAK AND SEBASTIAN FUENTES,

By and through their attorneys affiliated with the American Civil Liberties Union of New Hampshire Foundation, the American Civil Liberties Union of Maine Foundation, and the ACLU Foundation of Vermont,

/s/ Gilles Bissonnette
Gilles R. Bissonnette (N.H. Bar. No. 265393)
SangYeob Kim (N.H. Bar No. 266657)
Henry R. Klementowicz (N.H. Bar No. 21177)
American Civil Liberties Union of New Hampshire
18 Low Avenue
Concord, NH 03301
Tel. 603.224.5591
gilles@aclu-nh.org
sangyeob@aclu-nh.org
henry@aclu-nh.org

Carol Garvan (N.H. Bar No. 21304)
Zachary L. Heiden*
American Civil Liberties Union of Maine Foundation
P.O. Box 7860
Portland, Maine 04112
Tel. 207.619-8687
cgarvan@aclumaine.org
heiden@aclumaine.org

Lia Ernst*
Harrison Stark*
ACLU Foundation of Vermont
90 Main Street
Montpelier, VT 05602
Tel. 802.223.6304
lernst@acluvt.org
hstark@acluvt.org

Scott H. Harris (N.H. Bar No. 6840)
Steven Dutton (N.H. Bar No. 17101)
Jeremy Walker (N.H. Bar No. 12170)
McLane Middleton
900 Elm Street
Manchester, NH 03101
Tel. 603.628-1459
Scott.harris@mclane.com
Steven.Dutton@mclane.com
Jeremy.Walker@mclane.com

Albert E. Scherr (N.H. Bar No. 2268)
Professor of Law
University of New Hampshire School of Law
2 White Street
Concord, NH 03301
Tel. 603.513.5144
Albert.Scherr@law.unh.edu

Mark Sisti (N.H. Bar No. 2357)
Sisti Law Offices
387 Dover Road
Chichester, NH 03258
Tel. 603.224.4220
msisti@sistilawoffices.com

* Admitted *pro hoc vice*

Date: November 1, 2022