UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

JESSE DREWNIAK, Plaintiff, v. U.S. CUSTOMS AND BORDER PROTECTION, U.S. BORDER PATROL, MARK A. QUALTER, U.S. Border Patrol Agent, and ROBERT N. GARCIA, Chief Patrol Agent of Swanton Sector of U.S. Border Patrol, Defendants.	)	Civil No. 20-cv-852-LM

PLAINTIFF'S OBJECTION TO THE OFFICIAL CAPACITY DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Plaintiff Jesse Drewniak objects to the Motion to Dismiss filed by Defendants U.S. Customs and Border Protection, U.S. Border Patrol, and Robert N. Garcia in his official capacity as Chief Patrol Agent of the Swanton Sector of U.S. Border Patrol (collectively, the "Official Capacity Defendants"). *See* DN 20. This Court should deny this motion at this early stage of litigation.

SUMMARY OF ARGUMENT

In Count II of the Complaint, Plaintiff Jesse Drewniak seeks declaratory and injunctive relief to protect against the ongoing harm from immigration checkpoints occurring in New Hampshire. This includes the checkpoint in Woodstock, New Hampshire, which is approximately 90 driving miles from the Canadian border. During this Woodstock checkpoint, the Official

Capacity Defendants stopped and seized Mr. Drewniak on August 26, 2017. The Official Capacity Defendants have set up this checkpoint in Woodstock at least seven times over the last three years. As alleged in the Complaint, these checkpoints are unconstitutional because they are for the primary purpose of drug enforcement in violation of *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and because they are unreasonable in violation of *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). As in *Edmond* itself, Mr. Drewniak seeks "declaratory and injunctive relief" to remedy these ongoing constitutional harms. *See Edmond*, 531 U.S. at 36. The Official Capacity Defendants seek dismissal of Count II under Rule 12(b)(1) by arguing that Mr. Drewniak lacks standing to raise this claim.

The Official Capacity Defendants' sole contention for why Mr. Drewniak lacks standing is their belief that his "asserted future injuries are conjectural and not imminent or certainly impending." *See* Defs.' Mot. to Dismiss, at p. 10. This argument fails for multiple reasons. First, the Defendants' Motion ignores the relevant standard. Here, because the Official Capacity Defendants are bringing a challenge to the sufficiency of Mr. Drewniak's factual allegations on standing—as opposed to challenging the accuracy of these standing allegations—the normal Rule 12(b)(6) standard applies. Accordingly, this Court must credit Mr. Drewniak's well-pleaded standing allegations as true. *See Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001). However, instead of crediting Mr. Drewniak's allegations, the Official Capacity Defendants have improperly presented extrinsic evidence in the form of a declaration from Chief Patrol Agent Robert Garcia. As the Rule 12(b)(6) standard applies, this Court is barred from considering this declaration at this early stage of litigation.

The Official Capacity Defendants' presentation of this extrinsic evidence only highlights how dismissal on standing grounds would be premature. In cases challenging law enforcement

practices, as is the case here, courts have denied motions to dismiss injunctive claims, in part, because of the early stage of proceedings, i.e., before any discovery.[1] *See, e.g.*, *McBride v. Cahoone*, 820 F. Supp. 2d 623, 633 (E.D. Pa. 2011) (stating that "we cannot conclude at this nascent stage of the proceedings that [plaintiff] lacks standing"); *Rodriguez v. Cal. Highway Patrol*, 89 F. Supp. 2d 1131, 1142 (N.D. Cal. 2000) ("Plaintiffs are entitled to discovery to attempt to establish an evidentiary basis for their claims for injunctive relief. After discovery, Defendants may attack Plaintiffs' entitlement to injunctive relief by a motion for summary judgment.") (internal citation omitted); *see also Alasaad v. Nielsen*, No. 17-cv-11730-DJC, 2018 U.S. Dist. LEXIS 78783, at *37 (D. Mass. May 9, 2018) (noting that a specific contention raised by plaintiffs "may be borne out by discovery," and denying government's claim that plaintiffs had insufficiently alleged standing at the pleadings stage).

Second, Mr. Drewniak has more than adequately alleged that there is a sufficient likelihood that he will be ensnared in a future border patrol checkpoint. Mr. Drewniak is a unique person. For him, traveling to the White Mountains is almost a religion. He does it nearly every week. During these trips, Mr. Drewniak regularly travels through the very place—I-93 (South) in Woodstock, New Hampshire—where Border Patrol has conducted seven checkpoints over the last three years using the same unlawful tactics and employing drug-sniffing dogs. *See* Compl. ¶ 48. If Mr. Drewniak does not have standing to challenge Border Patrol's ongoing checkpoints in this area, then no one does. This would be concerning. Article III review of Border Patrol's activities is especially important here where Border Patrol (i) has effectively ignored *City of Indianapolis v. Edmond* and the Plymouth Circuit Court's May 1, 2018 order by continuing to conduct checkpoints

[1] Although Rule 26(d)(2) allows for early delivery of Rule 34 requests for production, those requests are not deemed to be served until the date of the Rule 26(f) conference, which has yet to occur.

in the same manner using canines and seizing small amounts of alleged contraband, and (ii) can only conduct these checkpoints if it can show that their effectiveness at minimizing illegal entry from the Canadian border outweighs the degree of intrusion on individual rights. *See, e.g.*, *Martinez-Fuerte*, 428 U.S. at 554, 558; *see also Jasinski v. Adams*, 781 F.2d 843, 849 (11th Cir. 1986) (per curiam). If this Court were to adopt Border Patrol's view of standing despite Mr. Drewniak's well-pleaded allegations, Border Patrol's actions could persist without any form of judicial review. Thousands of individuals would continue to be detained without probable cause by Border Patrol in violation of the Fourth Amendment.

For these reasons, this Court should deny this motion. This case should proceed to discovery.

SUMMARY OF ALLEGATIONS

On the afternoon of Saturday, August 26, 2017, Mr. Drewniak was a passenger in a vehicle traveling on I-93 (South) through the White Mountains. He was with two of his friends heading home to Hudson after concluding one of his many regular trips to the region. During this journey home, he and his two friends became ensnared in a temporary interior checkpoint run by U.S. Border Patrol in Woodstock, New Hampshire. Compl. ¶ 59. Woodstock is not at the United States/Canadian border. Instead, Woodstock is approximately 90 driving miles from that border. *Id.* ¶ 60.

Mr. Drewniak and his friends were not engaging in criminal activity. They were minding their own business. Nonetheless, during this checkpoint, Defendant Border Patrol Agent Mark Qualter and other Border Patrol agents stopped and seized Mr. Drewniak and his friends. These agents did so despite the fact that there was no reasonable suspicion or probable cause to believe that either Mr. Drewniak or his friends had committed a crime. *Id.* ¶¶ 62-64.

At the checkpoint, Defendant Qualter and other Border Patrol Agents used canines to conduct "pre-primary canine free air sniffs" of the vehicles waiting at the checkpoint. These dogs have been trained to alert to odors of some drugs. However, Border Patrol, through extrinsic evidence, has claimed that these dogs also serve an immigration purpose whereby they are "able to identify the presence of concealed humans and narcotics." *See* Garcia Decl. ¶ 5. This "concealed human" justification is "a ruse designed to conceal that the obvious purpose of the dogs [is] to detect for drugs." Compl. ¶ 85. As Agent Qualter admitted at a January 11, 2018 hearing, his dog has never detected a concealed human throughout his years of service as a Border Patrol agent. *Id.* ¶¶ 66, 85.

Consistent with Border Patrol's practice, Agent Qualter used his dog to sniff the vehicle in which Mr. Drewniak was a passenger. *Id.* ¶¶ 62-64. This sniff occurred at or around the same time in which Mr. Drewniak and his friends told the agents that they were United States citizens. *Id.* ¶¶ 68-69. Nonetheless, the Border Patrol agents required Mr. Drewniak and his friends to go to a secondary inspection area after Agent Qualter's dog apparently signaled. *Id.* ¶ 70. While in this area, Agent Qualter and his dog rummaged through the vehicle. *Id.* ¶¶ 73-75. Having found nothing, a Border Patrol agent—likely Agent Qualter—yelled at Mr. Drewniak "WHERE'S THE FUCKING DOPE?" *Id.* ¶ 76. Mr. Drewniak then retrieved a small quantity of hash oil in a Tupperware container from the center console and gave it to Agent Qualter. *Id.* ¶ 77. Agent Qualter then handed Mr. Drewniak and his friends over to the local Woodstock Police Department, who charged Mr. Drewniak with the violation-level offense of "Acts Prohibited." *Id.* ¶¶ 78-80.

Mr. Drewniak and 15 others who were similarly charged with state law drug offenses during this August 25-27, 2017 checkpoint challenged the seizure of this evidence. On May 1, 2018—after hearing testimony from Defendant Mark Qualter and other Border Patrol Agents—

Judge Thomas A. Rappa of the 2nd Circuit (District Division) in Plymouth found that the evidence seized during this August 2017 Checkpoint was in violation of the United States and New Hampshire Constitutions. He therefore suppressed any evidence seized during this checkpoint. *See* McCarthy Order *Ex. A* to Compl. In reaching this conclusion, that court evaluated the results and logistics of this purported "immigration" checkpoint in New Hampshire, finding that its primary purpose was, instead, detection and seizure of drugs. *Id.* at p. 11-12. Specifically, "the number of arrests for drug charges" arising from the checkpoint "far outnumbered the arrests for immigration violations," and "there was no evidence that any of the individuals arrested for immigration violations had crossed the Canadian border." *Id.* at p. 11. These facts, plus Border Patrol's overtures "to the State and local agencies for assistance," supported the conclusion that "the primary purpose of the action was detection and seizure of drugs," thereby making the checkpoints "unconstitutional under both State and federal law." *Id*. at p. 12; *see also* Compl. ¶¶ 86-92. The Official Capacity Defendants' motion to dismiss ignores this decision.

This August 2017 Checkpoint was not an isolated incident. In fact, "CBP and Border Patrol have a practice and/or custom of conducting unconstitutional Border Patrol checkpoints in northern New England, including in Woodstock, New Hampshire approximately 90 driving miles from the Canadian border." Compl. ¶ 108. In total, Border Patrol has conducted seven checkpoints at this Woodstock location since August 2017, *see id.* ¶¶ 46-48, in addition to three checkpoints elsewhere in New Hampshire. *See id.* ¶ 48 n.8; *see also* Garcia Decl. ¶ 12. At least with respect to the seven Woodstock checkpoints, Border Patrol conducted them all in the same manner using canines to search for drugs. *See* Compl. ¶ 48.

Following the Circuit Court's May 1, 2018 decision—and in light of Border Patrol's robust pattern and practice of violating the Fourth Amendment rights of motorists who are simply

attempting to travel on New Hampshire's roadways—Mr. Drewniak brought this lawsuit challenging the Official Capacity Defendants' use of temporary immigration checkpoints in New Hampshire. *See* Count II.

DISCUSSION

I. The Official Capacity Defendants' Motion to Dismiss under Rule 12(b)(1) Applies the Incorrect Legal Standard and Inappropriately Fails to Defer to Plaintiff's Factual Allegations.

The Official Capacity Defendants suggest that, in a Rule 12(b)(1) motion, "no presumptive truthfulness attaches to plaintiff's allegations," and "the court must address the merits of the jurisdictional claim by resolving the factual disputes between the parties." *See* Defs.' Mot. to Dismiss, at p. 6 (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977) and *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001)). The Official Capacity Defendants are incorrect.

As the First Circuit has held, a defendant can challenge jurisdiction under Rule 12(b)(1) in one of two ways:

> The first way is to mount a challenge which accepts the plaintiff's version of jurisdictionally-significant facts as true and addresses their sufficiency, thus requiring the court to assess whether the plaintiff has propounded an adequate basis for subject-matter jurisdiction. In performing this task, the court must credit the plaintiff's well-pleaded factual allegations (usually taken from the complaint, but sometimes augmented by an explanatory affidavit or other repository of uncontested facts), draw all reasonable inferences from them in her favor, and dispose of the challenge accordingly. For ease in classification, we shall call this type of challenge a "sufficiency challenge."
>
> The second way to engage the gears of Rule 12(b)(1) is by controverting the accuracy (rather than the sufficiency) of the jurisdictional facts asserted by the plaintiff and proffering materials of evidentiary quality in support of that position. Unlike, say, a motion for summary judgment under Federal Rule of Civil Procedure 56(c), this type of challenge under Federal Rule of Civil Procedure 12(b)(1)—which we shall call a "factual challenge"—permits (indeed, demands) differential factfinding. Thus, the plaintiff's jurisdictional averments are entitled to no presumptive weight; the court must address the merits of the jurisdictional claim by resolving the factual disputes between the parties. In conducting this inquiry, the court enjoys broad authority to order discovery, consider

extrinsic evidence, and hold evidentiary hearings in order to determine its own jurisdiction. *Valentin*, 254 F.3d at 363-64 (internal citations omitted).

Here, the Official Capacity Defendants' motion implicates the first type of jurisdictional challenge in *Valentin* and places at issue the sufficiency, as opposed to the accuracy, of Mr. Drewniak's jurisdictional allegations. Indeed, the Official Capacity Defendants' motion is filled with contentions that Mr. Drewniak's allegations, even if true, are not enough to allege sufficient injury. For example, the Official Capacity Defendants contend the following:

- "The plaintiff has not alleged any specific plans or dates for future travel, when a stop at a temporary checkpoint might occur." *See* Defs.' Mot. to Dismiss, at p. 12; and

- "[T]he plaintiff had a single encounter with a border checkpoint over three years ago. Under controlling Supreme Court precedent, a prior claim of illegal conduct does not confer Article III standing on a plaintiff who is seeking injunctive relief from alleged future harm." *See id.*, at p. 14.

As these contentions constitute an attack on the sufficiency of Mr. Drewniak's standing allegations, this Court "must credit the plaintiff's well-pleaded factual allegations[,] . . . draw all reasonable inferences from them in the plaintiff's favor, and dispose of the challenge accordingly."[2] *Valentin*, 254 F.3d at 363; *see also Sevigny v. United States*, No. 13-cv-401-PB, 2014 DNH 157, 2014 U.S. Dist. LEXIS 98600, at *7 (D.N.H. July 21, 2014) (where sufficiency challenge was raised, the court credited the plaintiff's well-pleaded factual allegations).

This standard for adjudicating a jurisdictional sufficiency challenge is the same as the standard applied on a Rule 12(b)(6) motion. *See Sevigny*, 2014 U.S. Dist. LEXIS 98600, at *7. Under this standard, a plaintiff must make factual allegations sufficient to "state a claim to relief

[2] In considering this Rule 12(b)(6) standard, Plaintiff notes that, in light of the declaration submitted by Agent Jeremy Forkey (DN 19-4), Plaintiff has (i) withdrawn the allegations in the Complaint alleging that Agent Forkey was present at the August 2017 Checkpoint and (ii) voluntarily dismissed his *Bivens* claim in Count I against Agent Forkey without prejudice. DN 23.

that is plausible on its face." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when it pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Twombly*, 556 U.S. at 678. In other words, the plausibility requirement "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" of illegal conduct. *Twombly*, 550 U.S. at 556; *see also Sepúlveda-Villarini v. Dep't of Educ. of P.R.*, 628 F.3d 25, 30 (1st Cir. 2010) ("*Twombly* cautioned against thinking of plausibility as a standard of likely success on the merits; the standard is plausibility assuming the pleaded facts to be true and read in a plaintiff's favor.").

Moreover, because this standard of review is tantamount to the standard of review that exists under Rule 12(b)(6), this Court cannot consider the four-page declaration of Chief Patrol Agent Robert N. Garcia. *See, e.g.*, *Piascik-Lambeth v. Textron Auto. Co.*, No. 00-258-JD, 2000 DNH 264, 2000 U.S. Dist. LEXIS 20884, at *2-3 (D.N.H. Dec. 22, 2020) (when considering a motion to dismiss under Rule 12(b)(6), "extrinsic materials submitted by the parties are not considered in deciding the motion"); *Unitt v. Bennett*, No. 17-11468-RGS, 2019 U.S. Dist. LEXIS 126402, at *5 (D. Mass. July 30, 2019) ("the court cannot consider extrinsic material on a 12(b)(6) motion"); *Ramirez v. DeCoster*, No. 2:11-cv-00294-JAW, 2012 U.S. Dist. LEXIS 86266, at *33-34 (D. Me. June 21, 2012) ("As an aside, the Defendants' decision to load the motion to dismiss record with thirty attached documents is contrary to the spirit of the Rules. The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the allegations in the complaint, not an opportunity to file a motion for summary judgment before discovery."); *Freeman v. Town of Hudson*, 714 F.3d 29, 35-36 (1st Cir. 2013) ("On a motion to dismiss, a court ordinarily

may only consider facts alleged in the complaint and exhibits attached thereto, or else convert the motion into one for summary judgment."; noting narrow exceptions—namely, documents the authenticity of which are not disputed by the parties, official public records, documents central to plaintiff's claim, and documents sufficiently referred to in the complaint—that are inapplicable here).

Finally, the extrinsic declaration produced by the Official Capacity Defendants only highlights why dismissal at this stage would be premature. For example, in support of their contention that Mr. Drewniak lacks standing, the Official Capacity Defendants rely on the following (unproduced) records and (untested) factual assertions: (i) "Prior to the commencement of the immigration checkpoints in 2017, an operation order was prepared detailing the Beecher Falls Station's planned enforcement activities," *see* Garcia Decl. ¶ 9; (ii) "The operation order underwent legal sufficiency review by Agency counsel and was reviewed and approved by both U.S. Border Patrol management within Swanton Sector and U.S. Border Patrol Headquarters," *see id.*; and (iii) "To date [as of November 6, 2020], the Beecher Falls Station has no scheduled immigration checkpoints planned to occur in New Hampshire." *See id.* ¶ 12; *see also* Defs.' Mot. to Dismiss, at p. 4. To dismiss this action without reciprocal discovery on these factual assertions would be fundamentally unfair where the Official Capacity Defendants themselves appear to acknowledge that they have access to voluminous information not in Mr. Drewniak's possession concerning their likelihood to set up checkpoints in the future. *See Miller v. United States*, 530 F. Supp. 611, 616 n.3 (E.D. Pa. 1982) ("I also note that fundamental fairness requires that the non-moving party be afforded the opportunity to conduct discovery so that he can, if possible, meet his burden of establishing jurisdiction. Since no such opportunity was afforded plaintiff in the instant

case, I have limited my inquiry solely to the question of whether lack of jurisdiction is apparent from the pleadings alone.") (internal citations omitted).

II. Plaintiff Has Standing to Seek Declaratory and Injunctive Relief Because There is a Sufficient Likelihood That He Will Be Ensnared in a Future Border Patrol Checkpoint.

Mr. Drewniak has standing under Count II to ask this Court for prospective equitable relief. *See* Compl., Count II and Prayer for Relief, B-D. The Official Capacity Defendants' actions—namely, operating Border Patrol checkpoints in New Hampshire for the purpose of drug interdiction and operating Border Patrol checkpoints in Woodstock on I-93 (South) despite the fact that their degree of intrusion on individual rights far outweighs their purported effectiveness (if any) at minimizing illegal entry from the Canadian border—violate Mr. Drewniak's constitutional rights and create a substantial risk that he will suffer the same injuries he suffered on August 26, 2017.

To establish Article III standing, a plaintiff must show: (i) an "injury in fact" that is "concrete and particularized" and "actual or imminent," not "conjectural" or "hypothetical"; (ii) a "causal connection" between the injury and the defendant's conduct; and (iii) a likelihood that a favorable decision will "redress[]" the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). To seek an injunction, a plaintiff must show "a sufficient likelihood that he will again be wronged in a similar way." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). This requires either a "'substantial risk' that the harm will occur" or a threat that is "certainly impending." *Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). Here, Mr. Drewniak alleges that there is a "substantial risk" that he will be injured again from Border Patrol's unconstitutional use of immigration checkpoints because "Mr. Drewniak frequently travels to the White Mountains each summer—the time that Border Patrol

has historically been the most active at the Woodstock checkpoint, stopping countless people each time." *See* Compl. ¶ 8; *see also id.* ¶¶ 98-101. The Official Capacity Defendants do not contest past injury, causality, or redressability. Instead, the Official Capacity Defendants' challenge to standing is limited to the first prong—namely, the question of whether Mr. Drewniak's alleged injury "is actual or imminent, not conjectural or hypothetical." Standing to seek prospective relief may rest on allegations that (i) the defendant adopted an unlawful policy or practice, and (ii) the plaintiff will be exposed to it. *See Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997) (requiring "a realistic risk of future exposure to the challenged policy"). Mr. Drewniak's allegations have met this threshold.

A. The Official Capacity Defendants Have Adopted the Challenged Policies and Practices.

The Official Capacity Defendants contend that standing does not exist because Mr. Drewniak "has not alleged … when a stop at a temporary checkpoint might occur." *See* Defs.' Mot. to Dismiss, at p. 12. But injured parties can show future injury when, as is the case here, "[t]he offending policy remains firmly in place." *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 306 (1st Cir. 2003); *see also Berner*, 129 F.3d at 24. For example, courts recognize injunctive standing to challenge police policies and practices. *See, e.g.*, *Mack v. Suffolk County*, 191 F.R.D. 16, 21 (D. Mass. 2000) (strip searches); *Petrello v. City of Manchester*, No. 16-cv-008-LM, 2017 U.S. Dist. LEXIS 144793, at *65 (D.N.H. Sep. 7, 2017) (granting injunction against a police department's practice of enforcing RSA 644:2, II(c) against passive panhandlers who do not step into the road or otherwise physically obstruct traffic). This case is unlike *Lyons* where the plaintiff did not allege that the government "ordered or authorized" the challenged policy or practice. 461 U.S. at 106–07 & n.7. Here, as alleged—and unlike *Lyons*—the Official Capacity Defendants have specifically ordered and authorized the challenged checkpoints in New Hampshire and, in

doing so, have seized thousands of individuals without probable cause. *See* Compl. ¶¶ 37 ("CBP and Border Patrol have a practice and custom of conducting unconstitutional Border Patrol checkpoints in northern New England"), 108 (same), 113 (noting that Border Patrol "has detained thousands of individuals without a warrant or reasonable suspicion of criminal activity"). Many cases distinguish *Lyons* on this basis.[3]

Regular enforcement further supports standing. "[T]he frequency of alleged injuries inflicted by the practices at issue … creates a likelihood of future injury sufficient to address any standing concerns." *Floyd v. City of New York*, 283 F.R.D. 153, 170 (S.D.N.Y. 2012). Here, the August 2017 Checkpoint that ensnared Mr. Drewniak was not an isolated incident, but rather was part of a pervasive pattern and practice on the part of the Official Capacity Defendants. In total, Border Patrol has conducted checkpoints at this Woodstock location on seven occasions: (i) August 25-27, 2017; (ii) September 26-28, 2017; (iii) May 27-29, 2018 Memorial Day Weekend[4]; (iv) June 15-17, 2018 Father's Day Weekend[5]; (v) August 21-23, 2018; (vi) September 25-27,

[3] *See, e.g.*, *McBride*, 820 F. Supp. 2d at 633 ("the *Lyons* Court rested its decision largely on the fact that City policy did not authorize police officers to use illegal chokeholds"); *Smith v. City of Chi.*, 143 F. Supp. 3d 741, 752 (N.D. Ill. 2015) ("In addition, Plaintiffs have alleged ongoing constitutional violations pursuant to an unconstitutional policy or practice in tandem with allegations that CPD officers repeatedly subjected them to unconstitutional stops and frisks, which leads to the reasonable inference of the likelihood that CPD officers will unlawfully stop and frisk Plaintiffs in the future."); *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 979-80 (D. Ariz. 2011) ("In *Lyons* itself, the court wrote that a victim of police misconduct could seek an injunction if he could show that department officials 'ordered or authorized police officers to act in such manner.' MCSO affirmatively alleges that its officers are authorized to stop individuals based only on reasonable suspicion or probable cause that a person is not authorized to be in the United States. This assertion establishes the standing of all named Plaintiffs to seek injunctive relief."); *Rodriguez*, 89 F. Supp. 2d at 1142 (noting that "Plaintiffs allege a pattern and practice of illegal law enforcement activity," whereas the *Lyons* complaint "did not assert that there was a pattern and practice of applying choke holds without provocation …."); *Nat'l Cong. for Puerto Rican Rights by Perez v. City of N.Y.*, 75 F. Supp. 2d 154, 161 (S.D.N.Y. 1999) ("Here defendants' policy, evidenced by a pervasive pattern of unconstitutional stops and frisks, has allegedly affected tens of thousands of New York City residents, most of whom have been black and Latino men. Courts have not been hesitant to grant standing to sue for injunctive relief where numerous constitutional violations have resulted from a policy of unconstitutional practices by law enforcement officers.") (internal citations omitted).

[4] Plaintiff's Complaint inadvertently states that this checkpoint occurred on May 26-28, 2018. *See* Compl. ¶¶ 48-49.

[5] Mr. Garcia's declaration does not reference this June 15-17, 2018 checkpoint. *See* CBP, "Swanton Sector Border Patrol Agents Arrest Illegal Aliens from 5 Different Countries," (June 19, 2018), https://www.cbp.gov/newsroom/local-media-release/swanton-sector-border-patrol-agents-arrest-illegal-aliens-5-

2018[6]; and (vii) June 8-9, 2019 during Laconia Motorcycle Week.[7] *See* Compl. ¶ 48. These checkpoints all occurred in the same manner as the August 2017 Checkpoint in which Border Patrol agents inspect each vehicle with a canine that is tasked with searching for drugs.[8] If the canine alerts, then the vehicle is sent to a secondary inspection area. If contraband is allegedly found, Border Patrol seizes that contraband. *Id.* ¶ 48; *see also* ¶¶ 49-50 (noting Border Patrol's seizure of small amounts of drugs during May 26-28, 2018 Memorial Day Weekend checkpoint and June 15-17, 2018 Father's Day Weekend checkpoint, likely through use of canines). On September 3-6, 2019, Border Patrol also set up a checkpoint on I-89 in Lebanon, near Dartmouth College—a location nearly 100 miles from the Canadian border. *Id.* ¶ 48 n.8.[9] The Official Capacity Defendants further acknowledge that they held two one-day checkpoints in Columbia, New Hampshire on April 7, 2019 and May 27, 2019. *See* Defs.' Mot. to Dismiss, at p. 11; Garcia Decl. ¶ 12. Border Patrol even informed the press in 2017 that "it plans on using more checkpoints in northern New England in the future." Compl. ¶ 100 (quoting Kathleen Masterson, "Broad Jurisdiction of U.S. Border Patrol Raises Concerns about Racial Profiling," WBUR (Oct. 11, 2017), https://www.wbur.org/news/2017/10/11/border-patrol-stops-profiling). As one court has succinctly noted: "[A plaintiff's] alleged future injury does not depend upon defendants' future illegal conduct untethered to a pattern of past practice, … but rather upon recurring conduct authorized by official policies." *Alasaad*, 2018 U.S. Dist. LEXIS 78783, at *31-32 (internal

different.

[6] Plaintiff's Complaint states that this checkpoint occurred on September 27, 2018. *See* Compl. ¶¶ 48, 51. Mr. Garcia's declaration states that this checkpoint occurred from September 25-27, 2018. *See* Garcia Decl. ¶ 11.

[7] Plaintiff's Complaint states that this checkpoint occurred on June 9, 2019. *See* Compl. ¶¶ 48, 51. Mr. Garcia's declaration states that this checkpoint occurred from June 8-9, 2019. *See* Garcia Decl. ¶ 12.

[8] As Mr. Garcia states in his declaration, "U.S. Border Patrol canines also may conduct free-air sniffs of vehicles in the pre-primary area to help expedite the processing of vehicles through the checkpoint." *See* Garcia Decl. ¶ 5 (further noting that they are trained to "identify … narcotics"); *see also id.* ¶ 6 (noting, during a secondary inspection, Border Patrol's investigation for "narcotics … violations").

[9] Plaintiff's Complaint states that this checkpoint occurred on September 5, 2019. *See* Compl. ¶¶ 48, 51. Mr. Garcia's declaration states that this checkpoint occurred from September 3-6, 2019. *See* Garcia Decl. ¶ 12.

citation omitted). Such recurring conduct on the part of the Official Capacity Defendants is precisely why standing exists here.

The Official Capacity Defendants seek to avoid the pervasive nature of this pattern and practice by presenting an unvetted declaration from Defendant Chief Patrol Agent Robert N. Garcia. In this declaration, Agent Garcia states that "[t]o date"—as of November 6, 2020—"the Beecher Falls Station has no scheduled immigration checkpoints planned to occur in New Hampshire." *See* Garcia Decl. ¶ 12. But this assertion does not help the Official Capacity Defendants' cause for at least two reasons. First, setting aside the fact that this extrinsic evidence cannot be considered at this stage, what is missing from Agent's Garcia's declaration is any testimony definitively disclaiming Border Patrol's willingness or ability to conduct a checkpoint at any moment in the near future. Agent Garcia's carefully-worded declaration suggests that Border Patrol can change its mind at any moment, noting that "[t]he re-initiation of immigration checkpoints is contingent upon operational needs, manpower, and budgetary considerations." *Id.* In other words, although Border Patrol may not have planned a checkpoint as of November 6, 2020, Border Patrol steadfastly maintains its ability to use its discretion to set up a checkpoint at any time based on certain ambiguous conditions. It is also well-established that a temporary moratorium on a challenged practice does not moot a plaintiff's claim challenging the practice. *See N.H. Lottery Comm'n v. Barr*, 386 F. Supp. 3d 132, 143 (D.N.H. 2019) ("at present, the State Actor Directive is nothing more than a temporary moratorium that cannot sustain a mootness claim"). Indeed, Agent Garcia's declaration raises the specter of a "bait and switch" scenario where this Court dismisses this matter based on Agent Garcia's untested assertion, and then Border Patrol proceeds to conduct such checkpoints consistent with its robust prior practice. Second, Agent Garcia also does not explain how such "needs, manpower, and budgetary considerations"

have changed to account for the lack of checkpoints in 2020, thereby leading to the reasonable inference that the current situation has not changed materially from 2017-2019 when checkpoints occurred with regularity. (One can speculate on whether and how COVID-19 has impacted Border Patrol's checkpoint plans in 2020, but Mr. Garcia's declaration is silent on this question.)

The Official Capacity Defendants further note that "nobody knows when USBP will conduct temporary checkpoints in New Hampshire." *See* Defs.' Mot. to Dismiss, at p. 12. But this does not destroy standing where the challenged practice is part of a pervasive and demonstrated pattern and practice, as is the case here. *See Allee v. Medrano*, 416 U.S. 802, 815 (1974) (a "persistent pattern of police misconduct" supports injunctive relief). Moreover, the fact that Mr. Drewniak cannot predict with complete certainty when a checkpoint will occur is through no fault of his own. Rather, this is due to Border Patrol's practice of secrecy where it declines to inform the public of when it plans to conduct a checkpoint.[10] To deny standing because Mr. Drewniak is not clairvoyant as to Border Patrol's intentions would not only reward Border Patrol's secrecy, but would also create a scenario where no one could challenge this impermissible practice. In any event, because the Official Capacity Defendants have not disavowed their practice of conducting such checkpoints at their discretion, Mr. Drewniak and the public at large are left with

[10] *See* Ethan Dewitt, "Border Patrol Planning Five More I-93 Immigration Checkpoints This Year, Emails Reveal," *Concord Monitor* (May 30, 2018) ("A spokeswoman for Customs and Border Protection, Stephanie Malin, declined to confirm the details [of future planned checkpoints]. 'The locations and frequency of our tactical immigration checkpoints are law enforcement-sensitive and not something we share,' she said Wednesday."), https://www.concordmonitor.com/U-S-Border-Patrol-planning-five-more-New-Hampshire-I-93-immigration-checkpoints-this-year-emails-reveal-17856927. Setting aside the fact that CBP's quotation in this article only confirms that the Official Capacity Defendants have presented one-sided testimony and that discovery is necessary, this Court can nonetheless take judicial notice of this quotation. *See In re Tyco Int'l, Ltd. Multidistrict Litig. (MDL 1335)*, MDL DOCKET NO. 02-1335-B, TYCO-PLAINTIFF ACTIONS Case No. 03-1339-B, 2004 DNH 47, 2004 U.S. Dist. LEXIS 4133, at *3 (D.N.H. Mar. 16, 2004) ("I must, however, limit my inquiry to the facts alleged in the complaint, incorporated into the complaint, or susceptible to judicial notice."); *see also Rodi v. S. New Eng. Sch. of Law*, 389 F.3d 5, 18-19 (1st Cir. 2004). Here, CBP's quotation that it does not disclose the location and frequency of checkpoints can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned, especially where this quote comes directly from CBP itself. *See* Fed. R. Evid. 201(b)(2).

the expectation that such checkpoints can occur at any time and without notice. As a result, Mr. Drewniak is forced to make a choice every time he regularly travels to the White Mountains—does he return home on a route that is 45 minutes faster, *see* Compl. ¶ 99, or does he risk entrapment in an immigration checkpoint that he believes violates his Fourth Amendment rights? *See Sevigny*, 2014 U.S. Dist. LEXIS 98600, at *18-19 (in finding that standing to bring a claim for declaratory relief was sufficiently alleged, explaining that the plaintiff "is now faced with the unenviable choice between foregoing these obligations indefinitely or exposing himself to a suit in which he could be held personally liable for his official actions"). This is more than sufficient at pleadings stage to allege standing.

Finally, the Official Capacity Defendants miss the mark in citing *Reddy v. Foster*, 845 F.3d 493 (1st Cir. 2017), which rejected pre-enforcement standing to challenge a ban on protesting near certain reproductive health care facilities. The Official Capacity Defendants cite *Reddy* for the proposition that "[s]peculation" that a government actor "might in the future take some other and additional action detrimental to" a plaintiff is "not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *See* Defs.' Mot. to Dismiss, at p. 14. In *Reddy*, however, the First Circuit held that the plaintiffs' assertions of standing were speculative as to New Hampshire's buffer zone statute, emphasizing that the statute had not yet been enforced. *Reddy*, 845 F.3d at 496, 503. Here, by contrast, Mr. Drewniak challenges Border Patrol's recurring conduct of initiating border patrol checkpoints in New Hampshire for the last three years on ten different occasions (seven of which were in Woodstock). *See Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 306 (1st Cir. 2003) (explaining that a "real and immediate threat" of injury may be

demonstrated through an "offending policy [that] remains firmly in place").[11]

B. Mr. Drewniak Has Adequately Shown That It Is Sufficiently Likely That He Will Be Exposed to the Challenged Policy and Practice.

Standing to seek prospective relief rests on a plaintiff's "realistic risk of future exposure to the challenged policy." *Berner*, 129 F.3d at 24 (lawyer had standing to challenge a judge's policy, though the lawyer might have had future cases assigned to 15 other judges). Mr. Drewniak need not prove he "inevitably will suffer" future injury. *Dimarzo v. Cahill*, 575 F.2d 15, 18 (1st Cir. 1978) (prisoners had standing to challenge fire hazards; "Defendant Hall inaptly construes the requirement of injury as requiring proof that the inmates inevitably will suffer physical injury or death from fire before they have standing to challenge the hazardous fire conditions which the district court found existing at Essex."); *see also Cotter v. City of Boston*, 193 F. Supp. 2d 323, 337 (D. Mass. 2002) (employees "exposed" to workplace policy had standing to challenge it, despite uncertainty when it would next be applied), *rev'd in part on other grounds*, 323 F.3d 160 (1st Cir. 2003).

Here, Mr. Drewniak has a "realistic risk of future exposure" to the challenged policy and practice—namely, that he will be ensnared in a Border Patrol checkpoint in the future. *See Berner*, 129 F.3d at 24. This case presents an exceptional set of facts. Mr. Drewniak is a unique person. He is not just an occasional traveler to the White Mountains. He is passionate about the region and will travel there at least 50 times to fish, forage, hike, and swim during fishing season (from

[11] The specific and plausible allegations here are distinguishable from the allegations in *Clapper v. Amnesty Int'l*, 568 U.S. 398 (2013), that the Court deemed speculative and attenuated. *See* Defs.' Mot to Dismiss, at p. 14. That case is relevant to pre-enforcement actions. The plaintiffs had sued to enjoin a statute granting the National Security Agency new surveillance powers—the day it went into effect. In that posture, the Court rejected standing, given the "highly attenuated chain of possibilities." *See Schuchardt v. President of the U.S.*, 839 F.3d 336, 338–39 (3rd Cir. 2016) (distinguishing *Clapper* on this basis). Here, by contrast, Mr. Drewniak has already been subjected to a seizure pursuant to Defendants' practices, and faces a substantial risk of future injury. Moreover, *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) referenced on Page 9-10 of the Organizational Defendants' Motion is distinguishable, as the injury alleged there was, in part, not "tied to the application of the challenged regulation." *See id.* at 495, 497-98.

approximately March to November). *See* Compl. ¶ 98. During ice fishing season (approximately December to February), Mr. Drewniak will also travel to the White Mountains and Lake Winnipesaukee approximately 10 times to enjoy outdoor recreation. *Id.* In short, Mr. Drewniak lives for the White Mountains and regularly travels I-93 (South) to return home after his frequent trips to the region. These allegations suffice on a motion to dismiss. *See, e.g., Alasaad*, 2018 U.S. Dist. LEXIS 78783, at *34 (plaintiffs' allegations that they regularly travel outside the U.S. for work, visit friends and family, engage in vacation and tourism, and will continue to do so in the future were sufficient to allege actual or imminent injury to challenge provide standing to challenge ICE's practice of searching electronic devices at ports of entry and, in some instances, confiscating the devices being searched); *Ibrahim v. DHS*, 669 F.3d 983, 993–94 (9th Cir. 2012) (plaintiff sufficiently pled standing to challenge border screening policies).

Relying on *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563 (1992), the Official Capacity Defendants contend that these allegations are insufficient because Mr. Drewniak—despite the fact that he was ensnared in the August 2017 Checkpoint—has "not alleged any specific plans or dates for future travel." *See* Defs.' Mot. to Dismiss, at p. 12. *Lujan* is distinguishable. The plaintiffs in *Lujan* alleged only plans to return "some day" to isolated parts of the globe that they had visited many years before. There, the travel was so speculative that specific dates could not be predicted. 504 U.S. at 564. Here, in contrast, Mr. Drewniak alleges ample past travel, as well as the unmistakable intent to engage in future travel. As alleged in the Complaint, he "will travel" to the White Mountain region practically every week in the future in the same place where the Woodstock checkpoint has occurred. *See* Compl. ¶ 98 (noting approximately 60 future visits during upcoming fly fishing and ice fishing seasons); *see also id.* ¶ 101 (alleging that "Mr. Drewniak will continue trips through Woodstock on I-93 in the future during popular travel

summer weekends"). These allegations go far beyond "nebulous 'some day' intentions," nor are they "vague or indefinite." *See Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 326 (1st Cir. 2009); Defs.' Mot. to Dismiss, at p. 12; *see also Wilwal v. Nielsen*, 346 F. Supp. 3d 1290, 1302 (D. Minn. 2018) ("The Court also concludes that Plaintiffs' allegations of future harm are sufficiently concrete despite omitting specific plan or dates of future travel. Courts do not require plaintiffs to engage in international travel when they have experienced difficulties at the border and reasonably expect the same difficulties when returning to the United States from future travel."); *Hernandez v. Cremer*, 913 F.2d 230, 234 (5th Cir. 1990) (finding "a reasonable expectation that [the plaintiff] will exercise his right to travel," even though the plaintiff did not want to risk being denied entry to the United States a second time"). Moreover, while the Official Capacity Defendants here move for pre-discovery dismissal, the *Lujan* plaintiffs moved for post-discovery summary judgment. *Lujan*, 504 U.S. at 559 ("On remand, the Secretary moved for summary judgment on the standing issue, and respondents moved for summary judgment on the merits."); *see also Rodriguez*, 89 F. Supp. 2d at 1142 (similarly distinguishing *Lyons* on basis that "the Court based its decision in *Lyons* on a full evidentiary record, not the untested allegations of the complaint").

Additionally, Mr. Drewniak's conduct—namely, simply traveling on I-93 (South) minding his own business—is commonplace and innocent. Despite this innocent activity, he was and likely will be exposed to warrantless, suspicion-less seizures during a checkpoint through no fault of his own. This further distinguishes this case from *Lyons*-type cases, where plaintiffs could theoretically avoid future injury by obeying the law and avoiding conflict with police.[12]

[12] *See, e.g.*, *LaDuke v. Nelson*, 762 F.2d 1318, 1326 (9th Cir. 1985) ("Unlike *Lyons*, the members of plaintiff class do not have to induce a police encounter before the possibility of injury can occur."; standing existed to challenge federal government's practice of initiating and executing searches of migrant farm housing); *Smith*, 143 F. Supp. 3d at 752 ("Plaintiffs' allegations are distinguishable from *Lyons* because Plaintiffs have alleged that they were engaging in innocent, lawful conduct — not unlawful conduct — prior to the alleged suspicion less stops and/or frisks, such as

Finally, "past injury [i]s probative of likely future injury." *See Suhre v. Haywood Cty.*, 131 F.3d 1083, 1088 (4th Cir. 1997). Here, Mr. Drewniak was ensnared in the August 2017 Checkpoint, which is probative of his likelihood to become ensnared in the future. *See* Compl. ¶¶ 58-85. The decision of the Massachusetts District Court in *Alasaad v. Nielsen* is instructive on this question. There, the Court found that plaintiffs sufficiently alleged standing to challenge the federal government's policies and practice of seizing electronic devices at the border. The Court explained:

> …. Plaintiffs' subjection to prior searches further bolsters their allegations of likely future searches. Although "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief," *Lujan*, 504 U.S. at 564 (quoting *Lyons*, 461 U.S. at 102), "[p]ast wrongs [a]re evidence bearing on 'whether there is a real and immediate threat of repeated injury,'" *Lyons*, 461 U.S. at 102 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)). *See, e.g.*, *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 37-38 (D.R.I. 2014) (finding standing for American citizen who had been inappropriately detained by ICE twice and warned that it could happen again); *Thomas v. County of Los Angeles*, 978 F.2d 504, 507 (9th Cir. 1992) (explaining that the "possibility of recurring injury ceases to be speculative when actual repeated incidents are documented" (quoting *Nicacio v. United States Immigration & Naturalization Service*, 797 F.2d 700, 702 (9th Cir. 1985))); *cf. Penobscot Nation v. Mills*, 861 F.3d 324, 336-37 (1st Cir. 2017) (denying standing at summary judgment where there was no evidence of prior enforcement of the policy in question against the plaintiffs). Here, all Plaintiffs have been subjected to electronics searches at the border and four Plaintiffs have been subjected to multiple device searches. … Plaintiffs' theory of standing, therefore, is sufficiently concrete to plausibly allege injury-in-fact.

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walking home from the grocery store, standing in front of their own homes or the homes of friends, or taking digital photographs for a college course."); *Cherri v. Mueller*, 951 F. Supp. 2d 918, 930 (E.D. Mich. 2013) ("Unlike *Lyons*, where the plaintiff would first have to violate the law before he would ever be subjected to the illegal chokehold again, Plaintiffs claim that their lawful movements to and from the United States are hindered because of the real and immediate threat that they will be stopped at the border and questioned about their religious practices and beliefs."); *Ortega-Melendres*, 836 F. Supp. 2d at 979, 987 (motorists had standing to challenge stops policies, though the "likelihood that any particular named Plaintiff will again be stopped in the same way may not be high," because the policy permits detention without reasonable suspicion that a criminal law was violated); *Roe v. City of New York*, 151 F. Supp. 2d 495, 503 (S.D.N.Y. 2001) ("Other courts have appropriately distinguished *Lyons* in cases where the plaintiffs have been subjected to police action for engaging in legal activity."); *Rodriguez*, 89 F. Supp. 2d at 1142 (distinguishing *Lyons* on basis that, in *Lyons*, "in order to grant injunctive relief the trial court would have had to conclude that the plaintiff was likely to commit crimes in the future"); *Nat'l Cong. for Puerto Rican Rights*, 75 F. Supp. 2d at 161 ("The fact that plaintiffs were stopped while engaging in everyday tasks further illustrates a realistic risk of future harm. Courts have distinguished Lyons and found standing where innocent individuals are victims of unconstitutional police conduct."); *Hernandez*, 913 F.2d at 234-35 ("The injury alleged to have been inflicted did not result from an individual's disobedience of official instructions and Hernandez was not engaged in any form of misconduct; on the contrary, he was exercising a fundamental Constitutional right.").

2018 U.S. Dist. LEXIS 78783, at *32-33.[13] Here, as in *Alasaad*, Mr. Drewniak's prior subjection to a prior invasive checkpoint, coupled with his regular travel in the region and the Official Capacity Defendants' repeated use of these checkpoints, is more than enough to satisfy standing at this stage.

C. The Official Capacity Defendants' Argument That Mr. Drewniak Lacks Standing Likely Would, If Adopted, Enable These Checkpoints to Proceed Without Any Form of Judicial Review.

Under the Official Capacity Defendants' theory of standing, effectively no one—not even a person like Mr. Drewniak who travels on I-93 (South) through Woodstock practically every week—would have standing to challenge Border Patrol's ongoing practice of establishing checkpoints in New Hampshire. This lack of standing would be attributable, in part, to Border Patrol's refusal to be transparent with the public as to when it plans to conduct a checkpoint. Shutting the courthouse doors would be especially dangerous here for two additional reasons.

First, Border Patrol has already shown an unwillingness to change its practices following the Plymouth Circuit Court's May 1, 2018 order concluding that Border Patrol's practices demonstrated that the primary purpose of the August 2017 Checkpoint was for drug purposes in violation of the Fourth Amendment. *See* McCarthy Order Ex. A to Compl., at p. 12 (citing *Edmond*, 532 U.S. at 32 (2000)). Despite this May 1, 2018 order, Border Patrol's practices not only remain unchanged, but accelerated, with five checkpoints occurring in Woodstock since May 2018 using drug-sniffing canines. In fact, Border Patrol's response to the Plymouth District Court's May 1,

[13] The Official Capacity Defendants also note that Mr. Drewniak "had a singular encounter with a border checkpoint." *See* Defs.' Mot. to Dismiss, at p. 14. However, "there is no per se rule requiring more than one past act . . . as a basis for finding a likelihood of future injury." *Roe v. City of New York*, 151 F. Supp. 2d 495, 503 (S.D.N.Y. 2001); *see also Floyd*, 283 F.R.D. at 170 ("Even [a] single stop, in light of the tens of thousands of facially unlawful stops, would likely confer standing."); *Hernandez*, 913 F.2d at 235 (where the plaintiff was denied entry from Mexico when defendant INS agents suspected his Puerto Rican birth certificate was fake, holding that the plaintiff had standing to challenge on due process grounds the existing procedures for admitting persons claiming to be citizens); *Ligon v. City of New York*, 288 F.R.D. 72, 81 n.52 (S.D.N.Y. 2013).

2018 order was to conduct another checkpoint on May 27-29, 2018 over Memorial Day weekend using the very same tactic of employing canines to search for drugs. Compl. ¶¶ 48-49. Here, "[t]his court cannot rely on a state judiciary to correct the unconstitutional practices of federal officials." *La Duke*, 762 F.2d at 1325.

Second, judicial review is vital because *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) does not create a blank check for Border Patrol to conduct interior checkpoints anywhere in the United States. *See Jasinski v. Adams*, 781 F.2d 843, 849 (11th Cir. 1986) (per curiam) ("Plaintiff alleges that the checkpoint was merely a 'dragnet' to catch illegal aliens travelling in south Florida, regardless of their point of entry. If true, these allegations could constitute an abuse of administrative discretion and might establish defendant Mongiello's liability.") (internal citations omitted). Rather, such checkpoints are only consistent with the Fourth Amendment if (i) they are limited to a "brief detention of travelers" during which the vehicle's occupants are subjected to a "brief question or two" about their citizenship status, and (ii) Border Patrol can show that their effectiveness at minimizing illegal entry from the Canadian border outweighs the degree of intrusion on individual rights. *See, e.g.*, *Martinez-Fuerte*, 428 U.S. at 554, 558. However, Border Patrol argues, under its erroneous view of standing, that it can effectively conduct checkpoints any time in New Hampshire without having to make this required showing in an Article III court. In other words, the Official Capacity Defendants' position appears to be, in essence, that they can engage in such checkpoints, as well as use drug-sniffing dogs as part of these operations, without any form of judicial scrutiny. If this Court were to agree, judicial review of Border Patrol's checkpoint authority would effectively be unavailable.

CONCLUSION

"[W]hat truly matters at this early stage is that enough facts [exist] to raise a reasonable

expectation that discovery will reveal evidence. That seems to be the case at hand." *See IRR Gas Station Corp. v. Puma Energy Caribe, LLC*, No. 19-2146 (GAG), 2020 U.S. Dist. LEXIS 131500, at *9 (D.P.R. July 22, 2020) (internal citations omitted). Here, the standing analysis based on the facts alleged "shows that this case has a sufficiently live controversy that shall be ripe for disposition after discovery is conducted." *Id.* While the Official Capacity Defendants may feel that they can present facts outside of Mr. Drewniak's Complaint to demonstrate that Mr. Drewniak lacks standing, the time for such presentation is at summary judgment or trial, where this Court can consider such facts after all sides have been given the opportunity to engage in adversarial discovery. In the meantime, this Court should deny the Official Capacity Defendants' Motion to Dismiss.

Wherefore, Mr. Drewniak respectfully requests that this Honorable Court:

A. Deny the Official Capacity Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction; and

B. Grant such other and further relief as may be just and equitable.

Dated: December 21, 2020

Respectfully submitted,

JESSE DREWNIAK,

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